THE WHITE HOUSE

WASHINGTON

December 1, 1988

MEMORANDUM FOR WHITE HOUSE STAFF

FROM: ARTHUR B. CULVAHOUSE, JR.
COUNSEL TO THE PRESIDENT

SUBJECT: Presidential Records Act Obligations of Departing White House Staff

As President Reagan's term begins to draw to a close, increasing numbers of White House staff members are requesting advice with respect to the disposition of the records they have accumulated during their tenure. While guidance on the disposition of White House records is contained in the White House Staff Manual, this appears to be an appropriate time to remind you of your obligations under the Presidential Records Act, and to provide you with a timetable for the transfer of records to the Office of Records Management.

In addition, Counsel's Office is planning on holding one or more briefings in the next month to provide further guidance on the disposition of Presidential records for interested staff members. In the interim, any questions that you have about the requirements of the Presidential Records Act should be addressed to Counsel's Office. Questions concerning the logistics of transferring your records to White House Central Files should be addressed to the Office of Records Management.

Presidential Records Act Obligations

As discussed at greater length in the White House Staff Manual, the ownership, maintenance and disposition of Presidential documents are governed by the Presidential Records Act. The requirements of that Act apply to all records of the White House Office, the Office of Policy Development, the Council of Economic Advisers, the President's Foreign Intelligence Advisory Board and the President's Intelligence Oversight Board. Those requirements also apply to certain records of the National Security Council and to records produced or received by the Director of the Office of Science and Technology Policy in his role as science adviser to the President.

The Presidential Records Act requires that staff members adequately document the performance of the President's constitutional, statutory and ceremonial duties; the decision as to whether information should be memorialized in the first instance rests with each staff member. In general, papers and similar

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materials found in the White House fall into one of three categories, */ each of which are subject to different treatment:

1. Presidential Records: Presidential records are the official documents written and received not only by the President but also by his staff. These records encompass any form of memorializing information concerning the President's constitutional, statutory and ceremonial duties, including but not limited to written documents, models, pictures, films and audio and electronic recordings. Presidential records are the property of the United States and when you leave the White House, you should deliver all Presidential records to the Office of Records Management at the White House. To ensure that the President maintains the maximum controls permitted by law, staff members may not retain copies of Presidential records upon departure from the White House.

2. Personal Records: Personal records are the private papers that staff members might keep in their offices. Examples of such papers include insurance claim forms, purely personal correspondence, or personal diaries or journals. Personal documents and files, as indicated in the White House Staff Manual, should have been stored separately from official records. They are your personal property and may be removed by you upon your departure from the White House, or handled in any other manner you so desire.

3. Nonrecord Materials: These are materials that do not rise to the level of a record, meaning that the material (1) does not contain information that either must be memorialized or is not available in a later version of the same document and (2) has been kept by you exclusively for your own use and reference and not made accessible to others on the staff. Examples of nonrecord materials include preliminary drafts of memoranda that are modified before being forwarded to another individual, unimportant notes to your secretary, notes of meetings taken solely for your convenience, and certain telephone and visitor logs. While staff members are free to dispose of materials that are truly nonrecord, because such materials contain official information, you may not remove them from the White House.

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*/ The NSC and OSTP have a fourth category of records, federal records, which are official government records not subject to the Presidential Records Act. A staff member departing from these offices is required to leave the originals of his federal records with his office. Staff members may take copies of their federal records as authorized by the Freedom of Information Act and the guidelines of their respective offices.

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Preparation of Presidential Records for Delivery to ORM

Prior to transferring files to ORM, staff members should ensure that they have gathered together all Presidential records and appropriately filed them. While the vast bulk of your records should already appear in well-organized files, you should take care to review your word-processing and/or PROFS computer memory to ensure that you have made a hard copy of all "record" material appearing there which can be transferred to ORM. Users of the EOP Electronic Mail system should be aware that while many electronic mail messages may be the equivalent of telephone calls and not rise to the level of record materials, some of them may contain information concerning the President's constitutional, statutory and ceremonial duties that you are required, under the terms of the Presidential Records Act, to memorialize. Those messages that do contain that information should be converted into hard copy for transfer to ORM.

In addition, staff members should, to the extent possible, ensure that any files that they have which contain particularly sensitive information are clearly labelled to reflect that fact. Under the terms of the Presidential Records Act, as well as available constitutional and common law privileges, most of the sensitive Presidential records can be protected, at least for a specified time period, from public access. While Archives personnel, in consultation with President Reagan or his designees, will review all Presidential records and segregate out at least those records that are to be protected under the Presidential Records Act, to avoid inadvertant release of sensitive information it is useful for those who created them, to the extent possible, to mark those files. Possible file labels may include:

(1) This file contains classified information (in general, this label should be unnecessary as classified files should already be clearly marked).

(2) This file contains information the release of which may be prejudicial to the maintenance of good relations with foreign nations (the vast bulk of such information should be classified and therefore would fall within category Number 1 above).

(3) This file contains sensitive personal information the release of which may be embarrassing to the individuals mentioned or to their families.

(4) This file contains sensitive information involving the confidential advice requested by or provided to the President or his advisers.

(5) This file contains sensitive law enforcement materials.

(6) This file contains trade secrets or sensitive commercial or financial information.

Delivery of Presidential Records to ORM

As noted above, departing staff members are responsible for ensuring that their Presidential Records are appropriately filed and transferred to ORM. In fact, as part of the official check-out procedures, departing staff members must certify that they have transferred their Presidential records to ORM. Under the Presidential Records Act, the United States Archivist will, upon the completion of the Administration, assume custody of the official records of President Reagan and his staff and will transport them to California where they eventually will be housed in the Ronald Reagan Presidential Library. While, as a general matter, staff members should transfer their files to ORM as they depart from the White House, in order to complete in a timely manner the logistical arrangements for moving these records to California, staff members who are staying on until or through January 20, 1989 **/ should comply with the following timetables:

1. Staff members should deposit in Central Files no later than Monday, January 10, all of their Presidential records, with the exception of those records which are essential for the President to carry out his official duties.

2. Those essential records not deposited on or before January 10, along with other records generated after January 10, must be deposited with Central Files by 5:00 p.m. on January 19. (Failure to transfer these records to ORM by January 19 may result in providing members of the new Administration with sensitive information to which they would otherwise not have access.)

To further aid in efforts to prepare these records for shipping to California, each staff member should, as soon as possible, deposit those of his or her Presidential records that are not needed for ongoing business with White House Central Files. Those records can, of course, be returned to the staff member from Central Files if they later become needed.

Archives' Assessments of Records Volume

Finally, staff members should be aware that as part of the preparations for transporting President Reagan's records to California, representatives of the Archivist will, beginning next

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**/ It is important for those members of the White House staff who may be remaining at the White House after January 20 to realize that you must nevertheless transfer all of your official records of the Reagan Administration to ORM in accordance with the timetables specified in this memorandum.

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week, visit individual offices solely for the purpose of ascertaining the volume of records stored there. White House staff members should cooperate fully with the efforts of Archives personnel to make these assessments.

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PRESIDENTIAL RECORDS ACT

The requirements governing the ownership, maintenance and disposition of Presidential documents under the Presidential Records Act, 44 U.S.C. sections 2201-07 (the "Act") are listed in summary and are explained in more detail in the material that follows.

Summary of Presidential Records Act Requirements

- Staff members must adequately document the performance of the President's constitutional, statutory, and ceremonial duties.

- Staff members must preserve the original of any Presidential record. Duplicate copies may be destroyed.

- Staff members should preserve Presidential records in complete and orderly files and should keep non-Presidential records that is, personal records, Federal records or non-record materials segregated, preferably through the use of separate filing systems.

- Staff members departing from the White House must turn over to the Office of Records Management the originals of all Presidential records in their possession.

- Staff members are prohibited from taking copies of any Presidential records with them when they depart from the White House, unless those records have clearly been made public previously (e.g,., copies of press releases).

- Staff members in some instances may dispose of "non-record" materials such as notes of meetings, rough drafts not circulated to others, visitor logs, duplicate copies, etc.; however, because such records contain official information, staff members are prohibited from removing them (or copies of them) from the White House.

Types of Records Covered by the Act

The Act defines "Presidential records" to include not only the official documents written and received by the President but also the official records created or received by his staff. "Presidential records" encompass any form of memorializing information, including but not limited to written documents, models, pictures, films and audio and electronic recordings.

While the Act requires that staff members adequately document the performance of the President's constitutional, statutory, and ceremonial duties, the decision whether information should be memorialized in the first instance remains with each staff member. For example, it is within the discretion of a staff member to dispose of materials that do not rise to the level of a record, such as scratch pads, unimportant notes to one's secretary, phone logs, visitor logs, notes of meetings, etc., provided this is based upon a determination that creation of a record is not required in the circumstance. However, if non-record material is not disposed of contemporaneously, staff members must be careful to ensure that it is kept by them exclusively for their own use. It should not be made accessible to others on the staff; making non-record material accessible to others on the staff will convert it into "record" material.

Records relating to political activities that are undertaken in the course of carrying out the President's official or ceremonial duties are Presidential records (e.g., political briefing papers for

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official trips and official meetings are Presidential records). Records relating to political activities not associated with the President's official duties are not Presidential records (e.g., materials for political and campaign-related meetings and trips).

Private papers, which staff members might keep in their offices are personal, not Presidential records. Personal records include diaries or journals that are kept by a staff member exclusively for his or her own use and reference, are not accessible to others on the staff, and are not used for transacting government business. Personal documents and files should be segregated and stored separately from official records.

Units of the Executive Office of the President Covered by the Act

All records of the White House Office, the Office of Policy Development, the Council of Economic Advisers, the President's Intelligence Oversight Board, and the President's Foreign Intelligence Advisory Board are Presidential records.

Records of the Office of Management and Budget, the Office of the United States Trade Representative, the Council on Environmental Quality, and the Office of Administration are Federal, not Presidential, records.

The records of the National Security Council staff are Federal records if they were received or created in connection with the work of the statutorily created National Security Council. Additionally the NSC's internal administrative records are Federal records. The records of the National Security Council staff are Presidential records if they were received or created for the President, the Assistant to the President for National Security, his Deputy, or a member of the White House staff independently of any meeting or policy and staff actions of the NSC.

The records of the Office of Science and Technology Policy are Federal records; however, those records produced or received by the Director of OSTP in his role as Science Advisor to the President are Presidential records and should be segregated as such.

Maintenance of Presidential Records

The law imposes an affirmative obligation on staff members to document adequately the performance of the President's constitutional, statutory, and ceremonial duties. Staff members are urged to document the performance of their duties and preserve these records in complete and orderly files. Personal records should be kept apart from official records and clearly labeled as such. Moreover, those officials or units that maintain both Presidential records and Federal records should file them separately with a clear indication of whether they are Presidential or Federal.

Assistance in distinguishing among Presidential, Federal and personal records may be obtained from the Office of the Counsel to the President. Assistance in establishing file systems may be obtained from the White House Office of Records Management.

In addition, staff members should, to the extent possible, ensure that any files that they have which contain certain types of particularly sensitive information are clearly labeled to reflect that fact. Under the terms of the Presidential Records Act, as well as available constitutional and common law privileges, most of such sensitive Presidential records will be protected, at least for a specified time period, from public access. Archives personnel, in consultation with the President or his designees, will review all Presidential records and segregate out those records that are to be protected under the Presidential Records Act. However, to avoid inadvertent release of sensitive information, it would be

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useful for those who created them, to the extent possible, to mark those files. Possible file labels may include:

- "Classified information" (in general, this label should be unnecessary as classified files should already be clearly marked).

- "Information the release of which may be prejudicial to the maintenance of good relations with foreign nations" (the vast bulk of such information should be classified and, therefore, would fall within category Number 1 above).

- "Sensitive personal information" (information the release of which may be embarrassing to the individuals mentioned or to their families).

- "Sensitive information involving the confidential advice requested by or provided to the President or his advisers."

- "Sensitive law enforcement materials."

- "Trade secrets or sensitive commercial or financial information."

- "Information subject to attorney-client or attorney work product privileges."

Disposition and Destruction of Presidential Records

Once a decision is made to memorialize and maintain information as a Presidential record, it becomes the property of the United States and may be disposed of only in accordance with procedures established by the Archivist of the United States. The Act prohibits the disposal of Presidential records unless those records no longer have administrative, historical, informational, or evidential value. Moreover, before disposing of any records the President must notify the Archivist and under some circumstances appropriate congressional committees.

The White House Office of Records Management ("ORM") maintains records disposal schedules, which are approved by the Archivist, for certain recurring types of disposable papers, such as form letter public mail, anonymous public mail, unsuccessful and unsolicited applications for employment, and enclosures received in public mail. If you have a recurring type of disposable material in your office, you may wish to request that ORM enter it on the records disposal schedule. Before you dispose of any documents, contact ORM to determine whether the category of items involved has been approved for disposal. Such prior notice is not necessary for destruction of exact duplicates of documents that are being maintained, or for copies of officially published documents, such as printed reports, etc.

ORM can also arrange for storage of records that are to be preserved, but for which there is no longer a current need. Offices are encouraged to develop systematic records retirement schedules, reserving filing space for those records for which there is a current need.

Legal Control of Presidential Records

Presidential records remain in the custody and control of the President during his term of office and are not accessible to the public under the Freedom of Information Act. In contrast, Federal records are accessible to the public under the provisions of the Freedom of Information Act.

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Upon completion of the Administration, the Archivist acquires custody of Presidential records. However, the President may assert control for 12 years over public access to certain categories of records. Basically, these categories are: (a) security classified items; (b) documents related to appointments to Federal office; (c) items specifically exempted from disclosure by other statutes; (d) trade secrets and commercial or financial information; (e) confidential communications requesting or submitting advice between the President and his advisers, or between such advisers; and (f) personnel or medical files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Thereafter, public access is determined by the Freedom of Information Act, subject in all cases to the President's right to invoke any constitutional privilege against disclosure.

Records that May be Retained by Staff Members Upon Departure

To insure that the President maintains the maximum controls permitted by law, staff members may not remove copies of Presidential records from their offices either now or at the end of the Administration. When a staff member leaves the White House, he or she shall deliver all files and records to ORM at the White House or, in the case of the National Security Council staff, to the Executive Secretariat of the National Security Council. Federal records shall be left with the appropriate agency. Staff members may remove only those records that are purely personal.

The foregoing is designed to provide general guidance with respect to the Presidential Records Act. Specific questions of coverage or interpretation should be addressed to the Counsel's Office. Assistance in records maintenance and storage may be obtained from the White House Office of Records Management.

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THE WHITE HOUSE

WASHINGTON

November 28, 1994

MEMORANDUM FOR WHITE HOUSE OFFICE STAFF

FROM: *JOHN PODESTA*
ASSISTANT TO THE PRESIDENT AND STAFF SECRETARY

MARVIN KRISLOV
ASSISTANT COUNSEL TO THE PRESIDENT

TERRY GOOD
DIRECTOR, OFFICE OF RECORDS MANAGEMENT

SUBJECT: *Disposition of Office Records*

As we approach the end of the second year of the Administration, we remind you that the Office of Records Management is prepared to accept files from your offices for processing and storage. Many of you have already submitted your files -- to date, over 3,000 cubic feet of records have been sent. The more important of these files are now included in two computer data bases: one containing textual abstracts, and one containing optical images.

Proper disposition of your office files and records is required by the Presidential Records Act and is a sound management practice. We encourage you to call on the staff of Records Management for assistance in organizing your files prior to forwarding them for cataloging. Your cooperation will assist the ongoing operations of your offices, and will contribute to writing the history of the Clinton Administration.

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THE WHITE HOUSE

WASHINGTON

MAY 5, 1993

MEMORANDUM FOR ALL WHITE HOUSE AND OTHER EXECUTIVE OFFICE OF THE PRESIDENT STAFF

FROM: THOMAS F. MCLARTY, III
CHIEF OF STAFF

RE: PRESIDENTIAL AND FEDERAL RECORDS

Attached are two memoranda concerning Presidential and federal records -- the records we create and receive in the Executive Office of the President.

All personnel in the White House and other offices in the Executive Office of the President should review these memoranda carefully and comply with the guidance set forth therein.

Thank you for your cooperation.

Attachments

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THE WHITE HOUSE

WASHINGTON

May 5, 1993

MEMORANDUM FOR ALL EXECUTIVE OFFICE OF THE PRESIDENT STAFF

FROM: JOHN D. PODESTA JDP
Assistant to the President and
Staff Secretary

STEPHEN R. NEUWIRTH
Associate Counsel to the President

RE: Presidential Records

The offices within the Executive Office of the President generate two categories of records: "Presidential Records" and Federal Records." A separate memo from David Watkins and Bruce Overton has been circulated today concerning "federal records."

This memorandum sets forth guidance on the creation, maintenance and disposition of "Presidential records" -- records "created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President."

It is important that all staff in the Executive Office of the President review this memorandum carefully. The failure to designate documents and other materials properly can have serious implications, including possibly subjecting those materials to public disclosure under the Freedom of Information Act during the President's term of office.

I. UNITS WITHIN THE EXECUTIVE OFFICE OF THE PRESIDENT THAT GENERATE PRESIDENTIAL RECORDS

All records of the White House Office, the Office of Policy Development, the National Economic Council, the Council of Economic Advisors, the President's Intelligence Oversight Board

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disposition can be obtained from the White House Office of Records Management (or, in the case of the Office of the Vice President, from the Vice President's records management staff).

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and the President's Foreign Intelligence Advisory Board are Presidential records.

As discussed below, records of the Office of the Vice President are Vice Presidential records and are treated under the Presidential Records Act in the same manner as Presidential records. The records of the Office of the Vice President are not federal records.

The records of the National Security Council staff are Presidential records if they were received or created by or for the President, the Assistant to the President for National Security Affairs, the Deputy Assistant to the President for National Security Affairs, the White House Office, or a unit or an individual within the NSC in advising or assisting the President, and are not official records of the NSC. All other NSC records are federal records.

Records produced or received by the Director of the Office of Science and Technology Policy in his role as Science Advisor to the President are Presidential records; all other OSTP records are federal records.

Records of the Office of Management and Budget, the Office of the United States Trade Representative, the Council on Environmental Quality, and the Office of Administration are federal, not Presidential, records.

II. Types of Records Covered by the Act

The Presidential Records Act defines "documentary materials" as "all books, correspondence, memorandums, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio, audio-visual, or other electronic or mechanical recordations." 44 U.S.C. § 2201(1).

The Act defines "Presidential records," in turn, to mean:

> documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President. Such term --
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> (A) includes any documentary materials relating to the political activities of the President or members

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> of his staff, but only if such activities relate to or have a direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.

44 U.S.C. § 2201(2).

Under this definition, Presidential records are documentary materials that meet two tests. First, the materials must have been created or received by the President, his immediate staff, or a unit or individuals (including volunteers) in the EOP whose function it is to advise and assist the President. Second, the records must relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President. Presidential records may be in any physical form, including paper, film and disk. The method used to record information may be manual, mechanical, photographic, electronic, or any combination of these or other technologies.

A document created by personnel in a White House office, or an EOP office that advises and assists the President, normally is a Presidential record once it is circulated to others in the course of conducting activities which relate to or have an effect upon the carrying out of Presidential duties. Moreover, even documents that are not circulated can be Presidential records if, in the judgment of the office at issue, those documents are needed to conduct business that relates to or has an effect upon the carrying out of Presidential duties.

Materials received by personnel in the White House office, or in EOP offices that advise and assist the President, similarly become Presidential records when they are received in the course of conducting activities which relate to or have an effect upon the carrying out of Presidential duties. Materials received may be Presidential records whether they have been transmitted in person, by messenger, by mail, by electronic communication, or by any other means.

At the same time, several types of documentary materials are not subject to the Presidential Records Act. The Act expressly excludes documentary materials that are (1) official records of an agency; (2) stocks of publications and stationery; and (3) extra copies of documents produced only for convenience of reference, when such copies are clearly so identified.

The Act also excludes "personal records," defined to include all documentary materials, or any reasonably segregable portion thereof, "of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of

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the constitutional, statutory, or other official or ceremonial duties of the President." Personal records may include:

-- diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal, which are not prepared or utilized for, or circulated or communicated in the course of, transacting government business;

-- materials relating to private political associations, and having no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President;

-- papers and other materials accumulated by a staff member before joining government service and not used in the course of transacting government business;

-- materials that relate to a staff member's private affairs, such as personal financial records, insurance forms, and materials relating to an individual's professional activities and outside business and political pursuits;

-- personal photographs;

-- materials relating exclusively to the President's own election to the office of the Presidency; and

-- materials directly relating to the election of a particular individual or individuals to Federal, State, or local office, which have no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.

Further examples of materials not covered by the Presidential Records Act may include items such as those listed below:

-- preliminary drafts, that are not circulated to any other individual, of correspondence, reports, and studies;

-- preliminary drafts, work sheets and informal notes that contain information reflected in final documents and that do not document policy development or execution;

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-- tickler, follow-up or suspense copies of correspondence, provided there are copies of such documents in the official files;

-- newspaper clippings or news summaries, that have not been annotated, or organized or arranged for some official purpose;

-- copies of printed or processed materials, such as operating and procedural manuals, directives, and notices, distributed for the information and use of office employees;

-- shorthand and other notes that have been transcribed or converted to formal documents that have been verified for accuracy and completeness; and

-- catalogs, trade journals, and other publications that are received from other government agencies, commercial firms, or private institutions and that are maintained for reference purposes.

It is important to remember, however, that certain documents in the categories listed above may be Presidential records -- particularly given that, in the White House, drafts, working papers and other similar materials often document policy development, significant decisions, or other matters related to the carrying out of Presidential duties, as discussed below.

III. Requirements for creation and maintenance of Presidential records

When advising or assisting the President in carrying out his duties, White House and EOP employees are responsible for complying with the Presidential Records Act and related regulations.

The law imposes an affirmative obligation on staff members to document adequately the performance of the President's constitutional, statutory and ceremonial duties. Where appropriate, staff members should document -- through notes, minutes or memoranda -- meetings, conversations and other business in connection with, or related to, the carrying out of the President's duties.

Presidential records should be maintained in organized files. For offices creating both Presidential and federal records, it is critical that staff members carefully segregate Presidential and federal records. Federal records are subject to

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the Federal Records Act and may be subject to public disclosure under the Freedom of Information Act during the President's term of office. Presidential records, by contrast, are not subject to the Federal Records Act and are not subject to the provisions of the Freedom of Information Act during the President's term of office. Those offices (such as the National Security Council) that create or receive both Presidential records and federal records should file them separately with a clear indication of which records are Presidential and which are federal.

In addition, staff members should, to the extent possible, ensure that any files containing particularly sensitive records are clearly marked to reflect that fact. Designations for files containing sensitive records may include:

(1) "classified information";[1]

(2) "information the release of which may be prejudicial to the maintenance of good relations with foreign nations";

(3) "sensitive personal information" (i.e., information the release of which may be embarrassing to the individuals mentioned or to their families);

(4) "sensitive law enforcement materials";

(5) "trade secrets or sensitive commercial or financial information"; and

(6) "information subject to attorney-client or attorney work product privileges."

Finally, personal records should be clearly labeled, kept apart from Presidential records (and federal records) and not made available to other staff in connection with any official purpose.

IV. Electronic Presidential records

Increasingly, Presidential records may be created electronically. Records may be generated on word processing or electronic mail ("e-mail") systems, or on electronic databases.

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[1] Please note that nothing in this memorandum should be construed to override existing Executive Orders setting forth who may designate specific documents as classified and what terms must be used in connection with such designations.

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Records generated electronically must be incorporated into an official recordkeeping system. Thus, no word processing or e-mail document that is a Presidential record should be deleted unless it has been (a) printed and placed in an appropriate file, or (b) preserved in an appropriate electronic system. Questions concerning the record status of electronically generated materials should be directed to the White House Records Management Office. That office will periodically monitor electronic systems to ensure that correct records status determinations have been made.

As is the case for all record matters, the White House Records Management Office will continue to work with the White House Counsel's Office to coordinate policy and practices with respect to electronic Presidential records.

V. Disposition and destruction of Presidential records

Presidential records are the property of the United States and may be disposed of only in accordance with procedures established by the Archivist of the United States. The Presidential Records Act prohibits the disposal of Presidential records unless those records no longer have administrative, historical, informational, or evidentiary value. Moreover, before disposing of any Presidential records, the President must notify the Archivist who, under certain clearly defined circumstances, will notify appropriate Congressional committees.

The White House Records Management Office will provide guidance concerning disposal of certain recurring types of papers, including form letter public mail, unsolicited public mail that is not reviewed by any person in the White House with decision-making authority and not answered by any member of the White House staff, anonymous public mail, and enclosures received in public mail -- most of which may be destroyed after notification to the Archivist of the United States or the Archivist's representative.

Offices that have these recurring types of disposable material should coordinate all disposal procedures through the Office of Records Management. Under no circumstances should such material be disposed of without prior approval of the White House Records Management Office. (Prior approval is not necessary for the destruction of exact duplicates of documents which are being retained, or for unmarked copies of officially published documents, such as printed reports.)

The White House Office of Records Management serves as a central file for all Presidential records. Its primary role is to manage, process, maintain and store records for the daily use

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of the President and all the policy units in the White House. Concurrently, it preserves these same records to ensure a comprehensive history of the Administration. All EOP staff members are encouraged to consult with this office for guidance on the creation and maintenance of files and on procedures for appropriate and systematic filing of documents.

VI. Legal control of Presidential records

Presidential records remain in the custody and control of the President during his term of office and are not subject to disclosure under the Freedom of Information Act during that term. As noted above, federal records are, by contrast, subject to the FOIA public disclosure provisions.

Upon completion of the Administration, the Archivist acquires custody of Presidential records. Many of these records will become available to the public under the FOIA five years after the end of the President's term of office. The President, however, may assert control over public access to certain categories of information -- generally including classified materials, documents related to appointments to federal offices, items specifically exempted from disclosure by other statutes, trade secrets or commercial information, confidential communications requesting or submitting advice between the President and his advisers (or between such advisers), and information implicating personal privacy concerns -- for up to twelve years after the end of the President's term. After twelve years, public access to these categories of documents is governed by the FOIA, subject to any Constitutional privilege against disclosure.

VII. Records that may be retained by staff members upon departure from office

Staff members may not remove Presidential records, or copies of such records, from their offices at any time, except in connection with an official function. Classified Presidential records may not be removed from the office at any time without compliance with the rules applicable to such materials. Records used in an official capacity should be returned to proper files immediately after such use.

When a staff member leaves the White House or another office in the EOP, he or she must deliver all Presidential records to the White House Records Management Office (or leave records in his or her office for pick-up). Staff members are not entitled to retain copies of any Presidential records for

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personal use, except copies of documents that have already been publicly released.

Federal records should be left at the appropriate agency, and disposed of in accordance with the advice set forth in the federal records guidance memorandum from David Watkins and Bruce Overton.

Purely personal, unclassified materials may be removed from the office by staff members at any time, subject to any agency procedures regulating such removal. If, during the course of service at the White House, a staff member wishes to store personal (including private political) materials at the White House Office of Records Management, the staff member must clearly designate those materials as "personal."

VIII. Records in the Office of the Vice President

The Presidential Records Act expressly provides that records of the Office of the Vice President are Vice-Presidential records and are to be treated under the Presidential Records Act in the same manner as Presidential records. Thus, materials created or received in the Office of the Vice President should be treated in accordance with the guidance set forth above. The Office of the Vice President has its own records management staff, and personnel in the Office of the Vice President should consult with that staff for additional guidance regarding the filing and disposition of Vice President's Office records.

The Presidential Records Act further provides that "[t]he authority of the Archivist with respect to Vice-Presidential records shall be the same as the authority of the Archivist with respect to Presidential records, except that the Archivist may, when the Archivist determines that it is in the public interest, enter into an agreement for the deposit of Vice-Presidential records in a non-Federal archival depository."

IX. Training

The White House Office of Records Management and other appropriate personnel will be providing records management training in the near future.

* * *

The foregoing is designed to provide general guidance with respect to the Presidential Records Act. Specific questions of coverage or interpretation should be addressed to the White House Counsel's office. Assistance in records maintenance and

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THE WHITE HOUSE

WASHINGTON

May 5, 1993

MEMORANDUM FOR ALL EXECUTIVE OFFICE OF THE PRESIDENT STAFF

FROM: DAVID WATKINS
Assistant to the President for Management and Administration

BRUCE OVERTON
General Counsel, Office of Administration

RE: Federal Records

INTRODUCTION

The offices within the Executive Office of the President generate two categories of records: "Presidential Records" and "Federal Records."

Records are "Presidential" if they are "created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory or other official or ceremonial duties of the President." Such Presidential records are subject to the provisions of the Presidential Records Act, 44 U.S.C. § 2201. Presidential records remain in the custody and control of the President during his term of office and are not accessible to the public until five years after the end of the Administration, at the earliest. The treatment of Presidential records will be addressed in a separate memorandum issued today by the White House Office.

It is the purpose of this memorandum to discuss the identification, maintenance and disposition of "federal" records. Materials are "federal records" if (1) the materials have been created or received by agency personnel in connection with their official duties in a federal agency, and (2) the materials are appropriate for preservation as evidence of the agency's activities or because they contain information of value. Federal records are subject to the provisions of the Federal Records Act, 44 U.S.C. Chapters 29, 31 and 33. Unlike Presidential records, federal records are accessible to the public during the

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Administration's term, unless exempt from disclosure under the provisions of the Freedom of Information Act.[1]

The Federal Records Act imposes certain legal obligations with respect to the creation and receipt, custody and maintenance, and disposition of federal records. The responsibilities apply regardless of whether the records are generated in paper form or by automated systems.

It is critical that staff members in offices, such as the National Security Council, that create or receive both federal and Presidential records, file those records separately in clearly designated files. Once a document is filed as a federal record, it becomes subject to the Federal Records Act and may be subject to public disclosure under the Freedom of Information Act. Presidential records, by contrast, are not subject to the Federal Records Act and are not subject to the provisions of the Freedom of Information Act during the President's term of office. Personal records (defined and discussed below) also should be segregated, and filed separately, from official records.

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[1] All records of the White House Office, the Office of Policy Development, the National Economic Council, the Council of Economic Advisers, the President's Intelligence Oversight Board and the President's Foreign Intelligence Advisory Board are Presidential records.

The records of the Office of the Vice President are treated in the same manner as Presidential records under the Presidential Records Act. The records of the Office of the Vice President are not federal records.

Records of the National Security Council staff are Presidential Records if they were received or created by or for the President, the Assistant to the President for National Security Affairs, the Deputy Assistant to the President for National Security Affairs, the White House office, or a unit or an individual within the NSC in advising or assisting the President, and not official records of the NSC.

Records produced or received by the Director of the Office of Science and Technology Policy in his role as Science Advisor to the President are Presidential records and should be segregated as such. Other records of the OSTP are federal records.

Records of the Office of Management and Budget, the Office of the United States Trade Representative, the Council on Environmental Quality, and the Office of Administration are federal, not Presidential records.

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The guidance that follows will assist EOP staff in complying with the Federal Records Act, which is designed to ensure that documentation of official activities is adequately created and preserved. See 44 U.S.C. § 3101. As explained below, not every document that you create or receive will be subject to the Federal Records Act, and it is therefore important to review this guidance to understand when Federal Records Act obligations do apply. In preparing this guidance, we have consulted with officials of the National Archives and Records Administration.

DEFINITION OF FEDERAL RECORDS

The Federal Records Act defines federal records as:

> [A]ll books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.
>
> -- 44 U.S.C. § 3301.

Under this definition, federal records are documentary materials that meet two tests. First, the materials must have been created or received by agency personnel in connection with their official duties in a federal agency. Second, the materials must be appropriate for preservation as evidence of the agency's activities or because they contain information of value. Federal records may be in any physical form, including paper, film and disk. The method used to record information may be manual, mechanical, photographic, electronic, or any combination of these or other technologies.

A document created in any agency normally becomes a federal record once it is circulated to others in the course of conducting agency business, or once it is placed in files accessible to others. Moreover, even documents that are not circulated can become federal records if, in the judgment of the agency, those documents are needed to conduct agency business -- and whether or not those documents are accommodated by current filing systems employed by the agency.

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Materials received by agency personnel are federal records when they are received in the course of official business. Materials received can become federal records whether they have been transmitted in person, by messenger, by mail, by electronic communication, or by any other means.

At the same time, certain types of documentary materials are not subject to the Federal Records Act. The Act specifically excludes (1) library and museum materials created, or acquired and preserved, solely for reference or exhibit purposes; (2) extra copies of documents kept only for convenience of reference; and (3) stocks of publications and processed documents. These and other types of transitory or duplicate records are considered "nonrecord" because they are not "appropriate for preservation" as defined in the Act. Such materials are not needed to provide full and accurate documentation of an agency's policies, decisions, procedures, and program activities. These materials need not be maintained in official files, and, unlike federal records, may be destroyed when no longer needed and without prior approval of the National Archives and Records Administration.

Other examples of "nonrecord" materials not covered by the Federal Records Act may include:

-- Preliminary drafts, that are not circulated to any other individual, of correspondence, reports, and studies.

-- Preliminary drafts, work sheets and informal written notes that contain information reflected in final documents and that do not document policy development or execution.

-- Tickler, follow-up or suspense copies of correspondence, provided there are copies of documents in the official files.

-- Newspaper clippings or news summaries, particularly if they are not annotated.

-- Copies of printed or processed agency materials, such as operating and procedural manuals, directives, and notices, distributed for the information or use of agency employees.

-- Shorthand and other notes that have been transcribed or converted to formal documents that have been verified for accuracy and completeness.

-- Catalogs, trade journals, and other publications that are received from other government agencies,

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commercial firms, or private institutions and that are maintained for reference purposes.

In addition, certain "personal papers" fall outside the scope of the Federal Records Act. Personal papers are documentary materials that are not used in the transaction of agency business. Examples include:

-- Papers and other materials accumulated by a staff member before joining government service.

-- Materials that relate to a staff member's private affairs, such as personal financial records, insurance forms, and materials relating to an individual's professional activities and outside business and political pursuits.

-- Personal photographs.

-- Materials that may refer to official duties but are not directly used to carry out those duties. These include diaries, personal calendars, journals, and notes intended for an individual's personal use (memory aids and personal observations on work-related matters).[2]

It is important to remember, however, that certain informal documents may be federal records. In the Executive Office of the President, to a greater extent than in many other government offices, drafts, notes, background materials or working papers can be considered federal records because they document policy development, significant decisions, major activities, or other matters basic to an understanding of the office and its role in government operations. Such materials should be treated as federal records and maintained in official files if they were circulated for review or clearance, and if they have been modified substantively.

When it is difficult to determine whether documents or other records should be treated as federal records, you should tentatively treat them as federal records and contact the appropriate EOP agency records management office for a final determination. Legal questions will be referred by the records management office to appropriate counsel.

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[2] For further information on personal papers, consult Personal Papers of Executive Branch Officials: A Management Guide, published by the National Archives and Records Administration. Copies are available in the Office of Administration, Records Management Office.

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RECORDS CREATION AND MAINTENANCE REQUIREMENTS

When acting in their capacity as employees of a federal agency, such agency employees are responsible for complying with the Federal Records Act and related regulations.

The law requires that adequate and proper records be created and preserved to document the organization, functions, policies, decisions, procedures and essential transactions of the agency. The law also specifically requires that records be kept for appropriate periods if they can be used to protect the legal and financial rights of the Government or individuals directly affected by the agency's activities.

In order to ensure that agency records contain an adequate and proper account of policy development, implementation and decision-making, each employee must document those discussions, meetings and telephone conversations that are necessary to understand these functions. Where appropriate, in formal settings, minutes or notes should be taken for the purpose of including them in official files.

All staff members are responsible for complying with procedures that result in adequate and proper records creation and maintenance. All materials meeting federal records criteria must be incorporated into appropriate agency files or records systems. EOP staff members should consult with the appropriate EOP agency records management office to address any questions concerning the creation and maintenance of federal records.

ELECTRONIC FEDERAL RECORDS

Increasingly, federal records may be created electronically. Records may be generated on word processing, or electronic mail ("e-mail"), systems or other computer applications.

Records generated electronically must be incorporated into an official recordkeeping system. Thus, no word processing or e-mail document that is a federal record should be deleted unless it has been (a) printed and placed in an appropriate file, or (b) preserved in an appropriate electronic system.

On January 6 and 11, 1993, in the case of Armstrong v. Executive Office of the President, United States District Judge Charles R. Richey directed the National Archives and Records Administration to work with components of the EOP to develop further recordkeeping guidance both for e-mail communications in the EOP and for disposition of EOP electronic federal records generally. Pursuant to these orders, and until further

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instructions, the following special rules should be observed by components of the EOP that generate federal records:

1. Material may not be deleted from any e-mail file unless (a) the material has been retained in full on a back-up tape or other comparable medium, and (b) the retained version includes both full text and all available transmittal information; and

2. EOP staff members with records management responsibility must monitor the implementation of guidance on federal records (including the status of records) to ensure consistent application of the court's order.

Questions concerning the status of electronic records, or the application of these rules to particular computer systems, should be directed to the appropriate EOP agency records management office. Those offices will periodically monitor electronic records systems to ensure that correct records status determinations have been made.

DESTRUCTION OR REMOVAL OF FEDERAL RECORDS

Federal records, as defined by the Federal Records Act, may not be destroyed, or permanently removed from appropriate official files, without the prior approval of the National Archives and Records Administration.

Federal records should be maintained in organized files and may not be damaged or altered by any staff member. Nor may federal records be temporarily removed from official files except for official purposes, and only if returned to the official files upon completion of that official function.

Policies and procedures governing the disposition of federal records are prescribed by the National Archives and Records Administration and are incorporated into the EOP records management program. Further information concerning these policies and procedures should be obtained from the appropriate EOP records management office.

REMOVAL OF NONRECORD AND PERSONAL MATERIALS

Purely personal, unclassified materials may be removed from the office by staff members at any time, subject to any agency procedures regulating such removal.

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Unclassified nonrecord materials, with the exception of copies of records, may be removed with the prior approval of an agency official with records management responsibility.

Except where expressly authorized by appropriate agency officials, copies of federal records, regardless of the reason for which they have been duplicated, may not be taken by staff members for any purpose other than an official purpose related to the staff members' official duties and responsibilities.

No classified materials may be removed from the office at any time, without compliance with the rules applicable to such materials.

TRAINING

EOP agency records management offices and other appropriate personnel will be providing records management training for all employees who generate or receive federal records.

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THE WHITE HOUSE

WASHINGTON

May 9, 1997

MEMORANDUM FOR EXECUTIVE OFFICE OF THE PRESIDENT STAFF

FROM: Charles F.C. Ruff
Counsel to the President

SUBJECT: Presidential Records

The Presidential Records Act, 44 U.S.C. §§ 2201-07, imposes certain requirements regarding Presidential documents. This Guidance will first summarize the White House policies regarding the statute, and then discuss them in more detail.

Summary of White House Policies Regarding the Presidential Records Act

- The purpose of the Presidential Records Act is to document the performance of the President's constitutional, statutory and ceremonial duties.
- To accomplish this purpose, the Act requires the preservation of all original Presidential records. You do not have to keep identical copies.
- You need not keep "nonrecord" materials, such as notes for your own use, rough drafts not circulated to others, or call and visitor logs.
- You should file Presidential Records -- those pertaining to the performance of the President's duties -- separately from your personal records.
- When you leave the White House, send the Office of Records Management all original Presidential Records you have.
- Unless they have been publicly released, you may not take copies of Presidential Records when you leave, without permission from Counsel's Office.
- If you have any questions whether particular documents are Presidential Records, contact Robert Weiner in Counsel's Office (6-6297).
- This Guidance addresses your obligations under the Presidential Records Act. In addition, the White House has received subpoenas and document requests. You must preserve all materials that are covered by such subpoenas or requests.

GUIDELINES FOR THE PRESIDENTIAL RECORDS ACT

I. What are Presidential Records?

Presidential Records must meet two tests:

1 They must be **created** or **received** by the President, his immediate staff, or others in the EOP whose job is to advise and assist the President, and

2. They must relate to or directly affect the performance of the President's constitutional, statutory, ceremonial or other official duties.

II. What units in the EOP generate Presidential Records?

Records of the following units which meet the two tests above are Presidential Records:

White House Office
National Security Council
Office of Policy Development
National Economic Council
Council of Economic Advisors
President's Intelligence Oversight Board
President's Foreign Intelligence Board

Records of the Office of the Vice President are treated in the same manner as Presidential Records. Records of other units in the Executive Office of the President are not Presidential Records, but may be subject to the Federal Records Act if they were created or received by employees of the agency and reflect the agency's activities or otherwise contain information of value.

III. What types or forms of records are included as Presidential Records?

A Presidential Record may be in any physical form, including: "books, correspondence, memorandums, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio, audio-visual, or other electronic or mechanical recordations." E-mails and documents existing only on computer are also included.

IV. What materials are <u>not</u> Presidential Records?

The following are not Presidential Records:

1. Personal records.

2. Nonrecord materials.

3. Official records of an agency.

4. Stocks of publications and stationery.

5. Extra copies of documents produced only for convenience or reference, when the copies are clearly identified as such.

V. What are "personal records?"

Personal records have a "purely private or nonpublic character" and do not relate to or affect the President's official duties. Personal records may include:

1. Diaries, journals, and the like if they are not prepared, used or circulated for government business.

2. Materials gathered by a staff member before joining government service, if not used for government business.

3. Materials relating solely to the staff member's private affairs, such as financial records, insurance forms, and outside professional associations.

4. Personal photographs.

5. Materials relating to the election of others to federal, state, or local office, which have no relation or direct effect on the performance of the President's official duties.

VI. Are political documents Presidential Records?

Under the statute, materials regarding the political activities of the President and his staff which do not relate to or directly affect the performance of the President's official duties are not Presidential Records. Neither are materials relating exclusively to the President's own election. Because it sometimes can be difficult to judge which documents fall into these categories, you should consult the Office of White House Counsel regarding the records you may remove.

VII. What are "nonrecord materials?"

The following types of materials may not be Presidential Records:

1. Preliminary drafts not circulated to persons besides the authors.

2. Preliminary drafts, work sheets, and notes <u>if</u> they are reflected in the final product <u>and</u> they do not document the development or implementation of policy.

3. Shorthand and other notes once they are transcribed or converted to formal documents which are verified for accuracy and completeness.

4. Scratch pads, visitor and call logs, and similar nonsubstantive documents.

VIII. What are your obligations regarding the creation of Presidential Records?

The Presidential Records Act requires that staff members adequately document the performance of the President's constitutional, statutory, and ceremonial duties. The decision whether to memorialize information rests in the first instance with each staff member.

IX. How should you maintain Presidential Records?

Maintain Presidential Records in organized files. Label and keep personal records separate from Presidential Records, and do not make personal records available to other staff for official business.

If your office has both Presidential and Federal Records, keep them separate. You may have to disclose Federal Records under the Freedom of Information Act. Presidential Records are not subject to such disclosure.

X. Can you destroy Presidential Records?

No. Presidential Records are the property of the United States, and may be disposed of only in accordance with procedures established by the Archivist.

One narrow exception: If your office receives certain recurring types of papers, including form letter public mail, unsolicited public mail not reviewed or answered by anyone in the White House, anonymous public mail, or enclosures in public mail, the White House Records Management Office will provide guidance regarding when you may dispose of those materials. Consult that Office before disposing of any such records.

XI. What happens to Presidential Records?

During his term, the President retains custody and control of Presidential Records.

At the end of the Administration, Presidential Records go to the Archives. Some will become subject to disclosure five years later. The President can restrict public access to certain documents, such as classified materials, documents related to appointments to federal office, or trade secrets, for up to 12 years. The materials then become publicly available as limited by any constitutional or other privilege.

XII. What can you take with you when you leave the EOP?

You may not take Presidential Records with you at the end of your employment. You also may not take copies of Presidential Records unless the records have been publicly released, or you have received permission from Counsel's Office. You may not remove classified documents from your office at any time without complying with the rules applicable to those materials. You may take political documents only with the approval of Counsel when you leave the EOP. You may also take personal records with you.

When a staff member leaves the White House or the EOP, he or she must deliver all Presidential Records to the White House Records Management Office (or leave the records in his or her office). NSC staff should provide their records to the NSC Records Management Office.

XIII. Who should you ask about the Presidential Records Act?

If you have questions regarding the coverage or interpretation of the Act, call **Robert Weiner** in the Office of White House Counsel **(6-6297)**. Direct your questions about records maintenance and disposition of files to the White House Office of Records Management (or, for the Office of the Vice President, to the Vice President's records management staff, and for the NSC, the NSC Records Management Office).

January 26, 2001

MEMORANDUM FOR: MICHELLE SALINAS

FROM: TERRY GOOD
OFFICE OF RECORDS MANAGEMENT

RE: DRAFT OF "FILES" SECTION FOR
WHITE HOUSE STAFF MANUAL

I have taken the liberty to revise this section, having found that the previous section left many staff confused. What follows will clarify and answer some of the most frequent questions that we received.

The Presidential Records Act, 44 U.S.C.§§2201-07, imposes certain requirements on the President and his staff regarding Presidential documents. The purpose of the Act is to ensure that documentation is created and preserved of the President's constitutional, statutory, and ceremonial actions. The Act applies to both the President and his staff who are his delegates. Thus staff must create and preserve documentation of their actions in carrying out the President's responsibilities. Some documents are considered "nonrecord," including identical copies, stocks of publications, notes for your own use, rough drafts not circulated to others, and logs of visitors and telephone calls. Any records relating to you personally, having nothing to do with your official duties, must be maintained separately from the official records.

At the end of your White House service, the official records in your custody must be left with either your successor or forwarded to the Office of Records Management. Unless they have been publicly released, you may not take copies of Presidential records when you leave, without permission of the Counsel's Office. If you have any questions about whether particular documents are Presidential records, contact the Counsel to the President (Room 128, EEOB, x67900).

In addition to the provisions of the Presidential Records Act, the White House may receive subpoenas and other requests for documents. You must preserve all materials that are covered by such subpoenas or requests.

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FILES *(also see Tab C-Records Management, Office of)*

The Presidential Records Act, 44 U.S.C. §§ 2201-07, imposes certain requirements regarding Presidential documents. The purpose of the Presidential Records Act is to document the performance of the President's constitutional, statutory and ceremonial duties. To accomplish this purpose, the Act requires the preservation of all original Presidential records. You do not have to keep identical copies. You need not keep "nonrecord" materials, such as notes for your own use, rough drafts not circulated to others, or call and visitor logs. In addition, official records of an agency and stocks of publications and stationery are not considered Presidential Records. You should file Presidential Records—those pertaining to the performance of the President's duties—separately from your personal records.

When you leave the White House, send the Office of Records Management all original Presidential Records you have. Unless they have been publicly released, you may not take copies of Presidential Records when you leave, without permission from Counsel's Office. If you have any questions about whether particular documents are Presidential Records, contact the Counsel to the President (Room 128, EEOB, x67900).

In addition to the provisions of the Presidential Records Act, the White House may receive subpoenas and other requests for documents. You must preserve all materials that are covered by such subpoenas or requests.

PL___VM___

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How NARA Can Help You with Records Management

What Is Records Management?
In government we all create records to do our business. In the Executive Office of the President (EOP), records that are created are either covered by the Presidential Records Act (PRA) or the Federal Records Act (FRA) which set legal requirements for recordkeeping and define the authorities and responsibilities of the President and his appointees.

The two acts differ to some extent in what they require (see attached), but records management is the common discipline that provides assistance in determining the most effective ways of meeting those differing requirements. The foundation of records management is that records go through a "life cycle" that applies to all records in all media.

- Creation phase - whereby an organization creates the records it needs to do its business
- Active phase - where the records are used to conduct the organization's business
- Disposition phase – where decisions are made about the length of time records must be retained.

What Are the Advantages of Good Records Management?
Good records management helps you in four basic ways:

1. It helps you conduct your business more effectively and efficiently throughout the life cycle by:
   - Specifying what documentation is necessary to conduct business to minimize the number of records that must be created and to maximize their value to meet business needs.
   - Identifying the most cost effective ways to organize, index, file, retrieve, and store records to achieve the maximum benefit for the money invested.
   - Determining the proper length of time to retain records for business purposes and identifying those records that warrant preservation in the National Archives or Presidential Library suitable for destruction and those and regularly carrying out those disposition instructions.
   - Developing requirements for computer systems to manage your records to meet your business needs.
2. It helps you comply with applicable governmental records management requirements.
3. It helps you respond completely and efficiently to requests for access to records
4. It ensures a good historical record that will allow those in the future to understand the accomplishments of the administration.

How Can NARA Assist You in Improving Records Management?
NARA recognizes that the EOP and its components have active records management programs, and NARA staff members have worked with these programs for many years. With the change of administrations, NARA would like to help the EOP through targeted assistance projects that support records management in the Bush administration. NARA staff can assist in all phases of records management. Here are examples of where NARA staff can help:

- Understanding and interpreting relevant records management statutes and applicable regulations and suggesting practices for implementing them effectively and efficiently.
- Developing criteria for identifying personal, presidential, and federal records.
- Selecting records management software and improving the records management capabilities of new and planned systems.
- Developing EOP specific guidance for FRA and PRA organizations
- Training staff in records management responsibilities
- Storing PRA (Presidential and Vice Presidential) and FRA records, personal materials, and gifts.
- Determining the appropriate disposition of records in all media within the context of applicable statutory requirements
- Planning for the transfer of records to NARA.

Implementing the Presidential Records Act and Federal Records Act Requirements.

As noted above, in the Executive Office of the President (EOP), records that are created are either covered by the Presidential Records Act (PRA) or the Federal Records Act (FRA). The Presidential Records Act applies to records created by components of the EOP that solely advise and assist the President.

The components of the EOP that create Presidential records are:

- The White House Office
- The Office of the Vice President
- Office of Policy Development
- Council of Economic Advisors
- The President's Intelligence Oversight Board
- The National Security Council
- The President's Foreign Intelligence Advisory Board
- The National Economic Council

The EOP components that generate Federal records that are governed by the Federal Records Act are:

- Office of Management and Budget
- Office of the United States Trade Representative
- The Council on Environmental Quality
- The Office of Administration
- The Office of Science and Technology Policy
- The Office of National Drug Control Policy

Both acts require the head of the organization (President or agency head) to take the necessary steps to ensure that adequate documentation of activities is created and maintained. Records management provides common tools for doing that in an effective and efficient manner. However, there are differences between the acts that will affect how records management is implemented.

- The FRA is supported by a series of Federal regulations that provide more specific direction about how agencies should implement a records management program. There are no similar regulations for the PRA.
- The FRA assumes that most Federal records will eventually be destroyed and only a small percentage will eventually come to NARA. The PRA assumes that most Presidential records will be preserved.
- The FRA and PRA set out different procedures for records disposition. Under the FRA agency heads submit records schedules to request the Archivist's approval for the disposition of records. In the case of Presidential records, the PRA states that the incumbent President must obtain the views in writing of the Archivist before disposing of any Presidential records, 44 USC §2203 (c) –(f).
- Access restrictions are different for PRA and FRA records. FRA records will be subject to the Freedom of Information Act (FOIA) during the Bush administration. PRA records are not subject to the FOIA until five years after the end of the administration.

Contact Point: Michael L. Miller, NARA 301-713-7110x229 (voice)
michael.miller@arch2.nara.gov 301-713-6852 (fax)

NARA Records Management Issues for Discussion with Bush Transition Team
Draft of 01/16/01

This document lays out a series of recommendations for improving records management and related information technology (IT) infrastructure based on the experience of National Archives and Records Administration (NARA) staff. These recommendations are meant to start a dialogue with the incoming administration on records management generally and the assistance NARA can provide.

Issues Requiring Immediate Attention

- Give guidance and training to all EOP staff on PRA, FRA, and personal records. Provide clear guidance on personal records to the appropriate staff handling these materials for the President, Vice President, and First Lady.
- Issue a memorandum on records management *responsibilities* to all staff.
- From the beginning of the administration clearly delineate and separate out what are records under the Presidential Records Act (PRA), what are personal papers under the PRA, and what are federal records under the Federal Records Act (FRA). This should be done for paper and electronic records.
- Establish by the President the ownership of personal (including political) materials generated by White House Staff and the appropriate disposition of such materials. This includes identifying for White House Staff what personal material belongs to the employee and what belongs to the President.

Priority Issues to Address Shortly After the Transition

- Develop a joint list of records management priorities reflecting EOP and NARA needs.
- Establish an overall management perspective for records at the Administration and Management level. Evaluate the potential for establishing a Chief Information Officer (CIO) for the *EOP* and having a records officer for the EOP reporting directly to the CIO.
- To the extent possible, establish common practices for managing PRA records (including records of the Vice President and First Lady), personal papers under the PRA, and FRA records in all media.
- Develop a system to replace ARMS II that meets both business and records management needs, including the need to maintain PRA, FRA, and personal records separately and the ability to distinguish between non-record material, and short-term and long-term FRA records.
- Determine whether these requirements (and other business requirements) are best met by a system developed in-house, a COTS/GOTS product, or a records management application.
- Incorporate records management requirements in all EOP systems as they are redesigned or upgraded, e.g., the Presidential Diary System.
- Establish in accordance with the PRA a regular process for disposal of Presidential records that are not needed for EOP or statutory or archival reasons. Examples include bulk mail (and bulk e-mail) and backup tapes.
- Work with the White House Gift Unit on implementing guidance for the *disposal or other disposition of* Presidential gifts that are not appropriate for retention in a Presidential Library.
- Establish a routine process for recycling backup tapes once authorization is obtained from the Archivist as required by statute. Develop a process to maintain backups of PRA and FRA records separately.

Specific Issues That Need to Be Addressed as Part of the Review

- The management of Vice President's Records, both paper and electronic, needs to be addressed, including the issue of the records of the Vice President in the Senate. The two systems are not integrated, although V.P. email could be routed into ARMS.
- The filing procedures for the central file for Presidential records should be reviewed. Sometimes, current filing practices result in the interfiling of personal and Presidential records.
- Review the management of the electronic directory of EOP employees. Could it be modified to serve as a historical record of employees as well as a record of those currently employed?
- Provide guidance to staff on the appropriate way to file electronic records to efficiently use the available drives and effectively manage the electronic records on them. Determine how best to manage the electronic versions of textual documents.
- Provide assistance in the management of First Lady's files, both electronic and paper.
- Designate clear records status at the point of establishment for the records of Task Forces and Commission and provide records management guidance to the staff of the Task Force or Commission including information on closing out the Task Force/Commission and the appropriate disposition of the records.
- Provide regular records management briefings for new employees, including interns. Where necessary, training should include or be supplemented with training on records classification, declassification, and redaction.
- Develop clear recordkeeping requirements for all types of transactions so that staff know what records must be created and maintained to document their work.

THE WHITE HOUSE

WASHINGTON

2/8/01

John:

The attached is a modified copy of the Counsel's draft.

I have taken the liberty of providing ORM's comments in italicized inserts.

Jerry

REV_00255121

DRAFT 2

February __, 2001

MEMORANDUM FOR WHITE HOUSE OFFICE
OFFICE OF POLICY DEVELOPMENT
COUNCIL OF ECONOMIC ADVISORS
PRESIDENT'S INTELLIGENCE OVERSIGHT BOARD
NATIONAL SECURITY COUNCIL
PRESIDENT'S FOREIGN INTELLIGENCE ADVISORY BOARD
NATIONAL ECONOMIC COUNCIL

FROM: ALBERTO R. GONZALES

SUBJECT: PRESIDENTIAL RECORDS ACT

The Presidential Records Act applies to all officers and employees in the above units within the Executive Office of the President. This memorandum, issued at the direction of President Bush, summarizes and explains your obligations under the Act.

The President has the statutory authority and responsibility under the Presidential Records Act (Section 2201-2207 of Title 44) to establish records management controls "to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented." The Act provides that "[d]ocumentary materials produced or received by the President, his staff, or units or individuals in the Executive Office of the President the function of which is to advise and assist the President, shall, *to the extent practicable*, be categorized as Presidential records or personal records upon their creation and be filed separately." The Act thus grants the President substantial discretion to determine the most "practicable" means for ensuring that records "adequate" to document the activities, deliberations, decisions, and policies reflecting the performance of his duties are created and preserved. In light of the President's substantial discretion, the President's records policies, as applied to those units in the EOP covered by the Presidential Records Act, are not subject to judicial review. *See Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993).

This memorandum provides guidance for you to determine (i) which of your records must be preserved and (ii) which records can be handled or discarded as you see fit. In preparing this memorandum, Counsel has carefully examined the Presidential Records Act, its statutory history, relevant court precedents, and regulations issued by the Archivist interpreting the analogous definition of records in the Federal Records Act, see 36 C.F.R. 1222.34, 1222.36. In addition, Counsel has closely studied the policies and practices of past Administrations, which are reflected in numerous memoranda, and has consulted with officials from the National Archives.

D. Counsel's Office

If you have any doubt whether particular documents are Presidential records, preserve the documents and contact the Counsel's office. The Counsel's Office will assist with any specific questions you have. As recurring questions occur, as they almost certainly will, the Counsel's Office will issue updates and revisions to this policy as necessary and appropriate.

The executive summary immediately below provides the guidance you will need on a day-to-day basis in order to comply with the Act. The remainder of the memorandum explains in greater detail the Counsel's interpretation of the Presidential Records Act and how that Act applies to particular categories of documents.

EXECUTIVE SUMMARY:
What records must be preserved and when, if ever, will they become public?

As a general matter, you must ensure preservation of any document that (i) is related to your official White House business *and* (ii) is received from or circulated to another person, regardless whether that other person is inside or outside the White House. That includes letters, memos, e-mails, notes, speeches, and other similar documents that relate to your official business *and* are received from or circulated to another person.

You must ensure preservation of all official documents that you receive from anyone outside the White House -- including Congress, departments and agencies of the Executive Branch, state governments, and private individuals and groups. In addition, you must ensure preservation of a copy of all official documents that you send to anyone outside the White House -- including Congress, departments and agencies of the Executive Branch, state governments, and private individuals and groups.

You are ***not*** required to preserve:

copies of documents if you are aware that someone else is maintaining a copy

personal documents

election- or campaign-related documents

notes or rough drafts so long as the notes or drafts are *not* circulated or made available to others (A document is not considered circulated to another person merely because an assistant helps in the physical preparation of a document, such as by typing drafts.)

publications such as congressional reports, books, newspapers, magazines, or news summaries and news clips

rolodexes, telephone logs, message logs, message slips, calendars, and visitor logs (unless, for example, a message slip communicates a substantive official message)

If you have any doubt whether particular documents or records must be preserved, you should preserve the documents and contact the Counsel's office.

Notwithstanding the minimum requirements of the Presidential Records Act, it bears mention that a fundamental purpose of the National Archives system and the Presidential Records Act is to preserve for history significant documents that accurately reflect the workings of a President and his White House advisors. Therefore, if you create or receive documents that are not

covered by the requirements of the Presidential Records Act, but that you nonetheless conclude would assist future historians in understanding the workings of this Administration (such as careful and accurate notes of particular meetings), you may donate them to the National Archives. You can simply give such documents, along with your Presidential records, to the Office of Records Management when you conclude your White House service.

We have several concerns/questions re this paragraph:

1) *While the staff person can donate them to NARA, it is incorrect to state that they can "simply give such documents to the Office of Records Management. . .," ORM will not accept personal records.*
2) *One might read this paragraph and draw the conclusion that ORM is only an archival operation where inactive records are stored. We do provide daily support to many offices in a variety of ways. This is more fully addressed later in our comments on the Section entitled "Office of Records Management."*

It also is important for you to understand w*hen* and *how* the public can gain access to Presidential records. To begin with, the White House Office and the other offices listed at the top of this memorandum, are ***not*** subject to the Freedom of Information Act while the President is in office. At the end of the Administration, the National Archives will take control of Presidential records (and will operate in conjunction with the designated Presidential library). The Archives must make most documents available for public release beginning 12 years after the end of the President's term or second term in the event of a two-term Presidency. The 12-year period has exceptions: The Archives must allow release of certain non-sensitive documents after 5 years, and the Archives must protect certain highly sensitive documents, such as national security documents and privacy information, forever.

We would offer a rephrasing of the last sentence above:

Following the conclusion of the Administration, the archivists at the Presidential Library where these records will be preserved, will begin a review process in anticipation of opening them to the public. Some documents will be available in their entirety 5 years after the Administration's end. Those containing national security or other sensitive information will be closed for longer time periods, until the information's classified or sensitive nature passes. Some privacy information may never be opened.

Finally, it is critical for you to read and understand Counsel's separate memorandum regarding the process that the White House will employ in the event it is ever necessary to respond to a subpoena or document request from Congress, a grand jury, or another investigative body. As is explained in that memorandum, your obligations in response to a subpoena or document request often will be more onerous than the more limited requirements of the Presidential Records Act outlined here. In particular, a subpoena or document request usually will require preservation of all documents (including notes, drafts, and potentially even your personal documents) that refer or relate to a particular

subject matter and that you possess at the time of the document request or thereafter create or receive.

You *always* must comply with all of the terms of any subpoena or document request even in those circumstances where those requirements are more stringent than your obligations under the Presidential Records Act.

II. DISCUSSION

1. General Definition of Presidential Records

The Presidential Records Act defines "Presidential records" to include "documentary materials, or any reasonably segregable portion thereof, created or received by the President" – or created or received by members of the staff of the covered EOP components – "in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President." The definition expressly encompasses not only written documents, but also models, pictures, films, and audio recordings.

We would offer a slight rephrasing of the last sentence above:

"The definition expressly encompasses not only written documents, but other materials such as, but not limited to, models, pictures, films, and audio recordings."

Congress intended that this definition be interpreted in accord with the definition of "federal records" in the analogous Federal Records Act, a separate records statute that was enacted before the Presidential Records Act and that applies to most federal departments and agencies in the Executive Branch. As the House Committee report accompanying the Presidential Records Act explained, "[t]o the extent that certain categories of documentary materials are not considered to be records under [the Federal Records Act], the same categories of materials generated or received by the President and his aides would generally also fall outside the ambit of what constitutes a record." H. Rep. No. 95-1487, at 11 (1978). That Congressional direction is instructive, for the National Archives has established regulations interpreting the Federal Records Act that, in turn, have guided our interpretation of the Presidential Records Act.

2. Act's Application to Particular Subject Matters

The Act expressly exempts two specific categories of documents -- political documents and personal-private documents – from the definition of Presidential records.

Political Documents Relating to Elections and Private Political Associations

The Act does not cover certain political and election-related documents.

First, the Act does not apply to (i) "materials relating exclusively to the President's own election to the office of the Presidency" and (ii) "materials directly relating to the election of a particular individual or individuals to Federal, state, or local office, which have no relation to or direct effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President."

Second, the Act does not cover "materials relating to private political associations and having no relation to or direct effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President."

The purpose of this exception is to ensure that documents related to political associations, elections, and campaigns are not classified as Presidential records. This exclusion from the Presidential records act works in tandem with the Hatch Act's express authorization of political activities by EOP employees. (Political activities are those activities primarily related to specific elections, to a campaign, or to the success of a political party.)

b. Personal documents

The Act also does not apply to records of "a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President." That includes any *personal* letters notes, private financial documents, or other documents that you may create, receive, or possess in your office.

c. Transition Records

Transition records are not Presidential records. However, if you bring transition or other records into the White House and then use them for official purposes in a manner that otherwise would make them Presidential records, then those records are in fact Presidential records.

We would offer a semantic change in the sentence above:
". . . . . then those records become in fact Presidential records."

---

d. Documents Containing Both Record and Non-Record Portions

The Act expressly recognizes that some documents may contain portions that are a Presidential record and portions that are a non-record (because they are either political or personal). The definition of

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We would suggest that "a" be inserted here.

Presidential record provides that only the "reasonably segregable" portion of the document that would qualify as a Presidential record is a Presidential record. Therefore, White House officials may segregate the official portions of a document from the personal portions (by redaction or by copying only the official portions and preserving that copy as the Presidential record) and preserve as a Presidential record only that portion of the document that actually qualifies as such.

The suggestion that staff may segregate official portions of a document from the non-record portions is unreasonable and impractical. They will not take the time, nor be consistent in their effort. No two people will agree. Having wrestled with this issue during three previous PRA Administrations, we can say that it was never tried and for good reason. Is it not far better to error on the side of history and state that, in instances of documents with mixed heritage, Presidential trumps non-record.

Official Documents that meet the definition of Presidential Records.

The Act requires preservation of virtually every document related to official business that you (i) show or send to another person (other than to an administrative or secretarial assistant involved in physically preparing the document) or (ii) receive from another person. That includes:

memos, letters, and other written communications circulated to or received from others, including documents to or from those outside the Government;

draft documents that are circulated or shown to a person other than the author;

marked-up edits or comments that are circulated or shown to another person; and

notes or minutes of meetings that are circulated or shown to others.

Post-it notes are no different from other kinds of documents. If they relate to official business and are circulated to others (for example, if you attach post-it notes on a draft document returned to its author), they are Presidential records and must be preserved, whether attached or unattached to other documents.

Similarly, e-mail is no different from other kinds of documents. Any e-mail relating to official business therefore qualifies as a Presidential record. All e-mail to your official e-mail address is automatically archived as if it were a Presidential record, and all e-mail from your official e-mail

address is treated as a Presidential record unless you designate otherwise (which you should not do unless it is clearly personal).

Finally, if you happen to receive an e-mail on a personal e-mail account or receive a letter or memorandum at home that otherwise would qualify as a Presidential record, it is your duty to treat that record as a Presidential record and to ensure that it is preserved and filed as such.

Non-Record Documents

a. Notes that are *not* shown or circulated to others

The 1978 House Committee Report accompanying the Presidential Records Act indicates that Congress intended the scope of covered "records" to be the same under both the Federal Records Act and the Presidential Records Act. That Congressional mandate is important because the National Archives has already issued regulations governing work-related notes for purposes of the Federal Records Act. Those regulations provide:

"Working files, such as . . . *rough notes*, and other similar materials shall be maintained . . . if (1) [t]hey were circulated or made available to employees, other than the creator, for official purposes . . .; *and* (2) [t]hey contain unique information, such as substantive annotations or comments included therein, that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities."

Consistent with the express Congressional direction regarding the equivalent scope of the two Acts, Counsel has followed this analogous Federal Records Act regulation in determining the requirements of the Presidential Records Act. In addition, Counsel also has carefully studied and obtained guidance from the past policies and practices of Presidents Reagan, Bush, and Clinton. The policy reflected in this memo with regard to uncirculated notes is consistent with the policies and practices of these three Presidents.

b. Drafts that are *not* circulated to or shown to others.

In determining the point at which a draft document rises to the level of a Presidential record, Counsel again has examined both the regulations of the National Archives interpreting the analogous definition for "federal records" and to the past policies and practices of Presidents Reagan, Bush, and Clinton.

The regulations provide that drafts must be preserved only if "(1) [t]hey were circulated or made available to employees, other than the creator, for official purposes . . .; *and* (2) [t]hey contain unique information, such as substantive annotations or comments included therein, that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities." Moreover, prior Administrations did not require White House staffers to preserve uncirculated drafts.

For that reason, Counsel has concluded that drafts that are not circulated to others are not Presidential records. However, any draft that is circulated to others is a Presidential record and must be preserved along with any comments or suggested edits on the draft.

c. Newspaper Clippings or News Summaries

The Act does not require maintenance of "stocks of publications," which applies to news clippings and news summaries, as well as extra copies of publications such as congressional reports, congressional records, and newspapers. If, however, you circulate or receive a news clip with a handwritten note or a post-it note, that would qualify as a Presidential record and must be preserved.

d. Copies

The Act does not require preservation of extra copies of documents that are produced only for convenience of reference, but this exception applies only to copies are clearly identified as such.

Telephone and Visitor Logs, Message Slips, and Calendars

White House staffers need not preserve message slips, message logs, visitor logs, and official calendars unless a message slip or log records a substantive message communicating a substantive decision or course of action.

f. Voice Mail

The White House voice mail system (like most voice mail systems currently in operation) does not have the capacity to maintain voice mail recordings as opposed to overwriting them (unlike the e-mail system, which archives e-mails). In addressing the question of voice mail, therefore, the Counsel has taken into account the Act's requirements that the President, in establishing record management controls, take such steps "as may be necessary to assure" that Presidential decisionmaking is "adequately documented" and that documentary materials be categorized "to the extent practicable" as Presidential records. Given the present state of White House voice mail technology (as is also true with most other government and corporate voice mail systems today), voice mails cannot reasonably be preserved on an ongoing basis without technological upgrades. Therefore, they do not qualify as Presidential records.

C. Office of Records Management

White House staffers should maintain their personal records separately from their Presidential records and label their folders accordingly. The White House Office of Records Management can provide assistance in establishing appropriate file systems and in storing files that are no longer needed on an ongoing basis.

When terminating White House employment, you must leave your Presidential records with the Office of Records Management and you may not take any Presidential records (or copies thereof) absent the express approval of the Counsel.

We would prefer a fuller treatment of ORM's mission. What follows appeared in an early Clinton Administration memorandum of records.

"The White House Office of Records Management (ORM) serves as a central file for all Presidential records. Its primary role is to manage, process, maintain and store records for the daily use of the President and all the policy units in the White House. Concurrently, it preserves these same records to ensure a comprehensive history of the Administration. All White House staff members are encouraged to consult with this office for guidance on the creation and maintenance of files and procedures for appropriate and systematic filing of documents."

Perhaps the last sentence could be modified with the phrase, ". . .as discussed in this memorandum."

The second paragraph might be worded as follows, to provide another option, in addition to the departure guidelines.

"Staff members, upon termination of White House employment, may elect to leave their office files for their successor or turn them over to ORM. They may not take with them any Presidential records or copies, absent the express approval of the Counsel. However, the departing staff member may take personal records. To reduce last minute confusion, the Counsel's Office and ORM encourage staff, throughout their tenure, to maintain these records separately from their official records."

Federal records

THE WHITE HOUSE

WASHINGTON

January 29, 1993

MEMORANDUM FOR EXECUTIVE OFFICE OF THE PRESIDENT AGENCY HEADS

FROM: DAVID WATKINS
ASSISTANT TO THE PRESIDENT FOR THE OFFICE OF MANAGEMENT AND ADMINISTRATION

SUBJECT: Guidance Regarding Records Retention

Attached for your information is guidance from the National Archives and Records Administration (NARA) regarding the preservation of electronic Federal records. Pursuant to court orders issued in the Armstrong v. Executive Office of the President (EOP) case, electronic materials may not be removed, deleted, or altered on EOP electronic communications systems until action is taken to prevent the destruction of Federal records. This guidance does not affect those EOP components that solely create Presidential records.

Once sufficient safeguard measures are in place that meet the requirements of the orders, such as backup tapes, agencies may again delete from their systems. More detailed guidance is expected from NARA on adequate safeguard measures. Concurrent with the Archivist's letter, the Office of Administration (OA) has been consulting with the Department of Justice (DOJ) and NARA with respect to implementing interim steps, consistent with the courts' orders, that affect the operation of its systems.

However, until adequate preservation safeguards are in place, each EOP agency should advise its staff that electronic materials are not to be deleted from electronic communications systems by individual users who create Federal records. Further clarification of the scope of the orders and questions should be directed to the OA Library and Information Services Division (LISD). Please call Mary H. Anton, LISD director, at 395-2527.

Attachment

REV_00255152

Counsel's Office, White House
Kavanaugh, Brett

Subject File

PRA (Presidential Records Act) Litigation
[Folder 1]

OA/NARA#: 2182/2093
9802

Box
Folder 46-15

REV_00255153

Counsel's Office, White House

Kavanaugh, Brett

Subject File

PRA (Presidential Records Act) Litigation
[Folder 2]

OA/NARA#: 2182/2093
9802

Box
Folder 46-16

REV_00255194

Draft A

TOR

A requester of Presidential records must not make any showing of need to submit a request for Presidential records. If ~~a former President~~ the President or a former President asserts a privilege in response to a request, and the requester chooses to challenge ~~that~~ that privilege claim in court, the requester only then must satisfy whatever standard the courts have established for overcome privilege cases.

Brett

COPY

THE WHITE HOUSE
WASHINGTON

December 19, 2001

Dear Mr. Stern:

This letter is to inform you that President Bush will not assert any constitutionally based privileges as to any records in boxes labeled 1, 2, 3, and 4 of Reagan Library records that recently were transmitted to the Counsel's office. This represents all of the records that had been provided to President Bush as of the beginning of this week and all that the Administration's attorneys have thus far reviewed.

Because President Reagan also has chosen not to assert any constitutionally based privilege over these records, please take all appropriate steps to make these records available to researchers as rapidly as possible.

Thank you for your assistance in this matter.

Sincerely,

Alberto R. Gonzales
Counsel to the President

Mr. Gary Stern
General Counsel
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740

Source: All Sources > Federal Legal - U.S. > Executive Branch Materials > **Executive Orders**
Terms: **"presidential records"** (Edit Search)

54 FR 3403

Title 3 -- The President

Presidential Records

Executive Order 12667 of January 18, 1989

54 FR 3403

January 23, 1989

TEXT:
By virtue of the authority vested in me as President by the Constitution and laws of the United States of America, and in order to establish policies and procedures governing the assertion of Executive privelege by incumbent and former Presidents in connection with the release of **Presidential records** by the National Archives and Records Administration pursuant to the **Presidential Records** Act of 1978, it is hereby ordered as follows:

Section 1 *Definitions.* For purposes of this Order:

(a) "Archivist" refers to the Archivist of the United States or his designee.

(b) "NARA" refers to the National Archives and Records Administration.

(c) "**Presidential Records** Act" refers to the **Presidential Records** Act of 1978 (Pub. L. No. 95-591, 92 Stat. 2523-27, as amended by Pub. L. No. 98-497, 98 Stat. 2287), codified at 44 U.S.C. 2201-2207.

(d) "NARA regulations" refers to the NARA regulations implementing the **Presidential Records** Act. 53 Fed. Reg. 50404 (1988), codified at 36 C.F.R. Part 1270.

(e) "**Presidential records**" refers to those documentary materials maintained by NARA pursuant to the **Presidential Records** Act and the NARA regulations.

(f) "Former President" refers to the former President during whose term or terms of office particular **Presidential records** were created.

(g) A "substantial question of Executive privilege" exists if NARA's disclosure of **Presidential records** might impair the national security (including the conduct of foreign relations), law enforcement, or the deliberative processes of the Executive branch.

(h) A "final court order" is a court order from which no appeal may be taken.

REV_00255197

Sec. 2. *Notice of Intent to Disclose* ***Presidential Records.***

(a) When the Archivist provides notice to the incumbent and former Presidents of his intent to disclose **Presidential records** pursuant to section 1270.46 of the NARA regulations, the Archivist, utilizing any guidelines provided by the incumbent and former Presidents, shall identify any specific materials, the disclosure of which he believes may raise a substantial question of Executive privilege. However, nothing in this Order is intended to affect the right of the incumbent or former Presidents to invoke Executive privilege with respect to materials not identified by the Archivist. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel to the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.

(b) Upon the passage of 30 days after receipt by the incumbent and former Presidents of a notice of intent to disclose **Presidential records,** the Archivist may disclose the records covered by the notice, unless during that time period the Archivist has received a claim of Executive privilege bythe incumbent or former President or the Archivist has been instructed by the incumbent president or his designee to extend the time period. If a shorter time period is required under the circumstances set forth in section 1270.44 of the NARA regulations, the Archivist shall so indicate in the notice.

Sec. 3. Claim of Executive Privilege by Incumbent President.

(a) Upon receipt of a notice of intent to disclose **Presidential records,** the Attorney General (directly or through the Assistant Attorney General for the Office of Legal Counsel) and the Counsel to the President shall review as they deem appropriate the records covered by the notice and consult with each other, the Archivist, and such other Federal agencies as they deem appropriate concerning whether invocation of Executive privilege is justified.

(b) The Attorney General and the Counsel to the President, in the exercise of their discretion and after appropriate review and consultation under subsection (a) of this section, may jointly determine that invocation of Executive privilege is not justified. The Archivist shall be promptly notified of an such determination.

(c) If after appropriate review and consultation under subsection (a) of this section, either the Attorney General or the Counsel to the President believes that the circumstances justify invocation of Executive privilege, the issue shall be presented to the President by the Counsel to the President and the Attorney General.

(d) If the President decides to invoke Executive privilege, the Counsel to the President shall notify the former President, the Archivist, and the Attorney General in writing of the claim of privilege and the specific **Presidential records** to which it relates. After receiving such notice, the Archivist shall not disclose the privileged records unless directed to do so by an incumbent President or by a final court order.

Sec. 4. *Claim of Executive Privilege by Former President.*

REV_00255198

(a) Upon receipt of a claim of Executive privilege by a former President, the Archivist shall consult with the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel), the Counsel to the President, and such other Federal agencies as he deems appropriate concerning the Archivist's determination as to whether to honor the former President's claim of privilege or istead to disclose the **Presidential records** notwithstanding the claim of privilege. An determination under section 3 of this Order that Executive privilege shall not be invoked by the incumbent President shall not prejudice the Archivist's determination with respect to the former President's claim of privilege.

(b) In making the determination referred to in subsection (a) of this section, the Archivist shall abide by any instructions given him by the incumbent President or his designee unless otherwise directed by a final court order. The Archivist shall notify the incumbent and former Presidents of his determination at least 30 days prior to disclosure of the **Presidential records,** unless a shorter time period is required in the circumstances set forth in section 1270.44 of the NARA regulations. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.

Sec. 5. *Judicial Review.* This Order is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

+/-

THE WHITE HOUSE,

/s/ Ronald Reagan

January 18, 1989.

[FR Doc. 89-1578

Filed 1-19-89; 11:07 am]

Billing code 3195-01-M

Source: All Sources > Federal Legal - U.S. > Executive Branch Materials > **Executive Orders**
Terms: **"presidential records"** (Edit Search)
View: Full
Date/Time: Friday, November 2, 2001 - 12:57 PM EST

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November 2, 2001

Dear Chairman Horn:

I have learned that on November 6 the House Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations will hold its previously postponed hearing on the Presidential Records Act. In advance of that hearing, we wanted to inform you of a recent development.

President Bush yesterday signed an executive order implementing section 2204(c) of the Presidential Records Act, the provision of the Act that states: "Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President." That statutory provision is necessary, of course, to the Act's constitutionality, for the Supreme Court held in 1977 that both former and current Presidents retain the constitutional right to assert privileges over the records of a former President, including after expiration of a 12-year period of presumptive non-disclosure. *See Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). Furthermore, Congress contemplated that such constitutional privileges would be available and could be asserted, even after expiration of the 12-year period: At the time the Act was enacted, Senator Percy stated that if a President "believe[d] that the 12-year closure period does not suffice, that President could object to the release of some document in the 13th or 15th or 20th year." Cong. Record S36844 (Oct. 13, 1978).

The Act and its legislative history, as well as the Supreme Court's decision in *Nixon v. Administrator of General Services*, obviously necessitate procedures for former and current Presidents to review Presidential records of a former President and, if they choose, to assert constitutional privileges. President Bush's order responds to that need by establishing clear and sensible procedures for former and current Presidents to exercise their rights and responsibilities in a timely manner. The order replaces an earlier executive order (Executive Order 12667 of January 18, 1989) that had established some skeletal procedures for assertion of privileges over Presidential records and had provided that the *current* President would have the primary responsibility for asserting privileges over the records of a former President. President Bush's new order supercedes that prior order both to set forth clearer procedures and to establish, consistent with the Supreme Court's decision in *Nixon v. Administrator of General Services* and with what the Administration believes to be sound policy and procedure, that *former* Presidents are to have the primary responsibility for asserting privileges over their records. Indeed, section 4 of President Bush's order, which is its most critical component, provides that the current President will defer, absent compelling circumstances, to the decisions of the former President regarding the former President's records. In sum, therefore, the new executive order grants the current President *less* relative authority over the records of a former President than did the prior executive order. We believe this point is critical to a proper understanding of the executive order, and has been largely overlooked in public commentary thus far.

REV_00255200

In addition, President Bush's order does not purport to guide former Presidents as to their privilege assertions. Section 9 of the order provides that the order does not purport to indicate "whether and under what circumstances a former President should assert or waive any privilege." Indeed, it would have been improper, if not illegal, for President Bush to attempt to limit or override the constitutional rights and privileges of former Presidents -- rights that have been guaranteed by the Supreme Court. But it also bears mention that Section 2 of the order refers to the historical practice before enactment of the Presidential Records Act by which former Presidents, over time, have released a vast majority of their records even though under no legal obligation to do so. We anticipate that this historical practice will continue. At a minimum, contrary to the claims of some commentators, there is no logical basis for assuming that former Presidents will exercise their constitutional and statutory authority to seek withholding of *privileged* records more aggressively than earlier Presidents -- from President Washington to President Carter -- exercised their plenary and far broader authority to withhold *all* records.

Finally, you should know that the Administration consulted extensively with the National Archives and Records Administration, the Department of Justice, and former Presidents' representatives before President Bush issued this order. We benefited greatly from that consultation.

Please do not hesitate to contact me if you have any questions about the order.

Sincerely,

Alberto R. Gonzales
Counsel to the President

The Honorable Steve Horn
United States House of Representatives
Washington, DC 20515

cc: The Honorable Janice Schakowsky

STATEMENT
by John W. Carlin
Archivist of the United States

to the
Subcommittee on Government Efficiency, Financial Management,
and Intergovernmental Relations
of the Committee on Government Reform
House of Representatives
Congress of the United States

On the Implementation and Effectiveness of the Presidential Records Act of 1978

November 6, 2001

Chairman Horn, Congresswoman Schakowsky, members of the Subcommittee, and Subcommittee staff, I am John Carlin, Archivist of the United States, and I thank you for the opportunity to appear before you this morning on the implementation of the Presidential Records Act. Mr. Chairman, I particularly want to thank you for holding this hearing and for your continued interest in the programs and responsibilities of the National Archives and Records Administration. We are fully aware that with the jurisdiction of this subcommittee, attention to NARA is your job. However, you have taken a particular interest in our mission during your career in Congress and the people of NARA and our many constituent groups thank you for that interest.

In order to set the foundation for this dialogue today, I would like to set out the history of the Presidential Records Act and provide the Subcommittee with an overview of our implementation to date. The Presidential Records Act (PRA) was enacted in 1978 to establish public ownership of the records created by subsequent Presidents and their staffs and to establish procedures

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governing the preservation and public availability of the records. As noted in the House Report accompanying the pending bill:

> The legislation would terminate the tradition of private ownership of Presidential papers and the reliance on volunteerism to determine the fate of their disposition. Instead, the preservation of the historical record of future Presidents would be assured and public access to the materials would be consistent under standards affixed in law. The primary function of the Presidential libraries remains unchanged. The libraries are to continue to provide information about their holdings and to make records available to researchers upon request on an impartial basis.

H. Rep. 95-1487, at 2-3 (95th Cong., 2d Sess., Aug. 14, 1978).

The PRA mandates that the Presidential records of an Administration be transferred to the legal and physical custody of the National Archives and Records Administration (NARA) immediately upon the end of the President's last term of office. The Archivist of the United States is given the "responsibility for the custody, control, and preservation of, and access to, the Presidential records of th[e former] President." 44 U.S.C. § 2203(f)(1). The PRA also requires the Archivist to appoint a Library Director in "consultation with the former President." *Id.* § 2203(f)(2). The Library Director balances archival and public access considerations with national security, confidentiality, and privacy concerns.

Since its enactment, NARA has taken legal custody of the Presidential records of Presidents Ronald Reagan, George H.W. Bush, and William J. Clinton. The Reagan and Bush records are housed in Presidential Libraries in Simi Valley, California and College Station, Texas, respectively. The Clinton records are stored in a records storage facility in Little Rock, Arkansas, until they can be transferred to a Presidential Library that is being constructed by former President Clinton.

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The PRA applies to all Vice-Presidential records in same manner as Presidential records, and affords the former Vice-Presidents the same authority as the former Presidents. Accordingly, all of the procedures and authorities that are ascribed in this testimony to the former Presidents also apply to the former Vice-Presidents (except that Vice-Presidential records may be stored at a separate location from the Presidential records).

Responsibilities of the Archivist of the United States Under the PRA

The PRA established Government control over Presidential records while codifying and preserving some of the basic practices that long existed with respect to the papers that Presidents had donated to the National Archives (dating back to President Hoover). As the House Report on the PRA bill stated: "It is anticipated that the Archivist will process the former Administration's papers in a manner roughly similar to current practices." H. Rep. 95-1487, at 15. The report also stated that "the determination whether access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist, in his discretion, after consultation with the former President." *Id.* § 2204(b)(3).

The PRA mandates that "[t]he Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act." *Id.* § 2203(f)(1). Overall, the PRA represents an effort to legislate a "careful balance between the public's right to know, with its vast implications to historians and other academic interests, and the rights of privacy and confidentiality of certain sensitive records generated by

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the President and his staff during the course of their White House activities." Floor Statement of Congressman Thompson, *Cong. Rec.*, Oct. 10, 1978, at 34897.

Presidential Papers and Materials Prior to the PRA

Prior to the PRA, and with the exception of the materials of former President Richard M. Nixon, the Presidential papers and materials maintained under NARA's control at the Presidential Libraries of former Presidents Hoover, Roosevelt, Truman, Eisenhower, Kennedy, Johnson, Ford, and Carter are controlled by the terms of the deeds of gift by which the former Presidents donated their records to the National Archives. Each of these deeds has provisions outlining categories of records that may be withheld from public access for some period of time. All of them seek to protect information that could harm national security, invade personal privacy, or cause embarrassment or harassment. Some also seek to protect documents involving confidential communications directly with the President. The deeds of Presidents Ford and Carter model the restrictions on the PRA exemptions.

In all instances, the Director of the Presidential Library, who is appointed by NARA in close consultation with the former President or representative, was given the independent authority and discretion to process and open the papers, with very limited involvement by the former President or representative. Living former Presidents in some cases would establish priorities for the processing of particular subjects or series of records. In other cases, a representative or review board was established – such as for Presidents Roosevelt and Kennedy because they died in office, as well as for Truman and Eisenhower – that exercised limited control over the decisions

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made by the Libraries. The boards' principal concern was with respect to the President's personal and family matters, and, in most cases, they disbanded after a short period of time.

Under these deeds of gift, NARA processed and opened Presidential materials based on the deeds and professional archival considerations. Moreover, because the materials at these Libraries were donated to the United States, they are not subject to request under the Freedom of Information Act (FOIA) or any other public access statute. This meant that the Library staff were able to process and open most records in an organized and systematic way based on how the records were filed or arranged. Such "systematic processing" is generally much more efficient and less time consuming than processing in response to FOIA requests. However, researchers have no legal recourse to challenge the withholding of records or delays in responding to requests.

The records of President Nixon are governed by the Presidential Recordings and Materials Preservation Act (PRMPA), 44 U.S.C. § 2111, note, which was passed by Congress in 1974 to ensure government control over the Nixon papers and tapes. The PRMPA also established a National Study Commission on Records and Documents of Federal Officials, which was charged with studying, among other things, "whether the historical practice regarding the records and documents produced by or on behalf of Presidents of the United States should be rejected or accepted and whether such practice should be made applicable with respect to all federal officials." Pub. L. 93-526, 88 Stat. 1695 (December 19, 1974), sec. 202. That commission produced a final report in 1977, and its recommendations were considered by Congress in drafting the PRA. *See* Hearings before a Subcommittee of the Committee on Government

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Operations on H.R. 10998 (the Presidential Records Act of 1978) and Related Bills, 95th Cong., 2d Sess., (Feb. 23, 28, Mar. 2, 7, 1978) (PRA Hearings).

Public Access to Presidential Records

Presidential records are not subject to public access requests during the President's term of office, and may be made available only by decision of the incumbent President. After the President leaves office, the records are also not available to public access requests for five years, unless NARA has processed an integral file segment sooner than five years. This five year period was intended principally to give NARA an opportunity to organize the records and begin systematic archival processing. At the end of the five year period, all Presidential records are subject to public access requests in accordance with the FOIA. However, for a period not to exceed 12 years from when the President leaves office, the President is authorized, but not required, to impose up to six Presidential restrictions (which must be imposed before the President leaves office and which are not subject to judicial review).

In addition, the PRA establishes that eight of the nine FOIA exemptions shall apply to Presidential records, which stay in effect after the Presidential restrictions expire. Congress specifically excluded Presidential records from the FOIA (b)(5) exemption concerning the deliberative process and other recognized privileges. Four of the six presidential restrictions are identical to corresponding FOIA exemptions: exemptions 1, for classified national security information; exemptions 3, for information protected by other statute; exemptions 4, for trade secrets and confidential business information; and exemptions 6, for unwarranted invasions of personal privacy. Presidential exemption 2 ("P2"), for "appointments to Federal office," has no

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FOIA counterpart, but is subsumed, in large part, under FOIA exemption (b)(6). Presidential exemption 5 ("P5"), concerning "confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers," is similar to FOIA exemption (b)(5), and protects the disclosure of presidential communications, deliberations, and other information that could be subject to a common law or constitutionally-based privilege.

Because the PRA subjects all Presidential records to public access through the FOIA, PRA Libraries open records almost exclusively in response to FOIA requests (or mandatory declassification review requests under Executive Order 12958 on Classified National Security Information), and have very little opportunity to conduct systematic processing of records after the first five years. Moreover, Congressional and grand jury investigations and other litigation has significantly limited systematic processing even during the first five years.

PRA Restrictions

The PRA does not mandate the Presidential restrictions, but rather makes clear that they may be narrowed or waived any time after the President leaves office. Moreover, in the legislative history, Congress anticipated that the Archivist to do just that:

> It is also expected that the Archivist will follow past practice in applying the restrictive categories in former Presidents' deeds of gift, and negotiate with the ex-President or his representative on an on-going basis to lessen the number of years chosen for particular mandatory restriction categories, to eliminate entire categories, or to permit release of particular records otherwise restricted.

H. Rep. 95-1487, at 15. Former Presidents Reagan and Bush have both narrowed the application of PRA exemptions P2 and P5 to their records, allowing significantly more records to be opened

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than what might otherwise be authorized. NARA will work with former President Clinton and his representative regarding the application of these exemptions as well.

The PRA also removes the authority to withhold Presidential records under FOIA exemption (b)(5) after the expiration of the P5 exemption. The elimination of a statutory exemption in no way prevents a proper assertion of Executive privilege by the former or incumbent President. As the PRA itself notes, the incumbent and former Presidents have clear legal authority to assert an Executive privilege over the Presidential records of former Presidents: "Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President." 44 U.S.C. § 2204(c)(2). This provision reflects the holding by the Supreme Court that the constitutionally based privileges available to a President "survive[] the individual President's tenure." *Nixon v. Administrator of General Services*, 433 U.S. 425, 449 (1977). Although the Supreme Court also noted the privileges are "subject to erosion over time after an administration leaves office." *Id.* at 451.

Special Access to Presidential Records

In addition to establishing procedures for public access, the PRA also establishes procedures for what NARA calls "special access" to Presidential records that are otherwise closed from public access. These special access provisions are designed to accommodate requests by Congressional investigators, Federal prosecutors, other parties in litigation, and the incumbent President for the ongoing business of the current Administration. However, prior to providing such access, NARA must notify the former and incumbent Presidents and provide them an opportunity to review the records and consider whether to assert any constitutionally-based privilege. Accordingly, either House of Congress, or a Committee or Subcommittee with appropriate

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jurisdiction, may request access to Presidential records. Similarly, Federal prosecutors may seek access through a grand jury subpoena, and other parties in litigation may seek access through court orders. The incumbent President may also obtain access to the records of a predecessor on behalf of his staff, such as the NSC, or any other agency, "for the conduct of current business." 44 U.S.C. § 2205(2)(B). The former President and his designated representative are always entitled to access to the Presidential records of his Administration.

That concludes my formal statement, Mr. Chairman, and I would be happy to answer any questions at the appropriate time.

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Mr. Chairman, Congresswoman Schakowsky, and members of the Subcommittee: Thank you for affording me the opportunity to speak on behalf of the Administration on the important topic before you.

As you are aware, last week President Bush signed an executive order that implements the Presidential Records Act. Specifically, President Bush's executive order implements section 2204(c) of the Presidential Records Act. That section provides that the Act shall not be "construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President." In the Act, Congress thus expressly recognized that both the incumbent President and former Presidents might invoke constitutionally based privileges to prevent the disclosure of presidential records that might otherwise be disclosed pursuant to other provisions of the Act, including after the expiration of the 12-year period of presumptive nondisclosure under the Act. As Senator Percy explained, if a President "believe[d] that the 12-year closure period does not suffice, that President could object to the release of some document in the 13th or 15th or 20th year." Cong. Record S36844 (Oct. 13, 1978).

Congress's recognition that former Presidents, as well as the incumbent President, might assert constitutionally based privileges is consistent with, and compelled by, Supreme Court case law. In Nixon v. Administrator of General Services, 433 U.S. 425 (1977), the Supreme Court embraced the view that "[u]nless [the President] can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." 433 U.S. at 448-49. In order to provide this necessary assurance of

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confidentiality, the Court ruled that the President's constitutionally based privileges for confidential communications must "survive[] the individual President's tenure." Id. at 449. The Court further held that a former President, although no longer a government official, is entitled to assert constitutionally based privileges with respect to his Administration's presidential records, and it expressly rejected the argument that "only an incumbent President can assert the privilege of the Presidency." Id. at 448.

The Supreme Court's ruling that both a former President and the incumbent President are entitled to assert constitutional privileges with respect to the records of the former President, and Congress's express accommodation of that ruling in section 2204(c) of the Presidential Records Act, entail the need for procedures to govern review of any records to which such privileges may apply. President Bush's executive order establishes clear, sensible, and workable procedures that will govern the decisions by former Presidents and the incumbent President whether to withhold or release privileged documents.

Consistent with the Supreme Court's decision in Nixon v. Administrator of General Services and with sound policy, President Bush's executive order confers on former Presidents the primary responsibility for asserting privileges with respect to their presidential records. Indeed, by providing (in section 4) that the incumbent President will, absent compelling circumstances, defer to the former President's decision whether or not to invoke a privilege, President Bush's executive order grants the incumbent President less authority over the records of a former President than the incumbent President had under the previous 1989 executive order implementing the Act.

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Let me emphasize, moreover, that the executive order is wholly procedural in nature. By its express terms, it does not, and is not intended to, "indicate whether and under what circumstances a former President should assert or waive any privilege." (Executive order § 9.) Nor does it in any respect purport to redefine the substantive scope of any constitutional privilege.

Before the Presidential Records Act took effect, former Presidents generally released the vast majority of their presidential records even though they were under no legal obligation to do so. The Administration anticipates that this historical practice will continue. Indeed, because the Act and the executive order give former Presidents less power to withhold records than they had before the Act was enacted, there is no reason to anticipate that former Presidents will exercise their constitutional privileges in a way that leads to greater withholding of records.

I hope that this information is helpful and would be pleased to respond to any questions you may have about this matter.

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Testimony

OF

Anna K. Nelson

Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations

Committee on Government Reform

November 6, 2001

My name is Anna K. Nelson. I am the Distinguished Adjunct Historian in Residence at the American University. I have done research in five presidential libraries, Roosevelt, Truman, Eisenhower, Kennedy and Johnson. I have also used the Nixon papers and done extensive research over the years at the National Archives in Washington. I was a staff member of the Public Documents Commission, 1976-77. Their report was partly responsible for the passage of the Presidential Records Act. From 1994-1998 I was a member of the John F. Kennedy Records Review Board.

Today I am representing the members of the American Historical Association, the Organization of American Historians, and the Society of American Archivists.

Influenced by the actions of former president Nixon, Congress passed the Presidential Records Act in 1978 for two reasons that are very apparent in the statute. First, to insure the protection of these records so they could not

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be destroyed. Second, to insure the records of the incumbent president would be open within a reasonable period of time. Declaring presidential records to be Federal Records, they protected the documents through Archives oversight. Establishing a time for disclosure, the statute gives a president twelve years to protect his records before they become available to the public. Meanwhile, other safeguards within the Act guaranteed that certain records, including national security records, could continue to be exempt from public scrutiny for many years to come. This law also deliberately excludes many personal papers of the president including diaries and private, political papers. With these exemptions, the Congress felt it had duly protected each former president.

Unfortunately, two days before he left office, President Ronald Reagan issued Executive Order 12667 which is now being used to nullify the Congressional intent to open presidential papers within a reasonable time. This Executive Order (E.O) required the U.S. Archivist to notify both the former and incumbent president when records are to be released after the 12 year period. After examining the records, the incumbent and former president can invoke Executive Privilege if they find records they do not wish to open. An incumbent president was given 30 days after

notification by the Archivist to make his decision and respond. In other words, this E.O. allows Executive Privilege to be invoked long after the president has left office.

Taking advantage of the Reagan Executive Order, the Bush administration took 9 months to make their decision thus delaying the release of the Reagan records three time since taking office. Although the original E.O. provides for the president to "identify any specific materials," the Bush administration proceeded in a different way. Rather than examine the records, they began reviewing legal and constitutional issues raised by the potential release of sensitive documents, including, one assumes, the use of Executive Privilege to keep 12 year old records closed. The result of that review is new Executive Order dated November 29, 2001 which confirms the previous order while adding an additional set of regulations.

The papers of President Reagan are the first to be organized and opened under the Presidential Records Act. Thus the Reagan papers will set the precedent for all other papers opened under the Act. It is difficult to know just why President Reagan chose to allow the incumbent to review these records but by capitalizing on this review and further extending its provisions, the Bush Administration,

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unwittingly perhaps, has thwarted the intention of Congress to open these government records to the public. We should also note that neither Mr. Reagan nor President Bush put a time limitation on the incumbent's ability to review . For example, theoretically a president in 2050 can continue to review for closure the records of the current Bush Administration.

Mr. Chairman, now more than ever we need to know the history of our recent past. The policies made more than 12 years ago still affect us. We need to know about those policies, the failures as well as the successes so that we can understand our own recent history. The release of 12 - 25 year old records is not the same as yesterday's leak to a favorite journalist. Nor need we fear the release of national security information which is protected by the Presidential Records Act, the Freedom of Information Act and other statutes.

The records in presidential libraries have become more important to American history as the power of the presidency has grown with each passing year. Unfortunately, it is not unusual for past presidents and their staffs to worry about the content of papers they no longer remember. Yet, most presidents gain stature from an examination of their records which tend to highlight pervasive problems

and illustrate the competence and skills of the president and his staff.

Congress passed the Presidential Records Act so that the American people could learn about their recent past. Congress acted wisely. This E.O. should not be allowed to nullify that Act.

Testimony of Scott L. Nelson

Attorney, Public Citizen Litigation Group

Hearing on "Oversight of the Presidential Records Act"
Before the Subcommittee on Government Efficiency, Financial Management
and Intergovernmental Affairs of the House Committee on Government Reform

November 6, 2001

Good afternoon, Mr. Chairman and members of the Subcommittee, and thank you for inviting me to testify before you this afternoon. The subject of my testimony is the most immediate and controversial issue affecting implementation of the Presidential Records Act ("PRA" or "Act") – namely, the legality of the recently issued Executive Order concerning the assertion of constitutional privileges to bar releases of records under the Act. The Order is troubling in a number of respects. Most significantly, it violates the PRA – and exceeds the bounds of legitimate protection of executive privilege –because it gives a former president the power to veto public releases of materials by the National Archives.

Before I explain the basis for my conclusions, I would like to take a few moments to describe my background in this area of law. I am currently an attorney with the Public Citizen Litigation Group here in Washington. Public Citizen has long had an interest in ensuring public access to governmental records, including the materials of former presidents, and has been involved in much of the litigation that has established the governing legal principles in this area, including litigation over materials of former Presidents Nixon, Reagan, and Bush. My own experience in the area includes approximately 15 years spent in private practice representing former President Nixon and, later, his executors, in litigation involving access to the Nixon presidential materials under the special legislation that governs those materials – legislation that is similar in many respects to the PRA. Some of that litigation also involved Public Citizen, and

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are subject to a constitutionally based privilege of the former or incumbent president. Thus, to the extent that the Bush Order imposes standards that extend the secrecy of such materials beyond the PRA's 12-year limit, it is lawful only if those standards are constitutionally required. Clear judicial precedent indicates that they are not.

The most plainly improper feature of the Bush Order is its requirement that the Archivist withhold materials from the public whenever the former president has asserted a claim of privilege, *even if the incumbent president disagrees with that claim.* The Bush Order claims to find authority for this requirement in the Supreme Court's decision in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), which held, among other things, that a former president retains a limited right to assert executive privilege independently from the incumbent president. Although the Court recognized this right, it also emphasized that the protection afforded historical presidential records was limited and eroded steadily as time passed. Thus, while recognizing a former president's right to *assert* a claim of privilege, the Supreme Court by no means implied that all such claims were valid or that incumbent executive branch officials were bound to honor such claims regardless of their merit. Rather, the implication of *Nixon v. Administrator* was that although former presidents could make claims of privilege, the Constitution permits such claims to be evaluated and rejected by current executive branch officials when, as is usually the case, the public's need for access to historical materials involving official government actions outweighs the former president's attenuated interest in confidentiality after he has been out of office for a number of years.

These implications of *Nixon v. Administrator* were made explicit by the United States Court of Appeals for the District of Columbia Circuit a few years later in its decision in *Public Citizen v. Burke*, 843 F.2d 1473 (D.C. Cir. 1988). That case concerned a directive by the Reagan

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Justice Department that closely parallels the terms of the Bush Executive Order. The Justice Department directive at issue in *Public Citizen v. Burke* instructed the Archives that it must defer to any claim of privilege asserted by former President Nixon to block public release of any of his presidential materials, which are held by the Archives under legislation that is applicable only to President Nixon but is similar to the PRA in its provisions encouraging public access to presidential records. The Justice Department argued that such deference was constitutionally required in order to protect the former president's ability to assert privilege claims under *Nixon v. Administrator*.

The D.C. Circuit, in an opinion written by Judge Silberman and joined by Judge Sentelle (both Reagan appointees) roundly rejected the Justice Department's view. The court held that the Archivist, as an executive branch official obligated to assist the incumbent president in fulfilling his constitutional duty to take care that the laws be faithfully executed, could not permissibly defer to a former president's claim of privilege if the claim was not legally proper. Thus, the court held, the Archivist (and the incumbent president) was obligated to assess independently a former president's assertion of privilege, to reject the claim if it were not well founded legally, and to release materials to the public as required by the statute if the privilege claim were rejected. The court further rejected the government's assertion – again echoed in the Bush Executive Order – that it is permissible for the Archivist to rubber-stamp a former president's privilege claim as long as a member of the public can challenge it in court. The court stated: "To say ... that [the former president's] invocation of executive privilege cannot be disputed by the Archivist, a subordinate of the incumbent President, but must rather be evaluated by the Judiciary in the first instance is in truth to delegate to the Judiciary the Executive Branch's responsibility" to carry out the law. 843 F.2d at 1479.

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The reasoning of *Public Citizen v. Burke* applies fully here, and the Bush Executive Order is plainly incompatible with it. Under the PRA, the Archivist is *required* to make materials available to the public after the expiration of the 12-year restriction period, *unless* there is some valid constitutionally based privilege that bars their release. By compelling the Archivist to withhold release of materials whenever the former president makes a claim of privilege, regardless of its legal merit, the Bush Executive Order, like the Justice Department directive struck down in *Burke*, allows current executive branch officials (including the incumbent president) to abdicate their responsibility to conform their actions to the law. Indeed, by requiring materials to be kept secret *even when the incumbent president disagrees with a former president's claim of privilege*, the Bush Order explicitly requires the executive branch to take actions the president has determined are *not* legally justified, in clear violation of the constitutional duty to execute the law faithfully and in plain defiance of the PRA. Moreover, the Bush Order goes so far as to bind the administration to support the former president's privilege claims in court even when it disagrees with them – a truly extraordinary abdication of the executive branch's obligation of fidelity to the law. In these respect, the Bush Order is even more obviously unlawful than the Justice Department directive at issue in *Burke*.

Another respect in which the Bush Order departs from the terms of the PRA and from judicial precedents involving access to presidential historical materials is in its apparent insistence that a person requesting access to presidential materials must, even after the Act's 12-year restriction period has expired, show some specific, demonstrable need for access in order to overcome executive privilege. This requirement is a departure from the plain terms of the PRA, which makes such materials available under FOIA standards – standards that do not require the showing of any specific need. See 44 U.S.C. § 2204(c)(1). Moreover, the Order conflicts with

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another ruling of the D.C. Circuit in litigation over the Nixon materials, *Nixon v. Freeman*, 670 F.2d 346 (D.C. Cir.), *cert. denied*, 459 U.S. 1035 (1982). In that decision, the Court of Appeals specifically rejected the argument that the constitutional privilege requires persons seeking access to presidential historical materials years after the president leaves office to show a specific need for access. Id. at 359. Because the privilege erodes with the passing of time, the court held that it was proper for the Archives to open materials to all comers, without a showing of need, and to place the burden on the former president to establish that particular disclosures would violate the privilege. That is exactly what the Presidential Records Act is designed to do. The new Executive Order, by contrast, turns the Act's requirement of public access on its head.

These are not the only features of the Bush Order that are legally suspect. The Order's provision that the constitutional executive privilege may be asserted by a deceased or disabled former president's family or personal representative is novel and highly debatable. The privilege is not, after all, a personal right of the former president. He is authorized to exercise it solely on behalf of the branch of government that he once headed. His family members or designees have no such claim of authority. To suggest, as does the Bush Order, that the incumbent president must defer to claims of privilege asserted not by a former officeholder, but simply by the former president's family, friends, or designees, threatens to expand the constitutional privilege beyond legitimate bounds.

5. The Bush Order Is Bad Policy. Beyond its legal flaws, the Bush Order threatens to subvert significantly the policies underlying the PRA. The PRA's premise is that public access to historically significant presidential records is desirable and that, once a decent interval has passed after a president leaves office, the grounds for restricting public access should be quite limited.

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The Bush Order represents a substantial threat to the PRA's fundamental goals. First, it creates the possibility that a former president may indefinitely delay access to records while he simply *considers* whether to assert a claim of privilege. Second, it permits him to declare large blocks of the materials off-limits to public access merely by asserting a claim of privilege, which the Archivist must respect however unfounded it may be, and which may only be challenged in court by a requester who can show a specific, demonstrable need for access (whatever that may mean).

This is not to suggest that the representatives of former President Reagan, or any other former president, will consciously act in bad faith to bar access to their materials. But with the ability to block access will come the temptation to use it, particularly when records that are (or may be) embarrassing to the former president or his close associates are concerned. It is easy in such a situation for a former president to confuse his own personal interest in denying access with an institutional executive branch interest that might support a claim of privilege. And experience teaches time and again that, given the chance, officials often err on the side of over-withholding materials and asserting interests in secrecy that, upon inspection, are without justification. For these reasons, it is a bad idea to give former presidents carte blanche authority to direct the Archivist to withhold materials from the public. And since this bad idea is plainly not constitutionally required, there can be no justification for enshrining it in an Executive Order.

Nor can the Bush Order's expansion of the secrecy of historical presidential records be justified, as some in the administration have suggested, on the basis of national security concerns. Even without the new Order, the Presidential Records Act and existing Executive Orders on national security classification provide ample authority to prevent the release of materials that could potentially damage national security. Simply put, the Act already provides

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protection to properly classified information even after the expiration of the 12-year restriction period, and it will continue to do so with or without the Bush Order. See 44 U.S.C. §§ 2204(a)(1) & (c)(1).

The new Order extends the secrecy not of information relating to national security, but of materials relating to communications between the former president and his advisers that do not implicate national security. The 68,000-some pages of Reagan materials that the Archives notified the White House it was prepared to release in February of this year, for example, were materials that were not subject to protection for national security reasons (or to restriction under any of the other categories that survive the 12-year limit under the Act). Rather, they had been withheld from release solely because they reflected communications between the former president and his advisers that were subject to the 12-year restriction. The new Order would allow the former President (or the incumbent) to impose an indefinite, blanket ban on release of these materials even though they contain *no* sensitive national security information.

In addition, national security reasons can provide no possible justification for the Order's provisions that effectively give a former president veto power over the release of materials by the Archivist. It is the incumbent president, not his predecessors, who has the constitutional power and duty to make judgments about the nation's security needs. If the incumbent president sees no national security justification for keeping particular materials secret, there can be no reason to allow a former president to override that determination.

In the final analysis, what the Bush Order reflects is a fundamental change in the PRA paradigm. The PRA is premised on the notion that the public is *entitled* to access to historical presidential materials subject only to defined exceptions set forth in the statute. Only for a limited, 12-year period is that access subject to restrictions imposed by the will of the former

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president. After the 12 years expire, the only limits are those imposed by the statute or – in rare cases – by constitutional doctrines of privilege.

The Bush Order reflects another model entirely. It is an attempt to resurrect the pre-PRA regime in which access to presidential materials was controlled by the former presidents (usually through restrictions in the deeds of gift through which the former presidents donated their materials to the public). Thus, the Bush Order repeatedly states that the public will be permitted access to materials only if the former president and the incumbent decide to "authorize" access.

That is not what the PRA is all about. Under the PRA, it is the statute that "authorizes" public access, whether the former president (or the incumbent) approves or not. Only in the exceptional circumstances where the former or incumbent president has a legally enforceable, constitutionally based privilege can the access authorized by the statute be denied. The Bush Order is incompatible with this statutory scheme. It is bad policy and bad law. I urge this Subcommittee to do anything it can to discourage the administration from implementing it.

Thank you.

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the principles established in that litigation are directly applicable to the issues posed by the new Executive Order.

1. **The Presidential Records Act.** The Presidential Records Act was enacted in 1978 to ensure permanent governmental control over presidential records and to broaden public access to them. In contrast to prior law, under which presidents were considered owners of all their papers, the PRA provides that presidential records are property of the federal government from the moment of their creation. Under the Act, they remain largely under the control of the president during his term in office. Once the president leaves office, however, the Act gives custody and control over the papers to the Archivist of the United States, and the National Archives and Records Administration ("NARA" or "the Archives") is responsible for processing the materials for release to the public under the terms of the Act.

Although the Act vests the Archivist with authority over presidential records, it does give former presidents the right to impose limited restrictions on public access to some of their materials. Specifically, the Act allows a president leaving office to direct that records falling within six specific categories may be kept from the public for up to 12 years after the president's last day in office. The categories of materials that may be restricted include, by way of example, information that is properly subject to national security classification, information whose release would infringe an individual's right to privacy, and trade secrets. One of the categories, and the one of most relevance for present purposes, encompasses confidential communications between the president and his senior advisers – that is, communications that are potentially within the scope of "executive privilege."

During the first five years after a president leaves office, the Act provides that none of his records will be generally available to the public, in order to allow NARA to gain control over the

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materials, move them into a presidential library, and begin the process of preparing them for public access. After the five years are up, any person may request access to presidential records, and the standards governing such a request are generally equivalent to those under the Freedom of Information Act. Between year five and year 12, however, no records that fall within any of the 12-year restriction categories may be released.

After the 12-year restriction period ends, all the former president's records become available for release to the public under FOIA standards – including, with one exception, FOIA's exemptions. The applicability of the FOIA exemptions means, for example, that classified materials, which are categorically exempt from release under FOIA, are not subject to release under the PRA even after the 12-year restriction period ends.

The one FOIA exemption that does *not* apply under the PRA is the so-called FOIA "exemption 5," which covers materials that are subject to the executive privilege. Thus, when the 12-year PRA restriction period for materials reflecting confidential communications between the president and his advisers runs out, those materials will generally not fall within any statutory exemption from public release (assuming they do not relate to national security matters). This reflects Congress' judgment that 12 years will generally be long enough to protect records containing the deliberations of the president and his advisers. After that lapse of time, the drafters of the Act concluded, the interest in public access to the historical record would outweigh any embarrassment that might otherwise attend the disclosure of the inner workings of the White House decisionmaking process.

To be sure, the Act does provide that it is not intended to limit (nor to confirm or expand) any constitutionally based privilege that may be available to the former president, or to the incumbent. And, at some level, the executive privilege is constitutionally based. But the

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Supreme Court has also emphasized that executive privilege is subject to "erosion over time" after a president leaves office. *See Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). The congressional judgment underlying the PRA is that that erosion would be such that, after the passage of 12 years, there would be little (if anything) in the president's communications with his advisers that should legitimately remain secret. To the extent that there may be some presidential communications that would remain constitutionally privileged against public release even after a lapse of 12 years, the Act's recognition of the possibility that the former president may have a constitutional privilege to assert provides the necessary safety valve to prevent any possible claim that its provisions for public access are unconstitutional.

2. The Reagan Presidential Records. To avoid problems that might result from the retroactive application of the PRA, it was made applicable beginning with the president who took office on January 20, 1981. That turned out to be President Ronald Reagan. Before leaving office, President Reagan invoked the maximum 12-year restriction for all categories of materials permitted under the Act, including the category of communications between the president and his advisers. President Reagan left office on January 20, 1989, and thus the 12-year restrictions expired on January 20 of this year, marking the first time in the history of the PRA that materials subject to the Act are available without regard to such restrictions – at least in theory.

Over the seven years that preceded the expiration of the 12-year restriction period, many requests for the release of Reagan presidential materials had been made at the new Reagan Presidential Library operated by NARA in Simi Valley, California. According to NARA estimates, over 4 million pages of records, from among the Library's total holdings of in excess of 40 million pages, had been opened to the public in response to those requests. From those files, however, NARA had withheld materials that were subject to the 12-year restriction

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imposed by President Reagan under the PRA. Among the materials withheld were about 68,000 pages of records that were withheld solely because they fell within the restriction category for communications between the former president and his advisers. In other words, these 68,000 pages were not subject to any other restriction (such as the restriction for materials that were national security classified).

When the 12-year restriction expired in January of this year, the 68,000 pages of materials reflecting communications between the former president and his advisers were no longer subject to any limitation on public access under the PRA. Accordingly, NARA advised the White House in February of this year that it intended to release those materials to the public. NARA provided this notification as required by an Executive Order issued by President Reagan shortly before he left office. That Order (Executive Order No. 12,667) provided that before the Archives released such materials, it must give at least 30 days' notice to both the incumbent and the former president, in order to give them the opportunity to assert any claim that a constitutionally based privilege prevents release of the materials. Notably, the Reagan Executive Order contemplated that if a former president made a privilege claim, the records that were the subject of the claim could still be released by NARA if the Archivist (acting subject to the direction of the incumbent president) rejected the claim of privilege. In that event, it would be up to the former president to seek judicial relief if he continued to press his claim of privilege.

Following the White House's receipt of the Archives' notice of intent to release the 68,000 pages of Reagan records, White House Counsel Gonzales three times extended the time permitted for the incumbent president's review of the materials under the Reagan Executive Order. The stated purpose of these extensions was to provide the White House Counsel's Office time to review what Mr. Gonzales referred to as "many constitutional and legal questions" raised

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by the impending release of these materials under the PRA. Pending the White House's review of those questions, the 68,000 pages of records have remained closed to the public for nearly ten months beyond the date when the restriction on their release under the PRA expired, even though no claim of a constitutionally based privilege has yet been made by the incumbent president. It is not yet known whether former President Reagan's representatives have asserted any claim of privilege as to any of the materials.

3. **The New Executive Order.** On November 1, 2001, the White House's review of "many constitutional and legal questions" culminated in the issuance of a new Executive Order governing the implementation of the PRA, which abrogates and supersedes the Reagan Order. The Bush Order sets forth procedures and substantive standards governing the assertion of claims of executive privilege by both former and incumbent Presidents following the expiration of the 12-year restriction period for materials involving communications between presidents and their advisers. The Bush Order has a number of troublesome features, which are described in detail below. The most striking of these is that it grants a former president the unfettered power to block the Archivist from releasing any materials to the public simply by making a claim of privilege (however unfounded that claim may be), leaving the burden on those who desire public access to challenge that claim in court.

The Bush Order does not only reverse the burden of seeking judicial review. It also, in contrast to the PRA (which makes access to presidential materials after the 12-year restriction period has ended available under FOIA standards that do not require requesters to show a need for access), asserts that "a party seeking to overcome the constitutionally based privileges that apply to Presidential records must establish at least a 'demonstrated, specific need' for particular

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records, a standard that turns on the nature of the proceeding and the importance of the information to that proceeding." Bush Order, § 2(c).

The Bush Order further provides that the Archivist must notify both the former president and the incumbent of any request for access to presidential records that are subject to the PRA, and must provide them with copies of the relevant records upon their request. Bush Order, § 3(a). The Order states that the former president shall review the records "as expeditiously as possible, and for no longer than 90 days for requests that are not unduly burdensome." Bush Order § 3(b). However, the Order goes on to provide that if the Archivist receives a request for an extension of time from the former president, the Archivist "shall not permit [public] access" to the materials, regardless of whether the former president's request is reasonable. *Id.* The Bush Order thus permits a former president to delay the release of materials indefinitely simply by requesting additional time to review them. Only after the former president has used whatever time he chooses to review the records must he advise the Archivist whether he "authorizes" access to the materials or whether he requests that some or all of the documents be withheld on the basis of a constitutionally based claim of privilege. Bush Order, § 3(c).

The Bush Order further provides that either concurrently with or after the review by the former president, the incumbent president has an unlimited amount of time in which to review any presidential materials that are subject to a request for access under the PRA. Bush Order, § 3(d). Upon completion of the incumbent's review process, the Order states that the incumbent is to decide whether he "concurs in" the former president's decision either to "request withholding of or authorize access to the records." Bush Order § 3(d). The Order tilts the scale in favor of secrecy by providing that "[a]bsent compelling circumstances, the incumbent President will concur in the privilege decision of the former President" and "will support" a

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former president's privilege claim "in any forum in which the privilege claim is challenged." Bush Order § 4.

When the incumbent president "concurs in" a former president's request that materials be withheld on privilege grounds, the Order provides that the incumbent shall so inform the Archivist, and that the Archivist thereafter shall not permit access to the materials unless both presidents change their minds or a court orders that the materials be released. Bush Order § 3(d)(1)(i). (Such a court order could only come about if a requester sued for access, since nothing in the PRA would permit the Archivist to bring an action against the former president or the incumbent to require that materials be released.)

Moreover, even when the incumbent president has found that there are "compelling circumstances" that require him to *disagree* with a former president's request that materials be withheld on grounds of privilege, the Bush Order provides that the Archivist is still forbidden to disclose the assertedly privileged materials to the public, "[b]ecause the former President independently retains the right to assert constitutionally based privileges." Bush Order, § 3(d)(1)(ii). Under such circumstances, the Bush Order provides that the Archivist must deny public access to the materials claimed to be privileged by the former president unless and until the incumbent president informs the Archives that both he and the former president agree to their release, or there is a final, nonappealable court order requiring that the records be released.

The Bush Order also provides that when the former president has "authorized access," the Archivist must nonetheless deny public access to records when the incumbent president so directs. Bush Order § 3(d)(2)(ii). Only when both the former president and the incumbent president "authorize access" does the Order permit the Archivist to grant public access to presidential records under the PRA. The Bush Order also forbids the Archivist to make

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presidential records available in response to judicial or congressional subpoenas unless both the incumbent and former presidents "authorize access" or there is a final, nonappealable court order requiring access. Bush Order, § 6.

Finally, the Bush Order purports to authorize private citizens other than a former president to assert constitutionally based privileges on behalf of a former president after he dies or when he is disabled. The Order provides that a former president may designate such a representative (or representatives) "to act on his behalf for purposes of the Presidential Records Act and this order." Bush Order, § 10. Upon the former president's death or disability, such a designated representative "shall act" on the former president's behalf, "including with respect to the assertion of constitutionally based privileges." *Id.* If the former president fails to designate such a representative, the Order provides that his family may do so. *Id.*

4. The Bush Order's Legal Flaws. The Bush Executive Order is fundamentally flawed, legally, constitutionally, and as a matter of policy. Although the Bush Order was described by administration officials upon its release as merely establishing a procedural mechanism for the assertion of privilege claims, the Reagan Executive Order that the Bush Order supersedes already provided more than adequate *procedures* for the assertion of privileges. What the Bush Order adds are new and improper substantive standards that displace and subvert the PRA's provisions for public access to presidential materials.

It must be remembered at the outset that the PRA is based on the concept that a president leaving office can impose only a 12-year restriction on materials reflecting communications with his advisers. Thereafter, those materials are presumptively open to the public unless they involve national security matters or other specific content exempt from disclosure, or unless they fall within the small category, which steadily diminishes with the passing of time, of materials that

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN HISTORICAL ASSOCIATION,
400 A Street, S.E.
Washington, D.C. 20003-3889,

HUGH DAVIS GRAHAM,
305 E. Islay Street
Santa Barbara, CA 93101,

STANLEY I. KUTLER,
4112 Keewatin Trail
Verona, WI 53593,

THE NATIONAL SECURITY ARCHIVE,
The George Washington University
Gelman Library, Suite 701
2130 H Street, NW
Washington, D.C. 20037,

ORGANIZATION OF AMERICAN HISTORIANS,
112 North Bryan Avenue
Bloomington, Indiana 47408-4199,

PUBLIC CITIZEN, INC.,
1600 20th Street, N.W.
Washington, D.C. 20009,

and

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
1815 N. Fort Myer Drive, Suite 900
Arlington, VA 22209,
Plaintiffs,

v.

THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,
700 Pennsylvania Avenue, N.W.
Washington, D.C. 20408

and

JOHN W. CARLIN, ARCHIVIST OF THE UNITED STATES,
700 Pennsylvania Avenue, N.W.
Washington, D.C. 20408,
Defendants.

No. _____

COMPLAINT FOR DECLARATORY, INJUNCTIVE AND MANDAMUS RELIEF

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their own previously expressed intention constitutes both agency action that is arbitrary, capricious, an abuse of discretion, not in accordance with law, and in excess of statutory authority and limitations (5 U.S.C. § 706(2)(A)&(C)), and the unlawful withholding of or unreasonable delay in agency action (5 U.S.C. § 706(1)). Plaintiffs have a right of action under 5 U.S.C. §§ 702, 704 and 706, 28 U.S.C. § 2201, and 28 U.S.C. § 1651, for review of, and for declaratory, injunctive, and mandamus relief against, the defendants' refusal to release the formerly restricted materials to the public.

Relief Requested

Wherefore, the plaintiffs pray for the following relief:

i. A declaratory judgment that Executive Order 13,233 is contrary to law and that defendants Carlin and NARA may not lawfully implement that Order;

ii. A declaratory judgment that defendants Carlin and NARA have unlawfully withheld the 68,000 pages of formerly restricted records in violation of the PRA;

iii. An injunction requiring defendants Carlin and NARA to make the 68,000 pages of formerly restricted records available to the public at the Reagan Presidential Library forthwith;

iv. In the alternative to the relief requested in subparagraph (c), a writ of mandamus compelling the defendants to carry out their nondiscretionary duty to make the 68,000 pages of records available to the public at the Reagan Presidential Library forthwith;

v. Costs and attorney fees as authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412;

vi. Such other and further relief as the Court may deem proper.

Respectfully submitted,

Scott L. Nelson, D.C. Bar No. 413548
David C. Vladeck, D.C. Bar No. 945063
Michael Tankersley, D.C. Bar No. 411978
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000
Attorneys for Plaintiffs

November 28, 2001

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Introduction

1. Plaintiffs, the American Historical Association, Hugh Davis Graham, Stanley I. Kutler, the Organization of American Historians, the National Security Archive, Public Citizen, Inc., and the Reporters Committee for Freedom of the Press bring this action under the Administrative Procedure Act ("APA"), 5 U.S.C. " 701 et seq., under their nonstatutory right to judicial review of unlawful executive action, and under the Presidential Records Act ("PRA"), 44 U.S.C. " 2201 et seq., to obtain a declaratory judgment that the Archivist of the United States and the National Archives and Records Administration ("NARA") must administer the Presidential Records Act without regard to the terms of Executive Order No. 13,233 (the "Bush Order"), and to compel the release of presidential materials of former President Ronald Reagan that are in the custody of NARA and are being withheld in violation of the PRA.

Jurisdiction

2. This Court has jurisdiction under 28 U.S.C. " 1331 and 1361.

Parties

3. Plaintiff American Historical Association ("AHA") is a nonprofit membership organization founded in 1884 and incorporated by Congress in 1889 for the promotion of historical studies, the collection and preservation of historical documents and artifacts, and the dissemination of historical research. As the largest historical society in the United States, with approximately 15,000 members, the AHA serves as the umbrella organization for historians working in every period and geographical area. As a part of their historical research activities, AHA's members regularly request and make use of presidential and vice presidential records held by NARA, including the records of former President Reagan and former Vice President Bush.

4. Plaintiff Hugh Davis Graham holds appointments as the Holland N. McTyeire Professor of History and as Professor of Political Science at Vanderbilt University, as well as a three-year appointment as Adjunct Professor of History at the University of California at Santa Barbara. He is a member of both the AHA and the OAH. His historical research has emphasized the development of domestic federal policy since World War II, especially in the fields of education, civil rights, and immigration policy, and he has published a number of books in those and other areas. Professor Graham conducts much of his research in presidential libraries, Eisenhower through Reagan. Among the specific subjects he has researched at the Reagan Presidential Library is President Reagan=s civil rights policy. He is co-director of a conference on the Reagan Presidency to be held in March 2002 and co-editor of a volume of papers, *The Reagan Presidency*, to be published in 2003.

5. Plaintiff Stanley I. Kutler is Professor Emeritus of History and Law at the University of Wisconsin, where he has taught since 1964. He is the founder and editor of the journal *Reviews in History* and the author of many books and papers on American presidents. In his research, he makes extensive use of the records of former presidents and vice presidents at presidential libraries and other NARA facilities. Professor Kutler was historical consultant for the forthcoming Showtime film, *The Day Reagan Was Shot*, and made use of records from the Reagan Presidential Library for his work on the film.

6. Plaintiff National Security Archive ("the Archive") is an independent non-governmental research institute and library located at The George Washington University in Washington, D.C. The Archive collects and publishes declassified documents acquired through the Freedom of Information Act ("FOIA"). The Archive is the world's largest nongovernmental library of declassified documents, has published more than 500,000 pages of declassified documents in various formats, and has become the leading non-profit user of FOIA. The Archive has made extensive requests for presidential and vice presidential records in NARA's custody, including Reagan presidential records maintained by NARA at the Reagan Presidential Library and Bush vice presidential records maintained by NARA at the Bush Presidential Library.

7. Plaintiff Organization of American Historians ("OAH") is a nonprofit membership organization devoted to promoting the study and teaching of American history. The OAH's 11,000 members in the U.S. and abroad include individual historians working in a variety of scholarly settings as well as institutions such as libraries, museums, and historical societies. The OAH promotes the widest possible access to historical sources and scholarship, and supports the preservation, dissemination, and exhibition of historical sources. As a part of their historical research activities, the OAH's members regularly request and make use of presidential and vice presidential records held by NARA, including the records of former President Reagan and former Vice President Bush.

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8. Plaintiff Public Citizen, Inc. ("Public Citizen"), is a public interest organization headquartered in Washington, D.C. Public Citizen is dedicated to protecting the rights of members of the public as both consumers and citizens. Public Citizen has long sought to preserve and advance the interest of citizens in open access to the records of their government, including presidential and vice presidential records. Public Citizen and its members regularly request government records and make use of them in their efforts to promote government reform and protect consumers.

9. Plaintiff Reporters Committee for Freedom of the Press is a nonprofit, unincorporated association of reporters and editors dedicated to protecting freedom of the press and the right of journalists to open access to government information. The Reporters Committee has a longstanding interest in securing public and press access to presidential records.

10. Defendant John W. Carlin is the Archivist of the United States. In that capacity, he has custody and control under the PRA of all the presidential materials of former President Ronald Reagan as well as the vice presidential materials of former Vice President George H.W. Bush, and is charged with the responsibility of making them available to the public at the earliest practical date.

11. Defendant NARA is an agency of the United States operating under the direction of defendant Carlin. NARA is responsible for carrying out defendant Carlin's responsibilities under the PRA and has promulgated regulations implementing the PRA. The presidential records of former President Reagan are housed in NARA facilities including the Reagan Presidential Library in Simi Valley, California, and the vice presidential records of former Vice President George H.W. Bush are housed in NARA facilities including the Bush Presidential Library in College Station, Texas.

The Presidential Records Act

12. For much of our nation's history, the documentary materials generated during a president's term in office were largely subject to the president's control, both during and after his presidency, unless the president chose to donate them to the United States. Congress enacted the PRA in 1978 to limit presidential control over presidential records and to provide for public access to presidential records after a president leaves office. The PRA was made applicable to the materials of presidents beginning with the president who would take office on January 20, 1981, making President Ronald Reagan the first president subject to the PRA.

13. The PRA provides that when a president leaves office, custody and control over all his presidential records as defined in 44 U.S.C. § 2201(2) are immediately vested in the Archivist of the United States, 44 U.S.C. § 2203(f)(1), who thereafter is solely responsible for preserving and securing the records and preparing them for public access. The PRA specifically charges the Archivist with the "affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act." *Id.*

14. The PRA does not provide for public access to the records of an outgoing president for the first five years after the Archivist acquires them. 44 U.S.C. § 2204(b)(2)(A). After the expiration of the five-year period, the records become subject to public availability through the provisions of FOIA, which are incorporated in the PRA. *Id.* § 2204(c)(1).

15. The availability of presidential records through FOIA requests, however, is limited by an outgoing president's right to restrict certain records from access for a period not to exceed 12 years after he leaves office. 44 U.S.C. § 2204(a). Specifically, a president about to leave office may specify a period of restriction, not to exceed 12 years, for records that contain:

i. National security information that is "properly classified pursuant to ... Executive order," *id.* § 2204(a)(1);

ii. Information "relating to appointments to Federal office," *id.* § 2204(a)(2);

iii. Information "specifically exempted from disclosure by statute," *id.* § 2204(a)(3);

iv. "Trade secrets and commercial or financial information obtained from a person and privileged or confidential," *id.* § 2204(a)(4);

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v. "Confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers," *id.* § 2204(a)(5); and

vi. Information "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 2204(a)(6).

16. After expiration of the 12-year restriction period, formerly restricted materials become available to the public through FOIA to the same extent as materials that were not restricted by the former president. The PRA provides that presidential records are subject to all the exemptions from release under FOIA, *except for* the exemption set forth in 5 U.S.C. § 552(b)(5), generally referred to as "exemption 5," which incorporates the "deliberative process" and "executive" privileges. 44 U.S.C. §§ 2204(c)(1).

17. The effect of these provisions is that, under the PRA, a president may prevent disclosure of records that reflect confidential communications with or among his advisers for no more than 12 years. Thereafter, such materials may *not* be withheld on the basis of nonconstitutional privileges that may otherwise shield deliberative executive branch communications, but must be released to the public unless they continue to fall into some other FOIA exemption (for example, the exemptions for materials that are properly subject to national security classification or that relate to law enforcement investigations), or unless there is some "constitutionally based" right or privilege that prevents public release. *See* 44 U.S.C. § 2204(c)(2).

18. The PRA provides that vice presidential records are also public property and are to be opened for access to the public on the same terms as presidential records. 44 U.S.C. § 2207. Thus, the 12-year limit on the restriction of confidential communications (*id.* § 2204(a)(5)) applies to vice presidential records as well.

19. The PRA provides that the Archivist must give the former president notice "when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have." 44 U.S.C. § 2206(3). NARA has implemented this requirement through a regulation providing that whenever the Archivist intends to make public any presidential record, he must provide 30 days' notice to the former president to allow him (or his designated representative) to assert any rights or privileges that would foreclose access to the materials. 36 C.F.R. § 1270.46(a), (b), (d). NARA's implementing regulation further provides that the Archivist may reject such assertion of a right or privilege by the former president provided that the Archivist states the basis for his decision in writing and notifies the former president of the date on which he will disclose the records in question. *Id.* § 1270.50(c). The regulation further provides that when the Archivist rejects a former president's claim of privilege, public access will be withheld for an additional 30 days to allow the former president to seek judicial review. *Id.* § 1270.46(c), (d). Finally, the regulation states that a copy of any notice to the former president of the impending release of his records shall also be provided to the incumbent president. *Id.* § 1270.46(e).

The Reagan Executive Order

20. On January 16, 1989, President Reagan issued Executive Order 12,667, 54 Fed. Reg. 3403 (the "Reagan Order"), which purported to direct the Archivist with respect to the performance of certain of his functions under the PRA.

21. The Reagan Order provided that when the Archivist notified the incumbent and former presidents of his intent to open records, he also was required to "identify any specific materials, the disclosure of which [the Archivist] believes may raise a substantial question of Executive privilege." Reagan Order, § 2 (a).

22. The Reagan Order purported to empower the president or his "designee" to extend beyond 30 days the time during which the Archivist must withhold from release, pending review by the incumbent president, presidential materials otherwise subject to public access under the PRA. Reagan Order, § 2(b).

23. The Reagan Order provided that the incumbent president, acting on advice of the Attorney General and the White House Counsel, could assert executive privilege and, on that basis, direct the Archivist not to release records of a former president. The Reagan Order required the Archivist to abide by any such direction unless otherwise ordered by a court or by a sitting president. Reagan Order, § 3.

24. The Reagan Order also provided that a former president could assert a claim of executive privilege to seek to bar the Archivist from releasing materials to the public, but that the Archivist would not be bound

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to accept such a claim of privilege. The Reagan Order required the Archivist to abide by any direction from the incumbent president or his "designee" as to whether to accept or deny a former president=s claim of privilege, unless otherwise ordered by a court. Reagan Order, § 4.

The Reagan Presidential Materials

25. President Reagan left office on January 20, 1989. Thereafter, the Archivist received his presidential records, which include almost 44 million pages of documents, a great number of electronic records including e-mail messages, and many thousands of photographs and audio-visual materials. The Reagan presidential records are housed in the Ronald Reagan Presidential Library, a facility made available to the federal government under the Presidential Libraries Act (44 U.S.C. § 2112) and operated by NARA.

26. Before leaving office, President Reagan exercised his right under the PRA to restrict for the maximum period of 12 years all materials falling within the restriction categories specified by 44 U.S.C. § 2204(a)(1)-(6).

27. The 12-year period of restriction specified by President Reagan expired on January 20, 2001.

28. During the 12-year restriction period, NARA's Reagan Library opened to the public, in response to FOIA requests, approximately 4 million pages of documents. In accordance with the PRA, NARA withheld from public access documents that fell within any of the categories of material restricted by President Reagan, including the restriction category for "confidential communications" with advisers.

29. Members of plaintiff AHA were among those who requested access to Reagan presidential records, and who did not receive access to restricted records.

30. For example, Professor Graham made specific requests on July 10, 1996, and July 20, 1999, for Reagan presidential records concerning Edwin Meese's role in developing Reagan Administration policy on civil rights, affirmative action, and voting rights. In its responses to those requests on June 9, 1997, and August 24, 2000, NARA's Reagan Library withheld a total of 257 pages of records under the PRA's restriction category for "confidential communications."

31. As of the date the 12-year restriction period expired, NARA had identified approximately 68,000 pages of documents that were restricted solely because of President Reagan's invocation of the PRA's "confidential communications" restriction category. Those 68,000 pages of documents were not otherwise subject to restriction under the PRA or exempt from release under FOIA on grounds of national security classification or any other basis.

32. But for the "confidential communications" restriction, NARA would have made the 68,000 pages of documents available to those persons who requested them and to the public at large.

33. On or about February 28, 2001, NARA provided notice to President George W. Bush and to former President Reagan that it intended to disclose to the public the approximately 68,000 pages of Reagan presidential records that had formerly been restricted as "confidential communications requesting or submitting advice" and that were now no longer subject to that restriction as a result of the expiration of the 12-year period. NARA's notice did not state that any of the records "raise a substantial question of Executive privilege" within the meaning of § 2(a) of the Reagan Order.

34. As defendant Carlin has acknowledged in an article entitled "Presidential Papers and the NARA," published in the *OAH Newsletter*, there is "keen interest" in the 68,000 pages of formerly restricted Reagan presidential records "on the part of historians, journalists, lawyers, members of Congress, students, and others--all of them seeking to discover the inner workings of the Executive Office of the President in the not-too-distant past." Moreover, NARA's decision to notify the White House and former President Reagan of its intention to open these formerly restricted documents to public access reflected its determination that, but for the now-expired restriction imposed by former President Reagan, there was no statutory basis under the PRA for withholding them from the public.

35. NARA's notice to the White House was provided in two letters, both of which included records schedules that identified and described in general terms the 68,000 pages of formerly restricted records. The White House did not receive from NARA actual copies of the 68,000 pages of records that NARA intended to open to the public, nor did the president or his staff seek to review those records during the 30 days provided for in Executive Order 12,667.

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36. After receiving the Archives' notice, White House Counsel Alberto R. Gonzales twice sent letters to defendant Carlin instructing him to extend for 90 days the time for President Bush to review the materials and claim privilege under the Reagan Order. During the consecutive 90-day extensions that Mr. Gonzales granted to the White House, neither he, the president, nor other White House staff members reviewed the 68,000 pages of formerly restricted documents that NARA intended to open to the public. According to defendant Carlin in his *OAH Newsletter* article "Presidential Records and the NARA," rather than reviewing whether there was a basis for objecting to the release of particular documents that was consistent with the terms of the PRA, the White House was instead "conduct[ing] a thorough legal review of the PRA and consider[ing] its long-term implications on the deliberative process for the Presidency and the Executive Branch."



37. On August 31, 2001, Mr. Gonzales again wrote defendant Carlin, this time granting the White House a further, indefinite extension of time to respond to NARA's notice of intention to release the formerly restricted documents. Mr. Gonzales' letter confirmed that the White House had not been reviewing particular documents to determine whether a basis existed for the president to invoke a constitutional privilege against their release, but had instead been considering what Mr. Gonzales referred to as "constitutional and legal questions" in order to arrive at some "legal framework and process" (other than the PRA and its implementing regulations) that would govern the release of the documents. The letter further stated that, at NARA's urging, the White House would consult with former presidents and review a "small sample of Presidential records" before taking action.

The Bush Executive Order

38. On November 1, 2001, President George W. Bush issued Executive Order 13,233 (the "Bush Order"), superseding the Reagan Order.

39. The Bush Order, entitled "Further Implementation of the Presidential Records Act," purports to set forth procedures and substantive standards governing the assertion of claims of executive privilege by both former and incumbent presidents following the expiration of the 12-year restriction period for materials involving communications between presidents and their advisers.

40. The Bush Order purports to describe the scope of the constitutional executive privilege of former presidents and vice presidents as well as incumbent presidents, and includes within that scope not only the privilege for confidential communications between the president and his close advisers, but also the common-law attorney-client and work-product privileges, the deliberative process privilege, and the state secrets privilege. Bush Order, § 2(a).

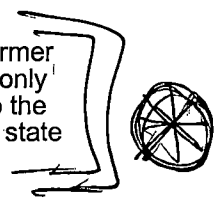

41. In contrast to the PRA, which makes presidential records available after the 12-year restriction period has ended under FOIA standards (which require no showing of need for access), the Bush Order asserts that "a party seeking to overcome the constitutionally based privileges that apply to Presidential records must establish at least a 'demonstrated, specific need' for particular records, a standard that turns on the nature of the proceeding and the importance of the information to that proceeding." Bush Order, § 2 (b).

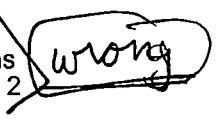

42. The Bush Order provides that the Archivist must notify both the former president and the incumbent of any request for access to presidential records that are subject to the PRA, and must provide them with copies of the relevant records upon their request. Bush Order, § 3(a). The Order states that the former president shall review the records "as expeditiously as possible, and for no longer than 90 days for requests that are not unduly burdensome." Bush Order § 3(b). However, the Order goes on to provide that if the Archivist receives a request for an extension of time from the former president, the Archivist "shall not permit [public] access" to the materials, regardless of whether the former president's request is reasonable. *Id.*

43. The Bush Order provides that upon the completion of the former president's review, the former president shall either request that the records be withheld on the basis of executive privilege or "authorize access" to them. Bush Order § 3(c).

44. The Bush Order further provides that either concurrently with or after the review by the former president, the incumbent president has an unlimited amount of time in which to review any presidential materials that are subject to a request for access under the PRA. Bush Order, § 3(d).

45. The Bush Order states that, upon completion of the incumbent's review process, the incumbent

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shall decide whether he "concurs in" the former president's decision either to "request withholding of or authorize access to the records." Bush Order § 3(d). The Order provides that "[a]bsent compelling circumstances, the incumbent President will concur in the privilege decision of the former President" and "will support" a former president's privilege claim "in any forum in which the privilege claim is challenged." Bush Order § 4.

46. When the incumbent president "concurs in" a former president's request that materials be withheld on privilege grounds, the Order provides that the incumbent shall so inform the Archivist, and that the Archivist thereafter shall not permit access to the materials unless both presidents change their minds or a court orders that the materials be released. Bush Order § 3(d)(1)(i).

47. Even when the incumbent president finds that there are "compelling circumstances" that require him to disagree with a former president's request that materials be withheld on grounds of privilege, the Bush Order provides that the Archivist is still forbidden to disclose the assertedly privileged materials to the public, "[b]ecause the former President independently retains the right to assert constitutionally based privileges." Bush Order, § 3(d)(1)(ii). Under such circumstances, the Bush Order provides that the Archivist must deny public access to the materials claimed to be privileged by the former president unless and until the incumbent president informs the Archives that both he and the former president agree to their release, or there is a final, nonappealable court order requiring that the records be released.

48. The Bush Order further provides that when the former president has "authorized access," the Archivist must nonetheless deny public access to records when the incumbent president so directs. Bush Order § 3(d)(2)(ii). Only when both the former president and the incumbent president "authorize access" does the Order permit the Archivist to grant public access to presidential records under the PRA.

49. The Bush Order also forbids the Archivist to make presidential records available in response to judicial or congressional subpoenas unless both the incumbent and former presidents "authorize access" or there is a final, nonappealable court order requiring access. Bush Order, § 6.

50. The Bush Order purports to authorize surrogates to assert constitutionally based privileges on behalf of a former president. The Order provides that a former president or his family may designate a representative "to act on his behalf for purposes of the Presidential Records Act and this order." Bush Order, § 10. Upon the former president's death or disability, such a designated representative "shall act" on the former president's behalf, "including with respect to the assertion of constitutionally based privileges." *Id.*

51. Finally, the Bush Order provides that a former vice president may assert an independent claim of executive privilege to bar access to his materials under the PRA, and that such a claim will be subject to all the provisions of the Bush Order, including that the Archivist must withhold access to materials once such a claim has been made, regardless of its validity, until the former vice president agrees that the materials may be made public or a court so orders. Bush Order, § 11.

52. Defendant Carlin has publicly announced his intention to abide by and implement the Bush Order.

NARA's Continued Withholding of Records

53. During the months that have elapsed since former President Reagan's restrictions on the 68,000 pages of documents containing "confidential communications" expired, defendants Carlin and NARA have continued to withhold those documents from public access.

54. Former President Reagan's representatives did not, at any time between NARA's notice of its intent to open the 68,000 pages of records and the issuance of the Bush Order, review the 68,000 pages of records to determine whether a claim of privilege to bar the release of particular records would be made on former President Reagan's behalf.

55. President Bush and his aides have also not reviewed the 68,000 pages of records to determine whether to claim a privilege that would bar the release of particular records.

56. No one has asserted a constitutionally based right or privilege that would preclude release of the 68,000 pages of documents as otherwise required by the PRA.

57. As a result of the withholding of the 68,000 pages of records, plaintiffs have been denied the ability to make use of those records for historical research. For example, Professor Graham has been unable to

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review the documents withheld in response to his requests for records concerning Edwin Meese's role in civil rights policy, and his research in that area has been impaired as a result. Professor Graham and other members of the AHA and OAH who intend to participate in the upcoming March 2002 conference on the Reagan Presidency have been impeded in their ability to prepare for that conference B which was originally scheduled to allow scholars at least a year to work with the Reagan presidential records after the expiration of the 12-year restriction period B by the continued unavailability of the formerly restricted Reagan records.

First Claim for Relief B APA, Nonstatutory Judicial Review and PRA B Declaratory Relief Against Implementation of Bush Order

58. Plaintiffs incorporate the allegations of paragraphs 1 through 57 above.

59. The PRA requires the Archivist to release to the public presidential and vice presidential records formerly subject to the restriction for confidential communications between the president and his advisers after the 12-year restriction period has expired, unless an applicable FOIA exemption applies or the materials are subject to a valid claim that the Constitution bars release. Thus, after the 12-year period expires, only a valid, constitutionally based claim of right or privilege can bar release of records that are no longer subject to any statutory restriction or exemption from release. When the Archivist withholds such records from release in the absence of a valid claim of constitutional right or privilege, as defendant Carlin is now doing, he violates the express terms of the PRA.

60. The Bush Order violates the PRA by instructing the Archivist, after the expiration of the 12-year restriction period, to withhold the release of records that are not restricted under the Act and that are not subject to a valid claim of constitutional privilege. Terms of the Bush Order that are contrary to law include:

i. The Bush Order provides that access to materials may be delayed for an unlimited period of time after the expiration of the 12-year restriction period while a former president and the incumbent president "review" materials proposed for release by NARA, in violation of the PRA's commands that records may not be restricted after the 12-year period expires and that the Archivist has an affirmative duty to make them public as soon as possible;

ii. The Bush Order provides that when a former president makes a claim of executive privilege seeking to bar release of materials whose disclosure is otherwise required by the PRA, the incumbent president "will concur" in that claim absent "compelling circumstances," and "will support that privilege claim in any forum in which the privilege claim is challenged" B even if the privilege claim is legally improper or unfounded;

iii. The Bush Order provides that, regardless of whether the incumbent president "concurs" in a former president's claim of privilege under the "compelling circumstances" standard, the Archivist "shall not permit access to the records" unless and until the former president agrees, or a court orders that materials be released, even if the claim of privilege is legally improper or unfounded;

iv. The Bush Order provides that the constitutional privileges of the executive branch may be asserted by a surrogate who has never held the office of the presidency, if the surrogate has been "designated" to do so by a former president who is deceased or disabled or by the family of a deceased or disabled former president, even though the Constitution does not allow for assertion of a claim of executive privilege by someone who has not held the office of president; and

v. The Bush Order provides that a former vice president may assert a claim of executive privilege independent of the privilege of the former or incumbent president, and the Order compels the Archivist to accord such a claim the same respect as a claim of privilege made by a former president, even though there is no constitutional basis for a vice presidential executive privilege.

61. The Bush Order is also contrary to NARA's regulations. NARA's regulations explicitly provide that when a former president asserts a claim of privilege seeking to bar access to a presidential record, the Archivist may "nevertheless determin[e] that the record in question should be disclosed" (36 C.F.R. § 1270.46(c)) and may open the record to the public 30 days after giving the former president notice of the denial of his claim of privilege. *Id.* § 1270.46(d). The Bush Order's command that the Archivist withhold records whenever the former president asserts a claim of privilege is directly at odds with these regulatory provisions. The regulations, having been lawfully promulgated under the notice-and-comment procedures of the APA (5 U.S.C. § 553) pursuant to authority properly delegated to NARA by the PRA (*see* 44 U.S.C. § 2206), take precedence over the Bush Order, which is based on no statutory authority and was issued without adherence to the APA rulemaking process.

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62. The terms of the Bush Order are not required by, and are in fact contrary to, the proper constitutional scope of executive privilege.

63. The issuance and implementation of the Bush Order have harmed and will continue to harm the plaintiffs and their members by depriving them of access to presidential and vice presidential records and the ability to make use of those records for historical research.

64. Implementation of the Bush Order by the Archivist constitutes agency action that is arbitrary, capricious, an abuse of discretion, not in accordance with law, and in excess of statutory authority and limitations within the meaning of the APA (5 U.S.C. § 706(2)(A)&(C)). Plaintiffs have a right to judicial review of, and declaratory relief against, such action under 5 U.S.C. " 702, 704 and 706 and 28 U.S.C. § 2201.

65. In the alternative, and regardless of whether there has yet been agency action with respect to the Bush Order, plaintiffs have a nonstatutory right to obtain judicial review of the lawfulness of the Bush Order's restrictions on the defendants' ability to comply with their legal obligations. Because the Bush Order is contrary to the terms of the PRA and lacks a valid constitutional basis, plaintiffs are entitled to a declaration under 28 U.S.C. § 2201 that the Order is unlawful and that the defendants may not implement it.

Second Claim for Relief B APA and PRA B Injunction Requiring Release of Records

66. Plaintiffs incorporate the allegations of paragraphs 1 through 65 above.

67. The approximately 68,000 pages of materials that were the subject of NARA's notice to the White House on February 28, 2001, are "presidential records" of Ronald Reagan as defined by the PRA, 44 U.S.C. § 2201(2), and thus are required to be "administered in accordance with the provisions of [the PRA]." 44 U.S.C. § 2202.

68. Under the PRA, defendants Carlin and NARA are "responsib[le] for the custody, control, and preservation of, and access to" the Reagan presidential records, and they "have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act." 44 U.S.C § 2203(f)(1).

69. The 12-year restriction imposed by former President Reagan under the PRA against release of records containing "confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers" (44 U.S.C. § 2204(a)(5)) expired on January 20, 2001. The PRA does not permit extension of this restriction beyond the 12-year limit.

70. There is no statutory basis for the invocation of any nonconstitutional privilege to withhold the 68,000 pages of records, since FOIA's "exemption 5," 5 U.S.C. § 552(b)(5), which otherwise would permit invocation of such privileges, is inapplicable to records under the PRA. *See* 44 U.S.C. § 2204(c)(1).

71. NARA has determined that the 68,000 pages of formerly restricted records are not subject to any statutory bar to disclosure under the PRA and has stated its intention that they should be opened to the public. There is no statutory basis under the PRA for withholding these materials, and no such basis has been asserted by former President Reagan or by President Bush. Defendants' continued withholding of the records is therefore contrary to law.

72. Because the Bush Order is unlawful and in violation of the PRA, its terms cannot be relied upon as a basis for continued withholding of the 68,000 pages of records.

73. Defendants have a mandatory, nondiscretionary duty to make the 68,000 pages of Reagan presidential records available to the public.

74. Plaintiffs and their members have been injured and continue to suffer injury through the denial of access to the 68,000 pages of records and the deprivation of the opportunity to make use of them for historical research.

75. The refusal by defendants Carlin and NARA to make the 68,000 pages of formerly restricted materials available to the public upon the conclusion of the 12-year restriction period in accordance with

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Representative Doug Ose
Opening Statement
Opening a New Door to History: The Presidential Records Act Takes Effect
November 6, 2001

Last February, after press accounts of President Clinton's last financial disclosure report and some furniture gifts which were ultimately returned by the Clintons to the White House residence, the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, which I chair, began an investigation of Presidential gifts. Among other records, the Subcommittee sought to examine the White House Gifts Unit's database and related records for the Clinton Administration. As a consequence, I have first-hand experience with requests, under the Presidential Records Act of 1978, for Presidential records relevant to a Congressional investigation.

President Reagan's 1989 Executive Order (E.O. 12267) expanded on the implementing regulations issued by National Archives and Records Administration (NARA). NARA's regulations were authorized by Section 2206 of the Act. The Order clarified some areas not specifically addressed in NARA's regulations. Most importantly, the Order identified only three areas where access to Presidential records could be limited -- if disclosure might impair national security, law enforcement, or the deliberative processes of the executive branch. I asked President Clinton's representative which of these three privileges, if any, could be asserted to deny my request for access to specific records. In the end, President Clinton's representative claimed no privileges for any of the requested records. As a result, NARA provided the Subcommittee with unfettered access to the requested records.

President Bush's new Executive Order (E.O. 13223), issued last Thursday, changed these access limitations. In a nutshell, law enforcement is dropped and two areas are added: "communications of the President or his advisors (the presidential communications privilege); [and] legal advice or legal work (the attorney-client or attorney work product privileges)." I am deeply concerned about the two new, broad limitations in the Order. Both - especially the Presidential communications privilege - could severely limit Congressional access to key documents in its investigations of a former Administration.

In today's hearing, I plan to question the Bush Administration's witnesses about the legal and substantive justification for this restrictive policy change. The bottom line is that the new Order appears to violate not only the spirit but also the letter of the Presidential Records Act. In 1978, Congress expressed its clear intent to make Presidential records available for Congressional investigations and then for the public after a 12-year period. This new Order undercuts the public's rights to be fully informed about how its government operated in the past.

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STATEMENT
by John W. Carlin
Archivist of the United States

to the
Subcommittee on Government Efficiency, Financial Management,
and Intergovernmental Relations
of the Committee on Government Reform
House of Representatives
Congress of the United States

On the Implementation and Effectiveness of the Presidential Records Act of 1978

November 6, 2001

Chairman Horn, Congresswoman Schakowsky, members of the Subcommittee, and Subcommittee staff, I am John Carlin, Archivist of the United States, and I thank you for the opportunity to appear before you this morning on the implementation of the Presidential Records Act. Mr. Chairman, I particularly want to thank you for holding this hearing and for your continued interest in the programs and responsibilities of the National Archives and Records Administration. We are fully aware that with the jurisdiction of this subcommittee, attention to NARA is your job. However, you have taken a particular interest in our mission during your career in Congress and the people of NARA and our many constituent groups thank you for that interest.

In order to set the foundation for this dialogue today, I would like to set out the history of the Presidential Records Act and provide the Subcommittee with an overview of our implementation to date. The Presidential Records Act (PRA) was enacted in 1978 to establish public ownership of the records created by subsequent Presidents and their staffs and to establish procedures

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governing the preservation and public availability of the records. As noted in the House Report accompanying the pending bill:

> The legislation would terminate the tradition of private ownership of Presidential papers and the reliance on volunteerism to determine the fate of their disposition. Instead, the preservation of the historical record of future Presidents would be assured and public access to the materials would be consistent under standards affixed in law. The primary function of the Presidential libraries remains unchanged. The libraries are to continue to provide information about their holdings and to make records available to researchers upon request on an impartial basis.

H. Rep. 95-1487, at 2-3 (95th Cong., 2d Sess., Aug. 14, 1978).

The PRA mandates that the Presidential records of an Administration be transferred to the legal and physical custody of the National Archives and Records Administration (NARA) immediately upon the end of the President's last term of office. The Archivist of the United States is given the "responsibility for the custody, control, and preservation of, and access to, the Presidential records of th[e former] President." 44 U.S.C. § 2203(f)(1). The PRA also requires the Archivist to appoint a Library Director in "consultation with the former President." *Id.* § 2203(f)(2). The Library Director balances archival and public access considerations with national security, confidentiality, and privacy concerns.

Since its enactment, NARA has taken legal custody of the Presidential records of Presidents Ronald Reagan, George H.W. Bush, and William J. Clinton. The Reagan and Bush records are housed in Presidential Libraries in Simi Valley, California and College Station, Texas, respectively. The Clinton records are stored in a records storage facility in Little Rock, Arkansas, until they can be transferred to a Presidential Library that is being constructed by former President Clinton.

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The PRA applies to all Vice-Presidential records in same manner as Presidential records, and affords the former Vice-Presidents the same authority as the former Presidents. Accordingly, all of the procedures and authorities that are ascribed in this testimony to the former Presidents also apply to the former Vice-Presidents (except that Vice-Presidential records may be stored at a separate location from the Presidential records).

Responsibilities of the Archivist of the United States Under the PRA

The PRA established Government control over Presidential records while codifying and preserving some of the basic practices that long existed with respect to the papers that Presidents had donated to the National Archives (dating back to President Hoover). As the House Report on the PRA bill stated: "It is anticipated that the Archivist will process the former Administration's papers in a manner roughly similar to current practices." H. Rep. 95-1487, at 15. The report also stated that "the determination whether access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist, in his discretion, after consultation with the former President." *Id.* § 2204(b)(3).

The PRA mandates that "[t]he Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act." *Id.* § 2203(f)(1). Overall, the PRA represents an effort to legislate a "careful balance between the public's right to know, with its vast implications to historians and other academic interests, and the rights of privacy and confidentiality of certain sensitive records generated by

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the President and his staff during the course of their White House activities." Floor Statement of Congressman Thompson, *Cong. Rec.*, Oct. 10, 1978, at 34897.

Presidential Papers and Materials Prior to the PRA

Prior to the PRA, and with the exception of the materials of former President Richard M. Nixon, the Presidential papers and materials maintained under NARA's control at the Presidential Libraries of former Presidents Hoover, Roosevelt, Truman, Eisenhower, Kennedy, Johnson, Ford, and Carter are controlled by the terms of the deeds of gift by which the former Presidents donated their records to the National Archives. Each of these deeds has provisions outlining categories of records that may be withheld from public access for some period of time. All of them seek to protect information that could harm national security, invade personal privacy, or cause embarrassment or harassment. Some also seek to protect documents involving confidential communications directly with the President. The deeds of Presidents Ford and Carter model the restrictions on the PRA exemptions.

In all instances, the Director of the Presidential Library, who is appointed by NARA in close consultation with the former President or representative, was given the independent authority and discretion to process and open the papers, with very limited involvement by the former President or representative. Living former Presidents in some cases would establish priorities for the processing of particular subjects or series of records. In other cases, a representative or review board was established – such as for Presidents Roosevelt and Kennedy because they died in office, as well as for Truman and Eisenhower – that exercised limited control over the decisions

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made by the Libraries. The boards' principal concern was with respect to the President's personal and family matters, and, in most cases, they disbanded after a short period of time.

Under these deeds of gift, NARA processed and opened Presidential materials based on the deeds and professional archival considerations. Moreover, because the materials at these Libraries were donated to the United States, they are not subject to request under the Freedom of Information Act (FOIA) or any other public access statute. This meant that the Library staff were able to process and open most records in an organized and systematic way based on how the records were filed or arranged. Such "systematic processing" is generally much more efficient and less time consuming than processing in response to FOIA requests. However, researchers have no legal recourse to challenge the withholding of records or delays in responding to requests.

The records of President Nixon are governed by the Presidential Recordings and Materials Preservation Act (PRMPA), 44 U.S.C. § 2111, note, which was passed by Congress in 1974 to ensure government control over the Nixon papers and tapes. The PRMPA also established a National Study Commission on Records and Documents of Federal Officials, which was charged with studying, among other things, "whether the historical practice regarding the records and documents produced by or on behalf of Presidents of the United States should be rejected or accepted and whether such practice should be made applicable with respect to all federal officials." Pub. L. 93-526, 88 Stat. 1695 (December 19, 1974), sec. 202. That commission produced a final report in 1977, and its recommendations were considered by Congress in drafting the PRA. *See* Hearings before a Subcommittee of the Committee on Government

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Operations on H.R. 10998 (the Presidential Records Act of 1978) and Related Bills, 95th Cong., 2d Sess., (Feb. 23, 28, Mar. 2, 7, 1978) (PRA Hearings).

Public Access to Presidential Records

Presidential records are not subject to public access requests during the President's term of office, and may be made available only by decision of the incumbent President. After the President leaves office, the records are also not available to public access requests for five years, unless NARA has processed an integral file segment sooner than five years. This five year period was intended principally to give NARA an opportunity to organize the records and begin systematic archival processing. At the end of the five year period, all Presidential records are subject to public access requests in accordance with the FOIA. However, for a period not to exceed 12 years from when the President leaves office, the President is authorized, but not required, to impose up to six Presidential restrictions (which must be imposed before the President leaves office and which are not subject to judicial review).

In addition, the PRA establishes that eight of the nine FOIA exemptions shall apply to Presidential records, which stay in effect after the Presidential restrictions expire. Congress specifically excluded Presidential records from the FOIA (b)(5) exemption concerning the deliberative process and other recognized privileges. Four of the six presidential restrictions are identical to corresponding FOIA exemptions: exemptions 1, for classified national security information; exemptions 3, for information protected by other statute; exemptions 4, for trade secrets and confidential business information; and exemptions 6, for unwarranted invasions of personal privacy. Presidential exemption 2 ("P2"), for "appointments to Federal office," has no

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FOIA counterpart, but is subsumed, in large part, under FOIA exemption (b)(6). Presidential exemption 5 ("P5"), concerning "confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers," is similar to FOIA exemption (b)(5), and protects the disclosure of presidential communications, deliberations, and other information that could be subject to a common law or constitutionally-based privilege.

Because the PRA subjects all Presidential records to public access through the FOIA, PRA Libraries open records almost exclusively in response to FOIA requests (or mandatory declassification review requests under Executive Order 12958 on Classified National Security Information), and have very little opportunity to conduct systematic processing of records after the first five years. Moreover, Congressional and grand jury investigations and other litigation has significantly limited systematic processing even during the first five years.

PRA Restrictions

The PRA does not mandate the Presidential restrictions, but rather makes clear that they may be narrowed or waived any time after the President leaves office. Moreover, in the legislative history, Congress anticipated that the Archivist to do just that:

> It is also expected that the Archivist will follow past practice in applying the restrictive categories in former Presidents' deeds of gift, and negotiate with the ex-President or his representative on an on-going basis to lessen the number of years chosen for particular mandatory restriction categories, to eliminate entire categories, or to permit release of particular records otherwise restricted.

H. Rep. 95-1487, at 15. Former Presidents Reagan and Bush have both narrowed the application of PRA exemptions P2 and P5 to their records, allowing significantly more records to be opened

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than what might otherwise be authorized. NARA will work with former President Clinton and his representative regarding the application of these exemptions as well.

The PRA also removes the authority to withhold Presidential records under FOIA exemption (b)(5) after the expiration of the P5 exemption. The elimination of a statutory exemption in no way prevents a proper assertion of Executive privilege by the former or incumbent President. As the PRA itself notes, the incumbent and former Presidents have clear legal authority to assert an Executive privilege over the Presidential records of former Presidents: "Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President." 44 U.S.C. § 2204(c)(2). This provision reflects the holding by the Supreme Court that the constitutionally based privileges available to a President "survive[] the individual President's tenure." *Nixon v. Administrator of General Services*, 433 U.S. 425, 449 (1977). Although the Supreme Court also noted the privileges are "subject to erosion over time after an administration leaves office." *Id.* at 451.

Special Access to Presidential Records

In addition to establishing procedures for public access, the PRA also establishes procedures for what NARA calls "special access" to Presidential records that are otherwise closed from public access. These special access provisions are designed to accommodate requests by Congressional investigators, Federal prosecutors, other parties in litigation, and the incumbent President for the ongoing business of the current Administration. However, prior to providing such access, NARA must notify the former and incumbent Presidents and provide them an opportunity to review the records and consider whether to assert any constitutionally-based privilege. Accordingly, either House of Congress, or a Committee or Subcommittee with appropriate

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jurisdiction, may request access to Presidential records. Similarly, Federal prosecutors may seek access through a grand jury subpoena, and other parties in litigation may seek access through court orders. The incumbent President may also obtain access to the records of a predecessor on behalf of his staff, such as the NSC, or any other agency, "for the conduct of current business." 44 U.S.C. § 2205(2)(B). The former President and his designated representative are always entitled to access to the Presidential records of his Administration.

That concludes my formal statement, Mr. Chairman, and I would be happy to answer any questions at the appropriate time.

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Testimony of Scott L. Nelson

Attorney, Public Citizen Litigation Group

Hearing on "Oversight of the Presidential Records Act"
Before the Subcommittee on Government Efficiency, Financial Management
and Intergovernmental Affairs of the House Committee on Government Reform

November 6, 2001

Good afternoon, Mr. Chairman and members of the Subcommittee, and thank you for inviting me to testify before you this afternoon. The subject of my testimony is the most immediate and controversial issue affecting implementation of the Presidential Records Act ("PRA" or "Act") – namely, the legality of the recently issued Executive Order concerning the assertion of constitutional privileges to bar releases of records under the Act. The Order is troubling in a number of respects. Most significantly, it violates the PRA – and exceeds the bounds of legitimate protection of executive privilege –because it gives a former president the power to veto public releases of materials by the National Archives.

Before I explain the basis for my conclusions, I would like to take a few moments to describe my background in this area of law. I am currently an attorney with the Public Citizen Litigation Group here in Washington. Public Citizen has long had an interest in ensuring public access to governmental records, including the materials of former presidents, and has been involved in much of the litigation that has established the governing legal principles in this area, including litigation over materials of former Presidents Nixon, Reagan, and Bush. My own experience in the area includes approximately 15 years spent in private practice representing former President Nixon and, later, his executors, in litigation involving access to the Nixon presidential materials under the special legislation that governs those materials – legislation that is similar in many respects to the PRA. Some of that litigation also involved Public Citizen, and

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are subject to a constitutionally based privilege of the former or incumbent president. Thus, to the extent that the Bush Order imposes standards that extend the secrecy of such materials beyond the PRA's 12-year limit, it is lawful only if those standards are constitutionally required. Clear judicial precedent indicates that they are not.

The most plainly improper feature of the Bush Order is its requirement that the Archivist withhold materials from the public whenever the former president has asserted a claim of privilege, *even if the incumbent president disagrees with that claim.* The Bush Order claims to find authority for this requirement in the Supreme Court's decision in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), which held, among other things, that a former president retains a limited right to assert executive privilege independently from the incumbent president. Although the Court recognized this right, it also emphasized that the protection afforded historical presidential records was limited and eroded steadily as time passed. Thus, while recognizing a former president's right to *assert* a claim of privilege, the Supreme Court by no means implied that all such claims were valid or that incumbent executive branch officials were bound to honor such claims regardless of their merit. Rather, the implication of *Nixon v. Administrator* was that although former presidents could make claims of privilege, the Constitution permits such claims to be evaluated and rejected by current executive branch officials when, as is usually the case, the public's need for access to historical materials involving official government actions outweighs the former president's attenuated interest in confidentiality after he has been out of office for a number of years.

These implications of *Nixon v. Administrator* were made explicit by the United States Court of Appeals for the District of Columbia Circuit a few years later in its decision in *Public Citizen v. Burke*, 843 F.2d 1473 (D.C. Cir. 1988). That case concerned a directive by the Reagan

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Justice Department that closely parallels the terms of the Bush Executive Order. The Justice Department directive at issue in *Public Citizen v. Burke* instructed the Archives that it must defer to any claim of privilege asserted by former President Nixon to block public release of any of his presidential materials, which are held by the Archives under legislation that is applicable only to President Nixon but is similar to the PRA in its provisions encouraging public access to presidential records. The Justice Department argued that such deference was constitutionally required in order to protect the former president's ability to assert privilege claims under *Nixon v. Administrator*.

The D.C. Circuit, in an opinion written by Judge Silberman and joined by Judge Sentelle (both Reagan appointees) roundly rejected the Justice Department's view. The court held that the Archivist, as an executive branch official obligated to assist the incumbent president in fulfilling his constitutional duty to take care that the laws be faithfully executed, could not permissibly defer to a former president's claim of privilege if the claim was not legally proper. Thus, the court held, the Archivist (and the incumbent president) was obligated to assess independently a former president's assertion of privilege, to reject the claim if it were not well founded legally, and to release materials to the public as required by the statute if the privilege claim were rejected. The court further rejected the government's assertion – again echoed in the Bush Executive Order – that it is permissible for the Archivist to rubber-stamp a former president's privilege claim as long as a member of the public can challenge it in court. The court stated: "To say ... that [the former president's] invocation of executive privilege cannot be disputed by the Archivist, a subordinate of the incumbent President, but must rather be evaluated by the Judiciary in the first instance is in truth to delegate to the Judiciary the Executive Branch's responsibility" to carry out the law. 843 F.2d at 1479.

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The reasoning of *Public Citizen v. Burke* applies fully here, and the Bush Executive Order is plainly incompatible with it. Under the PRA, the Archivist is *required* to make materials available to the public after the expiration of the 12-year restriction period, *unless* there is some valid constitutionally based privilege that bars their release. By compelling the Archivist to withhold release of materials whenever the former president makes a claim of privilege, regardless of its legal merit, the Bush Executive Order, like the Justice Department directive struck down in *Burke*, allows current executive branch officials (including the incumbent president) to abdicate their responsibility to conform their actions to the law. Indeed, by requiring materials to be kept secret *even when the incumbent president disagrees with a former president's claim of privilege*, the Bush Order explicitly requires the executive branch to take actions the president has determined are *not* legally justified, in clear violation of the constitutional duty to execute the law faithfully and in plain defiance of the PRA. Moreover, the Bush Order goes so far as to bind the administration to support the former president's privilege claims in court even when it disagrees with them – a truly extraordinary abdication of the executive branch's obligation of fidelity to the law. In these respect, the Bush Order is even more obviously unlawful than the Justice Department directive at issue in *Burke*.

Another respect in which the Bush Order departs from the terms of the PRA and from judicial precedents involving access to presidential historical materials is in its apparent insistence that a person requesting access to presidential materials must, even after the Act's 12-year restriction period has expired, show some specific, demonstrable need for access in order to overcome executive privilege. This requirement is a departure from the plain terms of the PRA, which makes such materials available under FOIA standards – standards that do not require the showing of any specific need. See 44 U.S.C. § 2204(c)(1). Moreover, the Order conflicts with

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another ruling of the D.C. Circuit in litigation over the Nixon materials, *Nixon v. Freeman*, 670 F.2d 346 (D.C. Cir.), *cert. denied*, 459 U.S. 1035 (1982). In that decision, the Court of Appeals specifically rejected the argument that the constitutional privilege requires persons seeking access to presidential historical materials years after the president leaves office to show a specific need for access. Id. at 359. Because the privilege erodes with the passing of time, the court held that it was proper for the Archives to open materials to all comers, without a showing of need, and to place the burden on the former president to establish that particular disclosures would violate the privilege. That is exactly what the Presidential Records Act is designed to do. The new Executive Order, by contrast, turns the Act's requirement of public access on its head.

These are not the only features of the Bush Order that are legally suspect. The Order's provision that the constitutional executive privilege may be asserted by a deceased or disabled former president's family or personal representative is novel and highly debatable. The privilege is not, after all, a personal right of the former president. He is authorized to exercise it solely on behalf of the branch of government that he once headed. His family members or designees have no such claim of authority. To suggest, as does the Bush Order, that the incumbent president must defer to claims of privilege asserted not by a former officeholder, but simply by the former president's family, friends, or designees, threatens to expand the constitutional privilege beyond legitimate bounds.

5. **The Bush Order Is Bad Policy.** Beyond its legal flaws, the Bush Order threatens to subvert significantly the policies underlying the PRA. The PRA's premise is that public access to historically significant presidential records is desirable and that, once a decent interval has passed after a president leaves office, the grounds for restricting public access should be quite limited.

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The Bush Order represents a substantial threat to the PRA's fundamental goals. First, it creates the possibility that a former president may indefinitely delay access to records while he simply *considers* whether to assert a claim of privilege. Second, it permits him to declare large blocks of the materials off-limits to public access merely by asserting a claim of privilege, which the Archivist must respect however unfounded it may be, and which may only be challenged in court by a requester who can show a specific, demonstrable need for access (whatever that may mean).

This is not to suggest that the representatives of former President Reagan, or any other former president, will consciously act in bad faith to bar access to their materials. But with the ability to block access will come the temptation to use it, particularly when records that are (or may be) embarrassing to the former president or his close associates are concerned. It is easy in such a situation for a former president to confuse his own personal interest in denying access with an institutional executive branch interest that might support a claim of privilege. And experience teaches time and again that, given the chance, officials often err on the side of over-withholding materials and asserting interests in secrecy that, upon inspection, are without justification. For these reasons, it is a bad idea to give former presidents carte blanche authority to direct the Archivist to withhold materials from the public. And since this bad idea is plainly not constitutionally required, there can be no justification for enshrining it in an Executive Order.

Nor can the Bush Order's expansion of the secrecy of historical presidential records be justified, as some in the administration have suggested, on the basis of national security concerns. Even without the new Order, the Presidential Records Act and existing Executive Orders on national security classification provide ample authority to prevent the release of materials that could potentially damage national security. Simply put, the Act already provides

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protection to properly classified information even after the expiration of the 12-year restriction period, and it will continue to do so with or without the Bush Order. See 44 U.S.C. §§ 2204(a)(1) & (c)(1).

The new Order extends the secrecy not of information relating to national security, but of materials relating to communications between the former president and his advisers that do not implicate national security. The 68,000-some pages of Reagan materials that the Archives notified the White House it was prepared to release in February of this year, for example, were materials that were not subject to protection for national security reasons (or to restriction under any of the other categories that survive the 12-year limit under the Act). Rather, they had been withheld from release solely because they reflected communications between the former president and his advisers that were subject to the 12-year restriction. The new Order would allow the former President (or the incumbent) to impose an indefinite, blanket ban on release of these materials even though they contain *no* sensitive national security information.

In addition, national security reasons can provide no possible justification for the Order's provisions that effectively give a former president veto power over the release of materials by the Archivist. It is the incumbent president, not his predecessors, who has the constitutional power and duty to make judgments about the nation's security needs. If the incumbent president sees no national security justification for keeping particular materials secret, there can be no reason to allow a former president to override that determination.

In the final analysis, what the Bush Order reflects is a fundamental change in the PRA paradigm. The PRA is premised on the notion that the public is *entitled* to access to historical presidential materials subject only to defined exceptions set forth in the statute. Only for a limited, 12-year period is that access subject to restrictions imposed by the will of the former

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president. After the 12 years expire, the only limits are those imposed by the statute or – in rare cases – by constitutional doctrines of privilege.

The Bush Order reflects another model entirely. It is an attempt to resurrect the pre-PRA regime in which access to presidential materials was controlled by the former presidents (usually through restrictions in the deeds of gift through which the former presidents donated their materials to the public). Thus, the Bush Order repeatedly states that the public will be permitted access to materials only if the former president and the incumbent decide to "authorize" access.

That is not what the PRA is all about. Under the PRA, it is the statute that "authorizes" public access, whether the former president (or the incumbent) approves or not. Only in the exceptional circumstances where the former or incumbent president has a legally enforceable, constitutionally based privilege can the access authorized by the statute be denied. The Bush Order is incompatible with this statutory scheme. It is bad policy and bad law. I urge this Subcommittee to do anything it can to discourage the administration from implementing it.

Thank you.

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the principles established in that litigation are directly applicable to the issues posed by the new Executive Order.

1. **The Presidential Records Act.** The Presidential Records Act was enacted in 1978 to ensure permanent governmental control over presidential records and to broaden public access to them. In contrast to prior law, under which presidents were considered owners of all their papers, the PRA provides that presidential records are property of the federal government from the moment of their creation. Under the Act, they remain largely under the control of the president during his term in office. Once the president leaves office, however, the Act gives custody and control over the papers to the Archivist of the United States, and the National Archives and Records Administration ("NARA" or "the Archives") is responsible for processing the materials for release to the public under the terms of the Act.

Although the Act vests the Archivist with authority over presidential records, it does give former presidents the right to impose limited restrictions on public access to some of their materials. Specifically, the Act allows a president leaving office to direct that records falling within six specific categories may be kept from the public for up to 12 years after the president's last day in office. The categories of materials that may be restricted include, by way of example, information that is properly subject to national security classification, information whose release would infringe an individual's right to privacy, and trade secrets. One of the categories, and the one of most relevance for present purposes, encompasses confidential communications between the president and his senior advisers – that is, communications that are potentially within the scope of "executive privilege."

During the first five years after a president leaves office, the Act provides that none of his records will be generally available to the public, in order to allow NARA to gain control over the

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materials, move them into a presidential library, and begin the process of preparing them for public access. After the five years are up, any person may request access to presidential records, and the standards governing such a request are generally equivalent to those under the Freedom of Information Act. Between year five and year 12, however, no records that fall within any of the 12-year restriction categories may be released.

After the 12-year restriction period ends, all the former president's records become available for release to the public under FOIA standards – including, with one exception, FOIA's exemptions. The applicability of the FOIA exemptions means, for example, that classified materials, which are categorically exempt from release under FOIA, are not subject to release under the PRA even after the 12-year restriction period ends.

The one FOIA exemption that does *not* apply under the PRA is the so-called FOIA "exemption 5," which covers materials that are subject to the executive privilege. Thus, when the 12-year PRA restriction period for materials reflecting confidential communications between the president and his advisers runs out, those materials will generally not fall within any statutory exemption from public release (assuming they do not relate to national security matters). This reflects Congress' judgment that 12 years will generally be long enough to protect records containing the deliberations of the president and his advisers. After that lapse of time, the drafters of the Act concluded, the interest in public access to the historical record would outweigh any embarrassment that might otherwise attend the disclosure of the inner workings of the White House decisionmaking process.

To be sure, the Act does provide that it is not intended to limit (nor to confirm or expand) any constitutionally based privilege that may be available to the former president, or to the incumbent. And, at some level, the executive privilege is constitutionally based. But the

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Supreme Court has also emphasized that executive privilege is subject to "erosion over time" after a president leaves office. *See Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). The congressional judgment underlying the PRA is that that erosion would be such that, after the passage of 12 years, there would be little (if anything) in the president's communications with his advisers that should legitimately remain secret. To the extent that there may be some presidential communications that would remain constitutionally privileged against public release even after a lapse of 12 years, the Act's recognition of the possibility that the former president may have a constitutional privilege to assert provides the necessary safety valve to prevent any possible claim that its provisions for public access are unconstitutional.

2. The Reagan Presidential Records. To avoid problems that might result from the retroactive application of the PRA, it was made applicable beginning with the president who took office on January 20, 1981. That turned out to be President Ronald Reagan. Before leaving office, President Reagan invoked the maximum 12-year restriction for all categories of materials permitted under the Act, including the category of communications between the president and his advisers. President Reagan left office on January 20, 1989, and thus the 12-year restrictions expired on January 20 of this year, marking the first time in the history of the PRA that materials subject to the Act are available without regard to such restrictions – at least in theory.

Over the seven years that preceded the expiration of the 12-year restriction period, many requests for the release of Reagan presidential materials had been made at the new Reagan Presidential Library operated by NARA in Simi Valley, California. According to NARA estimates, over 4 million pages of records, from among the Library's total holdings of in excess of 40 million pages, had been opened to the public in response to those requests. From those files, however, NARA had withheld materials that were subject to the 12-year restriction

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imposed by President Reagan under the PRA. Among the materials withheld were about 68,000 pages of records that were withheld solely because they fell within the restriction category for communications between the former president and his advisers. In other words, these 68,000 pages were not subject to any other restriction (such as the restriction for materials that were national security classified).

When the 12-year restriction expired in January of this year, the 68,000 pages of materials reflecting communications between the former president and his advisers were no longer subject to any limitation on public access under the PRA. Accordingly, NARA advised the White House in February of this year that it intended to release those materials to the public. NARA provided this notification as required by an Executive Order issued by President Reagan shortly before he left office. That Order (Executive Order No. 12,667) provided that before the Archives released such materials, it must give at least 30 days' notice to both the incumbent and the former president, in order to give them the opportunity to assert any claim that a constitutionally based privilege prevents release of the materials. Notably, the Reagan Executive Order contemplated that if a former president made a privilege claim, the records that were the subject of the claim could still be released by NARA if the Archivist (acting subject to the direction of the incumbent president) rejected the claim of privilege. In that event, it would be up to the former president to seek judicial relief if he continued to press his claim of privilege.

Following the White House's receipt of the Archives' notice of intent to release the 68,000 pages of Reagan records, White House Counsel Gonzales three times extended the time permitted for the incumbent president's review of the materials under the Reagan Executive Order. The stated purpose of these extensions was to provide the White House Counsel's Office time to review what Mr. Gonzales referred to as "many constitutional and legal questions" raised

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by the impending release of these materials under the PRA. Pending the White House's review of those questions, the 68,000 pages of records have remained closed to the public for nearly ten months beyond the date when the restriction on their release under the PRA expired, even though no claim of a constitutionally based privilege has yet been made by the incumbent president. It is not yet known whether former President Reagan's representatives have asserted any claim of privilege as to any of the materials.

3. **The New Executive Order.** On November 1, 2001, the White House's review of "many constitutional and legal questions" culminated in the issuance of a new Executive Order governing the implementation of the PRA, which abrogates and supersedes the Reagan Order. The Bush Order sets forth procedures and substantive standards governing the assertion of claims of executive privilege by both former and incumbent Presidents following the expiration of the 12-year restriction period for materials involving communications between presidents and their advisers. The Bush Order has a number of troublesome features, which are described in detail below. The most striking of these is that it grants a former president the unfettered power to block the Archivist from releasing any materials to the public simply by making a claim of privilege (however unfounded that claim may be), leaving the burden on those who desire public access to challenge that claim in court.

The Bush Order does not only reverse the burden of seeking judicial review. It also, in contrast to the PRA (which makes access to presidential materials after the 12-year restriction period has ended available under FOIA standards that do not require requesters to show a need for access), asserts that "a party seeking to overcome the constitutionally based privileges that apply to Presidential records must establish at least a 'demonstrated, specific need' for particular

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records, a standard that turns on the nature of the proceeding and the importance of the information to that proceeding." Bush Order, § 2(c).

The Bush Order further provides that the Archivist must notify both the former president and the incumbent of any request for access to presidential records that are subject to the PRA, and must provide them with copies of the relevant records upon their request. Bush Order, § 3(a). The Order states that the former president shall review the records "as expeditiously as possible, and for no longer than 90 days for requests that are not unduly burdensome." Bush Order § 3(b). However, the Order goes on to provide that if the Archivist receives a request for an extension of time from the former president, the Archivist "shall not permit [public] access" to the materials, regardless of whether the former president's request is reasonable. *Id.* The Bush Order thus permits a former president to delay the release of materials indefinitely simply by requesting additional time to review them. Only after the former president has used whatever time he chooses to review the records must he advise the Archivist whether he "authorizes" access to the materials or whether he requests that some or all of the documents be withheld on the basis of a constitutionally based claim of privilege. Bush Order, § 3(c).

The Bush Order further provides that either concurrently with or after the review by the former president, the incumbent president has an unlimited amount of time in which to review any presidential materials that are subject to a request for access under the PRA. Bush Order, § 3(d). Upon completion of the incumbent's review process, the Order states that the incumbent is to decide whether he "concurs in" the former president's decision either to "request withholding of or authorize access to the records." Bush Order § 3(d). The Order tilts the scale in favor of secrecy by providing that "[a]bsent compelling circumstances, the incumbent President will concur in the privilege decision of the former President" and "will support" a

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former president's privilege claim "in any forum in which the privilege claim is challenged." Bush Order § 4.

When the incumbent president "concurs in" a former president's request that materials be withheld on privilege grounds, the Order provides that the incumbent shall so inform the Archivist, and that the Archivist thereafter shall not permit access to the materials unless both presidents change their minds or a court orders that the materials be released. Bush Order § 3(d)(1)(i). (Such a court order could only come about if a requester sued for access, since nothing in the PRA would permit the Archivist to bring an action against the former president or the incumbent to require that materials be released.)

Moreover, even when the incumbent president has found that there are "compelling circumstances" that require him to *disagree* with a former president's request that materials be withheld on grounds of privilege, the Bush Order provides that the Archivist is still forbidden to disclose the assertedly privileged materials to the public, "[b]ecause the former President independently retains the right to assert constitutionally based privileges." Bush Order, § 3(d)(1)(ii). Under such circumstances, the Bush Order provides that the Archivist must deny public access to the materials claimed to be privileged by the former president unless and until the incumbent president informs the Archives that both he and the former president agree to their release, or there is a final, nonappealable court order requiring that the records be released.

The Bush Order also provides that when the former president has "authorized access," the Archivist must nonetheless deny public access to records when the incumbent president so directs. Bush Order § 3(d)(2)(ii). Only when both the former president and the incumbent president "authorize access" does the Order permit the Archivist to grant public access to presidential records under the PRA. The Bush Order also forbids the Archivist to make

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presidential records available in response to judicial or congressional subpoenas unless both the incumbent and former presidents "authorize access" or there is a final, nonappealable court order requiring access. Bush Order, § 6.

Finally, the Bush Order purports to authorize private citizens other than a former president to assert constitutionally based privileges on behalf of a former president after he dies or when he is disabled. The Order provides that a former president may designate such a representative (or representatives) "to act on his behalf for purposes of the Presidential Records Act and this order." Bush Order, § 10. Upon the former president's death or disability, such a designated representative "shall act" on the former president's behalf, "including with respect to the assertion of constitutionally based privileges." *Id.* If the former president fails to designate such a representative, the Order provides that his family may do so. *Id.*

4. The Bush Order's Legal Flaws. The Bush Executive Order is fundamentally flawed, legally, constitutionally, and as a matter of policy. Although the Bush Order was described by administration officials upon its release as merely establishing a procedural mechanism for the assertion of privilege claims, the Reagan Executive Order that the Bush Order supersedes already provided more than adequate *procedures* for the assertion of privileges. What the Bush Order adds are new and improper substantive standards that displace and subvert the PRA's provisions for public access to presidential materials.

It must be remembered at the outset that the PRA is based on the concept that a president leaving office can impose only a 12-year restriction on materials reflecting communications with his advisers. Thereafter, those materials are presumptively open to the public unless they involve national security matters or other specific content exempt from disclosure, or unless they fall within the small category, which steadily diminishes with the passing of time, of materials that

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Congressional Testimony/November 6, 2001

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Thank you Mr. Chairman for the invitation to address the committee on the constitutional principle of executive privilege. Although nowhere mentioned in the Constitution, executive privilege has a long history in presidential politics. Presidents since George Washington have claimed the right to withhold information from either Congress or the judicial branch. Despite this long history and the many precedents for its exercise, executive privilege remains a controversial power. That is understandable because the very notion that a president may withhold information from those who have compulsory powers strikes at the core of our democratic principles, especially accountability in government.

My comments today focus on the proper definition of executive privilege and the evolution of its exercise. Executive privilege is a legitimate presidential power when exercised under the appropriate circumstances. Like most other presidential powers, it is limited by the legitimate needs of the other branches. Executive privilege also is limited by the democratic principle of openness in government. Therefore, throughout U.S. history claims of executive privilege have been subject to various balancing tests. No claim of executive privilege should stand merely because a president or a high ranking administration official has uttered the words "national security" or "ongoing criminal investigation". A president's claim of executive privilege must be balanced against other needs and also must meet certain standards of acceptability.

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every step of the way by the opposition party-led Congress. Reagan ultimately backed down from his several claims of executive privilege and did more to weaken the doctrine as a result (Rozell, 1994: chapters 4-5).

President George H.W. Bush did not initiate any new executive privilege procedures. The 1982 Reagan memorandum remained in effect as official executive privilege policy during the Bush years. Bush frequently withheld information without invoking executive privilege. Like Ford and Carter, he avoided the negative taint of executive privilege and generally used other bases of authority for withholding information. When the Bush administration wanted to withhold information from the Congress, it used a variety of names other than executive privilege to justify that action. Among them were "internal departmental deliberations", "deliberations of another agency", and the "secret opinions policy" (Rozell, 1994: chapter 5). The chief investigator to the House Committee on the Judiciary during the Bush years said that Bush "avoided formally claiming executive privilege and instead called it other things. In reality, executive privilege was in full force and effect during the Bush years, probably more so than under Reagan" (Lewin interview).

President Clinton used executive privilege elaborately. Unlike former president Bush, he did not conceal executive privilege. Like Nixon, he concealed wrongdoing – or tried to – by resorting to executive privilege. Like Nixon, Clinton gave executive privilege a bad name and made it difficult once again for a future president to reestablish the legitimacy of this constitutional doctrine.

In 1994, the Clinton administration issued its own executive privilege procedures. The memorandum from the special counsel to the president Lloyd Cutler stated: "The

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policy of this Administration is to comply with congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch..... [E]xecutive privilege will be asserted only after careful review demonstrates that assertion of the privilege is necessary to protect Executive Branch prerogatives. The memorandum further stated that: "Executive privilege belongs to the President, not individual departments or agencies".

The Cutler memorandum described formal procedures for the use of executive privilege and these were not significantly different from those outlined in the Reagan memorandum. In light of Clinton's aggressive use of executive privilege in the presidential scandal of 1998-1999, one sentence stands out: "In circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings" (Memorandum from Lloyd Cutler, 1994).

The Clinton administration also adopted the very broad view that all White House communications are presumptively privileged and that Congress has a less valid claim to executive branch information when conducting oversight than when considering legislation (Letters from Attorney General Janet Reno to President Clinton).[i] On several occasions the Clinton administration used executive privilege to thwart congressional investigations of alleged White House wrongdoing.

The George W. Bush Administration

The Bush administration is making far-reaching efforts to expand the scope of executive privilege. In one such case the administration has made the claim that Congress

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can be refused access to documents in the Department of Justice regarding prosecutorial matters. In this particular case the administration maintains that it has the right to refuse a congressional request for access to such documents, even though the Department of Justice has closed down the particular investigation under dispute. A congressional hearing on that controversy scheduled for September 13 was understandably postponed due the overriding emphasis on fighting terrorism. In due time Congress needs to take up this issue again because if allowed to stand, the administration's position on expanding executive privilege any time the Department of Justice utters the words "prosecutorial" would set an impossible standard for Congress to overcome in trying to conduct its oversight function. In short, it would set a terrible precedent.

Today Congress rightly is concerned about the administration's executive order that would allow executive privilege to be vastly expanded to prevent the release of past presidents' official papers. I have several reactions:

First, the handling of presidential papers is a matter that should be handled by statute and not by executive order. Presidential papers are ultimately public documents – a part of our national records - and they are paid for with public funds. They should not be treated merely as private papers.

Second, there is legal precedent for allowing an ex-president to assert executive privilege. Yet the standard for allowing such a claim is very high and executive privilege cannot stand merely because an ex-president has some personal or political interest in preserving secrecy. An ex-president's interest in maintaining confidentiality erodes substantially once he leaves office and it continues to erode even further over time.

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Third, this executive order makes it easy for such claims by former presidents to stand and almost impossible for those challenging the claims to get information in a timely way to be useful. The legal constraints will effectively delay requests for information for years as these matters are fought out in the courts. These obstacles alone will settle the issue in favor of former presidents because many with an interest in access to information will conclude that they do not have the ability or the resources to stake a viable challenge. The burden will shift from those who must justify withholding information to fall instead on those who have made a claim for access to information.

Fourth, executive privilege may actually be frivolous in this case because there are already other secrecy protections in place for national security purposes. Why expand executive privilege so dramatically to cover what is already potentially covered by existing statutes and regulations? Furthermore, a general interest in confidentiality is not enough to sustain a claim of executive privilege over old documents that may go back as far as twenty years.

Executive privilege traditionally has been limited to withholding information regarding current matters of substantial national interest. In a democratic system the presumption is generally in favor of openness, not secrecy. There is no denying that presidents have needs of confidentiality. Yet the president's current efforts appear designed to substantially tip the balance in favor of secrecy. If the president's support for limiting access to Department of Justice memoranda and this executive order are allowed to stand, the administration will be able to withhold just about any materials going back many years as long as someone in the administration utters the words "national security"

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or "prosecutorial". Congress and the American public have an interest in making sure that does not happen.

What is striking about these latest executive privilege controversies is that the administration seeks to protect secrecy in the one case over documents regarding a terminated investigation and in the other case over the presidential papers of past administrations. Usually when an administration seeks to protect secrecy with executive privilege, it does so with regard to some matter of immediate national concern. That is not to suggest that all such claims necessarily have been valid, but just that the current administration has chosen some very untraditional cases with which to expand executive privilege. Neither case fits the traditional standards for valid claims of executive privilege.

With regard to legislative-executive disputes over information, the burden is on the president to demonstrate a need for confidentiality and not on Congress to prove that it has the right to conduct oversight. Similarly, the burden should be on a president or ex-president to demonstrate a need to close off access to past presidential records and not on citizens to prove that they have a right to examine public records. The Bush administration actions on executive privilege dramatically shift the burden away from where it belongs.

Resolving Executive Privilege Disputes

Executive privilege clearly is a constitutional power when exercised under the proper circumstances. Since the Nixon years, presidents have not made effective use of that power. Some have devised means of concealing executive privilege and some have used that power improperly. Congress has shown little deference toward presidential

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secrecy. The reality is that presidents have some needs of confidentiality and Congress has investigative powers. Executive privilege inevitably leads to interbranch clashes – usually between the president and Congress, but also recently between a president and the Office of the Independent Council (OIC).

It is understandable why, especially in light of recent events, that some would find appealing a statutory definition of executive privilege or a judicial clarification of the limits of that power. Yet over the course of presidential history there has evolved an understanding of executive privilege that has been established through precedent, court decisions, and presidential declarations. Executive privilege is legitimate when it applies to two broad circumstances: (1) protecting the national security, and (2) protecting the privacy of official White House deliberations when it is in the public interest to do so. In our democratic system, the presumption must be in favor of openness. The burden is on presidents to prove that they have a compelling need for secrecy, not on those who have legitimate compulsory powers to prove that they need information.

Resolving such disputes cannot occur through statutory guidelines or court-directed definitions. The proper resolution to conflict over presidential secrecy is rooted in the separation of powers. Congress and the courts already have the institutional means to challenge executive privilege. The proper solution to the potential abuse of executive privilege is not legalistic precision, but rather for the other branches to fully use the powers that they already possess.

If members of Congress are not satisfied with the president's response to their requests for information or testimony, they have numerous options. Congress can issue a subpoena and perhaps ultimately a contempt of Congress resolution, or retaliate by

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withholding support for the president's agenda or for one or more of his nominees, or simply withhold funding for presidential favored programs. These actions give the president the option of weighing the importance of secrecy against such interbranch conflict and the problems it may cause for him. If executive privilege can be exercised only for the most compelling reasons – a real threat to the national security or compromising internal discussions in a way that will clearly harm the public – then it is not unreasonable to force the president's hand in this fashion. Presumably, information being withheld for such vital purposes would take precedence over pending legislation or a presidential appointment.

In most cases in which presidents have withheld information or testimony and Congress has retaliated in some form, presidents ultimately have either ceded to Congress's demands or worked out some form of agreement to accommodate both sides in the dispute. In my studies of the history of executive privilege I have not come across a single incident in which a president gave in to Congress's demands and thereby committed a substantial harm to the national security or created a precedent that undermined the right of confidential deliberations for his successors.

Presidents simply are not powerless in these disputes. They have the ability to rally opinion against members of Congress for bottling up the agenda, program spending, or nominations. They can shift the burden to Congress to decide how important the information they seek is and how much political heat they should withstand. Presidents also have the powers of their office to help or to frustrate the needs of individual members of Congress.

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The history of executive privilege shows that the president and Congress usually resolve these disputes and that the lack of precise legal guidelines on the use of that power has not resulted in constitutional crises. Someone gives in or there is an agreed upon accommodation. The extreme case would of course involve Congress using its power of impeachment against the president who refused to cooperate with demands for information. President Theodore Roosevelt in one case personally seized government papers and dared Congress to impeach him for doing so. But Congress could have tried to get the documents by retaliating in less dramatic ways. The key point is that in legislative-executive disputes over information, the legislative possesses the ultimate weapon of impeachment should no action short of that step resolve the situation.

Rarely does either side benefit from disputes over information that result in retaliatory measures. There are powerful incentives for both branches to reach some accommodation. One approach has been for the executive to allow a few members of Congress – for example, the chair and ranking minority member of the committee seeking the information – to privately review confidential documents. There is nothing improper with having the executive limit access to secret information to some members of Congress who can attest to the validity of the need for secrecy.

The judicial branch sometimes is a party to an interbranch dispute over access to information. President Clinton tried to shield White House information and testimony from the Office of Independent Counsel (OIC) in 1998, but a federal judge ultimately decided that the constitutional balancing test weighed in favor of the OIC's need for information. The process of accommodation is obviously more difficult between the president and a judicial entity than between a president and Congress. But the same

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principle applies: each side should use the powers already at its disposal as fully as possible.

When a dispute over information rises to the level of a constitutional crisis, the courts may get involved, as happened in the Watergate episode. The unanimous court in U.S. v. Nixon declared the privilege "constitutionally based" and that on matters of national security or foreign policy deliberations, such a power is difficult for another branch to overcome. Yet the court made it clear that the privilege may, at times, have to defer to the constitutionally based powers of the coordinate branches of the government. In that case, the need for information in a criminal trial had to outweigh any presidential claim to secrecy. The Supreme Court in that case upheld the legitimacy of the judicial to pose as a viable check on the abuse of executive privilege.

There is also considerable legal precedent for in camera review of sensitive information by the courts. Rather than compelling disclosure of information for open court review, the executive may satisfy the court in secret chambers of the need for non-disclosure. The courts have repeatedly affirmed their right to decide in particular cases whether the necessity of protecting sensitive information does indeed outweigh the need for evidence in criminal justice matters.

Disputes over executive privilege cannot be resolved with constitutional or statutory exactitude. Such disputes can best be resolved through the normal ebb and flow of politics as provided for in the system of separation of powers.

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Some scholars have argued that executive privilege is a "myth" (Berger, 1974). During the Watergate scandal former president Richard Nixon claimed that executive privilege was a power that belonged to the entire executive branch of the government and that it was not subject to any limits. Both of these views are unsupportable. The relevant debate today is over the proper scope and limits of executive privilege. Few any longer argue that executive privilege is a "myth". Fewer still cling to the belief that the privilege is an absolute presidential power not subject to the compulsory powers of the other branches. Presidents have legitimate needs of confidentiality. The other branches and the public have legitimate needs of access to executive branch information. The question is not whether executive privilege is a legitimate power, but rather how to balance competing needs when a president makes a privilege claim.

The Definition and Application of Executive Privilege

Critics of executive privilege are quick to point out that the phrase "executive privilege" does not appear in the Constitution. To be precise, that phrase was not a part of the common language until the Eisenhower administration, leading some to suggest that executive privilege therefore cannot be constitutional (Berger, 1974; Prakash, 1999). This argument ultimately fails because every president since Washington has exercised some form of what we today call executive privilege, regardless of the words used to describe their actions. As Louis Fisher has pointed out, "one could play similar word games with 'impoundment', also of recent vintage, but only by ignoring the fact that, under different names, Presidents have from an early date declined to spend funds appropriated by Congress" (Fisher, 1978: 181).

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[i] The administration draws its view that Congress lacks a compelling need for executive branch information in cases of oversight from a dubious interpretation of the D.C. Circuit Court's 1974 ruling in Senate Select Committee on Presidential Campaign Activities v. Nixon (498 F. 2d 725). Although the court did not explicitly acknowledge Congress's need for information in cases of oversight, that is not the same as saying that the court over-ruled the well-established investigative powers of legislative committees. The Reagan and Bush administrations made similarly too broad claims in this regard.

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Executive privilege is an implied power derived from Article II. It is most easily defined as the right of the president and high-level executive branch officers to withhold information from those who have compulsory power – Congress and the courts (and, therefore, ultimately the public). This right is not absolute. The modern understanding of executive privilege has evolved over a long period, the result of presidential actions, official administration policies, and court decisions.

As he did in so many areas, President Washington had a profound influence on the development of executive privilege because of the precedents he established. In the first controversy over executive withholding of information from Congress, the president decided that he indeed possessed such a power, but only if his actions were in the service of the public interest. Washington determined that he could not withhold information merely for the purpose of concealing politically damaging or embarrassing information.

The particular circumstance involved the disastrous November 1791 St. Clair military expedition against Native American Indians in which General St. Clair lost many of his troops and supplies. A huge embarrassment to the administration, Congress convened an investigation and directed the president to turn over any documents or information germane to the decision to initiate the expedition. The political temptation for the president not to cooperate was clear.

With the unanimous advice of his cabinet, the president determined that he had the right under the Constitution to withhold the information, as long as it was in the public interest to do so. Thomas Jefferson attended the Cabinet discussion and later recorded in his notes that the Cabinet members had all determined "that the executive ought to communicate such papers as the public good would permit, and ought to refuse

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those, the disclosure of which would injure the public" (Ford, 1892: 189-190). In the end Washington determined that there were no potentially serious public consequences to divulging the information and he cooperated with the congressional investigation.

That Washington turned over all information requested by Congress in this controversy leads some to argue that this incident actually argues against the constitutional legitimacy of executive privilege (Berger, 1974; Prakash, 1999). The key point is that Washington first addressed the issue of the legitimacy of presidential withholding of information from Congress and concluded that the Constitution allows such an action. And of equal importance is that Washington set the precedent for use of executive privilege to protect the public interest, not the president's own political interests. On other occasions Washington asserted a right to withhold information and he followed through on those claims.

Washington established the appropriate standard when he determined that any presidential withholding of information must be in the service of the public interest, not the administration's own political interest. Unfortunately, not all of our presidents have acted so honorably. But over the course of U.S. history executive privilege has evolved into a constitutional principal that is recognized as legitimate when used under the proper circumstances. An examination of the modern evolution of executive privilege better helps us to understand how to resolve controversies over the exercise of that power today.

Executive Privilege and the Modern Presidents

Most prominently, President Eisenhower holds the presidential record for assertions of executive privilege at more than 40. Many of those assertions amounted to refusals to comply with congressional requests for testimony from White House officials.

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Eisenhower felt so strongly about the principle that at one point he stated "any man who testifies as to the advice he gave me won't be working for me that night" (Greenstein, 1982: 205). A key event in the development of executive privilege was Eisenhower's letter of May 17, 1954 to the secretary of defense instructing department employees not to comply with a congressional request to testify about confidential matters in the army-McCarthy hearings. Eisenhower articulated the principle that candid advice was essential to the proper functioning of the executive branch and that limiting candor would ultimately harm "the public interest" (Public Papers of the Presidents, 1954: 483-484).

Although many of Eisenhower's uses of executive privilege were clearly justified, the breadth of his understanding of that power disturbed many. At one point he effectively declared that executive privilege belonged to the entire executive branch, when in fact over the course of history the practice had been to confine its use to the president and high-level White House officials when directed by the president. He declared all advice to the president not subject to the compulsory powers of the other branches, although the development of executive privilege law more recently has resulted in a key distinction between discussions about official governmental matters and those about private matters.

Eisenhower's administration originated the use of the phrase executive privilege and expanded the actual practice of that power. Members of Congress rightfully concerned about the expanded practice sought to rein in Eisenhower's successors through the articulation of standards for the use of executive privilege. Rep. John Moss (D-CA), the chairman of the House Subcommittee on Government Information, led the effort. Beginning with the Kennedy administration, Moss sent letters to successive presidents

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requesting written clarification of policy toward the use of executive privilege. President John Kennedy replied that executive privilege "can be invoked only by the president and will not be used without specific presidential approval" (Mollenhoff, 1962: 239). President Lyndon Johnson similarly responded to a letter from Moss that "the claim of 'executive privilege' will continue to be made only by the president" (Executive Privilege, 1971: 35).

Ironically, President Richard Nixon responded most forthrightly to Moss's inquiry when he wrote: "the scope of executive privilege must be very narrowly construed. Under this Administration, executive privilege will not be asserted without specific presidential approval.... I want open government to be a reality in every way possible" (Letter from President Richard M. Nixon to Rep. John E. Moss). Nixon issued the first detailed presidential memorandum specifically on the proper use of executive privilege.

> The policy of this Administration is to comply to the fullest extent possible with Congressional requests for information. While the Executive branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest, this Administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons Executive privilege will not be used without specific Presidential approval (Memorandum from President Richard M. Nixon to Executive Department Heads).

The memorandum outlined the procedure to be used whenever a question of executive privilege was raised. If a department head believed that a congressional request for information might concern privileged information, he would consult with the attorney general. The two of them would then decide whether to release the information to Congress, or to submit the matter to the president through the counsel to the president. At that stage, the president either would instruct the department head to claim executive

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privilege with presidential approval, or request that Congress give some time to the president to make a decision.

The story of Nixon's vast abuse of executive privilege is well known and analyzed in detail elsewhere (Rozell, 1994: chapter 3). Nonetheless, Nixon's response to Moss and the executive privilege memorandum were important to the development of standard procedures on the scope and application of that doctrine.

Unfortunately Nixon's practices gave executive privilege a bad name and had a profoundly chilling effect on the ability of his immediate successors either to clarify procedures or properly exercise that power. President Gerald Ford began what became a common post-Watergate practice of avoiding executive privilege inquiries and using other constitutional or statutory powers to justify withholding information. Within a week of Ford's inauguration, Rep. Moss sent his usual inquiry to the president requesting a statement on executive privilege policy (Letter from Rep. John E. Moss to President Gerald R. Ford). Unlike Presidents Kennedy, Johnson, and Nixon, Ford ignored the letter. Other members of Congress weighed in with their own requests and Ford ignored their letters too. Numerous discussions took place within the White House over the need for the president to either reaffirm or modify Nixon's official executive privilege procedures. Ford took no action on the recommendations.

The associate counsel to the president summed up the dilemma nicely when he suggested three options: (1) cite exemptions from the Freedom of Information Act as the basis for withholding information "rather than executive privilege"; (2) use executive privilege only as a last resort – even avoid the use of the phrase in favor of "presidential" or "constitutional privilege"; (3) issue formal guidelines on executive privilege

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(Memorandum from Dudley Chapman to Philip W. Buchen). Ford chose to handle executive privilege controversies on a case-by-case basis rather than to issue general guidelines. He understood that for many people "executive privilege" and "Watergate" had become joined.

President Jimmy Carter similarly did not respond to congressional requests for clarification of administration policy on executive privilege. It was not until the week before the 1980 election that the Carter administration established some official executive privilege procedures. On October 31, 1980, the White House Counsel Lloyd Cutler issued an executive privilege memorandum to White House staff and heads of units within the Executive Office of the President. The memorandum established that those considering the use of executive privilege must first seek the concurrence of the office of counsel to the president. The memorandum also emphasized that only the president had the authority to waive executive privilege (Memorandum from Lloyd Cutler, 1980). Cutler later would become counsel to the president in the Clinton administration and would write new procedures on the use of executive privilege in 1994.

On November 4, 1982 President Ronald Reagan issued an executive privilege memorandum to heads of executive departments and agencies. The Reagan procedures dovetailed closely with the 1969 Nixon memorandum. For example, Reagan's guidelines affirmed the administration policy "to comply with congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the executive branch". The memorandum reaffirmed the need for "confidentiality of some communications" and added that executive privilege would be used "only in the most compelling circumstances, and only after careful review

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demonstrates that assertion of the privilege is necessary". Finally, "executive privilege shall not be invoked without specific presidential authorization".

The Reagan memorandum developed greater clarity of procedures than before. All congressional requests must be accommodated unless "compliance raises a substantial question of executive privilege." Such a question arises if the information "might significantly impair the national security (including the conduct of foreign relations), the deliberative process of the executive branch or other aspects of the performance of the executive branch's constitutional duties". Under these procedures, if a department head believed that a congressional request for information might concern privileged information, he or she would notify and consult with both the attorney general and the counsel to the president. Those three individuals would then decide to release the information to Congress, or have the matter submitted to the president for a decision if any one of them believes that it is necessary to invoke executive privilege. At that point, the department head would ask Congress to await a presidential decision. If the president chose executive privilege, he instructed the department head to inform Congress "that the claim of executive privilege is being made with the specific approval of the president". The Reagan memorandum allowed for the use of executive privilege, even if the information originated from staff levels far removed from the Oval Office (Memorandum from President Reagan to Heads of Executive Departments and Agencies).

By avoiding executive privilege, presidents Ford and Carter actually succeeded more than Reagan did at protecting secrecy. Ford and Carter understood in the post-Watergate era the negative connotations of executive privilege. President Reagan tried to reestablish the legitimacy of executive privilege, only to be harshly criticized and fought

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To: Paul Colborn

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 12, 2001

The Honorable Stephen Horn
Chairman
Subcommittee on Government Efficiency,
Financial Management and Intergovernmental Relations
Committee on Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letters, dated November 9, 2001 and November 13, 2001, which enclosed written questions to then-Acting Assistant Attorney General Edward Whelan, following his testimony at the Subcommittee's hearing on November 6, 2001, concerning the Presidential Records Act ("PRA") and Executive Order 13233, which sets forth policies and procedures for the implementation of the PRA with respect to the possible assertion of constitutionally-based privileges by former and incumbent Presidents. We are sending a similar letter to Congressman Ose, who also sent follow-up questions regarding the hearing.

On November 28, 2001, a complaint was filed in the United States District Court for the District of Columbia, initiating a lawsuit seeking a declaratory judgment that Executive Order 13233 is unlawful and an injunction requiring the release of approximately 68,000 pages of documents that are under review pursuant to Executive Order 13233. The questions that you and Chairman Ose have posed go to the very heart of the issues raised by the complaint. The Department is representing the defendants in this action and must, therefore, respectfully decline to answer your questions at this time. I trust you will appreciate that the litigation interests of the United States require that we present our legal positions first in the court proceedings themselves, before discussing them in other forums. We have consulted the White House Counsel's Office concerning whether the Department should respond to your questions before we address these issues in court, and that Office concurs in our determination that we should first address these issues in court.

We will keep you informed regarding developments in the litigation and the ongoing review under Executive Order 13233. In the latter regard, we understand that all decisions

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regarding whether to assert privilege with respect to any of the 68,000 pages will be completed in the next several months. Please do not hesitate to contact me if you would like additional assistance regarding this or any other matter.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Janice Schakowsky
The Honorable Doug Ose
The Honorable John Tierney

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 12, 2001

The Honorable Doug Ose
Subcommittee on Government Efficiency,
Financial Management and Intergovernmental Relations
Committee on Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Ose:

This responds to your letter, dated November 8, 2001, which enclosed written questions to then-Acting Assistant Attorney General Edward Whelan, following his testimony at the Subcommittee's hearing on November 6, 2001, concerning the Presidential Records Act ("PRA") and Executive Order 13233, which sets forth policies and procedures for the implementation of the PRA with respect to the possible assertion of constitutionally-based privileges by former and incumbent Presidents. We are sending a similar letter to Chairman Horn, who also sent follow-up questions regarding the hearing.

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We will keep you informed regarding developments in the litigation and the ongoing review under Executive Order 13233. In the latter regard, we understand that all decisions

regarding whether to assert privilege with respect to any of the 68,000 pages will be completed in several months. Please do not hesitate to contact me if you would like additional assistance regarding this or any other matter.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Dan Burton
The Honorable John Tierney
The Honorable Stephen Horn
The Honorable Janice Schakowsky

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Counsel's Office, White House

Kavanaugh, Brett

Subject File

PRA (Presidential Records Act) Litigation
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9696

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Folder 1

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN HISTORICAL ASSOCIATION, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 1:01CV02447 (CKK)
THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' "NOTICE WITH RESPECT TO PROCESSING OF RECORDS"

INTRODUCTION

In the guise of a "notice to generally update the Court with respect to processing of presidential records ... and vice presidential records ... under Executive Order 13,233" (Notice with Respect to Processing of Records, at 1), the government has revealed that its justiciability arguments, which were premised on the absence of any claim of privilege by a former officeholder (or his representative) under the Executive Order, have no remaining factual basis. The government's notice and the attached letter to the Archivist from White House Counsel Alberto Gonzales disclose that former President Reagan's representative has made a claim of privilege under Executive Order 13,233 to bar the release of 74 pages of documents and 15 minutes of videotape. Under the Executive Order, with which the Archivist is complying (*see* Pl. Statement of Undisputed Facts, ¶ 8; Pl. Supp. Statement of Undisputed Facts, ¶ 5), those materials will now be withheld from the public. Because the challenged features of the Executive Order have been expressly invoked and implemented, there is no remaining doubt that the Court may proceed to resolve the merits of plaintiffs' challenge to the lawfulness of the

Executive Order. As plaintiffs have previously explained, the government's justiciability arguments were never valid, but now, with the disappearance of their factual underpinnings, they have lost any semblance of merit.

THE NOTICE'S PROCEDURAL CONTEXT AND CONSEQUENCES

A brief review of the bidding up to this point may be of assistance to the Court in understanding the impact on the justiciability issues of the facts set forth in the government's notice. The Executive Order was issued on November 1, 2001. At that time, approximately 68,000 pages of Reagan documents whose 12-year statutory restriction under the Presidential Records Act had expired in January 2001 were withheld from the public pending review pursuant to the Executive Order. Plaintiffs filed this lawsuit on November 28, 2001. Their complaint sought (1) to compel the release of the 68,000 pages of Reagan documents and (2) relief against the ongoing operation of Executive Order 13,233.

On January 3, 2002, the Archives released approximately 8,000 of the 68,000 pages of withheld documents. On February 8, 2002, plaintiffs filed their motion for summary judgment, requesting permanent injunctive and declaratory relief that would (1) require release of the remaining 60,000 pages of documents and (2) forbid further implementation of Executive Order 13,233. Simultaneously, the government filed its motion to dismiss. On the same day, the government announced that approximately 59,000 more of the Reagan records had been cleared for release under the Order, leaving about 1,000 remaining to be reviewed.

The government's motion to dismiss argued that plaintiffs' claims were largely moot to the extent they sought release of the 68,000 pages of Reagan records, and that the claims for declaratory and injunctive relief with respect to Executive Order 13,233 were nonjusticiable for lack of standing or ripeness because there had as yet been no claim of privilege by a former

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President or Vice President (or his representative), and thus no records were being withheld as a result of such a claim. The government explained its position on standing as follows: "Because neither President Bush nor former President Reagan has asserted privilege over any of the 68,000 pages, Plaintiffs cannot establish a 'causal connection' between their alleged 'injury' and [the challenged] sections of the Bush Order, which have caused Plaintiffs no harm." Def. Mem. in Support of Mot. to Dismiss, at 16. As for ripeness, the government argued that plaintiffs' "claims are not constitutionally ripe because they are directed to provisions of the Bush Order that rest, for their application, upon a future event: an assertion of privilege by an incumbent or former President." *Id.* at 22.

The parties filed simultaneous oppositions to the motions on March 8, 2002. By that time, the government had announced its intention to release all but approximately 150 of the 68,000 pages of Reagan records. The government's opposition to plaintiffs' summary judgment motion argued that plaintiffs' request for the 68,000 pages was "largely (and will soon be fully) moot." Def. Opp. to Pl. Mot. for Summary Judgment, at 8. As for plaintiffs' request for declaratory and injunctive relief against the Executive Order itself, the government's opposition again contended that it was not justiciable because no assertion of privilege had been made, and thus, plaintiffs had not been "affected in any way by the Bush Order provisions they challenge." *Id.* at 6.

Plaintiffs, in their opposition to the government's motion to dismiss, pointed out that the dispute over the 68,000 pages was not yet "moot," because 150 pages were still being withheld. As for their broader request for declaratory and injunctive relief against the operation of Executive Order 13,233, plaintiffs explained that the dispute was justiciable because the Executive Order had caused, and was continuing to cause, an ongoing injury by impeding access

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to presidential and vice presidential records during the lengthy privilege reviews that it required, and because it threatened an imminent and impending injury in the form of outright denial of access to materials once a claim of privilege was asserted. Pl. Opp. to Mot. to Dismiss, at 3-21.

The parties submitted simultaneous replies on March 22, 2002. Plaintiffs' reply on the issue of justiciability emphasized both that they had *already* suffered injury through the operation of the order and that they alleged a likelihood of imminent future injury sufficient to satisfy Article III. Pl. Reply Mem. in Support of Mot. for Summary Judgment, at 2-3. The defendants' reply, by contrast, repeated the government's position that the plaintiffs' claims for relief against the operation of the Executive Order would not satisfy Article III justiciability standards "*until a former President, Vice President, or representative unilaterally asserts a constitutional privilege over a record they seek.*" Reply in Support of Def. Mot. to Dismiss, at 11 (emphasis added). The government continued (*id.* at 12):

> The issue, for ripeness purposes, is not whether the Archivist will withhold materials upon an assertion of constitutional privilege under the Bush Order (he will). The issue is whether a former President, Vice President, or presidential/vice-presidential representative will assert a privilege, thereby requiring a withholding. See, e.g., Public Citizen v. Burke, 843 F.2d 1473, 1477 n.5 (D.C. Cir. 1988) (challenge to regulations implementing public-access provisions of the Presidential Record[ing]s and Materials Preservation Act ("PRMPA") ripe in light of former President Nixon's "pending claims of executive privilege").[1]

[1] The government's reply went on to assert that plaintiffs' challenge would not be constitutionally ripe until a former officeholder asserted a privilege with which the incumbent did not "concur" under Section 4 of the Order. *Id.* at 12-13. This contention, however, was based on the misconception that plaintiffs challenge only the Order's requirement that materials be withheld even when the incumbent does not "concur" in an assertion of privilege. *See id.* at 5. As plaintiffs have made clear, however, they challenge the lawfulness of giving a former officeholder the authority to require withholding of materials regardless of whether the incumbent finds "exceptional circumstances" that prevent him from "concurring" in the assertion of privilege. *See* Mem. of Points & Auth. in Support of Pl. Mot. for Summary Judgment, at 15.

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Four months after the filing of the parties' replies, the Archives finally released the last 150 of the 68,000 pages of Reagan records that were referred to in plaintiffs' complaint — an action that plaintiffs acknowledge moots one of the forms of relief originally requested in this action (*i.e.*, an order compelling release of the 68,000 pages), but that even defendants do not contend moots the request for declaratory and injunctive relief against the Executive Order itself. Moreover, even as the Archives was proceeding to release the 150 pages, discovery and correspondence with the Archives had revealed that there were additional Reagan records whose statutory restriction expired in January 2001 that had not been released. As set forth in the Supplemental Statement of Undisputed Facts filed by the plaintiffs in October 2002, those records, comprising 1,654 pages of documents and 15 minutes of videotape, were also subjected to review under the Executive Order after plaintiffs requested that they be released.[2] As of the time of filing of the Supplemental Statement, the records were still under review, and no determination had yet been made whether they would be subject to a claim of privilege under the Executive Order. Thus, defendants contended that the facts set forth in the Supplemental Statement "do not affect the resolution of the justiciability issue currently before the Court (i.e., the issue whether plaintiffs' facial challenge to EO 13233 is justiciable)." Def. Resp. to Pl. Supp. Statement of Undisputed Facts, at 2.

Now, after ten full months of review of the 1,654 pages of documents and 15 minutes of video, the government has announced that President Reagan's representative has claimed a constitutional executive privilege to bar release of 74 pages of the documents, as well as the 15

[2] The Supplemental Statement also provides information about the number of George H.W. Bush vice presidential records whose release was impeded, though not ultimately prevented, by review under the Order.

REV_00255320

minutes of video. White House Counsel Gonzales' letter to the Archivist states that, applying the standard of Section 4 of the Executive Order, President Bush "will concur in and support" the Reagan representative's decision to assert privilege, not because he has judged it to be proper, but rather because there is no "compelling circumstance" that, in his view, requires disclosure against the wishes of the former President's representative. Given the government's own acknowledgment that the Archivist will abide by the terms of the Executive Order (*see supra*, p. 4), it is now a certainty that these materials will continue to be withheld from the public until President Reagan's representative "authorizes" their release.

The assertion of privilege and the resultant withholding of these materials from the public suffices, even under the government's unduly restrictive theories of standing and ripeness, to make plaintiffs' claims justiciable. As demanded by the government, the precise features of the Order that are at the heart of plaintiffs' challenge have now been invoked and implemented to the injury of the plaintiffs.[3] No more could possibly be required to render the issues justiciable.[4]

[3] Plaintiffs acknowledge there has as yet been no assertion of privilege by a former Vice President, but the months of delays in the release of vice presidential records that have already occurred, while the former Vice President considered whether to "authorize" their release, are sufficient to place issues as to the validity of the Executive Order's treatment of vice presidential records before the Court.

[4] The defendants' notice states in passing that the documents and video segments now being withheld "are not subject to plaintiffs' complaint." Def. Notice with Respect to Processing of Records, at 2. That is true in the sense that the complaint did not seek to compel the release of those specific documents (since their existence was not known at the time). But it is also irrelevant. The complaint seeks not only the release of specific documents, but also relief against the operation of the Executive Order. *See* Complaint at ¶¶ 1, 58-65, and "Relief Requested" ¶¶ (iv) & (vi). The assertion of privilege as to the 74 pages and the video segments is relevant because defendants have contended that, absent such a claim of privilege, plaintiffs' challenge to the Order itself is nonjusticiable. Now that such a claim has been made, the government's own criteria for establishing injury resulting from the Executive Order have been satisfied. Thus, although these particular Reagan documents and videos were not specifically sought in the complaint, their withholding supplies the present injury and concreteness that defendants previously claimed were lacking from plaintiffs' challenge to the Executive Order.

REV_00255321

In similar circumstances, the D.C. Circuit held in *Public Citizen v. Burke*, 843 F.2d 1473, 1477 n.5 (1988), that the challenge to an OMB directive requiring the Archives to defer to former President Nixon's claims of privilege was "now ripe for review in light of former President Nixon's pending claims of executive privilege and the Archivist's expressed intention to follow the OLC memorandum." So, here, plaintiffs' challenge to Executive Order 13,233 must necessarily be justiciable now that former President Reagan, through his representative, has made claims of executive privilege, and specific documents and videotapes are being withheld from the public as a result of the Archivist's expressed intention to abide by the terms of the Executive Order and withhold those documents.

CONCLUSION

For the foregoing reasons, this Court should proceed to resolve the merits of the issues presented by plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

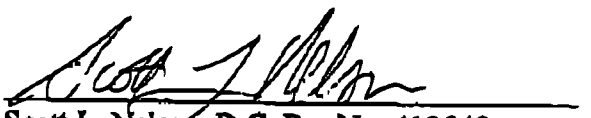

Scott L. Nelson, D.C. Bar No. 413548
David C. Vladeck, D.C. Bar No. 945063
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for Plaintiffs

April 29, 2003

REV_00255322

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2003, I caused a copy of the foregoing Plaintiffs' Response to Defendants' "Notice with Respect to Processing of Records" to be served by first-class mail and facsimile on:

Craig M. Blackwell
United States Department of Justice
Civil Division
Federal Programs Branch, Room 7130
P.O. Box 883
Ben Franklin Station
Washington, D.C. 20044

Scott L. Nelson

REV_00255323

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

[PRA (Presidential Records Act) Notifications] [1]

Box 47
Folder 2

OA/NARA #: 1825/1748
9633

REV_00255324

002

NARA GENERAL COUNSEL

04/16/2003 16:15 FAX 3018370293

REV_00255325

Notification Status Summary

Pending at the White House/Cleared by the Representative(s)

NLMS Case Number	Date Notice Sent to Reps and White House	Description	End of Expedited Review Period
NLMS 2002-023	06/27/02	74 pages and 15:38 minutes of videotape segments of Reagan Presidential records (NOTE: Reagan reps and White House approved the release of 1580 pages.) (All P5)	11/07/02
NLMS 2002-024	01/28/03	1,898 pages of Reagan Presidential records declassified in full or in part (73 pages of P5)	04/21/03
~~NLMS 2002-046~~	~~11/18/02~~	~~14,690 pages of Reagan Presidential records in full and 22 pages in part (220 pages of P5)~~	04/13/03
~~NLMS 2003-012~~	~~03/25/03~~	~~44,767 pages of Bush Presidential records~~	~~05/17/03~~
~~NLMS 2003-024~~	~~04/02/03~~	~~93 pages of Bush Presidential records~~	~~05/18/03~~
~~NLMS 2003-025~~	~~04/07/03~~	~~49 pages of Bush Presidential records~~	~~05/22/03~~
~~NLMS 2003-026~~	~~04/10/03~~	~~14 pages of Bush Vice Presidential records (no P5)~~	~~05/26/03~~

cleared 4/18

cleared 4/18

cleared 4/18

cleared 4/18

cleared 4/18

* - original notice letter attached

National Archives and Records Administration
700 Pennsylvania Avenue, NW
Washington, DC 20408-0001

VIA FACSIMILE
(NLMS 2002-024)

January 28, 2003

The Honorable Alberto R. Gonzales
Counsel to the President
The White House
Washington, D.C. 20502

Dear Judge Gonzales:

In accordance with the requirements of the Presidential Records Act (PRA), 44 U.S.C. §§2201-2207 and Executive Order 13233, this letter constitutes a formal notice from the National Archives and Records Administration (NARA) to the incumbent President of our intent to open Reagan Presidential records in response to the Freedom of Information Act (FOIA) requests, mandatory review requests and systematic processing projects listed in Attachment A.

This material, consisting of 1,898 pages, was previously restricted from release under 44 U.S.C. §2204(a)(1) and/or 5 U.S.C. §552(b)(1). In accordance with sections 3.6 and 3.7 of Executive Order 12958, archivists at the Ronald Reagan Library returned copies of these documents to the originating and equity agencies for a classification review. These documents have subsequently been declassified in whole or in part by those agencies.

Please note that NARA has previously notified the White House of our intent to release all 1,898 pages in this notification in accordance with E.O. 12667. In letters dated April 6, 2001, May 9, 2001, and July 11, 2001, NARA notified the incumbent President of our intent to release a total of 36,191 pages and 43 minutes of tape recordings, of which these records are a part. The incumbent President made no decision with respect to these three notifications as issued under E.O. 12667. Therefore, in accordance with E.O. 13233, NARA is now providing notification of our intent to open this material.

Additionally, NARA also informed former President Reagan's representative, Joanne Drake, of our intent to release these records under E.O. 12667, as part of the 36,191 pages. Even though Ms. Drake informed us then that former President Reagan had no objection to the release of these records at that time, we are now providing notice to her under E.O. 13233.

In order to fulfill the White House Counsel's Office request that NARA provide the incumbent President with document-level information about formerly classified material proposed for release as well as the agencies authorizing their declassification, copies of these Reagan Presidential records can be found at Attachment B. These copies are annotated to include a list of all reviewing agencies for each document. Further, it should be noted that 73 pages of the 1,898 pages proposed for opening in this notification contain confidential communications requesting or submitting advice that would normally have been withheld prior to January 20, 2001, under the PRA restrictions in 44

REV_00255326

U.S.C. §2204(a)(5), as they were asserted and narrowed by President Reagan. Copies of these documents have been segregated from the other documents and can be found at Attachment C.

Please inform us at your earliest convenience of your decision with respect to any privilege claims. Pursuant to E.O. 13233, NARA will not release the documents unless and until former President Reagan and the incumbent President agree to authorize access to the records.

If you have any questions relating to this request, please contact me at (202) 501-5700 or NARA General Counsel Gary M. Stern at (301) 837-3026.

Sincerely,

Nancy Kegan Smith

NANCY KEGAN SMITH
DIRECTOR
Presidential Materials Staff

Enclosure

cc: Brett Kavanaugh
Associate Counsel to the President
Paul Colborn
Office of Legal Counsel, Department of Justice
Gary M. Stern
General Counsel, National Archives and Records Administration
R. Duke Blackwood
Director, Ronald Reagan Library

REV_00255327

National Archives and Records Administration
700 Pennsylvania Avenue, NW
Washington, DC 20408-0001

VIA FACSIMILE
(NLMS 2002-046)

November 18, 2002

The Honorable Alberto R. Gonzales
Counsel to the President
The White House
Washington, D.C. 20500

Dear Judge Gonzales:

In accordance with the requirements of the Presidential Records Act (PRA), 44 U.S.C. §§2201-2207 and Executive Order 13233, this letter constitutes a formal notice from the National Archives and Records Administration (NARA) to the incumbent President of our intent to open Reagan Presidential records in response to the Freedom of Information Act (FOIA) request listed in Attachment A.

This material, consisting of 14,958 pages, has been reviewed for all applicable FOIA exemptions, resulting in a total of 268 pages restricted in whole and 22 pages restricted in part. NARA is proposing to open 14,690 pages in full and 22 pages in part. Reagan Presidential records are no longer subject to closure under the Presidential restrictive categories of the PRA. However, it should be noted that the material proposed for opening in this notice includes 220 pages of documents containing confidential communications requesting or submitting advice or other information that would normally have been withheld prior to January 20, 2001, under the PRA restrictions in 44 U.S.C. §2204(a), as they were asserted and narrowed by President Reagan. A copy of these documents is included at Attachment B. Additionally, nine pages of the records proposed for opening were declassified by Reagan Library staff using Department of State declassification guidelines. A copy of these declassified documents is included at Attachment C.

Copies of all other documents proposed for release under this notice will be provided to you upon request. We are also concurrently informing former President Reagan's representative, Joanne Drake, of our intent to release these records. Please inform us at your earliest convenience of your decision with respect to any privilege claims. Pursuant to E.O. 13233, NARA will not release the documents unless and until former President Reagan and the incumbent President agree to authorize access to the records.

If you have any questions relating to this request, please contact me at (202) 501-5700 or NARA General Counsel Gary M. Stern at (301) 837-3026.

Sincerely,

Nancy Kegan Smith

NANCY KEGAN SMITH
DIRECTOR
Presidential Materials Staff

REV_00255328

National Archives and Records Administration

700 Pennsylvania Avenue, NW
Washington, DC 20408-0001

VIA FACSIMILE
(NLMS 2003-026)

April 10, 2003

The Honorable Alberto R. Gonzales
Counsel to the President
The White House
Washington, D.C. 20502

Dear Judge Gonzales:

In accordance with the requirements of the Presidential Records Act (PRA), 44 U.S.C. §§2201-2207 and Executive Order 13233, this letter constitutes a formal notice from the National Archives and Records Administration (NARA) to the incumbent President of our intent to open Bush Vice Presidential records in response to the Freedom of Information Act (FOIA) request listed in Attachment A.

This material, consisting of 14 pages, has been reviewed for all applicable FOIA exemptions, resulting in no pages restricted in whole or in part. Therefore, NARA is proposing to open all 14 pages in full. Bush Vice Presidential records are no longer subject to closure under the Presidential restrictive categories of the PRA. However, it should be noted that the material proposed for opening in this notice contains no confidential communications requesting or submitting advice or information relating to appointment to Federal office that would normally have been withheld prior to January 20, 2001, under the PRA restrictions in 44 U.S.C. §2204(a), as they were asserted and narrowed by President Bush. *1

A copy of all records proposed for release under this notice will be provided to you upon your request. Please inform us at your earliest convenience of your decision with respect to any privilege claims. Pursuant to E.O. 13233, we are also concurrently informing former President Bush's representative, James W. Cicconi, and former President Reagan's representative, John Mintz, of our intent to release these records. NARA will not release the documents unless and until former Presidents Bush and Reagan and the incumbent President agree to authorize access to the records.

If you have any questions relating to this request, please contact me at (202) 501-5700 or NARA General Counsel Gary M. Stern at (301) 837-3026.

Sincerely,

Nancy Kegan Smith

NANCY KEGAN SMITH
DIRECTOR
Presidential Materials Staff

Enclosure

REV_00255329

National Archives & Records Administration

[redacted]

to: Brett Kavanaugh

fax #: 202-456-5104

re: Notice Letters

date: 04/16/2003

pages: 6 Pages (including cover sheet).

494
7372

From the desk of...

Gary M. Stern
General Counsel
NARA
8601 Adelphi Road
College Park, MD 20740-6001
Telephone: 301-837-3026
Fax: 301-837-0293
Email: garym.stern@nara.gov

ATTACHMENT B

National Archives and Records Administration

700 Pennsylvania Avenue, NW
Washington, DC 20408-0001

VIA FACSIMILE
(NLMS 2002-046)

November 18, 2002

The Honorable Alberto R. Gonzales
Counsel to the President
The White House
Washington, D.C. 20500

Dear Judge Gonzales:

In accordance with the requirements of the Presidential Records Act (PRA), 44 U.S.C. §§2201-2207 and Executive Order 13233, this letter constitutes a formal notice from the National Archives and Records Administration (NARA) to the incumbent President of our intent to open Reagan Presidential records in response to the Freedom of Information Act (FOIA) request listed in Attachment A.

This material, consisting of 14,958 pages, has been reviewed for all applicable FOIA exemptions, resulting in a total of 268 pages restricted in whole and 22 pages restricted in part. NARA is proposing to open 14,690 pages in full and 22 pages in part. Reagan Presidential records are no longer subject to closure under the Presidential restrictive categories of the PRA. However, it should be noted that the material proposed for opening in this notice includes 220 pages of documents containing confidential communications requesting or submitting advice or other information that would normally have been withheld prior to January 20, 2001, under the PRA restrictions in 44 U.S.C. §2204(a), as they were asserted and narrowed by President Reagan. A copy of these documents is included at Attachment B. Additionally, nine pages of the records proposed for opening were declassified by Reagan Library staff using Department of State declassification guidelines. A copy of these declassified documents is included at Attachment C.

Copies of all other documents proposed for release under this notice will be provided to you upon request. We are also concurrently informing former President Reagan's representative, Joanne Drake, of our intent to release these records. Please inform us at your earliest convenience of your decision with respect to any privilege claims. Pursuant to E.O. 13233, NARA will not release the documents unless and until former President Reagan and the incumbent President agree to authorize access to the records.

If you have any questions relating to this request, please contact me at (202) 501-5700 or NARA General Counsel Gary M. Stern at (301) 837-3026.

Sincerely,

Nancy Kegan Smith

NANCY KEGAN SMITH
DIRECTOR
Presidential Materials Staff

REV_00255332

Enclosures

cc: Brett Kavanaugh
Associate Counsel to the President
Paul Colborn
Office of Legal Counsel, Department of Justice
Gary M. Stern
General Counsel, National Archives and Records Administration
R. Duke Blackwood
Director, Ronald Reagan Library

REV_00255333

ATTACHMENT A

Case Number	Requester	Topic	Pages Processed	Pages Restricted	Pages Proposed for Opening
F97-054/5	David Welborn	Selected files from the Office of Legislative Affairs	14,958	268 in whole; 22 in part	14,690 in full; 22 in part

This request pertains to selected folders from the files of Kenneth Duberstein, Robert Kabel, and M.B. Oglesby, Jr., that pertain to their duties in the White House Office of Legislative Affairs. The records to be opened consist of material relating to a large array of issues involving the Reagan Administration's interactions with Congress between 1981 and 1986. This includes routine correspondence with members of Congress on various topics, routine information regarding proposed or pending legislation, requests for appointments, and requests for Presidential and Vice Presidential telephone calls to support various pieces of pending legislation. Also included are copies of legislation that were under consideration by Congress, reports on Congressional hearings and the testimony of various administration officials at those hearings, and memoranda regarding approaches taken by the Reagan Administration with executive agency officials and members of Congress in support of or opposition to legislation. Other records consist of memoranda that relate to appointment nominations by the President, legislative strategies employed by the Reagan Administration, and discussions concerning advice given by the Republican leadership in Congress. Finally, the chronological memoranda files maintained by these staff members in the Office of Legislative Affairs and processed for this FOIA request are generally routine in nature and document changes in various bills or relate to scheduling issues. This material contains 220 pages that would have been closed under restriction P-5 of the PRA prior to January 20, 2001. Copies of these pages can be found at Attachment B. It also includes nine pages declassified using Department of State guidelines. Copies of these pages can be found at Attachment C.

###

REV_00255334

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

#8

May 8, 1981

TO: Max

FROM: Bill Gribbin

RE: Judicial selection process - Senate role

There was long discussion at yesterday's meeting about the way the Senate will figure in the President's judicial nominations. The senior staff at the meeting all understand the traditional blue slip system. They all agree, however, that the President will simply not abide by it.

Currently, we are asking senators for at least three names for each vacancy to which they want to propose someone. Baker and Thurmond have toyed with the names being proposed seriatim. But this has not placated Senators who insist upon their traditional habit of sending up only one name.

(Senators who "named" a candidate before the Attorney General issued his guidelines in March are being grandfathered into this system and handled on a separate basis.)

The President definitely considers these his appointments under the Constitution. Meese, Baker, et al. are ready to encounter senatorial resistance and, in effect, to call upon public opinion if any of the President's choices are stalled in Judiciary.

To avoid as much trouble as we can, it was agreed to continue to accept lists of three names from everyone who will comply. In almost all cases, the President's choices will come from those lists. As Senators see judges and others being appointed from the lists of their colleagues, it is hoped they will be more likely to go along with this system.

In recalcitrant cases, a Senator may be permitted to submit three names seriatim. He takes his chances of being embarassed. He sends in a single name. We tell him it's not what we want. He sends in another. Same response. He sends down a third. We then take all three and see if the President wants any of them.

The catch to this entire system, however, is something which Senators do not yet understand, thank heaven. There will be hell to pay when they find out that, if the White House does not like anyone on their list, the President feels free to select anybody at all from their state. Someone recommended by party leaders, friends, interest groups, etc. The example Meese, Baker and others keep returning to is Illinois. (I suspect that Connecticut and Rhode Island may figure in this too, although so far there has been no problem with the Washington selections!)

c: Powell, Sherrie

REV_00255335

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

[PRA [Presidential Records Act] Notifications] [2]

Box 47
Folder 3

OA/NARA #: 1825/1743
9633

REV_00255336

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

[PRA (Presidential Records Act) Notifications] [3]

OA/NARA #: 1825/1743
9633

Box 47
Folder 4

REV_00255390

ATTACHMENT C

#1 URGENT

DEPARTMENT OF STATE

1982 FEB 25 AM 1 45

LDX MESSAGE RECEIPT
DEPARTMENT OF STATE

SITE B

S/S #

UNCLASSIFIED UPON REMOVAL OF CLASSIFIED ENCLOSURE(S)

MON 6/28/02

LDX MESSAGE NO. 02489 CLASSIFICATION ~~CONFIDENTIAL~~ No. Pages 4

FROM: TOEnders (Officer name) ARA (Office symbol) 29201 (Extension) 6263 (Room number)

MESSAGE DESCRIPTION Memo to Members of CBI Management Group

LDX TO: (Agency)	DELIVER TO:	Extension	Room No.
White House	Pamela Turner	456-6782	
"	David Gergen	456-7873	
"	Ken Duberstein	456-2230	
"	John Dressendorfer	456-7766	
"	Red Cavaney/Elizabeth Dole	456-2613	
"	Diana Lozano	456-6246	
"	~~Mort~~ Allin	456-2947	

REMARKS: FOR: CLEARANCE [ ] INFORMATION [X] PER REQUEST [ ] COMMENT [ ]

S/S Officer: [signature]

REV_00255421

URGENT

#3

URGENT

82 FEB 25 P5:38

WASHFAX RECEIPT
DEPARTMENT OF STATE

S/S #

MSN 1/27/02

MESSAGE NO. 02584 CLASSIFICATION ~~CONFIDENTIAL~~ No. Pages 2

FROM: T.O.Enders (Officer name) ARA (Office symbol) 29210 (Extension) 6263 (Room number)

MESSAGE DESCRIPTION Memorandum re CBI Follow-up

TO: (Agency)	DELIVER TO:	Extension	Room No.
NSC	Mr. Richard Childress	395-3576	OEOB
"	Mr. Henry Nau	395-6961	392 OEOB
"	Mr. Roger Fontaine	395-5694	"
"	Mr. C. Shoemaker	395-5865	386 "
"	Mr. Richard Pipes	395-5646	368 "
"	NSC/S		

FOR: CLEARANCE ☐ INFORMATION ☒ PER REQUEST ☐ COMMENT ☐

REMARKS: PLEASE CALL ADDRESSEES FOR PICK UP

PAGE ONE OF TWO ADDRESSEES

S/S Officer: [signature]

REV_00255423

#5 4 of 5

URGENT

WASHFAX RECEIPT
DEPARTMENT OF STATE

IB

S/S #

URGENT

6/27/02 MSN

MESSAGE NO. _____ CLASSIFICATION CONFIDENTIAL No. Pages 2

FROM: John A. Bushnell (Officer name) _____ (Office symbol) ARA/LA (Extension) 6263 (Room number)

MESSAGE DESCRIPTION Memorandum

TO: (Agency)	DELIVER TO:	Extension	Room No.
Treasury	Mr. David Pickford	566-2269	3407

FOR: CLEARANCE ☐ INFORMATION ☒ PER REQUEST ☐ COMMENT ☐

REMARKS: PLEASE CALL ADDRESSEE

S/S Officer: _____

REV_00255424

#6

Copy 5 of 5

WASHFAX RECEIPT
DEPARTMENT OF STATE

B

S/S #

MSN 6/27/06

MESSAGE NO. _____ CLASSIFICATION ~~CONFIDENTIAL~~ No. Pages 2

FROM: John A. Bushnell (Officer name) | ARA (Office symbol) | 24754 (Extension) | 6263 (Room number)

MESSAGE DESCRIPTION Memorandum

TO: (Agency)	DELIVER TO:	Extension	Room No.
DOD	Francis J. West	695-4351	

FOR: CLEARANCE ☐ INFORMATION ☒ PER REQUEST ☐ COMMENT ☐

REMARKS: _____

S/S Officer: _____

7254

URGENT

#7

DEPARTMENT OF STATE

1982 FEB 25 AM 9 46

LDX MESSAGE RECEIPT
DEPARTMENT OF STATE

SITE B

S/S #

NSA 6/27/02

LDX MESSAGE NO. 02489 CLASSIFICATION ~~CONFIDENTIAL~~ No. Pages 4

FROM: TOEnders (Officer name) ARA (Office symbol) 29201 (Extension) 6263 (Room number)

MESSAGE DESCRIPTION Memo to Members of CBI Management Group

LDX TO: (Agency)	DELIVER TO:	Extension	Room No.
White House	Pamela Turner	456-6782	
"	David Gergen	456-7873	
"	Ken Duberstein	456-2230	
"	John Dressendorfer	456-7766	
"	Red Cavaney/Elizabeth Dole	456-2613	
"	Diana Lozano	456-6246	
"	~~Mort~~ Allin	456-2947	

REMARKS: FOR: CLEARANCE [ ] INFORMATION [X] PER REQUEST [ ] COMMENT [ ]

S/S Officer: Oli Ethun

REV_00255426

#7a

DEPARTMENT OF STATE

1982 FEB 19 PM 3:05

URGENT

PJ

02408

WASHFAX RECEIPT
DEPARTMENT OF STATE

B

S/S #

82 FE 19 P3:14

URGENT

MJM 6/27/02

MESSAGE NO. _____ CLASSIFICATION ~~CONFIDENTIAL~~ No. Pages 3

FROM: John A. Bushnell (Officer name) ARA (Office symbol) 632-4754 (Extension) 6263 (Room number)

MESSAGE DESCRIPTION DECISIONS AND ASSIGNMENTS: FEBRUARY 18 MANAGEMENT GROUP MEETING

TO: (Agency)	DELIVER TO:	Extension	Room No.
WHITE HOUSE	Mort Allin	456-2947	
	Elizabeth Dole	456-2613	
	Pamela Turner	456-6782	
	David Gergen	456-7873	
	Ken Duberstein	456-2230	
	John Dressendorfer	456-7766	
	Diana Lozano	456-6246	
	Red Cavaney	456-2613	

FOR: CLEARANCE ☐ INFORMATION XX PER REQUEST ☐ COMMENT ☐

REMARKS: FOR REVIEW BEFORE MEETING IN OEOB AT 5:30 P.M., FEBRUARY 19

S/S Officer: [signature]

REV_00255427

DEPARTMENT OF STATE

Washington, D.C. 20520

~~CONFIDENTIAL~~

Attached

#8

February 18, 1982

TO: See Distribution

FROM: ARA/ECP - Robert J. Ryan

SUBJECT: CBI Legislative & Public Relations Strategy

I would like to hold another brief meeting Friday at 3:00 p.m. in the ECP Conference Room (entrance rm. 3234)

Attached is a paper providing an overview on our Legislative and Public Relations strategy. Our job in the next few days is to fill in the details.

JHPenfold;bwl
x20981

REV_00255428

PRA (Presidential Records Act) Policy Drafts

Counsel's Office, White House

Kavanaugh, Brett

Subject File

OA/NARA#: 341/237
9122

Box 47

Folder 5

REV_00255429

570147
FG006-04

Charlotte L. Montiel
01/13/2003 01:48:20 PM

Record Type: Record

To: Terry W. Good/WHO/EOP@EOP

cc:
Subject: files for Leitch

Terry,
David Leitch needs to see some of Tim Flanigan's old files. Can you get someone to pull those and get them to him? Thank you so much!
Charlotte

Here are the files:

Abortion
ADAG Candidate Resumes
Agency General counsel Resumes
Allen Senator George
Ambassador Contributil and Fundraising Roles
Appt/Removal Power
Blue Slip Policy
Clearance Process
Clearance Process
Clearance Standards
Clearance Issues
COG
Constitution's Requirement for the President to Sign Bills
Contact w/Agencies
Counseling for WH staff
Continuity of Operations Document
Court of Appeals Candidate
Counsel's Salary Info
Deputies Committee
DOJ WH Contact
Emergency Phone Numbers
Email records
EOP Security Briefing
EOP Organizations
Ethics--- Postemployment Restrictions
FBI/PAS Nomination Progress Tracking
Federalism Executive Order
Federalism Working Group
Gift Procedures
Gift Registry
Governors Island
Guidelines for Potential Appointees
Holocaust Memorial Council
Intern Program
Interns
Judicial Confirmation

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Phil:

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Subject File

PRA (Presidential Records Act) Reagan Records
[1]

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REV_00255432

Rachael L. Sunbarger 11/01/2001 07:45:27 PM

Record Type: Record

To:

cc:
Subject: EXECUTIVE ORDER: FURTHER IMPLEMENTATION OF THE PRESIDENTIAL RECORDS ACT

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release November 1, 2001

EXECUTIVE ORDER

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FURTHER IMPLEMENTATION OF THE PRESIDENTIAL RECORDS ACT

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish policies and procedures implementing section 2204 of title 44 of the United States Code with respect to constitutionally based privileges, including those that apply to Presidential records reflecting military, diplomatic, or national security secrets, Presidential communications, legal advice, legal work, or the deliberative processes of the President and the President's advisors, and to do so in a manner consistent with the Supreme Court's decisions in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), and other cases, it is hereby ordered as follows:

Section 1. Definitions.

For purposes of this order:

(a) "Archivist" refers to the Archivist of the United States or his designee.

(b) "Presidential records" refers to those documentary materials maintained by the National Archives and Records

Administration pursuant to the Presidential Records Act, 44 U.S.C. 2201-2207.

(c) "Former President" refers to the former President during whose term or terms of office particular Presidential records were created.

Sec. 2. Constitutional and Legal Background.

(a) For a period not to exceed 12 years after the conclusion of a Presidency, the Archivist administers records in accordance with the limitations on access imposed by section 2204 of title 44. After expiration of that period, section 2204(c) of title 44 directs that the Archivist administer Presidential records in accordance with section 552 of title 5, the Freedom of Information Act, including by withholding, as appropriate, records subject to exemptions (b)(1), (b)(2), (b)(3), (b)(4), (b)(6), (b)(7), (b)(8), and (b)(9) of section 552. Section 2204(c)(1) of title 44 provides that exemption (b)(5) of section 552 is not available to the Archivist as a basis for withholding records, but section 2204(c)(2) recognizes that the former President or the incumbent President may assert any constitutionally based privileges, including those ordinarily encompassed within exemption (b)(5) of section 552. The President=s constitu-tionally based privileges subsume privileges for records that reflect: military, diplomatic, or national security secrets (the state secrets privilege); communications of the President or his advisors (the presidential communications privilege); legal advice or legal work (the attorney-client or attorney work product privileges); and the deliberative processes of the President or his advisors (the deliberative process privilege).

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(b) In *Nixon v. Administrator of General Services*, the Supreme Court set forth the constitutional basis for the President's privileges for confidential communications: "Unless [the President] can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." 433 U.S. at 448-49. The Court cited the precedent of the Constitutional Convention, the records of which were "sealed for more than 30 years after the Convention." *Id.* at 447 n.11. Based on those precedents and principles, the Court ruled that constitutionally based privileges available to a President "survive[] the individual President's tenure." *Id.* at 449. The Court also held that a *former* President, although no longer a Government official, may assert constitutionally based privileges with respect to his

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Administration's Presidential records, and expressly rejected the argument that "only an incumbent President can assert the privilege of the Presidency." *Id.* at 448.

(c) The Supreme Court has held that a party seeking to overcome the constitutionally based privileges that apply to Presidential records must establish at least a "demonstrated, specific need" for particular records, a standard that turns on the nature of the proceeding and the importance of the information to that proceeding. See *United States v. Nixon*, 418 U.S. 683, 713 (1974). Notwithstanding the constitutionally based privileges that apply to Presidential records, many former Presidents have authorized access, after what they considered an appropriate period of repose, to those records or categories of records (including otherwise privileged records) to which the former Presidents or their representatives in their discretion decided to authorize access. See *Nixon v. Administrator of General Services*, 433 U.S. at 450-51.

Sec. 3. Procedure for Administering Privileged Presidential Records.

Consistent with the requirements of the Constitution and the Presidential Records Act, the Archivist shall administer Presidential records under section 2204(c) of title 44 in the following manner:

(a) At an appropriate time after the Archivist receives a request for access to Presidential records under section 2204(c)(1), the Archivist shall provide notice to the former President and the incumbent President and, as soon as practicable, shall provide the former President and the incumbent President copies of any records that the former President and the incumbent President request to review.

(b) After receiving the records he requests, the former President shall review those records as expeditiously as possible, and for no longer than 90 days for requests that are not unduly burdensome. The Archivist shall not permit access to the records by a requester during this period of review or when requested by the former President to extend the time for review.

(c) After review of the records in question, or of any other potentially privileged records reviewed by the former President, the former President shall indicate to the Archivist whether the former President requests withholding of or authorizes access to any privileged records.

(d) Concurrent with or after the former President's review of the records, the incumbent President or his designee may also

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review the records in question, or may utilize whatever other procedures the incumbent President deems appropriate to decide whether to concur in the former President's decision to request withholding of or authorize access to the records.

(1) When the former President has requested withholding of the records:

(i) If under the standard set forth in section 4 below, the incumbent President concurs in the former President's decision to request withholding of records as privileged, the incumbent President shall so inform the former President and the Archivist. The Archivist shall not permit access to those records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

(ii) If under the standard set forth in section 4 below, the incumbent President does not concur in the former President's decision to request withholding of the records as privileged, the incumbent President shall so inform the former President and the Archivist. Because the former President independently retains the right to assert constitutionally based privileges, the Archivist shall not permit access to the records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

(2) When the former President has authorized access to the records:

(i) If under the standard set forth in section 4 below, the incumbent President concurs in the former President's decision to authorize access to the records, the Archivist shall permit access to the records by the requester.

(ii) If under the standard set forth in section 4 below, the incumbent President does not concur in the former President's decision to authorize access to the records, the incumbent President may independently order the Archivist to withhold privileged records. In that instance, the Archivist shall not permit access to the records by a requester unless and until the incumbent

President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 4. Concurrence by Incumbent President.

Absent compelling circumstances, the incumbent President will concur in the privilege decision of the former President in response to a request for access under section 2204(c)(1). When the incumbent President concurs in the decision of the

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former President to request withholding of records within the scope of a constitutionally based privilege, the incumbent President will support that privilege claim in any forum in which the privilege claim is challenged.

Sec. 5. Incumbent President's Right to Obtain Access.

This order does not expand or limit the incumbent President's right to obtain access to the records of a former President pursuant to section 2205(2)(B).

Sec. 6. Right of Congress and Courts to Obtain Access.

This order does not expand or limit the rights of a court, House of Congress, or authorized committee or subcommittee of Congress to obtain access to the records of a former President pursuant to section 2205(2)(A) or section 2205(2)(C). With respect to such requests, the former President shall review the records in question and, within 21 days of receiving notice from the Archivist, indicate to the Archivist his decision with respect to any privilege. The incumbent President shall indicate his decision with respect to any privilege within 21 days after the former President has indicated his decision. Those periods may be extended by the former President or the incumbent President for requests that are burdensome. The Archivist shall not permit access to the records unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 7. No Effect on Right to Withhold Records.

This order does not limit the former President's or the incumbent President's right to withhold records on any ground supplied by the Constitution, statute, or regulation.

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Sec. 8. Withholding of Privileged Records During 12-Year Period.

In the period not to exceed 12 years after the conclusion of a Presidency during which section 2204(a) and section 2204(b) of title 44 apply, a former President or the incumbent President may request withholding of any privileged records not already protected from disclosure under section 2204. If the former President or the incumbent President so requests, the Archivist shall not permit access to any such privileged records unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 9. Establishment of Procedures.

This order is not intended to indicate whether and under what circumstances a former President should assert or waive any privilege. The order is intended to establish procedures for former and incumbent Presidents to make privilege determinations.

Sec. 10. Designation of Representative.

The former President may designate a represen-tative (or series or group of alternative representatives, as the former President in his discretion may determine) to act on his behalf for purposes of the Presidential Records Act and this order. Upon the death or disability of a former President, the former President's designated represen-tative shall act on his behalf for purposes of the Act and this order, including with respect to the assertion of constitutionally based

privileges. In the absence of any designated representative after the former President's death or disability, the family of the former President may designate a representative (or series or group of alternative representa-tives, as they in their discre-tion may determine) to act on the former President's behalf for purposes of the Act and this order, including with respect to the assertion of constitutionally based privileges.

Sec. 11. Vice Presidential Records.

(a) Pursuant to section 2207 of title 44 of the United States Code, the Presidential Records Act applies to the executive records of the Vice President. Subject to subsections (b) and (c), this order shall also apply with respect to any such records that are subject to any constitutionally based privilege that the former Vice President may be entitled to invoke, but in the administration of this order with respect to such records,

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references in this order to a former President shall be deemed also to be references to the relevant former Vice President.

(b) Subsection (a) shall not be deemed to authorize a Vice President or former Vice President to invoke any constitutional privilege of a President or former President except as authorized by that President or former President.

(c) Nothing in this section shall be construed to grant, limit, or otherwise affect any privilege of a President, Vice President, former President, or former Vice President.

Sec. 12. Judicial Review.

This order is intended to improve the internal management of the executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party, other than a former President or his designated representative, against the United States, its agencies, its officers, or any person.

Sec. 13. Revocation.

Executive Order 12667 of January 18, 1989, is revoked.

GEORGE W. BUSH

THE WHITE HOUSE,
November 1, 2001.

# # #

Forward to Brett? Y - N

Anne Womack
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Subject: Gonzales roundtable w/press

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Ellen E. Eckert

11/01/2001 05:55:35 PM

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THE WHITE HOUSE

Office of the Press Secretary

Internal Transcript November 1, 2001

PRESS ROUNDTABLE WITH
WHITE HOUSE COUNSEL ALBERTO GONZALES

Room 180
Dwight D. Eisenhower Executive Office Building

1:20 P.M. EST

JUDGE GONZALES: We're here to talk about presidential records. Before 1978, presidential records belonged to the outgoing President of the United States, and they would make

inappropriate and something that would be threatening to the nation? You just said those would be two standards, something that might be inappropriate or something that would be threatening to the nation. Could you distinguish the two?

JUDGE GONZALES: Well, the standard would be whether or not it satisfies the constitutional requirements for fitting in one of the recognized privileges.

Q On the Reagan documents, the 68,000 pages of Reagan documents, tell me again, where are you on that? You are still opposed to that release? You indicated they were going to be released?

JUDGE GONZALES: Well, I don't know what specific requests have been made of the archivist. I do know there have been --

Q The Washington Post reported this morning that you -- that this administration had blocked the release of 68,000 pages of documents that the Reagan administration wanted to be made public. Where are you on --

JUDGE GONZALES: I disagree with that.

Q You did -- that is not accurate?

JUDGE GONZALES: The Reagan representative is on board with this process and supports this process.

Q So therefore -- are we talking about the same thing here?

Q Those records were supposed to be released, by law, in January.

JUDGE GONZALES: They're available for release, but the statute makes quite clear -- makes quite clear that the statue in no way limits the constitutional prerogatives or privileges available to an incumbent President, or a former President. So on January --

Q Those are not national security documents, those are simply policy documents, and policy deliberation documents.

JUDGE GONZALES: But there may be implications for national security reasons. We don't know that. We don't know that, because --

Q Some historians are saying to us that the administration is using this current war on terrorism as a reason to champion national security as a reason to hold back on presidential records.

JUDGE GONZALES: We began this process back in May --

Q And also they say that this is just one more indication of the administration's attempts to restrict access to government records.

JUDGE GONZALES: Well, again, I think this not inconsistent with the battles that -- not battles, but the disagreements that have arisen between an administration and a Congress with respect to access to information. And all we have done here -- again, we have not created any new privileges, we haven't created any new obstacles. We've simply implemented an orderly process to deal with this information.

Q May I go back over two things, please, Judge? First, would you explain to us again why you felt it necessary to write a new executive order to replace the Reagan-era executive order? And, second, I'd like to return to the Freedom of Information question. The Post article says that for documents which are not covered by constitutionally based privileges, but are subject to requests under FOIA, the order states that the archivist "must withhold, if possible."

JUDGE GONZALES: I disagree with that. If there is no constitutional basis to assert a privilege, then the archivist -- the mandate on the archivist relates to a decision by a President or a former President. Whether or not that decision by a President or former President is in fact a legitimate one is one that has to be grounded on constitutional precedent.

Q Could you restate the reason for rewriting the executive order?

JUDGE GONZALES: The Reagan documents -- the Reagan executive order does not take into account the desires of a former President. It basically gives entirely the decision about what to do with documents to the incumbent President. We felt that that was inconsistent with Supreme Court precedent, which says that a former President, even though the former President is out of office, still has the ability and right to assert constitutional privileges.

And we also felt it was simply bad policy. We felt that the former President had as much, if perhaps not even more, of a right to decide what happens to his documents. And that was the reason that the executive order will be rescinded.

Q Former Presidents were, at one point, as I understand, given national security briefing updates. Is this still the case? And if that's the case, wouldn't they have a basis, given that information, to make a decision on what documents they want to release?

JUDGE GONZALES: Even if that is true today -- and I'm not going to confirm whether that's true today -- you don't know. I

mean, I would venture to guess that that former President is not going to have all of the same information that an incumbent President has, and that the incumbent President will always have more information, and may be in a better position -- well, will be in a better position to decide whether or not the release of documents of a former President do, in fact, jeopardize, say, the national security of this country.

Q So you're not going to confirm whether they get updates or not?

JUDGE GONZALES: No.

Q Well, what if a document has been released? Will that be released in perpetuity, so anybody can have access to that same document? Do you envision a process where large categories of documents will be reviewed, and then just opened, released for anyone?

JUDGE GONZALES: It would be like a FOIA request. Someone makes a request for -- these documents, I guess they would be catalogued; and you say, I want documents one through 50. The archivist will then provide a copy to the former President, and the incumbent President. We will review them, the former President's representative will review them, and make a decision whether or not those documents should be released. If they should be, then they get released to the person who requested the documents.

Q So every time somebody wants documents one-two-three, that has to go through that process?

JUDGE GONZALES: Will we go through that process? I don't believe it will go through that process.

Q Okay, so once it's been released, it will be rubber-stamped?

JUDGE GONZALES: It's out in the public domain.

Q And that process you outlined has to happen in 90 days, is that correct?

JUDGE GONZALES: Yes. We call for it to happen in 90 days, if at all possible.

Q Accepting the possibility that something like this becomes law, let's think for a minute about the court challenge. I mean, if you've got a secret document, and we, you know --

JUDGE GONZALES: It's not a secret document.

Q A withheld document that is not part of the public domain.

JUDGE GONZALES: It's a privilege document.

Q A privilege document. How do you have a court proceeding? How does a court proceeding work, and how can the public be satisfied that legitimate standards have been --

JUDGE GONZALES: Well, the statute clearly provides that, with respect to a former President who wants to assert a privilege, that the court of original jurisdiction is the District Court for the District of Columbia. And at that point, the President will have to come in and prove the privilege -- assert the privilege. The requester will have to show compelling circumstance or need to override that privilege.

Q Can I back up to when you all got -- you all got this sort of voluminous request for records from the Reagan Library. Where in the process did you all get to the point where you decided, look, we need to either formalize this, or -- what was it that created a trigger?

JUDGE GONZALES: Well, we realized very early we didn't have a process to deal with this.

Q Right, and you could have just developed a process. You didn't have to move to the point where you formalized this --

JUDGE GONZALES: Well, we wanted a process that was binding upon the archivist, who is within the executive branch, and the best way to do that is through an executive order. And that's why we did it through this process.

Q But you could not -- you don't believe that the archivist would have simply worked with you all on this? If all of these exemptions -- if you all aren't really writing any new law with this, and if this is, as you say, simply a matter of process, and setting down some clear dates, and that sort of thing, then why did you not believe the archivist would have simply worked with you? Why did you need to rise and take this to the level of an executive order?

JUDGE GONZALES: I guess we wanted to give comfort to the American people that we would have a process in place to ensure that within a reasonable period of time most documents would be released in due course.

Q Judge, is there any -- pardon me if you've already mentioned this, but has there been an instance where a past President has agreed to release papers --

JUDGE GONZALES: Oh, sure.

Q No -- that eventually endangered national security,

that actually breached national security somewhere along the line?

JUDGE GONZALES: I'm not aware of that. But, again --

Q Then why would you need a new process to make sure that doesn't happen in the future? The system then was working, was it not?

JUDGE GONZALES: Well, the difference is that, of course, before, those papers belonged to the former President. Now, these papers belong to the United States of America. So there is a difference. There is a difference.

Q How much input did the Bush Library have in this? Do they have any big document requests pending that they're worried about?

JUDGE GONZALES: I don't know of any document requests. But we did consult with former President Bush's representative on it.

Q Is the burden on proof on the historian or the scholar, if this goes to court, to prove that the President who asserts, the former President or the administration is --

JUDGE GONZALES: Major, I'm not certain, so I don't want to answer that question. I don't know. I just don't know the answer to that question.

Q Judge, can I ask on what you just said about -- that this process now, before, the papers belonged to the former President, and now they belong to the United States of America. This sounds to me -- I mean, coming late, but a major change.

JUDGE GONZALES: A major change from --

Q From once belonging to the former Presidents to --

JUDGE GONZALES: I began my remarks by explaining that before 1978, presidential records belonged to the outgoing President. So President Kennedy, President Nixon, President Carter, when they left office, their documents went with them. And they would decide, entirely on their own, which documents to release, on what timetable they would release those documents -- they could refuse to release any documents they wanted to for whatever reason.

In 1978, the Presidential Records Act was passed -- it was made effective, I think, in 1981 -- which basically provided that hereinafter, the presidential records of an outgoing President would belong to the National Archives. The Congress made quite clear that there would be limitations, restrictions on access to presidential records. And this executive order was passed merely to implement an orderly process to deal with requests for

presidential records.

Q So one of your goals is to bring the former Presidents back into it?

Q Right, it doesn't sound like you're ensuring that the public has a clear set of guidelines, it sounds like this executive order guarantees a former President a new sense of authority in terms of what they can control and --

JUDGE GONZALES: No, this executive order doesn't create that. Again, the law clearly recognizes that a former President has a constitutional privilege that can be asserted even without this executive order. What we've done is simply implement a process, in terms of educating American citizens, about how that privilege is going to rightfully be asserted.

Q And it also is a process by which the former President can execute those privileges.

JUDGE GONZALES: Sure.

Q If the court gave them the privileges, then it may have been unclear to former Presidents about how and when they should insert themselves in the process, if they want to implement or exercise. This process gives the former Presidents a clear --

Q Blueprint.

Q Blueprint, right -- of how then to exercise any kind of exemptions or objections, if they may want to; is that not also what this does?

JUDGE GONZALES: It does not -- I think it's giving us too much credit to say that we're providing a blueprint as to how a former President can assert a privilege. I think a former President knows very well how to assert a privilege, and when that privilege can be asserted.

Q Other than reasons of national security, what other reasons can you see a current President or former President saying, these papers shouldn't be released?

JUDGE GONZALES: Again, I don't want to get into that. There could be circumstances I just can't foresee, so --

Q Well, they're on the law, aren't they? That's in the law, isn't it?

JUDGE GONZALES: Yes, but it's all very fact-specific, depending upon the facts, and depending upon the document that's being requested.

Q Judge, you mentioned a moment ago that if a scholar or

historian takes a President to court, that scholar or historian would need to prove a "compelling need" for the document. Is that a judicially defined term of art?

JUDGE GONZALES: Yes. If you want to check with me later, I can give you the exact language from the U.S. Supreme Court case of Nixon v. Administrator of General Services, where the Court said what has to be shown to overcome a constitutionally based privilege. Don't tie me to those words. I can't remember now -- compelling, or something. Compelling need, or --

Q But there is a judicially defined standard by which a scholar or historian --

JUDGE GONZALES: Yes, there is.

Q -- would have to meet, to prove to the judge, to adjudicate this case, that there was this need to get this past the assertion of either a current President or a former President's privilege?

JUDGE GONZALES: Right. This is not a standard that we've made up. This is a standard that's recognized by the U.S. Supreme Court.

Q Judge, so that we may describe this as precisely as possible, would you be willing to make available to us the draft of the executive order?

JUDGE GONZALES: No.

Q Why not? You know, you're asking for --

JUDGE GONZALES: First of all, it may change. And, hopefully, we'll get it done quickly, and at that point you'll have a copy of the signed executive order.

Q Earlier you said in most cases 90 days, or you would try to make it?

JUDGE GONZALES: Yes.

Q Will it -- are there specific provisions in the order for going beyond 90 days --

JUDGE GONZALES: The order says 90 days. The truth of the matter is, if there's a request for 68,000 documents, and the Reagan representative has to review 68,000 documents, the Reagan representative may not be able to get it done in 90 days. It may take him 95 days. And so --

Q Well, it could take him 10 years. Is there any -- is there some specific end point to the review? Ninety days or never?

JUDGE GONZALES: Our objective, again, is to try to have the decision made within 90 days. Obviously, we have limited control upon the representative of a former President. But we would certainly do what we can, what we could do to ensure that we would have a decision within 90 days. That's our goal. We're going to make a good faith effort to make sure the decision is made with 90 days. And so we'll know where we're at in 90 days.

Q Obviously, that's not a binding requirement, and this could, in fact, if it's a document request like this, could take not weeks, not months, but years; isn't that true?

JUDGE GONZALES: I don't know how long it would take. Again, our objective is to try to get an answer to these requests as soon as possible.

Q Is 90 days in the executive order?

JUDGE GONZALES: Yes, 90 days is in the executive order.

Q Is it your goal, Judge, or will it be the goals of the administration on its end, to make its decision within 90 days?

JUDGE GONZALES: Absolutely.

Q So when do you hope to put this out?

JUDGE GONZALES: As soon as we can. I mean, we're still -- we need to finalize it, and get it approved by the President. And we'll get it out as soon as we can.

Q I realize that this isn't your purview, Judge, but it's hard to escape the suspicion that there could be political motives for not disclosing materials which might apply to people who served in this administration, who have served in past administrations -- the Reagan administration to begin with. And that is one thing, I guess, that has put this whole thing under a cloud of suspicion for many who look at it. I know that's not to do with the legality of it, but I think that's the elephant in the room here.

JUDGE GONZALES: Is there a question there?

Q Nope. (Laughter.) Not unless you care to respond to it.

Q I have a question. Do you have concerns about that perception?

Q Yes. Is there no response to that?

Q How concerned are you about the perception, no matter how diligently this is reported, that this administration is

doing everything it can to withhold information?

JUDGE GONZALES: Well, first of all --

Q And using the war as cloak.

JUDGE GONZALES: First of all, again, it wasn't until August, after the executive order had really been drafted, that we even looked at the contents. We don't know what's in those documents. There may, in fact, be embarrassing documents. There may not be any embarrassing documents. We don't know.

If a document is embarrassing, and we assert a privilege, we're going to lose when that claim is litigated. We're going to lose, because that's not a legitimate reason to assert a privilege.

Q But that would be years down the road, wouldn't it, Judge?

JUDGE GONZALES: I don't know how long it will take. I don't know how long. But the bottom line is that this administration does not intend to assert privilege unless there's a constitutional basis to do so. It will not be driven by politics or by what looks good. It will be driven by what is in fact allowed under the Constitution.

Q And can you address Bill's other point, which was the perception by some that there is an effort -- because some of the Reagan people, the people who worked in the Reagan administration now work in this administration -- that there might be some effort to try to make sure there isn't information -- try to protect people who have served in both administrations, that sort of layover that this --

JUDGE GONZALES: Well, again, I don't know what the documents hold. And we will assert a privilege only when there's a legitimate reason to do so. Look, we haven't withheld a single document yet. There's been a delay, no question about it. But there's been no decision not to release a document. Let's see how this process works.

Q Sir, in your conversations with the Reagan folks, was that concern expressed to you or your office that there may be, in fact, some embarrassing documents here?

JUDGE GONZALES: No, not that I'm aware of.

THE PRESS: Thank you.

END 1:55 P.M. EST

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Wendy L. Nipper/WHO/EOP@EOP
Jeanie S. Mamo/WHO/EOP@EOP
Taylor S. Gross/WHO/EOP@EOP
Christopher J. Orr/WHO/EOP@EOP
Matthew E. Smith/WHO/EOP@EOP
William T. Griffin/WHO/EOP@EOP
Tucker A. Eskew/WHO/EOP@EOP
Wendy L. Nipper/WHO/EOP@EOP
Christopher J. Orr/WHO/EOP@EOP
Scott Stanzel/WHO/EOP@EOP
Kenneth A. Lisaius/WHO/EOP@EOP
Rachael L. Sunbarger/WHO/EOP@EOP
Josephine B. Robinson/WHO/EOP@EOP
Claire E. Buchan/WHO/EOP@EOP
Brian Bravo/WHO/EOP@EOP
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Daniel J. Bartlett/WHO/EOP@EOP
Scott N. Sforza/WHO/EOP@EOP
James R. Wilkinson/WHO/EOP@EOP
Gail Randall/WHO/EOP@EOP
Jeanie S. Mamo/WHO/EOP@EOP
Ashleigh A. Adams/WHO/EOP@EOP
Alison M. Harden/WHO/EOP@EOP
Noelia Rodriguez/WHO/EOP@EOP

their own decision about what to do with their own records, what type of records to release, and when to release them. And typically, someone would make a request -- let's say for Jimmy Carter's records -- of the Carter Library. And President Carter or his representatives would make the decision what kind of documents to release. And they had the unfettered right to withhold any documents they wanted to, for however long they wanted to.

In 1978, the Presidential Records Act was passed, and I think it went into effect in 1981. And pursuant to that act, presidential records then became the property of the National Archives. And it first affects Ronald Reagan's records; he is the first President, former President, whose records are going to be subject to the Presidential Records Act.

Now, the act clearly recognizes that not all documents are to be released. In fact, I brought a copy of the statute that governs this. And the relevant statute is entitled, "Restrictions on Access to Presidential Records." So, clearly, Congress anticipated that certain documents would not be released.

And what we have done in this executive order is to provide a process, an orderly process, to help the Archivist, the former President, and the incumbent President deal with requests for information with respect to the presidential records of a former President. And that is what this order is intended to do. It does not in any way decide what kind of documents can be released. That decision is ultimately to be made by the former President and by the incumbent President.

There was an executive order that was signed by Ronald Reagan dealing with his presidential records. That will be rescinded by this order. And the reason that we are rescinding that order is because that order gives no deference whatsoever to the opinions of a former President. It basically says -- it gives, basically, the decision making to the incumbent President.

And we felt that was inconsistent with current Supreme Court precedent, and also, quite frankly, reflected bad policy. And we thought it would be more appropriate to really give the primary responsibility regarding presidential records to the former President whose records they belong to, and to have the incumbent President sort of be the backstop in making decisions about whether or not those documents should in fact be released.

So, with that, I'm happy to take any questions.

Q Some of the historians are saying that the proposed executive order is pretty much putting the PRA on its head, that there are plenty of exemptions under the current PRA to withhold things that are of national security concern, or personal concern, or third-party concerns, or even proprietary concerns,

and that there's really no need for any further restriction.

JUDGE GONZALES: Well, this does not impose any additional restrictions. I want to be very clear about this: the privileges that can be asserted by a former President or by an incumbent President exist pursuant to the laws -- by decisions by the U.S. Supreme Court. This order could not create, you know, that kind of privilege. It is a privilege that exists out there already, irrespective of this order.

All this order does is provide the process by which, again, as I said, the archivist, the former President, and the incumbent President can deal with requests for information. But even if we didn't have this order -- even if we didn't have this order -- if Ronald Reagan's representative wanted to assert a privilege because he felt a privilege was appropriate, he could go ahead and assert it without this order.

Q Well, Judge, as you noted, the Reagan papers are the first to come under this situation. And both the Reagan Library and the National Archives, which obviously are reviewing national security concerns, okayed these papers for release. What's wrong with letting these -- what's wrong with letting these papers out?

JUDGE GONZALES: There hasn't been a decision by the Reagan representative to allow specific documents to be released. This is not something that this White House developed entirely on its own. The reason it has taken some time to put this executive order in place is because we consulted extensively with representatives of the Reagan Library, the Bush 41 Library, representatives from President Clinton. We have consulted extensively with the Department of Justice, and we consulted extensively with the archivist and the officials there, to put together a process that we think provides an orderly way to deal with requests for information.

And, listen, there is no way to anticipate -- I mean, I fully anticipate that a lot of the documents that are within the Reagan Library will be released, and will be released in due course. But there are certain kinds of documents that I think it is appropriate, particularly for national security reasons, that we have a process in place to make sure that you don't release something that hurts the national security of this country.

Q What prompted you to do this? If all of these exemptions existed, and there's a process that is already being worked out when it comes to the Reagan papers, why insert yourself in the middle of it?

JUDGE GONZALES: Well, we didn't insert ourselves in the middle of it. What really prompted this was because in -- I think in May, there was a huge request for documentation from the Reagan Library. And they didn't know how to deal with it. And so it made us realize we need to have some kind of process in

place to deal with this.

And so we began in May, I believe, to work on the executive order. We worked on it through the summer, had it basically ready to go at the end of August. The archivist came to us, asked that we actually sample some of the documents, which we did. I think we sampled something like 2,000 documents provided to us by the archivist. And we -- but basically we have been ready to go with this executive order.

Again, what motivated this was the need to have an orderly process. That's what motivated this effort.

Q Well, let me ask this. I haven't read the order. But if the reports that I read are correct, the presumption ~~really~~ is in favor of not disclosing. For example --

JUDGE GONZALES: I don't agree.

Q Well, for example, if it is ~~true~~, as I read, that the order states that the archivist "must withhold, if possible," when requests are made under the Freedom of Information Act, that would seem to be an attempt not to disclose.

JUDGE GONZALES: I don't believe that the order provides for that. What the order provides for is a request be made to the archivist, for the incumbent President and the former President to be given a copy of those documents, and to make a decision within a certain period of time as to whether or not it's appropriate to assert a privilege. That's what it provides for.

Q Is there a "must withhold"?

JUDGE GONZALES: They ~~must withhold it if the former~~ President or the incumbent President wants to assert a privilege.

Now, let me make sure that everyone understands that this is not the end of the dispute, when that decision is made. That can be appealed to a court of law. And the President or the former President will only succeed on their decision to assert a privilege if, in fact, there ~~is a legitimate reason to do so.~~ This is not about trying to protect from embarrassing documentation or anything like that. This is about legitimately asserting privileges provided for under the Constitution.

Q Will there be a special office created to deal with this? Because I would imagine that you, if you say you had a huge number of requests in May, somebody's got to deal with those huge number of requests, both getting them through you and former Presidents. Are you creating a special office to, essentially, deal with these requests?

JUDGE GONZALES: We -- quite frankly, we haven't thought much about that. I think it will be headed primarily through the

Counsel's Office, but we haven't thought about establishing a special office to deal with this.

We are going to give a lot of deference to the former President, because they are, in fact, his documents. And so we will look to the representative of the former President to decide whether or not a privilege should be asserted. And the executive order makes clear that except for compelling circumstances, that this administration will agree with the decision by President Reagan's representative.

Q What about the just cause burden, that you have to show that there's a real reason that you need to make this request?

JUDGE GONZALES: That's language that comes from the U.S. Supreme Court. The Supreme Court says that when there is a legitimate privilege, constitutional privilege that has been asserted, and can be made, that the only way to override that is to show a just cause reason to do so. So this is not a standard that we created. This is a standard created in law, by the --

Q Does this apply to all the documents, or is there a category where -- just broad, general public access, and a category where this --

JUDGE GONZALES: Again, every request made for documentation will go through the archivist, through this very orderly process. And the process applies to all the documents. I think for the vast majority of the documents, there will not be any privileges asserted.

Q But all must be reviewed?

JUDGE GONZALES: All will be reviewed. But a decision -- the executive order provides, and this is one of the reasons why it's less restrictive than, say, former Presidents' programs have been, in that the incumbent President and the former President have to try to make a decision as to whether or not to assert a privilege within 90 days. And, hopefully, within that period of time a decision is made to release the documents, and people will have the opportunity to look at these documents.

Q Okay, well, what if there's no decision? Does it default to releasing them or does it default to --

JUDGE GONZALES: There will be a decision made. I mean, the full intent is to have a decision made by the representative of President Reagan and by this administration within 90 days, if at all possible.

Q There are people such as Congressman Hefley, a Republican, who basically says that the administration, either this administration or past administrations, tends to use executive orders in a much wider scope. Do you feel that -- I

mean, obviously you don't feel, but what about the question, that this executive order may be really legislating Congress, rather than Congress legislating the law?

JUDGE GONZALES: Well, Congress did not provide for any kind of mechanism or process to deal with this -- to deal with how to deal with the former President's records. And we have an obligation to make sure the laws are faithfully executed, that we have an orderly process in place to deal with this. And that's what this executive order is intended to do.

Q But the presumption seems to be for secrecy, Judge.

JUDGE GONZALES: This presumption is not --

Q It seems to be for secrecy.

JUDGE GONZALES: Sir, I don't know -- when you say "the presumption is for secrecy", I disagree with that. I don't think you can presume. There's no way of knowing how many of these documents will in fact be released. A lot will depend on the type of documents that are requested, and the review and the final decisions by the incumbent President and the former President.

Q That's a Catch-22. It can be blocked by either one.

JUDGE GONZALES: And can be released by either one.

Q No, not if the other one disagrees.

JUDGE GONZALES: But, again, there is a strong presumption in favor of the former President. If he wants to release documents, except for exceptional circumstances, this administration will abide by that decision.

Q Well, at the top here, you walked us through what had been the case prior to 1978, and obviously the big changes that we had then with the Records Release Act. And you just said twice, we are going to give a lot of deference to former Presidents. I mean, how does that not take us back to the pre-1978 period, when in fact they had almost exclusive control over their own papers?

JUDGE GONZALES: Because today, now, the former President cannot withhold documents if there is not a legitimate constitutional privilege basis on which to do so. And also now, today, the former President has to make that decision within a certain period of time. So in those two respects, this mechanism may in fact make it easier to get documents than before.

Q What would prevent a former President, though, from saying -- giving any reason, let's say, for saying I don't want these documents released? National security, privacy -- I mean,

you're saying that unless he can make a strong case on why they shouldn't be released, they will be released. But what will stop that former President from coming up with any argument to hold on to those papers?

JUDGE GONZALES: Well, again, a former President could attempt to do that. And then if that former President is challenged in court -- if, in fact, there's not a legitimate reason to assert that privilege, the public will have access to that information.

better answer

Q Is this executive order in effect right now? Has it taken effect?

JUDGE GONZALES: No, it is not in effect.

Q Well, where is it right now in the process?

JUDGE GONZALES: We are in the final stages of trying to finalize it. And hopefully we will get it done relatively soon.

Q What about the issue of redaction? What about the issue of redaction? I mean, lots of documents that have come out relating to Iran-Contra, for instance, were released but redacted almost to the point of uselessness. I mean, will that be part of this process, too?

JUDGE GONZALES: This executive order, again, does not deal with redaction at all.

Q Do you try to establish what is a legitimate reason to withhold?

JUDGE GONZALES: Well, part of our job will be to advise this President with respect to whether or not we think there's a constitutional basis to assert a privilege.

better answer

Now, the President may decide not to assert the privilege. There are many instances where, in the past, a former President may release documents, even though that President or the President's representatives may view it okay to go ahead and release the documents, even though a privilege can be asserted. That will still continue. There will be instances where former Presidents and this President will go ahead and decide to release documents, even though a privilege could be asserted. There's no reason to believe that that won't continue.

MR. FLEISCHER: Judge, excuse me one second. Before you walked in, Larry and Ed, the Judge held up the statute that Congress wrote that created this process, that led to the process that the Judge has created. And it says in the statute that there is a restriction on documents that can be released. So that is from the organic statute; this EO is a reflection of that.

Q Regardless of whether or not the documents will eventually be released, or how many, it does set up another obstacle. It does set up another barrier.

JUDGE GONZALES: It provides an orderly process, is what it does. Because you have to -- even without this EO, what would happen --

Q It must -- it will mean delay in the release of papers.

JUDGE GONZALES: But even without this EO, what would happen is that you would have to go to the archivist and get the papers anyway, ask for the papers. The archivist, because the archivist understands that a former President and an incumbent President have a constitutional basis to assert a privilege, will check with the former President and with the incumbent President to see, can I release these documents?

This provides an orderly process, trying to impose some time restraints, so that the decision can be made in an orderly fashion as quickly as possible.

Q Judge, how much time do you figure that you and your office have spent on this issue? And, prospectively, how time consuming do you expect it to be after the executive order is in effect?

JUDGE GONZALES: I can't anticipate the latter -- I don't know. We spent -- you know, this is an important issue. It's the first time this process has had to have been implemented. And as I said before, we have consulted with a lot of folks to make sure this is a process that makes sense under these circumstances.

Q Judge, in the process of deferring to former Presidents, if they give you the green light, will you -- and are you telling us and historians who are curious about this that in almost every case, if the former President gives you the green light, you are going to respect that green light? Or do you see part of your obligation to assert the President's wishes, and contravene the wishes of a former President, if there are issues you think need to be asserted, either constitutionally or on national security?

JUDGE GONZALES: Well, you'll have to remember that a former President may not have knowledge that this President has about, for example, national security issues that are ongoing; and that there may be reasons in which this President may want to go ahead and assert a privilege, even though the former President does not wish to do so, because this President may have knowledge. And it is the responsibility of this President, now, to protect the national security of this country.

Q How do you insulate yourself, then, against questions about that being simply a variation on the current prohibition we have, under the circumstances we're in now, of "not discussing operational details." I mean, isn't that a cloak that you can use to throw over -- how do you counter the accusations that will come from historians and scholars that you're using that, each and ever time you do it, as an excuse not to release stuff that is probably of legitimate public value? I mean, you know, how do you plan to deal with that? Because the questions most certainly are going to come, not just today, but every time this happens down the road.

JUDGE GONZALES: Again, all of these decisions can be tested in court. And if in fact we are not making a good faith effort to assert legitimate privileges, that will soon be revealed.

Q Do you anticipate that only the national security exemption would be applied in overruling a previous President's wishes? Or can you see, like, executive communication or --

JUDGE GONZALES: I can't anticipate -- again, it would be unfair for me to restrict this President's decision making, in terms of when he may override a decision of the former President. All I can say is the statute clearly provides for it, but it would require an exceptional circumstance.

Q The average citizen's recourse, if I understand this, the stopgap here, is to take a President or a former President to court.

JUDGE GONZALES: But that would be the recourse even without the order. That's the recourse without the order, because the President and former President still have that privilege, without the order. And so, even without the order, if a citizen wanted access to information, and a former President decides to assert his privilege, the only thing that a citizen can do is take them to court. We're not changing that.

Q Judge, in your conversations with the President, if you've had any on this particular subject, has he given you any indication of what he wants your sort of baseline assumptions to be? The assumption is, release as much as you can, if the former President gives you a green light, or filter everything very carefully and make sure that we are on the other side of the ledger, more toward asserting this privilege?

JUDGE GONZALES: Well, I think that there's a recognition of the importance, for historical reasons, of releasing as much information as we can, being mindful of the fact that there may be reasons that it's inappropriate or harmful to this country not to release certain information. I think we would err on trying to release as much information as we possibly can.

Q On that point, Judge, could you differentiate between

THE WHITE HOUSE

WASHINGTON

November 2, 2001

Dear Chairman Horn:

I have learned that on November 6 the House Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations will hold its previously postponed hearing on the Presidential Records Act. In advance of that hearing, we wanted to inform you of a recent development.

President Bush yesterday signed an executive order implementing section 2204(c) of the Presidential Records Act, the provision of the Act that states: "Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President." That statutory provision is necessary, of course, to the Act's constitutionality, for the Supreme Court held in 1977 that both former and current Presidents retain the constitutional right to assert privileges over the records of a former President, including after expiration of a 12-year period of presumptive non-disclosure. *See Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). Furthermore, Congress contemplated that such constitutional privileges would be available and could be asserted, even after expiration of the 12-year period: At the time the Act was enacted, Senator Percy stated that if a President "believe[d] that the 12-year closure period does not suffice, that President could object to the release of some document in the 13th or 15th or 20th year." Cong. Record S36844 (Oct. 13, 1978).

The Act and its legislative history, as well as the Supreme Court's decision in *Nixon v. Administrator of General Services*, obviously necessitate procedures for former and current Presidents to review Presidential records of a former President and, if they choose, to assert constitutional privileges. President Bush's order responds to that need by establishing clear and sensible procedures for former and current Presidents to exercise their rights and responsibilities in a timely manner. The order replaces an earlier executive order (Executive Order 12667 of January 18, 1989) that had established some skeletal procedures for assertion of privileges over Presidential records and had provided that the *current* President would have the primary responsibility for asserting privileges over the records of a former President. President Bush's new order supercedes that prior order both to set forth clearer procedures and to establish, consistent with the Supreme Court's decision in *Nixon v. Administrator of General Services* and with what the Administration believes to be sound policy and procedure, that *former* Presidents are to have the primary responsibility for asserting privileges over their records. Indeed, section 4 of President Bush's order, which is its most critical component, provides that the current President will defer, absent compelling circumstances, to the decisions of the former President regarding the former President's records. In sum, therefore, the new executive order grants the current President *less* relative authority over the records of a former President than did the prior executive order. We believe this point is critical to a proper understanding of the executive order, and has been largely overlooked in public commentary thus far.

In addition, President Bush's order does not purport to guide former Presidents as to their privilege assertions. Section 9 of the order provides that the order does not purport to indicate "whether and under what circumstances a former President should assert or waive any privilege." Indeed, it would have been improper, if not illegal, for President Bush to attempt to limit or override the constitutional rights and privileges of former Presidents -- rights that have been guaranteed by the Supreme Court. But it also bears mention that Section 2 of the order refers to the historical practice before enactment of the Presidential Records Act by which former Presidents, over time, have released a vast majority of their records even though under no legal obligation to do so. We anticipate that this historical practice will continue. At a minimum, contrary to the claims of some commentators, there is no logical basis for assuming that former Presidents will exercise their constitutional and statutory authority to seek withholding of *privileged* records more aggressively than earlier Presidents -- from President Washington to President Carter -- exercised their plenary and far broader authority to withhold *all* records.

Finally, you should know that the Administration consulted extensively with the National Archives and Records Administration, the Department of Justice, and former Presidents' representatives before President Bush issued this order. We benefited greatly from that consultation.

Please do not hesitate to contact me if you have any questions about the order.

Sincerely,

Alberto R. Gonzales
Counsel to the President

The Honorable Steve Horn
United States House of Representatives
Washington, DC 20515

cc: The Honorable Janice Schakowsky

National Archives

Washington, DC 20408

NEWS RELEASE

MEDIA ALERT

December 20, 2001

Previously Withheld Reagan Presidential Materials to be Released

WHAT: College Park, MD. . .Approximately 8,000 pages of materials from the records of Ronald Reagan's Presidency that were previously withheld under the Presidential Records Act restriction for confidential advice between White House officials. These records are the first segment of the approximately 68,000 pages of records that the National Archives Records Administration proposed to release earlier this year. In accordance with Executive Order 13233, representatives of former President Reagan and President Bush have reviewed these records and have chosen not to assert any constitutionally based privilege.

This opening consists of records from the staff member and office files, National Security Council files, and the alphabetically arranged Subject Files of the White House Office of Records Management (WHORM), beginning with Agriculture, Arts, Atomic/Nuclear Energy, and Business/Economics.

WHERE: The Research Room
The Ronald Reagan Library,
40 Presidential Drive
Simi Valley, CA 93065-0600
PHONE: 800-410-8354

WHEN: 9 A.M.
Thursday, January 3, 2002

* * *

For press information, contact the National Archives Public Affairs Staff at 301-713-6000.

02-24

OPTIONAL FORM 99 (7-90)

FAX TRANSMITTAL # of pages ▶

To Brett Kavanaugh	From Gary Stern
Dept./Agency	Phone #
Fax #	Fax #

NSN 7540-01-317-7368 5099-101 GENERAL SERVICES ADMINISTRATION

REV_00255461

FROM : Panasonic FAX SYSTEM PHONE NO. : Aug. 21 2000 05:19AM P1

TO: Brett

FYI

RICHARD REEVES
PRA 6

Tel. PRA 6
Fax

Judge Alberto Gonzales
The White House OEOB-175

Dear Judge Gonzales:

I am among the many writers and scholars who regularly work in the National Archives and Presidential libraries. My best known books based largely on such archival research are "President Kennedy: Profile of Power" and "President Nixon: Alone in the White House", published this month by Simon and Schuster. Those books were considered successes, I believe, and have been cited by presidents, including George H.W. Bush and Bill Clinton, as important contributions to not only understanding but to the operations of the White House.

As you know, I tried to send copies of those books to your office this morning, but was informed that the White House is not accepting packages because of the current crisis. Instead, I am faxing this note and putting the books (and a copy of a letter from George H.W. Bush) in ordinary U.S. Mail to be picked up at a date uncertain. My purpose is to try to bring to the White House's attention the implications of your order on the understanding of the the role of the Presidency in the future. It may be inconvenient in the present, but history is not about the past, it is a guide to the future.

I am also in the process of writing an assigned Op-Ed piece for The New York Times on this subject and would appreciate a call from you to discuss your viewpoint. As reported in the press, the order could essentially end most archival research on presidents (and vice presidents) by making it too expensive and too time-consuming. We are writers not lawyers. I will also attempt to organize other historians and journalists to dramatize the anti-history nature of the executive order.

I look forward to speaking with you and have attached a short biography for your information.

Sincerely,

Richard Reeves

PRA 6

RICHARD REEVES

Richard Reeves is an author and syndicated columnist whose twice-weekly column appears in more than 100 newspapers. His twelve books include *President Kennedy: Profile of Power*, named the best non-fiction book of 1993 by Time magazine. His study of President Nixon, *President Nixon:Alone in the White House*, was published in October by Simon and Schuster and is currently on bestseller lists around the country.

Reeves, former chief political correpondent of The New York Times and a frequent contributor to several of the country's leading magazines, is a senior lecturer at the University of Southern California and former Regents Professor of journalism and political science at UCLA. He has also made a number of television documentaries and has won all of television's major awards, including an Emmy at ABC News, and Columbia-DuPont and Peabody awards at PBS's Frontline. Twice a finalist for the Pulitzer Prize, he is currently a Pulitzer juror as well as a judge of the Los Angeles Times Book Awards.

Reeves' books, published in several languages, include: *A Ford,not a Lincoln; Convention; American Journey:Travelling with Tocqueville in Search of Democracy in America; Passage to Peshawar; Family Travels;* and *What the People Know·Freedom and the Press.* His films include: *American Journey; Lights, Camera, Politics; Struggle for Birmingham, and Red Star Over Khyber.*

He has been an editor at New York Magazine and Esquire and has been published frequently in The New Yorker and The New York Times Magazine. For several years he wrote a column for Travel and Leisure magazine under the titles "American in Paris" and "From the Continent."

Reeves was the 1998 winner of the Carey McWilliams Award of the American Political Science Association. He lives in New York and Washington with his wife, Catherine O'Neill. They have five children.

####

Richard Reeves
PRA 6
e-mail: PRA 6

DOCUMENT N0. P-01-1461

OFFICE OF THE VICE PRESIDENT
STAFFING MEMORANDUM

DATE: October 11, 2001 **DUE:** 10/12/01 10:00AM

SUBJECT: Proposed Executive Order Regarding Presidential Records Act

	ACTION	FYI		ACTION	FYI
LIBBY	☐	☐	PATEL	☑	☐
McGRATH	☑	☐	KLEPPE	☐	☐
MATALIN	☑	☐	O'DONNELL	☐	☐
ADDINGTON	☑	☐	DUNN	☐	☐
DORN	☑	☐	ABBOT	☐	☐
CONDA	☑	☐	LUNDQUIST	☐	☐
EDELMAN	☑	☐	STAFF SEC	☑	☐

ACTION:

PLEASE PROVIDE COMMENTS DIRECTLY TO THE STAFF SECRETARY BY 10:00 AM ON 10/12.

APPROVE: ☐
DISAPPROVE: ☐

COMMENTS: ① Can't we do this by GSA regulations not (P) E.O. –
② How does this square w/ implementing regs / E.O. for Nixon papers – I know that during Reagan WHC reviewed Nixon papers before they were released publicly.

RETURN TO: NEIL PATEL
STAFF SEC.
Rm: 284 Ext: 69000

REV_00255464

SS/ RM NO. _____

WHITE HOUSE STAFFING MEMORANDUM

Date: 10-10-01 ACTION / CONCURRENCE / COMMENT DUE BY: _____

Subject: PROPOSED EXECUTIVE ORDER REGARDING PRESIDENTIAL RECORDS ACT

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☑	☐	HUBBARD	☑	☐
CARD	☑	☐	IRASTORZA	☑	☐
HUGHES	☑	☐	JOHNSON	☑	☐
ROVE	☑	☐	LINDSEY	☑	☐
BOLTEN	☑	☐	SPELLINGS	☑	☐
HAGIN	☑	☐	MIERS	☐	☐
DANIELS	☑	☐	RICE	☑	☐
BLAKEMAN	☑	☐	CONNAUGHTON	☑	☐
CALIO	☑	☐	GERSON	☐	☐
FLEISCHER	☑	☐	CLERK	☑	☐
GONZALES	☐	☑	RIDGE	☐	☐
HAWKINS	☑	☐	_____	☐	☐

REMARKS:

PLEASE SEND COMMENTS TO ALBERTO GONZALES, EXT. 62632, NO LATER THAN 5:00 PM FRIDAY, OCTOBER 12, 2001, WITH COPY TO STAFF SECRETARY. THANK YOU.

RESPONSE:

Harriet E. Miers
Assistant to the President
and Staff Secretary
Ext. 62702

REV_00255465

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

TO: Judge Gonzales

DATE: 10-12-01

FAX #: 66279

Number of pages 9 (excluding this page)

FROM:

Jay Letkowitz
General Counsel
Office of Management and Budget
Washington, DC 20503
Phone: (202) 395-5044
Fax: (202) 395-7209

Comments:

OMB

WHITE HOUSE

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54 FR 3403

Title 3 -- The President

Presidential Records

Executive Order 12667 of January 18, 1989

54 FR 3403

January 23, 1989

TEXT:
By virtue of the authority vested in me as President by the Constitution and laws of the United States of America, and in order to establish policies and procedures governing the assertion of Executive privelege by incumbent and former Presidents in connection with the release of Presidential records by the National Archives and Records Administration pursuant to the **Presidential Records Act** of 1978, it is hereby ordered as follows:

Section 1 *Definitions.* For purposes of this Order:

(a) "Archivist" refers to the Archivist of the United States or his designee.

(b) "NARA" refers to the National Archives and Records Administration.

(c) "**Presidential Records Act**" refers to the **Presidential Records Act** of 1978 (Pub. L. No. 95-591, 92 Stat. 2523-27, as amended by Pub. L. No. 98-497, 98 Stat. 2287), codified at 44 U.S.C. 2201-2207.

(d) "NARA regulations" refers to the NARA regulations implementing the **Presidential Records Act.** 53 Fed. Reg. 50404 (1988), codified at 36 C.F.R. Part 1270.

(e) "Presidential records" refers to those documentary materials maintained by NARA pursuant to the **Presidential Records Act** and the NARA regulations.

(f) "Former President" refers to the former President during whose term or terms of office particular Presidential records were created.

(g) A "substantial question of Executive privilege" exists if NARA's disclosure of Presidential records might impair the national security (including the conduct of foreign relations), law enforcement, or the deliberative processes of the Executive branch.

(h) A "final court order" is a court order from which no appeal may be taken.

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Sec. 2. *Notice of Intent to Disclose Presidential Records.*

(a) When the Archivist provides notice to the incumbent and former Presidents of his intent to disclose Presidential records pursuant to section 1270.46 of the NARA regulations, the Archivist, utilizing any guidelines provided by the incumbent and former Presidents, shall identify any specific materials, the disclosure of which he believes may raise a substantial question of Executive privilege. However, nothing in this Order is intended to affect the right of the incumbent or former Presidents to invoke Executive privilege with respect to materials not identified by the Archivist. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel to the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.

(b) Upon the passage of 30 days after receipt by the incumbent and former Presidents of a notice of intent to disclose Presidential records, the Archivist may disclose the records covered by the notice, unless during that time period the Archivist has received a claim of Executive privilege bythe incumbent or former President or the Archivist has been instructed by the incumbent president or his designee to extend the time period. If a shorter time period is required under the circumstances set forth in section 1270.44 of the NARA regulations, the Archivist shall so indicate in the notice.

Sec. 3. Claim of Executive Privilege by Incumbent President.

(a) Upon receipt of a notice of intent to disclose Presidential records, the Attorney General (directly or through the Assistant Attorney General for the Office of Legal Counsel) and the Counsel to the President shall review as they deem appropriate the records covered by the notice and consult with each other, the Archivist, and such other Federal agencies as they deem appropriate concerning whether invocation of Executive privilege is justified.

(b) The Attorney General and the Counsel to the President, in the exercise of their discretion and after appropriate review and consultation under subsection (a) of this section, may jointly determine that invocation of Executive privilege is not justified. The Archivist shall be promptly notified of an such determination.

(c) If after appropriate review and consultation under subsection (a) of this section, either the Attorney General or the Counsel to the President believes that the circumstances justify invocation of Executive privilege, the issue shall be presented to the President by the Counsel to the President and the Attorney General.

(d) If the President decides to invoke Executive privilege, the Counsel to the President shall notify the former President, the Archivist, and the Attorney General in writing of the claim of privilege and the specific Presidential records to which it relates. After receiving such notice, the Archivist shall not disclose the privileged records unless directed to do so by an incumbent President or by a final court order.

Sec. 4. *Claim of Executive Privilege by Former President.*

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(a) Upon receipt of a claim of Executive privilege by a former President, the Archivist shall consult with the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel), the Counsel to the President, and such other Federal agencies as he deems appropriate concerning the Archivist's determination as to whether to honor the former President's claim of privilege or istead to disclose the Presidential records notwithstanding the claim of privilege. An determination under section 3 of this Order that Executive privilege shall not be invoked by the incumbent President shall not prejudice the Archivist's determination with respect to the former President's claim of privilege.

(b) In making the determination referred to in subsection (a) of this section, the Archivist shall abide by any instructions given him by the incumbent President or his designee unless otherwise directed by a final court order. The Archivist shall notify the incumbent and former Presidents of his determination at least 30 days prior to disclosure of the Presidential records, unless a shorter time period is required in the circumstances set forth in section 1270.44 of the NARA regulations. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.

Sec. 5. *Judicial Review.* This Order is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

+/-

THE WHITE HOUSE,

/s/ Ronald Reagan

January 18, 1989.

[FR Doc. 89-1578

Filed 1-19-89; 11:07 am]

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*1982 OLC LEXIS 77, *; 6 Op. O.L.C. 481, **

OPINION OF THE OFFICE OF LEGAL COUNSEL

CONFIDENTIALITY OF THE ATTORNEY GENERAL'S COMMUNICATIONS IN COUNSELING THE PRESIDENT

1982 OLC LEXIS 77; 6 Op. O.L.C. 481

August 2, 1982

CORE TERMS: disclosure, exemption, attorney-client, confidentiality, deliberative process, memorandum, adviser, deliberative, law enforcement, confidential, advice, informant, advisory, duty, secret, claim of privilege, deliberations, investigatory, Freedom Of Information Act, legal advice, presidential, discovery, exempt, national security, military, evidentiary, common law, predecisional, work-product, privileged

SYLLABUS:
[*1]

[The following memorandum examines the scope of confidentiality accorded the Attorney General's communications with the President, and the extent to which those communications may be shielded from compulsory disclosure to Members of Congress, the courts, and members of the public. It considers the dual nature of the Attorney General's role as Cabinet member and as principal legal adviser to the President, and extends to the broader question of the confidentiality of the deliberative materials generated by the Attorney General and those who assist him. The memorandum discusses the applicability of the doctrine of **executive privilege,** and the appropriate circumstances for its invocation. It also analyzes the scope of the deliberative process and **attorney-client** privileges under the Freedom of Information Act, and of the traditional governmental evidentiary privileges and their statutory counterparts.]

ADDRESSEE:
Memorandum for the Attorney General

OPINIONBY: OLSON

OPINION:
[481]** You have asked this Office to advise you regarding the scope of confidentiality accorded your communications with the President in your role as Attorney General. Your inquiry focused particularly on the extent to which legal advice **[*2]** rendered by you to the President may be shielded from compulsory disclosure to Members of Congress, the courts, and members of the public. Our analysis of these issues includes the broader subject of the confidentiality of the deliberative materials generated by you, and those who assist you, in the performance of your responsibilities as adviser to the President. We also discuss briefly certain privileges which protect other communications generated by the Department of Justice in the course of performing its duties.

Any discussion of the confidential nature of the Attorney General's communications with the President must begin with a recognition of the dual counseling functions performed by the Attorney General. The Attorney General serves as both a Cabinet adviser and the principal legal adviser to the President. n1 As a member of the President's Cabinet, the Attorney

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While it is unlikely that very many of the Attorney General's communications will be in the category of communications with regard to which claims of privilege are entitled to the strictest deference, *e.g.,* military, diplomatic, or sensitive national security matters, his communications to the President may nevertheless demand greater confidentiality than those of some other Cabinet advisers, because of the nature of the Attorney General's responsibilities to the Executive and his special areas of expertise, *e.g.,* legal advice and law enforcement. *See* Harmon Memorandum, *supra,* at 26. n17

n17 In his memorandum to the Attorney General regarding a congressional subcommittee's demand for certain documents from the Department of Energy, Assistant Attorney General Harmon advised:

[T]o whatever extent the customary **attorney-client** privilege applies to government attorneys, we believe that the reasons for the constitutional privilege against the compelled disclosure of executive branch deliberations have special force when legal advice is involved. None of the President's obligations is more solemn than his duty to obey the law. The Constitution itself places this responsibility on him, in his oath of office and in the requirement of article II, section 3 that "he shall take care that the laws be faithfully executed." Because this obligation is imposed by the Constitution itself, Congress cannot lawfully undermine the President's ability to carry it out. Moreover, legal matters are likely to be among those on which high government officials most need, and should be encouraged to seek, objective, expert advice. As crucial as frank debate on policy matters is, it is even more important that legal advice be "candid, objective, and even blunt or harsh," *see* United States v. *Nixon,* 418 U.S. 683, 708 (1974), where necessary. Any other approach would jeopardize not just particular policies and programs but the principle that the government must obey the law. For these reasons, it is critical that the President and his advisers be able to seek, and give, candid legal advice and opinions free of the fear of compelled disclosure.

Harmon Memorandum, *supra,* at 26. **[*24]**

II. The Freedom of Information Act -- Exemption 5: The Deliberative Process Privilege and the **Attorney-Client** Privilege

Exemption 5 of the Freedom of Information Act (FOIA) n18 protects from compulsory disclosure to the public, government materials which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption thus codifies the traditional common law privileges afforded certain documents in the context of civil litigation and discovery, *see* Fed. R. Civ. P. 26; Fed. R. Evid. 501, including the executive "deliberative **[**491]** process" privilege, *NLRB* v. *Sears, supra, EPA* v. *Mink,* 410 U.S. 73 (1973); *Taxation With Representation* v. *IRS,* 646 F.2d 666 (D.C. Cir. 1981); the **attorney-client** privilege, *Brinton* v. *Department of State,* 636 F.2d 600, 603-04 (D.C. Cir. 1980), *cert. denied,* 452 U.S. 905 (1981); *Mead Data Central* v. *United States Department of Air Force,* 566 F.2d 242, 252-55 (D.C. Cir. 1977); and the attorney **work-product** privilege, *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 154 (1975); **[*25]** *Bristol-Myers Co.* v. *FTC,* 598 F.2d 18 (D.C. Cir. 1978), as applied to document requests of government agencies from members of the public. *See also Coastal States Gas Corp.* v. *Department of Energy,* 617 F.2d 854 (D.C. Cir. 1980). All of these privileges encompassed by exemption 5 may be claimed, in appropriate circumstances, to protect communications between the Attorney General's Office and the Office of the President from compulsory disclosure to members of the press and the general public. n19 Nevertheless, even though the FOIA exemptions noted above are analogous to the common law evidentiary privileges which have been incorporated by implication into the Act, the standards for asserting the evidentiary privileges can serve only as a "rough guide" to the courts in determining the validity of FOIA exemption claims. This is so because

decisions as to discovery are usually based on a balancing of the relative need of the parties,

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and standards vary according to the kind of litigation involved. Furthermore, the most fundamental discovery and evidentiary principle, relevance to the issues being litigated, plays no part in FOIA cases.

Coastal States, supra, **[*26]** at 862, citing *EPA* v. *Mink,* 410 U.S. 73, 86 (1973). *See also Playboy Enterprises* v. *Department of Justice,* 677 F.2d 931, 936 (D.C. Cir. 1982); *McClelland* v. *Andrus,* 606 F.2d 1278, 1287 nn. 54, 55 (D.C. Cir. 1979). n20

n18 While other exemptions to the FOIA occasionally may be applicable to the types of communications discussed in this memorandum, *e.g.,* the exemption 7 privilege for law enforcement investigatory records, *see* 5 U.S.C. § 552(b)(7) discussed in part III.C., *infra,* because of the Attorney General's advisory relationship to the President, most such communications will come within the privileges embraced by exemption 5.

n19 The exemptions contained in the Freedom of Information Act do "not [provide] authority to withhold information from Congress." 5 U.S.C. § 552(c).

n20 In explaining the relationship between the privileges under FOIA and the evidentiary privileges in litigation, the D.C. Circuit stated:

[T]he analysis contained in Exemption 5 cases is applicable [to common law discovery cases] because Exemption 5 exempts only those documents normally privileged in the civil discovery context. *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 148-49 . . . (1975); *EPA* v. *Mink,* . . . 410 U.S. at 85-86 . . . (1973); *Vaughn* v. *Rosen,* . . . 523 F.2d at 1143 (1975). Thus in effect Exemption 5 is co-extensive with the common law discovery privileges: Exemption 5 shields from a member of the public seeking a document under FOIA that which would be shielded from a litigant seeking discovery from an agency. There is, however, an additional factor to be considered in the discovery context that is not considered in the FOIA context. . . . When a party seeks discovery against the Government and the Government interposes a claim of privilege, it is appropriate for the court to consider the litigant's need for the material. But when a member of the public seeks access to material under FOIA and the Government claims that the material comes within the purview of Exemption 5, disclosure is permitted of that which would "routinely be disclosed" in private litigation. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). *Stated differently, the extent of the requester's need is not considered in the FOIA context.*

McClelland v. *Andrus, supra,* at 1287, n.54 (emphasis supplied). **[*27]**

A. "Deliberative Process" Privilege

The "deliberative process" privilege under FOIA is substantially similar in scope and purpose to the deliberative process aspect of **executive privilege, [**492]** discussed above. Although both privileges apply generally to the same types of documents, the primary differences between the two privileges lie in their respective applications. First, **executive privilege** traditionally has been invoked only by the President to shield documents from disclosure to Congress, and by the President or the head of any executive department or agency in judicial proceedings. n21 FOIA exemptions, in contrast, may be claimed by the head, or other designated official, of any government agency in possession of documents for which a request has been made by a member of the public. Second, as noted above, claims of **executive privilege** for deliberative documents must be balanced against the public interest in disclosure, which is frequently analyzed in terms of the requesting government institution's ability to perform its functions responsibly -- whether legislative investigations or judicial resolution of disputes -- without gaining access to the disputed **[*28]** materials. In considering the claims of exemptions under FOIA, however, the requestor's interest in or need for the documents is irrelevant. *See* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); *McClelland* v. *Andrus, supra.* Notwithstanding these differences, the analyses involved in the applications of the two privileges are very similar.

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n21 *See* nn. 4, 5, *supra.*

As in the case of **executive privilege,** the "deliberative process" privilege embraced by exemption 5 was intended to protect the integrity of the decision-making process and to promote full and frank deliberations during that process. However, consistent with the strong disclosure policy of FOIA, the privilege is to be considered "'as narrowly as [is] consistent with efficient Government operation.'" *Coastal States, supra,* 617 F.2d at 868, quoting from S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). *See also FBI* v. *Abramson,* 456 U.S. 615, 629-32 (1982); *Department of Air Force* v. *Rose,* 425 U.S. 352, 360-62 (1976). The privilege exempts documents which are advisory or recommendatory in nature, reflecting "the give-and-take of the consultative process . . ., weighing the **[*29]** pros and cons of agency adoption of one viewpoint or another," *Coastal States, supra,* 617 F.2d at 866, and "other subjective documents that reflect the personal opinions of the writer prior to the agency's adoption of a policy." *Taxation With Representation, supra,* 646 F.2d at 677. *See also NLRB* v. *Sears, supra,* 421 U.S. at 150; *Brinton* v. *Department of State, supra,* 636 F.2d at 604-06. In the words of the D.C. Circuit, which has developed a considerable body of law construing the deliberative process privilege:

[The privilege] was created to protect the deliberative process of the government, by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision-makers without fear of publicity. . . . Such consultations are an integral part of [an agency's] deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions.

[493]** *Ryan* v. *Department of Justice,* 617 F.2d 781, 789-90 (D.C. Cir. 1980) (footnote omitted). In addition, the privilege was designed to

protect against premature disclosure of proposed policies **[*30]** before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

Coastal States, supra, 617 F.2d at 866.

Applying this standard to the materials discussed in this memorandum, documents reflecting the internal details involved in the preparation of formal Attorney General opinions or Office of Legal Counsel opinions, as well as the more informal predecisional working papers which pass between and within the Attorney General's Office and the Office of the President, would be included in this category of deliberative documents protected by exemption 5. *See, e.g., Brinton* v. *Department of State, supra* (holding that opinions prepared by the Office of the Legal Adviser for the Secretary of State fell within the deliberative process privilege of exemption 5).

The courts have held, however, that "deliberative process" privilege does *not* protect documents which reflect final opinions, statements of reasons supplying the bases for decisions, or policies actually **[*31]** adopted, or documents that otherwise constitute the "working law" of an agency. *See NLRB* v. *Sears, supra,* 421 U.S. at 152-53; *Taxation With Representation, supra,* 646 F.2d at 678; *Coastal States, supra,* 617 F.2d at 866-68. The rationale underlying the "final opinion" exception to the deliberative process privilege is to prevent agencies from developing a body of "secret law" veiled by the exemption 5 privilege -- the maintenance of which "would weigh heavily against the public interest." *Sterling Drug, Inc.* v. *FTC,* 450 F.2d 698, 715 (D.C. Cir. 1971). *See Brinton* v. *Department of State, supra,* 636 F.2d at 605. Thus, decision documents of the Office of the President, deliberative materials "incorporated" into those documents, and opinions of the Attorney General which have been "incorporated" into the President's final document, would be subject to disclosure under FOIA. *See EPA* v. *Mink,* 410 U.S. 73 (1973). n22

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n22 "Final opinions" of the Office of Legal Counsel or the Attorney General, which were written for the President and form part of the basis of the President's final action, but which have not been "incorporated" into the President's final decision document, would be protected from disclosure under exemption 5's privilege for **attorney-client** communications, as well as the deliberative process privileges. *See* Brinton v. Dep't of State, supra; Mead Data Central, supra.

If the "final opinions" from the Attorney General's Office are *not* of a legal advisory nature -- or are otherwise ineligible for a claim of **attorney-client** privilege -- an analysis must be made regarding the purpose of the opinion documents in issue. If the opinion is a predecisional document -- *i.e.,* the document presents the Attorney General's views on a particular matter which will be considered by the President in taking final executive action, or in the case where final executive action has already been taken but the Attorney General submits a document which "provide[s] guides for decisions of similar or analogous cases arising in the future" -- the Supreme Court has stated that the document is exempted from FOIA's disclosure mandate as a deliberative document. NLRB v. Sears, supra, 421 U.S. at 152, n.19. If the Attorney General's "final opinion" is postdecisional, as are most final opinions -- *i.e.,* communications which "look[] back on and explain[] . . . a decision already reached or a policy already adopted" -- the opinion would *not* be exempt from FOIA's disclosure mandate, since disclosure would pose "a negligible risk of denying to agency decisionmakers the uninhibited advice which is so important to agency decisions." *Id.*

In its companion case to NLRB v. Sears, supra, Renegotiation Bd. v. Grumman Aircraft Engineering Corp., 421 U.S. 168, 184-85 (1975), the Court set forth the additional consideration of whether the author of the "final opinion" possesses decisional authority with reference to matters addressed in the opinion. Thus, if the subject of the Attorney General's opinion, or other Department of Justice communication, involves a matter over which the Office of the President has final decisional authority, the opinion necessarily is predecisional, and therefore exempt from disclosure, even if the opinion represents the "final" view or disposition of the Department of Justice on the matter. Of course, the final action taken by the Office of the President may incorporate the Attorney General's advisory opinion -- in which case, it would lose its predecisional character and become subject to disclosure. *See also* Brinton v. Dep't of State, supra, 636 F.2d at 605 (holding that legal opinions prepared by the Office of the Legal Adviser for the Secretary of State were properly withheld on the ground that the Legal Adviser's opinions were not "final opinions" as contemplated by the FOIA, inasmuch as the Legal Adviser "has no authority to make final decisions concerning United States policy . . . [;] [i]nstead, his role is to give advice to those in the State Department who do make the policy decisions."). **[*32]**

[494]** Nor does the privilege extend to documents of a purely factual nature. In the case of documents of a mixed factual/deliberative nature, factual materials which can reasonably be severed from the deliberative or advisory segments of the document without compromising the confidential remainder of the document must be disclosed. EPA v. Mink, supra, 410 U.S. at 91. However, "factual segments [of advisory documents] are protected from disclosure as not being purely factual if the manner of selecting or presenting those facts would reveal the deliberate process, or if the facts are 'inextricably intertwined' with the policymaking process." Ryan v. Department of Justice, supra, 617 F.2d at 790 (footnotes omitted). *See* Playboy Enterprises v. Department of Justice, supra. n23

n23 The D.C. Circuit recently rejected the Department's claim of privilege for a 302-page document prepared by a task force of the Office of Professional Responsibility of the Department of Justice for the Attorney General. The document reported the results of an eight-month investigation into the circumstances surrounding the infiltration of an FBI informant into the Ku Klux Klan. Playboy Enterprises v. Dep't of Justice, supra, 677 F.2d 931. Against the Department's claim that the entire report "reflect[ed] the 'choice, weighing and analysis of facts' by the task force and [was] therefore protected as a part of the deliberative

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process," 677 F.2d at 935, the court of appeals held that the report was, for the most part, not exempt from disclosure, and remanded to the district court for a determination of those limited portions of the report which were properly exempt, as containing conclusions, recommendations, or opinions and were severable from the factual portions of the document. The court stated:

We are not persuaded by the Department's argument. Anyone making a report must of necessity select the facts to be mentioned in it; but a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material. If this were not so, every factual report would be protected as part of the deliberative process.

Id. **[*33]**

B. ***Attorney-Client*** *Privilege*

Exemption 5 of FOIA also embraces the common law evidentiary privilege for **attorney-client** communications. 5 U.S.C. § 552(b)(5); Fed. R. Civ. P. 26; Fed. R. Evid. 501. n24 *See NLRB* v. *Sears, supra,* 421 U.S. at 154; *Mead Data Central, supra.* The **attorney-client** privilege protects confidential disclosures of a client to his or her attorney, which were made in order to obtain legal assistance and not for the purpose of committing a crime or tort. 8 Wigmore, Evidence § 2290-2329 **[**495]** (McNaughton rev. 1961). *See Upjohn* v. *United States,* 449 U.S. 383 (1981); *Fisher* v. *United States,* 425 U.S. 391 (1976). Notwithstanding its overall purpose to protect the *client's* factual disclosures, the privilege has been extended by federal courts to include an attorney's communications to his or her client in order to prevent inadvertent disclosure, either directly or by implication, of information which the client had previously confided to the attorney, as well as to foster the attorney's ability to give sound and informed professional advice. *Coastal States, supra,* 617 F.2d at 862; *Mead Data Central, supra,* 566 F.2d **[*34]** at 254 n.25.

n24 The **attorney-client** privilege is a common law evidentiary privilege which has been codified in Rule 501 of the Federal Rules of Evidence and Rule 26 of the Federal Rules of Civil Procedure for use in civil litigation and discovery. While the Rules are not applicable to congressional subpoenas, the interests implicated by the **attorney-client** privilege generally are subsumed under a claim of **executive privilege** when a dispute arises over documents between the Executive and Legislative Branches, and the considerations of separation of powers and effective performance of constitutional duties determine the validity of the claim of privilege.

Like the executive and deliberative process privileges, the **attorney-client** privilege is designed to encourage full and frank discussions among the persons whose communications are protected and thereby to "promote [the] broader public interests in the observance of law and administration of justice." *Upjohn, supra,* 449 U.S. at 389. To this end, "[t]he privilege recognizes that sound legal advice or advocacy . . . depends upon the lawyer's being fully informed by the client." *Id. See also Mead Data Central, supra,* **[*35]** 566 F.2d at 252 ("The opinion of even the finest attorney . . . is no better than the information which his client provides. In order to ensure that a client receives the best possible legal advice, based on a full and frank discussion with his attorney, the **attorney-client** privilege assures him that confidential communications to his attorney will not be disclosed without his consent."). *See generally* 2 J. Weinstein and M. Berger, Weinstein's Evidence P503 (1982).

Although the **attorney-client** privilege traditionally has been recognized in the context of private **attorney-client** relationships, the privilege also functions to protect communications between government **attorneys and client** agencies or departments, as evidenced by its inclusion in the FOIA, much as it operates to protect **attorney-client** communications in the private sector. *See Brinton* v. *Department of State, supra,* 636 F.2d at 603-04; *Mead Data Central, supra,* 566 F.2d at 252-55; *Jupiter Painting Contracting Co.* v. *United States,* 87

F.R.D. 593, 598 (E.D. Pa. 1980); *Falcone* v. *Internal Revenue Service,* 479 F.Supp. 985, 989-90 (E.D. Mich. 1979). *See also* Office of Legal Counsel, "Memorandum **[*36]** for Helen S. Lessin, Director, Federal Legal Council, re: OLC Policies Regarding Issuance and Release of Opinions" (Sept. 10, 1980). n25

n25 In addition, Government attorneys, no less than private attorneys, are bound by the ABA Code of Professional Responsibility's disciplinary rule DR 4-101(B), which provides that a lawyer shall not knowingly reveal a confidence or secret of his client unless the client consents to such disclosure.

The Supreme Court's recent opinion in *Upjohn, supra,* analyzing the scope of the corporate "client" for purposes of the **attorney-client** privilege, is helpful to our consideration of the privilege in the context of the Attorney General and the Office of the President. In *Upjohn, supra,* the Court discarded the restrictive "control group" test n26 for determining which communications are within the scope of the privilege in a corporate setting, in favor of a broader scope of "client," more suited to the purposes of the privilege. The Court noted that the **[**496]** privilege was designed to protect both the giving of professional advice to those who are charged with the actual implementation of the client corporation's policies, as well as **[*37]** the communication of information to the attorney sufficiently specific to enable him or her to provide sound, practical, and informed legal advice. *Id.* at 390. These purposes were frustrated by the narrow scope of privileged communications recognized by the "control group" test.

n26 The control group test restricts the definition of "client" for purposes of the privilege to "upper-echelon management" officials "responsible for directing [the client corporation's] actions in response to legal advice." 449 U.S. at 388, 391.

While the *Upjohn* decision studiously avoided setting forth a precise formulation of the scope of the **attorney-client** privilege in the corporate or governmental setting, the Court was nonetheless insistent in its view that application of the privilege had to be determined in each case to serve the purposes of the privilege. In view of the criticism expressed in the *Upjohn* decision of the control group test, it is likely that, in most instances, the "client" in the context of communications between the President and the Attorney General, and their respective aides, would include a broad scope of White House advisers in the Office of the President. **[*38]** The "functional" analysis suggested by *Upjohn* focuses on whether the privilege would encourage the communication of relevant and helpful information from advisers most familiar with the matters on which legal assistance is sought, as well as whether the privilege is necessary to protect and encourage the communication of frank and candid advice to those responsible for executing the recommended courses of action. A corollary to this expanded concept of the "client," which reflects the realities of the governmental setting, is that the "attorney" whose communications are subject to the **attorney-client** privilege may, in fact, be *several* attorneys responsible for advising the "client" agency or division regarding the prudence and propriety of proposed courses of conduct. Thus, advice given by the various Assistant Attorneys General and their staffs may be subject to the privilege. *See, e.g., Brinton* v. *Department of State, supra.* n27

n27 Although the *Brinton* decision was ultimately decided on deliberative process grounds, the **attorney-client** privilege aspect of exemption 5 was discussed at length by the court.

Notwithstanding these notions of "**attorney" [*39] and "client"** which the Court has expanded to implement fully the purposes of the privilege, the actual operation of the privilege continues to be governed by the traditional guidelines and procedures. n28 As in the traditional **attorney-client** context, once the privilege has attached, only the client, in this case the President or some other high level official in the Office of the President who is responsible for receiving and acting on the legal advice, may waive it. Thus, for example, a FOIA request lodged with the Department of Justice for information communicated to the Office of the President by the Attorney General which is protected by the **attorney-client**

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privilege should not be honored unless the Office of the President consents to release of the information. *See* Office of Legal Counsel, "Memorandum for Helen S. Lessin," *supra. See generally* Harmon, Memorandum for Patricia M. **[**497]** Wald, Assistant Attorney General, Office of Legislative Affairs, "Formulation of Policy on Disclosure of Information to Congress" at 8, 10 (July 19, 1977).

n28 *See United States* v. *Anderson,* 34 F.R.D. 518, 523 (D. Colo. 1963), for application of the traditional **attorney-client** privilege formulation in the governmental context:

[T]he documents are privileged insofar as they do not comment or report on information coming from persons outside the government or from public documents, or are summaries of conferences held with or in the presence of outsiders, and were produced with the idea of obtaining or receiving legal advice. **[*40]**

In addition, the person seeking to assert the privilege -- either the client or the **attorney on the client's** behalf -- must be able to demonstrate that the confidential disclosures "might not have been made absent the privilege," *Fisher* v. *United States, supra,* at 403, and that the underlying facts for which the privilege is claimed have *remained* confidential. *Mead Data Central, supra,* at 253. *See also Permian Corp.* v. *United States,* 665 F.2d 1214 (D.C. Cir. 1981); *Brinton* v. *Department of State, supra.* n29 Applying this rule to President-Attorney General communications, the circulation of advisory documents outside the operative circle of officials responsible for giving or receiving advice in the Office of the President or the Department of Justice, or, the reporting of factual information acquired from persons or sources outside the privileged relationship, would constitute a waiver, whether express or implied, of the privilege with respect to those documents and would subject them to disclosure, unless exempt from the Freedom of Information Act pursuant to some other exemption. *See Permian Corp.* v. *United States, supra;* n30 *Brinton* **[*41]** v. *Department of State, supra.* Advisory documents from the Attorney General which have been turned over to congressional committees are presumed to be no longer confidential and may not be the basis of a claim of **attorney-client** privilege. *See generally* Harmon, "Formulation of Policy on Disclosure of Information to Congress," *supra.* n31 *See also Permian Corp.* v. *United States, supra,* at 1220-22. However, these same documents may be subject to the deliberative process privilege under exemption 5. n32

n29 The requirement that the confidential disclosures for which the privilege is sought have remained confidential does not preclude the privilege's proper attachment to communications which have been circulated in a limited fashion beyond the attorney and the person within the group requesting legal advice. *See Upjohn* v. *United States, supra,* at 395; *Coastal States, supra,* at 863; *Mead Data Central, supra,* at 253 n.24. This broader scope of the confidentiality requirement is particularly appropriate in the corporate and governmental contexts. *See discussion, infra.*

n30 In *Permian Corp., supra,* the D.C. Circuit held that the voluntary disclosure of confidential materials to a third party outside the privileged relationship, in this case, the SEC, constituted a waiver of the privilege with respect to those documents, notwithstanding the SEC's agreement to protect the documents from further disclosure. Thus, the court rejected the rule of "limited waiver," followed by the Eighth Circuit in *Diversified Industries, Inc.* v. *Meredith,* 572 F.2d 596 (1977) *(en banc),* and concluded that the privilege could no longer be invoked to protect the documents from being disclosed by the SEC to another government agency:

The Eighth Circuit's "limited waiver" rule has little to do with [the] confidential link between the client and his legal advisor. Voluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the **attorney-client** relationship. If the client feels the need to keep his communications with his attorney confidential, he is free to do so under the traditional rule by consistently asserting the privilege, even when the discovery request comes from a "friendly" agency.

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* * *

[T]he **attorney-client** privilege should be available only at the traditional price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality.

665 F.2d at 1220-21, 1222 (footnote omitted).

n31 Former Assistant Attorney General Harmon suggested that even the "limited disclosure" involved in disclosing privileged materials to an executive session of Congress, or in a nonpublic administrative hearing, "would appear to undermine the theoretical predicate of the privilege," as applied in the civil discovery context. "The purpose of a privilege is to protect confidential communications necessary to promote certain relationships; once this confidentiality is breached, the rationale for granting the privilege no longer applies." "Formulation of Policy on Disclosure of Information to Congress," *supra,* at 5 (citations omitted).

n32 There is an additional privilege available under exemption 5 which may be invoked, when appropriate, to protect communications from the Office of the Attorney General to the Office of the President -- the **work-product** privilege. The **work-product** privilege under exemption 5 of the FOIA protects documents prepared in contemplation of litigation which reflect the "mental processes" of attorneys. The **work-product** privilege is distinct from the **attorney-client** privilege in that "it provides a working attorney with a 'zone of privacy' within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories." *Coastal States, supra,* at 864. While the **attorney-client** privilege is designed to protect the client's interest in confidentiality, the purpose of the **work-product** privilege is to protect "the adversary trial process itself." *Id.*

Because it is limited to documents prepared in contemplation of litigation, the **work-product** privilege is the least invoked of the exemption 5 privileges in the context of President-Attorney General communications. The broad advisory role that the Attorney General plays vis-a-vis the President, together with the President's general lack of involvement in litigation strategies, makes their communications far more suited to the deliberative process and **attorney-client** privileges as a basis for nondisclosure in litigation or under FOIA. **[*42]**

[498]** III. The "Governmental" Evidentiary Privileges -- and Their Freedom of Information Act Counterparts

The so-called "governmental" evidentiary privileges are common law privileges, now incorporated into the Federal Rules of Civil Procedure and the Federal Rules of Evidence, which have traditionally been available exclusively to the government as a litigant. Daniel, Assistant Attorney General, Civil Division, "Memorandum to All Civil Division Attorneys re: Asserting Claims of Official Government Privilege in Litigation" (Nov. 1980). *See generally McClelland v. Andrus, supra,* at 1286, n.53, quoting *Association for Women in Science v. Califano,* 566 F.2d 339 (D.C. Cir. 1977). These privileges -- the informant's privilege, the law enforcement investigatory files privilege, n33 and the privilege for confidential information on required reports n34 -- supplement the deliberative process, **attorney-client and work-product** privileges discussed above which are available to governmental as well as private parties in the civil litigation and discovery contexts. *See* Fed. R. Civ. P. 26; Fed. R. Evid. 501. These "governmental" privileges are necessary to protect **[*43]** the ability of the Executive Branch to discharge its duties under the Constitution and the laws of the United States, but because their assertion in litigation does not raise the problems of a constitutional conflict with a coequal branch, these privileges may be invoked by the head of the executive department in possession or control of the requested documents, or his or her delegate. n35 *See Association for Women in Science v. Califano, supra. See also McClelland v. Andrus, supra;* Daniel, "Asserting Claims of Official Governmental Privilege in Litigation" (Nov. 1980). These privileges also have **[**499]** analogues in the Freedom of Information Act under

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exemptions 6 and 7, 5 U.S.C. §§ 552(b)(6),(7), to shield documents of the same general type from disclosure to members of the public. As noted in the foregoing discussion of the evidentiary privileges incorporated into exemption 5 of the FOIA, the court must strike a balance between "the public concern in revelations facilitating the just resolution of legal disputes [on the one hand,] and, on the other, occasional but compelling needs for confidentiality," *McClelland* v. *Andrus, supra* at 1287, n.55, in deciding **[*44]** claims of privilege in the litigation context.

n33 The investigatory files privilege -- which frequently encompasses information which might reveal the identity or statements of informants -- protects interests which may be asserted under a claim of **executive privilege** also, if the interests are sufficiently strong in a particular case to implicate constitutional concerns. *See* 40 Op. Att'y Gen. 45. *See also* Office of Legal Counsel, "**Executive Privilege** in Litigation for Investigative Files" (September 18, 1981); Harmon, "Memorandum to All Heads of Offices, Divisions, Bureaus, and Boards of the Department of Justice," (May 23, 1977); Rehnquist Testimony, *supra.* However, because these interests rarely impinge on the performance of constitutional functions of the Executive Branch to the same degree as the "state secrets" or deliberative process components of the privilege, the privilege is generally asserted simply as an evidentiary privilege in litigation.

n34 The privilege for confidential information on required government reports is similar to the informant's privilege, *see* discussion at 31, *infra,* in that it protects information solicited by the government for its purposes on a promise of confidentiality. This privilege, like its FOIA-exemption 6 counterpart, protects accident reports, employment history reports, financial disclosures, conflict-of-interest reports, and other information, the disclosure of which would constitute a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). *See Dep't of State* v. *Washington Post Co.,* 456 U.S. 595 (1982). *Dep't of the Air Force* v. *Rose,* 425 U.S. 352 (1976); *Ass'n for Women in Science, supra.* Of the privileges discussed in this memorandum, this is the least likely privilege to be invoked in the context of President-Attorney General communications.

n35 *See generally* n.5, *supra.* **[*45]**

A. Informant's Privilege

The informant's privilege permits the government to withhold the identity of persons who furnish information concerning violations of the law, or otherwise render assistance, to officers charged with law enforcement responsibilities. *See* 8 C. Wright & A. Miller, Federal Practice & Procedure, § 2019 at 155 (1970); *Roviaro* v. *United States,* 353 U.S. 53 (1957); *Black* v. *Sheraton Corp. of America,* 47 F.R.D. 263 (D.D.C. 1969), *aff'd* 564 F.2d 550 (D.C. Cir. 1977). The informant's privilege recognizes that prospective informants usually condition their cooperation with law enforcement officers on an assurance of anonymity in order to protect against physical harm or other undesirable consequences to themselves and their families which would very likely result as a consequence of disclosure. *United States* v. *Tucker,* 380 F.2d 206, 213 (2d Cir. 1967). Although this privilege protects only the identity of the informant, information provided by the informant may also be shielded under this privilege if its disclosure would reveal the informer's identity. *Rovario* v. *United States, supra,* at 60. The informant's privilege, **[*46]** like the other privileges discussed above, is qualified; therefore, the government must show that its interest in effective law enforcement outweighs the litigant's need for the information. *See Rovario* v. *United States, supra; In re Attorney General of United States,* 596 F.2d 58 (2d Cir. 1979); 2 J. Weinstein and M. Berger, Weinstein's Evidence P510[02] at 510-18 (1982).

B. Law Enforcement Investigatory Files Privilege

Like the informant's privilege, the privilege for law enforcement investigatory files is necessary to protect against the harm that would flow from public disclosure of information

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contained in the files and to facilitate the government's law enforcement process. *See* Black v. *United States,* 564 F.2d 531 (D.C. Cir. 1977); *Brown* v. *Thompson,* 430 F.2d 1214 (5th Cir. 1970). Disclosure of open investigatory files n36 would undercut the government's efforts to prosecute criminals by disclosing investigative techniques, forewarning suspects under investigation, **[**500]** deterring witnesses from coming forward, and prematurely revealing facts supporting the government's case. n37 The privilege for law enforcement investigatory files is a **[*47]** qualified privilege, and may be overcome by a strong showing of need or interest in disclosure of the information. *See* Black v. *United States, supra.*

n36 As is apparent from the reasons underlying the privilege, the law enforcement investigatory files privilege does not apply to files pertaining to investigations which have been closed, although information protected by another privilege, *e.g.,* the informant's privilege, would continue to be shielded. *See* 2 Weinstein's Evidence P509(07) at 509-52-58 (1982). *Cf.* Supreme Court's recent discussion of FOIA exemption 7 in *FBI* v. *Abramson,* 456 U.S. 615 (1982).

n37 *See also* former Attorney General Jackson's opinion at 40 Op. Att'y Gen. 45 (1941), concluding that premature disclosure of law enforcement investigative reports to Congress or the public could prejudice the rights of prospective defendants whose investigations are the subject of the reports.

C. FOIA Exemption 7

Exemption 7 of the Freedom of Information Act incorporates these privileges for law enforcement records to protect the information contained therein from compulsory disclosure to members of the public. Exemption 7 exempts **[*48]** from the general disclosure mandate of the FOIA those matters which are

investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel[.]

5 U.S.C. § 552(b)(7). The subparts of § 552(b)(7) make clear that the interests protected therein are roughly analogous to those protected by the "governmental" privileges in litigation for informant's identity and law enforcement investigatory files. *See generally FBI* v. *Abramson, supra; NLRB* v. *Robbins Tire & Rubber Co.,* 437 U.S. 214 (1978); *Lesar* **[*49]** v. *Department of Justice,* 636 F.2d 472 (D.C. Cir. 1980), *Church of Scientology of Calif.* v. *Department of Justice,* 612 F.2d 417 (9th Cir. 1979).

IV. Conclusion

The privileges available to protect the confidentiality of the Attorney General's communications with the Office of the President can be roughly categorized into three classes, depending upon the nature of the communications for which the privilege is asserted, the interests which are sought to be protected by the claim of privilege, and the persons against whom the claim is made. This memorandum represents an effort by this Office to provide the Attorney General with a general outline of the privileges available to him to protect his confidential communications **[**501]** and working papers from compulsory disclosure when he believes that disclosure would be against the interests of the Department, the President, or the broader "public," and to provide guidelines for the assertion of those privileges. While the foregoing discussion should prove helpful in providing a framework for

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General maintains a close and confidential advisory relationship with the President over a broad range of policy issues, including the highest and most delicate affairs of state. *See, e.g.,* Rankin, **[**482]** Assistant Attorney General, Office of Legal Counsel, "Memorandum for the Attorney General re: Secrecy **[*3]** of Cabinet Proceedings and Papers" (Oct. 15, 1954). This advisory relationship to the President, a relationship shared by all members of the President's Cabinet, is constitutionally based. Article II, § 2, of the Constitution provides that the President

may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices. . . .

n1 In 1828 Attorney General Wirt described the Attorney General as "confidential law adviser to the Executive branch of the government." *See* H. Cummings and C. McFarland, Federal Justice 91 (1937). In two lengthy essays analyzing the executive departments and the Attorney General in particular, former Attorney General Cushing described the department heads as the President's "constitutional counsellors," his "political or confidential ministers," and his "constitutional advisers." 7 Op. Att'y Gen. 453 (1855); 6 Op. Att'y Gen. 326 (1854).

With respect to the Attorney General, this constitutional duty was carried over into statute by § 35 of the Judiciary Act of 1789, 1 Stat. 93, which required the Attorney General "to give his advice and opinions **[*4]** upon questions of law when required by the President of the United States." This provision is now codified in 28 U.S.C. § 511. n2

n2 The original language of § 35 of the 1789 Judiciary Act has remained virtually intact through subsequent codifications of the provision. *See* 28 U.S.C. § 511 (1976), which provides:

The Attorney General shall give his advice and opinion on questions of law when required by the President.

We note, as a preliminary matter, that the confidentiality of the communications discussed herein cannot be analyzed without consideration of the contents of the communications, including the identities of the persons generating the communications and the persons to whom they are addressed, as well as the identities of the persons seeking disclosure. Generally speaking, however, the conclusions reached in this memorandum, and discussed in detail below, are as follows:

1. The President may assert an arguably absolute **executive privilege** against the Legislative Branch and in the courts to protect from disclosure communications involving military, diplomatic, or national security secrets, n3 a qualified **[**483] executive privilege** may be claimed to protect **[*5]** law enforcement investigatory files and sensitive deliberative communications between the Office of the President and the Attorney General's Office, as well as staff communications within the two offices which are reflective of the deliberative process. The President customarily reserves exclusively to himself the power to assert the claim of **executive privilege** against Congress. n4 However, the Attorney General, as "head of [an executive] department which has control over the matter," may, after personal consideration of the matter, invoke the privilege against others in court. *United States* v. *Reynolds,* 345 U.S. 1, 8 (1953). n5

n3 *See Halkin* v. *Helms,* 598 F.2d 1 (D.C. Cir. 1978), holding that "[t]he state secrets privilege is absolute[,]" *id.* at 7, but permitting the district court to examine a classified affidavit *in camera,* in order to satisify itself of the validity of the claim of privilege with respect to the underlying classified information.

Although the Supreme Court has not stated expressly that the privilege for military, diplomatic, and national security secrets is absolute, it has used very strong language to this effect. *See, e.g.,* the Court's suggestion in *United States* v. *Nixon,* 418 U.S. 683, 711 (1974),

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analysis of potential claims of privilege, we would caution that the applicability of any privilege to a given set of circumstances **[*50]** will almost always involve a judgment of competing values. While the Attorney General or the client must decide initially whether to assert the privilege, the task of resolving conflicts arising out of such competing values, in the final analysis, is one that is reserved to the courts.

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that even *in camera* examination of documents may be inappropriate when a court is satisfied, "from all the circumstances of the case," that there exists a reasonable danger of disclosure of military, diplomatic, or national security secrets:

As to the areas of Art. II duties [involving military or diplomatic secrets,] the courts have traditionally shown the utmost deference to Presidential responsibilities. In C. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) [(emphasis added)], dealing with Presidential authority involving foreign policy considerations, the Court said:

"The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. *It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."*

In United States v. Reynolds, 345 U.S. 1 [,10] (1953), . . . the Court said:

"It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and *the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."*

418 U.S. at 710-11 (emphasis added). *See also* United States v. Reynolds, 345 U.S. 1 (1953):

In each case, the showing of necessity [for access to the documents] which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, *but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.*

345 U.S. at 11 (footnote omitted) (emphasis added). *See generally* Daniel, Assistant Attorney General, Civil Division, "Memorandum to All Civil Division Attorneys re: Asserting Claims of Official Governmental Privilege in Litigation" (Nov. 1980); Rehnquist, Assistant Attorney General, Office of Legal Counsel, "Testimony on **Executive Privilege** before the Senate Judiciary Subcommittee on Separation of Powers" (Aug. 4, 1971). *Cf.* American Civil Liberties Union v. Brown, 619 F.2d 1170 (7th Cir. 1980) *(en banc),* and Halkin v. Helms, *supra,* both construing Reynolds, *supra,* and *Nixon, supra,* to permit *in camera* examinations of documents for which the state secrets privilege was claimed in certain exceptional circumstances. American Civil Liberties Union, *supra,* held that a litigant's strong showing of need, *e.g.,* that withheld documents were critical to substantiate a claim of constitutional violation, may compel the district court to conduct *in camera* review of documents allegedly covered by state secrets privilege in order to determine whether they are properly classified.

n4 This limitation on the exercise of the privilege against Congress stems from a practice instituted by Presidents Kennedy and Johnson, that "**Executive privilege** can be invoked only by the President and will not be used without specific Presidential approval," letter from President Kennedy to Congressman Moss (Mar. 7, 1962), and formalized in President Nixon's "Memorandum for the Heads of Executive Departments and Agencies" (Mar. 24, 1969). To date, subsequent administrations have followed this practice. *See* Olson, Assistant Attorney General, Office of Legal Counsel, "Memorandum to the Attorney General re: **Executive Privilege"** (Oct. 9, 1981); Harmon, Assistant Attorney General, Office of Legal Counsel, "Memorandum to All Heads of Offices, Divisions, Bureaus and Boards of the Department of Justice" (May 23, 1977). *See generally* Common Cause v. NRC, 674 F.2d 921, 935 (D.C. Cir. 1982) (dictum to the effect that only the President may assert **executive privilege)**.

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n5 Although assertion of the state secrets privilege clearly requires that the claim be made by the head of an agency, the case law governing other claims of **executive privilege** in litigation is not settled with respect to who must assert the privilege. *Compare* Union Oil v. Morton, 56 F.R.D. 643 (C.D. Cal. 1972); FTC v. Bramman, 54 F.R.D. 364 (W.D. Mo. 1972); (recognizing claims made by persons other than agency heads), *with* Anchem Products v. GAF Corp., 64 F.R.D. 550 (N.D. Ga. 1974); Carter v. Carlson, 56 F.R.D. 9 (D.D.C. 1972). *See also* Daniel, "Asserting Claims of Official Governmental Privilege in Litigation," *supra* note 3 (recommending that *all* claims of governmental privilege in litigation, other than those relating to the informant's privilege, be formally asserted by the heads of agencies). **[*6]**

2. The Attorney General may assert a "deliberative process" privilege pursuant to exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), to withhold from the public nonfactual deliberative communications; absent a breach of the confidentiality of the privileged communication, the President, or the Attorney General on his behalf, may assert the **attorney-client** privilege pursuant to exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5). Similarly, absent a waiver of the privilege, the Attorney General may assert the common-law privilege for **attorney-client** communications, which has been codified in Rule 501 of the Federal Rules of Evidence, and Rule 26 of the Federal Rules of Civil Procedure, to protect from disclosure in litigation certain confidential communications of a legal advisory nature which were prepared for the Office of the President.

3. Finally, this memorandum addresses the traditional "governmental" evidentiary privileges which, although available to the Attorney General, only **[**484]** rarely would be applicable to his communications with the President. These privileges, which have analogues in the Freedom of Information Act, protect **[*7]** (a) confidential information which certain employees or members of the public are required to report on government records, (b) the identity of government informants, and (c) certain law enforcement investigatory files. n6

n6 *See* Daniel, "Asserting Claims of Official Governmental Privilege in Litigation," *supra* note 3. *See also FOIA* exemption 6, which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," § 552(b)(6); and exemption 7, which shields certain law enforcement investigatory records, § 552(b)(7).

I. **Executive Privilege**

The doctrine of **executive privilege** defines the constitutional authority of the Executive Branch to protect documents or information in its possession from public disclosure and from the compulsory process of the Legislative and Judicial Branches. *See* Rehnquist, Assistant Attorney General, Office of Legal Counsel, Testimony on **Executive Privilege** Before Senate Judiciary Subcommittee on Separation of Powers (Aug. 4, 1971). **Executive privilege** protects material the disclosure of which would significantly impair the conduct of foreign relations, **[*8]** the national security, or the performance of the Executive's lawful duties. n7 It also shields confidential deliberative communications which have been generated within the Executive Branch from compulsory disclosure, in the absence of a strong showing of need by the branch seeking disclosure that access to the privileged communications is critical to the responsible fulfillment of its constitutional functions. Nixon v. Administrator of General Services, 433 U.S. 425, 441-55 (1977); United States v. Nixon, 418 U.S. 683, 711-12 (1974); Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730-31 (D.C. Cir. 1974) *(en banc).* This privilege is based on the need for confidentiality of communications among high-level government officials, as well as the constitutional doctrine of separation of powers, which provides that each branch of government is "suprem[e] . . . within its own assigned area of constitutional duties." United States v. Nixon, *supra* at 705.

n7 Because the types of communications discussed in this memorandum are less likely to implicate military, diplomatic, or national security interests, the qualified privilege for law enforcement files, *see* n.33 *infra,* and for sensitive advisory or deliberative communications,

provides a more appropriate focus for our analysis. **[*9]**

A. Constitutional and Practical Bases of the Privilege

The necessity for confidentiality in the advisory relationships between Cabinet advisers and the President, and their respective aides, is of both constitutional and practical significance. *See* United States v. *Nixon, supra; Senate Select Committee on Presidential Campaign Activities* v. *Nixon, supra. See also* Opinion of the Attorney General for the President, "Assertion of **Executive Privilege** in Response to a Congressional Subpoena," 43 Op. Att'y Gen. , 5 Op. O.L.C. 27 (Oct. 13, 1981) (hereafter 1981 Attorney General Opinion); Harmon, Assistant Attorney General, Office of Legal Counsel, "Memorandum for the **[**485]** Attorney General re: The Constitutional Privilege for Executive Branch Deliberations: The Dispute with a House Subcommittee over Documents Concerning Gasoline Conservation Fee" (Jan. 18, 1981) (hereafter Harmon Memorandum); Rehnquist Testimony, *supra.* n8 It is premised on the need to discuss confidential matters which arise within the Executive Branch and to assist the President in the discharge of his constitutional powers and duties, by ensuring discussion that is free-flowing and frank, **[*10]** unencumbered by fear of disclosure or intrusion by the public or the other branches of government. The President and those who assist him require candid advice on the wide range of issues which confront the Executive, and such candid advice may not be forthcoming if Cabinet advisers or their aides must anticipate disclosure of the advice rendered by them and the potential public or legislative criticism which might result therefrom.

n8 *See generally* Rankin, Assistant Attorney General, Office of Legal Counsel, "Memorandum for the Attorney General re: Secrecy of Cabinet Proceedings and Papers" at 3 (Oct. 15, 1954):

[T]he special and perhaps most significant aspect of [Cabinet members'] office is that of trusted adviser to the Chief Executive in the affairs of the Nation, a relationship which cannot long be maintained with respect to those feeling themselves at liberty to make unauthorized disclosures of information imparted to them at Cabinet meetings in strict confidence; and accordingly . . . each member, to retain the confidence of the President, must constantly bear in mind the overriding need for scrupulous observance of the secrecy of Cabinet proceedings and papers. **[*11]**

A unanimous n9 Supreme Court in *United States* v. *Nixon, supra,* affirmed the constitutional underpinnings of the privilege, recognizing the "protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties" as supported by the doctrine of separation of powers, and by historic practice. n10 The Court described this constitutional and historic basis as "too plain to require further discussion." *Id.* at 705. *See also Senate Select Committee, supra.* The Court went on to state that "human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *United States* v. *Nixon, supra* at 705. Such "temper[ed] candor" in presidential advisers' deliberations clearly would impede the President's performance of his constitutional duty to exercise the executive powers described in Art. II, § 3 of the Constitution. *See Nixon* v. *Administrator of General Services, supra; United States* v. *Nixon, supra.*

n9 Justice Rehnquist did not participate in this decision. 418 U.S. at 685.

n10 The Court noted that the 1787 Constitutional Convention had been conducted by the Framers in complete privacy, and that the records of the Convention were sealed for more than 30 years thereafter. 418 U.S. at 705, n.15. *See* 1 M. Farrand, The Records Of The Federal Convention of 1787, pp. xi-xxv (1911); 3 Stat. 475, 15th Cong., 1st Sess., Res. 8 (1818). *See also* C. Warren, The Making Of The Constitution 134-39 (1937).

The need for confidential deliberations is not unique to the Executive Branch. The Framers recognized that some congressional deliberations would of necessity be privileged from publication, Art. I, § 5, cl. 3, or from questioning beyond the House or Senate floor, Art. I, § 6, cl. 1. Similarly, judicial deliberations, as well as discussions between judges and their law clerks, are undoubtedly privileged, although neither the Executive nor the Legislative Branches has ever attempted to challenge the right of courts to withhold such information. *See generally* Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973) *(en banc);* Soucie v. David, 448 F.2d 1067, 1080-81 (D.C. Cir. 1971) (Wilkey, J., concurring); Henkin, "The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers," 120 U. Pa. L. Rev. 271, 274 (1971). **[*12]**

The Supreme Court and lower federal courts have made clear that the presumption of confidentiality accorded presidential communications is intended to protect not only the substance of sensitive communications between the President **[**486]** and his advisers but the integrity of the decisionmaking process within the Executive Branch as well. n11 *See* Nixon v. Administrator of General Services, supra; Senate Select Committee, supra; Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) *(en banc). See also* 1981 Attorney General Opinion *supra;* Harmon Memorandum, *supra.* It is these concerns which justify the invocation of **executive privilege** by the President, or, where appropriate, the heads of executive departments, as well as the "deliberative process" privilege, which may be claimed by any federal agency pursuant to exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), to withhold documents requested by members of the public. n12

n11 In its analysis of **executive privilege** in *United States* v. *Nixon, supra,* the Supreme Court discussed the role of confidentiality among presidential advisers and concluded:

The expectation of a President to the confidentiality of his conversations and correspondence . . . is [grounded on] the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

418 U.S. at 708 (footnote omitted).

n12 The deliberative process privilege will be discussed *infra* in part II.A. **[*13]**

B. Limitations on the Scope of the Privilege

Notwithstanding the necessity for confidentiality in executive deliberations, the privilege against their disclosure to Congress and the courts is qualified, in both scope and application. First, the **executive privilege** for intragovernmental deliberations does not protect materials the disclosure of which would not implicate or hinder the Executive Branch's decisionmaking processes. *United States* v. *Nixon, supra.* Thus, factual, nonsensitive materials -- communications from the Attorney General which do not contain advice, recommendations, tentative legal judgments, drafts of documents, or other material reflecting deliberative or policymaking processes -- do not fall within the scope of materials for which **executive privilege** may be claimed as a basis of nondisclosure. *Cf., e.g.,* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); Taxation With Representation v. IRS, 646 F.2d 666 (D.C. Cir. 1981); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866-69 (D.C. Cir. 1980). n13

n13 The standard for nondisclosure under a claim of **executive privilege** is analogous to the "deliberative process" privilege codified in the Freedom of Information Act, 5 U.S.C. § 552(b)(5), which exempts predecisional and deliberative documents from the general disclosure

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mandate of the Act. *See generally* McClelland v. Andrus, 606 F.2d 1278, 1287 n.54 (D.C. Cir. 1979). However, Congress may not expand the public's statutory right to disclosure under FOIA beyond those limits set, in any given case, by the constitutional doctrine of **executive privilege,** Soucie v. David, 448 F.2d 1067, 1071-72, n.9, 1081-83 (D.C. Cir. 1971); conversely, because of its constitutional basis independent of FOIA, Congress may not limit the scope of **executive privilege** by altering the standards for disclosure under FOIA. *Id.* **[*14]**

Second, even in cases involving sensitive deliberative materials for which a claim of privilege may be appropriate, the executive interest in nondisclosure must be balanced against the needs of the requesting branch before the validity of the claim of privilege can be determined. It is in these cases of potential conflict and competing claims of legitimate need by each branch that the separation of **[**487]** powers principle on occasion must yield to the principles of "a workable government" -- "separateness but interdependence, autonomy but reciprocity." United States v. Nixon, supra at 707 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). These principles recognize a "spirit of dynamic compromise" among the coordinate branches when a conflict in authority arises -- a spirit which requires each branch to "take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in a particular fact situation." United States v. AT&T, 567 F.2d 121, 127 (D.C. Cir. 1977). This duty to recognize and accommodate the legitimate **[*15]** needs of the other branches was examined in its constitutional context by the D.C. Circuit in *United States* v. *AT&T, id.* at 130 (footnote omitted):

[I]t was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations . . . [Thus,] the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive *modus vivendi,* which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.

See also 1981 Attorney General Opinion, *supra,* 5 Op. O.L.C. at 30 ("The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.").

The more generalized the executive interest in withholding the disputed information, the more likely it is that the claim of privilege will yield to a specific, articulated need related **[*16]** to the effective performance by the coordinate branches of their constitutionally assigned functions. Conversely, the more specific the need for confidentiality, and the less specific the articulated need of the requesting branch for the information, the more likely it is that the Executive's need for confidentiality will prevail. Nixon v. Administrator of General Services, supra; United States v. Nixon, supra. *See generally* 1981 Attorney General Opinion, *supra;* Harmon Memorandum, *supra.* Thus, in determining whether to assert the privilege, the Executive, in the first instance, must balance the "public" interest n14 inherent in the "general privilege of confidentiality of Presidential communications in performance of the President's responsibilities" against the national or public interest in disclosure, as determined by the ability **[**488]** of the requesting branch responsibly to fulfill its constitutional duties without the assistance provided by the requested documents. United States v. Nixon, supra, 418 U.S. at 706, 711-712. *See* Nixon v. Sirica, supra, 487 F.2d at 716-17. In making such a determination, each document -- and the role that **[*17]** it plays in the decisionmaking process -- must be examined individually. Playboy Enterprises v. Department of Justice, 677 F.2d 931, 935 (D.C. Cir. 1982); Coastal States, supra, 617 F.2d at 867.

n14 The "public" interest in nondisclosure derives from the recognized value which accrules to the public from an effective executive decisionmaking process, supported by the exchange

of "candid, objective, and even blunt or harsh opinions," *United States* v. *Nixon, supra* at 708, and fostered by ensuring the confidentiality of such opinions. *Nixon* v. *Sirica, supra* at 717. *See also McClelland* v. *Andrus,* 606 F.2d 1278, 1287 n.55 (D.C. Cir. 1979) (citations omitted) (recognizing the "compelling public [interest in] confidentiality" which is "[n] owhere . . . more vitally involved than in the fidelity of the sovereign's decision and policymaking resources.") *See generally* Rehnquist Testimony, *supra.*

In the case of Congress, the grant of legislative power in Article I of the Constitution implies a requirement that Congress have access to pertinent information, as well as the authority to summon witnesses and to compel the production of needed evidence, **[*18]** as a prerequisite to the proper performance of its legislative function. *Jurney* v. *MacCracken,* 294 U.S. 125 (1935); *McGrain* v. *Daugherty,* 273 U.S. 135 (1927). *See generally* Rehnquist Testimony, *supra.* Congress' duty to investigate and inform itself of matters which may involve the Executive is very broad, extending "over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate." *Barenblatt* v. *United States,* 360 U.S. 109, 111 (1959). *See also Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 504-07 (1975); *Watkins* v. *United States,* 354 U.S. 178, 187 (1957). *See generally* Cox, "**Executive Privilege,**" 122 U. Pa. L. Rev. 1383, 1426 (1974). This broad-based power of inquiry includes matters requiring new or remedial legislation, appropriations of funds, congressional probes into various governmental departments to expose corruption, inefficiency, or waste, as well as the administration of existing laws or proposed statutes. Yet, these very sources of Congress' power to obtain information also outline the limits of that power: Congress may only inquire **[*19]** into those matters on which it may potentially legislate or appropriate -- it may not inquire into those matters "which are within the exclusive province" of the Executive or the Judiciary. *Barenblatt, supra* at 112. *See Watkins, supra.* Nevertheless, the validity of a claim of privilege for documents demanded by Congress in the performance of its legitimate legislating functions, including the "oversight" function, can only be determined by balancing the particular interests of the Legislative and Executive Branches against each other in each case, in light of the possibility of accommodation. *Senate Select Committee, supra.* n15

n15 *See, e.g.,* 1981 Attorney General Opinion, *supra,* discussing the relatively weak congressional interest in obtaining predecisional, deliberative Executive Branch documents in the context of Congress' performance of its general "oversight" function, as compared to its consideration of specific legislative proposals:

At the stage of oversight, the congressional interest is a generalized one of ensuring that the laws are well and faithfully executed and of proposing remedial legislation if they are not. The information requested is usually broad in scope and the reasons for the request correspondingly general and vague. In contrast, when Congress is examining specific proposals for legislation, the information which Congress needs to enable it to legislate effectively is usually quite narrow in scope and the reasons for obtaining that information correspondingly specific. A specific, articulated need for information will weigh substantially more heavily in the constitutional balancing than a generalized interest in obtaining information.

[Moreover,] the congressional oversight interest will support a demand for predecisional, deliberative documents in the possession of the Executive Branch only in the most unusual circumstances. It is important to stress that congressional oversight of Executive Branch actions is justifiable only as a means of facilitating the legislative task of enacting, amending, or repealing laws. When such "oversight" is used as a means of participating directly in an ongoing process of decisionmaking within the Executive Branch, it oversteps the bounds of the proper legislative function. Restricted to its proper sphere, the congressional oversight function can almost always be properly conducted with reference to information concerning decisions which the Executive Branch has already reached. Congress will have a legitimate need to know the preliminary positions taken by Executive Branch officials during internal deliberations only in the rarest of circumstances.

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5 Op. O.L.C. at 29 (citations omitted). **[*20]**

[489]** Similarly, with respect to judicial functions, an evaluation must be made of the impact of a successful claim of **executive privilege** on the ability of the Judiciary to perform effectively its duties of fair adjudication of controversies and supervision of grand jury investigations. *See* United States v. Nixon, supra; Nixon v. Sirica, supra. As is the case when the privilege is asserted against the Legislative Branch, if the information withheld by the Executive is "demonstrably critical to the responsible fulfillment" of the Judiciary's functions, a generalized claim of privilege must fail. Nixon v. Sirica, 487 F.2d at 717 ("the general confidentiality privilege must recede before the grand jury's showing . . . that the subpoenaed [information] contain[s] evidence peculiarly necessary to the carrying out of [its] vital function."). *Cf.* Senate Select Committee, 498 F.2d at 731.

Notwithstanding these limitations on the scope of the privilege for Executive Branch communications, it is not essential that the communications for which the privilege is claimed have been directed to or emanated from the President himself. *See* Nixon, "Memorandum **[*21]** for the Heads of Executive Departments and Agencies" (March 24, 1969). *See also* United States v. AT&T, supra; Harmon Memorandum, *supra.* The underlying rationale of the privilege to foster robust and honest debate in the presidential decisionmaking process is as applicable to Executive Branch advisers both within and outside the immediate Office of the President as it is to the President himself. The Supreme Court, in United States v. Nixon, supra, recognized the need for the President *"and those who assist him* [to] be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." 418 U.S. 708 (emphasis supplied). In addition, this office has recently expressed the view that because of the importance of the executive department heads and their advisers to the President and his closest advisers in presidential decisionmaking, it would be "artificial" to draw a rigid and inflexible line between the executive departments and the President's Office, limiting the reach of the constitutional privilege only to the latter. Harmon Memorandum, *supra* at 13-14. n16 Thus, **[*22]** memoranda prepared by the Attorney General or his assistants containing legal or policy advice on issues under consideration by the President and his advisers may be properly encompassed by a claim of **executive privilege.** This category of documents would include, for example, staff level advice to Assistant Attorneys General concerning matters on which the President has **[**490]** sought advice, staff level advice to officials in the Office of the President, notes of middle level staff meetings concerning issues before the President or members of his staff, and tentative legal judgments or draft policy statements prepared for the President or his staff.

n16 Nevertheless, former Assistant Attorney General Harmon's January 18, 1981, memorandum recognized that there exist "differences of degree" of sensitivity inherent in the broad category of executive deliberations. The memorandum pointed out that in deciding whether to claim the privilege, it is especially important to protect the integrity of deliberations involving the President himself and his closest advisers:

In accommodating Congress's legitimate need for certain information, the executive branch should be least willing to reveal deliberations directly involving the President and his closest advisers, and more willing to disclose material from within the executive departments.

Harmon Memorandum, *supra,* at 13. **[*23]**

For purposes of invoking **executive privilege,** communications from the Attorney General, *qua* the President's chief legal adviser, should be analyzed in the same fashion as communications from other Cabinet advisers and trusted high-level officials. Unlike the **attorney-client** privilege, which focuses exclusively on communications of a *legal* advisory nature, **executive privilege** may be claimed for any nonfactual, sensitive deliberative communication for which there exists a sufficiently strong public interest in nondisclosure.

Counsel's Office, White House

Kavanaugh, Brett

Subject File

PRA (Presidential Records Act) Reagan Records [2]

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NUMBER OF PAGES: 4 *(NOT INCLUDING COVER SHEET)*

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# of PAGES: 4 (including cover page) DATE: 11/8/01

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November 8, 2001

BY FACSIMILE
M. Edward Whelan, III
Acting Assistant Attorney General
Office of Legal Counsel
950 Pennsylvania Avenue, N.W. - Room 3266
Washington, DC 20530

Dear Mr. Whelan:

This letter follows up on your testimony yesterday before the Government Reform Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations about President Bush's new Executive Order 13223, "Further Implementation of the Presidential Records Act." I would appreciate your providing the Administration's legal opinion for each of the attached questions.

Please contact Subcommittee Deputy Staff Director Barbara Kahlow at 226-3058 if you have any questions about this request. Please provide the requested information by November 30, 2001 to the Subcommittee majority staff in B-377 Rayburn House Office Building and the minority staff in B-350A Rayburn House Office Building.

Thank you in advance for your attention to this request.

Sincerely,

Doug Ose
Chairman
Subcommittee on Energy Policy, Natural
Resources and Regulatory Affairs

Attachment

cc: The Honorable Dan Burton
The Honorable John Tierney
The Honorable Stephen Horn

Questions for OLC on E.O. 13233

Q1. Section 1(g) of President Reagan's Executive Order (E.O.) 12667 defined that a "substantial question of Executive privilege" exists if "disclosure of Presidential records might impair the national security ..., law enforcement, or the deliberative processes of the Executive branch." What is the legal basis for the two new, broad categories of records with access restrictions -- "communications of the President or his advisors (the presidential communications privilege); [and] legal advice or legal work (the attorney-client or attorney work product privileges)" -- in Section 2(a) of E.O. 13233?

Q2. During the hearing, I questioned you about the apparent inconsistency between Sections 2204(c)(1) and 2204(c)(2) of the Presidential Records Act (PRA) and Section 2(a) of E.O. 13233. Section 2204(c)(1) provides that, after a 12-year period, the Archivist shall provide public access in accordance with the Freedom of Information Act (FOIA) but with one important exception. Namely, Section (b)(5) of FOIA, which provides an exemption for certain common law evidentiary privileges (such as the attorney-client, attorney work product and deliberative process privileges), cannot be used to withhold documents. This section also directs that access to Presidential records "shall be granted on nondiscriminatory terms." Section 2204(c)(2) states that "Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege."

Section 2(a) of the Order, however, provides that the President's constitutionally-based privileges "subsume" the attorney-client, attorney work product, and deliberative process privileges. I understand that courts have interpreted FOIA exemption (b)(5) to cover only common law evidentiary privileges. For example, see NLRB v. Sears & Roebuck Co., 421 U.S. 132, 150-54 (1975); EPA v. Mink, 410 U.S. 73, 85-91(1973); and FTC v. Grolier, Inc., 462 U.S. 19 (1983). I also understand that there is no judicial precedent according Constitutional status to such privileges. You agreed with me on this point. However, you explained that, if an incumbent or former President asserted a general claim of executive privilege with respect to a communication, the claim would encompass any common law privilege that could have otherwise been raised with respect to the communication. I am concerned by what seems to be a backdoor way of accomplishing what Congress intended to preclude.

Your explanation also appears to be irreconcilable with recent appellate court rulings. In In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997), cert. denied 117 S. Ct. 2482 (1997), the court held that the White House could not invoke any form of governmental attorney-client privilege to withhold potentially relevant information from a grand jury. In In re Bruce Lindsey, 158 F. 3d 1263 (D.C. Cir. 1998), cert. denied 119 S. Ct. 466 (1998), the court similarly denied assertions of attorney-client and attorney work product privileges by a White House counsel, holding that a government attorney cannot invoke these common law privileges in response to questions seeking information related to the commission of a crime. Finally, in In re Sealed Case (Espy), 121 F. 3d 729 (D.C. Cir. 1997), the court distinguished the Presidential communications privilege and the deliberative process privilege. The court observed that both are executive privileges meant to protect the confidentiality of executive branch decisionmaking. But, the

deliberative process privilege applies to executive branch officials generally and is a common law privilege that requires a lower threshold of need to be overcome. The Presidential communications privilege is rooted in "constitutional separation of powers principle and the President's unique role" and applies only to "direct decisionmaking by the President" relating to only those functions that form the core of Presidential authority, involving what the court characterized as "quintessential and non-delegable Presidential power", i.e., those functions expressly vested in the President by the Constitution. This case law appears to conclude that common law privileges that might arise in general communications with the President cannot automatically be "subsumed" under a general claim of executive privilege.

Based on this case law, please reconsider your incorporation theory. After your review of this case law, do you now think that the two new, broad categories in Section 2(a) of E.O. 13233 could withstand a court challenge?

Q3. Section 2(c) of E.O. 13233 sets a new standard - "demonstrated, specific need" - for citizens to meet to access some Presidential records. This standard is not in FOIA. Therefore, what is the policy basis for this change?

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8/16/01

Brett - prepare cover memo for staffing - explaining what this is and the need - as well as possible negative repercussions - Judge

Brett M. Kavanaugh
08/15/2001 01:54:09 PM

Record Type: Record

To: Alberto R. Gonzales/WHO/EOP@EOP, Elizabeth N. Camp/WHO/EOP@EOP, Timothy E. Flanigan/WHO/EOP@EOP

cc:

Subject: New draft Presidential Records EO

The plan is to get this into the OMB process by the end of the week. Note new Section 5, which both is accurate and should deflect criticism. **[Libby, print for Judge.]**

Reagan records EO August 15.do

36 CFR 1270.10

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TITLE 36 -- PARKS, FORESTS, AND PUBLIC PROPERTY
CHAPTER XII -- NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
SUBCHAPTER E -- PRESIDENTIAL RECORDS
PART 1270 -- PRESIDENTIAL RECORDS
SUBPART A -- GENERAL PROVISIONS

36 CFR 1270.10

§ 1270.10 Scope of part.

These regulations implement the provisions of the Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523-27, as amended by Pub. L. No. 98-497, sec. 107(b)(7), 98 Stat. 2287 (1984) (codified at 44 U.S.C. 2201-07), by setting forth the policies and procedures governing preservation, protection, and disposal of, and access to Presidential and Vice-Presidential records created during a term of office of the President or Vice President beginning on or after January 20, 1981. Nothing in these regulations is intended to govern procedures for assertion of, or response to, any constitutionally based privilege which may be available to an incumbent or former President.

HISTORY:
53 FR 50404, Dec. 15, 1988.

AUTHORITY:
The Presidential Records Act of 1978, Pub. L. 95-591, 92 Stat. 2523-27, as amended by the National Archives and Records Administration Act of 1984, Pub. L. 98-497, sec. 107(b)(7), 98 Stat. 2287 (1984) (codified at 44 U.S.C. 2201-07).

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*** THIS SECTION IS CURRENT THROUGH THE JULY 13, 2001 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 36 -- PARKS, FORESTS, AND PUBLIC PROPERTY
CHAPTER XII -- NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
SUBCHAPTER E -- PRESIDENTIAL RECORDS
PART 1270 -- PRESIDENTIAL RECORDS
SUBPART A -- GENERAL PROVISIONS

36 CFR 1270.12

§ 1270.12 Application.

(a) These regulations apply to all Presidential records created during a term of office of the President beginning on or after January 20, 1981.

(b) Vice-Presidential records shall be subject to the provisions of this part in the same manner as Presidential records. The Vice President's duties and responsibilities, with respect to Vice-Presidential records, shall be the same as the President's duties and responsibilities with respect to Presidential records. The Archivist's authority with respect to Vice-Presidential records shall be the same as the Archivist's authority with respect to Presidential records, except that the Archivist may, when he determines it to be in the public interest, enter into an agreement with a non-Federal archival repository for the deposit of Vice-Presidential records.

HISTORY:
53 FR 50404, Dec. 15, 1988.

AUTHORITY:
The Presidential Records Act of 1978, Pub. L. 95-591, 92 Stat. 2523-27, as amended by the National Archives and Records Administration Act of 1984, Pub. L. 98-497, sec. 107(b)(7), 98 Stat. 2287 (1984) (codified at 44 U.S.C. 2201-07).

137 words

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36 CFR 1270.14

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SUBPART A -- GENERAL PROVISIONS

36 CFR 1270.14

§ 1270.14 Definitions.

For the purposes of this part--

(a) The terms documentary material, Presidential records, personal records, Archivist, and former President have the meanings given them by 44 U.S.C. 2201 (1)-(5), respectively.

(b) The term agency has the meaning given it by 5 U.S.C. 551(1) (A)-(D) and 552(f).

(c) The term Presidential archival depository has the meaning given it by 44 U.S.C. 2101(1).

(d) The term Vice-Presidential records means documentary materials, or any reasonably segregable portion thereof, created or received by the Vice President, his immediate staff, or a unit or individual of the Office of the Vice President whose function is to advise and assist the Vice President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the Vice President. The term includes documentary materials of the kind included under the term Presidential records.

(e) The term filed means the date something is received in the office of the official to whom it is addressed.

HISTORY:
53 FR 50404, Dec. 15, 1988.

AUTHORITY:
The Presidential Records Act of 1978, Pub. L. 95-591, 92 Stat. 2523-27, as amended by the National Archives and Records Administration Act of 1984, Pub. L. 98-497, sec. 107(b)(7), 98 Stat. 2287 (1984) (codified at 44 U.S.C. 2201-07).

185 words

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Terms: "presidential records" (Edit Search)
Section: 36 CFR 1270.20

36 CFR 1270.20

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SUBPART B -- ACTIONS TAKEN ON BEHALF OF FORMER PRESIDENTS

36 CFR 1270.20

§ 1270.20 Designation of person or persons to act for former President.

(a) A President or former President may designate some person or persons to exercise, upon death or disability of the President or former President, any or all of the discretion or authority granted to the President or former President by chapter 22 of title 44 U.S.C.

(b) When a President or former President designates a person or persons to act for him pursuant to paragraph (a) of this section, this designation shall be effective only if the Archivist has received notice of the designation before the President or former President dies or is disabled.

(c) The notice required by paragraph (b) of this section shall be in writing, and shall include the following information:

(1) Name(s) of the person or persons designated to act for the President or former President;

(2) The current addresses of the person or persons designated; and

(3) The records, identified with reasonable specificity, over which the designee(s) will exercise discretion or authority.

HISTORY:
53 FR 50404, Dec. 15, 1988.

AUTHORITY:
The Presidential Records Act of 1978, Pub. L. 95-591, 92 Stat. 2523-27, as amended by the National Archives and Records Administration Act of 1984, Pub. L. 98-497, sec. 107(b)(7), 98 Stat. 2287 (1984) (codified at 44 U.S.C. 2201-07).

165 words

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36 CFR 1270.22

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SUBPART B -- ACTIONS TAKEN ON BEHALF OF FORMER PRESIDENTS

36 CFR 1270.22

§ 1270.22 When Archivist may act for former President.

In those instances where a President has specified, in accordance with 44 U.S.C. 2204(a), restrictions on access to Presidential records, but has not made a designation under § 1270.20 of this subpart, the Archivist shall, upon the death or disability of a President or former President, exercise the discretion or authority granted to a President or former President by 44 U.S.C. 2204.

HISTORY:
53 FR 50404, Dec. 15, 1988.

AUTHORITY:
The Presidential Records Act of 1978, Pub. L. 95-591, 92 Stat. 2523-27, as amended by the National Archives and Records Administration Act of 1984, Pub. L. 98-497, sec. 107(b)(7), 98 Stat. 2287 (1984) (codified at 44 U.S.C. 2201-07).

66 words

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Section: 36 CFR 1270.22

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Terms: "presidential records" (Edit Search)
Section: 36 CFR 1270.30

36 CFR 1270.30

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SUBPART C -- DISPOSAL OF PRESIDENTIAL RECORDS

36 CFR 1270.30

§ 1270.30 Disposal of Presidential records by incumbent President.

A President may, while in office, dispose of any Presidential records which in his opinion lack administrative, historical, informational, or evidentiary value if one of the following two sets of requirements is satisfied:

(a)(1) The President has obtained the written views of the Archivist concerning the proposed disposal; and

(2) The Archivist states in his written views to the President that he does not intend to request, with respect to the President's proposed disposal of Presidential records, the advice of the Committees on Rules and Administration and Governmental Affairs of the Senate, and the Committees on House Administration and Government Operations of the House of Representatives because he does not consider--

(i) The records proposed for disposal to be of special interest to the Congress; or

(ii) Consultation with the Congress concerning the proposed disposal to be in the public interest; or

(b)(1) The President has obtained the written views of the Archivist concerning the proposed disposal;

(2) The Archivist states in his written views either--

(i) That the records proposed for disposal may be of special interest to the Congress; or

(ii) That consultation with the Congress concerning the proposed disposal is in the public interest; and

(3) The President submits copies of the proposed disposal schedule to the Committees on Rules and Administration and Governmental Affairs of the Senate and the Committees on House Administration and Government Operations of the House of Representatives at least 60 calendar days of continuous session of Congress in advance of the proposed disposal date. For the purpose of this section, continuity of session is broken only by an adjournment of

Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the days in which Congress is in continuous session.

HISTORY:
53 FR 50404, Dec. 15, 1988.

AUTHORITY:
The Presidential Records Act of 1978, Pub. L. 95-591, 92 Stat. 2523-27, as amended by the National Archives and Records Administration Act of 1984, Pub. L. 98-497, sec. 107(b)(7), 98 Stat. 2287 (1984) (codified at 44 U.S.C. 2201-07).

330 words

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Terms: "presidential records" (Edit Search)
Section: 36 CFR 1270.32

36 CFR 1270.32

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36 CFR 1270.32

§ 1270.32 Disposal of Presidential Records in the custody of the Archivist.

(a) The Archivist may dispose of Presidential records which he has appraised and determined to have insufficient administrative, historical, informational, or evidentiary value to warrant their continued preservation.

(b) When Presidential records are scheduled for disposal pursuant to paragraph (a) of this section, the Archivist shall publish a notice of this disposal in the Federal Register at least 60 days before the proposed disposal date.

(c) The notice required by paragraph (b) of this section, shall include the following:

(1) A reasonably specific description of the records scheduled for disposal; and

(2) A concise statement of the reason for disposal of the records.

(d) Publication in the FEDERAL REGISTER of the notice required by paragraph (b) of this section shall constitute a final agency action for purposes of review under chapter 7 of title 5 U.S.C. (5 U.S.C. 701-706).

HISTORY:
53 FR 50404, Dec. 15, 1988.

AUTHORITY:
The Presidential Records Act of 1978, Pub. L. 95-591, 92 Stat. 2523-27, as amended by the National Archives and Records Administration Act of 1984, Pub. L. 98-497, sec. 107(b)(7), 98 Stat. 2287 (1984) (codified at 44 U.S.C. 2201-07).

153 words

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Terms: "presidential records" (Edit Search)
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36 CFR 1270.40

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36 CFR 1270.40

§ 1270.40 Identification of restricted records.

(a) If a President, prior to the conclusion of his term of office or last consecutive term of office, as the case may be, specifies durations, not to exceed 12 years, for which access to certain information contained in Presidential records shall be restricted, in accordance with 44 U.S.C. 2204, the Archivist or his designee shall identify the Presidential records affected, or any reasonably segregable portion thereof, in consultation with that President or his designated representative(s).

(b) The Archivist shall restrict public access to the information contained in those records identified as affected until--

(1) The date on which the former President waives the restriction on disclosure of the record or information contained within;

(2) The expiration of the period of restriction specified under 44 U.S.C. 2204(a) for the category of information under which a certain record, or a portion thereof, was restricted; or

(3) The Archivist has determined that the former President or an agent of the former President has placed in the public domain through publication a restricted record or a reasonably segregable portion thereof, if this date is earlier than either of the dates specified in paragraph (b)(1) or (2) of this section.

HISTORY:
53 FR 50404, Dec. 15, 1988.

AUTHORITY:
The Presidential Records Act of 1978, Pub. L. 95-591, 92 Stat. 2523-27, as amended by the National Archives and Records Administration Act of 1984, Pub. L. 98-497, sec. 107(b)(7), 98 Stat. 2287 (1984) (codified at 44 U.S.C. 2201-07).

211 words

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36 CFR 1270.42

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36 CFR 1270.42

§ 1270.42 Denial of access to public; right to appeal.

(a) Any person denied access to a Presidential record (hereinafter the requester) because of a determination that the record or a reasonably segregable portion thereof was (1) properly restricted under 44 U.S.C. 2204(a), and (2) not placed in the public domain by the former President or his agent, may file an administrative appeal with the Assistant Archivist for Presidential Libraries (NL), Washington, DC 20408.

(b) Appeals shall be filed no later than 10 working days after the requester receives written notification that access to Presidential records has been denied.

(c) Appeals shall be in writing and shall set forth the reason(s) why the requester believes access to the records sought should be allowed. The requester shall identify the specific records sought.

(d) Upon receipt of an appeal, the Assistant Archivist for Presidential Libraries shall have 30 working days from the date an appeal is filed to consider the appeal and to respond in writing to the requester. The Assistant Archivist's response shall state whether or not the Presidential records requested are to be released and the basis for this determination. The decision of the Assistant Archivist to withhold release of Presidential records is final and not subject to judicial review.

HISTORY:
53 FR 50404, Dec. 15, 1988.

AUTHORITY:
The Presidential Records Act of 1978, Pub. L. 95-591, 92 Stat. 2523-27, as amended by the National Archives and Records Administration Act of 1984, Pub. L. 98-497, sec. 107(b)(7), 98 Stat. 2287 (1984) (codified at 44 U.S.C. 2201-07).

215 words

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36 CFR 1270.44

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36 CFR 1270.44

§ 1270.44 Exceptions to restricted access.

(a) Notwithstanding any restrictions on access imposed pursuant to section 2204 or these regulations, and subject to any rights, defenses, or privileges which the United States or any agency or person may invoke, Presidential records shall be made available in the following instances:

(1) Pursuant to subpoena or other judicial process properly issued by a court of competent jurisdiction for the purposes of any civil or criminal investigation or proceeding;

(2) To an incumbent President if the records sought contain information which is needed for the conduct of current business of his office and is not otherwise available;

(3) To either House of Congress, or, to the extent of matter within its jurisdiction, to a Congressional committee or subcommittee if the records sought contain information which is needed for the conduct of business within its jurisdiction and is not otherwise available.

(b) Requests by an incumbent President, a House of Congress, or a Congressional committee or subcommittee pursuant to paragraph (a) of this section shall be addressed to the Archivist. All requests shall be in writing and, where practicable, identify the records sought with reasonable specificity.

(c) Presidential records of a former President shall be available to the former President or his designated representative upon request.

HISTORY:
53 FR 50404, Dec. 15, 1988.

AUTHORITY:
The Presidential Records Act of 1978, Pub. L. 95-591, 92 Stat. 2523-27, as amended by the National Archives and Records Administration Act of 1984, Pub. L. 98-497, sec. 107(b)(7), 98 Stat. 2287 (1984) (codified at 44 U.S.C. 2201-07).

227 words

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Terms: **"presidential records"** (Edit Search)
Section: **36 CFR 1270.46**

36 CFR 1270.46

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36 CFR 1270.46

§ 1270.46 Notice of intent to disclose Presidential records.

(a) The Archivist or his designee shall notify a former President or his designated representative(s) before any Presidential records of his Administration are disclosed.

(b)(1) The notice given by the Archivist or his designee shall:

(i) Be in writing;

(ii) Identify the particular records with reasonable specificity;

(iii) State the reason for the disclosure; and

(iv) Specify the date on which the record will be disclosed.

(2) In the case of records to be disclosed in accordance with § 1270.44, the notice shall also:

(i) Identify the requester and the nature of the request;

(ii) Specify whether the requested records contain materials to which access would otherwise be restricted pursuant to 44 U.S.C. 2204(a) and identify the category of restriction within which the record to be disclosed falls; and

(iii) Specify the date of the request.

(c) If, after receiving the notice required by paragraph (a) of this section, a former President raises rights or privileges which he believes should preclude the disclosure of a Presidential record, and the Archivist nevertheless determines that the record in question should be disclosed, in whole or in part, the Archivist shall notify the former President or his representative of this determination. The notice given by the Archivist or his designee shall:

(1) Be in writing;

(2) State the basis upon which the determination to disclose the record is made; and

(3) Specify the date on which the record will be disclosed.

(d) The Archivist shall not disclose any records covered by any notice required by paragraph (a) or (c) of this section for at least 30 calendar days from receipt of the notice by the former President, unless a shorter time period is required by a demand for Presidential records under § 1270.44.

(e) Copies of all notices provided to former Presidents under this section shall be provided at the same time to the incumbent President.

HISTORY:
53 FR 50404, Dec. 15, 1988.

AUTHORITY:
The Presidential Records Act of 1978, Pub. L. 95-591, 92 Stat. 2523-27, as amended by the National Archives and Records Administration Act of 1984, Pub. L. 98-497, sec. 107(b)(7), 98 Stat. 2287 (1984) (codified at 44 U.S.C. 2201-07).

328 words

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Terms: "presidential records" (Edit Search)
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36 CFR 1270.50

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36 CFR 1270.50

§ 1270.50 Consultation with law enforcement agencies.

(a) For the processing of Presidential records compiled for law enforcement purposes that may be subject to 5 U.S.C. 552(b)(7), the Archivist shall request specific guidance from the appropriate Federal agency on the proper treatment of a record if there is no general guidance applicable, if the record is particularly sensitive, or if the type of record or information is widespread throughout the files.

(b) When specific agency guidance is requested under paragraph (a) of this section, the Archivist shall notify the appropriate Federal agency of the decision regarding disclosure of the specific documents. Notice shall include the following:

(1) A description of the records in question;

(2) Statements that the records described contain information compiled for law enforcement purposes and may be subject to the exemption provided by 5 U.S.C. 552(b)(7) for records of this type; and,

(3) The name of a contact person at NARA.

(c) Agency guidance under this section is not binding on the Archivist. The final determination on whether Presidential records may be subject to the exemption in 5 U.S.C. 552(b)(7) is the Archivist's responsibility.

HISTORY:
53 FR 50404, Dec. 15, 1988.

AUTHORITY:
The Presidential Records Act of 1978, Pub. L. 95-591, 92 Stat. 2523-27, as amended by the National Archives and Records Administration Act of 1984, Pub. L. 98-497, sec. 107(b)(7), 98 Stat. 2287 (1984) (codified at 44 U.S.C. 2201-07).

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REV_00255519

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TOC: Code of Federal Regulations > /. . . / > SUBPART E -- PRESIDENTIAL RECORDS COMPILED FOR LAW ENFORCEMENT PURPOSES > **§ 1270.50 Consultation with law enforcement agencies.**
Terms: **"presidential records"** (Edit Search)
Section: **36 CFR 1270.50**
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Date/Time: Thursday, July 26, 2001 - 4:24 PM EDT

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54 FR 3403

Title 3 -- The President

Presidential Records

Executive Order 12667 of January 18, 1989

54 FR 3403

January 23, 1989

TEXT:
By virtue of the authority vested in me as President by the Constitution and laws of the United States of America, and in order to establish policies and procedures governing the assertion of Executive privelege by incumbent and former Presidents in connection with the release of Presidential records by the National Archives and Records Administration pursuant to the **Presidential Records Act** of 1978, it is hereby ordered as follows:

Section 1 *Definitions.* For purposes of this Order:

(a) "Archivist" refers to the Archivist of the United States or his designee.

(b) "NARA" refers to the National Archives and Records Administration.

(c) "**Presidential Records Act**" refers to the **Presidential Records Act** of 1978 (Pub. L. No. 95-591, 92 Stat. 2523-27, as amended by Pub. L. No. 98-497, 98 Stat. 2287), codified at 44 U.S.C. 2201-2207.

(d) "NARA regulations" refers to the NARA regulations implementing the **Presidential Records Act.** 53 Fed. Reg. 50404 (1988), codified at 36 C.F.R. Part 1270.

(e) "Presidential records" refers to those documentary materials maintained by NARA pursuant to the **Presidential Records Act** and the NARA regulations.

(f) "Former President" refers to the former President during whose term or terms of office particular Presidential records were created.

(g) A "substantial question of Executive privilege" exists if NARA's disclosure of Presidential records might impair the national security (including the conduct of foreign relations), law enforcement, or the deliberative processes of the Executive branch.

(h) A "final court order" is a court order from which no appeal may be taken.

Sec. 2. *Notice of Intent to Disclose Presidential Records.*

(a) When the Archivist provides notice to the incumbent and former Presidents of his intent to disclose Presidential records pursuant to section 1270.46 of the NARA regulations, the Archivist, utilizing any guidelines provided by the incumbent and former Presidents, shall identify any specific materials, the disclosure of which he believes may raise a substantial question of Executive privilege. However, nothing in this Order is intended to affect the right of the incumbent or former Presidents to invoke Executive privilege with respect to materials not identified by the Archivist. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel to the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.

(b) Upon the passage of 30 days after receipt by the incumbent and former Presidents of a notice of intent to disclose Presidential records, the Archivist may disclose the records covered by the notice, unless during that time period the Archivist has received a claim of Executive privilege bythe incumbent or former President or the Archivist has been instructed by the incumbent president or his designee to extend the time period. If a shorter time period is required under the circumstances set forth in section 1270.44 of the NARA regulations, the Archivist shall so indicate in the notice.

Sec. 3. Claim of Executive Privilege by Incumbent President.

(a) Upon receipt of a notice of intent to disclose Presidential records, the Attorney General (directly or through the Assistant Attorney General for the Office of Legal Counsel) and the Counsel to the President shall review as they deem appropriate the records covered by the notice and consult with each other, the Archivist, and such other Federal agencies as they deem appropriate concerning whether invocation of Executive privilege is justified.

(b) The Attorney General and the Counsel to the President, in the exercise of their discretion and after appropriate review and consultation under subsection (a) of this section, may jointly determine that invocation of Executive privilege is not justified. The Archivist shall be promptly notified of an such determination.

(c) If after appropriate review and consultation under subsection (a) of this section, either the Attorney General or the Counsel to the President believes that the circumstances justify invocation of Executive privilege, the issue shall be presented to the President by the Counsel to the President and the Attorney General.

(d) If the President decides to invoke Executive privilege, the Counsel to the President shall notify the former President, the Archivist, and the Attorney General in writing of the claim of privilege and the specific Presidential records to which it relates. After receiving such notice, the Archivist shall not disclose the privileged records unless directed to do so by an incumbent President or by a final court order.

Sec. 4. *Claim of Executive Privilege by Former President.*

REV_00255522

(a) Upon receipt of a claim of Executive privilege by a former President, the Archivist shall consult with the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel), the Counsel to the President, and such other Federal agencies as he deems appropriate concerning the Archivist's determination as to whether to honor the former President's claim of privilege or istead to disclose the Presidential records notwithstanding the claim of privilege. An determination under section 3 of this Order that Executive privilege shall not be invoked by the incumbent President shall not prejudice the Archivist's determination with respect to the former President's claim of privilege.

(b) In making the determination referred to in subsection (a) of this section, the Archivist shall abide by any instructions given him by the incumbent President or his designee unless otherwise directed by a final court order. The Archivist shall notify the incumbent and former Presidents of his determination at least 30 days prior to disclosure of the Presidential records, unless a shorter time period is required in the circumstances set forth in section 1270.44 of the NARA regulations. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.

Sec. 5. *Judicial Review.* This Order is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

+/-

THE WHITE HOUSE,

/s/ Ronald Reagan

January 18, 1989.

[FR Doc. 89-1578

Filed 1-19-89; 11:07 am]

Billing code 3195-01-M

Source: All Sources > Federal Legal - U.S. > Executive Branch Materials > **Executive Orders**
Terms: **"presidential records act"** (Edit Search)
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THE WHITE HOUSE

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THE WHITE HOUSE

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Counsel's Office, White House
Kavanaugh, Brett

Subject File

President Speaking on Senate Floor

OA/NARA#: 2180/2091
9800

Box 47
Folder 8

REV_00255528

TABLE 3–5

Addresses to the Senate

CONGRESS/DATE	DIGNITARY	COUNTRY
1st Congress		
Aug. 22, 1789	President George Washington [1]	United States
64th Congress		
Jan. 22, 1917	President Woodrow Wilson [2]	United States
65th Congress		
May 1, 1917	*René Viviani, vice premier of the Council of Ministers, minister of Justice	France
May 8, 1917	*Arthur James Balfour, member of Parliament, principal secretary of state for foreign affairs	United Kingdom
May 31, 1917	*Ferdinando di' Savoia, prince of Udine	Italy
June 22, 1917	*Ludovic Moncheur, baron, chief of the political bureau of the Belgian foreign office at Havre	Belgium
June 26, 1917	*Boris A. Bakhmetieff, ambassador to the United States [3]	Russia
Aug. 30, 1917	*Kikujirō Ishii, viscount, diplomat	Japan
Jan. 5, 1918	*Dr. Milenko R. Vesnitch, diplomat	Serbia
Sept. 24, 1918	Jules Jusserand, ambassador to the United States [4]	France
Sept. 30, 1918	President Woodrow Wilson [5]	United States
66th Congress		
July 10, 1919	President Woodrow Wilson [6]	United States
Oct. 28, 1919	*King Albert	Belgium
67th Congress		
July 12, 1921	President Warren G. Harding [7]	United States

*Also appeared separately before the House of Representatives, either on this date or one close to it.

[1] Seeking Senate's advice and consent on treaty with the southern Indians. President Washington also returned to the Senate on August 24 for further discussion of the treaty, but the Senate's insistence on referring the matter to a committee and on altering some provisions of the proposed treaty led him to conduct all future treaty business in writing. Subsequent presidents until Woodrow Wilson continued the precedent of sending written messages regarding appointments and treaties, rather than visiting the Senate.

[2] Planning ahead for peace.

[3] Bakhmetieff represented the provisional government of Russia set up after the overthrow of the monarchy in March 1917 and recognized by the United States. The Bolsheviks took over in November 1917.

[4] This address and reception was in conjunction with the presentation to the Senate of two Sèvres vases in appreciation of the United States' involvement in World War I. They are today in the Senate lobby, just off the Senate floor.

[5] Support of woman suffrage.

[6] Versailles treaty.

[7] Adjusted compensation for veterans of the World War. Senators objected to President Harding's speech as an unconstitutional effort to interfere with the deliberations of the Senate, and Harding did not repeat his visit.

REV_00255529

TABLE 3–5—CONTINUED

CONGRESS/DATE	DIGNITARY	COUNTRY
72d Congress		
May 31, 1932	President Herbert Hoover [8]	United States
76th Congress		
May 8, 1939	*President Anastasio Somoza, general	Nicaragua
77th Congress		
May 11, 1942	*President Manuel Prado	Peru
June 4, 1942	*President Manuel L. Quezon	Commonwealth of the Philippines [9]
June 15, 1942	*King George II [10]	Greece
June 25, 1942	*King Peter II [10]	Yugoslavia
Aug. 6, 1942	Queen Wilhelmina [10]	Netherlands
Nov. 25, 1942	*President Carlos Alberto Arroyo del Rio	Ecuador
78th Congress		
May 6, 1943	*President Enrique Penaranda, general	Bolivia
May 13, 1943	*President Edvard Beneš [10]	Czechoslovakia
June 10, 1943	*President Higinio Moríñigo M.	Paraguay
Jan. 20, 1944	*President Isaías Medina Angarita, general	Venezuela
79th Congress		
July 2, 1945	President Harry S. Truman [11]	United States
Sept. 10, 1945	*General Jonathan M. Wainwright [12]	United States
81st Congress		
Aug. 9, 1949	*President Elpidio Quirino	Philippines
Oct. 13, 1949	*Prime Minister Pandit Jawaharlal Nehru	India
April 13, 1950	President Gabriel Gonzalez-Videla	Chile
May 4, 1950	*Prime Minister Liaquat Ali Khan	Pakistan
Aug. 1, 1950	*Prime Minister Robert Gordon Menzies	Australia
82d Congress		
July 2, 1951	Aisuki Okamoto, member of the Diet	Japan
Aug. 23, 1951	Tentaro Kosaka, member of the Diet	Japan

*Also appeared separately before the House of Representatives, either on this date or one close to it.
[8] The emergency character of the economic situation in the U.S.
[9] At this time, the Philippines was still a possession of the United States, although it had been made a self-governing commonwealth in 1935, in preparation for full independence in 1946. From 1909 to 1916, Quezon had served in the U.S. House of Representatives as the resident commissioner from the Philippines.
[10] In exile.
[11] Senate in executive session on topic of United Nations Charter.
[12] Former prisoner of war (Japan).

REV_00255530

TABLE 3–5—CONTINUED

CONGRESS/DATE	DIGNITARY	COUNTRY
83d Congress		
Nov. 17, 1954	Vice President Sarvepalli Radhakrishnan [13]	India
84th Congress		
Mar. 16, 1955	*Prime Minister Robert Gordon Menzies	Australia
Mar. 30, 1955	*Prime Minister Mario Scelba	Italy
May 4, 1955	*Prime Minister Luang Phibun Songgram	Thailand
June 30, 1955	*Prime Minister U Nu	Burma
Jan. 5, 1956	President-elect Juscelino Kubitschek de Oliveira	Brazil
Feb. 2, 1956	*Prime Minister Sir Anthony Eden	United Kingdom
Mar. 15, 1956	*Prime Minister John A. Costello	Ireland
April 30, 1956	Vice President Joao Goulart	Brazil
85th Congress		
Feb. 27, 1957	*Guy Mollet, president of the Council of Ministers [14]	France
May 28, 1957	*Chancellor Konrad Adenauer	Federal Republic of Germany
June 20, 1957	*Prime Minister Nobusuke Kishi	Japan
July 11, 1957	*Prime Minister Husseyn Shaheed Suhrawardy	Pakistan
June 25, 1958	*Prime Minister Sardar Mohammad Daud	Afghanistan
July 29, 1958	*Prime Minister Amintore Fanfani (also foreign minister)	Italy
91st Congress		
Nov. 13, 1969	*President Richard M. Nixon [15]	United States
93d Congress		
Dec. 19, 1974	Vice President Nelson A. Rockefeller [16]	United States
101st Congress		
April 6, 1989	Former Senators Thomas F. Eagleton and Howard H. Baker, Jr.[17]	United States

*Also appeared separately before the House of Representatives, either on this date or one close to it.
[13] Presentation of new ivory gavel to the Senate.
[14] Today, the president of the Council is called the prime minister.
[15] Executive-legislative branch relations and Vietnam policy.
[16] Rockefeller was sworn in as vice president by Chief Justice Warren E. Burger, after which, by unanimous consent, he was allowed to address the Senate.
[17] 200th anniversary commemoration of Senate's first legislative session. (Eagleton and Baker addresses were given in the old Senate chamber during a regular legislative session.)

Sources: U.S., Congress, Senate, *Journal;* U.S., Congress, Senate, *Congressional Record;* U.S., Congress, House, *Journal;* U.S., Congress, *Annals of Congress.*

REV_00255531

Presidents Who Have Addressed the Senate from the Senate Floor

Woodrow Wilson
- 1/22/1917- Plan for Peace
- 9/30/1918- Women's Suffrage
- 7/10/1919- Versailles Treaty

Warren G. Harding
- 7/12/1921- WWI Veterans Compensation

Herbert Hoover
- 5/31/1932- Economy Message

Harry Truman
- 7/2/1945- United Nations Charter

Richard Nixon
- 11/13/1969- Vietnam Policy

Gerald Ford
- 8/21/1974- Cost of Living Council
- 11/21/1980*- General Remarks

*- Denotes that President Ford was not in office
Note: In 1801 President Thomas Jefferson ceased the practice of presidential appearances before Congress. This policy continued until 1913 when the practice was reinstated by President Woodrow Wilson

Counsel's Office, White House

Kavanaugh, Brett

Subject File

Presidential Authority - Price Controls [EMPTY]

OA/NARA#: 2163 / 2074
9693

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REV_00255533

Counsel's Office, White House

Kavanaugh, **Brett**

Subject File

Presidential Authority to Decline to Execute Statutory Provisions

OA/NARA#: 2163/2074
9693

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REV_00255534

Counsel's Office, White House
Kavaraugh, Brett

Subject Files

[Presidential Records]

OA/NARA#: 1824/1742
9632

Box 47
Folder 11

REV_00255535

National Archives and Records Administration

700 Pennsylvania Avenue, NW
Washington, DC 20408-0001

VIA FACSIMILE
(NLMS 2003-018)

May 20, 2003

The Honorable Alberto R. Gonzales
Counsel to the President
The White House
Washington, D.C. 20502

Dear Judge Gonzales:

This is in further reference to my letter dated February 4, 2003 providing you, on behalf of the incumbent President, with formal notice from the National Archives and Records Administration (NARA) of our intent to open 40 pages of Bush Vice Presidential records.

In accordance with the requirements of the Presidential Records Act (PRA), 44 U.S.C. §§ 2201-2207 and Executive Order 13233, we also informed former President Bush's representative, James W. Cicconi, and former President Reagan's representative, John Mintz, of our intent to release these records. We have subsequently been informed by both Mr. Cicconi and Mr. Mintz that they have no objection to the release of this material. Please note that the material proposed for opening in this notice includes 14 pages of documents containing confidential communications requesting or submitting advice and four pages containing information related to appointments to federal office that would normally have been withheld prior to January 20, 2001, under the PRA restrictions in 44 U.S.C. §2204(a), as they were asserted and narrowed by President Bush. A copy of these documents was provided to Brett Kavanaugh on February 4, 2003.

Pursuant to E.O. 13233, NARA will await a decision from the incumbent President regarding the release of these records. We look forward to hearing the views of the incumbent President regarding this notification as soon as possible, hopefully within 45 days of this letter, which would be July 5, 2003.

If you have any questions relating to this request, please contact me at (202) 501-5700 or NARA General Counsel Gary M. Stern at (301) 837-3026.

Sincerely,

Nancy Kegan Smith

NANCY KEGAN SMITH
DIRECTOR
Presidential Materials Staff

cc: Brett Kavanaugh
Associate Counsel to the President
Gary M. Stern
General Counsel, National Archives and Records Administration

REV_00255536

National Archives & Records Administration

facsimile TRANSMITTAL

[redacted]

to: Alberto R. Gonzales

fax #: (202) 456-6279

re: NLMS 2003-018

date: May 20, 2003

pages: [2 Pages (including cover sheet)].

From the desk of...

Nancy Smith
Director
Presidential Materials Staff
700 Pennsylvania Avenue, NW
Washington, D.C. 20408
Telephone: (202) 501-5700
Fax: (202) 501-5709
Email: nancy.smith@nara.gov

REV_00255537

Counsel's Office, White House

Kavanaugh, Brett

Subject File

Presidential Restrictions on Entry

Box 47

Folder 12

OA/NARA#: 2184/2095

9804

REV_00255538

Counsel's Office, White House

Kavanaugh, Brett

Subject File

Presidential Signing - Statements Regarding Use of Force

OA/NARA#: 2184/2095
9804

Box 48

Folder 1

REV_00255539

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
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TO: Brett Kavanaugh fax: 61647

COMMENT:

ACTION: **FYI**____ **RESPOND BY:**____

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release January 14, 1991

STATEMENT BY THE PRESIDENT

Today I am signing H.J. Res. 77, the "Authorization for Use of Military Force Against Iraq Resolution." By passing H.J. Res. 77, the Congress of the United States has expressed its approval of the use of U.S. Armed Forces consistent with U.N. Security Council Resolution 678. I asked the Congress to support implementation of U.N. Security Council Resolution 678 because such action would send the clearest possible message to Saddam Hussein that he must withdraw from Kuwait without condition or delay. I am grateful to those of both political parties who joined in the expression of resolve embodied in this resolution. To all, I emphasize again my conviction that this resolution provides the best hope for peace.

The debate on H.J. Res. 77 reflects the profound strength of our constitutional democracy. In coming to grips with the issues at stake in the Gulf, both Houses of Congress acted in the finest traditions of our country. This resolution provides unmistakable support for the international community's determination that Iraq's ongoing aggression against, and occupation of, Kuwait shall not stand. As I made clear to congressional leaders at the outset, my request for congressional support did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution. I am pleased, however, that differences on these issues between the President and many in the Congress have not prevented us from uniting in a common objective. I have had the benefit of extensive and meaningful consultations with the Congress throughout this crisis, and I shall continue to consult closely with the Congress in the days ahead.

GEORGE BUSH

THE WHITE HOUSE,
January 14, 1991.

# # #

REV_00255541

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

[Presidential Travel Expenses Articles]

OA/NARA#: 2175/2086
9795

Box 48

Folder 2

REV_00255542

Source: Legal > Federal Legal - U.S. > Administrative Agency Materials > **US Attorney General Opinions** ⓘ
Terms: **political /2 activity and date(bef 1983)** (Edit Search)

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*1982 OLC LEXIS 54, *; 6 Op. O.L.C. 214, **

OPINION OF THE OFFICE OF LEGAL COUNSEL

PAYMENT OF EXPENSES ASSOCIATED WITH TRAVEL BY THE PRESIDENT AND VICE PRESIDENT

1982 OLC LEXIS 54; 6 Op. O.L.C. 214

March 24, 1982

CORE TERMS: trip, travel, appropriated, political committee, apportionment, expenses associated, duties, appropriation, used to pay, defray, expenses incurred, augmentation, gift, campaign, political activities, campaign committee, federal office, unauthorized, non-official, apportioned, contributed, regulation, candidate, mixed, funds appropriated, political activity, political party, giving rise, incremental, reimbursed

SYLLABUS:
[*1]

Funds appropriated for the official functioning of the offices of the President and the Vice President may be used for travel expenses only if the travel is reasonably related to an official purpose; and, official activities may be funded only from funds appropriated for such purposes. Thus appropriated funds should not be used to pay for political travel and political funds should not be used to pay for official travel.

Whether an event is official or political for purposes of paying its expenses must be determined on a case-by-case basis, and both the nature of the event and the nature of the individual involved should be considered.

Where both official and **political activities** occur on the same trip, the expenses of individuals on the trip for both political and official reasons can be apportioned between the government and a political committee on a basis which reflects the time spent on the respective activities. During the period of a presidential election campaign, Federal Election Commission regulations may require a different rule of allocation.

ADDRESSEE:
Memorandum Opinion for the Counsel to the President

OPINIONBY: OLSON

OPINION:
[214]** This memorandum responds to your request for our advice **[*2]** about the payment of expenses associated with travel by the President or Vice President. We are to assume that travel by the President or Vice President may often include both official events, undertaken as part of the President's or Vice President's official roles as governmental leaders, and purely political events, undertaken for partisan purposes in order to advance the interests of the President's and Vice President's political party. This mixed character of much presidential and vice presidential travel follows naturally from their dual roles as governmental officials and leaders of their party. You have asked us to articulate the legal principles governing the allocation and payment of costs associated with such travel.

REV_00255543

Several caveats must be noted at the outset. First, our opinion should not be read as a declaration that the generally applicable principles will necessarily lead to an inflexible result in a particular case. In fact, the principles are of such generality that they often will generate few determinate results. They thus must be viewed as general guides to decisionmaking. Second, the principles should be applied to a particular trip by the officials most **[*3]** familiar with the facts of the trip. Each case may present unique circumstances that will need to be taken into **[**215]** account in determining, for instance, whether an event is "official" or "political" in character. As we will indicate, there is considerable room in this context for the careful use of informed discretion. Third, this opinion focuses on broadly applicable legal principles, not on the specific rules adopted by the Federal Election Commission for election activity. *See* 11 C.F.R. Chapter 1 (1981). If, in light of this opinion, particular questions arise, we will, of course, be glad to address them.

Furthermore, the principles discussed in this opinion may be fully understood only with an appreciation of the unique context presented by the peculiar functions and responsibilities of the President and Vice President in our system of government. They are the senior officials of the Executive Branch of government. Their official roles are necessarily political in the broad sense that they must formulate, explain, advocate, and defend policies. To the extent that the President and Vice President generate support for their policies and programs, they are also **[*4]** executing and fulfilling their official responsibilities. Even the most clearly partisan activity is not without some impact on the official activities of the President and Vice President.

By the same token, official success or failure by the President and Vice President has an inevitable and unavoidable impact on the standing of their political party, members of their party, and their party's candidates for public office. Thus, it is simply not possible to divide many of the actions of the President and Vice President into utterly official or purely political categories. To attempt to do so in most cases would ignore the nature of our political system and the structure of our government. Accordingly, efforts to establish such divisions must be approached with common sense and a good faith effort to apply the spirit of the principles we discuss in this memorandum, and they must be judged with considerable deference to the decisions of the persons directly involved in making the determinations.

With this background, our discussion will focus on three major questions. First, what are the basic legal principles to be applied, putting aside specialized restrictions formulated by **[*5]** the Federal Election Commission with regard to election activities? Second, how does one determine whether an event giving rise to an expense is "official" or "non-official" in character? Third, assuming that a trip involves events that are both official and non-official (or political) in character, may certain of the expenses for such a mixed trip be apportioned between the government, on the one hand, and a political committee, on the other hand? In the fourth section, we will discuss other considerations that bear on the issues discussed herein.

I. Two Basic Norms

When considering payment of expenses associated with presidential and vice presidential travel, two major principles governing the use of appropriated funds must be borne in mind. First, appropriated funds may be spent only for the purposes for which they have been appropriated. 31 U.S.C. § 628; 52 Comp. **[**216]** Gen. 504 (1973); 50 Comp. Gen. 534 (1971). Thus, funds appropriated for the official functioning of the offices of the President and the Vice President may be used for travel expenses only if the travel is reasonably related to an official purpose. If, however, there is no reasonable connection between **[*6]** the expense incurred and the official purposes to be served by an appropriation -- as, generally speaking, there would not be when an expense is incurred purely for partisan political purposes -- official funds may not be used to pay the expense.

REV_00255544

The second basic principle is that, in general, official activities should be paid for only from funds appropriated for such purposes, unless Congress has authorized the support of such activities by other means. Stated another way, although appropriated funds should not be used for non-official purposes, it is equally true that outside sources of funds may not be used to pay for official activities. This latter principle, which prevents the unauthorized augmentation of appropriations, has been recognized by the Comptroller General on numerous occasions. n1 A problem concerning an unauthorized augmentation of an appropriation does not arise when a trip is purely non-official in character and non-official funds are used to pay for it. Rather, the issue arises only where an official activity is supported by non-appropriated funds and where there is no authority for that to occur.

n1 *See, e.g.,* 23 Comp. Gen. 694 (1944); 46 Comp. Gen. 689 (1967). *See also* 9 Comp. Dec. 174 (1902); 17 Comp. Dec. 712 (1911). **[*7]**

In short, appropriated funds should not be used to pay for political events, and absent authority to the contrary, political funds should not be used to pay for official events. The difficulties of applying these principles arise because both types of activities may occur on the same trip and because it is exceedingly difficult in many instances to determine what is official and what is political.

II. What Tests Should Be Used for Determining Whether an Expense Should Be Considered "Political" or "Official?"

Because officials will wish to ensure that appropriated funds are used only to pay for expenses associated with official events and are not used to pay for political expenses, it will be necessary to determine on a case-by-case basis whether an expense is official or political in character. As discussed generally above, there is unfortunately no single litmus test for making such judgments. Indeed, many events could be characterized properly as either political or official or both. Therefore, in making this determination the persons most familiar with the facts of a particular trip will have to assess all of the circumstances involved and apply a large measure of common **[*8]** sense. There are, however, two major variables concerning the source of the expense to be borne in mind: the nature of the event involved, and the nature of the individual involved. Either, or both, of these indicia may be useful in a particular case in determining whether a particular expense should be considered official or political.

With respect to the nature of the event giving rise to an expense, an earlier opinion of this Office, entitled "Political Trips" and transmitted to the Counsel to the President on March 15, 1977, stated the following guidelines:

[217]** As a general rule, Presidential and Vice Presidential travel should be considered 'political' if its primary purpose involves their positions as leaders of their political party. Appearing at party functions, fundraising, and campaigning for specific candidates are the principal examples of travel which should be considered political. On the other hand, travel for inspections, meetings, non-partisan addresses, and the like ordinarily should not be considered 'political' travel even though they [sic] may have partisan consequences or concern questions on which opinion is politically divided. The President **[*9]** cannot perform his official duties effectively without the understanding, confidence, and support of the public. Travel and appearances by the President and Vice President to present, explain, and secure public support for the Administration's measures are therefore an inherent part of the President's and Vice President's official duties (pages 11-12).

We concur with the foregoing rules of thumb, which are based largely on a common sense understanding of the nature of **political** and official **activities.** n2

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n2 Although we generally agree with this earlier opinion of this Office, we would note that much of its advice is of a prudential, not strictly legal, character. In the present memorandum, we do not undertake to specify rules that are not legally mandated. Moreover, the earlier opinion itself takes pains to stress the flexibility that exists in determining whether, in a particular case, travel by the President is official or political (*see* page 7).

While we would hope that the foregoing generalities may be useful guides for the future, they should not be viewed as inflexible. There clearly is much room for discretion in determining whether an event giving rise to an **[*10]** expense is political or official. At bottom, the question is a factual one that can only be answered by those most familiar with the particular facts of a given situation. Nonetheless, in general, if the purpose of an event on a trip is to promote the partisan aims of the President's or Vice President's party or candidates of that party, then expenses incurred in performing the event would generally be political in character. Should particular questions arise about specific events, we would be glad to provide more concrete advice concerning them.

The second variable that may, in some circumstances, determine the character of a particular expense incurred on a trip is the nature of the individual whose activity generates the expense. There are some individuals who, in particular situations, are on a trip for inherently official or political purposes. Expenses incurred by them should generally be viewed as either official or political depending on their particular role. For instance, there are some persons whose official duties require them to be with the President, whether or not the President himself is on official business. n3 This group includes the President's doctor, his **[*11]** military aide, and the Secret Service agents responsible for his protection. n4 A similar group would exist for the Vice President. Expenses incurred during travel with the President or Vice President by this group of individuals should be **[**218]** considered official regardless of the character of the event that may be involved in a given trip.

n3 This point is the same as stated in the March 15, 1977, opinion of this Office, entitled "Political Trips" (pages 9, 15-16).

n4 This list is not intended to be exhaustive. The President may, in his discretion, determine that others are necessary members of his official party whenever he travels.

Similarly, on an otherwise entirely official trip, an individual may accompany the group for purely political reasons. As a rule, any expenses specifically incurred by such individuals should be considered political expenses, regardless of the events involved in the trip.

In short, as we noted at the outset of this section, there is no single test for determining whether an expense is political or official in character. Viewed generally, expenses of individuals whose official duties require them to travel with the President or Vice **[*12]** President should normally be considered official. Expenses of individuals who are on a trip for purely political reasons should normally be considered political. Expenses associated with individuals who are not necessarily serving in either a wholly official or wholly political capacity -- such as the President or Vice President or other individuals in the White House who may, consistent with their official duties, perform political functions -- should normally be judged to be official or political depending on the character of the event giving rise to the expense.

III. On a Mixed Trip Including Both Official and **Political Activities,** Can Certain Expenses Be Apportioned Between the Government and a Political Committee?

Based on what we have said thus far, the following conclusions may be stated. First, if all events during a trip are political in character, the only official expenses on the trip would be those associated specifically with the group of individuals whose official duties require them to accompany the President and Vice President. Second, if all events on a trip are official in

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character, the only political expenses would be those associated specifically with individuals **[*13]** who accompany the President and Vice President on the trip for purely political reasons. This means that on a trip that is entirely official, any expenses associated with the President or Vice President or others who are not necessarily on the trip for purely official or purely political reasons should be considered official. Conversely, on a trip that is entirely political, expenses associated with persons who are not necessarily on the trip for wholly official or wholly political reasons should be considered political.

A question remains, however, concerning expenses associated with individuals whose purpose for being on a trip is not necessarily only political or only official, when the trip itself is for both official and political purposes. Specifically, on a mixed trip involving a substantial official element and a substantial political element, can the expenses associated with the President or Vice President or others who are on the trip for both reasons be apportioned between the government and a political committee? There are several possible views on this question.

It might be argued, for example, that the performance of an official event during a trip could not have **[*14]** been accomplished without incurring certain expenditures **[**219]** and that, therefore, the entire cost of the trip should be treated as official and should be paid out of appropriated funds, with the sole exception being incremental expenses associated specifically with a **political activity** (*e.g.,* a hotel bill for an extra night's lodging necessitated entirely by a political event on the following day). This approach is grounded on the assumption that to permit any other apportionment of the cost of a trip to a political committee would allow the official budget to benefit from an unauthorized augmentation of appropriations. Since the expenses incurred were necessary to accomplish an official purpose, on this view they must be paid for in full with appropriated funds.

The opposite theory could also be advanced. That is, if there is any **political activity** on a trip, a political committee could theoretically be required to pay for the trip's entire cost (except for incremental expenses specifically attributable to an official event). This theory proceeds on the assumption that any other approach would allow the President's or Vice President's **political activities** to be subsidized **[*15]** by their official appropriations.

A third approach, which in effect combines the first two, is suggested by a prior opinion of this Office, transmitted to the Counsel to the President on September 17, 1980, and entitled "Reimbursement of Travel Expenses Incurred by Government Officials on Mixed Official and Campaign Trips." That opinion responded to a question about the operation of a Federal Election Commission (FEC) rule under which a campaign committee's share of the costs of a mixed official-political trip is the full cost of the trip from the point of origin through each campaign-related stop and back to the point of origin. 11 C.F.R. § 9004.F. n5 After the FEC adopted this rule, the White House Counsel's Office assumed that the expense to the government for such a trip would be the difference between the trip's actual cost and the amount reimbursed by the campaign committee. However, the Counsel's Office was concerned that such diminishment of the actual expense to the government could constitute an unauthorized augmentation of appropriations. For that reason, it sought an opinion of this Office.

n5 For instance, if a trip from Washington, D.C., to Chicago were taken for official purposes, and then a trip from Chicago to Denver were taken for campaign purposes (with a return from Denver to Washington, D.C.), under the FEC rule the campaign committee would have to make reimbursement for the cost of travel from Washington, D.C., to Denver and back to Washington, D.C. **[*16]**

The September 17, 1980, opinion concluded that, if the government were to pay only the difference between the actual cost of a trip and the amount reimbursed by the campaign committee under the FEC rule, there would be an unauthorized augmentation of

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appropriations (assuming no authority to accept contributions) so long as the government were allowed to "reap the benefit" of the enhanced payment of expenses by the campaign committee under the FEC rule. To cure this problem, the opinion stated that an accounting system should be devised to charge "the full allocated travel costs to *both* the Campaign Committee and the government agency," with a deposit of any excess funds in the Treasury (page 4, emphasis added).

While we express no view regarding the correctness of this third approach during the period of a presidential election campaign when the Federal Election **[**220]** Commission's regulations would be applicable, we do not believe that the approach correctly reflects the requirements that apply outside the campaign period. We believe that the first two approaches are unreasonable solutions to the problem because each tilts the scales completely toward one of the two conflicting **[*17]** guiding principles and results either in an inappropriate augmentation of appropriated funds or the subsidization of **political activity** with appropriated funds. The approach of the September 17, 1980, Office of Legal Counsel opinion attempts to address these problems in, we believe, an unrealistic and unnecessary way by requiring one trip to be paid for twice -- both with official funds *and* with political funds.

In our view, a fourth approach which attempts in good faith to apportion the costs of such a trip on the basis of a reasonable division between the time spent on **political activities** and the time spent on official activities is a more reasonable and a legal resolution of the underlying problems. For example, if 50 percent of a single day's events are political and 50 percent are official, approximately 50 percent of the costs associated with participants whose roles are not necessarily either official or political should be reimbursed by the political committee and 50 percent should be paid from appropriated funds, unless such an apportionment, under the particular circumstances, would on some basis be unreasonable or inequitable. We believe that such an approach faithfully **[*18]** accommodates both of the basic norms discussed in part I.

Thus, when there is a mixed trip involving the President or Vice President, the purpose of which is both substantially political and substantially official, expenses should be paid in the following manner: first, expenses for individuals who are necessarily official (Secret Service, etc.) should be paid for with appropriated funds; second, expenses for individuals who are necessarily political (campaign officials) should be reimbursed by a political committee; third, incremental expenses specifically attributable to an official event should be paid from appropriated funds, and incremental expenses specifically attributable to a political event should be paid from political funds; and finally, expenses for individuals whose official roles permit them to perform **political activity** should be reasonably and equitably apportioned so that a share reflecting the amount of a trip that is political in character should be paid by a political committee. If these general guidelines are followed, then the purposes of using appropriated funds for official purposes but not using such funds for political purposes will be achieved.

We must **[*19]** reaffirm the limited nature of our conclusion about apportionment. As we have indicated, some categories of expenses may have to be treated as entirely official or entirely political, and thus they would not be subject to apportionment. Apportionment would be appropriate only with respect to expenses associated with individuals whose official roles permit them to perform political functions, and only when those individuals are on a trip that itself is not entirely political or wholly official in nature. n6 In such circumstances, to accommodate **[**221]** both of the guiding norms noted in part I, we believe that an apportionment of expenses between appropriated funds and the funds of a political committee which reflects the relationship between official and **political activities** may be made. We urge caution in applying such an approach, particularly in retaining records to substantiate any characterization of an event or trip as political or official that could be used in the future if, for instance, there should be an audit by the General Accounting Office. n7

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n6 We are not suggesting any specific formula for apportionment, for several formulae may be equally reasonable and some may be particularly well suited to particular trips. For example, a formula may be predicated on the number of hours spent on each event, the number of hours on the entire trip (including travel time) devoted to official or political affairs, the number of events devoted to each, or if a trip is devoted to one type of event in a distant city and another type in a nearby city on the return flight, on the relative distances travelled to each. While some general guidelines within these limits should be established for consistency in application, the overriding factor is the reasonableness of the apportionment in a specific situation. We would not exclude the possibility of creating an exception for de minimis involvement in official activity during a trip that would be treated as entirely political, and vice versa. We note that previous Administrations have made use of such a de minimis exception, as indicated in the background materials supplied to us by your office.

n7 In two opinions to several Senators, dated October 6, 1980, and March 6, 1981, the Comptroller General discussed the apportionment of travel expenses for purposes of their payment by official and political funds under the Carter Administration (B-196862). Apportionment was not objected to by the Comptroller General. The Comptroller General expressly noted, as we have observed here, that there are "no guidelines of a legally binding nature [which] have been established by legislation, judicial decision, or otherwise" (page 2 of March 6, 1981, opinion). These opinions, coupled with prior practice by the White House, buttress our conclusion that a reasonable apportionment may be made in the circumstances we have described. **[*20]**

IV. Other Considerations

We would add one qualification to the preceding discussion. As noted in part I, official expenses, including expenses incurred during the President's and the Vice President's travel for official purposes, may not be paid for by funds other than those appropriated for official purposes unless there is authority to the contrary. An acceptable source of such authority would be a congressional authorization, in the form of a statute, for the President and the Vice President (or their respective offices) to accept gifts to defray their official expenses. This Office has concluded in the past that the White House Office and the Office of the Vice President do not have statutory authority to accept contributions or gifts. This legal premise provides the basis for the conclusion that the payment by a political committee of official travel expenses incurred by the President or Vice President would be an impermissible augmentation of the appropriations for these offices.

However, in the course of our research for this opinion, we reviewed a provision of law, 2 U.S.C. § 439a (1982), not considered in any of the prior opinions on this subject by this Office or **[*21]** by the Comptroller General, which appears to grant the President and Vice President gift authority, at least to the extent of authorizing them to accept contributions to defray their ordinary and necessary official expenses. Section 439a states in full:

Amounts received by a candidate as contributions that are in excess of any amount necessary to defray his expenditures, and *any other amounts contributed to an individual for the purpose of supporting his or her activities as a holder of Federal office, may be used by such* candidate or *individual,* as the case may be, *to* **[**222]** *defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office,* may be contributed to any organization described in section 170(c) of . . . [the Internal Revenue Code of 1954], or may be used for any other lawful purpose, including transfers without limitation to any national, State, or local committee of any political party; except that, with respect to any individual who is not a Senator or Representative in, or Delegate or Resident Commissioner to, the Congress on January 8, 1980, no such amounts may be converted by any person to any **[*22]** personal use, other than to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office.

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(Emphasis added.)

The foregoing provision authorizes "amounts contributed to an individual for the purpose of supporting his or her activities as a holder of Federal office" to be used by such individual "to defray any ordinary and necessary expenses incurred in connection with his or her duties. . . ." The term "Federal office" is defined separately as including the Offices of the President, the Vice President, and Members of Congress. 2 U.S.C. § 431(c). Accordingly, on its face, this provision would appear to authorize use by the President and Vice President of amounts contributed to such individuals for the purpose of supporting their activities as President or Vice President. This would include expenses incurred in the course of official travel. n8

n8 Of course, any applicable conflict of interest provisions would have to be borne in mind if § 439a were to be used as authority for the receipt of contributions for the President's or Vice President's travel expenses.

We have consulted the legislative history of 2 U.S.C. § **[*23]** 439a, first adopted as part of the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1289, and have found nothing that would be inconsistent with such an interpretation. However, in the limited time available, we similarly have found nothing to indicate that Congress specifically considered the provision's application to the Office of the President or Vice President. The brief floor discussion of this provision n9 and of a similar provision in a predecessor bill n10 merely focused on its application to Members of Congress, who traditionally have been permitted to accept gifts to defray the expenses of their offices. n11 A regulation promulgated by the Federal Election Commission under this provision repeats the language of the statute. *See* 11 C.F.R. §§ 113.1 & 113.2. Thus, we are aware of no indication that Congress intended it to mean anything other than what it clearly says: that elected officials including the President and the Vice President may accept gifts to defray expenses incurred in connection with the performance of their duties.

n9 *See* 120 Cong. Rec. 35139 (1974).

n10 *See* 119 Cong. Rec. 26606-07 (1973).

n11 Congress amended the provision in 1980, Pub. L. No. 96-187, §§ 105(4), 113, 93 Stat. 1354, 1366 (1980), generally to prohibit a federal official from converting contributed funds for his or her personal use. A specific exemption to this provision also was added for individuals who were Senators and Representatives on January 8, 1980. **[*24]**

[223]** Nevertheless, we would caution against complete reliance on § 439a until further consideration has been given to the authority under that statute for political committees to make contributions, and until the matter has been coordinated with the Federal Election Commission. In this connection, the Federal Election Commission has authority to render advisory opinions to federal officeholders about "the application of a general rule of law stated in" the Federal Election Commission Act, of which § 439a is a part. *See* 2 U.S.C. § 437 (b). To our knowledge, the Commission has not been called upon to and thus has not formally addressed the application of § 439a to gifts made to the President or the Vice President to defray the expenses of their offices.

Moreover, even if § 439a ultimately is to be relied upon to grant gift authority for the President and Vice President, we would advise that guidelines be established for the receipt of contributions under the provision. This will be necessary since the Standards of Conduct regulations applicable to agencies in the Executive Office of the President, 3 C.F.R. §§ 100.735-(1)-(32), were not drafted with the intent of regulating **[*25]** contributions to meet the official expenses of the President and Vice President. Those regulations as currently drafted might not be consistent with full implementation of § 439a if that were desired.

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CRS Report for Congress
National Emergency Powers

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December 10, 1990
Revised April 29, 1991

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Summary	National Emergency Powers
Background History	The Emergency Concept
Law and Practice	Congressional Concerns
The National Emergencies	Conclusion
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NATIONAL EMERGENCY POWERS

SUMMARY

The President of the United States has available certain powers that may be exercised in the event that the Nation is threatened by crisis, exigency, or emergency circumstances (other than natural disasters, war, or near-war situations). Such powers may be stated explicitly or implied by the Constitution, assumed by the Chief Executive to be constitutionally permissible, or inferred from or specified by statute. Through legislation, Congress has made a great many delegations of authority in this regard over the past 200 years.

There are, however, limits and restraints upon the President in his exercise of emergency powers. With the exception of the habeas corpus clause, the Constitution makes no allowance for the suspension of

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E.O. 12211	04/17/80	Further Prohibitions on Transactions with Iran
E.O. 12444	10/14/83	Continuation of Export Control Regulations
E.O. 12470	03/30/84	Continuation of Export Control Regulations
E.O. 12513	05/01/85	Prohibiting Trade and Certain Other Transactions Involving Nicaragua
E.O. 12532	09/09/85	Prohibiting Trade and Certain Other Transactions Involving South Africa
E.O. 12543	01/07/86	Prohibiting Trade and Certain Transactions Involving Libya
E.O. 12635	04/08/88	Prohibiting Certain Transactions With Respect to Panama
E.O. 12722	08/02/90	Blocking Iraqi Government Property and Prohibiting Transactions with Iraq
E.O. 12730	09/30/90	Continuation of Export Control Regulations
E.O. 12735	11/16/90	Chemical and Biological Weapons Proliferation

In its final report, issued in late May of 1976, the Special Committee concluded "by reemphasizing that emergency laws and procedures in the United States have been neglected for too long, and that Congress must pass the ***National Emergencies Act*** to end a potentially dangerous situation./64 The panel's recommended legislation, of course, was enacted into law before the end of the year.

Other issues identified by the Special Committee as deserving attention in the future, however, did not fare so well. The panel, for example, was hopeful that standing committees of both Houses of Congress would review statutory emergency power provisions within their respective jurisdictions with a view to the continued need for and possible adjustment of such authority./65 Actions in this regard probably were not as ambitious as the Special Committee expected. A title of the ***Federal Civil Defense Act*** of 1950, granting the President or Congress power to declare a civil defense emergency in the event an attack on the United States occurred or was anticipated, expired in June of 1974 after the House Committee on Rules failed to report a measure continuing the statute./66

A provision of emergency law was refined in May of 1976. Legislation was enacted granting the President the authority to order certain selected members of an armed services reserve component to active duty without a declaration of war or national emergency./67 Previously, such an activation of military reserve personnel had been limited to a "time of national emergency declared by the President" or "when otherwise authorized by law."/68

Another refinement of emergency law occurred in 1977 when action was completed on the ***International Emergency Economic Powers Act.***/69 Reform legislation containing this statute/70 modified a provision of the ***Trading With the Enemy Act*** of 1917 authorizing the President to regulate the Nation's international and domestic finance during periods of declared war or national emergency./71 The enacted bill limited the President's ***Trading With the Enemy Act*** power to regulate the country's finances to times of declared war. In the ***International Emergency Economic Powers Act;*** it conferred authority on the Chief Executive to exercise controls over international economic transactions in the future during a declared national emergency and established procedures governing the use of this power, including close consultation with Congress when declaring a national emergency to activate the IEEPA. Such a declaration would be subject to congressional regulation under

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the procedures of the ***National Emergencies Act.***/72

Other matters identified in the final report of the Special Committee for congressional scrutiny included--

- investigation of emergency preparedness efforts conducted by the executive branch;
- attention to congressional preparations for an emergency and continual review of emergency law; ending open-ended grants of authority to the Executive;
- investigation and institution of stricter controls over delegated powers; and
- improving the accountability of Executive decision making./73

There is some public record indication that certain of these points, particularly the first and the last, have been addressed in the past decade and a half by congressional overseers./74

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CONCLUSION

The development, exercise, and regulation of emergency powers, from the days of the Continental Congress to the present, reflect at least one highly discernible trend: those authorities available to the Executive in time of national crisis or exigency have, since the time of the **Lincoln** Administration, come to be increasingly rooted in statutory law. The discretion available to a Civil War President in his exercise of emergency power has, to a considerable extent, been harnessed in the contemporary period. Furthermore, due to greater reliance upon statutory expression, the range of this authority has come to be more circumscribed, and the options for its use have come to be regulated procedurally through the ***National Emergencies Act.*** Since its enactment, however, the ***National Emergencies Act*** has not been revisited by congressional overseers. Nonetheless, as the final report of the Senate Special Committee on National Emergencies suggests, the prospect remains that further improvements and reforms in this policy area might be pursued and perfected.

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13. U.S. Congress. Senate. Special Committee on the Termination of the National Emergency. National Emergency. Hearings, 93rd Congress, Ist session. April 11-12, 1973. Washington, U.S. Govt. Print. Off., 1973, p. 277.

14. Ibid., p. 279.

15. While the concept of emergency powers can arguably be extended to embrace authority exercised in response to circumstances of natural disaster, this dimension is not within the scope of this report. Various Federal response arrangements and programs for dealing with natural disasters have been established and administered with no potential or actual disruption of constitutional arrangements. With regard to **Corwin's** characterization of emergency conditions, these long-standing arrangements and programs suggest that natural disasters do "admit of their being dealt with according to rule.

16. 1Stat. 264-265.

17. This authority may presently be found at 10 U.S.C. 334 (1988).

18. See **James D. Richardson,** ed. A Compilation of the Messages and Papers of the Presidents. Vol. 1. New York, Bureau of National Literature, 1897, pp. 149-154.

19. See Ibid., Vol. 7, pp. 3215-3216.

20. **Clinton L. Rossiter.** Constitutional Dictatorship. New York, Harcourt, Brace, and World, 1963, p. 225.

21. Ibid.

22. See **James D. Richardson,** comp. A Compilation of the Messages and Papers of the Presidents. Vol. 7, p. 3216.

23. See Ibid., pp. 3216-3217.

24. Ibid., p. 3225.

25. **James G. Randall.** Constitutional Problems Under **Lincoln.** Urbana, University of Illinois Press, 1951; also see **Wilfred E. Binkley.** President and Congress. New York, Alfred A. Knopf, 1947, pp. 124-127; **Clinton L. Rossiter.** Constitutional Dictatorship, pp. 233-234; and **Woodrow Wilson.** Constitutional Government in the United States. New York, Columbia University Press, 1907, p. 58.

26. 39 Stat. 1814.

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27. 39 Stat. 728.

28. 41 Stat. 1359.

29. 48 Stat. 1689.

30. 40 Stat. 411.

31. 48 Stat. 1.

32. 48 Stat. 1691.

33. 54 Stat. 2643.

34. 55 Stat. 1647.

35. 61 Stat. 449.

36. 65 Stat. 451.

37. 66 Stat. 54; extended at 66 Stat. 96, 137, and 296.

38. 66 Stat, 330; extended at 67 Stat. 18 and 131.

39. 66 Stat. c31.

40. 64 Stat. A454.

41. 84 Stat. 2222.

42. See 10 U.S.C. 673 (1970).

43. 85 Stat. 926.

44. The historical record suggests that, prior to 1973 when congressional research revealed their existence, other outstanding proclaimed national emergencies were not apparent to or much discussed by Members of Congress.

45. U.S. Congress. House. Committee on the Judiciary. ***National Emergencies Act.*** Hearings, 94th Congress, Ist session. March 6, 13, 19, and April 9, 1975. Washington, U.S. Govt. Print. Off., 1975, p. 20.

46. Other members of the Special Committee included Senators **Clifford P. Case, Clifford P. Hansen, Philip A. Hart, James B. Pearson, Claiborne Pell,** and **Adlai E. Stevenson III.**

47. See U.S. Congress. Senate. Special Committee on National Emergencies and Delegated Emergency Powers. A Brief History of Emergency Powers in the United States. Committee print, 93rd Congress, 2d session. Washington, U.S. Govt. Print. Off., 1974; U.S. Congress. Senate. Special Committee on National Emergencies and Delegated Emergency Powers. A Recommended

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National Emergencies Act. S. Rept. 93-1170, 93rd Congress, 2d session. Washington, U.S. Govt. Print. Off., 1974; U.S. Congress. Senate. Special Committee on National Emergencies and Delegated Emergency Powers. Executive Orders in Times of War and National Emergency. Committee print, 93rd Congress, 2d session. Washington, U.S. Govt. Print. Off., 1974; U.S. Congress. Senate. Special Committee on National Emergencies and Delegated Emergency Powers. Executive Replies. [3 parts.] Committee print, 93rd Congress, 2d session. Washington, U.S. Govt. Print. Off., 1974; U.S. Congress. Senate. Special Committee on National Emergencies and Delegated Emergency Powers. National Emergencies and Delegated Emergency Powers. S. Rept. 94-922, 94th Congress, 2d session. Washington, U.S. Govt. Print. Off., 1976; U.S. Congress. Senate. Special Committee on the Termination of the National Emergency. Emergency Powers Statutes. S. Rept. 93-549, 93rd Congress, Ist session. Washington, U.S. Govt. Print. Off., 1973; U.S. Congress. Senate. Special Committee on the Termination of the National Emergency. National Emergency. [13 parts.] Hearings, 93rd Congress, Ist session. April 11, 12, July 24, November 28, 1973. Washington, U.S. Govt. Print. Off., 1973.

48. See U.S. Congress. Senate. Special Committee on the Termination of the National Emergency. Emergency Powers Statutes.

49. See. U.S. Congress. Senate. Special Committee on National Emergencies and Delegated Emergency Powers. A Recommended National Emergencies Act.

50. See U.S. Congress. Senate. Special Committee on National Emergencies and Delegated Emergency Powers. Executive Replies.

51. See U.S. Congress. Senate. Committee on Government Operations. ***National Emergencies Act.*** S. Rept. 93-1193, 93rd Congress, 2d session. Washington, U.S. Govt. Print. Off., 1974.

52. See Congressional Record, v. 120, October 7, 1974, pp. 34011-34022.

53. See U.S. Congress. House. Committee on the Judiciary, ***National Emergencies Act. Hearings,*** 94th Congress, Ist session. March 6, 13, 19, and April 9, 1975. Washington, U.S. Govt. Print. Off., 1975.

54. U.S. Congress. House. Committee on the Judiciary. National Emergencies. H. Rept. 94-238, 94th Congress, Ist session. Washington, U.S. Govt. Print. Off., 1975.

55. Congressional Record, v. 121, September 4, 1975, pp. 27631-27647; p. 27745.

56. See U.S. Congress. Senate. Committee on Government Operations. ***National Emergencies Act.*** Hearing, 94th Congress, 2d session. February 25, 1976. Washington, U.S. Govt. Print, Off., 1976.

57. See U.S. Congress. Senate. Committee on Government Operations. ***National Emergencies Act,*** S. Rept. 94-1168, 94th Congress, 2d session. Washington, U.S. Govt. Print. Off., 1976.

58. See Congressional Record, v. 122, August 27, 1976, pp. 28224-28228.

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59. Ibid., August 31, 1976, p. 28466.

60. 90 Stat. 1255; 50 U.S.C. 1601-1651 (1988); see U.S. Congress. Senate. Committee on Government Operations and Special Committee on National Emergencies and Delegated Emergency Powers. The ***National Emergencies Act*** (Public Law 94-412). Source Book: Legislative History, Texts, and Other Documents. Committee print, 94th Congress, 2d session. Washington, U.S. Govt. Print. Off., 1976.

61. See Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).

62. See 99 Stat. 405, 448.

63. The full texts of the cited executive orders declaring a national emergency may be found in the Title 3 compilations of the Code of Federal Regulations for the year indicated, or otherwise as follows: E.O. 12170, 3 C.F.R., 1979 Comp., pp. 457-458; E.O. 12211, 3 C.F.R., 1980 Comp., pp. 253-255; E.O. 12444, 3 C.F.R., 1983 Comp., pp. 214-215; E.O. 12470, pp. 168-169; E.O. 12513, 3 C.F.R., 1985 Comp., p. 342; E.O. 12532, 3 C.F.R., 1985 Comp., pp. 387-391; E.O. 12543, 3 C.F.R., 1986 Comp., pp. 181-182; E.O. 12635, pp. 563-564; E.O. 12722, Federal Register, v. 55, August 3, 1990, pp. 31803-31804; E.O. 12730, Federal Register, v. 55, October 2, 1990, pp. 40373- 40374.

64. U.S. Congress. Senate. Special Committee on National Emergencies and Delegated Emergency Powers. National Emergencies and Delegated Emergency Powers, p. 19.

65. Ibid., p. 10.

66. See 50 U.S.C. App. 2297 (1970); U.S. Congress. House. Committee on Armed Services. Extending Civil Defense Emergency Authorities. H. Rept. 93- 1243, 93rd Congress, 2d session. Washington, U.S. Govt. Print. Off., 1974; Associated Press. Rules Panel Halts Bill on War Powers. Washington Post, September 19, 1974, p. A5.

67. 90 Stat. 517; 10 U.S.C. 673b.

68. See 10 U.S.C. 673 (1970).

69. See 50 U.S.C. 1701-1706 (1988).

70. See 91 Stat. 1625.

71. See 12 U.S.C. 95a and 50 U.S.C. App. 5(b) (1976).

72. Of related interest to these statutory developments, President **Ford,** by proclamation of February 19, 1976, gave notice that E.O. 966, providing for the internment of Japanese-Americans in certain military areas during World War II, was canceled as of the issuance of the proclamation formally establishing the cessation of World War II on December 31, 1946. See 3 C.F.R., 1976 Comp., pp. 8-9. Certain statutory authority relevant to this executive order, concerning the creation of military areas and zones, was canceled by the ***National Emergencies Act.*** See 18 U.S.C. 1383 (1976). However, not all such authority was eliminated by the statute; a parallel provision concerning defensive sea areas was retained without modification or qualification. See 18 U.S.C. 2152 (1988).

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73. See U.S. Congress. Senate. Special Committee on National Emergencies and Delegated Emergency Powers. National Emergencies and Delegated Emergency Powers, pp. 11-18.

74. See, for example, U.S. Congress. House. Committee on Government Operations. ***Presidential Directives and Records Accountability Act.*** Hearing, 100th Congress, 2d session. August 3, 1988. Washington, U.S. Govt. Print. Off., 1989; U.S. Congress. House. Committee on Interior and Insular Affairs. Emergency Preparedness and the Licensing Process for Commercial Nuclear Power Reactors. [2 parts.] Hearings, 98th Congress, Ist session. April 18 and July 8, 1983. Washington, U.S. Govt. Print. Off., 1985.

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any of its provisions during a national emergency. Disputes over the constitutionality or legality of the exercise of emergency powers are judicially reviewable. Indeed, both the Judiciary and Congress, as co-equal branches, can restrain the Executive regarding emergency powers. So can public opinion. Furthermore, since 1976, the President has been subject to certain procedural formalities in utilizing some statutorily delegated emergency authority. The ***National Emergencies Act*** (50 U.S.C. 1601-1651) eliminated or modified some statutory grants of emergency authority, required the President to declare formally the existence of a national emergency and to specify what statutory authority, activated by the declaration, would be used, and provided Congress a means to countermand the President's declaration and the activated authority being sought.

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NATIONAL EMERGENCY POWERS

Federal law provides a variety of powers for the President to use in response to crisis, exigency, or emergency circumstances threatening the Nation. Moreover, they are not limited to military or war situations. Some of these authorities, deriving from the Constitution or statutory law, are continuously available to the President with little or no qualification. Others--statutory delegations from Congress--exist on a stand-by basis and remain dormant until the President formally declares a national emergency. These delegations, or grants of power, authorize the President to meet the problems of governing effectively in times of crisis. Under the powers delegated by such statutes, **the President may seize property, organize and control the means of production, seize commodities, assign military forces abroad, institute martial law, seize and control all transportation and communication, regulate the operation of private enterprise, restrict travel, and, in a variety of ways, control the lives of United States citizens.** Furthermore, Congress may modify, rescind, or render dormant such delegated emergency authority.

Until the crisis of World War I, Presidents utilized emergency powers at their own discretion. Proclamations announced their exercise of exigency authority. However, during World War I and thereafter, Chief Executives have had available to them a growing body of stand-by emergency authority which became operative upon the issuance of a proclamation declaring a condition of national emergency. Sometimes such proclamations confined the matter of crisis to a specific policy sphere, and sometimes they placed no limitation on the pronouncement whatsoever. These activations of stand-by emergency authority remained acceptable practice until the era of the Vietnam war. In 1976, Congress curtailed this practice with the passage of the ***National Emergencies Act.***

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BACKGROUND AND HISTORY

The exercise of emergency powers had long been a concern of the classical political theorists, including the eighteenth century English philosopher **John Locke,** who had a strong influence upon the Founding Fathers in the United States. A preeminent exponent of a government of laws and not of men, **Locke** argued that occasions may arise when the Executive must exert a broad discretion in meeting special exigencies or "emergencies" for which the legislative power has provided no relief or existing law grants no necessary remedy. He did not regard this prerogative as limited to wartime, or even to

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situations of great urgency. It was sufficient if the "public good" might be advanced by its exercise./1

Emergency powers were first expressed prior to the actual founding of the Republic. Between 1775 and 1781, the Continental Congress passed a series of acts and resolves which count as the first expressions of emergency authority./2 These instruments dealt almost exclusively with the prosecution of the Revolutionary War.

At the Constitutional Convention of 1787, emergency powers, as such, failed to attract much attention during the course of debate over the charter for the new government. It may be argued, however, that the granting of emergency powers by Congress is implicit in its Article I, section 8 authority to "provide for the common Defense and general Welfare," the commerce clause, its war, armed forces, and militia powers, and the "necessary and proper" clause empowering it to make such laws as are required to fulfill the executions of "the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

There is a tradition of constitutional interpretation that has resulted in so-called implied powers, which may be invoked in order to respond to an emergency situation. **Locke** seems to have anticipated this practice. Furthermore, Presidents have occasionally taken an emergency action which they assumed to be constitutionally permissible. Thus, in the American governmental experience, the exercise of emergency powers has been somewhat dependent upon the Chief Executive's view of the Presidential office.

Perhaps the President who most clearly articulated a view of his office in conformity with the **Lockean** position was **Theodore Roosevelt.** Describing what came to be called the "stewardship" theory of the Presidency, **Roosevelt** wrote of his "insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its constitutional powers. "It was his view " that every executive officer, and above all every executive officer in high position, was a steward of the people," and he "declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it." Indeed, it was **Roosevelt's** belief that, for the President, "it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws."/3

Opposed to this view of the Presidency was **Roosevelt's** former Secretary of War, personal choice for, and actual successor as Chief Executive, **William Howard Taft.** America's twenty-seventh President viewed his office in more limited terms, writing "that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. In his view, such a "specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is, "**Taft** concluded," no undefined residuum of power which he can exercise because it seems to him to be in the public interest .... /4

Between these two views of the Presidency lie various gradations of opinion, resulting in perhaps as many conceptions of the office as there have been holders. One authority has summed up the situation in the following words:

> Emergency powers are not solely derived from legal sources. The extent of their invocation and use is also contingent upon the personal conception which the incumbent of the Presidential office has of the Presidency and the premises upon which he interprets his legal powers. In the last analysis, the authority of a President is largely determined by the President himself./5

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Finally, apart from the Constitution, but resulting from its prescribed procedures, there are statutory grants of power for emergency conditions. The President is authorized by Congress to take some special or extraordinary action, ostensibly to meet the problems of governing effectively in times of exigency. Sometimes these laws are only of temporary duration. The ***Economic Stabilization Act*** of 1970, for example, allowed the President to impose certain wage and price controls for about three years before it eventually expired automatically in 1974./6 The statute gave the President emergency authority to address a crisis in the Nation's economy.

Of course, many of these laws are continuously maintained or permanently available for the President's ready use in responding to an emergency. The ***Defense Production Act,*** originally adopted in 1950 to prioritize and regulate the manufacture of military material, is exemplary of this type of statute./7

Lastly, there are various stand-by laws which convey special emergency powers once the President formally declares a national emergency activating them. In 1973, a Senate special committee studying emergency powers published a compilation identifying some 470 provisions of Federal law delegating to the Executive extraordinary authority in time of national emergency./8 The vast majority of them are of the stand-by kind-dormant until activated by the President. However, formal procedures for invoking these authorities, accounting for their use, and regulating their activation and application were only recently established by the ***National Emergencies Act*** of 1976./9

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THE EMERGENCY CONCEPT

Relying upon constitutional authority or congressional delegations made at various times over the past 200 years, the President of the United States may exercise certain powers in the event that the continued existence of the Nation is threatened by crisis, exigency, or emergency circumstances. What is a national emergency?

In the simplest understanding of the term, the dictionary defines an emergency as "an unforeseen combination of circumstances or the resulting state that calls for immediate action."/10 In the midst of the crisis of the Great Depression, a 1934 Supreme Court majority opinion characterized an emergency in terms of urgency and relative infrequency of occurrence as well as equivalence to a public calamity resulting from fire, flood, or like disaster not reasonably subject to anticipation./11 An eminent constitutional scholar, the late **Edward S. Corwin,** explained emergency conditions as being those which have not attained enough of stability or recurrency to admit of their being dealt with according to rule."/12 During congressional committee hearings on emergency powers in 1973, a political scientist described an emergency in the following terms: "It denotes the existence of conditions of varying nature, intensity and duration, which are perceived to threaten life or well-being beyond tolerable limits."/13 **Corwin** also indicated it "connotes the existence of conditions suddenly intensifying the degree of existing danger to life or well-being beyond that which is accepted as normal."/14

There are perhaps at least four aspects of an emergency condition. The first is its temporal character: an emergency is sudden, unforeseen, and of unknown duration. The second is its potential gravity: an emergency is dangerous and threatening to life and well-being. The third, in terms of governmental role and authority, is the matter of perception: who discerns this phenomenon? The Constitution may be guiding on this question, but not always conclusive. Fourth, there is the element, of response: by

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definition, an emergency requires immediate action, but is, as well, unanticipated and, therefore, as **Corwin** notes, cannot always be "dealt with according to rule." From these simple factors arise the dynamics of national emergency powers./15 These dynamics can be seen in the history of the exercise of emergency powers.

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LAW AND PRACTICE

During the summer of 1792, residents of western Pennsylvania, Virginia, and the Carolinas began forcefully opposing the collection of a Federal excise tax on whiskey. Anticipating rebellious activity, Congress enacted legislation providing for the calling forth of the militia to suppress insurrections and repel invasions./16 Section 3 of this statute required that a Presidential proclamation be issued to warn insurgents to cease their activity./17 If hostilities persisted, the militia could be dispatched. On August 17, 1794, President **Washington** issued such a proclamation. The insurgency continued. The President then took command of the forces organized to put down the rebellion./18

Here was the beginning of a pattern of policy expression and implementation regarding emergency powers. Congress legislated extraordinary or special authority for discretionary use by the President in a time of emergency. In issuing a proclamation, the Chief Executive notified Congress that he was making use of this power and also apprised other affected parties of his emergency action.

Over the next 100 years, Congress enacted various permanent and stand-by laws for responding largely to military, economic, and labor emergencies. During this span of years, however, the exercise of emergency powers by President **Lincoln** brought the first great dispute over the authority and discretion of the Chief Executive to engage in emergency actions.

By the time of **Lincoln's** inauguration (March 4, 1861), seven States of the lower South had announced their secession from the Union; the Confederate provisional government had been established (February 4, 1861); **Jefferson Davis** had been elected (February 9, 1861) and installed as president of the Confederacy (February 18, 1861); and an army was being mobilized by the secessionists. **Lincoln** had a little over two months to consider his course of action.

When the new President assumed office, Congress was not in session. For reasons of his own, **Lincoln** delayed calling a special meeting of the legislature, but soon ventured into its constitutionally designated policy sphere. On April 19, he issued a proclamation establishing a blockade on the ports of the secessionist States,/19 "a measure hitherto regarded as contrary to both the Constitution and the law of nations except when the government was embroiled in a declared, foreign war."/20 Congress, of course, had not been given an opportunity to consider a declaration of war.

The next day, the President ordered the addition of 19 vessels to the Navy "for purposes of public defense."/21 A short time later, the blockade was extended to the ports of Virginia and North Carolina./22

By a proclamation of May 3, **Lincoln** ordered that the regular army be enlarged by 22,714 men, that Navy personnel be increased by 18,000, and that 42,032 volunteers be accommodated for three-year terms of service./23 Such a directive, of course, antagonized many Representatives and Senators, because Congress is specifically authorized by Article I, Section 8, of the Constitution

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"to raise and support armies."

In his July message to the newly assembled Congress, **Lincoln** suggested that, while his actions with regard to the expansion of the armed forces might be legally suspect, "[t]hese measures, whether strictly legal or not, were ventured upon under what appeared to be a popular and a public necessity, trusting then, as now, that Congress would readily ratify them. It is believed," he wrote, "that nothing has been done beyond the constitutional competency of Congress."/24

Indeed, Congress subsequently did legislatively authorize, and thereby approve, the President's actions regarding his increasing armed forces personnel, and would do the same later concerning some other questionable emergency actions. In the case of **Lincoln,** the opinion of scholars and experts is "that neither Congress nor the Supreme Court exercised any effective restraint upon the President./25 The emergency actions of the Chief Executive were either unchallenged or approved by Congress, and were either accepted or, because of almost no opportunity to render judgment, went largely without notice by the Supreme Court. The President made a quick response to the emergency at hand, a response which Congress or the Court might have rejected in law, but which, nonetheless, had been made in fact and with some degree of popular approval. Similar controversy would arise concerning the emergency actions of Presidents **Woodrow Wilson** and **Franklin D. Roosevelt.** Both men exercised extensive emergency powers with regard to world hostilities, and **Roosevelt** also used emergency authority to deal with the Great Depression. Their emergency actions, however, were largely supported by statutory delegations and a high degree of approval on the part of both Congress and the public.

Furthermore, during the **Wilson** and **Roosevelt** presidencies, a major procedural development occurred in the exercise of emergency powers -- use of a proclamation to declare a national emergency and, thereby, to activate all stand-by statutory provisions delegating authority to the President during a national emergency. The first such national emergency proclamation was issued by President **Wilson** on February 5, 1917./26 Promulgated on the authority of a statute establishing the **United States Shipping Board,** the proclamation concerned water transportation policy./27 It Was statutorily terminated along with a variety of other wartime measures on March 3, 1921./28

President **Franklin D. Roosevelt** issued the next national emergency proclamation some 48 hours after assuming office./29 Proclaimed March 6, 1933, on the somewhat questionable authority of the ***Trading With the Enemy Act*** of 1917,/30 the proclamation declared a so-called "bank holiday" and halted a major class of financial transactions by closing the banks. Congress subsequently gave specific statutory support for the Chief Executive's action with the passage of the ***Emergency Banking Act*** on March 9./31 Upon signing this legislation into law, the President issued a second banking proclamation, based upon the authority of the new law, continuing the bank holiday until it was determined that banking institutions were capable of conducting business in accordance with new banking policy./32

Next, on September 8, 1939, President **Roosevelt** promulgated a proclamation of "limited" national emergency, though the qualifying term had no meaningful legal significance./33 Almost two years later, on May 27, 1941, he issued a proclamation of "unlimited" national emergency./34 This action, however, actually did not make any important new powers available to the Chief Executive in addition to those activated by the 1939 proclamation. The President's purpose in making the second proclamation was largely to apprise the American people of the worsening conflict in Europe and growing tensions in Asia.

These two war-related proclamations of a general condition of national emergency remained operative until 1947 when certain of the provisions of law they had activated were statutorily rescinded./35 Then, in 1951, Congress terminated the declaration of war against Germany./36 In the spring of the

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following year, the Senate ratified the treaty of peace with Japan. Because these actions marked the end of World War II for the United States, legislation was required to keep certain emergency provisions in effect. Initially, the ***Emergency Powers Interim Continuation Act*** temporarily maintained this emergency authority./37 It was subsequently supplanted by the ***Emergency Powers Continuation Act,*** which kept selected emergency delegations in force until August of 1953./38 By proclamation in April of 1952, President **Harry S. Truman** terminated the 1939 and 1941 national emergency declarations, leaving operative only those emergency authorities continued by statutory specification./39

Truman's 1952 termination, however, specifically exempted a December, 1950, proclamation of national emergency he had issued in response to hostilities in Korea./40 Furthermore, this condition of national emergency would remain in force and unimpaired well into the era of the Vietnam war.

Two other proclamations of national emergency also would be promulgated before Congress once again turned its attention to these matters. Faced with a postal strike, President **Richard M. Nixon** declared a national emergency in March of 1970,/41 thereby permitting him to use units of the military Ready Reserve to assist in moving the mail./42 A second national emergency was proclaimed by **Nixon** in August, 1971, to control the balance of payments flow by terminating temporarily certain trade agreement provisos and imposing supplemental duties on some imported goods./43

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CONGRESSIONAL CONCERNS

In the years following the conclusion of U.S. armed forces involvement in active military conflict in Korea, occasional expressions of concern were heard in Congress regarding the continued existence of **Truman's** 1950 national emergency proclamation long after the conditions prompting its issuance had disappeared. There was some annoyance that the President was retaining extraordinary powers intended only for time of genuine emergency, and a feeling that the Chief Executive was thwarting the legislative intent of Congress by continuously failing to terminate the declared national emergency./44

Growing public and congressional displeasure with the President's exercise of his war powers and deepening U.S. involvement in hostilities in Vietnam prompted interest in a variety of related matters. For Senator **Charles McC. Mathias,** a leader in this policy area, interest in the question of emergency powers developed out of U.S. involvement in Vietnam and the incursion into Cambodia. "It became clear," he said, "that the President had powers to commit us to warfare without adequate respect for the constitutional requirement that Congress alone can declare a state of war. In response, among other actions, Mathias, together with Senator **Frank Church,** sought to establish a Senate special committee to study and investigate the termination of a 1950 proclamation of national emergency that was being used to prosecute the Vietnam war, "to consider problems which might arise as the result of the termination and to consider what administrative or legislative actions might be necessary." Such a panel was initially chartered by S. Res. 304 as the Special Committee on the Termination of the National Emergency in June of 1972, but did not begin operations before the end of the year./45

With the convening of the 93rd Congress in 1973, the Special Committee was approved again with S. Res. 9. Upon exploring the subject matter of national emergency powers, however, the mission of the Special Committee became more burdensome. There was not just one proclamation of national emergency in effect, but four such instruments, issued in 1933, 1950, 1970, and 1971. The United States

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was in a condition of national emergency four times over, and with each proclamation, the whole collection of statutorily delegated emergency powers was activated. Consequently, in 1974, with S. Res. 242, the study panel was rechartered as the Special Committee on National Emergencies and Delegated Emergency Powers to reflect its focus upon matters larger than the 1950 emergency proclamation. It's final mandate was provided by S. Res. 10 in the 94th Congress, although its termination date was necessarily extended briefly in 1976 by S. Res. 370. Senator Church and Senator Mathias co-chaired the panel./46

The Special Committee conducted and produced various studies during its existence./47 After scrutinizing the United States Code and uncodified statutory emergency powers, the panel identified 470 provisions of Federal law which delegated extraordinary authority to the Executive in time of national emergency./48 Not all of them required a declaration of national emergency to be operative, but they were, nevertheless, extraordinary grants. The Special Committee also found that no process existed for automatically terminating the four outstanding national emergency proclamations. Thus, the panel began developing legislation containing a formula for regulating emergency declarations in the future and otherwise adjusting the body of statutorily delegated emergency powers by abolishing some provisions, relegating others to permanent status, and continuing others in a stand-by capacity. In addition, the panel also began preparing a report offering its findings and recommendations regarding the state of national emergency powers in the Nation.

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THE NATIONAL EMERGENCIES ACT

The Special Committee, in July of 1974, unanimously recommended legislation establishing a procedure for the Presidential declaration and congressional regulation of a national emergency. The proposal also modified various statutorily delegated emergency powers./49 In arriving at this reform measure, the panel consulted with various executive branch agencies regarding the significance of existing emergency statutes, recommendations for legislative action, and views as to the repeal of some provisions of emergency law./50

This recommended legislation was introduced by Senator Frank Church for himself and others on August 22, 1974, and became S. 3957. It was reported from the Senate Committee on Government Operations on September 30 without public hearings or amendment./51 The bill was subsequently discussed on the Senate floor on October 7, when it was amended and passed./52

Although a version of the reform legislation had been introduced in the House on September 16, becoming H.R. 16668, the Committee on the Judiciary, to which the measure was referred, did not have an opportunity to consider either that bill or the Senate adopted version due to the press of other business--chiefly the impeachment of President **Nixon** and the nomination of **Nelson A. Rockefeller** to be Vice President of the United States. Thus, the ***National Emergencies Act*** failed to be considered on the House floor before the final adjournment of the 93rd Congress.

With the convening of the next Congress, the proposal was introduced in the House on February 27, 1975, becoming H.R. 3884, and in the Senate on March 6, becoming S. 977. House hearings occurred in March and April before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary./53 The bill was subsequently marked-up and, on April 15, was reported in amended form to the full committee on a 4-0 vote. On May 21, the

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Committee on the Judiciary, on a voice vote, reported the bill with technical amendments./54 During the course of House debate on September 4, there was agreement to both the committee amendments and a floor amendment providing that national emergencies end automatically one year after their declaration unless the President informs Congress and the public of a continuation. The bill was then passed on a 388-5 yea and nay vote and sent to the Senate, where it was referred to the Committee on Government Operations./55

The Senate Committee on Government Operations held a hearing on H.R. 3884 on February 25, 1976,/56 The bill was subsequently reported on August 26 with one substantive and several technical amendments./57 The following day, the amended bill was passed and returned to the House./58 On August 31, the House agreed to the Senate amendments,/59 clearing the proposal for President **Gerald Ford's** signature on September.l4./60

As enacted, the ***National Emergencies Act*** consists of five titles. The first of these generally returned all stand-by statutory delegations of emergency power activated by an outstanding declaration of national emergency to a dormant state two years after the statute's approval. However, the Act did not cancel the 1933, 1950, 1970, and 1971 national emergency proclamations because these were issued by the President pursuant to his Article II constitutional authority. Nevertheless, it did render them ineffective by returning to dormancy the statutory authorities they had activated, thereby necessitating a new declaration to activate stand-by statutory emergency authorities.

Title II provides a procedure for future declarations of national emergency by the President and prescribes arrangements for their congressional regulation. The statute establishes an exclusive means for declaring a national emergency. Furthermore, emergency declarations shall automatically terminate after one year unless formally continued for another year by the President, but may be terminated earlier by either the President or Congress, Originally, the prescribed method for congressional termination of a declared national emergency originally was a concurrent resolution adopted by both Houses of Congress. This type of so-called "legislative veto" was effectively invalidated by the Supreme Court in 1983./61 The ***National Emergencies Act*** was amended in 1985 to substitute a joint resolution as the vehicle for rescinding a national emergency declaration./62

When declaring a national emergency, the President must indicate, according to Title III, the powers and authorities being activated to respond to the exigency at hand.

Certain Presidential accountability and reporting requirements regarding national emergency declarations are specified in Title IV, and the repeal and continuation of various statutory provisions delegating emergency powers is accomplished in Title V.

Since the 1976 enactment of the ***National Emergencies Act,*** the following national emergencies have been declared pursuant to its provisions. With the exception of the 1983 and 1984 actions continuing export control regulations, all of these emergency declarations are operative.

TABLE 1:
DECLARED NATIONAL EMERGENCIES, 1976-1990/63

Declaration	Date	Title
E.O. 12170	11/14/79	Blocking Iranian Government Property

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(2) Affirmative evidence

The presumption described in paragraph (1) may be rebutted only on production of affirmative evidence that the State or local government did not maintain documentation described in that paragraph.

(3) Inability to produce documentation

The inability of the Federal, State, or local government to produce source documentation supporting expenditure reports later than 3 years after the date of transmission of the final expenditure report shall not constitute evidence to rebut the presumption described in paragraph (1).

(4) Right of access

The period during which the Federal, State, or local government has the right to access source documentation shall not be limited to the required 3-year retention period referred to in paragraph (3), but shall last as long as the records are maintained.

(c) Binding nature of grant requirements

A State or local government shall not be liable for reimbursement or any other penalty for any payment made under this chapter if—

(1) the payment was authorized by an approved agreement specifying the costs;

(2) the costs were reasonable; and

(3) the purpose of the grant was accomplished.

(Pub.L. 93-288, Title VII, § 705, as added Pub.L. 106-390, Title III, § 304, Oct. 30, 2000, 114 Stat. 1573.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106-40, see 2000 U.S. Code Cong. and Adm. News, p. 1456.

References in Text

This chapter, referred to in text, originally read "this Act", meaning the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub.L. 93-288, May 22, 1974, 88 Stat. 143, which is classified principally to this chapter. See Tables for complete classification.

LIBRARY REFERENCES

American Digest System

United States ⇐82(2, 5).
Key Number System Topic No. 393.

Encyclopedias

United States, see C.J.S. § 122.

§ 5206. Buy American

(a) Compliance with Buy American Act

No funds authorized to be appropriated under this Act or any amendment made by this Act may be expended by an entity unless the entity, in expending the funds, complies with the Buy American Act (41 U.S.C. 10a et seq.).

(b) Debarment of persons convicted of fraudulent use of "made in america" labels

(1) In general

If the Director of the Federal Emergency Management Agency determines that a person has been convicted of intentionally affixing a label bearing a "Made in America" inscription to any product sold in or shipped to the United States that is not made in America, the Director shall determine, not later than 90 days after determining that the person has been so convicted, whether the person should be debarred from contracting under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.).

(2) Definition of debar

In this subsection, the term "debar" has the meaning given the term in section 2393(c) of Title 10.

(Pub.L. 106-390, Title III, § 306, Oct. 30, 2000, 114 Stat. 1574.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106-40, see 2000 U.S. Code Cong. and Adm. News, p. 1456.

References in Text

"This Act and the amendments made by this Act", referred to in subsec. (a), is Pub.L. 106-390, Oct. 30, 2000, 114 Stat 1552, the Disaster Mitigation Act of 2000, which enacted sections 5133, 5134, 5165, 5165a, 5165b, 5165c, 5205 and 5206 of this title, amended sections 3796b, 5122, 5154, 5170c, 5172, 5174, 5184, 5187, and 5192 of this title, and repealed sections 5176 and 5178 of this title; see Tables for complete classification.

The Buy American Act, referred to in subsec. (a), is Act Mar. 3, 1933, c. 212, Title III, 47 Stat. 1520, as amended, which is classified principally to section 10a et seq. of Title 41. See Tables for complete classification.

The Robert T. Stafford Disaster Relief and Emergency Assistance Act, referred to in subsec. (b)(1), is Pub.L. 93-288, May 22, 1974, 88 Stat. 143, as amended, which is classified principally to this chapter. See Tables for complete classification.

Codifications

Section was enacted as part of the Disaster Mitigation Act of 2000, and not as part of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, which comprises this chapter.

LIBRARY REFERENCES

American Digest System

United States ⇐82(2, 5).
Key Number System Topic No. 393.

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United States, see C.J.S. § 122.

CHAPTER 69—COMMUNITY DEVELOPMENT

Sec.
5302. General provisions.
5305. Activities eligible for assistance.
5307. Special purpose grants.
5308. Guarantee and commitment to guarantee loans for acquisition of property.
5318a. John Heinz Neighborhood Development Program.

LIBRARY REFERENCES

Texts and Treatises

6 Fed Proc L Ed, Civil Rights § 11:814.
1 Am Disab, Programs, Services and Accommodations § 1:137.

§ 5301. Congressional findings and declaration of purpose

HISTORICAL AND STATUTORY NOTES

Income Eligibility for Home and CDBG Programs

Pub.L. 105-276, Title V, § 590, Oct. 21, 1998, 112 Stat. 2651, provided that:

"(a) In general.—The Secretary of Housing and Urban Development shall, for not less than 10 jurisdictions that are metropolitan cities or urban counties for purposes of title I of the Housing and Community Development Act of 1974 [Title I of Pub.L. 93-383, Aug. 22, 1974, 88 Stat. 633, which is classified generally to 42 U.S.C.A. § 5301 et seq.], grant exceptions not later than 90 days after the date of the enactment of this Act [Oct. 21, 1998] for such jurisdictions that provide that—

"(1) for purposes of the HOME investment partnerships program under title II of the Cranston-Gonzalez National Affordable Housing Act [Title II of Pub.L. 101-625, Nov. 28, 1990, 104 Stat. 4079, which is generally classified to 42 U.S.C.A. § 12721 et seq.], the limitation based on percentage of median income that is applicable under section 104(10), 214(1)(A), or 215(a)(1)(A) [section 12704(10), 12744(1)(A), or 12745(a)(1)(A) of this title] for any area within the State or unit of general local government shall be the numerical percentage that is specified in such section; and

"(2) for purposes of the community development block grant program under title I of the Housing and Community Development Act of 1974 [Title I of Pub.L. 93-383, Aug. 22, 1974, 88 Stat. 633, which is classified generally to 42 U.S.C.A. § 5301 et seq.], the limitation based on percentage of median income that is applicable pursuant to section 102(a)(20) [section 5302(a)(20) of this title] for any area within the State or unit of general local government shall be the numerical percentage that is specified in subparagraph (A) of such section.

"(b) Effective date.—This section [this note] shall take effect on the date of the enactment of this Act [Oct. 21, 1998]."

[Amendments under Title V of Pub.L. 105-276 made on Oct. 21, 1998, but Title V to take effect, and the amendments made by Title V to apply beginning upon, Oct. 1, 1999, except as otherwise specifically provided in Title V or as otherwise specifically provided in any amendment made by Title V, and continuing applicability of provisions of law amended by Title V, see section 503 of Pub.L. 105-276, set out as a note

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to the President an application for the delegation of the authority to administer the program.

(2) Criteria

The President, in consultation and coordination with States and local governments, shall establish criteria for the approval of applications submitted under paragraph (1). The criteria shall include, at a minimum—

(A) the demonstrated ability of the State to manage the grant program under this section;

(B) there being in effect an approved mitigation plan under section 5165 of this title; and

(C) a demonstrated commitment to mitigation activities.

(3) Approval

The President shall approve an application submitted under paragraph (1) that meets the criteria established under paragraph (2).

(4) Withdrawal of approval

If, after approving an application of a State submitted under paragraph (1), the President determines that the State is not administering the hazard mitigation grant program established by this section in a manner satisfactory to the President, the President shall withdraw the approval.

(5) Audits

The President shall provide for periodic audits of the hazard mitigation grant programs administered by States under this subsection.

(As amended Pub.L. 106–390, Title I, § 104(c)(1), Title II, § 204, Oct. 30, 2000, 114 Stat. 1559, 1561.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–40, see 2000 U.S. Code Cong. and Adm. News, p. 1456.

Amendments

2000 Amendments. Subsec. (a). Pub.L. 106–390, § 104(c)(1), struck out "section 5176" and inserted "section 5165"; struck out "The total" and inserted "Subject to section 5165 of this title, the total".

Subsec. (c). Pub.L. 106–390, § 204, added subsec. (c).

§ 5171. Federal facilities

LIBRARY REFERENCES

Encyclopedias

Office of President, and powers and duties thereof, see C.J.S. United States §§ 27 to 30.
79 Am Jur 2d, Welfare Laws § 44.

Texts and Treatises

20 Fed Proc L Ed, Internal Revenue § 48:862.

§ 5172. Repair, restoration, and replacement of damaged facilities

(a) Contributions

(1) In general

The President may make contributions—

(A) to a State or local government for the repair, restoration, reconstruction, or replacement of a public facility damaged or destroyed by a major disaster and for associated expenses incurred by the government; and

(B) subject to paragraph (3), to a person that owns or operates a private nonprofit facility damaged or destroyed by a major disaster for the repair, restoration, reconstruction, or replacement of the facility and for associated expenses incurred by the person.

(2) Associated expenses

For the purposes of this section, associated expenses shall include—

(A) the costs of mobilizing and employing the National Guard for performance of eligible work;

(B) the costs of using prison labor to perform eligible work, including wages actually paid, transportation to a worksite, and extraordinary costs of guards, food, and lodging; and

(C) base and overtime wages for the employees and extra hires of a State, local government, or person described in paragraph (1) that perform eligible work, plus fringe benefits on such wages to the extent that such benefits were being paid before the major disaster.

(3) Conditions for assistance to private nonprofit facilities

(A) In general

The President may make contributions to a private nonprofit facility under paragraph (1)(B) only if—

(i) the facility provides critical services (as defined by the President) in the event of a major disaster; or

(ii) the owner or operator of the facility—

(I) has applied for a disaster loan under section 636(b) of Title 15; and

(II)(aa) has been determined to be ineligible for such a loan; or

(bb) has obtained such a loan in the maximum amount for which the Small Business Administration determines the facility is eligible.

(B) Definition of critical services

In this paragraph, the term "critical services" includes power, water (including water provided by an irrigation organization or facility), sewer, wastewater treatment, communications, and emergency medical care.

(4) Notification to Congress

Before making any contribution under this section in an amount greater than $20,000,000, the President shall notify—

(A) the Committee on Environment and Public Works of the Senate;

(B) the Committee on Transportation and Infrastructure of the House of Representatives;

(C) the Committee on Appropriations of the Senate; and

(D) the Committee on Appropriations of the House of Representatives.

(b) Federal share

(1) Minimum Federal share

Except as provided in paragraph (2), the Federal share of assistance under this section shall be not less than 75 percent of the eligible cost of repair, restoration, reconstruction, or replacement carried out under this section.

(2) Reduced Federal share

The President shall promulgate regulations to reduce the Federal share of assistance under this section to not less than 25 percent in the case of the repair, restoration, reconstruction, or replacement of any eligible public facility or private nonprofit facility following an event associated with a major disaster—

(A) that has been damaged, on more than one occasion within the preceding 10–year period, by the same type of event; and

(B) the owner of which has failed to implement appropriate mitigation measures to address the hazard that caused the damage to the facility.

(c) Large in-lieu contributions

(1) For public facilities

(A) In general

In any case in which a State or local government determines that the public welfare would not best be served by repairing, restoring, reconstructing, or

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replacing any public facility owned or controlled by the State or local government, the State or local government may elect to receive, in lieu of a contribution under subsection (a)(1)(A), a contribution in an amount equal to 75 percent of the Federal share of the Federal estimate of the cost of repairing, restoring, reconstructing, or replacing the facility and of management expenses.

(B) Areas with unstable soil

In any case in which a State or local government determines that the public welfare would not best be served by repairing, restoring, reconstructing, or replacing any public facility owned or controlled by the State or local government because soil instability in the disaster area makes repair, restoration, reconstruction, or replacement infeasible, the State or local government may elect to receive, in lieu of a contribution under subsection (a)(1)(A), a contribution in an amount equal to 90 percent of the Federal share of the Federal estimate of the cost of repairing, restoring, reconstructing, or replacing the facility and of management expenses.

(C) Use of funds

Funds contributed to a State or local government under this paragraph may be used—

(i) to repair, restore, or expand other selected public facilities;

(ii) to construct new facilities; or

(iii) to fund hazard mitigation measures that the State or local government determines to be necessary to meet a need for governmental services and functions in the area affected by the major disaster.

(D) Limitations

Funds made available to a State or local government under this paragraph may not be used for—

(i) any public facility located in a regulatory floodway (as defined in section 59.1 of title 44, Code of Federal Regulations (or a successor regulation)); or

(ii) any uninsured public facility located in a special flood hazard area identified by the Director of the Federal Emergency Management Agency under the National Flood Insurance Act of 1968 (42 U.S.C. 4001 et seq.).

(2) For private nonprofit facilities

(A) In general

In any case in which a person that owns or operates a private nonprofit facility determines that the public welfare would not best be served by repairing, restoring, reconstructing, or replacing the facility, the person may elect to receive, in lieu of a contribution under subsection (a)(1)(B), a contribution in an amount equal to 75 percent of the Federal share of the Federal estimate of the cost of repairing, restoring, reconstructing, or replacing the facility and of management expenses.

(B) Use of funds

Funds contributed to a person under this paragraph may be used—

(i) to repair, restore, or expand other selected private nonprofit facilities owned or operated by the person;

(ii) to construct new private nonprofit facilities to be owned or operated by the person; or

(iii) to fund hazard mitigation measures that the person determines to be necessary to meet a need for the person's services and functions in the area affected by the major disaster.

(C) Limitations

Funds made available to a person under this paragraph may not be used for—

(i) any private nonprofit facility located in a regulatory floodway (as defined in section 59.1 of title 44, Code of Federal Regulations (or a successor regulation)); or

(ii) any uninsured private nonprofit facility located in a special flood hazard area identified by the Director of the Federal Emergency Management Agency under the National Flood Insurance Act of 1968 (42 U.S.C. 4001 et seq.).

[See main volume for text of (d)]

(e) Eligible cost

(1) Determination

(A) In general

For the purposes of this section, the President shall estimate the eligible cost of repairing, restoring, reconstructing, or replacing a public facility or private nonprofit facility—

(i) on the basis of the design of the facility as the facility existed immediately before the major disaster; and

(ii) in conformity with codes, specifications, and standards (including floodplain management and hazard mitigation criteria required by the President or under the Coastal Barrier Resources Act (16 U.S.C. 3501 et seq.)) applicable at the time at which the disaster occurred.

(B) Cost estimation procedures

(i) In general

Subject to paragraph (2), the President shall use the cost estimation procedures established under paragraph (3) to determine the eligible cost under this subsection.

(ii) Applicability

The procedures specified in this paragraph and paragraph (2) shall apply only to projects the eligible cost of which is equal to or greater than the amount specified in section 5189 of this title.

(2) Modification of eligible cost

(A) Actual cost greater than ceiling percentage of estimated cost

In any case in which the actual cost of repairing, restoring, reconstructing, or replacing a facility under this section is greater than the ceiling percentage established under paragraph (3) of the cost estimated under paragraph (1), the President may determine that the eligible cost includes a portion of the actual cost of the repair, restoration, reconstruction, or replacement that exceeds the cost estimated under paragraph (1).

(B) Actual cost less than estimated cost

(i) Greater than or equal to floor percentage of estimated cost

In any case in which the actual cost of repairing, restoring, reconstructing, or replacing a facility under this section is less than 100 percent of the cost estimated under paragraph (1), but is greater than or equal to the floor percentage established under paragraph (3) of the cost estimated under paragraph (1), the State or local government or person receiving funds under this section shall use the excess funds to carry out cost-effective activities that reduce the risk of future damage, hardship, or suffering from a major disaster.

(ii) Less than floor percentage of estimated cost

In any case in which the actual cost of repairing, restoring, reconstructing, or replacing a facility under this section is less than the floor percentage established under paragraph (3) of the cost estimated under paragraph (1), the State or local government or person receiving assistance

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under this section shall reimburse the President in the amount of the difference.

(C) No effect on appeals process

Nothing in this paragraph affects any right of appeal under section 5189a of this title.

(3) Expert panel

(A) Establishment

Not later than 18 months after October 30, 2000, the President, acting through the Director of the Federal Emergency Management Agency, shall establish an expert panel, which shall include representatives from the construction industry and State and local government.

(B) Duties

The expert panel shall develop recommendations concerning—

(i) procedures for estimating the cost of repairing, restoring, reconstructing, or replacing a facility consistent with industry practices; and

(ii) the ceiling and floor percentages referred to in paragraph (2).

(C) Regulations

Taking into account the recommendations of the expert panel under subparagraph (B), the President shall promulgate regulations that establish—

(i) cost estimation procedures described in subparagraph (B)(i); and

(ii) the ceiling and floor percentages referred to in paragraph (2).

(D) Review by President

Not later than 2 years after the date of promulgation of regulations under subparagraph (C) and periodically thereafter, the President shall review the cost estimation procedures and the ceiling and floor percentages established under this paragraph.

(E) Report to Congress

Not later than 1 year after the date of promulgation of regulations under subparagraph (C), 3 years after that date, and at the end of each 2-year period thereafter, the expert panel shall submit to Congress a report on the appropriateness of the cost estimation procedures.

(4) Special rule

In any case in which the facility being repaired, restored, reconstructed, or replaced under this section was under construction on the date of the major disaster, the cost of repairing, restoring, reconstructing, or replacing the facility shall include, for the purposes of this section, only those costs that, under the contract for the construction, are the owner's responsibility and not the contractor's responsibility.

(f) Repealed. Pub.L. 106–390, Title II, § 205(e), Oct. 30, 2000, 114 Stat. 1566

(As amended Pub.L. 106–390, Title II, § 205(a) to (d)(1), (e), Oct. 30, 2000, 114 Stat. 1562, 1566.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–40, see 2000 U.S. Code Cong. and Adm. News, p. 1456.

References in Text

The National Flood Insurance Act of 1968, referred to in text, is Pub.L. 90–448, Title XIII, Aug. 1, 1968, 82 Stat. 572, as amended, which is classified principally to chapter 50 (section 4001 et seq.) of this title. See Tables for complete classification.

Amendments

2000 Amendments. Subsec. (a). Pub.L. 106–390, § 205(a), rewrote subsec. (a), which formerly read:

"(a) Contributions

"The President may make contributions—

"(1) to a State or local government for the repair, restoration, reconstruction, or replacement of a public facility which is damaged or destroyed by a major disaster and for associated expenses incurred by such government; and

"(2) to a person who owns or operates a private nonprofit facility damaged or destroyed by a major disaster for the repair, restoration, reconstruction, or replacement of such facility and for associated expenses incurred by such person."

Subsec. (b). Pub.L. 106–390, § 205(b), rewrote subsec. (b), which formerly read:

"(b) Minimum Federal share

"The Federal share of assistance under this section shall be not less than—

"(1) 75 percent of the net eligible cost of repair, restoration, reconstruction, or replacement carried out under this section;

"(2) 100 percent of associated expenses described in subsections (f)(1) and (f)(2) of this section; and

"(3) 75 percent of associated expenses described in subsections (f)(3), (f)(4), and (f)(5) of this section."

Subsec. (c). Pub.L. 106–390, § 205(c), rewrote subsec. (c), which formerly read:

"(c) Large in lieu contributions

"(1) For public facilities

"In any case where a State or local government determines that the public welfare would not be best served by repairing, restoring, reconstructing, or replacing any public facility owned or controlled by such State or local government, it may elect to receive, in lieu of a contribution under subsection (a)(1) of this section, a contribution of not to exceed 90 percent of the Federal share of the Federal estimate of the cost of repairing, restoring, reconstructing, or replacing such facility and of associated expenses. Funds contributed under this subsection may be used to repair, restore, or expand other selected public facilities, to construct new facilities, or to fund hazard mitigation measures which the State or local government determines to be necessary to meet a need for governmental services and functions in the area affected by the major disaster.

"(2) For private nonprofit facilities

"In any case where a person who owns or operates a private nonprofit facility determines that the public welfare would not be best served by repairing, restoring, reconstructing, or replacing such facility, such person may elect to receive, in lieu of a contribution under subsection (a)(2) of this section, a contribution of not to exceed 90 percent of the Federal share of the Federal estimate of the cost of repairing, restoring, reconstructing, or replacing such facility and of associated expenses. Funds contributed under this subsection may be used to repair, restore, or expand other selected private nonprofit facilities owned or operated by such person, to construct new private nonprofit facilities to be owned or operated by such person, or to fund hazard mitigation measures which such person determines to be necessary to meet a need for its services and functions in the area

"(3) Restriction on use for State or local contribution

"Funds provided under this subsection shall not be used for any State or local government cost-sharing contribution required under this chapter."

Subsec. (e). Pub.L. 106–390, § 205(d)(1), rewrote subsec. (e), which formerly read:

"(e) Net eligible cost

"(1) General rule

"For purposes of this section, the cost of repairing, restoring, reconstructing, or replacing a public facility or private nonprofit facility on the basis of the design of such facility as it existed immediately prior to the major disaster and in conformity with current applicable codes, specifications, and standards (including floodplain management and hazard mitigation criteria required by the President or by the Coastal Barrier Resources Act (16 U.S.C. 3501 et seq.)) shall, at a minimum, be treated as the net eligible cost of such repair, restoration, reconstruction, or replacement.

"(2) Special rule

"In any case in which the facility being repaired, restored, reconstructed, or replaced under this section was under construction on the date of the major disaster, the cost of repairing, restoring, reconstructing, or replacing such facility shall include, for purposes of this section, only those costs which, under the contract for such construction, are the owner's responsibility and not the contractor's responsibility."

Subsec. (f). Pub.L. 106–390, § 205(e), repealed subsec. (f), which formerly read:

"(f) Associated expenses

"For purposes of this section, associated expenses include the following:

"(1) Necessary costs

"Necessary costs of requesting, obtaining, and administering Federal assistance based on a percentage of assistance provided as follows:

"(A) For an applicant whose net eligible costs equal less than $100,000, 3 percent of such net eligible costs.

"(B) For an applicant whose net eligible costs equal $100,000 or more but less than $1,000,000, $3,000 plus 2 percent of such net eligible costs in excess of $100,000.

"(C) For an applicant whose net eligible costs equal $1,000,000 or more but less than $5,000,000, $21,000 plus 1 percent of such net eligible costs in excess of $1,000,000.

"(D) For an applicant whose net eligible costs equal $5,000,000 or more, $61,000 plus ½ percent of such net eligible costs in excess of $5,000,000.

"(2) Extraordinary costs

"Extraordinary costs incurred by a State for preparation of damage survey reports, final inspection reports, project applications, final audits, and related field inspections by State employees, including overtime pay and per diem and travel expenses of such employees, but not including pay for regular time of such employees, based on the total amount of

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5170c, 5172, 5173, 5192, and 5193 of this title in such State in connection with the major disaster as follows:

"(A) If such total amount is less than $100,000, 3 percent of such total amount.

"(B) If such total amount is $100,000 or more but less than $1,000,000, $3,000 plus 2 percent of such total amount in excess of $100,000.

"(C) If such total amount is $1,000,000 or more but less than $5,000,000, $21,000 plus 1 percent of such total amount in excess of $1,000,000.

"(D) If such total amount is $5,000,000 or more, $61,000 plus ½ percent of such total amount in excess of $5,000,000.

"(3) Costs of National Guard

"The costs of mobilizing and employing the National Guard for performance of eligible work.

"(4) Costs of prison labor

"The costs of using prison labor to perform eligible work, including wages actually paid, transportation to a worksite, and extraordinary costs of guards, food, and lodging.

"(5) Other labor costs

"Base and overtime wages for an applicant's employees and extra hires performing eligible work plus fringe benefits on such wages to the extent that such benefits were being paid before the disaster.".

Effective and Applicability Provisions

2000 Acts. Pub.L. 106–390, Title II, § 205(d)(2), Oct. 30, 2000, 114 Stat. 1566, provided that: "The amendment made by paragraph (1) [amending subsec. (e)(1) of this section] takes effect on the date of the enactment of this Act [Oct. 30, 2000] and applies to funds appropriated after the date of the enactment of this Act, except that paragraph (1) of section 406(e) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (as amended by paragraph (1) [subsec. (e)(1) of this section]) takes effect on the date on which the cost estimation procedures established under paragraph (3) of that section [subsec. (e)(3) of this section] take effect."

LIBRARY REFERENCES

Encyclopedias

Office of President, and powers and duties thereof, see C.J.S. United States §§ 27 to 30.
79 Am Jur 2d, Welfare Laws § 44.

Texts and Treatises

18 Fed Proc L Ed, Housing and Urban Development §§ 44:579-581, 586.

§ 5173. Debris removal

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Encyclopedias

Office of President, and powers and duties thereof, see C.J.S. United States §§ 27 to 30.

79 Am Jur 2d, Welfare Laws § 44.

§ 5174. Temporary housing assistance

Amendment of Section

Pub.L. 106–390, Title II, § 206(a), (d), Oct. 30, 2000, 114 Stat. 1566, provided that, effective 18 months after October 30, 2000, this section is amended to read as follows:

§ 5174. Federal assistance to individuals and households

(a) In general

(1) Provision of assistance

In accordance with this section, the President, in consultation with the Governor of a State, may provide financial assistance, and, if necessary, direct services, to individuals and households in the State who, as a direct result of a major disaster, have necessary expenses and serious needs in cases in which the individuals and households are unable to meet such expenses or needs through other means.

(2) Relationship to other assistance

Under paragraph (1), an individual or household shall not be denied assistance under paragraph (1), (3), or (4) of subsection (c) solely on the basis that the individual or household has not applied for or received any loan or other financial assistance from the Small Business Administration or any other Federal agency.

(b) Housing assistance

(1) Eligibility

The President may provide financial or other assistance under this section to individuals and households to respond to the disaster-related housing needs of individuals and households who are displaced from their predisaster primary residences or whose predisaster primary residences are rendered uninhabitable as a result of damage caused by a major disaster.

(2) Determination of appropriate types of assistance

(A) In general

The President shall determine appropriate types of housing assistance to be provided under this section to individuals and households described in subsection (a)(1) based on considerations of cost effectiveness, convenience to the individuals and households, and such other factors as the President may consider appropriate.

(B) Multiple types of assistance

One or more types of housing assistance may be made available under this section, based on the suitability and availability of the types of assistance, to meet the needs of individuals and households in the particular disaster situation.

(c) Types of housing assistance

(1) Temporary housing

(A) Financial assistance

(i) In general

The President may provide financial assistance to individuals or households to rent alternate housing accommodations, existing rental units, manufactured housing, recreational vehicles, or other readily fabricated dwellings.

(ii) Amount

The amount of assistance under clause (i) shall be based on the fair market rent for the accommodation provided plus the cost of any transportation, utility hookups, or unit installation not provided directly by the President.

(B) Direct assistance

(i) In general

The President may provide temporary housing units, acquired by purchase or lease, directly to individuals or households who, because of a lack of available housing resources, would be unable to make use of the assistance provided under subparagraph (A).

(ii) Period of assistance

The President may not provide direct assistance under clause (i) with respect to a major disaster after the end of the 18–month period beginning on the date of the declaration of the major disaster by the President, except that the President may extend that period if the President determines that due to extraordinary circumstances an extension would be in the public interest.

(iii) Collection of rental charges

After the end of the 18–month period referred to in clause (ii), the President may charge fair market rent for each temporary housing unit provided.

(2) Repairs

(A) In general

The President may provide financial assistance for—

(i) the repair of owner-occupied private residences, utilities, and residential infrastructure (such as a private access route) damaged by a major disaster to a safe and sanitary living or functioning condition; and

(ii) eligible hazard mitigation measures that reduce the likelihood of

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(B) Relationship to other assistance

A recipient of assistance provided under this paragraph shall not be required to show that the assistance can be met through other means, except insurance proceeds.

(C) Maximum amount of assistance

The amount of assistance provided to a household under this paragraph shall not exceed $5,000, as adjusted annually to reflect changes in the Consumer Price Index for All Urban Consumers published by the Department of Labor.

(3) Replacement

(A) In general

The President may provide financial assistance for the replacement of owner-occupied private residences damaged by a major disaster.

(B) Maximum amount of assistance

The amount of assistance provided to a household under this paragraph shall not exceed $10,000, as adjusted annually to reflect changes in the Consumer Price Index for All Urban Consumers published by the Department of Labor.

(C) Applicability of flood insurance requirement

With respect to assistance provided under this paragraph, the President may not waive any provision of Federal law requiring the purchase of flood insurance as a condition of the receipt of Federal disaster assistance.

(4) Permanent housing construction

The President may provide financial assistance or direct assistance to individuals or households to construct permanent housing in insular areas outside the continental United States and in other remote locations in cases in which—

(A) no alternative housing resources are available; and

(B) the types of temporary housing assistance described in paragraph (1) are unavailable, infeasible, or not cost-effective.

(d) Terms and conditions relating to housing assistance

(1) Sites

(A) In general

Any readily fabricated dwelling provided under this section shall, whenever practicable, be located on a site that—

(i) is complete with utilities; and

(ii) is provided by the State or local government, by the owner of the site, or by the occupant who was displaced by the major disaster.

(B) Sites provided by the President

A readily fabricated dwelling may be located on a site provided by the President if the President determines that such a site would be more economical or accessible.

(2) Disposal of units

(A) Sale to occupants

(i) In general

Notwithstanding any other provision of law, a temporary housing unit purchased under this section by the President for the purpose of housing disaster victims may be sold directly to the individual or household who is occupying the unit if the individual or household lacks permanent housing.

(ii) Sale price

A sale of a temporary housing unit under clause (i) shall be at a price that is fair and equitable.

(iii) Deposit of proceeds

Notwithstanding any other provision of law, the proceeds of a sale under clause (i) shall be deposited in the appropriate Disaster Relief Fund account.

(iv) Hazard and flood insurance

A sale of a temporary housing unit under clause (i) shall be made on the condition that the individual or household purchasing the housing unit agrees to obtain and maintain hazard and flood insurance on the housing unit.

(v) Use of GSA services

The President may use the services of the General Services Administration to accomplish a sale under clause (i).

(B) Other methods of disposal

If not disposed of under subparagraph (A), a temporary housing unit purchased under this section by the President for the purpose of housing disaster victims—

(i) may be sold to any person; or

(ii) may be sold, transferred, donated, or otherwise made available directly to a State or other governmental entity or to a voluntary organization for the sole purpose of providing temporary housing to disaster victims in major disasters and emergencies if, as a condition of the sale, transfer, or donation, the State, other governmental agency, or voluntary organization agrees—

(I) to comply with the nondiscrimination provisions of section 5151 of this title; and

(II) to obtain and maintain hazard and flood insurance on the housing unit.

(e) Financial assistance to address other needs

(1) Medical, dental, and funeral expenses

The President, in consultation with the Governor of a State, may provide financial assistance under this section to an individual or household in the State who is adversely affected by a major disaster to meet disaster-related medical, dental, and funeral expenses.

(2) Personal property, transportation, and other expenses

The President, in consultation with the Governor of a State, may provide financial assistance under this section to an individual or household described in paragraph (1) to address personal property, transportation, and other necessary expenses or serious needs resulting from the major disaster.

(f) State role

(1) Financial assistance to address other needs

(A) Grant to State

Subject to subsection (g), a Governor may request a grant from the President to provide financial assistance to individuals and households in the State under subsection (e).

(B) Administrative costs

A State that receives a grant under subparagraph (A) may expend not more than 5 percent of the amount of the grant for the administrative costs of providing financial assistance to individuals and households in the State under subsection (e).

(2) Access to records

In providing assistance to individuals and households under this section, the President shall provide for the substantial and ongoing involvement of the States in which the individuals and households are located, including by providing to the States access to the electronic records of individuals and

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make available any additional State and local assistance to the individuals and households.

(g) Cost sharing

(1) Federal share

Except as provided in paragraph (2), the Federal share of the costs eligible to be paid using assistance provided under this section shall be 100 percent.

(2) Financial assistance to address other needs

In the case of financial assistance provided under subsection (e)—

(A) the Federal share shall be 75 percent; and

(B) the non-Federal share shall be paid from funds made available by the State.

(h) Maximum amount of assistance

(1) In general

No individual or household shall receive financial assistance greater than $25,000 under this section with respect to a single major disaster.

(2) Adjustment of limit

The limit established under paragraph (1) shall be adjusted annually to reflect changes in the Consumer Price Index for All Urban Consumers published by the Department of Labor.

(i) Rules and regulations

The President shall prescribe rules and regulations to carry out this section, including criteria, standards, and procedures for determining eligibility for assistance.

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–40, see 2000 U.S. Code Cong. and Adm. News, p. 1456.

Amendments

2000 Amendments. Pub.L. 106–390, § 206(a), rewrote this section, which formerly read:

"§ 5174. Temporary housing assistance

"(a) Provision of temporary housing

"(1) In general

"The President may—

"(A) provide, by purchase or lease, temporary housing (including unoccupied habitable dwellings), suitable rental housing, mobile homes, or other readily fabricated dwellings to persons who, as a result of a major disaster, require temporary housing; and

"(B) reimburse State and local governments in accordance with paragraph (4) for the cost of sites provided under paragraph (2).

"(2) Mobile home site

"(A) In general

"Any mobile home or other readily fabricated dwelling provided under this section shall whenever possible be located on a site which—

"(i) is provided by the State or local government; and

"(ii) has utilities provided by the State or local government, by the owner of the site, or by the occupant who was displaced by the major disaster.

"(B) Other sites

"Mobile homes and other readily fabricated dwellings may be located on sites provided by the President if the President determines that such sites would be more economical or accessible than sites described in subparagraph (A).

"(3) Period

"Federal financial and operational assistance under this section shall continue for not longer than 18 months after the date of the major disaster declaration by the President, unless the President determines that due to extraordinary circumstances it would be in the public interest to extend such 18–month period.

"(4) Federal share

"The Federal share of assistance under this section shall be 100 percent; except that the Federal share of assistance under this section for construction and site development costs (including installation of utilities) at a mobile home group site shall be 75 percent of the eligible cost of such assistance. The State or local government receiving assistance under this section shall pay any cost which is not paid for from the Federal share.

"(b) Temporary mortgage and rental payments

"The President is authorized to provide assistance on a temporary basis in the form of mortgage or rental payments to or on behalf of individuals and families who, as a result of financial hardship caused by a major disaster, have received written notice of dispossession or eviction from a residence by reason of a foreclosure of any mortgage or lien, cancellation of any contract of sale, or termination of any lease entered into prior to such disaster. Such assistance shall be provided for the duration of the period of financial hardship but not to exceed 18 months.

"(c) In lieu expenditures

"In lieu of providing other types of temporary housing after a major disaster, the President is authorized to make expenditures for the purpose of repairing or restoring to a habitable condition owner-occupied private residential structures made uninhabitable by a major disaster which are capable of being restored quickly to a habitable condition.

"(d) Transfer of temporary housing

"(1) Direct sale to occupants

"Notwithstanding any other provision of law, any temporary housing acquired by purchase may be sold directly to individuals and families who are occupants of temporary housing at prices that are fair and equitable, as determined by the President.

"(2) Transfers to States, local governments, and voluntary organizations

"The President may sell or otherwise make available temporary housing units directly to States, other governmental entities, and voluntary organizations. The President shall impose as a condition of transfer under this paragraph a covenant to comply with the provisions of section 5151 of this title requiring nondiscrimination in occupancy of such temporary housing units. Such disposition shall be limited to units purchased under the provisions of subsection (a) of this section and to the purposes of providing temporary housing for disaster victims in major disasters or emergencies.

"(e) Notification

"(1) In general

"Each person who applies for assistance under this section shall be notified regarding the type and amount of any assistance for which such person qualifies. Whenever practicable, such notice shall be provided within 7 days after the date of submission of such application.

"(2) Information

"Notification under this subsection shall provide information regarding—

"(A) all forms of such assistance available;

"(B) any specific criteria which must be met to qualify for each type of assistance that is available;

"(C) any limitations which apply to each type of assistance; and

"(D) the address and telephone number of offices responsible for responding to—

"(i) appeals of determinations of eligibility for assistance; and

"(ii) requests for changes in the type or amount of assistance provided.

"(f) Location

"In providing assistance under this section, consideration shall be given to the location of and travel time to—

"(1) the applicant's home and place of business;

"(2) schools which the applicant or members of the applicant's family who reside with the applicant attend; and

"(3) crops or livestock which the applicant tends in the course of any involvement in farming which provides 25 percent or more of the applicant's annual income.".

Effective and Applicability Provisions

2000 Acts. Pub.L. 106–390, Title II, § 206(d), Oct. 30, 2000, 114 Stat. 1571, provided that: "The amendments made by this section [amending this section and section 5192(a)(6) of this title and repealing section 5178 of this title] take effect 18 months after the date of the enactment of this Act [Oct. 30, 2000].

LIBRARY REFERENCES

Encyclopedias

Office of President, and powers and duties thereof, see C.J.S. United States §§ 27 to 30.

79 Am Jur 2d, Welfare Laws § 44.

Law Review and Journal Commentaries

Helping hands: Aid for natural disaster homeless vs. aid for "ordinary homeless". David W. Sar, 7 Stan. Law & Pol'y Rev. 129 (1995–96).

Texts and Treatises

18 Fed Proc L Ed, Housing and Urban Development § 44:551.

§ 5176. Repealed. Pub.L. 106–390, Title I, § 104(c)(2), Oct. 30, 2000, 114 Stat. 1559

HISTORICAL AND STATUTORY NOTES

Section, Pub.L. 93–288, Title IV, § 409, formerly § 406, May 22, 1974, 88 Stat. 155; renumbered § 409, Pub.L. 100–707, Title I, § 106(e), Nov. 23, 1988, 102 Stat. 4703, related to minimum standards for public and private struc-

Another prior section 409 of Pub.L. 93–288 was renumbered section 412 by Pub.L. 100–707 and is classified to section 5179 of this title.

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§ 5177. Unemployment assistance

LIBRARY REFERENCES

Administrative Law

Disaster unemployment assistance, see 20 CFR § 625.1 et seq.

Encyclopedias

Unemployment compensation insurance under social security law generally, see C.J.S. Social Security and Public Welfare § 146 et seq.
79 Am Jur 2d, Welfare Laws § 44.

Texts and Treatises

Fed Proc L Ed, Housing and Urban Development § 44:571.
Yannacone, Cohen and Davison, Environmental Rights and Remedies.

§ 5177a. Emergency grants to assist low-income migrant and seasonal farmworkers

CROSS REFERENCES

"Rural development program" defined as in this section for purposes of prohibition or restricting water and waste facility services to electric customers, see 7 USCA § 917.

§ 5178. Individual and family grant programs

Repeal of Section

Pub.L. 106–390, Title II, § 206(c), (d), Oct. 30, 2000, 114 Stat. 1571, provided that, effective 18 months after October 30, 2000, this section is repealed.

HISTORICAL AND STATUTORY NOTES

Amendments

2000 Amendments. Pub.L. 106–390, § 206(c), repealed this section, which formerly read:

"§ 5178. Individual and family grant programs

"(a) In general

"The President is authorized to make a grant to a State for the purpose of making grants to individuals or families adversely affected by a major disaster for meeting disaster-related necessary expenses or serious needs of such individuals or families in those cases where such individuals or families are unable to meet such expenses or needs through assistance under other provisions of this chapter or through other means.

"(b) Cost sharing

"(1) Federal share

"The Federal share of a grant to an individual or a family under this section shall be equal to 75 percent of the actual cost incurred.

"(2) State contribution

"The Federal share of a grant under this section shall be paid only on condition that the remaining 25 percent of the cost is paid to an individual or family from funds made available by a State.

"(c) Regulations

"The President shall promulgate regulations to carry out this section and such regulations shall include national criteria, standards, and procedures for the determination of eligibility for grants and the administration of grants under this section.

"(d) Administrative expenses

"A State may expend not to exceed 5 percent of any grant made by the President to it under subsection (a) of this section for expenses of administering grants to individuals and families under this section.

"(e) Administration through Governor

"The Governor of a State shall administer the grant program authorized by this section in the State.

"(f) Limit on grants to individual

"No individual or family shall receive grants under this section aggregating more than $10,000 with respect to any single major disaster. Such $10,000 limit shall annually be adjusted to reflect changes in the Consumer Price Index for All Urban Consumers published by the Department of Labor.".

Effective Date of Repeal

Repeal by Pub.L. 106–390, Title II, § 206(c), effective 18 months after October 30, 2000, see Pub.L. 106–390, Title II, § 206(d), set out as a note under section 5174 of this title.

LIBRARY REFERENCES

Encyclopedias

Disbursement of federal funds generally; disaster aid, see C.J.S. United States § 122 et seq.
79 Am Jur 2d, Welfare Laws § 44.

Texts and Treatises

Fed Proc L Ed, Housing and Urban Development § 44:576.

§ 5179. Food coupons and distribution

LIBRARY REFERENCES

Administrative Law

Donation of foods, see 7 CFR § 250.1 et seq.
Issuance and use of coupons, see 7 CFR § 274.1 et seq.

Encyclopedias

Disbursement of federal funds generally; disaster aid, see C.J.S. United States § 122 et seq.
79 Am Jur 2d, Welfare Laws § 44.

§ 5180. Food commodities

LIBRARY REFERENCES

Administrative Law

Donation of foods, see 7 CFR § 250.1 et seq.

Encyclopedias

Disbursement of federal funds generally; disaster aid, see C.J.S. United States § 122 et seq.

79 Am Jur 2d, Welfare Laws § 44.

§ 5181. Relocation assistance

LIBRARY REFERENCES

Encyclopedias

Disbursement of federal funds; relocation assistance and disaster aid, see C.J.S. United States § 122 et seq.

79 Am Jur 2d, Welfare Laws § 44.

§ 5182. Legal services

LIBRARY REFERENCES

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.
79 Am Jur 2d, Welfare Laws § 44.

Texts and Treatises

18 Fed Proc L Ed, Housing and Urban Development § 44:571.

§ 5183. Crisis counseling assistance and training

LIBRARY REFERENCES

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.
79 Am Jur 2d, Welfare Laws § 44.

Texts and Treatises

18 Fed Proc L Ed, Housing and Urban Development § 44:572.

§ 5184. Community disaster loans

(a) In general

The President is authorized to make loans to any local government which may suffer a substantial loss of tax and other revenues as a result of a major disaster, and has demonstrated a need for financial assistance in order to perform its governmental functions.

(b) Amount

The amount of any such loan shall be based on need, shall not exceed 25 per centum of the annual operating budget of that local government for the fiscal year in which the major disaster occurs, and shall not exceed $5,000,000.

(c) Repayment

(1) Cancellation

Repayment of all or any part of such loan to the extent that revenues of the local government during the three full fiscal year period following the major disaster are insufficient to meet the operating budget of the local government, including additional disaster-related expenses of a municipal operation character shall be cancelled.

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(2) Condition on continuing eligibility

A local government shall not be eligible for further assistance under this section during any period in which the local government is in arrears with respect to a required repayment of a loan under this section.

(d) Effect on other assistance

Any loans Any loans made under this section shall not reduce or otherwise affect any grants or other assistance under this chapter.

(As amended Pub.L. 106–390, Title II, § 207, Oct. 30, 2000, 114 Stat. 1571.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–40, see 2000 U.S. Code Cong. and Adm. News, p. 1456.

Amendments

2000 Amendments. Pub.L. 106–390, § 207, rewrote this section, which formerly read:

"(a) In general

"The President is authorized to make loans to any local government which may suffer a substantial loss of tax and other revenues as a result of a major disaster, and has demonstrated a need for financial assistance in order to perform its governmental functions. The amount of any such loan shall be based on need, and shall not exceed 25 per centum of the annual operating budget of that local government for the fiscal year in which the major disaster occurs. Repayment of all or any part of such loan to the extent that revenues of the local government during the three full fiscal year period following the major disaster are insufficient to meet the operating budget of the local government, including additional disaster-related expenses of a municipal operation character shall be cancelled.

"(b) No effect on grants or other assistance

"Any loans made under this section shall not reduce or otherwise affect any grants or other assistance under this chapter.".

LIBRARY REFERENCES

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.
79 Am Jur 2d, Welfare Laws § 44.

Texts and Treatises

18 Fed Proc L Ed, Housing and Urban Development § 44:592.

§ 5185. Emergency communications

LIBRARY REFERENCES

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

79 Am Jur 2d, Welfare Laws § 44.

§ 5186. Emergency public transportation

LIBRARY REFERENCES

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

79 Am Jur 2d, Welfare Laws § 44.

§ 5187. Fire suppression grants

Amendment of Section

Pub.L. 106–390, Title III, § 303, Oct. 30, 2000, 114 Stat. 1572, provided that, effective 1 year after October 30, 2000, this section is amended to read as follows:

§ 5187. Fire management assistance

(a) In general

The President is authorized to provide assistance, including grants, equipment, supplies, and personnel, to any State or local government for the mitigation, management, and control of any fire on public or private forest land or grassland that threatens such destruction as would constitute a major disaster.

(b) Coordination with State and tribal departments of forestry

In providing assistance under this section, the President shall coordinate with State and tribal departments of forestry.

(c) Essential assistance

In providing assistance under this section, the President may use the authority provided under section 5170c of this title.

(d) Rules and regulations

The President shall prescribe such rules and regulations as are necessary to carry out this section.

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–40, see 2000 U.S. Code Cong. and Adm. News, p. 1456.

Amendments

2000 Amendments. Pub.L. 106–390, § 303(a), rewrote this section, which formerly read:

"§ 5187. Fire suppression grants

"The President is authorized to provide assistance, including grants, equipment, supplies, and personnel, to any State for the suppression of any fire on publicly or privately owned forest or grassland which threatens such destruction as would constitute a major disaster.".

Effective and Applicability Provisions

2000 Acts. Pub.L. 106–390, Title III, § 303(b), Oct. 30, 2000, 114 Stat. 1573, provided that: "The amendment made by subsection (a) [amending this section] takes effect 1 year after the date of the enactment of this Act [Oct. 30, 2000]."

LIBRARY REFERENCES

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.
79 Am Jur 2d, Welfare Laws § 44.

Texts and Treatises

18 Fed Proc L Ed, Housing and Urban Development § 44:596.

§ 5188. Timber sale contracts

LIBRARY REFERENCES

Texts and Treatises

18 Fed Proc L Ed, Housing and Urban Development § 44:601.

§ 5189. Simplified procedure

LIBRARY REFERENCES

Texts and Treatises

18 Fed Proc L Ed, Housing and Urban Development § 44:488.

§ 5189a. Appeals of assistance decisions

NOTES OF DECISIONS

Review 2

2. Hearing

Individual states can determine what type of hearing process is to be utilized in FEMA appeals, subject to limitation that judicial review be on record, written or oral, made before agency. Messamaker v. Iowa Dept. of Human Services, Iowa 1996, 545 N.W.2d 566.

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SUBCHAPTER IV–A—EMERGENCY ASSISTANCE PROGRAMS

§ 5192. Federal emergency assistance

Amendment of subsec. (a)(6)

Pub.L. 106–390, Title II, § 206(b), (d), Oct. 30, 2000, 114 Stat. 1570, provided that, effective 18 months after October 30, 2000, subsec. (a)(6) is amended by striking "temporary housing".

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–40, see 2000 U.S. Code Cong. and Adm. News, p. 1456.

Amendments

2000 Amendments. Subsec. (a)(6). Pub.L. 106–390, § 206(b), struck out "temporary housing" preceeding "assistance".

Effective and Applicability Provisions

Amendment by Pub.L. 106–390, Title II, § 206(b), effective 18 months after October 30, 2000, see Pub.L. 106–390, Title II, § 206(d), set out as a note under section 5174 of this title.

SUBCHAPTER IV–B—EMERGENCY PREPAREDNESS

§ 5195. Declaration of policy

HISTORICAL AND STATUTORY NOTES

Multi-Hazard Preparedness and Mitigation

Pub.L. 106–74, Title III, Oct. 20, 1999, 113 Stat. 1086, provided in part: "That beginning in fiscal year 2000 and each fiscal year thereafter, and notwithstanding any other provision of law, the Director of FEMA is authorized to provide assistance from funds appropriated under this heading [Emergency Management Planning and Assistance (Including Transfer of Funds)], subject to terms and conditions as the Director of FEMA shall establish, to any State for multi-hazard preparedness and mitigation through consolidated emergency management performance grants".

Abolition of Interstate Commerce Commission and Transfer of Functions

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub.L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 702 of Title 49, Transportation, and section 101 of Pub.L. 104–88, set out as a note under section 701 of Title 49. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub.L. 104–88, set out as a note under section 701 of Title 49.

Designation of Chair of President's Commission on Critical Infrastructure Protection Under Executive Order No. 12958

For provisions designating the Chair of the President's Commission on Critical Infrastructure Protection, established under Ex. Ord. No. 13010 of July 15, 1996, set out as a note under this section, as an official authorized to classify information originally as "Top Secret", see Order of the President, Feb. 26, 1997, 62 F.R. 9349, set out as a note under section 435 of Title 50, War and National Defense.

Multihazard Research Planning, and Mitigation; Functions, Etc., of Federal Emergency Management Agency

Pub.L. 96–472, Title III, §§ 301, 302, Oct. 19, 1980, 94 Stat. 2260, as amended Pub.L. 97–80, Title III, § 301, Nov. 20, 1981, 95 Stat. 1083, Pub.L. 97–464, Title II, § 201, Jan. 12, 1983, 96 Stat. 2533, provided that:

"Sec. 301. It is recognized that natural and manmade hazards may not be independent of one another in any given disaster, and it is also recognized that emergency personnel are often called upon to meet emergencies outside of their primary field of service. Furthermore, planning for and responding to different hazards have certain common elements. To make maximum use of these commonalities, the Director of the Federal Emergency Management Agency (hereinafter referred to as the 'Director') is authorized and directed to:

"(1) initiate, within one year after the date of enactment of this Act [Oct. 19, 1980], studies with the objective of defining and developing a multihazard research, planning, and implementation process within the Agency;

"(2) develop, within one year after the date of enactment of this Act [Oct. 19, 1980], in cooperation with State and local governments, prototypical multihazard mitigation projects which can be used to evaluate several approaches to the varying hazard mitigation needs of State and local governments and to assess the applicability of these prototypes to other jurisdictions with similar needs;

"(3) investigate and evaluate, within one year after the date of enactment of this Act [Oct. 19, 1980], the effectiveness of a range of incentives for hazard reductions that can be applied at the State and local government levels;

"(4) prepare recommendations as to the need for legislation that will limit the legal liability of those third party persons or groups assistance and advice to public employees, including policemen, firemen, and transportation employees, who are generally the first to respond to a hazardous incident; which recommendations shall be provided to the appropriate committees of Congress within one hundred and eighty days after the date of enactment of this Act [Oct. 19, 1980];

"(5) prepare, within one hundred and eighty days after the date of enactment of this Act [Oct. 19, 1980], a report on the status of the Agency's emergency information and communications systems which will provide recommendations on—

"(A) the advisability of developing a single, unified emergency information and communication system for use by the Agency in carrying out its emergency management activities;

"(B) the potential for using communication and remote sensing satellites as part of the Agency's emergency information and communication system; and

"(C) the type of system to be developed, if needed, including the relationship of the proposed system and its needs to the existing and emerging information and communication systems in other Federal agencies;

"(6) conduct a program of multihazard research, planning, and mitigation in coordination with those studies and evaluations authorized in paragraphs (1) through (5), as well as other hazard research, planning, and mitigation deemed necessary by the Director;

"(7) conduct emergency first response programs so as to better train and prepare emergency personnel to meet emergencies outside of their primary field of service; and

"(8) conduct a program of planning, preparedness, and mitigation related to the multiple direct and indirect hazards resulting from the occurrence of large earthquakes.

"Sec. 302. (a) For the fiscal year ending September 30, 1981, there are authorized to be appropriated to the Director $1,000,000 to carry out paragraphs (1) through (5) of section 301 and such sums as may be necessary to carry out paragraph (6) of such section.

"(b) For the fiscal year ending September 30, 1982, there are authorized to be appropriated to the Director—

"(1) $4,939,000 to carry out section 301, which amount shall include—

"(A) not less than $700,000 to carry out the purposes of paragraphs (1) through (6) of such section;

"(B) such sums as may be necessary, but in any case not less than $939,000, for use by the United States Fire Administration in carrying out paragraph (7) of such section; and

"(C) not less than $3,300,000 to carry out paragraph (8) of such section with respect to those large California earthquakes which were identified by the National Security Council's Ad Hoc Committee on Assessment of Consequences and Preparations for a Major California Earthquake; and

"(2) such further sums as may be necessary for adjustments required by law in salaries, pay, retirement, and employee benefits incurred in the conduct of activities for which funds are authorized by paragraph (1) of this subsection."

"(c) For the fiscal year ending September 30, 1983, there are authorized to be appropriated to the Director—

"(1) $2,774,000 to carry out section 301, which amount shall include—

"(A) not less than $300,000 to carry out the purposes of paragraphs (1) through (6) of such section;

"(B) such sums as may be necessary, but in any case not less than $939,000, for use by the United States Fire Administration in carrying out paragraph (7) of such section; and

"(C) not less than $1,535,000 to carry out paragraph (8) of such section with respect to those large California earthquakes which were identified by the National Security Council's Ad Hoc Committee on Assessment of Consequences and Preparations for a Major California Earthquake and with respect to other high seismic risk areas in the United States; and

"(2) such further sums as may be necessary for adjustments required by law in salaries, pay, retirement, and employee benefits incurred in the conduct of activities for which funds are authorized by paragraph (1) of this subsection."

REORGANIZATION PLANS

REORGANIZATION PLAN NO. 1 OF 1958

Eff. July 1, 1958, 23 F.R. 4991, 72 Stat. 1799, as amended Pub.L. 85–763, Aug. 26, 1958, 72 Stat. 861; Pub.L. 87–296, § 1, Sept. 22, 1961, 75 Stat. 630; Pub.L. 87–367, Title I, § 103(10), Oct. 4, 1961, 75 Stat. 788; Pub.L. 88–426, Title III, § 305(11), Aug. 14, 1964, 78 Stat. 423; Pub.L. 90–608, Title IV, § 402, Oct. 21, 1968, 82 Stat. 1194; Reorg. Plan No. 1 of 1973, § 3(a), eff. July 1, 1973, 38 F.R. 9579, 87 Stat. 1089

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, April 24, 1958, pursuant to the provisions of the Reorganization Act of 1949, approved June 20, 1949, as amended [see 5 U.S.C.A.

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CIVILIAN MOBILIZATION

Section 1. Transfer of Functions to the President.—

(a) There are hereby transferred to the President of the United States all functions vested by law (including reorganization plan) in the following: The Office of Defense Mobilization, the Director of the Office of Defense Mobilization, the Federal Civil Defense Administration, and the Federal Civil Defense Administrator.

(b) The President may from time to time delegate any of the functions transferred to him by subsection (a) of this section to any officer, agency, or employee of the executive branch of the Government, and may authorize such officer, agency, or employee to redelegate any of such functions delegated to him.

Sec. 2. Office of Emergency Preparedness.

[The Office of Emergency Preparedness including the offices of Director and Deputy Director, and all offices of Assistant Director, were abolished by Reorg. Plan No. 1 of 1973, § 3(a)(1), eff. July 1, 1973, 38 F.R. 9579, 87 Stat. 1089, set out under this section.]

Sec. 3. Regional Directors.

[All offices of Regional Director of the Office of Emergency Preparedness were abolished by Reorg. Plan No. 1 of 1973, § 3(a)(1), eff. July 1, 1973, 38 F.R. 9579, 87 Stat. 1089, set out under this section.]

Sec. 4. Membership on National Security Council.

[The functions of the Director of the Office of Emergency Preparedness as a member of the National Security Council were abolished by Reorg. Plan No. 1 of 1973, § 3(a)(2), eff. July 1, 1973, 38 F.R. 9579, 87 Stat. 1089, set out under this section.]

Sec. 5. Civil Defense Advisory Council.

[The Civil Defense Advisory Council, together with its functions, was abolished by Reorg. Plan No. 1 of 1973, § 3(a)(3), eff. July 1, 1973, 38 F.R. 9579, 87 Stat. 1089, set out under this section.]

Sec. 6. Abolitions.

The offices of Federal Civil Defense Administrator and Deputy Administrator provided for in section 101 of the Federal Civil Defense Act (50 U.S.C.App. 2271) and the offices of the Director of the Office of Defense Mobilization and Deputy Director of the Office of Defense Mobilization provided for in section 1 of Reorganization Plan Numbered 3 of 1953 (67 Stat. 634) are hereby abolished. The Director of the Office of Emergency Preparedness shall make such provisions as may be necessary in order to wind up any outstanding affairs of the offices abolished by this section which are not otherwise provided for in this reorganization plan. [As amended by Pub.L. 90-608, c. IV, § 402, Oct. 21, 1968, 82 Stat. 1194].

Sec. 7. Records, Property, Personnel, and Funds.

(a) The records, property, personnel, and unexpended balances, available or to be made available, of appropriations, allocations, and other funds of the Office of Defense Mobilization and of the Federal Civil Defense Administration shall, upon the taking effect of the provisions of this reorganization plan, become records, property, personnel, and unexpended balances of the Office of Emergency Preparedness.

(b) Records, property, personnel, and unexpended balances, available or to be made available, of appropriations, allocations, and other funds of any agency (including the Office of Emergency Preparedness), relating to functions vested in or delegated or assigned to the office of Defense Mobilization or the Federal Civil Defense Administration immediately prior to the taking effect of the provisions of this reorganization plan, may be transferred from time to time to any other agency of the Government by the Director of the Bureau of the Budget under authority of this subsection for use, subject to the provisions of the Reorganization Act of 1949, as amended, in connection with any of the said functions authorized at time of transfer under this subsection to be performed by the transferee agency.

(c) Such further measures and dispositions as the Director of the Bureau of the Budget shall determine to be necessary in connection with the provisions of subsections (a) and (b) of this section shall be carried out in such manner as he shall direct and by such agencies as he shall designate [As amended by Pub.L. 90-608, c. IV, § 402, Oct. 21, 1968, 82 Stat. 1194].

Sec. 8. Interim Provisions.—

The President may authorize any person who immediately prior to the effective date of this reorganization plan holds an office abolished by section 6 hereof to hold any office established by section 2 of this reorganization plan until the latter office is filled pursuant to the said section 2 or by recess appointment, as the case may be, but in no event for any period extending more than 120 days after the said effective date.

Sec. 9. Effective Date.—

The provisions of this reorganization plan shall take effect at the time determined under the provisions of section 6(a) of the Reorganization Act of 1949, as amended, or on July 1, 1958, whichever is later.

MESSAGE OF THE PRESIDENT

To the Congress of the United States:

I transmit herewith Reorganization Plan No. 1 of 1958, prepared in accordance with the Reorganization Act of 1949, as amended. The reorganization plan provides new arrangements for the conduct of Federal defense mobilization and civil defense functions.

In formulating Reorganization Plan No. 1, I have had the benefit of several studies made by the executive branch as well as those conducted by the Congress. The reorganization plan will overcome the major difficulties revealed by those studies and mentioned in my 1959 budget message where I made the following statement:

The structure of Federal organization for the planning, coordination, and conduct of our nonmilitary defense programs has been reviewed, and I have concluded that the existing statutes assigning responsibilities for the central coordination and direction of these programs are out of date. The rapid technical advances of military science have led to a serious overlap among agencies carrying on these leadership and planning functions. Because the situation will continue to change and because these functions transcend the responsibility of any single department or agency, I have concluded that they should be vested in no one short of the President. I will make recommendations to the Congress on this subject.

The principal effects of the organization plan are:

First, it transfers to the President the functions vested by law in the Federal Civil Defense Administration and those so vested in the Office of Defense Mobilization. The result is to establish a single pattern with respect to the vesting of defense mobilization and civil defense functions. At the present time disparity exists in that civil defense functions are vested in the President only to a limited degree while a major part of the functions administered by the Office of Defense Mobilization are vested by law in the President and delegated by him to that Office. Under the plan, the broad program responsibilities for coordinating and conducting the interrelated defense mobilization and civil defense functions will be vested in the President for appropriate delegation as the rapidly changing character of the nonmilitary preparedness program warrants.

Second, the reorganization plan consolidates the Office of Defense Mobilization and the Federal Civil Defense Administration to form a new Office of Defense and Civilian Mobilization [Office of Civil and Defense Mobilization] in the Executive Office of the President. I have concluded that, in many instances, the interests and activities of the Office of Defense Mobilization and the Federal Civil Defense Administration overlap to such a degree that it is not possible to work out a satisfactory division of those activities and interests between the two agencies. I have also concluded that a single civilian mobilization agency of appropriate stature and authority is needed and that such an agency will ensue from the consolidation and from the granting of suitable authority to that agency for directing and coordinating the preparedness activities of the Federal departments and agencies and for providing unified guidance and assistance to the State and local governments.

Third, the reorganization plan transfers the membership of the Director of the Office of Defense Mobilization on the National Security Council to the Director of the Office of Defense and Civilian Mobilization [Office of Civil and Defense Mobilization] and also transfers the Civil Defense Advisory Council to the Office of Defense and Civilian Mobilization [Office of Civil and Defense Mobilization].

Initially, the Office of Defense and Civilian Mobilization [Office of Civil and Defense Mobilization] will perform the civil defense and defense mobilization functions now performed by the Office of Defense Mobilization and the Federal Civil Defense Administration. One of its first tasks will be to advise me with respect to the actions to be taken to clarify and expand the roles of the Federal departments and agencies in carrying out nonmilitary defense preparedness functions. After such actions are taken, the direction and coordination of the civil defense and defense mobilization activities assigned to the departments and agencies will comprise a principal remaining responsibility of the Office of Defense and Civilian Mobilization [Office of Civil and Defense Mobilization].

After investigation, I have found and hereby declare that each reorganization included in Reorganization Plan No. 1 of 1958 is necessary to accomplish one or more of the purposes set forth in section 2(a) of the Reorganization Act of 1949, as amended.

I have also found and hereby declare that it is necessary to include in the accompanying reorganization plan, by reason of reorganizations made thereby, provisions for the appointment and compensation of new officers specified in sections 2 and 3 of the plan. The rates of compensation fixed for these officers are, respectively those which I have found to prevail in respect of comparable officers in the executive branch of the Government.

The taking effect of the reorganizations included in Reorganization Plan No. 1 of 1958 will immediately reduce the number of Federal agencies by one and, by providing sounder organizational arrangements for the administration of the affected functions, should promote the increased economy and effectiveness of the Federal expenditures concerned. It is, however, impracticable to itemize at this time the reduction of expenditures which it is probable will be brought about by such taking effect.

I urge that the Congress allow the reorganization plan to become effective.

DWIGHT D. EISENHOWER

The White House, April 24, 1958.

REORGANIZATION PLAN NO. 1 of 1973

Eff. July 1, 1973, 38 F.R. 9579, 87 Stat. 1089, as amended May 11, 1976, Pub.L. 94-282, Title V, § 502, 90 Stat. 472

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, January 26, 1973, pursuant to the provisions of Chapter 9 of Title 5 of the United States Code [5 U.S.C.A. ch. 9 (§§ 500 to 576)].

EXECUTIVE OFFICE OF THE PRESIDENT

Section 1. Transfer of functions to the President. Except as provided in section 3(a)(2) of this reorganization plan, there are hereby transferred to the President of the United States all functions vested by law in the Office of Emergency Preparedness or the Di-

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The procedures established under subsection (a) of this section shall require that—

[See main volume for text of (1) to (4)]

(5) that any background check under subsection (a) of this section and the results thereof shall be handled in accordance with the requirements of Public Law 92-544 except that this paragraph does not apply to any request by a qualified entity for a national criminal fingerprint background check pursuant to subsection (a)(3).

[See main volume for text of (c) to (e)]

(As amended Pub.L. 105-251, Title II, §§ 222(a),(b), Oct. 9, 1998, 112 Stat. 1885.)

HISTORICAL AND STATUTORY NOTES

Amendments

1998 Amendments. Subsec. (a)(3). Pub.L. 105-251, § 222(a), added par. (3).

Subsec. (b)(5). Pub.L. 105-251, § 222(b), inserted before the period at the end the following: ", except that this paragraph does not apply to any request by a qualified entity for a national criminal fingerprint background check pursuant to subsection (a)(3)".

§ 5119b. Funding for improvement of child abuse crime information

[See main volume for text of (a)]

(b) Additional funding grants for improvement of child abuse crime information.

[See main volume for text of (1)]

(2) There are authorized to be appropriated for grants under paragraph (1) a total of $20,000,000 for fiscal years 1999, 2000, 2001, and 2002.

[See main volume for text of (c)]

(As amended Pub.L. 105-251, Title II, § 222(c), Oct. 9, 1998, 112 Stat. 1885.)

HISTORICAL AND STATUTORY NOTES

Amendments

1998 Amendments. Subsec. (b)(2). Pub.L. 105-251, § 222(c), struck out "1994, 1995, 1996, and 1997" and inserted "1999, 2000, 2001, and 2002" in lieu thereof.

CHAPTER 68—DISASTER RELIEF

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SUBCHAPTER I—FINDINGS, DECLARATIONS, AND DEFINITIONS

CROSS REFERENCES

Commodity Credit Corporation sales price restrictions, and Presidential disaster areas costs, see 7 USCA § 7285.

§ 5121. Congressional findings and declarations

HISTORICAL AND STATUTORY NOTES

Short Title

2000 Amendments. Pub.L. 106-390, § 1(a), Oct. 30, 2000, 114 Stat. 1552, provided that: "This Act [enacting sections 5133, 5134, 5165, 5165a, 5165b, 5165c, 5205, and 5206 of this title, amending sections 3796b, 5122, 5154, 5170c, 5172, 5174, 5184, 5187, and 5192 of this title, repealing sections 5176 and 5178 of this title, and enacting provisions set out as notes under sections 3796b, 5121, 5165b, 5172, 5174, and 5187 of this title] may be cited as the 'Disaster Mitigation Act of 2000'."

1974 Acts. Section 1 of Pub.L. 93-288, as amended Pub.L. 100-707, Title I, § 102(a), Nov. 23, 1988, 102 Stat. 4689; Pub.L. 106-390, Title III, § 301, Oct. 30, 2000, 114 Stat. 1572, provided: "That this Act [enacting this section and sections 3231 to 3236, 5122, 5131, 5132, 5141 to 5158, 5171 to 5189, 5201, and former 5202 of this title, and section 1264 of former Title 31, Money and Finance, amending sections 1706c, 1709, 1715*l* of Title 12, Banks and Banking, sections 241-1, 646, 758 of Title 20, Education, sections 165, 5064, 5708 of Title 26, Internal Revenue Code, former section 1820 of Title 38, Veterans' Benefits, section 461 of Title 40, Public Buildings, Property, and Works, repealing sections 4401, 4402, 4411 to 4413, 4414 to 4420, 4431 to 4436, 4457 to 4462, 4481 to 4485 of this title, and enacting provisions set out as notes under this section and sections 4401, and 5178 of this title, section 1264 of former Title 31, and section 1681 of Title 48, Territories and Insular Possessions] may be cited as the 'Robert T. Stafford Disaster Relief and Emergency Assistance Act'."

Report on State Management of Small Disasters Initiative

Pub.L. 106-390, Title II, § 208, Oct. 30, 2000, 114 Stat. 1571, provided that:

"Not later than 3 years after the date of the enactment of this Act [Oct. 30, 2000], the President shall submit to Congress a report describing the results of the State Management of Small Disasters Initiative, including—

"(1) identification of any administrative or financial benefits of the initiative; and

"(2) recommendations concerning the conditions, if any, under which States should be allowed the option to administer parts of the assistance program under section 406 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5172)."

Study Regarding Cost Reduction

Pub.L. 106-390, Title II, § 209, Oct. 30, 2000, 114 Stat. 1571, provided that:

"Not later than 3 years after the date of the enactment of this Act [Oct. 30, 2000], the Director of the Congressional Budget Office shall complete a study estimating the reduction in Federal disaster assistance that has resulted and is likely to result from the enactment of this Act [the Disaster Mitigation Act of 2000, Pub.L. 106-390, Oct. 30, 2000, 114 Stat. 1552]."

Study of Participation by Indian Tribes in Emergency Management

Pub.L. 106-390, Title III, § 308, Oct. 30, 2000, 114 Stat. 1575, provided that:

"**(a) Definition of indian tribe.**—In this section, the term 'Indian tribe' has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

"**(b) Study.**—

"**(1) In general.**—The Director of the Federal Emergency Management Agency shall conduct a study of participation by Indian tribes in emergency management.

"**(2) Required elements.**—The study shall—

"(A) survey participation by Indian tribes in training, predisaster and postdisaster mitigation, disaster preparedness, and disaster recovery programs at the Federal and State levels; and

"(B) review and assess the capacity of Indian tribes to participate in cost-shared emergency management programs and to participate in the management of the programs.

"**(3) Consultation.**—In conducting the study, the Director shall consult with Indian tribes.

"**(c) Report.**—Not later than 1 year after the date of the enactment of this Act [Oct. 30, 2000], the Director shall submit a report on the study under subsection (b) to—

"(1) the Committee on Environment and Public Works of the Senate;

"(2) the Committee on Transportation and Infrastructure of the House of Representatives;

"(3) the Committee on Appropriations of the Senate; and

"(4) the Committee on Appropriations of the House of Representatives."

The National Drought Policy Act of 1998—Advisory Commission

Pub.L. 105-199, §§ 1 to 7, July 16, 1998, 112 Stat. 641 to 644, as amended Pub.L. 106-78,

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rector of the Office of Emergency Preparedness after the effective date of Reorganization Plan No. 1 of 1958.

Sec. 2. [Repealed. Pub.L. 94-282, Title V, § 502, May 11, 1976, 90 Stat. 472. Section transferred to the Director of the National Science Foundation all functions vested by law in the Office of Science and Technology or the Director or Deputy Director of the Office of Science and Technology.]

Sec. 3. **Abolitions.** (a) The following are hereby abolished:

(1) The Office of Emergency Preparedness including the offices of Director, Deputy Director, and all offices of Assistant Director, and Regional Director of the Office of Emergency Preparedness provided for by sections 2 and 3 of Reorganization Plan No. 1 of 1958 (5 U.S.C., App.).

(2) The functions of the Director of the Office of Emergency Preparedness with respect to being a member of the National Security Council.

(3) The Civil Defense Advisory Council, created by section 102(a) of the Federal Civil Defense Act of 1950 (50 U.S.C.App. 2272(a)), together with its functions.

(4) The National Aeronautics and Space Council, created by section 201 of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2471), including the office of Executive Secretary of the Council, together with its functions.

(5) The Office of Science and Technology, including the offices of Director and Deputy Director, provided for by sections 1 and 2 of Reorganization Plan No. 2 of 1962 (5 U.S.C., App.).

(b) The Director of the Office of Management and Budget shall make such provisions as he shall deem necessary respecting the winding up of any outstanding affairs of the agencies abolished by the provisions of this section.

Sec. 4. **Incidental transfers.** (a) So much of the personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with the functions transferred by sections 1 and 2 of this reorganization plan as the Director of the Office of Management and Budget shall determine shall be transferred at such time or times as he shall direct for use in connection with the functions transferred.

(b) Such further measures and dispositions as the Director of the Office of Management and Budget shall deem to be necessary in order to effectuate the transfers referred to in subsection (a) of this section shall be carried out in such manner as he shall direct and by such agencies as he shall designate.

Sec. 5. **Effective date.** The provisions of this reorganization plan shall take effect as provided by section 906(a) of title 5 of the United States Code [section 906(a) of Title 5], or on July 1, 1973, whichever is later.

MESSAGE OF THE PRESIDENT

To the Congress of the United States:

On January 5 I announced a three-part program to streamline the executive branch of the Federal Government. By concentrating less responsibility in the President's immediate staff and more in the hands of the departments and agencies, this program should significantly improve the services of the Government. I believe these reforms have become so urgently necessary that I intend, with the cooperation of the Congress, to pursue them with all of the resources of my office during the coming year.

The first part of this program is a renewed drive to achieve passage of my legislative proposals to overhaul the Cabinet departments. Secondly, I have appointed three Cabinet Secretaries as Counsellors to the President with coordinating responsibilities in the broad areas of human resources, natural resources, and community development, and five Assistants to the President with special responsibilities in the areas of domestic affairs, economic affairs, foreign affairs, executive management, and operations of the White House.

The third part of this program is a sharp reduction in the overall size of the Executive Office of the President and a reorientation of that office back to its original mission as a staff for top-level policy formation and monitoring of policy execution in broad functional areas. The Executive Office of the President should no longer be encumbered with the task of managing or administering programs which can be run more effectively by the departments and agencies. I have therefore concluded that a number of specialized operational and program functions should be shifted out of the Executive Office into the line departments and agencies of the Government. Reorganization Plan No. 1 of 1973, transmitted herewith, would effect such changes with respect to emergency preparedness functions and scientific and technological affairs.

STREAMLINING THE FEDERAL SCIENCE ESTABLISHMENT

When the National Science Foundation was established by an act of the Congress in 1950, its statutory responsibilities included evaluation of the Government's scientific research programs and development of basic science policy. In the late 1950's, however, with the effectiveness of the U.S. science effort under serious scrutiny as a result of Sputnik, the post of Science Adviser to the President was established. The White House became increasingly involved in the evaluation and coordination of research and development programs and in science policy matters, and that involvement was institutionalized in 1962 when a reorganization plan established the Office of Science and Technology within the Executive Office of the President, through transfer of authorities formerly vested in the National Science Foundation.

With advice and assistance from OST during the past decade, the scientific and technological capability of the Government has been markedly strengthened. This administration is firmly committed to a sustained, broadbased national effort in science and technology, as I made plain last year in the first special message on the subject ever sent by a President to the Congress. The research and development capability of the various executive departments and agencies, civilian as well as defense, has been upgraded. The National Science Foundation has broadened from its earlier concentration on basic research support to take on a significant role in applied research as well. It has matured in its ability to play a coordinating and evaluative role within the Government and between the public and private sectors.

I have therefore concluded that it is timely and appropriate to transfer to the Director of the National Science Foundation all functions presently vested in the Office of Science and Technology, and to abolish that office. Reorganization Plan No. 1 would effect these changes.

The multi-disciplinary staff resources of the Foundation will provide analytic capabilities for performance of the transferred functions. In addition, the Director of the Foundation will be able to draw on expertise from all of the Federal agencies, as well as from outside the Government, for assistance in carrying out his new responsibilities.

It is also my intention, after the transfer of responsibilities is effected, to ask Dr. H. Guyford Stever, the current Director of the Foundation, to take on the additional post of Science Adviser. In this capacity, he would advise and assist the White House, Office of Management and Budget, Domestic Council, and other entities within the Executive Office of the President on matters where scientific and technological expertise is called for, and would act as the President's representative in selected cooperative programs in international scientific affairs, including chairing such joint bodies as the U.S.-U.S.S.R. Joint Commission on Scientific and Technical Cooperation.

In the case of national security, the Department of Defense has strong capabilities for assessing weapons needs and for undertaking new weapons development, and the President will continue to draw primarily on this source for advice regarding military technology. The President in special situations also may seek independent studies or assessments concerning military technology from within or outside the Federal establishment using the machinery of the National Security Council for this purpose, as well as the Science Adviser when appropriate.

In one special area of technology—space and aeronautics—a coordinating council has existed within the Executive Office of the President since 1958. This body, the National Aeronautics and Space Council, met a major need during the evolution of our nation's space program. Vice President Agnew has served with distinction as its chairman for the past four years. At my request, beginning in 1969, the Vice President also chaired a special Space Task Group charged with developing strategy alternatives for a balanced U.S. space program in the coming years.

As a result of this work, basic policy issues in the United States space effort have been resolved, and the necessary interagency relationships have been established. I have therefore concluded, with the Vice President's concurrence, that the Council can be discontinued. Needed policy coordination can now be achieved through the resources of the executive departments and agencies, such as the National Aeronautics and Space Administration, augmented by some of the former Council staff. Accordingly, my reorganization plan proposes the abolition of the National Aeronautics and Space Council.

A NEW APPROACH TO EMERGENCY PREPAREDNESS

The organization within the Executive Office of the President which has been known in recent years as the Office of Emergency Preparedness dates back, through its numerous predecessor agencies, more than 20 years. It has performed valuable functions in developing plans for emergency preparedness, in administering Federal disaster relief, and in overseeing and assisting the agencies in this area.

OEP's work as a coordinating and supervisory authority in this field has in fact been so effective—particularly under the leadership of General George A. Lincoln, its director for the past four years, who retired earlier this month after an exceptional military and public service career—that the line departments and agencies which in the past have shared in the performance of the various preparedness functions now possess the capability to assume full responsibility for those functions. In the interest of efficiency and economy, we can now further streamline the Executive Office of the President by formally relocating those responsibilities and closing the Office of Emergency Preparedness.

I propose to accomplish this reform in two steps. First, Reorganization Plan No. 1 would transfer to the President all functions previously vested by law in the Office or its Director, except the Director's role as a member of the National Security Council, which would be abolished; and it would abolish the Office of Emergency Preparedness.

The functions to be transferred to the President from OEP are largely incidental to emergency authorities already vested in him. They include functions under the Disaster Relief Act of 1970 [42 U.S.C.A. § 4401 et seq.]; the function of determining whether a major disaster has occurred within the meaning of (1) Section 7 of the Act of September 30, 1950, as amended, 20 U.S.C. 241-1, or (2) Section 762(a) of the Higher Education Act of 1965, as added by Section 161(a) of the Education Amendments of 1972, Public Law 92-318, 86 Stat. 288 at 299 (relating to the furnishing by the Commissioner of Education of disaster relief assistance for educational purposes) [20 U.S.C.A. § 1132d-1]; and functions under Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862), with respect to the conduct of investigations to determine the effects on national security of the importation of certain articles.

The Civil Defense Advisory Council within OEP would also be abolished by this plan, as changes in domestic and international conditions since its establishment in 1950 have now obviated the need for a standing council of this type. Should advice of the kind the Council has provided be required again in the future, State and local officials and experts in the field can be consulted on an ad hoc basis.

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Second, as soon as the plan became effective, I would delegate OEP's former functions as follows:

All OEP responsibilities having to do with preparedness for and relief of civil emergencies and disasters would be transferred to the Department of Housing and Urban Development. This would provide greater field capabilities for coordination of Federal disaster assistance with that provided by States and local communities, and would be in keeping with the objective of creating a broad, new Department of Community Development.

OEP's responsibilities for measures to ensure the continuity of civil government operations in the event of major military attack would be reassigned to the General Services Administration, as would responsibility for resource mobilization including the management of national security stockpiles, with policy guidance in both cases to be provided by the National Security Council, and with economic considerations relating to changes in stockpile levels to be coordinated by the Council on Economic Policy.

Investigations of imports which might threaten the national security—assigned to OEP by Section 232 [19 U.S.C.A. § 1862] of the Trade Expansion Act of 1962 [19 U.S.C.A. § 1862]—would be reassigned to the Treasury Department, whose other trade studies give it a readymade capability in this field; the National Security Council would maintain its supervisory role over strategic imports.

Those disaster relief authorities which have been reserved to the President in the past, such as the authority to declare major disasters, will continue to be exercised by him under these new arrangements. In emergency situations calling for rapid interagency coordination, the Federal response will be coordinated by the Executive Office of the President under the general supervision of the Assistant to the President in charge of executive management.

The Oil Policy Committee will continue to function as in the past, unaffected by this reorganization, except that I will designate the Deputy Secretary of the Treasury as chairman in place of the Director of OEP. The Committee will operate under the general supervision of the Assistant to the President in charge of economic affairs.

DECLARATIONS

After investigation, I have found that each action included in the accompanying reorganization plan is necessary to accomplish one or more of the purposes set forth in Section 901(a) of title 5 of the United States Code. In particular, the plan is responsive to the intention of the Congress as expressed in Section 901(a)(1), "to promote better execution of the laws, more effective management of the executive branch and of its agencies and functions, and expeditious administration of the public business;" and in Section 901(a)(3), "to increase the efficiency of the operations of the Government to the fullest extent practicable;" and in Section 901(a)(5), "to reduce the number of agencies by consolidating those having similar functions under a single head, and to abolish such agencies or functions as may not be necessary for the efficient conduct of the Government."

While it is not practicable to specify all of the expenditure reductions and other economies which will result from the actions proposed, personnel and budget savings from abolition of the National Aeronautics and Space Council and the Office of Science and Technology alone will exceed $2 million annually, and additional savings should result from a reduction of Executive Pay Schedule positions now associated with other transferred and delegated functions.

The plan has as its one logically consistent subject matter the streamlining of the Executive Office of the President and the disposition of major responsibilities currently conducted in the Executive Office of the President, which can better be performed elsewhere or abolished.

The functions which would be abolished by this plan, and the statutory authorities for each, are:

(1) the functions of the Director of the Office of Emergency Preparedness with respect to being a member of the National Security Council (Sec. 101, National Security Act of 1947, as amended, 50 U.S.C. 402; and Sec. 4, Reorganization Plan No. 1 of 1958);

(2) the functions of the Civil Defense Advisory Council (Sec. 102(a), Federal Civil Defense Act of 1950; 50 U.S.C.App. 2272(a)); and

(3) the functions of the National Aeronautics and Space Council (Sec. 201, National Aeronautics and Space Act of 1958; 42 U.S.C. 2471).

The proposed reorganization is a necessary part of the restructuring of the Executive Office of the President. It would provide through the Director of the National Science Foundation a strong focus for Federal efforts to encourage the development and application of science and technology to meet national needs. It would mean better preparedness for and swifter response to civil emergencies, and more reliable precautions against threats to the national security. The leaner and less diffuse Presidential staff structure which would result would enhance the President's ability to do his job and would advance the interests of the Congress as well.

I am confident that this reorganization plan would significantly increase the overall efficiency and effectiveness of the Federal Government. I urge the Congress to allow it to become effective.

RICHARD NIXON.

THE WHITE HOUSE,
January 26, 1973.

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 10186

Ex. Ord. No. 10186, Dec. 1, 1950, 15 F.R. 8557, established the Federal Civil Defense Administration in the Office for Emergency Management of the Executive Office of the President, provided for the appointment of an Administrator and a Deputy Administrator, and delineated the purposes, functions, and authority of the Administration and the Administrator.

EXECUTIVE ORDER NO. 10222

Ex. Ord. No. 10222, Mar. 8, 1951, 16 F.R. 2247, which transferred to Federal Civil Defense Administration functions of Health Resources Office of National Security Resources Board, was revoked by section 904(a)(2) of Ex. Ord. No. 12919, June 3, 1994, 59 F.R. 29533, set out as a note under section 2153 of Title 50, Appendix, War and National Defense.

EXECUTIVE ORDER NO. 10346

Ex. Ord. No. 10346, Apr. 17, 1952, 17 F.R. 3477, as amended by Ex. Ord. No. 10438, Mar. 13, 1953, 18 F.R. 1491; Ex. Ord. No. 10773, July 1, 1958, 23 F.R. 5061; Ex. Ord. No. 10782, Sept. 6, 1958, 23 F.R. 6971; Ex. Ord. No. 11051, Sept. 27, 1962, 27 F.R. 9683, formerly set out as a note under section 2292 of this Appendix, related to the preparation by Federal agencies of civil defense emergency plans, and was revoked by Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, see below.

EXECUTIVE ORDER NO. 10529

Ex. Ord. No. 10529, Apr. 22, 1954, 19 F.R. 2397, as amended by Ex. Ord. No. 10773, July 1, 1958, 23 F.R. 5061; Ex. Ord. No. 10782, Sept. 6, 1958, 23 F.R. 6971; Ex. Ord. No. 11051, Sept. 27, 1962, 27 F.R. 9683, which related to Federal employee participation in State and local civil defense programs, was revoked by Ex. Ord. No. 12148, July 20, 1979, 44 F.R. 43239, set out below.

EXECUTIVE ORDER NO. 10611

Ex. Ord. No. 10611, May 11, 1955, 20 F.R. 3245, which related to establishment of the Civil Defense Coordinating Board, was revoked by section 7(7) of Ex. Ord. No. 10773.

EXECUTIVE ORDER NO. 10773

Ex. Ord. No. 10773, July 1, 1958, 23 F.R. 5061, as amended by Ex. Ord. No. 10782, Sept. 8, 1958, 23 F.R. 6971, which related to the delegation and transfer of functions to the Office of Civil and Defense Mobilization, was superseded by Ex. Ord. No. 11051, Sept. 27, 1962, 27 F.R. 9683, see below.

EXECUTIVE ORDER NO. 10902

Ex. Ord. No. 10902, Jan. 11, 1961, 26 F.R. 217, which related to the issuance of emergency preparedness orders, was superseded by Ex. Ord. No. 11051, Sept. 27, 1962, 27 F.R. 9683, see below.

EXECUTIVE ORDER NO. 10952

Ex. Ord. No. 10952, July 20, 1961, 26 F.R. 6577, as amended by Ex. Ord. No. 11051, Sept. 27, 1962, 27 F.R. 9683, which related to the assignment of civil defense responsibilities, was revoked by section 5–108 of Ex. Ord. No. 12148, July 20, 1979, 44 F.R. 43243, set out below.

EXECUTIVE ORDER NO. 10958

Ex. Ord. No. 10958, Aug. 14, 1961, 26 F.R. 7571, as amended by Ex. Ord. No. 11051, Sept. 27, 1962, 27 F.R. 9683, which provided for the delegation of functions respecting stockpiles of medical supplies and equipment and food, was revoked by Ex. Ord. No. 11794, July 11, 1974, 39 F.R. 25937.

EXECUTIVE ORDER NO. 10997

Ex. Ord. No. 10997, Feb. 16, 1962, 27 F.R. 1522, which related to assignment of emergency preparedness functions to Secretary of the Interior, was revoked by Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, see below.

EXECUTIVE ORDER NO. 10998

Ex. Ord. No. 10998, Feb. 16, 1962, 27 F.R. 1527, which related to assignment of emergency preparedness functions to Secretary of Agriculture, was revoked by Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, see below.

EXECUTIVE ORDER NO. 10999

Ex. Ord. No. 10999, Feb. 16, 1962, 27 F.R. 1527, which related to assignment of emergency preparedness functions to Secretary of Commerce, was revoked by Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, see below.

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EXECUTIVE ORDER NO. 11000

Ex. Ord. No. 11000, Feb. 16, 1962, 27 F.R. 1532, which related to assignment of emergency preparedness functions to Secretary of Labor, was revoked by Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, see below.

EXECUTIVE ORDER NO. 11001

Ex. Ord. No. 11001, Feb. 16, 1962, 27 F.R. 1534, which related to assignment of emergency preparedness functions to Secretary of Health, Education, and Welfare, was revoked by Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, see below.

EXECUTIVE ORDER NO. 11002

Ex. Ord. No. 11002, Feb. 16, 1962, 27 F.R. 1539, which related to assignment of emergency preparedness functions to Postmaster General, was revoked by Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, see below.

EXECUTIVE ORDER NO. 11003

Ex. Ord. No. 11003, Feb. 16, 1962, 27 F.R. 1540, which related to assignment of emergency preparedness functions to Administrator of Federal Aviation Agency, was revoked by Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, see below.

EXECUTIVE ORDER NO. 11004

Ex. Ord. No. 11004, Feb. 16, 1962, 27 F.R. 1542, which related to assignment of emergency preparedness functions to Housing and Home Finance Administrator, was revoked by Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, see below.

EXECUTIVE ORDER NO. 11005

Ex. Ord. No. 11005, Feb. 16, 1962, 27 F.R. 1544, which related to assignment of emergency preparedness functions to Interstate Commerce Commission, was revoked by Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, see below.

EXECUTIVE ORDER NO. 11051

Ex. Ord. No. 11051, Sept. 27, 1962, 27 F.R. 9683, as amended by Ex. Ord. No. 11075, Jan. 16, 1963, 28 F.R. 473; Ex. Ord. No. 11556, Sept. 4, 1970, 35 F.R. 14193; Ex. Ord. No. 11725, June 27, 1973, 38 F.R. 17175; Ex. Ord. No. 12046, Mar. 27, 1978, 43 F.R. 13349, which related to responsibility of the Office of Emergency Preparedness, was revoked by section 5–109 of Ex. Ord. No. 12148, July 20, 1979, 44 F.R. 43243, set out below.

EXECUTIVE ORDER NO. 11087

Ex. Ord. No. 11087, Feb. 26, 1963, 28 F.R. 1835, which related to assignment of emergency preparedness functions to Secretary of State, was revoked by Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, see below.

EXECUTIVE ORDER NO. 11088

Ex. Ord. No. 11088, Feb. 26, 1963, 28 F.R. 1837, which related to assignment of emergency preparedness functions to Secretary of the Treasury, was revoked by Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, see below.

EXECUTIVE ORDER NO. 11089

Ex. Ord. No. 11089, Feb. 26, 1963, 28 F.R. 1839, which related to assignment of emergency preparedness functions to Atomic Energy Commission, was revoked by Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, see below.

EXECUTIVE ORDER NO. 11090

Ex. Ord. No. 11090, Feb. 26, 1963, 28 F.R. 1841, which related to assignment of emergency preparedness functions to Civil Aeronautics Board, was revoked by Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, see below.

EXECUTIVE ORDER NO. 11091

Ex. Ord. No. 11091, Feb. 26, 1963, 28 F.R. 1843, which related to assignment of emergency preparedness functions to Civil Service Commission, was revoked by Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, see below.

EXECUTIVE ORDER NO. 11092

Ex. Ord. No. 11092, Feb. 11092, Feb. 26, 1963, 28 F.R. 1847, which related to assignment of Communications Commission, was revoked by Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, see below.

EXECUTIVE ORDER NO. 11093

Ex. Ord. No. 11093, Feb. 26, 1963, 28 F.R. 1851, which related to assignment of emergency preparedness functions to Administrator of General Services, was revoked by Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, see below.

EXECUTIVE ORDER NO. 11094

Ex. Ord. No. 11094, Feb. 26, 1963, 28 F.R. 1855, which related to assignment of emergency preparedness functions to Board of Governors of Federal Reserve System, Federal Home Loan Bank Board, Farm Credit Administration, Export-Import Bank of Washington, Board of Directors of Federal Deposit Insurance Corporation, Securities and Exchange Commission, Administrator of Small Business Administration, and Administrator of Veterans Affairs, was revoked by Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, see below.

EXECUTIVE ORDER NO. 11095

Ex. Ord. No. 11095, Feb. 26, 1963, 28 F.R. 1859, which related to assignment of emergency preparedness functions to Board of Directors of Tennessee Valley Authority, Railroad Retirement Board, Administrator of National Aeronautics and Space Administration, Federal Power Commission, and Director of National Science Foundation, was revoked by Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, see below.

EXECUTIVE ORDER NO. 11426

Ex. Ord. No. 11426, Aug. 31, 1968, 33 F.R. 12615, which provided for Federal-State liaison and cooperation, was superseded by Ex. Ord. No. 11455, Feb. 14, 1969, 34 F.R. 2299.

EXECUTIVE ORDER NO. 11490

Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, as amended by Ex. Ord. No. 11522, Apr. 6, 1970, 35 F.R. 5659; Ex. Ord. No. 11556, Sept. 4, 1970, 35 F.R. 14193; Ex. Ord. No. 11746, Nov. 7, 1973, 38 F.R. 30991; Ex. Ord. No. 11921, June 11, 1976, 41 F.R. 24294; Ex. Ord. No. 11953, Jan. 7, 1977, 42 F.R. 2492; Ex. Ord. No. 12038, Feb. 3, 1978, 43 F.R. 4957; Ex. Ord. No. 12046, Mar. 27, 1978, 43 F.R. 13349; Ex. Ord. No. 12107, Dec. 28, 1978, 44 F.R. 1055; Ex. Ord. No. 12148, July 20, 1979, 44 F.R. 43239; Ex. Ord. No. 12608, Sept. 9, 1987, 52 F.R. 34617; Ex. Ord. No. 12657, Nov. 18, 1988, 53 F.R. 47513, which related to assignment of emergency preparedness functions to Federal agencies and departments, was revoked by section 2901 of Ex. Ord. No. 12656, Nov. 18, 1988, 53 F.R. 47491, set out below.

EXECUTIVE ORDER NO. 11522

Ex. Ord. No. 11522, Apr. 6, 1970, 35 F.R. 5659, which related to the assignment of emergency preparedness functions to the United States Information Agency, was superseded by Ex. Ord. No. 11921, June 11, 1976, 41 F.R. 24294.

EXECUTIVE ORDER NO. 11725

Ex. Ord. No. 11725, June 27, 1973, 38 F.R. 17175, as amended by Ex. Ord. No. 11749, Dec. 10, 1973, 38 F.R. 34177; Ex. Ord. No. 12046, Mar. 27, 1978, 43 F.R. 13349, which related to transfer of certain functions of the Office of Emergency Preparedness, was revoked by Ex. Ord. No. 12148, July 20, 1979, 44 F.R. 43243, set out below.

EXECUTIVE ORDER NO. 11746

Ex. Ord. No. 11746, Nov. 7, 1973, 38 F.R. 30991, which related to the assignment of emergency preparedness functions to the Department of the Treasury, was superseded by Ex. Ord. No. 11921, June 11, 1976, 41 F.R. 24294.

EXECUTIVE ORDER NO. 12148

July 20, 1979, 44 F.R. 43239, as amended by Ex. Ord. No. 12155, Sept. 10, 1979, 44 F.R. 53071; Ex. Ord. No. 12156, Sept. 10, 1979, 44 F.R. 53073; Ex. Ord. No. 12381, Sept. 8, 1982, 47 F.R. 39795; Ex. Ord. No. 12673, Mar. 23, 1989, 54 F.R. 12571; Ex. Ord. No. 12919, June 3, 1994, 59 F.R. 29525

FEDERAL EMERGENCY MANAGEMENT

By the authority vested in me as President by the Constitution and laws of the United States of America, including the Federal Civil Defense Act of 1950, as amended (50 U.S.C.App. 2251 et seq.) the Disaster Relief Act of 1970, as amended (42 U.S.C. Chapter 58 note) (88 Stat. 143; 42 U.S.C. 5121 et seq.), the Earthquake Hazards Reduction Act of 1977 (42 U.S.C. 7701 et seq.), Section 4 of Public Law 92-385 (86 Stat. 56), as amended (50 U.S.C.App. 2285), the National Security Act of 1947, as amended [see Short Title note under 50 U.S.C.A. § 401], the Defense Production Act of 1950, as amended (50 U.S.C.App. 2061 et seq.), Reorganization Plan No. 1 of 1958 [set out as a note above], Reorganization Plan No. 1 of 1973 [set out as a note above], the Strategic and Critical Materials Stock Piling Act, as amended (50 U.S.C. 98 et seq.), Section

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Act of 1950 (31 U.S.C. 581c) [31 U.S.C.A. § 1531], and Section 301 of Title 3 of the United States Code [section 301 of Title 3, The President], and in order to transfer emergency functions to the Federal Emergency Management Agency, it is hereby ordered as follows:

1–1. Transfer or Reassignment of Existing Functions.

1–101. All functions vested in the President that have been delegated or assigned to the Defense Civil Preparedness Agency, Department of Defense, are transferred or reassigned to the Director of the Federal Emergency Management Agency.

1–102. All functions vested in the President that have been delegated or assigned to the Federal Disaster Assistance Administration, Department of Housing and Urban Development, are transferred or reassigned to the Director of the Federal Emergency Management Agency, including any of those functions redelegated or reassigned to the Department of Commerce with respect to assistance to communities in the development of readiness plans for severe weather-related emergencies.

1–103. All functions vested in the President that have been delegated or assigned to the Federal Preparedness Agency, General Services Administration, are transferred or reassigned to the Director of the Federal Emergency Management Agency.

1–104. All functions vested in the President by the Earthquake Hazards Reduction Act of 1977 (42 U.S.C. 7701 et seq.) [section 7701 et seq. of this title], including those functions performed by the Office of Science and Technology Policy, are delegated, transferred, or reassigned to the Director of the Federal Emergency Management Agency.

1–2. Transfer or Reassignment of Resources.

1–201. The records, property, personnel and positions, and unexpended balances of appropriations, available or to be made available, which relate to the functions transferred, reassigned, or redelegated by this Order are hereby transferred to the Director of the Federal Emergency Management Agency.

1–202. The Director of the Office of Management and Budget shall make such determinations, issue such orders, and take all actions necessary or appropriate to effectuate the transfers or reassignments provided by this Order, including the transfer of funds, records, property, and personnel.

2–1. General.

2–101. The Director of the Federal Emergency Management Agency shall establish Federal policies for, and coordinate, all civil defense and civil emergency planning, management, mitigation, and assistance functions of Executive agencies.

2–102. The Director shall periodically review and evaluate the civil defense and civil emergency functions of the Executive agencies. In order to improve the efficiency and effectiveness of those functions, the Director shall recommend to the President alternative methods of providing Federal planning, management, mitigation, and assistance.

2–103. The Director shall be responsible for the coordination of efforts to promote dam safety, for the coordination of natural and nuclear disaster warning systems, and for the coordination of preparedness and planning to reduce the consequences of major terrorist incidents.

2–104. The Director shall represent the President in working with State and local governments and private sector to stimulate vigorous participation in civil emergency preparedness, mitigation, response, and recovery programs.

2–105. The Director shall provide an annual report to the President for subsequent transmittal to the Congress on the functions of the Federal Emergency Management Agency. The report shall assess the current overall state of effectiveness of Federal civil defense and civil emergency functions, organizations, resources, and systems and recommend measures to be taken to improve planning, management, assistance, and relief by all levels of government, the private sector, and volunteer organizations.

2–2. Implementation.

2–201. In executing the functions under this Order, the Director shall develop policies which provide that all civil defense and civil emergency functions, resources, and systems of Executive agencies are:

(a) founded on the use of existing organizations, resources, and systems to the maximum extent practicable;

(b) integrated effectively with organizations, resources, and programs of State and local governments, the private sector and volunteer organizations; and

(c) developed, tested and utilized to prepare for, mitigate, respond to and recover from the effects on the population of all forms of emergencies.

2–202. Assignments of civil emergency functions shall, whenever possible, be based on extensions (under emergency conditions), of the regular missions of the Executive agencies.

2–203. For purposes of this Order, "civil emergency" means any accidental, natural, man-caused, or wartime emergency or threat thereof, which causes or may cause substantial injury or harm to the population or substantial damage to or loss of property.

2–204. In order that civil defense planning continues to be fully compatible with the Nation's overall strategic policy, and in order to maintain an effective link between strategic nuclear planning and nuclear attack preparedness planning, the development of civil defense policies and programs by the Director of the Federal Emergency Management Agency shall be subject to oversight by the Secretary of Defense and the National Security Council.

2–205. To the extent authorized by law and within available resources, the Secretary of Defense shall provide the Director of the Federal Emergency Management Agency with support for civil defense programs in the areas of program development and administration, technical support, research, communications, transportation, intelligence, and emergency operations.

2–206. All Executive agencies shall cooperate with and assist the Director in the performance of his functions.

2–3. Transition Provisions.

2–301. The functions which have been transferred, reassigned, or redelegated by Section 1 of this Order are recodified and revised as set forth in this Order at Section 4, and as provided by the amendments made at Section 5 to the provisions of other Orders.

2–302. Notwithstanding the revocations, revisions, codifications, and amendments made by this Order, the Director may continue to perform the functions transferred to him by Section 1 of this Order, except where they may otherwise be inconsistent with the provisions of this Order.

4–1. Delegation of Functions Transferred to the President.

4–101. [Revoked by Ex. Ord. No. 12155, Sept. 10, 1979, 44 F.R. 53071.]

4–102. The functions vested in the Director of the Office of Defense Mobilization by Sections 103 and 303 of the National Security Act of 1947, as amended by Sections 8 and 50 of the Act of September 3, 1954 (Public Law 779; 68 Stat. 1223 and 1244) (50 U.S.C. 404 and 405) [sections 404 and 405 of Title 50, War and National Defense], were transferred to the President by Section 1(a) of Reorganization Plan No. 1 of 1958, as amended (50 U.S.C.App. 2271 note) [set out above], and they are hereby delegated to the Director of the Federal Emergency Management Agency.

4–103. (a) The functions vested in the Federal Civil Defense Administration or its Administrator by the Federal Civil Defense Act of 1950, as amended (50 U.S.C.App. 2251 et seq.), were transferred to the President by Reorganization Plan No. 1 of 1958, and they are hereby delegated to the Director of the Federal Emergency Management Agency.

(b) Excluded from the delegation in subsection (a) is the function under Section 205(a)(4) of the Federal Civil Defense Act of 1950, as amended (50 U.S.C.App. 2286(a)(4)), relating to the establishment and maintenance of personnel standards on the merit basis that was delegated to the Director of the Office of Personnel Management by Section 1(b) of Executive Order No. 11589, as amended (Section 2–101(b) of Executive Order No. 12107) [set out as a note under section 3376 of Title 5, Government Organization and Employees].

4–104. The Director of the Federal Emergency Management Agency is authorized to redelegate, in accord with the provisions of Section 1(b) of Reorganization Plan No. 1 of 1958 (50 U.S.C.App. 2271 note) [now set out above], any of the functions delegated by Sections 4–101, 4–102 and 4–103 of this Order.

4–105. The functions vested in the Administrator of the Federal Civil Defense Administration by Section 43 of the Act of August 10, 1956 (70A Stat. 636) [section 2285 of the appendix to title 50] were transferred to the President by Reorganization Plan No. 1 of 1958, as amended (50 U.S.C.App. 271 note) [now set out above], were subsequently revested in the Director of the Office of Civil and Defense Mobilization by Section 512 of Public Law 86–500 (50 U.S.C.App. 2285) [section 2285 of the Appendix to Title 50] [the office was changed to Office of Emergency Planning by Public Law 87–296 (75 Stat. 630) and then to the Office of Emergency Preparedness by Section 402 of Public Law 90–608 (82 Stat. 1194)], were again transferred to the President by Section 1 of Reorganization Plan No. 1 of 1973 (50 U.S.C.App. 2271 note) [now set out above], and they are hereby delegated to the Director of the Federal Emergency Management Agency.

4–106. The functions vested in the Director of the Office of Emergency Preparedness by Section 16 of the Act of September 23, 1950, as amended (20 U.S.C. 646) [section 646 of Title 20, Education], and by Section 7 of the Act of September 30, 1950, as amended (20 U.S.C. 241–1) [section 241–1 of Title 20], were transferred to the President by Section 1 of Reorganization Plan No. 1 of 1973 (50 U.S.C.App. 2271 note) [now set out above], and they are hereby delegated to the Director of the Federal Emergency Management Agency.

4–107. That function vested in the Director of the Office of Emergency Preparedness by Section 762(a) of the Higher Education Act of 1965, as added by Section 161(a) of the Education Amendments of 1972, and as further amended (20 U.S.C. 1132d–1(a)) [section 1132d–1(a) of Title 20, Education], to the extent transferred to the President by Reorganization Plan No. 1 of 1973 (50 U.S.C.App. 2271 note) [now set out above], is hereby delegated to the Director of the Federal Emergency Management Agency.

4–2. Delegation of Functions Vested in the President.

4–201. The functions vested in the President by the Disaster Relief Act of 1970, as amended (42 U.S.C. Chapter 58 note), are hereby delegated to the Director of the Federal Emergency Management Agency.

4–202. The functions (related to grants for damages resulting from hurricane and tropical storm Agnes) vested in the President by Section 4 of Public Law 92–385 (86 Stat. 556) are hereby delegated to the Director of the Federal Emergency Management Agency.

Section 4–203. The functions vested in the President by the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5121 et seq.), except those functions vested in the President by Section 401 (relating to the declaration of major disasters and emergencies) [section 5170 of this title], Section 501 (relating to the declaration of emergencies) [section 5191 of this title], Section 405 (relating to the repair, reconstruction, restoration, or replacement of Federal facilities) [section 5171 of this title], and Section 412 (relating to food coupons and distribution) [section 5179 of this title], are hereby delegated to the Director of the Federal Emergency Management Agency.

4–204. The functions vested in the President by the Earthquake Hazards Reduction Act of

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1977, as amended (42 U.S.C. 7701 et seq.) [section 7701 et seq. of this title], are delegated to the Director of the Federal Emergency Management Agency.

4–205. Effective July 30, 1979, the functions vested in the President by Section 4(h) of the Commodity Credit Corporation (Charter Act, as amended (15 U.S.C. 714b(h)) [section 714b(h) of Title 15, Commerce and Trade], are hereby delegated to the Director of the Federal Emergency Management Agency.

4–206. Effective July 30, 1979, the functions vested in the President by Section 204(f) of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 485(f)) [section 485(f) of Title 40, Public Buildings, Property, and Works], are hereby delegated to the Director of the Federal Emergency Management Agency.

Sec. 4–207. The functions vested in the President by Section 502 of the Federal Civil Defense Act of 1950, as amended (50 U.S.C. App. 2302) [section 2302 of the Appendix to Title 50], are delegated to the Director of the Federal Emergency Management Agency.

5–1. Revocations.

5–101. Executive Order No. 10242, as amended, entitled "Prescribing Regulations Governing the Exercise by the Federal Civil Defense Administrator of Certain Administrative Authority Granted by the Federal Civil Defense Act of 1950" [50 U.S.C.A.App. § 2253 note], is revoked.

5–102. Sections 1 and 2 of Executive Order No. 10296, as amended [42 U.S.C.A. § 1592m note], entitled "Providing for the Performance of Certain Defense Housing and Community Facilities and Service Functions", are revoked.

5–103. Executive Order No. 10494, as amended [50 U.S.C.A.App. § 2101 note], relating to the disposition of remaining functions, is revoked.

5–104. Executive Order No. 10529, as amended, relating to federal employee participation in State and local civil defense programs, is revoked.

5–105. Section 3 of Executive Order No. 10601, as amended [7 U.S.C.A. § 1743 note], which concerns the Commodity Set Aside, is revoked.

5–106. Executive Order No. 10634, as amended [50 U.S.C.A.App. § 2092 note], relating to loans for facilities destroyed or damaged by a major disaster, is revoked.

5–107. Section 4(d)(2) of Executive Order No. 10900, as amended [7 U.S.C.A. § 1691 note], which concerns foreign currencies made available to make purchases for the supplemental stockpile, is revoked.

5–108. Executive Order No. 10952, as amended, entitled "Assigning Civil Defense Responsibilities to the Secretary of Defense and Others", is revoked.

5–109. Executive Order No. 11051, as amended, relating to responsibilities of the Office of Emergency Preparedness, is revoked.

5–110. Executive Order No. 11415, as amended [50 U.S.C.A.App. § 451 note], relating to the Health Resources Advisory Committee, is revoked.

5–111. Executive Order No. 11795, as amended [42 U.S.C.A. § 5121 note], entitled "Delegating Disaster Relief Functions Pursuant to the Disaster Relief Act of 1974", is revoked, except for Section 3 thereof.

5–112. Executive Order No. 11725, as amended, entitled "Transfer of Certain Functions of the Office of Emergency Preparedness", is revoked.

5–113. Executive Order No. 11749, as amended [42 U.S.C.A. § 5121 note], entitled "Consolidating Disaster Relief Functions Assigned to the Secretary of Housing and Urban Development" is revoked.

5–2. Amendments.

5–201. Executive Order No. 10421, as amended [50 U.S.C.A. former § 404 note], relating to physical security of defense facilities is further amended by (a) substituting the "Director of the Federal Emergency Management Agency" for "Director of the Office of Emergency Planning" in Sections 1(a), 1(c), and 6(b); and, (b) substituting "Federal Emergency Management Agency" for "Office of Emergency Planning" in Sections 6(b) and 7(b).

5–202. Executive Order No. 10480, as amended [50 U.S.C.A. App. § 2153 note], is further amended by (a) substituting "Director of the Federal Emergency Management Agency" for "Director of the Office of Emergency Planning" in Sections 101(a), 101(b), 201(a), 201(b), 301, 304, 307, 308, 310(b), 311(b), 312, 313, 401(b), 401(e), and 605; and (b) substituting "Director of the Federal Emergency Management Agency" for "Administrator of General Services" in Sections 305, 501, and 610.

5–203. Section 3(d) of Executive Order No. 10582 [41 U.S.C.A. § 10d note], as amended, which relates to determinations under the Buy American Act is amended by deleting "Director of the Office of Emergency Planning" and substituting therefor "Director of the Federal Emergency Management Agency".

5–204. Paragraph 21 of Executive Order No. 10789, as amended [50 U.S.C.A. § 1431 note], is further amended by adding "The Federal Emergency Management Agency" after "Government Printing Office".

5–205. Executive Order No. 11179, as amended [50 U.S.C.A.App. § 2153 note], concerning the National Defense Executive Reserve, is further amended by deleting "Director of the Office of Emergency Planning" in Section 2 and substituting therefor "Director of the Federal Emergency Management Agency".

5–206. Section 7 of Executive Order No. 11912, as amended [42 U.S.C.A. § 6201 note], concerning energy policy and conservation, is further amended by deleting "Administrator of General Services" and substituting therefor "Director of the Federal Emergency Management Agency".

5–207. Section 2(d) of Executive Order No. 11988 [42 U.S.C.A. § 4321 note], entitled "Floodplain Management" is amended by deleting "Federal Insurance Administration" and substituting therefor "Director of the Federal Emergency Management Agency".

5–208. Section 5–3 of Executive Order No. 12048 of March 29, 1978 [47 U.S.C.A. § 305 note], is amended by deleting "General Services Administration" and substituting therefor "Federal Emergency Management Agency" and by deleting "Administrator of General Services" and substituting therefor "Director of the Federal Emergency Management Agency".

5–209. Section 1–201 of Executive Order No. 12065 [50 U.S.C.A. § 401 note], is amended by adding "The Director of the Federal Emergency Management Agency" after "The Administrator, National Aeronautics and Space Administration" and by deleting "Director, Federal Preparedness Agency and to the" from the parentheses after "The Administrator of General Services".

5–210. Section 1–102 of Executive Order No. 12075 of August 16, 1978 [42 U.S.C.A. § 1450 note], is amended by adding in alphabetical order "(p) Federal Emergency Management Agency".

5–211. Section 1–102 of Executive Order No. 12083 of September 27, 1978 [42 U.S.C.A. § 7101 note], is amended by adding in alphabetical order "(z) the Director of the Federal Emergency Management Agency".

5–212. Section 9.11(b) of Civil Service Rule IX [5 CFR Part 9) [5 U.S.C.A. § 3301 note], is amended by deleting "the Defense Civil preparedness Agency and".

5–213. [Revoked by Ex. Ord. No. 12381, Sept. 8, 1982, 47 F.R. 39795.]

5–214. Executive Order No. 11490, as amended [set out as a note under this section], is further amended as follows:

(a) Delete the last sentence of Section 102(a) and substitute therefor the following: "The activities undertaken by the departments and agencies pursuant to this Order, except as provided in Section 3003, shall be in accordance with guidance provided by, and subject to, evaluation by the Director of the Federal Emergency Management Agency.".

(b) Delete Section 103 entitled "Presidential Assistance" and substitute the following new Section 103: "Sec. 103 General Coordination. The Director of the Federal Emergency Management Agency (FEMA) shall determine national preparedness goals and policies for the performance of functions under this Order and coordinate the performance of such functions with the total national preparedness programs.".

(c) Delete the portion of the first sentence of Section 401 prior to the colon and insert the following: "The Secretary of Defense shall perform the following emergency preparedness functions".

(d) Delete "Director of the Federal Preparedness Agency (GSA)" or "the Federal Preparedness Agency (GSA)" and substitute therefor "Director, FEMA", in Sections 401(3), 401(4), 401(5), 401(9), 401(10), 401(14), 401(15), 401(16), 401(19), 401(21), 401(22), 501(8), 601(2), 904(2), 1102(2), 1204(2), 1401(a), 1701, 1702, 2003, 2004, 2801(5), 3001, 3002(2), 3004, 3005, 3006, 3008, 3010, and 3013.

(e) The number assigned to this Order shall be substituted for "11051 of September 27, 1962" in Section 3001, and for "11051" in Sections 1802, 2002(3), 3002 and 3008(1).

(f) The number assigned to this Order shall be substituted for "10952" in Sections 1103, 1104, 1205, and 3002.

(g) Delete "Department of Defense" in Sections 502, 601(1), 804, 905, 1103, 1104, 1106(4), 1205, 2002(8), the first sentence of Section 3002, and Sections 3008(1) and 3010 and substitute therefor "Director of the Federal Emergency Management Agency.".

Section 6. This Order is effective July 15, 1979.

[Section 1–106 of Ex. Ord. No. 12155, which enacted sections 4–205 and 4–206 of Ex. Ord. No. 12148, was revoked by Pub.L. 100–180, Div. C, Title II, § 3203(b), Dec. 4, 1987, 101 Stat. 1247.]

EXECUTIVE ORDER NO. 12472

Apr. 3, 1984, 49 F.R. 13471

ASSIGNMENT OF NATIONAL SECURITY AND EMERGENCY PREPAREDNESS TELECOMMUNICATIONS FUNCTIONS

By the authority vested in me as President by the Constitution and laws of the United States of America, including the Communications Act of 1934, as amended (47 U.S.C. 151) [47 U.S.C.A. §§ 151 et seq., 609], the National Security Act of 1947, as amended [50 U.S.C.A. § 401 note], the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061) [50 U.S.C.A. App. § 2061 et seq.], the Federal Civil Defense Act of 1950, as amended (50 U.S.C. App. 2251) [50 U.S.C.A. App. § 2251 et seq.], the Disaster Relief Act of 1974 (42 U.S.C. 5121) [42 U.S.C.A. § 5121], Section 5 of Reorganization Plan No. 1 of 1977 (3 C.F.R. 197, 1978 Comp.) [see Appendix to Title 5, Government Organization and Employees], and Section 203 of Reorganization Plan No. 3 of 1978 (3 C.F.R. 389, 1978 Comp.) [see 5 U.S.C.A. App.], and in order to provide and maintain adequate, reliable telecommunications for the national security and emergency preparedness needs of the Federal Government, it is hereby ordered as follows:

Section 1. The National Communications System. (a) There is hereby established the National Communications System (NCS). The NCS shall consist of the telecommunications assets of the entities represented on the NCS Committee of Principals and an administrative structure consisting of the Executive Agent, the NCS Committee of Principals and the Manager. The NCS Committee of Principals shall consist of representatives from those Federal departments, agencies or entities, designated by the President, which lease or own telecommunications facilities or services of significance to national security or emergency preparedness, and

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entities which bear policy, regulatory or enforcement responsibilities of importance to national security or emergency preparedness telecommunications capabilities.

(b) The mission of the NCS shall be to assist the President, the National Security Council, the Director of the Office of Science and Technology Policy and the Director of the Office of Management and Budget in:

(1) the exercise of the telecommunications functions and responsibilities set forth in Section 2 of this Order; and

(2) the coordination of the planning for and provision of national security and emergency preparedness communications for the Federal government under all circumstances, including crisis or emergency, attack, recovery and reconstitution.

(c) The NCS shall seek to ensure that a national telecommunications infrastructure is developed which:

(1) Is responsive to the national security and emergency preparedness needs of the President and the Federal departments, agencies and other entities, including telecommunications in support of national security leadership and continuity of government;

(2) Is capable of satisfying priority telecommunications requirements under all circumstances through use of commercial, government and privately owned telecommunications resources;

(3) Incorporates the necessary combination of hardness, redundancy, mobility, connectivity, interoperability, restorability and security to obtain, to the maximum extent practicable, the survivability of national security and emergency preparedness telecommunications in all circumstances, including conditions of crisis or emergency; and

(4) Is consistent, to the maximum extent practicable, with other national telecommunications policies.

(d) To assist in accomplishing its mission, the NCS shall:

(1) serve as a focal point for joint industry-government national security and emergency preparedness telecommunications planning; and

(2) establish a joint industry-government National Coordinating Center which is capable of assisting in the initiation, coordination, restoration and reconstitution of national security or emergency preparedness telecommunications services or facilities under all conditions of crisis or emergency.

(e) The Secretary of Defense is designated as the Executive Agent for the NCS. The Executive Agent shall:

(1) Designate the Manager of the NCS;

(2) Ensure that the NCS conducts unified planning and operations, in order to coordinate the development and maintenance of an effective and responsive capability for meeting the domestic and international national security and emergency preparedness telecommunications needs of the Federal government; and

(3) Ensure that the activities of the NCS are conducted in [illegible]

gency management activities of the Federal Emergency Management Agency;

(4) Recommend, in consultation with the NCS Committee of Principals, to the National Security Council, the Director of the Office of Science and Technology Policy, or the Director of the Office of Management and Budget, as appropriate:

a. The assignment of implementation or other responsibilities to NCS member entities;

b. New initiatives to assist in the exercise of the functions specified in Section 2; and

c. Changes in the composition or structure of the NCS;

(5) Oversee the activities of and provide personnel and administrative support to the Manager of the NCS;

(6) Provide staff support and technical assistance to the National Security Telecommunications Advisory Committee established by Executive Order No. 12382, as amended; and

(7) Perform such other duties as are from time to time assigned by the President or his authorized designee.

(f) The NCS Committee of Principals shall:

(1) Serve as the forum in which each member of the Committee may review, evaluate, and present views, information and recommendations concerning ongoing or prospective national security or emergency preparedness telecommunications programs or activities of the NCS and the entities represented on the Committee;

(2) Serve as the forum in which each member of the Committee shall report on and explain ongoing or prospective telecommunications plans and programs developed or designed to achieve national security or emergency preparedness telecommunications objectives;

(3) Provide comments or recommendations, as appropriate, to the National Security Council, the Director of the Office of Science and Technology Policy, the Director of the Office of Management and Budget, the Executive Agent, or the Manager of the NCS, regarding ongoing or prospective activities of the NCS; and

(4) Perform such other duties as are from time to time assigned by the President or his authorized designee.

(g) The Manager of the NCS shall:

(1) Develop for consideration by the NCS Committee of Principals and the Executive Agent:

a. A recommended evolutionary telecommunications architecture designed to meet current and future Federal government national security and emergency preparedness telecommunications requirements;

b. Plans and procedures for the management, allocation and use, including the establishment of priorities or preferences, of Federally owned or leased telecommunications assets under all conditions of crisis

c. Plans, procedures and standards for minimizing or removing technical impediments to the interoperability of government-owned and/or commercially-provided telecommunications systems;

d. Test and exercise programs and procedures for the evaluation of the capability of the Nation's telecommunications resources to meet national security or emergency preparedness telecommunications requirements; and

e. Alternative mechanisms for funding, through the budget review process, national security or emergency preparedness telecommunications initiatives which benefit multiple Federal departments, agencies, or entities. Those mechanisms recommended by the NCS Committee of Principals and the Executive Agent shall be submitted to the Director of the Office of Management and Budget.

(2) Implement and administer any approved plans or programs as assigned, including any system of priorities and preferences for the provision of communications service, in consultation with the NCS Committee of Principals and the Federal Communications Commission, to the extent practicable or otherwise required by law or regulation;

(3) Chair the NCS Committee of Principals and provide staff support and technical assistance thereto;

(4) Serve as a focal point for joint industry-government planning, including the dissemination of technical information, concerning the national security or emergency preparedness telecommunications requirements of the Federal government;

(5) Conduct technical studies or analyses, and examine research and development programs, for the purpose of identifying, for consideration by the NCS Committee of Principals and the Executive Agent, improved approaches which may assist Federal entities in fulfilling national security or emergency preparedness telecommunications objectives;

(6) Pursuant to the Federal Standardization Program of the General Services Administration, and in consultation with other appropriate entities of the Federal government including the NCS Committee of Principals, manage the Federal Telecommunications Standards Program, ensuring wherever feasible that existing or evolving industry, national, and international standards are used as the basis for Federal telecommunications standards; and

(7) Provide such reports and perform such other duties as are from time to time assigned by the President or his authorized designee, the Executive Agent, or the NCS Committee of Principals. Any such assignments of responsibility to, or reports made by, the Manager shall be transmitted through the Executive Agent.

Sec. 2. Executive Office Responsibilities.

(a) Wartime Emergency Functions. (1) The National Security Council shall provide policy direction for the exercise of the war power functions of the Communications Act of 1934, as amended (47 U.S.C. 606) [section 606 of Title 47, Telegraphs, Telephones and Radiotelegraphs], should the President issue implementing instructions in accordance with the National Emergencies Act (50 U.S.C. 1601) [section 1601 et seq. of Title 50, War and National Defense].

(2) The Director of the Office of Science and Technology Policy shall direct the exercise of the war power functions of the President under Section 606(a), (c)–(e), of the Communications Act of 1934, as amended (47 U.S.C. 606) [section 606 of Title 47], should the President issue implementing instructions in accordance with the National Emergencies Act (50 U.S.C. 1601) [section 1601 et seq. of Title 50].

(b) Non-Wartime Emergency Functions. (1) The National Security Council shall:

a. Advise and assist the President in coordinating the development of policy, plans, programs and standards within the Federal government for the identification, allocation, and use of the Nation's telecommunications resources by the Federal government, and by State and local governments, private industry and volunteer organizations upon request, to the extent practicable and otherwise consistent with law, during those crises or emergencies in which the exercise of the President's war power functions is not required or permitted by law; and

b. Provide policy direction for the exercise of the President's non-wartime emergency telecommunications functions, should the President so instruct.

(2) The Director of the Office of Science and Technology Policy shall provide information, advice, guidance and assistance, as appropriate, to the President and to those Federal departments and agencies with responsibilities for the provision, management, or allocation of telecommunications resources, during those crises or emergencies in which the exercise of the President's war power functions is not required or permitted by law;

(3) The Director of the Office of Science and Technology Policy shall establish a Joint Telecommunications Resources Board (JTRB) to assist him in the exercise of the functions specified in this subsection. The Director of the Office of Science and Technology Policy shall serve as chairman of the JTRB; select those Federal departments, agencies, or entities which shall be members of the JTRB; and specify the functions it shall perform.

(c) Planning and Oversight Responsibilities. (1) The National Security Council shall advise and assist the President in:

a. Coordinating the development of policy, plans, programs and standards for the mobilization and use of the Nation's commercial, government, and privately owned telecommunications resources, in order to meet national security or emergency preparedness requirements;

b. Providing policy oversight and direction of the activities of the NCS; and

c. Providing policy oversight and guidance

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signed to the Federal departments and agencies by this Order.

(2) The Director of the Office of Science and Technology Policy shall make recommendations to the President with respect to the test, exercise and evaluation of the capability of existing and planned communications systems, networks or facilities to meet national security or emergency preparedness requirements and report the results of any such tests or evaluations and any recommended remedial actions to the President and to the National Security Council;

(3) The Director of the Office of Science and Technology Policy or his designee shall advise and assist the President in the administration of a system of radio spectrum priorities for those spectrum dependent telecommunications resources of the Federal government which support national security or emergency preparedness functions. The Director also shall certify or approve priorities for radio spectrum use by the Federal government, including the resolution of any conflicts in or among priorities, under all conditions of crisis or emergency; and

(4) The National Security Council, the Director of the Office of Science and Technology Policy and the Director of the Office of Management and Budget shall, in consultation with the Executive Agent for the NCS and the NCS Committee of Principals, determine what constitutes national security and emergency preparedness telecommunications requirements.

(d) Consultation with Federal Departments and Agencies. In performing the functions assigned under this Order, the National Security Council and the Director of the Office of Science and Technology Policy, in consultation with each other, shall:

(1) Consult, as appropriate, with the Director of the Office of Management and Budget; the Director of the Federal Emergency Management Agency with respect to the emergency management responsibilities assigned pursuant to Executive Order No. 12148, as amended [set out as a note under this section]; the Secretary of Commerce, with respect to responsibilities assigned pursuant to Executive Order No. 12046 [47 U.S.C.A. § 305 note]; the Secretary of Defense, with respect to communications security responsibilities assigned pursuant to Executive Order No. 12333 [50 U.S.C.A. § 401 note]; and the Chairman of the Federal Communications Commission or his authorized designee; and

(2) Establish arrangements for consultation among all interested Federal departments, agencies or entities to ensure that the national security and emergency preparedness communications needs of all Federal government entities are identified; that mechanisms to address such needs are incorporated into pertinent plans and procedures; and that such needs are met in a manner consistent, to the maximum extent practicable, with other national telecommunications policies.

(e) Budgetary Guidelines. The Director of the Office of Management and Budget, in consultation with the National Security Council and the NCS, will prescribe general guidelines and procedures for reviewing the financing of the NCS within the budgetary process and for preparation of budget estimates by participating agencies. These guidelines and procedures may provide for mechanisms for funding, through the budget review process, national security and emergency preparedness telecommunications initiatives which benefit multiple Federal departments, agencies, or entities.

Sec. 3. Assignment of Responsibilities to Other Departments and Agencies. In order to support and enhance the capability to satisfy the national security and emergency preparedness telecommunications needs of the Federal government, State and local governments, private industry and volunteer organizations, under all circumstances including those of crisis or emergency, the Federal departments and agencies shall perform the following functions:

(a) Department of Commerce. The Secretary of Commerce shall, for all conditions of crisis or emergency: (1) Develop plans and procedures concerning radio spectrum assignments, priorities and allocations for use by Federal departments, agencies and entities; and

(2) Develop, maintain and publish policy, plans, and procedures for the control and allocation of frequency assignments, including the authority to amend, modify or revoke such assignments, in those parts of the electromagnetic spectrum assigned to the Federal government.

(b) Federal Emergency Management Agency. The Director of the Federal Emergency Management Agency shall:

(1) Plan for and provide, operate and maintain telecommunications services and facilities, as part of its National Emergency Management System, adequate to support its assigned emergency management responsibilities;

(2) Advise and assist State and local governments and volunteer organizations, upon request and to the extent consistent with law, in developing plans and procedures for identifying and satisfying their national security or emergency preparedness telecommunications requirements;

(3) Ensure, to the maximum extent practicable, that national security and emergency preparedness telecommunications planning by State and local governments and volunteer organizations is mutually supportive and consistent with the planning of the Federal government; and

(4) Develop, upon request and to the extent consistent with law and in consonance with regulations promulgated by and agreements with the Federal Communications Commission, plans and capabilities for, and provide policy and management oversight of, the Emergency Broadcast System, and advise and assist private radio licensees of the Commission in developing emergency communications plans, procedures and capabilities.

(c) Department of State. The Secretary of State, in accordance with assigned responsibilities within the Diplomatic Telecommunications System, shall plan for and provide, operate and maintain rapid, reliable and secure telecommunications services to those Federal elements located at United States diplomatic missions and consular offices overseas. This responsibility shall include the provision and operation of domestic telecommunications in support of assigned national security or emergency preparedness responsibilities.

(d) Department of Defense. In addition to the other responsibilities assigned by this Order, the Secretary of Defense shall:

(1) Plan for and provide, operate and maintain telecommunications services and facilities adequate to support the National Command Authorities and to execute the responsibilities assigned by Executive Order No. 12333 [50 U.S.C.A. § 401 note]; and

(2) Ensure that the Director of the National Security Agency provides the technical support necessary to develop and maintain plans adequate to provide for the security and protection of national security and emergency preparedness telecommunications.

(e) Department of Justice. The Attorney General shall, as necessary, review for legal sufficiency, including consistency with the antitrust laws, all policies, plans or procedures developed pursuant to responsibilities assigned by this Order.

(f) Central Intelligence Agency. The Director of Central Intelligence shall plan for and provide, operate, and maintain telecommunications services adequate to support its assigned responsibilities, including the dissemination if intelligence within the Federal government.

(g) General Services Administration. Except as otherwise assigned by this Order, the Administrator of General Services, consistent with policy guidance provided by the Director of the Office of Management and Budget, shall ensure that Federally owned or managed domestic communications facilities and services meet the national security and emergency preparedness requirements of the Federal Civilian departments, agencies and entities.

(h) Federal Communications Commission. The Federal Communications Commission shall, consistent with Section 4(c) of this Order:

(1) Review the policies, plans and procedures of all entities licensed or regulated by the Commission that are developed to provide national security or emergency preparedness communications services, in order to ensure that such policies, plans and procedures are consistent with the public interest, convenience and necessity;

(2) Perform such functions as required by law with respect to all entities licensed or regulated by the Commission, including (but not limited to) the extension, discontinuance or reduction of common carrier facilities or services; the control of common carrier rates, charges, practices and classifications; the construction, authorization, activation, deactivation or closing of radio stations, services and facilities; the assignment of radio frequencies to Commission licensees; the investigation of violations of pertinent law and regulation; and the initiation of appropriate enforcement actions;

(3) Develop policy, plans and procedures signed in this Order under all conditions or crisis or emergency; and

(4) Consult as appropriate with the Executive Agent for the NCS and the NCS Committee of Principals to ensure continued coordination of their respective national security and emergency preparedness activities.

(i) All Federal departments and agencies, to the extent consistent with law (including those authorities and responsibilities set forth in Section 4(c) of this Order), shall:

(1) Determine their national security and emergency preparedness telecommunications requirements, and provide information regarding such requirements to the Manager of the NCS;

(2) Prepare policies, plans and procedures concerning telecommunications facilities, services or equipment under their management or operational control to maximize their capability of responding to the national security or emergency preparedness needs of the Federal government;

(3) Provide, after consultation with the Director of the Office of Management and Budget, resources to support their respective requirements for national security and emergency preparedness telecommunications; and provide personnel and staff support to the Manager of the NCS as required by the President;

(4) Make information available to, and consult with, the Manager of the NCS regarding agency telecommunications activities in support of national security or emergency preparedness;

(5) Consult, consistent with the provisions of Executive Order No. 12046, as amended [47 U.S.C.A. § 305 note], and in conjunction with the Manager of the NCS, with the Federal Communications Commission regarding execution of responsibilities assigned by this Order;

(6) Submit reports annually, or as otherwise requested, to the Manager of the NCS, regarding agency national security or emergency preparedness telecommunications activities; and

(7) Cooperate with and assist the Executive Agent for the NCS, the NCS Committee of Principals, the Manager of the NCS, and other departments and agencies in the execution of the functions set forth in this Order, furnishing them such information, support and assistance as may be required.

(j) Each Federal department or agency shall execute the responsibilities assigned by this Order in conjunction with the emergency management activities of the Federal Emergency Management Agency, and in regular consultation with the Executive Agent for the NCS and the NCS Committee of Principals to ensure continued coordination of NCS and individual agency telecommunications activities.

Sec. 4. General Provisions. (a) All Executive departments and agencies may issue such rules and regulations as may be necessary to carry out the functions assigned under this Or-

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(b) In order to reflect the assignments of responsibility provided by this Order,

(1) Sections 2-414, 4-102, 4-103, 4-202, 4-302, 5-3, and 6-101 of Executive Order No. 12046, as amended [47 U.S.C.A. § 305 note], are revoked;

(2) The Presidential Memorandum of August 21, 1963, as amended, entitled "Establishment of the National Communications System", is hereby superseded; and

(3) Section 2-411 of Executive Order No. 12046, as amended [47 U.S.C.A. § 305 note], is further amended by deleting the period and inserting ", except as otherwise provided by Executive Order No." and inserting the number assigned to this Order.

(c) Nothing in this Order shall be deemed to affect the authorities or responsibilities of the Director of the Office of Management and Budget, or any Office or official thereof; or reassign any function assigned any agency under the Federal Property and Administrative Services Act of 1949, as amended [40 U.S.C.A. § 471 note]; or under any other law; or any function vested by law in the Federal Communications Commission.

Sec. 5. This Order shall be effective upon publication in the Federal Register.

RONALD REAGAN

EXECUTIVE ORDER NO. 12656

Nov. 18, 1988, 53 F.R. 47491, as amended Ex. Ord. No. 13074, Feb. 9, 1998, 63 F.R. 7277

ASSIGNMENT OF EMERGENCY PREPAREDNESS RESPONSIBILITIES

WHEREAS our national security is dependent upon our ability to assure continuity of government, at every level, in any national security emergency situation that might confront the Nation; and

WHEREAS effective national preparedness planning to meet such an emergency, including a massive nuclear attack, is essential to our national survival; and

WHEREAS effective national preparedness planning requires the identification of functions that would have to be performed during such an emergency, the assignment of responsibility for developing plans for performing these functions, and the assignment of responsibility for developing the capability to implement those plans; and

WHEREAS the Congress has directed the development of such national security emergency preparedness plans and has provided funds for the accomplishment thereof;

NOW, THEREFORE, by virtue of the authority vested in me as President by the Constitution and laws of the United States of America, and pursuant to Reorganization Plan No. 1 of 1958 (72 Stat. 1799) [set out above], the National Security Act of 1947, as amended [50 U.S.C.A. § 401 et seq.], the Defense Production Act of 1950, as amended [50 U.S.C.A. § 2061 et seq.], and the Federal Civil Defense Act, as amended, it is hereby ordered that the responsibilities of the Federal departments and agencies in national security emergencies shall be as follows:

PART 1—PREAMBLE

Section 101. National Security Emergency Preparedness Policy.

(a) The policy of the United States is to have sufficient capabilities at all levels of government to meet essential defense and civilian needs during any national security emergency. A national security emergency is any occurrence, including natural disaster, military attack, technological emergency, or other emergency, that seriously degrades or seriously threatens the national security of the United States. Policy for national security emergency preparedness shall be established by the President. Pursuant to the President's direction, the National Security Council shall be responsible for developing and administering such policy. All national security emergency preparedness activities shall be consistent with the Constitution and laws of the United States and with preservation of the constitutional government of the United States.

(b) Effective national security emergency preparedness planning requires: identification of functions that would have to be performed during such an emergency; development of plans for performing these functions; and development of the capability to execute those plans.

Sec. 102. Purpose.

(a) The purpose of this Order is to assign national security emergency preparedness responsibilities to Federal departments and agencies. These assignments are based, whenever possible, on extensions of the regular missions of the departments and agencies.

(b) This Order does not constitute authority to implement the plans prepared pursuant to this Order. Plans so developed may be executed only in the event that authority for such execution is authorized by law.

Sec. 103. Scope.

(a) This Order addresses national security emergency preparedness functions and activities. As used in this Order, preparedness functions and activities include, as appropriate, policies, plans, procedures, and readiness measures that enhance the ability of the United States Government to mobilize for, respond to, and recover from a national security emergency.

(b) This Order does not apply to those natural disasters, technological emergencies, or other emergencies, the alleviation of which is normally the responsibility of individuals, the private sector, volunteer organizations, State and local governments, and Federal departments and agencies unless such situations also constitute a national security emergency.

(c) This Order does not require the provision of information concerning, or evaluation of, military policies, plans, programs, or states of military readiness.

(d) This Order does not apply to national security emergency preparedness telecommunications functions and responsibilities that are otherwise assigned by Executive Order 12472 [set out as a note under this section].

Sec. 104. Management of National Security Emergency Preparedness.

(a) The National Security Council is the principal forum for consideration of national security emergency preparedness policy.

(b) The National Security Council shall arrange for Executive branch liaison with, and assistance to, the Congress and the Federal judiciary on national security-emergency preparedness matters.

(c) The Director of the Federal Emergency Management Agency shall serve as an advisor to the National Security Council on issues of national security emergency preparedness, including mobilization preparedness, civil defense, continuity of government, technological disasters, and other issues, as appropriate. Pursuant to such procedures for the organization and management of the National Security Council process as the President may establish, the Director of the Federal Emergency Management Agency also shall assist in the implementation of and management of the National Security Council process as the President may establish, the Director of the Federal Emergency Management Agency also shall assist in the implementation of national security emergency preparedness policy by coordinating with the other Federal departments and agencies and with State and local governments, and by providing periodic reports to the National Security Council on implementation of national security emergency preparedness policy.

(d) National security emergency preparedness functions that are shared by more than one agency shall be coordinated by the head of the Federal department or agency having primary responsibility and shall be supported by the heads of other departments and agencies having related responsibilities.

(e) There shall be a national security emergency exercise program that shall be supported by the heads of all appropriate Federal departments and agencies.

(f) Plans and procedures will be designed and developed to provide maximum flexibility to the President for his implementation of emergency actions.

Sec. 105. Interagency Coordination.

(a) All appropriate Cabinet members and agency heads shall be consulted regarding national security emergency preparedness programs and policy issues. Each department and agency shall support interagency coordination to improve preparedness and response to a national security emergency and shall develop and maintain decentralized capabilities wherever feasible and appropriate.

(b) Each Federal department and agency shall work within the framework established by, and cooperate with those organizations assigned responsibility in, Executive Order No. 12472 [set out as a note under this section], to ensure adequate national security emergency preparedness telecommunications in support of the functions and activities addressed by this Order.

PART 2—GENERAL PROVISIONS

Sec. 201. General. The head of each Federal department and agency, as appropriate, shall:

(1) Be prepared to respond adequately to all national security emergencies, including those that are international in scope, and those that may occur within any region of the Nation;

(2) Consider national security emergency preparedness factors in the conduct of his or her regular functions, particularly those functions essential in time of emergency. Emergency plans and programs, and an appropriate state of readiness, including organizational infrastructure, shall be developed as an integral part of the continuing activities of each Federal department and agency;

(3) Appoint a senior policy official as Emergency Coordinator, responsible for developing and maintaining a multi-year, national security emergency preparedness plan for the department or agency to include objectives, programs, and budgetary requirements;

(4) Design preparedness measures to permit a rapid and effective transition from routine to emergency operations, and to make effective use of the period following initial indication of a probable national security emergency. This will include:

(a) Development of a system of emergency actions that defines alternatives, processes, and issues to be considered during various stages of national security emergencies;

(b) Identification of actions that could be taken in the early stages of a national security emergency or pending national security emergency to mitigate the impact of or reduce significantly the lead times associated with full emergency action implementation;

(5) Base national security emergency preparedness measures on the use of existing authorities, organizations, resources, and systems to the maximum extent practicable;

(6) Identify areas where additional legal authorities may be needed to assist management and, consistent with applicable Executive orders, take appropriate measures toward acquiring those authorities;

(7) Make policy recommendations to the National Security Council regarding national security emergency preparedness activities and functions of the Federal Government;

(8) Coordinate with State and local government agencies and other organizations, including private sector organizations, when appropriate. Federal plans should include appropriate involvement of and reliance upon private sector organizations in the response to national security emergencies;

(9) Assist State, local, and private sector entities in developing plans for mitigating the effects of national security emergencies and for providing services that are essential to a national response;

(10) Cooperate, to the extent appropriate, in compiling, evaluating, and exchanging relevant data related to all aspects of national security emergency preparedness;

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(11) Develop programs regarding congressional relations and public information that could be used during national security emergencies;

(12) Ensure a capability to provide, during a national security emergency, information concerning Acts of Congress, presidential proclamations, Executive orders, regulations, and notices of other actions to the Archivist of the United States, for publication in the *Federal Register*, or to each agency designated to maintain the *Federal Register* in an emergency;

(13) Develop and conduct training and education programs that incorporate emergency preparedness and civil defense information necessary to ensure an effective national response;

(14) Ensure that plans consider the consequences for essential services provided by State and local governments, and by the private sector, if the flow of Federal funds is disrupted;

(15) Consult and coordinate with the Director of the Federal Emergency Management Agency to ensure that those activities and plans are consistent with current National Security Council guidelines and policies.

Sec. 202. Continuity of Government. The head of each Federal department and agency shall ensure the continuity of essential functions in any national security emergency by providing for: succession to office and emergency delegation of authority in accordance with applicable law; safekeeping of essential resources, facilities, and records; and establishment of emergency operating capabilities.

Sec. 203. Resource Management. The head of each Federal department and agency, as appropriate within assigned areas of responsibility, shall:

(1) Develop plans and programs to mobilize personnel (including reservist programs), equipment, facilities, and other resources;

(2) Assess essential emergency requirements and plan for the possible use of alternative resources to meet essential demands during and following national security emergencies;

(3) Prepare plans and procedures to share between and among the responsible agencies resources such as energy, equipment, food, land, materials, minerals, services, supplies, transportation, water, and workforce needed to carry out assigned responsibilities and other essential functions, and cooperate with other agencies in developing programs to ensure availability of such resources in a national security emergency;

(4) Develop plans to set priorities and allocate resources among civilian and military claimants;

(5) Identify occupations and skills for which there may be a critical need in the event of a national security emergency.

Sec. 204. Protection of Essential Resources and Facilities. The head of each Federal department and agency, within assigned areas of responsibility, shall:

(1) Identify facilities and resources, both government and private, essential to the national defense and national welfare, and assess their vulnerabilities and develop strategies, plans, and programs to provide for the security of such facilities and resources, and to avoid or minimize disruptions of essential services during any national security emergency;

(2) Participate in interagency activities to assess the relative importance of various facilities and resources to essential military and civilian needs and to integrate preparedness and response strategies and procedures;

(3) Maintain a capability to assess promptly the effect of attack and other disruptions during national security emergencies.

Sec. 205. Federal Benefit, Insurance, and Loan Programs. The head of each Federal department and agency that administers a loan, insurance, or benefit program that relies upon the Federal Government payment system shall coordinate with the Secretary of the Treasury in developing plans for the continuation or restoration, to the extent feasible, of such programs in national security emergencies.

Sec. 206. Research. The Director of the Office of Science and Technology Policy and the heads of Federal departments and agencies having significant research and development programs shall advise the National Security Council of scientific and technological developments that should be considered in national security emergency preparedness planning.

Sec. 207. Redelegation. The head of each Federal department and agency is hereby authorized, to the extent otherwise permitted by law, to redelegate the functions assigned by this Order, and to authorize successive redelegations to organizations, officers, or employees within the department or agency.

Sec. 208. Transfer of Functions. Recommendations for interagency transfer of any emergency preparedness function assigned under this Order or for assignment of any new emergency preparedness function shall be coordinated with all affected Federal departments and agencies before submission to the National Security Council.

Sec. 209. Retention of Existing Authority. Nothing in this Order shall be deemed to derogate from assignments of functions to any Federal department or agency or officer thereof made by law.

PART 3—DEPARTMENT OF AGRICULTURE

Sec. 301. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Secretary of Agriculture shall:

(1) Develop plans to provide for the continuation of agricultural production, food processing, storage, and distribution through the wholesale level in national security emergencies, and to provide for the domestic distribution of seed, feed, fertilizer, and farm equipment to agricultural producers;

(2) Develop plans to provide food and agricultural products to meet international responsibilities in national security emergencies;

(3) Develop plans and procedures for administration and use of Commodity Credit Corporation inventories of food and fiber resources in national security emergencies;

(4) Develop plans for the use of resources under the jurisdiction of the Secretary of Agriculture and, in consultation with the Secretaries of Commerce, Defense, and the Interior, the Board of Directors of the Tennessee Valley Authority, and the heads of other government entities, plan for the national security emergency management, production, and processing of forest products;

(5) Develop, in coordination with the Secretary of Defense, plans and programs for water to be used in agricultural production and food processing in national security emergencies;

(6) In cooperation with Federal, State, and local agencies, develop plans for a national program relating to the prevention and control of fires in rural areas of the United States caused by the effects of enemy attack or other national security emergencies;

(7) Develop plans to help provide the Nation's farmers with production resources, including national security emergency financing capabilities;

(8) Develop plans, in consonance with those of the Department of Health and Human Services, the Department of the Interior, and the Environmental Protection Agency, for national security emergency agricultural health services and forestry, including:

(a) Diagnosis and control or eradication of diseases, pests, or hazardous agents (biological, chemical, or radiological) against animals, crops, timber, or products thereof;

(b) Protection, treatment, and handling of livestock and poultry, or products thereof, that have been exposed to or affected by hazardous agents;

(c) Use and handling of crops, agricultural commodities, timber, and agricultural lands that have been exposed to or affected by hazardous agents; and

(d) Assuring the safety and wholesomeness, and minimizing losses from hazards, of animals and animal products and agricultural commodities and products subject to continuous inspection by the Department of Agriculture or owned by the Commodity Credit Corporation or by the Department of Agriculture;

(9) In consultation with the Secretary of State and the Director of the Federal Emergency Management Agency, represent the United States in agriculture-related international civil emergency preparedness planning and related activities.

Sec. 302. Support Responsibility. The Secretary of Agriculture shall assist the Secretary of Defense in formulating and carrying out plans for stockpiling strategic and critical agricultural materials.

PART 4—DEPARTMENT OF COMMERCE

Sec. 401. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Secretary of Commerce shall:

(1) Develop control systems for priorities, allocation, production, and distribution of materials and other resources that will be available to support both national defense and essential civilian programs in a national security emergency;

(2) In cooperation with the Secretary of Defense and other departments and agencies, identify those industrial products and facilities that are essential to mobilization readiness, national

(3) In cooperation with the Secretary of Defense and other Federal departments and agencies, analyze potential effects of national security emergencies on actual production capability, taking into account the entire production complex, including shortages of resources, and develop preparedness measures to strengthen capabilities for production increases in national security emergencies;

(4) In cooperation with the Secretary of Defense, perform industry analyses to assess capabilities of the commercial industrial base to support the national defense, and develop policy alternatives to improve the international competitiveness of specific domestic industries and their abilities to meet defense program needs;

(5) In cooperation with the Secretary of the Treasury, develop plans for providing emergency assistance to the private sector through direct or participation loans for the financing of production facilities and equipment;

(6) In cooperation with the Secretaries of State, Defense, Transportation, and the Treasury, prepare plans to regulate and control exports and imports in national security emergencies;

(7) Provide for the collection and reporting of census information on human and economic resources, and maintain a capability to conduct emergency surveys to provide information on the status of these resources as required for national security purposes;

(8) Develop overall plans and programs to ensure that the fishing industry continues to produce and process essential protein in national security emergencies;

(9) Develop plans to provide meteorological, hydrologic, marine weather, geodetic, hydrographic, climatic, seismic, and oceanographic data and services to Federal, State, and local agencies, as appropriate;

(10) In coordination with the Secretary of State and the Director of the Federal Emergency Management Agency, represent the United States in industry-related international (NATO and allied) civil emergency preparedness planning and related activities.

Sec. 402. Support Responsibilities. The Secretary of Commerce shall:

(1) Assist the Secretary of Defense in formulating and carrying out plans for stockpiling strategic and critical materials;

(2) Support the Secretary of Agriculture in planning for the national security management, production, and processing of forest and fishery products;

(3) Assist, in consultation with the Secretaries of State and Defense, the Secretary of the Treasury in the formulation and execution of economic measures affecting other nations.

[See pocket part for text of Secs. 101 to 402]

PART 5—DEPARTMENT OF DEFENSE

Sec. 501. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Secretary of Defense shall:

(1) Ensure military preparedness and readi-

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(2) In coordination with the Secretary of Commerce, develop, with industry, government, and the private sector, reliable capabilities for the rapid increase of defense production to include industrial resources required for that production;

(3) Develop and maintain, in cooperation with the heads of other departments and agencies, national security emergency plans, programs, and mechanisms to ensure effective mutual support between and among the military, civil government, and the private sector;

(4) Develop and maintain damage assessment capabilities and assist the Director of the Federal Emergency Management Agency and the heads of other departments and agencies in developing and maintaining capabilities to assess attack damage and to estimate the effects of potential attack on the Nation;

(5) Arrange, through agreements with the heads of other Federal departments and agencies, for the transfer of certain Federal resources to the jurisdiction and/or operational control of the Department of Defense in national security emergencies;

(6) Acting through the Secretary of the Army, develop, with the concurrence of the heads of all affected departments and agencies, overall plans for the management, control, and allocation of all usable waters from all sources within the jurisdiction of the United States. This includes:

(a) Coordination of national security emergency water resource planning at the national, regional, State, and local levels;

(b) Development of plans to assure emergency provision of water from public works projects under the jurisdiction of the Secretary of the Army to public water supply utilities and critical defense production facilities during national security emergencies;

(c) Development of plans to assure emergency operation of waterways and harbors; and

(d) Development of plans to assure the provision of potable water;

(7) In consultation with the Secretaries of State and Energy, the Director of the Federal Emergency Management Agency, and others, as required, develop plans and capabilities for identifying, analyzing, mitigating, and responding to hazards related to nuclear weapons, materials, and devices; and maintain liaison, as appropriate, with the Secretary of Energy and the Members of the Nuclear Regulatory Commission to ensure the continuity of nuclear weapons production and the appropriate allocation of scarce resources, including the recapture of special nuclear materials from Nuclear Regulatory Commission licensees when appropriate;

(8) Coordinate with the Administrator of the National Aeronautics and Space Adminstration [sic] and the Secretary of Energy, as appropriate, to prepare for the use, maintenance, and development of technologically advanced aerospace and aeronautical-related systems, equipment, and methodologies applicable to national security emergencies;

(9) Develop, in coordination with the Secretary of Health and Human Services, the Director of the Federal Emergency Management Agency, the Director of the Federal Preparedness Agency of the General Services Administration, the Director of the Selective Service System, the Office of Personnel Management, and the Federal Emergency Management Agency, plans and systems to ensure that the Nation's human resources are available to meet essential military and civilian needs in national security emergencies;

(10) Develop national security emergency operational procedures, and coordinate with the Secretary of Housing and Urban Development with respect to residential property, for the control, acquisition, leasing, assignment and priority of occupancy of real property within the jurisdiction of the Department of Defense;

(11) Review the priorities and allocations systems developed by other departments and agencies to ensure that they meet Department of Defense needs in a national security emergency; and develop and maintain the Department of Defense programs necessary for effective utilization of all priorities and allocations systems;

(12) Develop, in coordination with the Attorney General of the United States, specific procedures by which military assistance to civilian law enforcement authorities may be requested, considered, and provided;

(13) In cooperation with the Secretary of Commerce and other departments and agencies, identify those industrial products and facilities that are essential to mobilization readiness, national defense, or post-attack survival and recovery;

(14) In cooperation with the Secretary of Commerce and other Federal departments and agencies, analyze potential effects of national security emergencies on actual production capability, taking into account the entire production complex, including shortages of resources, and develop preparedness measures to strengthen capabilities for production increases in national security emergencies;

(15) With the assistance of the heads of other Federal departments and agencies, provide management direction for the stockpiling of strategic and critical materials, conduct storage, maintenance, and quality assurance operations for the stockpile of strategic and critical materials, and formulate plans, programs, and reports relating to the stockpiling of strategic and critical materials.

(16) Subject to the direction of the President, and pursuant to procedures to be developed jointly by the Secretary of Defense and the Secretary of State, be responsible for the deployment and use of military forces for the protection of United States citizens and nationals and, in connection therewith, designated other persons or categories of persons, in support of their evacuation from threatened areas overseas.

Sec. 502. Support Responsibilities. The Secretary of Defense shall:

(1) Advise and assist the heads of other Federal departments and agencies in the development of plans and programs to support national mobilization. This includes providing, as appropriate:

(a) Military requirements, prioritized and time-phased to the extent possible, for selected end-items and supporting services, materials, and facilities;

(b) Recommendations for use of financial incentives and other methods to improve defense production as provided by law; and

(c) Recommendations for export and import policies;

(2) Advise and assist the Secretary of State and the heads of other Federal departments and agencies, as appropriate, in planning for the protection, evacuation, and repatriation of United States citizens in threatened areas overseas;

(3) Support the Secretary of Housing and Urban Development and the heads of other agencies, as appropriate, in the development of plans to restore community facilities;

(4) Support the Secretary of Energy in international liaison activities pertaining to nuclear materials facilities;

(5) In consultation with the Secretaries of State and Commerce, assist the Secretary of the Treasury in the formulation and execution of economic measures that affect other nations;

(6) Support the Secretary of State and the heads of other Federal departments and agencies as appropriate in the formulation and implementation of foreign policy, and the negotiation of contingency and post-emergency plans, intergovernmental agreements, and arrangements with allies and friendly nations, which affect national security;

(7) Coordinate with the Director of the Federal Emergency Management Agency the development of plans for mutual civil-military support during national security emergencies;

(8) Develop plans to support the Secretary of Labor in providing education and training to overcome shortages of critical skills.

[See pocket part for text of Secs. 601 to end]

PART 6—DEPARTMENT OF EDUCATION

Sec. 601. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Secretary of Education shall:

(1) Assist school systems in developing their plans to provide for the earliest possible resumption of activities following national security emergencies;

(2) Develop plans to provide assistance, including efforts to meet shortages of critical educational personnel, to local educational agencies;

(3) Develop plans, in coordination with the Director of the Federal Emergency Management Agency, for dissemination of emergency preparedness instructional material through educational institutions and the media during national security emergencies.

Sec. 602. Support responsibilities. The Secretary of Education shall:

(1) Develop plans to support the Secretary of Labor in providing education and training to overcome shortages of critical skills;

(2) Support the Secretary of Health and Human Services in the development of human services educational and training materials, including self-help program materials for use by human service organizations and professional

PART 7—DEPARTMENT OF ENERGY

Sec. 701. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Secretary of Energy shall:

(1) Conduct national security emergency preparedness planning, including capabilities development, and administer operational programs for all energy resources, including:

(a) Providing information, in cooperation with Federal, State, and energy industry officials, on energy supply and demand conditions and on the requirements for and the availability of materials and services critical to energy supply systems;

(b) In coordination with appropriate departments and agencies and in consultation with the energy industry, develop implementation plans and operational systems for priorities and allocation of all energy resource requirements for national defense and essential civilian needs to assure national security emergency preparedness;

(c) Developing, in consultation with the Board of Directors of the Tennessee Valley Authority, plans necessary for the integration of its power system into the national supply system;

(2) Identify energy facilities essential to the mobilization, deployment, and sustainment of resources to support the national security and national welfare, and develop energy supply and demand strategies to ensure continued provision of minimum essential services in national security emergencies;

(3) In coordination with the Secretary of Defense, ensure continuity of nuclear weapons production consistent with national security requirements;

(4) Assure the security of nuclear materials, nuclear weapons, or devices in the custody of the Department of Energy, as well as the security of all other Department of Energy programs and facilities;

(5) In consultation with the Secretaries of State and Defense and the Director of the Federal Emergency Management Agency, conduct appropriate international liaison activities pertaining to matters within the jurisdiction of the Department of Energy;

(6) In consultation with the Secretaries of State and Defense, the Director of the Federal Emergency Management Agency, the Members of the Nuclear Regulatory Commission, and others, as required, develop plans and capabilities for identification, analysis, damage assessment, and mitigation of hazards from nuclear weapons, materials, and devices;

(7) Coordinate with the Secretary of Transportation in the planning and management of transportation resources involved in the bulk movement of energy;

(8) At the request of or with the concurrence of the Nuclear Regulatory Commission and in consultation with the Secretary of Defense, recapture special nuclear materials from Nuclear Regulatory Commission licensees where necessary to assure the use, preservation, or safeguarding of such material for the common de-

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Title VII, § 753, Oct. 22, 1999, 113 Stat. 1170, provided that:

"Section 1. Short title.

"This Act [this note] may be cited as the 'National Drought Policy Act of 1998'.

"Sec. 2. Findings.

"Congress finds that—

"(1) the United States often suffers serious economic and environmental losses from severe regional droughts and there is no coordinated Federal strategy to respond to such emergencies;

"(2) at the Federal level, even though historically there have been frequent, significant droughts of national consequences, drought is addressed mainly through special legislation and ad hoc action rather than through a systematic and permanent process as occurs with other natural disasters;

"(3) there is an increasing need, particularly at the Federal level, to emphasize preparedness, mitigation, and risk management (rather than simply crisis management) when addressing drought and other natural disasters or emergencies;

"(4) several Federal agencies have a role in drought from predicting, forecasting, and monitoring of drought conditions to the provision of planning, technical, and financial assistance;

"(5) there is no single Federal agency in a lead or coordinating role with regard to drought;

"(6) State, local, and tribal governments have had to deal individually and separately with each Federal agency involved in drought assistance; and

"(7) the President should appoint an advisory commission to provide advice and recommendations on the creation of an integrated, coordinated Federal policy designed to prepare for, mitigate the impacts of, respond to, and recover from serious drought emergencies.

"Sec. 3. Establishment of Commission.

"(a) Establishment.—There is established a commission to be known as the National Drought Policy Commission (hereafter in this Act [this note] referred to as the 'Commission').

"(b) Membership.—

"(1) Composition.—The Commission shall be composed of 16 members. The members of the Commission shall include—

"(A) the Secretary of Agriculture, or the designee of the Secretary, who shall chair the Commission;

"(B) the Secretary of the Interior, or the designee of the Secretary;

"(C) the Secretary of the Army, or the designee of the Secretary;

"(D) the Secretary of Commerce, or the designee of the Secretary;

"(E) the Director of the Federal Emergency Management Agency, or the designee of the Director;

"(F) the Administrator of the Small Business Administration, or the designee of the Administrator;

"(G) two governors, who may be represented on the Commission by their respective designees, nominated by the National Governors' Association and appointed by the President, of whom—

"(i) one shall be the governor of a State east of the Mississippi River; and

"(ii) one shall be a governor of a State west of the Mississippi River;

"(H) a person nominated by the National Association of Counties and appointed by the President;

"(I) a person nominated by the United States Conference of Mayors and appointed by the President; and

"(J) six persons, appointed by the Secretary of Agriculture in coordination with the Secretary of the Interior and the Secretary of the Army, who shall be representative of groups acutely affected by drought emergencies, such as the agricultural production community, the credit community, rural and urban water associations, Native Americans, and fishing and environmental interests.

"(2) Date.—The appointments of the members of the Commission shall be made no later than 60 days after the date of the enactment of this Act [July 16, 1998].

"(c) Period of appointment; vacancies.—Members shall be appointed for the life of the Commission. Any vacancy in the Commission shall not affect its powers, but shall be filled in the same manner as the original appointment.

"(d) Initial meeting.—No later than 30 days after the date on which all members of the Commission have been appointed, the Commission shall hold its first meeting.

"(e) Meetings.—The Commission shall meet at the call of the chair.

"(f) Quorum.—A majority of the members of the Commission shall constitute a quorum, but a lesser number of members may hold hearings.

"(g) Vice chair.—The Commission shall select a vice chair from among the members who are not Federal officers or employees.

"Sec. 4. Duties of the Commission.

"(a) Study and report.—The Commission shall conduct a thorough study and submit a report on national drought policy in accordance with this section [section 4 of this note].

"(b) Content of study and report.—In conducting the study and report, the Commission shall—

"(1) determine, in consultation with the National Drought Mitigation Center in Lincoln, Nebraska, and other appropriate entities, what needs exist on the Federal, State, local, and tribal levels to prepare for and respond to drought emergencies;

"(2) review all existing Federal laws and programs relating to drought;

"(3) review State, local, and tribal laws and programs relating to drought that the Commission finds pertinent;

"(4) determine what differences exist between the needs of those affected by drought and the ability of Federal, State, local, and tribal governments to mitigate the impacts of and respond to drought;

"(5) collaborate with the Western Drought Coordination Council and other appropriate entities in order to consider regional drought initiatives and the application of such initiatives at the national level;

"(6) make recommendations on how Federal drought laws and programs can be better integrated with ongoing State, local, and tribal programs into a comprehensive national policy to mitigate the impacts of and respond to drought emergencies without diminishing the rights of States to control water through State law and considering the need for protection of the environment;

"(7) make recommendations on improving public awareness of the need for drought mitigation, and prevention; and response on developing a coordinated approach to drought mitigation, prevention, and response by governmental and nongovernmental entities, including academic, private, and nonprofit interests; and

"(8) include a recommendation on whether all Federal drought preparation and response programs should be consolidated under one existing Federal agency and, if so, identify such agency.

"(c) Submission of report.—

"(1) In general.—No later than 18 months after the date of the enactment of this Act [July 16, 1998], the Commission shall submit a report to the President and Congress which shall contain a detailed statement of the findings and conclusions of the Commission, together with its recommendations for such legislation and administrative actions as it considers appropriate.

"(2) Approval of report.—Before submission of the report, the contents of the report shall be approved by unanimous consent or majority vote. If the report is approved by majority vote, members voting not to approve the contents shall be given the opportunity to submit dissenting views with the report.

"Sec. 5. Powers of the Commission.

"(a) Hearings.—The Commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers necessary to carry out the purposes of this Act [this note].

"(b) Information from Federal agencies.—The Commission may secure directly from any Federal department or agency such information as the Commission considers necessary to carry out the provisions of this Act [this note]. Upon request of the chair of the Commission, the head of such department or agency shall furnish such information to the Commission.

"(c) Postal services.—The Commission may use the United States mails in the same manner and under the same conditions as other departments and agencies of the Federal Government.

"(d) Gifts.—The Commission may accept, use, and dispose of gifts or donations of services or property.

"Sec. 6. Commission personnel matters.

"(a) Compensation of members.—Each member of the Commission who is not an officer or employee of the Federal Government shall not be compensated for service on the Commission, except as provided under subsection (b). All members of the Commission who are officers or employees of the United States shall serve without compensation in addition to that received for their services as officers or employees of the United States.

"(b) Travel expenses.—The members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code [section 5701 et seq. of Title 5], while away from their homes or regular places of business in the performance of services for the Commission.

"(c) Detail of Government employees.—Any Federal Government employee may be detailed to the Commission without reimbursement, and such detail shall be without interruption or loss of civil service status or privilege.

"(d) Administrative support.—The Secretary of Agriculture shall provide all financial, administrative, and staff support services for the Commission.

"Sec. 7. Termination of the Commission.

"The Commission shall terminate 90 days after the date on which the Commission submits its report under section 4 [of this note]."

LIBRARY REFERENCES

Encyclopedias

Provisions for disbursement of federal funds; disaster aid generally, see C.J.S. United States § 122 et seq.

70 Am Jur 2d, Welfare Laws § 44.

Law Review and Journal Commentaries

Helping hands: Aid for natural disaster homeless vs. Aid for ordinary homeless. David W. Sar, 7:1 Stan. Law & Pol'y Rev. 129 (1995–96).

Texts and Treatises

18 Fed Proc L Ed, Housing and Urban Development, § 44:539.

7 Fed Proc L Ed, Condemnation of Property § 14:374.

20 Fed Proc L Ed, Internal Revenue § 48:862.

§ 5122. Definitions

As used in this chapter—

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(9) Develop national security emergency operational procedures for the control, utilization, acquisition, leasing, assignment, and priority of occupancy of real property within the jurisdiction of the Department of Energy;

(10) Manage all emergency planning and response activities pertaining to Department of Energy nuclear facilities.

Sec. 702. Support Responsibilities. The Secretary of Energy shall:

(1) Provide advice and assistance, in coordination with appropriate agencies, to Federal, State, and local officials and private sector organizations to assess the radiological impact associated with national security emergencies;

(2) Coordinate with the Secretaries of Defense and the Interior regarding the operation of hydroelectric projects to assure maximum energy output;

(3) Support the Secretary of Housing and Urban Development and the heads of other agencies, as appropriate, in the development of plans to restore community facilities;

(4) Coordinate with the Secretary of Agriculture regarding the emergency preparedness of the rural electric supply systems throughout the Nation and the assignment of emergency preparedness responsibilities to the Rural Electrification Administration.

PART 8—DEPARTMENT OF HEALTH AND HUMAN SERVICES

Sec. 801. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Secretary of Health and Human Services shall:

(1) Develop national plans and programs to mobilize the health industry and health resources for the provision of health, mental health, and medical services in national security emergencies;

(2) Promote the development of State and local plans and programs for provision of health, mental health, and medical services in national security emergencies;

(3) Develop national plans to set priorities and allocate health, mental health, and medical services' resources among civilian and military claimants;

(4) Develop health and medical survival information programs and a nationwide program to train health and mental health professionals and paraprofessionals in special knowledge and skills that would be useful in national security emergencies;

(5) Develop programs to reduce or eliminate adverse health and mental health effects produced by hazardous agents (biological, chemical, or radiological), and, in coordination with appropriate Federal agencies, develop programs to minimize property and environmental damage associated with national security emergencies;

(6) Develop guidelines that will assure reasonable and prudent standards of purity and/or safety in the manufacture and distribution of food, drugs, biological products, medical devices, food additives, and radiological products in national security emergencies;

(7) Develop national plans for assisting State and local governments in rehabilitation of persons injured or disabled during national security emergencies;

(8) Develop plans and procedures to assist State and local governments in the provision of emergency human services, including lodging, feeding, clothing, registration and inquiry, social services, family reunification and mortuary services and interment;

(9) Develop, in coordination with the Secretary of Education, human services educational and training materials for use by human service organizations and professional schools, and develop and distribute, in coordination with the Director of the Federal Emergency Management Agency, civil defense information relative to emergency human services;

(10) Develop plans and procedures in coordination with the heads of Federal departments and agencies, for assistance to United States citizens or others evacuated from overseas areas.

Sec. 802. Support Responsibility. The Secretary of Health and Human Services shall support the Secretary of Agriculture in the development of plans related to national security emergency agricultural health services.

PART 9—DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Sec. 901. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Secretary of Housing and Urban Development shall:

(1) Develop plans for provision and management of housing in national security emergencies, including:

(a) Providing temporary housing using Federal financing and other arrangements;

(b) Providing for radiation protection by encouraging voluntary construction of shelters and voluntary use of cost-efficient design and construction techniques to maximize population protection;

(2) Develop plans, in cooperation with the heads of other Federal departments and agencies and State and local governments, to restore community facilities, including electrical power, potable water, and sewage disposal facilities, damaged in national security emergencies.

PART 10—DEPARTMENT OF THE INTERIOR

Sec. 1001. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Secretary of the Interior shall:

(1) Develop programs and encourage the exploration, development, and mining of strategic and critical and other nonfuel minerals for national security emergency purposes;

(2) Provide guidance to mining industries in the development of plans and programs to ensure continuity of production during national security emergencies;

(3) Develop and implement plans for the management, control, allocation, and use of public land under the jurisdiction of the Department of the Interior in national security emergencies and coordinate land emergency planning at the Federal, State, and local levels.

Sec. 1002. Support Responsibilities. The Secretary of the Interior shall:

(1) Assist the Secretary of Defense in formulating and carrying out plans for stockpiling strategic and critical minerals;

(2) Cooperate with the Secretary of Commerce in the identification and evaluation of facilities essential for national security emergencies;

(3) Support the Secretary of Agriculture in planning for the national security management, production, and processing of forest products.

PART 11—DEPARTMENT OF JUSTICE

Sec. 1101. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Attorney General of the United States shall:

(1) Provide legal advice to the President and the heads of Federal departments and agencies and their successors regarding national security emergency powers, plans, and authorities;

(2) Coordinate Federal Government domestic law enforcement activities related to national security emergency preparedness, including Federal law enforcement liaison with, and assistance to, State and local governments;

(3) Coordinate contingency planning for national security emergency law enforcement activities that are beyond the capabilities of State and local agencies;

(4) Develop national security emergency plans for regulation of immigration, regulation of nationals of enemy countries, and plans to implement laws for the control of persons entering or leaving the United States;

(5) Develop plans and procedures for the custody and protection of prisoners and the use of Federal penal and correctional institutions and resources during national security emergencies;

(6) Provide information and assistance to the Federal Judicial branch and the Federal Legislative branch concerning law enforcement, continuity of government, and the exercise of legal authority during national security emergencies;

(7) Develop intergovernmental and interagency law enforcement plans and counterterrorism programs to interdict and respond to terrorism incidents in the United States that may result in a national security emergency or that occur during such an emergency;

(8) Develop intergovernmental and interagency law enforcement plans to respond to civil disturbances that may result in a national security emergency or that occur during such an emergency.

Sec. 1102. Support Responsibilities. The Attorney General of the United States shall:

(1) Assist the heads of Federal departments and agencies, State and local governments, and the private sector in the development of plans to physically protect essential resources and facilities;

(2) Support the Secretaries of State and the Treasury in plans for the protection of international organizations and foreign diplomatic, consular, and other official personnel, property, and other assets within the jurisdiction of the United States;

(3) Support the Secretary of the Treasury in developing plans to control the movement of property entering and leaving the United States;

(4) Support the heads of other Federal departments and agencies and State and local governments in developing programs and plans for identifying fatalities and reuniting families in national security emergencies;

(5) Support the intelligence community in the planning of its counterintelligence and counterterrorism programs.

PART 12—DEPARTMENT OF LABOR

Sec. 1201. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Secretary of Labor shall:

(1) Develop plans and issue guidance to ensure effective use of civilian workforce resources during national security emergencies. Such plans shall include, but not necessarily be limited to:

(a) Priorities and allocations, recruitment, referral, training, employment stabilization including appeals procedures, use assessment, and determination of critical skill categories; and

(b) Programs for increasing the availability of critical workforce skills and occupations;

(2) In consultation with the Secretary of the Treasury, develop plans and procedures for wage, salary, and benefit costs stabilization during national security emergencies;

(3) Develop plans and procedures for protecting and providing incentives for the civilian labor force during national security emergencies;

(4) In consultation with other appropriate government agencies and private entities, develop plans and procedures for effective labor-management relations during national security emergencies.

Sec. 1202. Support Responsibilities. The Secretary of Labor shall:

(1) Support planning by the Secretary of Defense and the private sector for the provision of human resources to critical defense industries during national security emergencies;

(2) Support planning by the Secretary of Defense and the Director of Selective Service for the institution of conscription in national security emergencies.

PART 13—DEPARTMENT OF STATE

Sec. 1301. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Secretary of State shall:

(1) Provide overall foreign policy coordination in the formulation and execution of continuity of government and other national security emergency preparedness activities that affect foreign relations;

(2) Prepare to carry out Department of State responsibilities in the conduct of the foreign relations of the United States during national security emergencies, under the direction of the President and in consultation with the heads of other appropriate Federal departments and agencies, including but not limited to:

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(a) Formulation and implementation of foreign policy and negotiation regarding contingency and post-emergency plans, intergovernmental agreements, and arrangements with United States' allies;

(b) Formulation, negotiation, and execution of policy affecting the relationships of the United States with neutral states;

(c) Formulation and execution of political strategy toward hostile or enemy states;

(d) Conduct of mutual assistance activities;

(e) Provision of foreign assistance, including continuous supervision and general direction of authorized economic and military assistance programs;

(f) Protection or evacuation of United States citizens and nationals abroad and safeguarding their property abroad, in consultation with the Secretaries of Defense and Health and Human Services;

(g) Protection of international organizations and foreign diplomatic, consular, and other official personnel and property, or other assets, in the United States, in coordination with the Attorney General and the Secretary of the Treasury;

(h) Formulation of policies and provisions for assistance to displaced persons and refugees abroad;

(i) Maintenance of diplomatic and consular representation abroad; and

(j) Reporting of and advising on conditions overseas that bear upon national security emergencies.

Sec. 1302. Support Responsibilities. The Secretary of State shall:

(1) Assist appropriate agencies in developing planning assumptions concerning accessibility of foreign sources of supply;

(2) Support the Secretary of the Treasury, in consultation, as appropriate, with the Secretaries of Commerce and Defense, in the formulation and execution of economic measures with respect to other nations;

(3) Support the Secretary of Energy in international liaison activities pertaining to nuclear materials facilities;

(4) Support the Director of the Federal Emergency Management Agency in the coordination and integration of United States policy regarding the formulation and implementation of civil emergency resources and preparedness planning;

(5) Assist the Attorney General of the United States in the formulation of national security emergency plans for the control of persons entering or leaving the United States.

PART 14—DEPARTMENT OF TRANSPORTATION

Sec. 1401. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Secretary of Transportation shall:

(1) Develop plans to promulgate and manage overall national policies, programs, procedures, and systems to meet essential civil and military transportation needs in national security emergencies;

(2) Be prepared to provide direction to all modes of civil transportation in national security emergencies, including air, surface, water, pipelines, and public storage and warehousing, to the extent such responsibility is vested in the Secretary of Transportation. This direction may include:

(a) Implementation of priorities for all transportation resource requirements for service, equipment, facilities, and systems;

(b) Allocation of transportation resource capacity; and

(c) Emergency management and control of civil transportation resources and systems, including privately owned automobiles, urban mass transit, intermodal transportation systems, the National Railroad Passenger Corporation and the St. Lawrence Seaway Development Corporation;

(3) Develop plans to provide for the smooth transition of the Coast Guard as a service to the Department of the Navy during national security emergencies. These plans shall be compatible with the Department of Defense planning systems, especially in the areas of port security and military readiness;

(4) In coordination with the Secretary of State and the Director of the Federal Emergency Management Agency, represent the United States in transportation-related international (including NATO and allied) civil emergency preparedness planning and related activities;

(5) Coordinate with State and local highway agencies in the management of all Federal, State, city, local, and other highways, roads, streets, bridges, tunnels, and publicly owned highway maintenance equipment to assure efficient and safe use of road space during national security emergencies;

(6) Develop plans and procedures in consultation with appropriate agency officials for maritime and port safety, law enforcement, and security over, upon, and under the high seas and waters subject to the jurisdiction of the United States to assure operational readiness for national security emergency functions;

(7) Develop plans for the emergency operation of U.S. ports and facilities, use of shipping resources (U.S. and others), provision of government war risks insurance, and emergency construction of merchant ships for military and civil use;

(8) Develop plans for emergency management and control of the National Airspace System, including provision of war risk insurance and for transfer of the Federal Aviation Administration, in the event of war, to the Department of Defense;

(9) Coordinate the Interstate Commerce Commission's development of plans and preparedness programs for the reduction of vulnerability, maintenance, restoration, and operation of privately owned railroads, motor carriers, inland waterway transportation systems, and public storage facilities and services in national security emergencies.

Sec. 1402. Support Responsibility. The Secretary of Transportation shall coordinate with the Secretary of Energy in the planning and [illegible] of [illegible] volved in the bulk movement of energy materials.

PART 15—DEPARTMENT OF THE TREASURY

Sec. 1501. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Secretary of the Treasury shall:

(1) Develop plans to maintain stable economic conditions and a market economy during national security emergencies; emphasize measures to minimize inflation and disruptions; and, minimize reliance on direct controls of the monetary, credit, and financial systems. These plans will include provisions for:

(a) Increasing capabilities to minimize economic dislocations by carrying out appropriate fiscal, monetary, and regulatory policies and reducing susceptibility to manipulated economic pressures;

(b) Providing the Federal Government with efficient and equitable financing sources and payment mechanisms;

(c) Providing fiscal authorities with adequate legal authority to meet resource requirements;

(d) Developing, in consultation with the Board of Governors of the Federal Reserve System, and in cooperation with the Board of Directors of the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, the National Credit Union Administration Board, the Farm Credit Administration Board and other financial institutions, plans for the continued or resumed operation and liquidity of banks, savings and loans, credit unions, and farm credit institutions, measures for the reestablishment of evidence of assets or liabilities, and provisions for currency withdrawals and deposit insurance;

(2) Provide for the protection of United States financial resources including currency and coin production and redemption facilities, Federal check disbursement facilities, and precious monetary metals;

(3) Provide for the preservation of, and facilitate emergency operations of, public and private financial institution systems, and provide for their restoration during or after national security emergencies;

(4) Provide, in coordination with the Secretary of State, for participation in bilateral and multilateral financial arrangements with foreign governments;

(5) Maintain the Federal Government accounting and financial reporting system in national security emergencies;

(6) Develop plans to protect the President, the Vice President, other officers in the order of presidential succession, and other persons designated by the President;

(7) Develop plans for restoration of the economy following an attack; for the development of emergency monetary, credit, and Federal benefit payment programs of those Federal departments and agencies that have responsibilities dependent on the policies or capabilities of the mentation of national policy on sharing war losses;

(8) Develop plans for initiating tax changes, waiving regulations, and, in conjunction with the Secretary of Commerce or other guaranteeing agency, granting or guaranteeing loans for the expansion of industrial capacity, the development of technological processes, or the production or acquisition of essential materials;

(9) Develop plans, in coordination with the heads of other appropriate Federal departments and agencies, to acquire emergency imports, make foreign barter arrangements, or otherwise provide for essential material from foreign sources using, as appropriate, the resources of the Export–Import Bank or resources available to the Bank;

(10) Develop plans for encouraging capital inflow and discouraging the flight of capital from the United States and, in coordination with the Secretary of State, for the seizure and administration of assets of enemy aliens during national security emergencies;

(11) Develop plans, in consultation with the heads of appropriate Federal departments and agencies, to regulate financial and commercial transactions with other countries;

(12) Develop plans, in coordination with the Secretary of Commerce and the Attorney General of the United States, to control the movement of property entering or leaving the United States;

(13) Cooperate and consult with the Chairman of the Securities and Exchange Commission, the Chairman of the Federal Reserve Board, the Chairman of the Commodities Futures Trading Commission in the development of emergency financial control plans and regulations for trading of stocks and commodities, and in the development of plans for the maintenance and restoration of stable and orderly markets;

(14) Develop plans, in coordination with the Secretary of State, for the formulation and execution of economic measures with respect to other nations in national security emergencies.

Sec. 1502. Support Responsibilities. The Secretary of the Treasury shall:

(1) Cooperate with the Attorney General of the United States on law enforcement activities, including the control of people entering and leaving the United States;

(2) Support the Secretary of Labor in developing plans and procedures for wage, salary, and benefit costs stabilization;

(3) Support the Secretary of State in plans for the protection of international organizations and foreign diplomatic consular, and other official personnel and property or other assets in the United States.

PART 16—ENVIRONMENTAL PROTECTION AGENCY

Sec. 1601. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Administrator of the Environmental Protection Agency shall:

(1) Develop Federal plans and foster development of State and local plans designed to

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hazardous agents (biological, chemical, or radiological) introduced into the environment in national security emergencies;

(2) Develop, for national security emergencies, guidance on acceptable emergency levels of nuclear radiation, assist in determining acceptable emergency levels of biological agents, and help to provide detection and identification of chemical agents;

(3) Develop, in coordination with the Secretary of Defense, plans to assure the provision of potable water supplies to meet community needs under national security emergency conditions, including claimancy for materials and equipment for public water systems.

Sec. 1602. Support Responsibilities. The Administrator of the Environmental Protection Agency shall:

(1) Assist the heads of other Federal agencies that are responsible for developing plans for the detection, reporting, assessment, protection against, and reduction of effects of hazardous agents introduced into the environment;

(2) Advise the heads of Federal departments and agencies regarding procedures for assuring compliance with environmental restrictions and for expeditious review of requests for essential waivers.

PART 17—FEDERAL EMERGENCY MANAGEMENT AGENCY

Sec. 1701. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Director of the Federal Emergency Management Agency shall:

(1) Coordinate and support the initiation, development, and implementation of national security emergency preparedness programs and plans among Federal departments and agencies;

(2) Coordinate the development and implementation of plans for the operation and continuity of essential domestic emergency functions of the Federal Government during national security emergencies;

(3) Coordinate the development of plans, in cooperation with the Secretary of Defense, for mutual civil-military support during national security emergencies;

(4) Guide and assist State and local governments and private sector organizations in achieving preparedness for national security emergencies, including development of plans and procedures for assuring continuity of government, and support planning for prompt and coordinated Federal assistance to States and localities in responding to national security emergencies;

(5) Provide the President a periodic assessment of Federal, State, and local capabilities to respond to national security emergencies;

(6) Coordinate the implementation of policies and programs for efficient mobilization of Federal, State, local, and private sector resources in response to national security emergencies;

(7) Develop and coordinate with all appropriate agencies civil defense programs to enhance Federal, State, local, and private sector capabilities for national security emergency crisis management, population protection, and recovery in the event of an attack on the United States;

(8) Develop and support public information, education and training programs to assist Federal, State, and local government and private sector entities in planning for and implementing national security emergency preparedness programs;

(9) Coordinate among the heads of Federal, State, and local agencies the planning, conduct, and evaluation of national security emergency exercises;

(10) With the assistance of the heads of other appropriate Federal departments and agencies, develop and maintain capabilities to assess actual attack damage and residual recovery capabilities as well as capabilities to estimate the effects of potential attacks on the Nation;

(11) Provide guidance to the heads of Federal departments and agencies on the appropriate use of defense production authorities, including resource claimancy, in order to improve the capability of industry and infrastructure systems to meet national security emergency needs;

(12) Assist the Secretary of State in coordinating the formulation and implementation of United States policy for NATO and other allied civil emergency planning, including the provision of:

(a) advice and assistance to the departments and agencies in alliance civil emergency planning matters;

(b) support to the United States Mission to NATO in the conduct of day-to-day civil emergency planning activities; and

(c) support facilities for NATO Civil Wartime Agencies in cooperation with the Departments of Agriculture, Commerce, Energy, State, and Transportation.

Sec. 1702. Support Responsibilities. The Director of the Federal Emergency Management Agency shall:

(1) Support the heads of other Federal departments and agencies in preparing plans and programs to discharge their national security emergency preparedness responsibilities, including, but not limited to, such programs as mobilization preparedness, continuity of government planning, and continuance of industry and infrastructure functions essential to national security;

(2) Support the Secretary of Energy, the Secretary of Defense, and the Members of the Nuclear Regulatory Commission in developing plans and capabilities for identifying, analyzing, mitigating, and responding to emergencies related to nuclear weapons, materials, and devices, including mobile and fixed nuclear facilities, by providing, inter alia, off-site coordination;

(3) Support the Administrator of General Services in efforts to promote a government-wide program with respect to Federal buildings and installations to minimize the effects of attack and establish shelter management organizations.

PART 18—GENERAL SERVICES ADMINISTRATION

Sec. 1801. Lead Responsibilities. In addition to the applicable responsibilities assigned in Parts 1 and 2, the Administrator of General Services shall:

(1) Develop national security emergency plans and procedures for the operation, maintenance, and protection of federally owned and occupied buildings managed by the General Services Administration, and for the construction, alteration, and repair of such buildings;

(2) Develop national security emergency operating procedures for the control, acquisition, leasing, assignment, and priority of occupancy of real property by the Federal Government, and by State and local governments acting as agents of the Federal Government, except for the military facilities and facilities with special nuclear materials within the jurisdiction of the Departments of Defense and Energy;

(3) Develop national security emergency operational plans and procedures for the use of public utility services (other than telecommunications services) by Federal departments and agencies, except for Department of Energy-operated facilities;

(4) Develop plans and operating procedures of government-wide supply programs to meet the requirements of Federal departments and agencies during national security emergencies;

(5) Develop plans and operating procedures for the use, in national security emergencies, of excess and surplus real and personal property by Federal, State, and local governmental entities;

(6) Develop plans, in coordination with the Director of the Federal Emergency Management Agency, with respect to Federal buildings and installations, to minimize the effects of attack and establish shelter management organizations;

Sec. 1802. Support Responsibility. The Administrator of General Services shall develop plans to assist Federal departments and agencies in operation and maintenance of essential automated information processing facilities during national security emergencies:[.]

PART 19—NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Sec. 1901. Lead Responsibility. In addition to the applicable responsibilities covered in Parts 1 and 2, the Administrator of the National Aeronautics and Space Administration shall coordinate with the Secretary of Defense to prepare for the use, maintenance, and development of technologically advanced aerospace and aeronautical-related systems, equipment, and methodologies applicable to national security emergencies.

PART 20—NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Sec. 2001. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Archivist of the United States shall:

(1) Develop procedures for publication during national security emergencies of the Federal Register for as broad public dissemination as is practicable of presidential proclamations and Executive orders, Federal emergency notices and actions, and Acts of Congress;

(2) Develop emergency procedures for providing instructions and advice on the handling and preservation of records critical to the operation of the Federal Government in national security emergencies.

PART 21—NUCLEAR REGULATORY COMMISSION

Sec. 2101. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Members of the Nuclear Regulatory Commission shall:

(1) Promote the development and maintenance of national security emergency preparedness programs through security and safeguards programs by licensed facilities and activities;

(2) Develop plans to suspend any licenses granted by the Commission; to order the operations of any facility licensed under Section 103 or 104; Atomic Energy Act of 1954, as amended (42 U.S.C. 2133 or 2134); to order the entry into any plant or facility in order to recapture special nuclear material as determined under Subsection (3) below; and operate such facilities;

(3) Recapture or authorize recapture of special nuclear materials from licensees where necessary to assure the use, preservation, or safeguarding of such materials for the common defense and security, as determined by the Commission or as requested by the Secretary of Energy.

Sec. 2102. Support Responsibilities. The Members of the Nuclear Regulatory Commission shall:

(1) Assist the Secretary of Energy in assessing damage to Commission-licensed facilities, identifying useable facilities, and estimating the time and actions necessary to restart inoperative facilities;

(2) Provide advice and technical assistance to Federal, State, and local officials and private sector organizations regarding radiation hazards and protective actions in national security emergencies.

PART 22—OFFICE OF PERSONNEL MANAGEMENT

Sec. 2201. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Director of the Office of Personnel Management shall:

(1) Prepare plans to administer the Federal civilian personnel system in national security emergencies, including plans and procedures for the rapid mobilization and reduction of an emergency Federal workforce;

(2) Develop national security emergency work force policies for Federal civilian personnel;

(3) Develop plans to accommodate the surge of Federal personnel security background and pre-employment investigations during national security emergencies.

Sec. 2202. Support Responsibilities. The Director of the Office of Personnel Management

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(1) Assist the heads of other Federal departments and agencies with personnel management and staffing in national security emergencies, including facilitating transfers between agencies of employees with critical skills;

(2) In consultation with the Secretary of Defense and the Director of Selective Service, develop plans and procedures for a system to control any conscription of Federal civilian employees during national security emergencies.

PART 23—SELECTIVE SERVICE SYSTEM

Sec. 2301. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Director of Selective Service shall:

(1) Develop plans to provide by induction, as authorized by law, personnel that would be required by the armed forces during national security emergencies;

(2) Develop plans for implementing an alternative service program.

PART 24—TENNESSEE VALLEY AUTHORITY

Sec. 2401. Lead Responsibility. In addition to the applicable responsibilities covered in Parts 1 and 2, the Board of Directors of the Tennessee Valley Authority shall develop plans and maintain river control operations for the prevention or control of floods affecting the Tennessee River System during national security emergencies.

Sec. 2402. Support Responsibilities. The Board of Directors of the Tennessee Valley Authority shall:

(1) Assist the Secretary of Energy in the development of plans for the integration of the Tennessee Valley Authority power system into nationwide national security emergency programs;

(2) Assist the Secretaries of Defense, Interior, and Transportation and the Chairman of the Interstate Commerce Commission in the development of plans for operation and maintenance of inland waterway transportation in the Tennessee River System during national security emergencies.

PART 25—UNITED STATES INFORMATION AGENCY

Sec. 2501. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Director of the United States Information Agency shall:

(1) Plan for the implementation of information programs to promote an understanding abroad of the status of national security emergencies within the United States;

(2) In coordination with the Secretary of State's exercise of telecommunications functions affecting United States diplomatic missions and consular offices overseas, maintain the capability to provide television and simultaneous direct radio broadcasting in major languages to all areas of the world, and the capability to provide wireless file to all United States embassies during national security emergencies.

Sec. 2502. Support Responsibility. The Director of the United States Information Agency shall assist the heads of other Federal departments and agencies in planning for the use of media resources and foreign public information programs during national security emergencies.

PART 26—UNITED STATES POSTAL SERVICE

Sec. 2601. Lead Responsibility. In addition to the applicable responsibilities covered in Parts 1 and 2, the Postmaster General shall prepare plans and programs to provide essential postal services during national security emergencies.

Sec. 2602. Support Responsibilities. The Postmaster General shall:

(1) Develop plans to assist the Attorney General of the United States in the registration of nationals of enemy countries residing in the United States;

(2) Develop plans to assist the Secretary of Health and Human Services in registering displaced persons and families;

(3) Develop plans to assist the heads of other Federal departments and agencies in locating and leasing privately owned property for Federal use during national security emergencies.

PART 27—VETERANS' ADMINISTRATION

Sec. 2701. Lead Responsibilities. In addition to the applicable responsibilities covered in Parts 1 and 2, the Administrator of Veterans' Affairs [now Secretary of Veterans Affairs] shall:

(1) Develop plans for provision of emergency health care services to veteran beneficiaries in Veterans' Administration [now Department of Veterans Affairs] medical facilities, to active duty military personnel and, as resources permit, to civilians in communities affected by national security emergencies;

(2) Develop plans for mortuary services for eligible veterans, and advise on methods for interment of the dead during national security emergencies.

Sec. 2702. Support Responsibilities. The Administrator of Veterans' Affairs [now Secretary of Veterans Affairs] shall;

(1) Assist the Secretary of Health and Human Services in promoting the development of State and local plans for the provision of medical services in national security emergencies, and develop appropriate plans to support such State and local plans;

(2) Assist the Secretary of Health and Human Services in developing national plans to mobilize the health care industry and medical resources during national security emergencies;

(3) Assist the Secretary of Health and Human Services in developing national plans to set priorities and allocate medical resources among civilian and military claimants.

PART 28—OFFICE OF MANAGEMENT AND BUDGET

Sec. 2801. In addition to the applicable responsibilities covered in Parts 1 and 2, the Director of the Office of Management and Budget shall prepare plans and programs to maintain its functions during national security emergencies. In connection with these functions, the Director of the Office of Management and Budget shall:

(1) Develop plans to ensure the preparation, clearance, and coordination of proposed Executive orders and proclamations;

(2) Prepare plans to ensure the preparation, supervision, and control of the budget and the formulation of the fiscal program of the Government;

(3) Develop plans to coordinate and communicate Executive branch views to the Congress regarding legislation and testimony by Executive branch officials;

(4) Develop plans for keeping the President informed of the activities of government agencies, continuing the Office of Management and Budget's management functions, and maintaining presidential supervision and direction with respect to legislation and regulations in national security emergencies.

PART 29—GENERAL

Sec. 2901. Executive Order Nos. 10421 [formerly set out as a note under Section 404 of Title 50, War and National Defense], and 11490 [formerly set out as a note under this section], as amended, are hereby revoked. This Order shall be effective immediately.

EXECUTIVE ORDER NO. 12657

Nov. 18, 1988, 53 F.R. 47513

FEDERAL EMERGENCY MANAGEMENT AGENCY ASSISTANCE IN EMERGENCY PREPAREDNESS PLANNING AT COMMERCIAL NUCLEAR POWER PLANTS

By the authority vested in me as President by the Constitution and laws of the United States of America, including the Federal Civil Defense Act of 1950, as amended (50 U.S.C.App. 2251 et seq.), the Disaster Relief Act of 1974, as amended (42 U.S.C. 5121 et seq.), the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.), Reorganization Plan No. 1 of 1958 [set out above], Reorganization Plan No. 1 of 1973 [set out above], and Section 301 of Title 3 of the United States Code, and in order to ensure that plans and procedures are in place to respond to radiological emergencies at commercial nuclear power plants in operation or under construction, it is hereby ordered as follows:

Section 1. Scope. (a) This Order applies whenever State or local governments, either individually or together, decline or fail to prepare commercial nuclear power plant radiological emergency preparedness plans that are sufficient to satisfy Nuclear Regulatory Commission ("NRC") licensing requirements or to participate adequately in the preparation, demonstration, testing, exercise, or use of such plans.

(b) In order to request the assistance of the Federal Emergency Management Agency ("FEMA") provided for in this Order, an affected nuclear power plant applicant or licensee ("licensee") shall certify in writing to FEMA that the situation described in Subsection (a) exists.

Sec. 2. Generally Applicable Principles and Directives. (a) Subject to the principles articulated in this Section, the Director of FEMA is hereby authorized and directed to take the actions specified in Sections 3 through 6 of this Order.

(b) In carrying out any of its responsibilities under this Order, FEMA:

(1) shall work actively with the licensee, and, before relying upon its resources or those of any other Department or agency within the Executive branch, shall make maximum feasible use of the licensee's resources;

(2) shall take care not to supplant State and local resources. FEMA shall substitute its own resources for those of the State and local governments only to the extent necessary to compensate for the nonparticipation or inadequate participation of those governments, and only as a last resort after appropriate consultation with the Governors and responsible local officials in the affected area regarding State and local participation;

(3) is authorized, to the extent permitted by law, to enter into interagency Memoranda of Understanding providing for utilization of the resources of other Executive branch Departments and agencies and for delegation to other Executive branch Departments and agencies and for delegation to other Executive branch Departments and agencies of any of the functions and duties assigned to FEMA under this Order; however, any such Memorandum of Understanding shall be subject to approval by the Director of the Office of Management and Budget ("OMB") and published in final form in the Federal Register; and

(4) shall assume for purposes of Sections 3 and 4 of this Order that, in the event of an actual radiological emergency or disaster, State and local authorities would contribute their full resources and exercise their authorities in accordance with their duties to protect the public from harm and would act generally in conformity with the licensee's radiological emergency preparedness plan.

(c) The Director of OMB shall resolve any issue concerning the obligation of Federal funds arising from the implementation of this Order. In resolving issues under this Subsection, the Director of OMB shall ensure:

(1) that FEMA has utilized to the maximum extent possible the resources of the licensee and State and local governments before it relies upon its appropriated and lawfully available resources or those of any Department or agency in the Executive branch;

(2) that FEMA shall use its existing resources to coordinate and manage, rather than duplicate, other available resources;

(3) that implementation of this Order is accomplished with an economy of resources; and

(4) that full reimbursement to the Federal Government is provided, to the extent permitted by law.

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Sec. 3. **FEMA Participation in Emergency Preparedness Planning.** (a) FEMA assistance in emergency preparedness planning shall include advice, technical assistance, and arrangements for facilities and resources as needed to satisfy the emergency planning requirements under the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.], and any other Federal legislation or regulations pertaining to issuance or retention of a construction permit or an operating license for a nuclear power plant.

(b) FEMA shall make all necessary plans and arrangements to ensure that the Federal Government is prepared to assume any and all functions and undertakings necessary to provide adequate protection to the public in cases within the scope of this Order. In making such plans and arrangements,

(1) FEMA shall focus planning of Federal response activities to ensure that:

(A) adequate resources and arrangements will exist, as of the time when an initial response is needed, given the absence or inadequacy of advance State and local commitments; and

(B) attention has been given to coordinating (including turning over) response functions when State and local governments do exercise their authority, with specific attention to the areas where prior State and local participation has been insufficient or absent;

(2) FEMA's planning for Federal participation in responding to a radiological emergency within the scope of this Order shall include, but not be limited to, arrangements for using existing Federal resources to provide prompt notification of the emergency to the general public; to assist in any necessary evacuation; to provide reception centers or shelters and related facilities and services for evacuees; to provide emergency medical services at Federal hospitals, including those operated by the military services and by the Veterans' Administration [now Department of Veterans Affairs]; and to ensure the creation and maintenance of channels of communication from commercial nuclear power plant licensees or applicants to State and local governments and to surrounding members of the public.

Sec. 4. **Evaluation of Plans.** (a) FEMA shall consider and evaluate all plans developed under the authority of this Order as though drafted and submitted by a State or local government.

(b) FEMA shall take all actions necessary to carry out the evaluation referred to in the preceding Subsection and to permit the NRC to conduct its evaluation of radiological emergency preparedness plans including, but not limited to, planning, participating in, and evaluating exercises, drills, and tests, on a timely basis, as necessary to satisfy NRC requirements for demonstrations of off-site radiological emergency preparedness.

Sec. 5. **Response to a Radiological Emergency.** (a) In the event of an actual radiological emergency or disaster, FEMA shall take all steps necessary to ensure the implementation of the plans developed under this Order and shall coordinate the actions of other Federal agencies to achieve the maximum effectiveness of Federal efforts in responding to the emergency.

(b) FEMA shall coordinate Federal response activities to ensure that adequate resources are directed, when an initial response is needed, to activities hindered by the absence or inadequacy of advance State and local commitments. FEMA shall also coordinate with State and local governmental authorities and turn over response functions as appropriate when State and local governments do exercise their authority.

(c) FEMA shall assume any necessary command-and-control function, or delegate such function to another Federal agency, in the event that no competent State and local authority is available to perform such function.

(d) In any instance in which Federal personnel may be called upon to fill a command-and-control function during a radiological emergency, in addition to any other powers it may have, FEMA or its designee is authorized to accept volunteer assistance from utility employees and other nongovernmental personnel for any purpose necessary to implement the emergency response plan and facilitate off-site emergency response.

Sec. 6. **Implementation of Order.** (a) FEMA shall issue interim and final directives and procedures implementing this Order as expeditiously as is feasible and in any event shall issue interim directives and procedures not more than 90 days following the effective date of this Order and shall issue final directives and procedures not more than 180 days following the effective date of this Order.

(b) Immediately upon the effective date of this Order, FEMA shall review, and initiate necessary revisions of, all FEMA regulations, directives, and guidance to conform them to the terms and policies of this Order.

(c) Immediately upon the effective date of this Order, FEMA shall review, and initiate necessary renegotiations of, all interagency agreements to which FEMA is a party, so as to conform them to the terms and policies of this Order. This directive shall include, but not be limited to, the Federal Radiological Emergency Response Plan (50 *Fed.Reg.* 46542 (November 8, 1985)).

(d) To the extent permitted by law, FEMA is directed to obtain full reimbursement, either jointly or severally, for services performed by FEMA or other Federal agencies pursuant to this Order from any affected licensee and from any affected nonparticipating or inadequately participating State or local government.

Sec. 7. **Amendments.** This Executive Order amends Executive Order Nos. 11490 (34 Fed. Reg. 17567 (October 28, 1969)) [formerly set out as a note under this section], 12148 (44 Fed.Reg. 43239 (July 20, 1979)) [set out as a note under this section], and 12241 (45 Fed.Reg. 64879 (September 29, 1980)) [not classified to the Code], and the same are hereby superseded to the extent that they are inconsistent with this Order.

Sec. 8. **Judicial Review.** This Order is intended only to improve the internal management of the Executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

Sec. 9. **Effective Date.** This Order shall be effective November 18, 1988.

EXECUTIVE ORDER NO. 12673

Mar. 23, 1989, 54 F.R. 12571

DELEGATION OF DISASTER RELIEF AND EMERGENCY ASSISTANCE FUNCTIONS

By virtue of the authority vested in me as President by the Constitution and laws of the United States of America, including the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5121 *et seq.*) [section 5121 et seq. of this title], and in order to conform delegations of authority to recent legislation, it is hereby ordered as follows:

Section 1. Section 4-203 of Executive Order No. 12148 [set out as a note under this section] is amended to read:

Section 4-203. The functions vested in the President by the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5121 *et seq.*), except those functions vested in the President by Section 401 (relating to the declaration of major disasters and emergencies) [section 5170 of this title], Section 501 (relating to the declaration of emergencies) [section 5191 of this title], Section 405 (relating to the repair, reconstruction, restoration, or replacement of Federal facilities) [section 5171 of this title], and Section 412 (relating to food coupons and distribution) [section 5179 of this title], are hereby delegated to the Director of the Federal Emergency Management Agency.

Sec. 2. Section 3 of Executive Order No. 11795 [set out as a note under section 5121 of this title] is amended by removing the words "Section 409" and inserting "Section 412" in place thereof.

Sec. 3. The functions vested in the President by Section 103(e)(2) of the Disaster Relief and Emergency Assistance Amendments of 1988, Public Law 100-707 (relating to the transmission of a report to the Committee on Public Works and Transportation of the House of Representatives and to the Committee on Environment and Public Works of the Senate) [set out as a note under section 5122 of this title], are hereby delegated to the Director of the Federal Emergency Management Agency.

Sec. 4. The functions vested in the President by Section 110 of the Disaster Relief and Emergency Assistance Amendments of 1988, Public Law 100-707 [set out as a note under section 5121 of this title], are hereby delegated to the Director of the Federal Emergency Management Agency.

Sec. 5. The functions vested in the President by Section 113 of the Disaster Relief and Emergency Assistance Amendments of 1988, Public Law 100-707 [set out as a note under section 5201 of this title], are hereby delegated to the Director of the Federal Emergency Management Agency.

Sec. 6. The amendments to Executive Order No. 12148 [set out as a note under this section] that are made by Section 1 of this Executive Order shall not affect the administration of any assistance for major disasters or emergencies declared by the President before the effective date of "The Disaster Relief and Emergency Assistance Amendments of 1988 [probably means the date of enactment of Pub.L. 100-707, which was approved Nov. 23, 1988]."

GEORGE BUSH

EXECUTIVE ORDER NO. 13010

July 15, 1996, 61 F.R. 37347, as amended by Ex. Ord. No. 13025, Nov. 13, 1996, 61 F.R. 58623; Ex. Ord. No. 13041, Apr. 3, 1997, 62 F.R. 17039; Ex. Ord. No. 13064, Oct. 11, 1997, 62 F.R. 53711; Ex. Ord. No. 13077, Mar. 10, 1998, 63 F.R. 12381; Ex. Ord. No. 13138, Sept. 30, 1999, 64 F.R. 53879

CRITICAL INFRASTRUCTURE PROTECTION

Certain national infrastructures are so vital that their incapacity or destruction would have a debilitating impact on the defense or economic security of the United States. These critical infrastructures include telecommunications, electrical power systems, gas and oil storage and transportation, banking and finance, transportation, water supply systems, emergency services (including medical, police, fire, and rescue), and continuity of government. Threats to these critical infrastructures fall into two categories: physical threats to tangible property ("physical threats"), and threats of electronic, radio-frequency, or computer-based attacks on the information or communications components that control critical infrastructures ("cyber threats"). Because many of these critical infrastructures is essential that the government and private sector work together to develop a strategy for protecting them and assuring their continued operation.

NOW, THEREFORE, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Establishment. There is hereby established the President's Commission on Critical Infrastructure Protection ("Commission").

(a) Chair. A qualified individual from outside the Federal Government shall be designated by the President from among the members to serve as Chair of the Commission. The Commission Chair shall be employed on a full-time

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(b) **Members.** The head of each of the following executive branch departments and agencies shall nominate not more than two full-time members of the Commission:

(i) Department of the Treasury;

(ii) Department of Justice;

(iii) Department of Defense;

(iv) Department of Commerce;

(v) Department of Transportation;

(vi) Department of Energy;

(vii) Central Intelligence Agency;

(viii) Federal Emergency Management Agency;

(ix) Federal Bureau of Investigation;

(x) National Security Agency.

One of the nominees of each agency may be an individual from outside the Federal Government who shall be employed by the agency on a full-time basis. Each nominee must be approved by the Steering Committee.

Sec. 2. The Principals Committee. The Commission shall report to the President through a Principals Committee ("Principals Committee"), which shall review any reports or recommendations before submission to the President. The Principals Committee shall comprise the:

(i) Secretary of the Treasury;

(ii) Secretary of Defense;

(iii) Attorney General;

(iv) Secretary of Commerce;

(v) Secretary of Transportation;

(vi) Secretary of Energy;

(vii) Director of Central Intelligence;

(viii) Director of the Office of Management and Budget;

(ix) Director of the Federal Emergency Management Agency;

(x) Assistant to the President for National Security Affairs;

(xi) Assistant to the Vice President for National Security Affairs.

(xii) Assistant to the President for Economic Policy and Director of the National Economic Council; and

(xiii) Assistant to the President and Director of the Office of Science and Technology Policy.

Sec. 3. The Steering Committee of the President's Commission on Critical Infrastructure Protection. A Steering Committee ("Steering Committee") shall oversee the work of the Commission on behalf of the Principals Committee. The Steering Committee shall comprise five members. Four of the members shall be appointed by the President, and the fifth member shall be the Chair of the Commission. Two of the members of the Committee shall be employees of the Executive Office of the President. The Steering Committee will receive regular reports on the progress of the Commission's work and approve the submission of reports to the Principals Committee.

Sec. 4. Mission. The Commission shall: (a) within 30 days of this order, produce a statement of its mission objectives, which will elaborate the general objectives set forth in this order, and a detailed schedule for addressing each mission objective, for approval by the Steering Committee;

(b) identify and consult with: (i) elements of the public and private sectors that conduct, support, or contribute to infrastructure assurance; (ii) owners and operators of the critical infrastructures; and (iii) other elements of the public and private sectors, including the Congress, that have an interest in critical infrastructure assurance issues and that may have differing perspectives on these issues;

(c) assess the scope and nature of the vulnerabilities of, and threats to, critical infrastructures;

(d) determine what legal and policy issues are raised by efforts to protect critical infrastructures and assess how these issues should be addressed;

(e) recommend a comprehensive national policy and implementation strategy for protecting critical infrastructures from physical and cyber threats and assuring their continued operation;

(f) propose any statutory or regulatory changes necessary to effect its recommendations; and

(g) produce reports and recommendations to the Steering Committee as they become available; it shall not limit itself to producing one final report.

Sec. 5. Advisory Committee to the President's Commission on Critical Infrastructure Protection. [Revoked by Ex. Ord. No. 13138, Sept. 30, 1999, 64 F.R. 53879]

Sec. 6. Administration. (a) All executive departments and agencies shall cooperate with the Commission and provide such assistance, information, and advice to the Commission as it may request, to the extent permitted by law.

(b) The Commission and the Advisory Committee may hold open and closed hearings, conduct inquiries, and establish subcommittees, as necessary.

(c) Members of the Advisory Committee shall serve without compensation for their work on the Advisory Committee. While engaged in the work of the Advisory Committee, members may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in the government service.

(d) To the extent permitted by law, and subject to the availability of appropriations, the Department of Defense shall provide the Commission and the Advisory Committee with administrative services, staff, other support services, and such funds as may be necessary for the performance of its functions and shall reimburse the executive branch components that provide representatives to the Commission for the compensation of those representatives.

(e) In order to augment the expertise of the Commission, the Department of Defense may, at the Commission's request, contract for the services of nongovernmental consultants who may prepare analyses, reports, background papers, and other materials for consideration by the Commission. In addition, at the Commission's request, executive departments and agencies shall request that existing Federal advisory committees consider and provide advice on issues of critical infrastructure protection, to the extent permitted by law.

(f) [Revoked by Ex. Ord. No. 13138, Sept. 30, 1999, 64 F.R. 53879.]

(g) The person who served as Chair of the Commission may continue to be a member of the Steering Committee after termination of the Commission.

Sec. 7. Review of Commission's Report. (a) Upon the termination of the Commission as set out in section 6(f) of this order, certain of the Commission's staff may be retained no later than September 30, 1998, solely to assist the Principals, Steering, and Advisory Committees in reviewing the Commission's report and preparing recommendations to the President. They shall act under the direction of the Steering Committee or its designated agent. The Department of Defense shall continue to provide funding and administrative support for the retained Commission staff.

(b) Pursuant to Executive Order 12958 [set out as a note under section 435 of Title 50, War and National Defense], I hereby designate the Executive Secretary of the National Security Council to exercise the authority to classify information originally as "Top Secret" with respect to the work of the Commission staff, the Principals Committee, the Steering Committee, the Advisory Committee, and the Infrastructure Protection Task Force.

Sec. 8. Interim Coordinating Mission. (a) While the Commission is conducting its analysis and until the President has an opportunity to consider and act on its recommendations, there is a need to increase coordination of existing infrastructure protection efforts in order to better address, and prevent, crises that would have a debilitating regional or national impact. There is hereby established an Infrastructure Protection Task Force ("IPTF") within the Department of Justice, chaired by the Federal Bureau of Investigation, to undertake this interim coordinating mission.

(b) The IPTF will not supplant any existing programs or organizations.

(c) The Steering Committee shall oversee the work of the IPTF.

(d) The IPTF shall include at least one full-time member each from the Federal Bureau of Investigation, the Department of Defense, and the National Security Agency. It shall also receive part-time assistance from other executive branch departments and agencies. Members shall be designated by their departments or agencies on the basis of their expertise in the protection of critical infrastructures. IPTF members' compensation shall be paid by their parent agency or department.

(e) The IPTF's function is to identify and coordinate existing expertise, inside and outside of the Federal Government, to:

(i) provide, or facilitate and coordinate the provision of, expert guidance to critical infrastructures to detect, prevent, halt, or confine an attack and to recover and restore service;

(ii) issue threat and warning notices in the event advance information is obtained about a threat;

(iii) provide training and education on methods of reducing vulnerabilities and responding to attacks on critical infrastructures;

(iv) conduct after-action analysis to determine possible future threats, targets, or methods of attack; and

(v) coordinate with the pertinent law enforcement authorities during or after an attack to facilitate any resulting criminal investigation.

(f) All executive departments and agencies shall cooperate with the IPTF and provide such assistance, information, and advice as the IPTF may request, to the extent permitted by law.

(g) All executive departments and agencies shall share with the IPTF information about threats and warning of attacks, and about actual attacks on critical infrastructures, to the extent permitted by law.

(h) The IPTF shall terminate no later than 180 days after the termination of the Commission, unless extended by the President prior to that date.

Sec. 9. General. (a) This order is not intended to change any existing statutes or Executive orders.

(b) This order is not intended to create any right, benefit, trust, or responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.

EXECUTIVE ORDER NO. 13130

July 14, 1999, 64 F.R. 38535

NATIONAL INFRASTRUCTURE ASSURANCE COUNCIL

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Advisory Committee Act, as amended (5 U.S.C. App.), and in order to support a coordinated effort by both government and private sector entities to address threats to our Nation's critical infrastructure, it is hereby ordered as follows:

Section 1. Establishment. (a) There is established the National Infrastructure Assurance Council (NIAC). The NIAC shall be composed of not more than 30 members appointed by the President. The members of the NIAC shall be selected from the private sector, including private sector entities representing the critical infrastructures identified in Executive Order 13010 [set out as a note under this section], and from State and local government. The members of the NIAC shall have expertise relevant to the functions of the NIAC and shall not be full-time officials or employees of the executive branch of the Federal Government.

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(b) The President shall designate a Chairperson and Vice-Chairperson from among the members of the NIAC.

(c) The National Coordinator for Security, Infrastructure Protection and Counter-Terrorism at the National Security Council (National Coordinator) will serve as the Executive Director of the NIAC.

(d) The Senior Director for Critical Infrastructure Protection at the National Security Council will serve as the NIAC's liaison to other agencies.

(e) Individuals appointed by the President will serve for a period of 2 years. Service shall be limited to no more than 3 consecutive terms.

Section 2. Functions. (a) The NIAC will meet periodically to:

(1) enhance the partnership of the public and private sectors in protecting our critical infrastructure and provide reports on this issue to the President as appropriate;

(2) propose and develop ways to encourage private industry to perform periodic risk assessments of critical processes, including information and telecommunications systems; and

(3) monitor the development of Private Sector Information Sharing and Analysis Centers (PSISACs) and provide recommendations to the National Coordinator and the National Economic Council on how these organizations can best foster improved cooperation among the PSISACs, the National Infrastructure Protection Center (NIPC), and other Federal Government entities.

(b) The NIAC will report to the President through the Assistant to the President for National Security Affairs, who shall assure appropriate coordination with the Assistant to the President for Economic Policy.

(c) The NIAC will advise the lead agencies with critical infrastructure responsibilities, sector coordinators, the NIPC, the PSISACs and the National Coordinator on the subjects of the NIAC's function in whatever manner the Chair of the NIAC, the National Coordinator, and the head of the affected entity deem appropriate.

(d) Senior Federal Government officials will participate in the meetings of the NIAC as appropriate.

(e) The Department of Commerce shall perform the functions of the President under the Federal Advisory Committee Act [5 U.S.C.A. App. 2] for the NIAC, except that of reporting to the Congress, in accordance with the guidelines and procedures established by the Administrator of General Services.

Section 3. Administration. To the extent permitted by law:

(a) The NIAC may hold open and closed hearings, conduct inquiries, and establish subcommittees as necessary.

(b) All executive departments and agencies shall cooperate with the NIAC and provide such assistance, information, and advice to the NIAC as it may request, as appropriate.

(c) Members of the NIAC shall serve without compensation for their work on the NIAC. While engaged in the work of the Council, members will be allowed travel expenses, including per diem in lieu of subsistence as authorized by law for persons serving intermittently in the Government service.

(d) To the extent permitted by law, and subject to the availability of appropriations, the Department of Commerce, through the Critical Infrastructure Assurance Office, shall provide the NIAC with administrative services, staff, and other support services, and such funds as may be necessary for the performance of its functions.

(e) The Council shall terminate 2 years from the date of this order, unless extended by the President prior to that date.

Section 4. Judicial Review. This order is not intended to create any right, benefit, trust, or responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.

WILLIAM J. CLINTON

EXECUTIVE ORDER NO. 13151

Apr. 27, 2000, 65 F.R. 25619

GLOBAL DISASTER INFORMATION NETWORK

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish a Global Disaster Information Network to use information technology more effectively to reduce loss of life and property from natural and man-made disasters, it is hereby ordered as follows:

Section 1. Policy. (a) It is the policy of this Administration to use information technology more effectively to coordinate the Federal Government's collection and dissemination of information to appropriate response agencies and State governments to prepare for and respond to natural and man-made disasters (disasters). As a result of changing population demographics in our coastal, rural, and urban areas over the past decades, the loss of life and property (losses) from disasters has nearly [illegible] the ways the Federal Government can reduce these losses is to use technology more effectively to coordinate its collection and dissemination (hereafter referred to collectively as "provision") of information which can be used in both planning for and recovering from disasters. While many agencies provide disaster-related information, they may not always provide it in a coordinated manner. To improve the provision of disaster-related information, the agencies shall, as set out in this order, use information technology to coordinate the Federal Government's provision of information to prepare for, respond to, and recover from domestic disasters.

(b) It is also the policy of this Administration to use information technology and existing channels of disaster assistance to improve the Federal [illegible] could be helpful to foreign governments preparing for or responding to foreign disasters. Currently, the United States Government provides disaster-related information to foreign governments and relief organizations on humanitarian grounds at the request of foreign governments and where appropriate. This information is supplied by Federal agencies on an ad hoc basis. To increase the effectiveness of our response to foreign disasters, agencies shall, where appropriate, use information technology to coordinate the Federal Government's provision of disaster-related information to foreign governments.

(c) To carry out the policies in this order, there is s established the Global Disaster Information Network (Network). The Network is defined as the coordinated effort by Federal agencies to develop a strategy and to use existing technical infrastructure, to the extent permitted by law and subject to the availability of appropriations and under the guidance of the Interagency Coordinating Committee and the Committee Support Office, to make more effective use of information technology to assist our Government, and foreign governments where appropriate, by providing disaster-related information to prepare for and respond to disasters.

Sec. 2. Establishment. (a) There is established an Interagency Coordinating Committee (Committee) to provide leadership and oversight for the development of the Network. The Office of the Vice President, the Department of Commerce through the National Oceanic and Atmospheric Administration, and the Department of State, respectively, shall designate a representative to serve as Co-chairpersons of the Committee. The Committee membership shall comprise representatives from the following departments and agencies:

(1) Department of State;

(2) Department of Defense;

(3) Department of the Interior;

(4) Department of Agriculture;

(5) Department of Commerce;

(6) Department of Transportation;

(7) Department of Energy;

(8) Office of Management and Budget;

(9) Environmental Protection Agency;

(10) National Aeronautics and Space Administration;

(11) United States Agency for International Development;

(12) Federal Emergency Management Agency; and

(13) Central Intelligence Agency.

At the discretion of the Co-chairpersons of the Committee, other agencies may be added to the Committee membership. The Committee shall include an Executive Secretary to effect coordination between the Co-chairpersons of the Committee and the Committee Support Office.

(b) There is established a Committee Support Office (Support Office) to assist the Committee by developing plans and projects that would further the creation of the Network. The Support Office shall, at the request of the Co-chairpersons of the Committee, carry out tasks

(c) The National Oceanic and Atmospheric Administration shall provide funding and administrative support for the Committee and the Support Office. To the extent permitted by law, agencies may provide support to the Committee and the Support Office to assist them in their work.

Sec. 3. Responsibilities. (a) The Committee shall:

(1) serve as the United States Government's single entity for all matters, both national and international, pertaining to the development and establishment of the Network;

(2) provide leadership and high-level coordination of Network activities;

(3) provide guidance for the development of Network strategies, goals, objectives, policies, and legislation;

(4) represent and advocate Network goals, objectives, and processes to their respective agencies and departments;

(5) provide manpower and material support for Network development activities;

(6) develop, delegate, and monitor interagency opportunities and ideas supporting the development of the Network; and

(7) provide reports, through the Co-chairpersons of the Committee, to the President as requested or at least annually.

(b) The Support Office shall:

(1) provide management and administrative support for the committee;

(2) develop Network strategies, goals, objectives, policies, plans, and legislation in accordance with guidance provided by the Committee;

(3) consult with agencies, States, nongovernment organizations, and international counterparts in developing Network development tasks;

(4) develop and make recommendations concerning Network activities to the agencies as approved by the Committee; and

(5) participate in projects that promote the goals and objectives of the Network.

Sec. 4. Implementation. (a) The Committee, with the assistance of the Support Office, shall address national and international issues associated with the development of the Network within the context of:

(1) promoting the United States as an example and leader in the development and dissemination of disaster information, both domestically and abroad, and, to this end, seeking cooperation with foreign governments and international organizations;

(2) striving to include all appropriate stakeholders in the development of the Network; and

(3) facilitating the creation of a framework that involves public and private stakeholders in a partnership for sustained operations of the Network.

(b) Intelligence activities, as determined by the Director of the Central Intelligence Agency, as well as national security-related activities of the Department of Defense and of the Department of Energy, are exempt from compliance

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Sec. 5. **Tribal Governments.** This order does not impose any requirements on tribal governments.

Sec. 6. **Judicial Review.** This order does not create any right or benefit, substantive or procedural, enforceable by law, by a party against the United States, its officers, its employees, or any other person.

WILLIAM J. CLINTON

PART A—POWERS AND DUTIES

§ 5196. Detailed functions of administration

[See main volume for text of (a) to (h)]

(i) Materials and facilities

[See main volume for text of (1) and (2)]

(3) The Director may lease real property required for the purpose of carrying out the provisions of this subsection, but shall not acquire fee title to property unless specifically authorized by law.

(4) The Director may procure and maintain under this subsection radiological, chemical, bacteriological, and biological agent monitoring and decontamination devices and distribute such devices by loan or grant to the States for emergency preparedness purposes, under such terms and conditions as the Director shall prescribe.

(5)Redesignated (4)

[See main volume for text of (j) and (k)]

(As amended Pub.L. 104–66, Title II, § 2071, Dec. 21, 1995, 109 Stat. 729.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1995 Acts. House Report No. 104–327, see 1995 U.S. Code Cong. and Adm. News, p. 674.

Amendments

1995 Amendments. Subsec. (i)(3) to (5). Pub.L. 104–66, § 2071, redesignated pars. (4) and (5) as pars. (3) and (4), respectively, and struck out former par. (3), which related to reports of property acquisitions.

CROSS REFERENCES

Chemical–biological emergency response team and addition to Federal response plan, see 50 USCA § 2314.

Director of Federal Emergency Management Agency compile master inventory, see 50 USCA § 2317.

§ 5196e. Radiological Emergency Preparedness Fund

There is hereby established in the Treasury a Radiological Emergency Preparedness Fund, which shall be available under the Atomic Energy Act of 1954, as amended, and Executive Order 12657, for offsite radiological emergency planning, preparedness, and response. Beginning in fiscal year 1999 and thereafter, the Director of the Federal Emergency Management Agency (FEMA) shall promulgate through rulemaking fees to be assessed and collected, applicable to persons subject to FEMA's radiological emergency preparedness regulations. The aggregate charges assessed pursuant to this section during fiscal year 1999 shall not be less than 100 percent of the amounts anticipated by FEMA necessary for its radiological emergency preparedness program for such fiscal year. The methodology for assessment and collection of fees shall be fair and equitable; and shall reflect costs of providing such services, including administrative costs of collecting such fees. Fees received pursuant to this section shall be deposited in the Fund as offsetting collections and will become available for authorized purposes on October 1, 1999, and remain available until expended.

For necessary expenses of the Fund for fiscal year 1999, $12,849,000, to remain available until expended.

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1998 Acts. House Conference Report No. 105–769 and Statement by President, see 1998 U.S. Code Cong. and Adm. News, p. 545.

References in Text

The Atomic Energy Act of 1954, referred to in text, is Act Aug. 30, 1954, c. 1073, § 1, 68 Stat. 921, as amended, which is classified principally to Chapter 23 [42 U.S.C.A. § 2011 et seq.] of this title. For complete classification of this Act to the Code, see Short Title note set out under 42 U.S.C.A. § 2011 and Tables.

Executive Order 12657, referred to in text, is Ex. Ord. No. 12657, Nov. 18, 1988, 53 F.R. 47513, which is set out as a note under 42 U.S.C.A. § 5951.

PART B—GENERAL PROVISIONS

§ 5197f. Relation to Atomic Energy Act of 1954

HISTORICAL AND STATUTORY NOTES

References in Text

The Atomic Energy Act of 1954, referred to in section heading and text, is Act Aug. 1, 1946, c. 724, as added Act Aug. 30, 1954, c. 1073, § 1, 68 Stat. 919, as amended, which is classified principally to chapter 23 (section 2011 et seq.) of this title. For complete classification of this Act to the Code, see Short Title of 1954 Acts note set out under section 2011 of this title and Tables.

SUBCHAPTER V—MISCELLANEOUS

§ 5201. Rules and regulations

LIBRARY REFERENCES

Texts and Treatises

20 Fed Proc L Ed, Internal Revenue § 48:862.

§ 5204b. Technical assistance for insular areas

HISTORICAL AND STATUTORY NOTES

Change of Name

Any reference in any provision of law enacted before Jan. 4, 1995, to the Committee on Natural Resources of the House of Representatives treated as referring to the Committee on Resources of the House of Representatives, see section 1(a)(8) of Pub.L. 104–14, set out as a note preceding section 21 of Title 2, The Congress.

§ 5205. Disaster grant closeout procedures

(a) Statute of limitations

(1) In general

Except as provided in paragraph (2), no administrative action to recover any payment made to a State or local government for disaster or emergency assistance under this chapter shall be initiated in any forum after the date that is 3 years after the date of transmission of the final expenditure report for the disaster or emergency.

(2) Fraud exception

The limitation under paragraph (1) shall apply unless there is evidence of civil or criminal fraud.

(b) Rebuttal of presumption of record maintenance

(1) In general

In any dispute arising under this section after the date that is 3 years after the date of transmission of the final expenditure report for the disaster or emergency, there shall be a presumption that accounting records were maintained that adequately identify the source and application of funds provided for financial

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CHAPTER 68—DISASTER RELIEF

SUBCHAPTER I—FINDINGS, DECLARATIONS, AND DEFINITIONS

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5121. Congressional findings and declarations.
(a) In general.
(b) Intent of Congress.
5122. Definitions.

SUBCHAPTER II—DISASTER PREPAREDNESS ASSISTANCE

5131. Federal and State disaster preparedness programs.
(a) Utilization of services of other agencies.
(b) Technical assistance for development of plans and programs.
(c) Grants to States for development of plans and programs.
(d) Grants for improvement, maintenance, and updating of State plans.
5132. Disaster warnings.
(a) Readiness of Federal agencies to issue warnings to State and local officials.
(b) Technical assistance to State and local governments for effective warnings.
(c) Warnings to governmental authorities and public endangered by disaster.
(d) Agreements with commercial communications systems for use of facilities.

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5143. Coordinating officers.
(a) Appointment of Federal coordinating officer.
(b) Functions of Federal coordinating officer.
(c) State coordinating officer.
5144. Emergency support teams.
5145, 5146. Repealed.
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5148. Nonliability of Federal Government.
5149. Performance of services.
(a) Utilization of services or facilities of State and local governments.
(b) Appointment of temporary personnel, experts, and consultants; acquisition, rental, or hire of equipment, services, materials and supplies.
5150. Use of local firms and individuals.
5151. Nondiscrimination in disaster assistance.
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(b) Compliance with regulations as prerequisite to participation by other bodies in relief operations.
5152. Utilization of relief organizations.
(a) Personnel and facilities.
(b) Coordination.

Priority to certain applications for public facility and public housing assistance.
(a) Priority.
(b) Obligation of certain discretionary funds.
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(a) Applicants for replacement of damaged facilities.
(b) Maintenance of insurance.
(c) State acting as self-insurer.
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(b) Transfer of property.
(c) Omitted.
(d) Definition.
(e) Effective date.
Duplication of benefits.
(a) General prohibition.
(b) Special rules.
(c) Recovery of duplicative benefits.
(d) Assistance not income.
Standards and reviews.
Penalties.
(a) Misuse of funds.
(b) Civil enforcement.
(c) Referral to Attorney General.
(d) Civil penalty.
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Protection of environment.
Recovery of assistance.
(a) Party liable.
(b) Rendering of care.
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(a) In general.
(b) Access to records.
(c) State and local audits.
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(c) Regulations.
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SUBCHAPTER IV—MAJOR DISASTER ASSISTANCE PROGRAMS

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Sec.
5171. Federal facilities.
(b) Availability of funds appropriated to agency for repair, reconstruction, restoration, or replacement of agency facilities.
(c) Steps for mitigation of hazards.
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(a) Contributions.
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(a) Provision of temporary housing.
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5176. Minimum standards for public and private structures.
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(a) Benefit assistance.
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5177a. Emergency grants to assist low-income migrant and seasonal farmworkers.
(a) In general.
(b) "Low-income migrant or seasonal farmworker" defined.
(c) Authorization of appropriations.
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(3) "United States" means the fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(4) "State" means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

[See main volume for text of (5)]

(6) Local Government

The term "local government" means—

(A) a county, municipality, city, town, township, local public authority, school district, special district, intrastate district, council of governments (regardless of whether the council of governments is incorporated as a nonprofit corporation under State law), regional or interstate government entity, or agency or instrumentality of a local government;

(B) an Indian tribe or authorized tribal organization, or Alaska Native village or organization; and

(C) a rural community, unincorporated town or village, or other public entity, for which an application for assistance is made by a State or political subdivision of a State.

[See main volume for text of (7) and (8)]

(9) Private nonprofit facility

"Private nonprofit facility" means private nonprofit educational, utility, irrigation, emergency, medical, rehabilitational, and temporary or permanent custodial care facilities (including those for the aged and disabled), other private nonprofit facilities which provide essential services of a governmental nature to the general public, and facilities on Indian reservations as defined by the President.

(As amended Pub.L. 106–390, Title III, § 302, Oct. 30, 2000, 114 Stat. 1572.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–40, see 2000 U.S. Code Cong. and Adm. News, p. 1456.

Amendments

2000 Amendments. Par. (3). Pub.L. 106–390, § 302(1), rewrote par. (3), which formerly read: "(3) 'United States' means the fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.".

Par. (4). Pub.L. 106–390, § 302(1), rewrote par. (4), which formerly read: "(4) 'State' means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.".

Par. (6). Pub.L. 106–390, § 302(2), rewrote par. (6), which formerly read: "(6) 'Local government' means (A) any county, city, village, town, district, or other political subdivision of any State, any Indian tribe or authorized tribal organization, or Alaska Native village or organization, and (B) includes any rural community or unincorporated town or village or any other public entity for which an application for assistance is made by a State or political subdivision thereof.".

Par. (9). Pub.L. 106–390, § 302(3), inserted "irrigation," following "utility,".

Local Government

Section 103(e) of Pub.L. 100–707 provided that:

[See main volume for text]

[Any reference in any provision of law enacted before Jan. 4, 1995, to the Committee on Public Works and Transportation of the House of Representatives treated as referring to the Committee on Transportation and Infrastructure of the House of Representatives, see section 1(a)(9) of Pub.L. 104–14, set out as a note preceding section 21 of Title 2, The Congress.]

CROSS REFERENCES

Major disaster as defined in this section for purposes of—

Special rule for extending time for filing drawback claims, see 19 USCA § 1313

LIBRARY REFERENCES

Encyclopedias

74 Am Jur 2d, Welfare Laws § 44.

Texts and Treatises

18 Fed Proc L Ed, Housing and Urban Development, § 44:539.

7 Fed Proc L Ed, Condemnation of Property § 14:386.

20 Fed Proc L Ed, Internal Revenue § 48:815.

NOTES OF DECISIONS

1. Emergency—Generally

Colon v. Carter, D.C.Puerto Rico 1980, 507 F.Supp. 1026, [main volume] vacated 633 F.2d 964.

SUBCHAPTER II—DISASTER PREPAREDNESS AND MITIGATION ASSISTANCE

§ 5131. Federal and State disaster preparedness programs

LIBRARY REFERENCES

Encyclopedias

Provisions for disbursement of federal funds; disaster aid generally, see C.J.S. United States § 122 et seq.

79 Am Jur 2d, Welfare Laws § 44.

Texts and Treatises

18 Fed Proc L Ed, Housing and Urban Development, § 44:597.

20 Fed Proc L Ed, Internal Revenue § 48:862.

§ 5132. Disaster warnings

LIBRARY REFERENCES

Encyclopedias

79 Am Jur 2d, Welfare Laws § 44.

Provisions for disbursement of federal funds; disaster aid generally, see C.J.S. United States § 122 et seq.

§ 5133. Predisaster hazard mitigation

(a) Definition of small impoverished community

In this section, the term "small impoverished community" means a community of 3,000 or fewer individuals that is economically disadvantaged, as determined by the State in which the community is located and based on criteria established by the President.

(b) Establishment of program

The President may establish a program to provide technical and financial assistance to States and local governments to assist in the implementation of predisaster hazard mitigation measures that are cost-effective and are designed to reduce injuries, loss of life, and damage and destruction of property, including damage to critical services and facilities under the jurisdiction of the States or local governments.

(c) Approval by President

If the President determines that a State or local government has identified natural disaster hazards in areas under its jurisdiction and has demonstrated the ability to form effective public-private natural disaster hazard mitigation partnerships, the President, using amounts in the National Predisaster Mitigation Fund established under subsection (i) (referred to in this section as the "Fund"), may provide technical and financial assistance to the State or local government to be used in accordance with subsection (e).

(d) State recommendations

(1) In general

(A) Recommendations

The Governor of each State may recommend to the President not fewer than

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Sec.
5196b. Contributions for personnel and administrative expenses.
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5197e. Authorization of appropriations and transfers of funds.
(a) Authorization of appropriations.
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5197f. Relation to Atomic Energy Act of 1954.
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5201. Rules and regulations.
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(b) Acceptance of gifts.
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5203. Excess disaster assistance payments as budgetary emergency requirements.
5204. Insular areas disaster survival and recovery; definitions.
5204a. Authorization of appropriations for insular areas.
5204b. Technical assistance for insular areas.
(a) Presidential assessment of response capability; recovery plan.
(b) Report to Congress.
5204c. Hazard mitigation for insular areas.

CROSS REFERENCES

Colorado River Floodway disaster assistance under this chapter for residential structures or public infrastructure, see 43 USCA § 1600e.

Coordination of funds for disaster relief employment assistance with programs under this chapter, see 29 USCA § 1784.

Displaced families or persons defined as families or persons displaced under this chapter for purposes of mortgage insurance, see 12 USCA § 1715*l*.

Endangered or threatened species and habitat requirements exemptions in Presidentially declared disaster areas, see 16 USCA § 1536.

Financial assistance for acquisition or construction purposes defined as excluding assistance received under this chapter, see 42 USCA § 4003.

Major disaster as determined under this chapter for purposes of—
Affordable housing matching requirement reduction, see 42 USCA § 12750.
Agricultural commodities price support, see 7 USCA § 1421.
Agricultural credit, see 7 USCA § 1981e.
Chief of Engineers' authority to perform emergency work on public and private property, see 33 USCA § 701n.
Community development funds allocated to metropolitan cities and urban counties, see 42 USCA § 5306.
Economic recovery assistance, see 42 USCA § 3231.
Energy crisis intervention for low-income home energy assistance program, see 42 USCA § 8623.
Farm commodities or products, see 7 USCA § 1427.
Farm housing assistance, see 42 USCA § 1490q.
Farm reserve inventories, see 7 USCA § 1427a.
Highway repair or reconstruction, see 23 USCA § 125.
Issuance and insurance of loans relating to farming, ranching, or aquaculture operations, see 7 USCA § 1961.
Juvenile justice and delinquency program grants selection process waiver, see 42 USCA § 5665a.
Mortgage insurance, see 12 USCA § 1709.
Reimbursement to states for funds made available to older individuals, see 42 USCA § 3030.
Small business loans, see 15 USCA § 636.
Tax deduction of losses from individual income tax, see 26 USCA § 165.
Tax losses for tobacco products, cigarette papers, and tubes, see 26 USCA § 5708.
Tax rules for losses to distilled spirits, wines, and beer, see 26 USCA § 5064.

Presidentially declared disaster defined as disaster warranting assistance under this chapter for purposes of special tax rules for conversion of principal residences, see 26 USCA § 1033.

Public Land Corps Program projects carried out in response to emergency declared under this chapter, see 16 USCA § 1723.

Remove or removal defined as including assistance provided under this chapter for purposes of released hazardous substances provisions, see 42 USCA § 9601.

Supplemental security income determination as excluding assistance under this chapter, see 42 USCA § 1382a.

Valuation of farm assets used as collateral for emergency loan purposes due to assistance requested under this chapter, see 7 USCA § 1964.

Veterans' loans secured by residential property lost, destroyed, or damaged as result of major disaster determined under this chapter, as giving rise to counseling and indulgence on loan instrument, see 38 USCA § 3720.

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SUBCHAPTER I—FINDINGS, DECLARATIONS, AND DEFINITIONS

§ 5121. Congressional findings and declarations

(a) In general

The Congress hereby finds and declares that—

(1) because disasters often cause loss of life, human suffering, loss of income, and property loss and damage; and

(2) because disasters often disrupt the normal functioning of governments and communities, and adversely affect individuals and families with great severity;

special measures, designed to assist the efforts of the affected States in expediting the rendering of aid, assistance, and emergency services, and the reconstruction and rehabilitation of devastated areas, are necessary.

(b) Intent of Congress

It is the intent of the Congress, by this chapter, to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters by—

(1) revising and broadening the scope of existing disaster relief programs;

(2) encouraging the development of comprehensive disaster preparedness and assistance plans, programs, capabilities, and organizations by the States and by local governments;

(3) achieving greater coordination and responsiveness of disaster preparedness and relief programs;

(4) encouraging individuals, States, and local governments to protect themselves by obtaining insurance coverage to supplement or replace governmental assistance;

(5) encouraging hazard mitigation measures to reduce losses from disasters, including development of land use and construction regulations; and

(6) providing Federal assistance programs for both public and private losses sustained in disasters [1]

(Pub.L. 93–288, Title I, § 101, May 22, 1974, 88 Stat. 143; Pub.L. 100–707, Title I, § 103(a), Nov. 23, 1988, 102 Stat. 4689.)

[1] So in original. Probably should be followed by a period.

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in subsec. (b), was in the original "this Act", meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note under this section and Tables.

Amendments

1988 Amendments. Subsec. (b)(5) to (7). Pub.L. 100–707, § 103(a)(1)-(3), struck out par. (7) expressing Congressional intent to provide disaster assistance through a long-range economic recovery program for major disaster areas; struck out "; and" at the end of par. (6); and inserted "and" at the end of par. (5).

Effective Dates

1974 Acts. Section 605 of Pub.L. 93–288, which provided for an effective date for Pub.L. 93–288, with the exception of section 5178 of this title, was repealed by Pub.L. 100–707, Title I, § 108(b), Nov. 23, 1988, 102 Stat. 4708.

Delegation of Functions

Functions of the President under the Disaster Relief Acts of 1970 and 1974, with certain exceptions, were delegated to the Director of the Federal Emergency Management Agency, see sections 4–201 and 4–203 of Ex. Ord. No. 12148, July 20, 1979, 44 F.R. 43239, set out as a note under section 2251 of Title 50, Appendix, War and National Defense.

Short Title

1993 Amendments. Pub.L. 103–181, § 1, Dec. 3, 1993, 107 Stat. 2054, provided that: "This Act [amending section 5170c of this title and enacting provisions set out as notes under sections 4601 and 5170c of this title] may be cited as the 'Hazard Mitigation and Relocation Assistance Act of 1993'."

1988 Amendments. Section 101(a) of Title I of Pub.L. 100–707 provided that: "This title [enacting sections 5141, 5153 to 5157, 5159 to 5164, 5170 to 5170c, 5172, 5174, 5178, 5189 to 5189b, and 5191 to 5193 of this title, amending this section, sections 1382a, 3030, 3231, 3232, 3539, 4003, 4013, 5122, 5131, 5143, 5144, 5147 to 5152, 5158, 5171, 5173, 5176, 5177, 5179 to 5188, 5201, 7704, and 9601 of this title, sections 1421, 1427, 1427a, 1961, 1964, and 2014 of Title 7, Agriculture, sections 1706c, 1709, and 1715l of Title 12, Banks and Banking, section 636 of Title 15, Commerce and Trade, sections 1536 and 3505 of Title 16, Conservation, sections 241–1 and 646 of Title 20, Education, section 125 of Title 23, Highways, sections 165, 5064, and 5708 of Title 26, Internal Revenue Code, section 701n of Title 33, Navigation and Navigable Waters, and former section 1820 of Title 38, Veterans' Benefits, repealing sections 5142, 5145, 5146, 5175, and 5202 of this title and former sections 5141, 5153 to 5157, 5172, 5174, 5178, and 5189 of this title, enacting provisions set out as notes under sections 3231, 5121, 5122, and 5201 of this title, amending provisions set out as a note under this section and section 1681 of Title 48, Territories and Insular Possessions, and repealing provisions set out as notes under section 5121 and former section 5178 of this title] may be cited as 'The Disaster Relief and Emergency Assistance Amendments of 1988'."

1980 Amendments. Pub.L. 96–568, § 1, Dec. 22, 1980, 94 Stat. 3334, provided: "That this Act [amending former section 5202 of this title] may be cited as the 'Disaster Relief Act Amendments of 1980'."

1974 Acts. Section 1 of Pub.L. 93–288, as amended by Pub.L. 100–707, Title I, § 102(a), Nov. 23, 1988, 102 Stat. 4689, provided: "That this Act [enacting this section and sections 3231 to 3236, 5122, 5131, 5132, 5141 to 5158, 5171 to 5189, 5201, and former 5202 of this title, and section 1264 of former Title 31, Money and Finance, amending sections 1706c, 1709, 1715l of Title 12, Banks and Banking, sections 241–1, 646, 758 of Title 20, Education, sections 165, 5064, 5708 of Title 26, Internal Revenue Code, former section 1820 of Title 38, Veterans' Bene-

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fits, section 461 of Title 40, Public Buildings, Property, and Works, repealing sections 4401, 4402, 4411 to 4413, 4414 to 4420, 4431 to 4436, 4457 to 4462, 4481 to 4485 of this title, and enacting provisions set out as notes under this section and sections 4401, and 5178 of this title, section 1264 of former Title 31, and section 1681 of Title 48, Territories and Insular Possessions] may be cited as the [sic] 'The Robert T. Stafford Disaster Relief and Emergency Assistance Act.' "

Declared Disasters and Emergencies Not Affected

Section 112 of Title I of Pub.L. 100–707 provided that: "This title [see Short Title of 1988 Amendments note under this section] shall not affect the administration of any assistance for a major disaster or emergency declared by the President before the date of the enactment of this Act [Nov. 23, 1988]."

Recommendations Concerning Improvement of Relationships Among Disaster Management Officials

Section 110 of Pub.L. 100–707 provided that: "Not later than 1 year after the date of the enactment of this Act [Nov. 23, 1988], the President shall recommend to the Congress proposals to improve the operational and fiscal relationships that exist among Federal, State, and local major disaster and emergency management officials. Such proposals should include provisions which—

"(1) decrease the amount of time for processing requests for major disaster and emergency declarations and providing Federal assistance for major disasters and emergencies;

"(2) provide for more effective utilization of State and local resources in major disaster and emergency relief efforts; and

"(3) improve the timeliness of reimbursement of State and local governments after the submission of necessary documentation."

[Functions of President under section 110 of Pub.L. 100–707 delegated to Director of Federal Emergency Management Agency by section 4 of Ex. Ord. 12673, Mar. 23, 1989, 54 F.R. 12571, set out as a note under section 2251 of Title 50, Appendix, War and National Defense.]

References to Disaster Relief Act of 1970

Section 702(m), formerly section 602(m) of Pub.L. 93–288, renumbered section 702(m) of Pub.L. 103–337, Div. A, Title XXXIV, § 3411(a)(2), Oct. 5, 1994, 108 Stat. 3100, provided that: "Whenever reference is made in any provision of law (other than this Act [the Disaster Relief Act of 1974, see Short Title of 1974 Acts note under this section]), regulation, rule, record, or document of the United States to provisions of the Disaster Relief Act of 1970 (84 Stat. 1744), repealed by this Act such reference shall be deemed to be a reference to the appropriate provision of this Act."

References to Disaster Relief Act of 1974

Section 102(b) of Title I of Pub.L. 100–707 provided that: "Whenever any reference is made in any law (other than this Act [see Tables for classification]), regulation, document, rule, record, or other paper of the United States to a section or provision of the Disaster Relief Act of 1974 [former short title of Pub.L. 93–288], such reference shall be deemed to be a reference to such section or provision of the Robert T. Stafford Disaster Relief and Emergency Assistance Act [Pub.L. 93–288, see Short Title of 1974 Acts note under this section]."

Seismic Safety of Federal and Federally Assisted or Regulated New Building Construction

For provisions relating to seismic safety requirements for new construction or total replacement of a building under this chapter after a presidentially declared major disaster or emergency, see Ex. Ord. No. 12699, Jan. 5, 1990, 55 F.R. 835, set out as a note under section 7704 of this title.

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 11749

Ex. Ord. No. 11749, Dec. 10, 1973, 38 F.R. 34177, which related to the consolidation of functions assigned to the Secretary of Housing and Urban Development, was revoked by Ex. Ord. No. 12148, July 20, 1979, 44 F.R. 43239, set out as a note under section 2251 of Title 50, Appendix, War and National Defense.

EX. ORD. NO. 11795. DELEGATION OF PRESIDENTIAL FUNCTIONS

Ex. Ord. No. 11795, July 11, 1974, 39 F.R. 25939, as amended by Ex. Ord. No. 11910, Apr. 13, 1976, 41 F.R. 15681; Ex. Ord. No. 12148, July 20, 1979, 44 F.R. 43239; Ex. Ord. No. 12673, Mar. 23, 1989, 54 F.R. 12571, provided:

By virtue of the authority vested in me by the Disaster Relief Act of 1974 (Public Law 93–288; 88 Stat. 143) [see References to Disaster Relief Act of 1974 note under this section], section 301 of title 3 of the United States Code, and as President of the United States of America, it is hereby ordered as follows:

[Sections 1 and 2. Revoked by Ex. Ord. No. 12148, § 5–111, July 20, 1979, 44 F.R. 43239.]

Sec. 3. The Secretary of Agriculture is designated and empowered to exercise, without the approval, ratification, or other action of the President, all of the authority vested in the President by section 412 of the act [section 5179 of this title] concerning food coupons and distribution.

[Sec. 4. Revoked by Ex. Ord. No. 12148, § 5–111, July 20, 1979, 44 F.R. 43239.]

LIBRARY REFERENCES

Administrative Law

Discrimination against poor and handicapped, see West's Federal Practice Manual § 13050.

American Digest System

Provisions for disbursement of federal funds; disaster aid generally, see United States ⇐82(1, 5).

Encyclopedias

Provisions for disbursement of federal funds; disaster aid generally, see C.J.S. United States § 122 et seq.

Law Reviews

Tortfeasor liability for disaster response costs: Accounting for the true cost of accidents. Note, LV Fordham L.Rev. 1001 (1987).

Unstable ground: Landslide policy in the United States. Robert B. Olshansky and J. David Rogers, 13 Ecology L.Q. 939 (1987).

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

Persons entitled to maintain action 2
State regulation or control 1

1. State regulation or control

The Federal Emergency Management Agency, as an agency of the United States, and acting pursuant to a valid delegation of the President's statutory authority to provide disaster assistance to the states, is not subject to state regulations or prohibitions which would impede the performance of its federal functions. 1981 (Counsel-Inf.Op.) 5 Op.O.L.C. 198.

2. Persons entitled to maintain action

Governor had standing under parens patriae doctrine to challenge alleged vio-

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Note 2

lation of Disaster Relief Act by Federal Emergency Management Agency, in view of express will of Congress that Act provide federal assistance to state and local governments in carrying out their responsibilities to alleviate suffering and damages and governor's interest in assuring that state's citizens were not denied full benefit of federal law designed to address unemployment caused by disaster. State of Kan. ex rel. Hayden v. U.S., D.Kan. 1990, 748 F.Supp. 797, on reconsideration 751 F.Supp. 1495, affirmed 953 F.2d 1392.

§ 5122. Definitions

As used in this chapter—

(1) Emergency

"Emergency" means any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.

(2) Major disaster

"Major disaster" means any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.

(3) "United States" means the fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(4) "State" means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

(5) "Governor" means the chief executive of any State.

(6) "Local government" means (A) any county, city, village, town, district, or other political subdivision of any State, any Indian tribe or authorized tribal organization, or Alaska Native village or organization, and (B) includes any rural community or unincorporated town or village or any other public entity for which an application for assistance is made by a State or political subdivision thereof.

(7) "Federal agency" means any department, independent establishment, Government corporation, or other agency of the executive branch of the Federal Government, including the United States Postal Service, but shall not include the American National Red Cross.

(8) Public facility

"Public facility" means the following facilities owned by a State or local government:

(A) Any flood control, navigation, irrigation, reclamation, public power, sewage treatment and collection, water supply and distribution, watershed development, or airport facility.

(B) Any non-Federal-aid street, road, or highway.

(C) Any other public building, structure, or system, including those used for educational, recreational, or cultural purposes.

(D) Any park.

(9) Private nonprofit facility

"Private nonprofit facility" means private nonprofit educational, utility, emergency, medical, rehabilitational, and temporary or permanent custodial care facilities (including those for the aged and disabled), other private nonprofit facilities which provide essential services of a governmental nature to the general public, and facilities on Indian reservations as defined by the President.

(Pub.L. 93–288, Title I, § 102, May 22, 1974, 88 Stat. 144; Pub.L. 100–707, Title I, § 103(b)–(d), (f), Nov. 23, 1988, 102 Stat. 4689, 4690; Pub.L. 102–247, Title II, § 205, Feb. 24, 1992, 106 Stat. 38.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

1992 Acts. Senate Report No. 102–243 and Statement by President, see 1992 U.S. Code Cong. and Adm. News, p. 44.

Amendments

1992 Amendments. Pars. (3), (4). Pub.L. 102–247 inserted "the Northern Mariana Islands,".

1988 Amendments. Par. (1). Pub.L. 100–707, § 103(b), inserted the heading "Emergency" and substituted a clarified and generalized definition for the term "emergency" previously meaning "any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, fire, explosion, or other catastrophe in any part of the United States which requires Federal emergency assistance to supplement State and local efforts to save lives and protect property, public health and safety or to avert or lessen the threat of a disaster".

Par. (2). Pub.L. 100–707, § 103(c), inserted the heading "Major Disaster" and amended text generally. Prior to amendment, text read as follows: "'Major disaster' means any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, tsunami, earthquake, vol-

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canic eruption, landslide, mudslide, snowstorm, drought, fire, explosion, or other catastrophe in any part of the United States which, in the determination of the President, causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter, above and beyond emergency services by the Federal Government, to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby."

Pars. (3), (4). Pub.L. 100–707, § 103(d), excluded the Canal Zone from the definition of the terms "United States" and "State".

Pars. (8), (9). Pub.L. 100–707, § 103(f), added pars. (8) and (9).

Local Government

Section 103(e) of Pub.L. 100–707 provided that:

"**(1) In general.**—The term 'local government' is deemed to have the same meaning in the Disaster Relief and Emergency Assistance Act [Pub.L. 93–288; see Short Title of 1974 Acts note under section 5121 of this title], as amended by this Act [Pub.L. 100–707; see Short Title of 1988 Amendments note under section 5121 of this title], as that term had on October 1, 1988, under section 102(6) of the Disaster Relief Act of 1974 [par. (6) of this section] and regulations implementing the Disaster Relief Act of 1974 [42 U.S.C.A. § 5121 et seq.].

"**(2) Termination of effectiveness.**—Paragraph (1) shall not be effective on and after the 90th day after the President transmits to the Committee on Public Works and Transportation of the House of Representatives and to the Committee on Environment and Public Works of the Senate a report which includes an interpretation of the term 'local government' for purposes of the Disaster Relief and Emergency Assistance Act, as amended by this Act."

[Functions of President under section 103(e)(2) of Pub.L. 100–707 delegated to Director of Federal Emergency Management Agency by section 3 of Ex. Ord. No. 12673, Mar. 23, 1989, 54 F.R. 12571, set out as a note under section 2251 of Title 50, Appendix, War and National Defense.]

[Committee on Public Works and Transportation of House of Representatives changed to Committee on Transportation and Infrastructure of House of Representatives by House Resolution No. 6, One Hundred Fourth Congress, Jan. 4, 1995.]

CROSS REFERENCES

Major disaster as defined in this section for purposes of—
Employment assistance funds availability, see 29 USCA § 1784.
Mortgage insurance eligibility for housing renovation and modernization, see 12 USCA § 1706c.
Relocation assistance advisory program, see 42 USCA § 4625.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

Emergency
Generally 1
Immigration 2

1. Emergency—Generally

Definition of "emergency" in this section did not support the application of this chapter to Cuban and Haitian refugee situation in Florida; the definition encompasses only natural disasters; accordingly, the provisions of § 4332 of this title were not inapplicable. Colon v. Carter, D.C.Puerto Rico 1980, 507 F.Supp. 1026, vacated on other grounds 633 F.2d 964.

2. —— Immigration

It is within the discretion of the President to determine whether an immigration emergency so threatens property or human life as to fall within the scope of this chapter. 1982 (Counsel–Inf.Op.) 6 Op.O.L.C. 708.

SUBCHAPTER II—DISASTER PREPAREDNESS ASSISTANCE

§ 5131. Federal and State disaster preparedness programs

(a) Utilization of services of other agencies

The President is authorized to establish a program of disaster preparedness that utilizes services of all appropriate agencies and includes—

(1) preparation of disaster preparedness plans for mitigation, warning, emergency operations, rehabilitation, and recovery;

(2) training and exercises;

(3) postdisaster critiques and evaluations;

(4) annual review of programs;

(5) coordination of Federal, State, and local preparedness programs;

(6) application of science and technology;

(7) research.

(b) Technical assistance for development of plans and programs

The President shall provide technical assistance to the States in developing comprehensive plans and practicable programs for preparation against disasters, including hazard reduction, avoidance, and mitigation; for assistance to individuals, businesses, and State and local governments following such disasters; and for recovery of damaged or destroyed public and private facilities.

(c) Grants to States for development of plans and programs

Upon application by a State, the President is authorized to make grants, not to exceed in the aggregate to such State $250,000, for the development of plans, programs, and capabilities for disaster preparedness and prevention. Such grants shall be applied for within one year from May 22, 1974. Any State desiring financial assistance under this section shall designate or create an agency to plan and administer such a disaster preparedness program, and shall, through such agency, submit a State plan to the President, which shall—

(1) set forth a comprehensive and detailed State program for preparation against and assistance following, emergencies and major disasters, including provisions for assistance to individuals, businesses, and local governments; and

(2) include provisions for appointment and training of appropriate staffs, formulation of necessary regulations and procedures and conduct of required exercises.

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(d) Grants for improvement, maintenance, and updating of State plans

The President is authorized to make grants not to exceed 50 per centum of the cost of improving, maintaining and updating State disaster assistance plans, including evaluations of natural hazards and development of the programs and actions required to mitigate such hazards; except that no such grant shall exceed $50,000 per annum to any State.

(Pub.L. 93–288, Title II, § 201, May 22, 1974, 88 Stat. 145; Pub.L. 100–707, Title I, § 104, Nov. 23, 1988, 102 Stat. 4690.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

Amendments

1988 Amendments. Subsec. (a). Pub.L. 100–707, § 104(b)(1), substituted "appropriate agencies" for "appropriate agencies (including the Defense Civil Preparedness Agency)".

Subsec. (d). Pub.L. 100–707, § 104(a)(b)(2), increased the limitation on the amount of the grant per annum to $50,000 from $25,000; and authorized grants for evaluations of natural hazards and development of the programs and actions required to mitigate such hazards.

LIBRARY REFERENCES

Administrative Law

Disaster preparedness programs and assistance, see 44 C.F.R. § 300.1 et seq.

American Digest System

Provisions for disbursement of federal funds; disaster aid generally, see United States ⇐82(1, 5).

Encyclopedias

Provisions for disbursement of federal funds; disaster aid generally, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

Disaster assistance agreements 1

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1. Disaster assistance agreements

Disaster assistance agreement was binding contract which obligated United States to provide such assistance as was called for therein. State of Tex., v. U.S., 1976, 537 F.2d 466, 210 Ct.Cl. 522.

§ 5132. Disaster warnings

(a) Readiness of Federal agencies to issue warnings to State and local officials

The President shall insure that all appropriate Federal agencies are prepared to issue warnings of disasters to State and local officials.

(b) Technical assistance to State and local governments for effective warnings

The President shall direct appropriate Federal agencies to provide technical assistance to State and local governments to insure that timely and effective disaster warning is provided.

(c) Warnings to governmental authorities and public endangered by disaster

The President is authorized to utilize or to make available to Federal, State, and local agencies the facilities of the civil defense communications system established and maintained pursuant to section 5196(c) of this title, or any other Federal communications system for the purpose of providing warning to governmental authorities and the civilian population in areas endangered by disasters.

(d) Agreements with commercial communications systems for use of facilities

The President is authorized to enter into agreements with the officers or agents of any private or commercial communications systems who volunteer the use of their systems on a reimbursable or nonreimbursable basis for the purpose of providing warning to governmental authorities and the civilian population endangered by disasters.

(Pub.L. 93–288, Title II, § 202, May 22, 1974, 88 Stat. 145; Pub.L. 103–337, Div. C, Title XXXIV, § 3412(b)(1), Oct. 5, 1994, 108 Stat. 3111.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1994 Acts. House Report No. 103–499 and House Conference Report No. 103–701, see 1994 U.S. Code Cong. and Adm. News, p. 2091.

Amendments

1994 Amendments. Subsec. (c). Pub.L. 103–337, § 3412(b)(1), substituted "section 5196(c) of this title" for "section 2281(c) of Title 50, Appendix".

LIBRARY REFERENCES

American Digest System

Provisions for disbursement of federal funds; disaster aid generally, see United States ⇐82(1, 5).

Encyclopedias

Provisions for disbursement of federal funds; disaster aid generally, see C.J.S. United States § 122 et seq.

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WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

SUBCHAPTER III—MAJOR DISASTER AND EMERGENCY ASSISTANCE ADMINISTRATION

§ 5141. Waiver of administrative conditions

Any Federal agency charged with the administration of a Federal assistance program may, if so requested by the applicant State or local authorities, modify or waive, for a major disaster, such administrative conditions for assistance as would otherwise prevent the giving of assistance under such programs if the inability to meet such conditions is a result of the major disaster.

(Pub.L. 93–288, Title III, § 301, as added Pub.L. 100–707, Title I, § 105(a)(2), Nov. 23, 1988, 102 Stat. 4691.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

Prior Provisions

A prior section 5141, Pub.L. 93–288, Title III, § 301, May 22, 1974, 88 Stat. 146, set out the procedure for determination of existence of emergency or major disaster, and was repealed by Pub.L. 100–707, Title I, § 105(a)(2), Nov. 23, 1988, 102 Stat. 4691.

LIBRARY REFERENCES

American Digest System

Provisions for disbursement of federal funds; disaster aid generally, see United States ⇐82(1, 5).

Encyclopedias

Provisions for disbursement of federal funds; disaster aid generally, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

Rules and regulations 1

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1. **Rules and regulations**

Regulatory 30–day submission requirement promulgated by the Federal Emergency Management Agency (FEMA), within which request for declaration of major disaster under the Disaster Relief Act had to be submitted, was valid; submission requirement was reasonably related to administrative enforcement of Act and was not contrary to any provision of Act. State of Kan. ex rel. Hayden v. U.S., D.Kan.1990, 751 F.Supp. 1495, affirmed 953 F.2d 1392.

§ 5142. Repealed. Pub.L. 100–707, Title I, § 105(a)(2), Nov. 23, 1988, 102 Stat. 4691

HISTORICAL AND STATUTORY NOTES

Section, Pub.L. 93–288, Title III, § 302, May 22, 1974, 88 Stat. 146, related to Federal assistance and its coordination with State and local disaster assistance.

§ 5143. Coordinating officers

(a) Appointment of Federal coordinating officer

Immediately upon his declaration of a major disaster or emergency, the President shall appoint a Federal coordinating officer to operate in the affected area.

(b) Functions of Federal coordinating officer

In order to effectuate the purposes of this chapter, the Federal coordinating officer, within the affected area, shall—

(1) make an initial appraisal of the types of relief most urgently needed;

(2) establish such field offices as he deems necessary and as are authorized by the President;

(3) coordinate the administration of relief, including activities of the State and local governments, the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief or disaster assistance organizations, which agree to operate under his advice or direction, except that nothing contained in this chapter shall limit or in any way affect the responsibilities of the American National Red Cross under the Act of January 5, 1905, as amended (33 Stat. 599) [36 U.S.C.A. § 1 et seq.]; and

(4) take such other action, consistent with authority delegated to him by the President, and consistent with the provisions of this chapter, as he may deem necessary to assist local citizens and public officials in promptly obtaining assistance to which they are entitled.

(c) State coordinating officer

When the President determines assistance under this chapter is necessary, he shall request that the Governor of the affected State designate a State coordinating officer for the purpose of coordinating State and local disaster assistance efforts with those of the Federal Government.

(Pub.L. 93–288, Title III, § 302, formerly § 303, May 22, 1974, 88 Stat. 147; renumbered § 302 and amended Pub.L. 100–707, Title I, § 105(b), Nov. 23, 1988, 102 Stat. 4691.)

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HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in subsecs. (b) and (c), in the original read "this Act", meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

The Act of January 5, 1905, as amended, referred to in subsec. (b)(3), is Jan. 5, 1905, c. 23, 33 Stat. 599, as amended, which enacted sections 1, 2, 3, former section 4, sections 4a, 5, 6, 8, and 9 of Title 36, Patriotic Societies and Observances. For complete classification of this Act to the Code, see Tables.

Amendments

1988 Amendments. Subsec. (a) Pub.L. 100–707 substituted "major disaster or emergency" for "major disaster".

Prior Provisions

A prior section 302 of Pub.L. 93–288, which was classified to section 5142 of this title, was repealed by Pub.L. 100–707.

LIBRARY REFERENCES

American Digest System

Appointment and powers of federal agents and employees, see United States ⇐36, 40.

Provisions for disbursement of federal funds; disaster aid generally, see United States ⇐82(1, 5).

Encyclopedias

Appointment and powers of federal agents and employees, see C.J.S. United States §§ 36, 38 et seq.

Provisions for disbursement of federal funds; disaster aid generally, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5144. Emergency support teams

The President shall form emergency support teams of Federal personnel to be deployed in an area affected by a major disaster or emergency. Such emergency support teams shall assist the Federal coordinating officer in carrying out his responsibilities pursuant to this chapter. Upon request of the President, the head of any Federal agency is directed to detail to temporary duty with the emergency support teams on either a reimbursable or nonreimbursable basis, as is determined necessary by the President, such personnel within the administrative jurisdiction of the head of the Federal agency as the President may need or believe to be useful for carrying out the functions of the emergency support teams, each such detail to be without loss of seniority, pay, or other employee status.

(Pub.L. 93–288, Title III, § 303, formerly § 304, May 22, 1974, 88 Stat. 148, renumbered § 303, Pub.L. 100–707, Title I, § 105(c), Nov. 23, 1988, 102 Stat. 4691.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in text, in the original read "this Act", meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

Prior Provisions

A prior section 303 of Pub.L. 93–288 was renumbered section 302 by Pub.L. 100–707 and is classified to section 5143 of this title.

LIBRARY REFERENCES

American Digest System

Appointment and powers of federal agents and employees, see United States ⇐36, 40.

Provisions for disbursement of federal funds; disaster aid generally, see United States ⇐82(1, 5).

Encyclopedias

Appointment and powers of federal agents and employees, see C.J.S. United States §§ 36, 38 et seq.

Provisions for disbursement of federal funds; disaster aid generally, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

§§ 5145, 5146. Repealed. Pub.L. 100–707, Title I, §105(d), Nov. 23, 1988, 102 Stat. 4691

HISTORICAL AND STATUTORY NOTES

Section 5145, Pub.L. 93–288, Title III, § 305, May 22, 1974, 88 Stat. 148, related to the authority of the President to provide assistance in an emergency.

Section 5146, Pub.L. 93–288, Title III, § 306, May 22, 1974, 88 Stat. 148, related to the cooperation of Federal agencies in rendering disaster assistance.

§ 5147. Reimbursement of Federal agencies

Federal agencies may be reimbursed for expenditures under this chapter from funds appropriated for the purposes of this chapter. Any funds received by Federal agencies as reimbursement for services or supplies furnished under the authority of this chapter shall be deposited to the credit of the appropriation or appropriations currently available for such services or supplies.

(Pub.L. 93–288, Title III, § 304, formerly § 307, May 22, 1974, 88 Stat. 149; renumbered § 304, Pub.L. 100–707, Title I, § 105(d), Nov. 23, 1988, 102 Stat. 4691.)

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HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in text, in the original read "this Act", meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

Prior Provisions

A prior section 304 of Pub.L. 93–288 was renumbered section 303 by Pub.L. 100–707 and is classified to section 5144 of this title.

LIBRARY REFERENCES

American Digest System

Provisions for disbursement of federal funds; disaster aid generally, see United States ⚖82(1, 5).

American Digest System

Provisions for disbursement of federal funds; disaster aid generally, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5148. Nonliability of Federal Government

The Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter.

(Pub.L. 93–288, Title III, § 305, formerly § 308, May 22, 1974, 88 Stat. 149, renumbered § 305, Pub.L. 100–707, Title I, § 105(d), Nov. 23, 1988, 102 Stat. 4691.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in text, in the original read "this Act", meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

Prior Provisions

A prior section 305 of Pub.L. 93–288, which was classified to section 5145 of this title, was repealed by Pub.L. 100–707.

LIBRARY REFERENCES

American Digest System

Claims against United States in general and actions against United States or its officers or agents, see United States ⚖93 et seq., 125(28 to 34), 127(1, 2).

Encyclopedias

Claims against United States in general and actions against United States or its officers or agents, see C.J.S. United States §§ 136 et seq., 178, 184.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

Declarations of disaster 2
Presidential decisions 3
Regulation promulgation 1

1. Regulation promulgation

Section of Disaster Relief Act precluding judicial review of disaster relief claims based upon discretionary actions of federal employees precluded review of claim that regulation restricting disaster unemployment benefits to those actually working or scheduled to work at time of disaster was an improper interpretation of relevant federal regulations; promulgation of challenged regulation was exactly the sort of exercise of discretion that Congress intended to insulate from judicial review. Rosas v. Brock, C.A.11 (Fla.) 1987, 826 F.2d 1004.

2. Declarations of disaster

Any decision of Federal Emergency Management Agency or its officials not to submit to President governor's request for "major disaster" declaration, which complied with procedural requirements, would be beyond their discretion and their statutory authority, and would be subject to judicial review. State of Kan. ex rel. Hayden v. U.S., D.Kan.1990, 748 F.Supp. 797, on reconsideration 751 F.Supp. 1495, affirmed 953 F.2d 1392.

3. Presidential decisions

President's decision on request for declaration of "major disaster" was not subject to judicial review, as decision involved discretionary function statutorily precluded from judicial review; therefore, district court lacked subject matter jurisdiction over governor's claims seeking to challenge denial of request for declaration of major disaster. State of Kan. ex rel. Hayden v. U.S., D.Kan.1990, 748 F.Supp. 797, on reconsideration 751 F.Supp. 1495, affirmed 953 F.2d 1392.

§ 5149. Performance of services

(a) Utilization of services or facilities of State and local governments

In carrying out the purposes of this chapter, any Federal agency is authorized to accept and utilize the services or facilities of any State or local government, or of any agency, office, or employee thereof, with the consent of such government.

(b) Appointment of temporary personnel, experts, and consultants; acquisition, rental, or hire of equipment, services, materials and supplies

In performing any services under this chapter, any Federal agency is authorized—

(1) to appoint and fix the compensation of such temporary personnel as may be necessary, without regard to the provisions of Title 5 governing appointments in competitive service;

(2) to employ experts and consultants in accordance with the provisions of section 3109 of such Title, without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such

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Title relating to classification and General Schedule pay rates; and

(3) to incur obligations on behalf of the United States by contract or otherwise for the acquisition, rental, or hire of equipment, services, materials, and supplies for shipping, drayage, travel, and communications, and for the supervision and administration of such activities. Such obligations, including obligations arising out of the temporary employment of additional personnel, may be incurred by an agency in such amount as may be made available to it by the President.

(Pub.L. 93–288, Title III, § 306, formerly § 309, May 22, 1974, 88 Stat. 149; renumbered § 306, Pub.L. 100–707, Title I, § 105(d), Nov. 23, 1988, 102 Stat. 4691.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in text, in the original read "this Act", meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

The provisions of Title 5 governing appointments in the competitive service, referred to in subsec. (b)(1), are classified to section 3301 et seq. of Title 5, Government Organization and Employees.

Prior Provisions

A prior section 306 of Pub.L. 93–288, which was classified to section 5146 of this title, was repealed by Pub.L. 100–707.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).
Federal authority and capacity to contract in general, see United States ⇐59 et seq.

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.
Federal authority and capacity to contract in general, see C.J.S. United States § 81 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5150. Use of local firms and individuals

In the expenditure of Federal funds for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities which may be carried out by contract or agreement with private organizations, firms, or individuals, preference shall be given, to the extent feasible and practicable, to those organizations, firms, and individuals residing or doing business primarily in the area affected by such major disaster or emergency. This section shall not be considered to restrict the use of Department of Defense resources in the provision of major disaster assistance under this chapter.

(Pub.L. 93–288, Title III, § 307, formerly § 310, May 22, 1974, 88 Stat. 150; renumbered § 307 and amended Pub.L. 100–707, Title I, § 105(e), Nov. 23, 1988, 102 Stat. 4691.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in text, in the original read "this Act", meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

Amendments

1988 Amendments. Pub.L. 100–707, § 105(e)(2), (3), substituted "major disaster or emergency" for "major disaster" in two instances, and added the sentence "This section shall not be considered to restrict the use of Department of Defense resources in the provision of major disaster assistance under this chapter."

Prior Provisions

A prior section 307 of Pub.L. 93–288 was renumbered section 304 by Pub.L. 100–707 and is classified to section 5147 of this title.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).
Federal authority and capacity to contract in general, see United States ⇐59 et seq.

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.
Federal authority and capacity to contract in general, see C.J.S. United States § 81 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5151. Nondiscrimination in disaster assistance

(a) Regulations for equitable and impartial relief operations

The President shall issue, and may alter and amend, such regulations as may be necessary for the guidance of personnel carrying out Federal assistance functions at the site of a major disaster or emergency. Such regulations shall include provisions for insuring that the distribution of supplies, the processing of applications, and other

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(B) Deadline for submission

The recommendations under subparagraph (A) shall be submitted to the President not later than October 1, 2001, and each October 1st thereafter or such later date in the year as the President may establish.

(C) Criteria

In making recommendations under subparagraph (A), a Governor shall consider the criteria specified in subsection (g).

(2) Use

(A) In general

Except as provided in subparagraph (B), in providing assistance to local governments under this section, the President shall select from local governments recommended by the Governors under this subsection.

(B) Extraordinary circumstances

In providing assistance to local governments under this section, the President may select a local government that has not been recommended by a Governor under this subsection if the President determines that extraordinary circumstances justify the selection and that making the selection will further the purpose of this section.

(3) Effect of failure to nominate

If a Governor of a State fails to submit recommendations under this subsection in a timely manner, the President may select, subject to the criteria specified in subsection (g), any local governments of the State to receive assistance under this section.

(e) Uses of technical and financial assistance

(1) In general

Technical and financial assistance provided under this section—

(A) shall be used by States and local governments principally to implement predisaster hazard mitigation measures that are cost-effective and are described in proposals approved by the President under this section; and

(B) may be used—

(i) to support effective public-private natural disaster hazard mitigation partnerships;

(ii) to improve the assessment of a community's vulnerability to natural hazards; or

(iii) to establish hazard mitigation priorities, and an appropriate hazard mitigation plan, for a community.

(2) Dissemination

A State or local government may use not more than 10 percent of the financial assistance received by the State or local government under this section for a fiscal year to fund activities to disseminate information regarding cost-effective mitigation technologies.

(f) Allocation of funds

The amount of financial assistance made available to a State (including amounts made available to local governments of the State) under this section for a fiscal year—

(1) shall be not less than the lesser of—

(A) $500,000; or

(B) the amount that is equal to 1.0 percent of the total funds appropriated to carry out this section for the fiscal year;

(2) shall not exceed 15 percent of the total funds described in paragraph (1)(B); and

(3) shall be subject to the criteria specified in subsection (g).

(g) Criteria for assistance awards

In determining whether to provide technical and financial assistance to a State or local government under this section, the President shall take into account—

(1) the extent and nature of the hazards to be mitigated;

(2) the degree of commitment of the State or local government to reduce damages from future natural disasters;

(3) the degree of commitment by the State or local government to support ongoing non-Federal support for the hazard mitigation measures to be carried out using the technical and financial assistance;

(4) the extent to which the hazard mitigation measures to be carried out using the technical and financial assistance contribute to the mitigation goals and priorities established by the State;

(5) the extent to which the technical and financial assistance is consistent with other assistance provided under this chapter;

(6) the extent to which prioritized, cost-effective mitigation activities that produce meaningful and definable outcomes are clearly identified;

(7) if the State or local government has submitted a mitigation plan under section 5165 of this title, the extent to which the activities identified under paragraph (6) are consistent with the mitigation plan;

(8) the opportunity to fund activities that maximize net benefits to society;

(9) the extent to which assistance will fund mitigation activities in small impoverished communities; and

(10) such other criteria as the President establishes in consultation with State and local governments.

(h) Federal share

(1) In general

Financial assistance provided under this section may contribute up to 75 percent of the total cost of mitigation activities approved by the President.

(2) Small impoverished communities

Notwithstanding paragraph (1), the President may contribute up to 90 percent of the total cost of a mitigation activity carried out in a small impoverished community.

(i) National predisaster mitigation fund

(1) Establishment

The President may establish in the Treasury of the United States a fund to be known as the "National Predisaster Mitigation Fund", to be used in carrying out this section.

(2) Transfers to fund

There shall be deposited in the Fund—

(A) amounts appropriated to carry out this section, which shall remain available until expended; and

(B) sums available from gifts, bequests, or donations of services or property received by the President for the purpose of predisaster hazard mitigation.

(3) Expenditures from fund

Upon request by the President, the Secretary of the Treasury shall transfer from the Fund to the President such amounts as the President determines are necessary to provide technical and financial assistance under this section.

(4) Investment of amounts

(A) In general

The Secretary of the Treasury shall invest such portion of the Fund as is not, in the judgment of the Secretary of the Treasury, required to meet current withdrawals. Investments may be made only in interest-bearing obligations of the United States.

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relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status.

(b) Compliance with regulations as prerequisite to participation by other bodies in relief operations

As a condition of participation in the distribution of assistance or supplies under this chapter or of receiving assistance under this chapter, governmental bodies and other organizations shall be required to comply with regulations relating to nondiscrimination promulgated by the President, and such other regulations applicable to activities within an area affected by a major disaster or emergency as he deems necessary for the effective coordination of relief efforts.

(Pub.L. 93–288, Title III, § 308, formerly § 311, May 22, 1974, 88 Stat. 150; renumbered § 308 and amended Pub.L. 100–707, Title I, § 105(f), Nov. 23, 1988, 102 Stat. 4691.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in text, in the original read "this Act", meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

Amendments

1988 Amendments. Subsec. (b). Pub.L. 100–707 substituted "under this chapter" for "under section 5172 or 5174 of this title".

Prior Provisions

A prior section 308 of Pub.L. 93–288 was renumbered section 305 by Pub.L. 100–707 and is classified to section 5148 of this title.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Discrimination prohibited in programs receiving federal assistance generally, see Civil Rights ⇐126.

Federal authority and capacity to contract in general, see United States ⇐59 et seq.

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

Discrimination prohibited in programs receiving federal assistance generally, see C.J.S. Civil Rights § 46 et seq.

Federal authority and capacity to contract in general, see C.J.S. United States § 81 et seq.

Law Reviews

Enforcing the hidden U.S. equal rights law. Ann Fagan Ginger, 20 Golden Gate U.L.Rev. 385 (1990).

WESTLAW ELECTRONIC RESEARCH

Civil rights cases: 78k[add key number].

United States cases: 393k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5152. Utilization of relief organizations

(a) Personnel and facilities

In providing relief and assistance under this chapter, the President may utilize, with their consent, the personnel and facilities of the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief or disaster assistance organizations, in the distribution of medicine, food, supplies, or other items, and in the restoration, rehabilitation, or reconstruction of community services housing and essential facilities, whenever the President finds that such utilization is necessary.

(b) Coordination

The President is authorized to enter into agreements with the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief or disaster assistance organizations under which the disaster relief activities of such organizations may be coordinated by the Federal coordinating officer whenever such organizations are engaged in providing relief during and after a major disaster or emergency. Any such agreement shall include provisions assuring that use of Federal facilities, supplies, and services will be in compliance with regulations prohibiting duplication of benefits and guaranteeing nondiscrimination promulgated by the President under this chapter, and such other regulation as the President may require.

(Pub.L. 93–288, Title III, § 309, formerly § 312, May 22, 1974, 88 Stat. 150; renumbered § 309, Pub.L. 100–707, Title I, § 105(f), Nov. 23, 1988, 102 Stat. 4691.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in text, in the original read "this Act", meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

Prior Provisions

A prior section 309 of Pub.L. 93–288 was renumbered section 306 by Pub.L. 100–707 and is classified to section 5149 of this title.

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LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).
Federal authority and capacity to contract in general, see United States ⇐59 et seq.

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.
Federal authority and capacity to contract in general, see C.J.S. United States § 81 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5153. Priority to certain applications for public facility and public housing assistance

(a) Priority

In the processing of applications for assistance, priority and immediate consideration shall be given by the head of the appropriate Federal agency, during such period as the President shall prescribe, to applications from public bodies situated in areas affected by major disasters under the following Acts:

(1) The United States Housing Act of 1937 [42 U.S.C.A. § 1437 et seq.] for the provision of low-income housing.

(2) Section 462 of Title 40 for assistance in public works planning.

(3) The Community Development Block Grant Program under title I of the Housing and Community Development Act of 1974 [42 U.S.C.A. § 5301 et seq.].

(4) Section 1926 of Title 7.

(5) The Public Works and Economic Development Act of 1965 [42 U.S.C.A. § 3121 et seq.].

(6) The Appalachian Regional Development Act of 1965.

(7) The Federal Water Pollution Control Act [33 U.S.C.A. § 1251 et seq.].

(b) Obligation of certain discretionary funds

In the obligation of discretionary funds or funds which are not allocated among the States or political subdivisions of a State, the Secretary of Housing and Urban Development and the Secretary of Commerce shall give priority to applications for projects for major disaster areas.

(Pub.L. 93–288, Title III, § 310, as added Pub.L. 100–707, Title I, § 105(g), Nov. 23, 1988, 102 Stat. 4691.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

The United States Housing Act of 1937, referred to in subsec. (a)(1), is Act Sept. 1, 1937, c. 896, as revised generally by Pub.L. 93–383, Title II, § 201(a), Aug. 22, 1974, 88 Stat. 653, which is classified generally to chapter 8 (section 1437 et seq.) of this title. For complete classification of this Act to the Code, see Short Title of 1937 Acts note set out under section 1437 of this title and Tables.

The Housing and Community Development Act of 1974, referred to in subsec. (a)(3), is Pub. L. 93–383, Aug. 22, 1974, 88 Stat. 633, as amended. Title I of the Housing and Community Development Act of 1974 is Title I of Pub.L. 93–383, which is classified generally to chapter 69 (section 5301 et seq.) of this title. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5301 of this title, and Tables.

The Public Works and Economic Development Act of 1965, as amended, referred to in subsec. (a)(5), is Pub.L. 89–136, Aug. 26, 1965, 79 Stat. 552, as amended, which is classified principally to chapter 38 (section 3121 et seq.) of this title. For complete classification of this Act to the Code, see Short Title of 1965 Acts note set out under section 3121 of this title and Tables.

The Appalachian Regional Development Act of 1965, referred to in subsec. (a)(6), is Pub.L. 89–4, Mar. 9, 1965, 79 Stat. 5, as amended, which is set out in the Appendix to Title 40, Public Buildings, Property, and Works. For complete classification of this Act to the Code, see Tables.

The Federal Water Pollution Control Act, referred to in subsec. (a)(7), is Act June 30, 1948, c. 758, as amended generally by Pub.L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 816, which is classified generally to chapter 26 (section 1251 et seq.) of Title 33, Navigation and Navigable Waters. For complete classification of this Act to the Code, see Short Title of 1948 Acts note set out under section 1251 of Title 33, and Tables.

Prior Provisions

A prior section 5153, Pub.L. 93–288, Title III, § 313, May 22, 1974, 88 Stat. 150, relating to same subject matter as present section but with references to different acts and provisions, was repealed by Pub.L. 100–707, Title I, § 105(g), Nov. 23, 1988, 102 Stat. 4691.

A prior section 310 of Pub.L. 93–288 was renumbered section 307 by Pub.L. 100–707 and is classified to section 5150 of this title.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funding; disaster aid and public housing, see United States ⇐82 (1, 3 to 3.5, 5).

Encyclopedias

Disbursement of federal funding; disaster aid and public housing, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5154. Insurance

(a) Applicants for replacement of damaged facilities

(1) Compliance with certain regulations

An applicant for assistance under section 5172 of this title (relating to repair, restoration, and replacement of damaged

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facilities), section 5189 of this title (relating to simplified procedure) or section 3233 of this title shall comply with regulations prescribed by the President to assure that, with respect to any property to be replaced, restored, repaired, or constructed with such assistance, such types and extent of insurance will be obtained and maintained as may be reasonably available, adequate, and necessary, to protect against future loss to such property.

(2) Determination

In making a determination with respect to availability, adequacy, and necessity under paragraph (1), the President shall not require greater types and extent of insurance than are certified to him as reasonable by the appropriate State insurance commissioner responsible for regulation of such insurance.

(b) Maintenance of insurance

No applicant for assistance under section 5172 of this title (relating to repair, restoration, and replacement of damaged facilities), section 5189 of this title (relating to simplified procedure), or section 3233 of this title may receive such assistance for any property or part thereof for which the applicant has previously received assistance under this chapter unless all insurance required pursuant to this section has been obtained and maintained with respect to such property. The requirements of this subsection may not be waived under section 5141 of this title.

(c) State acting as self-insurer

A State may elect to act as a self-insurer with respect to any or all of the facilities owned by the State. Such an election, if declared in writing at the time of acceptance of assistance under section 5172 or 5189 of this title or 3233 of this title or subsequently and accompanied by a plan for self-insurance which is satisfactory to the President, shall be deemed compliance with subsection (a) of this section. No such self-insurer may receive assistance under section 5172 or 5189 of this title for any property or part thereof for which it has previously received assistance under this chapter, to the extent that insurance for such property or part thereof would have been reasonably available.

(Pub.L. 93–288, Title III, § 311, as added Pub.L. 100–707, Title I, § 105(i), Nov. 23, 1988, 102 Stat. 4692, and amended Pub.L. 103–325, Title V, § 521, Sept. 23, 1994, 108 Stat. 2257.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

1994 Acts. Senate Report No. 103–169 and House Conference Report No. 103–652, see 1994 U.S. Code Cong. and Adm. News, p. 1881.

References in Text

This chapter, referred to in subsecs. (b) and (c), in the original read "this Act" meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

Amendments

1994 Amendments. Subsec. (b). Pub.L. 103–325, § 521, added provisions prohibiting waiver of requirements under section 5141 of this title.

Prior Provisions

A prior section 5154, Pub.L. 93–288, Title III, § 314, May 22, 1974, 88 Stat. 151, related to the same subject matter of the present section making some changes in text and was repealed by Pub.L. 100–707, Title I, § 105(h), Nov. 23, 1988, 102 Stat. 4692.

A prior section 311 of Pub.L. 93–288 was renumbered section 308 by Pub.L. 100–707 and is classified to section 5151 of this title.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5154a. Prohibited flood disaster assistance

(a) General prohibition

Notwithstanding any other provision of law, no Federal disaster relief assistance made available in a flood disaster area may be used to make a payment (including any loan assistance payment) to a person for repair, replacement, or restoration for damage to any personal, residential, or commercial property if that person at any time has received flood disaster assistance that was conditional on the person first having obtained flood insurance under applicable Federal law and subsequently having failed to obtain and maintain flood insurance as required under applicable Federal law on such property.

(b) Transfer of property

(1) Duty to notify

In the event of the transfer of any property described in paragraph (3), the transferor shall, not later than the date on which such transfer occurs, notify the transferee in writing of the requirements to—

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(A) obtain flood insurance in accordance with applicable Federal law with respect to such property, if the property is not so insured as of the date on which the property is transferred; and

(B) maintain flood insurance in accordance with applicable Federal law with respect to such property.

Such written notification shall be contained in documents evidencing the transfer of ownership of the property.

(2) Failure to notify

If a transferor described in paragraph (1) fails to make a notification in accordance with such paragraph and, subsequent to the transfer of the property—

(A) the transferee fails to obtain or maintain flood insurance in accordance with applicable Federal law with respect to the property,

(B) the property is damaged by a flood disaster, and

(C) Federal disaster relief assistance is provided for the repair, replacement, or restoration of the property as a result of such damage,

the transferor shall be required to reimburse the Federal Government in an amount equal to the amount of the Federal disaster relief assistance provided with respect to the property.

(3) Property described

For purposes of paragraph (1), a property is described in this paragraph if it is personal, commercial, or residential property for which Federal disaster relief assistance made available in a flood disaster area has been provided, prior to the date on which the property is transferred, for repair, replacement, or restoration of the property, if such assistance was conditioned upon obtaining flood insurance in accordance with applicable Federal law with respect to such property.

(c) Omitted

(d) Definition

For purposes of this section, the term "flood disaster area" means an area with respect to which—

(1) the Secretary of Agriculture finds, or has found, to have been substantially affected by a natural disaster in the United States pursuant to section 1961(a) of Title 7; or

(2) the President declares, or has declared, the existence of a major disaster or emergency pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.), as a result of flood conditions existing in or affecting that area.

(e) Effective date

This section and the amendments made by this section shall apply to disasters declared after September 23, 1994.

(Pub.L. 103–325, Title V, § 582, Sept. 23, 1994, 108 Stat. 2286.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1994 Acts. Senate Report No. 103–169 and House Conference Report No. 103–652, see 1994 U.S. Code Cong. and Adm. News, p. 1881.

References in Text

The Robert T. Stafford Disaster Relief and Emergency Assistance Act, referred to in subsec. (d)(2), is Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

"This section and the amendments made by this section", referred to in subsec. (e), means this section and the amendments made by subsec. (c) of section 582 of Pub.L. 103–325, see Codifications note set out under this section.

Codifications

Section was enacted as part of the National Flood Insurance Reform Act of 1994 and not as part of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, which comprises this chapter.

Subsec. (c) of section 582 of Pub.L. 103–325 amended section 4012a of this title.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

§ 5155. Duplication of benefits

(a) General prohibition

The President, in consultation with the head of each Federal agency administering any program providing financial assistance to persons, business concerns, or other entities suffering losses as a result of a major disaster or emergency, shall assure that no such person, business concern, or other entity will receive such assistance with respect to any part of such loss as to which he has received financial assistance under any other program or from insurance or any other source.

(b) Special rules

(1) Limitation

This section shall not prohibit the provision of Federal assistance to a person who is or may be entitled to receive benefits for the same purposes from another source if such person has not received such other benefits by the time of application for Federal assistance and if such person agrees to repay all duplicative assistance to the agency providing the Federal assistance.

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(2) Procedures

The President shall establish such procedures as the President considers necessary to ensure uniformity in preventing duplication of benefits.

(3) Effect of partial benefits

Receipt of partial benefits for a major disaster or emergency shall not preclude provision of additional Federal assistance for any part of a loss or need for which benefits have not been provided.

(c) Recovery of duplicative benefits

A person receiving Federal assistance for a major disaster or emergency shall be liable to the United States to the extent that such assistance duplicates benefits available to the person for the same purpose from another source. The agency which provided the duplicative assistance shall collect such duplicative assistance from the recipient in accordance with chapter 37 of Title 31, relating to debt collection, when the head of such agency considers it to be in the best interest of the Federal Government.

(d) Assistance not income

Federal major disaster and emergency assistance provided to individuals and families under this chapter, and comparable disaster assistance provided by States, local governments, and disaster assistance organizations, shall not be considered as income or a resource when determining eligibility for or benefit levels under federally funded income assistance or resource-tested benefit programs.

(Pub.L. 93–288, Title III, § 312, as added Pub.L. 100–707, Title I, § 105(i), Nov. 23, 1988, 102 Stat. 4693.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in subsec. (d), in the original read "This Act", meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

Prior Provisions

A prior section 5155, Pub.L. 93–288, Title III, § 315, May 22, 1974, 88 Stat. 152, related to the same subject matter as the present section and was repealed by Pub.L. 100–707, Title I, § 105(i), Nov. 23, 1988, 102 Stat. 4693.

A prior section 312 of Pub.L. 93–288 was renumbered section 309 by Pub.L. 100–707 and is classified to section 5152 of this title.

LIBRARY REFERENCES

Administrative Law

Emergency funds for repair of federal-aid highways, see 23 C.F.R. § 668.101 et seq.

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5156. Standards and reviews

The President shall establish comprehensive standards which shall be used to assess the efficiency and effectiveness of Federal major disaster and emergency assistance programs administered under this chapter. The President shall conduct annual reviews of the activities of Federal agencies and State and local governments in major disaster and emergency preparedness and in providing major disaster and emergency assistance in order to assure maximum coordination and effectiveness of such programs and consistency in policies for reimbursement of States under this chapter.

(Pub.L. 93–288, Title III, § 313, as added Pub.L. 100–707, Title I, § 105(j), Nov. 23, 1988, 102 Stat. 4694.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in text, in the original read "this Act" meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

Prior Provisions

A prior section 5156, Pub.L. 93–288, Title III, § 316, May 22, 1974, 88 Stat. 152, related to reviews and reports by the President and was repealed by Pub.L. 100–707, Title I, § 105(j), Nov. 23, 1988, 102 Stat. 4694.

A prior section 313 of Pub.L. 93–288, which was classified to section 5153 of this title, was repealed by Pub.L. 100–707.

LIBRARY REFERENCES

American Digest System

Office of the President and presidential powers and duties; powers and duties of federal officers and employees generally, see United States ⇐26, 28, 40, 41.

Encyclopedias

Office of the President and presidential powers and duties; powers and duties of federal officers and employees generally, see C.J.S. United States §§ 27 et seq., 38 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

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§ 5157. Penalties

(a) Misuse of funds

Any person who knowingly misapplies the proceeds of a loan or other cash benefit obtained under this chapter shall be fined an amount equal to one and one-half times the misapplied amount of the proceeds or cash benefit.

(b) Civil enforcement

Whenever it appears that any person has violated or is about to violate any provision of this chapter, including any civil penalty imposed under this chapter, the Attorney General may bring a civil action for such relief as may be appropriate. Such action may be brought in an appropriate United States district court.

(c) Referral to Attorney General

The President shall expeditiously refer to the Attorney General for appropriate action any evidence developed in the performance of functions under this chapter that may warrant consideration for criminal prosecution.

(d) Civil penalty

Any individual who knowingly violates any order or regulation issued under this chapter shall be subject to a civil penalty of not more than $5,000 for each violation.

(Pub.L. 93–288, Title III, § 314, as added Pub.L. 100–707, Title I, § 105(*l*), Nov. 23, 1988, 102 Stat. 4694.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in subsecs. (a) to (d), in the original read "this Act", meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

Prior Provisions

A prior section 5157, Pub.L. 93–288, Title III, § 317, May 22, 1974, 88 Stat. 152, related to criminal and civil penalties and was repealed by Pub.L. 100–707, Title I, § 105(k), Nov. 23, 1988, 102 Stat. 4694.

A prior section 314 of Pub.L. 93–288, which was classified to section 5154 of this title, was repealed by Pub.L. 100–707.

LIBRARY REFERENCES

American Digest System

Criminal and civil remedies for fraud, see Fraud ⇐31 et seq., 68 et seq.

Encyclopedias

Criminal and civil remedies for fraud, see C.J.S. Fraud §§ 62 et seq., 154 et seq.

Forms

Indictment and Information, see West's Federal Forms § 7081 et seq.
Sentence and judgment, see West's Federal Forms § 7801 et seq.

WESTLAW ELECTRONIC RESEARCH

Fraud cases: 184k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5158. Availability of materials

The President is authorized, at the request of the Governor of an affected State, to provide for a survey of construction materials needed in the area affected by a major disaster on an emergency basis for housing repairs, replacement housing, public facilities repairs and replacement, farming operations, and business enterprises and to take appropriate action to assure the availability and fair distribution of needed materials, including, where possible, the allocation of such materials for a period of not more than one hundred and eighty days after such major disaster. Any allocation program shall be implemented by the President to the extent possible, by working with and through those companies which traditionally supply construction materials in the affected area. For the purposes of this section "construction materials" shall include building materials and materials required for repairing housing, replacement housing, public facilities repairs and replacement, and for normal farm and business operations.

(Pub.L. 93–288, Title III, § 315, formerly § 318, May 22, 1974, 88 Stat. 152; renumbered § 315, Pub.L. 100–707, Title I, § 105(*l*), Nov. 23, 1988, 102 Stat. 4694.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

Prior Provisions

A prior section 315 of Pub.L. 93–288, which was classified to section 5155 of this title, was repealed by Pub.L. 100–707.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

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United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

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§ 5159. Protection of environment

An action which is taken or assistance which is provided pursuant to section 5170a, 5170b, 5172, 5173, or 5192 of this title, including such assistance provided pursuant to the procedures provided for in section 5189 of this title, which has the effect of restoring a facility substantially to its condition prior to the disaster or emergency, shall not be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852) [42 U.S.C.A. § 4321 et seq.]. Nothing in this section shall alter or affect the applicability of the National Environmental Policy Act of 1969 to other Federal actions taken under this chapter or under any other provisions of law.

(Pub.L. 93–288, Title III, § 316, as added Pub.L. 100–707, Title I, § 105(m)(1), Nov. 23, 1988, 102 Stat. 4694.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

The National Environmental Policy Act of 1969, referred to in text, is Pub.L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (section 4321 et seq.) of this title. For complete classification of this Act to the Code, see Short Title of 1970 Acts note set out under section 4321 of this title and Tables.

This chapter, referred to in text, in the original read "this Act" meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

Prior Provisions

A prior section 316 of Pub.L. 93–288, which was classified to section 5156 of this title, was repealed by Pub.L. 100–707.

LIBRARY REFERENCES

American Digest System

Regulations for protection of the environment in general, see Health and Environment ⚷25.5(1) et seq.

Encyclopedias

Regulations for protection of the environment in general, see C.J.S. Health and Environment § 61 et seq.

WESTLAW ELECTRONIC RESEARCH

Health and environment cases: 199k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5160. Recovery of assistance

(a) Party liable

Any person who intentionally causes a condition for which Federal assistance is provided under this chapter or under any other Federal

law as a result of a declaration of a major disaster or emergency under this chapter shall be liable to the United States for the reasonable costs incurred by the United States in responding to such disaster or emergency to the extent that such costs are attributable to the intentional act or omission of such person which caused such condition. Such action for reasonable costs shall be brought in an appropriate United States district court.

(b) Rendering of care

A person shall not be liable under this section for costs incurred by the United States as a result of actions taken or omitted by such person in the course of rendering care or assistance in response to a major disaster or emergency.

(Pub.L. 93–288, Title III, § 317, as added Pub.L. 100–707, Title I, § 105(m)(1), Nov. 23, 1988, 102 Stat. 4695.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in subsec. (a), in the original read "this Act" meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

Prior Provisions

A prior section 317 of Pub.L. 93–288, which was classified to section 5157 of this title, was repealed by Pub.L. 100–707.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⚷82(1, 5).

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5161. Audits and investigations

(a) In general

Subject to the provisions of chapter 75 of Title 31, relating to requirements for single audits, the President shall conduct audits and investigations as necessary to assure compliance with this chapter, and in connection therewith may question such persons as may be necessary to carry out such audits and investigations.

(b) Access to records

For purposes of audits and investigations under this section, the President and Comptroller General may inspect any books, docu-

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ments, papers, and records of any person relating to any activity undertaken or funded under this chapter.

(c) State and local audits

The President may require audits by State and local governments in connection with assistance under this chapter when necessary to assure compliance with this chapter or related regulations.

(Pub.L. 93–288, Title III, § 318, as added Pub.L. 100–707, Title I, § 105(m)(1), Nov. 23, 1988, 102 Stat. 4695.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in subsecs. (a), (b), and (c), in the original read "this Act" meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

Prior Provisions

A prior section 318 of Pub.L. 93–288 was renumbered section 315 by Pub.L. 100–707 and is classified to section 5158 of this title.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5162. Advance of non-Federal share

(a) In general

The President may lend or advance to an eligible applicant or a State the portion of assistance for which the State is responsible under the cost-sharing provisions of this chapter in any case in which—

(1) the State is unable to assume its financial responsibility under such cost-sharing provisions—

(A) with respect to concurrent, multiple major disasters in a jurisdiction, or

(B) after incurring extraordinary costs as a result of a particular disaster; and

(2) the damages caused by such disasters or disaster are so overwhelming and severe that it is not possible for the applicant

or the State to assume immediately their financial responsibility under this chapter.

(b) Terms of loans and advances

(1) In general

Any loan or advance under this section shall be repaid to the United States.

(2) Interest

Loans and advances under this section shall bear interest at a rate determined by the Secretary of the Treasury, taking into consideration the current market yields on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the reimbursement period of the loan or advance.

(c) Regulations

The President shall issue regulations describing the terms and conditions under which any loan or advance authorized by this section may be made.

(Pub.L. 93–288, Title III, § 319, as added Pub.L. 100–707, Title I, § 105(m)(1), Nov. 23, 1988, 102 Stat. 4695.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in subsec. (a), in the original read "this Act" meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5163. Limitation on use of sliding scales

No geographic area shall be precluded from receiving assistance under this chapter solely by virtue of an arithmetic formula or sliding scale based on income or population.

(Pub.L. 93–288, Title III, § 320, as added Pub.L. 100–707, Title I, § 105(m)(1), Nov. 23, 1988, 102 Stat. 4696.)

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HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in text, in the original read "this Act" meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5164. Rules and regulations

The President may prescribe such rules and regulations as may be necessary and proper to carry out the provisions of this chapter, and may exercise, either directly or through such Federal agency as the President may designate, any power or authority conferred to the President by this chapter.

(Pub.L. 93–288, Title III, § 321, as added Pub.L. 100–707, Title I, § 105(m)(1), Nov. 23, 1988, 102 Stat. 4696.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in text, in the original read "this Act" meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

LIBRARY REFERENCES

American Digest System

Administrative rulemaking power, see Administrative Law and Procedure ⇐385 et seq.

Office of the President, and presidential powers and duties in general, see United States ⇐26, 28.

Encyclopedias

Administrative rulemaking power, see C.J.S. Public Administrative Law and Procedure § 88 et seq.

Office of the President, and presidential powers and duties in general, see C.J.S. United States §§ 27 to 30.

WESTLAW ELECTRONIC RESEARCH

Administrative law and procedure cases: 15ak[add key number].
United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

SUBCHAPTER IV—MAJOR DISASTER ASSISTANCE PROGRAMS

§ 5170. Procedure for declaration

All requests for a declaration by the President that a major disaster exists shall be made by the Governor of the affected State. Such a request shall be based on a finding that the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary. As part of such request, and as a prerequisite to major disaster assistance under this chapter, the Governor shall take appropriate response action under State law and direct execution of the State's emergency plan. The Governor shall furnish information on the nature and amount of State and local resources which have been or will be committed to alleviating the results of the disaster, and shall certify that, for the current disaster, State and local government obligations and expenditures (of which State commitments must be a significant proportion) will comply with all applicable cost-sharing requirements of this chapter. Based on the request of a Governor under this section, the President may declare under this chapter that a major disaster or emergency exists.

(Pub.L. 93–288, Title IV, § 401, as added Pub.L. 100–707, Title I, § 106(a)(3), Nov. 23, 1988, 102 Stat. 4696.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in text, in the original read "this Act" meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

Prior Provisions

A prior section 401 of Pub.L. 93–288, classified to section 5171 of this title, has been renumbered section 405 of Pub.L. 93–288 by section 106(a)(2) of Pub.L. 100–707.

CROSS REFERENCES

Disaster area defined as major disaster determined pursuant to this section for purposes of emergency exceptions made by Federal financial institutions regulatory agency, see 12 USCA § 3352.

Mortgage insurance eligibility for housing renovation and modernization for purposes of major disaster as determined under this section, see 12 USCA § 1706c.

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LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).
Office of President, and powers and duties thereof, see United States ⇐26, 28.

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.
Office of President, and powers and duties thereof, see C.J.S. United States §§ 27 to 30.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5170a. General Federal assistance

In any major disaster, the President may—

(1) direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, and managerial, technical, and advisory services) in support of State and local assistance efforts;

(2) coordinate all disaster relief assistance (including voluntary assistance) provided by Federal agencies, private organizations, and State and local governments;

(3) provide technical and advisory assistance to affected State and local governments for—

(A) the performance of essential community services;

(B) issuance of warnings of risks and hazards;

(C) public health and safety information, including dissemination of such information;

(D) provision of health and safety measures; and

(E) management, control, and reduction of immediate threats to public health and safety; and

(4) assist State and local governments in the distribution of medicine, food, and other consumable supplies, and emergency assistance.

(Pub.L. 93–288, Title IV, § 402, as added Pub.L. 100–707, Title I, § 106(a)(3), Nov. 23, 1988, 102 Stat. 4696.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

Prior Provisions

A prior section 402, Pub.L. 93–288, Title IV, May 22, 1974, 88 Stat. 153, relating to repair and restoration of damaged facilities, and classified to a former section 5172 of this title, was repealed by Pub.L. 100–707, Title I, § 106(b), Nov. 23, 1988, 102 Stat. 4699.

CROSS REFERENCES

Financial assistance for coastal barrier emergency actions performed pursuant to this section, see 16 USCA § 3505.

Food stamp program's temporary emergency eligibility standards established after consultation with official exercising authority under this section, see 7 USCA § 2014.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).
Office of President, and powers and duties thereof, see United States ⇐26, 28.

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.
Office of President, and powers and duties thereof, see C.J.S. United States §§ 27 to 30.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5170b. Essential assistance

(a) In general

Federal agencies may on the direction of the President, provide assistance essential to meeting immediate threats to life and property resulting from a major disaster, as follows:

(1) Federal resources, generally

Utilizing, lending, or donating to State and local governments Federal equipment, supplies, facilities, personnel, and other resources, other than the extension of credit, for use or distribution by such governments in accordance with the purposes of this chapter.

(2) Medicine, food, and other consumables

Distributing or rendering through State and local governments, the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief and disaster assistance organizations medicine, food, and other consumable supplies, and other services and assistance to disaster victims.

(3) Work and services to save lives and protect property

Performing on public or private lands or waters any work or services essential to saving lives and protecting and preserving property or public health and safety, including—

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(B) Acquisition of obligations

For the purpose of investments under subparagraph (A), obligations may be acquired—

(i) on original issue at the issue price; or

(ii) by purchase of outstanding obligations at the market price.

(C) Sale of obligations

Any obligation acquired by the Fund may be sold by the Secretary of the Treasury at the market price.

(D) Credits to fund

The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to and form a part of the Fund.

(E) Transfers of amounts

(i) In general

The amounts required to be transferred to the Fund under this subsection shall be transferred at least monthly from the general fund of the Treasury to the Fund on the basis of estimates made by the Secretary of the Treasury.

(ii) Adjustments

Proper adjustment shall be made in amounts subsequently transferred to the extent prior estimates were in excess of or less than the amounts required to be transferred.

(j) Limitation on total amount of financial assistance

The President shall not provide financial assistance under this section in an amount greater than the amount available in the Fund.

(k) Multihazard advisory maps

(1) Definition of multihazard advisory map

In this subsection, the term "multihazard advisory map" means a map on which hazard data concerning each type of natural disaster is identified simultaneously for the purpose of showing areas of hazard overlap.

(2) Development of maps

In consultation with States, local governments, and appropriate Federal agencies, the President shall develop multihazard advisory maps for areas, in not fewer than five States, that are subject to commonly recurring natural hazards (including flooding, hurricanes and severe winds, and seismic events).

(3) Use of technology

In developing multihazard advisory maps under this subsection, the President shall use, to the maximum extent practicable, the most cost-effective and efficient technology available.

(4) Use of maps

(A) Advisory nature

The multihazard advisory maps shall be considered to be advisory and shall not require the development of any new policy by, or impose any new policy on, any government or private entity.

(B) Availability of maps

The multihazard advisory maps shall be made available to the appropriate State and local governments for the purposes of—

(i) informing the general public about the risks of natural hazards in the areas described in paragraph (2);

(ii) supporting the activities described in subsection (e); and

(iii) other public uses.

(l) Report on Federal and State administration

Not later than 18 months after October 30, 2000, the President, in consultation with State and local governments, shall submit to Congress a report evaluating efforts to implement this section and recommending a process for transferring greater authority and responsibility for administering the assistance program established under this section to capable States.

(m) Termination of authority

The authority provided by this section terminates December 31, 2003.

(Pub.L. 93–288, Title II, § 203, as added Pub.L. 106–390, Title I, § 102(a), Oct. 30, 2000, 114 Stat. 1553.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–40, see 2000 U.S. Code Cong. and Adm. News, p. 1456.

References in Text

This chapter, referred to in subsec. (g), originally read "this Act", meaning the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub.L. 93–288, May 22, 1974, 88 Stat. 143, which is classified principally to this chapter. See Tables for complete classification.

Findings and Purpose

Pub.L. 106–390, Title I, § 101, Oct. 30, 2000, 114 Stat. 1552, provided that:

"(a) Findings.—Congress finds that—

"(1) natural disasters, including earthquakes, tsunamis, tornadoes, hurricanes, flooding, and wildfires, pose great danger to human life and to property throughout the United States;

"(2) Greater emphasis needs to be placed on—

"(A) identifying and assessing the risks to States and local governments (including Indian tribes) from natural disasters;

"(B) implementing adequate measures to reduce losses from natural disasters; and

"(C) ensuring that the critical services and facilities of communities will continue to function after a natural disaster;

"(3) expenditures for postdisaster assistance are increasing without commensurate reductions in the likelihood of future losses from natural disasters;

"(4) In the expenditure of Federal funds under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.), high priority should be given to mitigation of hazards at the local level; and

"(5) With a unified effort of economic incentives, awareness and education, technical assistance, and demonstrated Federal support, States and local Governments (including indian tribes) will be able to—

"(A) form effective community-based partnerships for hazard mitigation purposes;

"(B) implement effective hazard mitigation measures that reduce the potential damage from natural disasters;

"(C) ensure continued functionality of critical services;

"(D) leverage additional non-Federal resources in meeting natural disaster resistance goals; and

"(E) make commitments to long-term hazard mitigation efforts to be applied to new and existing structures.

"(b) Purpose.—The purpose of this title [Title I of Pub.L. 106–390, Oct. 30, 2000, 114 Stat. 1552, which enacted this section and sections 5134, 5165, and 5165a of this title, amended section 5170c of this title, and repealed section 5176 of this title] is to establish a national disaster hazard mitigation program—

"(1) to reduce the loss of life and property, human suffering, economic disruption, and disaster assistance costs resulting from natural disasters; and

"(2) to provide a source of predisaster hazard mitigation funding that will assist States and local governments (including Indian tribes) in implementing effective hazard mitigation measures that are designed to ensure the continued functionality of critical services and facilities after a natural disaster."

LIBRARY REFERENCES

American Digest System

United States ⇐26, 82(2, 5).

Key Number System Topic No. 393.

Encyclopedias

United States, see C.J.S. § 27 to 28, 122.

§ 5134. Interagency task force

(a) In general

The President shall establish a Federal interagency task force for the purpose of coordinating the implementation of predisaster hazard mitigation programs administered by the Federal Government.

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(A) debris removal;

(B) search and rescue, emergency medical care, emergency mass care, emergency shelter, and provision of food, water, medicine, and other essential needs, including movement of supplies or persons;

(C) clearance of roads and construction of temporary bridges necessary to the performance of emergency tasks and essential community services;

(D) provision of temporary facilities for schools and other essential community services;

(E) demolition of unsafe structures which endanger the public;

(F) warning of further risks and hazards;

(G) dissemination of public information and assistance regarding health and safety measures;

(H) provision of technical advice to State and local governments on disaster management and control; and

(I) reduction of immediate threats to life, property, and public health and safety.

(4) Contributions

Making contributions to State or local governments or owners or operators of private nonprofit facilities for the purpose of carrying out the provisions of this subsection.

(b) Federal share

The Federal share of assistance under this section shall be not less than 75 percent of the eligible cost of such assistance.

(c) Utilization of DOD resources

(1) General rule

During the immediate aftermath of an incident which may ultimately qualify for assistance under this subchapter or subchapter IV–A of this chapter, the Governor of the State in which such incident occurred may request the President to direct the Secretary of Defense to utilize the resources of the Department of Defense for the purpose of performing on public and private lands any emergency work which is made necessary by such incident and which is essential for the preservation of life and property. If the President determines that such work is essential for the preservation of life and property, the President shall grant such request to the extent the President determines practicable. Such emergency work may only be carried out for a period not to exceed 10 days.

(2) Rules applicable to debris removal

Any removal of debris and wreckage carried out under this subsection shall be subject to section 5173(b) of this title, relating to unconditional authorization and indemnification for debris removal.

(3) Expenditures out of disaster relief funds

The cost of any assistance provided pursuant to this subsection shall be reimbursed out of funds made available to carry out this chapter.

(4) Federal share

The Federal share of assistance under this subsection shall be not less than 75 percent.

(5) Guidelines

Not later than 180 days after November 23, 1988, the President shall issue guidelines for carrying out this subsection. Such guidelines shall consider any likely effect assistance under this subsection will have on the availability of other forms of assistance under this chapter.

(6) Definitions

For purposes of this section—

(A) Department of Defense

The term "Department of Defense" has the meaning the term "department" has under section 101 of Title 10.

(B) Emergency work

The term "emergency work" includes clearance and removal of debris and wreckage and temporary restoration of essential public facilities and services.

(Pub.L. 93–288, Title IV, § 403, as added Pub.L. 100–707, Title I, § 106(a)(3), Nov. 23, 1988, 102 Stat. 4697.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in subsecs. (a) and (c), in the original read "this Act" meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

Prior Provisions

A prior section 403 of Pub.L. 93–288, relating to debris removal and classified to section 5173 of this title, was renumbered section 407 of Pub.L. 93–288 by section 106(c)(1) of Pub.L. 100–707.

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CROSS REFERENCES

Financial assistance for coastal barrier emergency actions performed pursuant to this section, see 16 USCA § 3505.

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American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).
Office of President, and powers and duties thereof, see United States ⇐26, 28.

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.
Office of President, and powers and duties thereof, see C.J.S. United States §§ 27 to 30.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5170c. Hazard mitigation

(a) In general

The President may contribute up to 75 percent of the cost of hazard mitigation measures which the President has determined are cost-effective and which substantially reduce the risk of future damage, hardship, loss, or suffering in any area affected by a major disaster. Such measures shall be identified following the evaluation of natural hazards under section 5176 of this title and shall be subject to approval by the President. The total of contributions under this section for a major disaster shall not exceed 15 percent of the estimated aggregate amount of grants to be made (less any associated administrative costs) under this chapter with respect to the major disaster.

(b) Property acquisition and relocation assistance

(1) General authority

In providing hazard mitigation assistance under this section in connection with flooding, the Director of the Federal Emergency Management Agency may provide property acquisition and relocation assistance for projects that meet the requirements of paragraph (2).

(2) Terms and conditions

An acquisition or relocation project shall be eligible to receive assistance pursuant to paragraph (1) only if—

(A) the applicant for the assistance is otherwise eligible to receive assistance under the hazard mitigation grant program established under subsection (a) of this section; and

(B) on or after December 3, 1993, the applicant for the assistance enters into an agreement with the Director that provides assurances that—

(i) any property acquired, accepted, or from which a structure will be removed pursuant to the project will be dedicated and maintained in perpetuity for a use that is compatible with open space, recreational, or wetlands management practices;

(ii) no new structure will be erected on property acquired, accepted or from which a structure was removed under the acquisition or relocation program other than—

(I) a public facility that is open on all sides and functionally related to a designated open space;

(II) a rest room; or

(III) a structure that the Director approves in writing before the commencement of the construction of the structure; and

(iii) after receipt of the assistance, with respect to any property acquired, accepted or from which a structure was removed under the acquisition or relocation program—

(I) no subsequent application for additional disaster assistance for any purpose will be made by the recipient to any Federal entity; and

(II) no assistance referred to in subclause (I) will be provided to the applicant by any Federal source.

(3) Statutory construction

Nothing in this subsection is intended to alter or otherwise affect an agreement for an acquisition or relocation project carried out pursuant to this section that was in effect on the day before December 3, 1993.

(Pub.L. 93–288, Title IV, § 404, as added Pub.L. 100–707, Title I, § 106(a)(3), Nov. 23, 1988, 102 Stat. 4698; Pub.L. 103–181, §§ 2(a), 3, Dec. 3, 1993, 107 Stat. 2054.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

1993 Acts. House Report No. 103–358 and Statement by President, see 1993 U.S. Code Cong. and Adm. News, p. 2545.

Amendments

1993 Amendments. Subsec. (a). Pub.L. 103–181, § 3(1), designated existing provisions as subsec. (a) and inserted a subsection (a) heading.

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Pub.L. 103–181, § 2(a)(1), substituted "75 percent" for "50 percent" following "The President may contribute up to".

Pub.L. 103–181, § 2(a)(2), substituted "15 percent of the estimated aggregate amount of grants to be made (less any associated administrative costs) under this chapter with respect to the major disaster" for "10 percent of the estimated aggregate amounts of grants to be made under section 5172 of this title with respect to such major disaster" after "shall not exceed".

Subsec. (b). Pub.L. 103–181, § 3(2), added subsec. (b).

Effective Dates

1993 Acts. Section 2(b) of Pub.L. 103–181 provided that: "The amendments made by this section [amending this section] shall apply to any major disaster declared by the President pursuant to The Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.) [this chapter] on or after June 10, 1993."

Prior Provisions

A prior section 404 of Pub.L. 93–288, relating to temporary housing assistance, and classified to section 5174 of this title, was repealed by section 106(d) of Pub.L. 100–707.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).
Office of President, and powers and duties thereof, see United States ⇐26, 28.

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.
Office of President, and powers and duties thereof, see C.J.S. United States §§ 27 to 30.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5171. Federal facilities

(a) Repair, reconstruction, restoration, or replacement of United States facilities

The President may authorize any Federal agency to repair, reconstruct, restore, or replace any facility owned by the United States and under the jurisdiction of such agency which is damaged or destroyed by any major disaster if he determines that such repair, reconstruction, restoration, or replacement is of such importance and urgency that it cannot reasonably be deferred pending the enactment of specific authorizing legislation or the making of an appropriation for such purposes, or the obtaining of congressional committee approval.

(b) Availability of funds appropriated to agency for repair, reconstruction, restoration, or replacement of agency facilities

In order to carry out the provisions of this section, such repair, reconstruction, restoration, or replacement may be begun notwithstanding a lack or an insufficiency of funds appropriated for such purpose, where such lack or insufficiency can be remedied by the transfer, in accordance with law, of funds appropriated to that agency for another purpose.

(c) Steps for mitigation of hazards

In implementing this section, Federal agencies shall evaluate the natural hazards to which these facilities are exposed and shall take appropriate action to mitigate such hazards, including safe land-use and construction practices, in accordance with standards prescribed by the President.

(Pub.L. 93–288, Title IV, § 405, formerly § 401, May 22, 1974, 88 Stat. 153; renumbered § 405, Pub.L. 100–707, Title I, § 106(a)(2), Nov. 23, 1988, 102 Stat. 4696.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

Prior Provisions

A prior section 405 of Pub.L. 93–288, Title IV, May 22, 1974, 88 Stat. 155, relating to the protection of the environment, was classified to section 5175 of this title, and was repealed by Pub.L. 100–707, Title I, § 105(m)(2), Nov. 23, 1988, 102 Stat. 4696.

CROSS REFERENCES

Endangered or threatened species and habitat requirements exemptions in Presidentially declared disaster areas, see 16 USCA § 1536.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).
Office of President, and powers and duties thereof, see United States ⇐26, 28.

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.
Office of President, and powers and duties thereof, see C.J.S. United States §§ 27 to 30.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5172. Repair, restoration, and replacement of damaged facilities

(a) Contributions

The President may make contributions—

(1) to a State or local government for the repair, restoration, reconstruction, or replacement of a public facility which is damaged or destroyed by a major disaster and for associated expenses incurred by such government; and

(2) to a person who owns or operates a private nonprofit facility damaged or destroyed by a major disaster for the repair,

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restoration, reconstruction, or replacement of such facility and for associated expenses incurred by such person.

(b) Minimum Federal share

The Federal share of assistance under this section shall be not less than—

(1) 75 percent of the net eligible cost of repair, restoration, reconstruction, or replacement carried out under this section;

(2) 100 percent of associated expenses described in subsections (f)(1) and (f)(2) of this section; and

(3) 75 percent of associated expenses described in subsections (f)(3), (f)(4), and (f)(5) of this section.

(c) Large in lieu contributions

(1) For public facilities

In any case where a State or local government determines that the public welfare would not be best served by repairing, restoring, reconstructing, or replacing any public facility owned or controlled by such State or local government, it may elect to receive, in lieu of a contribution under subsection (a)(1) of this section, a contribution of not to exceed 90 percent of the Federal share of the Federal estimate of the cost of repairing, restoring, reconstructing, or replacing such facility and of associated expenses. Funds contributed under this subsection may be used to repair, restore, or expand other selected public facilities, to construct new facilities, or to fund hazard mitigation measures which the State or local government determines to be necessary to meet a need for governmental services and functions in the area affected by the major disaster.

(2) For private nonprofit facilities

In any case where a person who owns or operates a private nonprofit facility determines that the public welfare would not be best served by repairing, restoring, reconstructing, or replacing such facility, such person may elect to receive, in lieu of a contribution under subsection (a)(2) of this section, a contribution of not to exceed 90 percent of the Federal share of the Federal estimate of the cost of repairing, restoring, reconstructing, or replacing such facility and of associated expenses. Funds contributed under this subsection may be used to repair, restore, or expand other selected private nonprofit facilities owned or operated by such person, to construct new private nonprofit facilities to be owned or operated by such person, or to fund hazard mitigation measures which such person determines to be

necessary to meet a need for its services and functions in the area affected by the major disaster.

(3) Restriction on use for State or local contribution

Funds provided under this subsection shall not be used for any State or local government cost-sharing contribution required under this chapter.

(d) Flood insurance

(1) Reduction of Federal assistance

If a public facility or private nonprofit facility located in a special flood hazard area identified for more than 1 year by the Director pursuant to the National Flood Insurance Act of 1968 (42 U.S.C. 4001 et seq.) is damaged or destroyed, after the 180th day following November 23, 1988, by flooding in a major disaster and such facility is not covered on the date of such flooding by flood insurance, the Federal assistance which would otherwise be available under this section with respect to repair, restoration, reconstruction, and replacement of such facility and associated expenses shall be reduced in accordance with paragraph (2).

(2) Amount of reduction

The amount of a reduction in Federal assistance under this section with respect to a facility shall be the lesser of—

(A) the value of such facility on the date of the flood damage or destruction, or

(B) the maximum amount of insurance proceeds which would have been payable with respect to such facility if such facility had been covered by flood insurance under the National Flood Insurance Act of 1968 [42 U.S.C.A. § 4001 et seq.] on such date.

(3) Exception

Paragraphs (1) and (2) shall not apply to a private nonprofit facility which is not covered by flood insurance solely because of the local government's failure to participate in the flood insurance program established by the National Flood Insurance Act.

(4) Dissemination of information

The President shall disseminate information regarding the reduction in Federal assistance provided for by this subsection to State and local governments and the owners and operators of private nonprofit facilities who may be affected by such a reduction.

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(e) Net eligible cost

(1) General rule

For purposes of this section, the cost of repairing, restoring, reconstructing, or replacing a public facility or private nonprofit facility on the basis of the design of such facility as it existed immediately prior to the major disaster and in conformity with current applicable codes, specifications, and standards (including floodplain management and hazard mitigation criteria required by the President or by the Coastal Barrier Resources Act (16 U.S.C. 3501 et seq.)) shall, at a minimum, be treated as the net eligible cost of such repair, restoration, reconstruction, or replacement.

(2) Special rule

In any case in which the facility being repaired, restored, reconstructed, or replaced under this section was under construction on the date of the major disaster, the cost of repairing, restoring, reconstructing, or replacing such facility shall include, for purposes of this section, only those costs which, under the contract for such construction, are the owner's responsibility and not the contractor's responsibility.

(f) Associated expenses

For purposes of this section, associated expenses include the following:

(1) Necessary costs

Necessary costs of requesting, obtaining, and administering Federal assistance based on a percentage of assistance provided as follows:

(A) For an applicant whose net eligible costs equal less than $100,000, 3 percent of such net eligible costs.

(B) For an applicant whose net eligible costs equal $100,000 or more but less than $1,000,000, $3,000 plus 2 percent of such net eligible costs in excess of $100,000.

(C) For an applicant whose net eligible costs equal $1,000,000 or more but less than $5,000,000, $21,000 plus 1 percent of such net eligible costs in excess of $1,000,000.

(D) For an applicant whose net eligible costs equal $5,000,000 or more, $61,000 plus ½ percent of such net eligible costs in excess of $5,000,000.

(2) Extraordinary costs

Extraordinary costs incurred by a State for preparation of damage survey reports, final inspection reports, project applications, final audits, and related field inspections by State employees, including overtime pay and per diem and travel expenses of such employees, but not including pay for regular time of such employees, based on the total amount of assistance provided under sections 5170b, 5170c, 5172, 5173, 5192, and 5193 of this title in such State in connection with the major disaster as follows:

(A) If such total amount is less than $100,000, 3 percent of such total amount.

(B) If such total amount is $100,000 or more but less than $1,000,000, $3,000 plus 2 percent of such total amount in excess of $100,000.

(C) If such total amount is $1,000,000 or more but less than $5,000,000, $21,000 plus 1 percent of such total amount in excess of $1,000,000.

(D) If such total amount is $5,000,000 or more, $61,000 plus ½ percent of such total amount in excess of $5,000,000.

(3) Costs of National Guard

The costs of mobilizing and employing the National Guard for performance of eligible work.

(4) Costs of prison labor

The costs of using prison labor to perform eligible work, including wages actually paid, transportation to a worksite, and extraordinary costs of guards, food, and lodging.

(5) Other labor costs

Base and overtime wages for an applicant's employees and extra hires performing eligible work plus fringe benefits on such wages to the extent that such benefits were being paid before the disaster.

(Pub.L. 93–288, Title IV, § 406, as added Pub.L. 100–707, Title I, § 106(b), Nov. 23, 1988, 102 Stat. 4699.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in subsec. (c)(3), in the original read "this Act" meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

The National Flood Insurance Act of 1968, referred to in subsec. (d)(1) and (2)(B), is Pub.L. 90–448, Title XIII, Aug. 1, 1968, 82 Stat. 572, as amended, which is classified generally to chapter 50 (section 4001 et seq.) of this title. For complete classification of this Act to the Code, see Short Title of 1968 Acts note set out

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under section 4001 of this title and Tables.

The National Flood Insurance Act, referred to in subsec. (d)(3), probably means the National Flood Insurance Act of 1968.

The Coastal Barrier Resources Act, referred to in subsec. (e)(1), is Pub.L. 97–348, Oct. 18, 1982, 96 Stat. 1653, as amended, which is classified generally to chapter 55 (section 3501 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 3501 of Title 16 and Tables.

Prior Provisions

A prior section 5172, Pub.L. 93–288, Title IV, § 402, May 22, 1974, 88 Stat. 153, relating to repair and restoration of damaged facilities, was repealed by Pub.L. 100–707, Title I, § 106(b), Nov. 23, 1988, 102 Stat. 4699.

A prior section 406 of Pub.L. 93–288, relating to minimum standards for public and private structures, and classified to section 5176 of this title, was renumbered section 409 of Pub.L. 93–288 by section 106(e) of Pub.L. 100–707.

CROSS REFERENCES

Endangered or threatened species and habitat requirements exemptions in Presidentially declared disaster areas, see 16 USCA § 1536.

Recovery Planning Council acceptance of determinations made under this section as element of economic recovery investment plan, see 42 USCA § 3232.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).
Office of President, and powers and duties thereof, see United States ⇐26, 28.

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.
Office of President, and powers and duties thereof, see C.J.S. United States §§ 27 to 30.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5173. Debris removal

(a) Presidential authority

The President, whenever he determines it to be in the public interest, is authorized—

(1) through the use of Federal departments, agencies, and instrumentalities, to clear debris and wreckage resulting from a major disaster from publicly and privately owned lands and waters; and

(2) to make grants to any State or local government or owner or operator of a private nonprofit facility for the purpose of removing debris or wreckage resulting from a major disaster from publicly or privately owned lands and waters.

(b) Authorization by State or local government; indemnification agreement

No authority under this section shall be exercised unless the affected State or local government shall first arrange an unconditional authorization for removal of such debris or wreckage from public and private property, and, in the case of removal of debris or wreckage from private property, shall first agree to indemnify the Federal Government against any claim arising from such removal.

(c) Rules relating to large lots

The President shall issue rules which provide for recognition of differences existing among urban, suburban, and rural lands in implementation of this section so as to facilitate adequate removal of debris and wreckage from large lots.

(d) Federal share

The Federal share of assistance under this section shall be not less than 75 percent of the eligible cost of debris and wreckage removal carried out under this section.

(Pub.L. 93–288, Title IV, § 407, formerly § 403, May 22, 1974, 88 Stat. 154; renumbered § 407 and amended Pub.L. 100–707, Title I, § 106(c), Nov. 23, 1988, 102 Stat. 4701.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

Amendments

1988 Amendments. Subsec. (a)(2). Pub.L. 100–707, § 106(c)(2), substituted "local government or owner or operator of a private nonprofit facility" for "local government".

Subsecs. (c), (d). Pub.L. 100–707, § 106(c)(3), added subsecs. (c) and (d).

Prior Provisions

A prior section 407 of Pub.L. 93–288 was renumbered section 410 by Pub.L. 100–707 and is classified to section 5177 of this title.

LIBRARY REFERENCES

Administrative Law

Disaster assistance, see 44 C.F.R. § 205.1 et seq.

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).
Office of President, and powers and duties thereof, see United States ⇐26, 28.

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.
Office of President, and powers and duties thereof, see C.J.S. United States §§ 27 to 30.

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United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

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§ 5174. Temporary housing assistance

(a) Provision of temporary housing

(1) In general

The President may—

(A) provide, by purchase or lease, temporary housing (including unoccupied habitable dwellings), suitable rental housing, mobile homes, or other readily fabricated dwellings to persons who, as a result of a major disaster, require temporary housing; and

(B) reimburse State and local governments in accordance with paragraph (4) for the cost of sites provided under paragraph (2).

(2) Mobile home site

(A) In general

Any mobile home or other readily fabricated dwelling provided under this section shall whenever possible be located on a site which—

(i) is provided by the State or local government; and

(ii) has utilities provided by the State or local government, by the owner of the site, or by the occupant who was displaced by the major disaster.

(B) Other sites

Mobile homes and other readily fabricated dwellings may be located on sites provided by the President if the President determines that such sites would be more economical or accessible than sites described in subparagraph (A).

(3) Period

Federal financial and operational assistance under this section shall continue for not longer than 18 months after the date of the major disaster declaration by the President, unless the President determines that due to extraordinary circumstances it would be in the public interest to extend such 18–month period.

(4) Federal share

The Federal share of assistance under this section shall be 100 percent; except that the Federal share of assistance under this section for construction and site development costs (including installation of utilities) at a mobile home group site shall be 75 percent of the eligible cost of such assistance. The State or local government receiving assistance under this section shall pay any cost which is not paid for from the Federal share.

(b) Temporary mortgage and rental payments

The President is authorized to provide assistance on a temporary basis in the form of mortgage or rental payments to or on behalf of individuals and families who, as a result of financial hardship caused by a major disaster, have received written notice of dispossession or eviction from a residence by reason of a foreclosure of any mortgage or lien, cancellation of any contract of sale, or termination of any lease, entered into prior to such disaster. Such assistance shall be provided for the duration of the period of financial hardship but not to exceed 18 months.

(c) In lieu expenditures

In lieu of providing other types of temporary housing after a major disaster, the President is authorized to make expenditures for the purpose of repairing or restoring to a habitable condition owner-occupied private residential structures made uninhabitable by a major disaster which are capable of being restored quickly to a habitable condition.

(d) Transfer of temporary housing

(1) Direct sale to occupants

Notwithstanding any other provision of law, any temporary housing acquired by purchase may be sold directly to individuals and families who are occupants of temporary housing at prices that are fair and equitable, as determined by the President.

(2) Transfers to States, local governments, and voluntary organizations

The President may sell or otherwise make available temporary housing units directly to States, other governmental entities, and voluntary organizations. The President shall impose as a condition of transfer under this paragraph a covenant to comply with the provisions of section 5151 of this title requiring nondiscrimination in occupancy of such temporary housing units. Such disposition shall be limited to units purchased under the provisions of subsection (a) of this section and to the purposes of providing temporary housing for disaster victims in major disasters or emergencies.

(e) Notification

(1) In general

Each person who applies for assistance under this section shall be notified regarding the type and amount of any assistance for

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which such person qualifies. Whenever practicable, such notice shall be provided within 7 days after the date of submission of such application.

(2) Information

Notification under this subsection shall provide information regarding—

(A) all forms of such assistance available;

(B) any specific criteria which must be met to qualify for each type of assistance that is available;

(C) any limitations which apply to each type of assistance; and

(D) the address and telephone number of offices responsible for responding to—

(i) appeals of determinations of eligibility for assistance; and

(ii) requests for changes in the type or amount of assistance provided.

(f) Location

In providing assistance under this section, consideration shall be given to the location of and travel time to—

(1) the applicant's home and place of business;

(2) schools which the applicant or members of the applicant's family who reside with the applicant attend; and

(3) crops or livestock which the applicant tends in the course of any involvement in farming which provides 25 percent or more of the applicant's annual income.

(Pub.L. 93–288, Title IV, § 408, as added Pub.L. 100–707, Title I, § 106(d), Nov. 23, 1988, 102 Stat. 4702.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

Prior Provisions

A prior section 5174, Pub.L. 93–288, Title IV, § 404, May 22, 1974, 88 Stat. 154, relating to temporary housing assistance, was repealed by Pub.L. 100–707, Title I, § 106(d), Nov. 23, 1988, 102 Stat. 4702.

A prior section 408 of Pub.L. 93–288, which was classified to section 5178 of this title and to a note set out under section 5178 of this title, was repealed by Pub.L. 100–707.

LIBRARY REFERENCES

Administrative Law

Disaster assistance, see 44 C.F.R. § 205.1 et seq.

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).
Office of President, and powers and duties thereof, see United States ⇐26, 27.

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.
Office of President, and powers and duties thereof, see C.J.S. United States §§ 27 to 30.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

Unpublished policies, reliance upon 1

1. Unpublished policies, reliance upon

Hurricane victims' claim that reliance by Federal Emergency Management Agency (FEMA) on "unpublished" policy to deny temporary housing assistance to otherwise eligible hurricane victims based on finding that another person in predisaster housing unit received assistance, without proof that applicant actually received such assistance, violated provision of Administrative Procedure Act (APA) was not within penumbra of district court's jurisdiction, since that policy was part and parcel of discretionary authority given to FEMA in Stafford Disaster Relief Act. Lockett v. Federal Emergency Management Agency, S.D.Fla.1993, 836 F.Supp. 847.

§ 5175. Repealed. Pub.L. 100–707, Title I, § 105(m)(2), Nov. 23, 1988, 102 Stat. 4696

HISTORICAL AND STATUTORY NOTES

Section, Pub.L. 93–288, Title IV, § 405, May 22, 1974, 88 Stat. 155, related to the protection of the environment.

§ 5176. Minimum standards for public and private structures

As a condition of any disaster loan or grant made under the provisions of this chapter, the recipient shall agree that any repair or construction to be financed therewith shall be in accordance with applicable standards of safety, decency, and sanitation and in conformity with applicable codes, specifications, and standards, and shall furnish such evidence of compliance with this section as may be required by regulation. As a further condition of any loan or grant made under the provisions of this chapter, the State or local government shall agree that the natural hazards in the areas in which the proceeds of the grants or loans are to be used shall be evaluated and appropriate action shall be taken to mitigate such hazards, including safe land-use and construction practices, in accordance with standards prescribed or approved by the President after adequate consultation with the appropriate elected officials of general purpose local governments, and the State shall furnish such evidence of compliance with this section as may be required by regulation.

(Pub.L. 93–288, Title IV, § 409, formerly § 406, May 22, 1974, 88 Stat. 155; renumbered § 409, Pub.L. 100–707, Title I, § 106(e), Nov. 23, 1988, 102 Stat. 4703.)

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HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in text, in the original read "this Act", meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

Prior Provisions

A prior section 409 of Pub.L. 93–288 was renumbered section 412 by Pub.L. 100–707 and is classified to section 5179 of this title.

LIBRARY REFERENCES

Administrative Law

Disaster assistance, see 44 C.F.R. § 205.1 et seq.

American Digest System

Disbursement of federal funds generally; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds generally; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5177. Unemployment assistance

(a) Benefit assistance

The President is authorized to provide to any individual unemployed as a result of a major disaster such benefit assistance as he deems appropriate while such individual is unemployed for the weeks of such unemployment with respect to which the individual is not entitled to any other unemployment compensation (as that term is defined in section 85(b) of Title 26) or waiting period credit. Such assistance as the President shall provide shall be available to an individual as long as the individual's unemployment caused by the major disaster continues or until the individual is reemployed in a suitable position, but no longer than 26 weeks after the major disaster is declared. Such assistance for a week of unemployment shall not exceed the maximum weekly amount authorized under the unemployment compensation law of the State in which the disaster occurred. The President is directed to provide such assistance through agreements with States which, in his judgment, have an adequate system for administering such assistance through existing State agencies.

(b) Reemployment assistance

(1) State assistance

A State shall provide, without reimbursement from any funds provided under this chapter, reemployment assistance services under any other law administered by the State to individuals receiving benefits under this section.

(2) Federal assistance

The President may provide reemployment assistance services under other laws to individuals who are unemployed as a result of a major disaster and who reside in a State which does not provide such services.

(Pub.L. 93–288, Title IV, § 410, formerly § 407, May 22, 1974, 88 Stat. 156; renumbered § 410 and amended Pub.L. 100–707, Title I, § 106(e), (f), Nov. 23, 1988, 102 Stat. 4703, 4704.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in subsec. (b), in the original read "this Act" meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

Amendments

1988 Amendments. Subsec. (a). Pub.L. 100–707, § 106(f)(1)–(3), substituted, in the first sentence, "is unemployed for the weeks of such unemployment with respect to which the individual is not entitled to any other unemployment compensation (as that term is defined in section 85(b) of Title 26) or waiting period credit" for "is unemployed"; in the second sentence, "26 weeks" for "one year"; and, in the third sentence, "occurred" for "occurred, and the amount of assistance under this section to any such individual for a week of unemployment shall be reduced by any amount of unemployment compensation or of private income protection insurance compensation available to such individual for such week of unemployment".

Subsec. (b). Pub.L. 100–707, § 106(f)(4), inserted heading and amended text generally. Prior to amendment, text read as follows: "The President is further authorized for the purposes of this chapter to provide reemployment assistance services under other laws to individuals who are unemployed as a result of a major disaster."

Prior Provisions

A prior section 410 of Pub.L. 93–288 was renumbered section 413 by Pub.L. 100–707 and is classified to section 5180 of this title.

LIBRARY REFERENCES

Administrative Law

Disaster unemployment assistance, see 20 C.F.R. § 625.1 et seq.

American Digest System

Disbursement of federal funds generally; disaster aid, see United States ⇐82(1, 5).

Unemployment compensation insurance under social security law generally, see Social Security and Public Welfare ⇐251 et seq.

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Encyclopedias

Disbursement of federal funds generally; disaster aid, see C.J.S. United States § 122 et seq.

Unemployment compensation insurance under social security law generally, see C.J.S. Social Security and Public Welfare § 146 et seq.

WESTLAW ELECTRONIC RESEARCH

Social security and public welfare cases: 356ak[add key number].
United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5177a. Emergency grants to assist low-income migrant and seasonal farmworkers

(a) In general

The Secretary of Agriculture may make grants, not to exceed $20,000,000 annually, to public agencies or private organizations with tax exempt status under section 501(c)(3) of Title 26, that have experience in providing emergency services to low-income migrant and seasonal farmworkers where the Secretary determines that a local, State or national emergency or disaster has caused low-income migrant or seasonal farmworkers to lose income, to be unable to work, or to stay home or return home in anticipation of work shortages. Emergency services to be provided with assistance received under this section may include such types of assistance as the Secretary of Agriculture determines to be necessary and appropriate.

(b) "Low-income migrant or seasonal farmworker" defined

For the purposes of this section, the term "low-income migrant or seasonal farmworker" means an individual—

(1) who has, during any consecutive 12 month period within the preceding 24 month period, performed farm work for wages;

(2) who has received not less than one-half of such individual's total income, or been employed at least one-half of total work time in farm work; and

(3) whose annual family income within the 12 month period referred to in paragraph (1) does not exceed the higher of the poverty level or 70 percent of the lower living standard income level.

(c) Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary to carry out this section.

(Pub.L. 101–624, Title XXII, § 2281, Nov. 28, 1990, 104 Stat. 3978.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1990 Acts. Senate Report No. 101–357, House Conference Report No. 101–916, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 856.

Codifications

Section was enacted as part of the Food, Agriculture, Conservation, and Trade Act of 1990, and not as part of the Robert T. Stafford Disaster Relief and Emergency Assistance Act which is classified principally to this chapter.

Separability of Provisions

If any provision of Pub.L. 101–624 or the application thereof to any person or circumstance is held invalid, such invalidity not to affect other provisions or applications of Pub.L. 101–624 which can be given effect without regard to the invalid provision or application, see section 2519 of Pub.L. 101–624, set out as a note under section 1421 of Title 7, Agriculture.

CROSS REFERENCES

Low-income migrant or seasonal farmworker defined as having same meaning as this section for purposes of application of North American Free Trade Agreement, see 19 USCA § 3391.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds in general; aid to state and local agencies, see United States ⇐82(1, 2).

Encyclopedias

Disbursement of federal funds in general; aid to state and local agencies, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5178. Individual and family grant programs

(a) In general

The President is authorized to make a grant to a State for the purpose of making grants to individuals or families adversely affected by a major disaster for meeting disaster-related necessary expenses or serious needs of such individuals or families in those cases where such individuals or families are unable to meet such expenses or needs through assistance under other provisions of this chapter or through other means.

(b) Cost sharing

(1) Federal share

The Federal share of a grant to an individual or a family under this section shall be equal to 75 percent of the actual cost incurred.

(2) State contribution

The Federal share of a grant under this section shall be paid only on condition that the remaining 25 percent of the cost is

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(b) Chairperson

The Director of the Federal Emergency Management Agency shall serve as the chairperson of the task force.

(c) Membership

The membership of the task force shall include representatives of—

(1) relevant Federal agencies;

(2) State and local government organizations (including Indian tribes); and

(3) the American Red Cross.

(Pub.L. 93–288, Title II, § 204, as added Pub.L. 106–390, Title I, § 103, Oct. 30, 2000, 114 Stat. 1557.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–40, see 2000 U.S. Code Cong. and Adm. News, p. 1456.

LIBRARY REFERENCES

American Digest System

United States ⇐26, 36.
Key Number System Topic No. 393.

Encyclopedias

United States, see C.J.S. § 27 to 28, 36 to 37, 62 to 64.

SUBCHAPTER III—MAJOR DISASTER AND EMERGENCY ASSISTANCE ADMINISTRATION

§ 5141. Waiver of administrative conditions

LIBRARY REFERENCES

Encyclopedias

Provisions for disbursement of federal funds; disaster aid generally, see C.J.S. United States § 122 et seq.

79 Am Jur 2d, Welfare Laws § 44.

§ 5148. Nonliability of Federal Government

LIBRARY REFERENCES

Texts and Treatises

18 Fed Proc L Ed, Housing and Urban Development § 44:539.

NOTES OF DECISIONS

Discretionary function 5
Persons protected 4

4. Persons protected

Police officer who had been deputized, at request of Federal Emergency Management Agency (FEMA), by United States Marshals Service in aftermath of hurricane, and who was involved in automobile accident while driving government vehicle in course of performing his duties of protecting FEMA workers and property, was not engaged in discretionary function at time of accident, and thus, officer and United States were not protected from liability under immunity provision of Disaster Relief Act; while FEMA's decision to establish disaster assistance centers was exercise of discretionary function, allegedly negligent operation of vehicle by government employee was performance of non-discretionary, operational function. Torres v. Government of the U.S. (Federal Emergency Management Agency and U.S. Marshal's Service), D.Virgin Islands 1997, 979 F.Supp. 1054.

5. Discretionary function

Stafford Act's discretionary function exception, which immunized federal government from liability arising out of its performance of discretionary function in providing disaster relief, did not apply to bar breach of contract claims asserted by trustee for owner of mobile home park and park's lessee-operator, based on alleged failure of Federal Emergency Management Agency (FEMA) and Army Corps of Engineers to ensure that cleanup of hurricane damage to park was conducted according to alleged contract; once FEMA entered into contract governing cleanup of park, its actions did not involve element of judgment or choice, but rather were mandated by agreed-upon standards. Dureiko v. U.S., C.A.Fed.2000, 209 F.3d 1345.

Property owner's breach of contract claims against the government arising from government contractor's removal of debris on the property after hurricane were barred under discretionary function exception of the Stafford Act precluding government liability for discretionary actions during disaster efforts authorized by the President pursuant to the Act. Sunrise Village Mobile Home Park, L.C. v. U.S., Fed.Cl.1998, 42 Fed.Cl. 392.

§ 5149. Performance of services

NOTES OF DECISIONS

Compensation 1

1. Compensation

As used in statute authorizing Federal Emergency Management Agency (FEMA) to appoint and fix "compensation" of temporary personnel without regard to requirements of federal civil service laws, term "compensation" includes leave and holiday pay, and thus FEMA is authorized to set compensation for temporary Disaster Assistance Employees without regard to provisions of Federal Leave Act. Thiess v. Witt, C.A.Fed. (Dist.Col.) 1996, 100 F.3d 915, exceptions sustained in part.

§ 5154. Insurance

(a) Applicants for replacement of damaged facilities

(1) Compliance with certain regulations

An applicant for assistance under section 5172 of this title (relating to repair, restoration, and replacement of damaged facilities), section 5189 of this title (relating to simplified procedure) or section 3149(c)(2) of this title shall comply with regulations prescribed by the President to assure that, with respect to any property to be replaced, restored, repaired, or constructed with such assistance, such types and extent of insurance will be obtained and maintained as may be reasonably available, adequate, and necessary, to protect against future loss to such property.

[See main volume for text of (2)]

(b) Maintenance of insurance

No applicant for assistance under section 5172 of this title (relating to repair, restoration, and replacement of damaged facilities), section 5189 of this title (relating to simplified procedure), or section 3149(c)(2) of this title may receive such assistance for any property or part thereof for which the applicant has previously received assistance under this chapter unless all insurance required pursuant to this section has been obtained and maintained with respect to such property. The requirements of this subsection may not be waived under section 5141 of this title.

(c) State acting as self-insurer

A State may elect to act as a self-insurer with respect to any or all of the facilities owned by the State. Such an election, if declared in writing at the time of acceptance of assistance under section 5172 or 5189 of this title or section 3149(c)(2) of this title or subsequently and accompanied by a plan for self-insurance which is satisfactory to the President, shall be deemed compliance with subsection (a) of this section. No such self-insurer may receive assistance under section 5172 or 5189 of this title for any property or part thereof for which it has previously received assistance under this chapter, to the extent that insurance for such property or part thereof would have been reasonably available.

(As amended Pub.L. 106–390, Title II, § 201, Oct. 30, 2000, 114 Stat. 1559.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–40, see 2000 U.S. Code Cong. and Adm. News, p. 1456.

Amendments

2000 Amendments. Subsec. (a)(1). Pub.L. 106–390, § 201, struck out "section 3233 of this title" and inserted "section 3149 (c)(2) of this title".

Subsec. (b). Pub.L. 106–390, § 201, struck out "section 3233 of this title" and inserted "section 3149 (c)(2) of this title".

Subsec. (c). Pub.L. 106–390, § 201, struck out "section 3233 of this title" and inserted "section 3149 (c)(2) of this title".

LIBRARY REFERENCES

Texts and Treatises

18 Fed Proc L Ed, Housing and Urban Devel-

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paid to an individual or family from funds made available by a State.

(c) Regulations

The President shall promulgate regulations to carry out this section and such regulations shall include national criteria, standards, and procedures for the determination of eligibility for grants and the administration of grants under this section.

(d) Administrative expenses

A State may expend not to exceed 5 percent of any grant made by the President to it under subsection (a) of this section for expenses of administering grants to individuals and families under this section.

(e) Administration through Governor

The Governor of a State shall administer the grant program authorized by this section in the State.

(f) Limit on grants to individual

No individual or family shall receive grants under this section aggregating more than $10,000 with respect to any single major disaster. Such $10,000 limit shall annually be adjusted to reflect changes in the Consumer Price Index for All Urban Consumers published by the Department of Labor.

(Pub.L. 93–288, Title IV, § 411, as added Pub.L. 100–707, Title I, § 106(g), Nov. 23, 1988, 102 Stat. 4704.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

Prior Provisions

A prior section 5178 and the effective date note thereto, Pub.L. 93–288, Title IV, § 408, May 22, 1974, 88 Stat. 156, relating to individual and family grant programs, were struck out by Pub.L. 100–707, Title I, § 106(g), Nov. 23, 1988, 102 Stat. 4704.

A prior section 411 of Pub.L. 93–288 was renumbered section 414 by Pub.L. 100–707 and is classified to section 5181 of this title.

LIBRARY REFERENCES

Administrative Law

Disaster assistance, see 44 C.F.R. § 205.1 et seq.

American Digest System

Disbursement of federal funds generally; disaster aid, see United States ⇐82(5).

Encyclopedias

Disbursement of federal funds generally; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

Persons eligible 1

1. Persons eligible

This section under which governor could make grants to cover portion of adjusted loss from damage or destruction of nonbusiness or nonfarm personal property from floods gave claimants opportunity to apply for grants but created no right to grant enforceable by heirs of decedent who suffered such loss. Kosjer v. Com., Dept. of Public Welfare, 1983, 464 A.2d 687, 76 Pa.Cmwlth. 614.

§ 5179. Food coupons and distribution

(a) Persons eligible; terms and conditions

Whenever the President determines that, as a result of a major disaster, low-income households are unable to purchase adequate amounts of nutritious food, he is authorized, under such terms and conditions as he may prescribe, to distribute through the Secretary of Agriculture or other appropriate agencies coupon allotments to such households pursuant to the provisions of the Food Stamp Act of 1964 (P.L. 91–671; 84 Stat. 2048) [7 U.S.C.A. § 2011 et seq.] and to make surplus commodities available pursuant to the provisions of this chapter.

(b) Duration of assistance; factors considered

The President, through the Secretary of Agriculture or other appropriate agencies, is authorized to continue to make such coupon allotments and surplus commodities available to such households for so long as he determines necessary, taking into consideration such factors as he deems appropriate, including the consequences of the major disaster on the earning power of the households, to which assistance is made available under this section.

(c) Food Stamp Act provisions unaffected

Nothing in this section shall be construed as amending or otherwise changing the provisions of the Food Stamp Act of 1964 [7 U.S.C.A. § 2011 et seq.] except as they relate to the availability of food stamps in an area affected by a major disaster.

(Pub.L. 93–288, Title IV, § 412, formerly § 409, May 22, 1974, 88 Stat. 157; renumbered § 412, Pub.L. 100–707, Title I, § 106(h), Nov. 23, 1988, 102 Stat. 4705.)

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HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

The Food Stamp Act of 1964, referred to in subsecs. (a) and (c), is Pub.L. 88–525, Aug. 31, 1964, 78 Stat. 703, as amended, known as the Food Stamp Act of 1977, which is classified generally to chapter 51 (section 2011 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see Short Title of 1964 Act note set out under section 2011 of Title 7 and Tables.

Effective Dates

1974 Acts. Section 605 of Pub.L. 93–288, formerly set out as a note under section 5121 of this title, provided that this section is effective Apr. 1, 1974.

Delegation of Functions

Secretary of Agriculture designated and empowered to exercise, without the approval, ratification, or other action of President, all authority vested in President by this section concerning food coupons and distribution, see section 3 of Ex. Ord. No. 11795, as amended, set out as a note under section 5121 of this title.

Prior Provisions

A prior section 412 of Pub.L. 93–288 was renumbered section 415 by Pub.L. 100–707 and is classified to section 5182 of this title.

LIBRARY REFERENCES

Administrative Law

Donation of foods, see 7 C.F.R. § 250.1 et seq.

Issuance and use of coupons, see 7 C.F.R. § 274.1 et seq.

American Digest System

Disbursement of federal funds generally; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds generally; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5180. Food commodities

(a) Emergency mass feeding

The President is authorized and directed to assure that adequate stocks of food will be ready and conveniently available for emergency mass feeding or distribution in any area of the United States which suffers a major disaster or emergency.

(b) Funds for purchase of food commodities

The Secretary of Agriculture shall utilize funds appropriated under section 612c of Title 7, to purchase food commodities necessary to provide adequate supplies for use in any area of the United States in the event of a major disaster or emergency in such area.

(Pub.L. 93–288, Title IV, § 413, formerly § 410, May 22, 1974, 88 Stat. 157; renumbered § 413, Pub.L. 100–707, Title I, § 106(h), Nov. 23, 1988, 102 Stat. 4705.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

Effective Dates

1974 Acts. Section 605 of Pub.L. 93–288, formerly set out as a note under section 5121 of this title, provided that this section is effective Apr. 1, 1974.

Prior Provisions

A prior section 413 of Pub.L. 93–288 was renumbered section 416 by Pub.L. 100–707 and is classified to section 5183 of this title.

LIBRARY REFERENCES

Administrative Law

Donation of foods, see 7 C.F.R. § 250.1 et seq.

American Digest System

Disbursement of federal funds generally; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds generally; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5181. Relocation assistance

Notwithstanding any other provision of law, no person otherwise eligible for any kind of replacement housing payment under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91–646) [42 U.S.C.A. § 4601 et seq.] shall be denied such eligibility as a result of his being unable, because of a major disaster as determined by the President, to meet the occupancy requirements set by such Act.

(Pub.L. 93–288, Title IV, § 414, formerly § 411, May 22, 1974, 88 Stat. 157; renumbered § 414, Pub.L. 100–707, Title I, § 106(h), Nov. 23, 1988, 102 Stat. 4705.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, referred to in text, is Pub.L. 91–646, Jan. 2, 1971, 84 Stat. 1894, as amended, which is classified principally to chapter 61 (section 4601 et seq.) of this title. For complete classification of this Act to the Code, see Short Title of 1971

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Acts note set out under section 4601 of this title and Tables.

Effective Dates

1974 Acts. Section 605 of Pub.L. 93–288, formerly set out as a note under section 5121 of this title, provided that this section is effective Apr. 1, 1974.

Prior Provisions

A prior section 414(a), (b) of Pub.L. 93–288 was renumbered section 417(a), (b) by Pub.L. 100–707 and is classified to section 5184 of this title.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; relocation assistance and disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds; relocation assistance and disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5182. Legal services

Whenever the President determines that low-income individuals are unable to secure legal services adequate to meet their needs as a consequence of a major disaster, consistent with the goals of the programs authorized by this chapter, the President shall assure that such programs are conducted with the advice and assistance of appropriate Federal agencies and State and local bar associations.

(Pub.L. 93–288, Title IV, § 415, formerly § 412, May 22, 1974, 88 Stat. 157, renumbered § 415, Pub.L. 100–707, Title I, § 106(h), Nov. 23, 1988, 102 Stat. 4705.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

Effective Dates

1974 Acts. Section 605 of Pub.L. 93–288, formerly set out as a note under section 5121 of this title, provided that this section is effective Apr. 1, 1974.

Prior Provisions

A prior section 415 of Pub.L. 93–288 was renumbered section 418 by Pub.L. 100–707 and is classified to section 5185 of this title.

LIBRARY REFERENCES

Administrative Law

Disaster assistance, see 44 C.F.R. § 205.1 et seq.

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5183. Crisis counseling assistance and training

The President is authorized to provide professional counseling services, including financial assistance to State or local agencies or private mental health organizations to provide such services or training of disaster workers, to victims of major disasters in order to relieve mental health problems caused or aggravated by such major disaster or its aftermath.

(Pub.L. 93–288, Title IV, § 416, formerly § 413, May 22, 1974, 88 Stat. 157; renumbered § 416 and amended Pub.L. 100–707, Title I, § 106(i), Nov. 23, 1988, 102 Stat. 4705.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

Amendments

1988 Amendments. Pub.L. 100–707 substituted "President is authorized to provide" for "President is authorized (through the National Institute of Mental Health) to provide".

Effective Dates

1974 Acts. Section 605 of Pub.L. 93–288, formerly set out as a note under section 5121 of this title, provided that this section is effective Apr. 1, 1974.

Prior Provisions

A prior section 416 of Pub.L. 93–288 was renumbered section 419 by Pub.L. 100–707 and is classified to section 5186 of this title.

LIBRARY REFERENCES

Administrative Law

Disaster assistance for crisis counseling and training, see 42 C.F.R. § 38.1 et seq.

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5184. Community disaster loans

(a) In general

The President is authorized to make loans to any local government which may suffer a substantial loss of tax and other revenues as a result of a major disaster, and has demonstrated a need for financial

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assistance in order to perform its governmental functions. The amount of any such loan shall be based on need, and shall not exceed 25 per centum of the annual operating budget of that local government for the fiscal year in which the major disaster occurs. Repayment of all or any part of such loan to the extent that revenues of the local government during the three full fiscal year period following the major disaster are insufficient to meet the operating budget of the local government, including additional disaster-related expenses of a municipal operation character shall be cancelled.

(b) No effect on grants or other assistance

Any loans made under this section shall not reduce or otherwise affect any grants or other assistance under this chapter.

(Pub.L. 93–288, Title IV, § 417(a), (b), formerly § 414(a), (b), May 22, 1974, 88 Stat. 158; renumbered § 417(a), (b), Pub.L. 100–707, Title I, § 106(j), Nov. 23, 1988, 102 Stat. 4705.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

Effective Dates

1974 Acts. Section 605 of Pub.L. 93–288, formerly set out as a note under section 5121 of this title, provided that this section is effective Apr. 1, 1974.

Prior Provisions

A prior section 417 of Pub.L. 93–288 was renumbered section 420 by Pub.L. 100–707 and is classified to section 5187 of this title.

Community Emergency Drought Relief

Pub.L. 95–31, Title I, May 23, 1977, 91 Stat. 169, provided: "That this Act be cited as the 'Community Emergency Drought Relief Act of 1977'.

"**Sec. 101.** **(a)** Upon the application of any State, political subdivision of a State, Indian tribe, or public or private nonprofit organization, the Secretary of Commerce is authorized to make grants and loans to applicants in drought impacted areas for projects that implement short-term actions to augment community water supplies where there are severe problems due to water shortages. Such assistance may be for the improvement, expansion, or construction of water supplies, and purchase and transportation of water, which in the opinion of the Secretary of Commerce will make a substantial contribution to the relief of an existing or threatened drought condition in a designated area.

"**(b)** The Secretary of Commerce may designate any area in the United States as an emergency drought impact area if he or she finds that a major and continuing adverse drought condition exists and is expected to continue, and such condition is causing significant hardships on the affected areas.

"**(c)** Eligible applicants shall be those States or political subdivisions of States with a population of ten thousand or more, Indian tribes, or public or private nonprofit organizations within areas designated pursuant to subsection (b) of this section.

"**(d)** Projects assisted under this Act shall be only those with respect to which assurances can be given to the satisfaction of the Secretary of Commerce that the work can be completed by April 30, 1978, or within such extended time as the Secretary may approve in exceptional circumstances.

"**Sec. 102.** Grants hereunder shall be in an amount not to exceed 50 per centum of allowable project costs. Loans shall be for a term not to exceed 40 years at a per annum interest rate of 5 per centum and shall be on such terms and conditions as the Secretary of Commerce shall determine. In determining the amount of a grant assistance for any project, the Secretary of Commerce may take into consideration such factors as are established by regulation and are consistent with the purposes of this Act.

"**Sec. 103.** In extending assistance under this Act the Secretary shall take into consideration the relative needs of applicant areas for the projects for which assistance is requested, and the appropriateness of the project for relieving the conditions intended to be alleviated by this Act.

"**Sec. 104.** The Secretary of Commerce shall have such powers and authorities under this Act as are vested in the Secretary by sections 701 and 708 of the Public Works and Economic Development Act of 1965, as amended [sections 3211 and 3218 of this title], with respect to that Act [section 3121 et seq. of this title].

"**Sec. 105.** The National Environmental Protection Act of 1969, as amended [section 4321 et seq. of this title], shall be implemented to the fullest extent consistent with but subject to the time constraints imposed by this Act, and the Secretary of Commerce when making the final determination regarding an application for assistance hereunder shall give consideration to the environmental consequences determined within that period.

"**Sec. 106.** **(a)** There is hereby authorized to be appropriated for the fiscal year ending September 30, 1977, $225,000,000 of which sum $150,000,000 is to be for the loan program herein, including administration thereof, and $75,000,000 of which is to be used for the grant program herein, including administration thereof, and such additional amounts for the fiscal year ending September 30, 1978, as may be reasonably needed for administrative expenses in monitoring and closing out the program authorized by the Act. Funds authorized by this Act shall be obligated by December 31, 1977.

"**(b)** Funds available to the Secretary for this Act shall be available for expenditure for drought impact projects conducted heretofore by eligible applicants during fiscal year 1977 if such projects are found to be compatible with the broad purposes of this Act."

LIBRARY REFERENCES

Administrative Law

Community emergency drought relief, see 13 C.F.R. § 318.1 et seq.

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5185. Emergency communications

The President is authorized during, or in anticipation of, an emergency or major disaster to establish temporary communications systems and to make such communications available to State and local government officials and other persons as he deems appropriate.

(Pub.L. 93–288, Title IV, § 418, formerly § 415, May 22, 1974, 88 Stat. 158; renumbered § 418, Pub.L. 100–707, Title I, § 106(j), Nov. 23, 1988, 102 Stat. 4705.)

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HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

Effective Dates

1974 Acts. Section 605 of Pub.L. 93–288, formerly set out as a note under section 5121 of this title, provided that this section is effective Apr. 1, 1974.

Prior Provisions

A prior section 418 of Pub.L. 93–288 was renumbered section 421 by Pub.L. 100–707 and is classified to section 5188 of this title.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5186. Emergency public transportation

The President is authorized to provide temporary public transportation service in an area affected by a major disaster to meet emergency needs and to provide transportation to governmental offices, supply centers, stores, post offices, schools, major employment centers, and such other places as may be necessary in order to enable the community to resume its normal pattern of life as soon as possible.

(Pub.L. 93–288, Title IV, § 419, formerly § 416, May 22, 1974, 88 Stat. 158; renumbered § 419, Pub.L. 100–707, Title I, § 106(j), Nov. 23, 1988, 102 Stat. 4705.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

Effective Dates

1974 Acts. Section 605 of Pub.L. 93–288, formerly set out as a note under section 5121 of this title, provided that this section is effective Apr. 1, 1974.

Prior Provisions

A prior section 419 of Pub.L. 93–288, which was classified to section 5189 of this title, was repealed by Pub.L. 100–707.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5187. Fire suppression grants

The President is authorized to provide assistance, including grants, equipment, supplies, and personnel, to any State for the suppression of any fire on publicly or privately owned forest or grassland which threatens such destruction as would constitute a major disaster.

(Pub.L. 93–288, Title IV, § 420, formerly § 417, May 22, 1974, 88 Stat. 158; renumbered § 417, Pub.L. 100–707, Title I, § 106(j), Nov. 23, 1988, 102 Stat. 4705.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

Effective Dates

1974 Acts. Section 605 of Pub.L. 93–288, formerly set out as a note under section 5121 of this title, provided that this section is effective Apr. 1, 1974.

LIBRARY REFERENCES

Administrative Law

Disaster assistance, see 44 C.F.R. § 205.1 et seq.

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5188. Timber sale contracts

(a) Cost-sharing arrangement

Where an existing timber sale contract between the Secretary of Agriculture or the Secretary of the Interior and a timber purchaser does not provide relief from major physical change not due to

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negligence of the purchaser prior to approval of construction of any section of specified road or of any other specified development facility and, as a result of a major disaster, a major physical change results in additional construction work in connection with such road or facility by such purchaser with an estimated cost, as determined by the appropriate Secretary, (1) of more than $1,000 for sales under one million board feet, (2) of more than $1 per thousand board feet for sales of one to three million board feet, or (3) of more than $3,000 for sales over three million board feet, such increased construction cost shall be borne by the United States.

(b) Cancellation of authority

If the appropriate Secretary determines that damages are so great that restoration, reconstruction, or construction is not practical under the cost-sharing arrangement authorized by subsection (a) of this section, he may allow cancellation of a contract entered into by his Department notwithstanding contrary provisions therein.

(c) Public notice of sale

The Secretary of Agriculture is authorized to reduce to seven days the minimum period of advance public notice required by section 476 of Title 16, in connection with the sale of timber from national forests, whenever the Secretary determines that (1) the sale of such timber will assist in the construction of any area of a State damaged by a major disaster, (2) the sale of such timber will assist in sustaining the economy of such area, or (3) the sale of such timber is necessary to salvage the value of timber damaged in such major disaster or to protect undamaged timber.

(d) State grants for removal of damaged timber; reimbursement of expenses limited to salvage value of removed timber

The President, when he determines it to be in the public interest, is authorized to make grants to any State or local government for the purpose of removing from privately owned lands timber damaged as a result of a major disaster, and such State or local government is authorized upon application, to make payments out of such grants to any person for reimbursement of expenses actually incurred by such person in the removal of damaged timber, not to exceed the amount that such expenses exceed the salvage value of such timber.

(Pub.L. 93–288, Title IV, § 421, formerly § 418, May 22, 1974, 88 Stat. 158; renumbered § 421, Pub.L. 100–707, Title I, § 106(j), Nov. 23, 1988, 102 Stat. 4705.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

Section 476 of Title 16, referred to in subsec. (c), was repealed by Pub.L. 94–588, § 13, Oct. 22, 1976, 90 Stat. 2958.

Effective Dates

1974 Acts. Section 605 of Pub.L. 93–288, formerly set out as a note under section 5121 of this title, provided that this section is effective Apr. 1, 1974.

LIBRARY REFERENCES

Administrative Law

Application for assistance, see 43 C.F.R. § 1815.0–3 et seq.

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Rights and remedies of government in regard to contracts generally, see United States ⇐75(1) et seq.

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

Rights and remedies of government in regard to contracts generally, see C.J.S. United States § 103 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5189. Simplified procedure

If the Federal estimate of the cost of—

(1) repairing, restoring, reconstructing, or replacing under section 5172 of this title any damaged or destroyed public facility or private nonprofit facility,

(2) emergency assistance under section 5170b or 5192 of this title, or

(3) debris removed under section 5173 of this title,

is less than $35,000, the President (on application of the State or local government or the owner or operator of the private nonprofit facility) may make the contribution to such State or local government or owner or operator under section 5170b, 5172, 5173, or 5192 of this title, as the case may be, on the basis of such Federal estimate. Such $35,000 amount shall be adjusted annually to reflect changes in the Consumer Price Index for All Urban Consumers published by the Department of Labor.

(Pub.L. 93–288, Title IV, § 422, as added Pub.L. 100–707, Title I, § 106(k), Nov. 23, 1988, 102 Stat. 4705.)

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HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

Prior Provisions

A prior section 5189, Pub.L. 93–288, Title IV, § 419, May 22, 1974, 88 Stat. 159, relating to alternative contributions, was struck out by Pub.L. 100–707, Title I, § 106(k), Nov. 23, 1988, 102 Stat. 4705.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5189a. Appeals of assistance decisions

(a) Right of appeal

Any decision regarding eligibility for, from, or amount of assistance under this subchapter may be appealed within 60 days after the date on which the applicant for such assistance is notified of the award or denial of award of such assistance.

(b) Period for decision

A decision regarding an appeal under subsection (a) of this section shall be rendered within 90 days after the date on which the Federal official designated to administer such appeals receives notice of such appeal.

(c) Rules

The President shall issue rules which provide for the fair and impartial consideration of appeals under this section.

(Pub.L. 93–288, Title IV, § 423, as added Pub.L. 100–707, Title I, § 106(*l*), Nov. 23, 1988, 102 Stat. 4705.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; review of federal agency action, see United States ⇐82(7).

Encyclopedias

Disbursement of federal funds; review of federal agency action, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

Exhaustion of remedies 1

1. Exhaustion of remedies

Administrative exhaustion of remedies was not required before hurricane victims could bring action challenging administrative temporary housing eligibility decisions of Federal Emergency Management Agency (FEMA), where exhaustion was not expressly required by statute, and regulation did not require appeal before review and did not compel the initial decision to be made inoperative pending that review. Lockett v. Federal Emergency Management Agency, S.D.Fla. 1993, 836 F.Supp. 847.

§ 5189b. Date of eligibility; expenses incurred before date of disaster

Eligibility for Federal assistance under this subchapter shall begin on the date of the occurrence of the event which results in a declaration by the President that a major disaster exists; except that reasonable expenses which are incurred in anticipation of and immediately preceding such event may be eligible for Federal assistance under this chapter.

(Pub.L. 93–288, Title IV, § 424, as added Pub.L. 100–707, Title I, § 106(*l*), Nov. 23, 1988, 102 Stat. 4706.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

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§ 5191. Procedure for declaration

(a) Request and declaration

All requests for a declaration by the President that an emergency exists shall be made by the Governor of the affected State. Such a request shall be based on a finding that the situation is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary. As a part of such request, and as a prerequisite to emergency assistance under this chapter, the Governor shall take appropriate action under State law and direct execution of the State's emergency plan. The Governor shall furnish information describing the State and local efforts and resources which have been or will be used to alleviate the emergency, and will define the type and extent of Federal aid required. Based upon such Governor's request, the President may declare that an emergency exists.

(b) Certain emergencies involving Federal primary responsibility

The President may exercise any authority vested in him by section 5192 of this title or section 5193 of this title with respect to an emergency when he determines that an emergency exists for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority. In determining whether or not such an emergency exists, the President shall consult the Governor of any affected State, if practicable. The President's determination may be made without regard to subsection (a) of this section.

(Pub.L. 93–288, Title V, § 501, as added Pub.L. 100–707, Title I, § 107(a), Nov. 23, 1988, 102 Stat. 4706.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

References in Text

This chapter, referred to in subsec. (a), in the original read "this Act" meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

Prior Provisions

A prior section 501 of Pub.L. 93–288 enacted subchapter VIII (section 3231 et seq.) of chapter 38 of this title.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5192. Federal emergency assistance

(a) Specified

In any emergency, the President may—

(1) direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, and managerial, technical and advisory services) in support of State and local emergency assistance efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe;

(2) coordinate all disaster relief assistance (including voluntary assistance) provided by Federal agencies, private organizations, and State and local governments;

(3) provide technical and advisory assistance to affected State and local governments for—

(A) the performance of essential community services;

(B) issuance of warnings of risks or hazards;

(C) public health and safety information, including dissemination of such information;

(D) provision of health and safety measures; and

(E) management, control, and reduction of immediate threats to public health and safety;

(4) provide emergency assistance through Federal agencies;

(5) remove debris in accordance with the terms and conditions of section 5173 of this title;

(6) provide temporary housing assistance in accordance with section 5174 of this title; and

(7) assist State and local governments in the distribution of medicine, food, and other consumable supplies, and emergency assistance.

(b) General

Whenever the Federal assistance provided under subsection (a) of this section with respect to an emergency is inadequate, the President may also provide assistance with respect to efforts to save lives,

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protect property and public health and safety, and lessen or avert the threat of a catastrophe.

(Pub.L. 93–288, Title V, § 502, as added Pub.L. 100–707, Title I, § 107(a), Nov. 23, 1988, 102 Stat. 4706.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports
1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

CROSS REFERENCES

Financial assistance for coastal barrier emergency actions performed pursuant to this section, see 16 USCA § 3505.
Food stamp program's temporary emergency eligibility standards established after consultation with official exercising authority under this section, see 7 USCA § 2014.

LIBRARY REFERENCES

American Digest System
Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias
Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5193. Amount of assistance

(a) Federal share

The Federal share for assistance provided under this subchapter shall be equal to not less than 75 percent of the eligible costs.

(b) Limit on amount of assistance

(1) In general

Except as provided in paragraph (2), total assistance provided under this subchapter for a single emergency shall not exceed $5,000,000.

(2) Additional assistance

The limitation described in paragraph (1) may be exceeded when the President determines that—

(A) continued emergency assistance is immediately required;

(B) there is a continuing and immediate risk to lives, property, public health or safety; and

(C) necessary assistance will not otherwise be provided on a timely basis.

(3) Report

Whenever the limitation described in paragraph (1) is exceeded, the President shall report to the Congress on the nature and extent of emergency assistance requirements and shall propose additional legislation if necessary.

(Pub.L. 93–288, Title V, § 503, as added Pub.L. 100–707, Title I, § 107(a), Nov. 23, 1988, 102 Stat. 4707.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports
1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

LIBRARY REFERENCES

American Digest System
Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias
Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

SUBCHAPTER IV–B—EMERGENCY PREPAREDNESS

§ 5195. Declaration of policy

The purpose of this subchapter is to provide a system of emergency preparedness for the protection of life and property in the United States from hazards and to vest responsibility for emergency preparedness jointly in the Federal Government and the States and their political subdivisions. The Congress recognizes that the organizational structure established jointly by the Federal Government and the States and their political subdivisions for emergency preparedness purposes can be effectively utilized to provide relief and assistance to people in areas of the United States struck by a hazard. The Federal Government shall provide necessary direction, coordination, and guidance, and shall provide necessary assistance, as authorized in this subchapter so that a comprehensive emergency preparedness system exists for all hazards.

(Pub.L. 93–288, Title VI, § 601, as added Pub.L. 103–337, Div. C, Title XXXIV, § 3411(a)(3), Oct. 5, 1994, 108 Stat. 3100.)

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HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1994 Acts. House Report No. 103–499 and House Conference Report No. 103–701, see 1994 U.S. Code Cong. and Adm. News, p. 2091.

LIBRARY REFERENCES

American Digest System

Measures and acts in exercise of war and national emergency powers, see War and National Emergency ⇐35 et seq.

Encyclopedias

Measures and acts in exercise of war and national emergency powers, see C.J.S. War and National Defense § 43 et seq.

WESTLAW ELECTRONIC RESEARCH

War and national emergency cases: 402k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5195a. Definitions

(a) Definitions

For purposes of this subchapter only:

(1) Hazard

The term "hazard" means an emergency or disaster resulting from—

(A) a natural disaster; or

(B) an accidental or man-caused event.

(2) Natural disaster

The term "natural disaster" means any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, drought, fire, or other catastrophe in any part of the United States which causes, or which may cause, substantial damage or injury to civilian property or persons.

(3) Emergency preparedness

The term "emergency preparedness" means all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard. Such term includes the following:

(A) Measures to be undertaken in preparation for anticipated hazards (including the establishment of appropriate organizations, operational plans, and supporting agreements, the recruitment and training of personnel, the conduct of research, the procurement and stockpiling of necessary materials and supplies, the provision of suitable warning systems, the construction or preparation of shelters, shelter areas, and control centers, and, when appropriate, the non-military evacuation of the civilian population).

(B) Measures to be undertaken during a hazard (including the enforcement of passive defense regulations prescribed by duly established military or civil authorities, the evacuation of personnel to shelter areas, the control of traffic and panic, and the control and use of lighting and civil communications).

(C) Measures to be undertaken following a hazard (including activities for fire fighting, rescue, emergency medical, health and sanitation services, monitoring for specific dangers of special weapons, unexploded bomb reconnaissance, essential debris clearance, emergency welfare measures, and immediately essential emergency repair or restoration of damaged vital facilities).

(4) Organizational equipment

The term "organizational equipment" means equipment determined by the Director to be necessary to an emergency preparedness organization, as distinguished from personal equipment, and of such a type or nature as to require it to be financed in whole or in part by the Federal Government. Such term does not include those items which the local community normally uses in combating local disasters, except when required in unusual quantities dictated by the requirements of the emergency preparedness plans.

(5) Materials

The term "materials" includes raw materials, supplies, medicines, equipment, component parts and technical information and processes necessary for emergency preparedness.

(6) Facilities

The term "facilities", except as otherwise provided in this subchapter, includes buildings, shelters, utilities, and land.

(7) Director

The term "Director" means the Director of the Federal Emergency Management Agency.

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§ 5155. Duplication of benefits

LIBRARY REFERENCES

Administrative Law

Emergency funds for repair of federal-aid highways, see 23 CFR § 668.101 et seq.

NOTES OF DECISIONS

Generally 1

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1. Generally

Determination by Federal Emergency Management Agency (FEMA) that disaster assistance statute required state to reimburse FEMA for insurance money available to state did not constitute rulemaking and, thus, notice and comment rulemaking requirements of Administrative Procedure Act (APA) were inapplicable to FEMA's determination. State ex rel. Attorney General v. Federal Emergency Management Agency, D.Hawai'i 1999, 78 F.Supp.2d 1111.

§ 5157. Penalties

LIBRARY REFERENCES

Texts and Treatises

18 Fed Proc L Ed, Housing and Urban Development §§ 44:552, 684.

§ 5158. Availability of materials

LIBRARY REFERENCES

Encyclopedias

79 Am Jur 2d, Welfare Laws § 44.

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

§ 5165. Mitigation planning

(a) Requirement of mitigation plan

As a condition of receipt of an increased Federal share for hazard mitigation measures under subsection (e), a State, local, or tribal government shall develop and submit for approval to the President a mitigation plan that outlines processes for identifying the natural hazards, risks, and vulnerabilities of the area under the jurisdiction of the government.

(b) Local and tribal plans

Each mitigation plan developed by a local or tribal government shall—

(1) describe actions to mitigate hazards, risks, and vulnerabilities identified under the plan; and

(2) establish a strategy to implement those actions.

(c) State plans

The State process of development of a mitigation plan under this section shall—

(1) identify the natural hazards, risks, and vulnerabilities of areas in the State;

(2) support development of local mitigation plans;

(3) provide for technical assistance to local and tribal governments for mitigation planning; and

(4) identify and prioritize mitigation actions that the State will support, as resources become available.

(d) Funding

(1) In general

Federal contributions under section 5170c of this title may be used to fund the development and updating of mitigation plans under this section.

(2) Maximum Federal contribution

With respect to any mitigation plan, a State, local, or tribal government may use an amount of Federal contributions under section 5170c of this title not to exceed 7 percent of the amount of such contributions available to the government as of a date determined by the government.

(e) Increased Federal share for hazard mitigation measures

(1) In general

If, at the time of the declaration of a major disaster, a State has in effect an approved mitigation plan under this section, the President may increase to 20 percent, with respect to the major disaster, the maximum percentage specified in the last sentence of section 5170c(a) of this title.

(2) Factors for consideration

In determining whether to increase the maximum percentage under paragraph (1), the President shall consider whether the State has established—

(A) eligibility criteria for property acquisition and other types of mitigation measures;

(B) requirements for cost effectiveness that are related to the eligibility criteria;

(C) a system of priorities that is related to the eligibility criteria; and

(D) a process by which an assessment of the effectiveness of a mitigation action may be carried out after the mitigation action is complete.

(Pub.L. 93–288, Title II, § 322, as added Pub.L. 106–390, Title I, § 104(a), Oct. 30, 2000, 114 Stat. 1558.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–40, see 2000 U.S. Code Cong. and Adm. News, p. 1456.

LIBRARY REFERENCES

American Digest System

United States ⇐26, 82(2, 5).

Key Number System Topic No. 393.

Encyclopedias

United States, see C.J.S. § 27 to 28, 122.

§ 5165a. Minimum standards for public and private structures

(a) In general

As a condition of receipt of a disaster loan or grant under this chapter—

(1) the recipient shall carry out any repair or construction to be financed with the loan or grant in accordance with applicable standards of safety, decency, and sanitation and in conformity with applicable codes, specifications, and standards; and

(2) the President may require safe land use and construction practices, after adequate consultation with appropriate State and local government officials.

(b) Evidence of compliance

A recipient of a disaster loan or grant under this chapter shall provide such evidence of compliance with this section as the President may require by regulation.

(Pub.L. 93–288, Title II, § 323, as added Pub.L. 106–390, Title I, § 104(a), Oct. 30, 2000, 114 Stat. 1559.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–40, see 2000 U.S. Code Cong. and Adm. News, p. 1456.

References in Text

This chapter, referred to in text, originally read "this Act", meaning the Robert T. Stafford Disaster Relief and Emergency Assistance Act,

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(8) Neighboring countries

The term "neighboring countries" includes Canada and Mexico.

(9) United States and States

The terms "United States" and "States" includes the several States, the District of Columbia, and territories and possessions of the United States.

(10) State

The term "State" includes interstate emergency preparedness authorities established under section 5196(h) of this title.

(b) Cross reference

The terms "national defense" and "defense," as used in the Defense Production Act of 1950 (50 U.S.C.App. 2061 et seq.), includes emergency preparedness activities conducted pursuant to this subchapter.

(Pub.L. 93–288, Title VI, § 602, as added Pub.L. 103–337, Div. C, Title XXXIV, § 3411(a)(3), Oct. 5, 1994, 108 Stat. 3101.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1994 Acts. House Report No. 103–499 and House Conference Report No. 103–701, see 1994 U.S. Code Cong. and Adm. News, p. 2091.

References in Text

The Defense Production Act of 1950, referred to in subsec. (b), is Act Sept. 8, 1950, c. 932, 64 Stat. 798, as amended, which is classified to section 2061 et seq. of the Appendix to Title 50, War and National Defense. For complete classification of this Act to the Code, see section 2061 of the Appendix to Title 50 and Tables.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

§ 5195b. Administration of subchapter

This subchapter shall be carried out by the Director of the Federal Emergency Management Agency.

(Pub.L. 93–288, Title VI, § 603, as added Pub.L. 103–337, Div. C, Title XXXIV, § 3411(a)(3), Oct. 5, 1994, 108 Stat. 3102.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1994 Acts. House Report No. 103–499 and House Conference Report No. 103–701, see 1994 U.S. Code Cong. and Adm. News, p. 2091.

LIBRARY REFERENCES

American Digest System

Powers and duties of federal officers, agents, and employees generally, see United States ⇐40, 41.

Encyclopedias

Powers and duties of federal officers, agents, and employees generally, see C.J.S. United States § 38 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

PART A—POWERS AND DUTIES

§ 5196. Detailed functions of administration

(a) In general

In order to carry out the policy described in section 5195 of this title, the Director shall have the authorities provided in this section.

(b) Federal emergency response plans and programs

The Director may prepare Federal response plans and programs for the emergency preparedness of the United States and sponsor and direct such plans and programs. To prepare such plans and programs and coordinate such plans and programs with State efforts, the Director may request such reports on State plans and operations for emergency preparedness as may be necessary to keep the President, Congress, and the States advised of the status of emergency preparedness in the United States.

(c) Delegation of emergency preparedness responsibilities

With the approval of the President, the Director may delegate to other departments and agencies of the Federal Government appropriate emergency preparedness responsibilities and review and coordinate the emergency preparedness activities of the departments and agencies with each other and with the activities of the States and neighboring countries.

(d) Communications and warnings

The Director may make appropriate provision for necessary emergency preparedness communications and for dissemination of warnings to the civilian population of a hazard.

(e) Emergency preparedness measures

The Director may study and develop emergency preparedness measures designed to afford adequate protection of life and property, including—

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(1) research and studies as to the best methods of treating the effects of hazards;

(2) developing shelter designs and materials for protective covering or construction; and

(3) developing equipment or facilities and effecting the standardization thereof to meet emergency preparedness requirements.

(f) Training programs

(1) The Director may—

(A) conduct or arrange, by contract or otherwise, for training programs for the instruction of emergency preparedness officials and other persons in the organization, operation, and techniques of emergency preparedness;

(B) conduct or operate schools or including the payment of travel expenses, in accordance with subchapter I of chapter 57 of Title 5, and the Standardized Government Travel Regulations, and per diem allowances, in lieu of subsistence for trainees in attendance or the furnishing of subsistence and quarters for trainees and instructors on terms prescribed by the Director; and

(C) provide instructors and training aids as necessary.

(2) The terms prescribed by the Director for the payment of travel expenses and per diem allowances authorized by this subsection shall include a provision that such payment shall not exceed one-half of the total cost of such expenses.

(3) The Director may lease real property required for the purpose of carrying out this subsection, but may not acquire fee title to property unless specifically authorized by law.

(g) Public dissemination of emergency preparedness information

The Director may publicly disseminate appropriate emergency preparedness information by all appropriate means.

(h) Interstate emergency preparedness compacts

(1) The Director may—

(A) assist and encourage the States to negotiate and enter into interstate emergency preparedness compacts;

(B) review the terms and conditions of such proposed compacts in order to assist, to the extent feasible, in obtaining uniformity between such compacts and consistency with Federal emergency response plans and programs;

(C) assist and coordinate the activities under such compacts; and

(D) aid and assist in encouraging reciprocal emergency preparedness legislation by the States which will permit the furnishing of mutual aid for emergency preparedness purposes in the event of a hazard which cannot be adequately met or controlled by a State or political subdivision thereof threatened with or experiencing a hazard.

(2) A copy of each interstate emergency preparedness compact shall be transmitted promptly to the Senate and the House of Representatives. The consent of Congress is deemed to be granted to each such compact upon the expiration of the 60–day period beginning on the date on which the compact is transmitted to Congress.

(3) Nothing in this subsection shall be construed as preventing Congress from disapproving, or withdrawing at any time its consent to, any interstate emergency preparedness compact.

(i) Materials and facilities

(1) The Director may procure by condemnation or otherwise, construct, lease, transport, store, maintain, renovate or distribute materials and facilities for emergency preparedness, with the right to take immediate possession thereof.

(2) Facilities acquired by purchase, donation, or other means of transfer may be occupied, used, and improved for the purposes of this subchapter before the approval of title by the Attorney General as required by section 255 of Title 40.

(3) The Director shall submit to Congress a report, at least quarterly, describing all property acquisitions made pursuant to this subsection.

(4) The Director may lease real property required for the purpose of carrying out the provisions of this subsection, but shall not acquire fee title to property unless specifically authorized by law.

(5) The Director may procure and maintain under this subsection radiological, chemical, bacteriological, and biological agent monitoring and decontamination devices and distribute such devices by loan or grant to the States for emergency preparedness purposes, under such terms and conditions as the Director shall prescribe.

(j) Financial contributions

(1) The Director may make financial contributions, on the basis of programs or projects approved by the Director, to the States for emergency preparedness purposes, including the procurement, construction, leasing, or renovating of materials and facilities. Such contributions shall be made on such terms or conditions as the Director shall prescribe, including the method of purchase, the

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quantity, quality, or specifications of the materials or facilities, and such other factors or care or treatment to assure the uniformity, availability, and good condition of such materials or facilities.

(2) No contribution may be made under this subsection for the procurement of land or for the purchase of personal equipment for State or local emergency preparedness workers.

(3) The amounts authorized to be contributed by the Director to each State for organizational equipment shall be equally matched by such State from any source it determines is consistent with its laws.

(4) Financial contributions to the States for shelters and other protective facilities shall be determined by taking the amount of funds appropriated or available to the Director for such facilities in each fiscal year and apportioning such funds among the States in the ratio which the urban population of the critical target areas (as determined by the Director) in each State, at the time of the determination, bears to the total urban population of the critical target areas of all of the States.

(5) The amounts authorized to be contributed by the Director to each State for such shelters and protective facilities shall be equally matched by such State from any source it determines is consistent with its laws and, if not matched within a reasonable time, the Director may reallocate such amounts to other States under the formula described in paragraph (4). The value of any land contributed by any State or political subdivision thereof shall be excluded from the computation of the State share under this subsection.

(6) The amounts paid to any State under this subsection shall be expended solely in carrying out the purposes set forth herein and in accordance with State emergency preparedness programs or projects approved by the Director. The Director shall make no contribution toward the cost of any program or project for the procurement, construction, or leasing of any facility which (A) is intended for use, in whole or in part, for any purpose other than emergency preparedness, and (B) is of such kind that upon completion it will, in the judgment of the Director, be capable of producing sufficient revenue to provide reasonable assurance of the retirement or repayment of such cost; except that (subject to the preceding provisions of this subsection) the Director may make a contribution to any State toward that portion of the cost of the construction, reconstruction, or enlargement of any facility which the Director determines to be directly attributable to the incorporation in such facility of any feature of construction or design not necessary for the principal intended purpose thereof but which is, in the judgment of the Director necessary for the use of such facility for emergency preparedness purposes.

(7) The Director shall submit to Congress a report, at least annually, regarding all contributions made pursuant to this subsection.

(8) All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed with the assistance of any contribution of Federal funds made by the Director under this subsection shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Act of March 3, 1931 (commonly known as the Davis-Bacon Act (40 U.S.C. 276a to 276a–5)), and every such employee shall receive compensation at a rate not less than one and ½ times the basic rate of pay of the employee for all hours worked in any workweek in excess of eight hours in any workday or 40 hours in the workweek, as the case may be. The Director shall make no contribution of Federal funds without first obtaining adequate assurance that these labor standards will be maintained upon the construction work. The Secretary of Labor shall have, with respect to the labor standards specified in this subsection, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (5 U.S.C.App.) and section 276c of Title 40.

(k) Sale or disposal of certain materials and facilities

The Director may arrange for the sale or disposal of materials and facilities found by the Director to be unnecessary or unsuitable for emergency preparedness purposes in the same manner as provided for excess property under the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471 et seq.). Any funds received as proceeds from the sale or other disposition of such materials and facilities shall be deposited into the Treasury as miscellaneous receipts.

(Pub.L. 93–288, Title VI, § 611, as added Pub.L. 103–337, Div. C, Title XXXIV, § 3411(a)(3), Oct. 5, 1994, 108 Stat. 3102.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1994 Acts. House Report No. 103–499 and House Conference Report No. 103–701, see 1994 U.S. Code Cong. and Adm. News, p. 2091.

References in Text

The Davis-Bacon Act, as amended, referred to in subsec. (j)(8), is Act Mar. 3, 1931, c. 411, 46 Stat. 1494, as amended, which is classified generally to sections 276a to 276a–5 of Title 40, Public Buildings, Property, and Works. For complete classification of this Act to the Code, see Short Title note set out under section 276a of Title 40 and Tables.

Reorganization Plan Numbered 14 of 1950, referred to in subsec. (j)(8), is set out in Appendix 1 to Title 5, Government Organization and Employees.

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The Federal Property and Administrative Services Act of 1949, referred to in subsec. (k), is Act June 30, 1949, c. 288, 63 Stat. 377, as amended. Provisions of that Act relating to disposal of government property are classified to chapter 10 (section 471 et seq.) of Title 40, Public Buildings, Property, and Works. For complete classification of this Act to the Code, see Short Title note set out under section 471 of Title 40 and Tables.

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Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).
Measures and acts in exercise of war and national emergency powers, see War and National Emergency ⇐35 et seq.

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.
Measures and acts in exercise of war and national emergency powers, see C.J.S. War and National Defense § 43 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
War and national emergency cases: 402k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5196a. Mutual aid pacts between States and neighboring countries

The Director shall give all practicable assistance to States in arranging, through the Department of State, mutual emergency preparedness aid between the States and neighboring countries.

(Pub.L. 93–288, Title VI, § 612, as added Pub.L. 103–337, Div. C, Title XXXIV, § 3411(a)(3), Oct. 5, 1994, 108 Stat. 3105.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1994 Acts. House Report No. 103–499 and House Conference Report No. 103–701, see 1994 U.S. Code Cong. and Adm. News, p. 2091.

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Federal and state cooperation, and relation of states to foreign nations, see States ⇐4.19, 7.

Encyclopedias

Federal and state cooperation, and relation of states to foreign nations, see C.J.S. States §§ 28, 34.

WESTLAW ELECTRONIC RESEARCH

States cases: 360k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5196b. Contributions for personnel and administrative expenses

(a) General authority

To further assist in carrying out the purposes of this subchapter, the Director may make financial contributions to the States (including interstate emergency preparedness authorities established pursuant to section 5196(h) of this title) for necessary and essential State and local emergency preparedness personnel and administrative expenses, on the basis of approved plans (which shall be consistent with the Federal emergency response plans for emergency preparedness) for the emergency preparedness of the States. The financial contributions to the States under this section may not exceed one-half of the total cost of such necessary and essential State and local emergency preparedness personnel and administrative expenses.

(b) Plan requirements

A plan submitted under this section shall—

(1) provide, pursuant to State law, that the plan shall be in effect in all political subdivisions of the State and be mandatory on them and be administered or supervised by a single State agency;

(2) provide that the State shall share the financial assistance with that provided by the Federal Government under this section from any source determined by it to be consistent with State law;

(3) provide for the development of State and local emergency preparedness operational plans, pursuant to standards approved by the Director;

(4) provide for the employment of a full-time emergency preparedness director, or deputy director, by the State;

(5) provide that the State shall make such reports in such form and content as the Director may require; and

(6) make available to duly authorized representatives of the Director and the Comptroller General, books, records, and papers necessary to conduct audits for the purposes of this section.

(c) Terms and conditions

The Director shall establish such other terms and conditions as the Director considers necessary and proper to carry out this section.

(d) Application of other provisions

In carrying out this section, the provisions of sections 5196(h) and 5197(h) of this title shall apply.

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(e) Allocation of funds

For each fiscal year concerned, the Director shall allocate to each State, in accordance with regulations and the total sum appropriated under this subchapter, amounts to be made available to the States for the purposes of this section. Regulations governing allocations to the States under this subsection shall give due regard to (1) the criticality of the areas which may be affected by hazards with respect to the development of the total emergency preparedness readiness of the United States, (2) the relative state of development of emergency preparedness readiness of the State, (3) population, and (4) such other factors as the Director shall prescribe. The Director may reallocate the excess of any allocation not used by a State in a plan submitted under this section. Amounts paid to any State or political subdivision under this section shall be expended solely for the purposes set forth in this section.

(f) Submission of plan

If a State fails to submit a plan for approval as required by this section within 60 days after the Director notifies the States of the allocations under this section, the Director may reallocate such funds, or portions thereof, among the other States in such amounts as, in the judgment of the Director, will best assure the adequate development of the emergency preparedness capability of the United States.

(g) Annual reports

The Director shall report annually to the Congress all contributions made pursuant to this section.

(Pub.L. 93–288, Title VI, § 613, as added Pub.L. 103–337, Div. C, Title XXXIV, § 3411(a)(3), Oct. 5, 1994, 108 Stat. 3106.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1994 Acts. House Report No. 103–499 and House Conference Report No. 103–701, see 1994 U.S. Code Cong. and Adm. News, p. 2091.

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Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Measures and acts in exercise of war and national emergency powers, see War and National Emergency ⇐35 et seq.

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

Measures and acts in exercise of war and national emergency powers, see C.J.S. War and National Defense § 43 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].

War and national emergency cases: 402k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5196c. Requirement for State matching funds for construction of emergency operating centers

Notwithstanding any other provision of this subchapter, funds appropriated to carry out this subchapter may not be used for the purpose of constructing emergency operating centers (or similar facilities) in any State unless such State matches in an equal amount the amount made available to such State under this subchapter for such purpose.

(Pub.L. 93–288, Title VI, § 614, as added Pub.L. 103–337, Div. C, Title XXXIV, § 3411(a)(3), Oct. 5, 1994, 108 Stat. 3107.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1994 Acts. House Report No. 103–499 and House Conference Report No. 103–701, see 1994 U.S. Code Cong. and Adm. News, p. 2091.

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Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

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United States cases: 393k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5196d. Use of funds to prepare for and respond to hazards

Funds made available to the States under this subchapter may be used by the States for the purposes of preparing for hazards and providing emergency assistance in response to hazards. Regulations prescribed to carry out this section shall authorize the use of emergency preparedness personnel, materials, and facilities supported in whole or in part through contributions under this subchapter for emergency preparedness activities and measures related to hazards.

(Pub.L. 93–288, Title VI, § 615, as added Pub.L. 103–337, Div. C, Title XXXIV, § 3411(a)(3), Oct. 5, 1994, 108 Stat. 3107.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1994 Acts. House Report No. 103–499 and House Conference Report No. 103–701, see 1994 U.S. Code Cong. and Adm. News, p. 2091.

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Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

PART B—GENERAL PROVISIONS

§ 5197. Administrative authority

(a) In general

For the purpose of carrying out the powers and duties assigned to the Director under this subchapter, the Director may exercise the administrative authorities provided under this section.

(b) Advisory personnel

(1) The Director may employ not more than 100 part-time or temporary advisory personnel (including not to exceed 25 subjects of the United Kingdom or citizens of Canada) as the Director considers to be necessary in carrying out the provisions of this subchapter.

(2) Persons holding other offices or positions under the United States for which they receive compensation, while serving as advisory personnel, shall receive no additional compensation for such service. Other part-time or temporary advisory personnel so employed may serve without compensation or may receive compensation at a rate not to exceed $180 for each day of service, plus authorized subsistence and travel, as determined by the Director.

(c) Services of other agency personnel and volunteers

The Director may—

(1) use the services of Federal agencies and, with the consent of any State or local government, accept and use the services of State and local agencies;

(2) establish and use such regional and other offices as may be necessary; and

(3) use such voluntary and uncompensated services by individuals or organizations as may from time to time be needed.

(d) Gifts

Notwithstanding any other provision of law, the Director may accept gifts of supplies, equipment, and facilities and may use or distribute such gifts for emergency preparedness purposes in accordance with the provisions of this subchapter.

(e) Reimbursement

The Director may reimburse any Federal agency for any of its expenditures or for compensation of its personnel and use or consumption of its materials and facilities under this subchapter to the extent funds are available.

(f) Printing

The Director may purchase such printing, binding, and blank-book work from public, commercial, or private printing establishments or binderies as the Director considers necessary upon orders placed by the Public Printer or upon waivers issued in accordance with section 504 of Title 44.

(g) Rules and regulations

The Director may prescribe such rules and regulations as may be necessary and proper to carry out any of the provisions of this subchapter and perform any of the powers and duties provided by this subchapter. The Director may perform any of the powers and duties provided by this subchapter through or with the aid of such officials of the Federal Emergency Management Agency as the Director may designate.

(h) Failure to expend contributions correctly

(1) When, after reasonable notice and opportunity for hearing to the State or other person involved, the Director finds that there is a failure to expend funds in accordance with the regulations, terms, and conditions established under this subchapter for approved emergency preparedness plans, programs, or projects, the Director may notify such State or person that further payments will not be made to the State or person from appropriations under this subchapter (or from funds otherwise available for the purposes of this subchapter for any approved plan, program, or project with respect to which there is such failure to comply) until the Director is satisfied that there will no longer be any such failure.

(2) Until so satisfied, the Director shall either withhold the payment of any financial contribution to such State or person or limit payments to those programs or projects with respect to which there is substantial compliance with the regulations, terms, and conditions governing plans, programs, or projects hereunder.

(3) As used in this subsection, the term "person" means the political subdivision of any State or combination or group thereof or any person, corporation, association, or other entity of any nature

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whatsoever, including instrumentalities of States and political subdivisions.

(Pub.L. 93–288, Title VI, § 621, as added Pub.L. 103–337, Div. C, Title XXXIV, § 3411(a)(3), Oct. 5, 1994, 108 Stat. 3107.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1994 Acts. House Report No. 103–499 and House Conference Report No. 103–701, see 1994 U.S. Code Cong. and Adm. News, p. 2091.

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Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).
Measures and acts in exercise of war and national emergency powers, see War and National Emergency ⇐35 et seq.

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.
Measures and acts in exercise of war and national emergency powers, see C.J.S. War and National Defense § 43 et seq.

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United States cases: 393k[add key number].
War and national emergency cases: 402k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5197a. Security regulations

(a) Establishment

The Director shall establish such security requirements and safeguards, including restrictions with respect to access to information and property as the Director considers necessary.

(b) Limitations on employee access to information

No employee of the Federal Emergency Management Agency shall be permitted to have access to information or property with respect to which access restrictions have been established under this section until it shall have been determined that no information is contained in the files of the Federal Bureau of Investigation or any other investigative agency of the Government indicating that such employee is of questionable loyalty or reliability for security purposes, or if any such information is so disclosed, until the Federal Bureau of Investigation shall have conducted a full field investigation concerning such person and a report thereon shall have been evaluated in writing by the Director.

(c) National security positions

No employee of the Federal Emergency Management Agency shall occupy any position determined by the Director to be of critical importance from the standpoint of national security until a full field investigation concerning such employee shall have been conducted by the Director of the Office of Personnel Management and a report thereon shall have been evaluated in writing by the Director of the Federal Emergency Management Agency. In the event such full field investigation by the Director of the Office of Personnel Management develops any data reflecting that such applicant for a position of critical importance is of questionable loyalty or reliability for security purposes, or if the Director of the Federal Emergency Management Agency for any other reason considers it to be advisable, such investigation shall be discontinued and a report thereon shall be referred to the Director of the Federal Emergency Management Agency for evaluation in writing. Thereafter, the Director of the Federal Emergency Management Agency may refer the matter to the Federal Bureau of Investigation for the conduct of a full field investigation by such Bureau. The result of such latter investigation by such Bureau shall be furnished to the Director of the Federal Emergency Management Agency for action.

(d) Employee oaths

Each Federal employee of the Federal Emergency Management Agency acting under the authority of this subchapter, except the subjects of the United Kingdom and citizens of Canada specified in section 5197(b) of this title, shall execute the loyalty oath or appointment affidavits prescribed by the Director of the Office of Personnel Management. Each person other than a Federal employee who is appointed to serve in a State or local organization for emergency preparedness shall before entering upon duties, take an oath in writing before a person authorized to administer oaths, which oath shall be substantially as follows:

"I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

"And I do further swear (or affirm) that I do not advocate, nor am I a member or an affiliate of any organization, group, or combination of persons that advocates the overthrow of the Government of the United States by force or violence; and that during such time as I am a member of _____ (name of emergency preparedness organization), I will not advocate nor become a member or an affiliate of any organization, group, or

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combination of persons that advocates the overthrow of the Government of the United States by force or violence."

After appointment and qualification for office, the director of emergency preparedness of any State, and any subordinate emergency preparedness officer within such State designated by the director in writing, shall be qualified to administer any such oath within such State under such regulations as the director shall prescribe. Any person who shall be found guilty of having falsely taken such oath shall be punished as provided in section 1621 of Title 18.

(Pub.L. 93–288, Title VI, § 622, as added Pub.L. 103–337, Div. C, Title XXXIV, § 3411(a)(3), Oct. 5, 1994, 108 Stat. 3108.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1994 Acts. House Report No. 103–499 and House Conference Report No. 103–701, see 1994 U.S. Code Cong. and Adm. News, p. 2091.

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Measures and acts in exercise of war and emergency powers, see War and National Emergency ⇐35 et seq.

Powers and duties of federal officers, agents, and employees generally, see United States ⇐40, 41.

Encyclopedias

Measures and acts in exercise of war and emergency powers, see C.J.S. War and National Defense § 43 et seq.

Powers and duties of federal officers, agents, and employees generally, see C.J.S. United States § 38 et seq.

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United States cases: 393k[add key number].
War and national emergency cases: 402k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5197b. Use of existing facilities

In performing duties under this subchapter, the Director—

(1) shall cooperate with the various departments and agencies of the Federal Government;

(2) shall use, to the maximum extent, the existing facilities and resources of the Federal Government and, with their consent, the facilities and resources of the States and political subdivisions thereof, and of other organizations and agencies; and

(3) shall refrain from engaging in any form of activity which would duplicate or parallel activity of any other Federal department or agency unless the Director, with the written approval of the President, shall determine that such duplication is necessary to accomplish the purposes of this subchapter.

(Pub.L. 93–288, Title VI, § 623, as added Pub.L. 103–337, Div. C, Title XXXIV, § 3411(a)(3), Oct. 5, 1994, 108 Stat. 3110.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1994 Acts. House Report No. 103–499 and House Conference Report No. 103–701, see 1994 U.S. Code Cong. and Adm. News, p. 2091.

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Measures and acts in exercise of war and emergency powers, see War and National Emergency ⇐35 et seq.

Powers and duties of federal officers, agents, and employees generally, see United States ⇐40, 41.

Encyclopedias

Measures and acts in exercise of war and emergency powers, see C.J.S. War and National Defense § 43 et seq.

Powers and duties of federal officers, agents, and employees generally, see C.J.S. United States § 38 et seq.

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United States cases: 393k[add key number].
War and national emergency cases: 402k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5197c. Annual report to Congress

The Director shall annually submit a written report to the President and Congress covering expenditures, contributions, work, and accomplishments of the Federal Emergency Management Agency pursuant to this subchapter, accompanied by such recommendations as the Director considers appropriate.

(Pub.L. 93–288, Title VI, § 624, as added Pub.L. 103–337, Div. C, Title XXXIV, § 3411(a)(3), Oct. 5, 1994, 108 Stat. 3110.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1994 Acts. House Report No. 103–499 and House Conference Report No. 103–701, see 1994 U.S. Code Cong. and Adm. News, p. 2091.

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Measures and acts in exercise of war and emergency powers, see War and National Emergency ⇐35 et seq.

Powers and duties of federal officers, agents, and employees generally, see United States ⇐40, 41.

Encyclopedias

Measures and acts in exercise of war and emergency powers, see C.J.S. War and National Defense § 43 et seq.

Powers and duties of federal officers, agents, and employees generally, see C.J.S. United States § 38 et seq.

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United States cases: 393k[add key number].

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War and national emergency cases: 402k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5197d. Applicability of subchapter

The provisions of this subchapter shall be applicable to the United States, its States, Territories and possessions, and the District of Columbia, and their political subdivisions.

(Pub.L. 93–288, Title VI, § 625, as added Pub.L. 103–337, Div. C, Title XXXIV, § 3411(a)(3), Oct. 5, 1994, 108 Stat. 3110.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1994 Acts. House Report No. 103–499 and House Conference Report No. 103–701, see 1994 U.S. Code Cong. and Adm. News, p. 2091.

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Construction and operation of statutes in general, see Statutes ⇐174 et seq.

Encyclopedias

Construction and operation of statutes in general, see C.J.S. Statutes § 311.

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Statutes cases: 361k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5197e. Authorization of appropriations and transfers of funds

(a) Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this subchapter.

(b) Transfer authority

Funds made available for the purposes of this subchapter may be allocated or transferred for any of the purposes of this subchapter, with the approval of the Director of the Office of Management and Budget, to any agency or government corporation designated to assist in carrying out this subchapter. Each such allocation or transfer shall be reported in full detail to the Congress within 30 days after such allocation or transfer.

(Pub.L. 93–288, Title VI, § 626, as added Pub.L. 103–337, Div. C, Title XXXIV, § 3411(a)(3), Oct. 5, 1994, 108 Stat. 3110.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1994 Acts. House Report No. 103–499 and House Conference Report No. 103–701, see 1994 U.S. Code Cong. and Adm. News, p. 2091.

LIBRARY REFERENCES

American Digest System

Appropriation and disbursement of federal funds in general, see United States ⇐82(1, 5), 85.

Encyclopedias

Appropriation and disbursement of federal funds in general, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5197f. Relation to Atomic Energy Act of 1954

Nothing in this subchapter shall be construed to alter or modify the provisions of the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.).

(Pub.L. 93–288, Title VI, § 627, as added Pub.L. 103–337, Div. C, Title XXXIV, § 3411(a)(3), Oct. 5, 1994, 108 Stat. 3110.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1994 Acts. House Report No. 103–499 and House Conference Report No. 103–701, see 1994 U.S. Code Cong. and Adm. News, p. 2091.

References in Text

The Atomic Energy Act of 1954, referred to in section heading and text, is Act Aug. 1, 1946, c. 724, as added Act Aug. 30, 1954, c. 1073, § 1, 68 Stat. 921, as amended, which is classified principally to chapter 23 (section 2011 et seq.) of this title. For complete classification of this Act to the Code, see Short Title of 1954 Acts note set out under section 2011 of this title and Tables.

LIBRARY REFERENCES

American Digest System

Construction and operation of statutes in general, see Statutes ⇐174 et seq.

Encyclopedias

Construction and operation of statutes in general, see C.J.S. Statutes § 311.

WESTLAW ELECTRONIC RESEARCH

Statutes cases: 361k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5197g. Federal Bureau of Investigation

Nothing in this subchapter shall be construed to authorize investigations of espionage, sabotage, or subversive acts by any persons other than personnel of the Federal Bureau of Investigation.

(Pub.L. 93–288, Title VI, § 628, as added Pub.L. 103–337, Div. C, Title XXXIV, § 3411(a)(3), Oct. 5, 1994, 108 Stat. 3110.)

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HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1994 Acts. House Report No. 103–499 and House Conference Report No. 103–701, see 1994 U.S. Code Cong. and Adm. News, p. 2091.

LIBRARY REFERENCES

American Digest System

Construction and operation of statutes in general, see Statutes ⇐174 et seq.

Encyclopedias

Construction and operation of statutes in general, see C.J.S. Statutes § 311.

WESTLAW ELECTRONIC RESEARCH

Statutes cases: 361k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

SUBCHAPTER V—MISCELLANEOUS

§ 5201. Rules and regulations

(a) Generally

(1) Necessary and proper rules and regulations

The President may prescribe such rules and regulations as may be necessary and proper to carry out any of the provisions of this chapter, and he may exercise any power or authority conferred on him by any section of this chapter either directly or through such Federal agency or agencies as he may designate.

(2) Deadline for payment of assistance

Rules and regulations authorized by paragraph (1) shall provide that payment of any assistance under this chapter to a State shall be completed within 60 days after the date of approval of such assistance.

(b) Acceptance of gifts

In furtherance of the purposes of this chapter, the President or his delegate may accept and use bequests, gifts, or donations of service, money, or property, real, personal, or mixed, tangible, or intangible. All sums received under this subsection shall be deposited in a separate fund on the books of the Treasury and shall be available for expenditure upon the certification of the President or his delegate. At the request of the President or his delegate, the Secretary of the Treasury may invest and reinvest excess monies in the fund. Such investments shall be in public debt securities with maturities suitable for the needs of the fund and shall bear interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities. The interest on such investments shall be credited to, and form a part of, the fund.

(Pub.L. 93–288, Title VII, § 701, formerly Title VI, § 601, May 22, 1974, 88 Stat. 163; Pub.L. 96–446, Oct. 13, 1980, 94 Stat. 1893; Pub.L. 100–707, Title I, § 108(a), Nov. 23, 1988, 102 Stat. 4707; renumbered § 701, Pub.L. 103–337, Div. C, Title XXXIV, § 3411(a)(1), (2), Oct. 5, 1994, 108 Stat. 3100.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Acts. Senate Report No. 93–778 and House Conference Report No. 93–1037, see 1974 U.S. Code Cong. and Adm. News, p. 3070.

1980 Acts. House Report No. 96–1431, see 1980 U.S. Code Cong. and Adm. News, p. 3977.

1988 Acts. House Report No. 100–517, see 1988 U.S. Code Cong. and Adm. News, p. 6085.

1994 Acts. House Report No. 103–499 and House Conference Report No. 103–701, see 1994 U.S. Code Cong. and Adm. News, p. 2091.

References in Text

This chapter, referred to in text, in the original read "this Act", meaning Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended. For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

Amendments

1988 Amendments. Subsec. (a). Pub.L. 100–707, § 108(a)(1), (2), designated existing provision as par. (1) and added par. (2).

1980 Amendments. Subsec. (a). Pub.L. 96–446, § 1(2), designated existing provisions as subsec. (a).

Subsec. (b). Pub.L. 96–446, § 1(3), added subsec. (b).

1974 Acts

Effective Dates

1974 Acts. Section 605 of Pub.L. 93–288, formerly set out as a note under section 5121 of this title, provided that this section is effective Apr. 1, 1974.

Delegation of Functions

The functions vested in the President by section 113 of the Disaster Relief and Emergency Assistance Amendments of 1988, Public Law 100–707, set out as a note under this section, delegated to the Director of the Federal Emergency Management Agency, pursuant to section 5 of Ex. Ord. No. 12673, Mar. 23, 1989, 54 F.R. 12571, set out as a note under section 2251 of the Appendix to Title 50, War and National Defense.

Deadline for Issuance of Regulations

Section 113 of Pub.L. 100–707 provided that: "Regulations necessary to carry out this title [see Short Title of 1988 Acts note set out under section 5121 of this title] and the amendments made by this title shall be issued no later than the 180th day following the date of the enactment of this Act [Nov. 23, 1988]."

LIBRARY REFERENCES

Administrative Law

Disaster preparedness aid, see 44 C.F.R. § 300.1 et seq.
Disaster unemployment assistance, see 20 C.F.R. § 625.1 et seq.
Federal disaster assistance, see 44 C.F.R. § 206.1 et seq.
New communities, assistance, see 24 C.F.R. § 720.1 et seq.

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).
Office of President, and powers and duties thereof, see United States ⇐26, 28.

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.
Office of President, and powers and duties thereof, see C.J.S. United States §§ 27 to 30.

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is classified principally to this chapter. See Tables for complete classification.

LIBRARY REFERENCES

American Digest System

United States ⇐26, 82(2, 5).
Key Number System Topic No. 393.

Encyclopedias

United States, see C.J.S. § 27 to 28, 122.

§ 5165b. Management costs

(a) Definition of management cost

In this section, the term " management cost" includes any indirect cost, any administrative expense, and any other expense not directly chargeable to a specific project under a major disaster, emergency, or disaster preparedness or mitigation activity or measure.

(b) Establishment of management cost rates

Notwithstanding any other provision of law (including any administrative rule or guidance), the President shall by regulation establish management cost rates, for grantees and subgrantees, that shall be used to determine contributions under this chapter for management costs.

(c) Review

The President shall review the management cost rates established under subsection (b) not later than 3 years after the date of establishment of the rates and periodically thereafter.

(Pub.L. 93–288, Title II, § 324, as added Pub.L. 106–390, Title II, § 202(a), Oct. 30, 2000, 114 Stat. 1560.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–40, see 2000 U.S. Code Cong. and Adm. News, p. 1456.

References in Text

This chapter, referred to in subsec. (b), originally read "this Act", meaning the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub.L. 93–288, May 22, 1974, 88 Stat. 143, which is classified principally to this chapter. See Tables for complete classification.

Effective and Applicability Provisions

2000 Acts. Pub.L. 106–390, Title II, § 202(b), Oct. 30, 2000, 114 Stat. 1560, provided that:

"(1) **In general.**—Subject to paragraph (2), subsections (a) and (b) of section 324 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (as added by subsection (a) [this section]) shall apply to major disasters declared under that Act [the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub.L. 93–288, May 22, 1974, 88 Stat. 143, which is classified principally to this chapter; see Tables for complete classification] on or after the date of the enactment of this Act [Oct. 30, 2000].

"(2) **Interim authority.**—Until the date on which the President establishes the management cost rates under section 324 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (as added by subsection (a) [this section]), section 406(f) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5172(f)) (as in effect on the day before the date of the enactment of this Act [Oct. 30, 2000]) shall be used to establish management cost rates."

LIBRARY REFERENCES

American Digest System

United States ⇐26, 82(2, 5).
Key Number System Topic No. 393.

Encyclopedias

United States, see C.J.S. § 27 to 28, 122.

§ 5165c. Public notice, comment, and consultation requirements

(a) Public notice and comment concerning new or modified policies

(1) In general

The President shall provide for public notice and opportunity for comment before adopting any new or modified policy that—

(A) governs implementation of the public assistance program administered by the Federal Emergency Management Agency under this chapter; and

(B) could result in a significant reduction of assistance under the program.

(2) Application

Any policy adopted under paragraph (1) shall apply only to a major disaster or emergency declared on or after the date on which the policy is adopted.

(b) Consultation concerning interim policies

(1) In general

Before adopting any interim policy under the public assistance program to address specific conditions that relate to a major disaster or emergency that has been declared under this chapter, the President, to the maximum extent practicable, shall solicit the views and recommendations of grantees and subgrantees with respect to the major disaster or emergency concerning the potential interim policy, if the interim policy is likely—

(A) to result in a significant reduction of assistance to applicants for the assistance with respect to the major disaster or emergency; or

(B) to change the terms of a written agreement to which the Federal Government is a party concerning the declaration of the major disaster or emergency.

(2) No legal right of action

Nothing in this subsection confers a legal right of action on any party.

(c) Public access

The President shall promote public access to policies governing the implementation of the public assistance program.

(Pub.L. 93–288, Title II, § 325, as added Pub.L. 106–390, Title II, § 203, Oct. 30, 2000, 114 Stat. 1560.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–40, see 2000 U.S. Code Cong. and Adm. News, p. 1456.

References in Text

This chapter, referred to in subsec. (b), originally read "this Act", meaning the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub.L. 93–288, May 22, 1974, 88 Stat. 143, which is classified principally to this chapter. See Tables for complete classification.

LIBRARY REFERENCES

American Digest System

United States ⇐26, 82(2, 5).
Key Number System Topic No. 393.

Encyclopedias

United States, see C.J.S. § 27 to 28, 122.

SUBCHAPTER IV—MAJOR DISASTER ASSISTANCE PROGRAMS

§ 5170c. Hazard mitigation

(a) In general

The President may contribute up to 75 percent of the cost of hazard mitigation measures which the President has determined are cost-effective and which substantially reduce the risk of future damage, hardship, loss, or suffering in any area affected by a major disaster. Such measures shall be identified following the evaluation of natural hazards under section 5165 of this title and shall be subject to approval by the President. Subject to section 5165 of this title, the total of contributions under this section for a major disaster shall not exceed 15 percent of the estimated aggregate amount of grants to be made (less any associated administrative costs) under this chapter with respect to the major disaster.

[See main volume for text of (b)]

(c) Program administration by States

(1) In general

A State desiring to administer the hazard mitigation grant program established by this section with respect to hazard mitigation assistance in the State may submit

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United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5202. Repealed. Pub.L. 100–707, Title I, § 108(c), Nov. 23, 1988, 102 Stat. 4708

HISTORICAL AND STATUTORY NOTES

Section, Pub.L. 93–288, Title VI, § 606, May 22, 1974, 88 Stat. 164; Pub.L. 95–51, § 1, June 20, 1977, 91 Stat. 233; Pub.L. 96–568, § 2, Dec. 22, 1980, 94 Stat. 3334, authorized the appropriations of such sums as necessary to carry out this chapter through the close of Sept. 30, 1981.

§ 5203. Excess disaster assistance payments as budgetary emergency requirements

Beginning in fiscal year 1993, and in each year thereafter, notwithstanding any other provision of law, all amounts appropriated for disaster assistance payments under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.) that are in excess of either the historical annual average obligation of $320,000,000, or the amount submitted in the President's initial budget request, whichever is lower, shall be considered as "emergency requirements" pursuant to section 901(b)(2)(D) of Title 2, and such amounts shall on and after December 12, 1991, be so designated.

(Pub.L. 102–229, Title I, Dec. 12, 1991, 105 Stat. 1711.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1991 Acts. Statement by President, see 1991 U.S. Code Cong. and Adm. News, p. 1361.

References in Text

The Robert T. Stafford Disaster Relief and Emergency Assistance Act, referred to in text, is Pub.L. 93–288, May 22, 1974, 88 Stat. 143, as amended, which is classified principally to this chapter (section 5121 et seq.). For complete classification of this Act to the Code, see Short Title of 1974 Acts note set out under section 5121 of this title and Tables.

Codifications

Section was enacted as part of the "Dire Emergency Supplemental Appropriations and Transfers for Relief From the Effects of Natural Disasters, for Other Urgent Needs, and for Incremental Cost of 'Operation Desert Shield/Desert Storm' Act of 1992", and not as a part of the "Robert T. Stafford Disaster Relief and Emergency Assistance Act" which comprises this chapter.

LIBRARY REFERENCES

American Digest System

Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias

Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases; 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5204. Insular areas disaster survival and recovery; definitions

As used in sections 5204 to 5204c of this title—

(1) the term "insular area" means any of the following: American Samoa, the Federated States of Micronesia, Guam, the Marshall Islands, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and the Virgin Islands;

(2) the term "disaster" means a declaration of a major disaster by the President after September 1, 1989, pursuant to section 5170 of this title; and

(3) the term "Secretary" means the Secretary of the Interior.

(Pub.L. 102–247, Title II, § 201, Feb. 24, 1992, 106 Stat. 37.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1992 Acts. Senate Report No. 102–243 and Statement by President, see 1992 U.S. Code Cong. and Adm. News, p. 44.

References in Text

Sections 5204 to 5204c of this title, referred to in text, was in the original "this title", meaning Title II of Pub.L. 102–247, Feb. 24, 1992, 106 Stat. 37, which enacted sections 5204 to 5204c of this title and amended section 5122 of this title.

Codifications

Section was enacted as part of the Omnibus Insular Areas Act of 1992 and not as part of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, which comprises this chapter.

WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

§ 5204a. Authorization of appropriations for insular areas

There are hereby authorized to be appropriated to the Secretary such sums as may be necessary to—

(1) reconstruct essential public facilities damaged by disasters in the insular areas that occurred prior to February 24, 1992; and

(2) enhance the survivability of essential public facilities in the event of disasters in the insular areas,

except that with respect to the disaster declared by the President in the case of Hurricane Hugo, September 1989, amounts for any fiscal year shall not exceed 25 percent of the estimated aggregate amount of grants to be made under sections 5170b and 5172 of this title for such disaster. Such sums shall remain available until expended.

(Pub.L. 102–247, Title II, § 202, Feb. 24, 1992, 106 Stat. 37.)

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HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports
1992 Acts. Senate Report No. 102–243 and Statement by President, see 1992 U.S. Code Cong. and Adm. News, p. 44.

Codifications
Section was enacted as part of the Omnibus Insular Areas Act of 1992 and not as part of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, which comprises this chapter.

LIBRARY REFERENCES

American Digest System
Appropriation of federal funds, see United States ⇐85.

Encyclopedias
Appropriation of federal funds, see C.J.S. United States § 123.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5204b. Technical assistance for insular areas

(a) Presidential assessment of response capability; recovery plans

Upon the declaration by the President of a disaster in an insular area, the President, acting through the Director of the Federal Emergency Management Agency, shall assess, in cooperation with the Secretary and chief executive of such insular area, the capability of the insular government to respond to the disaster, including the capability to assess damage; coordinate activities with Federal agencies, particularly the Federal Emergency Management Agency; develop recovery plans, including recommendations for enhancing the survivability of essential infrastructure; negotiate and manage reconstruction contracts; and prevent the misuse of funds. If the President finds that the insular government lacks any of these or other capabilities essential to the recovery effort, then the President shall provide technical assistance to the insular area which the President deems necessary for the recovery effort.

(b) Report to Congress

One year following the declaration by the President of a disaster in an insular area, the Secretary, in consultation with the Director of the Federal Emergency Management Agency, shall submit to the Senate Committee on Energy and Natural Resources and the House Committee on Natural Resources a report on the status of the recovery effort, including an audit of Federal funds expended in the recovery effort and recommendations on how to improve public health and safety, survivability of infrastructure, recovery efforts, and effective use of funds in the event of future disasters.

(Pub.L. 102–247, Title II, § 203, Feb. 24, 1992, 106 Stat. 37; Pub.L. 103–437, § 15(p), Nov. 2, 1994, 108 Stat. 4594.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports
1992 Acts. Senate Report No. 102–243 and Statement by President, see 1992 U.S. Code Cong. and Adm. News, p. 44.

1994 Acts. House Report No. 103–779, see 1994 U.S. Code Cong. and Adm. News, p. 3639.

Codifications
Section was enacted as part of the Omnibus Insular Areas Act of 1992 and not as part of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, which comprises this chapter.

Amendments
1994 Amendments. Subsec. (b). Pub.L. 103–437, § 15(p), substituted "House Committee on Natural Resources" for "House Committee on Interior and Insular Affairs".

Change of Name
Committee on Natural Resources of House of Representatives changed to Committee on Resources of House of Representatives by Resolution No. 6, One Hundred Fourth Congress, Jan. 4, 1995.

LIBRARY REFERENCES

American Digest System
Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias
Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

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United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 5204c. Hazard mitigation for insular areas

The total of contributions under the last sentence of section 5170c of this title for the insular areas shall not exceed 10 percent of the estimated aggregate amounts of grants to be made under sections 5170b, 5172, 5173, 5174, and 5178 of this title for any disaster: *Provided*, That the President shall require a 50 percent local match for assistance in excess of 10 percent of the estimated aggregate amount of grants to be made under section 5172 of this title for any disaster.

(Pub.L. 102–247, Title II, § 204, Feb. 24, 1992, 106 Stat. 38.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports
1992 Acts. Senate Report No. 102–243 and Statement by President, see 1992 U.S. Code Cong. and Adm. News, p. 44.

Codifications
Section was enacted as part of the Omnibus Insular Areas Act of 1992 and not as part of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, which comprises this chapter.

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American Digest System
Disbursement of federal funds; disaster aid, see United States ⇐82(1, 5).

Encyclopedias
Disbursement of federal funds; disaster aid, see C.J.S. United States § 122 et seq.

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United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

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CHAPTER 69—COMMUNITY DEVELOPMENT

Sec.
5301. Congressional findings and declaration of purpose.
(a) Critical social, economic, and environmental problems facing Nation's urban communities.
(b) Establishment and maintenance of viable urban communities; systematic and sustained action by Federal, State, and local governments; expansion of and continuity in Federal assistance; increased private investment; streamlining programs and improvement of functioning of agencies; action to address consequences of scarce fuel supplies.
(c) Decent housing, suitable living environment, and economic opportunities for persons of low and moderate income; community development activities which may be supported by Federal assistance.
(d) Consolidation of complex and overlapping Federal assistance programs into consistent system of Federal aid.
5302. General provisions.
(a) Definitions.
(b) Basis and modification of definitions.
(c) Designation of public agencies.
(d) Local governments, inclusion in urban county population.
(e) Exclusion of local governments from urban county population; notification of election.
5303. Grants to States, units of general local government and Indian tribes; authorizations.
5304. Statement of activities and review.
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(b) Certification of enumerated criteria by grantee to Secretary.
(c) Special certifications required for certain grants.
(d) Residential antidisplacement and relocation assistance plan; certification of adherence; contents.
(e) Submission of performance and evaluation report by grantee to Secretary; contents; availability for citizen comment; annual review and audit by Secretary of program implementation; adjustments in amount of annual grants.
(f) Audit of grantees by General Accounting Office; access to books, accounts, records, etc., by representatives of General Accounting Office.
(g) Environmental protection measures applicable for release of funds to recipients of assistance for projects; issuance of regulations by Secretary subsequent to consultation with Council on Environmental Quality; request and certification to Secretary for approval of release of funds; form, contents and effect of certification.
(h) Payments; revolving loan fund: establishment in private financial institution for rehabilitation activities; standards for payments: criteria.
(i) Metropolitan city as part of urban county.
(j) Retention of program income; condition of distribution.

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The COMMITTEE for JUSTICE

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CFJ Applauds Cornyn for Hearing on Judicial Confirmation Process Reform

"Filibuster strategy is unconstitutional, illegitimate," Gray says.

Washington, D.C. – The Committee for Justice (CFJ), a group supporting constitutionalist judicial nominees, today applauded Constitution Subcommittee Chairman Sen. John Cornyn (R-TX) for holding a hearing to explore constructive solutions to the unprecedented uses and abuse of the filibuster against judicial nominees.

"The federal courts are suffering from a vacancy crisis, but the Senate Democrats, on orders from People for the American Way, have resorted to reckless tactics to block qualified nominees from the federal bench," CFJ Chairman C. Boyden Gray said. "The Democrats' decision to filibuster not one but two highly qualified judicial nominees will go down in history as a corrupt act of constitutional malpractice. It amounts to a temper tantrum to deny each member of the Senate his or her constitutional right to offer advice and consent. One way or another, the responsible members of the Senate must end this destructive and unconstitutional obstruction."

"The judicial selection process, damaged by the Senate Democrats during the Robert Bork episode, has now been ridden completely off the rails," Gray also said. "Moderate Democrats should join Republicans in reforming the confirmation process to give all nominees, regardless of party, a fair hearing and then a floor-vote within a reasonable time period. Fifteen of this President's circuit court nominees have waited for over one year for floor votes; some almost two years. That level of obstruction, particularly before the end of a President's term, is unprecedented."

"There was once a time when the members of the academic and legal communities, regardless of politics, would raise their voices to decry misuse of the filibuster against federal court nominees," Gray concluded. "We attach a letter stating such opposition from 1968, regarding the filibuster of Abe Fortas, in hopes it will stir some of our current law school deans and past American Bar Association presidents to raise a similar protest today."

The Committee for Justice supports constitutionalist judicial nominees.

(See attached)

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REV_00255665

SENATE— *Tuesday, October 1, 1968*

(Legislative day of Tuesday, September 24, 1968)

The Senate met in executive session at 12 noon, on the expiration of the recess, and was called to order by the President pro tempore.

The Chaplain, Rev. Frederick Brown Harris, D.D., offered the following prayer:

Eternal God, who committest to us the swift and solemn trust of life, since we know not what a day may bring forth, but only that the hour for serving Thee is always present, may we wake to the instant claims of Thy holy will, not waiting for tomorrow, but yielding today. Consecrate with Thy presence the way our feet may go, and the humblest work will shine and the roughest places be made plain.

May our individual lives be as lighted windows amid the encircling gloom. In this global contest beyond the light and darkness, make us as individuals the kind of persons which Thou canst use as the instruments of Thy purpose for all mankind.

Thus may we—

"Rise up, O men of God
Have done with lesser things.
Give heart and mind and soul and strength,
To serve the King of Kings."

In Thy name we ask it. Amen.

SUBCOMMITTEE MEETING DURING SENATE SESSION

Mr. MANSFIELD. Mr. President, as in legislative session, I ask unanimous consent that the Subcommittee on Indian Education of the Committee on Labor and Public Welfare be authorized to meet during the session of the Senate today.

The PRESIDENT pro tempore. Without objection, it is so ordered.

SUPREME COURT OF THE UNITED STATES

The PRESIDENT pro tempore. The question is on the motion to proceed to the consideration of the nomination of Mr. Abe Fortas to be Chief Justice of the United States.

The time is equally divided between the Senator from Montana [Mr. MANSFIELD] and the Senator from Illinois [Mr. DIRKSEN].

The PRESIDING OFFICER (Mr. SPONG in the chair). Who yields time?

Mr. HART. Mr. President, I yield myself 5 minutes.

It takes less time than that for me to advise my colleagues that I support this nomination. I believe the background of Mr. Justice Fortas as a law professor and a public servant, the outstanding career which was his at the bar, and his past 3 years of distinguished service on the Supreme Court leave no doubt about his qualifications. That is not a partisan assessment. It is the sentiment of the overwhelming majority of nonpartisans who have considered this nomination, free from the pressure of personal involvement and political involvement.

I hope I do not do a disservice when I oversimplify, in the interest of time, to say that there are approximately four categories of opposition, when the theme of the opposition is boiled down to its substance. There is the critic of the Warren court. There is the opponent of civil rights progress. There is political partisanship. There is the rightwing pressure group. None of this bears on what I conceive to be what should be the relevant question before us—the qualifications of Abe Fortas.

But put aside the question of partisanship and motivation, and simply accept the fact that some Members of the Senate do not wish to see Mr. Justice Fortas become Chief Justice. Let us accept that. It is neither startling nor remarkable. Except for the most inconsequential routine matters in the Senate, there will always be opposition views. The old saw is that neither the Ten Commandments nor the Bill of Rights would get through the Senate without some opposition.

That is the reason why the rules provide a very simple yet decisive means of resolving disagreement. After debate has been had, let us call the roll. If the "yeas" prevail, the question carries. If the "nays" prevail, the question fails. I have no doubt that if such a rollcall were permitted on this nomination, the "yeas" would prevail, and Mr. Justice Fortas would become Chief Justice. What I hope will not happen is that that kind of vote on the merits will be denied us.

Never in our history has a matter of the nomination of a Justice to the Supreme Court been resolved by filibuster. I hope that those who treasure precedent in this body will recognize the danger to the Court, to the country, and to the Senate if we, for the first time, establish that kind of precedent.

A very recent editorial quoted the dean of the Yale Law School as saying that a filibuster in this situation is an assault upon our constitutional system.

What is the question before us? That we advise and consent or not to the question of Mr. Justice Fortas? No. The question is, Shall we be permitted to consider the nomination?

The Constitution is clear. In this situation, the President shall nominate and the Senate shall advise either to consent or withhold its consent. The first duty under the Constitution has been discharged. Let us be put in a position to meet our responsibility under the Constitution, to advise and to permit a majority to say "We consent" or "We withhold our consent."

Mr. President, I ask unanimous consent to have printed in the RECORD at this point a statement issued by the Lawyers' Committee on Supreme Court nominations, including a list of its members; a resolution adopted by the National Bar Association; and some letters bearing on the subject under discussion.

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

STATEMENT OF LAWYERS' COMMITTEE ON SUPREME COURT NOMINATIONS, SEPTEMBER 29, 1968

The Lawyers' Committee on Supreme Court Nominations today issued the attached statement urging the Senate to act promptly on the merits of the Supreme Court nominations pending before it. The Committee was formed September 12, 1968, and its membership comprises 162 lawyers from 49 states and the District of Columbia. The Committee opposes the use of the filibuster or other obstructive techniques to frustrate the appointive process. It also opposes the use of that process for indiscriminate attacks on the Supreme Court.

Included among this broadly representative group of lawyers are seven past presidents of the American Bar Association, many past and present officers of state bar associations and 23 law school deans. A list of the members is attached. The statement represents the personal views of the members of the Committee, and does not reflect the views of any institution with which they may be affiliated.

Inquiries may be directed to Jefferson B. Fordham, Dean of the University of Pennsylvania Law School.

STATEMENT

The Lawyers' Committee on Supreme Court Nominations respectfully urges the Senators opposed to the pending nominees to put their views to the test of a vote on the merits.

Over three months ago, the President submitted to the Senate for its "advice and consent" a nomination for Chief Justice of the United States. The nominee was questioned extensively before the Senate Judiciary Committee. A detailed record was compiled. Last week, a majority of the Senate Judiciary Committee reported out the nomination favorably. The sole question now before the Senate should be the qualification and fitness of the nominee for the position of Chief Justice.

No one would deny the need for careful consideration by the Senate of the qualifications of nominees to the highest court in the land. Nor is there any doubt that some period of debate and deliberation for that purpose is appropriate. But just as surely, the Senate has a duty not only to explore the issues but also to render a decision either granting or withholding its consent to the nominations.

If the pending nominations do not win the support of a majority of the Senate, they will fail. If they do win such support, they deserve the Senate's consent. Nothing would more poorly serve our constitutional system than for the nominations to have earned the approval of the Senate majority, but to be thwarted because the majority is denied a chance to vote.

Senators have never before employed a filibuster against a Supreme Court nomination. Indeed, prior Supreme Court appointments have seldom been debated more than one day, and none has been debated more than 8 days. Whatever the merits of the filibuster as a device to defeat disliked legislation, its use to frustrate a judicial appointment creates a dangerous precedent with important implications for the very structure of our Government.

Senators concerned about whether the courts have correctly applied the Constitution ought not to ignore their own constitutional duties. We therefore urge that after

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a reasonable time for debate the nominations to voted up or down on their merits.

MEMBERS

Brent M. Abel, San Francisco, Calif.
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J. Garner Anthony, Honolulu, Hawaii.
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Leon Jaworski, Houston, Tex.
Herbert Johnson, Atlanta, Ga.
Paul Johnston, Birmingham, Ala.
Charles W. Joiner, Dean, Wayne State University School of Law.
Donald F. Keefe, New Haven, Conn.
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Spencer Kimball, Dean, University of Wisconsin School of Law.
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W. William McCalpin, St. Louis, Mo.
Don G. McCormick, Carlsbad, N. MMex.
Robert B. McKay, Dean, New York University Law School.
Robert W. Meserve, Boston, Mass.
Lester W. Miller, Jr., Anchorage, Alaska.
Vernon X. Miller, Dean, Catholic University of America School of Law.
Joseph Millimet, Manchester, N.H.
R. W. Nahstoll, Portland, Oreg.
Phil C. Neal, Dean, University of Chicago Law School.
Russell D. Niles, New York, N.Y.
Robert A. Nitschke, Detroit, Mich.
Gilbert Nurick, Harrisburg, Pa.
Louis F. Oberdorfer, Washington, D.C.
Joseph O'Meara, Emeritus Dean, Notre Dame University School of Law.
William H. Orrick, Jr., San Francisco, Calif.
Revius O. Ortique, New Orleans, La.
Ross H. Oviatt, Watertown, S. Dak.
James Dickson Phillips, Dean, University of North Carolina of Law.
Samuel R. Pierce, Jr., New York, N.Y.
Louis H. Pollak, Dean, Yale Law School.
Thomas W. Pomeroy, Jr., Pittsburgh, Pa.
William Poole, Wilmington, Del.
Robert H. Reno, Concord, N.H.
Robert R. Richardson, Atlanta, Ga.
Simon H. Rifkind, New York, N.Y.
John D. Robb, Jr., Carlsbad, N. Mex.
Herschel H. Rose, Fairmont, W. Va.
Samuel I. Rosenman, New York, N.Y.
Oscar M. Ruebhausen, New York, N.Y.
Terry Sanford, Raleigh, N.C.
Whitney North Seymour, New York, N.Y.
Francis M. Shea, Wahington, D.C.
Jerome J. Shestack, Philadelphia, Pa.
Herbert D. Sledd, Lexington, Ky.
William A. Sloan, Albuquerque, N.M.
Jerry V. Smith, Lewiston, Idaho.
Kendrick Smith, Butte, Mont.
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Robert G. Storey, Dallas, Tex.
John A. Sutro, San Francisco, Calif.
Seth Taft, Cleveland, Ohio.
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Howard J. Trienens, Chicago, Ill.
Jerry Tubb, Oklahoma City, Okla.
William Tucker, Dean, Cornell Law School.
Lehan K. Tunks, Dean, University of Washington Law School.
Calvin H. Udall, Phoenix, Ariz.
Lewis H. Van Dusen, Jr., Philadelphia, Pa.
David H. Vernon, Dean, University of Iowa School of Law.
Robinson Verrill, Portland, Maine.
Robert L. Wald, Washington, D.C.
William F. Walsh, Houston, Tex.
William C. Warren, Dean, Columbia University School of Law.
Bethuel M. Webster, New York, N.Y.
Herbert Wechsler, Professor, Columbia University School of Law.
T. Girard Wharton, Newark, N.J.
Thomas W. Wiley, Phoenix, Ariz.
Edward Bennett Williams, Washington, D.C.
Charles Alan Wright, Professor, University of Texas.
Wilson W. Wyatt, Louisville, Ky.
David W. Yandell, Burlington, Vt.
John H. Yauch, Newark, N.J.

RESOLUTION OF 43D ANNUAL CONVENTION, NATIONAL BAR ASSOCIATION, INC., WASHINGTON, D.C.

(By the Resolutions Committee)

Whereas, the National Bar Association has always supported the Constitutional principle that the independence and the integrity of the Judiciary shall be inviolate; and

Whereas, the now Associate Justice of the United States Supreme Court, Abe Fortas, has achieved the highest honor that may be bestowed upon any lawyer and/or Judge; and

Whereas, the now Associate Justice Fortas has been nominated to be the Chief Justice and administrator of that Highest Court; and

Whereas, the now Associate Justice is awaiting confirmation to that position to which he has been nominated by our President; and

Whereas, we now note with dismay, the prolonged inquiry into the qualifications of Mr. Justice Fortas and particularly the efforts of some to relate their inquiries to decisions rendered by the Supreme Court; and

Whereas, we recognize the responsibility of the United States Senate to discharge its obligations to the American People;

Be it resolved that the National Bar Association assembled at Washington, D.C., in its 43rd Convention, does unequivocally, and without reservation, urge the Senate Judiciary Committee to recommend confirmation of Associate Justice Abe Fortas forthwith; respecting and supporting the wisdom of President Lyndon B. Johnson's judgment in naming Associate Justice Abe Fortas of the United States Supreme Court to be its Chief Justice;

And be it further resolved, that a copy of this Resolution be dispatched to the Chairman of the Judiciary Committee and to the Leadership of the United States Senate.

And be it further resolved, that a copy of this Resolution be dispatched to the Chairman and members of the Judiciary Committee and to the Leadership of the United States Senate.

Done this 30th day of July, 1968.

REVIUS O. ORTIQUE,
Chairman.

GEORGE LAWRENCE,
Cochairman.

Attest:

BILLY JONES,
President.

LEADERSHIP CONFERENCE ON CIVIL RIGHTS,
Washington, D.C., September 26, 1968.

DEAR SENATOR: Our long opposition to the filibuster, particularly, when it has been used to oppose the fight for full equality, leads us, now, to protest its impending use against the nomination of Justice Abe Fortas as Chief Justice of the United States.

As a non-partisan organization, the Leadership Conference on Civil Rights does not take positions on individual nominations. However, we believe there are issues, here, that threaten the independence of the Judiciary.

We express our concern in the enclosed statement.

We hope you will do all in your power to see that a filibuster is stopped and the Senate is given an opportunity to work its will.

Sincerely yours,

ROY WILKINS, *Chairman.*

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Free Congress
Foundation

Reforming The Judicial Selection Process

Bush Makes The Case For Timely Action While Leahy Suddenly Drops His Support For Deadlines

On October, 30, 2002, President Bush proposed what he called "a clean start for the process of nominating and confirming federal judges." While standing in the East Room, where he presented his first 11 nominees almost a year and a half ago, Bush said the existing process is so poisoned and polarized that nominees clearly are not being treated fairly.

Bush's proposals this week were simple and straightforward. He asked judges who expect to retire or take senior status to notify the President a year in advance, if possible. As he explained, the goal should be to have an appointee in place when the seat becomes vacant.

To further that goal, he proposed that Presidents submit a nomination within 180 days of receiving notice from the judge, that the Judiciary Committee hold a hearing within 90 days of the nomination, and that the Senate bring the nomination to a vote another 90 days later.

"The plan would be fair and would apply to—regardless of who the President is," he said. "It doesn't matter who the President is. What matters is a system which works."

For the past year and a half, that system has not worked. Bush has had to deal with a confirmation process run by Senators Patrick Leahy and Tom Daschle, who have made every effort to stall as many nominations as they can.

Their treatment of Bush's court of appeals nominees has been deplorable. Former President Reagan saw 95 percent of his court of appeals nominees confirmed during the first two years of his presidency. George H.W. Bush had 96 percent confirmed during the same period. Bill Clinton's figure was 85 percent. They have refused to show George W. Bush the same courtesy, only allowing 47 percent of his court of appeals nominees to be confirmed.

Some, like Priscilla Owen and Charles Pickering, had the votes in the Senate but were denied the chance for a vote. Others, like Dennis Shedd, had the votes in the Judiciary Committee and the Senate, but were denied a chance for a vote in either body—

until his party's losses in the election prodded Leahy into action. As Bush said, it is a lousy record.

The vacancy crisis and confirmation slowdown have very real effects, not just on the nominees and the judicial system, but also on ordinary people who look to the courts for justice. But when certain Senators decide that it is fine for the Sixth Circuit to operate with 7 of its 16 seats vacant for nearly a year, or for the D.C. Circuit to operate with 4 of its 12 seats vacant for months on end -- despite the availability of highly qualified nominees whose names are before them -- those Senators have signaled that they simply do not care.

Bush's proposal is a common sense resolution to a lot of the difficulties plaguing the confirmation process. Unfortunately, Judiciary Committee Democrats have declined to embrace it.

Outgoing committee chairman Patrick Leahy (D-VT) was especially critical of the proposal. "The President should understand that the Senate does not need arbitrary deadlines," he declared.

But until George W. Bush was elected President, Leahy had no problem at all with arbitrary deadlines for the Senate. In fact, the Congressional Record is full of examples of his outspoken support for deadlines and a few other reforms that he thinks are unimportant of late.

"I have said on the floor, although we are different parties, I have agreed with Gov. George Bush, who has said that in the Senate a nominee ought to get a vote, up or down, within 60 days."
146 Cong. Rec. S 10174, October 11, 2000

"Governor Bush of Texas recently also proposed that presidential nominations be acted upon by the Senate within 60 days . . . Governor Bush is right."
146 Cong. Rec. S 7436, July 21, 2000.

"The soon-to-be presidential nominee of the Republican Party has said—and I agree with him—that this is wrong, the Senate ought to vote these people up or down in 60 days."
146 Cong. Rec. S 7532, July 25, 2000.

"I mention this because Governor Bush and I, while we disagree on some issues, have one very significant issue on which we agree. He gave a speech a while back and criticized what has happened in the Senate where confirmations are held up not because somebody votes down a nominee but because they cannot ever get a vote. Governor Bush said: You have the nominee. Hold the hearing. Then, within 60 days, vote them up or vote them down. Don't leave them in limbo."
146 Cong. Rec. S 9672, October 3, 2000.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled . . . that Section 46 of title 28, United States Code, is

amended by adding at the end the following . . . the Senate shall not recess for more than nine days without first voting on a judicial nomination in any case in which the nomination . . . has been pending before the Senate for a period of 60 days or longer; and a judicial emergency is declared . . . due to vacancies in the affected circuit court."

S. 1906, a bill introduced by Leahy on April 2, 1998.

"As I have said before, it should not take more than 4 months to consider a judicial nominee. . . ."

143 Cong. Rec. S 7207, July 10, 1997.

"Any week in which the Senate does not confirm three judges is a week in which the Senate is failing to address the vacancy crisis. Any fortnight in which we have gone without a judicial confirmation hearing marks 2 weeks in which the Senate is falling behind."

105 Cong. Rec. S 76, January 28, 1998.

"A President should be given a great deal of latitude on who he nominates to the Federal court. If we disagree with a nomination, then we can vote against it. But, frankly, Mr. President, not only does it damage the integrity and the independence of the Federal judiciary by just holding judicial nominations hostage where nobody ever even votes on them, but I think it damages the integrity of the U.S. Senate."

143 Cong. Rec. S 5654, June 16, 1997.

"The Founding Fathers certainly intended that the Senate advise as to judicial nominations, i.e., consider, debate and vote up or down. They surely did not intend that the Senate, for partisan or factional reasons, would remain silent and simply refuse to give any advice or consider and vote at all, thereby leaving the courts in limbo, understaffed and unable properly to carry out their responsibilities for years."

Prepared Statement, Senate Judiciary Committee, May 10, 2000.

"Now, every Senator can vote against any nominee. Every Senator has that right. They can vote against them in [the Judiciary Committee] and on the floor. But it is the responsibility of the U.S. Senate to at least bring them to a vote. It is our responsibility under the Constitution, it is our responsibility to the Senate itself, it is our responsibility to the American public not to allow one Senator to determine for all 100 Senators whether a person will be confirmed to a federal judicial position or not."

143 Cong. Rec. S 10926, October 22, 1997.

REV_00255670

CATO INSTITUTE News Release

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October 30, 2002

Cato scholar praises Bush plan to end delays in confirmation hearings

Democrats controlling Senate Judiciary Committee politicize confirmation process

WASHINGTON—This afternoon, President Bush announced his plan to end the crisis that has paralyzed his nominations to the federal bench. James L. Swanson, editor in chief of the Cato Supreme Court Review and a senior fellow in constitutional studies at the Cato Institute, commented:

"For a year and a half, since May 2001, Democrats on the Senate Judiciary Committee have thwarted President Bush's efforts to fill vacancies on an understaffed federal bench. Democrats controlling that committee have politicized the confirmation process by refusing to hold hearings for many nominees—or once hearings have been held, by refusing to allow the full Senate to vote on many of the nominations. That scheme subverts the Constitution, undermines the rule of law, and impedes the administration of justice."

Commenting on the president's call for the Senate Judiciary Committee to hold a hearing within 90 days of receiving a nomination, Swanson added, "It was high time for the president to object to the Judiciary Committee's tactic of paralyzing nominations through delay. Stalling harms the nominees, the courts and the American people."

Regarding President Bush's proposal that the full Senate vote a nomination up or down no later than 180 days after the nomination is submitted, Swanson said: "The president is right to call for action by the full Senate, and in a timely manner. As James Madison suggested, the vote of 100 senators is preferable to the vote of a small and more radical cabal or committee."

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The Cato Institute is a nonpartisan public policy research foundation dedicated to broadening policy debate consistent with the traditional American principles of individual liberty, limited government, free markets, and peace.

PRESIDENT BUSH ANNOUNCES HIS PLAN TO ENSURE TIMELY CONSIDERATION OF JUDICIAL NOMINEES

Today the President outlined his plan to ensure timely consideration of judicial nominees. The President calls on the Senate and the Judiciary to join him in adopting this plan and applying it both now and in the future, no matter who is President or which party controls the Senate. The objective is to fix, on a permanent and bipartisan basis, a judicial confirmation process that is clearly broken.

THE CURRENT CRISIS

- There is a vacancy crisis in the federal Judiciary. As of this week, there are 79 vacancies out of the 849 authorized federal judgeships, a 9% vacancy rate. The 12 regional federal appeals courts face a particularly serious crisis, with 28 vacancies out of 167 judgeships, a 17% vacancy rate.

    - ✓ Chief Justice Rehnquist's 2001 Year-End Report on the Federal Judiciary, issued when there were 94 vacancies, called the situation "alarming."
    - ✓ The Secretary of the Judicial Conference of the United States, which is the federal Judiciary's governing body, stated in May 2002 that the overall shortage of federal judges is "staggering."
    - ✓ The American Bar Association report in August 2002 described the status of the federal Judiciary as an "emergency situation."
    - ✓ In 1998, when there were 50 judicial vacancies, Chairman Leahy stated that the number of vacancies represented a "judicial vacancy crisis." (AP, 10/22/98)
    - ✓ Caseloads in the federal courts continue to grow dramatically. Filings in the federal appeals courts reached an all-time high last year.

- The Senate has not lived up to its responsibility to hold fair hearings and prompt votes on judicial nominees.

    - ✓ The Senate has voted on only 80 of the President's 131 nominees overall and, even more problematic, has voted on only 14 of the President's 32 appeals court nominees. By contrast, in the first two years of the past three Administrations, 60 of the 65 appeals court nominees were confirmed.
    - ✓ As of November, 15 of President Bush's appeals court nominees will have been forced to wait more than a year just for a hearing (many are still waiting). That number is more than the number of appeals court nominees who had to wait a year for a hearing in the last 50 years combined.
    - ✓ The Chief Justice of the United States, speaking on behalf of the Judiciary in his 2001 Year-End Report, "ask[ed] the Senate to schedule up or down votes on judicial nominees within a reasonable time after receiving the nomination."
    - ✓ The American Bar Association report in August 2002 stated that as a result of delays in the judicial confirmation process, "the federal courts . . . suffer, and so does the rule of law." The report stated that the Senate Judiciary Committee's refusal to allow "confirmation proceedings in the full Senate is simply unacceptable to our notion of an appropriate and constitutional nomination process" and added: "Vote them up or down, but don't hang them out to dry."
    - ✓ The 2000 report of the bipartisan Citizens for Independent Courts stated that "the views of individual senators, while vital, should not be allowed to undermine collective decision-making in an open, deliberative process" and stated that "the

Senate process should proceed expeditiously to a committee hearing, committee review and voting, and floor consideration and voting."

THE PRESIDENT'S PROPOSAL

This President's plan requires specific commitments from everyone involved in the nomination and confirmation of federal judges:

- First, the President calls on federal court of appeals and district court judges to notify the President of their intended retirement dates at least a year in advance whenever possible. Because the nomination and confirmation of a federal judge can be a lengthy process even under the best of circumstances, advance notice is necessary to prevent extended unnecessary judicial vacancies. The President's call to the Judiciary builds on existing Judicial Conference recommendations and is intended to create a seamless process whereby a new federal judge is ready to take the bench at or near the time a sitting federal judge retires.

- Second, Presidents should submit a nomination to the Senate within 180 days of receiving notice of a federal court vacancy or intended retirement. This would help expedite the process by which home-State Senators, Representatives, bar leaders, and others provide their recommendations and evaluations of possible judicial candidates to the President, while leaving ample time for Presidents to vet and choose nominees of the highest quality.

- Third, the President calls on the Senate Judiciary Committee to hold a hearing within 90 days of receiving a nomination. The Committee has engaged in too many delays of too many nominees for too many years. A strict deadline, which will apply no matter who is President and which party controls the Senate, is the best way to ensure that judicial nominees are promptly and fairly considered. Ninety days is more than enough time for the Committee to conduct any necessary research before holding a hearing.

- Fourth, the President calls on the full Senate to hold an up-or-down floor vote within 180 days of receiving a judicial nomination. That is a generous period designed to give both the Committee and the full Senate ample time to evaluate nominees and answer any questions they may have. And all Senators will have an opportunity to have their voices heard and their votes counted.

Judicial Appointments
Historical Comparison: First Two Years of a Presidency

President	Nominations Submitted	Nominees Confirmed	Percentage Of Nominees Confirmed	Circuit Court Nominations Submitted	Circuit Court Nominees Confirmed	Circuit Court Percentage of Nominees Confirmed
G.W. Bush (as of 10-30-02)	131	80	**61%**	32	14	**44%**
Clinton	140	126	**90%**	22	19	**86%**
George H.W. Bush	74	70	**95%**	23	22	**96%**
Reagan	88	87	**99%**	20	19	**95%**

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WHITE HOUSE STAFFING MEMORANDUM

Date: 10-25-02 ACTION / CONCURRENCE / COMMENT DUE BY: 10-28-02, 3:00 PM

Subject: LETTERS REGARDING JUDICIAL CONFIRMATION PROCESS

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☑	☐	HUBBARD	☐	☐
CARD	☑	☐	IRASTORZA	☐	☐
BARTLETT	☐	☐	JOHNSON	☐	☐
BLAKEMAN	☐	☐	LINDSEY	☐	☐
BOLTEN	☑	☐	MARBURGER	☐	☐
BRIDGELAND	☐	☐	MIERS	☐	☑
CALIO	☑	☐	RICE	☐	☐
CONNAUGHTON	☐	☐	RIDGE	☐	☐
DANIELS	☑	☐	ROVE	☐	☐
FLEISCHER	☐	☑	SPELLINGS	☐	☐
GERSON	☐	☑	CLERK	☐	☐
GONZALES	☐	☑	_____	☐	☐
HAGIN	☐	☐	_____	☐	☐
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REMARKS:
PLEASE SEND COMMENTS TO BRETT KAVANAUGH, EXT. 67984, FAX 65104, NO LATER THAN 3:00 PM MONDAY, 10-28-02, WITH COPY TO STAFF SECRETARY. THANK YOU.

RESPONSE:
No comments . .

CLOSE HOLD

Harriet E. Miers
Assistant to the President
and Staff Secretary
Ext. 62702

TOTAL P.01

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CLOSE HOLD

SS/ RM NO. _____

WHITE HOUSE STAFFING MEMORANDUM

Date: 10-25-02 ACTION / CONCURRENCE / COMMENT DUE BY: 10-28-02, 3:00 PM

Subject: LETTERS REGARDING JUDICIAL CONFIRMATION PROCESS

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☑	☐	HUBBARD	☐	☐
CARD	☑	☐	IRASTORZA	☐	☐
BARTLETT	☐	☐	JOHNSON	☐	☐
BLAKEMAN	☐	☐	LINDSEY	☐	☐
BOLTEN	☑	☐	MARBURGER	☐	☐
BRIDGELAND	☐	☐	MIERS	☐	☑
CALIO	☑	☐	RICE	☐	☐
CONNAUGHTON	☐	☐	RIDGE	☐	☐
DANIELS	☑	☐	ROVE	☐	☐
FLEISCHER	☐	☑	SPELLINGS	☐	☐
GERSON	☐	☑	CLERK	☐	☐
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HAGIN	☐	☐	_____	☐	☐
HAWKINS	☑	☐	_____	☐	☐

REMARKS:
PLEASE SEND COMMENTS TO BRETT KAVANAUGH, EXT. 67984, FAX 65104, NO LATER THAN 3:00 PM MONDAY, 10-28-02, WITH COPY TO STAFF SECRETARY. THANK YOU.

See my comments - ay -

RESPONSE:

Harriet E. Miers
Assistant to the President
and Staff Secretary
Ext. 62702

CLOSE HOLD

SEPTEMBER 2002

Washington Lawyer

THE OFFICIAL JOURNAL OF THE DISTRICT OF COLUMBIA BAR

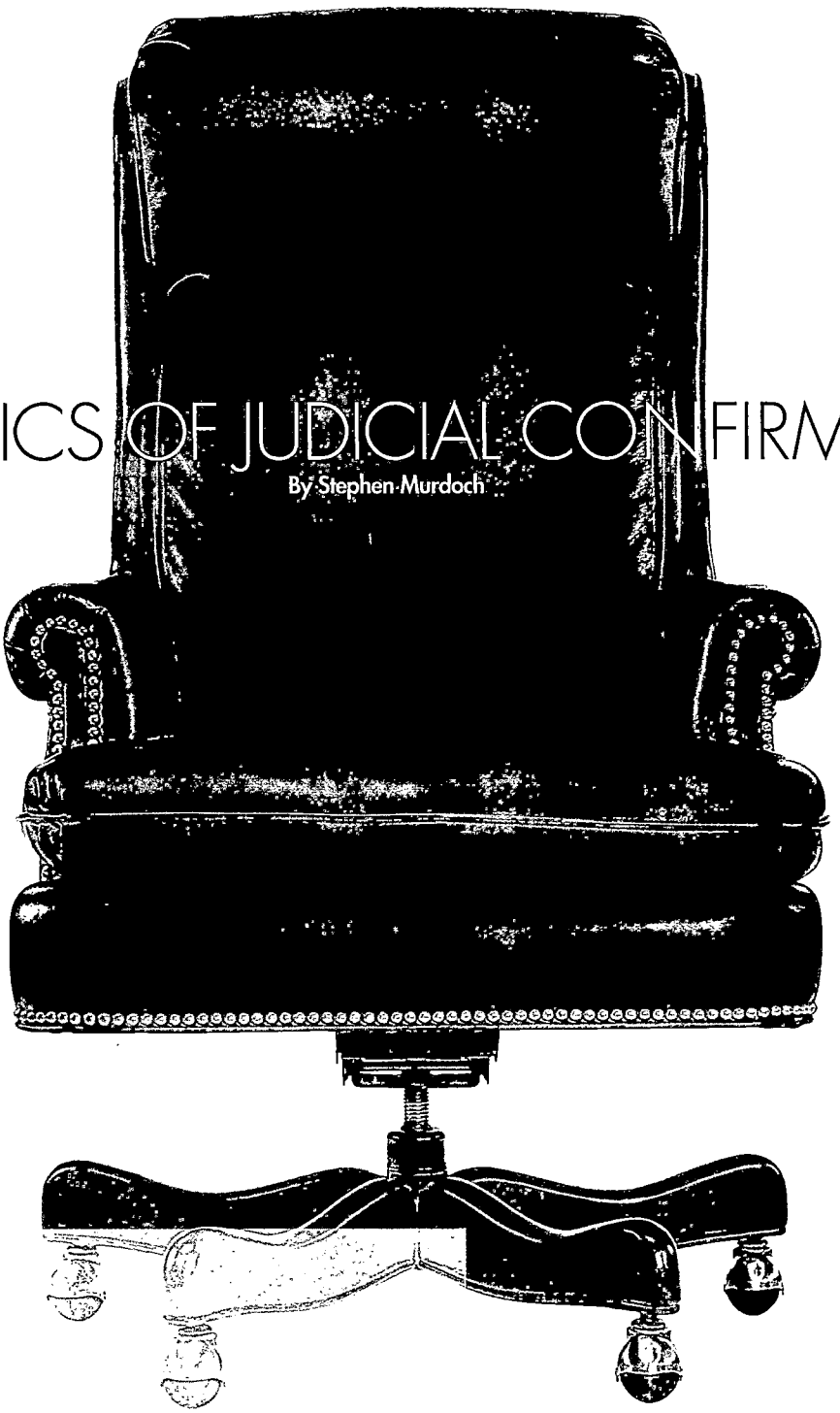

THE POLITICS OF JUDICIAL CONFIRMATION

By Stephen Murdoch

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discussion featuring attorneys from local law firms, the Federal Communications Commission, Capitol Hill, the Department of Justice, and trade associations.

A question-and-answer session and a postevent networking reception will take place following the panel discussion.

The event is cosponsored by the FCBA Diversity Committee with assistance from *CommLaw Conspectus*, a publication of the Columbus School of Law at the Catholic University of America.

For more information or to register, visit www.fcba.org or e-mail wendy@fcba.org.

WBA Starts Season With Open House

The Women's Bar Association (WBA) of the District of Columbia kicks off the fall season with a networking reception and open house on September 19 from 6 to 8 p.m. at the Homer Building, 601 13th Street NW, atrium level.

"Attendees will have an opportunity to network, make new contacts, and reestablish old ties," says WBA President Ellen Jakovic. "Most importantly, we hope attendees will enjoy the camaraderie and spirit of friendship which is an essential part of the WBA's mission."

The event, cosponsored by White & Case LLP, provides an opportunity for members and potential members to learn about the mission of the WBA and its programs and committees.

"The WBA helps its members advance and enhance their careers on many different levels," says Jakovic. "The WBA provides leadership training; personal and professional development opportunities; a forum for addressing issues of importance to the profession and the advancement of women; and a network of more than 1,000 attorneys."

For more information on attending or becoming a member of the WBA, call 202-639-8880, e-mail wba@wbadc.org, or visit www.wbadc.org.

Kristen Girard Morgan can be reached by e-mail at kgmorgan@dcbar.org.



Photograph by Washington's Best Photographers

Soccer star Mia Hamm of the Washington Freedom autographs a photo for Renita Bivins, an attorney with the U.S. Department of Transportation, at the Women's Bar Association's open house last year. The event returns September 19 with another special guest in addition to a wine and cheese reception.

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speaking of ethics

By Ernest T. Lindberg

Checking Conflicts When Moving to a New Firm


Mick Wiggins

When a lawyer contemplates moving to a new firm, it is necessary to determine whether prior work done by the lawyer on client matters may create a conflict of interest for the new firm. To check whether such conflicts exist, only information that does not constitute "confidences" or "secrets" may be revealed without client consent. In most cases, however, sufficient information may be disclosed to permit a check of conflicts.

In Opinion 273 (1997) the D.C. Bar Legal Ethics Committee discussed a number of issues raised by the movement of lawyers from one firm to another. One issue mentioned was the need to check for possible conflicts of interest between current and former clients of the lawyer's existing firm and the clients of the new firm. Seeking to address the uncertainty among lawyers who are proposing to move to a new firm, the Legal Ethics Committee in recent Opinion 312 considers the extent to which the moving lawyers may reveal information to their prospective new firms for the purpose of undertaking such checks.

The need for checking conflicts arises from Rule 1.10 (Imputed Disqualification) of the D.C. Rules of Professional Conduct. At paragraph (b) the rule provides that "[w]hen a lawyer becomes associated with a firm, the firm may not knowingly represent a person in a matter which is the same as, or substantially related to, a matter with respect to which the lawyer had previously represented a client whose interests are materially adverse" to the present firm's client, but only when the moving lawyer has in fact acquired information protected by Rule 1.6 (Confidentiality of Information) that is material to the matter.

Where a lawyer joining a firm is concerned about conflicts that may have been caused by work done before becoming a lawyer, as a law clerk, summer associate, paralegal assistant, or other nonlawyer assistant, Rule 1.10(b) does not require disqualification of the firm that the lawyer is joining in any event, but other considerations apply. *See* D.C. Ethics Op. 227 (1992).

Not every client of the former firm is deemed to be a former client of the moving lawyer, but only those with whom the lawyer had an attorney–client relationship. *See* Comment [19] to Rule 1.10. The result is that conflicts that applied to the lawyer while in firm A only because of imputation required by Rule 1.10(a) do not apply when the lawyer is moving to another firm.

This narrower scope of Rule 1.10(b) reflects the policy favoring attorney mobility. *See* Comment [10] to Rule 1.10. Typically, when a lawyer contemplates joining a new firm, the lawyer provides information to that firm indicating the clients, adversaries, and subject matter on which the lawyer has worked so that the new firm may check if the lawyer's joining would create a conflict of interest with any of the firm's clients.

It is not possible to generalize about how this process does or should occur. What a lawyer may disclose is considered in Rule 1.6, which requires lawyers not to reveal confidences and secrets of a client or former client. Without a former client's consent, therefore, a lawyer may, in checking conflicts at a new firm, reveal information about representations that is not privileged and is not secret. "Secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing or would likely be detrimental to the client. In the great majority of cases, this leaves the lawyer free to reveal sufficient information to carry out a reliable check of conflicts.

There are many instances when the facts surrounding a representation may be so sensitive and fraught with the possibility of injury or embarrassment to the client that, absent a waiver, the information is not subject to disclosure even for conflict-checking purposes. In those cases Opinion 312 suggests some rough guidelines to be applied on a case-by-case basis:

- As a general rule, to check conflicts it is merely necessary to compare the client name and the general subject of the representation.
- In some cases, identifying a particular issue or subject matter without identifying the client name may be sufficient to determine the lack of any conflict. *See* D.C. Ethics Op. 265 (1996).
- If the subject matter but not the client name is sensitive, it may be possible to avoid the sensitive area if the moving lawyer mentions only the client's name.
- If the identity of the client creates a problem, it may be possible to name those persons or entities to which that client is adverse.
- As a first stage in an inquiry, it may be possible to avoid revealing confidences and secrets by providing a list of names to the firm without revealing which are clients and which are adverse parties.

Ethics counsel Ernest T. Lindberg is available for telephone inquiries at 202-737-4700, ext. 231, or by e-mail at ethics@dcbar.org.

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Mick Wiggins

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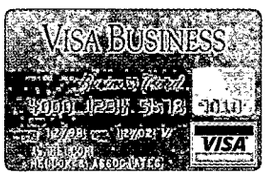

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tech notes

By David Simms

New Web Site Coming

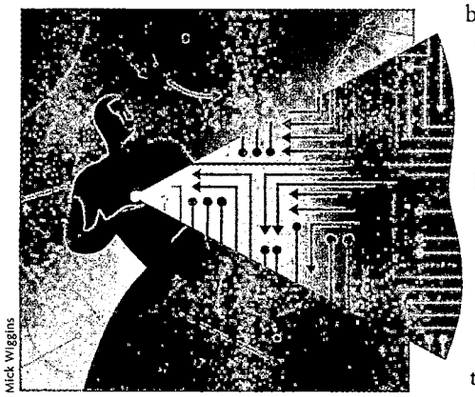

Mick Wiggins

A fresh, new D.C. Bar Web site is coming! Since the site's last redesign in June 1999, we've experienced a classic case of a site outgrowing its navigation. Over the last year we've added content from the Attorney/Client Arbitration Board, Clients' Security Fund, and Lawyer Counseling Program, and have expanded the attorney discipline area. Growth is good, but the downside is that the site is busting at its navigational seams, making it difficult for users to find information and perform the tasks they expect from a Web site.

Improvement is on the way. Thanks to some ingenious information architecture by our consultants, with input from Bar staff about content and development, the new site will have a much cleaner, more compact feel. It may even look like a smaller site at first glance. Don't be fooled. Doing away with clutter doesn't mean doing away with substance, and there's actually more packed into this compendious design.

To augment the recommendations of the information architects who contributed to this endeavor, Bar staff also spent an afternoon soliciting the assistance of members exiting a section event one afternoon. As they were leaving we asked them if they would like to serve as subjects in some user testing we were performing. If you were one of those individuals, thank you. It provided us with valuable information in understanding where the old site missed the mark.

There have also been considerable gains made in what is technically possible on a Web site since the dark ages way back in the penultimate year of the 20th century, and the redesigned site exploits these newer capabilities to make it as user-friendly as current technology permits.

The artwork of the new site was a big hit with Bar staff when first unveiled by the design firm. But as much as the artistry won me over on first impression, I came to appreciate it even more after reading the artist's statement. I'll share an excerpt of that statement with you now, but you'll need to understand that the new site is divided into three main areas for the following to make sense: "*Inside the Bar* includes a window, playing off the idea that one is actually inside a space. A lion is used in the *For Lawyers* banner design to symbolize strength and respect. Water is placed in center view in the *For the Public* banner characteristic of fountains in our public parks." Other imagery throughout the site is of cherry tree blossoms, a Metro station ceiling, marble floor tiles in Union Station, a ceiling detail from the Smithsonian's National Museum of Natural History, and columns in Georgetown.

To keep things interesting, I'll not spoil the mystery and spell out where all that is. You can have fun finding it on your own.

But looks aren't everything, and along with the modernized look and zippy navigational controls will be a whole host of new features Bar members have been requesting. The question most frequently asked of me over the last couple of years is "Can I pay my dues online?" Heretofore I've had to answer no. Now the answer is yes. In the weeks following the launch of the new site, we'll phase in the ability to purchase publications and register online for continuing legal education (CLE) courses, section programs, and other special Bar-sponsored events.

If you've not been taking advantage of the resources the Bar's Web site makes available, may I suggest you use the launch of the new site as the perfect time to join company with the roughly 2,000 people every day who already benefit from what it offers. For example, on the site there are more than 100 forms for Superior Court filings, and every Thursday morning the Court of Appeals releases slip opinions. You can subscribe to mailing lists to receive e-mail alerts of new ethics opinions as soon as they are released or CLE courses that match your practice area. Take advantage of the assistance made available by the Lawyer Practice Assistance Program; take advantage of the anonymity afforded by a Web site to seek counseling. There is so much more available at www.dcbar.org.

We didn't simply tweak our current design. In fact, we made no attempt to salvage any part of it, opting instead to rebuild the Web site from the ground up. In doing so, we tried to play soothsayer and predict where we'd be five years from now, and designed the site such that it allows for graceful scalability. Though we certainly want to get as much mileage as possible out of this redesign, it's never too soon to begin receiving your suggestions on how it could be improved. The e-mail I've received from members over the last couple of years has played a critical role in shaping the site we unveil this fall, so please keep those letters coming.

David Simms is the D.C. Bar Web editor. He can be reached at dsimms@dcbar.org.

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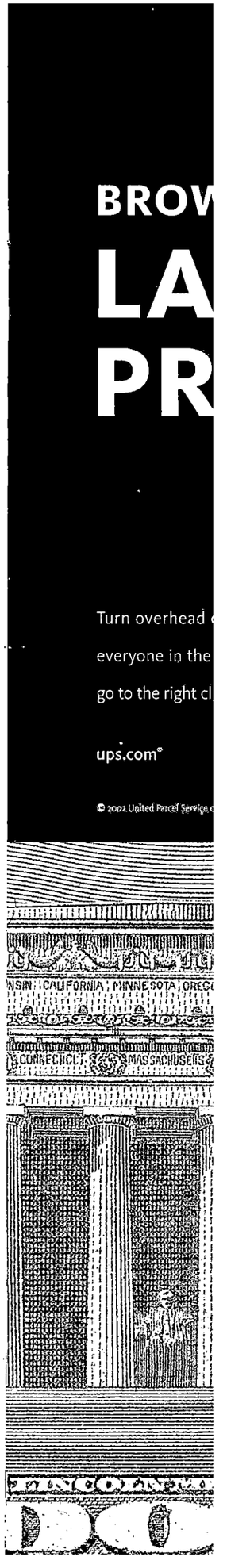

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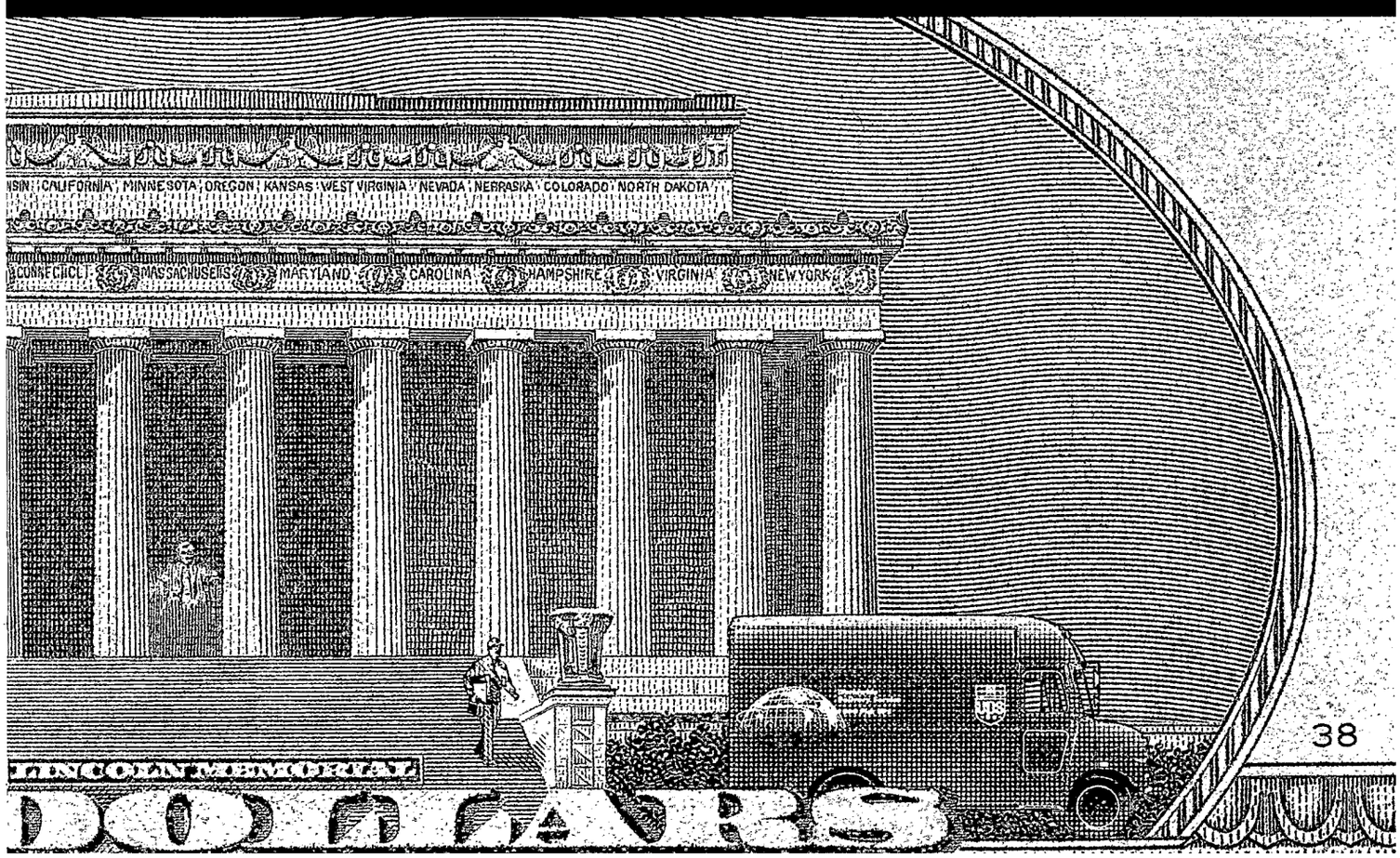

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legal beat

By Sean Groom

News and Notes on the D.C. Bar Legal Community

Clinton Questions Supreme Court's Direction

The American Constitution Society for Law and Policy invited a lawyer, a federal judge, and a senator to offer their insights on the direction of the U.S. Supreme Court at a special event held July 23 at Georgetown University Law Center. Joining attorney John Payton of Wilmer, Cutler & Pickering at the rostrum were Judge Robert W. Pratt of the Southern District of Iowa and New York Senator Hillary Rodham Clinton.

Elaborating on her thesis of the activist nature of the Supreme Court under Chief Justice William Rehnquist, Clinton expressed concern over the direction the Court has taken and its adherence to what she described as a philosophy of judicial supremacy.

"At its core," she said, "judicial supremacy holds that the judiciary is not merely the final arbiter but the sole arbiter of constitutional meaning in our democratic form of government. In other words, whatever the Congress and American people believe the Constitution means, the courts and especially the Supreme Court will not and should not hesitate to dismiss it."

According to Clinton, during its first 130 years the Supreme Court struck down approximately 50 acts of Congress; later the Warren court invalidated federal laws in 20 cases over a 16-year span. The pace of invalidating federal laws has accelerated, as the Rehnquist court overturned acts of Congress in no fewer than 32 cases during the last eight terms.

"By any measure," Clinton asserted, "the current court is one of the most activist, if not *the* most activist Supreme Court, in American history."

She pointed out, "In 11 of the 32 cases where the current court has stuck down a federal law, the Court did so not to protect individual rights but to protect states' rights, in many cases to protect states from the enforcement of civil rights guaranteed by federal law."

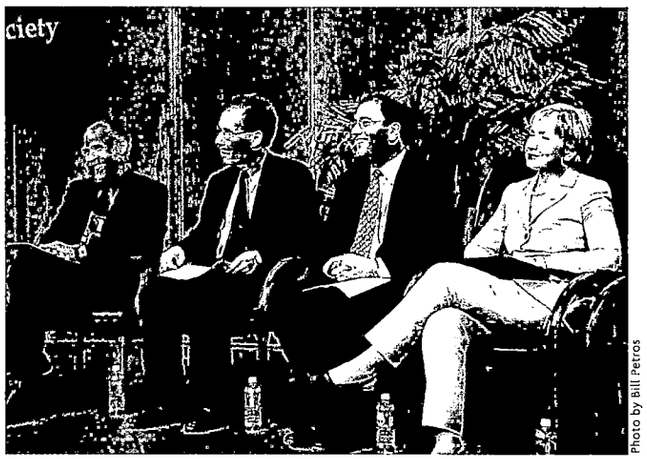

Photo by Bill Petros

The American Constitution Society hosted a forum on the Supreme Court featuring (from left) John Payton, Robert Pratt, society president Peter Rubin, and Hillary Clinton.

Clinton's remarks highlighted two cases of the October 2002 term that she believes will be instructive to watch, given the Court's federalism revival: *Nevada Department of Human Resources v. Hibbs* and *Pharmaceutical Research & Manufacturers of America v. Concannon.*

The *Hibbs* case addresses the constitutionality of the Family and Medical Leave Act (FMLA) and questions whether the legislation violates states' Eleventh Amendment immunity to suits from individuals. Hibbs sued the state of Nevada claiming that he was denied leave due to him under the act. In federal district court Nevada successfully argued it was immune to such suits, although the Ninth Circuit Court of Appeals overturned the ruling.

Clinton believes the legislative history of the bill establishes that the FMLA was passed to address the established history of gender discrimination in the United States and that the stated purpose of the act was to "promote the goal of equal opportunity for women and men" and thus was not in violation of the Constitution.

The same argument was used by the Bush administration when it argued that the Supreme Court should not grant certiorari. In his brief Solicitor General Theodore Olsen wrote: "The family-care provision at issue here stands on a distinct constitutional footing. It remedies and directly responds to the continuing effects of well-documented, historic gender discrimination in employment and employment policies."

Clinton expressed concern that the Court was reining in Congress's power to enforce the equal protection clause. If the Court were to rule against Hibbs, she said, the decision would exemplify "federalism gone awry."

The *Concannon* case involves a plan by the state of Maine, Healthy Maine Prescription Plan (Maine Rx), to provide discounted drugs to underinsured individuals who do not qualify for Medicaid.

Individuals who enroll in Maine Rx are eligible for discounted drugs at participating pharmacies. The state reimburses the pharmacy with rebates it has negotiated with the pharmaceutical manufacturer. The state negotiates the rebates by leveraging its buying power as administrator of the Medicaid program; companies that do not negotiate price reductions are not granted preapproval status in the Medicaid program, and patients must get authorization if they are prescribed a drug manufactured by those companies. The drug manufacturers sued the state alleging that the program violates the commerce clause.

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Clinton argued that the current Supreme Court has been usurping congressional power. "The Rehnquist revolution in constitutional law," she said, "has occurred at a time in our nation's history when there is no significant public clamor for a constitutional vision and, worse, the Court has rendered its decisions in terms deliberately designed to exclude Congress and by extension the American people from playing a part in defining what the Constitution requires and permits. The American people are not the true wizards behind the Court's velvet curtain and the Court seems intent on keeping it so."

John Payton, immediate past president of the D.C. Bar, discussed the likely appeal to the Supreme Court of the University of Michigan affirmative action cases, *Gratz v. Bollinger* and *Grutter v. Bollinger*. Payton represented the university in lawsuits challenging the admissions policies of the undergraduate and law schools.

The event's sponsor, the American Constitution Society for Law and Policy, is an organization of law students, law professors, attorneys, and judges created as a counterbalance to the Federalist Society.

American stitution Society ted a forum on Supreme Court turing (from left) n Payton, Robert tt, society presi- t Peter Rubin, and ary Clinton.

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Master Business License Deadline Extended

The D.C. Department of Consumer and Regulatory Affairs at a press conference on August 7 extended the grace period for businesses to obtain a master business license (MBL) to December 31.

The extension is for businesses located in the District's commercial zones and for those that conduct business within the District but have offices located outside the city. Home-based businesses within residential zones of the District have until February 28 to obtain the MBL.

The D.C. Bar has requested clarification from the District government regarding exactly who and what types of legal business entities must apply for an MBL.

Updated information on the MBL issue is available at www.dcbar.org/license.

Nomination Commission Announces Vacancies on Family Court

The District of Columbia Judicial Nomination Commission seeks candidates for three vacancies on the family court of the D.C. Superior Court. The commission will forward the names of three candidates for each opening to President Bush for selection to serve a 15-year term on the bench.

Membership Dues Reminder: Late Fees Now Assessed

District of Columbia Bar members who had not paid their annual dues by August 15 were sent a final notice by first-class mail levying a $30 late fee and notifying them that if they fail to mail dues and late fees by September 30 they will automatically be suspended for nonpayment of dues.

For more information, contact the D.C. Bar Membership Office at 202-626-3475 or 1-877-333-2227, ext. 475, or membership@dcbar.org.

The District of Columbia Family Court Act of 2001 created the three new positions on the family court. This legislation requires that family court judges have training or expertise in family law and a certified intention to serve a full five-year term on the family court and participate in training.

Interested candidates should submit a completed judicial questionnaire to the commission by the close of business on September 26. Persons who have a questionnaire on file with the commission and wish to be considered should write the chairperson, Patricia M. Worthy, indicating their interest by the September 26 deadline.

The Judicial Nomination Commission is located in the D.C. Superior Court, 515 Fifth Street NW, Room 325, Washington, DC 20001. To request a judicial questionnaire, call 202-879-0478.

Judicial candidates must be U.S. citizens and active members of the D.C. Bar, and for the five-year period immediately preceding nomination by the commission, must have been in active practice of law in the District of Columbia, on the faculty of a law school in the District, or employed as an attorney by the United States or the D.C. government.

Family Court Seeks Attorneys for CCAN Panel

The family court of the Superior Court of the District of Columbia seeks applications from attorneys interested in serving on the family court panel of lawyers for representation of indigent persons.

The Family Court Panels Committee and the presiding and deputy presiding judges of the family court will make recommendations to Chief Judge Rufus G. King III to install four separate panels of



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attorneys. The panels are for lawyers who will seek compensation from the court; pro bono attorneys do not need to apply to a panel. Individuals may serve on more than one panel.

The four panels are made up of attorneys eligible for appointment in juvenile proceedings for appointment as guardians ad litem, for appointment to represent parties in neglect and termination-of-parental-rights proceedings, and for appointment as special education advocates. Special education advocates are urged to apply even if they intend to seek compensation from the D.C. public school system, so that judges have a list of qualified attorneys from which to make appointments.

Panel information and applications are available from the Counsel for Child Abuse and Neglect (CCAN), D.C. Superior Court, 500 Indiana Avenue NW, Room 4415, Washington, DC 20001; 202-879-1406. Attorneys interested in serving on a family court panel must submit an application by 5 p.m. on October 1.

Lawyers who wish to be appointed to CCAN cases must complete an attorney training session. The next session is scheduled for October 24–25. Further information is available from the CCAN office.

Bar Seeks Nominations for Rosenberg Award

The D.C. Bar seeks nominations for the Beatrice Rosenberg Award for Outstanding Government Service. The award, which will be presented March 28 at the 2003 D.C. Bar Conference, honors a member of the Bar whose career in government exemplifies the highest order of public service.

Nominees should have a long-term government career with outstanding performance. They must also show excellent judgment on their own matters and matters handled by those under their supervision. Other qualities that make a strong candidate include community service and the mentoring of young lawyers. In addition, nominees must be employed by a federal, state, or local government agency.

The award's legendary namesake, who died in 1989, dedicated her 35-year career to government service, performing with distinction at the U.S. Department of Justice and the Equal Employment Opportunity Commission. She also served as a member of the Board on Professional Responsibility.

This will mark the 14th presentation of the award. The 2002 winner was Luis Eduardo Rumbaut, senior counsel to the D.C. Office of the Corporation Counsel.

Send written nominations by December 2 to Katherine Mazzaferri, Executive Director, D.C. Bar, 1250 H Street NW, Sixth Floor, Washington, DC 20005-5937.

Panel Reviews State of Criminal Justice System

Leading figures in the District of Columbia's local and federal criminal justice system entertained questions and reflected on the state of the justice system at a July 16 luncheon program sponsored by the Bar's Criminal Justice and Individual Rights Section.

Moderated by Gregory L. Poe, assistant federal public defender, the panel comprised Judge Reggie B. Walton, U.S. District Court for the District of Columbia; Judge Noël A. Kramer, presiding judge of the criminal division of the D.C. Superior Court; Roscoe C. Howard Jr., U.S. attorney for the District of Columbia; Michele A. Roberts, of counsel at Shea & Gardner; Ronald Sullivan, director of the Public Defender Service for the District of Columbia; and A. J. Kramer, federal public defender.



Judge Noël Kramer, Roscoe Howard, and Ronald Sullivan were among the panelists discussing the District's criminal justice system at a July 16 luncheon program sponsored by the Bar's Criminal Justice and Individual Rights Section.

Although the discussion of the state of the criminal justice system within the District of Columbia ranged widely, it focused in large part on the effects of antiterrorism legislation on the administration of justice.

Judge Kramer said the interpretation of rights under the Fourth, Fifth, and Sixth Amendments has changed under the Justice Department's antiterror campaign. She attributed this in part to a lack of understanding of these amendments among the general public, and as a consequence citizens care less about them and are willing to trade degrees of freedom for security.

Judge Walton agreed with the tenor of her comments, but also noted that Americans have relatively short memories. Provided the United States was not subject to a rash of terrorism, he expected the general mood to revert back to what it was before September 11, 2001.

Roscoe Howard acknowledged that the U.S. attorney's office and the Justice Department have taken a more aggressive posture on investigations. He stated that part of the U.S. attorney's office's mission is to find those who are planning harm before they commit the crime, and to do that within the framework of the Bill of Rights. He noted that the office takes its cue from public input received through its community prosecution effort.

One aspect of the community prosecution program, the multiple-defendant drug gang conspiracy prosecutions in federal court, was the subject of debate among the panelists. Howard said that these racketeering prosecutions are admittedly a drain on the court's time and the public defender's office. He added, however, that they are important because they paint a true picture of the crime and the charged individuals to the jury, and they are an effective way of reclaiming neighborhoods from organized criminal activity.

Although some of the panelists criticized this approach for creating excessively long trials and consuming too many resources, they all supported the program for its involvement in the community and for addressing quality-of-life crimes as well as complex homicide cases.

New Pro Bono Organization Taps Senior Lawyers' Skills

Over lunch two and half years ago, Robert Kapp and Anthony Essaye discussed their approaching retirements and began thinking about how they might productively and

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19 Ethics of Retainer Agreements and Billing Practices
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24 Ethics and the Internet
26 Pre-Trial Skills Series, Part 1
30 Introduction to Commercial Leasing Series, Part 1

October

2 Introduction to Export Controls
3 Pre-Trial Skills Series, Part 2
7 Introduction to Commercial Leasing, Part 2
10 Pre-Trial Skills Series, Part 3
15 Intensive Litigation Skills Series, Part 1
17 Introduction to Conflicts of Interest
17 Pre-Trial Skills Series, Part 4
18 Legal Writing
22 Intensive Litigation Skills Series, Part 2
24 Ethics Traps for Well-Intentioned Lawyers
25 Negotiation Skills Workshop
28 Understanding Jurors
29 Appellate Advocacy
29 Intensive Litigation Skills Series, Part 3

November

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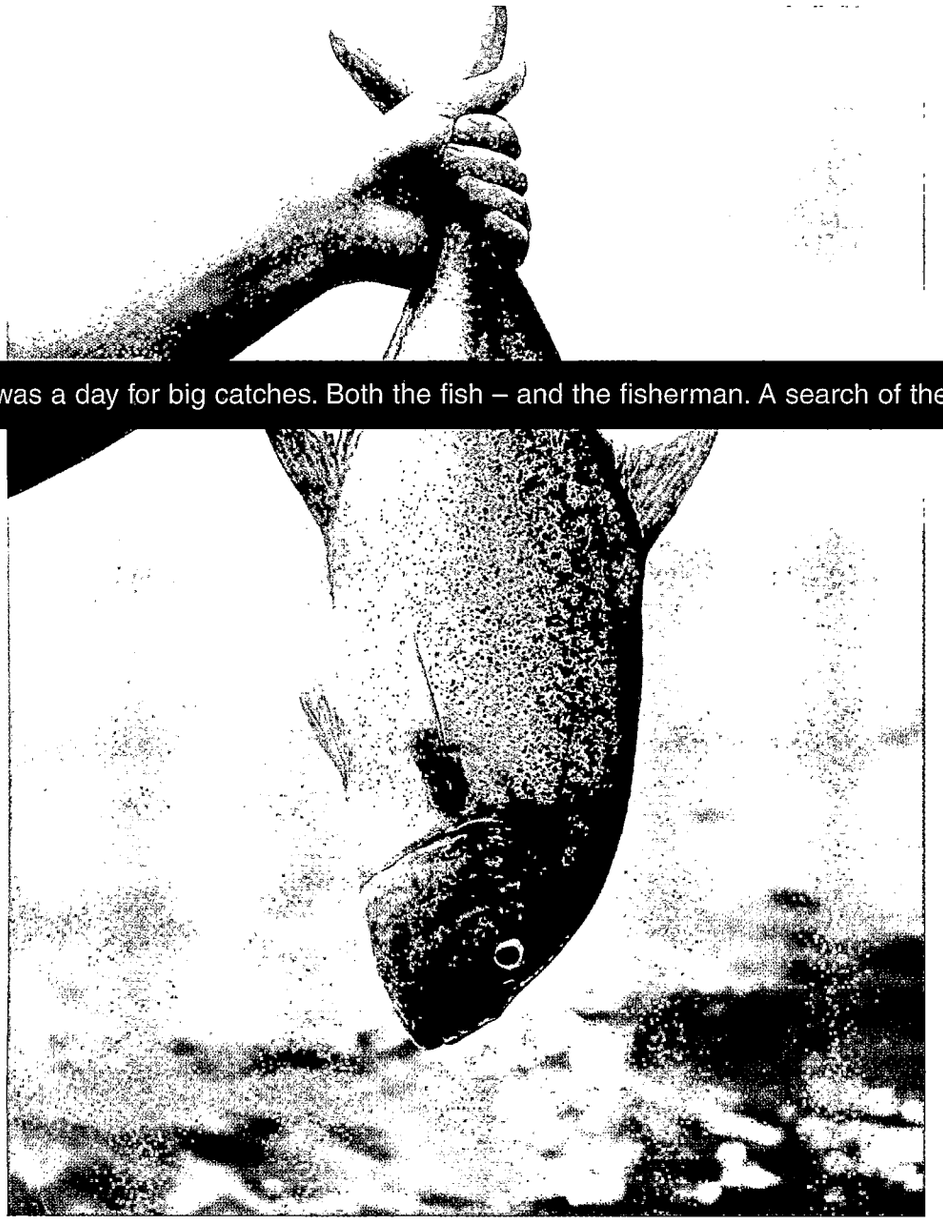

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Press Gallery Reviews Supreme Court Term



The D.C. Bar Courts, Lawyers and the Administration of Justice Section offered its annual summer series program "The Supreme Court: The View From the Press Gallery" on July 9, featuring (from left) Stuart Taylor of the *National Journal* and *Newsweek*; Tony Mauro of *Legal Times* and *American Lawyer Media*; Anne Gearan of the Associated Press; moderator Arthur Spitzer, legal director of the American Civil Liberties Union of the National Capital Area; Joan Biskupic of *USA Today*; and David Savage of the *Los Angeles Times*. The journalists gave their views of the Court's decisions during the most recent term and insights on the Court's daily operation.

Photo by Sean Groom

rewardingly use their newly found free time. They believed there was a substantial untapped capacity for pro bono work among senior lawyers who were retired or about to retire.

In the past, Kapp thought about the possibility of creating a domestic public interest law firm to tap this underutilized group, but more recently his interest had increasingly steered toward international human rights and the rule of law. In his discussion with Essaye, a former general counsel with the Peace Corps, the seeds of the International Senior Lawyers Project (ISLP) were sown. Over subsequent meetings the idea of ISLP began to take form and a working group of interested, qualified senior lawyers was assembled.

Kapp and Essaye set out identifying needs, projects, and lawyers willing to participate. With the help of grants from the Pew Charitable Trusts, the Soros Foundation Network, and several law firms, they have added an executive director and administrator and undertaken a feasibility study and plan.

Through conversations with public agencies and nongovernmental organizations in eastern Europe and South Africa, the study revealed a widespread need for lawyers in all fields of law for specific project tasks. Although the ISLP working group has several international members, the current preponderance of American lawyers, Kapp believes, will help the project promote its goal of fostering the growth of a pro bono and public interest legal culture abroad.

On the basis of planning research, ISLP has adopted four program responsibilities: provide assistance to government agencies, international organizations, and local nongovernmental organizations engaged in efforts to develop democratic institutions, advance the rule of law, strengthen human rights, and promote economic opportunity for disadvantaged populations; assist indigenous legal service providers to increase their capacity and to help train their staff; enhance the skills of local lawyers and paraprofessionals by helping to develop courses, programs, and workshops; and assist in developing an indigenous pro bono capacity.

ISLP currently has a database of 150 senior lawyers registered as potential volunteers. ISLP lawyers have completed four projects, including legal infrastructure review and recommendations in the district of Brcko in Yugoslavia and a human rights assessment in Russia, and have 10 projects currently under way or in development.

Attorneys wishing to get involved in ISLP should visit the organization's Web site at www.islp.org.

Oral History Project Captures Circuit Court Legends

Passing through the east entrance of the District of Columbia Circuit's E. Barrett Prettyman United States Courthouse, visitors find themselves standing before an interactive display with several listening stations. Pick up one of the earpieces and Judge Aubrey E. Robinson Jr. recounts discrimination during his career. At another listening station Judge Patricia M. Wald talks about the importance of oral argument and how it can influence a judge's decision.

The recordings are part of the Oral History Project of the Historical Society of the District of Columbia Circuit and will be in the courthouse lobby through the fall.

Begun in 1991, the project collects the stories of judges who have served the courts of the D.C. circuit and of prominent lawyers and courthouse staff who have actively been involved in court matters. The Oral History Project has recorded the experiences and reflections of more than 30 of the District's most recognizable jurists and attorneys, and nearly 30 additional histories are under way.

Under the direction of Stephen J. Pollak and Linda J. Ferren, the project has recruited some 40 attorneys to conduct interviews, with the goal of interviewing every living judge who has sat on the bench. The completed histories are kept in the library of the E. Barrett Prettyman Courthouse, the manuscript reading room of the Library of Congress, and the Historical Society of Washington, D.C.

Thumbing through the volumes, one will find the accounts of such individuals as Robert H. Bork, John H. Pickering, Harold H. Greene, and Charles Horskey. The narratives cover everything from legal philosophy and reflections on important cases to practice tips and humorous moments in the courtroom.

Judge Robinson, who served as chief judge of the District Court from 1982 until 1992, summarized qualities that make a good trial lawyer in his oral history: "First of all, a good trial lawyer knows his or her case. They have developed all the facts. They marshal the evidence to sustain their theory of the case or their theory of the prosecution or defense of a claim. They know the courtroom procedure; basic courtroom procedure—which is the cart and which is the horse—which comes first. A good trial lawyer has also the ability to understand people that he has to deal with in the context of a particular case.

"Second of all, a good trial lawyer ought to know something about the judge before whom the case is being tried.

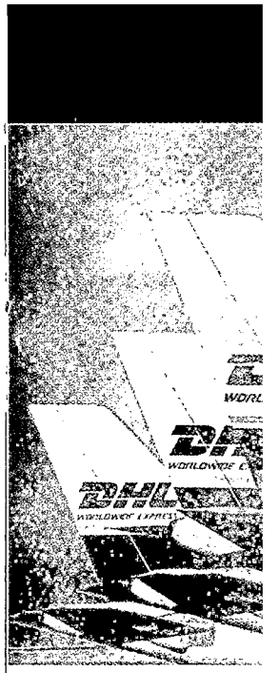

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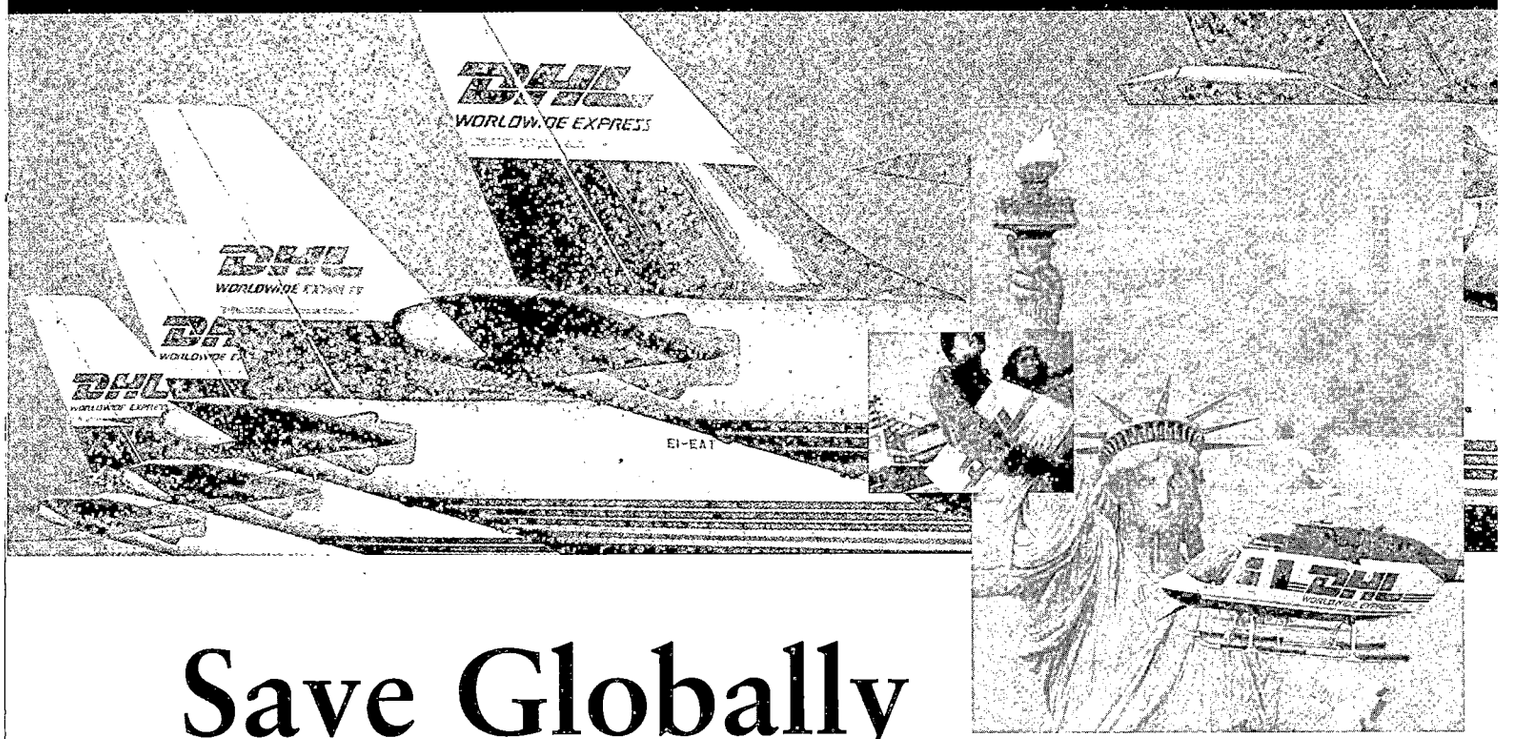

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D.C. Law Students Win Legal Assistance Fellowships



The law firm of Vinson & Elkins funded three fellowships granted by Equal Justice America to D.C. area law students this summer. Equal Justice America (EJA), a nonprofit organization that puts law students to work in legal assistance organizations throughout the United States, granted the fellowships to Christina Wilkes (second from left) of George Washington University, who worked for Ayuda; Corlie McCormick Jr. of Howard University, who worked for the Lawyers' Committee for Civil Rights Under Law; and Tatiana Guttierez of Georgetown University, who worked for D.C. Law Students in Court. Dan Ruben (left), EJA executive director, and Mark Laufman (right), a partner at Vinson & Elkins, joined the recipients at a reception held June 27 at the firm.

Photo by Sean Groom

What are the judge's no-nos, idiosyncrasies, level of patience? What is the judge's judicial temper, in fact, in a courtroom situation? How does it change? What makes it change? How can you eliminate changes that adversely affect you and obviously your client?

"The third thing a good trial lawyer knows is, in a jury case, he has some sense of understanding what makes jurors tick, especially when they are randomly selected from a very diverse population. [He knows] how to be clear; how to be direct without being condescending; how to walk that chalk line between establishing a record in the fashion the trial judge understands so that the application of the legal principles are made more easily, and at the same time, establishing a record that the jury understands. . . . So the good trial lawyer is really a person who understands people and knows how to deal with people in the context of adversarial litigation."

It appears, however, that sometimes even some of the most successful lawyers forgot Robinson's rules for a good trial lawyer—or at least forgot about his sense of humor.

John Pickering, a founding partner of Wilmer, Cutler & Pickering LLP, reminisced about a case tried before Judge Robinson: "Judge Robinson had a great sense of humor, and I saw it displayed beautifully during an argument in which the government was seeking a Taft–Hartley injunction against a coal mine strike that occurred in the Carter administration. The government came to argue for the injunction, and to stress the seriousness of the situation, the argument was begun by the attorney general, Judge Griffin Bell, who really had not had much time to review anything and he was just there, sort of like, I don't mean this in any derogatory sense, the acrobats that warm up the crowd before the main event came on—that was the lawyer from the civil division who was prepared to really answer questions.

"Judge Robinson couldn't resist: He threw a hypothetical at Judge Bell, which had nothing to do with much of anything; it was almost impossible to follow. He obviously had made it up just to have a bit of fun, and Judge Bell took him seriously and tried his best to answer the matter.

"Well, after a long argument, the judge [Robinson] said, 'Let's work out an order between the government, the union, and the coal companies,' and we all went trooping into the jury room. He presided and we really hammered out an acceptable order, in the course of which I had the opportunity in an aside to say, 'Why did you do that?' and he said, 'I was just seeing what the reaction would be.' "

Positions Open on Nominations Committee and NLSP Board

The D.C. Bar Board of Governors desires candidates for appointments this fall to the Committee on Nominations and the board of directors of the Neighborhood Legal Services Program (NLSP).

Under the Bar's bylaws, each year the board must appoint a seven-member Committee on Nominations that nominates candidates for Bar office for the next Bar election. Any active member of the Bar who is not an officer or member of the Board of Governors and who has not served on the Committee on Nominations at any time during the past three years is eligible.

The board is also accepting résumés from D.C. Bar members who are interested in serving on the board of directors of the NLSP. Candidates must be licensed attorneys who are supportive of the Legal Services Corporation Act and have an interest in, and knowledge of, the delivery of quality legal services to the poor. The D.C. Bar Screening Committee is required to attempt to reflect the diversity of the NLSP client population in its recommendations to the Bar's Board of Governors.

Candidates should submit a résumé of not more than two pages, along with a cover letter stating the position for which they wish to be considered, to the Screening Committee, District of Columbia Bar, 1250 H Street NW, Sixth Floor, Washington, DC 20005-5937.

The deadline for submissions is September 27.

Justice Department to Contract With Private Counsel to Collect Debts

The Department of Justice announced that it is seeking proposals from private counsel interested in entering into contracts to collect delinquent federal debts in the District of Columbia.

Sole practitioners and law firms that are awarded contracts will be authorized to sue federal debtors on behalf of the United States in the U.S. District Court for the District of Columbia. These private lawyers and law firms will help the Justice Department collect unsecured federal debts such as defaulted student loans, overpayments to veterans, and defaulted Small Business Administration loans.

Private counsel will be paid on a contingency fee basis and will be expected to

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New Bar Members Must Complete Practice Course

New members of the District of Columbia Bar are reminded that they have 12 months from the date of admission to complete the required course on District of Columbia practice offered by the D.C. Bar's Continuing Legal Education Program.

D.C. Bar members who have been inactive, retired, or voluntarily resigned for five years or more are also required to complete the course if they are seeking to switch or be reinstated to active member status. In addition, members who have been suspended for five years or more for nonpayment of dues or late fees are required to take the course to be reinstated.

New members who do not complete the mandatory course requirement within 12 months of admission receive a noncompliance notice and a final 60-day window in which to comply. After that date the Bar automatically suspends individuals who have not attended and forwards their names to the clerks of the District of Columbia Court of Appeals and the Superior Court of the District of Columbia, and to the Office of Bar Counsel.

Suspensions become a permanent part of members' records. To be reinstated one must complete the course and pay a $50 fee.

The course is $160. The next course dates are September 14, October 5, and November 2. Advance registration is encouraged.

bid the contingency fees they propose to charge to collect the unsecured debts.

Attorneys interested in obtaining a request for proposal from the Department of Justice should visit www.fedbizops.gov and click on "Find Business Opportunity" to search for solicitation number JRJMD-02-0213.

To be eligible to bid on these contracts, lawyers must be licensed to practice law in the District of Columbia and regularly engaged in the private practice of law in the District. They must also be admitted to practice before the U.S. District Court for the District of Columbia.

Attorneys with any questions about this program should contact Tim Spencer at 202-307-1956.

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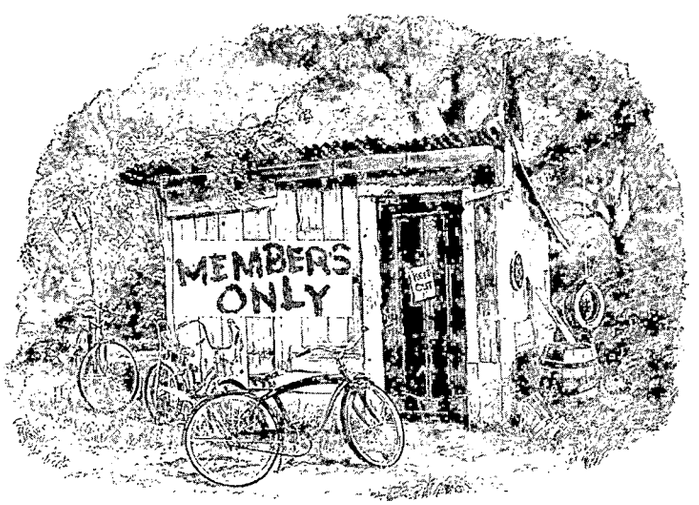

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POLITICS

CONFIRMATION

By Stephen Murdoch
Photography by Patrice Gilbert

The federal machinery appointing judges to the bench remains cumbersome and contentious, often leaving both political parties unhappy with the results.



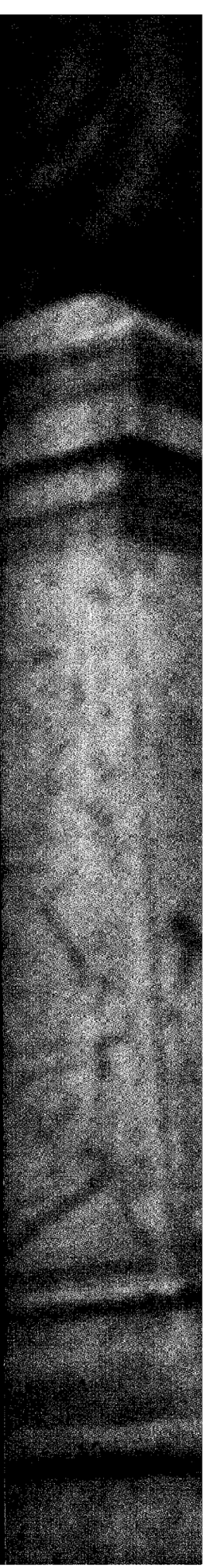

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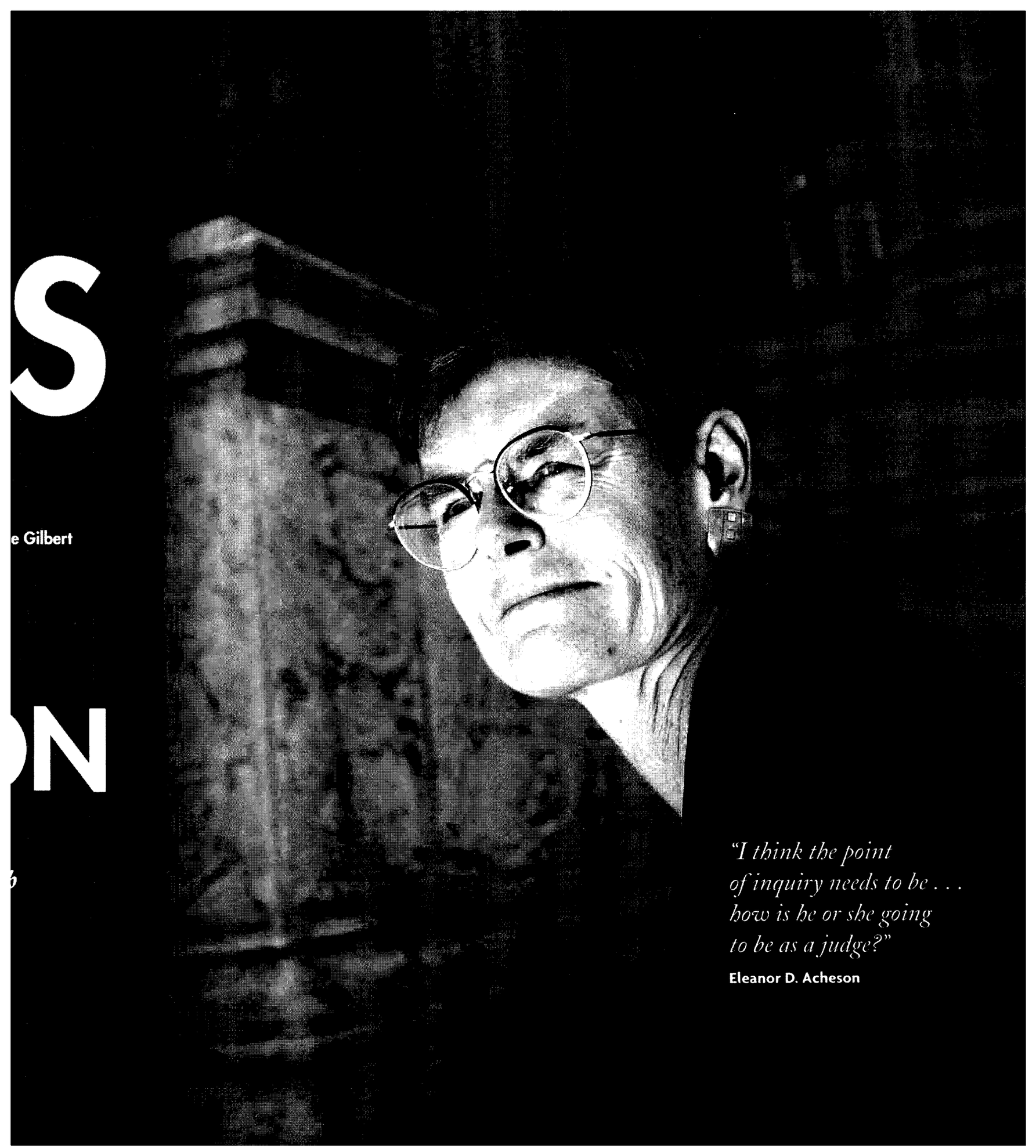

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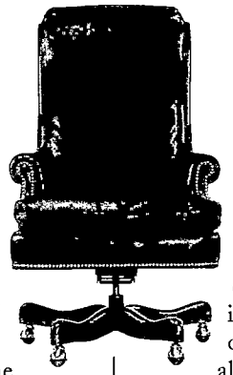

When it comes to judicial appointments, the Democrats and Republicans rarely speak words of compromise these days despite the ever-increasing delays in appointing judges that have created a "vacancy crisis" on the federal bench.

According to the Administrative Office of the United States Courts, as of April 26, 90 federal judgeships were vacant out of a total of 862. Twenty-nine of the vacancies were in the circuit courts, 60 in the district courts, and one in the Court of International Trade. Not all districts and circuits need more judges, but quite a few suffer from serious workload problems.

Unfortunately, partisan tensions over filling the vacancies will not abate anytime soon. Many Washington lawyers well versed in the machinations of the judicial appointment process believe Democrat–Republican relations are as bad as they've been in a long while. "I think we're at the depth of partisan acrimony about the judicial selection and confirmation process," says Ron Weich, a partner at Zuckerman Spaeder LLP and formerly chief counsel to Senator Edward Kennedy on the Judiciary Committee.

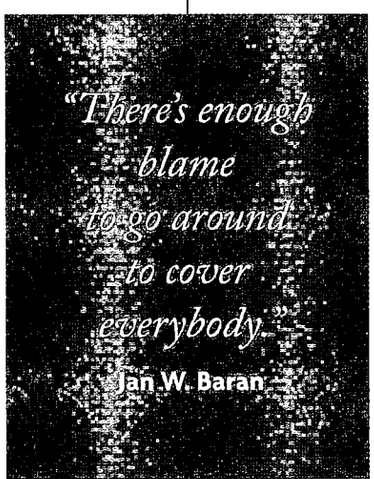

Improving the judicial appointment process is a common subject in Washington, especially in the wake of particularly contentious confirmation hearings. The shelves of Washington think tanks are full of studies and commissions authorized by bar groups and the political parties. Eminent lawyers and judges, too, have testified on the Hill repeatedly, offering advice to the Senate Committee on the Judiciary. Nevertheless, the federal machinery appointing judges to the bench remains cumbersome and contentious, often leaving both political parties unhappy with the results.

The *Washington Lawyer* has called upon six lawyers who have worked on appointments to explain why partisan relations are such a mess. These attorneys—three conservatives and three liberals—spoke to the magazine about the slowdown in appointing judges, the sore points in bipartisan politics, and whether candidates' ideologies should be considered during the process. Finally, they proposed commonsense ways to improve filling vacant judgeships.

Bureaucratic Slowdown

From the time a federal judgeship becomes available, usually through death or retirement, to the moment a judge is appointed is unavoidably long. The White House and the Department of Justice must sift through scores of candidates—vetting the more serious—for hundreds of judgeships, while liaising with home state senators' offices, gubernatorial staffs, and their party organizations. More often than not the president does not know the final candidate, who has arisen from the primeval ooze of local and state politics.

At the Senate Judiciary Committee, the number of parties pushing favored candidates is so great that the chairman, to avoid a deluge of telephone calls, often announces confirmation hearings without giving much notice. An insufficient number of staffers collect courtesy "blue slips" from home state senators, allowing the confirmation to go forward, and beaver away at piles of paperwork from the FBI and the Department of Justice. With luck the slate of candidates the chairman cobbles together for confirmation hearings will satisfy senators, the White House, and the Administrative Office of the United States Courts, ever conscious of its overworked districts and circuits.

This complicated, deliberative process is particularly slow during split governments wherein one party controls the Senate while the other has the White House. The bipartisan Constitution Project reports that between 1977 and 1998 Senates during unified governments were able to confirm nominees, on average, in only 59 days. However, Senates during split governments took an average of 121 days to confirm successful candidates. Unsuccessful candidates to the federal bench followed the same pattern: 103 days on average for a candidate to fail during a unified government versus 238 days during divided governments.

The year before a presidential election is often especially slow, too. At that time the parties in the Senate will delay confirmations in the hope that they will win both the White House and control of the Senate.

"Bottom line and most definitively, you go into an election, like the presidential one in 2000, and each side thinks they are going to win," says Eleanor Acheson, who was assistant attorney general during the Clinton administration. "It's very tempting to say, 'Well, if we win, we'll get all of our appointments, so why should we compromise now?' "

Even after the election, says Acheson, it can be harder to get up and running than it appears from the outside. "Transition is like molasses," she says. "It's just very hard to get people in place. It takes much longer than you think."

The sad reality is, these cumbersome bureaucracies are becoming even slower at nominating and confirming judges. According to the Constitution Project, of the four presidents from 1977 to 2000, Carter was the fastest at nominating judges, then Reagan, Bush, and finally Clinton, who was the slowest. During the 105th Congress ending in 1998, it took President Clinton 75 more days to nominate a district or circuit court judge than it did President Carter.

The Senate is also slowing down. On average the Senate took 78 days to confirm, deny, or let expire a judicial nomination during President Carter's administration. By the Clinton administration, the Senate took 164 days to act on a nominee.

Now presidents may also have a harder time appointing

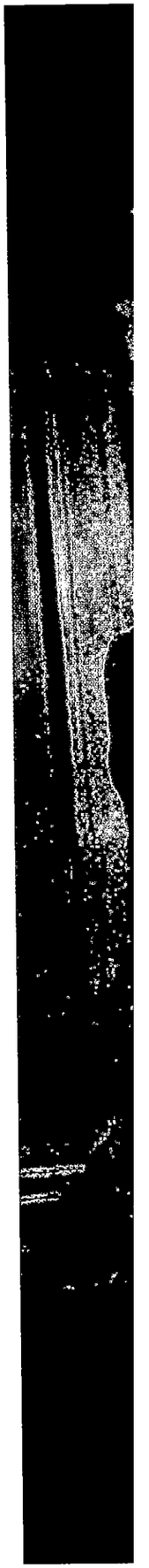

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judges than they did in the past. Ninety-eight percent of President Carter's successful nominations were appointed on his administration's first attempt to fill a district or circuit court vacancy. Although the Constitution Project has not yet finished its study of the last two Clinton years, for a term and a half the Clinton administration only had 73 percent of its successful nominations confirmed the first time. Carter never had to make more than two nominations to fill a vacancy, whereas Clinton had to make up to four.

Tit for Tat

One possible reason for increased delays in judicial appointments is the heightened importance lawmakers and the public place on judicial nominees, which in turn contributes to more political maneuvering. The appointment process was once a lower key affair than it is today. When President Roosevelt nominated Felix Frankfurter for the Supreme Court in 1939, for instance, it was not customary for nominees to testify before the Judiciary Committee. But when Frankfurter's views were misrepresented by other testimony, the White House advised him to appear in person. Frankfurter hesitated at first, fearing he would appear to be lobbying for the position. Frankfurter eventually testified, dispelling innuendoes of communist sympathy and winning his confirmation.

Today it would be remarkable for a Supreme Court nominee not to show up for his or her confirmation hearings fully prepped. During nominations to the Supreme Court and sometimes to circuit courts as well, administrations go into campaign mode, with key staff preparing for the hearings for weeks or even months. Partisan special-interest groups ratchet up their spin machines, too, with dizzying, issue-blurring effects. And during confirmation hearings, constituents follow closely via television and the Internet, immediately swamping the Senate Committee on the Judiciary with advice, opinion, and derision. The pressure on Senate offices is immediate and intense.

"I don't think the system needs to be fixed to a point where there's an automatic rubber stamp to any presidential nominee no matter who that person is."

Marcia D. Greenberger

Some Washington lawyers argue that the increased importance and scrutiny of the judicial appointment process is a result of the progress made in the 20th century. Despite the partisan bickering, the actual ideological gap between the parties, particularly in the Senate, is not as wide as it has been in the past.

"It's not as if we're debating about whether we should become a socialist nation or we should stick with capitalism," says Michael O'Neill, a law professor at George Mason University and former general counsel to the Judiciary Committee. "It's not as if we're debating about whether we should have an independent judiciary or not."

The parties may therefore feel the need to differentiate themselves, knowing all the while that the fighting and finger pointing can be done relatively safely. Moreover, the battles that remain—often over individual rights and social justice issues such as abortion, the death penalty, and women's rights—are focused more on the courts now than in the past because legislatures have not been as responsive. "As people began raising the social justice issues in the courts, in part because they ceased to be able to make progress in the legislatures, everybody on every single side of the issues focused on the courts as a battleground," says Acheson.

Who people think is to blame for the contentious environment often reflects their political persuasion. Ron Weich believes the Republicans shoulder the responsibility for the tensions, maneuvering, and delay in the appointment process today. "My personal view is that the approach of the Republican-controlled Senate during the Clinton administration has poisoned the waters in a manner that makes it difficult for Senate Democrats now to abide by a set of rules or deadlines," he says.

For O'Neill, who worked for Senator Orrin Hatch, much of the partisan tension dates back to the Robert Bork nomination. O'Neill notes that Bork had been a professor at Yale, solicitor general of the United States, a partner at a national law firm, and the author of a seminal text on antitrust law. In short, "He was worthy to wear the robe." Add in the hearings for William Rehnquist, when he was promoted to chief justice, and Clarence Thomas, and the Republicans became bitter, feeling they were "outflanked" and that their candidates were targeted for "narrow ideological reasons." Thus, when the Republicans took control of the Senate during the Clinton years, it was payback time. "You know, what comes around goes around to a certain extent," O'Neill says.

Jan Baran, formerly general counsel to the Republican National Committee and now a partner at Wiley Rein & Fielding LLP, sees a problem with the tit-for-tat attitude that results from both parties feeling aggrieved. "There was, in my view, unwarranted extensive delay during the last half of the Clinton administration, and now we're potentially seeing the beginning of similar delays in the Bush administration and its relationship with the Senate." He did not think the parties should delay the appointment process three years ago, nor does he think they should now.

It may be too early to tell if the Democratic-controlled Senate of today is mired in delay tactics. The past year in the Senate has been a strange and disrupted one. When Senator Jim Jeffords brought the Democrats to power, it took time to restructure the Judiciary Committee and get back to work. September 11 was also a disruptive influence, focusing the Senate's attention on defense and terrorism and slowing all other work. Lastly, the Bush administration's decision to cut the American Bar Association out of the candidate screening process prompted Senator Patrick Leahy, the chairman of the Judiciary Committee, to use the organization's services, which will further lengthen the confirmation process.

Despite a difficult year, and the apparent gridlock following Charles Pickering's denied confirmation, Marcia Greenberger, copresident of the National Women's Law Center, notes that the Senate confirmed 42 judges before getting around to Pickering. That's more, she says, than in some years that the Republicans controlled the Senate.

That Judge Pickering's nomination was denied does not necessarily indicate that Democrats and Republicans are at logger-

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heads, says Greenberger. "I don't think there is a system failure if a president felt strongly about somebody, nominated that person, and a majority of the senators on a committee charged with reviewing that nomination disagreed on appropriate grounds."

Judging Qualifications

One of the sorer points of contention between the Democrats and Republicans is the debate over whether or not a nominee's ideology should be openly considered during Senate confirmation hearings. The Constitution does not say that presidents may consider a candidate's ideology, but senators may not. In practice, however, there appears to be a double standard. President Bush can pledge during his campaign to nominate more judges like Justices Scalia and Thomas, but—at least publicly—the Senate is supposed to stick to a candidate's legal qualifications.

To Fred McClure, a former assistant for legislative affairs to President George H. W. Bush and now a shareholder at Winstead Sechrest & Minick P.C., there is nothing wrong with the president considering the ideology of potential candidates. "You would expect a Republican [president] to first of all nominate people who have a history of being Republican in nature," he says. And the same is true for a Democratic president. "You wouldn't expect a Bill Clinton under general circumstances to go get somebody Ronald Reagan put on the Federal District Court bench and elevate them to a higher court."

McClure and other Washington lawyers, however, emphasize that presidents do not choose candidates for the federal bench by grilling them on particular issues. The vetting of candidates' political philosophy only goes so far. "If some individual were to walk in to the White House and say, 'I've made up my mind on the abortion issue and you can count on me,' I'd think that would disqualify the individual from consideration for even nomination," says Jan Baran.

"I think we're at the depth of partisan acrimony about the judicial selection and confirmation process."
Ronald H. Weich

But if the executive branch expressly takes a nominee's political slant into account, why is it taboo for the Senate to consider it during confirmation hearings as well?

During his first hearing last year as chairman of the Judiciary Committee's subcommittee on administrative oversight and the courts, Senator Charles Schumer argued that his fellow lawmakers should expressly consider nominees' ideologies during confirmation hearings. During opening remarks, the senator stated that not taking ideologies publicly into account has led the Senate into an "escalating war of gotcha politics," wherein senators sift through nominees' pasts looking for proxies to deny candidates judgeships based on other grounds.

At a recent Federalist Society conference, Senator Jon Kyl criticized Schumer's hearings. He argued that the president—elected by the "mainstream" of the country—should decide who is ideologically appropriate, and not the senators. "Senator Schumer's constituency is not as broad—shall we just put it that way—as the national constituency," he said.

The fact is, though, senators do consider judicial nominees' ideologies, but avoid appearing to do so during public hearings. Fred McClure believes that "ideology has always played a part in the confirmation process. It's just that it sometimes manifests itself in different ways as the process goes forward."

In part, senators may fear being labeled partisan and reliving the Bork nomination, wherein the Senate delved in-depth into the nominee's judicial philosophy. They may also feel that investigations into ideology may threaten judicial independence. But what side of the debate individual senators line up on—for or against openly considering ideology—may also depend on which party controls the White House. As Michael O'Neill puts it, if it is your "ox [that] is being gored," you are less likely to want ideology to be considered. "If you're the one appointing the judges, you don't necessarily want your judges' ideology being looked at."

O'Neill also thinks Americans are culturally uncomfortable discussing ideology in public. Similar to conversations about class, talking about ideology simply "rubs people the wrong way." Moreover, senators' personal feelings are more liable to become hurt and bruised when they have personally championed candidates who are rejected. "When you tell Senator Lott . . . we're going to reject your buddy Pickering, it becomes personalized," says O'Neill. It's all the more frustrating for senators, he says, when a candidate's ideology, rather than his or her legal qualifications, is the main reason why the nomination fails.

Most of the attorneys the *Washington Lawyer* interviewed felt that ideology should only matter when the nominee is a rigid ideologue. No one lives in an opinion-free vacuum, they note, and it would be unrealistic to think judicial nominees are any different. Opinions, even strongly held convictions, should not bar someone from the federal bench.

Eleanor Acheson says that when she was at the Department of Justice, her office sought out candidates who would apply the law, regardless of personal belief. "I think the point of inquiry needs to be—regardless of what the person would do if he or she were czar—how is he or she going to be as a judge?" says Acheson.

Marcia Greenberger says that though she may be interested in a candidate's view on abortion, for instance, she is more concerned about the person's view of whether or not the law protects a woman's right to choose. Greenberger notes that Justice Brennan was personally opposed to abortion, but supported *Roe v. Wade*. "To me," she says, "the issue is much more a justice's approach to the law or a potential judge's approach to the law and the context of the Constitution. One might inform to some degree the other, but they are different inquiries."

Room for Improvement

Jan Baran thinks the acute partisan soreness felt on the Hill today is a result of America's political "equipoise," a situation in which neither party has had the clear upper hand in recent federal elections. Representatives and senators, Baran points out, have won seats by incredibly close margins over the last six to eight years. Moreover, the country has not elected a president with over 50 percent of the vote since 1988, and the presidential election of 2000 was "historically close."

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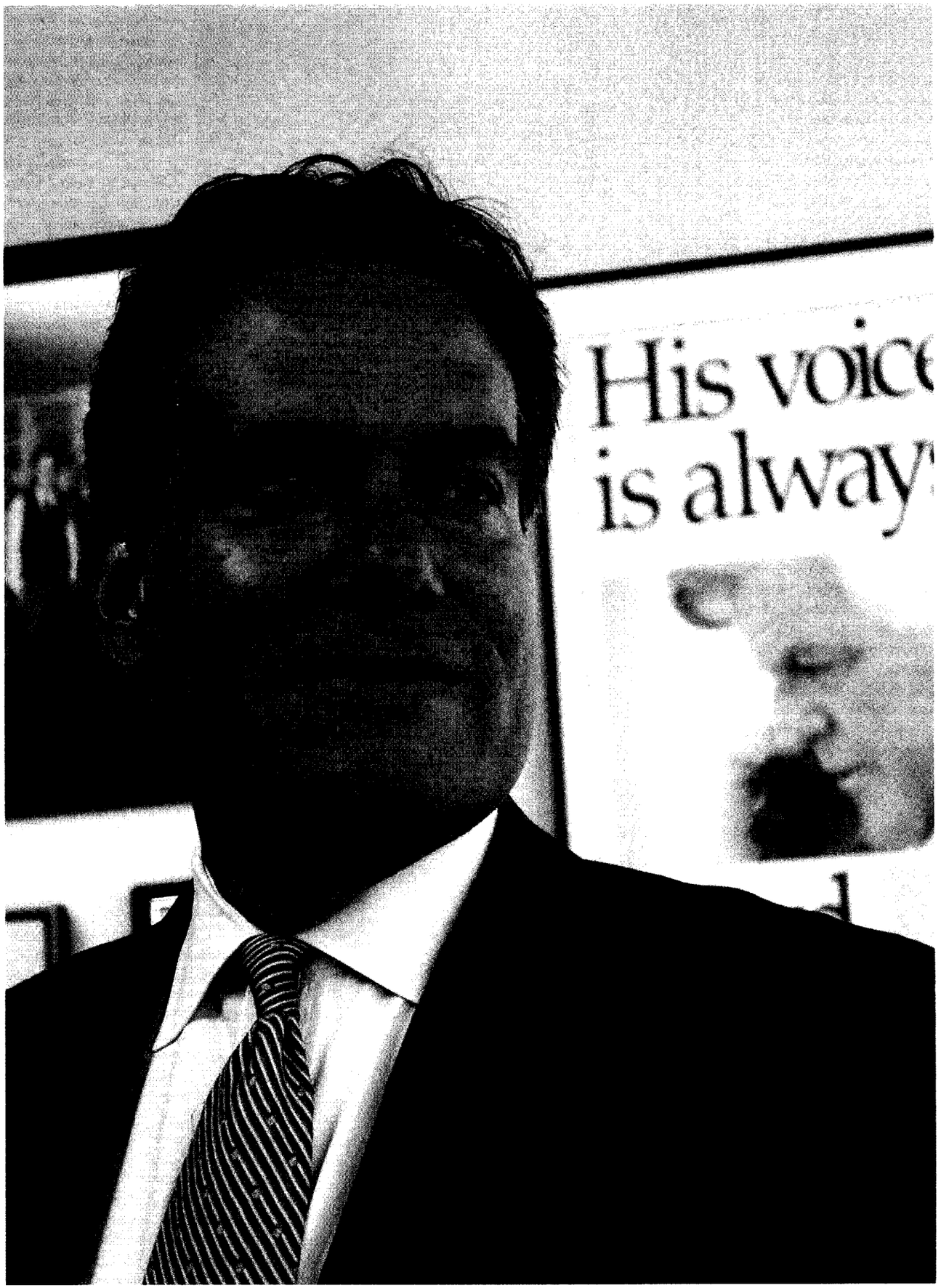

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seem to be extremely evenly divided among our society," says Baran. "Perhaps part of that is spilling over in this area [of] judicial appointments and confirmations."

The acrimonious feelings generated during the Clinton years have left Hill staffs, politicians, and Washington lawyers bitter, but neither party has the power to push its judicial candidates through the system unilaterally. The question before the political and legal community is how to surmount these ill feelings given that the parties share power in a divided government and there are many vacancies to be filled.

Baran says that the sides should come to an agreement. "They're going to [have to], on the one hand, atone for the sins of the fathers and, on the other hand, move forward." To Baran compromise is more likely now that Clinton is out of office, but of course, many of the Republican senators who battled against the president remain in office. It may be hard for the Senate-controlling Democrats to be magnanimous.

The crux of the problem is not a lack of good ideas for improving the judicial appointment process—a Constitution Project report included recommendations for change, as have many other studies and commissions authorized by bar groups and the political parties—but a paucity of political will to change. "I continue to believe that the recommendations and the timetables in the Constitution Project report are valid, but to implement those recommendations there needs to be a process for taking account of the distortions that occurred over the previous six years," says Ron Weich.

To assuage some of the bitterness, Baran suggests that some of the Democrats' candidates could be appointed by the Bush administration. It's an idea bandied about by many people in Washington—not surprisingly, the Democrats in particular.

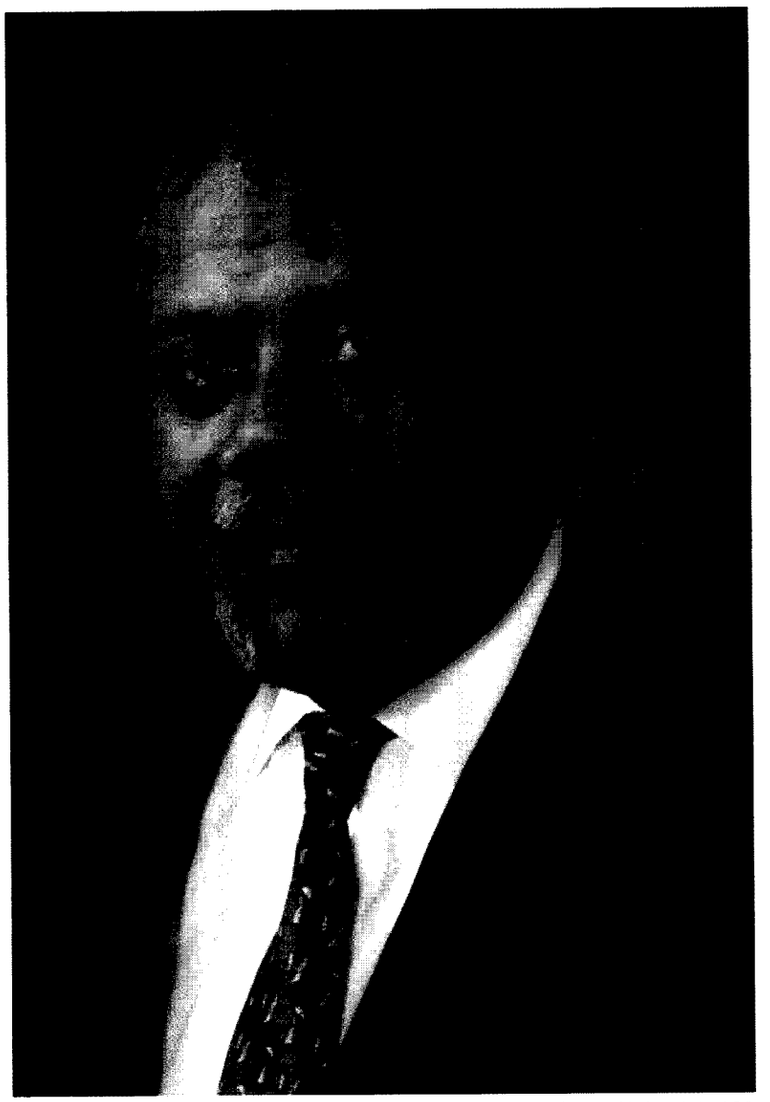

Photo courtesy of Winstead Sechrest & Minick P.C.

"Ideology has always played a part in the confirmation process. It's just that it sometimes manifests itself in different ways as the process goes forward."

Frederick D. McClure

But Michael O'Neill questions whether or not such a gesture by Bush would actually help the situation, or merely be symbolic. He notes that Bush has already appointed a couple of Clinton nominees without any sign that partisan tensions are easing. He says, too, that the antagonism is not really between the White House and Senate Democrats, but between the parties in the Senate.

As a result, both parties in the Senate need to get past their sense of being aggrieved and work together on concrete ways to regularize the process. Weich proposes that, out of fairness to the president and his nominee, in most instances senators should give candidates a hearing and a full Senate vote.

Having worked on judicial nominations at the Justice Department during the 1990s, Eleanor Acheson also has concrete ideas for improving efficiency. She found that it helps for the Senate Judiciary Committee to be upfront and clear about what it needs from the administration for each candidate. Changing the type of requests every time only slows the process down.

"I have to say, as chairman, Senator Hatch made things very clear," says Acheson. He wanted all of a candidate's unpublished opinions that had anything to do with a long list of hot-button subjects, such as abortion, sentencing, and the death penalty. Although the list was extensive, it helped Acheson's staff to know what kind of information to elicit from potential nominees straightaway.

Acheson also urges the Senate to have at least one hearing a month, in an "absolutely predictable, methodical way," making sure to include one circuit court nominee and three or four district court nominees. Furthermore, she advises a two-track system to speed up the process. The first track would be for nominees unlikely to have problematic confirmations. The second track would include nominee
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include nominees who will provoke debate. By focusing on the less problematic nominees first, Acheson believes, the Senate could reduce the number of vacancies significantly.

Finally, Acheson thinks the White House and the Senate should consider the needs of each circuit as a whole. Indeed, when she was at the Department of Justice, Acheson spoke with chief judges about the needs of their circuits. During these conversations, she would learn that some circuits might need prosecutors or defense attorneys, whereas others lacked women, minorities, or former state judges. With the needs of a circuit in mind, she says, lawmakers should be prepared to put deals and packages of nominees together. Acheson admits, however, that this is wishful thinking, "highly academic," and unlikely to work in real life because of the number of people pushing for their preferred candidates, rather than thinking of the needs of the circuits.

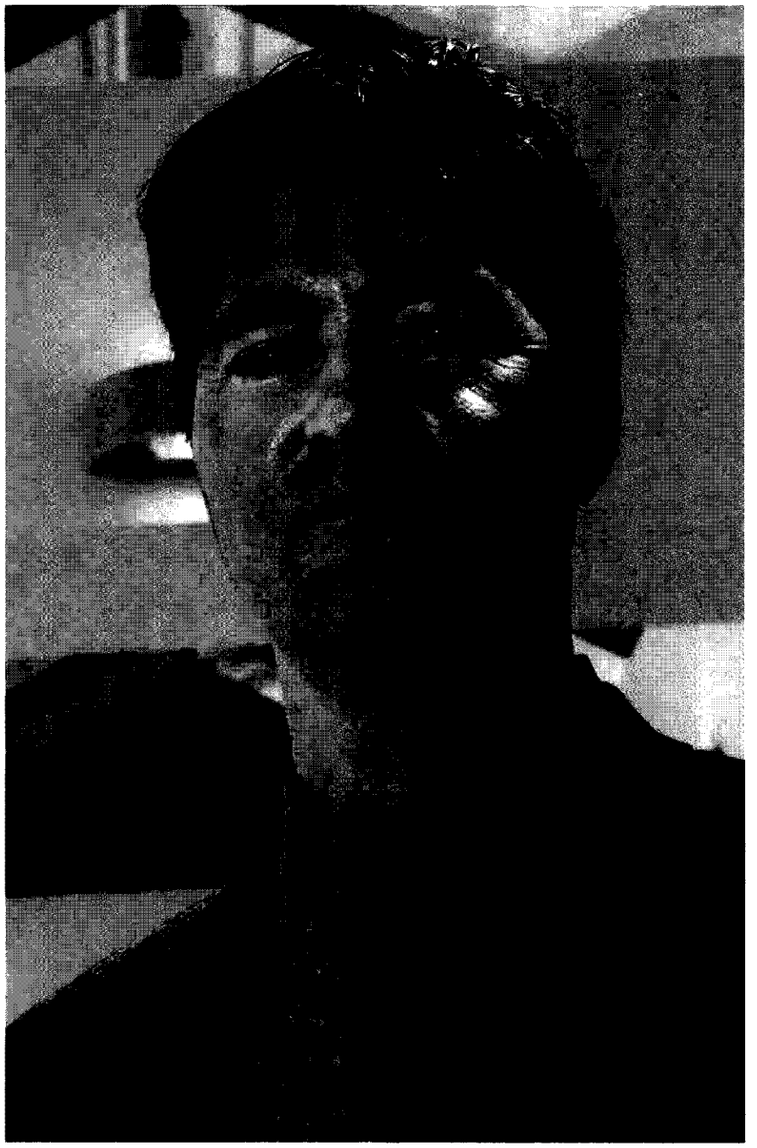

Having worked for the Judiciary Committee, O'Neill feels that lawmakers should rethink the strenuous vetting process that candidates undergo. Young Senate staffers are often the ones vetting the candidates and, O'Neill thinks, are often unseasoned and overly ideological. They have not yet learned that good people can make mistakes in life.

O'Neill worries that this supercritical process may be keeping great judges from the bench. Especially in the murky areas of drug use and sexual harassment, it would be a shame to lose a good candidate because of something he or she did "11 or 12 years ago," says O'Neill, who clerked for Justice Thomas on the Supreme Court. Ultimately, O'Neill asks, are we getting better people today than we did in the 1920s and '30s when the process wasn't so stringent? "Maybe. Maybe not."

"I'm a great believer in forgiveness. . . . I think all of us have done things that we probably regret in our lives. That's just the nature of being a human being," says O'Neill.

> *"It's not as if we're debating about whether we should have an independent judiciary or not."*
> **Michael E. O'Neill**

Burying the Hatchet

Unfortunately, the tit-for-tat battles in the divided government of the 1990s show little public sign of détente today. After the failed Pickering confirmation, the Bush administration held meetings with Republican senators and interest groups to prepare for the next set of nominees. "We are going to continue to nominate the same kind of people . . . [who are] well-qualified and in the mainstream," the *Washington Post* quoted White House counsel Alberto Gonzales saying on April 15. Both parties keenly believe they occupy the political center and neither is in the mood to compromise.

By its nature, especially during a divided government, the confirmation process is a contentious one, and a Senate that both confirms and denies nominees is doing its job. The solution to filling judicial vacancies does not involve a compliant Senate. "I don't think the system needs to be fixed to a point where there's an automatic rubber stamp to any presidential nominee no matter who that person is," says Marcia Greenberger.

In light of the vacancy crisis, though, the administration and the parties in the Senate must work together to appoint as many qualified judges as they can agree upon. Ultimately, the quality of justice for litigants in federal court will suffer if judges' dockets are too full, regardless of which party appointed them.

"There's enough blame to go around to cover everybody," says Jan Baran. The judicial appointment process would improve if the parties would "just bury the hatchet and find some solutions to actually go forward and get qualified people on the bench so that our judiciary can function."

Stephen Murdoch wrote about government infringement on civil liberties in the March issue.

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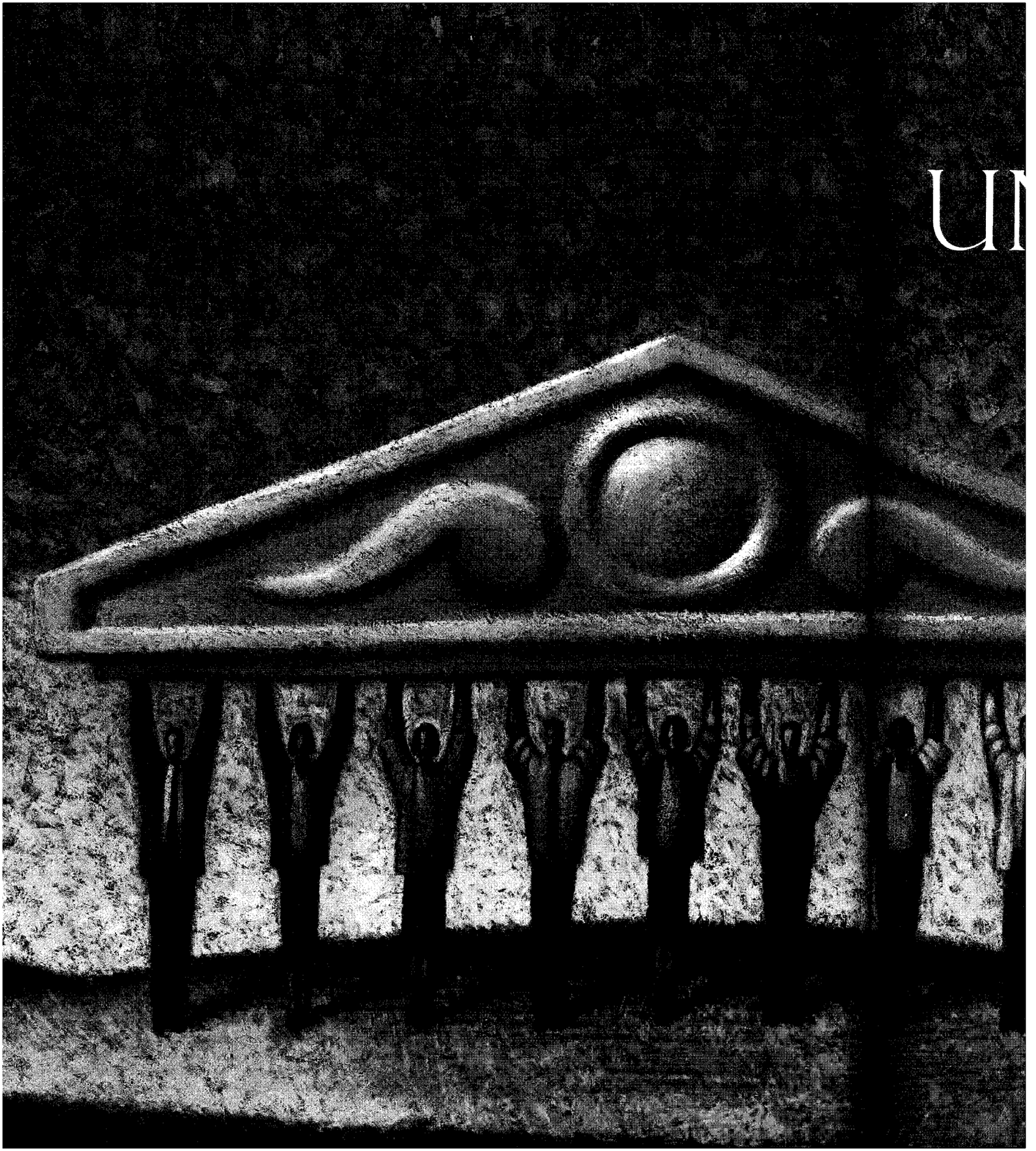
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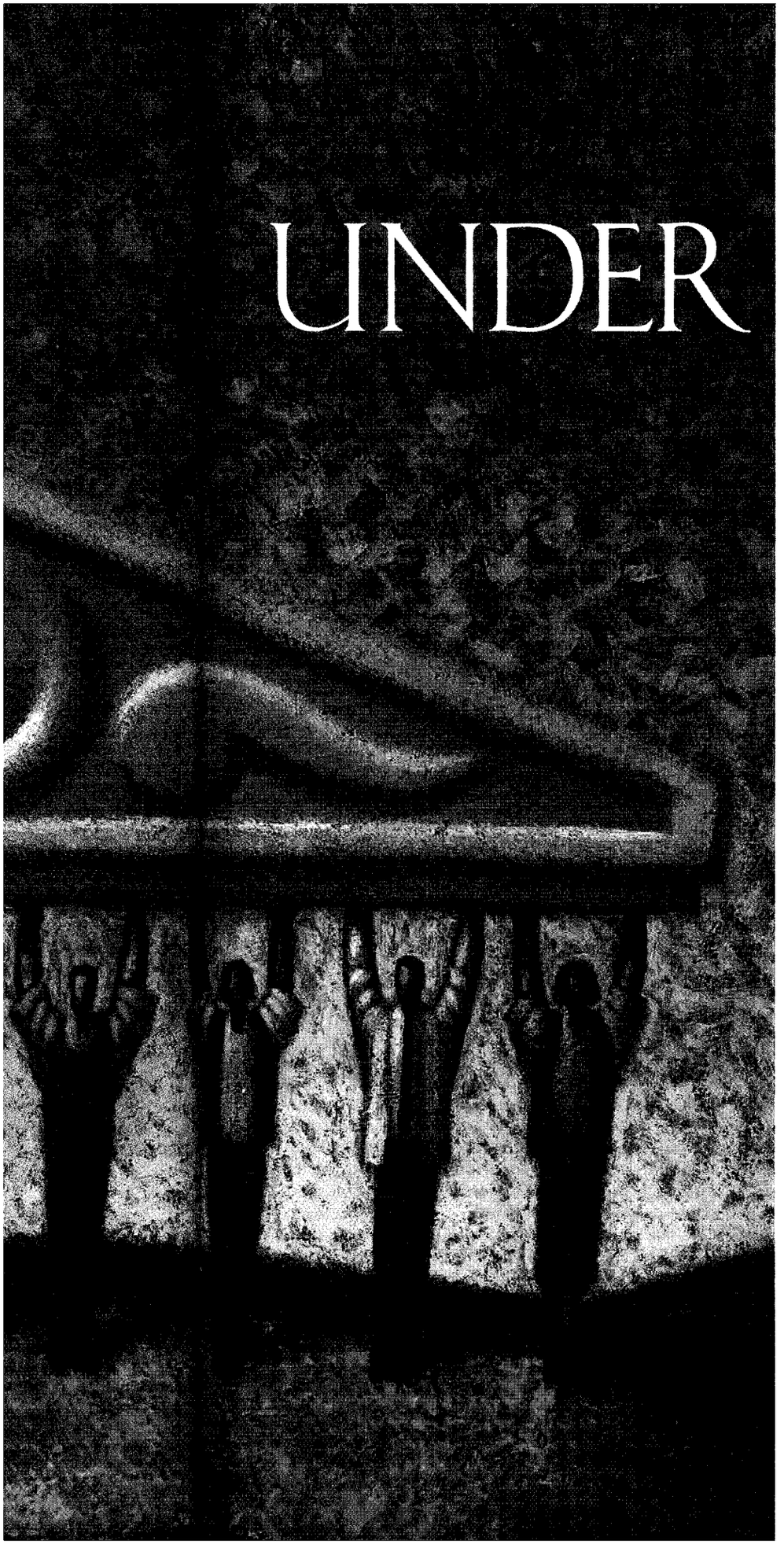

UNDER ONE ROOF

Multidisciplinary Practices

By Charles E. Buffon

The final report of the D.C. Bar Special Committee on Multidisciplinary Practice was approved by the Bar's Board of Governors in June and sent to the D.C. Court of Appeals, where it is currently under review. Committee chair Charles Buffon reports on the work of the committee.

The Board of Governors of the D.C. Bar recently voted to propose to the D.C. Court of Appeals that it adopt a recommendation that single-firm multidisciplinary practice (MDP) be permitted in the District of Columbia. The specific recommendation, as drafted by the Bar's Special Committee on Multidisciplinary Practice, would limit ownership of such firms to professionals and require that prospective firm clients be provided with detailed notice as to the nature of the organization and the possible risks associated with its retention.[1] On condition that such notice was provided and informed client consent obtained, it would eliminate the historic restriction preventing lawyers from sharing their legal fees with other professionals.[2]

This recommendation is part of a deregulatory process of considerable duration and having much broader scope. As some will recall, bar rules in many jurisdictions once prohibited advertising and set minimum fees. The rules of other professions were similarly restrictive. Coincident with a deregulation movement affecting many industries, as well as other professions, and spurred by court decisions based on First Amendment and antitrust principles, many of these restrictions have been swept away or curtailed.[3]

With respect to the sharing of legal fees, the first step was ending the prohibition on fee sharing among lawyers. Although its predecessor, Disciplinary Rule 2-107, only permitted sharing of fees among lawyers not in the same firm in proportion to the work performed, American Bar Association (ABA) Model Rule

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1.5(e), adopted by the ABA House of Delegates in 1983, abandoned that restriction on condition that fully informed client consent was obtained. Once the basic premise that any form of fee sharing should be prohibited was overcome, the debate could then turn to what the limits should be. The client consent procedure embodied in ABA Model Rule 1.5 also represented a shift from regulatory restriction to reliance on informed client consent as a mechanism for protecting consumer interests.

In the process of adopting the Model Rules in the District of Columbia, attention in this jurisdiction soon shifted to why lawyers should not be permitted to share fees and practice with members of other professions, not just their own. In particular, a number of law firms saw a demand for the provision of what came to be called ancillary nonlegal professional services, and others sought the right to include nonlawyers among their partners. One result was modification of Rule 5.4 of the D.C. Rules of Professional Conduct to permit D.C. law firms to have nonlawyer partners as long as the partnership "has as its sole purpose providing legal services to clients" and the nonlawyer partner "performs professional services which assist the organization in providing legal services to clients." Also, by adding a new comment 25 to Rule 1.7, the District of Columbia was among the first jurisdictions to expressly permit law firms to own and operate separate organizations that provide nonlegal services, marketed and practiced in coordination with the legal services provided by the parent law firm.

In permitting law firms to create and own organizations providing nonlegal professional services, the D.C. Bar and the Court of Appeals endorsed exercise of informed consumer choice in deciding which purveyors of professional services to use. Quite detailed disclosure requirements were adopted in order to assure that choices are well informed, but the decision whether to use related providers of different professional services was left to the prospective users of those services. Rather than prohibit such limited integration of professional services to occur, the Bar and the court chose to regulate the conditions of its use.

The comment to Rule 1.7 permitting law firms to own and control providers of nonlegal services is, however, a one-way street. Lawyers may share in the fees and profits of their nonlegal service affiliates, but nonlawyers employed by those affiliates may not share in the fees and profits of the parent law firms. Nevertheless, this bar's experience with law firm ownership and control of providers of nonlegal services informed the committee's consideration of whether fee sharing should be permitted to go both ways.

Nonlegal service firms owned by several D.C. law firms have been found attractive and useful by at least some consumers of legal and nonlegal services. Of the several ancillary service organizations originally opened, a number still exist. Nonetheless, law firms operating such affiliates have hardly swept the field, and many law firms (and presumably their clients) find no need of them. They are simply one more part of the professional services market.

Most important, despite advance foreboding, there is no evidence that the operation of ancillary nonlegal service organizations has resulted in any diminution in ethical or professional conduct among the law firms having such affiliates. Bar Counsel has not been flooded with complaints from dissatisfied clients, and there is no evidence that parent law firms or their affiliates have abused consumer interests. Law firms and their affiliates have provided the notice to their prospective clients that the Rules of Professional Conduct require, and that notice seems to work.

The affiliation of law firms and organizations providing other services may even have served to spread observance of legal profession norms. In addition to providing the client notice as required by the Rules of Professional Conduct, parent law firms of affiliated nonlegal service organizations have applied the legal profession's conflict rules to the entire practice of both the parent law firms and their ancillary affiliates. Rather than take the risk of treating two types of clients differently, these firms have imported legal practice conflict rules into nonlegal professional practice.

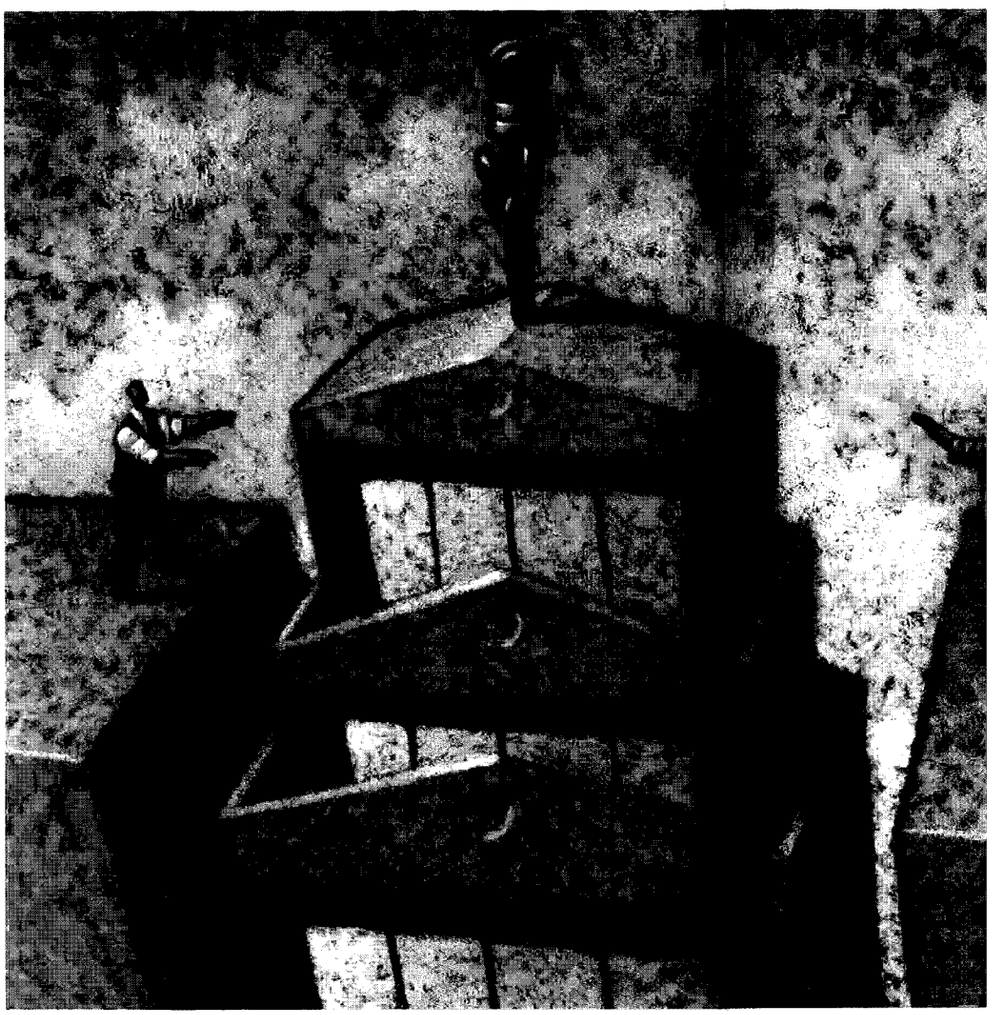

Effectuating these conflict avoidance mechanisms and practices has, in turn, imposed some comparative diseconomies on those ancillary organizations in relation to competitors that are not affiliated with law firms. As a result of these and other factors relating to law firm ownership, some organizations once affiliated with law firms have split off and gone their separate ways, while others have continued to bear the weight of following legal profession conflict rules. The important point is, however, that the rules established by the Bar and the courts as the conditions for permitting law firms to own and operate providers of nonlegal services have been followed despite whatever diseconomies they create.

The MDP committee and the Bar's Board of Governors were also informed by other real-world events. In particular, they were aware that the current ban on the sharing of legal fees has *not* prevented multidisciplinary practice from oc-

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curring; it has just made multidisciplinary practice less efficient and more expensive. Because some demand for the provision of multidisciplinary services does exist, a number of law firms, both here and elsewhere, have created joint marketing and joint practice affiliations with providers of various professional services, including accounting firms, management consulting firms, and financial service providers. By participating in joint promotion and sharing some overhead expenses, these organizations have tried to provide multidisciplinary practice in substance, though not in form. Because under current rules overheads cannot be fully combined and practices cannot be fully integrated in a single organization, multidisciplinary practice in this restricted form is not as effective and cost-efficient as it might be, but it does exist.



"On balance it seems much more likely that the gain in efficiency, expense, and choice the public will receive from permitting multidisciplinary practice will be greater than any diminution in professionalism that may occur."

The committee and the board were also quite aware of the argument "If it ain't broke, don't fix it." But in a world in which lawyers are frequently portrayed as money grubbers, who can believe that the present regulatory scheme is perfect? Although the Bar is rightfully proud of the time and effort devoted to providing legal services to the poor, many individuals of modest means and many companies, large and small, find that the legal services they need are inefficiently provided and very costly. Even the amount of time devoted by lawyers to pro bono services to the poor is far from enough, and more and more law firms and individual lawyers choose to contribute money, if at all, rather than contribute their own time and effort.

Multidisciplinary practice is no panacea. Nevertheless, people of varying means planning for retirement are likely to gain some benefit in time saved and cost avoided if lawyers and financial advisers are permitted to provide their services in the same organization. People going through a divorce may benefit from having legal, financial, and counseling services provided by a single source. Someone starting a new business may find it more efficient and affordable to get legal and accounting advice from a single organization created to provide small business services in an efficient and cost-effective manner. That is not to say that all clients will choose to receive integrated professional services in this manner, but removal of barriers to multidisciplinary practice at least make this possible.

Over the two years that the Special Committee on Multidisciplinary Practice studied the subject, its members ultimately came to a consensus that the burden of proof should be placed on those seeking to retain the current restrictive structure. Purchasers of legal services are grown-ups, and if fully informed, they are capable of making rational choices for themselves. Lawyers have been permitted to share fees with other lawyers with the informed consent of their clients, and law firms may own and manage providers of nonlegal services that market to the same clients on condition that those prospective clients have been provided with adequate notice of the risks involved.

Aware of this experience, the committee concluded that if fully informed as to the risks presented, consumers should also be permitted to make their own choices as to whether to obtain legal services from firms that specialize in legal services or from organizations that also offer other professional services. Potential consumers of professional services should not be hampered in making their own choices by rules preventing lawyers from sharing fees with other professionals absent some persuasive evidence that real consumer interests would unavoidably be put in jeopardy if the restriction was eliminated.

After considering the subject for over two years, the committee came to a consensus that the public will be better protected by full disclosure and opportunity for choice than by regulatory prohibition. Past restrictions on competition in the provision of professional services may arguably have benefited the already-established professionals who devised them, but there is no evidence that the public was better served by their existence. On balance it seems much more likely that the gain in efficiency, expense, and choice the public will receive from permitting multidisciplinary practice will be greater than any diminution in professionalism that may occur. It may also benefit younger and less-established lawyers by letting them have greater choice in the settings in which they will have an opportunity to be employed. The law firm employment model suits some, but not necessarily all.

It is obviously unethical to provide incompetent advice, disclose client secrets, conceal conflicts of interest, or cheat a client, and those abuses should be and remain affirmatively prohibited. There is, however, no apparent sense in which it is truly unethical to share fees openly with other professionals serving the same client, especially when doing so may provide better, more efficient, and less costly service to the client. Sharing fees jointly earned is an ethically neutral event, and it should be treated as such.

In order to serve consumer interests adequately and protect against abuse, consumer choice must, of course, be fully informed. For that reason, following the example of the notice and consent required of organizations providing nonlegal services through separate affiliates, the MDP committee's proposed recommendation spells out in considerable detail what disclosures must be made to prospective clients by firms offering multidisciplinary services. Because of these disclosures and the conflict avoidance rules that they would be expected to follow, multidisciplinary practice firms may face some disadvantages in comparison to firms that provide legal or other professional services through separate organizations. Nonetheless, the committee, in crafting its recommendation, wanted to assure that a potential client's choice of professional service provider would be as fully informed as practicably possible.

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Having devised these precautionary measures, the committee still questioned whether unavoidable and unacceptable risks to consumer welfare would be created by permitting nonlawyer professionals to have a controlling interest in organizations that provide multiple professional services. To solicit comment on that issue, the committee created alternative versions of a new model rule permitting single-firm multidisciplinary practice, one of which required such firms to be controlled by lawyers and one that did not. The committee then published both versions for comment. Somewhat surprisingly, the version that would have preserved lawyer control received very little support.

In the end, the issue of lawyer control came down to whether permitting legal services to be provided by organizations controlled by professionals other than lawyers would create unacceptable risks that clients would receive incompetent legal advice, have their confidences and secrets disclosed, have to endure undisclosed conflicts, or find themselves represented by lawyers engaged in other forms of misconduct. The committee also considered whether lawyers in organizations controlled by nonlawyers would contribute less to the provision of pro bono legal services and found no evidence that lawyer support for such services would diminish. Though not perfect, the closest analogies available are lawyers practicing in corporate and government settings. In neither case could the committee discern any sacrifice of professionalism or increased damage to consumer welfare attributable to nonlawyer control.

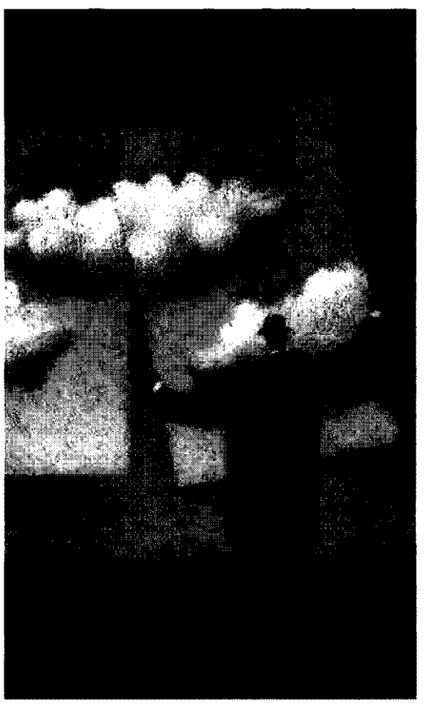

On the basis of that evidence, the committee concluded that it could continue to rely on individual lawyers to meet and exceed the standards of their profession even if a majority of their partners were members of other professions. The committee was not prepared to assume without any supporting evidence that lawyer control is necessary to assure that individual lawyers will continue to fulfill their own personal, professional obligations. The committee did note, however, that the states of New York and New Jersey have made organizations that provide legal services (not just individual lawyers) subject to their legal conduct rules. If there comes to be evidence that organizations (whether law firms or multidisciplinary practice firms) are putting pressure on individual lawyers to slight their professional obligations, the committee's preference would be to follow that lead and make those organizations themselves subject to professional conduct rules rather than presume that only lawyers can properly manage and control a multidisciplinary practice.

Finally, the committee did consider Enron. The Enron situation and others like it make a strong case for separating the preparation of public auditing reports from the provision of other professional services. Organizations that are obligated both to report to the public and to provide confidential advice to clients about which they are reporting are likely to face an inherent conflict. That conflict may not manifest itself when things are going well, but one important purpose of public audits is to spot and warn the public about matters that are not going well.

A single firm providing both legal services and ordinary consulting services would not have the same conflict. In each instance the obligation to provide loyalty and independent judgment would be due the same client, and neither involves an inherent obligation to report to the public. For that reason the committee concluded that the Enron situation has quite a bit to say about the special role, and the required independence from client influence, of public auditors, but it does not bear on the desirability of permitting other professional services to be provided to a single client by a single firm.

In addition, the Enron situation raised an issue of whether the law firms and accounting firms serving Enron had become so financially dependent on that single client that they were not willing or able to provide it with independent professional judgment. If such proves to have been the case, Enron's lawyers may have violated existing ethical precepts requiring the provision of independent judgment. Nonetheless, that would not seem to implicate multidisciplinary practice as such.

None of Enron's law firms provided other professional services, and its accounting firm did not provide legal services. The percentage of total billings represented by Enron was much greater to its law firms than to its accountants. Whether any single firm's dependency on Enron would have been greater or less had these firms been permitted to offer both legal and nonlegal services is impossible to know. The possibility that a law firm or other professional service firm can become so dependent upon a client as to become unable to provide independent advice does not turn on the existence or permissibility of multidisciplinary practice.

The real issue continues to be, who should make the decision whether a given client obtains multiple professional services through one firm or several firms, the bar (through prohibitory rules promulgated by a court) or the client itself? The conclusion reached by the Special Committee on Multidisciplinary Practice and the D.C. Bar's Board of Governors is that such decisions should be made by the people and organizations that use those services, after assuring that they have sufficient information to make their decisions well informed. Neither the committee nor the board believes that adequate justification exists for depriving consumers of professional services of an opportunity to choose to obtain such services from an organization that provides all of the services they need under one roof. Whatever clients decide, the choice should be theirs.

Notes

[1] *See* "Report and Recommendation of the District of Columbia Bar Special Committee on Multidisciplinary Practice," Wash. Law., Jan. 2002, at 30–41.

[2] In the District of Columbia the only existing barrier to multidisciplinary practice through a single organization is Rule 5.4 of the D.C. Rules of Professional Conduct, which, with very limited exceptions (described subsequently), prohibits lawyers from sharing their fees with nonlawyers.

[3] *See, e.g., FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

Charles E. Buffon, a partner with Covington & Burling, chairs the D.C. Bar Special Committee on Multidisciplinary Practice.

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We're here for you!

Join the voluntary bars today!

Many D.C. Bar members have enriched their practice of law by participating in programs sponsored by the voluntary bar associations in the District of Columbia. These bar associations offer a variety of programs and benefits designed to improve the individual lawyer's practice.

The D.C. Bar encourages lawyers to investigate the programs of these organizations and to consider membership. Get involved today by sending or faxing your contact information to the D.C. Bar. We'll see that your contact information is forwarded to the bars of your choice!

Voluntary Bar Associations of the District of Columbia

American Hellenic Lawyers Society: A local association for attorneys who are of Greek descent or whose practice involves Greece or Cyprus.

American Immigration Lawyers Association, D.C. Chapter: Founded to promote the practice of immigration law.

Asian Pacific American Bar Association of the Greater Washington, D.C. Area: Concerned with legal and social issues facing the Asian Pacific community in D.C.

Bar Association of the District of Columbia: The original voluntary bar for D.C., offering social and professional interaction.

D.C. Association of Criminal Defense Lawyers: NACDL local chapter, featuring a lawyer's strike force committee, which provides vigorous and effective legal representation to criminal defense lawyers who have serious conflicts with a judge or the prosecutor's office.

D.C. Defense Lawyers' Association: Defense attorneys in D.C. civil cases.

Department of Justice Association of Black Attorneys: Promotes the interest of minority attorneys and other employee members at the Department of Justice and in the greater community.

Energy Bar Association: Promote the proper administration of laws relating to the production, development, conservation, transmission, and economic regulation of energy.

Family Division Trial Lawyers Association of the Superior Court of the District of Columbia: Solo practitioners and small law firms that provide legal services to children and families at Superior Court.

Federal Bar Association, Capitol Hill Chapter: For attorneys practicing before the federal courts and in areas of federal law.

Federal Bar Association, D.C. Chapter: For attorneys practicing before the federal courts and in areas of federal law.

Federal Communications Bar Association: Promotes improved administration of federal laws relating to wire and radio communications.

Gay and Lesbian Attorneys of Washington: Works to advance the rights of lesbians and gay men.

Greater Washington Area Chapter, Women Lawyers Division, National Bar Association: Concerns of metropolitan community in general and African American women lawyers in particular.

Hispanic Bar Association of the District of Columbia: Further the legal rights afforded to Hispanics and to create a network of Hispanic legal professionals.

Inter-American Bar Association, D.C. Chapter: Promotes the rule of law in the Western Hemisphere.

International Association of Jewish Lawyers and Jurists, D.C. Chapter: Represents the District's Jewish legal community, defending Jewish interests and human rights in D.C., the U.S., and abroad.

International Trade Commission Trial Lawyers Association: For attorneys and those interested in the U.S. International Trade Commission and unfair trade practices.

Metropolitan Washington Employment Lawyers Association: Provides assistance to lawyers in protecting the rights of employees against the greater resources of their employers and the defense bar.

National Conference of Black Lawyers, D.C. Chapter: Works for advancement of political and human rights in the U.S. and internationally.

National Lawyers Guild, D.C. Chapter: Supports economic, social, and political justice.

Native American Bar Association of Washington, D.C.: Open to all attorneys and law students interested in the field of Indian law.

Sections of the D.C. Bar: The 21 sections of the D.C. Bar offer a wide selection of professional activities, providing a myriad of opportunities for the seasoned practitioner or the new attorney to advance specialized interests and to network with colleagues.

South Asian Bar Association: A local association of attorneys of south Asian origin and attorneys whose practice involves south Asia.

Superior Court Trial Lawyers Association: Members provide skilled and vigorous representation for indigent individuals charged with crimes within D.C.

Trial Lawyers Association of Metropolitan Washington, D.C.: Local affiliate of the Association of Trial Lawyers of America.

Washington Bar Association: Promotes the Afro-American lawyer's presence in the legal, judicial, and economic structure of American society.

Washington Council of Lawyers: Promotes the practice of pro bono and public interest law.

Washington Foreign Law Society: Promotes knowledge and understanding of foreign and international law.

Women's Bar Association of the District of Columbia: Works to achieve equality for women and justice for members of the community.

Young Lawyers Division of the Washington Bar Association: Promotes the Afro-American lawyer's presence in the legal, judicial, and economic structure of American society.

Young Lawyers Section of the Bar Association of the District of Columbia: Devoted to providing service to the community and to the Bar.

Yes, I want to get involved in the voluntary bars.

Name: _____

Address: _____

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Phone: _____

E-mail: _____

Please forward my name and contact information to the following voluntary bar associations (please list here):

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Return to:

The District of Columbia Bar, Attention: Executive Office
1250 H Street NW, Sixth Floor, Washington, DC 20005-5937
Phone 202-737-4700 Fax 202-626-3471
E-mail: executive.office@dcbar.org

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September 2002
Volume 17 No. 1
www.dcbar.org

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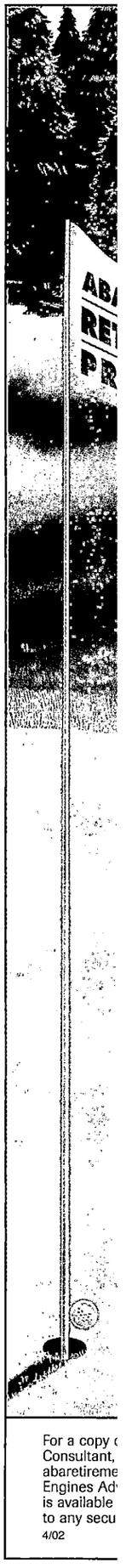

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Note: Unless otherwise indicated, all D.C. Bar events are held in the D.C. Bar Conference Center at 1250 H Street NW, lower level. For more information visit www.dcbar.org/events/search.cfm or call the Sections Office at 202-626-3463 or the CLE Office at 202-626-3488. CLE courses are sponsored by the D.C. Bar Continuing Legal Education Program. All events are subject to change.

SEPTEMBER 9

Supreme Court Review and Preview
2–5:15 p.m. CLE course cosponsored by the judicial division of the Federal Bar Association and the D.C. Bar Litigation Section. See story on page 7.

SEPTEMBER 10

Partnership Options and Convertible Instruments
12–1:30 p.m. Luncheon program sponsored by the Pass-Through Entities and Real Estate Committee of the Taxation Section.

Workers' Compensation in the District of Columbia
6–9:15 p.m. CLE course cosponsored by the Tort Law Section, Labor and Employment Law Section, and District of Columbia Affairs Section.

SEPTEMBER 12–13

The Essentials of Representing Nonprofits: Tax and Election Law for Public Policy
8:30 a.m.–4:15 p.m., 8:30 a.m.–3:15 p.m. Two-day CLE course cosponsored by the Alliance for Justice.

SEPTEMBER 17

Annual Plenary Session
12 p.m. Brown bag program sponsored by the International Law Section.

Cyberspace and the National Labor Relations Act
12–2 p.m. Brown bag program sponsored by the Labor Relations–Private Sector Committee of the Labor and Employment Law Section.

A New World for Accountants and Public Companies
6–8:15 p.m. CLE course cosponsored by the Corporation, Finance and Securities Law Section.

SEPTEMBER 19

Domain Name Disputes
12–2 p.m. Luncheon program sponsored by the Intellectual Property Law Section.

The Ethics of Retainer Agreements and Billing Practices
6–8:15 p.m. CLE course cosponsored by the Courts, Lawyers and the Administration of Justice Section, Litigation Section, Tort Law Section, and Estates, Trusts and Probate Law Section.

SEPTEMBER 23

From the Ground Up: Fundamentals of Practice in the D.C. Court of Appeals
6–9:15 p.m. CLE course cosponsored by the Litigation Section, Courts, Lawyers and the Administration of Justice Section, Tort Law Section, and Family Law Section. See story on page 6.

SEPTEMBER 24

Luncheon Program
12–2 p.m. Luncheon program sponsored by the Financial Instruments and Products Committee of the Taxation Section.

Ethics and the Internet
6–8:15 p.m. CLE course cosponsored by the Computer and Telecommunications Law Section and the Courts, Lawyers and the Administration of Justice Section.

SEPTEMBER 25

Luncheon Program
12–1:45 p.m. Luncheon program sponsored by the Exempt Organizations Committee of the Taxation Section.

Internationalization of Copyright
12–2 p.m. Luncheon program sponsored by the Intellectual Property Law Section.

SEPTEMBER 26

Luncheon With Raenelle Zapata, Rent Administrator
12–1:30 p.m. Luncheon program sponsored by the Rental Housing Committee of the Real Estate, Housing and Land Use Section. Hogan & Hartson, 555 13th Street NW.

50 Hot Technology Tips for Solos and Small Firms
12–1:45 p.m. Brown bag program sponsored by the Solo and Small Firm Practice Committee of the Law Practice Management Section. See story on page 7.

District of Columbia Candidates Forum
6 p.m. Evening program cosponsored by the District of Columbia Affairs Section and the University Club of Washington. 1135 16th Street NW. See story on page 6.

Pretrial Skills, Part I: Filing and Serving Actions/Answers and Defenses
6–9:15 p.m. CLE course cosponsored by the Family Law Section, Labor and Employment Law Section, Litigation Section, and Tort Law Section.

SEPTEMBER 30

Commercial Leasing, Part I
6–9:15 p.m. CLE course cosponsored by the Real Estate, Housing and Land Use Section.

OCTOBER 1

Brown Bag Program
12–2 p.m. Brown bag program sponsored by the Real Property Transactions Committee of the Real Estate, Housing and Land Use Section.

OCTOBER 2

Introduction to Export Controls
6–9:15 p.m. CLE course cosponsored by the International Law Section.

OCTOBER 3

Pretrial Skills, Part II: Discovery Issues
6–9:15 p.m. CLE course. See listing for September 26.

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OCTOBER 7

Commercial Leasing, Part II
6–9:15 p.m. See listing for September 30.

OCTOBER 8

Copyright Basics
6:30–9:15 p.m. CLE course cosponsored by the Washington Area Lawyers for the Arts, the D.C. Bar Arts, Entertainment and Sports Law Section, and the Washington Area Music Association. Williams & Connolly, 725 12th Street NW. Call 202-429-0960.

OCTOBER 9

Luncheon Program
12–2 p.m. Luncheon program sponsored by the Pass-Through Entities and Real Estate Committee of the Taxation Section.

OCTOBER 10

Pretrial Skills, Part III: Taking and Defending Depositions
6–9:15 p.m. CLE course. See listing for September 26.

OCTOBER 15

Intensive Trial Skills, Part I: Opening Statements
6–8:45 p.m. CLE course cosponsored by the Litigation Section and the Tort Law Section.

OCTOBER 16

Brown Bag Program
12–2 p.m. Brown bag program sponsored by the Labor and Employment Law Section.

OCTOBER 17

Introduction to Conflicts of Interest: Practical Issues and Solutions
9:30–11:45 a.m. CLE course cosponsored by the Courts, Lawyers, and Administration of Justice Section and the Litigation Section.

Pretrial Skills, Part IV: Substantive and Procedural Motions
6–9:15 p.m. CLE course. See listing for September 26.

OCTOBER 18

Legal Writing Workshop
9:30 a.m.–4:30 p.m. CLE course cosponsored by the Litigation Section.

OCTOBER 22

Intensive Trial Skills, Part II: Direct Examination and Cross-Examination
6–8:45 p.m. CLE course. See listing for October 15.

OCTOBER 24

Ethics Traps for Well-Intentioned Lawyers
6–9:15 p.m. CLE course cosponsored by the Courts, Lawyers and the Administration of Justice Section, Intellectual Property Law Section, and Computer and Telecommunications Law Section.

OCTOBER 25

Basic Negotiation Skills Workshop
9 a.m.–4 p.m. CLE course cosponsored by the Litigation Section.

OCTOBER 28

Understanding Jurors: A Unique Approach to Courtroom Advocacy
6–9:15 p.m. CLE course cosponsored by the Litigation Section and the Tort Law Section.

OCTOBER 29

Appellate Advocacy
9 a.m.–5 p.m. CLE course cosponsored by the U.S. Court of Appeals for the District of Columbia Circuit and the D.C. Bar Litigation Section.

Intensive Trial Skills, Part III: Closing Arguments
6–8:45 p.m. CLE course. See listing for October 15.

NOVEMBER 1

Winning With Technology: Creating Persuasive Courtroom Presentations
1:30–4:45 p.m. CLE course cosponsored by the Litigation Section.

NOVEMBER 4

HIPAA
12–2 p.m. Luncheon program sponsored by the Health Law Section

Securities and Corporate Law Ethics
6–8:15 p.m. CLE course cosponsored by the Corporation, Finance and Securities Law Section.

NOVEMBER 5

Brown Bag Program
12–2 p.m. Brown bag program sponsored by the Real Property Transactions Committee of the Real Estate, Housing and Land Use Section.

NOVEMBER 7

Defending Companies and Individuals in SEC Investigations, Part I
6–8:15 p.m. CLE course cosponsored by the Corporation, Finance and Securities Law Section.

NOVEMBER 8

Checklist for Electronic Discovery
9 a.m.–4:30 p.m. CLE course cosponsored by the Litigation Section, Computer and Telecommunications Law Section, and Intellectual Property Law Section.

NOVEMBER 12

How to Litigate a Trademark and Copyright Case
6–9:15 p.m. CLE course cosponsored by the Intellectual Property Law Section and the Litigation Section.

NOVEMBER 13

Luncheon Program
12–1:45 p.m. Luncheon program sponsored by the Exempt Organizations Committee of the Taxation Section.

NOVEMBER 14

A Primer on Nonprofit Law in the District of Columbia
9 a.m.–5 p.m. CLE course cosponsored by the D.C. Bar Corporation, Finance and Securities Law Section and the District of Columbia Affairs Section, and the Washington Council of Agencies.

Defending Companies and Individuals in SEC Investigations, Part II
6–8:15 p.m. CLE course. See listing for November 7.

NOVEMBER 20

Brown Bag Program
12–2 p.m. Brown bag program sponsored by the Labor and Employment Law Section.

Ethics and Lawyer Trust Accounts
6–9:15 p.m. CLE course cosponsored by the Law Practice Management Section, Litigation Section, and Courts, Lawyers and the Administration of Justice Section.

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Washington Lawyer

books in the law

Michael E. Tigar is a professor at the Washington College of Law of the American University and an active practitioner. For more than three decades Tigar has been taking on controversial clients and cases. His new book, *Fighting Injustice*, published by the American Bar Association, is a memoir that combines a probing exploration of some of the key issues the legal profession is facing today.

Recently Tigar sat down with D.C. Bar member Robert Pack to discuss his new book.



A Conversation With Michael E. Tigar

Interview by Robert Pack

THE WASHINGTON LAWYER: What prompted you to write *Fighting Injustice*?

MICHAEL TIGAR: I had thought about a book like this for a long time. My day job is as a law teacher, at Washington College of Law, where there is an enormous institutional commitment to social justice issues. A lot of students work on cases in which I'm involved, and I thought it was time to write a story that talked about how somebody who was interested in using the law in a constructive way made attempts—some successful, some not so successful—to do that. That's the first part of the book. The second part is organized thematically around certain issues.

Much of your practice has involved not just clients but causes you believe in. Would it be correct to label you as an advocate, as opposed to simply a lawyer?

Right. I never wanted to be a lawyer who sat in an office and drew wills or corporate charters. I decided to go to law school in 1963 because my understanding of a lawyer was someone who went to court and advocated. And there was a particular kind of advocacy that I wanted to do. The civil rights movement was in full swing. The attacks on the left that had begun during the McCarthy era were continuing. There were folks who needed defending. So I wanted to be a lawyer.

I was born and raised in southern California and graduated from the University of California at Berkeley. I was accepted at Boalt Hall, the law school there. I think it was the only law

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"**Of all the lawyers in America, Edward Bennett Williams** was the one who stood out for practicing the kind of law I wanted to practice."

school to which I applied, because it was my state school and it was cheap. The free speech movement began while I was in law school at Berkeley. I wasn't involved in it because I was too busy studying, but there was a ferment in society and in the law that certainly affected me.

Do you consider yourself a civil rights lawyer?
Twenty-five years ago I would have said civil rights. Now I think human rights is a better term. Why? Because civil rights to me connotes rights guaranteed by the American Constitution. The concept of human rights is an international concept.

From reading your book, I gather that your introduction to Washington was rather unusual.
Yes, it was. At the end of my second year in law school, Justice William Brennan appointed me his law clerk upon my graduation. However, as a student at Berkeley I had embraced progressive politics. During my third year my nomination began to cause controversy. Finally, in June of 1966 I got a call from Brennan and he was worried about this. There had been a statement on the floor of the House of Representatives by some reactionary congressman. Editorial writers were criticizing my appointment. Chief Justice Earl Warren, a former Republican governor of California, was getting heat, too, and putting pressure on Brennan about the situation.

I flew to Washington, where I'd never been before, and I met Justice Brennan in his chambers. After the pleasantries were over, the first thing he confronted me with was he wanted to know why was I once at a Communist Party training camp in Paterson, New Jersey. (I later found out that this was fed to him by the FBI through the Justice Department and Justice Abe Fortas, who was close to President Johnson.) I was flabbergasted. I told Justice Brennan that I'd never been to Paterson, New Jersey, much less at a Communist Party training camp there.

Brennan said he still wanted me to be his clerk. So I went back to California and packed my wife and infant daughter and our belongings into a VW bus. We drove across country and I made it to Washington with about $10 in my pocket. But when I showed up for work, Justice Brennan told me that to his regret he had decided he had to withdraw the clerkship.

To this day when I hear people say the FBI needs more power, I remember my personal experience. My reaction is, What is it in the FBI's past that makes you think they get it right often enough that they need unrestrained power free from supervision by other branches of government?

So there you were—a wife, a family, no money, no job. What did you do?
Of all the lawyers in America, Edward Bennett Williams was the one who stood out for practicing the kind of law I wanted to practice. So I called him, and he said I could come see him. When I told him what had happened, Williams said Justice Brennan was a close friend of his, and he couldn't believe Brennan would have done that. I gave him the phone number in Brennan's chambers, and told him he was welcome to call the justice. Williams said he really wasn't looking for another lawyer—there were only about 9 or 10 attorneys in his firm then—but he would think about it. My wife and I were staying with friends who lived about six blocks from Williams's office. I walked back there and a few minutes later the phone rang. It was Ed Williams. He said I had a job starting the following Monday.

A Supreme Court clerkship is about the most prestigious honor a recent law school graduate can receive. Would you classify losing out on that opportunity as one of the biggest regrets in your life?
I would not classify it as a regret for one moment. Everybody that I knew knew that I had been appointed clerk to a Supreme Court justice, and I never had to stay up late reading cert petitions. I'm not sure that it could have worked out better. And I did land on my feet. I wound up working for Edward Bennett Williams, who became my mentor and was almost like a father to me. Justice William Douglas offered me a clerkship the following year, but after discussing it with Ed Williams, I turned Douglas down, with thanks, because I was already into my legal career.

Controversy seems to have followed you. In 1970 you were teaching at UCLA Law School and the governor of California, Ronald Reagan, called upon the university's board of regents to fire you.
That's true. I arrived at UCLA in 1969 thinking I would settle down to a life of academic calm. The first thing that happened was that I got involved as a defense lawyer in the famous Chicago 8 conspiracy trial that grew out of the protests at the 1968 Democratic convention. I was jailed by Judge Julius Hoffman in a misunderstanding that quickly got cleared up. Shortly thereafter, Angela Davis arrived at UCLA to teach in the philosophy department, and she asked me to represent her when she refused to sign the university's loyalty oath. A year or so later she was charged in a homicide case. Meantime I volunteered to help Bill Kuntsler defend H. Rap Brown, another black militant. So I had a lot of controversial cases, which made the governor very upset.

Ironically, when I was student body president at Reseda High School, near Los Angeles, in 1957–58, I had invited Ronald Reagan, then a private citizen, to be the speaker at our assembly on patriotism. He came and spoke. I have a picture of him shaking hands with me. I remember I helped Ronald Reagan find a contact lens that he dropped backstage at our high school. I crawled around on my hands and knees with him.

You have represented many controversial clients, including Oklahoma City bombing conspirator Terry Nichols, in addition to the clients previously mentioned. Are there clients you would refuse to represent?
Yes. A lawyer is obligated to take an appointed case, or to represent someone who cannot otherwise find counsel. But in day-to-day practice we have the right, and I would say the duty, to make choices. I would not be willing to represent defendants in a lot of these corporate corruption cases. I am not interested in defending anyone having anything to do with the Enron business. I am so horrified by their conduct that I don't think I would be an effective lawyer for any of those folks.

You know, you hear people talk about how they get nervous walking in certain neighborhoods. Well, I was a professor at the University of Texas Law School in

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Austin from 1987 until 1998 and I've spent a fair amount of time in Houston. If I were walking down the street in Houston and I saw a well-dressed white man, I would cross the street. Otherwise he might steal my pension.

In the time since you first arrived in Washington 36 years ago, how would you say that the practice of law here has changed?

When I came to Washington in 1966 there were then no national law firms here that I was aware of. You didn't see these huge multicity law firms that will do everything for you. Over the years I have had experience working with some of these megafirms. Whatever it is they do well—and I'm sure there are many things they do well—I don't think they do litigation as well as a firm that is organized to be leaner and meaner and more focused on each individual case. That was the way Ed Williams's firm was organized when I joined. I was only the 10th lawyer there.

I think it's harder to persuade these big megafirms to do major pro bono cases. They are often more focused on profitability than on public service. Given the reduction in funding for legal services and defender services, that is a shame.

The other major change is, the only hot spot I knew of to eat lunch at that time was Duke Zeibert's.

What is the biggest challenge the American judicial system is facing today?

Independence. The assertion of article III constitutional authority to restrain the executive branch in its attacks on the Bill of Rights and on the very idea of international human rights. In less than two years of the Bush administration we have seen an unprecedented expansion of executive power, along with rollbacks in self-restraint by the executive branch. This struggle has been going ever since the republic was founded, but it has accelerated the last few years.

What's the most exciting case you've ever had?

For me, the most exciting case is the one that is happening right now. Whichever case that is.

Attorney Robert Pack is the author of Edward Bennett Williams for the Defense.

From the President

continued from page 5

on those who do not look like us or worship as we do. Our political leaders must hear us say that it is essential to maintain an appropriate balance between national security and civil liberty, especially when we confront real threats to both.

Notes

1 *See Hirabayashi v. United States*, 320 U.S. 81, 85–89 (1943); *see also Korematsu v. United States*, 323 U.S. 214, 215–17 (1944).

2 *See Korematsu*, 323 U.S. at 235–42 & nn.2–16 (Murphy, J., dissenting); *Hirabayashi*, 320 U.S. at 93–99.

3 *See* T. Jackman & D. Eggen, *'Combatants' Lack Rights, U.S. Argues*, Wash. Post, June 20, 2002, at A1; *see Hamdi v. Rumsfeld*, 2002 U.S. App. LEXIS 14012, slip op. at 12 (4th Cir. July 12, 2002) ("The government asserts that 'given the constitutionally limited role of the courts in reviewing military decisions, courts may not second-guess the military's determination that an individual is an enemy combatant and should be detained as such.' ").

4 *Hamdi*, slip op. at 12–13.

5 *U.S. Says It Has Thwarted Dirty-Bomb Terrorist Plot*, Wash. Post, June 16, 2002, at A3; *see also* M. Hamblett, *U.S. Ordered to Justify Detention of 'Dirty Bomber,'* N.Y.L.J., Aug. 1, 2002.

6 2002 U.S. App. LEXIS 14012 (4th Cir. July 12, 2002).

7 *Compare Korematsu and Hirabayashi with Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (after World War II ended, the Court considered and rejected the trial of civilians in military tribunals in Hawaii during the war).

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For more information, contact Elizabeth J. Branda, Esquire, Executive Attorney, Board on Professional Responsibility, 515 5th Street NW, Room 102, Washington, DC 20001, 202-638-4290.

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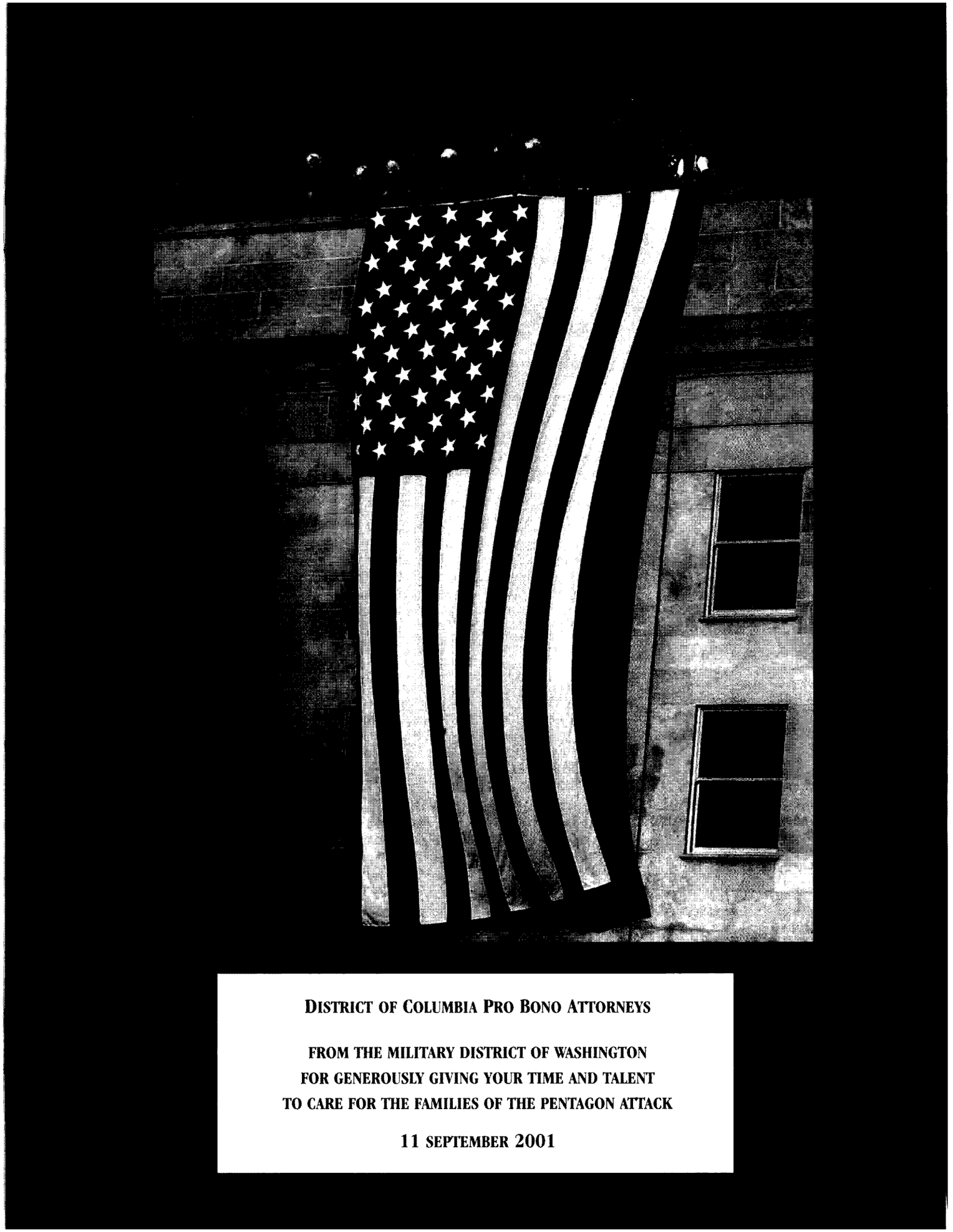

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attorney briefs

By Mark Winter

Honors and Appointments

Akin, Gump, Strauss, Hauer & Feld, L.L.P. has received the 2002 Thomas L. Sager Award from the Minority Corporate Counsel Association... The Trial Lawyers Association of Metropolitan Washington, D.C. has named **William E. Artz** Lawyer of the Year... The Bar Association of the District of Columbia (BADC) has installed new officers: **William E. Lawler III**, president; **Nicholas S. McConnell**, president-elect; **William E. Davis**, secretary; **William P. Atkins**, treasurer; and **Kim Keenan Solomon**, treasurer-elect. BADC has presented **Bruce J. Klores** with the Constance L. Belfiore Quality of Life Award... **Bennett Boskey** has been reelected treasurer of the council of the American Law Institute... **Nezida S. Davis** has been appointed chief of the Atlanta field office of the U.S. Department of Justice, Antitrust Division... **Louis R. Lessig** has received the Professional Achievement Award from the New Jersey State Bar Association Young Lawyers Division... **William R. Levasseur** has received the Andrew Hecker Memorial Award from the American Bar Association Tort and Insurance Practice Section... Milbank, Tweed, Hadley & McCloy partner **Michael D. Nolan** and retired partner **Mark Kantor** have been appointed adjunct professors of law at George University Law Center... **John L. Pinnix** has been installed as president of the American Immigration Lawyers Association... **Christopher S. Rizek**, of Caplin & Drysdale, Chartered, has been elected a fellow of the American College of Tax Counsel... **Sandra Robinson**, of Jack H. Olender & Associates, P.C., has been elected to the executive committee of the Association of Trial Lawyers of America... **Ronald R. Ross**, a partner with Troutman Sanders LLP, has been appointed to the board of directors of the D.C. Sports and Entertainment Commission... **Jacob A. Stein**, of Stein, Mitchell & Mezines LLP, has received the 2002 American Inns of Court Professional Award for the DC Circuit.

On the Move

Julie A. Goldman has joined Akin, Gump, Strauss, Hauer & Feld, L.L.P. as an associate... **Bonnie J. Campbell**, of Arent Fox Kintner Plotkin & Kahn, PLLC, has become head of the firm's government relations practice... **John P. Hewko** has rejoined Baker & McKenzie as a partner... **Michael E. Horowitz** has joined Cadwalader, Wickersham & Taft as a partner... **Thomas V. Sjoblom** has joined Chadbourne & Parke LLP as a partner... **Kathryn B. McGrath** and **Stephanie M. Monaco** have joined Crowell & Moring LLP as partners. **Theodore Sonde** has joined as senior counsel. **Jeffrey C. Blockinger, Angela C. Goelzer**, and **Denise Landers** have joined as counsel. **Prufesh R. Modhera** and **Liza M. Ray** have joined as associates... **James Howard** has joined Dickstein Shapiro Morin & Oshinsky LLP as counsel... **Catherine L. Creech** and **Kent A. Mason** have joined Davis & Harman LLP as partners... **Virginia Walker Boylan** and **Kevin Wadzinski** have joined Gardner Carton & Douglas as partners... **Beverly J. Haney** has joined Gardner, Maupin and Sutton, P.C. in Spotsylvania County, Virginia... **Reed D. Rubinstein** has joined Greenberg Traurig as of counsel... **Carl S. Nadler** has joined Heller Ehrman White & McAuliffe LLP as a shareholder... **Denise M. Clark** has been named general counsel of the Hotel Employees and Restaurant Employees International Union Welfare and Pension Funds in Aurora, Colorado... **Kathleen C. Callahan** and **Elaine L. Fitch** have joined Kalijarvi, Chuzi & Newman as associates... **Daniel S. Berger** and **Terrance L. Bessey** have joined Katten Muchin Zavis Rosenman as partners... **James C. Gould** and **Joseph F. Winterscheid** have joined McDermott, Will & Emery as partners... **Robert J. Koch** has joined Milbank, Tweed, Hadley & McCloy LLP as a partner... **John V. Ayanian** and **Brett I. Miller** have been elected to partnership with Morgan Lewis... **Christopher J. Heffernan** has joined Niles, Barton & Wilmer, LLP in Baltimore, Maryland, as a partner... **Thomas J. Ball** and **Jason T. Barbeau** have joined Schnader Harrison Segal & Lewis LLP as associates... **Elizabeth Diaz Calderon** has joined Spirer & Goldberg, P.C. as an associate... **Philip R. West** has joined Steptoe & Johnson LLP as a partner... **Sherwin S. Kaplan** has joined Thelen Reid & Priest LLP as of counsel. **Jewell Lim Esposito** has joined the firm as special counsel... **Timothy D. Belevetz** has joined the criminal tax section at the U.S. Department of Justice... **Mary E. Goulet** has joined Whitham, Curtis & Christofferson PC in Reston, Virginia, as of counsel... **Randolph M. Goodman**

continued on page 46

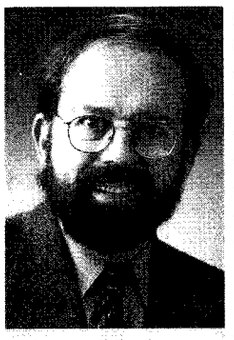

Mark T. McDermott has received the 2002 President's Award from the American Academy of Adoption Attorneys.

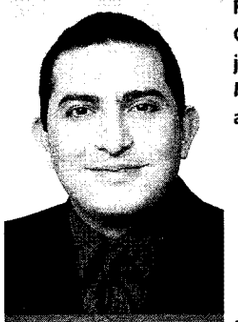

Francisco J. Orellana has joined Williams Mullen as an associate.



Herbert A. Glaser has joined Haynes and Boone LLP as a partner.

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The District of Columbia Affairs Section is sponsoring a "District of Columbia Candidates Forum" on September 26 at The University Club of Washington. Local candidates running in the November general election will present their positions on issues of vital importance to District residents and businesses.

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and **Barbara L. Kirschten** have joined Wilmer, Cutler & Pickering as partner and counsel, respectively.

Company Changes

Richard Douglas Brew has merged his practice with Damrell Nelson Schrimp Pallios Pacher & Silver, PLC of Modesto, California... **Hogan & Hartson L.L.P.** has opened an office in Beijing, China... McKenna & Cuneo L.L.P. and Long Aldridge & Norman LLP have merged practices to form **McKenna Long & Aldridge, L.L.P.**... **Frank J. Schuchat** has formed Ostema, Schuchat & Gitlin, LLC in Denver, Colorado... Nancy Lesser has launched **PAX Dispute Resolution LLC**, with offices at 1101 Pennsylvania Avenue NW... Arnander Irvine & Zeitman of London, England, has merged with **Shook, Hardy & Bacon L.L.P.**... Thomas J. Simeone and Craig D. Miller have formed **Simeone & Miller**, with offices at 1620 I Street NW... **Wiley Rein & Fielding LLP** has acquired Gold Morrison & Laughlin PC of northern Virginia.

Author! Author!

Linda Baumann has edited *Health Care Fraud and Abuse: Practical Perspectives*, published by BNA Books... **Eugene R. Fidell** and **Dwight H. Sullivan** have coedited *Evolving Military Justice*, published by the Naval Institute Press... **Stephen Horn** has written *Law of Gravity*, published by HarperCollins... **Terrence M. O'Connor** has coauthored *Federal Contracting Answer Book*, published by Management Concepts, Inc.... **Ira P. Robbins** has authored *Prisoners and the Law* and *Habeas Corpus Checklists*, both published by West Group... **Eric J. Schwartz** has written the chapter "United States Copyright Law" in *International Copyright Law and Practice*, published by LexisNexis.

Mark Winter may be reached by e-mail at mwinter@dcbar.org.

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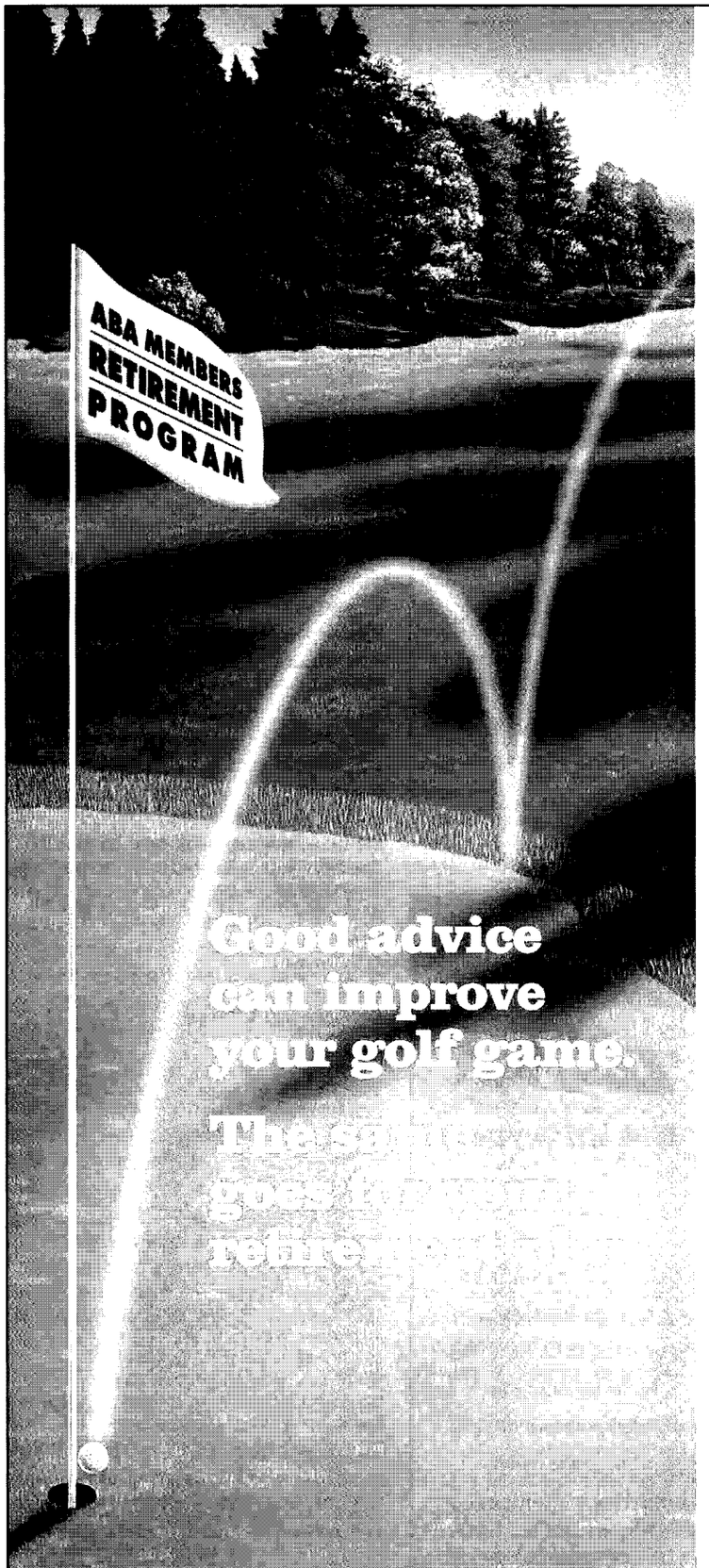



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legal spectator

By Jacob A. Stein

How to Get a Confession



There is talk now of using truth serum to get the truth from a terrorist. Does truth serum work? Who knows. There is also talk of using the tried-and-true method of getting confessions—moderately severe torture.

This brings to mind the apocryphal remark of the Calcutta policeman who said rubbing red pepper into the eyes of the poor devil until he confesses is more efficient than looking for witnesses in the noonday sun. Mad dogs and Englishmen and all that.

The law is skeptical of confessions made outside the courtroom. People may confess for reasons known and unknown and be innocent. The temptation to extort confessions is strong. Unless it is resisted it will push out the traditional means of getting the evidence. The balance in our legal system that discourages the use of questionable means is a delicate adjustment. "Take but degree away. Untune that string, and hark! What discord follows."

In the 1940s Fred E. Inbau (1909–1998), of Northwestern University Criminal Law Department, was fascinated by and wrote frequently on the subject of criminal interrogation. His book, *Criminal Interrogation and Confessions*, urged the police to use any kind of artifice, deception, and trick to get a confession. According to Inbau, anything goes. Inbau was before the Amanda (*sic*) warning.

There is a story that has been told of a Chicago criminal lawyer who knew Inbau and his techniques and who went Inbau one better.

We shall call the criminal lawyer Fred Bellows. His son, Cliff Bellows, was killed in an elevator accident. Cliff was in an office building elevator with five other passengers. The elevator went out of control and took a free fall from the 10th to the basement floor. The passengers were badly injured and were trapped for six hours before the rescue team hammered and drilled through the elevator top and freed them. Cliff was found dead. It was assumed the cause of death was his severe injuries. However, the autopsy disclosed something strange. Cliff Bellows had a bullet in his heart.

The police learned that Cliff carried a gun because of threats made against his criminal lawyer father. Thereafter the police declared that Cliff's death was a suicide. Cliff was so badly injured he decided, so it was thought, that if he survived life would not be worth living. He must have shot himself with his own gun. The fact that the others in the elevator were unaware of the gunshot was explained by the hammering and banging by the rescue crew.

Cliff's father had trouble with the way the police closed the case as a suicide. Cliff was not the type to commit suicide. Bellows decided to conduct his own investigation.

He learned that one of the persons on the elevator could have known Cliff because they worked for the same company and they may have gotten on at different floors. Bellows discovered evidence that pointed to a particular person on the elevator who may have had a motive to kill Cliff based on disagreements at the brokerage firm where they worked. But the evidence was weak, certainly not strong enough to interest a prosecutor. Bellows needed a confession.

A year after Cliff's death Bellows invited the occupants of the elevator to his home for dinner. The invitation said each would learn something new about the elevator accident.

On the evening in question they all showed up. Dinner was served promptly. After dinner Bellows said to the group that he was skeptical that his son committed suicide. He believes Cliff was killed by his own gun but the gun was used by somebody else who was in the elevator.

"The person who killed my son is now in this room. That person has been served a meal different from the meal served to the others. His meal and his alone contained poison. A poison that takes effect in 10 minutes."

Bellows then said, "He knows who he is. He is free to leave the room right now, and my chauffeur will take him to the hospital in time to save his life. If he doesn't want to leave, he can save himself by eating from the bowl of custard dessert that is now being placed in the center of the table. The dessert contains the antidote to the poison that was in the meal. But he must act quickly."

One of the persons had been drinking too much. He made fun of the whole ceremony. He said it was like an old 1930s movie that he had seen or maybe a Sherlock Holmes story he read. When nobody else took any of the dessert, he scooped out a generous portion and ate it.

Bellows said to him, "Sir, you waited too long. I don't think the antidote will work."

The person who had eaten the dessert looked startled, and then collapsed. In a few minutes he was unconscious.

Bellows said to the group, "Gentlemen, I deceived you. When I said there was poison in the dinner of the person I suspected of murdering my son, I was lying. And when I said that the dessert contained an antidote to the poison, of course that was a lie.

"Then you may ask why this man is stretched out unconscious on the floor. It is because the dessert did have something in it. Not an antidote but a strong soporific. He is sleeping and in time he will wake up.

"I tricked him into giving what in law is called an implied confession. It is a confession implied by the circumstances. My case against him has moved from the speculative to the presumptive.

"I don't want to leave it there. When he gets up you will see a demonstration of the art of cross-examination. Now that I have this implied confession, I will work backwards to get at the motive. That is what interests me. Why did he murder my son?

"While we wait for the subject of our inquiry to wake up, let's have some dessert, some dessert that I will eat with you. How about chocolate cheesecake? I will eat the first slice."

Jacob A. Stein may be reached by e-mail at jstein@steinmitchell.com.

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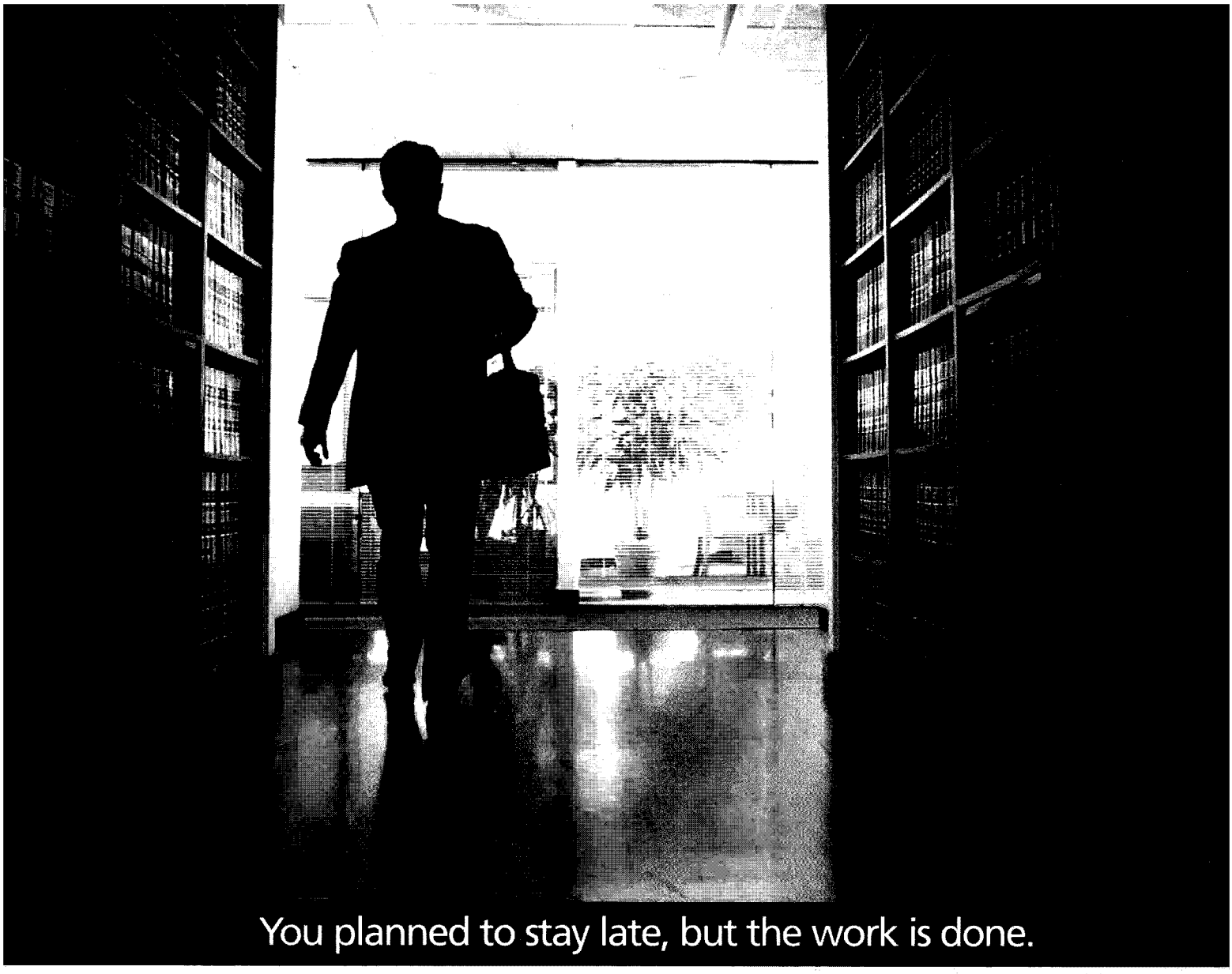

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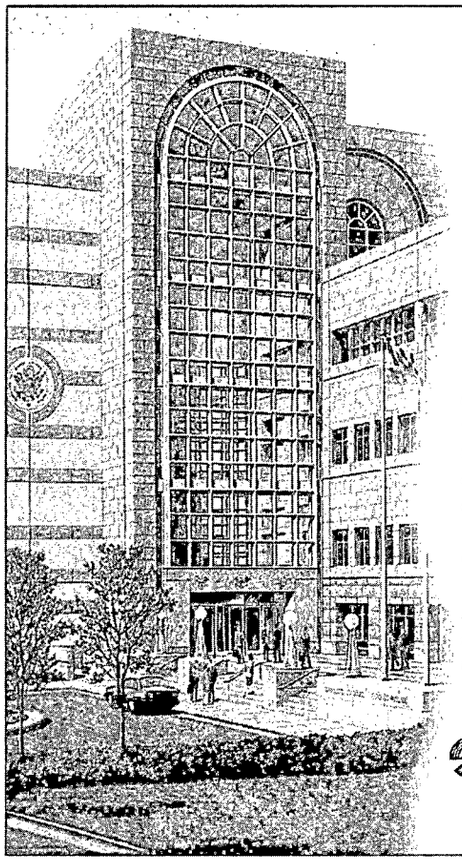

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By George W.

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from the president

By George W. Jones Jr.



In the Name of National Security

What an extraordinary year! Since September 2001 we have seen (1) terrorist attacks on the World Trade Center and the Pentagon, (2) an invasion of Afghanistan and ouster of the Taliban regime, (3) an attempt to blow up an airplane with explosive-filled tennis shoes, (4) weapons-grade anthrax in the mail, (5) a temporary shutdown of Congress, (6) a temporary relocation of the United States Supreme Court, (7) random pipe bombs in mailboxes, (8) an alleged plot to detonate a radioactive bomb in the District of Columbia, (9) periodic threats from Osama bin Laden and al Qaeda, and (10) periodic color-coded terrorist activity alerts from the White House.

Extraordinary times tend to generate no less extraordinary assertions of power. Following the Japanese surprise attack on Pearl Harbor in December 1941, we adopted a series of military orders that effectively required the imprisonment of *American citizens* on the West Coast solely on the basis of their Japanese ancestry.[1] In accordance with authority granted to him by Congress and President Franklin D. Roosevelt, Lieutenant General J. L. DeWitt concluded that the orders were necessary to protect against possible espionage and sabotage if the Japanese invaded the West Coast.

The orders were issued in the first few months after the attack on Pearl Harbor. Americans were outraged and angry. The rapid advances the Japanese had made in the Pacific in the first months of 1942 added fear and uncertainty to the mix. In these conditions it would have taken extraordinary courage for anyone to speak up on behalf of Japanese American citizens on the West Coast. The risk of being condemned as a naive fool or, worse, disloyal would have deterred all but the most courageous. Few spoke up.

By the time the Supreme Court considered *Korematsu v. United States*, however, the evidence of military necessity looked extremely doubtful.[2] Nonetheless, we were still at war. So the Court was not at all inclined to second-guess the military in this area, and upheld the constitutionality of the exclusion orders.

As in 1942, extraordinary events in the past 12 months have generated extraordinary assertions of power to respond to the threats we face. Yaser Esam Hamdi was captured by military forces in Afghanistan in November and held at Camp X-Ray at the naval base in Guantanamo Bay, Cuba, until it was confirmed that he had been born in Louisiana and, perhaps, had not renounced his U.S. citizenship. Then he was transferred to the Norfolk Naval Station brig in Norfolk, Virginia. The government took the position that, as an "enemy combatant" being detained according to the laws and customs of war, Hamdi was not entitled to consult privately with counsel.

On a petition for a writ of habeas corpus, Senior Judge Robert G. Doumar of the U.S. District Court for the Eastern District of Virginia summarily ordered the government to permit Hamdi to meet with a federal public defender in private. On appeal the Justice Department urged the Fourth Circuit to reverse, asserting that an American citizen, labeled an enemy combatant by the military, has no right to counsel or to judicial review of the grounds on which he is being held, whether he is taken into custody in the United States or in the field of battle.[3]

The court of appeals reversed the district court judgment and remanded the case for further consideration, but pointedly declined to embrace the government's "sweeping" argument for dismissal:

> In dismissing, we ourselves would be summarily embracing a sweeping proposition—namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so. Given the interlocutory nature of this appeal, a remand rather than an outright dismissal is appropriate.[4]

In the context in which the government made the argument—an armed combatant captured in the field of battle, outside the United States, in Afghanistan—the argument against judicial review seems compelling. The so-called Dirty Bomber, Jose Padilla, born in Brooklyn, New York, arrested in Chicago, Illinois, and allegedly involved in a plot to detonate a radioactive bomb in Washington, D.C., also has been labeled an enemy combatant. The proposition that Padilla is not entitled to counsel or judicial review of the basis on which he is being held strikes me as at least doubtful.[5]

Whatever one thinks of the merits of the argument, the audacity of the position the government staked out in *Hamdi v. Rumsfeld*[6] should remind us that the courts alone are not an adequate defense when confronting claims of military necessity or national security in wartime.[7] Uncritical acceptance of extravagant assertions of power in the name of national security is a threat, however, not just to those who would harm us, but to us and the freedoms so many have died to protect.

Lawyers are not the most significant players, but we know some things about the importance of procedural fairness and testing assertions of fact, even in the face of threats to public safety. As judges, as advocates, and perhaps most important, as citizens of the United States, we need to participate in the debate. Our political leaders must understand that we are not prepared to impose the costs of protecting us solely

continued on page 42

In Memoriam

The D.C. Bar remembers all of its members and friends who lost their lives on September 11, 2001.

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bar happenings

By Kristen Girard Morgan

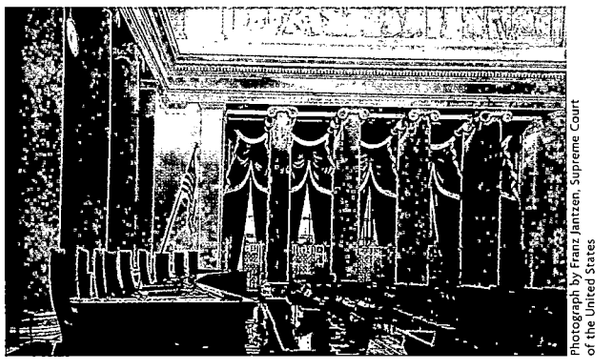

Photograph by Franz Jantzen, Supreme Court of the United States

The Supreme Court has agreed to hear 41 cases this term, some of which are on the agenda in "Supreme Court Review and Preview," a continuing legal education program scheduled for September 9 at the D.C. Bar.

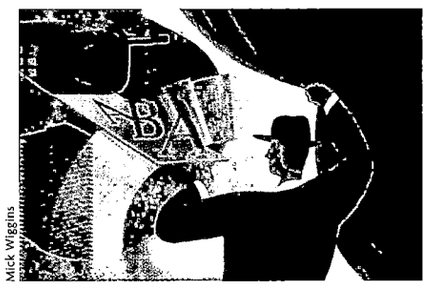

Mick Wiggins

Section Holds Candidates Forum

The D.C. Bar District of Columbia Affairs Section will present a candidates forum featuring local political hopefuls and incumbents on September 26 starting at 6 at the University Club of Washington, 1135 16th Street NW.

"The program will inform Bar members about the positions of candidates on issues of vital importance to D.C. residents, as well as businesses, nonprofits, professionals, and trade associations that are active in D.C. at the local and federal level," says moderator C. W. Tayler of Whiteford, Taylor & Preston L.L.P.

According to Tayler, the issues are broad-based and include the District's relations with the federal government, security measures at federal and local levels, maintenance of a business-friendly environment to encourage economic development, and serving the needs of citizens through infrastructure maintenance, equitable taxation policies, and social welfare programs.

Invited guests include winners of the September 10 primary elections for the offices of D.C. congressional delegate to the House of Representatives, mayor, D.C. Council chair, two at-large council seats, and council seats for Wards 1, 3, 5, and 6.

During the forum candidates for ward council seats will introduce themselves and ask questions of other candidates. All other candidates will have a specified time to speak, followed by a question-and-answer session. Tayler anticipates a lively and energetic debate on many hot issues, from taxation and security measures to business licensing and voting rights.

The program is cosponsored by the University Club of Washington.

For more information or to attend, contact the D.C. Bar Sections Office at 202-626-3463.

Learn the Fundamentals of Practicing in the D.C. Court of Appeals

Join an experienced panel of experts on September 23 for "From the Ground Up: Fundamentals of Practice in the D.C. Court of Appeals" from 6 to 9:15 p.m. at the D.C. Bar Conference Center, 1250 H Street NW, B-1 level.

"If you're downstairs in the Moultrie Building in Superior Court," says David Tedhams, staff attorney for the D.C. Court of Appeals, "you never know when you'll be up here [on the sixth floor in the Court of Appeals]."

Joining Tedhams as panelists are D.C. Court of Appeals associate judges John A. Terry and Eric T. Washington, chief deputy clerk Joy Chapper, and Case Management Division senior staff attorney Rosanna Mason.

Tedhams says the course will acquaint attorneys with the court, offer basic information on steering cases through an appeal, and present some of the unique wrinkles and pitfalls in local appellate practice.

Common mistakes, according to Tedhams, include bringing up an order that's not appealable, ignoring the vast amount of motions practice in the appellate court, not adhering to deadlines, incorrectly preparing records and transcripts, and being unaware of counsel's obligations.

"It seems simple," he says, but some attorneys are even "unaware of the standard of review the court applies in different cases."

The course, designed for new and experienced attorneys, will focus on getting to the D.C. Court of Appeals and staying there; identifying an appealable order; staying the proceedings; filing timely notices; writing briefs; and recovering costs and fees.

In addition, the course will cover direct appeals; petitions for review; writs and emergencies; interlocutory appeals; motions practice; time computation; persuasive oral arguments; judgments and opinions; and petitions for rehearing.

The course is sponsored by the D.C. Bar Continuing Legal Education (CLE) Program and cosponsored by the D.C. Bar Courts, Lawyers and the Administration of Justice Section, the Litigation Section, and the Family Law Section.

For more information or to register, contact the CLE Office at 202-626-3488 or visit www.dcbar.org/cle.

Section Series Kick Off Fall Program Lineup

Four D.C. Bar sections are kicking off series this month focusing on timely and relevant issues in a variety of practice areas.

"I urge members to mark their calendars and sign up now for a year of informative programs at significant savings," says sections manager Barbara James.

First, several committees of the Taxation Section will be offering luncheon series, starting with the Pass-Through Entities and Real Estate Committee with its program on September 10. On September 24 the Financial Instruments and Products Committee will commence its program series, followed on September 25 by the Exempt Organizations Committee.

Discounts are available to those who subscribe to any of the luncheon series sponsored by the Taxation Section.

Second, the Labor and Employment Law Section will start its monthly series on September 17 with "Cyberspace and the National Labor Relations Act"

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Photograph by Franz Jantzen, Supreme Court of the United States

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from 12 to 2 p.m.

The program will feature Julia Clark, general counsel, International Federation of Professional and Technical Engineers; Peter Healy Jr., partner, Fulbright & Jaworski; and Barry Kearney, associate general counsel, National Labor Relations Board. Thomas Knapp, chair of the Labor and Employment Law Section's Labor Relations–Private Sector Committee, is the moderator.

Third, the Solo and Small Firm Practice Committee of the Law Practice Management Section will launch its annual monthly brown bag luncheon series on September 26 with "50 Hot Technology Tips for Solo and Small Firms" from 12 to 1:45 p.m.

Learn how to enhance your law practice during this fast-paced, entertaining program full of practical suggestions, ideas, and tricks to keep you on top of your game. The program will feature Reid Trautz, director of the D.C. Bar Lawyer Practice Assistance Program.

The series will continue on October 23, November 20, December 19, January 23, and February 27.

Planned program topics include choosing a proper business entity for your legal practice, home and office networking, elder law, managing client communications and confidences by e-mail and the Internet, the paperless law office, noncompetition and trade secret requirements, and business plans for small firm and solo practices.

Fourth, the Real Estate, Housing and Land Use Section's Real Property Transactions Committee will host a series of brown bag lunches and light dinners beginning on October 1. The series continues on November 5 and includes the "12th Annual Highlights of Commercial Real Estate" on December 3 from 6 to 9 p.m. at the Westin Embassy Row, 2100 Massachusetts Avenue NW.

All programs, unless specified, will be held at the D.C. Bar Conference Center, 1250 H Street NW, B-1 level.

For more details and a schedule of upcoming series programs, or to register, contact the D.C. Bar Sections Office at 202-626-3463 or visit www.dcbar.org/sections.

Practitioners Offer Views on Supreme Court

Capping a fiery term with decisions on the death penalty, drug testing in America's schools, search and seizure, and school vouchers, the Supreme Court justices are gearing up for their return to the bench in October after a summer of rest.

"It's going to be a spectacular term," says Thomas Goldstein, a sole practitioner and experienced Supreme Court practitioner.

Join Goldstein and Michael Dreeben, deputy solicitor general at the U.S. Department of Justice, and Susan Block, professor at the Georgetown University Law Center, on September 9 for "Supreme Court Review and Preview" from 2 to 5:15 p.m. at the D.C. Bar Conference Center.

The course, sponsored by the D.C. Bar Continuing Legal Education Program, will feature an insider's look at the highlights, trends, and statistics of the Court's 2001–2002 term and the issues that will be before the Court in the next term.

"There are a number of hot-button issues on the Court's plate already, plus they are very likely to address affirmative action and campaign finance reform," says Goldstein.

Topics of discussion include the death penalty, First Amendment, and regulatory issues. In addition, the panelists will focus on the areas of federal power and state immunity, preemption, free speech, disability law, arbitration, and immigration.

The course is cosponsored by the judicial division of the Federal Bar Association and the D.C. Bar Litigation Section.

For more information or to register, contact the CLE Office at 202-626-3488 or visit www.dcbar.org/cle.

FCBA Hosts Career Night for Attorneys and Students

The Young Lawyers Committee of the Federal Communications Bar Association (FCBA) will be hosting a career night on September 19 from 6 to 8 p.m. at Hogan & Hartson L.L.P., 555 13th Street NW.

"In light of everything going on in the communications industry," says committee cochair Yaron Dori, "we think it's important for young lawyers to have an opportunity to be guided by those with more experience."

Dori, an associate with Hogan & Hartson, says since the industry is struggling, many law students and young attorneys are having trouble finding a job or the opportunity to network.

"The event," he says, "is intended to provide law students and new attorneys with career advice and an overview of the current employment landscape, as well as a chance to interact with senior members of the bar."

Law students and young attorneys pursuing a career in communications law would benefit from attending the event, Dori says, which will also include a panel

web happenings

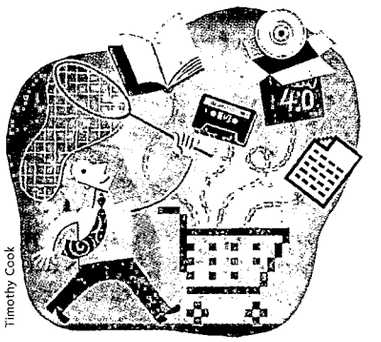

Timothy Cook

Just for You

The D.C. Bar's redesigned Web site, premiering this fall, will include a content portal just for lawyers featuring bar services, court information, disciplinary matters, and more. Attorney users will be able to navigate more effectively to the information they need without having to sift through public or general Bar content. The "For Lawyers" portal at www.dcbar.org also offers links to helpful legal resources, law libraries, voluntary bars, the legal career center, and membership information.

Read All About It

In this month's issue Charles Buffon, chair of the D.C. Bar's Special Committee on Multidisciplinary Practice, discusses the viability of lawyers and nonlawyers working together and sharing fees. Read the full text of the committee's report on this subject at www.dcbar.org/about_bar/comreports.html.

What's Your Opinion?

In our cover story Stephen Murdoch writes about the politics of judicial confirmation. Is ideology more important than qualifications in confirming a judicial nominee? Log on to www.dcbar.org/survey to voice your opinion.

Link of the Month

Keep up with trends in legal technology by visiting www.lawyerware.com to find listings of computer and software products for attorneys in a variety of practice areas. The site also offers advice on legal and business software, gadgets, hardware, and more.

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Judicature

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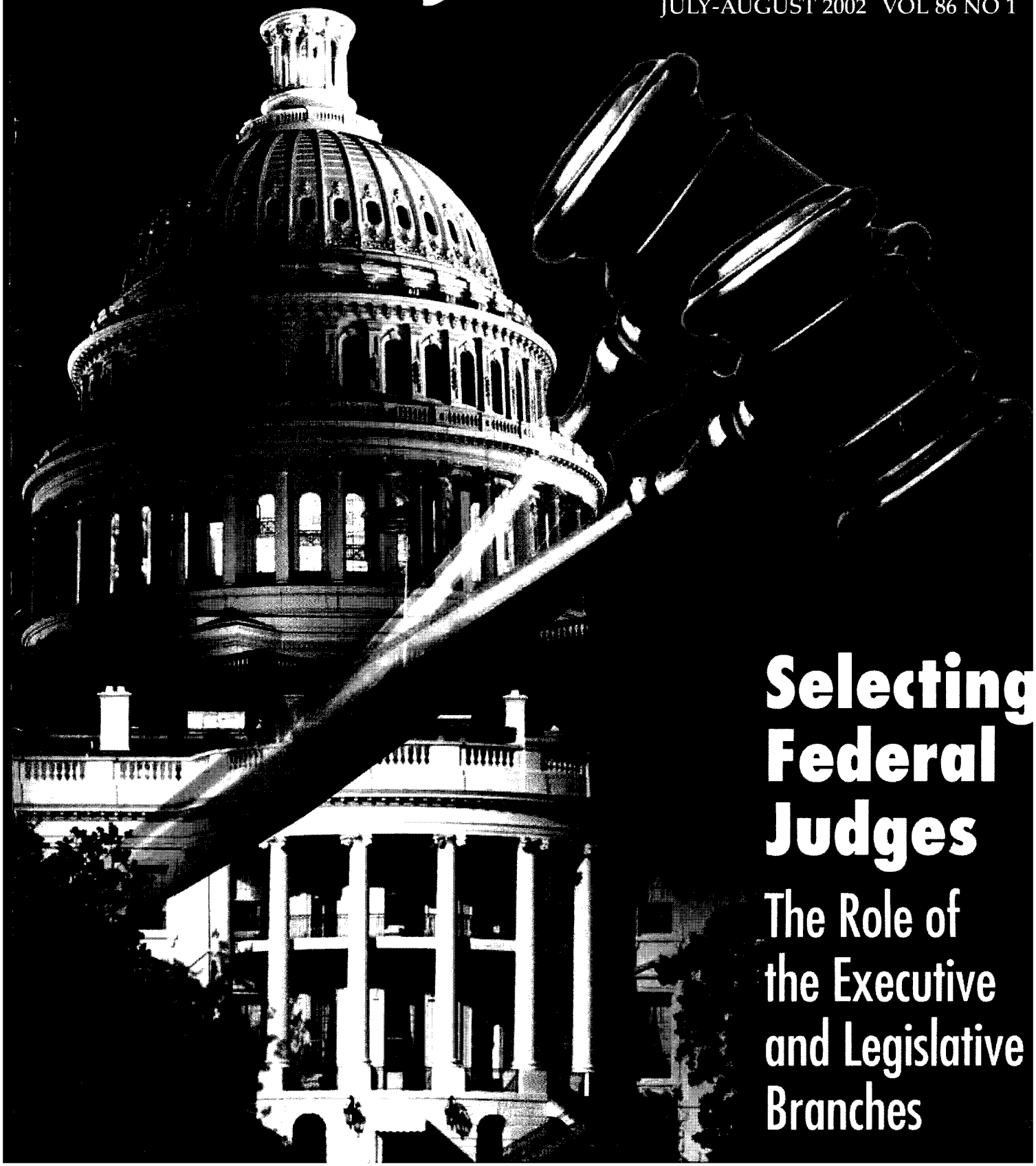

Selecting Federal Judges

The Role of the Executive and Legislative Branches

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Federal judicial selection

The selection and confirmation process has yielded a federal judiciary that has served the country well, and will continue to do so as long as the two political branches exercise some restraint and cooperation.

By Jon O. Newman



I suspect the problems of both presidential selection and Senate inquiry and confirmation are simpler than some people have made them out to be. I don't mean to suggest that there isn't room for legitimate debate about what's appropriate: should the executive branch take into consideration viewpoint ideology or should it simply select people based on their integrity, their knowledge of the law, their experience, and other neutral factors? However, I think that is a somewhat artificial choice.

***JON O. NEWMAN** is a senior judge on the U.S. Court of Appeals for the Second Circuit.*

It may be that 180 years ago, when a federal judge was primarily deciding technical admiralty, bankruptcy, and common law negotiable instruments cases, the judge's viewpoint was virtually irrelevant. But as long as the courts are on occasion going to confront searing issues as to affirmative action, the scope of the First Amendment, the tension between order and citizen rights in the criminal area, the issues posed by federalism, and the issues posed by separation of powers, it is certainly legitimate for any institution concerned with who federal judges are to cast an eye on general considerations of viewpoint.

When presidents look at such considerations, I think they are doing an entirely legitimate thing. And I don't think there is anything new about it. I know some people say, "Oh, it's gotten worse. The rejection of Judge Bork changed everything." I am not sure it changed everything.

Over the years, Republican presidents have wanted Republican nominees to the bench and Democratic presidents have wanted Democratic nominees. I do not think that was just a matter of rewarding the faithful. I think that was a surrogate for selecting people who had a generally compatible philosophical orientation with the administration that appointed them. I think it has been that way at least throughout the twentieth century, and I think that is perfectly legitimate.

What I object to, frankly, is when administrations, in the course of favoring a general philosophical outlook, mislead the public with labels that I think do a disservice both to administrations and to the judiciary. I think the easy rhetoric that, "I don't want activist judges, I want judges who practice judicial restraint," is oversimplified and misleading.

Two cases illustrate the point for me. There were two referenda on the West Coast, one in California and one in Oregon. The voters of California voted to block all affirmative action steps. The voters of Oregon voted to adopt an assisted-suicide law. A district judge in California issued an injunction blocking the referendum on affirmative action. He was bitterly assailed for being an activist. He was overturning the will of the people.

The judge in Oregon blocked a referendum, and thereby put a temporary stop to an assisted-suicide law against the will of the people of Oregon. Nobody accused him of activism. Apparently, whether you are an

This article is an edited version of an address presented on May 17, 2002 at the AJS symposium, "Selecting Federal Court of Appeals and District Court Judges: The Role and Responsibilities of the Executive and Legislative Branches."

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JAY MALLIN

A judge's view

activist or not in the area of blocking referendums depends on which way the people voted. It seems to me that labels like "activism" and "restraint" too often are subterfuges for reflecting whether a particular critic likes or does not like a decision.

The same with the easy label, "Are judges following the law, applying the law, or are they making the law?" You hear that a lot. It seems to me that is unfair to the judiciary. It suggests that half the judges are dutifully applying the law and the other half are making the law. It is not what happens. Anybody who follows the day-to-day business of the federal courts knows that.

If we have to decide the technicalities of a 10(b)(5) stock case, the technicalities of an antitrust ruling, copyright law, admiralty, or labor law, we are doing our level best in the trial and appellate courts to figure out what it is the Congress wants. If it is a statute, it is often very hard to know exactly what Congress wants or to follow the teachings of the Supreme Court. We are in the trenches. We are doing our level best to do it. It is just not true that half of us are applying the law faithfully and half of us are making it up.

I am not saying there are not some philosophical differences and that it does not matter to some extent what the life experience of the judge has been, and I think the president is entitled to take that into account. Let me defer for just a moment the question of to what extent and turn briefly to the hearing process.

The hearing process

When a nomination gets to the Senate, the senators have to give some thought to where they are along a continuum of inquiry. At one extreme is the direct confrontation: "Mr. So and So, how would you vote on a particular case?" That is one end of the continuum. At the other end is the most general, "Well, tell us about your experience, have you ever been convicted of a felony?" things of that sort.

My view on the legitimacy of the inquiry is very simple. I would draw the line right at the point where the prospective nominee is asked the specific question, "How would you vote on this case?" The reason I think that is an improper question is it totally undermines the adjudicative function. The judge, no surprise to anybody sitting in this room, is supposed to come to that next case without prejudgment, not necessarily without some views on the topic, but without prejudgment of the specific case.

If the judge has said at a Senate hearing or quietly to an administration before the Senate hearing, "Don't worry, you can count on me to vote this way on this case," that is prejudgment at its grossest form. Indeed, it is such prejudgment the judge probably ought to be recused if the case arises. Other than that question, however, it seems to me senators ought to be able to ask a prospective nominee anything, anything at all—to conduct a wide-ranging, searching inquiry about views.

Now, the fact that they ask does not mean the nominee must answer. A nominee can say, "Senator, I think that question gets too close to probing for how I would vote in a particular case, and I am not going to answer." Then, it seems to me that senator, the senators on the committee, and ultimately the full Senate have to make their judgment as to the senatorial prerogative. If the nominee draws the line too tightly and limits what the senators regard as legitimate inquiry into viewpoint, I think the Senate is entitled to reject that nominee.

However, senators might say—"Well, this nominee has answered a whole series of questions. We have gotten a pretty good look at this person's view on a lot of issues. We have asked about, generally, what does he or she think about the relations between the federal government and the states as an adjudicative matter? What does he or she think judges generally ought to do in the field of judicial remedies for discrimination, what does he or she generally think about the First Amendment—should it be interpreted expansively or narrowly? "The nominee has answered a series of questions, but balked on a few that are too specific." In that event, it seems to me, the Senate has a perfectly legitimate basis to make its assessment and can work its will.

Shading the judiciary

When the Senate finally works its will, the issue is to what extent should senators in their advice and consent capacity endeavor to insist that the judiciary reflect what they want and to what extent should they give the executive branch a considerable amount of deference and only reject those who are beyond some outer limit of acceptability? That is a controversial continuum that people have debated over the years.

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My view on that, again, is very simple. I think the people have elected a president and they have given the executive branch the legitimacy to shade the federal judiciary somewhat in the overall philosophical direction of the executive branch as to adjudicative matters. "Somewhat" is the key word. Particularly when the political branches of the government are divided, as they are now, I think both of those branches would do well to observe a certain degree of restraint as they decide how to fill the federal judiciary.

I do not think it is legitimate for the executive branch of either party to set out to populate the federal judiciary with people who have extreme views 100 percent sympathetic with the views of that branch, whether they are liberal or conservative. I also do not think it is legitimate for a Senate, whether conservative or liberal, to try to work its will in an extreme way such that the judiciary is populated by judges of their persuasion, or at least that they resist all judges who do not measure up to their particular philosophy.

In an era of divided government, the country has sent to the political branches an obvious message: "We are sort of in the middle." Well, if the country is in the middle in a democracy, then on the controversial legal issues of our time the judiciary ought to be in the middle. Indeed, the judiciary generally is in the middle. The judiciary in a democracy is in a real sense a balance wheel of the system. The political forces ebb and flow. Different parties get elected president. Different parties control the Congress. The federal judiciary has life tenure for a very good reason, that it will be a balance wheel and will not lurch violently one way or the other.

So, the executive branch gets to shade the philosophy of the judiciary a little bit by making four or eight years' worth of appointments, and the Senate gets to shade the philosophy of the judiciary a little bit by making it clear what sorts of people they will confirm and what sorts of people they will not confirm. That balance is useful.

Cool the rhetoric

The heated rhetoric that we have seen in recent years by both parties does a disservice to the country. It misleads the country as to what the judicial function is all about. So, my plea to both branches is cool the rhetoric. Take it down a few notches. Consult with each other. Recognize that the federal judiciary is the balance wheel in a democracy, that the executive branch is entitled to shade it somewhat towards the overall philosophy of the executive branch. The legislative branch, particularly in an era of divided government, is entitled to insist that the shading towards the philosophy of the executive branch be moderate and not extreme.

Once those ground rules are understood, it seems to me the process ought to work very smoothly. Now, that may be too much to hope for, politics being what it is. Nevertheless, I think there ought to be a cooling of the rhetoric, a recognition of the sensitivity of what is involved, an obligation to be fair to the American public, not to mislead them as to what the judicial function is about, but on the contrary to help educate them to the important function of the judiciary, giving candid recognition to the fact that it does matter who the judges are.

If it is an illusion to say half of us are making the law and half of us are applying the law, it is also just an illusion to say, "All that matters is did he go to a good law school and is he honest and does he have judicial temperament."

Philosophy matters, viewpoint matters, who we are matters. If it did not, you would not need judges at all. You would have a computer, you would put in the data, and it would spit out an answer.

Coming into balance

But that is not going to happen. Who we are and how we are picked and our backgrounds matter. Each branch is entitled to work its will to some extent. But in my judgment, just as we need to be the balance wheel of the democracy, I think the two branches need to themselves come more into balance, avoid the extremes, so that when the country says, "We are for divided government, we want to be in the middle," there is a recognition that extremism on the judiciary is also inappropriate. I think both branches can do this. I think, frankly, they do it tolerably well, despite the excesses of rhetoric. I think the judiciary for more than 200 years has been well served by the political branches. I think the quality of the federal judiciary, if I could immodestly say so, is quite high.

When we go around the world and talk to judges in other countries, we fully appreciate the high regard in which the American judiciary is held. We are always asked, particularly by emerging countries—and I have been talking with judges in a lot of foreign countries that are developing new judiciaries—"How can we develop a judiciary like yours?"

"Well," I tell them, "It isn't going to happen just by what you put in your constitution. We do it because of our traditions. We do it because of an active press. We do it because of mature political parties that by and large are not extreme. We operate in an environment of tolerance. All of those things contribute to a stable judiciary and a stable democracy. The selection and confirmation process are key ingredients in how stable that process is."

I think we have done very well—and when I say "we," I mean all three branches—over the years. Have we had some flare-ups? Sure. Have we made some mistakes? Sure. But the process has yielded a federal judiciary that I think has served the country well and will continue to do so, although some restraint and some cooperation between the two political branches is required. I think if the public demands that and the press keeps a close eye on things, they can expect the two political branches to cooperate. That is what is needed. I do not think the problem is that difficult. It just takes attention, care, a little subtlety, and avoidance of excesses, and then, I think, we will be well served by the results.

A historical perspective on federal JUDICIAL SELECTION

Although the tension between the executive and legislative branches over judicial selection is not new, today we are at a crossroads in determining how the process will work in the future.

By Elliot E. Slotnick

Federal judicial selection, at least for the lower courts, has been a relatively invisible focal point for public interest until recent years. This has been so despite the fact that judicial selection processes represent that very rare interface in American politics where, as is the case in some largely ceremonial occasions such as a State of the Union Address, all three branches of government come into play at the same time and enter the public stage at the same time.

***ELLIOT E. SLOTNICK** is a professor of political science and associate dean of the Graduate School at The Ohio State University.*

The contemporary tensions between the executive and legislative branches that we witnessed during the Clinton administration between a Democratic president and a Republican Senate and that we clearly are seeing between a Republican president and what is now a Democratic Senate during the first year and a half of the Bush administration are not completely new phenomena.

Indeed, debate at the Constitution's founding demonstrates that the relative roles of the executive and the legislative branches in this arena were a bone of contention among the framers. The Virginia Plan called for congressional selection of judges, while the New Jersey Plan lodged the power in the executive. Ultimately a compromise was reached, and the new constitutional language for "advice and consent" grew out of the language of the Special Committee on Postponed Matters, the Convention Committee whose workload included some of the most contentious and important matters in our country's founding.

Historically, and for the most part, choosing lower federal court judges, as distinct from Supreme Court justices, has been a relatively routine activity of American presidents. While, clearly, presidents have accentuated patronage historically, they did not necessarily accentuate policy in their appointment behavior. This has been particularly the case when those choices were initially suggested by, or at minimum received a clearance from, the senators from the president's party if there were any from the state in which a vacancy existed.

This clearance would be obtained through two mechanisms: across institutions, through senatorial courtesy exercised by the White House in conferring with the home state senators of the president's party; and within the Senate itself through the Judiciary Committee's blue slip. The blue slip has worked to ensure that home state senators of both parties, whether or not they are of the president's party, have some say when judges are being nominated from their state.

This isn't to say that policy motivations never entered into the

This article is an edited version of an address presented on May 17, 2002 at the AJS symposium, "Selecting Federal Court of Appeals and District Court Judges: The Role and Responsibilities of the Executive and Legislative Branches."

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president's choices. One can look, for example, to the Roosevelt administration and its efforts to support the New Deal through lower court appointments for some clear-cut evidence of these kinds of considerations. For example, in late 1936, William Denman, who was a Ninth Circuit Roosevelt appointee, wrote bluntly to the president, "The New Deal needs more federal judges."[1] In January 1937, three weeks before the unveiling of the court packing plan by the president, Roosevelt asked his appointment secretary about the potential candidacy of Sidney Mize for a district court judgeship:

"I want more information on this man as to whether he is a liberal or a reactionary. What sort of fellow is he?"[2]

Roosevelt received assurance from his assistant attorney general that he had, "looked carefully into the matter. I am convinced that Mr. Mize is a man of liberal views and would measure up in all respects to the expectations of the president."

Still, however, prior to the Nixon administration, policy considerations and/or ideological ones didn't often take primacy in lower court selection processes, both in the president's nomination behavior and in the Senate's exercise of advice and consent. Timely confirmation of virtually all presidential nominees was, in essence, routine and somewhat pro forma. Obviously, a good deal has changed in recent years, which of course brings us here today. I would like to explore some of those changes.

How it changed

For its part, the Nixon administration recognized the potential that judicial appointments, even those in the lower courts, perhaps especially those in the lower courts, could play in its policy agenda—in this instance, an agenda that stressed "law and order" and "strict construction of the Constitution" to quote the words of the administration.

Perhaps the most historically interesting "smoking gun" of the policy implications of judicial selection can be found in a seven-page memo written



Richard M. Nixon

by a then young Nixon aide by the name of Tom Charles Huston, a memo that Nixon himself endorsed. Huston wrote, and I quote, "Perhaps the least considered aspect of presidential power is the authority to make appointments to the federal bench, not merely the Supreme Court, but to the district and circuit court benches as well. Through his judicial appointments a president has the opportunity to influence the course of national affairs for a quarter of a century after he leaves office." Huston concluded that if the president "establishes his criteria and establishes machinery for ensuring that those criteria are met, the appointments he makes will be his in fact as well as in theory."[3]

After this memo was read by H.R. Haldeman and John Ehrlichman, it was sent directly to the president who in turn forwarded it to his Deputy Assistant Attorney General, Richard Kleindeist, who handled judicial nominations. There was a handwritten presidential notation on the memo, "RN agrees. Have this analysis in mind when making judicial nominations."

I think despite this memo it is a bit too easy to point to the Nixon administration as the historical point in time where the most significant changes took place in the nature of federal judicial selection. For one thing, I think the apparatus that was sought by Huston and the policy implications of judicial selection of which he spoke were not fully realized until the centralization of the judicial selection process that took place during the Reagan years in the White House.

For my part—and I think this is where my analysis gets off the track a little from the standard stories of this—I think the modern era of contentious politicized judicial selection politics can be traced to, perhaps surprisingly, the Carter administration. The reasons are many.

Selection under Carter

Framing judicial selection in the Carter administration, the Omnibus Judgeship Act of 1978 created 152 federal judgeships. This was the most ever handed at one time to a sitting president. Thirty-five of these seats were at the appeals court level. This unprecedented expansion of the judiciary did not go unnoticed by interested parties of every political stripe who recognized the policy role that these new judges would play well into the future.

Second, Jimmy Carter took actions that really struck at the heart of "business as usual" in judicial selection by establishing the United States Circuit Judge Nominating Commission. This was a set of 13 panels, one in each judicial circuit, with members appointed by the president who would prepare a confidential report for the president for each vacancy recommending the five persons best qualified to fill the judgeship.

While the identification of appeals court appointments has always been tied more directly to the president than to specific identifiable senators because, of course, judicial circuits cross state boundaries, it remains the case that there have been traditions of state seats on the circuit courts. And historically, overwhelmingly, the majority of replacement appointments for appeals court vacancies have, indeed, gone to judges from

1. Goldman, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 32 (New Haven: Yale University Press, 1997).
2. *Id* at 19-20.
3. *Id* at 205-207.

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the state in which the vacancy arose. So, senators often did have a personal stake in circuit appointments, and to many senators Carter's actions were seen as an unwarranted inroad on senatorial prerogatives of fairly long standing.

Making matters worse, from this kind of conflictual perspective, President Carter attempted to intervene in district court appointments as well—clearly, processes which were even much more closely tied to the choices of home state senators from the president's party. Indeed, he wrote a personal longhand letter to every Democratic senator urging them to establish similar nominating commissions in their home states for the selection of district court judge nominees. It was to this suggestion that Senator Lloyd Bentsen is alleged to have responded, "I am the merit commission for the State of Texas."



Jimmy Carter

Policy motivations

I think in the Carter administration there was a "stirring of the pot" of judicial selection processes that raised critical tensions in the balance between executive and legislative roles, tensions that continue with us today. Further, and I think as important as Carter's reforms and processes were, the president's strong personal interest in judicial selection was tied to some very strong policy motivations and substantive concerns regarding issues of affirmative action and the representativeness of the federal bench along racial and gender lines.

Not until the presidency of Franklin Roosevelt was the first woman appointed to a lifetime position on the federal bench. Harry Truman appointed the first African American to a lifetime appointment. Eisenhower did not name a single woman or black to a lifetime judgeship during his eight years in office. Some increases in judicial diversity occurred during the Kennedy, Johnson, and Nixon years, but they were by no means dramatic.

It was in this context that Carter's concerns about this issue were articulated in two ways, both of which ended up being controversial. First, in an Executive Order addressed to his Circuit Judge Nominating Commission, the president stated that, "Each panel is encouraged to make special efforts to seek out and identify well-qualified women and members of minority groups as potential nominees."

This strong and, frankly, previously unheard of push for meaningful affirmative action in judicial selection and the concern for diversity and representativeness among the president's nominees were not taken to kindly by many senators. Once again, the president wrote to each Democratic senator urging that they recruit women and minorities for the new judgeships and other vacancies. Indeed, sometimes, when names weren't forthcoming, the attorney general would literally send back the names and ask them to reopen the search.

In addition to a call for affirmative action, the president also ordained in another Executive Order that nominating commissions ensure that the candidate, and here was the kicker, "Possesses and has demonstrated a commitment to equal justice under the law." This was seen by many conservative senators as a euphemism for liberal judicial activism. As one senator on the Judiciary Committee told me in an interview at the time, "Fairminded? Equal justice? Maybe I am not picking up on the secret code, but I don't think I like what that means."

Interestingly and ironically, the president's open avowal of a substantive preference in his nominees even created tensions with people we would think were his "nominal friends." For example, Ted Kennedy, who you may recall chaired the Judiciary Committee in those days and was also a potential rival to Carter for the 1980 Democratic presidential nomination, authorized a Judiciary Committee questionnaire in which nominees were asked, "In what specific ways have you demonstrated a commitment to equal justice during your career?" Carter was, in effect, being criticized from the right for his substantive commitment in appointments, while, from the left, his feet were being held to the fire to make sure that his nominees actually met those very commitments.

Importantly, though, I think it should be noted that the Carter reform efforts did bear fruit. When Jimmy Carter took office, six women had been appointed to lifetime federal judgeships in our nation's history—Carter appointed 40 in four years. Similarly, while 33 ethnic minorities—blacks, Hispanics, and Asians—had been appointed prior to the Carter administration in the nation's history, 55 were seated during Jimmy Carter's four-year tenure.

Letting out the genie

Once this genie of avowedly open policy considerations in judicial selection had been let out of the bottle, and once an increase in the White House's political role in judicial selection, as distinct from the Justice Department's role in assessing the credentials of candidates increased, as it did during the Carter years, it would be very difficult to return to old ways.

In the wake of the Carter years, we were met by the two-term presidency of Ronald Reagan in which the policy agenda of the president and centralized White House control of judicial selection was clearly a major facet of the selection processes. Indeed, the Republican platform of 1980 pledged to award judgeships to those

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Bill Clinton

sharing conservative values. In the words of the platform:

> We pledge the appointment of women and men whose judicial philosophy is consistent with the belief in the decentralization of the federal system and efforts to return decision-making power to state and local elected officials. We will work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.

More recently, in the Clinton years, we witnessed the added tensions in executive/legislative relationships that divided government can bring about as Clinton's nominees met with unprecedented delay in the Republican-controlled Senate with, again, an unprecedented number of nominees not even being given a Judiciary Committee hearing or a subsequent floor vote.

The Clinton experience, however, presents us with a bit of an ironic twist. First, several articles in the symposium issue of *Judicature* on judicial selection in the Clinton years (March-April 2001) clearly documented that the president's nominees were all too often treated as if they were ideological zealots, while their behavior on the bench has demonstrated that they were quite moderate, actually the most conservative appointees of any Democratic president sitting on the bench today.

Indeed, I think it is fair to say that many of the Democratic party's natural constituents were somewhat frustrated with the decidedly non-ideological nature of the Clinton appointees and the processes that produced them. Nevertheless, President Clinton experienced unprecedented difficulties in getting his nominees confirmed because of ongoing tensions with the Senate majority about the appropriate balance of power in the appointment process. Again, this is a particular irony, since there is little evidence, unlike in the Reagan years, of the presidents seizing on judicial appointments as a major component of his policy agenda.



President George W. Bush

At a crossroads

So, it is this crisis in lower federal court judicial selection, and I think it is fair to label it a crisis, that brings us here today. We are, I think, at a crossroads in lower federal court judicial selection processes. Here, approximately a year and one half into one very atypical year and one half in the Bush administration, the shoe is now on the other foot—a Republican president and a Democratically controlled Senate. Appointment relationships are still in the process of being resolved, I think, and large questions are still being addressed about what the appropriate and relative roles of the president and the Senate, and in particular its Judiciary Committee, will be in these appointment processes.

It is in the continuing and emerging answers to these questions that I think we will find out whether the Clinton years were simply an anomaly in executive/legislative relations in this critical domain, or whether an era of unprecedented contentiousness and gridlock will be the newly institutionalized model that selection processes will follow. It seems to me that there are two alternative paths that could define the road ahead. One is premised on the lessons that we teach in our very first political science classes or that we learned in our first political science classes—what goes around comes around. The other is something I think we learned from our mothers—two wrongs don't make a right.

Despite a good deal of rhetoric from every political stripe over the past months, I am not sure we know quite yet which path is about to be followed because, at bottom, President Bush's first year and one half in office was so very, very different. There were some predictable givens at the beginning. Thus, for example, the process inherited the legacy of the mistreatment of Clinton's nominees. There was the reality of John Ashcroft, a lightening rod for partisan bickering, heading up the Justice Department. There was the legacy of Bush versus Gore and what some would argue was a tainted electoral victory. Of course, there was at first the specter of an evenly divided Senate.

In a situation that seemed like it could not get any worse for the president, it very clearly did. First, the Democrats took control of the Senate, and all legislative work stopped as the struggle for organizing the body proceeded to center stage. Then the tragedy of 9/11 struck, and judicial selection matters took a back seat at the Judiciary Committee to those dealing with national security and terrorism. The presence of anthrax closed down a Senate office building.

In this context, it seems to me, the actual record of judicial confirmations in President Bush's first year and one half is really somewhat difficult to characterize. For some it has been a glass that is half empty, and for others it is half full. Clearly, there remains much to be said and much to be written about where we are today and where we are heading.

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JAY MALLIN

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Selecting Federal Judges

The Role and Responsibilities of the Executive Branch

An edited transcript of a discussion at the AJS symposium "Selecting Federal Court of Appeals and District Court Judges" held on May 17, 2002 in Washington, DC.

The participants

Moderator

Nina Totenberg, Legal Affairs Correspondent, National Public Radio

Panelists

Eleanor D. Acheson, former Assistant Attorney General, Office of Policy Development

Walter Dellinger, former Assistant Attorney General, Office of Legal Counsel

C. Boyden Gray, Legal Counsel to former President George H. W. Bush

Brett M. Kavanaugh, Associate White House Counsel to President George W. Bush

Alan Charles Raul, Associate Counsel to President Ronald Reagan.

Nina Totenberg: When Nixon was president there was a formula. If there were two Democratic senators from a state, the Democratic senators got a substantial portion of the district court judgeship selections. It was understood that when the president picked his or the senators picked theirs, neither side would veto the other's choice unless it was "personally obnoxious," and that usually meant the person had done something personally, grievously terrible to the other side. The system did not work badly.



Nina Totenberg

My question is, is there any possibility of having politics be the solution instead of the problem again, or are we too far down this road? Is federal judicial selection simply going to be a war like the War of the Roses that only ends when everybody is exhausted?


Walter Dellinger

PHOTOS BY JAY MALLIN

Walter Dellinger: I think we need a drastic solution because of the downward spiral of delay and destruction and mutual recrimination that has been going on. I have a proposal. The Democratic leadership of the Senate would develop a short list of truly distinguished scholars and practitioners they would like to see considered for appointment to the courts of appeals. Some of those persons would be nominated by the president and added to the list of those the president had already submitted to the Senate; all of the nominees who met proper professional standards would promptly be confirmed.

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By replacing the politics of subtraction with the politics of addition, the federal bench could not only be brought back to full strength, but even invigorated by the inclusion of distinguished men and women from each party. My notion is that, to give a simple example, if you have the D.C. Circuit with two fine nominees and three vacancies, why have a battle over which one is confirmed? Why not add a distinguished Democrat and confirm all three?

The competition would be a race to the top, because you would want your list of nominees to be so impressive that the neutral gatekeepers of our public discourse in the editorial world would say, "What a marvelous list of nominees, this group of truly outstanding practitioners, lawyers, and judges."



Brett M. Kavanaugh

I sometimes worry that there is almost a sport in Washington where defeating a nominee or battling to confirm one seems more fun. It seems to me this would be a way to come together.

Totenberg: Brett, you work at the White House. What do you think of this idea?

Brett Kavanaugh: Well, the Constitution obviously assigns the power of nomination to a single person, the President of the United States, and so it should be up to the president to decide who a particular nominee is in consultation with the Senate. In terms of the race to the top, I think President Bush's nominees at the circuit court level have been a race to the top. I think they are notable for their excellent qualifications.

A year ago, there was a lot of talk about the ABA rating process, and Democratic senators wrote to the president, stating that the ABA was the gold standard for evaluating judicial nominees. Well, a year later, all of the president's circuit nominees who have been rated so far have been rated well-qualified or qualified by the American Bar Association. I think there has been a race to the top with the traditional constitutional process.

But also, it bears emphasis that President Bush, when he announced his first 11 nominees on May 9, 2001, at a time when the Republicans controlled the Senate, nominated Roger Gregory to the Fourth Circuit Court of Appeals. Gregory had been a recess appointment of President Clinton, a nominee of President Clinton who had not received a hearing.

President Bush, at a time when the Republicans controlled the Senate, reached out and tried to do something that would show he was trying, as he put it in his speech that day, "to rise above the bitterness of the past" and show that he wanted to set a new tone with respect to judicial appointments. Another of the nominees that day was Barrington Parker, a superb nominee for the Second Circuit Court of Appeals, who was appointed by President Clinton to the district court and then nominated to the court of appeals.

A year later, eight of the 11 still have not received hearings, despite their qualifications. Judge Gregory has been confirmed, Judge Parker has been confirmed, and one other, but the eight others who are really notable for their excellence still have not received hearings. President Bush has taken a step that President Clinton and other presidents have not taken, as he put it, "to rise above the bitterness of the past."

Totenberg: There are a significant number of vacancies on the Sixth Circuit. The Democratic senators from Michigan—who have been outraged because their nominees, the Clinton nominees, didn't get a hearing for years—have said that they are going to block at least the Michigan appointments unless there is some accommodation with them.

Senator Leahy offered a deal to the president personally, as I understand it. He said, "You pick either of these two women, you name one of them, whichever one you want to the Sixth Circuit, give the other one a district court appointment, and we will move on them. The logjam will be finished."

The president, as I understand it, looked at his aides and said, "Why can't we do this?" But it has not been done.

If we cannot do deals like that, what hope is there, Boyden Gray, for any sort of movement?

C. Boyden Gray: Well, I am at a disadvantage because I do not know the details of that deal. I suppose that deal, standing by itself, would unlock the logjam, and I would have to ask Brett to think about it. But I do not think that is what is at stake. Senator Schumer has made it very, very clear that he is going to impose a philosophical, ideological screen. He has been very, very candid about it.

What the Senate Judiciary Committee is doing is totally unprecedented. You can play around with the statistics all you want. The fact of the matter remains that over the last three decades or so, every term has produced about 190 confirmed nominations, and that held for Clinton. He got only five less, total, than President Reagan. The number of judges left unconfirmed were significantly less at the end of Clinton's term, and the number of judicial vacancies significantly less than the Democrats imposed on us when we left in 1992.

The last year or so of a presidential term has always been sort of a graveyard as people begin to think, "Well, why don't we just stop things?" The Republicans did this to President Carter, but even then reason pre-

vailed and two judges got through,

What people have done with the numbers now is to try to make it look like there is some new crisis. They take data from the last year of Clinton and compare it to President Bush's first year and a half. That is just apples and oranges. At this rate, President Bush will never get his appellate nominees confirmed.

You can play a game with numbers. President Eisenhower did not appoint any women. But how many did Truman appoint or nominate? How many did FDR? Women were not going to law school in those days. Of course it is contentious these days, but I do not think there is a growing crisis.

Eleanor Acheson: I do not want to get into the numbers thing because I do share the view that numbers can be used to say anything. I want to stick with Walter's thought, Nina's question, and make a minor correction or at least an addition to what Brett said. In the Clinton administration we did try to make arrangements and accommodations with Republican senators. It became a matter of necessity when we reached the point in a number of quarters of the country where we were looking at states and circuits with lots of Republican senators, some of whom absolutely refused to consider any person put forward by President Clinton at the district or circuit court level. We could not even engage them in dialogue.



C. Boyden Gray

One factor missing from Elliot Slotnick's look at the Clinton administration that nobody really can overstate, but it was there, was the real animosity towards the president that permeated certain Republican members of the Senate and certain quarters. There were people who would not even return phone calls from the counsel to the president, but there were others who really understood how important it was for there to be judges in their circuits and on their district courts. As a result we ended up with a number of our people getting through.

One of the things I know that is under discussion—Walter did not mention this as part of his idea but there are people on the Hill and some other groups that are talking about this—is maybe we should look circuit by circuit and educate ourselves and the public about who is on these circuits. How long have they been there? What types of cases tend to come before them? Obviously there are going to be many that are in common all across the country, but parts of the country have very different types of cases. What are the needs of the court?

In my job I heard regularly from chief judges on a very non-ideological basis, from people who were chief judges appointed by Democrats to circuit courts and from judges like Carolyn King in Texas who was appointed by a Republican and is a Republican. They know what their courts need. Her view was, "Gee, the president may be interested to know what I think."

Looking at who is there, looking at what the judges say they need, looking at the types of cases would not be a bad idea. I do not know if that is going to happen at the Senate. I certainly do not think it should happen to slow down the nominees that are there or to an unfair consideration of those nominees, but I think it would be a very useful idea.

The business of accommodation, as Walter suggests and particularly in the context of what Jon Newman was talking about earlier with the divided country and its views about these things and people being so much in the middle, is a very good idea. Whether it can be done politically is quite interesting.

Totenberg: Mr. Raul, my question is a factual one, can a Republican president these days in fact make major accommodations with the Democrats on the question of judges?

Alan Charles Raul: I think the answer, as a factual matter, is yes. As Brett Kavanaugh mentioned, two judges, Roger Gregory and Barrington Parker, were nominated by President Bush as carry-overs from the last administration. Of the circuit judges who have been confirmed, two of them were appointments or nominations of President Clinton.

With regard to the race for the top, if you read what Walter Dellinger has said and perhaps others in this room about President Bush's circuit court nominations, I think you would conclude that the best and the brightest really are being nominated. We are not talking about ideological appointments. We are talking about superquality appointments.

If you think of excellence as an accommodation, then the President has made an accommodation. We are not talking about ideological hacks; we are talking about some of the most outstanding lawyers in America. If that is not what the president is supposed to do, then I think we need to reconsider what the right roles and responsibilities are. When the best lawyers in the country cannot get hearings and cannot get confirmed, there is a problem with the system, but it is not in the White House. Having said that, I think accommodation, consultation, and a cooling of the rhetoric, as Judge Newman suggested this morning, is very appropriate, and not just because the country is evenly divided or

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maybe in the middle.

Going to Boyden Gray's point about the mainstream, what judges that have been appointed or nominated by this president are not in the mainstream? I think we have to revisit our view of the mainstream. I think this is an area where the media can help in not permitting extremist rhetoric to go unchallenged. The appointments that President Bush has made are very much within the mainstream. I doubt that anything but a very small percentage of the country would be uncomfortable with the kinds of people and the likely judicial decisions of appointments this president has made. I will be controversial and say that I think that is largely true of the immediate past president as well.

The "mainstream" is a fairly elastic concept. That does not necessarily mean the people who I view as in the mainstream are those who always agree with me, but rather judges who are making decisions that are not unreasonable, who are not deciding on the basis of illegitimate principles.



Alan Charles Raul

Let me go back to accommodation/consultation, which I do think should be part of the process. There ought to be some informal consultation. But with respect to Walter's model it does put one in mind of the FEC model, where one judge goes up from the Democratic side, one goes up from the Republican side, and you have very much a Democratic seat and a Republican seat on the Federal Election Commission. With all due respect to the excellent people who are appointed there, it results in a very political process where the voting tends to be based on the principle of where you stand depends on how you got your seat.

Totenberg: But if you do not like the process now, if it is not working now, what are you going to do to make it work better? Just saying "consultation" does not get you anywhere.

Raul: There is another truism besides Professor Slotnick's aphorisms of "What comes around goes around" and "Two wrongs don't make a right." The third in Washington is that "Prerogatives are not easily yielded."

When I was in President Reagan's Counsels Office working on judicial selections some of our fiercest battles were with same-party Republican senators on district judges, where President Reagan sought to institute a very controversial rule. He insisted on receiving three names from Republican senators for district court nominees. We tried to enforce that rigorously. We had some senators who would say, "If President Reagan wants three names, I'll give him three names, "Smith, Smith, and Smith." Ultimately, Judge Smith got appointed.

Dellinger: I have praised some of President Bush's nominees. But let me make it clear that I do not think that group of nominees reflects a cross-section of the best of the practitioners and law professors in the country. And no one would suggest that this is a cross-section without regard to party or ideology, even given the quality. It seems to me that what has happened is that the ambiguous, uncertain standard for senators has put us in the worst possible world. It is because of the uncertain standard that the process turns so sour. I would actually prefer one of the two extreme alternatives. One would be what I think ought to be the role with regard to the president's Executive branch nominees, which is that they all ought to be confirmed, absent some extraordinarily unusual event.

With regard to judges, either adopt that mode, which for lower court judges was historically the standard, or adopt the approach that the Senate has a co-equal role if they have the political mandate of having a majority and they simply ought to say, "I don't agree with this judge's philosophy. I think that was involved in his selection, so I am going to vote no." That would be a workable system without a lot of muss or fuss.

What do we have instead? We have a vague sense in the Senate that you can vote no for corruption or incompetence or views so extreme that they are outside the mainstream. Instead of simply saying "I don't agree with Judge X and his philosophy and I don't want to see him promoted," you have to go all out to show that he is some kind of terrible extremist in order to justify a no vote. That it seems to me is the worst place for the standard to wind up, that you have to justify a no vote.

Totenberg: It has always been that way, Walter. Abe Fortas was opposed for a variety of reasons and eventually forced off the bench because of corrupt conduct, but do not kid yourself about the real reason that he was opposed. He was opposed because of his views.

Dellinger: Always being so does not make it right. In some ways, in the nineteenth century the Senate seemed more free to vote no. One of the things we have to remember when we talk about the recent issues

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over confirmation, how many nominees do you think were rejected for the Supreme Court in the nineteenth century as compared with the twentieth century? In the twentieth century, one out of 13 nominees was rejected by the Senate for the Supreme Court. In the nineteenth century, it was one out of four. Five of Tyler's six nominees to the Supreme Court were rejected.

Totenberg: We are not talking about the Supreme Court.

Dellinger: I understand. I just want to say that there is a history here of a more active Senate role at that level.

Gray: I want to repeat my belief that this is new. Senator Schumer has been very candid that he wants to assert the right as one member of one committee to determine who goes to the floor. This is unprecedented.

Totenberg: You do not think John Ashcroft did that when he was on the committee?

Gray: I deny that Senator Aschcroft exercised the role of determining who would go to the floor.

Totenberg: You would deny that he blocked hearings for people, that he blocked votes for people, he and Senator Sessions and Senator Kyl to some extent on a fairly significant scale? The irony here to me is that when you talk to people off the record as a reporter, they mainly say that if it were left up to Orrin Hatch and Pat Leahy they could get the majority of these people through with relative ease.

Gray: All I can say is that I believe most of Clinton's appellate judges in the first two years were confirmed. We are at the stage now in the first year and a half of President Bush where he has gotten less than 30 percent confirmed.

Kavanaugh: I think the debate right now is why there needs to be a change in the process. A year ago President Bush, when announcing the first group of nominees, specifically said "I want to move forward" and said "every judicial nominee deserves a prompt hearing, a fair vote no matter who lives in the White House and no matter which party controls the Senate." He was setting out an approach to the judicial nomination and confirmation process that he thought and still thinks and has repeated many times should last no matter who is president; namely, let's get a timely hearing. There is simply no justification, in our view, for eight of the first 11 circuit court nominees to wait a year for a hearing. That is unprecedented.

Totenberg: I have recently looked at these numbers. I think it is disgraceful, but I do not think it is unprecedented.

There is no justification for eight of Bush's first 11 circuit court nominees to wait a year for a hearing.

—Brett Kavanaugh

Kavanaugh: In the first two years of the last three presidents, at least 85 percent of their circuit nominees were confirmed; we are at nine of 30. That is getting back to the numbers. I think, as a matter of process, there should be a timely hearing and a fair vote. As a matter of substance, a president should seek people of excellence, people of distinction, people who have wide bipartisan support in their home communities. I think President Bush's nominees will stand up. We invite more scrutiny of the nominees, of their records, of their support. They will stand up to it because they are superb nominees who have the kind of bipartisan support that shows they will be excellent judges.

Acheson: I want to make sort of a process point, but it goes to some of the things that Brett was just talking about, and that is this issue of scrutiny. I think that President George Bush and his team came out working very hard. It clearly was a priority of the administration. They were certainly ahead of where we were in the Clinton years not because it was not a priority, but I think the discipline was there in the Counsel's Office. Working very hard to get nominees up there is really excellent and to be commended.

The one thing I would not commend is that I think the administration does itself no favor by not seeking absolute full disclosure of every last living thing about a candidate. There have been a few hearings that have suggested that the internal work in that regard has not been good. People have been caught unawares, they have not been as demanding of their nominees as they should, particularly for circuit courts.

Similarly, the Senate, particularly if it has a clue that the administration may not be doing this efficiently, needs to work very, very hard to get the resources that it needs and give itself some reasonable amount of time to look through everything there is about these people. I think that will benefit the process, it will educate the senators, it will educate the public, and it is much fairer than some of the things that we have seen that have bumped through already this year. I think everybody who has really been tested by the people who are nominating them and get nominated under a process that has full scrutiny and lots of information out there should get a hearing.

The one process point should be, I think, that the committee really needs to set itself a time limit and tell the White House, "It is going to be a month for this person, because we know what the record is, and we think we can get through it. Everybody will know it, and then we can have a vote." And it may be six

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months for this person because they have 15 boxes or 3,500 boxes or whatever it is that need to be reviewed and read.

Another point, I do not believe that what Senator Schumer is doing is different than what happened before, at least in the experience that I had over eight years. Clearly, everything changed from the point of view of the activities of the committee after the elections that brought Senator Ashcroft, Senator Sessions, Senator Kyl, Senator Dwyer, and Senator Abraham to the Judiciary Committee. Senator Thompson was there, but he was not part of that group which was sort of a tag team giving us a lot of trouble and taking turns on candidates. It was very obvious.

I am not sure it was exactly as crisply ideological as Senator Schumer has said he is going to conduct himself. I think a good part of it was simply an obstructive move. There were some people for whom it worked. We ultimately got a lot of people through. I think that should not be done by anybody. I think that the Democrats in the Senate are trying to figure out—and I think they have been way too slow about it—a fair way to consider these people. I think that is what is going on now.

Totenberg: The irony is that in the years when the Republicans controlled the Senate and Mr. Clinton was president there was a very deliberate idea that filling these slots was not really that important. Do not challenge me on this one, because I have kept the tape. I have got the tape of Trent Lott saying, "Why should we confirm more judges? Nobody wants more judges." Now their view is different. My view is it should have always been different. These are very important positions.

But, as you have heard here today, there is an enormous amount of, I think, defensiveness on the part of Republicans and—how should I call it?—calm reasonableness from the Democrats because all they can hope for is accommodation. They do not have any real leverage except blocking people.

My question once again is how do you get out of this box? Walter came up with an idea but let me ask this of the Republicans—don't spew numbers at me again because I can tell you, for example, based on the numbers that the American Judicature Society has compiled, that President Reagan had more than 85 percent of his appeals court nominees confirmed and that President Clinton had someplace in the low 60s, I think. Or, I could tell that in the first year of the Hatch chairmanship the Republicans confirmed eight courts of appeals nominees compared to I think it is now 10 nominees that have been confirmed by the Democrats. These are meaningless, just as meaningless as yours.

Raul: First, we need to remember that there is nothing unpredictable about it. Delay and political controversy with judges is strategic—today and it was before. Not to decide about a judge is to decide, that is to say, to keep that spot vacant so that the president, the incumbent president, does not get to fill it up with nominees reflecting his point of view. It is not just keeping the vacancy, however, but also galvanizing political support.

It is perhaps unrealistic to believe that either party is going to give up the opportunity for its political supporters to make the kind of fund raising and political hay that they can about judges. So, it is in the interest of both sides to cast the nominations as vastly more extreme than they are. But I think out of the seeds of what Walter suggested there may be some way out of the quagmire where the political, strategic, and tactical interests of both sides are so divergent, to come up with a set of principles that would work today and would work in the future because, as Professor Slotnick said, "what comes around goes around."

You have to make people see a political advantage in being more accommodating and pay a political price for being unaccommodating. That Michigan senators can just not let any hearings go through and the Sixth Circuit is half empty ought to seem unacceptable to a lot of people. But if you take what Ms. Acheson said about seeking an agreement on time frames and time lines, a political advantage can be gained by appearing to be, or perhaps in fact, being a statesman.

Leading members of the Judiciary Committee could say that they are going to seek to advance their own political fortunes by being statesmanlike and come up with a set of principles, timing principles, perhaps even informal consultation principles that would be in effect for years and make it a timing issue. Lawyers often try to turn intractable problems into procedural issues because people tend to coalesce more easily around procedures than on substantive principles.

Gray: I disagree slightly with Alan. This is a political thing, and it is probably going to get resolved by a backroom deal where they resolve something in the Sixth Circuit. One of the difficulties we have now is the Senate does hang in the balance, and a lot of game playing is going on I am sure. At least if I were a senator, a Democrat, it is probably what I would be doing.

I do not see President Bush being the first president to say, "Okay, I will let the Senate Judiciary Committee, if held by the party of the other side, have one nomination for every one I make." I just do not see that kind of thing.

Totenberg: Well, he would not be the first, but I agree with you that he probably won't do it.

Dellinger: May I say just a word for politics? There is a positive thing to be said about politics. "Judicial review," as Alexander Bickell once said, "is a variant institution in a country that is basically a majoritarian democracy."

A president is elected by the people of the United States. Judges serve for life. For how long would it have been tenable if judges had been able to select their own successors? It is an appropriate role for politics, which in this country is the way we govern ourselves as a community, to play a role in the selection of the kinds of people that are going to

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have life tenure. It is an appropriately limited role, because it is the moment of politics before life tenure, which provides independence in terms of deciding cases.

You ought not let, as Judge Newman said, the politics of that moment extend forward in time as you would if you asked for a commitment on cases. Surely in a democracy it is appropriate that there be some role for the political branches in influencing the kind of people who are to serve. I think on that we agree across administrations. My proposal is that we try to turn more to the politics of addition rather than the politics of subtraction. Let that be the arena for debate rather than the politics of elimination and destruction.

Totenberg: Let me just switch this around for a second. Every time a president agrees to something, of course, it becomes a precedent for other senators to want the same thing. For example, the two Democratic senators from California got an agreement to have a screening committee to pick district court nominees that is evenly divided between their screeners and the Republican screeners. The names get sent to the White House without being in any particular order, and neither party has real leverage in these picks.

I suspect that the White House agreed to this and the Democratic senators agreed to this because they were in desperate shape for getting more district court judges in California. But of course other senators then want the same thing, particularly where there are two Democratic senators in a state.

Let me ask you, Eldie, what is a president to do if he knows that every time he makes such an arrangement his feet are going to be held to the fire the next time he wants to exert and keep his presidential appointment prerogatives?

Acheson: Well, the word has been used—politics, politics, politics. Boyden addressed it in one context and Walter just made a case for it. California is California. It is its own unique thing. There are probably people in the White House saying to the president, "Oh, my God, don't do that. It will be the end of the Republic as we know it."

I am sure there are other people in the White House who said, "God, what a brilliant idea. We can turn this around politically and use it. You know, we will be the good guys. We are going to be filling seats in California and nobody can be out there complaining about how we are not nominating the right kinds of people for California."



Eleanor D. Acheson

Maybe we are losing something, but we are also winning something. I think a couple of things are going on. I think this process has become, maybe not more political or politicized, but, as was implicit in Judge Newman's remarks, to the courts are coming the social questions of our time. That happened but in a very different context in the nineteenth century. It was all about economics and railroads and things like that.

Now you have a situation where great social questions of our time are being put to the courts. Today, everybody can know everything about not only who is being nominated, but what they are deciding, thanks to the media. I think that is a very important thing. It has moved from being sort of an outlier to something that people talk about in presidential elections, not just about Supreme Court candidates, but about circuit and district court candidates. The whole thing is freighted with politics at every level.

An operating principle for us, certainly, and I assume it is the same in this administration, is you do not have to do it the same everywhere because there is a different political calculus in other jurisdictions, and you are met with different kinds of situations.

It may be that in the work of Senators Feinstein and Boxer and the White House, everybody should be credited. The arrangements made, and some of the arrangements that future presidents make, will in fact begin to lay a groundwork for doing what should be done. Maybe it will start happening more than not.

Totenberg: Let me conclude this on a desultory note. As somebody who has covered judgeships for about 30-plus years and has always found it fascinating and important and tried to get people interested in it I regret to say that in the end you are preaching to the choir, and that there are relatively few choir members.

I give President Bush a lot of credit for trying to raise the profile on this issue, but I do not hold out much hope for his success. In the end, the people who care about this, care about this. The rest of the folks, it is not that they do not care, it is that they care about other things much more.

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POLITICS, PRIVILEGE & POWER

The Senate's role in the appointment of federal judges

The scope of the Senate's role in judicial appointments under the Constitution is unclear, and that role is complicated by fundamental changes in American political and institutional arrangements since the framing.

by Stephen B. Burbank

The Senate's role in the appointment of federal judges is set forth in Article 2, Section 2 of the Constitution:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the supreme Court, and all other Officers of the United States.

There are obvious limits to the guidance that this provision can provide when one seeks, in 2002, to determine how the Senate should exercise its constitutional responsibility. Even if we could recover with confidence the original understanding of the framers and ratifiers of the Constitution, the question would remain whether that understanding has any legal or normative force today. No such confidence is warranted; the Senate has the last word on the law, and normative arguments confront the reality of contemporary politics.

The text of Article 2, Section 2 is indeterminate as to the proper role of the Senate in giving "Advice and Consent." Moreover, there was relatively little attention given to the Senate's role during the Constitutional Convention and in the Ratification Debates. There is something there, if not for everyone, then at least for both those who would confine the Senate's role to a consideration of professional qualifications, character (including temperament) and (perhaps) general attitudes about the Constitution and law, on the one hand, and those who argue that the Constitution envisions a broader and deeper inquiry, including consideration of an individual's "ideology," on the other. Part of the problem is that the same individual may well have uttered apparently inconsistent views at different stages in the formation of the Constitution.[1]

During most of the Convention, the appointing power lay either with the Congress as a whole or with the Senate, and attempts to repose the power with the Executive alone were defeated. Indeed, late in the process, the delegates rejected a proposal much like that ultimately adopted. It has been persuasively argued that this reversal was due to a willingness to compromise among delegates from small states once they had won the "Great Compromise," which gave their states equal representation in the Senate.[2]

This history, including the role of the "Great Compromise," casts serious doubt on arguments for a narrow Senate role as a matter of original understanding. For, apart from the Senate's exclusive role in the penultimate draft of the Constitution, state (and regional) interests were in an important sense the politics of the late 18th century, and it is pretty clear that the framers understood that senators would and could appropriately pay attention to such matters in considering appointments.[3] In addition, it was not long after the Constitution came into effect that the Senate rejected a judicial nomination (of John Rutledge in 1795) for reasons that are political even by more modern standards.[4]

Even if we could with confidence recover the original understanding as to the nature of the Senate's role, one could fairly ask whether we should care. This question has two dimensions. The first has to do with

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1. *See, e.g.*, Gerhardt, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 15-38 (2001); Gauch, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337 (1989).

2. *See* Gauch, *supra* n. 1, at 341-42, 346-50; Wolfe, *The Senate's Power to Give "Advice and Consent" in Judicial Appointments*, 82 MARQ. L. REV. 355, 355-56 (1999). *But see* Gerhardt, *supra* n. 1, at 27 (arguments to that effect during ratification process "slightly overstated").

3. *See* Gauch, *supra* n. 1, at 353-58.

4. *See id.* at 358-62; Gerhardt, *supra* n. 1, at 51-52. According to the Senate's web page, "[i]n rejecting Rutledge, the Senate made it clear that an examination of a nominee's qualifications would extend beyond his personal qualifications to his political views. Those who differed substantively from the majority of senators could expect rough going." Learning About the Senate/Senate Briefings/Nominations, <http://www.senate.gov/learning/brief_3.html>



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the larger question, much disputed by law professors and others, of the value of various interpretive approaches to the Constitution. In seeking to answer *that* question one must confront fundamental changes in American political and institutional arrangements since the framing, including the development of political parties and changes in conceptions of law and of the judicial function.

The second dimension has to do with the fact that, as a legal matter, the role of the Senate in the appointment of federal judges is a "political question," insulated from judicial review.[5] That does not mean this question of constitutional interpretation is not properly a matter for sober reflection, including in particular by members of the Senate. Rather, it means that the Senate bears ultimate responsibility for the wise formulation and exercise of the power conferred.

As someone who is not allergic to originalism (as long as it is part of, and does not exhaust, the interpretive repertoire), I have come to believe that it yields the same answer to this question as less historically based approaches. That is because of changes in attitudes towards law and the judicial function, and hence towards the qualifications that suit a person for judicial office, as well as towards courts as instruments of policy. Thus, in seeking to provide the "security" to which reference was made at the time of the framing of the Constitution,[6] a responsible senator should have in mind both current conceptions of the judicial function and the purposes of the president in making a particular nomination.

A short history

Many students of federal judicial appointments divide the history of the Senate's role roughly into three broad periods: the 19th century, 1900-1967, and 1967 to the present. This is an artificial division that is driven by the number of Senate rejections of presidential nominations and by the fact that interest has centered on Supreme Court appointments to the exclusion of the inferior federal courts. According to the story based on this view, the Senate was not shy to reject federal judicial nominees, including for partisan political reasons, in the 19th century, was remarkably restrained during most of the 20th century, and has reassumed an active posture during the last 30 years or so.[7]

There may be historical studies of appointments to the lower federal courts that would enable us to gauge the plausibility of this standard account, but I have not come across them. I am doubtful, however, that, whatever its descriptive power as applied to Supreme Court nominations, the standard account well describes the history of the Senate's role as to appointments to the inferior federal courts.

Thus, it may be, as various commentators have suggested, that changing attitudes towards courts (e.g., the triumph of both judicial review and judicial supremacy), the ascendancy of lawyers in the Senate, and the prevalence of unified government all contributed to the greater acquiescence to Supreme Court nominations during most of the 20th century. A jurisprudential climate that enabled both presidents and courts to mask policy in first principles may have also played a part during the first half of that period.[8]

Yet, when the Senate considers a nomination to the Supreme Court, it is engaged in an act of obvious national importance, attracting substantial public interest, and its members therefore must be careful at least to seem to act responsibly. Appointments to the lower federal courts have not, for most of our history, engaged remotely similar public interest. Nor as a historical matter has the Senate played the same role in considering nominations to those courts. Indeed, apart from changing practices over time (e.g., nominations were not referred to a Senate committee until 1868), it is misleading to talk about a unitary "role" of the Senate in giving advice and consent to federal judicial appointments.[9]

Rather, it appears that the Senate plays and has played quite different

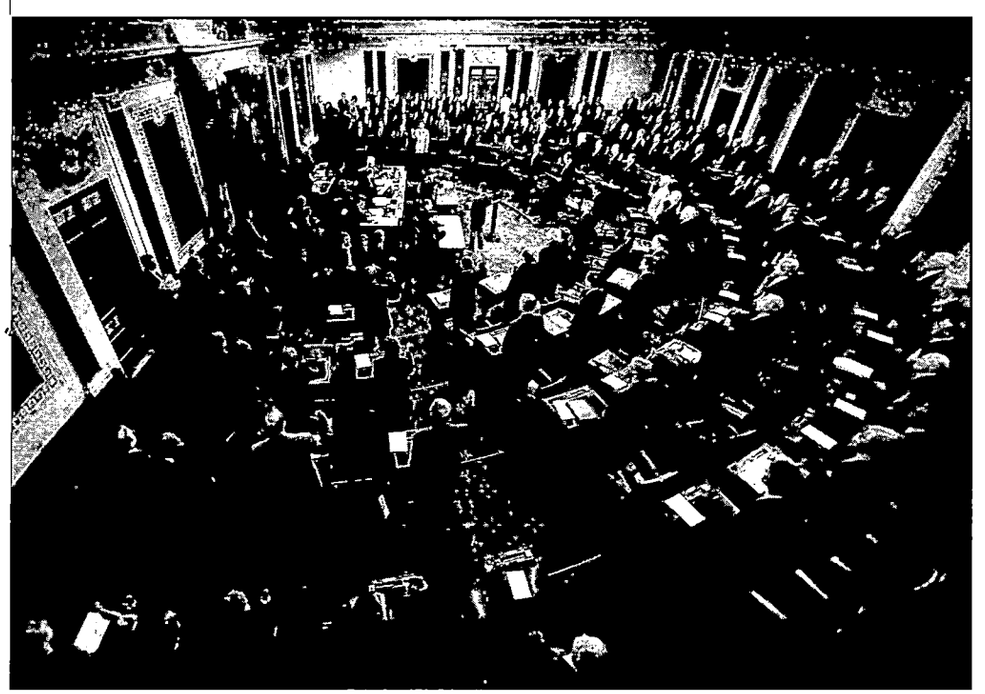

5. *Cf.* Nixon v. United States, 506 U.S. 224 (1993) (questions concerning conduct of Senate trial on articles of impeachment non-justiciable).

6. *See, e.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 42-43 (Farrand ed., rev. ed. 1966) (Madison); *id.* at 539 (Gouverneur Morris).

7. *See, e.g.*, Peretti, IN DEFENSE OF A POLITICAL COURT 93-100 (1999); Wolfe, *supra* n. 2, at 360-62; Freer, *Advice? Consent? Senatorial Immaturity and the Judicial Selection Process*, 101 W. VA. L. REV. 495 (1999).

8. *See*, Purcell, BRANDEIS AND THE PROGRESSIVE CONSTITUTION 39-63 (2000) (discussing Justice David Brewer and expanding federal judicial power).

9. *See generally* Goldman, PICKING FEDERAL JUDGES (1997).

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roles depending upon the court to which an individual is nominated. With respect to nominations to the federal trial courts, the Senate's role has been dominated by patronage, backed up by the practice of "senatorial courtesy," the so-called "blue slip" system[10] giving a veto power to senators of the president's party from the nominee's state, and during some periods to senators from the other party as well. Not surprisingly given the power thus conferred on individual senators, the process has been stubbornly non-transparent (to the point that the Judiciary Committee follows a practice precisely the opposite of that suggested by the language of the "blue slip").[11]

The recent past

Among the influences cited by students of federal judicial appointments for the greater activism of the Senate in the period since 1967, at least as to Supreme Court nominees, and at least as measured by Senate rejections, are: greater awareness of the impact of judicial decisions on important questions of social policy after the Warren Court; attention to the policy potential of judicial appointments on the part of recent presidents (not a new phenomenon—see FDR—but perhaps a more frequent one); and the greater incidence of divided government. These accounts have also tended to identify an increasing role for the White House (as opposed to the Justice Department) in nominations, which would not be surprising if presidents have been pursuing a policy agenda in making nominations, and which could be expected to arouse greater senatorial interest in those nominations, particularly in a period of divided government.

The Carter presidency is seen by some as ushering in the more active participation by the White House Counsel's Office in nominations (traced to frustration with the pace of affirmative action efforts by the Justice Department).[12] Other changes in process made by President Carter or during his term have affected the Senate's role(s) even more directly, although with varying durability.

It may be the case that President Carter's Circuit Judge Nominating Commission, with its 13 panels chosen largely by the White House (along highly partisan lines), reduced the modest influence that individual senators had enjoyed in appointments to the courts of appeals.[13] But President Reagan abolished the commission, and it has not been revived.[14] Moreover, the Clinton years witnessed horse trading between the White House and senators for courts of appeals appointments,[15] and recent news reports about nominations to the Sixth Circuit suggest more of the same with the political powers reversed.[16]

With Carter's active support, district judge nominating commissions were created in 30 states, thus establishing at the federal level systems akin to that long championed by AJS for the states. As a result, some senators (from the President's party) lost all or part of the power of patronage and "senatorial courtesy" (depending upon whether the names of those recommended went directly to the White House). At the same time, some senators (from the other side of the aisle) gained influence through their participation in creating and naming members of commissions. In that regard, the first such commission was apparently created by Florida's two democratic senators during the presidency of Gerald Ford.[17]

Although both President Reagan (through Attorney General William French Smith) and President Clinton encouraged senators to use nominating commissions or similar screening mechanisms, the extent to which senators did so is not clear.[18] Note again that, when such mechanisms are employed by senators of the president's party and result in the transmission of multiple names to the White House (as Smith recommended), they signal a diminution of senatorial power.

As chair of the Senate Judiciary Committee, Ted Kennedy instituted a discrete and extensive questionnaire to be completed by nominees and committed resources to the development of independent investigative capacity for the Committee. Both of these changes in Senate practice have endured, and they have obvious implications for the ability of the Senate to play an active role in considering federal judicial nominations.[19]

Senator Kennedy also announced that failure to return a "blue slip" would not automatically kill a nomination, since he would put to Committee vote whether the members wished to proceed.[20] It is not clear how long this change lasted. In truth, with senators unable to agree about

10. "It was the blue slip procedure, however, that institutionalized senatorial courtesy within the Judiciary Committee and created a kind of 'pocket veto' of judicial nominees for home state senators of both parties." Slotnick, *Reforms in Judicial Selection : Will They Affect the Senate's Role?*, 64 JUDICATURE 61, 63 (1980). The blue slip should be distinguished from the hold, which evolved "from an accommodation to members who cannot be present for a debate to a blue slip process writ large, in which legislation *and* nominees can be held up by any senator, for any reason, as long as the leadership decides to honor the hold." Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL OF RTS. J. 75, 87 (2001) (footnote omitted). *See also* Denning, *The Judicial Confirmation Process and the Blue Slip*, 85 JUDICATURE 218 (2002). The blue slip should also be distinguished from a committee chair's refusal to hold hearings. *See* Denning, *Reforming the New Confirmation Process: Replacing "Despise and Resent" with "Advice and Consent,"* 53 ADMIN. L. REV. 1, 9-11, 20-22 (2001).

11. *See* Goldman, et al., *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 228 (2001); Slotnick, *The Changing Role of the Senate Judiciary Committee in Judicial Selection*, 62 JUDICATURE 502 (1979). Although the blue slip states that failure to reply will be taken as indicating no objection to the nomination, in practice failure to return it blocks a hearing. *See id.* at 505; Denning, *The "Blue Slip," supra* n. 10, at 77-78.

12. *See* Goldman, *supra* n. 9, at 283.

13. *See* Berkson, et al., *A Study of the U.S. Circuit Judge Nominating Commission*, 63 JUDICATURE 104 (1979).

14. *See* Goldman, *supra* n. 9, at 290; Stiegler, *U.S. Circuit Judge Nominating Commission Abolished by Reagan*, 65 JUDICATURE 44 (1981).

15. *See* Goldman et al., *supra* n. 11, at 240.

16. *See, e.g.*, Dickerson, *Engler May Be in on Deal for Judicial Picks*, DETROIT FREE PRESS, Mar. 11, 2002, at 1B.

17. *See, e.g.*, Neff, *Breaking With Tradition: A Study of the U.S. District Judge Nominating Commissions*, 64 JUDICATURE 257(1981); Slotnick, *Reforms in Judicial Selection: Will They Affect the Senate's Role? (Part II)*, 64 JUDICATURE 115 (1980).

18. See Goldman, *supra* n. 9, at 288; Tobias, *Choosing Judges at the Close of the Clinton Administration*, 52 RUTGERS L. REV. 827, 830-32 (2000).

19. *See* Goldman, *supra* n. 9, at 263; Slotnick, *supra* n. 11; Ross, *The Questioning of Lower Federal Court Nominees During the Senate Confirmation Process*, 10 WM. & MARY BILL RTS. J. 119 (2001).

20. *See* Slotnick, *supra* n. 11, at 505-06.

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what practice was even a few years ago, nothing is clear about "senatorial courtesy" except that its practice has not been transparent.[21]

More generally, perhaps the most striking aspect of the exercise of the Senate's "Advice and Consent" power in connection with nominees to the lower federal courts during the Clinton administration is precisely its lack of transparency. Students of previous periods had concluded that the "blue slip" was rarely used and, when used, was rarely employed for the purpose of killing, as opposed to delaying, a nomination.[22] An apparently unprecedented number of nominees never made it to a Judiciary Committee hearing and/or to the floor during the Clinton presidency, however, with the result that statistics based on those who were the subject of such hearings, or of a vote in the full Senate, are misleading if not meaningless.[23]

Part of the explanation is surely election year politics, which has long been a factor in the pace and rate of confirmation. Some also see in this picture "pay back" for the defeat of the nomination of Robert Bork to the Supreme Court, but that seems the beginning rather than the end of analysis, at least when it is recalled that the subject is nominations to the lower federal courts.

Perhaps those who themselves are committed to the use of the federal judicial appointment process to advance a particular policy (and not simply partisan) agenda believe that others have a similar commitment, whether or not they will admit it. In any event, the result has been, or so it seems, that more and more nominations to the federal bench are now treated as if they were nominations to the Supreme Court,[24] with one major and important difference: senatorial accountability.

The road ahead

History suggests, and the recent experience of the Pickering nomination confirms, that, in a period of divided government and with a president who makes no secret of his intent to use federal judicial appointments to advance a policy agenda, the Senate will play an active role in considering nominations to the lower courts. We would not have needed history to tell us that for such appointments the process was likely to remain largely non-transparent. Again, senators cannot even agree about what the "blue slip" practice of the Judiciary Committee was in the recent past. And few senatorial offices responded to an AJS questionnaire designed to determine, among other things, what if any screening mechanisms they use in connection with district court and court of appeals vacancies.[25] Yet, two developments may have altered the landscape, even if not permanently.

Part of the package of compromises that attended the 2001 Senate reorganization after the Democrats gained control was an agreement "that blue slips would be treated as public information."[26] This in turn should make it harder for a hold outside of the blue slip system to remain anonymous. Perhaps relevant as well are the events of September 11, in the wake of which the President was encouraged not to repeat his father's "mistake" following the Gulf War and, thus, to take full advantage in the domestic sphere of the political capital that has been invested in him as Commander-in-Chief.[27] Whether or not he accepted the advice, and apart from the compromise on blue slips, it might have been more difficult for the loyal opposition to keep the process of considering nominations to the lower federal courts non-transparent. Neither phenomenon need (or is likely to) endure, however, and neither reflects acceptance of the need for accountability by the leadership in the Senate.

AJS has issued an important statement about the appropriate role of ideology in the Senate's "Advice and Consent" function, as follows:

> It is currently a matter of controversy whether the ideology of federal judicial nominees should be taken into account by the Senate in the confirmation process. The American Judicature Society believes the appropriate question is not whether ideology should play a role, but what role it should play. Ideology has always played, and inevitably will play, a role in federal judicial selection.
>
> Judges are human beings; they necessarily bring to the bench the perspectives obtained from prior life experiences. Presidents take these perspectives and predilections into account when they nominate judges. The Senate necessarily does the same.
>
> To say that ideology will play a role in the nomination and confirmation process, however, is not to say that it should play the sole, or even a primary role. Nominees who display ideological convictions so strong as to be impervious to contrary evidence, argument or law should not serve on the bench. Judging is not a political process, and the judiciary should not be politicized by the Executive Branch or the Senate. AJS believes judges should be chosen on the basis of established legal credentials, an ability to decide cases based upon their facts and the law, and a demonstrated capacity for open-mindedness, sound judgment, and even-handedness.

I subscribe to this statement, but I am not optimistic that, so long as the process of considering nominations to the lower federal courts remains a bastion of privilege largely shielded from public scrutiny, the public will have adequate information to assess the performance of its elected representatives according to these or any other criteria.

21. *See* Denning, *"The Blue Slip," supra* n. 10, at 78-85. Since 2001, however, "blue slips" have been public information. *See infra* text accompanying note 26.

22. *See* Slotnick, *supra* n. 10, at 69.

23. Holds and refusals by the chair of the Judiciary Committee to hold hearings, as well as the blue slip system, contributed to this situation. *See* Goldman, et al., *supra* n. 11; Denning, *"The Blue Slip," supra* n. 10, at 83-88; Denning, *Reforming the New Confirmation Process, supra* n. 10, at 10.

24. *See Clinton's Legacy or Bork's?*, 84 JUDICATURE 224 (2001). This development can only be encouraged by White House ceremonies that treat court of appeals nominees in a way formerly reserved for nominees to the Supreme Court. *See* Tobias, *The Bush Administration and Appeals Courts Nominees*, 10 WM. & MARY BILL RTS. J. 103, 103 (2001).

25. Moreover, the information available from other sources must be evaluated with care For instance, a number of such mechanisms have been established since the most recent presidential election by Democratic senators, while others were established by Republican senators during the Clinton presidency.

26. Denning, *The "Blue Slip," supra* n. 10, at 86 n. 76 (quoting Senator Patrick Leahy). They are available on the website of the Department of Justice's Office of Legal Policy. *See* id; http://www.usdoj.gov/olp/blueslips1.htm. (last visited April 24, 2002).

27. *A New Presidency*, THE WALL STREET JOURNAL, Sept. 19, 2001, at A20.

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Selecting Federal Judges

The Role and Responsibilities of the Legislative Branch

An edited transcript of a discussion at the AJS symposium "Selecting Federal Court of Appeals and District Court Judges" held on May 17, 2002 in Washington, DC.

The participants

Moderator

Marcia Coyle, Washington Bureau Chief, *National Law Journal*

Panelists

Victoria Bassetti, Judiciary Committee Counsel to Senator Herb Kohl

Richard J. Durbin, U.S. Senator (Illinois)

Connie Mack, former U.S. Senator (Florida)

Howard M. Metzenbaum, former U.S. Senator (Ohio)

Michael E. O'Neill, former General Counsel to the Senate Judiciary Committee.

Marcia Coyle: The first panel, consisting of current and former members of the Executive branch involved with judicial nominations, seemed to convey a general sense of pessimism about the confirmation process. Maybe there is a legitimate basis for the pessimism.



Marcia Coyle

I thought we might build on some comments that were made this morning by Judge Newman when he was talking about the process. He said that he did not think the problem was terribly complicated. He seemed to feel that what we need is to just find balance, balance in rhetoric and balance in nominees, particularly in an era of divided government.

What I would like for us to discuss is, how do you achieve that balance? Judge Newman really did not tell us. On the prior panel, Walter Dellinger came up with one suggestion that was intriguing. If you have a circuit, for example, with three vacancies and you have a Republican president, why not have the president pick two candidates and have the Senate, if it is Democratic controlled, suggest a candidate? Balance.

I do not know if that is a good or bad idea, but this is what I would like to discuss. Perhaps what Walter was trying to get at is that there is so much focus on the consent side of the Senate's responsibility that maybe we need a little more focus on the advice side, and what we can do to lift out of the morass we are in.

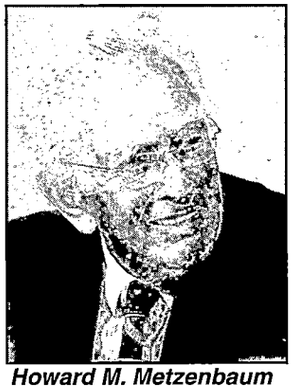

PHOTOS BY JAY MALLIN

Howard M. Metzenbaum

Howard Metzenbaum: I do not think the present system has worked that badly. In fact, I think it has worked rather well. I think there is a reasonable amount of balance in the courts throughout the country. I am not sure when people talk about substituting some other system what other system they would use. Would you permit the president alone to make

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the choice and not make it subject to the consent and approval of the Senate? I think not. Or, would you want the Senate or the House Judiciary Committees to make the determination? I doubt that very much.

One of the things I thought about when I was putting some notes together for this meeting was, why did we give Bork such a tough time while at the same time we let Rehnquist come through and Scalia sail through? Scalia, who is probably now the most dominant factor on the Supreme Court as far as conservatives are concerned, absolutely sailed through without any disagreement. So, you say to yourself, "How did this come about?" I am frank to tell you I do not know how it came about.

There is one factor that has not been taken into account with respect to the confirmation process that I believe would be particularly significant. I think I first came upon this when Justice David Souter was up for confirmation. Frankly, he was a pretty blank piece of paper when he came before us. We did not know much about him at all.

I remember having an interview with him in my office. I thought he was a pretty nice sort of fellow. I said to him, "Tell me the list of charities to which you have contributed in the last 10 years," and he told me. It was broad based and it was good.

In retrospect, I think if I were still a member of the Senate I might use that more often because individuals up for confirmation would not have been thinking about that aspect, that particular indicator, 10 years, 15 years ago. If they gave only to their church or their temple or if they gave only to one group or another, you get an idea of what kind of person he or she is. It would not be an absolute determinant, but I think it gives you a pretty fair idea as to what kind of individual is coming before you for confirmation for the court, and it would give you some idea as to whether that individual is going to have a broad-based appeal, take into account broad-based considerations, when a case is pending before him or her.



Connie Mack

Coyle: Just this week there was a news story out of Florida. The two Democratic U.S. senators wrote a letter to President Bush very upset because they felt the president had ignored a longstanding judicial nominating commission that was set up in Florida, had ignored three choices that were forwarded to him for, I think, district court and U.S. marshal vacancies.

Senator Mack, correct me if I am wrong, but you were very instrumental in the formation of that commission, were you not? That is part of the advice side of your responsibility. What is happening? Is it falling apart on both ends?

Connie Mack: Well, I am not sure that at this point I am qualified to answer why the administration reacted to the three nominees the way that they did. I would say that the commission that is in place now is different—the process was different in establishing it. I would have to know more about actually how this was done.

Coyle: You do not need to respond specifically, only about the concept of the local commission.

Mack: I think that when you mentioned the word "balance" a minute ago and focused not on the consent side, but the advice side, you really hit the nail on the head. Let me take a minute to tell you about the process that I eventually established.

When I was first elected to the Senate in 1988—and by the way I am not an attorney—I eventually decided that I needed some help with the process of selecting individuals who were going to be judges. There is a belief that you have certain rights and prerogatives that come with having won the election. Not much attention is focused on the issue of judges during an election, except what type of judges would you propose. Very, very seldom, if ever, is the question asked about how would you go about selecting judges, which I think is, in fact, a question that ought to be asked.

After I won the election, my brother Dennis, who was a lawyer, said to me, "Well, how are you going to go about selecting candidates for judgeships?" I really hadn't given much thought to it, but I said, "I think that's a prerogative that I have as being a newly elected member of the Senate." Dennis said, "Well, I would like for you to spend a little time talking with Mike Jamison, an attorney in Florida with the Holland & Knight firm, a fellow I went to college with."

I talked with Mike and he started to lay out for me this concept of a commission. Again, frankly my first reaction was that I was giving up some of my authority, some of my power, some of my responsibility, and so I was a little cool. Dennis encouraged me to talk to another fellow by the name of Tom Schultz, an attorney with the University of Florida that I knew. The end result was that it got me to start asking questions of my new colleagues about how they go about it. What I found out is that there is every method under the sun.

On one end of the spectrum is the good old boy network. A vacancy comes open, a call goes back to the state to a few of your close friends and associates. On the other end is a very sophisticated commission process.

After those discussions, and again with the recognition that I am not an attorney, that I really needed to have some outside input, I decided to put together a commission that was geographically balanced. I must admit

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that most of my interests were to see that there were Republicans on this particular commission, but the conclusion I came to was that what you want to create is a belief that this commission that is going to assist you in making recommendations, in fact, is balanced.

As I was thinking about what we might talk about today, the word "balance" kept coming up. The chairman of my commission, in fact, was a Democrat. There were several Democrats on the commission, one or two former presidents of the Florida Bar Association. What I ended up doing was creating a commission that had the perception of great competence and balance. Now, what helped me to do that was there was credibility to it.

Why did the commission work? I think there are three aspects to it. The process itself has to be good and public, public not in the sense that the interviews of the candidates are public, but that we made a public disclosure. Anyone who wanted to apply could do so.

Those applications were reviewed and narrowed down so that we would not have 50 or 60 or 70 individuals who would have to go through personal interviews. We narrowed it down to maybe 12 or 15. There were individual, personal interviews, extensive discussions with those individuals about their beliefs, their qualifications, and so forth. That was narrowed down to where three names came to me.

At that point, I engaged Senator Robert Graham—actually I should say that he was engaged even before that—letting him know who we thought we might see coming from the commission, an opportunity for him to understand who these individuals were, providing an opportunity to say to me that he had real concerns about a particular individual. He did not have a veto, but clearly had an opportunity to say, "Connie, I think if you go with this particular candidate we are going to have problems in the Senate."

Now, I could make the choice and say, "Okay, we are going to go ahead. We are going to have some problems, and we are going to deal with it on the floor or in committee." I do not remember a time when that occurred, which brings me to the second point.

I think there has to be an effort for members of the Senate, and particularly in this case members from the same state, to build some confidence, some faith, some trust in each other. Bob and I were fortunately able to do that. When he would say to me, "I think we have got a problem with this particular candidate," I did not take it as a political effort to try to stop somebody. I took it as a genuine concern on his part that needed to be addressed.

The third thing is politics itself. Over the years Bob and I became very close friends. We concluded that it was politically in our best interest to find ways to work together, and we believed that one of the ways to do that was with the appointments, or suggestions as to who should be nominated for a federal judgeship.

Coyle: Senator Durbin, what about the advice side? Has that part of the responsibility been shuffled aside? Is it possible to reinvigorate it if it has been, and should we do it?

Richard Durbin: Let me tell you my experience. When I first was elected, Carol Moseley-Braun, the other Democratic senator, and I set out to do this together. And we did it every step of the way. The first vacancy that we had for the district court in the Northern District of Illinois had 30 people apply. It was a very broad range of people who were interested in this opportunity to serve on the federal bench.

Four years later, when a vacancy occurred on the district court, 12 people applied for it. Now why? Why would you have that dramatic downturn in interest in applying for a job with this prestige? I think it reflected the fact that the process for judicial confirmation was invasive and interminable, and that prospective applicants looked at it and said, "It isn't worth the effort."

Let me add a footnote to this. If you think it is tough enough to find white males interested, believe me, when you are looking for women or minorities you have a dual problem. First, they fared very poorly under the Republican-controlled Senate Judiciary Committee.

Many women come into firms, get married, have a baby, leave, come back, do pro bono work, and have a much broader range of practice than many of the men who came before us as applicants. In that broad range of practice, women would occasionally lapse into something that looked "political." They were involved in too much work for legal defense or too much pro bono work. They were blackballed. They were not given a chance in the process. They, frankly, said, "You know, what is the real need to get involved in this and to see this all bogged down?"

Another element, of course, is that good minority attorneys are prime candidates at major law firms and make a lot of money. Senior partners at Chicago law firms came to me and said, "We are looking. If you see any prospective people in your office, minorities and women, we need them in our law firm." So, there is a great attraction for them to stay in the private sector where they are going to be handsomely rewarded compared to the federal side.

After Carol Moseley-Braun lost in the election four years ago, I called Peter Fitzgerald and we set up a process with the Democratic White House. I said, "Here is how it will work. You will get every fourth nominee. I will take the first three, and you get the fourth. I get the next three and you get the next one. Every nominee that I will choose or you will choose is subject to our mutual veto."

This cooperative arrangement, worked. We filled every single vacancy in Illinois. We moved our nominees through very, very quickly. It was similar to what Connie and Senator Graham worked out. We are still using that process. Now the tables have turned, and Senator Fitzgerald has three nominees and then I have one vacancy to fill. I think we can continue to fill vacancies under that approach. I think it is a good way to deal with it.

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Let me talk about the current state of affairs very quickly. You will be inundated with statistics from Republicans and Democrats to justify how the other side is unreasonable in this. I will, instead of going to the statistics, tell you that there are several things you should keep in mind. Approximately 80 cases were considered by the U.S. Supreme Court in its last term. Approximately 57,000 cases were considered by circuit courts across America.

If you want to know where the action is when it comes to key decisions that reflect on policy that is being made in Washington, look to the circuit courts. That is where the battle lines have been drawn. Those are the court vacancies that were the hardest to fill in the Clinton administration. Those are the people it was almost impossible to bring forward. I can go through the litany of people who "died" waiting a year, two years, three years, four years and never getting a hearing. Now, because those vacancies are left over from the Clinton administration, some on the Republican side hope to fill all of them as quickly as possible with Bush appointees. You can understand the natural resistance from the Democratic side, where we feel that some of our people were not treated fairly. That is a reality.



Senator Richard Durbin

Second, let me discuss beyond the circuit court aspect of it the standards that are being used. This troubles me as much as anything else. There are personal conduct standards that were applied to Clinton nominees that I think were unfair, and yet they were applied consistently, particularly in the area of drug use. I will not go into chapter and verse. Some nominees whom I consider to have been guilty of "youthful indiscretions," as the phrase goes, were stopped cold in their tracks and told they did not have a chance. There was going to be a hold on their nomination forever. That was a reality.

I can tell you that some of the nominees being sent to us by the Bush White House would not pass the same test. And you wonder why Democrats are standing back and saying, "Wait a minute, this is not fair, people for years were told that the aspiration of their life, to serve on the federal bench, had been stopped because 25 years earlier they had done something stupid. Now we are told, "Fill the vacancies and fill them quickly." You can understand what is boiling beneath the surface here.

How do we get out of this mess? Let me give you a very simple proposal that I hope that some in the White House would consider. Come back to some of the circuit court nominees from the Clinton White House, some of them who, frankly, were indisputably well qualified, people who could have served this country and can still serve this country as circuit court judges. Put them in the mix. Let us make this truly a bipartisan effort to fill the circuit court vacancies. That single effort, I think, would have a dramatic impact on the attitude on Capitol Hill.

What Chairman Leahy has said I think is accurate. If you send us moderate nominees, well skilled in the law and honest people, they are likely to come through the process very quickly. Send us someone who is fraught with controversy, and it is going to take longer. In fact, it may take a lot longer.

We are trying to move this towards the center in terms of the nominees. I think the Clinton White House faced that. They knew with the Hatch Judiciary Committee they had to do that, move toward the center with the nominees, and I hope the Bush White House will acknowledge that same responsibility.

Coyle: I can understand, because it is politics, that you would want to go back to some of the Clinton nominees. Maybe that will solve the problem this year, because of what happened two or three years ago, but how do we keep it from happening again? This is politics and it may happen again.

You say we tell the White House, "Don't send us contentious candidates." This is, again, Jon Newman's comments this morning: "We've got to find this balance not only in rhetoric, but in nominees." What can you do? You do not want to usurp the prerogative of the executive to nominate.

Again, we come back to the advice function here. Should you, should the Senate, have sort of a supernominating commission in which Republicans and Democrats do not nominate, but send a list over to the White House when there are circuit vacancies so that the White House can get a sense of who you are interested in, who you think is qualified before they send somebody back? Would that help? What about something concrete here?

Durbin: I think it is an interesting academic proposal, but it is unlikely to ever happen in the real world of politics. The president expects to have the right to fill vacancies. What I am suggesting is that when you have an election as close as the last one, when you have an experience like the

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one that we have just gone through, it really argues for the White House to take care to try to find that center stripe.

For example, one of the litmus tests now for many nominees is whether you have been a member of the Federalist Society. I will not get into the Federalist Society. I brought it up in a hearing, and every member of the Federalist Society wrote to me and said, "You are turning into Joe McCarthy by even mentioning the Federalist Society." But let me just say that the fact that somebody belongs or does not belong to the Federalist Society is irrelevant. The fact that they are conservative should be irrelevant. What we are trying to find is people who are reasonable and moderate in their general approach.

I think that there is plenty of room on the Republican side to find those nominees. I bet you found them, Connie, in your experience in Florida. I think we found them in Illinois. I hope that the president will be looking for those people, too. I do not know that there is going to be any superprocess that is going to be established. Imagine, if you will, the law that would have to be signed by the president to take his power away to appoint judges—interesting challenge.

Coyle: I was not thinking so much of taking away the power, but just setting up an advisory group, a body, maybe of senators and outside lawyers. I am not pushing this idea. I am just trying to ask, is there a way to solve that one problem that you have raised, the nominees that are the red flags that come into the Senate? I am not even sure, are they red flags before they get to you? What happens in the process, Mike? Would you have known, before you have actually investigated him, that someone like Pickering is a potential red-flag nominee?

Michael O'Neill: I think it is a little bit difficult. Going back for a moment on whether or not senators should provide a list to the president, Senator Arlen Specter several years ago had an idea that perhaps we should pass legislation that would allow the Senate to be able to recommend to the president a list of possible Supreme Court candidates, to be able to then have the president choose from that list of Supreme Court candidates, in a way regularizing and formalizing the Senate's advice function. In effect, the blue slip itself is a way that the Senate has used to formalize its advice function.



Michael O'Neill

When I was working on nominations for then-Chairman Hatch, I thought that the Clinton administration and the people that I worked with in the Department of Justice did a pretty good job by and large of seeking consultation with senators, both from their own party obviously and from the Republican party, in trying to come to a consensus pick or at least letting them know who they were planning to nominate.

I think it is those sorts of informal mechanisms that cause the White House to recognize that, even though the Constitution vests the president and solely the president with the appointment power, there is that little advice and consent feature that the president has to acknowledge. The fact that President Bush or then President Clinton had to consult with the home state senators, either before or after he would nominate an individual, was simply a reality of the political process.

I agree with Senator Metzenbaum that by and large the process works pretty well. Is it a perfect process? Far from it. I think that the Senate ought to, for example, once someone is nominated, have an obligation to give them a hearing and a vote.

Occasionally a candidate will have to be withdrawn; occasionally red flags do come up in FBI reports. You have got things going on behind the scenes where everybody perhaps agrees that, "Hmm, it may not be in the best interest of the body to allow this person to go forward. We don't necessarily want this person to withdraw, either. We don't want them to personally embarrass themselves."

Everybody agrees silently behind the scenes that this nomination will simply die. That happens on occasion, because sometimes things do not get caught immediately. I do not think (per se) that there are any specific red flags that stopped someone from going forward, unless it was something that came out of, for example, an FBI background check. There were certainly people, as Senator Durbin mentioned, who looked askance at the Federalist Society or who looked askance at membership in the ACLU or the NRA or the various and sundry interest groups that obviously play a role on Capitol Hill. I do not think any of those factors in and of themselves were necessarily disqualifying. I think you also have to look at the strategic background of what happens in the Senate.

I have enormous respect for the Senate. I have enormous respect for the people who serve in the Senate, and the fact that by and large as a collegial body they are able to work things out. The Bork hearings, the Rehnquist hearings, the Thomas hearings really were an anomaly, and they are certainly not the first time in that particular body that you have had problems like that. It is true that during most of the twentieth century there was not as much controversy

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over nominations to the lower courts, but certainly early in the country's history more nominees were rejected. Is that a bad thing? Is that a good thing? I do not necessarily think so. I think that the Senate does a pretty reasonable job, provided it takes action.

Coyle: Victoria, I was wondering about Senator Durbin's comment that the battle now is joined over the circuit judges. I know circuit judges have always issued, roughly, as many decisions as he noted. But is it also, in the absence of a Supreme Court vacancy for a while now, that there is increased focus on circuit judgeships?

Also, in your position, is there much consultation between, say, the Senate Judiciary Committee, since that is where the action is, and the White House over the course of the nomination, particularly one that may be controversial?

Victoria Bassetti: It seems to me that one of the ways that we achieve balance is when both sides realize that the extremes of imbalance are unbearable. The question is whether we have gotten to the point of it being absolutely unbearable, so unbearable that we really are going to finally have to achieve balance.

What you have heard about from Senator Metzenbaum, Senator Mack, and Senator Durbin is where we do manage to achieve balance, which is largely in the district court area. There, senators have set up commissions that have had extensive negotiations and consultations with the White House, and both sides are willing to realize that they are not going to get everything that they absolutely want and that, "They are going to compromise on a candidate who they can all find as perfectly acceptable."

Where you find more conflict right now is, indeed, over the circuit court nominees, and that is precisely one of the areas where there is the least amount of dialogue between the White House and the senators of the particular states or circuits involved. It would be a nice idea to think that if we get a Supreme Court nominee in the next few years we will manage to vent everything, and then everything will go back to being nice and easy on circuit courts, but I do not think so. I think it is an irreversible ratchet up that we have managed to get on circuit court nominees.

I think, though, that balance is a lot easier to achieve than we think it is. Balance has consistently and persistently been achieved on certain circuit courts when the White House has consulted and dealt with the senators from the state or circuit. It



Victoria Bassetti

is, to continue the analogy about the unbearability of conflict, sort of a mutual assured destruction situation that we are in. You know that you are in trouble when someone keeps using over and over and over again the word "prerogative" rather than "balance." If you have a lot of people insisting on their prerogatives, and the president has his and the Senate has its, that can lead to mutual assured destruction with regard to circuit court nominees.

There are solutions to it; there have been solutions to it over many years. It is just a question of finding the parties and the patterns that get us to that point. They have been found before, and we can find them again, but it is going to have to be because we have all come to realize that the path of destruction and the path of fighting is unbearable and not productive anymore.

Coyle: Senator Mack, are we at the point where we feel the fighting is unbearable and we should find those alternatives?

Mack: I think we are where we have always been. I really do not think that what is happening now is unusual. In my reading of history, what we are experiencing today are the personalities of people involved in politics. You could change the system to some degree, but all systems can be manipulated. I do not think that too much focus should be on how we get a change in the blue slips or how we set up a separate commission.

The bottom line is, we are experiencing what happens in a free, open, democratic society. Sometimes politicians make some stupid decisions, other times they make some excellent decisions. We are going to always have this conflict and this debate. Frankly, I think that is a strength of our democracy. Again, there are extremes, and it is the extremes that get the focus and that get us all fired up.

Coyle: That brings us back to what Senator Metzenbaum started with—does it not, Senator?—that this system by and large works and this is what it is, for better or for worse.

Metzenbaum: The system works pretty well. Is it perfect? No. Do I have a suggestion for a better system? Definitely not. I would say we ought to stick with it. Sometimes the system has worked in such a way that irritated or aggravated me, and probably sometimes I used the system to irritate or aggravate somebody else, probably more often than not. But that is part of the strength of democracy generally.

Coyle: At the end of Stephen Carter's very thoughtful book on Supreme Court confirmations (*The Confirmation Mess: Cleaning Up the Federal Appointments Process*), he has a list of recommendations, some of which are his and some of which he gleaned from various studies and commissions. Basically, he finds flaws with all of them. He says that if you really want changes, ultimately it is a change in attitude; it is a change in people who are involved in the system. The process is the way it is and it is, as he says, a "messy process."

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Concluding remarks

We may not be able to get politics out of federal judicial selection, but we can insist on selecting judges for whom politics won't be the sole or driving force.

By James L. Huffman

The issue of federal judicial selection has been of particular interest on the West Coast because of the circumstances of the Ninth Circuit. The Ninth Circuit covers an enormous area geographically, all the way from Arizona to Alaska and Hawaii. It is a tremendously overburdened court. Each judge sits on, roughly, 450 panels a year, which means that each judge is responsible on average for 150 dispositions. That caseload has tripled since 1988. It is a circuit which is, from the point of view of conservatives, out of balance because it has 20 Democratic appointees and seven Republican appointees.

It is also a circuit, partly because of geography and partly because of the politics within that geography, that is split in a political sense between what one might describe as the Northwest, in which I think Arizona wants to be included, and California. There is, as most of you know, a pending issue relating to the split of that circuit.

***JAMES L. HUFFMAN** is Dean and Erskine Wood, Sr. Professor at Lewis and Clark Law School.*

Maybe the last and most significant factor is the frequency with which the Ninth Circuit has been reversed by the U.S. Supreme Court. I think it was three years ago that something like 31 of 32 Ninth Circuit decisions were overturned. The record has not changed too much since then. Does ideology play a role in the selection of judges? Well, I think it clearly does.

One has to conclude from today's discussions that politics is important. There is also, I think, agreement from today's discussions that the process has changed, if perhaps not in becoming more political, certainly in the time that it takes for the process to work its way.

A good friend of mine, Diarmuid O'Scannlain, who sits on the Ninth Circuit Court of Appeals, told me a few weeks ago that his confirmation process in 1988 from appointment to taking the oath of office was about eight weeks. That may have been a little fast for the time, but I do not think that framework is within the conception of modern humans.

Judge Newman suggested this morning that the activism/restraint labels that are often used in these debates are too simplistic. I would certainly agree with that. I think one person's activism is another person's restraint; it just depends on which side of the political fence you are on. Judge Newman also suggested that we might cool the rhetoric. That seems like a good suggestion to me.

About a month ago, Al Hunt had a piece in the *Wall Street Journal* that was in effect encouraging the Democrats to continue to resist the Bush appointees on the theory that this is a political business. Hunt's argument was that the Democrats should not succumb to some sense that they have to rise above it all, but that politics was what it was all about and they should continue to proceed as they had. I think the first panel today underscores that.

You might say we should rise above politics, but I am not sure that politics is something that you rise above. I think it is a way that we have chosen to accomplish a lot of things in this country. Suggesting that we need to rise above it suggests that there is something wrong with politics; it is simply a way of deciding public matters.

Walter Dellinger suggested that we either approve everyone on the assumption that the president has ultimate and final authority to make these decisions, or that we take into account ideology and politics, but take a vote and be done with it—bring these people up for hearings and consideration. Our history suggests, and I would think most of the commentary today suggests, that is not the way the system works. The United States Senate is a place of mysterious workings to most of us who have not been participants in it, which gives some people more power than others on some issues and not on other issues. I suspect that will always remain the case. I think that the appeal for making sure everyone gets

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a hearing is a good appeal, it is the right appeal, but I am not sure it is one most likely to be successful.

Steve Burbank suggests in his talk that the president has caused the concern in the current Congress by making it very explicit that he will appoint people to the courts for political reasons. I certainly agree that the president has made that explicit. He is not the first president, I would suggest, to do so, and I think others have certainly in practice at least made it clear that was what they were intending to do.

I would suggest a variation on Professor Burbank's point and ask whether or not it has to do with more than a simple declaration by the president that he intends to make politics relevant, and suggest that it may also have to do with a recognition by the president and others, including those in the Senate, that, to put it in words that Judge Newman used this morning, it does matter who is on these courts. It does matter. They do have significant influence on issues that are important. Let me suggest the reason why I think it does matter, perhaps more today than it did 30 or 50 years ago.


JAY MALLIN

"[Politics] is a way we have chosen to accomplish a lot of things in this country."

Why it matters

When I started teaching constitutional law in 1973 there was much that I thought I could say something concrete about. There were some clear sets of standards that were laid out in most areas of constitutional law. Today, when I teach constitutional law, I find very, very little on which I can say very much concrete. What has happened, I believe, through that nearly 30-year period is that the United States Supreme Court has created a lot of standards that in turn have to be applied by the lower courts that are really and finally, simply, balancing tests.

When we have strict scrutiny, the balance tips one way; when we have a rational basis, it tips the other way. That approach, levels of scrutiny, was pretty much limited to equal protection law in the early seventies, but occasionally you saw it in due process cases. But now it is everywhere along with balancing being everywhere.

Perhaps the most recent case out of the Supreme Court where balancing is clearly the order of the day is the Tahoe Sierra case, which was a taking of property case involving Lake Tahoe and a moratorium on development. The whole prescription in the opinion written by Justice John Paul Stevens, but endorsing largely earlier opinions by Justice Sandra Day O'Connor, is that there is just a whole lot of stuff that has to be weighed. If that is what courts are asked to do, then courts are by definition going to be making something like political judgments. What they think about the relative importance of one value versus another value must come into their decisions. It is the only way to make those decisions.

The framers created what was clearly intended to be a political process, because selection is done by the political institutions of our government. It has become even more political because of the general trends in the development of the law, not just in constitutional law, that require judges to make judgments that some might argue might be better made in the legislative and executive branches.

My conclusion, based on what I have heard today and based on my own experience and many years of thinking about the courts, is that it is an inherently political process, as Al Hunt suggested and Walter Dellinger and others have said today. I think it is one that is exacerbated a bit by, or maybe a lot by, the increased reliance on balancing and judicial pragmatism.

As an aside, I might note that if you want to get a feel for what a strong practitioner of judicial pragmatism has in mind, read Judge Richard Posner's account of *Bush v. Gore* in which he defends the Court's decision not really on the merits of the legal analysis, which you can agree or disagree about, but on the fact that there was a problem to be solved and it was the pragmatic, and, therefore, right thing for the Court to do, to solve it. That is a very particular view of judging, which I do not think everyone would agree with.

So, politics is in it. There is no escaping that. I suppose the question is whether the politics is going to be well done or badly done. I thought I heard today most people saying, "We are not doing it very well now," and there are certainly ways we can improve upon it. But getting politics out, it seems to me, will not happen. I would, therefore, suggest that AJS' recommendation in its statement on ideology (see page 27) is one that really makes sense. You cannot get ideology out, but you can insist on judges for whom it won't be the sole or driving force.

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Ethics and Judges' Evolving Roles Off the Bench: Serving on Governmental Commmissions

by Cynthia Gray, Director,
AJS Center for Judicial Ethics

The impetus for judges to become more involved off-the-bench on issues such as domestic violence, juvenile justice, protection of children, substance abuse, victim services, and anti-crime initiatives creates a tension with the ethical rules designed to ensure impartiality on-the-bench. The American Judicature Society has published *Ethics and Judges' Evolving Roles Off the Bench: Serving on Governmental Commissions* to examine the limits the code of judicial conduct places on a judge's ability to participate in governmental commissions. The essay analyzes dozens of judicial ethics advisory opinions that address the issue, considers the types of commissions for which judicial involvement is proscribed and the types for which it is permitted, and describes the limits of permitted judicial involvement. To offer guidance that judges, courts, and others can use to determine whether and to what extent a judge may become involved with a particular commission, the essay lists factors that make judicial participation more likely to be appropriate and those that make it less likely to be appropriate.

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Should we blame Judge Judy?

The messages TV courtrooms send viewers

A recent study suggests that while syndicated television courtrooms do, indeed, teach the public about the justice system, the content of this curriculum leaves much to be desired.

by Kimberlianne Podlas

In the last decade, syndicated television courtrooms have crowded the television "docket." Despite their popularity, however, their impact on the viewing public's perceptions of the justice system and judges is unclear: Do these television representations educate citizens about simple legal rules and encourage jury service, or, in light of their trademark verbally aggressive, sarcastic judges, do they misrepresent the proper role of "judge" and reduce respect for the justice system?

***KIMBERLIANNE PODLAS** is an assistant professor in the Department of History and Social Sciences at Bryant College.*

To answer this question, a study of 241 individuals reporting for jury duty was conducted. It investigated the correlation between frequent syndi-court viewing and attitudes about the bench. Findings suggest that syndi-court does, indeed, teach the public about the justice system, but that the content of this curriculum leaves much to be desired.

For instance, frequent viewers tend to believe that judges should be active, ask questions during the proceedings, hold opinions regarding the outcome, and make these opinions known. Furthermore, unlike non-viewers, frequent viewers expressed a desire to uncover clues to a judge's opinion and interpreted judicial silence as indicating belief in one of the litigants.

Although the justice system rests on the creation of and adherence to legal rules and principles, its efficacy depends on collective respect generated from public opinion.[1] Positive opinions reinforce the validity of the justice system, its actors and outcomes, while negative ones undermine its credibility. Such opinions are formed in many ways. Sometimes citizens are influenced by personal experiences as litigants or employees of the court system. Other times information is gained through such means as academic coursework. In most instances, however, citizens do not have intimate contacts with the justice system; thus, media portrayals of courts fill the void.[2]

Both legal scholars and behavioral scientists have asserted that televising trials educates the public by providing a frame of reference for what the court system is, its fairness, and who

1. Selya, *The Confidence Games: Public Perceptions of the Judiciary*, 30 NEW ENG. L. REV. 909, 909-10 (1996). Opinions about the fairness of the justice system reflect its legitimacy: "[A] decision contrary to the public sense of justice . . . diminish[es] respect for the courts and for law itself. *Flood v. Kuhn*, 407 U.S. 258, 293 n.4 (1972) (Marshall dissenting).

2. Selya, *supra* n. 1, at 913; Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 786, 798 (1993); Slotnik, *Television news and the Supreme Court: a case study*, 77 JUDICATURE 21, 22 (1993) (majority of public obtains only information about law from television).

3. Selya, *supra* n. 1, at 913-14 (education of public should include media); *cf.* Roberts, *An Empirical And Normative Analysis of The Impact of Televised Courtroom Proceedings*, 51 SMU L. REV. 621, 627 (1998) (prohibiting public from viewing trials eliminates educational opportunity).

4. *See e.g.*, Estes v. Texas, 381 U.S. 532 (1965) (State asserting First Amendment right to view trial); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980) (Burger noting "educative effect" of televised proceedings on the public and right of press and public to attend trial implicit in First Amendment); Chandler v. Florida, 449 U.S. 560, 571 (1981) (State has interest, independent of wishes of defendant, to view and televise trial).

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its arbiters of justice are.[3] Similarly, the Supreme Court,[4] the American Bar Association,[5] and New York's chief judge[6] have all presumed an educative effect on behalf of televised law.

Though televised law has traditionally been confined to news coverage of noteworthy trials and obvious dramatizations, the last decade has marked the era of the syndicated courtroom (syndi-court). "Reality" law programs like "Judge Judy" and "The People's Court"[7] now populate the dial. Although individuals within the legal profession may disregard these "syndi-courts" as aberrational or embarrassing, for many citizens they provide the most accessible court information available.

Indeed, syndi-court is accessible to the average person in a way and to a degree that other televised legal proceedings are not. On any weekday anyone with a television can find at least one syndi-court; cable is not a prerequisite. They are also intellectually accessible: The stories are easily digestible, the conflicts clear, and the resolutions swift. And they follow a remarkably similar format: What one sees on Judge Judy is confirmed by what is seen on Judge Mathis, thus creating a unified body of information.

Ratings demonstrate that syndi-courts are actually seen by a significant portion of the public. One year after her 1996 debut, "Judge Judy" boasted the nation's top syndicated ratings,[8] and continues to enjoy significant popularity.[9] As a result, these shows possess a tremendous potential for impacting public opinion about the justice system.

These attributes make syndi-courts strong vehicles for cultivation and social learning. Cultivation theory considers the relationship between watching television and holding particular beliefs about the world.[10] According to this paradigm, watching a great deal of television will be associated with a tendency to hold beliefs consistent with the primary images and values depicted on screen. The closely related concept of social learning theory posits that viewers will look to the symbols and stories on television, and use these as schemata for their own behavior. In other words, media messages will teach and influence by providing explicit, concrete "models" for behavior, attitudes, and feelings.[11]

With regard to syndi-court, what viewers see on syndi-court will teach them how judges act. The intertwining of social learning and cultivation speaks to the effects that the stable, repetitive, and pervasive images and ideologies presented via televised syndi-court have on the non-litigious majority of the viewing public: Televised courtrooms become a primer through which the viewing public will come to know (or believe they know) how the law and judges operate.

One of the most visible symbols of law is the judge. Not only are judges vested with authority to orchestrate legal proceedings, but empirical evidence suggests that a judge can direct a jury to a verdict, even one the jury feels is unjust.[12] The primary focus in syndi-court is also the judge. Most shows are named after the judge, and the judge monopolizes much of the airtime. Even when litigants speak, the camera pans to the judge to capture his or her reaction.

Yet, many viewers do not understand that syndi-court is not a real court and that television brethren are not acting as (or may not even be) real judges. In fact, "the public regularly submits complaints about Judge Judy and other TV judges" to the California Commission on Judicial Performance. Apparently, many viewers do not "understand that Judge Judy and most of her cohorts are not present members of any judiciary."[13] This confusion is not surprising, as the tag-line of many of these



"Judge Mathis," a reality based court show, is presided over by former Detroit-area District Court Judge Greg Mathis

5. A recent American Bar Association report suggested "that the media can and does impact some people's knowledge" of the law. As reprinted in, *Symposium: American Bar Association Report on Perceptions of the US Justice System*, 62 ALB. L. REV. 1307, 1315 (1999), reprinted report, "Perceptions of the US Justice System," sponsored by the American Bar Association.

6. Kaye, Symposium, *Rethinking Traditional Approaches*, 62 ALB. L. REV. 1491, 1493 (1999).

7. There are approximately 10 syndicated courtroom shows presently airing. Belcher, *New Court Shows, Dab Of Talk, Games Fill TV Docket*, Tampa Tribune, Sept. 11, 2000, at 1.

8. Gunther, *The Little Judge Who Kicked Oprah's Butt; Daytime Television's Hottest Property*, Fortune, May 1999, at 32; Schlosser, *Another Benchmark for 'Judge Judy,'* Broadcasting & Cable, Mar. 29, 1999, at 15.

9. "Judge Judy" presently garners 7,061,000 viewers and remains among the top 10 syndicated shows. Keveny, *Syndicated Goldies Are Oldies: New Shows Are No Match*, USA Today, Nov. 26, 2001, at 4D.

10. Shanahan and Morgan, TELEVISION AND ITS VIEWERS, CULTIVATION THEORY AND RESEARCH, 172 (1999). Cultivation speaks to the implications of stable, repetitive, and pervasive images and ideologies that TV, here, syndi-court, provides.

11. Bandura. SOCIAL LEARNING THEORY (1977).

12. Olson and Olson, *Judges' Influence On Trial Outcomes and Jurors' Experiences of Justice: Reinscribing Existing Hierarchies Through The Sanctuary Trial*, 22 J. APPLIED COMM. RES. 16 (1994).

13. Farrel, *If Judge Judy Could Only Be Judged . . .*, Broward Daily Business Rev., July 7, 2000, at B4.

REV_00255767

Editorial

Cameras, the courts, and the public

Allowing public access to court proceedings by means of television and the internet promotes public understanding of, and involvement in, the judicial process.

In the January-February 2002 issue of *Judicature,* Allan Sobel, AJS's executive vice president and director, noted that "recent surveys reveal that the public's understanding of how the courts work is minimal, that citizens feel hostile toward the courts, and that generally the public's impression of our courts is primarily based on popular culture such as TV, movies, and high-profile but atypical cases." Why is this so, and what can be done?

Americans are woefully uneducated regarding their justice system. Little attention is devoted to the subject in primary and secondary schools. The average person generally has had little direct contact with the system. News reports often focus on high-profile cases, or those that involve scandal or salaciousness. The information is filtered to fit the media's needs and deadlines, and is often inaccurate or just plain wrong because reporters are generally no more knowledgeable about the system than is the public. Unfortunately, all too often the public's conceptions regarding the courts and their work are derived from watching the fictionalized courtroom dramas that today proliferate on TV and at the movies. That this is so is demonstrated by Kimberlianne Podlas' article, "Should we blame Judge Judy? The messages TV courtrooms send viewers," in this issue (see page 38). The unhappy result is diminished respect for our courts, our justice system, and the rule of law.

The power and authority of the judiciary depend on public respect and support. Respect and support for the system cannot reasonably be expected absent public understanding of, and involvement in, the process; and understanding of, and involvement in, the process cannot reasonably be expected without access.

The Founders recognized the importance of access to both the perception and the reality of justice. That is why they included in the Sixth Amendment the guarantee of a "public" trial. Times have changed dramatically since ratification of the Sixth Amendment in 1791. In today's world, where television and the internet occupy such central places in people's lives, the most effective means of affording public access to our judicial system is by permitting cameras in our courtrooms.

Critics maintain that, if cameras are allowed in courtrooms, lawyers and other participants will play to the camera; that witnesses will become nervous, affecting their testimony; and that excessive media exposure will prejudice criminal and civil defendants. They point to such notorious trials as that of O. J. Simpson. However, cameras in courtrooms need not lead to such results. Cameras have been a fixture in Florida courtrooms for 20 years. They have been installed in such a way as to make them inconspicuous, and most people are not even aware of their presence. Florida has not experienced any of the problems that concern the critics, notwithstanding its share of high-profile cases. Moreover, the presence of cameras in the Florida Supreme Court allowed the world to view in real time the proceedings in the 2000 election cases. In Florida, the court system has managed to accommodate both the rights of litigants and the rights of the public to see how the process works. And Florida is not alone. Such unobtrusive technology has been successfully used elsewhere, and is possible everywhere.

Our justice system is very good. However, denying access permits ignorance and fosters distrust, and distrust engenders a lack of respect. By making proceedings available for gavel-to-gavel broadcast on television or over the internet, we can educate the public about what actually goes on in court. We can let them see for themselves that, in fact, cases are routinely decided fairly and impartially, in accordance with the rule of law—that decisions are reached based on the facts and the applicable law, without regard to outside influences. We can also help correct misconceptions formed as the result of watching fictionalized courtroom dramas.

Allowing public access to court proceedings by means of television and the internet can also help to improve the justice system. In a democracy, public institutions thrive when exposed to the sunshine. Such exposure assists the system in identifying and improving deficiencies and, thereby, in becoming even better.

AJS has long advocated the need for public understanding of, and involvement in, the judicial process as a means of ensuring respect and support for our judicial system. Access is indispensable to any effort to improve understanding, and increase involvement. In today's technologically driven society, the best way to make the process more accessible is by gavel-to-gavel broadcast of proceedings on television and over the internet.

Editorials are prepared by a committee of the American Judicature Society appointed by the president.

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shows reminds viewers that they are watching "real people," "real judges," and "real cases." Thus, the line between law and pop-culture blurs.

The study

Despite the intuitive logic that television images of law have some educative effect, neither the overall nor educational impact of televised trials (real or syndicated) on the public's perception of the legal system is known. Thus, this study sought to discover whether those who did and did not regularly watch syndi-court held different opinions regarding judges and their expected behavior.

The study also considered whether prior court-related experience stymied any influence of syndi-court. Prior research suggests that people who lack direct experience with the court system are most influenced by television portrayals,[14] and, therefore likely to use them as substitutions. This might apply to syndi-court viewers: Experienced individuals who have seen a real judge in action and been instructed regarding the role of the judge, burdens of proof, and appropriate behavior of trial participants might be less inclined to exhibit the characteristics of the frequent viewers.

One criticism of many jury studies is that their findings lack practical value and cannot be generalized to actual jurors. Consequently, this study surveyed individuals reporting for jury duty, i.e., 241 juror-respondents from courthouses in Manhattan, the District of Columbia, and Hackensack, New Jersey.

While queuing up to enter the courthouse (and, in some instances, during breaks), individuals called for jury duty were approached, identified as being on jury duty, and asked to complete a questionnaire. Questionnaires were immediately retrieved as jurors completed them, and, in exchange for their participation, jurors were given elite pens and candy bars. All jurors approached returned questionnaires. Questionnaires that were substantially incomplete, and those collected from individuals unable to communicate with the researcher in English, were excluded from analysis.

To discern whether viewing was associated with certain factors contemplated by the questionnaire, the 225 respondents ultimately analyzed were divided into two groups: frequent viewers [FV] or non-viewers [NV]. A "frequent viewer" watched syndi-court between two to three times and more than five times per week. Non-viewers did not watch syndi-courts or did so, at most, once per week. Of the 225 juror responses analyzed, 149 (66 percent) were FV and 76 (34 percent) NV.

Findings

The questions highlighted in this article focused on negative characteristics that may be associated with syndi-court judges and their potential ramifications. Among the questions posed were:

- Should a judge have an opinion about the outcome/verdict in the case?
- Should a judge make her/his opinion about a case clear or obvious to the jury?
- Will you look for clues or try to figure out what the judge's opinion about the case is?
- Should a judge frequently ask questions?
- Should a judge be aggressive with the litigants OR express her/his displeasure with their testimony or behavior?

As reported in Table 1, though it appeared that some respondents of both groups envisioned an "active" bench, frequent viewers anticipated this to a much greater degree. Indeed, frequent viewing was associated with beliefs that judges should have an opinion regarding the verdict (FV =75 percent, NV =49 percent) and make it "clear or obvious" (FV =77 percent, NV =32 percent). The import of this intensifies as frequent viewers also stated they would "look for clues" or "try to figure out" the judge's opinion (FV =75 percent, NV =32 percent).

Frequent viewers also treated judicial silence differently. One question asked whether the judge's silence meant that she favored the plaintiff, favored the defendant, had no opinion, or it would depend on the evidence. Whereas few (13 percent) of non-viewers attributed any significance to silence, a majority of frequent viewers (74 percent) concluded (incorrectly so) that it meant that the judge strongly favored *either* the plaintiff or defendant.

Differences also emerged regarding the expectation of aggressive and investigatory judicial behavior. Eighty-three percent of frequent viewers (NV=38 percent) believed that judges should ask questions during proceedings and 64 percent (NV=26 percent) believed that a judge should "be aggressive with the litigants or express his/her displeasure with their testimony or behavior."

Finally, there was no evidence that prior court service either mediated the effects of frequent viewing or otherwise explained the differential responses of the frequent and non-viewers. Instead, prior court service was not shown to be positively or negatively associated with any of the variables assessed, such as opinions regarding judicial activity or its meaning. Additionally, as shown in Table 2, prior court experience was also not predictive of whether jurors held a negative or positive view of the bench.

Implications

The study suggests that the TV experiences provided by syndi-court are either substituted for accurate, first-hand court experience or integrated with existing knowledge of the court system. Moreover, there is little check on this stream of information as few competing models (such as regular transmission of complete trials) to syndi-court's representation exist. Rather, five days a week, episodes reinforce the model of the syndi-court judge: a not-so-neutral arbiter who is aggressive, inquisitive, and often sar-

14. Eschholz, *The Media And Fear Of Crime: A Survey of The Research*, 9 U. FLA. J.L. & PUB. POL'Y 37, 43 (1997) (viewers with no prior criminal justice experiences were more likely than viewers with previous experience to believe that police show portrayals were accurate).

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Table 1. Summary of findings

	FV	NV
Judicial opinions, activity		
judges should have opinion regarding verdict	75%	48.6%
judge should make opinion "clear"	76.5%	31.58%
jurors will "look for clues" to judge's opinion	74.5%	31.58%
Aggressive, investigatory behaviors		
judge should ask questions during trial	82.5%	38.16%
judges should "be aggressive with litigants or express displeasure with their testimony"	63.76%	26.32%
Interpretation of judicial silence		
judge's silence indicates belief in litigant	73.8%	13%

castic; someone who will indicate his or her opinion about the evidence or witnesses obviously and often; and will do so even when silent.

Reducing respect for the bench. The American legal system sets a high bar for the behavior of judges. It envisions a bench that is metered and thoughtful and the pinnacle of propriety. Indeed, this philosophy is reflected in The Model Code of Judicial Conduct. Canon 1 of The Code requires judges, at all times, to conform with the highest behavioral standards "so that the integrity and independence of the judiciary will be preserved." With regard to the appearance of impropriety, it is applied to judges both on and off the bench, in their professional activities as well as their personal lives.

Canon 2 is concerned with the appearance of justice, and recognizes the connection between the public's observation of judges and their perception of the integrity of the judicial system. It requires judges, at all times, to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary: "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges." Canon 3 provides that a judge shall be patient, dignified, and courteous to litigants, and shall perform duties without bias or prejudice.

Yet, the syndi-court bench seems to operate in opposition to these standards. Syndi-court judges are typically sarcastic, accusatory, and opinionated. When the public is fed the judicial model of syndi-court to the exclusion of accurate judicial representations, it is likely to conclude that these traits are common to real judges. Hence, the syndi-court personality may eclipse or infect the true behavior of judges, reducing respect for the bench and the decisions it must enforce. This diminishes the "brand" of judge—what a judge is supposed to be, supposed to represent—and breeds contempt for the judicial system as a whole.[15]

Moreover, that shows feature judges who continue to or have recently sat on the bench furthers this effect. For example, during the first years of his nationally syndicated television show "Judge Joe Brown" continued to sit in Shelby County, Tennessee. Judge Judy and The People's Court Presiding Justice Gerry Sheindlin both left the bench to pursue television opportunities.

Misinterpreting judicial behaviors and temperament. The law assumes that jurors enter the courtroom as blank slates free of bias. Yet people tend to interpret new information in the light of past experience.[16] The lesson of syndi-court is such a past experience that jurors may bring into the courtroom and apply during trial. Indeed, it sends messages about judge behavior that viewers may later use as interpretive guides in jury service.

Although caselaw establishes that a judge should neither be the focal nor vocal center of attention at trial,[17] syndi-court does not endorse this model of judicial restraint. To the contrary, viewers see precisely the opposite, and, therefore, are taught (as demonstrated by the responses of frequent viewers) that judges should, do, and will disclose opinions regarding the case. This may cause them as jurors to unduly focus on the judge and imbue banal action with profound, yet unintended, meaning. When confronted with uncertainty of whether a doubt qualifies as reasonable or whether evidence quantifies as preponderant, jurors may look for other clues, particularly from a legal expert who has also heard the evidence.

Indeed, the U.S. Supreme Court has recognized that the judge possesses a tremendous potential to influence the jury.[18] Where a jury is given clues to a judge's belief regarding the case or the parties, even a suggestion of opinion might be seized upon by the jury, "throw the scales [of justice] out of balance," and influence the eventual out-

Table 2. Express negative view of bench

Experience level	FV	NV
Prior court service or experience	23%	19%
No prior court service or experience	77%	80%

15. The 1999 ABA "Perceptions of the US Justice System" study, *supra* n. 5, reported that only one-third of respondents felt very strong or strong confidence in judges. This did not apply to the Supreme Court, in which 50 percent of respondents reported strong confidence.

16. This is consistent with research demonstrating that non-evidentiary information can sensitize jurors to evidence or testimony elicited at trial. *See* Kovera, Gresham, Borgida, Gray, and Regan, *Does Expert Psychological Testimony Inform or Influence Juror Decision Making? A Social Cognitive Analysis*, 82 J. APPLIED PSYCH. 178-80 (1997).

17. People v. Jamieson, 47 N.Y.2d 882, 883-84 (1979).

18. Turner v. Louisiana, 379 U.S. 466, 472 (1965) (juries are "extremely likely to be impregnated by the environing atmosphere").

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come.[19] Seeking to limit this effect, the law cautions that the power of the judge must "be exercised sparingly, without partiality, bias, or hostility. . . ."[20]

Courts have reversed criminal convictions where the running commentary of one judge mimicked that of syndi-court[21] or where the judge engaged in prolonged questioning.[22] Such questioning, even without an inappropriate or obviously disparaging tone, suggests to the jury that the court doubts the credibility of that particular witness, and deprives the accused of her constitutional right to a fair trial.

Furthermore, frequent viewers even believe that silence is meaningful, indicating the court's belief in one of the litigants. This is not surprising for, in syndi-court, activity and commentary is the norm. It appears that the only time the judge is silent (and not mugging disdain) is when the testimony or evidence is beyond reproach. Thus, silence is significant, equaling belief in one of the parties. Unfortunately, this inverts and misinterprets the accurate judicial standard of silence and neutrality.

Altering expectations of the legal system. Syndi-court also becomes an Emanuel for the procedure of trials and litigation of disputes. It creates in viewers expectations regarding legal rules and becomes a barometer against which all other judicial action is evaluated. When real courts fail to conform to these television expectations, the public, or at least frequent viewers, may become disillusioned with the justice system or lose respect for it.

For example, in syndi-court, the stories are easily digestible, the conflicts clear, and the resolutions swift. They promise instant legal gratification that real courts cannot. There are never breaks for in limine motions or hearings on admissibility. Thus, "the public is mystified when they see actual court cases taking so long to be decided. [It] wonders why judges and lawyers seem to encumber the process with so many unnecessary technicalities and criticizes them for it."[23] As judges fail to live up to their television personae, disputes drag on for more than 22 minutes, and decisions are not contemporaneous, confidence in the justice system is eroded.[24]

Syndi-court viewers may also reconceive how the law is supposed to function and what it is supposed to do. Syndi-court's themes of humiliation and moral reproach seep in and distort the public's context for personal and social judgments regarding the law. For instance, the president of the California Judges Association stated that sitting judges are reported to the commission or that some litigants are disappointed when they win the case but the judge has not humiliated their opponent.[25]

Syndi-court also idealizes the culmination of disputes. The payment of monetary awards and settling of grievances is quick and efficient. Winners always get their money and never need to embark on the arduous journey of enforcing settlements. Losers always appear, and never need to be brought to court through service of process or suffer default judgments.

Additionally, significant legal nuances are lost, leading to misunderstandings of burdens, presumptions of guilt, and evidentiary issues. The inherent and often contrived "dramatization" of syndi-court contributes to a lay tendency to embrace absolutes and dichotomies—black or white, right or wrong, guilt or innocence—which retards their ability to comprehend subtle analyses. Viewers may conclude that the justice system obfuscates issues, denies justice, and that judges are complicit in this injustice.

A model for litigant behavior. Finally, with repeated viewing, viewers may begin to model their behavior to comport with what they have witnessed on syndi-court. Hence, Judge Judy tutors viewers to present their cases in a real court, be it the trial, mediation, or small claims level. Litigants might, therefore, alter their behavior when appearing in court, attempting to play out what they have repeatedly seen on TV.[26]

Frequent viewers may also be inclined to represent themselves pro se. After all, though they may not be lawyers, they've seen it all on TV. Syndi-court presents average people litigating their own disputes without the aid of a lawyer, almost half of whom win. Thus, viewers may come to believe that either pro se representation is not very difficult or that pro se representation still ensures a 50 percent likelihood of success. It may also cause viewers to believe that judges will assist them, as this is what occurs on television. Indeed, there is evidence suggesting this interaction between frequent viewing of syndi-court and litigant behavior. This, in turn, might contribute to litigiousness, as one impediment to bringing suit is the expense of retaining a lawyer.

Additionally, by bringing a courtroom into the homes of viewers, it might make the real courtroom seem more accessible, and, therefore, litigation a more viable option. Some citizens who have legitimate legal gripes will forgo assertion of their legal rights because they cannot afford an attorney or, where that complaint is appropriate for the no-lawyers-allowed forum of small claims court, or were afraid to represent themselves. Thus, by demonstrating the nature of disputes appropriate for and litigant preparedness of syndi-court, courtroom-shy litigants may increase their comfort level with the small claims court. Though this might produce a

19. People v. Bell, 38 N.Y.2d 116, 120 (1975).
20. People v. Jamieson, 47 N.Y.2d at 883-84.
21. People v. De Jesus, 42 N.Y.2d 519, 520 (1977). There, the trial court responded to the testimony of an alibi witness by saying "It is not good enough. . . and you know better," and commented "Let's not be playing any games," "I don't need any help from you," and "Oh, come on."
22. This can suggest that the court is skeptical of the witness's testimony. People v. Carter, 40 N.Y.2d 933, 934 (1976).
23. Editorials, New Jersey Lawyer, March 27, 2000, at 6.
24. Sherwin, WHEN LAW GOES POP, THE VANISHING LINE BETWEEN LAW AND POP CULTURE 8 (2000).
25. Cox, *Judicial Watchdog Agency Wants to Protect Public From TV "Judges,"* Fulton County Daily Report, June 9, 2000.
26. An assistant court executive in California related an exchange with one pro se litigant who explained that he and his wife obtained all of their information about the courts from watching Judge Judy. Carter, *Self-Help Speeds Up,* 87 ABA J. 34 (July 2001).

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benefit of providing access to some who may have otherwise foregone enforcement of their rights, it might produce litigiousness in others. By showcasing all nature of disputes, however menial, as worthy of court action, syndi-court might promote litigiousness in American society.

Proposals

As with other attempts to connect television imagery with viewer behavior, this study cannot identify causation. The results may prove that frequent viewing of syndi-court teaches or cultivates in viewers a particular view of judges, or merely report that people who already hold such views are frequent viewers of such TV fare. Results may also speak to socio-economic status: a particular group of people may seek out these shows or may be the ones who are at home during the day and early evening to watch them.

Nevertheless, causation aside, the study demonstrates that a significant number of jurors walk into the courthouse with syndi-court experience. Indeed, a majority are frequent viewers. Furthermore, these frequent viewers possess a number of beliefs about judges and the justice system that, in many ways, are contrary to reality. And, regardless of how those beliefs were formed, they may improperly impact the delivery of justice and perceptions of the bench. Accordingly, court administrators, advocates, and judges should implement corrective actions to these potential influences. This is particularly warranted, since there is no evidence that prior court experience, such as jury service or being a witness or litigant, immunizes viewers against the effects of syndi-court.

Correcting the misimpressions borne of syndi-court and displacing them with the appropriate manner and etiquette of the courtroom should begin as soon as potential jurors enter the courthouse. Though all vicinages order jury duty differently, all share one thing: at some point, all prospective jurors sit in a room and wait. This is an opportunity to orient prospective jurors to the correct process and gently address the juxtaposition of syndi-court.

One method is a short (5-7 minute) video played on a constant loop in the juror "waiting room." In addition to explaining the basics of jury service, this information should also include reference to syndi-court, explaining that syndi-court's representation of judges is "dramatized" for effect, and that the judges that jurors will encounter in the courtroom will not and should not act like those on TV. It might also include video snippets of real trials with real judges in action—or, rather, inaction—with a voice over noting the differences. Many courthouses already have juror orientation programs in place; adding syndi-court cautions is relatively simple.

Attorneys might address the imagery of syndi-court through either instructive or investigative voir dire much like voir diring prospective jurors on any pertinent issue in the news, bias, or propensity toward police testimony. Counsel might ask the panel neutral questions pertaining to familiarity with, viewing habits of, and preference of judges on syndi-court. She can then shift to a more instructive tone, posing a series of leading questions designed to impart that syndi-court judges are not real, their behavior is uncommon, that judges typically are not to ask questions, that a judge who is quiet is not a judge who agrees, and even that the procedure or burdens (and testimony) will be different.

In conjunction with a voir dire strategy, counsel should request an instruction regarding syndi-court or an enhanced instruction that the jury is not to look to the court for an opinion regarding the outcome of the case. This will be more or less important depending on the personality of the court or whether it has been particularly quiet or talkative in response to certain aspects of the trial.

Regardless of counsel's actions, a court should also take precautions by instructing the jury. For example, when the slate of prospective jurors is first brought into the courtroom, as well as when the preliminary instructions are delivered to the impaneled jury, the court could simply explain to jurors that what they may have seen on syndi-court is incorrect, that judges are not to speak, that the court truly has no opinion, and that jurors are not to assume, look for clues to, or infer the existence of one. It is important to address these perceptions as soon as possible, otherwise a bias borne of syndi-court might take root that will be difficult to later remedy.

A similar instruction should be repeated in the main charge. Although final charges typically instruct that the judge has no opinion, where frequent viewers imbue the inactive behavior of "no opinion" with meaning, such an instruction remains impotent against the syndi-court effect: where juror preconceptions about the law differ from what judges state in their instructions, jurors are more likely to follow the instructions if the judges explicitly address the preconceptions, explaining how the law differs. Consequently, the naked "no bias, no opinion" instruction will likely be an ineffective remedy in contrast to an explicit instruction referring to syndi-court.

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The law has long been fictionalized on television, but recently the reality programming of syndi-court has gained significant popularity. For many citizens, syndi-court is their only connection with the justice system. Thus, its representations of judges and law become unopposed reality. Unfortunately, the reality of syndi-court often diverges from the reality of the justice system, and imparts in frequent viewers beliefs about judicial behavior and demeanor that are illegitimate and even damaging to the system. This study demonstrates that a majority of prospective jurors are "frequent viewers," and thus the potential for damage is significant. Consequently, the justice system should implement strategies to disabuse jurors of misperceptions borne of syndi-court.

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Judging by heuristic
Cognitive illusions in judicial decision making

By Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich

Many people rely on mental shortcuts, or heuristics, to make complex decisions, but this sometimes leads to inaccurate inferences, or cognitive illusions. A recent study suggests such cognitive illusions influence judicial decision making.



The institutional legitimacy of the judiciary depends on the quality of the judgments that judges make. Even the most talented and dedicated judges surely make occasional mistakes, but the public expects judges to avoid making *systematic* errors that favor particular parties or writing opinions that embed these mistakes into the substantive law.

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Psychological research on human judgment, however, suggests that this expectation might be unrealistic. This research indicates that people rely on mental shortcuts or "heuristics" to make complex decisions.[1] Reliance on heuristics facilitates good judgment most of the time, but in some circumstances causes people to draw systematically inaccurate inferences—in other words, these heuristics can create *cognitive illusions* of judgment.

Just as certain patterns of visual stimuli can fool people's eyesight, leading them to see images that are not really present, certain fact patterns can fool people's judgment, leading them to believe things that are not really true. The systematic nature of the errors that these illusions produce can be analogized to the sort of errors that an expert marksman makes if his rifle sight is out of alignment: his shots land in a tight cluster, but away from the bullseye.

Decades of research indicate that cognitive illusions affect the way juries decide cases.[2] But are judges any better? On the one hand, judges are intelligent, experienced, well-trained, and highly motivated decision makers, so it seems reasonable to speculate they might be immune to such illusions. On the other hand, research on judgment and choice suggests that cognitive illusions plague many professionals, including doctors, real-estate appraisers, engineers, accountants, options traders, military leaders, psychologists, and even lawyers.[3] Systematic, controlled studies of judicial decision making

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1. *See* Tversky and Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974).

2. *See* MacCoun, *Experimental Research on Jury Decision Making*, 244 SCIENCE 1046 (1989).

3. *See generally*, PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 258 (1993) (observing that "several studies have found that experts display either roughly the same biases as college students or the same biases at somewhat reduced levels").

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are rare,[4] and whether judges are susceptible to these cognitive illusions remains an open empirical question.

To begin to answer this question, we conducted an empirical study to determine whether five common cognitive illusions—anchoring, framing, hindsight bias, inverse fallacy, and egocentric bias—would influence the decision making of a sample of 167 federal magistrate judges. We administered a brief questionnaire to these judges during a general educational conference sponsored by the Federal Judicial Center. We found that each of these cognitive illusions influenced their decision-making processes.

Anchoring

When people make estimates (e.g., the fair market value of a house), they commonly rely on the initial value available to them (e.g., the list price). That initial value tends to "an-

4. A few studies have demonstrated the effects of various cognitive illusions in judges: Anderson, et. al., *Evaluation of Auditor Decisions: Hindsight Bias Effects and the Expectation Gap*, 14 J. ECON. PSYCHOL. 711, 726-727 (1993) (hindsight bias); Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH U. L. Q. 979 (1994) (egocentric biases); Viscusi, *How do Judges Think About Risk?* 1 AM. L. & ECON. REV. 26 (1999) (over-estimation of small risks, hindsight bias, and ambiguity aversion); Robbenolt, *Punitive Damage Decision Making: The Decisions of Citizens and Trial Court Judges*, 26 LAW & HUM. BEHAV. 315 (2002) (various biases in assessment of punitive damages).

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chor" their final estimates. Reliance on an anchor can be reasonable because an anchor might convey relevant information about the actual value. Even anchors that do *not* provide any useful information, however, can affect people's numeric estimates.

For example, people asked to estimate the average daytime temperature in downtown San Francisco provided higher estimates when first asked to determine whether the correct answer was greater or less than the absurdly high anchor of *558 degrees* Fahrenheit.[5] In litigation, anchors such as statutory damage caps and plaintiffs' attorneys' requests for damages have been shown to influence the size of damage awards even when they convey no information about the extent of the plaintiff's injury.[6]

We tested for the effect of anchoring on the judges in our sample by presenting them with the following description of a serious personal injury suit in which only damages were at issue:

> Suppose that you are presiding over a personal injury lawsuit that is in federal court based on diversity jurisdiction. The defendant is a major company in the package delivery business. The plaintiff was badly injured after being struck by one of the defendant's trucks when its brakes failed at a traffic light. Subsequent investigations revealed that the braking system on the truck was faulty, and that the truck had not been properly maintained by the defendant. The plaintiff was hospitalized for several months, and has been in a wheelchair ever since, unable to use his legs. He had been earning a good living as a free-lance electrician and had built up a steady base of loyal customers. The plaintiff has requested damages for lost wages, hospitalization, and pain and suffering, but has not specified an amount. Both parties have waived their rights to a jury trial.

We asked half of the judges "how much would you award the plaintiff in compensatory damages?" We asked the other half of the judges the same question, but only after we first asked them to rule on a motion filed by the defendant to have the case dismissed for ostensibly failing to meet the jurisdictional minimum in a diversity suit ($75,000). We hypothesized that the $75,000 damage threshold mentioned in the motion would serve as an anchor, even though the motion was frivolous.

Table 1: Anchoring effects: mean and quartile results

Condition	Mean	1st Quartile (25th percentile)	2nd Quartile (median)	3d quartile (75th percentile)
No anchor	$1,249, 000	$500,000	$1,000,000	$1,925,000
Anchor	$882,000	$288,000	$882,000	$1,000,000

Consistent with this hypothesis, we found that first ruling on the motion had a dramatic effect on the judges' damage awards, as shown in Table 1.

Those judges who were asked only to determine the damage award provided an average estimate of $1,249,000, while those judges who first ruled on the motion provided an average estimate of only $882,000. Also, three-quarters of the judges who ruled on the anchor provided damage award estimates that were lower than the median award provided in the no anchor condition. Even though the motion was baseless, it forced the judges to consider whether the case was worth more than $75,000. In estimating the amount of damages to be awarded, the judges in the anchoring condition began with $75,000 and adjusted upward, albeit inadequately from there.

These results are difficult to compare with other anchoring studies because we used a low anchor (most other studies use a high one) and we used a pre-trial motion to introduce the anchor (most studies use a damage request by a plaintiff's lawyer). That said, the results of our anchoring problem—providing a low anchor reduced the award by 29 percent—are similar to the results of the one mock-jury study (by Malouff and Schutte) that also involved the use of a low anchor. Although the percentage reduction in mean awards by the non-judges in that study exceeded the one we found in judges (46 percent versus 29 percent), we found a greater mean reduction in absolute dollars (roughly $77,000 versus $368,000).

These results likely overstate the effect of an anchor on a judge deciding a real case. Our materials were necessarily brief relative to an actual case in which a judge would have access to much more information, probably including conflicting numeric estimates. Although the anchoring effect is real, other factors might alter or diminish its impact in an actual case.

Framing

When people make risky or uncertain decisions—such as deciding whether to settle a case or to proceed to trial—they tend to categorize their decision options as potential gains or losses from the status quo.[7] This categorization, or "framing," of decision options influences judgment concerning the wisdom of incurring risk. People tend to prefer certainty when choosing between options that appear to represent gains and to prefer risk when choosing between options that appear to represent losses. For example, most people believe that a certain gain of $100 is preferable to a 50 percent chance of winning $200 but believe that a 50 percent chance of losing $200 is preferable to a certain $100 loss.

Framing can have a profound impact on the assessment of civil law-

5. Plous, *supra* n. 3, at 146 (citing to an unpublished study by Quattrone and colleagues).

6. *See* Chapman & Bornstein, *The More You Ask For the More You Get: Anchoring in Personal Injury Verdicts*, 10 APP. COG. PSYCHOL. 519 (1996); Malouff & Schutte, *Shaping Juror Attitudes: Effects of Requesting Different Damage Amounts in Personal Injury Trials*, 129 J. SOC. PSYCHOL. 491 (1989); Robbenolt & Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 LAW & HUM BEHAV. 353, 358-361 (1999).

7. *See* Kahneman & Tversky, *Choices, Values, and Frames*, 30 AM. PSYCHOLOGIST 341 (1984).

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suits because litigation produces a natural frame.[8] In most lawsuits, plaintiffs choose either to accept a settlement payment from the defendant or to gamble that further litigation will produce a larger gain. Most defendants, by contrast, choose either to make a certain settlement payment to the plaintiff or to gamble that further litigation will reduce the amount they must pay. Plaintiffs, in other words, often choose between options that appear to represent gains, while defendants often choose between options that appear to represent losses.[9] Consequently, one might expect there to be more pressure on plaintiffs to accept settlement offers than there is on defendants to make settlement offers. Framing effects might lead ostensibly neutral mediators, including judges, to encourage plaintiffs to accept settlement offers that are much lower than the expected value of the lawsuit.

To determine whether judges' settlement recommendations might be influenced by framing, we presented each of the judges with a hypothetical fact pattern to evaluate:

> Imagine that you are presiding over a case in which a plaintiff has sued a defendant for $200,000 in a copyright action. Both the plaintiff and the defendant are mid-sized publishing companies with annual revenues of about $2.5 million per year. They are represented by competent attorneys who have not tried cases before you in the past. You believe that the case is a simple one, but it presents some tough factual questions. There is no dispute as to the amount at stake, only as to whether the defendant's actions infringed on the plaintiff's copyright. You believe that the plaintiff has a 50 percent chance of recovering the full $200,000 and a 50 percent chance of recovering $0. You expect that should the parties fail to settle, each will spend approximately $50,000 at trial in litigation expenses. Assume that there is no chance that the losing party at trial will have to compensate the winner for these expenses.

We then asked the judges to indicate whether they thought the parties should settle the case. Half of the judges reviewed the case from the plaintiff's perspective: "You have learned that the defendant intends to offer to pay the plaintiff $60,000 to settle the case. Do you believe that the plaintiff should be willing to accept $60,000 to settle the case?" The other half reviewed the case from the defendant's perspective: "You have learned that the plaintiff intends to offer to accept $140,000 to settle the case. Do you believe that the defendant should be willing to pay $140,000 to settle the case?"

Judgments that require people to assess the predictability of past outcomes are pervasive in the law.

In both instances, the judges were confronted with proposed settlement offers that exceeded the expected judgment at trial by $10,000. Nevertheless, the plaintiff seemed to be choosing between gains, while the defendant seemed to be choosing between losses. We hypothesized that the judges evaluating this case from the plaintiff's perspective would be more likely to recommend settlement than those judges looking at it from the defendant's perspective.

The results supported this hypothesis. Among the judges evaluating the case from the plaintiff's (gains) perspective, 39.8 percent indicated that they thought the plaintiff should accept the $60,000 settlement offer, but only 25 percent of the judges evaluating the case from the defendant's (losses) perspective indicated that they thought the defendant should pay the $140,000 settlement payment proposed by plaintiff.

Although the frame of the problem influenced the judge's evaluations, it had less effect on the judges than on laypersons. The judges were 15 percentage points more inclined to say that plaintiff rather than defendant should settle, while other studies in which law students and undergraduates evaluated similar materials have found 14 to 51 percentage-point differences between subjects in the two conditions.[10]

Hindsight bias

Hindsight vision is 20/20. People overestimate their own ability to have predicted the past and believe that others should have been able to predict events better than was possible.[11] Psychologists call this tendency "hindsight bias."

Few judgments in ordinary life require people to assess the predictability of past outcomes, but such judgments are pervasive in the law. For example, determining whether a defendant was negligent requires judges and juries to evaluate the reasonableness of precautions that the defendant took against causing an accident even though they know that these precautions failed to prevent injury. Precautions that seem reasonable to people before the fact can seem negligent after the fact.

To test whether judges are susceptible to the hindsight bias, we presented each of the judges who participated in our study with a hypothetical fact pattern based on an actual case:

8. *See* Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 So. CAL. L. REV. 113, 129 (1996).

9. *Id. But see* Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163 (2000) (explaining that litigants' risk preferences are reversed in frivolous or low-probability litigation).

10. *See* Korobkin & Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*; 93 MICH L. REV. 107, 128-142 (1994); Rachlinski, *supra n.* 8, at 135-144.

11. *See* Fischhoff, *For Those Condemned to Study the Past: Heuristics and Biases in Hindsight*, in Kahneman, Slovic & Tversky (eds) JUDGMENT UNDER UNCERTAINITY; HEURISTICS AND BIASES. 335, 341(1982).

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In 1991, a state prisoner filed a *pro se* Section 1983 action in Federal District Court against the Director of the Department of Criminal Justice in his state, asserting, among other things, that the prison had provided him with negligent medical treatment in violation of Section 1983. The district court further found that the plaintiff knew his claims were not actionable because he had made similar claims several years earlier in a case that had been dismissed by the court. Thus, the district court sanctioned the plaintiff pursuant to Rule 11, ordering him to obtain the permission of the Chief Judge in the district before filing any more claims. The plaintiff appealed the district court's decision.

Table 2: Hindsight bias: percentage of judges identifying each outcome as the most likely, by condition.

Outcome provided	% Selecting as most likely outcome		
	Affirmed	Remanded	Vacated
Affirmed	**81.5**	7.4	11.1
Remanded	40.4	**38.6**	21.1
Vacated	27.8	20.4	**51.9**

Note: Boldface numbers indicate the percentage of judges identifying the given outcome as the most likely.

We randomly assigned the judges to one of three conditions. Judges in each condition were told that the court of appeals had either: affirmed the sanction; remanded the case to the district court for imposition of a less onerous sanction; or vacated the sanction. We then asked all of the judges: "In light of the facts of the case, as described in the passage above, which of the following possible outcomes of the appeal was most likely to have occurred (assume that the three outcomes below are the only possible ones)?" We hypothesized that the judges would be unable to escape the influence of having been given "knowledge" of the outcome when assessing which outcome was most likely to have occurred.

Consistent with this hypothesis, the outcome significantly influenced judges' assessments. As shown in Table 2, judges informed of a particular outcome were much more likely to have identified that outcome as the most likely to have occurred.

Overall, the sum of the percentage of judges in each of the three conditions who selected the outcome that they were provided as the "most likely to have occurred" was 172 percent, whereas it would have been 100 percent if learning the outcome had had no effect on the judges. Thus, the judges exhibited susceptibility to the hindsight bias.

Prior studies have demonstrated that the hindsight bias affects judges' assessments of negligence and recklessness.[12] Our study suggests that judges are also vulnerable to the bias in procedural contexts, such as judgments regarding: whether Rule 11 sanctions should be imposed (a motion or allegation can seem more frivolous after a judicial ruling denying it); and whether counsel provided ineffective assistance (decisions a lawyer makes in the course of representing a client can seem less competent after an undesirable outcome is obtained).

We estimate that 24 percent of the judges in our study made a different choice because of the hindsight bias (172 percent minus 100 percent divided by 3 conditions). This result is comparable to data from mock-jury studies.[13] It is also comparable to the estimate from a statistical review of studies of the hindsight bias, which indicated that the hindsight bias alters the decisions of 27 percent of decision makers.[14]

Inverse fallacy

When making categorical judgments, people tend to discount the importance of background statistics, such as the general prevalence of a particular category.[15] In one demonstration of this phenomenon, medical doctors were asked to estimate the likelihood that a patient who had tested positive for a certain rare disease actually had that disease.[16] The doctors were told that the test was 90 percent reliable and that the prevalence of the disease in patients such as the one in the example was one in one thousand. Although the actual likelihood is quite small, 80 percent of the doctors indicated that it was more likely than not that the patient had the illness. The doctors found the 90 percent reliability statistic compelling, but discounted the importance of the prevalence of the disease.

Psychologists have labeled the specific decision-making problem identified by the aforementioned study as the "inverse fallacy."[17] The inverse fallacy refers to the tendency to treat the probability of a hypothesis given the evidence (for example, the probability that a defendant was negligent given that a plaintiff was injured) as the same as, or close to, the probability of the evidence given the hypothesis (for example, the probability that the plaintiff would be injured if the defendant were negligent).

The inverse fallacy can affect the evaluation of probabilistic evidence in the courts. For example, DNA evi-

12. *See* Anderson, et. al., *supra* n. 4; Viscusi, *supra* n. 4; Jennings et. al., "Outcome Foreseeability and its Effects on Judicial Decisions" (unpublished manuscript on file with the authors).

13. Hastie, Schkade & Payne, *Juror Judgments in Civil Cases: Hindsight Effects on Judgments of Liability for Punitive Damages*, 23 LAW & HUM. BEHAV. 597, 606 (1999) (24 percent shift); Kamin & Rachlinski, *Ex Post (Does Not Equal) Ex Ante: Determining Liability in Hindsight*, 19 LAW & HUM. BEHAV. 89, 98 (1995) (34 percent shift); Stallard & Worthington, *Reducing the Hindsight Bias: Utilizing Attorney Closing Arguments*, 22 LAW & HUM. BEHAV. 671, 679 (1998) (28 percent shift).

14. Christensen-Szalanski & Willham, *The Hindsight Bias: A Meta-Analysis*, 48 ORGANIZATION BEHAV. & HUM. DECISION PROCESSES 147, 161 (1991).

15. *See* Kahneman & Tversky, *Subjective Probability: A Judgment of Representativeness*, 3 COGNITIVE PSYCHOL. 430 (1972).

16. Casscells, Schoenberger & Graboy, *Interpretations by Physicians of Clinical Laboratory Results*, 299 NEW ENG. J. MEDICINE 999 (1978).

17. *See* Koehler, *Why DNA Likelihood Ratios Should Account for Error (Even When A National Research Council Report Says They Should Not)*, 37 JURIMETRICS J. 425, 432 (1997).

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dence in a criminal case can provide the probability that a randomly selected DNA sample would match the DNA sample from the crime scene (and it typically states this as a tiny number). Committing the inverse fallacy would mean inferring that the likelihood that the defendant is innocent is equivalent to the likelihood of a random match. This inference, however, would be incorrect, as the probability that the defendant is innocent also depends on the size of the population that the suspect's DNA was drawn from and the reliability of the DNA test.

To test whether judges in our study would commit the inverse fallacy, we gave them a problem based loosely on the classic English case, *Byrne v. Boadle* (1863):

> The plaintiff was passing by a warehouse owned by the defendant when he was struck by a barrel, resulting in severe injuries. At the time, the barrel was in the final stages of being hoisted from the ground and loaded into the warehouse. The defendant's employees are not sure how the barrel broke loose and fell, but they agree that either the barrel was negligently secured or the rope was faulty. Government safety inspectors conducted an investigation of the warehouse and determined that in this warehouse: (1) when barrels are negligently secured, there is a 90% chance that they will break loose; (2) when barrels are safely secured, they break loose only 1% of the time; (3) workers negligently secure barrels only 1 in 1,000 times.

We then asked the judges to assess "how likely is it that the barrel that hit the plaintiff fell due to the negligence of one of the workers?" We provided the judges with one of four probability ranges to select: 0-25 percent, 26-50 percent, 51-75 percent, or 76-100 percent.

When presented with a problem like this one, most people commit the inverse fallacy and assume the likelihood that the defendant was negligent is 90 percent, or at least quite high. In fact, however, the actual probability that the defendant was negligent is only 8.3 percent. We hypothesized that most of the judges would commit the inverse fallacy and select the "76-100 percent" range.

The judges did relatively well on this inverse fallacy problem: 40.9 percent selected the right answer by choosing 0-25 percent; 8.8 percent indicated 26-50 percent; 10.1 percent indicated 51-75 percent; and 40.3 percent indicated 76-100 percent. Although more than 40 percent of the judges analyzed this problem correctly, a comparable percentage chose the 76-100 percent range, suggesting that many of the judges committed the inverse fallacy.

To some extent, judges in this study might have been responding to the underlying res ipsa loquitur doctrine that governs cases like the one described in our question. Under the facts as we describe them, the plaintiff makes out a clear case for liability under the doctrine. Because the law dictates that the defendant be liable under these circumstances, the judges might have relied on the doctrine in judging probabilities. This possibility, in fact, highlights one of the more serious difficulties that can arise from judicial reliance on faulty judgments, namely, that legal doctrine might be based on a mistaken inference process. The doctrine of res ipsa loquitur instructs judges to take no account of the base-rate of negligence, thereby cementing the inverse fallacy into important legal precedent.[18]

In any event, the judges in our study were more attentive than other experts to base-rate statistics. As noted above, 20 percent of a group of doctors—as compared to 40 percent of the judges in our study—provided a correct (or nearly correct) answer to a question using nearly identical probabilities.

Egocentric biases

People tend to make judgments about themselves and their abilities that are "egocentric" or "self-serving."[19] People routinely estimate, for example, that they are above average on a variety of desirable characteristics, including health, driving, productivity, and the likelihood that their marriage will succeed. Moreover, people overestimate their contribution to joint activities. Following a conversation, for example, both parties will usually estimate that they spoke more than half the time. Similarly, when married couples are asked to estimate the percentage of household tasks they perform, their estimates typically add up to far more than 100 percent.

Egocentric biases are generally psychologically healthy, but they can have an unfortunate influence on the litigation process. Due to egocentric biases, litigants and their lawyers might overestimate their own abilities, the quality of their advocacy, and the relative merits of their cases. These views, in turn, are likely to undermine settlement efforts, as each side remains too optimistic about its chances of winning at trial.

Like litigants and lawyers, judges might also be inclined to interpret information in self-serving or egocentric ways. Egocentric biases might keep judges from maintaining an awareness of their limitations, which could work to the detriment of litigants appearing in their courtrooms. For example, a federal judge can grant an interlocutory appeal only if she is willing to concede that she has issued a ruling on a matter of law "as to which there is substantial ground for difference of opinion."[20] Thus, a litigant seeking to persuade a judge to grant an interlocutory appeal must convince her that another judge could easily disagree with her ruling. Egocentric biases may facilitate judicial self-confidence and decisiveness, but they also might induce judges to underestimate the likelihood they will make mistakes when adjudicating and settling cases.

To test whether judges are prone to egocentric biases, we asked those participating in our study to respond to a simple question: "United States magistrate judges are rarely overturned on appeal, but it does occur. If we were to rank all of the magistrate judges currently in this room according to the rate at which their de-

18. Kaye, *Probability Theory Meets Res Ipsa Loquitur*, 77 MICH L. REV. 1456 (1979).

19. *See, e.g.*, Ross & Sicoly, *Egocentric Biases in Availability and Attribution*, 37 J. PERSONALITY & SOC. & SOC. PSYCHOL. 322 (1979) (testing for egocentric biases in joint activities).

20. 28 U.S.C. §1292(b).

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AJS
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From the executive vice president and director

How fortunate we are

by Allan D. Sobel



Each August some AJS Directors end their service on the Executive Committee so that others may take responsibility for guiding this great organization. This annual turnover causes me to think about how fortunate we are to have so many able people in our ranks. Six hard working individuals, who are devoted to the mission of improving the administration of justice, completed their terms on the committee this year: Lorenzo Arredondo, Stephen Burbank, Judith Chirlin, Richard Dysart, Amy Tirre, and Vincent Trosino.

Judge Arredondo has been a Lake County, Indiana, Circuit Court judge since 1981. He is a nationally recognized author and lecturer on justice system issues. Judge Arredondo joined AJS in 1977, and has served as a Director since 1996 and on the Executive Committee since 1998. Among his many accomplishments, Judge Arredondo received the Sherman Minton Judicial Excellence Award in 1995 and the Indiana State Bar Association Opportunities for Minorities Award in 1997. In 1996, 1997, and 1998, he was invited to the White House by President Clinton to attend a briefing on issues of importance to the Hispanic community.

Professor Burbank is the David Berger Professor for the Administration of Justice at the University of Pennsylvania. He is a nationally known expert on federal practice, international litigation, and judicial independence and accountability. Professor Burbank joined AJS in 1988 and has served as a Director since 1993 and on the Executive Committee since 1996. He has served as Acting Dean of the University of Pennsylvania Law School; Law Clerk to the Chief Justice of the United States; and Law Clerk to Justice Robert Braucher, Supreme Judicial Court of Massachusetts.

Judge Chirlin is a Los Angeles County Superior Court judge. She is a former chair of the National Association of Women Judges Committee on Judicial Selection and vice-chair of the California Judicial Council's Advisory Committee on Gender Bias in the Courts. Chirlin has served on a blue-ribbon commission studying California's women's prisons and was a member of the American Bar Association's Standing Committee on Judicial Selection, Tenure, and Compensation. She is a regular faculty member of the CEELI in Prague, Czech Republic. Judge Chirlin has been a member of AJS for more than 25 years. She served as Chair from 1997 to 1999.

An accomplished actor, Richard Dysart is best known for his role as Leland McKenzie in the TV show *L.A. Law.* He serves on the board of trustees for Galludet University in Washington, D.C., and is a member of the National Support Committee of the Native American Rights Fund. He is a member of the Academy of Motion Picture Arts and Sciences and the Academy of Television Arts and Sciences. Mr. Dysart joined AJS in 1988 and has been a Director since 1998 and a member of the Executive Committee since 1999.

Amy Tirre joined AJS as a young lawyer member in 1996, when she also joined the AJS Board and Executive Committee. Ms. Tirre is an attorney at the Jones Vargas firm, where she specializes in bankruptcy and creditors' rights. She began her career and was introduced to AJS as a clerk to Justice Miriam Shearing, current AJS chair and Nevada Supreme Court justice.

Vincent Trosino is president, vice chairman of the board, and chief operating officer of State Farm Insurance Companies. Mr. Trosino became a life member of AJS in 1998, at which time he joined the AJS Board and Executive Committee. In 2000, Mr. Trosino was elected chairman of the Board of Trustees of the American Institute for CPCU, the Insurance Institute of America, and the Insurance Institute for Applied Ethics. He also serves on the executive committee of the Brookings Institution.

Clearly, each of these committed members of our Executive Committee came to AJS as qualified, talented, and dedicated professionals. They attended meetings with enthusiasm, patience, and humor, and offered thoughtful ideas and questions to discussions. The organization owes a great deal to these six AJS members, who went beyond dues payments and occasional meeting attendance. They took days off from work or rescheduled vacation to attend Executive Committee meetings, award functions, and AJS programs. They worked with staff to make things happen for AJS and contributed financially every year. They sat in on innumerable conference calls as members of the nominating, editorial, visibility, and membership committees, among others, and, in so many ways, helped push for the continued success of AJS. For their contributions, I thank these six outgoing members of our Executive Committee, and hope that their efforts will serve as inspiration to those who come after them. ⚖

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Table 3: Summary of effect sizes in our study as compared to other decision makers

Cognitive illusion	*Our test for* the illusion	Normative expectation	Size of the effect	Compared *to others*
Anchoring effects	Estimated damages with and without a low anchor	No difference between conditions	Anchor reduced awards by 29%	Comparable
Framing effects	Settlement rates in gains and losses frames	No difference between conditions	Settlement rate 15 percentage points higher in gains frame	Better
Hindsight bias	Percent identifying known outcome as most likely outcome	Total percent of judges identifying known outcome (across 3 conditions) sums to 100%	Percentage identifying known outcome summed to 172%	Comparable
Inverse fallacy	Solution to evidentiary problem	Choosing correct answer	41% chose correct answer	Better
Egocentric bias	Identifying relative rate of being overturned on appeal (in quartiles)	Uniform distribution of answers across four quartiles	56% chose lowest quartile; 88% report being better than the median judge	Comparable

cisions have been overturned during their careers, [what] would your rate be?" We then asked the judges to place themselves into the quartile corresponding to their respective reversal rates: highest (i.e., >75 percent), second-highest (>50 percent), third-highest (>25 percent), or lowest (lowest 25 percent).

The judges exhibited an egocentric bias. Overall, 56.1 percent of the judges reported that their appeal rate placed them in the lowest quartile; 31.6 percent placed themselves in the second-lowest quartile; 7.7 percent in the second-highest quartile, and 4.5 percent in the highest quartile. In other words, nearly 87.7 percent of the judges believed that at least half of their peers had higher reversal rates on appeal. This pattern of results differs significantly from what one would expect if judges were unbiased. Even assuming that the 56.1 percent of the judges in the lowest quartile had never been overturned on appeal (an unlikely possibility, but one that would make their assessments reasonable), the remaining distribution of judges is skewed significantly towards the lower quartiles.

The magnitude of the egocentric bias exhibited by the judges in this study was similar to that reported in other studies of the bias. Judges in our sample were comparable to automobile drivers (87.5 percent claim to be safer than the average driver), slightly more modest than university faculty (94 percent claim to be better teachers than average), and much more modest than couples about to be married (99 percent claim to be less likely than the average couple to get divorced).[21]

Judges are human

Judges, it seems, are human. They appear to fall prey to the same cognitive illusions that psychologists have identified among lay persons and other professionals. Table 3 summarizes our results and compares them to the results of studies on non-judicial decision makers.

Although the judges in our study were less susceptible to framing effects and the inverse fallacy than other decision makers faced with similar situations, they proved to be just as susceptible as other experts and laypersons to the influence of anchoring effects, the hindsight bias, and the egocentric bias.

Overall, our results indicate that, like the rest of us, judges use heuristics that can produce systematic errors in judgment. Even if judges are free from prejudice against either litigant, fully understand the relevant law, know all of the relevant facts, and can put their personal politics aside, they might still make systematically erroneous decisions because of the way they—like all human beings—think.

Unlike the rest of us, however, judges' judgments can compromise the quality of justice that the courts deliver. In the law review article from which this article was abstracted, we have identified several things that judges can do to minimize the effects of cognitive illusions, including considering multiple perspectives and seeking out decision-making methods or standards that are less likely to be influenced by misleading heuristics.[22] A deeper understanding of how people think, including an appreciation of the power of heuristics, is the first step toward crafting sound solutions.

21. *See* Svenson, *Are We All Less Risky and More Skillful Than Our Fellow Drivers?* 47 ACTA PSYCHOLOGICA 143, 145-146 (1981) (driving); Cross, *Not Can, But Will College Teaching Be Improved?* 17 NEW DIRECTIONS FOR HIGHER EDUCATION 1, 5-6 (1977) (college professors); and Baker and Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439 (1993) (engaged couples).

22. Guthrie, Rachlinski & Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001).

Process in

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by Stephen

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Process in the federal appellate courts

by Stephen L. Wasby

Inside Appellate Courts: The Impact of Court Organization on Judicial Decision Making in the United States Courts of Appeals, by Jonathan Matthew Cohen. University of Michigan Press. 2002. 231 pages. $55.

In this important, well written book, sociologist and lawyer Jonathan Cohen effectively uses an organizational behavior perspective to provide a comprehensive portrayal of the structure and patterns within which the decisions of the United States courts of appeals are made.

Cohen has done for these courts what Heydebrand and Seron did for the U.S. district courts in *Rationalizing Justice* (1990). He uses the literature to make sense of the functioning of complex institutions. Recognizing that the judiciary is a large-scale, complex organization, Cohen "seeks to fill in the black box of the court's organizational character" (p. 3). He wants to show how organizational characteristics affect judicial processes, particularly as the courts of appeals deal with substantially increased caseload and growing case complexity. His effective use of social science materials makes his discussion of bureaucratization of the courts theoretically informed without theory overwhelming the presentation. The U.S. courts of appeals are discussed as organizations of the multidivisional form; they are decentralized, with highly autonomous units, but lack a central office with power to coordinate.

Although well presented data charts help identify variations across circuits, Cohen's method is qualitative, based on interviews with judges, secretaries, and law clerks in the District of Columbia, Seventh, and Ninth Circuits; extended observation in each court; and participation while clerking for a Ninth Circuit judge. Much attention is directed toward the Ninth Circuit without undercutting the book's more general applicability. Extended interview quotations help tell the story well, although at times one wishes for shorter quotes and more from the author.

Autonomy and interdependence

Cohen's principal theme throughout is the need for balance between the autonomy of individual chambers and the task interdependence of a multi-judge decision-making process. The public may view the judge as a solo character, but limits on judges' autonomy include not only the basic fact that appellate judges make decisions in groups but also that they are part of groups in their own chambers. Autonomy and interdependence are also balanced through the courts' formal features; their structural dimensions, by which Cohen means intra-chambers and inter-chambers interaction; and institutional/cultural dimensions; also playing a part is the interaction of these features. This interaction and these elements provide resiliency and allow adaptation to change. Cohen feels a "conservative evolutionary approach" (p. 219) is best, although he recognizes that adaptation may also allow courts to evade dealing with problems as they continue to function adequately.

The formal features are rules and procedures, the means by which the judges learn them, and what happens when they fail to follow them. The judges learn from the following elements, taken together: vertical and horizontal stare decisis; standards of review of lower court decisions; legal and personal expertise; briefs and oral argument; central staff and (elbow) law clerks; and opinion assignment and publication. As Cohen observes, "because judges learn the law and facts from multiple sources, the limitation or reduction of one . . . can be overcome by the reliance on other sources." (p. 82).

Examining interactions in judges' chambers and among those chambers, Cohen explores the danger, which he thinks overstated, of overdelegation to clerks and other chambers. Inter-chambers relations take place against a background of geographic span and dispersion, particularly in a large circuit like the Ninth; here Cohen focuses on the primarily written nature of communication, to which the clerk network adds in important ways. His intensive discussion of the use of clerk-prepared bench memoranda, including their use as a within-chambers communication device, and the benefits and costs of sharing them among chambers, is a first-rate addition to our knowledge of these courts. As inter-chambers communication is related to consistency of a court's outcomes, one of the book's small weaknesses is the failure to draw on the literature on inconsistency in large courts of appeals, particularly

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Arthur Hellman's work. (A declaration: Cohen makes substantial good use of the reviewer's earlier work on communication among courts of appeals judges, thus extending a longitudinal view of changes in how judges deal with each other.)

The court's organizational culture is a set of informal, institutionalized cultural norms. At times these conflict or point in different directions as they operate to reinforce either autonomy or interdependence. Cohen finds that formal rules trump substantive justice; this helps explain why ideology has limited force in these courts, where, in terms of the political scientists' debate, ideology has less effect than "attitudinalists" might expect.

Visiting judges, which courts of appeals use to deal with increasing caseload, cause a problem for a court's organizational culture. Here, however, Cohen loses his deft touch when he fails to distinguish adequately between district judges, who are from within the circuit and thus have applied circuit precedent, and who, in addition to the help they provide with caseload, are brought to sit with the appeals court to socialize them, and out-of-circuit visitors, most often senior judges who may reappear regularly to the extent the receiving court appreciates their work.

Particularly impressive about this book is the author's ability to note criticisms and concerns, such as tub-thumping claims of appellate court crisis, without getting sucked in by them. He properly treats many claims about consequences of "court bureaucratization," such as reliance on staff and clerks and decreased collegiality, as *perceived*, rather than actual, effects. More generally, he recognizes the need to learn before making prescriptions, something lost on many "reformers," about whose claims he remains agnostic. In his balanced, objective approach, he plays down and decries alarmist views.

Inside Appellate Courts should be read by all with an interest in the U.S. courts of appeals, even if already somewhat familiar with them. Cohen's book makes an important contribution to the growing study of the topic, but one quite different from the growing number of studies based on the sample of published courts of appeals opinions in the important Court of Appeals Database developed by Donald Songer. Someone with a theoretical perspective who was less immersed in data was needed to provide this broad picture, and it would not be too much to say that this is the book to be read before, and in preparation for, studies of appellate judges' voting behavior. I recommend it most highly.

***STEPHEN L. WASBY** is professor emeritus of political science at the University at Albany-SUNY.*

Examining a unique law

by Marc Mauer

Punishment and Democracy: Three Strikes and You're Out in California, by Franklin E. Zimring, Gordon Hawkins, and Sam Kamin. Oxford University Press, 2001. 244 pages. $30.

Imagine that a visiting judge from England or France were sitting in a California courtroom on sentencing day. A defendant just convicted of stealing $153 worth of videotapes is sentenced to 50 years to life in prison. How exactly might the visiting judge try to comprehend such a punishment in a nation that prides itself on its experiment in democracy?

Such a bizarre outcome was an actual result of what is described as the "largest penal experiment in American history" by longtime collaborators Franklin Zimring and Gordon Hawkins, along with Sam Kamin, in their comprehensive assessment of California's "three strikes and you're out" law. Adopted in 1994 in a political climate that could be characterized as frenzied about crime, the law provides a golden opportunity for analysis in the authors' new volume, *Punishment and Democracy*. The story they tell is comprised of two elements: an analysis of the law's impact and an assessment of its political origins and implications for the development of sentencing policy.

While half the states and the federal government have adopted some type of "three strikes" policy, the California law is unique in several respects. First, in contrast to most of the other state policies, it does not require three violent crimes before imposing a sentence of 25 years to life. The first two "strikes" need to be violent or serious, including residential burglary, but the third strike can be any of 500 felonies, no matter how minor. Additionally, the title of the law is really a misnomer, since its most significant impact is contained within its "two strike" provision, which doubles the applicable sentence for a second felony with a previously qualifying strike. For a variety of reasons, 90 percent of the offenders sentenced under the law have been subject to its second strike penalties.

In contrast to much of the political rhetoric surrounding discussion of the policy, which has assumed a direct correlation between the law's adoption and a resulting drop in crime in the state, the authors break

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down their analysis into quantifiable questions. Using impact data from a three-city study (Los Angeles, San Francisco, and San Diego), probably their most significant finding is that only 10 percent of persons arrested for a felony even have a first or second strike qualifying offense. Thus, this places a relatively modest upper limit on the amount of crime that might conceivably be affected by the law.

Looking at these data, some skeptics might contend that the law has been successful in deterring those facing second or third-strike penalties, and that this accounts for their low representation among arrestees. But Zimring, Hawkins, and Kamin find that the share of arrests comprised of second- and third-strike eligible arrestees hardly changed following the law's implementation. Thus, as crime declined in California, as it did in the rest of the nation, there was no significant additional deterrent effect observed on the law's target population. This suggests that the various factors that combined to reduce crime nationally—some combination of an improved economy, changes in the drug trade, strategic policing, and increased imprisonment—were most likely responsible for the trends in California as well.

Altered decision making

Of great interest to court practitioners are the findings regarding the ways in which the law has altered decision making and court dynamics. As with any system of mandatory sentencing, discretion has not necessarily been eliminated from the system, but rather transferred from the judge's chambers to the prosecutor's office. Since judges now have relatively little input in a three strikes case, the power of the prosecutor in charging and plea bargaining is magnified. In just the three cities under examination, substantial disparities result in the extent to which eligible cases are charged under the law. In San Francisco, where the incumbent prosecutor is notably unenthusiastic about the law, the proportion of third strike arrests resulting in incarceration actually declined following implementation of the law, due to diversion policies initiated by the prosecutor. In San Diego, by contrast, the average sentence in a third strike case rose to almost eight times that prior to the law's adoption.

Disparities resulting from the use of discretion are inherent in the justice system, of course, and are not entirely objectionable. But the effect of the three strikes law is to magnify the consequences of those decisions to such an extreme as to raise fundamental questions about fairness and justice. For a first offender sentenced to prison for grand theft (and many may not even receive a prison term) the typical sentence is two years, while the same crime treated as a third strike now brings 25 years in prison.

These disparities are further exaggerated due to the law's broad nature. About two-thirds of the second and third strike prosecutions are for non-violent drug and property offenses, hardly the message that was communicated to voters in the 1994 campaign.

The authors also assess the law in terms of broader considerations regarding how criminal justice policy should be developed, presenting the choice essentially as subject to either direct democracy, as evidenced by the three strikes ballot proposal, or one governed by criminal justice professionals. They describe the insulating advantages of independent decision making bodies within the justice system, be they judges, parole officials, or sentencing commissions, and see the adoption of "get tough" policies as in part a result of the "vacuum" of authority created by the absence of such structures in many states.

While their hoped-for reforms would be welcome in many respects,

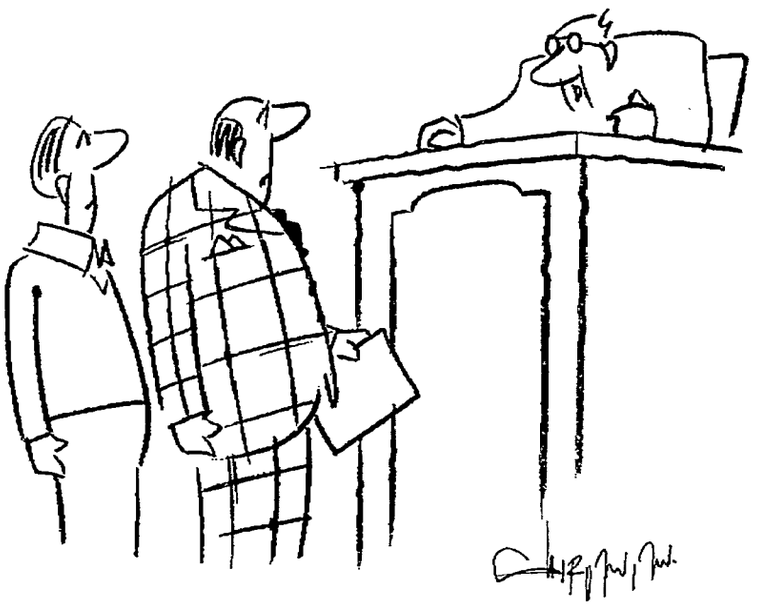

"Charges against you are dismissed, but your attorney is sentenced to Brooks Brothers for a complete make-over."

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it is questionable whether mere structural changes have been the primary cause, or can be expected to be the solution to, these deep-seated problems. Curiously, the authors make only passing reference to the influence of the Reagan years in enhancing citizen distrust of government. In fact, the seeds of the "get tough" movement can be traced back to the social conflicts of the 1960s and in this respect, punitive attitudes toward criminals have developed in parallel to more restrictive approaches regarding welfare and immigration policy as well. Thus, any efforts to design a more rational sentencing structure (could there be one any *less* rational than "three strikes?") will have to incorporate not only a consideration of appropriate decision making roles in the justice system, but also an assessment of, or change in, the political climate as well. A tall order, to be sure, but such are the implications of this historic shift.

Zimring, Hawkins, and Kamin have provided a wide-ranging examination of a historic development in the law. In their efforts to be thorough, their discussion of research methodology and rationale is often more detailed than many practitioners will need. But their conclusions about the effectiveness of a law that is unique in "the extremity of its terms and the revolutionary nature of its ambitions" are sobering and need to be considered both by policy makers and the public.

***MARC MAUER** is the assistant director of The Sentencing Project.*

Noteworthy

Kritzer, editor, **Legal Systems of the World** (ABC-CLIO, Santa Barbara, California, 2002. 800-368-6868, www.abc-clio.com. $385 (4 volumes)). This exhaustive four-volume set explores the structure, operation, and history of legal and judicial systems in every country on earth, every state in the union, and every province of Canada. University of Wisconsin political science and law professor Herbert Kritzer assembled a team of more than 350 legal scholars who contributed nearly 400 A-Z entries, from Administrative Law to Zimbabwe. Written in everyday language, it is a comprehensive work that brings together information that readers would otherwise have to search extensively to find.

In addition to the entries on countries and states, the work provides information on transnational systems such as the World Trade Organization and the African Commission on Human and People's Rights; Islamic, Jewish, and Roman law; alternative systems such as international arbitration; and common elements of law, including law clerks, jury selection, and trial courts. The volumes are illustrated with maps and more than 275 legal diagrams, and contain a bibliography, glossary, and index.

Ordover and Doneff, **Alternatives to Litigation: Mediation, Arbitration, and the Art of Dispute Resolution**, Second Edition (National Institute for Trial Advocacy, Notre Dame, Indiana, 2002. 800-225-6482, www.nita.org. $42.95 paper). The second edition of this work, first published in 1993, has been revised and expanded to reflect the growing interest in—and in some states, mandatory use of—alternative dispute resolution. The following additions have been made: new case law in the arbitration chapter, an in-depth section on communication skills in the negotiation chapter, and a new chapter on divorce mediation.

Sack, **Creating a Domestic Violence Court: Guidelines and Best Practices** (Family Violence Prevention Fund, San Francisco, California, 2002. 415-252-8089, www.endabuse.org. $15). This guide examines the values and principles needed to create effective domestic violence courts; outlines the components that are essential to operating a domestic violence court; provides a step-by-step action plan for jurisdictions that are considering starting domestic violence courts; and provides a list of resources, including the latest literature on domestic violence courts.

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New polls show widespread concern about threats to fair and impartial courts

By Geri Palast

A pair of new opinion polls shows that Americans and their judges are worried about the growing threat to fair and impartial courts—and they want something done. The polls were commissioned by the Justice at Stake Campaign, a new national partnership working to keep politics and special interests out of the courtroom, along with the National Center for State Courts.*

In the past decade, judges and legal observers have expressed concern about the growing pressure on state courts, especially in states where judges are elected. Special interests are investing millions of dollars to elect "their" judges, and the cost of judicial campaigns has been climbing rapidly. Court observers also worry that misleading and partisan attacks on judges' decisions threaten to bring sound-bite politics into the courtrooms. And few Americans vote in judicial elections.

To understand the attitudes of the public better, and gain the insights of judges who see these problems from the front lines, Justice at Stake commissioned a bipartisan team of national pollsters—Greenberg Quinlan Rosner Research and American Viewpoint—to conduct the surveys. About 1,000 voters were surveyed, along with almost 2,500 judges. (Indeed, 61 percent of the judges contacted completed the mail survey—an astounding response rate.)

The results are a wake-up call for anyone concerned about the integrity of America's courts. Voters and judges alike expressed deep concern about what is happening to how judges are selected, and the impact of politics on fair and impartial courts. They're especially worried about the role money and special interests play in judicial campaigns and court rulings, as well as the low levels of public involvement and awareness of judicial elections and the courts. Fearing that the justice system is increasingly divided into two tiers based on money and power, voters and state judges are ready to support reforms that would provide disclosure of special interest activities; increase voter education about judicial candidates and the courts; and improve the tone and conduct of judicial campaigns.

Money and special interests

The role of money and special interest pressure dominates concerns about judicial independence. To begin with, 76 percent of voters, and 26 percent of state judges, believe that campaign contributions made to judges have at least some influence on their decisions. Strong majorities of Democrats and Republicans agree that "individuals or groups who give money to judicial candidates often get favorable treatment."

Judges are keenly aware of the public's cynicism over the role of money in picking impartial judges. "Imagine if major league baseball players could contribute money to help decide which umpire was going to call a particular game," North Carolina Court of Appeals Judge James Wynn likes to say. "If you're up in the stands, and you know the pitcher gave $10,000 to have that particular umpire call his game, how much confidence could you have in the umpire's strike calls?" Likewise, 84 percent of judges express concern about special interest groups buying advertising to influence the outcomes of judicial elections. And 8 in 10 say they are quite concerned about special interests trying to use the courts to shape policy on a range of economic and social issues.

These fears may account for one of the most striking results of the poll: that 62 percent of voters, including nearly 90 percent of African-American voters, agree that "there are two systems of justice in the U.S.—one for the rich and powerful and one for everyone else." More than 80 percent of state judges say that they are concerned about these perceptions of unequal justice.

Ugly campaigns/public apathy

State judges also expressed rising frustration and concern with the changing tenor and direction of judicial elections, as an increasing number of these contests grow "nastier, noisier and costlier," in the words of Georgetown Law Professor Roy Schotland. A majority of state judges (55 percent) say that the tone and conduct of judicial campaigns has gotten worse over the past five years. And 63 percent of judges say they have been publicly criticized by state or national special interest groups, other public officials, or by political parties.

Many judges are unhappy with the pressure they face to raise campaign war chests, especially at the higher level courts. Forty-six percent of state judges report being under pressure to raise money for their campaigns,

* The American Judicature Society is one of Justice at Stake's 34 partners. More information on the two polls, and on Justice at Stake, is available at www.justiceatstake.org.

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with almost one-quarter (22 percent) of state supreme court judges saying that they are under a great deal of pressure to raise campaign funds during election years.

An informed public is vital to check the growing influence of money and special interests. Justice at Stake's polling confirmed the public's low participation and lack of information about judicial elections, and sought to help understand these trends.

Lack of information fuels public apathy. Only 13 percent of voters reported having a great deal of information about candidates in judicial elections, and only 22 percent claim to know a great deal about what courts and judges even do in their states. Of course, some voters may not be taking the time to learn about candidates. Others may feel the system of judicial elections leaves them without the information they need to make informed decisions.

Regardless of the cause, the outcome is clear: 90 percent of voters and 87 percent of judges say they are concerned that "because voters have little information about judicial candidates, judges are often selected for reasons other than their qualifications." Without increased efforts to inform the public better about candidates and courts, judicial elections could become even more dominated by special interests.

A call for reform

State judges and the public agree that it's time for change. They broadly support a range of reforms, especially better disclosure requirements, increased public education efforts, and voluntary steps to make judicial elections more civil. Many are ready for comprehensive changes to the system of judicial selection.

Proposals to monitor and disclose the role of money and special interests in judicial campaigns are popular. Ninety-four percent of state judges, and 88 percent of American voters, support a requirement "that all political advertisements in judicial elections clearly state who is paying for the ad." Moreover, nearly 9 in 10 judges and voters believe that "states should require that all judicial candidates disclose the individuals, parties, or organizations who donate money to their campaigns."

Voters and judges also strongly support increased public education efforts. Eighty-six percent of voters and 70 percent of judges support the idea of establishing independent citizen boards "to inform the public about misleading or inaccurate advertising in judicial campaigns." Support tops 90 percent among voters, and 75 percent among judges, for new state efforts to provide voter guides prior to judicial elections.

There is also broad support for voluntary efforts to change the tone and conduct of judicial elections. Ninety-three percent of state judges and 82 percent of voters support a voluntary proposal for judicial candidates "to condemn negative advertising done on their behalf." Ninety-six percent of judges and 88 percent of voters want judicial candidates to "commit to not making misleading or unfair accusations about opponents during elections." And 97 percent of judges believe "judicial candidates should never make promises during elections about how they will rule in cases that may come before them." (Note: Judges were surveyed before the Supreme Court's June decision in *Republican Party of Minnesota v. White,* which loosens certain restraints on the campaign speech of judicial candidates.)

Americans and state judges at all levels are also open to more comprehensive reforms, including broad support for campaign finance reform proposals for judicial elections. Seventy-eight percent of voters, and 71 percent of state judges, support limiting campaign contributions to judicial candidates. Eighty percent of voters, and 61 percent of judges, support a general proposal to provide public financing of judicial elections. Majorities of Democrats (63 percent) and Republicans (51 percent), and liberals (65 percent) and conservatives (53 percent) *strongly* favor the general proposal. For voters, spending restrictions in judicial elections is the most popular element of a public financing proposal—67 percent of voters strongly support spending restrictions or limiting spending to amounts provided in public election funds.

Respondents were also asked about judicial selection systems, including merit selection. The basic concept of merit selection and retention is supported by voters and state supreme court justices, but less so by lower level state judges. Seventy percent of voters, and 59 percent of state supreme court justices, support a general merit selection and retention proposal. However, lower level judges are less supportive of merit selection—except in Pennsylvania, which has been considering a proposal to institute merit selection of appellate judges.

***GERI PALAST** is Executive Director of Justice at Stake.*

Viewpoint

(from page 8)

The SCA makes representations to the legislature that the courts will be able to reduce case processing times in major felonies if certain appropriation requests are granted. The requests are granted and the case processing times remain the same. How does the chief respond?

***

State court administrator and chief justice are difficult jobs under the best of circumstances. They require knowledge of courts and human behavior, patience, energy, tolerance of ambiguity, and a willingness to make decisions with less than complete knowledge of the facts, all in a very public setting. Finding common ground on these seven points will not guarantee success. Nothing can do that in this complex an environment. But that common ground will make it much more likely that these two principal actors can function effectively as a team, and that fact alone substantially increases their odds of success.

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Briefs

Report says drug courts effective

A recent statewide study of California's drug courts indicates they are an effective way to improve lives and reduce drug use and criminal offenses. Drug courts were first established in California in 1993 as an alternative to incarceration for drug-abusing offenders. Today, there are 146 drug courts in 50 of the state's 58 counties.

The study found that:

- For participants who successfully completed the drug court program, arrest rates decreased 85 percent during two years after admission, compared to two years prior to entry.
- There was substantial improvement in family functioning for participants who successfully completed the drug court programs; 28 percent retained or regained child custody, 7 percent established visitation with their children, and 8 percent became current in child support payments.
- Ninety-six percent of drug tests were negative for participants during the program and 95 percent of babies born to mothers in the program were born drug free.
- Seventy percent of the participants were employed upon completion of drug court.

The report is available online at: http://www.courtinfo.ca.gov/reference/documents/dc_partnership.pdf.

ADR course online

With the presentation in April of a four-part Web-based course on alternative dispute resolution (ADR), New Mexico became the first state to offer a complete online course for its state judiciary. It was developed by New Mexico's Judicial Education Center. About 20 judges and court personnel involved in ADR programs accessed part or all of the course over the four weeks it was offered.

The course consists of four modules, each including video presentations, links to reference materials and other Web sites, exercises, and discussion groups. The videos include presentations by ADR experts and testimonials by judges who have successfully incorporated ADR in their courts. The first module also offers a demonstration contrasting how three different ADR techniques—mediation, settlement facilitation, and arbitration—are applied to the same hypothetical case.

The modules address four aspects of judicial ADR programs: understanding the various types of ADR; knowing when to apply (and not apply) each technique to various kinds of cases; developing plans for introducing ADR into the courts; and implementing those plans.

New Mexico's Judicial Education Center has been developing Web-based educational programming for several years, but the ADR project is the first full course produced. The JEC website, accessible at http://jec.unm.edu/, already includes text and graphics-based interactive training, the Center's full array of benchbooks, and an interactive trial that challenges the evidentiary procedural skills of the judge.

For further information on the ADR web course, contact Paul Biderman, Director, New Mexico Judicial Education Center, 505-277-8789, biderman@unm.edu.

2002 top 10 court websites

Justice Served (www.justiceserved.com), an alliance of court management and justice experts providing management services, consultation, and training to courts and justice agencies, has announced its top 10 court websites for 2002. The critieria for selection included court functionality—features that make essential information, documents, and/or processes directly available; web functionality—features that make the website accessible and useable; and extras—features that in some way enhance the overall effectiveness of the site. More than 400 sites were examined to determine the winners.

The top 10 are: New York State Unified Court System, http://e.courts.state.ny.us; Court Services, United Kingdom, www.courtservice.gov.uk; Washtenaw County, Michigan, Trial Court, www.co.washtenaw.mi.us/depts/courts/index.htm; Ministry of Law, Singapore, www.minlaw.gov.sg; Delaware, Ohio, Municipal Court, www.municipalcourt.org; Hamilton County, Ohio, Clerk of Courts, www.courtclerk.org; Alaska Court System, www.state.ak.us/courts; Washington State Courts, www.courts.wa.gov; U.S. Bankruptcy Court for the Southern District of New York, www.nysb.uscourts.gov; and Federal Court of Australia, www.fedcourt.gov.au.

—Briefs *by David Richert*

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ASK THE ADR PROFESSIONALS

News You Can Use from the National Arbitration Forum

These responses to current inquiries are prepared by the professional staff of the Forum to assist judges and judicial administrators in taking full advantage of ADR's benefits to the Courts.

Why is it that many businesses and consumers believe that arbitration is a good way to resolve their disputes?

There are a variety of good reasons why businesses and consumers use arbitration:

1) It fosters social justice.
2) It saves everyone time and money.
3) It meets the needs and interests of both businesses and consumers.
4) It is the right thing to do.

How does arbitration foster social justice? Access to civil justice is an essential societal goal. Parties with disputes need access to an affordable system to have their problems resolved. Arbitration is a great way for parties to seek and obtain relief because they can do so quickly, inexpensively and reasonably.

Arbitration allows parties to resolve claims that they cannot afford to litigate. In these cases, parties cannot afford to hire lawyers or do not have access to lawyers, or lawyers decline to litigate cases involving amounts of money significant to consumers, but too small for the lawyers.

Further, arbitration permits parties to easily pursue relief from parties who do business nationally. The arbitration system is a common, nationwide and worldwide system of rules and procedures, and relief can be readily obtained from a defendant wherever the parties reside or do business. Arbitration hearings can be in-person hearings like court trials, or can be a mix of telephone, on-line, or document hearings.

How does arbitration save time and money? Arbitration cases can be quickly administered and scheduled for a final hearing within months of their initiation or longer, if the parties need more time. Arbitration rules of procedure and evidence are flexible and provide parties with due process proceedings. The transaction costs and lost time from work are low in arbitration, and in many consumer/business arbitrations, the business pays the arbitration costs.

How does arbitration meet peoples' needs? People involved in a dispute want a fair resolution of their problem without things becoming worse. A neutral arbitrator who knows the applicable law can take the time at a hearing to allow the parties to tell their stories and decide the case on the merits. Arbitration allows parties, businesses and consumers, to disagree, while not destroying their relationships. A goal of arbitration is for the losing party to say: "I lost and it hurts, but the process was fair and I would do it again."

Why is arbitration the right thing to do? Modern business and consumer transactions require a modern dispute resolution system. Arbitration and mediation provide a prompt, easy to understand, and fair way to resolve all sorts of disputes. And so it is no surprise that businesses, consumers, employees, patients, and other individuals are using these ways to solve conflict. If a dispute cannot be resolved by negotiation or mediation, then arbitration is a simple solution.

Business ethics call for businesses to provide their customers with affordable and accessible ways to complain and resolve disputes, and so fair businesses are using arbitration to meet their ethical obligations. Consumers understand that arbitration is an effective way to get their disputes resolved with businesses. And all agree that arbitration is part of overall customer satisfaction.

Where do the courts fit in? As a practical matter, every arbitrator serves as a "magistrate" to the court. No arbitration award is enforceable, until the court enters an order confirming it.

The Federal Arbitration Act and the arbitration laws of every state empower judges to review arbitration awards when parties seek to enforce or challenge the awards. The United States Supreme Court and many federal and state courts have established standards of fairness for the arbitration process, hearings, and awards. Judges can apply these standards to make sure that due process and legal standards are being met.

National Arbitration Forum *arbitrators and mediators serve on-line and in person throughout the industrial world. For more information on the facts about arbitration, visit ARBITRATION-FORUM.COM or call 877-655-7755.*

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By James C

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Ensuring common ground between state court administrators and chief justices

State court administrators and chief justices must work together closely, and it is important they share, or at least understand and appreciate, the other's values.

By James C. Drennan

The state court administrator (SCA), along with the chief justice, is a critical actor in all state court systems. All courts need an effective presence in the state legislature and all state courts of last resort need administrative support. The increasing pressure for court automation services that are available across the state and across state lines inevitably raises issues that local courts cannot resolve on their own. Unfortunately, state court administrator is not a job conducive to long tenure. Given their necessary role, and an extensive turnover rate, it is important to have a selection process that maximizes the possibility that the court administrator and chief justice will be able to work together effectively.

***JAMES C. DRENNAN**, a professor of public law and government in the School of Government at the University of North Carolina, is a former state court administrator for North Carolina.*

There is no one process that will work for all states in all situations. The chief justice (or the hiring authority if it is not the chief justice) has to take into account the particular needs and characteristics of the state's situation. But there are areas which, if discussed openly and candidly by the hiring authority and the potential state court administrator, can minimize the likelihood of conflict and the time it takes for each party to understand the other's approach to the job. This article poses seven points for consideration that can serve to make it much more likely that the decision to hire a state court administrator will not lead to any surprises. There are no right answers. They all involve value judgments, but unless the SCA and the chief justice share the same (or at least understand and appreciate the other's) values, their relationship is likely to have serious problems.

• **Political pressure**. What is the response when a political actor with the power to influence policy that is important to the court wants some action taken that is not consistent with the court system's agenda, but which is within the court's area of authority? The request can come in all kinds of ways—to create judgeships or support positions where they are not needed, to not place a judgeship in a particular place because the wrong person or political party might get the job, to provide special computer support or to expedite the placing of improvements in a place that is not otherwise a priority, to name a few. The list could go on and on, but the issue is always the same. What are the principles that govern dealing with the powerful in the state? What is the price the courts are willing to pay for the principle? As an example, consider the following:

> If the speaker or chair of the appropriations committee requests the SCA to refrain from terminating an employee who violates some rules of the office [or some other similar action], how should the SCA respond? Should he or she do it? Try to reason with the legislator? What if the legislator is not willing to talk about it? What if the legislator threatens retaliation in the legislative process? Similar questions could also be posed about dealings with prominent local court officials.

• **Approach to lobbying.** What is the role of the SCA's office in lobbying the legislature? Some courts limit their lobbying to budget matters. Others take an active role in advocating for or against specific substantive legislation affecting the courts. Others provide information but generally refrain from taking positions on substantive matters. That is one dimension of the question. The other is one of role definition. On what issues does the SCA do the lobbying and on what issues does the chief justice take an active role?

Some examples:

> A bill is before the legislature to limit punitive damages–the judges are split on the bill but a majority favor the legislation. What position does the court system take? Who speaks for the court?

> A bill is before the legislature to raise court fees to finance a domestic violence computer system. What position does the court system take? Who speaks for the court?

> A bill is before the legislature to require judges to fill out time sheets and make them available to the public on the Internet. What position does the court system take? Who speaks for the court?

> The governor suggests cutting all agencies' budgets, including the courts, by

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three percent to support an expansion of the state's middle school education initiative. What position does the court system take? Who speaks for the court on that issue?

A merit selection bill is being discussed by the state bar association. The judges affected are split, but a majority supports the bill. What position does the court system take? Who speaks for the court?

Local court officials call key legislators to complain that the court system's budget does not adequately address salaries for support staff. What position does the court system take? Who speaks for the court?

• **Personnel decisions**. One of the most important things any governmental agency does is to make personnel decisions. That is certainly true for the SCA's office. Every administrator has a philosophy that guides such decisions, although it is often not stated. For the chief justice and state court administrator, it is important to be clear not only about that philosophy, but also about each person's role in the process. It is fairly typical for the SCA to exercise hiring authority in the Administrative Office of the Courts (AOC), but since the administrator works for the chief justice (or the supreme court), it is understandable for the chief justice to be interested in the operation of the AOC. How that interest is manifest is important to both. Examples:

The senior deputy administrator position in the AOC becomes open. Should the SCA fill it without consulting the chief justice, after consulting the chief justice about the process, after consulting the chief justice about both the process and the candidates, or by some other process?

What role do each of the parties expect the following to play in making hiring decisions in the AOC?

- Experience in the agency
- Seniority
- Recommendations from influential people
- Involvement in politics, judicial or otherwise
- Political party affiliation
- Whether the person is a "native"
- Diversity issues

An influential political figure is urging the chief justice to ensure the hiring of one of his supporters for a middle level administrative job in the AOC. The person meets the minimum qualifications, but there are other applicants with more experience and some in the agency who appear to be better candidates. What is the position of the court system on how this position should be filled and who communicates that position to the influential political figure?

• **Level of communication.** It is important for the chief justice and the SCA to communicate about important matters affecting the courts. Each is in many instances a spokesperson for the entire court system and it is not helpful when conflicting messages are communicated. The two should know how often each would like to communicate with the other. Does either expect the communication to be on a regular basis, or as the need arises? What issues are so important that neither should address them publicly without consulting the other? An example:

The mayor of the state's largest city accidentally runs into the chief justice at a political function. The mayor is seeking support from the SCA's office for a local computer system that would affect the courts. How should the chief justice respond? What if the contact is between the mayor and the SCA?

• **Delegation and support**. The formal relationship between a chief justice and the court administrator is usually pretty clear. The SCA works at the pleasure of the chief justice. Some chief justices are very interested in details of some or all operations. Some are not. Some court administrators feel the need to have a fair amount of autonomy on operational matters. It is important to discuss those feelings to ensure that both parties understand the other. There are usually some matters that a chief justice will want to retain control of, and it is important for a chief justice and SCA to be clear about what they are. For example:

A chief justice runs for election advocating a change in the method of judicial selection, an increase in technology support, and standardization of the method by which court appointed counsel for indigents are paid. Which of those issues would the chief expect the SCA to champion, and which would the chief want to retain control over? Which of those issues would the SCA think are more appropriately left to him or her?

• **Attitude about change**. Most court systems are involved in change. Typically, given the short tenures of many chief justices and state court administrators, one must be realistic about the changes that can be addressed. But the change process is very difficult and complicated to navigate successfully, particularly for courts in which the implementation of the changes is left to independent, locally accountable court officials. It is important for a chief justice and the SCA to have a common understanding of how far they are willing to go to support changes they believe are essential for the courts. It is also important to have an understanding of the approach that each would take in seeking to bring about a change. An example:

The state's judicial council, the governor, and the legislature want to improve the jury experience for jurors, but local governments and local court officials have primary operational responsibility for the system. What approach to this or other proposed changes would the chief justice expect to take and what approach would he or she expect the SCA to take?

• **Handling failure**. Court administration is a high risk job, when done right. It requires the balancing of competing interests. It is done in a public setting , in which there are lots of interested parties. There will be mistakes and failures, and some of them will be embarrassing. It is important for both parties to understand how failure will be treated. If it is unduly punished, it will deter risk-taking. If it has no consequences, performance may suffer. Failure provides a powerful learning opportunity, but only if it is not repeated. For example:

The information technology manager pushes for a major investment in a software system for the trial court clerks' offices. After a year and a major investment of funds, it is apparent that the system will not meet the clerks' needs. How do both the chief and the SCA respond?

(continued on page 56)

REV_00255736

Selecting federal court of appeals & district court judges



An AJS symposium examining the role and responsibilities of the executive and legislative branches

Selecting federal district and court of appeals judges has become an increasingly contentious process. Both the White House and the Senate have made ideology a major factor in selection and confirmation. Battles over recent nominations, such as that of Judge Charles Pickering, have led to increased hostility and have served to fortify already entrenched positions and to escalate partisan bitterness. The result is unfilled judicial vacancies; in some districts and circuits such vacancies have reached crisis proportions.

On May 17, 2002, the American Judicature Society convened a symposium in Washington, DC to discuss ways to end the impasse and to put ideology in its proper perspective. This issue of *Judicature* presents an edited version of that symposium.

The program included addresses by federal judge Jon O. Newman ("Federal judicial selection: a judge's view"); political science professor Elliot E. Slotnick ("A historical perspective on federal judicial selection"); law professor Stephen B. Burbank ("Politics, privilege, and power: The Senate's role in the appointment of federal judges"); and concluding remarks by law school dean James Huffman.

In addition, there were two panel discussions. The first, moderated by NPR's Nina Totenberg, examined the role and responsibilities of the executive branch. Participants included former and current White House counsels and Department of Justice officials. The second, moderated by the *National Law Journal's* Marcia Coyle, looked at the issue from the legislative side. That panel consisted of current and former senators and Judiciary Committee personnel.

Although the symposium resulted in no "solutions," most participants believed the dialogue was productive. *Judicature* readers are invited to offer their comments, which will be published in a future issue.

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THE WHITE HOUSE

WASHINGTON

March 11, 2003

Dear Senator Daschle:

The Senate is debating the nomination of Miguel A. Estrada to be a Judge of the United States Court of Appeals for the District of Columbia Circuit. Miguel Estrada's life is an example of the American Dream. He came to this country from Honduras as a teenager barely speaking English and went on to graduate with honors from Harvard Law School. He has argued 15 cases before the Supreme Court of the United States and served in the United States Department of Justice under Presidents of both political parties. The American Bar Association has given him its highest rating. When appointed, he will be the first Hispanic ever to serve on the D.C. Circuit.

I submitted Mr. Estrada's nomination to the Senate on May 9, 2001. But his nomination has been stalled for partisan reasons for nearly 2 years in which the Senate has not held a vote either to confirm or to reject the nomination.

The Senate has a solemn responsibility to exercise its constitutional advice and consent function and hold up or down votes on judicial nominees within a reasonable time after nomination. Senators who are filibustering a vote on Miguel Estrada are flouting the intention of the United States Constitution and the tradition of the United States Senate. The filibuster is the culmination of an escalating series of back-and-forth tactics that have marred the judicial confirmation process for years, as many judicial nominees have never received up or down Senate votes. And now, a minority of Senators are threatening for the first time to use ideological filibusters as a standard tool to indefinitely block confirmation of well-qualified nominees with strong bipartisan support. This has to end.

The judicial confirmation process is broken, and the consequences for the American people are real. Because of the Senate's failure to hold timely votes, the number of judicial vacancies has been unacceptably high during my Presidency and those of President Bill Clinton and President George H.W. Bush. The Chief Justice has warned that the high number of judicial vacancies, when combined with the ever-increasing caseloads,

leads to crowded courts and threatens the administration of justice. When understaffed, the Federal courts cannot act in a timely manner to resolve disputes that affect the lives and liberties of all Americans. The courts cannot decide constitutional cases promptly, which harms people seeking to vindicate and protect their rights, and the courts cannot rule on commercial cases efficiently, which hurts the economy, businesses, and workers. Our system of equal justice under law administered fairly and efficiently is at risk. The American Bar Association in 2002 accurately described the situation as an "emergency."

My concern about the state of the judicial confirmation process is not new. In June 2000, I proposed timely votes for all nominees, stating that the confirmation process "does not empower anyone to turn the process into a protracted ordeal of unreasonable delay and unrelenting investigation." In May 2001, when I announced my first judicial nominations, I urged the Senate to rise above the bitterness of the past and again asked that every judicial nominee receive a timely up or down vote. In October 2002, after nearly two additional years in which too many nominees did not receive votes, I proposed a specific, commonsense plan involving all three Branches that, among other steps, would ensure that all judicial nominees receive an up or down Senate vote within 180 days of nomination.

Over the years, many Senators of both political parties have publicly agreed with the principle that every judicial nominee should receive a timely up or down Senate vote. Similarly, the Federal Judiciary, speaking through the Chief Justice in his 2001 Year-End Report, has stated that the Senate should "schedule up or down votes on judicial nominees within a reasonable time after receiving the nomination."

I ask Senators of both parties to come together to end the escalating cycle of blame and bitterness and to restore fairness, predictability, and dignity to the process. I ask that the Senate take action, including adoption of a permanent rule, to ensure timely up or down votes on judicial nominations both now and in the future, no matter who is President or which party controls the Senate. This is the only way to ensure that our Judiciary works and that good people remain willing to be nominated to the Federal bench.

All Senators should have a chance to have their voices heard and their votes counted. All Presidents should have their judicial nominees considered and voted upon in a reasonable time. All nominees should have the certainty of an up or down Senate vote within a reasonable time. All Judges should have the assurance

that vacancies on their courts will not persist for years. And all Americans should have the assurance that the Federal courts will remain open and fully staffed to resolve their disputes and protect their rights and liberties.

As I stated last October, the current state of affairs in the United States Senate is not merely another round of political wrangling. It is a disturbing failure to meet a responsibility under the Constitution. Our country deserves better, the process can work better, and we can make it better. The Constitution has given us a shared duty, and we must meet that duty together. Thank you for your attention to this important matter.

Sincerely,

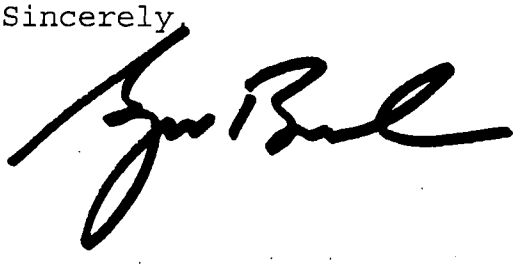

The Honorable Thomas A. Daschle
Minority Leader
United States Senate
Washington, D.C. 20510

MY TAKE

The Estrada Fiasco

LA OPINION PHOTO/JEFF SCOTT GRACE

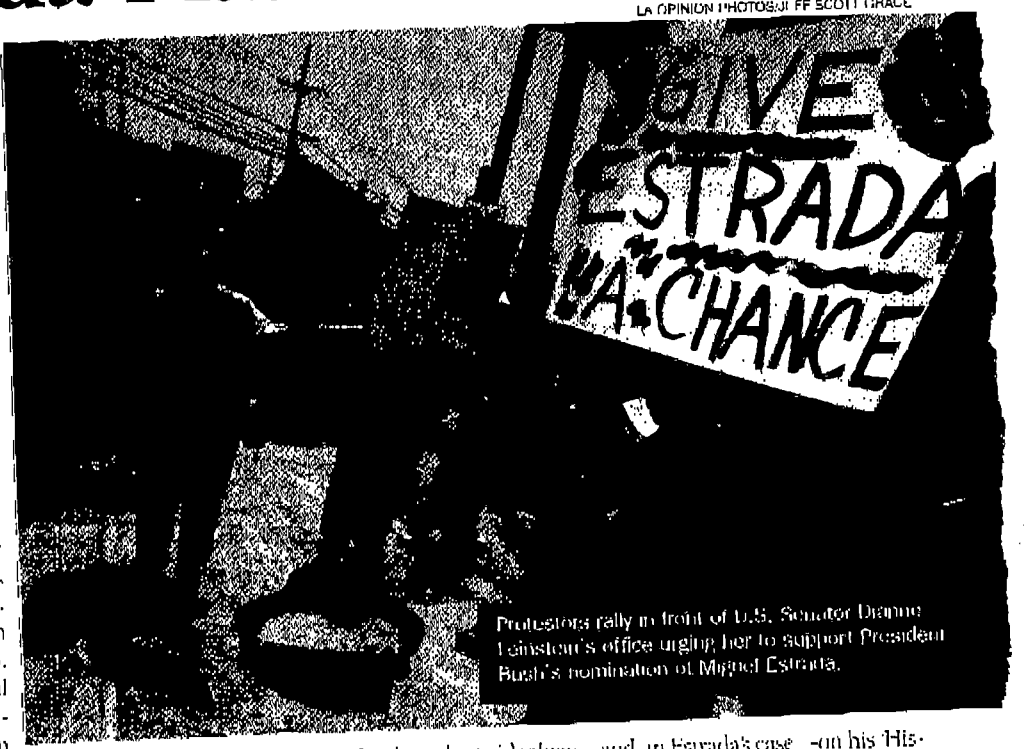

Protestors rally in front of U.S. Senator Dianne Feinstein's office urging her to support President Bush's nomination of Miguel Estrada.

As of press time, the Senate still had not confirmed President George W. Bush's nomination of Miguel Estrada to the Washington, D.C., District Court—this despite being nominated nearly two years ago with the highest recommendation possible from the American Bar Association and a stellar record of achievement.

A few Latin groups have been fighting doggedly for his approval. –Estrada is a Honduran immigrant and would be the first Hispanic American on the prestigious court, a step-stone to the U.S. Supreme Court– but the Democrats and several other Latin organizations are keen on killing the nomination.

On which grounds is not exactly clear.

To hear representatives of the Congressional Hispanic Caucus and the Mexican American Legal Defense and Education Fund put it, it's because Estrada is not authentically Latin. "Being Hispanic for us means much more than having a surname," explains New Jersey Rep. Bob Menendez, a member of the Congressional Hispanic Caucus. "It means having some relationship with the reality of what it is to live in this country as a Hispanic American."

Angelo Falcon, of the Puerto Rican Legal Defense and Education Fund, agrees. "It's not good enough simply to say that because of someone's genetics or surname that they should be considered Hispanic."

In other words, Falcon and Menendez believe that because Estrada has been nominated by a Republican president and is suspected of having views that are less liberal than their own, his ethnicity is in question.

Using that logic, the members of the League of United Latin American Citizens– the oldest Hispanic civil rights organization in the country –as well as the United States Hispanic Chamber of Commerce, the Hispanic National Bar Association, the Latino Coalition and the Hispanic Business Roundtable, all of which support Estrada's nomination, aren't truly Hispanic, either.

Naturally, Estrada's supporters see it differently. LULAC calls Estrada "truly one of the rising stars in the Hispanic community and a role model for our youth." Indeed, Estrada, who arrived in the United States at age 17, is the embodiment of what immigrants aspire for their children, having struggled to succeed in a new country, learn a new language, adopt to a different culture and study day and night to achieve his American Dream.

The objections have little to do with Estrada's abilities or qualifications. "Mr Estrada told [the Congressional Hispanic Caucus] that him being Hispanic he sees having absolutely nothing to do with his experience or his role as a federal court judge. That's what he said to us," Menendez says.

He finds that position deeply disturbing, but Hispanic Americans should see Menendez's comment as deeply unsettling.

Does he really believe that Hispanic judges are incapable– indeed shouldn't—make fair, unbiased decisions based solely on the merits of each case and on what the law dictates? Isn't that precisely what judges are supposed to do?

Naturally, this is all about ideology. Some believe, with no evidence whatsoever, that Estrada is stridently conservative and imagine him handing down ideologically driven decisions from the High Court. Marisa Demeo of MALDEF frets that if Estrada is confirmed, "the American Dreams of the majority of Hispanics living in this country will come to an end through his future legal decisions."

Unfortunately, Estrada's Latin opponents don't stop there, though. Falcon, of the Puerto Rican Legal Defense and Education Fund, belittles Estrada's success, calling it a "Latino Horatio Alger story that's been concocted."

That's a big, red warning flag: If you're Latin, be on alert, agree with Hispanic activists or be prepared to be flogged and have your heritage questioned before the nation.

To hear Falcon and some of the other opponents, judges should decide cases not on the facts and the law but on the basis of their ideology –and, in Estrada's case –on his 'Hispanicity.' Yet such a standard would mean the death of the rule of law.

Indeed, to judge Miguel Estrada by any yardstick other than his professional excellence and his personal integrity truly would be a step backward for all Americans—especially Hispanic Americans.

Let's review the facts: Since graduating from Harvard Law School with honors, Estrada has served as Assistant Solicitor General in the Clinton and Bush administrations, been a federal prosecutor in New York, served as a law clerk to Supreme Court Justice Kennedy, and done pro bono work such as defending a death row inmate before the U.S. Supreme Court.

He has built a reputation as one of the best appellate lawyers in the nation, having argued 15 cases before the Supreme Court—a figure that few lawyers can match, and a particularly impressive feat for someone who immigrated to this country with little English-speaking skills.

Estrada's record is anything but ideological—it's neither right wing nor left-wing. It is, quite simply, outstanding. The man deserves the chance to take his seat as the first Hispanic judge on the D.C. Circuit Court of Appeals.

And Hispanic Americans should remember those who have stood in his way.

– *Joe Viducira*

The opinions expressed in My Take are the writer's, not those of Hispanic Publishing Corporation or HISPANIC Trends Magazine.

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LEAHY, PATRICK on BLUE SLIPS

Now, any Senator can vote against any judicial nominee. They have that right. But I urge them to stand up on the floor of the Senate, where the public knows who they are and where they are, and either vote for or against people. It is not only disingenuous, but I think it is detrimental to our system of justice, and it is a true distortion of what we pledge to do in upholding the Constitution when some block judges by anonymous holds. And then we find that the reason for doing that is in connection with a fundraising and lobbying campaign in which letters were sent out by some group saying, in effect, that if you send this money, we will block judges and we will arrange for you to meet privately with leading elected officials.

That is wrong. That is wrong, Mr. President. It is unprecedented in the 23 years that I have been in the Senate. Nothing like this has ever been allowed by any of the leaders of the Senatenot by Senator Mansfield, not by Senator Byrd, not by Senator Baker, not by Senator Dole, and not by Senator Mitchell. It should not be allowed now. It is wrong, and it undermines the very credibility of the U.S. Senate, and it demeans the U.S. Senate; but, even more importantly, it is destructive of the independence of the judiciary.

143 Cong. Rec. S 11233, 10/27/97, When There Were 93 Vacancies

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LEAHY, PATRICK on BLUE SLIPS

Every Senator is free to vote for or against a nominee. What I have not appreciated is the mysterious hold over nominations for months at a time. Now that the sources of the hold have come forward, the Senate should proceed to debate and vote.

Those pressing this effort complain about what they see as the failure of the U.S. Senate to block the appointment of judges to the Federal bench. The American people, litigants, prosecutors, and judges have just the opposite complaintthat the perpetuation of judicial vacancies is affecting the administration of justice and rendering our laws empty promises.

143 Cong. Rec. S 11407, 10/30/97, When There Were 93 Vacancies

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LEAHY, PATRICK on BLUE SLIPS

In fact, how disturbing, how petty, and how shameful: Trying to disqualify an outstanding Hispanic woman judge by an anonymous hold.

I have far more respect for Senators who, for whatever reason, wish to vote against her. Stand up; vote against her. But to have an anonymous hold--an anonymous hold--in the U.S. Senate with 100 Members representing 260 million Americans, which should be the conscience of the Nation, should not be lurking in our cloakrooms anonymously trying to hold up a nominee. If we want to vote against somebody, vote against them. I respect that. State your reasons. I respect that. But don't hold up a qualified judicial nominee.

I was asked last week by Neil Lewis of the New York Times about this circumstance. He correctly reported my response in a front page story this last Saturday. I am offended by this anonymous

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effort to oppose her prompt confirmation by stealth tactics. Here is a highly qualified Hispanic woman judge who should have been confirmed to help end the crisis in the Second Circuit more than three months ago.
Acting to fill judicial vacancies is a constitutional duty that the Senate--and all of its member--are obligated to fulfill. In its unprecedented slowdown in the handling of nominees in the 104th and 105th Congresses, the Senate is shirking its duty. The Senate majority's choices as they stall Hispanic, women and minority nominees is wrong and should end.
If Senators are opposed to any judge, bring them up and vote against them. But don't do an anonymous hold, which diminishes the credibility and respect of the whole U.S. Senate.
I have had judicial nominations by both Democrat and Republican Presidents that I intended to oppose. But I fought like mad to make sure they at least got a chance to be on the floor for a vote.
I have stated over and over again on this floor that I would refuse to put an anonymous hold on any judge; that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty.
If we don't like somebody the President nominates, vote him or her down. But don't hold them in this anonymous unconscionable limbo, because in doing that, the minority of Senators really shame all Senators.

144 Cong. Rec. S 6521, 6/18/98, When There Were 72 Vacancies

LEAHY, PATRICK on BLUE SLIPS

I do not deny to any Senator his or her prerogatives as a member of the Senate. I have great respect for this institutions and its traditions. Still, I must say that this use of anonymous holds for extended periods that doom a nomination from ever being considered by the United States Senate is wrong and unfair.
It is against this backdrop that we are asking the Senate to be fair to these judicial nominees and all nominees. I do not want to see votes delayed on any nominee. For the last few years the Senate has allowed one or two or three secret holds to stop judicial nominations from even getting a vote. That is wrong.
Congressional Record – Senate, September 21, 1999

PATRICK LEAHY
Last month a column in The Wall Street Journal discussed this secret basis for the Republican hold against this fine judge. The Journal revealed that this delay was intended to ensure that Sonia Sotomayor was not nominated to the Supreme Court. That was confirmed by a report in The New York Times on June 13.
How disturbing and how shameful. I am offended by this anonymous effort to oppose her prompt confirmation by stealth tactics. Here is a highly-qualified Hispanic woman judge who should have been confirmed to help end the crisis in the Second Circuit more than four months ago.
Acting to fill judicial vacancies is a constitutional duty that the Senate--and all of its members--are obligated to fulfill. In its unprecedented slowdown in the handling of nominees in the 104th and 105th Congresses, the Senate is shirking its duty. This is wrong

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and should end.

145 Cong. Rec. S 11096, 7/17/98, When There Were 68 Vacancies

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LEAHY, PATRICK on BLUE SLIPS

This debate is about fairness and the issue that remains is the issue of fairness. For too long, nominees--judicial nominees such as Judge Paez, Ms. Berzon and Justice Ronnie White of Missouri, and executive branch nominees like Bill Lann Lee, have been opposed in anonymity, through secret holds and delaying tactics--not by straight up-or-down votes where Senators can vote for them or vote against them.
I do not deny each Senator his or her prerogative as a Member of this Senate. After 25 years here, I think I have demonstrated--and I certainly know in my heart--I have great respect for this institution and for its traditions, for all the men and women with whom I have served, the hundreds of men and women with whom I have served over the years in both parties. But this use of secret holds for extended periods to doom a nomination from ever being considered by the Senate is wrong, unfair, and beneath us.
The report of Citizens for Independent Courts recommends the Senate should eliminate the practice of allowing individual Members to place holds on a nominee. We ought to consider that.

145 Cong. Rec. S 11793, 10/1/99, When There Were 63 Vacancies

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LEAHY, PATRICK on BLUE SLIPS

The fact is I don't care who comes up, we don't like some of these people who were put there before, so if you're an extraordinarily well qualified woman, if you're an extraordinarily well-qualified minority or whatever, we're not going to put you on, that doesn't say much for our commitment to the independence of the Judiciary. Bring these people up, vote them up or vote them down.

SEN. PATRICK LEAHY: Well, a lot of times, we keep trying to get a person to at least have a vote, one way or the other, vote them up, vote them down. And we're told that, well, somebody has a concern so they're holding back. We never know who that mysterious somebody is. And yet when this person who is so offensive that we can't bring them to a vote, when after a year or two or three of waiting, they come out for a vote, they get 90 votes or 95 votes out of the 100-member Senate. But what's happened is that one or two Senators anonymously hold somebody back. I think that's wrong. I think that hurts the integrity of the courts, but it also is not a... it does not reflect well in the Senate or on the democratic process.

SEN. PATRICK LEAHY: Having said all that, I think it is time for those who will put these anonymous holds on to be required to come forward and have the votes, allow the committee to work the way we should. On had started to say something earlier, and I think it was going to say if it was left to the two of us, we could move it much faster. I believe that is so. I believe I'll say that, to Senator Hatch's credit. But you cannot have a small click decide they want to know exactly how judges are going to rule before they go on the bench, or they're not going to confirm them.

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The Newshour with Jim Lehrer,, 10/14/99, When There Were 63 Vacancies

LEAHY, PATRICK on BLUE SLIPS

Of course it is every Senator's right to vote as he or she sees fit on all matters. But I would hope that in the cases of these long-pending nominations, those who have opposed them will show them the courtesy of using this time to discuss with us any concerns they may have and to explain the basis for their anonymous holds and the Senate's refusals to act.

146 Cong. Rec. S 9657, 10/3/00, When There Were 66 Vacancies

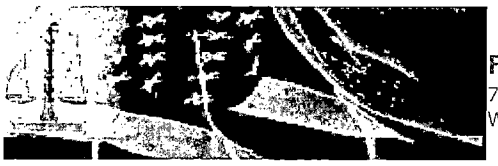

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Counsel's Office, White House

Kavanaugh, Brett

Subject File

President's Judges Plans [2]

OA/NARA#: 2179 / 2090
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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

Now, I keep bringing this issue up at the Judiciary Committee meeting, and I am told there are no objections to her, but somehow she is never brought forward to be voted on. I keep saying, if Senators want to vote against her, stand up, have the guts to stand up in the bright sunshine and say how they would vote on her, but nobody does, nobody does.

143 Cong. Rec. S 5084, 5/23/97, When There Were 99 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

Now, I say this, Mr. President, make the same argument now as when we have had a Republican President and a Democratically controlled Senate. If there is one area where partisan politics should not be allowed, it is in the area of the Federal judiciary.
A President should be given a great deal of latitude on who he nominates to the Federal court. If we disagree with a nomination, then we can vote against it. But, frankly, Mr. President, not only does it damage the integrity and the independence of the Federal judiciary by just holding judicial nominations hostage where nobody ever even votes on them, but I think it damages the integrity of the U.S. Senate.
If President Clinton sends a nominee to the Senate that any SenatorDemocrat or Republicandoesn't like, vote against him or her. That is your right as a U.S. Senator. But don't say, well, they look like pretty good people, but we can't even allow a vote on their nomination.
And don't say, if you are, for example, in Texas, that it is terrible that drug and illegal immigrant cases are not being heard, what is the court doing? People in Texas should say, what is the U.S. Senate doing? Why aren't they acting? If you are a civil litigant in the sixth circuit or ninth circuit, or a number of others that have emergency vacancies, and you have one of your rights to be protected, what do you do? You say, why aren't those judges hearing these cases? No. Say, why isn't the U.S. Senate confirming people.

143 Cong. Rec. S 5653, 6/16/97, When There Were 96 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

Let us bring them forward. I ask that one of the first we proceed to consider be Margaret Morrow, who seems to be held up only because she is a womanonly because she is a woman. There is no reason to hold up that judicial nomination. Let it be voted. If people do not want her, vote against her. If they want her, vote for her. But let's have a vote on this.
We are not helping the independencein fact, we are diminishing the independenceof the Federal judiciary.

143 Cong. Rec. S 9163, 9/11/97, When There Were 97 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

Mr. President, I call upon the U.S. Senate to reject that effort and go forward to fulfil our constitutionally mandated duty to advise and

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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

While the Republican candidate for President made a fine statement in which he called for votes on judicial nominations within 60 days, he has not prevailed upon the Senate Republican majority to treat nominees fairly now. Instead of 60 days, we see Judge Helene White's nomination to the Sixth Circuit pending more than 1400 days; Elena Kagan, U.S. Court of Appeals for the District of Columbia, pending 500 days; Judge James Wynn, U.S. Court of Appeals for the Fourth Circuit, pending more than 440 days; Kathleen McCree Lewis, U.S. Court of Appeals for the Sixth Circuit, pending more than 400 days; Enrique Moreno, U.S. Court of Appeals for the Fifth Circuit, pending more than 400 days; Bonnie Campbell, U.S. Court of Appeals for the Eighth Circuit, pending more than 240 days; Roger Gregory, U.S. Court of Appeals for the Fourth Circuit, pending more than 115 days; Lynette Norton, U.S. District Court for the Western District of Pennsylvania, pending more than 1300 days; Judge Legrome Davis, U.S. District Court for the Eastern District of Pennsylvania, pending more than 800 days; Patricia Coan, U.S. District Court for the District of Colorado, pending more than 500 days; Dolly Gee, U.S. District Court for the Central District of California, pending more than 500 days; Rhonda Fields, U.S. District Court for the District of Columbia, pending more than 350 days; Linda Riegle, U.S. District Court for the District of Nevada, pending more than 180 days; Ricardo Morado, U.S. District Court for the Southern District of Texas, pending more than 165 days. The Senate is adjourning leaving 33 judicial nominees whose nominations have been pending without Senate action for more than 60 days.

146 Cong. Rec. S 11314, 10/28/00, When There Were 66 Vacancies

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consent on the nominations of judges that the President has sent to us. Vote them up or vote them down, but show that we are united, whatever party we belong to, in protecting the integrity and, most importantly, the independence of our Federal judiciary.

143 Cong. Rec. S 9723, 9/19/97, When There Were 97 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

Mr. President, I call upon the U.S. Senate to reject that effort and go forward to fulfil our constitutionally mandated duty to advise and consent on the nominations of judges that the President has sent to us. Vote them up or vote them down, but show that we are united, whatever party we belong to, in protecting the integrity and, most importantly, the independence of our Federal judiciary.

143 Cong. Rec. S 9723, 9/19/97, When There Were 97 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

I hope we might reach a point where we as a Senate will accept our responsibility and vote people up or vote them down. Bring the names here. If we want to vote against them, vote against them. But time after time after time I hear that there are vacancies where people are really concerned, a lot of Senators have a concern about this person. Then we come to a vote and 99 out of 100 Senators or all 100 Senators vote for that person.

143 Cong. Rec. S 10924, 10/22/97, When There Were 93 Vacancies

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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

Now, any Senator can vote against any judicial nominee. They have that right. But I urge them to stand up on the floor of the Senate, where the public knows who they are and where they are, and either vote for or against people. It is not only disingenuous, but I think it is detrimental to our system of justice, and it is a true distortion of what we pledge to do in upholding the Constitution when some block judges by anonymous holds. And then we find that the reason for doing that is in connection with a fundraising and lobbying campaign in which letters were sent out by some group saying, in effect, that if you send this money, we will block judges and we will arrange for you to meet privately with leading elected officials.

That is wrong. That is wrong, Mr. President. It is unprecedented in the 23 years that I have been in the Senate. Nothing like this has ever been allowed by any of the leaders of the Senatenot by Senator Mansfield, not by Senator Byrd, not by Senator Baker, not by Senator Dole, and not by Senator Mitchell. It should not be allowed now. It is wrong, and it undermines the very credibility of the U.S. Senate, and it demeans the U.S. Senate; but, even more importantly, it is destructive of the independence of the judiciary.

143 Cong. Rec. S 11233, 10/27/97, When There Were 93 Vacancies

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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

This politicization, Mr. President, has been extended to include the practice of denying nominees an up or down vote on the Senate floor, or even in the Judiciary Committee. If the majority of the Senate opposes a judicial nominee enough to derail a nomination by an up or down vote, then at least the process has been served. Instead, however, the President's nominees are not even receiving that courtesy from this Senate: Some of the individuals whose nominations are pending before the Judiciary Committee or the full Senate have not been allowed a vote on the floor, much less in committee, for close to 2 years. It is especially troubling that of the 14 nominees who have been held up the longest by the Republican majority in the Senate, 12 are women or minorities.

143 Cong. Rec. S 12719, 12/15/97, When There Were 78 Vacancies

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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

In fact, how disturbing, how petty, and how shameful: Trying to disqualify an outstanding Hispanic woman judge by an anonymous hold.

I have far more respect for Senators who, for whatever reason, wish to vote against her. Stand up; vote against her. But to have an anonymous hold--an anonymous hold--in the U.S. Senate with 100 Members representing 260 million Americans, which should be the conscience of the Nation, should not be lurking in our cloakrooms anonymously trying to hold up a nominee. If we want to vote against somebody, vote against them. I respect that. State your reasons. I respect that. But don't hold up a qualified judicial nominee.

I was asked last week by Neil Lewis of the New York Times about this circumstance. He correctly reported my response in a front page story this last Saturday. I am offended by this anonymous effort to oppose her prompt confirmation by stealth tactics. Here is a highly qualified Hispanic woman judge who should have been confirmed to help end the crisis in the Second Circuit more than three months ago.

Acting to fill judicial vacancies is a constitutional duty that the Senate--and all of its member--are obligated to fulfill. In its unprecedented slowdown in the handling of nominees in the 104th and 105th Congresses, the Senate is shirking its duty. The Senate majority's choices as they stall Hispanic, women and minority nominees is wrong and should end.

If Senators are opposed to any judge, bring them up and vote against them. But don't do an anonymous hold, which diminishes the credibility and respect of the whole U.S. Senate.

I have had judicial nominations by both Democrat and Republican Presidents that I intended to oppose. But I fought like mad to make sure they at least got a chance to be on the floor for a vote.

I have stated over and over again on this floor that I would refuse to put an anonymous hold on any judge; that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty.

If we don't like somebody the President nominates, vote him or her down. But don't hold them in this anonymous unconscionable limbo, because in doing that, the minority of Senators really shame all Senators.

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144 Cong. Rec. S 6521, 6/18/98, When There Were 72 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

That is good advice. That is what this Senate should do, take up these nominations and vote them up or vote them down. I believe that if the Senate were given an opportunity to have a fair vote on the merits of the nomination of Judge Richard Paez or Timothy Dyk or any of the 21 judicial nominations pending on the Senate Executive Calendar, they would be confirmed. Perhaps that is why we are not being allowed to vote.

The Chief Justice of the United States Supreme Court has called the number of judicial vacancies "the most immediate problem we face in the federal judiciary." I have urged those who have been stalling the consideration of the President's judicial nominations to reconsider and work to fulfil our constitutional responsibility. Those who delay or prevent the filling of these vacancies must understand that they are harming the administration of justice. Courts cannot try cases, incarcerate the guilty or resolve civil disputes without judges.

I know that some are still playing a political game of payback for the defeat of the nomination of Judge Bork to the Supreme Court and other Republican judicial nomination over the last decade. I remind the Senate that the Senate voted on the Bork nomination and voted on the nomination of Clarence Thomas and did so in each case in less than 15 weeks. To delay judicial nominations for months and years and to deny them a vote is wrong.

144 Cong. Rec. S 12578, 10/14/98, When There Were 70 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

Having been voted out of Committee by a 4-1 margin, having waited for 2 years, this distinguished African American at least deserves a vote, up or down. Senators can stand up and say they will vote for or against him, but let this man have his vote.

145 Cong. Rec. S 7900, 6/30/99, When There Were 68 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

Having been voted out of Committee by a 4-1 margin, having waited for 2 years, this distinguished African American at least deserves a vote, up or down. Senators can stand up and say they will vote for or against him, but let this man have his vote.

145 Cong. Rec. S 7900, 6/30/99, When There Were 68 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

Mr. President, we have a number of highly-qualified nominees for judicial vacancies before the Senate and on the Executive Calendar. I want to be sure that the Senate treats them all fairly and accords each of them an opportunity for an up or down vote. I want to share with you a few of the cases that cry out for a Senate vote: Having been voted out of Committee twice, he has now been forced to wait for more than two years for Senate action. This distinguished African-American at least deserves the respect of this

Senate, and he should be allowed a vote, up or down. Senators can stand up and say they will vote for or against him, but let this man have his vote. Twenty-seven months after being nominated, the nomination remains pending before the Senate. I would certainly like to see Justice White be accorded an up or down vote.

145 Cong. Rec. S 11014, 9/16/99, When There Were 68 Vacancies

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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

Today we are not asking for any Senator's vote for any nomination. Instead, I am asking the Senate recognize that its responsibility is to vote on all the judicial nominations on the calendar. We can vote for them or against them, we can vote them up or vote them down, but after 44 months or 27 months or 20 months, after completing every step in what is a long, tortuous confirmation process, the nominations of Judge Richard Paez, Justice Ronnie White and Marsha Berzon are as entitled to a Senate vote as the nomination of Ted Stewart.

In my statement last week I detailed the path that each of these nominees has traveled to the Senate. All are now available for a vote on confirmation by the Senate. All should be accorded an up or down vote.

I hope we will have a chance to vote on them, not just in committee where I have voted for each one of them, but on the floor of the Senate. That is what the Constitution speaks of in our advise and consent capacity. That is what these good and decent people have a right to expect. That is what our oath of office should compel Members to do--to vote for or against. I do not question the judgment or conscience of any man or woman in this Senate if they vote differently than I do, but vote.

I am not asking anybody how they should or should not vote but allow nominees to have a vote. All the people being nominated are extremely highly qualified lawyers and judges. They have to put their lives on hold and the lives of their family on hold while they wait. They are neither fish nor fowl as a nominee. In private practice, all your partners come in and throw a big party and say it is wonderful, we are so proud of you, could you move out of the corner office because we want to take it now. And you cannot do anything while you wait and wait and wait.

Vote them up, vote them down.

145 Cong. Rec. S 11096, 9/21/99, When There Were 68 Vacancies

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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

They have been forced to run some kind of strange in-the-dark gauntlet of Senate confirmations. Those strong enough to work through that secret gauntlet and get reported to the floor are then being dealt the final death blow through a refusal of the Republican leadership to call them up for a vote. They should be called up for a fair vote. They may be defeated--the Republicans are in the majority; there are 55 Republican Senators; they could vote them down. But let them have a fair vote, up or down. Let all Senators have to stand up and vote aye or nay, and be responsible to their constituency to explain why they voted that way. Unfortunately, nominations are being killed through neglect and silence, not

defeated by a majority vote.
So I ask, again, for the Senate to fulfill its responsibility to vote on all the judicial nominations on the calendar; vote for them or vote against them. We can vote them up or we can vote them down, but after 44 months or 27 months or 20 months, let us vote.
He has been considered promptly and will be brought up for an up or down vote. There are some on this side of the aisle who oppose him and will vote against him. But every single Democrat, whether they are going to vote against him or for him, should allow him to be voted on and they will. That nomination has been pending 2 months.
I said last week I do not begrudge Ted Stewart a Senate vote. I do not. He is entitled to a vote. He went through the confirmation process. The Senate Judiciary Committee voted him out. It was not a unanimous vote, but he was voted out of the committee, and he is entitled to a vote. If Senators do not want to vote for him, vote against him. If Senators want to vote for him, vote for him. I intend to vote for him. I intend to give the benefit of the doubt both to the President and to the chairman of the Senate Judiciary Committee who recommended him.
Who is it who is afraid to vote on these nominations? Who is it who is hiding their opposition and obstructing these nominees? Can it be they are such a minority, they know that if it comes to a fair vote, these good men and women will be confirmed?
So rather than to allow a fair vote, they will keep it from coming to a vote. I would bet you that the same people who are holding these nominations back from a vote will go home on the Fourth of July and other holidays and give great speeches about the democracy of this country and how important democracy is and why we have to allow people to vote and express the will of the people--except in the Senate and, apparently, except if you are a minority or a woman.
I have been on the floor of this Senate when we have had Republican Presidents with Republican nominations, saying that they deserve to be brought forward for a vote one way or the other, including a couple instances of nominees I intended to vote against. I still said they deserved a vote. And they got their vote.
What we are currently experiencing is unconscionable and unprecedented, these kinds of delays. I think we hurt the Senate when we do this. We will have Republican Presidents; we will have Democratic Presidents. We will have Republican-controlled Senates; and we will have Democratic-controlled Senates. I have served here twice with the Democrats in control; twice with the Republicans in control. The precedents we establish are important if we are to go into the next century as the kind of body the Senate should be.
Do not let us end this century and this millennium leaving, as guidance for the next century and the next millennium and the next Senate, partisanship that tears at the very fabric, not only of the Senate but of the independence of the Federal judiciary itself. So many judges, judges who are considered conservative, judges who are considered liberal, judges who have had a Republican background or a Democratic background, judges who have been appointed by Republican Presidents, judges who have been appointed by Democratic Presidents, have been united in saying: Stop this. Do not go on with this. Because you are tearing at the

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very core of our independent judiciary, the most independent judiciary on Earth, a judiciary whose very independence allows us to maintain a balanced country, a country that is the most powerful on Earth, but a country that is also the most free and the most respected democracy. And a main factor guaranteeing that freedom and that democracy is our independent judiciary.
I could not agree more with Chief Justice Rehnquist. We should follow his advice. Let the Republican leadership schedule up-or-down votes on the nominations of Judge Paez and Marsha Berzon so that the Senate can finally act on them. Let us be fair to all. Nominees deserve to be treated with dignity and dispatch, not delayed for 2 and 3 years. We are talking about people going to the Federal judiciary, a third independent branch of Government. They are entitled to dignity and respect. They are not entitled automatically for us to vote aye, but they are entitled to a vote, aye or nay.
They deserve at least that. No nominee gets an automatic "aye" vote, but every nominee ought to be heard and at least voted on one way or the other.

145 Cong. Rec. S 11793, 10/1/99, When There Were 63 Vacancies

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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

LEAHY
The fact is I don't care who comes up, we don't like some of these people who were put there before, so if you're an extraordinarily well qualified woman, if you're an extraordinarily well-qualified minority or whatever, we're not going to put you on, that doesn't say much for our commitment to the independence of the Judiciary. Bring these people up, vote them up or vote them down.

SEN. PATRICK LEAHY: Well, a lot of times, we keep trying to get a person to at least have a vote, one way or the other, vote them up, vote them down. And we're told that, well, somebody has a concern so they're holding back. We never know who that mysterious somebody is. And yet when this person who is so offensive that we can't bring them to a vote, when after a year or two or three of waiting, they come out for a vote, they get 90 votes or 95 votes out of the 100-member Senate. But what's happened is that one or two Senators anonymously hold somebody back. I think that's wrong. I think that hurts the integrity of the courts, but it also is not a... it does not reflect well in the Senate or on the democratic process.

SEN. PATRICK LEAHY: Having said all that, I think it is time for those who will put these anonymous holds on to be required to come forward and have the votes, allow the committee to work the way we should. On had started to say something earlier, and I think it was going to say if it was left to the two of us, we could move it much faster. I believe that is so. I believe I'll say that, to Senator Hatch's credit. But you cannot have a small click decide they want to know exactly how judges are going to rule before they go on the bench, or they're not going to confirm them.

The Newshour with Jim Lehrer, 10/14/99, When There Were 63 Vacancies

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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

But Paez's supporters say he still deserves an up-or-down vote after all this time.
"We're saying at least be honest enough to vote on him," Leahy said. "If you don't want him, you've got 55 votes, you can defeat him."

Berlau, John, "Partisanship or Politics as Usual," Investor's Business Daily, 10/18/99, When There Were 63 Vacancies

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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

The Founding Fathers certainly intended that the Senate advise as to judicial nominations, i.e., consider, debate and vote up or down. They surely did not intend that the Senate, for partisan or factional reasons, would remain silent and simply refuse to give any advice or consider and vote at all, thereby leaving the courts in limbo, understaffed and unable properly to carry out their responsibilities for years.

Prepared Testimony, Senate Judiciary Committee,, 5/10/00, When There Were 80 Vacancies

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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

The soon-to-be presidential nominee of the Republican Party has said--and I agree with him--that this is wrong, the Senate ought to vote these people up or down in 60 days. Of course, we could do that. There is a concern that has been expressed--and rightly so--that so many nominees are held without any vote. Nobody votes against them, but nobody gets an opportunity to vote for them; they just sit there. And even though the criticism stings, the fact is that, on average, women and minorities take longer to go through this Senate than white males do. Some women, some minorities have gone through very quickly, but most have taken longer. Some of these people got held up for 2 or 3 or 4 years. When they finally got a vote, they passed overwhelmingly. But for 2 or 3 or 4 years they were humiliated, caused to dangle, have their law practices fall apart, have people question what was going on. Why? Because one or two Senators thought they should be held up. Well, let those one or two Senators vote against them. We are paid to vote yes or no, not maybe. I do not know whether it is because they are women, because they are Hispanic, because they are too liberal, or too conservative, too active, not active enough, that people don't want them to be confirmed. Let them vote against them.

146 Cong. Rec. S 7531, 7/25/00, When There Were 59 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

I mention this because Governor Bush and I, while we disagree on some issues, have one very significant issue on which we agree. He gave a speech awhile back and criticized what has happened in the Senate where confirmations are held up not because somebody votes down a nominee but because they cannot ever get a vote. Governor Bush said: You have the nominee. Hold the hearing. Then, within 60 days, vote them up or vote them down. Don't leave them

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in limbo.
Frankly, that is what we are paid to do in this body. We are paid to vote either yes or no--not vote maybe. When we hold a nominee up by not allowing them a vote and not taking any action one way or the other, we are not only voting "maybe" but we are doing a terrible disservice to the man or woman to whom we do this. They have to put their life on hold. They do not know what is going to happen: Are they going to be confirmed, or not? It is not like when any one of us runs for election; we know that on a certain day the election occurs. We either win or we lose. But we know that on that Tuesday, we are going to know our fate. We won or we lost.
President Clinton, to his credit, has nominated people who have received higher ratings than any President, Democrat or Republican, in 40 years and they still get held up. He said:
These people are highly qualified, which leads to only one conclusion, that the appointments process has been politicized in the hope of getting appointees ultimately to the bench who will be more political. That is wrong. It is a denial of justice.
President Clinton is right. We should move forward with these nominees. Let them have a vote. Don't do this in the dark of the night holding people up.

146 Cong. Rec. S 9671, 10/3/00, When There Were 66 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

I have said on the floor, although we are different parties, I have agreed with Gov. George Bush, who has said that in the Senate a nominee ought to get a vote, up or down, within 60 days. I urge in the time remaining in this session that he, as the head of his party, as their Presidential nominee, call the Republican leader of the Senate and say that all of these women, all of these minorities, in fact, all of the people who have been sitting here for well over 60 days waiting for a vote on their nomination, let them have a vote. Vote for them or vote against them. Bonnie Campbell deserves a vote. My guess is the reason she has not been brought for a vote is they know at least 80 of the 100 Senators would vote for her. It would be impossible to justify a vote against her because of her extraordinary qualifications.
Again, if Governor Bush is serious when he says have a vote within 60 days, pick up the phone, call the Senate majority leader, reach him at the switchboard, 202-224-3121, and ask him to bring her to a vote. It is a very easy thing to do.
Again I say if Governor Bush means it, pick up the phone and call 202-224-3121; ask the Senate switchboard to connect him to the Republican leader and say: You know, I have made it a tenet of my campaign that the Senate should vote on a nomination within 60 days. You can bring every one of these people to the floor for a vote, up or down, today. Let's do so. Who knows. We will find out how the Senate feels about them. Are they for them or are they against them? Right now, instead of voting yes or no, we vote "maybe," by having one or two Senators in the dark of night put holds on these people.

146 Cong. Rec. S 10164, 10/11/00, When There Were 66 Vacancies

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LEAHY, PATRICK on ACTING QUICKLY ON NOMINATIONS

He had a hearing on May 7. The Judiciary Committee reported his confirmation to the full Senate on May 22. This is the way the judicial confirmation process should work. The position had been open only a few months. The Senate was out at the time the vacancy occurred. Shortly after the elections, the President moved quickly with a nominee that had strong bipartisan support for his home State senators. The Judiciary Committee moved very quickly, and the nomination passed out unanimously. We know that there is a major need for a judge there. Alan Gold's nomination is now pending on the Senate calendar, awaiting action on the Senate floor. This process should not become entangled in partisan squabbling.

143 Cong. Rec. S 5653, 6/16/97, When There Were 96 Vacancies

LEAHY, PATRICK on ACTING QUICKLY ON NOMINATIONS

As I have said before, it should not take more than 4 months to consider a judicial nominee and the Gold nomination and its treatment should serve as the standard by which we measure the Senate's treatment of other nominees. Although it should represent the normal process, it is the exception this year.

143 Cong. Rec. S 7206, 7/10/97, When There Were 100 Vacancies

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LEAHY, PATRICK on ACTING QUICKLY ON NOMINATIONS

Likewise, I again urge the Republican leadership to proceed to consideration of the four judicial nominees favorably reported by the Judiciary Committee over the last 7 weeks. Yesterday, we succeeded in reporting three additional judicial nominees. I would hope that we could proceed to their confirmations early next week. Confirming those 7 nominations pending on the executive calendar would literally double our production for the first 6 months of this session.

143 Cong. Rec. S 7296, 7/11/97, When There Were 100 Vacancies

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LEAHY, PATRICK on ACTING QUICKLY ON NOMINATIONS

After being on the Senate calendar for a total of 7 months, this nomination has been delayed too long. I believe all would agree that it is time for the full Senate to debate this nomination and vote on it. I have inquired about a time agreement but gotten no response. Now that an opponent has finally come forward to identify himself, I look forward to a prompt debate and a vote on this nomination in accordance with the apparent commitment of the majority leader. I look forward to that debate. I ask again, as I have done repeatedly over the last several months, why not now, why not today, why not this week?

143 Cong. Rec. S 10924, 10/22/97, When There Were 93 Vacancies

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LEAHY, PATRICK on ACTING QUICKLY ON NOMINATIONS

Nine months should be more than a sufficient time for the Senate to complete its review of these nominees. During the four years of the

Bush Administration, only three confirmations took as long as nine months. Last year, 10 of the 36 judges confirmed took nine months or more and many took as long as a year and one-half. So far this year, Judge Ann Aiken, Judge Margaret Morrow, and Judge Hilda Tagle have taken 21 months, 26 months and 31 months respectively. Margaret McKeown's nomination has already been pending for 24 months. Judge Sotomayor's nomination has already been pending for 9 months. Pat Murphy's and Judge McCuskey's nominations have already been pending for 8 months. The average number of days to consider nominees used to be between 50 and 90, it rose last year to over 200 and this year stands at over 300 days from nomination to confirmation. That is too long and does a disservice to our Federal Courts.

144 Cong. Rec. S 2696, 3/27/98, When There Were 82 Vacancies

LEAHY, PATRICK on ACTING QUICKLY ON NOMINATIONS

Nominees deserve to be treated with dignity and dispatch -- not delayed for two and three years. We are seeing outstanding nominees nitpicked and delayed to the point that good women and men are being deterred from seeking to serve as federal judges. Nominees practicing law see their work put on hold while they await the outcome of their nominations. Their families cannot plan. All of this despite the fact that, by all objective accounts and studies, the judges that President Clinton has appointed have been a moderate group, rendering moderate decisions, and certainly including far fewer ideologues than were nominated during the Reagan Administration.

Certainly no President has consulted more closely with Senators of the other party on judicial nominations. The Senate should get about the business of voting on the confirmation of the scores of judicial nominations that have been delayed without justification for too long. We must redouble our efforts to work with the President to end the longstanding vacancies that plague the federal courts and disadvantage all Americans. That is our constitutional responsibility.

Prepared Statement, Senate Judiciary Committee, 7/29/99, When There Were 68 Vacancies

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LEAHY, PATRICK on ACTING QUICKLY ON NOMINATIONS

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Prepared Statement, Senate Judiciary Committee, 9/14/99, When There Were 68 Vacancies

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LEAHY, PATRICK on ACTING QUICKLY ON NOMINATIONS

The bipartisan Task Force on Judicial Selection of Citizens for Independent Courts has recommended that the Senate complete its consideration of judicial nominations within 60 days.

Governor Bush of Texas recently also proposed that presidential nominations be acted upon by the Senate within 60 days.

Of the 34 judicial nominations currently pending, 26 have already been pending for more than 60 days without Senate action. Already this Congress 83 nominees, including 56 eventually confirmed, have had to wait longer than 60 days for Senate action. I urge the Senate to do better.

If I could make a recommendation, I would join an unusual ally in that. Gov. George W. Bush of Texas Presidential nominations should be acted upon by the Senate within 60 days. He said:

The Constitution empowers the President to nominate officers of the United States, with the advice and consent of the Senate. That is clear-cut, straightforward language. It does not empower anyone to turn the process into a protracted ordeal of unreasonable delay and unrelenting investigation. Yet somewhere along the way, that is what Senate confirmations became --lengthy, partisan, and unpleasant. It has done enough harm, injured too many good people, and it must not happen again.

Governor Bush is right. President Clinton has said virtually the same thing. I have said the same thing. The fact is, if you do not want somebody to be a judge, then vote them down, but do not do this limbo thing where sometimes they wait for years and years. Marsha Berzon waited 2 1/2 years just to get a vote. They were not going to vote on this woman. When she finally came to a vote, she was confirmed overwhelmingly.

146 Cong. Rec. S 7436, 7/21/00, When There Were 59 Vacancies

LEAHY, PATRICK on ACTING QUICKLY ON NOMINATIONS

The soon-to-be presidential nominee of the Republican Party has said--and I agree with him--that this is wrong, the Senate ought to vote these people up or down in 60 days. Of course, we could do that. There is a concern that has been expressed--and rightly so--that so many nominees are held without any vote. Nobody votes against them, but nobody gets an opportunity to vote for them; they just sit there. And even though the criticism stings, the fact is that, on average, women and minorities take longer to go through this Senate than white males do. Some women, some minorities have gone through very quickly, but most have taken longer. Some of these people got held up for 2 or 3 or 4 years. When they finally got a vote, they passed overwhelmingly. But for 2 or 3 or 4 years they were humiliated, caused to dangle, have their law practices fall apart, have people question what was going on. Why? Because one or two Senators thought they should be held up. Well, let those one or two Senators vote against them. We are paid to vote yes or no, not maybe. I do not know whether it is because

they are women, because they are Hispanic, because they are too liberal, or too conservative, too active, not active enough, that people don't want them to be confirmed. Let them vote against them.

146 Cong. Rec. S 7531, 7/25/00, When There Were 59 Vacancies

LEAHY, PATRICK on ACTING QUICKLY ON NOMINATIONS

I mention this because Governor Bush and I, while we disagree on some issues, have one very significant issue on which we agree. He gave a speech awhile back and criticized what has happened in the Senate where confirmations are held up not because somebody votes down a nominee but because they cannot ever get a vote. Governor Bush said: You have the nominee. Hold the hearing. Then, within 60 days, vote them up or vote them down. Don't leave them in limbo.
Frankly, that is what we are paid to do in this body. We are paid to vote either yes or no--not vote maybe. When we hold a nominee up by not allowing them a vote and not taking any action one way or the other, we are not only voting "maybe" but we are doing a terrible disservice to the man or woman to whom we do this. They have to put their life on hold. They do not know what is going to happen: Are they going to be confirmed, or not? It is not like when any one of us runs for election; we know that on a certain day the election occurs. We either win or we lose. But we know that on that Tuesday, we are going to know our fate. We won or we lost.
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These people are highly qualified, which leads to only one conclusion, that the appointments process has been politicized in the hope of getting appointees ultimately to the bench who will be more political. That is wrong. It is a denial of justice.
President Clinton is right. We should move forward with these nominees. Let them have a vote. Don't do this in the dark of the night holding people up.

146 Cong. Rec. S 9671, 10/3/00, When There Were 66 Vacancies

LEAHY, PATRICK on ACTING QUICKLY ON NOMINATIONS

The debate on judicial nominations over the last several years has included too much delay with respect to too many nominations. The most prominent current examples of that treatment are Judge Helene White, Bonnie Campbell, Roger Gregory, and Enrique Moreno. With respect to these nominations, the Senate has for too long refused to do its constitutional duty and vote. Nominees deserve to be treated with dignity and dispatch--not delayed for two or three or four years. The nomination of Judge White has now been pending for over four years, the longest pending nomination without a hearing in Senate history.

146 Cong. Rec. S 9657, 10/3/00, When There Were 66 Vacancies

LEAHY, PATRICK on ACTING QUICKLY ON NOMINATIONS

I have said on the floor, although we are different parties, I have

agreed with Gov. George Bush, who has said that in the Senate a nominee ought to get a vote, up or down, within 60 days. I urge in the time remaining in this session that he, as the head of his party, as their Presidential nominee, call the Republican leader of the Senate and say that all of these women, all of these minorities, in fact, all of the people who have been sitting here for well over 60 days waiting for a vote on their nomination, let them have a vote. Vote for them or vote against them. Bonnie Campbell deserves a vote. My guess is the reason she has not been brought for a vote is they know at least 80 of the 100 Senators would vote for her. It would be impossible to justify a vote against her because of her extraordinary qualifications.
Again, if Governor Bush is serious when he says have a vote within 60 days, pick up the phone, call the Senate majority leader, reach him at the switchboard, 202-224-3121, and ask him to bring her to a vote. It is a very easy thing to do.
Again I say if Governor Bush means it, pick up the phone and call 202-224-3121; ask the Senate switchboard to connect him to the Republican leader and say: You know, I have made it a tenet of my campaign that the Senate should vote on a nomination within 60 days. You can bring every one of these people to the floor for a vote, up or down, today. Let's do so. Who knows. We will find out how the Senate feels about them. Are they for them or are they against them? Right now, instead of voting yes or no, we vote "maybe," by having one or two Senators in the dark of night put holds on these people.

146 Cong. Rec. S 10174, 10/11/00, When There Were 66 Vacancies

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LEAHY, PATRICK on ACTING QUICKLY ON NOMINATIONS

While the Republican candidate for President made a fine statement in which he called for votes on judicial nominations within 60 days, he has not prevailed upon the Senate Republican majority to treat nominees fairly now. Instead of 60 days, we see Judge Helene White's nomination to the Sixth Circuit pending more than 1400 days; Elena Kagan, U.S. Court of Appeals for the District of Columbia, pending 500 days; Judge James Wynn, U.S. Court of Appeals for the Fourth Circuit, pending more than 440 days; Kathleen McCree Lewis, U.S. Court of Appeals for the Sixth Circuit, pending more than 400 days; Enrique Moreno, U.S. Court of Appeals for the Fifth Circuit, pending more than 400 days; Bonnie Campbell, U.S. Court of Appeals for the Eighth Circuit, pending more than 240 days; Roger Gregory, U.S. Court of Appeals for the Fourth Circuit, pending more than 115 days; Lynette Norton, U.S. District Court for the Western District of Pennsylvania, pending more than 1300 days; Judge Legrome Davis, U.S. District Court for the Eastern District of Pennsylvania, pending more than 800 days; Patricia Coan, U.S. District Court for the District of Colorado, pending more than 500 days; Dolly Gee, U.S. District Court for the Central District of California, pending more than 500 days; Rhonda Fields, U.S. District Court for the District of Columbia, pending more than 350 days; Linda Riegle, U.S. District Court for the District of Nevada, pending more than 180 days; Ricardo Morado, U.S. District Court for the Southern District of Texas, pending more than 165 days. The Senate is adjourning leaving 33 judicial nominees whose

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nominations have been pending without Senate action for more than 60 days.

146 Cong. Rec. S 11314, 10/28/00, When There Were 66 Vacancies

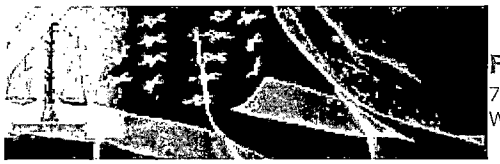

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LEAHY, PATRICK on BURDEN ON CASELOADS

It is getting a little ridiculous. Do people know that we get paid $133,000 a year, and we have not had 1 second of debate on the budget resolution that the Republican leadership of the Senate and the House are supposed to bring before us for a vote? Do they know that we get paid $133,000 a year, but if you want to litigate a case in a Federal court, you probably cannot get before a federal judge because of the vacancies that our inaction is perpetuating?

143 Cong. Rec. S 2299, 3/14/97, When There Were 93 Vacancies

LEAHY, PATRICK on BURDEN ON CASELOADS

We have confirmed less than one judge a month since the start of this session in January. We have almost 100 vacancies in the federal judiciary. Many of them are in critical areas, where huge backlogs are occurring, where courts are saying that we are benefiting criminals because they can't be tried; we can't have speedy trials. Criminals get the benefit of this by not having judges to hear the cases. If you have a civil case, forget about a speedy trial.

143 Cong. Rec. S 5653, 6/16/97, When There Were 96 Vacancies

LEAHY, PATRICK on BURDEN ON CASELOADS

The Chief Judge of the Eleventh Circuit has testified about "crushing workloads." He has noted that federal courts are "no longer able to provide the public with the same standard of excellent service that they did in the past." The Chief Justice of the U.S. Supreme Court, William Rehnquist, has called the rising number of Federal judicial vacancies "the most immediate problem we face in the Federal judiciary." He warned at the end of 1996 that "filling judicial vacancies is crucial to the fair and effective administration of justice."

143 Cong. Rec. S 9723, 9/19/97, When There Were 97 Vacancies

LEAHY, PATRICK on BURDEN ON CASELOADS

The American people know that a fair and impartial judiciary is key to maintaining our democracy and our rights. The continuing partisan campaign against qualified and fair judicial nominees has to come to an end. If the judiciary is to retain its ability to protect our rights and freedoms as we move into a new century of American history, if it is to serve as a check on the political branches, it must have the judges and resources necessary to the task. Vacant courtrooms and empty benches cannot hear criminal trials, enforce our environmental protection laws, resolve legal claims or uphold the Constitution against encroachment.

Those who delay or prevent the filling of these vacancies must understand that they are delaying or preventing the administration of justice. We can pass all the crime bills we want, but you cannot try the cases and incarcerate the guilty if you do not have judges. The mounting backlogs of civil and criminal cases in the dozens of emergency districts, in particular, are growing taller by the day.

National Public Radio has been running a series of reports all this week on the judicial crises and quoted the Chief Judge and U.S. attorney from San Diego earlier this week to the effect that criminal matters are being affected.

143 Cong. Rec. S 9957, 9/25/97, When There Were 97 Vacancies

LEAHY, PATRICK on BURDEN ON CASELOADS

The Judiciary Committee has heard testimony from Second Circuit, Ninth Circuit and Eleventh Circuit judges about the adverse impact of vacancies on the ability of the Federal courts to do justice. The effect is seen in extended delay in the hearing and determination of cases and the frustration that litigants are forced to endure. The crushing caseload will force Federal courts to rely more and more on senior judges, visiting judges and court staff.

143 Cong. Rec. S 9957, 9/25/97, When There Were 97 Vacancies

LEAHY, PATRICK on BURDEN ON CASELOADS

Meanwhile, the people served by the District Court for the Central District of California continue to suffer the effects of this. Vacancy cases are not heard, criminal cases are not being tried. This is one of more than 28 vacancies that have persisted for so long that they are classified as "judicial emergency" vacancies by the Administrative Office of the United States Courts.

143 Cong. Rec. S 10825, 10/9/97, When There Were 93 Vacancies

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LEAHY, PATRICK on BURDEN ON CASELOADS

When a U.S. attorney can refer to the lack of courtrooms and Federal judges as a bottleneck in the criminal justice process and the chief judge of a Federal district court can acknowledge that the court is so overwhelmed with criminal cases that it is operating like an assembly line, that cases are not given the attention that they deserve and that you know that you're making a lot of mistakes because of the speed, we have reached a crisis. That is not American justice, that is not the federal justice system on which all of us rely to protect our rights while enforcing the law.

143 Cong. Rec. S 10924, 10/22/97, When There Were 93 Vacancies

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LEAHY, PATRICK on BURDEN ON CASELOADS

Worse yet, it is affecting the quality of justice in the United States. The increase in the number of judicial vacancies in combination with the growth in criminal and civil filings has created a huge backlog of federal cases. According to Chief Justice Rehnquist, since 1990, the number of cases filed in courts of appeals has increased by 21 percent and those filed in district courts have grown by 24 percent. There was a five percent increase in the criminal caseload in 1997. This resulted in the largest federal criminal caseload in 60 years.

According to the Administrative Office of the U.S. Courts, the number of active cases pending for at least three years rose 20 percent from 1995 to 1996. According to the most recent data

provided by the Department of Justice, there are more than 16,000 federal cases that are more than three years old.

144 Cong. Rec. S 592, 2/10/98, When There Were 81 Vacancies

LEAHY, PATRICK on BURDEN ON CASELOADS

The mounting backlogs of civil and criminal cases in the dozens of emergency districts, in particular, are growing more critical by the day. This is particularly true in the Central and Southern District Courts of Illinois, where these outstanding nominees will serve once they are confirmed.

I hope there will be a realization by those in this body who have started down this destructive path of attacking the judiciary and stalling the confirmation of qualified nominees to the federal bench that those efforts do not serve the national interest or the American people. I hope that we can once again remove these important matters from partisan and ideological politics.

144 Cong. Rec. S 1986, 3/16/98, When There Were 82 Vacancies

LEAHY, PATRICK on BURDEN ON CASELOADS

The mounting backlogs of civil and criminal cases in the dozens of emergency districts, like the Southern and Central Districts of Illinois, are growing more critical by the day. Indeed, in the Southern District of Illinois, where Pat Murphy will serve when confirmed, Chief Judge Gilbert has reported that his docket has been so burdened with criminal cases that he went a year without trying a civil case.

I have urged those who have been stalling the consideration of the President's judicial nominations to reconsider and to work with us to have the Judiciary Committee and the Senate fulfill its Constitutional responsibility. Those who delay or prevent the filling of these vacancies must understand that they are delaying or preventing the administration of justice. Courts cannot try cases, incarcerate the guilty or resolve civil disputes without judges.

144 Cong. Rec. S 3028, 4/2/98, When There Were 79 Vacancies

LEAHY, PATRICK on BURDEN ON CASELOADS

Law clerks and attorney staff are being used more and more extensively in the determination of cases as backlogs grow. Bureaucratic imperatives seem to be replacing the judicial deliberation needed for the fair administration of justice. These are not the ways to continue the high quality of decision making for which our federal courts are admired or to engender confidence in our justice system.

When the President and the Chief Justice Spoke out, the Senate briefly got about its business of considering judicial nominations last year. Unfortunately, the Senate is back to a pace of confirming a judge a month. That is not acceptable, it does not serve the interests of justice and it does not fulfill our constitutional responsibilities. For the last several years I have been urging the

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Judiciary Committee and the Senate to proceed to consider and confirm judicial nominees more promptly and without the months of delay that now accompany so many nominations.

The Senate should get about the business of voting on the confirmation of the scores of judicial nominations that have been delayed with justification for too long. We must redouble our efforts to work with the President to end the longstanding vacancies that plague the federal courts and disadvantage all Americans. That is our constitutional responsibility.

Prepared Statement, Senate Judiciary Committee, 7/13/99, When There Were 68 Vacancies

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LEAHY, PATRICK on BURDEN ON CASELOADS

More than two years ago Chief Justice William Rehnquist warned that "vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary." The New York Times reported last year how the crushing workload in the federal appellate courts has led to what it calls a "two-tier system" for appeals, skipping oral arguments in more and more cases. Law clerks and attorney staff are being used more and more extensively in the determination of cases as backlogs grow.

Bureaucratic imperatives seem to be replacing the judicial deliberation needed for the fair administration of justice. These are not the ways to continue the high quality of decisionmaking for which our federal courts are admired or to engender confidence in our justice system.

Federal law enforcement relies on judges to hear criminal cases, and individuals and businesses pay taxes to exercise their right to resolve civil disputes in the federal courts. As workloads continue to grow and vacancies are perpetuated, the remaining judges are being overwhelmed and the work of the federal judiciary is suffering.

Our independent federal judiciary sets us apart from virtually all others in the world. Every nation that in this century has moved toward democracy has sent observers to the United States in their efforts to emulate our judiciary. Those fostering this slowdown of the confirmation process and other attacks on the judiciary are risking harm to institutions that protect our personal freedoms and independence.

146 Cong. Rec. S 7531, 7/25/00, When There Were 59 Vacancies



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LEAHY, PATRICK on CRIMINAL JUSTICE SYSTEM

Leahy also called on the Senate's Republican leaders to agree to acting on the growing backlog of judicial nominees that has prompted expressions of concern by Chief Justice William Rehnquist and the Administrative Office of the U.S. Courts. "No Senator can say he or she is against crime while also standing in the way of filling the swelling list of judicial vacancies that is darkening our courtrooms across the country," he said,

Congressional Press Release, 2/12/97, When There Were 90 Vacancies

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LEAHY, PATRICK on CRIMINAL JUSTICE SYSTEM

"We can pass all the crime bills we want, but you cannot lock up criminals if you do not have judges," said Sen. Patrick Leahy, D-Vt., the panel's top-ranking Democrat. "The mounting backlogs of civil and criminal cases ... are growing taller by the day."

Las Vegas Review-Journal, 8/13/97, When There Were 99 Vacancies

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LEAHY, PATRICK on CRIMINAL JUSTICE SYSTEM

"You have places where criminals are literally going free because you can't get a criminal case tried, so the prosecutor lowers or drops the charges," Leahy said. "It is the most irresponsible treatment I have seen of the judiciary in 23 years."

"It really is an attempt to undermine the independence of the judiciary," Leahy retorted. "We have people who have the highest qualifications of any judge in any administration and (their nominations) are being held up arbitrarily. And never with a vote."

Mathis, Deborah, "Federal Courts Clogged as Judicial Vacancies Mount,", 8/23/97, When There Were 99 Vacancies

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LEAHY, PATRICK on CRIMINAL JUSTICE SYSTEM

The Senate should consider the effect of its perpetuation of longstanding judicial vacancies on drug cases. The Criminal Justice Oversight Subcommittee held a hearing this week on the drug smuggling problem in the Caribbean, with particular attention to the activity in Puerto Rico. The Commander of the Coast Guard Atlantic Area testified that his primary counterdrug focus . . . for the upcoming year is on Puerto Rico, where the smuggling infrastructure is well developed, entrenched, and historically successful, with one-quarter of all cocaine destined for the United States . . . being shipped via the 110-mile long island of Puerto Rico.

Prepared Testimony, Senate Judiciary Committee, 5/10/00, When There Were 80 Vacancies.



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LEAHY, PATRICK on DC CIRCUIT

Mr. President, I am concerned when I hear attempts to tie Mr. Garland's nomination to the number of judges in the D.C. circuit. Let us remember that Mr. Garland is there to fill the 11th seat on the D.C. circuit, not the 12th seat. Even Judge Silberman, who has argued for abolishing the 12th seat for this court, has testified that "it would be a mistake, a serious mistake, for Congress to reduce down below 11 judges." That is a verbatim quote from Judge Silberman.

But we should also remember that when we just put numbers here, numbers do not tell the whole story. The D.C. circuit's docket is by far the most complex and difficult in the Nation. You can have a dozen routine matters in another circuit and one highly complex issue involving the U.S. Government in the D.C. circuit, brought because it is the D.C. circuit, that one would go on and equal the dozen or more anywhere else.

143 Cong. Rec. S 2515, 3/19/97, When There Were 93 Vacancies



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LEAHY, PATRICK on DON'T APPLY THE "THURMOND RULE"

For the last several years I have been urging the Judiciary Committee and the Senate to proceed to consider and confirm judicial nominees more promptly and without the months of delay that now accompany so many nominations.

There is a myth that judges are not traditionally confirmed in presidential election years. That is not true. Recall that 64 judges were confirmed in 1980, 44 in 1984, 42 in 1988 when a Democratic majority in the Senate confirmed 42 Reagan nominees, and, 66 in 1992 when a Democratic majority in the Senate confirmed 66 Bush nominees. The 17 confirmations in 1996 were an anomaly that should not be repeated. That has led to years of slower and lower confirmations and heavy backlogs in many federal courts.

Those fostering this slowdown of the confirmation process and other attacks on the judiciary are risking harm to institutions that protect our personal freedoms and independence. We must redouble our efforts to work with the President to end the longstanding vacancies that plague the federal courts and disadvantage all Americans. That is our constitutional responsibility.

Capitol Hill Hearing Testimony, 2/22/00, When There Were 79 Vacancies

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LEAHY, PATRICK on DON'T APPLY THE "THURMOND RULE"

Last year, faced with 100 federal judicial vacancies, the Senate confirmed only 34 new judges. I have challenged this Committee and the full Senate to return to the pace we met in 1998 when we held 13 confirmation hearings and confirmed 65 judges. That approximates the pace in 1992, when a Democratic majority in the Senate acted to confirm 66 judges during President Bush's final year in office.

There is a myth that judges are not traditionally confirmed in presidential election years. That is not true. Recall that 64 judges were confirmed in 1980, 44 in 1984, 42 in 1988 when a Democratic majority in the Senate confirmed Reagan nominees and, as I have noted, 66 in 1992 when a Democratic majority in the Senate confirmed 66 Bush nominees. Our federal judiciary cannot afford another unproductive election year session like 1996 when a Republican majority in the Senate confirmed only 17 judges. These 17 confirmations in 1996 were an anomaly that should not be repeated. Since then we have had years of slower and lower confirmations and heavy backlogs in many federal courts.

Prepared Testimony, Senate Judiciary Committee, 3/23/00, When There Were 75 Vacancies

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LEAHY, PATRICK on DON'T APPLY THE "THURMOND RULE"

I have challenged the Judiciary Committee and the full Senate to return to the pace they met in 1998 when we held 13 confirmation hearings and confirmed 65 judges. That approximates the pace in 1992, when a Democratic majority in the Senate acted to confirm 66 judges during President Bush's final year in office. There is a myth that judges are not traditionally confirmed in presidential

election years.

That is not true. Recall that 64 judges were confirmed in 1980, 44 in 1984, 42 in 1988 when a Democratic majority in the Senate confirmed 42 judges nominated by President Reagan and, as I have noted, 66 in 1992 when a Democratic majority in the Senate confirmed 66 judges nominated by President Bush.

Prepared Testimony, Senate Judiciary Committee, 5/10/00, When There Were 80 Vacancies

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LEAHY, PATRICK on DON'T APPLY THE "THURMOND RULE"

Having begun so slowly in the first five months of this year, we have much more to do before the Senate takes its final action on judicial nominees this year. We should be considering 20 to 40 more judges this year. Having begun so slowly, we cannot afford to follow the "Thurmond rule" and stop acting on these nominees at the end of the summer in anticipation of the presidential election. We must use all the time until adjournment to remedy the vacancies that have been perpetuated on the courts to the detriment of the American people and the administration of justice. I urge all Senators to make the federal administration of justice a top priority for the Senate for the rest of this year.

146 Cong. Rec. S 4366, 5/24/00, When There Were 80 Vacancies

LEAHY, PATRICK on DON'T APPLY THE "THURMOND RULE"

We cannot afford to follow the "Thurmond Rule" and stop acting on these nominees now in anticipation of the presidential election in November. We must use all the time until adjournment to remedy the vacancies that have been perpetuated on the courts to the detriment of the American people and the administration of justice.

Capitol Hill Hearing Testimony, 7/12/00, When There Were 59 Vacancies

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LEAHY, PATRICK on DON'T APPLY THE "THURMOND RULE"

Having begun so slowly in the first half of this year, we have much more to do before the Senate takes its final action on judicial nominees this year. We should be considering 20 to 30 more judges this year, including at least another half dozen for the court of appeals. We cannot afford to follow the "Thurmond Rule" and stop acting on these nominees now in anticipation of the presidential election in November. We must use all the time until adjournment to remedy the vacancies that have been perpetuated on the courts to the detriment of the American people and the administration of justice. That should be a top priority for the Senate for the rest of this year. In the last three months in session in 1992, between July 12 and October 8, 1992, the Senate confirmed 32 judicial nominations. I will work with Chairman Hatch to match that record.

146 Cong. Rec. S 6567, 7/12/00, When There Were 59 Vacancies

LEAHY, PATRICK on DON'T APPLY THE "THURMOND RULE"

Having begun so slowly in the first half of this year, we have much

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more to do before the Senate takes its final action on judicial nominees this year. We cannot afford to follow the "Thurmond Rule" and stop acting on these nominees now in anticipation of the presidential election in November. We must use all the time until adjournment to remedy the vacancies that have been perpetuated on the courts to the detriment of the American people and the administration of justice. That should be a top priority for the Senate for the rest of this year. In the last 10 weeks of the 1992 session, between July 24 and October 8, 1992, the Senate confirmed 32 judicial nominations. I will work with the Republican Majority to try to match that record.

146 Cong. Rec. S 7531, 7/25/00, When There Were 59 Vacancies



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LEAHY, PATRICK on END PARTISANSHIP IN CONFIRMATIONS

This is partisanship of an unprecedented nature. I have spoken twice on this floor today on what happens when we forget the normal traditions of the Senate. Traditionally certainly not in my lifetime no Democratic majority leader or Republican majority leader of the Senate would bring up a resolution for a vote directly attacking the President of the United States directly or indirectly attacking the President of the United States on a day when the President is heading off to a summit with other world leaders, especially with the leader of the other nuclear superpower, Russia. Yet, that tradition, which, as I said, has existed my whole lifetime, was broken today.

The other thing is that no matter which party controls the Senate, no matter what party controls the Presidency, we have always worked together so that the President, having been elected, can, subject to normal advice and consent, can appoint the judges he wants. And that tradition has been broken.

If we are going to go against these basic tenets of bipartisanship, then the Senate will not be the conscience of the Nation that it should be. The Senate will suffer. And if the Senate suffers, the country suffers.

143 Cong. Rec. S 2515, 3/19/97, When There Were 93 Vacancies

LEAHY, PATRICK on END PARTISANSHIP IN CONFIRMATIONS

Now I say this, Mr. President, make the same argument now as when we have had a Republican President and a Democratically controlled Senate. If there is one area where partisan politics should not be allowed, it is in the area of the federal judiciary.

143 Cong. Rec. S 5653, 6/16/97, When There Were 96 Vacancies

LEAHY, PATRICK on END PARTISANSHIP IN CONFIRMATIONS

They might not be able to speak up, but I will, because this year's continuing attack on the judicial branch, the slowdown in the processing of the scores of good women and men the President has nominated to fill vacancies on the federal courts around the country, and widespread threats of impeachment are all part of a partisan ideological effort to intimidate the judiciary. Judges cannot take the floor of the U.S. Senate and defend themselves. I will.

I have never known a time when the leadership of the Senate would tolerate partisan and ideological politics so diverting this institution from its constitutional esponsibilities with respect to the third constitutionally coequal branch of Government. If Wednesday's reports are accurate, sadly the American people must know that not only is the Senate leadership allowing these efforts, it is condoning them.

143 Cong. Rec. S 9723, 9/19/97, When There Were 97 Vacancies



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LEAHY, PATRICK on FILLING VACANCIES

I urge all Senators, all House Members, all of us who have the responsibility, who have taken the oath to uphold the Constitution, to step back a moment, stop the foolishness of these calls for impeachment, stop the irresponsibility of refusing to fill judicial vacancies, stop the attacks on the President as he moves from his hospital bed to one of the most important summits he will have of his Presidency.

143 Cong. Rec. S 2344, 3/17/97, When There Were 93 Vacancies

LEAHY, PATRICK on FILLING VACANCIES

As the Republicans fought amongst themselves, judiciary ranking member Patrick Leahy (D-Vt) watched the bickering with contempt. He noted that there are about 100 judicial vacancies and counting. "Instead of cobbling together even more obstacles, Senators should do the work they are sworn and paid to do and fill these vacancies," said Leahy.

Roll Call, 5/1/97, When There Were 99 Vacancies

LEAHY, PATRICK on FILLING VACANCIES

The President's address was an important one. I hope that his call for an end to the intimidation, the delay, the shrill voices of partisanship will be headed. I will continue to do all that I can to defend the integrity and independence of our federal judiciary and to urge the Republican leadership of the Senate to move forward promptly on judicial nominations. I ask unanimous consent that a copy of the text of the President's address be printed in the Record at the end of my statement.

143 Cong. Rec. S 10924, 10/22/97, When There Were 93 Vacancies

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LEAHY, PATRICK on FILLING VACANCIES

While I am encouraged that the Senate is today proceeding with the confirmation of a judicial nominee, there remains no excuse for the Senate's delay with respect to more than 50 other judicial nominations sent by the President. The Senate should be moving more promptly to fill the vacancies plaguing the federal courts. Twenty-three confirmations in a year in which we have witnessed 115 vacancies is not fulfilling the Senate's constitutional responsibility.

I have urged those who have been stalling the consideration of these fine women and men to reconsider and to work with us to have the committee and the Senate fulfill its constitutional responsibility. Those who delay or prevent the filling of these vacancies must understand that they are delaying or preventing the administration of justice. Courts cannot try cases, incarcerate the guilty or resolve civil disputes without judges. The mounting backlogs of civil and criminal cases in the dozens of emergency districts, in particular, are growing more critical by the day.

143 Cong. Rec. S 11407, 10/30/97, When There Were 93 Vacancies

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LEAHY, PATRICK on FILLING VACANCIES

I congratulate Judge Marcus and his family, and look forward to his service on the U.S. Court of Appeals. Additionally, I would like to commend my fellow committee members on the expediency of this nomination. If all judicial nominations were advanced as efficiently as Mr. Marcus', the vacancy crisis facing the federal judiciary would be easily solved.

143 Cong. Rec. S 11960, 11/7/97, When There Were 90 Vacancies

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LEAHY, PATRICK on FILLING VACANCIES

The first week of this session I challenged the Senate to maintain the pace that it reached last fall when we confirmed 27 judges in the last nine weeks of the session. In the first four weeks of this new session, however, we have acted to confirm only five judges. Judge Young will be the sixth judge confirmed in this our fifth week in session. We are well short of the mark and not measuring up to the pace this very Senate attained last fall. I therefore urge the Majority Leader to take up the nominations of G. Patrick Murphy, Michael P. McCluskey, Edward F. Shea, Jeremy D. Fogel and M. Margaret McKeown without further delay.

144 Cong. Rec. S 1198, 3/2/98, When There Were 82 Vacancies

LEAHY, PATRICK on FILLING VACANCIES

There is a need in a growing number of cases, a desperate need, to fill the almost 100 vacancies that continue to plague the federal justice system. The President has spoken to the issue both last September and in his most recent State of the Union. The Chief Justice spoke to the matter again in the 1997 Year End Report. I have spoken until I am blue in the face. The Senate can do a better job to fulfill its constitutional responsibility and to support the third co-equal branch of our government.

144 Cong. Rec. S 1986, 3/16/98, When There Were 82 Vacancies

LEAHY, PATRICK on FILLING VACANCIES

I have urged that the Senate at least maintain the pace established at the close of last year when we confirmed 27 judges in nine weeks. It was only with that kind of effort that we were able to improve our productivity. The Senate under Republican control has taken the last three years to match the one-year total confirmed in 1994 when we were on course to close the vacancies gap under Democratic leadership. I have challenged the Senate this year to maintain the pace we achieved over that last nine weeks of the last session. Clearing the Senate calendar and confirming the five nominees currently pending will help in that regard.

Prepared Statement, Senate Judiciary Committee, 3/18/98, When There Were 82 Vacancies

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LEAHY, PATRICK on FILLING VACANCIES

Senator Hatch is fond of saying that the Senate could do better. I agree with him and hope that we will continue to do better next

year. I began this year challenging the Senate to maintain that pace it established in the last nine months of last year. Had we done so, we could have confirmed 90 judges. Instead, the Senate has acted to confirm only 65 of the 91 nominations received for the 115 vacancies the federal judiciary experienced this year.

Meanwhile 50 judicial vacancies remain. This is one of the largest number of vacancies left unfilled at the end of a Congress. In 1983 vacancies numbered only 16. Even after the creation of 85 new judgeships in 1984, the number of vacancies had been reduced to only 33 by the end of the 99th Congress in 1986. At the end of the 100th Congress in 1988, which had a Democratic majority and a Republican President, judicial vacancies numbered only 23. In 1996 the Republican Senate adjourned leaving 64 judicial vacancies. This year the Senate is adjourning leaving 50 judicial vacancies and the number is likely to increase during the recess.

144 Cong. Rec. S 12962, 10/21/98, When There Were 70 Vacancies

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LEAHY, PATRICK on FILLING VACANCIES

I again urge the Senate to take seriously its responsibilities and help the President fill the longstanding vacancies in the federal courts around the country. Today the score is running against the prompt and fair administration of justice--vacancies 67, nominations 33, confirmations zero.

145 Cong. Rec. S 3670, 4/14/99, When There Were 65 Vacancies

LEAHY, PATRICK on FILLING VACANCIES

Law clerks and attorney staff are being used more and more extensively in the determination of cases as backlogs grow. Bureaucratic imperatives seem to be replacing the judicial deliberation needed for the fair administration of justice. These are not the ways to continue the high quality of decision making for which our federal courts are admired or to engender confidence in our justice system.

The Senate should get about the business of voting on the confirmation of the scores of judicial nominations that have been delayed with justification for too long. We must redouble our efforts to work with the President to end the longstanding vacancies that plague the federal courts and disadvantage all Americans. That is our constitutional responsibility.

Prepared Statement, Senate Judiciary Committee, 6/16/99, When There Were 68 Vacancies

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LEAHY, PATRICK on FILLING VACANCIES

There remain 36 judicial nominations pending in the Judiciary Committee, plus new nominations that the President is sending us every week. I have challenged the Senate to regain the pace it met in 1998 when the Committee held 13 hearings and the Senate confirmed 65 judges. That would still be one less than the number of judges confirmed by a Democratic Senate majority in the last year of the Bush Administration in 1992. Indeed, in the last two

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years of the Bush Administration, a Democratic Senate majority confirmed 124 judges. It would take an additional 67 confirmations this year for this Senate to equal that total.

Having begun so slowly in the first five months of this year, we have much more to do before the Senate takes its final action on judicial nominees this year. We should be considering 20 to 40 more judges this year. Having begun so slowly, we cannot afford to follow the "Thurmond rule" and stop acting on these nominees at the end of the summer in anticipation of the presidential election. We must use all the time until adjournment to remedy the vacancies that have been perpetuated on the courts to the detriment of the American people and the administration of justice. I urge all Senators to make the federal administration of justice a top priority for the Senate for the rest of this year.

146 Cong. Rec. S 4366, 5/24/00, When There Were 80 Vacancies

LEAHY, PATRICK on FILLING VACANCIES

The Senate should get about the business of voting on the confirmation of the scores of judicial nominations that have been delayed with justification for too long. We must redouble our efforts to work with the President to end the longstanding vacancies that plague the federal courts and disadvantage all Americans. That is our constitutional responsibility. It should not be shirked.

Frankly, it is humiliating to the Senate. It is beneath this great body. I have served here for over 25 years. I can't think of any greater honor that could come to me than to have the people of Vermont allow me to serve here. I should put on my tombstone, other than husband and father, that I was a United States Senator.

I have always thought of this Senate as the conscience of the Nation. We are not handling the conscience of this Nation very well. We have a responsibility to uphold the judiciary. If we allow it to be tattered, if we allow it to be shredded, if we allow it to be humiliated, how can a democracy of a quarter of a billion people uphold our laws? How can the country have respect both for the laws and the courts that administer them, if we in the Senate, the most powerful legislative body in this country, don't show that same respect? If we diminish that, it will be an example to be followed by the rest of the people in this country.

There are only 100 of us who have the privilege of serving here at any given time to represent a quarter of a billion Americans. Sometimes we should think more of that responsibility than partisan politics.

146 Cong. Rec. S7533, 7/25/00, When There Were 59 Vacancies



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LEAHY, PATRICK on JUDICIAL INDEPENDENCE

The distinguished majority leader has a concern with the President on the FEC. I am not going to get in the middle of that issue. Both sides claim they are moving forward with nominees. I have to assume the majority leader of the U.S. Senate has ways of bringing pressure to bear on the President of the United States without having to cripple the Federal judiciary or to do things that might appear, whether intended or not, to diminish the independence of the Federal judiciary.

[. . .]

We have confirmed less than one judge a month since the start of this session in January. We have almost 100 vacancies in the Federal judiciary. Many of them are in critical areas, where huge backlogs are occurring, where courts are saying that we are benefiting criminals because they can't be tried; we can't have speedy trials. Criminals get the benefit of this by not having judges to hear the cases. If you have a civil case, forget about a speedy trial.

[. . .]

Now, I say this, Mr. PresidentI make the same argument now as when we have had a Republican President and a Democratically controlled Senate. If there is one area where partisan politics should not be allowed, it is in the area of the Federal judiciary.

[. . .]

A President should be given a great deal of latitude on who he nominates to the Federal court. If we disagree with a nomination, then we can vote against it. But, frankly, Mr. President, not only does it damage the integrity and the independence of the Federal judiciary by just holding judicial nominations hostage where nobody ever even votes on them, but I think it damages the integrity of the U.S. Senate.

[. . .]

If President Clinton sends a nominee to the Senate that any Senator Democrat or Republican doesn't like, vote against him or her. That is your right as a U.S. Senator. But don't say, well, they look like pretty good people, but we can't even allow a vote on their nomination. And don't say, if you are, for example, in Texas, that it is terrible that drug and illegal immigrant cases are not being heard, what is the court doing? People in Texas should say, what is the U.S. Senate doing? Why aren't they acting? If you are a civil litigant in the Sixth Circuit or Ninth Circuit, or a number of others that have emergency vacancies, and you have one of your rights to be protected, what do you do? You say, why aren't those judges hearing these cases? No. Say, why isn't the U.S. Senate confirming people.

143 Cong. Rec. S 5653, 6/16/97, When There Were 96 Vacancies

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LEAHY, PATRICK on JUDICIAL INDEPENDENCE

Let us bring them forward. I ask that one of the first we proceed to consider be Margaret Morrow, who seems to be held up only because she is a woman. There is no reason to hold up that judicial nomination. Let it be voted. If people do not want her, vote against her. If they want her, vote for her. But let's have a vote on this.

We are not helping the independence. In fact, we are diminishing the independence of the federal judiciary.

143 Cong. Rec. S 9163, 9/11/97, When There Were 97 Vacancies

LEAHY, PATRICK on JUDICIAL INDEPENDENCE

"I defy anybody to find any time in our history where a concentrated effort like this has been done to intimidate judges," Leahy said. "If it continues, it becomes a real constitutional crisis of damaging the independence and the integrity of the federal judiciary."

The Boston Globe, 9/24/97, When There Were 97 Vacancies

LEAHY, PATRICK on JUDICIAL INDEPENDENCE

We've had far more vacations, the Senate's taken far more vacations than it has confirmed judges. I mean, this hasn't happened in 200 years. It's being done to pander to the ultra-right and pander to some of these fundraising appeals. But what it is doing is damaging the integrity and the independence of the federal judiciary.

Morning Edition (NPR), 9/24/97, When There Were 97 Vacancies



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LEAHY, PATRICK on JUSTICE DELAYED

Never have they allowed the Federal judiciary to get in such an abysmal state, when the Chief Justice has to say it is a crisis, when the Chief Justice says: It is hoped that the Administration and Congress will continue to recognize that filling judicial vacancies is crucial to the fair and effective administration of justice." And yet, we have to tell him today that we are not doing it, we are not doing our job.

143 Cong. Rec. S 2299, 3/14/97, When There Were 93 Vacancies

LEAHY, PATRICK on JUSTICE DELAYED

So, let us not get too carried away with the debate on what size the court should be. We can have legislation on that. The fact is, we have a judge who is needed, a judge who was nominated, and whose nomination was accepted and voted on by the Senate Judiciary Committee in 1995. It is now 1997. Let us stop the dillydallying. I suppose, as we are not doing anything elsewe do not have any votes on budgets or chemical weapons treaties or any of these other things we can doI suppose we can spend time on this. We ought to just vote this through, because at the rate we are currently going we are falling further and further behind, and more and more vacancies are continuing to mount over longer and longer times, to the detriment of greater numbers of Americans and the national cause of prompt justice.

143 Cong. Rec. S 2515, 3/19/97, When There Were 93 Vacancies

LEAHY, PATRICK on JUSTICE DELAYED

Those who delay or prevent the filling of these vacancies must understand that they are delaying or preventing the administration of justice. We can pass all the crime bills we want, but you cannot lock up criminals if you do not have judges. The mounting backlogs of civil and criminal cases in the emergency districts, in particular, are growing taller by the day.

143 Cong. Rec. S 8504, 7/31/97, When There Were 100 Vacancies

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LEAHY, PATRICK on JUSTICE DELAYED

Those who delay or prevent the filling of these vacancies must understand that they are delaying or preventing the administration of justice. We can pass all the crime bills we want, but you cannot lock up criminals if you do not have judges. The mounting backlogs of civil and criminal cases in the dozens of emergency districts, in particular, are growing taller by the day.

143 Cong. Rec. S 9163, 9/11/97, When There Were 97 Vacancies

LEAHY, PATRICK on JUSTICE DELAYED

Those who delay or prevent the filling of these vacancies must understand that they are delaying or preventing the administration of justice. We can pass all the crime bills we want, but you cannot try the cases and incarcerate the guilty if you do not have judges. The mounting backlogs of civil and criminal cases in the dozens of

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emergency districts, in particular, are growing taller by the day. National Public Radio has been running a series of reports all this week on the judicial crises and quoted the chief judge and U.S. attorney from San Diego earlier this week to the effect that criminal matters are being affected.

143 Cong. Rec. S 10050, 9/26/97, When There Were 97 Vacancies

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LEAHY, PATRICK on JUSTICE DELAYED

The current vacancy crisis is having a devastating impact on the administration of justice in courts around the country. Let me note a few examples:

These are real life examples of the harm caused by the irresponsible lack of action by this Senate in considering highly qualified judicial nominations. It is time for the Senate to fulfil its costitutional responsibility to confirm the Federal judges needed for the effective administration of justice.

143 Cong. Rec. S 10924, 10/22/97, When There Were 93 Vacancies

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LEAHY, PATRICK on JUSTICE DELAYED

Those pressing this effort complain about what they see as "the failure of the U.S. Senate to block" the appointment of judges to the Federal bench. The American people, litigants, prosecutors, and judges, Republicans and Democrats alike, have just the opposite complaintthat the perpetuation of judicial vacancies is affecting the administration of justice and rendering our laws empty promises.

143 Cong. Rec. S 11233, 10/27/97, When There Were 93 Vacancies

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LEAHY, PATRICK on JUSTICE DELAYED

Those who delay or prevent the filling of these vacancies must understand that they are delaying or preventing the administration of justice, Congress can talk the talk about being tough on crime, but the fact is that courts cannot try cases, incarcerate the guilty or resolve civil disputes without judges. The mounting backlogs of civil and criminal cases in the dozens of judicial emergency vacancies, in particular, are growing more critical by the day. We say we want to promote law and order. But that seems like mere lip service when matched with the Senate's dereliction of duty in filling these vacancies.

Press Release, 12/31/97, When There Were 78 Vacancies

LEAHY, PATRICK on JUSTICE DELAYED

The Chief Justice correctly warns that these "vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary." He is also right when he says that "the Senate should act within a reasonable time to confirm or reject nominees" and that "the Senate is surely under no obligation to confirm any particular nominee, but after a necessary time for inquiry it should vote him up or vote him down." But that was not the case in 1997, with more

than 40 judicial nominees relegated to limbo, having never been accorded a Senate vote.

In 1997, some in Congress started down the destructive path of attacking the judiciary and stalling the confirmation of qualified nominees to the federal bench. Some lawmakers in positions of high responsibility have even boasted that they intend to "intimidate" the independent judiciary. As Congress reconvenes in 1998, I hope we will realize that those efforts are a disservice to the American people and to the national interest. Those who delay or prevent the filling of these vacancies must understand that they are delaying or preventing the administration of justice. Congress can talk the talk about being tough on crime, but the fact is that courts cannot try cases, incarcerate the guilty or resolve civil disputes without judges. The mounting backlogs of civil and criminal cases in the dozens of judicial emergency vacancies, in particular, are growing more critical by the day. We say we want to promote law and order. But that seems like mere lip service when matched with the Senate's dereliction of duty in filling these vacancies.

The chief justice eloquently describes the importance of an independent and fully functioning federal judiciary. It is too important to be held hostage by partisan politics.

Statement on Federal Judiciary Report, 1/2/98, When There Were 83 Vacancies

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LEAHY, PATRICK on JUSTICE DELAYED

We should be doing more to keep it that way, not less. We are finally beginning to consider longstanding judicial nominations to fill the vacancies that plague the federal judiciary and threaten the administration of justice. We need to do more. We should consider without further delay the judiciary's requests for the resources that they need. We should consider S. 678, the Federal Judgeship Act, which I introduced at the request of the Judicial Conference to provide an additional 55 judges where needed around the country. We should act on S. 394, which I sponsored with Senator Hatch to unlink judicial salaries from our own. We should consider and confirm qualified nominees to the 83 vacancies to the federal courts.

144 Cong. Rec. S 787, 2/12/98, When There Were 81 Vacancies

LEAHY, PATRICK on JUSTICE DELAYED

Judges delayed means justice denied. Without judges, courts cannot try cases, sentence the guilty, or resolve civil disputes. Partisan and narrow ideological efforts to impose political litmus tests on judicial nominees and to shut down the judiciary must stop.

The Senate's judicial vacancy problem is more than a matter of numbers. The independence and integrity of the federal judiciary are being threatened. The nominations backlog is a function of the targeting of the judicial branch, just as the executive branch was targeted and shut down two years ago. Pressure groups within the right wing of the Republican Party have been formed and money is

being raised for the goal of "killing" Clinton judicial nominations. Constitutional amendments to undercut the independence of the judiciary have been introduced. Ideological impeachments have been threatened. A Republican leader in the House speaks openly about seeking to "intimidate" federal judges. The confirmation process is not immune to politics, but a particularly virulent strain has infected the Senate's consideration of judicial nominations over the last few years.

For more than 200 years, a strong and independent federal judiciary has served as the bulwark against overreaching by the political branches of government and been the protector of our constitutional rights and liberties.

Those who have started down this destructive path of attacking the judiciary and stalling the confirmation of qualified nominees to the federal bench need to realize that those tactics harm the national interest. We must remove these important matters from partisan and ideological politics. The American people can easily measure our progress.

The Boston Globe, 3/1/98, When There Were 82 Vacancies

LEAHY, PATRICK on JUSTICE DELAYED

I have urged those who have been stalling the consideration of the President's judicial nominations to reconsider and to work with us to have the Judiciary Committee and the Senate fulfil its constitutional responsibility. Those who delay or prevent the filling of these vacancies must understand that they are delaying or preventing the administration of justice. Courts cannot try cases, incarcerate the guilty or resolve civil disputes without judges.

144 Cong. Rec. S 1986, 3/16/98, When There Were 82 Vacancies

LEAHY, PATRICK on JUSTICE DELAYED

Those who delay or prevent the filling of these vacancies must understand that they are delaying or preventing the administration of justice. Courts cannot try cases, incarcerate the guilty or resolve civil disputes without judges.

Yesterday the Senate Republican Leader indicated that he regretted confirming too many federal judges. I strongly disagree. I realize that there are no vacancies on the federal bench in Mississippi, but there are numerous, longstanding vacancies in other places, vacancies that are harming the federal administration of justice. The people and businesses in these areas do need additional federal judges. Indeed the Judicial Conference of the United States recommends that in addition to filling the 81 current vacancies, Congress should authorize 55 additional judgeships throughout the country, as set forth in S.678, the Federal Judgeship Act that I introduced last May. There is a clamor for us to fill these vacancies and there is harm by the Senate's delay and failure to do so.

The Chief Justice of the United States Supreme Court pointedly declared in his 1997 Year End Report: "Vacancies cannot remain at

such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary." Must we wait for the administration of justice to break down before the Senate will take this crisis seriously and act on the 40 judicial nominees pending before us? I hope not.

Prepared Statement, Senate Judiciary Committee, 3/24/98, When There Were 82 Vacancies

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LEAHY, PATRICK on JUSTICE DELAYED

Must we wait for the administration of justice to disintegrate further before the Senate will take this crisis seriously and act on the judicial nominees pending before us? I hope not.

We are sworn to uphold the Constitution, we are sworn to uphold the laws, and we are paid pretty well to do that. We are failing our oath and we are failing the job the taxpayers of this country pay us to do.

144 Cong. Rec. S 2695, 3/27/98, When There Were 82 Vacancies

LEAHY, PATRICK on JUSTICE DELAYED

Must we wait for the administration of justice to disintegrate further before the Senate will take this crisis seriously and act on the nominees pending before it? I hope not. As part of my efforts to encourage the Senate to do its job, I am to day introducing the Judicial Emergency Responsibility Act. The purpose of this bill is to supplement the law by which Chief Judge Winter certified the emergency and to require the Senate to do its duty and to act on judicial nominations before it recesse s for significant stretches of time when a circuit court is suffering from a vacancy emergency."

144 Cong. Rec. S 3123, 4/2/98, When There Were 79 Vacancies

LEAHY, PATRICK on JUSTICE DELAYED

I have urged those who have been stalling the consideration of the President's judicial nominations to reconsider and work to fulfil this constitutional responsibility. Those who delay or prevent the filling of these vacancies must understand that they are delaying or preventing the administration of justice. Courts cannot try cases, incarcerate the guilty or resolve civil disputes without judges.

144 Cong. Rec. S 7535, 7/7/98, When There Were 68 Vacancies

LEAHY, PATRICK on JUSTICE DELAYED

The Senate has not even kept up with normal attrition over the past two years, let alone taken the type of concerted action needed to end the judicial vacancies crisis. The numerous, longstanding vacancies in some courts are harming the federal administration of justice.

Prepared Statement, Senate Judiciary Committee, 7/30/98, When There Were 68 Vacancies

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LEAHY, PATRICK on JUSTICE DELAYED

The numerous, longstanding vacancies in many courts are harming the federal administration of justice.

I continue to urge other Senators to join with me in working to consider and vote on judicial nominations without such delays. I note that two of the nominees participating in the hearing today were nominated within the last 10 days. With that type of expeditious treatment for others, we could consider many more of the qualified nominees pending for so long before this Committee.

Prepared Statement, Senate Judiciary Committee, 9/9/98, When There Were 72 Vacancies

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LEAHY, PATRICK on JUSTICE DELAYED

I have urged those who have been stalling the consideration of the President's judicial nominations to reconsider and work to fulfil this constitutional responsibility. Those who delay or prevent the filling of these vacancies must understand that they are delaying or preventing the administration of justice. Courts cannot try cases, incarcerate the guilty or resolve civil disputes without judges.

144 Cong. Rec. S 11021, 9/28/98, When There Were 72 Vacancies

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LEAHY, PATRICK on JUSTICE DELAYED

Litigants are being denied any opportunity to see the judges who are deciding their causes. Law clerks and attorney staff are being used more and more extensively in the determination of cases as backlogs grow. Bureaucratic imperatives seem to be replacing the deliberations needed for the fair administration of justice. These are not the ways to continue the high quality of decision-making for which our federal courts are admired or to engender confidence in our justice system.

What we are seeing is nothing short of an attack on our independent judiciary. Four years ago, the Republican Congressional majority sought leverage by shutting down the executive branch. Since then it has found less political resistance by taking aim at the judicial branch.

This is not a victimless tactic. Federal law enforcement relies on judges to hear criminal cases, and individuals and businesses pay taxes to exercise their right to resolve civil disputes in the federal courts. As workloads continue to grow and vacancies are perpetuated, the remaining judges are being overwhelmed and the work of the federal judiciary is suffering.

Roll Call, 6/21/99, When There Were 68 Vacancies



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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

Now, I keep bringing this issue up at the Judiciary Committee meeting, and I am told there are no objections to her, but somehow she is never brought forward to be voted on. I keep saying, if Senators want to vote against her, stand up, have the guts to stand up in the bright sunshine and say how they would vote on her, but nobody does, nobody does.

143 Cong. Rec. S 5084, 5/23/97, When There Were 99 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

Now, I say this, Mr. President, make the same argument now as when we have had a Republican President and a Democratically controlled Senate. If there is one area where partisan politics should not be allowed, it is in the area of the Federal judiciary.
A President should be given a great deal of latitude on who he nominates to the Federal court. If we disagree with a nomination, then we can vote against it. But, frankly, Mr. President, not only does it damage the integrity and the independence of the Federal judiciary by just holding judicial nominations hostage where nobody ever even votes on them, but I think it damages the integrity of the U.S. Senate.
If President Clinton sends a nominee to the Senate that any SenatorDemocrat or Republicandoesn't like, vote against him or her. That is your right as a U.S. Senator. But don't say, well, they look like pretty good people, but we can't even allow a vote on their nomination.
And don't say, if you are, for example, in Texas, that it is terrible that drug and illegal immigrant cases are not being heard, what is the court doing? People in Texas should say, what is the U.S. Senate doing? Why aren't they acting? If you are a civil litigant in the sixth circuit or ninth circuit, or a number of others that have emergency vacancies, and you have one of your rights to be protected, what do you do? You say, why aren't those judges hearing these cases? No. Say, why isn't the U.S. Senate confirming people.

143 Cong. Rec. S 5653, 6/16/97, When There Were 96 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

Let us bring them forward. I ask that one of the first we proceed to consider be Margaret Morrow, who seems to be held up only because she is a womanonly because she is a woman. There is no reason to hold up that judicial nomination. Let it be voted. If people do not want her, vote against her. If they want her, vote for her. But let's have a vote on this.
We are not helping the independencein fact, we are diminishing the independenceof the Federal judiciary.

143 Cong. Rec. S 9163, 9/11/97, When There Were 97 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

Mr. President, I call upon the U.S. Senate to reject that effort and go forward to fulfil our constitutionally mandated duty to advise and

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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

While the Republican candidate for President made a fine statement in which he called for votes on judicial nominations within 60 days, he has not prevailed upon the Senate Republican majority to treat nominees fairly now. Instead of 60 days, we see Judge Helene White's nomination to the Sixth Circuit pending more than 1400 days; Elena Kagan, U.S. Court of Appeals for the District of Columbia, pending 500 days; Judge James Wynn, U.S. Court of Appeals for the Fourth Circuit, pending more than 440 days; Kathleen McCree Lewis, U.S. Court of Appeals for the Sixth Circuit, pending more than 400 days; Enrique Moreno, U.S. Court of Appeals for the Fifth Circuit, pending more than 400 days; Bonnie Campbell, U.S. Court of Appeals for the Eighth Circuit, pending more than 240 days; Roger Gregory, U.S. Court of Appeals for the Fourth Circuit, pending more than 115 days; Lynette Norton, U.S. District Court for the Western District of Pennsylvania, pending more than 1300 days; Judge Legrome Davis, U.S. District Court for the Eastern District of Pennsylvania, pending more than 800 days; Patricia Coan, U.S. District Court for the District of Colorado, pending more than 500 days; Dolly Gee, U.S. District Court for the Central District of California, pending more than 500 days; Rhonda Fields, U.S. District Court for the District of Columbia, pending more than 350 days; Linda Riegle, U.S. District Court for the District of Nevada, pending more than 180 days; Ricardo Morado, U.S. District Court for the Southern District of Texas, pending more than 165 days. The Senate is adjourning leaving 33 judicial nominees whose nominations have been pending without Senate action for more than 60 days.

146 Cong. Rec. S 11314, 10/28/00, When There Were 66 Vacancies

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consent on the nominations of judges that the President has sent to us. Vote them up or vote them down, but show that we are united, whatever party we belong to, in protecting the integrity and, most importantly, the independence of our Federal judiciary.

143 Cong. Rec. S 9723, 9/19/97, When There Were 97 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

Mr. President, I call upon the U.S. Senate to reject that effort and go forward to fulfil our constitutionally mandated duty to advise and consent on the nominations of judges that the President has sent to us. Vote them up or vote them down, but show that we are united, whatever party we belong to, in protecting the integrity and, most importantly, the independence of our Federal judiciary.

143 Cong. Rec. S 9723, 9/19/97, When There Were 97 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

I hope we might reach a point where we as a Senate will accept our responsibility and vote people up or vote them down. Bring the names here. If we want to vote against them, vote against them. But time after time after time I hear that there are vacancies where people are really concerned, a lot of Senators have a concern about this person. Then we come to a vote and 99 out of 100 Senators or all 100 Senators vote for that person.

143 Cong. Rec. S 10924, 10/22/97, When There Were 93 Vacancies

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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

Now, any Senator can vote against any judicial nominee. They have that right. But I urge them to stand up on the floor of the Senate, where the public knows who they are and where they are, and either vote for or against people. It is not only disingenuous, but I think it is detrimental to our system of justice, and it is a true distortion of what we pledge to do in upholding the Constitution when some block judges by anonymous holds. And then we find that the reason for doing that is in connection with a fundraising and lobbying campaign in which letters were sent out by some group saying, in effect, that if you send this money, we will block judges and we will arrange for you to meet privately with leading elected officials.

That is wrong. That is wrong, Mr. President. It is unprecedented in the 23 years that I have been in the Senate. Nothing like this has ever been allowed by any of the leaders of the Senatenot by Senator Mansfield, not by Senator Byrd, not by Senator Baker, not by Senator Dole, and not by Senator Mitchell. It should not be allowed now. It is wrong, and it undermines the very credibility of the U.S. Senate, and it demeans the U.S. Senate; but, even more importantly, it is destructive of the independence of the judiciary.

143 Cong. Rec. S 11233, 10/27/97, When There Were 93 Vacancies

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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

This politicization, Mr. President, has been extended to include the practice of denying nominees an up or down vote on the Senate floor, or even in the Judiciary Committee. If the majority of the Senate opposes a judicial nominee enough to derail a nomination by an up or down vote, then at least the process has been served. Instead, however, the President's nominees are not even receiving that courtesy from this Senate: Some of the individuals whose nominations are pending before the Judiciary Committee or the full Senate have not been allowed a vote on the floor, much less in committee, for close to 2 years. It is especially troubling that of the 14 nominees who have been held up the longest by the Republican majority in the Senate, 12 are women or minorities.

143 Cong. Rec. S 12719, 12/15/97, When There Were 78 Vacancies

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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

In fact, how disturbing, how petty, and how shameful: Trying to disqualify an outstanding Hispanic woman judge by an anonymous hold.

I have far more respect for Senators who, for whatever reason, wish to vote against her. Stand up; vote against her. But to have an anonymous hold--an anonymous hold--in the U.S. Senate with 100 Members representing 260 million Americans, which should be the conscience of the Nation, should not be lurking in our cloakrooms anonymously trying to hold up a nominee. If we want to vote against somebody, vote against them. I respect that. State your reasons. I respect that. But don't hold up a qualified judicial nominee.

I was asked last week by Neil Lewis of the New York Times about this circumstance. He correctly reported my response in a front page story this last Saturday. I am offended by this anonymous effort to oppose her prompt confirmation by stealth tactics. Here is a highly qualified Hispanic woman judge who should have been confirmed to help end the crisis in the Second Circuit more than three months ago.

Acting to fill judicial vacancies is a constitutional duty that the Senate--and all of its member--are obligated to fulfill. In its unprecedented slowdown in the handling of nominees in the 104th and 105th Congresses, the Senate is shirking its duty. The Senate majority's choices as they stall Hispanic, women and minority nominees is wrong and should end.

If Senators are opposed to any judge, bring them up and vote against them. But don't do an anonymous hold, which diminishes the credibility and respect of the whole U.S. Senate.

I have had judicial nominations by both Democrat and Republican Presidents that I intended to oppose. But I fought like mad to make sure they at least got a chance to be on the floor for a vote.

I have stated over and over again on this floor that I would refuse to put an anonymous hold on any judge; that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty.

If we don't like somebody the President nominates, vote him or her down. But don't hold them in this anonymous unconscionable limbo, because in doing that, the minority of Senators really shame all Senators.

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144 Cong. Rec. S 6521, 6/18/98, When There Were 72 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

That is good advice. That is what this Senate should do, take up these nominations and vote them up or vote them down. I believe that if the Senate were given an opportunity to have a fair vote on the merits of the nomination of Judge Richard Paez or Timothy Dyk or any of the 21 judicial nominations pending on the Senate Executive Calendar, they would be confirmed. Perhaps that is why we are not being allowed to vote.

The Chief Justice of the United States Supreme Court has called the number of judicial vacancies "the most immediate problem we face in the federal judiciary." I have urged those who have been stalling the consideration of the President's judicial nominations to reconsider and work to fulfil our constitutional responsibility. Those who delay or prevent the filling of these vacancies must understand that they are harming the administration of justice. Courts cannot try cases, incarcerate the guilty or resolve civil disputes without judges.

I know that some are still playing a political game of payback for the defeat of the nomination of Judge Bork to the Supreme Court and other Republican judicial nomination over the last decade. I remind the Senate that the Senate voted on the Bork nomination and voted on the nomination of Clarence Thomas and did so in each case in less than 15 weeks. To delay judicial nominations for months and years and to deny them a vote is wrong.

144 Cong. Rec. S 12578, 10/14/98, When There Were 70 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

Having been voted out of Committee by a 4-1 margin, having waited for 2 years, this distinguished African American at least deserves a vote, up or down. Senators can stand up and say they will vote for or against him, but let this man have his vote.

145 Cong. Rec. S 7900, 6/30/99, When There Were 68 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

Having been voted out of Committee by a 4-1 margin, having waited for 2 years, this distinguished African American at least deserves a vote, up or down. Senators can stand up and say they will vote for or against him, but let this man have his vote.

145 Cong. Rec. S 7900, 6/30/99, When There Were 68 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

Mr. President, we have a number of highly-qualified nominees for judicial vacancies before the Senate and on the Executive Calendar. I want to be sure that the Senate treats them all fairly and accords each of them an opportunity for an up or down vote. I want to share with you a few of the cases that cry out for a Senate vote: Having been voted out of Committee twice, he has now been forced to wait for more than two years for Senate action. This distinguished African-American at least deserves the respect of this

Senate, and he should be allowed a vote, up or down. Senators can stand up and say they will vote for or against him, but let this man have his vote. Twenty-seven months after being nominated, the nomination remains pending before the Senate. I would certainly like to see Justice White be accorded an up or down vote.

145 Cong. Rec. S 11014, 9/16/99, When There Were 68 Vacancies

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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

Today we are not asking for any Senator's vote for any nomination. Instead, I am asking the Senate recognize that its responsibility is to vote on all the judicial nominations on the calendar. We can vote for them or against them, we can vote them up or vote them down, but after 44 months or 27 months or 20 months, after completing every step in what is a long, tortuous confirmation process, the nominations of Judge Richard Paez, Justice Ronnie White and Marsha Berzon are as entitled to a Senate vote as the nomination of Ted Stewart.

In my statement last week I detailed the path that each of these nominees has traveled to the Senate. All are now available for a vote on confirmation by the Senate. All should be accorded an up or down vote.

I hope we will have a chance to vote on them, not just in committee where I have voted for each one of them, but on the floor of the Senate. That is what the Constitution speaks of in our advise and consent capacity. That is what these good and decent people have a right to expect. That is what our oath of office should compel Members to do--to vote for or against. I do not question the judgment or conscience of any man or woman in this Senate if they vote differently than I do, but vote.

I am not asking anybody how they should or should not vote but allow nominees to have a vote. All the people being nominated are extremely highly qualified lawyers and judges. They have to put their lives on hold and the lives of their family on hold while they wait. They are neither fish nor fowl as a nominee. In private practice, all your partners come in and throw a big party and say it is wonderful, we are so proud of you, could you move out of the corner office because we want to take it now. And you cannot do anything while you wait and wait and wait.

Vote them up, vote them down.

145 Cong. Rec. S 11096, 9/21/99, When There Were 68 Vacancies

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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

They have been forced to run some kind of strange in-the-dark gauntlet of Senate confirmations. Those strong enough to work through that secret gauntlet and get reported to the floor are then being dealt the final death blow through a refusal of the Republican leadership to call them up for a vote. They should be called up for a fair vote. They may be defeated--the Republicans are in the majority; there are 55 Republican Senators; they could vote them down. But let them have a fair vote, up or down. Let all Senators have to stand up and vote aye or nay, and be responsible to their constituency to explain why they voted that way. Unfortunately, nominations are being killed through neglect and silence, not

defeated by a majority vote.
So I ask, again, for the Senate to fulfill its responsibility to vote on all the judicial nominations on the calendar; vote for them or vote against them. We can vote them up or we can vote them down, but after 44 months or 27 months or 20 months, let us vote.
He has been considered promptly and will be brought up for an up or down vote. There are some on this side of the aisle who oppose him and will vote against him. But every single Democrat, whether they are going to vote against him or for him, should allow him to be voted on and they will. That nomination has been pending 2 months.
I said last week I do not begrudge Ted Stewart a Senate vote. I do not. He is entitled to a vote. He went through the confirmation process. The Senate Judiciary Committee voted him out. It was not a unanimous vote, but he was voted out of the committee, and he is entitled to a vote. If Senators do not want to vote for him, vote against him. If Senators want to vote for him, vote for him. I intend to vote for him. I intend to give the benefit of the doubt both to the President and to the chairman of the Senate Judiciary Committee who recommended him.
Who is it who is afraid to vote on these nominations? Who is it who is hiding their opposition and obstructing these nominees? Can it be they are such a minority, they know that if it comes to a fair vote, these good men and women will be confirmed?
So rather than to allow a fair vote, they will keep it from coming to a vote. I would bet you that the same people who are holding these nominations back from a vote will go home on the Fourth of July and other holidays and give great speeches about the democracy of this country and how important democracy is and why we have to allow people to vote and express the will of the people--except in the Senate and, apparently, except if you are a minority or a woman.
I have been on the floor of this Senate when we have had Republican Presidents with Republican nominations, saying that they deserve to be brought forward for a vote one way or the other, including a couple instances of nominees I intended to vote against. I still said they deserved a vote. And they got their vote.
What we are currently experiencing is unconscionable and unprecedented, these kinds of delays. I think we hurt the Senate when we do this. We will have Republican Presidents; we will have Democratic Presidents. We will have Republican-controlled Senates; and we will have Democratic-controlled Senates. I have served here twice with the Democrats in control; twice with the Republicans in control. The precedents we establish are important if we are to go into the next century as the kind of body the Senate should be.
Do not let us end this century and this millennium leaving, as guidance for the next century and the next millennium and the next Senate, partisanship that tears at the very fabric, not only of the Senate but of the independence of the Federal judiciary itself. So many judges, judges who are considered conservative, judges who are considered liberal, judges who have had a Republican background or a Democratic background, judges who have been appointed by Republican Presidents, judges who have been appointed by Democratic Presidents, have been united in saying: Stop this. Do not go on with this. Because you are tearing at the

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very core of our independent judiciary, the most independent judiciary on Earth, a judiciary whose very independence allows us to maintain a balanced country, a country that is the most powerful on Earth, but a country that is also the most free and the most respected democracy. And a main factor guaranteeing that freedom and that democracy is our independent judiciary.
I could not agree more with Chief Justice Rehnquist. We should follow his advice. Let the Republican leadership schedule up-or-down votes on the nominations of Judge Paez and Marsha Berzon so that the Senate can finally act on them. Let us be fair to all. Nominees deserve to be treated with dignity and dispatch, not delayed for 2 and 3 years. We are talking about people going to the Federal judiciary, a third independent branch of Government. They are entitled to dignity and respect. They are not entitled automatically for us to vote aye, but they are entitled to a vote, aye or nay.
They deserve at least that. No nominee gets an automatic "aye" vote, but every nominee ought to be heard and at least voted on one way or the other.

145 Cong. Rec. S 11793, 10/1/99, When There Were 63 Vacancies

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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

LEAHY
The fact is I don't care who comes up, we don't like some of these people who were put there before, so if you're an extraordinarily well qualified woman, if you're an extraordinarily well-qualified minority or whatever, we're not going to put you on, that doesn't say much for our commitment to the independence of the Judiciary. Bring these people up, vote them up or vote them down.

SEN. PATRICK LEAHY: Well, a lot of times, we keep trying to get a person to at least have a vote, one way or the other, vote them up, vote them down. And we're told that, well, somebody has a concern so they're holding back. We never know who that mysterious somebody is. And yet when this person who is so offensive that we can't bring them to a vote, when after a year or two or three of waiting, they come out for a vote, they get 90 votes or 95 votes out of the 100-member Senate. But what's happened is that one or two Senators anonymously hold somebody back. I think that's wrong. I think that hurts the integrity of the courts, but it also is not a... it does not reflect well in the Senate or on the democratic process.

SEN. PATRICK LEAHY: Having said all that, I think it is time for those who will put these anonymous holds on to be required to come forward and have the votes, allow the committee to work the way we should. On had started to say something earlier, and I think it was going to say if it was left to the two of us, we could move it much faster. I believe that is so. I believe I'll say that, to Senator Hatch's credit. But you cannot have a small click decide they want to know exactly how judges are going to rule before they go on the bench, or they're not going to confirm them.

The Newshour with Jim Lehrer, 10/14/99, When There Were 63 Vacancies

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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

But Paez's supporters say he still deserves an up-or-down vote after all this time.
"We're saying at least be honest enough to vote on him," Leahy said. "If you don't want him, you've got 55 votes, you can defeat him."

Berlau, John, "Partisanship or Politics as Usual," Investor's Business Daily, 10/18/99, When There Were 63 Vacancies

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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

The Founding Fathers certainly intended that the Senate advise as to judicial nominations, i.e., consider, debate and vote up or down. They surely did not intend that the Senate, for partisan or factional reasons, would remain silent and simply refuse to give any advice or consider and vote at all, thereby leaving the courts in limbo, understaffed and unable properly to carry out their responsibilities for years.

Prepared Testimony, Senate Judiciary Committee,, 5/10/00, When There Were 80 Vacancies

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LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

The soon-to-be presidential nominee of the Republican Party has said--and I agree with him--that this is wrong, the Senate ought to vote these people up or down in 60 days. Of course, we could do that. There is a concern that has been expressed--and rightly so--that so many nominees are held without any vote. Nobody votes against them, but nobody gets an opportunity to vote for them; they just sit there. And even though the criticism stings, the fact is that, on average, women and minorities take longer to go through this Senate than white males do. Some women, some minorities have gone through very quickly, but most have taken longer. Some of these people got held up for 2 or 3 or 4 years. When they finally got a vote, they passed overwhelmingly. But for 2 or 3 or 4 years they were humiliated, caused to dangle, have their law practices fall apart, have people question what was going on. Why? Because one or two Senators thought they should be held up. Well, let those one or two Senators vote against them. We are paid to vote yes or no, not maybe. I do not know whether it is because they are women, because they are Hispanic, because they are too liberal, or too conservative, too active, not active enough, that people don't want them to be confirmed. Let them vote against them.

146 Cong. Rec. S 7531, 7/25/00, When There Were 59 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

I mention this because Governor Bush and I, while we disagree on some issues, have one very significant issue on which we agree. He gave a speech awhile back and criticized what has happened in the Senate where confirmations are held up not because somebody votes down a nominee but because they cannot ever get a vote. Governor Bush said: You have the nominee. Hold the hearing. Then, within 60 days, vote them up or vote them down. Don't leave them

in limbo.
Frankly, that is what we are paid to do in this body. We are paid to vote either yes or no--not vote maybe. When we hold a nominee up by not allowing them a vote and not taking any action one way or the other, we are not only voting "maybe" but we are doing a terrible disservice to the man or woman to whom we do this. They have to put their life on hold. They do not know what is going to happen: Are they going to be confirmed, or not? It is not like when any one of us runs for election; we know that on a certain day the election occurs. We either win or we lose. But we know that on that Tuesday, we are going to know our fate. We won or we lost.
President Clinton, to his credit, has nominated people who have received higher ratings than any President, Democrat or Republican, in 40 years and they still get held up. He said:
These people are highly qualified, which leads to only one conclusion, that the appointments process has been politicized in the hope of getting appointees ultimately to the bench who will be more political. That is wrong. It is a denial of justice.
President Clinton is right. We should move forward with these nominees. Let them have a vote. Don't do this in the dark of the night holding people up.

146 Cong. Rec. S 9671, 10/3/00, When There Were 66 Vacancies

LEAHY, PATRICK on NOMINEES DESERVE A FLOOR VOTE

I have said on the floor, although we are different parties, I have agreed with Gov. George Bush, who has said that in the Senate a nominee ought to get a vote, up or down, within 60 days. I urge in the time remaining in this session that he, as the head of his party, as their Presidential nominee, call the Republican leader of the Senate and say that all of these women, all of these minorities, in fact, all of the people who have been sitting here for well over 60 days waiting for a vote on their nomination, let them have a vote. Vote for them or vote against them. Bonnie Campbell deserves a vote. My guess is the reason she has not been brought for a vote is they know at least 80 of the 100 Senators would vote for her. It would be impossible to justify a vote against her because of her extraordinary qualifications.
Again, if Governor Bush is serious when he says have a vote within 60 days, pick up the phone, call the Senate majority leader, reach him at the switchboard, 202-224-3121, and ask him to bring her to a vote. It is a very easy thing to do.
Again I say if Governor Bush means it, pick up the phone and call 202-224-3121; ask the Senate switchboard to connect him to the Republican leader and say: You know, I have made it a tenet of my campaign that the Senate should vote on a nomination within 60 days. You can bring every one of these people to the floor for a vote, up or down, today. Let's do so. Who knows. We will find out how the Senate feels about them. Are they for them or are they against them? Right now, instead of voting yes or no, we vote "maybe," by having one or two Senators in the dark of night put holds on these people.

146 Cong. Rec. S 10164, 10/11/00, When There Were 66 Vacancies

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LEAHY, PATRICK on NOMINEES ENTITLED TO A HEARING

It is discouraging to once again have to call attention to the fact that some 40 nominees are pending before the Judiciary Committeenominees who have yet to be accorded even a hearing during this Congress.

143 Cong. Rec. S 8504, 7/31/97, When There Were 100 Vacancies

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LEAHY, PATRICK on NOMINEES ENTITLED TO A HEARING

We are not doing our job. We are not being responsible. We are being dishonest, condescending, and arrogant toward the judiciary. It deserves better and the American people deserve better.

In spite of our efforts last year in the aftermath of strong criticism from the Chief Justice of the United States, the vacancies facing the federal judiciary are, again, approximately 70 and the vacancies gap is not being closed. We have more federal judicial vacancies extending longer and affecting more people. Judicial vacancies now stand at over 8 percent of the federal judiciary. If one considers the additional judges recommended by the Judicial Conference, the vacancies' rate would be over 15 percent.

Nominees deserve to be treated with dignity and dispatch--not delayed for two and three years. We are seeing outstanding nominees nitpicked and delayed to the point that good women and men are being deterred from seeking to serve as federal judges. Nominees practicing law see their work put on hold while they await the outcome of their nominations. Their families cannot plan.

145 Cong. Rec. S 10544, 9/8/99, When There Were 68 Vacancies

LEAHY, PATRICK on NOMINEES ENTITLED TO A HEARING

Acting to fill judicial vacancies is a constitutional duty that the Senate--and all of its members--are obligated to fulfill. In its unprecedented slowdown in the handling of nominees since the 104th Congress, the Senate is shirking its duty. That is wrong and should end. The Senate recesses with a sorry record of inaction on judicial nominations.

145 Cong. Rec. S 11014, 9/16/99, When There Were 68 Vacancies

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LEAHY, PATRICK on NOMINEES ENTITLED TO A HEARING

I have urged the Senate time and time again to fulfill our responsibilities. I wish we would do this, take a couple days less vacation time, work a few afternoons, and confirm the judges that we need around the country.

In fact, I may be doing a disservice to these major-leaguers by comparing them to the Senate. Why? Because these ballplayers are acting professionally and doing what they are paid to do. We are not acting professionally. We are not fulfilling our constitutional responsibilities. We are not doing what we are paid to do. We are refusing to vote yes or no on these judges.

146 Cong. Rec. S 3500, 5/4/00, When There Were 80 Vacancies

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LEAHY, PATRICK on NOMINEES ENTITLED TO A HEARING

The Constitution empowers the President to nominate officers of the United States, with the advice and consent of the Senate. That is clear-cut, straightforward language. It does not empower anyone to mm the process into a protracted ordeal of unreasonable delay and unrelenting investigation. Yet somewhere along the way, that is what Senate confirmations became - lengthy, partisan, and unpleasant. That has done enough harm, injured too many good people, and it must not happen again.

He proposed that Presidential nominations be acted upon by the Senate within 60 days. Of the 42 judicial nominations currently pending, 26 have already been pending for more than 60 days without Senate action. Already this Congress, 78 nominees, including 52 eventually confirmed, have had to wait longer than 60 days for Senate action. I urge the Senate to do better.

With 20 vacancies on the federal appellate courts across the country and nearly half of the total judicial emergency vacancies in the federal courts system in our appellate courts, our courts of appeals are being denied the resources that they need, and their ability to administer justice for the American people is being hurt. There continue to be multiple vacancies on the Ninth Circuit. I am likewise concerned that the Fourth, Sixth and District of Columbia Circuits are suffering from multiple vacancies.I continue to urge the Senate to meet our responsibilities to all nominees, including women and minorities, and look forward to action on the nominations of Judge James Wynn, Jr. to the Fourth Circuit, Enrique Moreno to the Fifth Circuit, and Kathleen McCree Lewis to the Sixth Circuit. Working together, the Senate can join with the President to confirm well-qualified, diverse and fair-minded judges to fulfill the needs of the federal courts around the country.

Having begun so slowly in the first five months of this year, we have much more to do before the Senate takes its final action on,judicial nominees this year. We should be considering 20 to 40 more judges this year. Having begun so slowly, we cannot afford to follow the "Thurmond rule" and stop acting on these nominees at the end of the summer in anticipation of the presidential election. We must use all the time until adjournment to remedy the vacancies that have been perpetuated on the courts to the detriment of the American people and the administration of justice. I urge all Senators to make the federal administration of justice a top priority for the Senate for the rest of this year.

Prepared Testimony, Senate Judiciary Committee, 6/15/00, When There Were 66 Vacancies



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LEAHY, PATRICK on ONE "BAD RULING"

Those of us who have tried a lot of cases know that sometimes cases do not turn out the way you want. That is why you have appellate courts. Sometimes judges rule in a way that you just cannot understand. But I am not going to condemn President Reagan's appointees as judges and President Bush's appointees as judges, or President Reagan or President Bush, because of a few aberrations, decisions about which I do not know all the facts and in connection with which I have not reviewed all the evidence. I would not do this and no one else should try, in a political year, to condemn President Clinton, who I must say has appointed some darned good men and women to the judiciary-just as President Bush appointed some darned good men and women to the judiciary, and President Reagan did, and President Carter did, and President Ford did. All of these Presidents have appointed judges on whom I had the opportunity to vote.

142 Cong. Rec. S 3725, 4/19/96, When There Were 55 Vacancies

LEAHY, PATRICK on ONE "BAD RULING"

It is sad that this effort is premised on the slanted portrayal of decisions, many of which were decided by judges appointed by President Bush. I have spoken before about the dangers of characterizing isolated decisions to stir up anger against the judiciary just so that somebody can get shortterm monetary and political gain. It is not worth the price to try to destroy one of our independent branches of Government and the most independent and effective judiciary in the world.

143 Cong. Rec. S 11233, 10/27/97, When There Were 93 Vacancies

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LEAHY, PATRICK on ONE "BAD RULING"

It is sad that this effort is premised on the slanted portrayal of decisions, many of which were decided by judges appointed by Republican Presidents. I have spoken before about the dangers of characterizing isolated decisions to stir up anger against the judiciary. Shortterm monetary or political gain is not worth the price.

143 Cong. Rec. S 11407, 10/30/97, When There Were 93 Vacancies

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LEAHY, PATRICK on ONE "BAD RULING"

I have noted before the respect I have for our colleague from Philadelphia and for his experience and judgment both as a prosecutor and as a Senator. Senator Specter has been a steadfast supporter of Judge Massiah-Jackson. He has done the work to evaluate the criticism of her record. He has looked at the trial records and the Philadelphia Bar Association report and compared the criticism to the facts. He knows the circumstances in Philadelphia that form the backdrop for the criticism of this nominee's record from local prosecutors and police. My own review of the cases leads me to the same conclusions that he has drawn: Prosecutors were disappointed in a number of her rulings but she had a basis in the record for the great majority of her orders. She

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has admitted to mistakes and been reversed on occasion, but that handful of errors should not have disqualified her from this appointment.

144 Cong. Rec. S 1984, 3/16/98, When There Were 82 Vacancies

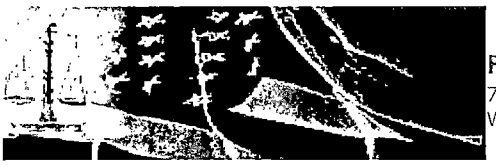

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LEAHY, PATRICK on SENIOR JUDGES

Also at our last executive business session, my friend from Utah, the distinguished chairman of the Judiciary Committee, said there is and has been no judicial vacancy crisis. That is a bold statement considering there are 67 current vacancies in courts and emergency situations, including the Fifth Circuit. If we pass the bill that has been requested by the nonpartisan judicial conference, we would have another 7 or more judicial vacancies, so we would have over 150 judicial vacancies.

The chairman went on to say that since 363 senior judges are now serving in the federal judiciary the true number of vacancies is "less than zero." While it is true that there are 363 senior judges now serving, it is inaccurate to say that the true number of vacancies is less than zero.

I commend the large number of senior judges for coming in to help out and fill in. Some of them are well into their eighties. But that is not the way it should be. Surely, if we didn't have these senior judges, the courts would collapse under the weight of their own caseloads and the extended and extensive vacancies.

146 Cong. Rec. S 9671, 10/3/00, When There Were 66 Vacancies

LEAHY, PATRICK on SENIOR JUDGES

The extraordinary service that has been provided by our corps of senior judges does not mean there are no vacancies. In the federal courts around the country there remain 66 current vacancies and 12 more on the horizon. With the judgeships included in the Hatch-Leahy Federal Judgeship Act of 2000, there would be over 135 vacancies across the country. That is the truer measure of vacancies, many of which have been long-standing judicial emergency vacancies in our southwest border states. The Chief Judges of both the Fifth and Sixth Circuits have had to declare their entire courts in emergencies since there are too many vacancies and too few Circuit judges to handle their workload.

146 Cong. Rec. S 11490, 11/1/00, When There Were 66 Vacancies

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LEAHY, PATRICK on TESTS FOR JUDICIAL FITNESS

We can joke about it, but it is not a joking matter. We have people with their lives on hold. When the President asks some man or woman to take a Federal courtship, their entire practice is put on holdit is kind of a good news/bad news situation. The President calls up and says, "I've got good news for you. I'm going to nominate you for the Federal bench. Now I have bad news for you. I'm going to nominate you for the Federal bench." He or she finds their law practice basically stops on the date of that nomination. They cannot bring on new clients.

Their partners give him or her a big party and say, "Please move out of your office," because they know it is going to take a year or 2 or 3 to get through the confirmation process.

This is partisanship of an unprecedented nature. I have spoken twice on this floor today on what happens when we forget the normal traditions of the Senate. Traditionallycertainly not in my lifetime no Democratic majority leader or Republican majority leader of the Senate would bring up a resolution for a vote directly attacking the President of the United Statesdirectly or indirectly attacking the President of the United Stateson a day when the President is heading off to a summit with other world leaders, especially with the leader of the other nuclear superpower, Russia. Yet, that tradition, which, as I said, has existed my whole lifetime, was broken today.

The other thing is that no matter which party controls the Senate, no matter what party controls the Presidency, we have always worked together so that the President, having been elected, can, subject to normalnormaladvise and consent, can appoint the judges he wants. And that tradition has been broken. If we are going to go against these basic tenets of bipartisanship, then the Senate will not be the conscience of the Nation that it should be. The Senate will suffer. And if the Senate suffers, the country suffers.

143 Cong. Rec. S 2515, 3/19/97, When There Were 93 Vacancies

LEAHY, PATRICK on TESTS FOR JUDICIAL FITNESS

Nominees practicing law see their work put on hold while they await the outcome of their nominations. Their families cannot plan. They are left to twist in the wind. All of this despite the fact that, by all objective accounts and studies, the judges that President Clinton has appointed are a moderate group of judges, rendering moderate decisions, and certainly including far fewer ideologues than were nominated during the Reagan Administration.

146 Cong. Rec. S 8934, 9/21/00, When There Were 63 Vacancies



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LEAHY, PATRICK on VACANCY CRISIS

"We are approaching a real crisis," Leahy said Thursday. "We must begin to fulfill our responsibilities to the third, co-equal branch of our federal government and quit acting for narrow ideological or partisan purposes."

Chattanooga Free Press, 1/25/97, When There Were 83 Vacancies

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LEAHY, PATRICK on VACANCY CRISIS

Mr. Leahy has signaled in recent Judiciary Committee meetings that he will press for quick confirmation of nominees, saying that the Republicans slowed down the confirmation process last year because a Presidential election was coming and they wanted to preserve any vacancies in case they captured the White House. Last year, for the first time in this century, the Senate did not confirm any judges for the appeals courts, the level just below the Supreme Court, and only 17 district court judges were confirmed, a record Mr. Leahy has said is abysmal.

"We are approaching a real crisis" in terms of the backlog of cases in the courts, he said.

New York Times, 2/9/97, When There Were 90 Vacancies

LEAHY, PATRICK on VACANCY CRISIS

This is the first hearing of the 105th Congress on nominees to a few of the nearly 100 vacancies that are creating a crisis for the federal judiciary. In the past, this Committee has not had to wait until after the Ides of March for our first confirmation hearing. We have already fallen behind the pace established by Chairman Hatch and Chairman Thurmond in the 104th and 97th Congresses.

The district courts hear federal criminal cases as well as other trials, and we are now risking not having enough judges to hear the cases necessary to put criminals behind bars, where they belong. Having a civil case tried in Federal court is becoming an increasingly expensive and time-consuming process as our overworked Federal judges give priority to criminal matters.

The Senate is not fulfilling its constitutional responsibility, it is interfering with the President's authority to appoint federal judges, and branch for political gain. This is a scandal in the making. It is high time for the Senate to do its duty and consider and confirm judges to the vacancies that have persisted for far too long.

Prepared Statement, Senate Judiciary Committee, 3/18/97, When There Were 93 Vacancies

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LEAHY, PATRICK on VACANCY CRISIS

Mr. President, for the past several months I have spoken about the crisis being created by the almost 100 vacancies that are being perpetuated on the federal courts around the country and the failure of the Senate to carry out its constitutional responsibilities to advise and consent to judicial confirmations.

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This district in Texas is only one example of crisis that affects the entire country. We could find similar backlog problems in district courts in California, Florida, and other States that are swamped with rising cases and unfilled judicial vacancies. Yesterday, I met with members of the Federal Judges Association who are very concerned about the growing backlogs and rising caseloads in Federal courts across the Nation.

143 Cong. Rec. S 4580, 5/15/97, When There Were 99 Vacancies

LEAHY, PATRICK on VACANCY CRISIS

Mr. President, last week I spoke at some length about the crisis being created by our failure to move forward expeditiously to fill longstanding judicial vacancies. This week, we have the opportunity to double our confirmations by taking up and approving the five judicial nominees on the Senate Executive Calendar. As the Senate approaches its fifth extended recess, it have found time to confirm only five federal judges of the 38 nominees the President has sent to us. That is less than one judge per month.

I have spoken often about the crisis being created by the 100 vacancies that are being perpetuated on the federal courts around the country, as has the Chief Justice of the United States. At the rate that we are currently going, more and more vacancies are continuing to mount over longer and longer times to the detriment of greater numbers of Americans and the national cause of prompt justice.

143 Cong. Rec. S 6492, 6/26/97, When There Were 96 Vacancies

LEAHY, PATRICK on VACANCY CRISIS

I have spoken often about the crisis being created by the 100 vacancies that are being perpetuated on the federal courts around the country, as has the Chief Justice of the United States. At the rate that we are currently going more and more vacancies are continuing to mount over longer and longer times to the detriment of greater numbers of Americans and the national cause of prompt justice.

As I have said before, it should not take more than 4 months to consider a judicial nominee and the Gold nomination and its treatment should serve as the standard by which we measure the Senate's treatment of other nominees. Although it should represent the normal process, it is the exception this year.

143 Cong. Rec. S 7206, 7/10/97, When There Were 100 Vacancies

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LEAHY, PATRICK on VACANCY CRISIS

I have spoken often about the crisis being created by the 103 vacancies that are being perpetuated on the federal courts around the country. At the rate that we are currently going this year, more and more vacancies are continuing to mount over longer and longer times to the detriment of greater numbers of Americans and the national cause of prompt justice. We are not even keeping up with

attrition.

In July I received a copy of a letter sent to President Clinton and the Republican leader of the Senate by seven presidents of national legal associations. These presidents note the "looming crisis in the Nation brought on by the extraordinary number of vacant federal judicial positions" and the "injustice of this situation for all of society." They point to " d angerously crowded dockets, pended civil case dockets, burgeoning criminal caseloads, overburdened judges, and chronically undermanned courts" as circumstances that "undermine our democracy and respect for the supremacy of law." I agree with these distinguished leaders that we must without further delay "devote the time and resources necessary to expedite the selection and confirmation process for federal judicial nominees." The President is doing his part, having sent us 61 nominations so far this year with more on the way. The Senate should start doing its part.

143 Cong. Rec. S 8819, 9/4/97, When There Were 97 Vacancies

LEAHY, PATRICK on VACANCY CRISIS

I have spoken often about the crisis being created by the vacancies that are being perpetuated on the federal courts around the country. At the rate that we are going, we are not keeping up with attrition. When we adjourned last Congress there were 64 vacancies on the federal bench. After the confirmation of 15 judges in 9 months, there has been a net increase of 33 vacancies. The Chief Justice of the Supreme Court has called the rising number of vacancies "the most immediate problem we face in the federal judiciary."

143 Cong. Rec. S 9163, 9/11/97, When There Were 97 Vacancies

LEAHY, PATRICK on VACANCY CRISIS

Mr. President, I think it is regrettable that this week the Senate has failed to consider and confirm judges necessary to fill vacancies that are leading to a crisis in the federal courts. Instead, this is going to be remembered as the week that the Republican leadership in the House and the Republican leadership in the Senate talked openly about seeking to intimidate their word to intimidate the federal judiciary.

143 Cong. Rec. S 9723, 9/19/97, When There Were 97 Vacancies

LEAHY, PATRICK on VACANCY CRISIS

Those who delay or prevent the filling of these vacancies must understand that they are delaying or preventing the administration of justice. We can pass all the crime bills we want, but you cannot try the cases and incarcerate the guilty if you do not have judges. The mounting backlogs of civil and criminal cases in the dozens of emergency districts, in particular, are growing taller by the day. National Public Radio broadcast a series of reports all lasts week on the judicial crises and quoted the Chief Judge and U.S. Attorney from San Diego earlier this week to the effect that criminal matters are being affected.

I have spoken about the crisis being created by the vacancies that are being perpetuated on the federal courts around the country. At the rate that we are going, we are not keeping up with attrition. When we adjourned last Congress there were 64 vacancies on the federal bench. After the confirmation of 18 judges in nine months, there has been a net increase of 30 vacancies, an increase of almost 50 percent in the number of federal judicial vacancies.

The Chief Justice of the Supreme Court has called the rising number of vacancies "the most immediate problem we face in the federal judiciary." Chairman Hatch has said that we can do better. I agree with them and add that we must do better. I have urged those who have been stalling the consideration of these fine women and men to reconsider their action and work with us to have the Committee and the Senate fulfill its constitutional responsibility.

This weekend the President of the United States devoted his national radio address to the threat being posed to our judicial system by those who are intent on partisan and ideological intimidation of federal judges. I ask that a copy of the President's Radio Address on Judicial Nominations from September 26, 1997, be included in the record.

Judiciary Committee Testimony, 9/30/97, When There Were 97 Vacancies

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LEAHY, PATRICK on VACANCY CRISIS

In light of all of this, I was surprised to read the remarks of the distinguished Chairman of the Judiciary Committee in response to the President of the United States in the Record for September 29. The Senator from Utah referred to myths and distortions, but I do not believe that he could have been referring to the statement by the President. The President spoke the truth. There is a vacancy crisis in the federal judiciary and there is a Republican slowdown of judicial confirmations.

More recently, the Chief Justice termed the rising number of vacancies on the Federal bench "the most immediate problem we face in the federal judiciary." This is hardly a partisan statement but a recognition of the seriousness of the crisis posed by judicial vacancies.

143 Cong. Rec. S 10924, 10/22/97, When There Were 93 Vacancies

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LEAHY, PATRICK on VACANCY CRISIS

Sen. Patrick J. Leahy (D-Vt.), ranking minority member on Judiciary Committee, said the current figures cited by Rehnquist were "pretty frightening" and said, "If this continues, it becomes a constitutional crisis."

The Washington Post, 1/3/98, When There Were 83 Vacancies

LEAHY, PATRICK on VACANCY CRISIS

Any week in which the Senate does not confirm three judges is a week in which the Senate is failing to address the vacancy crisis.

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Any fortnight in which we have gone without a judicial confirmation hearing marks 2 weeks in which the Senate is falling behind.

105 Cong. Rec. S 76, 1/28/98, When There Were 83 Vacancies

LEAHY, PATRICK on VACANCY CRISIS

I will do all that I can to help end the vacancy crisis that is plaguing the federal courts and threatening the quality of justice for the American people.

Testimony, Senate Indian Affairs FY99 Indian Programs Budget, 2/25/98, When There Were 81 Vacancies

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LEAHY, PATRICK on VACANCY CRISIS

The mounting backlogs of civil and criminal cases in the dozens of emergency districts, in particular, are growing more critical by the day. This is especially true in the Central and Southern District Courts of Illinois, where these outstanding nominees will serve once they are confirmed. Indeed, in the Southern District of Illinois, where Pat Murphy will serve if his nomination is ever voted on by the full Senate, Chief Judge Gilbert has reported that his docket has been so burdened with criminal cases that he went for a year without having a hearing in a civil case. In 1996, 88 percent of the cases filed in all federal trial courts were civil, while 12 percent were criminal. But in the Southern District of Illinois, not one of those civil cases was heard by Chief Judge Gilbert.

I have urged those who have been stalling the consideration of the President's judicial nominations to reconsider and to work with us to have the Judiciary Committee and the Senate fulfill its constitutional responsibility. Those who delay or prevent the filling of these vacancies must understand that they are delaying or preventing the administration of justice. Courts cannot try cases, incarcerate the guilty or resolve civil disputes without judges.

Nine months should be more than a sufficient time for the Senate to complete its review of these nominees. During the four years of the Bush Administration, only three confirmations took as long as nine months. Last year, 10 of the 36 judges confirmed took nine months or more and many took as long as a year and one-half. So far this year, Judge Ann Aiken, Judge Margaret Morrow, and Judge Hilda Tagle have taken 21 months, 26 months and 31 months respectively. Margaret McKeown's nomination has already been pending for 24 months. Judge Sotomayor's nomination has already been pending for 9 months. Pat Murphy's and Judge McCuskey's nominations have already been pending for 8 months. The average number of days to consider nominees used to be between 50 and 90, it rose last year to over 200 and this year stands at over 300 days from nomination to confirmation. That is too long and does a disservice to our Federal Courts.

144 Cong. Rec. S 2696, 3/27/98, When There Were 82 Vacancies

LEAHY, PATRICK on VACANCY CRISIS

The numerous, longstanding vacancies in some courts are harming

the federal administration of justice. The people in these districts and circuits need additional federal judges. Indeed the Judicial Conference of the United States recommends that in addition to filling the current vacancies, the Congress should authorize 53 additional judgeships throughout the country, as set forth in S. 678, the Federal Judgeship Act that I introduced in May 1997. That indicates that the work demands of the federal judiciary justify 133 additional judges. There is a clamor for us to fill these vacancies and there is harm by the Senate's delay and failure to do so.

I hope that the Judiciary Committee and the Senate will proceed to consider and confirm judicial nominees more promptly and without the months of delay that now accompany so many nominations. I hope the Committee will not delay in scheduling the additional hearings we need to hold to consider the fine men and women whom the President has nominated to fill these important positions.

144 Cong. Rec. S 7238, 6/26/98, When There Were 72 Vacancies

LEAHY, PATRICK on VACANCY CRISIS

In order to understand why a judicial vacancy crisis is plaguing so many federal courts, we need only recall how unproductive the Republican Senate has been over the last three years. More and more of the vacancies are judicial emergencies that have been left vacant for longer periods of time. The President has sent the Senate qualified nominees for 23 of the current judicial emergency vacancies, 15 of those nominations that are still pending as the Senate prepares to adjourn.

144 Cong. Rec. S 12964, 10/21/98, When There Were 70 Vacancies

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LEAHY, PATRICK on VACANCY CRISIS

The Republican-controlled Senate confirmed 65 of U.S. President Bill Clinton's nominees to be federal judges this year, but Democrats still complained about the pace of confirmations. Partisan foot-dragging is putting a further strain on short-staffed federal courtrooms already overloaded with cases, senator patrick leahy, a democrat, said wednesday as the senate confirmed 17 judges shortly before adjourning for the year. Fifty of the government's 834 federal judgeships remain vacant, Leahy said. "In order to understand why a judicial vacancy crisis is plaguing so many federal courts, we need only recall how unproductive the Republican Senate has been over the past three years," he said in a statement. "at each step of the process, judicial nominations are being delayed and stalled." Republicans insist there is no partisan slowdown. "This Congress has taken steps to significantly reduce the federal judicial vacancy rate to its lowest rate in almost a decade," said Senator Orrin Hatch, a Republican and Chairman of the Senate Judiciary Committee. the committee takes the first look at Presidential nominations and votes whether to reject them or to send them to the Senate for a vote. However, Attorney General Janet Reno thanked Leahy and Hatch for speedy work at the close of the Congressional session. "We intend to work very hard to begin the 106th Congress with as many candidates for nomination as possible, so that we can continue to work with the Senate to ensure

a full bench," Reno said at her weekly news conference.

Xinhua News Agency, 10/22/98, When There Were 70 Vacancies

LEAHY, PATRICK on VACANCY CRISIS

The Judicial Conference of the United States has recommended that Congress authorize an additional 69 judgeships, in order for the federal courts to have the judicial resources they need to do the justice. These are in addition to the 67 current vacancies. That means that the federal courts need the equivalent of 136 more judges. I cannot remember a time when the resource needs of the federal courts were so neglected by the Congress.

During the four years that the Republican majority has controlled the Senate, it has barely kept up with attrition when it comes to judicial vacancies. Even with the confirmations achieved last year, the current vacancies number as many as existed at the time the Senate recessed in 1994. The Senate has not made the progress it should have in filling the longstanding vacancies that continue to plague the federal judiciary. The Chief Justice of the U.S. Supreme Court and others continue to speak of the problem of too few judges and too much work. In 1997 the Chief Justice noted: "Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary."

145 Cong. Rec. S 3670, 4/14/99, When There Were 65 Vacancies

LEAHY, PATRICK on VACANCY CRISIS

The extraordinary service that has been provided by our corps of senior judges does not mean there are no vacancies. In the federal courts around the country there remain 66 current vacancies and 12 more on the horizon. With the judgeships included in the Hatch-Leahy Federal Judgeship Act of 2000, there would be over 135 vacancies across the country. That is the truer measure of vacancies, many of which have been long-standing judicial emergency vacancies in our southwest border states. The Chief Judges of both the Fifth and Sixth Circuits have had to declare their entire courts in emergencies since there are too many vacancies and too few Circuit judges to handle their workload.

146 Cong. Rec. S 11490, 11/1/00, When There Were 66 Vacancies

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LEAHY, PATRICK on VACANCY CRISIS (APPELLATE COURTS)

As part of my efforts to encourage the Senate to do its job, I am today introducing the Judicial Emergency Responsibility Act. The purpose of this bill is to supplement the law by which Chief Justice Winter certified the emergency and to require the Senate to do its duty and to act on judicial nominations before it recesses for significant stretches of time when a Circuit Court is suffering from a vacancy emergency.

144 Cong. Rec. S 3120, 4/2/98, When There Were 79 Vacancies

LEAHY, PATRICK on VACANCY CRISIS (APPELLATE COURTS)

Today, the Senate Judiciary Committee has an opportunity to move forward on nominations to two Courts of Appeal that are feeling the devastating effects of the slowdown in judicial confirmations by the Republican Senate over the last three years. Professor William A. Fletcher is himself a victim of these efforts. Just this week a column by Anthony Lewis in the New York Times and an editorial in the Washington Post each focussed on the ordeal that this fine person has had to endure as some play politics with the administration of justice and demagogue the judiciary.

Prepared Statement, Senate Judiciary Committee, 4/29/98, When There Were 79 Vacancies

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LEAHY, PATRICK on VACANCY CRISIS (APPELLATE COURTS)

Indeed, earlier this year I proposed a bill that requires the Senate to vote on nominations for Court of Appeals vacancies that created an emergency under federal law. The week after Chief Judge Winter of the Second Circuit certified such an emergency last spring, I introduced the Judicial Emergency Responsibility Act, S. 1906. The purpose of this bill is to supplement the law by which Chief Justice Winter certified the judicial emergency, a judicial emergency that still persists in the Second Circuit, and to require the Senate to do its duty and to act on judicial nominations before it recesses for significant stretches of time. The Senate should not be taking vacations when a Circuit Court is suffering from a vacancy emergency.

144 Cong. Rec. S 11021, 9/28/98, When There Were 72 Vacancies

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LEAHY, PATRICK on VACANCY CRISIS (APPELLATE COURTS)

Both the Second Circuit and the Ninth Circuit have had to cancel hearings over the past couple of years due to judicial vacancies. The Second Circuit has had to declare a circuit emergency and to proceed with only one circuit judge on their three-judge panels. The New York Times ran a front-page story recently on how the crushing workload in the Federal appellate courts has lead to what the Times called a "two-tier system" for appeals. In testimony and statements over the last few years, I have seen Chief Judge Winter and former Chief Judge Newman of the Second Circuit, Chief Judge Hug and Judge Trott of the Ninth Circuit and Chief Judge Hatchett of the Eleventh Circuit all warn of the problem of too few judges and too much work. I deeply regret that these twin problems have

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combined to lead to the perception that the federal appellate courts can no longer provide the same attention to individual cases that has marked the federal administration of justice in the past.

appellate courts have had to forgo oral argument in more and more cases. Litigants are being denied any opportunity to see the judges who are deciding their causes. Law clerks and attorney staff are being used more and more extensively in the determination of cases as backlogs grow. As caseloads grow, bureaucratic imperatives seem to be replacing the administration of justice. These are not the ways to engender confidence in our system of justice, acceptance of the judicial process, support for the decisions being rendered or respect for courts. Congress needs to support the judicial branch with the judges and other resources it needs.

145 Cong. Rec. S 3670, 4/14/99, When There Were 65 Vacancies

LEAHY, PATRICK on VACANCY CRISIS (APPELLATE COURTS)

The vacancies on the courts of appeals around the country are particularly acute. The Ninth Circuit continues to be plagued by multiple vacancies. I am glad to see Mr. Tallman included in this hearing. We should also be making progress on the nominations of Barry Goode, Judge Johnnie B. Rawlinson and James E. Duffy, Jr. Representing the State of Vermont, I am acutely aware that there is no one on the Ninth Circuit from the State of Hawaii. I know that federal law requires that "there be at least one circuit judge in regular active service appointed from the residents of each state in that circuit," 28 U.S.C. 44(c), and would like to see us proceed to confirm each of these outstanding nominees.

The Fifth Circuit continues to labor under a circuit emergency declared last year by its Chief Judge. We should be moving the nominations of Alston Johnson and Enrique Moreno to that Circuit to help it meet its responsibilities.

This week I received a copy of a letter from the Chief Judge of the Sixth Circuit concerning the multiple vacancies plaguing that Circuit. Chief Judge Merritt was disturbed by a report that this Committee would not be moving any nominees for the Sixth Circuit this year. He wrote:

The Sixth Circuit Court of Appeals now has four vacancies. Twenty-five percent of the seats on the Sixth Circuit are vacant. The Court is hurting badly and will not be able to keep up with its work load due to the fact that the Senate Judiciary Committee has acted on none of the nominations to our Court. One of the vacancies is five years old and no vote has ever been taken. One is two years old. We have lost many years of judge time because of the vacancies.

By the time the next President is inaugurated, there will be six vacancies on the Court of Appeals. Almost half of the Court will be vacant and will remain so for most of 2001 due to the exigencies of the nomination process. Although the President has nominated candidates, the Senate has refused to take a vote on any of them.

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The Founding Fathers certainly intended that the Senate "advise" as to judicial nomination, i.e., consider, debate and vote up or down. They surely did not intend that the Senate, for partisan or factional reasons, would remain silent and simply refuse to give any advice or consider and vote at all, thereby leaving the courts in limbo, understaffed and unable properly to carry out their responsibilities for years.

Prepared Testimony, Senate Judiciary Committee, 3/23/00, When There Were 75 Vacancies

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LEAHY, PATRICK on VACANCY CRISIS (APPELLATE COURTS)

The vacancies on the courts of appeals around the country are particularly acute. Vacancies on the courts of appeals are continuing to rob these courts of approximately 12.3 percent of their authorized active strength, as they have for the last several years. The Ninth Circuit continues to be plagued by multiple vacancies. We should be making progress on the nominations of Barry Goode, Judge Johnnie B. Rawlinson and James E. Duffy, Jr., as well as that of Richard Tallman.

146 Cong. Rec. S 3500, 5/4/00, When There Were 80 Vacancies

LEAHY, PATRICK on VACANCY CRISIS (APPELLATE COURTS)

The vacancies on the courts of appeals around the country are particularly acute. Vacancies on the courts of appeals are continuing to rob these courts of more than 12 percent of their authorized active strength, as they have for the last several years. The Fourth Circuit, the Fifth Circuit, the Sixth Circuit, the Ninth Circuit, the Tenth Circuit and the District of Columbia Circuit continue to have multiple vacancies.

Prepared Testimony, Senate Judiciary Committee, 5/10/00, When There Were 80 Vacancies

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LEAHY, PATRICK on VACANCY CRISIS (APPELLATE COURTS)

Especially troubling is the vacancy rate on the courts of appeals, which continues at over 11 percent (20 out of 179) without the creation of any of the additional judgeships that those courts need to handle their increased workloads.

Most troubling is the circuit emergency that had to be declared more than seven months ago by the Chief Judge of the Court of Appeals for the Fifth Circuit. I recall when the Second Circuit had such an emergency two years ago. Along with the other Senators representing States from the Circuit, I worked hard to fill the five vacancies then plaguing my circuit. The situation in the Fifth Circuit is not one that we should tolerate; it is a situation that I wished we had confronted by expediting consideration of the nominations of Alston Johnson and Enrique Moreno last year. I still hope that the Senate will consider both this year.

With 20 vacancies on the federal appellate courts across the country and nearly half of the total judicial emergency vacancies in the federal courts system in our appellate courts, our courts of

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appeals are being denied the resources that they need, and their ability to administer justice for the American people is being hurt. There continue to be multiple vacancies on the Ninth Circuit. Three vacancies is too many and perpetuating these four judicial emergency vacancies, as the Senate has in this one circuit, is irresponsible. We should act on these nominations promptly and provide the Ninth Circuit with the judicial resources it needs and to which it is entitled.

146 Cong. Rec. S 4366, 5/24/00, When There Were 80 Vacancies

LEAHY, PATRICK on VACANCY CRISIS (APPELLATE COURTS)

Especially troubling is the vacancy rate on the courts of appeals, which continues at over 11 percent (20 out of 179) without the creation of any of the additional judgeships that those courts need to handle their increased workloads.

Most troubling is the circuit emergency that had to be declared more than seven months ago by the Chief Judge of the Court of Appeals for the Fifth Circuit. I recall when the Second Circuit had such an emergency two years ago. Along with the other Senators representing States from the Circuit, I worked hard to fill the five vacancies then plaguing my circuit. The situation in the Fifth Circuit is not one that we should tolerate; it is a situation that I wished we had confronted by expediting consideration of the nominations of Alston Johnson and Enrique Moreno last year. I still hope that the Senate will consider both of this year.

With 20 vacancies on the federal appellate courts across the country and nearly half of the total judicial emergency vacancies in the federal courts system in our appellate courts, our courts of appeals are being denied the resources that they need, and their ability to administer justice for the American people is being hurt. There continue to be multiple vacancies on the Ninth Circuit. Three vacancies is too many and perpetuating these four judicial emergency vacancies, as the Senate has in this one circuit, is irresponsible. We should act on these nominations promptly and provide the Ninth Circuit with the judicial resources it needs and to which it is entitled.

I am likewise concerned that the Fourth, Sixth and District of Columbia Circuits are suffering from multiple vacancies.

Prepared Testimony, Senate Judiciary Committee, 5/25/00, When There Were 80 Vacancies

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LEAHY, PATRICK on VACANCY CRISIS (APPELLATE COURTS)

The Constitution empowers the president to nominate officers of the United States, with the advice and consent of the Senate. That is clear-cut, straight-forward language. It does not empower anyone to "mmm" the process into a protracted ordeal of unreasonable delay and unrelenting investigation. Yet somewhere along the way, that is what Senate confirmations became - lengthy, partisan, and unpleasant. That has done enough harm, injured too many good people, and it must not happen again.

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He proposed that presidential nominations be acted upon by the Senate within 60 days. Of the 42 judicial nominations currently pending, 26 have already been pending for more than 60 days without Senate action. Already this Congress 78 nominees, including 52 eventually confirmed, have had to wait longer than 60 days for Senate action. I urge the Senate to do better.

With 20 vacancies on the federal appellate courts across the country and nearly half of the total judicial emergency vacancies in the federal courts system in our appellate courts, our courts of appeals are being denied the resources that they need, and their ability to administer justice for the American people is being hurt. There continue to be multiple vacancies on the Ninth Circuit. I am likewise concerned that the Fourth, Sixth and District of Columbia Circuits are suffering from multiple vacancies.I continue to urge the Senate to meet our responsibilities to all nominees, including women and minorities, and look forward to action on the nominations of Judge James Wynn, Jr. to the Fourth Circuit, Enrique Moreno to the Fifth Circuit, and Kathleen McCree Lewis to the Sixth Circuit. Working together the Senate can join with the President to confirm well-qualified, diverse and fair-minded judges to fulfill the needs of the federal courts around the country.

Having begun so slowly in the first five months of this year, we have much more to do before the Senate takes its final action on,judicial nominees this year. We should be considering 20 to 40 more judges this year. Having begun so slowly, we cannot afford to follow the "Thurmond rule" and stop acting on these nominees at the end of the summer in anticipation of the Presidential election. We must use all the time until adjournment to remedy the vacancies that have been perpetuated on the courts to the detriment of the American people and the administration of justice. I urge all Senators to make the federal administration of justice a top priority for the Senate for the rest of this year.

Prepared Testimony, Senate Judiciary Committee, 6/15/00, When There Were 66 Vacancies

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LEAHY, PATRICK on VACANCY CRISIS (APPELLATE COURTS)

With 21 vacancies on the federal appellate courts across the country, and nearly half of the total judicial emergency vacancies in the federal courts system in our appellate courts, our courts of appeals are being denied the resources that they need. Their ability to administer justice for the American people is being hurt. There continue to be multiple vacancies on the Fourth, Fifth, Sixth, Ninth, Tenth and District of Columbia Circuits. The vacancy rate for our courts of appeals is more than 11 percent nationwide - and that does not begin to take into account the additional judgeships requested by the Judicial Conference to handle their increased workloads. If we added the 11 additional appellate judges being requested, the vacancy rate would be 16 percent. Still, not a single qualified candidate for one of these vacancies on our federal appellate courts is being heard today. At our first Executive Business Meeting of the year, I noted the opportunity we had to

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make bipartisan strides toward easing the vacancy crisis in our nation's federal courts. I believed that a confirmation total of 65 by the end of the year was achievable if we made the effort, exhibited the commitment, and did the work that was needed to be done. I urged that we proceed promptly with confirmations of a number of outstanding nominations to the Court of Appeals, including qualified minority and women candidates. Unfortunately, that is not what has happened. Just as there was no appellate court nominee included in the April confirmation hearing, there is no appellate court nominee included today. Indeed, this Committee has not reported a nomination to a Court of Appeals vacancy since April 12, and it has reported only two all year. The Committee has yet to report the nomination of Allen Snyder to the District of Columbia Circuit, although his hearing was eight weeks ago; the nomination of Bonnie Campbell to the Eighth Circuit, although her hearing was six weeks ago; or the nomination of Judge Johnnie Rawlinson, although her hearing was four weeks ago.

We cannot afford to follow the "Thurmond Rule" and stop acting on these nominees now in anticipation of the Presidential election in November. We must use all the time until adjournment to remedy the vacancies that have been perpetuated on the courts to the detriment of the American people and the administration of justice.

Capitol Hill Hearing Testimony, 7/12/00, When There Were 59 Vacancies

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LEAHY, PATRICK on VACANCY CRISIS (APPELLATE COURTS)

With 21 vacancies on the federal appellate courts across the country, and nearly half of the total judicial emergency vacancies in the federal courts system in our appellate courts, our courts of appeals are being denied the resources that they need. Their ability to administer justice for the American people is being hurt. There continue to be multiple vacancies on the Fourth, Fifth, Sixth, Ninth, Tenth and District of Columbia Circuits. The vacancy rate for our courts of appeals is more than 11 percent nationwide--and that does not begin to take into account the additional judgeships requested by the Judicial Conference to handle their increased workloads. If we added the 11 additional appellate judges being requested, the vacancy rate would be 16 percent. Still, not a single qualified candidate for one of these vacancies on our federal appellate courts is being heard today.

146 Cong. Rec. S 6567, 7/12/00, When There Were 59 Vacancies



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LEAHY, PATRICK on X NUMBER OF VACANCIES IS TOO MANY

For purposes of perspective, let us also recall that by August 1992, during the last year of the President Bush's term, a Democratic majority in the Senate had confirmed 53 of the 65 nominees sent to us by a Republican President. That, too, is a far cry from this year's 15 out of 65.

143 Cong. Rec. S 9163, 9/11/97, When There Were 97 Vacancies

LEAHY, PATRICK on X NUMBER OF VACANCIES IS TOO MANY

Mr. President, today there are 82 vacancies among the federal judiciary. We can see another 15 vacancies on the horizon. If we confirm Jeremy Fogel to the U.S. District Court for the Northern District of California in a vote this evening, then we will have confirmed 11 judges so far this year. That is less than four a month. When you know that you have close to 100 vacancies, 4 a month doesn't cut it. The President spoke to this issue; the Chief Justice spoke to it.

The Senate can do a better job.

144 Cong. Rec. S 1986, 3/16/98, When There Were 82 Vacancies

LEAHY, PATRICK on X NUMBER OF VACANCIES IS TOO MANY

Mr. President, I am sorry I was not on the Senate floor to hear Chairman Hatch earlier this afternoon. I was attending an important confirmation hearing and chairing a meeting of the bipartisan Internet Caucus. I spoke to the issue of judicial nominations last Friday and say, again, with 60 current and longstanding vacancies within the federal judiciary, and seven more on the horizon, we cannot afford to stop or slow down the little progress we are making.

146 Cong. Rec. S 7531, 7/25/00, When There Were 59 Vacancies



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DASCHLE, TOM on BURDEN ON CASELOADS

The Nation cannot afford to continue to see cases delayed and backlogs grow due to judicial vacancies that could be filled if Republicans would stop seeking to delay or block well-qualified and capable judges.

Press Release, "The 105th Congress,", 12/2/97, When There Were 78 Vacancies



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DASCHLE, TOM on DON'T APPLY THE "THURMOND RULE"

And so, whether it was with Republican or Democratic administrations, when we were in the majority, we did not allow the politics of a national election to dictate the number of confirmations.

There is a dire shortage -- we have a judicial emergency right now, throughout the country. And it's important for us to respond to that emergency, confirm the many, many judges whose nominations are still languishing either in committee or on the floor.

There are well over 70 vacancies -- if I recall, it's 74 vacancies -- right now. But we have got to address those vacancies, we have got to address the nominations, we have got to get on with a lot more confirmations than we've had to date.

Briefing with Senate Minority Leader Tom Daschle, 3/7/00, When There Were 75 Vacancies

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DASCHLE, TOM on JUSTICE DELAYED

So we now know, as this becomes more clear to all of us, the Republicans are holding up judgeships, causing extraordinary delay of justice in many parts of our country because we don't have judges, in order to intimidate the judiciary.

Morning Edition (NPR), 9/26/97, When There Were 97 Vacancies

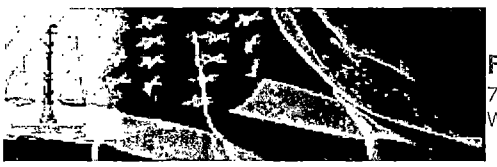

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DASCHLE, TOM on VACANCY CRISIS

And so, whether it was with Republican or Democratic administrations, when we were in the majority, we did not allow the politics of a national election to dictate the number of confirmations.

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Briefing with Senate Minority Leader Tom Daschle, 3/7/00, When There Were 75 Vacancies

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BIDEN, JOSEPH on BURDEN ON CASELOADS

The Senate has been dragging its feet despite the undeniable fact that these judges are badly needed. The federal trial and appellate courts to which we confirm judges apply our federal laws. Without a steady supply of judges, these courts cannot enforce our laws.

142 Cong. Rec. S 12289, 10/3/96, When There Were 62 Vacancies

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BIDEN, JOSEPH on JUSTICE DELAYED

"Because judicial vacancies create a terrible strain on the federal courts, processing these nominees thoroughly, but efficiently, has been one of my highest priorities," said Delaware Democrat Joseph Biden, the Judiciary Committee's chairman. "The Judiciary Committee has made phenomenal progress."

Gannett News Service, 10/14/94, When There Were 78 Vacancies

BIDEN, JOSEPH on NOMINEES DESERVE A FLOOR VOTE

But I also respectfully suggest that everyone who is nominated is entitled to have a shot, to have a hearing and to have a shot to be heard on the floor and have a vote on the floor.

143 Cong. Rec. S 2540, 3/19/97, When There Were 93 Vacancies

BIDEN, JOSEPH on FILLING VACANCIES

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Gannett News Service, 10/14/94, When There Were 78 Vacancies

BIDEN, JOSEPH on FILLING VACANCIES

Here are the top priorities of the Delaware region's lawmakers for the 1994 session of Congress:

Sen. Joseph R. Biden Jr., D-Del.:

Crime control. He will continue to fight for his $ 22.3 billion omnibus crime bill, a national drug strategy bill that has not yet been introduced, and gun control legislation.

Health care. Biden has not settled on a plan to support.

Filling judicial vacancies.

Protecting Delaware from federal legislation designed to divvy up millions of dollars in unclaimed stock dividends that were awarded to Delaware by the U.S. Supreme Court.

Foreign relations issues, including trade with China and arms treaties.

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Gannett News Service, 1/21/94, When There Were 116 Vacancies

BIDEN, JOSEPH on X NUMBER OF VACANCIES IS TOO MANY

Currently, there are 63 vacancies on the federal bench. This year, the Judiciary Committee has held only 5 nominations hearings, and reported out only 23 nominees to fill these vacancies. We should have done more.

142 Cong. Rec. S 12289, 10/3/96, When There Were 62 Vacancies

BIDEN, JOSEPH on DC CIRCUIT

Mr. President, 2 of the 12 seats on the District of Columbia Court of Appeals are currently vacant. Some have argued that the vacancy to which Merrick Garland has been nominated should not be filled because the D.C. circuit is overstaffed. But the reasons Congress gave for approving 12 seats for the D.C. circuit remain compelling today and justify filling this vacancy.

The D.C. circuit needs 12 judges to handle its complex caseload. A large portion of the D.C. circuit caseload consists of complex administrative appeals which generally consume a larger amount of judicial resources than other appellate cases. Therefore, comparison of raw caseload data between the D.C. circuit, with its high percentage of complex administrative cases, and the other circuits is misleading. According to the statistics provided by the Administrative Office of U.S. Courts for the period from September 30, 1995 to September 30, 1996, 1,347 cases were filed in the D.C. circuit, 474 of whichor 35.2 percentwere administrative appeals. In contrast, in the remaining 11 circuits, of the 51,991 cases filed, only 2,827or 5.4 percentwere administrative appeals.

The D.C. circuit has a long time interval between filing a notice of appeal and final disposition. Because the D.C. circuit has this incredibly high percentage of administrative appeals relative to the other circuits and because these types of cases require tremendous amounts of judicial resources, litigants in the D.C. circuit must wait an average of 12 months between the filing of the notice of appeal and final disposition. Only 3 of the 12 circuits have a longer average for this time frame.
The fact that the D.C. circuit has a long time interval between filing and disposition is indicative of the complex cases that the circuit handles. Other circuits have more criminal appeals and gardenvariety diversity cases that often are amenable to summary disposition without oral argument.

The D.C. circuit has fewer pro se appeals than other circuits. In addition to having fewer criminal appeals and diversity cases, the D.C. circuit has a lower percentage of pro se mandamus cases than all other circuits. Chief Judge Edwards has noted that pro se appeals are often frivolous, easily identified as lacking merit, or otherwise amenable to disposition without significant expenditure of judicial resources.

The D.C. circuit has more cases of national importance than other

circuits. Not only are complex administrative appeals commonly heard in the D.C. circuit, but as a result of its location at the seat of the Federal Government, the D.C. circuit also hears a disproportionate number of the highprofile cases of national importance that reach the U.S. Courts of Appeals. The D.C. circuit decided in 1996 alone National Treasury Employees Union versus United States of America, a challenge to the constitutionality of the LineItem Veto Act, as well as Perot versus Federal Election Commission, an appeal from a district court's rejection of Ross Perot's attempt to participate in last year's Presidential debates.

The same reasons that supported the creation of a 12 judgeship for the D.C. circuit in 1984 justify its existence now. If reasoned deliberation and study of this circuit leads to the conclusion that a future vacancy should not be filled, then we should address that issue, but not within the context of this nomination. If ad hoc analysis becomes our mode of operation, we will give the appearance of a politicized judiciary.

143 Cong. Rec. S 2515, 3/19/97, When There Were 93 Vacancies

BIDEN, JOSEPH on NOMINEES DESERVE A FLOOR VOTE

My reading of the Constitution, though, is the Judiciary Committee is not mentioned in the Constitution. The Judiciary Committee is not mentioned. The Senate is. We only in the Judiciary Committee have the right to give advice to the Senate, but it is the Senate that gives its advice and consent on judicial nominations. . . .

It is totally appropriate for Republicans to reject every single nominee if they want to. That is within their right. But it is not, I will respectfully request, Madam President, appropriate not to have hearings on them, not to bring them to the floor and not to allow a vote, and it is not appropriate to insist that we, the Senators--we, the Senators--get to tell the President who he must nominate if it is not in line with the last 200 years of tradition.

143 Cong. Rec. S 2540, 3/19/97, When There Were 93 Vacancies

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BIDEN, JOSEPH on BLUE SLIPS

The third point my friend raised was the point about consultation. It is true that I do believe, and I have told this President as well, that I think the President -- not the President personally, but the administration -- should consult with Senators when they are nominating a judicial nominee from that Senator's State, for two reasons: One, out of courtesy; and, two, that Senator may have important information relative to that nominee and relative to that nominee's position and reputation within the community that the President should know about.

I also believe that I and the entire committee should consult with the person voicing an objection. That is a reasonable thing. But just as the letter that was read relative to Senator Thurmond's view of how this blue slip thing works, I believe that is all it does. It does not allow for, even on a judicial nominee, for a single Senator to have a veto power. It is taken very seriously.

139 Cong. Rec. S 13153, 10/6/93, When There Were 127 Vacancies

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FEINSTEIN, DIANE on 9TH CIRCUIT

"A judicial emergency exists on the Ninth Circuit Court of Appeals like none other in history," Feinstein said in a prepared statement last week. "It is during this climate that some of my colleagues in the senate are trying to gain support for a proposal to split the circuit. With a wink of the eye, some members seem to be saying: If we split the circuit, we'll confirm some judges."

Kisliuk, Bill, The Recorder, "Circuit Split Building Steam, But Measure May Still Fall Short,

, 7/22/97, When There Were 100 Vacancies

FEINSTEIN, DIANE on 9TH CIRCUIT

Any delay in processing Ninth Circuit cases is the responsibility, I believe, of the Congress of the United States. The circuit needs more judges. It has asked for them, and the Judicial Conference of the United States has endorsed this request; we should authorize this. The proposed bill to divide the circuit makes the overload matters worse, not better. Senate Bill 956 would divide the present Ninth Circuit into two unequal-sized circuits. It would create two courts, a 19-judge court and a nine-judge court in place of a single 28-judge court. Now that might be okay, but listen to this. Something like 70 percent of the Ninth Circuit cases come from California and Arizona in the southern part of the current Ninth Circuit. But the proposed southern circuit would have far fewer than 70 percent of the judges. The northern sector of the current Ninth Circuit currently has proportionately more judges with disproportionately fewer cases, so it is already skewed.

Federal News Service, 9/14/95, When There Were 55 Vacancies

FEINSTEIN, DIANE on NOMINEES DESERVE A FLOOR VOTE

Democratic California Sens. Barbara Boxer and Dianne Feinstein said that seven vacancies on the 28-seat 9th Circuit have contributed to a judicial emergency, leading to a backlog of cases. "If a senator has a problem with particular nominees, he or she should vote against them," Feinstein said. "But a nominee should not be held up interminably by a handful of anonymous senators."

Simon, Richard, "Minorities Denounce Senate Delays on Judges," Los Angeles Times, 10/6/99, When There Were 63 Vacancies

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FEINSTEIN, DIANE on NOMINEES DESERVE A FLOOR VOTE

I think what we on this side are encountering is the holding up of judges, particularly on the Ninth Circuit Court of Appeals, for years on end. That must stop. A nominee is entitled to a vote. Vote them up; vote them down. To keep them hanging on--the court has 750 cases waiting for a judge. These judges are necessary. If someone has opposition to a judge, which I believe to be the case in at least one, they should come to the floor and say that.
What this does to a judge's life is, it leaves them in limbo--I should say, a nominee's life--whether they have a place to live, whether they are going to make a move. It is our job to confirm these

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judges. If we don't like them, we can vote against them. That is the honest thing to do. If there are things in their background, in their abilities that don't pass muster, vote no.
What I am asking for, as a Senator from California, on these three judges, is to just tell us when we might see their nominations before the Senate for a vote up or down. I think there is also an understanding by the White House that will be the case as well.

145 Cong. Rec. S 11014, 9/16/99, When There Were 68 Vacancies

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FEINSTEIN, DIANE on NOMINEES DESERVE A FLOOR VOTE

Let's bring their nominations up, debate them if necessary, and vote them up or down.

143 Cong. Rec. S 9165, 9/11/97, When There Were 97 Vacancies

FEINSTEIN, DIANE on BLUE SLIPS

Democratic California Sens. Barbara Boxer and Dianne Feinstein said that seven vacancies on the 28-seat 9th Circuit have contributed to a judicial emergency, leading to a backlog of cases.

"If a senator has a problem with particular nominees, he or she should vote against them," Feinstein said. "But a nominee should not be held up interminably by a handful of anonymous senators."

Simon, Richard, "Minorities Denounce Senate Delays on Judges,"

Los Angeles Times, 10/6/99, When There Were 63 Vacancies



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HARKIN, TOM on FILLING VACANCIES

There are 22 vacancies in our federal appeals courts. With the growing number of vacancies in the federal courts, these positions should be filled with qualified individuals as soon as possible. And so I urge the Republican leadership to take the steps necessary to allow the full Senate to vote up or down on these important nominations.

146 Cong. Rec. S 8339, 9/11/00, When There Were 63 Vacancies

HARKIN, TOM on NOMINEES ENTITLED TO A HEARING

Mr. President, I understand another disturbing event has happened this morning. I am informed that the Senate Judiciary Committee has met this morning and has refused to report out any more judges--refused to do so; just stopped. Again, this flies in the face of what our responsibilities are supposed to be around here. If someone doesn't like a person, or they don't think they are qualified--I should not say "doesn't like"--if they don't think they are qualified to assume a judgeship, let them vote against that person. But that doesn't give them a reason to hold someone up in committee.

I say to the Judiciary Committee: Report her nomination out. If for some reason you think she is unqualified--I cannot imagine why--then you can cast your vote, but at least let's bring the nominee to the floor.

As I said earlier, this is another indication of how the leadership in this Senate is shirking its responsibilities to the people of this country--to put it off, delay, stonewall, don't do anything--when we have a crying need to fill these vacancies.

This is not right. It is not right to treat a person like this. It is not right to block someone who has had their hearing and is widely supported on both sides of the aisle. It might be a different story if there were a lot of controversy about Bonnie Campbell, but there is none. As I said, Senator Grassley, a conservative Republican, is openly supporting her. Republicans in my State have been supportive of her getting on the Eighth Circuit.

This is, I think, a black mark on the operations of the Senate, another indication of how the leadership of this Senate refuses to do the people's business, to let things come out on the floor so we can vote up or down. Bonnie Campbell is being denied her right, I believe, as a citizen of this country to have her nomination acted upon by the full Senate, and it is a bad mark on the Senate.

146 Cong. Rec. S 8881, 9/21/00, When There Were 63 Vacancies

HARKIN, TOM on ACTING QUICKLY ON NOMINATIONS

I hope the Judiciary Committee and the leadership on that side--I say to my friend from Utah--will listen to the words of Texas Governor George Bush. He said he would call for a 60-day deadline for judges--once they are nominated, the Senate will have 60 days

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to hold a hearing, to report out of committee and vote on the Senate floor. I say to my friends on the Republican side--you are supporting George Bush for President. If he said he would call for a 60-day deadline, I ask my friends on the Republican side: Why don't we act accordingly?

In this Congress, the judicial nominees who have been confirmed had to wait on average 211 days. Governor Bush said they should not wait longer than 60 days. This is not getting better; it is getting worse around here. It is really a shame.

146 Cong. Rec. S 9657, 10/3/00, When There Were 66 Vacancies

HARKIN, TOM on ACTING QUICKLY ON NOMINATIONS

Bonnie Campbell from Iowa is a former attorney general who is now the head of the Violence Against Women office in the Department of Justice, has done a great job. She's got strong bipartisan support. She's supported by Senator Grassley from my state, and me, the Bar Association. I don't know of anyone that is not supporting her for any of these reasons. And yet she's bottled up and will not be reported out, they're not reporting her out to the floor so that we can act on it. I think this is unconscionable.
I'll just close by saying that Governor Bush had the right idea. He said the candidate should get an up or down vote within 60 days of their nomination. The Republican leadership in the Senate should follow that advice.

Press Conference on Pending Women Judicial Nominees, 9/14/00, When There Were 63 Vacancies

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HARKIN, TOM on NOMINEES DESERVE A FLOOR VOTE

I thought that if the President nominated them, they had a fair hearing, and they were reported out, my only decision was whether or not they were qualified--not whether they were ideologically opposed to me or to how I feel or what I believe. It has been my observation over the last quarter century that oftentimes when judges who have more of a liberal bent get appointed to the court, in many cases they come down on the more conservative side of cases. And I have seen conservative judges appointed to the court come down on the liberal side of cases.

You never really know how this will come out, but you know whether or not people are legitimately qualified to serve on the bench. I am not naive enough not to know that there are always politics involved in how judges are nominated. I understand that. That is the system in which we live. But there comes a point where politics ends and responsibility begins. When you have people who have had a hearing, who are qualified, yet they won't be reported out for a vote on the Senate floor, that is pure politics and that is the height of irresponsibility. The Republican leadership is being totally irresponsible.

146 Cong. Rec. S 9657, 10/3/00, When There Were 66 Vacancies

HARKIN, TOM on IDEOLOGICAL LITMUS TESTS

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146 Cong. Rec. S 9657, 10/3/00, When There Were 66 Vacancies

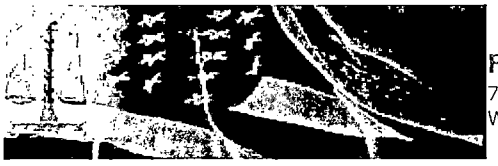

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KENNEDY, EDWARD on BURDEN ON CASELOADS

In some areas of the country, people have to wait years to have their cases even heard in court. And then they have to wait years more for overburdened judges to find time to issue their decisions. Families, workers, small businesses, women and minorities have traditionally looked to the courts to resolve disputes. The lack of federal judges makes the swift resolution of their cases impossible.

144 Cong. Rec. S 292, 2/3/98, When There Were 81 Vacancies

KENNEDY, EDWARD on BURDEN ON CASELOADS

Justice delayed is justice denied. Thousands of Americans with legitimate grievances cannot get their day in court, because judicial vacancies are not being filled and current federal judges don't have the time to hear their cases. It's hard to crack down on crime when there are not enough judges to enforce the laws that Congress passes.

143 Cong. Rec. S 2515, 3/19/97, When There Were 93 Vacancies

KENNEDY, EDWARD on BURDEN ON CASELOADS

If the federal courts were a business, they would be in bankruptcy. There are over 90 vacancies in judgeships today. In his 1996 annual report, Chief Justice Rehnquist criticized Congress failure last year to create additional federal judgeships and called it a shortcoming. The Administrative Office of the U.S. Courts has requested an additional 20 temporary positions on the courts of appeals and 21 permanent and 12 temporary positions in the district courts to address the heavy backlogs that are piling up.

143 Cong. Rec. S 2515, 3/19/97, When There Were 93 Vacancies

KENNEDY, EDWARD on JUSTICE DELAYED

While Republican leaders play politics with the federal judiciary, countless individuals and businesses across the country are forced to endure needless delays in obtaining the justice they deserve. Justice is being delayed and denied in courtrooms across the country because of the unconscionable tactics of the Senate Republican majority.

145 Cong. Rec. S 11102, 9/21/99, When There Were 68 Vacancies

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KENNEDY, EDWARD on JUSTICE DELAYED

The bottleneck in the Senate is jeopardizing the court system and undermining the quality of justice. Fewer than half of President Clinton's nominees have been confirmed.

We owe it to Americans across the country to give these nominees a vote. If our Republican colleagues don't like them, vote against them. But give them a vote.

144 Cong. Rec. S 292, 2/3/98, When There Were 81 Vacancies

KENNEDY, EDWARD on JUSTICE DELAYED

"The current judicial shutdown is an unconscionable act of partisan politics," Kennedy said. "It is impairing the effective enforcement of the laws. The real victims are the American people. Justice delayed is justice denied."

The Atlanta Journal-Constitution, 5/11/97, When There Were 99 Vacancies

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KENNEDY, EDWARD on JUSTICE DELAYED

Justice delayed is justice denied. Thousands of Americans with legitimate grievances cannot get their day in court, because judicial vacancies are not being filled and current Federal judges don't have the time to hear their cases. It's hard to crack down on crime when there are not enough judges to enforce the laws that Congress passes.

143 Cong. Rec. S 2515, 3/19/97, When There Were 93 Vacancies

KENNEDY, EDWARD on END PARTISANSHIP IN CONFIRMATIONS

Caseloads are backlogged throughout the country. Citizens must wait additional years to resolve disputes, answer constitutional questions, and obtain justice.

The current judicial shutdown, like the government shutdown in 1995, is an unconscionable act of partisan politics It is impairing the effective enforcement of the laws. The real victims are the American people. Justice delayed is justice denied. Thousands of Americans with legitimate grievances cannot get their day in court, because federal judges don't have the time to schedule their cases. The criminal justice system is suffering too. It's hard to crack down on criminal when there are not enough judges to hold trials.

The issue is far more than a numbers game. What we are witnessing today is a direct assault on the President's constitutional power to nominate and appoint judges. Deliberate effort,, are being made in Congress to undermine the judicial independence that is at the heart of the rule of law. Advise and consent in the Senate is becoming abuse and dissent.

Congressional Press Release, 4/30/97, When There Were 95 Vacancies

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KENNEDY, EDWARD on END PARTISANSHIP IN CONFIRMATIONS

It is time to end the excessive partisanship over judicial nominations. I hope very much that our action on Merrick Garland is a sign that the unacceptable log jam is breaking and that the Senate is now returning to its proper role of advise and consent, not partisan obstruction, in the consideration of judicial nominations.

143 Cong. Rec. S 2515, 3/19/97, When There Were 93 Vacancies

KENNEDY, EDWARD on NOMINEES ENTITLED TO A HEARING

Mr. President, for several months, many of us have been concerned about the Senate's continuing delays in acting on President Clinton's nominees to the federal courts. Since the Senate convened in January, we have confirmed only 17 judges and 43 are still waiting

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for action. These delays can only be described as an abdication of the Senate's constitutional responsibility to work with the President and ensure the integrity of our federal courts.

The vast majority of these nominees are clearly well-qualified, and would be confirmed by overwhelming votes of approval. It would be an embarrassment for our Republican colleagues to vote against them. It should be even more embarrassing for the Republican majority in the Senate to abdicate their clear constitutional responsibility to do what they were elected to do.

145 Cong. Rec. S 11102, 9/21/99, When There Were 68 Vacancies

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KENNEDY, EDWARD on NOMINEES DESERVE A FLOOR VOTE

It is true that some Senators have voiced concerns about these nominations. But that should not prevent a roll call vote which gives every Senator the opportunity to vote "yes" or "no." These nominees and their families deserve a decision by the Senate. Parties with cases, waiting to be heard by the federal courts deserve a decision by the Senate. Ms. Berzon, Judge White, and Judge Paez deserve a decision by this Senate.

145 Cong. Rec. S 11102, 9/21/99, When There Were 68 Vacancies

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KENNEDY, EDWARD on NOMINEES DESERVE A FLOOR VOTE

We owe it to Americans across the country to give these nominees a vote. If our Republican colleagues don't like them, vote against them. But give them a vote.

144 Cong. Rec. S 292, 2/3/98, When There Were 81 Vacancies

KENNEDY, EDWARD on DEFERENCE TO THE PRESIDENT'S CHOICES

Over 200 years ago, the Framers of the Constitution created a system of checks and balances to ensure that excessive power is not concentrated in any branch of government. The President was given the authority to nominate federal judges with the advise and consent the Senate [sic]. The clear intent was for the Senate to work with the President, not against him, in this process.

146 Cong. Rec. S 1221, 3/7/00, When There Were 75 Vacancies

KENNEDY, EDWARD on VACANCY CRISIS

While the Senate plays political games with the judiciary, the backlog of cases continues to pile up in the courts and undermines our judicial system.

146 Cong. Rec. S 1221, 3/7/00, When There Were 93 Vacancies

KENNEDY, EDWARD on JUSTICE DELAYED

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146 Cong. Rec. S 1221, 3/7/00, When There Were 93 Vacancies



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LEVIN, CARL on BURDEN ON CASELOADS

Even more important, it is unfair to the citizens served by the court. There is a large backlog of cases in the Sixth Circuit which is a serious concern for not just Michigan but for all the States that are served by that court. Over one-fourth of the judgeships on the Sixth Circuit are currently vacant, and that is among the highest vacancy rate of any circuit court in the country.

Judge Gilbert Merritt, who recently served as Chief Judge of the Sixth Circuit, wrote in a March 20 letter to Chairman Hatch: The court is "hurting badly and will not be able to keep up with its workload due to the fact that the Senate Judiciary Committee has acted on none of the nominations to our court."

146 Cong. Rec. S 9657, 10/3/00, When There Were 66 Vacancies

LEVIN, CARL on NOMINEES ENTITLED TO A HEARING

To keep these nominees pending for so long without hearings is unfair to the nominees, particularly where there is no known objection and where there is no explanation for the refusal to grant hearings.

146 Cong. Rec. S 9657, 10/3/00, When There Were 66 Vacancies

LEVIN, CARL on 6TH CIRCUIT

While I am glad that the Senate has finally confirmed these two district court judges, I am deeply concerned about the vacancies in the Sixth Circuit U.S. Court of Appeals. The length of time that nominees for these positions have remained pending is unfair, both to the nominees, and to the State of Michigan.

The Senate slowdown has a serious impact on the administration of justice. In a March 20, 2000 letter to Senator Hatch, Judge Gilbert Merritt, Chief Judge of the U.S. Court of Appeals for the Sixth Circuit, notes that these vacancies have hampered the Court's ability to complete the public's business. The Court, in his words, is deteriorating rapidly due to the high number of judicial vacancies.

146 Cong. Rec. S 4366, 5/24/00, When There Were 80 Vacancies

LEVIN, CARL on ACTING QUICKLY ON NOMINATIONS

Governor Bush has said that no nominee should wait longer than 60 days for a decision in the Senate. He is the nominee of the Republican Party, and we would hope that the leadership of this Senate and the Judiciary Committee, the Republicans who run both the Senate and the committee, would listen -- if not to their consciences, and if not to the judges who sit on these courts, and if not to the litigants who are waiting for justice because of these vacancies year after year -- at least would listen to their own nominee for president, who says 60 days is the longest that anybody should wait for a vote on their confirmation.

Press Conference on Pending Women Judicial Nominees, 9/14/00, When There Were 63 Vacancies

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LEVIN, CARL on NOMINEES DESERVE A FLOOR VOTE

Quote
"Sen. Levin is incensed by the delay in White's nomination, as well as delays of nominees from other states who have been in the pipeline for so long.

Ryan, Richard A., "President feuds with Abraham: Snub delays Detroit judge's appointment to U.S. appeals court,"
""It is unconscionable to keep people waiting,"" Levin said. ""At a minimum, give people a hearing and vote them up or down. If members want to vote no, that is their choice. But not to give them a hearing is just unfair.""
Being kept in limbo for so long is ""unfair and disruptive to the nominees and their families,"" Levin said, because attorneys in private practice are unable to take on new clients. The uncertainty can cause anxiety and stress."

The Detroit News,, 10/17/99, When There Were 63 Vacancies



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MERRITT, GILBERT S., CHIEF JUDGE, SIXTH CIRCUIT on 6TH CIRCUIT

Meanwhile, the U.S. Judicial Conference has declared a "judicial emergency" in the 6th Circuit. Twelve judges are trying to handle the workload of 16. Each active judge is deciding more than 550 cases per year -- "a caseload that is excessive by any standard," Chief Judge Gilbert S. Merrit said.
"Our court should not be treated in this fashion," Merritt wrote. "The public's business should not be treated this way. The litigants in the federal courts should not be treated this way. The remaining judges on a court should not be treated this way."
The court is "rapidly deteriorating," he continued, "understaffed and unable properly to carry out their responsibilities for years."
Schwartz, Matthew S., "Judicial nominee waiting 3 years for Senate hearing; Judge Helene White sets record; 37 other judgeships also held up,",

The Detroit News, 8/11/00, When There Were 60 Vacancies

MERRITT, GILBERT S., CHIEF JUDGE, SIXTH CIRCUIT on 6TH CIRCUIT

U.S. Court of Appeals for the Sixth Circuit
Nashville, TN, March 20, 2000
Re: Vacancies on the Sixth Circuit Court of Appeals
Hon. Orrin Hatch
U.S. Senate,
Washington, DC.

Dear Senator Hatch: Several years ago during the period that I was Chairman of the Executive Committee of the United States Judicial Conference, we met from time to time, and you were always concerned that the Senate Judiciary Committee do its duty in filling the vacancies on the various Courts of Appeals. I write now to you to request that the Judiciary Committee bring up for a hearing and a vote nominations to the Sixth Circuit Court of Appeals.

I was taken aback to see an alleged statement of Senator Mike DeWine from Ohio that no vote would be taken for a nomination to fill the vacancy currently existing from Ohio. Senator DeWine was quoted as saying that due to partisan considerations there would be no more hearings or votes on vacancies for the Sixth Circuit Court of Appeals. I hope that this was not an accurate quote.

The Sixth Circuit Court of Appeals now has four vacancies. Twenty-five per cent of the seats on the Sixth Circuit are vacant. The Court is hurting badly and will not be able to keep up with its work load due to the fact that the Senate Judiciary Committee has acted on none of the nominations to our Court. One of the vacancies is five years old and no vote has ever been taken. One is two years old. We have lost many years of judge time because of the vacancies.

By the time the next President is inaugurated, there will be six vacancies on the Court of Appeals. Almost half of the Court will be vacant and will remain so for most of 2001 due to the exigencies of the nomination process. Although the President has nominated

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candidates, the Senate has refused to take a vote on any of them.

Our Court should not be treated in this fashion. The public's business should not be treated this way. The litigants in the federal courts should not be treated this way. The remaining judges on a court should not be treated this way. The situation in our Court is rapidly deteriorating due to the fact that 25% of the judgeships are vacant. Each active judge of our Court is now participating in deciding more than 550 cases a year--a case load that is excessive by any standard. In addition, we have almost 200 death penalty cases that will be facing us before the end of next year. I presently have six pending before me right now and many more in the pipeline. Although the death cases are very time consuming (the records often run to 5000 pages), we are under very short deadlines imposed by Congress for acting on these cases. Under present circumstances, we will be unable to meet these deadlines. Unlike the Supreme Court, we have no discretionary jurisdiction and must hear every case.

The Founding Fathers certainly intended that the Senate "advise" as to judicial nominations, i.e., consider, debate and vote up or down. They surely did not intend that the Senate, for partisan or factional reasons, would remain silent and simply refuse to give any advice or consider and vote at all, thereby leaving the courts in limbo, understaffed and unable properly to carry out their responsibilities for years.

You and other members of the Senate have appeared before the Judicial Conference and other judges' groups many times and said that you care about the federal courts. I hope that you will now act to help us on the Sixth Circuit Court of Appeals. We need your help and the help of the two Senators from Ohio, the two Senators from Tennessee, the two Senators from Kentucky, and the Senators from Michigan.

Sincerely,
Gilbert S. Merritt.

, 3/20/00, When There Were 75 Vacancies

MERRITT, GILBERT S., CHIEF JUDGE, SIXTH CIRCUIT on NOMINEES DESERVE A FLOOR VOTE

U.S. Court of Appeals for the Sixth Circuit
Nashville, TN, March 20, 2000
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Sincerely,
Gilbert S. Merritt.
March 20, 2000

Letter to Senator Hatch, 3/20/00, When There Were 75 Vacancies



Free Congress Foundation
717 Second Street, NE
Washington, DC 20002



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NEW YORK TIMES on FILLING VACANCIES

A year has gone by since Chief Justice William Rehnquist, deploring the backlog in untried cases, pleaded with the Senate to act in a timely and orderly way on President Clinton's nominees for the federal bench. In response, the Senate began to make progress in reducing judicial vacancies. But its recent record is indefensible.

Contrary to assertions by the Judiciary Committee Chairman, Orrin Hatch, that he is moving rapidly, the record shows that the Republican Senate has approved many fewer judges than a Democratic Senate did during the comparable phase of George Bush's Presidency. Mr. Clinton has promised to press the Senate to act on his judicial nominees in an expeditious fashion when it returns from the August recess. He must do so, of course, but the real problem lies with Mr. Hatch and his obstructionist colleagues. Somebody ought to tell him and other Republican leaders that they are embarrassing their party.

Editorial, New York Times, 8/14/99, When There Were 64 Vacancies

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NEW YORK TIMES on FILLING VACANCIES

It seems that Senate Republicans would rather inflict damage on the nation's judicial system than fulfill their constitutional responsibility to act with reasonable dispatch on President Clinton's judicial nominations.

President Clinton has been inexcusably slow in making nominations. But the main culprits are Senate Republicans, who have stalled in processing the nominations they have.

The Senate could have eased the Second Circuit's crisis by voting to confirm Sonia Sotomayor, a fine Federal District Court judge originally named to the bench by President George Bush. She was approved by the Judiciary Committee on March 5 by a vote of 16 to 2. But repeated pleas by Senator Patrick Leahy of Vermont for action on her nomination have been ignored as the courts continue to disintegrate.

Editorial, "Emergency in the Courts," The New York Times, 4/6/98, When There Were 79 Vacancies

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NEW YORK TIMES on RECESS APPOINTMENTS

The President should name Mr. Lee to the civil rights job. While he is at it, Mr. Clinton might consider using his recess authority to challenge the Senate on judicial vacancies as well.
"Another Route for Bill Lann Lee,"

New York Times, 11/25/97, When There Were 90 Vacancies



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PEOPLE FOR THE AMERICAN WAY on BURDEN ON CASELOADS

"All Americans should understand the gravity of what the Right has undertaken by attacking the judicial system," said Carole Shields, president of People For the American Way. "Right-wing leaders are so eager to offer a political payoff to their constituents that it matters little if the federal bench and our Constitution are smothered in the process. They have lost sight of the fundamental dividing lines that preserve our democracy."

Shields said the report shows how the conservative assault has placed the federal courts close to a point of crisis. "As the weeks and months go by, judicial vacancies remain unfilled, dockets are packed to bursting, hundreds of cases go unheard and mistakes are made out of haste," Shields said. "This must end, and it must end now. It is time that those responsible for this unconscionable paralysis recognized the harm they have done."

M2 Presswire, 10/6/97, When There Were 93 Vacancies

PEOPLE FOR THE AMERICAN WAY on JUDICIAL INDEPENDENCE

A comprehensive report released today by People For the American Way documents how, over the past two years, the right wing has launched an assault on the judiciary - by blocking scores of nominees, threatening impeachments and proposing to curtail the courts' jurisdiction. The report shows how a rapidly growing movement among political conservatives has targeted not just a set of judges or a particular ideology, but the very independence of the federal bench.

"All Americans should understand the gravity of what the Right has undertaken by attacking the judicial system," said Carole Shields, president of People For the American Way. "Right-wing leaders are so eager to offer a political payoff to their constituents that it matters little if the federal bench and our Constitution are smothered in the process. They have lost sight of the fundamental dividing lines that preserve our democracy."

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Elliot Mincberg, legal director of People For the American Way, said the refusal to confirm judges, combined with a constant flow of rhetoric attacking the bench and openly calling for "rebellion," has emerged as much more than a partisan dispute. "Political battles come and go, but rarely have we seen such a palpable threat to the system of checks and balances that forms the core of American democracy," Mincberg said. "The Founders intended for the judiciary to safeguard our constitutional rights, including when threatened by unconstitutional laws. When legislators and advocates call for allowing majorities to overrule decisions, for

judicial term limits, for impeachments, they do violence to the Constitution itself."

The report shows that while conservatives claim only to seek judicial restraint, their actions and rhetoric have been driven primarily by the re-election of a Democratic President. "This talk of 'judicial activism' conceals a simple refusal to confirm the president's nominees," Mincberg said. "Even conservative legal scholars have acknowledged that today's judiciary shows no ideological tilt. In the Senate, allies of the Far Right have essentially decided the president should no longer have the right to nominate judges."

According to the report, many conservatives hope that if they are unable to take power away from the judiciary, their relentless campaign of intimidation will bully judges into passing their litmus test. "If we could get any momentum going to impeach the Justices, it would have an effect on their thinking," the Free Congress Foundation's Paul Weyrich has said. In fact, the report reveals that right-wing activists strongly pushed the idea of impeaching judges months before this tactic was mentioned by House Majority Whip Tom DeLay and other conservative politicians.

In compiling Judges Delayed, Justice Denied (http://pfaw.org/pubs/justice), PFAW's staff researchers combed through news stories and journals, direct-mail pieces, speech texts, judicial documents, and TV and radio broadcasts to produce a detailed record of the Right's burgeoning crusade against judges and their authority. The report shows that rhetoric by Far Right groups such as Focus on the Family, the Family Research Council, the Christian Coalition and the Eagle Forum built throughout 1996, then reached a fever pitch after the election.

Some conservatives speak dramatically about stirring up a revolt. Former judge Robert Bork questions whether Americans have a duty to start a "morally justified revolution" against the "regime" of the federal bench. Former Watergate conspirator Charles Colson ponders the "usurpation of ultimate political power" by judges and doubts "the moral legitimacy of the current political order." Others paint dire scenarios of a judiciary that controls American life: The Family Research Council's Gary Bauer says his group will battle "judicial tyranny," while Christian Coalition founder Pat Robertson calls the courts an "oligarchy" creating "unelected tyranny." Phyllis Schlafly calls the courts "the No. 1 threat to our democratic process."

The report concludes that these activists' rhetorical barrage has provided political cover for the Senate leadership to virtually shut down the confirmation process. But the effects of this shutdown upon the federal bench have been staggering. Among the report's findings:

Ninety-seven seats out of 846 on the federal bench, or 11 percent, remain vacant. For the first time in 40 years, not a single appellate court judge was confirmed in the last election year, 1996. There is a

record number of 29 "judicial emergencies," vacancies that have stood for 18 months or longer. Because nearly one-third of the seats on the 9th Circuit Court of Appeals are vacant, 600 hearings have been canceled there this year. The circuit's chief judge calls this "a crisis of serious proportions." And judges in other districts report that because of huge backlogs, civil cases have been almost completely crowded out by criminal cases.
"The Right's cries of 'judicial activism' are an eerie echo of a sad time in this nation's history," said Shields. "That is precisely the kind of rhetoric conservatives used in 1954 when the Supreme Court handed down its landmark decision in Brown v. Board of Education. Then, too, congressmen talked about impeaching judges, but Americans rejected this as extremism. Now all of us should stand fast against this latest onslaught - because, just as they were at the dawn of the republic, the courts must remain the last and best safeguard of individual liberty."

M2 Presswire, "Judges Delayed, Justice Denied,", 10/6/97, When There Were 93 Vacancies

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PEOPLE FOR THE AMERICAN WAY on RECESS APPOINTMENTS

"We applaud President Clinton's timely holiday gift to the people of these five states and to all of America," said People For the American Way President Ralph G. Neas, who was present in the Oval Office for President Clinton's announcement. "With this highly qualified appointment he has broken down a shameful and archaic barrier to equality that has no place in our nation in the 21st century."
The seat that Judge Gregory will fill has been vacant for 10 years. While the Senate leadership, spurred on by Sen. Jesse Helms, has refused to act on President Clinton's previous African American nominees to this Circuit, the Court has been declared by the U.S. Judicial Conference to be in a state of judicial emergency, with vacancies hampering the Court's ability to hear cases and administer justice in a timely way.

"People For The American Way: President Clinton Appoints First African American Judge To 4th U.S. Circuit Court of Appeals,"

U.S. Newswire, 12/27/00, When There Were 67 Vacancies

PEOPLE FOR THE AMERICAN WAY on JUSTICE DELAYED

Dockets are backing up, cases are going unheard for years at a time, justice is being delayed.

Report, Judges Delayed, Justice Denied, 10/1/97, When There Were 93 Vacancies

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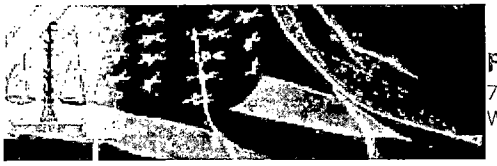

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REHNQUIST, WILLIAM on VACANCY CRISIS

Meanwhile, in his annual report on the federal courts, Chief Justice William H. Rehnquist urged Clinton to fill the judicial vacancies. "There is perhaps no issue more important to the judiciary right now than this serious judicial vacancy problem," Rehnquist wrote in his year-end report, which was released on Jan. 1. The federal courts, Rehnquist added, must adjust to "an era of austerity" that will affect the administration of justice. "Our challenge will be to preserve the best of our current adversary system -- and thereby do justice -- while recognizing the new realities," he said. (See this issue, p. 92.)

"President Clinton and the Courts, 1/8/94, When There Were 116 Vacancies

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REHNQUIST, WILLIAM on BURDEN ON CASELOADS

If Federal jurisdiction remains at its current level -- or, worse, increases -- judicial vacancies will aggravate the problem of too few judges and too much work. Currently, 82 of the 846 Article III judicial offices in the Federal judiciary -- almost 1 out of every 10 -- are vacant. Twenty-six of the vacancies have been in existence for 18 months or longer and on that basis constitute what are called 'judicial emergencies.' In the Court of Appeals for the Ninth Circuit, the percentage of vacancies is particularly troubling, with over one-third of its seats empty.
Judicial vacancies can contribute to a backlog of cases, undue delays in civil cases, and stopgap measures to shift judicial personnel where they are most needed. Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the Federal judiciary. Fortunately for the judiciary, a dependable corps of senior judges has contributed significantly to easing the impact of unfilled judgeships.

The New York Times, 1/1/98, When There Were 83 Vacancies

REHNQUIST, WILLIAM on JUSTICE DELAYED

The number of judicial vacancies can have a profound impact on a court's ability to manage its caseload effectively. Because the number of judges confirmed in 1996 was low in comparison to the number confirmed in preceding years, the vacancy rate is beginning to climb. When the 104th Congress adjourned in 1996, 17 new judges had been appointed and 28 nominations had not been acted upon. Fortunately, a dependable corps of senior judges contributes significantly to easing the impact of unfilled judgeships. It is hoped that the Administration and Congress will continue to recognize that filling judicial vacancies is crucial to the fair and effective administration of justice.

Legal Times, 1/6/97, When There Were 83 Vacancies

REHNQUIST, WILLIAM on JUSTICE DELAYED

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Judicial vacancies can contribute to a backlog of cases, undue delays in civil cases, and stopgap measures to shift judicial personnel where they are most needed. Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary.

The institutions that have the constitutionally assigned powers of nominating and confirming judicial nominees bear some of the responsibility for the current situation. . . .

Whatever the size of the federal judiciary, the President should nominate candidates with reasonable promptness, and the Senate should act within a reasonable time to confirm or reject them. Some current nominees have been waiting a considerable time for a Senate Judiciary Committee vote or a final floor vote.

The Senate confirmed only 17 judges in 1996 and 36 in 1997, well under the 101 judges it confirmed during 1994. The Senate is, of course, very much a part of the appointment process for any Article III judge. One nominated by the president is not "appointed" until confirmed by the Senate.

The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down. In the latter case, the president can then send up another nominee. . . .

The Washington Post, 1/2/98, When There Were 83 Vacancies

REHNQUIST, WILLIAM on NOMINEES DESERVE A FLOOR VOTE

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"Judiciary Report: Congress is Probed," The New York Times, 1/1/98, When There Were 83 Vacancies

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JUDICIAL NOMINATIONS -- (Senate - September 09, 2002)

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Mr. LOTT. Mr. President, I do not want to take an extended period of time because I know the managers of the legislation are here and ready to go forward with the very important consideration of and amendments to the Homeland Security Department, but I must comment on action last week of the Senate Judiciary Committee.

Once again, Mr. President, there has been a tremendous miscarriage of justice by the Judiciary Committee. By a vote of 10 to 9, a unanimous, partisan block of Democrats--10 Democrats--voted against the nomination of Priscilla Owen, who had been nominated by the President to a seat on the Fifth Circuit Court of Appeals.

The way this nomination was handled is a cause for great concern as well as the fact that, once again, the Senate will not have a chance to vote on a eminently qualified and experienced nominee to serve on the Fifth Circuit Court of Appeals. I am convinced that had her nomination been permitted to make it to the floor--as the Republican Majority in the past allowed numerous controversial Democrat nominees to get to the floor--Judge Owen would be approved by the full Senate and she would be confirmed.

We always hear the arguments of those who say that there have been actions in the past where nominees who were qualified were not given votes. However, during the time when I was majority leader I remember numerous cases where despite the belief of many Senators on our side that the nominees' views were far, far outside the mainstream, we still permitted their nominations to come to the floor. We did that because while we disagreed with their political and ideological views, it was still hard to argue that they were not professionally qualified.

Mr. President, I specifically remember the nominations of Marsha Berzon, Richard Paez and Rosemary Barkett. Certainly, these nominees, while they were qualified, were in my opinion not near as qualified in the legal profession as Priscilla Owen.

Berzon had had no judicial experience whatsoever. And a minority of the ABA evaluation committee gave Berzon and Paez only a ``qualified'' rating whereas the ABA committee unanimously--unanimously--gave Priscilla Owen its highest rating of ``well qualified.''

Beyond professional qualifications, numerous Senators on this side of the aisle also had severe concerns that Berzon, Paez, and Barkett were very far out of the mainstream in light of their records which raised questions for many Senators as to whether they should be confirmed.

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Marsha Berzon had been a prominent ACLU and Labor Union lawyer who opposed parental consent laws for minors' to have abortions and had worked against the rights of individual workers in favor of the rights of unions. She was also a prominent and active member of the Brennan Center for Justice that cranked out initiatives it characterized as ``stand[ing] up to right-wing attacks on the judiciary."

Richard Paez had written publicly of his belief that whenever judges feel legislatures have failed to act, ``there's no choice but for the courts to resolve the question that perhaps ideally and preferably should be resolved through the legislative process." That is exactly the kind of judicial activism that Priscilla Owen's critics have falsely accused her of in order to give themselves an excuse for voting against her. Paez had also ruled as a district judge--prior to his confirmation to the appeals court--that States and cities could not outlaw was aggressive and intimidating panhandling by the homeless because it would infringe on a panhandler's free speech rights.

Rosemary Barkett, while a Florida Supreme Court Justice, had argued for overturning the death penalty of a man who had brutally murdered a youth in Jacksonville and then sent a tape to the victim's mother describing the horrible details of the killing. An opinion signed by Barkett opposed the death arguing

that the killing was ``a social awareness case ..... effectuated to focus attention on ..... racial discrimination."

Nevertheless, despite the misgivings and question marks from an ideology standpoint as to whether or not they should be confirmed, the Republican majority permitted all three of these nominations to come to the floor and be voted on by the full Senate and all three were confirmed.

Now, in contrast to these three far left nominees, let me speak to Priscilla Owen's qualifications.

First of all, I am not one who thinks it is particularly important whether the American Bar Association rates a nominee qualified or not. But, of course, the ABA's judgment has been described by a number of leading Democrats as the gold standard in terms of evaluating a nominee's qualifications to serve in the Federal judiciary. Senator *Leahy* and senator *Schumer* described it that way in a March 16, 2001 letter to the President insisting that the ABA's role in the judicial confirmation process had to be maintained.

However, that did not prevent them from voting against Priscilla Owen after she received a ``well qualified" rating from the American Bar Association--the highest possible rating they could give and they gave it to her unanimously. This is also the first instance, I believe, that we have had of a nominee rated ``well qualified" by the American Bar Association being defeated in the Judiciary Committee and

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the Senate. So, from the standpoint of the American Bar Association, this nominee certainly more than qualified.

Also, Mr. President, when you look at Judge Owen's record, it is clear that she has a long record of being outstanding not only academically and intellectually, but also from the standpoint of character, experience, and professionalism as well.

This is a nominee who has had a stellar legal career. She graduated with honors from Baylor Law School and its undergraduate program and made the highest score on the Texas bar exam the year she took it. She then had a highly regarded legal practice with a leading law firm in Texas for 17 years. She

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then gave up her lucrative private sector practice to serve with distinction for the past eight years on the Texas State Supreme Court.

She was elected, in a contested race, as I understand it, and then reelected unopposed with over 80 percent of the vote. She still enjoys overwhelming community support. She has been publicly endorsed and supported by Democrats and Republicans, including 15 former presidents of the Texas Bar Association. Every major newspaper in the state also supports her.

Mr. President, there is no question this nominee is qualified by experience, by education, and by the time that she spent in the Texas Supreme Court, where she has built up a very fine record of being a fair judge who has worked very hard in understanding the issues that have been before her and in casting her votes on the supreme court.

Yet, last week, I was shocked to hear her described by Senator *Daschle* as not qualified. These are exact quotes: ``We will confirm qualified judges.'' ``Don't send us unqualified people.''

Whatever you may be able to say about might be wrong with this nominee--because maybe she is too conservative, or maybe on she did not meet some litmus test from the liberal outside interest groups or because she didn't meet the test of a particular Senator--in no way could you describe this nominee as not being qualified or as being unqualified.

I am very worried when we see this sort of pattern developing. There have probably been very few nominees in the past to serve on the Fifth Circuit Court of Appeals more qualified than this nominee by every category you might bring to bear.

Let me remind my colleagues on this point what the their gold standard ABA's actual standards are. Let me quote what the ABA itself says it looks at when it rates nominees.

The [ABA] Committee's evaluation criteria for federal judicial nominations is directed solely to professional qualifications: integrity, professional competence and judicial temperament .....

Integrity is self-defining. The nominee's character and general reputation in the legal community are investigated, as are his or her industry and diligence .....

Professional competence encompasses such qualities as intellectual capacity, judgment, writing and analytical ability, knowledge of the law and breadth of professional experience .....

In investigating judicial temperament, the Committee considers the nominee's compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias and commitment to equal justice under the law .....

The ABA itself also notes that its standards are even higher for Appellate Court Nominees.

[T]he Committee believes that appellate court nominees should possess an especially high degree of scholarship and academic talent and an unusual degree of overall excellence.

Again, Mr. President, when the ABA applied these standards to Priscilla Owen they unanimously rated her ``well qualified.''

To merit a rating of ``Well Qualified'' the nominee must be at the top of the legal profession in his or

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her legal community, have outstanding legal ability, breadth of experience, the highest reputation for integrity and either have demonstrated, or exhibited the capacity for, judicial temperament.

So it is a shame to characterize this nominee as somehow being professionally unqualified and it is a shame that the full Senate was denied an opportunity to vote on her because of a partisan, straight party-line vote of 10-9 with all Democrats voting against her.

Again, in my opinion, it reflects very poorly on the Senate, and I fear it will make it even more difficult for us to complete our work when we see these types of allegations leveled against such a fine nominee. It also puts even further into question the utility and necessity of bothering to have the ABA evaluate judicial nominations when the Democrats on the Judiciary Committee are going to put ideology first and a nominee's professional qualifications and ABA rating a far second.

Mr. President, I could not let that partisan and unwarranted vote in the Judiciary Committee go unnoticed by the leader of the Republicans, and correct the public record regarding a nominee with such outstanding legal credentials as Judge Owen. She is clearly qualified.

I would note in closing that the Washington Post in an editorial published this past July 24 agreed with the President and Republicans when it said that:

Justice Owen is indisputably well qualified, having served on a state supreme court for seven years and, prior to her election, having had a well-regarded law practice.

I hope we will ultimately find a way for this nominee to be confirmed before all is said and done.

Mr. President, I yield to the Senator from Kentucky.

Mr. *McCONNELL.* Mr. President, I want to add to what the distinguished Republican leader has said. I have been in the Senate 18 years. This is the best witness I have ever heard, not just for a judicial nomination but for anything--an absolutely brilliant judge. She would have been confirmed had she been reported to the Senate, even without a positive recommendation.

I say to my friend, the leader, I worry about where we are, as well. I think we have crossed some kind of threshold here from which it is going to be very difficult to retreat from in the coming years.

I say to my friends on the other side of the aisle, we are not going to always be in the minority, and they may have a President again, as regretful as that might be to some of us, and the shoe could be on the other foot. Do we really want to establish this kind of standard , that we are prepared to vote down extraordinarily well qualified judges, who may be liberal or conservative, simply because we are of the other persuasion?

I think it is a low point in the recent history of the Senate. And I am not sure where we go from here. But I do not believe I will ever view these nominations quite the same way as I did in the past.

I can say this: I would like to have a lot of my votes back, going back over the last 8 years--Ginsburg, Breyer--scores of nominees for the circuit and district benches who I knew were far to the left of me, but I believed it was the President's prerogative. The Democrats won the election. It was the President's prerogative. And short of some kind of egregious failure to meet up to professional standards, it was not my place to impose my view on the nominee.

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So I think it was a sad day in the history of the Senate. I agree with everything the Republican leader has had to say about this most unfortunate episode. I hope the President will not withdraw this nomination and will send it up again next year, and hopefully we will have a Senate with a little more of an open mind to this truly outstanding nominee.

Mr. LOTT. Mr. President, let me just conclude my remarks with this, a quote from Senator *Biden*, a member of the Judiciary Committee for a long time. Unfortunately, he was also recorded last week as voting against Judge Owen despite her excellent record and the ABA's highest rating. But when he was chairman of the Judiciary Committee, I am convinced he worked hard at trying to be fair in the way the nominees were considered under the previous President Bush.

But while on Judiciary Committee back in 1986 on the issue of judicial nominations he was quoted to this effect:

[Judicial confirmation] is not about pro-life or pro-choice, conservative or liberal. It is not about Democrat or Republican. It is about the intellectual and professional competence to serve as a member of the third co-equal branch of the Government.

I agree. Priscilla Owen met that criterion. She should have been confirmed.

I yield the floor.

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The Washington Times May 10, 2001, Thursday, Final Edition

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The Washington Times

May 10, 2001, Thursday, Final Edition

SECTION: PART A; Pg. A1

LENGTH: 881 words

HEADLINE: Bush sends nominees in 'good faith';
Leahy foresees few foes to 'encouraging' judicial batch

BYLINE: Joseph Curl; THE WASHINGTON TIMES

BODY:
President **Bush** yesterday announced his first batch of judicial nominees, saying he would trust in the "good faith" of the Senate to swiftly confirm them and drawing a confident prediction from a top Democrat that all will pass muster.

"I now submit these nominations in good faith, trusting that good faith will also be extended by the United States Senate," Mr. **Bush** said in an East Room ceremony, flanked by his 11 nominees, more than half of whom are women or racial minorities.

"I urge senators of both parties to rise above the bitterness of the past to provide a fair hearing and a prompt vote to every nominee," he said.

Sen. Patrick J. **Leahy** of Vermont, the ranking Democrat on the Senate Judiciary Committee, who attended yesterday's ceremony, said: "Had I not been encouraged, I would not have been here today." "I know them well enough that I would assume they'll go through all right," he said.

Most of the nominees - which include two blacks, three women and a Hispanic - have conservative ties and backgrounds, but the names of three other candidates for federal judicial positions were trimmed from the list before yesterday's event.

Bush spokesman Ari Fleischer said he did not know when those more-contentious candidates would be nominated.

During yesterday's brief White House event, Mr. **Bush,** in not-so-veiled language intended to put the Senate on the spot, said the confirmation process has became a partisan battleground that has "little to do with the merits of the person sitting before the committee."

"I urge senators of both parties to rise above the bitterness of the past to provide a fair hearing and a prompt vote to every nominee. That should be the case for no matter who lives in this house and no matter who controls the Senate.

"I ask for the return of civility and dignity to the confirmation process. And with this distinguished group of nominees awaiting confirmation, there is no better opportunity than

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right now," Mr. **Bush** said.

The Republican-controlled Senate used its "advice and consent" role of reviewing all federal judicial appointments to reject many of President Clinton's nominees, often by simply not bringing the nomination to a vote.

In his first two years in office - the only time when Democrats controlled the Senate - Mr. Clinton pushed through 129 **judges,** an average of 65 each year. After Republicans took over, he won confirmation of 245 - just 41 per year.

The same was true, however, when Democrats controlled the body and the president was Mr. **Bush's** father. In fact, one of the new president's nominees - U.S. District **Judge** Terrence W. Boyle - was nominated by the first President **Bush** but never voted on in the Senate.

Mr. **Leahy** said that while partisan rancor has gridlocked nominations for years, it need not be so.

"It becomes polarized only if we try to lurch the federal judiciary one way or the other," he said.

But he also said that before he will move forward on the nominations, he will ask the American Bar Association to review them.

"We will submit the nominees to the ABA, so there could be peer review," Mr. **Leahy** said.

That move may rankle some Republicans and Mr. **Bush,** who in March ended the ABA's 54-year advisory role in the process of choosing Supreme Court and other federal **judges,** in part because of association's liberal political activism.

Mr. Fleischer said the more than 100 vacancies represent 17 percent of all positions on the federal bench.

All 11 nominees - of whom seven are sitting **judges,** three practicing lawyers and one a law professor - attended yesterday's White House ceremony, but none spoke to reporters.

Mr. **Bush** said: "As a group, they command broad, bipartisan support among those who know them and who have served with them. I submit their names to the Senate with full confidence that they will satisfy any test of judicial merit."

Also attending the event were Sen. Orrin G. Hatch of Utah, chairman of the Senate Judiciary Committee, Attorney General John Ashcroft, Sen. Strom Thurmond, South Carolina Republican, and Virginia senators George F. Allen and John W. Warner.

Mr. Allen and Mr. Warner, both Republican, said they support the nomination of Roger L. Gregory, first named to the federal court by Mr. Clinton in a controversial "recess" appointment while the Senate was out of session. **Judge** Gregory became the first black **judge** in the 4th Circuit.

Mr. Fleischer said it is "an unprecedented act for a president to renominate a judicial choice to the circuit court whose original nomination was made by a president of the other party. It has never happened before in the history of our country."

But there were signs yesterday that Democrats will seek to oppose the nomination of **Judge** Boyle, a former aide to Sen. Jesse Helms, North Carolina Republican.

"Until we find some constructive process that allows for balance, then I would not support

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any nominee, including **Judge** Boyle," said Sen. John Edwards, North Carolina Democrat.

Mr. **Bush** defended his nominees, saying, "Every **judge** I appoint will be a person who clearly understands the role of a **judge** is to interpret the law, not to legislate from the bench. . . . And all will be exceptional for their humanity and their integrity."

GRAPHIC: Photo (color), Jurist prudence: President **Bush** introduces his 11 nominees to the Federal Appeals Court during a White House ceremony. Pictured in the rear row, from left: **Judge** Terrence Boyle, Michael McConnell, **Judge** Deborah Cook, **Judge** Barrington Parker. Middle row, from left: Jeffrey Sutton, **Judge** Edith Brown Clement, **Judge** Roger Gregory, John Roberts. Front row, from left: **Judge** Dennis Shedd, Miguel Estrada and **Judge** Priscilla Owens., By J.M. Eddins Jr./The Washington Times

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SECTION: PART A; Pg. A1

LENGTH: 830 words

HEADLINE: Democrats give up veto demand after **Bush's** 'gesture'

BYLINE: Audrey Hudson; THE WASHINGTON TIMES

BODY:
Senate Democrats yesterday backed down from demands for veto power over judicial nominees, and said they will move forward with President **Bush's** first 11 candidates.

Rather than a blanket objection, Democrats will review nominees on a case-by-case basis - standard Senate procedure.

Only one nominee, Terrence Boyle to the 4th U.S. Circuit Court of Appeals, is opposed by his home-state senator, John Edwards, North Carolina Democrat. A negative blue slip on the nomination has been submitted, Democrats said. "The result will not be a veto power over **judges,** it will, rather, force the White House to come meet us and act in a moderate way in terms of how they choose **judges,**" said Sen. Charles E. Schumer, New York Democrat.

"I think we ought to move ahead with these **judges** that the president submitted," said Sen. Edward M. Kennedy, Massachusetts Democrat. "I think we ought to move the process ahead with them."

Democrats said they will continue the disputed "blue slip" policy to indicate support or opposition to federal **judges** from home-state senators, but it will not carry the weight of a veto, which they have been demanding for more than a month.

"That's the power they always had," said Sen. Jon Kyl, Arizona Republican.

The White House planned to send 14 nominations to the Senate yesterday, but withheld three nominees objected to by their home-state senators.

In their public statements, Democratic senators declared victory, citing the three withheld nominations, which they called a good-faith gesture from Mr. **Bush.**

Asked if letting the process go forward is a conciliatory gesture from Democrats to the White House, Sen. Joseph R. Biden Jr. of Delaware said "yeah, it is."

"I am pleased the White House has chosen to work with us on this first group," said Senate Minority Leader Tom **Daschle.**

Democrats had earlier refused to take the word of Sen. Orrin G. Hatch, Judiciary Committee

chairman and Utah Republican, that consultation would take place. Now they appear willing to give Mr. Hatch and the president the benefit of the doubt.

As further proof of the Democrats' retreat, they agreed to let key Justice Department nominations held hostage over the veto issue move forward today.

"The president made a gesture and it was met with a gesture from the Democrats," said Ron Bonjean, spokesman for Senate Majority Leader Trent Lott, Mississippi Republican.

"This was a first test to see if they will be cooperative, although there will be many more tests down the road," Mr. Bonjean said.

Mr. Schumer said the Democrats have received "initial signals" the White House "will not try to just roll over us."

If a home-state senator does object to a nomination and it is not resolved through consultation, Mr. Schumer suggested the unified Democratic caucus would block the nomination in committee. The committee is split 9-9, but votes cannot be cast without a quorum of 10 members.

Mr. Kyl called the tactic "absolutely unprecedented" and said he hoped objections would be based on qualifications, not on "political pique or partisan reasons."

Democrats said they were reserving judgment on the first batch of nominees, except to say that most are conservative candidates. Two nominations, however, were first put forth by former President Bill Clinton: Roger L. Gregory to the 4th U.S. Circuit Court of Appeals, and Barrington D. Parker Jr. to the 2nd Circuit.

Republicans are united in their approval of the nominations, and said each "has demonstrated outstanding legal abilities, the highest ethical standards, and a proven record of service to diverse communities," according to a Senate Republican policy paper issued yesterday.

Mr. Hatch did not address the Democrats' retreat, but, in a statement released by his office, said he hoped to move the nominees quickly through his committee and onto the Senate floor for a final vote.

"President **Bush** has nominated top-notch, highly-qualified candidates to the bench," Mr. Hatch said.

"He has reached across the aisle and nominated Democrats and continues to keep his promise to work in a bipartisan fashion to lower the partisan rhetoric in this town," Mr. Hatch said.

"They are all home runs, highly qualified and experienced," Mr. Kyl said.

Sen. Patrick J. Leahy, Vermont Democrat, said nominees selected on their qualifications would likely be confirmed, but that Democrats would block those they believe were picked for their ideology.

The White House also angered Democrats when it removed the American Bar Association (ABA) from the vetting process.

However, Mr. Kennedy said Democratic reviews of the candidates "will specifically include analysis by the ABA and recommendations by the home-state senators."

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"We ought to hear from the Bar Association, we ought to have extensive examination of their backgrounds, we ought to hear what the home senators say about them," Mr. Kennedy said.

* Dave Boyer contributed to this article.

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DELAYS IN SENATE ACTION ON JUDICIAL NOMINATIONS (Senate - June 18, 1998)

Mr. LEAHY. Mr. President, just a couple of weeks ago, I commented in the **Congressional Record** on the Senate majority's poor record in acting on judicial nominees, especially noting those judicial nominees who are either minorities or women. I included a recent letter from the Congressional Hispanic Caucus, which calls upon the Senate Republican leadership to allow votes on the Latino judicial nominees who have languished in the Senate for far too long.

I have also spoken often about the crisis in the second circuit and the need for the Senate to move forward to confirm the nominees to that court who are pending on the calendar.

Judge Sonia Sotomayor is just such a qualified nominee, and she is one being held up by the Republican majority, apparently because some on the other side of the aisle believe she might one day be considered by President Clinton for nomination to the U.S. Supreme Court, should a vacancy arise.

Last week, a lead editorial in the Wall Street Journal discussed this secret basis for the Republican hold against this fine judge. The Journal reveals that these delays are intended to ensure that Sonia Sotomayor not be nominated to the Supreme Court, although it is hard to figure out just how that is logical or sensible.

In fact, how disturbing, how petty, and how shameful: Trying to disqualify an outstanding Hispanic woman judge by an anonymous hold.

I have far more respect for Senators who, for whatever reason, wish to vote against her. Stand up; vote against her. But to have an anonymous hold--an anonymous hold--in the U.S. Senate with 100 Members representing 260 million Americans, which should be the conscience of the Nation, should not be lurking in our cloakrooms anonymously trying to hold up a nominee. If we want to vote against somebody, vote against them. I respect that. State your reasons. I respect that. But don't hold up a qualified judicial nominee.

I was asked last week by Neil Lewis of the New York Times about this circumstance. He correctly reported my response in a front page story this last Saturday. I am offended by this anonymous effort to oppose her prompt confirmation by stealth tactics. Here is a highly qualified Hispanic woman judge who should have been confirmed to help end the crisis in the Second Circuit more than three months ago.

The times Argus recently included an editorial entitled `Partisan Nonsense' on this hold. The editorial notes that Judge Sotomayor rose from a housing project in the Bronx to Princeton, Yale and a federal court appointment by President Bush, a Republican. The editorial notes that the stalling tactics are aggravating the judicial emergency faced by the Second Circuit caused by judicial vacancies for which the Republican leadership in the Senate refuses to consider her, and another worthy nominee. The editorial concludes by urging me to make `a lot of noise over this partisan nonsense.'

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I don't always follow the editorials in my home State. But this one I am happy to follow.

I will continue to speak out on behalf of Judge Sotomayor and all the qualified nominees being stalled here in the U.S. Senate.

Judge Sotomayor in not the only woman or minority judicial nominee who has been needlessly stalled. Indeed, if one considers those nominees who have taken the longest to confirm this year, we find a disturbing pattern:

Hilda Tagle, the only Hispanic woman the Senate has confirmed this year, took 32 months to be confirmed as a district court judge for the Southern District of Texas. That is more than two-and-one-half years.

Judge Richard Paez, currently a district court judge and a nominee to the Ninth Circuit, was first nominated in January 1996. Twenty-nine months latter, Judge Paez's nomination remains in limbo on the Senate calendar.

Nor have we seen any progress on the nomination of Jorge Rangel to the Fifth Circuit or Anabelle Rodriquez to the District Court for Puerto Rico, although her nomination was received in January 1996, almost 29 months ago.

For that matter, we have seen the President's nomination of Judge James A. Beaty Jr., the first African American nominated to the Fourth Circuit, stalled for 30 months, since December 1995. The situation in the Fourth Circuit was the topic of a Washington Post editorial past Saturday. We have seen the attack on Judge Frederica Massiah-Jackson, who would have been the first African-American woman to serve on the Eastern District of Pennsylvania, but who was forced to withdraw. We have seen the nomination of Clarence Sundram held up since September 1995, almost 33 months.

In his annual report on the judiciary this year on New Year's Day, the Chief Justice of the United States Supreme Court observed: `Some current nominees have been waiting a considerable time for a Senate Judiciary Committee vote or a final floor vote. The Senate confirmed only 17 judges in 1996 and 36 in 1997, well under the 101 judges it confirmed in 1994.' He went on to note: `The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.' Which of course is absolutely correct.

For some unexplained reason, judicial nominees who are women or racial or ethnic minorities seem to take the longest in the Senate. Of the 10 judicial nominees whose nominations have been pending the longest before the Senate, eight are women and racial or ethnic minority candidates. A ninth has been delayed in large measure because of opposition to his mother, who already serves as a judge. The tenth is one who blew the lid off the $1.4 million right-wing campaign to `kill' Clinton judicial nominees.

Pending on the Senate calendar, having been passed over again and again, are Judge Sonia Sotomayor, Judge Richard Paez, Oki Mollway and Ronnie White. Held up in committee after two hearings is Clarence Sundram. Still without a hearing are Anabelle Rodriquez, Judge James A. Beaty Jr., and Jorge C. Rangel. What all these nominees have in common is that they are either women or members of racial or ethnic minorities.

Acting to fill judicial vacancies is a constitutional duty that the Senate--and all of its member--are obligated to fulfill. In its unprecedented slowdown in the handling of nominees in the 104th and 105th Congresses, the Senate is shirking its duty. The Senate majority's choices as they stall Hispanic, women

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and minority nominees is wrong and should end.

Mr. President, I have served here for nearly 24 years. I know Members of the Senate. I have enormous respect for so many of them, Republicans and Democrats alike. The vast majority of Senators I have served with do not have any bias or ethnic bias against people. They do not have a religious bias. They do not have a gender bias. But somehow ethnic and gender biases have crept into the stalling of these nominations.

If Senators are opposed to any judge, bring them up and vote against them. But don't do an anonymous hold, which diminishes the credibility and respect of the whole U.S. Senate.

I have had judicial nominations by both Democrat and Republican Presidents that I intended to oppose. But I fought like mad to make sure they at least got a chance to be on the floor for a vote.

I have stated over and over again on this floor that I would refuse to put an anonymous hold on any judge; that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty.

If we don't like somebody the President nominates, vote him or her down. But don't hold them in this anonymous unconscionable limbo, because in doing that, the minority of Senators really shame all Senators.

With that, Mr. President, I see Senators have come back to the floor for their debate. So I ask unanimous consent that copies of the editorials of the Times Argus and the Washington Post, and the report from the New York Times, which I referred to, be printed in the **Record**.

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

[Page: S6522] GPO's PDF

From The Times Argus, June 15, 1998

[FROM THE TIMES ARGUS, JUNE 15, 1998]

Partisan Nonsense

You may never have heard of a federal district judge named Sonia Sotomayor, and it appears that several key Republicans are hoping you never will. They'd like her to simply vanish from the nation's political radar screen, but Vermont's Sen. Patrick Leahy is among those who stand in their way.

It appears these political foes of President Clinton are afraid that if they confirm Judge Sotomayor's nomination to the 2nd District U.S. Circuit Court of Appeals, as Clinton has proposed, her next stop will be a seat on the United States Supreme Court.

Although Sotomayor grew up in the sprawling housing projects of the Bronx, where success stories are less than commonplace, she managed to graduate with high honors from Princeton, become editor of the Yale Review and earn a reputation as an effective federal prosecutor.

In 1992, she was appointed to the federal bench by then-President George Bush. That would seem to

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suggest she had bipartisan support, but that was before some nervous Republicans began to fear there may soon be an opening on the Supreme Court. That opening, they worried, would allow Clinton to nominate Sotomayor, a woman and an Hispanic.

Of course there is no vacancy on the high court, nor has there been any clear signal that there will be one any time soon. Justice John Paul Stevens, who many believe will be the first of the present batch of justices to retire, has already hired his clerks for the next court session. In addition, Sotomayor's name was not on a list of recommended nominees the Hispanic National Bar Association submitted to Clinton.

But even if there was a pending vacancy, what is it about Judge Sotomayor that would make Republicans so worried? Is it that she's Hispanic? Is it that she's too liberal, or too much a judicial activist?

For the record nobody is saying, but off the record, some Senate aides concede their bosses are worried she would, indeed, be an activist. Interestingly, conservative supporters of Judge Sotomayor's nomination vehemently disagree with that assessment.

Enter Sen. Leahy, the senior Democrat on the Judiciary Committee. In blunt terms, Leahy has criticized the Republicans who, behind the scenes and not for attribution, are seeking to scuttle Sotomayor's nomination.

`Their reasons are stupid at best and cowardly at worst,' Leahy told a New York Times reporter. `What they are saying is that they have a brilliant judge who happens to be a woman and Hispanic and they haven't the guts to stand up and argue publicly against her on the floor. They just want to hide in their cloakrooms and do her in quietly.'

Those are strong words, particularly for the United States Senate, but Leahy's anger is genuine and justified.

The campaign against Judge Sotomayor began on the editorial pages of the ultra-conservative Wall Street Journal and was given much wider exposure when it was taken up by Rush Limbaugh, the right wing radio talk show host.

The Journal was upset with Sotomayor's ruling that a coalition of New York businesses promoting a program for the homeless had violated federal law by not paying the minimum wage. This, in the Journal's opinion, constituted `judicial activism.'

But a well-known conservative, Gerald Walpin, has rushed to Sotomayor's defense and his message is worth heeding.

`If they had read the case they would see that she said she personally approved of the homeless program but that as a judge she was required to apply the law as it exists,' Walpin commented. `She wrote that the law does not permit an exception in this case. That's exactly what conservatives want a non-activist judge who does not apply her own views but is bound by the law.'

What's particularly aggravating by the stalling tactics of Clinton's foes is that they come at a time of major judicial delays caused by the existing vacancies on the bench Judge Sotomayor would fill. The chief judge of the circuit, a conservative Republican, has written about having to declare `judicial emergencies' because of these vacancies.

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We hope Sen. Leahy makes a lot of noise over this partisan nonsense.

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[Page: S6523] GPO's PDF

From the New York Times, June 13, 1998

[FROM THE NEW YORK TIMES, JUNE 13, 1998]

G.O.P., Its Eyes On High Court, Blocks a Judge

(BY NEIL A. LEWIS)

Washington, June 12--Judge Sonia Sotomayor seemed like a trouble-free choice when President Clinton nominated her to an appeals court post a year ago. Hers was an appealing story: a child from the Bronx housing projects who went on to graduate summa cum laude from Princeton and become editor of the Yale Law Journal and then a Federal prosecutor.

Moreover, she had been a trial judge since 1992, when she was named to the bench by the last Republican president George Bush.

But Republican senators have been blocking Judge Sotomayor's elevation to the appeals court for a highly unusual reason: to make her less likely to be picked by Mr. Clinton for the Supreme Court, senior Republican Congressional aides said in interviews.

The delay of a confirmation vote on Judge Sotomayor to the United States Court of Appeals for the Second Circuit, based in New York, is an example of the intense and often byzantine political maneuverings that take place behind the scenes in many judicial nominations. Several elements of the Sotomayor case are odd, White House officials and Democrats in Congress say, but the chief one is the fact that there is no vacancy on the Supreme Court, and no firm indication that there will be one soon. Nor is there any evidence of a campaign to put Judge Sotomayor under consideration for a seat if there were a vacancy.

Judge Sotomayor's nomination was approved overwhelmingly by the Senate Judiciary Committee in March. Of the judicial nominees who have cleared the committee in this Congress, she is among those who have waited the longest for a final vote on the floor.

Senate Republican staff aides said Trent Lott of Mississippi, the majority leader, has agreed to hold up a vote on the nomination as part of an elaborate political calculus; if she were easily confirmed to the appeals court, they said, that would put her in a position to be named to the Supreme Court. And Senate Republicans think that they would then have a difficult time opposing a Hispanic woman who had just been confirmed by the full Senate.

`Basically, we think that putting her on the appeals court puts her in the batter's box to be nominated to the Supreme Court,' said one senior Republican staff aide who spoke on the condition of anonymity. `If Clinton nominated her it would put several of our senators in a real difficult position.'

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Mr. Lott declined through a spokeswoman to comment.

Judge Sotomayor sits on Federal District Court in Manhattan, and the aides said some senators believe that her record on the bench fits the profile of an `activist judge,' a description that has been used by conservatives to question a jurist's ability to construe the law narrowly. It is a description that Judge Sotomayor's supporters, including some conservative New York lawyers, dispute.

Senator Patrick Leahy of Vermont, the senior Democrat on the Judiciary Committee, was blunt in his criticism of the Republicans who are blocking a confirmation vote. `Their reasons are stupid at best and cowardly at worst,' he said.

`What they are saying is that they have a brilliant judge who also happens to be a woman and Hispanic. and they haven't the guts to stand up and argue publicly against her on the floor,' Senator Leahy said. `They just want to hide in their cloakrooms and do her in quietly.'

The models for the strategy of putting candidates on appeals courts to enhance their stature as Supreme Court nominees are Judge Robert H. Bork and Judge Clarence Thomas. Both were placed on the Court of Appeals for the District of Columbia Circuit in part to be poised for nomination to the Supreme Court. Judge Bork was denied confirmation to the Supreme Court in 1987 and Judge Thomas was confirmed in 1991, in both cases after bruising political battles.

The foundation for the Republicans's strategy is based on two highly speculative theories: that Mr. Clinton is eager to name the first Hispanic person to the Supreme Court and that he will have such an opportunity when one of the current justices, perhaps John Paul Stevens, retires at the end of the current Supreme Court term next month.

Warnings about the possibility of Judge Sotomayor's filling Justice Stevens's seat was raised by the Wall Street Journal's editorial pages this month, both in an editorial and in an op-ed column by Paul A. Gigot, who often reflects conservative thinking in the Senate.

Although justices often announce their retirements at the end of a term, Justice Stevens has not given a clue that he will do so. He has, in fact, hired law clerks for next year's term. The Journal's commentary also criticized Judge Sotomayor's record, particularly her March ruling in a case involving a Manhattan business coalition, the Grand Central Partnership. She rules that in trying to give work experience to the homeless, the coalition had violated Federal law by failing to pay the minimum wage.

Gerald Walpin, a former Federal prosecutor who is widely known in New York legal circles as a staunch conservative, took issue with the Journal's criticism.

`If they had read the case they would see that she said she personally approved of the homeless program but that as a judge she was required to apply the law as it exists,' he said. `She wrote that the law does not permit an exception in this case. That's exactly what conservatives want: a nonactivist judge who does not apply her own views but is bound by the law.' Mr. Bush nominated Judge Sotomayor in 1992 after a recommendation from Daniel Patrick Moynihan, New York's Democratic Senator.

It also remains unclear how some Senate Republicans came to believe that Judge Sotomayor was being considered as a candidate for the Supreme Court. Hispanic bar groups have for years pressed the Clinton Administration to name the first Hispanic justice, but White House officials said they are not committed to doing so. The Hispanic National Bar Association has submitted a list of six candidates for the Supreme Court to the White House. But Martin R. Castro, a Chicago lawyer and official of the group,

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said Judge Sotomayor's name is not on the list.

The only Republicans to vote against her in March were Senator John Kyl of Arizona and Senator John Ashcroft of Missouri. The committee's other conservative members, including Orrin G. Hatch of Utah and Strom Thurmond of South Carolina, voted in her favor. Mr. Kyl and Mr. Ashcroft both declined to comment today.

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From the Washington Post, June 13, 1998

[FROM THE WASHINGTON POST, JUNE 13, 1998]

Unpacking the Court

The saga of the North Carolina seats on the U.S. Court of Appeals for the 4th Circuit is a caricature of the power individual senators have to hold up judicial nominations. In 1990 Congress added some seats to the 4th Circuit, including one for North Carolina. to this day--7 1/2 years later--that seat remains vacant. The reason is a byzantine power play by Sen. Jesse Helms.

The first nomination to the ghost seat was made by President Bush in 1991. He picked a conservative district court judge and Helms favorite named Terrence Boyle. That nomination was dropped--much to Mr. Helm's fury--when Mr. Bush subsequently lost the 1992 election. Since then Mr. Helms has stymied President Clinton's efforts to fill the seat. When President Clinton named Rich Leonard to it late in 1995, Mr. Helms blocked the nomination, and the Senate never acted on it. With no prospect of success, the nomination was not resubmitted in the next Congress. What's more, since Judge Dixon Phillips Jr. took senior status in 1994 and thereby opened another North Carolina slot on the court, Mr. Helms has also blocked the administration's attempts to fill that seat. As a result, the president's choice--U.S. District Judge James Beaty Jr: has been in limbo for 2 1/2 years without getting even a hearing. Mr. Helms has not even indicated to the administration what sort of nominees might be acceptable.

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CONGRESSIONAL RECORD -- *SENATE*

Wednesday, March 19, 1997

105th Congress, 1st Session

Cong Rec S 2538

REFERENCE: ,No.

TITLE: SETTING THE RECORD STRAIGHT ON JUDICIAL NOMINATIONS

SPEAKER: Mr. BIDEN; Mr. SARBANES; Mr. HELMS

TEXT:

Madam President, I have not spoken on judges this year, but having worked on it for so many years with my friend from Utah, having either been the ranking member or chairman of that committee. But let me make one point.

It is one thing to say that we are going to disagree on judges. We did that when we were in control. We did that. And we said that all the judges that have been nominated here by two successive Republican Presidentswe picked seven out of a total of over 500we said we disagree with these judges. The most celebrated case was Judge Bork, and less celebrated cases were people who have gone beyond being judges. Some are Senators. But the bottom line was that we understand that.

But what I do not understand is this notion and all of the talk about activist judges without any identification of who the activist judges are. It is one thing for the Republicans to say that we are not going to vote for or allow activist judges. We understand that. We are big folks. We understand baseball, hardball. We got that part. No problem.

But what I do not understand is saying we are not going to allow

whether or not I have an ideological problem with them.

Mr. SARBANES. Will the Senator yield. It is worse than that. It is not whether you let the President have his nominees confirmed. You will not even let them be considered by the Senate for an upordown vote. That is the problem today. In other words, the other side will not let the process work so these nominees can come before the Senate for judgment. Some may come before the Senate for judgment and be rejected by the Senate. That is OK.

Mr. BIDEN. Fair enough.

Mr. SARBANES. But at least let the process work so the nominees have an opportunity and the judiciary has an opportunity to have these vacant positions filled so the court system does not begin to break down because of the failure to confirm new judges.

Mr. BIDEN. If the Senator will yield, let me give an example of what you just said. I know you know, but it is important for the Record.

I meet every yearI will not now because I am not the top Democrat on the committee. But every year for, I don't know, 14 or 15 years, I meet with what is called the Judicial Conference a legislatively organized body where the Congress says the court can have such a function, where we look for recommendations.

I might add, by the way, you may remember when there was a Republican President named Reagan, the Senator from Delaware introduced a bill to increase the number of Federal judgeships by 84. Why did I do that? I

did that because the Federal court came to us, the Judicial Conference, and said, "Here is our problem. We don't have enough judges to administer justice in a timely fashion in this country. And there is a backlog on all these criminal cases."

I must admit to the Senator, when they came to me with that request, I knew the problem I was going to have. I was going to go into a Democratic caucus and say, by the way, a Republican President, who is a fine man but the most ideological guy we had in a long time, who announced he was going to appoint only very conservative judges, I was now going to give him 84 more than he had.

I realized that was not a politically wise thing for me to do. But, listening to the court, I did just that. My recollection is the Senator from Maryland stood with me and said, "I don't like it. I admit, I am not crazy about 84 more judges being appointed by Ronald Reagan. But the court needs to be filled."

Now we have the strange happening, the courts come back to us and sayand they do this in a very scientific waywe not only need the vacancies filled, we need more judges than we have. They cite, as the Senator is very familiar with, they cite the backlog, they give the rationale that cases are being backed up. Guess what? The idea that we will even get a chance to discuss a judgeship bill, I predict to my friend from Maryland, on this floor is zerozero. Not only that, to further make the point, this is the first time in the 24 years that I have been a Senator, in 24 years, the first time I have ever heard anybody come to the floor and say: You know, we should basically decommission judgeships.

The ninth circuit is the busiest circuit in America, out in California. One of our colleagues, a very wonderful guy, a nice guy,

says, "I am not going to let any other judge be in the ninth circuit"notwithstanding they have five vacancies, if I am not mistaken, and they are up to their ears in work. This started last year when I was in charge of the Democratic side. He said, "I am not going to let anybody go through until the ninth circuit splits into two circuits."

I said, "Why do you want it to split?"

He said, "The reason I want it to split is I don't like the fact that California judges are making decisions that affect my State."

The distinguished Senator from Idaho is shaking his head. He agrees. He is in that circuit. It is painful to point this out, but the reason why there is a Federal court is so there is not Illinois, Indiana, Idaho, California justice. There is one uniform interpretation of the Constitution. That is the reason we have a Federal circuit court of appeals.

Now, this is quite unusual. We haveand I was not referring to the distinguished Senator from Idaho, who is on the floor, when I said, "there was a Senator." That is not to whom I am referring. But another one of our colleagues said he is not going to let anybody go through until there is a split, because he does not like the idea that decisions relating to his State are being made by judges who are not from his State or are not from States of similar size. That is, interestingly, an effectively rewrite of the Constitution of the United States of America. I do not think the Senator thought it in those terms, but that is literally what it is.

Now I am being told, OK, unless we, in fact, split the circuitand

by the way, I am not opposed to splitting the circuit. We split the fifth circuit because when we got to the point where Florida grew so bigFlorida and Mississippi and Alabama and Louisiana, they are all in the same circuitbut they got so big, because of population growth, we saidthe court recommended, we agreedthat it should be split into two circuits. We understand that. I am not opposed to that. I am not arguing about that. But the idea that someone says, "Until you do it my way, until you can assure me I am not going to be associated with that State of California, I am not going to let any vacancies be filled"

Mr. SARBANES. If the Senator will yield, in effect what is happening is the court system is being held hostage, so it is not able to function properly as a court system should. I submit that is an irresponsible tactic to use. As Members of the Congress, the first branch of Government, we have a responsibility to see that the court system can function in a proper fashion.

The Senator from Delaware, when he was chairman of the committee, always measured up to that responsibility, I think often taking a lot of political heat for doing it. But he was out to make sure the system could function. He had Republican Presidents nominating judges. He processed their nominations. He brought them to the floor of the Senate. He gave the Senate a chance to vote on them up or down for those people to get confirmed. That process is breaking down.

Mr. BIDEN. I voted for all of them but seven, I might add. There were only seven times that I voted against any of those nominees.

Mr. SARBANES. That process, I repeat, is now breaking down.

The other thing that is happening, as he says, instead of disagreeing

with the qualifications of a nominee, the other side says, "We don't really need the position."

Mr. BIDEN. That is right.

Mr. SARBANES. And that is what we heard on Merrick Garland. In fact, when he first came up here, he was nominated for the 12th position on the D.C. circuit. They said, "We don't need that position. We have nothing against Merrick. He is a wonderful fellow, of course. We just don't think we need that 12th position." Of course, that does a lot for Merrick Garland. He's sitting, waiting to join the court. Then someone already on the court took senior status, and then they had two vacant positions, the 11th and 12th. Merrick Garland is nominated. He's now up for the 11th position; not the 12th position, the 11th position. The majority is right back here on the floor and it says, "We don't need this position." This is the 11th position. They never made that argument last year when he was going for the 12th position. Then they said we need the 11th, we don't need the 12th. Now they are back, some, todayfortunately, they did not prevailsaying we do not need either the 11th or the 12th position.

Mr. BIDEN. If the Senator will yield on that point, it is probably going to get him in trouble, but I want to compliment the chairman of the committee. The chairman of the committee did not buy into that argument. The chairman of the committee took the position on this that we should act, and he had been pushing this for some time.

Again, I see my distinguished friend, who now I work with in another capacity, as the minoritythe euphemism we use is ranking memberof the Foreign Relations Committee. We have much less disagreement than we have on some issues relating to judges. But, with him here, I can

remember that during the last days when the Senator from Delaware was trying to push through judgeson October 8, 1992, the last day of the session, with President Bush as President of the United States, the Senator from Delaware pushed through seven Republican judgesthe last day.

I will bet you that has not happened very often in this place with Democrats or Republicans: The last day, seven.

The reason I mention that is one of my distinguished colleagueswe have very different views, but I like him a lotwalked up to me and he was from a State where there were two Republican Senators, and two of those judges were his. He walked up and shook my hand. This will not go in the Recordit will go in the Record, but his name won't, but my colleagues will know who he is. He shook my hand and said, "Joe, you're a nice guy. I really appreciated it." He says, "Of course, you know I would never do this for you."

I like him because he is straightforward and honest. He meant it, and that's why we get along so well. I am

not referring to the Senator from North Carolina. He said, "I'd never do this for you." The point being, not that Biden is a good guy or Biden is a stupid guy, the point being that the court is in desperate trouble in a number of jurisdictions. In southern California and south Florida, and in a number of places where there are drug cases that are backed up, a number of places where there are significant civil case backlogs, a number of places where population growth is straining the court, they need these vacancies filled.

I respectfully suggest that it is a rareit is a raredistrict court nominee by a Republican President or a Democratic President who, if you first believe they are honest and have integrity, have any reason to vote against them. I voted for Judge Bork, for example, on the circuit court, because Judge Bork I believed to be an honest and decent man, a brilliant constitutional scholar with whom I disagreed, but who stood there and had to, as a circuit court judge, swear to uphold the law of the land, which also meant follow Supreme Court decisions. A circuit court cannot overrule the Supreme Court.

So any member who is nominated for the district or circuit court who, in fact, any Senator believes will be a person of their word and follow stare decisis, it does not matter to me what their ideology is, as long as they are in a position where they are in the general mainstream of American political life and they have not committed crimes of moral turpitude, and have not, in fact, acted in a way that would shed a negative light on the court.

So what I want to say, and I will yield because I see my friend from South CarolinaNorth Carolina, I beg your pardon. I am used to dealing with our close friend in the Judiciary Committee who is from South Carolina. I seem to have the luck of getting Carolinians to deal with, and I enjoy them. I will yield the floor by saying, I will come back to the floor at an appropriate time in the near term, immediately when we get back from the recess, and I will, as they say, Madam President, fill in the blanks in terms of what the absolute detail and each of the numbers are, because I have tried to recall some of them off the top of my head, not having intended to speak to this issue when I walked across the floor earlier.

Let it suffice to say at the moment, at least for me, that it is

totally appropriate for any U.S. Senator to voice his or her opposition to any nominee for the Court, and they have a full right to do that. In my study of and teaching of constitutional law and separation of powers issues, there is nothing in the Constitution that sets the standard any Senator has to apply, whether they vote for or against a judge.

But I also respectfully suggest that everyone who is nominated is entitled to have a shot, to have a hearing and to have a shot to be heard on the floor and have a vote on the floor.

We had a tie vote in the committee, Madam President, on one of the Supreme Court nominees. I was urged by those who opposed himand I opposed this particular nomineeto not report it to the floor. My reading of the Constitution, though, is the Judiciary Committee is not mentioned in the Constitution. The Judiciary Committee is not mentioned. The Senate is. We only in the Judiciary Committee have the right to give advice to the Senate, but it is the Senate that gives its advice and consent on judicial nominations.

I sincerely hope, and I have urged the administration to confer with Republican Senators before they nominate anyone from that Senator's State. I think that is totally appropriate. I think it is appropriate, as well, that Republican Senators, with a Democratic President, have some input, which Democrats never had with the last two Republican Presidents. I think that is appropriate.

But I do not think it is appropriate, if this is the caseand I do not know for certain, it just appears to beif the real hangup here is wanting to reach an informal agreement that for every one person the President of the United States gets to nominate, the Republican Party will get to nominate someone, the Republican Party in the Senate. Or

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for every two persons that the President nominates, the Republicans get to nominate one.

It is totally appropriate for Republicans to reject every single nominee if they want to. That is within their right. But it is not, I will respectfully request, Madam President, appropriate not to have hearings on them, not to bring them to the floor and not to allow a vote, and it is not appropriate to insist that we, the Senatorswe, the Senatorsget to tell the President who he must nominate if it is not in line with the last 200 years of tradition.

Again, I did not intend speaking at all on this, other than the fact I walked through and it was brought up, and since I was in that other capacity for so long, I felt obliged to speak up.

I see my friend from North Carolina is here. I do not know if he wishes to speak on judges or foreign policy matters, but whichever he wishes to speak on, I am sure it will be informative. I yield the floor.

Mr. HELMS addressed the Chair.

The PRESIDING OFFICER (Mr. Brownback). The Senator from North Carolina is recognized.

Mr. HELMS. Mr. President, let me say that I always enjoy my friend, Senator Bidenall of it. You have to wait awhile sometimes, but the enjoyment is nonetheless sincere.

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activist judges and then not identifying who those activist judges are. This is kind of what is going on here, and no one wants to say it. But since I have the reputation of saying what no one wants to say, I am going to say it.

Part of what is going on here is, and in the Republican caucus there are some who say, No. We want to change the rules. We want to make sure, of all the people nominated for the Federal bench, that the Republican Senators should be able to nominate half of them, or 40 percent of them, or 30 percent of them. That is malarkey. That is flat out malarkey. That is blackmail. That has nothing to do with activist judges.

I do not doubt the sincerity of my friend from Utah. We have worked together for 22 years. But here is my challenge. Any judge nominated by the President of the United States, if you have a problem with his or her activism, name it. Tell us what it is. Define it like we did. You disagreed. You disagreed with the definition. But we said straight up, "Bang. I do not want Bork for the following reasons." People understand that. But do not try to change 200 years of precedent and tell us that we are not letting judges up because we want the Republican Senator to be able to name the judge. Don't do that, or else do it and do it in the open. Let's have a little bit of legislating in the sunshine here. Do it flat in the open.

I see my colleagues nodding and smiling. I am sort of breaching the unspoken rule here not to talk about what is really happening. But that is what is really happening. I will not name certain Senators. But I have had Senators come up to me and say, Joe, here is the deal. We will let the following judges through in my State if you agree to get the President to say that I get to name three of them. Now folks, that is a

change of a deal. That is changing precedent. That isn't how it works. The President nominates. We dispose one way or another of that nomination. And the historical practice has beenand while I was chairman we never once did thatthat never once that I am aware of did we ever say, "By the way, we are not letting Judge A through unless you give me Judges B and C."

Now, let me set the record totally straight here. There are States where precedents were set years ago. The Republican and Democratic Senator, when it was a split delegation, have made a deal up front in the open. In New York, Senator Javits and Senator Moynihan said: Look. In the State of New York, the way we are going to do this is that whomever is the Senator representing the party of the PresidentI believe they broke it down to 60for every two people that Senator gets to name, the Senator in the party other than the President gets to name one. OK, fine. Jacob Javits did not go to Pat Moynihan and demand that he was going to do that. Moynihan made the offer, as I understand it, to Jacob Javits. That is not a bad way to proceed.

But now to come along and say, "By the way, in the name of activist judges, we are not going to move judges" is not what this is about.

I might point out that all the talk last election that started off it all fizzled because it did not go anywhereabout how there is going to be an issue about activism on the courts, we pointed out that of all the judges that came up in Clinton's first term, almost all of them were voted unanimously out of this body by Democrats and Republicans, including the former majority leader. He only voted against three of all the nominees, then he argued, by the way, that Clinton nominated too many activist judges. And then it kind of fizzled when I held a little press conference, and said, "By the way. You voted for all of them." It kind of made it hard to make this case that they were so

activist.

So look. Let me say that I will not take any more time, but I will come back to the floor with all of the numbers and the details. But here is the deal.

If the Republican majority in the Senate says, "Look, the following 2, 5, 10, 12, 20 judges are activist for the following reasons, and we are against them," we understand that. We will fight it. If we disagree, we will fight it. But if they come along and say, "We are just not letting these judges come up because really what is happening is they are coming to guys like me and saying, Hey, I will make you a deal. You give me 50 percent of judges, and I will let these other judges go through.' " Then that isn't part of the deal.

Look, I have a message to the Court. I know the Court never reads the Congressional Record, and Justice Scalia said that we should not consider the Record for legislative history because everybody knows that all the Congressional Record is is what Senators' staff say and not what Senators know. He is wrong. But that is what he said. Maybe they don't read it. But I want to send a message.

Madam President, when I was chairman of the committee and there was a Republican President named Reagan and a Republican President named Bush, the Judicial Conference on a monthly basis would write to me and say, "Why aren't you passing more judges?" They have been strangely silent about the vacancies that exist. Now, I agree that the administration has been slow in pulling the trigger here. They have not sent enough nominees up in a timely fashion. And I have been critical of them for the last 2 years, Madam President. But that is not the case now. All I am saying to you is, as they say in parts of my State, "I

smell a rat here." What I think is happeningand I hope I am wrong is that this is not about activism.

This is about trying to keep the President of the United States of America from being able to appoint judges, particularly as it relates to the courts of appeals.

Now, what is happening is what happened today. Merrick Garland was around for years. Now, what is going to happen is they are going to say we reported out a circuit court of appeals judge. Aren't we doing something. The truth of the matter is the proof will be in the pudding several months from now when we find out whether or not we are really going to move on these judges.

Let me point out one other thing. And I see my friend from Maryland in the Chamber, and I will yield particularly since I had not intended speaking at this moment.

Mr. SARBANES. I want to ask the Senator a couple questions when he finishes his statement.

Mr. BIDEN. The point I wish to make is this. When I was chairman of the committee and a Republican was President, we held, on average, a hearing for judges once every 2 weeks and had usually five judges, circuit court and district court, who we heard.

Last year we essentially had one hearing every other month and we had to fight to get three to four on the agenda to be heard.

Mr. SARBANES. Will the Senator yield for a question.

Mr. BIDEN. I will be happy to.

Mr. SARBANES. This is a chart that Senator Leahy, now the ranking member on the Judiciary Committee, used today in the course of the Merrick Garland debate which I think is enormously instructive. It is the number of judges confirmed during second Senate sessions in Presidential election years.

Mr. BIDEN. I got it.

Mr. SARBANES. Now, in 1996, with a Democratic President, President Clinton, and a Republican Senate, the Senate confirmed no judges for the court of appeals, none whatsoever, and 17 judges for the district court. Now, in 1992, the previous election yearthat was when Mr. Bush was President

Mr. BIDEN. And I was chairman.

Mr. SARBANES. And if I am not mistaken, the distinguished Senator from Delaware was the very able chairman of the Judiciary Committee.

Mr. BIDEN. I did not say "able." I was chairman.

Mr. SARBANES. I am suggesting the Senator is able. I am prepared to make that statement. We confirmed 11 court of appeals judges and 55I repeat, 55district judges in an election year. Now, that gives you some sense of how the Democratic majority in the Senate, led at the time by the able Judiciary Committee chairman, was dealing with this matter, essentially in a nonpolitical way.

In 1988, when I think, again, the Senator from Delaware was still the chairman of the Committee

Mr. BIDEN. That is correct.

Mr. SARBANES. With President Reagan, a Republican Presidentagain, in an election yearwe confirmed 7 court of appeals judges and 35 district court judges. Actually, the 35 that we confirmed in that election year was better than the Republican Senate did for President Reagan in 1984 when they only confirmed 33 judges. In any event, clearly this performance in these years is in marked contrast to what happened in 1996 and what apparently is continuing now in 1997. Merrick Garland was the first judge approved this year.

Mr. BIDEN. If I may respond to the Senator, obviously the facts are correct, but I think it worth elaborating a little bit more on the facts. I saw my very able colleague, the present chairman of the Judiciary Committee, on television the other day, and he was talking about the number of judges that were "left hanging," who were not confirmed and sent back to the administration at the end of 1992, the Bush administration. And he cited an accurate number. But as my very distinguished friend, who is, as well, a scholar, knows, there is an old expression attributed to Benjamin Disraeli, who said there are three kinds of lies: lies, damn lies, and statistics.

What my able friend from Utah did not mention is that just like President CarterCarter's judges is a separate charge we can go back to, but just like President Clinton, President Bush did not get his nominees up here until the end of the process.

In other words, they were late getting here. Notwithstanding the fact that he was late in getting his nominees up, the Senator may remember in the caucus over the objection of some Democrats who said the Republicans would never do this, I insisted we confirm judges up to the day we adjourned the Senate. During the last week the Senate was in that year, we confirmed seven judges. I could have easily just sneezed and they would not have been confirmed. And the fact is the reason why we did not confirm more is because we did not have time to hold the hearings and we were holding hearings on 20 or more a month.

Mr. SARBANES. If the Senator will yield, I can recall the Senator was holding hearings right up into the fall of the election year and judges were being brought to the floor of the Senate and being confirmed. And he is absolutely correct; there were some

Mr. BIDEN. Republican judges.

Mr. SARBANES. Yes, Republican judges. And there were some Members on the Democratic side who said, why are you doing this? We are about to have an election and the result may give us control of the White House. And the Senator from Delaware said, look, we ought not to have politics play a heavy hand in the judicial confirmation process.

One of the worst things that is happening in the Senate is what amounts to a heavy politicizing of the judicial confirmation process that is taking place in this body, and that was reflected in the performance in 1996 as compared with the performance in 1992 when the Senator from Delaware did his very best to keep politics out of the process, to fill judicial posts and to let the judiciary function as an independent branch of our Government. What is happening here is extremely serious. And of course, the Senator, with his candor, came to

the floor and sort of stripped away the veneer and laid out what is going on behind the scenes, which is a complete departure from past practices. When there were Republican Presidents, I did not play a role in whom the Presidents sent up to the Senate to be nominated and confirmed in the job

Mr. BIDEN. If the Senator will yield, I was chairman or ranking member of that committee for 14 years. My distinguished colleague from Delaware is Senator Roth, who is my close friend. Every single Federal judge in the last 24 years who has been appointed in the district of Delaware or the third circuit has been appointed by Senator Roth. I did not expect, did not ask, and not once was ever consulted about who he would appoint, and I supported every one that he sent up. Not one single time was I made aware of anything other than after the fact, which is OK. I am not complaining about that.

Mr. SARBANES. That was the system.

Mr. BIDEN. That was the system. Not one single time. And I was chairman of the committee.

Now, I would point out one other thing to my friend. I want to have complete candor. If one considers taking judges based on their ideology and call that political, yes, we Democrats were political, as well. I am not complaining about that. I am not complaining about anybody who stands up and says I do not want Judge Smith, the President's nominee, because I think he will be bad on the court for the following reasons and comes to the floor and makes the case. I do not quarrel with that because I think that is the prerogative of the Senate and any Senator. What I am quarreling with is a different kind of politicizing, and that is drawing the conclusion that because I now control the Senate, I am not going to let the President of the United States have nominees

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JUDICIAL NOMINATIONS (Senate - June 16, 1997)

Mr. LEAHY. Mr. President, I have spoken on the floor many, many times about the pace of the Senate confirming judicial nominees. The distinguished Presiding Officer, my friend, has had to do double duty because he has had to listen to me do it in the Judiciary Committee, too, on occasion. I commend his equanimity and patience in listening to my remarks.

Mr. President, I urge all Senators, Republican and Democrat alike, to move forward on the confirmation of judicial nominees. This weekend, on one of the ubiquitous television talk shows, the distinguished majority leader said he intended to block action on all nominations except military nominees until President Clinton fills four seats on the Federal Election Commission. The distinguished majority leader, of course, has the right and power to control the calendar of the Senate. I have no question about that. But I hope he would reconsider this policy for all nominees, but especially for the Federal judiciary.

The distinguished majority leader has a concern with the President on the FEC. I am not going to get in the middle of that issue. Both sides claim they are moving forward with nominees. I have to assume the majority leader of the U.S. Senate has ways of bringing pressure to bear on the President of the United States without having to cripple the Federal judiciary or to do things that might appear, whether intended or not, to diminish the independence of the Federal judiciary.

For example, we have four noncontroversial nominees at the moment in the Federal circuit and district courts. They should not get delayed in this political squabble. They enjoy strong bipartisan support. They were unanimously reported to the full Senate by the Judiciary Committee with all Democrats and all Republicans on that committee voting for them. More importantly, they are desperately needed in the courts which they have been nominated.

Let me give an example. Alan Gold has been nominated to be a U.S. district court judge for the southern district of Florida. Now, this is a noncontroversial nominee but it is also one desperately needed. He is an extremely well qualified nominee. The Judiciary Committee unanimously reported his nomination last month, and the Southern District Court of Florida desperately needs him to help manage its growing backlog of cases. This is in a district that has one of the fastest-growing populations in this country. In fact, during his confirmation hearing, the distinguished Republican Senator from Florida, Senator **Mack**, told the Judiciary Committee, `This appointment comes at a critical time for south Florida. The Supreme Court's recent decision in Lenz versus Mathis has resulted in the early release of hundreds of violent criminals back on the streets and brought about a crisis of confidence in the safety of our neighborhood. This unsettling feeling made it especially critical for South Florida to have a full complement of the judges administering the laws to fight violent crime.'

We first received Alan Gold's nomination in February of this year. The President nominated him for a vacancy on the district court for the southern district of Florida. This vacancy existed since shortly after the elections last year. He has the support of both Senator **Graham** and Senator **Mack**.

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He had a hearing on May 7. The Judiciary Committee reported his confirmation to the full Senate on May 22. This is the way the judicial confirmation process should work. The position had been open only a few months. The Senate was out at the time the vacancy occurred. Shortly after the elections, the President moved quickly with a nominee that had strong bipartisan support for his home State senators. The Judiciary Committee moved very quickly,

and the nomination passed out unanimously. We know that there is a major need for a judge there. Alan Gold's nomination is now pending on the Senate calendar, awaiting action on the Senate floor. This process should not become entangled in partisan squabbling.

Instead, we should look at the one branch of our Government that is supposed to be nonpartisan--the judiciary--and not allow the Federal judiciary to be caught up in partisan squabbling of Senators or with the White House. We should move this nomination through the Senate very quickly.

Another example of a judicial nomination that we should move quickly is in the northern district of Georgia, where Thomas Thrash, Jr., has been nominated to be a U.S. district judge. We unanimously reported his nomination to the Senate last month, on May 22. But this is also a district--the northern district of Georgia--there in the eleventh circuit that desperately needs Thomas Thrash to help manage a growing backlog of cases.

Now, we received his nomination in May 1996--over a year ago. He was accorded a hearing last Congress, on July 31, 1996. But his nomination got caught in the election year freeze, which said we will not move nominations after a certain time in a Presidential election year. The President nominated him on the first day of this Congress for the same vacancy. That vacancy has existed since March of 1996, for over a year. He had a confirmation hearing on May 7. He was supported by both Senator **Cleland** and Senator **Coverdell**, one Democrat and one Republican from Georgia, and was reported to the Senate by the Judiciary Committee 2 weeks later. Now, this is not a case that should be held up because of a partisan squabble.

Also pending on the calendar is Eric Clay to be a circuit judge for the sixth circuit, another noncontroversial, well-qualified nominee. The Judiciary Committee unanimously reported his nomination to the Senate on May 22 of this year. Now, the sixth circuit desperately needs help in managing a growing backlog of cases. They have three vacancies, two of which have been designated judicial emergencies by the Judicial Conference of the United States. I mention the judicial emergencies, Mr. President, because this is not a case of some mere debating point; this is the Federal judiciary of this country with emergencies, where they need judges, where we could confirm the judges, and, frankly, the U.S. Senate is not doing its job.

We first received Eric Clay's nomination in March 1996. He was accorded a hearing on March 26, 1996. He was reported unanimously by the Judiciary Committee to the Senate on April 25, 1996. And now, more than a year later, we are still waiting for him to be confirmed. Now, Eric Clay has the strong support of both Senator **Levin** and Senator **Abraham**, one Republican and one Democrat. We ought to confirm this judge for the sixth circuit.

We also have Arthur Gajarsa's nomination to be U.S. circuit judge for the Federal circuit on the calendar. We first received his nomination in April--not April 1997, but April 1996. His nomination was passed unanimously by the Judiciary Committee back in June of last year. Now he is back here again, passed unanimously again. He ought to be confirmed quickly.

We also have the nomination of Margaret Morrow for the U.S. District Court for the Central District of

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California on the Senate calendar. She is another well-qualified nominee. Ms. Morrow is the first woman president of the California Bar Association and the Judiciary Committee unanimously approved her nomination last year, but her confirmation got caught up in the election year stall on judicial confirmations. Just last week, the Judiciary Committee again approved her nomination. The Senate should quickly take action on the nomination of Margaret Morrow.

We have confirmed less than one judge a month since the start of this session in January. We have almost 100 vacancies in the Federal judiciary. Many of them are in critical areas, where huge backlogs are occurring, where courts are saying that we are benefiting criminals because they can't be tried; we can't have

speedy trials. Criminals get the benefit of this by not having judges to hear the cases. If you have a civil case, forget about a speedy trial.

I just look at some of the headlines we have had recently seen, which are shown on this chart. One is by the Washington Post, by Sue Anne Pressley: `Cases Pile Up as Judgeships Remain Vacant; Drug Crackdown, Immigration Inundate U.S. Courts in Texas.' Apparently, you can be on the southern border of this country and have drug and immigration cases in major courts that can't be heard because you can't get enough judges there.

Bruce Fein is one who has written primarily from a conservative viewpoint. His column: `Judge Not.' It speaks of the independent Federal judiciary. He says, `The supreme jewel of our Constitution is a fiercely independent Federal judiciary, but congressional Republicans are attacking this gem.'

We have a couple of editorials on the Chief Justice--one from the Washington Post and one from the New York Times--speaking of the alert from the Chief Justice: `A Reminder From the Chief Justice.' These are the cases where the Chief Justice of this country--another conservative Republican--has said, `We have a crisis situation; let's move on it.'

We have one entitled, `The GOP Hold on Judgeships; Partisan Politics Have Ground Confirmations to a Halt.'

Now, I say this, Mr. President--I make the same argument now as when we have had a Republican President and a Democratically controlled Senate. If there is one area where partisan politics should not be allowed, it is in the area of the Federal judiciary.

One thing that sets our country apart from virtually all others is the independence of our Federal judiciary. Every country that in this century has moved toward democracy has sent observers to the United States of America to look at our Federal judiciary and they say, `How do you have such an independent judiciary?' Look what is happening in countries that are sometimes lurching into democracy. They say the one thing that holds them back, that allows crime to continue, that allows an economic system to break down, that allows graft and corruption to occur in each of those countries is because their judiciary cannot be truly independent. In our country, our Federal judiciary is truly independent.

Now, each one of us, I would gather, on this floor at some time or another has disagreed with a decision of a Federal judge, for different reasons. Each one of us, I would be willing to guess, has to thank God we have an independent Federal judiciary and that we can't stand up and tell the judge how to rule. I know that when I argued cases before Federal courts, I used to sit there knowing they were going to be independent, knowing that I might win and I might lose. I would make my best argument, and it would

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go from there. That is the way it should be.

What I worry about, Mr. President, is that if we allow the Federal judiciary to be caught up in partisan moves, where one side tries to get advantage over the other, while one side or the other might win in the short term, all of us as Americans are damaged because our Federal judiciary is damaged. Every one of us--Republican or Democrat--should know if we look at history, read history, and if we understand history, that one of the reasons we are the greatest democracy history has ever known is because of our independent Federal judiciary. We should never allow anything to happen to cut back on that independence.

I have never seen anything like this current stall in the judicial confirmation process in almost 23 years in the U.S. Senate. I came here in 1974, in one of the largest classes of this Senate. In fact, I today stand here as the only one who has not announced retirement or left. But I think all the way through that, working with some of the finest men and women I have ever known in both parties--and we have had fights, partisan fights, saying that we should do this farm bill this way or this farm bill that way, or this highway bill this way or that way, or the crime bill this way or that way--we fought it out and we have had the votes and one side or the other wins, and the President either

signs it or not. We have done this on foreign policy issues and on all others. But the one area that we have tried to protect from partisan squabbles has been the area of the Federal judiciary.

We know that whoever is President is going to have the greatest influence of all of us on who is going to be a Federal judge. President Reagan made it very clear when he ran for President, for example, who he would appoint as Federal judges. A lot of these Federal judges are not the men and women I would have appointed from that circuit or that district. But I voted for all of them because they were honest people, people of integrity, people of confidence, and people I could look at and say, although I might have disagreed with their political background, I know that, as a litigant, if I came before his or her court, I could expect an honest treatment.

President Bush had other ideas who should be there, as President Carter and President Ford did. These are all Presidents I have served with. President Clinton now has his ideas.

Now, the interesting thing, President Ford was appointed, but these others, in every election, at some point during the campaign, it became an issue as to who will this Presidential candidate appoint to the Federal judiciary. And the American people examined their views and they elected President Carter, President Reagan, President Ford, and President Clinton.

A President should be given a great deal of latitude on who he nominates to the Federal court. If we disagree with a nomination, then we can vote against it. But, frankly, Mr. President, not only does it damage the integrity and the independence of the Federal judiciary by just holding judicial nominations hostage where nobody ever even votes on them, but I think it damages the integrity of the U.S. Senate.

I have said many times that the U.S. Senate should be the conscience of the Nation. On occasion, it has been. But it does not reflect the conscience of a great nation when we take a third and independent branch of our Government, a truly independent branch of our Government, and try to whittle away its independence and try to whittle away its efficacy, and do it unwilling to stand on the floor of the U.S. Senate and vote one way or the other.

If President Clinton sends a nominee to the Senate that any Senator--Democrat or Republican--doesn't like, vote against him or her. That is your right as a U.S. Senator. But don't say, well, they look like

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pretty good people, but we can't even allow a vote on their nomination. And don't say, if you are, for example, in Texas, that it is terrible that drug and illegal immigrant cases are not being heard, what is the court doing? People in Texas should say, what is the U.S. Senate doing? Why aren't they acting? If you are a civil litigant in the sixth circuit or ninth circuit, or a number of others that have emergency vacancies, and you have one of your rights to be protected, what do you do? You say, why aren't those judges hearing these cases? No. Say, why isn't the U.S. Senate confirming people.

Mr. President, what is the parliamentary situation?

The PRESIDING OFFICER. The Senator should be advised that under the previous order, at 12:30, the Senate was to begin consideration of S. 903. Neither of the floor managers for that legislation are present; therefore, a request to continue would be in order.

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Mr. LEAHY. I thank the Chair. I ask unanimous consent to continue for another 10 minutes as in morning business.

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

Mr. LEAHY. Mr. President, we live, unfortunately, in a partisan time. I have never seen either the U.S. Senate or the House of Representatives tied up in such partisan knots. I find that it is personally distressing to me. I have enormous respect for the U.S. Senate and enormous respect for the House of Representatives.

I have felt it a great privilege to serve with distinguished Republican and Democrat leaders of both the House and the Senate. I think I have been a personal friend of nearly every leader in the House and the Senate in both parties. And I have considered that as one of the great joys of serving in the U.S. Senate. I can think of a number of times I have joined with Members of both parties to push difficult legislation through. The last farm bill was an example when it was completely tied up. Then it became the Lugar-Leahy-Dole farm bill and passed this Senate with the highest number of votes which I believe a farm bill had ever passed before. The next closest one was probably the Lugar-Leahy farm bill of 5 years before.

I am not suggesting that the two parties hold hands on every issue by any means. I don't think that would serve the country well. But there are certain issues where we come together for the country. We have done this on major foreign policy issues. We have done it at times when this country desperately needed it. We did it recently on the budget agreement.

Mr. President, each one of us should search our souls and ask whether the country is well served by the bitterness that has gone on in some of the partisanship, by the personal attacks against each other and against the institution that we should be proud to serve, or the attacks against the President that have become so personal.

We should ask ourselves if we benefit this great Nation that we are privileged to serve if we diminish and chip away and even destroy some of the independence of our Federal judiciary because, if we do that, Mr. President, some day we will no longer be here. Nobody holds a seat in the U.S. Senate. The distinguished Presiding Officer will leave sometime, and the Senator from Vermont will leave the U.S. Senate sometime. All of us will.

But when we leave, we should look back, and ask, `What did we do here? What mark in history did we

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leave?' If we have left as our mark that we made the Government better, that we made the Senate better, that we made the Congress better, that we protected the institutions of our Government, that we protected the people of our democracy, then we can go home knowing that we served our Nation well.

But we should ask ourselves, each and every one, if we leave here and say that as a result of our partisanship on either side of the aisle that the Federal judiciary was diminished--one of the great institutions of this country, one of the reasons we have remained a democracy, one of the things which guaranteed our diversity, which allows the most powerful nation that history has ever known to be a democracy and not a dictatorship--then we cannot feel that we have served our Nation well. We cannot feel that we can be proud of our time in the U.S. Senate.

So I urge Senators to think about this story. I realize that we are in a different time--and I am reminded that I have spoken before on the floor of the Senate about the experience my father had in Vermont in 1937, 3 years before I was born. Vermont was one of the most Republican States back in 1936 in the Roosevelt great landslide. Alf Landon--the distinguished father of our distinguished former colleague, Senator Kassebaum--Alf Landon carried two States: Maine and Vermont.

And the head of our largest insurance company, the National Life Insurance Co., basically the titular head of the Republican Party, was standing next to my father on State Street in Montpelier, VT, as President Roosevelt was making a visit to Vermont and went by in an open car. The president of the National Life Insurance Co. stood at attention and took off his hat--all men wore hats at that time--and he held it over his heart as President Roosevelt's car went by. My dad said, `I can't believe you took off your hat for Franklin Roosevelt.' He looked with arched concern at my father and said, `Howard, I took off my hat for the President of the United States, not for Franklin Roosevelt.'

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*146 Cong Rec S 7531, **

CONGRESSIONAL RECORD -- ***SENATE***

Tuesday, July 25, 2000

106th Congress, 2nd Session

146 Cong Rec S 7531

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TITLE: JUDICIAL NOMINEES

SPEAKER: Mr. **LEAHY;** Mr. SANTORUM; Mr. REID; Mr. NICKLES

TEXT: [*S7531]

Mr. President, I am sorry I was not on the **Senate** floor to hear Chairman Hatch earlier this afternoon. I was attending an important confirmation hearing and chairing a meeting of the bipartisan Internet Caucus. I spoke to the issue of judicial nominations last Friday and say, again, with 60 current and longstanding vacancies within the federal judiciary, and seven more on the horizon, we cannot afford to stop or slow down the little progress we are making.

Our hearing today included three nominees moved forward to fill positions on the District Court of Arizona that have all been declared judicial emergencies. Each of the nominees was nominated last Friday. They are now having their hearing, they look forward to being voted out of committee on Thursday and approved by the **Senate** before the week is out--within one week of nomination. This demonstrates what we can do when we want to take action. All the talk about needing six months or more to process and review nominees is just that--talk. If all goes according to schedule, these nominees will be in and out of the **Senate** in less than one week.

We could do that with a number of nominees. Instead, this is a **Senate** that has kept highly-qualified nominees, such as Richard Paez and Marsha Berzon, waiting for years before they get a vote. There is just no reason to have a qualified nominee like Judge Helene White of Michigan held hostage for over 42 months without a hearing.

I am disappointed to have seen another hearing come and go without even one nominee to fill one of the many vacancies to the Courts of

And this is where last October, the **Senate** wrongfully rejected President Clinton's nomination of Justice Ronnie White. That vote made me doubt seriously whether this **Senate,** serving at the end of a half century of progress, would have voted to confirm Judge Hastie or Justice Marshall.

On October 5, 1999, the **Senate Republicans** voted in lockstep to reject the nomination of Justice Ronnie White to the federal court in Missouri--a nomination that had been waiting 27 months for a vote. For the first time in almost 50 years a nominee to a federal district court was defeated by the United States **Senate.** There was no **Senate** debate that day on the nomination. There was no open discussion--just that which took place behind the closed doors of the **Republican** caucus lunch that led to the party-line vote.

It is unfortunate that the **Republican Senate** has on a number of occasions delayed consideration of too many women and minority nominees. The treatment of Judge Richard Paez and Marsha Berzon are examples from earlier this year. Both of these nominees were eventually confirmed this past March by wide margins.

I have been calling for the **Senate** to work to ensure that all nominees are given fair treatment, including a fair vote for the many minority and women candidates who remain pending. According to the report released last September by the Task Force on Judicial Selection of Citizens for Independent Courts, the time it has been taking for the **Senate** to consider nominees has grown significantly and during the 105th Congress, minorities and women nominees took significantly longer to gain **Senate** consideration than white male nominees: 60 days longer for non-whites, and 65 days longer for women than men. The study verified that the time to confirm female nominees was now significantly longer than that to confirm male nominees--a difference that has defied logical explanation. They recommend that "the responsible officials address this matter to assure that candidates for judgeships are not treated differently based on their gender."

On July 13, 2000, President Clinton spoke before the NAACP Convention in Baltimore and lamented the fact that the **Senate** has been slow to act on his judicial nominees who are women and minorities. He said: "The quality of justice suffers when highly-qualified women and minority candidates, fully vested, fully supported by the American Bar Association, are denied the opportunity to serve for partisan political reasons." He went on to say: "The face of injustice is not compassion; it is indifference, or worse. For the integrity of the courts and the strength of our Constitution, I ask the **Republicans** to give these people a vote. Vote them down if you don't want them on." I agree with the President.

The **Senate** should be moving forward to consider the nominations of Judge James Wynn, Jr. and Roger Gregory to the Fourth Circuit. When

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confirmed, Judge Wynn and Mr. Gregory will be the first African-Americans to serve on the Fourth Circuit and will each fill a judicial emergency vacancy. Fifty years has passed since the confirmation of Judge Hastie to the Third Circuit and still there has never been an African-American on the Fourth Circuit. The nomination of Judge James A. Beatty, Jr., was previously sent to us by President Clinton in 1995. That nomination was never considered by the **Senate** Judiciary Committee or the **Senate** and was returned to President Clinton without action at the end of 1998. It is time for the **Senate** to act on a qualified African-American nominee to the Fourth Circuit. President Clinton spoke powerfully about these matters last week. We should respond not by misunderstanding or mischaracterizing what he said, but by taking action on this well-qualified nominees.

In addition, the **Senate** should act favorably on the nominations of Judge Helene White and Kathleen McCree Lewis to the Sixth Circuit, Bonnie Campbell to the Eighth Circuit, and Enrique Moreno to the Fifth Circuit. Mr. Moreno succeeded to the nomination of Jorge Rangel on which the **Senate** refused to act last Congress. These are well-qualified nominees who will add to the capabilities and diversity of those courts. In fact, the Chief Judge of the Fifth Circuit declared that a judicial emergency exists on that court, caused by the number of judicial vacancies, the lack of **Senate** action on pending nominations, and the overwhelming workload.

I am disappointed that the Committee has not reported the nomination of Bonnie Campbell to the Eighth Circuit. She completed the nomination and hearing process two months ago and is strongly supported by Senator Grassley and Senator Harkin from her home state. She will make an outstanding judge.

Filling these vacancies with qualified nominees is the concern of all Americans. The **Senate** should treat minority and women and all nominees fairly and proceed to consider them without delay.

I think it was unfortunate that the chairman tried to assign blame for the **Senate's** lack of progress on a number of legislative items. I disagree with that assessment. He knows, as I do, that the Democratic leader made a proposal that would have moved the H-1B legislation and allowed votes on the humanitarian immigration issues. The **Republicans** refused Senator Daschle's offer. We all know the Democrats have not opposed the religious liberty bill Senator Kennedy helped develop. We all know we have been pressing for reauthorization of the Violence Against Women's Act for many months. It is not fair to suggest Democrats are holding that up.

I will give you one other example. I am getting calls from police organizations, and I see the distinguished assistant minority leader, the Senator from Nevada, who served as a police officer. He will understand this. I am getting calls from police organizations all over the country.

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They ask me: Why hasn't the Campbell-**Leahy** bill to provide more bulletproof vests passed? Why hasn't it gone through the **Senate?** I tell my friend from Nevada what I told them. I said: My friend from Nevada, who is the Democratic whip, has checked, as I have, with every single Democrat, and every single Democrat is willing to pass it this minute by unanimous consent. We said that to the **Republican** leader.

We were told there was an objection on the **Republican** side. My goodness. Have we gotten so partisan that a bill

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sponsored by the distinguished Senator from Colorado, Mr. Campbell, by myself and the distinguished chairman of the **Senate** Judiciary Committee, Mr. Hatch, a bill to provide bulletproof vests--cosponsored by the distinguished Senator from Nevada, Mr. Reid, as well--that a bill to provide bulletproof vests for law enforcement officers is being stalled by **Republican** objections? That is wrong.

If that bill were allowed to come to the floor for a vote, I am willing to bet--in fact, I know because we have already checked--that every Democratic Senator would vote for it. But I am also willing to bet that virtually every **Republican** Senator would vote for it. This is not a Democrat or **Republican** bill. In fact, Senator Campbell and I have specifically worked to make sure it is not a partisan bill.

So I tell my friends from law enforcement: Please call the other side of the aisle. I am convinced that a majority of **Republicans** support it, but somebody on the **Republican** side is holding it up. The Democrats are willing to pass it immediately.

The chairman of the Judiciary Committee knows we were working toward a bankruptcy bill until the **Republicans** decided to end bipartisan discussion and negotiate among themselves and not negotiate with the Democrats.

He knows we should have passed the Madrid Protocol Implementation Act weeks, if not months, ago. I tell the business community that continuously asks me that every single Democrat is willing to move forward with it. It has been stalled on the **Republican** side.

In fact, let me take a bill involving the two of us. The Hatch-**Leahy** juvenile crime bill passed the **Senate** in May of 1999. Again, I ask my friend from Nevada: As I recall, that passed with 73 votes, Democrats and **Republicans,** the majority of both parties. It passed the **Senate** with 73 votes.

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My friend from Utah is the chair of the House-**Senate** conference. But we haven't convened in almost a year. It is a bill that should have been enacted last year. But we will not even have a conference. Seventy-three Senators voted for that bill--73. We can't get the conference to meet on it and the **Senate** controls the conference.

These are a lot of items, such as the H-1B legislation, the religious liberty bill, the Violence Against Women Act reauthorization, the bulletproof vest bill, the Madrid Protocol Implementation Act, the Hatch-**Leahy** juvenile crime bill, the bankruptcy bill. These are things that can move forward. But there seems to be no movement from the other side.

I will continue to try to find ways to work with the distinguished chairman, my friend from the Judiciary Committee, to make progress. I point out that we worked together on civil asset forfeiture reform, and it passed. We worked together on intellectual property and antitrust matters. Those measures pass with a majority of **Republicans** and Democrats joining us. But now we find legislation on the bulletproof vest bill, which most of us agree on, that we cannot get passed. We find nominations on which we cannot get a vote--even when the soon to be **Republican** nominee for the Presidency, Governor Bush, said we ought to vote them up or down within 60 days. We can't get votes on them. Some stay stalled for months and years by humiliating delay.

I have spoken about how humiliating it must be to somebody who is nominated for a judgeship--the pinnacle of their legal career. They get nominated. The American Bar and others looked at them, and said: This is an outstanding person, an outstanding lawyer, and they would be a terrific jurist. Usually we get inundated with letters from lawyers--**Republicans** and Democrats alike--who say they know this man or woman and he or she would make a superb judge. The FBI and others do the background check --as thorough as you can imagine, such that most people in private life would never be able to put up with it. Their privacy is just shredded. They come back and say: This is an outstanding person.

If they are in private practice, they are congratulated by their partners in their firm. They say how wonderful it is. They realize, of course, that the nominee can't take on any more new cases because no one wants conflicts of interest. They kind of suggest as soon as they have this party that the nominee can sort of move out so the rest of the law firm can go forward.

The nominees wait and wait and wait and wait. Nobody is against them, but they can't get a hearing. They can't get a vote. Then, if the public pressure grows enough, if they are in a high profile, they may get a hearing. Then if the pressure continues, they may get a Committee vote. And then, if the pressure really builds and the Democratic leader and the Democratic caucus insist, they may get a **Senate** vote on confirmation. When they get voted, they get confirmed--with the

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exception of Justice White--by 90 to 10, or 95 to 5, and many times unanimously. But their lives has been put on hold for 2 or 3 years. Their authority as a judge has been diminished because of that. It is humiliating to them.

Frankly, it is humiliating to the **Senate.** It is beneath this great body. I have served here for over 25 years. I can't think of any greater honor that could come to me than to have the people of Vermont allow me to serve here. I should put on my tombstone, other than husband and father, that I was a United States Senator.

I have always thought of this **Senate** as the conscience of the Nation. We are not handling the conscience of this Nation very well.

We have a responsibility to uphold the judiciary. If we allow it to be tattered, if we allow it to be shredded, if we allow it to be humiliated, how can a democracy of a quarter of a billion people uphold our laws? How can the country have respect both for the laws and the courts that administer them, if we in the **Senate,** the most powerful legislative body in this country, don't show that same respect? If we diminish that, it will be an example to be followed by the rest of the people in this country.

There are only 100 of us who have the privilege of serving here at any given time to represent a quarter of a billion Americans. Sometimes we should think more of that responsibility than partisan politics.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. REID. Mr. President, before my friend from Vermont leaves, let me say a few things. In this body, we tend not to give the accolades to

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our fellow Senators that we should. I want the Senator from Vermont to know how the entire Democratic caucus supports and follows the lead of this man on matters related to the judiciary. He has done an outstanding job leading the Democratic conference through this wide-ranging jurisdictional authority of the Judiciary Committee.

We are very proud of the work that Pat **Leahy** does. The people of Vermont should know that, first of all, he is always looking after the people of Vermont. I am from a State 3,000 miles away from Vermont, the State of Nevada. People in Nevada should, every day, be thankful for the work the Senator does, not only for the State of Vermont but for the country.

I want the Record to be spread with the fact that we in the minority are so grateful for the work the Senator from Vermont does for our country. The statement made today certainly outlines many of the problems we are having in the **Senate,** none of which are caused by the Senator from Vermont.

Mr. **LEAHY.** Mr. President, I thank my friend from Nevada. I must admit, in my 25 years, nobody has handled the job as whip the way the Senator has. In having the Senator as an ally on the floor, I come well armed, indeed.

Mr. SANTORUM. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

The PRESIDING OFFICER (Mr. Inhofe). Without objection, it is so ordered.

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Appeals around the country. I was encouraged to hear Senator Lott recently say that he continues to urge the Judiciary Committee to make progress on judicial nominations. The Majority Leader said: "There are a number of nominations that have had hearings, nominations that are ready for a vote and other nominations that have been pending for quite some time and that should be considered." He went on to note that the groups of judges he expects us to report to the **Senate** will include "not only district judges but circuit judges." Unfortunately, the Committee has not honored the Majority Leader's representations and was only willing to consider a few District Court nominees at today's hearing. Pending before the Committee are a dozen nominees to the Federal Courts of Appeals who are awaiting a hearing--12 nominees, not one of which the **Republican** Majority saw fit to include in this hearing. Left off the agenda are Judge Helene White of Michigan, who is now the longest pending judicial nomination at over 42 months without even a hearing; Barry Goode, whose nomination to the Ninth Circuit was the subject of Senator Feinstein's statements at our Committee meeting last Thursday and who has been pending for over two years; as well as a number of qualified minority nominees whom I have been speaking about throughout the year, including Kathleen McCree Lewis of Michigan, Enrique Moreno of Texas and Roger Gregory of Virginia.

I noted for the **Senate** last Friday that there continue to be multiple vacancies on the Fourth, Fifth, Sixth, Ninth, Tenth and District of Columbia Circuits. With 20 vacancies, our appellate courts have nearly half of the total judicial emergency vacancies in the federal court system. I know how fond our Chairman is of percentages, so I note that the vacancy rate for our Courts of Appeals is more than 11 percent nationwide. Of course that vacancy rate does not begin to take into account the additional judgeships requested by the Judicial Conference to handle their increased workloads. If we added the 11 additional appellate judges being requested, the vacancy rate would be 16 percent. By comparison, the vacancy rate at the end of the Bush Administration, even after a Democratic Majority had acted in 1990 to add 11 new judgeships for the Courts of Appeals, was only 11 percent. Even though the Congress has not approved a single new Circuit Court position within the federal judiciary since 1990, the **Republican Senate** has by design lost ground in filling vacancies on our appellate courts.

At our first Judiciary Committee meeting of the year, I noted the opportunity we had to make bipartisan strides toward easing the vacancy crisis in our nation's federal courts. I believed that a confirmation total of 65 by the end of the year was achievable if we made the effort, exhibited the commitment, and did the work that was needed to be done. I urged that we proceed promptly with confirmations of a number of outstanding nominations to the Court of Appeals, including qualified minority and women candidates.

Yet only five nominees to the appellate courts around the country have had nomination hearings this year and only three of those five have been reported by the Committee to the **Senate** and confirmed--only three all year. The Committee included no Court of Appeals nominees at the hearings on April 27 and July 12, and there are no Court of Appeals

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nominee at the hearing today. The Committee has yet to report the nomination of Allen Snyder to the District of Columbia Circuit, although his hearing was 11 weeks ago, or the nomination of Bonnie Campbell to the Eighth Circuit, although her hearing was eight weeks ago. The **Republican** candidate for President talks about final **Senate** action on nominations within 60 days and we cannot get the Committee to report some nominations within 60 days of their hearing.

There is no good reason to have a qualified nominee such as Judge Helene White of Michigan held hostage for over 42 months without a hearing--42 months, and she has not even gotten a hearing. We had two men who were nominated last Friday, and they had a hearing today. They will probably be confirmed this week. Helene White has been held hostage for over 42 months without a hearing. She is the record holder for judicial nominees who have had to wait for a hearing--and her wait continues. It is insulting to the people of Michigan, insulting to the court, and insulting to her. The people of Michigan deserve a vote up or down on this outstanding lawyer and Judge from Michigan.

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Now why do I keep mentioning this? I keep mentioning it because, frankly, we are doing a poor job in confirming judges. I compare this to the last year of President Bush's term. We had a Democratic majority in the **Senate.** We confirmed twice as many judges then as this **Senate** is confirming now with a **Republican** majority and a Democratic President. Something was said the other day that, well, the Democrats are in the minority, and that is probably why they complain so. Well, heavens, I would be happy to have the complaints of the **Republicans** when they were in the minority. The Democrats moved twice as many judges for a **Republican** President as **Republicans** are moving for a Democratic President. It is a simple fact.

3. The soon-to-be **presidential nominee of the Republican** Party has said--and I agree with him--that this is wrong, the **Senate** ought to vote these people up or down in 60 days. Of course, we could do that. There is a concern that has been expressed--and rightly so--that so many nominees are held without any vote. Nobody votes against them, but nobody gets an opportunity to vote for them; they just sit there. And even though the criticism stings, the fact is that, on average, women and minorities take longer to go through this **Senate** than white males do. Some women, some minorities have gone through very quickly, but most have taken longer.

I said earlier that I do not see any sense of bias or sexism in our chairman. I have known him for over 20 years, and I have never heard him make a biased remark or a sexist remark during that whole time. But something is happening, somewhere they are being held up. It is wrong. One of the things that most **Republicans** and Democrats ought to be able to agree on is what Governor Bush said: Do it and vote them up or down in 60 days. Let's make a decision.

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Some of these people got held up for 2 or 3 or 4 years. When they finally got a vote, they passed overwhelmingly. But for 2 or 3 or 4 years they were humiliated, caused to dangle, have their law practices fall apart, have people question what was going on. Why? Because one or two Senators thought they should be held up. Well, let those one or two Senators vote against them. We are paid to vote yes or no, not maybe. I do not know whether it is because they are women, because they are Hispanic, because they are too liberal, or too conservative, too active, not active enough, that people don't want them to be confirmed. Let them vote against them.

I argued, when we had a very distinguished African American justice of a State supreme court, that we ought to let him at least have a vote. We had a vote after 2 years and, on a party line vote, he was voted down. Every single **Republican** voted against him, and every single Democrat voted for him, even though he had the highest rating of the American Bar Association, even though he was a justice of his state's highest court, and even though he was one of the most outstanding nominees either of a Democratic or **Republican** President to come before the **Senate.** At least he had a vote. I think the vote was wrong; he should have been confirmed. But at least he had a vote.

I also worry about are all these people who are not even given a vote.

Senator Hatch compared this year's confirmation total against totals from other Presidential election years. The only year to which this can be favorably compared is 1996 when the **Republican** majority in the **Senate** refused to confirm even a single appellate court judge to the Federal bench. The total that year was zero. That is hardly a comparison in which to take pride. I say let us compare 1992, in which there was a Democratic majority in the **Senate** and a **Republican** President. We confirmed 11 court of appeals nominees during that **Republican** President's last year in office--11 court of appeals nominees, and 66 judges in all. In fact, we went out in October of that year. We were having hearings in September. We were having people confirmed in October.

So do not come here and say the Democrats are not well grounded in complaining about what is happening. We established the way nonpartisanship can work in confirming judges. We did it for **Republican** Presidents. Obviously, it is not being done for a Democratic President. What we did in 1992, between July 24 and October 8, was the **Senate** confirmed 32 judicial nominees. We ought to try to do the same here, basically, from now until about the time we go out. Again, the last time that happened at the end of a President's term, the Democrats helped get 32 judges through during that period of 10 weeks at the end of the Congress. Well, we ought to do the same here. The **Republicans** ought to be willing to do the same thing.

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In fact, in 1992 the Committee held 15 hearings--twice as many as this Committee has found time to hold this year. Late that year, we met on July 29, August 4, August 11, and September 24, and all of the nominees who had hearings then were eventually confirmed before adjournment. We have a long way to go before we can think about resting on any laurels.

Having begun so slowly in the first half of this year, we have much more to do before the **Senate** takes its final action on judicial nominees this year. We cannot afford to follow the "Thurmond Rule" and stop acting on these nominees now in anticipation of the presidential election in November. We must use all the time until adjournment to remedy the vacancies that have been perpetuated on the courts to the detriment of the American people and the administration of justice. That should be a top priority for the **Senate** for the rest of this year. In the last 10 weeks of the 1992 session, between July 24 and October 8, 1992, the **Senate** confirmed 32 judicial nominations. I will work with the **Republican** Majority to try to match that record.

One of our most important constitutional responsibilities as United States Senators is to advise and consent on the scores of judicial nominations sent to us to fill the vacancies on the federal courts around the country. I continue to urge the **Senate** to meet its responsibilities to all nominees, including women and minorities. That these highly qualified nominees are being needlessly delayed is most regrettable. The President spoke to this situation earlier this month in his appearance before the NAACP. The **Senate** should join with the President to confirm these well-qualified, diverse and fair-minded nominees to fulfill the needs of the federal courts around the country.

The Arizona vacancies are each judicial emergency vacancies. Two were authorized in appropriations legislation last year when the **Republicans** Majority continued its refusal to consider a bill to meet the judicial Conference's recommendation for 72 additional judges around the country. All we were able to authorize were a few judgeships in Arizona, Florida and Nevada. That points out one of the reasons that the comparisons that Chairman Hatch is seeking to draw to the vacancy rates at the end of the Bush Administration are incorrect. During President Reagan's Administration and again during the Bush Administration, Congress added a significant number of new judgeships. The so-called vacancy rate that Senator Hatch is so fond of citing at the end of the Bush Administration is highly inflated by the addition of 85 new judgeships in 1990 and by the addition of 87 new judgeships in 1984, of which many where yet to be filled. By contrast the vacancies currently plaguing the federal courts are longstanding and in spite of **Republican** intransigence against authorizing additional judgeships requested by the Judicial Conference since 1996. If those additional judgeships were taken into account, the vacancy rate today would be over 13 percent with over 120 vacancies--hardly a comparison that the **Republican** majority would want to make, but that would be comparing comparable figures.

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In addition, even running the gauntlet and getting a confirmation hearing does not automatically guarantee someone a vote before the current Judiciary Committee. Bonnie Campbell, nominated by the President on March 2, 2000, has completed the nomination and hearing process and is strongly supported by Senator Grassley and Senator Harkin from her home state. But her name continues to be left off the agenda at our executive meetings for the last several weeks. She is a former Iowa Attorney General and former high ranking Justice Department official who has worked extensively on domestic violence and crime

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victims matters. Allen Snyder is another well-respected and highly-qualified nominee who got a hearing but no Committee vote. He was nominated on September 22, 1999, received the highest rating from the ABA, enjoys the full support of his home state Senators, and had his hearing on May 10, 2000. There are and have been many others.

I continue to urge the **Senate** to meet its responsibilities to all nominees, including women and minorities. That highly-qualified nominees are being needlessly delayed is most regrettable. The **Senate** should join with the President to confirm well-qualified, diverse and fair-minded nominees to fulfill the needs of the federal courts around the country.

More than two years ago Chief Justice William Rehnquist warned that "vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary." The New York Times reported last year how the crushing workload in the federal appellate courts has led to what it calls a "two-tier system" for appeals, skipping oral arguments in more and more cases. Law clerks and attorney staff are being used more and more extensively in the determination of cases as backlogs grow. Bureaucratic imperatives seem to be replacing the judicial deliberation needed for the fair administration of justice. These are not the ways to continue the high quality of decisionmaking for which our federal courts are admired or to engender confidence in our justice system.

When the President and the Chief Justice spoke out, the **Senate** briefly got about its business of considering judicial nominations last year. Unfortunately, last year the **Republican** majority returned to the stalling tactics of 1996 and 1997 and judicial vacancies are again growing in both number and duration. Chief Justice Rehnquist wrote at the end of 1997: "The **Senate** is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down." The **Senate** is not defeating judicial nominations in up or down votes on their qualifications but refusing to consider them and killing them through inaction.

During **Republican** control it has taken two-year periods for the **Senate** to match the one-year total of 101 judges confirmed in 1994, when we were on course to end the vacancies gap. Nominees like Judge

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Helene White, Barry Goode, Judge Legrome Davis, and J. Rich Leonard, deserve to be treated with dignity and dispatch--not delayed for two and three years. We are still seeing outstanding nominees nitpicked and delayed to the point that good women and men are being deterred from seeking to serve as federal judges. Nominees practicing law see their work put on hold while they await the outcome of their nominations. Their families cannot plan. They are left to twist in the wind. All of this despite the fact that, by all objective accounts and studies, the judges that President Clinton has appointed have been a moderate group, rendering moderate decisions, and certainly including far fewer ideologues than were nominated during the Reagan Administration.

Federal law enforcement relies on judges to hear criminal cases, and individuals and businesses pay taxes to exercise their right to resolve civil disputes in the federal courts. As workloads continue to grow and vacancies are perpetuated, the remaining judges are being overwhelmed and the work of the federal judiciary is suffering.

Our independent federal judiciary sets us apart from virtually all others in the world. Every nation that in this century has moved toward democracy has sent observers to the United States in their efforts to emulate our judiciary. Those fostering this slowdown of the confirmation process and other attacks on the judiciary are risking harm to institutions that protect our personal freedoms and independence.

What progress we started making two years ago has been lost and the **Senate** is again failing even to keep up with normal attrition. Far from closing the vacancies gap, the number of current vacancies has grown from 57, when Congress recessed last year, to 60. Since some like to speak in terms of percentage, I should note that the judicial vacancy rate now stands at over seven percent of the federal judiciary (60/852). If one considers the 63 additional judges recommended by the judicial conference, the vacancies rate would be over 13 percent (123/915).

What is most significant about the recent trend of judicial vacancies and vacancy rates is that the vacancies that existed in 1993 (after the creation of 85 new judgeships in 1990) had been cut almost in half in 1994, when the rate was reduced to 7.4% with 63 vacancies at the end of the 103rd Congress. We continued to make progress even into 1995. In fact, the vacancy rate was lowered to 5.8% after the 1995 session, and before the partisan attack on federal judges began in earnest in 1996 and 1997.

Progress in the reduction of judicial vacancies was reversed in 1996, when Congress adjourned leaving 64 vacancies, and in 1997, when Congress adjourned leaving 80 vacancies and a 9.5% rate. No one was happier than I that the **Senate** was able to make progress in 1998 toward reducing the vacancy rate. I praised Senator Hatch for his effort. Unfortunately, the vacancies are now growing again.

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Let me also set the record straight, yet again, on the erroneous but oft-repeated argument that "the Clinton Administration is on record as having stated that a vacancy rate just over 7% is virtual full-employment of the judiciary." That is not true.

The statement can only be alluded to an October 1994 press release. That press release cannot be construed or even fairly misconstrued in this manner. That press release was pointing out at the end of the 103rd Congress that if the **Senate** proceeded to confirm the 14 nominees then on the **Senate** calendar, it would have reduced the judicial vacancy rate to 4.7%, which the press release then proceeded to compare to a favorable unemployment rate of under 5%.

This was not a statement of administration position or even a policy statement but a poorly designed press release that included an ill-conceived comment. Job vacancy rates and unemployment rates are not comparable. Unemployment rates are measures of people who do not have jobs not of federal offices vacant without an appointed office holder.

When I learned that some **Republicans** had for partisan purposes seized upon this press release, taken it out of context, ignored what the press release actually said and were manipulating it into a misstatement of Clinton administration policy, I asked the Attorney General, in 1997, whether there was any level or percentage of judicial vacancies that the administration considered acceptable or equal to "full employment."

The Department responded:

> There is no level or percentage of vacancies that justifies a slow down in the **Senate** on the confirmation of nominees for judicial positions. While the Department did once, in the fall of 1994, characterize a 4.7 percent vacancy rate in the federal judiciary as the equivalent of the Department of Labor full employment' standard, that characterization was intended simply to emphasize the hard work and productivity of the Administration and the **Senate** in reducing the extraordinary number of vacancies in the federal Article III judiciary in 1993 and 1994. Of course, there is a certain small vacancy rate, due to retirements and deaths and the time required by the appointment process, that will always exist. The current vacancy rate is 11.3 percent. It did reach 12 percent this past summer. The President and the **Senate** should continually be working diligently to fill vacancies as they arise, and should always strive to reach 100 percent capacity for the federal bench.

At no time has the Clinton administration stated that it believes that 7 percent vacancies on the federal bench is acceptable or a

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virtually full federal bench. Only **Republicans** have expressed that opinion. As the Justice Department noted two years ago in response to an inquiry on this very questions, the **Senate** should be "working diligently to fill vacancies as they arise, and should always strive to reach 100 percent capacity for the federal bench."

Indeed, I informed the **Senate** of these facts in a statement in the Congressional Record on July 7, 1998, so that there would be no future misunderstanding or misstatement of the record. Nonetheless, in spite of the facts and in spite of my July 1998 statement, these misleading statements continue to be repeated.

The **Senate** should get about the business of voting on the confirmation

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of the scores of judicial nominations that have been delayed with justification for too long. We must redouble our efforts to work with the President to end the longstanding vacancies that plague the federal courts and disadvantage all Americans. That is our constitutional responsibility. It should not be shirked.

I am sorry that Senator Hatch feels that he is being attacked from all sides. I regret that some on his side of the aisle and other critics have sought to prevent him from doing his duty. I have gone out of my way to compliment the Chairman when praise was warranted and to keep my criticism from becoming personal.

With respect to the **Senate's** treatment of nominees who are women or minorities, I remain vigilant. I have said that I do not regard Senator Hatch as a biased person. I have also been outspoken in my concern about the manner in which we are failing to consider qualified minority and women nominees over the last four years. From Margaret Morrow and Margaret McKeown and Sonia Sotomayor, through Richard Paez and Marsha Berzon, and including Judge James Beatty, Judge James Wynn, Roger Gregory, Enrique Moreno and all the other qualified women and minority nominees who have been delayed and opposed over the last four years, I have spoken out. The **Senate** may never remove the blot that occurred last October when the **Republican** Senators emerged from a **Republican** Caucus to vote lockstep against Justice Ronnie White to be a Federal District Court Judge in Missouri.

The United States **Senate** is the scene where some 50 years ago, in October 1949, the **Senate** confirmed President Truman's nomination of William Henry Hastie to the Court of Appeals for the Third Circuit, the first **Senate** confirmation of an African American to our federal district courts and courts of appeal. This **Senate** is also where some 30 years ago the **Senate** confirmed President Johnson's nomination of Thurgood Marshall to the United States Supreme Court.

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Counsel's Office, White House

Kavanaugh, Brett

Subject File

President's Judges Plan [3]

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CONGRESSIONAL RECORD -- *SENATE*

Tuesday, February 3, 1998

105th Congress, 2nd Session

144 Cong Rec S 292

REFERENCE: Vol. 144, No. 5

TITLE: NOMINATIONS OF CARLOS R. MORENO, OF CALIFORNIA, TO BE UNITED STATES DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA AND CHRISTINE O. C. MILLER, OF THE DISTRICT OF COLUMBIA, TO BE A JUDGE OF THE UNITED STATES COURT OF FEDERAL CLAIMS

SPEAKER: Mr. HATCH; Mr. LEAHY; Mrs. FEINSTEIN; Mr. KENNEDY; Mr. NICKLES; Mr. FORD

TEXT: **[*S292]**

The PRESIDING OFFICER. Under the previous order, the Senate will now go into executive session to consider two nominations which the clerk will report.

The assistant legislative clerk read the nominations of Carlos R. Moreno, of California, to be United States District Judge for the Central District of California and Christine O. C. Miller, of the District of Columbia, to be a judge of the United States Court of Federal Claims.

Mr. HATCH addressed the Chair.

The PRESIDING OFFICER. The Senator from Utah is recognized.

Mr. HATCH. Madam President, I rise today to support the nominations of Carlos Moreno to the Federal district bench in the Central District of California and Christine O. Miller to the Court of Federal Claims.

I plan to discuss in greater detail why I intend to support these

workload. That brings the total pool of federal judges available to hear cases up to 1,188.

Despite claims to the contrary, the Senate has confirmed the vast majority of President Clinton's nominees, and I am confident that we will continue on a steady course this session. I am basically pleased with the pace at which the Judiciary Committee and the Senate have acted on the President's nominees. Indeed, one of the Senate's first items of business this session was to confirm three judicial nominees, including Ann Aiken, a controversial nominee whom I supported. We can, of course, always improve. I am hoping that the Committee will establish a good working relationship with the White House in this new year.

Such a relationship, however, does not mean that the President has carte blanche to appoint judges. The Constitution obligates the Senate to give advice to the President on his nominees and ultimately to consent to them. Under my stewardship, the Judiciary Committee will not simply push nominees through just for the sake of filling vacancies. Only recently, after the Judiciary Committee had expeditiously reviewed and held hearings on two nominees, did information surface that caused one of those nominees to withdraw and that places the other's confirmation prospects in question. If the Committee were blindly to follow some sort of a timetable in processing nominees, the federal bench would have been adversely affected. Indeed, such a specific timetable could encourage nominees to withhold relevant information from the Committee in

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the hope of forcing a vote. There is a good deal of background research that must be done by the Committee before it can send a nominee to the floor. If the Committee fails to do its groundwork, it fails the Senate, and thus prevents that body from fulfilling its constitutional duty. I do not hold the President to any sort of a timetable in selecting nominees; nor would I expect others to place such burdens upon the Senate.

I would further note that the Chief Justice's report did not focus solely on judicial vacancies. In fact, the primary focus of his remarks was the increase in the federal judiciary's workload. The Chief Justice complimented Congress on its efforts to reform federal habeas corpus procedures and to streamline prison litigation suits--two measures that he indicated would be of great benefit to the judiciary. As I recall, these were legislative measures the ABA opposed. Nevertheless, I am hopeful that the ABA will be supportive of further efforts to improve the judicial process.

In a similar vein, the Chief Justice expressed concern about the expansion of federal jurisdiction. I hope in the coming months to review the current status of federal jurisdiction and to search for recommendations on how federal courts might be freed from hearing cases more properly brought in state courts. I think we must be vigilant in searching for ways to utilize properly the federal courts' limited resources.

Last year, I sought to steer the confirmation process in a

way that kept it a fair and principled one, and exercised what I felt was the appropriate degree of deference to the President's judicial nominees. Yet, the solution to an increased judicial workload should not be simply to add more judges or for the Senate to be held to some sort of a confirmation timetable. I am confident that the Committee will stay the course and continue to exercise its constitutional duty in an appropriate manner. Thank you for considering my views.

Sincerely,

Orrin G. Hatch,

Chariman.

Mr. HATCH. I thank the Chair, and I yield the floor.

Mr. LEAHY addressed the Chair.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

Mr. LEAHY. Madam President, I am glad to be here with my good friend from Utah and welcome him back from a productive weekend.

Last week, I commended the chairman of the Judiciary Committee for scheduling the judicial confirmation hearing, the first of this year, for tomorrow afternoon, and I commend the chairman again. I note that he is following through on his earlier statement by including both Margaret McKeown of Washington State and Susan Oki Mollway of Hawaii at that hearing. They have each been pending for over 18 months, and it will be good to have their confirmation hearing.

I hope we will maintain pace this year that was established during the last 9 weeks of the last session. In order to do that, I hope that in addition to these nominees we can proceed to confirm additional nominees for article III judicial vacancies before the end of the week.

I am delighted the Senate is getting the opportunity to consider the nomination of Judge Carlos Moreno to the United States District Court for the Central District of California. He has been strongly supported by both Senators Feinstein and Boxer. They have both spoken to me about him and strongly support him.

I have spoken often about the District Court of the Central District of California, its workload and the need to confirm qualified nominees for the judicial vacancies that persist and are arising on that Court. I have spoken most often about that Court in connection with the longstanding nomination of Margaret Morrow. It is my expectation that the Senate will fulfill the commitment it made last year and proceed to that nomination by the end of next week.

Judge Moreno received his undergraduate education at Yale College and his law degree from Stanford Law School. He was a deputy city attorney in Los Angeles, as well as a municipal court judge before joining the Los Angeles Superior Court in 1993. Judge Moreno is currently serving the people of California as a Judge of the California Superior Court. He received high remarks from the American Bar Association and was reported by the Judiciary Committee on November 13, 1997, unanimously. I thank both the majority leader and my good friend from Utah for bringing him up this morning.

Along with Judge Moreno currently pending on the Senate calendar are Ms. Morrow, two nominees for long-vacant judgeships in Illinois and a

Pennsylvania State court judge. I hope that we have a strong bipartisan vote in his favor.

I also expect that today the Senate will confirm the President's judgment in nominating and reappointing Judge Christine Miller to the Court of Claims. The President's nomination of Judge Miller was received last year before her first term expired, but the Senate failed to act on it before adjournment last fall.

The President used his recess appointment power to reappoint Judge Miller and resubmitted her nomination. Today the Senate will reaffirm the President's action and confirm her to a full term.

The Court of Claims is an important court. It is established by Congress under article I of the Constitution. No less than the Federal judiciary that is appointed to fill vacancies in the article III courts that we speak about so often, the vacancies on the Court of Claims should be filled and filled without delay.

Madam President, I hope that the distinguished Senator from Utah and I will be allowed by our caucuses to move forward on judges as quickly as possible. I know there is support in mine to do that.

Madam President, I see the distinguished Senator from California on the floor and yield to her.

The PRESIDING OFFICER. The Senator from California is recognized.

Mrs. FEINSTEIN. Madam President, I thank the ranking member, and I thank the Presiding Officer. I also would like to begin by thanking the distinguished chairman of the Judiciary Committee for what was, by and

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large, a rapid and prompt processing of Carlos Moreno. I submitted the name of Carlos Moreno to the President for appointment to the District Court from the Central District of California. In a sense, Madam President, I believe he is prototypical of really what a good Federal judge should bring to that office. I would like to just quickly go over what is an amazing success story.

Judge Moreno was born in East L.A., just 2 miles from the Federal courthouse where he will be serving. He has earned the respect and admiration of both the legal and the law community, and he has had 13 years of service on the State courts. He has strong bipartisan support, including the endorsements of the former Governor George Deukmejian and Los Angeles County Sheriff Sherman Block.

As the chairman of the committee pointed out, he obtained his bachelor's degree from Yale in 1970 and his J.D. from Stanford in 1975. He began his legal career in the City Attorney's Office of Los Angeles where he worked for 4 years, from 1975 to 1979.

He prosecuted numerous jury trials, misdemeanor prosecutions, and criminal and civil consumer protection cases. He worked as a litigation attorney for 7 years, handling commercial litigation in State and Federal courts. So he has experience in both the civil as well as the criminal law. His caseload there included bankruptcy, wrongful termination, banking, real estate, and antitrust.

In 1986 the Governor of California, George Deukmejian, appointed him to the municipal court. He served there for 7 years, handling 40 civil jury trials in addition to a regular criminal trial workload.

In 1993, Governor Wilson elevated him to the California Superior

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Court where he served for the past 4 years. He averaged approximately 2 dozen jury trials a year, at least a third of which have been homicides. The remainder have consisted of a broad range of felonies and he has presided over about a dozen bench trials per year.

So, 13 years as a municipal and superior court judge. This year he was selected as the superior court judge of the year by the criminal law section of the Los Angeles County Bar Association and was described as one who earns praise from both prosecutors and defense attorneys for his fair, even-tempered handling of a high-volume calendar of criminal cases. The large number of court trials he handles in which both sides, both sides, waive the jury and try the case before him is an indicator, I believe, of the trust he has received from opposing counsels.

Madam President, I ask unanimous consent to have printed in the Record letters of support by George

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Deukmejian, former Governor; a letter from the District Attorney of Los Angeles County; and a letter from the Sheriff of Los Angeles County.

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

Los Angeles, CA,

October 6, 1997.

Re Judge Carlos R. Moreno.

Hon. Orrin Hatch,

Chairman, Committee on Judiciary, U.S. Senate, Washington, DC.

Dear Senator Hatch: It has come to my attention that Judge Carlos Moreno has been nominated for an appointment to the U.S. District Court, Central District of California.

In 1986, it was my pleasure to appoint him to the Compton Municipal Court and in 1993 he was appointed by Governor Pete Wilson to the Los Angeles Superior Court.

It is my understanding that he has performed in an exemplary manner as a Municipal and Superior Court Judge and has a clear perception of the importance of maintaining a judicial system that insures fairness and social order.

Judge Moreno is well suited for this position. I am confident that he has the appropriate judicial skills and in light of his qualifications, I hope you will give him every consideration for appointment to the U.S. District Court.

Most cordially,

George Deukmejian,

35th Governor of California.

Los Angeles County

District Attorney,

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Los Angeles, CA, May 2, 1997.

Hon. Dianne Feinstein,

U.S. Senator, San Francisco, CA.

Dear Dianne: Superior Court Judge Carlos R. Moreno has informed me that he is seeking an appointment to the U.S. District Court for the Central District of California, and I am writing to strongly recommend his nomination and confirmation.

Although Judge Moreno is not a personal acquaintance of mine, I have had the opportunity to personally interview him and to speak with several of my colleagues who have appeared before him on many occasions. All of the persons I contacted were effusive in their praise of the professional attributes that Judge Moreno brings to the bench as a Superior Court trial judge: he is fair, bright, willing to read with care the lawyers' written motions, control his courtroom, and give both sides fair hearings in his court. In addition, he apparently relishes legal research and thoroughly familiarizes himself with the issues of a case before he gives a decision--a quality which would serve him well on the Federal bench.

I do not make recommendations on behalf of those seeking appointments lightly, and in fact, I turn down most requests. However, the level of support and enthusiasm expressed by my colleagues on behalf of Judge Moreno prompted me to agree to interview him, and I found him during the interview to have the personal attributes that I had been told he displays on a daily basis in his court. I am confident Carlos Moreno would serve as a District Court judge with distinction, and I

believe his appointment would be beneficial to the citizens of California.

Very truly yours,

Gil Garcetti,

District Attorney.

County of Los Angeles,

Monterey Park, CA, April 23, 1997.

Hon. Dianne Feinstein,

U.S. Senate,

San Francisco, CA.

Dear Dianne: It has come to my attention that Los Angeles County Superior Court Judge Carlos R. Moreno has indicated his desire to be appointed a United States District Court Judge for the Central District of California. I am pleased and honored to give him my personal endorsement.

Judge Moreno has an extensive criminal justice background. He has been a Judge of the Superior Court of Los Angeles County since November of 1993. Prior to that, Judge Moreno was a City Attorney with the City of Los Angeles from 1975 to 1979 where he handled criminal and civil consumer protection prosecutions and legislative and politically sensitive matters. He was a member of the law firm of Kelley, Drye & Warren from 1979 to 1986, and in October 1986 Judge Moreno was elected Judge of the Municipal Court. He held that seat

judges' nominations, but first I would like to address some of the concerns that have been expressed with respect to the Senate's role in the confirmation of Federal judges.

As chairman of the Senate Judiciary Committee, one of the most important duties I hold or fulfill is in screening judicial nominees. Indeed, the Constitution itself obligates the Senate to provide the President with advice concerning his nominees and to consent to their ultimate confirmation. Although some have complained about the pace at which the Senate has moved on judicial nominees, I would note that this body has undertaken its constitutional obligation in a wholly appropriate fashion.

Indeed, the first matter to come before the Senate this session was confirmation of three of President Clinton's judicial nominees. Senator Lott is to be commended for giving these nominees early attention. As well, the Judiciary Committee has announced judicial confirmation hearings for February 4 and February 25.

In 1997, the first session of the 105th Congress, the Senate confirmed 36 judges. This is only slightly behind the historical average of 41 judges confirmed during the first sessions in each of the last five Congresses. And I would note the Judiciary Committee itself processed 47 nominees, including the two judges we are considering today.

Currently, there are 88 judicial vacancies in the judiciary, 85 if the three nominees confirmed last week are included. In May 1992, however, when a Republican occupied the White House and the Democrats controlled the Senate, there were 117 vacancies on the Federal bench.

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until his appointment to the Superior Court in 1993. Throughout his tenure on the bench, he has continually demonstrated the prerequisite abilities necessary to be a fair, impartial, and knowledgeable jurist.

Judge Moreno is an extremely hard working individual of impeccable character and integrity. His list of credits, both professionally and within the community, is extensive.

I would like to recommend that you favorably consider his appointment. I have no doubt that he would be a distinguished addition to the United States District Court.

Sincerely,

Sherman Block,

Sheriff.

Mrs. FEINSTEIN. Madam President, to sum it up, I believe we have a man among men, a fine jurist, a fine attorney, skilled and knowledgeable in both criminal and civil law. This is the reason I respectfully submit him as someone who is really prototypical of the kind and type of background that one might bring to the Federal district court.

I thank the ranking member and I thank the chairman for the rapid processing of this distinguished nominee.

I yield the floor.

Mr. KENNEDY. Madam President, I strongly support the nominations of

Carlos Moreno and Christine Miller to serve as federal judges.

Judge Moreno is superbly qualified to serve as a federal judge in the Central District of California. He is a graduate of Yale University, Harvard Business School, and Stanford Law School. Currently, he is a judge on the Los Angeles Superior Court. As a member of that court's Trial Delay Reduction Committee he was instrumental in establishing and enforcing policies that successfully reduced trial backlogs in Los Angeles County. At a time when lengthy backlogs are also plaguing the federal courts, Judge Moreno's experience will be an important asset for California's Central District Court.

Judge Miller is also well qualified to continue her service on the United States Court of Federal Claims. She has served on that court for the past fifteen years, and President Clinton's nomination of her for a second fifteen-year term is a tribute to her ability and leadership.

I also want to take this opportunity to express my concern that the Senate has still not had a chance to vote on the nomination of Margaret Morrow to the federal district court for the Central District of California. Ms. Morrow was first nominated in May 1996. She was approved by the Judiciary Committee in June last year, and it is long past time for the Senate to vote on her nomination.

On average, it is taking twice as long for Senate Republicans to confirm President Clinton's nominees as it took for Democrats to act on President Bush's nominations. But I am especially concerned about the Republicans' record of subjecting women who are nominated for federal judgeships to far greater delays than men.

Women nominated to the federal courts are four times--four times--more likely than men to be held up by the Republican Senate for more

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than a year.

Last year, the Senate confirmed 30 men, but only 6 women. And, by confirming only 36 judges, the Senate condemned many of our nation's busiest courts to even lengthier delays in processing their civil cases.

There is no question that Margaret Morrow possesses the necessary qualifications to be confirmed. She is a Harvard-educated attorney and a partner in a prestigious California law firm. She is the first woman to serve as the president of the California Bar Association. She is a well-respected attorney and a role model for women in the legal profession.

Yet action on her nomination has been delayed--like nine other nominees who have been waiting for more than 18 months--because the Republicans are playing politics and preventing needed judicial positions from being filled.

When even a Republican Chief Justice criticizes the Republican Congress for refusing to move more quickly to confirm judges, you know something's wrong. The Chief Justice is deeply concerned about the large number of judicial vacancies on the federal courts. There are too few judges to handle the workload.

The bottleneck in the Senate is jeopardizing the court system and undermining the quality of justice. Fewer than half of President Clinton's nominees have been confirmed.

We owe it to Americans across the country to give these nominees a vote. If our Republican colleagues don't like them, vote against them.

But give them a vote.

The distinguished majority leader has rightly noted that the process of confirming judges is time-consuming. The Senate should take care to ensure that only individuals acceptable to both the President and the Senate are confirmed. The President and the Senate do not always agree. But it should not take longer to consider women than it does to consider men.

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Some Republicans claim they have slowed the confirmation process to protect the federal courts from "judicial activism.'' But this argument is a smokescreen. If President Clinton is actually nominating judicial activists, then why is it that these nominees are approved overwhelmingly when the Senate is finally allowed to vote on them? The closest vote that we have had on any nominee in this Congress was the 76 to 30 vote in favor of Ann Aiken last week.

The claim that Clinton judges are activist judges is a transparent ruse being used to slow down the confirmation process. The reason is obvious. The Republican majority in Congress is doing all it can to prevent a Democratic President from naming judges to the federal courts. The courts are suffering, and so is the nation.

In some areas of the country, people have to wait years to have their cases even heard in court. And then they have to wait years more for overburdened judges to find time to issue their decisions. Families, workers, small businesses, women and minorities have traditionally looked to the courts to resolve disputes. The lack of federal judges makes the swift resolution of their cases impossible.

In fact, there are more sitting Federal judges today than there were through virtually all of the Reagan and Bush administrations. As of today, there are 756 active Federal judges. In addition, there are 432 senior judges who must, by law, hear cases, albeit with a reduced load. Ordinarily, when a judge decides to leave the bench, he or she does not completely retire, but instead takes senior status. A judge who takes senior status, as opposed to a judge who completely retires, must hear a certain number of cases each year. Thus, when a judge leaves the bench, he or she does not stop working altogether, he or she merely takes a somewhat reduced caseload.

Even in the ninth circuit, which has 10 vacancies, only one judge has actually stopped hearing cases. The others have all taken senior status and are still hearing cases. The total pool of Federal judges available to hear cases is 1,188, a record number of Federal judges.

The Republican Senate has confirmed the vast majority of President Clinton's judicial nominees, and if the President continues to send us qualified nominees, I am sure that trend will continue. Let me say, however, that I will not vote to confirm judges who refuse to abide by the rule of law. In my view, that is the absolute minimal qualification an individual must have to serve as one of our lifetime-appointed Federal judges.

Last year, I sought to steer the confirmation process in a way that kept it a fair and principled one, and exercised what I felt was the appropriate degree of deference to the President's judicial nominees. It is in this spirit of fairness that I will vote to confirm Judge Miller and Judge Moreno.

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Judge Moreno is currently a Los Angeles superior court judge. He was appointed to that position in 1993 by Governor Wilson. Prior to his current appointment, Judge Moreno served as a municipal court judge, worked as an associate in the L.A. firm of Kelley, Drye & Warren, and served as deputy city attorney in Los Angeles.

Judge Miller currently serves on the Court of Federal Claims. She was appointed to that position in 1983 by President Ronald Reagan. Judge Miller, before her judicial appointment, worked at the law firms of Shack & Kimball, and then Hogan & Hartson. She also had the honor, after graduating from the Utah College of Law, of clerking for the Honorable David Lewis, a Tenth Circuit Court of Appeals judge.

I think both these individuals will serve the Federal bench well and, therefore, urge my colleagues to support them. I also would like to submit for the Record an editorial written by our leader, Senator Trent Lott, which appeared on February 2 in the Washington Post, also a letter I wrote to the ABA discussing the Senate's work in confirming nominees. I ask unanimous consent that both those documents be printed in the Record.

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

From the Washington Post, Feb. 2, 1998

Rehnquist's Rush to Judgment

(By Trent Lott)

Chief Justice Rehnquist's 1997 year-end report has drawn considerable press attention to the Senate's role in the confirmation and appointment of federal judges. Good. It's about time proper attention was given to these unique government officials, who are appointed for life, paid salaries that can run to nearly $145,000 and are provided facilities and staff costing American taxpayers many millions of dollars annually.

And if the cost of these judgeships and the judiciary bureaucracy isn't enough to cause concern, consider the fact that many such lifetime-appointed judges actually attempt to make law from the bench. This is especially troubling when federal judges seek to impose taxes on the public or turn criminals loose on society.

The chief justice contends that federal judges are underpaid and overworked and that the "quality of justice'' administered by the federal judiciary is in peril. He also attempts to make an argument for more judges based on statistics regarding, for example, the total caseload of all district and circuit courts and the number of judicial vacancies.

Interestingly, Rehnquist chooses to omit statistics that hurt his case. In his report, he notes that the "Senate confirmed only 17 judges in 1996 and 36 in 1997, well under the 101 judges it confirmed during 1994.''

True, the 17 judges confirmed in 1996 were certainly low as compared with most other years. But in 1989, the Democrat-

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controlled Senate confirmed 15 of President George Bush's nominees. Moreover, the chief justice's reference to 1994 and the confirmation of 101 judges that year is inappropriate, because the Democrats controlled the Senate and the presidency that year. Historically, the number and pace of confirmations lessen when one party holds the White House and the other the Senate. The large number of vacancies on the bench in 1994 allowed Clinton to nominate many more judges than in an average year, which accounts for the large number of confirmations.

The chief justice also neglected to point out that Congress has authorized an additional 250 judgeships since 1978 (now totaling 849). Further, rather than retiring, many judges take "senior'' status, in which they continue to be paid, have staff and decide cases. There are approximately 274 district and 82 circuit judges on "senior'' status, contributing to the reduction of the workload of "active'' judges.

Almost every year, Congress receives a request from the judiciary to add new judgeships to meet caseload increases. The Committee on Long Range Planning of the Judicial Conference projects that we will need 1,370 federal judges by the year 2000, 2,350 judges by 2010 and 4,110 by 2020. Clearly, the problems of caseload will have to be addressed over the coming years. But merely creating new judgeships will not provide solutions to such issues.

The chief justice also focused on the number of vacancies--83--in the district and circuit courts. This number pales in comparison with the 125 vacancies that occurred in 1993

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during President Clinton's first year, when the Democrats controlled the Senate. The chief also failed to mention that President Clinton has not submitted nominees to the Senate for 41 of these vacancies.

Of the 13 nominees for circuit court judgeships, five were went to the Senate less than 30 days from adjournment. Of the 28 district court nominees, three were sent to the Senate within 30 days of adjournment, another three within 45 days and one within 60 days of adjournment. Even the most partial observers of the confirmation process recognize that more than 60 days is required for investigation of a nominee's education, experience and potential judicial temperament.

As noted by the chief justice, the judiciary characterizes 26 of the current 83 vacancies that have existed for more than 18 months as "judicial emergencies.'' There appears to be no basis for this characterization other than the length of time the position has been vacant and the notion that every authorized position urgently needs to be filled. In fact, one vacant position in the 4th Circuit, authorized in 1990, has never been filled, and President Clinton has not nominated anyone to it. By the same token, he submitted nominees just last year for two Texas district court positions vacant since being authorized in 1990.

Clearly, the president did not view vacancies in any of those positions as "emergencies.'' In all, of the 26 "emergencies,'' only 12 apparently are deemed important enough that the president has submitted nominations fill them.

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The pace of confirmation hasn't changed much in the Senate since 1987. That was the year Democrats regained control of the Senate and slowed the process of confirming Reagan nominees. District court confirmations averaged 129 days and circuit court confirmations 113 days in 1987. This pace continued during the Bush administration, when Democrats controlled the Senate. The experience of the Robert Bork, Douglas Ginsberg and Clarence Thomas nominations to the Supreme Court did much to further politicize an already labor-intensive and time-consuming review process.

The pace quickened in 1993 and '94, when President Clinton's district court nominees were confirmed on average within 74 days of referral to the Democrat-controlled Senate. The pace naturally slowed again when Republicans regained control of the Senate.

The chief justice's dismal assessment of the judiciary is not warranted. Congress will continue to closely monitor the needs of the judiciary to fulfill its function as a separate and equal branch of government. As a part of this process, Congress will create and maintain such judgeships as are necessary to empower the judiciary to accomplish the fair and equal application of justice through the interpretation and application of our laws.

U.S. Senate,

Committee on the Judiciary,

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Washington, DC, February 3, 1998.

Mr. Jerome Shestack,

President, American Bar Association, Philadelphia, PA.

Dear President Shestack: I am sorry that I could not attend the American Bar Association's annual convention this year, as I am at the World Economic Summit. I understand, however, that Senator Patrick Leahy ably represents the Judiciary Committee. Nevertheless, I thought it prudent to make you aware of my views regarding the so-called judicial vacancies issue, in which, I am sure, the ABA has great interest.

As you are doubtless aware, Chief Justice William Rehnquist recently released his annual report on the federal judiciary. In that report, he noted, among other things, the need expeditiously to fill vacancies on the federal bench. The Chief Justice's comments were very similar to those made over the years, including 1992, when he urged the Senate to confirm more of President Bush's judicial nominees. Interestingly, 117 vacancies existed May 1992, compared with the 88 we have today.

In 1997, the Senate confirmed 36 judges, only slightly behind the historical average of 41 judges confirmed during the first sessions in each of the last five Congresses. And the Judiciary Committee itself processed 47 nominees during the past session. There are currently more sitting judges than there were throughout virtually all the Reagan and Bush administrations. As of today, there are approximately 756 active federal judges. In addition, there are 432 senior judges who must continue to hear cases, albeit with a reduced

THE WHITE HOUSE

WASHINGTON

November 7, 2002

Dear Senator Daschle, Senator Lott, Senator Leahy, and Senator Hatch:

On October 30, 2002, as you know, President Bush announced a proposal for timely consideration of judicial nominees. I write regarding the President's proposal and to suggest that we meet at your convenience to discuss it further.

The proposal is designed to resolve the judicial vacancy crisis and to improve the judicial nomination and confirmation process, both now and in the future no matter who is President or which party controls the Senate. The proposal involves all three Branches of the Federal Government. It calls on federal court of appeals and district court judges to provide advance notice of one year if possible before retirement, which builds on existing Judicial Conference policy. The proposal calls on Presidents to submit nominations within 180 days of a vacancy or announced future retirement. (President Bush will abide by this deadline for pending and future vacancies, including for the new judgeships recently created by H.R. 2215. The President thus intends, for example, to submit nominees for all currently known vacancies for which no nominee is pending no later than April 25, 2003.) The proposal further provides that the Senate Judiciary Committee should hold a hearing for each nominee within 90 days of a nomination, and the full Senate should hold an up-or-down floor vote on each nominee within 180 days after nomination.

The President's proposal builds upon statements that he made during the 2000 Presidential campaign and again in 2001 when announcing his first 11 judicial nominees. On June 8, 2000, then-Governor Bush stated that the Senate confirmation process "does not empower anyone to turn the process into a protracted ordeal of unreasonable delay and unrelenting investigation. . . . The President must be prompt in submitting his nominations, and the Senate prompt in acting upon them." At that time, Governor Bush proposed a timely standard for the Senate to meet in voting on all Presidential nominations, including nominations to the Judiciary. He stated that he would "ask Republicans and Democrats in the Senate to follow this standard regardless of who may be elected next November." When asked directly whether his standard should apply to President Clinton's pending judicial nominees, Governor Bush stated that he "would hope that Republicans would hear my call" and added: "[I]f it's good enough for me, it's good enough for . . . President [Clinton]."

On May 9, 2001, when announcing his first judicial nominees, President Bush similarly stated: "Over the years, we have seen how the confirmation process can be turned to other ends. . . . This is not good for the Senate, for our courts or for the country. . . . I urge Senators of both parties to rise above the bitterness of the past, to provide a fair hearing and a prompt vote to every nominee. That should be the case for no matter who lives in this house, and no matter who controls the Senate. I ask for the return of civility and dignity to the confirmation process."

The President's October 30, 2002, proposal builds upon his prior statements, and also upon the past statements of Senators of both parties who have advocated a timely hearing and timely up-or-down floor vote for every judicial nominee. The proposal also is consistent with

recommendations of the Chief Justice (as representative of the Federal Judiciary), the American Bar Association, the bipartisan Citizens for Independent Courts, and the bipartisan Miller Commission.

In response to the President's call for a timely hearing and up-or-down floor vote, some have argued that certain appeals court nominees of President Clinton were mistreated, while others have contended that certain appeals court nominees of President George H.W. Bush in 1991 and 1992 were mistreated. In fact, at the end of those two Administrations, the records of the 106th Congress (in 1999-2000) and the 102nd Congress (in 1991-92) were similar. In 1999-2000, of the 30 court of appeals nominees President Clinton submitted more than 180 days before the end of his Presidency, only 15 received an up-or-down Senate floor vote. (President Bush re-nominated one of those 15 appeals court nominees who did not receive an up-or-down floor vote, Roger Gregory.) In 1991-92, of the 29 court of appeals nominees President George H.W. Bush submitted more than 180 days before the end of his Presidency, only 19 received an up-or-down floor vote. The record of the Senate in those years does not meet the standard that President Bush has proposed. As the President has stated, however, we will not be able to solve the vacancy crisis and improve the judicial nomination and confirmation process with an endless cycle of blame and bitterness.

The President believes we all must look forward and ensure a process that is fair and predictable from the day a vacancy is announced to the day a new judge is sworn, no matter who is President or which party controls the Senate. As he said when announcing the proposal, the President wants to work with the other Branches to ensure a system that is fair and effective for the Judiciary, Senators, Presidents, and nominees -- and for the American people who depend on the federal courts to dispense justice fairly and promptly.

Thank you very much for your continued work on this issue and for considering the President's proposal to improve the judicial nomination and confirmation process on a bipartisan basis. I look forward to meeting with you at your convenience to discuss the proposal further.

Sincerely,

Alberto R. Gonzales
Counsel to the President

The Honorable Thomas A. Daschle
The Honorable Trent Lott
The Honorable Patrick J. Leahy
The Honorable Orrin G. Hatch
United States Senate
Washington, DC 20510

Copy: The Honorable William H. Rehnquist

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*146 Cong Rec S 9657, **

CONGRESSIONAL RECORD -- ***SENATE***

Tuesday, October 3, 2000

106th Congress, 2nd Session

146 Cong Rec S 9657

REFERENCE: Vol. 146, No. 121

TITLE: EXECUTIVE SESSION - NOMINATIONS OF MICHAEL J. REAGAN, OF ILLINOIS, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ILLINOIS; SUSAN RITCHIE BOLTON, OF ARIZONA, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA; MARY H. MURGUIA, OF ARIZONA, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA

SPEAKER: Mr. HATCH. Mr. DURBIN. Mr. ROBB. Mr. LEVIN. Mr. HARKIN. Mr. **LEAHY.**

BILL NUMBER:
S. Res. 364 ◆ Retrieve Bill Tracking Report
◆ Retrieve full text of bill

TEXT: [*S9657]

The PRESIDING OFFICER. Under the previous order, the **Senate** will now go into executive session and proceed to the consideration en bloc of Executive Calendar Nos. 652, 654, and 655, which the clerk will report.

The assistant legislative clerk read the nominations of Michael J. Reagan, of Illinois, to be U.S. District Judge for the Southern District of Illinois;

Susan Ritchie Bolton, of Arizona, to be U.S. District Judge for the District of Arizona;

Mary H. Murguia, of Arizona, to be U.S. District Judge for the District of Arizona.

The PRESIDING OFFICER. The Senator from Utah.

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labeled him a "judicial activist." They produced some excuses or reasons for not confirming him, and he was defeated--one of the few times in modern memory that a judge made it to the floor and lost on a recorded vote.

I wonder how Justice Thurgood Marshall, the first black Justice appointed to the Supreme Court 33 years ago, would observe and reflect on what happened to Ronnie White.

I think Justice Marshall would have viewed the current state of judicial nominations differently than the Federalist Society. This conservative group has over 25,000 members plus scores of affiliates, including former Independent Counsel Kenneth Starr; Supreme Court Justices Thomas and Scalia; and University of Chicago's Richard Epstein and Frank Easterbrook, also a federal appellate judge.

And their numbers are growing. The Federalist Society has chapters in 140 out of the 182 accredited law schools. The campus chapter at the University of Illinois College of Law is very active.

I don't have to tell you about the Society's "originalist" approach to the Constitution. Justice Scalia's and Justice Thomas's opinions clearly reflect their point of view.

I don't have to tell you the Federalist Society has been instrumental in influencing the law. They have helped to weaken or rolled back statutes on civil rights and affirmative action; voting rights; women's right's and abortion rights; workers' rights; prisoners' rights; and the rights of consumers, the handicapped and the elderly.

Martin Luther King., Jr., once said, "The moment is always right to do what is right."

I think the moment is right to hold the tobacco industry responsible for the costs incurred by the federal government for the medical treatment of individuals made ill by their deadly products.

I think the moment is right to hold the gun industry accountable for the irresponsible design, manufacture, distribution and marketing of their lethal weapons.

The moment is right to ensure that HMOs and health insurance companies can be held accountable for their wrongdoing that results in the injury or death of American citizens.

The moment may be right to elect a President who will appoint

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Justices who reflect that point of view and will protect our civil liberties.

I think the moment is right to remove barriers to the bench so that every citizen--whether man, woman, or whatever ethnic, racial, or religious background--can be adequately represented on our court.

I will say a word on behalf of my nominee who is before the **Senate,** Michael Reagan, the judicial nominee for the U.S. District Court for the Southern District of Illinois. Senator Fitzgerald and I reached an agreement about the selection of these nominees. Michael Reagan is the product of this agreement.

Michael Reagan possesses all the qualities necessary to make a tremendous contribution to the federal bench.

He has strong bipartisan support, as well as, the support of several respected judges, leaders, and organizations including: the National Sheriffs' Association; the Honorable Moses Harrison II, Chief Justice, Illinois Supreme Court; The Most Reverend Wilton D. Gregory, Bishop of the Diocese of Belleville; the Illinois Federation of Teachers; and the Illinois Pharmacists Association.

They have all written letters supporting Michael Reagan's nomination to fill the Southern District of Illinois' judicial vacancy.

Michael Reagan is a full-time public servant who wears several hats. In addition to his private practice, Mr. Reagan serves as a Commissioner of the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois. Mr. Reagan has held this position since 1995 and is responsible for supervising the attorney registration and disciplinary system in Illinois, a very important assignment.

In addition, Mr. Reagan serves as Assistant Public Defender in St. Clair County, Illinois. In this capacity, he represents indigent criminal defendants charged with major felonies. Mr. Reagan has served as an Assistant Public Defender since 1996.

Mr. Reagan also serves as an Honorary Deputy Sheriff in St. Clair, a fully commissioned law enforcement position that he has held for the past three years. His background as a police officer certainly qualified him in that capacity. As an Honorary Deputy Sheriff, Mr. Reagan has full arrest powers and is subject to be called to duty in the event of an emergency.

Mr. Reagan began his career in public service as a police officer after graduating with a Bachelor's of Science degree from Bradley

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University in 1976, his law degree from St. Louis University in 1980.

Although Mr. Reagan holds many notable positions, the most important roles he plays are that of husband and father. Mr. Reagan has been married to Elaine Catherine Edgar since 1976. They have four boys. I have met them all; they are great kids.

The Reagans will soon be celebrating their 25th anniversary. It is a great family.

I am pleased that the **Senate** will have this opportunity to vote for Michael Reagan. He possesses a rare combination of intelligence, practical experience, temperament, and devotion to public service that makes for a great Federal judge. I look forward to his service on the Federal bench.

I yield the floor.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. ROBB. Mr. President, I join my distinguished colleagues to express my outrage at the treatment of judicial nominees this year. I do so with the same preface as my distinguished friend from Illinois, in saying that I have a good working and personal relationship with the chairman of the committee, but the failure to confirm the nominees at this time is an outrage.

I would like to focus my remarks on our efforts to fill one of the vacancies on the Fourth Circuit Court of Appeals.

The Fourth Circuit Court of Appeals has fifteen seats. Five of those seats are currently vacant.

We have one seat on the Fourth Circuit Court of Appeals that has been vacant for a decade--longer than any other vacancy in the nation.

Filling this vacancy has been deemed a "judicial emergency" by the U.S. Judicial Conference.

On June 30, the President of the United States nominated Roger Gregory, a distinguished lawyer from Virginia, to fill this vacancy. Mr. Gregory graduated summa cum laude from Virginia State University and received his J.D. from the University of Michigan. He has an extensive federal practice, is an accomplished attorney, and was described by Commonwealth Magazine as one of Virginia's "Top 25 Best

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and Brightest." And he has bipartisan support. Senators John Warner and Arlen Specter have also written to the Judiciary Committee to seek a hearing for Mr. Gregory.

Despite the well-documented need for another judge on this court, and despite Mr. Gregory's stellar qualifications, the Judiciary Committee has

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stubbornly refused to even grant Mr. Gregory the courtesy of a hearing. In failing to provide Mr. Gregory with a hearing, the Judiciary Committee is abdicating its Constitutional responsibility and is effectively standing in the courthouse door to block this nomination.

Article II of the United States Constitution makes clear that the President is to nominate and the **Senate** is to provide advice and consent on the nomination. It is difficult for the **Senate** to provide advice or give its consent if it won't even allow the nominee to be heard. Many excuses have been offered for why this nominee won't be granted a hearing. One convenient excuse is that this is a presidential election year.

There is nothing in Article II of the United States Constitution, however, that suspends its provisions every four years. We have a constitutional obligation to render our advice and, if appropriate, grant our consent or, if not appropriate, decline to grant our consent. But we cannot just throw up our hands and declare that this provision of the Constitution is rendered meaningless during presidential election years.

The supposed logic that underlies this excuse is that the nominee may not reflect the judicial philosophy of the next Administration. But how can we even question the nominee's judicial philosophy if we never hear from him. So even this excuse argues in favor of granting the nominee a hearing.

The most recent excuse for failing to act on Mr. Gregory's nomination is that five years ago a gentleman from North Carolina was nominated for this seat, and so the argument goes this seat now "belongs" to North Carolina. But five years before that, when this seat and three others were created, a Virginian was arguably nominated to fill this seat--but the **Senate** only acted to fill the other three seats and this one has been vacant ever since.

More importantly, however, seats on Courts of Appeal don't "belong" to any state. As I have already noted, there are only ten judges currently sitting in the Fourth Circuit. Four of these ten judges are filling seats that were previously filled by a candidate judge and then from another state. Finally, it's a little hard for the senior Senator

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from North Carolina to complain that the seat belongs to North Carolina when he is the one who has been blocking a North Carolinian from filling the seat.

Rather than hide behind excuses, the **Senate** Judiciary Committee ought to seize the opportunity to right a historical wrong. The Fourth Circuit Court of Appeals has the largest percentage of African-Americans in the nation. Yet, the Fourth Circuit has never been integrated. In fact, it is the only Circuit in the country that has never in history had minority representation. If we were to confirm Roger Gregory--who is African-American--we could knock down yet another barrier that has existed for far too long.

In my view, courts should better reflect the people over whom they pass judgment. We still have time, if only we have the will to act. In 1992, when there was a **Republican** in the White House and the Democrats ran the **Senate,** we confirmed 6 Circuit Court judges later than July: 3 in August 2, in September 1, in October. In fact, its instructive to look at the one nominee who was confirmed in October of 1992. Timothy K. Lewis was nominated to the Third Circuit Court of Appeals on September 17. The Judiciary Committee gave him a hearing on September 24. He was reported out of the Judiciary Committee on October 7, and confirmed by the **Senate** on October 8.

Roger Gregory is an outstanding nominee. Rather than standing in the courthouse door, we ought to throw the door open and desegregate the Fourth Circuit. We ought to end this judicial and moral emergency and we ought to do it now.

Mr. President, I yield the floor and reserve any time remaining for those covered under the unanimous consent order.

The PRESIDING OFFICER (Mr. Enzi). The Chair, in his capacity as a Senator from Wyoming, suggests the absence of a quorum with time to be allocated equally between the sides.

Without objection, the clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. LEVIN. Mr. President, the **Senate** today will vote on the

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confirmation of a number of judicial nominees. I not only have no problem with that, I very much favor it. These nominees deserve a vote. The districts in which they will serve surely deserve to have their nominations acted upon. I believe the Nation, as a whole, deserves to have these nominees, and other nominees awaiting hearings and votes acted on by this **Senate** as well.

The Judiciary Committee held hearings for three of the nominees and approved those nominations less than a week after the nominations were received. Other nominees wait in vain for years just for a hearing. That strikes me as being an arbitrary and inexplicable system, unfair to nominees awaiting hearings, awaiting votes, and unfair to the districts or the circuits in which they would serve if confirmed. I believe it is also unfair--perhaps this is most important of all--to the people who await justice in their courts.

Two Michigan nominees to the Sixth Circuit have been waiting unsuccessfully for a hearing for more than 3 1/2 years and 1 year respectively. Two women, highly qualified, nominated from Michigan for the Sixth Circuit where there is a severe shortage of judges and an enormous caseload that sits there pending, while they have been waiting for more than 3 1/2 years and 1 year respectively.

Judge Helene White, who is a court of appeals judge in Michigan, was first nominated in January of 1997. Her nomination to the Sixth Circuit Court of Appeals has never been acted upon. She has never been granted a hearing.

Kathleen McCree Lewis was nominated to the Sixth Circuit over a year ago. It has been pending before the Judiciary Committee for over a year. No hearing, no action.

These are two judicial nominees from my home State of Michigan. Despite there being no objection that I know of to their nominations, and in the absence of any explanation whatsoever, they have been kept in limbo without even a hearing for 3 1/2 years and 1 year respectively. I believe that is truly unconscionable. In the history of the **Senate,** no nominee has waited as long as Judge White for a confirmation hearing. The seat that she has been nominated for has been vacant for 5 1/2 years. It is considered a "judicial emergency" by the Judicial Conference of the United States.

There is no apparent reason for the denial of hearings for these two nominees. No one has questioned their qualifications for the bench. No one that I know of objects to their candidacies. It is well known Judge White and Ms. Lewis are both talented, hard-working nominees.

Each are highly respected for their records which show them to be women of integrity and fairness. Judge White has had a distinguished

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career. She was a trial judge for 10 years on the Wayne County Circuit Court bench and in 1992 was elected to the Michigan Court of Appeals where she has served ever since. She also serves on the board of directors of the Michigan Legal Services and the board of governors of the American Jewish Committee.

Kathleen McCree Lewis is a distinguished appellate practitioner at the Detroit law firm of Dykema Gossett, one of the most prestigious law firms in our State. She also served as a commissioner on the Detroit Civil Service Commission and on the Civic Center Commission. She has argued dozens of cases and is a respected appellate lawyer in the very circuit to which she has been nominated. She also happens to be the daughter of the late Wade McCree, a highly respected judge who served on the Sixth Circuit, and was a former Solicitor General of the United States. If confirmed, Kathleen McCree Lewis will be the first African American woman ever to serve on the Sixth Circuit.

Gov. George **Bush has said that the Senate** should act on nominees within 60 days. That deadline passed years ago for Judge White and for Kathleen McCree Lewis. According to Governor **Bush:**

> The Constitution empowers the President to nominate officers of the United States, with the advice and consent of the **Senate.**

Then he said:

> That is clear-cut, straightforward language. It does not empower anyone to turn

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> the process into a protracted ordeal of unreasonable delay and unrelenting investigation.

To keep these nominees pending for so long without hearings is unfair to the nominees, particularly where there is no known objection and where there is no explanation for the refusal to grant hearings.

Even more important, it is unfair to the citizens served by the court. There is a large backlog of cases in the Sixth Circuit which is a serious concern for not just Michigan but for all the States that are served by that court. Over one-fourth of the judgeships on the Sixth Circuit are currently vacant, and that is among the highest vacancy rate of any circuit court in the country.

Judge Gilbert Merritt, who recently served as chief judge of the Sixth Circuit, wrote in a March 20 letter to Chairman Hatch: The court

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is "hurting badly and will not be able to keep up with its workload due to the fact that the **Senate** Judiciary Committee has acted on none of the nominations to our court."

Judge Merritt went on to say the following--and this is the former chief judge who still sits on the court. This is what Judge Merritt said:

> Our court should not be treated in this fashion. The public's business should not be treated this way. The litigants in the Federal courts should not be treated this way. The remaining judges on a court should not be treated this way. The situation in our court is rapidly deteriorating due to the fact that 25 percent of the judgeships are vacant. Each active judge of our court is now participating in deciding more than 550 cases a year--a caseload that is excessive by any standard. In addition, we will have almost 200 death penalty cases that will be facing us before the end of the next year.
>
> The Founding Fathers certainly intended the **Senate** "advise" as to judicial nominations, i.e., consider, debate and vote up or down. They surely did not intend that the **Senate,** for partisan or factional reasons, would remain silent and simply refuse to give any advice or consider any vote at all, thereby leaving the courts in limbo, understaffed and unable to properly carry out their responsibilities for years.

That is Judge Merritt's letter. In addition to that, the Judiciary Committee chairman, Senator Hatch, received a letter from 14 former presidents of the State bar of Michigan. These include, by the way, Democrats and **Republicans.** That letter pleads for action relative to the situation on the Sixth Circuit.

The Michigan bar presidents wrote in their letter to Senator Hatch that the state of affairs on the Sixth Circuit has "serious adverse effects on the bar and the administration of justice for our clients. We urge you to promptly schedule hearings for, and to pass to the **Senate** floor for a vote, the nominations of Judge Helene White and Kathleen McCree Lewis."

In the last few months, there have also been several articles and editorials in papers around Michigan calling on the **Senate** to confirm the court of appeals nominees for Michigan.

An editorial in the Detroit Free Press said:

> The **Senate's** delay in considering President Clinton's

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nominations to the Sixth Circuit court is unfair to Michigan, to the nominees, and to anyone whose future might be affected by a decision of this court.

An editorial in the Observer and Eccentric newspapers urged the Judiciary Committee and its members to "give two thoughtful and well-respected Michigan lawyers the courtesy of timely hearings on their nominations to the Federal judiciary that is currently hamstrung in carrying out its work."

An editorial in the Detroit News described the failure to act on Sixth Circuit nominees as "the sort of die-hard intransigence that should be out of bounds."

And a Jewish News editorial called the stall a "travesty of justice."

If Senators have concerns about something in the records of these Michigan candidates--and no one has raised anything to that effect--then Senators should air their concerns in a committee hearing and then let the committee vote. It is unfair to Michigan, it is unfair to the citizens who use this court to keep these judicial nominees endlessly in limbo, despite the absence of any objection that I know of to their nominations and with no explanation forthcoming whatsoever.

A number of us have spent many hours over the last few years trying to get hearings for these Sixth Circuit Court of Appeals nominees from Michigan, and yet two well-qualified candidates, each deserving a hearing and a **Senate** vote, have been left in limbo with no explanation, no stated objection.

What we are doing today in approving these four nominees, it seems to me, is surely our function, totally appropriate, and I believe and hope the nominees will be confirmed.

As we do this, we should also focus on nominees pending in the Judiciary Committee, awaiting hearings or awaiting a vote by the committee after a hearing, who are left there no matter how long they have been waiting, sometimes, again, years in the case of Helene White and Barry Goode. We have others who have been waiting since April of last year, June of last year, August of last year, September of last year. I think we can do better than that. We should rise above that kind of nonaction on the part of our Judiciary Committee.

No plea from me or from others who have worked with me on these nominations has produced hearings, despite the editorials, despite the letters from the bar associations and from Judge Merritt. Despite all these efforts, we have received just silence and statements about

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waiting a little longer or "we'll see" or "we'll try."

We should be better than that. The Constitution wants us to be better than that. I will vote to confirm these nominees whose nominations, in many cases, were sent to the **Senate,** heard by the Judiciary Committee, and approved by the Judiciary Committee in less than a week. At the same time, I will be thinking of the vacancies that exist on the Sixth Circuit Court of Appeals that have remained unfilled for years, where there is a judicial emergency, an enormous backlog, and where, despite all the pleas from the bar association, the Sixth Circuit, from indeed the Chief Justice of the United States, to vote on confirmations, we have these two well-qualified women from Michigan sitting there, awaiting a hearing, endlessly in limbo, nothing but silence, no explanation as to why their hearings are refused, no objection being noted or stated to their nominations, only two well-qualified women left in limbo and in silence.

We can do better. We should do better. I hope we find a way some day to do better.

I ask unanimous consent to print in the Record the following letters and editorials.

There being no objection, the materials were ordered to be printed in the Record, as follows:

U.S. Court of Appeals

for the Sixth Circuit,

Nashville, TN, March 20, 2000.

Re: Vacancies on the Sixth Circuit Court of Appeals

Hon. Orrin Hatch,
U.S. **Senate,**
Washington, DC.

Dear Senator Hatch: Several years ago during the period that I was Chairman of the Executive Committee of the United States Judicial Conference, we met from time to time, and you were always concerned that the **Senate** Judiciary Committee do its duty in filling the vacancies on the various Courts of Appeals. I write now to you to request that the Judiciary Committee bring up for a hearing and a vote nominations to the Sixth Circuit Court of Appeals.

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Mr. HATCH. Mr. President, we are here today in the crunch of end-of-session business to debate and take time on four noncontroversial judicial nominees. This debate today was demanded by **Senate** Democrats who, ironically, have stood in the way of these nominations made by President Clinton, their own President. These are Clinton nominees the Democrats are holding up, Clinton nominees whom Democrats are insisting we take precious time to debate.

For the past few years, **Senate** Democrats have threatened shutdowns, claimed the existence of a so-called judicial vacancy crisis, and complained of race and sex bias in order to push through President Clinton's judicial nominees. These allegations are false.

First, there is and has been no judicial vacancy crisis. consider, for example, the Clinton administration's statements on this issue. At the end of the 1994 **Senate** session, the Clinton administration in a press release entitled "Record Number of Federal Judges Confirmed" took credit for having achieved a low vacancy rate. At that time, there were 63 vacancies and a 7.4 percent vacancy rate. The Clinton administration's press release declared: "This is equivalent to full employment' in the... federal judiciary." Today, there are 67 vacancies--after the votes today there will be only 63 vacancies, the same as in the 1994. Instead of declaring the judiciary fully employed as they did in 1994. Democrats claim that there is a vacancy crisis.

In fact, the **Senate** has confirmed President Clinton's nominees at almost the same rate as it confirmed those of Presidents Reagan and **Bush.** President Reagan appointed 382 Article III judges. Thus far, the **Senate** has confirmed 373 of President Clinton's nominees and, after the votes today, will have confirmed four more. During President Reagan's two terms, the **Senate** confirmed an average of 191 judges. During President **Bush's** one term, the **Senate** confirmed 193 judges. After these four judges are confirmed today, the **Senate** will have confirmed an average of 189 judges during each of President Clinton's two terms.

Second, there has not been a confirmation slowdown this year. Comparing like to like, this year should be compared to prior election years during times of divided government. In 1988, the Democrat-controlled **Senate** confirmed 41 Reagan judicial nominees. After these four nominees are confirmed today, the **Republican Senate** this year will have confirmed 39 of President Clinton's nominees--a nearly identical number.

In May, at a Judiciary Committee hearing, Senator Biden, the former chairman of the Judiciary Committee, said: "I have told everyone, and I want to tell the press, if the **Republican** Party lets through more than 30 judges

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this year, I will buy you all dinner." When he said this, Senator

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I was taken aback to see an alleged statement of Senator Mike DeWine from Ohio that no vote would be taken for a nomination to fill the vacancy currently existing from Ohio. Senator DeWine was quoted as saying that due to partisan considerations there would be no more hearings or votes on vacancies for the Sixth Circuit Court of Appeals. I hope that this was not an accurate quote.

The Sixth Circuit Court of Appeals now has four vacancies. Twenty-five per cent of the seats on the Sixth Circuit are vacant. The Court is hurting badly and will not be able to keep up with its work load due to the fact that the **Senate** Judiciary Committee has acted on none of the nominations to our Court. One of the vacancies is five years old and no vote has ever been taken. One is two years old. We have lost many years of judge time because of the vacancies.

By the time the next President is inaugurated, there will be six vacancies on the Court of Appeals. Almost half of the Court will be vacant and will remain so for most of 2001 due to the exigencies of the nomination process. Although the President has nominated candidates, the **Senate** has refused to take a vote on any of them.

Our Court should not be treated in this fashion. The public's business should not be treated this way. The litigants in the federal courts should not be treated this way. The remaining judges on a court should not be treated this way. The situation in our Court is rapidly deteriorating due to the fact that 25% of the judgeships are vacant. Each active judge of our Court is now participating

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in deciding more than 550 cases a year--a case load that is excessive by any standard. In addition, we have almost 200 death penalty cases that will be facing us before the end of next year. I presently have six pending before me right now and many more in the pipeline. Although the death cases are very time consuming (the records often run to 5000 pages), we are under very short deadlines imposed by Congress for acting on these cases. Under present circumstances, we will be unable to meet these deadlines. Unlike the Supreme Court, we have no discretionary jurisdiction and must hear every case.

The Founding Fathers certainly intended that the **Senate** "advise" as to judicial nominations, i.e., consider, debate and vote up or down. They surely did not intend that the **Senate,** for partisan or factional reasons, would remain silent and simply refuse to give any advice or consider and vote at all, thereby leaving the courts in limbo, understaffed and unable properly to carry out their responsibilities for years.

You and other members of the **Senate** have appeared before

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the Judicial Conference and other judges' groups many times and said that you care about the federal courts. I hope that you will now act to help us on the Sixth Circuit Court of Appeals. We need your help and the help of the two Senators from Ohio, the two Senators from Tennessee, the two Senators from Kentucky, and the Senators from Michigan.

Sincerely,
Gilbert S. Merritt.

July 7, 2000.
Re: Vacancies on the Sixth Circuit Court of Appeals.

Hon. Orrin Hatch,
U.S. **Senate,**
Washington, DC.
Hon. Patrick **Leahy,**
U.S. **Senate,**
Washington, DC.

Dear Senators Hatch and **Leahy:** Recently, the former and current presidents of the Ohio State Bar wrote Senators DeWine and Voinovich a letter expressing their deep concern over the present situation in the Court of Appeals for the Sixth Circuit. With four of the sixteen seats vacant, the circuit is in a state of judiciary emergency. Former Chief Judge Gilbert Merritt has said:

"Our Court should not be treated in this fashion. The public's business should not be treated this way. The litigants in the federal courts should not be treated this way. The remaining judges on a court should not be treated this way.

* * * * *

"The Founding Fathers certainly intended that the **Senate** "advise" as to judicial nominations, i.e., consider, debate and vote up or down. They surely did not intend that the **Senate,** for partisan or factional reasons, would remain silent and simply refuse to give any advice or consider and vote at all, thereby leaving the courts in limbo, understaffed and unable to properly to carry out their responsibilities for years."

Chief Justice Rehnquist has expressed the same sentiments.

Presently three Michigan seats remain open. The President has made two nominations. Judge Helene White was nominated in January 1997, and is the longest pending nominee without a hearing by over a year; Kathleen McCree Lewis was nominated in September, 1999. Senator Abraham returned the "blue slips" for the nominees in April. Joe Davis, a spokesman for Senator Abraham, was quoted as saying that Senator Abraham

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wants hearings for these nominees to take place. Still, no hearings have been scheduled.

As former Michigan Bar Presidents, we agree with our Ohio colleagues that the situation has serious adverse affects on the bar and the administration of justice for our clients. We urge you to promptly schedule hearings for, and to pass to the **Senate** floor for a vote, the nominations of Judge Helene White and Kathleen McCree Lewis.

Respectfully,
Honorable Victoria A. Roberts (1996-1997); Honorable Dennis W. Archer (1984-1985); John A. Krsul (1982-1983); George T. Roumell, Jr. (1918-1986); William G. Reamon (1976-1977); Joseph L. Hardig, Jr. (1977-1978); Eugene D. Mossner (1987-1988); Donald Reisig (1988-1989); Robert B. Webster (1989-1990); Fred L. Woodworth (1991-1992); George A. Googasian (1992-1993); Jon R. Muth (1994-1995); Thomas G. Kienbaum (1995-1996); and Edmund M. Brady, Jr. (1997-1998).

From the Detroit Free Press, May 2, 2000

Judges On Hold: **Senate** hurts Justice by Delaying Confirmations

The 6th Circuit Court of Appeals now has four vacancies. Twenty-five percent of the seats... are vacant. The court is hurting badly and will not be able to keep up with its workload due to the fact that the **Senate** Judiciary Committee has acted on none of the nominations to our court."

Those were the words of Judge Gilbert Merritt, former chief judge of the Cincinnati-based circuit, in a letter last month to **Senate** Judiciary Chairman Orrin Hatch, R-Utah, and eight other senators--including **Senates** Carl Levin and Spencer Abraham of Michigan, one of eight states covered by the circuit.

Merritt should not be alone in his outrage. The **Senate's** delay in considering President Bill Clinton's nominations to the court is unfair to Michigan, to the nominees, and to anyone whose future might be affected by a decision of this court.

The judicial confirmation process has bogged down in mean-spirited, petty partisan wrangling between Democrat Clinton and the **Republican**-controlled **Senate,** which seems determined to wait out the lame duck and let his nominations wither.

It's not just the 6th Circuit, either. According to the **Senate** Judiciary Committee, there are 78 vacancies and 10 future vacancies in the federal judiciary. Only seven judges have been confirmed this year. Six nominees are pending on the **Senate** floor, 39 in committee, one nominee has withdrawn.

The 6th Circuit vacancies are for seats vacated by Judges

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Damon J. Keith and Cornelia Kennedy. Michigan Appeals Court Judge Helene White was nominated in January 1997 to fill the Keith vacancy. She has never had even a hearing. Nominee Kathleen McCree Lewis has been waiting since September 1999.

This is a disgrace that did not have to happen. Abraham sits on the Judiciary Committee and could move these along. Instead, he stalled consideration for three years, claiming the Clinton administration blindsided him with the White nomination.

It's hard to fathom what that has to do with the efficient, effective administration of justice in reasonable time, with the best interests of citizens in Michigan.

The federal court system should not be treated this way. Neither should the judges who seek to serve it, nor the citizens it is supposed to serve.

From the Michigan Press, June 25, 2000

Is the GOP Playing Politics With Judicial Appointments?

(By Phil Power)

"The presidential appointments process now verges on complete collapse." So concludes Paul C. Light, of the Brookings Institution (usually a liberal Washington think tank) and Virginia L. Thomas, of the Heritage Foundation (usually conservative) in a study of the experiences of 435 cabinet and sub-cabinet officials who served in the Reagan, **Bush** and Clinton administrations.

Some found treatment by the White House appointments people "an ordeal."

Others--35 percent of Reagan administration appointees and 57 percent of Clinton's nominees--were held hostage to the politics of the U.S. **Senate** in waiting for confirmation hearings.

That's one reason a lot of talented people are not about to consider appointment to top government positions.

A perfect instance of this general problem concerns the nominations of two Michigan lawyers to fill vacancies on the U.S. Sixth Circuit Court of Appeals that have been twisting slowly in the wind of the U.S. **Senate** for far too long.

Helene White is presently a member of the Michigan Court of Appeals; nominated by President Clinton in January 1997, Judge White has yet to receive a hearing from the **Senate** Judiciary Committee. Kathleen McCree Lewis, the daughter of former U.S. Solicitor General Wade McCree, is a partner in

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the Dykema Gossett law firm in Detroit; her nomination has been pending before the Judiciary Committee since September, 1999.

The Sixth Circuit is authorized to have 16 judges. Currently, the Court has four vacancies, one of which goes back for five years. For the Court to operate at 75 percent efficiency means long delays to the litigants and enormous workloads for the remaining judges (each of whom now has a caseload of 550 cases each year). Authorities now consider the number of vacancies in the federal court system to constitute a "judicial emergency."

What's going on here?
Michigan's Senator Carl Levin, a Democrat and a minority member of the Judiciary Committee, says it's because **Republicans** in the **Senate,** hoping to win the presidency this fall, have decided to hold up judicial nominations from the Clinton White House.

As evidence, he produces a table showing that while the Democrats controlled the **Senate** during the **Bush** Administration, a total of 66 federal judges were confirmed.

However, when the GOP ran the **Senate** during the first term of the Clinton Administration, 17 judges were confirmed.

So far in Clinton's second term, the **Senate** has confirmed only seven judges, with a total of 33 judicial nominees hanging fire before the Judiciary Committee without any hearings scheduled on their nominations. There are at present 81 vacancies in the federal judiciary.

Michigan's other Senator, Spencer Abraham, is also a member of the Judiciary Committee, but as a **Republican** his party controls the committee.

I asked Joe Davis, a spokesman for Senator Abraham, how come it's taken three and a half years (in the case of Judge White) and eight months (in the case of lawyer Lewis) just to get the committee to hold hearings on their nominations.

According to Davis, "Senator Abraham does not know whether or when hearings will take place. He wants them to take place, though."

That's nice. Frankly, I suspect if Senator Abraham really wanted the Judiciary Committee to hold hearings on these nominations, he'd find a way to do it PDQ.

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A member of the Sixth Circuit, Judge Gilbert S. Merit, wrote in March a letter to **Senate** Judiciary Chairman Orrin Hatch: "The Founding Fathers certainly intended that the

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Senate advise' as to judicial nominations, i.e., consider, debate and vote up or down.

They surely did not intend that the **Senate,** for partisan or factional reasons, would remain silent and simply refuse to give any advice or consider and vote at all, thereby leaving the courts in limbo, under-staffed and unable properly to carry out their responsibilities for years."

Senator Abraham is running for reelection this fall. He is stressing his performance as an effective senator in his campaign. Somebody should ask him why he can't get his committee to give two able, thoughtful and well respected Michigan lawyers the courtesy of timely hearings on their nominations to the federal judiciary that is currently hamstrung in carrying out its work.

From the Detroit News, August 13, 2000

Get Judges Out of Limbo

Michigan Court of Appeals Judge Helene White got the welcome word that she had been appointed to the federal bench in January 1997.

That was 43 months, or more than 1,300 days ago. She is still waiting to be approved by the U.S. **Senate** and take her seat with the Sixth Circuit appeals court in Cincinnati, which covers Michigan and several other states. She now has the distinction of being the longest-delayed judicial nominee in American history.

Judge White has been caught in the cross-fire between President Bill Clinton and the **Republican Senate** leadership. So has Detroit attorney Kathleen McRee Lewis, whose nomination to the same court has been held up for nine months.

The **Senate** is angry, and justifiably so, at the president for deliberately bypassing the confirmation process and appointing Bill Lann Lee head of the civil rights division of the Justice Department. President Clinton knew that Mr. Lee did not stand a chance of being confirmed because of the his record in backing racial quotas.

Mr. Clinton got around it by the semi-devious route of making a recess appointment. This has infuriated **Senate** Majority Leader Trent Lott. In retaliation, he is holding up 37 judicial appointments.

This is exactly the sort of bitter political obstruction that Texas Gov. George W. **Bush** pledged to end in his convention acceptance speech last week.

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"I don't have enemies to fight," he said. "I want to change the tone in Washington to one of civility and respect."

Senate Republicans should listen to their party's nominee. While their anger is understandable. It is the courts, and by extension those who use the federal courts, who are punished because of the resulting shortage of judges.

Sen. Lott hasn't even scheduled hearings for these nominations. And the clock is ticking. If no action is taken by Oct. 6, when the **Senate** adjourns, the nominations will die.

U.S. Sen. Spencer Abraham, the Michigan **Republican,** initially supported the stall by withholding his approval of the nominations on the grounds that he was not properly consulted by the White House. But he has since been mollified, and he has given his go-ahead. His staff says, however, that he will not push for hearings, which would be within his power as a member of the Judiciary Committee. That is for the Democratic nominators to do, his staff argues.

Every nominee deserves, at the least, a hearing within a reasonable time frame. Mr. **Bush** has specifically suggested 60 days.

Certainly, there is ample room for disagreement when the legislative and executive branches of government are in the hands of different parties. But Mr. Lott's pique has outlived any reasonable purpose. It is the sort of die-hard intransigence that should be out of bounds.

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

The PRESIDING OFFICER. Without objection, the time will be equally divided. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. HARKIN. Mr. President, parliamentary inquiry: I understand this Senator has 30 minutes?

The PRESIDING OFFICER. That is correct.

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Mr. HARKIN. I thank the Chair.

Mr. President, I will support consideration by the **Senate** of these nominations to fill district judge vacancies in Arizona and Illinois because we are entering a critical stage in the rising number of judicial vacancies in our Federal courts. However, in addition to the district vacancies, there are 22 vacancies in our Federal appeals courts, and pending before the Judiciary Committee are several appeals court nominations who are more than qualified to fill those positions. That, of course, includes a constituent of mine, Bonnie J. Campbell, former attorney general of the State of Iowa and presently the head of the Department of Justice Office of Violence Against Women. Her nomination is for the Eighth Circuit U.S. Court of Appeals.

These positions should be filled with qualified individuals as soon as possible. I urge the **Republican** leadership to take the steps necessary to allow the full **Senate** to vote up or down on these important nominations.

Basically what I have been hearing from the other side of the aisle, the **Republican** leadership, is: This is an election year. Why allow circuit nominees a vote on the floor? Hold it up. Maybe Governor **Bush** will win the election and we will control the **Senate** and the House, and we can have a whole new batch of appointees next year.

That attitude led me to take a look at the history of our judicial nominations. Let's go back to a time when there was a mirror image of what we have here, when there was a **Republican** President in the White House and a Democratic majority in the **Senate.** That year would be 1992. That year, then-President George **Bush** nominated fourteen circuit court judges. From July through October, the Democrat-controlled **Senate** confirmed nine of those judges. This year, a Democratic President nominated seven circuit court judges but with a **Republican**-controlled **Senate,** only one of these nominees has been confirmed. We have several pending, but we see no action. Time is running out. Basically what I have been told is, it is over with. They are not going to report any more of these nominees out for circuit courts.

I have also heard the argument that Bonnie Campbell was not nominated until this year so we shouldn't expect this nominee to go through. Let's take a look at what I am talking about with these charts. This is kind of a busy looking chart, but these are the circuit judges nominated in 1992 by then-President George **Bush.** These were all nominated in 1992. There were 14 nominated. There were 9 who had hearings, 9 who were referred, and 9 who were confirmed, 9 out of 14 who were nominated that year.

There was one nominee--Timothy Lewis--who was nominated in September

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of 1992, had his hearing in September of 1992, was referred in October of 1992, and confirmed in October of 1992. If the attitude that prevails among the **Republican** leadership today had prevailed in the Democrat-controlled **Senate** in 1992, we would not have confirmed anyone after July. This year, we have had none since July.

In 1992, we had two in September, two in August, and one in October, despite the fact that it too was late in an election year. This year we have only had one.

It is clear who is playing politics with judgeships. The **Republican** leadership of the **Senate** is playing the most baldfaced politics. It is not alleged that these nominees are not qualified. It is simply that they were nominated by a Democratic President. That is all. I have not heard one person on the **Republican** side tell me that Bonnie Campbell is not qualified to be a circuit court judge.

Some people on the other side may have some differences with her on some of her views. I understand that. I have had differences of view with judges I have voted to confirm. Why? Because I thought they were qualified.

I thought that if the President nominated them, they had a fair hearing, and they were reported out, my only decision was whether or not they were qualified--not whether they were ideologically opposed to me or to how I feel or what I believe. It has been my observation over the last quarter century that oftentimes when judges who have more of a liberal bent get appointed to the court, in many cases they come down on the more conservative side of cases. And I have seen conservative judges appointed to the court come down on the liberal side of cases. You never really know how this will come out, but you know whether or not people are legitimately qualified to serve on the bench.

So the arguments made that Bonnie Campbell wasn't nominated until this year--well, as I said, in 1992, we had nine circuit court judges confirmed that were nominated in that year. A couple of these were quite controversial. This year, we have had one confirmed. We have six more pending for the circuit courts. I know my colleague

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from Vermont, who is ranking member on the Judiciary Committee, stated this last week that when a majority in the **Senate** starts playing these kinds of games, the result is that when the other side becomes the majority they will do the same thing. That is too bad for our democratic system of government, too bad for the judgeships, and for our third branch of Government to have that happen.

I am not naive enough not to know that there are always politics involved in how judges are nominated. I understand that. That is the

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system in which we live. But there comes a point where politics ends and responsibility begins. When you have people who have had a hearing, who are qualified, yet they won't be reported out for a vote on the **Senate** floor, that is pure politics and that is the height of irresponsibility. The **Republican** leadership is being totally irresponsible.

Of the judges nominated in 1992, every judge who got a hearing--every single judge who had a hearing in a Democrat-controlled Congress, when a Democrat was the Chair of the Judiciary Committee, when the Democrats controlled the Judiciary Committee, every person who got a hearing was confirmed. Every single one. That is not the case today. Too many political games are being played, I am afraid, on the Judiciary Committee and on the other side.

I would like to mention one other judicial example from 1992. Michael Melloy was nominated for the district court in April of that year. He was a **Bush** nominee, supported by Senator Grassley. As my colleagues know, Senator Grassley and I have a longstanding commitment to support the nominations of individuals from Iowa to our courts. Mr. Melloy is an example of this. He was nominated April 9, 1992, received his hearing on August 4, 1992, reported out of committee on August 12, 1992, and confirmed by the **Senate** that very same day in 1992.

Again, I may have been ideologically opposed to Mr. Melloy. There may have been some things he believed in that I didn't, but there was no question in my mind that Mr. Melloy was fully qualified to be a Federal judge. As long as he was qualified and supported by Senator Grassley and the administration, I supported that nominee, even though it was in the closing days of 1992.

Let's look at the current nominees that we have. Three of the four we are going to be voting on today were nominated, got hearings, and were reported out of the committee within one week. Mr. James Teilborg was nominated on July 21, 2000, got his hearing on July 25, and was reported out of the committee on July 27. Now he stands to be confirmed today. On the other hand, Bonnie Campbell received a hearing by the Judiciary Committee in May--more than 2 months before Mr. Teilborg. Yet she is not here on the floor. Why is it that Mr. Teilborg can come out on the floor today and not Bonnie Campbell? Politics, the rankest form of politics.

The majority is being very inconsistent in their arguments. They say, well, Bonnie Campbell was nominated this year, so it is too late. Mr. Teilborg was nominated this year--nominated, had a hearing, and was reported out all in the same week, and he will be confirmed today. If this year was too late for Bonnie Campbell, why wasn't it too late for James Teilborg?

As I said, nobody has come up and said Bonnie Campbell is not

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Biden apparently believed that the confirmation this year of more than 30 judges would be fair. Well Senator Biden owes some people some dinners, maybe everybody in the press. After the votes today, the **Senate** this year will have confirmed 39 judicial nominees.

The 1992 election year requires a bit more analysis.

The Democrat-controlled **Senate** did confirm 64 **Bush** nominees that year, but this high number was due to the fact that Congress had recently created 85 new judgeships. Examining the percentage of nominees confirmed shows that compared to 1992, there is no slowdown this year. In 1992, the Democrat-controlled **Senate** confirmed 33 of 73 individuals nominated that year--or 45 percent. This year, the **Senate** will confirm 25 of 44 individuals nominated in 2000--or 57 percent. Those who cite the 1992 high of 64 confirmations as evidence of an election-year slowdown do not mention these details. Nor do they mention that despite those 64 confirmations, the Democrat-controlled **Senate** left vacant 115 judgeships when President **Bush** left office--nearly double the current number of vacancies.

Senate Democrats often cite Chief Justice Rehnquist's 1997 remarks as evidence of a **Republican** slowdown. Referring to the 82 vacancies then existing, the Chief Justice said: "Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal Judiciary." Senators who cite this statement, however, do not also cite the Chief Justice's similar statement in 1993, when the Democrats controlled both the White House and the **Senate:** "There is perhaps no issue more important to the judiciary right now than this serious judicial vacancy problem." As the head of the judicial branch, the Chief Justice has continued to maintain pressure on the President and **Senate** to speedily confirm judges. He has not singled out the **Republican Senate,** however. Selective use of his statements to imply that he has is inappropriate.

The Chief Justice made additional comments in 1997, which also undermine the claim of a vacancy crisis. After calling attention to the existing vacancies, he wrote: "Fortunately for the Judiciary, a dependable corps of senior judges has contributed significantly to easing the impact of unfilled judgeships." The 67 current vacancies, in other words, are not truly vacant. There are 363 senior judges presently serving in the federal judiciary. Although these judges' seats are technically counted as vacant, they continue to hear cases at reduced workload. Assuming that they maintain a 25 percent workload (the minimum required by law), the true number of vacancies is less than zero.

Third, allegations of race or sex bias in the confirmation process are absolutely false. Just this month, for example, President Clinton issued a statement alleging bias by the **Senate.** He said: "The quality of justice suffers when highly qualified women and minority candidates are denied an opportunity to serve in the judiciary." The White House,

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qualified. I challenge someone to come on the floor and say that. Again, if people want to vote against Bonnie Campbell to be a circuit court judge, that is the right of each Senator--not only a right, but an obligation--if they believe someone is unqualified. We can't do that as long as she is bottled up in the committee.

The Senator from Utah has the power on that committee to report her out. I say to my good friend from Utah, who just appeared on the floor, the Senator from Utah can report Bonnie Campbell's name out here to the floor and we can have a vote on this nominee. That is the way it should be done. Nobody has come up to me to say she is not qualified. She is a former attorney general of the State of Iowa. Since 1995, she has led the implementation of the Violence Against Women Act as the head of that office under the Justice Department. She has broad support on both sides of the aisle. This is a case where a judicial nominee has the support of both the **Republican** Senator from Iowa, Mr. Grassley, and the Democratic Senator from Iowa, me. Yet she has not been reported out of the Judiciary Committee. I say report her out. If people want to vote against her or say something about her qualifications, let them.

I can stand here today and talk about the qualifications of James Teilborg, or the other people; but, quite frankly, I am convinced they are qualified. I may be opposed to the way they think once in a while, but they are qualified. Is the reason Bonnie Campbell is not being reported out because somebody on the other side of the aisle doesn't like the way she thinks, or because she may have a view on an issue contrary to theirs? The rankest form of politics is holding up Bonnie Campbell's nomination. We have a backlog of nominees and we should vote on her.

The Violence Against Women Act expires this year. The Office of Violence Against Women in the Department of Justice has had only one person head it since this bill was first implemented in 1995, and that is Bonnie J. Campbell. The reauthorization of the Violence Against Women Act was voted on in the House of Representatives last week. If I am not mistaken, I think the vote was 415-3. So 415 Members of the House voted to reauthorize the Violence Against Women Act. Now, if the only person to ever head that office had done a bad job in enforcing that law, had not acted responsibly, had not brought honor and acclaim to that office and the administration of that law, do you think that 415 Members of the House would have voted to reauthorize it? No. They would have been on their feet over there, one after the other, talking about how terrible this office has been run and how the person operating that office had done such a bad job in enforcing the law. Not one Member of the House took the floor to so speak.

The one person to head that office is Bonnie J. Campbell. Not one person I have ever run across has said she has done anything less than an exemplary job in running that office. Yet the **Senate** Judiciary Committee will not report her name out for action by the full **Senate.** Yet we will get the Violence Against Women Act here and Senator after Senator will rush up to speak about how great this law is. I will bet

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you won't hear one Senator get up and say how badly this law has been administered by the Office of Violence Against Women in the Department of Justice.

That tells you what an outstanding job Bonnie Campbell has done in that office.

If that is the case, why won't the **Senate** Judiciary Committee report her name out? Politics; pure rank politics. That is what is going on in the Judiciary Committee today. I hope it won't be that way if the Democrats take charge of the **Senate.** I am not on the Judiciary Committee, but we tend to get in what I call a "cesspool spiral," like a whirlpool. One side takes over the majority and begins to stall nominations, and then the other side takes over, we keep spiraling down further and further to the point where any nominee for a Federal court will be held up months and perhaps even years while we await the next election. Then our third branch of Government truly becomes a political football.

I hope the Judiciary Committee and the leadership on that side--I say to my friend from Utah--will listen to the words of Texas Governor George **Bush.** He said he would call for a 60-day deadline for judges--once they are nominated, the **Senate** will have 60 days to hold a hearing, to report out of committee and vote on the **Senate** floor.

Bonnie Campbell has been there a lot longer than 60 days and so have some of the other judges.

I say to my friends on the **Republican** side--you are supporting George **Bush** for President. If he said he would call for a 60-day deadline, I ask my friends on the **Republican** side: Why don't we act accordingly?

In this Congress, the judicial nominees who have been confirmed had to wait on average 211 days. Governor **Bush** said they should not wait longer than 60 days. This is not getting better; it is getting worse around here. It is really a shame.

Let's look at the percentages. I am told: This is the same today as it was before--blah, blah, blah, blah. I hear this all the time--nothing has changed.

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It has changed dramatically. For example, in the Reagan years, during the 98th Congress, the **Republicans** were in the majority. They had a **Republican** President. We received 22 circuit court nominations, and 14 were confirmed. This is a **Republican** President and a **Republican Senate**--22 received, and 14 confirmed, for a 63.6-percent confirmation

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rate.

Let's look at the 100th Congress. President Reagan was still President, but there was a Democratic **Senate.** Twenty-six circuit court judge nominations were received; 17 were confirmed, for a 65.4-percent confirmation rate.

Think about that. Democrats had a higher confirmation rate under President Reagan--a very conservative President. We had a higher confirmation rate when the Democrats were in charge of the **Senate than when the Republicans** were in charge. We didn't block things when the Democrats were in charge.

Next, the 102d Congress, 1991-1992. President **Bush was the Republican** making nominations and the Democrats were in charge in the **Senate.** We received 31 circuit court nominations. Twenty were confirmed, again, for a 64.5-percent confirmation rate--**Republican** President and a Democratic **Senate.**

Now we move to the 104th Congress. We had a Democratic President, President Clinton, and we had a **Republican Senate.** Twenty circuit court nominations were received; 11 were confirmed. That was a 55-percent confirmation rate.

Now we are in the 106th Congress. We have a Democratic President and a **Republican Senate.** Thirty-one circuit court of appeals nominations have been received; 15 have been confirmed, for a 48.4-percent confirmation rate.

I ask my friend--and he is my friend--the chairman of the Judiciary Committee: How can we live with something like that? How can the Judiciary Committee come to this **Senate** with a straight face and say that a 48-percent confirmation rate is what we did in the past, when the record is clear? The record is in the 60-percent confirmation rate when we had **Republican** Presidents and a Democratic **Senate.** Yet today we are faced with a 48-percent confirmation rate.

I have heard from many judges. I have gotten letters from them saying that it is time we filled the bench. Cases are backing up. We need to get judges on the bench. But I suppose we first have to pay attention to the elections.

This one nominee, Bonnie J. Campbell, should be reported out if for no other reason than we need people on the bench who are sensitive to what is happening in domestic abuse cases and violence against women.

In 1998, American women were the victims of 876,000 acts of domestic

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violence. In 5 years--1993 to 1998--domestic violence accounted for 22 percent of the violent crimes against women. During those same years, children under the age of 12 lived in 43 percent of the households where this violence occurred. It is generational. The kids see it, they grow up, and they become abusive parents themselves.

In Iowa, and all across America, prosecutors, victim service organizations, and law enforcement officers are fighting. But they need help. We need to reauthorize the Violence Against Women Act. But there is more we can do to make sure that we have judges who know what is happening from firsthand experience and who can make sure that the law is applied fairly and upheld in courts around the country.

That is why we need someone like Bonnie Campbell on the circuit court of appeals. As I said, she is widely supported. She is supported by me and by Senator Grassley. She has the support of judges, police organizations, women, and domestic violence coalitions. She has strong support in the State of Iowa and on both sides of the aisle.

I ask the chairman of the committee: Why aren't we reporting out Bonnie Campbell? Why? Just one simple question: Why? Is there a member of the majority who thinks she is not qualified? Let them so state. Have specific objections been raised as to her qualifications? If so, we ought to know that so they can be addressed. But all we hear is a deafening silence from the other side. We are left to assume that the reason Bonnie Campbell is being held up is because they are hoping their nominee wins the election. That is their right to hope that. They can work as hard as they can for him. I don't blame them for that. But to hold up a qualified person like Bonnie Campbell who had her hearing 2 months before Mr. Teilborg had his; yet she is being locked up in the committee--all the paperwork is done. Yet politics is holding her up.

Mr. President, I ask unanimous consent the text of an article that appeared in the Des Moines Register the other day regarding the Bonnie Campbell nomination and the text of two editorials, one in the Cedar Rapids Gazette and one in the Des Moines Register, be printed in the Record.

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

From the Des Moines Register, Oct. 1, 2000

Campbell Issue Aids Democrats' Politics

(By Jane Norman)

If Iowa Democrats needed any more reason to be excited and energized about this year's presidential race in the state,

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they probably have found it in the controversy swirling around the stalled nomination of Iowan Bonnie Campbell in the **Republican**-controlled U.S. **Senate.** George W. **Bush,** hello?

Campbell, the director of the Violence Against Women office for the U.S. Justice Department, was nominated in March to be Iowa's new appeals-court judge for the 8th Circuit based in St. Louis. She had a spectacularly sedate hearing before the **Senate** Judiciary Committee in May, but then the nomination process ground to a halt. She's one of 42 judicial nominees pending in the **Senate.**

Campbell has had the support not just of Senator Tom Harkin, but also Senator Charles Grassley, even though it must stick in Grassley's craw. Campbell, who ran for governor of Iowa in 1994 and lost, made remarks during her race about Christian conservatives that riled conservative activists, who appealed to Grassley to kill her bid for the bench. That's fair; whatever you think of the merits of their arguments, it's their right to protest something as significant as a lifetime judicial appointment.

Grassley declined to side with his traditional conservative allies and supported Campbell, saying Democrats did not stand in the way he wanted judicial appointments during the waning days of the **Bush** presidency. While Grassley predicted that Campbell would fall victim to election-year politics, there's no evidence that he has tried to sabotage her behind the scenes.

Campbell's nomination hung around all summer, gaining the support of the bar association and the Iowa Police Association. When Congress returned to work in September, Harkin started turning up the heat. During the past week, he has taken to the floor repeatedly to lambaste majority **Republicans** for holding up the nomination, and he holds forth at length on the Campbell nomination with Iowa reporters.

This has been a masterful strategy by Harkin, who's become such a surrogate for Vice President Al Gore that Harkin was paired with GOP vice-**presidential nominee** Dick Cheney on a Fox News show. Campbell's woes only assist Harkin in making the case for a Democratic presidency, over and over again in media outlets across Iowa.

On Tuesday night, Harkin enlisted the help of Senator Joe Biden, the Delaware Democrat and Judiciary Committee member who's a friend of Campbell. Harkin and Biden formed a mutual admiration society on the floor to praise Campbell, and Biden recalled that he recommended that Campbell be made director of the Violence Against Women office when it was launched.

Biden insisted it was "flat malarkey" that Democrats have held up **Republican** appointments during the last days of **Republican** presidencies, and said he pushed through a flock of qualified Texas judges for Senator Phil Gramm in late

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1992. "To be fair about it there were three members of our caucus who ripped me a new ear in the caucus for doing this," said Biden.

Harkin said no **Republican** has ever come to him and explained their opposition to the nomination. "In fact, **Republicans** in Iowa ask me why she is being held up," said Harkin. "Mainstream **Republicans** are asking me that."

Biden said it is a "terrible precedent," and that it is hard on Harkin to see someone so "shabbily treated" from his home state. You hoped there was a box of tissues close at hand.

Then, on Thursday, Harkin revealed to reporters that he had been told by **Senate** Judiciary Committee Chairman Orrin Hatch "in no uncertain terms" that the **Republican** caucus won't budge on the nomination. Harkin said there's not much he can do now other than fume on the floor and ponder holding up **Republican** priorities.

All of this cater-wauling gives Harkin, and Iowa Democrats, a huge opportunity to seize a way to criticize **Republicans** on the selection of judges, an issue where the GOP is somewhat vulnerable, particularly among women and undecided voters.

Texas Governor **Bush** does not sit in the **Senate,** and he is not the one holding up the stop sign. But his party is doing it, ostensibly for his benefit. Is it really wise to have the confirmation of a woman as a judge become a major fuss in a supposedly battleground state in the last month before the presidential election?

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On top of that, many Iowa Democrats are still angry at how Campbell was treated during her race for governor. The prospect that women such as Campbell will be shut out for another four years if **Bush** is elected president is like a booster shot for get-out-the-vote efforts.

Harkin said Thursday that he absolutely' would push Campbell to be nominated again if Gore wins the presidency. For the time being, she serves Democrats' purposes just as well if she never dons black robes.

From the Cedar Rapids Gazette, Sept. 26, 2000

Stop Stalling on Judicial Candidate

In three weeks or less, Congress will adjourn before the 2000 elections, and increasingly it appears it will do so before the U.S. **Senate** brings the nomination of Bonnie Campbell to the U.S. Court of Appeals for the Eighth Circuit up for a vote.

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It's not as if Campbell, the former attorney general of Iowa, is trying to get in at the last minute--unless you consider a six-month wait the last minute. Campbell was nominated to the job by the Clinton Administration in March. She had a hearing in May.

What's taking so long?

It seems apparent the **Republican**-controlled **Senate** Judiciary Committee is growing content to hold onto this nomination until after the session--and, not coincidentally--until after the November election, when they hope to win the White House. That would mean a **Republican** would more than likely be appointed to the job.

It is not unusual for political parties to try to run out the clock on nominations in the hope the next election will bring them to power. That does not make it right, and in this case it makes no sense to sit on the Campbell nomination.

U.S. Sen. Tom Harkin, D-Iowa, is her sponsor and he pointed out a week ago there are 22 vacancies on the federal appeals court. Campbell has the backing of the American Bar Association and the Iowa State Police Association. She also has the backing of U.S. Sen. Charles Grassley, R-Iowa, who is also a member of the Judiciary Committee. Traditionally, Grassley and Harkin have backed the other's nominees, and if Campbell's nomination fails, we would hate to see that understanding damaged.

Frustrated proponents of the Campbell nomination--as well as several other nominations--have been arguing recently that over the last three years, women and minority candidates have had to wait longer to get through the confirmation process than their white male counterparts.

The chairman of the Judiciary Committee, U.S. Sen. Orrin Hatch, R-Utah, has denied women and minorities are being treated differently in the committee than their white male counterparts. Still, of the 21 candidates for the federal bench who are women or minorities, nine have been waiting for more than a year for a hearing.

Campbell has a lengthy record in private legal practice. Elected in 1990, she was the first woman to serve as Iowa Attorney General. She was appointed in 1995 to be the director of the Violence Against Women Office in the U.S. Justice Department. Her hearing revealed no good reason why she should be denied this position.

The **Senate** leadership should do the right thing in the waning days of this session and let the full **Senate** vote on Campbell. It should set aside whatever reason it has for stalling and move forward. Let the process work and bring this nomination to the floor for a vote.

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Mr. HARKIN. I see the distinguished chairman of the Judiciary Committee on the floor. He is a good man. He and I have fought many battles together. I like him personally and I respect him. If he would like to engage in colloquy, I will. He knows how strongly I feel about this nominee, about her qualifications and about the kind of job she has done at the Department of Justice. I am sure he knows I will do everything that is humanly and senatorially possible to try to get her name here. I believe I have a right and an obligation to do that. I will, within the confines of what is right and proper in the **Senate,** not violating any rules, do everything I can to try to get her name out.

We will be here this week and we will be here next week. I ask my friend from Utah, will we be allowed to have a vote on Bonnie Campbell for the Eighth Circuit Court of Appeals?

I yield the floor.

The PRESIDING OFFICER. The Chair recognizes the Senator from Utah.

Mr. HATCH. Mr. President, I will submit a resolution, and after these remarks I will spend some time answering my two dear colleagues, Senator Robb of Virginia and Senator Harkin from Iowa, to the best of my ability.

(The remarks of Mr. Hatch pertaining to the submission of S. Res. 364 are printed in today's Record under "Submission of Concurrent and **Senate** Resolutions.")

Mr. HATCH. Mr. President, I must respond to the remarks of Senator Robb and Senator Harkin.

With regard to the nomination of Roger L. Gregory, the position for which Mr. Gregory has been nominated has been vacant since it was created in 1990. Before nominating Mr. Gregory, the President had not even submitted a name to the **Senate** for this position in almost 5 years. Despite the longstanding vacancy of this judgeship, the work of the Fourth Circuit has not been adversely affected.

Moreover, when the President did submit a name to the **Senate** for disposition almost 5 years ago, he submitted the name of a resident of North Carolina, J. Rich Leonard. In doing so, the President effectively agreed that this seat should be filled by a North Carolinian.

The PRESIDING OFFICER. Without objection, the Senator's previous time consumed on the Olympics will not count against his 7 minutes.

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Mr. HATCH. I ask unanimous consent I be able to speak for another 15 minutes.

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

Mr. HATCH. The President effectively agreed this seat should be filled by a North Carolinian. By nominating Roger Gregory, a Virginian, for the seat instead of a North Carolinian, the President sought to avoid the traditional practice of seeking the "advice and consent" of the Senators from the State where the judgeship is located about which local lawyer should be nominated.

It is very late in the session to be considering a circuit court nomination. Some nominations can move through the confirmation process quickly, but only where the White House has dealt with the **Senate** on nominations in good faith. The Arizona nominations we are debating today moved through the confirmation process quickly because the White House did work closely with Senator Kyl and negotiated in good faith over which Arizonans should get these lifetime appointments.

In contrast, the White House has not dealt with the **Senate** on nominations in good faith. During our August recess, the President determined to recess appoint several executive branch officials over the express objections of numerous Senators. Furthermore, Democrats stood in the way of these four nominees we are debating today, the President's nominees, and they threatened to shut down the work of the **Senate.** This is hardly good faith. In fact, it was a Democrat hold--a Democrat hold by the minority leader on these four judges who are put forth by this President in accordance with an agreement worked out--that really caused a lot of angst on our side, plus the fact that these recess appointments that were made without consultation caused a lot of difficulty. Then we have virtually every bill filibustered, even on the motion to proceed. As a matter of fact, the H-1B bill, which just passed 96-1, had three filibusters on it, from the motion to proceed right on up through final passage of 96-1.

I must respond to some of the things Senator Robb said here this morning. He used some pretty incendiary language to imply that the **Senate** majority is biased against Mr. Gregory because he is an African American. Senator Robb said we "are standing in the courthouse door" and are refusing to "integrate" the Fourth Circuit. These allegations of racial bias are beneath the dignity of a Senator in the U.S. **Senate,** and they are offensive and politically motivated. When Democrats blocked the nomination of Lillian BeVier to the Fourth Circuit--which is what they did--the first female nominee to the Fourth Circuit, no one on our side accused them of gender bias.

I am sure Roger Gregory is a fine man. I have no doubt about that. I

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have been told that by a number of friends of mine, including former Secretary Coleman. But I have informed my colleagues that because of the atmosphere that has resulted from the President's refusal to consult with the Senators from North Carolina, because of the President's recent recess appointments and disregard of commitments he had made up here, and disregard of the advice and consent because of the petty parliamentary games in which our friends on the other side have engaged, Mr. Gregory's nomination is not going to move forward. And because this is a North Carolina seat. We would have to have somebody nuts, from North Carolina, who would not stand up for a

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North Carolinian in this seat. There is just no question about it. The President knew that, having nominated a North Carolinian before.

I would like to respond to Senator Levin for a few minutes. I don't want to go beyond that. There are other things I could say. But I bitterly resent anybody trying to play racial politics with judges, especially after what we went through in prior administrations.

It had always been my intention as chairman of the Judiciary Committee to hold a hearing on judicial nominations during the month of September. I planned on doing that. At that hearing I was fully prepared to consider the nomination of some of these people, and perhaps even Helene White or Kathleen McCree Lewis to the U.S. Court of Appeals for the Sixth Circuit. A number of my colleagues were pressing very strongly for that. I wanted to try to resolve that if I could.

However, events conspired to prevent that from happening. First, during the August recess, the President determined to recess appoint several executive branch nominees over the express objection of numerous Senators. He did so notwithstanding the agreement to clear such recess appointments with the relevant Senators. We do not have much power around here in some ways against a President of the United States, but we can demand that he consult with us. These Senators are very aggrieved by the way they were treated on these appointments--I think rightly so.

Second, Democrat Senators determined to place holds on the four nominations we are debating today and threatened shutdowns of the **Senate's** committee work, going as far as to invoke the 2-hour rule and forcing the postponement of scheduled committee hearings, including the Wen Ho Lee hearing, which is an important hearing, a bipartisan hearing, for both sides to look at.

Helene White and Kathleen McCree Lewis have only the White House and **Senate** Democrats to blame for the current situation, I might add, because of some of these petty procedural games we have been going through around here with filibusters of almost everything that comes up, or a threat to bring up all kinds of extraneous amendments if we do

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though, also issued a statement boasting of the high number of women and minorities that Clinton has appointed to the federal courts: "The President's record of appointing women and minority judges is unmatched by any President in history. Almost half of President Clinton's judicial appointees have been women or minorities." The **Senate,** obviously, confirmed this record number of women and minorities. That is hardly evidence of systemic bias--or any bias at all.

Last November, Senator Joseph Biden, former chairman of the Judiciary Committee, stated:

> There has been argumentation occasionally made... that the Judiciary Committee... has been reluctant to move on certain people based upon gender or ethnicity or race.... T here is absolutely no distinction made on these grounds . ... W hether or not a nominee moves has not a single thing to do with gender or race.... I realize I will get political heat for saying that, but it happens to be true.

I personally appreciated Senator Biden's comments on that, while others were trying to play politics with these issues. He knows how difficult it is under the circumstances to please both sides on these matters. The chairman takes pain from both sides on these matters. There is no question there are some on our side who have wanted to slow down this process, and others on the other side have wanted to speed up the process. The important thing is that we do a good process. That is what we have tried to do.

The statistics confirm Senator Biden's position. Data comparing the median time required for **Senate** action on male versus female and minority versus non-minority nominees shows only minor differences. During President **Bush's** final two years in office, the Democrat-controlled **Senate** took 16 days longer to confirm female nominees compared with males. This differential decreased to only 4 days when **Republicans** gained control of the **Senate** in 1994. During the subsequent 105th and 106th Congresses, it increased.

The data concerning minority nominees likewise shows no clear trend. When **Republicans** gained control in 1994, it took 28 days longer to confirm minority nominees as compared to non-minority nominees. This difference decreased markedly during the 105th Congress so that minorities were confirmed 10 days faster than non-minorities. The present 106th Congress is taking only 11 days longer to confirm a minority nominees than it is to confirm non-minority nominees.

These minor differences are a matter of happenstance. They show no clear trend. And even if there were actual differences, a differential of a week or two is insignificant compared to the average time that it takes to select and confirm a nominee. On average, the Clinton White House spends an average of 315 days to select a nominee while the **Senate** requires an average of 144 days to confirm.

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happen to bring a bill up that needs to be passed.

It is very late in the session to be considering a circuit court nomination. Some nominations can move through the confirmation process quickly, but only where the White House has dealt with the **Senate,** on nominations, in good faith. The Arizona nominations we are debating today moved through the confirmation process quickly because the White House worked closely with Senator Kyl and others, and myself, and negotiated in good faith over which Arizonans should get these lifetime appointments.

Everybody knows there is a tremendous need along the southern border in Arizona to have these judges. There is a tremendous court docket there that needs these judges. Yet they have been delayed for 2 solid months almost.

In contrast, the White House and **Senate** Democrats have not dealt in good faith, given the President's recess appointments in August of several executive branch nominees over the express objection of numerous Senators and **Senate** Democrats' efforts to hold up these nominees and hold up the work of the **Senate.**

With regard to the nomination of Bonnie J. Campbell, in March, Bonnie Campbell was nominated to the U.S. Court of Appeals for the Eighth Circuit. At the urging of Senator Grassley, the Judiciary Committee held a hearing for Ms. Campbell in May. It had always been my intention for the Judiciary Committee to report Ms. Campbell's nomination. However, events conspired to prevent that from happening.

First, during the August recess, as I have explained, the President determined to recess appoint several executive branch nominees over the express objection of numerous Senators. He did so notwithstanding his agreement to clear such recess appointments with the relevant Senators. By the way, this type of an agreement arose out of Senator Byrd's objections in earlier Congresses. His objections were followed here on the part of people on our side of the aisle, and the President agreed to it and then violated that agreement.

Second, after the August recess, Democrat Senators determined to place holds on the four nominations we are debating today, even though everybody admits--I think everybody admits --that they are important nominations and this arrangement that has been worked out has been fair.

Again, they threatened to shut down the **Senate's** committee work, going as far as to invoke the 2-hour rule and enforce the postponement of scheduled committee hearings. And we went through that because of pique. For these reasons, Bonnie Campbell's nomination has stalled. Ms. Campbell has only the White House and **Senate** Democrats to blame for the

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current situation.

I might add, it did not help at all on our side for these petty filibusters on everything. It used to be when I got here, there might be one or two or three filibusters a year at the very most, and then they were on monumental issues that involved a wide disparity of belief. It was not every little motion to proceed, every little bill we were going to pass, like the one we just passed 96-1. To go through three filibuster cloture votes on that bill was beyond belief. But that irritated a lot of people. It made it more difficult to get these judges through.

Mr. Harkin, the Senator from Iowa, claimed that his review of history led him to believe we are "playing politics with the judges." I strongly disagree. In President Reagan's last year, the Democrat-controlled **Senate** confirmed 41 nominees. After the votes today, the **Senate** this year will have confirmed 39 nominees. And there have been some indications there might be some games played with one of the four judges here today. If that is the case, boy, Katie bar the door, after what we have been trying to do here.

The committee worked sincerely to try to get these nominations out, and they have been here for quite a while. Finally, few nominees are confirmed when the White House and **Senate** are controlled by different political parties. From 1987 to 1992, the Democrat-controlled **Senate** confirmed an average of 46 Reagan and **Bush** nominees per year. Things changed when President Clinton was elected. In 1994, the Democrat-controlled **Senate** pushed through 100 Clinton nominees. They could not have done that without cooperation from **Republicans,** but they did that.

In 1992, at the end of the **Bush** administration when Democrats controlled the **Senate,** the vacancy rate stood at 11.5 percent. Now at the end of the Clinton administration the vacancy rate after the votes today will stand at just 7.4 percent.

Also in 1992, Congress adjourned without having acted on 53 **Bush** nominations, or should I say nominees who were sitting there waiting to be confirmed. After the votes today, there will be only 38 Clinton nominations that are pending.

Under both Democrats and **Republicans, the Senate** historically confirms 65 to 70 percent of the President's nominees. In his last 2 years, President **Bush** made 176 nominations, and the Democrat-controlled **Senate** confirmed 122 of them, yielding a confirmation rate of 69 percent. During the last 2 years, President Clinton made 112 nominations, and after today's votes, the **Senate** will have confirmed 73 of them. He has a confirmation rate of almost the same, 65 percent.

In May, at a Judiciary Committee hearing, Senator Biden indicated he

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did not believe we would do even 30 judges this year. He is wrong. We will have now done, at the end of the day, 39 judicial nominees confirmed by the **Senate.**

There has been much debate today about everything but the four nominees we ostensibly are debating. I fully support these nominees and want to say a few words about them. They are supported by their home State Senators--Senators Kyl, McCain, Fitzgerald, and Durbin.

The nominees we are supposedly debating today are as follows: Susan Ritchie Bolton from Arizona: Ms. Bolton has served as judge in the Maricopa County Superior Court since 1989. Before that, from 1977-89, she worked in private practice at a Phoenix law firm. From 1975-77, she clerked for the Hon. Laurance T. Wren of the Arizona Court of Appeals. Ms. Bolton received her law degree, with high distinction,

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from the University of Iowa Law School in 1975, and her undergraduate degree, with honors, from the University of Iowa in 1973.

Mary H. Murguia: Since 1998, Ms. Murguia has served in the Executive Office of U.S. Attorneys, first as Counsel and then as Director. Before that she served as an Assistant U.S. Attorney in the District of Arizona from 1990-98. From 1985-90, she was an Assistant District Attorney in Wyandotte Country, Kansas. She received her law degree from the University of Kansas Law School in 1985, and her undergraduate degree from the University of Kansas in 1982.

Michael J. Reagan: Mr. Reagan has worked in private practice since graduating from law school in 1980; since 1995, he has been a sole practitioner at the Law Office of Michael J. Reagan. In addition, he has served as an Assistant Public Defender (part time) since 1995. He received his law degree from St. Louis University Law School in 1980, and his undergraduate degree from Bradley University in 1976.

James A. Teilborg: Mr. Teilborg has been a partner at the Phoenix law firm of Teilborg Sanders & Parks since 1972; before that he was an associate at another Phoenix firm from 1967-72. He received his law degree from the University of Arizona School of Law in 1966.

Some have complained the Arizona nominations have moved more quickly while others have not. Some nominations can move through the confirmation process quickly, there is no question about that, but only where the White House has dealt with the **Senate** on nominations in good faith. The Arizona nominations we are debating today moved through the confirmation process quickly because the White House worked closely with Senator Kyl and negotiated in good faith over which Arizonans should get these lifetime appointments.

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All four are Democrats, all four are supported by the President, all four came through the appropriate committee--the Judiciary Committee--and all four will be voted on today, and I expect all four to be confirmed unanimously. If there are no politics played, they will be confirmed unanimously.

In contrast, the White House and **Senate** Democrats have not dealt in good faith, given the President's recess appointments in August of several executive branch nominees over the express objection of numerous Senators and **Senate** Democrats' efforts to hold up these nominees and obstruct the work of the **Senate**--the filibusters that have occurred on almost everything that comes up here and, of course, the holds that have been placed on these four nominees who are President Clinton's nominees. It does not take long until people on our side know there are too many games being played on judicial nominees.

We have done a good job. President Reagan had the all-time highest confirmation of judges during his 8 years. That was 382 judges. By the end of the day, when we confirm these 4, President Clinton will have the all-time second highest, as far as I know, and that is 377 judges, 5 fewer than President Reagan. Had we not had all these games played, I believe I could have held a hearing in September, which I no longer can hold, and we would have confirmed probably enough to draw President Clinton equal to President Reagan.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. HATCH. I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. **LEAHY.** Mr. President, I have been scarcely able to hold back the tears listening to my good friend from Utah. I am sure he did not mean to mislead the **Senate,** but those who might not know the numbers could be misled, not by any intent on the part of the senior Senator from Utah.

As he has said himself, we will have confirmed fewer than 40 judges in the last year of President Clinton's term in office. When the Democrats controlled the **Senate,** in the last year of President **Bush's** term in office, we confirmed 66. In fact, we were holding hearings right into September and voting on judges up to the last days of the session, confirming judges for President **Bush.**

The distinguished Senator from Utah feels perhaps some have suggested inappropriately that women, minorities, and others take longer going through this body. I point out that the ones who suggested that have

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been independent bipartisan groups outside the **Senate.**

I have stated over and over, I have never seen or heard a statement expressing--I wonder if the Senator from Utah can stay while I speak; I do not want to say this with him off the floor--I have never once heard him express either a racist or a sexist remark. He has been a close and dear friend of mine for over 20 years. Nor have I ever suggested that anybody on the **Senate** Judiciary Committee has taken a racist or sexist position, but I am troubled, as I hope he and others would be troubled, by the fact that women and minorities, if they are nominated for judgeships, have taken longer to go through this **Republican**-controlled **Senate** than others if they are allowed to go through at all.

We talk about Roger Gregory, nominated to the Fourth Circuit. It has been suggested this is a seat that is reserved to North Carolina. That is not so. As pointed out in the Wall Street Journal in a recent letter from the President's Counsel Beth Nolan, this is a vacant seat that has not been allocated to the State of North Carolina and is appropriate for an appointment from Virginia. The distinguished chairman of the committee has said that Senators should work with the White House. In this case, two of the most distinguished Members of the **Senate**--one a **Republican,** one a Democrat, John Warner and Chuck Robb--worked very closely with the White House on this Virginia nomination and both support the nomination of Roger Gregory.

Senator Robb strongly urged the White House to appoint Roger Gregory, a highly distinguished African American. Senator Warner supports him. He has the highest ratings possible from bar associations. But he cannot get confirmed by the **Senate;** he cannot even get a hearing.

I commend what Senator Robb said on the floor today in support of Roger Gregory. I hope all of us will listen to him.

Likewise, I was struck by the remarks of Senator Durbin of Illinois with respect to the Supreme Court and his support for Michael Reagan to a district court judgeship in Illinois. Senator Durbin laid out what I have also heard from **Republicans** and Democrats who support Michael Reagan for that judgeship. Democrats and **Republicans** were at hearings for him. Democrats and **Republicans,** ranging across the political spectrum, have spoken to me in support of Michael Reagan. He is supported by both home state Senators, one a **Republican** and one a Democrat.

Senator Carl Levin, the distinguished senior Senator from Michigan, one of the most respected voices in this body, spoke of his support for Judge Helene White to the Sixth Circuit and Kathleen McCree Lewis to the Sixth Circuit and how he wished they would be considered. They have been held up and blocked by this **Senate.** Is the chairman saying that Judge Helene White and Kathleen McCree Lewis do not have the support of their two Senators from Michigan? If that is the case, we ought to know

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that. I understand that they both have that support. If they don't have the support of a home state Senator, then let's say that. Judge Helene White and Kathleen McCree Lewis are extraordinarily well-qualified women. I wish they would get confirmed.

Senator Tom Harkin, was an extraordinary advocate for Bonnie Campbell. I can't add to what he has said. Senator Harkin spoke extremely well about Bonnie Campbell and, of course, Bonnie Campbell should be confirmed. Again, going to the test: Did the President work with the Senators from that State. Are we saying that the two Senators from Iowa do not support Bonnie Campbell? My understanding is both of them support her. Why can't she get Committee consideration and a **Senate** vote?

The **Senate** will move forward on a number of nominees today: Michael Reagan, Susan Ritchie Bolton, Mary Helen Murguia, and James Teilborg. I recommend that all four be confirmed by the **Senate.** It is unfortunate that this **Republican**-controlled **Senate,** is not willing to do for President Bill

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Clinton what a Democratic-controlled **Senate** did for President George **Bush,** and move people forward. We can talk about the numbers that various Presidents have appointed. Recent Presidents have appointed more judges than George Washington did or Thomas Jefferson or Abraham Lincoln or Teddy Roosevelt. But we are also a much bigger country, and we have a lot more cases and need more judges. In fact, if we passed the judgeship bill the distinguished senior Senator from Utah and I have introduced, the vacancy rate would be well into the teens with over 130 vacancies.

We have waited 10 years to authorize new judges, even as this country has expanded over the years and caseloads have grown. The Judicial Conference is asking us to authorize 70 judges. In fact, I strongly urge we pass the judgeship bill before the Presidential election while no one knows who is going to be elected President, and we are looking at what is best for our court system.

I am glad to see the **Senate** moving forward on these three nominees. I expect they will be approved overwhelmingly. They are all well qualified for appointment to the federal courts.

Three judicial nominees on the **Senate** calendar have been cleared by Democrats for action for some time, including two from Arizona and one from Illinois who has been pending the longest of the four.

There were Senators who wanted to be heard and have a chance to debate the lack of hearings and the refusal to give hearings to qualified nominees. They have spoken eloquently on behalf of Roger

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Gregory, Bonnie Campbell and Judge Helene White. They are not seeking to filibuster these nominations and each has agreed to a reasonable time for debate before a vote.

The Senator from Arizona is right that there has been a problem with the nomination of James Teilborg, who happens to be a close personal friend of the Senator since their days together back at the University of Arizona Law School. Mr. Teilborg was nominated on July 21 and was afforded a hearing and was reported by the Judiciary Committee within a week.

The frustration that many Senators feel with the lack of attention the Committee has shown long-pending judicial nominees has recently boiled over. They wish to be heard; they seek parity and similar treatment for nominees they support. I understand their frustration and have been urging action for some time. This could all have been easily avoided if we were continuing to move judicial nominations like Democrats did in 1992, when we held hearings in September and confirmed 66 judges that presidential election year.

Michael Reagan, nominated to be a District Court Judge for the Southern District of Illinois, is a distinguished private attorney in Belleville, Illinois. He graduated from Bradley University in 1976, and St. Louis University Law School in 1980. He has been in private practice for over 20 years, and has been an adjunct professor of law at Belleville Area College and St. Louis University. He also presently serves as an Assistant Public Defender in St. Clair County, Illinois. He enjoys the support of both of his home state Senators. When other nominees to the Illinois federal courts were given hearings and confirmed in June, he was held back. He had likewise been nominated in early May. He was finally included in a hearing in late July and reported unanimously by the Judiciary Committee on July 27. He could have been confirmed before the August recess or at any time in September. I am glad that time has finally come.

Judge Susan Ritchie Bolton has presided in the Arizona Superior Court for Maricopa County since 1989. She received her undergraduate degree and law degree from the University of Iowa. Following law school she clerked for the Honorable Laurence T. Wren on the Arizona Court of Appeals. She then went into private practice at Shimmel, Hill, Bishop & Bruender. She enjoys the support of both of her home state Senators and received a well-qualified rating from the American Bar Association. She was nominated on July 21, participated in a confirmation hearing on July 25 and was unanimously reported by the Judiciary committee on July 27. She could have been confirmed before the August recess or at any time in September. I am glad the **Senate** is turning its attention to her nomination and am confident that she will be confirmed to fill the judicial emergency vacancy for which she was nominated.

Mary Murguia currently serves as Director of the Executive Office for U.S. Attorneys. She also serves as an Assistant U.S. Attorney for the

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District of Arizona. Prior to that, she served as an Assistant District Attorney for the Wyandotte County District Attorney's Office. She earned her undergraduate and law degrees from the University of Kansas. She enjoys the full support of both of her home state Senators. Like Judge Bolton, she was nominated on July 21, received a hearing on July 25 and was unanimously reported by the Judiciary Committee on July 27. She could have been confirmed before the August recess or at any time in September. I know that the **Senate** will now do the right thing and confirm her to fill the judicial emergency vacancy for which she was nominated.

I thank the Majority Leader and commend the Democratic Leader for scheduling the consideration of these judicial nominations. I wish there were many more being considered to fill the 67 current vacancies and eight on the horizon. I wish that we were making progress on the Hatch-**Leahy** Federal Judgeship Act of 2000, S. 3071, and authorizing the 70 judgeships affected by that legislation as requested by the Judicial Conference.

I heard Senator Hatch argue last week that the vacancies on the federal judiciary are "less than zero". While I marvel at the audacity of such argument, it moves us no closing to fulfilling our constitutional responsibilities to the federal judiciary. Likewise the notion that the refusal by some to waive the **Senate's** 2-hour rule in late September somehow preventing the Committee from holding additional confirmation hearings in early September or now is hardly compelling. I wish the Committee and the **Senate** would have followed the model established in 1992 and continued holding hearings and reporting judicial nominees in August and September. That simply did not happen and despite my requests no additional hearings were held. This year we held about half as many hearings as in 1992. Despite all of our efforts we have been unable to get the Judiciary Committee to consider the nominations of Bonnie Campbell or Allen Snyder or Fred Woocher following their hearings.

The debate on judicial nominations over the last several years has included too much delay with respect to too many nominations. The most prominent current examples of that treatment are Judge Helene White, Bonnie Campbell, Roger Gregory, and Enrique Moreno. With respect to these nominations, the **Senate** has for too long refused to do its constitutional duty and vote. Nominees deserve to be treated with dignity and dispatch--not delayed for two or three or four years. The nomination of Judge White has now been pending for over four years, the longest pending nomination without a hearing in **Senate** history.

Of course it is every Senator's right to vote as he or she sees fit on all matters. But I would hope that in the cases of these long-pending nominations, those who have opposed them will show them the courtesy of using this time to discuss with us any concerns they may have and to explain the basis for their anonymous holds and the **Senate's** refusals to act.

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It was only a couple of years ago when the Chief Justice of the United States chastised this **Senate** for refusing to vote up or down on judicial nominations after a reasonable period for review.

This **Senate** continues to reject his wisdom and, in my view, our duty.

It is my hope the **Senate** will confirm all four district court nominees on the **Senate** calendar. I know there are Senators who want a chance to debate the lack of hearings and the refusal to give hearings to qualified nominees. I understand that frustration, and it is justifiable, especially as it is not the way the Democrats acted when they controlled the **Senate** with a **Republican** President.

The nominee from Illinois should have been confirmed some time ago. The nominees from Arizona have zipped through here faster than the **Republican** leadership has allowed most

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judges to go through. When Senators supporting nominations, received months and years before, see newer nominees zip through, they are, of course, frustrated.

The Judiciary Committee has reported only three nominees to the court of appeals all year. We have held hearings without even including a nominee to the court of appeals. We have denied a committee vote to two outstanding nominees who have succeeded in getting hearings; namely, Bonnie Campbell and Allen Snyder. You have to understand the frustration of Senators and those outside the **Senate** who know that Roger Gregory and Helene White and Bonnie Campbell and Kathleen McCree Lewis and others should have been considered by the Judiciary Committee and voted on by the **Senate.**

On September 14, Senators Barbara Mikulski, Barbara Boxer, Blanche Lincoln, Tom Harkin, and Carl Levin and Representative Carolyn Maloney from the other body, highlighted the **Senate's** failure to act on judicial nominations to the Federal bench. They called on the **Senate** leadership to consider qualified women before the Congress adjourned. They also discussed the problems of judicial emergencies, the length of time it takes women and people of color to be confirmed, and how the Federal courts do not currently reflect the diversity of our country. I do not recall them or anybody else ascribing motives to those who are holding up these people. Rather, they were saying in a diverse country such as ours, the Federal court should reflect the diversity of our country.

They focused on the following women who have been waiting more than 60 days for confirmation: Helene White, U.S. Court of Appeals for the Sixth Circuit, has been pending more than 1,360 days; Kathleen McCree

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Lewis, U.S. Court of Appeals for the Sixth Circuit, has been pending more than 370 days; Bonnie Campbell, U.S. Court of Appeals for the Eighth Circuit, has been pending more than 215 days; Elena Kagen, U.S. Court of Appeals for the District of Columbia, has been pending for more than 480 days; Lynette Norton, U.S. District Court for the Western District of Pennsylvania, has been pending more than 890 days; Patricia Coan, U.S. District Court for the District of Colorado, has been pending more than 500 days; Dolly Gee, U.S. District Court for the Central District of California, has been pending more than 495 days; Rhonda Fields, U.S. District Court for the District of Columbia, has been pending more than 325 days; and Linda Riegle, U.S. District Court for the District of Nevada, has been pending more than 165 days. That is why these Senators and this Member of Congress made the statement we did.

Mr. President, am I correct in understanding that under the previous order, we are to recess at 12:30?

The PRESIDING OFFICER. The Senator is correct.

Mr. **LEAHY.** Then I yield the floor and withhold the remainder of my time.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. **LEAHY.** Mr. President, I believe I also have an hour under another part of the unanimous consent agreement.

The PRESIDING OFFICER. The Senator is correct.

Mr. **LEAHY.** I will withhold that and yield the floor.

SUBJECT: JUDGES (92%); POLITICS (90%); CAMPAIGNS & ELECTIONS (90%); VOTERS & VOTING (89%); LEGISLATORS (78%); YEAR 2000 ELECTIONS (78%);

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Under my stewardship, the Judiciary Committee has considered President Clinton's judicial nominees more carefully than the Democratic **Senate** did in 1993 and 1994. Some individuals confirmed by the **Senate** then likely would not clear the committee today. The **Senate's** power of advice and consent, after all, is not a rubber stamp.

But there is no evidence of bias or of a confirmation slowdown. **Senate** Democrats claim that **Republicans** have politicized the confirmation process. **Republicans,** though, have not levied false charges or used petty parliamentary games.

In conclusion, it always is the case that some nominations die at the end of the Congress. In 1992, when Democrats controlled the **Senate,** Congress adjourned without having acted on 53 **Bush** nominations. Currently there are only 38 Clinton nominations that are pending before the Judiciary Committee.

It is not the end of the line for nominees that do not get confirmed this year. **Republican** nominees who failed to get confirmed have bone on to great careers, both in public service and the private sector. Senator Jeff Sessions, Governor Frank Keating, Washington attorney John Roberts, and law professor Lillian BeVier are just a few examples. Lillian BeVier and a number of other women are prime examples of those who were denied the opportunity of being on the court for one reason or another back in those days.

I bitterly resent anybody trying to play politics with this issue. I stand ready to defend our position on the Judiciary Committee, and I look forward to confirming these last four nominees today. And, of course, once we have done that, we will have matched what was done back in 1994, when the President said we had a full judiciary, with a vacancy of 7.4 percent.

I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Illinois is recognized.

Mr. DURBIN. It is my understanding that under the unanimous consent request, I have 10 minutes to speak.

The PRESIDING OFFICER. Correct.

Mr. DURBIN. Mr. President, I have spoken with the staff of Senator **Leahy** and, if I go beyond 10 minutes, I ask that the additional time be taken from that allocated to Senator **Leahy.**

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I thank Senator Hatch for his leadership and friendship on the **Senate** Judiciary Committee. We have our differences. When I served on the committee, we had some profound differences, but I respect him very much, and I respect the job he does.

I thank Senator Hatch personally for the kind attention which he has given to the vacancies in my home State of

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Illinois. I am happy to report that with the nomination and confirmation of Michael Reagan, we will have a full complement of Federal judges in our State, which will make the workload more manageable all across the State. So I thank Senator Hatch and also Senator Fitzgerald. We have been working for the last 2 years, on a very bipartisan basis, toward approving these nominees to have come before the **Senate.**

Before I address the nomination of Michael Reagan, I would like to address a larger issue which involves not only the **Senate** Judiciary Committee but the entire **Senate,** the Congress, and the people of this country because this week marks the opening of the Supreme Court's new term. It is a good moment to reflect on the role of the Supreme Court, its past, and its future.

This brief statement that I present to you represents some of the concerns I have about the Supreme Court, the role it is playing, and the impact of the Presidential election on the future of that Court.

One of the most interesting books ever written about America was written by a French tourist by the name of Alexis de Tocqueville. He came to the United States 165 years ago, traveling around different cities and making observations about this American character. This was a brand new nation. De Tocqueville wrote in his famous work his observations and took them back to Europe.

One might think that a book such as that would be lost in history. It turns out that de Tocqueville's observations were so impressive that 165 years later we still turn to this book, and I think it is nothing short of amazing that his observations turn out to be valid today. De Tocqueville made an observation about America and about all of the important political questions in our country which sooner or later turn out to be judicial questions. This wasn't a criticism. Quite the contrary. De Tocqueville admired the innovations in the American judiciary that granted the courts the independence and clarity of function that were found nowhere else in the world. De Tocqueville believed these observations would mean that America's judicial system would hear, and act on, the most important issues of the day. He couldn't have been more correct.

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Think about the "big issues". The issues that the American people have cared about--argued about--most deeply. The issues that spark the most debate--and the most passion. Sooner or later, the battle over these issues comes before the highest court in the land. Slavery. Child labor. Worker safety. Monopolies. Unionization. Freedom of the press. Capital punishment. Segregation. Environmental protection. Voting rights. A woman's right to choose.

The battle always comes to the Supreme Court; always comes before the nine justices who are Constitutionally granted enormous responsibilities, and enormous power.

In just the past year, the Supreme Court has offered important rulings on abortion, school prayer, gay rights, aid to parochial schools, pornography, Miranda rights, violence against women, parental rights--just to name a few. Not all of these decisions have turned out as I would have hoped.

For instance, take the case of U.S. vs. Morrison. The Supreme Court struck down a provision of the Violence Against Women Act that gave victims of rape and domestic violence the right to sue their attackers in federal court. Congress passed this law to give women an additional means of pursuing justice when they are the victims of assault. We passed this law because the States themselves did not always adequately pursue rapists and assailants. And the States acknowledged this!

Thirty-six States had entered this suit on behalf of the woman who had been victimized. They wanted victims of violence against women to retain the right to bring their attackers to court. But the Supreme Court, in a narrow vote, decided otherwise. The vote... five to four.

But this close margin is not unusual on our highest court--it is becoming commonplace. Rarely has the Supreme Court been so narrowly divided for such a long period of time. The replacement of just one judge could drastically change the dynamic of the Court for decades to come.

Chief Justice Rehnquist and Justices Scalia and Thomas--the Court's most conservative members--tend to vote together on hot button social and political issues such as affirmative action and school prayer. Centrist conservatives, Justices O'Connor and Kennedy, usually join them. The dissent is often written by the more liberal justices--Stevens, Souter, Ginsberg and Breyer. Both Ginsberg and Breyer are Clinton appointments.

Many of the Supreme Courts decisions have been made on the basis of a

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single vote. Partial birth abortion--five to four. Age discrimination--five to four. Gay rights--five to four. Warantless police searches--five to four. The federal role in death penalty cases--five to four.

These are not mere academic cases. These are decisions that change people's lives. We all hope that the Supreme Court will act wisely and fairly. But we also all know--history and human nature tell us so--that this is not always the case.

We learned in school about the Dred Scott case. Mr. Scott had lived in my home state of Illinois--where slavery was banned--and sued for his freedom on the basis that he had already lived as a free man, and had the right to continue to do so. The Supreme Court infamously disagreed, finding that Mr. Scott was nothing more than property--"to be Used in Subserviency to the Interests, the Convenience, or the Will, of His Owner", a man "Without Social, Civil, or Political Rights." The decisions of the Supreme Court--and at times, the opinion of just one Justice--can make the difference between having, or losing, a cherished right.

Perhaps that is the reason that my colleague, the senior Senator from Utah, is of the opinion that a President's power to make nominations to the Supreme Court and to the federal bench is--and this is a quote--". ..the single most important issue of this next election."

I think he's right. The next President may have the opportunity to make two or three appointments to the Supreme Court. He may even appoint the next Chief Justice.

In the first two hundred years since the signing of the Constitution, the Supreme Court invalidated 128 laws that had been passed by Congress. About one law every two years, on average. Since 1995, however, the Court has struck down 21 laws, more than four per year. This is an unprecedented assertion of judicial power.

Will the next President try to use the appointment process to further shift the balance of power between the branches of government?

Will the next President of the United States use a litmus test to "pack" the Supreme Court with Justices--Justices whose minds were already made up on important issues?

That is what the far right, members of the Federalist Society, want. They want to turn back the hands of the clock.

So I'm inclined to agree with the distinguished Senator from Utah. This is, indeed, one of the most important issues of the Presidential

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campaign.

Imagine a Supreme Court with three Antonin Scalia's--three Clarence Thomases--three radically conservative Justices bent on greatly restricting the authority of the federal government. The philosophical balance of the Court would shift dramatically. One by one the protections that have been built up over the past thirty five years could fall.

If you read the history of the Supreme Court, you will note that up until the time Franklin Roosevelt was President, it was an extremely conservative and somewhat lackluster Court. The Court started to change during Roosevelt's Presidency, and beyond. **Republican** and Democratic Presidents thereafter appointed more activist judges who looked at the problems facing America. One by one, the protections which we built up over that period of time would be in jeopardy.

Protection of the rights of minorities, women, and the handicapped; protection of voting rights, civil rights, worker rights, reproductive rights; protection of the environment; protection from gun violence; and protection of our fundamental freedoms as Americans. One by one, a different court could challenge each of these protections.

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No longer could the federal government require background checks for gun purchases, rein in polluters, or protect the persecuted.

I hope all Americans will give some thought to the type of Supreme Court they feel can best serve the American people. I hope they give it some thought before they go out and vote in November.

In addition to who will be appointed, it's also critical to realize who is not being appointed.

More than any previous president, President Clinton has succeeded in diversifying the bench. Nevertheless, women and minorities are still underrepresented in our Federal courts. It isn't as if some Members of Congress have not tried to address this disparity. But as hard as we try to diversify the bench, we have not been able to produce the record of success that we would like to show.

I wonder how one of the great Justices ever to serve on the Supreme Court, Justice Thurgood Marshall, would have reflected on the treatment of a nominee, Ronnie White for the Federal District Court in Missouri. He is a member of Missouri Supreme Court. He is African American. He was judged qualified and reported by the **Senate** Judiciary Committee. Then he was rejected on the **Senate** floor by a party-line vote. Some

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EXECUTIVE SESSION -- (Senate - July 30, 2002)

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NOMINATION OF D. BROOKS SMITH TO BE UNITED STATES CIRCUIT JUDGE

Mr. DASCHLE. Madam President, I now ask that the Senate proceed to executive session, as provided under the previous order.

The PRESIDING OFFICER. The Senate will proceed to executive session, and the clerk will report the nomination.

The assistant legislative clerk read the nomination of D. Brooks Smith, of Pennsylvania, to be United States Circuit Judge for the Third Circuit.

The PRESIDING OFFICER. There are now 4 hours for debate, evenly divided between the chairman and ranking member.

The Senator from Pennsylvania.

Mr. SPECTER. Madam President, it is with considerable pride that I urge my colleagues to vote to confirm a very distinguished Federal judge, D. Brooks Smith, now Chief Judge of the Western District of Pennsylvania, whose nomination is now before the Senate for the Court of Appeals for the Third Circuit.

Judge Smith comes to this position with an outstanding academic background, having received his bachelor's degree from Franklin and Marshall College in 1973, his law degree from Dickinson Law School, and then engaged in the active practice of law for 8 years before becoming district attorney of Blair County, PA, a populous county whose county seat is Altoona.

He then became a judge of the Court of Common Pleas of Blair County in 1984, serving for 4 years until he became a judge for the United States District Court for the Western District of Pennsylvania where he is now the chief judge, and for now almost 14 years has had very distinguished service there.

I came to know Judge Smith when he appeared before the bipartisan nominating panel which had been established by Senator Heinz and myself, and I found him very well qualified and have known him on a continuing basis rather well over the course of the past 14 years. I have talked to him on many occasions and met with him on many occasions, discussing problems of the courts administratively, and issues that may come before the Judiciary Committee. He has been an outstanding jurist.

Judge Smith enjoys a unique reputation among all of the people who know him. During his confirmation hearings, large groups of people who knew him rallied to his defense and came forward to attest to his erudition, his scholarship, his good character, and his judicial temperament.

Certain issues have been raised which had delayed the confirmation. One involved a fishing club in which he was a member, but that club did not practice what is called invidious discrimination because it was a social club only. While in confirmation hearings for the district court, he had said he would resign from the club if they did not change their membership rules. It was later determined in 1992 in an opinion of precedential value that the club did not engage in invidious discrimination, so there was no

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Judge Smith did not resign within a year, or 2 years, as he had sworn. In fact, he did not resign within the time that the ethical rules that he was sworn to uphold as a judge required. He did not resign until 10 years later and then only when a new position on a higher court for someone from Western Pennsylvania opened up and he hoped to be appointed to it.

There is no reasonable, logical explanation for why he waited for more than 10 years to follow through except that one: There is now a vacancy on a court that he wanted to go to, the Third Circuit from Western Pennsylvania. Claims that the ethical rules changed to allow his continued membership are groundless.

The reason I stress this is that we have judicial nominations hearings, and the distinguished Senator from Utah, the distinguished Senator from Illinois, we have all sat in these hearings. You ask for certain commitments from judicial nominees because once they are confirmed they have a lifetime position.

When a nominee comes before the Senate and makes a commitment, we must rely on his or her word to honor that the promise will be kept. With Federal judges that is especially true. Once confirmed, they have lifetime appointments. Impeachment is not a realistic way to enforce such commitments and, unlike Republicans in the House and Senate a few years ago, I have never suggested impeachment of Federal judges.

If we allow such a promise, whether it is about club membership or some other issue, to be so flagrantly broken with no consequence, then promises and assurances to the United States Senate will mean very little. I think that is a bad precedent. I think that is a bad message to send to future nominees to the courts and to the executive branch: just tell us what we want to hear and then ignore those commitments without any consequence.

I cannot think of another occasion in which a judicial nominee has promised to take specific actions and then been confirmed, after failing to keep his word. It is true that some judicial nominees have been confirmed after resigning from a discriminatory club, but none have ever been confirmed after telling the Senate that they would resign and then failing for years to do so. The closest analogy I recall is the failed nomination of Judge Kenneth Ryskamp to the 11th Circuit, because Judge Ryskamp was on notice that membership in discriminatory clubs was impermissible, but he continued his membership in a discriminatory club anyway.

As a district court nominee of President Reagan in 1986, Judge Ryskamp admitted that he was then a member of the University Club, which had a rule against allowing women as members, and the Riviera Club, which had no race-specific membership rules, but which in practice had no Jewish or African American members. During his 1986 hearing, Senator Simon asked Ryskamp if he thought he should resign from the University Club, and Ryskamp promised the Senate, ``I will resign from any club the Committee feels is inappropriate.'' In 1986, he was not asked specifically about the Riviera Club, which he later said he did not consider to be a discriminatory club. He subsequently resigned from the University Club, but not the Riviera Club.

During his nomination by the first President Bush to the Eleventh Circuit, Judge Ryskamp's two-decade long membership in the Riviera Club was questioned extensively. For example, Senator *Kennedy* noted that the fact that the Senate had not specifically asked Judge Ryskamp to resign from the Riviera Club did not lessen his responsibility to follow the ethical rules anyway and resign. I recall that Judge Ryskamp told me that he resigned shortly before his confirmation hearing in March 1991 because his continued membership created the appearance of impropriety, not because, in his view, the Club discriminated. In April 1992, the motion to report favorably Judge Ryskamp's circuit nomination to the

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floor was defeated. The subsequent motion to send the nomination to the floor without recommendation also failed.

Unlike Judge Smith, Judge Ryskamp never promised to resign from the club at issue, although several Senators believed Judge Ryskamp should have done so following his first confirmation. I think it only reasonable that Judge Smith's conduct regarding his previous promise to the Senate would lead a reasonable person to doubt the sincerity of his assurances to the Senate this year in other areas, as well.

Breaking a promise to the Senate, or misleading the Senate into believing that certain action would be taken, is an independent yet unusually strong reason for the rejection of a judicial nominee. I do not think Judge Smith should be given a promotion after failing to keep his word to the Senate. If his statements to the Senate in 1988 were not promises, then he most assuredly misled the Senate into believing he was going to resign, and he did not do so within any period that can be considered reasonable. On this basis alone, I feel I must vote against Judge Smith's confirmation to the Third Circuit.

Spruce Creek invidiously discriminates against women. Prior to his nomination to be promoted to the Third Circuit, Judge Smith never informed the Senate that he did not have to keep his promise to the Senate. He acknowledged in both his 1988 and 2001 Senate Questionnaires that the Club violated the ethical rules against judges belonging to clubs that engage in invidious discrimination. In fact, when Judge Smith finally resigned from the Club in December of 1999, he told the Club's president that the Club's men-only membership rules ``continue to be at odds with current expectations of Federal judicial conduct.'' It is only now that questions have been raised about his very late resignation does he belatedly assert for the first time that the Club is ``purely social'' and so the rules against discriminatory club membership do not apply. The exception he seeks to create would swallow the rule. His statements on this point really give me pause with respect to how Judge Smith would follow the law as an appellate judge or whether he would seek to bend it to his personal purposes. Public officials should not have to

be told, repeatedly, not to belong to clubs that discriminate.

We have received a letter from Professor Stephen Gillers, the Vice Dean of the New York University School of Law, observing that the ethical rules against discriminatory club membership do not apply to purely private social clubs that do not allow business or professional meetings. However, both Professor Gillers and Professor Monroe Friedman, a distinguished ethics scholar, have noted that if club members can or do sponsor events or meetings at the club that are business or professionally related then the club cannot be called purely private and the club's discrimination against membership for women is ``invidious'' within the meaning of the Code of Conduct's prohibitions. This is true even if women are allowed, by the men who belong to the club, to attend some or all business and professional meetings hosted by the club's members.

I understand that, in fact, Spruce Creek has always allowed members to host business and professional meetings at its facilities. We know that members have hosted business meetings and gatherings of their professional colleagues at the Club. The President of the Club, who has been a member for decades, told Senate staff that members can use Club facilities for any meetings or occasions they want, without any oversight, but he refused to discuss the specific ways the

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Club is used by members for business meetings.

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We also know that the Club's constitution and by-laws do not discourage the members from hosting business, professional or political meetings at the Club. Women, regardless of their standing in the community or in their profession, cannot invite their colleagues to Spruce Creek for business meetings because they are explicitly and intentionally excluded from membership.

Additionally, according to Professor Gillers, Judge Smith had an obligation to make sure that the Club maintained a purely social purpose, if he was going to claim that his membership was exempt from the ethical rules. He could not merely assume that it did. There is no ``don't ask, don't tell'' exception to the ethical rules. Given his previous assurances to the Senate and his own admissions up to and including his resignation in 1999, he can hardly assert that the Club is ``purely social'' now, as an after-the-fact justification for his conduct. He has made no showing in support of this belated contention.

Professor Gillers' view of this obligation to inquire is consistent with the guidance in the Judicial Conference's Compendium to the Code of Conduct for United States Judges. Judge Smith also did not follow the Compendium's advice regularly to re-evaluate club membership policies and practices. Judge Smith also did not seek an ethics opinion from his fellow Federal judges about whether the rules against discriminatory club membership somehow exempted this Club to which he so badly wanted to belong.

Judge Smith now says that he did not seek an ethics opinion because it was so clear to him that the ethics rules did not apply to this Club after amendments in 1992 that supposedly let him off the hook. This is another implausible and self-serving assertion. As Professor Gillers noted, the 1992 amendments to the Code of Conduct for United States Judges without a doubt strengthened the prohibition against discriminatory club membership by adopting the language of the ABA code referred to in the Senate Questionnaire that Judge Smith promised to follow when he swore to the Senate that he would resign. The only significant difference is that the rule Judge Smith promised to follow in 1988 allowed judges one year to get discriminatory rules changed or resign, while the 1992 rule gave judges up to two years, from learning of discrimination according to the Code's new, tougher rules, to change the club's practices or resign. Yet, Judge Smith did not resign in 1989, 1990, 1991, 1992, 1993, or 1994. He did not resign until a chance for a higher position in the Federal courts became available in 1999.

I recall that more than a decade ago the Senate Judiciary Committee considered this issue at length. There was testimony from women and men from across the country describing the impact of discriminatory private clubs on the women and people of color excluded. From time to time, I suppose, reminders of these lessons are necessary.

In 1990, 2 years after Judge Smith was confirmed and promised the Senate that he would resign from the mens-only Spruce Creek Club, the Senate Judiciary Committee passed a sense of the Committee resolution on the issue of discriminatory clubs. The resolution stated that discrimination at clubs where business is conducted and which intentionally exclude women and minorities is ``invidious'' and ``conflicts with the appearance of impartiality required of persons who may serve in the federal judiciary.'' The Committee's resolution that was adopted on August 2, 1990, provides a bright-line rule for public officials. It defines the clubs at issue as those where members bring business clients or professional associates to the club for conferences, meetings, meals, or use of the facilities. Spruce Creek meets this definition. It is

also obviously a place where contacts valuable for business purposes, employment and professional advancement are formed. The Club, by arbitrarily and intentionally excluding women from membership, practices invidious discrimination as defined by the Senate Judiciary Committee. Public officials should not have to be told repeatedly not to belong to clubs that discriminate.

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All judges, no matter how popular, have a solemn obligation to ``avoid the appearance of impropriety in all activities,'' under both the Judicial Conference's Code of Conduct for United States Judges and the ABA's model code. That is because, in the words of those codes, ``Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.''

This prohibition applies ``to both the professional and personal conduct of a judge.'' The Judiciary Committee's club resolution similarly sets a high standard of conduct for Federal judges in their personal conduct with regard to club memberships and association. Judge Smith has failed in those obligations. He may very well be a nice person and courteous to women litigants in his courtroom, but that does not excuse him from following the ethical rules that govern his conduct as a lifetime appointee to the Federal courts. Ethical rules apply to all judges equally, regardless of popularity.

Judge Smith had an obligation to resign from the Spruce Creek Rod and Gun Club, both by virtue of his promise to the Senate and because of his responsibilities under the ethical codes, and he failed to do so in a timely fashion. His conduct should not be rewarded with a promotion.

I would also like to set the record straight on one final related point. Supporters of Judge Smith have referenced President Jimmy Carter visiting the Club. According to Carter's memoirs, however, one time in the late 1970s President Carter and the First Lady were invited by the ``Spruce Creek Hunting and Fishing Club for a day of fishing on a portion of their leased stream.'' That day, they met the man who actually owned that parcel of land and thereafter they visited and stayed at his farm, not the Club. The chapter in his book called ``Spruce Creek'' relates to the creek, not the Club. There is no evidence that President Carter has ever endorsed the Club's intentional, invidious discrimination against women.

Judge Smith failed to recuse himself promptly from conflicts of interest. I am also concerned about Judge Smith's late recusal, or disqualification, in two cases involving his substantial financial investments. According to two distinguished professors of legal ethics, Professor Gillers and Professor Friedman, Judge Smith also violated ethical rules due to his late recusal from the Black cases, a 1997 investment fraud case and a related 1999 criminal case. This is because it is undisputably true that Judge Smith and his wife had substantial investments (valued at between $200,000 and $500,000 together) in the bank or holding company that faced significant financial liability in those cases and because his wife also worked at the bank.

In one of those cases, Judge Smith waited five months to recuse himself. In the other case, he waited about a week to recuse himself after realizing that the bank was involved, but he issued significant orders in the intervening period. In both cases, Judge Smith revealed only his wife's employment at the bank to the lawyers in the cases. He never disclosed their substantial financial investments to the lawyers in either the civil or the criminal case. Judge Smith contends that he was not required to recuse himself but did so only in ``an abundance of caution.'' He also contends, basically, that nobody was harmed by his late recusal.

In the opinions of two ethics experts, however, Judge Smith was required to recuse himself from any case in which the judge or his spouse has any interest that could be substantially affected by the outcome of the case, in accordance with the rules passed by Congress in 28 U.S.C. □ 455 (a) and (b) (4), and with cases of the Supreme Court and Third Circuit. These rules against conflicts of interest, which are intended ``to avoid even the appearance of partiality,'' are largely self-enforcing. Parties may not know that a judge has substantial financial investments affected by the case and may not move to disqualify a judge unless the judge fully discloses such information. Judge Smith, again reading ethical rules

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narrowly, did not

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do so. Such facts do not give one confidence in his conduct on the bench.

I do think this Senate should take seriously a lifetime appointee's failure to follow ethical rules, in this area and others, such as discriminatory club membership. It is problematic to confirm someone to the Court of Appeals who would read the ethical obligations so narrowly. This is especially so because, under the structure of the Federal courts, it is the circuit court

judges who preside over ethics complaints against lower federal judges. I do not think those who read such rules narrowly should be elevated and given that special responsibility.

Judge Smith's remarks as a Federal District Court judge: Another troubling area is Judge Smith's insensitive and activist speeches. A number of these remarks call into question Judge Smith's judgment and fairness. For example, as a sitting federal judge he has given speeches in which he calls ``legal spam'' cases that affect the rights of ordinary Americans, such as cases involving their financial security, social security appeals, pension plan collection cases, and bankruptcy appeals. Such a characterization is shocking for its insensitivity to the importance of such cases to the individuals seeking a fair hearing of their claims in federal court. It calls into question how seriously Judge Smith has taken his oath as judge to administer justice to all persons equally and to ``do equal right to the poor and to the rich.''

Judge Smith also spoke out in favor of parties being required to pay each other's costs in responding to discovery requests. That idea--like the idea of requiring the loser in a case to pay the winner's expenses, which he also endorsed has been widely rejected because it would impose significant financial burdens on individuals suing corporations, for example, for personal injuries caused by a defective product. Such a rule could make it impossible for individuals to pursue legitimate grievances for which Congress has provided a federal court forum.

Another concern is Judge Smith's speeches to conservative ideological groups in which he basically gives advisory opinions about the constitutionality of federal statutes. For example, in 1993, as a sitting judge, he gave a far-reaching speech to the Federalist Society in which he advised the audience that the proposed Violence Against Women Act (VAWA) was unconstitutional. He said this landmark legislation could not be justified as within the power of the federal government. He was also very critical of Congress's extensive findings of fact in VAWA, calling them a ``promiscuous invocation of the Commerce Clause.'' This lack of deference and respect to the legislative findings of a co-equal branch of government is troubling.

Judge Smith told the Federalist Society his own principles for deciding such cases: ``First, ask whether the subject matter is within the power of the national government by express delegation in the text of the [C]onstitution, or impliedly through a historically honest reading of the necessary and proper clause. If not stop!'' Such a subjectively narrow reading of the Constitution could ostensibly result in the overturning of many laws intended to protect the rights of individuals. He assured the Senate at his recent hearing that he would not read the Constitution so narrowly if he were promoted, but in 1988 he also assured the Senate that he would resign from a discriminatory club the following year, a promise he did not keep. I am not sure his assurances on the important issue of the scope of Congressional power should be credited now.

Similarly, Judge Smith gave a speech at the 1997 National Convention of the Federalist Society on

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``The Federalization of Criminal Law." In it he criticized the invocation of federal jurisdiction via the Commerce Clause in a ``routine" car bombing case under 18 U.S.C. □ 844, as well as the ``rape-shield" amendments to the Federal Rules of Evidence which generally bars evidence of a rape victim's sexual history. Judge Smith took issue with federal intrusion into these areas of the law, stating that using that statute in car bombing cases and rules like the rape-shield rule reflect ``elitism: a mind set on the part of Congress and some federal prosecutors that the state court systems can't be trusted to `get it right' ..... never mind the text of the Constitution." Such statements are unsettling. It seems as though Judge Smith has a deep distrust that Congress does not follow the Constitution, despite the precedent that requires judges to give congressional enactments a presumption of constitutionality.

Judge Smith has also written an article endorsing an idea he calls ``benign judicial activism" in which a judge intervenes early in a case to help reach a speedy and just resolution. While this idea has superficial appeal, in practice this approach may not be so benign. In about half of Judge Smith's more than 50 reversals, the Third Circuit reversed his decisions either to grant summary judgment in whole or in part to defendants in civil cases or to dismiss plaintiffs' complaints with prejudice. In a number of such reversals which span his years on the bench the Third Circuit took issue with his early intervention in cases in ways that denied plaintiffs the opportunity to have their cases adjudicated or tried on the merits. Thus, the Court of Appeals to which Judge Smith is now nominated has repeatedly reversed decisions of his which improvidently granted summary judgment or dismissals in favor of civil defendants, often big, corporate defendants. This pattern, combined with his speeches and conduct, raises concern.

Judge Smith's participation in seminars at resorts paid for by special interests is problematic. Another area of concern is that Judge Smith has attended a large number of

educational seminars funded by corporations and groups with an interest in interpreting the law a particular way, in a politically or ideologically conservative way favoring corporate interests. As a sitting federal judge, Judge Smith has spent more than 72 days on junkets at luxury resorts on trips valued at more than $37,000 which were funded by corporations and conservative special interest groups. Judge Smith has taken three trips to seminars funded by the Foundation for Research on Economics and the Environment (FREE), which promotes ``free market environmentalism," opposes environmental regulations, and gives lectures on topics like ``Liberty and the Environment: A Case for Principled Judicial Activism." He has also taken nine trips funded by the Law and Economics Center (LEC), which is affiliated with George Mason Law School and which sponsors seminars with anti-regulatory bent on topics like ``Misconceptions about Environmental Pollution and Cancer."

My colleague on the Senate Judiciary Committee, Senator *Feingold*, has spent a great deal of time trying to address the problem of these junkets. The current ethical rules do not clearly prohibit such judicial education seminars at luxury resorts paid for by special interests, and it is difficult for outsiders to obtain information about who is really footing the bill. According to one report, however, Judge Smith has presided over at least two dozen cases involving corporations that funded LEC and he is one of the most frequent fliers to such seminars. I do think it is difficult to maintain the appearance of impartiality under such circumstances. It is axiomatic that judges must be perceived as fair and impartial, and actually be so, for our system of justice to work. I am troubled by Judge Smith's insensitivity to such matters.

Judge Smith's reversals for dismissing plaintiffs' claims: I am also concerned about the unsettling anti-plaintiff pattern in Judge Smith's judicial decisions. Judge Smith's published and unpublished decisions reveal numerous instances in which he has been more solicitous to corporations than to plaintiffs and pro se litigants. Judge Smith has been reversed by the Third Circuit dozens of times for denying plaintiffs the opportunity to try the merits of their cases. In cases involving personal injuries, toxic torts,

employee rights, and civil rights claims by prisoners, Judge Smith has been reversed for improvidently granting defendants' motions for summary judgment, prematurely dismissing plaintiffs' complaints, and inappropriately denying motions for injunctive relief without giving the plaintiffs a hearing.

Overall, Judge Smith has been reversed 51 times, including 18 unpublished reversals, in 14 years. In contrast, Judge Pickering was reversed 28 times in 11 years and Judge Barrington Parker, one of President Bush's nominees who was confirmed last fall, was

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reversed nine times in 11 years on the district court bench. The Third Circuit's reversals suggest that Judge Smith's political philosophy greatly influences the outcome in cases before him. Of the many problematic reversals and published, as well as unpublished, decisions of Judge Smith on the district court, three are particularly illustrative of his approach to claims of plaintiffs, but there are many others that raise concerns.

In *Metzgar* v. *Playskool*, 30 F.3d 459 (3d Cir. 1994), for example, three Reagan appointees reversed Judge Smith's dismissal by summary judgment to the corporate defendant that had been sued for the death of a 15-month-old child who choked on a wooden block marketed without a warning label. Judge Smith granted summary judgment to the corporation on his theory that choking is an obvious danger and therefore no express warning was necessary. The Third Circuit was ``troubled'' by Judge Smith's analysis and his reliance on flawed statistics. The appellate court concluded that Judge Smith should have given the jury a chance to consider whether the blocks were so obviously dangerous that no specific warning was needed for parents of toddlers.

In *Wicker* v. *Consolidated Rail Corporation,* 143 F.3d 690 (3d Cir. 1998), Judge Smith was reversed for granting summary judgment to an employer sued under the Federal Employees Liability Act (FELA) for injuries caused by exposure to toxic solvents, degreasers and paints illegally dumped and buried by the employer. Smith granted the corporation's motion for summary judgment on the ground that the workers had signed a release settling prior, unrelated injury claims against the railroad. The Third Circuit reversed and held that FELA was intended to protect workers in these situations and that the releases seized on by Smith were invalid.

In *Brown* v. *Borough of Mahaffey,* 35 F.3d 846 (3d Cir. 1994), Judge Smith improvidently granted summary judgment to a city that refused to allow the plaintiff and his Pentecostal ministry access to tent revival meetings in violation of their rights under the Free Exercise Clause of the First Amendment. The city had intentionally locked a recently-erected gate to impede access to the Christian revival meetings. Judge Smith concluded erroneously that these actions, even if manifesting anti-Christian bias, did not constitute a substantial burden on

the exercise of their religion. The Third Circuit reversed, holding that Judge Smith's analysis was ``inappropriate for a free exercise claim involving intentional burdening of religious exercise'' because ``[a]pplying such a burden test to non-neutral government actions would make petty harassment of religious institutions and exercise immunity from the protection of the First Amendment.'' The Third Circuit completely disagreed with Judge Smith's hostile decision in which he stated that the plaintiff's ``invocation of the First Amendment provisions guaranteeing religious liberty in so glaring a piece of spiteful litigation is insulting to the principles protected by that constitutional amendment.'' I was shocked by Judge Smith's rough and disrespectful treatment of the legitimate claims of people of faith in this case.

This unsettling pattern created by Judge Smith's judicial decisions, his high level of participation in

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right wing, special interest-funded junkets, his activist and insensitive speeches, his late recusal in cases involving his substantial financial interests, and his very belated resignation from a discriminatory club create a very unfavorable impression. Judge Smith's defense to each of these significant problems seems to be that he actually is a fair judge despite the appearance that he is not. I am not convinced that his record warrants a promotion to a higher court.

Judge Smith's cramped and self-serving approach to the ethical rules that are supposed to govern federal judges is particularly troubling. He seems to think he is above the rules. His actual record of conduct on and off the bench creates a negative impression that is not reflected in Judge Smith's apparent popularity among his friends. I have no doubt that Judge Smith is an intelligent and charismatic person. What his record as a whole, not just as a colleague or friend, calls into question is his sensitivity, his fairness, his impartiality and his judgment. It calls into question how seriously he has taken his promises and assurances to the Senate in the past and recently, as well as how seriously he has taken his oath as judge to administer justice to all persons equally and to do equal right to the poor and to the rich. The record Judge Smith's own record of performance as a federal judge over these past 14 years does not merit his promotion to one of the highest courts in the land. Based on that record, I will vote against confirmation.

My good friend from Utah is waiting patiently. I withhold the remainder of my time.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, hearing my colleague, one might forget that this is the U.S. Senate rather than some whacky politically correct college campus--Berkeley on the Potomac. The fact is, this judge is one of the most respected judges in all of Pennsylvania. He has virtually everybody in western Pennsylvania on his side. He has served 14 years on the Federal bench and has done a very good job in doing so. He is highly respected and has the highest rating from the American Bar Association--the gold standard, according to our colleagues from the other side. And he did not break his word.

The fact is, the law was different than was explained to him when he appeared before the committee, and it is still different than the distinguished Senator from Vermont has been making out here today.

I often hear my colleagues talk about the Clinton nominees who were left at the end of the 106th Congress, but I rarely hear them mention the 54 nominees who were left at the end of the Democratic-controlled 102nd Congress when George Herbert Walker Bush was President. If we are going to waste our time looking back on nominations past instead of looking ahead, let's not forget the 54 nominees the Democratic-controlled Senate left at the end of the 102nd. That is 13 more than the number of Clinton nominees left at the end of the 106th whom we hear so much about, and about 17 of them didn't have a chance anyway. The rest of them there were for reasons. Some of them, the blue slips weren't returned by Senators. You can't call them up.

I don't really think to talk about past congressional action on nominations in any way furthers the work we have been doing as a committee. However, it is difficult to listen to only a select portion of what has occurred in the past without trying to set the record straight. Those Bush 1 nominees who were never confirmed are just as important as these Clinton nominees who have been complained about, and there were far more of them than there were Clinton nominees left over. It is just a matter of fact. Whoever is President, you have some nominees left over. But there were a lot more left over by Democrats than there were by Republicans.

Let me name some of them: Jay C. Waldman of the Third Circuit, nominated for the Third Circuit;

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Franklin Van Antwerpen, Third Circuit; Lillian R. BeVier, Fourth Circuit; Terrence W. Boyle, Fourth Circuit, who has been sitting here for 14 months, nominated again 10 years later; Francis Keating II, current Governor of Oklahoma, the Tenth Circuit; Sidney A. Fitzwater, Fifth Circuit; John G. Roberts, again, nominated by the second Bush 10 years later, sat there all those months in the first Bush, and now he is sitting here for 14 months in this administration; John A. Smietanka, Sixth Circuit; Frederico Moreno, Eleventh Circuit; Justin P. Wilson, Sixth Circuit; James R. McGregor, Western District of Pennsylvania; Edmund Kavanagh, Northern District of New York; Thomas Sholtz, Southern District of Florida; Andrew O'Rourke, Southern District of New York.

There are plenty of names and an awful lot more than were left at the end of the Clinton administration, and with very little justification. They have seldom mentioned that the all-time confirmation champion was Ronald Reagan with 382 judges. He had 6 years of a favorable party Senate. His own party controlled the Senate. He got 382 judges through. President Clinton, with the opposition party controlling the Senate, with me as chairman,

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as a member of the opposition party, got 377 judges through, virtually the same number as the all-time confirmation champion, Ronald Reagan.

Continuing my list of judges: Tony Graham, Northern District of Oklahoma; Carlos Bea, Northern District of California; James Franklin Southern District of Georgia; David Trager, Eastern District of New York; Kenneth Carr, Western District of Texas; James Jackson, Northern District of Ohio; Terral Smith, Western District of Texas;, Paul Schechtman, Southern District of New York; Percy Anderson, Central District of California; recently confirmed; Lawrence Davis, Eastern District of Missouri; Andrew Hane, Southern District of Texas; recently confirmed; Russell Lloyd, Southern District of Texas; John Walter, Central District of California; recently confirmed; Gene Vougts, Western District of Missouri; Manuel Quintana, Southern District of New York; Charles Banks, Eastern District of Arkansas; Robert Hunter, Northern District of Alabama; Maureen Mahoney, Eastern District of Virginia; James Mitchell, District of Nebraska; Ronald Leighton, District of Oklahoma; William Quarles, District of Maryland; James McIntyre, Southern District of California; Leonard Davis, Eastern Northern District of Texas; recently confirmed; Douglas Drushal, Northern District of Ohio; Christopher Hagy, Northern District of Georgia; Lewis Leonatti, Eastern District of Missouri; Raymond Finch, Northern District of Vermont; James McMonagle, Northern District of Ohio; Katherine Armentrout, District of Maryland; Larry Hicks, District of Nevada; Richard Casey, Southern District of New York; Edgar Campbell, Middle District of Georgia; Joanna Seyvert, Eastern District of New York; Robert Kostelka, Western Northern District of Louisiana; Richard Dorr, Western District of Missouri; has had a hearing; James Payne, District of Oklahoma, confirmed this congress; Walter Prince, District of Massachusetts; George O'Toole, Jr., District of Massachusetts; William Dimetroulas, Southern District of Florida; Henry Saad, Eastern District of Michigan--not to mention Kenneth Ryskamp, who, like Charles Pickering, was voted down in committee and never received a full Senate vote.

Let me also say I am going to get into this because I didn't think we would get down to the point where we started talking about a 115-member club that is a social club, not a business club, and virtually everybody knows it. To make that the big brouhaha that this is supposed to be is just almost beyond belief to me. I didn't want to have to talk about that, but I will be happy to.

I rise today to express my strong support for Judge D. Brooks Smith whom the President nominated on September 10 of last year for the Third Circuit Court of Appeals to be confirmed today or tomorrow. It has been over 5 months since his committee hearing. It has been over 60 days since the Judiciary Committee reported Judge Smith's nomination favorably to the Senate. I am disappointed, however,

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with the treatment Judge Smith is getting from those whose well-funded business it is to oppose President Bush's nominees.

I have warned before of the growing power of the extreme left of mainstream special interest groups upon the judicial confirmation process. Almost all of them are right here in this town. My colleagues know full well that when I was chairman of the Judiciary Committee, I did not welcome conservative groups telling the committee how to vote and what to do.

I told them to get lost. I even directed my staff to refuse briefings from them and even meetings with them. But the evidence indicates a very different relationship now to liberal special interest groups that seem to call the shots.

Newspapers from the Wall Street Journal to the Washington Post have commented on these liberal special interest groups and on their control of this process. But it is not a matter of opinion; here is the evidence. I would like to have printed in the **RECORD** evidence of this unfortunate relationship. First is a fundraising letter from People for the American Way taking credit for the rather shameless defeat of Judge Charles Pickering's nomination; second, a letter from a liberal Hispanic organization telling the committee not to bring up the nomination of Miguel Estrada until August to give them time to prepare a Pickering-like campaign against him. The President nominated Miguel Estrada over 1 full year ago. He would be the first Hispanic to sit on the Nation's second most influential court. But the Democratic leadership refuses to give him a hearing. Now I think we know why.

Lastly, I want to have printed in the **RECORD** a press release from the National Organization For Women, issued just hours after the Judiciary Committee voted to report favorably the nomination of Judge Brooks Smith to the full Senate. It appears that NOW and other radical liberal groups have demanded that the Democrat leadership come to the floor and fight to defeat Judge Smith.

I ask unanimous consent that the documents I have just referenced be printed in the **RECORD**.

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

PEOPLE FOR THE AMERICAN WAY,

Washington, DC, April 5, 2002.

In the past couple of weeks, the Wall Street Journal's notoriously right-wing editorial board has twice attacked People For the American Way--and me personally--in particularly venomous language. Being called a ``race-card specialist'' is not the best way to start the day. (You think I'd be used to it given that the Journal's editorial board has run more than two dozen attacks on me over the years, especially during my tenure at the Leadership Conference on Civil Rights as I chaired the successful coalition battle to keep Robert Bork off the U.S. Supreme Court.)

But there's good news in those unfair and inaccurate poison-pen editorials. As a longtime progressive ally recently reminded me, they don't come after us like that unless they think we're winning.

In this case their fears were well founded. On March 14, the Senate Judiciary Committee voted to reject the nomination of Judge Charles Pickering to a lifetime appointment to the U.S. Circuit Court of Appeals. People For the American Way played a crucial leadership role in the broad progressive coalition effort to defeat this nomination in the face of attacks from the far right, the GOP Senate leadership, and the White House. Even before the vote, the far right had been coming after us with all

reason for him to leave the club.

An issue arose on a case, where he presided for a relatively brief period of time, as to whether there should have been an earlier recusal. The matter was inquired into, investigated at length by former Gov. Dick Thornburgh and former Attorney General of the United States, and in an elaborate statement, he went through the case in detail and found, as I concluded as well, that the judge had made a timely recusal.

Some issues were also raised as to a speech which Judge Smith made on the Violence Against Women Act. He had concluded that there was not Federal jurisdiction for that particular statute.

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I, frankly, disagreed with him about his conclusion on that, as lawyers are wont to do, even lawyers who become judges or lawyers who become Senators. In fact, the Supreme Court of the United States ultimately agreed with Judge Smith on the point.

I mention these issues in passing because I think they are not worth any more comment. The issues were considered at great length by the Judiciary Committee, and in a 12-to-7 vote, the Judiciary Committee recommended Judge Smith's confirmation.

As is well known, Judge Smith's nomination came before the Judiciary Committee at a time of considerable controversy involving the timing and the confirmation of nominees submitted by President Bush.

Senator *Biden*, Senator *Kohl*, and Senator *Edwards* all voted to confirm Judge Smith in an atmosphere where there was, to say the least, at least some element of partisanship.

I only mention those issues. I think they do not bear any more comment than I have given them.

When a man such as D. Brooks Smith undertakes public service in a Federal judgeship, I think it ought to be noted that there is a very considerable personal and financial sacrifice. I thank Judge Smith for serving on the Federal bench, and I thank all the Federal judges for serving on the Federal courts which are the pillars of justice and the pillars of our democratic society.

Judge Smith has undergone a difficult period in this confirmation process which has taken quite a considerable period of time. I compliment him for his steadfastness and for his determination in staying the course and in working through on this confirmation.

There is no doubt of Judge Smith's qualifications--his educational background, temperament, judicial experience, and experience being a district attorney. Judge Smith has a broad range of experience.

The Third Circuit is in desperate need of judges. They are in an emergency situation. I ask unanimous consent that a letter from Chief Judge Edward R. Becker be printed in the **RECORD** at the conclusion of my remarks.

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

(See exhibit 1)

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the rhetorical fury they can muster. I can only imagine what will happen now that it is clear we won't let them complete their ideological takeover of the federal courts without a fight.

Pat Robertson recently told millions of his television viewers that People For the American Way is ``bad news for America. They don't tell the truth, and what they're doing is essentially smearing this man.'' Robertson's son Gordon, the heir apparent to the evangelist's empire, used the same television platform to accuse People For the American Way of ``anti-Christian bigotry,'' telling viewers we opposed Pickering because he is a Christian. Phyllis Schlafly's Eagle Forum has denounced People For the American Way and our allies as an ``Unholy Alliance'' while calling Democratic members of the Senate Judiciary Committee the ``Tyrannical Ten.''

Ultra-conservative senators like Trent Lott, Orrin Hatch and Mitch McConnell have gone after us and other Pickering critics. And right-wing pundits on the Internet are even worse, making totally irresponsible and inflammatory remarks.

The increasing frequency and harshness of the attacks directed against People For the American Way reflect more than anything else our leadership role in the progressive movement and the effectiveness of our work. We've been accused of aiding America's enemies for standing up to Attorney General John Ashcroft and his assaults on the Constitution. We've been attacked as anti-Christian bigots for defending separation of church and state. And now we're being attacked for fighting to preserve the federal courts as a refuge for people seeking to have their civil rights and civil liberties protected.

The recent Judiciary Committee vote was the first victory in what will certainly be a long and fierce struggle over the future of the federal judiciary and the rights and freedoms protected by our Constitution.

I hope that you will take this opportunity to become a member of People For the American Way or to continue your support. At this watershed moment in our history, we would be proud and honored to march forward with you as our partner.

Sincerely,

Ralph G. Neas,
President.

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Mexican American Legal Defense & Educational Fund, National Association of Latino Elected & Appointed Officials, National Council of La Raza, National Puerto Rican Coalition, Puerto Rican Legal Defense & Education Fund,

Washington, DC, May 1, 2002.
Hon. **PATRICK LEAHY,**
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: As national Latino civil rights organizations, we write on a matter of great importance to U.S. Latinos, and all Americans--the nomination of Miguel Estrada to the D.C. Circuit

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Court of Appeals. Although historically we have expressed our views on judicial nominees with different levels of frequency, we are united in our view that all federal judicial appointments are important because they are life-long appointments, because they are positions of great symbolism, and because federal judges interpret the U.S. Constitution and federal laws serving as the balance to the legislative and executive branches of the federal government. While the Supreme Court is the highest court, the appellate courts wield considerable power. During its most recent term, the Supreme Court heard only 83 cases, while the circuit courts decided 57,000 cases. As a practical matter, circuit courts set the precedent in most areas of federal law.

We are united at this time around our belief that Mr. Estrada's nomination deserves full, thoughtful, and deliberate consideration. The President proposes to place Mr. Estrada, who has no judicial experience, on arguably the single most important federal appeals court to decide a myriad of statutory and regulatory issues that directly affect the Latino community. Every appointment to a powerful court is important as we recently witnesses in the Supreme Court's 5-4 decision in Hoffman Plastics that stripped undocumented workers of certain labor law protections. This decision, which inevitably will result in increased exploitation of the undocumented, as well as weaker labor standards for all low-wage workers, underscores the importance of nominations such as this one, not just to Hispanics, but all Americans.

This decision comes on the heels of a series of Supreme Court decisions which, in our view, have unnecessarily and incorrectly narrowed civil rights and other protections for Latinos. While we look to see if judicial nominees meet certain basic requirements such as honesty, integrity, character, temperament, and intellect, we also look for qualities that go beyond the minimum requirements. We look to see if a nominee, regardless of race or ethnicity, has a demonstrated commitment to protecting the rights of ordinary U.S. residents and to preserving and expanding the progress that has been made on civil rights, including rights protected through core provisions in the Constitution, such as the Equal Protection Clause and Due Process Clause, as well as through the statutory provisions that protect our legal rights.

We are aware that some are demanding a commitment from you and the Judiciary Committee to announce a date certain for action on Mr. Estrada's nomination. We agree with the proposition that every nominee deserves timely consideration. For this reason, we urged the Senate to act on the nomination of Judge Richard Paez to the Ninth Circuit Court of Appeals, who was forced to wait for four years before being confirmed. We also believe, however, that if a nominee's record is sparse the Judiciary Committee should allow sufficient time for those interested in evaluating his record, including the U.S. Senate, to complete a thorough and comprehensive review of the nominee's record. We therefore respectfully request that you consider scheduling a hearing no earlier than August, prior to the scheduled recess. This leaves sufficient time for action prior to adjournment if his record is strong enough to receive substantial bipartisan support.

In the interim, we pledge to conduct a fair and thoughtful assessment of Mr. Estrada's record, and to communicate our views on his nomination to you, Ranking Member Hatch, and other Committee members in a timely manner.

Sincerely,

Antonia Hernandez,

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President and General Counsel, Mexican American Legal Defense and Educational Fund.

Raul Yzaguirre,

President, National Council of La Raza.

Manuel Mirabal,

President, National Puerto Rican Coalition.

Juan Figueroa,

President and General Counsel, Puerto Rican Legal Defense and Education Fund.

Arturo Vargas,

Executive Director, National Association of Latino Elected and Appointed Officials.

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[From the National Organization for Women, May 23, 2002]

Judiciary Committee Vote Insults Women; NOW Vows Campaign in Full Senate
(By Kim Gandy)

The field of credible Democrats running for President was significantly narrowed today when two rumored candidates insulted every employed woman, every woman in business, and every woman who has been a victim of violence in this country. In casting their votes to promote Judge D. Brooks Smith to the Third Circuit Court of Appeals, only one step below the Supreme Court, rumored candidates Sen. Joseph Biden, D-Del., and Sen. John Edwards, D-N.C., disregarded the extensive evidence of unethical behavior and discriminatory conduct that caused the Washington Post, New York Times and Los Angeles Times to oppose Smith's confirmation.

In an embarrassingly convoluted rationale, Biden expressed disappointment in Smith's strong criticism of the Violence Against Women Act (VAWA), but said it would be a ``double standard'' to vote against Smith because Supreme Court Chief Justice William Rehnquist held a similar opinion on VAWA. Apparently Biden doesn't recall that his vote for Rehnquist was cast many years before VAWA was even introduced. As for a ``double standard,'' someone should tell Sen. Biden that double nothing is still nothing. Biden's previous leadership on violence against women is just that--previous. He has jettisoned it in favor of friendship--his stated presumption of supporting any nominee sponsored by Sen. Arlen Specter, R-Pa. No doubt the people of Delaware will want to know that they have elected a Republican from Pennsylvania to represent them.

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Another Presidential wanna-be, Sen. Edwards, hid out in his office across the hall from the hearing, and didn't even have the courage to case his ``Yes'' vote in public. Sen. Herbert Kohl, D-Wis., joined all of the committee Republicans, whose cowardly votes betrayed the women of their states by recommending elevation of a judge whose repeated ``ethical lapses'' deserve censure, not promotion.

The Senate's reputation as an ``Old Boys Club'' was reinforced by today's vote, in which both of the women on the Judiciary Committee voted against Smith, but he won anyway because 12 of the 17 men voted in his favor. To promote a judge who will have to decide on cases of discrimination, when that judge has himself cavalierly participated in discrimination and even ruled in favor of discriminatory practices, is the height of irresponsibility by those who are charged with that duty.

NOW commends both of the women who serve on the Judiciary Committee, Senators Dianne Feinstein, D-Calif., and Maria Cantwell, D-Wash., whose votes against confirming Smith spoke volumes, as well as Committee Chair Patrick Leahy, D-Vt., who spoke eloquently about discrimination against women, and Senators Richard Durbin, D-Ill., Russ Feingold, D-Wis., Edward Kennedy, D-Mass., and Charles Schumer, D-N.Y.

NOW intends to seek a filibuster in the Senate against Judge Smith's confirmation, and will urge every Senator to participate who cares about protecting the last 40 years of progress women have made. The Judiciary Committee's vote for D. Brooks Smith made a mockery of judicial standards. Unless the full Senate reverses, it will send a message to women that they can't expect to have civil rights--or ethics--taken seriously by the Senate or the courts.

Mr. HATCH. Referring in the most vitriolic terms to my friends, Senators Biden and Edwards, voting for Judge Smith in committee, NOW begins by saying:

The field of credible Democrats runningÐfor President was significantly narrowedÐtoday.....

This is simply because these Senators exercised their independent judgment and supported Judge Smith. Honoring the President's prerogative to nominate judges should hardly be a cause to attack my Democrat colleagues or take them out of a potential Presidential candidacy or race.

Rather than speak further about Judge Smith's enemies, I would like to speak about his friends. I think an editorial in the liberal Pittsburgh Post-Gazette put Judge Smith's nomination best when they wrote:

Outside Washington's world of partisan politics, Smith seems to have no enemies, only admirers. Those who have watched him work say an exemplary 14-year record in the Federal bench in Western Pennsylvania is being twisted by political opportunists. His popularity outside the capital extends even to members of the opposing political party, who describe him as fair, hard-working, and respectful to all.

I hope I am not alone in this Senate in finding this home-town report much more reliable and convincing than the hit pieces circulated by the Washington left-wing special interest groups, or for that matter the New York Times, which I read faithfully everyday and respect in many ways--but not in this instance.

But given the bipartisan support Judge Smith enjoys from the people who know him best, and his stellar

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record, I find it most difficult to accept that the opposition to him has centered on his belonging to an all-male, family oriented fishing club where his father first taught him to fly fish--the same rustic club that Jimmy and Roslyn Carter have visited to escape, relax, and fish.

If this is the kind of thing that members of the body use as an excuse for thwarting the President's judicial nominations, then the American people will have a big laugh at our expense. And rightly so.

In fact, there are hundreds of small, family-oriented fishing clubs like the one Judge Smith belonged to all across this country from Washington to North Carolina. I even pointed out the web□site called *www.womensflyfishing.net*, which lists the 60 or so women-only fishing clubs across the country.

We are far from those days when prestigious downtown clubs kept women out of their facilities, and in any case that is not the nature of Judge Smith's family-oriented, fly-fishing club. The special interest groups out to get Judge Smith on this count are proving that when the only tool you have is a hammer, everything you see starts looking like a nail.

In fact, there is a rich mosaic of single gender social clubs in this country that are entirely unobjectionable to any reasonable person. You should not be surprised to know, Mr. President, that this country is well-served by over 6,500 women's only clubs of every size.

Are Judge Smith's opponents in this Senate really prepared to say that the members of the important Francesca Club in San Francisco or the powerful Raleigh Women's Club, or the Junior Leagues throughout the South and all over the country, or the Masons, or the Knights of Columbus cannot serve as judges?

Perhaps the reason for this misguided line of attack on Judge Smith lies in the fact that, in his 1988 confirmation hearing before the Judiciary Committee, he stated that he believed the Judicial Code would require him to try to open the club to women, and to resign if he failed. But the fact is that he was wrong in that belief. The Judicial Code does not require resignation from clubs whose principal purpose is social, that do not function as public accommodations serving food to the public, or whose principal purpose is other than business.

Mr. President, the building you saw has a living room, a kitchen, two bathrooms, and six bedrooms on the second floor. It is not a great big building, even though they blew up a picture to make it look like it was. Even if it was, it is used only for social purposes, and then by a membership of 115.

By the way, that club does not have public accommodations. It does not serve food to the public. It does not do business with the public.

No legalistic parsing of words can change this fact, even though any motivated lawyer can certainly confuse the issue, as we have seen in the Judiciary Committee.

It is not surprising, of course, that the Judge Smith's detractors have chosen to disregard the clear constitutional standards articulated by the Supreme Court as well as the letter of the public accommodations law of Pennsylvania. After 1988, when the issue of single gender clubs was at its most heated peak, the Judicial Conference adopted standards pursuant to Supreme Court's decisions. It made clear that there was nothing--absolutely nothing--improper about a judge or nominee belonging to single-gender clubs, which exist in great numbers for both women and men in this country, so long as the association or club exhibits certain attributes of privacy first articulated by the Supreme Court in the 1984 case of Roberts v. Jaycees.

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Judge Smith was under no obligation to make efforts to open the club to women--as he promised this committee--or to resign from the club. But he did both, even though he had no obligation to do so.

Opposing Judge Smith because he used to belong to a fisher-men's club is most absurd when contrasted with Judge Smith's record. Judge Smith, who currently serves as Chief Judge for the Western District of Pennsylvania, has earned a reputation for competence, fairness, and judicial temperament during 14 years as a Federal judge.

I used to practice law in that district and tried cases in the Federal District Court of Western Pennsylvania.

Judge Smith was appointed to that job at age 36--he was one of the youngest Federal judges in the country--and he came to it with experience as a state court judge, as a prosecutor, and as a private practitioner.

His nomination is supported by lawyers, judges, and public figures from across the political spectrum. The Pittsburgh Post-Gazette, a respected newspaper with a liberal editorial viewpoint, has endorsed his nomination three times.

The accounts of the people who know Brooks Smith best became real to me a few weeks ago when I listened to tremendously moving stories of women lawyers from Pennsylvania who recounted emotionally powerful events where Judge Smith bent over backwards to help them succeed as pregnant women and mothers in the practice of law.

The truth is that Judge Smith is supported in the strongest possible terms by the women leaders and members of the Women's Bar Association of Western Pennsylvania, the Allegheny County Bar Association, and the Blair Bedford Domestic Abuse Advisory Board, to name a few.

The Women's Bar Association gave Judge Smith their Susan B. Anthony Award ``because of his commitment to eradicating gender bias in the court system.'' That is a remarkable laud. The officers of the Women's Bar have also stated that they ``did not receive a single complaint concerning Judge Smith.''

To attempt now to taint Judge Smith as being insensitive to women's rights or interests is really beyond the pale of fairmindedness, if not decency.

Judge Smith, who is currently the Chief Judge for the Western District of Pennsylvania, has earned a reputation for competence, fairness, and judicial temperament during his 13 1/2 years as a Federal judge. He was appointed to that job at age 36--he was one of the youngest Federal judges in the country--and he came to it with experience as a State-court judge, as a prosecutor, and as a private practitioner.

I briefly recount Judge Smith's record because it highlights the nature of the prejudice that occurs when a nominee or any person is judged on a single, private and lawful lifestyle choice. It seems to me that the root of all intolerance begins with just that act: to judge a person's entire worth based on a single characteristic, whether it be how a person exercises his or her freedom or religion or his of her freedom of association, which, like religion, has contributed so much to this Nation's unmatched vitality.

I believe the Senate suffered a great shame when it ruined whole careers in the 1950s by asking a single infamous question intruding into the freedom of association. I was ashamed when the Judiciary Committee echoed this question last year by questioning nominees about the Federalist Society, as

distinguished an association of lawyers as there could be. Now the special interest groups are asking the Senate to deny the President's nominee a confirmation on the basis of a fly fishing club.

I fear the American people, are going to roll their eyes at the Senate with these type of accusations. But the truth of it is that if we disregard the right of lawful association, it will be no laughing matter.

The Supreme Court first recognized the freedom of association in 1958 as an extension of first amendment free speech in NAACP v. Alabama, and most recently it reaffirmed the right in Boy Scouts of America v. Dale.

It is a right, as Justice Thurmond Marshall wrote, ``which our system honors'' and that encourages ``all-white, all-black, all-brown, all-yellow clubs, as well as all-Catholic, all-Jewish as well as all-agnostic clubs to be established.'' And, it is a right that applies, Mr. President, as Justice Sandra Day O'Connor noted, to clubs whose purposes would be ``undermined if they were unable to confine their membership to those of the same sex, race, religion, or ethnic background.''

We should be glad that our personal politics are trumped by this American freedom because it has protected groups as diverse as the Communist Party and the Moose Lodge, and from the NAACP to the Boy Scouts of America. The freedom of association has

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protected the thousand points of light that have made this country's public life so vibrant. And it helps to distinguish us from those foreign places where people are shunned or even imprisoned for mere memberships in unpopular associations.

While the constitutional right of association at first related to expressive association and protected unpopular groups, like the NAACP, in 1984, the Supreme Court articulated the right of intimate association concerning clubs such as Judge Smith's small fishing club. It did so while enforcing Minnesota's public accommodations law against a large single gender organization organized principally for business purposes. That is not the case here. The Court described the attributes of such intimate associations that the Constitution honors, including ``relative smallness.'' That is the case here. Judge Smith's former club has only 115 members. It has been around for a lot of years and has had both women and men enjoy the benefits.

An intimate association, said Justice Brennan, writing for the Court, must be protected ``as a fundamental element of personal liberty,'' and ``must be secured against undue intrusion .....because of the role of such relationships in safeguarding the individual freedom central to our constitutional scheme.'' As Justice Brennan explained, such small clubs transmit our culture and ``foster diversity.'' They foster pluralism.

I for one stand by our freedom of association. As Justice Thurmond Marshall pointed out, it is a freedom that has helped make this country great, and a freedom we honor. I hope that all on this Committee do also, and that Judges, or people who might want to be Judges someday, are just as free as anyone else to exercise that right lawfully.

Now, Senators who do not share my reverence for this First Amendment right will be interested to know that the State of Pennsylvania has a law against clubs that discriminate on the basis of gender. Pennsylvania has not sought to regulate the club Judge Smith resigned from--and for a good reason: that club does not violate the law against discrimination.

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In fact, Pennsylvania courts have found single-gender clubs to be permissible not on the basis of First Amendment rights, but as a privacy right, citing Griswold v. Connecticut. It would certainly be an entertaining footnote to Griswold jurisprudence if opponents of Judge Smith, who have seen fit to probe Judge Smith's views on Griswold, voted against him for exercising privacy rights emanating from that very case.

The special interest groups that are working to discredit Judge Smith apparently think that President Bush's circuit court nominees deserve to have their records distorted and their reputations dragged through the mud. But I don't think that any judicial nominee deserves such treatment, and that was something I practiced as chairman for 6 of President Clinton's 8 years in office.

I strongly agree with the Washington Post editorial of February 19, 2002, and nobody would suggest the Washington Post is a conservative newspaper, that ``opposing a nominee should not mean destroying him.'' The Post pointed out, ``The need on the part of liberal groups and Democratic senators to portray a nominee as a Neanderthal--all the while denying they are doing so--in order to justify voting him down is the latest example of the degradation of the confirmation process.''

I continue to hope that my colleagues will be sensitive to the dangers to the judiciary and to the reputation of this body that will certainly result from the repeated practice of degrading honorable and accomplished people who are will to put their talents to work in the public service. I urge my colleagues to examine Judge Smith on his record, and not on superficial and unsubstantiated allegations.

When Judge Smith comes for a vote we will have the opportunity to show that the senate is focused on the merits of President Bush's nominees, and is not out to obstruct them in the name of sensibilities far from the mainstream of the American people. I hope we take it. I hope we vote favorably on a fine judge.

My colleague has made a point in the past that somehow men's clubs are problematic and powerful and that women's clubs are somehow different and poorer. That is not a problem. I have a photo of an all-women's club. This is the Sulgrave Club of Washington. I, for one, believe they have a right to have an all-women's club.

If my colleagues have trouble seeing the club, it is a mansion. It is not just a living room, kitchen, and six bedrooms upstairs. It is the building behind the Jaguar, the Lexis and, of course, the Mercedes. It is not itty-bitty by anybody's stretch of the imagination. And it is probably in a historical landmark situation.

My colleague has also mentioned the ethicists who have written to condemn Judge Smith. Other ethicists have written to support Judge Smith.

One of these Democrat ethicists, by the way, is the one standing on the car. If my colleagues cannot see it because it is a little dark, maybe the camera can come in a little closer. That is one of the ethicists they can get to write almost any opinion they want. This ethicist has argued in favor of introducing false testimony into a trial and argued perjured testimony to a jury.

This is a photograph of another of the regulars who write to denounce President Bush's nominees. I might add, again, he is the one standing on top of the police car. We expect to have a lot of other letters from this particular ethicist.

This is the type of stuff we are putting up with. I think it is time to stop it. I think it is legitimate for

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people to differ on a judge's qualification from time to time, but there is little or no reason to differ on this one. This is a good man.

I hold a license in that area. I know the top lawyers in that area. I tried against a number of the top lawyers in that area. I have to say I do not know any of them who are not in favor of Judge Smith, and that ought to count more than some of these bits of calumny that have been thrown his way by some who do not like President Bush's nominees.

Mr. KENNEDY. Mr. President, I will vote against the confirmation of Judge D. Brooks Smith to the United States Court of Appeals for the Third Circuit. While Judge Smith is an intelligent jurist, I believe that his serious ethical lapses, and his record of reversals by the Third Circuit in cases concerning civil rights, and the rights of workers, environmental protection and consumer safety suggest that Smith has not met his burden of showing that he should be elevated to the Third Circuit.

Judge Smith's handling of his membership in the Spruce Creek Rod and Gun club, a club whose by-laws explicitly forbid the admission of women, gives me great concern. I am disturbed by Judge Smith's failure to resign from the Spruce Creek Club in a timely manner despite his sworn oral and explicit written promise to this committee at the time of his 1988 confirmation hearing. Smith promised that if he was unsuccessful in trying to change the club's membership policies he would resign, but he failed to do so for another 11 years, until 1999.

Rather than provide a simple explanation, or an apology, for his failure to fulfill this promise, Judge Smith claimed at his hearing that the Judicial Code of Conduct, the ethical rules governing judges, did not actually require resignation from the club. According to Smith, the Spruce Creek Club is purely a social club and is thus exempt from the rules. This strikes me as disingenuous. Judge Smith's 1999 resignation letter to Spruce Creek made clear that he was resigning from the club because its male-only admissions policies ``continue to be at odds with current expectations of Federal judicial conduct,'' suggesting that he knew the club's membership policy was in conflict with the Judicial Code of Conduct.

Contrary to Judge Smith's representations, it also appears that the Spruce Creek Club is not merely a social club, but a place where business is conducted. Three ethicists, including one who wrote at the behest of the Ranking Minority Member of the Judiciary Committee, have written that if the Spruce Creek Club can be used for business purposes, its exclusion of women would violate the Judicial Code of Conduct. The President of Spruce Creek Club has acknowledged that members of this club are allowed to host a variety of meetings on the premises, and

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the committee has learned that business and political meetings have been held at the club. The Code of Judicial Conduct is clear that exclusion of women, minorities, and others from clubs where business is conducted is prohibited. In addition, in 1990, this committee adopted a resolution stating that membership in organizations that practice invidious discrimination was inappropriate for a judicial nominee. The resolution reflects our belief that because such membership ``may be viewed as a tacit endorsement of the discriminatory practices, it conflicts with the appearance of impartiality'' that is required of federal judges. We recognized that exclusion of women and racial, ethnic or religious minorities from social clubs that also perform business denies these groups opportunities to make contacts with important members of the community, contacts that are often crucial to professional advancement.

I am also troubled by Judge Smith's approach to cases implicating Federal rights important to victims of discrimination, workers and the disabled, and his disturbing, consistent pattern of favoring business

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and employers in these cases. Judge Smith has been reversed 51 times by the Third Circuit, often by panels of conservative judges. In many of these cases, Smith takes a narrow view of the laws protecting plaintiffs against abuses by businesses and employers.

For instance, in Wicker v. Conrail, a case brought under the Federal Employer's Liability Act, FELA, Judge Smith was reversed by the Third Circuit for dismissing claims by workers who were exposed to toxic chemicals at their job site. The company knew the job site was contaminated, but the workers did not, yet Smith found that the workers had waived their claims by signing a general release settling prior, unrelated injury claims. The Third Circuit reversed, holding that claims relating to unknown risks cannot be waived under FELA, and emphasized the Supreme Court's directive, ignored by Judge Smith, that FELA be given a ``proemployee'' construction.

Similarly, in Ackerman v. Warnaco, the Third Circuit reversed Smith for granting summary judgment to the company with regard to ERISA claims brought by former employees who were denied promised severance pay after the company, unbeknownst to the workers, changed its written policy to deny severance pay shortly before laying off the workers. Again, in Unity Real Estate v. Hudson, Smith ruled against workers in a case concerning the Coal Industry Retiree Health Benefit Act. Amazingly, Smith held that coal act, which Congress passed in 1992 to require companies to enforce collective bargaining agreements promising lifetime health benefits for longtime workers, amounted to an unconstitutional taking. One year later, in a similar case, the Third Circuit effectively overruled Smith's holding on this score, noting that every Court of Appeals to have considered a ``takings'' challenge to the coal act had rejected it.

In addition, Judge Smith has a disturbing pattern of ruling against plaintiffs in civil rights cases. For instance, in United States v. Pennsylvania, Judge Smith ruled that an institution for the mentally disabled, whose violations included serving pest-infested food, improperly confining residents, failing to provide appropriate medical treatment, and overmedicating residents--did not violate the Constitution's due process clause. In another case, Schaefer v. Board of Public Education, Judge Smith was reversed by the Third Circuit, for dismissing the sex discrimination claim of a male teacher who claimed that the school board's family leave policy, which entitled women, but not men, to one year of unpaid leave for childbirth or ``childrearing'' violated Title VII.

Judge Smith's pattern of ruling in favor of business is particularly troubling when coupled with his frequent attendance at seminars funded by pro-business corporations and groups. Judge Smith spent more than 72 days on junkets at luxury resorts. The trips were valued at more than $37,000 and sponsored by groups that promote ``free market environmentalism,'' and oppose environmental regulations. I am troubled by the appearance of partiality caused by Judge Smith's frequent attendance at such junkets given the pro-business pattern of his rulings.

Judge Smith's narrow view of congressional power to pass legislation under the commerce clause, as expressed in a 1993 speech to the Federalist Society, also gives me great concern. In this speech, Judge Smith criticized the Violence Against Women's Act, which passed both Houses of Congress by overwhelming majorities, as exceeding Congress's power under the commerce clause. Judge Smith advanced a cramped reading of Congress' commerce clause power, stating that ``the Framers' primary, if not sole, reason for giving Congress authority over interstate commerce was to permit the national government to eliminate trade barriers.'' Not only would Judge Smith's reading of the commerce clause render Congress powerless to pass statutes like the Violence Against Women's Act but, under Judge Smith's reasoning, it appears that any Congressional enactment other than those aimed at eliminating trade barriers would be constitutionally suspect, including statutes such as the Fair Labor Standards Act, the Equal Pay Act, the Clean Air Act, and the Clean Water Act.

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Mr. SPECTER. I am confident, based on my personal knowledge of Judge Smith and his outstanding record, that he will be a credit to the Court of Appeals for the Third Circuit.

I thank my distinguished colleague from Utah and my distinguished colleague from Vermont for permitting me to speak at this time.

Exhibit 1

U.S. COURT OF APPEALS

FOR THE THIRD CIRCUIT,

Philadelphia, PA, July 15, 2002.
Hon. **ARLEN SPECTER,**
Hart Senate Office Building,
Washington, DC.

DEAR SENATOR SPECTER: Because the exercise of my responsibility to assure that efficient administration of justice for over 21 million Americans within the Third Judicial Circuit is being seriously impaired by the current impasse in the Senate over judicial nominations, I feel constrained to cry out. A total of eleven--yes eleven--judges within the Third Circuit, whose presence is desperately needed, would, I believe, have been confirmed and entered on duty but for the impasse.

Let me begin with the United States Court of Appeals for the Third Circuit. But for the impasse, Judge D. Brooks Smith would now be on my Court, which has three vacancies, two of them of long standing. I have scheduled him to sit in the early Fall, and we need him. We ``borrow'' judges in 45% of our cases, which is too much. But that situation pales in comparison with that of the District Court for the Western District of Pennsylvania. There are five vacant judgeships on that Court; as of September 30, 2002, these judgeships will have been vacant for a total of 161.7 months. If it were not for the impasse, the following judges would likely have entered on duty: Joy Flowers Conti, who I understand has resigned from her law firm partnership, anticipating a July swearing-in-date (and is now without income); David S. Cercone; Terrence F. McVerry; and Arthur J. Schwab. The Western District is in desperate straits. Motions are piling up, and trials are being delayed.

Other courts within the Third Circuit are similarly disadvantaged. Two nominees to the Middle District of Pennsylvania are awaiting floor votes: John E. Jones, III and Christopher C. Conner, both nominated to fill vacancies that are well over a year old. Two nominees to the Eastern District of Pennsylvania, one of the busiest courts in the nation, are also being held up: Timothy J. Savage and James Knoll Gardner. We also have problems in New Jersey where we have five vacancies. Stanley R. Chesler and William J. Martini are awaiting floor votes. There are also putative nominees for the other three vacancies: Jose Linares, Freda Wolfson, and Robert Kugler, whose progress is obviously being slowed by the impasse. Their presence is needed there to take up the slack caused by my assignment of Senior Judge Alfred Wolin, who had a full docket, to handle the mega-asbestos bankruptcy cases in Delaware, one of the nation's most important judicial assignments.

I have always respected the processes of the United States Senate. I came to the bench from politics, and understand the senatorial prerogatives. I have been tempted to speak out before, yet because of my background, held back. But the current impasse is too much even for me, hence this letter. As a judge of over three decades of experience on the federal bench, I understand the weighing and balancing process, and I believe that it is out of all proportion to the exercise of senatorial prerogative that these eleven

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In sum, I do not believe that Judge Smith has shown he has the integrity and commitment to core constitutional values required to justify his elevation to the Third Circuit. I therefore oppose his nomination.

Mr. HATCH. Mr. President, I ask unanimous consent that I be allowed to speak as in morning business.

The PRESIDING OFFICER (Mr. **SCHUMER**). Without objection, it is so ordered.

(The remarks of Mr. HATCH are printed in today's **RECORD** under ``Morning Business.")

Mr. HATCH. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

The PRESIDING OFFICER (Mr. **REID**). Without objection, it is so ordered.

Mr. SCHUMER. Mr. President, I will say a word about the nomination of D. Brooks Smith to the Third Circuit. For me, my concerns with Judge Smith are not about ethics but about ideology. My questions are about his record. My worries are about what kind of judge he has been at the trial level and what kind of judge he will be at the appellate level.

Time and time again, the President says he is going to nominate conservatives in the mold of Justices Scalia and Thomas. Every indication is that he is following through with that promise.

At least by my standards, that is not OK. I certainly want legal excellence at the highest order. Diversity ought to be at the highest courts. We ought not have a bench of all like men. But I also want moderation and ideological balance. Unfortunately, as they nominate judge after judge, hard right, out of the mainstream, far further to the right than President Clinton's nominees were to the left, it is clear that this administration is committed to imbalance on the courts. Frankly, that is a strategy I cannot get behind.

When it comes to D. Brooks Smith, there are some red flags raised. As a city district court judge, he gave a speech in which he criticized the constitutionality of the Violence Against Women Act, something I am pretty proud of because I was the author, along with Congresswoman *Louise Slaughter* in the House of Representatives. Senator *Biden* did a great job here in the Senate. Now, this was years before the Supreme Court had addressed the Violence Against Women Act and when there was still a possibility it would come before him as a judge. That is some very unjudge-like behavior.

I asked him some simple, written questions about his views on the law. I asked him about his views on the right to privacy. I asked him to reconcile his views on VAWA with his views on other Federal laws such as the Endangered Species Act. The response I got, I regret to say, was inadequate.

Judge Smith told me what the precedence said, not what he personally believes.

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That might be OK if you are a nominee to the district court where you do

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not have as much of a chance to make law. These days when you are nominated to an appellate court, when the Supreme Court takes virtually 75 cases a year, that argument does not fly. So I wrote back to Judge Smith, and again I asked him about his views. I made it clear I wanted to know about his personal views, not what the law was, but what his personal views were because we all know that influences a judge greatly when they make decisions.

This idea that judges are part of an ideological system and read the law in the same way is poppycock.

Why is it judges nominated by Democratic nominees read the law differently than judges nominated by Republican nominees? We know ideology plays a role. There is nothing wrong with that. But we ought to let it into our decisionmaking.

Judge Smith dodged again.

I think I am entitled to know what a nominee thinks. I am not going to go about blindly confirming nominees to lifetime seats on the Federal courts without those answers. I am not going to vote to give the judge a lifetime appointment, tremendous power, the most unaccountable power that our Founding Fathers gave to any single person. I am not going to

give that judge the power to invalidate the laws passed in this legislative, duly elected body; laws that protect privacy, laws that protect working people, laws that protect women, the environment. I am not going to give a judge the power to validate those laws unless I know what they think of our power, the Congress's power as a coequal branch of Government, when it comes to these important issues.

I have an obligation on behalf of the 19 million New Yorkers I represent to learn those views. They want to know if the judge is too far left or too far right. They want to know about things that affect their lives: How much money they are going to make; safety in the workplace; how the environment is going to be treated; and if they are a member of a minority group, how the judge regards civil rights. They want to know this. I want to know.

I am not going to make the mistake that this body made with Clarence Thomas, who came before this body. I was not here then. I was in the House. We don't, of course, vote on judges. He said he had no views on Roe v. Wade. I am not making that mistake again. I don't think any Member should. We all know Judge Thomas had strong views on Roe v. Wade, but he came here and said he had none, he had never discussed it.

If D. Brooks Smith had given me legitimate answers to my questions, I might have supported him. But his answers were not answers at all.

Now, I understand we cannot ask judges to precommit themselves on issues that come before them, even though that is what Judge Smith did in his VAWA speech. I don't want to put nominees in that position. When it comes to issues already decided, when it comes to discussing their judicial philosophy, when it comes to Supreme Court cases that will never come before this judge, I don't get why we shouldn't know what that judge thinks.

Every semester, first year law students are asked to critique Supreme Court opinions. But someone up

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for a Federal judgeship will not tell us what they think about the seminal Supreme Court cases?

On the latest nominee for whom we had a hearing, Judge Owen, I asked her views. She said she doesn't think that way. She was asked to write papers in law school. She was asked to make opinions this way. She did not want to tell us.

There is a trend here. There is a trend. They don't want us to know what they think because they are so far out of the mainstream that they never could get picked if they told us their real views. They would never get supported by this body. They will not be honest about their views regarding Brown v. Board of Education or Korematus v. United States or Miranda v. Arizona or Roe v. Wade?

Judge Smith says what he thinks about the constitutionality of a statute the Supreme Court has yet to rule on, but he will not say what he thinks about Supreme Court opinions that have already been issued? Something is wrong with that. This nominee has it all turned around and it doesn't make sense.

The fact is, we are in the midst of a conservative judicial revolution. The very same people who decried the liberal activists, who took too many things too far--I am very critical of some of those opinions--are now doing the same thing themselves. When the hard right members of the conservative movement in the 1980s realized they could only get so much of their agenda implemented through elected branches because they were too far over for the American people, they turned their focus to the courts. They started a campaign that ran through the Reagan administration, through the first Bush administration, and continues through this administration. President Bush would like to portray himself as a moderate to the American people. Maybe he is. When I talk to him he sounds that way to me, one-on-one.

But if you look at who he nominates, there is hardly a moderate among them, particularly at the appellate court level. The nominees are committed to an ideological agenda which turns the clock back to maybe the 1930s, maybe the 1890s. They hate the Government and its power, by and large. They think the Federal Government has far too much power, which, let me tell you, in our post-September 11 world makes no sense.

So for the better part of the last decade, the commerce clause has been under assault and a whole host of laws protecting women, senior citizens, the disabled, and the environment have been invalidated. Now they turn their attention to the spending clause. To the average person, this sounds like mine-numbing stuff. But unfortunately, it has real impact on real people and it has to stop.

D. Brooks Smith is going to become a judge. We all know he has the vote. Tomorrow morning he will join a long line of judges, confirmed by the Senate, who appear to be intent on curtailing congressional power to protect the people who elect us.

At some point this Senate needs to wake up to the fact that our President and his Department of Justice are playing by different rules when it comes to nominating judges. They are using ideology as litmus tests, and then, when we want to ask about ideology, they say no, that is off the table. They are doing it to the detriment of the courts and the people the courts are supposed to protect.

I yield the floor.

The PRESIDING OFFICER. In my capacity as a Senator from Nevada, I suggest the absence of a quorum.

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The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

The PRESIDING OFFICER (Mr. **SCHUMER**). Without objection, it is so ordered.

The PRESIDING OFFICER. Under the previous order, the Chair now recognizes the Senator from New Jersey, Mr. *Torricelli.*

END

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nominees (and scores of others) be held up so long. I urge you to press my plea before your colleagues.

Sincerely yours,
EDWARD R. BECKER.

The PRESIDING OFFICER (Mr. *Durbin*). The Senator from Pennsylvania.

Mr. SANTORUM. Mr. President, I thank the Senator from Utah for yielding me some time, and I also thank the Senator from Vermont for allowing Senator *Specter* and I to speak first on this nominee.

I, too, like Senator *Specter*, am very proud tonight to praise the nomination of Brooks Smith to the Third Circuit Court of Appeals and to congratulate the President on an excellent nominee. I certainly urge all of my colleagues on both sides of the aisle to vote for his confirmation. I truly hope they look at his record of 17 years of judicial service and experience on both the Federal and State level.

He is someone of paramount integrity, someone who is obviously academically qualified, having been confirmed already as a Federal judge some 13 years ago. He has impeccable credentials academically and professionally prior to being a judge, and I think his service on both the trial court level and the common pleas court of Blair County, as well as on the Federal bench of the western district, now serving as chief judge of the western district, has been exemplary.

He is someone who has been a model judge, someone who has steered a course, as most people who have described his nomination, right down the center, someone who follows the law and is very steadfast to what the role of a judge is, which is not to go out and make law but simply to serve in the capacity of meting out justice in a fair and equitable way that meets the expectations of the litigants. He has been highly praised by everyone.

He has gotten a letter of support from almost the entire Pennsylvania congressional delegation, Democrats and Republicans alike. He has been rated well qualified by the ABA and highly recommended by the Allegheny County Bar Association, which is their highest rating. Allegheny County is the bar where the Western District of Pennsylvania is located. He has gotten support from every prior U.S. attorney from Jimmy Carter on through President Clinton's appointments to the U.S. attorney position in the western district. They have all come out in support of him.

His colleagues on the statewide bench from the supreme court, superior court, on down, have written letters of support, both Republicans and Democrats alike, for his nomination.

One of the most disturbing aspects of this nomination was what some on the far left-wing groups have done to try to impeach Judge Smith's integrity. Senator *Specter* reviewed the three things that have been brought up in a 17-year career. Probably the most outrageous of all of them is the fact that Judge Smith belonged--I know this might be shocking to some of my colleagues--to a sportsman club that only has male members. I know that none of my colleagues have ever heard of such a thing, but believe it or not most sportsman clubs in America, I would suggest, have limitations on memberships. If anyone is interested in the opposite, where sportsman clubs limit membership only to women, go to www.womensflyfishing.net, and they will find 60 organizations where only women are permitted to be members.

At this particular club, the Spruce Creek Rod and Gun Club, only men are allowed to be members, but women certainly are allowed on the premises and

allowed to use the facilities. They simply cannot be members of the club.

This club is a beautiful place. It is right in the heart

of Pennsylvania. It has attracted many people from around the country because of its fabulous fly fishing. One such person who is an annual visitor, according to his own article on the subject, to this limited club is former President Jimmy Carter.

Former President Jimmy Carter goes to this club to which Judge Smith used to belong. When President Carter was President, my colleagues may recall the incident when the rabbit attacked his boat. That was somewhat of a famous incident during the Carter Presidency. That happened at the Spruce Creek Rod and Gun Club. This is purely a social organization.

When Judge Smith was before the Judiciary Committee, it was unclear whether he should continue to belong to such an organization. He was confirmed nonetheless. He promised at that time, when it was unclear whether that membership was unethical in some respects, that he would try to reverse the policy, and if he was unsuccessful he would resign. Subsequent to that, in 1992, the judicial code was changed and, as Senator *Specter* said, this kind of club does not fall into the ethical category of invidious. Therefore, as a result, he was not required under the judicial conduct code to resign.

Nevertheless, he tried for several years. Every year at their meetings, he would try to have women allowed to become members, but he failed. Eventually, I think after 9 or 10 years, he decided he would give up that quest and leave. This was some 5 years ago.

I understand there are a lot of women's groups that are complaining about this. To be candid, the complaint should be not that he resigned too late but that he is not still there trying to change it. That, to me, would be legitimate, to say he should have continued to stay there to try to get women as members. Instead, he gave up the fight, as some might suggest, and decided simply not to belong.

I think they have sort of missed the point, and the point is--this is ridiculous is really the point. The point that he belonged to this club has nothing to do with his ability to be a jurist. Probably the worst aspect of this whole thing is it brought up this tenor that somehow Judge Smith was anti-woman. Well, we had the president of the NOW organization in his home county, Blair County, former Democratic county commissioner, come to the Senate, to the LBJ room. She did a press conference talking about how Judge Smith, when he was a common pleas court judge, did more to help her in her role as county commissioner than anybody else she met in county government, and that he had an excellent record in regard to violence on women, and a variety of other things, as he did as a common pleas court judge.

Then later on, we heard from members of the women's bar association of western Pennsylvania going on at length about how Judge Smith was the best judge they had to deal with, who was the most respectful of women in the courtroom, most accepting of women in the courtroom.

This is the most frustrating part for the judge, and I know Senator *Specter* commented how difficult a process this has been for him, to be attacked for things that are so spurious and tangential to this whole process, and trying to then frame them for something that he has worked all his life to prove that he was not. It was really unfair.

Senator *Specter* went through the other two issues that have been highlighted. One is a case where he

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should have recused himself earlier. The trustee in the case, the former Attorney General and Governor, Richard Thornburgh, who said he would have been the aggrieved party in the case, as it turned out, said, no; that Judge Smith handled the case properly and forthrightly. The judge who eventually was assigned the case commented she would have handled the case in the precise manner Judge Smith handled the case. The Securities and Exchange Commission looked at this and stated Judge Smith did nothing improper.

There is absolutely nothing there when it comes to these ``improprieties'' of Judge Smith on the bench. This is reaching. This is trying to find a reason to oppose someone who has an impeccable record of service in the judicial community of western Pennsylvania, someone who has been outstanding in everything he has attempted. He is an incredibly well-qualified person for this position. He has done nothing but prove that his nomination for the Third Circuit is warranted.

I am very hopeful that my colleagues again on both sides of the aisle--and I thank Senator *Specter*, Senator *Edwards*, Senator *Kohl*, and Senator *Biden* for their support of this nominee in committee--will be joined by many others on the other side of the aisle to confirm, as the ABA said, a well-qualified, very solid candidate, for the Third Circuit Court of Appeals.

Mr. LEAHY. Mr. President, I yield myself such time as I may consume.

I ask consent that following me, the Presiding Officer recognize the senior Senator from Utah; at 7:50 this evening, without using time from either side, the senior Senator from New Jersey be recognized for 10 minutes; and then we revert back to whichever member of the Judiciary Committee sought recognition.

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

Mr. LEAHY. Mr. President, the Senate is debating the nomination of D. Brooks Smith to the United States Court of Appeals for the Third Circuit. This, incidentally, is the 13th circuit court nominee to be considered by the Senate since the change in Senate majority and reorganization of the Judiciary Committee fewer than 13 months ago. That is an average of one court of appeals judge a month since the Democratic majority has been in place. That does set a record.

We voted and confirmed three judges yesterday, one a circuit court of appeals judge. There are 10 other judicial nominees on the calendar. All have been approved on the Democratic side of the aisle. We have no objection to going forward with votes on them. I commend the Senator from South Dakota, the majority leader, Senator *Daschle*, who worked very hard to overcome the Republican objections so we can vote on President Bush's nominees to the judiciary.

We set a record on the number of courts of appeals nominees who have been given hearings and votes. We have moved forward, including confirming one yesterday, and we will vote on another circuit court nominee tomorrow. That will be 13 in less than 13 months, plus more than 60 other judicial nominees for whom we have held hearings or on whom we have already voted. This seat on the Third Circuit is another example of the different ways in which the Republican majority and Democratic majority have proceeded.

Today's debate is taking place in broad daylight. Under the Democratic majority, Judge Smith received a hearing less than 4 months after receipt of his ABA peer review. In contrast, Judge Cindrich was previously nominated for the same vacancy on the Third Circuit by President Clinton. He sat there

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for 10 months. You may wonder what happened at his hearing. He never got a hearing. You may wonder what happened on his vote. He never got a vote. He was never allowed a hearing; he was never allowed a vote. Four months after Judge Smith came up with his ABA papers, we had a hearing.

This is one of the many court of appeals vacancies for which President Clinton nominated qualified and moderate nominees but the Republican majority would not allow a vote--neither a hearing nor a committee vote. Bonnie Campbell, Allen Snyder, and so many others--I am sure they have not been treated as fairly as Judge Smith's nomination.

It is not enough to say some of the Republicans did not want those judicial nominees to be confirmed. I will vote against this nominee. I am the Chairman of the Committee. I could have refused to hold a hearing on Judge Smith. I could have refused to put his nomination on the calendar for a vote in our Committee. I did not. Even though, after the hearing, I made my up my mind to oppose this judge, I allowed the Committee to vote on his nomination and, if he got a majority vote in the Committee, allowed it to come to the Senate floor. That has always been the Democratic practice, and a practice that I follow.

Every Senator, Democrat and Republican, will vote his or her conscience

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about the merits of Judge Smith's promotion to the appellate bench. I do not question the conscience of any Senator in doing that. While the course charted by the Democratic Senate to improve the process and hold judicial nominees is an honorable, difficult and time-consuming course, it is a road not taken in many instances by the Republicans in the recent past.

Some nominees, such as Judge Smith, are a portrait of contradiction. Those on the other side can extol his accomplishments and his popularity, but they omit his failings. They minimize his troubling record on ethical issues and his decisions as a judicial officer. Some, we heard tonight, may belittle the genuine concerns raised by many and shared by some Members of this Senate. I believe they are legitimate concerns.

As I said, I could have refused to allow him to have a hearing. I could have refused to allow him to have a vote in the Committee. I did not. I do have genuine concerns.

Some on the other side may try to castigate or caricature those who express opinions that are in opposition to the confirmation of a nominee. They may even choose to vilify those who dare to vote against a nominee who may be popular but who may be flawed in so many important respects. All of these contrasting views and accusations might cause an outside observer to wonder what exactly is the truth. The fundamental questions are whether this particular nominee should be confirmed, whether he should be promoted to a higher court, and whether his record of conduct on and off the bench warrants promotion. A lifetime appointment to review the decisions of other judges is not a right.

With the Supreme Court hearing fewer than 100 cases per year, it is the circuit courts that are really the courts of last resort for thousands of cases each year. These cases affect the Constitution, as well as statutes intended by Congress to protect the rights of all Americans; for example, the right to equal protection of the laws, the right to privacy, as well as the best opportunity to have clean air and clean water, not only for ourselves but for our future generations.

These courts are where Federal regulations will be upheld or overturned, where reproductive rights

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will be retained or lost, and where intrusive Government action will be allowed or curtailed. They are courts where thousands of individuals have their final appeal in matters affecting their financial future, their health, their lives, their liberty. I believe this record does not demonstrate that Judge D. Brooks Smith merits this promotion.

In saying this, I mean no disrespect to the senior Senator from Pennsylvania, Mr. *Specter*, who strongly supported the confirmation of this nominee, nor disrespect to the nominee who is well-liked by many. I genuinely mean no harm to Judge Smith, no matter how we vote tomorrow. He has a lifetime appointment and a lifetime salary as a Federal judge. It is fair to say, however, that this nominee's record is problematic in a number of ways. Among my many concerns is the fact that Judge Smith's action creates an appearance that is too often beholden to special interests. The Federal courts are supposed to be an independent judiciary that is not beholden to anyone--the left, the right, or any economic interests. An independent judiciary is the people's bulwark against the loss of their freedom and rights.

A number of judges and lawyers in Pennsylvania have written to the Senate to support Judge Smith's confirmation. A number of individuals and groups from Pennsylvania and elsewhere in the Third Circuit and throughout the country have written to the Senate, have called and e-mailed our office to express their deep concerns about this nomination.

We have heard from many Americans who are concerned about Judge Smith's record as a judge, including, incidentally, a resolution that was passed by the City Council of the City of Philadelphia. It was sent to us after the vote in the Judiciary Committee. It called for his nomination to be rejected.

I am going to put in the **RECORD** at the end of my statement this City Council resolution, as well as the opinions of two ethics professors.

I am disappointed that Judge Smith's record on and off the bench has resulted in this kind of controversy. As I reviewed his record as a judge, that record raised significant doubts in my mind as well.

The issue for me is whether Judge Smith's record justifies this promotion from the lifetime Federal judgeship he now holds to the higher lifetime Federal judgeship. In this case, it is to a court that is only one step below the Supreme Court. Appellate judges in the circuit courts write opinions that become law, affecting all of us, whether we live in Pennsylvania, Utah, Vermont, or Illinois. I do not believe Judge Smith's record justifies this promotion.

For one thing, he failed to keep his promise to resign from a discriminatory country club. Incidentally, that was not a promise that is something given in a political statement or to somebody in the press in response to an impromptu question. This was a promise Judge Smith made in a sworn statement before the Senate a few years ago. He belonged to a discriminatory club for more than a decade after he swore, after he took an oath, that he would quit if the rules were not changed to allow women to become members, in 1988.

He stood there, he raised his right hand, he swore to tell the truth, and he told us that he would resign if women were not admitted by 1989. He did resign from this Spruce Creek Rod and Gun Club in 1999, 10 years later.

What do you suppose was the thing that finally made him keep his word? A cynic would say that a vacancy had arisen on the court he wanted to be promoted to, and suddenly he thought: Wait a minute. I know I swore to resign by 1989--I had a lifetime judgeship and why do I have to resign from a club I

like--but then suddenly, whoops, I might be promoted to even a higher Federal judgeship, maybe I better dust off that promise. I realize I am 10 years late, but better late than never.

I find that extremely troubling.

We had testimony by his supporters in letters that, well, the Spruce Creek is just a little fishing club, an itty-bitty fishing club of no consequence, kind of like a shack in the woods where a group of male friends might store their gear.

It is not exactly an itty-bitty club. This here is the itty-bitty club.

I have a little farmhouse in Vermont. My house probably would fit in the garage of this itty-bitty club. Look at this stately club. The Republicans may have missed one thing when they previously referred to this itty-bitty clubhouse, this inconsequential clubhouse as ``rustic.'' Maybe they didn't realize that, because it is such a stately and important place, it is on the National Registry of Historic Places.

I bet your home, Mr. Presiding Officer, is not on the National Registry of Historic Places. Mine is not on the National Registry of Historic Places. I will bet the senior Senator from Utah's home is not on the National Registry of Historic Places. But this little no-consequence, little tiny fishing club, the itty-bitty fishing club, is on such a prestigious list.

For nearly a century, this itty-bitty fishing club has been an exclusive recreational sportsmen's club that hosts its members and guests at its beautiful clubhouse. It has dining facilities. This itty-bitty clubhouse has fireplaces. It has bedrooms for overnight guests. It is not just a little bend in the road; it sits on hundreds of acres of prime real estate.

We can joke about it. It is obvious that Judge Smith and his supporters thought we would not actually go and find a picture of the club. I think they probably wish that we would not go back to his sworn testimony in which he promised to resign 10 years before he did. But let us be clear about what this is. The sports club--it does not make a difference whether the sport pursued is fishing or golfing. There are a number of women's fly fishing clubs attesting to the interest of women in that sport, and that is fine.

If men want to go off and go fly fishing themselves, that is fine. If women want to go off and go fly fishing, that is fine. But when they have facilities to conduct business and when businesspeople go there to conduct business and that is how you may be able to get ahead in the business world if you exclude women from it, if you say, women, if you want to be in business, you are not going to be able to

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join the moguls of the business or legal community here, then it is exclusionary.

Women anglers who might have a fly fishing association could not walk into the Spruce Creek clubhouse. They could not fish in the stream called Spruce Creek that runs through the land owned by the club--unless a man, who is a member, condescended to invite them.

Frankly, it does not make any difference whether you exclude women or you exclude African Americans or you exclude people of particular religious faiths--it is still exclusion. That is why it is particularly troublesome that, when Judge Smith was up here the last time before the Senate seeking a lifetime appointment, he swore in sworn testimony to the Judiciary Committee and to the Senate of the United States that he would resign if he could not promptly get the club to change its exclusionary rules.

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SENATOR ARLEN SPECTER PENNSYLVANIA

Issues

Judicial Nominations

One of my most important duties as a United States Senator is the confirmation of federal judges. Article II, Section 2 of the Constitution states that the president "shall nominate, and, by and with the advice and consent of the Senate, shall appoint ... Judges of the Supreme Court, and all other officers of the United States." Because federal judges are given lifetime tenure, I take the Senate's role in the confirmation process very seriously.

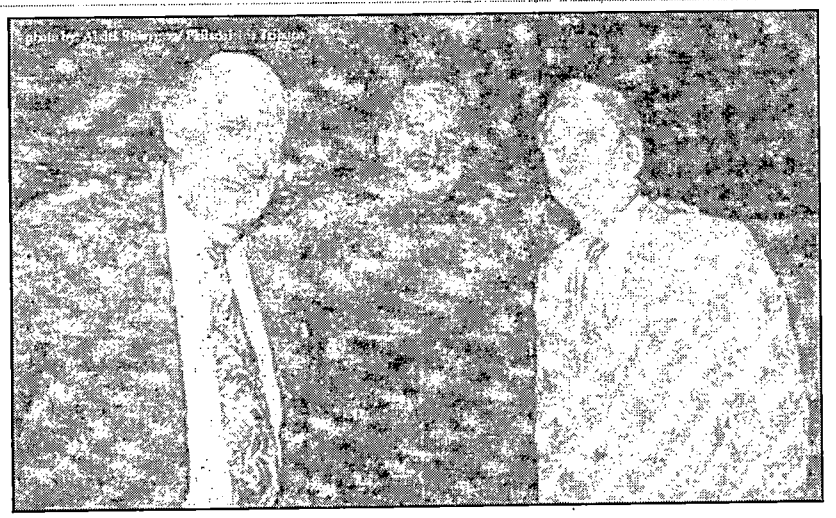

Too many judicial vacancies exist with federal judges, especially vacancies on the court of appeals. I hope that the Judiciary Committee and the Senate acts quickly to give all of President Bush's nominees a hearing and an up or down vote before the end of the 107th Congress.

In order to speed up the judicial confirmation process I recently proposed a resolution which would provide for timetables, so that after a certain number of days after a nomination, a hearing would be held, within a certain number of additional days there would be action by the Judiciary Committee on a vote, and within another specified time, there would be a vote on the Senate floor. I believe that such a process is necessary to make sure that there are enough judges on the federal courts to ensure adequate access to justice and to deal with the growing case backlog facing the federal judiciary.

However, we have had remarkable success in getting Pennsylvania judges confirmed in the 107th Congress. President Bush has nominated twelve Pennsylvanians to sit on the federal courts, including eleven, for the district courts and one for the court of appeals. Currently, the Senate has confirmed nine of these district court judges and one judge for the Third Circuit Court of Appeals which sits in Philadelphia.

This success is due to the bipartisan nominating commission which Senator Santorum and I have established. This commission reviews federal judicial candidates and recommends individuals to Senator Santorum and myself. We, in turn, recommend these individuals to the President. This process, I have learned, ensures consensus, diversity, and speeds along the confirmation of our judges.

The following is the current status of all Pennsylvania Federal Judicial Nominees:

Eastern District of Pennsylvania
Michael M. Baylson
CONFIRMED on April 30, 2002 (Vote: 98-0)

Legrome D. Davis
CONFIRMED on April 18, 2002 (Vote: 94-0)

James Knoll Gardner

Submenu

- Defense
- Education
- Environment
- Foreign Affairs
- Judicial Nominat
- Medicare
- Social Security
- Tax Relief
- Transportation
- Veteran's Affairs

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CONFIRMED on Ocotober 2, 2002 (Unanimous consent)

Cynthia M. Rufe
CONFIRMED on April 30, 2002 (Vote: 98-0)

Timothy J. Savage
CONFIRMED on August 1, 2002 (Voice Vote)

Middle District of Pennsylvania
Christopher C. Conner
CONFIRMED on July 26, 2002 (Voice Vote)

John E. Jones
CONFIRMED on July 29, 2002 (Vote: 96-0)

Western District of Pennsylvania
David S. Cercone
CONFIRMED on August 1, 2002 (Voice Vote)

Joy Flowers Conti
CONFIRMED on July, 29, 2002 (Vote: 96-0)

Terrence F. McVerry
CONFIRMED on September 3, 2002 (Vote: 88-0)

Arthur J. Schwab
Confirmed on September 13, 2002 (Vote: 92-0)

U.S. Court of Appeals for the 3rd Circuit
D. Brooks Smith
CONFIRMED on July 31, 2002

Judicial Nominations Press Releases

- *Jul. 31* - **Senator Arlen Specter (R-PA)**, a senior member of the U.S. Senat...
- *May. 23* - WASHINGTON, D.C. – D. Brooks Smith, President Bush's nominee for the United Stat...
- *Mar. 07* - WASHINGTON, D.C. – U.S. Senator Arlen Specter, a senior member of the Judiciary ...
- *Feb. 27* - U.S. Senator Arlen Specter, a senior member of the Judiciary Committee made the ...
- *Jan. 23* - WASHINGTON - Senator Arlen Specter (R-PA), made the following comments today reg...

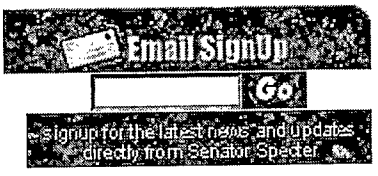

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JUDICIAL NOMINATIONS -- (Senate - March 08, 2002)

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Mr. SPECTER . Madam President, I have sought recognition to comment briefly on the pending nomination of Judge Charles Pickering for the circuit court of appeals, which was heard by the Judiciary Committee yesterday, with the vote postponed until next week.

I support Judge Pickering because I think Judge Pickering, in the year

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2002, is an appropriate nominee for the circuit court. If Charles Pickering were still a State Senator in the 1970s, I would vote against him because his civil rights record at that time was not good. But today he is a different man. This is a different time.

The opposition raised against Judge Pickering, in large measure, is about what he was as a Mississippi State Senator in the 1970s.

It is my hope that at a minimum we will send Judge Pickering's nomination to the floor of the Senate for a vote by the full Senate. The Constitution provides for confirmation by the Senate--not by the Senate Judiciary Committee. There are solid indicators that if Judge Pickering reached the floor, there would be 51 or more votes for his confirmation.

When you take into account an analysis of the comments within the beltway by those who oppose Judge Pickering vociferously, and those in Mississippi who know him best, they are for him. Those who talk about him in Mississippi talk in specifics about how he took a courageous stand against a leader of the Ku Klux Klan, about how he sided with an African American who was a defendant in a case where there was a white victim, something which was frequently not the case in the South.

This may be a warmup for the next Supreme Court nomination.

We have already seen some indicators of that with some members of the Judiciary Committee saying that a litmus test should be applied, and, if a nominee will not pledge to uphold Roe v. Wade, that nominee is not appropriate for confirmation.

This is an effort, in effect, to equate Brown v. Board of Education on segregation, with Roe v. Wade. It is obvious that if someone did not support Brown v. Board of Education and desegregation, that person would not be considered fit for the Federal bench today. But to apply a litmus test more broadly

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is very troublesome, in my opinion.

It is my hope that if Judge Pickering receives a negative vote in committee along party lines, which seems almost certain, that at a minimum he would be sent to the floor for full floor consideration.

We ought to establish a truce--an armistice--on the partisan in-fighting which has been ongoing on nominations. When we had a Democrat in the White House and a Republican-controlled Senate, it was the mirror image of what we have today with Republican President Bush in the White house and a Senate Judiciary Committee in the Senate controlled by the Democrats. I said the same thing when we had President Clinton in the White House and a Republican-controlled Senate. I crossed party lines to vote for Judge Paez and Judge Berzon, Judge Gregory and Bill Lann Lee for Assistant Attorney General for the Civil Rights Division.

It is my hope that we will establish a protocol.

I think Senator *McConnell* was right when he said yesterday in the Judiciary Committee hearing that we are facing an ``institutional crisis."

The American people do not like the partisan bickering--Democrats versus Republicans--especially when it comes to the selection of Federal judges and there is a judicial emergency in many circuits.

It is my hope that we will move ahead to try to end this partisanship.

There is solid precedent for submitting nominees to the full Senate when there is a negative or tied vote in committee. Judge Bork was defeated 8 to 5 in committee. Yet his nomination was sent to the floor for consideration as a Supreme Court nomination.

Justice Clarence Thomas had a tie vote in the committee of 7 to 7, but by a vote of 13 to 1 his nomination was sent to the floor.

Six nominees for district court or circuit courts have been sent to the full Senate when they did not receive an affirmative vote in committee--since 1951.

We still have time to revise the thinking on Judge Pickering. We still have time for an analysis on an appropriate way to handle Judge Pickering. But I submit that we ought to establish a principle from the Judiciary Committee that, if the vote is strictly along party lines, the matter be put before the full Senate for consideration.

I thank my distinguished colleague from New Hampshire for allowing me to precede him on the floor.

I yield the floor.

The PRESIDING OFFICER. The Senator from New Hampshire.

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*148 Cong Rec S 4113, **

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107th Congress, 2nd Session

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SPEAKER: Mr. **LOTT;** Mr. DASCHLE

TEXT: [*S4113]

Mr. **LOTT** . Mr. President, I have been wanting to speak about the situation with regard to the President's judicial nominations. I have a number of points I wish to make.

I know there were some discussions about the nominations earlier this morning and even this afternoon. The major point we are trying to make today is that today is the 1-year anniversary of eight of the President's nominations to serve on circuit courts. These minorities, men and women, have not even had the courtesy of a hearing, let alone a vote in the Judiciary Committee.

I have learned over the years that when you are talking about judges and judicial nominations each side will have their statistics about what happened in the Clinton years, what happened in the Reagan years, and what happens right now. But the fact is, these eight nominees have not even had a hearing; they have been pending for a full year.

There are actually 11 nominees who were sent forward in a group_the first nominations of President Bush. Three of those have been confirmed. Two of those, I might add, were recycled, in effect, because they were Democrats, or were selected by Democrats, and they were qualified. The President resubmitted their names. They got through the process. But these eight have not had any further consideration for a full year.

You can argue statistics. But usually Presidents get their circuit nominations confirmed within a year of having them sent forward.

The President sought men and women of great experience and who meet the highest standards of legal training, temperament, and judgment_for all of his nominations, but particularly for this first group of circuit court nominees.

He sought out nominees who respect the powers given to them by the Constitution and who will interpret the law_not make the law. He sought out nominees who have reputations as

lawyers of skill, discernment, and high character. He even sought out nominees who had a great deal of experience in arguing cases before the Supreme Court. In this group of eight nominees, they have collectively appeared before the Supreme Court over 60 times. One of the nominees has alone argued before the Supreme Court 30 times. In terms of their education, their experience, and their integrity, this group is unimpeachable and quite remarkable.

Here are these individuals' pictures. I think a picture helps inform our debate, because it takes the debate away from the realm of just statistics or mere names.

Mr. President, when we are talking about judges who have been delayed, we are talking about Miguel Estrada, who was born in Honduras, and has lived the American dream. He has tremendous experience in his profession, including serving as Assistant U.S. Solicitor General under President Clinton, a Supreme Court law clerk, arguing 15 cases before the Supreme Court, and working as a Federal prosecutor. He also graduated magna cum laude from Harvard Law School_not an institution known for turning out conservative lawyers, or judges_but certainly an eminently respected institution as far as quality, high standards, and academic rigor are concerned. Yet Estrada has been denied a fair hearing.

Why? Noone has suggested he is not qualified by education, by experience, or by professional or personal integrity.

Does he have a conservative philosophy? Does he believe in strict construction of the Founder's intent in interpreting the Constitution? Yes. Does that disqualify him? It should not.

I voted for Justice Ginsburg when she came before the Senate. I did not agree with her judicial or legal philosophy. I knew she would rule quite often in ways with which I would not agree. While most justices exercise discretion, you can't always count on how they may rule. But she was qualified by experience, by education, and by personal integrity and demeanor and I voted for her regardless of the fact that her philosophy was contrary to my own.

Unfortunately, I cannot think of any other reason than ideological prejudice for why Miguel Estrada has not had a hearing and an opportunity to be voted on_despite the fact that he was unanimously given the ABA's highest rating, "well qualified" by the American Bar Association which is supposed to be the Democrat's Gold Standard for evaluating nominees judicial qualifications. Yet, Miguel Estrada has not even had a hearing.

Another example, which is clearly one that is hard to understand, is the delay in considering Justice Priscilla Owen, a nominee to the Fifth Circuit Court of Appeals. I have a special feeling in my heart about this circuit because it does include my State of Mississippi. Judge Owen has served on the Texas Supreme Court since 1994. She has been involved in business in the private sector. She is an outstanding graduate of Baylor Law School in Texas.

Again, by education, by experience, and by personal integrity, this is a lady who should have been accorded a hearing and a vote by now in the Judiciary Committee and on the floor of the Senate.

Mr. President, why do we need another pound of flesh concerning the Fifth Circuit Court of Appeals? Is Judge Charles Pickering who has already been voted down in the Judiciary Committee not enough. If we are looking for tit for tat, how about just saying: OK, good, take that, Mr. President, Trent **Lott,** Republicans, we repaid you what you deserved from the past? But how does all of that apply to Priscilla Owen? Why has this lady not been accorded a hearing? Remember, **[*S4114]**
once again, that she has been pending for a full year.

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One interesting thing of note, Mr. President, is that two of these nominees, were actually nominated by the first President Bush. So they in a sense have been waiting over 10 years to get a fair hearing and be confirmed to the circuit courts.

John Roberts is one of those two, and has again been nominated to the DC Circuit Court of Appeals. He is one of the Nation's leading appellate lawyers, having argued 36 cases before the U.S. Supreme Court, and serving as a Deputy Solicitor General for our Nation. He also graduated magna cum laude from Harvard. So again, by education, by incredible experience, and by personal integrity, he has stellar qualifications to serve as a circuit court judge. Yet, he too has been denied a fair hearing and an opportunity to be considered by the Senate by the majority of Democrats on the Judiciary Committee.

Mr. President, our Nation's fourth President, James Madison, was certainly correct when he said that the courts exist to "exercise not the will of men, but the judgment of law." This President has gone to great lengths to nominate thekind of men and women who will do that once they are confirmed.

Another nominee who has been delayed for over a year without cause or justification, is Justice Deborah Cook, nominated to the Sixth Circuit Court of Appeals. She has served as a justice on the Ohio Supreme Court since 1994. Before becoming a judge, she was the first woman partner at Akron's oldest law firm. She is a graduate of the University of Akron Law School.

This is the circuit where half of the judicial seats are vacant. There is a long history on why that is, but the fact is that again the nominee is an eminently qualified nominee. And she has been waiting 52 weeks for a hearing even though the ABA voted unanimously that she was qualified.

So what is the problem, Mr. President? There are no allegations of improper conduct. There are no allegations that she is not qualified by experience, by education, or by demeanor, yet she is still waiting on a hearing.

Yet another nominee unjustifiably delayed is Judge Terrence Boyle, a nominee to the Fourth Circuit Court of Appeals. He was unanimously confirmed to be a Federal district judge in 1984.

Mr. President, one of the things that struck me as very interesting about Judge Pickering's treatment by the Democrats was that he has been a sitting federal district court judge since 1990, over 12 years. And now we have a nominee who has been a Federal district judge for almost two decades, who was unanimously confirmed in 1984. The former chairman of the State Democratic Party in North Carolina even supports his nomination. He is a graduate of American University's Law School. This is one of the two nominees, the other being John Roberts, who was first nominated to be a circuit court judge back during the first President Bush's administration. He was younger and well experienced then, and he now has another decade of experience as a Federal district court judge to his credit. And here he is back again, only to be denied a fair hearing by the Democrats.

So, in each and every one of these cases, there is no explanation for the year-long delay in giving President Bush's first group of nominees prompt and fair treatment.

Michael McConnell has been nominated to the Tenth Circuit Court of Appeals and again he is an eminently qualified legal scholar. He is one of the Nation's leading constitutional scholars, the author of legal books, and a prolific contributor to law journals. He has argued 11 cases before the Supreme Court. His reputation for fairness and integrity has generated support from numerous law professors. He is a graduate of the University of Chicago Law School. Again, on what possible grounds is such an extraordinarily qualified individual denied a

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hearing for over a year?

Judge Dennis Shedd, a nominee to the Fourth Circuit Court of Appeals, was another nominee unanimously confirmed to be a Federal district judge in 1990_yet another sitting Federal district judge, Mr. President. He is strongly supported in his home State by both Senators_Senator Fritz Hollings and Senator Strom Thurmond_and served in the past as chief counsel to the Senate Judiciary Committee. He is one of ours no less. Yet, he has been waiting unjustifiably for over a year for a fair hearing and a vote.

Mr. President, I believe I have talked about each one of the nominee's personal qualifications to serve on the circuit courts of America. I should note that, back in January, the chairman of the Judiciary Committee indicated there would be a hearing for Justice Priscilla Owen, Michael McConnell, and Miguel Estrada_and that they would have hearings this year. Now, I guess we have 4 more months that have expired, another 4 months in which they have not been given a hearing much less a vote.

I hope they will given more than the courtesy of a hearing, which seems the minimum they should have. They should have a vote in the Judiciary Committee and then a vote here in the full Senate.

Mr. President, the delay in confirming such well qualified nominees to be judges has had an adverse impact on the judicial system itself. The number of vacancies has gone up over the past year_there are now almost 100 judgeships vacant_while 44 nominations languish in the Senate. As a result, justice is being delayed as the caseload burden increases for almost every current judge in the nation.

I would take a moment to note one curious thing about today's efforts regarding judges. We had six judges on the calendar ready to be voted on; but only four were moved, the other two were not. One of the two nominees has a very close association with Senator Hatch. The other one is the lone circuit judge on the calendar. So, once again, it appears circuit judges are receiving worse treatment by the Judiciary Committee than are the Federal district court nominees.

I realize around here we get to thinking: Well, wait a minute, circuit courts are more involved in the interpretation of the law. Maybe they are more important. But I will tell you what, if you ever practiced a day of law, the ones you see who really are dealing with the law every day are the Federal district judges. I do not understand the big dichotomy here and why the circuit judges are being delayed and treated so unfairly.

I want to point out what is happening in terms of these circuit judges nominated by President Bush as compared to the treatment that was afforded circuit court nominees during President Clinton's first two years in office.

First off, I should note that while President Bush sent his first nominations up on May 9, 2001, a year ago, President Clinton did not send up his first batch of nominations to the Senate until August of his first year in office.

So, there was actually less time to actually get President Clinton's nominees confirmed than there has been to get George Bush's out.

Yet you can see from the chart what is actually happening with Bush's nominees, particularly with respect to the circuit judges. President Clinton, in the 14 months after his first nominee was sent up, got 86 percent of them confirmed by the time Congress adjourned. Ultimately, over the course of the following Congress, Clinton ended up getting almost all of the judges he nominated during his first Congressional term. Again, I am not going to get into great arguments over the exact percentages or numbers, but there is clearly a problem here. While

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Clinton got 86 percent of his circuit judges by the time his first Congress adjourned, President Bush only has 30 percent so far. And at the current pace the judiciary is considering Bush's nominees, it looks like Bush is not going to break 50% by the end of this Congress.

It looks as if we might get two or three more circuit judges by the end of the year, but it surely is moving deliberately slowly. The American people recognize this is a problem for the country. When you have a circuit like the 6th circuit that has a 50-percent vacancy rate, then you begin to wonder, do we have enough judges to cover all the cases, even the truly important ones?

This is a question of law and order, Mr. President, drug cases, terrorist cases.

Justice Rehnquist, the Chief Justice, has decried the vacancy crisis as **[*S4115]** "alarming." More than 10 percent of Federal judgeships are currently vacant. So this problem for our nation that is very serious, particularly after the terrorist attacks in New York and here in Washington.

I have talked to Senator Daschle about it. Senator Nickles and I, along with Senator Hatch, have talked to Senator Leahy and Senator Reid. I know, having been majority leader, that sometimes these problems are hard to resolve. The Judiciary Committee doesn't always follow instructions even from the elected leaders. But this creates a problem. We have been trying to resist slowing down or blocking meetings or progress on the legislative process because we want to move forward on these important bills. But we have to point out that there is a blatant unfairness here, to the country and to the nominees. I can't help but think of the cliche that justice delayed is justice denied. That is what is happening here.

I know my time is running out. I probably will come back and talk more about this later. I ask for fairness, fairness for these eight circuit judges. We can argue about the others later, the other circuit nominees, other district judges, but after an entire year President Bush's first eight nominees should have a hearing. They should have a vote on the Senate floor. No criticisms have been raised against them other than un-attributed hints that they are conservative, and the current majority in the Senate is looking for some sort of a litmus test or conformance, I guess, based on philosophy and ideology. I don't think that either fair or appropriate. It is not what is called for under the Constitution. I hope that the Senate will ultimately find a way to make progress in this area and give these nominees the opportunity to be fairly considered based upon their temperament, professional and educational qualifications, and their personal integrity.

As President Bush has noted in making the case for getting his nominees confirmed, Federal judges are key to making sure America functions well. Every day they uphold the rights of an individual, they protect the innocent, they punish the guilty. Their rulings are essential to the rule of law in our nation. To discharge their responsibilities the federal courts must have judges."

Because of the number of vacancies in our nation's courts, Americans are being forced to wait for justice, and the burden on federal judges is growing heavier.

Mr. President, one newspaper, the Wichita Eagle, got it exactly right on the judges issue back in March in part I think because it is located in the heart of America when it said: "But just as presidents have an obligation not to nominate the incompetent or unqualified to the federal bench, presidents deserve the broad authority in making their choices for such judicial posts. And the Senate has a responsibility to give those choices every possible consideration and, barring some glaring defect, confirm them quickly. Yet the backstabbing and stalling on judicial **confirmations** has escalated to the point of obstructing justice. It needs to stop."

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This President's nominees are men and women of distinction and great accomplishment. They are solidly within the mainstream of American legal opinion, and they share a principled commitment to follow the law, not legislate it from the bench.

Mr. President, President Bush' nominees should be given fair hearings, voted on, and confirmed by the Senate as soon as possible.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The senior assistant bill clerk proceeded to call the roll.

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

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

Mr. DASCHLE . Mr. President, the people who have been discussing and negotiating the trade matter have asked for a little additional time. In order to accommodate their discussions, I ask unanimous consent that the period for morning business be extended until 3:45.

Mr. **LOTT** . Mr. President, at this point I would have to object. I don't know that I would want to. I just have not had a chance to discuss this with Senator Daschle.

The PRESIDING OFFICER. The Senator from Georgia.

(The remarks of Mr. Cleland pertaining to the introduction of ♦ S. 1492 are located in today's Record under "Statements on Introduced Bills and Joint Resolutions.")

The PRESIDING OFFICER. The Senator from Nevada is recognized.

SUBJECT: JUDGES (78%); LAWYERS (77%); EDUCATION (75%); ANNIVERSARIES (58%);

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TRENT LOTT May 9, 2002 lott.senate.gov

Senator Lott Asks the Senate to Vote on Circuit Judges

Senator Lott joined an overwhelming majority of Republican Senators on May 9 in calling on the Senate to vote on the confirmation of nine men and women nominated one year ago by President Bush to the Circuit Courts of Appeals.

"We're talking about outstanding Americans of diverse backgrounds who have not even had the courtesy of a hearing," Senator Lott said. "And there's no explanation for it."

The one-year-old nominations are: John G. Roberts and Miguel Estrada, both for the Court of Appeals for the District of Columbia; Terrence Boyle and Dennis Shedd, both for the 4th Circuit Court of Appeals; Michael McConnell and Jeffrey Sutton, both for the 10th Circuit Court of Appeals; Priscilla Owen for the 5th Circuit Court of Appeals; and Deborah Cook for the 6th Circuit Court of Appeals.

"It's a matter of simple fairness, and I think the American people understand that justice delayed is justice denied," Senator Lott said.

The Republican Leader said that historically, a president can count on seeing all of his first 11 Circuit Court nominees confirmed. Presidents Reagan, George Herbert Walker Bush and Clinton all enjoyed a 100% confirmation rate on their first 11 Circuit Court nominees, and all were confirmed well within a year of nomination. In stark contrast, eight of President Bush's nominations to the Circuit Courts which are only one step below the Supreme Court are still pending in the Judiciary Committee, 365 days after nomination.

"Justice is being denied in our courts because of the refusal of the 10 Democratic Senators on the Judiciary Committee to confirm conservative, well-qualified judges to our Circuit Courts of Appeals," Senator Lott said. " These 10 liberal Senators prefer judges who share their activist ideology and who would use the power of the bench to make laws that the Senators have been unsuccessful in passing through Congress.

"Justice delayed is justice denied. It's time for the Senate to stop this cowardly process of blocking these eight distinguished nominees in the Committee. It's time for the Senate to have the courage of its convictions. It's time to vote."

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TRENT LOTT August 1, 2002 lott.senate.gov

Senate Majority Leadership may have to be left back next year. . .

Senator Lott joined with Senators Kay Bailey Hutchison of Texas, Rick Santorum of Pennsylvania and the other members of the Senate Republican Leadership in issuing a 1st Semester Progress Report to the Senate Democratic Majority for the latter's failure to complete the people's business on critical issues facing the nation.

Majority Leader Tom Daschle and his leadership now controlling the Senate received:

• An "incomplete" on Energy for failing to bring a final energy independence bill to a vote while conflicts deepen in the Mid East;

• An "incomplete" on Prescription Drugs for denying seniors needed medications by bringing a flawed bill to the Senate floor strictly as a political issue, without any strategy or plan for actually putting a drug plan for seniors into law;

• An "incomplete" for failing to bring to a vote the President's Department of Homeland Security bill;

• An "incomplete, if not failure" for not passing a Budget to govern the nation's spending beginning October 1, 2002, the first time a Senate Majority has ignored the budget law since it was enacted in 1974;

• An "incomplete" on Welfare Reform Reauthorization, putting at risk our success story in moving welfare recipients off welfare rolls and into good jobs and future lives;

• An "incomplete" on enacting the defense funding bill for the new fiscal year beginning October 1, despite the President's calls to get this bill to his desk ASAP so that the War on Terrorism and our troops on the ground will not be affected by politics;

• And finally, an "incomplete" in confirming the President's judicial nominations to fill critical vacancies in the nation's Circuit Courts of Appeals so law and order judges will ensure that victims are not denied justice.

"As you can see, this is not the kind of report card you'd want to have to ask your parents to sign," Senator Lott told a press Capitol press conference on Thursday, August 1, when the report card was issued. "This Majority may have to be held back. But that's not stopping them from going out to recess tomorrow."

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TRENT LOTT October 17, 2002

lott.senate.gov

The Judicial Crisis

Yet again a few liberals on the Senate Judiciary Committee are trying to block a conservative judge from a conservative state, just as they did with Mississippi's Judge Charles Pickering and Judge Priscilla Owen, of Texas. This time, Judge Dennis Shedd, - a highly-qualified judge from South Carolina - is being denied a vote before the Senate Judiciary Committee, which has repeatedly failed in its duty to approve judges and report them to the full Senate floor for a vote, where they enjoy broad bipartisan support. This is creating a judicial crisis, and a shortage of federal judges. The reason for the committee's inaction: some people fear judges who strictly interpret law, rather than make it.

It is no secret that the political left has tried to achieve its agenda through the courts. They have done this with the help of activist judges who have ruled so broadly that they have essentially made new law from the bench. Many liberals too often feel the need to go around elected representatives and instead default to the courts. This is because on the many so-called "hot button" issues, a majority of Americans find the button not so hot at all, and in fact come down solidly on the traditional side. For example, most Americans solidly support responsible gun ownership. As we have seen in Mississippi, a wide majority support a sensible tort system, where frivolous lawsuits are kept out of court. An overwhelming majority of Americans believe that the words "under God" are perfectly acceptable for our Pledge of Allegiance. Even 30 years after legalization, roughly half of all Americans still strongly oppose abortion. For these reasons, and others, conservative judges - especially those who are practicing Christians like Judge Pickering - annoy, anger and scare the political left in this country, which has repeatedly shown hostility toward traditional values and traditional institutions like businesses, churches, marriage and families. Many on the left feel that conservative judges are conspiring to use the judicial branch to promote a conservative agenda in the same way the left has in the past used the bench to advance its liberal agenda.

I suggest nothing could be further from the truth. Judge Pickering, Judge Owen, Judge Shedd are all rated highly by the American Bar Association (ABA) for their legal experience and fairness in interpreting the law. As conservative jurists, they do not believe in making law from the bench. Sure, they have personal opinions and feelings, but they were not given this coveted ABA rating by a bunch of partisan hacks who share their views. Instead, the ABA - a professional organization made up of legal experts from all backgrounds - bestows this rating based on a judge's professional experience and ethical conduct. If anything, the records of Judge Pickering, Judge Owen and Judge Shedd show that they are prepared to rule fairly, whether they agree with the law personally or not.

With the exception of nominees to the Supreme Court, usually the U.S. Senate has downplayed personal philosophical differences in the confirmation of judges, particularly circuit judges. During my years in the Senate, I have voted for a number of judges with whom I disagreed sharply in terms of politics. I voted for Judge Ruth Bader Ginsburg's confirmation, when President Clinton nominated her for the U.S. Supreme court. She and I have differing views, but nevertheless she was qualified by education and experience. President Bush, and indeed all presidents, are entitled to nominate judges who are qualified by education, experience, and demeanor. The full Senate should be allowed by its Judiciary Committee to confirm or deny judges based on a judge's professional merits alone.

It is up to the Congress and President to make the law. It is up to judges to apply that law. To those who feel judges should indeed make law on the bench, and who fear judges like Judge Pickering, Judge Owen and Judge Shedd will use the courts to advance their personal views, I suggest they look at the records of these qualified men and women. Anyone will find these judges' standards to be much higher than that.

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USA TODAY, November 5, 2002

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USA TODAY

November 5, 2002, Tuesday, FINAL EDITION

SECTION: NEWS; Pg. 8A

LENGTH: 770 words

HEADLINE: Senate sub makes political waves

BYLINE: Andrea Stone

BODY:
An angry Minnesota Gov. Jesse Ventura appointed a political independent to the **Senate** on Monday as a temporary replacement for Democrat Paul Wellstone, who died last month in a plane crash. At the same time, two candidates vying for the full six-year term clashed in their first and only debate.

Ventura, miffed at the partisan tone of last week's memorial service for Wellstone, named Dean Barkley to represent Minnesota at the post-election **Senate** session that begins next week. Barkley's **Senate** bid in 1994 garnered the Reform Party the 5% of the vote needed to put it on the ballot and win public financing.
Democrats, who worry that Barkley will vote with Republicans on spending and homeland-security bills next week, accused Ventura of grandstanding. "It's typical Jesse Ventura," state Democratic Chairman Mike Erlandson said. "He decided to make a political rant when people wanted to focus on who is going to be their next U.S. senator."

Sara Janecek, a Republican strategist and co-editor of *Politics in Minnesota* newsletter, called Ventura's announcement "a ridiculous side show" and added, "The governor is trying to matter, and he doesn't."

Barkley's appointment will result in a 49-49 split, with two independents. It was unclear whether he would serve until Nov. 19, when today's election is certified, or until early January, when new senators usually are seated.

Senate Minority Leader Trent **Lott,** R-Miss, said if Barkley decided to side with Republicans, "I would be recognized as majority leader as soon as he is sworn in."

Lott said he hoped that would allow Republicans to push through not only homeland-security and terrorism-insurance bills, but also the nominations of more than 80 **judicial** and other **nominees** held up by Democrats.

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"I'm sure this all puts him in a whirlwind," **Lott** said Monday on Oliver North's radio talk show. Barkley's "in the catbird seat right now. The decisions he makes will be very important."

If Barkley, 52, sides with the GOP, it will be a fitting end to the most topsy-turvy **Senate** in U.S. history. It began with a 50-50 split and Sen. Tom Daschle, D-S.D., as majority leader for a few weeks in January 2001 before Dick Cheney replaced Al Gore as president of the **Senate. Lott** ran the **Senate** until June 2001, when Sen. Jim Jeffords of Vermont bolted from the Republican Party and became an independent allied with Democrats. Daschle took over until now.

The two men vying for the full six-year term squared off in a polite but at times heated debate at St. Paul's Fitzgerald Theater, an old vaudeville house best known as the home of public radio's *A Prairie Home Companion*.

Mondale, 74, who served in the **Senate** from 1964 to 1976, was aggressive throughout the debate. He called Coleman's campaign "the poster child for what is wrong in politics," citing its reliance on contributions from corporations and special-interest groups.

Coleman, 53, a former Democrat and mayor of St. Paul, criticized what he called his former party's divisive tone. He pledged to work across party lines.

The two clashed most on tax policy. Coleman said he favors making President **Bush's** 10-year, $ 1.35 trillion tax cuts permanent. He noted that taxes rose during Mondale's stint as President Carter's vice president. He reminded viewers of Mondale's pledge in the 1984 presidential race to raise taxes.

Mondale parried by noting that President Reagan raised taxes after beating him in a landslide. "I was the one who told the truth before the election," Mondale said. "And I think that's one of the big things Minnesotans have to look at: Who's got the courage to stand up, level with the people, even when it's difficult?"

Mondale said he favors tax cuts for the middle class; he said the **Bush** tax cuts most benefit the wealthiest 1% of Americans.

Lawrence Jacobs, a political scientist at the University of Minnesota, said Mondale surprised many observers with his aggressive approach in the debate. He called the strategy "high risk" but necessary if the Democrat is to win over the 10% of independent voters who remain undecided.

In summing up, Coleman reiterated what became his campaign theme after Mondale stepped in to replace Wellstone: that the race is about the future, not the past. Mondale appealed to voters to "re-elect" him.

"It's the question of, who can get the job done?" he said. "I know the **Senate.** I've served in

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the **Senate.** I was the president of the **Senate.** And under the rules, if you will re-elect me, I go into the **Senate** leadership on the first day."

GRAPHIC: PHOTO, B/W, Ann Heisenfelt, AP; After debate in St. Paul: Republican Norm Coleman, left, and Democrat Walter Mondale are competing to represent Minnesota for the full six-year term in the **Senate.** The Minnesota Independence Party was not invited to the debate Monday.

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April 30th, 2002 Contact: Margarita Tapia, 202.224.5225

JUDICIARY STATEMENT: "STATUS OF JUDICIAL CONFIRMATIONS"

Statement of Sen. Orrin Hatch

Hatch

before the

Senate Judiciary Committee

"Status of Judicial Confirmations"

Mr. President, I would like to respond briefly to some comments made earlier today on the topic of judicial confirmations. I had no intention of bringing up this topic today, but now I find myself with no choice but to set the record straight. I want to make one observation and then two simple points.

Mr. President, my observation is this: The American people want this Senate to help – rather than hinder – President Bush and anyone else who is President. Everyone understands that we are living at a time of great national importance. Our government is being put to a test. President Bush is performing extraordinarily well, and he is leading our country and our military in the right direction to achieve prosperity and security for all Americans. The American people support President Bush and his Administration, and they correctly believe that the Senate should do the same.

But the people who follow the Judiciary Committee's record on reviewing and approving President Bush's judicial nominations are frustrated – for good reason – with the way in which this body has treated President Bush. They know that President Bush gave great care and attention to finding nominees who are extremely well-qualified, highly talented legal thinkers who hold mainstream American values. There is not an ideologue among them. To the contrary, President Bush's picks for the judiciary are all principled and fair people, from a variety of backgrounds and experiences, who are committed to following precedent, applying the law as it exists, and standing firm against judicial activism. President Bush should not be forced to divert any more of his time and attention away from the war on terrorism and his many domestic priorities in order to persuade this body to do what is right for the American people.

Now, Mr. President, I would like to make two points that directly respond to the comments made earlier today.

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First, the current Senate leadership is NOT doing a better job this Congress than the Senate has done under other presidents. I listened as my colleague explained that, if looked at through the right looking glass, or examined in the right subsection of the right time period of the right session of the right Congress, then the current numbers are pretty impressive.

But Mr. President, the most important measure of performance should be how we are handling the most important courts: the Circuit Court of Appeal. Let's compare the treatment of President Bush's first 11 circuit court nominees to the first 11 of previous presidents. President Reagan, the first President Bush and President Clinton all enjoyed a 100% confirmation rate on their first 11 Circuit Court nominees,

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and all were confirmed well within a year. President Reagan's first 11 were confirmed in an average of 39 days, the first President Bush's first 11 averaged 88 days, and President Clinton's first 11 - only 115 days. The longest any of these individuals were held up in Committee was 202 days. In stark contrast to previous presidents, 8 of President Bush's first 11 nominations – made on May 9th, 2001, almost a year ago – are still pending in Committee without so much as a hearing! That's nearly 365 days, and only 3 of President's first 11 nominees are confirmed. Is this what the Democratic leadership considers a record-breaking pace? It may be record-breaking, all right, but not the record they're talking about. They are confirming with the velocity of molasses.

Now I heard my colleague suggest that some of the first 11 nominees may have been superseded out of courtesy to Republican Senators who requested some later-nominated judges to move first. Well, I know how difficult it is to Chair the committee, and such requests do come in. But I would suggest to my friend that he do what I did for President Clinton: consider more than one circuit nominee per hearing. That's what we did, under Republican leadership, no fewer than 10 times. Why not two at a time?

Of course, the pace of confirming a President's first 11 nominees is not the only measure by which the current leadership is falling short. My colleague suggested that kudos should be awarded for bringing the circuit court vacancy rate down to 29. Well, it was NEVER that high at the end of ANY Congress when Republicans controlled the Senate. And I certainly don't recall that, during my Chairmanship, any of our Circuit Courts were facing the kind of crisis that is going on today in the 6th Circuit Court of Appeals, where the Court is operating at half-staff despite the fact that President Bush has nominated SEVEN highly qualified people to serve on that court.

The fact is that, at the close of the 106th Congress, when I was Chairman of the Judiciary Committee, there were only 67 vacancies in the federal judiciary. In the space of one Democratic-controlled congressional session last year, that number shot up to nearly 100, where it remains today. Under Republican leadership, the Senate confirmed essentially the same number of judges for President Clinton (377) as it did for President Reagan (382), which proves bipartisan fairness – especially when you consider that President Reagan had six years of his party controlling the Senate, and President Clinton had only two.

So, how did we go from 67 vacancies at the end of the Clinton Administration to nearly 100 today? There can be only one answer: The current pace of hearings and confirmations is simply not keeping up with the increase in vacancies. We are moving so slowly that we are barely keeping up with natural attrition. President Bush nominated 66 highly qualified individuals to fill judicial vacancies last year. But in the first four months of Democratic control of the Senate last year, only 6 federal judges were confirmed. At several hearings, the Judiciary Committee considered only one or two judges at a time. The Committee voted on only 6 of 29 circuit court nominees in 2001, a rate of 21%, leaving 23 of them without any action at all.

This leads to my second point, Mr. President, which is that the current situation has nothing whatsoever to do with ideology. I was surprised to hear my friend, the Chairman of the Judiciary Committee, address earlier today the question of introducing ideology into the judicial confirmation process. Some of my Democrat colleagues have made no bones about the fact that this is exactly what they are seeking to do. In July, they have even held hearings expressly on how to justify it. We saw what happened to Judge Charles Pickering.

What is now occurring is far beyond the mere tug-of-war politics that unfortunately surrounds Senate judicial confirmation since Robert Bork. Some of my colleagues are out to effect a fundamental change in our constitutional system, as they were instructed to do by noted liberal law professors at a retreat

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early last year. Rather than seeking to determine the judiciousness of a nominee and whether a nominee will be able to rule on the law or the Constitution without personal bias, they want to guarantee that our judges all think in the same way, a way that is much further to the left of mainstream than most of President Bush's nominees.

In the judiciary that some would create, citizens will have to worry about the personal politics of the judge to whom they come for justice under the law. I strongly object to that result.

Mr. President, the legitimacy of our courts, and especially the Supreme Court, comes from much more than black robes and a high bench. It comes from the people's belief that judges and justices will apply a judicial philosophy without regard to personal politics or bias.

In conclusion, Mr. President, it is time for this Senate to examine the real situation in the Judiciary Committee, rather than listen to more inventive ways of spinning it. We have lots of work to do. There are 90 vacancies in the federal judiciary – a vacancy rate of more than 10.5% – and we have 50 nominees pending, including 4 nominees for the Court of Federal Claims. Nineteen of the pending nominees are for circuit court positions, yet the Senate has confirmed only 9 circuit judges this Congress. This is despite a crisis of 29 vacancies pending in the circuit courts nationwide – virtually the same number of vacancies pending when the Democrats took control of the Senate in June of last year.

Mr. President, the American people are disappointed in this process. They want the Senate to help – not hinder – President Bush. I urge my friends across the aisle to focus on this situation, to step up the pace of hearings and votes, and to do what's right for the country.

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April 12th, 2002 Contact: Margarita Tapia 202.224.5225

HATCH ADDRESSES JUDICIAL CONFIRMATION PROCESS IN 'STATE OF THE SENATE'

Washington - Sen. Orrin G. Hatch (R-Utah), ranking Republican member of the Senate Committee on the Judiciary, today issued the following remarks on the current state of the judicial confirmation process:

"Thank you, Leader, for this opportunity to report on the State of the Senate's responsibility to confirm federal judges. I am sorry to say the we are not doing as well as I would like for the American people.

"The fact is our federal courts are in a vacancy crisis, while here in the Senate the judicial confirmation process appears to have fallen into the hands of very liberal Senate Democrats who appear intent on letting outside, extreme-left, special interest groups launch the most invidious attacks on the good people the President has nominated.

"Though you would think that Democrats might have recoiled after the national backlash they got from the hurtful way they treated a good man like Charles Pickering of Mississippi, it seems the stoves of the special interest groups are readying to boil up an attack on Judge Brooks Smith of Pennsylvania.

"Judge Smith has a very distinguished record as a federal judge for almost 14 years, and no one has questioned his ability or competence. Yet the extremists are trying to make hay out of the fact that he used to be a member of a family oriented fishing club, like hundreds of clubs that exist from Vermont to Utah that happen to limit membership to men or to women for solely leisure purposes.

"What is most distressing about this latest inside Washington attack is that it is yesterday's hysteria in more ways than one. Since 1988, the courts and the Judicial Conference have made clear that there is nothing improper about a Judge or nominee belonging to a single gender club that exhibits certain attributes first articulated by Justice William Brennan as an extension of First Amendment speech.

"I, for one, stand by the Freedom of Association. As Justice Thurgood Marshall pointed out, the ability to associate as we see fit is part of what makes this country great, and a freedom we honor. I hope Democrats do also. Judges, or people who might want to be Judges someday, are just as free as anyone else to exercise that right.
"The American people will roll their eyes at an attempt to ignore a 14-year career on the bench while focusing on a private hunting or fishing club . For goodness sake, Judge Smith has the support of the Women's Bar Association of Western Pennsylvania and the local Domestic Violence Board in Pennsylvania.

"This sort of thing is not good for the country. In the case of Judge Pickering, I have to say, I am very concerned that an impression has been created by how Judge Pickering was treated, that Democrats are imposing a litmus test on personal views, in some cases derived of religious conviction. Judge Pickering was a Southern Baptist. The American people -- liberal or conservative -- will not, and should not, stand for this. To impose a litmus test offends everyone who appreciates the rule of law and the diversity that makes our country strong.

"Let me just report that today marks the 338th day since President Bush announced his first 11 picks for the federal bench. There can be little doubt that the unwillingness of Democrats to move more

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expeditiously in judicial confirmations is exacerbating the existing circuit court vacancy crisis.

"What is happening in the Senate confirmation process is not tit for tat or mere pay back, Democrats are in the throes of pursuing a course that is more serious than that. Senate Democrats are seeking to de-diversify the federal judiciary. They are seeking a federal judiciary that looks nothing like the American people.

"One of my Senate colleagues, the senior Senator from New York, repeatedly argues that we need more diversity on our circuit courts of appeal. I couldn't agree more! But Democrats do not walk the talk. The 6th Circuit, for the Midwest States, currently has 6 Democrat-appointed judges, but only 2 Republican. President Bush has 7 nominees pending for that circuit, none have received a hearing. The 9th Circuit, for the Western states, has 17 Democrat-appointed judges but only 7 Republicans. No pending nominee has received a hearing. And in the 2nd Circuit, which covers New York, there are 9 Democrats and 1 Republican, but we do not hear Democrats clamoring for diversity in the 2nd Circuit.

"The bottom line is that nearly one in five circuit court seats is vacant all across America. When President Bush sent up his first nominees we had 31 circuit court vacancies, and today we still have 31 vacancies despite the nation's need. President Bush has responded to the circuit court vacancy crisis by rapidly nominating top-notch men and women. The only obstacle standing in the way of the nominees' ability to serve the American people is a Democrat-led Senate."

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April 11th, 2002 Contact: Margarita Tapia 202.224.5225

JUDICIARY STATEMENT: "NOMINATIONS OF HOWARD, ANDERSON, BAYLSON, GRIESBACH, LANCASTER, RUFE, AND WALTER"
Statement of Senator Orrin G. HatchRanking Republican MemberBefore the United States Senate Committee on the JudiciaryHearing on the Nominations ofJeffrey R. Howard, to be U.S. Circuit Judge, First CircuitPercy Anderson, to be U.S. District Judge, Central District of CaliforniaMichael M. Baylson, to be U.S. District Judge, E. District of PennsylvaniaWilliam C. Griesbach, to be U.S. District Judge, Eastern District of WisconsinJoan E. Lancaster, to be U.S. District Judge, District of MinnesotaCynthia M. Rufe, to be U.S. District Judge, Eastern District of Pennsylvania John F. Walter, to be U.S. District Judge, Central District of California

Statement of Sen. Orrin Hatch

before the

Senate Judiciary Committee

I am pleased that the Judiciary Committee is considering the nominations of seven exceedingly well-qualified candidates for the federal bench, and I would like to welcome you to the Committee.

Before we discuss the excellent credentials of today's nominees, however, I must take just a minute to make an observation about how this hearing fits into the bigger picture of the Committee's work on judicial nominations.

Today marks the 337th day since President Bush announced his first 11 picks for the federal bench. Eight of those nominations have been languishing in this committee for nearly a year with no commitments for hearings or votes any time soon. All eight received the ABA's majority rating of either well-qualified or qualified. Among these are some of the very best lawyers in the history of our country, including Miguel Estrada, John Roberts and Michael McConnell, just to name three.

This Committee's unwillingness to move more expeditiously on these nominations is exacerbating the circuit court vacancy crisis that exists in America today. Nearly one in five circuit court seats is vacant all across America. When President Bush sent up his first nominees we had 31 circuit court vacancies, and today we still have 31 vacancies. The DC Circuit Court of Appeals is one-third vacant and the 6th Circuit is 50-percent vacant.

President Bush has responded to the circuit court vacancy crisis by rapidly nominating top-notch men and women. The only obstacle standing in the way of the nominees' ability to serve the American people is this Committee.

I am glad that we will consider a circuit court nominee today, but I will point out that in years past under Republican leadership, we regularly considered two or more circuit nominees at a time. In fact, we did so on ten different occasions.

I'm also particularly pleased to see nominees John Walter and Percy Anderson from the Central District of California here - and I'll bet they are happy to be here today too - considering it's been 10 years since they were initially nominated to their seats during the first Bush Administration. They were both

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nominated in March of 1992, but unfortunately the Senate - which was controlled by the Democrats at the time - denied them a hearing.

Interestingly, they are not the only nominees pending before the Committee today who were nominated by the first President Bush nearly 10 years ago. Terrence Boyle for the 4th Circuit, John Roberts for the D.C. Circuit, Henry Saad for the 6th Circuit, Leonard Davis for the Eastern District of Texas, Andrew Hanen for the Southern District of Texas, Ronald Leighton for the Western District of Washington, and Richard Dorr for the Western District of Missouri - all seven of these nominees were also nominated by the first President Bush, but never received Committee action at that time. I hope that they too will soon receive their long-awaited hearings.

Now, although I would like to explain my support for each of the seven excellent nominees before us today, in the interest of time, I am going to ask Chairman Kohl if the balance of my remarks could be included in the record at this point. That way, we will have more time for the introductions from Members and for the nominees themselves. Let me just say that you are all excellent nominees and I am going to support all of you. I will work with my colleagues for your swift confirmation.

Jeffrey Howard's nomination to the First Circuit Court of Appeals is one more example of the quality appointments that President Bush is making. Mr. Howard has the record of a great attorney and a great public servant. He has served his communities in elected and appointed office and in a myriad public and volunteer undertakings. The people of New Hampshire can be proud of him.

As New Hampshire's Attorney General, he wrote and implemented one of the nation's first effective comprehensive state wide interdisciplinary protocols to combat domestic violence. He also led the fight in New Hampshire for consumers that were the victim of fraudulent businesses. As Principal Associate Deputy Attorney General for the Justice Department, Mr. Howard was a top advisor to Attorney General William Barr, in the areas of asset forfeiture, drug enforcement, and civil rights.

Percy Anderson, nominated to be U.S. District Judge for the Central District of California, began his career representing indigent clients in civil matters. He later became an Assistant U.S. Attorney in Los Angeles, where he spent six years as First Assistant Division Chief, managing criminal division affairs in the absence of the Chief of the division. In 1985, he joined the Bryan Cave firm, specializing in white collar criminal defense and aviation litigation. In 1996, Mr. Anderson became a partner with Sonnenschein Nath & Rosenthal, a Los Angeles firm, where he focuses on commercial litigation, intellectual property, products liability, false claims, and white collar criminal defense work.

Michael Baylson, nominated to be U.S. District Judge for the Eastern District of Pennsylvania, is familiar with that district because he has served as the United States Attorney there. In that capacity, he developed a reputation for adopting new and successful strategies for the war on drugs, including the tactic of identifying a drug gang, then infiltrating it to learn all its members and indict them en masse. He also was an early proponent of the "Weed and Seed" program designed to "weed out" drug dealers from a community and then "seed" those communities with social services and financial support.

William C. Griesbach, nominated to be U.S. District Judge for the Eastern District of Wisconsin, comes to us with seven years of experience on the bench, having served as a Wisconsin State Circuit Court Judge since 1995. Prior to his elevation to the bench, Judge Griesbach obtained substantial experience in both criminal and civil litigation: He spent eight years as an Assistant District Attorney for Brown County Wisconsin handling criminal matters, and five years before that at a Green Bay, Wisconsin law firm working on civil cases.

Joan E. Lancaster, nominated to be U.S. District Judge for the District of Minnesota, began her career

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as an Assistant City Attorney, trying approximately 12 jury and 40 court trials during her service. She then spent ten years as an Assistant U.S. Attorney for the District of Minnesota. After two years of private practice, Justice Lancaster was named as a District Court Judge in the 4th Judicial District in Minnesota. Since 1998, she has served as an Associate Justice on the Minnesota Supreme Court.

Cynthia M. Rufe, nominated to be U.S. District Judge for the Eastern District of Pennsylvania, is another example of how President Bush has tried to create a diverse federal judiciary. Judge Rufe can only be described as a true champion of the rights of children and women. She also was a high school teacher. In addition to her charity work, Judge Rufe has also run the gambit of the legal profession. She was a Public Defender for 5 years and went on to start her own private practice. As a judge, she was appointed by the Pennsylvania Supreme Court and served with distinction as a member of the Appellate Procedural Rules Committee.

John F. Walter, nominated to the U.S. District Court for the Central District of California, has gained experience in private practice and government service. Mr. Walter has served as an Assistant U.S. Attorney in the Criminal Division, Fraud and Special Prosecutions Unit, where he prosecuted the then-largest bank burglary in the U.S. He has been in private practice since1972, working not only as a civil litigator but also as a criminal defense lawyer. As a member of the Federal Indigent Defense Panel, Mr. Walter has represented more than 75 indigent defendants charged with federal crimes in federal court and devoted thousands of pro bono hours to these cases.

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March 21st, 2002 Contact: Margarita Tapia 202.224.5225

FLOOR STATEMENT: "THE LOTT RESOLUTION & THE CIRCUIT COURT VACANCY CRISIS"

Statement of Sen. Orrin Hatch

before the

United States Senate

"Lott Resolution in light of the vacancy crisis on the Circuit Court."

Last Thursday, Senator Lott introduced a resolution calling for the Judiciary Committee to hold hearings on each of the circuit court judges nominated by President Bush on May 9 of last year.

We are coming up on the one-year anniversary of those nominations, and yet only 3 of the 11 nominees have had hearings and confirmation votes. All of these nominees have received well-qualified or qualified ratings from the American Bar Association, which some of my Democratic colleagues have described as the gold standard in evaluating judicial nominees.

Why is it so problematic that none of these 8 nominees have received a hearing or vote? Well, it is no secret that there is a vacancy crisis in the federal circuit courts, and that we are making no progress in addressing it.

Let's take a look at some numbers. A total of 22 circuit nominations are pending in the Judiciary Committee. But we have confirmed only 1 circuit judge this year, and only 7 since President Bush took office.

When Senate Democrats took over the Judiciary Committee in June of last year, there were 31 circuit court vacancies, and there remain 31 circuit court vacancies today. This does not represent progress – it represents stagnation. In contrast, at the end of 1995 (which was Republicans' first year of control of the Judiciary Committee during the Clinton Administration), there were only 13 circuit vacancies.

In fact, during President Clinton's first term, circuit court vacancies never exceeded 20 at the end of any year – including 1996, a presidential election year, when the pace of confirmations has traditionally slowed.

Moreover, there were only 2 circuit nominees left pending in Committee at the end of President Clinton's first year in office. In contrast, 23 of President Bush's circuit nominees were left hanging in Committee at the end of last year.

In light of the vacancy crisis, we cannot afford to let only 10 Senators defeat a circuit nominee. This is a question of process, not of seeking favorable treatment. For all these reasons, it is imperative to support Senator Lott's resolution to get hearings and votes for our longest pending circuit nominees. Given the vacancy crisis in our circuit courts, I can't imagine anyone voting against it.

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Some of our Democratic colleagues have tried to blame the Republicans for the present circuit court vacancy crisis by suggesting that 45% of President Clinton's circuit court nominees were not confirmed during his presidency. But that number is inflated by double counting individuals that were nominated more than once.

For example, by their numbers, Marsha Berzon – who was nominated in the 105th Congress, but not confirmed until the 106th – would count as two nominations and only one confirmation. If you remove the double counting and count by individuals, without counting withdrawn nominees, President Clinton nominated 86 individuals for the Circuit Courts and only 21 were not confirmed. That's only 24% who were not confirmed, as opposed to 45%.

And, of those 21 nominees who did not move, 9 lacked home state support, 1 had incomplete paperwork, and another was nominated after the August recess in 2000. That leaves only 10 circuit court nominees that did not receive action – some of whom may have had issues that simply cannot be publicly divulged.

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March 21st, 2002 Contact: Margarita Tapia 202.224.5225

STATEMENT ON THE STATUS OF JUDICIAL CONFIRMATIONS

Washington – Sen. Orrin G. Hatch (R-Utah), Ranking Republican Member of the Senate Committee on the Judiciary, today addressed the status of judicial confirmations before the United States Senate. Senator Hatch's comments follow.

"Mr. President, I must respond to some of the comments that my colleagues across the aisle have made about the pace of judicial confirmations. These comments have included a gross distortion of my record as Chairman of the Judiciary Committee during six years of the Clinton Administration. Although we've all heard enough of the numbers, I will not hesitate to defend my record when it is unjustly attacked, as it has been over the past week.

"I believe that the source of many, if not all, of these attacks stems from the defensive posture that many of my Democratic colleagues have taken since ten members of the Judiciary Committee refused to send the nomination of Judge Charles Pickering to the floor for a vote by the full Senate. Some of these colleagues have defended what they call the Senate's fair treatment of judicial nominees in general, and Judge Pickering in specific. But the fact of the matter is that the Senate never got the opportunity to vote on Judge Pickering's nomination. The reality is that the ten Democratic members of the Judiciary Committee determined for the rest of the Senate the fate of Judge Pickering's nomination. This is despite the fact – or perhaps because of the fact – that had Judge Pickering's nomination been considered by the full Senate, he very likely would have been confirmed.

"The Committee's treatment of Judge Pickering is problematic for several reasons. First, during the six years that Republicans controlled the Senate during the Clinton Administration, not once was one of his judicial nominations killed by a Committee vote. The sole Clinton nominee who was defeated nevertheless received a floor vote by the full Senate. Judge Pickering was denied that opportunity. Some of my Democratic colleagues have said that their treatment of Judge Pickering was not payback. In one sense, they're right – if they were interested in treating President Bush's nominees as well as the Republicans treated President Clinton's nominees, then they would have sent Judge Pickering's nomination to the floor for a vote by the full Senate.

"Second, the actions of the Democratic members of the Committee were clearly orchestrated by liberal special interest groups. It is no coincidence that these groups asked the Committee to demand Judge Pickering's unpublished opinions, then – surprise! – the Committee announces that it will compel Judge Pickering to produce all of his unpublished opinions. I do not recall another nominee who has been subjected to a production demand of such scope – except, of course, for Judge D. Brooks Smith, another Bush nominee whom the groups have targeted.

"Let me read the text of the letter to Judge Smith. It simply says, "Copies of your unpublished opinions, not previously produced to the Committee, have been requested by Members. Please contact our nominations clerk . . . to arrange transmission of the materials. Thank you for your assistance in this matter." That's it. There is no explanation for why the Committee is demanding these unpublished opinions, and there was no consultation with the Republicans about taking the drastic step of demanding these opinions. This letter, incidentally, was sent to Judge Smith after his confirmation hearing – just like with Judge Pickering. There is nothing fair about subjecting nominees to fishing expeditions simply because the liberal special interest groups do not like them. The Committee's

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treatment of Judge Pickering's nomination was not an example of the Committee doing its job, as one of my colleagues described it last week. Instead, it's an example of special interest groups pulling strings. I am deeply concerned about what this means for the fairness with which future judicial nominees will be treated – especially any Supreme Court justice that President Bush may have the opportunity to nominate.

"Some of my Democratic colleagues have tried to minimize the effect of their party-line Committee vote to defeat Judge Pickering's nomination by declaring that, last year, they held the first confirmation hearing on a Fifth Circuit judge since 1994. While this is technically true, there is an important fact they leave out: From 1994 to 1997, no Fifth Circuit nominees were pending for the Committee to act on. President Clinton did not nominate another Fifth Circuit judge until 1997, and that nominee did not have home state support due to lack of consultation from the White House. He was not renominated after the end of the 105th Congress. The next Fifth Circuit judge was not nominated until 1999. He, too, lacked home state support due to lack of consultation from the White House. Finally, a third Fifth Circuit nominee was nominated in 1999. So, in reality, only one of President Clinton's Fifth Circuit nominees after 1999 could have possibly moved, and I should say that nominee was not nominated until the seventh year of the Clinton presidency.

"Now, let's compare this record to the present Bush Administration. The Democrats have already killed one of President Bush's Fifth Circuit nominees, Judge Pickering, who enjoys the strong support of both of his home state senators. If they are being guided by precedent, then my Democratic colleagues have no excuse for refusing to move every other Fifth Circuit Bush nominee who has home state support. One such nominee, Justice Priscilla Owen of Texas, has been pending in Committee for over 300 days now without so much as a hearing.

"Which brings me to another point. My Democratic colleagues have argued at length about how fairly they are treating President Bush's judicial nominees, especially his circuit nominees. In fact, last week one of my colleagues said on the floor, "We are trying to accord nominees whose paperwork is complete and whose blue slips are returned both a hearing and a fair up or down vote." This colleague must have forgotten about the eight circuit judges whom President Bush nominated on May 9 of last year and who have been languishing in Committee without so much as a hearing for over 300 days. With one exception, the paperwork on all of these nominees has been complete for months. Each of these nominees has received a rating of well-qualified or qualified from the ABA, which my Democratic colleagues have referred to as the gold standard in evaluating judicial nominees.

"The rest of President Bush's circuit nominees have fared just as poorly. Only 9% of his circuit nominees awaiting a Committee vote have had a hearing thus far. This means that 91% of his circuit nominees, including 8 of his first 11 circuit judges nominated on May 9, have been languishing in Committee for no reason, but that the liberal interest groups don't want them to move.

"The failure of the Committee to act on these circuit nominees is particularly disturbing in light of the vacancy crisis in the circuit courts. The number of vacancies in the circuit courts is dramatically higher than it has been during the first two years of the most recent presidential Administrations. At the end of the first two years of the Bush I Administration, there were only 7 circuit court vacancies. At the end of the first two years of the first term of the Clinton Administration, there were only 15 circuit vacancies. At the end of the first two years of the second term of the Clinton Administration, there were only 14 vacancies. Incidentally, I chaired the Judiciary Committee during this time, and there were fewer vacancies than there were when Democrats controlled the Senate during the first two years of the first term of the Clinton Administration.

"Now, let's look at the present Administration. There are currently 31 vacancies in the circuit courts.

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This is the same exact number of vacancies in the circuit courts that existed when the Democrats took control of the Senate on June 5 of last year. This does not represent progress – it represents stagnation. It is for this reason that I find it more than a little hard to swallow my colleague's arguments that their pace of judicial confirmations is keeping up with the vacancy rate. The numbers simply tell another story: We are making absolutely no progress in addressing the vacancy crisis in the federal judiciary.

"Even if you look beyond the circuit courts to the full judiciary, the numbers are not much better. The end-of-session vacancies during the first two years of Republican control of the Senate during the Clinton Administration never exceeded the vacancies we now face. At the end of 1995, my first year of chairing the Committee, there were 50 vacancies in the federal judiciary. Only 13 of these vacancies were in the circuit courts. At the end of 1996, my second year of chairing the Committee, there were 63 vacancies in the federal judiciary. Only 18 were in the circuit courts. But at the end of last session, there were 94 vacancies in the federal judiciary. Now we have 95 vacancies, which is a dramatic increase from the 67 vacancies that existed at the end of the 106th Congress. As we've seen, 31 of these vacancies are in the circuit courts. What does this mean? It means that the Senate's pace under Democratic control in confirming President Bush's judicial nominees is simply not keeping up with the increasing vacancy rate, not even in "accordance with the precedents and practices of the Committee."

"For anyone who doubts that the vacancy crisis represents a problem, let me point out that the Sixth Circuit is presently functioning at a 50% capacity. Eight of that court's 16 seats are vacant. President Bush has nominated 7 well qualified individuals to fill the vacancies on that court. Two of those nominees, Deborah Cook and Jeffrey Sutton, have been pending since May 9 of last year. They were among those first 11 judges that President Bush nominated. Yet they have languished in Committee without so much as a hearing while the Sixth Circuit functions at 50% capacity. And although the Michigan Senators have blocked hearings for the three Bush nominees from Michigan by refusing to return blue slips, the paperwork on the remaining four nominees is complete. Again, nothing stands between them and a confirmation hearing except my Democratic colleagues.

"Another appellate court that is in trouble is the D.C. Circuit, which is missing one-third of its judges: It has only 8 of its 12 seats filled. President Bush nominated two exceedingly well qualified individuals to fill seats on the D.C. Circuit on May 9 of last year. Those individuals, Miguel Estrada and John Roberts, are among the most well respected appellate lawyers in the country. And I should say that Miguel Estrada would be the first Hispanic to sit on this important court. Democrats talk a lot about diversity, but apparently it's diversity only if the candidates agree with the extreme liberal views of the special interest groups. This troubles me. The Judiciary Committee has not granted them a hearing, much less a vote. If the D.C. Circuit and the Sixth Circuit are any indication, it appears that the Committee is doing what it can to avoid filling seats on the courts that need judges the most.

"Part of the problem is a reluctance by the Committee to move more than one circuit judge per hearing. In fact, I don't believe that the Democrats have moved more than one circuit judge per hearing during the entire time they've had control of the Senate. When I was Chairman, I had ten hearings with more than one circuit nominee on the agenda. In fact, I had hearings with more than one circuit nominee on the agenda in every session in which I was Chairman except for presidential election years. THAT is precedents and practices of the Committee. Let's stop making excuses and confirm judges. If we are going to get serious about filling circuit vacancies, then I encourage my Democratic colleagues to move more than one circuit nominee per hearing.

"One of the more ludicrous charges I've heard is that the Republicans did not confirm any judges while they held the majority in the Senate last year. Let me set the record straight on this. President Bush announced his first eleven judicial nominations on May 9. I scheduled a confirmation hearing on three of those judicial nominees – all circuit court nominees – for May 23. However, some Democratic

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members of the Committee claimed to need more time to assess the nominees. Out of an abundance of caution, and in the interest of fairness, I agreed to postpone the hearing despite widespread speculation that the Republicans' loss of the majority in the Senate was imminent. As we all know, control of the Senate shifted to the Democrats shortly thereafter, on June 5. So, while the Republicans were ready to hold a hearing on three circuit judges within two weeks of their nomination in May, it took the Democrats until the end of August to hold confirmation hearings on three circuit judges.

"I've also heard my Democratic colleagues complain that I was unfair because almost 60 Clinton nominees never received a hearing or vote. Well, I have two responses to this charge. First, the Democrats who controlled the Senate during the first Bush Administration left 59 judicial nominees hanging without a hearing or vote at the end of four years. In contrast, only 53 Clinton nominees weren't confirmed over my 6 years as Chairman. Yet my Democratic colleagues claim that I was unfair to Clinton nominees, despite the fact that they left more Bush I nominees unconfirmed in a shorter period of time.

"Second, many of the Clinton nominees who were not confirmed had good reasons for not moving. As I've mentioned, not including withdrawn nominees, there were only 53 Article III judicial nominees who were nominated by President Clinton during my six years as Chairman who did not get confirmed. Of those, 9 were nominated too late in a Congress for the Committee to feasibly act on them or were lacking paperwork. That leaves 44. Seventeen of those lacked home state support, which was often the result of a lack of consultation with home state senators. There was no way to confirm those without completely ignoring the senatorial courtesy that we afford to home state senators in the nominations process. That leaves 27. One nominee was defeated on the Senate floor, which leaves only 26 remaining nominees. Of those 26, some may have had other reasons for not moving that I simply cannot comment on. So in all 6 years that I chaired the Committee while President Clinton was in office, we are really only talking about 26 nominees who were left.

"Now, I heard one of my Democratic colleagues on the floor last week comparing their pace to mine in increments of months – nine months to twelve months, nine months to nine months, three months to three months, and so on. I must admit that I had a tough time following his argument in light of the astronomical vacancy rate that we now face in the federal judiciary. But in terms of fairness, let me set forth what I consider to be the bottom line. President Clinton enjoyed an 85% confirmation rate on the individuals he nominated. A total of 377 Clinton nominees sit on the federal bench today. This number is only 5 short of President Reagan, who holds the all-time record of appointing judges to the bench. When President Bush's judicial confirmations start approaching these numbers, then I may be ready to agree that the Democrats are treating his nominees fairly."

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Counsel's Office, White House

Kavanaugh, Brett

Subject File

President's Judges Plan [4]

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*146 Cong Rec S 9671, **

CONGRESSIONAL RECORD -- *SENATE*

Tuesday, **October** 3, 2000

106th Congress, 2nd Session

146 Cong Rec S 9671

REFERENCE: Vol. 146, No. 121

TITLE: NOMINATION OF JAMES A. TEILBORG, OF ARIZONA, TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA

SPEAKER: Mr. **LEAHY.** Mr. EDWARDS. Mr. KYL. Mr. INHOFE. Mr. HARKIN. Mr. WELLSTONE. Mr. LOTT. Mr. CRAIG. Mr. THURMOND.

BILL NUMBER:
H.R. 4690 ◆ Retrieve Bill Tracking Report
◆ Retrieve full text of bill

TEXT: [*S9671]

The assistant legislative clerk read the nomination of James A. Teilborg, of Arizona, to be U.S. District Judge for the District of Arizona.

Mr. **LEAHY.** Mr. President, I understand that under the prior unanimous consent agreement the distinguished Senator from Utah, Mr. Hatch; the Senator from Arizona, Mr. Kyl; and I each have 1 hour for the Teilborg nomination, and the distinguished Senator from Iowa, Mr. Harkin, has up to 3 hours, unless time is yielded back, is that correct?

The PRESIDING OFFICER. That is correct.

Mr. **LEAHY.** Mr. President, I ask unanimous consent that I be able to yield 5 minutes to the distinguished Senator from North Carolina, Mr. Edwards, without losing my right to the floor.

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

The Senator from North Carolina is recognized.

We still have pending without a hearing the nomination of Roger Gregory of Virginia and Judge James Wynn of North Carolina to the Fourth Circuit. Were either of these highly-qualified jurists confirmed by the Senate, we would be finally acting to allow a qualified African American to sit on that Court for the first time. Fifty years has passed since the confirmation of Judge Hastie to the Third Circuit and still there has never been an African-American on the Fourth Circuit in the history of that Circuit. The nomination of Judge James A. Beatty, Jr., was previously sent to us by President Clinton in 1995. That nomination was never considered by the Senate Judiciary Committee or the Senate and was returned to President Clinton without action at the end of 1998. It is time for the Senate to act on a qualified African-American nominee to the Fourth Circuit. It is also time for the Senate to act on the nomination of Kathleen McCree Lewis to be the first African American woman to serve on the Sixth Circuit. President Clinton spoke powerfully about these matters at the NAACP Convention. We should respond not be misunderstanding or mischaracterizing what he said but, instead, by taking action on these well-qualified nominees.

I commend Senators Robb and Warner, along with Representatives Bobby Scott and Jim Clyburn, for speaking out last Wednesday to draw attention to the Senate's failure to act upon the nomination of Roger Gregory to fill an emergency vacancy in the Fourth Circuit. As Senator Robb pointed out, Mr. Gregory has been nominated to fill a vacancy that has existed on the Fourth Circuit for 10 years. While the Court is authorized to have 15 judges, it is operating with only 10 judges today. That means the Court has one-third of its positions vacant. Beth Nolan, the Counsel to the President, recently wrote in the Wall Street Journal:

> T he seat for which Mr. Gregory was nominated has not been filed before, nor allocated to any particular state in the Fourth Circuit. Moreover, Roger Gregory has the strong support of both of his home-state senators (who were indeed consulted prior to nomination). Democratic Sen. Chuck Robb recommended Mr. Gregory to the president and has been working tirelessly on Mr. Gregory's behalf. Republican Sen. John Warner has joined Sen. Robb in requesting that Sen. Hatch give Mr. Gregory a hearing.

It is past time for the Judiciary Committee to consider Mr. Gregory's nomination.

We still have pending before the Committee the nomination of Enrique Moreno to the Fifth Circuit. He is the latest in a succession of outstanding Hispanic nominees by President Clinton to that Court, but he too is not being considered by the Committee or the Senate. Mr. Moreno succeeded to the nomination of Jorge Rangel on which the Senate refused to act last Congress. These are well-qualified nominees who will add to the capabilities and diversity of those courts. In fact, the Chief Judge of the Fifth Circuit declared that a judicial emergency

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exists on that court, caused by the number of judicial vacancies, the lack of Senate action on pending nominations, and the overwhelming workload.

I remain vigilant regarding the Senate's treatment of nominees who are women or minorities. I have said that I do not regard the Chairman as a biased person. I have also been outspoken in my concern about the manner in which we are failing to consider qualified minority and women nominees over the last several years. From Margaret Morrow, Margaret McKeown and Sonia Sotomayor, through Richard Paez and Marsha Berzon, and including Judge James Beatty, Jr., Judge James Wynn, Roger Gregory, Enrique Moreno and all the other qualified women and minority nominees who have been delayed and opposed over the last several years, I have spoken out.

The Senate will never remove the blot that occurred last October when the Republican Senators emerged from a Republican Caucus to vote lockstep against Justice Ronnie White to be a Federal District Court Judge in Missouri. At a Missouri Bar Association forum last week, Justice White expressed concern that the rejection of his nominations to a federal judgeship will have a "chilling effect" on the desire of young African American lawyers to seek to enter the judiciary. The Senate took the wrong action last October when the Republican caucus rejected Justice White's nomination.

At our last Executive Business Session in the Judiciary Committee, the Chairman used some of Senator Biden's remarks from a nominations hearing last November to make the point that he is neither racist nor sexist. And I agree. I do not believe that the Chairman is himself for or against a particular nominee based purely on race or gender, though I do understand that the Committee does keep track of such numbers for statistical purposes. But to paraphrase our former Chairman from later on in that Executive Business Session, it would be better for the current Chairman to explain to those of us on this side of the aisle and the public at large why he is not moving on particular nominations. I understand there may be outstanding FBI investigations that he is not at liberty to discuss, but I do not believe any such impediments exist that would prevent the Chairman from telling us why Helene White, Roger Gregory, and Enrique Moreno have not yet had a hearing.

There continue to be multiple vacancies on the Third, Fourth, Fifth, Sixth, Ninth, Tenth and District of Columbia Circuits. With 23 current vacancies, our appellate courts have nearly half of the total judicial emergency vacancies in the federal court system. I note that the vacancy rate for our Courts of Appeals is more than 11 percent nationwide. If we were to take into account the additional appellate judgeships included in the Hatch-**Leahy** Federal Judgeship Act of 2000, a bill that was requested by the Judicial Conference to handle their increased workloads, the vacancy rate would be 16 percent.

Also at our last executive business session, my friend from Utah, the

distinguished chairman of the Judiciary Committee, said there is and has been no judicial vacancy crisis. That is a bold statement considering there are 67 current vacancies in courts and emergency situations, including the Fifth Circuit. If we pass the bill that has been requested by the nonpartisan judicial conference, we would have another 7 or more judicial vacancies, so we would have over 150 judicial vacancies.

The chairman went on to say that since 363 senior judges are now serving in the Federal judiciary the true number of vacancies is "less than zero." While it is true that there are 363 senior judges now serving, it is inaccurate to say that the true number of vacancies is less than zero.

I commend the large number of senior judges for coming in to help out and fill in. Some of them are well into their eighties. But that is not the way it should be. Surely, if we didn't have these senior judges, the courts would collapse under the weight of their own caseloads and the extended and extensive vacancies.

What we have is a situation where selfless public servants have made a conscious decision to hold off on the rewards of retiring from a job well done to help administer fair and proper justice in our country. Our senior judges should be thanked for their diligent work and dedication. Still, their service does not mean we have fewer vacancies. Indeed, the Judicial Conference has recommended 70 new judgeships in addition to the already existing 67 vacancies.

Let's not say the only way that can happen is if people, no matter how old they are, say: I will never retire; I will just keep on showing up and do the best I can. It is the lifeblood of our judiciary to have new judges come in.

I regret that the last confirmation hearing for Federal judges held by the Judiciary Committee was in July. In fact, that was the last time the Judiciary Committee reported any nominees to the full Senate. Throughout August,

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September, and now the first week in October, there have been no additional hearings held, or even noticed; no executive business meetings have included any judicial nominees on the agenda.

I mention that because in 1992, the last year of the Bush administration, we had a Republican President and a Democratic majority in the Senate. We held three confirmation hearings in August and September. We continued to work to confirm judges.

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How late did we work, even though we have the so-called Thurmond rule which cuts off judicial nominations after about midyear? Do you know how long the Democrat-controlled Senate was confirming judges for a Republican President? Up to and including the very last day of the session; not up to and including 6 months before the session ended.

I know there is some frustration. Some Senators have objected to Senate committees continuing to meet on other matters while the Senate is in session. That is partly because the matter is so acute with regard to the numerous vacancies in our court of appeals and the qualified women and men who have been nominated and stalled.

The chairman says, and he holds the banner for his party, that Democrats have no grounds to complain. I remind the Senate of the hoops that Richard Paez and Marsha Berzon had to jump through in order to get a vote, including the extraordinary step of overcoming a motion to postpone indefinitely the vote on Marsha Berzon.

So I hope we will continue to meet our responsibility to all nominees--men, women, and minorities. As long as the Senate is in session, I am going to urge action. Highly qualified nominees should not be delayed. The Senate should join with the President to confirm well-qualified, diverse, and fair-minded nominees to fulfill the needs of the Federal courts around the country.

I see my friend from Arizona on the floor. I have spoken somewhat longer than I suggested to him that I would. I apologize for that, but I hope he will take some comfort from the fact that as I said at the beginning of my talk that I would vote for the nominees from his State, including one who has been a long-time friend of his. I am going to be urging Members on this side to do so. I can say with some certitude, all four will be confirmed.

Mr. President, I reserve the remainder of my time and yield the floor.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. KYL. Mr. President, I appreciate those remarks of the distinguished ranking member of the Judiciary Committee. It is probably a good segue for me to try to explain what has been going on here because colleagues who may be watching or people who are not in the Senate may be wondering what all of the discussion has been about when there are four specific nominees who President Clinton has nominated for Federal district judgeships and they are ostensibly being considered by the Senate and I have heard no discussion about the four. So I am going to discuss the four very briefly.

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The problem, as you have heard, is that many on the other side of the aisle are unhappy with the fact that other nominees have not been considered this year. You have heard all the discussion about that. You have heard Senator Hatch on our side explain why that is so. But there has been great displeasure on the other side because, in their view, not all the nominees they would have liked to have considered were considered.

The four nominees who are before us today are the only four the Senate can consider. They are the only nominees who have gone all the way through the process from nomination, ABA clearance, FBI clearance, hearing before the Judiciary Committee, and then the Judiciary Committee having acted upon them to send them to the floor of the Senate. These are the only four on whom the Senate can act. I am pleased that, today, we will have the opportunity to do that.

All four of these nominees were pending in July. The majority leader made a request of the minority to consider the four nominees. That request was denied, however. So these four nominees had to be held over the August recess. Obviously, on our side we would have much preferred that the four confirmations could have occurred because of the need to fill these vacancies for the District in Arizona--which I will refer to in just a moment--but to which Senator **Leahy** referred. He acknowledges we have a significant need in Arizona to fill these positions. But there was objection on his side to their consideration.

So when we came back in September, the majority leader again asked the minority leader for concurrence to bring these four nominees to the floor for a vote. Again, that was denied by the Democratic side.

People might ask: Why would Democrats be objecting to President Clinton's nominees? The reason has nothing to do with their merits. As Senator **Leahy** pointed out, undoubtedly all four of these nominees will be confirmed because they are all four very well qualified. The reason has to do with the politics of this Chamber. Because some Democrats were concerned that not all of their people had been yet considered, they were going to hold up nominees they perceived to be important to me and to Senator Fitzgerald from Illinois, the home State of the four nominees here before us.

But the fact is, these people are needed to serve the people of the United States of America. They were nominees of President Clinton. So the bottom line is that it is now time for the nominations to be considered by the full Senate. We need to get over the politics. We need to get on with doing the people's business and confirm these four well-qualified individuals. I am pleased that both the majority and minority have now made that possible and that in a few minutes we will be able to vote for all of these candidates.

The first three candidates should have been discussed this morning. I

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know they were not. Instead, we had the discussion that you have heard. But those four nominees, as Senator Hatch mentioned, are Michael Reagan from Illinois, about whom you will hear a little more in a moment from Senator Fitzgerald; Mary Murguia, a very well qualified assistant U.S. attorney from Arizona who, by the way, if confirmed, will be the first Latina to serve as a Federal district court judge from Arizona; and the Honorable Susan Bolton, a very distinguished Superior Court judge in Arizona. All three of those candidates I deem to be well qualified. I chaired the hearing. I can certainly attest to the fact that the two from Arizona have the highest qualifications.

That leaves the fourth who is being considered separately here for reasons I will discuss in just a moment, but he is James Teilborg. Since I think it is appropriate when we are going to vote on somebody to actually have a little discussion about the individual, I am pleased to present a couple of minutes on his background here.

He was born and raised on a farm in southern Colorado and was State President of the Colorado Future Farmers of America. He married his wife, Connie, 37 years ago. They have two sons, Andy and Jay, and three granddaughters.

He and I attended the University of Arizona College of Law beginning in 1964. That is where I first met Jim Teilborg. I have known him ever since, and we have been close friends. So I can attest not only to his qualifications as a fine lawyer but also as a fine individual. He served in active duty U.S. Air Force to attend Navigator School. He is a retired colonel in the United States Air Force Reserve after 31 years in the National Guard and Reserve service. He was a member of the National Guard for 7 years, a navigator on the C-97 and KC-97 aircraft and, by the way, has been 23 years admissions counselor for the U.S. Air Force Academy. I would also note for the entire time I have been with the U.S. Congress, Jim Teilborg has chaired my service academy committee, a huge job of interviewing all the individuals who would like to attend one of our military service academies: interviewing them, making recommendations to me, and then for me to the academies. As a result of his exemplary service, I must say we have a much higher than average rate of acceptance by the service academies--because of Jim Teilborg's fine service.

He was a founder of the law firm of Teilborg, Sanders & Parks, the 12th largest law firm in Arizona. His practice focused on the areas of aviation, professional negligence, product liability, and complex tort litigation.

The Presiding Officer will appreciate, as a pilot himself, that, of course, Jim

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Teilborg is an accomplished pilot as well.

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He is a 33-year veteran trial lawyer. He was President of the Maricopa County Bar Association, and was a member of the board of directors. He was the lawyer representative to the Ninth Circuit Judicial Conference, a distinguished position for a member of the bar, and has served as chairman of the Maricopa County Bar Association Medical/Legal Liaison Committee, and also served as chairman of the Special State Bar Disciplinary Administrative Defense Counsel.

He is a Member of the International Association of Defense Counsel board of directors and was its president in 1981; and, a very prestigious honor, a fellow of the American College of Trial Lawyers. This is the pinnacle for anybody who really wants to call himself a trial lawyer. In the latest edition of "The Best Lawyers of America," of course, he is included.

Jim Teilborg is one of those rare individuals who has practiced law for all of this time, made no enemies that I know of, but a lot of friends in the practice of law as a very competent litigator, a fine individual, and one who, as we found when we interviewed people in Arizona about his potential nomination, had unanimous support among judges and lawyers for service on the Federal district court.

I cannot think of anyone who would be more suited for the position because of his background, because of his judicial temperament, and because of his philosophy of always treating people fairly and his love for the law. It is personally a great honor for me and a pleasure to recommend James Teilborg to my colleagues.

That is probably the last you will hear about Jim Teilborg. Nobody is going to argue against him as an individual, I am sure. Of course, none has so far. I am hopeful that the political disagreement we have had over other nominees will not spill over into a negative vote on Jim Teilborg.

There is only one reason he has been set apart from the other nominees, and that is that he happens to be a Republican. Of course, I have supported nearly 97 percent of President Clinton's nominees during the time I have been in the Senate, and I daresay virtually all of them have been Democrats. One cannot base a vote on partisan reasons in this body.

I was very pleased to hear Senator **Leahy** say he would urge the support for Jim Teilborg, as well as committing that support himself. While we on both sides of the aisle have voted against candidates for reasons having to do with the merits of that individual candidate, I do not know of any time I have seen a colleague vote against a nominee in protest of something someone else had done. That would be wrong. A protest vote having nothing to do with the individual would be wrong.

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If the Senator from Vermont will still stay on the floor one more moment, I will quote him because I want him to know how much I agree with this important statement of his.

He said:

> We should be the conscience of the Nation. On some occasions, we have been, but we tarnish the conscience of this great Nation if we establish the precedents of partisanship and rancor that go against all precedents and set the Senate on a course of meanness and smallness.

The Senator from Vermont was, I think, very accurate not only in what he predicted would be the consequence of the precedent we would set if we acted in that degree of smallness, but also I think expressed the view all of us share that our decisions should be based upon the merits, however we see them--maybe differently--but never voting on an individual because of the actions of someone else, to make a protest about some other point.

I appreciate his comments, and I commend to all of his colleagues the statement he has made here with respect to Jim Teilborg.

Mr. **LEAHY.** Will the Senator yield?

Mr. KYL. I will be very happy to yield.

Mr. **LEAHY.** I appreciate what my friend from Arizona said. And he is my friend. It has been my experience on the committee, even on issues that start out appearing to be partisan, that the Senator from Arizona has worked hard to remove that sense of partisanship. He and I have joined together on a number of pieces of legislation. I do not think he would object to the description as a conservative Republican and myself as a liberal Democrat, but we have both been pragmatic Senators in getting some very good pieces of legislation through.

I mention that because he and I may well share a belief that there have been some times this year when it has become too partisan. I hope after the elections, no matter who is elected President and no matter what the numbers are in the House and the Senate, that a number of Senators who have had the experience of working together across the aisle will start off the year trying to find pieces of legislation we can do that will demonstrate to the country there are many Members of good will in both parties who do want what is best for this country. There will be issues, of course, where there are distinct party differences, but there are so many issues where there is far more

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unity. I hope we can do that.

I thank the Senator for his kind words. I yield the floor.

Mr. KYL. Mr. President, I thank the Senator. I will conclude. Some of the best things we have done have been in a bipartisan way--some of the things Senator **Leahy** and Senator Hatch have worked on in particular, things that Senator Feinstein and I have worked on in particular. I certainly look forward to getting together with Senator **Leahy** after the election to see how we begin next year, assuming I am returned to this body.

I conclude with a quick comment about the need to fill this position in Arizona.

In 1999, Congress created nine new Federal district court judgeships--four for Florida, two for Nevada, and three for Arizona. The Nevada positions and three of four in Florida have been confirmed, but none has been confirmed yet for Arizona. That is why this is such an important matter as we conclude our business this year.

These nominees are needed to handle the ever-increasing caseload in Arizona, and here is an illustration of that caseload.

Our criminal felony caseload has increased 60 percent in the last 3 years. The district of Arizona ranks second in total weighted filings for a judge among the Nation's 94 districts, by the way, twice the national average--901 compared to the national average of 472. We are fourth in weighted felony filings per judgeship. Felony filings per judgeship weighted are 236 percent above the national average.

So you can see, Mr. President, why this burgeoning amount of work in Arizona requires that we fill these positions. We have 19 Indian reservations and 21 tribes which produces a steady stream of U.S. jurisdiction cases which are not found in most other States. Because we are on the border, we have a lot of illegal immigration and drug smuggling cases. And Arizona is one of the fastest growing States in terms of population. It is pretty easy to see how a State such as Arizona can get into a position where it has to fill these positions.

I am very pleased that at this point, just before the Senate concludes its business for the year, we are able to fill these three positions in Arizona, as well as the Illinois position. I am delighted my colleague from Vermont will be urging his colleagues on the Democratic side to support all four nominations. I have certainly done the same on our side of the aisle. I think it will send a very good signal of that very kind of bipartisanship Senator **Leahy** was talking about if all of these nominees receive our unanimous support.

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I reserve the remainder of whatever time is remaining on my side. Mr. President, it is my understanding that any quorum call time will be attributed to both sides equally; is that correct?

The PRESIDING OFFICER. The Senator is correct.

Mr. KYL. I suggest the absence of a quorum.

The PRESIDING OFFICER. The Senator will have to make that request.

Mr. KYL. I ask unanimous consent that any time spent in a quorum call be equally divided.

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

Mr. KYL. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

[*S9677]

The assistant legislative clerk proceeded to call the roll.

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

The PRESIDING OFFICER (Mr. Crapo). Without objection, it is so ordered.

Mr. INHOFE. Mr. President, I rise to make some brief comments.

I was listening, while I was chairing the session, to the very distinguished Senator from Vermont talking about how many appointments and how many nominees should be acted upon. He was very passionate in his appeal to just have a vote; let's just vote up or down. He named nominee after nominee and how many days they have been under consideration.

I was tempted to go back and get the history as to some of the problems we are having with this administration and the fact that, yes, I am guilty of putting holds on judicial nominees and doing the same

REV_00256117

Mr. EDWARDS. Mr. President, I am pleased that today we are discussing some of the vacancies that exist in the Federal judiciary. There was a discussion this morning about an issue that is near and dear to my heart and important to the folks in North Carolina, which is the vacancies on the U.S. Court of Appeals for the Fourth Circuit.

Senator Robb came down and discussed Judge Gregory's nomination. Chairman Hatch responded. I would like to say a few words about that discussion.

There are 15 authorized judgeships on the Fourth Circuit Court of Appeals. There are presently only 10 active judges on that court. By tradition, my State of North Carolina, which is the largest, most populous State in the Fourth Circuit, is allocated three of those judgeships. Out of those 10 judgeships --presently active judges on the Fourth Circuit--how many come from North Carolina? None.

We are the only State in the nation that is not represented on a Federal circuit court, along with Hawaii. We are the largest State in the circuit. We have the largest population in the circuit, and we don't have a judge representing our State on this court. That has been true since Judge Ervin died in 1999.

The people of North Carolina, who have cases regularly heard in the Fourth Circuit, have no one there representing them. In addition, to the extent the court is regularly interpreting matters of North Carolina law, which it is required to do in diversity cases, there is no judge in this court who is trained in North Carolina law. Now, this Congress recognized some time ago how important it was for States to be represented on their circuit courts of appeal by enacting a law--in fact, requiring that States have a judge on their Federal circuit court of appeals. We have none. As I indicated before, along with Hawaii, we are the only two States in the country that are not represented on our circuit court of appeals.

Now, Chairman Hatch had some discussion this morning about Judge Gregory and his nomination to the Fourth Circuit in the State of Virginia, and the fact that that was a slot traditionally allocated to my State of North Carolina.

My question to Chairman Hatch is: What are we doing about the nomination of Judge Wynn? Judge Wynn is a very well-respected, very moderate, centrist jurist from North Carolina, who has been nominated for over a year from my State to fill a vacancy that is traditionally allocated to North Carolina. There is no question that Judge Wynn would be approved by this

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thing that, back in 1985, Senator Byrd did when Ronald Reagan was President of the United States.

But rather than go into that, I will only say this--I don't want to take much time; I want the Senator from Iowa to have his time--we have acted upon President Clinton's nominees. In fact, it is my understanding that he is only five short of having an all-time record of having nominees being confirmed in a period of time.

Even though the Senator from Vermont was quite eloquent in talking about all of the judicial nominees who were left without final action being taken, either to confirm or not confirm, if we quit right now and didn't confirm these four we are discussing today, at the end of President Clinton's term, that would leave a total of 67 vacancies. It is my understanding that 61 is considered to be a full bench.

Let's say 67 vacancies are there. Back when President Bush was President, when he left office at the end of 1992, there were 107 vacancies.

The bottom line there is the Democrat-controlled Senate at that time was able to stop or was stopping more of the nominations than the Republican-controlled Senate is today.

Seeing that the Senator from Iowa has left the Chamber and no one else is asking for time, I will go ahead at this point and proceed to the history behind this.

Back in 1985, when Ronald Reagan was President of the United States and the Senate was controlled by the Democrats, a lot of the conservative appointments--not just judicial nominations but others--by the President were not acted upon by the Democrat-controlled Senate. Consequently, President Reagan did something he should not have done back in 1985. He started making recess appointments, and he made many recess appointments. The majority leader at that time, the very distinguished Senator from West Virginia, Mr. Byrd, wrote a letter to President Reagan.

In this letter, he reminded him as to what the senatorial prerogative was in accordance with the Constitution. At that time he said: You have violated the Constitution with these recess appointments, and you have done so to avoid our confirmation or lack of confirmation. Therefore, if you have any more recess appointments, I will put a hold on all nominees, not just judicial nominations but all nominations.

Consequently, after a short period of time, President Reagan wrote a letter back to Senator Byrd and said: You are right; it was a violation of the Constitution. And he recited that the Constitution had a

provision for recess appointments only in the cases when the appointment occurs during the time we are in recess and that that was not the case when he made his recess appointments.

Fifteen months ago, when we found out that President Clinton was making excessive recess appointments, I found the old letter that Bob Byrd had sent to President Reagan, and I sent that same letter to President Clinton, saying the same thing: If you continue to do recess appointments, we are going to put holds on all your nominees, except, I said, just judicial nominees. Consequently, President Clinton, after a period of 3 or 4 weeks, wrote a letter back and said that he would agree to the same terms Ronald Reagan had agreed to back in 1985. Then when President Clinton violated his word, I put holds on nominations. This was 15 months ago.

As we all know, there was a vote to override my holds after a few months, and that was successful. However, for all judicial nominations that have not gone through the process since President Clinton did have 17 recess appointments during the August recess, I have renewed that hold on all future judicial nominations.

I yield the floor.

The PRESIDING OFFICER. The Senator from Iowa.

Mr. HARKIN. Mr. President, for the benefit of Senators and staff, I initially had 3 hours of time on which to speak about the judicial nominees and, more specifically, the holdup that is happening on the Judiciary Committee with regard to the former attorney general of the State of Iowa, Bonnie J. Campbell, who has been nominated for a seat on the Eighth Circuit Court of Appeals.

In discussing this with several Senators, I can say that it is now my intention to speak for a few minutes and to yield back the remainder of my time. In discussions with our side, I understand there probably will be just voice votes on all of these nominees.

Just for planning purposes--I know how sometimes I get irritated when I don't really know what is happening when some people have a lot of time--I want Senators to know I am going to speak for a few minutes, yield back my time, and then move to the votes on the nominees.

Again, I want to respond a little bit to what my friend from Utah said this morning, the chairman of the Judiciary Committee, Senator Hatch. I am reading from the transcript of this morning's session. Senator Hatch said:

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It had always been my intention for the Judiciary Committee to report Ms. Campbell's nomination. However, events conspired to prevent that from happening.

First, during the August recess, as I have explained, the President determined to recess appoint several executive branch nominees over the express objection of numerous Senators.

He did so notwithstanding his agreement to clear such recess appointments with the relevant Senators....

Second, after their August recess, Democrat Senators determined to place holds on the four nominations we are debating today, even everybody admits--I think everybody admits--that they are important nominations and this arrangement that has been worked out has been fair.

Again, they threatened to shut down the Senate's committee work, going as far as to invoke the 2-hour rule and forcing the postponement of scheduled committee hearings.... For these reasons, Bonnie Campbell's nomination has stalled. Ms. Campbell has only the White House and Senate Democrats to blame for the current situation.

I don't know what the Senator from Utah is talking about. Bonnie Campbell had nothing to do with whether the President made recess appointments or not. And the holds that were placed on the four nominations--they were saying, wait a minute, Bonnie Campbell had her hearing 2 months before some of the nominees that we are voting on today. Three of these nominees that will get their vote today were nominated, got their hearing and were reported out of Committee within one week in July of this year. Bonnie Campbell's hearing was in May.

So we are only saying: Why not take those who had their hearings first? Why take up those who had them later? Bonnie Campbell had her hearing, answered questions; they had more written questions that they sent her, and she responded to those. Yet there again, three of the four judges we are voting on here today went through the first three steps of the process within one week.

Ms. Campbell has only the White House and Senate Democrats to blame for the current situation? What is the Senator from Utah talking about? What is to blame are the pure rank politics of the Senate Judiciary Committee and the Senate Republicans for holding up Bonnie Campbell's nomination and keeping it bottled up in committee.

The Senator from Utah knows full well that this Senator from Iowa had every right to exercise his rights as a Senator on the floor, to bottle up a lot of things on this floor after the August recess. I did not do so because I was led to believe that, by acting in good faith, the Senate Judiciary Committee would act on Bonnie Campbell's nomination.

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Why? Because the Senator from Iowa,

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Mr. Grassley--and if I am not mistaken, he is the second ranking member on the Judiciary Committee--supports Bonnie Campbell and has stated so publicly. So I figured, well, he is second ranking.

Now, Mr. Kyl, the Senator from Arizona, is fourth ranking on the committee, but he gets his nominee through. He was nominated, had a hearing, and was reported out that week. Mr. Kyl gets his nominee through.

Well, I figured if I acted in good faith--and I did so by not doing anything and letting the Judiciary Committee go from one week to the next, one week to the next, and I thought this week they didn't report

The nomination was confirmed.

Mr. CRAIG. Mr. President, I move to reconsider the vote.

Mr. **LEAHY.** I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The question now is, Will the Senate advise and consent to the three nominations en bloc?

The nominations, were confirmed.

Mr. **LEAHY.** Mr. President, I move to reconsider the vote.

Mr. BIDEN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. KYL. Mr. President, I rise to thank all of those responsible for helping in the steering of the confirmation of these four nominees--Senator Hatch and Senator **Leahy.**

I also would like to make a quick comment about my colleague, Senator Grassley, who observed earlier that even though I rank fifth on the Judiciary Committee and Senator Grassley ranks second, I was able to

secure these nominees; whereas, the nominee very important to Senator Grassley and Senator Harkin has not been considered.

I want to make it clear that seniority had nothing to do with it. Senator Grassley has worked long and hard on behalf of the nominee that Senator Harkin has spoken about, Bonnie Campbell, former attorney general of Iowa.

I worked very hard on behalf of these nominees. But to make it clear, the nominees from Arizona were President Clinton's nominees. I worked with my colleague in the House, Ed Pastor, a Democrat, in helping to ensure that these nominees could be considered in

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this session of the Congress; that we could have the Senate Judiciary Committee approve the nominations, and send them to the floor for consideration. It was still laid over over the August recess. Notwithstanding all of that, we were able to get it done.

But in the case of Bonnie Campbell, she is a circuit court nominee. I know Senator Grassley and Senator Harkin have an agreement that they will support each other's nominees when the other party is in power. In this case, the Democratic President makes a nominee, and Senator Harkin is supportive and Senator Grassley is also supportive. He certainly has been supportive.

I want the Record to be clear--I am sure Senator Harkin would concur in this--that Senator Grassley has been a very strong advocate for Bonnie Campbell.

I think the circumstances that permitted us to confirm these other four nominees--one from Illinois and three from Arizona --didn't have anything to do with the seniority on the committee or it wouldn't have been possible for the Arizona judges to have been confirmed by the Senate.

I thank the Chair.

Mr. HARKIN. Mr. President, I respond by saying I was not trying to imply one way or the other that seniority had something to do with who gets out of the Judiciary Committee. My main point was that three of the four nominees we voted on today have been pending a very short time. They were nominated in July, their hearing was in July, and they were reported out of Committee in July--all in the same week. And they were brought to the floor today. Bonnie Campbell has been sitting there for 215 days. She had her hearing in May. Yet they won't report her out of the Judiciary Committee.

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This is unfair. It is unfair to her. It is unfair to the women of this country. It is unfair to the court which needs to fill this position. We recognize in Bonnie Campbell a champion, a champion of women, someone who has done an outstanding job in administering the office of violence against women. She is the only one who has held that office since the legislation was passed. The House last week voted 415-3 to reauthorize it. Now we will try to do something in the Senate. I think the women of this country understand the Republican-controlled Judiciary Committee and the Republican-controlled Senate are stopping the Senate from having a vote on Bonnie Campbell for pure political reasons.

I think it is wrong the way they are treating Bonnie Campbell in this nomination process. I will continue to point that out every day that we remain in session. It is unfair to her. It is unfair to the women of this country to have someone so qualified, someone who has done so much to reduce and prevent violence against women, to have the Senate Judiciary Committee bottle up her name and not even permit it to come on the floor for a vote.

I am still hopeful perhaps they will see the light and permit that to happen, although time is running out. I will take every day we are here to talk about it.

I yield the floor.

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

Mr. THURMOND. Mr. President, we have heard much debate today about Federal judges. One would think that President Clinton has fared very poorly in the judicial confirmation process, but this is simply not true. He has done quite well with the cooperation of the Republican-controlled Senate.

During the President's first term, the Senate confirmed nearly one-quarter of the entire Federal Judiciary. After today, the Senate will have confirmed 44 percent or 377 Clinton judges.

It is no secret that while I served as Chairman of the Judiciary Committee during the first six years of the Reagan Administration, I made the confirmation of judges a top priority of the Committee. I am proud of our accomplishments during those years.

Yet, with Republican control of the Congress, President Clinton's success rate is really no different. After today, the Senate will have confirmed only five more Article III judges for President Reagan than it has thus far for President Clinton.

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Today, the vacancy rate is 7.9 percent, and the Clinton Administration has recognized a 7 percent vacancy rate as virtual full employment for the Judiciary. The vacancy rate at the end of the Bush Administration was 11.5 percent, but there was no talk then about a vacancy crisis. At the end of the Bush Administraton, the Congress adjourned without acting on 53 Bush nominations. Today, there are only 38 Clinton nominees pending in Committee.

The Fourth Circuit is a good example of the healthy status of the Judiciary. The court is operating very well and does not need more judges. In fact, today, it is the most efficient circuit. The Fourth Circuit takes less time than any other to decide a case on appeal. The truth is that, due to a lack of cases needing oral argument, the Fourth Circuit has cancelled at least one term of court for each of the past four years, and two terms of court for the past two years.

The Chief Judge of the Fourth Circuit has made clear that additional judges are not needed, and he should know better than us the needs of his court. There is no good reason to add judges to the most efficient circuit in the nation. Given that a circuit judgeship costs about one million dollars per year for the life of the judge, it would be a waste of taxpayer money to do so.

We also should not be misled by the fact that some vacancies are defined as a "judicial emergency." The term is defined so broadly that, with one exception, all current circuit court judgeships that have been vacant for 18 months are considered "emergencies."

The issue of judgeships in the Federal courts is not just about numbers and statistics. Much more is at stake. Each judgeship is a life-time appointment that yields great power but is basically accountable to no one.

The Senate has a Constitutional duty to review each nominee carefully and deliberately. We take this responsibility very seriously in the Judiciary Committee, as we must. We cannot be a rubber stamp for any Administration. The entire Nation loses when we allow judicial activists or judges who are soft on crime to be confirmed to these life-time positions.

Under Senator Hatch's leadership, the Judiciary Committee has taken a fair and reasoned approach to the confirmation process. As a result, the Clinton Administration has done quite well regarding judicial confirmations.
her out, maybe they'll do it next week, or maybe the next week. Well, now, the time has run out and it is clear to me I was being strung along all this time with false promises that the Judiciary Committee would, indeed, act on Bonnie Campbell's nomination.

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So now to say that it is the Senate Democrats who are to blame for the current situation with Bonnie Campbell is utter fabrication, total nonsense. The Senator from Utah knows as well as I do that there is one reason it is being held up, and it is called politics--pure rank politics. Then, again, Senator Hatch says that the reason it has been held up is because President Clinton had some recess appointments, and that we had a hold on these four nominees for a while. Well, why is he singling out one nominee? Why is he targeting Bonnie Campbell? Why is Bonnie Campbell the target? What about all the other judges? Why is he singling her out?

Is it because of her work to prevent domestic violence as the director of the Office of Violence Against Women at the Justice Department? The Senate Republicans have stalled passing the reauthorization of that law just as they have blocked Bonnie Campbell's nomination from getting a vote on the Senate floor.

Bonnie Campbell has done a superb job of focusing on the issue of violence against women, especially domestic violence. The Violence Against Women Act has expired. It expired on the last day of September of this year. This Republican Congress didn't even see fit to take it up and pass it.

So it is no surprise to me that in poll after poll after poll across this country women are saying no to Republican candidates because they see what has been happening here. This Republican Senate is holding up the one person who really knows what violence against women is about, who headed that office and has done a superb job; yet Senate Republicans aren't going to let her come out. How well has she done? Take a look at the House vote on reauthorization. The vote was 415 to 3. Do you really think this bill would have been reauthorized if the person who has headed the office to implement its provisions had done a bad job?

Well, I say to Senate Republicans, you better beware. The women of this country are watching what you do up here on the issues that are important to them. They want the Senate to reauthorize VAWA. They want judges who will enforce that law. Who better to do that than Bonnie Campbell? She is qualified, and no one has come to the Senate floor and said any differently since her hearing.

I can tell you, this Republican Senate that is holding up her nomination and the reauthorization of VAWA will have only themselves to blame if the women of this country vote overwhelmingly against their party in November. It pains me to say this, but I think that is what it has come down to. If they want to play politics with Bonnie Campbell and Violence Against Women, go right ahead, but it will bite them bad. Real bad.

You may think you are only holding up one person, only one judge, saying, well, she was from Iowa, not of any consequence. I say to my Republican friends, you are seriously mistaken. Bonnie Campbell did an outstanding job as attorney general for the State of Iowa. She was well known to women all over this country as a role model and someone they have looked to for leadership, someone who has brought honor to our State, honor to the legal profession, honor to this administration, and honor to what we are about as a nation in trying to provide more equality for women in this country.

I say to my friends on the Republican side, if you think you are playing smart politics by holding up Bonnie Campbell's nomination, I say to you that you are sadly mistaken.

But I guess it has come down to this. I am told that there is no use even talking about it anymore. They are not going to let Bonnie Campbell's nomination be reported out. I don't know about that. I say it is never over until it's over. And perhaps some cooler heads will prevail on the Republican side. They will see that they are only hurting their own cause. They are only hurting themselves and their candidates who are out there running by holding up Bonnie Campbell's nomination.

It is time we have more diversity on the Federal bench. Only 20 percent of the Federal judiciary are women. Of the 148 circuit judges, only 33 are women. It is time we have more--qualified women on the federal bench.

Last year, a report by the Task Force on Judicial Selection of Citizens for Independent Courts--an independent group--verified that the time to confirm female nominees is now significantly longer than that to confirm male nominees. There is a difference that has defied logical explanation. The fact is--it is true--to confirm female nominees takes a lot longer than men.

We have some men who are being voted on today. We have one man being voted on today who was nominated in July. He was passed out the same week. Bonnie Campbell has waited 215 days since she was nominated.

The standard bearer of the Republican Party this year--Gov. Bush of Texas--said there should be a deadline of 60 days from nomination through the process.

Evidently, the Republicans in the Senate and on the Judiciary Committee are not paying much heed to their standard bearer.

I am sorry to have to disagree with Mr. Hatch. But the White House is

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not to blame for this, and neither are the Senate Democrats.

Mr. Hatch has an argument with the White House on recess appointments. That is another matter entirely. It has nothing to do with judicial nominees.

Maybe he doesn't like what Mr. Clinton said at a press conference. Maybe Senator Hatch doesn't like a lot of things the President does. But does that give the Senator from Utah the right to hold up a judicial nominee because he doesn't like what the President did on some other matter?

I want to point out again that three out of the four nominees voted on today were nominated, a hearing was held, and they were reported out of the committee in 1 week in July. Yet Bonnie Campbell has been waiting 215 days, and they will not report her out of the committee.

One can only ask again why the Republicans are playing this political charade. I guess they figure, well, if they just hold on, maybe their guy will win and they can move ahead.

But, as I said earlier, I think the Republicans over there ought to be aware of this one. This one is going to bite hard.

Mr. President, I yield whatever time the Senator from Minnesota desires. I yield up to 10 minutes to the Senator from New York, Mr. Schumer, and I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. WELLSTONE. Mr. President, I came to the floor to support my colleague, the Senator from Iowa, and to speak for a couple of minutes about Bonnie Campbell. I believe Bonnie Campbell would be the second woman to serve on the Eighth Circuit Court of Appeals. Dianne Murphy from Minnesota is the first. Bonnie Campbell has done a lot of good work, but most important is her record at the Justice Department in the violence against women office.

I come here to speak about this woman's magnificent work. Bonnie Campbell has probably more than any single individual made the most difference when it came to reducing violence and trying to end some of the violence in families; unfortunately, most of it directed against women and children. About every 13 seconds, a woman is battered in our country. A home should be a safe place. Somewhere between 3 million and 10 million witness this in their homes.

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body if he ever got a hearing and a vote on the floor.

Unfortunately, that has not happened. It is easy to understand why the Clinton administration believed they needed to take some action. That action has turned out to be to nominate Judge Gregory. I have to admit it was somewhat frustrating to me, representing North Carolina, to have Judge Gregory nominated for the slot he was nominated for because it was traditionally allocated to North Carolina. But, I do support Judge Gregory's nomination.

In addition to having no judge from North Carolina being on the Fourth Circuit Court of Appeals, our court does not presently have, nor has it ever had, an African American judge. The Fourth Circuit Court of Appeals has the largest African American population in the country and does not now have, nor has it ever had, an African American judge. Obviously, there is a huge part of our population in the Fourth Circuit that has never been represented on this court. They are entitled to representation by a well-qualified judge.

In fact, Judge Wynn who was nominated over a year ago--from my State that has no judge on the Fourth Circuit--is also an African American judge. I urge Chairman Hatch to grant Judge Wynn a hearing and to push forward his vote on the floor of this Senate where he will be approved.

The bottom line is that Judge Gregory is a well-respected and well-qualified African American lawyer from the State of Virginia who also deserves a hearing, and also deserves a vote in this body this year.

The argument that is made--and Chairman Hatch made it this morning--is we only need 10 judges on the Fourth Circuit, we don't really need the 15 that Congress in fact has authorized. The reason is that the chief judge of that circuit, Judge Wilkinson, says they do not need any more judges, they are operating perfectly efficiently.

I point out several things.

No. 1, the Fourth Circuit issues more one-sentence opinions than any Federal circuit court in the country. Litigants come before it and make their case. Instead of getting a reasoned decision about why they won or lost their case, they get one sentence. What does that tell them about how much attention in fact is being paid to their case?

This same argument was made when there were 13 judges on the court. Now we are down to l0.

Since when do we let the chief judge of the circuit court decide how

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Bonnie Campbell has visited Minnesota. I have seen her speak with very quiet eloquence. I cannot say enough about the magnificent work she has done. As attorney general in Iowa, I think she passed the first anti-stalking law in the State. She is well known in Iowa. She is well known throughout the United States of America. She is a skillful lawyer. She would be a great judge. She is extremely important when it comes to being a voice for families in this country. She has done probably some of the best work that any individual could possibly do in this incredibly important area of reducing violence in this country. There is way too much violence--especially directed at women and children.

I cannot for the life of me understand why we have been waiting almost 7 months or thereabouts for this nomination to move through the Senate.

Minnesota is covered by the Eighth Circuit Court of Appeals. Dianne Murphy is from the State of Minnesota. She was the first woman to serve on this court. She is a great judge.

Bonnie Campbell would be a great judge. We need her on this court. We need a judge who understands the concerns and circumstances of too many women's lives and too many children's lives in this country. We need a judge such as Bonnie Campbell who has such a distinguished background and such a distinguished career. We need a judge on the Eighth Circuit Court of Appeals like Bonnie Campbell with such a proven record of public service. I can't find anything in her background, I can't find anything in her record, I can't find anything about her which would make her anything other than 100 percent eminently qualified to serve on this court of appeals.

I share in the indignation that my colleague from Iowa has expressed. There is no excuse to hold this nomination for one day longer. I think it is shameful that, in the Senate, really good people who have so much to offer, who could do such good--in this particular case, at the Eighth Circuit of Appeals--find themselves blocked for no good reason.

I heard Senator Harkin say he thought this was going to come back to "bite." I hope it does. It is true; most of the people in the country are not so directly connected to this process of how we do confirmations of judicial appointments. We have had Senator **Leahy** doing yeoman work, and there are other Senators who have spoken. Senator **Leahy** provides the leadership. The more people learn about a person of the caliber of Bonnie Campbell--and as a man, I care a lot about how we can reduce this violence in families, how we can reduce the violence in homes--the more people hear about this, the more outraged they will be, and for good reason.

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I know it is asking too much, but I want to see a little bit more fairness. I want to see an end to this blocking of good people who could do good work and could help so much. Bonnie Campbell is a perfect example. We shouldn't be delaying this nomination one day. But we are. I just want to express my support for Bonnie Campbell.

I yield the floor.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. Before I get into the substance of my remarks dealing with honoraria for judges, I echo the words of my colleague from Minnesota, Senator Wellstone, as well as our leader on the Judiciary Committee, Senator **Leahy,** about the holdup in judges. Senator **Leahy** has laid it out quite carefully; that is, that we have not appointed as many judges, on a percentage basis, as when Democrats controlled the Senate during the Reagan and Bush years.

I particularly add my voice to those who are asking that Bonnie Campbell be added to the Eighth Circuit.

The reason I rise is not only as a member of the Judiciary Committee, not only as somebody who believes we ought to fill the vacancies in our courts--and I am appreciative that Senator Hatch has worked with me to fill those vacancies in New York. Neither the Second Circuit nor any of the New York district courts have vacancies, and we did manage to fill at least six judgeships this year. I thank the chairman for that. But that doesn't mean the rest of the country should have things unanswered.

I worked with Bonnie Campbell. I was the sponsor in the House of the Violence Against Women Act. It was authored originally by Senator Biden and Senator Boxer, when she was a House Member. She carried it between 1990 and 1992. When she was elected to the Senate, she asked me to take the reins, and we did. We passed the law. As somebody greatly interested in the Violence Against Women Act, of bringing that dirty little secret, the amount of violence in our families, out into the sunlight so we could deal with it, I believed very strongly the right person should be appointed to be in charge of the act.

Bonnie Campbell did a fabulous job on an issue of great concern to all Americans. I think it is just unfair to "reward her" by letting her sit there in **limbo** when she so deserves and could be such a great addition to the Eighth Circuit. I plead with my friend, the Senate majority leader, my friend, the chairman of the Judiciary Committee--who, as I say, has been fair and good to New York on this issue--to bring the names of all four judges before the Senate, or all the judges who are waiting in the wings--there are more than four--but particularly Bonnie Campbell.

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On an issue related, as well, of debating a number of nominees to be Federal judges, I want to address an issue that affects the entire Federal judiciary: The ban on honoraria. Under current law, as we all know, Federal judges are not allowed to accept honoraria. That is how it should be. The framers of the Constitution designed article III to keep judges outside of politics and above influence. Read the Federalist Papers. One of the great debates was that Federal judges, in article III, achieve life appointment.

There was one reason for it: So they would be unfettered, so they would be uninfluenced; they could make their own decisions, knowing that no sanction could be taken against them for decisions they made, and, just as importantly, so the public would know it.

Because the judiciary has neither the power of the sword, as does the executive, nor the power of the purse, as does Congress, it is essential that the judiciary maintain its power--and it has, thank God--for these 211 years since the Constitution was written, through an untainted reputation for integrity and impartiality. The Federal judiciary has had it. It has frustrated us at times. It frustrated Franklin D. Roosevelt in the 1930s. It has frustrated some Members today on issues where we disagree with the majority. There is nothing we can do about it, thank God, because an independent judiciary is vital.

I believe the public, if the surveys I have seen are correct, believes the Federal judiciary is independent--far more, I might say, than State and local judiciaries where there are either elections or appointments of term so that judges believe they have to please either an individual or even the whole electorate to make up their minds.

Nothing could do more to undo the justified reputation so much wanted by the founders and sustained in this Republic as the provision that has been inserted into H.R. 4690 that would allow judges to accept honoraria. The repeal of the ban would create a significant loophole in the Ethics in Government Act of 1978 which bars high-ranking Federal officials of all branches of Government from receiving speaking fees for 11 years. This prohibition has limited real and perceived corruption. It has limited real corruption and, probably much more widespread, perceived corruption. The conflicts of interest among Members of Congress, Federal judges, and senior members of the executive branch have been limited, as well.

I, for one, opposed honoraria for Members of Congress. I don't believe in a standard for the judges and a different one for Members. While honoraria were allowed in the Congress for most of the years I served in the House, I refused to take them. I remember my first speech, right after I was elected. A leading financial institution in New York asked me to speak. I had just been appointed to the Banking

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Committee, which regulated a lot of their activities. After the speech, they handed me a check. I was sort of surprised; it sort of knocked my socks off. I looked at the check. I said: This is wrong; this is not a check for the "Reelect Schumer Committee"--which I

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would have believed would have been untoward to give me right after a speech anyway--but this is for me. They said: Yes, that is your honorarium.

I felt bad about it, returned the check, and vowed not to take any honoraria in the future.

It is even more important for judges because, as I said, they are not sanctioned to election; they are not supposed to be sanctioned to the whims of either the people or of special interest groups. It would simply lower the standard for the very officials for whom standards should be the highest.

Thousands of U.S. citizens go before Federal judges every year and expect impartial justice. That is why judges have, as I mentioned, life appointments. That is why the rules so assiduously guard against even the appearance of impropriety. And that is why we spend so much time debating the appointment of these judges. We know once they are appointed, that is it; they are in for life.

Lifting the ban will only leave litigants wondering whether the integrity of the judges has been undermined by speaking fees from groups that have a stake, or may have a stake, in the case before them.

The Federal judiciary, it is said, is underpaid. If you believe it, raise the pay; budget the money. But don't, please, allow judges to moonlight as talking heads.

That demeans our independent Federal judiciary. To simply give them leave to forage for speaking engagements is nothing less than an abdication of our responsibility. Moreover, exempting judges from the honorarium ban will give the biggest benefit to those who are in high demand for speaking engagements--likely the most famous, the most high ranking. Presumably inadequate compensation is a problem for all Federal judges, not just those who can garner the largest fees or even who are the most eloquent. We don't hire our judges, we don't appoint our judges, on the basis of eloquence.

Additionally, if judges are underpaid, then they may be more susceptible to influence from outside income--even more reason to maintain the honorarium ban.

REV_00256131

In conclusion, the issue boils down to one simple, simple nugget: The faith of the people in their government. We have a great Republic. The more I am on Earth, the more I believe that the Founding Fathers were the greatest collection of practical geniuses history has ever known and the more I believe that our country is, as they put it, a noble experiment. It was when it started, and, God bless America, it still is today.

Honoraria for judges strike a dagger right in the heart of what the Founding Fathers wanted--a totally independent judiciary, perceived as independent as well as actually being independent. Inserting this nefarious provision into the thick of an appropriations bill in the dark of night ruins that image. Unfortunately, the sneaky addition of this provision matches the substantive effect of it. It will only enhance the public's perception that those in government should not be trusted.

I yield the floor.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. LOTT. Mr. President, I understand that the Senators from Iowa and Vermont are ready to yield back their time; is that correct?

Mr. REID. Yes. On behalf of the Democrats who have been allocated time, time is yielded back.

Mr. LOTT. With that in mind, we also yield back all our time on the majority side.

I ask for the yeas and nays on the nomination of James Teilborg.

The PRESIDING OFFICER. Is there a sufficient second?

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There appears to be a sufficient second.

The yeas and nays were ordered.

Mr. LOTT. This vote will occur momentarily. However, for just a minute, I will suggest the absence of a quorum, and we will be ready to proceed almost immediately. I want Senators to know the vote is about to begin.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. LOTT. Mr. President, we are ready for the recorded vote.

The PRESIDING OFFICER. The question is, Will the Senate advise and consent to the nomination of James A. Teilborg, of Arizona, to be U.S. District Judge for the District of Arizona? The yeas and nays have been ordered. The clerk will call the roll.

The legislative clerk called the roll.

Mr. NICKLES. I announce that the Senator from New Hampshire (Mr. Gregg) is necessarily absent.

Mr. REID. I announce that the Senator from California (Mrs. Feinstein), the Senator from Massachusetts (Mr. Kennedy), the Senator from Connecticut (Mr. Lieberman), and the Senator from Arkansas (Mrs. Lincoln) are necessarily absent.

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

The result was announced--yeas 95, nays 0, as follows:

REV_00256133

Rollcall Vote No. 263 Leg.

YEAS--95

Abraham
Akaka
Allard
Ashcroft
Baucus
Bayh
Bennett
Biden
Bingaman
Bond
Boxer
Breaux
Brownback
Bryan
Bunning
Burns
Byrd
Campbell
Chafee, L.
Cleland
Cochran
Collins
Conrad
Craig
Crapo
Daschle
DeWine
Dodd
Domenici
Dorgan
Durbin
Edwards
Enzi
Feingold
Fitzgerald
Frist
Gorton
Graham
Gramm
Grams
Grassley
Hagel
Harkin
Hatch
Helms
Hollings
Hutchinson
Hutchison
Inhofe
Inouye

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Jeffords
Johnson
Kerrey
Kerry
Kohl
Kyl
Landrieu
Lautenberg
Leahy
Levin
Lott
Lugar
Mack
McCain
McConnell
Mikulski
Miller
Moynihan
Murkowski
Murray
Nickles
Reed
Reid
Robb
Roberts
Rockefeller
Roth
Santorum
Sarbanes
Schumer
Sessions
Shelby
Smith (NH)
Smith (OR)
Snowe
Specter
Stevens
Thomas
Thompson
Thurmond
Torricelli
Voinovich
Warner
Wellstone
Wyden

NOT VOTING--5

Feinstein
Gregg
Kennedy
Lieberman
Lincoln

SUBJECT: JUDGES (91%); AFRICAN AMERICANS (78%); APPROVALS (78%);

REV_00256135

LOAD-DATE: 10-04-2000

Source: Legal > Federal Legal - U.S. > Individual Congressional Record Materials > **Congressional Record - 106th Congress** ⓘ
Terms: **governor bush and leahy and limbo and date(geq (10/03/2000) and leq (10/03/2000))** (Edit Search)
View: Full
Date/Time: Tuesday, November 5, 2002 - 5:24 PM EST

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many judges go on the court? That is a function we in Congress have responsibility for--not him.

You can certainly make an argument that this is a partisan decision that the chief judge has made--that he likes the present composition of the court. He was a Republican-nominated judge.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. EDWARDS. I ask unanimous consent for another 3 minutes.

Mr. **LEAHY.** Mr. President, I yield another 3 minutes without losing my right to the floor.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. EDWARDS. Mr. President, here we have the chief judge, who is a Republican-nominated judge, and a court that now has a majority of Republican judges. You can certainly make the argument that he likes the composition of the court the way it is; he never wants that to be changed.

That is so fundamentally wrong and so fundamentally different from the way our Constitution provides. We should be nominating judges. Whether it is a Democratic or a Republican administration, it shouldn't make any difference in nominating well-qualified judges. This body should act on the qualification of those men and women to serve on the court, not based upon the Republican or Democratic composition of the court. It is just that simple. This should be totally nonpartisan.

My State has no one representing them on the Fourth Circuit. There is not, nor has there ever been, an African American judge on this court.

The simple bottom line is that we have the responsibility of deciding how many judges should be authorized for that court. We have made that decision--15. It is now down to 10. Of those 10, North Carolina has none. The people of North Carolina are entitled to be represented on this court.

In addition to that, we should deal with the issue that there has never been an African American judge on this court.

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We presently have pending the nomination of two well-respected and very well qualified African American jurists.

This is what I would say to the Chairman Hatch. Let us have a hearing on Judge Wynn. Let Judge Wynn have a vote on the floor of this Senate, and let the people of North Carolina have what, by law enacted by this body, they are entitled to, which is a judge representing them on their Federal court of appeals so that when my people go to the Fourth Circuit Court of Appeals to have their case heard, they have at least one judge representing them on that court. Aren't they entitled to that?

I yield the floor.

Mr. **LEAHY.** Mr. President, I commend the distinguished Senator from North Carolina for his comments. Senator Edwards has been a friend since he came to this body. I have, at the risk of embarrassing him, stated on a number of occasions on this floor that the Senate was enhanced by his presence here. As a lawyer, I must say that having him here because of his own experience as one of the most outstanding and most recognized trial lawyers in the country, to say nothing about his own State. I think Senators on both sides of the aisle should listen to what he said.

He is not a Senator who speaks in the abstract and who simply reads a statement on this. This is a Senator who has spent time in the courts of his State and of the region. He has had active practice in both State courts and Federal courts. He understands the judicial system.

He has argued cases at all levels. He has worked with lawyers who have been on his side of an issue and opposed to him. He knows, as does any lawyer who practices law, that no matter how much you might try a case at the trial level, at some point, especially if the stakes are high, that case is going to go up on appeal. It is going to go up on appeal whether you are the plaintiff or the defendant. Whoever loses that case, if it is of significance, will take it up on appeal.

I recall the statements made in court when I was trying cases. The judge in chambers would say: OK, we will take it to the jury and let justice be done. Usually the person who had the weaker case said: If that is the case, I will appeal, if justice is done.

But the fact of matter is cases become more and more complex and more and more significant to the litigants and to the issues of law. They go up on appeal, and you ought to have a good appellate court.

I commend the Senator for what he has said. I hope we will listen to what is needed in that appellate court.

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We should also note, I suggest, that there is going to be a significant debate tonight in Boston between the two candidates of our two great parties--the Republican and Democratic Parties. Both parties have nominated those we consider to be our best choices. Obviously, I strongly support my friend of over 20 years, Al Gore. But I also know that the Republican Party has nominated a very distinguished Governor, George W. Bush.

4.

I mention this because **Governor Bush** and I, while we disagree on some issues, have one very significant issue on which we agree. He gave a speech awhile back and criticized what has happened in the Senate where confirmations are held up not because somebody votes down a nominee but because they cannot ever get a vote. **Governor Bush** said: You have the nominee. Hold the hearing. Then, within 60 days, vote them up or vote them down. Don't leave them in **limbo.**

Frankly, that is what we are paid to do in this body. We are paid to vote either yes or no--not vote maybe.

When we hold a nominee up by not allowing them a vote and not taking any action one way or the other, we are not only voting "maybe" but we are doing a terrible disservice to the man or woman to whom we do this. They have to put their life on hold. They do not know what is going to happen: Are they going to be confirmed, or not? It is not like when any one of us runs for election; we know that on a certain

[*S9673]

day the election occurs. We either win or we lose. But we know that on that Tuesday, we are going to know our fate. We won or we lost.

These people come here and they never know what may happen. They don't know whether they will have a hearing. And if they have a hearing, they don't know if there will be a vote in committee. And if there is a vote in committee, they don't know whether they will come on the floor. And if they come on the floor, they don't know if they will have a vote because one person hiding in the Cloakroom will say: Don't allow it to come to a vote yet. So they may have 99 Senators voting for them but somebody mysteriously in the background says "Don't vote," and they don't vote.

Helene White of the U.S. Court of Appeals for the Sixth Circuit has been pending for 1,360 days. **Governor Bush** said we ought to have a vote up or down within 60 days. Let's have a vote on Helene White. She has been waiting not 60 days, not 600 days, but 1,360 days.

Kathleen McCree Lewis, who has been nominated for the U.S. Court of Appeals for the Sixth Circuit, an outstanding African American woman,

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who has one of highest ratings of anybody we have ever seen come before the Senate, has been waiting for 370 days. Not the 60 days we talked about, but more than six times the 60 days. Bonnie Campbell, for the U.S. Court of Appeals for the Eighth Circuit, has been spending for more than 215 days.

We are debating bringing up the Violence Against Women Act which has been stalled. The Violence Against Women Act has expired. Distinguished Senators on both sides of the aisle are working to bring it up and we cannot bring it up for a vote.

I see the distinguished Senator from Delaware and the distinguished Senator from Kansas, both of whom support it on the floor, and we cannot get that up for a vote.

We also can't get Bonnie Campbell up, even though she is the Director of the Violence Against Women Office. She supported, worked for and administered the Violence Against Women Act, an act that has seen a dramatic decrease in violence against women.

We ought to be standing and applauding Ms. Campbell. She is somebody who shows by her own experience that she can do the things necessary to bring down this scourge of violence against women in our country. Now that she has gone through the vetting process, and found out that she is one of the most qualified people to be a judge of anyone confirmed in the last 20 years, Republican or Democrat, we ought to at least let her have a vote instead of holding her in **limbo.**

Elena Kagan for the U.S. Court of Appeals for the District of Columbia has been pending for more than 480 days without a vote; Lynette Norton, for the U.S. District Court for the Western District of Pennsylvania, has been pending for more than 890 days; Patricia Coan, for the U.S. District Court for the District of Colorado, has been pending for more than 500 days; Dolly Gee, for the U.S. District Court for the Central District of California has been pending for more than 495 days; Rhonda C. Fields, for the U.S. District Court for the District of Columbia, has been pending for 325 days; Linda Riegle, for the U.S. District Court of Nevada, has been pending for more than 165 days.

Let them have a vote. These women are outstanding. They have demonstrated more than most people who get confirmed in this body, Republican or Democrat, how well qualified they are. At least let them have a vote. If people want to vote against them, vote against them.

I will state for the record that I will vote for every one of them. In checking with our side of the aisle, every single Democrat Senator will vote for every one of these women.

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President Clinton, in remarks before the Michigan Bar Association, recently spoke about the Senate's failure to act upon his judicial nominees, noting his nominees have received more top American Bar Association ratings than those of any President in 40 years. President Clinton, to his credit, has nominated people who have received higher ratings than any President, Democrat or Republican, in 40 years and they still get held up. He said:

> These people are highly qualified, which leads to only one conclusion, that the appointments process has been politicized in the hope of getting appointees ultimately to the bench who will be more political. That is wrong. It is a denial of justice.



President Clinton is right. We should move forward with these nominees. Let them have a vote. Don't do this in the dark of the night holding people up.

We are going to have four nominees, three from Arizona which has a desperate situation, where they need Federal judges. My friend from Arizona, Senator Kyl, has pointed out, quite rightly, that cases cannot be heard, several cases cannot be heard. He has had experiences as a civil lawyer. He knows how difficult that is.

I say as a former prosecutor, when that happens, the criminal cases can't be heard because you don't have enough people on the bench. When that happens, the prosecutor has to start plea bargaining down. He or she has to either get a lighter sentence or has to start dropping charges all over the place because they know they can't get a trial because the judges aren't there.

If we are going to be tough on law and order, we have to have the judges there. We cannot just say we are against crime. I am willing to concede that all 100 of us are against crime. But if we are going to fight crime, we have to have the men and women there to do it: the prosecutors, the defense attorneys, and the judges.

If we will move those judges through, I will vote for every one of them. But I also point out that they can move through very rapidly, all the judges from the time they were nominated, to the hearings, to the floor. A lot of the other judges discussed today are judicial nominees who have waited and waited and waited and waited and cannot get a vote.

It is not too late in the session to move on these nominations. We know that we can make quick progress when we want to do so. The group of nominees being considered tonight include nominations received on a Friday, who had a hearing the next Wednesday and were reported that Thursday, all within a week. In addition, there is the example of a hearing held last month by the Government Affairs Committee on two

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District of Columbia Superior Court judges, one who was nominated on May 1 and the other who was nominated on June 26. Another example of the ability of the Senate to act is the September 8 confirmation of James E. Baker to the U.S. Court of Appeals for the Armed Forces. In addition, there is the examples of Timothy Lewis who was confirmed in waning days of the 1992 session, the last year of a Republican presidential term with a Democratic majority in the Senate. Judge Lewis was confirmed to the Third Circuit on October 8, having only been nominated on September 17 of that year.

Of course, the Republican candidate for the presidency has said that nominations should be acted upon within 60 days. Of the 42 judicial nominations currently pending, 37 have been pending from 60 days to 4 years without final action.

Let us compare the lack of action this year to what a Democratic majority in the Senate accomplished in 1992 during the last year of a Republican presidential term. The Senate confirmed 11 Court of Appeals nominees during that Republican President's last year in office and a total of 66 judges for that year. This year the Senate is will not reach anywhere near 66 confirmations, not 60, not 50, not even 40. In 1992, the Committee held 15 hearings--twice as many as this Committee has found time to hold this year. In the last 10 weeks of the 1992 session, the Committee held four hearings and all of the nominees who had hearings then were confirmed before adjournment. In the last 10 weeks of the 1992 session, we confirmed 32 judicial nominations. In the last 10 weeks of this year we will be holding no hearings and confirming only four District Court nominees.

We still have pending without a hearing qualified nominees like Judge Helene White of Michigan. She has been held hostage for over 45 months without a hearing. She is the record holder for a judicial nominee who has had to wait the longest for a hearing and her wait continues without explanation to this day.

We still have pending before the Committee, the nomination of Bonnie Campbell to the Eighth Circuit. Ms Campbell had her hearing last May, but

[*S9674]

the Committee refuses to consider her nomination, vote her up or vote her down. Instead, there is the equivalent of an anonymous and unexplained secret hold. Bonnie Campbell is a distinguished lawyer, public servant and law enforcement officer. She was the Attorney General for the State of Iowa and the Director of the Violence Against Women Office at the United States Department of Justice. And she enjoys the support of both of her home State Senators, Senator Harkin and Senator Grassley. I understand and share Senator Harkin's frustration and believe that the Senate's failure to act on this highly qualified nominee is without justification.

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Terms: **governor bush and leahy and date(geq (10/11/2000) and leq (10/11/2000))** (Edit Search)

*146 Cong Rec S 10164, **

CONGRESSIONAL RECORD -- *SENATE*

Wednesday, **October** 11, 2000

106th Congress, 2nd Session

146 Cong Rec S 10164

REFERENCE: Vol. 146, No. 126

TITLE: TRAFFICKING VICTIMS PROTECTION ACT OF 2000--CONFERENCE REPORT

SPEAKER: Mr. BROWNBACK. Mr. WELLSTONE. Mr. **LEAHY.** Mr. KENNEDY. Mrs. BOXER. Mrs. MURRAY. Ms. MIKULSKI. Ms. LANDRIEU. Mr. LAUTENBERG. Mr. BINGAMAN.

BILL NUMBER:
H.R. 3244 ♦ Retrieve Bill Tracking Report
♦ Retrieve full text of bill

TEXT: [*S10164]

The PRESIDING OFFICER. The Senate will now proceed to the conference report accompanying H.R. 3244.

The clerk will report the conference report.

The legislative clerk read as follows:

> The Committee of Conference on the disagreeing votes of the two Houses on the amendment of the Senate on the bill, H.R. 3244, an act to combat trafficking of persons, especially into the sex trade, slavery, and slavery-like conditions, in the United States and countries around the world through prevention, through prosecution and enforcement against traffickers, and through protection and assistance to victims of trafficking, having met, have agreed that the House recede from its disagreement to the amendment of the Senate, and agree to the same with an amendment, and the Senate agree to the same, signed by a majority of the conferees on the part of both Houses.

The PRESIDING OFFICER. The Senate will proceed to the consideration of the conference report.

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countries rare and punishment of traffickers almost nonexistent. Without work or much hope of a future at home, an eager teenager will find it hard to believe that the promise of a job in Italy, Turkey or Israel is almost certain to be worthless.

"I answered an ad to be a waitress," said Tamara, 19, a Ukrainian prostitute in a massage parlor near Tel Aviv's old Central Bus Station, a Russian-language ghetto for the cheapest brothels. "I'm not sure I would go back now if I could. What would I do there, stand on a bread line or work in a factory for no wages?"

Tamara, like all other such women interviewed for this article, asked that her full name not be published. She has classic Slavic features, with long blond hair and deep green eyes. She turned several potential customers away so she could speak at length with a reporter. She was willing to talk as along as her boss was out. She said she was not watched closely while she remained within the garish confines of the "health club."

"I didn't plan to do this," she said, looking sourly at the rich red walls and leopard prints around her. "They took my passport, so I don't have much choice. But they do give me money. And believe me, it's better than anything I could ever get at home."

* * * * *

Mr. BROWNBACK. Mr. President, Irina's story is told all too often and is reenacted all too often around the world today. Our Government estimates that between 600,000 and 2 million women are trafficked each year beyond international borders. They are trafficked for the purpose of sexual prostitution by organized crime units and groups that are aggressively out making money off the trafficking of human flesh. It is wrong. This bill seeks to deal with that wrong and that tragedy that has occurred and is occurring around the world today.

This is significant human rights legislation that this body is going to pass. I hope, predict, and pray that it will pass today. It is significant human rights legislation for those poor young victims who are trafficked and who are caught sometimes with the view that, "I am just stupid, I got caught in this," but who live this horrible, hellish life they have been put into and trafficked into and can't find their way out.

The conference report is entitled "The Victims of Trafficking and Violence Protection Act of 2000." As I mentioned previously, it passed the House of Representatives on Friday, October 6, by a vote of 371-1.

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The Senate will vote on this conference report today, with the lead underlying bill being the Brownback-Wellstone anti-trafficking legislation. Senator Wellstone and I have been working for the last year on this legislation, which is a companion to the Smith-Gejdenson bill in the House known as the Trafficking Victims Protection Act of 2000.

I want to thank and recognize my staff, Sharon Payt and Karen Knutson, two people who have worked tirelessly and endlessly to deal with this particular issue.

Our anti-trafficking bill is the first complete legislation to address the growing practice of international "trafficking" worldwide. This is one of the largest manifestations of modern-day slavery internationally. Notably, this legislation is the most significant human rights bill of the 106th Congress, if passed today, as hoped for. This is also the largest anti-slavery bill that the United States has adopted since 1865 and the demise of slavery at the end of the Civil War. Therefore, I greatly anticipate this vote today in the Senate on this legislation.

Senator Wellstone's and my trafficking bill, which passed in the Senate on July 27 of this year, was conferenced to reconcile the differences with the House bill, and the conference report was filed on October 5, Thursday, of last week. The final conference package contains four additional pieces of legislation which are substantially appropriate to our bill. Most significant among those bill amendments is the Violence Against Women Act, known as VAWA, which provides relief and assistance to those who suffer domestic violence in America. Thus, the additional four bills included in this conference report include the Violence Against Women Act. This is a reauthorization of the initial bill which was passed in 1994 as part of the Omnibus Crime Control Act; this legislation renews several grant programs to assist law enforcement officers, social service providers, and others dealing with sexual crime and domestic violence.

Also in this package is Aimee's law, which provides for interstate compensation for the costs of incarceration of early-release sex offenders who commit another sex crime in a second State. It is based on the circumstances of what happened in a Pennsylvania case where a murderer was released early out of a Nevada prison, went to Pennsylvania, and kidnapped and brutally raped and murdered a young girl there who was in the very flower of life and coming forth. This law is built upon that terrible crime that took place in Pennsylvania.

Also in this package is the 21st Amendment Enforcement Act, which allows for State attorneys general to enforce their State alcohol control laws in Federal court, including laws prohibiting sales to minors, which strengthens the grant of authority to States under the 21st amendment to the Constitution; and the Justice for Victims of

REV_00256147

Terrorism Act, which authorizes the payment of foreign seized assets to American victims of international terrorism.

The last step to adopting this legislative package in Congress rests with the Senate today.

Before I continue describing this urgently needed legislation, I would like to take a few moments to thank some key people who have brought us to this point today. Some of them are in the Galleries as I speak. They are people of heart, courage, and intelligence whose advocacy made a way for this bill--whose dedication pried open the doors and let the light shine into this darkness. Among them is Senator Wellstone who started this work long before I came on board. He and his wife, most notably, 3 years ago started advocating on this particular issue. I know he stands firmly and strongly today as one of the principal advocates to set this aside, and he brought this forward and seeks to go forward from here to help those who are victims of these crimes.

I also thank Congressmen Chris Smith and Sam Gejdenson. I would also like to thank Gary Haugen of the International Justice Mission and Dr. Laura Lederter of the Protect Project at Johns Hopkins University. Dr. Laura Lederter of the Protect Project at Johns Hopkins University is the foremost authority in the country on tracking from where and to where these victims are trafficked.

I have up here one of the maps she introduced of women who have been trafficked out of Russia and Ukraine with the fall of the Soviet Union. With the increased travel out of there to freedom, we have seen a huge amount of trafficking also taking place. These are the routes out of Russia and Ukraine and where they go--to Canada, to the United States, to Mexico, to Europe, to Africa and Asia, to Australia and New Zealand. This is the work of her project.

I also want to thank Michael Horowitz of the Hudson Institute, and Gloria Steinem, whom I am not noted to thank, is part of this coalition; Chuck Colson, Jessica Neuworth, William Bennett, the National Association of Evangelicals, the Southern Baptist Convention, among others I'm sure I'm forgetting. I would also like to thank the staff for both the Senate and House, including Joseph Rees, David Abramowitz, Charlotte Oldham-Moore, Jill Hickson, Mark Lagon, and my staff Karen Knutson and Sharon Payt. Thank you all. We are here today at final passage because of all your efforts.

This legislation is our best opportunity to challenge the largest manifestation of slavery worldwide, known as "trafficking." This practice of trafficking involves the coercive transportation of persons into slavery-like conditions, primarily involving forced prostitution, among other forms of slavery-like conditions.

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Trafficking is the new slavery of the world. These victims are routinely forced against their will into the sex trade, transported across international borders, and left defenseless in a foreign country. This bill also addresses the insidious practice known as "debt bondage," wherein a person can be enslaved to the money lender for an entire lifetime because of a $50 debt

[*S10167]

taken by the family for an emergency. This is a common practice in countries throughout the South Asian region.

People of conscience have fought against the different manifestations of slavery for centuries. This anti-slavery legislation is in the tradition of William Wilberforce and Amy Carmichael of England, who were ardent abolitionists against different forms of slavery. Amy Carmichael was a British missionary to India at the turn of last century, in the early 1900's. Upon arrival, she was mortified to discover the routine practice of forced temple prostitution. This was and continues to be a practice wherein young girls, from age six onward, are dedicated to the local temple, and are then forced into prostitution against their will to generate income. Upon this morbid discovery, Amy Carmichael began to physically steal the young girls away from this incredibly degrading form of slavery, hiding the girls to escape the inevitable backlash of violence. Eventually, the government outlawed this practice of forced temple prostitution, as a result of her efforts. However, it bears noting that this terrible practice continues today, in a lesser degree, in rural villages throughout South Asia, including India.

This bill challenges the myriad forms of slavery including sex trafficking, temple prostitution, and debt bondage, among other forms.

This new phenomenon of sex trafficking is growing exponentially. Some report that it is, at least, $7 billion per year illicit trade, exceeded only by the international drug and arms trade. Its victims are enslaved into a devastating brutality against their will, with no hope for release or justice, while its perpetrators build criminal empires on this suffering with impunity. Our legislation will begin to challenge these injustices.

This is the new slavery of the world, Dr. Kevin Bales of the University of Surrey in England recently testified for us before the Senate Foreign Relations Committee. He astutely observed that the new slavery has a peculiar quality which does not look like the old forms associated with lifetime bondage as a chattel slave, but it is slavery nonetheless.

Sex trafficking is among the most common forms of the new slavery and typically entails shorter periods of bondage, usually asking for 5 to 6

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years, or whenever something like AIDS or tuberculosis is contracted, after which the victim is thrown out on the street, broken, without community or resources, left to die. I have met with people caught in that condition.

Women and children are routinely forced against their will. Sex traffickers favor girls aging in the range of 10 to 13.

I have a number of other things I could say, but my time is limited. I know a number of people want to speak on this bill. I ask to reserve the remainder of my time. I will turn the floor over to Senator Wellstone.

I ask unanimous consent on any quorum calls that might be called during the discussion of this conference report, that time be allotted and assessed against all allocated time to speak under the bill, including myself and Senator Wellstone, along with Senator Biden, Senator Hatch, and Senator **Leahy,** who have all been allocated time. I ask the quorum calls be equally divided between those who have time under the bill.

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

Mr. BROWNBACK. I finally note to others who seek to speak on this bill, I invite Members to come to the floor to make comments. At the conclusion of our presentation, a vote will occur on this conference report.

I yield the floor.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. WELLSTONE. Mr. President, I thank the Chair.

I thank my colleague, Senator Brownback, for his very gracious remarks. It has been an honor to work with him on this legislation. I think a very strong friendship has come out of this effort. There are some times when we can work and reach out and have the most interesting and I hope important coalition. Working with Senator Brownback, Sharon Payt, and Karen Knutson has been the best legislative work. At the end of the day, I believe today we will pass this legislation. Members can feel they have done something really good. They can make a positive difference. I thank Senator Brownback for his great leadership and his great work for each step along the way. In all the negotiations, all the work that has been done, the Senator has been there. I thank the Senator.

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I want to talk about Charlotte Oldham-Moore and Jill Hickson, who have worked with me and our staff, who have done a great job. There are other people who will be on the floor who put this together--especially the Violence Against Women Act--Senator **Leahy,** Senator Biden, Senator Hatch, and others, and Sam Gejdenson and Chris Smith have been phenomenal. I thank them for their yeoman work on the House side. I also thank Frank Loy and Harold Koh at the State Department for their work.

The trafficking of human beings for forced prostitution and sweatshop labor is a rapidly growing human rights abuse. It is one of the greatest aspects of the globalization of the world economy. The Victims of Trafficking and Violence Protection Act of 2000 is the first piece of legislation to address the widespread practice of the trafficking of men, women, and children into sweatshop labor and sexual bondage.

My wife Sheila urged me to do something about this problem several years ago. Consequently, she and I spent time with women trafficked from the Ukraine to work in brothels in Western Europe and the United States. They told us after the breakup of the Soviet Union and the ascendancy of the mob, trafficking in women and girls became a booming industry that destroyed the lives of the youngest and most vulnerable in their home countries.

We began work on the bill then, and 3 years later, after extraordinary bipartisan effort, tremendous leadership from Senators Brownback and **Leahy,** and Sam Gejdenson and Chris Smith, and others, it passed the House with a vote of 371-1. Now it is poised to pass the Senate.

Our Government estimates that 2 million people are trafficked each year. Of those, 700,000 women and children, primarily young girls, are trafficked from poor countries to rich countries and sold into slavery, raped, locked up, physically and psychologically abused, with food and health care withheld. Of those, as many as 50,000 immigrants are brought into the United States each year, and they wind up trapped in brothels, sweatshops, and other types of forced labor, abused and too fearful to seek help.

Traffickers exploit the unequal status of women and girls, including harmful stereotypes of women as property and sexual objects to be bought and sold. Traffickers have also taken advantage of the demand in our country and others for cheap, unprotected labor. For the traffickers, the sale of human beings is a highly profitable, low-risk enterprise as these women are viewed as expendable and reusable commodities.

Overall, profit in the trade can be staggering. It is estimated that the size of this business is $7 billion annually, only surpassed by

that of the illegal arms trade. Trafficking has become a major source of new income for criminal rings. It is coldly observed that drugs are sold once while a woman or a child can be sold 10 or 20 times a day.

In the United States, Thai traffickers who incarcerated Thai women and men in sweatshops in El Monte, CA, are estimated to have made $8 million in 6 years. Further, Thai traffickers who enslaved Thai women in a New York brothel made about $1.5 million over 1 year and 3 months.

Last year, Albanian women were kidnapped from Kosovo refugee camps and trafficked to work in brothels in Turkey and Europe. Closer to home, organized crime has trafficked Russian and Ukranian women into sexually exploitive work in dozens of cities in the United States of America. Just next door, law enforcement authorities suspected mafia involvement in the gruesome murder of a Russian woman trafficked to Maryland.

All of these cases reflect a new condition: Women whose lives have been disrupted by civil wars or fundamental changes in political geography, such as the disintegration of the Soviet Union or the violence in the Balkans, have fallen prey to traffickers.

Seeking financial security, many innocent persons are lured by traffickers'

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false promises of a better life and lucrative jobs abroad. Seeking this better life, they are lured by local advertisements for good jobs in foreign countries at wages they could never imagine at home. However, when they arrive, these victims are often stripped of their passports, held against their will, some in slave-like conditions, in the year 2000.

Rape, intimidation, and violence are commonly employed by traffickers to control their victims and to prevent them from seeking help. Through physical isolation and psychological trauma, traffickers and brothel owners imprison women in a world of economic and sexual exploitation that imposes a constant threat of arrest and deportation, as well as violent reprisals by the traffickers themselves to whom the women must pay off ever-growing debts. That is the way this works.

Many brothel owners actually prefer foreign women, women who are far from help and from home, who do not speak the language, precisely because of the ease of controlling them. Most of these women never imagined they would enter such a hellish world, having traveled abroad to find better jobs or to see the world.

Many in their naivete believe nothing bad can happen to them in the

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rich and comfortable countries such as Switzerland or Germany or the United States. Others are less naive, but they are desperate for money and opportunity. But they are no less hurt by the trafficker's brutal grip.

Trafficking rings are often run by criminals operating through nominally reputable agencies. In some cases overseas, police and immigration officials of other nations participate and benefit from the trafficking. Lack of awareness or complacency among government officials such as border control and consular offices contributes to the problem. Furthermore, traffickers are rarely punished, as official policies often inhibit victims from testifying against their traffickers, making trafficking a highly profitable, low-risk business venture for some.

Trafficking abuses are occurring not just in far-off lands but here at home in America as well. The INS has discovered 250 brothels in 26 different cities which involve trafficking victims. This is from a CIA report. This is the whole problem of no punishment--being able to do this with virtual impunity.

In a 1996 trafficking case involving Russian and Ukrainian women who answered ads to be au pairs, sales clerks and waitresses, and were forced to provide sexual services and live in a massage parlor in Bethesda, MD, the Russian-American massage parlor owner was fined. He entered a plea bargain and charges were dropped with the restriction that he would not operate a business again in Montgomery County. The women, who had not been paid any salary and were charged $150 for their housing, were deported or left the United States voluntarily. There was no charge at all.

Teenage Mexican girls were held in slavery in Florida and the Carolinas, and they were forced to submit to prostitution.

Russian and Latvian women were forced to work in nightclubs in the Midwest. According to charges filed against the traffickers, the traffickers picked the women up upon their arrival at the airport, seized their documents and return tickets, locked them in hotels and beat them. This is in our country. The women were told that if they refused to work in sexually exploitive conditions, the Russian Mafia would kill their families. Furthermore, over a 3-year period, hundreds of women from the Czech Republic who answered advertisements in Czech newspapers for modeling were ensnared in an illegal prostitution ring.

Trafficking in persons for labor is an enormous problem as well. The INS has also worked on cases involving South Asian children smuggled into the United States to work in slavery-like conditions. In one case, about 100 Indian children, some of them as young as 9 or 10, were brought into New York and shuffled around the country to work in construction and restaurants--ages 9 and 10, in the United States;

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today, in the United States--2000.

Some of the children appear to have been sold by their parents to the traffickers. In Woodbine, MD, a pastor bought Estonian children, ages 14 to 17, promising them they would attend Calvery Chapel Christian Academy, but then forcing them to clean roach-invested apartments and to do construction. The children worked 15 hours a day. The children were threatened and punishments included denial of food and being forced to stand in one spot for prolonged periods.

The bitter irony is that quite often victims are punished more harshly than the traffickers because of their illegal immigration status, their serving as prostitutes, or their lack of documents, which the traffickers have confiscated in order to control the victims.

A review of the trafficking cases showed that the penalties were light and did not reflect the multitude of human rights abuses perpetrated against these women.

In a Los Angeles case, traffickers kidnapped a Chinese woman, raped her, forced her into prostitution, posted guards to control her movements, and burned her with cigarettes. Nevertheless, the lead defendants received 4 years and the other defendants received 2 and 3 years. That is what they received.

In a tragic case involving over 70 Thai laborers who had been held against their will, systematically abused, and made to work 20-hour shifts in a sweatshop, the seven defendants received sentences ranging from 4 to 7 years with one defendant receiving 7 months.

In another case where Asian women were kept physically confined for years with metal bars on the windows, guards, and an electronic monitoring system, and were forced to submit to sex with as many as 400 customers to repay their smuggling debt, the traffickers received 4 years and 9 years--in the United States of America, in the year 2000.

I thank Senator Brownback for his work. It is important.

A review of the trafficking cases showed that the penalties were light and they did not reflect the multitude of the human rights abuses perpetrated against these women. The statutory minimum for sale into involuntary servitude is only 10 years, whereas the maximum for dealing in small quantities of certain drugs is life.

Let me repeat that. The statutory minimum for sale into involuntary servitude is only 10 years, whereas the maximum for dealing in small quantities of certain drugs is life.

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Few State and Federal laws are aimed directly at people who deliver or control women for the purpose of involuntary servitude or slavery in sweatshops or brothels. Consequently, prosecutors are forced to assemble cases using a hodgepodge of laws, such as document fraud and interstate commerce, and accept penalties that they believe are too light for the offense. Up until this legislation, there was no way for the prosecutors to go after these traffickers.

The Victims of Violence and Trafficking Protection Act of 2000 establishes, for the first time, a bright line between the victim and the perpetrator. It punishes the perpetrator and provides a comprehensive approach to solving the root problems that create millions of trafficking victims each year.

This legislation aims to prevent trafficking in persons, provide protection and assistance to those who have been trafficked, and strengthen prosecution and punishment for those who are responsible for the trafficking. It is designed to help Federal law enforcement officials expand antitrafficking efforts here and abroad, to expand domestic antitrafficking and victim assistance efforts, and to assist nongovernment organizations, governments and others worldwide, who are providing critical assistance to victims of trafficking. It addresses the underlying problems which fuel the trafficking industry by promoting public antitrafficking awareness campaigns and initiatives in other countries to enhance economic opportunity, such as microcredit lending programs and skills training, for those who are most susceptible to trafficking, and have an outreach so women and girls as young as 10 and 11 know what they might be getting into.

It also increases protections and services for trafficking victims by establishing programs designed to assist in the safe reintegration of victims into their communities and ensure that such programs address both the physical and mental health needs of trafficking victims.

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Imagine what it would be like to be age 12 or 13, a young girl, to go through this. We have, in Minnesota, the Center for the Treatment of Torture Victims. It is a holy place. I have had an opportunity to meet with staff and meet with many men and women who have been helped by this center. These girls, these women, have gone through the same living hell.

This legislation also increases protections and services for trafficking victims by providing community support. Furthermore, the bill seeks to stop the practice--and this is so important. I am sitting next to Senator Kennedy who has done so much with the immigration work. This bill seeks to stop the practice of immediately deporting the victims back to potentially dangerous situations by providing them with

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(The report was printed in the House proceedings of the Record of October 5, 2000.)

The PRESIDING OFFICER. The Senator from Kansas is recognized.

Mr. BROWNBACK. Mr. President, I believe under the uniform unanimous consent agreement that we have, time has been allocated to several different Members of the Senate to speak on this conference report; is that correct?

The PRESIDING OFFICER. The Senator is correct.

Mr. BROWNBACK. Mr. President, let me start this debate and discussion with the story of Irina. Irina's story appeared in the New York Times not that long ago, and it is similar to the story of a number of women with whom I have met and who have been caught in this situation of sex trafficking--young ladies I met with in Nepal, and several testified in committee. I think Irina's story tells in graphic detail why this is a problem and why the Senate needs to act.

> Irina always assumed that her beauty would somehow rescue her from the poverty and hopelessness of village life. A few months ago, after answering a vague ad in a small Ukrainian newspaper, she slipped off a tour boat when it put in at Haifa, hoping to make a bundle dancing naked on the tops of tables.
>
> She was 21, self-assured and glad to be out of Ukraine. Israel offered a new world, and for a week or two everything seemed possible. Then, one morning, she was driven to a brothel, where her boss burned her passport before her eyes.
>
> "I own you," she recalled his saying. "You are my property and you will work until you earn your way out. Don't try to leave. You have no papers and you don't speak Hebrew. You will be arrested and deported. Then we will get you and bring you back."

That was her master. The article goes on.

> It happens every single day. Not just in Israel, which has deported nearly 1,500 Russian and Ukrainian women like Irina in the past three years. But throughout the world, where selling naive and desperate young women into sexual bondage has become one of the fastest-growing criminal enterprises in the robust global economy.
>
> ... Many end up like Irina. Stunned and outraged by the sudden order to prostitute herself, she simply refused. She

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some interim immigration relief. Victims of "severe forms of trafficking," defined as people who were held against their will--"for labor or services through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery"--would be eligible for a special visa letting them stay in the country at least through the duration of their captors' prosecution, and perhaps permanently.*****-*****- -Name: -Payroll No. -Folios: -Date: -Subformat:

Right now, if you are a Ukrainian girl or woman in a massage parlor in Bethesda, and you step forward to get some help, you are deported. The trafficker is hardly prosecuted. The victim is automatically deported. This provides temporary visa protection.

I will give an example. In a 1996 trafficking case involving Russian and Ukrainian women who had answered ads to be au pairs, sales clerks, and waitresses but were forced to provide sexual services and live in a massage parlor in Bethesda, MD, 2 miles from here, the Russian American massage parlor owner was fined. He entered a plea bargain and charges were dropped with the restriction that he would not operate his business again in Montgomery County. The women, who had not been paid any salary, were forced into prostitution, and were charged for their housing, were deported.

This legislation toughens current Federal trafficking penalties, criminalizing all forms of trafficking in persons and establishing punishment commensurate with the heinous nature of this crime. The bill establishes specific laws against trafficking. Violators can be sentenced to prison for 20 years to life, depending on the severity of the crime. Yes, if you are trafficking a young girl and forcing her into prostitution, you can face a life sentence. They can also be forced to make full restitution to their victims, paying them the salary that would have been due for their months or years of involuntary service.

This bill requires expanded reporting on trafficking, including a separate list of countries which are not meeting minimum standards for the elimination of trafficking.

It requires the President to suspend "nonhumanitarian and nontrade" assistance to only the worst violators on the list of countries which do not meet these minimum standards and who actively condone this human rights abuse. This is a major piece of human rights legislation. This is a major human rights bill.

These are the rare governments which are openly complicit in trafficking people across their borders. It allows the Congress to monitor closely the progress of countries in their fight against trafficking, and it gives the administration flexibility to couple its diplomatic efforts to combat trafficking with targeted enforcement

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action. Finally, the bill provides three generous waivers.

By passing the Victims of Violence and Trafficking Act today, this Chamber will take a historic step toward the elimination of trafficking in persons.

Thanks to the partnership of Jewish and Evangelical groups, women and human rights organizations, and others, we will take a historic and effective step against organized crime rings and corrupt public officials who each year traffic more than 2 million people into desperate, broken lives of bondage and servitude.

Something important is in the air when such a broad coalition of people, including Bill Bennett, Gloria Steinem, Rabbi David Sapperstein, Ann Jordan, and Chuck Colson work together for the passage of this legislation. I am thankful for their support, I am thankful for the support of the administration, and I am thankful for your support today in seeking to end this horrible, widespread, and growing human rights abuse.

By way of conclusion, I say to my colleagues, starting with Senator Brownback, I believe with passage of this legislation--I believe it will pass today and the President will sign it--we are lighting a candle. We are lighting a candle for these women and girls and sometime men forced into forced labor. I also think because of the work of so many in the House and the Senate, this can be a piece of legislation that other governments in other parts of the world can pass as well. This is the beginning of an international effort to go after this trafficking, to go after this major, god-awful human rights abuse, this horrible exploitation of women, sometimes men, and of girls.

I am very proud of this legislation. I thank my colleague from Kansas. I thank other colleagues as well.

Mr. President, how much time do I have remaining?

The PRESIDING OFFICER (Mr. Hagel). The Senator has 36 minutes remaining.

Mr. WELLSTONE. Mr. President, I reserve the remainder of my time. The other part of this legislation that is so significant, and I know colleagues are here to speak about it, is the reauthorization of the Violence Against Women Act. I want to reserve time to speak about that very important piece of legislation. For me, to see both of these bills pass and to see it happen today is one of the best days I can have in the Senate. I yield the floor.

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The PRESIDING OFFICER. The Senator from Vermont.

Mr. **LEAHY.** Mr. President, if the Senator from Massachusetts will withhold for a moment, is my understanding correct that the Senator from Vermont has 3 hours?

The PRESIDING OFFICER. The Senator is correct.

Mr. **LEAHY.** Mr. President, for the information of colleagues, I do not intend to use all that time. At some point, I am going to yield back a considerable amount of time. I know there are Senators on both sides of the aisle who have commitments tonight, some connected with the debates of the two parties' Presidential nominees. It is my hope we will be voting fairly early this afternoon--a vote on the Thompson point of order and final passage.

I yield such time as the Senator from Massachusetts needs, and I ask unanimous consent that I then be able to yield to the Senator from California.

The PRESIDING OFFICER. Without objection, it is so ordered. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, I greatly appreciate the absolutely splendid presentation by my friend and colleague, Senator Wellstone. I agree with him on so many issues. His statement today was one of his very best. We can certainly understand the extraordinary work he has done, along with Senator Brownback and others, to make sure this legislation is considered. All of us will forever be grateful to him for his leadership in this extremely important area. I certainly am. I thank him for an absolutely splendid presentation.

Mr. President, I'm pleased that the Senate is finally about to pass the re-authorization of the Violence Against Women Act. The current authorization for the Act expired on September 30, and it has taken far too long to bring this important extension to the Senate floor.

A woman is beaten every 15 seconds as a result of domestic violence. Every year, one-third of the women who are murdered are killed by their husbands or partners, and approximately one million women are stalked. Conservative estimates indicate that 60 percent of disabled women, up to 25 percent of pregnant women, and 1 out of 25 elderly people have suffered domestic violence.

This isn't a problem that only affects adults. Each year, 3.3 million children are exposed to domestic violence. In homes where abuse of women occurs, children are 1,500 times more likely to be abused as

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well. Whether they witness the violence or are actually assaulted by the abuser, many children learn shocking behavior from adults. 12 percent of high school dating couples

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have suffered abuse in their relationships, and often these teenagers are themselves victims of abuse at home.

Eighteen year-old Tanyaliz Torres and her mother were stabbed to death by her father in Springfield, Massachusetts. Fifty-eight-year-old Mabel Greineder of Wellesley, Massachusetts was stabbed and bludgeoned to death by her husband. From October 1999 through September 2000, 24 Massachusetts women and children were killed as a result of domestic violence. It is a national epidemic that touches every community in the country.

The Violence Against Women Act was enacted in 1994 to address this problem and provide greater safety and peace of mind for millions of women and their families. The act creates a partnership between the public sector and the private sector at every level--Federal, State, and local. Its goal is to establish a safety net of new programs and policies, including community-based services for victims, a National Domestic Violence Hotline, needed technological assistance, and larger numbers of well-trained law enforcement officers and prosecutors.

The national Hotline gives women across the country immediate access to the help they need. Since its initiation in 1996, it has received over 500,000 calls. When a Spanish-speaking woman in Arizona needed shelter for herself and her three children, the Hotline called a shelter in Phoenix, found a Spanish-speaking counselor, and gave the caller the counselor's name and directions to the shelter. In the countless cases, the Hotline is an invaluable resource, and we must do all we can to support it.

In Massachusetts, $20 million under the Violence Against Women Act has been awarded to advocacy organizations, law enforcement personnel, and State and local governments. The Wampanoag Tribe of Gay Head received funding to develop and strengthen tribal justice strategies to remedy violent crimes against Indian women and to develop and strengthen services for victims.

The act also supports HarborCOV--Harbor Communities Overcoming Violence--a Massachusetts program serving Chelsea and Greater Boston. In addition to its core services, HarborCOV has an economic development component which helps survivors move from welfare to work. Employment training and employment referrals are also provided to help domestic violence victims find jobs.

The reauthorization will ensure that support for these programs and

others will continue. It also includes important new measures, such as transitional housing assistance and a $175 million authorization for shelters, which will be significant additional tools in the battle against domestic violence.

One of the most important provisions in the bill is the Battered Immigrant Protection Act. This provision helps battered immigrants by restoring access to a variety of legal protections undermined by the 1996 immigration laws. The Violence Against Women Act passed in 1994 included provisions that allowed battered immigrants to apply for legal status without the cooperation of their abusers, and enabled victims to seek protective orders and cooperate with law enforcement officials to prosecute crimes of domestic violence.

Unfortunately, the subsequent changes in immigration laws have reduced access to those protections. Thousands of battered immigrants are again being forced to remain in abusive relationships, out of fear of being deported or losing their children. The pending bill removes obstacles currently hindering the ability of battered immigrants to escape domestic violence safely and prosecute their abusers.

It restores and expands vital legal protections like 245(i) relief. This provision will assist battered immigrants, like Donna, who have been in legal limbo since the passage of the 1996 immigration laws. Donna, a national of Ethiopia, fled to the U.S. in 1992 after her father, a member of a prominent political party, was murdered. In 1994, Donna met Saul, a lawful permanent resident and native of Ethiopia. They married and moved to Saul's home in Massachusetts. Two years later, Saul began drinking heavily and gradually became physically and verbally abusive. The abuse escalated and Donna was forced to flee from their home. She moved in with close family friends who helped her seek counseling. She also filed a petition for permanent residence under the provisions of the Violence Against Women Act.

Unfortunately, with the elimination of 245(i), the only way for Donna to obtain her green card is to return to Ethiopia, the country where her father was murdered. The possibility of returning there terrifies her. This legislation will enable her to obtain her green card here, where she has the support and protection of family and access to the domestic violence counseling she needs.

Under this act, battered immigrants will also have up to one year from the entry of an order of removal to file motions to reopen prior deportation orders. The Attorney General may waive the one year deadline on the basis of extraordinary circumstances or hardship to the battered immigrant's child.

This Act will also expand remedies for battered immigrants living abroad with spouses and parents serving in the United States military or other federal positions. Current law only allows battered immigrants

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residing in the United States to request this relief. This bill will make it easier for these immigrants and their children to escape abusive relationships and obtain the help they deserve.

The legislation also grants the Attorney General the discretion to waive certain bars to immigration relief for qualified applicants. For example, battered immigrant women acting in self-defense are often convicted of domestic violence crimes. Under the 1996 immigration law, they became deportable and are denied relief under the Violence Against Women Act. The Attorney General will be able to use the waiver authority to help battered immigrants who otherwise qualify for relief.

Also, recently divorced battered immigrants will be able to file self-petitions. Current law allows only battered immigrant women currently married to their abusive spouses to qualify for relief. As a result, many abusers have successfully rushed to the court house to obtain divorces, in order to deny relief to their immigrant spouse. This provision will prevent this unfair result and ensure that victims are not wrongly deprived of the legal protection they need.

These and other important measures will do a great deal to protect battered immigrants and their children from domestic violence and free them from the fear that often prevents them from prosecuting these crimes. Congress enacted the Violence Against Women Act in 1994 to help all victims of domestic violence, regardless of their citizenship. It is long past time to restore and expand these protections.

I am also pleased that the legislation includes authorization for increased funds for the National Domestic Violence Hotline. Consistent with last year's funding, the bill authorizes $2 million a year for the hotline and ensures that the Hotline will be an effective source of assistance, providing vital services to women, children, and their families.

A second, equally important part of the bill we are considering today is the Trafficking Victims Protection Act, which condemns and combats the trafficking of persons into forced prostitution or forced labor, a practice that is tantamount to modern day slavery.

Enactment of this legislation will strengthen laws that punish traffickers and ensure protection for their victims--most of whom are women and children.

One of the most important of these provisions expands assistance and protection to victims of severe forms of trafficking, ensuring that they receive appropriate shelter and care, and are able to remain in the United States to assist in the prosecution of traffickers. Relief from deportation is also critical for victims who could face retribution or other hardship if removed from the United States.

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Sara, a native of Sri Lanka, was promised a lucrative job as a housekeeper. Upon arrival in the U.S., Sara was virtually imprisoned in her employer's Massachusetts home, and subjected to physical and sexual assault. She bore three children as a result of rape. After 5 years of living in captivity and isolation, she was finally

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able to escape. This legislation will provide persons like Sara with the protection and rights they need to assist in the prosecution of these despicable crimes.

Finally, this legislation also includes an important provision to provide compensatory damages to Frank Reed and other American citizens who were victims of Iranian terrorism.

In 1986, Frank Reed, of Malden, MA, was kidnapped in Lebanon. At the time, he was a private citizen and president of the Lebanese International School. During his 44-month captivity, he was blindfolded, chained, tortured, and held in solitary confinement for 2 years. His captors periodically fed him arsenic, from which his health still suffers.

In 1990, he was released to Syrian Army intelligence officers in Beirut, who took him to the U.S. Embassy in Damascus. I met him when he returned to the United States after his tragic and traumatic ordeal.

A U.S. judge ordered the Iranian Government to provide Frank Reed and his wife with $26 million in compensatory damages, but the Government has refused to comply.

Under the legislation we are approving today, the U.S. Government will provide the funding. The amount will be recovered in turn by the U.S. Government from the Iranian Government through a Foreign Military Sales Account that holds $400 million.

Frank Reed suffered immensely at the hands of his brutal captors, and so did his family, and he deserves this compensation.

I strongly support the Violence Against Women Act of 2000, the Trafficking Victims Protection Act, and the Justice for Victims of Terrorism Act. This legislation will ensure that we are doing much more to protect women from violence and abuse, and it deserves to be enacted as soon as possible.

ELEMENTARY AND SECONDARY EDUCATION ACT

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Mr. President, I want to also address the Senate for just a few moments on another matter of importance to families all across this country which is central to their concerns, and that is, what has happened to this Senate's commitment to passing and reauthorizing the Elementary and Secondary Education Act? That legislation is the backbone of Federal participation in helping local communities strengthen academic achievement and accomplishment. We are now going into the final days of this Congress and we still have not reauthorized that central piece of legislation even though we have had strong commitment by the majority party that this was a priority and that we were going to have consideration of this legislation.

We heard a great deal during the recent debates of our two candidates for President and our two candidates for Vice President about education. But our American families are wondering, whatever happened to the Senate of the United States on this issue? The fact is, we are basically AWOL, we are A-W-O-L on this issue. It is the first time in 35 years that we have failed to reauthorize this legislation.

I understand, as we remain here for these final days, that we will have a conference report for agriculture, that we will have a series of appropriations conference reports, but there is no reason in the world we can't go back and complete this legislation in the time that we are in here waiting for the various appropriations bills.

We continue to challenge the Republican leadership to bring this back. There is still unfinished business in education and in the area of minimum wage. There is unfinished business on the Patients' Bill of Rights and on the prescription drug issue.

I want to reemphasize exactly where we are on the issue of the Elementary and Secondary Education Act. These are statements that have been made by the Republican leader, Senator Lott's promise on education, going back to January 6, 1999. He said:

> Education is going to be a central issue this year.... For starters, we must reauthorize the Elementary and Secondary Education Act. That is important.

Remarks to U.S. Conference of Mayors, January 29, 1999:

> But Education is going to have a lot of attention, and it's not going to be just words....

Press conference, June 1999:

> Education is number one on the agenda for Republicans in

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the Congress this year....

Remarks to the U.S. Chamber of Commerce in February of 2000:

We're going to work very hard on education. I have emphasized that every year I've been Majority Leader.... And Republicans are committed to doing that.

A speech to the National Conference of State Legislatures, February 3, 2000:

We must reauthorize the Elementary and Secondary Education Act.... Education will be a high priority in this Congress.

On the Senate floor, May 1, 2000:

This is very important legislation. I hope we can debate it seriously and have amendments in the education area. Let's talk education.

Press stakeout, May 2, 2000:

Question: Senator, on ESEA, have you scheduled a cloture vote on that?

Senator Lott: No, I haven't scheduled a cloture vote.... But education is number one in the minds of the American people all across this country and every State, including my own State. For us to have a good, healthy, and even a protracted debate and amendments on education, I think is the way to go.

We agree with that statement. We still have some time, while we are waiting for the appropriators to conclude their work, where we ought to be bringing this back and having a full debate. We are prepared to do that. We think it can be done.

Senate floor, July 10, 2000:

I, too, would very much like to see us complete the Elementary and Secondary Education Act.... I feel very strongly about getting it done.... We can work day and night for the next 3 weeks.

Senate floor, July 25, 2000:

> We will keep trying to find a way to go back to this legislation this year and get it completed.

That was on July 25, and we are still waiting.

The fact is, we are failing to meet this central challenge. Our Presidential candidates are talking about the issue of education, but they are talking about it in a vacuum because the Senate of the United States is failing to take up this particular issue which makes such a difference to families, and that is strengthening academic achievement and accomplishment. The fact is that we are in a new world of technology and it is demanding. We have to refocus and re-prioritize the whole issue of education to make sure that it addresses the needs of today's economy and society. This is going to be central in terms of our national debate and discussion. That is what this debate is all about.

What is going to be our involvement in terms of helping families? The fact is that we are absent in this debate because we are refusing to conclude action.

This is what is happening in America. More students are now taking the SATs. 83 percent of four-year colleges use SAT scores as a factor in admission. Increasing numbers of students are recognizing that a college education is the key to success in America. Families understand the importance of taking those tests; children understand it. We want to make sure we are helping those families who have children taking the SATs and those who would like their children to take the SATs.

As depicted on this chart, this is what has happened. From 1995, 42 percent of the children were taking SATs, and it is up to 44 percent in 2000.

More students are also taking advanced math and science classes because they understand that in a highly technological world, with new kinds of demands in terms of technology, they are going to have to do more in terms of math and science courses. We see increases in the number of students taking advanced classes in pre-calculus, calculus, and physics. Young people are doing their share. The real question is whether we in the Congress are going to do ours. The answer comes back that, no, we are not. Look at what has been happening with the SAT math scores. They are higher now than in the last 30 years, and they are continuously moving up. The indicators are all positive. You would not know that listening to **Governor Bush** last week. We know we are facing challenges across the country, but look at the SAT math scores; they are the highest in 30 years. More kids are taking the SAT, and still

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was beaten and raped before she succumbed. Finally she got a break. The brothel was raided and she was brought here to another place , the only women's prison in Israel. Now, like hundreds of Ukrainian and Russian women with no documents or obvious forgeries, she is waiting to be sent home.

This is a quote from Irina:

"I don't think the man who ruined my life will even be fined," she said softly, slow tears filling her enormous green eyes. "You can call me a fool for coming here. That's my crime. I am stupid. A stupid girl from a little village. But can people really buy and sell women and get away with it? Sometimes I sit here and ask myself if that really happened to me, if it can really happen at all."

Then, waving her arm toward a muddy prison yard, where Russian is spoken more commonly than Hebrew, she whispered one last thought: "I am not the only one, you know. They have ruined us all."

I ask unanimous consent to have printed in the Record the full text of this article.

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

Traffickers' New Cargo: Naive Slavic Women

(By Michael Specter)

Ramle, Israel.--Irina always assumed that her beauty would somehow rescue her from the poverty and hopelessness of village life. A few months ago, after answering a vague ad in a small Ukrainian newspaper, she slipped off a tour boat when it put in at Haifa, hoping to make a bundle dancing naked on the tops of tables.

She was 21, self-assured and glad to be out of Ukraine. Israel offered a new world, and for a week or two everything seemed possible. Then, one morning, she was driven to a brothel, where her boss burned her passport before her eyes.

"I own you," she recalled his saying. "You are my property and you will work until you earn your way out. Don't try to leave. You have no papers and you don't speak Hebrew. You will be arrested and deported. Then we will get you and bring you back."

It happens every single day. Not just in Israel, which has

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the scores are moving up. I think we ought to understand what is happening out there. Some progress is being made.

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Now, this doesn't mean that progress is being made in all of the States. That is very important, indeed. Looking at the State SAT averages and progress made since 1997, some States have done much better than others. I am glad my own State of Massachusetts has moved up some 8 points, from an average total SAT score of 1,016 in 1997 to 1,024 in 2000. We have had major educational reforms. We have done many things in our State in terms of smaller class sizes, better trained teachers, and afterschool programs. We are not doing all the things we need to be doing, but we have done a lot. We have also taken advantage of Net Day to try, in a voluntary way, to get good computers in classrooms with well-trained teachers.

We also have found out in this discussion and debate that not all the States--including the State of Texas--have made progress. It is interesting that actually the State of Texas has declined some 2 points in their average total SAT score since 1997. They dropped from an average score of 995 in 1997 to 993 in 2000. They are also below the national SAT total score average. The national average has gone up 3 points from 1997 to 2000, but the State of Texas has gone down 2 points. That is a 5-point spread. So I think when we listen to these debates about what ought to be done, we ought to try to take with a grain of salt what has been happening in Texas over the period of these last 3 years.

In addition, looking back at the trend over the last 10 years, as I understand it, in SAT verbal scores since 1990, Texas has been 10 points below the national average. By 2000, the gap had grown to 12 points. In math, Texas has been 12 points below the national average. By 2000, the gap has grown to 14 points.

I think we want to have leadership at the national level that is going to bring continued improvement. We know we have challenges. We know we have challenges in urban areas and we have challenges in rural areas. But we also know some of the things that work. The STARS Program, as we have seen in Tennessee, has been very important in terms of enhancing children's academic achievement and accomplishment.

We know what has happened when we focus on getting better teachers in schools, such as in the State of Connecticut. Much of the progress there has been under Republican as well as Democratic Governors. We want to try to find out what has worked in these States and then have an opportunity to try to give general national application to it. But we are effectively being closed out by the Republican leadership from having this debate. That is what families ought to understand across this country.

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We are basically being told we can't have a debate here in the Senate on the issue of education. We had 6 days when the measure was before the Senate, and 2 days were for debate only. We had eight votes and one was a voice vote. So that meant seven rollcalls and three of them were virtually unanimous. So we really didn't have much debate and discussion. We had 16 days of debate on the bankruptcy legislation and 55 different amendments on it. So it is a matter of prioritizing.

I dare say we are failing to meet the responsibilities to families across this country who want to have investment in the kinds of educational programs that are going to work and who understand their children are living in a new age of technological challenges. They want to see their children move ahead academically. We have seen that children are prepared to do that. We have seen them taking more difficult courses. They are taking the challenges of SATs. They are prepared to move ahead.

Some of the States are moving ahead boldly, such as North Carolina, in terms of their efforts. But we have to ask ourselves: Where in the world are the Congress and Senate in terms of helping and assisting families in this area? The fact of the matter is that we are AWOL. We have failed to do our homework. If we were students with this behavior, we would be in the principal's office for several hours in discipline.

We are going to continue to talk about this. I see that we now are going to have a continuing resolution that will go into next week. We may go even further. There is no reason in the world we can't use these interludes to take on one of the really important issues for families; that is, the reauthorization of the Elementary and Secondary Education Act.

I thank the Senator from Vermont for yielding time.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. **LEAHY.** Mr. President, I believe under the unanimous consent agreement that I can now yield to the distinguished Senator from California. I ask the Senator from California how much time she would like.

Mrs. BOXER. Between 10 and 15 minutes.

Mr. **LEAHY.** I yield 15 minutes to the distinguished Senator from California.

So many have worked so hard on this. The distinguished Senators from

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Massachusetts and Minnesota have spoken already, but especially Senators Boxer, Mikulski, Lincoln, Landrieu, Murray, and Feinstein have worked so hard.

I yield 15 minutes to the Senator from California.

I ask the Chair how much time is remaining for the Senator from Vermont.

The PRESIDING OFFICER. The Senator has 2 hours 35 minutes remaining.

Mr. **LEAHY.** I thank the Chair.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. Mr. President, thank you very much. I thank my friend from Vermont for all his hard work. I thank my friend, Senator Wellstone. I thank Senator Brownback. I thank Senator Biden and Senator Hatch.

We have a very important bill before us. I think the Trafficking Victims Protection Act sort of stands on its own. I would love to have seen that come on its own because it is a landmark piece of legislation. I felt the same way about the Violence Against Women Act.

That is a landmark piece of legislation. Unfortunately, I think we have issues and pieces of legislation that shouldn't be in here. But that is the way it goes. How you would ever get to the point where you would put an issue that deals with sales of wine on the Internet is beyond me. I don't think people really get what we do here when we take these issues and blend them together. But let's call it the way it is.

The Trafficking Victims Protection Act and the Violence Against Women Act are so important that Members are willing to say, even if they didn't agree with all the appendages, they are willing to go along with them. I am going to make some comments about each piece that is in this legislation.

The Violence Against Women Act is very near and dear to my heart because in 1990 I was over in the House, where I served very proudly for about 10 years, and Senator Biden came to me and said: Would you be willing to offer the Violence Against Women Act in the House? He had authored it in the Senate. I was extremely pleased to agree.

The whole issue of domestic violence in our country up until that

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time was never discussed. It was swept under the rug. Even though we knew it was brutalizing women and children, we didn't have the courage to act. In those early years, it was very hard to get attention paid to violence against women.

I was able in the House to get through just a couple of pieces of that legislation. But it wasn't until I came to the Senate with Senator Biden that we really orchestrated tremendous support for the bill. In 1994, we got it through as part of the Crime Act. It has proven itself.

In this particular reauthorization, we will provide $3.3 billion in funding over the next 5 years to protect victims of domestic abuse and violence. We have made tremendous progress. We have seen a reduction of about 21 percent in domestic violence. But still to this day, we have a national crisis that shatters the lives of millions of women across the country and tears at the very fabric of our society.

Reauthorizing these programs sends a much needed message to those who even think about lifting a hand to a spouse or think about lifting a hand to an innocent child that we will not stand silently by and that we in fact will protect those victims of domestic violence.

We know that nationwide nearly one in every three adult women experiences at least one physical assault by an intimate partner. We know for a fact that domestic violence is the leading cause

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of injury to women age 15 to 44, with nearly one-third of women who are murdered being murdered by a husband or a boyfriend.

Although domestic violence affects both men and women, the overwhelming majority of domestic violence victims happen to be women. That is why a majority of the services authorized under the Violence Against Women Act focus on the unique circumstances of women in abusive relationships.

Again, we have made progress. Since 1994, when the bill passed and President Clinton signed it into law, there has been a 21-percent decrease in intimate partner violence and we have increased battered women's shelters by 60 percent.

I remember in those years when we were battling for this bill, we originally pointed out that there were more shelters for animals than there were for battered women. I am proud to say today we have seen an increase in the number of shelters so we can in fact address the critical needs of victimized women and their children, many of whom have absolutely no place to go and therefore sometimes they are forced to stay in these abusive relationships. Where are they going to go?

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They will go out on the street if they don't have a loving family to go home to. It is a tragic situation indeed.

The bill ensures that we will be funding a continued increase in these shelters. But we also want to stop the violence before it gets to that. We have STOP grants that provide moneys for rape prevention, and education grants, and a 24-hour national domestic violence hotline which is so important. Women in these circumstances need to have a reassuring voice. They believe sometimes that no one cares about them; they are all alone. If they can dial that hotline and get professional help, it makes all the difference in the world.

This bill will strengthen law enforcement efforts to reduce domestic violence by requiring the enforcement of other States' protection orders as a condition of funding for some of the grants. In other words, if you have a batterer who tries to escape prosecution by going across State lines, we address this issue.

This is very important. I want to talk about the children. We talk about battered women, but we know--this is an incredible fact as we look at the causes of violence in society, and we are right to look everywhere in the society--we need to understand if a young boy sees his father beat his mother, that child is twice as likely to abuse his own wife than the son of a nonviolent parent. If a child, particularly a young boy, sees a father beat a mother, he is twice as likely to abuse his own spouse.

We know 10 million children every year are exposed to domestic violence. More alarming even than that is the fact that 50 percent to 70 percent of those men who abuse their female partners also abuse their children. It becomes a way of life and a way of communicating for which we should have zero tolerance. These abused children are at high risk for violent, delinquent behavior. The National Institute for Justice reports that being abused as a child increases a child's likelihood of arrest as a juvenile by 53 percent. We know even when they are young they are more apt to be arrested and get in trouble. We know when they are adult and they marry they are more likely to abuse a spouse.

When we talk about the Violence Against Women Act, we are not talking only about women. We are also talking about the children. If there is anything we can do in this hallowed hall of the Senate, it is to protect children. We have the Safe Havens for Children Pilot Program; we have victims of child abuse programs funded; we have rural domestic violence and child abuse enforcement grants. This package also includes training for judges and court personnel. We also, for the first time, look at battered immigrants, which is a very important issue, because we sometimes have people coming here who don't understand their rights. They need to understand their rights, that their bodies don't belong to anyone else, and they have a right to cry out if they are abused.

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There are many other programs reauthorized by the Violence Against Women Act, such as those to combat sexual assault and rape, transitional housing, and civil, legal assistance. Again, a lot of these folks don't understand their legal rights. We provide grants to counsel them. We include protection for older and disabled women.

It is hard to even imagine an older woman in our society or a disabled person being victimized. Is there no rule that would say to every human being that there has to be respect? Unfortunately, in some cases, these rules don't penetrate. So we have to get tough and make sure that we prevent this. However, if it happens, we will crack down.

Again, I thank Senator Joe Biden for his work. It is very important.

Also, a judgeship that is being held up is the nomination of Bonnie Campbell to the U.S. Court of Appeals for the Eighth Circuit. One might ask what it has to do with the Violence Against Women Act. The fact is, Bonnie Campbell has been the first and only Director of the Violence Against Women Office in the Department of Justice, and her nomination is being held up because of partisan politics in the Senate. Here is a woman who paved the way for the Violence Against Women Act, ensuring it was successful, and she is a perfect person to be a judge. She was the attorney general in Iowa for many years. Her achievements and qualifications are obvious. If we really care about the Violence Against Women Act, and I believe we do, then I believe we will have an overwhelming vote, hopefully a unanimous vote. Then we ought to look at one of the people who has made this act such a success. What a wonderful tribute it would be to the women of America to make Bonnie Campbell a judge.

I join with Senator Harkin on this because I know he has been quite distressed that such an excellent nominee has had a hearing, but her nomination has not come out of committee. We know of no one who is opposed to Bonnie Campbell. I think it would be a fitting tribute to the women of America to bring her nomination quickly to the floor.

I appreciate the work of Senator Wellstone and Senator Brownback on the Trafficking Victims Protection Act. We know that some of these victims have been subjected to the most horrific lives, including rape, sexual abuse, torture, starvation, and imprisonment. The selling of naive and desperate women into sexual bondage has become one of the fastest growing criminal enterprises in the global economy. It is hard to understand how this could happen. But when people are in a strange land and are frightened, they look to others to protect them when they really want to hurt and harm them. This legislation authorizes $94 million over 2 years to stop this abhorrent practice.

At the beginning of my remarks, I talked about sometimes attaching bills to other bills that make no sense. I am sad to say this has the

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alcoholic beverage sales attached to it. I am very sorry for the small wineries in my State. I tried to protect them. I will have some kind of a colloquy with Senator Hatch on this. Half of our 900 wineries in California are run by families. They don't have big, elaborate distributors; they don't have a big distribution. Because of this they will need to sell their product on the Internet. I have nothing against the way wine is distributed, but the new technologies will make it possible for our many wine sellers to sell directly to consumers without the need to go through a middleman or middle person. I think it is sad that we have attached this because these very small family-owned wineries may well suffer.

I am going to be working with my colleagues. I know Senator **Leahy** is quite sympathetic to this. We want to make sure there are no negative impacts from this legislation. We think there will be. But we are going to follow this very closely.

The excuse given is, we will stop kids from buying on the Internet. That is a legitimate point. But we recommended a solution dealing directly with preventing underage drinking, and it was not accepted. In my heart of hearts, I believe this is a special interest piece of legislation to protect the distributors. It doesn't do anything to protect young people from buying liquor. I think it is a sad day for our small wineries that are trying hard to survive in California.

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In conclusion, I again thank Senator **Leahy** for this time. It is a wonderful day. We finally got this Violence Against Women Act reauthorized. We are going to put an end, hopefully, to the sex trafficking. It is a good day for the Senate.

I only hope we will heed the words of Senator Kennedy now and get on with education, get on with prescription drugs, and get on with the real Patients' Bill of Rights. Let's do our work. We can do our work. The American people want us to do it. The way the procedure is going now, we have no chance to offer amendments on education or health care. It is a shame.

I yield my time.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. **LEAHY.** Mr. President, I agree with the distinguished Senator from California on Bonnie Campbell. As the one who has brought life into the Violence Against Women Act, it is remarkable that she cannot even get a vote in this Chamber on her judicial nomination.

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I have said on the floor, although we are different parties, I have agreed with Gov. George Bush, who has said that in the Senate a nominee ought to get a vote, up or down, within 60 days. I urge in the time remaining in this session that he, as the head of his party, as their Presidential nominee, call the Republican leader of the Senate and say that all of these women, all of these minorities, in fact, all of the people who have been sitting here for well over 60 days waiting for a vote on their nomination, let them have a vote. Vote for them or vote against them. Bonnie Campbell deserves a vote. My guess is the reason she has not been brought for a vote is they know at least 80 of the 100 Senators would vote for her. It would be impossible to justify a vote against her because of her extraordinary qualifications.

Again, if **Governor Bush** is serious when he says have a vote within 60 days, pick up the phone, call the Senate majority leader, reach him at the switchboard, 202-224-3121, and ask him to bring her to a vote. It is a very easy thing to do.

I agree with the Senator on the Internet alcohol bill. That was included over my objection. It is unnecessary. It is dangerous to e-commerce. Adding Internet sales on alcohol demeans the issue of violence against women and sex trafficking that this bill is all about. It is demeaning to what is a good bill.

Mrs. BOXER. I thank my friend for his comments on all fronts. Regarding his last comment, he is so right. When I first learned there was a move to attach this bill to the Violence Against Women Act, I was absolutely stunned. People have to watch what we do here. They understand, unfortunately, that the special interests still have a lot of influence. This is one case where they had too much influence. As my friend knows, we tried to work this so we could address the issue of juveniles buying liquor from the Internet, which everyone agrees is a terrible thing. This hurts our small wineries--let's call it the way it is--in favor of the big distributors.

But on the Bonnie Campbell point, I particularly want to say to my friend how much I have appreciated his leadership on these judicial nominations. I say today we would not have had even the meager number that we have had without his leadership and his pointing out, over and over again, that women and minorities are getting second-class treatment here.

I ask my friend if he would recount, briefly, the study he had quoted many times, showing that women and minorities take about 3 months longer, on average, to get through; just his comments on how it always seems we are here fighting for women or a minority. It does not seem as if we have to fight that hard for the white male.

Mr. **LEAHY.** If the Senator will yield, the study was done by the non-partisan Citizens for Independent Courts. In fact, the former

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Republican Congressman from Oklahoma, Mickey Edwards, co-chaired that study. They found, without taking sides and without taking political stands, that women and minorities took longer to be confirmed by the Senate. Unfortunately, a lot of those women and minorities are not even getting a vote.

Again I say if **Governor Bush** means it, pick up the phone and call 202-224-3121; ask the Senate switchboard to connect him to the Republican leader and say: You know, I have made it a tenet of my campaign that the Senate should vote on a nomination within 60 days. You can bring every one of these people to the floor for a vote, up or down, today. Let's do so. Who knows. We will find out how the Senate feels about them. Are they for them or are they against them? Right now, instead of voting yes or no, we vote "maybe," by having one or two Senators in the dark of night put holds on these people.

I see the distinguished Senator from Washington State, who has been one of the great leaders on the issue of violence against women, on sex trafficking, and on these other issues. I ask her, how much time does the Senator from Washington require?

Mrs. MURRAY. Ten minutes.

Mr. **LEAHY.** We yield 10 minutes.

The PRESIDING OFFICER. The Senator from Washington.

Mrs. MURRAY. Mr. President, I thank the Senator from Vermont for his comments. I am looking forward, hopefully, to him chairing the Judiciary Committee next year; so that women such as Bonnie Campbell are not held up for months on end and we actually have a chance to put good, qualified women and minorities into judiciary positions in this country.

I also thank the Senator from Vermont for his tremendous work on the Violence Against Women Act, bringing us to a point today where we are finally going to have a vote on this bill, despite the fact there are other parts of this bill that I do not believe should be attached to it. I appreciate his efforts because this is an extremely important bill.

I have come to the floor to express my strong support for reauthorizing the Violence Against Women Act and to endorse the pending conference report. In communities across America, the Violence Against Women Act has been an overwhelming success. It has empowered women and children to escape violent relationships, and it has helped to put abusers behind bars. On every account, the Violence Against Women Act deserves to be reauthorized. I urge my colleagues to support this vital

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legislation.

It is unfortunate that reauthorization was allowed to lapse this past month, but I am pleased the Republican leadership has finally agreed that reauthorization must be a priority. I wish we had reached the conclusion earlier in this session.

This subject deserves a much more open and extended debate than has been allowed, but I want to take full advantage of the opportunity before us, the chance to reauthorize and strengthen the Violence Against Women Act. VAWA has been nothing short of historic.

Not long ago, domestic violence was considered a private family matter. That perception made it very difficult for women to get help and for communities to confront domestic violence. But all of that changed in 1994. I am very proud to have worked to pass the Violence Against Women Act because, for the first time, our Nation recognized domestic violence for what it is--a violent crime and a public health threat.

Through the Violence Against Women Act, we created a national strategy for dealing with violence against women. Today, looking back, it is very clear just how revolutionary the act was. For the first time, it established a community-wide response, bringing together cops and prosecutors, shelters and advocates and others on the front lines of domestic violence. It authorized programs to give financial and technical support to police departments to focus on domestic violence and to encourage arrests. It recognized and supported the essential role of the courts in ensuring justice. It provided funding for battered women's shelters and for programs that address the public health impact of domestic violence.

VAWA authorized funding for the Centers for Disease Control and Prevention, for Rape Prevention and Education, and it helped establish a national toll-free hotline for victims of domestic violence. Today, 1-800-799-SAFE offers battered women immediate help. In fact, every month, that hotline receives more than 13,000 calls. Back in 1994, some people wondered whether this unprecedented national strategy would work. Today, 6 years

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later, the facts are in and it is clear that the Violence Against Women Act has been a success. Arrests and convictions are up. We have more than doubled funding for battered women's shelters. Since 1994, we have appropriated close to $2 billion for VAWA-related programs.

As a member of the Senate Appropriations Committee, one of my highest priorities has always been increasing funding for the Violence Against Women Act programs. In communities throughout my State and others, the

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deported nearly 1,500 Russian and Ukrainian women like Irina in the past three years. But throughout the world, where selling naive and desperate young women into sexual bondage has become one of the fastest-growing criminal enterprises in the robust global economy.

The international bazaar for women is hardly new, of course. Asians have been its basic commodity for decades. But economic hopelessness in the Slavic world has opened what experts call the most lucrative market of all to criminal gangs that have flourished since the fall of Communism: white women with little to sustain them but their dreams. Pimps, law enforcement officials and relief groups all agree that Ukrainian and Russian women are now the most valuable in the trade.

Because their immigration is often illegal--and because some percentage of the women choose to work as prostitutes--statistics are difficult to assess. But the United Nations estimates that four million people throughout the world are trafficked each year--forced through lies and coercion to work against their will in many types of servitude. The International Organization for Migration has said that as many as 500,000 women are annually trafficked into Western Europe alone.

Many end up like Irina. Stunned and outraged by the sudden order to prostitute herself, she simply refused. She was beaten and raped before she succumbed. Finally she got a break. The brothel was raided and she was brought here to Neve Tirtsa in Ramle, the only women's prison in Israel. Now, like hundreds of Ukrainian and Russian women with no documents or obvious forgeries, she is waiting to be sent home.

"I don't think the man who ruined my life will even be fined," she said softly, slow tears filling her enormous green eyes. "You can call me a fool for coming here. That's my crime. I am stupid. A stupid girl from a little village. But can people really buy and sell women and get away with it? Sometimes I sit here and ask myself if that really happened to me, if it can really happen at all."

Then, waving her arm toward the muddy prison yard, where Russian is spoken more commonly than Hebrew, she whispered one last thought: "I'm not the only one, you know. They have ruined us all."

traffic patterns: russia and ukraine supply the flesh

Centered in Moscow and the Ukrainian capital, Kiev, the networks trafficking women run east to Japan and Thailand, where thousands of young Slavic women now work against their will as prostitutes, and west to the Adriatic Coast and beyond. The routes are controlled by Russian crime gangs based in Moscow. Even when they do not specifically move the

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need is overwhelming, and funding makes a dramatic difference. Working with the chairman of the Subcommittee on Labor, HHS, and Education of the Senate Appropriations Committee, I have seen funding for shelters climb from $10 million to more than $100 million. I know Senator Specter has been a strong advocate for the Violence Against Women Act programs. I am pleased that VAWA has always been a bipartisan issue in appropriations.

While we have much to be proud of today, we cannot forget that abuse is still too common. In Washington State, my home State, the toll-free domestic violence hotline received more than 37,000 calls between July 1998 and July 1999. We cannot forget that there are still too few resources for women in need. In my State during that same period, 23,806 women and children were turned away from shelters--turned away as they sought help because the resources were not there.

We cannot forget that not all communities offer a full range of services, and not all police departments are equipped to handle a life-threatening domestic violence call.

The truth is, while the Violence Against Women Act was a historic first step, it was just that, a first step. The time has come for us to build on the foundation created by that act. VAWA offered an immediate response to the threat of violence. Now it is time to address the long-term issues. It is time to confront the long-range economic barriers that trap women and children in violent relationships.

I have worked with Senators Wellstone and Schumer to write and introduce the Battered Women's Economic Security Act. This legislation tears down economic barriers and breaks the cycle of violence. Our bill deals with employment discrimination, insurance discrimination, housing assistance, legal help, and child care. It addresses the punitive elements of the welfare system that can penalize women who are fleeing dangerous situations. It provides additional help to shelters and providers to meet the overwhelming needs of battered women and children.

I had hoped we would have been able to reauthorize the Violence Against Women Act in a timely manner and move to addressing those economic issues that I have outlined. Unfortunately, we cannot have that debate today or in this session of Congress. But let me assure my colleagues we will be back in the 107th Congress to fight to put these powerful tools in the hands of victims and their advocates.

Before I conclude, I want to say a special word of thanks to the many people who have helped us reach this point today.

I thank, again, Senator **Leahy** and Senator Biden for their leadership. They worked very hard to bring a bipartisan bill to the floor today.

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I also thank all of the advocates who fought so hard to ensure the success of the Violence Against Women Act and who have been aggressive in urging this Congress to act. Without their support in our communities, VAWA would never have been a success.

I thank the Washington State Coalition Against Domestic Violence for its dedicated work.

I thank all of the advocates, police officers, and community leaders with whom I have worked since 1994 to implement VAWA and to strengthen this important act.

I thank the many shelters and organizations that have opened their facilities to me during this session of Congress, including the Tacoma-Pierce County YWCA, Kitsap Special Assault Victims Investigative Services in Bremerton, the Bellingham YWCA, the Vancouver YWCA Domestic Violence Day Care Shelter, the Spokane Domestic Violence Consortium, the Spokane Women's Drop-In Center, and the people at Vashon Island Domestic Violence Outreach Services.

As I have visited with them, I have seen firsthand the services they offer and the challenges they face. I have spoken personally with women who have had their lives changed because of the services offered, and I have been impressed by the progress they are making day in and day out. Those experiences have strengthened my determination to support their work in the Senate.

In closing, it is clear the Violence Against Women Act has been a remarkable success. We cannot delay authorization any longer, and I urge my colleagues to vote for this measure. I look forward to working with those in the Senate and those in my State to help build on the progress of the Violence Against Women Act in the next session of Congress.

I thank the Chair.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. **LEAHY.** Mr. President, how much time is remaining for the Senator from Vermont?

The PRESIDING OFFICER. The Senator from Vermont has 55 minutes 35 seconds.

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Mr. **LEAHY.** Out of the 3 hours? We have not been in session 3 hours, Mr. President. The Senator from Vermont had a total of 3 hours. We went into session less than 3 hours ago.

The PRESIDING OFFICER. If the Senator will indulge, we will recalculate.

Mr. **LEAHY.** I thought there might be more. You have to watch out for that fuzzy math.

The PRESIDING OFFICER. The Senator from Vermont has 1 hour 55 minutes remaining.

Mr. **LEAHY.** That sounds a little closer to it. I am going to be reserving time for my own speech, but I have been withholding giving a speech because other Members on our side want to speak. I see the distinguished Senator from Maryland. I yield 5 minutes to the distinguished Senator from Maryland, my good friend.

The PRESIDING OFFICER. The Senator from Maryland.

Ms. MIKULSKI. Mr. President, I hope today the Senate will pass legislation to improve the lives of women in America and around the world and protect them from predators.

Make no mistake, when people commit crimes, they never commit crimes against people who are bigger, stronger, or have more power than they. They always go after the weak, the vulnerable. One can be weak either in physical strength or weak because one does not have the same size weapon.

Today we have two pieces of legislation pending: One, the reauthorization of the Violence Against Women Act, and the other will break new ground to protect women and children who are bought and sold around the world as if they were commodities. They are victims of predatory behavior.

By passing this legislation, we are going to protect them. Women in their own homes are often victims of violence. Mr. President, 900,000 women last year were battered in their own homes.

The Violence Against Women Act says we will not tolerate violence, whether it is in the home, in the neighborhood, or on a street corner.

I thank Senator **Leahy** and Senator Brownback who have been working on

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this legislation, along with Senator Joe Biden. We appreciate the support and leadership of the good men here.

We want to be sure that through this legislation, we are going to not only prevent violence but help women rebuild their lives. The Violence Against Women Act works through domestic violence programs at the State level, works with law enforcement, and works in treatment programs for those who were the abusers. I hope we pass this legislation.

The second part is legislation that will also be a hallmark. It is the Sexual Trafficking Victims Protection Act. Girls as young as 10 years old are kidnapped from their villages and taken to brothels or sweatshops where they are imprisoned, forced to work as prostitutes, beaten, threatened, and even drugged into submissiveness. They prey upon women in the poorest regions of the world.

In addition, in central and southern Europe, with the collapse of the old economy, women from very poor villages are lured by fraudulent scam

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predators into thinking they are going to work in the West and are going to work in the hospitality industry. You bet it's hospitality. It is called turning them into whores.

I say to my colleagues, that is not what the free world and free economy should be about. We want to make the trafficking in women and children as criminal as the trafficking in illegal drugs. Guess what. Often the same scum who traffic in women are also the ones who traffic in drugs and traffic in illegal weapons of mass destruction.

I support and applaud the efforts of the Senator from Kansas who has taken the leadership in this area. He has visited Asia and has seen the recruitment and despicable circumstances under which young girls and children are forced to work. From briefings here, we know this is going on in the Balkans, out of Ukraine, and out of Poland. Many are brought into this country under false pretenses with phony visas. We have to stop the trafficking of women around the world.

This is very good legislation.

It will improve the lives of women in America and around the world. By passing the Violence Against Women Act, we are helping the victims of domestic violence to rebuild their lives. By passing the Trafficking Victims Protection Act, we are protecting women and children who are bought and sold, and forced into slavery.

Again every year, more than 900,000 women are victims of violence in

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their own homes. Every second, 20 women are battered. The Violence Against Women Act says we will not let violence threaten women, families, or communities.

Violence against women is not just a threat to the health and safety of women. It is a threat to the health and safety of families and our communities.

No woman in this country should live in fear. No woman should fear walking home at night. No woman should fear leaving a campus library. No woman should fear that her husband or boyfriend will hurt her or her children.

We will not tolerate it--not in Maryland, where 41 women were killed by domestic violence last year; not anywhere in America, where 4 women a day are killed by domestic violence.

The Violence Against Women Act supports programs that help women to rebuild their lives. It strengthens law enforcement's response to domestic violence. It gives legal assistance to victims of domestic violence, and it creates safe havens for women and children who are victims of domestic violence.

The Violence Against Women Act will protect thousands of woman throughout the country. Today we are also taking steps to protect women throughout the world--by passing the Sex Trafficking Victims Act.

The truly repugnant practice of trafficking in human beings affects between one and two million women and girls each year. As I have stated, girls as young as ten years old are kidnaped from their villages. Or unsuspecting families allow their daughters to leave--with promises of good jobs and better lives. These women are taken to brothels or sweatshops--where they are imprisoned. They are forced to work as prostitutes. They are beaten, they are threatened--and many are killed. Even if a woman escapes, she is often so afraid of retaliation that she will not testify against her abductors.

Organized, international criminals are responsible for the increase in trafficking. They prey on young women in the poorest regions of the world. They take advantage of the most vulnerable--who live in developing countries with poor economic and uneven law enforcement.

Most countries have no way of dealing with this sophisticated form of international crime. Many countries where trafficking is most prevalent lack the laws and law enforcement authority to handle the problem. To often, when local authorities catch traffickers, the women get the brunt of the punishment for prostitution--while traffickers face minor penalties.

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That is why this legislation is so important. It focuses on prevention, protection, and support for victims, and prosecution of traffickers. It recognizes that trafficking is a global problem that requires an international solution.

To prevent trafficking this legislation raises the awareness of the problem in villages and countries. It educates potential victims by promoting anti-trafficking awareness campaigns and by authorizing educational and training assistance to international organizations and foreign governments. It also requires the Secretary of State to report on the severe forms of trafficking in persons in the annual country reports.

To strengthen prosecution, this legislation provides local authorities with the tools to crack down on traffickers.

To support the victims of trafficking, this legislation directs funds for international organizations that help these women to rebuild their lives. They are given a safe haven where they can recover. They are provided with education, training, and microloans.

This legislation also recognizes that trafficking is not just a foreign problem. Approximately 50,000 women are brought to the United States each year where they are forced into prostitution or other servitude. This bill toughens current Federal trafficking penalties by doubling the current maximum penalties for traffickers to 20 years imprisonment with the possibility of life imprisonment. It also changes immigration law to help victims of trafficking. This will stop the practice of deporting victims back to potentially dangerous situations.

We want this century to be one of democracy and human rights. We will not achieve this unless everyone, including the worlds' poorest women, is able to control their own lives. This means education, economic development, family planning and civic institutions that protect the rights of women. The legislation we are passing today will take us closer to achieving these goals. I urge my colleagues to join me in strongly supporting the Violence Against Women Act and the Sex Trafficking Victims Act.

In conclusion, 4 years ago, I was a victim of violence. I was coming home from dinner with a wonderful professor who was an economic adviser to me and was here for a conference. I got her to her hotel. As I stepped out of my car, zam, I was mugged. I lost my handbag. I had a severe injury to my hand. I tried to fight him off, but he was over 6 feet, and I am under 5 feet. Fortunately, I escaped with my life. All I had was a broken memory and shattered security in my own neighborhood.

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Thanks to the success of the Baltimore Police Department and the pressing of charges and the willingness not to plea bargain, that man is doing time while I hope I am out here doing good. I want to be sure the streets of America are safe. I have an entire Baltimore community on my side, including the informants. Not every woman has that. Let's try to get them the resources they need to be safe in their homes and communities. I thank the Chair.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. **LEAHY.** Mr. President, I recall very well the incident of which the Senator from Maryland speaks. I am pleased this is a case where the perpetrator was arrested and prosecuted.

One of the things I learned in my years as a prosecutor is that too often nobody wanted to pursue those cases. All that meant, of course, was that somebody else would be a victim. In this case, it was the Senator from Maryland. But from my experience, had the person not been apprehended, not been convicted, then someday it would be somebody else. So I commend the people of Baltimore who rallied to her. At least out of that sorry thing there was adequate prosecution. But we have so much violence against women that we never see.

I recall so many times police officers seeing a badly battered woman, and where we would bring prosecution, but as I talked to her, I would find this had happened several times before in a domestic situation and that they had gone to law enforcement, and others, and had been turned back where nothing had been followed up on. We had a very aggressive program in my office where we would follow up on it. I have to think there are a number of deaths, though, that have occurred and do occur in places where it is not followed up on.

This is something you do not see in the sunny ads and the perfect homes and domestic situations that we see on our television. The fact is, there are a lot of places in this country where

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there is enormous violence against women.

I would add to the comments of my colleague, it goes across every economic strata, it goes across all social strata. This is not one thing that is just in poor neighborhoods or just in one ethnic group or another. This goes across the economic strata. It goes across good neighborhoods and bad neighborhoods, large families and small families. But, unfortunately, many times it never comes to the attention of law enforcement. Regrettably, sometimes when it does, it is not followed up on. This act, itself, will help focus the attention of law enforcement on this.

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Mr. President, the Senator from New Jersey had asked to speak, and I know the Senator from Louisiana wishes to speak.

Mr. BROWNBACK. Mr. President, if I could say before my colleague from Maryland leaves the floor, I thank her for her leadership on this Violence Against Women Act and for her statements on the sex trafficking bill. I look forward to working with her on both issues as we move forward. Hopefully, this will be cleared through the Senate and signed into law and we can take more actions and steps down the road to see that people are cared for in these terrible situations. I do appreciate her comments and her support. I thank the Senator.

I apologize for the interruption.

Mr. **LEAHY.** The Senator from Kansas does not have to make any apologies with all the work he has done on this. I appreciate him being here.

I yield 5 minutes to the Senator from Louisiana.

Ms. LANDRIEU. Mr. President, I join with the others in thanking our colleague from Vermont, Senator **Leahy,** for his leadership in this area and, of course, Senator Biden and other Senators who have spoken this morning on this important subject.

I want to follow up with what Senator **Leahy** just said by sharing with him, and with all here, an unfortunate story that appeared recently in a newspaper out of Maryland where a 44-year-old man was convicted of raping an 18-year-old girl who was unconscious from drinking.

Unfortunately, this judge is one of many judges, or at least too many--the number is too high--who are ignorant and uninformed. He said on the record in this particular case: "Finding an unconscious woman is a dream come true to a lot of men."

Finding an unconscious woman is a dream come true to a lot of men.

I will submit this judge's name for the Record and will be writing him a personal letter, asking him, if he did make this statement which was reported, that he resign his seat immediately.

That is part of the problem we have in this Nation. The Senator from Vermont, as a former prosecutor, understands this well, that this problem is pervasive. It is a real shame in America--this country of freedom and order and democracy--that we still have a severe and

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serious problem of domestic violence.

Sometimes our Nation takes that extra step and goes that extra mile to stop violence on the street and to continue to support our police officers. Yet when it comes to stopping violence in our own homes, our Government falls short in terms of funding, in terms of research, in terms of education.

That is the hope that this act brings. It is to help move judges such as this off the bench; so when he is up for reelection, there is some education in the community that would force his either resignation or moving him off the bench through the election cycle.

There are prosecutors around the Nation, some of whom are more enlightened than others. But I will tell you of two in my State who are doing an outstanding job on this subject: DA Paul Connick from Jefferson Parish and DA Walter Reed from St. Tammany Parish.

We have many excellent DAs. But in the last few years, many of these DAs--99 percent of whom, I would imagine, in the Nation are male and who perhaps do not come to the subject from a very personal point of view--have been really educated because of the good work that has been done in this Congress and with groups all around this Nation.

These two particular DAs have instituted a very progressive policy which is basically a no-drop policy, which means that if a battered woman comes in to file a charge, the DA takes it upon himself, and basically the State and the county and the parish, even if she begins to back down because her self-esteem is not as strong as it should be, or she is understandably frightened, or she has been threatened if she does not drop the charges, to simply tell the abuser, when he comes in for his interview: I am sorry, we refuse to drop the charges. This is against you and me, buddy, basically, and we are going to see this to the end, where you can get the punishment coming to you.

They are really being very aggressive. I hope if other district attorneys or other staffers or folks and other elected officials are tuning in today, they will encourage district attorneys all over this Nation to take up the no-drop policy, because getting abusers convicted, getting them punished, and then getting them the right treatment for this is the only way we are going to stop this terrible tragedy from occurring.

There are so many things I could say about this subject, but I do think our leaders realize it is about education; it is about district attorneys; it is about judges, it is about the court system; it is not just about shelters and counseling and aid, which is so important. This is the first step, giving women a safe place to go, giving children a safe place to go. Our justice system must work for them. That is why

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this bill is so important.

My colleague from New Jersey is waiting to speak on the same subject. I thank Senator Lautenberg for his great leadership in this area. But let me just for the record read some recent headlines.

The PRESIDING OFFICER. The Senator's 5 minutes have expired.

Mr. **LEAHY.** Mr. President, I yield the Senator 2 more minutes.

Ms. LANDRIEU. I thank the Senator.

Mr. President, let me read some recent headlines from our national newspapers because the Senator was making an earlier point that I agree with, that this isn't just in poor neighborhoods; this isn't just in neighborhoods of people who have recently come to this Nation; this isn't about people who have not had a good education; this affects everyone in all walks of life.

"Popular Romance Novelist Shot and Killed by Estranged Husband," an AP story from June 1999.

"Tommy Lee goes to jail for Wife Abuse," from USA Today, in May 1998.

"Colorado Rockies Pitcher Arrested on Suspicion of Punching Pregnant Wife in Face," from the Washington Post, August 1999.

"Number of Women Dying from Domestic Violence Holding Steady Despite Drastic Drop in Overall Homicide Rates," San Francisco, February 1998.

Mr. President, we have to do a better job. We have to continue on this track. Violence has no place in our society--on our streets, on our playgrounds, or in back alleys. But it most certainly has no place in our homes where children grow up. If a home can't be safe, if a home can't provide peace for a child or a woman, as a person, where can they find peace, Mr. President? That is what this bill is about.

I think it is appropriate that the Violence Against Women Act will be passed with the Trafficking Victims Protection Act. It says that we understand that violence against women is a world wide problem.

In passing the Violence Against Women Act in 1994 we seized the opportunity to be a world leader--to take the stand that in the

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women overseas, they provide security, logistical support, liaison with brothel owners in many countries and, usually, false documents.

Women often start their hellish journey by choice. Seeking a better life, they are lured by local advertisements for good jobs in foreign countries at wages they could never imagine at home.

In Ukraine alone, the number of women who leave is staggering. As many as 400,000 women under 30 have gone in the past decade, according to their country's Interior Ministry. The Thai Embassy in Moscow, which processes visa applications from Russia and Ukraine, says it receives nearly 1,000 visa applications a day, most of these from women.

Israel is a fairly typical destination. Prostitution is not illegal here, although brothels are, and with 250,000 foreign male workers--most of whom are single or here without their wives--the demand is great. Police officials estimate that there are 25,000 paid sexual transactions every day. Brothels are ubiquitous.

None of the women seem to realize the risks they run until it is too late. Once they cross the border their passports will be confiscated, their freedoms curtailed and what little money they have taken from them at once.

"You want to tell these kids that if something seems too good to be true it usually is," said Lyudmilla Biryuk, a Ukrainian psychologist who has counseled women who have escaped or been released from bondage. "But you can't imagine what fear and real ignorance can do to a person."

The women are smuggled by car, bus, boat and plane. Handed off in the dead of night, many are told they will pick oranges, work

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as dancers or as waitresses. Others have decided to try their luck at prostitution, usually for what they assume will be a few lucrative months. They have no idea of the violence that awaits them.

The efficient, economically brutal routine--whether here in Israel, or in one of a dozen other countries--rarely varies. Women are held in apartments, bars and makeshift brothels; there they service, by their own count, as many as 15 clients a day. Often they sleep in shifts, four to a bed. The best that most hope for is to be deported after the police finally catch up with their captors.

Few ever testify. Those who do risk death. Last year in Istanbul, Turkey, according to Ukrainian police investigators, two women were thrown to their deaths from a

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greatest democracy in the world it is unacceptable that such violence occurs.

We have spent $16 billion on programs on education, assistance and prosecution. We must continue.

Every 5 minutes a woman is raped. Every day four women die as a result of domestic violence.

More women are injured by domestic violence than by automobile accidents and cancer deaths combined.

We have made progress but there is more to be done.

Here are some of the other statistics from that Tulane study:

More than eight of ten knew someone who had been murdered;

More than half had witnessed a shooting;

43% said they had seen a dead body in their neighborhood; and

37% of them were themselves victims of physical violence.

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If we think that violence is something that only affects other countries we must think again. If we think that a bill like the violence against women's act only affects women we are wrong.

Studies show that a child's exposure to the father abusing the mother is the strongest risk factor for transmitting violent behavior from one generation to the next.

A significant number of young males in the juvenile justice system were from homes where violence was the order of the day.

Family violence costs the nation from $5 to $10 billion annually in medical expenses, police and court costs, shelters and foster care, sick leave, absenteeism, and non-productivity.

Last week I told you about a woman from my State, Jacqulene Gersfeld,

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who was gunned down by her husband outside a courthouse just moments after she filed for divorce.

The VAWA reauthorization includes a provision to expand the investigation and prosecution of crimes of violence against women.

The need for this is great 85% of all reported rapes end up with no conviction. Almost 90% result in no jail time.

In Baltimore, MD, a 44 year old man was convicted of raping an 18 year old girl who was unconscious from drinking. The judge in the case said the following on the record: "Finding an unconscious woman is a dream come true for a lot of men." And so he sentenced him only to probation.

Mr. **LEAHY.** Mr. President, I yield 10 minutes to the distinguished senior Senator from New Jersey.

The PRESIDING OFFICER. The Senator from New Jersey is recognized.

Mr. LAUTENBERG. Mr. President, first, I thank my colleague, Senator **Leahy,** for helping us get an addition to this legislation that we think is critically important. I also extend my thanks to Senator Brownback of Kansas for his assistance in enabling us to get our particular section of this bill into place.

Mr. President, a light comes as a result of the fact that we have our female colleagues with us in this Senate. How hard they work to get things done on both sides of the aisle. What a difference it has made in the way we operate. Many of us were here before there was a reasonable presence of women--and it is not yet "reasonable"; I will strike that word. But that will change in time. We are getting there. They have helped to bring to the consciousness of all America the kinds of abuses that are perpetrated against women and young children who are female--disgusting practices that shock us all; trafficking in young women, forcing them into virtual slavery and being sexually exploited, and losing their identity in the process. It is a humiliation few can imagine. I commend the authors of this bill. Also, I commend them for including the section on violence against women.

Mr. President, 3 years ago, when we were hard at work trying to reduce gun violence in our society, I offered a piece of legislation to prohibit those who had even as little as a misdemeanor charge proven against them from getting guns. It was a tough battle, and we were on the losing side a couple of times, with the old song about it which is "the camel's nose under the tent, and you will be controlling guns," and so forth, instead of thinking about how many lives we would save. We know that about 150 times a year a woman has a gun pointed at her

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head--and I guess the reverse is also true occasionally--and is told, "I will blow your head off" in front of children. What kind of wounds does that leave even if the trigger isn't pulled? It is a terrible memory for all of those who are either victims or witnesses.

With the help of President Clinton, we were finally able to get a piece of legislation in a budget bill that had to be done--it is almost 4 years now, and it had to be done and it passed and was signed into law--to prevent spousal and children abusers from getting permits to own a gun. The result is that almost 35,000 gun permits have been denied to these people--35,000 potential opportunities for a man to put a gun against a woman's head and threaten to take her life. So I support this bill with these two sections. I have added a section--myself and Senator Mack of Florida--that talks about helping those who have been victims of terrorism, whether on our shores or away from America. American citizens are deserving of protection. I am pleased the Senate is going to pass this package of worthy legislation.

The underlying Trafficking Victims Protection Act addresses a very serious human rights issue in Europe and elsewhere, where people are trafficking particularly for sexual exploitation. Finally, we are taking action to combat trafficking and to help these victims. I am pleased that this conference report will also reauthorize the Violence Against Women Act and expand coverage to include new programs for immigrant women, elderly women, and women in the military service.

Throughout my career, I have worked to help prevent domestic violence. I strongly supported the original Violence Against Women Act, which Congress passed in 1994. I am so pleased that we are going to take care of those aberrations of behavior that leave women and families devastated. But we are getting onto another subject, as well, which I think is critical, and that is to provide justice for victims of terrorism as part of the trafficking victims protection conference report.

Mr. President, we all talk about our objections and abhorrence of terrorist attacks against American citizens, whether abroad or at home, and I had an experience that was almost in front of my eyes which shocked me and caused me to think about how we might prevent terrorism against our citizens at any time, at any place.

One of those victims was a young woman named Alisa Flatow. She was a junior at Brandeis University and she was studying in Israel for a time. In 1995, on April 9, she boarded a bus that took her from a place called Ashkelon to another destination. She never arrived. Shortly after noon, when the bus was in the Gaza Strip, a suicide bomber drove a van loaded with explosives into the bus. Seven passengers were killed. Alisa Flatow was among those injured. An Israeli Defense Forces helicopter rushed her to a hospital in a community nearby. It was the same day I arrived in Israel from a trip in the Middle East. When I arrived there, our U.S. Ambassador informed me of the terrible tragedy

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that had occurred and that one of them was a constituent from New Jersey and that she had been severely injured in that attack. I immediately reached her home in West Orange, NJ, an area very familiar to me because I lived near that neighborhood.

I spoke to her mother, Rosalyn, and was informed that Alisa's father, Steve, was already on his way to Israel. By the time he arrived, the emergency surgery had failed to save his daughter's life. She died on April 10. She was 20 years old.

For any of those who have children, they know that 20 years of age is almost the beginning of life.

I have three daughters and a son. Those were marvelous years as they approached the end of their college terms and prepared for life beyond.

But that didn't prevent a faction of the Palestinian Islamic Jihad from claiming responsibility and being proud of what they did with that suicide bombing. What good was it going to do their cause to have one mission of terrorists to frighten people and prevent them from conducting their lives as they would like to without any specific gain to be had?

There was a sponsor who paid something to somebody to have these young people assassinated. It was Iran. That is one of the reasons that country is still on the State Department's list of terrorist countries.

I want to tell you, Mr. President, that I am befuddled by some of the policy decisions we make.

The PRESIDING OFFICER. The Senator's 10 minutes has expired.

Mr. LAUTENBERG. I ask if I can have 5 more minutes.

Mr. **LEAHY.** I yield 5 more minutes to the Senator from New Jersey.

The PRESIDING OFFICER. The Senator from New Jersey.

Mr. LAUTENBERG. I thank Senator **Leahy.**

There is no stronger advocate for the protection and safety of our citizens than President Clinton. But I don't understand why we take a country such as Iran and start to deal with them in trade of insignificant items. Would you believe--I am almost embarrassed to

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say it--that caviar, pistachio, Persian rugs are vital items for the well-being of our society? It is outrageous.

But there are differences in point of view. I am not a professional diplomat. Maybe I fail to understand the longer term value of something that looks trivial to me as I express myself.

For the past five years, I have been proud to stand with Steve Flatow in his effort to achieve some measure of justice for the killing of his daughter. He and I both want to hold Iran accountable.

But Alisa Flatow was not Iran's only victim. Matt Eisenfeld of Connecticut and Sarah Duker of New Jersey, a young American couple in Israel, also were killed in 1996 when a suicide bomb from an Iran-sponsored group ripped through a bus they had boarded.

One cannot comprehend what these missions are supposed to accomplish.

I don't want to bring the situation in Israel and the Middle East up to a full-scale debate at this moment. But there can be nothing gained by assaults against people or their property.

I made a speech yesterday in which I pleaded with Mr. Arafat to stop the hatred of his people; to stop the inflammation; to stop the propaganda that induces this kind of hatred and action; to stop ugly cartoons about people who inhabit Israel, the Jewish community; and to stop the anti-Semitic diatribes that still occur in Palestine. Stop it; stop it.

Well-known journalist Terry Anderson and others were held hostage in Lebanon in the late 1980s by captors funded by Iran.

They and their families also deserve justice, as do the families of those killed when the Cuban government in 1996 deliberately shot down two planes used by Brothers to the Rescue.

Mr. President, The Antiterrorism Act of 1996 gave American victims of state-sponsored terrorism the right to sue the responsible state.

The law carved out a deliberately narrow exception to the sovereign immunity protections our laws afford other countries.

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The PRESIDING OFFICER. The Senator's 5 minutes has expired.

Mr. LAUTENBERG. Mr. President, I ask the Senator from Vermont if I may have 5 more minutes.

Mr. **LEAHY.** Mr. President, I yield an extra 5 minutes to the Senator from New Jersey, especially because of the tremendous work he has done along with the Senator from Florida, Mr. Mack, on this subject. I think they have had to overcome so many obstacles and so many mysterious holds on their legislation. I, of course, yield 5 more minutes to the Senator.

Mr. LAUTENBERG. I thank the Senator from Vermont not only for his graciousness in extending to me additional time but for the help and guidance that he gave as we tried to put this piece of legislation into law.

Our goal then, and our goal now, is to allow American victims to receive some measure of justice in U.S. courts and to make state sponsors of terrorism pay for the death and devastation they have wrought.

Victims of terrorism have put the 1996 law to good use. The Flatow family won a U.S. court judgment against Iran in 1998. Other victims of terrorism won similar cases.

The Justice for Victims of Terrorism Act helps the victims collect compensatory damages they've won fair and square in our nation's courts.

Foreign countries that sponsor terrorism should have to pay for the awful toll that terrorist attacks take on families like the Flatows. And we hope that making terrorist states pay that price will deter them from sponsoring terrorism in the future.

Let me close, by thanking the many cosponsors and Senators who have helped advance this legislation. I particularly would like to thank Senator Mack, who has been with me every step of the way, and Gary Shiffman on his staff.

I also want to thank Frederic Baron of my staff who worked so hard on this bill.

I think this bill is a good example of bipartisan cooperation for a worthy cause--helping provide justice for American victims of terrorism abroad.

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I am sure this legislation will pass overwhelmingly, but I want this message to go out across this globe: that if you sponsor terrorism against American citizens, you will pay a price. We ought to be unrelenting in that. I was proud of our country when we moved against Afghanistan to pay for the perpetrators of dastardly acts against American citizens and their interests.

We can never step aside and argue whether or not it is appropriate. We have to find out by testing the waters, by making sure that the legislation is there. If there is a challenge, so be it. But we have to indicate we will not stand by and let this happen without repercussions to those who sponsor terrorism.

I yield the floor.

The PRESIDING OFFICER (Mr. Roberts). The Senator from Minnesota.

Mr. WELLSTONE. Mr. President, I thank the Senator from New Jersey and the Senator from Florida for their excellent work. I want to take a moment to engage in a colloquy with Senator Brownback to clarify a phrase in division A of the bill. In order to be eligible for the visa provided, the traffic victim would be required to prove she would face "extreme hardship involving unusual and severe harm."

This is a new standard under the Immigration and Nationality Act. Can the Senator explain why this new standard was created?

Mr. BROWNBACK. I am happy to respond to the Senator from Minnesota.

This was raised in conference committee under thorough discussion about this new standard of "extreme hardship involving unusual and severe harm." There was a fear on the part of some conferees that some judicial interpretations over the term "extreme hardship" might be too expansive; specifically, the conferees objected to an interpretation that the applicant could prove "extreme hardship" by showing he or she would miss American baseball after being deported from the United States. So this language should be interpreted as a higher standard than some of these expansive interpretations of "extreme hardship."

At the same time, however, this language should not exclude bona fide victims who would suffer genuine and serious harm if they were deported. There is no requirement that the harm be physical harm. I repeat, there is no requirement that the harm be physical harm or that it be caused by the trafficking itself. The harm or the hardship does not have to be caused by the trafficking itself. The purpose of

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inserting the phrase "unusual and severe" is to require a showing that something more than the inconvenience and dislocation that any alien would suffer upon removal might occur.

I wish to make it clear in future interpretations of this act, while this is higher than extreme hardship, it doesn't require physical harm; it doesn't require the harm be associated with the trafficking, to be able to allow an American to qualify under this new definition within the act.

I thank my colleague from Minnesota for allowing me the opportunity to clarify this particular issue.

Mr. WELLSTONE. I thank the Senator for his clarification.

We have been talking about the trafficking legislation. Before a final vote, I want to get back to that legislation. I think it is such an important human rights effort.

I will talk about the reauthorization of the Violence Against Women Act and make a couple of points. Again, to have a vote on legislation that goes after this egregious practice of trafficking of women and girls for the purposes of forced prostitution and forced labor is important to our country and to the world. Then to have reauthorization of the Violence Against Women Act also makes this a doubly important bill. I am so pleased to be on the conference committee and to be able to be a part of helping to make this happen.

I thank Senator Biden, I thank Senator Hatch, and I thank Senator **Leahy** and others, for including in this bill authorization for what we call safe havens or safety visitation centers. Let me explain by way of example from Minnesota. I need to honor these children, and I need to honor their mother. Anyone from Minnesota will remember the case of Alex and Brandon, seen in this picture; two beautiful boys. It was these two boys and what happened to them that made me understand the importance of safety visitation centers more than anything else that could ever have happened.

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On July 3, 1996, Brandon, who was 5, and Alex, who was 4, were murdered by their father during an unsupervised visit. Their mother, Angela, was separated from Kurt Frank, the children's father. During the marriage, she was physically and emotionally abused. Angela had an order of protection against Kurt Frank, but during the custody hearing she requested her husband not be allowed to see the children in unsupervised settings. The request he see the children only in supervised settings was rejected by the judge. Kirk Frank was able to see his sons with no supervision. When he did, and God knows why, he

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killed them. We have a center now, that the community supports, which is a safety visitation center.

The point is this: There are two different examples. Say a woman has been battered. And please remember, every 13 seconds a woman is battered in the country. Say she has had the courage to get away, to end this marriage. There is a separation going on and a divorce; you are still not necessarily going to say the father can't see the child, but if the father comes to the home to pick up the child, he steps inside the home and then battering can start again. There is no protection. If you can do it at the safe havens, supervision centers, you can protect the woman and you can protect the children.

Or it might be the case where you are worried about the threat of a father to the children, but you cannot say a father can't see the child; with a supervised visitation center the father can see the children there.

This is really important. We are working very hard right now with Senator Hollings to get some funding. I am pleased this is a part of this legislation.

I say to colleagues, this was the work of Jill Morningstar on my staff, who, with my wife Sheila, made a lot of progress. It is so important to reauthorize. The hotline is important; the training for police is important; the support for law enforcement is important; the support for battered women shelters is so important for the people who are there in the trenches. All of this matters. The focus on rural communities and support in rural communities is important, as well. It has made a difference, a big difference.

In my State of Minnesota, this year already 33 women have been murdered. Each case is an example of "domestic violence." Last year, in the whole year, it was only 28. The year is only half over and we have already had 33 women who have been murdered. Clearly, we are going to have to do a lot more. To reauthorize this bill today is a huge victory.

Mr. President, I think it should whet our appetite to do much, much more. I am absolutely committed to making sure we do more to provide some support for children who witness this violence in their homes. These kids run into difficulty in school. These kids, quite often, run into trouble. These children are falling between the cracks and there is no real support for them.

There is another piece of legislation--and I hope to get it in the bill--I am very excited about Day One in Minnesota where we want to make sure all of the shelters are electronically wired so with one call to the hotline, a woman will know where she and her children can

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go. Rather than calling, being told there is no space, and then not knowing where to go, it should only take one call. That is very important.

Then, there is a whole set of initiatives that would enable women to be more independent, to get more support to be more independent--whether it be affordable housing, whether it be family and medical applied to women in this situation, whether it be more job training--you name it. This will enable women to be put in a position where they are not unable or unwilling to leave a very dangerous situation for themselves and their children.

I say to colleagues, I am so pleased we are going to pass this conference report with an overwhelming vote. I am pleased to be a part of helping to work out this agreement. But I also think clearly, more than anything else, this ought to make us more determined to do much more. Again, about every 13 seconds a woman is battered in her home today in our country.

I will take a little more time to talk about the trafficking bill, since both these bills are linked together, to again make the point for all my colleagues, Democrats and Republicans alike, it is critically important to vote for this conference report, to keep this conference report intact.

I will keep thanking Senator Brownback. It has been great to work with him. I thank him for his fine work.

We are talking about 50,000 women, girls, trafficked to our country. We are talking about 2 million worldwide. We are talking about women, sometimes girls as young as 10 or 11, coming from countries where there is economic disintegration. They are trying to figure out a way they could go somewhere and they are told they could become waitresses. They are told there is a job.

When they arrive, their visas are taken away from them; they are beaten; they don't know the language; they don't know their rights; and they are forced into prostitution. We had a massage parlor 2 miles from here in Bethesda which was staffed mainly by Russian-Ukraine women. That is one example. This is one of the grimmest aspects of the new global economy. It is, in many ways, more profitable than drugs because these women and girls are recyclable. It is that God-awful. In the year 2000, this legislation is the first of its kind in this country. It is a model for many other governments around the world.

We put a focus on three "P's": No. 1, prevention, getting the outreach work done to other nations so these young girls and women will know what they are getting into and have some understanding what these traffickers are about. No. 2, protection, so when a girl steps forward,

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balcony while six of their Russian friends watched.

In Serbia, also last year, said a young Ukrainian woman who escaped in October, a woman who refused to work as a prostitute was beheaded in public.

In Milan a week before Christmas, the police broke up a ring that was holding auctions in which women abducted from the countries of the former Soviet Union were put on blocks, partially naked, and sold at an average price of just under $1,000.

"This is happening wherever you look now," said Michael Platzer, the Vienna-based head of operations for the United Nations' Center for International Crime Prevention. "The mafia is not stupid. There is less law enforcement since the Soviet Union fell apart and more freedom of movement. The earnings are incredible. The overhead is low--you don't have to buy cars and guns. Drugs you sell once and they are gone. Women can earn money for a long time."

"Also," he added, "the laws help the gangsters. Prostitution is semilegal in many places and that makes enforcement tricky. In most cases punishment is very light."

In some countries, Israel among them, there is not even a specific law against the sale of human beings.

Mr. Platzer said that although certainly "tens of thousands" of women were sold into prostitution each year, he was uncomfortable with statistics since nobody involved has any reason to tell the truth.

"But if you want to use numbers," he said, "think about this. Two hundred million people are victims of contemporary forms of slavery. Most aren't prostitutes, of course, but children in sweatshops, domestic workers, migrants. During four centuries, 12 million people were believed to be involved in the slave trade between Africa and the New World. The 200 million--and many of course are women who are trafficked for sex--is a current figure. It's happening now. Today."

distress calls: far-flung victims provide few clues

The distress call came from Donetsk, the bleak center of coal production in southern Ukraine. A woman was screaming on the telephone line. Her sister and a friend were prisoners in a bar somewhere near Rome. They spoke no Italian and had no way out, but had managed, briefly, to get hold of a man's cell phone.

"Do you have any idea where they are, exactly?" asked Olga Shved, who runs La Strada in Kiev, Ukraine's new center dedicated to fighting the trafficking of women in Eastern Europe and the countries of the former Soviet Union.

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then she is not the one who pays the price. Right now there is no temporary visa protection so if you were to try to get out of this you are the one who is deported. In the meantime, these traffickers go without any punishment, which is something I want to get to in a moment. So you want to provide that protection. You also want to provide services for these young women to be able to rebuild their lives after they have been through this torture. It is torture. And finally, No. 3, prosecution. Right now our law enforcement community tells us they want to go after them but they do not have the laws. What we are saying is, if you are involved in this trafficking, you are going to face stiff sentences. If you are involved in the trafficking of a girl under the age of 14, you can face a life sentence. So there is a very strong part of the provision dealing with punishment.

We also have a listing of countries where this is happening, with a special focus on governments that are complicit in it. The President can take action against those governments, but there are also security waivers and other waivers. It is a balanced piece of legislation. I am proud of it. I think it will make a difference.

I think it is terribly important. I read some of these examples before. Let me give a couple of examples right now of what is happening in the year 2000.

In Los Angeles, where traffickers kidnapped a Chinese woman, raped her, forced her into prostitution, posted guards to control her movements, and burned her with cigarettes, the lead defendant received 4 years and the other defendants received 2 to 3 years for this offense.

In another case where Asian women were kept physically confined for years, with metal bars on the windows, guards and an electronic monitoring system, and were forced to submit to sex with as many as 400 customers to repay their smuggling debt, the traffickers received between 4 and 9 years. This is the year 2000 we are talking about.

Then I gave the example of a 1996 trafficking case involving Russian and Ukrainian women who would answer ads to be au pairs, sales clerks, and waitresses but were forced to provide sexual services and live in a massage parlor in Bethesda, MD. The Russian-American massage parlor owner was fined. He entered a plea bargain, the charges were dropped, with the restriction he would not operate a business again in Montgomery County. The women, who had not been paid any salary and were charged $150 for their housing, were deported or left the country.

This is what we are dealing with right now. There was a case involving

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70 deaf Mexicans that my colleagues may remember, who were held under lock and key, forced to peddle trinkets, who were beaten and in some cases tortured. The leader received 14 years and the other traffickers from 1 to 8 years.

We intend to take this more seriously. Let me give one other example. The United States v. Hou, several Mexican nationals, all illegally in the United States, were required to live in one of the chicken sheds at an egg ranch. The shed was open to the elements. The defendants, man and wife, did not give the men any shelter, but encouraged them to build a small room out of cardboard and styrofoam egg cartons.

The men lived less than 15 feet from the chickens they tended. The men had to spread powerful pesticides in and around the chicken sheds, and the chemicals and various fuel oils were stored immediately next to their cardboard room. Faulty wiring in the rickety building resulted in a fire. One of the workers was killed as he tried to escape the shed and another suffered horrible burns. Despite the atrocious conditions, there was no evidence that the men had been kept in the defendants' service through threats of force or violence; the men stayed in the shed because Ms. Hou preyed upon their lack of English-speaking ability and lack of immigration status, deliberately misleading the victims and convincing them there was nowhere else to go.

Because the labor of the workers was maintained through a scheme of nonviolent and psychological coercion, the case did not fall under the involuntary servitude statutes--which could have resulted in life sentences given the death of one of the victims. Our legislation changes that. That is why this legislation is so important. No longer in the United States of America are we going to turn our gaze away from this kind of exploitation, to this kind of murder of innocent people.

This is a real commitment by the Senate and the Congress to defend human rights. This is a good piece of legislation.

I yield the floor.

The PRESIDING OFFICER. The distinguished Senator from Kansas.

Mr. BROWNBACK. Mr. President, I wish to speak on a couple of other provisions in this bill to clarify those for Members. We will be voting on it later today. If others of my colleagues desire to speak on this bill, I urge them to come to the floor and speak now or forever hold their peace on this particular piece of legislation.

The item I wish to speak on now is Aimee's law. This is a part of this overall conference report that has passed the House, as I mentioned, by 371-1. Aimee's law was prompted by the tragic death of a

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college senior, Aimee Willard, who was from Brookhaven, PA, near Philadelphia. Arthur Bomar is a convicted murderer who was earlier paroled from a Nevada prison. Even after he had assaulted a woman in prison, Nevada released him early. Bomar traveled to Pennsylvania where he found Aimee. He kidnapped, brutally raped, and murdered Aimee. He was prosecuted a second time for murder for this terrible crime in Delaware County, PA.

Aimee's mother, Gail Willard, has become a tireless advocate for victims' rights and serves as an inspiration on this particular piece of legislation.

This important legislation would use Federal crime-fighting funds to create an incentive for States to adopt stricter sentencing laws by holding States financially accountable for the tragic consequences of an early release which results in a violent crime being perpetrated on the citizens of another State. Specifically, Aimee's law will redirect Federal crime-fighting dollars from a State which has released early a murderer, rapist, child molester, to pay the prosecutorial and incarceration costs incurred by a State which has had to reconvict this released felon for a similar type of crime.

More than 14,000 murders, rapes, and sexual assaults on children are committed each year by felons who have been released after serving a sentence for one of these very same crimes.

Convicted murderers, rapists, and child molesters who are released from prisons and cross State lines are responsible for sexual assaults on more than 1,200 people annually, including 935 children, including Aimee Willard.

The reason I point this out is because Aimee's law previously passed this body by a vote of 81-17. As I mentioned, it redirects Federal crime funds from a State that has released early a murderer, rapist, or child molester, to pay the prosecutorial and incarceration costs incurred by a State which has had to reconvict this felon for a similar crime.

The formula for early release is if the criminal served less than 85 percent of his original sentence, and if a State kept a criminal in prison less time than the national average for a sentence of the same crime.

To counter concerns raised by the National Governors' Association, this does not federalize any crimes. I emphasize that, it does not federalize any crimes. It simply upholds State standards regarding murder, rape, and child molestation.

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Sex offenders have one of the highest recidivism rates of any crime, thus, requiring more stringent standards in amount of the sentence served.

This only affects Federal crime funds which are transferred from State 1 to State 2 where a crime has been committed of a similar type by the criminal who was released early from State 1.

The reason I go through this at some length is because some of my colleagues have a concern about this. I understand there will be a point of order raised against this as being part of the overall package. There will be a vote on that point of order.

If people want to get this bill dealing with sex trafficking, the Violence Against Women Act, the international terrorism aspect of this bill, the Internet alcohol enforcement of this bill through, they need to vote against those who seek to strip this particular provision out of the bill because if they strip this provision out, the bill has to go back to the House for it to be voted on, and it will have to be voted on again in the Senate.

We do not have the time to do it. It will kill the bill. If people vote to strip this provision out of this particular bill and send it back to the House, and it has to come back here, it will kill the bill. We do not have time to do that.

While some raise federalism arguments, most of our colleagues have already voted in favor of Aimee's law; 81 have voted in favor of it already. There are some arguable federalism principles involved. I think most of those have been worked out with the National Governors' Association. There is a strong advocacy group that has worked to get these standards where, if a person has been convicted in one State, they should serve their time rather than being released to commit a similar crime in another State. That is the direction of this.

I plead with my colleagues: Do not remove this provision. Do not support the point of order because, if you do, it is going to kill everything. It will kill the sex trafficking bill. It will kill the Violence Against Women Act. Do not do it. Most people have already supported this particular provision, Aimee's law.

I wish to say a couple of things on other issues before we break for the policy luncheons. I particularly appreciate my colleagues, Senator Lautenberg and Senator Mack, for their provisions on the Justice for Victims of Terrorism Act. I understand Senator Hatch will speak later about the 21st Amendment Enforcement Act on VAWA. We have had an excellent discussion this morning on the importance of this legislation protecting women who are subject to domestic violence. This is reauthorization of important language and important legislation and

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strengthening of it as well. That is an important feature.

I appreciate Senate majority leader Trent Lott bringing this issue to the floor. It is a good package of protection for both domestic and international women and children subject to violence. That is the theme that runs through this set of acts. It is protection for women, protection for children, protection domestically, and protection internationally.

I am very pleased with this legislation. It is a key piece of legislation to pass during this session of Congress to provide that level of protection. I am glad it has been done on a bipartisan basis. Mostly my colleagues from the other side of the aisle have spoken this morning supporting this legislation. Support is similarly strong on our side

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of the aisle. It is good to have that support back and forth.

Rather than using up the rest of my time, I simply say to my colleagues who want to speak, please come to the floor. I anticipate we will be voting on this legislation by the middle of the afternoon. We will be recessing for policy luncheons from 12:30 p.m. until I believe 2:15 p.m., which is the normal recess time.

This will be a good time for people to comment on this important legislation. I plead with them: Do not strike this particular provision, Aimee's law, because it will sink the entire bill. It is a good bill. It is good legislation. It previously passed both Houses overwhelmingly. Let's get it done.

I reserve the remainder of my time, and I yield the floor.

The PRESIDING OFFICER. The distinguished Senator from Vermont is recognized.

Mr. **LEAHY.** Mr. President, I yield the distinguished Senator from New Mexico time off my time. I yield to him for another purpose, and once he speaks, I am sure the Chair will understand the reason. I yield to the Senator from New Mexico.

The PRESIDING OFFICER. The Senator from New Mexico is recognized.

Mr. BINGAMAN. Mr. President, I thank my colleague for his courtesy in yielding me some time. I ask unanimous consent that I be allowed to speak as in morning business for 3 minutes.

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

(The remarks of Mr. Bingaman are located in today's Record under "Morning Business.")

The PRESIDING OFFICER. The Senator from Vermont.

Mr. **LEAHY.** Mr. President, I reiterate something the Senator from Kansas and the Republican floor leader on this bill have said, and that is that we hope, because of the request of a number of Senators on both sides of the aisle, to get these votes on both the Thompson point of order and final passage sometime midafternoon today. As one who holds the largest bulk of the individual time, I alert my colleagues that after the distinguished Senator from Utah and the distinguished Senator from Delaware, I will yield back the remaining part of that time which will move up somewhat the time of the vote.

The reason, incidentally, I have reserved the bulk of my time is to protect a number of Senators who wished to speak. I think virtually all of them have spoken. At least one of the Senators who would have wished to speak, the Senator from California, Mrs. Feinstein, has just undergone surgery for an accident to her leg and is not going to be here, although, of course, any statement by her will be printed in the Record. But the others have spoken.

Mr. President, I am glad that the Senate is finally taking up this conference report. Unlike the conference on the Hatch-**Leahy** juvenile justice bill that passed the Senate in May 1999 with a bipartisan majority of 73 votes, and so many other matters that are still left undone by this Congress, we have an opportunity through this conference report to come to conclusion on three items that I have supported and tried to pass for many months. Unfortunately, there are two additional, extraneous items that were added over my opposition and that should not have been added to this conference report at all. I will speak on each of these matters.

At the outset, I want to acknowledge the important work of Representative Conyers in the House, who has been a stalwart and consistent supporter of the Violence Against Women Act of 2000. Without his cooperation and support and the hard work of his staff, we would not be standing here today. I also want to pay tribute to the efforts of Senators Boxer, Mikulski, Lincoln, Landrieu, Murray and Feinstein. Their efforts throughout this Congress, including in the last several days, have made the difference in our ability to move forward to begin this debate today.

With Senators Kennedy, Biden, Specter, Smith and so many others, I

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have been urging the Republican leadership to take up and pass the Violence Against Women Act of 2000 for some time. I had to urge action by the Judiciary Committee for several weeks before we were finally able to have it added to the agenda on June 15, 2000. It was reported unanimously the same month. Over the last several months since this legislation was reported, I have worked and prodded and pushed along with our Democratic Leader Senator Daschle, Senator Reid, Senator Durbin, Senator Robb, Senator Bingaman and others on both sides of the aisle to try to get this matter taken up and passed without further delay.

The President of the United States wrote the Majority Leader back on September 27, 2000 urging passage. The First Lady and the Vice President had previously called for passage back in June at the time of the Judiciary Committee markup. The Violence Against Women Act of 2000 is a matter upon which we need to act.

I addressed this matter twice on the Senate floor in late September when an effort was being made by some on the Republican side of the aisle to try to use VAWA as a vehicle to force consideration of a flawed bankruptcy bill or to override Oregon state law. I said that playing political games with this important legislation was the wrong thing to do and that VAWA should not be used as leverage to enact less worthy provisions. Unfortunately, the Republican leadership in the Senate has been adamant in its refusal to take up and consider VAWA as a stand alone matter, even after the House passed its bill by a 415 to 3 vote. While we have been successful in preventing VAWA from being used as a vehicle for some measures, thanks in part to the President pro tempore Senator Thurmond and Senator Brownback honoring commitments they made to me in order to go to conference, we have not been wholly successful and two additional and unfortunate riders are included over my objection in this conference report.

Due to their dilatory tactics, VAWA was allowed by the Republican leadership to lapse on Saturday, September 30, despite the fact that it has served the women of this country well and the measure had passed the House by a vote of 415 to 3. Such inaction by the current Senate majority is not limited to reauthorization of VAWA. Congressional leaders have continued to drag their feet on enacting comprehensive juvenile crime prevention and enforcement legislation and reasonable gun safety measures, which have been stalled in conference for over a year. Judicial vacancies around the country and most acutely in our federal courts of appeals remain vacant month after month, year after year, while qualified women and men cannot get a hearing or a vote. Legislation to extend the Campbell-**Leahy** program to help provide bulletproof vests for local law enforcement officers was the victim of a secret hold in the Republican Senate cloakroom. Important intellectual property legislation is stalled without explanation by a similar anonymous hold on the other side of the aisle. And hate crime legislation, the Local Law Enforcement Enhancement Act of 2000, has been dropped in conference in spite of the votes in both the Senate and House approving it.

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I am pleased that we will finally be able to reestablish the Violence Against Women Act, a law that makes such a profound difference in the lives of women and families who fall victim to domestic violence. I would not normally support efforts to add extraneous items in a conference report. In this case, in light of the unwillingness of the Senate Republican leadership to allow the Senate to act on the Violence Against Women Act of 2000 and the lapse of its authorization, I joined with Senator Biden and Senator Hatch to add it to the sex trafficking conference report we now consider.

I agreed with Senator Biden's assessment that in light of its importance and the resistance we have seen from the Senate Republican leadership to proceed to the VAWA bill for a straight up or down vote, this was the only way we would ever be able to get it considered by the Senate this year. I commend Senator Biden for making clear at the second and last meeting of the conferees on September 28th that he intended to insist on the conference reauthorizing the Violence Against Women Act. Indeed, I had raised it at our initial meeting of conferees as the one thing we should consider adding to this bill, if anything extraneous was to be considered.

Unfortunately, when we voted on adding VAWA to the conference report,

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only three Senate conferees voted to support it--Senators Biden, Hatch and me--and the other four Senate conferees all voted against. I am glad that over the ensuing days, the other four Senate conferees and the House conferees, whose votes initially seemed to doom this effort, have reversed position and joined with us to add VAWA into this conference report. I am glad that others agree with us that while we need to address the tragic plight of women who are brought to the United States, we need to pass reauthorization of VAWA to help battered women in this country, as well.

Although a conferee, I did not sign the conference report that we consider today. It may come as a surprise to some who have served in this body and remember how conferences are supposed to proceed, that I was not given an opportunity to consider the final report or to sign before it was filed. Indeed, after a second short meeting of conferees, the final meeting, which had been promised so that we could finalize our action, never occurred. Side deals were struck and broken and revised and implemented without resuming the conference. Legislating around here has come to resemble the television program "Survivor" more than the process intended by the Constitution or our Senate rules. We have all become increasingly accustomed to shortcuts in the legislative process, but we are now getting to the point that once sufficient numbers of signatures are obtained on a conference report, once an alliance has formed, conferees from the minority may not even be accorded an opportunity to view the final package let alone asked for their views. In this matter, after I had worked to ensure that VAWA was included in the conference report, I was treated like a member of

the ill-fated Pagong tribe.

Had I been consulted we might have avoided the extended debate and point of order that Senator Thompson is bringing today. I was able to intervene just before the filing of the conference report when I obtained a draft that showed the elimination of the small state minimum funding level in certain grant programs. These eliminations would have been such a disaster for Vermont, New Hampshire, Delaware, Utah, Alaska and so many small and rural states that I had raise a strong objection and the small state minimum of $600,000 for shelters was restored by a last-minute handwritten change to the final conference report.

Unfortunately, while this conference report contains provisions that enjoy broad bipartisan support and will make a positive contribution to the well-being of many people, the Republican majority could not resist loading this conference report with other legislative proposals that are so problematic they could not have passed as stand-alone measures in this or any other Congress.

Let me begin by reviewing the positive parts of this conference report. These are the reasons that, last Friday, our colleagues in the House passed the Conference Report on Victims of Trafficking and Violence Protection Act 371 to 1.

The trafficking of people for the illicit sex trade or slave labor is plainly abhorrent. This conference report partially addresses that problem by providing additional authority to law enforcement and offering visas to victims of severe trafficking, among other measures. Those who have experienced the horror of trafficking and are willing to assist law enforcement in prosecuting trafficking should receive the option of staying in the United States. The law enforcement and immigration measures in this report are the result of compromises reached between both Houses and both sides. In some cases, especially in the immigration area, these provisions are not as generous as I and many other members of this conference would prefer.

This bill will also insist that information about severe forms of trafficking in persons be provided in the annual State Department Country Report for each foreign country, an important step forward in our attempts to raise consciousness about this issue. It also provides for the establishment of an Inter-Agency Task Force to monitor and combat trafficking, with annual and interim reports on countries whose governments do not comply with the minimum standards. The bill calls upon the President to establish initiatives to enhance economic opportunity for potential trafficking victims, such as microcredit lending programs, training, and education.

As someone who has been a strong supporter of human rights, both in the United States and abroad, I am pleased to be associated with this attempt to reduce trafficking and protect its victims. I hope that the

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Senate can also turn its attention to human rights issues that affect immigrants who arrive in the United States willingly. In particular, I request that the Senate consider S. 1940, the Refugee Protection Act, a bill I have introduced with Senator Brownback that would restrict the use of expedited removal to times of immigration emergencies. Under expedited removal, those who flee persecution in their home countries face automatic removal from our country if they are traveling without documents, or even with documents that are facially valid but that an INS officer suspects are invalid. The limited protections that were built into this process when it was adopted in 1996 have proven insufficient, and we are receiving continuing reports of people in real danger being forced to leave the United States without even a hearing. This is simply inappropriate, and does an injustice to our nation's reputation as a haven for the oppressed.

As I already noted, reauthorization of the Violence Against Women Act, or VAWA II, was also added to this report with strong bipartisan support. This is a particularly appropriate bill to add to this conference report. As the conference report states, " t raffickers primarily target women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunity in countries of origin." VAWA II contains a number of important programs to protect women and children in this country, and would complement the goals of this legislation.

I witnessed the devastating effects of domestic violence early in my career as the Vermont State's Attorney for Chittenden County. In those days, long before the passage of the VAWA, Vermont lacked the support programs and services to assist victims of domestic violence. Today, because of the effort and dedication of people in Vermont and across the country who work on these problems every day, an increasing number of women and children are receiving help through domestic violence programs and shelters around the nation.

Six years ago, VAWA passed Congress as part of the Violent Crime Control and Law Enforcement Act. That Act combined tough law enforcement strategies with safeguards and services for victims of domestic violence and sexual assault. I am proud to say that Vermont was the first State in the country to apply for and receive funding under VAWA. Since VAWA was enacted, Vermont has received almost $14 million in VAWA funds. Since the passage of VAWA in 1994, I have been privileged to work with groups such as the Vermont Network Against Domestic Violence and Sexual Assault and the Vermont Center for Crime Victim Services and countless advocates who work to stop to violence against women and who provide assistance to victims.

This funding has enabled Vermont to develop specialized prosecution units and child advocacy centers throughout the state. Lori Hayes, Executive Director of the Vermont Center for Crime Victim Services and Marty Levin of the Vermont Network Against Domestic Violence and Sexual Abuse have been especially instrumental in coordinating VAWA grants in

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The woman's answer was no. Ms. Shved began searching for files and telephone numbers of the local consul, the police, anybody who could help.

"Do they know how far from Rome they are?" she asked, her voice tightening with each word. "What about the name of the street or bar? Anything will help," she said, jotting notes furiously as she spoke. "We can get the police on this, but we need something. If they call back, tell them to give us a clue. The street number. The number of a bus that runs past. One thing is all we need."

Ms. Shved hung up and called officials at Ukraine's Interior Ministry and the Foreign Ministry. Her conversations were short, direct and obviously a routine part of her job.

That is because Ukraine--and to a lesser degree its Slavic neighbors Russia and Belarus--has replaced Thailand and the Philippines as the epicenter of the global business in trafficking women. The Ukrainian problem has been worsened by a ravaged economy, an atrophied system of law enforcement, and criminal gangs that grow more brazen each year. Young European women are in demand, and Ukraine, a country of 51 million people, has a seemingly endless supply. It is not that hard to see why.

Neither Russia nor Ukraine reports accurate unemployment statistics. But even partial numbers present a clear story of chaos and economic dislocation. Federal employment statistics in Ukraine indicate that more than two-thirds of the unemployed are women. The Government also keeps another statistic: employed but not working. Those are people who technically have jobs, and can use company amenities like day-care centers and hospitals. But they do not work or get paid. Three-quarters are women. And of those who have lost their jobs since the Soviet Union dissolved in 1991, more than 80 percent are women.

The average salary in Ukraine today is slightly less than $30 a month, but it is half that in the small towns that criminal gangs favor for recruiting women to work abroad. On average, there are 30 applicants for every job in most Ukrainian cities. There is no real hope; but there is freedom.

In that climate, looking for work in foreign countries has increasingly become a matter of survival.

"It's no secret that the highest prices now go for the white women," said Marco Buffo, executive director of On the Road, an anti-trafficking organization in northern Italy. "They are the novelty item now. It used to be Nigerians and Asians at the top of the market. Now it's the Ukrainians."

Economics is not the only factor causing women to flee

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Vermont. Their hard work has brought grant funding to Vermont for encouraging the development and establishment of arrest policies for combating rural domestic violence and child abuse. These grants have made a real difference in the lives of those who suffer from violence and abuse. Reauthorization of these vital programs in VAWA II will continue to build on these successes.

VAWA II continues to move us toward reducing violence against women by strengthening law enforcement through the extension of STOP grants, which encourage a multi-disciplinary approach to improving the criminal justice system's response to violence against women. With support from STOP grants, law enforcement, prosecutors, courts, victim advocates and

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service providers work together to ensure victim safety and offender accountability.

The benefits of STOP grants are evident throughout Vermont. With STOP grants the Windham County Domestic Violence Unit, the Rutland County Women's Network and Shelter and others like them have enhanced victim advocacy services, improved safety for women and children, and ensured that perpetrators are held accountable. The Northwest Unit for Special Investigations in St. Albans, Vermont, established a multi-disciplinary approach to the investigation of adult sexual assault and domestic violence cases with the help of STOP funds. By linking victims with advocacy programs at the time of the initial report, the Unit finds that more victims get needed services and support and thus find it easier to participate in the investigation and subsequent prosecution. The State's Attorney's Office, which has designated a prosecutor to participate in the Unit, has implemented a new protocol for the prosecution of domestic violence cases. The protocol and multi-disciplinary approach are credited with an 80 percent conviction rate in domestic violence and sexual assault cases.

Passing VAWA II will continue grants that strengthen pro-arrest policies and enforcement of protection orders. In a rural state like Vermont, law enforcement agencies greatly benefit from cooperative, inter-agency efforts to combat and solve significant problems. Last year, approximately $850,000 of this funding supported Vermont efforts to encourage arrest policies.

Vermont will also benefit from the extension of Rural Domestic Violence and Child Victimization Enforcement Grants under VAWA II. These grants are designed to make victim services more accessible to women and children living in rural areas. I worked hard to see these provisions included in the original VAWA in 1994, and I am proud that its success has merited an increased authorization for funding in VAWA II. Rural Domestic Violence and Child Victimization Enforcement Grants have been utilized by the Vermont Network Against Domestic Violence and Sexual Assault, the Vermont Attorney General's Office, and the Vermont Department of Social and Rehabilitation Services to increase community

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awareness, develop cooperative relationships between state child protection agencies and domestic violence programs, expand existing multi disciplinary task forces to include allied professional groups, and create local multi-use supervised visitation centers.

VAWA II also reauthorizes the National Stalker and Domestic Violence Reduction Grant. This important grant program assists in the improvement of local, state and national crime databases for tracking stalking and domestic violence. As we work to prevent violence against women, we must not forget those who have already fallen victim to it. VAWA II recognizes that combating violence against women extends beyond providing assistance to victims, it includes preventing women from becoming victims at all.

The National Domestic Violence Hotline, which has assisted over 180,000 callers, will continue its crucial operation through the reauthorization of VAWA. Much like the state hotline that the Vermont Network Against Domestic Violence and Sexual Assault helped establish in Vermont, the National Hotline reaches victims who may feel they have nowhere to turn.

I am especially pleased to see that VAWA II will authorize a new grant program for civil legal assistance. In the past, funding for legal services for victims of domestic violence was dependent on a set-aside in the STOP grant appropriation. This separate grant authorization will allow victims of violence, stalking and sexual assault, who would otherwise be unable to afford professional legal representation, to obtain access to trained attorneys and advocacy services. In my State, Vermont Legal Aid, the Vermont Network to End Domestic Violence and the South Royalton Legal Clinic of Vermont Law School are currently involved in a collaborative project to expand civil legal assistance services to domestic violence victims across the state. These three organizations are partnering to create Intensive Service Teams that will provide coordinated civil legal assistance and victim advocacy in Rutland County and the Northeast Kingdom. Grants such as this one that support training, technical assistance and support for cooperative efforts between victim advocacy groups and legal assistance providers will continue to prosper under VAWA II.

I remain concerned, however, over a highly objectionable provision that prohibits any expenditure of the civil legal assistant grant funds to support litigation with respect to abortion. Currently, the Legal Services Corporation (LSC) operates under two abortion-related restriction provisions: The 1974 LSC statute bans the use of federally appropriated Corporation funds for legal assistance for any abortion-related proceeding or litigation. Additionally, an appropriations rider to the Commerce-Justice-State appropriations bill restricts LSC funds from use by any person or entity that participates in abortion-related litigation.

The language in VAWA II bill reaches further, in the sense that it

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would ban more organizations than just LSC from spending funds on abortion-related litigation. Under the Senate language, grants can be made to private, nonprofit entities, Indian tribal governments, and publicly funded organizations such as law schools. These grantees are certainly worthy and appropriate to provide these services generally; the objection is solely that they should not be gagged from providing abortion related legal assistance. I am concerned about the precedent this provision would set in expanding the restriction on abortion-related litigation to other programs and organizations. I think this kind of language should give us pause as we consider the effect it would have on victims who, in the face of domestic violence, sexual assault in family relationships, incest or rape, must run a gauntlet of congressionally imposed barriers in order simply to obtain full and complete information about their comprehensive health-care options.

The original VAWA authorized funding for programs that provide shelter to battered women and children. I am pleased to see that VAWA II expands this funding so that facilities such as the Women Helping Battered Women Shelter in Burlington, Vermont, and the Rutland County Women's Shelter in Rutland, Vermont will continue to serve victims in their most vulnerable time of need. As I have noted, at one point I obtained a draft conference report that had dropped the $600,000 small state minimum funding these grants. I am relieved that my objection was heard and the minimum restored.

As glad as I am that we are finally reauthorizing VAWA, this is not the version of VAWA that I cosponsored and supported in the Judiciary Committee and urged the Senate to enact. In fact, this is not the VAWA II bill that was negotiated among staff at a bipartisan, bicameral meeting earlier in this process. The version of VAWA II in this conference report was negotiated behind closed doors in the last minutes before the conference report was filed. Unfortunately, this approach saw additional provisions added and struck that have diminished the final product. One provision of particular concern to me is that on transitional housing.

The previous Senate version of the Violence Against Women Act of 2000, S. 2787, had over 70 co-sponsors. I am one of them. That version included better provisions on transitional housing assistance. It would have been a significant improvement over the original VAWA. This new grant program for short-term housing assistance and support services for homeless families who have fled from domestic violence environments was a priority for me and Vermont, where availability of affordable housing is at an all-time low. Unfortunately, this authorization was reduced to one year without my consent. Those involved in the discussions attribute the change to "jurisdictional concerns" of the Health, Labor and Pensions Committee. I look forward to working with Senators Jeffords, Gregg and Kennedy next year during reauthorization of the Child Abuse Prevention and Treatment Act to extend the authorization of this important program. We should all be concerned with providing victims of domestic violence with a safe place to recover from their traumatic experiences. In addition, I would like to see more support

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for groups that address the need for funding for under-served populations.

There are positive things to come out of the revised version of VAWA II. I am pleased that we were able to cover "dating violence" in most of the provisions and grant programs. The Bureau of Justice Statistics report indicates that more than four in every 10 incidents of domestic violence involves non-married persons, and further, that the highest rate of domestic violence occurs among young people aged 16-24. It is crucial that we authorize prosecution of their offenders. We cannot ignore this increasingly at risk segment of the population. The House-passed version of VAWA II had contained such provisions and I support them as they have been incorporated into the conference report.

In 1994, we designed VAWA to prevent abusive husbands from using control over their wives' immigration status to control them. Over the ensuing six years we have discovered additional areas that need to be addressed to protect immigrant women from abuse, and have attempted to do so in this legislation. VAWA II will ensure that the immigration status of battered women will not be affected by changes in the status of their abusers. It will also make it easier for abused women and their children to become lawful permanent residents and obtain cancellation of removal. With this legislation, battered immigrant women should not have to choose to stay with their abusers in order to stay in the United States.

I am pleased that we have taken these additional steps to protect immigrant women facing domestic abuse in the United States. I would also like to point out the difficult situation of immigrant women who face domestic violence if they are returned to their home country.

Numerous cases have arisen recently in which women who fear being killed by abusive spouses in their native lands were denied claims for asylum, despite the fact that the police in those countries do not enforce what limited laws apply to domestic violence. There are additional cases in which women who fear for their lives due to ingrained social practices--such as "honor killings" in Jordan, in which families have female relatives killed for "dishonoring" them--have lost asylum claims. The Attorney General is currently reviewing the Board of Immigration Appeals decision Matter of R-A-, which is the precedent on which these later decisions have been based. I have written, along with Senator Landrieu and many other of my colleagues, urging the Attorney General to reverse this decision and protect women who face persecution. I renew that request today, and hope that the passage of this legislation will prompt action on this issue as well.

The conference report includes a provision that would require dissemination of sex registry information to colleges and universities.

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Currently, the Family Educational Rights and Privacy Act (FERPA) applies strict restrictions on the dissemination of information in "education records," but these restrictions are specifically defined to exclude "records maintained by a law enforcement unit" of the school and were created for a law enforcement purpose. Thus, to the extent that campus police get information about registered sex offenders under State law, they are able to use it as they wish. Apparently not satisfied to leave this issue to the States, the conference report would mandate that States provide sex registry information concerning students to colleges and universities where the students are registered.

I see no need to impose a federal disclosure requirement when the States are now free to regulate as they see fit the dissemination of sex registry information to schools and campus police, who may use it to protect the safety of those on campus. No one is opposed to taking adequate safety measures regarding sex offenders on campus. My concern has to do with unnecessary federal mandates when the States are perfectly capable of addressing the issue.

VAWA II includes a provision to enhance protections for older women from domestic violence and sexual assault. Last year I introduced the Seniors Safety Act, S. 751, which would enhance penalties for crimes against seniors. This provision in VAWA II is an important complement to that legislation and I am pleased this provision has been able to generate wide support.

VAWA II would also help young victims of crime through funding for the establishment of safe and supervised visitation centers for children in order to reduce the opportunity for domestic violence. Grants will also be extended to continue funding agencies serving homeless youth who have been or who are at risk of abuse and to continue funding for victims of child abuse, including money for advocates, training for judicial personnel and televised testimony.

Many of the most successful services for victims start at the local level, such as Vermont's model hotline on domestic violence and sexual assault. VAWA II recognizes these local successes and continues grant funding of community demonstration projects for the intervention and prevention of domestic violence.

The original VAWA was an important and comprehensive Federal effort to combat violence against women and to assist the victims of such violence. Passage of VAWA II gives us the opportunity to continue funding these successful programs, to improve victim services, and to strengthen these laws so that violence against women is eliminated. I am pleased that we were able to find a way to get this considered and passed. I deeply regret that we have not been able to do so in stand-alone legislation or before VAWA expired last month.

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The conference report also includes the Justice for Victims of Terrorism Act. I commend Senators Lautenberg and Mack for working with the Administration on this consensus legislation which addresses serious policy concerns raised by prior versions of the bill. This measure has been cleared for action and passage by unanimous consent for some time by all Democratic Senators. In my view, it should have been passed in its own right a long time ago.

The Justice for Victims of Terrorism Act addresses an issue that should deeply concern all of us: the enforcement of court-ordered judgments that compensate the victims of state-sponsored terrorism. This legislation has the strong support of American families who have lost loved ones due to the callous indifference to life of international terrorist organizations and their client states, and it deserves our support as well.

One such family is the family of Alisa Flatow, an American student killed in Gaza in a 1995 bus bombing. The Flatow family obtained a $247 million judgment in Federal court against the Iranian-sponsored Islamic Jihad, which proudly claimed responsibility for the bombing that took her life. But the family has been unable to enforce this judgment because Iranian assets in the United States remain frozen.

The conference report that the Senate passes today will provide an avenue for the Flatow family and others in their position to recover some of the damages due them under American law. It will permit these plaintiffs to attach certain foreign assets to satisfy the compensatory damages portion of their judgments against foreign states for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act. It will also permit these plaintiffs to recover post-judgment interest and, in the case of claims against Cuba, certain amounts that have been awarded as sanctions by judicial order.

I am also pleased that this measure also includes a **Leahy**-Feinstein amendment dealing with support for victims of international terrorism. This amendment will enable the Office for Victims of Crime to provide more immediate and effective assistance to Americans who are victims of terrorism abroad--Americans like those killed or injured in the embassy bombings in Kenya and Tanzania, and in the Pan Am 103 bombing over Lockerbie, Scotland. These victims deserve help, but according to OVC, existing programs are failing to meet their needs. Working with OVC, we have crafted legislation to correct this problem.

The **Leahy**-Feinstein part of this measure will permit the Office for Victims of Crime to serve these victims better by expanding the types of assistance for which the VOCA emergency

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reserve fund may be used, and the range of organizations to which

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assistance may be provided. These changes will not require new or appropriated funds: They simply allow OVC greater flexibility in using existing reserve funds to assist victims of terrorism abroad, including the victims of the Lockerbie and embassy bombings.

This provision will also authorize OVC to raise the cap on the VOCA emergency reserve fund from $50 million to $100 million, so that the fund is large enough to cover the extraordinary costs that would be incurred if a terrorist act caused massive casualties, and to replenish the reserve fund with unobligated funds from its other grant programs.

At the same time, the provision will simplify the presently-authorized system of using VOCA funds to provide victim compensation to American victims of terrorism abroad, by permitting OVC to establish and operate an international crime victim compensation program. This program will, in addition, cover foreign nationals who are employees of any American government institution targeted for terrorist attack. The source of funding is the VOCA emergency reserve fund, which we authorized in an amendment I offered to the 1996 Antiterrorism and Effective Death Penalty Act.

Finally, the provision clarifies that deposits into the Crime Victims Fund remain available for intended uses under VOCA when not expended immediately. This should quell concerns raised regarding the effect of spending caps included in appropriations bills last year and this. I understand the appropriations' actions to have deferred spending but not to have removed deposits from the Fund. This provision makes that explicit.

I want to thank Senator Feinstein for her support and assistance on this initiative. Senator Feinstein cares deeply about the rights of victims, and I am pleased that we could work together on some practical, pragmatic improvements to our federal crime victims' laws. We would have liked to do more. In particular, we would have liked to allow OVC to deliver timely and critically needed emergency assistance to all victims of terrorism and mass violence occurring outside the United States and targeted at the United States or United States nationals.

Unfortunately, to achieve bipartisan consensus on this provision, we were compelled to restrict OVC's authority, so that it may provide emergency assistance only to United States nationals and employees. It seems more than a little bizarre to me that the richest country in the world would reserve emergency aid for victims of terrorism who can produce a passport or W-2. I will continue to work with OVC and victims' organization to remedy this anomaly.

I regret that we have not done more for victims this year, or during the last few years. I have on several occasions noted my concern that we not dissipate the progress we could be making by focusing

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exclusively on efforts to amend the Constitution. Regretfully, I must note that the pace of victims legislation has slowed noticeably and many opportunities for progress have been squandered. I look forward to continuing to work with the Administration, victims groups, prosecutors, judges and other interested parties on how we can most effectively assist victims and provide them the greater voice and rights that they deserve.

This is the third good part of the package that comes before the Senate today. The sex trafficking bill, VAWA II and the Justice for Victims of Terrorism legislation could each have passed in its own right. The are being bundled together because the Republican leadership refused to proceed to consideration of VAWA II or the victims legislation and this session is drawing to a close. We are already passed the sine die adjournment date that had been set by the Majority Leader. We are already into the second or third or fourth continuing resolution needed to keep the government operating while Congress completes appropriations bills that should have been enacted in July and September.

While the conference report contains many provisions which I support, it also has been used as a vehicle for some pet Republican legislative projects that I do not endorse. I refer specifically to "Aimee's law" and the "Twenty-First Amendment Enforcement Act."

The conference report contains a legislative proposal called "Aimee's law," which, though well intended, will not serve this country well. We all shudder when a violent offender is incarcerated for an insufficient length of time only to be released and claim another victim. Let us be clear: everyone agrees that serious violent offenders should serve appropriate and sufficient incarceration. Yet, Aimee's law is not the way to pursue this goal. Neither Aimee's law or Congress can accurately assess with one hundred percent accuracy which offender will be a recidivist and which offender will not. This proposal has myriad practical implementation problems that will make this law a headache to administer for the States and the Department of Justice, without living up to its promise of stopping future tragedies.

Ironically, Aimee's law will adversely affect the States' ability to fight crime. By taking law enforcement funds away from the states, the legislation will in effect reduce the states' capacity to fight crime. The Pennsylvania Secretary of Corrections has advised that "Pennsylvania, along with many other states, plans for the use of federal law enforcement money years in advance. Excessive penalties have a high potential to interfere with states' abilities to keep violent offenders--including those who have committed Aimee's law crimes--incarcerated for longer periods of time."

Specifically, this proposal would allow a state to apply to the Attorney General for reimbursement of the costs for investigation, prosecution and incarceration of prisoners who were previously

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convicted in another state for murder, rape or a dangerous sexual offense. The source of the reimbursement funds will be from Federal law enforcement assistance funds that would otherwise be paid out to the state that convicted the individual of the prior offense and released that offender.

Last year, this proposal was adopted as an amendment to S. 254, the Juvenile Justice bill. Even then I expressed grave reservations with the language and complications contained in the legislation. Specifically, I noted that the proposal was "extremely complicated and can create a great deal of problems with some States" and offered "to work more on the language to see if there are areas of unnecessary complication that could be removed." (Record, May 19, 2000, p. S5526). Unfortunately, the juvenile justice conference, in which the language of this proposal could have been refined, has failed to meet for over a year. Apparently, the Republican leadership intends to end the Congress without ever completing work on the juvenile crime bill.

By any stretch of the imagination, the costs of Aimee's law outweigh its promised benefits:

First, Aimee's law penalizes states' law enforcement not for their own actions, but for the actions taken by judicial and corrections officers resulting in the release of a defendant who has not served the incarceration period required under Aimee's law. Indeed, defendants who escape from jail without serving their full term and commit subsequent crimes could subject the state in which they committed their initial crimes to decreased federal funds otherwise used to help law enforcement.

Second, Aimee's law requires the annual collection, maintenance and reporting of criminal history for violent offenders and covers not just those offenders currently in the system but any such offender no matter how long ago that offender was convicted, served time and was released. This provision alone demands an enormous investment of time and money, neither of which the legislation provides, to build the criminal history database necessary to implement the new law. As the Department of Justice has pointed out, " s ince no time limit is imposed between the prior and subsequent convictions, the system would require electronic criminal records that do not now exist and would be very expensive to accumulate." This "would require the establishment of a major national data center to collect and match state records" and constitutes an "unfunded mandate."

During a colloquy in the House on October 6th, Congressman Conyers

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asked a House sponsor of Aimee's law whether it was the drafters' intent that Aimee's law shall apply prospectively, that is only to offenders whose first sentence for a covered offense occurs on or after

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the effective date of this law, January 1, 2002, and the sponsor responded affirmatively. Yet, the law remains murky on this point since the effective date may be construed to apply only to the time when states may make applications for reimbursement, not to when the offenses occurred. We have two years before the effective date to clarify this point, and others, in this problematic law.

Third, while Aimee's law would exempt certain States from application of the law, those exemptions are predicated, in part, upon "the average term of imprisonment imposed for that offense in all States." The Pennsylvania Director of Corrections has pointed out that " t here is no record of what the national average...' is for crimes covered in this language. Further, if such an average existed, it would continually fluctuate, guaranteeing that there would always be some states out of compliance."

Fourth, Aimee's law adopts offense definitions that are unclear and fail to conform to the offense definitions found in the federal criminal code or to the standard legal terms used in state codes making it difficult to enforce Aimee's law across state lines.

The National Governors' Association has repeatedly registered its disapproval of Aimee's law as "onerous, impractical and unworkable." Consequently, States may simply agree among themselves not to file the applications with the Attorney General required to obtain reimbursement. Indeed, such an application might trigger a retaliatory review of the applicant's own record of released defendants and result in reduction of important federal funds. As a consequence, states may view invocation of Aimee's law reimbursement provisions as a risky proposition.

In short, Aimee's law is an empty promise that may make good fodder for 60-second campaign spots but will do nothing to continue the progress we have made over the last eight years to reduce the violent crime rate or to truly help crime victims.

Senator Hatch has insisted that the "Twenty-First Amendment Enforcement Act" be included in the conference report, despite the fact that the conference met September 28th, and expressly rejected inclusion of this proposal in the conference report. It was rejected by the Senate conferees and the House conferees went so far as to adopt the position that no extraneous legislation would be added to the sex trafficking provisions. Nevertheless, the conference report contains Senator Hatch's bill, which amounts to a double whammy--it is unnecessary and dangerous to e-commerce. The purported goal of this legislation is to enforce state liquor laws. The approach of this legislation sets a dangerous precedent by erecting barriers to interstate and electronic commerce.

Specifically, the bill would permit the enforcement of state liquor

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their homelands. There is also social reality. For the first time, young women in Ukraine and Russia have the right, the ability and the willpower to walk away from their parents and their hometowns. Village life is disintegrating throughout much of the former Soviet world, and youngsters are grabbing any chance they can find to save themselves.

"After the wall fell down, the Ukrainian people tried to live in the new circumstances," said Ms. Shved. "It was very hard, and it gets no easier. Girls now have few and opportunities yet great freedom. They see Pretty Woman,' or a thousand movies and ads with the same point, that somebody who is rich can save them. The glory and ease of wealth is almost the basic point of the Western advertising that we see. Here the towns are dying. What jobs there are go to men. So they leave."

First, however, they answer ads from employment agencies promising to find them work in a foreign country. Here again, Russian crime gangs play a central role. They often recruit people through seemingly innocuous "mail order bride" meetings. Even when they do not, few such organizations can operate without paying off one gang or another. Sometimes want ads are almost honest, suggesting that the women earn up to $1,000 a month as "escorts" abroad. Often they are vague or blatantly untrue.

recruiting methods: ads make offers too good to be true

One typical ad used by traffickers in Kiev last year read: "Girls: Must be single and very pretty. Young and tall. We invite you for work as models, secretaries, dancers, choreographers, gymnasts. Housing is supplied. Foreign posts available. Must apply in person."

One young woman who did, and made it back alive, described a harrowing journey. "I met these guys and they asked if I would work at a strip bar," she said. "Why not, I thought. They said we would have to leave at once. We went by car to the Slovak Republic where they grabbed my passport. I think they got me new papers there, but threatened me if I spoke out. We made it to Vienna, then to Turkey. I was kept in a bar and I was told I owed $5,000 for my travel. I worked for three days, and on the fourth I was arrested."

Lately, the ads have started to disappear from the main cities--where the realities of such offers are known now. These days the appeals are made in the provinces, where their success is undiminished.

Most of the thousands of Ukrainian women who go abroad each year are illegal immigrants who do not work in the sex business. Often they apply for a legal visa--to dance, or work in a bar--and then stay after it expires.

Many go to Turkey and Germany, where Russian crime groups

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laws in Federal court. This expansion of the jurisdiction of the Federal courts is not warranted. State attorneys general are already enforcing their state liquor laws in state courts--whether the alcohol was brought over the Internet or over the counter at the corner store. The Internet has not changed the enforcement of state liquor laws.

This year, for instance, the Utah Attorney General successfully enforced that state's liquor laws against an out-of-state direct sales shipper of alcoholic beverages. That case resulted in fines of more than $25,000 and guilty pleads by an out-of-state direct shipper to state law counts of unlawfully importing alcohol and selling it to a minor.

Indeed, the Utah Attorney General, Jan Graham, declared: "This case represents a significant win for Utah. No longer can retailers claim that we have no authority over illegal transactions that occur outside of the state. If you're shipping to a Utah resident, we can and will prosecute you."

This legislation is using the Internet as an excuse to impose a Federal fix for a problem that is already being solved at the state level. Whatever happened to Federalism? In fact, the National Conference of State Legislatures opposes this legislation, calling the bill "an overreaction to a situation which can be reconciled among the states and not in a federal court."

Skeptics rightly are concerned that some may be using the Internet as an excuse to protect the decades-old distribution system for wine and other alcoholic beverages. Although the Internet has not changed state liquor law enforcement, it has opened up the wine and beer market to new consumer choices and competition.

With the power of electronic commerce, adult consumers now have the freedom to choose from a rich assortment of different wine and beer products--from small wineries to nationwide brewers in America or any other country in the world.

We should be embracing this free market and open competition. Competition in the free market is the American way. But instead some wine and beer wholesalers want to use this legislation as a protectionist ploy to keep their present distribution system, which effectively locks out small wineries and micro-breweries from ever getting their products on a store shelf. Mothers Against Drunk Driving and the National Conference of State Legislatures have noted that this Federal legislation is nothing more than an attempt to use the Federal courts in a disagreement between wholesalers and small independent wineries and breweries.

On August 12, 1999, The Wall Street Journal wrote about this

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legislation: "This is a bad bill, with dangerous consequences not only for alcohol but for the future of e-commerce and other cross-state transactions." I whole-heartedly agree.

The Department of Justice has warned Congress in relation to legislation affecting the Internet that: " A ny prohibitions that are designed to prohibit criminal activity on the Internet must be carefully drafted to accomplish the legislation's objectives without stifling the growth of the Internet or chilling its use." This bill fails that test. It is not carefully crafted. In fact, it is not even needed. It also could chill the use of the Internet as a means of promoting interstate commerce.

I will vote in support of this conference report because the provisions on sex trafficking, VAWA and justice for victims are proposals I endorse. I do so with profound regret with the process and that the majority insisted on including Aimee's law and the internet alcohol bill that are not well considered. They are the price that we pay for making progress here today. I will work to see if we can limit their damage.

In closing, I wish to thank the conferees and their staffs who showed courtesy to me and mine. In particular, I thank Karen Knutsen of Senator Brownback's staff and Mark Lagon and Brian McKee of the staff of the Foreign Relations Committee. I thank Nancy Zirkin of the American Association of University Women and Pat Reuss of the NOW Legal Defense and Education Fund for their efforts on behalf of VAWA II. This has been a difficult matter at a difficult time that is being concluded as best we can under these circumstances in order to enact the sex trafficking legislation, VAWA II and the victims bill for all the good they can mean.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. **LEAHY.** Mr. President, I ask unanimous consent that the distinguished Senator from Kansas be recognized to make a unanimous consent request.

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

Mr. BROWNBACK. Mr. President, I ask unanimous consent that the votes occurring relative to the Thompson appeal as provided in the consent agreement this body agreed to on October 6, 2000, occur at 4:30 p.m. today, with adoption of the conference report to occur immediately following that vote as provided in the consent agreement.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

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Mr. BROWNBACK. Mr. President, for the information of Members, in light of this agreement, the next two votes will occur at approximately 4:30 p.m. with the Thompson appeal vote occurring at 4:30 and the conference report vote occurring immediately thereafter.

SUBJECT: HUMAN
TRAFFICKING (91%); LEGISLATION (90%); PROSTITUTION (90%); WOMEN (90%); ARRESTS (

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are particularly powerful. Israeli leaders say that Russian women--they tend to refer to all women from the former Soviet Union as Russian--disappear off tour boats every day. Officials in Italy estimate that at least 30,000 Ukrainian women are employed illegally there now.

Most are domestic workers, but a growing number are prostitutes, some of them having been promised work as domestics only to find out their jobs were a lie. Part of the problem became clear in a two-year study recently concluded by the Washington-based nonprofit group Global Survival Network: police officials in many countries just don't care.

The network, after undercover interviews with gangsters, pimps and corrupt officials, found that local police forces--often those best able to prevent trafficking--are least interested in helping.

Gillian Caldwell of Global Survival Network has been deeply involved in the study. "In Tokyo," she said, "a sympathetic senator arranged a meeting for us with senior police officials to discuss the growing prevalence of trafficking from Russia into Japan. The police insisted it wasn't a problem, and they didn't even want the concrete information we could have provided. That didn't surprise local relief agencies, who cited instances in which police had actually sold trafficked women back to the criminal networks which had enslaved them."

official reactions: best-placed to help, but least inclined

Complacency among police agencies is not uncommon. "Women's groups want to blow this all out of proportion," said Gennadi V. Lepenko, chief of Kiev's branch of Interpol, the international police agency. "Perhaps this was a problem a few years ago. But it's under control now."

That is not the view at Ukraine's Parliament--which is trying to pass new laws to protect young women--or at the Interior Ministry.

"We have a very serious problem here and we are simply not equipped to solve it by ourselves," said Mikhail Lebed, chief of criminal investigations for the Ukrainian Interior Ministry. "It is a human tragedy, but

[*S10166]

also, frankly, a national crisis. Gangsters make more from these women in a week than we have in our law enforcement budget for the whole year. To be honest, unless we get some help we are not going to stop it."

But solutions will not be simple. Criminal gangs risk little by ferrying women out of the country; indeed, many of the women go voluntarily. Laws are vague, cooperation between

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Counsel's Office, White House

Kavanaugh, Brett

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President's Judges Plan: Judges - Judicial Conference Action on President's Proposal

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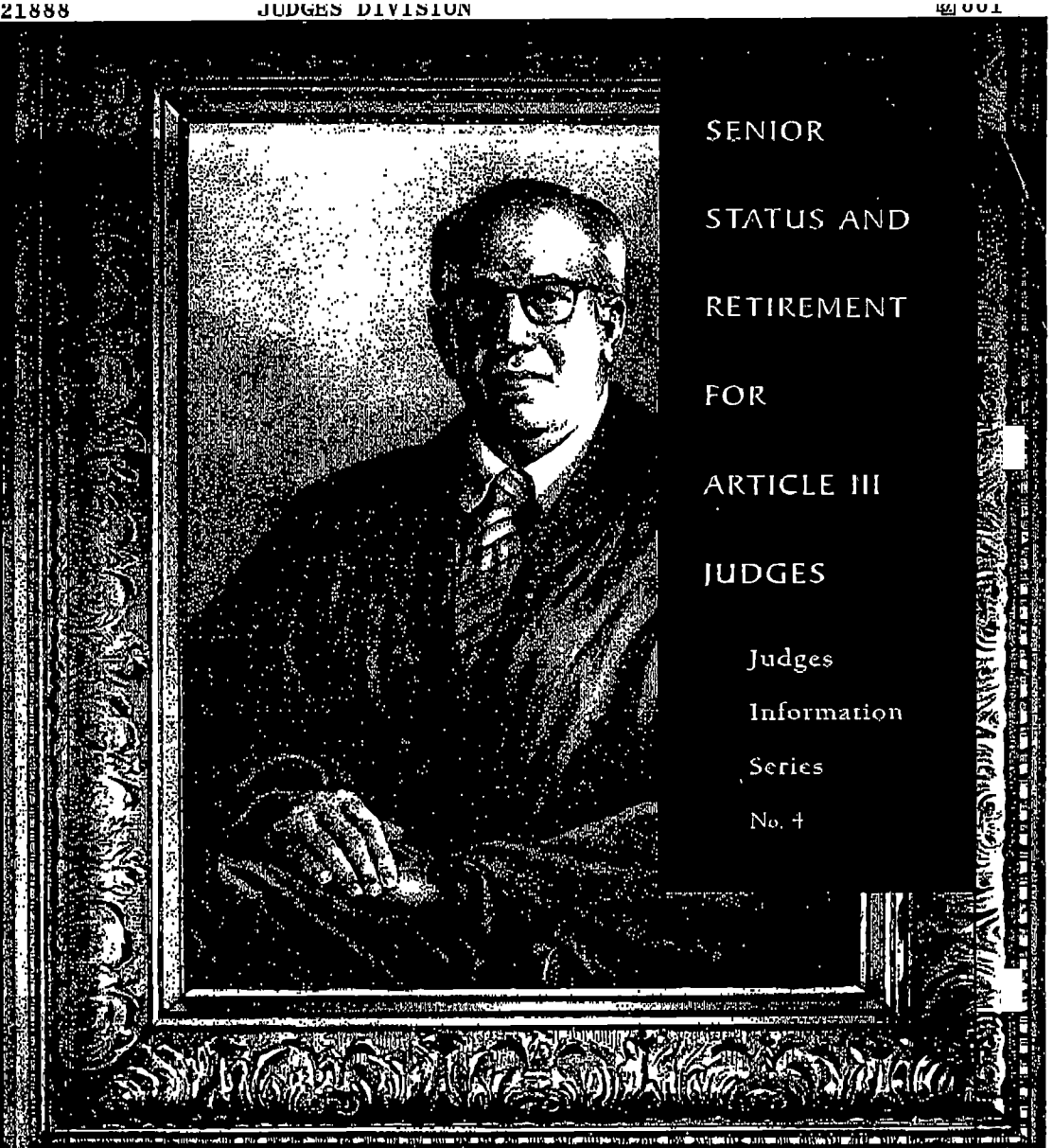

SENIOR STATUS AND RETIREMENT FOR ARTICLE III JUDGES

Judges Information Series No. 4

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Leonidas Ralph Mecham, Director

REV_00256220

- the chief judge of the Court of International Trade (in the case of another judge of that court).

A judge who takes senior status on disability and has 10 or more years of Article III service will continue to receive the full salary of the judicial office, including any future COLAs and other salary increases. If a judge takes senior status on disability and has less than 10 years of Article III service, the judge receives one-half the salary of the judicial office, plus future COLAs and other salary increases.

A circuit judicial council or the Judicial Conference of the United States may request that a judge who is 65 years of age or older retire voluntarily from office or from regular active service without being required to satisfy the "Rule of 80" as to length of service if the judge is found to be disabled or to have committed an act of misconduct. *See* 28 U.S.C. §§ 372(c)(6)(B) (iii) & (c)(8)(A).

The disability of a circuit or district judge who does not retire voluntarily may be certified by a majority of the members of the circuit judicial council. In this case, the President may appoint an additional judge to the respective court if the judge in question is found to be unable to discharge all judicial duties efficiently and appointment of another judge is necessary for the efficient dispatch of business. The judge certified as disabled remains in active status but loses seniority in relation to all other active judges of the respective court for purposes of precedence, service as chief judge, or temporary performance of chief judge duties. *See* 28 U.S.C. § 372(b).

Official Notifications

In March 1988, the Judicial Conference considered the subject of judgeship vacancies and determined that "vacancies place significant burdens on the courts by increasing the workloads of those judges available for duty and diminishing the courts' ability to discharge their responsibilities." As a result, the Conference adopted a policy urging all judges nearing retirement to notify the President and the Administrative Office, if possible, six to twelve months before the contemplated change in status. This policy is further reflected in the *Long Range Plan for the Federal Courts* approved by the Conference in 1995 (see Recommendation 67).

A judge who decides to take senior status under 28 U.S.C. § 371(b) must notify the President in writing of the intention to leave active service and take senior status. Sample letters are included in Appendix G. Copies of that letter (or a similar notification) should be sent to the following:

REV_00256221

Counsel's Office, White House

Kavanaugh, Brett

Subject File

President's Judges Plan: Judges Proposal

OA/NARA#: 2179/2090
9799

Box 48
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REV_00256222

l judgeship, however, the earlier years of
ward eligibility for retirement from office
e who resigns in order to accept appoint-
ition may, in limited circumstances, receive
r the Civil Service Retirement System or
em (see chapters 12 and 13 at pages 57 and

2 SENIOR STATUS

A judge who retires from regular active judicial service but elects to retain judicial office is known and designated as a senior judge. 28 U.S.C. § 294(b). Senior status may be taken under either 28 U.S.C. § 371(b)(1) (retirement from regular active service based on the Rule of 80) or 28 U.S.C. § 372(a) (retirement on disability). These statutes are reprinted in Appendix B.

ELIGIBILITY

Rule of 80 (28 U.S.C. § 371(b))

A judge who satisfies the Rule of 80 age and service requirements may choose senior status. The number of years of service and the judge's age must total at least 80, with the minimum retirement age fixed at 65 years and the service years ranging from 10 to 15 years. Only whole years, not fractions of years, are computed for purposes of the Rule of 80.

Voluntary Certification of Permanent Disability (28 U.S.C. § 372(a))

Any judge, regardless of age or length of service, may also retire from regular active service and take senior status if the judge becomes permanently disabled from performing judicial duties. A judge must certify the disability to the President in writing, and also furnish the President a certificate of disability signed by—

- the Chief Justice (in the case of an associate justice of the Supreme Court, a chief circuit judge, or the chief judge of the Court of International Trade),
- the chief circuit judge (in the case of another circuit judge or a district judge), or

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- the chief judge of the Court of International Trade (in the case of another judge of that court).

A judge who takes senior status on disability and has 10 or more years of Article III service will continue to receive the full salary of the judicial office, including any future COLAs and other salary increases. If a judge takes senior status on disability and has less than 10 years of Article III service, the judge receives one-half the salary of the judicial office, plus future COLAs and other salary increases.

A circuit judicial council or the Judicial Conference of the United States may request that a judge who is 65 years of age or older retire voluntarily from office or from regular active service without being required to satisfy the "Rule of 80" as to length of service if the judge is found to be disabled or to have committed an act of misconduct. *See* 28 U.S.C. §§ 372(c)(6)(B) (iii) & (c)(8)(A).

The disability of a circuit or district judge who does not retire voluntarily may be certified by a majority of the members of the circuit judicial council. In this case, the President may appoint an additional judge to the respective court if the judge in question is found to be unable to discharge all judicial duties efficiently and appointment of another judge is necessary for the efficient dispatch of business. The judge certified as disabled remains in active status but loses seniority in relation to all other active judges of the respective court for purposes of precedence, service as chief judge, or temporary performance of chief judge duties. *See* 28 U.S.C. § 372(b).

Official Notifications

In March 1988, the Judicial Conference considered the subject of judgeship vacancies and determined that "vacancies place significant burdens on the courts by increasing the workloads of those judges available for duty and diminishing the courts' ability to discharge their responsibilities." As a result, the Conference adopted a policy urging all judges nearing retirement to notify the President and the Administrative Office, if possible, six to twelve months before the contemplated change in status. This policy is further reflected in the *Long Range Plan for the Federal Courts* approved by the Conference in 1995 (*see* Recommendation 67).

A judge who decides to take senior status under 28 U.S.C. § 371(b) must notify the President in writing of the intention to leave active service and take senior status. Sample letters are included in Appendix G. Copies of that letter should be sent to the following:

(1) Chief Justice of the United States
Washington, D.C. 20543

(2) Director
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

(3) Director
Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20002

(4) Chief, Judges Compensation and Benefits Branch
Article III Judges Division
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544.

A judge should also provide written notice to his or her court of the intention to take senior status:

- Circuit judges should notify the chief circuit judge and the circuit executive (or the clerk of court, in the case of judges of the Federal Circuit).
- District judges and judges of the Court of International Trade should notify the chief judge and the clerk of their respective courts.

A judge who retires from regular active service on disability grounds under 28 U.S.C. § 372(a) must certify the disability to the President in writing accompanied by a certificate of disability signed by—

(1) the Chief Justice (in the case of a chief circuit judge or the chief judge of the Court of International Trade),
(2) the chief judge of the circuit (in the case of another circuit judge or a district judge), or
(3) the chief judge of the Court of International Trade (in the case of another judge of that court).

Sample letters are included in Appendix G. Copies of that letter (or a similar notification) should be sent to the following (at the addresses indicated above):

(1) the Chief Justice of the United States
(2) the Director of the Administrative Office of the United States Courts
(3) the Director of the Federal Judicial Center
(4) the Chief of the Judges Compensation and Benefits Branch, Article III Judges Division.

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A judge should also provide written notice to his or her court of the intention to retire from active service on disability grounds:

- Circuit judges should notify the chief circuit judge and the circuit executive (or the clerk of court, in the case of judges of the Federal Circuit).
- District judges and judges of the Court of International Trade should notify the chief judge and the clerk of their respective courts.

Compensation

A senior judge receives retirement compensation equal to the full salary of the judicial office at the time of retirement, plus any post-retirement COLAs and (subject to the workload certification requirement described below) other periodic salary increases. (If retired from regular active service on disability grounds before completing 10 years of service, a senior judge receives only one-half the judicial salary, including post-retirement adjustments and increases.) *See* 28 U.S.C. §§ 371(b), 372(a), 461(a). No statutory authority exists to provide either senior or active Article III judges any other types of salary adjustments provided to federal employees generally, such as "locality" pay or "post differential" pay.

Workload Certification

In order to receive post-retirement salary increases other than cost-of-living adjustments, a judge who takes senior status under the Rule of 80 generally must be certified each year, by the chief judge of the circuit in which the judge was commissioned (for a senior judge of the Court of International Trade, the chief judge of that court), as having performed certain judicial or administrative duties in the preceding calendar year. The nature and amount of these duties are described in 28 U.S.C. § 371(f) and the Rules for Certification of Senior Judges (contained in volume III of the *Guide to Judiciary Policies and Procedures* and reprinted in Appendix I) and may comprise:

- administrative duties equal to the full-time work of an employee of the judicial branch;

  or

- judicial duties, in an amount equal to or greater than the amount of work an average active service judge of the same office (*i.e.*, circuit or district) performs in three months, consisting of (1) a caseload involving courtroom participation, (2) substantial judicial duties not involving courtroom participation, or (3) a combination of (1) and (2);

TRANSMITTAL COVER SHEET

DAN JACKSON
Chief, Judges Compensation and Benefits Branch
Article III Judges Division
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Room 2-300N
Washington, DC 20544

VOICE: 202-502-1880
FAX: 202-502-1811

Date: 7/10/02

To: Brent Greenfield

From: Dawn Fatello

Description: Sr. Status

Number of pages (including transmittal sheet): 4

Transmitted by: _____

Will follow by mail: Yes ☐ No ☐

Counsel's Office, White House

Kavanaugh, Brett

Subject File

President's Judges Plan: Judges Proposal - Womack / Kavanaugh [1]

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Box 48

Folder 10

REV_00256227

Judicial Appointments
Historical Comparison: First Two Years of a Presidency

President	Nominations Submitted	Nominees Confirmed	Percentage Of Nominees Confirmed	Circuit Court Nominations Submitted	Circuit Court Nominees Confirmed	Circuit Court Percentage of Nominees Confirmed
G.W. Bush (as of Aug. '02 Senate recess)	123	72	**59%**	32	13	**41%**
Clinton	140	126	**90%**	22	19	**86%**
George H.W. Bush	74	70	**95%**	23	22	**96%**
Reagan	88	87	**99%**	20	19	**95%**

Judicial Appointments
Historical Comparison: First Two Years of a Presidency

President	Circuit Court Nominees who waited more than a year for a hearing
G.W. Bush (as of August 2002)	11
Clinton	0
George H.W. Bush	0
Reagan	0

107TH CONGRESS
2D SESSION

S. RES. _____

IN THE SENATE OF THE UNITED STATES

Mr. SPECTER submitted the following resolution; which was referred to the Committee on _____

RESOLUTION

Providing for a protocol for nonpartisan confirmation of judicial nominees.

Whereas there has been a continuing controversy with the political party of the President protesting the process on confirmation of Federal judges by the Senate when the Senate is controlled by the opposite political party; and

Whereas there is a concern about a lack of public confidence in the Senate's judicial confirmation process when different parties control the White House and the Senate: Now, therefore, be it

Resolved,

SECTION 1. PROTOCOL FOR NONPARTISAN CONFIRMATION OF JUDICIAL NOMINEES.

(a) TIMETABLES.—

REV_00256230

(1) COMMITTEE TIMETABLES.—The Chairman of the Committee on the Judiciary, in collaboration with the Ranking Member, shall—

(A) establish a timetable for scheduling hearings for nominees to the United States district courts, courts of appeal, and Supreme Court, after the names of such nominees have been submitted to the Senate by the President; and

(B) establish a timetable for action by the full Committee after the hearings, and for reporting out nominees to the full Senate.

(2) SENATE TIMETABLES.—The Majority Leader, in collaboration with the Minority Leader, shall establish a timetable for action by the full Senate after the Committee on the Judiciary has reported out the nominations.

(b) EXTENSION OF TIMETABLES.—

(1) COMMITTEE EXTENSIONS.—The Chairman of the Committee on the Judiciary, in collaboration with the Ranking Member, may extend the time for action by the Committee for cause, such as the need for more investigation or additional hearings.

(2) SENATE EXTENSIONS.—The Majority Leader, in collaboration with the Minority Leader, may

extend the time for floor action for cause, such as the need for more investigation or additional hearings.

(c) REPORT OF NOMINATION TO SENATE.—

(1) NOMINATION TO SUPREME COURT.—Regardless of the vote of the Committee on the Judiciary, a nomination for the Supreme Court of the United States shall be reported by the Committee for action by the full Senate.

(2) NOMINATION TO DISTRICT COURT OR COURT OF APPEALS.—If a nomination for the United States district court or court of appeals is rejected by the Committee on the Judiciary on a party line vote, the nomination shall be reported by the Committee for action by the full Senate.

June 8, 2000

Governor George W. Bush

"A New Approach"

"We need a clean break from the recent past. It is time for leadership that sets a new tone – a tone of respect and bipartisanship. A president can do this. He can refrain from personal attacks, and treat members of both parties with respect. He can reach across the partisan aisle and work with all for the good of the country. In this same spirit, there are some practical steps we can take to change Washington. I am proposing today a set of six specific reforms relating to the budget process, pork-barrel spending, and nominations."

-- Governor George W. Bush

EXECUTIVE SUMMARY

Governor Bush believes that leaders should focus on solving problems, not settling scores. Yet partisan strife has become a way of life in Washington. Progress on vital national issues, such as Social Security and health care reform, has been stalled by brinkmanship, when it should have been advanced by statesmanship. The result has been an erosion of citizen confidence in government.

In contrast, Governor Bush has repeatedly reached across the aisle on a bipartisan basis in Texas to pass vital legislation, ranging from a new Texas Code of Education to civil justice reform. To bring this spirit of bipartisan leadership to Washington, and to restore confidence in government, Governor Bush proposes a series of practical reforms:

To promote bipartisan cooperation in the budget process, Governor Bush will:

- Adopt biennial budgeting to promote long-range planning and to allow budget decisions to be made in non-election years; alternating years would be used for oversight.
- Require a Joint Budget Resolution, signed by the President, to promote early agreement on an overall budget framework.
- Enact legislation to prevent government shutdowns, allowing the government to stay open even if an appropriations bill is not signed by October 1st of the new fiscal year.

To restore trust in government and eliminate pork-barrel spending, Governor Bush will:

- Support a Bipartisan Commission to Eliminate Pork-Barrel Spending, whose recommendations will be presented to the Congress for a straight "up or down" vote on the entire package.
- Seek line item veto legislation, fully constitutional, allowing the President to defer indefinitely unnecessary spending and use the savings to pay down the national debt.

To minimize delay and division over presidential appointments, Governor Bush will:

- Make the prompt submission of presidential nominees a top priority, and challenge Congress to act within 60 days of the submission of presidential nominees for the new Administration, regardless of who is elected president in 2000.

REV_00256233

Restoring Trust and Civility

> *"A strong leader is guided by the convictions of his heart, not by the counsel of his pollster. A strong leader sets his mind to solving problems, not settling scores. And if goodwill is to prevail, a leader must set the right tone. Every successful mayor and governor understands this. And so should a president."*
>
> -- Governor George W. Bush

In recent years, the federal government has been wracked by partisan strife. Progress on vital national issues, such as health care and Social Security reform, has been stalled by brinkmanship. As a result, citizen confidence and trust in government has eroded. Indeed, a recent ABC News/Washington Post survey found that only 30 percent of those responding said they "trusted" the federal government to do "what is right" all or most of the time.

In contrast, many state and local governments have succeeded in laying aside partisan differences to advance the public interest. As a Republican governor who has worked with a Democratic legislature, Governor Bush has repeatedly reached across the aisle on a bipartisan basis to pass legislation:

- Governor Bush worked with the Democratic Chairman of the House Public Education Committee to enact a new Texas Code of Education, which eliminated unnecessary bureaucracy, restored local control to schools, set clear goals and held districts accountable for results.

- Governor Bush worked with Democrats and Republicans to restructure the Texas Workforce Commission, consolidating 28 programs in 10 different state agencies into one agency, and devolving power to 28 new local workforce boards headed by local businesses. The resulting model was used as a template for federal workforce reform legislation in 1998.

- And in 1995, by working closely with a Democratic Lieutenant Governor, Governor Bush and the Texas Legislature passed a tort reform package that limited punitive damage awards, reformed the deceptive trade practices act, limited forum shopping, and curbed frivolous suits.

None of this bipartisan spirit is possible without leadership, and a president, above all, can provide that leadership. To create this spirit of bipartisanship in Washington, and to restore trust in government, Governor Bush will propose a set of specific reforms aimed at three perennial problems: the budget process, pork-barrel spending, and the process for approving presidential nominations.

REV_00256234

Reforming the Budget Process

"If the discord in Washington never seems to end, this is partly because the budget process never seems to end. Lawmakers spend more than half of their time each year wrangling over budget resolutions, reconciliation bills, and appropriations bills."
-- Governor George W. Bush

Every year, Congress battles over the budget, and each year, it seems, the battles get bloodier. While no procedural change can substitute for a commitment to bipartisan cooperation, Governor Bush believes there are several practical reforms that can blunt the partisan edge of budget negotiations.

A. Biennial Budgeting and Appropriations

The current annual budget cycle has proven to be time-consuming and inefficient, regardless of which party is in control of Congress. Only twice in the last 50 years has the Congress enacted all 13 appropriation bills by the end of the fiscal year. Each year, the same disputes over the same issues dominate the fall season in Washington. Under the imminent threat of a budget shutdown, leaders make hasty decisions simply to keep the government running.

In contrast, a biennial budget would allow lawmakers to devote more time every other year to ensuring that taxpayers' money is spent wisely and efficiently. In addition, government agencies would receive more stable funding, which would facilitate longer-range planning. According to Lee Hamilton, former Democratic Representative and currently Director of the Woodrow Wilson Center, moving to "biennial budgeting would also free up time that could be used by Congress and the executive branch to focus more on long-term strategic thinking – examining the challenges our country will face over the coming decades."

Under a biennial budget, funding decisions would be made in non-election years to help de-politicize the process. Moreover, lawmakers could devote more time to finishing the appropriation bills on time because the next year would be free for other legislative business.

Unfortunately, biennial budgeting recently failed to pass the House on a very close vote. Twenty-one states, however, including Texas, use biennial budgeting. As President, Governor Bush will:

Introduce Legislation to Adopt Biennial Budgeting and Appropriations: Government spending decisions would be made every two years, leaving the alternating year to be used for effective oversight of the federal agencies and systemic review.

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B. Require a Joint Budget Resolution

The budget process should allow our leaders to determine the overall fiscal course for the federal government. But under current law, neither the President's budget nor the Congressional budget has the force of law. As a result, the existing process discourages cooperation and encourages posturing. The Congress writes budgets that implicitly ignore the President's power to sign and veto laws, and the President crafts budgets that ignore the Congress' power to write legislation. There is little incentive for the President and Congress to reach early agreement on the broad outlines of a budget package, thus increasing the chance of a "train wreck" at the end of the process.

In contrast, a joint budget resolution would recognize that the two branches of government must cooperate. A joint resolution requires the President's signature and has the force of law. This joint budget resolution would set the overall level of appropriations, mandatory spending, taxes, and debt reduction in a simple document. It would bring the President into the process at an early stage and, together with biennial budgeting, would help restore order to the budget process. In 1997, the Congress and the President negotiated an overall framework before debating any specific legislation. This broad agreement facilitated passage of the Taxpayer Relief Act, the Balanced Budget Act, and the appropriations bills.

To maximize the chance of bipartisan cooperation on the budget, as President, Governor Bush will:

Seek Legislation to Require a Joint Budget Resolution Signed by the President: The joint budget resolution would set the overall level of appropriations, mandatory spending, taxes, and debt reduction into law. This would encourage the two branches of government to agree on an overall fiscal strategy before specific tax and spending bills are written.

C. Preventing Government Shutdowns

Under the present system, when appropriators cannot agree, and when Congress and the President remain at loggerheads, the government can shut down altogether. Most recently, for example, the federal government shut down (except for "essential functions") from November 14 to 19, 1995. That shutdown, however, did not end the stalemate, and from December 16, 1995 to January 8, 1996, the federal government shut down again while Congress and the President wrestled with the budget.

Fortunately, good suggestions exist for limiting this predictable trouble spot. Since the budget impasse of 1995, several members of Congress, including Senators McCain, Domenici, and Thompson, have each sponsored bills that would prevent future government shutdowns. As President, Governor Bush will:

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Seek Legislation Preventing Government Shutdowns: If an appropriations bill is not signed by October 1 of the new fiscal year, affected programs would continue to be funded at the lower of the President's budget or the prior year's level. This legislation would apply to each of the 13 appropriations bills, and to any omnibus bill. It would remove incentives for the President or the Congressional leadership to use the leverage of "shutting down government" to achieve spending objectives they could not otherwise obtain through the normal appropriations process.

Eliminating Pork-Barrel Spending

"It's often said that one politician's "pork" is another's vital project, one district's "corporate welfare" another district's vital federal investment. But we need a more objective definition of "vital." This confusion is the source of far too much waste, and frankly far too much haggling, bargaining, and resentment in Washington."

-- Governor George W. Bush

A. Challenging the Politics of Pork-Barrel Spending

A perennial criticism of the federal government is that the annual budget contains too much "pork-barrel spending." The persistence of pork erodes citizen confidence in government, and skirmishes over pork contribute to personal and partisan divisions throughout federal government. While many have observed that "one man's pork is another's essential service," there are some consistent characteristics of what fairly qualifies as pork.

According to the nonpartisan Citizens Against Government Waste, most pork-barrel spending can be identified as having at least two of the following seven characteristics:

1. It was requested by only one Chamber of Congress;
2. It was not specifically authorized;
3. It was not awarded competitively;
4. It was not requested by the President;
5. It greatly exceeded the President's budget request or the previous year's funding;
6. It was not the subject of congressional hearings; or
7. It serves only a local or special interest.

Items frequently cited as pork include $250,000 for research on caffeinated chewing gum (FY 1999) and $750,000 for grasshopper research in Alaska (FY 1999).

While many will debate the precise definition of pork, few will dispute that it is persistently difficult to strip from the budget. It is the rare Member who will challenge individual pork provisions for fear that his or her own pork initiatives will be challenged in return.

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What is needed is a bipartisan mechanism to eliminate pork-barrel spending. Senator McCain, along with Senators Thompson, Lieberman, and Abraham, has proposed just such a mechanism – a bipartisan commission to identify and eliminate pork initiatives. As President, Governor Bush will:

Endorse Legislation Calling for a Bipartisan Commission to Eliminate Pork-Barrel Spending: The legislation would create a bipartisan legislative commission to identify and propose for reduction or elimination non-entitlement government spending. The recommendations from the Commission would be presented to the Congress through legislation calling for an "up or down" vote on the entire package.

B. Line Item Veto Authority

The longer-term solution to the problem of unnecessary pork-barrel spending is to empower the President to act directly to stop it through the line item veto. The governors of 43 of the 50 states already have this authority, and at least eleven Presidents since the Civil War – Ulysees Grant, Rutherford Hayes, Chester Arthur, Franklin Roosevelt, Harry Truman, Dwight Eisenhower, Richard Nixon, Gerald Ford, Ronald Reagan, George Bush, and Bill Clinton – have publicly called for giving the President line item veto authority. Similarly, Governor Bush would support a constitutional amendment giving the President this authority. Because the amendment process is by design long and cumbersome, he also supports immediate legislation providing for equivalent authority for the President to limit wasteful and pork-barrel spending.

In April 1996, Congress passed and the President signed the Line Item Veto Act. Two years later, in 1998, the Supreme Court declared the Act unconstitutional because it "g[ave] the President the unilateral power to change the text of duly enacted statutes." At the same time, however, the Court acknowledged that there were fully constitutional ways to accomplish the same result.

From the Nation's founding, the President has had the authority – *if Congress so delegates it* – to decline to spend appropriated sums. However, this authority was curtailed in 1974, when Congress passed the Impoundment Control Act, which restricted the President's authority to decline to spend appropriated sums.

The Line Item Veto Act of 1996 attempted to return some of that authority, but did so by allowing the President to permanently and irreversibly prevent an appropriation from having any "legal force or effect." Because this was tantamount to a "repeal" of a duly enacted law, the Court struck it down. But, as Justice Scalia noted in dissent, "[h]ad the Line Item Veto Act authorized the President to 'decline to spend' any item of spending contained in the Balanced Budget Act of 1997, there is not the slightest doubt that authorization would have been constitutional."

In order to increase the President's authority to limit unnecessary pork spending, Governor Bush will:

REV_00256238

Propose Fully Constitutional Line Item Veto Legislation Linked to Paying Down the National Debt: Governor Bush will propose legislation giving the President the authority to decline to spend amounts appropriated for discretionary budget authority. Such deferrals will be allowed whenever the President determines the deferrals will not impair essential government functions and will not harm the national interest. All savings from such deferrals will be used to pay down the national debt.

Expediting Presidential Nominations

"The Constitution empowers the president to nominate officers of the United States, with the advice and consent of the Senate. That is clear-cut, straightforward language. It does not empower anyone to turn the process into a protracted ordeal of unreasonable delay and unrelenting investigation. Yet somewhere along the way, that is what Senate confirmations became – lengthy, partisan, and unpleasant. This has done enough harm, injured too many good people, and it must not happen again."

-- Governor George W. Bush

In recent years, the process of presidential nominations and confirmations has become increasingly lengthy, partisan, and unpleasant, resulting in fewer good people being willing to enter into high-level government service. As one recent nominee famously remarked, "[i]t is nasty and brutish without being short." In April 2000, the Heritage Foundation and the Brookings Institution released a joint report detailing the delays and problems with presidential nominations.

Under President Reagan, 11 percent of nominations took over 6 months to confirm; under President Bush, 25 percent took over 6 months; under President Clinton, 44 percent took over 6 months. Moreover, under President Clinton, 49 percent of appointees described the confirmation process as "confusing," and 25 percent as "embarrassing." This acrimony and delay causes the country to go without senior government officials – especially sub-cabinet officials – for extended periods of time, and it discourages good people from entering public service in the first place.

Governor Bush believes that a bipartisan effort should be made to improve the nominations process – regardless of which party wins the White House later this year. Thus, to minimize delay and divisions over presidential nominations and to help restore confidence in government, Governor Bush will:

Make the Prompt Submission of Presidential Nominees a Top Priority, and Challenge Congress to Act on Those Nominees Within 60 Days: Governor Bush believes that 60 days is a reasonable and achievable goal for Senate action on nominees. Indeed, from 1964 to 1984, 48 percent of all presidential nominees were through the confirmation process in one to two months. The Senate can and should do so, Governor Bush believes, *regardless* of who is elected President in 2000.

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March 13, 2002, Wednesday, Final Edition

SECTION: EDITORIAL; Pg. A29

LENGTH: 806 words

HEADLINE: End the **Judicial** Blame Game

BYLINE: Lloyd Cutler and Mickey Edwards

BODY:

Perhaps no issue has roiled the waters of partisanship in Washington in recent years more than federal **judicial** nominations. The **judicial** nomination "blame game," in which each party points an accusing finger at the other, consists of well-worn positions: The president is blamed for nominating candidates who are "too ideological" or otherwise unsuitable, and the Senate is blamed for stalling its vote on confirming the president's nominees. The rhetoric, along with the time needed to confirm judges, increases substantially when one political party controls the White House and the other controls the Senate.

There is no question that thoughtful scrutiny of **judicial** nominees is justified and is indeed the Senate's duty. After all, federal judges have life tenure and make decisions on important issues that affect millions of Americans. Ultimately, however, vacancies on the federal bench need to be filled. Judgeships sometimes remain open for two or three years. This can cause significant backlogs in civil cases, which, unlike criminal cases, are generally not subject to legal time limits. Delay in confirming judges means justice delayed for individuals and businesses, and, combined with the bitter nature of some **confirmation** battles, it may deter many qualified candidates from seeking federal judgeships. A recent study by the Constitution Project at Georgetown University and Professor Wendy Martinek of Binghamton University suggests the continuing nature of the problem. In the first year of President George W. Bush's term in office, successful nominees took an average of 112 days from nomination to **confirmation.** This compares with 36 days in the first year of President Reagan's first term, 46 days in the first year of his second term, 62 days in the first year of the first President Bush's administration and 52 days in the first year of President Clinton's first term. The current president's first year is only a modest improvement over the first year of Clinton's second term, when the average period from nomination to **confirmation** was 133 days.

Of course, the current president's first year in office was an extraordinary one: First, the change in control of the Senate disrupted the normal flow of committee work, and soon

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afterward the attacks of Sept. 11 pushed much of the nation's domestic agenda onto a back burner. In addition, the new Senate leadership is deferring action on **judicial** nominations until they are reviewed by the American Bar Association. Last year, the ABA's ratings were reported to the committee on average about eight weeks after the date of nomination, reflecting both the time it takes the Department of Justice to provide the relevant information to the ABA and the ABA's review procedures. Since the Eisenhower administration, presidents had sent proposed nominations to the ABA before they were submitted to the Senate; President Bush does not seek ABA review of his nominees. Thus, the delay associated with that process now takes place after nomination, rather than before.

Even taking all this into account, the 112-day period from nomination to **confirmation** in President Bush's first year is a matter for concern. In 1999, the bipartisan task force of the Constitution Project urged both the White House and the Senate to make filling vacancies in timely fashion a high priority. It also made several recommendations that might help reduce delay as well as ensure high-quality nominees. Both the executive branch and the Senate should devote adequate staffing to the screening and processing of nominees. Although the Senate should satisfy itself that nominees are professionally qualified, impartial, committed to equal justice under law and possessed of a **judicial** temperament, it should refrain from seeking pre-commitments from candidates about unresolved issues that might come before them as judges and should exercise caution when drawing conclusions about candidates based upon their previous clients, speeches or writings. In addition, both the executive branch and the Senate should judge candidates on their merits and should avoid linking votes on candidates with unrelated business that is the subject of bargaining between the two branches or between senators.

Over the past 20 years, both political parties have been responsible for changing what was once a relatively speedy process into one that often moves more slowly than molasses in January. Failure to reverse this trend may delay the provision of justice in federal courts and discourage able men and women from seeking to serve as federal judges.

Lloyd Cutler, former White House counsel to Presidents Clinton and Carter, and Mickey Edwards, former Republican representative from Oklahoma, are the co-chairs of the Constitution Project's courts initiative.

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Federal News Service June 26, 2001, Tuesday

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June 26, 2001, Tuesday

SECTION: PREPARED TESTIMONY

LENGTH: 1074 words

HEADLINE: PREPARED TESTIMONY OF **LLOYD** N. **CUTLER**

BEFORE THE SENATE JUDICIARY COMMITTEE SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

SUBJECT - SHOULD IDEOLOGY MATTER?: **JUDICIAL** NOMINATIONS 2001

BODY:
I have served on two national commissions dealing with how to improve the process of nominating and confirming federal judges. Both have taken up the ideological issues that are the subject of your hearing today. The first commission, created by The Miller Center of Public Affairs at the University of Virginia, filed its report in 1996. The second, created by the Century Foundation and called Citizens for Independent Courts, filed its report in 1999.

My views on the role of ideology in the nominating and confirming process are set forth in these reports. They are incorporated in my statement. I will read a few key paragraphs from each:

First The Miller Center report in 1996:

"What is most important is the appointment of judges who are learned in the law, who are conscientious in their work ethic, and who possess what lawyers describe as "**judicial** temperament." That term, difficult to define, essentially has to do with a personality that is evenhanded, unbiased, impartial, courteous yet firm, and dedicated to a process, not a result. The law will be fairly read and applied, irrespective of the judge's personal views as to its wisdom; where the judge is the finder of fact, the facts will be fairly found." "As this Report recognizes, throughout our history the appointment process has been built on politics. The danger of purely political appointees lacking the necessary competence led Attorney General Brownell to introduce the American Bar Association's participation in the process. At that time -- and for some years thereafter -- relatively few persons in the Executive Branch and the Senate or its staff worked on **judicial** appointments, and rarely were any of them, even when lawyers, experienced in court practices and procedures. The ABA Committee was designed to fill that lack and insure, insofar as the political process permitted, the high quality of those selected."

"In addition to the growing number of appointments, the changing political process has had its impact on who the candidates for **judicial** office are and whether they will be nominated and confirmed. The increasingly ideological nature of political campaigns, the need for huge sums of money, the growth of dependence on contributions from various ideological groups, and the willingness of these groups to launch personal attacks on candidates they

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ideologically oppose, has the potential to affect the appointment process in unfortunate ways. Even putting aside the cases of Supreme Court nominees such as Robert Bork and Clarence Thomas, where this problem was obvious, there have been some signs of similar ideological controversy creeping into the process of nominating and confirming lower court candidates. While it appears that the present administration has been conscious of the problem and relatively successful in avoiding such ideological controversies, we have learned of occasional episodes where qualified candidates have refused to be considered or have withdrawn from fear of being "Borked."

The Commission believes that it would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the **confirmation** process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science; it also serves to weaken public confidence in the courts. Just as candidates should put aside their partisan political views when appointed to the bench, so too should they put aside ideology. To retain either is to betray dedication to the process of impartial judging. Men and women qualified by training and experience to be judges generally do not wish to and do not indulge in partisan or ideological approaches to their work. The rare exception should not be taken as the norm.In any case, it is our view that the important process of appointing federal judges need not be as difficult as it now seems. The ultimate question is simply whether or not potential candidates have the qualities of integrity, good judgment and experience to become **judicial** officers of the United States. Occasional mistakes will be made. But no amount of bureaucratic vetting or testing for ideology will achieve perfection, and too complex a process can do more harm than good."

Second, the Century Foundation Report in 1999:

Recommendations for Executive and Legislative Branch Reviewers on Ideology in Federal **Judicial** Selection

1. Candidates for judgeships should be committed to deciding cases based on the law and facts of particular cases, without the intrusion of any rigid ideological pre-commitments to certain results or approaches to the law.

2. Reviewers should investigate a candidate's experience, qualifications, temperament, character, and general views of the law and of the **judicial** role. Selecting a federal judge is not just a matter of picking a legal technician, for a person's judgments may well reflect one's broad values and commitments.

3. Reviewers must refrain from asking candidates for particular pre- commitments about unresolved cases or issues that may come before them as judges.

4. The limit on questions seeking pre-commitments should be applied by reviewers in a common-sense fashion. In particular, this limit should not be allowed to prevent a fully deliberative investigation into the backgrounds, qualifications, and **judicial** philosophies of candidates for judgeships.

5. The limit on questions seeking pre-commitments should be respected equally by the President and other executive branch reviewers as well as by senators and other legislative branch reviewers, despite differences in the roles played by the two branches in the appointment process.

6. The limit on questions seeking pre-commitments should apply with respect to candidates for courts at all levels of the federal judiciary.

7. Reviewers seeking to assess a candidate's views should exercise caution when evaluating

a person's current or former clients, memberships, and writings or speeches.

8. The value of **judicial** independence is consistent with pursuing diversity on the federal bench.9. The value of **judicial** independence is consistent with active involvement by bar associations in the selection process.

Rather than read these extracts from the two reports, I will file them for the record. After making a few personal observations of my own, I will be pleased to answer your questions.

END

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Judicial Appointments
Historical Comparison: First Two Years of a Presidency

President	Nominations Submitted	Nominees Confirmed	Percentage Of Nominees Confirmed	Circuit Court Nominations Submitted	Circuit Court Nominees Confirmed	Circuit Court Percentage of Nominees Confirmed
G.W. Bush (as of Aug. '02 Senate recess)	123	72	**59%**	32	13	**41%**
Clinton	140	126	**90%**	22	19	**86%**
George H.W. Bush	74	70	**95%**	23	22	**96%**
Reagan	88	87	**99%**	20	19	**95%**

Judicial Appointments
Historical Comparison: First Two Years of a Presidency

President	Circuit Court Nominees who waited more than a year for a hearing
G.W. Bush (as of August 2002)	11
Clinton	0
George H.W. Bush	0
Reagan	0

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NOMINATIONS -- (Senate - July 23, 2001)

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Mr. KYL. Mr. President, when we first came back and began this Congress in January, there was a lot of talk about bipartisanship at that time due primarily to the fact that the Senate was equally divided between Republicans and Democrats, and we knew we better act in a bipartisan way or not a lot would get done.

Since that time, of course, the Democratic Party has taken the majority, by virtue of the transfer from a Republican to an independent status, and we now have 50 Democrats, 49 Republicans, and one independent in the Senate; therefore, the Senate is under the control of the Democratic Party as the majority party. But we have a Republican administration and no less of a requirement to work together in a bipartisan fashion.

The distinguished President pro tempore chairs a committee which, by its very nature, requires bipartisanship. I think I was presiding in the chair the day the distinguished President pro tempore and his counterpart, the ranking member, the Senator from Alaska, talked about the fact that without the kind of bipartisan cooperation in that committee that has characterized its work, it would be hard for the Senate to get its work done.

That is also true of some other things, some housekeeping, if you will, that the Senate has to do as part of its

constitutional responsibilities and, frankly, are among the most important of its responsibilities. That includes the advice and consent that we provide with respect to nominees from the executive branch.

When a new President comes into power, there is also a certain transition that takes place because the new President nominates his own people for his executive branch department, his Cabinet officers and subcabinet officers, and also, of course, judicial nominations.

In order for those departments to be fully staffed and up and operating, it is necessary for the Senate, as quickly as possible, to hold hearings on those

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nominees , to act on them one way or the other, and then those that it approves--the vast majority--can join the President and begin work in the executive branch of Government. Ordinarily, that is a somewhat lengthy process but not a particularly difficult process.

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Most of the nominations are relatively routine. After they finish their FBI check, there is a hearing . There is almost never any controversy and therefore it is not difficult for the Senate to confirm those nominees . In fact, for the benefit of a lot of folks who would not be aware of the process, we do not take time in this Chamber to debate each and every nominee and hold a rollcall vote on each and every nominee. Instead, most of them are not controversial, and the leader will ask that a group of them be considered in a group, at the end of the day; and if no Senator objects to the nominations, they are all approved, and they are approved unanimously.

That is the way it is done for most of the nominees . There are well over 600--I don't know the exact number--that we have to confirm. The problem is, this year, because of the election difficulties in Florida, the administration did not have as much time during the transition to get these people selected. As a result, we started out about a month behind in terms of the nominations from the Bush administration. Fortunately, the administration has worked very quickly and has actually caught up and even surpassed some previous administrations in the number of nominations that have been sent to the Senate.

But the Senate has not acted very quickly either. Part of that was due to the fact we had this change from an equally divided Senate to a Senate controlled by the Democratic Party, and there was a period when the reorganization resolution had not yet been adopted.

People might say: Why is all that important? Let's just get these nominees approved. Sometimes there are certain steps the Senate has to take before it can do things. The fact is, now we have had quite a period of time within which to act on these nominees , and we are beginning to act on some of them, but, frankly, they are not occurring as fast as I think they should occur and many of us believe should occur.

There are still far too many nominees we have not confirmed, and we are afraid will not be confirmed by the beginning of the August recess, in less than 2 weeks from now. That means it would not be until after Labor Day that the President would have his full complement of Cabinet officers in place, and subcabinet officers. That is far too long.

As of this month, over one-eighth of the Bush administration term is now gone, and many of the people he would have working for him are not even confirmed. The Senate has, so far, confirmed 210 Bush administration nominees , and that includes the 77 that we have confirmed just in the last 11 days. But even with that progress, it is just 58 percent of the nominees that President Bush has sent to us so far.

This chart represents the 58 percent of nominees confirmed by the Senate from George W. Bush. At this same time during the Bill Clinton administration, the Senate had confirmed 74 percent; and in the Reagan administration, 72 percent. These are administrations that took over from a previous party.

Ronald Reagan took over from Jimmy Carter. Bill Clinton took over from George Bush. And George Bush, of course, took over from Bill Clinton--each changing parties in the process.

So as we can see, the Bush nominees have not been approved, have not been confirmed at the same rate as the Senate confirmed previous Presidents' nominees . That is putting a real burden on this White House.

Incidentally, even though it wasn't a change from Reagan to the first George Bush in terms of party, the percentage was exactly the same as with regard to George W. Bush. Clearly, the Senate has to do a

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better job getting these nominations heard, getting them to the Senate floor, and getting them approved.

The same thing is true with respect to judicial nominations. We are going to need to hold hearings and confirm judges at a much faster pace, or we are going to be way behind in terms of judgeships. I will talk about that in just a little bit.

The bottom line, the first point I am trying to make is that we would literally have had to confirm about 83 nominations last week to match the nominations that we confirmed for the Clinton administration. We confirmed only 23. We were literally 50 nominations behind as of last week.

The Bush administration has nominated 365 people to date. With the 210 confirmed, that leaves 155. We have less than 2 weeks before the August recess. We would have to do about 75 per week to get these all confirmed. The fact is, 27 of those are judicial nominees . There is no way we can hold all of the hearings on them. So let's subtract the 27 judicial nominees ; that still leaves 128 nonjudicial nominees . Those are the people the President needs to help run his Cabinet and his Cabinet agencies. That would mean we would have to do about 65 per week, this week and next week, in order to be done.

We are hopeful the Democratic leadership will cooperate in a bipartisan way to get these nominees confirmed. Because of what I explained earlier, it is not difficult to accomplish this. We can walk and chew gum at the same time. We can do both appropriations bills and nominations because nominations usually don't require a lot of time for debate on the Senate floor, and they don't require rollcall votes in most cases. In most cases, they are bundled together because they are not controversial. The leader asks unanimous consent at the end of the day that they be approved. That consent is given. They are approved, and it doesn't take very much time at all.

The good news is, the Senate can do both things at the same time. It can both pursue legislative business, which in the case of the next 2 weeks is going to consist mostly of appropriations bills, and at the same time we can do these nominations. That is the good news.

Let me try to give you a little bit of an idea of some of the agencies that have nominations pending and why these are important. As I said, there are 27 judicial nominations pending, 26 or 27. Everybody understands the importance of the judiciary. Tomorrow, the Judiciary Committee is going to hold a hearing on three nominees , but only one of them is a judge. The other two are nominees for the Department of Justice.

We have only confirmed three judicial nominees this entire year for President Bush. There is now a vacancy rate that is far higher than it was at the end of the last administration. In fact, there are today 108 vacancies in Federal courts. This is about 45 or so more than there were at the end of the Clinton administration.

Just to quote a couple of my colleagues to illustrate the significance of these judicial nominees , Senator *Leahy* is the chairman of the Senate Judiciary Committee and has always been

a very strong advocate for filling these judicial positions. When Bill Clinton was President, this is something Senator *Leahy* said:

Any week in which the Senate does not confirm three judges is a week in which the Senate is failing to address the vacancy crisis. Any fortnight in which we have gone without a judicial confirmation hearing marks 2 weeks in which the Senate is falling further behind.

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Senator *Leahy* is right about that. He said this in January of 1998. When he made that statement, there were fewer than 85 vacancies. Today there are 108 vacancies. As lawyers would say, a fortiori, it is important for us to begin confirming these judges. Moreover, as he pointed out, you can't confirm them until you have had hearings, and we are not having hearings on these judges.

We are supposed to have a hearing this week, but only one judge is on the panel. I remember the last three or four hearings of last year, we had five or six judges per panel. To have only 1 judge on the panel when there are 26 others on which we could have a hearing --their FBI clearances have been done; they are ready to have their hearing --is simply to slow down the process. There is no reason why we can't add more judges to the hearing calendar. We should be doing that.

I respectfully request that the chairman of the Judiciary Committee get on with the scheduling of these hearings.

Our majority leader, the distinguished Senator from South Dakota, last year said:

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Today there are 76 vacancies on the Federal bench. Of those 76 vacancies, 29 have been empty so long they are officially classified as judicial emergencies. The failure to fill these vacancies is straining our Federal court system and delaying justice for people all across this country. This cannot continue.

That was in March of 2000. When he made that statement, there were 76 vacancies, 29 of which were categorized as ``judicial emergencies.'' Today there are 108 vacancies, 40 of which are classified as ``judicial emergencies.''

It is clear the Judiciary Committee needs to begin holding more hearings, that we need to get these judges to the Senate floor for confirmation, and that the Senate needs to act more quickly on these very important judicial nominations, 40 of which are classified right now as ``emergencies.'' In other words, according to the administrative office of the U.S. courts, these are the positions which need to be filled immediately or the administration of justice will suffer. It represents 12.6 percent of the judicial positions in our country today. That is the vacancy rate, and of those, just under 40 percent, are classified as ``judicial emergencies.'' Clearly, we have to get working on these nominations.

I note that my colleague, Senator *Craig*, has arrived. I was going to begin discussing some of the specific nominees who are not judicial nominees that have been pending for a long time that we want to get cleared. Before I do that, perhaps my colleague is ready to make a presentation. I am happy to wait and go into some of the specific names after a little bit.

I yield to the Senator from Idaho.

The PRESIDENT pro tempore. How much time does the Senator yield?

Mr. KYL. As much time as the Senator takes.

The PRESIDENT pro tempore. The Senator is recognized for as much time as he consumes.

Mr. CRAIG. I thank my colleague from Arizona for yielding. Most importantly, let me thank him for coming to the floor this afternoon to talk about what, without question, is a critically important issue to our country. That is that a President, once elected and sworn in by a Nation, has the right to govern the

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Clinton Administration Judicial Nominations

JUDGESHIP	NOMINATIONS	WITHDRAWN	RETURNED	REJECTED	CONFIRMED
Supreme Court	2	0	0	0	2
U.S. Circuit	106	3	38	0	65
U.S. District	384	8	70	1	305
U.S. International Trade	6	0	1	0	5
Article III Judicial Nomination TOTAL	498	11	109	1	377
U.S. Court of Federal Claims	7	0	0	0	7
U.S. Tax Court	9	0	0	0	9
U.S. Court of Appeals for Veterans Claims	1	0	0	0	1
Superior Court of the District of Columbia	24	0	2	0	22
District of Columbia Court of Appeals	5	0	1	0	4
U.S. Court of Appeals for the Armed Services	2	0	0	0	2
OVERALL TOTAL	546	11	112	1	422

Procedural Votes

DATE	NOMINEE	VOTE
October 4, 1994	H. Lee Saroken – Third Circuit	Cloture Invoked, 85-12
September 28, 1995	James L. Dennis – Fifth Circuit	Motion to Recommit Rejected, 46-54
September 21, 1999	Marsha L. Berzon – Ninth Circuit	Motion to Proceed Rejected, 45-54
March 8, 2000	Marsha L. Berzon – Ninth Circuit	Cloture Invoked, 86-13
September 21, 1999	Richard A. Paez – Ninth Circuit	Motion to Proceed Rejected, 45-53
March 8, 2000	Richard A. Paez – Ninth Circuit	Cloture Invoked, 85-14
March 9, 2000	Richard A. Paez – Ninth Circuit	Motion to Postpone Rejected, 31-67

-There were 59 Roll Call Votes (52 confirmation of the nomination & 7 procedural) on Judicial Nominations during the Clinton Administration.
- A total of 26 returned nominations (11 Circuit & 15 District) were re-sunmitted and confirmed by the Senate.

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Senator Kyl

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April 30, 2002

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Kyl Asks For Movement on Judges

Eight of 11 Circuit Court Nominees Still Languish After One Year

WASHINGTON, D.C. - U.S. Sen. Jon Kyl (R-AZ) today expressed disappointment that Senate Democratic leaders blocked his repeated requests to move forward on even one of the eight circuit court judges still awaiting a confirmation hearing nearly one year after their nomination by President Bush.

"Today on the Senate floor, I asked the leadership to schedule hearings on eight well-qualified judges who have been languishing in limbo for more than a year, and the Democrats said no," said Kyl today. "I asked them for hearings on seven judges, or six, or five, or four, and they said no again. Finally, I asked for a promise to hold a hearing on even one of the eight judges who have waited for Senate action for more than a year, and again my request was rebuffed.

"The lesson to be drawn is obvious: the Senate Democratic leadership is determined to obstruct and delay judicial nominations, and it is the American people who will suffer. If left unchecked, the spiraling vacancy rate on the federal courts could mean that trials are postponed, sentencings and judgments are delayed, and it would be harder for law-enforcement authorities to track and pursue suspected terrorists and other criminal offenders."

On the Senate floor, Kyl noted that only 31 percent of President Bush's circuit court nominees have been confirmed by the Senate, compared to 63 percent for President Clinton at this point in his term. Similarly, only 44 percent of Bush's overall judicial nominees have been confirmed, compared to 67 percent for Clinton at the same point in his term.

"President Bush deserves swift approval of his own nominees - and the American people certainly deserve to have a fully-staffed court system to carry out the administration of

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justice," Kyl added.

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FOR IMMEDIATE RELEASE:
March 5, 2002

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Kyl Urges Committee Colleagues to Release Judge Pickering

Fears Partisanship Will Frustrate Majority Will

WASHINGTON, D.C. - U.S. Senator Jon Kyl, a member of the Senate Judiciary Committee, today implored committee colleagues to let the majority of the Senate vote on Judge Charles Pickering's nomination to the Fifth Circuit Court of Appeals, regardless of their personal vote on his nomination.

"With respect to judicial nominations, the Constitution requires the advice and consent of the Senate, not the advice and consent of the Judiciary Committee," said Kyl. "Since a clear majority of the Senate is poised to confirm Judge Pickering, I implore my committee colleagues to honor the democratic process and discharge Judge Pickering's nomination regardless of their own vote on his confirmation."

The Arizona Republican noted that Judge Pickering was confirmed to his current post on the U.S. District Court without a single vote in opposition in the Senate. In the last few weeks, at least two Senate Democrats have publicly stated an inclination to vote to confirm Judge Pickering for the Court of Appeals, giving him a clear majority were his nomination discharged from the committee, controlled 10-9 by Democrats.

"Ten Democrats, many of whom offered no opposition to Judge Pickering in the past, should not have the power to frustrate the wishes of more than 50 Senators," said Kyl.

Kyl, who expressed disgust with "harsh and unfair" attacks on Judge Pickering's record, also warned Democrats of the precedent they are setting for future nominations to the courts.

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FOR IMMEDIATE RELEASE:
Friday, May 3, 2002

An Unjust Delay

By
Senator Jon Kyl

One year ago on May 9, President Bush appeared at the White House with his first 11 nominees to fill seats on the federal courts of appeals. One year later, eight of those 11 - all rated "qualified" or "well-qualified" by the American Bar Association -- have yet to even have a hearing scheduled on their nominations.

This isn't the way it used to be. President Bush's three immediate predecessors - Presidents Reagan, Bush, and Clinton - saw nearly all of the judicial candidates nominated in the first eight months of their terms confirmed by the Senate within one year. By contrast, the Senate has confirmed just half of President Bush's total judicial nominees - signifying an appalling refusal by the Senate to respect the President's ability to select judges for the federal courts.

This week I went to the Senate floor to try to fix this inequity. At the very least, I asked my colleagues to agree to schedule hearings on the eight circuit court nominees who have languished for nearly a year. They rejected that request. Very well, I said, what about promising to schedule a hearing on seven of those nominees, or six or five, or even just one? They rejected each of those requests, too.

The necessity of acting promptly to confirm judges is much more than simply a matter of fairness to the President, though that is important. It is also the Senate's responsibility to the American people.

If we do not act to fill those vacancies -- many of which are considered emergencies -- and the number of empty seats on the courts continues to rise, the American people will pay the price. Delayed justice can take many forms. It may mean that some criminals linger on the streets while they await trial or sentencing. Or that victims of crimes will have to wait longer for judgments or compensation. Or that it becomes harder for law-enforcement officials to get judicial consent in time to track or monitor suspected terrorists within our borders.

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The Senate's inaction has risen to such a level that it has sparked a rare rebuke from the Chief Justice of the Supreme Court (who called the delays "alarming"), the Wall Street Journal (opining that "the Senate has not done enough to meet its constitutional responsibility") and the Washington Post (which editorialized that the Democratic leadership "has offered no reasonable justification for stalling on these nominations.")

Let me tell you about the eight circuit court nominees who have been consigned to an uncertain limbo for nearly a year:

- John Roberts has argued 36 cases before the U.S. Supreme Court and served as Deputy Solicitor General of the United States.

- Miguel Estrada argued 15 cases before the Supreme Court, worked as a federal prosecutor, and as assistant U.S. solicitor general. He came to America as a teenager, speaking virtually no English. If confirmed, he would be the first Hispanic ever to serve on the D.C. Circuit Court of Appeals.

- Texas Supreme Court Justice Priscilla Owen was elected to her current post in 1994 and re-elected in 2000, when she was endorsed by every major newspaper in the state.

- Michael McConnell, a nominee to the 10th Circuit, is one of the nation's leading constitutional scholars, endorsed by hundreds of Democratic law professors across the country.

- Jeff Sutton, a nominee to the Sixth Circuit, graduated first in his class at Ohio State Law School, and served as solicitor for the state.

- Justice Deborah Cook, who currently serves on the Ohio Supreme Court, was the first woman partner ever at Akron's oldest law firm.

- Judge Dennis Shedd, unanimously confirmed to the federal district court in 1990, served as chief counsel to the Senate Judiciary Committee.

- Terrence Boyle, unanimously confirmed to the federal district court in 1984, is endorsed by the former chairman of the North Carolina Democratic Party, who hailed him for his fairness and integrity.

These are exemplary candidates being held hostage by a Senate majority that is playing politics with real people's lives - using them as bargaining chips to move legislation, or attacking them on behalf of special-interest groups determined to keep conservatives off the courts. This victimizes not only the nominees themselves, but their families, their friends, and their fellow citizens, over whom they would preside as judges.

This is why Senate Republicans will mark the one-year anniversary of their selection with disappointment and frustration. It shouldn't have to be this hard - or taken this long -- for any President to get such well-qualified and distinguished people on the federal courts.

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FOR IMMEDIATE RELEASE:
July 24, 2001

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Kyl Warns of Vacancy "Emergency" on Federal Courts

Urges Senate to Move Forward on Nominations Vital to Workings of Government

WASHINGTON, D.C. – U.S. Senator Jon Kyl (R-AZ), warning that the nation faces a judicial "emergency," today urged the Senate to hold more hearings on President Bush's judicial nominations and to quickly bring candidates to the Senate floor for a vote. "Today the nation confronts a judicial confirmation emergency that imperils the administration of the courts and delays justice," said Kyl. "Without a properly staffed court system, cases are delayed, sentences cannot be swiftly imposed on many criminals, and violent crime victims and their families are continually frustrated and delayed in their quest for justice."

Kyl noted that there are currently 108 vacancies on the federal courts – 45 more than at the end of the Clinton administration. Of those vacancies, 40 are classified as judicial "emergencies" by the administrative office of the U.S. courts. To date, only three judicial nominees have been confirmed by the Senate in the entire year.

Kyl also said he was concerned that, overall, 42 percent of Bush administration nominees have not yet been voted on by the Senate – a rate far higher than at a similar point in time for Presidents Clinton and Reagan (26 and 28 percent, respectively).

"Acting quickly on administration nominations is one of the most important duties of the Senate, and it can be done without extensive debate on the Senate floor," Kyl said. "This is not a partisan issue, but an urgent need." Kyl noted that, in addition to the serious court vacancies, several key administration await Senate action.

These include: the Ambassador to the United Nations, the chairman of the Consumer Products' Safety Commission, the lawyer for the Department of Labor to enforce labor laws, and the director of the Office for Victims of Crime at the Department of Justice. In total, there are 27 nominees pending before the Judiciary Committee; ten before the Agriculture

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Committee; nine pending before the Armed Services Committee; seven pending before the Banking Committe; and 41 before the Foreign Relations Committee, Kyl said.

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Kyl: Judicial Vacancy Pace Worsening

Says New Effort to Change Rules On Nominations Will Cause

WASHINGTON, D.C. - U.S. Senator Jon Kyl (R-AZ), a member of the Senate Judiciary Committee, today said the American people should be disappointed by the "glacial" pace of judicial confirmations. He also warned that a new effort to change the rules concerning the Senate's exercise of its confirmation power would only worsen the vacancy crisis.

"Though the nation faces a growing vacancy crisis on the federal courts -- imperiling the swift administration of justice -- the Senate has managed to confirm only four federal judges this entire year," said Kyl. "Faced with 108 judicial vacancies - including 40 considered 'emergencies' - the American people should rightfully expect that the Senate do better than the rate of approving one judge every eight weeks."

Kyl said that a hearing scheduled today by the Judiciary Subcommittee on Administrative Oversight threatened to further delay the confirmation of judges. Entitled "The Senate's Role in the Nomination and Confirmation Process: Whose Burden?," the hearing follows one held earlier this year that suggested that a judicial nominee's political beliefs alone would be a suitable grounds to reject his or her nomination.

"Not only is the Senate delaying confirmations, now some Senators want to change the way the process has worked for most of our history," Kyl said. "First they suggested that candidates with an unwelcome political ideology need not apply for a job on the courts. And today they suggest that presidential nominees may be presumed unqualified until the nominees demonstrate their fitness to some Senators' satisfaction.

"This is no way to pursue a swift and bipartisan confirmation process - and it is the American public that suffers from these delays," Kyl added. "Without a properly staffed court system, cases are delayed, sentences cannot be swiftly imposed on many criminals,

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and violent crime victims and their families are continually frustrated and delayed in their quest for justice. It's time to move on nominations."

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FOR IMMEDIATE RELEASE:
March 15, 2002

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Kyl Lauds Confirmation Of Tucsonan David Bury For Federal Judgeship

Senator Says Help Is On The Way For Overworked Federal District Court

WASHINGTON, D.C. - U.S. Senator Jon Kyl today commended the Senate for unanimously approving the nomination of Tucsonan David C. Bury for a seat on the U.S. District Court for the District of Arizona. Bury's nomination was jointly supported by Senators Kyl and John McCain.

"David Bury's confirmation fills the third and final vacancy on Arizona's U.S. District Court," said Kyl today. "This is good news for Arizonans. For too long, the federal court in Tucson has been overworked and overburdened, creating a judicial vacancy emergency in our state that unavoidably delayed the administration of justice. That is why many of us have worked so hard to get the Senate to act quickly to fill these vacancies."

In addition to Bury, the Senate recently confirmed Pima County Superior Court Judge Cindy K. Jorgensen and Arizona Supreme Court Justice Frederick Martone for the U.S. District Court. All three were nominated by President Bush and sponsored by Kyl and McCain.

Mr. Bury is a founding partner and shareholder in the firm of Bury, Moeller, O'Meara & Gage P.C. of Tucson, Arizona. He has served as a trial lawyer for over 34 years, with experience in almost every area of civil trial practice. He has served as a lawyer representative to the Ninth Circuit Judicial Conference, on the Commission on Trial Court Appointments for Pima County, and on the disciplinary committee for the State Bar of Arizona. Bury is a graduate of the University of Arizona College of Law.

Kyl also urged the Senate to act quickly on President Bush's nomination of David Gonzales for U.S. Marshal for the District of Arizona. Gonzales presently serves as commander and chief of staff of the Arizona Department of Public Safety in Phoenix. He has previously

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worked as Interim Chief of Police in South Tucson and Bullhead City, and has served on various professional organizations, including the Arizona Latino Police Officer Association, the Arizona Highway Patrol Association, the International Association of Chiefs of Police, and the Arizona Juvenile Justice Commission.

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Kyl Marks One Year Of Senate Inaction On Bush Circuit Court Nominees

"It Shouldn't Have Had to Come to This," Says Kyl

WASHINGTON, D.C. - U.S. Sen. Jon Kyl (R-AZ), a member of the Senate Judiciary Committee, today offered the following statement marking the one year anniversary of President Bush's first selection of candidates to serve on federal circuit courts:

"The anniversary we commemorate today is a sad one, because no one imagined it would ever have to come to this. But the fierce opposition to President's Bush's circuit court nominees is so unprecedented and so disgraceful that Republicans have had to join together to demand something that should not be so hard to get: simple fair play.

"The failure to act on judges is a disservice to the American people. Delayed justice can take many forms. It may mean that some criminals linger on the streets while they await trial or sentencing. Or that victims of crimes will have to wait longer for judgments or compensation. Or that it becomes harder for law-enforcement officials to get judicial consent in time to track or monitor suspected terrorists within our borders.

"Yet one year after these nominees have been selected, and many months after each have been rated qualified to serve by the American Bar Association, eight of the President's original circuit court selections have not even had a hearing to consider their nominations. This gamesmanship is a cruel affront to these fine candidates, their families, and their reputations.

"This astonishing refusal by the Democratic majority to even hold hearings on these nominees is unprecedented. Presidents Clinton, Bush, and Reagan all had nearly every one of their initial circuit court nominees confirmed by the Senate within one year of their selections.

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"Of course, both sides can wage a war of statistics about what happened in the past. But the question should be what is happening right now. More than three-quarters of President Bush's initial circuit court nominees today linger in an uncertain limbo, delaying justice for the American people. That is not fair to the President, to the nominees, or the country. It must be remedied, and it is the reason Republicans are speaking out today."

The following Circuit Court nominees have all been rated "qualified" or "well-qualified" for their posts by the American Bar Association and have waited exactly one year for any Senate action on their nominations:

- John Roberts has argued 36 cases before the U.S. Supreme Court and served as Deputy Solicitor General of the United States.
- Miguel Estrada argued 15 cases before the Supreme Court, worked as a federal prosecutor, and as assistant U.S. solicitor general. He came to America as a teenager, speaking virtually no English. If confirmed, he would be the first Hispanic ever to serve on the D.C. Circuit Court of Appeals.
- Texas Supreme Court Justice Priscilla Owen was elected to her current post in 1994 and re-elected in 2000, when she was endorsed by every major newspaper in the state.
- Michael McConnell, a nominee to the 10th Circuit, is one of the nation's leading constitutional scholars, endorsed by hundreds of Democratic law professors across the country.
- Jeff Sutton, a nominee to the Sixth Circuit, graduated first in his class at Ohio State Law School, and served as solicitor for the state.
- Justice Deborah Cook, who currently serves on the Ohio Supreme Court, was the first woman partner ever at Akron's oldest law firm.
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Kyl: Time to Fix Judicial Backlog

Senator Wants Pending Nominees Sent to the Floor by August

WASHINGTON, D.C. – U.S. Senator Jon Kyl (R-AZ), a member of the Senate Judiciary Committee, today continued to press the Senate leadership for a vote on all pending Bush administration nominees – including judiciary nominations -- before the chamber departs for its August recess.

"I will continue to press the Senate to confirm all pending nominees – many of whom have been languishing in uncertain limbo for months -- before our scheduled August recess," said Kyl. "This does not have to be a challenge, and this does not have to be difficult. A Senate committed to bipartisanship should be able to move forward on these nominees without further delay."

Last week, Kyl successfully reached agreement with the Democratic Senate leadership to schedule an up or down vote on five bottled-up Interior Department nominees. The Senator held up debate on an Interior appropriations bill until the nominations were acted on.

In addition to Executive Branch nominations, Kyl said a serious delay in confirming judicial nominees presents an equally grave crisis. He noted that not a single Bush judicial nominee to federal district or circuit courts have yet been confirmed by the Senate. Of 29 judiciary nominations announced by President Bush since his Inauguration, only three have had any hearings, he added.

"While I commend Democratic leaders for making some progress on confirming some administration nominees, we still have a long way to go," said Kyl. "Failure to promptly consider judicial nominees imperils the administration of justice."

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Source: News & Business > News > **News Group File, All** ⓘ
Terms: **"and at least hearings for judicial nominees"** (Edit Search)

The National Journal July 29, 2000

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July 29, 2000

SECTION: POLITICS; Pg. 2452; Vol. 32, No. 31

LENGTH: 2503 words

HEADLINE: America Is 'Starved for a New Tone'

BYLINE: James A. Barnes

BODY:

During one of his last campaign swings before the Republican National Convention, Texas Gov. George W. Bush talked with National Journal Staff Correspondent James A. Barnes between bites of airline food. The following are edited excerpts of their conversation:

NJ: What's President Clinton done right?

Bush: Protected his child. Began the process of saying that children are private. He is a master at using presidential power to paint the Congress in a corner. Relations between the executive branch and the legislative branch are a crucial part of the mix of a presidency.

NJ: How's he harmed the presidency? Bush: You know what? I don't think any individual can harm the presidency. I think the office is greater than its occupants, and I believe I can restore dignity to that office and I believe I can build enough capital to get something done. That's one of the refreshing things about the American system. Changes of power are peaceful and orderly, and tend to purge the system. I say that remembering what it was like in the '60s and the '70s, a very difficult period of time in American history.

NJ: Are you saying he somehow degraded the office?

Bush: I'm saying he's embarrassed the country.

NJ: Would you consider pardoning him if he's indicted for lying about his relationship with Monica Lewinsky?

Bush: No. He asked not to be pardoned. He said it loud and clear, and I take him at his word.

NJ: How do you think your approach to leading would differ from Al Gore's?

Bush: I think that Al Gore is a part of a scene in Washington that believes that when you tear something down, when

you attack, you get ahead. I don't believe you can lead doing that. I don't think you can solve Social Security's problems by creating an environment of distrust. And there's nothing in this campaign thus far that has shown me there would be a different type of attitude in Washington, D.C., than that attitude of polarization. It's one thing to criticize, it's another thing to put everything in such personal matters. I think a President has got to set a different tone. And this country is starved for a different tone, one of the reasons I'm going to get elected.
NJ: In Knoxville, Tenn., last month, you called for a new approach to the way Washington works and said that "leaving yesterday's quarrels behind" would help achieve that goal.

Bush: Absolutely.
NJ: Is there something Republicans should let go of?

Bush: Yeah. There is a real bitterness about some Republicans, (who) are so used to the squabbles and the finger-pointing. In a speech I gave at the big gala in Washington, I basically said both parties are to blame. I happen to believe most of the onus is on the President. I think a President can set a tone. I wouldn't have run for the presidency if I did not believe an Administration can change a tone and an atmosphere in Washington, I firmly believe that. On the other hand, the Congress has responded at times, too, in like kind.
NJ: You also said in Knoxville that if elected you would ask the Senate to act on your nominations in 60 days.

Bush: Yes.
NJ: Thinking about the good will you said is important to establish in Washington, why wait until next year? Why shouldn't the Senate act in this session on President Clinton's nominees whose names were submitted at least 60 days ago?

Bush: That's a very good question. And I would hope that Republicans would hear my call. Now, there's going to be special circumstances in some of the cases. I mean, some judges may be deemed to be incompetent, but I hope there is expeditious review.
NJ: In this session?

Bush: Absolutely.
NJ: And **at least hearings for judicial nominees?**

Bush: Yeah, if it's good enough for me, it's good enough for the President.
NJ: In terms of letting things go, how about Republican calls for a special counsel investigation of the Clinton-Gore fund raising and their criticism of the Attorney General as being derelict in duty for not moving forward with one?

Bush: Well, there's a great deal of suspicion in Washington. There are folks that have completely overstepped the bounds of fund raising and yet there's been no real accountability. I can understand why Republicans are frustrated. Right after the primaries, my opponent said he wants to ban "soft money," the very same day the President is out raising soft

money. These are sleight-of-hand experts. There has been no full accountability of the involvement. I mean, yesterday the Vice President says at the Buddhist temple no money changed hands. My only point is, in the face of a call for campaign funding reform, the best campaign funding reform is going to have honest people.
NJ: It's your first week in the White House....

Bush: Yes, thank you. I love an optimist. You're the only guy that's ever asked me that question.
... what are some of the first things you do in the office?

Obviously, Step 1 is to bring what is going to be a really interesting, smart, capable Cabinet and staff together and begin the process of doing something I did as governor-of building a team. I haven't thought this far ahead. One of the first things I did was have a full ethics briefing. I said this is the standard, the highest and all that, and attorneys briefed our staff on what to look for, what things to be careful about. Another thing is to start reaching out to Congress to prepare a legislative agenda. The first 100 days, 90 days, or 110 days will be very important. There are some executive directives like getting the Secretary of Defense started on a long-term strategic plan for what the military is going to look like. We have a chance to redefine war and, therefore, enhance peace. I really want our government and our country spending money on the military in a wise, focused fashion. Spending needs to be based upon a strategic vision that says today's military will be high in morale. We'll pay soldiers better and have better training, less deployment. This military needs to look different 30 years from now, so let's start the process today. That requires executive direction.
NJ: If elected, do you plan to use the Reagan model of quick action on major legislation?

Bush: Yes.
NJ: Would Social Security reform be a hundred days agenda item?

Bush: It would be wonderful if it could be, but I think Social Security reform is going to require first and foremost a bipartisan commission, which I would hope to get in place quickly. John McCain had a very good idea on the commission. I don't know whether their recommendations could come out in the first 100 days.
NJ: Would you put McCain on the commission?

Bush: Depends on where he is. I'm not telling you.

NJ: Why haven't you done more in conjunction with Republican congressional leaders in the campaign?

Bush: You mean why haven't I campaigned with them? It's not intentional. They are where they are in Washington, and I'm out in the hustings. They're friends, they're going to be allies. But there is something else here. They asked me yesterday on TV, "Are you for the President's swap on marriage penalty for prescription drugs?" This is up to the Congress and this

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President to resolve.
NJ: Are you concerned that the Republican Congress and President Clinton might cut some legislative deals to benefit both of them politically, as they did in 1996, which undercut Bob Dole's presidential campaign?

Bush: I expect it. But if it's good for the country, it doesn't concern me. I don't know what you have in mind, but I will tell an example of where I thought the Congress stood strong, and deservedly so, was on eliminating the death tax. In other words, it was a pure bill.
NJ: How much difference ideologically do you see between congressional Republicans and GOP governors?

Bush: It's just a difference. I thought you were going to say between the House and the Senate, and my answer to that was it's hard to tell because of the procedural nature of both houses. You can take the same person with the same philosophy, but because the rules are different, there's a lot of procedural differences that tend to set the tenor of each body. Same with governors. We're all conservative people, but there's such a difference between a governor and a legislator. It's just a different mentality. The governors are decision-makers, they're doers, they play the hand they've been dealt, and the legislative body tends to be more reactive. I tease people, saying appropriators are appropriators. If you think they are going to take surpluses and pay down debt, you don't understand the nature of an appropriator. Both Republican and Democrat appropriators appropriate. That's why I have no faith that unspent money, is going to be spent on what people want.
NJ: Have you ever voted for a Democrat?

Bush: Well, my stock answer is they always put the curtains on the booth for a reason, but, yes, I have, in Texas.
NJ: Who are some Democrats you admire?

Bush: I greatly admired (late Texas Lt. Gov.) Bob Bullock a lot. And he passed as a close friend. When he went it was a tearful moment. Speaker Pete Laney of the Texas House, I admire Pete. We have our differences, sometimes, but I think he's been a very good speaker, and I think the success of my tenure as governor is a result of me being able to work with Pete.
NJ: Democrats outside of Texas?

Bush: I had a good visit with (Sen.) Bob Kerrey the other day. And I found him to be a very interesting man. Just willing to think anew. Bob's an interesting guy. I was very impressed by him.
NJ: Do you think the nominating process should be changed so it's not so compressed?

Bush: That's a really hard question to ask somebody that's just come through the process. We're people who get mikes stuck in our face and(asked), "Will you promise to keep Iowa and New Hampshire first?" as you're campaigning in Iowa and New Hampshire. I mean, you know, hello? And so we're fresh off of

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promises to these states. Yeah, something has to be done, I think. I don't know what the solution is. I know this, though: It was a pretty tough process, physically. I'm in great condition, and it was a lot tougher than I thought it would be. Maybe it's because it was so compressed. I mean, remember-we're flying across the country, going from New York to California to Ohio to Missouri to California to New York, and it was a lot of work. I'm not averse to work, don't get me wrong. I'm not complaining, but it was tough. I think the process is good in many ways, though. It gave voters a chance to look at me. You didn't know me from Adam. You're probably wondering what this guy is all about. You now have a different set of data points. You saw me lose. You saw me lose, hopefully, gracefully. You saw me turn around and win. Everything looked like it was heading right to victory and all of a sudden I lost again.
NJ: How about what phase in the campaign, like after you lost New Hampshire?

Bush: That was a learning experience. On the road to the presidency, there are certain moments that help define who I am to the public and who I am to myself. I believe that I am growing into the presidency. And I think there's a series of steps toward that. And, there's a certain internal, hard to describe what's happening to me, because you're talking in midprocess. But there's a certain internal, certain events that...
NJ: Steel you?

Bush: Yeah, that steel you; convince you that it's meant to be. Defeat is part of it. You see the primaries are this. You wake up in New Hampshire the next morning, you just got clobbered. Then you're down in Delaware and South Carolina. And you win Delaware, and the next moment it's South Carolina, and you win South Carolina, and then it's Michigan. Those of us who have run for office before remember the victories and then remember a little time off between the victories and the transition. In other words, there's a moment. And the final moment doesn't arrive for the presidency until November. So there's a series of these emotional ups and downs, and it's like a marathon. It's like a very-long-distance race. I've come away realizing that this process requires the utmost of discipline and focus and patience, something I have not been long on in my life. But I'm becoming a much more patient person, which I think will stand me in good stead to be the President. Patience is very important, because with patience comes the confidence-confidence in the strategy, confidence in the wisdom of the American people, confidence in my own abilities.
NJ: How important do you think the debates will be?

Bush: What debates? Just kidding. I think they'll be important, part of the puzzle. I think the selection of the Vice President will be very important. I think the acceptance speech will be important, and I think some of the debates will be important. But I think the Sunday Gore and I appeared on interview shows was important. For those who were paying attention, I think people got to see me under questioning and got to see Gore. It's kind of an interesting side-by-side comparison.

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But you pick moments, this is a moment. You walk away saying, you know, "complete idiot" or "maybe I will vote for him." And so do the voters. They pick up glimpses. People decide all kinds of different ways. The debates will have some importance. I found the debates in the primaries to be very important moments, important for me, important for my campaign. We got exposure. People paid attention, but they weren't deciding.
NJ: What lessons did you take from your father's loss in 1992?

Bush: That incumbency, if not properly defended, is fragile.
NJ: And his victory in '88?

Bush: That it's important to drive the agenda.
NJ: How are you like your father?

Bush: Call up people who know us both.
NJ: Same for your mother?

Bush: Sure. I don't know. A lot of people say I'm a lot like my mom. That's a hard question for me to answer. I don't spend a lot of time trying to figure me out, particularly in terms of what my genetic disposition is, and my personality is, relative to my parents. I'm just not into psychobabble. But Beverly Kaufman, the county clerk in Harris County, said one time when she was introducing me, she said, "I'm introducing a very great governor, an interesting man-he's got his daddy's eyes and his mother's mouth."

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Terms: **"and at least hearings for judicial nominees"** (Edit Search)
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June 8, 2000, Thursday

TYPE: CAMPAIGN 2000

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HEADLINE: GOVERNOR GEORGE W. BUSH (R-TX) DELIVERS REMARKS ON GOVERNMENT REFORM; KNOXVILLE, TENNESSEE

SPEAKER:
GOVERNOR GEORGE W. BUSH (R-TX),

BODY:
GOVERNOR BUSH DELIVERS REMARKS ON GOVERNMENT REFORM AT

KNOXVILLE, TENNESSEE, EVENT, AS RELEASED BY THE BUSH

CAMPAIGN

JUNE 9, 2000

SPEAKER: GOVERNOR GEORGE W. BUSH (R-TX)

REPUBLICAN PARTY PRESIDENTIAL CANDIDATE

*

BUSH: Thank you very much. It is good to be in Knoxville.

It has been almost a year since my campaign began. Since that first trip to Iowa, I have laid out my agenda for America both at home and abroad.

My goals for America are clear. To make sure that every child is educated, by returning high standards and accountability to public schools.
To bring more economic growth and opportunity, by reducing the income tax burden on all Americans -- especially those aspiring to the middle class.

To keep our commitment to elderly Americans, and generations to come, by saving and strengthening social security.

To keep the peace, by building a national missile defense, modernizing our military, and establishing clear principles for the use of our power in the world.

These are things that must be done, the nation's pressing business.

Today I want to talk about the way we conduct the nation's business. Many Americans believe that Washington's way of doing things just isn't working. That government's purposes are too often forgotten, and opportunities too often squandered -- resulting in too few results.

In so many ways, America in the year 2000 is the picture of success. Our economy is more competitive than ever -- more efficient. Our technologies are marvels of creativity. Throughout the private sector, we're seeing what people can accomplish with strong leadership, clear goals, fair dealing, and cooperation.

This could hardly be said of the federal government. There is too much argument in Washington and not enough discussion. Too much polling and not enough decision making. Too much needless division, not enough shared accomplishment. Not enough final acts and resolutions, and lasting achievements.

There is blame enough to go around. I do not dismiss the serious disagreements that are part of politics, but the reality is that Americans look upon this spectacle and don't like what they see. They know that this is not the way the world's great power should conduct its affairs. I agree with them. It's time for change.

Consider, by contrast, many of our state and local governments, where the best ideas and boldest reforms of the last decade have taken place. All across America, governors, state legislators, and city officials have laid partisan differences aside and done what they were elected to do -- serve the people.

In New York City, Mayor Rudy Giuliani brought order and civility back to the streets -- cutting crime rates by 50 percent.

In Cleveland, Mayor Michael White's bipartisan leadership has led to a revitalized downtown area and a higher quality of life similar to Mayor Ash, here in Knoxville.

In Wisconsin, Governor Tommy Thompson led bipartisan reform and proved that welfare dependence could be reversed -- reducing the rolls in his state by 91 percent similar to Governor Sundquist, here in Tennessee.

In Texas, we never lack for partisan battles. Texas is a two- party state where tough politics comes naturally. But when it counts, we work to put the public interest first. In my first term as governor, I worked with a Democratic legislature to reform education, the legal system, juvenile justice, and welfare. These were joint accomplishments of a Republican governor and a Democratic legislature.

Politics has not been my career. And what I've learned in the private sector has proven true

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in government: a little good will goes a long way. Good will is earned by respecting your opponents, telling the truth, and leaving yesterday's quarrels behind.

And if good will is to prevail, a leader must set the right tone. A leader guided his convictions, not by the counsel of his pollster. A strong leader sets his mind to solving problems, not settling scores. Every successful mayor and governor understands this. And so should the next president.

With just seven months until the end of his term, we will leave our current president to the judgment of history. What matters now is whether the bitterness that now prevails in Washington will continue after his term.

There is a clear choice in this campaign, and the people are seeing it in the kind of tone we set, and how we talk about the big issues facing America. Take social security, for example. Recently I laid out a plan, a framework, to guide bipartisan reform in social security, to increase its value and keep our commitments to the elderly. There will be reasonable disagreements on this important issue. Surely, all can agree that this is a serious matter requiring the best efforts of both parties.

And yet all we have heard from my opponent are the familiar exaggerations and scare tactics. Ideas he doesn't share are never just the other side of an issue: They are "radical" or "reckless" ideas. Proposals he disapproves of are never just arguable; they are always "risky schemes."

This kind of unnecessary rhetoric is characteristic of the tone in Washington. It's the war-room mentality -- the hostile stance, the harsh charges, the lashing out at enemies. We have had eight years of this, and eight years is enough.

We need a clean break from the recent past. It is time for leadership that sets a new tone -- a tone of respect and bipartisanship.

A president can do this. He can refrain from personal attacks, and treat members of both parties with respect. He can reach across the partisan aisle and work with all for the good of the country.

In this same spirit, there are some practical steps we can take to change Washington. I am proposing today a set of six specific reforms relating to the budget process, pork-barrel spending, and nominations.

First, the budget process. I will propose that the federal budget be passed by both houses of Congress and signed by the president into law.

As it is now, the president and Congress work separately on their own budget proposals. Only very late in the year do these two branches begin working together on the details. Often their separate budgets are just a prelude to battle. A joint budget resolution signed by

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the legislative branch and the executive branch would start the process on the right footing, encouraging cooperation, and early agreement on fundamentals.

I also support a law putting the entire budget and appropriations process on a biennial basis, as is done in my state and 20 others.

If the discord in Washington never seems to end, this is partly because the budget process never seems to end. Lawmakers spend more than half of their time each year wrangling over budget resolutions, reconciliation bills, and appropriations bills. And often, as many legislators will tell you, they've hardly had time to examine the bills before the vote is taken.

By putting the process on a two-year schedule, we allow more time for thoughtful debate on the whole range of issues facing the Congress -- better oversight of the bureaucracy, confirmations, and other long term concerns.

I will also propose a bill ending the annual threat of shutting down the government.

These threats have given both parties some moments we all prefer to forget. Disagreements have become deadlocks, the entire budget process resulting in no budget at all. Americans have had to watch federal agencies close for business and national parks and monuments turn away visitors.

These standoffs have undermined public confidence in government. To ensure that the government does not shut down again, here is what I propose.

If an appropriations bill is not signed by October first of the new fiscal year, affected programs would continue to be funded at the level of the president's budget, or the previous year's level as approved by Congress -- whichever is lower.

Behind this reform is the simple principle that, above and beyond the quarrels of the moment, the United States government has certain basic commitments, and those commitments must be kept.

Next, I will address a longstanding source of public irritation and outrage -- the wasteful habit of pork-barrel spending.

It's often said that one politician's "pork" is another's vital project, one district's "corporate welfare" another district's vital federal investment. But we need a more objective definition of "vital."

This confusion is the source of too much waste, and too much haggling, bargaining, and resentment in Washington. We have all heard examples of wasteful spending, such as the $250,000 to research caffeinated chewing gum. Or the 750,000 dollars for grasshopper

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research. New examples come along every year. The process never seems to change.

I support the establishment of a bipartisan commission to eliminate pork throughout the federal government.

There is bipartisan support for such a commission, including the backing of Senators McCain, Thompson, Abraham, and Lieberman. But such an idea needs a presidential push, which I will give it. This panel will submit to Congress a list of all spending projects deemed frivolous and unnecessary. The Congress will then cast a simple "up" or "down" vote. No amendments, no back-scratching, no logrolling.

Further, to bring fiscal discipline to the budget, I will ask Congress to pass line-item veto legislation.

The Supreme Court has made clear how such legislation can pass constitutional muster. Congress cannot give the president a permanent line-item veto. But it can give the president authority to decline to spend wasteful appropriations. As president, I will seek that constitutional authority. And I will use it to prevent spending that fails to serve the public interest. And I will use the unspent money to pay down the national debt.

These reforms can take some of the friction out of our national politics -- and justify greater public confidence in Washington. But they are reforms of procedure only. In the end, only the spirit of the lawmakers themselves can bring real change to Washington. Above all else, we must call a truce to politics as combat -- where differences of principle give rise to unprincipled attacks on character.

A good place to start is the nomination and confirmation process.

The Constitution empowers the president to nominate officers of the United States, with the advice and consent of the Senate. That is clear-cut, straightforward language. It does not empower anyone to turn the process into a protracted ordeal of unreasonable delay and unrelenting investigation.

Yet somewhere along the way, that is what Senate confirmations became -- lengthy, partisan, and unpleasant. Often they are occasions for pushing larger agendas, having nothing to do with the merits of the nominee. At some memorable low points, hearings have become a gauntlet of accusation, interest-group warfare, and public humiliation. This has done enough harm to the process.

The president and the Senate have a joint responsibility here. The president must be prompt in **submitting his nominations,** and the Senate prompt in acting upon them.

Starting next January, I will make the prompt submission of my presidential nominees a top priority. And I will ask the Senate to act on each nominee I submit within 60 days. I would ask Republicans and Democrats in the Senate to follow this standard regardless of who may

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be elected next November.

Public service is an honorable calling, and there are many now serving in Washington who view it just that way. But their voices are easily drowned out in the din of battle. Instead, the agenda is determined -- the tone set -- by the loud, the aggressive, the contentious.

This should not be the spirit of Washington. This is no way to encourage good people to serve, and no way to build a legacy of accomplishment.

None of us can control how others will conduct themselves. But each of us can control our own actions and our own words. As president, I will set a new tone in Washington. I will do everything I can to restore civility to our national politics -- a respect for honest differences, and a decent regard for one another.

Thank you very much.

END

NOTES:
Unknown - Indicates speaker unknown.
Inaudible - Could not make out what was being said.
off mike - Indicates could not make out what was being said.

PERSON: GEORGE WALKER BUSH (97%); GEORGE W BUSH (73%);

LOAD-DATE: June 9, 2000

Document 1 of 1

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Brent D. Greenfield
08/05/2002 05:23:34 PM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: 60-day quotes

NJ: You also said in Knoxville that if elected you would ask the Senate to act on your nominations in 60 days.

Bush: Yes.

NJ: Thinking about the good will you said is important to establish in Washington, why wait until next year? Why shouldn't the Senate act in this session on President Clinton's nominees
whose names were submitted at least 60 days ago?

Bush: That's a very good question. And I would hope that Republicans would hear my call. Now, there's going to be special circumstances in some of the cases. I mean, some judges may be
deemed to be incompetent, but I hope there is expeditious review.

NJ: In this session?

Bush: Absolutely.

NJ: And at least hearings for judicial nominees?

Bush: Yeah, if it's good enough for me, it's good enough for the President.
-The National Journal, 07/29/00

GEORGE BUSH: ...Above all else, we must call a truce to the politics as combat, where differences of principles give rise to the unprincipled attacks on character. And a good place to start is in the nomination and confirmation process. The President and the Senate have a joint responsibility. The President must be prompt in submitting his nominations, and the Senate prompt in

acting on them. Starting next January, I will make the prompt submission of my presidential nominees as top priorities, and I will ask the Senate to act on each nominee I submit within 60 days. I ask this to both - (Applause) - I ask both Republicans and Democrats to follow this standard, regardless of who may be elected next November.
-The NewsHour with Jim Lehrer, 06/09/00

Above all else, we must call a truce to politics as combat -- where differences of principle give rise to unprincipled attacks on character.

A good place to start is the nomination and confirmation process.

The Constitution empowers the president to nominate officers of the United States, with the advice and consent of the Senate. That is clear-cut, straightforward language. It does not empower anyone to turn the process into a protracted ordeal of unreasonable delay and unrelenting investigation.

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The president and the Senate have a joint responsibility here. The president must be prompt in submitting his nominations, and the Senate prompt in acting upon them.

Starting next January, I will make the prompt submission of my presidential nominees a top priority. And I will ask the Senate to act on each nominee I submit within 60 days. I would ask Republicans and Democrats in the Senate to follow this standard regardless of who may be elected next November.
-FDCH Political Transcript, 06/08/00

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THE WHITE HOUSE
WASHINGTON

October 30, 2002

COPY
from ORM

The Honorable William H. Rehnquist
The Chief Justice
of the United States
Washington, D.C. 20543

Dear Mr. Chief Justice:

I write to propose a specific plan to address the problem of judicial vacancies and improve the judicial confirmation process. The plan would apply both now and in the future, no matter who is President or which party controls the Senate. The cooperation of all three Branches of the Federal Government is necessary for the plan to work.

There is a vacancy crisis in the Federal Judiciary. As of this week, there are 79 vacancies out of 849 authorized judgeships, which amounts to a 9 percent vacancy rate. The 12 regional Federal appeals courts face a particularly serious crisis, with 28 vacancies out of 167 judgeships, amounting to a 17 percent vacancy rate. The number of judicial vacancies has been unacceptably high throughout my Presidency. Your 2001 Year-End Report on the Federal Judiciary called the situation "alarming," and the Secretary of the Judicial Conference of the United States stated in May 2002 that the "overall shortage" of Federal judges is "staggering." Moreover, the caseloads in the Federal courts continue to grow dramatically; for example, filings in the Federal appeals courts reached an all time high last year.

The high judicial vacancy numbers, when combined with the increasing caseloads, create crowded dockets and slow down the justice system. When judicial vacancies go unfilled, Federal courts cannot act in a timely manner to protect constitutional rights, resolve civil disputes, and enforce the criminal, environmental, and civil rights laws that affect the lives and liberties of all Americans.

Too many judicial nominees -- and particularly appeals court nominees -- have had to wait too long for their Senate hearings and up-or-down Senate floor votes. Speaking on behalf of the Judiciary in your 2001 Year-End Report, you "ask[ed] the Senate to schedule up or down votes on judicial nominees within a reasonable time after receiving the nomination." Many outside entities with an interest in the Judiciary have made similar pleas. For example, the American Bar Association in August 2002 adopted a resolution that the Senate should promptly advise and consent to or reject the nominees. The accompanying ABA report stated: "Vote them up or down, but don't hang them out to dry." These concerns are not new.

* Not dispatched through ORM

Today, I am advancing a new plan for the process of nominating and confirming Federal judges. We should have an even-handed, predictable procedure from the day a vacancy is announced to the day a new judge is sworn. This procedure should apply now and in the future, no matter who is President or which party controls the Senate.

First, Federal court of appeals and district court judges should notify the President of their intention to retire at least a year in advance, if possible. Because the nomination and confirmation of a Federal judge is a lengthy process even under the best of circumstances, judges who retire without advance notice can unintentionally create a judicial vacancy that can last for many months. This proposal builds on existing policy of the Judiciary and will help us work toward a system in which a new Federal judge is ready to take the bench on the day a sitting judge retires.

Second, Presidents should submit a nomination to the Senate within 180 days of receiving notice of a Federal court vacancy or intended retirement. This proposal will speed up the sometimes time-consuming process of obtaining recommendations and evaluations from home-State Senators, Representatives, Governors, and bar leaders -- while leaving ample time for Presidents to vet and choose nominees of the highest quality.

Third, the Senate Judiciary Committee should hold a hearing within 90 days of receiving a nomination. A strict deadline is the best way to ensure that judicial nominees are promptly and fairly considered. And 90 days is more than enough time for the Committee to conduct necessary research before holding a hearing.

Finally, the full Senate should hold an up-or-down floor vote on each nominee no later than 180 days after the nomination is submitted. That is a very generous period of time that will allow all Senators to evaluate nominees and have their votes counted.

If adopted and followed by all three Branches, this plan will help restore fairness and dignity to the judicial confirmation process. All Senators will have a chance to make their voices heard and their views known. All nominees will have the certainty of an up-or-down Senate floor vote within a reasonable amount of time. All Presidents will have their judicial nominees considered promptly. All Americans will see a more dignified process, and have their Federal courts fully staffed to protect their rights and liberties. And the judicial vacancy crisis will be resolved.

This plan requires everyone involved in the nomination and confirmation of Federal judges to commit to improving the system. I respectfully call on the Judiciary, acting through you and the Judicial Conference of the United States, and the Senate to join me in adopting and following this plan both now and in the future.

Thank you for your consideration of this proposal.

Sincerely,

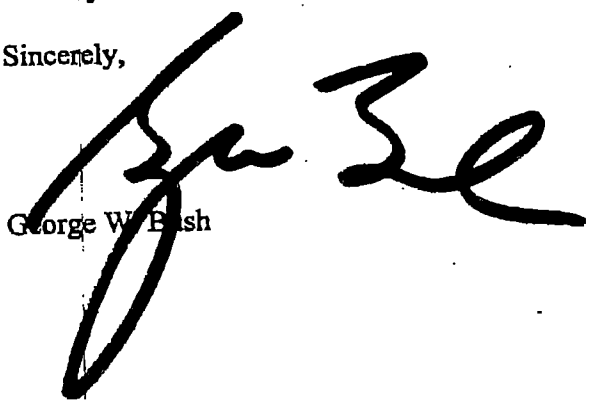

George W. Bush

UNITED STATES SENATE
REPUBLICAN
POLICY COMMITTEE

Larry E. Craig, Chairman
Jude West, Staff Director

Publications Issue List Vote Analysis Main Page

May 9, 2002

Good For the Gander

What Democrats Said When Their President Was Nominating and Republicans Controlled the Judiciary Committee

Among the constitutional responsibilities entrusted to the Senate, none is more critical to the well-being of our democracy than providing advice and consent on Presidential nominations.

- Minority Leader Tom Daschle, March 8, 2000

No one will be here forever. All will leave at some time. When we leave, we can only look back and say: What kind of service did we give? Did we put the country's interests first? Or did we put partisan interest first? Did we put integrity first, or did we play behind the scenes and do things that were wrong?

- Ranking Judiciary Committee Member Patrick Leahy, September 21, 1999

One of the things that most Republicans and Democrats ought to be able to agree on is what [then-]Governor Bush said: Do it and vote them up or down in 60 days. Let's make a decision.

- Senator Leahy, July 25, 2000

On May 9, 2001, President Bush sent his first batch of judicial nominations to the Senate for consideration. One year later, 3 of the 11 nominees have been confirmed, the other 8 are yet to have even a hearing. Of the three that have been confirmed, two were Democrats who were previously nominated by President Clinton. Compare the record of this Senate with that of previous Senates: Presidents Clinton, G.H.W. Bush, and Reagan had 90, 93, and 98 percent, respectively, of their nominees confirmed during their first two years in office. This Senate has confirmed just over one-half of President Bush's nominees.

What follows is a collection of statements from the *Congressional Record* all made by Senate Democrats during the 106th Congress when their president was making the nominations and the Republicans were in control of the Senate. It would seem that if Democrats stood by what they said then, that the current backlog of Bush judicial nominations would be nonexistent.

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What Democrats Said About Vacancy Rates and Judicial Emergencies

[Note that as of May 9, 2002, the number of existing vacancies is 84 - 10.3 percent of the Federal Judiciary. Of the current vacancies, at least 35 (approximately 10 percent) are considered judicial emergencies. Of President Bush's 100 judicial nominations, 44 percent await Senate confirmation.]

- SEN. DASCHLE: One might assume we have no pressing need for Federal judges. In fact, just the opposite is true. Today, there are 76 vacancies on the Federal bench. Of those 76 vacancies, 29 have been empty so long they are officially classified as "judicial emergencies." The failure to fill these vacancies is straining our Federal court system and delaying justice for people all across this country. This cannot continue. As Chief Justice Rehnquist warns, "Judicial vacancies cannot remain at such high levels indefinitely without eroding the quality of justice." (S1255, 3/8/2000)

- SEN. LEAHY: I am challenging the Senate to regain the pace it met in 1998 when the committee held 13 hearings and the Senate confirmed 65 judges.. . . As it is, the vacancy rate is almost 10 percent . . . Especially troubling is the vacancy rate on the courts of appeals, which continues at 15 percent. (S588, 2/10/2000)

- SEN. LEAHY: We have 75 vacancies in the federal court. Prosecutors are under pressure all the time to move cases through because we have not confirmed the judges; we have not added the extra judges they need. The courts are backlogged. You cannot get civil cases heard because of all the criminal cases. (S1344, 3/9/2000)

- SEN. LEAHY: The Senate needs to consider judicial nominations promptly and to confirm without additional delay the many fine men and women President Clinton is sending us. . . . Unfortunately, past delays mean that 26 of the current vacancies, over 40 percent, are already judicial emergency vacancies. . . . (S2092, 3/2/99)

- SEN. LEAHY: The vacancies gap is not being closed. . . . Judicial vacancies now stand at approximately 8 percent of the Federal judiciary. (S11796, 10/1/99)

- SEN. DASCHLE: We have 34 nominees pending. There is no reason why every single one of them cannot be confirmed or at least considered in the next few months. (S1365, 3/9/2000)

- SEN. LEAHY: With 21 vacancies on the Federal appellate courts across the country, and nearly half of the total judicial emergency vacancies in the Federal courts systems in our appellate courts, our courts of appeals are being denied the resources that they need. Their ability to administer justice for the American people is being hurt. (S6567, 7/12/2000)

- SEN. LEAHY: I note that the vacancy rate for our Courts of Appeals is more than 12 percent nationwide. . . . In the federal courts around the country there remain 63 current vacancies and several more on the horizon. . . . So long as the Senate is in session, I will urge action. (S9881-9882, 10/5/2000)

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What Democrats Said About the Senate's Duty of Advice and Consent

- SEN. LEAHY: I hope we will have a chance to vote on them, not just in committee . . . but on the floor of the Senate. That is what the Constitution speaks of in our advise and consent capacity. That is what these good and decent people have a right to expect. That is what our oath of office should compel Members to do - to vote for or against. I do not question the judgement or conscience of any man or woman in this Senate if they vote differently that I do, but vote. (S11102, 9/21/99)

- SEN. SCHUMER: By not filling vacancies, we hamper the judiciary's ability to fulfill its own constitutional duties. . . . This delay makes a mockery of the Constitution, makes a mockery of the fact that we are here working, and makes a mockery of the lives of very sincere people who have put themselves forward to be judges and then they hang out there in limbo. (S1211, 3/7/2000)

- SEN. LEAHY: Acting to fill judicial vacancies is a constitutional duty that the Senate - and all of its members - are obligated to fulfill. In its unprecedented slowdown in the handling of nominees since the 104th Congress, the Senate is shirking its duty. That is wrong and it should end. (S7792, 6/29/99)

- SEN. KENNEDY: Over 200 years ago, the Framers of the Constitution created a system of checks and balances to ensure that excessive power is not concentrated in any branch of government. The President was given the authority to nominate federal judges with the advice and consent of the Senate. The clear intent was for the Senate to work with the President, not against him, in this process. (S1221, 3/7/2000)

- SEN. LEAHY: We must redouble our efforts to work with the President to end the longstanding vacancies that plague the federal courts and disadvantage all Americans. That is our constitutional responsibility. (S10544, 9/8/99)

- SEN. LEAHY: There are only 100 of us who are elected to represent a quarter of a billion Americans. . . . Let us not play silly parliamentary games and tell the American people we do not have the guts to vote . . . (S1331, 3/8/2000)

- SEN. REED: This is one of our enumerated duties in the Constitution. . . . I ask my colleagues to take their constitutional duty seriously and vote for these nominees on the basis of their objective qualifications, and not on the basis of petty politics. This process is much too important to the citizens of this great democracy to do otherwise. (S1356-1357, 3/9/2000)

- SEN. LEAHY: One of our most important constitutional responsibilities as United States Senators is to advise and consent on the scores of judicial nominations sent to us to fill the vacancies on the federal courts around the country. I continue to urge the Senate to meet its responsibilities to all nominees. . . . We must redouble our efforts . . . . That is our constitutional responsibility. It should not be shirked. (S7532-7534, 7/25/2000)

What Democrats Said About Treatment of Nominees

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- SEN. LEAHY: The American people should measure our progress by our treatment of the many qualified nominees . . . to the Courts of Appeals around the country. . . . That all of these highly qualified nominees are being needlessly delayed is most regrettable. The Senate should join with the President to confirm these well-qualified, diverse, and fair-minded nominees to fulfill the needs of the Federal courts around the country. (S6567-6568, 7/12/2000)

- SEN. LEAHY: We are not being responsible. We are being dishonest, condescending, and arrogant toward the judiciary. It deserves better and the American people deserve better. . . . Nominees deserve to be treated with dignity and dispatch. . . . We are seeing outstanding nominees nitpicked and delayed to the point that good women and men are being deterred from seeking to serve as federal judges. (S10544, 9/8/99)

- SEN. KENNEDY: Many of us have been concerned about the Senate's continuing delays in acting on President Clinton's nominees to the federal courts . . . . This kind of partisan, Republican stonewalling is irresponsible and unacceptable. It's hurting the courts and it's hurting the country. . . . The continuing delays are a gross perversion of the confirmation process that has served this country well for more than 200 years. When the Founders wrote the Constitution and gave the Senate the power of advice and consent on Presidential nominations, they never intended the Senate to work against the President. . . . (S11102, 9/21/99)

- SEN. LEAHY: We should be the conscience of the Nation. On some occasions we have been. But we tarnish the conscience of this great Nation if we establish the precedence of partisanship and rancor that go against all precedents and set the Senate on a course of meanness and smallness . . . . For the last several years, I have been urging the Judiciary Committee and the Senate to proceed to consider and confirm judicial nominees more promptly, without the months of delay that now accompany so many nominations. (S11795-11796, 10/1/99)

- SEN. LEVIN: To keep these nominees pending for so long without hearings is unfair to the nominees, particularly where there is no known objection and where there is no explanation for the refusal to grant hearings. . . . We should also focus on nominees pending in the Judiciary Committee, awaiting hearings or awaiting a vote by the committee after a hearing, who are left there no matter how long they have been waiting. . . . (S9661-9662, 10/3/2000)

- SEN. LEAHY: Nominees practicing law see their work put on hold while they await the outcome of their nominations. Their families cannot plan. They are left to twist in the wind. (S8935, 9/21/2000)

What Democrats Said About Time for Considering Nominees

- SEN. LEAHY: All the talk about needing six months or more to process and review nominees is just that - talk. (S7531, 7/25/2000)

- SEN. LEAHY: The Judiciary Committee needs to do a better job and the Senate needs to proceed more promptly to consider nominees reported to it. . . . The Senate needs to consider judicial nominations promptly and to confirm without additional

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delay the many fine men and women President Clinton is sending us. (S3671, 4/14/99)

- SEN. DASCHLE: I believe there is a time and a place for us to consider any nominee and, once having done so, we need to get on with it. I cannot imagine that anybody could justify, anybody could rationalize, anybody could explain why, in the name of public service, we would put anyone through the misery and the extraordinary anguish that these nominees have had to face for years. Why would anyone ever offer themselves for public service . . . ? (S1365, 3/9/2000)

- SEN. LEVIN: The Judiciary Committee held hearings for three of the nominees and approved those nominations less than a week after the nominations were received. Other nominees wait in vain for years just for a hearing. That strikes me as being an arbitrary and inexplicable system, unfair to nominees . . . and unfair to the districts or the circuits in which they would serve if confirmed. I believe it is also unfair - perhaps this is most important of all - to the people who await justice in their courts. (S9661, 10/3/2000)

- SEN. LEAHY: [Judge Julio Fuentes'] nomination has already been pending for over seven months. He should get a hearing and prompt consideration. (S12689, 10/15/99)

- SEN. LEAHY: If I could make a recommendation, I would join an unusual ally in that. Gov. George W. Bush of Texas [stated that] presidential nominations should be acted upon by the Senate within 60 days. He said: 'The Constitution . . does not empower anyone to turn the process into a protracted ordeal of unreasonable delay and unrelenting investigation. Yet somewhere along the way, that is what Senate confirmations became - lengthy, partisan, and unpleasant. It has done enough harm, injured too many good people, and it must not happen again.' Governor Bush is right. . . . I have said the same thing. (S7437, 7/21/2000)

- SEN. HARKIN: I hope the Judiciary Committee and the leadership on that side. . .will listen to the words of Texas Governor George Bush. He said he would call for a 60-day deadline for judges - once they are nominated, the Senate will have 60 days to hold a hearing, to report out of committee and vote on the Senate floor. . . . If he said he would call for a 60-day deadline, I ask my friends on the Republican side: Why don't we act accordingly? (S9664-9665, 10/3/2000)

What Democrats Said About Affording Judicial Nominees a Vote

- SEN. HARKIN: There are 22 vacancies in our federal appeals courts . . . . These positions should be filled with qualified individuals as soon as possible. I urge the Republican leadership to take the steps necessary to allow the full Senate to vote up or down on these important nominations. (S9664, 10/3/2000)

- SEN. LEAHY: Let us find a way to tell these nominees they will get a vote one way or the other. I am not asking anybody how they should or should not vote but allow nominees to have a vote. All the people being nominated are extremely highly qualified lawyers and judges. They have to put their lives on hold and the lives of their families on hold while they wait. . . . Vote them up, vote them down. (S11102, 9/21/99)

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- SEN. DASCHLE: It is important that all of the nominees who are pending before the Judiciary Committee be considered. (s11789, 10/1/99)

- SEN. DASCHLE: The Republican majority should not be allowed to cherry-pick among nominees, allowing some to be confirmed in weeks, while letting other nominations languish for years. . . . Let the Senate vote on every nomination. (S11919, 10/5/99)

- SEN. LEAHY: When we hold a nominee up by not allowing them a vote and not taking any action one way or the other, we are not only voting "maybe" but we are doing a terrible disservice to the man or woman to whom we do this. They have to put their life on hold. They do not know what is going to happen: Are they going to be confirmed, or not? (S9672, 10/3/2000)

- SEN. LEAHY: Either vote for them or vote against them. Don't leave people . . . just hanging forever with even getting a rollcall vote. That is wrong. It is not a responsible way and besmirches the Senate. . . . (S9881-9882, 10/5/2000)

What Democrats Said About Leadership Allowing a Controversial Vote

- SEN. LEAHY: The distinguished chairman of the Senate Judiciary Committee deserves great credit for having gotten these nominees through our committee, notwithstanding opposition from some members of his own party, and for having gotten them onto the floor and on the calendar. (S11102, 9/21/99)

- SEN. REED: I also recognize Senator Lott for making a commitment to bring the Paez and Berzon nominations to the Floor for a vote by March 15, over the protests of certain members of his caucus. (S1356, 3/9/2000)

- SEN. DASCHLE: I thank the majority leader. He and I have talked about this on several occasions, and it is never easy when you have dissent within your own caucus to make decisions. He made a commitment last year, and he held to that commitment this year. He said we would have these votes, up or down, on the confirmation of these two judicial nominees before the 15th of March, and we are going to do that. I publicly thank him and commend him for holding to that commitment. It is not easy. He has done a difficult thing, but he has done it. (S1366, 3/9/2000)

What Democrats Said About Fairness Versus Retribution

- SEN. DASCHLE: There is going to be no payback. We are not going to do to Republican nominees, whenever that happens, what they have done to Democratic nominees. Why? Because it is not right. Will we differ? Absolutely. Will we have votes and vote against nominees on the basis of whatever we choose? Absolutely. But are we going to make them wait for years and years to get their fair opportunity to be voted on and considered? Absolutely not. That is not right. I do not care who is in charge. I do not care which President is making the nomination. That is not right. (S1365, 3/9/2000)

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- SEN. HARKIN: Politics; pure rank politics. That is what is going on in the Judiciary Committee today. I hope it won't be that way if the Democrats take charge of the Senate. I am not on the Judiciary Committee, but we tend to get in what I call a "cesspool spiral," like a whirlpool. One side takes over the majority and begins to stall nominations, and then the other side takes over, we keep spiraling down further and further to the point where any nominee for a federal court will be held up months and perhaps even years while we await the next election. Then our third branch of government truly becomes a political football. (S9664-9665, 10/3/2000)

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Brett M. Kavanaugh
11/11/2002 05:46:22 PM

Record Type: Record

To: staylor@nationaljournal.com @ inet

cc:
Subject: Senator Bayh on President's judges proposal

HUME: Senator, the president's team came forth in the final days of the campaign with a plan on judicial nominations that would have had retiring judges announce their retirements a year before they did. It would have had a timetable for the consideration of appointments to fill the seats. And it would have provided for a vote on the Senate floor on judicial nominees.

At the time, of course, it was looked as a eleventh-hour proposal, politics. The administration clearly intends to follow up on it and press for it.

What is your view of that proposal? Is that something you'd be interested in seeing passed?

BAYH: I'm willing to give it serious consideration, Brit. I think we need to get away, both parties--you know, this happened when Clinton was president. It's now happening a little bit now. We need to get a more orderly process in place for dealing with these nominations.

The big fight, though, won't be on the district and appellate court nominees. The big fight will be if there's a Supreme Court vacancy and what to do then.

HUME: Right, but do you believe that a president should be entitled at least to a floor vote on judicial nominees?

BAYH: I think in most cases yes. If someone is just clearly beyond the pale, then the committees do have their rights.

HUME: True, but if someone is clearly...

BAYH: In most cases, yes.

HUME: Clearly beyond the pale presumably means, reported out of the Judiciary Committee with a negative recommendation to the floor, where the Senate, presumably, in its wisdom, if the nominee is beyond the pale, would reject it.

BAYH: In most cases, yes. Unless there's something exceptional.

Brett M. Kavanaugh
11/11/2002 05:47:24 PM

Record Type: Record

To: staylor@nationaljournal.com @ inet

cc:

Subject: Sen. Hatch letter to editor in Salt Lake Tribune

BY ORRIN G. HATCH

Editorial boards are entitled to their own opinions, but not to their own set of facts. The Salt Lake Tribune's editorial against President Bush's plan to reform the judicial selection process ("Federal Bench Fiasco," Nov. 5) puts The Tribune in the extremely rare company of those who argue against speeding up a process that virtually every sensible observer thinks is too slow.

No one can honestly defend the current 77 empty seats in the federal judiciary, which means that 9 percent of the judicial branch sits vacant. This is one of the highest vacancy rates in modern times.

The Senate's goal -- regardless of who is president and which party controls the Senate -- should be to evaluate and confirm judicial nominees in a timely way in order to ensure a fully functioning federal judiciary. That is difficult to achieve due to the amount of work involved in researching the personal and professional backgrounds of nominees. It is also complicated by too much partisan politics. President Bush's plan to start the process earlier, and to establish a time frame for hearings and votes, is an honorable and practical way to streamline the review process and minimize divisive partisanship.

It is difficult to understand The Tribune's opposition to the idea of judges announcing their retirements in advance. Most other high-level public officials are selected before their offices are vacated; we elect presidents, senators, representatives and governors -- to name just a few -- while their predecessors remain in office. This method ensures continuity.

Moreover, it is entirely possible for the Senate to hold a hearing within three months, and a vote within six months, of the president's nominations. A rule forcing such a timetable would go a long way toward removing the partisan power to slow the process.

Selective statistics from narrow time periods in the past, such as those included in your editorial, only confuse the issues. My record as chairman of the Senate Judiciary Committee demonstrates that, contrary to your assertion, the Republicans who controlled the Senate during the past six years of the Clinton administration did not start the current controversy. In fact, those six years saw the number of judicial vacancies decrease by three.

Overall, during President Clinton's eight years in office, the Senate confirmed 377 judges,

essentially the same (only five fewer) as it confirmed for President Reagan, who, by the way, had more judges confirmed than any other president in history. Note that President Reagan had six years of a Senate controlled by his own party, while President Clinton had only two.

Finally, although the Republicans get a lot of blame for the 41 Clinton nominees who did not receive hearings, that number is 13 fewer than the 54 nominees who suffered the same fate at the hands of Democrats during the first Bush administration. By the way, nine of the Clinton 41 were nominated so late in Clinton's eighth year that they could not possibly have been processed by the Senate.

Although neither party has a perfect record in the Senate, President Bush came to the judicial selection process with clean hands, having had no involvement in any of the prior controversies. And he began his term with an astonishing olive branch: The first-ever renomination of a circuit court nomination first submitted by a president of the other party.

It is even more ludicrous to accuse President Bush of failing to nominate fast enough. President Bush has responded to the vacancy crisis in the appellate courts by nominating a total of 32 top-notch men and women. The Senate Democrats have simply stalled them, confirming only 14 and leaving 17 more pending in committee. This disregards precedent. At the end of President Clinton's first year in office, there were only two circuit court nominees left pending in committee without hearings or votes; after President Bush's first year, there were 23.

There is great wisdom behind President Bush's call for the Senate to hold timely hearings and votes for all judicial nominees, regardless of who is president and who controls the Senate. By streamlining the process and limiting the power of partisan politicians on both sides of the political aisle, such a rule would serve the long-term interests of the judiciary and the American people. I simply don't understand The Salt Lake Tribune's concern here.

Rachael L. Sunbarger 05/09/2001 03:10 PM

Record Type: Record

To:

cc:

Subject: REMARKS BY THE PRESIDENT DURING FEDERAL JUDICIAL APPOINTEES ANNOUNCEMENT

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release
May 9, 2001

REMARKS BY THE PRESIDENT
DURING FEDERAL JUDICIAL APPOINTEES
ANNOUNCEMENT

The East Room

2:43 P.M. EDT

THE PRESIDENT: Thank you all very much. Attorney General, it's good to see you, sir, and happy birthday. Today is his birthday. Also, Judge Al Gonzales. Judge Gonzales is a great friend of mine who, fortunately, is my lawyer and is a part of the process, judicial selection process. Thank you for being here, Judge.

I'm also honored to welcome members of the United States Senate who are here to welcome the nominees to Washington: of course, Senator Orrin Hatch, Chairman of the Judiciary; as well as Senator Patrick Leahy, ranking member on the Judiciary. It's good to see you men, thank you both

for coming.

John Warner, George Allen, George Voinovich and last, but not least, Senator Strom Thurmond. Welcome. (Applause.) Thank you all for coming.

I'm pleased to welcome my judicial nominees to the White House. And I'm pleased to welcome their family and friends, as well.

This is a proud moment for all of you, and it's a proud moment for me, as well. A President has fewer greater responsibilities than that of nominating men and women to the courts of the United States. A federal judge holds a position of great influence and respect, and can hold it for a lifetime.

When a President chooses a judge, he is placing in human hands the authority and majesty of the law. He owes it to the Constitution and to the country to choose with care. I have done so.

With me this afternoon are my first 11 judicial nominees, individuals of experience and character. Four of them serve as United States district judges, all four confirmed by unanimous votes. Two others are sitting judges on state supreme courts. Four have served as law clerks in the Supreme Court of the United States. One has served here as an associate counsel to the President. One already holds the position for which I nominate him, by recess appointment of President Clinton.

These men and women have followed different paths to this nomination. They come from diverse backgrounds, and will bring a wide range of experience to the

bench. All have sterling credentials and have met high standards of legal training, temperament and judgment.

As a group, they command broad, bipartisan support among those who know them and who have served with them. I submit their names to the Senate with full confidence that they will satisfy any test of judicial merit.

These first nominations are also an opportunity to outline the standards by which I will choose all federal judges. The American people expect judges of the highest caliber, and my nominees will meet that test. A judge, by the most basic measure, has an obligation shared by the President and members of Congress. All of us are constitutional officers, sworn to serve within the limits of our Constitution and laws. When we observe those limits, we exercise our rightful power. When we exceed those limits, we abuse our powers.

Every judge I appoint will be a person who clearly understands the role of a judge is to interpret the law, not to legislate from the bench. To paraphrase the third occupant of this house, James Madison, the courts exist to exercise not the will of men, but the judgment of law. My judicial nominees will know the difference. Understanding this will make them more effective in the defense of rights guaranteed under the Constitution, the enforcement of our laws, and more effective in assuming that justice is done to the guilty and for the innocent.

My standard is informed by the oath that each judge will take: to administer justice without respect to persons, and to do equal right to poor and to the rich. A

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good judge exercises these powers with discernment, courage and humility. These are commitments, not just to philosophy, but of character.

My nominees today and in the years to come will be notable for their distinction and accomplishments. And all will be exceptional for their humanity and their integrity. With today's 11 nominees, we continue a constitutional process that involves all three branches of government.

For many weeks now, we have sought and received advice from senators of both parties. I now submit these nominations in good faith, trusting that good faith will also be extended by the United States Senate. Over the years, we have seen how the confirmation process can be turned to other ends. We have seen political battles played out in committee hearings -- battles that have little to do with the merits of the person sitting before the committee.

This is not good for the Senate, for our courts or for the country.

There are, today, over a hundred vacancies on the federal courts, causing backlogs, frustration and delay of justice. I urge senators of both parties to rise above the bitterness of the past, to provide a fair hearing and a prompt vote to every nominee. That should be the case for no matter who lives in this house, and no matter who controls the senate.

I ask for the return of civility and dignity to the confirmation process. And with this distinguished group of nominees awaiting confirmation, there is no better

opportunity than right now. I congratulate all of you on your service past, and for your service to come.

God bless. (Applause.)

END

2:50 P.M. EDT

NEWS RELEASE

Administrative Office of the U.S. Courts

March 13, 2002 Contact: Karen Redmond

Federal Courts Caseload in Fiscal Year Continues at High Levels

Caseloads in the federal courts during fiscal year 2001 continued near or exceeded FY 2000 caseload levels, according to statistics released by the Administrative Office of the U.S. Courts. The Judiciary's 2001 fiscal year, the 12-month period from October 1 to September 30, established a new high for appeals cases, and saw the overall criminal caseload dip by 0.1 percent--just 37 cases --from the highest totals reported since 1933. Bankruptcy filings grew 14 percent during the Judiciary's fiscal year. The civil caseload fell, but by only 3 percent. The complete statistical report for FY 2003 is available in *Judicial Business of the United States Courts 2001*, at http://www.uscourts.gov/judbususc/judbus.html.

U.S. Courts of Appeals

For the sixth consecutive year, appeals filed in the federal courts of appeals broke records. FY 2001 filings in the 12 regional courts of appeals rose 5 percent to 57,464, the seventh successive year of growth in filings. The overall growth was due to increases in original proceedings (up 48 percent), criminal appeals (up 5 percent), administrative agency appeals (up 2 percent), and civil appeals (up 1 percent). Bankruptcy appeals dropped only 5 percent.

Original proceedings have risen each year since 1998, when motions requesting authority to file second or successive habeas corpus prisoner petitions and pro se mandamus petitions for which fees were not paid at filing were first added to the general docket for the courts of appeals.

Appeals related both to immigration laws, and to weapons and firearms, fueled the second consecutive year of growth in criminal appeals. Since 1997, the number of appeals related to immigration laws has climbed a staggering 297 percent. Civil appeals filings, which had declined for two years, rose 1 percent in 2001, primarily due to a 30 percent jump in prisoner petition motions to vacate sentence. An increase in appeals of decisions by the Occupational Safety and Health Administration, National Labor Relations Board and the Immigration and Naturalization Service led to a 2 percent rise in filings of administrative agency appeals. Meanwhile, bankruptcy appeals, which accounted for less than 2 percent of all appeals filed, fell for the third consecutive year, dropping 5 percent to their lowest level since 1983.

(MORE)

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U.S. District Courts

Criminal Filings

Filings of criminal cases in FY 2001 dropped just 37 cases from FY 2000 levels to 62,708. Similarly, the number of defendants decreased less than 1 percent to 83,252. This slight dip in filings follows six consecutive years of growth. Although many courts reported lower criminal filings than expected for the month of September, no clear connection to the events of September 11 has been made at this point.

Federal courts reported a record level of weapons and firearms filings, and drug cases grew 5 percent. Three of the five southwestern border districts received the highest number of drug cases in the nation. The Western District of Texas had 2,296 cases, the Southern District of California had 1,682 cases, and the Southern District of Texas had 1,499 cases. For the first time since 1992, immigration filings declined, falling 7 percent to 11,277. Fraud cases also fell, by 3 percent.

Since 1997, criminal cases (excluding transfers) have jumped 25 percent. This increase stemmed largely from growth in filings involving immigration (up 69 percent), drugs (up 35 percent), and firearms law violations (up 84 percent).

Civil Filings

Civil filings in the district courts fell 3 percent to 250,907. Filings with the U.S. as plaintiff or defendant fell 11 percent, primarily as a result of a 46 percent decrease in cases with the U.S. as plaintiff seeking the recovery of overpayments and enforcement of judgments. A 47 percent drop in student loan recovery filings was a major factor in this substantial decline. The Department of Education has implemented new administrative measures that caused fewer student loan cases to be filed in the federal courts. A 17 percent decrease in forfeiture and penalty cases, most of them involving drug-related seizures of property, also contributed to the overall reduction in cases filed with the U.S. as plaintiff. Officials at the Department of Justice have indicated that, with the passage of the Civil Asset Forfeiture Reform Act in 2000, the federal government now requires a higher standard of proof before these cases can be filed in court.

Filings with the U.S. as defendant increased 10 percent, largely due to a 23 percent surge in federal prisoner petitions and an 8 percent rise in social security filings. Motions to vacate sentence filed by federal prisoners grew 36 percent. Federal habeas corpus (excluding death penalty) prisoner petitions rose 15 percent. In 2001, social security filings related to disability insurance and supplemental security income grew 6 percent and 9 percent, respectively.

Total private cases remained stable. Filings related to federal question jurisdiction fell less than 1 percent, while diversity of citizenship and civil rights filings rose less than 1 percent.

(MORE)

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Trials Completed

District court trials include proceedings resulting in jury verdicts or other final judgments, as well as other contested hearings at which evidence is presented. In 2001, the number of civil and criminal trials completed in the U.S. district courts declined 8 percent, with most of the decrease due to an 18 percent reduction in total civil trials. The number of criminal trials has increased 3 percent over the past five years, 4 percent from 2000 to 2001. Nonjury criminal trials jumped 13 percent, largely because of increases in hearings on contested proceedings.

Criminal Justice Act Appointments

In 2001, a total of 123,968 appointments of counsel were made under the Criminal Justice Act (CJA), an increase of 5 percent over the 118,494 appointments in 2000. The CJA provides funding for the representation of individuals with limited financial resources in federal criminal proceedings. Representations closed by the 70 federal or traditional community defender organizations rose 6 percent in FY 2001 to 70,703. The growth in representations occurred mainly in four districts along the southwestern border of the U.S.: the Western and Southern Districts of Texas, the District of Arizona, and the Southern District of California.

Probation and Pretrial Services

The number of persons under supervision in the federal court system on September 30, 2001, was 104,715, a 4 percent increase over the number reported on September 30, 2000. Persons serving terms of supervised release constituted 65 percent of all persons under supervision. Over the last decade, both the number and percentage of convicted defendants sentenced to prison have risen, and this has contributed to the growth in persons serving terms of supervised release. From 1991 to 2001, the number of convicted defendants sentenced to prison soared 83 percent.

The number of defendants in pretrial services cases opened in 2001 rose 1 percent to 86,140. Pretrial services officers prepared 82,709 pretrial services reports, up 1 percent. Federal judges conducted 194,693 pretrial hearings in 2001.

Fiscal Year Bankruptcy Filings

Following two years of decline, bankruptcy filings climbed 14 percent to 1,437,354, a fiscal year record. Overall, bankruptcy filings increased under all chapters of the bankruptcy code except for chapter 12. In fiscal year 2001, nonbusiness filings rose 14 percent with increases under all chapters of the bankruptcy code, while business filings increased 7 percent. Only three of the 94 districts reported declines in petitions in 2001. In 2001, cases per judgeship numbered 4,436, up 48 percent from the 2,998 cases in 1992, when the last new bankruptcy judgeships were created. Bankruptcy filings have continued to rise. The federal Judiciary recently released statistics for calendar year bankruptcy filings, showing that filings increased 19 percent in the 12-month period ending December 31, 2001.

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Judicial Caseload Indicators
Fiscal Years 1992, 1997, 2000, and 2001

Judicial Caseload	1992	1997	2000	2001	% Change Since 1992	% Change Since 1997	% Change Since 2000
U.S. Courts of Appeals[1]							
Cases Filed	47,013	52,319	54,697	57,464	22.2	9.8	5.1
Cases Terminated	44,373	51,194	56,512	57,422	29.4	12.2	1.6
Cases Pending	35,799	39,846	40,261[2]	40,303	12.6	1.1	0.1
U.S. District Courts							
Criminal (Includes Transfers)							
Cases Filed	48,366	50,363	62,745	62,708	29.7	24.5	-0.1
Defendants Filed	68,668	70,201	83,963	83,252	21.2	18.6	-0.8
Cases Terminated	44,147	46,887	58,102	58,718	33.0	25.2	1.1
Cases Pending	34,078	37,237	47,677[2]	51,677	51.6	38.8	8.4
Civil							
Cases Filed	230,509	272,027	259,517	250,907	8.8	-7.8	-3.3
Cases Terminated	231,304	249,641	259,637	248,174	7.3	-0.6	-4.4
Cases Pending	218,824	272,602	250,202[2]	252,935	15.6	-7.2	1.1
U.S. Bankruptcy Courts							
Cases Filed	977,478	1,367,364	1,262,102	1,437,354	47.0	5.1	13.9
Cases Terminated	900,719	1,223,967	1,256,874	1,301,016	44.4	6.3	3.5
Cases Pending	1,220,102	1,326,136	1,378,139[2]	1,514,477	24.1	14.2	9.9
Federal Probation System							
Persons Under Supervision	85,920	91,434	100,395	104,715	21.9	14.5	4.3
Presentence Reports	49,567	52,174	63,666	63,028	27.2	20.8	-1.0
Pretrial Services							
Total Cases Activated	60,478	71,107	87,513	88,049	45.6	23.8	0.6
Pretrial Services Cases Activated	58,098	69,283	85,617	86,140	48.3	24.3	0.6
Pretrial Diversion Cases Activated	2,380	1,824	1,896	1,909	-19.8	4.7	0.7
Total Released on Supervision	26,255	28,629[2]	34,547	35,082	33.6	22.5	1.5
Pretrial Supervision	24,013	26,433[2]	32,388	33,033	37.6	25.0	2.0
Diversion Supervision	2,242	2,196[2]	2,159	2,049	-8.6	-6.7	-5.1

[1]Excludes the U.S. Court of Appeals for the Federal Circuit.
[2]Revised.

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BK

Standing Rules of The Senate

RULE XXXI

EXECUTIVE SESSION - PROCEEDINGS ON NOMINATIONS

1. When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered, be referred to appropriate committees; and the final question on every nomination shall be, "Will the Senate advise and consent to this nomination?" which question shall not be put on the same day on which the nomination is received, nor on the day on which it may be reported by a committee, unless by unanimous consent.

2. All business in the Senate shall be transacted in open session, unless the Senate as provided in rule XXI by a majority vote shall determine that a particular nomination, treaty, or other matter shall be considered in closed executive session, in which case all subsequent proceedings with respect to said nomination, treaty, or other matter shall be kept secret: Provided, That the injunction of secrecy as to the whole or any part of proceedings in closed executive session may be removed on motion adopted by a majority vote of the Senate in closed executive session: Provided further, That any Senator may make public his vote in closed executive session.

3. When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate; but if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion.

4. Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending unless otherwise ordered by the Senate.

5. When the Senate shall adjourn or take a recess for more than thirty days, all motions to reconsider a vote upon a nomination which has been confirmed or rejected by the Senate, which shall be pending at the time of taking such adjournment or recess, shall fall; and the Secretary shall return all such nominations to the President as confirmed or rejected by the Senate, as the case may be.

6. Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

7. (a) The Official Reporters shall be furnished with a list of nominations to office after the proceedings of the day on which they are received, and a like list of all confirmations and rejections.

(b) All nominations to office shall be prepared for the printer by the Official Reporter, and printed in the Congressional Record, after the proceedings of the day in which they are received, also nominations

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recalled, and confirmed.

(c) The Secretary shall furnish to the press, and to the public upon request, the names of nominees confirmed or rejected on the day on which a final vote shall be had, except when otherwise ordered by the Senate.

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REPORT OF THE COMMISSION ON THE SELECTION OF FEDERAL JUDGES 1996

Miller Center Commission No. 7

Preface

Miller Center Commissions seek to address urgent problems of public affairs by undertaking studies, taking testimony from witnesses, and reporting their findings in the form of recommendations for improving and strengthening some aspect of American governance. This seventh Miller Center Commission addresses problems concerning the process of appointing federal judges.

Although the Clinton administration appointed a larger number of federal judges in its first two years than did preceding administrations in their first two years, the federal judicial system continues to be plagued by a troubling accretion of unfilled judicial vacancies, delays in the appointment process, and backlogs of pending appointments. This Commission addresses the problems currently afflicting the federal judicial appointment process.

The bipartisan Commission is composed of present and former federal district and circuit court judges, former White House counsels to Republican and Democratic presidents, former Justice Department officials, two former U.S. senators, a prominent attorney, and a law school professor. The co-chairmen of the Commission are Nicholas deB. Katzenbach, attorney general in the Johnson administration, and Harold R. Tyler, Jr., a former federal judge and deputy attorney general in the Ford administration. Other members of the Commission include former Senators Howard Baker and Birch Bayh, Washington attorney Lovida H. Coleman, Jr., former counsels to presidents Lloyd N. Cutler and Fred F. Fielding, former federal Judges Leon Higginbotham and Frederick B. Lacey, United States District Judge Kimba M. Wood, and Professor Daniel J. Meador. David M. O'Brien served as part-time reporter. The director and Commission members drafted the final Report with extensive assistance from Professor Daniel J. Meador and Thomas W. Smith. Preliminary drafts were done by Professor David M. O'Brien

The Commission was established in October 1994, and met ten times in the months from 1994 to early 1996. It met monthly during the last half of 1995. The Commission conducted interviews with all the participants involved in the process of appointing federal judges, including representatives from the White House, the Department of Justice, the Federal Bureau of Investigation, the American Bar Association, and the Senate Judiciary Committee. It also invited and received suggestions from federal judges throughout the country. In addition, it considered reports by other bodies, including the Long Range Planning Report of the Judicial Conference of the United States. The Commission report describes the current selection process and its history, identifies problems that call for reform in the 1990s, and makes recommendations to improve the process. The report does not address the unique problems involved in the appointment of Supreme Court justices.

Kenneth W. Thompson, Director
White Burkett Miller Center of Public Affairs

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To maintain a full complement of circuit and district judges, a vacancy should be recognized on the date that a sitting judge becomes eligible for senior status. Although most judges take senior status when they become eligible, some do not and some do not announce their intentions far in advance. If a vacancy were deemed to exist on the date of eligibility, all parties concerned—senators, the Department of Justice, and the White House—could select and vet a nominee to be ready to take office on that date. If the new vacancy had been filled by that date, the number of authorized judgeships would be reduced by one when the judge eligible for senior status takes senior status. The Commission thus recommends that

> **Congress should enact a statute providing that an additional judgeship is created on the date an incumbent judge becomes eligible for senior status, if the incumbent judge does not take senior status on that date. If the newly created position has been filled, the number of authorized judgeships would be reduced by one when the incumbent takes senior status, retires, or dies.**

III. CONCLUSION

It is most important to appoint judges who are learned in the law, who are conscientious in their work ethic, and who possess what lawyers describe as "judicial temperament." That term, though difficult to define, essentially describes a personality that is evenhanded, unbiased, impartial, courteous yet firm, and dedicated to a process, not a result. The law should be fairly read and applied, irrespective of the judge's personal views as to its wisdom. Where the judge is the finder of fact, the facts will be fairly found.

The Commission would be remiss if it did not conclude by acknowledging that, even during the exponential growth of the lower federal courts since the early 1950s, the selection and appointment procedures of the executive and the Senate have usually resulted in high-quality judges. While the Commission has been concerned about delays in filling vacancies, particularly in light of the rapid increase in cases, our focus on that concern in no way indicates dissatisfaction with the quality of the appointments. The quality of the judiciary is clearly far more important than the time taken in the appointment process, and we believe our proposals will enhance that quality.

Nonetheless, this Commission believes there are trends which suggest the possibility of future problems. One is simply the growth of the federal judiciary itself which could possibly lessen the prestige of office and hence the pool of available talent. It is crucial to our system of law and government that the public retain confidence in the high quality, fairness, and impartiality of the judiciary. Due process begins with the reputation and skill of the judges themselves.

As this report recognizes, throughout our history the judicial appointment process has been built on politics. The danger of purely political appointees lacking the necessary competence led Attorney General Brownell to introduce the American Bar Association's participation. At that time—and for some years thereafter—relatively few persons in the executive branch and the Senate or its staff worked on judicial appointments, and rarely were any of them experienced in court practices and procedures. The ABA Committee was designed to fill that shortcoming and insure, insofar as the political process permitted, the high quality of those selected.

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The Commission was surprised and concerned to find that today many more persons from the White House staff, the Department of Justice (including the FBI), and the Senate are involved at all stages of the appointment process. Quite apart from the obvious prospect of "over investigating" candidates and unnecessarily invading their personal privacy, the growing number of people raises the specter of excessive bureaucratization. Put differently, it poses the threat of lowering the level at which the nomination and confirmation decisions are actually made. This trend is clearly related to the increased number of judicial appointments and to the resulting fact that each individual appointment is politically less important to senators. In years past, campaign managers or lawyers who raised most of the money and otherwise assisted in electing a senator, often expected a judicial appointment as a reward. Indeed, Attorney General Brownell involved the ABA to assure that a senator's political preference was also a competent lawyer.

In addition to the growing number of appointments, the changing political process has affected who the candidates for judicial office are and whether they will be nominated and confirmed. The increasingly ideological nature of political campaigns, the need for huge sums of money, the growing dependence on contributions from various ideological groups, and the willingness of these groups to launch personal attacks on candidates they ideologically oppose, has the potential to affect the appointment process in unfortunate ways. Even putting aside the cases of Supreme Court nominees such as Robert Bork and Clarence Thomas, where this problem was obvious, there have been some signs of similar ideological controversy creeping into the process of nominating and confirming lower court candidates. While it appears that the present administration has been conscious of the problem and relatively successful in avoiding such ideological controversies, we have learned of occasional episodes where qualified candidates have refused to be considered or have withdrawn from fear of being "Borked."

The Commission believes that it would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science, it also serves to weaken public confidence in the courts. Just as candidates should put aside their partisan political views when appointed to the bench, so too should they put aside ideology. To retain either is to betray dedication to the process of impartial judging. Men and women qualified by training and experience to be judges generally do not wish to and do not indulge in partisan or ideological approaches to their work. The rare exception should not be taken as the norm.

In any case, it is our view that the important process of appointing federal judges need not be as difficult as it now seems. The ultimate question is simply whether or not potential candidates have integrity, good judgment, and the experience necessary to become judicial officers of the United States. Occasional mistakes will be made. But no amount of bureaucratic vetting or ideological testing will achieve perfection, and too complex a process can do more harm than good.

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Commission Co-Chairmen

Nicholas deB. Katzenbach
Harold R. Tyler, Jr.

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Frederick B. Lacey
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Kenneth W. Thompson
David M. O'Brien
Thomas W. Smith

Witnesses Before the Commission

Victoria Radd
William Willis
Eleanor Acheson
Edward Whelan, III
Dick Hildreth
Thomas Coyle
Thomas Kelley

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Appendix A

Number of Judicial Appointments by Presidents from FDR to Clinton

President	Supreme Court	Circuit Court	District Court	Total
Roosevelt	9	52	137	198
Truman	4	27	102	133
Eisenhower	5	45	127	177
Kennedy	2	20	102	124
Johnson	2	41	125	168
Nixon	4	45	182	231
Ford	1	12	52	65
Carter		56	206	262
Reagan	4	78	290	372
Bush	2	37	148	187
Clinton	2	27	138	167

*Article III judgeships. President Clinton's judicial appointees are for his first two years in office.

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Appendix B

Average Time Required to Fill Federal Judicial Vacancies, 1979-1994

Year	Number of Judges Appointed	Average Number of Days from Vacancy to Nomination	Average Number of Days from Nomination to Confirmation	Average Number of Days to Fill Vacancy
1979	135	219	73	292
1980	64	333	91	424
1981	41	435	34	469
1982	47	310	32	342
1983	32	276	39	315
1984	43	163	36	199
1985	84	321	45	366
1986	44	368	41	409
1987	43	326	102	428
1988	41	284	140	424
1989	15	682	60	742
1990	55	362	81	443
1991	56	289	79	368
1992	66	366	139	505
1993	28	753	51	804
1994*	101	690	87	777
Average (1979-1994)	56	386	71	457

*As of October 8, 1994

Source: Senate Judiciary Committee

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Appendix C
JUDICIAL NOMINEE QUESTIONNAIRES

A. GENERAL PERSONAL QUESTIONS

SENATE Q#	SENATE Substance	DEPT. OF JUSTICE Q#	DEPT. OF JUSTICE Substance	ABA Q#	ABA Substance
I. 1. IV.1	Full name and any former names used.	A. 1. A.2.	Full name and any former names used. Government position sought.	1	Full name and social security number.
I. 2. IV.2	Address (current residence and office).	A. 3. A.4.	Current residence and mailing address. Home and office telephone numbers.	2	Office and home phone numbers and addresses (name of law firm if associated).
I. 3.	Date and place of birth.	N/A	Question not asked.	3 4	Date and place of birth. Naturalized? If so, give place and date.
I. 4.	Marital status and spouse's name/maiden name (if applicable), occupation and employer's name/address.	A. 5.	Marital status, spouse's current employer and also employer(s) for preceding five years (if applicable).	5. a.	Marital status, date of marriage, spouse's name/maiden name (if applicable).
N/A	Question not asked.	N/A	Question not asked.	5. b.	Divorced? If so, give date, moving party, case number, court and grounds.
N/A	Question not asked.	N/A	Question not asked.	5. c.	Names of children; their ages, addresses and occupations.

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I. 5.	Education (list each college, law school and date of degree).	N/A	Question not asked.	7	List colleges and law schools attended, degrees received, and reasons for leaving if degree not received.
I. 6.	Employment record (list by year each business or other enterprise since college).	A. 6.	List all jobs held in last 10 years with job title, employer, location and dates.	16	List any occupation not legal, judicial or in public office with dates and details.
I. 7.	Military service (list dates, service, rank, serial number and type of discharge).	N/A	Question not asked.	6	Military service (list dates, branch, rank, serial number and type of discharge).
I. 8.	Honors and Awards of interest to the Committee.	N/A	Question not asked.	28.	List honors, prizes, awards not previously mentioned.

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I. 13	What is present state of your health and when was your last physical exam?	B. 8. B. 9.	What is the condition of your health? Have you had a physical exam recently?	24. a 24. b 24. c 24.d 24. e 24. f 24.g	What is the present state of your health? In last 10 years have you been hospitalized for injury/illness or prevented from working? If so, give particulars. Suffer from any impairment? If so, give details. When was your most recent exam and who was the doctor? Currently being treated for illness? If so, give details. Ever treated for alcohol or drug dependency? If so, give details. Ever treated for mental illness? If so, give details.

B. LEGAL EXPERIENCE AND BACKGROUND

I.9.	Bar Associations (list all legal or judicial committees or conferences with titles and dates).	B. 3.	All memberships and offices in professional, fraternal, scholarly and civic organizations.	26.	All bar associations and professional societies with dates and offices held (including significant committee memberships).

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I. 10	Other memberships in organizations which lobby public bodies.	B. 3.	See above.	27. J27b J27c	All memberships in organizations other than bar associations or professional societies. Judge: also list chairmanships of bar associations and professional societies. Judge: describe participation, if any, on judicial committees, conferences, and as designated appellate judge.
I. 11	All courts in which admitted to practice with dates and list any lapses. Same information for administrative bodies requiring special admission.	N/A	Question not asked.	8.	All courts in which admitted to practice with dates of admission and the same for administrative bodies requiring special admission.
I. 12	List of all publications with copies of material not readily available and speeches on constitutional law or legal policy with readily available press reports about such speeches.	N/A	Question not asked.	25.	Furnish at least five examples of legal articles, books, briefs, etc. which represent your personal work (for briefs, indicate the degree to which they represent your personal work).

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I. 14	State chronologically any judicial offices held with description.	N/A	Question not asked.	14. a J.12 J13 J14.	Give dates and details of any judicial offices held with description. Judge: Describe your ten most important opinions with cites and appellate review, if any. Judge: describe any non-judicial office held.
I. 15	Provide citations for your ten most important opinions (if applicable), same for all appellate opinions reversing or criticizing your rulings, and your significant opinions on state or federal constitutional issues with related appellate rulings (if not readily available, provide copies of these).	N/A	Question not asked.	N/A	Question not asked.

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I. 16	State any other public offices held with terms of service and descriptions, and list chronologically other candidacies.	B. 6.	List all offices with a political party in the last ten years, and any candidacies during the last ten years.	14. b	Give details of any non-judicial public office ever held, including dates of service and whether elected or appointed.
II.6	Ever play a role in a political campaign? If so, identify particulars, including candidate, dates, and your title/responsibilities.	B.7.	List all contributions to political parties/ election committees during the past six years.	15.	Give details and dates of any unsuccessful candidacies.

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I. 17 a. 1. a. 2. a. 3. b.1. b.2. c.1. c.2. c.3. c.4. c.5.	Describe chronologically your legal career including: Clerkships. Solo practice. Law firms, companies, and gov't agencies. Describe general character of your practice. Describe former clients and specialities. Frequency of appearances in court? If this varied, give by date. Percentage of appearances in (a) federal, (b) state, and (c) other courts. Percentage (a) civil and (b) criminal. Number of cases tried to conclusion and state your role. Percentage of cases (a) jury and (b) non-jury.	N/A	Question not asked.	9. a b c d 10. a b 11. a. b. c. d. e. 12.	Describe chronologically your law practice including: dates of clerkships. periods of solo practice periods with law firms, companies or gov't agencies with names and phone numbers of those with direct knowledge of your work there. any other relevant particulars. Describe general character of your practice over time. Describe your typical clients and areas of specialization. During last five years: What was frequency of appearances in court? If this varied, describe such variances and give dates for them. What percentage of appearances in (a) federal, (b) state, and (c) other courts? What percentage (a) civil and (b) criminal? Number of cases tried to conclusion and what was your role? Percentage of cases (a) jury and (b) non-jury? Same for prior 5 years.

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I. 18	Describe ten most significant litigated matters you personally handled. Give citation, summary, identify client, detail nature of your participation. Also: (a) date of representation. (b) name of court and judge. (c) names, addresses and phone numbers of co-counsel and principal counsel for other parties	N/A	Question not asked.	13.	Describe ten most significant litigated matters you personally handled. Give citation, summary, identify client, detail nature of your participation. Also: (a) dates of trial. (b) name of court and judge. (c) names, addresses and phone numbers of co-counsel for each of the other parties.
I. 19	Describe the most significant legal activities you pursued (non-trial or non-litigation). Describe the nature of your participation (unless privileged).	N/A	Question not asked.	N/A	Question not asked.

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C. FINANCIAL DATA AND CONFLICT OF INTEREST

II.1	Sources, amounts and dates of all anticipated receipts from business relationships. Describe arrangements for any future compensation.	E.1.	Describe all financial arrangements for deferred compensation from business relationships. NOTE: DOJ requires financial information as to all household members.	17. a. b.	Are you now an officer or manager of business enterprise? If so, give details including title and term. Do you intend to resign such positions? If not, give reasons.
II.2.	Explain how you will resolve potential conflicts of interest and identify likely areas which may initially pose conflicts.	C.1. (A) (B) (C) D.1. E.2 E.3 E.4	List all organizations: connected to you in business relationship. in which you have continuing financial relationship (detail). in which you have other financial interests (detail). Will you sever all business connections if confirmed? Describe any business or financial relationship or transaction of the last five years which could result in a potential conflict of interest. Describe any lobbying activity of the last five years. Explain how you will resolve any conflict of interest raised by the responses above.	17.	See Q# 17 above.

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II.3.	Do you have plans to pursue outside employment with or without pay if confirmed? If so, explain.	D.2.	Do you have plans to pursue outside employment with or without pay if confirmed? If so, explain.	17.b	See Q# 17.b above.
II.4. II.5.	List all sources of income received in the calendar year prior to nomination. FINANCIAL STATEMENT REQUIRED	C.2. (A) (B) (C) (D)	Provide a complete net worth statement which includes: itemized assets. liabilities in excess of $1000. sources and amounts of items of value. copies of last three federal tax returns. FINANCIAL STATEMENT REQUIRED	N/A	Question not asked.

D. INVOLVEMENT IN LEGAL PROCEEDINGS/TAX AUDITS/OTHER CONFIDENTIAL

IV.3	Ever been discharged or resigned due to impending discharge?	N/A	Question not asked.	N/A	Question not asked.
IV.4	Have you and your spouse paid all back taxes? Any tax payments made prior to your nomination? If so, detail.	N/A	Question not asked.	N/A	Question not asked.

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IV.5.	Tax lien or collection procedure ever instituted against you? If so, detail.	N/A	Question not asked.	20.	Tax lien ever instituted against you? If so, give particulars.
IV.6	You or spouse ever subject of any tax audit or inquiry? If so, detail.	B.1.	Have your tax returns ever been the subject of an audit or inquiry? If so, explain.	N/A	Question not asked.
IV.7.	You or your spouse ever declared bankruptcy? If so, give particulars.	N/A	Question not asked.	N/A	Question not asked.
IV.8	Have you or any organization you belonged to ever been under investigation for violating any law or regulation? If so, detail.	B.2	Are you currently under federal, state or local investigation for possible violation of a criminal statute? If so, give details.	18. 19.	Ever been arrested, charged or held by federal, state or local law enforcement for violation of any law, regulation or ordinance? If so, give details. Have you ever been under investigation for possible violation of a criminal statute? If so, give particulars.
IV.9	Have you ever been the subject of a complaint to any group, agency or court for breach of ethics or rule of conduct? If so, give particulars.	B.4.	Ever been disciplined or cited for breach of ethics or unprofessional conduct or been the subject of any such complaint? If so, give full details.	23.	Ever been cited or disciplined for breach of ethics or unprofessional conduct or been the subject of any such complaint? If so, give particulars.

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IV.10	Ever been a party to any litigation?	B.5.	Ever been involved in any civil litigation or administrative proceedings appropriate for consideration by the Committee? If so, give details.	21. 22.	Ever been sued by a client? If so, detail. Ever been a party in any other legal proceeding? If so, give particulars.
IV.11	Please advise the Committee of any other adverse information that may affect your nomination.	B.10	Without details, anything in your personal life which may be of embarrassment to the administration? What about near relatives?	30.	State any other information adverse or positive which should be disclosed in connection with your nomination.

E. GENERAL/OTHER

III.1	Describe your work to provide those disadvantaged with legal services.	N/A	Question not asked.	29.	Describe any pro bono or community service activities undertaken.
III.2	Any membership in a discriminatory organization? If so, what efforts did you make to try to change such policies?	N/A	Question not asked.	N/A	Question not asked.
III.3	Selection committee in your jurisdiction to recommend nominations? If so, did they recommend you? Describe the entire process you underwent.	N/A	Question not asked.	N/A	Question not asked.

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III.4	Did anyone involved in your selection discuss any legal case or issue seeking to learn how you might rule? If so, explain fully.	N/A	Question not asked.	N/A	Question not asked.
III.5	Discuss your views on a criticism of judicial activism.	N/A	Question not asked.	N/A	Question not asked.
N/A	Question not asked.	N/A	Question not asked.	J24a b. c. d.	Judge: Did you participate in any proceeding in which you had a financial interest? If so, give particulars. Is there a rule in your court as to sitting on such cases? If so, state the rule and whether you complied with it. Have you, to best of your knowledge, complied with applicable ABA statutes and canons? If no, give particulars. Ever receive outside compensation (other than for teaching)? If so, give particulars.

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Appendix D
CONSOLIDATED QUESTIONNAIRE FOR JUDICIAL NOMINEES[1]

In answering these questions please use letter size paper. Repeat each question and place your answer immediately beneath it. To expedite matters, send in your completed Questionnaire as soon as possible since it is a prerequisite for the usual process of investigation.

If in response to any question you enclose published articles or judicial opinions, please include on your Questionnaire the full title of the article or the full citation for the judicial opinion.

1. Full name and social security number (include any former names used).

2. Address: List current place of residence and office address(es). Include zip codes, telephone numbers and area codes (include name of law firm, if applicable).

3. Date and place of birth. If you are naturalized, give the place and date of naturalization.

4. Marital status: If you are married, identify your spouse's present employer and his or her employer(s) for the five preceding years with the addresses. Give your spouse's name/pre-marriage name (if applicable).

5. Have you been divorced? If so, please give the date, moving party, case number, court and grounds.

6. Provide the names of your children, their ages, addresses and present occupations.

7. Education: List each college and law school you have attended, including dates of attendance, degrees received and dates degrees were granted. If you left any institution without receiving a degree, provide the reason for leaving.

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[1] This questionnaire also contains changes and deletions suggested by the Commission as possible improvements in keeping with modern developments in the practice of law. These are in bold type and brackets at the end of the relevant questions.

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8. Employment record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, non-profit or otherwise, including law firms, with which you were connected as an officer, director, partner, proprietor, or employee during the past ten (10) years. Include the job title, description, name of employer and address. If you have ever been engaged in any occupation, business or profession other than the practice of law or holding judicial or other public office, please give details, including dates.

[Change - insertion of time limitation.]

9. Military service: Have you ever had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number, and type of discharge received.

10. Honors and awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest.

11. What is the present state of your health and when was your last physical exam? In the last ten years have you been hospitalized for any injury or illness, or have you been prevented from working or otherwise incapacitated? If so, please give particulars, including the causes, the dates, the places of confinement, and the present status of the condition which caused the confinement or incapacitation. If you suffer from any impairment of eyesight or hearing or any other physical handicap please give details. Are you currently under treatment for an illness or physical condition? If so, please give details. Have you ever been treated for or had any problem with alcoholism or any related condition associated with consumption of alcoholic beverages, or any other form of drug addition or dependency? If so, please give details. If you have ever been treated for or suffered from any form of serious mental illness, please give details. **[Change to add "serious" in last line.]**

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REPORT OF THE COMMISSION ON THE SELECTION OF FEDERAL JUDGES

I. Current Problems in the Selection and Confirmation of Federal Judges

The present process of selecting and appointing federal judges requires urgent attention for the following interrelated reasons. First, the size of the federal judiciary has increased in recent decades and is projected to grow further in the next century. Thus the president is responsible for nominating, and the Senate for confirming, a larger number of federal judges than in the past. This suggests that, unless the selection and appointment process is streamlined, the problems identified in this report will be exacerbated. Second, as the number of federal judges and appointments has grown, so has the number and average duration of judicial vacancies. A high percentage of judicial vacancies creates serious problems for the work load of federal courts and the prompt administration of justice. Third, the process of federal judicial selection and appointment has become increasingly complex and prolonged, involves a growing number of people, and is in need of simplification and some discipline.

The size of the federal judiciary is increasing because federal jurisdiction has expanded vastly since 1950. Over the 160 years following the Judiciary Act of 1789, the number of district and appellate court judgeships grew gradually to 277. Between 1950 and 1990, however, as Congress created new federal crimes and civil causes of action, annual filings in federal district courts increased by almost 300 percent and Congress legislated a concomitant growth in the number of judges. Congress had authorized increasing federal judgeships to 828 by 1994.

Anticipating continued growth in federal caseloads, the Committee on Long Range Planning of the Judicial Conference of the United States projects needing 1,370 federal judgeships by 2000; 2,350 by 2010; and 4,110 by 2020. While the desirability of increasing the number of federal judgeships is subject to debate, some further growth appears inevitable.

In recent times, presidents have nominated and the Senate has confirmed more federal judges than ever before (Appendix A). President Clinton appointed more federal judges in his first two years than did his two immediate predecessors in their first two years in office. Chief Justice William H. Rehnquist, in his 1994 Year-End Report on the Federal Judiciary, "commend[ed] the President and the Senate for confirming 101 Article III judges during Congress's Second Session, the highest number in a single year since 1980." Still, the creation of additional federal judgeships and the large number the large number that remain vacant are serious problems that, in the words of the chief justice, have "greatly affected court work load in recent years."

The Committee on Long Range Planning of the Judicial Conference of the United States recently observed that, along with the increase in the size of the federal bench and the resulting increase in the frequency and number of vacancies, the time between vacancy and confirmation has also increased. During the last 15 years, the average time between a vacancy and nomination for the federal bench has been over a year; and it usually takes another three months to confirm the nomination (Appendix B).

Unfortunately, delays in nominating and confirming federal judicial appointees appear to be growing. "Emergency judicial vacancies"—vacancies that remain open for more than eighteen months—are increasing and are lasting longer than in the past. In December 1995, for instance, there were 65 vacancies on the federal bench, but only 39 nominees for those vacancies. Of the remaining

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12. Bar associations: List all Bar associations, legal or judicial-related committees of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups. List all memberships and offices in any other professional, fraternal, scholarly and civic organizations (include any significant committee memberships) over the past ten (10) years. **[Change - add to end of second sentence "over the past ten (10) years".]**

13. Other memberships: List any political party and all organizations to which you belong that are active in lobbying before public bodies. **[Change - delete last sentence as repetitive.]**

14. Court admissions: List all courts in which you have been admitted to practice, with dates of admission and lapses, if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

15. Published writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited during the last ten (10) years. Please supply one copy of all published material not readily available. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them. You should furnish at least five examples of legal articles, books, briefs, etc., which represent your personal work (for briefs, indicate the degree to which they represent your personal work). **[Change - insertion of time limitation in first sentence.]**

16. State chronologically any judicial offices you have held with their description, and state whether these positions were elective or appointive.

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17. For judges, provide citations for your ten most important opinions, and citations with short summaries of all appellate opinions reversing or criticizing your rulings. Provide any significant opinions you have written on state or federal constitutional issues, and include related appellate rulings (if any of these opinions are not readily available, please provide copies).

18. Public office: State (chronologically) any other public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elected public office. List all offices with a political party in the last ten years, and list all contributions to and involvement in political parties or election committees during the past six years. Also, please provide the details and dates of any unsuccessful candidacies.

19. Legal career: Describe chronologically your legal career after graduation from law school, including

a. Whether you served as a clerk to a judge, and if so, the name of the judge, the court, and the dates of your clerkship.

b. Whether you practiced alone, and if so, the addresses and dates.

c. The dates, names and addresses of law firms, companies, and government agencies with which you have been connected, and the nature of your connection.

d. Describe the general character of your practice, dividing it into periods with dates if its character changed over time.

e. Describe your typical former clients and any of your specialties.

f. List the frequency of appearances you made in court, and if this varied, describe each variance by year.

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g. List the percentage of your appearances in

i. federal courts;

ii. state courts of record; and

iii. other courts.

h. List the percentage of your work in civil and criminal cases.

i. List the number of cases in courts of record that you tried to conclusion, and state your role in each as counsel, chief counsel or associate counsel.

j. List the percentage of your cases which were jury and non-jury.

20. Describe the ten most significant litigated matters in which you participated as sole or lead counsel. Provide the citation, if available, a short summary, identify your client, detail the nature of your participation and give the formal disposition of the case. Also list for each case:

a. The date of your representation;

b. The name of the court and judge before whom the case was litigated, including the docket number; and

c. The names, addresses, phone numbers of your co-counsel and principal counsel for each of the other parties. **[Change - "as sole or lead counsel" after "participate".]**

21. Describe the most significant legal activities you have pursued (which did not involve trial or litigation). Describe the nature of your participation (unless it was privileged).

22. List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stocks, options, uncompleted contracts and other future benefits from previous business relationships in excess of $10,000.00. Describe any arrangements you have made for future compensation for any business or professional relationship. Also list if you are an officer or

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manager of a business enterprise, including your title and term of service. If you intend to resign such position, please explain when, and, if not, provide the reasons. **[Changes - (1) limitation of specific amount; (2) delete third sentence as too broad and intrusive.]**

23. List all organizations

a. Connected to you in a business relationship;

b. In which you have any continuing financial relationship through the ownership of stock, stock options, bonds, partnership interests, or other securities. Any interests held indirectly through trusts or other arrangements should be included. Please provide a copy of any trust or other agreement; and

c. In which you have any other financial interests. Please provide complete details. Please explain whether you will sever all business connections listed if you are confirmed. Explain how you will resolve any conflict of interest raised by the responses above. **[Change - delete third and fourth sentences as being unnecessary.]**

24. Do you have plans, commitments or agreements to pursue outside employment with or without pay if you are confirmed? If so, please explain.

25. Please list all sources of income received in the calendar year prior to your nomination, and for the current year. Include all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500. Complete the attached financial statement for you and your spouse, including a list of each asset valued in excess of $10,000.00, liabilities in excess of $1,000.00, any sources or amounts of items of value, and copies of your last three federal income tax returns. **[Changes: (1) insert phrase "for you and your spouse" after "financial statement"; (2) value of asset in excess of $10,000.]**

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26. Have you ever been discharged or resigned from a job due to an impending discharge?

27. Have you or your spouse paid all back taxes? Have you made any tax payments prior to your nomination? If so, please provide details.

28. Has a tax lien or other tax collection procedure ever been instituted against you? If so, please provide details.

29. Have the tax returns of you or your spouse ever been subject to audit for either federal, state or local taxes? If so, please provide details.

30. Have you or your spouse ever declared bankruptcy? If so, please provide particulars.

31. Have you or any corporation of which you were or are an officer or director or any firm of which you are or were a partner ever been under investigation for violating any law or regulation? Have you ever been charged or arrested for violation of any federal law or regulation, state law or regulation, or county law, ordinance, or regulation (do not include traffic violations for which a fine of $250.00 or less was imposed). If so, please provide details. **[Changes: (1) substitute specific definition of "organization"; (2) raise fine amount to $250; (3) delete last sentence as repetitive of material in first two sentences.]**

32. Have you ever been the subject of a complaint to any organized bar group, government agency, or court for breach of ethics or rule of conduct? If so, please provide particulars.

[Change - "any organized bar group, government agency ..."]

33. Have you ever been involved in any civil litigation or administrative proceeding in which you were found negligent or guilty of fraud? If so, please give details. Also, state whether or not you have ever been sued by a client and, if so, what was the outcome. **[Changes: (1) first sentence revised to refer to negligence or fraud; (2) new last sentence.]**

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34. [2]Describe any significant *pro bono* or community service activities you have undertaken during your career. **[Change - insert the word "significant".]**

35. [3]Do you currently belong, or have you ever belonged within the last ten (10) years, to any social, business or professional organization which discriminates on grounds of race, gender, etc.—through either formal membership requirements or in its activities or practices? If so, please list with dates of membership. What have you done to try to change these policies if they still exist? **[Changes: (1) Insertion of time limitation; (2) insert phrase "social, business or professional" before "organization".]**

36. For judges, with respect to your judicial service:

a. Have you participated in any proceeding in which you have had stock or other financial interest in one of the parties or in the matter in controversy? If so, please give particulars.

b. Is there a rule or custom in your court as to judges sitting on such cases? If so, state the rule or custom and whether or not you have complied with it.

c. Have you to the best of your knowledge and belief complied with the applicable statutes and canons of the American Bar Association relative to such matters as were enforced and applicable at the time? If not, please give particulars.

d. Have you ever received compensation from outside sources for services rendered (other than fees and expenses for lectures or teaching)? If so, please give particulars.

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[2] Old paragraph 34 deleted as being too vague.

[3] Old paragraphs 37 through the end deleted as being either unnecessary or repetitive in concept.

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Appendix E

Judicial, Professional, and Political Service of the Commission Members, Staff, and Witnesses

Co-Chairmen

Nicholas deB. Katzenbach was assistant attorney general and deputy attorney general from 1961-1965; attorney general and under secretary of State in the Johnson administration. He taught at Yale and the University of Chicago Law Schools. From 1969-1986 he was a senior vice president and general counsel of IBM. Since his retirement from IBM he has practiced law in New Jersey. He contributed to the conclusions and important sections of the Report.

Harold R. Tyler, Jr. was an assistant attorney general, USA from 1959-60. He was a U.S. district judge for the Southern District of New York, from 1962-1975. From 1975-77, he was deputy attorney general, USA and vice chairman of the Administrative Conference of the USA. He has been a member of Patterson, Belknap, Webb & Tyler in New York City since 1977. Judge Tyler took major responsibility for legal research and sections of the Report.

Members

Howard Baker, Jr. returned to the practice of law at Baker, Donelson, Bearman & Caldwell in Washington after serving in the United States Senate from 1967-1985, and as President Reagan's chief of staff, from February 1987 to July 1988. He was vice chairman of the Senate Watergate Committee and served two terms as minority leader and two terms as majority leader in the Senate.

Birch Bayh is the senior partner with the law firm of Bayh, Connaughton & Malone, P.C. in Washington, D.C. He served three terms as a United States Senator from Indiana. He was ranking member of the Senate Judiciary Committee.

Lovida H. Coleman, Jr. is partner in the Washington law firm of Sutherland, Asbill & Brennan. She is a member of the Litigation Group specializing in white collar criminal matters and civil practice. She was deputy general counsel to the Bush-Quayle '92 re-election campaign and director of Policy Issues. From 1977-1980, she served in the Department of Justice as special assistant to the attorney general.

Lloyd N. Cutler is partner in the Washington law firm of Wilmer, Cutler & Pickering. In 1979-1980 he served as counsel to the president of the United States, and from March-September 1994 he was special counsel to the president of the United States. He also served as special counsel to the president on ratification of SALT II Treaty, 1979-1980,

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and as a member of the President's Commission on Strategic Forces (Scowcroft Commission), 1983-1984. He played a significant editorial role in the Report.

Fred F. Fielding is senior partner in the Washington law firm of Wiley, Rein & Fielding where he serves as head of the firm's Corporate Services, Government Affairs, and Crisis Management—White Collar litigation practices. From 1981-1986, he served as counsel to the president of the United States; deputy counsel to the president, 1972-1974; and assistant counsel, 1970-1972.

Leon A. Higginbotham, Jr. has been of counsel since 1993 to the New York City law firm of Paul, Weiss, Rifkind, Wharton & Garrison. From 1964-1977, he was judge of the U.S. district court for the Eastern District of Pennsylvania, and from 1977-1993, was a judge on the U.S. Court of Appeals for the Third Circuit. Since 1993, he has also been a professor at the Kennedy School of Government at Harvard University.

Frederick B. Lacey is a senior partner at LeBoeuf, Lamb, Greene & MacRae in New York City. He was a United States district judge from 1971-1986, while also serving as a member of the United States Foreign Intelligence Surveillance Court and the United States Temporary Emergency Court of Appeals; United States attorney 1969-1971; a judicial adviser to the Department of Justice Delegation to the United Nations Meeting on Organized Crime in Milan, Italy, 1985.

Daniel J. Meador is James Monroe Professor of Law Emeritus at the University of Virginia. He was assistant attorney general, Office for Improvements in the Administration of Justice, U.S. Department of Justice, 1977-1979; chairman, ABA Standing Committee on Federal Judicial Improvements, 1987-1990; member of the Board of Directors, American Judicature Society, 1975-1977, 1980-1983; and member of the Board of Directors, State Justice Institute, 1986-1992. Professor Meador played a key role in editing the various drafts of the Report.

Kimba M. Wood is United States District Judge for the Southern District of New York. Previously, she was with the law firm of LeBoeuf, Lamb, Leiby & MacRae in New York City. From 1989-1991, she was judicial representative to the ABA Section of Antitrust Law; member of the New York State Bar Association House of Delegates in 1984; chairman of the ABA Antitrust Law Section from 1983-1984; and member of the American Law Institute. Judge Wood did important research for the Report.

Miller Center Staff

Kenneth W. Thompson, coordinator of the Commission, is director of the Miller Center of Public Affairs and J. Wilson Newman Professor of Government in the Woodrow Wilson Department of Government and Foreign Affairs at the University of Virginia. He served as vice president of the Rockefeller Foundation from 1961-1973. He is the author of some twenty-five books on government and international relations.

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David M. O'Brien, part-time reporter of the Commission, is a member of the faculty of the Department of Government and Foreign Affairs at the University of Virginia specializing in American Government and Constitutional Law. He is the author of *Storm Center: The Supreme Court in American Politics*. He prepared the first drafts of large portions of the Report.

Thomas W. Smith, acting assistant professor of Government at Wake Forest University and ABD graduate student in the Department of Government at the University of Virginia, assisted the Commission throughout the project with editing and revisions of the Report.

Witnesses Before the Commission

Victoria Radd, Office of the White House Counsel
William Willis, chairman, American Bar Association Standing Committee on Federal Judiciary
Eleanor Acheson, assistant attorney general, Office of Policy Development, Department of Justice
Edward Whelan, III, Senate Judiciary Committee Staff
Dick Hildreth, Thomas Coyle, and Thomas Kelley, Federal Bureau of Investigation

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26 vacancies, several had originated two to three years earlier.

Over the last few decades the process of selecting, nominating, and confirming federal judges has become increasingly dependent on larger staff operations for screening and investigating potential nominees. The Commission heard testimony from representatives of all entities involved in the nominating and confirming process. Much of that testimony demonstrates how the process of federal judicial appointments has changed and become more complicated during the last few decades. Potential judicial nominees must fill out three lengthy questionnaires and be screened by attorneys in the White House and the Department of Justice. Thereafter, potential judicial nominees undergo extensive investigations by the White House, the Department of Justice, the Federal Bureau of Investigation, the American Bar Association's Standing Committee on Federal Judiciary, and the Senate Judiciary Committee, as well as a number of private organizations—such as the Alliance for Justice and the Free Congress Foundation—that now monitor federal judicial appointments.

However, the Senate has historically forced presidents who are making federal district court appointments to confer with senators from the state in which the judicial vacancy exists. Furthermore, these senators can put a "hold" on nominations they do not approve, and thus ensure "senatorial patronage." Attorney General Robert F. Kennedy described the process as a senatorial appointment with the advice and consent of the president. However, during the Carter administration, senators were asked to suggest more than one name for each district court vacancy in their home state. That practice and other presidential attempts to curb senatorial patronage over lower federal court judgeships continued under Republican Presidents Ronald Reagan and George Bush, but with limited success.

Having a divided government, with one party in the White House and the other controlling Congress, enhances senators' abilities to veto district court nominations. Though divided government was uncommon during the 19th century, it has become commonplace since the 1950s. Under these circumstances, presidents selecting nominees have sometimes had to consider views from senators of the opposing party. In the 1980s, the Reagan administration tried to gain greater control over the selection of lower court judicial nominees. The Reagan administration's Department of Justice also used more attorneys in the Office of Legal Policy and the litigation divisions of the Department of Justice to review the records of, and conduct extensive interviews with, potential judicial nominees.

Thus, the process of selecting lower federal court judges has changed in three basic ways. There are now more attorneys and resources in the White House and Department of Justice devoted to screening potential judicial nominees. Extensive interviews with potential judicial nominees have also become routine. Finally, White House staff have become more involved in the screening and selection process. These trends in the process of selecting federal judicial nominees largely continued during the Bush and Clinton administrations. At least fourteen attorneys in the White House and the Department of Justice are currently involved in screening and interviewing potential judicial nominees. Other lawyers in the Department of Justice are also called to assist in the interviewing process as needed.

Today the White House no longer encourages senators to recommend three potential nominees for a district court vacancy in their home state. Instead, the Clinton administration has sought only a single recommendation for each vacancy. That policy change, while it reduces the number of candidates to be screened, may further delay nominations to the district courts because considerable time and resources are sometimes expended on a potential nominee who, for whatever

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reason, proves undesirable or problematic. The administration is then forced to seek another recommendation.

Judicial nominations are delayed even further because some senators are slow in making recommendations for district court vacancies. Senators may await the recommendations of their own nominating commissions, or be reluctant to choose among several deserving aspirants. This already serious problem may worsen because the number of judicial vacancies is increasing and the process of selecting judicial nominees has become a larger and more time-consuming staff operation.

The process of selecting and nominating candidates for courts of appeals is slightly different. Because federal appellate courts have jurisdictions that span several states, presidents have greater discretion and defer less to individual senators when selecting nominees for circuit courts. When a vacancy appears on a circuit court, however, some senators and governors from the state of the vacating judge often seek to influence the selection of the new nominee. In such cases, presidents may need to take their recommendations into account for political reasons. During the Clinton administration, the selecting nominees for the courts of appeals has been centered in the more politically sensitive White House staff, with much less involvement by Justice Department attorneys.

Although most delays in filling lower federal court vacancies can be attributed to the selection and nomination processes, vetting nominations and scheduling Senate Judiciary Committee confirmation hearings also delay federal judicial appointments. The Commission found that the Senate Judiciary Committee lacks a sufficient number of staff counsel to conduct its investigations of nominees, particularly where there is a large number of nominations. To alleviate that problem, the Department of Justice has at times provided its lawyers to assist in the Senate Judiciary Committee's investigations.

Although the role of the American Bar Association's Standing Committee on Federal Judiciary has been criticized, alternatively by liberals and conservatives, the committee is useful in evaluating the professional qualifications of judicial nominees. While recent administrations have found some of the committee's investigations duplicative and too time consuming, there has been improvement over the past year or so.

Symbolic and illustrative of how "bureaucratized" the federal judicial appointment process has become in recent decades, judicial nominees are required to complete questionnaires for the Department of Justice, the Senate Judiciary Committee, and the American Bar Association. The White House also uses these questionnaires. They ask a broad range of questions concerning professional experience, financial data, physical condition, and judicial philosophy. Filling out these questionnaires is burdensome and often redundant for the potential judicial nominees.

In the Commission's view, the cumbersome and protracted judicial selection process imposes costs on the justice system and on potential appointees. Highly qualified persons may be reluctant to seek or accept nomination because of the burdensome and redundant screening and vetting process. They may also be concerned about personal privacy and low judicial salaries. Moreover, waiting in limbo for many months while nomination or confirmation is pending can be particularly hard on practicing lawyers. They may lose clients and find planning for the future difficult.

Ultimately, the problems inherent in the process of appointing federal judges affect the quality of those serving on the federal bench. Maintaining the high quality of the federal judiciary is essential to the administration of justice. If the problems in promptly filling judicial vacancies with high-caliber appointees are not addressed, dockets will become even more crowded and we will find that justice

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delayed is justice denied. As Judge Learned Hand admonished almost a half-century ago, "If we are to keep democracy, there must be one commandment: Thou shalt not ration justice."

II. Recommendations

A. Expediting the Selection of Judicial Nominees

To expedite the nomination process, the Commission offers the following recommendations for consideration by senators and those officials in the administration involved in the process of appointing federal judges.

1. Senators should identify candidates before a vacancy occurs, and those candidates should be vetted promptly, either before the vacancy occurs or within 30 days thereafter.

Identifying and vetting potential judicial nominees early is especially crucial in districts with large numbers of judges and, hence, frequent vacancies.

2. Senators should recommend candidates no later than 90 days after a judicial vacancy occurs.

3. Senators should recommend and prioritize two or more names for each vacancy, thereby avoiding delays in case a potential nominee becomes unavailable or undesirable.

These recommendations are especially important for solving the problems presented by protracted vacancies on district courts that have heavy caseloads and numerous judges. If not promptly filled, the frequent judicial vacancies that inevitably occur on such courts have a particularly deleterious effect on the administration of justice.

With respect to the administration's role in screening and selecting nominees for federal district courts, the Commission makes the following recommendations.

4. If a senator does not respond to the request for more than one name, then the administration should advise the senator of additional persons whom the administration would like to consider.

This recommendation is an attempt both to encourage the selection and nomination of the most highly qualified judicial nominees and to avoid unnecessary delays should an initially considered candidate prove undesirable.

5. Officials in the executive branch who are concerned with the selection of judicial nominees should develop and maintain lists of prospective judicial

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nominees for district and circuit courts.

6. If senators have not made their recommendations within 90 days of a district court vacancy, the president should proceed with the administration's own nominee and, if confirmation is delayed, make recess appointments to the federal bench.

The Ninth Circuit Court of Appeals recently upheld the constitutionality of a recess appointment of a federal judge in *United States v. Woodley*, 751 F.2d 1008 (9th cir., 1985) (en banc). Admittedly, some nominees may be reluctant to accept a recess appointment because recess appointees might not eventually be confirmed by the Senate. We note, however, that five of the 15 recess appointees to the U.S. Supreme Court took their seats on the bench before their confirmation, including three of Republican President Dwight D. Eisenhower's appointees: Chief Justice Earl Warren, Justice William J. Brennan, Jr., and Justice Potter Stewart. In addition, recess appointments could be attractive to persons of considerable experience, such as lawyers who would be willing to serve temporarily despite the possibility that they may not be confirmed.

7. The White House, the Department of Justice, the Federal Bureau of Investigation, and the American Bar Association should complete their investigations of potential judicial candidates within 90 days of a senator's recommendation.

8. The ABA Standing Committee on Federal Judiciary should provide the administration and the Senate Judiciary Committee with a brief statement of the reasons for its rating.

A brief explanation of the ABA Committee's rating for a nominee would allow the executive branch, the Senate, and the public to understand its views. By explaining its rating, the ABA Committee can avoid the charge that the Committee is taking ideological or political considerations into account.

9. The American Bar Association should expand the size of its Standing Committee on Federal Judiciary and have more than one representative for each circuit.

Given the expanding number of federal judgeships and nominees, the ABA needs to expand the size of its Committee if it is to complete its investigation of judicial nominees within 30 days, as it should.

10. The White House and the Justice Department should review their current procedures in order to simplify the process. In particular, they should consider reducing the breadth and extent of questions posed to judicial candidates, doing away with duplicative inquiries, and whether personal interviews are really needed.

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The Commission was somewhat surprised to find that the number of persons involved in selecting and nominating candidates for the lower federal courts has significantly increased. Before 1981, only one or two staff people in the Justice Department, apart from the FBI, were involved. Personal interviews were rare and conducted only by the attorney general or deputy to clarify a difficult question such as a health problem. For a brief period, under Attorney General Kennedy, interviews were used to determine whether candidates from the deep South would follow the Constitution in racial matters. Kennedy abandoned these latter interviews when he found them far less reliable than the opinions of outside observers familiar with the candidate and his or her record. The practice of more extensive interviews on a range of issues appears to have begun in 1981. Several Commission members seriously question whether such interviews are relevant or necessary to determine a candidate's integrity, competence, and work habits.

Not only do we question the need for interviews but we believe they may offend some candidates. Moreover, the public, and especially the bar association, may see the effort as an attempt to influence the candidate's judicial views. We are satisfied that this is not the Justice Department's intent, but the perception may exist nonetheless. The participating personnel are either involved in the political process or perceived to be involved, and are thus believed to be interested in more than simply professional competence. Further, relative to the candidates, the persons conducting the interviews are young and inexperienced in litigation. Questions sometimes unintentionally probe personal beliefs and, coupled with the relative inexperience of the interviewer, may offend some candidates.

There is no question that the White House staff, Justice Department attorneys, the FBI, the ABA, and the Senate staff perform duplicative functions. To some extent this may be unavoidable, but efforts to assign more specific and limited roles might prove helpful. For example, the ABA Committee should confine itself to professional experience and competence. By virtue of their own experience and contacts, ABA Committee members can better make those judgments. If the FBI confined its inquiry to personal and financial integrity, health, and similar matters within its particular expertise, duplication could be reduced. Where the selecting officials believe more information is required, they can go back to the ABA and the FBI and request more data. Since the candidate is normally interviewed by an ABA representative and by the FBI, Justice Department attorneys and the White House staff should consider whether those interviews will suffice.

Experience has shown that it is difficult to determine how persons selected for the federal bench will perform. It is nevertheless true that the best indicator of future performance is the candidate's experience, integrity, intellectual capacity, objectivity, and termperament, as judged by his or her professional colleagues. Such judgments are relatively easy to ascertain.

B. Expediting the Senate Confirmation Process for Judicial Nominees

The Commission urges the Senate Judiciary Committee to explore ways to expedite the confirmation process for federal judicial nominees. Toward that end, the Commission makes the following recommendations, intended as objectives and guidelines for the confirmation process.

1. The Senate Judiciary Committee should increase the number of its staff

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attorneys charged with investigating judicial nominees. When there is an unusually large number of nominations pending, the Department of Justice should continue its present practice of lending personnel to the Senate Judiciary Committee in order to expedite investigations.

2. If a judicial nominee is noncontroversial, the Senate Judiciary Committee should forego holding a confirmation hearing on the nominee.

3. The Senate Judiciary Committee and the Senate should clear nominees for full Senate confirmation within two months of receiving the president's nomination.

Most hearings for noncontroversial judicial nominees are largely ceremonial. Having to schedule such hearings for times when senators can be present significantly delays the confirmation process. This problem will be exacerbated as the number of federal judgeships and vacancies continues to grow.

C. Eliminating Redundancies and Paperwork

Currently, prospective nominees for district courts and courts of appeals are required to complete two lengthy questionnaires—one for the Justice Department and White House, and one for the ABA Committee. After a nomination is made, the Senate Judiciary Committee requires the nominee to complete yet another lengthy questionnaire. These three questionnaires are duplicative and often overlap. Responding to the questionnaires is unnecessarily time consuming and onerous. A single questionnaire would suffice. The Commission therefore recommends the following modifications.

1. Prospective nominees for judicial office should be required to complete a single questionnaire which supplies all information sought by the Department of Justice, the White House, the ABA Standing Committee on Federal Judiciary, and the Senate Judiciary Committee. Appendix C contains a consolidated questionnaire that this Commission derived from the three questionnaires now used by the administration, the Senate Committee, and the ABA Committee.

2. The Department of Justice, the White House, the ABA Committee, and the Senate Judiciary Committee should explore whether or not it is really necessary or appropriate to obtain all the information presently sought. Appendix D contains the Commission's recommendations as to questions which could be eliminated or modified to make the questionnaire less burdensome and less intrusive without losing relevant information.

D. Timely Notice of Vacancies and Advanced Processing of Nominees

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Counsel's Office, White House

Kavanaugh, Brett

Subject File

President's Judges Plan: Judges Proposal - Womack/Kavanaugh [2]

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The Federalist Society
for Law and Public Policy Studies

Judicial Nominations

Index

There has been much controversy lately concerning the pace of Senate confirmations of Bush Administration judicial nominees, as well as the manner in which nominees ought to be scrutinized by the Senate. Following is a bibliography of materials to shed further light on this subject, as well as a history of the ABA's response on this general subject.

Senate Hearings : The American Bar Association : Advocacy Groups : Other Resources

Senate Hearings

- Hearings on the Judicial Confirmations Debate:

  Hearing before the Senate Committee on the Judiciary Subcommittee on Administrative Oversight and the Courts on "The Senate's Role in the Nomination and Confirmation Process: Whose Burden?" September 4, 2001

  Selected Testimony:

- Testimony of Ron Rotunda
- Testimony of Dean Douglas Kmiec
- Testimony of Hon. Paul Simon
- Testimony of Mark Tushnet

  Hearing before the Senate Committee on the Judiciary Subcommittee on Administrative Oversight and the Courts on "Should Ideology Matter?: Judicial Nominations 2001" June 26, 2001

  Selected Testimony:

- Senator Orrin Hatch
- Senator Charles Schumer
- Testimony of Boyden Gray
- Testimony of Lloyd Cutler
- Testimony of Steve Presser
- Testimony of Eugene Volokh
- Testimony of Clint Bolick

The American Bar Association

- ABA 2001 Legislative & Governmental Priorities

  Protracted delays in the judicial nomination and/or confirmation process weaken the federal judiciary by depriving it of the judges needed to resolve disputes expeditiously. Protracted delays also contribute to dangerously crowded dockets, suspended civil case dockets, overburdened judges, and

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understaffed courts.

The Senate Judiciary Subcommittee on Administrative Oversight and the Courts held hearings on June 26 and September 4, 2001, to examine the role of ideology in the nomination and confirmation process. Over the last several Congresses, allegations that the nomination and confirmation process have been held hostage to politics have reached frenzied proportions and provoked calls for moderation and respect among the branches of government. Interbranch respect and restraint is the basic theme underlying the conclusions and recommendations of the 1997 ABA Report on Judicial Independence.

ABA Policy

The ABA urges the President to nominate candidates for vacant federal judicial positions promptly and urges the Senate to hear and vote on those nominations in an expeditious manner. The ABA also urges the appointment and confirmation of minority lawyers of racial and ethnic diversity to all levels of the federal judiciary.

Key Points

- The judicial selection and confirmation process is one of the most important constitutional responsibilities entrusted to the President and the Senate.
- The President and Members of the Senate need to work together to foster public trust and confidence in our justice system by creating a federal judiciary that reflects the rich diversity of America.
- The integrity and independence of the federal judiciary is threatened by protracted delays in filling judicial vacancies.
- Chronically understaffed courts have produced dangerously crowded dockets, delays in hearing criminal cases, suspended civil dockets, and overburdened judges.

- An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence

b. Judicial Appointments

"The nomination and confirmation process is the one point at which the political branches may exercise a check on the composition and quality of the federal bench. To these ends, it is appropriate and desirable for members of the Senate and the President to explore the qualifications, character and judicial philosophy of would-be judges.

Problems arise, however, when legitimate inquiries into a nominee's judicial philosophy degenerate into thinly veiled efforts to preordain how the nominee will rule on specific issues in the future. Such "litmus test" questions cut to the quick of would-be judges' decisional independence and are properly resisted by the nominees.

A strong and independent judiciary likewise turns on the orderly filling of judicial vacancies. Protracted delays in the nomination and confirmation process, whether by design or as a result of inefficiency, weaken the federal judiciary and should be avoided.

The Miller Center Commission on the Selection of Federal Judges was established in 1994 by the University of Virginia's Miller Center of Public Affairs to respond to the perceived growing crisis in the federal court system caused by lengthy delays in filling judgeships. The Miller Commission issued its report on May 15, 1996 which contained a number of significant recommendations, including the following:181

- Senators, in their "advice and consent" role, should identify good judgeship candidates before a vacancy occurs and the candidates should be thoroughly appraised and "vetted" either before the vacancy occurs or within 30 days after it;
- Senators should recommend two or more names to the President, in order of priority, for each vacancy to avoid delays in case a potential nominee becomes unavailable. In no case should a

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senator's recommendation go to the executive branch later than 90 days after a vacancy occurs.
- If a senator doesn't respond to the request for more than one name, the Administration should notify the senator of additional names the Administration would like to consider. The executive branch too should maintain lists of prospective judicial nominees.
- If senators haven't made recommendations within 90 days of a district court vacancy, the President should proceed with the administration's own nominee, and if confirmation is delayed, make a temporary, or "recess" appointment.
- The White House, Department of Justice, FBI and American Bar Association all should complete their investigations of candidates within 90 days of a vacancy.
- The ABA should have more than one representative from each circuit court on its Standing Committee on Federal Judiciary and should provide a brief explanation for its rating, to avoid charges that it sometimes takes political considerations into account.
- The White House and Justice Department should review current procedures to simplify them and avoid duplication and should consider eliminating personal interviews with candidates, to avoid the appearance of trying to influence candidates' judicial views.
- The Senate Judiciary Committee should increase the number of its staff attorneys investigating judicial nominees.
- If a nominee is noncontroversial, the Senate Judiciary Committee should forgo holding confirmation hearings.
- The committee should clear nominees for full Senate confirmation within two months of receipt of a President's nomination.
- Prospective nominees should be required to complete only a single questionnaire that supplies all the information sought by the Department of Justice, White House, ABA and Senate Judiciary Committee.
- Those agencies should explore whether it is really necessary or appropriate to obtain all the information presently sought.
- Congress should enact a statute providing that an additional judgeship is created on the date an incumbent becomes eligible for senior status (semi-retirement) even if the incumbent doesn't take senior status on that date. The number of authorized judgeships would be reduced by one when the incumbent takes senior status, fully retires or dies.

Recommendation:
The Commission urges that judicial vacancies be filled without delay and further urges that the procedures recommended by the 1996 Report of the Miller Center Commission on the Selection of Federal Judges set forth above, should be fully considered."

- ABA Resolutions Regarding Judicial Vacancies:
  - **1998 Midyear Meeting:** Urge the President of the United States promptly to advance nominees for current vacancies for federal judicial positions and the Senate of the United States to hear and vote on those nominations in an expeditious manner. Urge ABA members and bar associations to contact the President and appropriate members of the Senate to urge prompt action on the nominations. 98M8A.
  - **1997 BOG:** Resolve that the Board of Governors of the American Bar Association, which includes members of the both political parties, urge the United States Senate promptly to hear and vote on pending nominations for United States District Courts and Court of Appeal and that such action is essential for the effective and efficient administration of justice in the United States. 1097BOG 2.11.

- Yes, the ABA Rankings Are Biased
  Clinton's judicial nominees were much more likely to get a favorable rating.
  By: James Lindgren
- Federalist Society ABA Watch Project
  - ABA Watch
  - Barwatch Emails

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Advocacy Groups

Several groups have served as "watchdogs" over the judicial nominations process. Here are some links to the work they have been conducting:

- The Center for Individual Freedom: "The judicial confirmation process in the 107th Congress has been stalled by politics, as qualified nominees to the federal bench have been held in limbo. In this section, the Center provides an up-to-date list of judicial nominees yet to be confirmed by the Senate. Most of them are being denied a hearing in the Judiciary Committee."
- People for the American Way and its report, "Courting Disaster: How a Scalia-Thomas Supreme Court Would Endanger our Rights and Freedoms" PFAW has also published a report: "President Bush, the Senate, and the Federal Judiciary: Unprecedented Situation Calls for Unprecedented Solution" which attempts to "debunk accusations that Bush administration's nominees are being treated unfairly by the Senate, and documents the unprecedented blockade waged by some Senate Republicans, many of whom now clamor for immediate votes on Bush administration judicial nominees, against highly qualified Clinton administration nominees."
- National Organization for Women's "Judicial Nominees Special Report: Our Courts at Risk" According to the NOW Web site: "George W. Bush clearly holds the power to imprint his conservative agenda on the U.S. judicial system. To date, the Bush administration has sent 66 nominations to the Senate Judiciary Committee. The Senate has already confirmed 28 of them (22 trial level, and six appellate level). The Judiciary Committee has held 11 hearings on judicial nominees since July, while during the Clinton years the Republican-dominated committee held barely half a dozen hearings per year. These lower-court positions play a vital role in the judicial process because a vast majority of cases never make it to the Supreme Court. Cases that are decided by the Supreme Court face another threat. We find ourselves in the longest interval between Supreme Court vacancies in 178 years. When a position opens, Bush will surely attempt to fill it with someone from his stable of right-wing judicial ideologues. Considering that two out of three Supreme Court decisions in the last term were decided by 5-4 votes, all of our fundamental rights — reproductive rights, civil rights, lesbian rights, disability rights and so many other gains feminists have fought for in the past 35 years — could be at risk with the addition of just one new ultra-conservative Supreme Court justice. There is a ray of hope: With Democratic Sen. Patrick Leahy chairing the judiciary committee, we have the political opportunity to stop at least some of the most egregious nominations from going forward."

Other Resources

- Cato Policy Analysis no. 446, "How Constitutional Corruption has Led to Ideological Litmus Tests for Judicial Nominees," by Roger Pilon
- Debate: Of Senate Default and Judicial Nominations: Does the Constitution Require the Full Senate to Act?, Dean Doug Kmiec and Elliot Mincberg (PDF), June 7, 2002
- Speech by Vice President Dick Cheney to the Federalist Society's 2001 National Lawyers Convention
- Hot Topics: Conservative Judicial Activism
- U.S. Department of Justice, Office of Legal Policy: Statistics on Judicial Nominations
- U.S. Senate Judiciary Committee: Nominations
- "End the Judicial Blame Game" by Lloyd Cutler and Mickey Edwards, *The Washington Post,* March 13, 2002
- Debate: Resolved, The Senate Should Take Ideology into Account in the Judicial Confirmations Process, Ralph Neas and Roger Pilon, The Cato Institute, January 16, 2002
- "The Role of Ideology in Confirming Federal Court Judges" by Ronald D. Rotunda, *The Georgetown Journal of Legal Ethics*, Fall 2001
- Stephen B. Presser, Should Ideology of Judicial Nominees Matter?: Is the Senate's Current Reconsideration of the Confirmation Process Justified?, 6 *Tex. Rev. L. & Politics* 245 (2001).

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BYLINE: By CASSANDRA BURRELL, Associated Press Writer

DATELINE: WASHINGTON

BODY:
The Republican-controlled Senate confirmed 65 of President Clinton's nominees to be federal judges this year, but that failed to stop Democratic grumbling about the pace of confirmations.

Partisan foot-dragging is putting a further strain on short-staffed federal courtrooms already overloaded with cases, Sen. Patrick Leahy, D-Vt., said Wednesday as the Senate confirmed 17 judges shortly before adjourning for the year.

Despite the last-minute flurry of approvals, 50 of the government's 834 federal judgeships remain vacant, **Leahy** said.

"In order to understand why a **judicial vacancy crisis** is plaguing so many federal courts, we need only recall how unproductive the Republican Senate has been over the past three years," he said in a statement. "At each step of the process, judicial nominations are being delayed and stalled."

Republicans insist there is no partisan slowdown.

"This Congress has taken steps to significantly reduce the federal judicial vacancy rate to its lowest rate in almost a decade," said Sen. Orrin Hatch, R-Utah, chairman of the Senate Judiciary Committee. The committee takes the first look at presidential nominations and votes whether to reject them or to send them to the Senate for a vote.

Attorney General Janet Reno thanked Leahy and Hatch for speedy work at the close of the congressional session.

" We intend to work very hard to begin the 106th Congress with as many candidates for nomination as possible, so that we can continue to work with the Senate to ensure a full bench," Reno said at her weekly news conference.

Appointed by the president, federal judges have lifetime tenure and can exert influence long

after the appointing president leaves office.

The Senate left town without passing judgment on four candidates approved by the Judiciary Committee, including Judge Richard Paez, who was first nominated to 9th U.S. District Court of Appeals in San Francisco in January 1996. Those nominations - and two dozen never voted out of committee - died when the Senate adjourned. Clinton will have to resubmit them or substitutes when a new session of Congress reconvenes in January.

Democrats say that in 1994, the year before Republicans regained control of the Senate, 101 judges were confirmed. And the confirmation process is taking longer, they say.

Hatch said that during the 104th Congress' two-year session, when Republicans wielded control of both Houses for the first time in 40 years, 75 Clinton judges were confirmed. Republicans say that compares favorably with the 71 confirmed by the 101st Congress, when President Bush was in the White House and Democrats ruled the Senate.

"Even if we were to stop holding nomination hearings - and we have not - I think you will see that our efforts compare quite favorably to other Congresses in terms of the number of judges confirmed at this point in the year, especially if you look at recent Democrat-controlled Congresses," Hatch said.

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Report of the Proceedings of the Judicial Conference of the United States

March 15, 1988

Washington, D.C.
1988

LEGISLATIVE AFFAIRS Fax:2025021799 Oct 24 2002 12:52 P.02

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COMMITTEE ON JUDICIAL RESOURCES

JUDGESHIP VACANCIES

Judgeship vacancies place significant burdens on the courts by increasing the workloads of those judges available for duty and diminishing the courts' ability to discharge their responsibilities. Accordingly, the Judicial Conference:

1. Noted the adverse effect on the courts and litigants attributable to vacancies in Article III judgeship positions and considers all such vacancies "judicial emergencies".

2. Urged all judges nearing retirement to notify the President and the Administrative Office as far in advance as possible of a change in status -- if possible, six to twelve months before the contemplated date of change in status.

3. Agreed that greater effort should be made to publicize the deleterious effect such vacancies have on the administration of justice.

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are indispensable resources who are readily available to supplement the work of life-tenured district judges in meeting workload demands. Maintaining an appropriate division of labor between district judges and magistrate judges will pose a continuing challenge to the courts. Maximum flexibility should be retained in the district courts to promote the most effective use of magistrate judges in each district in light of local conditions and changing caseload needs. Although each district court exercises discretion in its use of magistrate judges, the effort to encourage effective utilization of magistrate judges must be national in approach and effect.

The need to conserve the increasingly scarce time of district judges will make effective and extensive use of magistrate judges (including those retired judges available for recall service) a practical necessity in virtually all courts. Expanding the role of the magistrate judge in the area of felony criminal trials should be examined, taking into account constitutional considerations and sound judicial policy. The district courts should expand the use of magistrate judges to conduct civil proceedings with the parties' consent as currently authorized by 28 U.S.C. § 636(c). Use of magistrate judges for this purpose may necessitate reassessment of how they perform other functions. It has been suggested, for example, that where only an issue of law must be resolved, use of the report and recommendation procedure is inefficient because it is a duplicative use of resources.

District courts should adopt comprehensive plans for using magistrate judges in accordance with Judicial Conference guidelines. This process could lead to development of minimum standards to ensure that existing magistrate judge resources are used effectively before additional positions are authorized. Magistrate judges should be provided adequate staff, clerical, research, and other support services to enhance their ability to perform the functions specified above.

❒ RECOMMENDATION 66: **Magistrate judges should be vested with a limited contempt power to punish summarily for misbehavior committed in their presence, and to punish for disobedience or resistance to their lawful orders in civil cases referred to them for disposition with the consent of the parties.**

To be recognized and utilized as fully effective judicial officers in the district court, magistrate judges must possess the requisite legal authority and status, including an ability to enforce their own orders. Although 28 U.S.C. § 636(e) provides that certain acts or conduct in proceedings assigned to a magistrate judge constitute a contempt of the district court, the authority of the magistrate judge in such instances is limited to certifying the operative facts to a district judge and serving a show cause order on the alleged contemner. The power to punish litigants directly for contempt is essential in all cases of misbehavior in a magistrate judge's presence, and in cases of disobedience or resistance to a lawful order issued in civil matters referred to a magistrate judge for disposition with the consent of the parties. Indeed, the present lack of contempt power for magistrate judges can be a major detriment to their performance of judicial functions.

Diminishing the Problem of Judicial Vacancies

❒ RECOMMENDATION 67: **Attention should be given to the problem of fre-**

The Judicial Conference of the United States has approved the recommendations and implementation strategies in this *Long Range Plan* to guide future administrative action and policy development by the Conference and other judicial branch authorities. All other text in this *Plan*, including commentary on individual recommendations and strategies, explains and supplements the approved items but does not necessarily reflect the views of the Conference.

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quent, prolonged judicial vacancies in the federal courts. The executive branch and the Senate should be encouraged to fill vacancies promptly, and the judicial branch should utilize procedures and policies to mitigate the impact of vacancies on the capacity of the courts to conduct judicial business.

Research aimed at eliminating obstacles to efficiency in the federal courts shows two disturbing trends: (1) an increasing percentage of vacant judgeships; and (2) a lengthening average time from the occurrence of a vacancy to the confirmation of a successor judge. Unfortunately, while the judicial vacancy rate is among the more serious problems facing the federal courts, the solution to the problem lies primarily outside the judicial branch.

By constitutional design, the very nature of judicial appointments is political. Any potential solution that seeks to remove politics from, and to shorten, the appointments process would also dramatically change the nature of the appointment process and may require a constitutional amendment.[15] This plan does not endorse such drastic remedies. Nonetheless, several ideas for addressing the problem are outlined here as a means of emphasizing how serious the problem is and why it requires prompt attention and appropriate action.[16]

At present, nominees for court of appeals, district court, Court of International Trade, and Court of Federal Claims judgeships are selected through a variety of methods that depend on the type and geographic location of the positions to be filled, the decision making styles of persons involved in the process, and the prevailing political realities. Predictably, the results vary. It is not the province of the judiciary to instruct the executive and legislative branches on *how* they should discharge their responsibilities. Nevertheless, the other branches might consider measures aimed at speedier, perhaps surer decisions. For example, they might wish to undertake periodic review and enhancement of the procedures used to identify and screen judicial candidates, as well as devote additional financial and personnel resources to the selection process.

Ultimately it may be more worthwhile to address the *effect* of the vacancy problem rather than its various *causes.* The impact of prolonged vacancies is invariably the same: courts are required to manage caseloads without adequate judicial resources. Although it may be possible to expedite the appointment process, vacancies undoubtedly will continue to occur more rapidly than the system can fill them. The courts, in order to continue to meet their mandates, must maintain the ability to function well at less than full strength.

Implementation Strategies:

67a *Delays in filling judicial vacancies should be reduced by encouraging retiring judges and those taking senior status to provide substantial* (i.e., *six-month or one-year) advance notice of that action.* ✳

The lengthiest delays in filling judgeships arise in the process of identifying and evaluating the suitability of potential nominees. If that process can be routinely commenced *before* a vacancy arises, the period of time in which a court is required to operate at less than full strength can be substantially reduced if not eliminated. Advance notice can be used to achieve this

[15] See Chapter 10, notes 11-17 and accompanying text *infra.*

[16] Chapter 10 also discusses the judicial vacancies problem, suggesting more far-reaching solutions in the event of an alternative, much less favorable, future.

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result in two ways: (1) directly apprising executive and legislative branch officials of the impending need for a judicial appointment; and (2) allowing local bar and civic organizations to use their resources to encourage the President and the Senate to act speedily in appointing a new judge.

Timely selection of successor judges depends, of course, on prompt notice of retirement decisions as they are made. Because this entails voluntary cooperation from individuals who, for various reasons, may not otherwise choose to make their retirement plans known in advance, it will be necessary to remind judges periodically of the Judicial Conference policy, adopted in March 1988, urging advance notification of impending retirements from active service or the bench.[17]

67b *Statistics should be maintained concerning the number, length, and impact of judicial vacancies (including data which relates to judicial emergencies) in each court, and benchmarks or timelines should be created for the nomination and confirmation of all judges. The judicial branch should publicize all vacancies extending beyond these limits, and all data on judicial emergencies, to Congress and the President by means of semi-annual reports.*

It is essential that judicial appointments be viewed as an important task that will be performed expeditiously. The stark impact of vacancies on each court's ability to function should be documented through the statistical presentations of judicial workload. In addition, reasonable time frames should exist for completing the appointment process. A useful approach would be the voluntary acceptance of "benchmarks" or "timelines" for nominations and confirmations. If generally recognized in the legal and political communities—*e.g.*, with support from bar organizations, scholars, and the press—an expectation would be created that vacancies will be filled promptly. Periodic reports to Congress and the President would reinforce the point by reminding the other two branches, and the public at large, of any vacancies extending beyond the suggested time frames. In addition, the policy of declaring "judicial emergencies" in courts with vacancies of 18-months or longer duration should be continued.[18]

67c *Procedures for the temporary assignment of judges should emphasize the importance of providing assistance to courts with vacant judgeships.*

As described earlier in this chapter,[19] a flexible, efficient system of bringing judicial resources temporarily to the aid of overworked courts will be needed to an ever-increasing extent. In particular, courts operating at less than full strength should be encouraged to seek assistance of senior judges and other volunteer judges from courts able to spare them. One useful approach might be to dispatch "judicial emergency teams" of available district judges, magistrate judges, and support staff to aid understaffed districts with overwhelming dockets.[20]

67d *Procedures and policies governing the transaction of court business should seek to address special circumstances arising as a result of prolonged judicial vacancies. Among other things, rules governing the number of visiting*

[17] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 31-32 (Mar. 1988).

[18] *Id.*

[19] See Recommendation 62 *supra*.

[20] See note 12 *supra* and accompanying text.

The Judicial Conference of the United States has approved the recommendations and implementation strategies in this *Long Range Plan* to guide future administrative action and policy development by the Conference and other judicial branch authorities. All other text in this *Plan*, including commentary on individual recommendations and strategies, explains and supplements the approved items but does not necessarily reflect the views of the Conference.

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or senior judges serving on panels in the courts of appeals should be held in abeyance during the existence of vacancies on a court constituting a judicial emergency.

The individual courts should be active in devising means of coping with long-standing vacancies. Although various measures can (and should) be taken at the national or circuit levels, each court should take responsibility for developing emergency procedures (including exceptions to normal methods of operation, where permissible) to expedite the handling of judicial business when required to operate at less than full judge strength.

For example, applicable law requires that a majority of judges on any court of appeals panel "be judges of that court." But the same law allows for exceptions if "such judges cannot sit because recused or disqualified," or when "the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness."[21] Although the circuits differ—in local rules, decisional law, or practice—on whether senior judges are "judges of th[e] court" for purposes of panel composition, the statute clearly empowers a court to deviate from the requirement, however defined, if an emergency arises. The courts of appeals should therefore be encouraged to take advantage of all available judicial resources, including senior and visiting judges, when vacancies seriously threaten their ability to function effectively. Of course, these "emergency" panels should be utilized sparingly given the possible impact on the coherence and consistency of circuit law.

[21] 28 U.S.C. § 46(b) (1988).

Managing Judicial Branch Resources

The governance structure of the federal courts reserves considerable local autonomy to individual courts and their judges. Recently, the decentralization of management authority has increased. With this trend has come increased accountability and responsiveness to centralized leadership. The trend is consistent with modern management theory, which emphasizes the efficiency benefits of empowering those small units closest to an enterprise's core mission.

Budget decentralization and expanded local roles in personnel and procurement have made judges and court administrators increasingly responsible for the direction and operations of their units. Planning—both near- and long-term—has become even more crucial.[22] In an environment of inadequate resources, priorities will constantly need to be set and reset. Thus while budget decentralization deals with the limited spending authority over these insufficient resources allocated to individual courts, the larger problem of resource allocation among the various levels of the judicial branch remains. Development and implementation of administrative policies, as noted in Chapter 7, might affect the decentralized governance of resource management.

Budget Decentralization

❒ RECOMMENDATION 68: **To match responsibility with authority, the budget execution function should be further decentralized so that each court may**

[22] *See, e.g.*, Henry Mintzberg, *The Fall and Rise of Strategic Planning*, 72 HARV. BUS. REV. (No. 3) 107, 112*ff.* (1994).

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Brent D. Greenfield
10/25/2002 10:51:52 AM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: Legal Times column

Legal Times, 07/08/02:

Let's Agree on a Timely Basis

To break the judicial nominations gridlock, the Senate needs to vote on schedule.

By Arlen Specter

Our constitutional system for choosing federal judges has hit an impasse. Public confidence in the Senate confirmation process has declined, while the inordinate number of judicial vacancies has caused corresponding delays in federal court dockets. For the benefit of those seeking legal redress and for citizens generally, we in the Senate can and must act to remedy this unacceptable situation. The solution lies in something as straightforward-and nonpartisan-as a series of scheduled steps leading to a full Senate vote on each and every nominee.

It was another series of steps that led to the current gridlock in confirming federal judicial nominees: President George W. Bush failed to win the popular vote in the 2000 presidential election, with the contest essentially decided in the Supreme Court. The president nominated for the federal bench several prominent individuals with judicial philosophies similar to the president's views. Sen. James Jeffords of Vermont left the Republican Party, ceding control of the Senate to the Democratic Party. Now the Democrats directing the Senate have refused to appropriately act on Bush judicial nominations-in several cases, for more than a year-in much the same way that Clinton judicial nominees were treated for six years by a Republican-controlled Senate. This reciprocal partisan treatment has in turn created an even deeper division in a Senate already deeply divided in light of the disputed 2000 election and the Jeffords defection. Advocacy groups with vested interests in the makeup of the judiciary have continued to wage negative campaigns against nominees, prompting at various times the invocation-and sometimes abuse-of the time-honored tradition of senatorial courtesy to delay or defeat nominations.

Article II, Section 2, of the Constitution tells us that the president "shall nominate, and, by and with the advice and consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other officers of the United States." The Senate is thus a critical part of the process for naming

federal judges. Unfortunately, the advice-and-consent power is applied in an arcane and ad hoc practice that lacks any set time lines-and therefore is subject to abuse.

All too often of late, where a president of one political party has submitted a judicial nomination to a Senate controlled by the opposite party, that nomination has been subjected to partisan treatment not focused solely on the nominee's qualifications for the federal bench. This has been the case regardless of which party controlled the White House and which party controlled the Senate.

Individual senators and committee chairmen have taken advantage of the ad hoc process to cause excessive delays in considering nominees. Some nominees have not even received a hearing. At other times, the Committee on the Judiciary-acting along party lines-has prevented the full Senate from exercising its constitutional duty to vote on all judicial nominations. While confirmation disputes have often been resolved by back-room arrangements among the Senate leadership, these deals themselves have tended to undermine the legitimacy of the confirmation process in the public's eyes.

I have suggested a simple Senate rule change-a nominations protocol-that would establish a timetable for confirmations.

My nominations protocol provides that the chair of the Senate Judiciary Committee, in consultation with the ranking member, set a specific timetable for committee action on each nominee. A certain number of days after a nomination is submitted by the president, a hearing would be held, and within a certain number of additional days there would be a vote by the Judiciary Committee on whether to report the nominee to the full Senate for its consideration. Then, the majority leader of the Senate, in consultation with the minority leader, would agree upon a timetable for floor action so that, within another specified period of time, there would be a vote by the full Senate.

Additionally, my protocol requires that a nomination would proceed to the Senate floor if the nominee were rejected in committee on a party-line vote. The recent nomination to elevate U.S. District Judge Charles Pickering Sr. of Mississippi to the U.S. Court of Appeals for the 5th Circuit is an instance where a nomination, rejected by the Judiciary Committee on a 10-9 party-line vote, was not reported to the full Senate for consideration. It is likely that Judge Pickering would have been confirmed by the full Senate. Thus the Democrats' refusal to allow the full Senate to consider his nomination did not conform to the Constitution, which calls for the Senate-not simply a committee-to make the decision to accept or reject federal judicial nominees.

I believe that any president, notwithstanding his political persuasion, should be accorded a certain degree of deference in his judicial nominations. Neither the text of the Constitution nor any contemporaneous or subsequent history says anything about the ability of one senator or one committee to defeat a judicial nomination by the president. To the contrary, in Federalist 76, Alexander Hamilton made clear that this constitutional function was to be exercised by the Senate as a whole, which would serve as a check upon unwise appointments. Each and every senator should participate in bringing the collective wisdom of the Senate to bear on judicial

nominations. If one senator or one committee has the de facto power to block a nomination, then the advice-and-consent clause of the Constitution is rendered virtually meaningless.

Reporting a nomination to the full Senate even absent a majority vote in committee also has historical support under Senate practice. Since 1950, six lower court nominees have been sent to the full Senate even though they did not receive an affirmative vote in the Judiciary Committee.

Similarly, under my protocol, any Supreme Court nominee would be reported to the full Senate irrespective of the committee vote. This conforms with recent Senate practice: In 1991, the nomination of Judge Clarence Thomas to be an associate justice failed to receive a majority vote (7-7) in the Judiciary Committee, yet was reported to the full Senate, which confirmed him, 52-48. Another Supreme Court nominee, Judge Robert Bork, received a negative vote (9-5) in the Judiciary Committee, but his nomination was still sent to the Senate floor-and was ultimately defeated, 58-42.

To ensure that ample discretion is retained at the committee level, the timetables under my protocol could always be extended for cause, such as the need for more investigation or additional hearings. While it is presumed that the White House will adequately consult with senators from the judicial nominee's home state, a failure to consult-in and of itself-should not be considered sufficient cause to indefinitely delay a judicial nomination.

Besides the constitutional concern, a vital pragmatic consideration underlies the need for my protocol. According to both sitting federal judges and their court executives, filling vacancies is the most pressing issue facing our lower courts-due to the correlation between judicial vacancies and delays in processing cases.

For example, look at the 6th Circuit. The court's 50 percent vacancy rate has left a death penalty appeal pending for more than eight years, while a plaintiff in a civil case died after having waited more than 15 months just to have oral arguments in a job discrimination suit.

Egregious delays can also be found in the 4th Circuit, where more than a quarter of the seats are unfilled despite four declared judicial emergencies and one seat being vacant for eight years. Meanwhile, simple appeals languish. A municipality in South Carolina has been waiting 39 months for clarification of the constitutionality of its ban on the docking of longline fishing vessels at the local marina. A routine Longshoreman's Act claim has been pending for 38 months. It is difficult to conceive of a fully occupied court that could not dispose of such mundane cases in more than three years.

These anecdotal examples are representative of a much broader and most disturbing pattern of easily avoidable judicial vacancies and emergencies. The situation is unacceptable, and the Senate has a constitutional responsibility to act. My proposed protocol would provide a nonpartisan way to fill judicial vacancies with due care but without undue political influence.

Arlen Specter is the senior U.S. senator from Pennsylvania, a Republican, and a member of the Senate Judiciary Committee.

THE WHITE HOUSE

WASHINGTON

BRIEFING PAPER

REMARKS ON JUDICIAL CONFIRMATIONS
Tuesday, October, 29, 2002
1:40 p.m. – 2:10 p.m.
East Room
Alberto R. Gonzales

I. PURPOSE

To speak about the judicial vacancy crisis and Senate confirmation process and to propose a specific plan for the timely consideration of judicial nominees.

II. BACKGROUND

The process for Senate confirmation of judges remains broken, exacerbating a judicial vacancy crisis that the Chief Justice of the United States has termed "alarming." The Senate's delay in holding hearings and up-or-down floor votes on judges has been a problem for many years, but is now worse than ever.

Many observers, including the Chief Justice and most recently the American Bar Association, have called for the Senate to give every judicial nominee a timely hearing and up-or-down vote. At your initial announcement of judicial nominees on May 9, 2001, you called for the Senate to ensure a timely hearing and vote for all judicial nominees, no matter who is President or which party controls the Senate.

III. PARTICIPANTS

Attorney General John Ashcroft
Deputy Attorney General Larry Thompson
Solicitor General Ted Olson
Judge Alberto Gonzales
Bar leaders, Justice Department officials, lawyers, and others to be determined

IV. PRESS PLAN

Open

V. SEQUENCE OF EVENTS

You arrive State Floor and are announced into East Room by Judge Gonzales.
You proceed to podium and deliver remarks.
You conclude remarks and depart.

VI. REMARKS

Provided by speechwriting.

VII. ATTACHMENTS

Remarks attached.

OFFICE OF THE VICE PRESIDENT
WASHINGTON

October 23, 2002

MEMORANDUM FOR BRETT KAVANAUGH
ASSOCIATE COUNSEL TO THE PRESIDENT

FROM: **JONATHAN BURKS**
DEPUTY STAFF SECRETARY TO THE VICE PRESIDENT

SUBJECT: **Judicial confirmation Process Decision Memo**

The Office of the Vice President has reviewed the above-referenced draft and recommends the changes marked on the attached copy.

Attachment

cc: **Harriet Miers**
Staff Secretary

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
August 12-13, 2002

RESOLVED, that the prompt filling of existing judicial vacancies in the federal courts of the United States is essential for the efficient, responsible and effective administration of justice; and that undue delays in the nomination and confirmation of candidates for vacancies in the federal courts of the United States adversely affects such effective, responsible and timely administration of justice;

FURTHER RESOLVED, that the American Bar Association urges the following:

1. The President of the United States should promptly nominate candidates to fill vacancies in the federal courts of the United States.

2. The Senate Committee on the Judiciary should promptly act on nominees.

3. The Senate of the United States should promptly advise and consent to or reject the nominees.

FURTHER RESOLVED, that the American Bar Association urges its members and state, local, and territorial bar associations to encourage the President to make prompt appointments to fill federal judicial vacancies and to contact the appropriate members of the Senate to urge prompt hearings and votes on pending nominations for the federal courts of the United States.

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Judicial Appointments
Historical Comparison: First Two Years of a Presidency

President	Nominations Submitted	Nominees Confirmed	Percentage Of Nominees Confirmed	Circuit Court Nominations Submitted	Circuit Court Nominees Confirmed	Circuit Court Percentage of Nominees Confirmed
G.W. Bush (as of Aug. '02 Senate recess)	123	72	**59%**	32	13	**41%**
Clinton	140	126	**90%**	22	19	**86%**
George H.W. Bush	74	70	**95%**	23	22	**96%**
Reagan	88	87	**99%**	20	19	**95%**

Judicial Appointments
Historical Comparison: First Two Years of a Presidency

President	Circuit Court Nominees who waited more than a year for a hearing
G.W. Bush (as of August 2002)	11
Clinton	0
George H.W. Bush	0
Reagan	0

REV_00256374

PRESIDENT BUSH ANNOUNCES HIS PLAN TO ENSURE TIMELY CONSIDERATION OF JUDICIAL NOMINEES

Today the President outlined his plan to ensure timely consideration of judicial nominees. The President calls on the Senate and the Judiciary to join him in adopting this plan and applying it both now and in the future, no matter who is President or which party controls the Senate. The objective is to fix, on a permanent and bipartisan basis, a judicial confirmation process that is clearly broken.

THE CURRENT CRISIS

- There is a vacancy crisis in the federal judiciary. As of this week, there are 79 vacancies out of the 849 authorized federal judgeships, a 9% vacancy rate. The 12 regional federal appeals courts face a particularly serious crisis, with 28 vacancies out of 167 judgeships, a 17% vacancy rate.

    - ✓ Chief Justice Rehnquist's 2001 Year-End Report on the Federal Judiciary, issued when there were 94 vacancies, called the situation "alarming."
    - ✓ The Secretary of the Judicial Conference of the United States, which is the federal judiciary's governing body, stated in May 2002 that the overall shortage of federal judges is "staggering."
    - ✓ The American Bar Association report in August 2002 described the status of the federal judiciary as an "emergency situation."
    - ✓ In 1998, when there were 50 judicial vacancies, Chairman Leahy stated that the number of vacancies represented a "judicial vacancy crisis." (AP, 10/22/98)
    - ✓ Caseloads in the federal courts continue to grow dramatically. Filings in the federal appeals courts reached an all-time high last year.

- The Senate has not lived up to its responsibility to hold fair hearings and prompt votes on judicial nominees.

    - ✓ The Senate has voted on only 80 of the President's 131 nominees overall and, even more problematic, has voted on only 14 of the President's 32 appeals court nominees. By contrast, in the first two years of the past three Administrations, 60 of the 65 appeals court nominees were confirmed.
    - ✓ As of November, 15 of President Bush's appeals court nominees will have been forced to wait more than a year just for a hearing (many are still waiting). That number is more than the number of appeals court nominees who had to wait a year for a hearing in the last 50 years combined.
    - ✓ The Chief Justice of the United States, speaking on behalf of the Judiciary in his 2001 Year-End Report, "ask[ed] the Senate to schedule up or down votes on judicial nominees within a reasonable time after receiving the nomination."
    - ✓ The American Bar Association report in August 2002 stated that as a result of delays in the judicial confirmation process, "the federal courts . . . suffer, and so does the rule of law." The report stated that the Senate Judiciary Committee's refusal to allow "confirmation proceedings in the full Senate is simply unacceptable to our notion of an appropriate and constitutional nomination process" and added: "Vote them up or down, but don't hang them out to dry."
    - ✓ The 2000 report of the bipartisan Citizens for Independent Courts stated that "the views of individual senators, while vital, should not be allowed to undermine collective decision-making in an open, deliberative process" and stated that "the

Senate process should proceed expeditiously to a committee hearing, committee review and voting, and floor consideration and voting."

THE PRESIDENT'S PROPOSAL

This President's plan requires specific commitments from everyone involved in the nomination and confirmation of federal judges:

- First, the President calls on federal court of appeals and district court judges to notify the President of their intended retirement dates at least a year in advance whenever possible. Because the nomination and confirmation of a federal judge can be a lengthy process even under the best of circumstances, advance notice is necessary to prevent extended unnecessary judicial vacancies. The President's call to the Judiciary builds on existing Judicial Conference recommendations and is intended to create a seamless process whereby a new federal judge is ready to take the bench at or near the time a sitting federal judge retires.

- Second, Presidents should submit a nomination to the Senate within 180 days of receiving notice of a federal court vacancy or intended retirement. This would ensure that nominees are promptly submitted to the Senate and would help expedite the process by which home-State Senators, Representatives, bar leaders, and others provide their recommendations and evaluations of possible judicial candidates to the President.

- Third, the President calls on the Senate Judiciary Committee to hold a hearing within 90 days of receiving a nomination. The Committee has engaged in too many delays of too many nominees for too many years. A strict deadline, which will apply no matter who is President and which party controls the Senate, is the best way to ensure that judicial nominees are promptly and fairly considered. Ninety days is more than enough time for the Committee to conduct any necessary research before holding a hearing.

- Fourth, the President calls on the full Senate to hold an up-or-down floor vote within 180 days of receiving a judicial nomination. That is a generous period designed to give both the Committee and the full Senate ample time to evaluate nominees and answer any questions they may have. And all Senators will have an opportunity to have their voices heard and their votes counted.

U.S. SENATOR PATRICK LEAHY

CONTACT: Office of Senator Leahy, 202-224-4242 **VERMONT**

Comments Of Judiciary Committee Chairman Patrick Leahy On The White House Proposal On Judicial Nominations Wednesday, Oct. 30, 2002

"I regret that instead of accepting our many previous invitations to work with the Senate and increase the level of consultation and cooperation to help fill judicial vacancies, the White House repeatedly has chosen to continue down its path of trying to politicize the process. The timing and handling of this unilateral White House proposal, a week before the elections, and after ignoring all previous invitations to consult with the Senate, cannot help but raise questions about its purpose.

"We have restored steadiness and openness to the judicial confirmation process. The Democratic Senate has moved far faster and with far more fairness than the previous Republican Senate in filling judicial vacancies, even though many of those vacancies were kept open through Republican stalling on so many of President Clinton's nominees. We have done more in 15 months than our predecessors did in 30 months. In just 15 months, the Judiciary Committee has voted on 100 nominees and approved 98 of them.

"Our list of firsts includes the first nominee confirmed to the 6th Circuit in almost five years, even though three of President Clinton's nominees to that court never got hearings and votes, and the first confirmation to the 5th Circuit in six years. The President today was incorrect in suggesting that no 6th Circuit nominee has been confirmed. The Senate on its own takes an average of only 150 days from nomination to confirmation, even with the time the White House has added to the Senate's timetable for peer-review vetting by the ABA.

"President Bush said he wanted to be a uniter and not a divider, but he has nominated several appellate court nominees who divide the American people and who divide the Senate, and controversial nominations always take longer. The President can help by choosing nominees not primarily for their ideology but for their fairness. The Senate has clearly shown that consensus nominees are acted on promptly.

"Cooperation from the White House would allow us to make a good record even better. The Senate has taken good-faith steps to speed the confirmation process. The White House has not reciprocated. Ten months ago I invited the President to work with the Senate and I renewed that invitation most recently on Monday. I would be glad to begin those discussions about consultation with the Senate and other steps to improve the process. But the President should understand that the Senate does not need arbitrary deadlines. What we need is cooperation from the White House in choosing more

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Judge Jose Martinez, S.D. Florida

Judge Arthur Schwab, W.D. Pennsylvania

Judge Reena Raggi, 2nd Circuit

Judge James Gardner, E.D. Pennsylvania

Judge Ronald Clark, E.D. Texas

Judicial Nominations Reported Favorably by the Senate Judiciary Committee to the Senate and on the Senate Executive Calendar Awaiting Final Action by the Senate:

John M. Rogers to the U.S. Court of Appeals for the Sixth Circuit

Judge Stanley R. Chesler to the U.S. District Court for the District of New Jersey

Rosemary M. Collyer to the U.S. District Court for the District of Columbia

Mark E. Fuller to the U.S. District Court for the Middle District of Alabama

Daniel L. Hovland to the U.S. District Court for the District of North Dakota

Kent A. Jordan to the U.S. District Court for the District of Delaware

Judge James E. Kinkeade to the U.S. District Court for the Northern District of Texas

Judge Robert G. Klausner to the U.S. District Court for the Central District of California

Judge Robert B. Kugler to the U.S. District Court for the District of New Jersey

Ronald B. Leighton to the U.S. District Court for the Western District of Washington

Judge Jose L. Linares to the U.S. District Court for the District of New Jersey

Judge Alia M. Ludlum to the U.S. District Court for the Western District of Texas

William J. Martini to the U.S. District Court for the District of New Jersey

Judge Thomas W. Phillips to the U.S. District Court for the Eastern District of Tennessee

Judge Linda R. Reade to the U.S. District Court for the Northern District of Iowa

William E. Smith to the U.S. District Court for the District of Rhode Island

Jeffrey White to the U.S. District Court for the Northern District of California

Judge Freda Wolfson to the U.S. District Court for the District of New Jersey

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Executive Branch Confirmations:

Department of Justice and Other Agencies:

Ralph Boyd, Assistant Attorney General, Civil Rights Division

Eileen O'Connor, Assistant Attorney General, Tax Division

James Ziglar, Commissioner Immigration and Naturalization Service

Asa Hutchinson, Administrator, Drug Enforcement Administration (DEA)

Sarah Hart, Director, National Institute of Justice

Robert Mueller, Director, Federal Bureau of Investigation

Robert McCallum, Assistant Attorney General, Civil Division

John Gillis, Director, Office of Victims of Crime

Richard Nedelkoff, Director, Bureau of Justice Assistance

Deborah Daniels, Assistant Attorney General, Office of Justice Programs

Jay Bybee, Assistant Attorney General, Office of Legal Counsel

Benigno Reyna, Director, U.S. Marshals' Service

Juan Carlos Benitez, Special Counsel for Immigration-Related Unfair Employment Practices

Sharee Freeman, Director, Community Relations Service

Jay Stevens, Associate Attorney General

James Rogan, Director of the U.S. Patent and Trademark Office

Thomas Sansonetti, Assistant Attorney General, Environment and Natural Resources Division

John Walters, Director, Office of National Drug Control Policy (ONDCP)

Mauricio Tamargo, Chair, Foreign Claims Settlement Commission

J. Robert Flores, Administrator, Office of Juvenile Justice and Delinquency Prevention

Scott M. Burns, Deputy Director for State and Local Affairs, ONDCP

John M. Brown, III, Deputy Administrator, DEA

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Barry D. Crane, Deputy Director for Supply Reduction, ONDCP

Mary Ann Solberg, Deputy Director, ONDCP

Lawrence Greenfeld, Director, Bureau of Justice Statistics

United States Attorneys:

Michael Heavican, Nebraska

Paul McNulty, E.D. New York

Colm Connolly, Delaware

Roscoe Howard, Jr., District of Columbia

Michael Sullivan, Massachusetts

Joseph Van Bokkelen, N.D. Indiana

Stephen Pence, W.D. Kentucky

Gregory Van Tatenhove, E.D. Kentucky

Thomas Heffelfinger, Minnesota

Patrick Meehan, E.D. Pennsylvania

Mary Beth Buchanan, W.D. Pennsylvania

Peter Hall, Vermont

John Brownlee, W.D. Virginia

Tim Burgess, Alaska

Harry Mattice, E.D. Tennessee

Robert McCampbell, W.D. Oklahoma

Matthew Mead, Wyoming

Michael Mosman, Oregon

John Suthers, Colorado

Susan Brooks, S.D. Indiana

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Todd Graves, W.D. Missouri

Terrell Harris, W.D. Tennessee

David Iglesias, New Mexico

Charles Larson, Sr., N.D. Iowa

Steven Colloton, S.D. Iowa

Gregory Lockhart, S.D. Ohio

Anna Mills Wagoner, M.D. North Carolina

Margaret Chiara, W.D. Michigan

Robert Conrad, W.D. North Carolina

Thomas Gean, W.D. Arkansas

James Greenlee, N.D. Mississippi

Raymond Gruender, E.D. Missouri

Daniel Bogden, Nevada

Thomas DiBiagio, Maryland

Thomas Johnston, N.D. West Virginia

Donald Washington, W.D. Louisiana

Patrick Fitzgerald, N.D. Illinois

John McKay, W.D. Washington

Karl Warner, S.D. West Virginia

Leura Canary, M.D. Alabama

Paul Charlton, Arizona

Jeffrey Collins, E.D. Michigan

William Duffey, Jr., N.D. Georgia

Dunn Lampton, S.D. Mississippi

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Alice Howze Martin, N.D. Alabama

William Mercer, Montana

Thomas Moss, Idaho

Strom Thurmond, Jr., South Carolina

Maxwell Wood, M.D. Georgia

Drew Wrigley, North Dakota

David Dugas, M.D. Louisiana

Edward Kubo, Hawaii

James McDevitt, E.D. Washington

David O'Meilia, N.D. Oklahoma

Sheldon Sperling, E.D. Oklahoma

Johnny Sutton, W.D. Texas

Richard Thompson, S.D. Georgia

Harry Cummins, III, E.D. Arkansas

Christopher Christie, New Jersey

David York, S.D. Alabama

Michael Battle, W.D. New York

Thomas Colantuono, New Hampshire

James Vines, M.D. Tennessee

Paul Perez, M.D. Florida

Eric F. Melgren, Kansas

Michael Shelby, S.D. Texas

Jane Boyle, N.D. Texas

Matthew Orwig, E.D. Texas

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James Comey, S.D. New York

Thomas Marino, M.D. Pennsylvania

Debra W. Yang, C.D. California

Frank D. Whitney, E.D. North Carolina

Steven M. Biskupic, E.D. Wisconsin

Jan Paul Miller, C.D. Illinois

James McMahon, South Dakota

Roslynn R. Mauskopf, E.D. New York

Gregory Robert Miller, N.D. Florida

Kevin Vincent Ryan, N.D. California

Marcos D. Jimenez, S.D. Florida

Miriam F. Miquelon, S.D. Illinois

J.B. Van Hollen, W.D. Wisconsin

United States Marshals:

Dwight MacKay, Montana

James Dawson, S.D. West Virginia

William Jenkins, M.D. Louisiana

Ronald McCubbins, Jr., W.D. Kentucky

David Murtaugh, N.D. Indiana

Nehemiah Flowers, S.D. Mississippi

Arthur Hedden, E.D. Tennessee

David Jolley, W.D. Tennessee

Michael Roach, W.D. Oklahoma

Eric Robertson, W.D. Washington

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Brian Ennis, Nebraska

Chester Keely, N.D. Alabama

John Loyd, E.D. Oklahoma

David Viles, Maine

Johnny Hughes, Maryland

Randy Johnson, Alaska

Larry Wagster, N.D. Mississippi

William Smith Taylor, S.D. Alabama

Dennis Cluff Merrill, Oregon

John Schickel, E.D. Kentucky

William "Rut" Whittington, W.D. Louisiana

Stephen Fitzgerald, W.D. Wisconsin

J.C. Raffety, N.D. West Virginia

James Rose, Wyoming

James Kennedy, S.D. Indiana

Theophile Duroncelet, E.D. Louisiana

James Plousis, New Jersey

Charles Reavis, E.D. North Carolina

Timothy Welch, N.D. Oklahoma

Michael Regan, M.D. Pennsylvania

Jesse Seroyer, Jr., M.D. Alabama

Gregory Forest, W.D. North Carolina

John Edwards, Vermont

Kim Widup, N.D. Illinois

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Don Slazinik, S.D. Illinois

Patrick McDonald, Idaho

Warren Anderson, South Dakota

James Parmley, N.D. New York

John Quinn, N.D. Iowa

David Gonzales, Arizona

Edward Zahren, Colorado

Charles M. Sheer, W.D. Missouri

Gorden Eden, Jr., New Mexico

John Lee Moore, E.D. Texas

Ronald Henderson, E.D. Missouri

Randy Paul Ely, N.D. Texas

Gary Shovlin, E.D. Pennsylvania

Steven Monier, New Hampshire

Walter Bradley, Kansas

William P. Kruziki, E.D. Wisconsin

Steven Deatherage, C.D. Illinois

Thomas M. Fitzgerald, W.D. Pennsylvania

Pike, G. Wayne, W.D. Virginia

David W. Thomas, Delaware

Randall D. Anderson, Utah

Ray E. Carnahan, E.D. Arkansas

David S. Carpenter, North Dakota

Theresa A. Merrow, M.D. Georgia

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Ruben Monzon, S.D. Texas

James M. Wahlrab, S.D. Ohio

Anthony Dichio, Massachusetts

James T. Roberts, S.D. Georgia

James R. Dougan, W.D. Michigan

Michael L. Kline, E.D. Washington

George B. Walsh, District of Columbia

Peter A. Lawrence, W.D. New York

Charles E. Beach, S.D. Iowa

Richard Vaughn Mecum, N.D. Georgia

Burton Stallwood, Rhode Island

Denny Wade King, Tennessee

Antonio Candia Amador, C.D. California

Executive Branch Nominations Reported Favorably by the Senate Judiciary Committee to the Senate and on the Senate Executive Calendar Awaiting Final Action by the Senate:

Carol Chien-Hua Lam to be U.S. Attorney for the Southern District of California

Glenn Suddaby to be U.S. Attorney for the Northern District of New York

Johnny Mack Brown to be U.S. Marshal for the District of South Carolina

John Francis Clark to be U.S. Marshal for the Eastern District of Virginia

Robert Maynard Grubbs to be U.S. Marshal for the Eastern District of Michigan

Joseph Guccione to be U.S. Marshal for the Southern District of New York

Judicial and Executive Branch Nominations on which the Senate Judiciary Committee Voted Not to Report:

Charles Pickering, Sr. to the U.S. Court of Appeals for the Fifth Circuit

Priscilla Owen to the U.S. Court of Appeals for the Fifth Circuit

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As you can see, the Senate Judiciary Committee has worked hard to consider your judicial and executive branch nominations over the past 15 months since the Committee was permitted to reorganize following the change in majority. During that time, the Senate Judiciary Committee held 26 hearings for more than 100 of your nominees for lifetime appointment to the federal bench as well as 16 hearings for 21 executive branch nominees.

It was unfortunate to see the Senate's historic record of bipartisan cooperation on confirmations distorted in the weeks leading up to November elections. It was disturbing to see the White House, Senate Republicans and Republican candidates distorting the record and ignoring the Senate Judiciary Committee's achievements and those of the Senate.

The Judiciary Committee held hearings on 103 judicial nominations in 15 months. We held votes on 100 judicial nominations in 15 months and favorably reported 98 of your judicial nominees. The Committee voted not to report only two judicial nominees.

We held hearings on every federal trial court nominee who had a completed file by October 2. Unfortunately several, 16, of your judicial nominees do not have the support of home-state Senators. Had the White House worked more closely with those Senators of both parties, those situations may well have been avoided. In addition, because of the White House's decision to change the procedures that had been used since President Eisenhower by Republican and Democratic Presidents alike to obtain peer reviews through the ABA, a number of your more recent nominees, 10, do not have ABA peer reviews. Had we received the ABA peer reviews earlier in the course of the last 16 months, the Committee could have held hearings and voted on another 12 to 15 judges.

The Senate proceeded to confirm 80 judges in the 15 months since the change in majority, including 14 judges to the circuit courts. That is more judges than the Republican majority had confirmed in its final 30 months of Senate control from 1999 through the summer of 2001, more than the Republican majority had confirmed in its first two full years of Senate control in 1995 and 1996 combined, and more than were confirmed in the first two years of your father's term in 1989 and 1990 combined.

At our Committee meeting on October 8, the Committee favorably reported 17 judicial nominations to the Senate. At that one meeting, we equaled the output of the Republican Senate majority for the entire 1996 session when only 17 District Court judges were confirmed all year. No judges were confirmed to the circuit courts during the entire 1996 session of Congress when the Republican majority was in control.

In the 15 months in which I have chaired the Judiciary Committee, we held hearings on 20 circuit court nominees, held Committee votes on 17 and favorably reported 15 circuit court nominees. In the six and one-half years that the Republican majority controlled the pace of President Clinton's nominees, only 46 circuit court nominees were confirmed. In the first 15 months of Democratic control, by contrast, 14 circuit court nominees were confirmed.

To compare how your nominees are being treated in contrast to how the Republican Senate majority treated President Clinton's nominees, let me note the following. Senator Hatch is fond of saying that he presided over six years of President Clinton's terms in office and that President Clinton appointed 377 federal judges (although 127 were confirmed under the chairmanship of Senator Biden). Had the Republicans acted as quickly on as many of President Clinton's

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noncontroversial nominees. Controversial nominations to lifetime appointments, once confirmed, cannot be undone, and the Senate's consideration should not be needlessly rushed. Arbitrary deadlines on the Senate would only serve to remove any pressure from the White House in moderating the President's choices."

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[Judiciary Chairman Patrick Leahy (D-Vt.) today also released a letter sent Monday to President Bush, reporting on the Senate's work in acting on his judicial nominations and once again inviting a constructive dialogue with the President on further improvements in the process. The letter is pasted at the bottom of this page.]

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[Source: Senate Judiciary Committee:]

NOMINEES WHO THE PRESIDENT TOOK MORE THAN 180 DAYS TO NOMINATE

Nominee	Court	Days to Nomination
John R. Adams	ND Ohio	608
Thomas Ludington	ED Michigan	589
Robert G. Klausner	CD California	544
James Otero	CD California	544
Sandra Feurstein	ED New York	540
Richard Griffin	6th Circuit	522
James Dever	North Carolina	467
Timothy J. Corrigan	MD Florida	467
Morrison England	ED California	425
Timothy Savage	ED Pennsylvania	405
David Cercone	WD Pennsylvania	405
Richard Dorr	WD Missouri 405	
Henry Autrey	ED Missouri	405

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nominees as the Judiciary Committee has over the last 15 months on your nominees, President Clinton would have been able to appoint 597 federal judges. During the time in which the Republican majority controlled the pace of confirmations in the Senate, had they maintained the pace that Democrats have maintained in reporting your judicial nominations to the Senate over the last 15 months, President Clinton's judicial appointments during the period of Republican control would have been 89 percent higher.

Rather than acknowledge the better pace that your nominees have been considered than those of the last President, you and members of your staff have chosen to treat this as a partisan political matter. You have refused to acknowledge what we have been able to achieve and, instead, focused only on your most controversial and divisive nominations.

In attempting to address responsibly the large number of vacancies created by Republican obstruction when they controlled the Senate, the Committee has endeavored to move as quickly as possible on the less controversial of the nominees, in order to provide much needed relief to the federal courts. The Committee's reporting 98 judicial nominations and the Senate's confirmation of 80 in 15 months demonstrates our willingness to act fairly, expeditiously and in a bipartisan way.

I inherited 110 vacancies when I became Chairman. Since then an additional 47 vacancies have arisen. The judiciary does not suffer from those 150 plus vacancies, which it would had we done nothing. With 80 confirmations so far in just 15 months, we have significantly reduced the vacancies in the 862-member federal judiciary to 77.

Unfortunately, despite the current number of judicial vacancies, you have not made nominations to 26 of the open seats on the federal courts (26 of 77). While we are moving at a fast pace to consider your judicial nominees, we obviously cannot confirm those who have not yet been nominated. Morever, a number of your more recent nominees, including all eight received in September and October, do not have ABA peer reviews and will not be eligible to be considered at all this year.

We wish you had chosen to work with us more closely on the important work of filling our federal courts with judicial nominees who will follow precedent, be fair and impartial to all people, and protect the rights of all Americans. If you would work with us and nominate less divisive, less controversial nominees, that would contribute greatly to the process and our mutual success. Unfortunately, you have chosen to politicize these appointments and to seek to create a partisan campaign issue.

Your unwillingness to work with the Majority Leader in selection nominees for bipartisan boards and commissions has greatly complicated the confirmation process, as well. Likewise, Republican Senators' unwillingness to proceed on your nominees has been a great difficulty and threatens progress on the judicial nominees reported by the Judiciary Committee and on the Senate Executive Calendar.

At the beginning of my term as Chairman of the Senate Judiciary Committee I reached out to try to work with your Administration. I renewed my efforts in January and the early parts of this year. I am doing so, again. Meaningful consultation, ideological balance and a depoliticizing of the judicial nomination process are all matters I remain willing to discuss. We have accomplished a good deal already. We could accomplish much more working more

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closely together.

Sincerely,

_____
PATRICK LEAHY
Chairman

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Jeffrey White	ND California	391
William Smith	Rhode Island	384
Alia Ludlum	WD Texas	377
Legrome Davis	ED Pennsylvania	369
Cynthia Rufe	ED Pennsylvania	369
Arthur Schwab	WD Pennsylvania	369
Kenneth Marra	SD Florida	369
John Walter	CD California	368
William Griesbach	ED Wisconsin	368
Joy Conti	WD Pennsylvania	368
Percy Anderson	CD California	368
Jose Martinez	SD Florida	368
Frederick Rohlfing	Hawaii	368
Ronald Leighton	WD Washington	367
Henry Hudson	ED Virginia	367
Andrew Hanen	SD Texas	367
David Godbey	ND Texas	367
Cormac Carney	CD California	357
Leonard Davis	ED Texas	347
Samuel Mays	WD Tennessee	345
Ronald Clark	ED Texas	329
John E. Jones	MD Pennsylvania	328
Christopher Conner	MD Pennsylvania	316

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Thomas Varlan	ED Tennessee	314
Jose Linares	New Jersey	304
Richard Holwell	SD New York	294
Susan Bieke Neilson	6th Circuit	292
Judge D. Brooks Smith	3rd Circuit	233
Henry Saad	6th Circuit	292
Maurice Hicks	WD Louisiana	286
Amy St. Eve	ND Illinois	273
Judge Julia Smith Gibbons	6th Circuit	262
William H. Steele	11th Circuit	262
Phillip Martinez	WD Texas	262
Timothy Stanceu	ITC	261
Ralph Erickson	North Dakota	255
Ashley Royal	MD Georgia	251
Stanley Chesler	New Jersey	236
Robert Blackburn	Colorado	233
David Bury	Arizona	233
Cindy Jorgenson	Arizona	233
Gregory Frost	SD Ohio	212
Clay Land	ND Georgia	212
Randy Crane	SD Texas	212
Freda Wolfson	New Jersey	209
William Martini	New Jersey	207

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James Mahan	Nevada	201
Frederick Martone	Arizona	201
Julie Robinson	Kansas	201
Christina Armijo	New Mexico	194
Danny Reeves	ED Kentucky	194
Karon Bowdre	ND Alabama	194
Karen Caldwell	ED Kentucky	194
Clair Egan	ND Oklahoma	194
Kurt Englehardt	ED Louisiana	194
Stephen Friot	WD Oklahoma	194
Callie Granade	SD Alabama	194
Joe Heaton	WD Oklahoma	194
Larry Hicks	Nevada	194
William Johnson	New Mexico	194
Michael Baylson	ED Pennsylvania	190
Rosemary Collyer	D. DC	182
David Bunning	ED Kentucky	182

VACANCIES FOR WHICH THE PRESIDENT HAS FAILED TO NOMINATE (Vacancies More Than 180 Days Old)

Vacancy Created By	Court	Days Vacant as of October 30, 2002
Judge Charles Wiggins	9th Circuit	2128 days
Judge Sam Ervin	4th Circuit	1168 days
Judge Morton Greenberg	3rd Circuit	853 days

Judge Patrick Duggan	E.D. Mich.	792 days
Judge Francis Murnaghan	4th Circuit	790 days
Judge Laurence Silberman	D.C. Circuit	728 days
Judge Spencer Letts	C.D. Cal.	680 days
Judge Richard Vollmer	S.D. Ala.	668 days
Judge Robert Jones	D. Ore.	547 days
Judge Stephen Williams	D.C. Circuit	426 days
Judge James C. Fox	E.D. NC	272 days
Judge William Standish	W.D. Pa.	243 days
Judge Carol Los Mansmann	3rd Circuit	235 day
Judge Shelby Highsmith	S.D. Fla.	229 days

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October 28, 2002

The Honorable George W. Bush
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear Mr. President:

At times it has seemed to me that you may not be aware of all of your judicial and executive branch nominees on which the Democratic majority of the Senate Judiciary Committee and the Senate have deferred to you and consented to the nomination. Accordingly, I list for you below the nominees the Judiciary Committee has voted on since I became Chairman.

Judicial Nominations Reported and Confirmed Between July 20, 2001 and October 2, 2002:

Judge Roger Gregory, 4th Circuit

Judge Richard Cebull, D. Montana

Judge Sam Haddon, D. Montana

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Judge William Riley, 8th Circuit

Judge Sharon Prost, Federal Circuit

Judge Reggie Walton, D. District of Columbia

Judge Barrington Parker, Jr., 2d Circuit

Judge Michael Mills, N.D. Mississippi

Judge James Payne, N.D./ E.D./ W.D. Oklahoma

Judge Karen Caldwell, E.D. Kentucky

Judge Laurie Smith Camp, D. Nebraska

Judge Claire Eagan, N.D. Oklahoma

Judge Larry Hicks, D. Nevada

Judge Christina Armijo, D. New Mexico

Judge Karon Bowdre, D. Alabama

Judge Stephen Friot, W.D. Oklahoma

Judge Terry Wooten, D. South Carolina

Judge Edith Brown Clement, 5th Circuit

Judge Harris Hartz, 10th Circuit

Judge Joe Heaton, D. Oklahoma

Judge Danny Reeves, E.D. Kentucky

Judge John Bates, D. District of Columbia

Judge Kurt Engelhardt, E.D. Louisiana

Judge Julie Robinson, D. Kansas

Judge William Johnson, D. New Mexico

Judge Clay Land, D. Georgia

Judge Frederick Martone, D. Arizona

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Judge C. Ashley Royal, M.D. Georgia

Judge Marcia Krieger, D. Colorado

Judge James Mahan, D. Nevada

Judge Callie Granade, S.D. Alabama

Judge Philip Martinez, W.D. Texas

Judge Michael Melloy, 8th Circuit

Judge Jay Zainey, E.D. Louisiana

Judge David Bunning, E.D. Kentucky

Judge James Gritzner, S.D. Iowa

Judge Richard Leon, D. District of Columbia

Judge Robert Blackburn, D. Colorado

Judge Cindy Jorgenson, D. Arizona

Judge Ralph Beistline, D. Alaska

Judge David C. Bury, D. Arizona

Judge Randy Crane, S.D. Texas

Judge Terrence O'Brien, 10th Circuit

Judge Lance M. Africk, E.D. Louisiana

Judge Legrome Davis, E.D. Pennsylvania

Judge Jeffrey Howard, 1st Circuit

Judge Percy Anderson, C.D. California

Judge William Griesbach, E.D. Wisconsin

Judge Joan Lancaster, D.C. Minnesota

Judge John Walter, C.D. California

Judge Cynthia Rufe, E.D. Pennsylvania

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Judge Michael Baylson, E.D. Pennsylvania

Judge Leonard Davis, E.D. Texas

Judge Andrew Hanen, S.D. Texas

Judge Samuel H. Mays, W.D. Tennessee

Judge Thomas Rose, S.D. Ohio

Judge Paul Cassell, D. Utah

Judge Lavenski R. Smith, 8th Circuit

Judge Richard R. Clifton, 9th Circuit

Judge Christopher C. Conner, M.D. Pennsylvania

Judge Julia Smith Gibbons, 6th Circuit

Judge Joy Flowers Conti, W.D. Pennsylvania

Judge John E. Jones III, M.D. Pennsylvania

Judge D. Brooks Smith, 3rd Circuit

Judge Henry Autrey, E.D. Missouri

Judge Richard E. Dorr, W.D. Missouri

Judge David Godbey, N.D. Texas

Judge Henry Hudson, E.D. Virginia

Judge Timothy Savage, E.D. Pennsylvania

Judge Amy J. St. Eve, N.D. Illinois

Judge David Cercone, W.D. Pennsylvania

Judge Morrison Cohen England, E.D. California

Judge Terrence McVerry, W.D. Pennsylvania

Judge Kenneth Marra, S.D. Florida

Judge Timothy Corrigan, M.D. Florida

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U.S. SENATOR PATRICK LEAHY

CONTACT: Office of Senator Leahy, 202-224-4242 **VERMONT**

Comments Of Judiciary Committee Chairman Patrick Leahy
On The White House Proposal On Judicial Nominations
Wednesday, Oct. 30, 2002

"I regret that instead of accepting our many previous invitations to work with the Senate and increase the level of consultation and cooperation to help fill judicial vacancies, the White House repeatedly has chosen to continue down its path of trying to politicize the process. The timing and handling of this unilateral White House proposal, a week before the elections, and after ignoring all previous invitations to consult with the Senate, cannot help but raise questions about its purpose.

"We have restored steadiness and openness to the judicial confirmation process. The Democratic Senate has moved far faster and with far more fairness than the previous Republican Senate in filling judicial vacancies, even though many of those vacancies were kept open through Republican stalling on so many of President Clinton's nominees. We have done more in 15 months than our predecessors did in 30 months. In just 15 months, the Judiciary Committee has voted on 100 nominees and approved 98 of them.

"Our list of firsts includes the first nominee confirmed to the 6th Circuit in almost five years, even though three of President Clinton's nominees to that court never got hearings and votes, and the first confirmation to the 5th Circuit in six years. The President today was incorrect in suggesting that no 6th Circuit nominee has been confirmed. The Senate on its own takes an average of only 150 days from nomination to confirmation, even with the time the White House has added to the Senate's timetable for peer-review vetting by the ABA.

"President Bush said he wanted to be a uniter and not a divider, but he has nominated several appellate court nominees who divide the American people and who divide the Senate, and controversial nominations always take longer. The President can help by choosing nominees not primarily for their ideology but for their fairness. The Senate has clearly shown that consensus nominees are acted on promptly.

"Cooperation from the White House would allow us to make a good record even better. The Senate has taken good-faith steps to speed the confirmation process. The White House has not reciprocated. Ten months ago I invited the President to work with the Senate and I renewed that invitation most recently on Monday. I would be glad to begin those discussions about consultation with the Senate and other steps to improve the process. But the President should understand that the Senate does not need arbitrary deadlines. What we need is cooperation from the White House in choosing more

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Judge Jose Martinez, S.D. Florida

Judge Arthur Schwab, W.D. Pennsylvania

Judge Reena Raggi, 2nd Circuit

Judge James Gardner, E.D. Pennsylvania

Judge Ronald Clark, E.D. Texas

Judicial Nominations Reported Favorably by the Senate Judiciary Committee to the Senate and on the Senate Executive Calendar Awaiting Final Action by the Senate:

John M. Rogers to the U.S. Court of Appeals for the Sixth Circuit

Judge Stanley R. Chesler to the U.S. District Court for the District of New Jersey

Rosemary M. Collyer to the U.S. District Court for the District of Columbia

Mark E. Fuller to the U.S. District Court for the Middle District of Alabama

Daniel L. Hovland to the U.S. District Court for the District of North Dakota

Kent A. Jordan to the U.S. District Court for the District of Delaware

Judge James E. Kinkeade to the U.S. District Court for the Northern District of Texas

Judge Robert G. Klausner to the U.S. District Court for the Central District of California

Judge Robert B. Kugler to the U.S. District Court for the District of New Jersey

Ronald B. Leighton to the U.S. District Court for the Western District of Washington

Judge Jose L. Linares to the U.S. District Court for the District of New Jersey

Judge Alia M. Ludlum to the U.S. District Court for the Western District of Texas

William J. Martini to the U.S. District Court for the District of New Jersey

Judge Thomas W. Phillips to the U.S. District Court for the Eastern District of Tennessee

Judge Linda R. Reade to the U.S. District Court for the Northern District of Iowa

William E. Smith to the U.S. District Court for the District of Rhode Island

Jeffrey White to the U.S. District Court for the Northern District of California

Judge Freda Wolfson to the U.S. District Court for the District of New Jersey

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Executive Branch Confirmations:

Department of Justice and Other Agencies:

Ralph Boyd, Assistant Attorney General, Civil Rights Division

Eileen O'Connor, Assistant Attorney General, Tax Division

James Ziglar, Commissioner Immigration and Naturalization Service

Asa Hutchinson, Administrator, Drug Enforcement Administration (DEA)

Sarah Hart, Director, National Institute of Justice

Robert Mueller, Director, Federal Bureau of Investigation

Robert McCallum, Assistant Attorney General, Civil Division

John Gillis, Director, Office of Victims of Crime

Richard Nedelkoff, Director, Bureau of Justice Assistance

Deborah Daniels, Assistant Attorney General, Office of Justice Programs

Jay Bybee, Assistant Attorney General, Office of Legal Counsel

Benigno Reyna, Director, U.S. Marshals' Service

Juan Carlos Benitez, Special Counsel for Immigration-Related Unfair Employment Practices

Sharee Freeman, Director, Community Relations Service

Jay Stevens, Associate Attorney General

James Rogan, Director of the U.S. Patent and Trademark Office

Thomas Sansonetti, Assistant Attorney General, Environment and Natural Resources Division

John Walters, Director, Office of National Drug Control Policy (ONDCP)

Mauricio Tamargo, Chair, Foreign Claims Settlement Commission

J. Robert Flores, Administrator, Office of Juvenile Justice and Delinquency Prevention

Scott M. Burns, Deputy Director for State and Local Affairs, ONDCP

John M. Brown, III, Deputy Administrator, DEA

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Barry D. Crane, Deputy Director for Supply Reduction, ONDCP

Mary Ann Solberg, Deputy Director, ONDCP

Lawrence Greenfeld, Director, Bureau of Justice Statistics

United States Attorneys:

Michael Heavican, Nebraska

Paul McNulty, E.D. New York

Colm Connolly, Delaware

Roscoe Howard, Jr., District of Columbia

Michael Sullivan, Massachusetts

Joseph Van Bokkelen, N.D. Indiana

Stephen Pence, W.D. Kentucky

Gregory Van Tatenhove, E.D. Kentucky

Thomas Heffelfinger, Minnesota

Patrick Meehan, E.D. Pennsylvania

Mary Beth Buchanan, W.D. Pennsylvania

Peter Hall, Vermont

John Brownlee, W.D. Virginia

Tim Burgess, Alaska

Harry Mattice, E.D. Tennessee

Robert McCampbell, W.D. Oklahoma

Matthew Mead, Wyoming

Michael Mosman, Oregon

John Suthers, Colorado

Susan Brooks, S.D. Indiana

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Todd Graves, W.D. Missouri

Terrell Harris, W.D. Tennessee

David Iglesias, New Mexico

Charles Larson, Sr., N.D. Iowa

Steven Colloton, S.D. Iowa

Gregory Lockhart, S.D. Ohio

Anna Mills Wagoner, M.D. North Carolina

Margaret Chiara, W.D. Michigan

Robert Conrad, W.D. North Carolina

Thomas Gean, W.D. Arkansas

James Greenlee, N.D. Mississippi

Raymond Gruender, E.D. Missouri

Daniel Bogden, Nevada

Thomas DiBiagio, Maryland

Thomas Johnston, N.D. West Virginia

Donald Washington, W.D. Louisiana

Patrick Fitzgerald, N.D. Illinois

John McKay, W.D. Washington

Karl Warner, S.D. West Virginia

Leura Canary, M.D. Alabama

Paul Charlton, Arizona

Jeffrey Collins, E.D. Michigan

William Duffey, Jr., N.D. Georgia

Dunn Lampton, S.D. Mississippi

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Alice Howze Martin, N.D. Alabama

William Mercer, Montana

Thomas Moss, Idaho

Strom Thurmond, Jr., South Carolina

Maxwell Wood, M.D. Georgia

Drew Wrigley, North Dakota

David Dugas, M.D. Louisiana

Edward Kubo, Hawaii

James McDevitt, E.D. Washington

David O'Meilia, N.D. Oklahoma

Sheldon Sperling, E.D. Oklahoma

Johnny Sutton, W.D. Texas

Richard Thompson, S.D. Georgia

Harry Cummins, III, E.D. Arkansas

Christopher Christie, New Jersey

David York, S.D. Alabama

Michael Battle, W.D. New York

Thomas Colantuono, New Hampshire

James Vines, M.D. Tennessee

Paul Perez, M.D. Florida

Eric F. Melgren, Kansas

Michael Shelby, S.D. Texas

Jane Boyle, N.D. Texas

Matthew Orwig, E.D. Texas

REV_00256411

James Comey, S.D. New York

Thomas Marino, M.D. Pennsylvania

Debra W. Yang, C.D. California

Frank D. Whitney, E.D. North Carolina

Steven M. Biskupic, E.D. Wisconsin

Jan Paul Miller, C.D. Illinois

James McMahon, South Dakota

Roslynn R. Mauskopf, E.D. New York

Gregory Robert Miller, N.D. Florida

Kevin Vincent Ryan, N.D. California

Marcos D. Jimenez, S.D. Florida

Miriam F. Miquelon, S.D. Illinois

J.B. Van Hollen, W.D. Wisconsin

United States Marshals:

Dwight MacKay, Montana

James Dawson, S.D. West Virginia

William Jenkins, M.D. Louisiana

Ronald McCubbins, Jr., W.D. Kentucky

David Murtaugh, N.D. Indiana

Nehemiah Flowers, S.D. Mississippi

Arthur Hedden, E.D. Tennessee

David Jolley, W.D. Tennessee

Michael Roach, W.D. Oklahoma

Eric Robertson, W.D. Washington

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Brian Ennis, Nebraska

Chester Keely, N.D. Alabama

John Loyd, E.D. Oklahoma

David Viles, Maine

Johnny Hughes, Maryland

Randy Johnson, Alaska

Larry Wagster, N.D. Mississippi

William Smith Taylor, S.D. Alabama

Dennis Cluff Merrill, Oregon

John Schickel, E.D. Kentucky

William "Rut" Whittington, W.D. Louisiana

Stephen Fitzgerald, W.D. Wisconsin

J.C. Raffety, N.D. West Virginia

James Rose, Wyoming

James Kennedy, S.D. Indiana

Theophile Duroncelet, E.D. Louisiana

James Plousis, New Jersey

Charles Reavis, E.D. North Carolina

Timothy Welch, N.D. Oklahoma

Michael Regan, M.D. Pennsylvania

Jesse Seroyer, Jr., M.D. Alabama

Gregory Forest, W.D. North Carolina

John Edwards, Vermont

Kim Widup, N.D. Illinois

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Don Slazinik, S.D. Illinois

Patrick McDonald, Idaho

Warren Anderson, South Dakota

James Parmley, N.D. New York

John Quinn, N.D. Iowa

David Gonzales, Arizona

Edward Zahren, Colorado

Charles M. Sheer, W.D. Missouri

Gorden Eden, Jr., New Mexico

John Lee Moore, E.D. Texas

Ronald Henderson, E.D. Missouri

Randy Paul Ely, N.D. Texas

Gary Shovlin, E.D. Pennsylvania

Steven Monier, New Hampshire

Walter Bradley, Kansas

William P. Kruziki, E.D. Wisconsin

Steven Deatherage, C.D. Illinois

Thomas M. Fitzgerald, W.D. Pennsylvania

Pike, G. Wayne, W.D. Virginia

David W. Thomas, Delaware

Randall D. Anderson, Utah

Ray E. Carnahan, E.D. Arkansas

David S. Carpenter, North Dakota

Theresa A. Merrow, M.D. Georgia

REV_00256414

Ruben Monzon, S.D. Texas

James M. Wahlrab, S.D. Ohio

Anthony Dichio, Massachusetts

James T. Roberts, S.D. Georgia

James R. Dougan, W.D. Michigan

Michael L. Kline, E.D. Washington

George B. Walsh, District of Columbia

Peter A. Lawrence, W.D. New York

Charles E. Beach, S.D. Iowa

Richard Vaughn Mecum, N.D. Georgia

Burton Stallwood, Rhode Island

Denny Wade King, Tennessee

Antonio Candia Amador, C.D. California

Executive Branch Nominations Reported Favorably by the Senate Judiciary Committee to the Senate and on the Senate Executive Calendar Awaiting Final Action by the Senate:

Carol Chien-Hua Lam to be U.S. Attorney for the Southern District of California

Glenn Suddaby to be U.S. Attorney for the Northern District of New York

Johnny Mack Brown to be U.S. Marshal for the District of South Carolina

John Francis Clark to be U.S. Marshal for the Eastern District of Virginia

Robert Maynard Grubbs to be U.S. Marshal for the Eastern District of Michigan

Joseph Guccione to be U.S. Marshal for the Southern District of New York

Judicial and Executive Branch Nominations on which the Senate Judiciary Committee Voted Not to Report:

Charles Pickering, Sr. to the U.S. Court of Appeals for the Fifth Circuit

Priscilla Owen to the U.S. Court of Appeals for the Fifth Circuit

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As you can see, the Senate Judiciary Committee has worked hard to consider your judicial and executive branch nominations over the past 15 months since the Committee was permitted to reorganize following the change in majority. During that time, the Senate Judiciary Committee held 26 hearings for more than 100 of your nominees for lifetime appointment to the federal bench as well as 16 hearings for 21 executive branch nominees.

It was unfortunate to see the Senate's historic record of bipartisan cooperation on confirmations distorted in the weeks leading up to November elections. It was disturbing to see the White House, Senate Republicans and Republican candidates distorting the record and ignoring the Senate Judiciary Committee's achievements and those of the Senate.

The Judiciary Committee held hearings on 103 judicial nominations in 15 months. We held votes on 100 judicial nominations in 15 months and favorably reported 98 of your judicial nominees. The Committee voted not to report only two judicial nominees.

We held hearings on every federal trial court nominee who had a completed file by October 2. Unfortunately several, 16, of your judicial nominees do not have the support of home-state Senators. Had the White House worked more closely with those Senators of both parties, those situations may well have been avoided. In addition, because of the White House's decision to change the procedures that had been used since President Eisenhower by Republican and Democratic Presidents alike to obtain peer reviews through the ABA, a number of your more recent nominees, 10, do not have ABA peer reviews. Had we received the ABA peer reviews earlier in the course of the last 16 months, the Committee could have held hearings and voted on another 12 to 15 judges.

The Senate proceeded to confirm 80 judges in the 15 months since the change in majority, including 14 judges to the circuit courts. That is more judges than the Republican majority had confirmed in its final 30 months of Senate control from 1999 through the summer of 2001, more than the Republican majority had confirmed in its first two full years of Senate control in 1995 and 1996 combined, and more than were confirmed in the first two years of your father's term in 1989 and 1990 combined.

At our Committee meeting on October 8, the Committee favorably reported 17 judicial nominations to the Senate. At that one meeting, we equaled the output of the Republican Senate majority for the entire 1996 session when only 17 District Court judges were confirmed all year. No judges were confirmed to the circuit courts during the entire 1996 session of Congress when the Republican majority was in control.

In the 15 months in which I have chaired the Judiciary Committee, we held hearings on 20 circuit court nominees, held Committee votes on 17 and favorably reported 15 circuit court nominees. In the six and one-half years that the Republican majority controlled the pace of President Clinton's nominees, only 46 circuit court nominees were confirmed. In the first 15 months of Democratic control, by contrast, 14 circuit court nominees were confirmed.

To compare how your nominees are being treated in contrast to how the Republican Senate majority treated President Clinton's nominees, let me note the following. Senator Hatch is fond of saying that he presided over six years of President Clinton's terms in office and that President Clinton appointed 377 federal judges (although 127 were confirmed under the chairmanship of Senator Biden). Had the Republicans acted as quickly on as many of President Clinton's

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noncontroversial nominees. Controversial nominations to lifetime appointments, once confirmed, cannot be undone, and the Senate's consideration should not be needlessly rushed. Arbitrary deadlines on the Senate would only serve to remove any pressure from the White House in moderating the President's choices."

#####

[Judiciary Chairman Patrick Leahy (D-Vt.) today also released a letter sent Monday to President Bush, reporting on the Senate's work in acting on his judicial nominations and once again inviting a constructive dialogue with the President on further improvements in the process. The letter is pasted at the bottom of this page.]

#####

[Source: Senate Judiciary Committee:]

NOMINEES WHO THE PRESIDENT TOOK MORE THAN 180 DAYS TO NOMINATE

Nominee	Court	Days to Nomination
John R. Adams	ND Ohio	608
Thomas Ludington	ED Michigan	589
Robert G. Klausner	CD California	544
James Otero	CD California	544
Sandra Feurstein	ED New York	540
Richard Griffin	6th Circuit	522
James Dever	North Carolina	467
Timothy J. Corrigan	MD Florida	467
Morrison England	ED California	425
Timothy Savage	ED Pennsylvania	405
David Cercone	WD Pennsylvania	405
Richard Dorr	WD Missouri 405	
Henry Autrey	ED Missouri	405

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nominees as the Judiciary Committee has over the last 15 months on your nominees, President Clinton would have been able to appoint 597 federal judges. During the time in which the Republican majority controlled the pace of confirmations in the Senate, had they maintained the pace that Democrats have maintained in reporting your judicial nominations to the Senate over the last 15 months, President Clinton's judicial appointments during the period of Republican control would have been 89 percent higher.

Rather than acknowledge the better pace that your nominees have been considered than those of the last President, you and members of your staff have chosen to treat this as a partisan political matter. You have refused to acknowledge what we have been able to achieve and, instead, focused only on your most controversial and divisive nominations.

In attempting to address responsibly the large number of vacancies created by Republican obstruction when they controlled the Senate, the Committee has endeavored to move as quickly as possible on the less controversial of the nominees, in order to provide much needed relief to the federal courts. The Committee's reporting 98 judicial nominations and the Senate's confirmation of 80 in 15 months demonstrates our willingness to act fairly, expeditiously and in a bipartisan way.

I inherited 110 vacancies when I became Chairman. Since then an additional 47 vacancies have arisen. The judiciary does not suffer from those 150 plus vacancies, which it would had we done nothing. With 80 confirmations so far in just 15 months, we have significantly reduced the vacancies in the 862-member federal judiciary to 77.

Unfortunately, despite the current number of judicial vacancies, you have not made nominations to 26 of the open seats on the federal courts (26 of 77). While we are moving at a fast pace to consider your judicial nominees, we obviously cannot confirm those who have not yet been nominated. Morever, a number of your more recent nominees, including all eight received in September and October, do not have ABA peer reviews and will not be eligible to be considered at all this year.

We wish you had chosen to work with us more closely on the important work of filling our federal courts with judicial nominees who will follow precedent, be fair and impartial to all people, and protect the rights of all Americans. If you would work with us and nominate less divisive, less controversial nominees, that would contribute greatly to the process and our mutual success. Unfortunately, you have chosen to politicize these appointments and to seek to create a partisan campaign issue.

Your unwillingness to work with the Majority Leader in selection nominees for bipartisan boards and commissions has greatly complicated the confirmation process, as well. Likewise, Republican Senators' unwillingness to proceed on your nominees has been a great difficulty and threatens progress on the judicial nominees reported by the Judiciary Committee and on the Senate Executive Calendar.

At the beginning of my term as Chairman of the Senate Judiciary Committee I reached out to try to work with your Administration. I renewed my efforts in January and the early parts of this year. I am doing so, again. Meaningful consultation, ideological balance and a depoliticizing of the judicial nomination process are all matters I remain willing to discuss. We have accomplished a good deal already. We could accomplish much more working more

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closely together.

Sincerely,

_____
PATRICK LEAHY
Chairman

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Jeffrey White	ND California	391
William Smith	Rhode Island	384
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Legrome Davis	ED Pennsylvania	369
Cynthia Rufe	ED Pennsylvania	369
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Joy Conti	WD Pennsylvania	368
Percy Anderson	CD California	368
Jose Martinez	SD Florida	368
Frederick Rohlfing	Hawaii	368
Ronald Leighton	WD Washington	367
Henry Hudson	ED Virginia	367
Andrew Hanen	SD Texas	367
David Godbey	ND Texas	367
Cormac Carney	CD California	357
Leonard Davis	ED Texas	347
Samuel Mays	WD Tennessee	345
Ronald Clark	ED Texas	329
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Clay Land	ND Georgia	212
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Frederick Martone	Arizona	201
Julie Robinson	Kansas	201
Christina Armijo	New Mexico	194
Danny Reeves	ED Kentucky	194
Karon Bowdre	ND Alabama	194
Karen Caldwell	ED Kentucky	194
Clair Egan	ND Oklahoma	194
Kurt Englehardt	ED Louisiana	194
Stephen Friot	WD Oklahoma	194
Callie Granade	SD Alabama	194
Joe Heaton	WD Oklahoma	194
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Michael Baylson	ED Pennsylvania	190
Rosemary Collyer	D. DC	182
David Bunning	ED Kentucky	182

VACANCIES FOR WHICH THE PRESIDENT HAS FAILED TO NOMINATE (Vacancies More Than 180 Days Old)

Vacancy Created By	Court	Days Vacant as of October 30, 2002
Judge Charles Wiggins	9th Circuit	2128 days
Judge Sam Ervin	4th Circuit	1168 days
Judge Morton Greenberg	3rd Circuit	853 days

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Judge Patrick Duggan	E.D. Mich.	792 days
Judge Francis Murnaghan	4th Circuit	790 days
Judge Laurence Silberman	D.C. Circuit	728 days
Judge Spencer Letts	C.D. Cal.	680 days
Judge Richard Vollmer	S.D. Ala.	668 days
Judge Robert Jones	D. Ore.	547 days
Judge Stephen Williams	D.C. Circuit	426 days
Judge James C. Fox	E.D. NC	272 days
Judge William Standish	W.D. Pa.	243 days
Judge Carol Los Mansmann	3rd Circuit	235 day
Judge Shelby Highsmith	S.D. Fla.	229 days

#####

October 28, 2002

The Honorable George W. Bush
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Dear Mr. President:

At times it has seemed to me that you may not be aware of all of your judicial and executive branch nominees on which the Democratic majority of the Senate Judiciary Committee and the Senate have deferred to you and consented to the nomination. Accordingly, I list for you below the nominees the Judiciary Committee has voted on since I became Chairman.

Judicial Nominations Reported and Confirmed Between July 20, 2001 and October 2, 2002:

Judge Roger Gregory, 4th Circuit

Judge Richard Cebull, D. Montana

Judge Sam Haddon, D. Montana

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Judge William Riley, 8th Circuit

Judge Sharon Prost, Federal Circuit

Judge Reggie Walton, D. District of Columbia

Judge Barrington Parker, Jr., 2d Circuit

Judge Michael Mills, N.D. Mississippi

Judge James Payne, N.D./ E.D./ W.D. Oklahoma

Judge Karen Caldwell, E.D. Kentucky

Judge Laurie Smith Camp, D. Nebraska

Judge Claire Eagan, N.D. Oklahoma

Judge Larry Hicks, D. Nevada

Judge Christina Armijo, D. New Mexico

Judge Karon Bowdre, D. Alabama

Judge Stephen Friot, W.D. Oklahoma

Judge Terry Wooten, D. South Carolina

Judge Edith Brown Clement, 5th Circuit

Judge Harris Hartz, 10th Circuit

Judge Joe Heaton, D. Oklahoma

Judge Danny Reeves, E.D. Kentucky

Judge John Bates, D. District of Columbia

Judge Kurt Engelhardt, E.D. Louisiana

Judge Julie Robinson, D. Kansas

Judge William Johnson, D. New Mexico

Judge Clay Land, D. Georgia

Judge Frederick Martone, D. Arizona

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Judge C. Ashley Royal, M.D. Georgia

Judge Marcia Krieger, D. Colorado

Judge James Mahan, D. Nevada

Judge Callie Granade, S.D. Alabama

Judge Philip Martinez, W.D. Texas

Judge Michael Melloy, 8th Circuit

Judge Jay Zainey, E.D. Louisiana

Judge David Bunning, E.D. Kentucky

Judge James Gritzner, S.D. Iowa

Judge Richard Leon, D. District of Columbia

Judge Robert Blackburn, D. Colorado

Judge Cindy Jorgenson, D. Arizona

Judge Ralph Beistline, D. Alaska

Judge David C. Bury, D. Arizona

Judge Randy Crane, S.D. Texas

Judge Terrence O'Brien, 10th Circuit

Judge Lance M. Africk, E.D. Louisiana

Judge Legrome Davis, E.D. Pennsylvania

Judge Jeffrey Howard, 1st Circuit

Judge Percy Anderson, C.D. California

Judge William Griesbach, E.D. Wisconsin

Judge Joan Lancaster, D.C. Minnesota

Judge John Walter, C.D. California

Judge Cynthia Rufe, E.D. Pennsylvania

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Judge Michael Baylson, E.D. Pennsylvania

Judge Leonard Davis, E.D. Texas

Judge Andrew Hanen, S.D. Texas

Judge Samuel H. Mays, W.D. Tennessee

Judge Thomas Rose, S.D. Ohio

Judge Paul Cassell, D. Utah

Judge Lavenski R. Smith, 8th Circuit

Judge Richard R. Clifton, 9th Circuit

Judge Christopher C. Conner, M.D. Pennsylvania

Judge Julia Smith Gibbons, 6th Circuit

Judge Joy Flowers Conti, W.D. Pennsylvania

Judge John E. Jones III, M.D. Pennsylvania

Judge D. Brooks Smith, 3rd Circuit

Judge Henry Autrey, E.D. Missouri

Judge Richard E. Dorr, W.D. Missouri

Judge David Godbey, N.D. Texas

Judge Henry Hudson, E.D. Virginia

Judge Timothy Savage, E.D. Pennsylvania

Judge Amy J. St. Eve, N.D. Illinois

Judge David Cercone, W.D. Pennsylvania

Judge Morrison Cohen England, E.D. California

Judge Terrence McVerry, W.D. Pennsylvania

Judge Kenneth Marra, S.D. Florida

Judge Timothy Corrigan, M.D. Florida

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Source: News & Business > News > **News Group File, Most Recent Two Years**
Terms: **daschle and bush and date(is 5-10-2001) and judge** (Edit Search)

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The Associated Press May 10, 2001, Thursday, BC cycle

The Associated Press

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May 10, 2001, Thursday, BC cycle

SECTION: Washington Dateline

LENGTH: 756 words

HEADLINE: Senate Democrats seem ready to allow most of **Bush's** first **judges**

BYLINE: By JESSE J. HOLLAND, Associated Press Writer

DATELINE: WASHINGTON

BODY:
President **Bush's** first slate of judicial nominees appears headed for confirmation in the divided Senate following compromises with Democrats that will delay the battle over the direction of the federal judiciary until later.

Calling for "civility and dignity," **Bush** on Wednesday nominated 11 lawyers, including some prominent conservatives, who were hand-picked for easy confirmation to the U.S. Circuit Court of Appeals - the courts of last resort for most lawsuits in the country.

The nominees "will be exceptional for their humanity and their integrity," **Bush** said during an announcement ceremony in the East Room of the White House.

Democrats appeared content with the choices after **Bush** withheld the planned nominations of at least four conservatives to avoid Democratic objections, and added Roger Gregory and Barrington Parker - two blacks who had been tapped by former President Clinton. "We are pleased that the White House has chosen to work with us on the first group of nominations," said Senate Minority Leader Thomas **Daschle,** D-S.D. He noted that some Democrats already had turned in positive reviews of some of the nominees.

Sen. Patrick Leahy of Vermont, the Judiciary Committee's top Democrat, even attended the White House announcement. "Had I not been encouraged, I would not have been here today," he said.

Bush chose seven lawyers from states with Republican senators and two **judges** from New York and Louisiana, both with Democratic senators. He also selected a respected federal **judge** and former Judiciary Committee counsel from South Carolina, which is represented by Republican Strom Thurmond and Democrat Ernest "Fritz" Hollings.

But even with the administration's vetting, at least one nominee, U.S. District **Judge** Terrence Boyle of North Carolina, faces a difficult confirmation process because of past bitterness over senators' power to block judicial nominees.

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Boyle, first nominated by **Bush's** father, is caught in a battle between Republican Sen. Jesse Helms and Democratic Sen. John Edwards, both of North Carolina. Democrats blocked the former Helms aide in 1991, and Helms retaliated by blocking Clinton's nominees from North Carolina.

Edwards has threatened to block Boyle again.

"Until we find some constructive process that allows for balance, then I would not support any nominee, including **Judge** Boyle," he said.

The junior senator has yet to turn in his required approval form and has "reserved judgment" on Boyle, spokesman Mike Briggs said.

Edwards also sent a letter to **Bush** saying the renomination of North Carolina Court of Appeals **Judge** James A. Wynn could help solve the problem. Wynn was denied a confirmation hearing by Republicans on the Senate Judiciary Committee for two years.

Other problems simmer just beneath the surface.

Democrats say there won't be any quick confirmation votes since **Bush** ended the American Bar Association's role in the White House vetting process.

Sen. Charles Schumer, D-N.Y., a Judiciary Committee member, said the nominees won't be voted on until the ABA gives Democrats a report. "The Democrats will not be railroaded into rubber-stamping a group of **judges,**" he said.

Democrats also recall Clinton's **judges** who were blocked by Republicans. Tensions over the judicial confirmation process has been high since Democrats scuttled the Supreme Court nomination of Robert Bork in 1987. Republicans, in turn, blocked many Clinton nominees to lower court seats.

"We will make sure it's a balanced judiciary," Leahy said. "Just as the Republicans felt they should keep a balanced judiciary when there's a Democratic president, we as Democrats feel there should be a balanced judiciary when there is a Republican president."

Bush said he wants "good faith" from the Senate. He cited the "backlogs, frustration and delay of justice" caused by vacancies and urged "a fair hearing and a prompt vote to every nominee."

Interest groups, meanwhile, are mounting opposition against some of the nominees.

Americans United for Separation of Church and State announced its opposition to University of Utah professor Michael McConnell, recognized as especially conservative on abortion rights and church-state separation. He was tapped for the 10th U.S. Circuit Court of Appeals, based in Denver.

"McConnell is the religious right's dream court nominee," said the Rev. Barry W. Lynn, executive director of Americans United. "He's a conservative Christian who's willing to use the force of government to impose his viewpoint."

GRAPHIC: AP Photos WH108,110

LOAD-DATE: May 11, 2001

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Source: News & Business > News > **News Group File, Most Recent Two Years**
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View: Full
Date/Time: Tuesday, November 5, 2002 - 6:25 PM EST

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The Washington Post, May 10, 2001

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May 10, 2001, Thursday, Final Edition

SECTION: A SECTION; Pg. A02

LENGTH: 860 words

HEADLINE: 11 Judicial Nominees Named; Bush Urges Senate to Rise Above Partisan 'Bitterness'

BYLINE: Amy Goldstein and Helen Dewar, Washington Post Staff Writers

BODY:

President Bush announced 11 nominees to a half-dozen federal appeals courts yesterday, imploring the Senate to "rise above the bitterness" that has thwarted the confirmation of judges in the recent past. Senate Democrats indicated that they will attempt to block at least one nomination but said that they have no wholesale plans to hinder consideration of the White House's candidates.

In his first round of choices for the federal judiciary, Bush adhered to his campaign commitment to fill court vacancies predominantly with conservative legal thinkers. But the administration sidestepped sharper ideological controversy by withholding three anticipated nominees opposed by Democrats and by selecting candidates who largely come from states without Democratic senators. At a time when Democrats wield considerable leverage because they hold half the seats in the Senate and on the Senate Judiciary Committee, the only nominee they immediately vowed to oppose is Terrence W. Boyle, a U.S. district judge from North Carolina whom Bush nominated to the 4th U.S. Circuit Court of Appeals, whose jurisdiction stretches from Maryland to the Carolinas. A former aide to Sen. Jesse Helms (R-N.C.) who Bush's father had tried to put on the appeals court, Boyle is opposed by Sen. John Edwards (D-N.C.). Edwards wrote to the White House this week, urging Bush to consider a black judge, nominated to the appeals court by President Bill Clinton, for whom Helms had refused to allow a confirmation hearing.

Edwards's opposition comes as the Judiciary Committee has been sparring over how much influence to grant individual Democratic senators who balk at nominees from their own states. Committee Chairman Orrin G. Hatch (R-Utah) has said that he will consider senators' views but will not be bound by them.

In a show of solidarity, the nine Democrats on the panel wrote Hatch a letter late last week, essentially saying that they will stand in the way of any nominee who lacks the support of his

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or her senators.

Yesterday, party leaders modulated their tone. "I'm pleased that the White House has chosen to work with us on the first group of nominations," said Minority Leader Thomas A. Daschle (D-S.D.). Sen. Patrick J. **Leahy** (Vt.), the Judiciary Committee's ranking Democrat and the only Senate Democrat who attended the White House ceremony at which Bush announced his choices, said: "Had I not been **encouraged,** I would not have been here today."

Daschle and other Democrats said, however, that they believe they have already influenced Bush's selections and that they expect to be consulted by the White House over future nominations. They left open the possibility that they may ultimately oppose more of the nominees who were announced yesterday, once their records are better known.

Bush used part of the ceremony in the East Room to warn against the political antagonisms that prevented many of Clinton's nominees from winning confirmation over the past six years. "We have seen political battles played out in committee hearings -- battles that have little to do with the merits of the person sitting before the committee," the president said. "I urge senators of both parties to rise above the bitterness of the past, to provide a fair hearing and a prompt vote to every nominee."

During the six-minute afternoon ceremony, all 11 nominees stood on risers next to Bush's lectern. The president extolled them but did not introduce them by name.

In exhorting the Senate to act swiftly, White House officials noted that eight of yesterday's appellate court nominations would fill vacancies that have been classified as "judicial emergencies" by the Administrative Office of the U.S Courts because of the number of vacant seats on certain circuits and the volume of cases there.

Bush has an uncommon opportunity to put his imprint on the federal judiciary because of a large number of vacancies. On the U.S. circuit courts of appeals -- the regional appellate courts that are the final arbiter over most federal laws -- 17 percent of the 179 seats are vacant. At the trial-level district courts, 10 percent of the 665 seats are vacant.

During the campaign, Bush drew the support of many conservatives who hoped that he would give the judiciary a more conservative tilt. Yesterday, a few of the president's choices already began to draw the ire of liberal organizations. For example, ADA Watch protested the nomination of Jeffrey S. Sutton to the Ohio-based 6th Circuit, contending that he has opposed the Americans With Disabilities Act and other civil rights laws.

For the Washington area, Bush nominated prominent, conservative Washington attorneys Miguel A. Estrada and John G. Roberts to the D.C. Circuit Court of Appeals, considered the nation's second-highest court after the U.S. Supreme Court. In addition to Boyle, the White House selected for the 4th Circuit Dennis W. Shedd, a district judge from South Carolina, and Roger L. Gregory, who became the first black judge on the relatively conservative circuit when Clinton gave him a one-year appointment while the Senate was in recess late last year.

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HEADLINE: Bush urges Senate to confirm court nominees quickly

BYLINE: TOM DIEMER, PLAIN DEALER BUREAU

BODY:
WASHINGTON - President Bush yesterday called on senators to "rise above the bitterness of the past" and move quickly to confirm his first 11 nominees to the U.S. Court of Appeals, the second highest court in the land.

Bush presented his choices - a conservative but diverse cast that includes two Ohioans - amid signs that Senate Democrats would not stall the judicial confirmations.

"Had I not been **encouraged**, I would not have been here today," said Sen. Patrick **Leahy**, the ranking Democrat on the Judiciary Committee, who was among the White House guests. "I will continue to work with the president." Ohio Supreme Court Justice Deborah Cook of Akron, and Columbus lawyer Jeffrey Sutton are Bush's nominees for the U.S. Court of Appeals for the 6th Circuit, which covers Ohio, Kentucky, Tennessee and Michigan.

They stood to Bush's left with the other nominees, who included three women, a Latino, and two African Americans who were originally named to the bench by President Clinton. In brief remarks aimed at the Senate, the president urged a halt to "political battles played out in committee hearings."

The current dispute centers on whether a single senator from a nominee's home state could hold up a White House appointment. Ohio's senators are both Republicans, but 14 states have one senator from each party.

The argument reached a boiling point last week when Democrats, insisting on their right to block objectionable nominations, walked out of a Senate Judiciary Committee hearing and threatened to stand in the way of all federal court confirmations.

But consultation resumed behind the scenes and tempers cooled. Yesterday, **Leahy** indicated the nominees would be considered on a case by case basis.

Sen. Mike DeWine, an Ohio Republican who sits on the Judiciary Committee, said he had "the feeling it is going to get worked out, and we are going to move forward."

In 1987, Democrats refused to confirm Supreme Court nominee Robert Bork, largely because of his conservative ideology. Last year, Republicans rejected the federal court nomination of an African-American, Ronnie White of Missouri, and stalled other appointments.

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"There are some bad feelings hung over from last year," said Sen. George Voinovich, an Ohio Republican who attended the White House event. "I am prayerful they will give each of these nominees their day in court."

Cook, who is in her second term on the Ohio high court, said she could understand how "others label me a conservative."

"My record speaks for itself," she said. "I don't apply any sort of litmus test. I must apply the law."

Sutton, the former Ohio Solicitor General, has argued nine cases before the U.S. Supreme Court. He has defended school vouchers and argued successfully that states cannot be sued by aggrieved workers under the Americans with Disabilities Act.

Both Ohio nominees are members of the Federalist Society, an organization of conservative lawyers who believe in strict construction of the Constitution.

"If nominees are picked because of their competence and independence, I suspect they get confirmed," **Leahy** said. "If they're picked because of their ideology and the direction they want to bring the court, they're not going to be confirmed."

Plain Dealer reporter Elizabeth Auster contributed to this report.

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The Judicial Vacancy Crisis: Quantity and Quality

By
Thomas L. Jipping, J.D.

Submitted to the U.S. House of Representatives Subcommittee on the Constitution
Following the Hearing
"A Judiciary Diminished is Justice Denied:
the Constitution, the Senate, and the Vacancy Crisis in the Federal Judiciary"

Submitted on Behalf of:

60 Plus Association
American Center for Law & Justice
American Conservative Union
American Family Association
Centre for New Black Leadership
Christian Coalition of America
Citizens for Community Values
Citizens United Foundation
Concerned Women for America
Eagle Forum
Family Research Council
Gun Owners of America
Home School Legal Defense Association
Landmark Legal Foundation
Law Enforcement Alliance for America
Life Issues Institute
National Legal Foundation
Southeastern Legal Foundation
U.S. Business & Industry Council

October 18, 2002

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"interpretation"[32] which is "the process of...ascertaining the meaning of a...written document."[33] While the legislative task involves political "will,"[34] the judicial task involves "judgment."[35] The law's meaning comes from those who make, not those who interpret, it.

This "judicial restraint," that is, judges restrained by law made by others, is part of the system of separated government powers that is necessary to preserve liberty itself. Alexander Hamilton stressed that "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'"[36] The Supreme Court has recognized that the separation of government powers was "adopted by the Framers to ensure the protection of 'our fundamental liberties.'"[37]

Like the U.S. Constitution, every state constitution separates government power into legislative, executive and judicial branches. This separation alone implies that each branch may not exercise the powers given to the others. At least 35 states,[38] however, explicitly state, in the words of the Arizona Constitution, that each branch "shall be separate and distinct, and no one [branch] shall exercise the powers properly belonging to either of the others."[39] Some states even identify this separation of powers, including the judicial branch's inability to exercise lawmaking power, as necessary "to the end that it may be a government of laws and not of men."[40]

The debate over judicial appointments is thus a debate over "the proper limits of judicial power."[41] That is, should the separation of powers be maintained and judges remain limited to interpreting the law or should the separation of powers be scrapped and judges have the power to make law?

A. The Obstruction Campaign's Goals

Leftist political forces oppose a judiciary that allows the people to make law because the people reject the leftist political agenda. The far-left needs a liberal activist judiciary to achieve its political goals. The far-left opposes President Bush's judicial nominees because he has pledged to appoint judges who will not legislate from the bench.[42]

1. Limiting judicial appointments

This obstruction campaign's first goal is to limit Bush appointments to all federal courts in general, and to certain courts in particular. This goal, in turn, has two related motives, preventing appointment of judges not likely to rule "favorably" and, therefore, to maximize the influence of liberal activist judges already on the bench.

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The far-left wants to maintain, for example, the current 51 percent majority of full-time judges appointed by Democrat presidents.[43] It also wants to maintain the composition of individual courts. Of the 24 full-time judges on the U.S. Court of Appeals for the Ninth Circuit, for example, 17 (71 percent) were appointed by Democrat presidents, 14 of them (58 percent) by President Clinton alone. President Bush has made nominations to fill two of the four current vacancies but neither has received a Judiciary Committee hearing.

Similarly, seven of the 16 full-time positions on the U.S. Court of Appeals for the Sixth Circuit are vacant. Of the nine full-time judges, six (67 percent) were appointed by Democrat presidents, five (56 percent) by President Clinton. President Bush has made nominations to fill all seven of the current vacancies but only one has received a Judiciary Committee hearing. Of these seven nominations, two have been pending for 527 days, three for 344 days, and one for 303 days.[44]

2. Influencing judicial decisions

As Todd Gaziano described in his Subcommittee testimony, prolonged numerous vacancies can permit certain "emergency rules to operate."[45] These rules can alter the normal composition of the three-judge appeals court panels to include two senior or visiting judges rather than two full-time judges.[46] This, in turn, can influence the results and reasoning in judicial decisions from what they would have been otherwise. The Ninth Circuit decision declaring the Pledge of Allegiance unconstitutional because it contains the words "under God"[47] was one of those cases.

Mr. Gaziano also described how multiple, long-standing vacancies make "judicial manipulation of the docket" a "disturbing possibility."[48] He gave one prominent example, a case in which the Sixth Circuit upheld the University of Michigan's racial preference admissions policy.[49] The district court had struck down the policy.[50] On May 14, 2001, those defending the policy asked that the entire *en banc* Sixth Circuit, rather than a three-judge panel, consider the appeal. At the time of this request, the Court had 11 full-time judges, six Democrats and five Republicans. Chief Judge Boyce Martin, a Carter appointee, did not circulate the *en banc* request until October 15, after two Republican appointees had retired. The now-reduced Court took the case and voted 5-4 to uphold the racial preference policy on May 14, 2002. The chief judge wrote the opinion, with all five judges in the majority Democrat appointees and three of the four dissenters Republican appointees.

At that time, seven Bush nominees were pending in the Senate Judiciary Committee, two of them for more than a year and six for more than six months. This was certainly enough time for confirmation, since the Committee has confirmed at least seven appeals court nominees within six months of their nomination.[51] And it is likely that the votes of any who had been confirmed would have changed the outcome

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of this case, an outcome that was in direct contrast to the way other circuits had decided the same issue.[52]

B. The Obstruction Campaign's Tactics

1. Changing the Senate's role

The far-left will employ whatever tools will help achieve its political goals. If judges are more receptive than legislatures, leftists abandon the statehouse for the courthouse, even if doing so upsets the separation of powers. Similarly, when the people elect a president pledged to nominating restrained judges, the far-left tries to empower the Senate to play a more aggressive role, even if doing so upsets the constitutional division of roles in the judicial selection process.

The blueprint for this approach was created in 1985 with publication of Harvard law professor Laurence Tribe's book *God Save This Honorable Court*. The Senate used his battle plan to defeat the 1987 Supreme Court nomination of Robert Bork. That episode in confirmation politics is repeating itself, with Professor Tribe again advising Senate Democrats, testifying at a June 2001 hearing that ideology should drive confirmations.[53]

As Professor John Eastman outlined in his Subcommittee testimony, America's founders gave the exclusive power to nominate and the primary power to appoint federal judges to the president.[54] This is clear, first and foremost, from the Constitution's text itself. The sole mention of judicial selection is found in Article II about the executive branch. Alexander Hamilton wrote the obvious, that "in the business of appointments the execurtive will be the principal agent."[55]

This, then, makes Mr. Neas's claim that "the Senate has a co-equal role with the President in appointing federal judges"[56] absolutely incomprehensible. One can readily see the political or tactical value for him of fundamentally altering the Constitution's assignment of judicial selection responsibilities, but tactical value alone does not make it so.

As to the Senate's role of checking the president's ultimate appointment, Hamilton wrote that it would have "a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters."[57] In contrast, the far-left wants the Senate to have a very loud operation directed toward co-opting the president's appointment power altogether.

2. Judiciary Committee defeating nominees

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Other historical standards relate to the tactics used to defeat Bush nominees. Appeals court nominee Priscilla Owen, for example, was the first female nominee ever voted down in the Judiciary Committee and the first who had received a unanimous "well qualified" rating from the American Bar Association. She was the second Bush nominee voted down by the Judiciary Committee, only the sixth in nearly 60 years.[58]

Republicans never defeated a Clinton nominee in the Judiciary Committee when they ran the Senate during 1995-2000. Even Ronnie White, the only Clinton nominee defeated by the full Senate, was approved by the committee and sent to the Senate for a final vote.

3. Partisanship

The Judiciary Committee has voted on three nominees to the U.S. Court of Appeals for the Fifth Circuit, one each from Texas, Louisiana, and Mississippi, the three states in the jurisdiction. The committee, by the same party-line vote, defeated the two nominees from states with two Republican senators, Priscilla Owen from Texas and Charles Pickering from Mississippi, and approved the nominee from a state with two Democrat senators, Edith Clement from Louisiana.[59] Several other appeals court nominees who remain stuck in the Judiciary Committee - Deborah Cook and Jeffrey Sutton of Ohio, Michael McConnell of Utah, and Timothy Tymkovich of Colorado - are from states with two Republican senators. Others, including Dennis Shedd of South Carolina, have the bi-partisan support of their home-state senators.

When Democrats control the Senate, they confirm an average of 65 nominees per year for a Democrat president (1993-94) and 44 nominees per year for a Republican president (1987-92, 2001-02), for a partisan differential of 21. When Republicans control the Senate, they confirm an average of 49 nominees per year for a Republican president (1981-86) and 41 nominees per year for a Democrat president (1995-2000), for a partisan differential of eight.

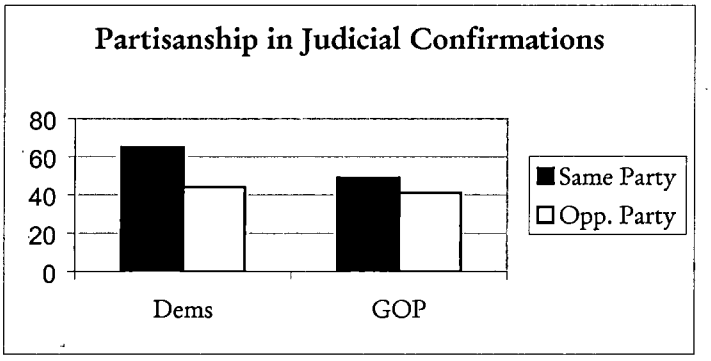

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III. Conclusion

By most objective measures, certainly by those Democrats have used in the past, there is a judicial vacancy crisis today. The cause of that crisis, however, is more important. The campaign to obstruct President Bush's judicial appointments is perpetuating the vacancy crisis to keep to a minimum appointment of restrained judges who will let the people make the law. Restrained judges, however, who know their proper place in our system of separated government power, are necessary for the people to retain the power to govern ourselves and, therefore, to preserve our liberty.

NOTES

[1] Senior Fellow in Legal Studies, Concerned Women for America. M.A. in political science, State University of New York (SUNY) at Buffalo (1989); J.D. *cum laude*, SUNY-Buffalo (1987); B.A. with honors, Calvin College (1983). Law Clerk to Judge William D. Hutchinson, U.S. Court of Appeals for the Third Circuit (1988-89).

[2] Organizations endorsing this report include the 60 Plus Association, American Center for Law & Justice, American Conservative Union, American Family Association, Centre for New Black Leadership, Christian Coalition of America, Citizens for Community Values, Citizens United Foundation, Concerned Women for America, Eagle Forum, Family Research Council, Gun Owners of America, Homes School Legal Defense Association, Landmark Legal Foundation, Law Enforcement Alliance of America, Life Issues Institute, National Legal Foundation, Southeastern Legal Foundation, U.S. Business & Industry Council.

[3] See 28 U.S.C. section 371 (1994).

[4] See http://www.uscourts.gov/vacancies/judgevacancy.htm.

[5] In April 2000, the figure was 67.5 percent; in September 1999, it was 77.9 percent; in March 1999, it was 83.3 percent; in October 1998, it was 87.1 percent; in April 1998, it was 84.6 percent; and in April 1997, it was 81 percent. See Jipping, "From Least Dangerous Branch to Most Profound Legacy: The High Stakes in Judicial Selection," 4 *Texas Review of Law & Politics* 365,419 (2000).

[6] http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html.

[7] This includes 665 positions on the U.S. District Court, 179 on the U.S. Court of Appeals, nine on the U.S. Court of International Trade, and nine on the U.S. Supreme Court.

[8] U.S. Constitution, Article III, Section 1 ("The Judges ... shall hold their Offices during good Behaviour"). This clause does not impose an additional condition for service, or an additional ground for removal, but only that judicial tenure, unlike legislative or executive, is not limited to a term of years. See Fenton, "The Scope of the Impeachment Power," 65 *Northwestern University Law Review* 719,724-25 (1970); Ferrick, "Impeaching Federal Judges: A Study of the Constitutional Provisions," 39 *Fordham Law Review* 1,51 (1970) ("'Good Behaviour' was an expression of 'tenure,' used to secure the independence of the judiciary.").

[9] The Administrative Office of the U.S. Courts currently lists 15 future vacancies, all on the U.S. District Court, six of them at least six months in the future. See http://www.uscourts.gov/vacancies/futurevacancy.htm.

[10] T. Gaziano, "Testimony of Todd F. Gaziano" House Judiciary Subcommittee on the Constitution (October 10, 2002), at 5 (hereinafter *Gaziano Testimony*). In 1994, the Clinton administration argued that 63 vacancies constituted "virtual full employment." See Hatch, "Judicial Nominees: The Senate's Steady Progress," *The Washington Post*, January 11, 1998, at C9; *Congressional Record*, January 28, 1998,

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at S74 (statement of Sen. Hatch); *Congressional Record*, May 21, 1998, at S5316 (statement of Sen. Hatch) ("[T]he Clinton administration is on record as having stated that 63 vacancies is virtual full employment for the federal judiciary."). Vacancies under President Bush have averaged 51 percent above even this higher benchmark.

[11] http://www.uscourts.gov/cj96.htm.

[12] http://www.uscourts.gov/ttb/jan98ttb/january.htm.

[13] Current Judiciary Committee Chairman Sen. Patrick Leahy (D-Vermont) frequently cited Chief Justice Rehnquist's statements during Judiciary Committee meetings and in speeches before the full Senate. See, e.g., *Congressional Record*, April 14, 1999, at S3670; *Congressional Record*, October 22, 1997, at S10924; Judiciary Committee Statement, September 30, 1997; *Congressional Record*, September 11, 1997, at S9163; *Congressional Record*, July 10, 1997, at S7206; *Congressional Record*, June 26, 1997, at S6492. Sen. Edward Kennedy (D-Massachusetts), a longtime Judiciary Committee member, has done the same. See *Congressional Record*, March 19, 1997, at S2515). Former Attorney General Janet Reno referred to the Chief Justice's warnings in her August 5, 1997, speech to the American Bar Association. Sen. Charles Schumer (D-New York), a Judiciary Committee member, wrote a letter to the editor of the Albany *Times Union* on January 18, 1998, in which he stated that the Chief Justice "is correct in saying that partisan concerns are leading to a plethora of judicial vacancies."

[14] http://www.janda.org/politxts/State%20of%20Union%20Addresses/1993-2000%20Clinton/Clinton.98.html. President Clinton cited the Chief Justice's warning in his August 12, 1999, speech to the American Bar Association, when there were only 63 vacancies. He often cited the Chief Justice during his weekly radio addresses. See *Congressional Record*, October 22, 1997, at S10924.

[15] See *supra* note 6.

[16] http://leahy.senate.gov/press/199801/980101.html.

[17] *Id.*

[18] *Congressional Record*, October 21, 1998.

[19] R. Neas, "Written Testimony of Ralph G. Neas," House Judiciary Subcommittee on the Constitution (October 10, 2002), at 1 (hereinafter *Neas Testimony*).

[20] See Rutkus, "Judicial Nominations by President Clinton During the 103rd-106th Congresses," *CRS Report for Congress* (February 21, 2001).

[21] CRS does not count judicial nominations made within four months of adjournment of a two-year Congress because of the time required for FBI background checks, Judiciary Committee evaluation, hearings, and the like. See Garcia, "Failed Nominations on Which No Hearings Were Held, 1987-1996," *Congressional Research Service Memorandum* (September 5, 1997), at 1. Since President Bush no longer provides the American Bar Association with names of prospective nominees prior to nomination, however, the ABA conducts its evaluations after nomination, lengthening this time.

[22] *Neas Testimony*, at 1.

[23] Rutkus, *supra* note 20, at summary page.

[24] *Neas Testimony*, at 2.

[25] U.S. Constitution, Article II, Section 2.

[26] Speech before the American Society of Newspaper Editors, April 19, 1996.

[27] Meese, "Foreword," in *Judicial Selection: Merit, Ideology, and Politics* (National Legal Center for the Public Interest, 1990), at x. This appeared to be true for some appointees of President Harry Truman. Judge David Bazelon served on the U.S. Court of Appeals for the D.C. Circuit from 1949 to 1993. Judge David Edelstein served on the U.S. District Court for the Southern District of New York from 1951 to 2000. He was in active service for 43 of those 49 years. And Judge Seybourn Lynn served on the U.S. District Court for the Northern District of Alabama from 1945 to 2000, nearly half of those 55 years as a senior judge.

[28] U.S. Constitution, Article III, Section 1.

[29] Federal judges are subject to the same standard for impeachment as all other "civil Officers of the United States," namely, "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Constitution, Article II, Section 4.

[30] Hamilton, *The Federalist* No.78, available at http://memory.loc.gov/const/fed/fed_78.html.

[31] Hamilton, *The Federalist* No.73, available at http://memory.loc.gov/const/fed/fed_73.html.

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[32] Hamilton, *supra* note 30.
[33] *Black's Law Dictionary* (5th ed. 1979), at 734.
[34] Hamilton, *supra* note 30.
[35] *Id.*
[36] *Id.*, quoting Montesquieu, *The Spirit of Laws* (Nugent trans., Rothman 1991), at 152.
[37] *Gregory v. Ashcroft*, 501 U.S. 452,458 (1991), quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234,242 (1985).
[38] See, e.g., Alabama Const., Section 43 ("the judicial [department] shall never exercise the legislative and executive powers, or either of them"); Arizona Const., Article III; Arkansas Const., Article 4, Section 2; California Const., Article 3, Section 3; Colorado Const., Article III; Connecticut Const., Article XVIII; Florida Const., Article II, Section 3 ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches"); Idaho Const., Article II, Section 1; Illinois Const., Article II, Section 1 ("No branch shall exercise powers properly belonging to another"); Indiana Const., Article 3, Section 1; Iowa Const., Article III, Section 1; Kentucky Const., Section 28; Louisiana Const., Article II, Section 2; Maine Const., Article III, Section 2; Maryland Const., Article 8; Massachusetts Const., Part the First, Article XXX; Michigan Const., Article III, Section 2; Minnesota Const., Article III, Section 1; Missouri Const., Article II, Section 1; Montana Const., Article III, Section 1; Nebraska Const., Article II, Section 1; Nevada Const., Article III, Section 1; New Jersey Const., Article III, Section 1 ("No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others"); North Carolina Const., Article I, Section 6; Oklahoma Const., Article IV, Section 1; Oregon Const., Article III, Section 1; Rhode Island Const., Article V; South Carolina Const., Article I, Section 8; South Dakota Const., Article II; Tennessee Const., Article II, Section 2; Texas Const., Article 2, Section 1; Utah Const., Article V, Section 1; Vermont Const., Chapter II, Section 5; Virginia Const., Article I, Section 5; West Virginia Const., Article V, Section 1; Wyoming Const., Article II, Section 1.
[39] Arizona Constitution, Article III.
[40] Alabama Const., Article III, Section 42. See also Massachusetts Const., Part the First, Article XXX.
[41] Meese, *supra* note 27. See also McDowell, "Doubting Thomas," *The New Republic*, July 29, 1991, at 12 (it is "an argument over ... the nature and extent of judicial power under a written Constitution").
[42] Making his first judicial nominations on May 9, 2001, President Bush said: "Every judge I appoint will be a person who clearly understand the role of a judge is to interpret the law, not to legislate from the bench." http://www.whitehouse.gov/news/releases/2001/05/20010509-3.html.
[43] http://www.judicialselection.org/.
[44] http://www.usdoj.gov/olp/nominations.htm.
[45] *Gaziano Testimony*, at 11.
[46] See *id.* at 12.
[47] *Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002).
[48] *Gaziano Testimony*, at 14.
[49] See *id.* The case is *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002).
[50] *Grutter v. Bollinger*, 137 F.Supp.2d 821 (E.D. Mich. 2001).
[51] These include Barrington Parker (nominated 5/9/01, confirmed 10/11/01) and Reena Raggi (nominated 5/1/02, confirmed 9/20/02) to the Second Circuit, Roger Gregory (nominated 5/9/01, confirmed 7/20/01) to the Fourth Circuit, Edith Clement (nominated 5/9/01, confirmed 11/13/01) to the Fifth Circuit, William Riley (nominated 5/23/01, confirmed 8/2/01) to the Eighth Circuit, Harris Hartz (nominated 6/21/02, confirmed 12/6/01) to the Tenth Circuit, and Sharon Prost (nominated 5/21/01, confirmed 9/21/01) to the Federal Circuit.
[52] *Gaziano Testimony*, at 14. In another example, the Sixth Circuit voted 2-1 that a Kentucky resolution allowing display of historic documents including the Ten Commandments is an unconstitutional "establishment of religion." In *Adland v. Russ*, 2002 U.S.App. LEXIS 21054 (10/9/02), the same Carter appointee, Chief Judge Boyce Martin, wrote the opinion, joined by a Clinton-appointed visiting judge who was participating only because the Sixth Circuit was so under-staffed.
[53] See Professor Tribe's testimony at http://judiciary.senate.gov/oldsite/te062601tri.htm.

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[54] J. Eastman, "The Limited Nature of the Senate's Advice and Consent Role: Prepared Testimony of Dr. John Eastman," House Judiciary Subcommittee on the Constitution (October 10, 2002).
[55] A. Hamilton, *The Federalist* No.65, available at http://memory.loc.gov/const/fed/fed_65.html.
[56] *Neas Testimony*, at 2. He is not alone among leftists pushing this unconstitutional view. On June 26, 2001, Sen. Charles Schumer (D-New York) chaired a hearing in his Judiciary Subcommittee on Administrative Oversight and the Court titled "Should Ideology Matter? Judicial Nominations 2001." Marcia Greenberger, Co-President of the National Women's Law Center, testified that the Senate has a "co-equal, independent role" in judicial selection. See http://www.nwlc.org/pdf/nominationstestimony.pdf, testimony at 6. Her argument that the president having "a superior role in judicial appointments ... would upset the ... [Constitution's] system of checks and balances," *id.* at 7, is impossible to reconcile with the view of America's founders (the ones who created that system of checks and balances) that "in the business of appointments the executive will be the principal agent." *See supra* note 55.
[57] A. Hamilton, *The Federalist* No.76, available at http://memory.loc.gov/const/fed/fed_76.html.
[58] See Rutkus, "Senate Judiciary Committee Votes on Judicial Nominations Other than Those Approving Motions to Report Favorably, 1943 to the Present," *Congressional Research Service Memorandum* (March 5, 2002), at 3-4. The others were Charles Pickering, defeated on March 14, 2002; Kenneth Ryskamp, defeated on April 11, 1991; Bernard Siegan, defeated on July 14, 1988; Jefferson Sessions, defeated on June 5, 1986; and Charles Winberry, defeated on March 4, 1980. See *id.*
[59] The Judiciary Committee approved Judge Clement's nomination on November 1, 2001, with the full Senate approving the nomination on November 13, 2001, by a 99-0 vote. See http://www.senate.gov/legislative/vote1071/vote_00335.html.

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The Judicial Vacancy Crisis: Quantity and Quality

By
Thomas L. Jipping[1]

Submitted to the U.S. House of Representatives Subcommittee on the Constitution
Following the Hearing
"A Judiciary Diminished is Justice Denied:
the Constitution, the Senate, and the Vacancy Crisis in the Federal Judiciary"

October 18, 2002

On October 10, 2002, the U.S. House of Representatives Judiciary Subcommittee on the Constitution held an oversight hearing on the current vacancy crisis in the federal judiciary. This report is submitted on behalf of various organizations[2] concerned about both the quantitative vacancy crisis and its qualitative cause.

Leftist political forces are obstructing President Bush's judicial appointments, thus perpetuating a judicial vacancy crisis, because they seek a judiciary more powerful, and more ideological, than those appointments will likely provide. They see an unelected federal judiciary, rather than an elected legislature, as a more reliable and potent vehicle for achieving their political goals.

I. Quantity: Is There a Vacancy Crisis?

A. What Is a "Vacancy"?

To the layman, a judicial "vacancy" implies an empty position with no one doing any work. Judges in "active" service can, however, assume "senior" status, a form of semi-retirement that allows them to continue working and receive a full judicial salary.[3] The change in status does create an active-service "vacancy" needing a replacement, but means a judge remains, maintaining a partial caseload. Fifty-eight of the current 77 vacancies (75 percent) were created by judges assuming senior status,[4] a proportion comparable to previous years.[5]

Judicial vacancies will always be with us. In his 2001 annual report on the judiciary, Chief Justice William Rehnquist acknowledged that "part of the problem is endemic to the size of the federal Judiciary. With more judges, there are more

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retirements and more vacancies to fill."[6] Nonetheless, vacancies have a greater impact when they are widespread, of long duration, and deliberate.

B. Judicial "Full Employment"

The federal judiciary currently contains 862 permanent positions[7] and judges, who serve for an unlimited term,[8] retire whenever they wish. Some announce their retirement months in advance,[9] others do not. One scholar testifying before the Subcommittee concluded that "a vacancy rate of about three to four percent [26-34 vacancies] represents the 'full employment' level ... for the federal judiciary."[10] The current 77 vacancies constitute a 9 percent vacancy rate.

C. Is There a Vacancy "Crisis"?

1. The Rehnquist standard

One possible "crisis" benchmark comes from Chief Justice William Rehnquist. When there were 82 vacancies, he warned in his 1996 annual report on the judiciary that "filling judicial vacancies is crucial to the fair and effective administration of justice."[11] One year later, with vacancies at the same level, Chief Justice Rehnquist's warning was more direct: "Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal Judiciary."[12]

Democrats frequently quoted Chief Justice Rehnquist's warnings to argue for more confirmations.[13] In his 1998 State of the Union Address, for example, President Clinton said: "Here is what the Chief Justice of the United States wrote: 'Judicial vacancies cannot remain at such high levels indefinitely without eroding the quality of justice.' I simply ask the United States Senate to heed this plea and vote on the highly qualified nominees before you, up or down."[14]

Chief Justice Rehnquist's warning focused on a sustained high vacancy rate. Vacancies have only recently dropped to the current level, vacancies averaging 100 in 2001 and 95 overall since President Bush took office. This prompted Chief Justice Rehnquist, in his 2001 annual report, to repeat his 1997 warning and urge the Senate "to act with reasonable promptness and to vote on each nominee up or down."[15]

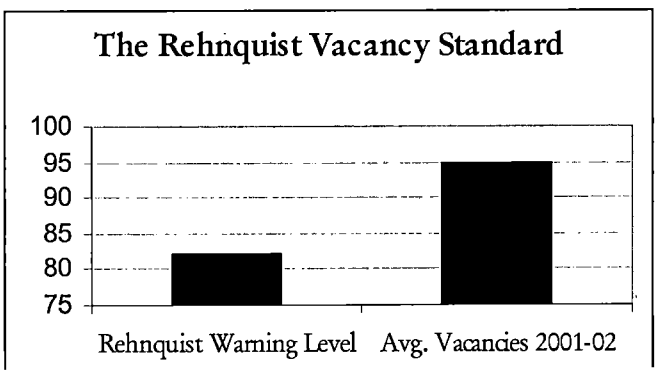

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2. The Leahy standards

Current Senate Judiciary Committee Chairman Patrick Leahy (D-Vermont) has also offered standards for identifying a judicial vacancy crisis. Responding to Chief Justice Rehnquist's 1997 warning, for example, Sen. Leahy said: "I hope his message will help shame the Senate into clearing the backlog early in the new year."[16] Vacancies under President Bush have averaged 16 percent above the level when the Chief Justice issued his warning, a level Sen. Leahy condemned as "poor" and worthy of "shame."

Sen. Leahy also condemned the Senate for leaving "more than 40 judicial nominees" in "limbo, having never been accorded a Senate vote."[17] Of the 47 currently pending nominees, 24 have not yet received a hearing in Sen. Leahy's committee. Nearly half of these have been waiting for more than a year.

On October 21, 1998, Sen. Leahy said that 48 vacancies (5.6 percent) constituted "a judicial vacancy crisis."[18] Vacancies are currently 60 percent higher than Sen. Leahy's "crisis" level and have averaged 98 percent higher since President Bush

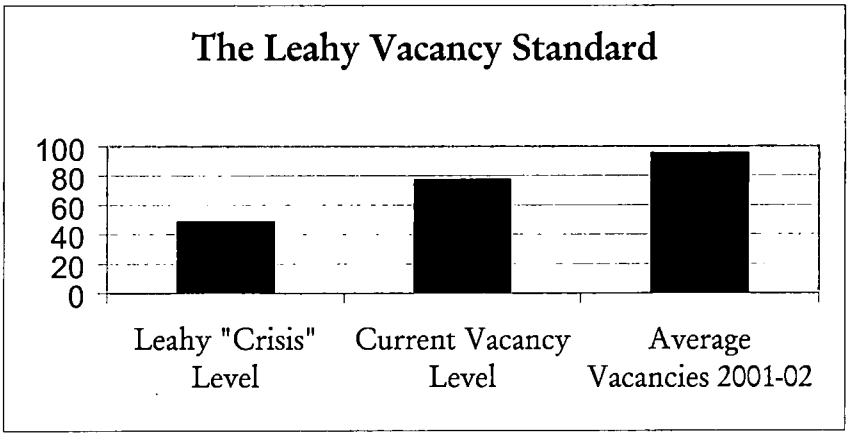

took office.

3. Historical standards

With Democrats running the Senate, judicial vacancies under President Bush have averaged 95, compared to an average of 70 when Republicans ran the Senate under President Clinton. Vacancies on the U.S. Court of Appeals have been 50 percent higher under President Bush than under President Clinton.

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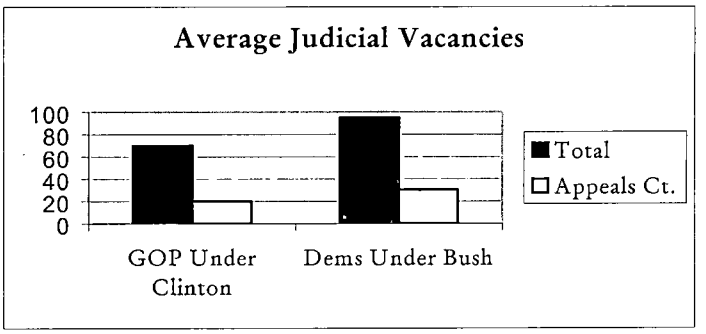

Confirmations provide another comparison. The Senate confirmed 128 nominees during the first two years of the Clinton administration but just 80 during the first two years of the Bush administration. Democrats controlled the Senate during both periods, suggesting a partisan pattern.

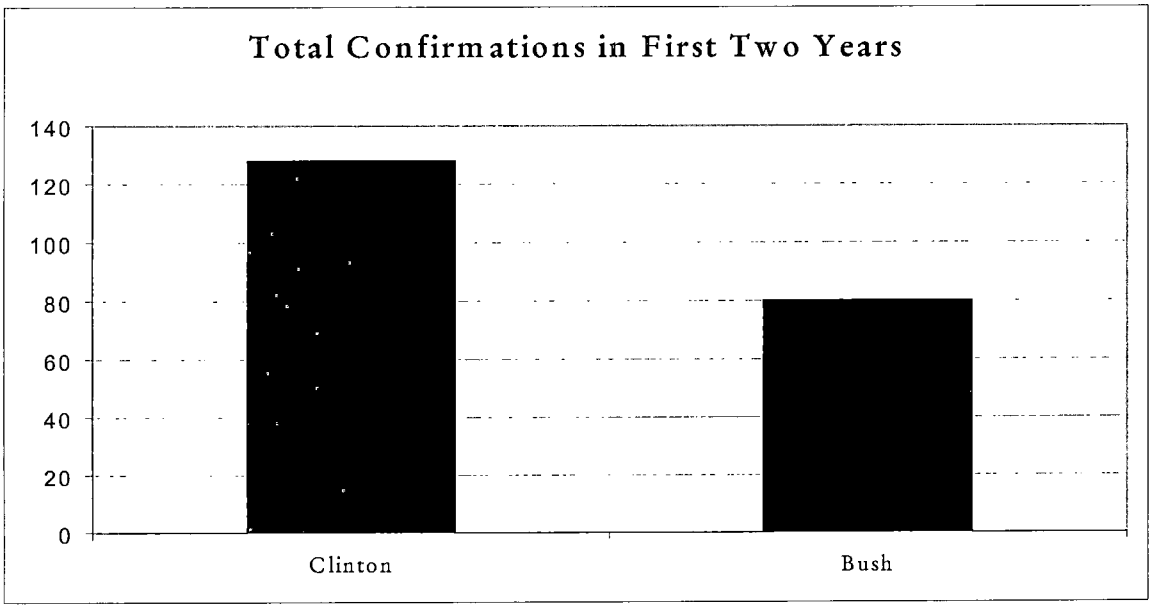

Confirmation rates are an even better measure than confirmation totals because they account for the number of nominations. The Senate confirmed an average of 92 percent of the three previous presidents' appeals court nominees during their first two years, compared to just 44 percent for President Bush.

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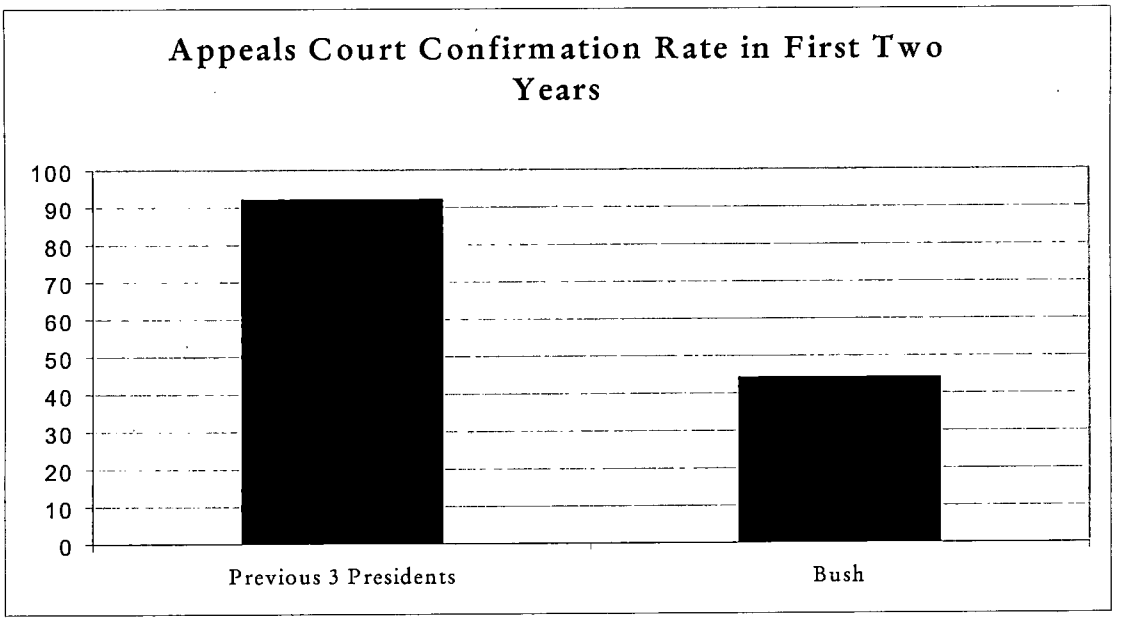

Another historical standard reflects the deference traditionally given to a new president's first nominees. President Bush sent his first group of 11 appeals court nominees to the Senate on May 9, 2001. Three have been confirmed, three have had a Judiciary Committee hearing but no vote, one has been defeated in the Judiciary Committee, and four have yet to receive a hearing at all. The average time pending in the Senate for this first group of nominees is 421 days.

Two of the three confirmed nominees, however, had already been named to the federal bench by President Clinton, one to the U.S. District Court and the other, by recess appointment, to the Fourth Circuit. President Bush nominated U.S. District Judge Barrington Parker to the Second Circuit and Judge Roger Gregory to a full position on the Fourth Circuit as a "good will" bi-partisan gesture. Removing these from the calculation shows that the nine appeals court nominees originally selected by President Bush have been pending for an average of 489 days. By comparison, the three previous presidents saw their first 11 appeals court nominees confirmed in an average of 81 days.

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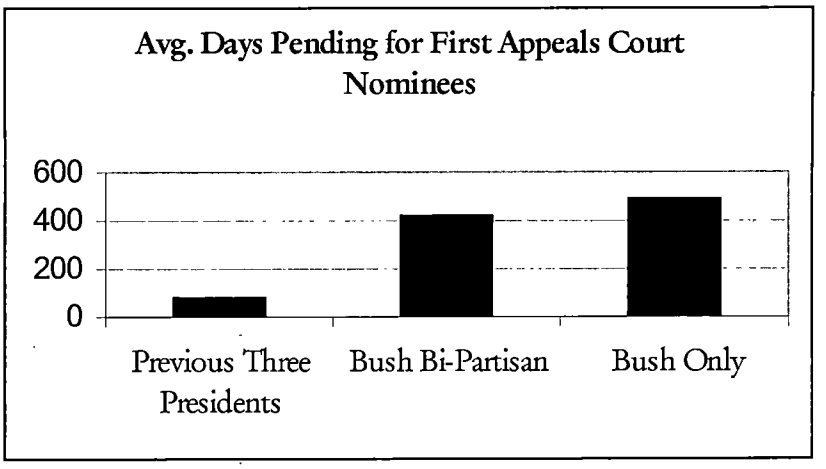

4. Ralph Neas' fake standards

Ralph Neas, president of People for the American Way (PAW), testified before the Subcommittee. In his oral remarks and written statement, Mr. Neas repeated several claims PAW has often made about confirmation of President Clinton's judicial nominees by the Republican Senate during 1995-2000.

First, Mr. Neas claimed that "35 percent of President Clinton's appellate court nominees were blocked from 1995-2000."[19] **Creative statistical tricks allow Mr. Neas to overstate the truth by at least 40 percent.**

This and other similar claims state confirmations as a percentage of "nominations" rather than "nominees." An individual nominee, however, can result in more than one nomination if the Senate does not confirm him and the president re-nominates him. The focus on nominations rather than nominees overstates the nomination totals and understates the confirmation rate.

Mr. Neas counts as "blocked nominations" individuals who are today serving as federal judges!

According to the Congressional Research Service, President Clinton's appeals court nominations exceed his appeals court nominees by nearly 20 percent.[20] The CRS data show that during 1995-2000, President Clinton nominated 68 individuals to the U.S. Court of Appeals, withdrew four of them himself, and the Senate confirmed 41 of the rest. Eliminating several others who were nominated too late to be confirmed[21] shows that the Republican-led Senate failed to vote on about 25 percent of President Clinton's appeals court nominees. Not only is this significantly less than Mr. Neas' claim, but he provided no benchmark for evaluating whether even the figure he used was outside the historical norm.

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Second, Mr. Neas claimed that "45 percent [of President Clinton's appellate court nominees] failed to receive a vote in the Congress during which they were nominated."[22]

Accepting this as an accurate statement for the moment, the situation is, by Mr. Neas' own measure, obviously worse today. At least 54 percent of President Bush's appellate court nominees have not received a vote during the 107th Congress. Not surprisingly, Mr. Neas did not mention this in his testimony.

This claim, however, is false because it too counts nominations rather than nominees. Mr. Neas can thus count many nominees as not receiving a vote in the Congress during which they were nominated, even though most of these nominees were eventually confirmed. The CRS report cited above, in fact, states that "most ... of the persons whose nominations were returned" and the end of a two-year Congress "were later re-nominated and ultimately confirmed."[23]

President Clinton, for example, nominated William Fletcher to the U.S. Court of Appeals for the Ninth Circuit three times, in the 103rd-105th Congresses. The Senate confirmed him on October 8, 1998, one of the many sitting federal judges whom Mr. Neas would count as "blocked."

Another gimimick allowing Mr. Neas to create fake standards is comparing different time frames. As he did in his testimony before the Subcommittee, he will often compare "the first year during which Democrats controlled the Senate, beginning in July 2001"[24] with a previous calendar year.

II. Quality: The Cause of the Vacancy Crisis

The Constitution gives the president the power to nominate and, subject to Senate approval, to appoint federal judges.[25] As former Senate Majority Leader Robert Dole has said, these appointments may be a president's "most profound legacy."[26] Former Attorney General Edwin Meese agrees: "No President exercises more power more far-reaching, more likely to influence his legacy, than the selection of federal judges. Laws come and go; policies wax and wane; but judges, it often seems, go on forever."[27] Federal judges have unlimited terms, serving "during good behavior"[28] until they leave office voluntarily or by impeachment.[29] More importantly, during that unlimited tenure federal judges have the final word on the meaning, and thus the content, of our laws.

By original design and through most of American history, the scope of this power was very modest. America's founders believed that the judiciary would be the "weakest"[30] branch of government because the legislative branch, which has "superior weight and influence,"[31] makes the law. The judiciary's task is merely

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THE WHITE HOUSE

WASHINGTON

October 22, 2002

MEMORANDUM FOR HARRIET MIERS

FROM: ALBERTO R. GONZALES

SUBJECT: STAFFING OF JUDICIAL CONFIRMATION PROCESS DECISION MEMO

Attached is a decision memo for the President regarding the Judicial Confirmation process.

Please circulate this memo with a notation of "Close Hold." Comments should be returned to Brett Kavanaugh in my office no later than 4:00 pm on Wednesday, October 23, 2002. His phone number is 456-7984 and his fax number is 456-5104.

Thank you.

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[President's Judicial Nominations] [1]

Counsel's Office, White House

Kavanaugh, Brett

Subject File

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NOMINATION OF JAMES A. TEILBORG, OF ARIZONA, TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA -- (Senate - October 03, 2000)

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The assistant legislative clerk read the nomination of James A. Teilborg, of Arizona, to be U.S. District Judge for the District of Arizona.

Mr. LEAHY. Mr. President, I understand that under the prior unanimous consent agreement the distinguished Senator from Utah, Mr. **HATCH**; the Senator from Arizona, Mr. **KYL**; and I each have 1 hour for the Teilborg nomination, and the distinguished Senator from Iowa, Mr. **HARKIN**, has up to 3 hours, unless time is yielded back, is that correct?

The PRESIDING OFFICER. That is correct.

Mr. LEAHY. Mr. President, I ask unanimous consent that I be able to yield 5 minutes to the distinguished Senator from North Carolina, Mr. **EDWARDS**, without losing my right to the floor.

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

The Senator from North Carolina is recognized.

Mr. EDWARDS. Mr. President, I am pleased that today we are discussing some of the vacancies that exist in the Federal judiciary. There was a discussion this morning about an issue that is near and dear to my heart and important to the folks in North Carolina, which is the vacancies on the U.S. Court of Appeals for the Fourth Circuit.

Senator **ROBB** came down and discussed Judge Gregory's nomination. Chairman **HATCH** responded. I would like to say a few words about that discussion.

There are 15 authorized judgeships on the Fourth Circuit Court of Appeals. There are presently only 10 active judges on that court. By tradition, my State of North Carolina, which is the largest, most populous State in the Fourth Circuit, is allocated three of those judgeships. Out of those 10 judgeships --presently active judges on the Fourth Circuit--how many come from North Carolina? None.

We are the only State in the nation that is not represented on a Federal circuit court, along with Hawaii. We are the largest State in the circuit. We have the largest population in the circuit, and we don't have a judge representing our State on this court. That has been true since Judge Ervin died in 1999.

The people of North Carolina, who have cases regularly heard in the Fourth Circuit, have no one there representing them. In addition, to the extent the court is regularly interpreting matters of North Carolina law, which it is required to do in diversity cases, there is no judge in this court who is trained in North Carolina law. Now, this Congress recognized some time ago how important it was for States to be represented on their circuit courts of appeal by enacting a law--in fact, requiring that States have a judge on their Federal circuit court of appeals. We have none. As I indicated before, along with Hawaii, we are the only two States in the country that are not represented on our circuit court of appeals.

Now, Chairman **HATCH** had some discussion this morning about Judge Gregory and his nomination to the Fourth Circuit in the State of Virginia, and the fact that that was a slot traditionally allocated to my State of North Carolina.

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My question to Chairman **HATCH** is: What are we doing about the nomination of Judge Wynn? Judge Wynn is a very well-respected, very moderate, centrist jurist from North Carolina, who has been nominated for over a year from my State to fill a vacancy that is traditionally allocated to North Carolina. There is no question that Judge Wynn would be approved by this

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body if he ever got a hearing and a vote on the floor.

Unfortunately, that has not happened. It is easy to understand why the Clinton administration believed they needed to take some action. That action has turned out to be to nominate Judge Gregory. I have to admit it was somewhat frustrating to me, representing North Carolina, to have Judge Gregory nominated for the slot he was nominated for because it was traditionally allocated to North Carolina. But, I do support Judge Gregory's nomination.

In addition to having no judge from North Carolina being on the Fourth Circuit Court of Appeals, our court does not presently have, nor has it ever had, an African American judge. The Fourth Circuit Court of Appeals has the largest African American population in the country and does not now have, nor has it ever had, an African American judge. Obviously, there is a huge part of our population in the Fourth Circuit that has never been represented on this court. They are entitled to representation by a well-qualified judge.

In fact, Judge Wynn who was nominated over a year ago--from my State that has no judge on the Fourth Circuit--is also an African American judge. I urge Chairman **HATCH** to grant Judge Wynn a hearing and to push forward his vote on the floor of this Senate where he will be approved.

The bottom line is that Judge Gregory is a well-respected and well-qualified African American lawyer from the State of Virginia who also deserves a hearing, and also deserves a vote in this body this year.

The argument that is made--and Chairman **HATCH** made it this morning--is we only need 10 judges on the Fourth Circuit, we don't really need the 15 that Congress in fact has authorized. The reason is that the chief judge of that circuit, Judge Wilkinson, says they do not need any more judges, they are operating perfectly efficiently.

I point out several things.

No. 1, the Fourth Circuit issues more one-sentence opinions than any Federal circuit court in the country. Litigants come before it and make their case. Instead of getting a reasoned decision about why they won or lost their case, they get one sentence. What does that tell them about how much attention in fact is being paid to their case?

This same argument was made when there were 13 judges on the court. Now we are down to l0.

Since when do we let the chief judge of the circuit court decide how many judges go on the court? That is a function we in Congress have responsibility for--not him.

You can certainly make an argument that this is a partisan decision that the chief judge has made--that he likes the present composition of the court. He was a Republican-nominated judge.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. EDWARDS. I ask unanimous consent for another 3 minutes.

Mr. LEAHY. Mr. President, I yield another 3 minutes without losing my right to the floor.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mr. EDWARDS. Mr. President, here we have the chief judge, who is a Republican-nominated judge, and a court that now

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has a majority of Republican judges. You can certainly make the argument that he likes the composition of the court the way it is; he never wants that to be changed.

That is so fundamentally wrong and so fundamentally different from the way our Constitution provides. We should be nominating judges. Whether it is a Democratic or a Republican administration, it shouldn't make any difference in nominating well-qualified judges. This body should act on the qualification of those men and women to serve on the court, not based upon the Republican or Democratic composition of the court. It is just that simple. This should be totally nonpartisan.

My State has no one representing them on the Fourth Circuit. There is not, nor has there ever been, an African American judge on this court.

The simple bottom line is that we have the responsibility of deciding how many judges should be authorized for that court. We have made that decision--15. It is now down to 10. Of those 10, North Carolina has none. The people of North Carolina are entitled

to be represented on this court.

In addition to that, we should deal with the issue that there has never been an African American judge on this court.

We presently have pending the nomination of two well-respected and very well qualified African American jurists.

This is what I would say to the Chairman **HATCH**. Let us have a hearing on Judge Wynn. Let Judge Wynn have a vote on the floor of this Senate, and let the people of North Carolina have what, by law enacted by this body , they are entitled to, which is a judge representing them on their Federal court of appeals so that when my people go to the Fourth Circuit Court of Appeals to have their case heard, they have at least one judge representing them on that court. Aren't they entitled to that?

I yield the floor.

Mr. LEAHY. Mr. President, I commend the distinguished Senator from North Carolina for his comments. Senator **EDWARDS** has been a friend since he came to this body . I have, at the risk of embarrassing him, stated on a number of occasions on this floor that the Senate was enhanced by his presence here. As a lawyer, I must say that having him here because of his own experience as one of the most outstanding and most recognized trial lawyers in the country, to say nothing about his own State. I think Senators on both sides of the aisle should listen to what he said.

He is not a Senator who speaks in the abstract and who simply reads a statement on this. This is a Senator who has spent time in the courts of his State and of the region. He has had active practice in both State courts and Federal courts. He understands the judicial system.

He has argued cases at all levels. He has worked with lawyers who have been on his side of an issue and opposed to him. He knows, as does any lawyer who practices law, that no matter how much you might try a case at the trial level, at some point, especially if the stakes are high, that case is going to go up on appeal. It is going to go up on appeal whether you are the plaintiff or the defendant. Whoever loses that case, if it is of significance, will take it up on appeal.

I recall the statements made in court when I was trying cases. The judge in chambers would say: OK, we will take it to the jury and let justice be done. Usually the person who had the weaker case said: If that is the case, I will appeal, if justice is done.

But the fact of matter is cases become more and more complex and more and more significant to the litigants and to the issues of law. They go up on appeal, and you ought to have a good appellate court.

I commend the Senator for what he has said. I hope we will listen to what is needed in that appellate court.

We should also note, I suggest, that there is going to be a significant debate tonight in Boston between the two candidates of our two great parties--the Republican and Democratic Parties. Both parties have nominated those we consider to be our best choices. Obviously, I strongly support my friend of over 20 years, **AL GORE.** But I also know that the Republican Party has nominated a very distinguished Governor, George W. Bush.

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I mention this because Governor Bush and I, while we disagree on some issues, have one very significant issue on which we agree. He gave a speech awhile back and criticized what has happened in the Senate where confirmations are held up not because somebody votes down a nominee but because they cannot ever get a vote. Governor Bush said: You have the nominee. Hold the hearing. Then, within 60 days, vote them up or vote them down. Don't leave them in limbo.

Frankly , that is what we are paid to do in this body . We are paid to vote either yes or no--not vote maybe.

When we hold a nominee up by not allowing them a vote and not taking any action one way or the other, we are not only voting ``maybe" but we are doing a terrible disservice to the man or woman to whom we do this. They have to put their life on hold. They do not know what is going to happen: Are they going to be confirmed, or not? It is not like when any one of us runs for election; we know that on a certain

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day the election occurs.

We either win or we lose. But we know that on that Tuesday, we are going to know our fate. We won or we lost.

These people come here and they never know what may happen. They don't know whether they will have a hearing. And if they have a hearing, they don't know if there will be a vote in committee. And if there is a vote in committee, they don't know whether they will come on the floor. And if they come on the floor, they don't know if they will have a vote because one person hiding in the Cloakroom will say: Don't allow it to come to a vote yet. So they may have 99 Senators voting for them but somebody mysteriously in the background says ``Don't vote," and they don't vote.

Helene White of the U.S. Court of Appeals for the Sixth Circuit has been pending for 1,360 days. Governor Bush said we ought to have a vote up or down within 60 days. Let's have a vote on Helene White. She has been waiting not 60 days, not 600 days, but 1,360 days.

Kathleen McCree Lewis, who has been nominated for the U.S. Court of Appeals for the Sixth Circuit, an outstanding African American woman, who has one of highest ratings of anybody we have ever seen come before the Senate, has been waiting for 370 days. Not the 60 days we talked about, but more than six times the 60 days. Bonnie Campbell, for the U.S. Court of Appeals for the Eighth Circuit, has been spending for more than 215 days.

We are debating bringing up the Violence Against Women Act which has been stalled. The Violence Against Women Act has expired. Distinguished Senators on both sides of the aisle are working to bring it up and we cannot bring it up for a vote.

I see the distinguished Senator from Delaware and the distinguished Senator from Kansas, both of whom support it on the floor, and we cannot get that up for a vote.

We also can't get Bonnie Campbell up, even though she is the Director of the Violence Against Women Office. She supported, worked for and administered the Violence Against Women Act, an act that has seen a dramatic decrease in violence against women.

We ought to be standing and applauding Ms. Campbell. She is somebody who shows by her own experience that she can do the things necessary to bring down this scourge of violence against women in our country. Now that she has gone through the vetting process, and found out that she is one of the most qualified people to be a judge of anyone confirmed in the last 20 years, Republican or Democrat, we ought to at least let her have a vote instead of holding her in limbo.

Elena Kagan for the U.S. Court of Appeals for the District of Columbia has been pending for more than 480 days without a vote; Lynette Norton, for the U.S. District Court for the Western District of Pennsylvania, has been pending for more than 890 days; Patricia Coan, for the U.S. District Court for the District of Colorado, has been pending for more than 500 days; Dolly Gee, for the U.S. District Court for the Central District of California has been pending for more than 495 days; Rhonda C. Fields, for the U.S. District Court for the District of Columbia, has been pending for 325 days; Linda Riegle, for the U.S. District Court of Nevada, has been pending for more than 165 days.

Let them have a vote. These women are outstanding. They have

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demonstrated more than most people who get confirmed in this body , Republican or Democrat, how well qualified they are. At least let them have a vote. If people want to vote against them, vote against them.

I will state for the record that I will vote for every one of them. In checking with our side of the aisle, every single Democrat Senator will vote for every one of these women.

President Clinton, in remarks before the Michigan Bar Association, recently spoke about the Senate's failure to act upon his judicial nominees, noting his nominees have received more top American Bar Association ratings than those of any President in 40 years. President Clinton, to his credit, has nominated people who have received higher ratings than any President, Democrat or Republican, in 40 years and they still get held up. He said:

These people are highly qualified, which leads to only one conclusion, that the appointments process has been politicized in the hope of getting appointees ultimately to the bench who will be more political. That is wrong. It is a denial of justice.

President Clinton is right. We should move forward with these nominees. Let them have a vote. Don't do this in the dark of the night holding people up.

We are going to have four nominees, three from Arizona which has a desperate situation, where they need Federal judges. My friend from Arizona, Senator **KYL**, has pointed out, quite rightly, that cases cannot be heard, several cases cannot be heard. He has had experiences as a civil lawyer. He knows how difficult that is.

I say as a former prosecutor, when that happens, the criminal cases can't be heard because you don't have enough people on the bench. When that happens, the prosecutor has to start plea bargaining down. He or she has to either get a lighter sentence or has to start dropping charges all over the place because they know they can't get a trial because the judges aren't there.

If we are going to be tough on law and order, we have to have the judges there. We cannot just say we are against crime. I am willing to concede that all 100 of us are against crime. But if we are going to fight crime, we have to have the men and women there to do it: the prosecutors, the defense attorneys, and the judges.

If we will move those judges through, I will vote for every one of them. But I also point out that they can move through very rapidly, all the judges from the time they were nominated, to the hearings, to the floor. A lot of the other judges discussed today are judicial nominees who have waited and waited and waited and waited and cannot get a vote.

It is not too late in the session to move on these nominations. We know that we can make quick progress when we want to do so. The group of nominees being considered tonight include nominations received on a Friday, who had a hearing the next Wednesday and were reported that Thursday, all within a week. In addition, there is the example of a hearing held last month by the Government Affairs Committee on two District of Columbia Superior Court judges, one who was nominated on May 1 and the other who was nominated on June 26. Another example of the ability of the Senate to act is the September 8 confirmation of James E. Baker to the U.S. Court of Appeals for the Armed Forces. In addition, there is

the examples of Timothy Lewis who was confirmed in waning days of the 1992 session, the last year of a Republican presidential term with a Democratic majority in the Senate. Judge Lewis was confirmed to the Third Circuit on October 8, having only been nominated on September 17 of that year.

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DELAYS IN SENATE ACTION ON JUDICIAL NOMINATIONS (Senate - June 18, 1998)

Mr. LEAHY. Mr. President, just a couple of weeks ago, I commented in the **Congressional Record** on the Senate majority's poor record in acting on judicial nominees, especially noting those judicial nominees who are either minorities or women. I included a recent letter from the Congressional Hispanic Caucus, which calls upon the Senate Republican leadership to allow votes on the Latino judicial nominees who have languished in the Senate for far too long.

I have also spoken often about the crisis in the second circuit and the need for the Senate to move forward to confirm the nominees to that court who are pending on the calendar.

Judge Sonia Sotomayor is just such a qualified nominee, and she is one being held up by the Republican majority, apparently because some on the other side of the aisle believe she might one day be considered by President Clinton for nomination to the U.S. Supreme Court, should a vacancy arise.

Last week, a lead editorial in the Wall Street Journal discussed this secret basis for the Republican hold against this fine judge . The Journal reveals that these delays are intended to ensure that Sonia Sotomayor not be nominated to the Supreme Court, although it is hard to figure out just how that is logical or sensible.

In fact, how disturbing, how petty, and how shameful: Trying to disqualify an outstanding Hispanic woman judge by an anonymous hold .

I have far more respect for Senators who, for whatever reason, wish to vote against her. Stand up; vote against her. But to have an anonymous hold --an anonymous hold --in the U.S. Senate with 100 Members representing 260 million Americans, which should be the conscience of the Nation, should not be lurking in our cloakrooms anonymously trying to hold up a nominee. If we want to vote against somebody, vote against them. I respect that. State your reasons. I respect that. But don't hold up a qualified judicial nominee.

I was asked last week by Neil Lewis of the New York Times about this circumstance. He correctly reported my response in a front page story this last Saturday. I am offended by this anonymous effort to oppose her prompt confirmation by stealth tactics. Here is a highly qualified Hispanic woman judge who should have been confirmed to help end the crisis in the Second Circuit more than three months ago.

The times Argus recently included an editorial entitled `Partisan Nonsense' on this hold . The editorial notes that Judge Sotomayor rose from a housing project in the Bronx to Princeton, Yale and a federal court appointment by President Bush, a Republican. The editorial notes that the stalling tactics are aggravating the judicial emergency faced by the Second Circuit caused by judicial vacancies for which the Republican leadership in the Senate refuses to consider her, and another worthy nominee. The editorial concludes by urging me to make `a lot of noise over this partisan nonsense.'

I don't always follow the editorials in my home State. But this one I am happy to follow.

I will continue to speak out on behalf of Judge Sotomayor and all the qualified nominees being stalled here in the U.S. Senate.

Judge Sotomayor in not the only woman or minority judicial nominee who has been needlessly stalled. Indeed, if one considers those nominees who have taken the longest to confirm this year, we find a disturbing pattern:

Hilda Tagle, the only Hispanic woman the Senate has confirmed this year, took 32 months to be confirmed as a district court

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judge for the Southern District of Texas. That is more than two-and-one-half years.

Judge Richard Paez, currently a district court judge and a nominee to the Ninth Circuit, was first nominated in January 1996. Twenty-nine months latter, Judge Paez's nomination remains in limbo on the Senate calendar.

Nor have we seen any progress on the nomination of Jorge Rangel to the Fifth Circuit or Anabelle Rodriquez to the District Court for Puerto Rico, although her nomination was received in January 1996, almost 29 months ago.

For that matter, we have seen the President's nomination of Judge James A. Beaty Jr., the first African American nominated to the Fourth Circuit, stalled for 30 months, since December 1995. The situation in the Fourth Circuit was the topic of a Washington Post editorial past Saturday. We have seen the attack on Judge Frederica Massiah-Jackson, who would have been the first African-American woman to serve on the Eastern District of Pennsylvania, but who was forced to withdraw. We have seen the nomination of Clarence Sundram held up since September 1995, almost 33 months.

In his annual report on the judiciary this year on New Year's Day, the Chief Justice of the United States Supreme Court observed: `Some current nominees have been waiting a considerable time for a Senate Judiciary Committee vote or a final floor vote. The Senate confirmed only 17 judges in 1996 and 36 in 1997, well under the 101 judges it confirmed in 1994.' He went on to note: `The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.' Which of course is absolutely correct.

For some unexplained reason, judicial nominees who are women or racial or ethnic minorities seem to take the longest in the Senate. Of the 10 judicial nominees whose nominations have been pending the longest before the Senate, eight are women and racial or ethnic minority candidates. A ninth has been delayed in large measure because of opposition to his mother, who already serves as a judge . The tenth is one who blew the lid off the $1.4 million right-wing campaign to `kill' Clinton judicial nominees.

Pending on the Senate calendar, having been passed over again and again, are Judge Sonia Sotomayor, Judge Richard Paez, Oki Mollway and Ronnie White. Held up in committee after two hearings is Clarence Sundram. Still without a hearing are Anabelle Rodriquez, Judge James A. Beaty Jr., and Jorge C. Rangel. What all these nominees have in common is that they are either women or members of racial or ethnic minorities.

Acting to fill judicial vacancies is a constitutional duty that the Senate--and all of its member--are obligated to fulfill. In its unprecedented slowdown in the handling of nominees in the 104th and 105th Congresses, the Senate is shirking its duty. The Senate majority's choices as they stall Hispanic, women and minority nominees is wrong and should end.

Mr. President, I have served here for nearly 24 years. I know Members of the Senate. I have enormous respect for so many of them, Republicans and Democrats alike. The vast majority of Senators I have served with do not have any bias or ethnic bias against people. They do not have a religious bias. They do not have a gender bias. But somehow ethnic and gender biases have crept into the stalling of these nominations.

If Senators are opposed to any judge , bring them up and vote against them. But don't do an anonymous hold , which diminishes the credibility and respect of the whole U.S. Senate.

I have had judicial nominations by both Democrat and Republican Presidents that I intended to oppose. But I fought like mad to make sure they at least got a chance to be on the floor for a vote.

I have stated over and over again on this floor that I would refuse to put an anonymous hold on any judge ; that I would object and fight against any filibuster on a judge , whether it is somebody I opposed or supported; that I felt the Senate should do its duty.

If we don't like somebody the President nominates, vote him or her down. But don't hold them in this anonymous unconscionable limbo, because in doing that, the minority of Senators really shame all Senators.

With that, Mr. President, I see Senators have come back to the floor for their debate. So I ask unanimous consent that copies of the editorials of the Times Argus and the Washington Post, and the report from the New York Times, which I referred to, be printed in the **Record**.

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

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From The Times Argus, June 15, 1998

[FROM THE TIMES ARGUS, JUNE 15, 1998]

Partisan Nonsense

You may never have heard of a federal district judge named Sonia Sotomayor, and it appears that several key Republicans are hoping you never will. They'd like her to simply vanish from the nation's political radar screen, but Vermont's Sen. Patrick Leahy is among those who stand in their way.

It appears these political foes of President Clinton are afraid that if they confirm Judge Sotomayor's nomination to the 2nd District U.S. Circuit Court of Appeals, as Clinton has proposed, her next stop will be a seat on the United States Supreme Court.

Although Sotomayor grew up in the sprawling housing projects of the Bronx, where success stories are less than commonplace, she managed to graduate with high honors from Princeton, become editor of the Yale Review and earn a reputation as an effective federal prosecutor.

In 1992, she was appointed to the federal bench by then-President George Bush. That would seem to suggest she had bipartisan support, but that was before some nervous Republicans began to fear there may soon be an opening on the Supreme Court. That opening, they worried, would allow Clinton to nominate Sotomayor, a woman and an Hispanic.

Of course there is no vacancy on the high court, nor has there been any clear signal that there will be one any time soon. Justice John Paul Stevens, who many believe will be the first of the present batch of justices to retire, has already hired his clerks for the next court session. In addition, Sotomayor's name was not on a list of recommended nominees the Hispanic National Bar Association submitted to Clinton.

But even if there was a pending vacancy, what is it about Judge Sotomayor that would make Republicans so worried? Is it that she's Hispanic? Is it that she's too liberal, or too much a judicial activist?

For the record nobody is saying, but off the record, some Senate aides concede their bosses are worried she would, indeed, be an activist. Interestingly, conservative supporters of Judge Sotomayor's nomination vehemently disagree with that assessment.

Enter Sen. Leahy, the senior Democrat on the Judiciary Committee. In blunt terms, Leahy has criticized the Republicans who, behind the scenes and not for attribution, are seeking to scuttle Sotomayor's nomination.

`Their reasons are stupid at best and cowardly at worst,' Leahy told a New York Times reporter. `What they are saying is that they have a brilliant judge who happens to be a woman and Hispanic and they haven't the guts to stand up and argue publicly against her on the floor. They just want to hide in their cloakrooms and do her in quietly.'

Those are strong words, particularly for the United States Senate, but Leahy's anger is genuine and justified.

The campaign against Judge Sotomayor began on the editorial pages of the ultra-conservative Wall Street Journal and was given much wider exposure when it was taken up by Rush Limbaugh, the right wing radio talk show host.

The Journal was upset with Sotomayor's ruling that a coalition of New York businesses promoting a program for the homeless had violated federal law by not paying the minimum wage. This, in the Journal's opinion, constituted `judicial activism.'

But a well-known conservative, Gerald Walpin, has rushed to Sotomayor's defense and his message is worth heeding.

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EXECUTIVE SESSION -- (Senate - October 05, 1999)

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EXECUTIVE CALENDAR

NOMINATION OF RONNIE L. WHITE

The PRESIDING OFFICER. Under the previous order, the hour of 2:15 having arrived, the Senate will now go into executive session and proceed to the vote on Executive Calendar Nos. 172, 215 and 209 which the clerk will report.

The legislative clerk read the nomination of Ronnie L. White, of Missouri, to be United States District Judge for the Eastern District of Missouri.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I ask unanimous consent that it be in order to ask for the yeas and nays on each nomination with one showing of hands.

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

Mr. HATCH. I now ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There appears to be a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is, Will the Senate advise and consent to the nomination of Ronnie L. White, of Missouri, to be United States District Judge for the Eastern District of Missouri? On this question, the yeas and nays have been ordered. The clerk will call the roll.

The legislative assistant called the roll.

Mr. NICKLES. I announce that the Senator from Florida (Mr. **MACK**) is necessarily absent.

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

The result was announced--yeas 45, nays 54, as follows:

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(Rollcall Vote No. 307 Ex.)
YEAS--45

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McConnell

Murkowski

Nickles

Roberts

Roth

Santorum

Sessions

Shelby

Smith (NH)

Smith (OR)

Snowe

Specter

Stevens

Thomas

Thompson

Thurmond

Voinovich

Warner

NOT VOTING--1

Mack

Mr. ASHCROFT. Mr. President, I move to reconsider the vote.

Mr. CRAIG. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. LEAHY. Mr. President, I ask unanimous consent to continue for 1 minute.

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

Mr. LEAHY. Mr. President, I have to say this with my colleagues present. When the full history of Senate treatment of the

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nomination of Justice Ronnie White is understood, when the switches and politics that drove the Republican side of the aisle are known, the people of Missouri and the people of the United States will have to judge whether the Senate was unfair to this fine man and whether their votes served the interests of justice and the Federal courts.

I am hoping--and every Senator will have to ask himself or herself this question--the United States has not reverted to a time in its history when there was a color test on nominations.

The PRESIDING OFFICER. The majority leader.

Mr. LOTT. Mr. President, I use leader time for 1 minute in response.

With regard to nominations, judicial or otherwise, I am sure the Senate would never use any basis for a vote other than the qualifications and the record of the nominee. And just so the record will be complete, as a matter of fact, of the 19 nominees who have been confirmed this year, 4 of them have been women, 1 of them African American, and 3 of them have been Hispanic. Their records and the kind of judges these men and women would make are the only things that have been a factor with the Senate and are the only things that should ever be a factor.

I ask unanimous consent that the remaining votes in the series be limited to 10 minutes each.

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

Mr. DASCHLE. Mr. President, I rise to express how saddened I am by the party-line vote against Judge Ronnie White today. I had sincerely hoped that today would mark the beginning of a bipartisan attempt to clear the backlog of federal judicial nominees and begin to fill the vacancies that are rampant throughout the federal judiciary. I was mistaken. Instead, we got a party-line vote against a qualified minority judge coupled with a continued refusal to schedule votes on other qualified minority and women nominees.

Judge White is eminently qualified to sit on the federal bench. He is a distinguished jurist and the first African-American to serve on the Missouri Supreme Court. Prior to his service on Missouri's Supreme Court, Judge White served as a State Representative to the Missouri Legislature, where he chaired the Judiciary Committee. In his law practice, which he continued during his service as a legislator, White handled a variety of civil and criminal matters for mostly low income individuals. His nomination received the support of the St. Louis Metropolitan Police Department, the Saint Louis Post Dispatch, and the National Bar Association. He is a fine man who has given his life to public service and he deserved better than what he got from this Senate. He deserved better than to be kept waiting 27 months for a vote, and then to be used as a political pawn.

This vote wasn't about the death penalty. This vote wasn't about law and order. This vote was about the unfair treatment of minority judicial nominees. This vote tells minority judicial candidates ``do not apply.'' And if you do, you will wait and wait, with no guarantee of fairness.

Judge Marsha Berzon , for instance, has been kept waiting more than 20 months for a vote. Judge Richard Paez has been waiting more than 44 months. These nominees deserve a vote. While I am totally dismayed by what happened here today with respect to Judge White's nomination, the Senate today functioned, albeit in a partisan, political manner.

As Chief Justice Rehnquist has recognized: ``The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.'' An up-or-down vote, that is all we ask for Berzon and Paez . And, after years of waiting, they deserve at least that much. The Republican majority should not be allowed to cherry-pick among nominees, allowing some to be confirmed in weeks, while letting other nominations languish for years. Accordingly, I vow today, that we Democrats just will not allow Paez and Berzon to be forgotten.

As I have in the past, I will again move to proceed to the nominations of Judge Paez and Marsha Berzon , and I intend to take this action again and again should unnamed Senators continue to block a vote. Particularly after today's vote, I must say, I find it simply baffling that a Senator would vote against even voting on a judicial nomination. Today's actions prove that we all understand that we have a constitutional outlet for antipathy against a judicial nominee--a vote against that nominee. What the Constitution does not contemplate is for one or two Senators to grind a nomination to a halt on the basis of a ``secret'' hold. This cowardly, obstructionist tactic is an anathema to the traditions of the Senate. Thus, today, I implore, one more time, every Senator to follow Senator **LEAHY**'s advice, and treat every nominee ``with dignity and dispatch.'' Lift your holds, and let the Senate vote on every nomination.

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The business of judges is the simple but overwhelmingly important business of providing equal justice to the poor and to the rich. Accordingly, the consequences of this confirmation process are awesome. It is time that we all take it more seriously and it is time that we schedule votes on every nominee on the Calendar--including Judge Paez and Marsha Berzon . All we are asking of our Republican colleagues is to give these nominees the vote--and hopefully the fair consideration--they deserve. We will press this issue every day and at every opportunity until they get that vote.

Today is a dark day for the Senate. We have voted down a fully-qualified nominee but I hope we can do better in the future and that we can move forward on the Paez and Berzon nominations in a fair and non-partisan manner.

The PRESIDING OFFICER. The Clerk will report the next nomination, Calendar No. 215.

The legislative clerk read the nomination of Brian Theadore Stewart, of Utah, to be United States District Judge for the District of Utah.

The PRESIDING OFFICER. The question is, Will the Senate advise and consent to the nomination of Brian Theadore Stewart, of Utah, to be United States District Judge for the District of Utah? On this question, the yeas and nays have been ordered. The clerk will call the roll.

The legislative clerk called the roll.

Mr. NICKLES. I announce that the Senator from Florida (Mr. **MACK**) is necessarily absent.

Mr. REID. I announce that the Senator from Montana (Mr. **BAUCUS**) is necessarily absent.

The result was announced--yeas 93, nays 5, as follows:

[Rollcall Vote No. 308 Ex.]

YEAS--93

Abraham

Akaka

Allard

Ashcroft

Bayh

Bennett

Biden

Bingaman

Bond

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Breaux

Brownback

Bryan

Bunning

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THE NOMINATION OF BONNIE CAMPBELL -- (Senate - October 06, 2000)

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Mr. HARKIN. Mr. President, it has now been 218 days--218 days that the Judiciary Committee of the Senate has had Bonnie J. Campbell's name there and not reported her out. She has had her hearings. Her paperwork is done. Yet she sits bottled up in the Senate Judiciary Committee.

I understand that later today--or maybe early next week--there will be a unanimous consent request to bring up for consideration and pass the Violence Against Women Act. It is a very good bill, a good law, that has done a lot to help reduce domestic violence in our country.

But we have an interesting dichotomy here. There will be a line of Senators out here talking about how they are all for the Violence Against Women Act. It will go through here like greased lightning. But when it comes to the person who has been in charge of implementing the provisions of the Violence Against Women Act, the person who has been in charge of the Office of Violence Against Women since its beginning in 1995--because it was created by the Violence Against Women Act--when it comes to that person who is widely recognized all over America as the one person who has done more to implement that law than anybody else--when it comes to that person, they say, no, we are not going to let her be reported out of the Judiciary Committee. That is Bonnie Campbell.

It is all right to have the Violence Against Women Act but, no, it is not all right to have her sit on the court of appeals--the one person who knows this law intimately, the one person who has led the fight in this country against domestic violence and violence against women in general.

Bonnie Campbell has not been treated fairly by this Senate, by the Republican leadership, and by the Senate Judiciary Committee.

I have heard all the arguments--including the one that she she wasn't nominated until this year. Mr. President, she was nominated in early March. She had her hearing in May. Yet the other day we reported four judges out, all of whom were nominated later than Bonnie Campbell. Three were nominated in July, had their hearing, and were reported out all in the same week. Yet Bonnie Campbell sits there, 218 days today.

It is not as if the appeals courts are full. We have 22 vacancies on the appeals courts. And we need more women serving on the appeals court. Out of 148 circuit judges, 33 are women--22 percent. Yet the Republican leadership in this Senate and on the Senate Judiciary Committee will not let Bonnie Campbell's name come out for a vote.

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If somebody on the other side wants to vote against her, for whatever reason, that is their right. It is their senatorial privilege and even their responsibility, if they feel deeply about it, to do so. But I don't believe it is anyone's responsibility, nor even a right, to hold that name bottled up in committee when she is fully qualified. I have not heard one Senator say Bonnie Campbell is not qualified for this position--not one. I have heard no objections raised at all. She is supported by both the Senators from Iowa--a Republican Senator, Mr. **GRASSLEY**, and by me, a Democrat. So there has been strong, bipartisan support.

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Again, she is a former attorney general of the State of Iowa and now head of the Violence Against Women office. Yet they won't report her name out.

Yes, they will let the Violence Against Women Act come through, and we will hear wonderful speeches about it, I am sure, from the Republican side. The House of Representatives, last week, voted for the Violence Against Women Act, 415-3. Does anybody believe they would have voted that overwhelmingly if the only person who has run that office had done a bad job and had not enforced the law fairly and equitably and brought honor to the law and the position? Absolutely not. By that 415-3 vote, they were saying Bonnie Campbell has done an outstanding job.

Mr. WELLSTONE. Will the Senator yield?

Mr. HARKIN. Yes.

Mr. WELLSTONE. I say this to the Senator from Iowa--and I wonder whether he would agree with me--I think if we had an up-or-down vote on Bonnie Campbell, it would be 100-0 or 99-1. Under the Violence Against Women Act, in terms of dramatically affecting the lives of women and their children, we would not have been able to have made a real difference without Bonnie Campbell. She is the one who made this a reality----

Mr. HARKIN. Exactly.

Mr. WELLSTONE. When it came to directly affecting their lives. If we had a vote, I think it would be 100-0 or 99-1.

Mr. HARKIN. I hadn't made that point, but yes, that is true. If we had a vote, I daresay maybe one or two may have a problem for some reason, but I think it would be overwhelming.

Mr. LEAHY. Will the Senator yield for a question?

Mr. HARKIN. Yes.

Mr. LEAHY. The Republican nominee for President, George W. Bush, has said what the Senate ought to do on all these nominees is, within 60 days, vote them up or down, but at least bring them to a vote. Would the Senator from Iowa agree with me that that is a good idea on what should be done?

Mr. HARKIN. I think that is a great idea .

Mr. LEAHY. Would he also agree with me that if Governor Bush actually means that, he ought to pick up the phone and call the Republican leadership and say there are an awful lot of women and minorities and others who have been bottled up, as well as Bonnie Campbell, a lot longer than 60 days--I think one for more than 1,360 days--we ought to vote them up or down?

Mr. HARKIN. I agree.

Mr. LEAHY. Lastly, would the Senator from Iowa agree with me that all he wants and would be satisfied with--bring her down here, 9 o'clock in the morning, or at night, whatever, and let's have a rollcall vote? I can assure you, I have read all of her file, and I sit on the Judiciary Committee. I have gone through every bit of this. Bonnie Campbell is one of the most qualified people nominated by either a Republican or Democrat in the 25 years I have been on the Judiciary Committee.

Mr. HARKIN. I agree with the Senator from Vermont, my great friend who does an outstanding job on the Judiciary Committee. He is absolutely right. Governor Bush said we ought to have a 60-day deadline. He should pick up the phone, as my friend said, and call the Republican leadership. He is the leader of the Republican Party.

UNANIMOUS CONSENT AGREEMENT

Mr. President, I will, as I do every day, ask unanimous consent to discharge the Judiciary Committee on further consideration of the nomination of Bonnie Campbell, nominee for the Eighth Circuit Court, and that her nomination be considered by the Senate following the conclusion of action on the pending matter, and that the debate on the nomination be

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limited to 2 hours equally divided, and that a vote on her nomination occur immediately following the use or yielding back of that time.

The PRESIDING OFFICER. Is there objection?

Mr. SESSIONS. I object.

The PRESIDING OFFICER. Objection is heard.

Mr. HARKIN. Mr. President, I intend to make my point every day. And as you can see, an objection to bringing Bonnie Campbell's name out of the Judiciary Committee so we can have a debate and vote is made every time on the Republican side. That is who is holding this up. It is a darn shame that this is being done to a person who has led an exemplary life, done an outstanding job in public service both as attorney general of Iowa and now as head of the Violence Against Women Office in the Department of Justice. It is not right, it is not fair.

So every day that we are here I will continue to ask unanimous consent to bring her name out. Before I yield the floor, once again, I will point out that in 1992, when there was a Republican President and a Democratic Senate, 9 circuit court judges had their hearings; there were 14 nominated in 1992, during an election year, and 9 had hearings. Of all those who had hearings, they were all referred and all confirmed--one as late as October of 1992, a couple in September, and a couple were in August.

When the shoe was on the other foot, when there was a Republican President and a Democratic Senate, we had the hearings. Everyone who had a hearing during the Bush Administration got a vote in Committee. All but one got a vote on the Senate floor. Well, Bonnie Campbell had her hearing. All the paperwork is done. Yet she has been referred. Every single one was confirmed in 1992.

Well, this is the year 2000 and we have had seven circuit court judges nominated this year. One has had a hearing and was referred and was confirmed. That is one out of seven. In 1992, it was 9 out of 14. Tell me who is playing politics around this place. Tell me who wants to play politics with the circuit courts. It is not our side. It is the other side.

In 1992, as I said, we had nine circuit judges nominated and confirmed. This year, there was only one. No. 1, it is a flimsy argument to say because she was nominated this year it is too late. No. 2, it is a phony argument that, well, it is a circuit court and maybe George Bush will win the election and, therefore, we will put Republicans on there instead of somebody such as Bonnie Campbell.

In 1992, as I pointed out, when the roles were reversed, we confirmed nine circuit court judges that year. We could have said the same thing: Bill Clinton may win, so don't confirm them. But we didn't do that. I believe the right course of action to follow is to report those out, let them have a debate. If people want to vote one way or the other, that is their right.

I will continue to take this floor every day until we adjourn sine die, or whatever we do here. I will begin to use every means at my disposal to get her name out of the Judiciary Committee and make sure she is treated fairly by this Senate and that at least we have a vote.

I yield the floor.

UNANIMOUS CONSENT REQUEST--S. 3059

The PRESIDING OFFICER. The Senator from Arizona.

Mr. REID. Will the Senator yield for a unanimous consent request?

Mr. McCAIN. I am doing a unanimous consent.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. McCAIN. I ask unanimous consent that the majority leader, in consultation with the Democrat leader, establish a date

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SETTING THE RECORD STRAIGHT ON JUDICIAL NOMINATIONS (Senate - March 19, 1997)

Mr. BIDEN. The point I wish to make is this. When I was chairman of the committee and a Republican was President, we held, on average, a hearing for judges once every 2 weeks and had usually five judges, circuit court and district court, who we heard.

Last year we essentially had one hearing every other month and we had to fight to get three to four on the agenda to be heard.

Mr. SARBANES. Will the Senator yield for a question.

Mr. BIDEN. I will be happy to.

Mr. SARBANES. This is a chart that Senator **Leahy**, now the ranking member on the Judiciary Committee, used today in the course of the Merrick Garland debate which I think is enormously instructive. It is the number of judges confirmed during second Senate sessions in Presidential election years.

Mr. BIDEN. I got it.

Mr. SARBANES. Now, in 1996, with a Democratic President, President Clinton, and a Republican Senate, the Senate confirmed no judges for the court of appeals, none whatsoever, and 17 judges for the district court. Now, in 1992, the previous election year--that was when Mr. Bush was President----

Mr. BIDEN. And I was chairman.

Mr. SARBANES. And if I am not mistaken, the distinguished Senator from Delaware was the very able chairman of the Judiciary Committee.

Mr. BIDEN. I did not say `able.' I was chairman.

Mr. SARBANES. I am suggesting the Senator is able. I am prepared to make that statement. We confirmed 11 court of appeals judges and 55--I repeat, 55--district judges in an election year. Now, that gives you some sense of how the Democratic majority in the Senate, led at the time by the able Judiciary Committee chairman, was dealing with this matter, essentially in a nonpolitical way.

In 1988, when I think, again, the Senator from Delaware was still the chairman of the Committee----

Mr. BIDEN. That is correct.

Mr. SARBANES. With President Reagan, a Republican President--again, in an election year--we confirmed 7 court of appeals judges and 35 district court judges. Actually, the 35 that we confirmed in that election year was better than the Republican Senate did for President Reagan in 1984 when they only confirmed 33 judges. In any event, clearly this performance in these years is in marked contrast to what happened in 1996 and what apparently is continuing now in 1997. Merrick Garland was the first judge approved this year.

Mr. BIDEN. If I may respond to the Senator, obviously the facts are correct, but I think it worth elaborating a little bit more on the facts. I saw my very able colleague, the present chairman of the Judiciary Committee, on television the other day, and he was talking about the number of judges that were `left hanging,' who were not confirmed and sent back to the

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administration at the end of 1992, the Bush administration. And he cited an accurate number. But as my very distinguished friend, who is, as well, a scholar, knows, there is an old expression attributed to Benjamin Disraeli, who said there are three kinds of lies: lies, damn lies, and statistics.

What my able friend from Utah did not mention is that just like President Carter--Carter's judges is a separate charge we can go back to, but just like President Clinton, President Bush did not get his nominees up here until the end of the process.

In other words, they were late getting here. Notwithstanding the fact that he was late in getting his nominees up, the Senator may remember in the caucus over the objection of some Democrats who said the Republicans would never do this, I insisted we confirm judges up to the day we adjourned the Senate. During the last week the Senate was in that year, we confirmed seven judges. I could have easily just sneezed and they would not have been confirmed. And the fact is the reason why we did not confirm more is because we did not have time to hold the hearings and we were holding hearings on 20 or more a month.

Mr. SARBANES. If the Senator will yield, I can recall the Senator was holding hearings right up into the fall of the election year and judges were being brought to the floor of the Senate and being confirmed. And he is absolutely correct; there were some----

Mr. BIDEN. Republican judges.

Mr. SARBANES. Yes, Republican judges. And there were some Members on the Democratic side who said, why are you doing this? We are about to have an election and the result may give us control of the White House. And the Senator from Delaware said, look, we ought not to have politics play a heavy hand in the judicial confirmation process.

One of the worst things that is happening in the Senate is what amounts to a heavy politicizing of the judicial confirmation process that is taking place in this body, and that was reflected in the performance in 1996 as compared with the performance in 1992 when the Senator from Delaware did his very best to keep politics out of the process, to fill judicial posts and to let the judiciary function as an independent branch of our Government. What is happening here is extremely serious. And of course, the Senator, with his candor, came to the floor and sort of stripped away the veneer and laid out what is going on behind the scenes, which is a complete departure from past practices. When there were Republican Presidents, I did not play a role in whom the Presidents sent up to the Senate to be nominated and confirmed in the job----

Mr. BIDEN. If the Senator will yield, I was chairman or ranking member of that committee for 14 years. My distinguished colleague from Delaware is Senator **Roth**, who is my close friend. Every single Federal judge in the last 24 years who has been appointed in the district of Delaware or the third circuit has been appointed by Senator **Roth**. I did not expect, did not ask, and not once was ever consulted about who he would appoint, and I supported every one that he sent up. Not one single time was I made aware of anything other than after the fact, which is OK. I am not complaining about that.

Mr. SARBANES. That was the system.

Mr. BIDEN. That was the system. Not one single time. And I was chairman of the committee.

Now, I would point out one other thing to my friend. I want to have complete candor. If one considers taking judges based on their ideology and call that political, yes, we Democrats were political, as well. I am not complaining about that. I am not complaining about anybody who stands up and says I do not want Judge Smith, the President's nominee, because I think he will be bad on the court for the following reasons and comes to the floor and makes the case. I do not quarrel with that because I think that is the prerogative of the Senate and any Senator. What I am quarreling with is a different kind of politicizing, and that is drawing the conclusion that because I now control the Senate, I am not going to let the President of the United States have nominees whether or not I have an ideological problem with them.

Mr. SARBANES. Will the Senator yield. It is worse than that. It is not whether you let the President have his nominees confirmed. You will not even let them be considered by the Senate for an up-or-down vote. That is the problem today. In other words, the other side will not let the process work so these nominees can come before the Senate for judgment.

Some may come before the Senate for judgment and be rejected by the Senate. That is OK.

Mr. BIDEN. Fair enough.

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Mr. SARBANES. But at least let the process work so the nominees have an opportunity and the judiciary has an opportunity to have these vacant positions filled so the court system does not begin to break down because of the failure to confirm new judges.

Mr. BIDEN. If the Senator will yield, let me give an example of what you just said. I know you know, but it is important for the **Record**.

I meet every year--I will not now because I am not the top Democrat on the committee. But every year for, I don't know, 14 or 15 years, I meet with what is called the Judicial Conference --a legislatively organized body where the Congress says the court can have such a function, where we look for recommendations.

I might add, by the way, you may remember when there was a Republican President named Reagan, the Senator from Delaware introduced a bill to increase the number of Federal judgeships by 84. Why did I do that? I did that because the Federal court came to us, the Judicial Conference, and said, `Here is our problem. We don't have enough judges to administer justice in a timely fashion in this country. And there is a backlog on all these criminal cases.'

I must admit to the Senator, when they came to me with that request, I knew the problem I was going to have. I was going to go into a Democratic caucus and say, by the way, a Republican President, who is a fine man but the most ideological guy we had in a long time, who announced he was going to appoint only very conservative judges, I was now going to give him 84 more than he had.

I realized that was not a politically wise thing for me to do. But, listening to the court, I did just that. My recollection is the Senator from Maryland stood with me and said, `I don't like it. I admit, I am not crazy about 84 more judges being appointed by Ronald Reagan. But the court needs to be filled.'

Now we have the strange happening, the courts come back to us and say--and they do this in a very scientific way--we not only need the vacancies filled, we need more judges than we have. They cite, as the Senator is very familiar with, they cite the backlog, they give the rationale that cases are being backed up. Guess what? The idea that we will even get a chance to discuss a judgeship bill, I predict to my friend from Maryland, on this floor is zero--zero. Not only that, to further make the point, this is the first time in the 24 years that I have been a Senator, in 24 years, the first time I have ever heard anybody come to the floor and say: You know, we should basically decommission judgeships.

The ninth circuit is the busiest circuit in America, out in California. One of our colleagues, a very wonderful guy, a nice guy, says, `I am not going to let any other judge be in the ninth circuit'--notwithstanding they have five vacancies, if I am not mistaken, and they are up to their ears in work. This started last year when I was in charge of the Democratic side. He said, `I am not going to let anybody go through until the ninth circuit splits into two circuits.'

I said, `Why do you want it to split?'

He said, `The reason I want it to split is I don't like the fact that California judges are making decisions that affect my State.'

The distinguished Senator from Idaho is shaking his head. He agrees. He is in that circuit. It is painful to point this out, but the reason why there is a Federal court is so there is not Illinois, Indiana, Idaho, California justice. There is one uniform interpretation of the Constitution. That is the reason we have a Federal circuit court of appeals.

Now, this is quite unusual. We have--and I was not referring to the distinguished Senator from Idaho, who is on the floor, when I said, `there was a Senator.' That is not to whom I am referring. But another one of our colleagues said he is not going

to let anybody go through until there is a split, because he does not like the idea that decisions relating to his State are being made by judges who are not from his State or are not from States of similar size. That is, interestingly, an effectively rewrite of the Constitution of the United States of America. I do not think the Senator thought it in those terms, but that is literally what it is.

Now I am being told, OK, unless we, in fact, split the circuit--and by the way, I am not opposed to splitting the circuit. We split the fifth circuit because when we got to the point where Florida grew so big--Florida and Mississippi and Alabama and Louisiana, they are all in the same circuit--but they got so big, because of population growth, we said--the court recommended, we agreed--that it should be split into two circuits. We understand that. I am not opposed to that. I am not arguing about that. But the idea that someone says, `Until you do it my way, until you can assure me I am not going to be

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associated with that State of California, I am not going to let any vacancies be filled'----

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Mr. SARBANES. If the Senator will yield, in effect what is happening is the court system is being held hostage, so it is not able to function properly as a court system should. I submit that is an irresponsible tactic to use. As Members of the Congress, the first branch of Government, we have a responsibility to see that the court system can function in a proper fashion.

The Senator from Delaware, when he was chairman of the committee, always measured up to that responsibility, I think often taking a lot of political heat for doing it. But he was out to make sure the system could function. He had Republican Presidents nominating judges. He processed their nominations. He brought them to the floor of the Senate. He gave the Senate a chance to vote on them up or down for those people to get confirmed. That process is breaking down.

Mr. BIDEN. I voted for all of them but seven, I might add. There were only seven times that I voted against any of those nominees.

Mr. SARBANES. That process, I repeat, is now breaking down.

The other thing that is happening, as he says, instead of disagreeing with the qualifications of a nominee, the other side says, `We don't really need the position.'

Mr. BIDEN. That is right.

Mr. SARBANES. And that is what we heard on Merrick Garland. In fact, when he first came up here, he was nominated for the 12th position on the D.C. circuit. They said, `We don't need that position. We have nothing against Merrick. He is a wonderful fellow, of course. We just don't think we need that 12th position.' Of course, that does a lot for Merrick Garland. He's sitting, waiting to join the court. Then someone already on the court took senior status, and then they had two vacant positions, the 11th and 12th. Merrick Garland is nominated. He's now up for the 11th position; not the 12th position, the 11th position. The majority is right back here on the floor and it says, `We don't need this position.' This is the 11th position. They never made that argument last year when he was going for the 12th position. Then they said we need the 11th, we don't need the 12th. Now they are back, some, today--fortunately, they did not prevail--saying we do not need either the 11th or the 12th position.

Mr. BIDEN. If the Senator will yield on that point, it is probably going to get him in trouble, but I want to compliment the chairman of the committee. The chairman of the committee did not buy into that argument. The chairman of the committee took the position on this that we should act, and he had been pushing this for some time.

Again, I see my distinguished friend, who now I work with in another capacity, as the minority--the euphemism we use is ranking member--of the Foreign Relations Committee. We have much less disagreement than we have on some issues relating to judges. But, with him here, I can remember that during the last days when the Senator from Delaware was trying to push through judges--on

October 8, 1992, the last day of the session, with President Bush as President of the United States, the Senator from Delaware pushed through seven Republican judges--the last day.

I will bet you that has not happened very often in this place with Democrats or Republicans: The last day, seven.

The reason I mention that is one of my distinguished colleagues--we have very different views, but I like him a lot--walked up to me and he was from a State where there were two Republican Senators, and two of those judges were his. He walked up and shook my hand. This will not go in the **Record**--it will go in the **Record**, but his name won't, but my colleagues will know who he is. He shook my hand and said, `Joe, you're a nice guy. I really appreciated it.' He says, `Of course, you know I would never do this for you.'

I like him because he is straightforward and honest. He meant it, and that's why we get along so well. I am not referring to the Senator from North Carolina. He said, `I'd never do this for you.' The point being, not that **Biden** is a good guy or **Biden** is a stupid guy, the point being that the court is in desperate trouble in a number of jurisdictions. In southern California and south

Florida, and in a number of places where there are drug cases that are backed up, a number of places where there are significant civil case backlogs, a number of places where population growth is straining the court, they need these vacancies filled.

I respectfully suggest that it is a rare--it is a rare--district court nominee by a Republican President or a Democratic President who, if you first believe they are honest and have integrity, have any reason to vote against them. I voted for Judge Bork, for example, on the circuit court, because Judge Bork I believed to be an honest and decent man, a brilliant constitutional scholar with whom I disagreed, but who stood there and had to, as a circuit court judge, swear to uphold the law of the land, which also meant follow Supreme Court decisions. A circuit court cannot overrule the Supreme Court.

So any member who is nominated for the district or circuit court who, in fact, any Senator believes will be a person of their word and follow stare decisis, it does not matter to me what their ideology is, as long as they are in a position where they are in the general mainstream of American political life and they have not committed crimes of moral turpitude, and have not, in fact, acted in a way that would shed a negative light on the court.

So what I want to say, and I will yield because I see my friend from South Carolina--North Carolina, I beg your pardon. I am used to dealing with our close friend in the Judiciary Committee who is from South Carolina. I seem to have the luck of getting Carolinians to deal with, and I enjoy them. I will yield the floor by saying, I will come back to the floor at an appropriate time in the near term, immediately when we get back from the recess, and I will, as they say, Madam President, fill in the blanks in terms of what the absolute detail and each of the numbers are, because I have tried to recall some of them off the top of my head, not having intended to speak to this issue when I walked across the floor earlier.

Let it suffice to say at the moment, at least for me, that it is totally appropriate for any U.S. Senator to voice his or her opposition to any nominee for the Court, and they have a full right to do that. In my study of and teaching of constitutional law and separation of powers issues, there is nothing in the Constitution that sets the standard any Senator has to apply, whether they vote for or against a judge.

But I also respectfully suggest that everyone who is nominated is entitled to have a shot, to have a hearing and to have a shot to be heard on the floor and have a vote on the floor.

We had a tie vote in the committee, Madam President, on one of the Supreme Court nominees. I was urged by those who opposed him--and I opposed this particular nominee--to not report it to the floor. My reading of the Constitution, though, is the Judiciary Committee is not mentioned in the Constitution. The Judiciary Committee is not mentioned. The Senate is. We only in the Judiciary Committee have the right to give advice to the Senate, but it is the Senate that gives its advice and consent on judicial nominations.

I sincerely hope, and I have urged the administration to confer with Republican Senators before they nominate anyone from that Senator's State. I think that is totally appropriate. I think it is appropriate, as well, that Republican Senators, with a Democratic President, have some input, which Democrats never had with the last two Republican Presidents. I think that is appropriate.

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NOMINATIONS OF CARLOS R. MORENO, OF CALIFORNIA, TO BE UNITED STATES DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA AND CHRISTINE O. C. MILLER, OF THE DISTRICT OF COLUMBIA, TO BE A JUDGE OF THE UNITED STATES COURT OF FEDERAL CLAIMS (Senate - February 03, 1998)

Mr. KENNEDY. Madam President, I strongly support the nominations of Carlos Moreno and Christine Miller to serve as federal judges.

Judge Moreno is superbly qualified to serve as a federal judge in the Central District of California. He is a graduate of Yale University, Harvard Business School, and Stanford Law School. Currently, he is a judge on the Los Angeles Superior Court. As a member of that court's Trial Delay Reduction Committee he was instrumental in establishing and enforcing policies that successfully reduced trial backlogs in Los Angeles County. At a time when lengthy backlogs are also plaguing the federal courts, Judge Moreno's experience will be an important asset for California's Central District Court.

Judge Miller is also well qualified to continue her service on the United States Court of Federal Claims. She has served on that court for the past fifteen years, and President Clinton's nomination of her for a second fifteen-year term is a tribute to her ability and leadership.

I also want to take this opportunity to express my concern that the Senate has still not had a chance to vote on the nomination of Margaret Morrow to the federal district court for the Central District of California. Ms. Morrow was first nominated in May 1996. She was approved by the Judiciary Committee in June last year, and it is long past time for the Senate to vote on her nomination.

On average, it is taking twice as long for Senate Republicans to confirm President Clinton's nominees as it took for Democrats to act on President Bush's nominations. But I am especially concerned about the Republicans' record of subjecting women who are nominated for federal judgeships to far greater delays than men.

Women nominated to the federal courts are four times--four times--more likely than men to be held up by the Republican Senate for more than a year.

Last year, the Senate confirmed 30 men, but only 6 women. And, by confirming only 36 judges, the Senate condemned many of our nation's busiest courts to even lengthier delays in processing their civil cases.

There is no question that Margaret Morrow possesses the necessary qualifications to be confirmed. She is a Harvard-educated attorney and a partner in a prestigious California law firm. She is the first woman to serve as the president of the California Bar Association. She is a well-respected attorney and a role model for women in the legal profession.

Yet action on her nomination has been delayed--like nine other nominees who have been waiting for more than 18 months--because the Republicans are playing politics and preventing needed judicial positions from being filled.

When even a Republican Chief Justice criticizes the Republican Congress for refusing to move more quickly to confirm judges, you know something's wrong. The Chief Justice is deeply concerned about the large number of judicial vacancies on the federal courts. There are too few judges to handle the workload.

The bottleneck in the Senate is jeopardizing the court system and undermining the quality of justice. Fewer than half of President Clinton's nominees have been confirmed.

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We owe it to Americans across the country to give these nominees a vote . If our Republican colleagues don't like them, vote against them. But give them a vote .

The distinguished majority leader has rightly noted that the process of confirming judges is time-consuming. The Senate should take care to ensure that only individuals acceptable to both the President and the Senate are confirmed. The President and the Senate do not always agree. But it should not take longer to consider women than it does to consider men.

Some Republicans claim they have slowed the confirmation process to protect the federal courts from `judicial activism.' But this argument is a smokescreen. If President Clinton is actually nominating judicial activists, then why is it that these nominees are approved overwhelmingly when the Senate is finally allowed to vote on them? The closest vote that we have had on any nominee in this Congress was the 76 to 30 vote in favor of Ann Aiken last week.

The claim that Clinton judges are activist judges is a transparent ruse being used to slow down the confirmation process. The reason is obvious. The Republican majority in Congress is doing all it can to prevent a Democratic President from naming judges to the federal courts. The courts are suffering, and so is the nation.

In some areas of the country , people have to wait years to have their cases even heard in court. And then they have to wait years more for overburdened judges to find time to issue their decisions. Families, workers, small businesses, women and minorities have traditionally looked to the courts to resolve disputes. The lack of federal judges makes the swift resolution of their cases impossible.

The number of cases filed in the federal appeals courts has grown by 11 percent over the last six years. The average time between filing and disposition has also increased. Courts with long-standing vacancies are in even worse shape.

In California's Central District Court, the Court to which both Carlos Moreno and Margaret Morrow have been nominated, the caseload has grown by 15 percent since 1994. The time people have to wait for their civil cases to be resolved has increased by 11 percent. In that district, over 300 pending civil cases are more than three years old.

Across the country , real people are being hurt. In the Central District of Illinois, a disabled Vietnam veteran who was fired after enduring harassment from his co-workers has been waiting over three and a half years for a resolution to his case.

In the Southern District of Texas, 4,000 victims of a student loan fraud are waiting for the outcome of a class action suit that has been pending for almost eight years.

In the District Court of South Carolina, there is still no decision in a suit filed more than six years ago against the state's apportionment laws. The outcome of this case will affect hundreds of thousands of citizens. It goes to the heart of whether the basic constitutional principle of `one person, one vote' is being fairly applied. The last communication the lead plaintiff received from the Court was in June of last year.

In the Southern District of Florida, Julio Vasquez--a U.S. citizen migrant worker--broke his leg in 1989 in a boarding house provided by his employer. To this day, nearly nine years later, Mr. Vasquez has never received sufficient medical attention, and his injury affects his ability to work. He is still waiting for the judge's ruling in his case.

These are typical victims of the vacancy crisis in the federal courts. They are hard-working Americans injured on the job--citizens seeking to exercise their right to vote --students trying to get an education--disabled veterans searching for justice.

I commend my colleagues for bringing two distinguished nominees to a vote today. I hope with this new year we will see a new day in moving ahead to fill the vacancies in our courts and end these unconscionable delays.

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Mr. HATCH. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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JUDICIAL NOMINATIONS -- (Senate - September 21, 1999)

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Mr. KENNEDY. Mr. President, for several months, many of us have been concerned about the Senate's continuing delays in acting on President Clinton's nominees to the federal courts. Since the Senate convened in January, we have confirmed only 17 judges and 43 are still waiting for action. These delays can only be described as an abdication of the Senate's constitutional responsibility to work with the President and ensure the integrity of our federal courts.

At the current rate it will take years to confirm the remainder of the judicial nominees currently pending before the Judiciary Committee. This kind of partisan, Republican stonewalling is irresponsible and unacceptable. It's hurting the courts and it's hurting the country. It's the worst kind of ``do nothing'' tactic by this ``do nothing'' Senate.

The continuing delays are a gross perversion of the confirmation process that has served this country well for more than 200 years. When the Founders wrote the Constitution and gave the Senate the power of advice and consent on Presidential nominations, they never intended the Senate to work against the President, as this Senate is doing, by engaging in a wholesale stall and refusing to act on large numbers of the President's nominees.

Currently, there are 61 vacancies in the federal judiciary, and several more are likely to arise in the coming months, as more and more judges retire from the federal bench. Of the 61 current vacancies, 22 have been classified as ``judicial emergencies'' by the Judicial Conference of the United States, which means they have been vacant for 18 months or more.

The vast majority of these nominees are clearly well-qualified, and would be confirmed by overwhelming votes of approval. It would be an embarrassment for our Republican colleagues to vote against them. It should be even more embarrassing for the Republican majority in the Senate to abdicate their clear constitutional responsibility to do what they were elected to do.

The delay has been especially unfair to nominees who are women and minorities. Last year, two-thirds of the nominees who waited the longest for confirmation were women or minorities. Already, in this Congress, the Senate is on track to repeat last year's dismal performance. Of the 11 nominees who have been waiting more than

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a year to be confirmed, 7 are women or minorities. On the 50th anniversary of President Truman's appointment of the first African American to the Court of Appeals--Judge William Hastie--the Republican leadership should be ashamed of this record, particularly

given the caliber of the distinguished African American, Latino, and female nominees waiting for confirmation.

For example, Marsha Berzon, Richard Paez, and Ronnie White have waited too long--far too long--for a vote on the Senate floor. Ms. Berzon is an outstanding attorney with an impressive record. She has written more than 100 briefs and petitions to the Supreme Court, and has argued four cases there. When she was first nominated last year, she received strong recommendations and had a bipartisan list of supporters, including our former colleague, Senator Jim McClure, and Fred Alvarez, a Commissioner on the Equal Employment Opportunity Commission and Assistant Secretary of Labor under President Reagan. Her nomination is also supported by major law enforcement organizations, and by many of those who have

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opposed her in court.

Ms. Berzon was first nominated in January 1998--20 months later, the Senate has still not voted on her nomination.

The Senate is also irresponsibly refusing to vote on two other distinguished nominees--Judge Ronnie White, an African American Supreme Court judge in the state of Missouri, and California District Court Judge Richard Paez. Judge White was nominated to serve on the District Court for the Eastern District of Missouri more than two years ago. Judge Paez was first nominated three years ago--three years ago--to serve on the Court of Appeals for the Ninth Circuit.

It is true that some Senators have voiced concerns about these nominations. But that should not prevent a roll call vote which gives every Senator the opportunity to vote ``yes'' or ``no.'' These nominees and their families deserve a decision by the Senate. Parties with cases, waiting to be heard by the federal courts deserve a decision by the Senate. Ms. Berzon, Judge White, and Judge Paez deserve a decision by this Senate.

While Republican leaders play politics with the federal judiciary, countless individuals and businesses across the country are forced to endure needless delays in obtaining the justice they deserve. Justice is being delayed and denied in courtrooms across the country because of the unconscionable tactics of the Senate Republican majority.

It is long past time to act on these and other nominations. I urge my Republican colleagues to end this partisan stall and allow the President's nominees to have the vote by the Senate that they deserve.

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FEDERAL VACANCIES REFORM ACT OF 1998 (Senate - September 28, 1998)

Mr. DURBIN. Thank you, Madam President.

I thank the Senator from Michigan for yielding.

Madam President, I rise today to oppose this effort to bring to a close debate on the Vacancies Act reform legislation, S.2176. I urge my colleagues to join me in voting against cloture.

Without so much as a blink, a breath, or a blush, a cloture motion on the bill itself was immediately filed last Thursday morning on the heels of the Senate's agreement to proceed to this bill. This quick flinch maneuver is an attempt to deny Members the opportunity to offer meaningful relevant amendments to improve this legislation, such as those I intend to pursue to address the Senate's responsibility to act expeditiously on pending nominations.

Before I outline the importance of assessing both sides of the process and outline my specific reservations about the bill as presently drafted, I wish to emphasize that I share the convictions and concerns of the sponsors, notably Senators **Byrd**, **Thurmond**, and **Thompson**, about the critical need to preserve and protect the constitutional prerogative of the Senate to advise and consent to Presidential nominations to executive branch positions. I am sure that I am not alone in this view.

I appreciate the sponsors' zeal to remedy what has grown to be, numerous instances and examples throughout the government, of outright challenges to Senate authority by ignoring the Vacancies Act. There has been flagrant and contagious disregard for the application of the existing law as the sole mechanism for temporarily filling advise and consent positions while awaiting the nomination and confirmation of the official candidate.

I wholeheartedly concur that this law needs clarification so that moves to end-run its application are halted. The bill as advanced by the Governmental Affairs Committee laudably addresses this exclusivity question.

Thus, I do not oppose efforts to bolster the Vacancies Act as the exclusive mechanism (with limited and explicit exceptions) for the president to designate officials to temporarily fill vacancies in positions requiring Senate confirmation.

Unfortunately, in its current form this bill goes well beyond that justifiable but limited goal in several respects. Moreover, it fails to go far enough to address the Senate's duty to timely act on nominations.

While the Administration may well bear some responsibility for the slow pace of nominations, I am dismayed that the Senate would want to so severely restrict the ability to fill vacant positions temporarily and to conduct the people's business while at the same time impeding the nominations process and confirming nominees at a snail's pace.

The Senate bears partial responsibility for the time it takes to nominate officials for Senate confirmed positions. This Congress has subjected the Administration's nominees to unprecedented scrutiny, using almost any prior alleged indiscretion--no matter how trivial--by a nominee as an excuse to delay or prevent a vote.

Senators have also interjected themselves into the President's nominations process to an unparalleled degree. As a result, that front-end process --the selection, recruitment, and vetting of candidates--takes longer than ever before.

The nomination and confirmation process , it has been observed, is one of `the President proposing, the Senate disposing.' If the Senate expects adherence to the rigid parameters this bill would impose on advancing candidates, we as its Members need to be ready and willing to diligently consider these candidates for public office and take prompt and deliberate action to

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confirm or reject them.

The Senate has frequently declined to exercise its advice and consent responsibility in a timely and appropriate manner. Too often, nominations die in Committee, languish interminably on the Executive Calendar, or simply take months or years to move through this Chamber.

Just as the President has a responsibility to forward nominees to the Senate in a timely fashion, we in the Senate have a concomitant obligation to discharge our constitutional prerogative of advice and consent on those candidates in an efficient and expeditious fashion.

We cannot simply confront practical deficiencies in the front-end phase of the process for recruiting and evaluating qualified candidates and ignore our own responsibilities.

We owe it not only to the Executive, but to the American public, to offer--not withhold--our advice and where appropriate, our consent.

I have filed and certainly hope to have an opportunity to offer some relevant amendments designed to address those instances of dilatory Senate Committee processing and floor inaction once a nominee is advanced to the calendar.

One amendment would provide that any nomination submitted to the Senate that is pending before a Senate committee for 150 calendar days shall on the day following such 150th day, be discharged and placed on the Senate executive calendar and be considered as favorably reported.

Another amendment would require the Senate to take up for a vote any nomination which has been pending on the Executive Calendar in excess of 150 days. Such Senate consideration must occur within 5 calendar days of the 150th day. In effect, it creates an end point after which we can no longer hold up a nominee.

I am not suggesting that we would give our consent to all of these nominees. I am basically saying that this process should come to a close . The Senate should vote. It should make its decision.

If we want to reasonably time-limit the front end of the process --with which I do not disagree--and promptly fill vacancies, we need to be equally willing to build some finality into the back-end of the process and impose some time limits on our own consideration of these candidates.

The first problem I find with this bill is that filling positions in the Government requires time far longer than that specified in this bill.

I have an amendment which suggests increasing the 150-day period to 210 days. I am sure people are wondering, if they are following this debate, why it would take so long for any kind of process to review a nominee. Well, as it turns out, the average number of days that a vacancy exists prior to a Senate nomination for the White House is 313 days. What could possibly take 313 days in investigating the qualifications of an individual to fill the job?

Consider all of the things that are going to be investigated. Not only the lengthy forms the individual must fill out, ethics disclosures, financial statements, fingerprints and the like, but also an FBI investigation,

a Federal Bureau of Investigation report on that person, the opportunity for groups to contact the White House and say that they either oppose or support the individual, the opportunity for Members of Congress to come forward and suggest to the administration that they either support that nominee or they oppose it. And as it turns out, some of these things such as an FBI report may not happen as quickly as some people imagine. We have heaped on that agency additional responsibilities every year. We entrust them with very important jobs. We tell them that we want them to fingerprint and make certain that those who want to be citizens of the United States, in fact, have no criminal record in any foreign country. That is a valid question, but it is an additional administrative responsibility.

The list goes on and on and on. As a consequence, when the administration comes to this agency, and it is only one example, and asks for a timely review of an individual nominated for a position, they sometimes have to wait in line. And while they wait the clock is ticking.

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And consider this as well. As a result of this legislation, saying the administration shall only have 150 days, what if in the midst of this process --say, for example, 4 or 5 months into the process --the administration reaches a conclusion that the individual should not go forward and the nomination should not be sent to the Senate. Does the clock start to run again? No. The clock continues to run 150 days, so the new nominee, starting over going through all these processes, trying to clear all these hurdles, is still burdened by the original clock ticking at 150 days. I don't think it is realistic. I don't think it is fair. Merely adding 30 additional days to the current 120-day timeframe within which an acting official may temporarily perform the duties and functions of the vacant office unless the Senate has forwarded a nominee to the Senate within that span is impractical. It is unrealistic, and I do not believe it is adequate.

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Mr. BYRD. Madam President, will the Senator yield?

Mr. DURBIN. I will be happy to yield.

Mr. BYRD. The Senator from Illinois has suggested an amendment, Madam President, as far as I am concerned, I could accept. Why not let us invoke cloture; that amendment is certainly a germane amendment, and have the Senator put it up for action by the Senate? I am one who would vote for it.

Mr. DURBIN. I thank the Senator from West Virginia, and I certainly appreciate those comments. But we are told by the Senate Parliamentarian that the amendment would be relevant but not germane, and therefore any action for cloture which would put a burden on the Senate to act within a certain period of time on nominees that are sent would be wiped away, or could be wiped away by this cloture motion.

Mr. BYRD. Madam President, will the Senator yield further?

Mr. DURBIN. I will be happy to yield.

Mr. BYRD. I may have misunderstood the Senator. I thought the Senator was suggesting that the 150 days is not enough and that he would like to see 30 additional days. That would certainly seem to be germane as far as I am concerned.

Mr. DURBIN. If the Senator will allow me to respond, that amendment is germane. The only other amendments which would impose a responsibility on the Senate to move a nominee out of committee within 150 days after it is sent from the White House or to move it off the Executive Calendar for a vote within 150 days, I am told by the Senate Parliamentarian, may not be

allowed if cloture is invoked.

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Mr. BYRD. Yes. I expect the Parliamentarian is right on that. I would not argue with that, nor would I probably support it.

If the Senator will allow me, the Constitution doesn't say that the Senate has to confirm the nominees. It simply says the President cannot have the full responsibility and power himself to name people to important positions. This is a matter that has to be shared under the Constitution between the President and the Senate. This constitutional provision--the appointments clause--I am trying to protect today is being given the runaround by the Justice Department and several other Departments, and I want to protect that constitutional power that is given to the Senate. As to whether or not the Senate acts on nominations, the Constitution doesn't require the Senate to act, but I think that the Senate does act, and would continue to act, on nominations within a reasonable period of time.

Having been the majority leader of the Senate during three different Congresses, I can say to the distinguished Senator that when I was majority leader we had nominations left on the calendar at the end of a Congress, in all three of the Congresses in which I served as majority leader. When we adjourned sine die that Executive Calendar was not wiped clean. We all did the best we could, but we did leave some nominations on the calendar. And I certainly share the Senator's feeling that the Senate ought to act expeditiously, in a reasonable fashion, but when it comes to requiring the Senate to act on all nominations, I don't think the Constitution requires that. And I might have to part company with the Senator at that point. But some of his other suggestions, I think, are very well made.

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Mr. DURBIN. I thank the Senator from West Virginia. It pains me to believe we would have a difference of opinion, but those things do occur. I am certain the Senator as majority leader did his constitutional responsibility--there has never been a doubt about that--and also acted with dispatch in a timely manner.

I think the Senator makes a good point. We not only want to protect the clear constitutional responsibility and right of the Senate in this process , we want to bring the best men and women forward to continue serving our Government, and we want it all done in a timely fashion. My concern with this bill is it addresses one side of the equation. It says to the executive branch, you have to move in a more timely fashion to bring these men and women to the Senate for consideration. If we are clearly looking for filling vacancies in a timely fashion, that is only half the process . Once the nomination is brought to the Senate, we should move in a timely fashion, too. Otherwise, using the old reference to equity, we don't come to this argument with clean hands, and that is why I think there should be some symmetry here in the requirement of the executive as well as the legislative branch.

Mr. BYRD. Madam President, will the Senator yield?

Mr. DURBIN. I will be happy to yield.

Mr. BYRD. And I thank him for yielding. The Senator, as I think I understand, suggested that if we are going to deal with one part of the equation, namely, the nominating process by the executive, and protect ourselves in that regard, we ought to be equally interested in dealing with the other half of the equation by requiring action by the Senate to confirm or reject nominees.

May I with great respect suggest--and I am doing this for the record. I am sure I am not ahead of the Senator in thinking this--I am trying to address the constitutional side of the equation and stop the administration, not only this administration but also previous administrations, from conducting a runaround of the constitutional advice and consent powers of the Senate. I am suggesting we deal with that constitutional side of the equation.

Now, the other side, which the distinguished Senator mentions, if he will pardon my saying so, I think what he is talking about is the political side of the equation. That part is not included in the Constitution. The Constitution doesn't require the Senate to act on any nomination. But that is the political side. I would like to deal with the constitutional side, and that is the purpose of this legislation. And then we can do the best we can on dealing with the political side. The Senator is quite right; neither side comes into this matter with perfectly clean hands. That is an old equity maxim.

It reminds me of Themistocles who happened to say, one day, `that he looked upon it as the principal excellence of a general to know and foresee the designs of the enemy;' Aristides answered, `that is indeed a necessary qualification; but there is another very excellent one, and highly becoming a general, and that is to have clean hands.' The same thing would apply here. Neither party has clean hands when it comes to moving all nominations sent by a President to an up or down vote. As majority leader during the Presidential years of Mr. Carter and again during the 100th Congress, I can remember that the calendars were not always cleared of items that had been reported by committees when adjournments sine die occurred. I hope that we will not get bogged down in this way about a purely political matter when a far more important constitutional matter, important to the prerogatives of the Senate in the matter of appointments is at hand.

And let me state to the Senator the number of nominees that were left on the executive calendar when I was majority leader, at the time of sine die adjournment.

When I was majority leader--I will just take one Congress, for example, the 100th Congress.

The PRESIDING OFFICER. The time of the Senator from Illinois has expired.

Mr. BYRD. Mr. President, I ask unanimous consent the Senator have an additional 5 minutes.

Mr. LEVIN. Reserving the right to object, and I surely hope I will not, I wonder how much time remains.

Mr. BYRD. And that that time not be charged against either side.

The PRESIDING OFFICER. The Senator from Michigan has 21 minutes; the Senator from Tennessee has 9 minutes. Is there objection to the request?

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Mr. LEVIN. The modified request, we have no objection to.

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

Mr. BYRD. I will just say this. To show that we all sometimes fail to have clean hands, when I was majority leader in the second session of the 100th Congress--I don't mind saying this--the civilian nominations totaled 516, including 112 nominations carried over from the first session; 335 of these were confirmed, 170 were unconfirmed, and 11 were withdrawn. So, this is a failing that can be ascribed to both Democrats and Republicans when they are in control of the Congress.

But, yet, I come back to my original premise; namely, that the Constitution did not require me to call up all those nominations off the calendar. It didn't say I had to do that. But it did say, with respect to nominations, that appointments to vacancies were to be shared by the President and the Senate, and that is what this bill is contemplating to enforce and what I am fighting for today.

I thank the distinguished Senator.

Mr. DURBIN. I thank the Senator from West Virginia.

I would just say that I can't believe that I hurried back from Chicago this morning to come to the floor of the U.S. Senate to actually engage my friend and fellow Senator from West Virginia in any debate about the Constitution. I plead nolo contendere. I am not able to join you in that. And I can't even reach back in Greek or Roman history for any kind of solace or defense.

I am not sure who the author was, it could have been a Greek or Roman, maybe a West Virginian, or even an Illinoisan, who once said the profound statement, `What is sauce for the goose is sauce for the gander,' and that is what I am attempting to argue here. That is, if we are going to impose on the executive branch a requirement to produce the nominee in 150 days, or if the time goes beyond that to suffer the possibility of not having an acting person in that slot, then we should accept the responsibility on the Senate side as well, to act in a timely manner on these nominees.

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Mr. BYRD. Mr. President, will the Senator yield? I hope he will forgive me.

Mr. DURBIN. I will be happy to yield.

Mr. BYRD. I am not here to engage in challenging his statements. He is one of the fine Members of this Senate; one of the newer Members, in a way. He served a long time in the House of Representatives. He comes to the Senate well prepared to be a good Senator, and he is a good Senator.

But, again, I am concerned about that part of the responsibility which the Constitution places on both the executive and the legislative. I think the legislative is being given the run-around by the Judiciary Department. It has not just been during this administration. It has been, as I say, going on for over 25 years, and this is an opportunity for us to correct that, I hope we would vote for cloture and perhaps some of the Senators' amendments--which are certainly worthy of consideration and probably of adoption, some of them--could be given a chance to be offered and debated. I hope we would invoke cloture, indeed, to have an opportunity to do that.

Mr. DURBIN. I thank the Senator from West Virginia.

I think what we have found is that rarely do we visit this rather obscure area of the law, the Vacancies Act. I am hoping in this visitation on one side, that we have some balance and impose requirements on the Senate to act in a timely fashion, as we impose a requirement on the executive branch to report a nominee in a timely fashion. But I also hope the time periods that we choose are realistic. I think anyone involved in this process at any level understands that when a person's name comes up in nomination, they are subjected to far greater scrutiny than ever before. It discourages many good people from even trying public service, and I am sure that many have been disappointed.

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HEADLINE: Harry Reid Discusses the Politics of the Democrat-Controlled **Senate**

GUESTS: Harry Reid

BYLINE: Mark Shields; Robert Novak

HIGHLIGHT:
Democratic **Senate** Majority Whip Harry Reid of Nevada discusses the politics behind James Jeffords' decision to become an independent. Finally, he talks about the agenda and priorities of the Democrat- controlled **Senate**

BODY:
THIS IS A RUSH TRANSCRIPT. THIS COPY MAY NOT BE IN ITS FINAL FORM AND MAY BE UPDATED.

MARK SHIELDS, CO-HOST: I'm Mark Shields. Robert Novak and I will question the No. 2 Democrat in the now Democratic-controlled U.S. **Senate.**

ROBERT NOVAK, CO-HOST: He is **Senate** Majority Whip Harry Reid of Nevada.

(BEGIN VIDEOTAPE)

NOVAK (voice-over): Party control of the **Senate** shifted this week for the first time ever during the course of a session.

SEN. THOMAS DASCHLE (D-SD), MAJORITY LEADER: I believe I have the moral authority as any majority leader would have with a 51-49 margin and I look forward to working with Senator Lott all the way through on all the issues.

SEN. TRENT LOTT (R-MS), MINORITY LEADER: A number of Democrats came right out last week and basically said, "Well, this is the end of national missile defense; this is the end of, you know, an opportunity to have additional oil supply in the ANWR of Alaska." But worst of all, that "this was the end to conservative judges and we're going to have a litmus test."

NOVAK: Senator Trent Lott might still be majority leader were it not for Harry Reid. He gave up his top Democratic slot on the Environment and Public Works Committee so that Senator

James Jeffords of Vermont could still be a committee chairman if he left the Republican Party.

Elected to the Nevada legislature in 1968, Senator Reid later served as lieutenant governor of Nevada and chairman of the Nevada Gaming Commission. He was first elected to Congress in 1982. After four years in the House, he was elected to the **Senate** in 1986. He was elected to a third term in 1998 by only 428 votes, but returning to Washington was chosen by his Democratic colleagues as assistant party leader, or whip.

(END VIDEOTAPE)

NOVAK: Senator Reid, there seems to be some different versions of the conversion of James Jeffords from the Republican side of the aisle to voting in the Democratic Caucus. Are you saying, Senator, that he made this as a leap of faith -- as you say, as an evolutionary process rather than a deal? There was no promise that he would be given your slot on the Environment Committee? And the fact that he became a committee chairman after he decided was just a bonus for him?

SEN. HARRY REID (D-NV), **SENATE** MAJORITY WHIP: Well, you know, it's interesting. I talked to Jim Jeffords this week, and I said, "You know, I just finished an interview with Mary McGrory and she asked me where we held all of our meetings." I said, "Except for one, we held it right here, didn't we, Jim?"

You know, we met on the **Senate** floor, once in a while as he passed going to the bathroom. But these long meetings of ours weren't very long -- short conversations on the **Senate** floor, and we had one long meeting in his office.

If he were looking for a good deal, he should have stayed as a Republican as far as goodies. They offered a line to become part of the leadership. They allowed to have him -- they would waive the term limit rule they had and allow him to stay on as chairman of the committee. And he had all kinds of things, as I've said. He had the kitchen sink and everything filled up in it.

All my conversations with Jim Jeffords were very above-board. We talked about the problems he was having in the party. I indicated to him that I'd like to have him on the committee, and, of course, I have a lot to do. And there came a time during the very end of the conversation that we would talk to him about the chairmanship of the committee. But that deal was not made until Friday -- the Thursday after he announced his change.

NOVAK: But surely -- the rumor was all over the Hill, Senator Reid: Surely he knew that he was going to get that chairmanship, even if he didn't have it written in your blood.

REID: Bob, I have no doubt that he knew that he could get that if he wanted it, but it was not a quid pro quo. If he were looking for some goodies, he should have stayed where he was.

NOVAK: Senator Reid, actually on the tax bill, which he voted for, there were more Democratic defections than Republican defections. And I wonder, since you're the No. 2 person in the leadership, when you see that your new chairman of the Finance Committee, Max Baucus, standing by President Bush's side at the signing ceremony the other day, just exulting in a bill that you and Senator Daschle have said is a terrible bill, does that give you a little heartburn? Are you upset with Max Baucus?

REID: Bob, Senator Daschle and I have made the decision we're going to look forward, not back. I have served with Max Baucus ever since I've been back here. He is a good man. He

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is going to be a great chairman of the Finance Committee. He did what he did as a result of what he thought was the best thing for the state of Montana and the country.

Now, I may disagree with him, but I think generally speaking Max Baucus and I agree on 95 percent of the things he has done and will do. So I'm not concerned at all about his having joined with Grassley.

I think the picture of the president with Max Baucus is a picture we need to magnify. We need more pictures like that, and we're going to have them. We're going to have more bipartisan legislation.

SHIELDS: Speaking of other pictures, Senator Reid, your conversion skills have been established in bringing over Senator Jeffords. What about John McCain? Are there overtures being made and conversations being held? Do you think that John McCain will move to independent status?

REID: If any of the three of us said we thought John McCain was going to do this or that, on Monday no one would be right. No one knows from day to day what John McCain's going to do. John McCain is a certified independent. He is going to do what he thinks is the right thing to do.

John McCain and I -- he and I came to Washington together in 1982, and he's one step ahead of me in seniority because Arizona has more people in it than Nevada. He and I literally have been side by side since we came here.

But I know John McCain, and John McCain is somebody that I don't know.

(LAUGHTER)

SHIELDS: That's a good answer.

Senator Reid, your leader and your friend Tom Daschle had this to say about Yucca Mountain, the potential repository for nuclear waste in Nevada. I'll put it up on the board. It says, "I think the Yucca Mountain issue is dead. As long as we're in the majority, it's dead." He said that on the 1st of June, 2001.

Do you agree with that? I mean, is there no possibility of any nuclear waste finding its way into the state of Nevada?

REID: That statement created so much controversy, some of the great journalists in America wrote about it.

SHIELDS: And some others, too.

(LAUGHTER)

REID: Interestingly enough, Frank Murkowski this week has said that he doubts very seriously if Yucca Mountain will be a place where they're going to store nuclear waste.

SHIELDS: But he's in the minority. You're in the majority.

REID: Well, but he has been an advocate for nuclear waste as long as I've been back here. And I think the situation we have is right now Yucca Mountain has cost about $8 billion. The price tag on Yucca Mountain is $58 billion. And I think that is without any consideration given to the transportation aspects of it.

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Tom Daschle is a realist. Frank Murkowski is a realist. Pete Domenici, who serves on the Subcommittee on Energy and Water with me -- we provide the money for Yucca Mountain and other things nuclear in this country -- he said to me that he thinks that the standards issued by Governor Whitman this week also indicate that it's going to be extremely difficult, if not impossible, at NRC to certify it.

REID: So, in short, what should we do with it? Leave it where it is? Dry cast storage containment? Or as Pete Domenici wants to, start looking at transportation. Daschle and Murkowski are right.

SHIELDS: But doesn't this effectively say, "This is the end of the growth of the nuclear industry in this country during an energy crisis"?

REID: Quite to the contrary, Bob. I think if we decide to do something about -- Bob. Pardon me, Mark.

If we decide to do something with producing nuclear power, solve the problem with nuclear waste and we can get on board right away.

NOVAK: Senator Reid, the last I saw there was over 60 votes in the **Senate,** certainly over 50 votes, that's in favor of a Yucca Mountain repository. So when you say, and Senator Daschle says, that there's not going to be a bill, are you saying that you are going to use all the parliamentary wiles you can, the filibuster and other things, to keep it from coming to an up-and-down vote on the floor? And is this going to be true of the other things that Senator Lott was talking about, like national missile defense. Are you going to keep the things you don't like from coming to an up-and-down vote on the floor?

REID: Bob, one of the interesting things about nuclear waste, it doesn't take new legislation. Nothing has to be done. Yucca Mountain is already on legislation has been passed. It was passed in 1982. The problem is that the scientific community is beginning to turn their nose up. The money going in there is going into a big cesspool. It's like dumping money into nowhere. And people are beginning to realize that if you haven't even addressed transportation, Yucca Mountain is not possible.

SHIELDS: Senator Reid, we learned that in spite of the new tone in Washington proclaimed by the Bush administration, that Senator Daschle, prior to becoming majority leader, had not had a conversation with the president since March. When was the last time, prior to your becoming majority whip -- or have you had one since you became majority whip with President George W. Bush?

REID: I've had one meeting with the president. It was an enjoyable meeting. He's a very, very pleasant man.

SHIELDS: When was that meeting?

REID: Well, it was a couple of months ago.

But I think that he's learned that now he's going to have to be doing something other than talking about bipartisanship; he's going to have to do it. He's had experience in Texas doing it. I don't think there's a reason that hasn't, except his staff has been giving him some terribly bad advice.

SHIELDS: OK.

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We have to take a break. When we come back, we'll ask Senator Harry Reid if President Bush is trying to steal the Democrat's thunder on health care issues.

(COMMERCIAL BREAK)

NOVAK: **Senate** Majority Whip Harry Reid, I'm going to ask you a straight question, and I'd love to get a straight answer out of you.

Is there a litmus test on federal judges appointed by President Bush on whether or not they're pro-choice or pro-life? That if they are pro-life that they are anti-abortion, they are going to be eliminated.

REID: I don't think we should have litmus tests for members of the sub-Cabinet, the Cabinet or the judges. And I think that this controversy over the judiciary, I'm afraid the Republican minority is concerned that we're going to treat them like they've treated us.

And what I mean by that is, you take the 106th Congress, it took 285 days on an average to get a judge approved; 103rd Congress when we controlled, it was 80 days. So you can see the difference there. Fifty five percent of President Clinton's judicial nominations to the appellate court were turned down.

We're not going to do that. We're going to have hearings. We're going to have the process vetted as soon as possible. And I think we should have up-or-down votes in the committee and on the floor. So the answer is, no, there is not litmus test and there will not be.

NOVAK: But, Senator, the president intended to name Congressman Christopher Cox of California, a very well-respected member of Congress, though quite conservative and anti-abortion. And that under the so-called blue slip system, one senator, Senator Barbara Boxer, has eliminated him from even being appointed. She's only one of -- what is it? -- 19 senators -- 18 senators in that judicial circuit. Do you think that's a good system, the blue slip system where one senator can get rid of all that?

REID: Bob, we didn't invented that system. Orrin Hatch invented that system. We're just following...

NOVAK: But you think it's a good system?

REID: I personally don't think it's a good system. I think the best system is one that John Ensign and I have developed in the state of Nevada, where we have bipartisan look at these judges. He's going to appoint three, I'm going to get one. I said that's one more than I deserve. And we've agreed so far on three judges; not a bad way to go. It can be done. I just think we need a more open process.

You're asking about nominations, generally. The system is broken for judges and everybody else. Bush will not have his Cabinet people in place until February of next year. It's not our fault. It's the system.

NOVAK: Sub-Cabinet?

REID: Yes. It's terrible.

SHIELDS: Senator Reid, on the question of litmus tests, you are rather lonesome on occasion because you are a pro-life Democrat. We hear so much every four years about the Republicans ought to be a big tent party, welcome in pro-choice folks, but really it seemed in the last few conventions that pro-life Democrats have been unwelcome to the party.

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THE PAEZ NOMINATION -- (Senate - March 08, 2000)

Some who have opposed Berzon's nomination have even called her a labor zealot. But Mr. President, there are a number of people in this room who were attorneys before joining the Senate. They know, as do I, that the code of professional responsibility requires zealous advocacy on a client's behalf. So to mention her zeal for her practice is simply to highlight one of those qualities which makes her such a fine candidate for the 9th Circuit. It shows that she has taken her practice of law to the highest and most professional level.

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And lest her opponents complain about professionalism and infer unfairly that a former labor lawyer cannot be fair to management, listen to what numerous management-side attorneys who have litigated against her say about Marsha Berzon. Let's take the case of W.I. Usery, Jr., a former Republican Secretary of Labor:

Usery said Ms. Berzon ``has all the qualifications needed, as well as the honesty and integrity that we need and deserve in our court system today..... I know she will be dedicated to the principles of fairness and impartiality in all her judicial activities.''

Or perhaps, we should listen to Fred Alvarez, President Ronald Reagan's former EEOC Commissioner and Assistant Secretary of Labor. Alvarez says:

Someone with the intellect and integrity, which Ms. Berzon has demonstrated, understands the difference between advocacy and the solemn responsibilities undertaken as a federal appellate court judge ..... I can think of no other union-side lawyer who would command so strong and so compelling a consensus from management lawyers on her suitability for such an important position on the 9th Circuit Court of Appeals.

So there you have it Mr. President. Top Republican officials--who we can be sure favor management positions by personal philosophy--endorse Berzon and her professionalism without reservation.

So let's put the foolish argument that Marsha Berzon can't be fair concerning labor issues to rest.

Let's review. We've shown that arguments that Berzon is some liberal by her association with Justice Brennan are fallacious. We've shown that arguments that she is a zealous advocate and should be rejected as an ideologue in fact highlight her mastery of the practice of law and make her highly qualified for this position. We've exploded the myth that she is anti-management and incapable of impartiality in hearing cases pitting management versus labor, and found that she works towards reaching consensus. So one has to wonder Mr. President, what is really going on here?

I'm concerned about the appearance that Marsha Berzon has had such a long, hard road to confirmation because she is a woman. And I don't blame the public for taking that message from this delay when a highly qualified appellate attorney is held up for years and the arguments against her confirmation are so thin.

At the end of 1999, the entire federal judiciary included only 158 women--that's a scant and embarrassing 20% of sitting judges. Rather than attempting to address that disparity, this Senate has chosen to continue the policies of limiting the upward elevation of talented and capable women attorneys and judges. We've repeatedly delayed action on a host of female candidates. What's the impact? If fewer women get confirmed, there are fewer lower court judges to elevate to the nation's appellate courts. And if the judiciary remains a male bastion, as far as we've come in this country in recognizing equal rights for women, we risk creating the perception that gender biases will continue to plague our judicial system well into the 21st century.

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I believe Ms. Berzon is highly qualified to sit on the 9th Circuit, and her confirmation should wait no longer. I enthusiastically support her and I urge my colleagues to do the same.

I yield the floor.

Mr. BUNNING. Mr. President, I rise in opposition to the nominations of Richard Paéz and Marsha Berzon to sit on the 9th Circuit Court of Appeals.

There are serious problems with the 9th Circuit. It has become a renegade Circuit, far out of the mainstream of modern American jurisprudence, and I am afraid that if these nominees are confirmed, they will only make a bad situation worse.

Over the past six years, the 9th Circuit has been overturned 86% of the time by the U.S. Supreme Court, a terrible record. During this period, the Supreme Court has reviewed 99 decisions from the 9th Circuit, and overturned 85 of those decisions. During the current session, the 9th Circuit has been overturned in all of the 7 cases reviewed by the Supreme Court, and in one term--1996-97--27 of 28 decisions were overturned, including 17 by unanimous votes.

This is the worst record of any circuit, and is especially troubling given the size and influence of the 9th Circuit. It covers almost 40% of the country, and 50 million Americans--20 million more than any other circuit. The fact that the 9th Circuit has been slipping toward judicial extremism is no laughing matter, and directly affects a large part of our nation and almost one-fifth of our citizens.

The main reason for the judicial imbalance on the 9th Circuit is that Democratic appointees currently comprise 15 of the 22 positions on the 9th Circuit, 10 of whom were appointed by President Clinton. I do not begrudge President Clinton his appointees; he is the President, and has the constitutional right and responsibility to fill the federal bench. But the 9th Circuit has become lopsided with activist judges that has helped push it far out of the judicial mainstream. The circuit cries out for balance.

Confirming Richard Paez and Marsha Berzon to the 9th Circuit would only exacerbate its problems. Mr. President, I do not know the nominees and I have nothing against them. Their records show that they have long legal backgrounds, and deserve a final vote on their nominations. But, the record also shows that they both tilt far too left in their judicial views and would not help to restore balance or judicial sensibilities to the 9th Circuit.

Ms. Berzon has worked as the general counsel of the AFL-CIO for over a decade, and was long active with the ACLU. At least one conservative group has described her as the ``worst judicial nomination President Clinton has ever made.'' Mr. President, Ms. Berzon is entitled to her views and I am not going to criticize her for her personal beliefs. But looking at her past and the causes which she has pushed show that, if confirmed, she is not going to help steer the 9th Circuit toward the judicial mainstream.

As for Judge Paez, he currently sits on the federal district court in the 9th Circuit, and his nomination is opposed by over 300 grassroots conservative organizations that are troubled by his judicial activism. The U.S. Chamber of Commerce, and the Hispanic Chamber of Commerce, have even taken the unusual step of opposing his nomination because of their concerns over some of his past decisions, arguing that he has pursued an agenda that ``has the potential to cause significant disruption in U.S. and world markets.'' Mr. President, business groups usually do not become involved in judicial nominations, and when they do it should make us wonder.

Even the Washington Post editorial page, no friend of conservative causes, has cautioned that opposition to Judge Paez ``is not entirely frivolous'', and points to past public remarks by Judge Paez that show how ``sympathetic'' he is to activist, judicial thinking.

Mr. President, since coming to the Senate I have voted for some of President Clinton's judicial nominees, and I have opposed several. Yesterday, in fact, I voted to confirm Julio Fuente to sit on the Third Circuit. But confirming Richard Paez and Marsha Berzon to sit on the 9th Circuit would be a mistake, and would directly affect 50 million Americans. The 9th Circuit has serious problems, and confirming these nominations are not going to fix those problems. Consequently, I am going to oppose them.

Mr. FEINGOLD. Mr. President, I rise to speak today in strong support of the nomination of Richard Paez to be a judge on the Court of Appeals for the 9th Circuit. By finally moving on the nominations of Judge Paez and Ms. Marsha Berzon this week, the Senate will take long-delayed steps towards returning the 9th Circuit dockets to a manageable level. Action on

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these nominees is long overdue. I believe their nominations should be confirmed, and I hope, after all this delay, there will be strong bipartisan votes in favor of them.

Four years, 1 month, and 11 days. Just over forty-nine months. One thousand, four hundred and ninety-nine days. That's right. 1499 days, two short of 1500. That is how long Judge Richard Paez has been waiting for the Senate to act on his nomination. In the same amount of time, a young adult could enter and complete a full college degree program. Let me repeat that. Judge Paez has waited for the Senate to grant him the simple grace of voting his nomination up or down for longer than it takes a young American to complete an entire college education. A President or Governor could be inaugurated, serve his or her entire term

[Page: S1299] GPO's PDF

and be re-inaugurated during that same four year time period. While I'm sure Judge Paez is a patient man, possessed of the proper judicial temperament that makes him an excellent candidate to sit on the 9th Circuit, I know that even his patience must have long-ago worn thin waiting for the Senate to act on his nomination.

First nominated to fill a 9th Circuit vacancy on January 26, 1996, Judge Paez has been subject to delay after delay after delay, and yet his opponents have not been able to give a convincing reason why we shouldn't confirm his nomination. Even with his 13 year record as a LA Municipal Court Judge and nearly 6 years as a U.S. District Court Judge for the Central District of California, those who don't want him on the bench can't build a case against his elevation to the 9th Circuit. They charge that he is an ``activist judge,'' but the record simply doesn't support this allegation.

Judge Paez now bears the dubious distinction of suffering through the longest pendency of a nomination to the federal bench in the history of the United States.

All Judge Paez, has ever asked for was this opportunity: an up or down vote on his confirmation. Y et for years, the Senate has denied him that simple courtesy.

I find it ironic that Judge Paez, the same judge who diligently worked to reduce the length of delays in resolving civil matters in Los Angeles and throughout California's court system through his design and implementation of a civil trial delay reduction project, should himself be subjected to such egregious delay in getting his ``day in court'' before the full Senate. Particularly when the Senate confirmed his nomination for a District Court judgeship in July 1994 by unanimous consent. Now I recognize that control of this body has changed since 1994, but his nomination to the District Court was confirmed without objection. And his record on that court has been exemplary.

This delay has not simply been unfair to Judge Paez and his family. It has affected the administration of justice. Listen to the concerns of Procter Hug, Jr., Chief Judge of the 9th Circuit. Chief Judge Hug has responsibility for overseeing the functioning and managing the caseloads of the entire Circuit. Currently, of the 28 spots on the 9th Circuit, 6 stand vacant. Chief Judge Hug explained in a letter this past week to the Judiciary Committee that during his term as Chief Judge, the Senate has left him with up to 10 vacancies on the court at any one time. He has responded to this judicial emergency by begging his colleagues to redouble efforts to resolve cases and then increased their dockets to prevent even longer delays in resolution of cases. Hug argues forcefully for the confirmation of Judge Paez and Ms. Berzon and asks this body to swiftly fill the other 4 vacancies on the court.

Now Mr. President, let me address the argument made by the Majority Leader and others that the pending 9th Circuit nominations should be rejected because that circuit has a supposedly high level of reversals when its decisions are reviewed by the Supreme Court. This argument simply doesn't hold water.

First, if we assume that this argument is not meant to be critical of the views or qualifications Judge Paez or any other nominee personally, it makes no sense at all. Even if we disagree with the direction of that court, why would we deny the 9th Circuit adequate resources, thereby depriving the litigants in that circuit of efficient administration of justice? It just makes no sense.

More importantly, arguing that the Ninth Circuit is out of step with the Supreme Court and needs to be reined in doesn't get opponents over the hurdle that they have not yet been able to satisfy--to show that Judge Paez is unsuitable for the appellate bench. He is obviously not responsible for past decisions of the 9th Circuit. So the argument has to be that his elevation will continue the Circuit on its supposedly misguided course. The evidence of Judge Paez being unable to follow Supreme Court precedent is thin indeed, if not non-existent.

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But more fundamentally, it is simply not factually correct that the 9th Circuit is out of step with the Supreme Court and other circuit courts. Chief Judge Hug in his letter convincingly refutes the argument that his circuit is reversed more often than others. In fact, its clear from the numbers that even in 1996-1997, when the 9th Circuit's reversal rate was at its highest level of recent years, it was reversed less frequently than 5 other circuits--the 5th, 2nd, 7th, D.C. and Federal--each of which were reversed 100% of the time that year by the Supreme Court. In more recent years, the statistics show even more clearly that the 9th Circuit is not a runaway train that somehow needs to be slowed down, but many in the Senate would like it to become a more conservative circuit, perhaps to be broken into two conservative circuits. And they are willing to hold up Judge Paez and others to achieve that political objective.

Furthermore, I have to point out that reversal rates are a very poor criteria for judging a court's work. The Supreme Court is not required to review every appellate decision. It picks which cases to review. So it is hardly surprising that when it does take a case, it reverses a lower court. Chief Judge Hug quite rightly points out that the 9th Circuit decides about 4,500 cases on the merits each year. 4,500. So the fact that 10 or 20 cases per year are reversed really should not trouble us. It is just not a plausible argument against a nominee for this Circuit that its decisions are out of the mainstream.

We ought to congratulate the women and men currently serving on the 9th Circuit for so successfully fulfilling their judicial roles at the same time vacancies are greatly increasing their dockets and stretching their time thin. The pressure to carefully make the proper judicial decisions is great, and these Judges are responding with professionalism. I thank them for that, but I cannot help but think that we are putting an unconscionable burden on them.

So what is the point of raising meritless arguments against this nominee? Why the long delay? Let me suggest two possibilities, neither of which reflect well on the Senate. First, Senators delaying these nominations may be trying to run out the clock until President Clinton leaves office. Confirmations always slow down in a presidential election year. In 10 months, we will have a new President. Perhaps a different President will put forward a different nominee. But Judge Paez was actually nominated a year before the President's 2nd inaugural. So holding up this particular nomination for purely political reasons is most unfair. In some ways, this nomination should get special treatment. We had an intervening election after the nomination was first made, and President Clinton won. It is indefensible to hold a nomination hostage for his entire second term. It defies the clear constitutional prerogatives of the duly elected President to choose nominees to the bench and the duty of the Senate to say yes or no.

Some Senators may also object to moving the nomination of Judge Paez because of a perceived judicial philosophy. Some opponents of his nomination look to his long and distinguished service in legal aid and attempt to tar him with the epithet of ``liberal,'' forgetting that his exemplary judicial career has been filled with distinction at all levels. A close look at his record as a U.S. District Court judge since the Senate confirmed his nomination in 1994 debunks attempts to label his opinions as conservative or liberal, reactionary or progressive.

The Los Angeles Daily Journal, which is a newspaper devoted to covering the courts and the legal profession in Los Angeles commissioned 15 legal experts to examine Judge Paez's decisions in seven different cases. Each case was reviewed by at least 2 experts. The results were clear. Thirteen of the legal scholars and practitioners found Paez's opinions ``well-reasoned and well-written.'' Two others were mildly critical. And, in the one decision in which the experts were critical of Judge Paez's decision not to dismiss claims that Unocal Corporation was liable for human rights abuses in Burma, a third expert countered the criticism of Judge Paez's decision, saying ``I would give Judge Paez very good marks on his ruling.'' What's the point here? In a variety of decisions, the commentators praised the work of Judge Paez. Here are some of their comments:

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I carefully read Judge Paez's opinion and found that it was excellent in every respect.

His writing was clear and his expression was good. He did not show any ideological or personal bias.

Judge Paez's injunction--in a case against anti-abortion demonstrators--was entirely consistent with the reasoning and result in conservative jurisdictions.

The result is that claims that the Judge's record is activist, or liberally slanted are simply wrong. Claims that he is anti-business are simply not borne out by the facts. Paez also ruled in favor of Philip Morris on a second-hand smoke suit and for Isuzu against Consumers Union. Senators opposing this nominee because they claim he's anti-business are missing the point. Paez rules on each case on the merits--yes, on the merits--and shows no favoritism for or against business. So again, Mr.

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President, I'm just baffled by these claims of activism or anti-business philosophy being leveled against Richard Paez.

Now if his record as a judge doesn't support these charges of ``judicial activism'' where did Judge Paez's opponents get the idea that he must be stopped. Opponents aren't saying it openly but it could be that they are worried that a judge who formerly worked in a legal aid capacity must be a liberal, and incapable of making balanced decisions. Having failed to find any hint of bias or lack of judicial temperament in 20 years of judicial decisions, what other reason for opposition could there be other than a belief that if you are an attorney who agrees to work on behalf of those unable to access the legal system because they are poor or under-educated, as Judge Paez did for nine years early in his career, you must be a liberal, right?

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EXECUTIVE SESSION -- (Senate - September 21, 1999)

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NOMINATION OF BRIAN THEADORE STEWART, OF UTAH, TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF UTAH

CLOTURE MOTION

The PRESIDING OFFICER. Under the previous order, the clerk will report the motion to invoke cloture.

Mr. KENNEDY. Mr. President, I send an amendment to the desk on the minimum wage and ask for its immediate consideration.

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The PRESIDING OFFICER. The Senate is not on that bill.

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

The PRESIDING OFFICER. The clerk will report the motion to invoke cloture.

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

The PRESIDING OFFICER. The clerk will call the roll to ascertain the presence of a quorum.

The legislative assistant proceeded to call the roll.

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

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

The PRESIDING OFFICER. Under the previous order, the clerk will report the motion to invoke cloture.

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The assistant legislative clerk read as follows:

Cloture Motion

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 215, the nomination of Brian Theadore Stewart, of Utah, to be United States district judge for the district of Utah vice J. Thomas Greene, retired:

Trent Lott, Orrin Hatch, Mike Crapo, Wayne Allard, Ben Nighthorse Campbell, Charles Grassley, Peter G. Fitzgerald, Connie Mack, Chuck Hagel, Rod Grams, Pat Roberts, Conrad Burns, Judd Gregg, Larry E. Craig, Robert F. Bennett, and Mike DeWine.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call under rule XXII is waived.

The question is, Is it the sense of the Senate that debate on the nomination of Brian Theadore Stewart, of Utah, to be United States District Judge for the District of Utah, be brought to a close?

The yeas and nays are required under the rule.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. NICKLES. I announce that the Senator from Arizona (Mr. **MCCAIN**), is necessarily absent.

The yeas and nays resulted--yeas 55, nays 44, as follows:

[Rollcall Vote No. 281 Ex.]

YEAS--55

Abraham

Allard

Ashcroft

Bennett

Bond

Brownback

Bunning

Burns

Campbell

Chafee

Cochran

Collins

Coverdell

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Sarbanes

Schumer

Torricelli

Wellstone

Wyden

NOT VOTING--1

McCain

The PRESIDING OFFICER. On this vote, the yeas are 55, the nays are 44. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected.

Mr. LEAHY. Mr. President, I deeply regret that we have reached this point in connection with the nomination of Brian Theadore Stewart to the District Court for Utah. Please understand that Democrats are prepared to vote on this nomination, as we are on all of the judicial nominations pending on the Senate Executive Calendar. This impasse is caused not by Democrats' refusals to vote on that nomination but by Republican refusals to allow a vote on the nominations of Judge Paez or Ms. Berzon. If we can vote on the Stewart nomination in less than 2 months, we should be able to vote on the Paez nomination within 4 years and the Berzon nomination within 2 years.

This debate is about fairness. The Senate needs to be fair to all people in this country. For too long nominees--judicial nominees like Judge Paez, Ms. Berzon and Justice Ronnie White of Missouri, and Executive Branch nominees like Bill Lann Lee-- have been opposed in anonymity through secret holds and delaying tactics. They have been forced to run a gauntlet of Senate confirmation. Those strong enough to survive are being dealt the final death blow not by being defeating in a fair up or down vote on the nomination but through a refusal of the Republican leadership to call them up for a vote. These nomination are being killed through neglect and silence, not defeated by a majority vote.

Today we are not asking for any Senator's vote for any nomination. Instead, I am asking the Senate recognize that its responsibility is to vote on all the judicial nominations on the calendar. We can vote for them or against them, we can vote them up or vote them down, but after 44 months or 27 months or 20 months, after completing every step in what is a long, tortuous confirmation process, the nominations of Judge Richard Paez, Justice Ronnie White and Marsha Berzon are as entitled to a Senate vote as the nomination of Ted Stewart.

I do not begrudge Ted Stewart a Senate vote. Despite strong opposition from many quarters from Utah and around the country, from environmentalists and civil rights advocates alike, I did not oppose the Stewart nomination in Committee and I expect to vote for his final confirmation here on the floor of the United States Senate. I have been supportive of Chairman **HATCH** in his efforts to expedite Committee consideration of the Stewart nomination with the expectation that these other nominees who have been held up so long, nominees like Judge Richard Paez, Marsha Berzon and Justice White, were to be considered by the Senate and finally voted on, as well. The Chairman and I have both voted for Judge Paez and Justice White each time they were considered by the Committee and we both voted for and support Marsha Berzon.

I have tried to work with the Chairman and with the Majority Leader on all these nominations. I would like to work with those whom the Majority Leader is protecting from having to vote on the Paez and Berzon nominations, but I do not know who there are. In spite of what was supposed to be a Senate policy that did away with anonymous holds, we remain in a situation where I do not even know who is objecting to proceeding to schedule a vote on the Paez and Berzon nominations, let alone why they are objecting. In this setting I have no ability to reason with them or address whatever

their concerns are because I do not know their concerns. That is wrong and unfair to the nominees.

I do not deny to any Senator his or her prerogatives as a member of the Senate. I have great respect for this institutions and

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its traditions. Still, I must say that this use of anonymous holds for extended periods that doom a nomination from ever being considered by the United States Senate is wrong and unfair.

Again, I say that this debate is about fairness and about the Senate being fair to all nominees and to other Senators and to the American people. If we can vote on the Stewart nomination within 4 weeks in session, we can vote on the Paez nomination within 4 years and the Berzon nomination within 2 years. That is the point that the distinguished Democratic Leader was making by moving to proceed to consider those nominations this evening. The Republican majority has refused to debate those nominations and continues its steadfast refusal to vote on them after years of delay.

I do not want to see any judicial nomination held up without a vote, but the Republican leadership is not being fair to the other judicial nominees on the calendar. We ask only for a firm commitment that they will each get an up or down vote, too. The Republican Majority refuses to make even that commitment to a vote before the end of the session on these qualified nominees.

In my statement last week I detailed the path that each of these nominees has traveled to the Senate. All are now available for a vote on confirmation by the Senate. All should be accorded an up or down vote.

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Judge Richard Paez is an outstanding jurist and a source of great pride and inspiration to Hispanics in California and around the country. He served as a local judge before being confirmed to the federal court bench several years ago and is currently a Federal District Court Judge. He has twice been reported to the Senate by the Judiciary Committee and has spent a total of 9 months over the last 2 years on the Senate Executive Calendar awaiting the opportunity for a final confirmation vote. His nomination was first received by the Senate in January 1996, 44 months ago.

Justice Ronnie White is an outstanding member of the Missouri Supreme Court and has extensive experience in law and government. He is the first African American to serve on the Missouri Supreme Court. He has also been twice reported favorably to the Senate by the Judiciary Committee and has spent a total of 7 months on the floor calendar awaiting the opportunity for a final confirmation vote. His nomination was first received by the Senate in June 1997, 27 months ago.

Marsha Berzon is one of the most qualified nominees I have seen in 25 years. Her legal skills are outstanding, her practice and productivity have been extraordinary. Lawyers against whom she has litigated regard her as highly qualified for the bench. Nominated for a judgeship within the Circuit that saw this Senate hold up the nominations of other qualified women for months and years--people like Margaret Morrow, Ann Aiken, Margaret McKeown and Susan Oki Mollway--she, too, is listed ahead of the Stewart nomination on the floor calendar. Ms. Berzon was first nominated in January 1998, 20 months ago, and a year and one-half before Mr. Stewart.

It is against this backdrop that we are asking the Senate to be fair to these judicial nominees and all nominees. I do not want to see votes delayed on any nominee. For the last few years the Senate has allowed one or two or three secret holds to stop judicial nominations from even getting a vote. That is wrong.

The Chief Justice of the United States Supreme Court wrote in January last year:

Some current nominees have been waiting a considerable time for a Senate Judiciary Committee vote or a final floor vote..... The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.

Let us follow the advice of the Chief Justice. Let the Republican leadership schedule up or down votes on the nominations of Judge Paez, Justice White and Marsha Berzon so that we can vote them up or vote them down. And so that we can proceed on all the judicial nominations that our federal courts need to do their job of administering justice. Let us be fair to all.

Mrs. BOXER. Mr. President, I voted against cloture on the Stewart nomination because the process that brought us to this vote has, to date, prevented the Senate from even considering the nominations of several other judicial nominees who have been waiting far longer than has Mr. Stewart.

Richard Paez and Marsha Berzon, two nominees for the 9th Circuit, have both been reported by the Judiciary Committee and have been on the Senate Executive Calendar since July. But, more important, their nominations have been pending in the Senate for years--2 years in the case of Ms. Berzon and three years for Judge Paez!

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It is patently unfair to ignore these fine nominations while moving forward on the Stewart nomination. I have no problem with Mr. Stewart, as far as I know. But this is an important process question, and I simply had no choice but to vote no on cloture on Stewart until we are assured of also moving ahead with those nominations which have been pending far longer.

Mr. KOHL. Mr. President, Ted Stewart, as any other nominee, deserves a vote. And eventually, I expect to vote for him, because I respect the judgment of my friend **ORRIN HATCH** and of the President. But there is a long line of qualified nominees ahead of him and, at least at this point, it's not right for him to ``cut'' in line.

For example, just compare Mr. Stewart's path with that of another qualified candidate, Tim Dyk, a nominee for the Federal Circuit. Mr. Dyk was first nominated 18 months ago, came out of Committee with strong bipartisan support, then stalled on the floor in the last days of the session because of a ``secret'' hold. He was nominated again eight months ago, and he has still never been placed on the agenda.

As for Mr. Stewart, he was nominated less than two months ago, and it took him just 48 hours to go from nomination, to hearing, to Committee approval. Now Mr. Stewart is up for a full Senate vote just 53 days after he was nominated. Meanwhile, five hundred and two days after Tim Dyk was nominated, he seems to be going nowhere fast.

That makes no sense to me or, I suspect, to Chairman **HATCH**, who also supports this nominee.

Mr. President, as with Mr. Stewart, Mr. Dyk will, I predict, be confirmed with bipartisan support. He's a first-rate intellect. He passed this Committee by a 14 to 4 vote last year, and all of us know that the Federal Circuit would be lucky to have someone of his caliber.

Like Tim Dyk and Ted Stewart, there are many other deserving nominees out there. Let's not play favorites. These nominees, who have to put their lives on hold waiting for us to act, deserve an ``up or down'' vote. And, more importantly, the American people deserve prompt action, so that our courts can stay on top of their workload, and continue putting criminals behind bars.

So, Mr. President, I expect to support Ted Stewart, but don't think he alone should get the timely consideration that all nominees--including Tim Dyk, Marsha Berzon and Richard Paez--deserve. So I hope we can get an agreement to move forward not only Mr. Stewart, but also other deserving nominees. Thank you.

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JUDICIAL NOMINATIONS (Senate - May 15, 1997)

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Mr. KOHL. Mr. President, yesterday Mr. **Leahy** and several of my colleagues spoke about judicial confirmations. Let me make a few additional points. First, we are experiencing a record slowdown in confirming judges. Last year, only 17 Federal judges were confirmed, and not a single judge for a court of appeals. This year, the process has gotten even worse--only two judges have been confirmed, and the year is almost half over. Indeed, at our current pace, with only 5 judges likely to be confirmed a year, and an average of more than 50 retiring, we would have no federal judges at all in 20 years. Literally, an empty bench.

Second, we need these judges, both to prosecute and sentence violent criminals and to prevent more backlogs in civil cases. This is about justice--it shouldn't be about politics. Don't take my word on this, ask Chief Justice Rehnquist. He says `filling judicial vacancies is crucial to the fair and effective administration of justice.' Chief Justice Rehnquist is right.

Or ask Judge George Kazen from the Southern District of Texas. He is the subject of a front page article in today's Washington Post with the headline `Cases Pile Up as Judgeships Remain Vacant.' He is hearing a dramatic increase in criminal cases now because we're cracking down on illegal immigration and drug smuggling in his border district. He desperately wants and needs help. But we haven't helped. Instead, the Senate has held up a nominee for his district for almost 2 years. I ask unanimous consent to print this article in the **Record** at the conclusion of my remarks.

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

(see exhibit 1.)

Mr. President, third, inaction now can only make matters worse. If we don't start moving judges, some Senators might feel compelled to put a hold on all other legislative business. Or the President could be forced to make recess appointments to the Federal bench. Of course, no one wants either of these things, including me. But if we don't confirm nominees through the normal process , I am afraid this is what could happen.

Mr. President, let's breathe life back into the confirmation process . Let's vote on the nominees who already have been approved by the Judiciary Committee, and let's set a timetable for future hearings on pending judges. Let's fulfill our constitutional responsibilities; justice demands that at a minimum. I thank you, and I yield the floor.

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Exhibit 1

From the Washington Post, May 15, 1997

[FROM THE WASHINGTON POST, MAY 15, 1997]

Cases Pile Up as Judgeships Remain Vacant

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(BY SUE ANNE PRESSLEY)

Laredo, TX.--The drug and illegal immigrant cases keep coming. No sooner does Chief U.S. District Judge George Kazen clear one case than a stack of new cases piles up. He takes work home at night, on weekends.

`It's like a tidal wave,' Kazen said recently. `As soon as I finish 25 cases per month, the next 25 are on top of me and then you've got the sentence reports you did two months before. There is no stop, no break at all, year in and year out, here they come.

`We've already got more than we can say grace over down here,' he said.

This is what happens to a federal judge on the southern border of the United States when Washington cracks down on illegal immigration and drug smuggling. It is a situation much aggravated by the fact that the Senate in Washington has left another federal judgeship in this district vacant for two years, one of 72 vacancies on federal district courts around the country.

As Border Patrol officers and other federal agents swarm this southernmost region of Texas along the Mexican border in ever-increasing numbers, Judge Kazen's docket has grown and grown. He has suggested, so far unsuccessfully, that a judgeship in Houston be reassigned to the Rio Grande Valley to help cope.

In Washington, where the laws and policies were adopted that has made Kazen's life so difficult, the Senate has made confirmation of federal judges a tedious process , often fraught with partisan politics. In addition to the 72 federal district court vacancies (the trial level), there are 25 circuit court vacancies (the appellate level) and two vacant international trade court judgeships across the country, leaving unfilled 99 positions, or 11 percent of the federal judiciary. Twenty-six nominations from President Clinton are pending, according to Jeanne Lopatto, spokeswoman for the Senate Judiciary Committee, which considers nominations for recommendation to the full Senate for confirmation .

Of those 99 vacancies, 24 qualify as judicial emergencies, meaning the positions have been vacant more than 18 months, according to David Sellers of the Administrative Office of the U.S. Courts. Two of the emergencies exit in Texas, including the one in Kazen's southern district.

Lopatto said the thorough investigation of each nominee is a time-consuming process . But political observes say Republicans, who run the Senate, are in no hurry to approve candidates submitted by a Democratic president. The pinch is particularly painful here in border towns. The nominee for Brownsville, in Kazen's district, has been awaiting approval since 1995. Here in Laredo, Kazen's criminal docket has increased more than 20 percent over last year.

`We have a docket,' he said, `that can be tripled probably at the drop of a hat. * * * The Border Patrol people, the Customs people at the [international] bridges will tell you, they don't catch a tenth of who is going through. The more checkpoints you man, the more troops you have at the bridges, will necessarily mean more stops and more busts.'

And many more arrests are expected, the result of an unprecedented focus on policing the U.S.-Mexico border. Earlier this year, Clinton unveiled a $367 million program for the Southwest for fiscal 1998, beginning Oct. 1, that includes hiring 500 new Border Patrol agents, 277 inspectors for the Immigration and Naturalization Service, 96 Drug Enforcement Administration agents and 70 FBI agents.

In Kazen's territory, the number of Border Patrol agents already has
swollen dramatically, from 347 officers assigned to the Laredo area in fiscal 1993 to 411 officers in fiscal 1996. More tellingly, in 1993, agents in the Laredo sector arrested more than 82,000 people on cocaine, marijuana and illegal immigration charges. By 1996, arrests had soared to nearly 132,000, according to data supplied by the INS.

All of which is keeping Kazen and the other judges here hopping. `I don't know what the answer is,' said U.S. District Judge John Rainey, who has been acting as `a circuit rider' as he tries to keep Kazen out in Laredo from his post in Victoria, Tex. `I certainly don't see it easing up anytime soon. There still seems to be such a demand for drugs in this country, and that's what causes people to bring them in. Until society changes, we won't see any changes down here.'

In a letter to Rep. Henry B. Gonzalez (D-Tex.) in February, Kazen outlined the need for a new judge in the Laredo or McAllen division, rather than in Houston, where a vacancy was recently created when then-Chief Judge Norman Black assumed senior status. `The `border' divisions of our court--Brownsville, McAllen and Laredo--have long borne the burden of one of the heaviest criminal dockets in the country, and the processing of criminal cases involves special pressures, including

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those generated by the Speedy Trial Act,' he wrote.

On a recent typical day, Kazen said, he sentenced six people on drug charges and listened to an immigration case. His cases tend to involve marijuana more often than cocaine, he said.

`The border is a transshipment area,' he said. `The fact is, a huge amount of contraband somehow crosses the Texas-Mexican border, people walking through where the river is low, and there are hundreds and hundreds of miles of unpatrolled ranchland.

`In some cases,' Kazen continued, `we're seeing a difference in the kind of defendant. We're almost never seeing the big shots--we're seeing the soldiers. Once in a while, we'll see a little bigger fish, but we're dealing with very, very smart people. We see some mom-and-pop stuff, too. There was a guy who came before me who had been in the Army umpteen years, and he needed the money, he was going bankrupt, so he did this 600-pound marijuana deal. He said he stood to pick up $50,000, and now he's facing five to 40 years.

`We see kids 18 and 19 years old,' Kazen said. `We see pregnant women. We see disabled people in wheel-chairs. This is very, very tempting stuff.' In Washington, the argument over court vacancies continues. On April 30, Attorney General Janet Reno told the Judiciary Committee, `Chief judges are calling my staff to report the prospect of canceling court sittings and suspending civil calendars for lack of judges, and to ask when they can expect help. This committee must act now to send this desperately needed help.'

In remarks yesterday to the Federal Judges Association meeting in Washington, Reno warned that `the number [of vacancies] is growing.'

`As you are no doubt aware,' Reno told the judges, `the level of contentiousness on the issue of filling judicial vacancies has unfortunately increased in recent times.'

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THE JUDICIARY (Senate - January 28, 1998)

Mrs. BOXER. Mr. President, I am very glad that we are moving forward with judges today. We all hear, as we are growing up, that, `Justice delayed is justice denied,' and we have, in many of our courts, vacancies that have gone on for a year, 2 years, and in many cases it is getting to the crisis level. So I am pleased that we will be voting. I thi nk, wh ether the delays are on the Republican sid e or the Democratic side, le t these names come up, let us have debate, let us vote.

In that regard, I am looking forward to having our debate on the nominee I had recommended to President Clinton, Margaret Morrow, who has the strong support of Senator **Hatch**, many Republicans on the Judiciary Committee, and I am very hopeful we can get that nomination resolved.

I kno w that our leaders had agreed that vote would take place before the February recess and I wil l be speaking with both leaders to find out a date certain.

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JUDICIAL VACANCIES (Senate - May 14, 1997)

Mrs. BOXER. Mr. President, will my friend yield for about 2 minutes?

Mr. LEAHY. Of course. I am happy to yield to the Senator from California.

Mrs. BOXER. I am appreciative of the Senator taking to the floor today to discuss this entire issue. We all learned growing up that justice delayed is justice denied.

We have these openings. Look, I was told very clearly by the chairman of the Judiciary Committee, `Senator, you have to come in with nominations that will pass by Republicans and Democrats. You need to bring forward nominees who are supported by Republicans and Democrats.'

Mr. President, I have done just that. I think Senator **Leahy** has outlined this magnificently--I have never seen a nominee with such bipartisan support as this woman. This is what is so extraordinary about the kind of treatment she is receiving: a secret hold that has been placed on her.

Mr. President, this is not the way to run the U.S. Senate. Let's allow this woman's name to be placed on the floor and then those who have any objection can express their objections and vote no. But I am so confident that the vast majority of our colleagues will vote for Margaret Morrow.

I say that not only because of her extraordinary bipartisan support, but because of her incredible qualifications. I say to my friend from Vermont how much I appreciate his leadership on this. Sometimes we forget these nominees have private lives. This is a woman who is a law partner in a law firm making preparations for a new career. She is a 45-year-old wife and mother. She has a very loving family. They are very proud of her. They are completely mystified about these questions that keep coming. I have talked to several members of the Judiciary Committee, both Democrats and Republicans, and when I speak with them, I say to you, Mr. President, one on one, I am very confident that Margaret Morrow will get a vote and a fair vote.

I want to quote from one letter that is so important.

H. Walter Croskey, associate justice in the Court of Appeals for the State of California, Second Appellate District, describes himself, Mr. President, as a conservative Republican. He has written to Senator **Hatch**, and he wrote to Senator **Hatch** about an article he read that suggested that `concerns have been raised in the [Judiciary] Committee about judicial activism and noted that there were questions as to whether Margaret would be a judge who would follow the Constitution and the laws as they are written.' He says, `Such concerns are not shared by anyone who knows Margaret.' And he goes on to say, `Her well known and often expressed reverence for our system of government and justice and her great intellectual integrity provides full assurance that she would be the kind of judge who would follow and apply the laws as written * * *.'

He goes on.

Mr. President, we have Republican after Republican from my State. This particular judge was appointed by George Deukmejian, Republican Governor of the State of California.

Mayor Richard Riordan, Sheriff Sherman Block, a Republican-elected sheriff, supports her nomination.

So it is so difficult, frankly, for this Senator to understand why we would play with the life of a woman like this and not give

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her her fair chance.

I understand that women's organizations have written to Senator **Leahy** and Senator **Hatch**. They have been very patient. But when you see a panel of people, as Senator **Leahy** has described, three men and one woman, and the three men get reported out of the committee--and I venture to say, I know they are all extremely qualified--I would put Margaret's qualifications right up against any of those.

So I am very pleased that my colleague, the ranking member on the Judiciary Committee, has raised this issue. I am hopeful, I say to my friend and the Presiding Officer today, that because Senator **Grassley** has lifted his objection to bringing the nomination to the floor and others on the committee have done the same, that they will prevail upon that secret hold, they will find who that particular Senator is who has put a hold here. If we start putting holds on each other's nominations and on each other's bills and on each other's amendments, I say to my friend, we are only going to deteriorate in this U.S. Senate. The people expect more.

To reiterate Mr. President, I come to the floor today to urge that Margaret M. Morrow be voted out of the Judiciary Committee and confirmed to sit on the U.S. District Court for the Central District of California.

Margaret Morrow is an outstanding candidate for the Federal bench, who enjoys broad bipartisan support. She has over a dozen support letters from prominent, widely respected Republicans, including judges, elected officials, and others. It has been my honor to recommend such a fine candidate to the President. Her name was submitted to me by my judicial advisory committee for the Central District of California. My committee enthusiastically found her to be a superior judicial candidate.

However, despite her strong bipartisan support and strong credentials, her nomination remains indefinitely stalled in committee. She has had two hearings, and has had several rounds of questions with no end in sight. No Member has come forward to explain why she should not be confirmed.

MARGARET MORROW'S HISTORY

Margaret Morrow was first nominated by the administration on May 9, 1996. She received the first of her nomination hearings before the Senate Judiciary Committee on June 25, 1996, and was reported out of committee just 2 days later without any opposition from the committee.

For several months, Margaret Morrow's nomination sat on the Executive Calendar waiting to be moved, and finally died on the floor of the Senate when we adjourned at the end of the session.

Margaret was then renominated on January 7 of this year because of her impeccable credentials. Her nomination languished for over 2 more months until further action on March 18, when she had yet another hearing.

Twice, now, the Judiciary Committee has reviewed stacks of information she provided to the committee, a full FBI background investigation, and her testimony before the committee. Yet, Margaret still sits in committee, facing repeated rounds of questions with no end in sight.

JUDICIAL VACANCIES

Margaret Morrow's confirmation should not be held hostage for political reasons, Mr. President. According to the U.S. Constitution , the President nominates, and the Senate shall provide advice and consent. It is not the role of the Senate to obstruct the process and prevent numbers of highly qualified nominees from even being given the opportunity for a vote on the Senate floor.

Today, we have 26 nominations from the President to consider. Every one of these nominations should be voted out of committee and placed on the calendar for consideration on the Senate floor.

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MARGARET MORROW'S LIFE IS ON HOLD

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The vacancy Ms. Morrow would be filling has been vacant since January 24, 1996. In 2 short months, this vacancy will become a judicial emergency. That will make three judicial emergencies in the ninth circuit courts, and four judicial emergencies in the California district courts. Two of those judicial emergencies will be in the Central District of California. I don't think I need to remind this body that the Central District of California in Los Angeles is one of the busiest courts in the Nation.

To provide some historical context, in 1992, every one of the 66 nominees approved by the Senate Judiciary Committee were approved by the full Senate. Every single person nominated, Mr. President, was under a Republican administration and a Democratic-controlled Senate. Included in those 66 judges were 11 circuit court nominees. In 1992, the Democratic Senate confirmed the highest number of judges of any year of President Bush's term. And the confirmations did not slow as the election approached. During the 4-month period between June and September, the Senate Judiciary Committee favorably reported 32 nominees, including 7 appeals court nominees.

Former Majority Leader Bob Dole spoke

of this process himself. In June of last year, he said `We should not be holding people up. If we need a vote, vote them down or vote them up * * * because [the nominees] probably have plans to make and there are families involved.' Even then-Majority Leader Dole recognized the necessity to provide resolution for nominees out of fairness to these individuals and their families.

Before I speak about Ms. Morrow's credentials or historical precedent for judicial confirmations, I wanted to make the point that there is also a personal side to the judicial confirmation process. For nominees who are awaiting confirmation, their personal and professional lives hang in the balance.

Margaret Morrow--a 45-year-old mother and law partner--has put her life and her professional practice on hold while she waits for the Senate to approve her nomination. The Senate's delay has affected her ability to assume certain responsibilities at her law practice. Her whole family--particularly her husband and young son--have waited patiently for her confirmation to proceed. Many of us here in the Senate have no idea what kind of strain and stress awaiting confirmation means for these nominees. We owe to her prompt Senate consideration.

Mr. President, I am unaware of any substantive reason why Ms. Morrow's nomination has not been before the full Senate long before today. If another Member of this body has a reason for opposing her confirmation, I want the opportunity to discuss those objections, as does Ms. Morrow, and to move on to Senate consideration.

THREE POINTS

There are three aspects of Margaret Morrow's qualifications, in particular, I want to emphasize:

First, Ms. Morrow's long history and background in the legal profession. Her credentials are impeccable.

Second, Ms. Morrow has the confidence of a broad spectrum of supporters.

Third, Ms. Morrow's qualifications and the broad support she enjoys would make her an exceptionally distinguished addition to the Federal bench.

MS. MORROW'S LONG HISTORY AND BACKGROUND IN THE LEGAL PROFESSION, HER CREDENTIALS ARE IMPECCABLE

Ms. Morrow graduated magna cum laude from Bryn Mawr College, and received her law degree from Harvard University, graduating cum laude. Ms. Morrow has enjoyed 23 years in private practice in commercial and civil litigation, and is now a partner at the prestigious law firm of Arnold & Porter. She is married to Judge Paul Boland of the Los Angeles Superior Court and they have a son, Patrick Morrow Boland.

From 1988 to 1989, Ms. Morrow served as president of the 25,000-member Los Angeles County Bar Association, the second largest voluntary bar association in the country, and created an innovative program in California called Pro Bono Council which calls on members of the association to do pro bono work for the poor. From 1993, she served a 1-year term as president of the largest mandatory bar association in the country, the 150,000-member State Bar of California. Ms. Morrow

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was the first woman to ever hold this office in that organization.

Ms. Morrow has been recognized several times during her tenure in the legal profession. A few of these include a listing in 1994 as one of the top twenty lawyers in Los Angeles by California Law Business, a weekly publication of the Los Angeles Daily Journal. In 1995 and again in 1996, Ms. Morrow was included in the Los Angeles Business Journal's `Law Who's Who,' a list of 100 outstanding Los Angeles business lawyers.

Just this February, Ms. Morrow received the Shattuck-Price Award, the highest honor given by the Los Angeles County Bar Association for individuals with outstanding dedication to the high principles of the legal profession, the administration of justice and the progress of the county bar. Others who have received such distinction include Warren Christopher and Shirley Hufstedler, former U.S. circuit court judge and U.S. Secretary of Education.

MS. MORROW HAS THE CONFIDENCE OF A BROAD SPECTRUM OF SUPPORTERS

I'm not the only one who believes Ms. Morrow has an excellent legal mind and is a

credit to the legal profession. Ms. Morrow enjoys the broad support of accomplished persons. Many of California's prominent and conservative Republican lawmakers and elected officials support her confirmation:

H. Walter Croskey, associate justice in the Court of Appeals for the State of California, Second Appellate District, and self-described conservative Republican writes to Senator **Hatch** about an article he read that:

. . . suggested that concerns have been raised in the [Judiciary] Committee about judicial activism and noted that there were questions as to whether Margaret would be a judge who would follow the Constitution and the laws as they are written. Such concerns are not shared by anyone who knows Margaret. Her well known and often expressed reverence for our system of government and justice and her great intellectual integrity provides full assurance that she would be the kind of judge who would follow and apply the laws as written with her only agenda to make that system work better and more efficiently. . . . The reservations expressed about her are simply without foundation and should not deter the Judiciary Committee from taking prompt and favorable action on what we here in California regard as a truly inspired choice.

The district attorney of Orange County, Mike Capizzi, writes to Senator **Lott**:

I have absolutely no hesitation in commending her nomination to you as being among the very best ever likely to come before you. * * * Of particular interest to crime victims, law enforcement and public prosecutors are her initiatives and achievement in the fields of juvenile justice and domestic violence, where her efforts have helped focus national attention.

He ends his letter by stating:

The record of scholarship, citizenship, and dedication to improving the legal system that Margaret will bring with her to the federal bench reveals great promise for a truly exceptional jurist of whom we will all be proud. I sincerely, wholeheartedly and enthusiastically entreat you to confirm Margaret's nomination for appointment to the district court, without delay. We need her.

Los Angeles Mayor Richard Riordan writes in strong support of Ms. Morrow's nomination. He adds that Morrow, `would be an excellent addition to the Federal bench. She is dedicated to following the law, and applying it in a rational and objective fashion.'

Representative **James Rogan**, former Republican assembly leader in the California Legislature, now Member of Congress, who gave a supporting introduction for Margaret Morrow at her second hearing, wrote to Senator **Trent Lott** urging his support of Ms. Morrow's nomination because he believes she would be `conscientious in applying the law.'

Republican Los Angeles County Sheriff Sherman Block also supports Ms. Morrow's nomination, stating she is an extremely hard worker with impeccable character and integrity.

Republican Robert Bonner, appointed by President Reagan as U.S. attorney for the Central District, later appointed to the U.S. District Court in the Central District, and former head of the Drug Enforcement Administration under President Bush has also lent his support, stating she is a `brilliant person with a first-rate legal mind * * * nominated based upon merit, not

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political affiliation.'

Lod Cook, chairman emeritus of ARCO, and a prominent Republican in the State of California wrote of Ms. Morrow:

I am convinced she is the type of person who would serve us well on the federal bench. I believe she will bring no personal or political agenda to her work as a judicial officer. Rather, her commitment will be to ensuring fairness and openness in the judicial process and to deciding cases on the facts and the law as they present themselves.

Mr. President, I ask unanimous consent that these and additional letters of support be printed in the **Record**.

There being no objection, the material was ordered to be printed in the **Record**, as follows:
STATE OF CALIFORNIA,

Court of Appeal,
Los Angeles, CA, April 17, 1997.

Hon. Orrin G. Hatch,
Chairman, Committee on the Judiciary, U.S. Senate, Russell Senate Office Building, Washington, DC.
Re Nomination of Margaret Mary Morrow.

Dear Senator Hatch: I am pleased to write in support of the nomination of Margaret Morrow to the United States District Court for the Central District of California. I have known Margaret for over 15 years, both professionally and socially. During that period, I have worked with her on many local and state bar activities and committees; I have had repeated opportunities to discuss legal issues with her; and she has appeared before me in both the trial and appellate courts on a number of occasions. Finally, I am very familiar with her reputation in the legal community, both in Southern California and statewide. Based on all of that, I believe that she is the most outstanding candidate for appointment to the federal trial court who has been put forward in my memory.

Yesterday, I read an article in our local legal newspaper about Margaret's second hearing before the Judiciary Committee on March 18, 1997. That article suggested that concerns have been raised in the Committee about judicial activism and noted that there were questions as to whether Margaret would be a judge who would follow the Constitution and the laws as they are written. Such concerns are not shared by anyone who knows Margaret. Her well known and often expressed reverence for our system of government and justice and her great intellectual integrity provides full assurance that she would be the kind of judge who would follow and apply the laws as written with her only agenda to make that system work better and more efficiently. She will be a judge of whom all Americans, Republican or Democrat, can be very proud.

Every now and then we have the opportunity to bring into government service a truly outstanding person, a person whose knowledge, intelligence, integrity and industry are such as to command universal respect and admiration. We have that opportunity with Margaret's nomination. As the second woman to head the Los Angeles County Bar Association, (the second largest voluntary bar association, after the ABA, in the nation), the first woman to be elected president of the California State Bar Association, an attorney who has won every award and accolade which can be bestowed by the California legal community and a practicing lawyer with superlative skills and reputation, she can truly be characterized as an exceptional choice for appointment to the District Court. Indeed, as I mentioned, I can recall none better in my professional experience. The reservations expressed about her are simply without foundation and should not deter the Judiciary Committee from taking prompt and favorable action on what we here in California regard as a truly inspired choice.

As a lifelong conservative Republican, I would be very disappointed to see members of the Committee, whose views I share and admire on so many issues, fail to embrace this exceptionally well qualified nominee. Margaret's nomination should be promptly approved and sent to the Senate floor with a favorable recommendation.

My best to you and your staff. Keep up the good work.

Yours truly,
H. Walter Croskey.

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JUDICIAL CONFIRMATIONS IN THE 105TH CONGRESS (Senate - December 15, 1997)

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Mr. SARBANES. Mr. President, now that we have concluded the 1st session of the 105th Congress, I want to again focus the attention of the Senate and the American people on the glacial pace of Federal judicial confirmations during this session.

Mr. President, the reluctance of the Senate to confirm the President's nominees to the Federal bench is a carryover from the 2d session of the 104th Congress, during which the Republican-controlled Senate, in an unprecedented display of election-year inaction, confirmed only 17 district court nominees and no circuit court nominees.

This pattern of inaction has continued into the 105th Congress, during which the Senate has confirmed only 36 of the President's judicial nominees--7 circuit judges and 29 district court judges. Admittedly, there was some effort made in the waning days of the session to confirm judges, but the overall numbers remain highly disturbing and worthy of attention.

In the last 2 years, the Senate has confirmed 53 judicial nominees, while a total of 81 seats on the bench continue to lie vacant, and 41 nominees await committee or floor consideration.

In other words, there are still more nominees pending in the Senate than were confirmed this year, and more than twice the number of nominees confirmed last year.

Compare the number of nominees confirmed thus far this year and in the 104th Congress to the number confirmed in the last two Democratically controlled Congresses, one of which featured a Republican President. In the 102d Congress, the Senate confirmed 124 Federal judges, while in the 103d Congress it confirmed 129 Federal judges. In the 104th Congress, the Republicans confirmed but 75 judges, while this year it confirmed 36. In other words, in the last 3 years, the Republican majority in the Senate has confirmed fewer Federal judges than the Democratically controlled Senate did in either the 102d or the 103d Congress.

I ask my colleagues to further compare the figures of the last 2 years with the number of judicial nominees confirmed by Democratically controlled Senates during years when a Republican White House faced a Democratic challenge--when, as in 1996, the party in control of the Senate had an incentive to delay confirmations, in the hopes that the Presidential election would effect a transfer of the White House to its party. "S12720

In 1992, when President Bush stood for reelection and the Democrats controlled the Senate, the Senate confirmed 11 circuit

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court judges and 55 district court judges. In other words, the Democratically controlled Senate in 1992 confirmed almost four times the number of Republican nominees confirmed by the Republican controlled Senate in 1996, and almost 25 percent more judges than the Republican Senate has confirmed in the last 2 years combined.

Similarly, in 1988, when Vice President Bush stood for election, the Democratically controlled Senate confirmed 7 circuit court judges and 33 district court judges--over twice the number of judges confirmed last year, and more judges than were confirmed in this past nonelection year.

Clearly, in the last couple of years, the politicization of the confirmation process has increased. Today, the Republican majority in the Senate is effectively bottling up nominees in committee and on the floor, in stark contrast to the behavior of Democratically controlled Senates over the last decade.

This politicization, Mr. President, has been extended to include the practice of denying nominees an up or down vote on the Senate floor, or even in the Judiciary Committee. If the majority of the Senate opposes a judicial nominee enough to derail a nomination by an up or down vote, then at least the process has been served. Instead, however, the President's nominees are not even receiving that courtesy from this Senate: Some of the individuals whose nominations are pending before the Judiciary Committee or the full Senate have not been allowed a vote on the floor, much less in committee, for close to 2 years. It is especially troubling that of the 14 nominees who have been held up the longest by the Republican majority in the Senate, 12 are women or minorities.

Let me give one example of this phenomenon--that of James Beaty, the President's nominee to the Fourth Circuit Court of Appeals, which includes my State of Maryland.

Judge Beaty, currently a district court judge in North Carolina, was nominated by the President to the court of appeals in the 104th Congress, during which he did not even receive a vote in committee. He was renominated on January 7 of this year, and has yet to receive even a hearing in the committee, much less an up-or-down vote there, or on the floor.

Some have argued against Judge Beaty's nomination that, in their view, the fourth circuit does not need an additional judge, and that failure to confirm him would amount to a conservation of taxpayer resources. Assuming for the sake of argument that that is the case--and I would disagree that it is the case--Congress should act affirmatively to eliminate the vacant seat on that court before a nominee comes before it, not stall an individual's nomination into oblivion with arguments created after the fact. When you have a nominee sent to the Senate and then claims are made that the seat is unnecessary, it is simply impossible to divorce the claim that the seat is unnecessary from an ad hominem attack on the candidate himself.

Judge Beaty, if confirmed to the fourth circuit, would be the first African-American to sit on that court. Prior to becoming a district court judge, Judge Beaty maintained a general civil and criminal litigation practice in Winston-Salem, NC, and then served as a State court judge for 13 years. These accomplishments entitle him, at the very least, to an up-or-down vote on the floor of the U.S. Senate. Instead, he has not even received a committee hearing--much less a committee vote, at the hands of the majority.

By any measure, Mr. President, the Congress has become increasingly politicized in the last few years. I submit to my colleagues, however, that if there is one subject that should remain immune from political games and pressure it is our Federal judicial system, which is the envy of the world for its independence and integrity, and which is absolutely fundamental to our system of government.

It is essential for the maintenance of public confidence in this system that the confirmation process be as far removed from politics as possible. Yet we seem to be moving in the exact opposite direction, as we hear Members of the other party calling for impeachment of judges on the basis of decisions with which the Members disagree, and for defeat of judicial nominees deemed to possess liberal or activist tendencies.

This behavior--while perhaps politically advantageous in the short run--betrays a basic and dangerous misunderstanding of the role of the courts in our system of government.

Moreover, on a purely practical level, the Senate's failure to confirm the 42 nominees before it adjourns hamstrings the courts' ability to deal with its ever-increasing caseload--an increase that, I might add, Mr. President, is in large part due to the majority's proclivity for federalizing areas of law that have been historically left to the States.

So we have district judges throughout the country putting aside all civil cases in order to deal with their criminal dockets,

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because their courts have been left shorthanded by the Senate's inaction. We have courts of appeals canceling oral arguments because of shortages on their courts. We have Chief Justice Rehnquist--hardly the kind of liberal judicial activist that so concerns the majority--calling the problem of judicial vacancies the most pressing problem facing the Federal courts today. And yet we see little in the way of movement by the Senate to alleviate these burdens.

Mr. President, I hope my colleagues--especially my Republican colleagues--will give serious attention to the problems, both practical and philosophical, that will result if the Senate does not revisit its approach to the judicial confirmation process, and that in this area, the second session of the 105th Congress will proceed in a markedly different manner than the last 2 years.

In closing, I would like to commend the efforts of my colleague from Vermont, Senator **Leahy,** the ranking member of the Judiciary Committee, in this area. He has tried to jog the Senate into acting to resolve this problem: I regret that his calls for action have not been heeded thus far, though I hold out hope that common sense and respect for our constitutional system will prevail in the long run.

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SETTING THE RECORD STRAIGHT ON JUDICIAL NOMINATIONS (Senate - March 19, 1997)

Mr. SARBANES. I want to ask the Senator a couple questions when he finishes his statement.

Mr. BIDEN. The point I wish to make is this. When I was chairman of the committee and a Republican was President , we held, on average, a hearing for judges once every 2 weeks and had usually five judges, circuit court and district court, who we heard.

Last year we essentially had one hearing every other month and we had to fight to get three to four on the agenda to be heard.

Mr. SARBANES. Will the Senator yield for a question.

Mr. BIDEN. I will be happy to.

Mr. SARBANES. This is a chart that Senator **Leahy**, now the ranking member on the Judiciary Committee, used today in the course of the Merrick Garland debate which I think is enormously instructive. It is the number of judges confirmed during second Senate sessions in Presidential election years.

Mr. BIDEN. I got it.

Mr. SARBANES. Now, in 1996, with a Democratic President , President Clinton, and a Republican Senate, the Senate confirmed no judges for the court of appeals, none whatsoever, and 17 judges for the district court. Now, in 1992, the previous election year--that was when Mr. Bush was President ----

Mr. BIDEN. And I was chairman.

Mr. SARBANES. And if I am not mistaken, the distinguished Senator from Delaware was the very able chairman of the Judiciary Committee.

Mr. BIDEN. I did not say `able.' I was chairman.

Mr. SARBANES. I am suggesting the Senator is able. I am prepared to make that statement. We confirmed 11 court of appeals judges and 55--I repeat, 55--district judges in an election year. Now, that gives you some sense of how the Democratic majority in the Senate, led at the time by the able Judiciary Committee chairman, was dealing with this matter, essentially in a nonpolitical way.

In 1988, when I think, again, the Senator from Delaware was still the chairman of the Committee----

Mr. BIDEN. That is correct.

Mr. SARBANES. With President Reagan, a Republican President --again, in an election year--we confirmed 7 court of appeals judges and 35 district court judges. Actually, the 35 that we confirmed in that election year was better than the Republican Senate did for President Reagan in 1984 when they only confirmed 33 judges. In any event, clearly this performance in these years is in marked contrast to what happened in 1996 and what apparently is continuing now in 1997. Merrick Garland was the first judge approved this year.

Mr. BIDEN. If I may respond to the Senator, obviously the facts are correct, but I think it worth elaborating a little bit more on the facts. I saw my very able colleague, the present chairman of the Judiciary Committee, on television the other day, and he was talking about the number of judges that were `left hanging,' who were not confirmed and sent back to the administration at the end of 1992, the Bush administration. And he cited an accurate number. But as my very distinguished friend, who is, as well, a scholar, knows, there is an old expression attributed to Benjamin Disraeli, who said there are three kinds of lies: lies, damn lies, and statistics.

What my able friend from Utah did not mention is that just like President Carter--Carter's judges is a separate charge we can go back to, but just like President Clinton, President Bush did not get his nominees up here until the end of the process.

In other words, they were late getting here. Notwithstanding the fact that he was late in getting his nominees up, the Senator may remember in the caucus over the objection of some Democrats who said the Republicans would never do this, I insisted we confirm judges up to the day we adjourned the Senate. During the last week the Senate was in that year, we confirmed seven judges. I could have easily just sneezed and they would not have been confirmed . And the fact is the reason why we did not confirm more is because we did not have time to hold the hearings and we were holding hearings on 20 or more a month.

Mr. SARBANES. If the Senator will yield, I can recall the Senator was holding hearings right up into the fall of the election year and judges were being brought to the floor of the Senate and being confirmed . And he is absolutely correct; there were some----

Mr. BIDEN. Republican judges.

Mr. SARBANES. Yes, Republican judges. And there were some Members on the Democratic side who said, why are you doing this? We are about to have an election and the result may give us control of the White House. And the Senator from Delaware said, look, we ought not to have politics play a heavy hand in the judicial confirmation process.

One of the worst things that is happening in the Senate is what amounts to a heavy politicizing of the judicial confirmation process that is taking place in this body, and that was reflected in the performance in 1996 as compared with the performance in 1992 when the Senator from Delaware did his very best to keep politics out of the process, to fill judicial posts and to let the judiciary function as an independent branch of our Government. What is happening here is extremely serious. And of course, the Senator, with his candor, came to the floor and sort of stripped away the veneer and laid out what is going on behind the scenes, which is a complete departure from past practices. When there were Republican Presidents, I did not play a role in whom the Presidents sent up to the Senate to be nominated and confirmed in the job----

Mr. BIDEN. If the Senator will yield, I was chairman or ranking member of that committee for 14 years. My distinguished colleague from Delaware is Senator **Roth**, who is my close friend. Every single Federal judge in the last 24 years who has been appointed in the district of Delaware or the third circuit has been appointed by Senator **Roth**. I did not expect, did not ask, and not once was ever consulted about who he would appoint, and I supported every one that he sent up. Not one single time was I made aware of anything other than after the fact, which is OK. I am not complaining about that.

Mr. SARBANES. That was the system.

Mr. BIDEN. That was the system. Not one single time. And I was chairman of the committee.

Now, I would point out one other thing to my friend. I want to have complete candor. If one considers taking judges based on their ideology and call that political, yes, we Democrats were political, as well. I am not complaining about that. I am not complaining about anybody who stands up and says I do not want Judge Smith, the President's nominee, because I think he will be bad on the court for the following reasons and comes to the floor and makes the case. I do not quarrel with that because I think that is the prerogative of the Senate and any Senator. What I am quarreling with is a different kind of politicizing, and that is drawing the conclusion that because I now control the Senate, I am not going to let the President of the United States have nominees whether or not I have an ideological problem with them.

Mr. SARBANES. Will the Senator yield. It is worse than that. It is not whether you let the President have his nominees confirmed . You will not even let them be considered by the Senate for an up-or-down vote. That is the problem today. In other words, the other side will not let the process work so these nominees can come before the Senate for judgment.

Some may come before the Senate for judgment and be rejected by the Senate. That is OK.

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Mr. BIDEN. Fair enough.

Mr. SARBANES. But at least let the process work so the nominees have an opportunity and the judiciary has an opportunity to have these vacant positions filled so the court system does not begin to break down because of the failure to confirm new judges.

Mr. BIDEN. If the Senator will yield, let me give an example of what you just said. I know you know, but it is important for the **Record**.

I meet every year--I will not now because I am not the top Democrat on the committee. But every year for, I don't know, 14 or 15 years, I meet with what is called the Judicial Conference --a legislatively organized body where the Congress says the court can have such a function, where we look for recommendations.

I might add, by the way, you may remember when there was a Republican President named Reagan, the Senator from Delaware introduced a bill to increase the number of Federal judgeships by 84. Why did I do that? I did that because the Federal court came to us, the Judicial Conference, and said, `Here is our problem. We don't have enough judges to administer justice in a timely fashion in this country. And there is a backlog on all these criminal cases.'

I must admit to the Senator, when they came to me with that request, I knew the problem I was going to have. I was going to go into a Democratic caucus and say, by the way, a Republican President , who is a fine man but the most ideological guy we had in a long time, who announced he was going to appoint only very conservative judges, I was now going to give him 84 more than he had.

I realized that was not a politically wise thing for me to do. But, listening to the court, I did just that. My recollection is the Senator from Maryland stood with me and said, `I don't like it. I admit, I am not crazy about 84 more judges being appointed by Ronald Reagan. But the court needs to be filled.'

Now we have the strange happening, the courts come back to us and say--and they do this in a very scientific way--we not only need the vacancies filled, we need more judges than we have. They cite, as the Senator is very familiar with, they cite the backlog, they give the rationale that cases are being backed up. Guess what? The idea that we will even get a chance to discuss a judgeship bill, I predict to my friend from Maryland, on this floor is zero--zero. Not only that, to further make the point, this is the first time in the 24 years that I have been a Senator, in 24 years, the first time I have ever heard anybody come to the floor and say: You know, we should basically decommission judgeships.

The ninth circuit is the busiest circuit in America, out in California. One of our colleagues, a very wonderful guy, a nice guy, says, `I am not going to let any other judge be in the ninth circuit'--notwithstanding they have five vacancies, if I am not mistaken, and they are up to their ears in work. This started last year when I was in charge of the Democratic side. He said, `I am not going to let anybody go through until the ninth circuit splits into two circuits.'

I said, `Why do you want it to split?'

He said, `The reason I want it to split is I don't like the fact that California judges are making decisions that affect my State.'

The distinguished Senator from Idaho is shaking his head. He agrees. He is in that circuit. It is painful to point this out, but the reason why there is a Federal court is so there is not Illinois, Indiana, Idaho, California justice. There is one uniform interpretation of the Constitution. That is the reason we have a Federal circuit court of appeals.

Now, this is quite unusual. We have--and I was not referring to the distinguished Senator from Idaho, who is on the floor, when I said, `there was a Senator.' That is not to whom I am referring. But another one of our colleagues said he is not going

to let anybody go through until there is a split, because he does not like the idea that decisions relating to his State are being made by judges who are not from his State or are not from States of similar size. That is, interestingly, an effectively rewrite of the Constitution of the United States of America. I do not think the Senator thought it in those terms, but that is literally what it is.

Now I am being told, OK, unless we, in fact, split the circuit--and by the way, I am not opposed to splitting the circuit. We split the fifth circuit because when we got to the point where Florida grew so big--Florida and Mississippi and Alabama and

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NOMINATION OF MARY A. McLAUGHLIN, OF PENNSYLVANIA, TO BE UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA -- (Senate - May 24, 2000)

NOMINATION OF NATHAN HATCH

Mr. BAYH. Mr. President, I rise today to congratulate Dr. Nathan Hatch for receiving the Senate's approval of his nomination to serve as a member of the National Council on the Humanities. Dr. Hatch has dedicated his life to academia. He currently serves as Provost of the University of Notre Dame and is also a Professor of History. As Provost, Dr. Hatch has focused on three areas: the establishment of academic centers of excellence, including the expansion of the Keough Institute for Irish Studies and the enhancement of the Medieval Institute; revitalization of undergraduate education through the creation of the Kaneb Center for Teaching and Learning; and the pursuit of outstanding faculty.

Dr. Hatch is considered to be one of the most influential scholars in the study of the history of religion in America. His book, The Democratization of American Christianity, won both the Albert Outler Prize in Ecumenical Church History and the John Hope Franklin Prize for the best book in American Studies; it was also chosen by his peers as one of the two most important books in the study of American religion.

Dr. Hatch is a remarkable asset for the University of Notre Dame and the State of Indiana. His experiences at Notre Dame will make him a valuable addition to the National Council on the Humanities. I applaud the Senate today for confirming this outstanding Hoosier.

NOMINATIONS OF MARIANNE BATTANI AND DAVID LAWSON

Mr. LEVIN. Mr. President, I am pleased that the Senate has confirmed the two nominees for the Federal District Court in the Eastern District of Michigan, Judge Marianne Battani and David Lawson.

Mr. President, Michigan could not be better served. These nominees are well-known in Michigan for their long and distinguished careers, high standards of moral and ethical conduct, and knowledge and commitment to the law. I have every confidence that they will both be outstanding federal judges.

While I am glad that the Senate has finally confirmed these two district court judges, I am deeply concerned about the vacancies in the Sixth Circuit U.S. Court of Appeals. The length of time that nominees for these positions have remained pending is unfair, both to the nominees, and to the State of Michigan.

There are now three Michigan vacancies on the Sixth Circuit. One of the nominees for these vacancies is Helene White, who was nominated more than three years ago, and is still awaiting a hearing. Kathleen McCree Lewis has been pending at the Committee awaiting a hearing for more than eight months. And the third candidate for a Michigan seat has not yet been nominated but hopefully will be at any time.

These Michigan candidates are intelligent and hardworking advocates of the law, who at a minimum, deserve to have and up or down vote on their nominations . Yet, Circuit Court of Appeals nominees continue to face unconscionable delays in this Senate.

The Senate slowdown has a serious impact on the administration of justice. In a March 20, 2000 letter to Senator **HATCH**, Judge Gilbert Merritt, Chief Judge of the U.S. Court of Appeals for the Sixth Circuit, notes that these vacancies have hampered the Court's ability to complete the public's business. The Court, in his words, is deteriorating rapidly due to the high number of judicial vacancies.

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Judge Merritt writes:

The Sixth Circuit Court of Appeals now has four vacancies. Twenty-five per cent of the seats on the Sixth Circuit are vacant. The Court is hurting badly and will not be able to keep up with its work load due to the fact that the Senate Judiciary Committee has acted on none of the nominations to our Court. One of the vacancies is five years old and no vote has ever been taken. One is two years old. We have lost many years of judge time because of the vacancies.

By the time the next President is inaugurated, there will be six vacancies on the Court of Appeals. Almost half of the Court will be vacant and will remain so for most of 2001 due to the exigencies of the nomination process. Although the President has nominated candidates, the Senate has refused to take a vote on any of them.

Our Court should not be treated in this fashion. The public's business should not be treated this way. The litigants in the federal courts should not be treated this way. The remaining judges on a court should not be treated this way. The situation in our Court is rapidly deteriorating due to the fact that 25% of the judgeships are vacant. Each active judge of our Court is now participating in deciding more than 550 cases a year--a case load that is excessive by any standard. In addition, we have almost 200 death penalty cases that will be facing us before the end of next year. I presently have six pending before me right now and many more in the pipeline. Although the death cases are very time consuming (the records often run to 5000 pages), we are under very short deadlines imposed by Congress for acting on these cases. Under present circumstances, we will be unable to meet these deadlines. Unlike the Supreme Court, we have no discretionary jurisdiction and must hear every case.

The Founding Fathers certainly intended that the Senate ``advise'' as to judicial nominations, i.e., consider, debate and vote up or down. They surely did not intend that the Senate, for partisan or factional reasons, would remain silent and simply refuse to give any advice or consider and vote at all, thereby leaving the courts in limbo, understaffed and unable properly to carry out their responsibilities for each year.

I again urge the Senate Judiciary Committee to promptly hold a confirmation hearing for the Sixth Circuit Court of Appeals nominees from Michigan. They are highly qualified individuals who deserve to be voted on by this Senate.

NOMINATION OF RICHARD TALLMAN

Mr. GORTON. Mr. President, it is my pleasure to support the confirmation today of Richard Tallman to the Ninth Circuit Court of Appeals. In an unusual, if not unprecedented arrangement, particularly at this time and for the controversial Ninth Circuit, the White House, Senator **MURRAY**, and I have worked together quietly to select and confirm absolutely first rate judges from Washington State. Dick Tallman is no exception.

I had not met Mr. Tallman before he was chosen as a finalist for a district court vacancy by a Judicial Merit Selection Committee jointly appointed by Senator **MURRAY** and me. He impressed me tremendously at the time and I was privileged to be able later to recommend him to fill a vacancy on the Ninth Circuit Court of Appeals.

Mr. Tallman enjoys broad bi-partisan support within Washington's legal community, including that of the Democratic State Attorney General, two former United States Attorneys for Western Washington, the Federal Public Defender from Western Washington, the President of the Ninth Circuit District Judges Association, and the Federal Bar Association for the Western District of Washington.

Prior to starting his own small firm where he continues to specialize in white collar criminal defense, Mr. Tallman practiced law for many years at one of the largest private firms in Seattle, Bogle & Gates. Before that he served as an Assistant United States Attorney for the Western District of Washington. He has also been sought out by all levels of state government, serving as a Special Assistant City Attorney for Seattle, a Special Deputy Prosecuting Attorney for King County, as well as a Special Assistant Attorney General for Washington State. Over the years, Mr. Tallman has taught and lectured extensively to groups of lawyers and non-lawyers on a range of legal topics, instructing groups including the National Park Service, the Washington Medical Association, and the Seattle Police Academy.

Mr. Tallman's involvement in bar and civic activities is no less impressive than his professional record. In addition to extensive pro bono work, he has served as president of the local federal bar association and as chair of the lawyer delegates to the Ninth Circuit

Judicial Conference. He has been active in committees for local, state, and federal bar associations, in the selection of judges, bench-bar relations, and in helping women and minorities interested in legal careers.

As the accomplishments I have just reviewed attest, Mr. Tallman is an impressive man. What these accomplishments to not convey, however, is the warmth, good humor, and the clear unpretentious intelligence I have observed in my short acquaintance with him. The Ninth Circuit will clearly benefit from our action today.

Mr. LEAHY. Mr. President, one of our most important constitutional responsibilities is to provide advice and consent on the scores of judicial nominations sent to us to fill the vacancies on the federal courts around the country. Today we made some progress. We confirmed 16 new judges. For that I thank the Democratic leader and the majority leader, my counterpart on the Judiciary Committee, Senator **HATCH**, and all those who worked with us to achieve Senate action on these judicial nominees.

The Senate has finally begun to consider the judges needed to serve the American people in our federal courts. But before any Senator thinks that our work is done for the year, let us take stock: We are only one-third of the way to the number of judges nominated by a Republican President and confirmed by a Democratic majority in 1992, and only half way to the levels of confirmations achieved in 1984 and 1988. Today we finally passed the level of 17 confirmations achieved in 1996, the year before I became the Ranking Democrat on the Judiciary Committee. That low water mark is no measure of success, however.

Today we face more judicial vacancies than when the Senate adjourned in 1994. That means there are more vacancies across the country than when the Republican majority took controlling responsibility for the Senate in January 1995. Over the last six years we have gained no ground in our efforts to fill longstanding judicial vacancies that are plaguing the federal courts.

In addition, recall that this is the first action that the Senate has taken on judicial nominees since March 9, when the Senate ended 4-years of delay and finally voted to confirm Judge Richard Paez to the Ninth Circuit. For more than two months, for more than 10 weeks, the Senate has not acted to confirm a single judge, not one. That stall accounts for the backlog in judicial nominations that results in there being 16 judicial nominations on the Senate calendar today. On the other hand, since March 9, seven additional vacancies have arisen and the Senate has received 17 additional nominations.

There remain 36 judicial nominations pending in the Judiciary Committee, plus new nominations that the President is sending us every week. I have challenged the Senate to regain the pace it met in 1998 when the Committee held 13 hearing and the Senate confirmed 65 judges. That would still be one less than the number of judges confirmed by a Democratic Senate majority in the last year of the Bush Administration in 1992. Indeed, in the last two years of the Bush Administration, a Democratic Senate majority confirmed 124 judges. It would take an additional 67 confirmations this year for this Senate to equal that total.

Over the last five years the Republican-controlled Senate confirmed the following: 58 federal judges in the 1995 session; 17 in 1996; 36 in 1997; 65 in 1998; and 34 in 1999. By contrast, in one year, 1994, with a Democratic majority in the Senate, we confirmed 101 judges. With commitment and hard work many things are achievable.

Of the confirmations achieved this year, seven were nominations that were reported last year and should have been confirmed last year. That would have made last year's total slightly more respectable. Instead, they were held over and inflate this year's numbers. In addition, Tim Dyk, one of the nominees finally being considered today, was nominated in 1998 and has been held over two years.

Moreover, the Republican Congress has refused to consider the authorization of the additional judges needed by the federal judiciary to deal with their ever increasing workload. In 1984, and again in 1990, Congress responded to requests by the Chief Justice and the Judiciary Conference for needed judicial resources. Indeed, in 1990, a Democratic majority in the Congress created scores of needed new judgeships during a Republican Administration.

Three years ago the Judicial Conference of the United States requested that an additional 53 judgeships be authorized around the country. Last year the Judicial Conference renewed its request but increased it to 72 judgeships needing to be authorized around the country. Instead, the only federal judgeships created since 1990 were the nine District Court judgeships authorized in the omnibus appropriations bill at the end of last year.

If Congress had timely considered and passed the Federal Judgeship Act of 1999, S.1145, as it should have, the federal

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judiciary would have nearly 130 vacancies today. That is the more accurate measure of the needs of the federal judiciary that have been ignored by the Congress over the past several years and places the vacancy rate for the federal judiciary at 14 percent (128 out of 915). As it is, the vacancy rate is almost 10 percent (65 out of 852) and has remained too high throughout the five years that the Republican majority has controlled the Senate.

Especially troubling is the vacancy rate on the courts of appeals, which continues at over 11 percent (20 out of 179) without the creation of any of the additional judgeships that those courts need to handle their increased workloads.

Most troubling is the circuit emergency that had to be declared more than seven months ago by the Chief Judge of the Court of Appeals for the Fifth Circuit. I recall when the Second Circuit had such an emergency two years ago. Along with the other Senators representing States from the Circuit, I worked hard to fill the five vacancies then plaguing my circuit. The situation in the Fifth Circuit is not one that we should tolerate; it is a situation that I wished we had confronted by expediting consideration of the nominations of Alston Johnson and Enrique Moreno last year. I still hope that the Senate will consider both this year.

I deeply regret that the Senate adjourned last November and left the Fifth Circuit to deal with the crisis in the federal administration of justice in Texas, Louisiana and Mississippi without the resources that it desperately needs. I look forward to our resolving this difficult situation. I will work with the Majority Leader and the Democratic Leader to resolve that emergency at the earliest possible time.

With 20 vacancies on the Federal appellate courts across the country and nearly half of the total judicial emergency vacancies in the Federal courts system in our appellate courts, our courts of appeals are being denied the resources that they need, and their ability to administer justice for the American people is being hurt. There continue to be multiple vacancies on the Ninth Circuit. Three vacancies is too many and perpetuating these four judicial emergency vacancies, as the Senate has in this one circuit, is irresponsible. We should act on these nominations promptly and provide the Ninth Circuit with the judicial resources it needs and to which it is entitled.

I am likewise concerned that the Fourth, Sixth and District of Columbia Circuits are suffering from multiple vacancies.

I continue to urge the Senate to meet our responsibilities to all nominees, including women and minorities, and look forward to action on the nominations of Judge James Wynn, Jr. to the Fourth Circuit, Enrique Moreno to the Fifth Circuit, Kathleen McCree Lewis to the Sixth Circuit and Judge Johnnie Rawlinson to the Ninth Circuit. Working together the Senate can join with the President to confirm well-qualified, diverse and fair-minded judges to fulfill the needs of the federal courts around the country.

Having begun so slowly in the first five months of this year, we have much more to do before the Senate takes its final action on judicial nominees this year. We should be considering 20 to 40 more judges this year. Having begun so slowly, we cannot afford to follow the ``Thurmond rule'' and stop acting on these nominees at the end of the summer in anticipation of the presidential election. We must use all the time until adjournment to remedy the vacancies that have been perpetuated on

the courts to the detriment of the American people and the administration of justice. I urge all Senators to make the federal administration of justice a top priority for the Senate for the rest of this year.

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REV_00256511

April 30, 2003
The Honorable George W. Bush
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Mr. President:

Six months ago you described the judicial nomination and confirmation process as "broken" and declared "we have a duty to repair it." I could not agree with you more. To fulfill that duty, both the Administration and the Senate must be willing to make concessions for the sake of the Judiciary and the nation. I write to suggest a reform that requires such concessions, but, if adopted, will go a long way toward repairing the damage that has been done.

As matters currently stand, both sides are clearly considering ideology in evaluating candidates for the bench and nominees are being delayed and deferred because of it.

On the front end, while most of the candidates you have sent to the Senate have been mainstream conservatives (and have been swiftly confirmed), a growing number of nominees have records that raise both eyebrows and concerns about their commitment to balance, fairness, and moderation. They may be excellent lawyers, but they have spent their careers advancing agendas that harm – most particularly – women, consumers, workers, civil rights, and the environment.

On the back end, in the face of such extremist nominees, one simply cannot expect the Senate to disregard its constitutional obligation and rubberstamp these extremist nominees. When confronted with nominees' hostility to basic fairness, we must ask questions, demand answers, and do all we can to stop those who fail to demonstrate the capacity to be even-handed jurists. Thus far, you have declined to take ideology out of the process. That is your right and I respect it, but it means we must continue to stand up against nominees who will bring an activist agenda to the courts.

Thus, we find ourselves at an impasse when it comes to several nominees. In addition, because we have to spend so much time vetting other nominees for whom red flags are raised, the process moves more slowly than any of us would like.

I believe there is a solution to the problems we face.

Both the Administration and the Senate should agree to the

creation of nominating commissions in every state, the District of Columbia, and each Circuit Court of Appeals. Every commission will consist of an equal number of Republicans and Democrats, chosen by the President and the opposition party's Senate leader. Each commission will propose one candidate to fill each vacancy. Barring evidence that any candidate proposed by a Commission is unfit for judicial service, the President will nominate the individual and the Senate will confirm her or him.

To ensure each vacancy is filled rapidly but not hastily, the Commission will have a reasonable period of time within which to propose a nominee, the President will have a short time within which to make the nomination, and the Senate will have the same short period of time within which to confirm him or her.

This proposal is our best hope for filling the bench with judges who are appointed based on merit, not ideology or party affiliation. It is also our best hope for breaking the vicious cycle that the judicial nomination and confirmation process has been stuck in for years.

The solution I offer is similar to one proposed 25-years ago by President Carter, who relied on judicial nominating commissions to generate candidates for circuit court vacancies and it is similar to nominating commissions used by Senators in several states. The biggest differences are that this proposal ensures that all federal judges are appointed by the same process regardless of what party is in power and it guarantees that every single selection is bipartisan.

By giving the President and the Senate equal roles in picking the judge-pickers, both retain some control over the process, but neither gets a stranglehold.

By forcing every selection to be bipartisan, we maximize the prospect of achieving balance and moderation on the bench. Very few extremists on either side will get through and, in the rare instance where one does, he or she likely will be offset by an extremist on the other side.

By mutually agreeing to abide by the choices the commissions make, we take politics and patronage out of the process.

Once this system is in place, Presidents and Senates will be hard-pressed to abandon it. We have a real chance here to put these battles to rest for good.

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I promise to work to secure support for this proposal from every Senator on both sides of the aisle. I will also ask every Democratic candidate for the White House to take a vow to support this reform. Your leadership on this matter is essential to achieving this momentous goal. I hope you will agree to work with me to fix our broken system.

I look forward to hearing from you soon.

Sincerely
Charles E. Schumer
United States Senator

REV_00256514

The Superior Court
LOS ANGELES, CALIFORNIA 90012
CHAMBERS OF
DZINTRA I. JANAVS, JUDGE

February 22, 2002

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(213) 974-1234

The Hon. Patrick Leahy
Chairman, Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

The Hon. Orrin G. Hatch
Ranking Minority Member, Senate Judiciary Committee
104 Hart Senate Office Building
Washington, DC 20510

The Hon. Dianne Feinstein
331 Hart Senate Office Building
Washington, DC 20510

The Hon. Barbara Boxer
112 Hart Senate Office Building
Washington, DC 20510

Re: Nomination of Judge Carolyn B. Kuhl to U.S. Court of Appeals for the 9th Circuit

Dear Senators:

We are all colleagues of Judge Carolyn B. Kuhl on the Superior Court of the State of California for Los Angeles County. We write in support of her being given a prompt and fair hearing on her nomination to be a Judge of the United States Court of Appeals for the Ninth Circuit. We have served with her variously in the criminal felony courts, the general jurisdiction civil courts, the pilot program for complex litigation, and on committees and special projects

Judge Kuhl is seen by us and by the members of the Bar who appear before her as a fair, careful and thoughtful judge who applies the law without bias. She is respected by prosecutors, public defenders, and members of the plaintiffs' and defense bar. She is conscientious, scholarly, courteous and willing to listen with an open mind to the arguments of counsel. Judge Kuhl approaches her job with respect for the law and not a political "agenda."

Judge Kuhl has been a mentor to new women judges who join our Court to help them navigate the unfamiliar waters of judicial service. She has helped promote the judicial careers of women, both Republican and Democrat. She supported the Hon. Margaret Morrow when Judge Morrow was awaiting a hearing before the Senate Judiciary Committee on her nomination by President Clinton to the United States District Court in Los Angeles. She also wrote in support of President Clinton's nomination of the Hon. Richard Paez to the Ninth Circuit when he likewise awaited his confirmation after his nomination by President Clinton. This shows both Judge Kuhl's open-mindedness and the continuing importance of affording all Presidents' judicial nominees a hearing. We would hope that equal consideration would now be given to allowing Judge Kuhl to have a timely hearing and vote.

As you know, the evaluation of Judge Kuhl, her professional work, credentials and competence by the American Bar Association's Standing Committee On The Federal Judiciary was completed last August. We understand that Judge Kuhl was rated Well Qualified by a substantial majority of that Committee and rated Qualified by the other members of that Committee. This high rating of Judge Kuhl for such an important appellate position is entirely consistent with our observations and her well deserved, excellent reputation among her colleagues and the bar. She is also a very decent, caring, honest and patient human being who is a delight to have as a professional colleague and friend.

As sitting Judges, we more than anyone appreciate the importance of an independent, fair-minded and principled judiciary. We believe that Carolyn Kuhl represents the best values of such a judiciary. Under the Constitution it is ultimately for each member of your Committee and eventually each member of the Senate to determine whether or not to confirm Judge Kuhl, but we urge you to deal with the question on the merits and not by denying her a hearing.

Sincerely yours,

The Hon. Dzintra Janavs

The Hon. Mary Ann Murphy

The Hon. Emilie H. Elias

The Hon. Judith C. Chirlin

The Hon. Ann Kough

The Hon. Victoria Chaney

The Hon. Ann I. Jones

The Hon. Helen I. Bendix

The Hon. Linda K. Lefkowitz

The Hon. Lorna Parnell

The Hon. Patricia L. Collins

The Hon. Elizabeth A. Grimes

The Hon. Rita Miller

The Hon. Lee Edmon

The Hon. Fumiko H Wasserman

The Hon. Mary Thornton House

The Hon. Ruth Ann Kwan

The Hon. Kathleen Kennedy Powell

The Hon. Tricia Ann Bigelow

The Hon. Judith L. Champagne

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HEADLINE: 11 Judicial Nominees Named; Bush Urges Senate to Rise Above Partisan 'Bitterness'

BYLINE: Amy Goldstein and Helen Dewar, Washington Post Staff Writers

BODY:
President Bush announced 11 nominees to a half-dozen federal appeals courts yesterday, imploring the Senate to "rise above the bitterness" that has thwarted the confirmation of judges in the recent past. Senate Democrats indicated that they will attempt to block at least one nomination but said that they have no wholesale plans to hinder consideration of the **White House's** candidates.

In his first round of choices for the federal judiciary, Bush adhered to his campaign commitment to fill court vacancies predominantly with conservative legal thinkers. But the administration sidestepped sharper ideological controversy by withholding three anticipated nominees opposed by Democrats and by selecting candidates who largely come from states without Democratic senators.

At a time when Democrats wield considerable leverage because they hold half the seats in the Senate and on the Senate Judiciary Committee, the only nominee they immediately vowed to oppose is Terrence W. Boyle, a U.S. district judge from North Carolina whom Bush nominated to the 4th U.S. Circuit Court of Appeals, whose jurisdiction stretches from Maryland to the Carolinas. A former aide to Sen. Jesse Helms (R-N.C.) who Bush's father had tried to put on the appeals court, Boyle is opposed by Sen. John Edwards (D-N.C.). Edwards wrote to the **White House** this week, urging Bush to consider a black judge, nominated to the appeals court by President Bill Clinton, for whom Helms had refused to allow a confirmation hearing.

Edwards's opposition comes as the Judiciary Committee has been sparring over how much influence to grant individual Democratic senators who balk at nominees from their own states. Committee Chairman Orrin G. Hatch (R-Utah) has said that he will consider senators' views but will not be bound by them.

In a show of solidarity, the nine Democrats on the panel wrote Hatch a letter late last week, essentially saying that they will stand in the way of any nominee who lacks the support of his or her senators.

Yesterday, party leaders modulated their tone. "I'm pleased that the **White House** has chosen to work with us on the first group of nominations," said Minority Leader Thomas A. **Daschle** (D-S.D.). Sen. Patrick J. Leahy (Vt.), the Judiciary Committee's ranking Democrat and the only Senate Democrat who attended the **White House** ceremony at which Bush

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announced his choices, said: "Had I not been encouraged, I would not have been here today."

Daschle and other Democrats said, however, that they believe they have already influenced Bush's selections and that they expect to be consulted by the **White House** over future nominations. They left open the possibility that they may ultimately oppose more of the nominees who were announced yesterday, once their records are better known.

Bush used part of the ceremony in the East Room to warn against the political antagonisms that prevented many of Clinton's nominees from winning confirmation over the past six years. "We have seen political battles played out in committee hearings -- battles that have little to do with the merits of the person sitting before the committee," the president said. "I urge senators of both parties to rise above the bitterness of the past, to provide a fair hearing and a prompt vote to every nominee."

During the six-minute afternoon ceremony, all 11 nominees stood on risers next to Bush's lectern. The president extolled them but did not introduce them by name.

In exhorting the Senate to act swiftly, **White House** officials noted that eight of yesterday's appellate court nominations would fill vacancies that have been classified as "judicial emergencies" by the Administrative Office of the U.S Courts because of the number of vacant seats on certain circuits and the volume of cases there.

Bush has an uncommon opportunity to put his imprint on the federal judiciary because of a large number of vacancies. On the U.S. circuit courts of appeals -- the regional appellate courts that are the final arbiter over most federal laws -- 17 percent of the 179 seats are vacant. At the trial-level district courts, 10 percent of the 665 seats are vacant.

During the campaign, Bush drew the support of many conservatives who hoped that he would give the judiciary a more conservative tilt. Yesterday, a few of the president's choices already began to draw the ire of liberal organizations. For example, ADA Watch protested the nomination of Jeffrey S. Sutton to the Ohio-based 6th Circuit, contending that he has opposed the Americans With Disabilities Act and other civil rights laws.

For the Washington area, Bush nominated prominent, conservative Washington attorneys Miguel A. Estrada and John G. Roberts to the D.C. Circuit Court of Appeals, considered the nation's second-highest court after the U.S. Supreme Court. In addition to Boyle, the **White House** selected for the 4th Circuit Dennis W. Shedd, a district judge from South Carolina, and Roger L. Gregory, who became the first black judge on the relatively conservative circuit when Clinton gave him a one-year appointment while the Senate was in recess late last year.

LOAD-DATE: May 10, 2001

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Federal News Service

May 9, 2001, Wednesday

SECTION: WHITE HOUSE BRIEFING

LENGTH: 1060 words

HEADLINE: STAKEOUT WITH SENATOR PATRICK LEAHY (D-VT) FOLLOWING PRESIDENT BUSH'S JUDICIAL NOMINATION ANNOUNCEMENTS

LOCATION: WHITE HOUSE DRIVEWAY

BODY:
SEN. LEAHY: I forgot -- you had started asking a question before, but basically I'll repeat the answer I gave and you can figure the question.

The president has nominated a number of judges. I don't know all of them; I know some of them. I would hope that we would go **forward quickly.** We'll certainly ask the ABA to do as quick an analysis as possible of them.

And one of the things I was struck by is that, in at least a couple of instances I know of where the senators have told me, from their home states, that they will submit quickly the blue slips. I say this as an indication that sometimes this looks like a very polarized thing, and it does not necessarily have to be. It becomes polarized only if we try to lurch the federal judiciary one way or the other.

So, any questions?

Q What's the situation in the Judiciary Committee per se right now, on all nominations?

SEN. LEAHY: It's such sweetness and light that it's almost impossible to bear. (Scattered laughter.)

Q Will there be a vote tomorrow on the --

Q So the deadlock has been broken on the Judiciary?

SEN. LEAHY: No, no. No, I think we understand the blue slip issue. We have made it very clear to Senator Hatch, the Democrats, what they will do on the blue slip. He has a feeling what he would do. Obviously, if there is a conflict at any one time, that's when it would create a problem.

But the blue slip is designed so that you have a check-and- balance in the Senate, so that the federal court system doesn't suddenly become a far left or a far right committee -- or, judiciary. The Republicans insisted on the blue slip as a check-and-balance, an appropriate check-and-balance, on President Clinton. We are asking for no more, no less, and we will insist on that with President Bush.

In the long run, I suspect it will help President Bush just as in the long run, in many cases, it helped President Clinton. You end up having a more moderate, non-ideological court where the key, the key question is not ideology, but competence, and that's our thing. We are very respectful of the president's right -- in fact, some would say duty -- to nominate, but at the same time, we have a constitutional duty that has existed since the beginning of the country, and that is to advise and consent.

It's not "nominate and rubber-stamp." It's nominate and then advise and consent.

Q Senator, are you encouraged by the slate the president put up this time? You talked today, earlier, about the importance of balance.

SEN. LEAHY: Yeah.

Q Does this strike you, on first impression, as a balanced slate?

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SEN. LEAHY: Had I not been encouraged, I would not have been here today.

Q Would you have been here today if --

SEN. LEAHY: And I am -- I will continue to work with the president. I completely respect his right to nominate anybody he wants. I mean, he could nominate a(n) ultra right-wing ideologue, if he wants, but the Senate would not confirm, just as, had President Clinton nominated an ultra left-wing ideologue, the Senate would not have confirmed. What we're doing is just making sure of the checks and balances.

And one of the things that's happened in this -- it got to somewhat of a rocky start. I think they did not understand now there's a lot more consulting with senators. And we'll go on. These things sometimes happen at the beginning of a(n) administration.

Some have said that you might get more of a gridlock with a 50-50 Senate. I think it's just the opposite. I think this is -- calls upon us to do the best to cooperate and make it work.

Q Are you going to allow nominations to move on a case-by- case basis until the blue slip thing is resolved, or everything stopped up right now?

SEN. LEAHY: Well, no, as far as I'm concerned, the blue slip is resolved.

Q Oh.

SEN. LEAHY: It will be the way -- we made it very clear when people would move or not. If you had senators who refuse to return the blue slip or a give a negative blue slip, I doubt if that nominee is going to go anywhere. And that's always been the way. No matter how you describe it, that's always been the way in the Senate. That's the way it will continue to be.

Thank you.

Q At this point, with what you know about these nominees, do you know enough to say you think they'll --

SEN. LEAHY: I -- we haven't even started this. We will submit to the ABA, so there could be peer review, and they will go forward. I know a couple of them personally, and only because I had sat on their original confirmation hearings, I know them well enough that I would assume they'll go through all right. But we'll have the ABA review, and then we'll go forth.

(Cross talk.)

Q Senator, you soon should be voting on the nominees be to head of the drug policy office and head of the DEA. Can you --

SEN. LEAHY: I don't think we do the drugs -- I don't think we do the drug policy office, do we? Is the drug policy office confirmable?

STAFF/Q Yes.

SEN. LEAHY: Are you sure?

STAFF/Q Yes.

SEN. LEAHY: Okay. I'll take your word for it.

Well, let's -- I don't -- I haven't even looked at that, but I heard --

Q What are your thoughts on the philosophies for the two men that the president is choosing for those posts?

SEN. LEAHY: Well, one of them I don't know; the other one is Asa Hutchinson.

Q Yeah, and John Walters.

SEN. LEAHY: Well, let me tell you -- I don't know Mr. Walters at all, and so I can't speak to that. But Asa Hutchinson I know very well. He and I were actually on obviously very publicly opposite sides on the impeachment trial. In fact, he led the Republican group that did the depositions, and I led the Democratic group that did depositions. So we had to deal with each

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other on that. All my dealings with Congressman Hutchinson I found him to be totally honest, even though we disagreed on issues; I found him to be totally scrupulous in his dealings with me. I respect him greatly. Unless there's something that's going to come out of this hearing that I'm not aware of, I would assume I would be supporting him. We obviously disagree philosophically on a lot of issues. We obviously disagreed during the impeachment trial. But the respect I have for him is such, and the respect I know he has for the United States, is that I would assume I'm going to be supporting him, unless something comes up that we're not aware of.

Thank you.

Q Thank you.

END

LOAD-DATE: May 10, 2001

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The Washington Times

May 10, 2001, Thursday, Final Edition

SECTION: PART A; Pg. A1

LENGTH: 881 words

HEADLINE: Bush sends nominees in 'good faith';
Leahy foresees few foes to 'encouraging' judicial batch

BYLINE: Joseph Curl; THE WASHINGTON TIMES

BODY:
President Bush yesterday announced his first batch of judicial nominees, saying he would trust in the "good faith" of the Senate to swiftly confirm them and drawing a confident prediction from a top Democrat that all will pass muster.

"I now submit these nominations in good faith, trusting that good faith will also be extended by the United States Senate," Mr. Bush said in an East Room ceremony, flanked by his 11 nominees, more than half of whom are women or racial minorities.

"I urge senators of both parties to rise above the bitterness of the past to provide a fair hearing and a prompt vote to every nominee," he said.

Sen. Patrick J. **Leahy** of Vermont, the ranking Democrat on the Senate Judiciary Committee, who attended yesterday's ceremony, said: "Had I not been encouraged, I would not have been here today."

"I know them **well enough** that I would assume they'll go through all right," he said.

Most of the nominees - which include two blacks, three women and a Hispanic - have conservative ties and backgrounds, but the names of three other candidates for federal judicial positions were trimmed from the list before yesterday's event.

Bush spokesman Ari Fleischer said he did not know when those more-contentious candidates would be nominated.

During yesterday's brief White House event, Mr. Bush, in not-so-veiled language intended to put the Senate on the spot, said the confirmation process has became a partisan battleground that has "little to do with the merits of the person sitting before the committee."

"I urge senators of both parties to rise above the bitterness of the past to provide a fair hearing and a prompt vote to every nominee. That should be the case for no matter who lives in this house and no matter who controls the Senate.

"I ask for the return of civility and dignity to the confirmation process. And with this distinguished group of nominees awaiting confirmation, there is no better opportunity than right now," Mr. Bush said.

The Republican-controlled Senate used its "advice and consent" role of reviewing all federal judicial appointments to reject many of President Clinton's nominees, often by simply not bringing the nomination to a vote.

In his first two years in office - the only time when Democrats controlled the Senate - Mr. Clinton pushed through 129 **judges,** an average of 65 each year. After Republicans took over, he won confirmation of 245 - just 41 per year.

The same was true, however, when Democrats controlled the body and the president was Mr. Bush's father. In fact, one of the new president's nominees - U.S. District **Judge** Terrence W. Boyle - was nominated by the first President Bush but never voted on in the Senate.

Mr. **Leahy** said that while partisan rancor has gridlocked nominations for years, it need not be so.

"It becomes polarized only if we try to lurch the federal judiciary one way or the other," he said.

But he also said that before he will move forward on the nominations, he will ask the American Bar Association to review them.

"We will submit the nominees to the ABA, so there could be peer review," Mr. **Leahy** said.

That move may rankle some Republicans and Mr. Bush, who in March ended the ABA's 54-year advisory role in the process of choosing Supreme Court and other federal **judges,** in part because of association's liberal political activism.

Mr. Fleischer said the more than 100 vacancies represent 17 percent of all positions on the federal bench.

All 11 nominees - of whom seven are sitting **judges,** three practicing lawyers and one a law professor - attended yesterday's White House ceremony, but none spoke to reporters.

Mr. Bush said: "As a group, they command broad, bipartisan support among those who know them and who have served with them. I submit their names to the Senate with full confidence that they will satisfy any test of judicial merit."

Also attending the event were Sen. Orrin G. Hatch of Utah, chairman of the Senate Judiciary Committee, Attorney General John Ashcroft, Sen. Strom Thurmond, South Carolina Republican, and Virginia senators George F. Allen and John W. Warner.

Mr. Allen and Mr. Warner, both Republican, said they support the nomination of Roger L. Gregory, first named to the federal court by Mr. Clinton in a controversial "recess" appointment while the Senate was out of session. **Judge** Gregory became the first black **judge** in the 4th Circuit.

Mr. Fleischer said it is "an unprecedented act for a president to renominate a judicial choice to the circuit court whose original nomination was made by a president of the other party. It has never happened before in the history of our country."

But there were signs yesterday that Democrats will seek to oppose the nomination of **Judge** Boyle, a former aide to Sen. Jesse Helms, North Carolina Republican.

"Until we find some constructive process that allows for balance, then I would not support any nominee, including **Judge** Boyle," said Sen. John Edwards, North Carolina Democrat.

Mr. Bush defended his nominees, saying, "Every **judge** I appoint will be a person who

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clearly understands the role of a **judge** is to interpret the law, not to legislate from the bench. . . . And all will be exceptional for their humanity and their integrity."

GRAPHIC: Photo (color), Jurist prudence: President Bush introduces his 11 nominees to the Federal Appeals Court during a White House ceremony. Pictured in the rear row, from left: **Judge** Terrence Boyle, Michael McConnell, **Judge** Deborah Cook, **Judge** Barrington Parker. Middle row, from left: Jeffrey Sutton, **Judge** Edith Brown Clement, **Judge** Roger Gregory, John Roberts. Front row, from left: **Judge** Dennis Shedd, Miguel Estrada and **Judge** Priscilla Owens., By J.M. Eddins Jr./The Washington Times

LOAD-DATE: May 10, 2001

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The Washington Times

May 10, 2001, Thursday, Final Edition

SECTION: PART A; Pg. A1

LENGTH: 830 words

HEADLINE: Democrats give up veto demand after Bush's 'gesture'

BYLINE: Audrey Hudson; THE WASHINGTON TIMES

BODY:
Senate Democrats yesterday backed down from demands for veto power over judicial nominees, and said they will move forward with President Bush's first 11 candidates.

Rather than a blanket objection, Democrats will review nominees on a case-by-case basis - standard Senate procedure.

Only one nominee, Terrence Boyle to the 4th U.S. Circuit Court of Appeals, is opposed by his home-state senator, John Edwards, North Carolina Democrat. A negative blue slip on the nomination has been submitted, Democrats said.

"The result will not be a veto power over **judges,** it will, rather, force the White House to come meet us and act in a moderate way in terms of how they choose **judges,**" said Sen. Charles E. Schumer, New York Democrat.

"I think we ought to **move ahead with these judges** that the president submitted," said Sen. Edward M. **Kennedy,** Massachusetts Democrat. "I think we ought to move the process ahead with them."

Democrats said they will continue the disputed "blue slip" policy to indicate support or opposition to federal **judges** from home-state senators, but it will not carry the weight of a veto, which they have been demanding for more than a month.

"That's the power they always had," said Sen. Jon Kyl, Arizona Republican.

The White House planned to send 14 nominations to the Senate yesterday, but withheld three nominees objected to by their home-state senators.

In their public statements, Democratic senators declared victory, citing the three withheld nominations, which they called a good-faith gesture from Mr. Bush.

Asked if letting the process go forward is a conciliatory gesture from Democrats to the White House, Sen. Joseph R. Biden Jr. of Delaware said "yeah, it is."

"I am pleased the White House has chosen to work with us on this first group," said Senate Minority Leader Tom Daschle.

Democrats had earlier refused to take the word of Sen. Orrin G. Hatch, Judiciary Committee chairman and Utah Republican, that consultation would take place. Now they appear willing to give Mr. Hatch and the president the benefit of the doubt.

As further proof of the Democrats' retreat, they agreed to let key Justice Department

nominations held hostage over the veto issue move forward today.

"The president made a gesture and it was met with a gesture from the Democrats," said Ron Bonjean, spokesman for Senate Majority Leader Trent Lott, Mississippi Republican.

"This was a first test to see if they will be cooperative, although there will be many more tests down the road," Mr. Bonjean said.

Mr. Schumer said the Democrats have received "initial signals" the White House "will not try to just roll over us."

If a home-state senator does object to a nomination and it is not resolved through consultation, Mr. Schumer suggested the unified Democratic caucus would block the nomination in committee. The committee is split 9-9, but votes cannot be cast without a quorum of 10 members.

Mr. Kyl called the tactic "absolutely unprecedented" and said he hoped objections would be based on qualifications, not on "political pique or partisan reasons."

Democrats said they were reserving judgment on the first batch of nominees, except to say that most are conservative candidates. Two nominations, however, were first put forth by former President Bill Clinton: Roger L. Gregory to the 4th U.S. Circuit Court of Appeals, and Barrington D. Parker Jr. to the 2nd Circuit.

Republicans are united in their approval of the nominations, and said each "has demonstrated outstanding legal abilities, the highest ethical standards, and a proven record of service to diverse communities," according to a Senate Republican policy paper issued yesterday.

Mr. Hatch did not address the Democrats' retreat, but, in a statement released by his office, said he hoped to move the nominees quickly through his committee and onto the Senate floor for a final vote.

"President Bush has nominated top-notch, highly-qualified candidates to the bench," Mr. Hatch said.

"He has reached across the aisle and nominated Democrats and continues to keep his promise to work in a bipartisan fashion to lower the partisan rhetoric in this town," Mr. Hatch said.

"They are all home runs, highly qualified and experienced," Mr. Kyl said.

Sen. Patrick J. Leahy, Vermont Democrat, said nominees selected on their qualifications would likely be confirmed, but that Democrats would block those they believe were picked for their ideology.

The White House also angered Democrats when it removed the American Bar Association (ABA) from the vetting process.

However, Mr. **Kennedy** said Democratic reviews of the candidates "will specifically include analysis by the ABA and recommendations by the home-state senators."

"We ought to hear from the Bar Association, we ought to have extensive examination of their backgrounds, we ought to hear what the home senators say about them," Mr. **Kennedy** said.

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George W. Bush Circuit Court Nominees

	Well Qualified		Qualified		Not Qualified	
First Circuit	0	0%	1	100%	0	0%
Second Circuit	2	100%	0	0%	0	0%
Third Circuit	1	100%	0	0%	0	0%
Fourth Circuit	1	33%	2	67%	0	0%
Fifth Circuit	4	100%	0	0%	0	0%
Sixth Circuit	4	50%	4	50%	0	0%
Seventh Circuit	0	-	0	-	0	-
Eighth Circuit	2	67%	1	33%	0	0%
Ninth Circuit	2	67%	1	33%	0	0%
Tenth Circuit	3	60%	2	40%	0	0%
Eleventh Circuit	0	0%	1	100%	0	0%
DC Circuit	2	100%	0	0%	0	0%
Federal Circuit	0	0%	1	100%	0	0%
TOTAL	21	62%	13	38%	0	0%

George W. Bush District Court Nominees

		Well Qualified		Qualified		Not Qualified	
AL	*MD*	0	0%	1	100%	0	0%
	ND	0	0%	1	100%	0	0%
	SD	1	50%	1	50%	0	0%
AK		0	0%	1	100%	0	0%
AZ		1	33%	2	67%	0	0%
CA	*CD*	5	83%	1	17%	0	0%
	ED	1	100%	0	0%	0	0%
	ND	0	0%	1	100%	0	0%
CO		2	100%	0	0%	0	0%
DC		4	100%	0	0%	0	0%
DE		1	100%	0	0%	0	0%
FL	*SD*	1	50%	1	50%	0	0%
	MD	1	100%	0	0%	0	0%
GA	*MD*	2	100%	0	0%	0	0%
HI		0	0%	0	0%	1	100%
IA	*SD*	1	100%	0	0%	0	0%
	ND	1	100%	0	0%	0	0%
IL	*ND*	1	100%	0	0%	0	0%
IN	*ND*	2	100%	0	0%	0	0%

George W. Bush District Court Nominees

		Well Qualified		Qualified		Not Qualified	
KS		1	100%	0	0%	0	0%
KY	*ED*	0	0%	2	67%	1	33%
LA	*WD*	1	50%	1	50%	0	0%
	ED	1	33%	2	67%	0	0%
MD		2	100%	0	0%	0	0%
MI	*ED*	1	100%	0	0%	0	0%
MN		1	100%	0	0%	0	0%
MO	*ED*	0	0%	1	100%	0	0%
	WD	0	0%	1	100%	0	0%
MS	*ND*	0	0%	1	100%	0	0%
MT		2	100%	0	0%	0	0%
NC	*ED*	0	0%	2	100%	0	0%
ND		0	0%	2	100%	0	0%
NE		0	0%	1	100%	0	0%
NJ		4	80%	1	20%	0	0%

George W. Bush District Court Nominees

		Well Qualified		Qualified		Not Qualified	
NM		0	0%	2	100%	0	0%
NV		2	100%	0	0%	0	0%
NY	*ED*	2	100%	0	0%	0	0%
	SD	1	100%	0	0%	0	0%
OH	*ND*	0	0%	1	100%	0	0%
	SD	2	100%	0	0%	0	0%
OK	*ND*	1	100%	0	0%	0	0%
	WD	2	100%	0	0%	0	0%
	ED	1	100%	0	0%	0	0%
PA	*ED*	5	100%	0	0%	0	0%
	WD	2	50%	2	50%	0	0%
	MD	2	100%	0	0%	0	0%
RI		0	0%	1	100%	0	0%
SC		1	100%	0	0%	0	0%
TN	*WD*	1	50%	1	50%	0	0%
	ED	1	50%	1	50%	0	0%
TX	*ND*	2	100%	0	0%	0	0%
	SD	1	50%	1	50%	0	0%
	WD	2	67%	1	33%	0	0%
	ED	2	100%	0	0%	0	0%

George W. Bush District Court Nominees

		Well Qualified		Qualified		Not Qualified	
UT		1	100%	0	0%	0	0%
VA	*ED*	1	100%	0	0%	0	0%
WA	*WD*	1	100%	0	0%	0	0%
WI	*ED*	1	100%	0	0%	0	0%
Int'l Trade		0	0%	1	100%	0	0%
TOTAL		71	66%	34	32%	2	2%

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

DATE RECEIVED: 3/3/2003

NAME OF CORRESPONDENT: Patrick Leahy

SUBJECT: **Meeting with Estrada**

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	ACTION DATE M/D/YR	DISPOSITION TYPE RESP	C D	COMPLETED M/D/YR
	CUGONZ	A	2/26/2003	C		
	ACTION COMMENTS:					
	Brett	A				
	ACTION COMMENTS:					
	ACTION COMMENTS:					
	ACTION COMMENTS:					

COMMENTS:

ADDITIONAL CORRESPONDENTS: **MEDIA:**

REV_00256534

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

February 26, 2003

The Honorable Alberto R. Gonzalez
Counsel to the President
The White House
Washington, DC 20500

Dear Judge Gonzales,

When I previously met with Mr. Estrada he indicated no objection to our reviewing his work at the Solicitor General's office. He reiterated that position at the hearing last September. If the suggestion in your February 25 letter includes production of these long-requested materials, I would be interested in pursuing it.

As the Democratic Leader and Assistant Democratic Leader have repeatedly stated, a positive response to the February 11 letter from Senator Daschle and me to the President would pave the way for completing Senate action on this nomination. Senator Bennett's colloquy with Senator Reid and me on the Senate floor indicated how to resolve this matter. I regret that the Administration has rejected Senator Bennett's approach.

It is most unfortunate that the President has, to date, chosen not to follow precedent and make Mr. Estrada's workpapers available to the Senate in connection with this nomination and that you have insisted upon maintaining a wall of secrecy around those writings in closed cases. Prior administrations have provided Justice Department memoranda written by attorneys to the Solicitor General, as well as memoranda of the Solicitor General and the head of the Office of Legal Policy in connection with past nominations when requested by the Senate. The reversal by this Administration of the traditional policy of accommodation has led to the current impasse.

Please do not hesitate to contact me or my staff to arrange for the production of the requested information so that we may proceed.

Sincerely,

PATRICK LEAHY
United States Senator

Texas Lawyers for a Fair Judiciary

March 12, 2003

VIA FACSIMILE *202-456-2461*
President George W. Bush
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear President Bush,

The press has reported that Justice Priscilla Owen may be re-nominated for a position on the United States Court of Appeals for the Fifth Circuit. Justice Owen's previous nomination was defeated by the Senate Judiciary Committee because of her partisanship, ideological leanings and activist tendencies. If her previous history was not a sufficient demonstration of these characteristics, a recent decision by the Texas Supreme Court further confirms that she is among those judges who are willing to subvert logic to reach an ideologically correct result consistent with the extreme right wing of the Republican party. An enclosed editorial from the Houston Chronicle from Saturday, January 4, 2003, addresses her willingness to put partisan ideology above law and logic.

Her re-nomination would be doubly unfortunate because Texas possesses so many conservative judges who are Republican and who are intellectually brilliant, fair, non-partisan and non-ideological. Judge Sim Lake from the Southern District of Texas in Houston, Judge Deborah Hankinson, outgoing Justice of the Texas Supreme Court, and Judge Sidney Fitzwater, from the Northern District of Texas in Dallas are all distinguished jurists with long records of scholarship and fair judicial administration and decision making. Surely, there are others but these three come to mind readily as conservative, Republican, seasoned, strong and neither activist nor ideological.

I would implore the President to nominate one of these judges rather than re-nominate a justice whose nomination is certain to create partisan bickering, rancor and enormous opposition.

Former Vice-President Gore had the good grace to withdraw his nomination from the next presidential race. Justice Owen ought to have the good grace to withdraw her name. If she doesn't, she should not be re-nominated because there are other Republicans who are much more qualified in every sense of the word.

The American people deserve judges who have demonstrated a commitment to evenhanded administration of justice.

Sincerely,

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Margaret A. Harris
Katherine L. Butler
Scott Newar
Jenifer C. Melby
Thomas H. Padgett, Jr.
Beatrice Mladenka-Fowler
Barbara Gardner
Daryl Moore
Houston, Texas

Cheryl Rubenstein
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Tim Mahoney
Rick Levy
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NOMINATIONS OF RAY FISHER, MARSHA BERZON, AND RICHARD PAEZ -- (Senate - October 04, 1999)

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Mrs. FEINSTEIN. Mr. President, I want to first thank our minority leader for all of his effort in bringing public attention to the plight of pending judicial nominees.

Thanks to Senator **DASCHLE**'s efforts, we have made some progress. Jim Lorenz, a fine California attorney who served seven years on my judicial selection committee, was confirmed on Friday along with Victor Marrero of New York.

Jim Lorenz's confirmation will help address a desperate shortage of judges in the Southern District of California. I have spoken several times with Marilyn Huff, Chief Judge of the Southern District of California, about the District's caseload crisis.

A recent judicial survey ranked the Southern District as the most overburdened court in the country. The weighted average caseload in the Southern District is 1,006 cases per judge, more than twice the national average.

It is also a significant step forward for the Senate that we will have a vote tomorrow on Associate Attorney General, Ray Fisher, to be a Circuit Judge on the Ninth Circuit Court of Appeal.

Ray Fisher is an extraordinary nominee who will add some support to the skeleton crew of judges currently presiding on the Ninth Circuit.

Currently, the Ninth Circuit has seven vacancies, which is 25 percent of the total judgeship positions on the circuit.

Each one of these judicial vacancies qualifies as a judicial emergency. The Chief Judge of the Ninth Circuit reports that the Circuit could handle 750 more cases right now if the vacancies were filled.

Prior to his appointment as Associate Attorney General, Ray Fisher was considered one of the top trial lawyers in Southern California. His legal skills are so highly regarded that he recently was inducted into the American College of Trial Lawyers, an honor bestowed on only the top one percent of the profession.

During his 30 year career in private practice, Ray Fisher specialized in the toughest of cases, complex civil litigation, and in alternate dispute resolution. In 1988, he founded the Los Angeles Office of Heller Ehrman, White and McAullife, an office that has grown from 6 attorneys to 48.

The Standing Committee on Federal Judiciary of the American Bar Association has deemed Mr. Fisher ``Well Qualified'' for appointment as Judge of the United States Court of Appeals.

Ray Fisher graduated from Stanford Law School in 1966, where he was president of The Stanford Law Review and awarded the Order of the Coif. Following law school, he served as a law clerk for Judge J. Skelley Wright of United States Court of Appeals for the District of Columbia Circuit and Supreme Court Justice William Brennan.

I am confident Ray Fisher's acute interest in public service, specifically in public safety, and his overarching concern for

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fairness will serve the Ninth Circuit well.

However, I am disappointed that the Senate could not confirm other pending Ninth Circuit nominees. Ray Fisher is a start, but six vacancies remain on the Ninth Circuit Court of Appeals.

Two of those vacancies should be filled by Marsha Berzon and Judge Richard Paez.

It is a disturbing fact that women and minority nominees are having a difficult time getting confirmed by the Senate.

A report by the independent, bipartisan group Citizens for Independent Courts released last week found that during the 105th Congress, the average time between nomination and confirmation for male nominees was 184 days, while for women it was 249 days--a full 2 months longer.

This disturbing trend continues this year. Women and minorities constitute over 55 percent of the President's nominees in 1999; by contrast, only 41 percent of the nominees confirmed this year by the Senate are women or minorities.

All we have ever asked for Marsha Berzon and Richard Paez is that both nominees get an up-or-down vote. If a Senator has a problem with particular nominees, he or she should vote against them. But a nominee should not be held up interminably by a handful of Senators.

Let me assure my colleagues, this does not mark the end of a fight. At some point, legislation is not going to move until Marsha Berzon and Judge Richard Paez get an up-or-down vote. Let me take a moment to discuss the nominations process that these two nominees have experienced.

Judge Richard Paez, the first Mexican-American District judge in Los Angeles, was nominated on January 25, 1996--almost four years ago. He still hasn't made it to the Senate Floor for a vote. Any problem with his nomination can't be with his legal background.

He has 17 years of judicial experience. The American Bar Association found him to be ``well-qualified.'' He is also strongly supported by the legal community in Los Angeles including Gil Garcetti, the District Attorney, the Los Angeles County Police Chiefs' Association and the Association for Los Angeles Deputy Sheriffs. Judge Paez has described this interminable nominations process as a ``cloud'' hanging over his head. Litigants in his court constantly query him if the case is going to be continued, if his case is going to be assigned to someone else, or if Judge Paez is going to keep it. No nominee should have to face this uncertainty. His family has been thrust into the public limelight, and for four years every action he has taken has been subject to microscopic scrutiny.

Marsha Berzon was nominated almost a year and a half ago. She had her first hearing on July 30, 1998, and a second hearing in June 1999. Only in July 1999 was she reported out of committee and her nomination is pending before the Senate. Nationally renowned appellate attorney with over 20 years of appellate practice, she clerked for Supreme Court Justice Brennan and U.S. Court of Appeals Judge James Browning. She graduated Order of the Coif from Boalt Hall, has the support of law enforcement including the National Association of Police Organizations (NAPO) and the International Union of Police Organizations, has strong bipartisan support including former Idaho Senator James Mclure and former EPA Administrator William D. Ruckelshaus.

The slow pace of this nomination has caused an incredible burden on Marsha Berzon both personally and professionally. Due to uncertainty over her future, she has significantly curtailed her private practice, and no longer is representing clients before the Supreme Court or the Ninth Circuit.

Chief Justice Rehnquist recently said that ``[t]he Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.''

Richard Paez and Marsha Berzon do not deserve to have their distinguished

careers and personal lives held in limbo. Our institutional integrity requires an up-or-down vote.

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Until Marsha Berzon and Richard Paez get votes, this nominations process will remain tainted.

I assure my colleagues in the Senate that the nominations of Marsha Berzon and Richard Paez will not fade away. We will keep pressing for these nominees until they get the vote they deserve.

- [Begin Insert]

Mr. HATCH. Mr. President, it is a great pleasure for me to support--on the Senate floor--the confirmation of a judicial candidate who is the epitome of good character, broad experience, and a judicious temperament.

First, however, I think it appropriate that I spend a moment to acknowledge the minority for relenting in what I consider to have been an ill-conceived gambit to politicize the judicial confirmations process. My colleagues appear to have made history on September 21 by preventing the invocation of cloture for the first time ever on a district judge's nomination.

This was--and still is--gravely disappointing to me. In a body whose best moments have been those in which statesmanship triumphs over partisanship, this unfortunate statistic does not make for a proud legacy.

My colleagues--who were motivated by the legitimate goal of gaining votes on two particular nominees--pursued a short term offensive which failed to accomplish their objective and risked long-term peril for the nation's judiciary. There now exists on the books a fresh precedent to filibuster judicial nominees whose nominations either political party disagrees with.

I have always, and consistently, taken the position that the Senate must address the qualifications of a judicial nominee by a majority vote, and that the 41 votes necessary to defeat cloture are no substitute for the democratic and constitutional principles that underlie this body's majoritarian premise for confirmation to our federal judiciary.

But now the Senate is moving forward with the nomination of Ted Stewart. I think some of my colleagues realized they had erred in drawing lines in the sand, and that their position threatened to do lasting damage to the Senate's confirmation process, the integrity of the institution, and the judicial branch.

The record of the Judiciary Committee in processing nominees is a good one. I believe the Senate realized that the Committee will continue to hold hearings on those judicial nominees who are qualified, have appropriate judicial temperament, and who respect the rule of law. I had assured my colleagues of this before we reached this temporary impasse and I reiterate this commitment today.

This is not a time for partisan declarations of victory, but I am pleased that my colleagues revisited their decision to hold up the nomination. We are proceeding with a vote on the merits of Ted Stewart's nomination, and we will then proceed upon an arranged schedule to vote on other nominees in precisely the way that was proposed prior to the filibuster vote.

Ultimately, it is my hope for us, as an institution, that instead of signaling a trend, the last two weeks will instead look more like an aberration that was quickly corrected. I look forward to moving ahead to perform our constitutional obligation of providing advice and consent to the President's judicial nominees.

And now, I would like to turn our attention to the merits of Ted Stewart's nomination. I have known Ted Stewart for many years. I have long respected his integrity , his commitment to public service, and his judgment. And I am pleased that President Clinton saw fit to nominate this fine man for a seat on the United States District Court for the District of Utah.

Mr. Stewart received his law degree from the University of Utah School of Law and his undergraduate degree from Utah State University. He worked as a practicing lawyer in Salt Lake City for six years. And he served as trial counsel with the Judge Advocate General in the Utah National Guard.

In 1981, Mr. Stewart came to Washington to work with Congressman **JIM HANSEN.** His practical legal experience served him well on Capitol Hill, where he was intimately involved in the drafting of legislation.

Mr. Stewart's outstanding record in private practice and in the legislative branch earned him an appointment to the Utah Public Service Commission in 1985. For 7 years, he served in a quasi-judicial capacity on the commission, conducting hearings, receiving evidence, and rendering decisions with findings of fact and conclusions of law.

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NOMINATIONS -- (Senate - September 16, 1999)

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Mr. LEAHY. Mr. President, while the distinguished majority leader is still on the floor, I note I, too, do not want to see the Senate go down a path where a minority of the Senate is determining a judge's fate on votes of 41. In fact, the distinguished majority leader is perhaps aware of the fact that during the Republican administrations I rarely ever voted against a nomination by either President Reagan or President Bush. There were a couple I did.

I also took the floor on occasion to oppose filibusters to hold them up and believe that we should have a vote up or down. Actually, I was one of those who made sure, on a couple controversial Republican judges, that we did. That meant 100 Senators voted on them, 100.

In this case, unfortunately, we have at least one judge who has been held for 3 years by one or two or three or four Senators, not 41 but less than a handful. All I am asking is that we give them the fairness of having the whole Senate vote on them.

Unfortunately, in the last couple years, women and minorities have been held up longer than anybody else on these Federal judgeships. They ought to be allowed a vote up or down. If Senators want to vote against them, then vote against them. If they want to vote for them, vote for them. But to have two or three people, quietly, in the back room, never be identified as being the ones holding them up, I think that is unfair to the judiciary, it is unfair to the nominees, and, frankly, it demeans the Senate.

Mrs. FEINSTEIN addressed the Chair.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. I thank the Chair.

Mr. President, as a Senator representing California, who sits on the Judiciary Committee, I have to say a word or two on this subject.

First, I believe the chairman of our committee, Senator **HATCH**, has been very fair with respect to these judges. I believe he has tried his level best to move the calendar along.

I think what we on this side are encountering is the holding up of judges, particularly on the Ninth Circuit Court of Appeals, for years on end. That must stop. A nominee is entitled to a vote . Vote them up; vote them down. To keep them hanging on--the court has 750 cases waiting for a judge. These judges are necessary. If someone has opposition to a judge, which I believe to be the case in at least one, they should come to the floor and say that.

It is also my understanding and my desire to ask that there be some commitment from the other side as to when specifically the nominations of Judge Paez, Marsha Berzon, and Ray Fisher, pending on this calendar--

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Judge Paez pending for 4 years; Marsha Berzon through two sessions now--can at least be brought to the floor for a vote .

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I am prepared to vote on the judges that the majority leader mentioned. I am prepared to vote affirmatively, but I can't do that unless I have some knowledge that judges who have stood on this calendar for years can be brought up before this body for a vote . I don't think that is too much to ask the other side to do.

What this does to a judge's life is, it leaves them in limbo--I should say, a nominee's life--whether they have a place to live, whether they are going to make a move. It is our job to confirm these judges. If we don't like them, we can vote against them. That is the honest thing to do. If there are things in their background, in their abilities that don't pass muster, vote no.

I think every one of us on this side is prepared for that. The problem is, we have a few people who prevent them from having a vote , and this goes on month after month, year after year.

The ranking member of the committee said something that I believe is concurred in on this side; that is, women and minorities have an inordinately difficult time having their nominations processed in an orderly and expeditious way. I don't think that befits this body.

What I am asking for, as a Senator from California, on these three judges, is to just tell us when we might see their nominations before the Senate for a vote up or down. I think there is also an understanding by the White House that will be the case as well.

I ask the majority party to please take this into consideration, allow us a vote up or down, and give us a time when this might happen.

Once again, I thank the ranking member and the chairman of the committee. I know the Senator from Utah has done everything he possibly can to move these nominations. I, for one, very much appreciate it. I am hopeful the leadership of his side will be able to give us some accommodation on this.

Mr. HATCH addressed the Chair.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I appreciate my colleague's kind remarks. I support Mr. Stewart's nomination, and I urge my colleagues to do the same, and not to filibuster any nominee , let alone this nominee .

I am pleased, with regard to the judicial nominations that have been voted on so far this session--and there have been well over 300 since this President became President--that no one on our side, to my knowledge, has threatened to filibuster any of these judges. I think that is the way to proceed.

I think it is a travesty if we ever start getting into a game of filibustering judges. I have to admit that my colleagues on the other side attempted to do that on a number of occasions during the Reagan and Bush years. They always backed off, but maybe they did because they realized there were enough votes to stop a filibuster against Federal judges. I think it is a travesty if we treat this third branch of government with such disregard that we filibuster judges.

I also have appreciated the comments of the ranking member of the Judiciary Committee, Senator **LEAHY**, who stated on this floor in the past:

I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported. .....

The Republican leadership, the Democratic President, the Republican chairman, and the Democratic ranking member of the Judiciary Committee all support Mr. Stewart's nomination. The nomination should not be filibustered. As I understand it, the only reason there would be a filibuster is because some Senators want their judges up. They have no real reason to filibuster Mr. Stewart.

The only way I could ever see a filibuster would be justified is if a nominee is so absolutely unqualified to sit on the Federal bench that the only way to stop that person is a filibuster. I can understand it under those circumstances. Even then, I would question whether that should be done. If a person is so unqualified, we ought to be able to beat that person on the floor.

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Counsel's Office, White House

Kavanaugh, Brett

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[President's Judicial Nominations] [2]

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*520 U.S. 651, *; 117 S. Ct. 1573, **;*
*137 L. Ed. 2d 917, ***; 1997 U.S. LEXIS 3076*

JON E. EDMOND, PETITIONER v. UNITED STATES; JAKE A. LAZENBY, PETITIONER v. UNITED STATES; MICHAEL B. LEAVER, PETITIONER v. UNITED STATES; JAMES B. LEONARD, PETITIONER v. UNITED STATES; ROBERT J. NICHOLS, PETITIONER v. UNITED STATES; DONALD H. VENABLE, PETITIONER v. UNITED STATES

No. 96-262

SUPREME COURT OF THE UNITED STATES

520 U.S. 651; 117 S. Ct. 1573; 137 L. Ed. 2d 917; 1997 U.S. LEXIS 3076; 65 U.S.L.W. 4362; 97 Cal. Daily Op. Service 3728; 97 Daily Journal DAR 6292; 10 Fla. L. Weekly Fed. S 459

February 24, 1997, Argued
May 19, 1997 *, Decided
* Together with Lazenby v. United States; Leaver v. United States, Leonard v. United States; Nichols v. United States; and Venable v. United States, also on certiorari to the same court (see this Court's Rule 12.4).

PRIOR HISTORY:

Petition for a writ of certiorari to the United States Court of Appeals for the Armed Forces.

DISPOSITION: 45 M.J. 19 (first judgment), 44 M.J. 273 (second, third, fifth, and sixth judgments), and 44 M.J. 272 (fourth judgment), affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: On a writ of certiorari to the United States Court of Appeals for the Armed Forces, petitioner inmates sought review of the judgment of said court with respect to each petitioner in a consolidated petition pursuant to Sup. Ct. R. 12.4. Petitioners were convicted by court-martial, which convictions and sentences were affirmed by the appellate court and the Court of Appeals for the Armed Forces.

OVERVIEW: Petitioner inmates were each convicted by court-martial, which convictions and sentences were affirmed in whole or part by the Coast Guard Court of Criminal Appeals and then by the next reviewing court. Petitioner's sought review, alleging that the appointment of civilian judges to the Coast Guard Court of Criminal Appeals by the Secretary of Transportation were invalid because the Secretary of Transportation and not the Judge Advocate General had appointed the civilian judges sitting on the panel which affirmed petitioners' convictions. The Court affirmed the convictions, holding that said appointments were not invalid. The Court held that art. 66(a) Unif. Code Mil. Justice, 10 U.S.C.S. § 866(a) did not give Judge Advocates General authority to appoint Court of Criminal Appeal judges and that 49 U.S.C.S. §323(a) gave the Secretary of Transportation the authority to do so. The court also held that said judges were inferior officers and hence that said appointments by the Secretary did not violate U.S. Const. art. II, § 2, cl. 2.

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such regulations and orders as he deems appropriate to carry out the provisions of [Title 14] or any other law applicable to the Coast Guard," 14 U.S.C. § 633. The Commandant of the Coast Guard is required to "carry out duties and powers prescribed by the Secretary of Transportation," and he "reports directly to the Secretary." 49 U.S.C. § 108(b). Most relevant to the present case, HN4 49 U.S.C. § 323(a) provides: "The Secretary of Transportation may appoint and fix the pay of officers and employees of the Department of Transportation and may prescribe their duties and powers." Petitioners do not dispute that judges of the Coast Guard Court of Criminal Appeals are officers of the Department of Transportation. Thus, although the statute does not specifically mention Coast Guard judges, the plain language of § 323(a) appears to give the Secretary power to appoint them.

Petitioners argue, however, that § 323(a) is a default statute, applicable only where Congress has not otherwise provided for the appointment of specific officers. Petitioners contend that Article 66(a) of the UCMJ, 10 U.S.C. § 866(a), gives the Judge Advocate General of each **military** branch exclusive authority to appoint judges of his respective Court of Criminal Appeals. That provision reads as follows:

[1578]** HN5

> "Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate **military** judges. . . . Appellate **military** judges who are assigned to a Court of **[*657]** Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate **military** judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which **military** judge assigned to the court will act as senior judge on each panel."

[*HR2D]** [2D]
[*HR3]** [3]
Were we to accept petitioners' interpretation of Article 66(a) as providing for the "appointment" of Court of Criminal Appeals judges, their argument that Congress intended it to be the exclusive means of appointment might prove persuasive. Ordinarily, HN6 where a specific provision conflicts with a general one, the specific governs. *Busic* v. *United States,* 446 U.S. 398, 406, 64 L. Ed. 2d 381, 100 S. Ct. 1747 (1980). Conspicuously absent from Article 66(a), however, is any mention of the "appointment" of **military** judges. Instead, the statute refers to judges "who are *assigned* to a Court of Criminal Appeals" (emphasis added). The difference between the power to "assign" officers to a particular task and the power to "appoint" those officers is not merely stylistic. In *Weiss*, we upheld the assignment of **military** officers to serve on **military** courts because they had previously been "appointed" as officers of the United States pursuant to the **Appointments Clause,** and because Congress had **[***927]** not designated the position of a **military** judge as one requiring reappointment. 510 U.S. at 176. We noted in *Weiss* that Congress has consistently used the word "appoint" with respect to **military** positions requiring a separate appointment, rather than using terms not found within the **Appointments Clause,** such as "assign": "Congress repeatedly and consistently distinguished between an office that would require a separate appointment and a position or duty to which one could be 'assigned' or 'detailed' by a superior **[*658]** officer." *Id.*, at 172. We found it significant that the sections of the UCMJ relating to **military** judges "speak explicitly and exclusively in terms of 'detail' or 'assign'; nowhere in these sections is mention made of a separate appointment." *Id.*, at 172. This analysis suggests that Article 66(a) concerns not the appointment of Court of Criminal

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Appeals judges, but only their assignment.

[*HR2E]** [2E]
[*HR4]** [4]
[*HR5]** [5]
Moreover, we see no other way to interpret Article 66(a) that would make it consistent with the Constitution. Under the **Appointments Clause,** Congress could not give the Judge Advocate General power to "appoint" even inferior officers of the United States; that power can be conferred only upon the President, department heads, and courts of law. Thus, petitioners are asking us to interpret Article 66(a) in a manner that would render it clearly unconstitutional--which HN7 we must of course avoid doing if there is another reasonable interpretation available. *NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. 490, 500, 59 L. Ed. 2d 533, 99 S. Ct. 1313 (1979); *Blodgett* v. *Holden,* 275 U.S. 142, 72 L. Ed. 206, 48 S. Ct. 105 (1927). Petitioners respond that reading § 323(a) to permit the Secretary to appoint Court of Criminal Appeals judges causes us unnecessarily to reach the constitutional question whether those judges are inferior officers under the **Appointments Clause,** since Congress may vest only the appointment of inferior officers in a department head. But a constitutional question confronted in order to preserve, if possible, a congressional enactment is not a constitutional question confronted unnecessarily.

[*HR2F]** [2F]
We conclude that Article 66(a) does not give Judge Advocates General authority to appoint Court of Criminal Appeals judges; that § 323(a) does give the Secretary of Transportation authority to do so; and we turn to the constitutional question whether this is consistent with the **Appointments Clause. [**1579]**

III

The **Appointments Clause** of Article II of the Constitution reads as follows:

> HN8
>
> **[*659]** "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const., Art. II, § 2, cl. 2.

[*HR6]** [6]
[*HR7A]** [7A]
As we recognized in *Buckley* v. *Valeo,* 424 U.S. 1, 125, 46 L. Ed. 2d **[***928]** 659, 96 S. Ct. 612 (1976), the **Appointments Clause** of Article II is more than a matter of "etiquette or protocol"; it is among the significant structural safeguards of the constitutional scheme. By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the **Appointments Clause** prevents congressional encroachment upon the Executive and Judicial Branches. See *id.*, at 128-131; *Weiss, supra,* at 183-185 (SOUTER, J., concurring); *Freytag* v. *Commissioner,* 501 U.S. 868, 904, 115 L. Ed. 2d 764, 111 S. Ct. 2631, and n.4 (1991) (SCALIA, J., concurring). This disposition was also designed to assure a higher quality of appointments: the Framers anticipated that the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body. "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty, and a more exact regard to reputation." The Federalist No. 76, p. 387 (M. Beloff ed. 1987)

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(A. Hamilton); accord, 3 J. Story, Commentaries on the Constitution of the United States 374-375 (1833). The President's power to select principal officers of the United States was not left unguarded, however, as Article II further requires the "Advice and Consent of the Senate." This serves both to curb executive abuses of the appointment power, see 3 Story, at 376-377, and "to promote a judicious choice of [persons] for filling the offices of the union," The Federalist No. 76, at 386-387. **[*660]** By requiring the joint participation of the President and the Senate, the **Appointments Clause** was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one. Hamilton observed:

> "The blame of a bad nomination would fall upon the president singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the senate; aggravated by the consideration of their having counteracted the good intentions of the executive. If an ill appointment should be made, the executive for nominating, and the senate for approving, would participate, though in different degrees, in the opprobrium and disgrace." *Id.*, No. 77, at 392.

See also 3 Story, *supra*, at 375 ("If [the President] should . . . surrender the public patronage into the hands of profligate men, or low adventurers, it will be impossible for him long to retain public favor.")

[*HR1C]** [1C]
[*HR7B]** [7B]
The prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers. "But," the **Appointments Clause** continues, "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." This provision, sometimes referred to as the "Excepting Clause," was added to the proposed Constitution on the last day of the Grand Convention, with little discussion. See 2 M. Farrand, Records of the Federal Convention of 1787, pp. 627-628 (1911 ed.). As one of our early opinions suggests, its obvious purpose is administrative convenience, see *United States* v. *Germaine*, 99 U.S. 508, 510, 25 L. Ed. 482 (1879)--but that convenience was deemed to outweigh the benefits of the more cumbersome procedure only with respect to the appointment of "inferior Officers." Section 323(a), which confers appointment power upon the Secretary of Transportation, can constitutionally be **[*661]** applied **[***929]** to the appointment of Court of Criminal Appeals judges only if those judges are "inferior Officers." **[**1580]**

Our cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for **Appointment Clause** purposes. Among the offices that we have found to be inferior are that of a district court clerk, *Ex parte Hennen*, 13 Pet. 225, 258 (1839), an election supervisor, *Ex parte Siebold*, 100 U.S. 371, 397-398, 25 L. Ed. 717 (1880), a vice-consul charged temporarily with the duties of the consul, *United States* v. *Eaton*, 169 U.S. 331, 343, 42 L. Ed. 767, 18 S. Ct. 374 (1898), and a "United States commissioner" in district court proceedings, *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 352-354, 75 L. Ed. 374, 51 S. Ct. 153 (1931). Most recently, in *Morrison* v. *Olson*, 487 U.S. 654, 101 L. Ed. 2d 569, 108 S. Ct. 2597 (1988), we held that the independent counsel created by provisions of the Ethics in Government Act of 1978, 28 U.S.C. §§ 591-599, was an inferior officer. In reaching that conclusion, we relied on several factors: that the independent counsel was subject to removal by a higher officer (the Attorney General), that she performed only limited duties, that her jurisdiction was narrow, and that her tenure was limited. *Id.*, at 671-672.

Petitioners are quite correct that the last two of these conclusions do not hold with regard to the office of **military** judge at issue here. It is not "limited in tenure," as that phrase was

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used in *Morrison* to describe "appointment essentially to accomplish a single task [at the end of which] the office is terminated." *Id.*, at 672. Nor are **military** judges "limited in jurisdiction," as used in *Morrison* to refer to the fact that an independent counsel may investigate and prosecute only those individuals, and for only those crimes, that are within the scope of jurisdiction granted by the special three-judge appointing panel. See *Weiss*, 510 U.S. at 192 (SOUTER, J., concurring). However, *Morrison* did not purport to set forth a definitive test for whether an office is "inferior" under the **Appointments Clause.** To the contrary, it explicitly stated: "We need not attempt here to decide exactly **[*662]** where the line falls between the two types of officers, because in our view [the independent counsel] clearly falls on the 'inferior officer' side of the line." 487 U.S. at 671.

[*HR1D]** [1D]
To support principal-officer status, petitioners emphasize the importance of the responsibilities that Court of Criminal Appeals judges bear. They review those court-martial proceedings that result in the most serious sentences, including those "in which the sentence, as approved, extends to death, dismissal . . ., dishonorable or bad-conduct discharge, or confinement for one year or more." Art. 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1). They must ensure that the court-martial's finding of guilt and its sentence are "correct in law and fact," Art. 66(c), UCMJ, 10 U.S.C. § 866(c), which includes resolution of constitutional challenges. And finally, unlike most appellate judges, Court of Criminal Appeals judges are not required to defer to the trial court's factual findings, but may independently "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." *Ibid*. We do not dispute **[***930]** that **military** appellate judges are charged with exercising significant authority on behalf of the United States. This, however, is also true of offices that we have held were "inferior" within the meaning of the **Appointments Clause.** See, *e.g.*, *Freytag* v. *Commissioner*, 501 U.S. 868, 881-882, 115 L. Ed. 2d 764, 111 S. Ct. 2631 (1991) (special trial judges having "significant . . . duties and discretion" are inferior officers). HN9 The exercise of "significant authority pursuant to the laws of the United States" marks, not the line between principal and inferior officer for **Appointments Clause** purposes, but rather, as we said in *Buckley*, the line between officer and non-officer. 424 U.S. at 126.

[*HR8]** [8]
Generally speaking, the term "inferior officer" connotes a relationship with some higher ranking officer or officers below the President: whether one is an "inferior" officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a **[*663]** higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the **[**1581]** Constitution might have used the phrase "lesser officer." Rather, in the context of a clause designed to preserve political accountability relative to important government assignments, we think it evident that HN10 "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.

This understanding of the **Appointments Clause** conforms with the views of the first Congress. On July 27, 1789, Congress established the first executive department, the Department of Foreign Affairs. In so doing, it expressly designated the Secretary of the Department as a "principal officer," and his subordinate, the Chief Clerk of the Department, as an "inferior officer:

> "Section 1. *Be it enacted* . . . that there shall be an Executive department, to be denominated the Department of Foreign Affairs, and that there shall be a principal officer therein, to be called the Secretary for the Department of Foreign Affairs, who shall perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President of the United States, agreeable

to the Constitution, relative to [matters respecting foreign affairs]; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct.

Section 2. *And be it further enacted*, That there shall be in the said department, an inferior officer, to be appointed by the said principal officer, and to be employed therein as he shall deem proper, and to be called the chief Clerk in the Department of Foreign Affairs. . . ." 1 Stat. 28, ch. IV. **[*664]** Congress used similar language in establishing the Department of War, repeatedly referring to the Secretary of that department as a "principal officer," and the chief clerk, who would be "employed" within the Department as the Secretary "shall deem proper," as an "inferior officer." 1 Stat. 49, ch. VII.

[*HR1E]** [1E]
Supervision of the work of Court of Criminal Appeals judges is divided between the Judge Advocate General (who in the Coast Guard is **[***931]** subordinate to the Secretary of Transportation) and the Court of Appeals for the Armed Forces. The Judge Advocate General exercises administrative oversight over the Court of Criminal Appeals. He is charged with the responsibility to "prescribe uniform rules of procedure" for the court, and must "meet periodically [with other Judge Advocates General] to formulate policies and procedure in regard to review of court-martial cases." Art. 66(f), UCMJ, 10 U.S.C. § 866(f). It is conceded by the parties that the Judge Advocate General may also remove a Court of Criminal Appeals judge from his judicial assignment without cause. The power to remove officers, we have recognized, is a powerful tool for control. *Bowsher* v. *Synar*, 478 U.S. 714, 727, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986); *Myers* v. *United States*, 272 U.S. 52, 71 L. Ed. 160, 47 S. Ct. 21 (1926).

[*HR1F]** [1F]
[*HR9A]** [9A]
[*HR10]** [10]
The Judge Advocate General's control over Court of Criminal Appeals judges is, to be sure, not complete. He may not attempt to influence (by threat of removal or otherwise) the outcome of individual proceedings, Art. 37, UCMJ, 10 U.S.C. § 837, and has no power to reverse decisions of the court. This latter power does reside, however, in another Executive Branch entity, the Court of Appeals for the Armed Forces. n2 That court reviews every decision of the **[*665]** Courts of Criminal Appeals in which: (a) the sentence extends to death; (b) the Judge Advocate General orders such review; or (c) **[**1582]** the court itself grants review upon petition of the accused. Art. 67(a), UCMJ, 10 U.S.C. § 867(a). The scope of review is narrower than that exercised by the Court of Criminal Appeals: so long as there is some competent evidence in the record to establish each element of the offense beyond a reasonable doubt, the Court of Appeals for the Armed Forces will not reevaluate the facts. Art. 67(c), UCMJ, 10 U.S.C. § 867(c); *United States* v. *Wilson*, 6 M.J. 214 (C. M. A. 1979). This limitation upon review does not in our opinion render the judges of the Court of Criminal Appeals principal officers. What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers.

[*HR9B]** [9B]
[9B]

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - n2 Article 141 of the UCMJ, 10 U.S.C. § 941, states that the Court of Appeals for the Armed Forces "is established under

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article I of the Constitution," and "is located for administrative purposes only in the Department of Defense." Although the statute does not specify the court's "location" for non-administrative purposes, other provisions of the UCMJ make clear that it is within the Executive Branch. The court reviews the judgments of only **military** tribunals, Art. 67, UCMJ, 19 U.S.C. § 867; its judges must meet annually in committee with the Judge Advocates General and two members appointed by the Secretary of Defense to survey the operation of the **military** justice system, Art. 146, UCMJ, 10 U.S.C. § 946; and the President may remove its judges for neglect of duty, misconduct, or mental or physical disability, Art. 142, UCMJ, 10 U.S.C. § 942(c).

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Finally, petitioners argue that *Freytag* v. *Commissioner*, 501 U.S. 868, 115 L. Ed. 2d 764, 111 S. Ct. 2631 (1991), which held that special trial judges charged with assisting Tax Court judges were inferior officers and could be appointed by the Chief Judge of the Tax Court, suggests that Court of Criminal Appeals judges are principal officers. Petitioners contend that Court of Criminal Appeals judges more closely resemble Tax Court judges--who we implied (according to petitioners) were principal officers **[***932]** --than they do special trial judges. We note initially that *Freytag* does not hold that Tax Court judges are principal officers; only the appointment of special trial judges was at issue in that case. Moreover, there are two significant distinctions between Tax Court judges and Court of Criminal Appeals judges. First, there is no Executive- **[*666]** Branch tribunal comparable to the Court of Appeals for the Armed Forces that reviews the work of the Tax Court; its decisions are appealable only to courts of the Third Branch. 26 U.S.C. § 7482. And second, there is no officer comparable to a Judge Advocate General who supervises the work of the Tax Court, with power to determine its procedural rules, to remove any judge without cause, and to order any decision submitted for review. *Freytag* does not control our decision here.

* * *

[*HR1G]** [1G]
[*HR2G]** [2G]
We conclude that 49 U.S.C. § 323(a) authorizes the Secretary of Transportation to appoint judges of the Coast Guard Court of Criminal Appeals; and that such appointment is in conformity with the **Appointments Clause** of the Constitution, since those judges are "inferior Officers" within the meaning of that provision, by reason of the supervision over their work exercised by the General Counsel of the Department of Transportation in his capacity as Judge Advocate General and the Court of Appeals for the Armed Forces. The judicial appointments at issue in this case are therefore valid.

Accordingly, we affirm the judgment of the Court of Appeals for the Armed Forces with respect to each petitioner.

It is so ordered.

CONCURBY: SOUTER (In Part)

CONCUR: JUSTICE SOUTER, concurring in part and concurring in the judgment.

I join in Parts I and II of the Court's opinion and agree with the reasoning in Part III insofar as it describes an important, and even necessary, reason for holding judges of the Coast Guard Court of Criminal Appeals to be inferior officers within the meaning of the **Appointments Clause,** U.S. Const., Art. II, § 2, cl. 2. The Court states that "generally speaking, the term 'inferior officer' connotes a relationship [of supervision and direction] with some higher **[*667]** ranking officer or officers below the President; whether one is an 'inferior' officer depends on whether he has a superior." *Ante*, at 11-12. The Court goes on to

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show that administrative supervision of these judges by the Judge Advocate General of the Coast Guard, combined with his power to control them by removal from a case, establishes that the intermediate appellate judges here have the necessary superior. With this conclusion I agree, but unlike the Court I am not prepared to decide on that basis alone that these judges are inferior officers.

Because the term "inferior officer" implies an official superior, one who has no superior is not an inferior officer. This unexceptionable maxim will in some instances be dispositive of status; it might, for example, lead to **[**1583]** the conclusion that United States district judges cannot be inferior officers, since the power of appellate review does not extend to them personally, but is limited to their judgments. See *In re Sealed Case*, 267 U.S. App. D.C. 178, 838 F.2d 476, 483 (CADC 1988), rev'd *sub nom. Morrison* v. *Olson*, 487 U.S. 654, **[***933]** 101 L. Ed. 2d 569, 108 S. Ct. 2597 (1988) (suggesting that "lower federal judges . . . are principal officers" because they are "not subject to personal supervision," 838 F.2d at 483); cf. *ante*, at 13-14.

It does not follow, however, that if one is subject to some supervision and control, one is an inferior officer. Having a superior officer is necessary for inferior officer status, but not sufficient to establish it. See, *e.g.*, *Morrison* v. *Olson*, *supra*, at 654, 722 (1988) ("To be sure, it is not a *sufficient* condition for 'inferior' officer status that one be subordinate to a principal officer. Even an officer who is subordinate to a department head can be a principal officer") (SCALIA, J., dissenting). Accordingly, in *Morrison*, the Court's determination that the independent counsel was "to some degree 'inferior'" to the Attorney General, see *id.*, at 671, did not end the enquiry. The Court went on to weigh the duties, jurisdiction, and tenure associated with the office, *id.*, at 671-672, before concluding that the independent counsel was an inferior **[*668]** officer. Thus, under *Morrison*, the Solicitor General of the United States, for example, may well be a principal officer, despite his statutory "inferiority" to the Attorney General. See, *e.g.*, 28 U.S.C. § 505 (directing Presidential appointment, with the advice and consent of the Senate, of a Solicitor General to "assist the Attorney General in the performance of his duties"). The mere existence of a "superior" officer is not dispositive.

In this case, as the Court persuasively shows, the Judge Advocate General has substantial supervisory authority over the judges of the Coast Guard Court of Criminal Appeals. As the Court notes, the Judge Advocate General prescribes rules of procedure for the Court of Criminal Appeals, formulates policies for review of court martial cases, and is authorized to remove judges from their judicial assignments without cause. See *ante*, at 13. While these facts establish that the condition of supervision and control necessary for inferior officer status has been met, I am wary of treating them as sufficient to demonstrate that the judges of the Court of Criminal Appeals are actually inferior officers under the Constitution.

In having to go beyond the Court's opinion to decide that the criminal appeals judges are inferior officers, I do not claim the convenience of a single sufficient condition, and, indeed, at this stage of the Court's thinking on the matter, I would not try to derive a single rule of sufficiency. What is needed, instead, is a detailed look at the powers and duties of these judges to see whether reasons favoring their inferior officer status within the constitutional scheme weigh more heavily than those to the contrary. Having tried to do this in a concurring opinion in *Weiss* v. *United States*, 510 U.S. 163, 182, 127 L. Ed. 2d 1, 114 S. Ct. 752 (1994), I will not repeat the essay. See *id.*, at 192-194 (reviewing the *Morrison* factors, including tenure, jurisdiction, duties, and removal; concluding that because it is "hard to say with any certainty" whether Courts of **Military** Review judges should be considered principal or inferior officers, **[*669]** deference to the political branches' judgment is appropriate). Here it is enough to add that after the passage of three Terms since writing in *Weiss*, **[***934]** I am unrepentant. I therefore join not only in the Court's conclusion that the necessary supervisory condition for inferior officer status is satisfied here, but in the Court's ultimate holding that the judges of the Coast Guard Court of Criminal Appeals are inferior officers within the meaning of the **Appointments Clause.**

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REFERENCES: ◆ Return To Full Text Opinion

- ◆ Go to Supreme Court Brief(s)
- ◆ Go to Oral Argument Transcript

53 Am Jur 2d, **Military** and Civil Defense 24; 53A Am Jur 2d, **Military** and Civil Defense 338

3 Federal Procedure, L Ed, Armed Forces, Civil Disturbances, and National Defense 5:192, 5:193

45 Am Jur Trials 351, Court-Martial Defense by the Nonmilitary Lawyer; 61 Am Jur Trials 1, Considering Appeals

USCS, Constitution, Art II, 2, cl 2; 10 USCS 801(1), 866; 14 USCS 1-3; 49 USCS 323(a)

L Ed Digest, Courts-Martial 15

L Ed Index, **Appointments Clause;** Coast Guard; Courts-Martial

ALR Index, Appointment; Armed Forces; Coast Guard; Court-Martial

Annotation References:

Supreme Court's construction and application of **appointments clause** of Art II, 2, cl 2, of Federal Constitution. 101 L Ed 2d 1072.

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OUTCOME: The court affirmed the judgment with respect to each petitioner, holding that the Secretary of Transportation was authorized to appoint civilian members of the Coast Guard Court of Criminal Appeals and that such authorization was constitutional under the **Appointments Clause** of Article II.

CORE TERMS: appointment, inferior, military, appoint, inferior officer, appointed, civilian, armed forces, assigned, duty, principal officer, advice, independent counsel, supervision, commissioned, secretarial, subordinate, sentence, constitutional question, court-martial, memorandum, removal, tenure, clerk, vest, department head, presidential, convenience, nomination, prescribe

LexisNexis(TM) HEADNOTES - Core Concepts - ♦ Hide Concepts

Military & Veterans Law > Military Justice

HN1 Appellate **military** judges who are assigned to a Court of Criminal Appeals must be members of the bar but may be commissioned officers or civilians. art. 66(a) Unif. Code Mil. Justice, 10 U.S.C.S. § 866(a).

Constitutional Law > The Presidency > Appointment of Officials

Military & Veterans Law > Military Justice

HN2 **Military** trial and appellate judges are officers of the United States and must be appointed pursuant to U.S. Const. art. II, § 2, cl. 2.

Military & Veterans Law > Military Justice

HN3 A defendant is entitled to a hearing before a properly appointed panel of the Coast Guard Court of **Military** Review.

Military & Veterans Law > Military Justice

HN4 See 49 U.S.C.S. § 323(a).

Military & Veterans Law > Military Justice

HN5 See art. 66(a) Unif. Code Mil. Justice, 10 U.S.C.S. § 866(a).

Governments > Legislation > Interpretation

HN6 In construing statutes, where a specific provision conflicts with a general one, the specific governs.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

HN7 The court must avoid construing a statute so as to render it clearly unconstitutional if there is another reasonable interpretation available.

Constitutional Law > The Presidency > Appointment of Officials

HN8 See U.S. Const., art. II, § 2, cl. 2.

Constitutional Law > The Presidency > Appointment of Officials

HN9 The exercise of "significant authority pursuant to the laws of the United States" marks not the line between principal and inferior officer for purposes under U.S. Const. art. II, § 2, cl. 2, but rather the line between officer and non-officer.

Constitutional Law > The Presidency > Appointment of Officials

HN10 "Inferior officers" are officers whose work is directed and supervised at some level

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by others who were appointed by presidential nomination with the advice and consent of the United States Senate.

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DECISION: Secretary of Transportation's appointments of two civilian judges to predecessor of Coast Guard Court of Criminal Appeals held authorized by 49 USCS 323(a) and valid under **appointments clause** of Art II, 2, cl 2 of Federal Constitution.

SUMMARY: While the **appointments clause** of Art II, 2, cl 2 of the Federal Constitution requires that principal officers of the United States must be appointed by the President with the advice and consent of the Senate, the **appointments clause** authorizes Congress to vest the appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments. "Several court-martial cases involved the question whether the two then-serving civilian judges of the Coast Guard Court of Criminal Appeals, an intermediate court in the **military** justice system, had been validly appointed. Under 14 USCS 1-3, the Coast Guard was established as a **military** service that, except in time of war, was part of the Department of Transportation, and under 49 USCS 323(a), the Secretary of Transportation was authorized to appoint officers of that department. Article 66 of the Uniform Code of **Military** Justice (UCMJ) (10 USCS 866) authorized each Judge Advocate General to establish a Court of Criminal Appeals (formerly known as a Court of **Military** Review), composed of judges who (1) could be commissioned officers or civilians, (2) were referred to as being "assigned" to the court, and (3) were authorized to review court-martial proceedings. Pursuant to Article 1(1) of the UCMJ (10 USCS 801(1)), the General Counsel of the Department of Transportation was, ex officio, the Judge Advocate General of the Coast Guard. The two civilian judges in question had originally been assigned by the General Counsel to serve on the court (under its predecessor name of the Coast Guard Court of **Military** Review). When a concern was raised under the **appointments clause,** both judges were appointed to the court (still under its predecessor name) by a 1993 memorandum of the Secretary. In each of the cases at hand, (1) an accused's court-martial conviction and sentence was affirmed, in whole or in part, by the Coast Guard Court of Criminal Appeals (as such or under its predecessor name) after the 1993 appointments; and (2) the United States Court of Appeals for the Armed Forces, the highest court in the **military** justice system, eventually upheld the conviction (44 MJ 272; 44 MJ 273; 45 MJ 19) in reliance on that court's ruling, in still another case, that the Secretary's 1993 appointments were valid. The several accused then sought review in a consolidated petition for certiorari.

On certiorari, the United States Supreme Court affirmed with respect to each accused. In an opinion by Scalia, J., expressing the unanimous view of the court as to holding 1 below, and joined as to holding 2 below by Rehnquist, Ch. J., and Stevens, O'Connor, Kennedy, Thomas, Ginsburg, and Breyer, JJ., it was held that (1) 323(a) gave the Secretary the statutory authority to appoint civilian judges of the Coast Guard Court of Criminal Appeals; and (2) accordingly, the Secretary's 1993 appointments of the two civilian judges in question were valid under the **appointments clause,** since such judges were inferior officers within the clause's meaning, by reason of the supervision of the judges' work by the General Counsel and by the Court of Appeals for the Armed Forces.

Souter, J., concurring in part and concurring in the judgment, expressed the view that with respect to the **appointments clause**--while he agreed that judges of the Coast Guard Court of Criminal Appeals were inferior officers and that the supervision requirement for inferior-officer status had been satisfied--the Supree Court should have engaged in a further and detailed look at the powers and duties of such judges to see whether the reasons in favor of inferior-officer status weighed more heavily than the reasons to the contrary.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

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[*HN1]** Courts-
MARTIAL §15
review -- Court of Criminal Appeals judges -- validity of appointments --

Headnote: [1A] [1B] [1C] [1D] [1E] [1F] [1G]
Appointments, pursuant to 49 USCS 323(a), by the United States Secretary of Transportation of civilian judges of the Coast Guard Court of Criminal Appeals (under its predecessor name of the Coast Guard Court of **Military** Review), an intermediate court in the **military** justice system, are valid under the **appointments clause** of Art II, 2, cl 2 of the Federal Constitution, since such judges are inferior officers within the clause's meaning--by reason of the supervision of the judges' work by the General Counsel of the Department of Transportation, as ex officio Judge Advocate General of the Coast Guard pursuant to Article 1 (1) of the Uniform Code of **Military** Justice (UCMJ) (10 USCS 801(1)), and by the Court of Appeals for the Armed Forces, as the highest court in the **military** justice system--because (1) even though, under the provisions in Article 66 of the UCMJ (10 USCS 866) concerning the review of court-martial proceedings, Court of Criminal Appeals judges are charged with exercising significant authority on behalf of the United States, this factor marks the line between officers and nonofficers, rather than the line between principal officers--who would have to be appointed by the President with the advice and consent of the Senate--and inferior officers, whose appointment may be vested by Congress in a department head; (2) each Judge Advocate General--who in the Coast Guard is subordinate to the Secretary of Transportation--exercises administrative oversight over the corresponding Court of Criminal Appeals, including (a) responsibilities as to the policies and procedures for the review of court-martial cases, and (b) the power to remove a judge from a Court of Criminal Appeals assignment without cause; (3) even though Article 37 of the UCMJ (10 USCS 837) prohibits a Judge Advocate General from attempting to influence, by threat of removal or otherwise, the outcome of individual proceedings--and even though a Judge Advocate General has no power to reverse decisions of a Court of Criminal Appeals--the latter power resides in another executive branch entity, the Court of Appeals for the Armed Forces, pursuant to Article 67 of the UCMJ (10 USCS 867); and (4) while the scope of review exercised by the latter court is narrower than that exercised by a Court of Criminal Appeals, (a) this limitation upon review does not render Court of Criminal Appeals judges principal officers, and (b) instead, what is significant is that such judges have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers.

[*HN2]** Courts-
MARTIAL §15
review -- Court of Criminal Appeals judges -- authority to appoint --

Headnote: [2A] [2B] [2C] [2D] [2E] [2F] [2G]
While Article 66(a) of the Uniform Code of **Military** Justice (UCMJ) (10 USCS sec; 866(a)) does not give Judge Advocates General the statutory authority to appoint judges of the Courts of Criminal Appeals--intermediate courts in the **military** justice system-- 49 USCS 323(a) gives the United States Secretary of Transportation the statutory authority to appoint civilian judges of the Coast Guard Court of Criminal Appeals, as (1) 14 USCS 1-3 establish the Coast Guard as a **military** service that, except in time of war, is part of the Department of Transportation, and 323(a) authorizes the Secretary to appoint officers of that department; (2) Article 66(a) authorizes each Judge Advocate General to establish a Court of Criminal Appeals, composed of judges who may be commissioned officers or civilians; (3) pursuant to Article 1(1) of the UCMJ (10 USCS 801(1)), the General Counsel of the Department of Transportation is, ex officio, the Judge Advocate General of the Coast Guard; (4) even though 323(a) does not specifically mention civilian judges of the Coast Guard Court of Criminal Appeals, the plain language of 323(a) appears to give the Secretary power to appoint such judges, as it is not disputed that such judges are officers of the Department of Transportation; and (5) while it is argued that 323(a) is a default statute that is not

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applicable in view of Article 66(a), which allegedly provides specific appointment authority, (a) conspicuously absent from Article 66(a) is any mention of the "appointment" of **military** judges, (b) instead, Article 66(a) refers to judges who are "assigned" to a Court of Criminal Appeals, (c) the difference between the power to "assign" officers to a particular task and the power to "appoint" those officers is not merely stylistic, and (d) Article 66(a) must be read to concern only the assignment of such judges, not their appointment, in order to render Article 66(a) consistent with the **appointments clause** of Art II, 2, cl 2 of the Federal Constitution, which clause prohibits Congress from giving the Judge Advocates General power to appoint even inferior officers of the United States, because such power can constitutionally be conferred upon only the President, department heads, and courts of law.

[*HN3]**
STATUTES §233.5
specific and general --

Headnote: [3]
Ordinarily, where a specific statutory provision conflicts with a general one, the specific governs.

[*HN4]**
STATUTES §107
avoiding doubt as to constitutionality --

Headnote: [4]
With respect to the Federal Constitution, the United States Supreme Court must avoid interpreting a federal statute in a manner that would render the statute clearly unconstitutional, if there is another reasonable interpretation available.

[*HN5]**
COURTS §95.3
necessity of confronting constitutional question --

Headnote: [5]
A federal constitutional question that is confronted by the United States Supreme Court in order to preserve, if possible, a congressional enactment is not a constitutional question confronted unnecessarily.

[*HN6]**
CONSTITUTIONAL LAW §71

OFFICERS §8
appointment -- prevention of congressional encroachment --

Headnote: [6]
In providing for the appointment of officers of the United States, the **appointments clause** of Art II, 2, cl 2 of the Federal Constitution is more than a matter of etiquette or protocol and is among the significant structural safeguards of the constitutional scheme; the clause's proisions prevent congressional encroachment upon the executive and judicial branches, are designed to assure a higher quality of appointments, serve to curb executive abuses of the appointment power, and are designed to insure public accountability for both the making of a bad appointment and the rejection of a good one.

[*HN7]**
OFFICERS §8
manner of appointment --

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Headnote: [7A] [7B]
While the **appointments clause** of Art II, 2, cl 2 of the Federal Constitution authorizes Congress to vest the appointment of inferior officers of the United States "in the President alone, in the Courts of Law, or in the Heads of Departments," the clause's prescribed manner for the appointment of principal officers--that is, by the President with the advice and consent of the Senate--is also the default manner for the appointment of inferior officers.

[*HN8]**
OFFICERS §8
appointment -- who is inferior officer --

Headnote: [8]
Generally speaking, for purposes of distinguishing between principal and inferior officers of the United States under the **appointments clause** of Art II, 2, cl 2 of the Federal Constitution, the term "inferior officer" connotes a relationship with some higher ranking officer or officers below the President; whether one is an inferior officer depends on whether one has a superior; it is not enough that other officers may be identified who formally maintain a higher rank--or who possess responsibilities of a greater magnitude--for if that were the intention, then the Constitution might have used the phrase "lesser officer"; rather, in the context of a clause designed to preserve political accountability relative to important government assignments, inferior officers are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.

[*HN9]** Courts-
MARTIAL §15
review -- Court of Appeals for Armed Forces --

Headnote: [9A] [9B]
Even though Article 141 of the Uniform Code of **Military** Justice (UCMJ) (10 USCS 941)--in providing that the United States Court of Appeals for the Armed Forces, the highest court in the **military** justice system, is established under Article I of the Federal Constitution and is "located for administrative purposes only" in the Department of Defense--does not specify the court's "location" for nonadministrative purposes, Articles 67, 142(c), and 146 of the UCMJ (10 USCS 867, 942(c), and 946) make clear that the court is within the executive branch, as (1) under Article 67, the court reviews the judgments of only **military** tribunals; (2) under Article 142(c), the President may remove the court's judges for neglect of duty, misconduct, or mental or physical disability; and (3) under Article 146, the court's judges must meet annually in committee, with the Judge Advocates General and with two members appointed by the Secretary of Defense, to survey the operation of the **military** justice system.

[*HN10]** Courts-
MARTIAL §15
review -- scope --

Headnote: [10]
With respect to court-martial proceedings, the scope of review exercised by the United States Court of Appeals for the Armed Forces, the highest court in the **military** justice system, is narrower than the scope of review exercised by an intermediate Court of Criminal Appeals, for, under Article 67(c) of the Unform Code of **Military** Justice (10 USCS 867(c)), the Court of Appeals for the Armed Forces will not reevaluate the facts, so long as there is some competent evidence in the record to establish each element of the offense beyond a reasonable doubt.

SYLLABUS:

REV_00256549

The Coast Guard Court of Criminal Appeals (formerly the Coast Guard Court of **Military** Review) hears appeals from the decisions of courts-martial, and its decisions are subject to review by the United States Court of Appeals for the Armed Forces. Under Article 66(a) of the Uniform Code of **Military** Justice (UCMJ), its judges may be commissioned officers or civilians. During the times here relevant, the court had two civilian members, both of whom were originally assigned to the court by the General Counsel of the Department of Transportation. In anticipation of the possible invalidation of these assignments under the **Appointments Clause,** Article II, § 2, cl. 2, the Secretary of Transportation issued a memorandum "adopting" the General Counsel's earlier judicial assignments as appointments of his own. In *Ryder* v. *United States,* 515 U.S. 177, 115 S. Ct. 2031, 132 L. Ed. 2d 136 (1995), this Court overturned a conviction that had been affirmed, before the secretarial appointments, by a Coast Guard Court of **Military** Review panel that included both civilian members, as it was conceded that the judges had not been validly appointed pursuant to the **Appointments Clause.** The present case concerns the validity of six convictions that were affirmed by the Coast Guard Court of Criminal Appeals (or its predecessor), with one or both civilian judges participating, after the secretarial appointments. The Court of Appeals for the Armed Forces affirmed the convictions, relying on its holding on remand in *Ryder* that the Secretary's appointments were valid and cured the defect that had previously existed.

Held: The judicial appointments at issue are valid. Pp. 4-15.

(a) Congress has authorized the Secretary to appoint civilian members of the Coast Guard Court of Criminal Appeals. Petitioners' argument that those appointments are invalid because the Secretary lacks the power under 49 U.S.C. § 323(a) to appoint Coast Guard judges is rejected. Although § 323(a) does not specifically mention such judges, its plain language authorizes the Secretary to "appoint and fix the pay of officers and employees of the Department." This Court rejects petitioners' assertion that § 323(a) is a default statute superseded by express language in Article 66(a) of the UCMJ giving the Judge Advocate General of each **military** branch exclusive authority to appoint Court of Criminal Appeals judges. Conspicuously absent from Article 66(a) is any mention of "appointment." Instead, the statute refers only to judges "who are *assigned* to a Court of Criminal Appeals" (emphasis added). The fact that this Court found the distinction to be significant in *Weiss* v. *United States,* 510 U.S. 163, 171-72, 127 L. Ed. 2d 1, 114 S. Ct. 752, suggests that Article 66(a) concerns not the appointment of judges, but only their assignment. A contrary interpretation of Article 66(a) would render it unconstitutional, for under the **Appointments Clause** Congress could not give Judge Advocates General power to "appoint" even inferior officers of the United States. Pp. 4-7.

(b) The Secretary's authorization to appoint civilian Court of Criminal Appeals judges is constitutional. The **Appointments Clause** gives the President the exclusive power to select principal officers by and with the advice and consent of the Senate, but authorizes Congress to "vest the Appointment of . . . inferior Officers . . . in the Heads of Departments." Despite the importance of the responsibilities the judges in question bear, they are "inferior Officers" under the Clause. Generally speaking, "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the Senate's advice and consent. See, *e.g.,* 1 Stat. 28, ch. 4, §§ 1, 2. Supervision of the work of Coast Guard Court of Criminal Appeals judges is divided between the General Counsel of the Department of Transportation (who is subordinate to the Secretary) and the Court of Appeals for the Armed Forces. See Arts. 66(f), 67(a), UCMJ. Significantly, these judges have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers, and hence they are inferior within the meaning of Article II. *Morrison* v. *Olson,* 487 U.S. 654, 671-672, 101 L. Ed. 2d 569, 108 S. Ct. 2597, and *Freytag* v. *Commissioner,* 501 U.S. 868, 115 L. Ed. 2d 764, 111 S. Ct. 2631, distinguished. Pp. 7-15.

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45 M.J. 19 (first judgment), 44 M.J. 273 (second, third, fifth, and sixth judgments), and 44 M.J. 272 (fourth judgment), affirmed.

COUNSEL: Alan B. Morrison argued the cause for petitioners.

Malcolm L. Stewart argued the cause for respondent.

JUDGES: SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., joined, and in which SOUTER, J., joined as to Parts I and II. SOUTER, J., filed an opinion concurring in part and concurring in the judgment.

OPINIONBY: SCALIA

OPINION: [*653] [1576] [***924]** JUSTICE SCALIA delivered the opinion of the Court.

[*HR1A]** [1A]
[*HR2A]** [2A]
We must determine in this case whether Congress has authorized the Secretary of Transportation to appoint civilian members of the Coast Guard Court of Criminal Appeals, and if so, whether this authorization is constitutional under the **Appointments Clause** of Article II.

I

The Coast Guard Court of Criminal Appeals (formerly known as the Coast Guard Court of **Military** Review) is an intermediate court within the **military** justice system. It is one of four **military** Courts of Criminal Appeals; others exist for the Army, the Air Force, and the Navy-Marine Corps. The Coast Guard Court of Criminal Appeals hears appeals from the decisions of courts-martial, and its decisions are subject to review by the United States Court of Appeals for the Armed Forces (formerly known as the United States Court of **Military** Appeals). n1

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 The names of the Courts of **Military** Review and of the United States Court of **Military** Appeals were changed, effective October 5, 1994, by Pub. L. 103-337, § 924, 108 Stat. 2831.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

HN1 Appellate **military** judges who are assigned to a Court of Criminal Appeals must be members of the bar, but may be commissioned officers or civilians. Art. 66(a), Uniform Code of **Military** Justice (UCMJ), 10 U.S.C. § 866(a). During the times relevant to this case, the Coast Guard Court of Criminal Appeals has had two civilian members, Chief Judge Joseph H. Baum and Associate Judge Alfred F.Bridgman, Jr. These judges were originally assigned to serve on the court by the General Counsel of the Department of Transportation, **[*654]** who is, ex officio, the Judge Advocate General of the Coast Guard, Art. 1(1), UCMJ, 10 U.S.C. § 801(1). Subsequent events, however, called into question the validity of these assignments.

In *Weiss* v. *United States,* 510 U.S. 163, 127 L. Ed. 2d 1, 114 S. Ct. 752 (1994), we considered whether the assignment of commissioned **military** officers to serve as **military** judges without reappointment under the **Appointments Clause** was constitutional. We held that HN2 **military** trial and appellate judges are officers of the United States and must be appointed pursuant to the **Appointments Clause.** *Id.*, at 170. We upheld the judicial

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assignments at issue in *Weiss* because each of the **military** judges had been previously appointed by the President as a commissioned **military** officer, and was serving on active duty under that commission at the time he was assigned to a **military** court. We noted, however, that "allowing civilians to be assigned to Courts of **Military** Review, without being appointed pursuant to the **Appointments Clause,** obviously presents **[***925]** a quite different question." *Id.*, at 170, n.4.

In anticipation of our decision in *Weiss*, Chief Judge Baum sent a memorandum to the Chief Counsel of the Coast Guard requesting that the Secretary, in his capacity as a department head, reappoint the judges so the court would be constitutionally valid beyond any doubt. See *United States* v. *Senior*, 36 M.J. 1016, 1018 (C. G. C. M. R. 1993). On January 15, 1993, the Secretary of Transportation issued a memorandum "adopting" **[**1577]** the General Counsel's assignments to the Coast Guard Court of **Military** Review "as judicial appointments of my own." The memorandum then listed the names of "those judges presently assigned and appointed by me," including Chief Judge Baum and Judge Bridgman. Addendum to Brief for Petitioners A6.

Two Terms ago, in *Ryder* v. *United States*, 515 U.S. 177, 115 S. Ct. 2031, 132 L. Ed. 2d 136 (1995), we considered the validity of a conviction that had been affirmed by a panel of the Coast Guard Court of **Military** Review, including its two civilian members, before the **[*655]** secretarial appointments of January 15, 1993. The Government conceded that the civilian judges of the Court of **Military** Review had not been appointed pursuant to the **Appointments Clause,** see Brief for United States in *Ryder* v. *United States*, O.T. 1994, No. 94-431, p. 9, n.9, but argued that Ryder's conviction should be affirmed notwithstanding this defect. We disagreed, holding that HN3↑Ryder was "entitled to a hearing before a properly appointed panel of" the Coast Guard Court of **Military** Review. 515 U.S. at (slip op., at 10). We did not consider the validity of convictions affirmed by the court after the secretarial appointments.

Each of the petitioners in the present case was convicted by court-martial. In each case the conviction and sentence were affirmed, in whole or in part, by the Coast Guard Court of Criminal Appeals (or its predecessor the Court of **Military** Review) after the January 15, 1993, secretarial appointments. Chief Judge Baum participated in each decision, and Judge Bridgman participated in the appeals involving two of the petitioners. The Court of Appeals for the Armed Forces affirmed the convictions, relying on its holding on remand in *United States* v. *Ryder*, 44 M.J. 9 (1996), that the Secretary of Transportation's appointments were valid and cured the defect that had previously existed. Petitioners sought review in a consolidated petition pursuant to this Court's Rule 12.4, and we granted certiorari, 519 U.S. , 117 S. Ct. 416, 136 L. Ed. 328 (1996).

II

[*HR1B]** [1B]
[*HR2B]** [2B]
Petitioners argue that the Secretary's civilian appointments to the Coast Guard Court of Criminal Appeals are invalid for two reasons: first, the Secretary lacks authority under 49 U.S.C. § 323(a) to appoint members of the court; second, judges of **military** Courts of Criminal Appeals are principal, not inferior, officers within the meaning of the **Appointments Clause,** and must therefore be appointed by the **[*656]** President with the advice and consent of the Senate. We consider these contentions in turn.

[*HR2C]** [2C]
Congress has established the Coast Guard as a **military** service and branch of the armed forces that, except in time of war (when it operates as a service within the Navy), is **[***926]** part of the Department of Transportation. 14 U.S.C. §§ 1-3. The Secretary of Transportation has broad authority over the Coast Guard, including the power to "promulgate

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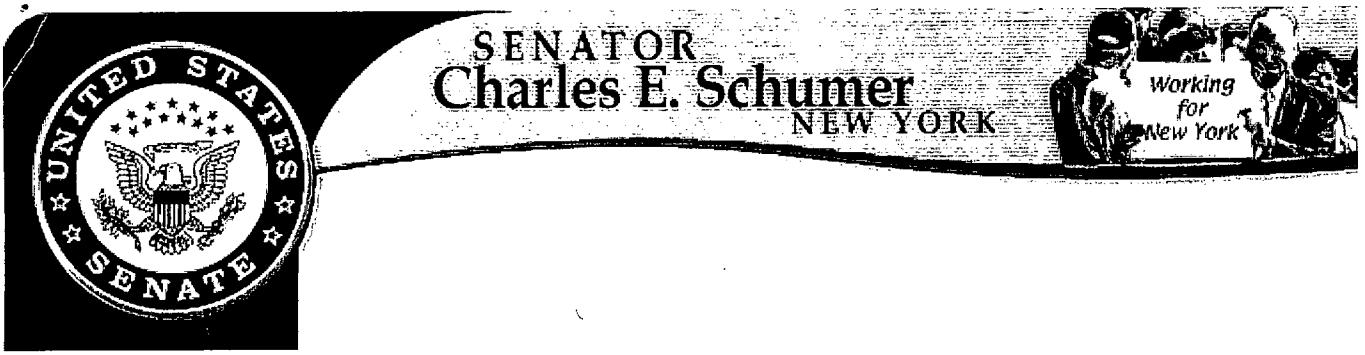

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Letter

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April 30, 2003
The Honorable George W. Bush
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Mr. President:

Six months ago you described the judicial nomination and confirmation process as "broken" and "we have a duty to repair it." I could not agree with you more. To fulfill that duty, both the Adminis the Senate must be willing to make concessions for the sake of the Judiciary and the nation. I wr suggest a reform that requires such concessions, but, if adopted, will go a long way toward repai damage that has been done.

As matters currently stand, both sides are clearly considering ideology in evaluating candidates f bench and nominees are being delayed and deferred because of it.

On the front end, while most of the candidates you have sent to the Senate have been mainstrea conservatives (and have been swiftly confirmed), a growing number of nominees have records th both eyebrows and concerns about their commitment to balance, fairness, and moderation. They excellent lawyers, but they have spent their careers advancing agendas that harm – most particu women, consumers, workers, civil rights, and the environment.

On the back end, in the face of such extremist nominees, one simply cannot expect the Senate t its constitutional obligation and rubberstamp these extremist nominees. When confronted with nc hostility to basic fairness, we must ask questions, demand answers, and do all we can to stop th to demonstrate the capacity to be even-handed jurists. Thus far, you have declined to take ideolc

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the process. That is your right and I respect it, but it means we must continue to stand up agains who will bring an activist agenda to the courts.

Thus, we find ourselves at an impasse when it comes to several nominees. In addition, because spend so much time vetting other nominees for whom red flags are raised, the process moves m than any of us would like.

I believe there is a solution to the problems we face.

Both the Administration and the Senate should agree to the creation of nominating commissions state, the District of Columbia, and each Circuit Court of Appeals. Every commission will consist number of Republicans and Democrats, chosen by the President and the opposition party's Sen Each commission will propose one candidate to fill each vacancy. Barring evidence that any can proposed by a Commission is unfit for judicial service, the President will nominate the individual Senate will confirm her or him.

To ensure each vacancy is filled rapidly but not hastily, the Commission will have a reasonable p time within which to propose a nominee, the President will have a short time within which to mak nomination, and the Senate will have the same short period of time within which to confirm him o

This proposal is our best hope for filling the bench with judges who are appointed based on meri ideology or party affiliation. It is also our best hope for breaking the vicious cycle that the judicial and confirmation process has been stuck in for years.

The solution I offer is similar to one proposed 25-years ago by President Carter, who relied on ju nominating commissions to generate candidates for circuit court vacancies and it is similar to nor commissions used by Senators in several states. The biggest differences are that this proposal e all federal judges are appointed by the same process regardless of what party is in power and it that every single selection is bipartisan.

By giving the President and the Senate equal roles in picking the judge-pickers, both retain some over the process, but neither gets a stranglehold.

By forcing every selection to be bipartisan, we maximize the prospect of achieving balance and r on the bench. Very few extremists on either side will get through and, in the rare instance where he or she likely will be offset by an extremist on the other side.

By mutually agreeing to abide by the choices the commissions make, we take politics and patron the process.

Once this system is in place, Presidents and Senates will be hard-pressed to abandon it. We hav chance here to put these battles to rest for good.

I promise to work to secure support for this proposal from every Senator on both sides of the aisl ask every Democratic candidate for the White House to take a vow to support this reform. Your l on this matter is essential to achieving this momentous goal. I hope you will agree to work with m broken system.

I look forward to hearing from you soon.

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Sincerely
Charles E. Schumer
United States Senato

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Service: **Get by LEXSEE®**
Citation: **501 U.S. 868,AT 884**

*501 U.S. 868, *; 111 S. Ct. 2631, **;*
*115 L. Ed. 2d 764, ***; 1991 U.S. LEXIS 3818*

THOMAS FREYTAG, ET AL., PETITIONERS *v.* COMMISSIONER OF INTERNAL REVENUE

No. 90-762

SUPREME COURT OF THE UNITED STATES

501 U.S. 868; 111 S. Ct. 2631; 115 L. Ed. 2d 764; 1991 U.S. LEXIS 3818; 59 U.S.L.W. 4872; 91-2 U.S. Tax Cas. (CCH) P50,321; 68 A.F.T.R.2d (RIA) 5025; 91 Cal. Daily Op. Service 5040; 91 Daily Journal DAR 7712

April 23, 1991, Argued
June 27, 1991, Decided

PRIOR HISTORY:

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

DISPOSITION: 904 F.2d 1011, affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner taxpayers appealed from the order of the United States Court of Appeals for the Fifth Circuit that upheld the tax court's determination that petitioners owed tax deficiencies and rejected petitioners' contention that the reassignment of their cases by the chief tax court judge to a special trial judge violated 26 U.S.C.S. § 7443A and the appointments clause of U.S. Const. art. II, § 2, cl. 2.

OVERVIEW: Federal income tax deficiencies were assessed against petitioner taxpayers who allegedly deducted losses realized in a tax shelter scheme. Petitioners sought review of the determinations in tax court. The tax court judge retired due to illness during the trial, and, with petitioners' consent, their cases were reassigned to a special trial judge who ultimately ruled that petitioners owed additional taxes. The chief tax court judge adopted the ruling. Petitioners alleged that the adjudication of their cases by the special trial judge was not authorized by 26 U.S.C.S. § 7443A, and that the reassignment violated the appointments clause of U.S. Const. art. II, § 2, cl. 2. The court of appeals rejected petitioners' claims and affirmed. The court granted certiorari and affirmed, holding that 26 U.S.C.S. § 7443A(b)(4) authorized the chief judge's assignment of petitioners' cases to the special trial judge. The court further concluded that the special trial judge's appointment did not violate the appointments clause because the tax court's role in the federal judicial scheme closely resembled that of Article I courts, which were given appointment power by the United States Constitution.

OUTCOME: The court granted certiorari and affirmed the court of appeals' order that upheld the tax court's ruling that petitioner taxpayers owed tax deficiencies, and that the reassignment of petitioners' cases to a special trial judge violated federal law and the appointments clause of the United States Constitution was without merit because the reassignment was authorized by statute, and the tax court was given the proper appointment power by Congress.

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limits the term "Department" to those departments of the executive branch of the Federal Government which are named in 5 USCS 101 does not provide a similar limitation on the term "Department" within the meaning of the appointments clause.

[*HN15]**
CLAIMS §1.5

CONSTITUTIONAL LAW §19

COURTS §186

OFFICERS §8
appointments clause -- judicial power -- territorial courts -- Court of Claims -- congressional interpretation --

Headnote: [15A] [15B] [15C] [15D] [15E]
A court which has been established by Congress pursuant to Article I of the Federal Constitution, and which court exercises the judicial power of the United States, can be a "Court of Law" within the meaning of the Federal Constitution's appointments clause (Art II, 2, cl 2)--which empowers the President to appoint the judges of the United States Supreme Court and other principal federal officers with the advice and consent of the Senate, while providing that Congress may by law vest the appointment of inferior officers of the United States in "the President alone, in the Courts of Law, or in the Heads of Departments"--because (1) the text of the appointments clause does not limit "the Courts of Law" to those courts established under Article III of the Federal Constitution; (2) the appointments clause does not provide that Congress can vest appointment power only in the United States Supreme Court and other courts established under Article III, or only in tribunals that exercise broad common-law jurisdiction; (3) other non-Article III courts, such as the former Court of Claims and a territorial court, exercise the judicial power of the United States; and (4) Congress' consistent and longstanding interpretation of the appointments clause evinces a clear congressional understanding that Article I courts can be given the power to appoint. (Scalia, O'Connor, Kennedy, and Souter, JJ., dissented from this holding.)

[*HN16]**
CONSTITUTIONAL LAW §27
cognate terms --

Headnote: [16]
The Federal Constitution's terms are illuminated by their cognate provisions.

[*HN17]**
CONSTITUTIONAL LAW §22
construction -- usage --

Headnote: [17]
Traditional ways of conducting government give meaning to the Federal Constitution.

[*HN18]**
COURTS §225.1

INTERNAL REVENUE §82.5

OFFICERS §8
appointments clause -- Tax Court as "Court of Law" -- judicial power -- judicial review --

Headnote: [18A] [18B] [18C]

REV_00256573

The United States Tax Court, a court established by Congress pursuant to Article I of the Federal Constitution, is a "Court of Law" within the meaning of the Federal Constitution's appointments clause (Art II, 2, cl 2)--which provides that Congress may by law vest the appointment of inferior officers of the United States in "the President alone, in the Courts of Law, or in the Heads of Departments"--because (1) the Tax Court, insofar as it was established to interpret and apply the Internal Revenue Code and regulations promulgated by the Internal Revenue Service in disputes between taxpayers and the Federal Government, exercises judicial power; (2) such judicial power is exercised to the exclusion of any other executive, legislative, or administrative function, and the Tax Court's exclusively judicial role distinguishes it from other non-Article III tribunals that perform multiple functions and provides the limit on the diffusion of appointment power that the Constitution demands; (3) the Tax Court's function and role in the federal judicial scheme closely resemble those of the Federal District Courts, which indisputably are "Courts of Law" within the meaning of the appointments clause, and the Tax Court exercises its judicial powers in much the same way as the District Courts exercise theirs; and (4) the decisions of the Tax Court are not subject to review by either Congress, the President, or District Courts, but rather--like District Court judgments--are appealable only to regional Federal Courts of Appeal, which courts review Tax Court decisions in the same manner and to the same extent as decisions of the District Courts in civil actions tried without a jury, rather than under the standard of review that a Court of Appeals applies to agency rulemaking. (Scalia, O'Connor, Kennedy, and Souter, JJ., dissented from this holding.)

SYLLABUS: The Chief Judge of the United States Tax Court, an Article I court composed of 19 judges appointed by the President, is authorized to appoint special trial judges, 26 U. S. C. § 7443A(a), and to assign to them certain specified proceedings, §§ 7443A(b)(1), (2), and (3), and "any other proceeding which the chief judge may designate," § 7443A(b)(4). As to subsection (b)(4) proceedings, the special trial judge may hear the case and prepare proposed findings and an opinion, but the actual decision is rendered by a Tax Court judge, § 7443A(c). When petitioners sought review in the Tax Court of determinations of approximately $ 1.5 billion in federal income tax deficiencies, their cases were assigned to a Tax Court judge but were later reassigned, with petitioners' consent, to a Special Trial Judge. His unfavorable opinion was adopted by the Chief Judge as the opinion of the Tax Court. The Court of Appeals affirmed, rejecting petitioners' arguments that the assignment of complex cases to a special trial judge was not authorized by § 7443A and that such assignment violated the Appointments Clause of the Constitution, which, *inter alia*, limits congressional discretion to vest the appointment of "inferior Officers" to the President, the heads of departments, and the courts of law.

Held:

1. Subsection (b)(4) authorizes the Chief Judge to assign *any* Tax Court proceeding, regardless of complexity or amount in controversy, to a special trial judge for hearing and preparation of proposed findings and a written opinion. Its plain language contains no limiting term restricting its reach to cases that are minor, simple, or narrow; and neither the statute's structure nor legislative history contradicts the broad sweep of this language. Pp. 873-877.

2. Section 7443A does not transgress the structure of separation of powers embodied in the Appointments Clause. Pp. 877-892.

(a) This is one of those rare cases in which the Court should exercise its discretion to hear petitioners' challenge. That challenge goes to the validity of the Tax Court proceeding that is the basis for this litigation and, thus, is a nonjurisdictional structural constitutional objection that may be considered, even though petitioners consented to the assignment. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 535-536. Pp. 878-880, 8 L. Ed. 2d 671, 82 S. Ct. 1459.

(b) A special trial judge is an "inferior Officer" whose appointment must conform to the

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Appointments Clause. Such a judge acts as an inferior officer who exercises independent authority in cases governed by subsections (b)(1), (2), and (3). The fact that in subsection (b)(4) cases he performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status. Pp. 880-882.

(c) The Clause reflects the Framers' conclusion that widely distributed appointment power subverts democratic government. Thus, such power can be vested in the Tax Court's Chief Judge only if that court falls within one of the three repositories the Clause specifies. Clearly Congress did not intend to grant the President the power to appoint special trial judges. And the term "Department" refers only to executive divisions like Cabinet-level departments. *United States* v. *Germaine*, 99 U.S. 508, 510-511, 25 L. Ed. 482. Treating the Tax Court as a "Department" would defy the purpose of the Clause, the meaning of the Constitution's text, and the clear intent of Congress to transform that court from an executive agency into an Article I court. Pp. 882-888.

(d) An Article I court, which exercises judicial power, can be a "Court of Law" within the meaning of the Appointments Clause. The reference to "Courts of Law" cannot be limited to Article III courts merely because they are the only courts the Constitution mentions. Congress has wide discretion to assign the task of adjudication to legislative tribunals, see, *e. g., American Insurance Co.* v. *Canter*, 1 Pet. 511, 546; and an Article I court cannot exercise judicial power and not be one of the "Courts of Law." *Buckley* v. *Valeo*, 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612, distinguished. To hold otherwise would also undermine Congress' understanding that Article I courts can be given the power to appoint. See, *e. g., In re Hennen*, 13 Pet. 230. Pp. 888-890.

(e) The Tax Court is a "Court of Law" within the Clause's meaning. It exercises judicial power to the exclusion of any other function; its function and role closely resemble those of the federal district courts; and it is independent of the Executive and Legislative Branches, in that its decisions are appealable in the same manner as those of the district courts. Pp. 890-892.

COUNSEL: Kathleen M. Sullivan argued the cause for petitioners. With her on the briefs were Brian Stuart Koukoutchos and Richard J. Sideman.

Deputy Solicitor General Roberts argued the cause for respondent. With him on the briefs were Solicitor General Starr, Assistant Attorney General Peterson, Stephen J. Marzen, Gary R. Allen, and Steven W. Parks. *

* Erwin N. Griswold, pro se, and Patricia A. Dunn filed a brief of amicus curiae.

JUDGES: BLACKMUN, J., delivered the opinion for a unanimous Court with respect to Parts I, II, and III, and the opinion of the Court with respect to Part IV, in which REHNQUIST, C. J., and WHITE, MARSHALL, and STEVENS, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which O'CONNOR, KENNEDY, and SOUTER, JJ., joined, post, p. 892.

OPINIONBY: BLACKMUN

OPINION: [*870] [*774] [**2634]** JUSTICE BLACKMUN delivered the opinion of the Court.

[*HR1A]** [1A]
The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government. James Madison put it this way: "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." The Federalist No. 47, p. 324 (J. Cooke ed. 1961). In this litigation, we

REV_00256575

must decide whether the authority that Congress has granted the Chief Judge of the United States Tax Court to appoint special trial judges transgresses our structure of separated powers. We answer that inquiry in the negative.

I

By the Tax Reform Act of 1969, § 951, 83 Stat. 730, 26 U. S. C. § 7441, Congress "established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court." It also empowered the Tax Court to appoint commissioners to assist its judges. § 958, 83 Stat. 734. By the Tax Reform Act of 1984, § 464(a), 98 Stat. 824, the title "commissioner" was changed to "special trial judge." By § 463 (a) of that Act, 98 Stat. 824, and by § 1556(a) of the Tax Reform Act of 1986, 100 Stat. 2754, HN1 Congress authorized the Chief Judge of the Tax Court to appoint and assign these special trial judges to hear certain specifically **[*871]** described proceedings and "any other proceeding which the chief judge may designate." 26 U. S. C. §§ 7443A(a) and (b). The Tax Court presently consists of 19 judges appointed to 15-year terms by the **[**2635]** President, by and with the advice and consent of the Senate. **[***775]** §§ 7443(a), (b), and (e).

II

[*HR2A]** [2A]
This complex litigation began with determinations of federal income tax deficiencies against the several petitioners, who had deducted on their returns approximately $ 1.5 billion in losses allegedly realized in a tax shelter scheme. n1 When petitioners sought review in the Tax Court in March 1982, their cases were assigned to Tax Court Judge Richard C. Wilbur. Trial began in 1984. Judge Wilbur became ill in November 1985, and the Chief Judge of the Tax Court assigned Special Trial Judge Carleton D. Powell to preside over the trial as evidentiary referee, with the proceedings videotaped. App. 2. When Judge Wilbur's illness forced his retirement and assumption of senior status effective April 1, 1986, the cases were reassigned, with petitioners' specified consent, Brief for Petitioners 8; Tr. of Oral Arg. 10, to Judge Powell for preparation of written findings and an opinion. App. 8, 12-14. The judge concluded that petitioners' tax shelter scheme consisted of sham transactions and that petitioners **[*872]** owed additional taxes. The Chief Judge adopted Judge Powell's opinion as that of the Tax Court. 89 T.C. 849 (1987). n2

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 At oral argument, counsel for petitioners described the litigation in this way:

"This is a tax case with implications for up to 3,000 taxpayers and a billion and a half in alleged tax deficiencies, and it involved one of the longest trials below in the tax court's history -- 14 weeks of evidence, complex financial testimony, 9,000 pages of transcripts, 3,000-plus exhibits." Tr. of Oral Arg. 3.

Counsel also stated petitioners' primary position:

"In other words, just to put our point succinctly, Congress did not and could not have intended special trial judges in large, complex, multiparty, multimillion dollar tax shelter cases -- alleged tax shelter cases such as this one -- Congress did not and could not have intended such cases to be in effect decided by the autonomous actions of a special trial judge." *Id.*, at 17.

[*HR2B]** [2B]
n2 Petitioners place some emphasis on the facts that Special Trial Judge Powell filed his proposed findings and opinion with the Tax Court on October 21, 1987; that on that day the

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Chief Judge issued an order reassigning the litigation to himself for disposition, App. 15; and that on that same day the Chief Judge adopted the opinion of Judge Powell. Brief for Petitioners 8-9. Indeed, the opinion, including its appendix, covers 44 pages in the Tax Court Reports. At oral argument, however, counsel observed that Judge Powell "sometime in the preceding 4 months had filed a report with the Chief Judge of the tax court." Tr. of Oral Arg. 11. In any event, this chronology does not appear to us to be at all significant. The Chief Judge had the duty to review the work of the Special Trial Judge, and there is nothing in the record disclosing how much time he devoted to the task. As Chief Judge he was aware of the presence of the several cases in the court and the magnitude of the litigation. The burden of proof as to any negative inference to be drawn from the time factor rests on petitioners. We are not inclined to assume "rubber stamp" activity on the part of the Chief Judge.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Petitioners took an appeal to the Court of Appeals for the Fifth Circuit. It affirmed. 904 F.2d 1011 (1990). Petitioners did not argue to the Court of Appeals, nor do they argue here, that the Tax Court is not a legitimate body. Rather, they contended that the assignment of cases as complex as theirs to a special trial judge was not authorized by § 7443A, and that this violated the Appointments Clause of the Constitution, Art. II, § 2, cl. 2. The Court of Appeals ruled that because the question of the Special Trial Judge's authority was "in essence, an attack upon the subject matter jurisdiction of the special trial judge, it may be **[***776]** raised for the first time on appeal." 904 F.2d at 1015 (footnote omitted). The court then went on to reject petitioners' claims on the merits. It concluded that the Code authorized the Chief Judge of the Tax Court to assign a special trial judge to hear petitioners' cases and that petitioners had waived any constitutional challenge to this appointment by consenting to a trial before Judge Powell. *Id.*, at 1015, n. 9.

[*873] We granted certiorari, 498 U.S. 1066 (1991), to resolve the important questions the litigation **[**2636]** raises about the Constitution's structural separation of powers.

III

[*HR3A]** [3A] HN2
Section 7443A(b) of the Internal Revenue Code specifically authorizes the Chief Judge of the Tax Court to assign four categories of cases to special trial judges: "(1) any declaratory judgment proceeding," "(2) any proceeding under section 7463," "(3) any proceeding" in which the deficiency or claimed overpayment does not exceed $ 10,000, and "(4) any other proceeding which the chief judge may designate." In the first three categories, the Chief Judge may assign the special trial judge not only to hear and report on a case but also to decide it. § 7443A(c). In the fourth category, the Chief Judge may authorize the special trial judge only to hear the case and prepare proposed findings and an opinion. The actual decision then is rendered by a regular judge of the Tax Court.

Petitioners argue that adjudication by the Special Trial Judge in this litigation exceeded the bounds of the statutory authority that Congress has conferred upon the Tax Court. Despite what they concede to be the "sweeping language" of subsection (b)(4), Brief for Petitioners 6, petitioners claim that Congress intended special trial judges to preside over only the comparatively narrow and minor matters covered by subsections (b)(1), (2), and (3).

[*HR3B]** [3B]
[*HR4]** [4]
The plain language of § 7443A(b)(4) surely authorizes the Chief Judge's assignment of petitioners' cases to a special trial judge. HN3When we find the terms of a statute unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances. *Demarest* v. *Manspeaker*, 498 U.S. 184, 190, 112 L. Ed. 2d 608, 111 S. Ct.

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599 (1991). Subsection (b)(4) could not be more clear. HN4 It states that the Chief Judge may assign "any other proceeding" to a special trial judge for duties short of "making the decision." The subsection's text contains no **[*874]** limiting term that restricts its reach to cases that are minor, simple, or narrow, as petitioners urge. We have stated that HN5 courts "are not at liberty to create an exception where Congress has declined to do so." *Hallstrom v. Tillamook County*, 493 U.S. 20, 27, 107 L. Ed. 2d 237, 110 S. Ct. 304 (1989).

[*HR3C]** [3C]
Nothing in the legislative history contradicts the broad sweep of subsection (b)(4)'s language. In proposing to authorize the Chief Judge to assign "any other proceeding" to the special trial judges, the Committee on Ways and Means stated that it intended "to clarify" that any other proceeding could be assigned to special trial judges "so long as a Tax Court judge must enter the decision." H. R. Rep. No. 98-432, pt. 2, p. 1568 (1984). The Report goes on to explain:

> **[***777]** "A technical change is made to allow the Chief Judge of the Tax Court to assign any proceeding to a special trial judge for hearing and to write proposed opinions, subject to review and final decision by a Tax Court judge, regardless of the amount in issue. However, special trial judges will not be authorized to enter decisions in this latter category of cases." *Ibid.*

The Conference Report "follows the House Bill," H. R. Conf. Rep. No. 98-861, p. 1127 (1984), and, like the House Report, indicates that Congress knowingly removed the jurisdictional requirement of a maximum amount in dispute in order to expand the authority of special trial judges to hear, but not to decide, cases covered by subsection (b)(4).

Petitioners appear not to appreciate the distinction between the special trial judges' authority to hear cases and prepare proposed findings and opinions under subsection (b)(4) and their lack of authority actually to decide those cases, which is reserved exclusively for judges of the Tax Court. n3 Because they do **[**2637]** not distinguish between hearing a **[*875]** case and deciding it, petitioners advance two arguments that, it seems to us, miss the mark.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 Petitioners also argue that the deferential standard with which Tax Court Rule 183 requires a Tax Court judge to review the factual findings of a special trial judge allows the latter not only to hear a case but effectively to resolve it. This point is not relevant to our grant of certiorari, which concerned the question whether the assignment of petitioners' cases to a special trial judge was authorized by 26 U. S. C. § 7443A(b)(4). Accordingly, we say no more about this new argument than to note that under § 7443A(c) a special trial judge has no authority to decide a case assigned under subsection (b)(4).

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Petitioners first argue that the legislative history notes that the amendment to what is now § 7443A was merely a "technical" change and cannot be read to transfer dispositive power to special trial judges. Petitioners are correct that the 1984 amendment neither transferred decisional power nor altered the substantive duties of the special trial judges. HN6 Congress has limited the authority of special trial judges to enter decisions to the narrow category of cases set forth in subsections (b)(1), (2), and (3). The scope of the special trial judges' authority to hear and decide cases, however, has little, if any, relevance to the category of cases that the special trial judges may hear but not decide.

Since the enactment of the Revenue Act of 1943, § 503, 58 Stat. 72, the Tax Court has possessed authority to appoint commissioners to assist it in particular cases. Special trial

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judges and their predecessors, the commissioners, have been authorized for almost a half century to hear any case before the Tax Court in the discretion of its Chief Judge. In practice, before 1984, special trial judges often heard and reported on large and complex cases. Accordingly, when Congress adopted subsection (b)(4), it codified the Chief Judge's discretion to assign cases like petitioners' to a special trial judge for hearing and preparation of a report. The 1984 amendment was "technical" in light of the historical development of the special trial judges' role; the technical nature of the amendment, however, does not alter the wide-ranging effect of the statutory text's grant of authority to the Chief Judge to assign "any other **[***778]** proceeding" within the Tax Court's jurisdiction to a special trial judge.

[*876] Petitioners also argue that the phrase "any other proceeding" is a general grant of authority to fill unintended gaps left by subsections (b)(1), (2), and (3). Reading subsection (b)(4) as a catchall provision, petitioners argue that its meaning must be limited to cases involving a small amount of money because any other interpretation would render the limitations imposed by subsections (b)(1), (2), and (3) a nullity. In support of this argument, petitioners rely on this Court's decision in *Gomez* v. *United States*, 490 U.S. 858, 104 L. Ed. 2d 923, 109 S. Ct. 2237 (1989).

We held in *Gomez* that the Federal Magistrates Act's general grant of authority allowing magistrates to "be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States," 28 U. S. C. § 636(b) (3), did not permit a magistrate to supervise juror *voir dire* in a felony trial over a defendant's objection. In so holding, we explained:

> "When a statute creates an office to which it assigns specific duties, those duties outline the attributes of the office. Any additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties." 490 U.S. at 864.

In the Magistrates Act, the list of specifically enumerated duties followed the general grant of authority and provided the outlines for the scope of the general grant. Unlike the Magistrates Act, HN7 § 7443A explicitly distinguishes between the categories of cases enumerated in subsections (b)(1), (2), and (3), which are declaratory judgment proceedings and cases involving $ 10,000 or less, and the category of "any other proceeding" found in subsection (b)(4).

[2638]** The lesser authority exercised by special trial judges in proceedings under subsection (b)(4) also prevents that subsection from serving as a grant of general authority to fill any gaps left in the three preceding subsections. HN8 Special trial judges may hear *and* decide declaratory judgment proceedings and the limited-amount cases. A special trial judge, **[*877]** however, cannot render the final decision of the Tax Court in a case assigned under subsection (b)(4). If the cases that special trial judges may hear, but not decide, under subsection (b)(4) are limited to the same kind of cases they could hear and decide under the three preceding subsections, then subsection (b)(4) would be superfluous. Our cases consistently have expressed HN9 "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Pennsylvania Dept. of Public Welfare* v. *Davenport*, 495 U.S. 552, 562, 109 L. Ed. 2d 588, 110 S. Ct. 2126 (1990). See also *Automobile Workers* v. *Johnson Controls, Inc.*, 499 U.S. 187, 201, 113 L. Ed. 2d 158, 111 S. Ct. 1196 (1991). HN10 The scope of subsection (b)(4) must be greater than that of subsections (b)(1), (2), and (3).

[*HR3D]** [3D]
We conclude that subsection HN11 (b)(4) permits the Chief Judge to assign *any* Tax Court

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proceeding, regardless of complexity or amount, to a special trial judge for hearing and the preparation of proposed findings and written opinion. The statute's language, structure, and history permit no other conclusion.

[*779]** IV

[*HR1B]** [1B]
This construction of § 7443A raises a constitutional issue to which we now must turn. Petitioners submit that if subsection (b)(4) permits a special trial judge to preside over the trial of any Tax Court case, then the statute violates the Appointments Clause of the Constitution, Art. II, § 2, cl. 2. According to petitioners, a special trial judge is an "Officer" of the United States who must be appointed in compliance with the Clause. The Clause reads:

> HN12"He [the President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in **[*878]** the President alone, in the Courts of Law, or in the Heads of Departments."

Thus, HN13the Constitution limits congressional discretion to vest power to appoint "inferior Officers" to three sources: "the President alone," "the Heads of Departments," and "the Courts of Law." Petitioners argue that a special trial judge is an "inferior Officer," and also contend that the Chief Judge of the Tax Court does not fall within any of the Constitution's three repositories of the appointment power.

A

[*HR5A]** [5A]
We first address the Commissioner's argument that petitioners have waived their right to challenge the constitutional propriety of § 7443A. The Commissioner contends that petitioners waived this right not only by failing to raise a timely objection to the assignment of their cases to a special trial judge, but also by consenting to the assignment.

[*HR6A]** [6A]
The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political. Our separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch. See *Mistretta* v. *United States*, 488 U.S. 361, 382, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989). The Appointments Clause not only guards against this encroachment but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.

[2639]** The Commissioner correctly notes that petitioners gave their consent to trial before the Special Trial Judge. This Court in the past, however, has exercised its discretion to consider nonjurisdictional claims that had not been raised below. See *Grosso* v. *United States*, 390 U.S. 62, 71-72, 19 L. Ed. 2d 906, 88 S. Ct. 709 (1968); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 535-536, 8 L. Ed. 2d 671, 82 S. Ct. 1459 (1962); *Hormel* v. *Helvering*, 312 U.S. 552, 556-560, 85 L. Ed. 1037, 61 S. Ct. 719 (1941). *Glidden* expressly included Appointments Clause objections to judicial officers in the category of nonjurisdictional structural **[*879]** constitutional objections that could be considered on appeal whether or not they were ruled upon below:

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> "And in *Lamar* v. *United States*, **[***780]** 241 U.S. 103, 117-118, 60 L. Ed. 912, 36 S. Ct. 535, the claim that an intercircuit assignment . . . usurped the presidential appointing power under Art. II, § 2, was heard here and determined upon its merits, despite the fact that it had not been raised in the District Court or in the Court of Appeals or even in this Court until the filing of a supplemental brief upon a second request for review." *Glidden*, 370 U.S. at 536 (Harlan, J., announcing the judgment of the Court).

[*HR5B]** [5B]
[*HR7]** [7]
Like the Court in *Glidden*, we are faced with a constitutional challenge that is neither frivolous nor disingenuous. The alleged defect in the appointment of the Special Trial Judge goes to the validity of the Tax Court proceeding that is the basis for this litigation. It is true that, as a general matter, a litigant must raise all issues and objections at trial. But the disruption to sound appellate process entailed by entertaining objections not raised below does not always overcome what Justice Harlan called "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." *Ibid.* We conclude that this is one of those rare cases in which we should exercise our discretion to hear petitioners' challenge to the constitutional authority of the Special Trial Judge.

In reaching this conclusion, we note that we are not persuaded by the Commissioner's request that this Court defer to the Executive Branch's decision that there has been no legislative encroachment on Presidential prerogatives under the Appointments Clause in connection with § 7443A. According to the Commissioner, the structural interests implicated in this litigation are those of the Executive Branch, which can be expected to look out for itself. It is claimed, accordingly, that there is no need for this Court to be concerned about protecting the separation-of-powers interests at stake here.

[*880]

[*HR6B]** [6B]
[*HR8]** [8]
We are not persuaded by this approach. The Commissioner, we believe, is in error when he assumes that the interest at stake is the Executive's own appointment power. The structural principles embodied in the Appointments Clause do not speak only, or even primarily, of Executive prerogatives simply because they are located in Article II. HN14 The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interests. For example, the Clause forbids Congress to grant the appointment power to inappropriate members of the Executive Branch. Neither Congress nor the Executive can agree to waive this structural protection. "The assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review." *INS* v. *Chadha*, 462 U.S. 919, 942, n. 13, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983). The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic.

B

We turn to another preliminary issue in petitioners' Appointments **[***781]** Clause challenge. **[**2640]** Petitioners argue that a special trial judge is an "inferior Officer" of the United States. If we disagree, and conclude that a special trial judge is only an employee,

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petitioners' challenge fails, for such "lesser functionaries" need not be selected in compliance with the strict requirements of Article II. *Buckley* v. *Valeo*, 424 U.S. 1, 126, n. 162, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976).

The Commissioner, in contrast to petitioners, argues that a special trial judge assigned under § 7443A(b)(4) acts only as an aide to the Tax Court judge responsible for deciding the case. The special trial judge, as the Commissioner characterizes his work, does no more than assist the Tax Court judge in taking the evidence and preparing the proposed findings and opinion. Thus, the Commissioner concludes, special **[*881]** trial judges acting pursuant to § 7443A (b)(4) are employees rather than "Officers of the United States."

[*HR1C]** [1C]
[*HR9A]** [9A]
[*HR10]** [10]
"Any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II]." *Buckley*, 424 U.S. at 126. The two courts that have addressed the issue have held that special trial judges are "inferior Officers." The Tax Court so concluded in *First Western Govt. Securities, Inc.* v. *Commissioner*, 94 T.C. 549, 557-559 (1990), and the Court of Appeals for the Second Circuit in *Samuels, Kramer & Co.* v. *Commissioner*, 930 F.2d 975, 985 (1991), agreed. Both courts considered the degree of authority exercised by the special trial judges to be so "significant" that it was inconsistent with the classifications of "lesser functionaries" or employees. Cf. *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 352-353, 75 L. Ed. 374, 51 S. Ct. 153 (1931) (United States commissioners are inferior officers). We agree with the Tax Court and the Second Circuit that **HN15** a special trial judge is an "inferior Officer" whose appointment must conform to the Appointments Clause.

[*HR9B]** [9B]
The Commissioner reasons that special trial judges may be deemed employees in subsection (b)(4) cases because they lack authority to enter a final decision. But this argument ignores the significance of the duties and discretion that special trial judges possess. The office of special trial judge is "established by Law," Art. II, § 2, cl. 2, and the duties, salary, and means of appointment for that office are specified by statute. See *Burnap* v. *United States*, 252 U.S. 512, 516-517, 64 L. Ed. 692, 40 S. Ct. 374 (1920); *United States* v. *Germaine*, 99 U.S. 508, 511-512, 25 L. Ed. 482 (1879). These characteristics distinguish special trial judges from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute. Furthermore, special trial judges perform more than ministerial tasks. They take testimony, **[*882]** conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.

Even if the duties of special trial judges under subsection (b)(4) were **[***782]** not as significant as we and the two courts have found them to be, our conclusion would be unchanged. Under §§ 7443A(b)(1), (2), and (3), and (c), the Chief Judge may assign special trial judges to render the decisions of the Tax Court in declaratory judgment proceedings and limited-amount tax cases. The Commissioner concedes that in cases governed by subsections (b)(1), (2), and (3), special trial judges act as inferior officers who exercise independent authority. But the Commissioner urges that petitioners may not rely on the extensive power wielded by the special trial judges in declaratory judgment proceedings and limited-amount tax cases because petitioners lack standing to assert the rights of taxpayers whose cases are assigned **[**2641]** to special trial judges under subsections (b)(1), (2), and (3).

This standing argument seems to us to be beside the point. Special trial judges are not inferior officers for purposes of some of their duties under § 7443A, but mere employees with respect to other responsibilities. The fact that an inferior officer on occasion performs duties

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CORE TERMS: appointment, inferior, judicial power, courts of law, tribunal, appoint, assign, duty, appointed, hear, forfeiture, power to appoint, assigned, Court of Law, presidential, territorial, salary, vest, forfeited, subject-matter, waived, entity, secretary, encroachment, Twenty-fifth Amendment, inferior officer, authorize, constitutional challenge, nonjurisdictional, establishment

LexisNexis(TM) HEADNOTES - Core Concepts - ♦ Hide Concepts

Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491)

HN1 Congress has authorized the chief judge of the tax court to appoint and assign special trial judges to hear certain specifically described proceedings and any other proceeding which the chief judge may designate. 26 U.S.C.S. §§ 7443A(a) and (b).

Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491)

HN2 26 U.S.C.S. § 7443A(b) specifically authorizes the chief judge of the tax court to assign four categories of cases to special trial judges: (1) any declaratory judgment proceeding, (2) any proceeding under 26 U.S.C.S. § 7463, (3) any proceeding in which the deficiency or claimed overpayment does not exceed $ 10,000, and (4) any other proceeding which the chief judge may designate. In the first three categories, the chief judge may assign the special trial judge not only to hear and report on a case but also to decide it. 26 U.S.C.S. § 7443A(c). In the fourth category, the chief judge may authorize the special trial judge only to hear the case and prepare proposed findings and an opinion. The actual decision then is rendered by a regular judge of the tax court.

Governments > Legislation > Interpretation

HN3 When a reviewing court finds the terms of a statute unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances.

Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491)

HN4 26 U.S.C.S. § 7443A(b)(4) states that the chief judge may assign any other proceeding to a special trial judge for duties short of making the decision. The subsection's text contains no limiting term that restricts its reach to cases that are minor, simple, or narrow, as petitioners urge.

Governments > Legislation > Interpretation

HN5 Courts are not at liberty to create an exception where Congress has declined to do so.

Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491)

HN6 Congress has limited the authority of special trial judges to enter decisions to the narrow category of cases set forth in 26 U.S.C.S. §§ 7443A(b)(1), (2), and (3). The scope of the special trial judges' authority to hear and decide cases, however, has little, if any, relevance to the category of cases that the special trial judges may hear but not decide.

Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491)

HN7 26 U.S.C.S. § 7443A explicitly distinguishes between the categories of cases enumerated in 26 U.S.C.S. §§ 7443A(b)(1), (2), and (3), which are declaratory judgment proceedings and cases involving $ 10,000 or less, and the category of any other proceeding found in 26 U.S.C.S. § 7443(A)(b)(4).

Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491)

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that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution. If a special trial judge is an inferior officer for purposes of subsections (b)(1), (2), and (3), he is an inferior officer within the meaning of the Appointments Clause and he must be properly appointed.

C

[*HR1D]** [1D]
[*HR11]** [11]
Having concluded that the special trial judges are "inferior Officers," we consider the substantive aspect of petitioners Appointments Clause challenge. The principle of separation of powers is embedded in the Appointments Clause. Its relevant language bears repeating: "The Congress may by **[*883]** Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Congress clearly vested the Chief Judge of the Tax Court with the power to appoint special trial judges. An important fact about the appointment in this case should not be overlooked. This case does not involve an "interbranch" appointment. Cf. *Morrison* v. *Olson*, 487 U.S. 654, 675-677, 101 L. Ed. 2d 569, 108 S. Ct. 2597 (1988). However one might classify the Chief Judge of the Tax Court, there surely is nothing incongruous about giving him the authority to appoint the clerk or an assistant judge for that court. See *id.*, at 676. We do not consider here an appointment by some officer of inferior officers in, for example, the Department of Commerce or Department of State. The appointment in this case is so obviously appropriate that petitioners' burden of persuading us that it violates the Appointments Clause is indeed heavy.

[*HR12]** [12]
Although petitioners bear a heavy burden, their challenge is a serious one. Despite Congress' authority to create offices and to provide for the method of appointment to those offices, "Congress' power . . . is inevitably bounded by the express language of Article II, cl. 2, and unless the method it provides comports with the latter, the holders of those offices will not be 'Officers of the United States.'" *Buckley*, 424 U.S. at 138-139 (discussing Congress' power **[***783]** under the Necessary and Proper Clause).

[*HR6C]** [6C]
The "manipulation of official appointments" had long been one of the American revolutionary generation's greatest grievances against executive power, see G. Wood, The Creation of The American Republic 1776-1787, p. 79 (1969) (Wood), because "the power of appointment to offices" was deemed "the most insidious and powerful weapon of eighteenth century despotism." *Id.*, at 143. Those who framed our Constitution addressed these concerns by carefully husbanding the appointment power to limit its diffusion. Although the debate on the Appointments Clause was brief, the **[*884]** sparse record indicates the Framers' determination to limit the distribution of the power of appointment. The Constitutional Convention rejected Madison's complaint that the Appointments Clause did "not go far enough if it be necessary at all": Madison argued that "Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices." 2 Records of the Federal Convention of 1787, pp. 627-628 (M. Farrand rev. 1966). The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people. Thus, the Clause bespeaks a principle of limitation by dividing the power to appoint the principal federal officers -- ambassadors, ministers, heads of departments, and judges -- between the Executive and Legislative Branches. See *Buckley*, 424 U.S. at 129-131. **[**2642]** Even with respect to "inferior Officers," the Clause allows Congress only limited authority to devolve appointment power on the President, his heads of departments, and the courts of law.

[*HR1E]** [1E]

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With this concern in mind, we repeat petitioners' central challenge: Can the Chief Judge of the Tax Court constitutionally be vested by Congress with the power to appoint? The Appointments Clause names the possible repositories for the appointment power. It is beyond question in this litigation that Congress did not intend to grant to the President the power to appoint special trial judges. We therefore are left with three other possibilities. First, as the Commissioner urges, the Tax Court could be treated as a department with the Chief Judge as its head. Second, as the *amicus* suggests, the Tax Court could be considered one of "the Courts of Law." Third, we could agree with petitioners that the Tax Court is neither a "Department" nor a "Court of Law." Should we agree with petitioners, it would follow that the appointment power could not be vested in the Chief Judge of the Tax Court.

[*885]

[*HR13A]** [13A]
We first consider the Commissioner's argument. According to the Commissioner, the Tax Court is a department because for 45 years before Congress designated that court as a "court of record" under Article I, see § 7441, the body was an independent agency (the predecessor Board of Tax Appeals) within the Executive Branch. Furthermore, the Commissioner argues that § 7441 simply changed the status of the Tax Court within that branch. It did not remove the body to a different branch or change its substantive duties.

The Commissioner "readily" acknowledges **[***784]** that "the Tax Court's fit within the Executive Branch may not be a perfect one." Brief for Respondent 41. But he argues that the Tax Court must fall within one of the three branches and that the Executive Branch provides its best home. The reasoning of the Commissioner may be summarized as follows: (1) The Tax Court must fit into one of the three branches; (2) it does not fit into either the Legislative Branch or the Judicial Branch; (3) at one time it was an independent agency and therefore it must fit into the Executive Branch; and (4) every component of the Executive Branch is a department.

We cannot accept the Commissioner's assumption that every part of the Executive Branch is a department, the head of which is eligible to receive the appointment power. The Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint. The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government. Given the inexorable presence of the administrative state, a holding that every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint. The Framers recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power. See Wood 79-80. So do we. For the Chief Judge of the Tax Court to qualify as a "Head of [a] Department," the Commissioner must demonstrate not only that the Tax **[*886]** Court is a part of the Executive Branch but also that it is a department.

We are not so persuaded. This Court for more than a century has held that the term "Department" refers only to "'a part or division of the executive government, as the Department of State, or of the Treasury,'" expressly "created" and "giv[en] . . . the name of a department" by Congress. *Germaine*, 99 U.S. at 510-511. See also *Burnap*, 252 U.S. at 515 ("The term head of a Department means . . . the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, and War, who is a member of the Cabinet"). Accordingly, the term "Heads of Departments" does not embrace **[**2643]** "inferior commissioners and bureau officers." *Germaine*, 99 U.S. at 511.

Confining the term "Heads of Departments" in the Appointments Clause to executive divisions like the Cabinet-level departments constrains the distribution of the appointment power just as the Commissioner's interpretation, in contrast, would diffuse it. The Cabinet-level departments are limited in number and easily identified. Their heads are subject to the

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exercise of political oversight and share the President's accountability to the people.

Such a limiting construction also ensures that we interpret that term in the Appointments Clause consistently with its interpretation in other constitutional provisions. In Germaine, see 99 U.S. at 511, this Court noted that the phrase "Heads of Departments" in the Appointments Clause must be read in conjunction with the Opinion Clause of Art. II, § 2, cl. 1. The Opinion Clause provides that the President **[***785]** "may require the Opinion, in writing, of the principal Officer in each of the Executive Departments," and *Germaine* limited the meaning of "Executive Department" to the Cabinet members.

[*HR13B]** [13B]
[*HR14A]** [14A]
The phrase "executive departments" also appears in § 4 of the Twenty-fifth Amendment, which empowers the Vice **[*887]** President, together with a majority of the "principal officers of the executive departments," to declare the President "unable to discharge the powers and duties of his office." The Amendment was ratified February 10, 1967, and its language, of course, does not control our interpretation of a prior constitutional provision, such as the Appointments Clause. n4 Nevertheless, it is instructive that the hearings on the Twenty-fifth Amendment confirm that the term "department" refers to Cabinet-level entities:

> "Only officials of Cabinet rank should participate in the decision as to whether presidential inability exists. . . . The intent . . . is that the Presidential appointees who direct the 10 executive departments named in 5 U. S. C. 1 [now codified as § 101], or any executive department established in the future, generally considered to comprise the President's Cabinet, would participate . . . in determining inability." H. R. Rep. No. 203, 89th Cong., 1st Sess., 3 (1965).

[*HR14B]** [14B]

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - n4 Because the language of the Twenty-fifth Amendment does not bind our interpretation of the Appointments Clause, the fact that the Amendment strictly limits the term "department" to those departments named in 5 U. S. C. § 101 does not provide a similar limitation on the term "Department" within the meaning of the Appointments Clause. We do not address here any question involving an appointment of an inferior officer by the head of one of the principal agencies, such as the Federal Trade Commission, the Securities and Exchange Commission, the Federal Energy Regulatory Commission, the Central Intelligence Agency, and the Federal Reserve Bank of St. Louis.

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[*HR13C]** [13C]
Even if we were not persuaded that the Commissioner's view threatened to diffuse the appointment power and was contrary to the meaning of "Department" in the Constitution, we still could not accept his treatment of the intent of Congress, which enacted legislation in 1969 with the express purpose of "making the Tax Court an Article I court rather than an executive agency." S. Rep. No. 91-552, p. 303 (1969). Congress deemed it "anomalous to continue to classify" **[*888]** the Tax Court with executive agencies, *id.*, at 302, and questioned whether it was "appropriate for one executive agency [the pre-1969 tribunal] to

be sitting in judgment on the determinations of another executive agency [the IRS]." *Ibid.*

Treating the Tax Court as a "Department" and its Chief Judge as its "Head" would defy the purpose of the Appointments Clause, the meaning of the Constitution's text, and the clear intent of Congress to transform the Tax Court into an Article I **[**2644]** legislative court. The Tax Court is not a "Department."

Having so concluded, we now must determine whether it is one of the "Courts of Law," as *amicus* suggests. Petitioners and the Commissioner both take the position that the Tax Court cannot be a "Court of Law" within the meaning of the Appointments Clause because, they **[***786]** say, that term is limited to Article III courts. n5

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n5 The Commissioner has not been consistent in this position. Indeed, when the present litigation was in the Fifth Circuit, the Government advocated that the Tax Court is one of the "Courts of Law." Brief for Appellee in No. 89-4436 et al., pp. 47-51. It abandoned that position in the later case of *Samuels, Kramer & Co.* v. *Commissioner*, 930 F.2d 975 (CA2 1991), and there urged that the Tax Court was a "Department." Brief for Appellee in No. 89-4436 et al., pp. 34-48.

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[*HR15A]** [15A]
[*HR16]** [16]
The text of the Clause does not limit the "Courts of Law" to those courts established under Article III of the Constitution. The Appointments Clause does not provide that Congress can vest appointment power only in "one supreme Court" and other courts established under Article III, or only in tribunals that exercise broad common-law jurisdiction. Petitioners argue that Article II's reference to the "Courts of Law" must be limited to Article III courts because Article III courts are the only courts mentioned in the Constitution. It of course is true that the Constitution "nowhere makes reference to 'legislative courts.'" See *Glidden*, 370 U.S. at 543. But petitioners' argument fails nevertheless. We **[*889]** agree with petitioners that the Constitution's terms are illuminated by their cognate provisions. This analytic method contributed to our conclusion that the Tax Court could not be a department. Petitioners, however, underestimate the importance of this Court's time-honored reading of the Constitution as giving Congress wide discretion to assign the task of adjudication in cases arising under federal law to legislative tribunals. See, *e. g., American Insurance Co.* v. *Canter*, 1 Pet. 511, 546 (1828) (the judicial power of the United States is not limited to the judicial power defined under Article III and may be exercised by legislative courts); *Williams* v. *United States*, 289 U.S. 553, 565-567, 77 L. Ed. 1372, 53 S. Ct. 751 (1933) (same).

[*HR15B]** [15B]
Our cases involving non-Article III tribunals have held that these courts exercise the judicial power of the United States. In both *Canter* and *Williams*, this Court rejected arguments similar to the literalistic one now advanced by petitioners, that only Article III courts could exercise the judicial power because the term "judicial Power" appears only in Article III. In *Williams*, this Court explained that the power exercised by some non-Article III tribunals *is* judicial power:

> "The Court of Claims . . . undoubtedly . . . exercises judicial power, but the question still remains -- and is the vital question -- whether it is the judicial power defined by Art. III of the Constitution.
>
> "That judicial power apart from that article may be conferred by Congress upon

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> legislative courts . . . is plainly apparent from the opinion of Chief Justice Marshall in *American Insurance Co.* v. *Canter* . . . dealing with the territorial courts. . . . The legislative courts possess and exercise judicial power . . . although not conferred in virtue of the third article of the Constitution." 289 U.S. at 565-566.

We cannot hold that an Article I court, such as the Court of Claims in *Williams* or the Territorial Court of Florida in **[*890]** *Canter*, can exercise the judicial power of the United States and yet cannot be one of the "Courts of Law."

Nothing in *Buckley* v. *Valeo* contradicts **[***787]** this conclusion. While this Court in *Buckley* paraphrased the Appointments Clause to allow the appointment of inferior officers "by the President alone, by the heads of departments, or by the Judiciary," 424 U.S. at 132, we did not hold that "Courts of Law" consist only of the Article III judiciary. The appointment authority of the "Courts of Law" was not before this Court in *Buckley*. Instead, we were concerned with whether the appointment of Federal Elections **[**2645]** Commissioners by Congress was constitutional under the Appointments Clause.

[*HR15C]** [15C]
[*HR17]** [17]
The narrow construction urged by petitioners and the Commissioner also would undermine longstanding practice. "From the earliest days of the Republic," see *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 64, 73 L. Ed. 2d 598, 102 S. Ct. 2858 (1982), Congress provided for the creation of legislative courts and authorized those courts to appoint clerks, who were inferior officers. See, *e. g., In re Hennen*, 13 Pet. 230 (1839). Congress' consistent interpretation of the Appointments Clause evinces a clear congressional understanding that Article I courts could be given the power to appoint. Because "'traditional ways of conducting government . . . give meaning' to the Constitution," *Mistretta*, 488 U.S. at 401, quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610, 96 L. Ed. 1153, 72 S. Ct. 863 (1952) (concurring opinion), this longstanding interpretation provides evidence that Article I courts are not precluded from being "Courts of Law" within the meaning of the Appointments Clause.

[*HR15D]** [15D]
[*HR18A]** [18A]
Having concluded that HN16 an Article I court, which exercises judicial power, can be a "Court of Law" within the meaning of the Appointments Clause, we now examine the Tax Court's functions to define its constitutional status and its role in the constitutional scheme. See *Williams*, 289 U.S. at 563-567. The Tax Court exercises judicial, rather than **[*891]** executive, legislative, or administrative, power. It was established by Congress to interpret and apply the Internal Revenue Code in disputes between taxpayers and the Government. By resolving these disputes, the court exercises a portion of the judicial power of the United States.

[*HR18B]** [18B]
The Tax Court exercises judicial power to the exclusion of any other function. It is neither advocate nor rulemaker. As an adjudicative body, it construes statutes passed by Congress and regulations promulgated by the Internal Revenue Service. It does not make political decisions.

The Tax Court's function and role in the federal judicial scheme closely resemble those of the federal district courts, which indisputably are "Courts of Law." Furthermore, the Tax Court exercises its judicial power in much the same way as the federal district courts exercise theirs. It has authority to punish contempts by fine or imprisonment, 26 U. S. C. § 7456(c);

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to grant certain injunctive relief, § 6213(a); to order the Secretary of the Treasury to refund an overpayment determined by the court, § 6512(b)(2); and to subpoena and examine witnesses, order production **[***788]** of documents, and administer oaths, § 7456(a). All these powers are quintessentially judicial in nature.

*HN17*The Tax Court remains independent of the Executive and Legislative Branches. Its decisions are not subject to review by either the Congress or the President. Nor has Congress made Tax Court decisions subject to review in the federal district courts. Rather, like the judgments of the district courts, the decisions of the Tax Court are appealable only to the regional United States courts of appeals, with ultimate review in this Court. The courts of appeals, moreover, review those decisions " in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." § 7482(a). This standard of review contrasts with the standard applied to agency rulemaking by the courts of appeals under § 10(e) of the Administrative Procedure Act, 5 U. S. C. § 706(2)(A). See *Motor Vehicle Mfrs.* **[*892]** *Assn. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43-44, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983).

[*HR1F]** [1F]
[*HR15E]** [15E]
[*HR18C]** [18C] *HN18*
The Tax Court's exclusively judicial role distinguishes it from other non-Article III tribunals that perform multiple functions and provides the limit on the diffusion of appointment power that the Constitution demands. Moreover, since the early 1800's, Congress **[**2646]** regularly granted non-Article III territorial courts the authority to appoint their own clerks of court, who, as of at least 1839, were "inferior Officers" within the meaning of the Appointments Clause. See *In re Hennen*, 13 Peters at 258. Including Article I courts, such as the Tax Court, that exercise judicial power and perform exclusively judicial functions among the "Courts of Law" does not significantly expand the universe of actors eligible to receive the appointment power.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

CONCURBY: SCALIA (In Part)

CONCUR: JUSTICE SCALIA, with whom JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER join, concurring in part and concurring in the judgment.

I agree with the Court that 26 U. S. C. § 7443A allows the Chief Judge of the Tax Court to assign special trial judges to preside over proceedings like those involved here, and join Parts I, II, and III of its opinion. I disagree, however, with the Court's decision to reach, as well as its resolution of, the Appointments Clause issue.

I

As an initial matter, I think the Court errs by entertaining petitioners' constitutional challenge on the merits. Petitioners not only failed to object at trial to the assignment of their case to a special trial judge, but expressly consented to that assignment. It was only after the judge ruled against them that petitioners developed their current concern over whether his appointment violated Article II, § 2, cl. 2, of the **[*893]** Constitution. They raised this important constitutional question for the first time in their appeal to the Fifth Circuit. That court concluded that petitioners had "waived this objection" by consenting to the assignment of **[***789]** their case. 904 F.2d 1011, 1015, n. 9 (1990). When we granted certiorari, we asked the parties to brief and argue the following additional question: "Does a party's consent to have its case heard by a special tax judge constitute a waiver of any right to

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challenge the appointment of that judge on the basis of the Appointments Clause, Art. II, § 2, cl. 2?" 498 U.S. 1066 (1991).

Petitioners would have us answer that question "no" by adopting a general rule that "structural" constitutional rights as a class simply *cannot* be forfeited, and that litigants are entitled to raise them at any stage of litigation. The Court neither accepts nor rejects that proposal -- and indeed, does not even mention it, though the opinion does dwell upon the structural nature of the present constitutional claim, *ante*, at 878-880. Nor does the Court in any other fashion answer the question we specifically asked to be briefed, choosing instead to say that, in the present case, it will "exercise our discretion" to entertain petitioners' constitutional claim. *Ante*, at 879. Thus, when there occurs a similar forfeiture of an Appointments Clause objection -- or of some other allegedly structural constitutional deficiency -- the courts of appeals will remain without guidance as to whether the forfeiture must, or even may, be disregarded. (The Court refers to this case as "one of the rare" ones in which forfeiture will be ignored, *ibid.* -- but since all forfeitures of Appointments Clause rights, and arguably even all forfeitures of structural constitutional rights, can be considered "rare," this is hardly useful guidance.) Having asked for this point to be briefed and argued, and having expended our time in considering it, we should provide an answer. In my view the answer is that Appointments Clause claims, and other structural constitutional claims, have no special entitlement to review. A party forfeits the right to advance on appeal a nonjurisdictional **[*894]** claim, structural or otherwise, that he fails to raise at trial. Although I have no quarrel with the proposition that appellate courts may, in truly exceptional circumstances, exercise discretion to hear forfeited claims, I see no basis for the assertion that the structural nature of a constitutional claim **[**2647]** in and of itself constitutes such a circumstance; nor do I see any other exceptional circumstance in the present case. Cf. *Peretz* v. *United States, post*, at 954-955 (SCALIA, J., dissenting). I would therefore reject petitioners' sweeping proposition that structural constitutional rights as a class cannot be waived or forfeited and would refuse to entertain the constitutional challenge presented here. n1

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n1 I have no quarrel with the Court's decision to entertain petitioners' statutory claim on the merits, as that claim was resolved on the merits by the Court of Appeals. See *Virginia Bankshares, Inc.* v. *Sandberg, post*, at 1099, n. 8 (1991).

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"No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* **[***790]** v. *United States*, 321 U.S. 414, 444, 88 L. Ed. 834, 64 S. Ct. 660 (1944); see also *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239, 84 L. Ed. 1129, 60 S. Ct. 811 (1940). Forfeiture n2 is "not a mere technicality and **[*895]** is essential to the orderly administration of justice." 9 C. Wright & A. Miller, Federal Practice and Procedure § 2472, p. 455 (1971). In the federal judicial system, the rules generally governing the forfeiture of claims are set forth in Federal Rules of Criminal Procedure 51 and 52(b) and Federal Rule of Civil Procedure 46. The Tax Court, which is not an Article III court, has adopted a rule virtually identical to the latter, Tax Court Rule 144. These rules reflect the principle that a trial on the merits, whether in a civil or criminal case, is the "main event," and not simply a "tryout on the road" to appellate review. Cf. *Wainwright* v. *Sykes*, 433 U.S. 72, 90, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977). The very word "review" presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance. To abandon that principle is to encourage the practice of "sandbagging": suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later -- if the outcome is unfavorable -- claiming that the course followed was reversible error.

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n2 The Court uses the term "waive" instead of "forfeit," see *ante*, at 878-880. The two are really not the same, although our cases have so often used them interchangeably that it may be too late to introduce precision. Waiver, the "intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938), is merely one means by which a forfeiture may occur. Some rights may be forfeited by means short of waiver, see, *e. g.*, *Levine* v. *United States*, 362 U.S. 610, 619, 4 L. Ed. 2d 989, 80 S. Ct. 1038 (1960) (right to public trial); *United States* v. *Bascaro*, 742 F.2d 1335, 1365 (CA11 1984) (right against double jeopardy), cert. denied *sub nom. Hobson* v. *United States*, 472 U.S. 1017, 87 L. Ed. 2d 613, 105 S. Ct. 3476, 105 S. Ct. 3477 (1985); *United States* v. *Whitten*, 706 F.2d 1000, 1018, n. 7 (CA9 1983) (right to confront adverse witnesses), cert. denied, 465 U.S. 1100, 80 L. Ed. 2d 125, 104 S. Ct. 1593 (1984), but others may not, see, *e. g.*, *Johnson, supra* (right to counsel); *Patton* v. *United States*, 281 U.S. 276, 312, 74 L. Ed. 854, 50 S. Ct. 253 (1930) (right to trial by jury). A right that cannot be waived cannot be forfeited by other means (at least in the same proceeding), but the converse is not true.

In this case, petitioners expressly consented to the Special Trial Judge's role. As far as my analysis is concerned, however, it would not matter if an even more inadvertent forfeiture were involved -- that is, if petitioners had not even consented but had merely failed to object in timely fashion. I shall not try to retain the distinction between waiver and forfeiture throughout this opinion, since many of the sources I shall be using disregard it.

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The blanket rule that "argument[s] premised on the Constitution's structural separation of powers [are] not a matter of personal rights and therefore [are] not waivable," Brief for Petitioners 43-44, would erode this cardinal principle of sound judicial administration. It has no support in principle or in precedent or in policy.

As to principle: Personal rights that happen to bear upon governmental structure are no more laden with public interest (and hence inherently nonwaivable by the individual) **[**2648]** than many other personal rights one can conceive of. First **[*896]** Amendment free-speech rights, for example, or the Sixth Amendment right to a trial that is "public," provide benefits to the entire society more important than many structural guarantees; but if the litigant does not assert them in a timely **[***791]** fashion, he is foreclosed. See, *e. g.*, *Head* v. *New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 432-433, n. 12, 10 L. Ed. 2d 983, 83 S. Ct. 1759 (1963) (First Amendment); *Levine* v. *United States*, 362 U.S. 610, 619, 4 L. Ed. 2d 989, 80 S. Ct. 1038 (1960) (Sixth Amendment). Nor is it distinctively true of structural guarantees that litigants often may undervalue them. Many criminal defendants, for example, would prefer a trial from which the press is excluded.

It is true, of course, that a litigant's prior agreement to a judge's expressed intention to disregard a structural limitation upon his power cannot have any *legitimating* effect -- *i. e.*, cannot render that disregard *lawful*. Even if both litigants not only agree to, but themselves propose, such a course, the judge must tell them no. But the question before us here involves the effect of waiver not *ex ante* but *ex post* -- its effect not upon right but upon *remedy:* Must a judgment already rendered be set aside because of an alleged structural error to which the losing party did not properly object? There is no reason in principle why that should always be so. It will sometimes be so -- not, however, because the error was structural, but because, whether structural or not, it deprived the federal court of its requisite subject-matter jurisdiction. Such an error may be raised by a party, and indeed must be noticed *sua sponte* by a court, at all points in the litigation, see, *e. g.*, *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 17-18, 95 L. Ed. 702, 71 S. Ct. 534 (1951); *Mansfield, C. &*

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L. M. R. Co. v. *Swan*, 111 U.S. 379, 382, 28 L. Ed. 462, 4 S. Ct. 510 (1884); *Capron* v. *Van Noorden*, 6 U.S. 126, 2 Cranch 126, 127, 2 L. Ed. 229 (1804). Since such a jurisdictional defect deprives not only the initial court but also the appellate court of its power over the case or controversy, to permit the appellate court to ignore it because of waiver would be to give the waiver legitimating, as opposed to merely remedial, effect, *i. e.*, the effect of approving, *ex* **[*897]** *ante*, unlawful action by the appellate court itself. That this, rather than any principle of perpetual remediability of structural defects, is the basis for the rule of "nonwaivability" of lack of subject-matter jurisdiction is demonstrated by the fact that a final judgment cannot be attacked *collaterally* -- *i. e.*, before a court that *does* have jurisdiction -- on the ground that a subject-matter jurisdictional limitation (structural or not) was ignored. See, *e. g.*, *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, n. 9, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982).

As to precedent: Petitioners place primary reliance on some broad language in *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 92 L. Ed. 2d 675, 106 S. Ct. 3245 (1986). We said in that case that "when these Article III limitations are at issue" (referring not to all structural limitations of the Constitution, but only to those of Article III, §§ 1 and 2) "notions of consent and waiver cannot be dispositive." 478 U.S. at 851. But the claim before us in *Schor* involved a particular sort of structural defect (a tribunal's exceeding its subject-matter jurisdiction) which, as I have just described, had traditionally been held nonwaivable on appeal in the context of Article III tribunals. To extend the same treatment to similar defects in the **[***792]** context of non-Article III tribunals is quite natural, whether or not it is analytically required. Cf., *e. g.*, *Clapp* v. *Commissioner*, 875 F.2d 1396, 1399 (CA9 1989) ("While the Tax Court is an Article I court, . . . the few cases discussing the differences between the Tax Court and an Article III court indicate that questions of Tax Court jurisdiction are to be resolved in the same manner as for an Article III court"). It is clear from our opinion in *Schor* **[**2649]** that we had the analogy to Article III subject-matter jurisdiction in mind. "To the extent that this structural principle is implicated in a given case," we said, "the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2." **[*898]** 478 U.S. at 850-851. n3 I would not extend that nonwaiver rule -- a traditional rule in its application to Article III courts, and understandably extended to other federal adjudicative tribunals -- to structural defects that do not call into question the jurisdiction of the forum. The subject-matter jurisdiction of the forum that issued the judgment, the Tax Court, is not in question in the present case.

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n3 Ironically enough, the categorical "no-waiver" rule that petitioners propose would destroy the very parallelism between administrative and judicial tribunals that *Schor* sought to achieve. For we have held that, in the administrative context, the use of unauthorized personnel to conduct a hearing (a hearing examiner not properly appointed pursuant to the Administrative Procedure Act) would not justify judicial reversal of the agency decision where no objection was lodged before the agency itself:

"We hold that the defect in the examiner's appointment was an irregularity which would invalidate a resulting order if the Commission had overruled an appropriate objection made during the hearings. But it is not one which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity." *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38, 97 L. Ed. 54, 73 S. Ct. 67 (1952).

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Petitioners only other appeal to precedent is *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 8 L. Ed.

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2d 671, 82 S. Ct. 1459 (1962). That case did address a nonjurisdictional structural defect that had not been raised below. As the Court explains, however, that was a structural defect that went to the validity of the very proceeding under review, *ante*, at 879, as opposed to one that merely affected the validity of the claim -- for example, improper appointment of the Executive officer who issued the regulation central to the controversy. That was considered significant by the only opinion in the case (that of Justice Harlan, joined by Justices Brennan and Stewart) to address the waiver point. ("The alleged defect of authority here relates to basic constitutional protections *designed in part for the benefit of litigants." Id.*, at 536 (emphasis added).) The formulation petitioners advance, of course, is much broader than that. ("An argument premised on the Constitution's structural separation of powers is not a matter of personal rights and **[*899]** therefore *is not waivable*." Brief for Petitioners 43-44 (emphasis added)). "There can be no hierarchy among separation of powers principles, in which some are fundamental and nonwaivable while the vindication of others may be relegated to the vagaries of individual litigation strategies." *Id.*, at 45.) Even more important, Justice Harlan's **[***793]** plurality opinion in *Glidden* does not stand for the proposition that forfeiture can *never* be imposed, but rather the more limited proposition, which the Court reiterates today, that forfeiture need not *always* be imposed.

Several recent opinions flatly contradict petitioners' blanket assertion that structural claims cannot be waived. Surely under our jurisprudence the so-called negative Commerce Clause is structural. See *Dennis* v. *Higgins*, 498 U.S. 439, 447, 112 L. Ed. 2d 969, 111 S. Ct. 865 (1991). And surely the supposed guarantee against waivability must apply in state courts as well as in federal courts, since according to petitioners it emanates from the structural rights themselves. Yet only last Term, in *Jimmy Swaggart Ministries* v. *Board of Equalization of California*, 493 U.S. 378, 397, 107 L. Ed. 2d 796, 110 S. Ct. 688 (1990), we declined to consider a negative Commerce Clause challenge to a state tax because state courts had found the issue procedurally barred as a result of petitioner's failure to raise it in his administrative proceeding for a tax refund. And in *G. D. Searle & Co.* v. *Cohn*, 455 U.S. 404, 414, 71 L. Ed. 2d 250, **[**2650]** 102 S. Ct. 1137 (1982), we declined to reach a negative Commerce Clause claim in litigation arising in the federal courts; we remanded the case for consideration of that issue by the Court of Appeals, "*if it was properly raised below*." (Emphasis added.) The Federal Courts of Appeals (even after *Schor*) have routinely applied the ordinary rules of forfeiture to structural claims not raised below. See, *e. g., United States* v. *Doremus*, 888 F.2d 630, 633, n. 3 (CA9 1989) (separation of powers claims), cert. denied, 498 U.S. 1046, 112 L. Ed. 2d 772, 111 S. Ct. 751, 111 S. Ct. 752 (1991); *Opdyke Investment Co.* v. *Detroit*, 883 F.2d 1265, 1276 (CA6 1989) (same); *Interface Group, Inc.* v. **[*900]** *Massachusetts Port Authority*, 816 F.2d 9, 16 (CA1 1987) (Breyer, J.) (Supremacy and Commerce Clause claims).

Finally, as to policy: The need for the traditional forfeiture rule -- in cases involving structural claims as in all others -- is obvious. Without that incentive to raise legal objections as soon as they are available, the time of lower court judges and of juries would frequently be expended uselessly, and appellate consideration of difficult questions would be less informed and less complete. Besides inviting these evils, the categorical rule petitioners advance would require the development of a whole new body of jurisprudence concerning which constitutional provisions are "structural" -- a question whose answer is by no means clear. Cf. Sunstein, Government Control of Information, 74 Calif. L. Rev. 889, 915 (1986) (arguing that the First Amendment is structural). Moreover, since that rigid rule would cut so much against the grain of reason and practice, it would have the side effect of distorting substantive law. The maxim *volenti non fit injuria* has strong appeal in human affairs, and, by requiring it to be absolutely and systematically disregarded in cases involving structural protections of the Constitution, we would incline ourselves towards finding that no such structural protection exists.

Thus, the structural nature of the claim here is not sufficient reason to ignore its forfeiture -- and the Court (though it discusses the virtues of structure at some length) does not

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HN8 Special trial judges may hear and decide declaratory judgment proceedings and the limited-amount cases. A special trial judge, however, cannot render the final decision of the tax court in a case assigned under 26 U.S.C.S. § 7443A(b)(4).

Governments > Legislation > Interpretation

HN9 An appellate court has a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.

Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491)

HN10 The scope of 26 U.S.C.S. § 7443A(b)(4) must be greater than that of 26 U.S.C.S. §§ 7443A(b)(1), (2), and (3).

Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491)

HN11 26 U.S.C.S. § 7443A(b)(4) permits the chief judge to assign any tax court proceeding, regardless of complexity or amount, to a special trial judge for hearing and the preparation of proposed findings and written opinion.

Constitutional Law > The Presidency > Appointment of Officials

HN12 See U.S. Const. art. II, § 2, cl. 2.

Constitutional Law > The Presidency > Appointment of Officials

HN13 The United States Constitution limits congressional discretion to vest power to appoint inferior officers to three sources: the President alone, the heads of departments, and the courts of law.

Constitutional Law > The Presidency > Appointment of Officials

HN14 The Appointments Clause of U.S. Const. art. II, § 2, cl. 2 prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint.

Constitutional Law > The Presidency > Appointment of Officials

HN15 A special trial judge is an inferior officer whose appointment must conform to the appointments clause of U.S. Const. art. II, § 2, cl. 2.

Constitutional Law > The Presidency > Appointment of Officials

HN16 An Article I court, which exercises judicial power, can be a court of law within the meaning of the appointments clause of U.S. Const. art. II, § 2, cl. 2.

Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491)

HN17 The tax court remains independent of the executive and legislative branches. Its decisions are not subject to review by either the Congress or the President. Nor has Congress made tax court decisions subject to review in the federal district courts. Rather, like the judgments of the district courts, the decisions of the tax court are appealable only to the regional United States courts of appeals, with ultimate review in the United States Supreme Court. The courts of appeals, moreover, review those decisions in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury. 26 U.S.C.S. § 7482(a). This standard of review contrasts with the standard applied to agency rulemaking by the courts of appeals under § 10(e) of the Administrative Procedure Act, 5 U.S.C.S. § 706(2)(A).

Constitutional Law > The Presidency > Appointment of Officials

Tax Law > Federal Tax Administration & Procedure > Tax Court (IRC secs. 7441-7491)

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[*794]** pretend otherwise. There must be some additional reason, then, why the Court "exercise[s] our discretion," *ante*, at 879, to disregard the forfeiture. To disregard it without sufficient reason is the exercise not of discretion but of whimsy. Yet beyond its discussion of structure, the only reason the Court gives is no reason at all: "we are faced with a constitutional challenge that is neither frivolous nor disingenuous," *ibid.* That describes the situation with regard to the vast majority of forfeited claims raised on appeal. As we make clear in another case decided this very day, waiver generally **[*901]** extends not merely to "frivolous" and "disingenuous" challenges, but even to "the most basic rights of criminal defendants." *Peretz, post*, at 936. Here, petitioners expressly consented to the Special Trial Judge. Under 26 U. S. C. § 7443A, the Chief Judge of that court has broad discretion to assign cases to special trial judges. Any party who objects to such an assignment, if so inclined, can easily raise the constitutional issue pressed today. Under these circumstances, I see no reason why this should be included among those "rare cases in which we should exercise our discretion," *ante*, at 879, to hear a forfeited claim.

II

Having struggled to reach petitioners' Appointments Clause objection, the Court finds it invalid. I agree with that conclusion, but the reason the Court assigns is in my view both wrong and full of danger for the future of our system of separate and coequal powers.

The Appointments Clause provides:

> "The Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II, § 2, cl. 2.

[2651]** I agree with the Court that a special trial judge is an "inferior Officer" within the meaning of this Clause, with the result that, absent Presidential appointment, he must be appointed by a court of law or the head of a department. I do not agree, however, with the Court's conclusion that the Tax Court is a "Court of Law" within the meaning of this provision. I would find the appointment valid because the Tax Court is a "Department" and the Chief Judge is its head.

A

A careful reading of the Constitution and attention to the apparent purpose of the Appointments Clause make it clear that the Tax Court cannot be one of those "Courts of Law" **[*902]** referred to there. The Clause does not refer generally to "Bodies exercising judicial Functions," or even to "Courts" generally, or even to "Courts of Law" generally. It refers to "*the* Courts of Law." Certainly this does not mean *any* "Court of Law" (the Supreme Court of Rhode Island would not do). The definite article "the" obviously narrows the class of eligible "Courts of Law" to those courts of law envisioned by the Constitution. Those are Article III courts, and the Tax Court is not one of them.

The Court rejects this conclusion because the Appointments Clause does not (in the style of the Uniform **[***795]** Commercial Code) contain an explicit cross-reference to Article III. *Ante*, at 888-889. This is no doubt true, but irrelevant. It is equally true that Article I, § 8, cl. 9, which provides that Congress may "constitute Tribunals inferior to the supreme Court," does not explicitly say "Tribunals under Article III, below." Yet, this power "plainly relates to the 'inferior Courts' provided for in Article III, § 1; it has never been relied on for establishment of any other tribunals." *Glidden Co.* v. *Zdanok*, 370 U.S. at 543 (opinion of Harlan, J.); see also 3 J. Story, Commentaries on the Constitution of the United States §

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1573, p. 437 (1833). Today's Court evidently does not appreciate, as Chief Justice Marshall did, that the Constitution does not "partake of the prolixity of a legal code," *McCulloch* v. *Maryland*, 17 U.S. 316, 4 Wheat. 316, 407, 4 L. Ed. 579 (1819). It does not, like our opinions, bristle with "*supras*," "*infras*," and footnotes. Instead of insisting upon such legalisms, we should, I submit, follow the course mapped out in *Buckley* v. *Valeo*, 424 U.S. 1, 124, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976) *(per curiam)*, and examine the Appointments Clause of the Constitution in light of the "cognate provisions" of which it is a central feature: Article I, Article II, and Article III. The only "Courts of Law" referred to there are those authorized by Article III, § 1, whose judges serve during good behavior with undiminishable salary. Art. III, § 1. See *Glidden Co.* v. *Zdanok*, *supra*, at 543 (opinion of Harlan, J.); *United States* v. *Mouat*, 124 U.S. 303, 307, 31 L. Ed. 463, 8 S. Ct. 505 **[*903]** (1888) ("courts of justice") (dictum). The Framers contemplated no other national judicial tribunals. "According to the plan of the convention, *all* judges who may be appointed by the United States are to hold their offices *during good behavior* . . . ." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (second emphasis in original).

We recognized this in *Buckley, supra*, and it was indeed an essential part of our reasoning. Responding to the argument that a select group of Congressmen was a "Department," we said:

> "The phrase 'Heads of Departments,' used as it is in conjunction with the phrase 'Courts of Law,' suggests that the Departments referred to are themselves in the Executive Branch or at least have some connection with that branch. While the Clause expressly authorizes Congress to vest the appointment of certain officers in the 'Courts of Law,' the absence of similar language to include Congress must mean that neither Congress nor its officers were included within the language 'Heads of Departments' in this part of cl. 2.
>
> **[**2652]** "Thus, with respect to four of the six voting members of the Commission, neither the President, the head of any department, *nor the Judiciary* has any voice in their selection." *Id.*, at 127 (emphasis added).

The whole point of this passage is that "the Heads of Departments" must reasonably be understood to refer exclusively to the Executive Branch (thereby excluding officers of Congress) because "the Courts of Law" obviously refers exclusively to the Judicial Branch. We were right in *Buckley*, and the Court is wrong today.

[*796]** Even if the Framers had no particular purpose in making the Appointments Clause refer only to Article III courts, we would still of course be bound by that disposition. In fact, however, there is every reason to believe that the Appointments Clause's limitation to Article III tribunals was adopted **[*904]** with calculation and forethought, faithfully implementing a considered political theory for the appointment of officers.

The Framers' experience with postrevolutionary self-government had taught them that combining the power to create offices with the power to appoint officers was a recipe for legislative corruption. n4 The foremost danger was that legislators would create offices with the expectancy of occupying them themselves. This was guarded against by the Incompatibility and Ineligibility Clauses, Article I, § 6, cl. 2. See *Buckley, supra*, at 124. But real, if less obvious, dangers remained. Even if legislators could not appoint themselves, they would be inclined to appoint their friends and supporters. This proclivity would be unchecked because of the lack of accountability in a multimember body -- as **[*905]** James Wilson pointed out in his criticism of a multimember executive:

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> "Are impartiality and fine discernment likely to predominate in a numerous [appointing] body? In proportion to their own number, will be the number of their friends, favorites and dependents. An office is to be filled. A person nearly connected, by some of the foregoing ties, with one of those who is to vote in filling it, is named as a candidate. . . . Every member, who gives, on his account, a vote for his friend, will expect the return of a similar favor on the first convenient opportunity. In this manner, a reciprocal intercourse of partiality, of interestedness, of favoritism, perhaps of venality, is established; and in no particular instance, is there a practicability of tracing the poison to its source. Ignorant, vicious, and prostituted characters are introduced into office; and some of those, who voted, and procured others to vote for them, are the first and loudest in expressing **[***797]** their astonishment, that the door of admission was ever opened to men of their infamous description. The suffering people are thus **[**2653]** wounded and buffeted, like Homer's Ajax, in the dark; and have not even the melancholy satisfaction of knowing by whom the blows are given." 1 Works of James Wilson 359-360 (J. Andrews ed. 1896).

See also Essex Result, in Memoir of Theophilus Parsons 381-382 (1859); The Federalist No. 76, pp. 455-457 (C. Rossiter ed. 1961) (A. Hamilton). And not only would unaccountable legislatures introduce their friends into necessary offices, they would create unnecessary offices into which to introduce their friends. As James Madison observed:

> "The power of the Legislature to appoint any other than their own officers departs too far from the Theory which requires a separation of the great Departments of Government. One of the best securities against the creation **[*906]** of unnecessary offices or tyrannical powers is an exclusion of the authors from all share in filling the one, or influence in the execution of the other." Madison's Observations on Jefferson's Draft of a Constitution for Virginia, reprinted in 6 Papers of Thomas Jefferson 308, 311 (J. Boyd ed. 1952).

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n4 The Court apparently thinks that the Appointments Clause was designed to check executive despotism. *Ante*, at 883-884. This is not what we said in *Buckley* v. *Valeo*, 424 U.S. 1, 129, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976), and it is quite simply contrary to historical fact. The quotations on which the Court relies describe abuses by the unelected royal governors and the Crown, who possessed the power to create and fill offices. The drafters of several early State Constitutions reacted to these abuses by lodging the appointment power in the legislature. See, *e. g.*, Va. Const. (1776) (legislature appoints judges); cf. Articles of Confederation, Art. IX (Congress appoints courts and officers of land forces). Americans soon learned, however, that "in a representative republic where the executive magistracy is carefully limited . . . it is against the enterprising ambition of the [legislative] department that the people ought to indulge all their jealousy and exhaust all their precautions." The Federalist No. 48, p. 309 (C. Rossiter ed. 1961) (J. Madison). Soon after the revolution, "the appointing authority which in most constitutions had been granted to the assemblies had become the principal source of division and faction in the states." G. Wood, The Creation of The American Republic, 1776-1787, p. 407 (1969). By 1780, States were reacting to *these* abuses by reposing appointment authority in the executive. See Mass. Const., Part The Second, Chapter II, § 1, Art. IX (1780); N. H. Const. (1784) (officers appointed by president and a council). On legislative despotism, see generally Wood, *supra*, at 403-409. The Framers followed the lead of these later Constitutions. The Appointments Clause is, intentionally and self-evidently, a limitation on *Congress*.

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For these good and sufficient reasons, then, the federal appointment power was removed from Congress. The Framers knew, however, that it was not enough simply to define in writing who would exercise this power or that. "After discriminating . . . in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task [was] to provide some practical security for each, against the invasion of the others." The Federalist No. 48, p. 308 (C. Rossiter ed. 1961) (J. Madison). Invasion by the Legislature, of course, was the principal threat, since the "legislative authority . . . possesses so many means of operating on the motives of the other departments." *Id.*, No. 49, p. 314 (J. Madison). It can "mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments," *id.*, No. 48, p. 310 (J. Madison), and thus control the nominal actions (*e. g.*, appointments) of the other branches. Cf. T. Jefferson, Notes on the State of Virginia 120 (W. Peden ed. 1955).

Thus, it was not enough simply to repose the power to execute the laws (or to appoint) in the President; it was also necessary to provide him with the means to resist legislative encroachment upon that power. The means selected were various, including a separate political constituency, to which he alone was responsible, and the power to veto encroaching laws, see Art. I, § 7, or even to disregard them when they are unconstitutional. See Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 920-924 (1990). One of the most obvious and necessary, however, was a permanent salary. Art. II, § 1. Without this, "the separation of the **[*907]** executive from the legislative department would be merely nominal and nugatory. The legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him." The Federalist No. 73, p. 441 (C. Rossiter **[***798]** ed. 1961) (A. Hamilton). See also *id.*, No. 51, p. 321 (J. Madison); Mass. Const., Part The Second, Chapter II, § 1, Art. XIII (1780).

A power of appointment lodged in a President surrounded by such structural fortifications could be expected to be exercised independently, and not pursuant to the manipulations of Congress. The same is true, to almost the same degree, of the appointment power lodged in the heads of departments. Like the President, these individuals possess a reputational stake in the quality of the individuals they appoint; and though they are not themselves able to resist congressional encroachment, they are directly answerable to the President, who is responsible to *his* constituency for their appointments and has the motive and means to assure faithful actions by his direct lieutenants.

[2654]** Like the President, the Judicial Branch was separated from Congress not merely by a paper assignment of functions, but by endowment with the means to resist encroachment -- foremost among which, of course, are life tenure (during "good behavior") and permanent salary. These structural accoutrements not only assure the fearless adjudication of cases and controversies, see The Federalist Nos. 78, 79 (A. Hamilton); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57-60, 73 L. Ed. 2d 598, 102 S. Ct. 2858 (1982) (opinion of Brennan, J.); they also render the Judiciary a potential repository of appointment power free of congressional (as well as Presidential) influence. In the same way that depositing appointment power in a fortified President and his lieutenants ensures an *actual* exclusion of the legislature from appointment, so too does reposing such power in an Article III court. The Court's holding, that Congress may deposit **[*908]** such power in "legislative courts," without regard to whether their personnel are either Article III judges *or* "Heads of Departments," utterly destroys this carefully constructed scheme. And the Court produces this result, I remind the reader, not because of, but *in spite of*, the apparent meaning of the phrase "the Courts of Law."

B

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Having concluded, against all odds, that "the Courts of Law" referred to in Article II, § 2, are not the courts of law established by Article III, the Court is confronted with the difficult problem of determining what courts of law they *are*. It acknowledges that they must be courts which exercise "the judicial power of the United States" and concludes that the Tax Court is such a court -- even though it is not an Article III court. This is quite a feat, considering that Article III begins "*The* judicial Power of the United States" -- not "*Some of* the judicial Power of the United States," or even "*Most of* the judicial Power of the United States" -- "shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Despite this unequivocal text, the Court sets forth the startling proposition that "the judicial power of the United States is not limited to the judicial power defined under Article III." *Ante*, at 889. It turns out, however -- to our relief, I suppose it must be said -- that this is really only a pun. "The judicial power," as the Court uses it, bears no resemblance to the constitutional **[***799]** term of art we are all familiar with, but means only "the power to adjudicate in the manner of courts." So used, as I shall proceed to explain, the phrase covers an infinite variety of individuals exercising *executive* rather than *judicial* power (in the constitutional sense), and has nothing to do with the separation of powers or with any other characteristic that might cause one to believe *that* is what was meant by "the Courts of Law." As far as I can tell, the only thing to be said for this approach is that it makes the Tax **[*909]** Court a "Court of Law" -- which is perhaps the object of the exercise.

I agree with the unremarkable proposition that "Congress [has] wide discretion to assign the task of adjudication in cases arising under federal law to legislative tribunals." *Ante*, at 889. Congress may also assign that task to subdivisions of traditional executive departments, as it did in 1924 when it created the Tax Court's predecessor, the Tax Board of Appeals -- or to take a more venerable example, as it did in 1791 when it created within the Treasury Department the Comptroller of the United States, who "decided on appeal, without further review by the Secretary, all claims concerning the settlement of accounts." Casper, An Essay in Separation of Powers: Some Early Versions and Practices, 30 Wm. & Mary L. Rev. 211, 238 (1989); see 1 Stat. 66. Such tribunals, like any other administrative board, exercise the executive power, not the judicial power of the United States. They are, in the words of the great Chief Justice, "incapable of receiving **[**2655]** [the judicial power]" -- unless their members serve for life during good behavior and receive permanent salary. *American Ins. Co.* v. *Canter*, 1 Pet. 511, 546 (1828) (Marshall, C. J.).

It is no doubt true that all such bodies "adjudicate," *i. e.*, they determine facts, apply a rule of law to those facts, and thus arrive at a decision. But there is nothing "inherently judicial" about "adjudication." To be a federal officer and to adjudicate are necessary but not sufficient conditions for the exercise of federal judicial power, as we recognized almost a century and a half ago.

> "That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the act of 1795, [*Martin* v. *Mott*,] **[*910]** 25 U.S. 19, 12 Wheat. 19, 6 L. Ed. 537 [(1827)], or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. 272, 18 How. 272, 280, 15 L. Ed. 372 (1856).

Accord, Bator, The Constitution as Architecture: Legislative and Administrative Courts Under

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Article III, 65 Ind. L. J. 233, 264-265 (1990). The first Patent Board, which consisted of Thomas Jefferson, Henry Knox, and Edmund Randolph in their capacities as Secretary of State, Secretary of War, and Attorney General, respectively, 1 Stat. **[***800]** 109, 110 (1790), adjudicated the patentability of inventions, sometimes hearing argument by petitioners. See 18 J. Pat. Off. Soc. 68-69 (July 1936). They were exercising the *executive* power. See Easterbrook, "Success" and the Judicial Power, 65 Ind. L. J. 277, 280 (1990). Today, the Federal Government has a corps of administrative law judges numbering more than 1,000, whose principal statutory function is the conduct of adjudication under the Administrative Procedure Act (APA), see 5 U. S. C. §§ 554, 3105. They are all *executive* officers. "Adjudication," in other words, is no more an "inherently" judicial function than the promulgation of rules governing primary conduct is an "inherently" legislative one. See *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911); APA, 5 U. S. C. § 553 ("Rule making").

It is true that Congress *may* commit the sorts of matters administrative law judges and other executive adjudicators now handle to Article III courts -- just as some of the matters now in Article III courts could instead be committed to executive adjudicators. "There are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United **[*911]** States, as it may deem proper." *Murray's Lessee, supra*, at 284. See also *Ex parte Bakelite Corp.*, 279 U.S. 438, 451, 73 L. Ed. 789, 49 S. Ct. 411 (1929). Congress could, for instance, allow direct review by the courts of appeals of denials of Social Security benefits. It could instead establish the Social Security Court -- composed of judges serving 5-year terms -- within the Social Security Administration. Both tribunals would perform identical functions, but only the former would exercise the judicial power.

In short, given the performance of adjudicatory functions by a federal officer, it is the identity of the officer -- not something intrinsic about the mode of decisionmaking or type of decision -- that tells us whether the judicial power is being exercised. "Our cases demonstrate [that] a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned." *Bowsher* v. *Synar*, 478 U.S. 714, 749, 92 L. Ed. 2d 583, 106 S. Ct. 3181 **[**2656]** (1986) (STEVENS, J., concurring in judgment). Cf. *INS* v. *Chadha*, 462 U.S. 919, 953, n. 16, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983). Where adjudicative decisionmakers do not possess life tenure and a permanent salary, they are "incapable of exercising any portion of the judicial power." *Ex parte Randolph*, 20 F. Cas. 242, 254 (No. 11,558) (CC Va. 1833) (Marshall, C. J.).

The Tax Court is indistinguishable from my hypothetical Social Security Court. It reviews determinations by Executive Branch officials (the Internal Revenue Service) that this much or that much tax is owed -- a classic executive function. For 18 years its predecessor, the Board of Tax Appeals, did the very same thing, see H. Dubroff, The United States Tax Court 47-175 (1979), and no one suggested that body exercised "the judicial power." We held just the opposite:

> "The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decision **[***801]** of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided." *Old* **[*912]** *Colony Trust Co. v. Commissioner*, 279 U.S. 716, 725, 73 L. Ed. 918, 49 S. Ct. 499 (1929) (Taft, C. J.).

Though renamed "the Tax Court of the United States" in 1942, it remained "an independent agency in the Executive Branch," 26 U. S. C. § 1100 (1952 ed.), and continued to perform

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the same function. As an *executive* agency, it possessed many of the accoutrements the Court considers "quintessentially judicial," *ante*, at 891. It administered oaths, for example, and subpoenaed and examined witnesses, § 1114; its findings were reviewed "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury," § 1141(a). This Court continued to treat it as an administrative agency, akin to the Federal Communications Commission (FCC) or the National Labor Relations Board (NLRB). See *Dobson* v. *Commissioner*, 320 U.S. 489, 495-501, 88 L. Ed. 248, 64 S. Ct. 239 (1943).

When the Tax Court was statutorily denominated an "Article I Court" in 1969, its judges did not magically acquire the judicial power. They still lack life tenure; their salaries may still be diminished; they are still removable by the President for "inefficiency, neglect of duty, or malfeasance in office." 26 U. S. C. § 7443(f). (In *Bowsher* v. *Synar, supra*, at 729, we held that these latter terms are "very broad" and "could sustain removal . . . for any number of actual or perceived transgressions.") How anyone with these characteristics can exercise *judicial* power "independent . . . [of] the Executive Branch" is a complete mystery. It seems to me entirely obvious that the Tax Court, like the Internal Revenue Service, the FCC, and the NLRB, exercises executive power. Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 451, n. 43 (1989). See also *Northern Pipeline*, 458 U.S. at 113 (WHITE, J., dissenting) (equating administrative agencies and Article I courts); *Samuels, Kramer & Co.* v. *Commissioner*, 930 F.2d 975, 992-993 (CA2 1991) (collecting academic authorities for same proposition).

[*913] In seeking to establish that "judicial power" in some constitutionally significant sense -- in a sense different from the adjudicative exercise of *executive* power -- can be exercised by someone other than an Article III judge, the Court relies heavily upon the existence of territorial courts. *Ante*, at 889-891. Those courts have nothing to do with the issue before us. n5 I **[***802]** agree that they **[**2657]** do not exercise the national *executive* power -- but neither do they exercise any national *judicial* power. They are neither Article III courts nor Article I courts, but Article IV courts -- just as territorial governors are not Article I executives but Article IV executives.

> "These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. . . . In legislating for them, Congress exercises the combined powers of the general, and of a *state* government." *American Ins. Co.* v. *Canter*, 1 Peters at 546 (Marshall, C. J.) (emphasis added).

[*914] Or as the Court later described it:

> "[Territories] are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control." *Benner* v. *Porter*, 50 U.S. 235, 9 How. 235, 242, 13 L. Ed. 119 (1850).

Thus, Congress may endow territorial governments with a plural executive; it may allow the executive to legislate; it may dispense with the legislature or judiciary altogether. It should

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be obvious that the powers exercised by territorial courts tell us nothing about the nature of an entity, like the Tax Court, which administers the general laws of the Nation. See *Northern Pipeline, supra,* at 75-76 (opinion of Brennan, J.).

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n5 Sadly, the Court also relies on dicta in *Williams* v. *United States*, 289 U.S. 553, 77 L. Ed. 1372, 53 S. Ct. 751 (1933), an opinion whose understanding of the principles of separation of powers ought not inspire confidence, much less prompt emulation. It includes, for example, the notion that all disputes over which Article III provides jurisdiction can only be committed to Article III courts, *id.*, at 580-581; see also D. Currie, Federal Courts 145-146 (1982) -- which would make the Tax Court unconstitutional. *Williams* has been declared an "intellectual disaster" by commentators. P. Bator, D. Meltzer, P. Miskin, & D. Shapiro, Hart & Wechsler's The Federal Courts and The Federal System 468 (3d ed. 1988); Bator, The Constitution as Architecture: Legislative And Administrative Courts Under Article III, 65 Ind. L. J. 233, 242-243, n. 30 (1990) ("I could devote a whole lecture to the ways in which [the reasoning of *Williams*] is erroneous").

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The Court claims that there is a "longstanding practice" of permitting Article I courts to appoint inferior officers. *Ante*, at 890. I am unaware of such a practice. Perhaps the Court means to refer not to Article I courts but to the territorial courts just discussed, in which case the practice would be irrelevant. As I shall discuss below, an Article I court (such as the Tax Court) that is not within any other department would be able to have its inferior officers appointed by its chief judge -- not under the "Courts of Law" provision of Article II, § 2, but under the "Heads of Departments" provision; perhaps it is that sort of practice the Court has in mind. It is certain, in any case, that no decision of ours has ever approved the appointment of an inferior officer by an Article I court. *Ex parte Hennen*, 13 Pet. 230 (1839), which the Court cites, involved appointment by an Article III tribunal.

III

Since the Tax Court is not a court of law, unless the Chief Judge is the head of a department, the appointment **[***803]** of the Special Trial Judge was void. Unlike the Court, I think he is.

[*915] I have already explained that the Tax Court, like its predecessors, exercises the executive power of the United States. This does not, of course, suffice to make it a "Department" for purposes of the Appointments Clause. If, for instance, the Tax Court were a subdivision of the Department of the Treasury -- as the Board of Tax Appeals used to be -- it would not qualify. In fact, however, the Tax Court is a free-standing, self-contained entity in the Executive Branch, whose Chief Judge is removable by **[**2658]** the President (and, save impeachment, no one else). Nevertheless, the Court holds that the Chief Judge is not the head of a department.

It is not at all clear what the Court's reason for this conclusion is. I had originally thought that the Court was adopting petitioners' theory -- wrong, but at least coherent -- that "Heads of Departments" means Cabinet officers. This is suggested by the Court's reliance upon the dictum in *Burnap* v. *United States*, 252 U.S. 512, 515, 64 L. Ed. 692, 40 S. Ct. 374 (1920), to the effect that the head of a department must be "'the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, and War, *who is a member of the Cabinet,'" ante*, at 886 (emphasis added); by the Court's observation that "the Cabinet-level departments are limited in number and easily identified," *ibid.;* and by its reliance upon the fact that in the Twenty-fifth Amendment "the term 'department' refers to Cabinet-level entities," *ante*, at 887. Elsewhere, however, the Court seemingly disclaims

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Cabinet status as the criterion, see *ante*, at 887, n. 4, and says that the term "Department" means "executive divisions *like* the Cabinet-level departments," *ante*, at 886 (emphasis added). Unfortunately, it never specifies what characteristic it is that causes an agency to *be* "like a Cabinet-level department," or even provides any intelligible clues as to what it might have in mind. It quotes a congressional Committee Report that seemingly equates Cabinet status with inclusion within the statutory defintion of "'department'" in 5 U. S. C. § 101, *ante*, at 887 (quoting H. R. Rep. **[*916]** No. 203, 89th Cong., 1st Sess., 3 (1965)), but this hint is canceled by a footnote making it clear that "Cabinet-like" character, whatever it is, is *not* "strictly limited" by that provision, *ante*, at 887, n. 4. Its approving quotation of *Burnap*'s reference to "a great division of the executive branch" might invite the guess that numerosity is the key -- but the Department of Education has fewer than 5,000 employees, and the FCC, which the Court also appears willing to consider such a "'great division,'" *ante*, at 886, fewer than 1,800. See Employment and Trends as of March 1991, Office of Personnel Management, Table 2. The Court reserves the right to consider as "Cabinet-like" and hence as "Departments" those agencies which, above all others, are at the farthest remove from Cabinet status, and whose heads are specifically designed *not* to have the quality that the Court earlier thinks important, of being "subject to the exercise of political oversight and **[***804]** sharing the President's accountability to the people," *ante*, at 886 -- namely, independent regulatory agencies such as the Federal Trade Commission and the Securities and Exchange Commission, *ante*, at 887, n. 4. Indeed, lest any conceivable improbability be excluded, the Court even reserves the right to consider as a "Department" an entity that is not headed by an officer of the United States -- the Federal Reserve Bank of St. Louis, whose president is appointed in none of the manners constitutionally permitted for federal officers, but rather by a Board of Directors, two-thirds of whom are elected by regional banks, see 12 U. S. C. §§ 302, 304, and 341. It is as impossible to respond to this random argumentation as it is to derive a comprehensible theory of the appointments power from it. I shall address, therefore, what was petitioners' point, what I originally took to be the point of the Court's opinion, and what is the only trace of a flesh-and-blood point that subsists: the proposition that "Department" means "Cabinet-level agency."

There is no basis in text or precedent for this position. The term "Cabinet" does not appear in the Constitution, the **[*917]** Founders having rejected proposals to create a Cabinet-like entity. See H. Learned, The President's Cabinet 74-94 (1912); E. Corwin, The President 97, 238-240 (5th rev. ed. 1984). The existence of a Cabinet, its membership, and its prerogatives (except to the extent the Twenty-fifth Amendment speaks to them), **[**2659]** are entirely matters of Presidential discretion. Nor does any of our cases hold that "the Heads of Departments" are Cabinet members. In *United States v. Germaine*, 99 U.S. 508, 25 L. Ed. 482 (1879), we merely held that the Commissioner of Pensions, an official *within* the Interior Department, was not the head of a department. And, in *Burnap, supra*, we held that the Bureau of Public Buildings and Grounds, a bureau *within* the War Department, was not a department.

The Court's reliance on the Twenty-fifth Amendment is misplaced. I accept that the phrase "the principal officers of the executive departments" is limited to members of the Cabinet. It is the structural composition of the phrase, however, and not the single word "departments" which gives it that narrow meaning -- "the principal officers" of the "executive departments" in gross, rather than (as in the Opinions Clause) "the principal Officer in each of the executive Departments," or (in the Appointments Clause) simply "the Heads" (not "principal Heads") "of Departments."

The only history on the point also militates against the Court's conclusion. The 1792 Congress passed an "Act to establish the Post-Office and Post Roads within the United States," creating a Postmaster General and empowering him to appoint "an assistant, and deputy postmasters, at all places where such may be found necessary." § 3, 1 Stat. 234. President Washington did not bring the Postmaster into his Cabinet. See Learned, *supra*, at 233-249. It seems likely that the Assistant Postmaster General and Deputy Postmasters were

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inferior officers -- which means either that "the Heads of Departments" include principal officers other than the Cabinet, or that the Second Congress and President **[*918]** Washington did not understand the **[***805]** Appointments Clause. In any case, it is silly to think that the Second Congress (or any later Congress) was supposed to *guess* whether the President would bring the new agency into his Cabinet in order to determine how the appointment of its inferior officers could be made.

Modern practice as well as original practice refutes the distinction between Cabinet and non-Cabinet agencies. Congress has empowered non-Cabinet agencies to appoint inferior officers for quite some time. See, *e. g.*, 47 U. S. C. § 155(f) (FCC -- managing director); 15 U. S. C. § 78d(b) (Securities and Exchange Commission -- "such officers . . . as may be necessary"); 15 U. S. C. § 42 (Federal Trade Commission -- secretary); 7 U. S. C. § 4a(c) (Commodity Futures Trading Commission -- general counsel). In fact, I know of very few inferior officers in the independent agencies who are appointed by the President, and of none who is appointed by the head of a Cabinet department. The Court's interpretation of "Heads of Departments" casts into doubt the validity of many appointments and a number of explicit statutory authorizations to appoint.

A number of factors support the proposition that "Heads of Departments" includes the heads of all agencies immediately below the President in the organizational structure of the Executive Branch. It is quite likely that the "Departments" referred to in the Opinions Clause ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments," Art. II, § 2) are the same as the "Departments" in the Appointments Clause. See *Germaine, supra*, at 511. In the former context, it seems to me, the word must reasonably be thought to include all independent establishments. The purpose of the Opinions Clause, presumably, was to assure the President's ability to get a written opinion on all important matters. But if the "Departments" it referred to were only Cabinet departments, **[*919]** it would not assure the current President the ability to receive a written opinion concerning the operations of the Central Intelligence Agency, an agency that is not within any other department, and whose Director is not a member of the Cabinet.

[2660]** This evident meaning -- that the term "Departments" means all independent executive establishments -- is also the only construction that makes sense of Article II, § 2's sharp distinction between principal officers and inferior officers. The latter, as we have seen, can by statute be made appointable by "the President alone, . . . the Courts of Law, or . . . the Heads of Departments." Officers that are not "inferior Officers," however, *must* be appointed (unless the Constitution itself specifies otherwise, as it does, for example, with respect to officers of Congress) *by the President, "by and with the Advice and Consent of the Senate*." The obvious purpose of this scheme is to make sure that all the business of the Executive will be conducted under the supervision of officers appointed by the President with Senate approval; only officers "inferior," *i. e.*, subordinate, to those can be appointed in some other fashion. If the Appointments Clause is read as I read it, all inferior officers can be made appointable by their ultimate (sub-Presidential) superiors; as petitioners **[***806]** would read it, only those inferior officers whose ultimate superiors happen to be Cabinet members can be. All the other inferior officers, if they are to be appointed by an Executive official at all, must be appointed by the President himself or (assuming cross-department appointments are permissible) by a Cabinet officer who has no authority over the appointees. This seems to me a most implausible disposition, particularly since the makeup of the Cabinet is not specified in the Constitution, or indeed the concept even mentioned. It makes no sense to create a system in which the inferior officers of the Environmental Protection Agency, **[*920]** for example -- which may include, *inter alios*, bureau chiefs, the general counsel, and administrative law judges -- must be appointed by the President, the courts of law, or the "Secretary of Something Else."

In short, there is no reason, in text, judicial decision, history, or policy, to limit the phrase "the Heads of Departments" in the Appointments Clause to those officials who are members

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HN18 The tax court's exclusively judicial role distinguishes it from other non-Article III tribunals that perform multiple functions and provides the limit on the diffusion of appointment power that the United States Constitution demands.

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DECISION: Federal Constitution's appointments clause (Art II, 2, cl 2) held not violated by 26 USCS 7443A, which authorizes chief judge of United States Tax Court to appoint special trial judges.

SUMMARY: Under 26 USCS 7443A(b), the chief judge of the United States Tax Court--which court was established by Congress under Article I of the Federal Constitution--is authorized to appoint and assign special trial judges (1) to hear and decide declaratory judgment proceedings and cases involving $ 10,000 or less (26 USCS 7443A(b)(1)-7443A(b)(3)); and (2) to hear and prepare proposed findings and a written opinion in "any other proceeding which the chief judge may designate" (26 USCS 7443A(b)(4)). In cases assigned under 7443A(b)(4), the actual decision is rendered by a regular judge of the Tax Court who has been appointed by the President of the United States, by and with the advice and consent of the Senate. After the Commissioner of Internal Revenue determined income tax deficiencies against several taxpayers, who had deducted on their returns approximately $ 1.5 billion in losses allegedly realized in a tax shelter scheme, the taxpayers sought review in the Tax Court. When the Tax Court judge assigned to the taxpayers' cases became ill after trial began, the chief judge assigned a special trial judge to preside over the trial as an evidentiary referee, and the proceedings were videotaped to enable the Tax Court judge to review testimony at home. Subsequently, the Tax Court judge retired and assumed senior status, and the chief judge--with the taxpayers' consent--reassigned the cases to the same special trial judge for preparation of written findings and an opinion. The special trial judge concluded that the tax shelter scheme consisted of sham transactions and that the taxpayers owed additional taxes. The chief judge formally adopted the special trial judge's opinion as the decision of the Tax Court (89 TC 849). On appeal, the United States Court of Appeals for the Fifth Circuit, affirming, ruled that (1) the assignment of the taxpayers' cases to the special trial judge was authorized by 7443A; and (2) the taxpayers' contention, raised for the first time on appeal, that 7443A violated the Federal Constitution's appointments clause (Art II, 2, cl 2)--which provides that Congress may by law vest the appointment of "inferior Officers" of the United States in "the President alone, in the Courts of Law, or in the Heads of Departments"--had been waived by the taxpayers' consent to the assignment of their cases (904 F2d 1011).

On certiorari, the United States Supreme Court affirmed. In an opinion by Blackmun, J., expressing the unanimous view of the court as to holding 1 below, and joined by Rehnquist, Ch. J., and White, Marshall, and Stevens, JJ., as to holdings 2 and 3 below, it was held that (1) in view of the language and legislative history of 7443A, 7443A(b)(4) permitted the chief judge to assign any Tax Court proceeding to a special trial judge, regardless of the proceeding's complexity or the monetary amount involved; (2) the Supreme Court would exercise its discretion to hear the taxpayers' appointments clause challenge to the propriety of 7443A, even though the taxpayers had consented to the chief judge's assignment of their cases to the special trial judge, since the alleged defect in the special trial judge's appointment went to the validity of the taxpayers' Tax Court proceedings; and (3) the appointments clause--and the constitutional principle of separation of powers embedded in the clause--were not violated by 7443A, notwithstanding that a special trial judge appointed pursuant to 7443A was an "inferior Officer" whose appointment must conform to the appointments clause, because the chief judge could be vested by Congress with the power to appoint such special trial judges, insofar as the Tax Court was a "Court of Law" under the appointments clause.

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of the President's Cabinet. I would give the term its ordinary meaning, something which Congress has apparently been doing for decades without complaint. As an American dictionary roughly contemporaneous with adoption of the Appointments Clause provided, and as remains the case, a department is "[a] separate allotment or part of business; a distinct province, in which a class of duties are allotted to a particular person . . . ." 1 N. Webster, American Dictionary 58 (1828). I readily acknowledge that applying this word to an entity such as the Tax Court would have seemed strange to the Founders, as it continues to seem strange to modern ears. But that is only because the Founders did not envision that an independent establishment of such small size and specialized function would be created. They chose the word "Department," however, not to connote size or function (much less Cabinet status), but separate organization -- a connotation that still endures even in colloquial usage today ("that is not my department"). The Constitution is clear, I think, about the chain of appointment and supervision that it envisions: Principal officers could be permitted by law to appoint their subordinates. That should subsist, however much the nature of federal business or of federal organizational structure may alter.

I must confess that in the case of the Tax Court, as with some other independent establishments (notably, the so-called "independent regulatory agencies" such as the FCC and the Federal Trade Commission) permitting appointment of inferior officers by the agency head may not ensure the **[*921]** high degree of insulation from congressional control that was the purpose of the appointments scheme elaborated in the Constitution. That is a consequence of our decision in *Humphrey's Executor* v. *United States*, 295 U.S. 602, 79 L. Ed. 1611, 55 S. Ct. 869 (1935), which approved congressional restriction upon arbitrary dismissal of the heads of such agencies by the President, a scheme avowedly designed to made such agencies less accountable to him, and hence he less responsible for them. Depending upon how broadly one reads the President's **[**2661]** power to dismiss "for cause," it may be that he has no control over the appointment of inferior officers in **[***807]** such agencies; and if those agencies are publicly regarded as beyond his control -- a "headless Fourth Branch" -- he may have less incentive to care about such appointments. It could be argued, then, that much of the *raison d'etre* for permitting appointive power to be lodged in "Heads of Departments," see *supra*, at 903-908, does not exist with respect to the heads of *these* agencies, because they, in fact, will not be shored up by the President and are thus not resistant to congressional pressures. That is a reasonable position -- though I tend to the view that adjusting the remainder of the Constitution to compensate for *Humphrey's Executor* is a fruitless endeavor. But in any event it is not a reasonable position that supports the Court's decision today -- both because a "Court of Law" artificially defined as the Court defines it is even *less* resistent to those pressures, and because the distinction between those agencies that are subject to full Presidential control and those that are not is entirely unrelated to the distinction between Cabinet agencies and non-Cabinet agencies, and to all the other distinctions that the Court successively embraces. (The Central Intelligence Agency and the Environmental Protection Agency, for example, though not Cabinet agencies or components of Cabinet agencies, are not "independent" agencies in the sense of independence from Presidential control.) **[*922]** In sum, whatever may be the distorting effects of later innovations that this Court has approved, considering the Chief Judge of the Tax Court to be the head of a department seems to me the only reasonable construction of Article II, § 2.

* * *

For the above reasons, I concur in the judgment that the decision below must be affirmed.

REFERENCES: ♦ Return To Full Text Opinion

- Go to Supreme Court Brief(s)
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L Ed Index, Appointments Clause; Executive Acts or Officers; Separation of Powers; Tax Court

Index to Annotations, Appointment; Executive Acts and Officers; Separation of Powers; Tax Court

Annotation References:

Supreme Court's construction and application of appointments clause of Art II, 2, cl 2, of Federal Constitution. 101 L Ed 2d 1072.

What issues will the Supreme Court consider, though not, or not properly, raised by the parties. 42 L Ed 2d 946.

Modern status of applicability of doctrine of estoppel against federal government and its agencies. 27 ALR Fed 702.

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Scalia, J., joined by O'Connor, Kennedy, and Souter, JJ., concurring in part and concurring in the judgment, expressed the view that (1) 7443A allowed the chief judge of the Tax Court to assign special trial judges to preside over proceedings like those involved in the case at hand; but (2) the taxpayers' express consent to the assignment of their cases to a special trial judge constituted a forfeiture of their claim that 7443A violated the appointments clause; and (3) the chief judge's appointment of special trial judges was valid under the appointments clause not because the Tax Court was a "Court of Law," but because the Tax Court was a "Department" with the chief judge as its "Head."

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

[*HN1]**
CONSTITUTIONAL LAW §72

JUDGES §1

OFFICERS §8
appointments clause -- separation of powers -- Tax Court -- special trial judges --

Headnote: [1A] [1B] [1C] [1D] [1E] [1F]
The Federal Constitution's appointments clause (Art II, 2, cl 2)--which provides that Congress may by law vest the appointment of "inferior Officers" of the United States in "the President alone, in the Courts of Law, or in the Heads of Departments"--and the constitutional principle of separation of powers embedded in the clause are not violated by 26 USCS 7443A, which provides that the chief judge of the United States Tax Court is authorized to appoint and assign special trial judges to both hear and decide cases in certain specifically described proceedings, and to hear and propose findings in any other proceeding which the chief judge may designate; although a special trial judge appointed pursuant to 7443A is an "inferior Officer" whose appointment must conform to the appointments clause, the chief judge of the Tax Court can be vested by Congress with the power to appoint such special trial judges, because the Tax Court is a "Court of Law" under the appointments clause. (Scalia, O'Connor, Kennedy, and Souter, JJ., dissented in part from this holding.)

[*HN2]**
EVIDENCE §272
burden of proof -- actions by judges --

Headnote: [2A] [2B]
The burden of proof rests on taxpayers challenging a decision of the United States Tax Court as to any negative inference to be drawn from the fact that on the same day, (1) the special trial judge assigned by the chief judge of the Tax Court to prepare written findings and a proposed opinion in the taxpayers' case, pursuant to 26 USCS 7443A(b)(4), filed such findings and opinion; (2) the chief judge issued an order reassigning the litigation to himself for disposition; and (3) the chief judge adopted the opinion of the special trial judge.

[*HN3]**
COURTS §225.2

STATUTES §108.5
Tax Court -- assignments to special trial judges --

Headnote: [3A] [3B] [3C] [3D]
Pursuant to 26 USCS 7443A(b)(4), which authorizes the chief judge of the United States Tax Court to assign to a special trial judge, for hearing and the preparation of proposed findings and a written opinion, "any other proceeding which the chief judge may designate" in addition to declaratory judgment proceedings and proceedings involving $ 10,000 or less--as

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to which proceedings, enumerated in 26 USCS 7443A(b)(1)-7443A(b)(3), a special trial judge can be assigned not only to hear and report on a case, but also to decide it--the chief judge is permitted to assign any Tax Court proceeding to a special trial judge, regardless of the proceeding's complexity or the monetary amount involved, because (1) the plain language of 7443A authorizes such assignment, since the text contains no limiting terms that restrict its reach to cases that are minor, simple, or narrow; (2) nothing in the legislative history of 7443A contradicts the broad sweep of the language of 7443A(b)(4), in that (a) the House Report and the conference committee report indicate that Congress intended to clarify that any other proceeding could be assigned to a special trial judge so long as a Tax Court judge must enter the decision, and also that Congress knowingly removed the jurisdictional requirement of a maximum amount in dispute in order to expand the authority of special trial judges to hear but not to decide cases covered by 7443A(b)(4), and (b) the legislation which included 7443A(b)(4) was a "technical" change, as such term was used in the legislative history, in light of the historical development of the special trial judge's role--insofar as special trial judges and their predecessors, the commissioners, have been authorized for almost a half century to hear any case before the Tax Court in the discretion of its chief judge--but the technical nature of such legislation does not alter the wide-ranging effect of the grant of authority to the chief judge in 7443A(b)(4); and (3) the phrase "any other proceeding" in 7443A(b)(4) is not a general grant of authority to fill unintended gaps left by 7443A(b)(1)-7443A(b)(3), and a reading of 7443A(b)(4) as a catch-all provision limited to cases involving a small amount of money is not required on the ground that any other interpretation would render the limitations imposed by 7443A(b)(1)-7443A(b)(3) a nullity, in that 7443A(b)(4)--the scope of which must be greater than that of 7443A(b)(1)-7443A(b)(3)--would be superfluous if the cases that special trial judges could hear but not decide under 7443A(b)(4) are limited to the same kind of cases that they could hear and decide under 7443A(b)(1)-7443A(b)(3).

[*HN4]**
STATUTES §83
absence of ambiguity --

Headnote: [4]
When the terms of a statute are unambiguous, judicial inquiry is complete except in rare and exceptional circumstances.

[*HN5]**
APPEAL §1112.5
validity of Tax Court proceedings -- failure to raise question below -- consent --

Headnote: [5A] [5B]
On certiorari, the United States Supreme Court will exercise its discretion to hear a challenge by taxpayers under the Federal Constitution's appointments clause (Art II, 2, cl 2), which provides that Congress may by law vest the appointment of inferior officers of the United States in "the President alone, in the Courts of Law, or in the Heads of Departments," to 26 USCS 7443A, which authorizes the chief judge of the United States Tax Court to assign to a special trial judge, for hearing and the preparation of proposed findings and a written opinion, "any other proceeding which the chief judge may designate" in addition to declaratory judgment proceedings and proceedings involving $ 10,000 or less--as to which proceedings a special trial judge can be assigned to decide a case as well--notwithstanding that the taxpayers consented, and failed to raise a timely objection, to the chief judge's assignment of their Tax Court cases, which involved approximately $ 1.5 billion in alleged tax deficiencies, to a special trial judge, since the alleged defect in the special trial judge's appointment goes to the validity of the taxpayers' Tax Court proceedings. (Scalia, O'Connor, Kennedy, and Souter, JJ., dissented from this holding.)

[*HN6]**

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CONSTITUTIONAL LAW §68.5

ESTOPPEL AND WAIVER §6

OFFICERS §8
separation of powers -- function of appointments clause --

Headnote: [6A] [6B] [6C]
The Federal Constitution's appointments clause (Art II, 2, cl 2)--which empowers the President to appoint the principal federal officers with the advice and consent of the Senate, while providing that Congress may by law vest the appointment of "inferior Officers" of the United States in "the President alone, in the Courts of Law, or in the Heads of Departments"--not only guards against the aggrandizement of power by one branch of the Federal Government at the expense of another branch, but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power; the structural principles of separation of powers embodied in the appointments clause do not speak only or even primarily of prerogatives of the executive branch of the Federal Government simply because such principles are located in Article II of the Constitution; insofar as the appointments clause bespeaks a principle of limitation by dividing the power to appoint the principal federal officers between the executive and legislative branches and by allowing Congress only limited authority to devolve appointment power on the President, "the Heads of Departments," and "the Courts of Law," so as to insure that those who wielded the appointment power were accountable to political force and the will of the people, the appointments clause prevents Congress from dispensing power too freely, and the clause limits the universe of eligible recipients of the power to appoint; the structural interests protected by the appointments clause are not those of any one branch of the government, but rather those of the entire republic, and thus neither Congress nor the executive branch can agree to waive the structural protection afforded by the appointments clause. (Scalia, O'Connor, Kennedy, and Souter, JJ., dissented in part from this holding.)

[*HN7]**
APPEAL §1104

CONSTITUTIONAL LAW §68.5
failure to raise question below -- separation of powers --

Headnote: [7]
Although a litigant in federal court generally must raise all issues and objections at trial, the disruption to sound appellate practice entailed by entertaining objections not raised below does not always overcome the strong interest of the federal judiciary in maintaining the federal constitutional plan of separation of powers.

[*HN8]**
COURTS §95

STATUTES §13
federal bill -- judicial review --

Headnote: [8]
The assent of the executive branch of the Federal Government to a bill which contains a provision contrary to the Federal Constitution does not shield the bill from judicial review.

[*HN9]**
JUDGES §1

OFFICERS §2

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REFERENCE §6
appointments clause -- special trial judge of Tax Court -- establishment of office -- employees -- special masters --

Headnote: [9A] [9B]
For purposes of the Federal Constitution's appointments clause (Art II, 2, cl 2)--which empowers the President to appoint certain officers of the United States with the advice and consent of the Senate, while providing that Congress may by law vest the appointment of "inferior Officers" in "the President alone, in the Courts of Law, or in the Heads of Departments"--a special trial judge appointed by the chief judge of the United States Tax Court pursuant to 26 USCS 7443A--which provides that the chief judge is authorized to appoint and assign special trial judges to both hear and decide cases in certain specifically described proceedings (26 USCS 7443A(b)(1)-7443A(b)(3)), and to hear and propose findings in any other proceeding which the chief judge may designate (26 USCS 7443A(b)(4))--is an "inferior Officer" whose appointment must conform to the appointments clause, because (1) the establishment of the office, and the duties, salary, and means of appointment of such special trial judges are specified by statute, and such characteristics distinguish special trial judges from the special masters hired by courts established under Article III of the Constitution; (2) in the course of taking testimony, conducting trials, ruling on the admissibility of evidence, and enforcing compliance with discovery orders, special trial judges appointed under 7443A perform more than ministerial tasks and exercise significant discretion; and (3) even if the duties of special trial judges under 7443A(b)(4) are not significant, special trial judges cannot be inferior officers for purposes of some of their duties under 7443A, but mere employees with respect to other responsibilities, since the fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the appointments clause does not transform the inferior officer's status under the Constitution.

[*HN10]**
OFFICERS §2
definition -- appointment --

Headnote: [10]
For purposes of the Federal Constitution's appointments clause (Art II, 2, cl 2)--which empowers the President to appoint certain "Officers of the United States" with the advice and consent of the Senate, while providing that Congress may by law vest the appointment of "inferior Officers" of the United States in "the President alone, in the Courts of Law, or in the Heads of Departments"--any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States," and such person must therefore be appointed in the manner prescribed by the appointments clause.

[*HN11]**
EVIDENCE §244
burden of persuasion -- appointment of officers --

Headnote: [11]
Persons seeking to challenge the authority of Congress to vest the chief judge of the United States Tax Court with the power to appoint special trial judges for the Tax Court bear a heavy burden of persuasion that such vesting violates the Federal Constitution's appointments clause (Art II, 2, cl 2), insofar as an interbranch appointment is not implicated in such a challenge.

[*HN12]**
OFFICERS §2
creation of office -- appointment --

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Headnote: [12]
Despite Congress' authority under Article II of the Federal Constitution to create offices and to provide for the method of appointment to those offices, Congress' power is inevitably bounded by the express language of Article II, and unless the method Congress provides comports with Article II, the holders of those offices will not be "Officers of the United States" within the meaning of Article II.

[*HN13]**
COMMISSIONERS AND MAGISTRATES §1

CONSTITUTIONAL LAW §27

EVIDENCE §244

OFFICERS §8

STATUTES §102

UNITED STATES §22
appointments clause -- Tax Court as executive "Department" -- separation of powers -- President --

Headnote: [13A] [13B] [13C]
The United States Tax Court is not a "Department" for purposes of the Federal Constitution's appointments clause (Art II, 2, cl 2)--which provides that Congress may by law vest the appointment of "inferior Officers" of the United States in "the President alone, in the Courts of Law, or in the Heads of Departments"--because (1) given the appointments clause's limitation of the actors in whom Congress may vest the power to appoint, it cannot be assumed that every component of the Federal Government's executive branch is a department, the head of which is eligible to receive appointment power under the appointments clause; (2) the term "Department" refers only to a part or division of the executive branch that has been expressly created and given the name of a department by Congress, and thus the term "Heads of Departments" does not embrace inferior commissioners and bureau officers; (3) confining the term "Heads of Departments" to executive divisions like the Cabinet-level departments constrains the distribution of the appointment power, and insures that the term is interpreted consistently with its interpretation in other provisions of the Federal Constitution, including (a) the opinion clause of Art II, 2, cl 1, which provides that the President may require opinions from the principal officers of the "Executive Departments," and in which clause the term "Executive Departments," according to a previous decision of the United States Supreme Court, is limited to Cabinet members, and (b) 4 of the Twenty-fifth Amendment regarding the disability of the President, in which section the term "executive departments," according to the hearings on the Amendment, refers to Cabinet-level entities; and (4) the express purpose of the legislation which established the Tax Court was to make it a court under Article I of the Federal Constitution, rather than an executive agency. (Scalia, O'Connor, Kennedy, and Souter, JJ., dissented from this holding.)

[*HN14]**
CONSTITUTIONAL LAW §6
effect of amendment -- repeated terms --

Headnote: [14A] [14B]
The language of the Federal Constitution's Twenty-fifth Amendment does not control the interpretation of a prior provision of the Federal Constitution, such as the appointments clause (Art II, 2, cl 2); this being the case, the fact that the Twenty-fifth Amendment strictly

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Federal News Service September 14, 2000, Thursday

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September 14, 2000, Thursday

SECTION: PRESS CONFERENCE OR SPEECH

LENGTH: 3839 words

HEADLINE: PRESS CONFERENCE WITH SENATOR BARBARA MIKULSKI (D-MD) AND OTHERS

TOPIC: PENDING WOMEN JUDICIAL NOMINEES

PARTICIPANTS INCLUDE: SENATOR BARBARA BOXER (D-CA) SENATOR TOM HARKIN (D-IA), SENATOR CARL **LEVIN** (D-MI), SENATOR BLANCHE LAMBERT LINCOLN (D-AR), REPRESENTATIVE CAROLYN MALONEY (D-NY), AND SENATOR PATTY MURRAY (D-WA)

LOCATION: THE SENATE SWAMP, WASHINGTON, D.C.

BODY:
SEN. MIKULSKI: Good afternoon, everybody. I'm here to join my colleagues in both the House and the United States Senate to really call for freeing our judicial nominees.

Democrats know that people want judges who reflect the American mosaic, yet this Republican Congress repeatedly blocks women and minorities to our federal courts. We know that women nominees wait two and a half months longer to be confirmed than their male counterparts. We now have 38 nominees waiting for confirmation. Nine of these are women, and they've been waiting more than 60 days. Some have been waiting for years.

The women of the Senate are "nine and counting." Our women judicial nominees are nine and waiting.

One candidate, **Helene White,** has been waiting over three and a half years, no hearing, for a seat vacant in 1995. We have a distinguished applicant like Ronnie White, who waited for over a year, only to be voted down in the Congress.

What does this mean? Well I'll tell you what it means: that in the Republicanly-controlled Congress, if you are a woman or a minority, you wait at the back of the bus. This party seems to forget that it was once the party of Lincoln, and now it is the party of judicial block.

We're waiting to confirm President Clinton's appointments. We have outstanding women and men who are African American, Asian American and Hispanic. Clinton and the Gore administration have nominated more women and minorities for the federal judiciary than any time in history.

But this is not only about color; it is about ensuring that there's competency on the judicial bench. We've encouraged them to hold hearings, have votes, move this out. Just two days ago, a Republican senator took the floor to say he was putting a hold on further nominees. Well, you know what this means for justice? It means justice delayed.

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What we now have is a judicial emergency. Four of the 15 seats are vacant. Every woman and minority has delayed. We don't have time for delays; the courts don't have time for delays; America doesn't have time for delays. I hope Tom DeLay calls the Senate and says, "Let's get moving."

I would now like to turn this conference over to one of the great champions; the person who walked up the steps to make sure that women were represented on the Judiciary for judicial nominations; a great fighter, my colleague, Senator Barb Boxer.

SEN. BOXER: Thank you, Senator Mikulski.

I want to thank Senator Mikulski, I want to thank the American Association of University Women for organizing this effort to call attention to the shameful way that women nominees to the federal judiciary have been treated by this Republican Senate.

Senator Mikulski has pointed out the long time that women and minorities have had to wait to get their day, if you will, in the Senate court, so they can take their seats on the judiciary.

Today we are focusing on women. I strongly support the four women who are patiently await their confirmation, the four women we are focusing on today. They are very fortunate to have Senators Harkin and **Levin** fighting for them. They couldn't have better fighters than those two senators.

But I want to point out today that these four women are not isolated cases. There is a terrible pattern of treating these first- class nominees as second-class citizens.

I would like to share the stories, very briefly, of three women nominees from California who have gone down this difficult path.

In May 1996 President Clinton nominated Margaret Morrow (sp) to the U.S. District Court for the Central District of California. You couldn't find a more qualified, less controversial woman. She got the unanimous vote of the Senate Judiciary Committee. Chairman Hatch called her one of the most qualified nominees he had ever seen. You would think it would have been a slam-dunk, but her nomination died in the pre-election logjam. So the president nominated Ms. Morrow (sp) in January '97, and again we expected a swift confirmation. But a small group of right-wing senators targeted Margaret as part of their campaign against the so-called activist judiciary. By the way, I think "activist" means "anyone who has a pulse." (Laughter.)

Support poured in, from Democrats and Republicans alike, for Margaret. Finally, in February '98, after putting her life on hold for 21 months, Margaret Morrow (sp) was confirmed. You'd think it would have been a close vote, wouldn't you? They made her suffer so much. It was 67 to 28.

One more quick story:

Marsha Berzon. In '98 President Clinton nominated her to the Ninth Circuit Court of Appeal, and she was so qualified and is so qualified --distinguished record, broad bipartisan support. She had to put her life on hold in private practice, turning down cases and suspending her personal plans. And like Ms. Morrow (sp), Ms. Berzon had to wait two years before she was confirmed -- and again, overwhelmingly so.

The last case:

Dolly Gee, G-E-E. She is still waiting. She was nominated in May '99. The Republicans

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haven't even given her the courtesy of a hearing, even though she's been endorsed by prominent Republicans.

Dolly Gee is the daughter of Chinese immigrants. She would make history in this particular confirmation. She became an attorney largely because she saw the conditions in the garment industry in Los Angeles, where her mother worked as a seamstress.

Now she has a successful civil practice with an emphasis on employment law.

Dolly Gee's private life is the embodiment of the American dream, but her experience in the U.S. Senate is an American nightmare. So we're here today to end that nightmare, to give the Republican Senate a wake-up call, to let the people of America know how these fine women are being treated, and we are here to say we are going to focus the light on this matter.

And it is my great privilege to turn it over to Congresswoman Maloney of New York, a strong leader for women and equal rights for all people.

REP. C. MALONEY: Thank you so much, Barbara.

SEN. BOXER: You're welcome.

REP. C. MALONEY: And I thank all of my friends in the Senate and my former colleague in the House, Blanche, and especially Nancy Zirkin of AAUW that helped organize this today.

Less than a year ago, we stood here together to ask whether there was a glass ceiling in the Senate. We wanted to know how there could be so many vacancies on the federal bench. Right now, there are 64 vacancies, 23 of which are judicial emergencies, while so many talented, qualified women and men have had their nominations held up.

Well, here we are again with many more exceptional nominees, and still they are held up. There are 38 nominees, nine of whom are women, and I must note that only 20 percent of the federal bench now is represented -- only 20 percent of the federal judges in the United States are women. And we need the nominees and the judges of this country to reflect this country, and we need more women and minorities on the bench.

We have passed many federal laws in housing and discrimination, in all types of areas, and our courts are clogged and waiting to act with justice. And if we don't nominate and put forward these people, then we will just wait and wait and wait for justice.

And as these important nominees sit idle and important cases wait for fair hearings, members of the Senate -- some members of the Senate -- stall, hoping that the outcome of the November election will result in a president who will nominate more conservative candidates.

This is just plain wrong. We need to move forward and put qualified women, minorities and men on the bench, and we are calling to have these vacancies filled.

It is now my great pleasure to introduce the senator from the great state of Michigan, Senator **Levin.**

SEN. **LEVIN:** Two of the women who we're focusing on today are from Michigan. They are nominees for the Sixth Circuit Court of Appeals. They are **Helene White,** who is a judge now in the second- highest court in Michigan and has been a Court of Appeals judge for seven years, and before that was a trial court judge for 10 years. And the other woman who we're focusing on is Kathleen McCree Lewis, a very distinguished appellate advocate with one of

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the largest law firms in Michigan. She would be the first African American woman to sit on the Sixth Circuit Court of Appeals if she were confirmed.

We've been unable to get hearings for these two women. The first one, **Helene White,** has waited three and a half years for a hearing. This is the longest wait for a hearing in Senate history. Kathleen McCree Lewis has waited a year for a hearing. This is just for a hearing. No objection has been raised to their nomination, no suggestion has been made that they're not qualified. It's just no action, non-action. It's just stall. It's just, "Well, it's not me, it's somebody else." The truth of the matter is that the leadership of the Senate has a responsibility to do what the Constitution says we should do, which is to advise and at least vote on whether or not to consent to the nomination of nominees for these courts.

We have a 25 percent vacancy rate in the Sixth Circuit of Appeals. The recently retired chief judge, Judge Meritt (sp), wrote a letter which in a way is -- I think it's one of the strongest letters I have ever heard from any court. This was written to Senator Hatch, who said the following about the Sixth Circuit:

"Our courts should not be treated in this fashion. The public's business should not be treated this way. The litigants in a federal court should not be treated this way. The remaining judges on a court should not be treated this way. The situation in our court is," to use his words, "rapidly deteriorating due to the fact that 25 percent of the judgeships are vacant." And then he finished: "The Founding Fathers certainly intended that the Senate advise as to the judicial nomination -- that is, consider, debate and vote up or down.

They surely did not intend that the Senate, for partisan or factional reasons, would remain silent and simply refuse to give any advice or consider and vote at all, thereby leaving the courts in limbo, understaffed and unable properly to carry out their responsibilities for years."

Governor Bush has said that no nominee should wait longer than 60 days for a decision in the Senate. He is the nominee of the Republican Party, and we would hope that the leadership of this Senate and the Judiciary Committee, the Republicans who run both the Senate and the committee, would listen -- if not to their consciences, and if not to the judges who sit on these courts, and if not to the litigants who are waiting for justice because of these vacancies year after year -- at least would listen to their own nominee for president, who says 60 days is the longest that anybody should wait for a vote on their confirmation.

Judge White has waited three and a half years. Kathleen Lewis has waited a year. It's too long. It's wrong. It's unfair not just to them, but to my constituents in Michigan and to the people of the United States.

Pat, I think --

SEN. MURRAY: I'm ready.

SEN. **LEVIN:** Are you next, Patty? I need to -- whoops, excuse me for --

SEN. MURRAY: Thank you. We are here today to strongly object to the Republican majority who continues to block the confirmation of qualified judges, especially women and minorities. This is about justice, and justice delayed is justice denied. By failing to confirm nominees, the Republicans have delayed justice for those who rely on our overburdened court system. As a result of their inaction, cases are piling up in dockets across America. Our justice system is being held hostage, and America's communities are paying the price.

In fact, the Republican-controlled Senate is far behind the norm in confirming judges. Only 48 percent of President Clinton's Circuit Court of Appeals nominees for this year have been confirmed by the Senate. In comparison, during President Bush's last year in office, the

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Democratic Senate confirmed 65 percent of his nominees. This delay is especially troubling when we look at what's happened to women and minorities.

We know that women are already underrepresented on the federal bench and we know there are many vacancies yet to fill. Nine women have been waiting for confirmation for more than 60 days. One of those women, **Helene White,** has been waiting for more than 1,300 days -- over three and a half years.

Unfortunately, Republicans have created a glass ceiling that blocks the confirmation of women judges. It's time to dismantle that glass ceiling and let qualified jurists take their place on the bench.

We are here to send a message to the Republican leadership: Confirm the judicial nominees pending before the Senate, and let these qualified men and women fill the vacancies in courtrooms across America.

Thank you and it is my honor to introduce Senator Blanche Lincoln from Arkansas.

SEN. LINCOLN: I'm delighted to join with my colleagues and former colleagues here today to talk about such a travesty.

Although there aren't any judges in my home state awaiting confirmation, I'm here because I'm appalled, as a women and as a senator, about the games that are being played with these people's lives and with our judicial system.

Just several weeks ago, after meeting with a group of appellate and district court judges in Arkansas, I sent a letter on this issue to our majority leader to express my frustration. In that letter, I reminded him that people look to us for more than just legislation; they look to us for an example. And although we don't need -- or we don't have any waiting confirmations, those judges expressed to me an incredible overload in their courts. I can't imagine what the situation must be in these areas where these positions are left unfilled.

I was taught at an early age that public service is a high calling and a noble profession. We need to encourage it, not discourage it. I was also taught at an early age that there is absolutely no good excuse to be rude. And the way that we're handling these confirmations is irresponsible, it's unacceptable, and it's rude to think that we are asking these people to put their life on hold; to not even be heard; to not have a hearing; to not even be voted up or down.

My colleagues before me have outlined many of the examples that -- of why -- and have given some of the disheartening examples of qualified, dedicated women and men who are willing to serve this country.

You know, there's a lot of talk among my colleagues about restoring the faith of the people in their political system and government.

But in my opinion, if we want respect, we've got to earn it. And we need to start right here and right now with treating these people respectably. If we want people to respect their government again, then government must act respectably. It's my hope that we'll take the necessary steps to give these men and these women, especially, the up or down vote that they deserve.

I thank my colleagues for all of what they have done, and I'm proud to introduce Senator Tom Harkin.

SEN. HARKIN: Thanks, Blanche. I'm sorry I'm late. I was just at a hearing.

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SEN. LINCOLN: There you go, Tom. How are you?

SEN. HARKIN: Thank you all very much for being here. Thank you all for holding this press conference to address this important issue. Again, I'm sure I'm just going to echo the sentiments expressed by my colleagues on these judicial nominations. This process has been dragging on too long. The Senate should act promptly to fill these vacancies. I'm especially concerned about my own constituent, Bonnie Campbell, for the Eighth Circuit. And I know Senator **Levin,** I met his judge nominees **Helene White** and Kathleen McCree Lewis.

Bonnie Campbell from Iowa is a former attorney general who is now the head of the Violence Against Women office in the Department of Justice, has done a great job. She's got strong bipartisan support. She's supported by Senator Grassley from my state, and me, the Bar Association. I don't know of anyone that is not supporting her for any of these reasons. And yet she's bottled up and will not be reported out, they're not reporting her out to the floor so that we can act on it. I think this is unconscionable.

I'll just close by saying that Governor Bush had the right idea. He said the candidate should get an up or down vote within 60 days of their nomination. The Republican leadership in the Senate should follow that advice.

Thank you. Any questions, or -- Mike?

Q Senator Harkin -- any of the senators. (Off mike) -- you've got many pressure points; you can work with leadership, hold bills, what have you. Have you done that? Why not? Are you going to do something like that -- (off mike) -- to get your nominees -- (off mike)?

SEN. HARKIN: There may come a time for that, but basically -- I'm speaking for myself -- there's sort of been an implied -- not implied. No, no. That's the wrong word. There's actually been statements made to me and others that if we engage in any activity like that, that they absolutely will not report them out.

And so we're at a situation here where we didn't have a Judiciary Committee meeting this week. They're supposed to have one next week. Well, if that goes into the week after that, you see what they're playing with, is that there's a game going on here. We know that we have the power to slow things down and perhaps take some actions here to try to force their hand, but we're told if they do that, they absolutely won't report them out. And so all we can do is operate on goodwill and good faith around here. We're told that they're going to have a meeting. We're told that they're going to vote on these nominees or, in the case of yours, to have a hearing after three long years. And you know, you kind of go on good faith around this place.

SEN. LINCOLN: Why should we have to trade progress for partisanship?

SEN. HARKIN: Yeah. Go ahead, Blanche. That's a good statement.

SEN. LINCOLN: Why should we have to trade progress for partisanship? I mean, this is our duty. This is something we should be doing. We're not asking them to vote for these nominees, we're just asking them to vote. Give these people the courtesy that they deserve, being heard, you know, instead of asking them to put their lives on hold for 1,300 days. I can't imagine, especially as a --

SEN. HARKIN: Yeah. If they want to vote against them, let them vote against them. That's their prerogative. But at least have a vote.

SEN. **LEVIN:** The leadership of the Senate has urged us to hold off on any of those tactics

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because they still see the possibility that they're going to be able to get some of these nominees confirmed. And we've abided by that request. We've been incredibly patient, those of us who have nominees from our states, and we're trying to show just the maximum of good faith and good will that is humanly possible. That's our goal. We're not trying to in any way disrupt the Senate. That's not our purpose here. And as long as the leadership is telling us there's still this hope that we can accomplish our goal without those tactics, it seems to me we should give them that benefit of the doubt and that additional period of time. It may come -- it may come to that point, however.

Q (Off mike.)

SEN. **LEVIN:** No, no. No. Both Mr. -- Senator Daschle and Senator Lott and Senator Hatch. We've spoken with great frequency to all of them and Senator Leahy with great regularity.

And we still have a ray of hope -- a ray of hope that the Judiciary Committee will both report out the judge in the case of the Iowa Court of Appeals nominee and hold hearings for the two judges from Michigan who have been nominated to the Sixth Circuit, and I can't comment on other situations because those are the only ones that I'm familiar with.

Q (Off mike) --

SEN. **LEVIN:** Yes.

Q (Continues, off mike) -- objected that the president's recess appointments -- (off mike) -- kind of rubbed some senators the wrong way. They were supposed to have five nominations -- (off mike). Do you see a kind of tit-for-tat here that got away from him, or was that a wise decision --

SEN. HARKIN: No, no. Look. Look, I saw a comment made by someone, I forget, that the president was thwarting the Constitution by making recess appointments. Those are constitutional appointments. That is constitutionally permitted. Now, they can only serve until the end of the session, but recess appointments are constitutional.

Q (Off mike) -- it flies in the face, if your nominees are being held hostage, in retaliation. So you don't fault the president on this?

SEN. HARKIN: No, because his nominees were held up. Again, the same situation, where they weren't given the benefit of a hearing and a vote and the due process here in the Senate, and in the case of a couple of these people, the offices to which he appointed them were offices that needed to be directed. They need a director. They needed someone in there to run these offices.

SEN. **LEVIN:** I just want quickly -- 14 past presidents of the Michigan Bar Association, Republicans and Democrats, have urged hearings for these two nominees. They are well-qualified, and we have copies both of this letter from the presidents of the Michigan bar as well as the letter from the retired chief judge of the 6th Circuit that I made reference to before.

And one other quick comment. What is happening here, if these hearings are not held or these votes not taken, is that a pattern is being set for future Senates which is unhealthy for future Senates and future presidents. And people who follow the course of action that is currently being followed of not allowing hearings or votes on nominees who've been waiting a long period of time are putting into place a pattern which, it seems to me, they should not want to set for future Senates and for future presidents.

And they ought to see the lack of wisdom in their short-term gain that they may see by

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denying people a vote or a hearing. There may be a short-term benefit in leaving some vacancies for the next president, but they're not going to benefit from it in the next Senate because the next Senate will follow the pattern of this one, I assume, if that is the way they're going to play this thing out.

So we've been very, very patient. We have followed the advice of the minority leader and Senator Hatch in holding off, still in the hope that some of these nominees can be given hearings and votes. We can't say that that course of action is going to last indefinitely; it will not. But at least we've shown good faith, maximum patience, and we still have a hope that without this kind of a tactic that you make reference to, that we can get justice and fairness and decency applied to these nominees.

END

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September 14, 2000, Thursday

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LOCATION: THE SENATE SWAMP, WASHINGTON, D.C.

BODY:
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What we now have is a judicial emergency. Four of the 15 seats are vacant. Every woman and minority has delayed. We don't have time for delays; the courts don't have time for delays; America doesn't have time for delays. I hope Tom DeLay calls the Senate and says,

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"Let's get moving."

I would now like to turn this conference over to one of the great champions; the person who walked up the steps to make sure that women were represented on the Judiciary for judicial nominations; a great fighter, my colleague, Senator Barb Boxer.

SEN. BOXER: Thank you, Senator Mikulski.

I want to thank Senator Mikulski, I want to thank the American Association of University Women for organizing this effort to call attention to the shameful way that women nominees to the federal judiciary have been treated by this Republican Senate.

Senator Mikulski has pointed out the long time that women and minorities have had to wait to get their day, if you will, in the Senate court, so they can take their seats on the judiciary.

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But I want to point out today that these four women are not isolated cases. There is a terrible pattern of treating these first- class nominees as second-class citizens.

I would like to share the stories, very briefly, of three women nominees from California who have gone down this difficult path.

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The last case:

Dolly Gee, G-E-E. She is still waiting. She was nominated in May '99. The Republicans haven't even given her the courtesy of a hearing, even though she's been endorsed by prominent Republicans.

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Now she has a successful civil practice with an emphasis on employment law.

Dolly Gee's private life is the embodiment of the American dream, but her experience in the U.S. Senate is an American nightmare. So we're here today to end that nightmare, to give the Republican Senate a wake-up call, to let the people of America know how these fine women are being treated, and we are here to say we are going to focus the light on this matter.

And it is my great privilege to turn it over to Congresswoman Maloney of New York, a strong leader for women and equal rights for all people.

REP. C. MALONEY: Thank you so much, Barbara.

SEN. BOXER: You're welcome.

REP. C. MALONEY: And I thank all of my friends in the Senate and my former colleague in the House, Blanche, and especially Nancy Zirkin of AAUW that helped organize this today.

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This is just plain wrong. We need to move forward and put qualified women, minorities and men on the bench, and we are calling to have these vacancies filled.

It is now my great pleasure to introduce the senator from the great state of Michigan, Senator Levin.

SEN. LEVIN: Two of the women who we're focusing on today are from Michigan. They are nominees for the Sixth Circuit Court of Appeals. They are Helene White, who is a judge now in the second- highest court in Michigan and has been a Court of Appeals judge for seven years, and before that was a trial court judge for 10 years. And the other woman who we're focusing on is Kathleen McCree Lewis, a very distinguished appellate advocate with one of the largest law firms in Michigan. She would be the first African American woman to sit on the Sixth Circuit Court of Appeals if she were confirmed.

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We've been unable to get hearings for these two women. The first one, Helene White, has waited three and a half years for a hearing. This is the longest wait for a hearing in Senate history. Kathleen McCree Lewis has waited a year for a hearing. This is just for a hearing. No objection has been raised to their nomination, no suggestion has been made that they're not qualified. It's just no action, non-action. It's just stall. It's just, "Well, it's not me, it's somebody else." The truth of the matter is that the leadership of the Senate has a responsibility to do what the Constitution says we should do, which is to advise and at least vote on whether or not to consent to the nomination of nominees for these courts.

We have a 25 percent vacancy rate in the Sixth Circuit of Appeals. The recently retired chief judge, Judge Meritt (sp), wrote a letter which in a way is -- I think it's one of the strongest letters I have ever heard from any court. This was written to Senator Hatch, who said the following about the Sixth Circuit:

"Our courts should not be treated in this fashion. The public's business should not be treated this way. The litigants in a federal court should not be treated this way. The remaining judges on a court should not be treated this way. The situation in our court is," to use his words, "rapidly deteriorating due to the fact that 25 percent of the judgeships are vacant." And then he finished: "The Founding Fathers certainly intended that the Senate advise as to the judicial nomination -- that is, consider, debate and vote up or down.

They surely did not intend that the Senate, for partisan or factional reasons, would remain silent and simply refuse to give any advice or consider and vote at all, thereby leaving the courts in limbo, understaffed and unable properly to carry out their responsibilities for years."

Governor Bush has said that no nominee should wait longer than 60 days for a decision in the Senate. He is the nominee of the Republican Party, and we would hope that the leadership of this Senate and the Judiciary Committee, the Republicans who run both the Senate and the committee, would listen -- if not to their consciences, and if not to the judges who sit on these courts, and if not to the litigants who are waiting for justice because of these vacancies year after year -- at least would listen to their own nominee for president, who says 60 days is the longest that anybody should wait for a vote on their confirmation.

Judge White has waited three and a half years. Kathleen Lewis has waited a year. It's too long. It's wrong. It's unfair not just to them, but to my constituents in Michigan and to the people of the United States.

Pat, I think --

SEN. MURRAY: I'm ready.

SEN. LEVIN: Are you next, Patty? I need to -- whoops, excuse me for --

SEN. MURRAY: Thank you. We are here today to strongly object to the Republican majority who continues to block the confirmation of qualified judges, especially women and minorities. This is about justice, and justice delayed is justice denied. By failing to confirm nominees, the Republicans have delayed justice for those who rely on our overburdened court system. As a result of their inaction, cases are piling up in dockets across America. Our justice system is being held hostage, and America's communities are paying the price.

In fact, the Republican-controlled Senate is far behind the norm in confirming judges. Only 48 percent of President Clinton's Circuit Court of Appeals nominees for this year have been confirmed by the Senate. In comparison, during President Bush's last year in office, the

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Democratic Senate confirmed 65 percent of his nominees. This delay is especially troubling when we look at what's happened to women and minorities.

We know that women are already underrepresented on the federal bench and we know there are many vacancies yet to fill. Nine women have been waiting for confirmation for more than 60 days. One of those women, Helene White, has been waiting for more than 1,300 days -- over three and a half years.

Unfortunately, Republicans have created a glass ceiling that blocks the confirmation of women judges. It's time to dismantle that glass ceiling and let qualified jurists take their place on the bench.

We are here to send a message to the Republican leadership: Confirm the judicial nominees pending before the Senate, and let these qualified men and women fill the vacancies in courtrooms across America.

Thank you and it is my honor to introduce Senator Blanche Lincoln from Arkansas.

SEN. LINCOLN: I'm delighted to join with my colleagues and former colleagues here today to talk about such a travesty.

Although there aren't any judges in my home state awaiting confirmation, I'm here because I'm appalled, as a women and as a senator, about the games that are being played with these people's lives and with our judicial system.

Just several weeks ago, after meeting with a group of appellate and district court judges in Arkansas, I sent a letter on this issue to our majority leader to express my frustration. In that letter, I reminded him that people look to us for more than just legislation; they look to us for an example. And although we don't need -- or we don't have any waiting confirmations, those judges expressed to me an incredible overload in their courts. I can't imagine what the situation must be in these areas where these positions are left unfilled.

I was taught at an early age that public service is a high calling and a noble profession. We need to encourage it, not discourage it. I was also taught at an early age that there is absolutely no good excuse to be rude. And the way that we're handling these confirmations is irresponsible, it's unacceptable, and it's rude to think that we are asking these people to put their life on hold; to not even be heard; to not have a hearing; to not even be voted up or down.

My colleagues before me have outlined many of the examples that -- of why -- and have given some of the disheartening examples of qualified, dedicated women and men who are willing to serve this country.

You know, there's a lot of talk among my colleagues about restoring the faith of the people in their political system and government.

But in my opinion, if we want respect, we've got to earn it. And we need to start right here and right now with treating these people respectably. If we want people to respect their government again, then government must act respectably. It's my hope that we'll take the necessary steps to give these men and these women, especially, the up or down vote that they deserve.

I thank my colleagues for all of what they have done, and I'm proud to introduce Senator Tom **Harkin.**

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SEN. **HARKIN:** Thanks, Blanche. I'm sorry I'm late. I was just at a hearing.

SEN. LINCOLN: There you go, Tom. How are you?

SEN. **HARKIN:** Thank you all very much for being here. Thank you all for holding this press conference to address this important issue. Again, I'm sure I'm just going to echo the sentiments expressed by my colleagues on these judicial nominations. This process has been dragging on too long. The Senate should act promptly to fill these vacancies. I'm especially concerned about my own constituent, Bonnie Campbell, for the Eighth Circuit. And I know Senator Levin, I met his judge nominees Helene White and Kathleen McCree Lewis.

Bonnie Campbell from Iowa is a former attorney general who is now the head of the Violence Against Women office in the Department of Justice, has done a great job. She's got strong bipartisan support. She's supported by Senator Grassley from my state, and me, the Bar Association. I don't know of anyone that is not supporting her for any of these reasons. And yet she's bottled up and will not be reported out, they're not reporting her out to the floor so that we can act on it. I think this is unconscionable.

I'll just close by saying that **Governor Bush had the right idea.** He said the candidate should get an up or down vote within 60 days of their nomination. The Republican leadership in the Senate should follow that advice.

Thank you. Any questions, or -- Mike?

Q Senator **Harkin** -- any of the senators. (Off mike) -- you've got many pressure points; you can work with leadership, hold bills, what have you. Have you done that? Why not? Are you going to do something like that -- (off mike) -- to get your nominees -- (off mike)?

SEN. **HARKIN:** There may come a time for that, but basically -- I'm speaking for myself -- there's sort of been an implied -- not implied. No, no. That's the wrong word. There's actually been statements made to me and others that if we engage in any activity like that, that they absolutely will not report them out.

And so we're at a situation here where we didn't have a Judiciary Committee meeting this week. They're supposed to have one next week. Well, if that goes into the week after that, you see what they're playing with, is that there's a game going on here. We know that we have the power to slow things down and perhaps take some actions here to try to force their hand, but we're told if they do that, they absolutely won't report them out. And so all we can do is operate on goodwill and good faith around here. We're told that they're going to have a meeting. We're told that they're going to vote on these nominees or, in the case of yours, to have a hearing after three long years. And you know, you kind of go on good faith around this place.

SEN. LINCOLN: Why should we have to trade progress for partisanship?

SEN. **HARKIN:** Yeah. Go ahead, Blanche. That's a good statement.

SEN. LINCOLN: Why should we have to trade progress for partisanship? I mean, this is our duty. This is something we should be doing. We're not asking them to vote for these nominees, we're just asking them to vote. Give these people the courtesy that they deserve, being heard, you know, instead of asking them to put their lives on hold for 1,300 days. I can't imagine, especially as a --

SEN. **HARKIN:** Yeah. If they want to vote against them, let them vote against them. That's their prerogative. But at least have a vote.

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SEN. LEVIN: The leadership of the Senate has urged us to hold off on any of those tactics because they still see the possibility that they're going to be able to get some of these nominees confirmed. And we've abided by that request. We've been incredibly patient, those of us who have nominees from our states, and we're trying to show just the maximum of good faith and good will that is humanly possible. That's our goal. We're not trying to in any way disrupt the Senate. That's not our purpose here. And as long as the leadership is telling us there's still this hope that we can accomplish our goal without those tactics, it seems to me we should give them that benefit of the doubt and that additional period of time. It may come -- it may come to that point, however.

Q (Off mike.)

SEN. LEVIN: No, no. No. Both Mr. -- Senator Daschle and Senator Lott and Senator Hatch. We've spoken with great frequency to all of them and Senator Leahy with great regularity.

And we still have a ray of hope -- a ray of hope that the Judiciary Committee will both report out the judge in the case of the Iowa Court of Appeals nominee and hold hearings for the two judges from Michigan who have been nominated to the Sixth Circuit, and I can't comment on other situations because those are the only ones that I'm familiar with.

Q (Off mike) --

SEN. LEVIN: Yes.

Q (Continues, off mike) -- objected that the president's recess appointments -- (off mike) -- kind of rubbed some senators the wrong way. They were supposed to have five nominations -- (off mike). Do you see a kind of tit-for-tat here that got away from him, or was that a wise decision --

SEN. **HARKIN:** No, no. Look. Look, I saw a comment made by someone, I forget, that the president was thwarting the Constitution by making recess appointments. Those are constitutional appointments. That is constitutionally permitted. Now, they can only serve until the end of the session, but recess appointments are constitutional.

Q (Off mike) -- it flies in the face, if your nominees are being held hostage, in retaliation. So you don't fault the president on this?

SEN. **HARKIN:** No, because his nominees were held up. Again, the same situation, where they weren't given the benefit of a hearing and a vote and the due process here in the Senate, and in the case of a couple of these people, the offices to which he appointed them were offices that needed to be directed. They need a director. They needed someone in there to run these offices.

SEN. LEVIN: I just want quickly -- 14 past presidents of the Michigan Bar Association, Republicans and Democrats, have urged hearings for these two nominees. They are well-qualified, and we have copies both of this letter from the presidents of the Michigan bar as well as the letter from the retired chief judge of the 6th Circuit that I made reference to before.

And one other quick comment. What is happening here, if these hearings are not held or these votes not taken, is that a pattern is being set for future Senates which is unhealthy for future Senates and future presidents. And people who follow the course of action that is currently being followed of not allowing hearings or votes on nominees who've been waiting a long period of time are putting into place a pattern which, it seems to me, they should not

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want to set for future Senates and for future presidents.

And they ought to see the lack of wisdom in their short-term gain that they may see by denying people a vote or a hearing. There may be a short-term benefit in leaving some vacancies for the next president, but they're not going to benefit from it in the next Senate because the next Senate will follow the pattern of this one, I assume, if that is the way they're going to play this thing out.

So we've been very, very patient. We have followed the advice of the minority leader and Senator Hatch in holding off, still in the hope that some of these nominees can be given hearings and votes. We can't say that that course of action is going to last indefinitely; it will not. But at least we've shown good faith, maximum patience, and we still have a hope that without this kind of a tactic that you make reference to, that we can get justice and fairness and decency applied to these nominees.

END

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United States General Accounting Office

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Principles of Federal Appropriations Law

Second Edition

Volume I

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example, an appropriation expressly included two mandatory earmarks for projects beyond the scope of the related authorization. Noting that "the appropriation language provides its own expanded authorization for these programs," GAO concluded that the agency was required to reserve funds for the two mandatory earmarks before committing the balance of the appropriation for discretionary expenditures.

Except to the extent Congress expressly expands or limits authorized purposes in the appropriation act, the appropriation must be used in accordance with the authorization act in terms of purpose. Thus, in B-125404, August 31, 1956, it was held that an appropriation to construct a bridge across the Potomac River pursuant to a statute authorizing construction of the bridge and prescribing its location was not available to construct the bridge at a slightly different location even though the planners favored the alternate location. Similarly, in B-193307, February 6, 1979, the Flood Control Act of 1970 authorized construction of a dam and reservoir for the Ellicott Creek project in New York. Subsequently, legislation was proposed to authorize channel construction instead of the dam and reservoir, but was not enacted. A continuing resolution made a lump-sum appropriation for flood control projects "authorized by law." The Comptroller General found that the appropriation did not repeal the prior authorization, and that therefore the funds could not properly be used for the alternative channel construction.

d. Period of Availability

An authorization of appropriations, like an appropriation itself, can be made on a multiple-year or no-year, as well as fiscal year, basis. The question we address here is the extent to which the period of availability specified in an authorization or enabling act is controlling.

Congress can, in an appropriation act, expand the period of availability beyond that specified in the authorization, but it must do so explicitly. The action must be explicit because of (1) the rule against repeals by implication, (2) the presumption that every appropriation in an annual appropriation act is a one-year appropriation, and (3) the prohibition in 31 U.S.C. § 1301(c) against construing an appropriation to be permanent or available continuously unless the appropriation act expressly so states.

Thus, an appropriation of funds "to remain available until expended" (no-year) was found controlling over a provision in the

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authorizing legislation which authorized appropriations on a two-year basis. B-182101, October 16, 1974. See also B-149372/ B-158195, April 29, 1969 (two-year appropriation of Presidential transition funds held controlling notwithstanding provision in Presidential Transition Act of 1963 which authorized services and facilities to former President and Vice-President only for six months after expiration of term of office).

A 1982 decision, 61 Comp. Gen. 532, included an additional complication. An authorization act had authorized funds to be appropriated for a particular project "for fiscal year 1978." The FY 1978 funds for that project were included in a larger lump sum appropriated "as authorized by law, to remain available until expended." GAO reconciled the two statutes by finding the appropriation to be a no-year appropriation, except to the extent the related authorization specified a lesser period of availability. Thus, funds for the project in question from the lump-sum appropriation were available for obligation only during fiscal year 1978.

Clearly, Congress can also reduce the period of availability from that specified in the authorization act. Indeed, express language in the appropriation itself is not needed to reduce the period of availability to the fiscal year covered by the appropriation act.

In the first group of cases to consider this issue, the crucial test was whether the appropriation language specifically referred to the authorization. If it did, then GAO considered the provisions of the authorization act—including any multiple-year or no-year authorizations—to be incorporated by reference into the provisions of the appropriation act. This was regarded as sufficient to satisfy 31 U.S.C. § 1301(c) and to overcome the presumption of fiscal year availability derived from the enacting clause. If the appropriation language did not specifically refer to the authorization act, the appropriation was held to be available only for the fiscal year covered by the appropriation act. 45 Comp. Gen. 508 (1966); 45 Comp. Gen. 236 (1965); B-147196, April 5, 1965; B-127518, May 10, 1956; B-37398, October 26, 1943. The reference had to be specific; the phrase "as authorized by law" was not enough. B-127518, May 10, 1956.

The House Committee on Appropriations considered the issue in connection with the 1964 foreign aid appropriations bill. In its report on that bill, the Committee first described existing practice:

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"The custom and practice of the Committee on Appropriations has been to recommend appropriations on an annual basis unless there is some valid reason to make the item available for longer than a one-year period. The most common technique in the latter instances is to add the words 'to remain available until expended' to the appropriation paragraph.

"In numerous instances, . . . the Congress has in the underlying enabling legislation authorized appropriations therefor to be made on an 'available until expended' basis. When he submits the budget, the President generally includes the phrase 'to remain available until expended' in the proposed appropriation language if that is what the Executive wishes to propose. The Committee either concurs or drops the phrase from the appropriation language."

H.R. Rep. No. 1040, 88th Cong., 1st Sess. 55 (1963). The Committee then noted a situation in the 1963 appropriation which had apparently generated some disagreement. The President had requested certain refugee assistance funds to remain available until expended. The report goes on to state:

"The Committee thought the funds should be on a 1-year basis, thus the phrase 'to remain available until expended' was not in the bill as reported. The final law also failed to include the phrase or any other express language of similar import. Thus Congress took affirmative action to limit the availability to the fiscal year 1963 only." Id. at 56.

The Committee then quoted what is now 31 U.S.C. § 1301(c), and stated:

"The above quoted 31 U.S.C. [§ 1301(c)] seems clearly to govern and, in respect to the instant class of appropriation, to require the act making the appropriation to expressly provide for availability longer than 1 year if the enacting clause limiting the appropriations in the law to a given fiscal year is to be overcome as to any specific appropriation therein made. And it accords with the rule of reason and ancient practice to retain control of such an elementary matter wholly within the terms of the law making the appropriation. The two hang together. But in view of the question in the present case and the possibility of similar questions in a number of others, consideration may have to be given to revising the provisions of 31 U.S.C. [§ 1301(c)] to make its scope and meaning crystal clear and perhaps update it as may otherwise appear desirable." Id. (Emphasis in original.)

Section 1301(c) was not amended, but soon after the above discussion appeared, appropriation acts started including a general provision stating that "[n]o part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein." This added another

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ingredient to the recipe which had not been present in the earlier decisions, although it took several years before the new general provision began appearing in almost all appropriation acts.

When the issue arose again in a 1971 case, GAO considered the new appropriation act provision and the 1963 comments of the House Appropriations Committee. As a result of these developments, the rule was changed. Now, if an appropriation act contains the provision quoted in the preceding paragraph, it will not be sufficient for an appropriation contained in that act to merely incorporate a multiple-year or no-year authorization by reference. The effect of this general provision is to require the appropriation language to expressly provide for availability beyond one year in order to overcome the enacting clause. 50 Comp. Gen. 857 (1971). In that decision, GAO noted that "it seems evident that the purpose [of the new general provision] is to overcome the effect of our decisions . . . regarding the requirements of 31 U.S.C. [§ 1301(c)]," and further noted the apparent link between the discussion in House Report 1040 and the appearance of the new provision. Id. at 859. See also 58 Comp. Gen. 321 (1979) and B-207792, August 24, 1982. Thus, the appropriation act will have to expressly repeat the multiple-year or no-year language of the authorization, or at least expressly refer to the specific section of the authorizing statute in which it appears.

Changes in the law from year to year may produce additional complications. For example, the National Historic Preservation Act (authorization) provided that funds appropriated and apportioned to states would remain available for obligation for three fiscal years, after which time any unobligated balances would be reapportioned. This amounted to a no-year authorization. For several years, appropriations to fund the program were made on a no-year basis, thus permitting implementation of the authorization provision. Starting with FY 1978, however, the appropriation act was changed and the funds were made available for two fiscal years. This raised the question of whether the appropriation act had the effect of overriding the apparently conflicting authorizing language, or if it meant merely that reapportionment could occur after two fiscal years instead of three, thus effectively remaining a no-year appropriation.

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GAO concluded that the literal language and plain meaning of the appropriation act must govern. In addition to the explicit appropriation language, the appropriation acts contained the general provision restricting availability to the current fiscal year unless expressly provided otherwise therein. Therefore, any funds not obligated by the end of the two-year period would expire and could not be reapportioned. B-151087, September 15, 1981; B-151087, February 17, 1982.

For purposes of the rule of 50 Comp. Gen. 857 and its progeny, it makes no difference whether the authorization is in an annual appropriations authorization act or in permanent enabling legislation. It also appears to make no difference whether the authorization merely authorizes the longer period of availability or directs it. See, for example, 58 Comp. Gen. 321 (1979), in which the general provision restricting availability to the current fiscal year, as the later expression of congressional intent, was held to override 25 U.S.C. § 13a, which provides that the unobligated balances of certain Indian assistance appropriations "shall remain available for obligation and expenditure" for a second fiscal year. Similarly, in Dabney v. Reagan, No. 82 Civ. 2231-CSH (S.D.N.Y. March 21, 1985), 1985 WL 443, the court held that a 2-year period of availability specified in appropriation acts would override a "mandatory" no-year authorization contained in the Solar Energy and Energy Conservation Bank Act.

e. Authorization Enacted After Appropriation

Our discussion thus far has, for the most part, been in the context of the normal sequence—that is, the authorization act is passed before the appropriation act. Sometimes, however, consideration of the authorization act is delayed and it is not enacted until after the appropriation act. Determining the relationship between the two acts involves application of the same general principles we have been applying when the acts are enacted in the normal sequence.

The first step is to attempt to construe the statutes together in some reasonable fashion. To the extent this can be done, there is no real conflict, and the reversed sequence will in many cases make no difference. Earlier, for example, we discussed the rule that a specific earmark in an authorization act must be followed when the related appropriation is an unspecified lump sum. In two of the cases cited for that proposition—B-220682, February 21, 1986, and B-193282, December 21, 1978—the appropriation act had been

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enacted prior to the authorization, a factor which did not affect the outcome.

In B-193282, for example, the 1979 Justice Department authorization act authorized a lump-sum appropriation to the Immigration and Naturalization Service and provided that $2 million "shall be available" for the investigation and prosecution of certain cases involving alleged Nazi war criminals. The 1979 appropriation act made a lump-sum appropriation to the INS but contained no specific mention of the Nazi war criminal item. The appropriation act was enacted on October 10, 1978, but the authorization act was not enacted until November. In response to a question as to the effect of the authorization provision on the appropriation, the Comptroller General advised that the two statutes could be construed harmoniously, and that the $2 million earmarked in the authorization act could be spent only for the purpose specified. It was further noted that the $2 million represented a minimum but not a maximum. B-193282, December 21, 1978, amplified by B-193282, January 25, 1979. This is the same result that would have been reached if the normal sequence had been followed.

Similarly, in B-226389, November 14, 1988, a provision in the 1987 Defense Appropriation Act prohibited the Navy from including certain provisions in ship maintenance contracts. The 1987 authorization act, enacted after the appropriation, amended a provision in title 10 of the United States Code to require the prohibited provisions. Application of the "last in time" rule would have negated the appropriation act provision. However, it was possible to give effect to both provisions by construing the appropriation restriction as a temporary exemption from the permanent legislation in the authorization act. Again, this is the same result that would have been reached if the authorization act were enacted first.

If the authorization and appropriation cannot be reasonably reconciled, the "last in time" rule will apply just as it would under the normal sequence, except here the result will be different because the authorization is the later of the two. A 1989 case will illustrate. The 1989 Treasury Department appropriation act contained a provision prohibiting the placing of certain components of the Department under the oversight of the Treasury Inspector General. A month later, Congress enacted legislation placing those components under the Inspector General's jurisdiction and transferring their internal audit staffs to the Inspector General "notwithstanding any

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other provision of law." But for the "notwithstanding" clause, it might have been possible to use the same approach as in B-226389 and find the appropriation restriction a temporary exemption from the new permanent legislation. In view of that clause, however, GAO found that the two provisions could not be reconciled, and concluded that the Inspector General legislation, as the later enactment, superseded the appropriation act provision. B-203900, February 2, 1989.

Just as with any other application of the "last in time" rule, the later enactment prevails only to the extent of the irreconcilable conflict. B-61178, October 21, 1946 (specific limitations in appropriation act not superseded by after-enacted authorization absent indication that authorization was intended to alter provisions of prior appropriation).

Sometimes, application of the standard principles fails to produce a simple answer. For example, Congress appropriated $75 million for FY 1979 for urban formula grants "as authorized by the Urban Mass Transportation Act of 1964." When the appropriation was enacted, legislation was pending—and was enacted three months after the appropriation—repealing the existing formula and replacing it with a new and somewhat broader formula. The new formula provision specified that it was to be applicable to "sums appropriated pursuant to subparagraph (b) of this paragraph." On the one hand, since the original formula had been repealed, it could no longer control the use of the appropriation. Yet on the other hand, funds appropriated three months prior to passage of the new formula could not be said to have been appropriated "pursuant to" the new act. Hence, neither formula was clearly applicable to the $75 million. The Comptroller General concluded that the $75 million earmarked for the grant program had to be honored, and that it should be distributed in accordance with those portions of the new formula that were "consistent with the terms of the appropriation," that is, the funds should be used in accordance with those elements of the new formula that had also been reflected in the original formula. B-175155, July 25, 1979.

f. Two Statutes Enacted on Same Day

The Supreme Court has said that the doctrine against repeal by implication is even more forceful "where the one Act follows close upon the other, at the same session of the legislature." Morf v. Bingaman, 298 U.S. 407, 414 (1936). This being the case, the doctrine reaches perhaps its strongest point, and the "last in time" rule is

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correspondingly at its weakest, when both statutes are enacted on the same day. Except in the very rare case in which the intent of one statute to affect the other is particularly manifest, it makes little sense to apply a "last in time" concept where the time involved is a matter of hours, or as in one case (B-79243, September 28, 1948), seven minutes. Thus, the starting point is the presumption—applicable in all cases but even stronger in this situation—that Congress intended both statutes to stand together. 67 Comp. Gen. 332, 335 (1988); B-204078.2, May 6, 1988.

When there is an apparent conflict between an appropriation act and another statute enacted on the same day, the approach is to make every effort to reconcile the statutes so as to give maximum effect to both. In some cases, it will be found that there is no real conflict. In 67 Comp. Gen. 332, for example, one statute authorized certain Commodity Credit Corporation appropriations to be made in the form of current, indefinite appropriations, while the appropriation act, enacted on the same day, made line-item appropriations. There was no conflict because the authorization provision was a directive to the Congress itself which Congress was free to disregard, subject to a possible point of order, when making the actual appropriation. Similarly, there was no inconsistency between an appropriation act provision which required that Panama Canal Commission appropriations be spent only in conformance with the Panama Canal Treaty of 1977 and its implementing legislation, and an authorization act provision, enacted on the same day, requiring prior specific authorizations. B-204078.2, May 6, 1988.

In other cases, applying traditional rules of statutory construction will produce reconciliation. For example, if one statute can be said to be more specific than the other, they can be reconciled by applying the more specific provision first, with the broader statute then applying to any remaining situations. See B-231662, September 1, 1988; B-79243, September 28, 1948.

Legislative history may also help. In B-207186, February 10, 1989, for example, authorizing legislation extended the life of the Solar Bank to March 15, 1988. The 1988 appropriation, enacted on the same day, made a 2-year appropriation for the Bank. Not only were there no indications of any intent for the appropriation to have the effect of extending the Bank's life, there were specific indications to the contrary. Thus, GAO regarded the appropriation as available, in theory for the full 2-year period, except that the authority for

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anyone to obligate the appropriation would cease when the Bank went out of existence.

The most extreme situation, and one in which the "last in time" rule by definition cannot possibly apply, is two conflicting provisions in the same statute. Even here, the approaches outlined above will usually prove successful. See, e.g., B-211306, June 6, 1983. We have found only one case, 26 Comp. Dec. 534 (1920), in which two provisions in the same act were found irreconcilable. One provision in an appropriation act appropriated funds to the Army for the purchase of land; another provision a few pages later in the same act expressly prohibited the use of Army appropriations for the purchase of land. The Comptroller of the Treasury concluded, in a very brief decision, that the prohibition nullified the appropriation. The advantage of this result, although not stated this way in the decision, is that Congress would ultimately have to resolve the conflict and it is easier to make expenditures that have been deferred than to recoup money after it has been spent.

g. Ratification by Appropriation

"Ratification by appropriation" is the doctrine by which Congress can, by the appropriation of funds, confer legitimacy on an agency action which was questionable when it was taken. Clearly Congress may ratify that which it could have authorized. Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 301-02 (1937). It is also settled that Congress may manifest its ratification by the appropriation of funds. Greene v. McElroy, 360 U.S. 474, 504-06 (1959); Ex Parte Endo, 323 U.S. 283, 303 n.24 (1944); Brooks v. Dewar, 313 U.S. 354, 360-61 (1941).

Having said this, however, we must also emphasize that "ratification by appropriation is not favored and will not be accepted where prior knowledge of the specific disputed action cannot be demonstrated clearly." D.C. Federation of Civic Associations v. Airis, 391 F.2d 478, 482 (D.C. Cir. 1968); Associated Electric Cooperative, Inc. v. Morton, 507 F.2d 1167, 1174 (D.C. Cir. 1974), cert. denied, 423 U.S. 830. Thus, a simple lump-sum appropriation, without more, will generally not afford sufficient basis to find a ratification by appropriation. Endo, 323 U.S. at 303 n.24; Airis, 391 F.2d at 481-82; Wade v. Lewis, 561 F. Supp. 913, 944 (N.D. Ill. 1983); B-213771, July 10, 1984. The appropriation "must plainly show a purpose to bestow the precise authority which is claimed." Endo, 323 U.S. at 303 n.24.

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Some courts have used language which, when taken out of context, implies that appropriations cannot serve to ratify prior agency action. E.g., Concerned Residents of Buck Hill Falls v. Grant, 537 F.2d 29, 35 n.12 (3d Cir. 1976). Nevertheless, while the doctrine may not be favored, it does exist. We turn now to some specific situations in which the doctrine has been accepted or rejected.

Presidential reorganizations have generated perhaps the largest number of cases. Generally, when the President has created a new agency or has transferred a function from one agency to another, and Congress subsequently appropriates funds to the new agency or to the old agency for the new function, the courts have found that the appropriation ratified the Presidential action. Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 116 (1947); Isbrandtsen-Moller Co. v. United States, 300 U.S. 139, 147 (1937). The transfer to the Equal Employment Opportunity Commission in 1978 of enforcement responsibility for the Age Discrimination in Employment Act and the Equal Pay Act produced a minor flood of litigation. The cases were complicated by the existence of a legislative veto issue, with the ratification issue having to be faced only if the reorganization authority were found severable from the legislative veto. Although the courts were not uniform, a clear majority found that the subsequent appropriation of funds to the EEOC ratified the transfer. EEOC v. Dayton Power & Light Co., 605 F. Supp. 13 (S.D. Ohio 1984); EEOC v. Delaware Dept. of Health & Social Services, 595 F. Supp. 568 (D. Del. 1984); EEOC v. New York, 590 F. Supp. 37 (N.D.N.Y. 1984); EEOC v. Radio Montgomery, Inc., 588 F. Supp. 567 (W.D. Va. 1984); EEOC v. City of Memphis, 581 F. Supp. 179 (W.D. Tenn. 1983); Muller Optical Co. v. EEOC, 574 F. Supp. 946 (W.D. Tenn. 1983), aff'd on other grounds, 743 F.2d 380 (6th Cir. 1984). Contra, EEOC v. Martin Industries, 581 F. Supp. 1029 (N.D. Ala. 1984), appeal dismissed, 469 U.S. 806; EEOC v. Allstate Ins. Co., 570 F. Supp. 1224 (S.D. Miss. 1983), appeal dismissed, 467 U.S. 1232. Congress resolved any doubt by enacting legislation in 1984 to expressly ratify all prior reorganization plans implemented pursuant to any reorganization statute.[45]

Another group of cases has refused to find ratification by appropriation for proposed construction projects funded under lump-sum appropriations where the effect would be either to expand the

[45]Pub. L. No. 98-532, 98 Stat. 2705 (1984), 5 U.S.C. § 906 note.

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scope of a prior congressional authorization or to supply an authorization required by statute but not obtained. Libby Rod and Gun Club v. Poteat, 594 F.2d 742 (9th Cir. 1979); National Wildlife Federation v. Andrus, 440 F. Supp. 1245 (D.D.C. 1977); Atchison, Topeka and Santa Fe Ry. Co. v. Callaway, 382 F. Supp. 610 (D.D.C. 1974); B-223725, June 9, 1987.

A few additional cases in which ratification by appropriation was found are summarized below:

- The Tennessee Valley Authority had asserted the authority to construct power plants. TVA's position was based on an interpretation of its enabling legislation which the court found consistent with the purpose of the legislation although the legislation itself was ambiguous. The appropriation of funds to TVA for power plant construction ratified TVA's position. Young v. TVA, 606 F.2d 143 (6th Cir. 1979), cert. denied, 445 U.S. 942.
- The authority of the Postmaster General to conduct a mail transportation experiment was ratified by the appropriation of funds to the former Post Office Department under circumstances showing that Congress was fully aware of the experiment. The court noted that existing statutory authority was broad enough to encompass the experiment, and nothing prohibited it. Atchison, Topeka and Santa Fe Ry. Co. v. Summerfield, 229 F.2d 777 (D.C. Cir. 1955), cert. denied, 351 U.S. 926.
- The authority of the Department of Justice to retain private counsel to defend federal officials in limited circumstances, while not explicitly provided by statute, is regarded as ratified by the specific appropriation of funds for that purpose. 2 Op. Off. Legal Counsel 66 (1978).

Note that in all of the cases in which ratification by appropriation was approved, the agency had at least an arguable legal basis for its action. See also Airis, 391 F.2d at 481 n.20; B-232482, June 4, 1990. The doctrine has not been used to excuse violations of law. Also, when an agency action is constitutionally suspect, the courts will require that congressional action be particularly explicit. Greene v. McElroy, 360 U.S. at 506-07; EEOC v. Martin Industries, 581 F. Supp. at 1033-37; Muller Optical Co. v. EEOC, 574 F. Supp. at 954.

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h. Repeal by Implication

We have on several occasions referred to the rule against repeal by implication. The leading case in the appropriations context is Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978). In that case, Congress had authorized construction of the Tellico Dam and Reservoir Project on the Little Tennessee River, and had appropriated initial funds for that purpose. Subsequently, Congress passed the Endangered Species Act of 1973. Under the provisions of that Act, the Secretary of the Interior declared the "snail darter," a three-inch fish, to be an endangered species. It was eventually determined that the Little Tennessee River was the snail darter's critical habitat and that completion of the dam would result in extinction of the species. Consequently, environmental groups and others brought an action to halt further construction of the Tellico Project. In its decision, the Supreme Court held in favor of the plaintiffs, notwithstanding the fact that construction was well under way and that, even after the Secretary of the Interior's actions regarding the snail darter, Congress had continued to make yearly appropriations for the completion of the dam project.

The appropriation involved was a lump-sum appropriation which included funds for the Tellico Dam but made no specific reference to it. However, passages in the reports of the appropriations committees indicated that those committees intended the funds to be available notwithstanding the Endangered Species Act. The Court held that this was not enough. The doctrine against repeal by implication, the Court said, applies with even greater force when the claimed repeal rests solely on an appropriation act.

> "When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden."

Id. at 190. Noting that "[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress" (id. at 191), the Court held that the unspecified inclusion of the Tellico Dam funds in a lump-sum appropriation was not sufficient to constitute a repeal by implication of the Endangered Species Act insofar as it related to that project.[46] In other words, the doctrine of ratification by appropriation we discussed in the preceding section does not apply, at least when the

[46]Less than four months after the Court's decision, Congress enacted legislation exempting the Tellico project from the Endangered Species Act. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 5, 92 Stat. 3751, 3761 (1978).

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appropriation is an otherwise unspecified lump sum, where the effect would be to change an existing statutory requirement.

TVA v. Hill is important because it is a clear and forceful statement from the Supreme Court. In terms of the legal principle involved, however, the Court was breaking little new ground. A body of case law from the lower courts had already laid the legal foundation. One group of cases, for example, had established the proposition that the appropriation of funds does not excuse non-compliance with the National Environmental Policy Act. Environmental Defense Fund v. Froehlke, 473 F.2d 346 (8th Cir. 1972); Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971); National Audubon Society v. Andrus, 442 F. Supp. 42 (D.D.C. 1977); Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 749 (E.D. Ark. 1971). Cases supporting the general proposition of TVA v. Hill in other contexts were also not uncommon. See Associated Electric Cooperative, Inc. v. Morton, 507 F.2d 1167 (D.C. Cir. 1974), cert. denied, 423 U.S. 830; D.C. Federation of Civic Associations v. Airis, 391 F.2d 478 (D.C. Cir. 1968); and Maiatico v. United States, 302 F.2d 880 (D.C. Cir. 1962).

Some subsequent cases applying the concept of TVA v. Hill (although not all citing that case) include Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984); 64 Comp. Gen. 282 (1985); B-208593.6, December 22, 1988; B-213771, July 10, 1984; B-204874, July 28, 1982; and B-193307, February 6, 1979. In B-204874, for example, the Comptroller General advised that the otherwise unrestricted appropriation of coal trespass receipts to the Bureau of Land Management did not implicitly amend or repeal the provisions of the Federal Land Policy and Management Act prescribing the use of such funds.

In reading the cases, one will encounter the occasional sweeping statement such as "appropriations acts cannot change existing law," National Audubon Society v. Andrus, 442 F. Supp. at 45. Such statements can be misleading, and should be read in the context of the facts of the particular case. It is clear from TVA v. Hill, together with its ancestors and its progeny, that Congress cannot legislate by legislative history. It seems equally clear that the appropriation of funds, without more, is not sufficient to overcome a statutory requirement. If, however, instead of an unrestricted lump sum, the

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appropriation in Hill had provided a specific line-item appropriation for the Tellico project, together with the words "notwithstanding the provisions of the Endangered Species Act," it is difficult to see how a court could fail to give effect to the express mandate of the appropriation.

Thus, the message is not that Congress cannot legislate in an appropriation act. It can, and we have previously cited a body of case law to that effect. The real message is that, if Congress wants to use an appropriation act as the vehicle for suspending, modifying, or repealing a provision of existing law, it must do so advisedly, speaking directly and explicitly to the issue.

i. Lack of Authorization

As we have previously noted, there is no general statutory requirement that appropriations be preceded by specific authorizations, although they are required in some instances. Where authorizations are not required by law, Congress may, subject to a possible point of order, appropriate funds for a program or object which has not been previously authorized or which exceeds the scope of a prior authorization, in which event the enacted appropriation, in effect, carries its own authorization and is available to the agency for obligation and expenditure. E.g., 67 Comp. Gen. 401 (1988); B-219727, July 30, 1985; B-173832, August 1, 1975.

It has also been held that, as a general proposition, the appropriation of funds for a program whose funding authorization has expired, or is due to expire during the period of availability of the appropriation, provides sufficient legal basis to continue the program during that period of availability, absent indication of contrary congressional intent. 65 Comp. Gen. 524 (1986); 65 Comp. Gen. 318, 320-21 (1986); 55 Comp. Gen. 289 (1975); B-131935, March 17, 1986; B-137063, March 21, 1966. The result in these cases follows in part from the fact that the total absence of appropriations authorization legislation would not have precluded the making of valid appropriations for the programs. E.g., B-202992, May 15, 1981. In addition, as noted, the result is premised on the conclusion, derived either from legislative history or at least the absence of legislative history to the contrary, that Congress did not intend for the programs to terminate.

There are limits on how far this principle can be taken, depending on the particular circumstances. One illustration is B-207186, February 10, 1989. A 1988 continuing resolution provided funds for

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the Solar Bank, to remain available until September 30, 1989. Legislation enacted on the same day provided for the Bank to terminate on March 15, 1988. Based in part on legislative history indicating the intent to terminate the Bank on the specified sunset date, GAO distinguished prior decisions in which appropriations were found to authorize program continuation, and concluded that the appropriation did not authorize continuation of the Solar Bank beyond March 15, 1988.

A device Congress has used on occasion to avoid this type of problem is an "automatic extension" provision, under which funding authorization is automatically extended for a specified time period if Congress has not enacted new authorizing legislation before it expires. An example is discussed in B-214456, May 14, 1984.

Questions concerning the effect of appropriations on expired or about-to-expire authorizations have tended to arise more frequently in the context of continuing resolutions. The topic is discussed further, including several of the cases cited above, in Chapter 8.

Where specific authorization is statutorily required, the case may become more difficult. In Libby Rod and Gun Club v. Poteat, 594 F.2d 742 (9th Cir. 1979), the court held that a lump-sum appropriation available for dam construction was not, by itself, sufficient to authorize a construction project for which specific authorization had not been obtained as required by 33 U.S.C. § 401. The court suggested that TVA v. Hill and similar cases do not "mandate the conclusion that courts can never construe appropriations as congressional authorization," although it was not necessary to further address that issue in view of the specific requirement in that case. Poteat, 594 F.2d at 745-46. The result would presumably have been different if Congress had made a specific appropriation "notwithstanding the provisions of 33 U.S.C. § 401." It should be apparent that the doctrines of repeal by implication and ratification by appropriation are relevant in analyzing issues of this type.

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D. Statutory Interpretation: Determining Congressional Intent

"[T]his is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." Greenwood v. United States, 350 U.S. 366, 374 (1956) (Frankfurter, J.).

1. The Goal of Statutory Construction [47]

As we have noted elsewhere, an appropriation can be made only by means of a statute. In addition to providing funds, the typical appropriation act includes a variety of general provisions. Anyone who works with appropriations matters will also have frequent need to consult authorizing and program legislation. It should thus be apparent that the interpretation of statutes is of critical importance to appropriations law.[48]

The objective of this section is to provide a brief overview, designed primarily for those who do not work extensively with legislative materials. The cases we cite are but a sampling, selected for illustrative purposes or for a particularly good judicial statement of a point. The literature in the area is voluminous, and readers who need more than we can provide are encouraged to consult one of the established treatises such as Sutherland's Statutes and Statutory Construction.

The goal of statutory construction is simply stated: to determine and give effect to the intent of the enacting legislature. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975); United States v. American Trucking Associations, Inc., 310 U.S. 534, 542 (1940); 55 Comp. Gen. 307, 317 (1975); 38 Comp. Gen. 229 (1958). While the goal may be simple, the means of achieving it are complex and often controversial. The primary vehicle for determining legislative intent is the language of the statute itself. When this does not suffice, there is an established body of principles, centering primarily on the use of legislative history, to aid in the effort.

[47]There is a technical distinction between "interpretation" (determining the meaning of words) and "construction" (application of words to facts). 2A Sutherland, Statutes and Statutory Construction § 45.04 (4th ed. 1984). The distinction, as Sutherland points out, has little practical value. We, as does Sutherland, use the terms interchangeably.

[48]"But if Congress has all the money of the United States under its control, it also has the whole English language to give it away with . . . ." 9 Op. Att'y Gen. 57, 59 (1857).

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At this point, it is important to recognize that the concept of "legislative intent" is in many cases a fiction. Where not clear from the statutory language itself, it is often impossible to ascribe an intent to Congress as a whole.[49] As we will note later, a committee report represents the views of that committee. Statements by an individual legislator represent the views of that individual. Either may, but do not necessarily or inherently, reflect a broader congressional perception. For this reason, the use of legislative history to determine congressional intent has come under increased criticism. To say this, however, is by no means to denigrate the process. Applying the complex maze of rules and "canons of construction," imperfect as the process may be, serves the essential purpose of providing a common basis for problem-solving.

This in turn is important for two reasons. First, everyone has surely heard the familiar statement that our government is a government of laws and not of men.[50] This means that you have a right to have your conduct governed and judged in accordance with identifiable principles and standards, not by the whim of the decisionmaker. Second, the law should be reasonably predictable. A lawyer's advice that a proposed action is or is not permissible amounts to a reasoned and informed judgment as to what a court is likely to do if the action is challenged. While this can never be an absolute guarantee, it once again must be based on identifiable principles and standards. Conceding its weaknesses, the law of statutory construction represents an organized approach for doing this.

2. The "Plain Meaning" Rule

"The Court's task is to construe not English but congressional English." Commissioner v. Acker, 361 U.S. 87, 95 (1959) (Frankfurter, J., dissenting).

By far the most important rule of statutory construction is this: You start with the language of the statute. Mallard v. United States District Court, 490 U.S. 296, 300 (1989). The primary vehicle for Congress to express its intent is the words it enacts into law. As stated in an early Supreme Court decision:

[49]E.g., United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318 (1897): "Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority of the members of each house in relation to the meaning of the act."

[50]"The government of the United States has been emphatically termed a government of laws, and not of men." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

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"The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used . . . ."

Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845). A somewhat better-known statement is from United States v. American Trucking Associations, 310 U.S. at 543:

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."

If the meaning is clear from the language of the statute, there is no need to resort to legislative history or any other extraneous source. This is the so-called "plain meaning" rule. If the meaning is "plain," you apply that meaning and that's the end of the inquiry. E.g., Mallard v. District Court, 490 U.S. 296; United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989); Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7, 12 (1983); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982); TVA v. Hill, 437 U.S. 153, 184 n.29 (1978); Ex parte Collett, 337 U.S. 55, 61 (1949); Caminetti v. United States, 242 U.S. 470, 485, 490 (1917); 56 Comp. Gen. 943 (1977); B-230656, April 4, 1988. In Mallard, for example, the Supreme Court held that a court may not require an unwilling attorney to represent an indigent litigant under a statute providing that a court "may request an attorney to represent" indigents in civil cases. "Request" simply does not mean "require."

One common-sense way to determine the plain meaning of a word is to consult a dictionary. E.g., Mallard, 490 U.S. at 301; American Mining Congress v. EPA, 824 F.2d 1177, 1183-84 & n.7 (D.C. Cir. 1987). As a perusal of any dictionary will show, words often have more than one meaning.[51] The "plain meaning" will be the ordinary, everyday meaning rather than some obscure usage. E.g., Mallard, 490 U.S. at 301; 38 Comp. Gen. 812 (1959). If a word has more than one ordinary meaning and the context of the statute does not make it clear which is being used, there may well be no "plain meaning" for purposes of that statute.

[51] "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.).

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The converse of the plain meaning rule is that it is legitimate and proper to resort to legislative history when the meaning of the statutory language is not plain on its face. Again, we start with an early Supreme Court passage, this one a famous statement by Chief Justice John Marshall:

"Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . . ."

United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805). See also United States v. Donruss Co., 393 U.S. 297, 302-03 (1969); Caminetti, 242 U.S. at 490 (legislative history "may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation").

Like all "rules" of statutory construction, the plain meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." Boston Sand and Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (Holmes, J.), quoted in Watt v. Alaska, 451 U.S. 259, 266 (1981). In another often-quoted statement, the Court said:

"When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'" [footnotes omitted].

United States v. American Trucking Associations, Inc., 310 U.S. 534, 543-44 (1940), quoted in, for example, Train v. Colorado Public Interest Research Group, 426 U.S. 1, 10 (1976).

Thus, it is generally accepted that the literal language of a statute will not be followed if it would produce a result demonstrably inconsistent with clearly expressed congressional intent. The case probably most frequently cited for this proposition is Church of the Holy Trinity v. United States, 143 U.S. 457 (1892), which gives several interesting examples. One of those examples is United States v. Kirby, 74 U.S. (7 Wall.) 482 (1868), in which the Court held that a statute making it a criminal offense to knowingly and wilfully obstruct or retard a driver or carrier of the mails did not apply to a sheriff arresting a mail carrier who had been indicted for murder. Another is an old English ruling that a statute making it a felony to break out of jail did not apply to a prisoner who broke out because the jail was on fire. Holy Trinity, 143 U.S. at 460-61. An example

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from early administrative decisions might be 24 Comp. Dec. 775 (1918), holding that an appropriation for "messenger boys" was available to hire "messenger girls."[52] See also "Errors in Statutes" later in this chapter.

In cases subsequent to Holy Trinity, the Court has emphasized that departures from the plain meaning rule are justified only in "rare and exceptional circumstances," such as the illustrations used in Holy Trinity. Crooks v. Harrelson, 282 U.S. 55, 60 (1930). See also United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242 (1989); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982); TVA v. Hill, 437 U.S. 153, 187 n.33 (1978) (citing Crooks v. Harrelson with approval).

The exception to the plain meaning rule is also sometimes phrased in terms of avoiding "absurd consequences." E.g., United States v. Ryan, 284 U.S. 167, 175 (1931). As the dissenting opinion in TVA v. Hill points out (437 U.S. at 204 n.14), there is a bit of confusion in this respect in that Crooks—again, cited with approval by the majority in TVA v. Hill—explicitly states that avoiding absurd consequences is not enough, although the Court has used the "absurd consequence" formulation in post-Crooks cases such as Ryan. In any event, as a comparison of the majority and dissenting opinions in TVA v. Hill will demonstrate, the "absurd consequences" test is not always easy to apply in that what strikes one person as absurd may be good law to another.

3. Use of Legislative History

a. Uses and Limitations

The term "legislative history" refers to the body of congressionally-generated written documents relating to a bill from the time of introduction to the time of enactment. Legislative history is always relevant in the sense that it is never "wrong" to look at it. Thus, most cases purporting to apply the plain meaning rule also review legislative history—TVA v. Hill being one good example—if for no other reason than to establish that nothing in that history contradicts the court's view of what the plain meaning is.

[52]The decision had nothing to do with equality of the sexes; the "boys" were all off fighting World War I.

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It is entirely proper to use legislative history to seek guidance on the purpose of a statute (to see, for example, what kinds of problems Congress wanted to address), or to confirm the apparent plain meaning, or to resolve ambiguities. A classic example of the latter is a statute using the words "science" or "scientific." Either term, without more, does not tell you whether the statute applies to the social sciences as well as the physical sciences. E.g., American Kennel Club, Inc. v. Hoey, 148 F.2d 920, 922 (2d Cir. 1945); B-181142, August 5, 1974 (GAO recommended term "science and technology" in a bill be defined to avoid this ambiguity). If the statute does not include a definition, you would look next to the legislative history.

The use becomes improper when the line is crossed from using legislative history to resolve things that are not clear from the statutory language to using it to rewrite the statute. The Comptroller General put it this way:

> "[A]s a general proposition, there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into the law that which is not there."

55 Comp. Gen. 307, 325 (1975). To pursue this thought with our "science" example, if a statute authorizing grants for scientific research explicitly defined the term as meaning the physical and biological sciences, grants for research in economics or sociology would not be authorized, notwithstanding any legislative history to the contrary. Or, to take an illustration in a lighter vein, suppose Congress enacted a law to "regulate the feeding of garbage to swine."[53] One might legitimately ask precisely what Congress intended to include in the term "garbage." If the statute did not include a definition, the legislative history might provide guidance.[54] On the other hand, if someone asked whether the law applied to farm animals other than swine (assuming anyone would consider feeding garbage to other farm animals), the answer would clearly be no, unless specified in the statute itself. One term is inherently ambiguous; the other is plain on its face.

[53]Yes, it exists. It's the Swine Health Protection Act, Pub. L. No. 96-468, 94 Stat. 2229 (1980), 7 U.S.C. §§ 3801-3813.

[54]In this case, the statute does define the term. See 7 U.S.C. § 3802(2).

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b. Components and Their Relative Weight

Legislative history falls generally into three categories: committee reports, floor debates, and hearings. For probative purposes, they bear an established relationship to one another. Let us emphasize before proceeding, however, that listing items of legislative history in an "order of persuasiveness" is merely a guideline. The evidentiary value of any piece of legislative history depends on its relationship to other available legislative history and, most importantly, to the language of the statute.

(1) Committee reports

The most authoritative single source of legislative history is the conference report. E.g., Squillacote v. United States, 739 F.2d 1208, 1218 (7th Cir. 1984); B-142011, April 30, 1971. This is especially true if the statutory language in question was drafted by the conference committee. The reason the conference report occupies the highest rung on the ladder is that it must be voted on and adopted by both Houses, and thus is the only legislative history document that can be said to reflect the will of both Houses. Commissioner v. Acker, 361 U.S. 87, 94 (1959) (Frankfurter, J., dissenting).

Next in sequence are the reports of the legislative committees which considered the bill and reported it out to their respective Houses. The Supreme Court has consistently been willing to rely on committee reports when otherwise appropriate. E.g., Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474 (1921); United States v. St. Paul, Minneapolis & Manitoba Ry. Co., 247 U.S. 310, 318 (1918); Lapina v. Williams, 232 U.S. 78, 90 (1914).

However, material in committee reports, even a conference report, will ordinarily not be used to controvert clear statutory language. Squillacote, 739 F.2d at 1218; Hart v. United States, 585 F.2d 1025 (Ct. Cl. 1978); B-33911/B-62187, July 15, 1948.

Committee reports, as with all legislative history, must be used with caution. The following two passages reflect recent criticism of excessive reliance on committee reports. The first is from the opinion of the Court of Claims in Hart v. United States, 585 F.2d at 1033, quoted in Conlon v. United States, 8 Cl. Ct. 30, 33 (1985):

"We note that with the swiftly growing use of the staff system by Congress, many congressional documents may be generated that are not really considered fully by each or perhaps by any legislator. Thus, committee reports and

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the like are perhaps less trustworthy sources of congressional intent than they used to be, and less than the actual wording of the legislation, which one would hope received more thorough consideration prior to enactment. If there is inadvertent error either in the statute or in the committee report, the offender is more likely to be the latter, surely."

The second is an excerpt from a colloquy between Senators Armstrong and Dole which took place on July 19, 1982:

"Mr. ARMSTRONG. Mr. President, did members of the Finance Committee vote on the committee report?

"Mr. DOLE. No.

"Mr. ARMSTRONG. Mr. President, the reason I raise the issue is not perhaps apparent on the surface . . . . The report itself is not considered by the Committee on Finance. It was not subject to amendment by the Committee on Finance. It is not subject to amendment now by the Senate.

. . . .

"I only wish the record to reflect that this is not statutory language. It is not before us. If there were matter within this report which was disagreed to by the Senator from Colorado or even by a majority of all Senators, there would be no way for us to change the report. I could not offer an amendment tonight to amend the committee report.

". . .[F]or any jurist, administrator, bureaucrat, tax practitioner, or others who might chance upon the written record of this proceeding, let me just make the point that this is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute."[55]

Notwithstanding the imperfections of the system, in those cases where there is a need to resort to legislative history, committee reports remain generally recognized as the best source.

(2) Floor debates

Proceeding downward on the ladder, after committee reports come floor debates. Statements made in the course of floor debates have traditionally been regarded as suspect in that they are "expressive

[55]128 Cong. Rec. 16918-19 (1982), quoted in Hirschey v. Federal Energy Regulatory Commission, 777 F.2d 1, 7 n.1 (D.C. Cir. 1985) (Scalia, J., concurring).

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of the views and motives of individual members." Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474 (1921). In addition—

> "[I]t is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other . . . ."

United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318 (1897). Some of the earlier cases, such as Trans-Missouri Freight, indicate that floor debates should never be taken into consideration. Under the more modern view, however, they may be considered, the real question being the weight they should receive in various circumstances.

Floor debates are less authoritative than committee reports. Garcia v. United States, 469 U.S. 70, 76 (1984); Zuber v. Allen, 396 U.S. 168, 186 (1969); United States v. O'Brien, 391 U.S. 367, 385 (1968); United States v. United Automobile Workers, 352 U.S. 567, 585 (1957). It follows that they will not be regarded as persuasive if they conflict with explicit statements in more authoritative portions of legislative history such as committee reports. United States v. Wrightwood Dairy Co., 315 U.S. 110, 125 (1942); B-114829, June 27, 1975.

Debates will carry considerably more weight when they are the only available legislative history as, for example, in the case of a post-report floor amendment. Northeast Bancorp, Inc. v. Board of Governors, 472 U.S. 159, 169-70 (1985); Preterm, Inc. v. Dukakis, 591 F.2d 121, 128 (1st Cir. 1979), cert. denied, 441 U.S. 952. Indeed, the Preterm court suggested that "heated and lengthy debates" in which "the views expressed were those of a wide spectrum" of members might be more valuable in discerning congressional intent than committee reports "which represent merely the views of [the committee's] members and may never have come to the attention of Congress as a whole." Preterm, 591 F.2d at 133.

The weight to be given statements made in floor debates varies with the identity of the speaker. Thus, statements by legislators in charge of a bill, such as the pertinent committee chairperson, have been regarded as "in the nature of a supplementary report" and

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receive somewhat more weight. United States v. St. Paul, Minneapolis & Manitoba Ry. Co., 247 U.S. 310, 318 (1918). See also McCaughn v. Hershey Chocolate Co., 283 U.S. 488, 493-94 (1931) (statements by Members "who were not in charge of the bill" were "without weight"); Duplex v. Deering, 254 U.S. at 474-75; National Labor Relations Board v. Thompson Products, Inc., 141 F.2d 794, 798 (9th Cir. 1944). The Supreme Court's statement in St. Paul Ry. Co. gave rise to the entirely legitimate practice of "making" legislative history by preparing questions and answers in advance, to be presented on the floor and answered by the Member in charge of the bill.[56]

Statements by the sponsor of a bill are also entitled to somewhat more weight. E.g., Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951); Ex Parte Kawato, 317 U.S. 69, 77 (1942). However, they are not controlling. Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979).

Statements by the opponents of a bill expressing their "fears and doubts" generally receive little, if any, weight. Shell Oil Co. v. Iowa Dept. of Revenue, 488 U.S. 19, 29 (1988); Schwegmann, 341 U.S. at 394. However, even the statements of opponents may be "relevant and useful," although not authoritative, in certain circumstances, such as, for example, where the supporters of a bill make no response to opponents' criticisms. Arizona v. California, 373 U.S. 546, 583 n.85 (1963); Parlane Sportswear Co. v. Weinberger, 513 F.2d 835, 837 (1st Cir. 1975).

Where Senate and House floor debates suggest conflicting interpretations and there is no more authoritative source of legislative history available, it is legitimate to give weight to such factors as which House originated the provision in question and which House has the more detailed and "clear cut" history. Steiner v. Mitchell, 350 U.S. 247, 254 (1956); 49 Comp. Gen. 411 (1970).

(3) Hearings

Hearings occupy the bottom rung on the ladder. They are valuable for many reasons: they help define the problem Congress is

[56]The origin and use of this device were explained in a floor statement by former Senator Morse on March 26, 1964. See 110 Cong. Rec. 6423 (1964).

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addressing; they present opposing viewpoints for Congress to consider; and they provide the opportunity for public participation in the lawmaking process. As legislative history, however, they are the least persuasive form. The reason is that they reflect only the personal opinion and motives of the witness. It is impossible to attribute these opinions and motives to anyone in Congress, let alone Congress as a whole, unless more authoritative forms of legislative history expressly adopt them. As one court has stated, an isolated excerpt from the statement of a witness at hearings "is not entitled to consideration in determining legislative intent." Pacific Ins. Co. v. United States, 188 F.2d 571, 572 (9th Cir. 1951). "It would indeed be absurd," said another court, "to suppose that the testimony of a witness by itself could be used to interpret an act of Congress." SEC v. Collier, 76 F.2d 939, 941 (2d Cir. 1935).

There is one significant exception. Testimony by the government agency which recommended the bill or amendment in question, and which often helped draft it, is entitled to special weight. Shapiro v. United States, 335 U.S. 1, 12 n.13 (1948); SEC v. Collier, 76 F.2d at 941.

Also, testimony at hearings can be more valuable as legislative history if it can be demonstrated that the language of a bill was revised in direct response to that testimony. Relevant factors include the presence or absence of statements in more authoritative history linking the change to the testimony; the proximity in time of the change to the testimony; and the precise language of the change as compared to what was offered in the testimony. See Premachandra v. Mitts, 753 F.2d 635, 640-41 (8th Cir. 1985). See also Allen v. State Board of Elections, 393 U.S. 544, 566-68 (1969); SEC v. Collier, 76 F.2d at 940, 941.

c. Post-Enactment Statements

Observers of the often difficult task of discerning congressional intent occasionally ask, isn't there an easier way to do this? Why don't you just call the sponsor or the committee and ask what they had in mind? The answer is that post-enactment statements have virtually no weight in determining prior congressional intent. The reason is that it is impossible to demonstrate that the substance of a post hoc statement reflects the intent of the pre-enactment Congress, unless it can be corroborated by pre-enactment statements, in which event it would be unnecessary. Or, as the Supreme Court has said:

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"Since such statements cannot possibly have informed the vote of the legislators who earlier enacted the law, there is no more basis for considering them than there is to conduct postenactment polls of the original legislators."

Pittston Coal Group v. Sebben, 488 U.S. 105, 118-19 (1988).

This rule applies regardless of the identity of the speaker (sponsor, committee, committee chairman, etc.) and regardless of the form of the statement (report, floor statement, letter, affidavit, etc.). There are numerous cases in which the courts, and particularly the Supreme Court, have expressed the unwillingness to give weight to post-enactment statements. See, e.g., Bread Political Action Committee v. Federal Election Commission, 455 U.S. 577, 582 n.3 (1982); Quern v. Mandley, 436 U.S. 725, 736 n.10 (1978); Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974); United States v. Southwestern Cable Co., 392 U.S. 157, 170 (1968); Haynes v. United States, 390 U.S. 85, 87 n.4 (1968). GAO naturally follows the same principle. E.g., 54 Comp. Gen. 819, 822 (1975).

Even post-enactment material may be taken into consideration, despite its very limited value, when there is absolutely nothing else. See B-169491, June 16, 1980.

4. Some Other Principles

Many other principles or "canons" of construction exist to aid in the interpretation of statutes. Again, they are guidelines rather than rigid rules, and their application depends on their relationship to the totality of available evidence. We note here a few useful points.

a. Title

The title of a statute is relevant in determining its scope and purpose. By "title" in this context we mean the line on the slip law immediately following the words "An Act," as distinguished from the statute's "popular name," if any. For example, Public Law 97-177 is "An Act [t]o require the Federal Government to pay interest on overdue payments, and for other purposes" (title); section 1 says that the act may be cited as the "Prompt Payment Act" (popular name). A public law may or may not have a popular name; it always has a title.

The title of an act may not be used to change the plain meaning of the enacting clauses. It is evidence of the act's scope and purpose, however, and may legitimately be taken into consideration to

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resolve ambiguities. E.g., Lapina v. Williams, 232 U.S. 78, 92 (1914); White v. United States, 191 U.S. 545, 550 (1903); Church of the Holy Trinity v. United States, 143 U.S. 457, 462-63 (1892); United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805); 36 Comp. Gen. 389 (1956); 19 Comp. Gen. 739, 742 (1940). To illustrate, in Church of the Holy Trinity, the Court used the title of the statute in question, "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States," as support for its conclusion that the statute was not intended to apply to professional persons, specifically in that case, ministers and pastors.

The utility of this principle will, of course, depend on the degree of specificity in the title. Its value has been considerably diminished by the practice, found in many recent statutes such as the Prompt Payment Act noted above, of adding on the words "and for other purposes."

b. Punctuation

Punctuation may be taken into consideration when no better evidence exists, although punctuation or the lack of it should never be the controlling factor. For example, whether an "except" clause is or is not set off by a comma may help determine whether the exception applies to the entire provision or just to the portion immediately preceding the "except" clause. E.g., B-218812, January 23, 1987.

Punctuation was a relevant factor in the majority opinion in United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241-42 (1989). A number of additional cases, which we do not repeat here, are cited in Justice O'Connor's dissenting opinion, 489 U.S. at 249.

c. Effect of Omission

In the course of researching legislative history, you occasionally find a provision especially pertinent to your inquiry that was in the original version of a bill but was deleted later in the legislative process, or was proposed in a floor amendment but not adopted. It is tempting to draw inferences from the omission. For example, if an amendment is proposed to exempt a particular situation but is rejected, it might seem that Congress obviously did not want the exemption.

However, unless the legislative history explains the reason for the omission or deletion or the reason is indisputably clear from the

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context, drawing conclusions is little more than speculation. Perhaps Congress did not want that particular provision; perhaps Congress felt it was already covered in the same or other legislation. Absent an explanation, the effect of such an omission or deletion is simply inconclusive. Fox v. Standard Oil Co., 294 U.S. 87, 96 (1935); Southern Packaging and Storage Co. v. United States, 588 F. Supp. 532, 549 (D.S.C. 1984); 63 Comp. Gen. 498, 501-02 (1984); 63 Comp. Gen. 470, 472 (1984).

d. Similar Words in Same Statute

When Congress uses the same term in more than one place in the same statute, it is presumed that Congress intends for the same meaning to apply absent evidence to the contrary. The Comptroller General stated the principle as follows in 29 Comp. Gen. 143, 145 (1949), a case involving the term "pay and allowances":

> "[I]t is a settled rule of statutory construction that it is reasonable to assume that words used in one place in a legislative enactment have the same meaning in every other place in the statute and that consequently other sections in which the same phrase is used may be resorted to as an aid in determining the meaning thereof; and, if the meaning of the phrase is clear in one part of the statute and in others doubtful or obscure, it is in the latter case given the same construction as in the former."

A corollary to this principle is that when Congress uses a different term, however closely related, it intends a different meaning. E.g., 56 Comp. Gen. 655, 658 (1977) (term "taking line" presumed to have different meaning than "taking area" which had been used in several other sections in the same statute).

5. Retroactivity of Statutes

The traditional rule has been that statutes and amendments to statutes are construed to apply prospectively only (that is, from their date of enactment or other effective date if one is specified). Under this traditional rule, statutes are not construed to apply retroactively unless a retroactive construction is required by express language or by necessary implication or unless it is demonstrated that this is what Congress clearly intended. 38 Comp. Gen. 103 (1958); 34 Comp. Gen. 404 (1955); 28 Comp. Gen. 162 (1948); 16 Comp. Gen. 1051 (1937); 7 Comp. Gen. 266 (1927); 5 Comp. Gen. 381 (1925); 2 Comp. Gen. 267 (1922); 26 Comp. Dec. 40 (1919); B-205180, November 27, 1981; B-191190, February 13, 1980; B-162208, August 28, 1967. This has also been the traditional rule of the courts. E.g., Greene v. United States, 376 U.S. 149 (1964).

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A measure of confusion arose with the Supreme Court's decision in Bradley v. Richmond School Board, 416 U.S. 696 (1974). In that case, the Court held that when a law changes subsequent to a judgment of a lower court, whether the change is constitutional, statutory, judicial, or administrative, an appellate court must apply the new law, i.e., the law in effect when it renders its decision, unless applying the new law would produce manifest injustice or unless there is statutory direction or legislative history to the contrary. Relevant factors in making the "manifest injustice" determination are "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." Id. at 717. Whether Bradley was intended to replace the traditional rule, or whether it was merely a limited exception applicable to post-judgment changes for cases on appeal, was not clear. What did become clear was that, to the extent Bradley superseded the traditional rule, what had once been a fairly simple question had become a very complicated one. See, e.g., 64 Comp. Gen. 493 (1985), concluding that Bradley does not require retroactive application of the administrative offset provisions of the Debt Collection Act of 1982.

Subsequent action by the Supreme Court suggests that Bradley may be the exception rather than the rule. In a 1988 decision, the Court said:

> "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. E.g., Greene v. United States, 376 U.S. 149, 160 . . . ."

Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988).

More recently, the Court has acknowledged, but did not resolve, the "apparent tension" between Bradley and Bowen. Kaiser Aluminum & Chemical Corp. v. Bonjorno, ___ U.S. ___, 110 S. Ct. 1570, 1577 (1990). The Court of Appeals for the Federal Circuit has been more blunt, viewing the "tension" as an "irreconcilable conflict," and choosing to follow the Bowen rule. Sargisson v. United States, 913 F.2d 918, 922-23 (Fed. Cir. 1990). See also Mai v. United States, 22 Cl. Ct. 664, 667-68 (1991).

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Another line of cases has dealt with a different aspect of retroactivity. GAO is reluctant to construe a statute to retroactively abolish or diminish rights which had accrued before its enactment unless this was clearly the legislative intent. For example, the Tax Reduction Act of 1975 authorized $50 "special payments" to certain taxpayers. Legislation in 1977 abolished the special payments as of its date of enactment. GAO held in B-190751, April 11, 1978, that payments could be made where payment vouchers were validly issued before the cutoff date but lost in the mail. Similarly, payments could be made to eligible claimants whose claims had been erroneously denied before the cutoff but were later found valid. B-190751, September 26, 1980.

6. Errors in Statutes

a. Clerical or Typographical Errors

A statute may occasionally contain what is clearly a technical or typographical error which, if read literally, could alter the meaning of the statute or render execution effectively impossible. In such a case, if the legislative intent is clear, the intent will be given effect over the erroneous language.

In one situation, a supplemental appropriation act made an appropriation to pay certain claims and judgments as set forth in Senate Document 94-163. Examination of the documents made it clear that the reference should have been to Senate Document 94-164, as Senate Document 94-163 concerned a wholly unrelated subject. The manifest congressional intent was held controlling, and the appropriation was available to pay the items specified in Senate Document 94-164. B-158642-0.M., June 8, 1976. The same principle had been applied in a very early decision in which an 1894 appropriation provided funds for certain payments in connection with an election held on "November fifth," 1890. The election had in fact been held on November 4. Recognizing the "evident intention of Congress," the decision held that the appropriation was available to make the specified payments. 1 Comp. Dec. 1 (1894). See also 11 Comp. Dec. 719 (1905); 8 Comp. Dec. 205 (1901); 1 Comp. Dec. 316 (1895).

In another case, a statute authorized the Department of Agriculture to purchase "section 12" of a certain township for inclusion in a national forest. However, section 12 was already included within

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the national forest, and it was clear from the legislative history that the "section 12" was a printing error and the statute should have read "section 13." The Comptroller General concluded that the clear intent should be given effect, and that the Department was authorized to purchase section 13. B-127507, December 10, 1962.

More recently, Congress authorized awards for cost savings disclosures, and added the new provisions to the existing Government Employees Incentive Awards Act. The new authority was to terminate on September 30, 1984, but the sunset provision erroneously used the word "title" instead of "subchapter." Read literally, the entire Incentive Awards Act would have terminated at the end of FY 1984, a result that was clearly not intended. GAO concluded that the statute could be construed as if the correct word had been used. 64 Comp. Gen. 221 (1985). The mistake was corrected when Congress later extended the sunset date.

Courts have followed the same approach in correcting obvious printing or typographical errors. See Ronson Patents Corp. v. Sparklets Devices, Inc., 102 F. Supp. 123 (E.D. Mo. 1951); Fleming v. Salem Box Co., 38 F. Supp. 997 (D. Ore. 1940); Pressman v. State Tax Commission, 204 Md. 78, 102 A.2d 821 (1954); Johnson v. United States Gypsum Co., 217 Ark. 264, 229 S.W.2d 671 (1950); Baca v. Board of Commissioners, 10 N.M. 438, 62 P. 979 (1900).

b. Error in Amount Appropriated

A 1979 decision illustrates one situation in which the above rule will not apply. A 1979 appropriation act contained an appropriation of $36 million for the Inspector General of the Department of Health, Education, and Welfare. The bills as passed by both Houses and the various committee reports specified an appropriation of only $35 million. While it seemed apparent that the $36 million was the result of a typographical error, it was held that the language of the enrolled act signed by the President must control and that the full $36 million had been appropriated. The Comptroller General did, however, inform the Appropriations Committees. 58 Comp. Gen. 358 (1979). See also 2 Comp. Dec. 629 (1896); [1] Bowler, First Comp. Dec. 114 (1894).

However, if the amount appropriated is a total derived from adding up specific sums enumerated in the appropriation act, then the amount appropriated will be the amount obtained by the correct

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addition, notwithstanding the specification of an erroneous total in the appropriation act. 31 U.S.C. § 1302; 2 Comp. Gen. 592 (1923).

In recent years, Congress has on occasion authorized the Clerk of the House to make certain corrections in the printed enrollment of appropriation bills. E.g., Pub. L. No. 100-454, § 2(a)(2), 102 Stat. 1914 (1988) (FY 1989 appropriation bills). However, the authority is limited to spelling, punctuation, and stylistic corrections and does not extend to altering amounts.

7. Statutory Time Deadlines

Statutes may contain a variety of time deadlines directed at government agencies. Some, statutes of limitations being the prime example, are usually mandatory. Miss a statute of limitations and, with very few exceptions, you've lost the right to file the claim or commence the lawsuit. Other time deadlines may be either mandatory or "directory." If a time deadline on an agency action is directory only, missing the deadline will not deprive the agency of the authority to take the action.

The general rule followed in most circuits is:

> "[a] statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision."

St. Regis Mohawk Tribe v. Brock, 769 F.2d 37, 41 (2d Cir. 1985), cert. denied, 476 U.S. 1140, quoting Fort Worth Nat'l Corp. v. FSLIC, 469 F.2d 47, 58 (5th Cir. 1972).[57]

The St. Regis case concerned a provision in the Comprehensive Employment and Training Act which required the Secretary of Labor to investigate complaints alleging improprieties and to issue a final determination not later than 120 days after receiving the complaint. The issue was whether failure to meet the 120-day deadline barred the government from attempting to recover misused funds. Applying the above rule, the court held that it did not.

The issue was litigated in other circuits. The circuits split, St. Regis representing the majority view. One of the minority cases went to the Supreme Court which, in Brock v. Pierce County, 476 U.S. 253

[57] St. Regis cites several additional cases for the proposition.

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(1986), agreed with the St. Regis result. While the Supreme Court treated favorably the rule espoused in St. Regis, it stopped short of expressly adopting it. The Court first noted that "[t]his Court has never expressly adopted the Circuit precedent [the St. Regis rule] upon which the Secretary relies. However, our decisions supply at least the underpinnings of those precedents." Id. at 259-60. The Court then cautioned, however, that "[w]e need not, and do not, hold that a statutory deadline for agency action can never bar later action unless that consequence is stated explicitly in the statute." Id. at 262 n.9. Noting that treating the deadline as mandatory would prejudice important public rights (the right of the taxpayers to guard against misuse of public funds), the Court held that the mere use of the word "shall" in the statute did not make it mandatory. Id. at 261-62.

Thus, while the St. Regis rule remains a reasonably reliable guideline, its precise parameters await future development. At a minimum, it would seem, the statutory deadline must be cast in mandatory terms. Failure to specify a consequence of missing the deadline will be relevant, but perhaps can be overcome by persuasive legislative history indicating a contrary intent. Another relevant factor is the nature of the rights or interests involved, public or private, and the extent to which they will be affected by the mandatory/directory determination.

One context in which statutory deadlines are more likely to be found directory is the termination of temporary public commissions. In Ralpho v. Bell, 569 F.2d 607 (D.C. Cir. 1977), for example, the court held that a statutory time limit on the existence of the Micronesian Claims Commission was directory and did not preclude further consideration of claims which had been denied on allegedly improper grounds.

A temporary commission is frequently required to submit a report as its final official act. The enabling statute often provides a deadline for submitting the report, with the commission to go out of existence a specified time period after submitting the report. GAO has found these deadlines to be directory only, concluding that a commission which fails to submit its final report on time is authorized to continue in existence, the termination period being measured from the actual submission of the report. B-225832.6, July 8, 1987; B-211021, May 3, 1984. As the 1984 decision points out, the

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commission does not thereby acquire permanent existence; Congress retains control through oversight and the appropriations process.

As noted, a relevant factor in assessing the effect of a statutory deadline is the nature and effect of any rights or interests affected. In some circumstances, missing a deadline may provide the basis for challenging agency action in denying benefits that would have been available had the agency acted in a more timely fashion. Thus, one court held that the Environmental Protection Agency was required, to the extent of available budget authority, to fund certain water quality grant applications submitted after the end of the fiscal year where the delay was attributable to the agency's failure to issue guidelines within the statutorily-prescribed time period. National Association of Regional Councils v. Costle, 564 F.2d 583 (D.C. Cir. 1977). In determining the effect of a statutory time limit, "a court should consider the purpose and design of the entire statutory program of which it is a part." Id. at 591. The same result would probably not apply under the Stewart B. McKinney Homeless Assistance Act since the legislation provided for the use of guidelines under prior programs during the interim period until new guidelines were issued. Delay in issuing the McKinney guidelines would thus not have the same effect as in Costle. B-229004-O.M., February 18, 1988.

In sum, a statutory time deadline on agency action will generally be regarded as directory rather than mandatory where the statute does not specify a consequence of non-compliance. It may be found mandatory, however, if there is persuasive legislative history indicating that intent, or if significant rights or interests would be prejudiced by failing to enforce the deadline.

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Chapter 3

Agency Regulations and Administrative Discretion

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Agency Regulations and Administrative Discretion

This chapter deals with certain topics in administrative law which, strictly speaking, are not "appropriations law" or "fiscal law." Nevertheless, the material covered is so pervasive in all areas of federal law, appropriations law included, that a brief treatment in this publication is warranted. We caution that it is not our purpose to present an administrative law treatise, but rather to highlight some important "cross-cutting" principles that appear in various contexts in many other chapters. The case citations should be viewed as an illustrative sampling.

A. Agency Regulations

As a conceptual starting point, agency regulations fall into two broad categories. First, every agency head has the authority, largely inherent but also authorized generally by 5 U.S.C. § 301,[1] to issue regulations to govern the internal affairs of his or her agency. This statute is nothing more than a grant of authority for what are called "housekeeping" regulations. Chrysler Corp. v. Brown, 441 U.S. 281, 309 (1979); NLRB v. Capitol Fish Co., 294 F.2d 868, 875 (5th Cir. 1961). It confers "administrative power only." United States v. George, 228 U.S. 14, 20 (1913); 54 Comp. Gen. 624, 626 (1975). Regulations in this category may include such things as conflicts of interest, employee travel, or delegations to organizational components.

In addition, when Congress enacts a new program statute, it typically does not prescribe every detail of its implementation but leaves it to the administering agency to do so by regulation.[2] There are many reasons for this. It is often not possible to foresee in advance every detail that ought to be covered. In other cases, there may be a need for flexibility in implementation that is simply not practical to detail in the legislation. In many cases, Congress prefers to legislate a policy in terms of broad standards, leaving the details of implementation to the agency with program expertise.

[1] "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. . . ."

[2] Regulations of this type have traditionally been called "statutory regulations," as distinguished from "administrative regulations," such as those issued under 5 U.S.C. § 301. E.g., 21 Comp. Dec. 482 (1915). While the statutory vs. administrative terminology may be convenient shorthand in some contexts, its significance has been largely superseded by the Administrative Procedure Act. Courts today occasionally use the term "administrative regulations" in the broader sense of agency regulations in general. E.g., Rodway v. United States Dep't of Agriculture, 514 F.2d 809, 814 (D.C. Cir. 1975).

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Finally, it is much easier for an agency to amend a regulation to reflect changing circumstances than it would be for Congress to have to go back and amend the basic legislation. Thus, agency regulations have become an increasingly vital element of federal law.

1. The Administrative Procedure Act

The key statute governing the issuance of agency regulations is the Administrative Procedure Act (APA), originally enacted in 1946 and now found in Title 5 of the United States Code, primarily sections 551–559 (administrative provisions) and 701–706 (judicial review).[3] The APA deals with two broad categories of administrative action: rulemaking and adjudication. Our concern here is solely with the rulemaking portions.

a. The Informal Rulemaking Process

The APA uses the term "rule" rather than "regulation." In the context of the APA, the issuance of a regulation is called "rulemaking." The term "rule" is given a very broad definition in 5 U.S.C. § 551(4):

> " '[R]ule' means the whole or any part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ."

It is apparent from this definition that a great many agency issuances, regardless of what the agency chooses to call them, are "rules."

The APA prescribes two types of rulemaking, which have come to be known as "formal" and "informal." Formal rulemaking under the APA involves a trial-type hearing (witnesses, depositions, transcript, etc.) and is governed by 5 U.S.C. §§ 556 and 557. This more rigorous, and today relatively uncommon, procedure is required only where the governing statute requires that the proceeding be "on the record." 5 U.S.C. § 553(c); United States v. Florida East Coast Railway Co., 410 U.S. 224 (1973).

Most agency regulations are the product of informal rulemaking—the notice and comment procedures prescribed by 5 U.S.C. § 553. The

[3]For an excellent summary of the APA together with a useful bibliography, see Administrative Conference of the United States, Federal Administrative Procedure Sourcebook (1985). The Sourcebook is also particularly useful because it reprints in full the 1947 Attorney General's Manual on the Administrative Procedure Act, which has been called the government's "most authoritative interpretation of the APA." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 218 (1988) (Justice Scalia, concurring).

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first step in this process is the publication of a proposed regulation in the Federal Register. The Federal Register is a daily publication printed and distributed by the Government Printing Office. 44 U.S.C. § 1504.[4] The agency then allows a period of time during which interested parties may participate in the process, usually by submitting written comments although oral presentations are sometimes permitted. Next, the agency considers and evaluates the comments submitted, and determines the content of the final regulation, which is also published in the Federal Register, generally at least 30 days prior to its effective date. 5 U.S.C. §§ 553(b)–(d).

Publication of a document in the Federal Register constitutes legal notice of its contents. 44 U.S.C. § 1507; Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); 63 Comp. Gen. 293 (1984).

The agency is also required to publish a "concise general statement" of the basis and purpose of the regulation. 5 U.S.C. § 553(c). This is commonly known as the preamble, the substance of which appears in the Federal Register under the heading "Supplementary Information."

The preamble is extremely important since it is the primary means for a reviewing court to evaluate compliance with section 553. The courts have cautioned not to read the terms "concise" and "general" too literally. Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968). Rather, the preamble must be adequate:

> "to respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule."

Rodway v. United States Dep't of Agriculture, 514 F.2d 809, 817 (D.C. Cir. 1975). See also Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir. 1977), cert. denied, 434 U.S. 829; Automotive Parts, 407 F.2d at 338. As one court stated, "the agencies do not have quite the prerogative of obscurantism reserved to the legislatures." United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2d Cir. 1977). The preamble does not, however, have to

[4]Indispensable though it may be, the Federal Register has been termed "voluminous and dull." Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 387 (1947) (Justice Jackson, dissenting).

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address every item included in the comments. Id.; Automotive Parts, 407 F.2d at 338.

The preamble normally accompanies publication of the final regulation, although this is not required as long as it is sufficiently close in time to make it clear that it is in fact contemporaneous and not a "post hoc rationalization." Action on Smoking and Health v. Civil Aeronautics Board, 713 F.2d 795, 799 (D.C. Cir. 1983); Tabor v. Joint Board for Enrollment of Actuaries, 566 F.2d 705, 711 n.14 (D.C. Cir. 1977).

Apart from questions of judicial review, the preamble serves another highly important function. It provides, as its title in the Federal Register indicates, useful supplementary information. Viewed from this perspective, the preamble serves the same purpose with respect to a regulation as legislative history does with respect to a statute.[5]

Codifications of agency regulations are issued in bound and permanent form in the Code of Federal Regulations. The "C.F.R." is supplemented or republished at least once a year. 44 U.S.C. § 1510. Unfortunately, with rare exceptions, the preamble does not accompany the regulations into the C.F.R., but is found only in the original Federal Register issuance. The C.F.R. does, however, give the appropriate Federal Register citation. Regulations on the use of the Federal Register and the C.F.R. are found in 1 C.F.R. Chapter I.

Agencies may supplement the APA procedures, but are not required to unless directed by statute. The Supreme Court has admonished that a court should:

"not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good."

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 549 (1978). The Court repeated its caution the following year in Chrysler Corp. v. Brown, 441 U.S. 281, 312-13 (1979).

[5]The "legislative history" analogy may be extended to unpublished agency documents used in the preparation of a regulation, which may be relevant in resolving ambiguities in the regulation. See Deluxe Check Printers, Inc. v. United States, 5 Cl. Ct. 498, 500-01 (1984).

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The Court of Appeals for the District of Columbia Circuit, in Home Box Office, Inc. v. FCC, 567 F.2d at 35-36, has provided the following summary of the APA's informal rulemaking requirements:

"The APA sets out three procedural requirements: notice of the proposed rulemaking, an opportunity for interested persons to comment, and 'a concise general statement of [the] basis and purpose' of the rules ultimately adopted. . . . As interpreted by recent decisions of this court, these procedural requirements are intended to assist judicial review as well as to provide fair treatment for persons affected by a rule. . . . To this end there must be an exchange of views, information and criticism between interested persons and the agency. . . . Consequently, the notice required by the APA, or information subsequently supplied to the public, must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based. . . . Moreover, a dialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points raised by the public. . . ."

Against this backdrop, the Comptroller General has found that an agreement to issue, with specified content, a regulation otherwise subject to the APA, not only violates the APA but is invalid as contrary to public policy. B-212529, May 31, 1984. In effect, a promise to issue a regulation with specified content amounts to a promise to disregard any adverse public comments received, clearly a violation of the APA.

Prior to legislation enacted on November 29, 1990, proposed regulations were usually drafted by agency staff, based on the agency's own expertise. Nothing prohibited agencies from consulting with interested parties at this preliminary stage, but, with few exceptions, it was rarely done. The few agencies which did experiment with "negotiated rulemaking" found that it reduced the potential for court challenges to the final regulations. Congress provided a uniform statutory framework by enacting the Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (1990), which added a new 5 U.S.C. §§ 581–590. Under this legislation, a proposed regulation is drafted by a committee composed of representatives of the agency and other interested parties. An agency may use this procedure if it determines, among other things, that there are a limited number of identifiable interests that will be significantly affected by the regulation, and that there is a reasonable likelihood that a committee can reach a consensus without unreasonably delaying the rulemaking process. Once the proposed regulation is developed in this manner, it remains subject to the

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APA's notice and comment requirements. The negotiated rulemaking procedure is optional, an agency's decision to use or not use it is not subject to judicial review, and use of the procedure does not entitle the regulation to any greater deference than it would otherwise receive. (The background information in the first part of this paragraph is taken from the report of the House Judiciary Committee, H.R. Rep. No. 461, 101st Cong., 2d Sess. 7-9 (1990).)

b. Informal Rulemaking: When Required

A great many things are required by one statute or another to be published in the Federal Register. One example is "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D). Privacy Act notices are another example. 5 U.S.C. § 552a(e)(4). Other items required or authorized to be published in the Federal Register are specified in 44 U.S.C. § 1505. However, the mere requirement to publish something in the Federal Register is not, by itself, a requirement to use APA procedures.

As a starting point, anything that falls within the definition of a "rule" in 5 U.S.C. § 551(4) and for which formal rulemaking is not required, is subject to the informal rulemaking procedures of 5 U.S.C. § 553 unless exempt. This statement is not as encompassing as it may seem, since section 553 itself provides several very significant exemptions. These exemptions, said one court, "will be narrowly construed and only reluctantly countenanced." New Jersey Dep't of Environmental Protection v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980). Be that as it may, they appear in the statute and cannot be disregarded.

For example, section 553 does not apply to matters "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2). Several agencies, primarily in response to a recommendation by the Administrative Conference of the United States, have published in the Federal Register a statement committing themselves to follow APA procedures in these matters. To the extent an agency has done this, it has voluntarily waived the benefit of the exemption and must follow the APA. E.g., Alcaraz v. Block, 746 F.2d 593 (9th Cir. 1984); Humana of South Carolina, Inc. v. Califano, 590 F.2d 1070 (D.C. Cir. 1978); Rodway v. United States Dep't of Agriculture, 514 F.2d 809 (D.C. Cir. 1975); Herron v. Heckler, 576 F. Supp. 218 (N.D. Cal. 1983); Ngou v. Schweiker, 535 F. Supp. 1214 (D.D.C. 1982); B-202568,

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September 11, 1981. If an agency has not waived its exemption with respect to the specified matters, it need not follow the APA.[6] California v. EPA, 689 F.2d 217 (D.C. Cir. 1982); City of Grand Rapids v. Richardson, 429 F. Supp. 1087 (W.D. Mich. 1977).

Another significant exemption, found in 5 U.S.C. § 553(b), is for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." Again, much litigation has ensued over whether a given regulation is "substantive" or "legislative," in which event section 553 applies, or whether it is "interpretative," in which event it does not. See, for example, Guardian Federal Savings and Loan Ass'n v. FSLIC, 589 F.2d 658 (D.C. Cir. 1978); Joseph v. United States Civil Service Commission, 554 F.2d 1140 (D.C. Cir. 1977); Detroit Edison Co. v. EPA, 496 F.2d 244 (6th Cir. 1974). As these cases demonstrate, the agency's own characterization of a regulation as interpretative is not controlling.[7]

A regulation which is subject to 5 U.S.C. § 553 but which is issued in violation of the required procedures (including a non-existent or inadequate preamble) stands an excellent chance of being invalidated. If the regulation is one the agency is required to issue, the courts will typically declare the regulation invalid, or "void" (e.g., W.C. v. Bowen, 807 F.2d 1502 (9th Cir. 1987)), or vacate the regulation and remand it to the agency for further proceedings in compliance with the APA, the extent of the further proceedings depending on the degree of non-compliance.[8] If the regulation is authorized but not required, it will still be invalidated but the

[6]The exemption may be unavailable to particular agencies or programs, in whole or in part, by virtue of some other statute. For example, Congress has required the Department of Energy to follow the APA with respect to public property, loans, grants, or contracts, although the Department may waive notice and comment upon finding that strict compliance is likely to cause serious harm to the public health, safety, or welfare. 42 U.S.C. §§ 7191(b)(3), (e).

[7]As should be apparent, the traditional classification of regulations as "statutory" or "administrative" is of little help in assessing the applicability of the APA. Most "administrative regulations" (regulations issued under the authority of 5 U.S.C. § 301) will be exempt from the APA not because somebody calls them "administrative," but because they will be matters "relating to agency management or personnel" or "rules of agency organization, procedure, or practice." Substantive or legislative regulations will generally be "statutory," but so will most regulations relating to grants or loans, as well as many interpretative regulations.

[8]E.g., Tabor v. Board of Actuaries, 566 F.2d at 712; Rodway v. Dep't of Agriculture, 514 F.2d at 817; Detroit Edison Co. v. EPA, 496 F.2d at 249. Occasionally, although this appears to be a minority position, a court may be willing to entertain further explanation from the agency in the form of affidavits or testimony. E.g., National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688 (2d Cir. 1975).

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agency will usually have the discretion to repromulgate under the correct procedures.[9]

Agency issuances may be called many things besides regulations: manuals, handbooks, instruction memoranda, etc. For purposes of determining applicability of the APA, the test is the substance and effect of the document rather than what the agency chooses to call it. E.g., Guardian Federal Savings and Loan Ass'n v. FSLIC, 589 F.2d at 666; Herron v. Heckler, 576 F. Supp. at 230; Saint Francis Memorial Hospital v. Weinberger, 413 F. Supp. 323, 327 (N.D. Cal. 1976).

If agency in-house publications are inconsistent with "governing statutes and regulations of the highest or higher dignity, e.g., regulations published in the Federal Register, they do not bind the government, and persons relying on them do so at their peril." Fiorentino v. United States, 607 F.2d 963, 968 (Ct. Cl. 1979), cert. denied, 444 U.S. 1083.

2. Regulations May Not Exceed Statutory Authority

It is a fundamental proposition that agency regulations are bound by the limits of the agency's statutory and organic authority. An often quoted statement of the principle appears in the Supreme Court's decision in Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134 (1936):

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

To take an example of particular relevance to this publication, an agency may not expend public funds or incur a liability to do so on the basis of a regulation, unless the regulation is implementing authority given by law. A regulation purporting to create a liability on the part of the government not supported by statutory authority is invalid and not binding on the government. Atchison, Topeka & Santa Fe Railroad Co. v. United States, 55 Ct. Cl. 339 (1920); Holland-America Line v. United States, 53 Ct. Cl. 522 (1918); Illinois

[9]E.g., United States v. Garner, 767 F.2d 104, 123 (5th Cir. 1985); Joseph v. Civil Service Commission, 554 F.2d at 1157.

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Central Railroad Co. v. United States, 52 Ct. Cl. 53 (1917). See also B-201054, April 27, 1981, discussed below. In other words, the authority to obligate or expend public funds cannot be created by regulation; the basic authority must be conferred by Congress.

Further illustrations may be found in the following decisions of the Comptroller General:

- Where the program statute provided that federal grants "shall be" a specified percentage of project construction costs, the grantor agency could not issue regulations providing a mechanism for reducing the grants below the specified percentage. 53 Comp. Gen. 547 (1974).
- Where a statute provided that administrative costs could not exceed a specified percentage of funds distributed to states under an allotment formula, the administering agency could not amend its regulations to relieve states of liability for overexpenditures or to raise the ceiling. B-178564, July 19, 1977, affirmed in 57 Comp. Gen. 163 (1977).
- Absent a clear statutory basis, an agency may not issue regulations establishing procedures to accept government liability or to forgive indebtedness based on what it deems to be fair or equitable. B-201054, April 27, 1981. See also B-118653, July 15, 1969.

See also Harris v. Lynn, 555 F.2d 1357 (8th Cir. 1977) (agency cannot extend benefits by regulation to class of persons not included within authorizing statute); Tullock v. State Highway Commission of Missouri, 507 F.2d 712, 716-17 (8th Cir. 1974); Pender Peanut Corp. v. United States, 20 Cl. Ct. 447, 455 (1990) (monetary penalty not authorized by statute cannot be imposed by regulation); 62 Comp. Gen. 116 (1983); 56 Comp. Gen. 943 (1977); B-201706, March 17, 1981.

3. "Force and Effect of Law"

A very long line of decisions holds that "statutory regulations" which are otherwise valid (that is, which are within the bounds of the agency's statutory authority) have the force and effect of law. E.g., 53 Comp. Gen. 364 (1973); 43 Comp. Gen. 31 (1963); 37 Comp. Gen. 820 (1958); 33 Comp. Gen. 174 (1953); 31 Comp. Gen. 193 (1951); 22 Comp. Gen. 895 (1943); 15 Comp. Gen. 869 (1936); 2 Comp. Gen. 342 (1922); 21 Comp. Dec. 482 (1915).

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The thrust of these decisions is that the regulations are binding on all concerned, the issuing agency included, and that the agency cannot waive their application on an ad hoc or situational basis. In view of developments in the law in recent years, stating the principle in terms of "statutory regulations" has become somewhat oversimplified.

In Chrysler Corp. v. Brown, 441 U.S. 281 (1979), the Supreme Court provided detailed instruction as to when an agency regulation is entitled to the "force and effect of law." The regulation "must have certain substantive characteristics and be the product of certain procedural requisites." 441 U.S. at 301. Specifically, the Court listed three tests which must be met:

- The regulation must be a "substantive" or "legislative" regulation affecting individual rights or obligations. Regulations which are interpretative only generally will not qualify.[10]
- The regulation must be issued pursuant to, and subject to any limitations of, a statutory grant of authority. For purposes of this test, 5 U.S.C. § 301 does not constitute a sufficient grant of authority. 441 U.S. at 309-11. (This test is discussed further under "Agency Administrative Interpretations" later in this chapter.)
- The regulation must be issued in compliance with any procedural requirements imposed by Congress. This generally means the APA, unless the regulation falls within one of the exemptions previously discussed.[11]

A regulation which meets these three tests will be given the "force and effect of law." A regulation with the force and effect of law is "binding on courts in a manner akin to statutes" (Chrysler Corp., 441 U.S. at 308); it has the same legal effect "as if [it] had been enacted by Congress directly" (Federal Crop Insurance Corp. v.

[10]This of course is the same distinction discussed earlier with respect to the applicability of informal rulemaking procedures under the APA. It has been pointed out that the term "legislative" is preferable to "substantive" because the latter can become confused with another distinction occasionally encountered, substantive vs. procedural, which has little value in the present context. A legislative rule may be procedural, and an interpretative rule may be substantive in the sense that it does not deal with an issue of procedure. See Joseph v. United States Civil Service Comm'n, 554 F.2d 1140, 1153 n.24 (D.C. Cir. 1977). Professor Kenneth Culp Davis, in his Administrative Law Treatise, vol. 2, § 7:9 (2d ed. 1979), also suggests that the term "substantive" in this context should be discontinued in favor of "legislative." Whichever term is used, the terminology can be misleading, as pointed out in Production Tool Corp. v. Employment and Training Admin., 688 F.2d 1161, 1166 (7th Cir. 1982).

[11]See, for example, B-226499, April 1, 1987, holding that an unpublished notice purporting to amend a published regulation did not have the force and effect of law.

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Merrill, 332 U.S. 380, 385 (1947)); it "is as binding on a court as if it were part of the statute" (Joseph v. United States Civil Service Commission, 554 F.2d 1140, 1153 (D.C. Cir. 1977)); it is "as binding on the courts as any statute enacted by Congress" (Production Tool Corp. v. Employment and Training Admin., 688 F.2d 1161, 1165 (7th Cir. 1982)).

This is strong language. It cautions a reviewing court (or reviewing administrative agency) not to substitute its own judgment for that of the agency, and not to invalidate a regulation merely because it would have interpreted the law differently. A regulation with the force and effect of law is controlling, subject to the "arbitrary and capricious" standard of the APA (5 U.S.C. § 706). Batterton v. Francis, 432 U.S. 416, 425-26 (1977); Guardian Federal Savings and Loan Ass'n v. FSLIC, 589 F.2d 658, 664-65 (D.C. Cir. 1978); Joseph v. Civil Service Commission, 554 F.2d at 1154 n.26. A regulation will generally be found arbitrary and capricious—

> "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983).

Thus, rather than saying "statutory regulations have the force and effect of law," it is more accurate to say that "substantive or legislative regulations, issued pursuant to a grant of statutory authority and in compliance with the APA or other procedural statute as and to the extent applicable, have the force and effect of law." Such a regulation, as the numerous GAO decisions have pointed out, should be uniform in application, is binding on the government as well as any private parties affected, and, at least as a general proposition, cannot be waived on an ad hoc basis.

For cases applying the Chrysler standards in determining that various regulations do or do not have the force and effect of law, see Horner v. Jeffrey, 823 F.2d 1521 (Fed. Cir. 1987); St. Mary's Hospital, Inc. v. Harris, 604 F.2d 407 (5th Cir. 1979); Intermountain Forest Industry Ass'n v. Lyng, 683 F. Supp. 1330 (D. Wyo. 1988).

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4. Waiver of Regulations

When you ask whether an agency can waive a regulation, you are really asking to what extent an agency is bound by its own regulations. If a given regulation binds the issuing agency, then the agency should not be able to grant ad hoc waivers, unless the governing statute has given it that authority and the agency has built it into the regulation. The question of whether an agency must follow its own regulations is somewhat broader than the question of waiver. However, we have chosen to treat them together because the answer, to the extent an answer can be said to exist at the present time, is basically the same.

A regulation with the "force and effect of law" is clearly binding on the agency. See also Section C.3 below. If the courts meant what they said about such regulations being treated essentially the same as statutes, then the agency should not be able to waive the regulation any more than it could waive the statute. The underlying philosophy—still valid—was expressed as follows in a 1958 GAO decision:

> "Regulations must contain a guide or standard alike to all individuals similarly situated, so that anyone interested may determine his own rights or exemptions thereunder. The administrative agency may not exercise discretion to enforce them against some and to refuse to enforce them against others." 37 Comp. Gen. 820, 821 (1958).[12]

Even here, however, there may be room for some slight measure of discretion, at least with respect to certain types of regulation. For example, in American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970), the Court held that the Interstate Commerce Commission could deviate from a provision in what was at least a "statutory," if not a "legislative" regulation, stating that the regulations were "not intended primarily to confer important procedural benefits upon individuals," but were "mere aids to the exercise of the agency's independent discretion" (id. at 538-39).

The real problems arise when one enters the realm of regulations which do not have the force and effect of law. These may include regulations which were published in the Federal Register under APA procedures but which are classified as interpretative, as well as a

[12]Of course, the government has "prosecutorial discretion" in enforcing violations, and may select one case or a few cases to make its point. This is different from the point being made in the text, which is that an agency cannot follow its regulation when it feels like it and not follow it when it does not feel like it.

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variety of unpublished agency documents, including internal publications such as manuals, handbooks, etc. There is a growing body of case law on whether regulations in this category are binding on the issuing agency. At the present time, the best answer we can give is that some are while others are not.

In some of the cases, the issue is stated as whether the given item constitutes a "regulation." E.g., Fairington Apartments of Lafayette v. United States, 7 Cl. Ct. 647 (1985). The thing to remember is that, in this specific context, the answer to that question determines only whether the item is binding on the agency in that case. It does not necessarily follow that an item found to be a "regulation" should have been published under APA procedures or that it has the force and effect of law. These are separate (although related) questions which, as discussed above, have their own tests and standards.

Early (and some not so early) GAO and Comptroller of the Treasury decisions viewed the waiver question as flowing essentially from the old statutory vs. administrative distinction. Thus, it has often been held that statutory regulations may not be waived. E.g., 60 Comp. Gen. 15, 26 (1980); 57 Comp. Gen. 662 (1978); 10 Comp. Gen. 242 (1930); B-233946.2, December 14, 1989; B-208610, September 1, 1983. See also the cases cited in the first paragraph under "Force and Effect of Law" above. Correspondingly, several decisions hold that "administrative regulations" can be waived. E.g., 4 Comp. Gen. 767 (1925); 1 Comp. Gen. 13 (1921); 26 Comp. Dec. 99 (1919); 21 Comp. Dec. 482 (1915). As a result of Supreme Court decisions in the 1950's, GAO modified its position somewhat in 51 Comp. Gen. 30 (1971), noting cautiously that the former distinctions "are no longer regarded as applicable in all respects" (whatever that means). Id. at 32.

The Supreme Court has also yet to articulate a clear standard. For example, in Morton v. Ruiz, 415 U.S. 199 (1974), the Court held the Bureau of Indian Affairs bound by a provision in an internal BIA manual which stated that directives relating to the public are published in the Federal Register in accordance with the APA. Based on this, the Court held ineffective another provision in the BIA manual, not published in the Federal Register, restricting eligibility for general assistance benefits. "Where," the Court said, "the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." Id. at 235. Yet in Schweiker v. Hansen,

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450 U.S. 785 (1981), the Court found a Social Security Administration claims manual not binding on the agency, in a case where an individual's eligibility for benefits was at stake.[13]

Without undertaking an extensive analysis, the best that can be said is that, at least where a purported waiver or deviation would be adverse to individuals, some non-legislative regulations may now be as binding on the agency as legislative regulations. Morton v. Ruiz; 51 Comp. Gen. 30 (1971). See also Massachusetts Department of Correction v. Law Enforcement Assistance Administration, 605 F.2d 21, 26 (1st Cir. 1979); B-184068, August 22, 1975. However, other types of non-legislative regulations, particularly where the regulations are for the primary benefit of the agency and failure to follow them would not adversely affect private parties, remain open to waiver. E.g., 60 Comp. Gen. 208, 210 (1981) (Urban Mass Transportation Administration internal guideline on evidence of grantee financial capability).

An interesting variation occurred in Health Systems Agency of Oklahoma, Inc. v. Norman, 589 F.2d 486 (10th Cir. 1978). An application for designation as a Health Systems Agency was submitted to the Department of Health, Education, and Welfare 55 minutes past the deadline announced in the Federal Register, because the applicant's representative overslept. HEW refused to accept the application. Finding that the deadline was not statutory, that its purpose was the orderly transaction of business, and that internal HEW guidelines permitted some discretion in waiving the deadline, the court held HEW's refusal to be an abuse of discretion.

What seems clear is that a "form over substance" approach will be rejected, and what an agency chooses to call its regulation is largely immaterial. As stated in one GAO decision:

"That the Bureau's policy and procedure memoranda were never intended as 'regulations' is of no particular import since whether or not they are such must be determined by their operative nature." 43 Comp. Gen. 31, 34 (1963).

[13]"[T]here is no doubt that Connelly failed to follow the Claims Manual in neglecting to recommend that respondent file a written application and in neglecting to advise her of the advantages of a written application. But the Claims Manual is not a regulation. It has no legal force, and it does not bind the SSA." 450 U.S. at 789.

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In assessing the binding nature of a non-legislative regulation or other agency document, the language of the document itself is obviously an important starting point. Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 537-38 (D.C. Cir. 1986). The issuing agency's intent is also an important factor. Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969); New England Tank Industries of New Hampshire, Inc. v. United States, 861 F.2d 685 (Fed. Cir. 1988); Fairington Apartments of Lafayette v. United States, 7 Cl. Ct. 647 (1985). Intent is ascertained by examining "the provision's language, its context, and any available extrinsic evidence." Doe v. Hampton, 566 F.2d 265, 281 (D.C. Cir. 1977).

Factors which may provide some indication of intent, although they are not dispositive, are whether the item has been published in the Federal Register (failure to do so suggests an intent that the item be non-binding), and, more significantly, whether it has been published in the Code of Federal Regulations (under 44 U.S.C. § 1510, the C.F.R. is supposed to contain only documents with "legal effect"). Brock v. Cathedral Bluffs, 796 F.2d at 538-39.

For further reading on this interesting and apparently still evolving topic, see:

- Peter Raven-Hansen, Regulatory Estoppel: When Agencies Break Their Own 'Laws,' 64 Tex. L. Rev. 1 (1985).
- Note, Violations by Agencies of Their Own Regulations, 87 Harv. L. Rev. 629 (1974).

5. Amendment of Regulations

While waiver of regulations can be problematic, it has long been recognized that the authority to issue regulations includes the authority to amend or revoke those regulations, at least prospectively. E.g., 21 Comp. Dec. 482, 484 (1915). This common-sense proposition is reflected in the APA's definition of rulemaking as "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5).

An amendment to a regulation, like the parent regulation itself, must of course remain within the bounds of the agency's statutory authority. B-221779, March 24, 1986; B-202568, September 11, 1981.

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As the APA's definition of rulemaking makes clear, an amendment to a regulation is subject to the APA to the same extent as the parent regulation. Thus, if a regulation is required to follow the notice and comment procedures of 5 U.S.C. § 553, an amendment or repeal of that regulation must generally follow the same procedures. Consumer Energy Council of America v. Federal Energy Regulatory Commission, 673 F.2d 425, 446 (D.C. Cir. 1982); Detroit Edison Co. v. EPA, 496 F.2d 244 (6th Cir. 1974); B-221779, March 24, 1986.

If a regulation is subject to the APA's informal rulemaking requirements, an unpublished agency document which purports to amend that regulation is invalid and does not bind the government. Fiorentino v. United States, 607 F.2d 963, 968 (Ct. Cl. 1979), cert. denied, 444 U.S. 1083; 65 Comp. Gen. 439 (1986); B-226499, April 1, 1987.

It is possible to have a regulation subject to 5 U.S.C. § 553, with an amendment to that regulation which falls within one of the exemptions, in which event the amendment need not comply with the APA procedures. See Detroit Edison, 496 F.2d at 245, 249; B-202568, September 11, 1981; 5 Op. Off. Legal Counsel 104 (1981). Although we have found no cases, logic would suggest that the converse is also possible—an amendment to an interpretative regulation which rises to the level of a substantive or legislative rule.

If a parent regulation is exempt from compliance with the APA but the agency has, without generally waiving the exemption, published it under APA procedures anyway, the voluntary compliance will not operate as a waiver. The agency may subsequently amend or repeal the regulation without following the APA. Baylor Univ. Medical Center v. Heckler, 758 F.2d 1052 (5th Cir. 1985); Malek-Marzban v. Immigration and Naturalization Service, 653 F.2d 113 (4th Cir. 1981); Washington Hospital Center v. Heckler, 581 F. Supp. 195 (D.D.C. 1984).

6. Retroactivity

A number of decisions have pointed out that amendments to regulations should be prospective only. E.g., 35 Comp. Gen. 187 (1955); 32 Comp. Gen. 315 (1953); 2 Comp. Gen. 342 (1922); 21 Comp. Dec. 482 (1915). The theory is that amendments should not affect rights or reliance accruing under the old regulation. While these are still crucial concerns, the law is not quite that simple.

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At the outset, it may be useful to understand the difference between "primary" and "secondary" retroactivity. Primary retroactivity changes the past legal consequences of past actions. Secondary retroactivity changes the future legal consequences of past actions. See generally Bowen v. Georgetown University Hospital, 488 U.S. 204, 219-20 (1988) (Justice Scalia, concurring).

To take a concrete illustration, when Individual Retirement Accounts were first authorized, most people could take an income tax deduction for amounts deposited into an IRA, up to a statutory ceiling. A few years later, Congress changed the law to eliminate the deduction for persons covered by certain types of retirement plan. This is an example of secondary retroactivity. Persons affected by the amendment could no longer deduct IRA contributions in the future, but the deductions they had taken in the past were not affected. (A purely prospective amendment would have applied only to new IRAs opened on or after the effective date of the amendment.) If Congress had attempted to invalidate deductions taken prior to the amendment, this would have been primary retroactivity.

It is generally accepted that Congress can make its laws retroactive in either the primary or the secondary sense if retroactive application serves a rational legislative purpose, subject of course to constitutional limitations (such as due process and the impairment of contracts). See id. at 223; Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729–30 (1984); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15–17 (1976). The same standard does not, however, apply to agency regulations.

There is no blanket prohibition on secondary retroactivity in agency regulations. The standard of review is the "arbitrary or capricious" standard of the APA. See Bowen, 488 U.S. at 220. With respect to primary retroactivity, however, the Bowen Court held that:

> "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." Id. at 208.

There may be some room for exceptions even from the strict proscription of the Bowen rule, based on a balancing of interests in a particular case. See Bowen, 488 U.S. at 224-25; Citizens to Save

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Spencer County v. EPA, 600 F.2d 844, 879-81 (D.C. Cir. 1979); Saint Francis Memorial Hospital v. Weinberger, 413 F. Supp. 323, 332-33 (N.D. Cal. 1976). Reduced stringency may also be appropriate in the case of a policy statement,[14] or certain interpretative rules.[15]

Does the APA prohibit retroactive rulemaking? Thus far, the Supreme Court has not directly addressed the question. The court of appeals decision affirmed by the Supreme Court in Bowen held that it does. Georgetown University Hospital v. Bowen, 821 F.2d 750 (D.C. Cir. 1987). The Supreme Court's majority opinion did not discuss the APA, although Justice Scalia's concurring opinion expressly endorsed the circuit court's views.

The prohibition on retroactivity in rulemaking does not apply to adjudication. Bowen, 488 U.S. at 220-21 (concurring opinion). In the context of adjudication, retroactivity is measured against a standard of reasonableness and a balancing of interests. E.g., Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Commission, 606 F.2d 1094, 1116 n.77 (D.C. Cir. 1979), cert. denied, 445 U.S. 920 and 447 U.S. 922; NLRB v. Majestic Weaving Co., 355 F.2d 854 (2d Cir. 1966); Shell Oil Co. v. Kleppe, 426 F. Supp. 894, 908 (D. Colo. 1977). As suggested above, the extent to which a balancing approach might justify exceptions from the Bowen rule with respect to regulations remains to be determined.

B. Agency Administrative Interpretations

1. Interpretation of Statutes

The interpretation of a statute, by regulation or otherwise, by the agency Congress has charged with the responsibility for administering it, is entitled to considerable weight. This principle is really a matter of common sense. An agency that works with a program from day to day develops an expertise which should not be lightly

[14]E.g., Iowa Power and Light Co. v. Burlington Northern, Inc., 647 F.2d 796, 812 (8th Cir. 1981), cert. denied, 455 U.S. 907.

[15]E.g., Caterpillar Tractor Co. v. United States, 589 F.2d 1040, 1043 (Ct. Cl. 1978) (first regulation promulgated under a statute).

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disregarded. Even when dealing with a new law, Congress does not entrust administration to a particular agency without reason, and this decision merits respect. This, in addition to fundamental fairness, is why GAO considers it important to obtain agency comments wherever possible before rendering a decision.[16]

In the often cited case of Udall v. Tallman, 380 U.S. 1, 16 (1965), the Supreme Court stated the principle this way:

"When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."

When the agency's interpretation is in the form of a regulation with the force and effect of law, the "deference," as we have seen, is at its highest. The agency's position should be upheld unless it is arbitrary or capricious. There should be no question of substitution of judgment. If the agency position can be said to be reasonable or to have a rational basis within the statutory grant of authority, it should stand, even though the reviewing body finds some other position preferable.

When the agency's interpretation is in the form of an interpretative regulation, manual, handbook, etc.— anything short of a regulation with the force and effect of law—the standard of review is somewhat lessened, and it is here that the question of deference really comes into play. It is clear that a reviewing body "is not required to give effect to an interpretative regulation." Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977). Yet, as the Court also instructed in Udall v. Tallman, there is an entitlement to deference.

Deference in this context is not some fixed concept, but is variable, depending on the interplay of several factors. The Supreme Court explained the approach as follows in Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944):

[16]GAO's desire for agency comments applies to audit reports as well as legal decisions. However, in view of the fundamental differences between the two products, the process differs. GAO's policy for audit reports is, at a minimum, to discuss the draft report with agency officials at an "exit conference." Depending on the results of the conference, written comments may or may not be requested, although GAO prefers to obtain written comments, especially when the report deals with sensitive or controversial issues. The final report will then reflect the comments received and identify significant changes resulting from them. See generally 31 U.S.C. § 718. For a legal decision, the agency's position on the legal issue(s) involved is solicited before a draft is ever written. For obvious reasons, draft legal decisions are not submitted for comment.

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"We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority [i.e., the statements in question were not regulations with the force and effect of law], do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

The basic premise that an agency interpretation is entitled to some largely undefined degree of deference is now settled. See, for example, in addition to the Tallman and Skidmore cases cited above, Chrysler Corp. v. Brown, 441 U.S. 281, 315 (1979); Batterton v. Francis, 432 U.S. 416, 424-25 (1977); General Electric Co. v. Gilbert, 429 U.S. 125, 141 (1976) (referring to the above-quoted passage from Skidmore as the "most comprehensive statement of the role of interpretative rulings"); West Coast Construction Co. v. Oceano Sanitary District, 311 F. Supp. 378, 383 (N.D. Cal. 1970).[17]

As noted above, the degree of weight to be given an agency administrative interpretation varies with several factors:

- The nature and degree of expertise possessed by the agency. Chrysler Corp., 441 U.S. at 315; Batterton, 432 U.S. at 425 n.9. To take a somewhat self-serving example, we like to think that GAO's expertise in appropriations matters merits a certain respect. E.g., International Union, UAW v. Donovan, 746 F.2d 855, 861 (D.C. Cir. 1984), cert. denied, 474 U.S. 825; City of Los Angeles v. Adams, 556 F.2d 40, 51 (D.C. Cir. 1977).
- The duration and consistency of the interpretation. United States v. Clark, 454 U.S. 555, 565 (1982); Chrysler Corp., 441 U.S. at 315; Batterton, 432 U.S. at 425 n.9; Skidmore, 323 U.S. at 140; Theodus v. McLaughlin, 852 F.2d 1380, 1387 (D.C. Cir. 1988); Oceano, 311 F. Supp. at 383. While consistency may not always be a virtue, inconsistency will not help your case in court. E.g., Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987); Rowan Cos. v. United States, 452 U.S. 247, 258-63 (1981); General Electric Co. v. Gilbert, 429 U.S. at 143.

[17]The rule is hardly a new one. It has consistently been espoused by the Supreme Court for well over a century and a half. Some of the early cases are: United States v. Philbrick, 120 U.S. 52, 59 (1886); Hahn v. United States, 107 U.S. 402, 406 (1882); United States v. Pugh, 99 U.S. 265, 269 (1878); United States v. Moore, 95 U.S. 760, 763 (1877); Edwards v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827).

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- The soundness and thoroughness of reasoning underlying the position. Skidmore, 323 U.S. at 140.
- Evidence (or lack thereof) of congressional awareness of, and acquiescence in, the administrative position. United States v. American Trucking Ass'ns, 310 U.S. 534, 549-50 (1940); Helvering v. Winmill, 305 U.S. 79, 82-3 (1938); Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 313-15 (1933); 41 Op. Att'y Gen. 57 (1950); B-114829-O.M., July 17, 1974.

For illustrations of how GAO has applied the deference principle in decisions, see:

- 49 Comp. Gen. 510 (1970) (Department of Agriculture regulations under Meat Inspection Act).
- 48 Comp. Gen. 5 (1968) (Veterans Administration interpretation of statutory educational assistance allowance).
- 42 Comp. Gen. 467, 477 (1963) (long-standing Navy application of Buy American Act).
- B-205365, June 3, 1985 (Department of Energy's statement on duration of Residential Conservation Service program).
- B-211558, February 13, 1984 (statement of Federal Emergency Management Agency on eligibility for certain Disaster Relief Act assistance).
- A-51604, August 25, 1981, affirming A-51604, February 19, 1980 (Department of Agriculture regulations on administrative cost reimbursement under the Food Stamp Act).
- B-160573, June 6, 1967, affirming B-160573, January 17, 1967 (Office of Emergency Planning interpretation of coverage under the Federal Disaster Act).

The deference principle does not apply to an agency's litigating position unless that position is also expressed in the regulations, rulings, or administrative practice of the agency. Bowen v. Georgetown University Hospital, 488 U.S. at 212. It also does not apply to an agency's interpretation of a statute which is not part of its program or enabling legislation. United States Dep't of Justice v. Federal Labor Relations Authority, 709 F.2d 724, 729 n.21 (D.C. Cir. 1983); Library of Congress v. Federal Labor Relations Authority, 699 F.2d 1280, 1286 n.29 (D.C. Cir. 1983).

As noted above, a regulation with the "force and effect of law" merits the highest degree of deference. In this connection, it is necessary to elaborate somewhat on the second Chrysler test—that

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the regulation be issued pursuant to a statutory grant of authority. How specific must the statutory delegation be? Chrysler itself provides somewhat conflicting signals. In one place, in the course of listing the three tests, the Court gives as an example the proxy rules of the Securities and Exchange Commission. 441 U.S. at 302-03. These are issued under the explicit delegation of 15 U.S.C. § 78n, which authorizes the SEC to issue proxy rules. Yet in another place, the Court said:

> "This is not to say that any grant of legislative authority to a federal agency by Congress must be specific before regulations promulgated pursuant to it can be binding on courts in a manner akin to statutes. What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued." 441 U.S. at 308.

A sampling of case law suggests that the "force and effect of law" is more likely to be found where the delegation is explicit. For example, the Secretary of the Treasury has general authority to "prescribe all needful rules and regulations" to administer the Internal Revenue Code. 26 U.S.C. § 7805. In addition, various other provisions of the Internal Revenue Code authorize the issuance of regulations dealing with specific topics. Regulations issued under the general authority of 26 U.S.C. § 7805—statutory though they may be—are not given the force and effect of law, and are accorded less deference than regulations issued under one of the more specific provisions. United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982); Rowan Cos. v. United States, 452 U.S. 247, 252-53 (1981); McDonald v. Commissioner, 764 F.2d 322, 328 (5th Cir. 1985); Gerrard v. United States Office of Education, 656 F. Supp. 570, 574 n.4 (N.D. Cal. 1987); Lima Surgical Associates v. United States, 20 Cl. Ct. 674, 679 n.8 (1990).

Some other illustrative cases are:

- Horner v. Jeffrey, 823 F.2d 1521 (Fed. Cir. 1987) (provision of Federal Personnel Manual found to be interpretive only, because statute did not expressly authorize Office of Personnel Management to define term "military service").
- Fmali Herb, Inc. v. Heckler, 715 F.2d 1385, 1387 (9th Cir. 1983) (Food and Drug Administration regulation defining term "common use in food" held interpretive because FDA was not "instructed by statute" to define the term).

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- St. Mary's Hospital, Inc. v. Harris, 604 F.2d 407 (5th Cir. 1979) (regulation issued under statute prohibiting disclosure of certain data "except as the Secretary . . . may by regulations prescribe" found to meet second Chrysler test).
- Intermountain Forest Industry Ass'n v. Lyng, 683 F. Supp. 1330, 1340-41 (D. Wyo. 1988) (second Chrysler test satisfied in case of published Forest Service timber management regulations where statutory delegation was not explicit, but this did not extend to plans developed under the regulations).

The question of deference to agency interpretations received considerable attention from the Supreme Court in the 1980's. Perhaps the most important case, one which we have not previously mentioned, is Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), a decision involving regulations of the Environmental Protection Agency under the Clean Air Act. The Court formulated its approach in terms of two questions. The first question is "whether Congress has directly spoken to the precise question at issue." Id. at 842. If it has, the agency must of course comply with clear congressional intent, and regulations to the contrary will be invalidated. Thus, before you ever get to questions of "deference," it must first be determined that the regulation is not contrary to the statute, a question of delegated authority rather than deference. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." Id. at 843 n.9.

Once you cross this threshold, that is, once you determine that the "statute is silent or ambiguous with respect to the specific issue," the question becomes "whether the agency's answer is based on a permissible construction of the statute." Id. at 843. The Court went on to say:

> "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. [This presumably refers to regulations with the "force and effect of law," although the Chevron Court did not use that language.] Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Id. at 843-44 (footnotes omitted).

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Reiterating the traditional deference concept, the Court then said that the proper standard of review is not whether the agency's construction is "inappropriate," but merely whether it is "a reasonable one." Id. at 844-45.

Three years later, in Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421 (1987), the Court revisited the issue. The majority opinion arguably removes statutory construction from the scope of the deference concept, and indicates that deference is required only when an agency is applying a standard to a particular set of facts. Id. at 446-48. In a separate opinion concurring in the judgment only, Justice Scalia sharply criticized the majority opinion for misapplying Chevron and for doing so gratuitously. Id. at 453-55.

The lower courts wasted little time in finding Cardoza-Fonseca to have effectively modified Chevron, rejecting deference on "pure questions of statutory construction." E.g., Union of Concerned Scientists v. Nuclear Regulatory Commission, 824 F.2d 108 (D.C. Cir. 1987); Adams House Health Care v. Heckler, 817 F.2d 587 (9th Cir. 1987); International Union, UAW v. Brock, 816 F.2d 761 (D.C. Cir. 1987).

Before the ink on these decisions was dry, the Supreme Court spoke again in still another 1987 decision, NLRB v. United Food and Commercial Workers Union, 484 U.S. 112. The majority opinion indicates that, even under Cardoza-Fonseca, the two-step approach of Chevron continues to apply to a "pure question of statutory construction." 484 U.S. at 123. Justice Scalia wrote another concurring opinion, this time joined by three other Justices including the Chief Justice, applauding the return to Chevron and explicitly calling the three 1987 court of appeals cases cited above wrong. 484 U.S. at 133-34. A court of appeals case following this "latest" reading of Cardoza-Fonseca is Theodus v. McLaughlin, 852 F.2d 1380 (D.C. Cir. 1988). See also B-232482, June 4, 1990 (applying Chevron).

We began this chapter by noting the increasing role of agency regulations in the overall scheme of federal law. We conclude this discussion with the observation that this enhanced role makes continued litigation on the issues we've outlined inevitable. The proliferation and complexity of case law perhaps lends credence to Professor Davis' mild cynicism:

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"Unquestionably one of the most important factors in each decision on what weight to give an interpretative rule is the degree of judicial agreement or disagreement with the rule."[18]

2. Interpretation of Agency's Own Regulations

The principle of giving considerable deference to the administering agency's interpretation of a statute applies at least with equal force to an agency's interpretation of its own regulations. The Udall v. Tallman Court, after making the statement quoted at the beginning of this section, went on to state that "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." 380 U.S. at 16.

Perhaps the strongest statement is found in a 1945 Supreme Court decision, Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14:

"Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[19]

A good illustration of how all of this can work is found in B-222666, January 11, 1988. The Defense Security Assistance Agency (DSAA) is responsible for issuing instructions and procedures for Foreign Military Sales transactions. These appear in the Security Assistance Management Manual (SAMM). A disagreement arose between DSAA and an Army operating command as to whether certain "reports of discrepancy," representing charges for nonreceipt by customers, should be charged to the FMS trust fund (which would effectively pass the losses on to all FMS customers) or to Army appropriated funds. DSAA took the latter position. GAO reviewed the regulation in question, and found it far from clear on this point. The decision noted that "both of the conflicting interpretations in this case appear to have merit, and both derive support from portions of the regulation." However, while the regulation may have been complex, the solution to the problem was fairly

[18]2 Administrative Law Treatise § 7:13 (2d ed. 1979).

[19]While this determines the controlling interpretation, the propriety of that interpretation does not automatically follow. As the Court went on to caution in the very next sentence, "[t]he legality of the result reached by this process, of course, is quite a different matter." Bowles, 325 U.S. at 414.

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simple. DSAA wrote the regulation and GAO, citing the standard from the Bowles case, could not conclude that DSAA's position was plainly erroneous or inconsistent with the regulation. Therefore, DSAA's interpretation must prevail.

See also Immigration and Naturalization Service v. Stanisic, 395 U.S. 62, 72 (1969); San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26 (D.C. Cir. 1986); 63 Comp. Gen. 154 (1984); 57 Comp. Gen. 347 (1978); 56 Comp. Gen. 160 (1976); B-202568, September 11, 1981.

Just as with the interpretation of statutes, inconsistency in the application of a regulation will significantly diminish the deference courts are likely to give the agency's position. E.g., Murphy v. United States, 22 Cl. Ct. 147, 154 (1990).

C. Administrative Discretion

"[S]ome play must be allowed to the joints if the machine is to work." Tyson & Brother v. Banton, 273 U.S. 418, 446 (1927) (Justice Holmes, dissenting).

Throughout this publication, the reader will encounter frequent references to administrative discretion. The concept of discretion implies choice or freedom of judgment, and appears in a variety of contexts. There are many things an agency does every day that involve making choices and exercising discretion.

One type of discretion commonly occurs in the context of purpose availability. A decision may conclude that an appropriation is legally available for a particular expenditure if the agency, in its discretion, determines that the expenditure is a suitable means of accomplishing an authorized end.

To put this another way, there is often more than one way to do something, and reasonable minds may differ as to which way is the best. The thing to keep in mind from the legal perspective is that if a given choice is within the actor's legitimate range of discretion, then, whatever else it may be, it is not illegal. For example, as we will see in Chapter 4, an agency has discretionary authority to provide refreshments at award ceremonies under the Government Employees Incentive Awards Act. Agency A may choose to do so while agency B chooses not to. Under this type of discretion, agency B's reasons are irrelevant. It may simply not want to spend the money. As a matter of law, both agencies are correct.

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Another type of discretion is implicit in all of the preceding discussion of agency regulations. This type occurs when Congress charges an agency with responsibility for implementing a program or statute, but leaves much of the detail to the agency. In the course of carrying out the program or statute, the agency may be required to make various decisions, some of which may be expressly committed to agency discretion by the governing statute. Subject to certain fundamental concepts of administrative law, the agency is free to make those decisions in accordance with the sound exercise of discretion.

Under the Administrative Procedure Act, action which is "committed to agency discretion by law" is not subject to judicial review. 5 U.S.C. § 701(a)(2). As the Supreme Court has pointed out, this is a "very narrow exception" applicable in "rare instances" where, quoting from the APA's legislative history, "statutes are drawn in such broad terms that in a given case there is no law to apply." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971). As noted, the "no law to apply" exception is uncommon, and most exercises of discretion will be found reviewable at least to some extent.

At this point, we should emphasize that these introductory comments are largely oversimplified; they are intended merely to lay a foundation for a discussion of the principles that follow.

1. Discretion Is Not Unlimited

To say that an agency has freedom of choice in a given matter does not mean that there are no limits to that freedom. Discretion does not mean unbridled license. The decisions have frequently pointed out that discretion means legal discretion, not unlimited discretion. The point was stated as follows in 18 Comp. Gen. 285, 292 (1938):

> "Generally, the Congress in making appropriations leaves largely to administrative discretion the choice of ways and means to accomplish the objects of the appropriation, but, of course, administrative discretion may not transcend the statutes, nor be exercised in conflict with law, nor for the accomplishment of purposes unauthorized by the appropriation . . . ."

See also 35 Comp. Gen. 615, 618 (1956); 4 Comp. Gen. 19, 20 (1924); 7 Comp. Dec. 31 (1900); 5 Comp. Dec. 151 (1898); B-130288, February 27, 1957; B-49169, May 5, 1945; A-24916, November 5, 1928.

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Discretion must be exercised before the obligation is incurred. Approval after the fact is merely a condoning of what has already been done and does not constitute the exercise of discretion. 22 Comp. Gen. 1083 (1943); 14 Comp. Gen. 698 (1935); A-57964, January 30, 1935. (This point should not be confused with an agency's occasional ability to ratify an otherwise unauthorized act. See, for example, the discussion of quantum meruit claims in Chapter 12.)

One way to illustrate the concept of "legal discretion" is to visualize a person standing in the center of a circle. The circumference of the circle represents the limits of discretion, imposed either by law or by the difficult-to-define but nonetheless real concept of "public policy."[20] The person is free to move in any direction, to stay near the center or to venture close to the perimeter, even to brush against it, but must stay within the circle. If our actor crosses the line of the circumference, he has exceeded or, to use the legal term, "abused" his discretion.

When GAO is performing its audit function, it may criticize a particular exercise of discretion as ill-conceived, inefficient, or perhaps wasteful. From the legal standpoint, however, there is no illegal expenditure as long as the actor remains within the circle. We may also note that the size of the circle may vary. For example, as we will see in Chapter 17, government corporations frequently have a broader range of discretion than non-corporate agencies.

When Congress wishes to confer discretion unrestrained by other law, its practice has been to include the words "notwithstanding the provisions of any other law" or similar language. 14 Comp. Gen. 578 (1935). Even this is not totally unfettered, however. For example, even this broad authority would not, at least as a general proposition, be sufficient to permit violation of the criminal laws. Also, agency power to act is always bound by the Constitution. Short of an amendment to the Constitution itself, no statute, however explicit, can be construed to authorize constitutional violations.

In addition, depending on the context and circumstances, federal laws of general applicability may be found to remain applicable.

[20]See, e.g., L'Orange v. Medical Protective Co., 394 F.2d 57 (6th Cir. 1968) (court may invalidate an act as "contrary to public policy" in the sense of being "injurious to the public," even where the act may not be expressly prohibited by statute).

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E.g., D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231, 1265 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (provision of Federal-Aid Highway Act directing construction of a bridge "notwithstanding any other provision of law" did not render inapplicable certain federal statutes regarding protection of historic sites).

An example of a statute permitting action without regard to other laws is 50 U.S.C. § 1431, under which the President may authorize an agency with national defense functions to enter into or modify contracts "without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense." Provisions of this type are not self-executing but contemplate specific administrative determinations in advance of the proposed action. In other words, the "other provisions of law" continue to apply unless and until waived by an authorized official. 35 Comp. Gen. 545 (1956). See also 22 Comp. Gen. 400 (1942).

2. Failure or Refusal to Exercise Discretion

Where a particular action or decision is committed to agency discretion by law, the agency is under a legal duty to actually exercise that discretion. The principle has evolved, and now appears firmly established, that the failure or refusal to exercise discretion committed by law to the agency is itself an abuse of discretion. As the following cases demonstrate, the fact of exercising discretion and the particular results of that exercise are two very different things.

We start with a Supreme Court decision, Work v. Rives, 267 U.S. 175 (1925). That case involved section 5 of the Dent Act, 40 Stat. 1274, under which Congress authorized the Secretary of the Interior to compensate a class of people who incurred losses in furnishing supplies or services to the government during World War I. The Secretary's determinations on particular claims were to be final and conclusive. The statute "was a gratuity based on equitable and moral considerations" (id. at 181), vesting the Secretary with the ultimate power to determine which losses should be compensated.

The plaintiff in Rives had sought mandamus to compel the Secretary to consider and allow a claim for a specific loss, incurred as a result of the plaintiff's obtaining a release from a contract to buy land. The Secretary had previously denied the claim because he had interpreted the statute as not embracing money spent on real

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estate. In holding that the Secretary had done all that was required by law, the Court cited and distinguished a line of cases—

"in which a relator in mandamus has successfully sought to compel action by an officer who has discretion concededly conferred on him by law. The relator [plaintiff] in such cases does not ask for a decision any particular way but only that it be made one way or the other." Id. at 184.

The Secretary had made a decision on the claim, had articulated reasons for it, and had not exceeded the bounds of his statutory authority. That was enough. A court could compel the Secretary to actually exercise his discretion, that is, to act on a claim one way or the other, but could not compel him to exercise that discretion to achieve a particular result.

In Simpkins v. Davidson, 302 F. Supp. 456 (S.D.N.Y. 1969), the plaintiff sued to compel the Small Business Administration to make a loan to him. The court found that the plaintiff was entitled to submit an application, and to have the SBA consider that application and reach a decision on whether or not to grant the loan. However, he had no right to the loan itself, and the court could not compel the SBA to exercise its discretion to achieve a specific result. A very similar case on this point is Dubrow v. Small Business Administration, 345 F. Supp. 4 (C.D. Cal. 1972). See also B-226121-O.M., February 9, 1988, citing and applying these cases.

Another case involved a provision of the Farm and Rural Development Act which authorized the Secretary of Agriculture to forgo foreclosure on certain delinquent loans. The plaintiffs were a group of farmers who alleged that the Secretary had refused to consider their requests. The district court held that the Secretary was required to consider the requests. Matzke v. Block, 542 F. Supp. 1107 (D. Kans. 1982). "When discretion is vested in an administrative agency, the refusal to exercise that discretion is itself an abuse of discretion." Id. at 1115. The Court of Appeals for the Tenth Circuit affirmed that portion of the decision in Matzke v. Block, 732 F.2d 799 (10th Cir. 1984), stating at page 801:

"The word 'may', the Secretary 'may' permit deferral, is, in our view, a reference to the discretion of the Secretary to grant the deferral upon a showing by a borrower. It does not mean as the Secretary argues that he has the discretion whether or not to implement the Act at all and not to consider any 'requests' under the statutory standards."

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The Comptroller General applied these principles in 62 Comp. Gen. 641 (1983). The Military Personnel and Civilian Employees' Claims Act of 1964 gives agencies discretionary authority to consider and settle certain employee personal property claims. An agency asked whether it had discretion to adopt a policy of refusing all claims submitted to it under the Act. No, the concept of administrative discretion does not extend that far, replied the Comptroller. While GAO would not purport to tell another agency which claims it should or should not consider—that part was discretionary—the decision noted that "a blanket refusal to consider all claims is, in our opinion, not the exercise of discretion" (id. at 643), and held "that an agency has the duty to actually exercise its discretion and that this duty is not satisfied by a policy of refusing to consider all claims" (id. at 645). Thus, for example, an agency would be within its discretion to make and announce a policy decision not to consider claims of certain types, such as claims for stolen cash, or to impose monetary ceilings on certain types of property, or to establish a minimum amount for the filing of claims. What it cannot do is disregard the statute in its entirety.

Additional cases illustrating this concept are California v. Settle, 708 F.2d 1380 (9th Cir. 1983); Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971); and Jacoby v. Schuman, 568 F. Supp. 843 (E.D. Mo. 1983).

3. Regulations May Limit Discretion

By issuing regulations, an agency may voluntarily (and perhaps even inadvertently) limit its own discretion. A number of cases have held that an agency must comply with its own regulations, even if the action is discretionary by statute.

The leading case is United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). The Attorney General had been given statutory discretion to suspend the deportation of aliens under certain circumstances, and had, by regulation, given this discretion to the Board of Immigration Appeals. The Supreme Court held that, regardless of what the situation would have been if the regulations did not exist, the Board was required under the regulations to exercise its own judgment, and it was improper for the Attorney General to attempt to influence that judgment, in this case by issuing a list of "unsavory characters" he wanted to have deported. "In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its

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decision in any manner." Id. at 267. Of course, the Attorney General could always amend his regulations, but an amendment could operate prospectively only.

Awards under the Government Employees Incentive Awards Act, as we will discuss in Chapter 4, are wholly discretionary. In a 1982 decision, GAO reviewed Army regulations which provided that "awards will be granted" if certain specified criteria were met, and noted that the Army had circumscribed its own discretion by committing itself to make an award if those conditions were met. B-202039, May 7, 1982. Reviewing Air Force regulations under similar legislation applicable to military personnel, the Court of Claims noted in Griffin v. United States, 215 Ct. Cl. 710, 714 (1978):

> "Thus, we think that the Secretary may have originally had uncontrolled and unreviewable discretion in the premises, but as he published procedures and guidelines, as he received responsive suggestions, as he implemented them and through his subordinates passed upon compensation claims, we think by his choices he surrendered some of his discretion, and the legal possibility of abuse of discretion came into the picture."

More recently, the Comptroller General concluded in 67 Comp. Gen. 471 (1988) that the Farmers Home Administration had broad statutory authority to terminate the accrual of interest on the guaranteed portion of defaulted loans, but that it had restricted that discretion by certain provisions in its own regulations.

Another group of cases in this category are those, previously noted in Section A.1 of this chapter, in which an agency has waived an exemption from the APA and was held bound by that waiver.

For additional authority on the proposition that an agency can, by regulation, restrict otherwise discretionary action, see United States v. Nixon, 418 U.S. 683 (1974); Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); Sargisson v. United States, 913 F.2d 918, 921 (Fed. Cir. 1990); California Human Development Corp. v. Brock, 762 F.2d 1044 (D.C. Cir. 1985); Griffin v. Harris, 571 F.2d 767 (3d Cir. 1978); McCarthy v. United States, 7 Cl. Ct. 390 (1985).

4. Insufficient Funds

Congress occasionally legislates in such a manner as to restrict its own subsequent funding options. An example is contract authority,

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described in Chapter 2. Another example is entitlement legislation not contingent upon the availability of appropriations. A well-known example here is social security benefits. Where legislation creates, or authorizes the administrative creation of, binding legal obligations without regard to the availability of appropriations, a funding shortfall may delay actual payment but does not authorize the administering agency to alter or reduce the "entitlement."

In the far more typical situation, however, Congress merely enacts a program and authorizes appropriations. For any number of reasons—budgetary constraints, changes in political climate, etc.—the actual funding may fall short of original expectations. What is an agency to do when it finds that it does not have enough money to accommodate an entire class of beneficiaries? Obviously, it can ask Congress for more. However, as any program administrator knows, asking and getting are two different things. If the agency cannot get additional funding and the program legislation fails to provide guidance, there is solid authority for the proposition that the agency may, within its discretion, establish reasonable classifications, priorities, and/or eligibility requirements, as long as it does so on a rational and consistent basis.[21]

The concept was explained by the Supreme Court in Morton v. Ruiz, 415 U.S. 199, 230-31 (1974), a case involving an assistance program administered by the Bureau of Indian Affairs:

> "[I]t does not necessarily follow that the Secretary is without power to create reasonable classifications and eligibility requirements in order to allocate the limited funds available to him for this purpose. [Citations omitted.] Thus, if there were only enough funds appropriated to provide meaningfully for 10,000 needy Indian beneficiaries and the entire class of eligible beneficiaries numbered 20,000, it would be incumbent upon the BIA to develop an eligibility standard to deal with this problem, and the standard, if rational and proper, might leave some of the class otherwise encompassed by the appropriation without benefits. But in such a case the agency must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries."

[21] Even under an entitlement program, an agency could presumably meet a funding shortfall by such measures as making prorated payments, but such actions would be only temporary pending receipt of sufficient funds to honor the obligation. The recipient would remain legally entitled to the balance.

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In Suwannee River Finance, Inc. v. United States, 7 Cl. Ct. 556 (1985), the plaintiff sued for construction-differential subsidy payments under the Merchant Marine Act, administered by the Maritime Administration. In response to a sudden and severe budget reduction, MarAd had cut off all subsidies for nonessential changes after a specified date, and had notified the plaintiff to that effect. Noting that "[a]fter this budget cut, MarAd obviously could no longer be as generous in paying subsidies as it had been before," the court held MarAd's approach to be "a logical, effective and time-honored method for allocating the burdens of shrinking resources" and well within its administrative discretion. Id. at 561.

Another illustration is Dubrow v. Small Business Administration, 345 F. Supp. 4 (C.D. Cal. 1972), noted above in our discussion of failure to exercise discretion. The SBA was administering a program of low interest loans under the Disaster Relief Act following an earthquake in Los Angeles County. During the last few months of the period SBA established for filing applications, the number of applications increased drastically, to the point where it became apparent that continuing to approve claims in the same ratio as past claims would far exceed available funds. Unable to obtain additional funding from Congress, SBA changed its guidelines to require a more stringent showing of need and a reasonable ability to repay. The court held that SBA had not acted arbitrarily nor abused its discretion.

An illustration from the Comptroller General's decisions is B-202568, September 11, 1981. Due to a severe drought in the summer of 1980, the Small Business Administration found that its appropriation was not sufficient to meet demand under the SBA's disaster loan program. Rather than treating applicants on a "first come, first served" basis, SBA amended its regulations to impose several new restrictions, including a ceiling of 60 percent of actual physical loss. GAO reviewed SBA's actions and found them completely within the agency's administrative discretion.

In a 1958 case, Congress had, by statute, directed the Department of the Interior to transfer $2.5 million from one appropriation to another. Congress had apparently been under the impression that the "donor" account contained a sufficient unobligated balance. The donor account in fact had ample funds if both obligated and unobligated funds were counted, but had an unobligated balance of only $1.3 million. Interior was in an impossible position. It could not

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liquidate obligations in both accounts. If it transferred the full $2.5 million, some valid obligations under the donor appropriation would have to wait; if it transferred only the unobligated balance, it could not satisfy the entire obligation under the receiving account. First, GAO advised that the transfer would not violate the Antideficiency Act since it was not only authorized but directed by statute. As to which obligation should be liquidated first—that is, which could be paid immediately and which would have to await a supplemental appropriation—the best answer GAO could give was that "the question is primarily for determination administratively." In other words, there was no legally mandated priority, and all the agency could do was use its best judgment. GAO added, however, that it might be a good idea to first seek some form of congressional clarification. 38 Comp. Gen. 93 (1958).

An early case, 22 Comp. Dec. 37 (1915), considered the concept of prorating. Congress had appropriated a specific sum for the payment of a designated class of claims against the Interior Department. When all claims were filed and determined, the total amount of the allowed claims exceeded the amount of the appropriation. The question was whether the amount appropriated could be prorated among the claimants.

The Comptroller of the Treasury declined to approve the prorating, concluding that "action should be suspended until Congress shall declare its wishes by directing a pro rata payment . . . or by appropriating the additional amount necessary to full payment." Id. at 40. If the decision was saying merely that the agency should attempt to secure additional funds—or at least explore the possibility—before taking administrative action which would reduce payments to individual claimants, then it is consistent with the more recent case law and remains valid to that extent. If, however, it was suggesting that the agency lacked authority to prorate without specific congressional sanction, then it is clearly superseded by Morton v. Ruiz and the other cases previously cited. There is no apparent reason why prorating should not be one of the discretionary options available to the agency along with the other options discussed in the various cases. It has one advantage in that each claimant will receive at least something.

A conceptually related situation is a funding shortfall in an appropriation used to fund a number of programs. Again, the agency

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must allocate its available funds in some reasonable fashion. Mandatory programs take precedence over discretionary ones.[22] Within the group of mandatory programs, more specific requirements should be funded first, such as those with specific time schedules, with remaining funds then applied to the more general requirements. B-159993, September 1, 1977; B-177806, February 24, 1978 (non-decision letter). These principles apply equally, of course, to the allocation of funds between mandatory and nonmandatory expenditures within a single-program appropriation. E.g., 61 Comp. Gen. 661, 664 (1982).

Other cases recognizing an agency's discretion in coping with funding shortfalls are Los Angeles v. Adams, 556 F.2d 40, 49-50 (D.C. Cir. 1977), and McCarey v. McNamara, 390 F.2d 601 (3d Cir. 1968).

[22]A "mandatory program," as we use the term here, should not be confused with the entitlement programs previously noted. A mandatory program is simply one which Congress directs (rather than merely authorizes) the agency to conduct, but within the limits of available funding. Entitlement programs would take precedence over these "mandatory" programs.

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Introduction

"[T]he protection of the public fisc is a matter that is of interest to every citizen . . . ." Brock v. Pierce County, 476 U.S. 253, 262 (1986).

A. Nature of Appropriations Law

A federal agency is a creature of law and can function only to the extent authorized by law. The Supreme Court has expressed what is perhaps the quintessential axiom of "appropriations law" as follows:

> "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."

United States v. MacCollom, 426 U.S. 317, 321 (1976). Thus, the concept of "legal authority" is central to the spending of federal money. When we use the term "federal appropriations law" or "federal fiscal law," we mean that body of law which governs the availability and use of federal funds.

Federal funds are made available for obligation and expenditure by means of appropriation acts (or occasionally by other legislation) and the subsequent administrative actions which release appropriations to the spending agencies. The use or "availability" of appropriations once enacted and released (that is, the rules governing the purpose, amounts, manner, and timing of obligations and expenditures) is governed by various authorities: the terms of the appropriation act itself; legislation, if any, authorizing the appropriation; the "organic" or "enabling" legislation which prescribes a function or creates a program which the appropriation funds; general statutory provisions which allow or prohibit certain uses of appropriated funds; and general rules which have been developed largely through decisions of the Comptroller General and the courts. These sources, together with certain provisions of the Constitution of the United States, form the basis of "appropriations law"—an area where questions may arise in as many contexts as there are federal actions that involve spending money.

Although this publication attempts to incorporate all relevant authorities, its primary focus is on the decisions and opinions of the "accounting officers of the government"—the Comptroller General of the United States and his predecessors.

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B. The Congressional "Power of the Purse"

The congressional "power of the purse" refers to the power of Congress to appropriate funds and to prescribe the conditions governing the use of those funds.[1] The power derives from specific provisions of the Constitution of the United States. First, Article I, section 8 empowers the Congress to "pay the Debts and provide for the common Defence and general Welfare of the United States," and to—

> "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [listed in Art. I, § 8], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Next, the so-called Appropriations Clause, the first part of Article I, section 9, clause 7, provides that—

> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."

The Appropriations Clause has been described as "the most important single curb in the Constitution on Presidential power."[2] It means that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937). Regardless of the nature of the payment—salaries, payments promised under a contract, payments ordered by a court, whatever—a federal agency may not make a payment from the United States Treasury unless Congress has made the funds available. As the Supreme Court stated well over a century ago:

> "However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not . . . previously sanctioned [by a congressional appropriation]."

Reeside v. Walker, 52 U.S. (11 How.) 272, 291 (1850). This prescription remains as valid today as it was when it was written. Citing both Cincinnati Soap and Reeside, the Court recently reiterated that any exercise of power by a government agency "is limited

[1]While the phrase itself is well-known, there has been relatively little literature describing and analyzing the substantive aspects of the power. One recent treatment is Stith, Congress' Power of the Purse, 97 Yale L.J. 1343 (1988).

[2]Edward S. Corwin, The Constitution and What It Means Today 134 (H.W. Chase & C.R. Ducat 14th ed. 1978).

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by a valid reservation of congressional control over funds in the Treasury." Office of Personnel Management v. Richmond, ___ U.S. ___, 110 S. Ct. 2465, 2472 (1990).[3]

As these statements by the Supreme Court make clear, the congressional "power of the purse" reflects the fundamental proposition that a federal agency is dependent on Congress for its funding. At its most basic level, this means that it is up to Congress to decide whether or not to provide funds for a particular program or activity and to fix the level of that funding. In exercising its appropriations power, however, Congress is not limited to these elementary functions. It is also well-established that Congress can, within constitutional limits, determine the terms and conditions under which an appropriation may be used. See, e.g., Cincinnati Soap Co., 301 U.S. at 321; Oklahoma v. Schweiker, 655 F.2d 401, 406 (D.C. Cir. 1981) (citing numerous cases); Spaulding v. Douglas Aircraft Co., 60 F. Supp. 985, 988 (S.D. Cal. 1945), aff'd, 154 F.2d 419 (9th Cir. 1946). Thus, Congress can decree, either in the appropriation itself or by separate statutory provisions, what will be required to make the appropriation "legally available" for any expenditure. It can, for example, describe the purposes for which the funds may be used, the length of time the funds may remain available for these uses, and the maximum amount an agency may spend on particular elements of a program. In this manner, Congress may, and often does, use its appropriation power to accomplish policy objectives and to establish priorities among federal programs.

Congress can also use its appropriation power for other measures. It can, for example, include a provision in an appropriation act prohibiting the use of funds for a particular program. By doing this without amending the program legislation, Congress can effectively suspend operation of the program for budgetary or policy reasons, or perhaps simply to defer further consideration of the merits of the program. The Supreme Court recognized the validity of this application of the appropriation power in United States v. Dickerson, 310 U.S. 554 (1940).

As some authorities have pointed out, there are limitations on the congressional spending power. Courts have listed four restrictions:

[3]Numerous similar statements exist. See, e.g., Knote v. United States, 95 U.S. 149, 154 (1877); Doe v. Mathews, 420 F. Supp. 865, 870-71 (D.N.J. 1976); Hart's Case, 16 Ct. Cl. 459, 484 (1880), aff'd, Hart v. United States, 118 U.S. 62 (1886).

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an exercise of the spending power must be in pursuit of the general welfare; conditions imposed on the use of federal funds must be reasonably related to the articulated goal; the intent of Congress to impose conditions must be authoritative and unambiguous; and the action in question must not be prohibited by an independent constitutional bar. South Dakota v. Dole, 483 U.S. 203, 207-08 (1987); Nevada v. Skinner, 884 F.2d 445, 447 (9th Cir. 1989), cert. denied, 110 S. Ct. 1112. However, the Skinner court conceded that discussion of these restrictions comes more from commentators than from the courts themselves. Id. at 447 n.2.

The only cases we have found in which courts invalidated funding restrictions as exceeding the congressional spending power did so on the grounds that the restrictions violated some independent constitutional bar. For example, in United States v. Lovett, 328 U.S. 303 (1946), the Supreme Court held an appropriation act restriction unconstitutional as a bill of attainder. The rider in question was a prohibition on the payment of salary to certain named individuals rather than a condition on the receipt of funds. In a more recent case, a provision in the 1989 District of Columbia appropriation act prohibited the use of any funds appropriated by the act unless the District adopted legislation spelled out in the rider. The provision was invalidated on first amendment grounds. Clarke v. United States, 705 F. Supp. 605 (D.D.C. 1988), aff'd, 886 F.2d 404 (D.C. Cir. 1989). The district court recognized that Congress has the power to condition funding on the enactment of certain legislation by the states. E.g., North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532, 535-36 (E.D.N.C. 1977), aff'd mem., 435 U.S. 962. The difference was that the provision in question would have barred use of all funds provided for the District for 1989 and, as both the district court and the court of appeals noted, was thus clearly coercive. 705 F. Supp. at 609; 886 F.2d at 409.[4]

Unless and until the courts provide further definition, it would appear safe to say that Congress can, as long as it does not violate the Constitution, appropriate money for any purpose it chooses, from paying the valid obligations of the United States to what the Supreme Court has termed "pure charity,"[5] and can implement

[4]As of the date of this publication, the Clarke litigation may not be over. See Clarke v. United States, 898 F.2d 162 (D.C. Cir. 1990) (period for seeking Supreme Court review tolled pending en banc reconsideration of government motions).

[5]United States v. Realty Co., 163 U.S. 427, 441 (1896).

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policy objectives by imposing conditions on the receipt or use of the money.

The Constitution does not provide detailed instruction on how Congress is to implement its appropriation power, but leaves it to Congress to do so by statute. Congress has in fact done this, and continues to do it, in two ways: the annual budget and appropriations process and a series of permanent "funding statutes." As one court has put it:

> "[The Appropriations Clause] is not self-defining and Congress has plenary power to give meaning to the provision. The Congressionally chosen method of implementing the requirements of Article I, section 9, clause 7 is to be found in various statutory provisions." Harrington v. Bush, 553 F.2d 190, 194-95 (D.C. Cir. 1977).

There were few statutory funding controls in the early years of the Nation and abuses were commonplace. As early as 1809, one senator, citing a string of abuses, introduced a resolution to look into ways to prevent the improper expenditure of public funds.[6] In 1816 and 1817, John C. Calhoun lamented the "great evil" of diverting public funds to uses other than those for which they were appropriated.[7] Even as late as the post-Civil War years, the situation saw little improvement. "Funds were commingled. Obligations were made without appropriations. Unexpended balances from prior years were used to augment current appropriations."[8]

The permanent funding statutes, found mostly in Title 31 of the United States Code, are designed to combat these and other abuses. They did not spring up overnight, but have evolved over the span of nearly two centuries. Nevertheless, when viewed as a whole, they form a logical pattern. We may regard them as pieces of a puzzle which fit together to form the larger picture of how Congress exercises its control of the purse. Some of the key statutory directives in this scheme, each of which is discussed elsewhere in this publication, are:

[6]19 Annals of Cong. 347 (1809) (remarks of Senator Hillhouse).

[7]Hopkins & Nutt, The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis, 80 Mil. L. Rev. 51, 57 n.7 (1978).

[8]Id. at 57.

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- A statute will not be construed as making an appropriation unless it expressly so states. 31 U.S.C. § 1301(d).
- Agencies may not spend, or commit themselves to spend, in advance of or in excess of appropriations. 31 U.S.C. § 1341 (Antideficiency Act).
- Appropriations may be used only for their intended purposes. 31 U.S.C. § 1301(a).
- Appropriations made for a definite period of time may be used only for expenses properly incurred during that time. 31 U.S.C. § 1502(a) ("bona fide need" statute).
- Unless authorized by law, an agency may not keep money it receives from sources other than congressional appropriations, but must deposit the money in the Treasury. 31 U.S.C. § 3302(b) ("miscellaneous receipts" statute).

The second part of Article I, section 9, clause 7 of the Constitution requires that—

> "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

Implementation of this provision, as a logical corollary of the appropriation power, is also wholly within the congressional province, and the courts have so held.[9] United States v. Richardson, 418 U.S. 166, 178 n.11 (1974) ("it is clear that Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interest"); Harrington v. Bush, 553 F.2d at 195; Hart v. United States, 16 Ct. Cl. at 484 ("[a]uditing and accounting are but parts of a scheme for payment . . . .").

The Constitution mentions appropriations in only one other place. Article I, section 8, clause 12 provides that the Congress shall have power to "raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years." The two-year limit in clause 12 has been strictly construed as applying essentially to appropriations for personnel and for operations and maintenance, and not to other military appropriations such as weapon system procurement or military construction. See B-114578, November 9, 1973; 40 Op. Att'y Gen. 555 (1948); 25 Op.

[9]Thus, Congress has delegated authority to the Comptroller General to prescribe, after consultation with the President and the Secretary of the Treasury, accounting principles and standards for the federal government. 31 U.S.C. § 3511.

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Att'y Gen. 105 (1904). In any event, Congress has traditionally made appropriations for military personnel and operations and maintenance on a fiscal-year basis.

Whenever one reflects upon the constitutional prerogatives of the legislature, it must be against the backdrop of a central theme underlying much of federal fiscal law and policy—the natural antithesis of executive flexibility and congressional control. Each objective is valid and necessary, but it is impossible to simultaneously maximize both. Either can be enhanced only at the expense of the other. Finding and maintaining a reasonable and proper balance is both the goal and the challenge of the legal process.

C. Historical Perspective

1. Evolution of the Budget and Appropriations Process [10]

The first general appropriation act, passed by Congress in 1789, appropriated a total of $639,000 and illustrates what was once a relatively uncomplicated process. We quote it in full (1 Stat. 95):

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be appropriated for the service of the present year, to be paid out of the monies which arise, either from the requisitions heretofore made upon the several states, or from the duties on impost and tonnage, the following sums, viz. A sum not exceeding two hundred and sixteen thousand dollars for defraying the expenses of the civil list, under the late and present government; a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war; a sum not exceeding one hundred and ninety thousand dollars for discharging the warrants issued by the late board of treasury, and remaining unsatisfied; and a sum not exceeding ninety-six thousand dollars for paying the pensions to invalids."

As the size and scope of the federal government have grown, so has the complexity of the appropriations process.

In 1789, the House established the Ways and Means Committee to report on revenues and spending, only to disband it that same year following the creation of the Treasury Department. The House

[10]For a more detailed review, see Louis Fisher, The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices, 29 Cath. U.L. Rev. 51, 53-59 (1979).

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Ways and Means Committee was re-established to function permanently in 1795 and was recognized as a standing committee in 1802.

On the Senate side, the Finance Committee was established as a standing committee in 1816. Up until that time, the Senate had referred appropriation measures to temporary select committees. By 1834, jurisdiction over all Senate appropriation bills was consolidated in the Senate Finance Committee.

In the mid-19th century, a move was begun to restrict appropriation acts to only those expenditures which had been previously authorized by law. The purpose was to avoid the delays caused when legislative items or "riders" were attached to appropriation bills. Rules were eventually passed by both Houses of Congress to require, in general, prior legislative authorizations for the enactment of appropriations.

It was during this same period that the concept of a fiscal year separate and distinct from the calendar year came into existence.[11]

Under the financial strains caused by the Civil War, appropriations committees first appeared in both the House and the Senate, diminishing the jurisdiction of the Ways and Means and Finance Committees, respectively. Years later, the need for major reforms was again accentuated by the burdens of another war. Following World War I, Congress passed the Budget and Accounting Act of 1921, Pub. L. No. 67-13 (June 10, 1921), 42 Stat. 20.

Before 1921, departments and agencies generally made individual requests for appropriations. These submissions were compiled for congressional review in an uncoordinated "Book of Estimates." The Budget and Accounting Act authorized the President to submit a national budget each year and restricted the authority of the agencies to present their own proposals. See 31 U.S.C. §§ 1104, 1105. With this centralization of authority for the formulation of the executive branch budget in the President and the newly established Bureau of the Budget (now Office of Management and Budget), Congress also

[11]Prior to 1842, the government did not distinguish between fiscal year and calendar year. From 1842 to 1976, the government's fiscal year ran from July 1 to the following June 30. In 1974, Congress changed the fiscal year to run, starting with FY 1977, from October 1 to September 30. 31 U.S.C. § 1102. The concept of a fiscal year has been termed an "absolute necessity." Sweet v. United States, 34 Ct. Cl. 377, 386 (1899). See also Bachelor v. United States, 8 Ct. Cl. 235, 238 (1872) (reasons for fixing a fiscal year are "so obvious . . . that no one can fail to see their importance").

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took steps to strengthen its jurisdiction over fiscal matters, including the establishment of the General Accounting Office.[12]

The decades immediately following World War II saw growth in both the size and the complexity of the federal budget. It became apparent that the congressional role in the "budget and appropriations" process centered heavily on the appropriations phase and placed too little emphasis on the budgetary phase. A major round of reforms came about with the Congressional Budget and Impoundment Control Act of 1974.[13] This statute made several major changes in the budget and appropriations process. For example:

- It established a detailed calendar governing the various stages of the budget and appropriations process. 2 U.S.C. § 631.
- It provided for congressional review of the President's budget; the establishment of target ceilings for federal expenditures through one or more concurrent resolutions; and the evaluation of spending bills against these targets. 2 U.S.C. §§ 632–642. Prior to this time, Congress had considered the President's budget only in the context of individual appropriation bills. To implement the new process, the law created Budget Committees in both the Senate and the House, and a Congressional Budget Office.
- Prompted by the growth of "backdoor spending," it enhanced the role of the Appropriations Committees in reviewing proposals for contract authority, borrowing authority, and mandatory entitlements. 2 U.S.C. § 651.

The 1974 legislation also imposed limitations on the impounding of appropriated funds by the executive branch. 2 U.S.C. §§ 681–688.

The next piece of major legislation in the fiscal area was the Balanced Budget and Emergency Deficit Control Act of 1985, known as the Gramm-Rudman-Hollings Act,[14] enacted to deal with a growing budget deficit (excess of total outlays over total receipts for a given fiscal year, 2 U.S.C. § 622(6)). The Gramm-Rudman procedures received a major overhaul with the Budget Enforcement Act of

[12]A summary of the changes brought about by the Budget and Accounting Act, including a listing of all amendments to the Act up to 1989, may be found in National Federation of Federal Employees v. Cheney, 883 F.2d 1038, 1043-46 (D.C. Cir. 1989).

[13]Pub. L. No. 93-344, 88 Stat. 297 (1974).

[14]Pub. L. No. 99-177, title II, 99 Stat. 1037, 1038 (1985).

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1990.[15] The law establishes maximum deficit amounts for each fiscal year through FY 1995, subject to adjustment, and sets monetary caps on several broad spending categories. In grossly oversimplified terms, if spending bills cause a cap to be exceeded, the law provides mechanisms for making appropriate spending reductions (called "sequestrations" of budget authority). Sequestrations may occur at several points during a fiscal year.

2. GAO's Role in the Process

As the budget and appropriations process has evolved over the course of the 20th century, GAO's role with respect to it has also evolved. Title III of the Budget and Accounting Act of 1921, GAO's basic enabling statute, created two very different roles for the Comptroller General and his new agency. First, he was to assume all the duties of the Comptroller of the Treasury and his six subordinate auditors, and to serve as the chief accounting officer of the government. To this end, the Comptroller General is to settle all claims by and against the government,[16] and to settle the accounts of the United States government.[17] Another of these functions is the issuance of legal decisions, discussed separately in Section E below.

In addition, the Comptroller General was directed to investigate the receipt, disbursement, and application of public funds, reporting the results to Congress;[18] and to make investigations and reports upon the request of either House of the Congress or of any congressional committee with jurisdiction over revenue, appropriations, or expenditures.[19] He is also directed to supply such information, if requested, to the President.[20] The mandates in the 1921 legislation, together with a subsequent directive in the Legislative Reorganization Act of 1946 to make expenditure analyses of executive branch

[15]Title XIII of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 (November 5, 1990), 104 Stat. 1388–573. The law requires the Comptroller General to report to the Congress and the President, 45 days after the end of a legislative session, on the extent to which the President and the Office of Management and Budget have complied with the statutory requirements.

[16]Budget and Accounting Act § 305, 42 Stat. at 24, 31 U.S.C. § 3702(a).

[17]31 U.S.C. § 3526(a), also derived from § 305 of the Budget and Accounting Act.

[18]Budget and Accounting Act §§ 312(a) and (c), 42 Stat. at 25-26, 31 U.S.C. §§ 712(1), 719(c).

[19]Budget and Accounting Act § 312(b), 42 Stat. at 26, 31 U.S.C. §§ 712(4) and (5). At about this same time, both the House and the Senate consolidated jurisdiction over all appropriation bills in a single committee in each body.

[20]31 U.S.C. § 719(f), derived from Budget and Accounting Act § 312(e), 42 Stat. at 26.

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agencies with reports to the cognizant congressional committees,[21] have played a large part in preparing the Congress to consider the merits of the President's annual budget submission.

The Accounting and Auditing Act of 1950[22] authorized the Comptroller General to audit the financial transactions of each executive, legislative, and judicial agency;[23] and to prescribe, in consultation with the President and the Secretary of the Treasury, accounting principles, standards, and requirements for the executive agencies suitable to their needs.[24]

The Legislative Reorganization Act of 1970 expanded the scope of GAO's audit activities to include program evaluations as well as financial audits.[25]

The Congressional Budget and Impoundment Control Act of 1974 gave GAO a number of additional duties in the budgetary arena. It directs GAO, in cooperation with Treasury, the Office of Management and Budget, and the Congressional Budget Office, to "establish, maintain, and publish standard terms and classifications for fiscal, budget, and program information of the Government, including information on fiscal policy, receipts, expenditures, programs, projects, activities, and functions." Agencies are to use these terms and classifications in providing information to Congress.[26] It gives GAO a variety of functions relating to the obtaining, studying, and reporting to Congress of fiscal, budget, and program information.[27] Finally, it gives the Comptroller General the responsibility to

[21]Pub. L. No. 79-601, § 206, 60 Stat. 812, 837 (1946), 31 U.S.C. §§ 712(3), 719(e).

[22]Budget and Accounting Procedures Act of 1950, Pub. L. No. 81-784, Title I, Part II, 64 Stat. 832, 834 (1950).

[23]Id. § 117(a), 64 Stat. at 837, 31 U.S.C. § 3523(a).

[24]Id. § 112(a), 64 Stat. at 835, 31 U.S.C. § 3511(a).

[25]Pub. L. No. 91-510, § 204, 84 Stat. 1140, 1168 (1970), 31 U.S.C. § 717.

[26]31 U.S.C. §§ 1112(c) and (d), derived from Pub. L. No. 93-344, § 801(a), 88 Stat. at 327.

[27]31 U.S.C. §§ 1113(b)–(e), also derived from Pub. L. No. 93-344, § 801(a). GAO is continually studying the budget process as part of its overall mission. For an overview of GAO reform proposals, with references to related GAO reports, see Managing the Cost of Government: Proposals for Reforming Federal Budgeting Practices, GAO/AFMD-90-1 (October 1989). A study of the budget deficit is The Budget Deficit: Outlook, Implications, and Choices, GAO/OCG-90-5 (September 1990).

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Foreword

We are pleased to present the second edition of Principles of Federal Appropriations Law. Our first edition, published in June 1982, was to our knowledge the first attempt at a comprehensive treatment of the body of law governing the expenditure of federal funds. Response to that effort has been both gratifying and encouraging.

Our objective in Principles is to present a basic reference work covering those areas of law in which the Comptroller General renders decisions and which are not covered in other GAO publications. Our approach has been to lay a foundation with text discussion, using relevant authorities to illustrate the principles discussed, their application, and exceptions. We have tried to be simultaneously basic and detailed—basic so that the book will be useful as a "teaching manual" for the novice or occasional user, lawyer and non-lawyer alike; detailed so that it will also be a useful reference for those whose work requires a more in-depth understanding. Principles is essentially expository in nature, and should not be regarded as an independent source of legal authority.

The material in this publication is, of course, subject to change by statute or through the decision-making process. In addition, it is manifestly impossible to cover every aspect of this broad field. We make no claim to have included every relevant decision, and we may admit, albeit grudgingly, that errors and omissions are probably inevitable. Principles should therefore be used as a general guide and starting point, and not as a substitute for legal research. As errors, omissions, and new material are discovered, they will be addressed in revisions or supplements, which we plan to issue periodically.

It is also important to emphasize that we have tried to focus our attention on issues and principles of governmentwide application. In various instances, there may be agency-specific legislation which provides authority or restrictions somewhat different from the general rule. While we have noted many of these for purposes of illustration, a comprehensive cataloguing of such legislation is beyond the scope of this publication. Thus, failure to note agency-specific exceptions in a given context does not necessarily mean that they do not exist.

We are publishing our second edition in looseleaf format. It will consist of four volumes. Users should retain their copies of the first

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monitor, and report to Congress on, all proposed impoundments of budget authority by the executive branch.[28]

The Federal Managers' Financial Integrity Act of 1982[29] is a very brief law but one with substantial impact. It was intended to increase governmentwide emphasis on internal accounting and administrative controls. Agencies are to establish internal accounting and administrative control systems in accordance with standards prescribed by the Comptroller General, conduct annual reviews of their systems in accordance with Office of Management and Budget guidelines, and report the results of these reviews to the President and to Congress. GAO monitors, and issues governmentwide reports on, the implementation of the Financial Integrity Act. See, for example, Financial Integrity Act: Inadequate Controls Result in Ineffective Federal Programs and Billions in Losses, GAO/AFMD-90-10 (November 1989).

D. "Life Cycle" of an Appropriation

An appropriate subtitle for this section might be "phases of the budget and appropriations process." An appropriation has phases roughly similar to the various stages in the existence of "man"—conception, birth, death, even an afterlife. The various phases in an appropriation's "life cycle" may be identified as follows:

- Executive budget formulation and transmittal
- Congressional action
- Budget execution and control
- Audit and review
- The "afterlife"—unexpended balances

1. Executive Budget Formulation and Transmittal

The first step in the life cycle of an appropriation is the long and exhaustive administrative process of budget preparation and review, a process that may well take place several years before the budget for a particular fiscal year is ready to be submitted to the Congress. The primary participants in the process at this stage are the agencies and individual organizational units, who review current operations, program objectives, and future plans, and the

[28]Pub. L. No. 93-344, §§ 1014(b), 1015, 88 Stat. at 335, 336, 2 U.S.C. §§ 685(b), 686.

[29]Pub. L. No. 97-255, 96 Stat. 814 (1982), codified at 31 U.S.C. §§ 3512(c) and (d) (redesignated by section 301(a) of the Chief Financial Officers Act of 1990).

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Office of Management and Budget (OMB),[30] which is charged with broad oversight, supervision, and responsibility for coordinating and formulating a consolidated budget submission.

Throughout this preparation period, there is a continuous exchange of information among the various federal agencies, OMB, and the President, including revenue estimates and economic outlook projections from the Treasury Department, the Council of Economic Advisers, the Congressional Budget Office, and the Departments of Commerce and Labor.

The President's budget must be submitted to Congress on or before the first Monday in February of each year, for use during the following fiscal year. 2 U.S.C. § 631. Numerous statutory provisions, the most important of which are 31 U.S.C. §§ 1104–1109, prescribe the content and nature of the materials and justifications that must be submitted with the President's budget request. A comprehensive listing is contained in GAO's report Budget Issues: The President's Budget Submission, GAO/AFMD-90-35 (October 1989). Specific instructions and policy guidance are contained in OMB Circular No. A-11, entitled Preparation and Submission of Budget Estimates.

2. Congressional Action

a. Summary of Congressional Process

In exercising the broad discretion granted by the Constitution, the Congress can approve funding levels contained in the President's budget, increase or decrease those levels, eliminate proposals, or add programs not requested by the Administration.

In simpler times, appropriations were often made in the form of a single, consolidated appropriation act. The most recent regular consolidated appropriation act[31] was the General Appropriation Act, 1951, 64 Stat. 595. Since that time, appropriations have generally

[30]OMB was established by Part 1 of Reorganization Plan No. 2 of 1970 (84 Stat. 2085), which designated the former Bureau of the Budget as OMB and transferred all the authority vested in the Bureau and its director to the President. By Executive Order 11541, July 1, 1970, the President in turn delegated that authority to the Director of OMB. OMB's primary functions include assistance to the President in the preparation of the budget and the formulation of the fiscal program of the government, supervision and control of the administration of the budget, centralized direction in executive branch financial management, and review of the organization and management of the executive branch.

[31]For a few years in the mid-1980s, very few regular appropriation acts were passed, resulting in consolidated continuing resolutions for those years.

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been made in a series of regular appropriation acts plus one or more supplemental appropriation acts. Most regular appropriation acts are organized on the basis of one or more major departments and a number of smaller agencies (corresponding to the jurisdiction of appropriations subcommittees), although a few are based solely on function. An agency may receive funds under more than one appropriation act. The individual structures are of course subject to change over time. At the present time, there are 13 regular appropriation acts, as follows:

- Departments of Commerce, Justice, State, the Judiciary, and related agencies
- Department of Defense
- Department of the Interior and related agencies
- Departments of Labor, Health and Human Services, Education, and related agencies
- Department of Transportation and related agencies
- Department of the Treasury, Postal Service, and general government
- Departments of Veterans Affairs, Housing and Urban Development, and independent agencies
- District of Columbia
- Energy and water development
- Foreign operations, export financing, and related programs
- Legislative branch
- Military construction
- Rural development, Department of Agriculture, and related agencies

Before considering individual appropriation measures, however, Congress must, under the Congressional Budget Act, first agree on governmentwide budget totals. A timetable for congressional action is set forth in 2 U.S.C. § 631, with further detail in §§ 632–656. Key steps in that timetable are summarized below.[32]

First Monday in February. On or before this date, the President submits to Congress the Administration's budget request for the fiscal year to start the following October 1. The deadline under the

[32]References on the process are Senate Committee on the Budget, Gramm-Rudman-Hollings and the Congressional Budget Process, S. Prt. No. 99-119, 99th Cong., 1st Sess. (1985), and Library of Congress, Congressional Research Service, Manual on the Federal Budget Process, No. 87-286 GOV (March 31, 1987). Both are useful although outdated in some respects in light of the Budget Enforcement Act of 1990.

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1974 Budget Act had been the first Monday after January 3. While this was changed by section 13112(a)(4) of the Omnibus Budget Reconciliation Act of 1990, the conference report on the 1990 legislation stresses the expectation that the President continue to comply with the January deadline, and that the "increased flexibility be used very rarely to meet only the most pressing exigencies." H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 1171 (1990).

February 15. The Congressional Budget Office submits to the House and Senate Budget Committees its annual report required by 2 U.S.C. § 602(f). The report contains the CBO's analysis of fiscal policy and budget priorities.

Within 6 weeks after President submits budget. Each congressional committee with legislative jurisdiction submits to the appropriate Budget Committee its views and estimates on spending and revenue levels for the following fiscal year on matters within its jurisdiction. 2 U.S.C. § 632(d), as amended by section 13112(a)(5) of the Omnibus Budget Reconciliation Act of 1990, 104 Stat. 1388–608. The House and Senate Budget Committees then hold hearings and prepare their respective versions of a concurrent resolution, which is intended to be the overall budget plan against which individual appropriation bills are to be evaluated.

April 15. Congress completes action on the concurrent resolution, which includes a breakdown of estimated outlays by budget function. 2 U.S.C. § 632(a). The conference report on the concurrent resolution allocates the totals among individual committees. 2 U.S.C. § 633(a). The resolution may also include "reconciliation directives"—directives to individual committees to recommend legislative changes in revenues or spending to meet the goals of the budget plan. 2 U.S.C. § 641(a).

June 10. House Appropriations Committee completes the process of reporting out the individual appropriation bills.

June 15. Congress completes action on any reconciliation legislation stemming from the concurrent resolution.

June 30. House of Representatives completes action on annual appropriation bills.

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Of course, House consideration of the individual appropriation bills will have begun several months earlier. The first step is for each subcommittee of the House Appropriations Committee to study appropriation requests and evaluate the performance of the agencies within its jurisdiction. Typically, each subcommittee will conduct hearings at which federal officials give testimony concerning both the costs and achievements of the various programs administered by their agencies, and provide detailed justifications for their funding requests. Eventually each subcommittee reports a single appropriation bill for consideration by the entire committee and then the full House membership.

As individual appropriation bills are passed by the House, they are sent to the Senate. As in the House, each appropriation measure is first considered in subcommittee and then reported by the full Appropriations Committee to be voted upon by the full Senate. In the event of variations in the Senate and House versions of a particular appropriation bill, a conference committee including representatives of both Houses of Congress is formed. It is the function of the conference committee to resolve all differences, but the full House and Senate (in that order) must also vote to approve the conference report.

Following either the Senate's passage of the House version of an appropriation measure, or the approval of a conference report by both bodies, the enrolled bill is then sent to the President for signature or veto. The Congressional Budget Act envisions completion of the process by October 1.

b. Points of Order

A number of requirements relevant to an understanding of appropriations law and the legislative process are found in rules of the Senate and/or House of Representatives. For example, Rule XXI(2), Rules of the House of Representatives, prohibits appropriations for objects not previously authorized by law. A similar but more limited prohibition exists in Rule XVI, Standing Rules of the Senate. Other examples are the prohibition against including general legislation in appropriation acts[33] (Senate Rule XVI, House Rule XXI), and the prohibition against consideration by a conference committee of matters not committed to it by either House (Senate Rule XXVIII, House Rule XXVIII). The applicability of Senate and House

[33]Whether a given item is general legislation or merely a condition on the availability of an appropriation is frequently a difficult question.

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rules is exclusively within the province of the particular House and a matter on which the Comptroller General will generally not render an opinion. E.g., B-173832, August 1, 1975.

In addition, rather than expressly prohibiting a given item, legislation may provide that it shall not be in order for the Senate or House to consider a bill or resolution containing that item. An important example from the Congressional Budget Act of 1974 is 2 U.S.C. § 651(a), which provides that it shall not be in order for either House to consider any bill, resolution, or amendment containing certain types of new spending authority, such as contract authority, unless that bill, resolution, or amendment also provides that the new authority is to be effective for any fiscal year only to the extent provided in appropriation acts.

The effect of these rules and of statutes like 2 U.S.C. § 651(a) is to subject the non-complying bill to a "point of order." A point of order is a procedural objection raised by a Member alleging a departure from a rule or statute governing the conduct of business. It differs from an absolute prohibition in that (a) it is always possible that no one will raise it, and (b) if raised, it may or may not be sustained. Also, some measures may be considered under special resolutions waiving points of order. If a point of order is raised and sustained, the offending provision is effectively killed, and may be revived only if it is amended to cure the non-compliance.

The potential effect of a rule or statute subjecting a provision to a point of order is limited to the pre-enactment stage. If a point of order is not raised, or raised and not sustained, the provision if enacted is no less valid. To restate, a rule or statute subjecting a given provision to a point of order has no effect or application once the legislation or appropriation has been enacted. 57 Comp. Gen. 34 (1977); 34 Comp. Gen. 278 (1954); B-173832, August 1, 1975; B-123469, April 14, 1955; B-87612, July 26, 1949.

3. Budget Execution and Control

a. In General

The body of enacted appropriation acts for a fiscal year, as amplified by legislative history and the relevant budget submissions, becomes the government's financial plan for that fiscal year. The

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"execution and control" phase refers generally to the period of time during which the budget authority made available by the appropriation acts remains available for obligation. An agency's task during this phase is to spend the money Congress has given it to carry out the objectives of its program legislation.

The Office of Management and Budget apportions or distributes budgeted amounts to the executive branch agencies, thereby making funds in appropriation accounts (administered by the Treasury Department) available for obligation. 31 U.S.C. §§ 1511–16. The apportionment system through which budget authority is distributed by time periods (usually quarterly) or by activities is intended to achieve an effective and orderly use of available budget authority, and to reduce the need for supplemental or deficiency appropriations. Each agency then makes allotments pursuant to the OMB apportionments or other statutory authority. 31 U.S.C. §§ 1513(d), 1514. An allotment is a delegation of authority to agency officials which allows them to incur obligations within the scope and terms of the delegation.[34] These concepts will be discussed further in Chapter 6. Further detail on the budget execution phase may also be found in OMB Circular No. A-34, Instructions on Budget Execution.

In addition, OMB exercises a leadership role in executive branch financial management. This role was strengthened, and given a statutory foundation, by the Chief Financial Officers Act of 1990, Pub. L. No. 101-576 (November 15, 1990), 104 Stat. 2838. The "CFO" Act also enacted a new 31 U.S.C. Chapter 9, which establishes a Chief Financial Officer in the cabinet departments and several other executive branch agencies, to work with OMB and to develop and oversee financial management plans, programs, and activities within the agency.

b. Impoundment

While an agency's basic mission is to carry out its programs with the funds Congress has appropriated, there is also the possibility that, for a variety of reasons, the full amount appropriated by Congress will not be expended or obligated by the administration. Under the Impoundment Control Act of 1974, an impoundment is an action or inaction by an officer or employee of the United States that precludes the obligation or expenditure of budget authority

[34]Note the distinction in terminology: Congress appropriates, OMB apportions, and the receiving agency allots (or allocates) within the apportionment.

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provided by Congress. GAO, Glossary of Terms Used in the Federal Budget Process, PAD-81-27, at 63 (1981).[35] The Act applies to "Salaries and Expenses" appropriations as well as program appropriations. 64 Comp. Gen. 370, 375-76 (1985).

There are two types of impoundment action—deferrals and rescission proposals. A deferral is a postponement of budget authority in the sense that an agency temporarily withholds or delays obligation or expenditure. The President is required to submit a special message to Congress reporting any deferral of budget authority. Deferrals are authorized only to provide for contingencies, to achieve savings made possible by changes in requirements or greater efficiency of operations, or as otherwise specifically provided by law.[36] A deferral may not be proposed for a period beyond the end of the fiscal year in which the special message reporting it is transmitted, although, for multiple-year funds, nothing prevents a new deferral message covering the same funds in the following fiscal year. 2 U.S.C. §§ 682(1), 684.[37]

A rescission involves the cancellation of budget authority previously provided by Congress (before that authority would otherwise expire), and can be accomplished only through legislation. The President must advise Congress of any proposed rescissions, again in a special message. The President is authorized to withhold budget authority which is the subject of a rescission proposal for a period of 45 days of continuous session following receipt of the proposal. Unless Congress acts to approve the proposed rescission within that time, the budget authority must be made available for obligation. 2 U.S.C. §§ 682(3), 683, 688.

[35]For a detailed discussion of impoundment before the 1974 legislation, see B-135564, July 26, 1973.

[36]These requirements are repeated in 31 U.S.C. § 1512(c), which prescribes conditions for establishing reserves through the apportionment process. The President's deferral authority under the Impoundment Control Act thus mirrors his authority to establish reserves under the Antideficiency Act. In other words, deferrals are authorized only in those situations in which reserves are authorized under the Antideficiency Act. GAO/OGC-90-4 (B-237297.3, March 6, 1990). Deferrals for policy reasons are not authorized. Id.

[37]Under the original 1974 legislation, a deferral could be overturned by the passage of an impoundment resolution by either the House or the Senate. This "legislative veto" provision was found unconstitutional in City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987), and the statute was subsequently amended to remove it. Congress may, of course, enact legislation disapproving a deferral and requiring that the deferred funds be made available for obligation.

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The Impoundment Control Act requires the Comptroller General to monitor the performance of the executive branch in reporting proposed impoundments to the Congress. A copy of each special message reporting a proposed deferral or rescission must be delivered to the Comptroller General, who then must review each such message and present his views to the Senate and House of Representatives. 2 U.S.C. § 685(b). If the Comptroller General finds that the executive branch has established a reserve or deferred budget authority and failed to transmit the required special message to the Congress, the Comptroller General so reports to the Congress. The Comptroller General also reports to the Congress on any special message transmitted by the executive branch which has incorrectly classified a deferral or a rescission. 2 U.S.C. § 686. GAO will construe a deferral as a de facto rescission if the timing of the proposed deferral is such that "funds could be expected with reasonable certainty to lapse before they could be obligated, or would have to be obligated imprudently to avoid that consequence." 54 Comp. Gen. 453, 462 (1974).

If, under the Impoundment Control Act, the executive branch is required to make budget authority available for obligation (if, for example, Congress does not pass a rescission bill) and fails to do so, the Comptroller General is authorized to bring a civil action in the United States District Court for the District of Columbia to require that the budget authority be made available. 2 U.S.C. § 687.

The expiration of budget authority or delays in obligating it resulting from ineffective or unwise program administration are not regarded as impoundments unless accompanied by or derived from an intention to withhold the budget authority. B-229326, August 29, 1989. Similarly, an improper obligation, although it may violate several other statutes, is generally not an impoundment. 64 Comp. Gen. 359 (1985).

There is also a distinction between deferrals, which must be reported, and "programmatic" delays, which GAO does not regard as reportable under the Impoundment Control Act. A programmatic delay is one in which operational factors unavoidably impede the obligation of budget authority, notwithstanding the agency's reasonable and good faith efforts to implement the program. GAO/OGC-91-8 (B-241514.5, May 7, 1991); GAO/OGC-91-3 (B-241514.2, February 5, 1991). Since intent is a relevant factor, the determination requires a case-by-case evaluation of the agency's justification in

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light of all of the surrounding circumstances. Delays resulting from the following factors may be programmatic, depending on the facts and circumstances involved: uncertainty as to the amount of budget authority that will ultimately be available for the program (B-203057, September 15, 1981; B-207374, July 20, 1982, noting that the uncertainty is particularly relevant when it "arises in the context of continuing resolution funding, where Congress has not yet spoken definitively"); time required to set up the program or to comply with statutory conditions on obligating the funds (B-96983/B-225110, September 3, 1987); compliance with congressional committee directives (B-221412, February 12, 1986); delay in receiving a contract proposal requested from contemplated sole source awardee (B-115398, February 6, 1978); historically low loan application level (B-115398, September 28, 1976); late receipt of complete loan applications (B-195437.3, February 5, 1988); delay in awarding grants pending issuance of necessary regulations (B-171630, May 10, 1976); administrative determination of allowability and accuracy of claims for grant payments (B-115398, October 16, 1975). A programmatic delay may become a reportable deferral if the programmatic basis ceases to exist.

4. Audit and Review

a. Basic Responsibilities

Every federal department or agency has the initial and fundamental responsibility to assure that its application of public funds adheres to the terms of the pertinent authorization and appropriation acts, as well as any other relevant statutory provisions. This responsibility—enhanced by the enactment of the Federal Managers' Financial Integrity Act and the creation of an Inspector General in many agencies—includes establishing and maintaining appropriate accounting and internal controls, one of which is an internal audit program. Assuring the legality of proposed payments is also, under 31 U.S.C. § 3528, one of the basic responsibilities of agency certifying officers. The Chief Financial Officers Act of 1990 (Pub. L. No. 101-576, §§ 303, 304, 104 Stat. 2838, 2849–53), added new 31 U.S.C. § 3515 and 3521(e)–(h), which provide for the preparation and audit of financial statements for those agencies required to establish Chief Financial Officers. In addition, GAO regularly

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edition since it will not be completely superseded until publication of Volume IV of this second edition.

We express our appreciation to the many persons in all branches of the federal government, as well as nonfederal readers, who have called or written to offer comments and suggestions. Our primary goal now, as it was in 1982, is to present a document that will be useful. To this end, we continue to welcome any comments or suggestions for improvement.

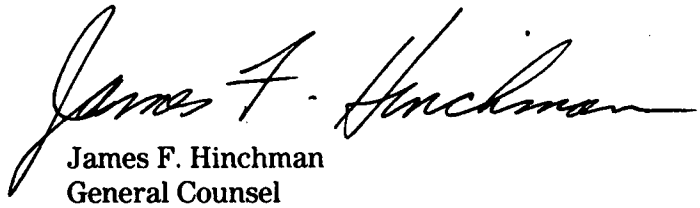

James F. Hinchman
General Counsel

July 1991

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audits federal programs under its various authorities previously summarized.

b. GAO Recommendations

GAO's principal function is to examine the financial, management, and program activities of federal agencies, and to evaluate the efficiency, effectiveness, and economy of agency operations. GAO's reports to the Congress contain both objective findings and recommendations for improvement. Recommendations may be addressed to the Congress itself (for changes in legislation) or to agency heads (for action which the agency is authorized to take under existing law).

Under section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720, whenever GAO issues a report which contains recommendations to the head of any federal agency, the agency must submit a written statement of the actions taken with respect to the recommendations (1) to the Senate Committee on Governmental Affairs and the House Committee on Government Operations not later than sixty days after the date of the report, and (2) to the Senate and House Appropriations Committees in connection with the agency's first request for appropriations submitted more than sixty days after the date of the report. As GAO pointed out in a letter to a private inquirer (B-207783, April 1, 1983), the law does not require the agency to comply with the recommendation, merely to report on the "actions taken," which can range from full compliance to zero. The theory is that, if the agency disagrees, Congress will have both positions so that it can then take whatever action it might deem appropriate.

The term "agency" for purposes of 31 U.S.C. § 720 is broadly defined to include any department, agency, or instrumentality of the United States government, including wholly owned but not mixed-ownership government corporations, or the District of Columbia government. 31 U.S.C. § 720(a); B-114831-O.M., July 28, 1975.

Although formal recommendations within the scope of 31 U.S.C. § 720 are most commonly made in audit reports, they are occasionally made in Comptroller General decisions as well. See, e.g., 59 Comp. Gen. 1 (1979); 58 Comp. Gen. 350 (1979); 53 Comp. Gen. 547 (1974). Decisions may also include suggestions which are not intended to invoke the formal response requirements of 31 U.S.C. § 720. When section 720 is intended to apply, it will be explicitly cited.

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5. The "Afterlife"—Unexpended Balances

Continuing our "life cycle" analogy, an appropriation "dies" in a sense at the end of its period of obligational availability. There is, however, an afterlife to the extent of any unexpended balances. Unexpended balances, both obligated and unobligated, retain a limited availability for five fiscal years following expiration of the period for which the source appropriation was made. These concepts are discussed in Chapter 5.

E. The Role of the Accounting Officers: Legal Decisions

1. A Capsule History

Since the early days of the Republic, the Congress, in exercising its oversight of the public purse, has utilized administrative officials for the settlement of public accounts and the review of federal expenditures. These officials have traditionally been called the "accounting officers" of the government.[38]

a. Accounting Officers Prior to 1894

Throughout most of the 19th century, the accounting officers consisted of a series of comptrollers and auditors. Starting in 1817 with two comptrollers and four auditors, the number increased until, for the second half of the century, there were three co-equal comptrollers (First Comptroller, Second Comptroller, Commissioner of Customs) and six auditors (First Auditor, Second Auditor, etc.), all officials of the Treasury Department. The jurisdiction of the comptrollers and auditors was divided generally along departmental lines, with the auditors examining accounts and submitting their settlements to the appropriate comptroller.

The practice of rendering written decisions goes back at least to 1817. However, very little of this material exists in published form. (Until sometime after the Civil War, the decisions were handwritten.)

[38]Decisions, especially the earlier ones, frequently refer to the "accounting officers of the government." While this language has fallen into disuse in recent decades, its purpose was to distinguish those matters within the jurisdiction of the Comptroller General and the General Accounting Office from those matters within the jurisdiction of the "law officers of the government," i.e., the Attorney General and the Department of Justice.

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There are no published decisions of the First Comptroller prior to the term of William Lawrence (1880–1885). Lawrence published his decisions in a series of 6 annual volumes. After Lawrence's decisions, a gap of 9 years followed until First Comptroller Robert Bowler published a single unnumbered volume of his 1893-94 decisions.[39]

The decisions of the Second Comptroller and the Commissioner of Customs were never published. However, volumes of digests of decisions of the Second Comptroller were published starting in 1852. The first volume, unnumbered, saw three cumulative editions, the latest issued in 1869 and including digests for the period 1817–1869. Three additional volumes (designated volumes 2, 3, and 4) were published in 1884, 1893, and 1899 (the latter being published several years after the office had ceased to exist), covering respectively the periods 1869-84, 1884-93, and 1893-94.[40]

Thus, material available in permanent form from this period consists of Lawrence's 6 volumes, Bowler's single volume, and 4 volumes of Second Comptroller digests.

b. 1894–1921: Comptroller of the Treasury

In 1894, Congress enacted the so-called Dockery Act, actually a part of the general appropriation act for 1895 (28 Stat. 162, 205), which consolidated the functions of the First and Second Comptrollers and the Commissioner of Customs into the newly created Comptroller of the Treasury. (The title was a reversion to one which had been used before 1817.) The 6 auditors remained, with different titles, but their settlements no longer had to be automatically submitted to the Comptroller.

The Dockery Act included a provision requiring the Comptroller of the Treasury to render decisions upon the request of an agency head or a disbursing officer. (Certifying officers did not exist back then.) Although this was to a large extent a codification of existing practice, it gave increased significance to the availability of the

[39]Citations to these are rarely encountered, and we have observed no consistent citation format, except that the First Comptroller's name is always included to prevent confusion with the later Comptroller of the Treasury series. Example: 5 Lawrence, First Comp. Dec. 408 (1884).

[40]Digests are numbered consecutively within each volume. Citations should specify the digest number rather than the page number since several digests appear on each page. Example: 4 Dig. Second Comp. Dec. ¶ 35 (1893). Without the text of the decisions themselves, the digests are of primarily historical interest.

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decisions. Accordingly, the first Comptroller of the Treasury (Robert Bowler, who had been First Comptroller when the Dockery Act passed) initiated the practice of publishing an annual volume of decisions "of such general character as will furnish precedents for the settlements of future accounts." 1 Comp. Dec. iv (1896) (Preface).

The Decisions of the Comptroller of the Treasury series consists of 27 volumes covering the period 1894–1921.[41] Comptroller of the Treasury decisions not included in the annual volumes exist in bound "manuscript volumes," which are now in the custody of the National Archives and are thus unavailable as a practical matter.

c. 1921 to the Present Time

When the Budget and Accounting Act of 1921 created the General Accounting Office, the offices of the Comptroller of the Treasury and the 6 Auditors were abolished and their functions transferred to the Comptroller General. Among these functions was the issuance of legal decisions to agency officials concerning the availability and use of appropriated funds. Thus, the decisions GAO issues today reflect the continuing evolution of a body of administrative law on federal fiscal matters dating back to the Nation's infancy. We turn now to a brief description of this function under the stewardship of the Comptroller General.

2. Decisions of the Comptroller General

a. General Information

Certain federal officials are entitled by statute to receive GAO decisions. The Comptroller General renders decisions in advance of payment when requested by disbursing officers, certifying officers, or the head of any department or establishment of the federal government, who may be uncertain whether he or she has authority to make, or authorize the making of, particular payments. 31 U.S.C. § 3529. These, logically, are known as "advance decisions."

Decisions are also provided to disbursing and certifying officers who request review of a settlement of their accounts, and to individual claimants who request review or reconsideration by the

[41]These are cited by volume and page number, respectively, and the year of the decision, using the abbreviation "Comp. Dec." Example: 19 Comp. Dec. 582 (1913). There is also a hefty (2,497 pages) volume, published in 1920, of digests of decisions appearing in volumes 1–26.

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Comptroller General of settlements made by an agency disallowing their claims in whole or in part. In addition, the Comptroller General may, in his discretion, render decisions or legal opinions to other individuals or organizations, both within and outside the government.

A decision is binding on the executive branch[42] and on the Comptroller General himself,[43] but is not binding on a private party who, if dissatisfied, retains whatever recourse to the courts he would otherwise have had. There is no legal requirement for the private party to come to GAO, under the doctrine of exhaustion of administrative remedies, before seeking judicial resolution.

There is no specific procedure for requesting a decision from the Comptroller General. A simple letter is usually sufficient. The request should, however, include all pertinent information or supporting material, and should present any arguments the requestor wishes to have considered.

A request for an advance decision submitted by a certifying officer will usually arise from "a voucher presented . . . for certification." 31 U.S.C. § 3529(a)(2). At one time, GAO insisted that the original voucher accompany the request, and occasionally declined to render the decision if this was not done. See, e.g., 21 Comp. Gen. 1128 (1942). The requirement was eliminated in B-223608, December 19, 1988:

"Consistent with our current practice, submission of the original voucher need not accompany the request for an advance decision. Accordingly, in the future, the original voucher should be retained in the appropriate finance office. A photocopy accompanying the request for decision will be sufficient. Language to the contrary in prior decisions may be disregarded."

[42]See United States ex rel. Skinner & Eddy Corp. v. McCarl, 275 U.S. 1, 4 n.2 (1927); St. Louis, Brownsville & Mexico Ry. Co. v. United States, 268 U.S. 169, 174 (1925); United States v. Standard Oil Co. of California, 545 F.2d 624, 637-38 (9th Cir. 1976); Burkley v. United States, 185 F.2d 267, 272 (7th Cir. 1950); United States ex rel. Steacy-Schmidt Mfg. Co. v. Globe Indemnity Co., 66 F.2d 302, 303 (3d Cir. 1933); United States ex rel. Brookfield Construction Co. v. Stewart, 234 F. Supp. 94, 99–100 (D.D.C. 1964); Pettit v. United States, 488 F.2d 1026, 1031 (Ct. Cl. 1973); 54 Comp. Gen. 921 (1975); 45 Comp. Gen. 335, 337 (1965). An exception is decisions on bid protests under the Competition in Contracting Act, 31 U.S.C. §§ 3551–56, which by law have been designated as advisory only. See Ameron, Inc. v. Corps of Engineers, 809 F.2d 979 (3d Cir. 1986).

[43]31 U.S.C. § 3526(b).

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Even if no voucher is submitted, GAO will most likely render the decision notwithstanding the absence of a voucher if the question is of general interest and appears likely to recur. E.g., 55 Comp. Gen. 652 (1976); 53 Comp. Gen. 429 (1973); 53 Comp. Gen. 71 (1973); 52 Comp. Gen. 83 (1972).

An involved party or agency may request reconsideration of a decision. The standard applied is whether the request demonstrates error of fact or law (e.g., B-184062, July 6, 1976) or presents new information not considered in the earlier decision. While the Comptroller General gives precedential weight to prior decisions,[44] a decision may be modified or overruled by a subsequent decision. In overruling its decisions, GAO tries to follow the approach summarized by the Comptroller of the Treasury in a 1902 decision:

"I regret exceedingly the necessity of overruling decisions of this office heretofore made for the guidance of heads of departments and the protection of paying officers, and fully appreciate that certainty in decisions is greatly to be desired in order that uniformity of practice may obtain in the expenditure of the public money, but when a decision is made not only wrong in principle but harmful in its workings, my pride of decision is not so strong that when my attention is directed to such decision I will not promptly overrule it. It is a very easy thing to be consistent, that is, to insist that the horse is 16 feet high, but not so easy to get right and keep right." 8 Comp. Dec. 695, 697 (1902).

The more significant decisions or those with wide applicability are published annually in hardbound volumes entitled Decisions of the Comptroller General. Because GAO is limited by statute to one published volume each year,[45] most decisions are unpublished. They are, however, readily available to other government agencies and to the public. There is no legal distinction between a published decision and an unpublished decision. 28 Comp. Gen. 69 (1948). Major points in a decision are summarized in one or more digests, which now appear as headnotes preceding both published and unpublished decisions.[46]

[44]It is a general principle of administrative law that an agency rendering administrative decisions should follow its own decisions or give a reasoned explanation for departure. See, e.g., Doubleday Broadcasting Co. v. FCC, 655 F.2d 417, 422-23 (D.C. Cir. 1981).

[45]44 U.S.C. § 1311. This statute originated in 1882 (22 Stat. 391), shortly after First Comptroller Lawrence started publishing his decisions.

[46]While the digest is thus an integral part of a legal decision, it should be noted that language in a headnote or digest is only a paraphrase or summary, and cannot be relied upon in preference to the text of the decision itself. 56 Comp. Gen. 275 (1977).

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Informal opinions expressed by GAO officers or employees are meant to be helpful but are in no way controlling on any subsequent formal or official determinations by the Comptroller General. 56 Comp. Gen. 768, 773-74 (1977); 31 Comp. Gen. 613 (1952); 29 Comp. Gen. 335 (1950); 12 Comp. Gen. 207 (1932); 4 Comp. Gen. 1024 (1925).

b. Note on Citations

Published decisions of the Comptroller General—those printed in the annual Decisions of the Comptroller General volumes—are cited by volume, page number on which the decision begins, and the year. Example: 31 Comp. Gen. 350 (1952). Unpublished decisions are cited by file number and date, for example, B-193282, December 21, 1978. The present file numbering system ("B-numbers") has been in use since January 1939. From 1924 through 1938, file numbers had an "A" prefix.[47] Decisions selected for publication but for which page numbers have not yet been assigned are cited as follows: 69 Comp. Gen. ___(B-123456, April 1, 1990).

Since GAO developed its decision format in 1974, decisions, both published and unpublished, include a " Matter of" caption. Especially where the caption is the name of an individual or business entity, it is sometimes included as part of the citation. Example: Lynne Gweeney, 65 Comp. Gen. 760 (1986). We have chosen not to do so in this publication.

c. Matters Not Considered

There are a number of areas in which, as a matter of law or policy, the Comptroller General will generally decline to render a decision.

In the first category are questions concerning which the determination of another agency is by law "final and conclusive." Examples are determinations on the merits of a claim against another agency under the Federal Tort Claims Act (28 U.S.C. § 2672) or the Military Personnel and Civilian Employees' Claims Act of 1964 (31 U.S.C. § 3721). Another example is a decision by the Secretary of Veterans Affairs on a claim for veterans' benefits (38 U.S.C. § 211(a)). See 56

[47]Cases prior to 1924 were classified according to type into one of four categories: advance decision (A.D. 1234), review decision (Review No. 2345), division memorandum (D.M. 3456), or appeal (Appeal No. 4567). In addition, some of the earliest decisions have no file designation. These must be cited by reference to the "manuscript volume" in which the decision appears. (These are volumes maintained by GAO primarily for internal purposes, containing the written product of the Office of General Counsel for a given month in chronological sequence.) Example: unpublished decision of September 1, 1921, 1 MS Comp. Gen. 712.

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Comp. Gen. 587, 591 (1977); B-226599.2, November 3, 1988 (non-decision letter).

In addition, GAO has traditionally declined to render decisions in a number of areas which are specifically within the jurisdiction of some other agency and concerning which GAO would not be in the position to make authoritative determinations, even though the other agency's determination is not statutorily "final and conclusive." Thus, GAO will not "decide" whether a given action violates a provision of the Criminal Code (18 U.S.C.) since this is within the jurisdiction of the Justice Department and the courts.[48] If the use of public funds is an element of the alleged violation, the extent of GAO's involvement will be to determine if appropriated funds were in fact used and to refer the matter to the Justice Department if deemed appropriate or if requested to do so.[49]

Other examples of areas where GAO has declined to render decisions are antitrust law;[50] political activities of federal employees under the Hatch Act;[51] and determinations as to what is or is not taxable under the Internal Revenue Code.[52]

Apart from preparing litigation reports if requested by the Justice Department, GAO will generally not render an opinion on an issue which is the subject of current litigation, especially if the Comptroller General finds the matter unduly speculative, except on stipulation of the parties or unless the court expresses an interest in receiving GAO's opinion.[53] Particular circumstances may dictate an

[48]48 Comp. Gen. 24, 27 (1968); 37 Comp. Gen. 776 (1958); 20 Comp. Gen. 488 (1941); B-215651, March 15, 1985.

[49]An example here is 18 U.S.C. § 1913, the anti-lobbying statute.

[50]59 Comp. Gen. 761 (1980); 50 Comp. Gen. 648 (1971); 21 Comp. Gen. 56, 57 (1941); B-218279/B-218290, March 13, 1985; B-190983, December 21, 1979; B-194584, August 9, 1979.

[51]B-165548, January 3, 1969.

[52]B-147153, November 21, 1961; B-173783.127, February 7, 1975 (non-decision letter). See also 26 U.S.C. § 6406.

[53]58 Comp. Gen. 282, 286 (1979); B-240908, September 11, 1990; B-218900, July 9, 1986; B-217954, July 30, 1985; B-203737, July 14, 1981; B-179473, March 5, 1974; A-36314, April 29, 1931. For examples of cases where GAO's opinion was requested by a court, see 56 Comp. Gen. 768 (1977) and B-186494, July 22, 1976. Also, under 28 U.S.C. § 2507, the United States Claims Court may issue a "call" upon GAO (or any other agency) for comments on a particular issue or for other information.

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exception. E.g., 67 Comp. Gen. 553 (1988), where GAO was essentially elaborating on a prior decision on an appropriations issue which had not been addressed by the court and where the agency had informed the court that it had requested GAO's opinion. GAO's policy with respect to issues which are the subject of agency administrative proceedings is generally similar to its litigation policy. 4 C.F.R. § 22.8. See also B-231838, January 4, 1989 (declining to render an opinion on the propriety of an attorney's fee award being considered by the Equal Employment Opportunity Commission).

Another long-standing GAO policy concerns the constitutionality of acts of Congress. As an agent of the Congress, GAO has always considered it inappropriate to question the constitutionality of duly enacted statutes. In other words, GAO presumes the constitutionality of all federal laws unless or until the courts say otherwise.[54] GAO will, however, express its opinion, upon the request of a Member or committee of Congress, on the constitutionality of a bill prior to enactment. E.g., B-228805, September 28, 1987.

d. Research Aids

For anyone without ready access to the research facilities in GAO's main building in Washington, D.C., researching GAO decisions has never been particularly easy, especially in view of the large proportion of unpublished material. In recent years, some of the computerized legal research systems (e.g., Juris, Lexis, Westlaw) have started including some GAO materials. In addition, GAO's procurement decisions are published commercially, and some of the commercial "newsletter" services, especially in the areas of contracts and grants, include summaries of relevant GAO issuances. This publication, we hope, will also make the job easier.

In addition to this publication, GAO's Office of General Counsel publishes several other items dealing with areas in which the Office has developed special expertise. These publications include:

- Civilian Personnel Law Manual
  Title I – Compensation
  Title II – Leave

[54]B-215863, July 26, 1984; B-210922.1, June 27, 1983; B-114578, November 9, 1973; B-157984, November 26, 1965; B-124985, August 17, 1955; A-23385, June 28, 1928. Except for matters perceived as involving conflicts between the prerogatives of the executive and legislative branches, the Attorney General has expressed a similar policy. 39 Op. Att'y Gen. 11 (1937).

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Title III – Travel
Title IV – Relocation

- Military Personnel Law Manual
- Bid Protests at GAO: A Descriptive Guide (4th ed. 1991) (no case citations but a useful summary together with full text of GAO's bid protest regulations).

GAO also furnishes a telephone research service for government agencies and members of the public at no charge. While this service does not provide callers with legal analysis, it can provide the following types of information:

- whether an issue has been considered by GAO. (This is limited to GAO's legal decisions and opinions. It does not include audit reports.)
- citations to decisions of the Comptroller General involving a particular issue.
- whether a decision of the Comptroller General has been modified, overruled, or cited in subsequent decisions.

The telephone research service may be reached on (202) 275–5028. Copies of decisions for which a file number and date are known may be obtained, free of charge, by calling (202) 275–6241.

In addition to the annual Decisions of the Comptroller General volumes, GAO's Office of General Counsel publishes other reference material, which includes:

- Monthly "advance sheet" pamphlets of decisions (full text) to be included in the next hardbound volume.
- Monthly pamphlets entitled Digests of Decisions of the Comptroller General of the United States. Prior to October 1989, these pamphlets, under a slightly different name, included digests only of unpublished decisions. Now they include digests of published decisions as well.
- Index Digest volumes covering the published decisions. These hardbound volumes are now published at 5–year intervals. The most recent, the tenth in the series, covers the period October 1, 1981 through September 30, 1986.

In addition to these current materials, there is also a hardbound index volume, published in 1931, covering the 27 Comptroller of the Treasury volumes and the first 8 volumes of GAO decisions, and

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a hardbound computer-generated scope line index volume, published in 1968 in cooperation with the Department of the Air Force, covering volumes 1–46 of the Comptroller General's decisions (with a 1970 supplement).

3. Other Relevant Authorities

a. GAO Materials

GAO expresses its positions in many forms. Most of the GAO materials cited in this publication are decisions of the Comptroller General, published and unpublished. While these constitute the most significant body of GAO positions on legal issues, the editors have also included, as appropriate, citations to the following items:

(1) Legal opinions to Congress—As noted above, GAO prepares many legal opinions at the request of congressional committees or individual Members of Congress. Congressional opinions are prepared in letter rather than decision format, but if signed by the Comptroller General or his delegate, they have the same weight and effect. The citation form is identical to that for decisions, and some are now published in the annual Decisions of the Comptroller General volumes. As a practical matter, except where specifically identified in the text, the reader will not be able to distinguish between a decision and a congressional opinion based on the form of the citation.

(2) Office memoranda—Legal questions are frequently presented by other divisions or offices within GAO. The response is in the form of an internal memorandum, formerly signed by the Comptroller General, but now, for the most part, signed by the General Counsel or someone on the General Counsel's staff. The citation is the same as for an unpublished decision, except that the suffix "O.M." (Office Memorandum) has traditionally been added. More recent material tends to omit the suffix, in which case our practice in this publication is to identify the citation as a memorandum to avoid confusion with decisions. Office memoranda are generally not cited in decisions. Technically, an office memorandum is not a decision of the Comptroller General as provided in 31 U.S.C. § 3529, does not have the same legal or precedential effect, and should never be cited as a decision. See, e.g., A-10786, May 23, 1927. Notwithstanding these limitations, we have included selected citations to

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GAO office memoranda, particularly where they provide guidance in the absence of formal decisions on a given point or contain useful research or discussion.

(3) Audit reports—A GAO audit report is cited by its title, date of issuance, and a numerical designation. Up to the mid-1970's, the same file numbering system was used as in decisions ("B-numbers"). Now, the designation for an audit report consists of the initials of the issuing division, the fiscal year, and the report number, although a "B-number" is also assigned. Reports are numbered sequentially within each fiscal year. Thus, the first report issued by the General Government Division for FY 1990 would be designated "GAO/GGD-90-1." Certain types of reports are further designated by a letter suffix attached to the report number (e.g., BR for briefing report, FS for fact sheet). The names of audit divisions are subject to change over time as reorganizations occur, so the initials in a particular citation may not correspond to an existing audit division at any given time.

Several audit reports are cited throughout this publication either as authority for some legal proposition or to provide sources of additional information to supplement the discussion in the text. To prevent confusion stemming from different citation formats used over the years, our practice in this publication is to always identify an audit report as a "GAO report" in the text, in addition to the citation.

As required by 31 U.S.C. § 719(h), GAO issues monthly and annual lists of reports. In addition, GAO occasionally prepares bibliographies of reports and decisions in a given subject area (food, land use, etc.). GAO reports may be obtained by calling (202) 275–6241.

In addition to the reports themselves, GAO publishes a number of pamphlets and other documents relating to its audit function. References to any of these will be fully described in the text where they occur.

(4) Non-decision letters — These are letters, signed by some subordinate official, usually to an individual or organization who has requested information or who has requested a legal opinion but is not entitled by law to a formal decision. Their purpose is basically to convey information rather than resolve a legal issue. Several of these are cited in this publication, either because they offer

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a particularly clear statement of some policy or position, or to supplement the material found in the decisions. Each is identified parenthetically. The citation form is otherwise identical to an unpublished decision. As with the office memoranda, these are not decisions of the Comptroller General and do not have the same legal or precedential effect.

(5) Circular letters—A circular letter is a letter addressed simply to the "Heads of Federal Departments and Agencies" or to "Federal Certifying and Disbursing Officers." It is distributed automatically to all federal agencies on GAO's distribution list. Circular letters, although not common, are used for a variety of purposes and may emanate from a particular division within GAO or directly from the Comptroller General. Circular letters which announce significant changes in pertinent legal requirements or GAO audit policy or procedures are occasionally cited in this publication. They are identified as such and often, but not always, bear file designations similar to unpublished decisions.

(6) General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies—This large looseleaf volume is the official medium through which the Comptroller General issues accounting principles and standards and related material for the development of accounting systems and internal auditing programs, uniform procedures, and regulations governing GAO's relationship with other federal agencies and private parties. It consists of eight titles (U.S. General Accounting Office; Accounting; Audit; Claims; Transportation; Pay, Leave, and Allowances; Fiscal Procedures; Records Management). The titles are revised and updated individually from time to time. In areas of mutual coverage, the Policy and Procedures Manual (particularly titles 4 and 7) is an important complement to Principles of Federal Appropriations Law.

(7) A Glossary of Terms Used in the Federal Budget Process, PAD-81-27 (3d ed., March 1981)—This is a booklet containing standard definitions of fiscal and budgetary terms developed by GAO in cooperation with the Treasury Department, Office of Management and Budget, and Congressional Budget Office, as required by 31 U.S.C. § 1112(c). Definitions used throughout Principles of Federal

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Appropriations Law are based on the Glossary unless otherwise noted.

b. Non-GAO Materials

As we have emphasized, the primary focus of this publication is the issuances of the General Accounting Office, particularly legal decisions and opinions. Manifestly, however, various non-GAO authorities require inclusion.

References to legislative materials should be readily recognizable. Citations to the United States Code are to the edition or its supplements current as of the time of publication, unless specified otherwise. We specify the year only when referring to an obsolete edition of the Code. Section numbers and even title numbers may change over the years as a result of amendments or recodifications. For convenience and (we hope) clarity, we have generally used current citations even though the referenced decision may have used an older obsolete citation. Where the difference is significant, it will be noted in the text.

We have also included relevant decisions and opinions of other administrative agencies, primarily the Department of Justice, although our research in these areas has not been exhaustive. The Attorney General renders legal opinions pursuant to various provisions of law. E.g., 28 U.S.C. §§ 511–513. There are two series of published opinions.

Opinions signed by the Attorney General are called "formal opinions," and are published in volumes entitled Official Opinions of the Attorneys General of the United States Advising the President and Heads of Departments in Relation to Their Official Duties (cited "Op. Att'y Gen."). The series started in 1852 and now numbers 42 volumes. They are published at irregular intervals.

The second series consists of selected opinions by the Justice Department's Office of Legal Counsel, which prepares and issues legal opinions under delegation from the Attorney General. Commencing in 1977, volumes 1–6 of the Opinions of the Office of Legal Counsel have thus far been published. Logically enough, they are cited "Op. Off. Legal Counsel." Given the lengthy intervals in recent decades between volumes of the "formal" Attorney General opinions, these are now included in the OLC volumes as well. We have used a parallel citation format to identify this latter group. Example: 43 Op. Att'y Gen. ___, 4A Op. Off. Legal Counsel 16

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(1980). In addition, we have, in consultation with that office, cited a number of OLC opinions issued subsequent to the most recent published volume, some of which may eventually be selected for publication.

A Treasury Department publication cited a number of times is the Treasury Financial Manual, Volume I (formerly known as the Treasury Fiscal Requirements Manual). This, also issued in looseleaf form, is the Treasury Department's detailed procedural guidance on fiscal matters (central accounting and reporting, receipts, disbursements, etc.). The TFM is indispensable for finance personnel.

c. Note on Title 31 Recodification

Many of the key statutes of general applicability that govern the use of appropriated funds are found in Title 31 of the United States Code (U.S.C.). Title 31 was recodified on September 13, 1982 (Pub. L. No. 97-258, 96 Stat. 877). A recodification is intended as a—

> "compilation, restatement, and revision of the general and permanent laws of the United States which conforms to the understood policy, intent, and purpose of the Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections both of substance and of form . . . ." 2 U.S.C. § 285b(1).

Enactment of a recodification transforms the title into "positive law." A recodified title is legal evidence of the law, and resort to the Statutes at Large for evidentiary purposes is no longer necessary.

The recodification of Title 31 is essentially a restatement in updated form. It is not supposed to make any substantive change in the law. This point is made in the statute itself (Pub. L. No. 97-258, § 4(a), 96 Stat. 1067, 31 U.S.C. note preceding § 101) and in the accompanying report of the House Judiciary Committee (H.R. Rep. No. 97-651, 97th Cong., 2d Sess. 3 (1982)). In addition, the courts will not read a substantive change into a recodification in the absence of evidence that Congress intended a substantive change. E.g., Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 227 (1957); United States v. Thompson, 319 F.2d 665, 669 (2d Cir. 1963).

Part of the recodification is the repeal of the various source statutes. Thus, the "popular names" of the various pre-1982 laws found in Title 31 no longer exist. To illustrate, section 1 of Pub. L.

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No. 88-558, 78 Stat. 767, provided that the act may be cited as the "Military Personnel and Civilian Employees' Claims Act of 1964." Prior to the recodification, Pub. L. No. 88-558 was found in Title 31 at §§ 240–243. The recodification redesignated it as 31 U.S.C. § 3721 (96 Stat. 973), and repealed Pub. L. No. 88-558 (Pub. L. No. 97-258, § 5(b), 96 Stat. 1068, 1080). Therefore, since Pub. L. No. 88-558, including section 1, has been repealed, there is, in a strict technical sense, no longer a "Military Personnel and Civilian Employees' Claims Act of 1964"; there is only a "31 U.S.C. § 3721." Having said this, however, we have continued to use many of the old popular names because they have become so familiar throughout the government that to stop using them would cause more confusion than it is worth. Also, they continue to be listed in the Popular Names index in the United States Code.

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Chapter 2

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The Legal Framework

A. Appropriations and Related Terminology

1. Introduction

The reader will find it useful to have a basic understanding of certain appropriations law terminology that will be routinely encountered throughout this publication. Some of our discussion will draw upon definitions which have been enacted into law for application in various budgetary contexts. Other definitions are drawn from custom and usage in the budget and appropriations process, in conjunction with administrative and judicial decisions.

In addition, 31 U.S.C. § 1112(c), previously noted in Chapter 1, requires the Comptroller General, in cooperation with the Treasury Department, Office of Management and Budget, and Congressional Budget Office, to maintain and publish standard terms and classifications for "fiscal, budget, and program information," giving particular consideration to the needs of the congressional budget, appropriations, and revenue committees. Federal agencies are required by 31 U.S.C. § 1112(d) to use this standard terminology when providing information to Congress.

The terminology developed pursuant to this authority is published in a GAO booklet entitled A Glossary of Terms Used in the Federal Budget Process, PAD-81-27 (3d ed., March 1981) [hereinafter Glossary]. Unless otherwise noted, the terminology used throughout this publication is based on the Glossary. The following sections present some of the more important terminology in the budget and appropriations process. Many other terms will be defined in the chapters which deal specifically with them.

2. Concept and Types of Budget Authority

Congress finances federal programs and activities by providing "budget authority." Budget authority is a general term referring to various forms of authority provided by law to enter into obligations which will result in immediate or future outlays of government funds. The statutory definition, effective beginning with fiscal year 1992, is:

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"The term 'budget authority' means the authority provided by Federal law to incur financial obligations, as follows:

"(i) provisions of law that make funds available for obligation and expenditure (other than borrowing authority), including the authority to obligate and expend the proceeds of offsetting receipts and collections;

"(ii) borrowing authority, which means authority granted to a Federal entity to borrow and obligate and expend the borrowed funds, including through the issuance of promissory notes or other monetary credits;

"(iii) contract authority, which means the making of funds available for obligation but not for expenditure; and

"(iv) offsetting receipts and collections as negative budget authority, and the reduction thereof as positive budget authority

"The term includes the cost for direct loan and loan guarantee programs, as those terms are defined by [the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 13201(a)]." [1]

a. Appropriations

Appropriations are the most common form of budget authority. As we have seen in Chapter 1 in our discussion of the congressional "power of the purse," the Constitution prohibits the withdrawal of money from the Treasury unless authorized in the form of an appropriation enacted by Congress.[2] Thus, funds paid out of the United States Treasury must be accounted for by charging them to an appropriation provided by or derived from an act of Congress.

The term "appropriation" may be defined as:

"An authorization by an act of Congress that permits Federal agencies to incur obligations and to make payments out of the Treasury for specified purposes."[3]

[1]Section 3(2) of the Congressional Budget Act of 1974, 2 U.S.C. § 622(2), as amended by the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 (November 5, 1990), §§ 13201(b) and 13211(a), 104 Stat. 1388–614 and 620. Prior to the Congressional Budget Act, the term "obligational authority" was frequently used instead of budget authority.

[2]The Constitution does not specify precisely what assets comprise the "Treasury" of the United States. An important statute in this regard is 31 U.S.C. § 3302(b), discussed in detail in Chapter 6, which requires that, unless otherwise provided, a government agency must deposit any funds received from sources other than its appropriations in the general fund of the Treasury, where they are then available to be appropriated as Congress may see fit.

[3]Glossary at 42; Andrus v. Sierra Club, 442 U.S. 347, 359 n.18 (1979). See also 31 U.S.C. §§ 701(2) and 1101(2). The term "authorization" as used in this definition must be distinguished from an "authorization of appropriations" as described in Section C.1.

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"Nothing in this world is palled in such impenetrable obscurity as a U.S. Treasury Comptroller's understanding."

Mark Twain

The Complete Travel Books of Mark Twain

Abbreviations

APA	Administrative Procedure Act
C.F.R.	Code of Federal Regulations
EAJA	Equal Access to Justice Act
EEOC	Equal Employment Opportunity Commission
FAR	Federal Acquisition Regulation
FY	Fiscal year
GAO	General Accounting Office
GSA	General Services Administration
HUD	Department of Housing and Urban Development
IRS	Internal Revenue Service
NRC	Nuclear Regulatory Commission
OMB	Office of Management and Budget
SBA	Small Business Administration
TFM	Treasury Financial Manual
U.S.C.	United States Code

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While other forms of budget authority may authorize the incurring of obligations, the authority to incur obligations by itself is not sufficient to authorize payments from the Treasury. See, e.g., National Association of Regional Councils v. Costle, 564 F.2d 583, 586 (D.C. Cir. 1977); New York Airways, Inc. v. United States, 369 F.2d 743 (Ct. Cl. 1966). Thus, at some point if obligations are paid, they are usually paid by and from an appropriation. Section B.1 of this chapter discusses in more detail precisely what types of statutes constitute appropriations.

Appropriations do not represent cash actually set aside in the Treasury. They represent legal authority granted by Congress to incur obligations and to make disbursements for the purposes, during the time periods, and up to the amount limitations, specified in the appropriation acts.

Appropriations are identified on financial documents by means of "account symbols" which are assigned by the Treasury Department based on the number and types of appropriations an agency receives and other types of funds it may control. An appropriation account symbol is a group of numbers, or a combination of numbers and letters, which identifies the agency responsible for the account, the period of availability of the appropriation, and the specific fund classification. Detailed information on reading and identifying account symbols is contained in the Treasury Financial Manual (I TFM Chapter 2-1500). Specific accounts for each agency are listed in a publication entitled Federal Account Symbols and Titles, issued quarterly as a supplement to the TFM.

b. Contract Authority

Contract authority is a form of budget authority which permits contracts or other obligations to be entered into in advance of an appropriation or in excess of amounts otherwise available in a revolving fund. Glossary at 42. It is to be distinguished from the inherent authority to enter into contracts possessed by every government agency but which is dependent upon the availability of funds.

Contract authority itself is not an appropriation; it provides the authority to enter into binding contracts but not the funds to make payments under them. Therefore, contract authority must be funded (or, in other words, the funds needed to liquidate obligations under the contracts must be provided) by a subsequent appropriation (called a "liquidating appropriation") or by the use of

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receipts or offsetting collections authorized for that purpose. See B-228732, February 18, 1988; National Association of Regional Councils v. Costle, 564 F.2d 583, 586 (D.C. Cir. 1977); OMB Circular No. A-11, § 14.1(a) (1990); OMB Circular No. A-34, § 21.1 (1985).

Contract authority may be provided in appropriation acts (e.g., B-174839, March 20, 1984) or, more commonly, in other types of legislation (e.g., B-228732, February 18, 1988). Either way, the authority must be specific. 31 U.S.C. § 1301(d). As we noted in Chapter 1, one of the objectives of the Congressional Budget Act of 1974 was to provide increased control by the appropriations process over various forms of so-called "backdoor spending" such as contract authority. To this end, legislation providing new contract authority will be subject to a point of order in either the Senate or the House of Representatives unless it also provides that the new authority will be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation acts. 2 U.S.C. § 651(a).

Contract authority has a "period of availability" analogous to that for an appropriation. Unless otherwise specified, if it appears in an appropriation act in connection with a particular appropriation, its period of availability will be the same as that for the appropriation. If it appears in an appropriation act without reference to a particular appropriation, its period of availability, again unless otherwise specified, will be the fiscal year covered by the appropriation act. 32 Comp. Gen. 29, 31 (1952); B-76061, May 14, 1948; National Association of Regional Councils v. Costle, 564 F.2d 583, 587-88 (D.C. Cir. 1977). This period of availability refers to the time period during which the contracts must be entered into, as distinguished from the duration of the contracts themselves, which is governed by the terms of the legislation granting the authority.

As noted above, appropriations generally constitute budget authority. However, an appropriation to liquidate contract authority is an important exception. Since contract authority itself constitutes new budget authority, an appropriation to liquidate that authority is not counted as new budget authority. This treatment is necessary to avoid counting the amounts twice. B-171630, August 14, 1975.

Since the contracts entered into pursuant to contract authority constitute obligations binding on the United States, Congress has little

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practical choice but to make the necessary liquidating appropriations. B-228732, February 18, 1988; B-226887, September 17, 1987. As the Supreme Court has put it:

> "The expectation is that appropriations will be automatically forthcoming to meet these contractual commitments. This mechanism considerably reduces whatever discretion Congress might have exercised in the course of making annual appropriations."

Train v. City of New York, 420 U.S. 35, 39 n.2 (1975). A failure or refusal by Congress to make the necessary appropriation would not defeat the obligation, and the party entitled to payment would most likely be able to recover in a lawsuit. E.g., B-211190, April 5, 1983.

c. Borrowing Authority

"Borrowing authority" is statutory authority (in a substantive or appropriation act) that permits a federal agency to incur obligations and to liquidate those obligations out of borrowed moneys.[4] Borrowing authority may consist of (a) authority to borrow from the Treasury (authority to borrow funds from the Treasury that are realized from the sale of public debt securities), (b) authority to borrow directly from the public (authority to sell agency debt securities), (c) authority to borrow from (sell agency debt securities to) the Federal Financing Bank, or (d) some combination of the above.

Borrowing from the Treasury is the most common form and is also known as "public debt financing." As a general proposition, GAO has traditionally expressed a preference for financing through direct appropriations on the grounds that the appropriations process provides enhanced congressional control. E.g., B-141869, July 26, 1961. The Congressional Budget Act met this concern to an extent by requiring generally that new borrowing authority, as with new contract authority, be limited to the extent or amounts provided in appropriation acts. 2 U.S.C. § 651(a). More recently, GAO has recommended that borrowing authority be provided only to those accounts which can generate enough revenue in the form of collections from nonfederal sources to repay their debt. Budget Issues: Agency Authority to Borrow Should be Granted More Selectively, GAO/AFMD-89-4 (September 1989).[5]

[4]Glossary at 42; OMB Circular No. A-11, § 14.1(a) (1990).

[5]If an agency cannot repay with external collections, it must either extend its debt with new borrowings, seek appropriations to repay the debt, or seek to have the debt forgiven by statute. Repayment from external collections is the only alternative that reimburses the Treasury in any meaningful sense. See AFMD-89-4 at 17, 20.

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d. Monetary Credits

A type of borrowing authority specified in the expanded definition of budget authority contained in the Omnibus Budget Reconciliation Act of 1990, is monetary credits. The monetary credit is a relatively uncommon concept in government transactions. At the present time, it exists mostly in a handful of statutes authorizing the government to use monetary credits to acquire property such as land or mineral rights. Examples are the Rattlesnake National Recreation Area and Wilderness Act of 1980, discussed in 62 Comp. Gen. 102 (1982), and the Cranberry Wilderness Act, discussed in B-211306, April 9, 1984.[6]

Under the monetary credit procedure, the government does not issue a check in payment for the acquired property. Instead, it gives the seller "credits" in dollar amounts reflecting the purchase price. The holder may then use these credits to offset or reduce amounts it owes the government in other transactions which may, depending on the terms of the governing legislation, be related or unrelated to the original transaction. The statute may use the term "monetary credit" (as in the Cranberry legislation) or some other designation such as "bidding rights" (as in the Rattlesnake Act). Where this procedure is authorized, the acquiring agency does not need to have appropriations or other funds available to cover the purchase price because no cash disbursement is made. An analogous device authorized for use by the Commodity Credit Corporation is "commodity certificates."[7]

The inclusion of monetary credits as budget authority has the effect of making them subject to the appropriation controls of the Congressional Budget Act, such as the requirements of 2 U.S.C. § 651.

e. Offsetting Receipts

The federal government receives money from numerous sources and in numerous contexts. For budgetary purposes, collections are classified in two major categories, governmental receipts and offsetting collections.[8]

[6]These and other examples are noted in GAO's report, Budget Treatment of Monetary Credits, GAO/AFMD-85-21 (April 8, 1985).

[7]See Farm Payments: Cost and Other Information on USDA's Commodity Certificates, GAO/RCED-87-117BR (March 26, 1987).

[8]See Glossary at 46–49; OMB Circular No. A-11, § 14.1(d) (1990).

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Governmental receipts or budget receipts are collections resulting from the government's exercise of its sovereign or regulatory powers. Examples are tax receipts, customs duties, and court fines. Collections in this category are deposited in receipt accounts and are compared against total outlays for purposes of calculating the budget surplus or deficit.

Offsetting collections are collections resulting from business-type or market-oriented activities, such as the sale of goods or services to the public, and intragovernmental transactions. Their budgetary treatment differs from governmental receipts in that they are offset against (deducted from or "netted against") budget authority in determining total outlays. Offsetting collections are also divided into two major categories.

First is offsetting collections credited to appropriation or fund accounts. These are collections which, under specific statutory authority, may be deposited in an appropriation or fund account under the control of the receiving agency, and which are then available for obligation by the agency subject to the purpose and time limitations of the receiving account.

Second is offsetting receipts. Offsetting receipts are offsetting collections which are deposited in a receipt account.[9] For budgetary purposes, these amounts are deducted from budget authority by function or subfunction and by agency.[10]

The Balanced Budget and Emergency Deficit Control Act of 1985 first addressed the budgetary treatment of offsetting receipts by adding the authority "to collect offsetting receipts" to the definition of budget authority. The expanded definition in the Omnibus Budget Reconciliation Act of 1990 is more explicit. The authority to obligate and expend the proceeds of offsetting receipts and collections is treated as negative budget authority. In addition, the reduction of offsetting receipts or collections (e.g., legislation authorizing

[9]This usually means a general fund receipt account (miscellaneous receipts), but also includes amounts deposited in special or trust fund accounts. An example of offsetting receipts deposited in a special receipt account is discussed in B-199216, July 21, 1980.

[10]H.R. Conf. Rep. No. 433, 99th Cong., 1st Sess. 102 (1985), reprinted in 1985 U.S. Code Cong. & Admin. News 988, 1020. This is the conference report on the Balanced Budget and Emergency Deficit Control Act of 1985.

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an agency to forgo certain collections) is treated as positive budget authority.[11]

f. Loan and Loan Guarantee Authority

A loan guarantee is an agreement, authorized by statute, by which the United States pledges to pay part or all of the loan principal and interest to a lender or holder of a security in the event of default by a third-party borrower.[12] The government does not know whether or to what extent it may be required to honor the guarantee until there has been a default. Loan guarantees are contingent liabilities which may not be recorded as obligations until the contingency occurs. See 64 Comp. Gen. 282, 289 (1985) and Chapter 11.

Prior to legislation enacted in November 1990, loan guarantees were expressly excluded from the definition of budget authority. Budget authority was created only when an appropriation to liquidate loan guarantee authority was made.

Statutory reform of the budgetary treatment of federal credit programs came about in two stages. First, the Balanced Budget and Emergency Deficit Control Act of 1985 added a definition of "credit authority" to the Congressional Budget Act, specifically, "authority to incur direct loan obligations or to incur primary loan guarantee commitments." 2 U.S.C. § 622(10).[13] Any bill, resolution, or conference report providing new credit authority will be subject to a point of order unless the new authority is limited to the extent or amounts provided in appropriation acts. 2 U.S.C. § 652(a).[14]

The second stage was the Federal Credit Reform Act of 1990,[15] effective starting with fiscal year 1992. Under this legislation, the

[11]This was the intent of the 1985 legislation, as reflected in the conference report (supra note 10), although it had not been expressed in the legislation itself.

[12]Glossary at 64; OMB Circular No. A-11, § 33.2(b) (1990).

[13]The statute does not further define the term "primary loan guarantee."

[14]This is the same control device we have previously noted for contract authority and borrowing authority. Although loan guarantee authority was not viewed as budget authority in 1985, the apparent rationale was that the control, if it is to be employed, must apply at the authorization stage because the opportunity for control no longer exists by the time liquidating budget authority becomes necessary. An example of a statute including this language is discussed in B-230951, March 10, 1989.

[15]Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 (November 5, 1990), § 13201(a), 104 Stat. 1388-609.

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"cost" of loan and loan guarantee programs is budget authority. "Cost" means the estimated long-term cost to the government of a loan or loan guarantee (defaults, delinquencies, interest subsidies, etc.), calculated on a net present value basis, excluding administrative costs. Except for entitlement programs (the statute notes the guaranteed student loan program and the veterans' home loan guaranty program as examples) and certain Commodity Credit Corporation programs, new loan guarantee commitments may be made only to the extent budget authority to cover their costs is provided in advance or other treatment is specified in appropriation acts. Appropriations of budget authority are to be made to "credit program accounts," and the programs administered from revolving non-budgetary "financing accounts."

The Credit Reform Act reflects the thrust of proposals by GAO, the Office of Management and Budget, the Congressional Budget Office, and the Senate Budget Committee. See GAO report, Budget Issues: Budgetary Treatment of Federal Credit Programs, GAO/AFMD-89-42 (April 1989), which includes a discussion of the "net present value" approach to calculating costs.

3. Some Related Concepts

a. Spending Authority

The Congressional Budget Act of 1974 introduced the concept of "spending authority." The term is a collective designation for authority provided in laws other than appropriation acts to obligate the United States to make payments. It includes, to the extent budget authority is not provided in advance in appropriation acts, permanent appropriations (such as authority to spend offsetting collections), the non-appropriation forms of budget authority described above (e.g., contract authority, borrowing authority, authority to forgo collection of offsetting receipts), entitlement authority, and any other authority to make payments. 2 U.S.C. § 651(c)(2). The different forms of spending authority are subject to varying controls in the budget and appropriations process. For example, as noted previously, proposed legislation providing new contract authority or new borrowing authority will be subject to a point of order unless it limits the new authority to such extent or amounts as provided in appropriation acts.

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Further information on spending authority may be found in two 1987 GAO companion reports, one a summary presentation[16] and the other a detailed inventory.[17]

b. Entitlement Authority

Entitlement authority is statutory authority, whether temporary or permanent,

> "to make payments (including loans and grants), the budget authority for which is not provided for in advance by appropriation acts, to any person or government if, under the provisions of the law containing such authority, the United States is obligated to make such payments to persons or governments who meet the requirements established by such law."[18]

Entitlement authority is treated as spending authority during congressional consideration of the budget. In order to make entitlements subject to the reconciliation process, the Congressional Budget Act provides that proposed legislation providing new entitlement authority to become effective prior to the start of the next fiscal year will be subject to a point of order. 2 U.S.C. § 651(b)(1). Entitlement legislation which would require new budget authority in excess of the allocation made pursuant to the most recent budget resolution must be referred to the appropriations committees. Id. § 651(b)(2).

4. Types of Appropriations

Appropriations are classified in different ways for different purposes. Some are discussed elsewhere in this publication.[19] The following classifications, although phrased in terms of appropriations, apply equally to the broader concept of budget authority.

a. Classification Based on Duration [20]

(1) One-year appropriation: an appropriation which is available for obligation only during a specific fiscal year. This is the most common type of appropriation. It is also known as a "fiscal year" or "annual" appropriation.

[16]Budget Issues: The Use of Spending Authority and Permanent Appropriations is Widespread, GAO/AFMD-87-44 (July 1987).

[17]Budget Issues: Inventory of Accounts with Spending Authority and Permanent Appropriations, 1987, GAO/AFMD-87-44A (July 1987).

[18]2 U.S.C. §§ 622(9), 651(c)(2)(C); Glossary at 57.

[19]Supplemental and deficiency appropriations: Chapter 6, Section D; lump-sum and line-item appropriations: Chapter 6, Section F; continuing resolutions: Chapter 8.

[20]Glossary at 43; OMB Circular No. A-11, § 14.1(a) (1990).

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(2) Multiple-year appropriation: an appropriation which is available for obligation for a definite period of time in excess of one fiscal year.

(3) No-year appropriation: an appropriation which is available for obligation for an indefinite period. A no-year appropriation is usually identified by appropriation language such as "to remain available until expended."

b. Classification Based on Presence or Absence of Monetary Limit [21]

(1) Definite appropriation: an appropriation of a specific amount of money.

(2) Indefinite appropriation: an appropriation of an unspecified amount of money. An indefinite appropriation may appropriate all or part of the receipts from certain sources, the specific amount of which is determinable only at some future date, or it may appropriate "such sums as may be necessary" for a given purpose.

c. Classification Based on Permanency [22]

(1) Current appropriation: an appropriation made by the Congress in, or immediately prior to, the fiscal year or years during which it is available for obligation.

(2) Permanent appropriation: a "standing" appropriation which, once made, is always available for specified purposes and does not require repeated action by Congress to authorize its use.[23] Legislation authorizing an agency to retain and use offsetting receipts tends to be permanent; if so, it is a form of permanent appropriation.

d. Classification Based on Availability for New Obligations

(1) Unexpired appropriation: an appropriation which is available for incurring and recording new obligations.

(2) Expired appropriation: an appropriation which is no longer available to incur new obligations, although it may still be available

[21] Glossary at 43; OMB Circular No. A-11, § 14.1(a) (1990).

[22] Glossary at 44.

[23] This is similar to a no-year appropriation except that a no-year appropriation will be closed if it remains inactive for two consecutive fiscal years. 31 U.S.C. § 1555. In actual usage, the term "permanent appropriation" tends to be used more in reference to appropriations contained in permanent legislation, while "no-year appropriation" is used more to describe appropriations found in appropriation acts.

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for the recording and/or payment (liquidation) of obligations properly incurred before the period of availability expired.

An appropriation may combine characteristics from more than one of the above groupings. For example, a "permanent indefinite" appropriation is open-ended as to both period of availability and amount. Examples are 31 U.S.C. § 1304 (payment of certain judgments against the United States) and 31 U.S.C. § 1322(b)(2) (refunding amounts erroneously collected and deposited in Treasury).

e. Reappropriation

The term "reappropriation" means congressional action to continue the obligational availability, whether for the same or different purposes, of all or part of the unobligated portion of budget authority which has expired or would otherwise expire. Reappropriations are counted as new budget authority in the first year for which the availability is extended.[24]

B. Some Basic Concepts

1. What Constitutes an Appropriation

The starting point is 31 U.S.C. § 1301(d), which provides:

"A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made."

Thus, the rule is that the making of an appropriation must be expressly stated. An appropriation cannot be inferred or made by implication. E.g., 50 Comp. Gen. 863 (1971).

Regular annual and supplemental appropriation acts present no problems in this respect as they will be apparent on their face. They, as required by 1 U.S.C. § 105, bear the title "An Act making

[24]Glossary at 44; OMB Circular No. A-11, § 14.2(f) (1990). See also 31 U.S.C. § 1301(b) (reappropriation for different purpose is to be accounted for as a new appropriation).

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appropriations . . . ." However, there are situations in which statutes other than regular appropriation acts may be construed as making appropriations.

Under the above rule, while the authority must be expressly stated, it is not necessary that the statute actually use the word "appropriation." If the statute contains a specific direction to pay (as opposed to a mere authorization), and a designation of the funds to be used, such as a direction to make a specified payment or class of payments "out of any money in the Treasury not otherwise appropriated," then this amounts to an appropriation. 63 Comp. Gen. 331 (1984); 13 Comp. Gen. 77 (1933). See also 34 Comp. Gen. 590 (1955).

For example, a private relief act which directs the Secretary of the Treasury to pay, out of any money in the Treasury not otherwise appropriated, a specified sum of money to a named individual constitutes an appropriation. 23 Comp. Dec. 167, 170 (1916). Another example is B-160998, April 13, 1978, concerning section 11 of the Federal Fire Prevention and Control Act of 1974, which authorizes the Secretary of the Treasury to reimburse local fire departments or districts for costs incurred in fighting fires on federal property. Since the statute directed the Secretary to make payments "from any moneys in the Treasury not otherwise appropriated" (i.e., it contained both the specific direction to pay and a designation of the funds to be used), the Comptroller General concluded that section 11 constituted a permanent indefinite appropriation.

Both elements of the test must be present. Thus, a direction to pay without a designation of the source of funds is not an appropriation. For example, a private relief act which contains merely an authorization and direction to pay but no designation of the funds to be used does not make an appropriation. 21 Comp. Dec. 867 (1915); B-26414, January 7, 1944.[25] Similarly, public legislation enacted in 1978 authorized the U.S. Treasury to make an annual prepayment to Guam and the Virgin Islands of the amount estimated to be collected over the course of the year for certain taxes, duties, and fees. While it was apparent that the prepayment at least for the first year would have to come from the general fund of

[25]A few early cases will be found which appear inconsistent with the proposition stated in the text. E.g., 6 Comp. Dec. 514, 516 (1899) and 4 Comp. Dec. 325, 327 (1897). These cases predate the enactment in 1902 (32 Stat. 552, 560) of what is now 31 U.S.C. § 1301(d) and should be disregarded.

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the Treasury, the legislation was silent as to the source of the funds for the prepayments, both for the first year and for subsequent years. It was concluded that, while the statute may have established a permanent authorization, it was not sufficient under 31 U.S.C. § 1301(d) to constitute an actual appropriation. B-114808, August 7, 1979. (Congress subsequently made the necessary appropriation in Pub. L. No. 96-126, 93 Stat. 954, 966 (1979).)

The designation of a source of funds without a specific direction to pay is also not an appropriation. 67 Comp. Gen. 332 (1988).

Thus far, we have been talking about the authority to make disbursements from the general fund of the Treasury. There is a separate line of decisions establishing the proposition that statutes which authorize the collection of fees and their deposit into a particular fund, and which make the fund available for expenditure for a specified purpose, constitute continuing or permanent appropriations; that is, the money is available for obligation or expenditure without further action by the Congress. The reasoning is that, under 31 U.S.C. § 3302(b), all money received for the use of the United States must be deposited in the general fund of the Treasury absent statutory authority for some other disposition. Once the money is in the Treasury, it can be withdrawn only if Congress appropriates it.[26] Therefore, the authority for an agency to obligate or expend collections without further congressional action amounts to a continuing appropriation of the collections. E.g., United Biscuit Co. v. Wirtz, 359 F.2d 206, 212 (D.C. Cir. 1965), cert. denied, 384 U.S. 971. This principle has been applied to revolving funds and various special deposit funds.

Cases involving the "special fund" principle fall into two categories. In the first group, the question is whether a particular statute authorizing the deposit and expenditure of a class of receipts makes those funds available for the specified purpose or purposes without further congressional action. These cases, in other words, raise the basic question of whether the statute may be regarded as an appropriation. Cases answering this question in the affirmative include 59 Comp. Gen. 215 (1980) (mobile home inspection fees collected by the Secretary of Housing and Urban Development); B-228777, August 26, 1988 (licensing revenues received by the Commission on the Bicentennial); B-204078.2, May 6, 1988

[26]U.S. Constitution, art. I, § 9, cl. 7, discussed in Chapter 1, Section B.

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(Panama Canal Revolving Fund); B-197118, January 14, 1980 (National Defense Stockpile Transaction Fund); B-90476, June 14, 1950. See also 1 Comp. Gen. 704 (1922) (revolving fund created in appropriation act remains available beyond end of fiscal year where not specified otherwise).

The second group of cases involves the applicability of statutory restrictions or other provisions which by their terms apply to "appropriated funds" or exemptions which apply to "nonappropriated funds." For example, fees collected from federal credit unions and deposited in a revolving fund for administrative and supervisory expenses have been regarded as appropriated funds for various purposes. 63 Comp. Gen. 31 (1983), aff'd upon reconsideration, B-210657, May 25, 1984 (payment of relocation expenses); 35 Comp. Gen. 615 (1956) (restrictions on reimbursement for certain telephone calls made from private residences). Other situations applying the "special fund as appropriation" principle are summarized below:

- Various funds held to constitute appropriated funds for purposes of GAO's bid protest jurisdiction:[27] 65 Comp. Gen. 25 (1985) (funds received by National Park Service for visitor reservation services); 64 Comp. Gen. 756 (1985) (Tennessee Valley Authority power program funds); 57 Comp. Gen. 311 (1978) (commissary surcharges).
- Applicability of other procurement laws: United Biscuit Co. v. Wirtz, 359 F.2d 206 (D.C. Cir. 1965), cert. denied, 384 U.S. 971 (Armed Services Procurement Act applicable to military commissary purchases); B-217281-O.M., March 27, 1985 (federal procurement regulations applicable to Pension Benefit Guaranty Corporation revolving funds).
- User fee toll charges collected by the Saint Lawrence Seaway Development Corporation are "appropriated funds." However, many of the restrictions on the use of appropriated funds will nevertheless be inapplicable by virtue of the Corporation's organic legislation and its status as a corporation. B-193573, January 8, 1979, modified and affirmed by B-193573, December 19, 1979; B-217578, October 16, 1986. The December 1979 decision noted that the capitalization of a government corporation, whether a lump-sum appropriation in the form of capital stock or the authority to borrow through the issuance of long-term bonds to the United States Treasury, consists of "appropriated funds."

[27]GAO regulations exempt nonappropriated fund procurements. 4 C.F.R. § 21.3(m)(8).

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- User fees collected under Tobacco Inspection Act are appropriated funds and as such are subject to restrictions on payment of employee health benefits. 63 Comp. Gen. 285 (1984).
- The Prison Industries Fund is an "appropriated fund" subject to the General Services Administration's surplus property regulations. 60 Comp. Gen. 323 (1981).

Other cases in this category are 50 Comp. Gen. 323 (1970); 35 Comp. Gen. 436 (1956); B-191761, September 22, 1978; B-67175, July 16, 1947.

In each of the special fund cases cited above, the authority to make payments from the fund involved was clear from the governing legislation. However, it was not necessary to address whether the legislation also satisfied 31 U.S.C. § 1301(d), because that statute has long been construed as referring to the general fund of the Treasury and not to money authorized to be deposited in the Treasury as a "special fund." 13 Comp. Dec. 700 (1907); 13 Comp. Dec. 219 (1906). See also 59 Comp. Gen. 215, 217 (1980).

Finally, the cases cited above generally involve statutes which specify the fund to which the collections are to be deposited. This is not essential, however. A statute which clearly makes receipts available for obligation or expenditure without further congressional action will be construed as authorizing the establishment of such a fund as a necessary implementation procedure. 59 Comp. Gen. 215 (1980) (42 U.S.C. § 5419); 13 Comp. Dec. 700 (1907); B-226520, April 3, 1987 (non-decision letter) (26 U.S.C. § 7475).

2. Specific vs. General Appropriations

a. General Rule

An appropriation for a specific object is available for that object to the exclusion of a more general appropriation which might otherwise be considered available for the same object, and the exhaustion of the specific appropriation does not authorize charging any excess payment to the more general appropriation, unless there is something in the general appropriation to make it available in addition to the specific appropriation. In other words, if an agency has a specific appropriation for a particular item, and also has a general appropriation broad enough to cover the same item, it does not

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have an option as to which to use. It must use the specific appropriation. Were this not the case, agencies could evade or exceed congressionally-established spending limits.

The cases illustrating this rule are legion.[28] Generally, the fact patterns and the specific statutes involved are of secondary importance. The point is that the agency does not have an option. If a specific appropriation exists for a particular item, then that appropriation must be used and it is improper to charge the more general appropriation (or any other appropriation) or to use it as a "back-up." A few cases are summarized as examples:

- A State Department appropriation for "publication of consular and commercial reports" could not be used to purchase books in view of a specific appropriation for "books and maps." 1 Comp. Dec. 126 (1894). The Comptroller of the Treasury referred to the rule as having been well-established "from time immemorial." Id. at 127.
- The existence of a specific appropriation for the expenses of repairing the United States courthouse and jail in Nome, Alaska, precludes the charging of such expenses to more general appropriations such as "miscellaneous expenses, U.S. courts" or "support of prisoners, U.S. courts." 4 Comp. Gen. 476 (1924).
- A specific appropriation for the construction of an additional wing on the Navy Department Building could not be supplemented by a more general appropriation to build a larger wing desired because of increased needs. 20 Comp. Gen. 272 (1940).
- Appropriations of the District of Columbia Health Department could not be used to buy penicillin to be used for Civil Defense purposes because the District had received a specific appropriation for "all expenses necessary for the Office of Civil Defense." 31 Comp. Gen. 491 (1952).

Further, the fact that an appropriation for a specific purpose is included as an earmark in a general appropriation does not deprive it of its character as an appropriation for the particular purpose designated, and where such specific appropriation is available for the expenses necessarily incident to its principal purpose, such incidental expenses may not be charged to the more general appropriation. 20 Comp. Gen. 739 (1941). In the cited decision, a general appropriation for the Geological Survey contained the provision

[28]A few are 64 Comp. Gen. 138 (1984); 36 Comp. Gen. 526 (1957); 17 Comp. Gen. 974 (1938); 5 Comp. Gen. 399 (1925).

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"including not to exceed $45,000 for the purchase and exchange . . . of . . . passenger-carrying vehicles." It was held that the costs of transportation incident to the delivery of the purchased vehicles were chargeable to the specific $45,000 appropriation and not to the more general portion of the appropriation.

The rule has also been applied to expenditures by a government corporation from corporate funds for an object for which the corporation had received a specific appropriation, where the reason for using corporate funds was to avoid a restriction applicable to the specific appropriation. B-142011, June 19, 1969.

Of course, the rule that the specific governs over the general is not peculiar to appropriation law. It is a general principle of statutory construction and applies equally to provisions other than appropriation statutes. E.g., 62 Comp. Gen. 617 (1983); B-152722, August 16, 1965. However, another principle of statutory construction is that two statutes should be construed harmoniously so as to give maximum effect to both wherever possible. In dealing with non-appropriation statutes, the relationship between the two principles has been stated as follows:

"Where there is a seeming conflict between a general provision and a specific provision and the general provision is broad enough to include the subject to which the specific provision relates, the specific provision should be regarded as an exception to the general provision so that both may be given effect, the general applying only where the specific provision is inapplicable." B-163375, September 2, 1971.

As stated before, however, in the appropriations context, this does not mean that a general appropriation is available when the specific appropriation has been exhausted. Using the more general appropriation would be an unauthorized transfer (discussed later in this chapter) and would improperly augment the specific appropriation.

b. Two Appropriations Available for Same Purpose

There are situations in which either of two appropriations can be construed as available for a particular object, but neither can reasonably be called the more specific of the two. The rule in this situation is this: Where either of two appropriations may reasonably be construed as available for expenditures not specifically mentioned under either appropriation, the determination of the agency as to which of the two appropriations to use will not be questioned.

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However, once the election has been made, the continued use of the appropriation selected to the exclusion of any other for the same purpose is required, in the absence of changes in the appropriation acts. 68 Comp. Gen. 337 (1989); 23 Comp. Gen. 827 (1944); 10 Comp. Gen. 440 (1931); 5 Comp. Gen. 479 (1926); 15 Comp. Dec. 101 (1908); 5 Op. Off. Legal Counsel 391 (1981).

In 59 Comp. Gen. 518 (1980), the Environmental Protection Agency received separate lump-sum appropriations for "Research and Development" and "Abatement and Control." A contract entered into in 1975 could arguably have been charged to either appropriation, but EPA had elected to charge it to Research and Development. Applying the above rule, the Comptroller General concluded that a 1979 modification to the contract had to be charged to Research and Development funds, and that the Abatement and Control appropriation could not be used.

Thus, in this type of situation (two appropriations, both arguably available, neither of which specifies the object in question), the agency may make an initial election as to which appropriation to use. However, once it has made that election and has in fact used the selected appropriation, it cannot thereafter, because of insufficient funds in the selected appropriation or for other reasons, change its election and use the other appropriation.

3. Transfer and Reprogramming

For a variety of reasons, agencies have a legitimate need for a certain amount of flexibility to deviate from their budget estimates. Two ways to shift money from one place to another are transfer and reprogramming. While the two concepts are related in this broad sense, they are nevertheless different.

a. Transfer

Transfer is the shifting of funds between appropriations. Glossary at 80. For example, if an agency receives one appropriation for Operations and Maintenance and another for Capital Expenditures, a shifting of funds from either to the other is a transfer.

The basic rule with respect to transfer is simple: Transfer is prohibited without statutory authority. The rule applies equally to (1)

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transfers from one agency to another,[29] (2) transfers from one account to another within the same agency,[30] and (3) transfers to an interagency or intraagency working fund.[31] In each instance, statutory authority is required. An agency's erroneous characterization of a proposed transfer as a "reprogramming" is irrelevant. See B-202362, March 24, 1981.

The rule applies even though the transfer is intended as a temporary expedient (for example, to alleviate a temporary exhaustion of funds) and the agency contemplates reimbursement. Thus, without statutory authority, an agency cannot "borrow" from another account or another agency. 36 Comp. Gen. 386 (1956); 13 Comp. Gen. 344 (1934). An exception to this proposition is 31 U.S.C. § 1534, under which an agency may temporarily charge one appropriation for an expenditure benefiting another appropriation of the same agency, as long as amounts are available in both appropriations and the accounts are adjusted to reimburse the appropriation initially charged during or as of the close of the same fiscal year. This statute was intended to facilitate "common service" activities. For example, an agency procuring equipment to be used jointly by several bureaus or offices within the agency funded under separate appropriations may initially charge the entire cost to a single appropriation and later apportion the cost among the appropriations of the benefiting components. See generally S. Rep. No. 1284, 89th Cong., 2d Sess. (1966), reprinted at 1966 U.S. Code Cong. & Admin. News 2340.

The prohibition against transfer is codified in 31 U.S.C. § 1532, the first sentence of which provides:

"An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law."

[29]7 Comp. Gen. 524 (1928); 4 Comp. Gen. 848 (1925); 17 Comp. Dec. 174 (1910). A case in which adequate statutory authority was found to exist is B-217093, January 9, 1985 (transfer from Japan-United States Friendship Commission to Department of Education to partially fund study of Japanese education).

[30]65 Comp. Gen. 881 (1986); 33 Comp. Gen. 216 (1953); 33 Comp. Gen. 214 (1953); 17 Comp. Dec. 7 (1910); B-206668, March 15, 1982; B-178205, April 13, 1976; B-164912-O.M., December 21, 1977.

[31]26 Comp. Gen. 545, 548 (1947); 19 Comp. Gen. 774 (1940); 6 Comp. Gen. 748 (1927); 4 Comp. Gen. 703 (1925).

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In addition to the express prohibition of 31 U.S.C. § 1532, an unauthorized transfer would violate 31 U.S.C. § 1301(a) (which prohibits the use of appropriations for other than their intended purpose), would constitute an unauthorized augmentation of the receiving appropriation, and could, if the transfer led to overobligating the receiving appropriation, result in an Antideficiency Act violation as well. E.g., B-222009-O.M., March 3, 1986.

Some agencies have limited transfer authority either in permanent legislation or in appropriation act provisions. Such authority will commonly set a percentage limit on the amount that may be transferred from a given appropriation and/or the amount by which the receiving appropriation may be augmented. A transfer pursuant to such authority is, of course, entirely proper. B-167637, October 11, 1973. An example is 7 U.S.C. § 2257, which authorizes transfers between Department of Agriculture appropriations. The amount to be transferred may not exceed 7% of the "donor" appropriation, and the receiving appropriation may not be augmented by more than 7% except in extraordinary emergencies. Cases construing this provision include 33 Comp. Gen. 214 (1953); B-218812, January 23, 1987; B-123498, April 11, 1955; and B-218812-O.M., July 30, 1985.

If an agency has transfer authority of this type, its exercise is not precluded by the fact that the amount of the receiving appropriation had been reduced from the agency's budget request. B-151157, June 27, 1963. Also, the transfer statute is an independent grant of authority and, unless expressly provided otherwise, the percentage limitations do not apply to transfers under any separate transfer authority the agency may have. B-239031, June 22, 1990.

Another type of transfer authority is illustrated by 31 U.S.C. § 1531, which authorizes the transfer of unexpended balances incident to executive branch reorganizations, but only for purposes for which the appropriation was originally available. Cases discussing this authority include 31 Comp. Gen. 342 (1952) and B-92288 et al., August 13, 1971.

Statutory transfer authority does not require any particular "magic words." Of course the word "transfer" will help, but it is not necessary as long as the words that are used make it clear that transfer is being authorized. B-213345, September 26, 1986; B-217093, January 9, 1985; B-182398, March 29, 1976 (letter to Senator Laxalt), modified on other grounds by 64 Comp. Gen. 370 (1985).

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Some transfer statutes have included requirements for approval by one or more congressional committees. In light of the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983), such "legislative veto" provisions are no longer valid. Whether the transfer authority to which the veto provision is attached remains valid depends on whether it can be regarded as severable from the approval requirement. This in turn depends on an evaluation, in light of legislative history and other surrounding circumstances, of whether Congress would have enacted the substantive authority without the veto provision. See, e.g., 6 Op. Off. Legal Counsel 520 (1982), in which the Justice Department concluded that a Treasury Department transfer provision was severable and therefore survived a legislative veto provision.

The precise parameters of transfer authority will, of course, depend on the terms of the statute which grants it. The analytical starting point is the second sentence of 31 U.S.C. § 1532:

> "Except as specifically provided by law, an amount authorized to be withdrawn and credited [to another appropriation account or to a working fund] is available for the same purpose and subject to the same limitations provided by the law appropriating the amount."

A number of GAO decisions, several predating the enactment of 31 U.S.C. § 1532, have made essentially the same points—that, except to the extent the statute authorizing a transfer provides otherwise, transferred funds are available for purposes permissible under the donor appropriation and are subject to the same limitations and restrictions applicable to the donor appropriation.[32]

Restrictions applicable to the receiving account but not to the donor account may or may not apply. Where transfers are intended to accomplish a purpose of the source appropriation (Economy Act transactions, for example), transferred funds have been held not subject to such restrictions. E.g., 21 Comp. Gen. 254 (1941); 18 Comp. Gen. 489 (1938); B-35677, July 27, 1943; B-131580-O.M., June 4, 1957. However, for transfers intended to permit a limited augmentation of the receiving account (7 U.S.C. § 2257, for example),

[32]E.g., 31 Comp. Gen. 109. 114-15 (1951); 28 Comp. Gen. 365 (1948); 26 Comp. Gen. 545, 548 (1947); 18 Comp. Gen. 489 (1938); 17 Comp. Gen. 900 (1938); 17 Comp. Gen. 73 (1937); 16 Comp. Gen. 545 (1936); B-167034-O.M., January 20, 1970.

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this principle is arguably inapplicable in view of the fundamentally different purpose of the transfer.

As noted above, in the context of working funds, the prohibition against transfer applies not only to interagency funds, but to the consolidation of all or parts of different appropriations of the same agency into a single fund as well. In a few instances, the "pooling" of portions of agency unit appropriations has been found authorized where necessary to implement a particular statute. In B-195775, September 10, 1979, the Comptroller General approved the transfer of portions of unit appropriations to an agency-wide pool to be used to fund the Merit Pay System established by the Civil Service Reform Act of 1978. The transfers, while not explicitly authorized in the statute, were seen as necessary to implement the law and carry out the legislative purpose. Following this decision, the Comptroller General held in 60 Comp. Gen. 686 (1981) that the Treasury Department could "pool" portions of appropriations made to several separate bureaus to fund an Executive Development Program also authorized by the Civil Service Reform Act. However, pooling which would alter the purposes for which funds were appropriated is an impermissible transfer unless authorized by statute. E.g., B-209790-O.M., March 12, 1985.

The reappropriation of an unexpended balance for a different purpose is a form of transfer. Such funds cease to be available for the purposes of the original appropriation. 18 Comp. Gen. 564 (1938); A-79180, July 30, 1936. Cf. 31 U.S.C. § 1301(b) (reappropriation for different purpose to be accounted for as a new appropriation). If the reappropriation is of an amount "not to exceed" a specified sum, and the full amount is not needed for the new purpose, the balance not needed reverts to the source appropriation. 18 Comp. Gen. at 565.

The prohibition against transfer would not apply to transfers of administrative allocations within a lump-sum appropriation since the allocations are not legally binding.[33] Thus, where the (then) Department of Health, Education, and Welfare received a lump-sum appropriation covering several grant programs, it could set aside a portion of each program's allocation for a single fund to be used for

[33]The agency must be careful that a transfer of administrative allocations does not, under its own fund control regulations, produce a violation of 31 U.S.C. § 1517(a), discussed further in Chapter 6.

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"cross-cutting" grants intended to serve more than one target population, as long as the grants were for projects within the scope or purpose of the lump-sum appropriation. B-157356, August 17, 1978.

b. Reprogramming

A few years ago, the Deputy Secretary of Defense made the following statement:

"The defense budget does not exist in a vacuum. There are forces at work to play havoc with even the best of budget estimates. The economy may vary in terms of inflation; political realities may bring external forces to bear; fact-of-life or programmatic changes may occur. The very nature of the lengthy and overlapping cycles of the budget process poses continual threats to the integrity of budget estimates. Reprogramming procedures permit us to respond to these unforeseen changes and still meet our defense requirements."[34]

The thrust of this statement, while made from the perspective of the Defense Department, applies at least to some extent to all agencies.

Reprogramming is the utilization of funds in an appropriation account for purposes other than those contemplated at the time of appropriation.[35] In other words, it is the shifting of funds from one object to another within an appropriation. The term "reprogramming" appears to have come into use in the mid-1950s although the practice, under different names, pre-dates that time.[36]

The authority to reprogram is implicit in an agency's responsibility to manage its funds; no statutory authority is necessary. See, e.g., 4B Op. Off. Legal Counsel 701 (1980), discussing the Attorney General's authority to reprogram to avoid deficiencies; B-196854.3, March 19, 1984 (Congress is "implicitly conferring the authority to reprogram" by enacting lump-sum appropriations). Indeed, reprogramming is usually a non-statutory arrangement. This means that there is no general statutory provision either authorizing or prohibiting it, and it has evolved largely in the form of informal (i.e., non-statutory) agreements between various agencies and their

[34]Remarks Prepared for Delivery by The Honorable William H. Taft IV, Deputy Secretary of Defense, before the House Armed Services Committee Concerning Reprogramming Action Within the Department of Defense, September 30, 1985 (unprinted).

[35]Glossary at 74; B-164912-O.M., December 21, 1977.

[36]Louis Fisher, Presidential Spending Power 76-77 (1975). Fisher also briefly traces the evolution of the concept.

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congressional oversight committees. These informal arrangements do not have the force and effect of law. Blackhawk Heating & Plumbing Co. v. United States, 622 F.2d 539, 548 (Ct. Cl. 1980). See also 56 Comp. Gen. 201 (1976), holding that the Navy's failure to complete a form required by Defense Department reprogramming regulations was not sufficient to support a claim for proposal preparation costs by an unsuccessful bidder upon cancellation of the proposal.

Thus, as a matter of law, an agency is free to reprogram unobligated funds as long as the expenditures are within the general purpose of the appropriation and are not in violation of any other specific limitation or otherwise prohibited. E.g., B-123469, May 9, 1955. This is true even though the agency may already have administratively allotted the funds to a particular object. 20 Comp. Gen. 631 (1941). In some situations, the agency's discretion may rise to the level of a duty. E.g., Blackhawk Heating & Plumbing at 552 n.9 (satisfaction of obligations under a settlement agreement).

There are at present no reprogramming guidelines applicable to all agencies. As one might expect, reprogramming policies, procedures, and practices vary considerably among agencies.[37] In view of the nature of its activities and appropriation structure, the Defense Department has the most detailed and sophisticated procedures.[38]

In some cases, Congress has attempted to regulate reprogramming by statute, and of course any applicable statutory provisions control. B-164912-O.M., December 21, 1977. For example, a provision frequently found in Defense Department appropriation acts prohibits the use of funds to prepare or present a reprogramming request to the Appropriations Committees "where the item for

[37]GAO reports in this area include Economic Assistance: Ways to Reduce the Reprogramming Notification Burden and Improve Congressional Oversight, GAO/NSIAD-89-202 (September 1989) (foreign assistance reprogramming); Budget Reprogramming: Opportunities to Improve DOD's Reprogramming Process, GAO/NSIAD-89-138 (July 1989); Budget Reprogramming: Department of Defense Process for Reprogramming Funds, GAO/NSIAD-86-164BR (July 1986).

[38]See Reprogramming of Appropriated Funds, Department of Defense Directive No. 7250.5 (1980); Implementation of Reprogramming of Appropriated Funds, Department of Defense Instruction No. 7250.10 (1980).

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which reprogramming is requested has been denied by the Congress."[39] The Comptroller General has construed this provision as prohibiting a reprogramming request which would have the effect of restoring funds which had been specifically deleted in the legislative process; that is, the provision is not limited to the denial of an entire project. See GAO report entitled Legality of the Navy's Expenditures for Project Sanguine During Fiscal Year 1974, LCD-75-315 (January 20, 1975).

Under Defense's arrangement as reflected in its written instructions, reprogramming procedures apply to funding shifts between program elements, but not to shifts within a program element. Thus, the denial of a request to reprogram funds from one program element to another does not preclude a military department from shifting available funds within the element. 65 Comp. Gen. 360 (1986). In other words, all funding shifts are not necessarily "reprogrammings." The level at which reprogramming procedures and restrictions will apply depends on applicable legislation, if any, and the arrangements an agency has worked out with its respective committees.

In the absence of a statutory provision such as the Defense provision noted above, a reprogramming which has the effect of restoring funds deleted in the legislative process has been held not legally objectionable. B-195269, October 15, 1979.

Reprogramming frequently involves some form of notification to the appropriations and/or legislative committees. In a few cases, the notification process is prescribed by statute. However, in most cases, the committee review process is non-statutory, and derives from instructions in committee reports, hearings, or other correspondence. Sometimes, in addition to notification, reprogramming arrangements also provide for committee approval. As in the case of transfer, under the Supreme Court's Chadha decision, statutory committee approval or veto provisions are no longer permissible. However, an agency may continue to observe committee approval procedures as part of its informal arrangements, although they would not be legally binding. B-196854.3, March 19, 1984.

[39]E.g., Department of Defense Appropriations Act, 1990, Pub. L. No. 101-165, § 9015, 103 Stat. 1112, 1132 (1989).

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In sum, reprogramming procedures provide an element of congressional control over spending flexibility short of resort to the full legislative process. They are for the most part non-binding, and compliance is largely a matter of "keeping faith" with the pertinent committees.

4. General Provisions: When Construed as Permanent Legislation

Appropriation acts, in addition to making appropriations, frequently contain a variety of provisions either restricting the availability of the appropriations or making them available for some particular use. Such provisions come in two forms: (a) "provisos" attached directly to the appropriating language, and (b) general provisions. A general provision may apply solely to the act in which it is contained ("No part of any appropriation contained in this Act shall be used . . ."), or it may have general applicability ("No part of any appropriation contained in this or any other Act shall be used . . .").[40] Provisions of this type are no less effective merely because they are contained in appropriation acts. It is settled that Congress can enact general or permanent legislation in appropriation acts. E.g., United States v. Dickerson, 310 U.S. 554 (1940); Cella v. United States, 208 F.2d 783, 790 (7th Cir. 1953), cert. denied, 347 U.S. 1016; NLRB v. Thompson Products, Inc., 141 F.2d 794, 797 (9th Cir. 1944); 41 Op. Att'y Gen. 274, 276 (1956). General provisions may be phrased in the form of restrictions or positive authority.

As noted in Chapter 1, rules of both the Senate and the House of Representatives prohibit "legislating" in appropriation acts. However, this merely subjects the provision to a point of order and does not affect the validity of the legislation if the point of order is not raised, or is raised and not sustained. Thus, once a given provision has been enacted into law, the question of whether it is "general legislation" or merely a restriction on the use of an appropriation, i.e., whether it might have been subject to a point of order, is academic.

This section deals with the question of when provisos or general provisions appearing in appropriation acts can be construed as permanent legislation.

[40]In recent decades, general provisions of government-wide applicability—the "this or any other act" provisions—have, for the most part, been consolidated in the annual Treasury, Postal Service, and General Government appropriation acts. E.g., Pub. L. No. 101-136, Title VI, 103 Stat. 783, 816 (1989) (fiscal year 1990).

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Since an appropriation act is made for a particular fiscal year, the starting presumption is that everything contained in the act is effective only for the fiscal year covered. Thus, the rule is: A provision contained in an annual appropriation act is not to be construed to be permanent legislation unless the language used therein or the nature of the provision makes it clear that Congress intended it to be permanent. The presumption can be overcome if the provision uses language indicating futurity, such as "hereafter," or if the provision is of a general character bearing no relation to the object of the appropriation. 65 Comp. Gen. 588 (1986); 62 Comp. Gen. 54 (1982); 36 Comp. Gen. 434 (1956); 32 Comp. Gen. 11 (1952); 24 Comp. Gen. 436 (1944); 10 Comp. Gen. 120 (1930); 5 Comp. Gen. 810 (1926); 7 Comp. Dec. 838 (1901).

In analyzing a particular provision, the starting point in ascertaining Congress' intent is, as it must be, the language of the statute. The question to ask is whether the provision uses "words of futurity." The most common "word of futurity" is "hereafter" and provisions using this term will usually be construed as permanent. For specific examples, see Cella v. United States, 208 F.2d at 790; 70 Comp. Gen. ___ (B-242142, March 22, 1991); 26 Comp. Gen. 354, 357 (1946); 2 Comp. Gen. 535 (1923); 11 Comp. Dec. 800 (1905); B-108245, March 19, 1952; B-100983, February 8, 1951; B-76782, June 10, 1948. The precise location of the word "hereafter" may be important. It may not be sufficient, for example, if it appears only in an exception clause and not in the operative portion of the provision. B-228838, September 16, 1987.

Words of futurity other than "hereafter" have also been deemed sufficient. Thus, there is no significant difference in meaning between "hereafter" and "after the date of approval of this act." 65 Comp. Gen. 588, 589 (1986); 36 Comp. Gen. 434, 436 (1956); B-209583, January 18, 1983. Using a specific date rather than a general reference to the date of enactment produces the same result. B-57539, May 3, 1946. "Henceforth" will also do the job. B-209583, January 18, 1983. So will specific references to future fiscal years. B-208354, August 10, 1982.

In 24 Comp. Gen. 436 (1944), the words "at any time" were viewed as words of futurity in a provision which authorized reduced transportation rates to military personnel who were "given furloughs at any time." In that decision, however, the conclusion of permanence was further supported by the fact that Congress appropriated

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funds to carry out the provision in the following year as well, and did not repeat the provision but merely referred to it.

The words "or any other act" in a provision addressing funds appropriated in or made available by "this or any other act" are not words of futurity. They merely refer to any other appropriation act for the same fiscal year. 65 Comp. Gen. 588 (1986); B-230110, April 11, 1988; B-228838, September 16, 1987; B-145492, September 21, 1976.[41] See also A-88073, August 19, 1937 ("this or any other appropriation"). Similarly, the words "notwithstanding any other provision of law" are not words of futurity. B-208705, September 14, 1982.

The words "this or any other act" may be used in conjunction with other language that makes the result, one way or the other, indisputable. The provision is clearly not permanent if the phrase "during the current fiscal year" is added. Norcross v. United States, 142 Ct. Cl. 763 (1958). Addition of the phrase "with respect to any fiscal year" makes the provision permanent. B-230110, April 11, 1988.

If words of futurity indicate permanence, it follows that a proviso or general provision that does not contain words of futurity will generally not be construed as permanent. 65 Comp. Gen. 588 (1986); 32 Comp. Gen. 11 (1952); 20 Comp. Gen. 322 (1940); 10 Comp. Gen. 120 (1930); 5 Comp. Gen. 810 (1926); 3 Comp. Gen. 319 (1923); B-209583, January 18, 1983; B-208705, September 14, 1982; B-66513, May 26, 1947; A-18614, May 25, 1927. The courts have applied the same analysis. See United States v. Vulte, 233 U.S. 509, 514 (1914); Minis v. United States, 40 U.S. (15 Pet.) 423 (1841); United States v. International Business Machines Corp., 892 F.2d 1006, 1009 (Fed. Cir. 1989); NLRB v. Thompson Products, Inc., 141 F.2d 794, 798 (9th Cir. 1944); City of Hialeah v. United States Housing Authority, 340 F. Supp. 885 (S.D. Fla. 1971).

As the preceding paragraphs indicate, the language of the statute is the crucial determinant. However, other factors may also be taken into consideration. Thus, the repeated inclusion of a provision in annual appropriation acts indicates that it is not considered or

[41]One early case found the words "or any other act" sufficient words of futurity. 26 Comp. Dec. 1066 (1920). A later decision, B-37032, October 5, 1943, regarded their effect as inconclusive. Both of these cases must be regarded as implicitly modified by the consistent position expressed in the more recent decisions.

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intended by Congress to be permanent. 32 Comp. Gen. 11 (1952); 10 Comp. Gen. 120 (1930); A-89279, October 26, 1937; 41 Op. Att'y Gen. 274, 279-80 (1956). However, where adequate words of futurity exist, the repetition of a provision in the following year's appropriation act has been viewed simply as an "excess of caution." 36 Comp. Gen. 434, 436 (1956). This factor is of limited usefulness, since the failure to repeat in subsequent appropriation acts a provision which does not contain words of futurity can also be viewed as an indication that Congress did not consider it to be permanent and simply did not want it to continue. See 18 Comp. Gen. 37 (1938); A-88073, August 19, 1937. Thus, if the provision does not contain words of futurity, repetition or non-repetition lead to the same result—that the provision is not permanent. If the provision does contain words of futurity, non-repetition indicates permanence but repetition, although it suggests non-permanence, is inconclusive.

The inclusion of a provision in the United States Code is relevant as an indication of permanence but is not controlling. 36 Comp. Gen. 434 (1956); 24 Comp. Gen. 436 (1944). Failure to include a provision in the Code would appear to be of no significance. A reference by the codifiers to the failure to reenact a provision suggests non-permanence. 41 Op. Att'y Gen. at 280-81.

Legislative history is also relevant, but has been used for the most part to support a conclusion based on the presence or absence of words of futurity. See 65 Comp. Gen. 588 (1986); B-209583, January 18, 1983; B-208705, September 14, 1982; B-108245, March 19, 1952; B-57539, May 3, 1946; Cella v. United States, 208 F.2d at 790 n.1; NLRB v. Thompson Products, 141 F.2d at 798. In B-192973, October 11, 1978, a general provision requiring the submission of a report "annually to the Congress" was held not permanent in view of conflicting expressions of congressional intent. Legislative history by itself has not been used to find futurity where it is missing in the statutory language.

The degree of relationship between a given provision and the object of the appropriation act in which it appears or the appropriating language to which it is appended is a factor to be considered. If the provision bears no direct relationship to the appropriation act in which it appears, this is an indication of permanence. For example, a provision prohibiting the retroactive application of an energy tax

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credit provision in the Internal Revenue Code was found sufficiently unrelated to the rest of the act in which it appeared, a supplemental appropriations act, to support a conclusion of permanence. B-214058, February 1, 1984. See also 62 Comp. Gen. 54, 56 (1982); 26 Comp. Gen. 354, 357 (1946); 32 Comp. Gen. 11 (1952); B-37032, October 5, 1943; A-88073, August 19, 1937. The closer the relationship, the less likely it is that the provision will be viewed as permanent. A determination under rules of the Senate that a proviso is germane to the subject matter of the appropriation bill will negate an argument that the proviso is sufficiently unrelated as to suggest permanence. B-208705, September 14, 1982.

The phrasing of a provision as positive authorization rather than a restriction on the use of an appropriation is an indication of permanence, but usually has been considered in conjunction with a finding of adequate words of futurity. 36 Comp. Gen. 434 (1956); 24 Comp. Gen. 436 (1944). An early decision, 17 Comp. Dec. 146 (1910), held a proviso to be permanent based solely on the fact that it was not phrased as a restriction on the use of the appropriation to which it was attached, but this decision seems inconsistent with the weight of authority and certainly with the Supreme Court's decision in Minis v. United States, cited above.

Finally, a provision may be construed as permanent if construing it as temporary would render the provision meaningless or produce an absurd result. 65 Comp. Gen. 352 (1986); 62 Comp. Gen. 54 (1982); B-200923, October 1, 1982. These decisions dealt with a general provision designed to prohibit cost-of-living pay increases for federal judges except as specifically authorized by Congress. The provision appeared in a continuing resolution which expired on September 30, 1982. The next applicable pay increase would have been effective October 1, 1982. Thus, if the provision were not construed as permanent, it would have been meaningless "since it would have been enacted to prevent increases during a period when no increases were authorized to be made." 62 Comp. Gen. at 56-57. Similarly, a provision was held permanent in 9 Comp. Gen. 248 (1929) although it contained no words of futurity, because it was to become effective on the last day of the fiscal year and an alternative construction would have rendered it effective for only one day, clearly not the legislative intent. See also 65 Comp. Gen. 588, 590 (1986); B-214058, February 1, 1984.

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In sum, the six additional factors mentioned above are all relevant as indicia of whether a given provision should be construed as permanent. However, the presence or absence of words of futurity remains the crucial factor, and the additional factors have been used for the most part to support a conclusion based primarily on this presence or absence. Four of the factors—occurrence or nonoccurrence in subsequent appropriation acts, inclusion in United States Code, legislative history, and phrasing as positive authorization—have never been used as the sole basis for finding permanence in a provision without words of futurity. The two remaining factors—relationship to rest of statute and meaningless or absurd result—can be used to find permanence in the absence of words of futurity, but the conclusion is almost invariably supported by at least one of the other factors such as legislative history.

C. Relationship of Appropriations to Other Types of Legislation

1. Distinction Between Authorization and Appropriation

Appropriation acts must be distinguished from two other types of legislation: "enabling" or "organic" legislation and "appropriation authorization" legislation. Enabling or organic legislation is legislation which creates an agency, establishes a program, or prescribes a function, such as the Department of Education Organization Act or the Federal Water Pollution Control Act. While the organic legislation may provide the necessary authority to conduct the program or activity, it, with relatively rare exceptions, does not provide any money.

Appropriation authorization legislation, as the name implies, is legislation which authorizes the appropriation of funds to implement the organic legislation. It may be included as part of the organic legislation or it may be separate. As a general proposition, it too does not give the agency any actual money to spend. With certain exceptions (discussed in Section B.1 of this chapter), only the appropriation act itself permits the withdrawal of funds from the Treasury. The principle has been stated as follows:

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"The mere authorization of an appropriation does not authorize expenditures on the faith thereof or the making of contracts obligating the money authorized to be appropriated."

16 Comp. Gen. 1007, 1008 (1937). Restated, an authorization of appropriations does not constitute an appropriation of public funds, but contemplates subsequent legislation by the Congress actually appropriating the funds. 35 Comp. Gen. 306 (1955); 27 Comp. Dec. 923 (1921).[42]

Like the organic legislation, authorization legislation is considered and reported by the committees with legislative jurisdiction over the particular subject matter, whereas the appropriation bills are exclusively within the jurisdiction of the appropriations committees.

There is no general requirement, either constitutional or statutory, that an appropriation act be preceded by a specific authorization act. The existence of a statute (organic legislation) imposing substantive functions upon an agency which require funding for their performance is itself sufficient authorization for the necessary appropriations. B-173832, July 16, 1976; B-173832, August 1, 1975; B-111810, March 8, 1974. However, statutory requirements for authorizations do exist in a number of specific situations. An example is section 660 of the Department of Energy Organization Act, 42 U.S.C. § 7270 ("Appropriations to carry out the provisions of this chapter shall be subject to annual authorizations"). Another example is 10 U.S.C. § 114(a), which provides that no funds may be appropriated for military construction, military procurement, and certain related research and development "unless funds therefor have been specifically authorized by law."

In addition, rules of the House of Representatives prohibit appropriations for expenditures not previously authorized by law. See Rule XXI(2), Rules of the House of Representatives. The effect of this Rule is to subject the offending appropriation to a point of order. A more limited provision exists in Rule XVI, Standing Rules of the Senate.

[42]See also 67 Comp. Gen. 332 (1988); 37 Comp. Gen. 732 (1958); 26 Comp. Gen. 452 (1947); 15 Comp. Gen. 802 (1936); 4 Comp. Gen. 219 (1924); A-27765, July 8, 1929.

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The majority of appropriations today are preceded by some form of authorization although, as noted, it is not statutorily required in all cases.

Authorizations take many different forms, depending in part on whether they are contained in the organic legislation or are separate. Authorizations contained in organic legislation may be "definite" (setting dollar limits either in the aggregate or for specific fiscal years) or "indefinite" (authorizing "such sums as may be necessary to carry out the provisions of this act"). An indefinite authorization serves little purpose other than to comply with House Rule XXI. Appropriation authorizations enacted as separate legislation resemble appropriation acts in structure, for example, the annual Department of Defense Authorization Acts.

An authorization act is basically a directive to the Congress itself which Congress is free to follow or alter (up or down) in the subsequent appropriation act. A statutory requirement for prior authorization is also essentially a congressional mandate to itself. Thus, for example, if Congress appropriates money to the Defense Department in violation of 10 U.S.C. § 114, there are no practical consequences. The appropriation is just as valid, and just as available for obligation, as if section 114 had been satisfied or did not exist.

In sum, the typical sequence is: (1) organic legislation, (2) authorization of appropriations, if not contained in the organic legislation, and (3) the appropriation act. While this may be the "normal" sequence, there are deviations and variations, and it is not always possible to neatly label a given piece of legislation. Consider, for example, the following:

"The Secretary of the Treasury is authorized and directed to pay to the Secretary of the Interior . . . for the benefit of the Coushatta Tribe of Louisiana . . . out of any money in the Treasury not otherwise appropriated, the sum of $1,300,000."[43]

This is the first section of a law enacted to settle land claims by the Coushatta Tribe against the United States and to prescribe the use and distribution of the settlement funds. Applying the test described above in Section B.1, it is certainly an appropriation—it contains a specific direction to pay and designates the funds to be

[43]Pub. L. No. 100-411, § 1(a)(1), 102 Stat. 1097 (1988).

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used—but, in a technical sense, it is not an appropriation act. Also, it contains its own authorization. Thus, we have an authorization and an appropriation combined in a statute that is neither an authorization act (in the sense described above) nor an appropriation act. General classifications may be useful and perhaps essential, but they should not be expected to cover all situations.

2. Specific Problem Areas and the Resolution of Conflicts

a. Introduction

Appropriation acts, as we have seen, do not exist in a vacuum. They are enacted against the backdrop of program legislation and, in many cases, specific authorization acts. This section deals with two broad but closely related issues. First, what precisely can Congress do in an appropriation act? Is it limited to essentially "rubber stamping" what has previously been authorized? Second, what does an agency do when faced with what it perceives to be an inconsistency between an appropriation act and some other statute?

The remaining portions of this section raise these issues in a number of specific contexts. In this introduction, we present four important principles. The resolution of problems in the relationship of appropriation acts to other statutes will almost invariably lie in the application of one or more of these principles.

First, as a general proposition, appropriations made to carry out authorizing laws "are made on the basis that the authorization acts in effect constitute an adjudication or legislative determination of the subject matter." B-151157, June 27, 1963. Thus, except as specified otherwise in the appropriation act, appropriations to carry out enabling or authorizing laws must be expended in strict accord with the original authorization both as to the amount of funds to be expended and the nature of the work authorized. 36 Comp. Gen. 240, 242 (1956); B-220682, February 21, 1986; B-204874, July 28, 1982; B-125404, August 31, 1956; B-151157, June 27, 1963. While it is true that one Congress cannot bind a future Congress, nor can it bind subsequent action by the same Congress, an authorization act is more than an academic exercise and its requirements must be followed unless changed by subsequent legislation.

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Second, Congress is free to amend or repeal prior legislation as long as it does so directly and explicitly and does not violate the Constitution. It is also possible for one statute to implicitly amend or repeal a prior statute, but it is firmly established that "repeal by implication" is disfavored, and statutes will be construed to avoid this result whenever reasonably possible. E.g., Tennessee Valley Authority v. Hill, 437 U.S. 153, 189-90 (1978); Morton v. Mancari, 417 U.S. 535, 549 (1974); Posadas v. National City Bank, 296 U.S. 497, 503 (1936); 68 Comp. Gen. 19, 22-23 (1988); 64 Comp. Gen. 143, 145 (1984); 58 Comp. Gen. 687, 691-92 (1979); 53 Comp. Gen. 853, 856 (1974); 34 Comp. Gen. 170, 172-73 (1954); 21 Comp. Gen. 319, 322-23 (1941); B-236057, May 9, 1990. A repeal by implication will be found only where "the intention of the legislature to repeal [is] clear and manifest." Posadas, 296 U.S. at 503.

A corollary to the "cardinal rule" against repeal by implication, or perhaps another way of saying the same thing, is the rule of construction that statutes should be construed harmoniously so as to give maximum effect to both wherever possible. E.g., Posadas, 296 U.S. at 503; 53 Comp. Gen. at 856; B-208593.6, December 22, 1988.

Third, if two statutes are in irreconcilable conflict, the more recent statute, as the latest expression of Congress, governs. As one court concluded in a statement illustrating the eloquence of simplicity:

> "The statutes are thus in conflict, the earlier permitting and the later prohibiting. The later statute supersedes the earlier."

Eisenberg v. Corning, 179 F.2d 275, 277 (D.C. Cir. 1949). In a sense, the "last in time" rule is yet another way of expressing the repeal by implication principle. We state it separately to highlight its narrowness: it applies only when the two statutes cannot be reconciled in any reasonable manner, and then only to the extent of the conflict. E.g., Posadas, 296 U.S. at 503; B-203900, February 2, 1989; B-226389, November 14, 1988; B-214172, July 10, 1984, aff'd upon reconsideration, 64 Comp. Gen. 282 (1985).

The fourth principle we state in two parts:

(a) Despite the occasional comment to the contrary in judicial decisions (a few of which we will note later), Congress can and does "legislate" in appropriation acts. E.g., Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir. 1979), cert. denied, 441 U.S. 952; Friends of the

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Earth v. Armstrong, 485 F.2d 1 (10th Cir. 1973), cert. denied, 414 U.S. 1171; Eisenberg v. Corning, 179 F.2d 275 (D.C. Cir. 1949); Tayloe v. Kjaer, 171 F.2d 343 (D.C. Cir. 1948). See also the Dickerson, Cella, and Thompson Products cases cited above in Section B.4, and the discussion of the congressional power of the purse in Chapter 1, Section B. It may well be that the device is "unusual and frowned upon." Preterm, 591 F.2d at 131. It also may well be that the appropriation act will be narrowly construed when it is in apparent conflict with authorizing legislation. Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1558 (D.C. Cir. 1984). Maybe—although we express no independent judgment—it is even "universally recognized as exceedingly bad legislative practice." Tayloe, 171 F.2d at 344. Nevertheless, appropriation acts are, like any other statute, passed by both Houses of Congress and either signed by the President or enacted over a presidential veto. As such, and subject of course to constitutional strictures, they are "just as effective a way to legislate as are ordinary bills relating to a particular subject." Friends of the Earth, 485 F.2d at 9.

(b) Legislative history is not legislation. As useful and important as legislative history may be in resolving ambiguities and determining congressional intent, it is the language of the appropriation act, and not the language of its legislative history, that is enacted into law. As the Supreme Court stated in a case previously cited which we will discuss in more detail later:

> "Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress . . . ."

Tennessee Valley Authority v. Hill, 437 U.S. at 191.

These, then, are the "guiding principles" which will be applied in various combinations and configurations to analyze and resolve the problem areas identified in the remainder of this section. For the most part, our subsequent discussion will merely note the applicable principle(s). A useful supplemental reference on many of the topics we discuss is Louis Fisher, The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices, 29 Cath. U.L. Rev. 51 (1979).

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b. Variations in Amount

(1) Appropriation exceeds authorization

Generally speaking, Congress is free to appropriate more money for a given object than the amount previously authorized. As the Comptroller General stated in a brief letter to a Member of Congress:

"While legislation providing for an appropriation of funds in excess of the amount contained in a related authorization act apparently would be subject to a point of order under rule 21 of the Rules of the House of Representatives, there would be no basis on which we could question otherwise proper expenditures of funds actually appropriated." B-123469, April 14, 1955.

The governing principle was stated as follows in 36 Comp. Gen. 240, 242 (1956):

"It is fundamental . . . that one Congress cannot bind a future Congress and that the Congress has full power to make an appropriation in excess of a cost limitation contained in the original authorization act. This authority is exercised as an incident to the power of the Congress to appropriate and regulate expenditures of the public money."

If we are dealing with a line-item appropriation or a specific earmark in a lump-sum appropriation, the quoted statement would appear beyond dispute. However, complications arise where the authorization for a given item is specific and a subsequent lump-sum appropriation includes a higher amount for that item specified only in legislative history and not in the appropriation act itself. In this situation, the rule that one Congress cannot bind a future Congress or later action by the same Congress must be modified somewhat by the rule against repeal by implication. The line of demarcation, however, is not precisely defined.

In 36 Comp. Gen. 240, Congress had authorized the construction of two bridges across the Potomac River "at a cost not to exceed" $7 million. A subsequent appropriation act made a lump-sum appropriation which included funds for the bridge construction (specified in legislative history but not in the appropriation act itself) in excess of the amount authorized. The decision concluded that the appropriation, as the latest expression of Congress on the

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matter, was available for expenditure.[44] Similarly, it was held in B-148736, September 15, 1977, that the National Park Service could expend its lump-sum appropriation for planning and construction of parks even though the expenditures for specific parks would exceed amounts authorized to be appropriated for those parks.

Both of these cases were distinguished in 64 Comp. Gen. 282 (1985), which affirmed a prior unpublished decision, B-214172, July 10, 1984. Authorizing legislation for the Small Business Administration provided specific funding levels for certain SBA programs. SBA's 1984 appropriation act contained a lump-sum appropriation for the programs which, according to the conference report, included amounts in excess of the funding levels specified in the authorization. Relying in part on Tennessee Valley Authority v. Hill, GAO concluded that the two statutes were not in conflict, that the appropriation did not implicitly repeal or amend the authorizations, and that the spending levels in the authorization were controlling. The two prior cases were distinguished as being limited in scope and dealing with different factual situations. 64 Comp. Gen. at 285. For example, it was clear in the prior cases that Congress was knowingly providing funds in excess of the authorization ceilings. In contrast, the SBA appropriation made explicit reference to the authorizing statute, thus suggesting that Congress did not intend that the appropriation be inconsistent with the authorized spending levels. Id. at 286-87.

(2) Appropriation less than authorization

Congress is free to appropriate less than an amount authorized either in an authorization act or in program legislation, again, as in the case of exceeding an authorization, at least where it does so directly. E.g., 53 Comp. Gen. 695 (1974). This includes the failure to fund a program at all, i.e., not to appropriate any funds. United States v. Dickerson, 310 U.S. 554 (1940).

A more recent case in point is City of Los Angeles v. Adams, 556 F.2d 40 (D.C. Cir. 1977). The Airport and Airway Development Act of 1970 authorized airport development grants "in aggregate amounts not less than" specified dollar amounts for specified fiscal

[44]The decision also held that obligations in excess of the amount included in the appropriation would violate the Antideficiency Act. Since the appropriation in question was a lump-sum appropriation which did not mention the bridge construction item, this portion of the decision is no longer valid. See Chapter 6, Section F.

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years, and provided an apportionment formula. Subsequent appropriation acts included specific limitations on the aggregate amounts to be available for the grants, less than the amounts authorized. The court concluded that both laws could be given effect by limiting the amounts available to those specified in the appropriation acts, but requiring that they be distributed in accordance with the formula of the authorizing legislation. In holding the appropriation limits controlling, the court said:

"According to its own rules, Congress is not supposed to use appropriations measures as vehicles for the amendment of general laws, including revision of expenditure authorization. . . . Where Congress chooses to do so, however, we are bound to follow Congress's last word on the matter even in an appropriations law." Id. at 48-49.

Where the amount authorized to be appropriated is mandatory rather than discretionary, Congress can still appropriate less, or can suspend or repeal the authorizing legislation, as long as the intent to suspend or repeal the authorization is clear. The power is considerably diminished, however, with respect to entitlements that have already vested. The distinction is made clear in the following passage from the Supreme Court's decision in United States v. Larionoff, 431 U.S. 864, 879 (1977):

"No one disputes that Congress may prospectively reduce the pay of members of the Armed Forces, even if that reduction deprived members of benefits they had expected to be able to earn. . . . It is quite a different matter, however, for Congress to deprive a service member of pay due for services already performed, but still owing. In that case, the congressional action would appear in a different constitutional light."

Several earlier cases provide concrete illustrations of what Congress can and cannot do in an appropriation act to reduce or eliminate a non-vested mandatory authorization. In United States v. Fisher, 109 U.S. 143 (1883), permanent legislation set the salaries of certain territorial judges. Congress subsequently appropriated a lesser amount, "in full compensation" for that particular year. The Court held that Congress had the power to reduce the salaries, and had effectively done so. "It is impossible that both acts should stand. No ingenuity can reconcile them. The later act must therefore prevail . . . ." Id. at 146. See also United States v. Mitchell, 109 U.S. 146 (1883). In the Dickerson case cited above, the Court found a mandatory authorization effectively suspended by a provision in an appropriation act prohibiting the use of funds for the payment

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in question "notwithstanding the applicable portions of" the authorizing legislation.

In the cases in the preceding paragraph, the "reduction by appropriation" was effective because the intent of the congressional action was unmistakable. The mere failure to appropriate sufficient funds is not enough. In United States v. Langston, 118 U.S. 389 (1886), for example, the Court refused to find a repeal by implication in "subsequent enactments which merely appropriated a less amount . . . and which contained no words that expressly or by clear implication modified or repealed the previous law." Id. at 394. A similar holding is United States v. Vulte, 233 U.S. 509 (1914). A failure to appropriate in this type of situation will prevent administrative agencies from making payment, but, as in Langston and Vulte, is unlikely to prevent recovery by way of a lawsuit. See also New York Airways, Inc. v. United States, 369 F.2d 743 (Ct. Cl. 1966); Gibney v. United States, 114 Ct. Cl. 38 (1949).

Thus, appropriating less than the amount of a non-vested mandatory authorization, including not appropriating any funds for it, will be effective under the "last in time" rule as long as the intent to suspend or repeal the authorization is clear. However, by virtue of the rule against repeal by implication, a mere failure to appropriate sufficient funds will not be construed as amending or repealing prior authorizing legislation.

(3) Earmarks in authorization act

In Chapter 6, Section B, we set forth the various types of language Congress uses in appropriation acts when it wants to "earmark" a portion of a lump-sum appropriation as either a maximum or a minimum to be spent on some particular object. These same types of earmarking language can be used in authorization acts.

A number of cases have considered the question of whether there is a conflict when an authorization establishes a minimum earmark ("not less than," "shall be available only"), and the related appropriation is a lump-sum appropriation which does not expressly mention the earmark. Is the agency in this situation required to observe the earmark? Applying the principle that an appropriation must be expended in accordance with the related authorization unless the appropriation act provides otherwise, GAO has concluded that the agency must observe the earmark. 64 Comp. Gen. 388

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(1985); B-220682, February 21, 1986 ("an earmark in an authorization act must be followed where a lump sum is appropriated pursuant to the authorization"); B-207343, August 18, 1982; B-193282, December 21, 1978. See also B-131935, March 17, 1986. This result applies even though following the earmark will drastically reduce the amount of funds available for non-earmarked programs funded under the same appropriation. 64 Comp. Gen. at 391. (These cases can also be viewed as another application of the rule against repeal by implication.)

If Congress expressly appropriates an amount at variance with a previously-enacted authorization earmark, the appropriation will control under the "last in time" rule. For example, in 53 Comp. Gen. 695 (1974), an authorization act had expressly earmarked $18 million for UNICEF for specific fiscal years. A subsequent appropriation act provided a lump sum, out of which only $15 million was earmarked for UNICEF. The Comptroller General concluded that the $15 million specified in the appropriation act was controlling and represented the maximum available for UNICEF for that fiscal year.

c. Variations in Purpose

As noted previously, it is only the appropriation, and not the authorization by itself, that permits the incurring of obligations and the making of expenditures. It follows that an authorization does not, as a general proposition, expand the scope of availability of appropriations beyond what is permissible under the terms of the appropriation act. The authorized purpose must be implemented either by a specific appropriation or by inclusion in a broader lump-sum appropriation. Thus, an appropriation made for specific purposes is not available for related but more extended purposes contained in the authorization act but not included in the appropriation. 19 Comp. Gen. 961 (1940). See also 37 Comp. Gen. 732 (1958); 35 Comp. Gen. 306 (1955); 26 Comp. Gen. 452 (1947).

In addition to simply failing to appropriate funds for an authorized purpose, Congress can expressly restrict the use of an appropriation for a purpose or purposes included in the authorization. E.g., B-24341, April 1, 1942 ("[W]hatever may have been the intention of the original enabling act it must give way to the express provisions of the later act which appropriated funds but limited their use").

Similarly, by express provision in an appropriation act, Congress can expand authorized purposes. In 67 Comp. Gen. 401 (1988), for

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construction. (Rerouting was apparently not possible.) B-125309, December 6, 1955.[4]

In any case, an appropriation serves as a limitation, or more accurately, a series of limitations relating to time and amount in addition to purpose. In some situations, an appropriation is simultaneously a grant of authority. For example, 5 U.S.C. § 3109 authorizes agencies to procure the services of experts and consultants, but only "[w]hen authorized by an appropriation or other statute." In contrast with the statute authorizing services for credit unions noted earlier, 5 U.S.C. § 3109 by itself does not authorize an agency to spend general operating appropriations to hire consultants. Unless an agency has received this authority somewhere in its permanent legislation, the hiring of consultants under section 3109 is an authorized purpose only if it is specified in the agency's appropriation act.

c. Effect of Budget Estimates

The relationship of an appropriation to the agency's budget request is another important factor in determining purpose availability. If a budget submission requests a specific amount of money for a specific purpose, and Congress makes a specific line-item appropriation for that purpose, the purpose aspects of the appropriation are relatively clear and simple. The appropriation is legally available only for the specific object described.

The trend in recent decades, however, has favored the enactment of lump-sum appropriations, which are stated in terms of broad object categories such as "salaries and expenses," "operations and maintenance," or "research and development." In analyzing the relationship of a lump-sum appropriation to its corresponding budget request from the perspective of purpose availability, there are two basic rules.

First, where an amount to be expended for a specific purpose which is not otherwise prohibited is included in a budget estimate, the appropriation is legally available for the expenditure even though the appropriation act does not make specific reference to it. 35 Comp. Gen. 306, 308 (1955); 28 Comp. Gen. 296, 298 (1948); 26 Comp. Gen. 545, 547 (1947); 23 Comp. Dec. 547 (1917); B-125935,

[4]The protection of archaeological data is now provided by statute. See 16 U.S.C. § 469a-1 and the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa et seq.

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It should be emphasized that the prior decisions were overruled only to the extent inconsistent with the new holding. Two specific elements of 58 Comp. Gen. 202 were not involved in the 1981 decision and remain valid. First, use of appropriated funds to serve meals or refreshments remains improper except under specific statutory authority. 58 Comp. Gen. at 206.[45] Second, 58 Comp. Gen. 202 found the purchase of commercial insurance on art objects improper. Id. at 207. This portion also remains valid.

The decision at 60 Comp. Gen. 303 was expanded in B-199387, March 23, 1982, to include small "samples" of ethnic foods prepared and served during a formal ethnic awareness program as part of the agency's equal employment opportunity program. In the particular program being considered, the attendees were to pay for their own lunches, with the ethnic food samples of minimal proportion provided as a separate event. Thus, the samples could be distinguished from meals or refreshments, which remain unauthorized. (The decision did not specify how many "samples" an individual might consume in order to develop a fuller appreciation.)

Although 60 Comp. Gen. 303 was not cast in precisely these terms, it is another example of the "theory of relativity" in purpose availability to which we have alluded in various places in this chapter. Equality in all aspects of federal employment is now a legal mandate. An agency is certainly within its discretion to determine that fostering racial and ethnic awareness is a valid—perhaps indispensable—means of advancing this objective. This being the case, it is not at all far-fetched to conclude that certain expenditures that might be wholly inappropriate in other contexts could reasonably relate to this purpose. Thus, hiring an African dance troupe could not be justified to further an objective of, for example, conducting a financial audit or constructing a building or procuring a tank, but the relationship changes when the objective is promoting cultural awareness.

Once the concept of the preceding paragraph is understood, it should be apparent why, in 64 Comp. Gen. 802 (1985), GAO distinguished the cultural awareness cases and concluded that the Army

[45]Compare B-208729, May 24, 1983, in which an Army unit sponsored a catered luncheon to commemorate Dr. Martin Luther King, Jr., but—properly—charged attendees for the meal.

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could not use appropriated funds to provide free meals for handicapped employees attending a luncheon in honor of National Employ the Handicapped Week. This is not to say that an agency's EEO program should not embrace the handicapped—on the contrary, it can, should, and is required to—but merely that "[u]nlike ethnic and cultural minorities, handicapped persons do not possess a common cultural heritage" within the intended scope of the cultural awareness cases. Id. at 804 (quoting from the request for decision).

d. Entertainment of Non-Government Personnel

Just as the entertainment of government personnel is generally unauthorized, the entertainment of non-government personnel is equally impermissible. The basic rule is the same regardless of who is being fed or entertained: Appropriated funds are not available for entertainment, including free food, except under specific statutory authority.

Two of the most frequently cited decisions for this proposition are 5 Comp. Gen. 455 (1925) and 26 Comp. Gen. 281 (1946). In 5 Comp. Gen. 455, expenditures by two Army officers for entertaining officials of foreign governments while making arrangements for an around-the-world flight were disallowed. In 26 Comp. Gen. 281, appropriations were held unavailable for dinners and luncheons for "distinguished guests" given by a commissioner of the Philippine War Damage Commission. Other early decisions on point are: 5 Comp. Gen. 1018 (1926); B-85555, June 6, 1949; and A-10221, October 8, 1925. A limited exception was recognized in B-22307, December 23, 1941, to permit entertainment of officials of foreign governments incident to the gathering of intelligence for national security.

As with the cases dealing with government employees, a large proportion of the decisions tend to involve food. In 43 Comp. Gen. 305 (1963), funds were not available to furnish food or refreshments at "recognition ceremonies" for volunteers at Veterans Administration field stations. The ceremonies had been designed as an inducement to the volunteers to continue rendering service. Naturally, the situation would be permissible under specific statutory authority. B-152331, November 19, 1975. Other examples are 26 Comp. Gen. 281, cited above, and B-138081, January 13, 1959, disallowing the cost of a breakfast meeting with Canadian officials called at the initiative of the Chairman of the Securities and Exchange Commission.

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Several more recent decisions illustrate the continued application of the rule and some of the exceptions permitted by statute. In 68 Comp. Gen. 226 (1989), the Department of Housing and Urban Development used its research and technology appropriations for entertainment expenses incident to a trade show it sponsored in the Soviet Union. Since HUD had no authority to sponsor the show, the related expenditures were improper. The decision further pointed out that, even if the trade show itself had been authorized, the research and technology appropriations still would not have been available for entertainment, although HUD could then have used its "official reception and representation" funds. See also 65 Comp. Gen. 16 (1985) (free in-flight meals during weather research flight unauthorized for non-government personnel).

In 57 Comp. Gen. 806 (1978), the Comptroller General held that appropriations available to the judiciary for jury expenses could not be used to buy coffee and refreshments for jurors during recesses in trial proceedings. The situation was analogized to the cases prohibiting the purchase of food from appropriated funds for employees working under unusual conditions. The decision noted that statutory authority existed to pay actual subsistence expenses for jurors under sequestration, not an issue in the case at hand. The relevant appropriation language was subsequently amended to provide for refreshments, and the authority was made permanent in 1989.[46]

In a 1979 decision, appropriations of the Equal Employment Opportunity Commission were found not available to host a reception for Hispanic leaders in conjunction with a planning conference. B-193661, January 19, 1979. The case fell squarely within the general rule. So did B-205292, June 2, 1982, involving a Fourth of July fireworks display by a Navy station, justified as a community relations measure. While good community relations may be desirable for all government agencies, fireworks are not necessary to the operation and maintenance of the Navy.

The propriety of using appropriated funds to furnish luncheons to public school officials in conjunction with Marine Corps recruiting programs was considered in B-162642, August 9, 1976. A statute authorized reimbursement of necessary expenses incurred by

[46]Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 988, 1012 (1989).

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recruiters, and applicable regulations permitted the reimbursement to include small amounts spent for occasional lunches, snacks, or non-alcoholic beverages. GAO, however, did not consider a planned luncheon involving a formal presentation with a guest speaker as within the intended scope of the statute or regulations. Since the statute and regulations were broadly worded, payment in that case was authorized. The decision cautioned, however, against incurring similar expenses in the future unless the regulations were first revised to provide adequate guidelines and limitations.

The National Park Service has authority to provide for "interpretive demonstrations" at Park Service sites. 16 U.S.C. § 1a-2(g). GAO reviewed this authority and its legislative history in 68 Comp. Gen. 544 (1989), concluding that it could properly include some level of entertainment, as long as it was sufficiently related to the significance of the particular site. Thus, there was no objection to the 1988 Railroader's Festival at the Golden Spike National Historic Site, which included musical entertainment by a band specializing in railroad and 19th century western American music. (Golden Spike is the site of the completion of the first U.S. transcontinental railroad in 1869.) Similarly within this authority was the decoration of a historic ranch house at the Grant-Kohrs Ranch National Historic Site to "interpret" how the ranch celebrated Christmas during the frontier era. B-226781, January 11, 1988. However, an "open house" with refreshments and a visit by Santa Claus had "too indirect and conjectural a bearing" on the Park Service's mission and was therefore unauthorized. Id.

No discussion of entertainment would be complete without B-182357, December 9, 1975. The Foreign Assistance Act of 1961, as amended, authorized funds for an informational program to give foreign military trainees a greater exposure to American culture. To implement the program, the Department of Defense set up a program whereby officers would serve as escorts for foreign military trainees to impart to them an active appreciation of American values and ideals. The case involved a voucher submitted by a civilian employee of the Navy for expenses incurred as escort officer for a group of 12 senior foreign naval officers being trained in the United States. The voucher included visits to a variety of restaurants, night clubs, and bars. One of the items was a visit to the Boston Playboy Club. The claimant justified the visit as "symbolic of the United States" and "one of the most enjoyable experiences" the trainees had during their stay in America. Apparently

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to get more symbolism, the party returned for a second visit. In reviewing the case, the Comptroller General noted that, under the statutory program, the funds could have been given directly to the trainees to be spent as they desired, and the agency would therefore have considerable discretion in spending the money for the trainees. In addition, the regulations provided "no guidance whatsoever" on the limits of the program. Somewhat reluctantly, the Comptroller General was forced to conclude that "the lack of adequate guidance to the escort officer leaves us no alternative but to allow him credit for the expenses incurred."

e. Recreational and Welfare Facilities for Government Personnel

(1) The rules: older cases and modern trends

The basic rule for recreational facilities—which, as we shall see, has become more flexible in recent years—was established in early decisions: Appropriations are not available unless the expenditure is authorized by express statutory provision or by necessary implication. Thus, in 18 Comp. Gen. 147 (1938), appropriations for a river and harbor project on Midway Island were held not available to provide recreational facilities such as athletic facilities and motion pictures for the working force. Similarly, in 27 Comp. Gen. 679 (1948), the Comptroller General advised that Navy appropriations were not available to hire full-time or part-time employees to develop and supervise recreational programs for civilian employees of the Navy. The reason in both cases was that the expenditure would have at best only an indirect bearing on the purposes for which the appropriations were made.

Other early decisions applying the general rule are B-49169, May 5, 1945 (rental of motion picture by Bonneville Power Administration); B-37344, October 14, 1943 (footballs and basketballs for employees in Forest Service camps); and A-55035, May 19, 1934 (billiard tables for Tennessee Valley Authority employees). In B-49169, the Comptroller General pointed out that the Administrator's authority to make such expenditures as he "may find necessary" does not mean anything he may approve, regardless of its nature, but the expenditures must bear a direct relationship to the purposes to be accomplished under the particular legislation.

It follows that, as a general proposition, appropriated funds may not be used to underwrite travel to sports or recreational events since this is not the performance of public business. E.g., 42 Comp.

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Gen. 233 (1962). Of course, the particular circumstances may warrant an exception. Thus, appropriations for "student athletic and related activities" at the Federal Law Enforcement Training Center may be used to provide limited off-site busing to shopping centers, recreational facilities, and places of worship in the nearest town several miles away. The students—government employees in travel status—must live at the Center for several weeks, most do not have cars, and there is no public transportation to the nearest town. B-214638, August 13, 1984.

One area in which recreational and welfare expenditures have been permitted with some regularity is where employees are located at a remote site, where such facilities would not otherwise be available. Expenditures were permitted in the following cases:

- Purchase of ping pong paddles and balls by the Corps of Engineers to equip a recreation room on a seagoing dredge. B-61076, February 25, 1947.
- Transportation of musical instruments, billiard and ping pong tables, and baseball equipment, obtained from surplus military stock, to isolated Weather Bureau installations in the Arctic. B-144237, November 7, 1960.
- Purchase of playground equipment for children of employees living in a government-owned housing facility in connection with the operation of a dam on the Rio Grande River in an isolated area. 41 Comp. Gen. 264 (1961). The agency in that case had statutory authority to provide recreational facilities for employees and the question was whether that authority extended to employees' families as well. It did.
- Use of an appropriation of the Federal Aviation Administration for construction of "quarters and related accommodations" to provide tennis courts and playground facilities in an isolated sector of the Panama Canal Zone. B-173009, July 20, 1971.
- Purchase of a television set and antenna for use by the crew on a ship owned by the Environmental Protection Agency. The ship was used to gather and evaluate water samples from the Great Lakes and cruises lasted for up to 15 days. The alternative would have been to extend the length of the cruises to permit more frequent docking. 54 Comp. Gen. 1075 (1975).
- Provision of television services for National Weather Service employees on a remote island in the Bering Sea. The agency was authorized to furnish recreational facilities by the Fur Seal Act of

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1966, but the statute also required that the employees be charged a reasonable fee. B-186798, September 16, 1976.

In recent decades, the role of certain "employee welfare" activities in employee morale and productivity has been increasingly recognized. In some instances, the recognition has been accompanied by statutory authority. For example, the Defense Department has specific authority to use appropriated funds for welfare and recreation. The authority originated in general provisions contained in annual appropriation acts, and was made permanent in 1983.[47]

The civilian agencies generally do not have comparable statutory authority, and decisions must be made, for the most part, under 31 U.S.C. § 1301(a) and the necessary expense doctrine. Even here, however, the rather strict rule of the early decisions has undergone some liberalization, even in non-remote locations. While the general rule expressed in 18 Comp. Gen. 147 and 27 Comp. Gen. 679 remains as a bar to indiscriminate expenditures, it may now be said that an agency has reasonable discretion to spend its money for employee welfare purposes if the expenditure can be said to enhance employee morale and to be a significant factor in hiring and retention. The test remains one of necessity, but it is evaluated in terms of the agency's legitimate interest in the welfare, morale, and productivity of its employees. Determinations must be made on a case-by-case basis.

A good illustration of this evolution is the treatment of programmed "incentive music" (sometimes called "Muzak"[48] or, by its detractors, "elevator music"). When GAO first visited the issue, it concluded that an agency could not, within its legitimate range of discretion, find this to be a "necessary expense." B-86148, November 8, 1950. The issue arose again 20 years later when the Bureau of the Public Debt, Treasury Department, asked if it could use its Salaries and Expenses appropriation to provide programmed incentive music for its employees. The system had been installed by a previous tenant and the speakers were located in central work areas rather than in private offices. The Bureau pointed out that private concerns had found that such music enhanced employee

[47]Department of Defense Appropriation Act, 1984, Pub. L. No. 98-212, § 735, 97 Stat. 1421, 1444 (1983) ("Appropriations for the current fiscal year and hereafter for operation and maintenance of the active forces shall be available for . . . welfare and recreation").

[48]The name is derived from the MUZAK Company, one of the providers.

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morale by "creating a pleasantly stimulating and efficient atmosphere during the workday" and helped to minimize employee boredom. GAO had rejected similar arguments in the 1950 decision. This time, GAO concurred, accepting the Bureau's justification that the expenditure would improve employee morale and increase productivity. 51 Comp. Gen. 797 (1972), overruling B-86148. In terms of the legal principle involved, whether GAO agreed with the justification or not was irrelevant; all that matters is that the determination is now viewed as a proper exercise of agency discretion.

Another example of a permissible expenditure in this area is the subsidization of employee cafeterias, previously discussed. Still another is parking facilities, discussed later in the section on personal expenses. Two items covered in the section on health and medical care—physical fitness activities and smoking cessation programs—further illustrate evolving trends in the area of employee welfare and morale. A final example is our next topic, child care.

(2) Child care

Like the cultural awareness programs previously discussed, child care is another example of evolution in the law to accommodate a changing society. Not too many decades ago, questions of using appropriated funds to provide child care services for government employees would not have received serious consideration. The typical government employee (male) simply did not need them because his spouse stayed home to take care of the kids. In fact, comprehensive child care legislation was vetoed as recently as 1971.[49]

Times have changed and the federal government, as an employer, is not immune from the changes. The number of single-parent families in America has increased dramatically, as has the number of two-parent families in which both parents work, out of either economic necessity, personal choice, or some combination of factors. The

[49]Veto of Economic Opportunity Amendments of 1971 [S. 2007, 92d Cong.], 7 Weekly Comp. Pres. Doc. 1634 (December 11, 1971). The legislation included child care for federal employees. The veto message did express support for child care for welfare recipients and the working poor.

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inevitable result is a heightened awareness of the need for child care.[50]

GAO's first written discussion of the authority to spend appropriated funds to provide child care services for government employees, B-39772-O.M., July 30, 1976, was not a decision to another agency but an internal memorandum from the General Counsel analyzing GAO's own authority. GAO was considering establishing a day care center in its own building, to be funded and operated by employees. GAO's administrative officials wanted to know what kinds of support the agency could or could not provide without statutory authority, which, at the time, did not exist.

The General Counsel analyzed the questions from the perspective of purpose availability, and concluded that the Comptroller General could allocate space in the GAO building for a day care center; could use GAO's appropriations to renovate the space and buy equipment; and could assume part or all of the rent payable to the General Services Administration for the space.

However, before any of these things could be done, the Comptroller General, as the agency head, would first have to determine that the expenditure would materially contribute to recruiting or retaining staff or maintaining employee morale and hence efficiency and productivity. Because of the lack of statutory authority, the memorandum cautioned that GAO should disclose any substantial capital expenditures for renovation in its budget presentation and to the Appropriations Committees if it chose to take such action. See also B-205342, December 8, 1981 (non-decision letter), reiterating the general conclusion of the 1976 memorandum. As it turned out, GAO did not establish a day care center until after the enactment of 40 U.S.C. § 490b, discussed below.

Prior to the enactment of more general legislation in 1985, some agencies had authority to provide day care facilities under agency-specific legislation. For example, legislation authorized the (then) Department of Health, Education, and Welfare to donate space for day care centers. In 57 Comp. Gen. 357 (1978), the Comptroller

[50]Some GAO reports on child care in the federal sector are: Child Care: Employer Assistance for Private Sector and Federal Employees, GAO/GGD-86-38 (February 11, 1986); Military Child Care Programs: Progress Made, More Needed, GAO/FPCD-82-30 (June 1, 1982); Child Care: Availability for Civilian Dependents at Selected DOD Installations, GAO/HRD-88-115 (September 15, 1988).

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General held that the use of the term "donate" gave the agency discretion to provide the space without charge, or to lease space in other buildings for that purpose if suitable space was not available in buildings the agency already occupied. Also, as we have seen, the Defense Department has specific authority to use Operation and Maintenance appropriations for welfare expenditures.

In 1985, Congress enacted 40 U.S.C. § 490b, which authorizes, but does not require, federal agencies to provide space and services for child care centers. The term "services" is defined as including "lighting, heating, cooling, electricity, office furniture, office machines and equipment, telephone service (including installation of lines and equipment . . .), and security systems . . . ." Id. § 490b(b)(3).[51] The space and services may be provided with or without charge.

The Comptroller General's first opportunity to construe 40 U.S.C. § 490b came in response to an arbitration panel award that included a union day care proposal for the children of civilian employees. Council 214, American Federation of Government Employees, AFL-CIO, 15 F.L.R.A. 151 (1984), aff'd sub nom. Department of the Air Force v. Federal Labor Relations Authority, 775 F.2d 727 (6th Cir. 1985). The FLRA directed the Air Force to incorporate the award in its collective bargaining agreement,[52] and the Air Force in turn asked GAO whether, under 40 U.S.C.§ 490b, it had authority to use its appropriations to implement the award. The resulting decision, 67 Comp. Gen. 443 (1988), reached the following conclusions:

- The Air Force can, either with or without charge, allot space in government buildings under its control for child care facilities for civilian employees, and can provide the services outlined in the statute.
- The Air Force can use its appropriations to renovate, modify, or expand the space allotted to make it suitable for use as a child care facility.
- The Air Force can expand existing child care facilities for military personnel to accommodate the children of civilian employees.

[51]The definition was patterned generally after the statute authorizing agencies to provide space to federal credit unions, 12 U.S.C. § 1770, discussed in 66 Comp. Gen. 356 (1987).

[52]The fact that day care is involved cannot be determined from either opinion, both of which discuss procedural issues.

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February 7, 1956; B-125404, September 16, 1955; B-51630, September 11, 1945; B-27425, August 7, 1942; A-22070, March 30, 1928.

For example, in preparing its budget request for a Salaries and Expenses appropriation, an agency will typically include such items as employee salaries, travel, training, incentive awards, contributions to health insurance and retirement, etc. An ensuing lump-sum appropriation in the simple form "for salaries and expenses, $X" will be legally available for all of the items specified.

A corollary to this rule is that the lack of a specific budget request for an item does not preclude an agency from making an expenditure for that item from a lump-sum appropriation which is otherwise available for items of that type. E.g., B-149163, June 27, 1962. See also 20 Comp. Gen. 631 (1941); B-198234, March 25, 1981.[5] Suppose in our previous example the agency neglected to budget for incentive awards for FY 1990. Since incentive awards are an authorized category of expenditure under a Salaries and Expenses appropriation and do not require specific appropriation language, the agency's 1990 S&E appropriation would be legally available for incentive awards, notwithstanding the absence of a budget estimate, provided the agency had enough discretionary money left in the account.

The second basic rule is as follows: The inclusion of an item in departmental budget estimates for an expenditure which is otherwise prohibited by law, and the subsequent appropriation of funds without specific reference to the item, do not constitute authority for the proposed expenditure or make the appropriation available for that purpose. 26 Comp. Gen. 545, 547 (1947); 6 Comp. Gen. 573 (1927); B-76841, August 23, 1948. See also 18 Comp. Gen. 533 (1938). Burying an item prohibited by law in budget justifications and then claiming that Congress must have intended to include that item because it was there in black and white in the budget materials and Congress did not object, is not enough. An appropriation would be available for an otherwise prohibited item only if it makes specific reference to the item. Congress can, in effect, "waive" a statutory prohibition, but it must do so explicitly. As the discussion

[5]These two cases do not explicitly state that there was no budget request for the item in question, although it is apparent from the context.

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The decision also concluded that any reimbursements received from a child care center (which, as noted, are optional under 40 U.S.C. § 490b) must be deposited in the Treasury as miscellaneous receipts.

In 70 Comp. Gen. ___ (B-239708, January 31, 1991), GAO concluded that 40 U.S.C. § 490b does not preclude the General Services Administration from leasing space or constructing buildings for child care facilities if there is insufficient space available in existing federal buildings. The authority in section 490b to use existing space is not exclusive. (The 1988 decision to the Air Force, 67 Comp. Gen. 443, had expressed a contrary view and was overruled to that extent.)

In late 1989, Congress enacted new child care legislation for the armed forces, including the authority to use fees collected from parents. Military Child Care Act of 1989, title XV of the National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, 103 Stat. 1352, 1589 (1989).

f. Reception and Representation Funds

Implicit in all of our discussion of entertainment is the point that otherwise improper expenditures may be authorized under specific statutory authority. Congress has long recognized that many agencies have a legitimate need for items that otherwise would be prohibited as entertainment, and has responded by making limited amounts available for official entertainment to those agencies which can justify the need. Entertainment appropriations originated from the need to permit officials of agencies whose activities involve substantial contact with foreign officials to reciprocate for courtesies extended to them by foreign officials. For example, the State Department would find it difficult to accomplish its mission if it could not spend any money entertaining foreign officials. In fact, some of the early entertainment appropriations were limited to entertaining non-U.S. citizens, and some could only be spent overseas. An example of the latter type is discussed in B-46169, December 21, 1944. Restrictions of this nature have become increasingly uncommon.

Entertainment appropriations may take various forms. Some agencies have their own well-established structures which may include permanent legislation. For example, the State Department has permanent authorization to pay for official entertainment. 22 U.S.C. § 4085. See also 22 U.S.C. § 2671, which authorizes expenditures for

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"unforeseen emergencies" which may include official entertainment in certain contexts. The authority of 22 U.S.C. § 4085 is implemented by means of annual appropriations under the heading "Representation Allowances."[53] State Department representation allowances have been found available for rental of formal evening wear by embassy officials accompanying the Ambassador to the United Kingdom in presenting his credentials to the Queen, 68 Comp. Gen. 638 (1989); hiring extra waiters and busboys to serve at official functions at foreign posts, 64 Comp. Gen. 138 (1984); and meals for certain embassy officials at Rotary Club meetings in Tanzania, if approved by the local Chief of Mission, B-232165, June 14, 1989. A GAO fact sheet reviewing expenditures at selected overseas posts is Representational Funds: State Department Expenditures at Selected Posts, GAO/NSIAD-87-73FS (February 1987).

The Defense Department also has its own structure. Under 10 U.S.C. § 127, the Secretary of Defense, or of a military department, within the limitations of appropriations made for that purpose, may use funds to "provide for any emergency or extraordinary expense which cannot be anticipated or classified." When so provided in an appropriation, the official may spend the funds "for any purpose he determines to be proper." Annual Operation and Maintenance appropriations include amounts for "emergencies and extraordinary expenses."[54] Although the title is not particularly revealing, it has long been understood that official representation expenses are charged to this account. See Internal Controls: Defense's Use of Emergency and Extraordinary Funds, GAO/AFMD-86-44 (June 4, 1986); DOD Use of Official Representation Funds to Entertain Foreign Dignitaries, GAO/ID-83-7 (December 29, 1982); 69 Comp. Gen. 197 (1990) (reception for newly assigned commander at U.S. Army School of the Americas); B-221257-O.M., February 6, 1986.

With these two major exceptions, most agencies follow a similar pattern and receive their entertainment funds, if they receive them at all, simply as part of their annual appropriations. The appropriation may specify that it will be available for "entertainment." See, e.g., B-20085, September 10, 1941. Far more commonly, however,

[53]E.g., Pub. L. No. 101-162, 103 Stat. 988, 1007 (1989) (FY 1990).

[54]E.g., Department of Defense Appropriations Act, 1990, Pub. L. No. 101-165, 103 Stat. 1112, 1115 (Army, Navy), 1116 (Air Force, Defense Agencies) (1989).

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the term used in the appropriation is "official reception and representation." This has come to be the technical "appropriations language" for entertainment.

While we cannot guarantee that one does not exist somewhere, we have not found a congressional definition of the term "official reception and representation." Absent a definition, we found it instructive to review agency justifications to see what sort of authority Congress thought it was conferring. The term seems to have originated—or at least became more widespread—in the early 1960's. We identified the first appearance of the term for a number of agencies, and selected two, the Departments of Agriculture and Interior, as illustrative. Both agencies first received "official R&R" funds in their appropriations for fiscal year 1963.[55]

The Department of Agriculture explained that the Secretary frequently finds it necessary to provide a luncheon or similar courtesy to various individuals and small groups in the conduct of official business, to promote effective working relationships with farm, trade, industry, and other groups which are directly related to accomplishing the Department's work. Such official courtesies benefit the government, and the Secretary and Under Secretary should not be required to bear these expenses from their own personal funds as was then the case. In conclusion, the justification observed that "[i]t is unseemly that the hospitality should always be left to the visitor."[56] Similarly, the Department of the Interior explained that its request for "not to exceed $2,000 for official reception and representation expenses" was intended to provide authority to use appropriated funds for expenses incurred by the Secretary "in fulfilling the courtesy and social responsibilities directly associated with his official duties," in situations much like those the Agriculture Department had noted. Such official expenses, the justification asserted, "rightly should be borne by the Government rather than be financed from personal funds."[57]

[55]Department of Agriculture and Related Agencies Appropriation Act, 1963, Pub. L. No. 87-879, 76 Stat. 1203, 1212 (1962); Department of the Interior and Related Agencies Appropriation Act, 1963, Pub. L. No. 87-578, 76 Stat. 335, 345 (1962).

[56]Department of Agriculture Appropriations for 1963: Hearings before the Subcomm. on Department of Agriculture and Related Agencies Appropriations of the House Comm. on Appropriations, 87th Cong., 2d Sess. pt. 4, at 2090-91 (1962).

[57]Interior Department and Related Agencies Appropriations for 1963: Hearings on H.R. 10802 before a Subcomm. of the Senate Comm. on Appropriations, 87th Cong., 2d Sess. 550 (1962).

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One point that is clear from these excerpts is that an R&R appropriation, whatever its origins may have been, is not limited to the entertainment of foreign nationals, unless of course the appropriation language so provides. The experience of the former Department of Health, Education, and Welfare provides further evidence that, absent some indication to the contrary, Congress does not intend that an "official R&R" appropriation be limited to entertaining foreign nationals. The Secretary of HEW first received an entertainment appropriation in HEW's FY 1960 appropriation act, but it was limited to certain foreign visitors.[58] The language was changed to "official reception and representation" in HEW's FY 1964 appropriation.[59] The conference report on the 1964 appropriation explained that the change was intended to expand the scope of the appropriation to include U.S. citizens as well as foreign visitors.[60]

It is clear that R&R appropriations have traditionally been sought, justified, and granted in the context of an agency's need to interact with various non-government individuals or organizations. Precisely who these individuals or organizations might be will vary with the agency. Of course, the fact that the thrust of the appropriation is the entertainment of non-government persons does not mean that government persons are precluded. For example, it has long been recognized that persons from other agencies (and by necessary implication members of the host agency as well) may be included incident to an authorized entertainment function for non-government persons. E.g., B-84184, March 17, 1949.

An agency has wide discretion in the use of its R&R appropriation. 61 Comp. Gen. 260, 266 (1982); B-212634, October 12, 1983. As a general proposition, "official agency events, typically characterized by a mixed ceremonial, social and/or business purpose, and hosted in a formal sense by high level agency officials" and relating to a function of the agency will not be questioned. B-223678, June 5, 1989. Accordingly, R&R funds have been found available for the following:

[58]Pub. L. No. 86-158, § 209, 73 Stat. 339, 355 (1959).

[59]Pub. L. No. 88-136, § 905, 77 Stat. 224, 246 (1963).

[60]H.R. Conf. Rep. No. 774, 88th Cong., 1st Sess. 11 (1963).

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- Christmas party for government officials and their spouses or guests, held by Secretary of the Interior at the Custis-Lee Mansion. 61 Comp. Gen. 260 (1982), affirmed upon reconsideration, B-206173, August 3, 1982.
- Party for various government officials and their families or guests held on July 4 by Secretary of Interior to celebrate Independence Day. B-212634, October 12, 1983.
- Luncheon incident to "graduation ceremony" for Latin American students being trained by the Bureau of Labor Statistics. B-84184, March 17, 1949.
- Entertainment of British war workers visiting various American cities as guests of the British Ministry of Information. B-46169, August 18, 1945.[61]

In a case previously noted in our coverage of award ceremonies, the Veterans Administration could not use its general appropriations to provide refreshments at an awards ceremony for volunteers, but it could use its R&R appropriation. 43 Comp. Gen. 305 (1963). An agency may also use its R&R funds, although it is not required to, for refreshments at award ceremonies under the Government Employees' Incentive Awards Act. 65 Comp. Gen. 738, 741 n.5.

As discussed later in our section on personal expenses, appropriated funds are not available for business or calling cards. However, R&R appropriations are available for business cards for employees whose jobs include representation. B-223678, June 5, 1989. Business cards, as the decision states, are a legitimate and accepted representation device.[62]

A case relied on in B-223678 was B-122515, February 23, 1955, in which the Comptroller General held that a "representation allowance" similar to the State Department appropriation discussed above could be used to purchase printed invitation cards and envelopes in connection with an official function at an overseas mission. In 42 Comp. Gen. 19 (1962) and in B-131611, May 24, 1957, however, a similar appropriation to the Foreign Agricultural Service

[61]The decision modified the result of an earlier decision, B-46169, December 21, 1944, based on a change in the relevant appropriation language. The 1944 decision contains a fuller statement of the facts.

[62]A possible impediment to implementation of this decision is the prohibition in the Government Printing and Binding Regulations on the printing or engraving of business cards. The decision advised the agency to consult the Joint Committee on Printing before spending the money.

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was not available for printed invitations because an executive order provided that the Foreign Agricultural Service was to be governed by State Department regulations, and the applicable State Department regulations prohibited the use of representation allowances for printing cards.

Notwithstanding the discretion it confers, an R&R appropriation is not intended to permit government officials to feed themselves and one another incident to the normal day-to-day performance of their jobs. Thus, GAO has held that R&R funds may not be used to provide food or refreshments at intra-government work sessions or routine business meetings, even if held outside of normal working hours. B-223678, June 5, 1989.

A final but significant limitation on the use of representation funds stems from the appropriation language itself—R&R appropriations are made for the expenses of official reception and representation activities. There must be some connection with official agency business. Thus, it would be improper to use representation funds for a social function hosted and attended by private parties, such as a breakfast for Cabinet wives. 61 Comp. Gen. 260 (1982), affirmed upon reconsideration, B-206173, August 3, 1982. Similarly, R&R funds may not be used for entertainment incident to an activity which is itself unauthorized. 68 Comp. Gen. 226 (1989) (entertainment incident to trade show in Soviet Union which agency had no authority to sponsor). The impropriety of the underlying activity necessarily "taints" the entertainment expenditures.

6. Fines and Penalties

As a general proposition, no authority exists for the federal government to use appropriated funds to pay fines or penalties incurred as a result of its activities or those of its employees.

In the most common situation, a fine is assessed against an individual employee for some action he or she took in the course of performing official duties. The cases frequently involve traffic violations. The rule is that appropriated funds are not available to pay the fine or reimburse the employee. The theory is that, while an employee may have certain discretion as to precisely how to perform a given task, the range of permissible discretion does not include violating the law. If the employee chooses to violate the law, he is acting beyond the scope of his authority and must bear any resulting liability as his personal responsibility.

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The earliest case stating the rule appears to be B-58378, July 31, 1946. Holding that a government employee ticketed for parking a government vehicle in a "no parking" zone could not be reimbursed, the Comptroller General stated:

> "[T]here is not known to this office any authority to use appropriated moneys for payment of the amount of a fine imposed by a court on a Government employee for an offense committed by him while in the performance of, but not as a part of, his official duty. Such fine is imposed on the employee personally and payment thereof is his personal responsibility."

The rule applies to forfeitures of collateral as well as fines. B-102829, May 8, 1951.

The first published decision stating the rule, and the case most often cited, is 31 Comp. Gen. 246 (1952). A government employee double-parked a government vehicle to make a delivery. While the employee was inside the building, the inner vehicle drove away, leaving the government vehicle unattended in the middle of the street, whereupon it was ticketed. Citing B-58378 and B-102829, the Comptroller General held that the employee could not be reimbursed from appropriated funds for the amount of the fine.[63]

GAO has applied the rule even in a case where the employee could establish that the speedometer on the government vehicle was inaccurate. B-173660, November 18, 1971. While at first glance this might seem like a harsh and unfair result, it in fact was not, at least in that particular case. In that case, the employee was ticketed for driving at 85 mph. The speedometer at the time read a mere 73 mph. Conceding the established inaccuracy of the speedometer, the employee nevertheless, by observing other vehicles on the road and applying common sense, should have suspected that he was driving at an excessive rate of speed.

The very statement of the rule as quoted above from B-58378 suggests that there may be situations in which reimbursement is permissible. The exception occurred in 44 Comp. Gen. 312 (1964). In connection with the case of Sam Giancana v. J. Edgar Hoover, 322 F.2d 789 (7th Cir. 1963), an agent of the Federal Bureau of Investigation was ordered by the court to answer certain questions. Based

[63]For other cases involving motor vehicle violations, see 57 Comp. Gen. 270 (1978); B-147420, April 18, 1968; B-168096-O.M., August 31, 1976; B-147420, July 27, 1977 (non-decision letter); B-173783.188, March 24, 1976 (non-decision letter).

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on Justice Department regulations and specific instructions from the Attorney General, the FBI agent refused to testify and was fined for contempt of court. The contempt order was upheld in Sam Giancana v. Marlin W. Johnson, 335 F.2d 372 (7th Cir. 1964). Finding that the employee had incurred the fine by reason of his compliance with Department regulations and instructions and that he was without fault or negligence, GAO held that the FBI could reimburse the agent from its Salaries and Expenses appropriation under the "necessary expense" doctrine.[64]

Subsequently, some people thought that 31 Comp. Gen. 246 and 44 Comp. Gen. 312 appeared inconsistent, and GAO has discussed the two lines of reasoning in several later decisions. The distinction is this: In 31 Comp. Gen. 246, the offense was committed while performing official duties but it was not a necessary part of those duties. The employee could have made the delivery without parking illegally. The fine in 44 Comp. Gen. 312 was "necessarily incurred" in the sense that the employee was following his agency's regulations and the instructions of his agency head. Thus, the actions that gave rise to the contempt fine could be viewed as a necessary part of the employee's official duties, although certainly not in the sense that it would have been physically impossible for the employee to have done anything else.

Applying these concepts, the Comptroller General held in B-205438, November 12, 1981, that the Federal Mediation and Conciliation Service could reimburse a former employee for a contempt fine levied against him for refusal to testify, pursuant to agency regulations and instructions, on matters discussed at a mediation session at which he was present while employed by the agency.

Reimbursement was denied, however, in B-186680, October 4, 1976. There, a Justice Department attorney was fined for contempt for missing a court-imposed deadline. The attorney had been working under a number of tight deadlines and argued that it was impossible to meet them all. However, he had not been acting in compliance with regulations or instructions, had exercised his own judgment in missing the deadline in question, and the record did not support a determination that he was without fault or negligence in

[64]The decision further held that a contempt fine, even though imposed by court order, is not a judgment against the United States and may not be paid from the permanent judgment appropriation, 31 U.S.C. § 1304.

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the matter. Therefore, the case was governed by 31 Comp. Gen. 246 rather than 44 Comp. Gen. 312.

Reading all of these cases together, it seems fair to state that the mere fact of compliance with instructions will not by itself be sufficient to authorize reimbursement. There must be some legitimate government interest to protect. Thus, it would not be sufficient to instruct an employee to refuse to testify where the purpose is to avoid embarrassment or to avoid the disclosure of government wrongdoing. Similarly, it would follow that the prohibition against reimbursement of traffic fines could not be circumvented merely because some supervisor instructed a subordinate to park illegally.

The two lines of cases were discussed in the specific context of traffic violations in B-107081, January 22, 1980, a response to a Member of Congress. Summarizing the rules discussed above, the Comptroller General pointed out that they applied equally to law enforcement personnel. However, the Comptroller General alluded to one situation in which reimbursement might be authorized—a parking fine incurred by a law enforcement official as a necessary part of an official investigation. An example might be parking an unmarked undercover vehicle during a surveillance where there was no other feasible alternative. Compare 38 Comp. Gen. 258 (1958) concerning the reimbursement of parking meter fees.

Another situation in which a fine was held reimbursable is illustrated in 57 Comp. Gen. 476 (1978). Forest Service employees had loaded logs on a truck to transport them from Virginia to West Virginia. In Virginia, the driver was fined for improper loading (overweight on rear axle). The employees had loaded the logs in a forest and there was no way for them to have checked the weight. The fine did not result from any negligent or intentional act on the part of the driver. Under these circumstances, the Comptroller General found that the fine was not for any personal wrongdoing by the employee but was, in effect, a citation against the United States. Therefore, Forest Service appropriations were available to reimburse the fine. This situation is distinguishable from the case of an overweight fine levied against a commercial carrier, which is not reimbursable. 35 Comp. Gen. 317 (1955). A more recent case discussing similar issues in the context of a leased vehicle is 70 Comp. Gen. ___ (B-239511, December 31, 1990).

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Similar reasoning applies with respect to penalties in the form of liquidated damages assessed against a government employee who fails to either use or cancel airline reservations in accordance with the carrier's applicable tariff. If the charges are unavoidable in the conduct of official travel or are incurred for reasons beyond the traveler's control and acceptable to the agency concerned, they may be reimbursed from the agency's travel appropriations. However, if the charges are not unavoidable in the performance of official business nor incurred for reasons beyond the employee's control and acceptable to the agency, they are personal to the employee and may not be reimbursed. 41 Comp. Gen. 806 (1962).

The cases discussed so far have all involved fines levied against individual employees. Questions may also arise over the liability of a federal agency for a fine or civil penalty. The question is essentially one of sovereign immunity. In order for a federal agency to be liable for a fine or penalty, there must be an express statutory waiver of sovereign immunity. E.g., Ohio v. United States Department of Energy, 904 F.2d 1058 (6th Cir. 1990).

For example, the Clean Air Act provides for the administrative imposition of civil penalties for violation of state or local air quality standards. The statute directs the federal government to comply with these standards and makes government agencies liable for the civil penalties to the same extent as nongovernmental entities. In view of this express waiver of sovereign immunity, the Comptroller General held that agency operating appropriations are available, under the "necessary expense" theory, to pay administratively imposed civil penalties under the Clean Air Act. B-191747, June 6, 1978. If the penalty is imposed by court action, it may be paid from the permanent judgment appropriation, 31 U.S.C. § 1304. However, if there is no legitimate dispute over the basis for liability or the amount of the penalty, an agency may not avoid use of its own appropriations by the simple device of refusing to pay and forcing the state or local authority to sue. 58 Comp. Gen. 667 (1979).

Absent the requisite statutory waiver of sovereign immunity, the agency's appropriations would not be available to pay a fine or penalty. For example, in 65 Comp. Gen. 61 (1985), appropriated funds were not available to pay a "fee," which was clearly in the nature of a penalty, imposed by a City of Boston ordinance for equipment malfunctions resulting in the transmission of false fire

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of repeal by implication in Chapter 2 points out, mention of the prohibited item in a lump-sum appropriation's legislative history is similarly insufficient to authorize the expenditure.

Finally, there is a middle-ground in limited circumstances. If an item is questionable but not clearly prohibited, and legislative history indicates that Congress intended to include that item in a lump-sum appropriation, GAO will regard the appropriation as available for the expenditure. E.g., A-30714, March 1, 1930. See also "Ratification by Appropriation" in Chapter 2.

3. New or Additional Duties

Appropriation acts tend to be bunched at certain times of the year while substantive legislation may be enacted any time. A frequently recurring situation is where a statute is passed imposing new duties on an agency but not providing any additional appropriations. The question is whether implementation of the new statute must wait until additional funds are appropriated, or whether the agency can use its existing appropriations to carry out the new function, either pending receipt of further funding through the normal budget process or in the absence of additional appropriations (assuming in either case the absence of contrary congressional intent).

The rule is that existing agency appropriations which generally cover the type of expenditures involved are available to defray the expenses of new or additional duties imposed by proper legal authority. The test for availability is whether the duties imposed by the new law bear a sufficient relationship to the purposes for which the previously-enacted appropriation was made so as to justify the use of that appropriation for the new duties.

For example, in the earliest published decision cited for the rule, the Comptroller General held that the Securities and Exchange Commission could use its general operating appropriation for fiscal year 1936 to perform additional duties imposed on it by the later-enacted Public Utility Holding Company Act of 1935. 15 Comp. Gen. 167 (1935).

Similarly, the Interior Department could use its 1979 "Departmental Management" appropriation to begin performing duties imposed by the Public Utilities Regulatory Policies Act of 1978, and to provide reimbursable support costs for the Endangered Species

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alarms. See also B-227388, September 3, 1987 (no authority to pay false alarm fines imposed by municipality).

What about a penalty assessed by one federal agency against another? In B-161457, May 9, 1978, the Comptroller General held that, absent a statute specifically so providing, an agency's appropriations are not available to pay penalties assessed by the Internal Revenue Service for late filing or underpayment of employment taxes. The reason is that this would constitute a use of the funds for a purpose other than that for which they were appropriated.

7. Firefighting and Other Municipal Services

a. Firefighting Services: Availability of Appropriations

A frequent subject of inquiry has been the authority of the federal government to voluntarily contract, or to pay involuntary assessments, for firefighting services rendered by local governments to federal property and buildings. The general rule is: If the political subdivision rendering the service is required by law to extinguish fires within its boundaries, then the United States cannot make additional payments in any form to underwrite that legal responsibility. The earliest published decision containing a detailed discussion of the rule and its rationale is 24 Comp. Gen. 599 (1945).

The rule proceeds from the premise that firefighting is a governmental rather than a proprietary or business function. Where a local firefighting organization (city or county fire department, fire protection district, etc.) is required by local law to cover a particular territorial area and to respond to fires without direct charge to the property owners, this duty extends to federal as well as nonfederal property within that territorial area. A charge to appropriated funds under these circumstances would amount to a tax or a payment in lieu of taxes and would, absent specific statutory authority, violate the government's constitutional immunity from taxation. It follows that the government may not contract for firefighting services which it would be legally entitled to receive in any event,[65] nor may it reimburse a political subdivision for the

[65]In addition to the cases cited in the text, see B-131932, March 13, 1958; B-125617, April 11, 1956; B-126228, January 6, 1956; B-105602, December 17, 1951; B-40387-O.M., June 24, 1966.

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additional costs incurred in fighting a federal fire.[66] See 53 Comp. Gen. 410 (1973) and cases cited therein. In addition to the taxation problem, use of appropriated funds for this purpose would violate 31 U.S.C. § 1301(a). 32 Comp. Gen. 91 (1952).

Limited reimbursement authority now exists by virtue of the Federal Fire Prevention and Control Act of 1974, discussed later in this section. The present discussion concerns the availability of appropriations apart from that limited authority.

In applying the rule, it is irrelevant that a city cannot regulate building and fire codes for structures on a military establishment within the city limits. 24 Comp. Gen. 599 (1945). Also, the rule applies equally when the fire protection is provided by a volunteer fire department performing the mandatory governmental function for a political subdivision. The fact that the firefighters are unpaid does not affect the local government unit's legal duty to render the service. 26 Comp. Gen. 382 (1946); B-47142, April 3, 1970.

In 53 Comp. Gen. 410 (1973), GAO denied a claim by the St. Louis Community Fire Protection District and several surrounding fire districts and departments for equipment losses and supplemental payroll expenses incurred in fighting a massive fire at the St. Louis Federal Records Center. The St. Louis CFPD could not be reimbursed because the Records Center was within its territorial responsibility. The surrounding fire districts were also under a duty to respond to the alarm because they had entered into mutual aid agreements with the St. Louis CFPD which had the effect of extending their own areas of responsibility.

In some rural areas, firefighting services may be unavailable or very limited. In such areas, the government may have to provide its own fire protection. The Comptroller General had held, in 32 Comp. Gen. 91 (1952), that an agency could not enter into "mutual aid agreements" to extend that service to the general community beyond the boundaries of government property, even where the local inhabitants were predominantly government employees and where the additional protection could be accomplished without additional expense. Later, Congress enacted legislation specifically authorizing reciprocal agreements for mutual aid. 42 U.S.C.

[66]In addition to the cases cited in the text, see B-167709, September 9, 1969; B-153911, December 6, 1968; B-147731, January 22, 1962.

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§§ 1856–1856d. This statutory authority is limited to mutual aid agreements and does not authorize an agency to enter into an agreement to reimburse a political subdivision for services unilaterally provided to the government. 35 Comp. Gen. 311, 313 (1955); B-126228, January 6, 1956; B-40387-O.M., June 24, 1966. An agency participating in a mutual aid agreement under this authority may contribute, on a basis comparable to other participants, to a common fund to be used for training and equipment incident to responding to fires and related emergencies such as hazardous waste accidents. B-222821, April 6, 1987.

If the government may not contract for or reimburse fire protection services which a local entity is legally required to provide, it follows that the government may not pay a "service charge" for fire protection provided by a municipality with respect to federal property within the city limits, at least where the assessment for fire protection is normally included in the city's property tax. In 49 Comp. Gen. 284 (1969), the city of New London, Connecticut, sought to charge the government on a direct cost-related basis for fire protection afforded the United States Coast Guard Academy. Fire protection was included in the city's real estate tax and the "service charge" was to apply only to tax-exempt property. In view of the city's duty to provide fire protection to the Academy, the Comptroller General found the proposed charge to be an unconstitutional tax on the government. See also B-160936, March 13, 1967. However, a flat-fee service charge levied by a utility district for extinguishing a fire in a postal vehicle was held permissible where the utility district was under no legal obligation to provide the service. B-123294, May 2, 1955.

In B-168024, December 13, 1973, a city was required to provide fire protection to all property within its boundaries, but was given the option under state law of financing the fire protection by service charges rather than from general tax revenues. In these circumstances, it was held that the United States could pay a valid service charge, although the charge in that particular case was held to be a tax and therefore invalid because it was based on the value of the property rather than the quantum of services provided. The decision contains a useful discussion of the distinction between a service charge and a tax.[67]

[67]For more on the distinction between a tax and a service charge, see "Other Municipal Services" later in this section, and Section C.15.

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Because the rule is predicated on the existence of state laws requiring political subdivisions to provide firefighting services, it would not apply in instances where there is no entitlement to service. Thus, reimbursement was allowed in 3 Comp. Gen. 979 (1924) where a fire unit had no legal duty to respond to an emergency call outside its district. It was further noted that there was no violation of the prohibition on accepting voluntary services found in 31 U.S.C. § 1342 (part of the Antideficiency Act). Similarly, a contractual agreement for fire protection with the nearest fire district may be proper where the federal property in question is not served by any fire district. 35 Comp. Gen. 311 (1955). Under the same theory, the Comptroller General held that the Bureau of Indian Affairs could make a financial contribution to the "Community Fire Truck," a volunteer firefighting organization which otherwise would have been under no obligation to respond to fires at an Indian school outside the limits of the city served by the organization. 34 Comp. Gen. 195 (1954). See also B-163089, February 8, 1968; B-123294, May 2, 1955. However, there is no authority to pay for fire services rendered without a pre-existing legal obligation if such services were necessary to protect adjoining state or privately-owned property as to which such a legal duty existed. 30 Comp. Gen. 376 (1951).

A variation occurred in B-116333-O.M., October 15, 1953, in which it was held permissible to reimburse a private firefighting enterprise for repair and maintenance service to hydrants and fire alarm boxes on a government-owned and operated housing facility, irrespective of the duty of the municipality.

In the analysis of legal duty to provide protection, it is irrelevant that the government may have engaged in an activity causing the fire. 32 Comp. Gen. 401 (1953); B-167709, September 9, 1969; B-147731, December 28, 1961; B-6400, August 28, 1940.[68] Similarly, there is no estoppel created by the fact that the United States operated its own fire protection at a given installation for a period of time. If the legal duty to provide protection exists, the United States is entitled to claim protection at any time its own service

[68]A claim for expenses (as opposed to damages) incurred by a state in suppressing a fire starting on federal property and allegedly caused by the negligence of a federal employee is not a claim for injury or loss of property under the Federal Tort Claims Act and is therefore not cognizable under that Act. Oregon v. United States, 308 F.2d 568 (9th Cir. 1962), cert. denied, 372 U.S. 941; California v. United States, 307 F.2d 941 (9th Cir. 1962), cert. denied, 372 U.S. 941; B-163089, October 19, 1970.

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becomes obsolete, undesirable, or uneconomical. B-129013, September 20, 1956; B-126228, January 6, 1956.

An exception to the general rule may exist in the case of a "federal enclave." This term usually describes large tracts of land held under exclusive federal jurisdiction. In 45 Comp. Gen. 1 (1965), the Comptroller General held that, despite locally available protection, a federal enclave could provide its own fire protection on a contract basis. Further, adjacent land under federal control but not part of the federal enclave could be protected under the same contractual arrangement. However, an additional factor in 45 Comp. Gen. 1 was that legitimate doubt existed as to whether the fire district was under a legal obligation under state law to provide services to the federal property involved, and the district had petitioned the state government to redraw its boundaries to exclude the federal property. The effect of this factor is unclear, and since that time, no case has been decided in which a federal enclave was involved. Note that the threatened exclusion of the federal property was based on a legitimate doubt as to whether protection was required by state law. If protection is required, exclusion would be improper. See B-129013, September 20, 1956. Cf. B-192641, May 2, 1979 (non-decision letter) (questioning a redistricting to exclude federal property which was not a federal enclave).

A 1981 decision addressed the authority of the Bureau of Land Management to contract with rural fire districts in Oregon and Washington for fire protection and firefighting services for federally-owned timberlands in those states. The Comptroller General reviewed the principles and precedents established over the years and concluded that, since the fire districts were legally required to protect the federal tracts, the Bureau could not enter into the desired contracts without specific statutory authority. However, Bureau installations with a federally-maintained firefighting capacity could enter into mutual aid agreements under 42 U.S.C. § 1856, discussed above. 60 Comp. Gen. 637 (1981).

b. Federal Fire Prevention and Control Act of 1974

In light of the huge losses suffered by local fire districts in the 1973 St. Louis Records Center fire, the need for some legislative action became apparent. The result was section 11 of the Federal Fire Prevention and Control Act of 1974, 15 U.S.C. § 2210. This provision allows a fire service fighting a fire on federal property to file a claim for the direct expenses and direct losses incurred. The claim

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is filed with the United States Fire Administration, Federal Emergency Management Agency (FEMA).[69] The amount allowable is the amount by which the additional firefighting costs, over and above the claimant's normal operating costs, exceed the total of any payments made by the United States to the claimant or its parent jurisdiction for the support of fire services on the property in question, including taxes and payments in lieu of taxes.

FEMA, upon determining the amount allowable, must forward it to the Treasury Department for payment. The Comptroller General has determined that section 11 constitutes a permanent indefinite appropriation for the payment of these claims. B-160998, April 13, 1978. Disputes under section 11 may be adjudicated in the United States Claims Court. FEMA has issued implementing regulations at 44 C.F.R. Part 151.

Notwithstanding this authority, the decisions discussed previously in this section remain significant for several reasons. First, they define the extent to which an agency may use its own appropriations apart from 15 U.S.C. § 2210. Second, they define the extent to which an agency may contract for fire protection services. Finally, section 11 provides that payment shall be subject to reimbursement by the federal agency under whose jurisdiction the fire occurred, "from any appropriations which may be available or which may be made available for the purpose." Although no decision has been rendered on this point, it would seem that the existing body of decisions provides a starting point in determining the extent to which an agency's operating appropriations "may be available" to make this reimbursement.

c. Other Municipal Services

The principles involved in the firefighting cases are relevant to other municipal services as well.

The closest analogy is police protection. Like fire protection, police protection is a mandatory governmental function. Thus a municipality may not levy direct charges against the United States for ordinary police protective services provided within its area of jurisdiction. 49 Comp. Gen. 284, 286-87 (1969); B-187733, October 27, 1977. However, the United States may pay on a quantum meruit basis for police services over and above the ordinary level, where

[69]The function was transferred to FEMA from the Commerce Department by Reorganization Plan No. 3 of 1978.

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the city is not required to provide such extraordinary services and where the same charge would be imposed on non-federal users in like circumstances. Examples are: extra police for special events such as football games at the Coast Guard Academy (49 Comp. Gen. at 287); special police details at Bicentennial ceremonies (B-187733, October 27, 1977).

The same principles have been applied to emergency ambulance services required to be furnished by a municipality. 49 Comp. Gen. 284. However, contracts with state or local governments or private entities for ambulance services have been held permissible where there was no requirement for the political subdivision involved to provide ambulance services without direct charge. 51 Comp. Gen. 444 (1972), modifying B-172945, June 22, 1971; B-198032, June 3, 1981. Another example is the maintenance of public highways. See B-199205, April 27, 1981.

A charge for services rendered by a state or local government to the United States is to be distinguished from a tax; the former may be paid while the latter may not. E.g., 20 Comp. Gen. 748 (1941). While this distinction does not apply to mandatory governmental functions such as police and fire protection, it has frequently been cited in connection with such things as water and sewer services. As a general proposition, a charge for water and/or sewer services is a permissible service charge rather than a tax if it is based on the quantum of direct services actually furnished. See 31 Comp. Gen. 405 (1952) (assessment for water/sewer services levied on city-wide basis rather than quantum of service rendered held a tax); 29 Comp. Gen. 120 (1949) (sewer service charge held payable on quantum meruit basis); 20 Comp. Gen. 206 (1940) (water charge held to be a tax where it was levied as a flat charge rather than on the basis of actual water consumption). See also 49 Comp. Gen. 284 (1969); B-168024, December 13, 1973; B-105117, March 16, 1953.

A reasonable charge based on the quantum of direct services actually furnished need not be considered a tax even though the services in question are provided to the taxpayers of the political subdivision without a direct charge, provided of course that the political subdivision is not required by law to furnish the service without direct charge. Such a charge may be paid if it is applied equally to all tax-exempt property, but not if it applies only to federal tax-exempt property. 50 Comp. Gen. 343 (1970).

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A sewer service charge which is otherwise proper may be paid in advance if required by local law, notwithstanding 31 U.S.C. § 3324. The government's liability would also include late payment penalties to the extent required by local law. 39 Comp. Gen. 285 (1959).

GAO has applied the same principles to charges for 9-1-1 emergency service. In a series of cases, GAO examined 9-1-1 charges in several states and found that they amounted to a tax and therefore could not be assessed against the United States or its agencies. 66 Comp. Gen. 385 (1987) (Florida); 65 Comp. Gen. 879 (1986) (Maryland); 64 Comp. Gen. 655 (1985) (Texas); B-230691, May 12, 1988 (Tennessee); B-239608, December 14, 1990 (non-decision letter) (Rhode Island). One decision stated:

> "In our view, telephone access to police, fire and other municipal services is intrinsically connected to the services themselves. The fact that 9-1-1 service is more technologically sophisticated than normal telephone access does not change its essential character." 66 Comp. Gen. at 386.

In each case, the charges were included in telephone bills, with the telephone company acting as collection agent for the relevant governmental authority. As noted in 66 Comp. Gen. 385, 387, a 9-1-1 fee might be properly payable if a telephone company installed and operated the system itself and, as with directory assistance for example, offered the service as a component of its regular communications services. However, in none of the situations examined was this the case.

Several characteristics of the systems support the conclusion of non-liability: the service is provided by a local government or quasi-governmental unit; public funding of the service requires legal authority such as an ordinance or referendum; and the charge is not related to actual levels of service but is based on a flat rate per telephone line. 65 Comp. Gen. at 881. It is irrelevant that the 9-1-1 charge is called a "service charge" (B-230691) or a "service fee" (64 Comp. Gen. 655), or that state law provides that the charge shall not be construed as a tax (B-230691), or that the local government has threatened to cut off access (66 Comp. Gen. 385). The same analysis produced the same result in B-227388, September 3, 1987, in which a municipality tried to charge a federal agency a registration fee for 9-1-1 services.

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The distinction between "vendor taxes" and "vendee taxes" discussed later in this chapter, i.e., the applicability or non-applicability to the government depending on the "legal incidence" of the tax, applies as well to 9-1-1 charges. Thus, in B-238410, September 7, 1990, GAO considered the Arizona 9-1-1 statute, found that it was a vendor tax and, distinguishing the prior 9-1-1 decisions, concluded that it could be assessed against the federal government.

A final group of cases involves the installation of traffic signals. At one point, GAO took the position, subsequently modified, that appropriated funds could not be used to pay for or contribute to the installation of traffic signals on public roads or highways, regardless of the resulting benefit to the government. Traffic control, so the reasoning went, is a municipal service financed by tax revenues the same as police or firefighting services, for which payment by a federal agency is not permissible. 51 Comp. Gen. 135 (1971); 36 Comp. Gen. 286 (1956).

A different situation was presented in 55 Comp. Gen. 1437 (1976). There, a state highway bisected an Army installation and the Army wanted to install a traffic light to regulate traffic at the intersection of the state highway and a road on the Army facility. Local authorities had agreed to repair and maintain the light if the Army would purchase and install it. Since the light would be located on federal property and would be for the primary benefit of the federal facility, even though it would regulate traffic on the state highway as well, GAO distinguished the prior cases and concluded that the Army could use its appropriations for the proposed expenditure.

In 1982, GAO modified the prior decisions and held that traffic signals at or near a federal facility, where the federal facility is the primary beneficiary and benefit to the general public is incidental, should be governed by the same tests applicable to other municipal services. If the state or local government is legally required to provide the service to all residents free of charge, the federal agency may not pay. If, however, the service is not legally required and the charge does not discriminate against the United States—i.e., any other resident would be subject to a similar charge—then the appropriations of the benefiting agency may be used. 61 Comp. Gen. 501 (1982).

Does the primary benefit shift where the federal agency is leasing the property from a private owner? GAO said no in 65 Comp. Gen.

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847 (1986), but the lease in that case was to continue for at least another six years. The answer would presumably be different if the agency were about to vacate, but the decision does not purport to address precisely where the line should be drawn.

8. Gifts and Awards

a. Gifts

Appropriated funds may not be used for personal gifts, unless, of course, there is specific statutory authority. 68 Comp. Gen. 226 (1989). To state the rule in this manner is to make it appear rather obvious. If, for example, a General Counsel decided it would be a nice gesture and improve employee morale to give each lawyer in the agency a Christmas turkey, few would argue that the expense should be borne by the agency's appropriations. Appropriated funds could not be used because the appropriation was not made for this purpose (assuming, of course, that the agency has not received an appropriation for Christmas turkeys) and because giving turkeys to lawyers is not reasonably necessary to carry out the mission at least of any agency that now exists. Most cases, however, are not quite this obvious or simple.

The cases generally involve the application of the necessary expense doctrine, and the result is that items in the nature of gifts can rarely be justified. In making the analysis, it makes no difference whether the "gift items" are given to federal employees or to others. The connection is either there or, far more commonly, it is not. In each of the cases in which funds have been found unavailable, there was a certain logic to the agency's justification, and the amount of the expenditure in many cases was small. The problem is that, were the justification sufficient, there would be no stopping point. If a free ashtray might generate positive feelings about an agency or program or enhance motivation, so would a new car or an infusion of cash into the bank account. The rule prohibiting the use of appropriated funds for personal gifts reflects the clear potential for abuse and the impossibility of drawing a rational line.

In 53 Comp. Gen. 770 (1974), a certifying officer for the Small Business Administration asked GAO to rule on the propriety of an expenditure for decorative ashtrays which were distributed to federal employee participants of a conference sponsored by that agency.

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Committee and Review Board created by the Endangered Species Act Amendments of 1978. Both statutes were enacted after Interior's 1979 appropriation. B-195007, July 15, 1980.

The rule has also been applied to additional duties imposed by Executive Order. 32 Comp. Gen. 347 (1953); 30 Comp. Gen. 258 (1951).

Additional cases are 30 Comp. Gen. 205 (1950); B-211306, June 6, 1983; B-153694, October 23, 1964.

A variation occurred in 54 Comp. Gen. 1093 (1975). The unexpended balance of a Commerce Department appropriation, which had been used to administer a loan guarantee program and to make collateral protection payments under the Trade Expansion Act of 1962, was transferred to a similar but new program by the Trade Act of 1974. The 1974 statute repealed the earlier provisions. This meant that the transferred funds could no longer be used for expenses under the 1962 act—including payments on guarantee commitments—even though that was the purpose for which they were originally appropriated, unless the expenditures could also be viewed as relating to the Department's functions under the 1974 act. Applying the rationale of the later-imposed duty cases, the Comptroller General concluded that the purposes of the two programs were sufficiently related so that the Department could continue to use the transferred funds to make collateral protection payments and to honor guarantees made under the 1962 act.

A related question is the extent to which an agency may use current appropriations for preliminary administrative expenses in preparation for implementing a new law, prior to the receipt of substantive appropriations for the new program. Again, the appropriation is available provided it is sufficiently broad to embrace expenditures of the type contemplated. Thus, the National Science Foundation could use its fiscal year 1967 appropriations for preliminary expenses of implementing the National Sea Grant College and Program Act of 1966, enacted after the appropriation, since the purposes of the new act were basically similar to the purposes of the appropriation. 46 Comp. Gen. 604 (1967). The preliminary tasks in that case included such things as development of policies and plans, issuance of internal instructions, and the establishment of organizational units to administer the new program.

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By passing out ashtrays, the agency intended that they would generate conversation concerning the conference and thereby further the SBA's objectives by serving as a reminder of the purposes of the conference. The decision held that the justification given by the agency was not sufficient because the recipients of the ashtrays were federal officials who were already charged by law to cooperate with the objectives of the SBA. Thus, there was no necessity that ashtrays be given away. The ashtrays were properly designated as personal gifts.

Similarly, in 54 Comp. Gen. 976 (1975), specially made key chains which were distributed to educators who attended seminars sponsored by the Forest Service were determined to be personal gifts despite the Department of Agriculture's claim that their distribution would generate future responses from participants. That decision stated:

"The appropriation . . . proposed to be charged with payment for the items in question is available for . . . expenses necessary for forest protection and utilization . . . . Since the appropriation is not specifically available for giving key chains to individuals, in order to qualify as a legitimate expenditure it must be demonstrated that the acquisition and distribution of such items constituted a necessary expense of the Forest Service."

The decision concluded that the key chains were not necessary to implement the appropriation and were, therefore, improper expenditures.

This line of reasoning was also used in 57 Comp. Gen. 385 (1978). There it was held that novelty plastic garbage cans containing candy in the shape of solid waste which were distributed by the Environmental Protection Agency to attendees at an exposition were personal gifts. The agency's argument that the candy was used to attract people to its exhibit on the Resource Conservation and Recovery Act and therefore to promote solid waste management was not sufficient to justify the expenditure.

In B-195247, August 29, 1979, the Comptroller General held that an expenditure of appropriated funds for the cost of jackets and sweaters as Christmas gifts to corpsmen at a Job Corps Center with the intent of increasing morale and enhancing program support was unauthorized. It was determined that these were not a necessary

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and proper use of appropriated funds and therefore were personal gifts.

The following cases are additional illustrations of expenditures which were found to be in the nature of personal gifts and therefore improper:

- T-shirts stamped with Combined Federal Campaign logo to be given to employees contributing a certain amount. 70 Comp. Gen. ___ (B-240001, February 8, 1991).
- Winter caps purchased by National Oceanographic and Atmospheric Administration to be given to volunteer participants in weather observation program to create "esprit de corps" and enhance motivation. B-201488, February 25, 1981.
- Photographs taken at the dedication of the Klondike Gold Rush Visitor Center to be sent by the National Park Service as "mementos" to persons attending the ceremony. B-195896, October 22, 1979.
- "Sun Day" buttons procured by the General Services Administration and given out to members of the public to show GSA's support of certain energy policies. B-192423, August 21, 1978.
- Agricultural products developed in Department of Agriculture research programs (gift boxes of convenience foods, leather products, paperweights of flowers imbedded in plastic) to be given to foreign visitors and other official dignitaries. B-151668, June 30, 1970.
- Cuff links and bracelets to be given to foreign visitors by the Commerce Department to promote tourism to the United States. B-151668, December 5, 1963; B-151668, June 12, 1963 (same case).

As a number of the preceding cases point out (e.g., B- 151668, December 5, 1963), while the agency's administrative determination of necessity is given considerable weight, it is not controlling.

Some expenditures which resemble personal gifts have been approved because they were found necessary to carry out the purposes of the agency's appropriation. For example, in B-193769, January 24, 1979, it was held that the purchase and distribution of pieces of lava rocks to visitors of the Capulin Mountain National Monument was a necessary and proper use of the Department of the Interior's appropriated funds. The appropriation in question was for "expenses necessary for the management, operation, and maintenance of areas and facilities administered by the National Park Service . . . ." The distribution of the rocks furthered the

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objectives of the appropriation because it was effective in preserving the Monument by discouraging visitors from removing lava rock elsewhere in the Monument. Thus, the rocks were not considered to be personal gifts.

Similarly, GAO concluded in B-230062, December 22, 1988, that the Army could use its appropriations to give away framed recruiting posters as "prizes" in drawings at national conventions of student organizations. The students had to fill out cards to enter the drawings, and the cards would provide leads for potential recruits. Also, the Army is authorized to advertise its recruitment program, and posters are a legitimate form of advertising.

Another case in which GAO found adequate justification is 68 Comp. Gen. 583 (1989), concluding that the United States Mint may give complimentary specimens of commemorative coins and medals to customers whose orders have been mishandled. Since customers who do not receive what they paid for may be disinclined to place further orders, the goodwill gesture of giving complimentary copies to these customers would directly contribute to the success of the Mint's commemorative sales program.

b. Contests

(1) Entry fees

The Comptroller General has held that payment of an entry fee to enter agency publications in a contest sponsored by a private organization is improper and cannot be justified as a necessary expense, at least where the prize is a monetary award to be given to the editors of the winning publications. B-164467, June 14, 1968.

However, payment of a contest entry fee may be permissible where the prize is awarded to the agency and not to the individuals and where there is sufficient justification that the expense will further the objects of the appropriation. B-172556, December 29, 1971. The Comptroller General pointed out in that decision that whether appropriated funds may be used to enter a contest will depend on the nature of the contest, the nature of the prizes and to whom they are awarded, and the sufficiency of the administrative justification.

Thus, the Bureau of Mines could use its appropriations to enter an educational film it produced in an industrial film festival where entry was made in the Bureau's name, awards would be made to

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the Bureau and not to any individuals, and there was adequate justification that entry would further the Bureau's function of promoting mine safety. B-164467, August 9, 1971.

(2) Government-sponsored contests

In an early case, the Navy wanted to use its appropriation for naval aviation to sponsor a competition for the design of amphibious landing gear for Navy aircraft. Cash prizes would be awarded for the two most successful designs. The Comptroller General ruled, however, that the proposed expenditure was unauthorized because the prizes were not related to the reasonable value of the services of the successful contestants and because the appropriation contemplated that the design and development work would be performed by Navy personnel. 5 Comp. Gen. 640 (1926).

While 5 Comp. Gen. 640 may be said to express a general rule, later decisions have permitted agencies to, in effect, sponsor contests and competitions where artistic design was involved. Thus, in A-13559, April 5, 1926, the Arlington Memorial Bridge Commission wanted to invite several firms to submit designs for a portion of the Arlington Memorial Bridge. Each design accepted by the Commission would be purchased for $2,000, estimated to approximate the reasonable cost of preparing a design. Since the $2,000 was reasonably related to the cost of producing a design, GAO viewed the proposal as amounting to a direct purchase of the satisfactory designs and distinguished 5 Comp. Gen. 640 on that basis. A significant factor was that the bridge was intended not merely as a functional device to cross the river but "as a memorial in which artistic features are a major, if not the primary, consideration."

This decision was followed in 9 Comp. Gen. 63 (1929), holding that the Marine Corps could offer a set sum of $1,000 for an acceptable original design for a service medal. The Comptroller General stated:

"Competition in the purchase of supplies or articles for Government use in its most common form is for the purpose of securing specified supplies or articles at the lowest possible price. Where, however, the purpose is the selection of the most suitable and artistic design . . . , the primary value of the subject being in its design, the ordinary procedure may be reversed and the amount to be expended fixed in advance at a sum considered to be the reasonable value of the services solicited and the bidders requested to submit the best design which they can furnish for that sum." Id. at 65.

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The concept of A-13559 was followed and applied in several later decisions. See 19 Comp. Gen. 287, 288 (1939) (design of advertising literature for savings bonds); 18 Comp. Gen. 862 (1939) (plaster models for Thomas Jefferson Memorial); 14 Comp. Gen. 852 (1935) (bronze tablets and memorials for Boulder Dam); A-37686, August 1, 1931 (monument at Harrodsburg, Kentucky, as first permanent settlement west of the Allegheny Mountains); A-35929, April 3, 1931 (ornamental sculptured granite columns for the Arlington Memorial Bridge).

Thus, a prize competition per se is generally unauthorized in accordance with 5 Comp. Gen. 640. However, the procedure in A-13559 and its progeny is permissible where artistic features are the major consideration and the amount awarded is related to the reasonable cost of producing the design.

Apart from the artistic design line of cases, an agency may be authorized to sponsor a contest under the necessary expense theory, if the expenditure bears a reasonable relationship to carrying out some authorized activity. For example, in B-158831, June 8, 1966, prizes were awarded to enrollees at a Job Corps Conservation Center in a contest to suggest a name for the Center newspaper. GAO held the expenditure permissible because the enabling legislation authorized the providing of "recreational services" for the enrollees and the contest was viewed as a permissible exercise of administrative discretion in implementing the statutory objective.

In another case, the National Park Service sponsored a cross-country ski race in a national park, and awarded trophies to the winners. The cost of the trophies could not be charged to appropriations for management, operation, and maintenance of the national park system. However, the Park Service also received appropriations for recreational programs in national parks, and the trophies could properly have been charged to that account. B-214833, August 22, 1984. See also B-230062, December 22, 1988.

c. Awards

A number of early decisions established the proposition that, absent specific statutory authority, appropriations could not be used to purchase such items as medals, trophies, or insignia for the purpose of making awards. The rationale follows that of the gift cases. The prohibition was applied in 5 Comp. Gen. 344 (1925) (medals for winners of athletic events) and 15 Comp. Gen. 278

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(1935) (annual trophies for Naval Reserve bases for efficiency). In 10 Comp. Gen. 453 (1931), the Comptroller General held that a general appropriation could be used to design and procure medals of honor for air mail flyers where the awarding of the medals had been authorized in virtually concurrent legislation. The general appropriation was viewed as available to carry out the specifically expressed intent of Congress and the express authorization obviated any need for a more specific appropriation.

The rule was restated in 45 Comp. Gen. 199 (1965) and viewed as prohibiting the purchase of a plaque to present to a state to recognize 50 years of achievement in forestry. While the voucher in that case was paid because the plaque had already been presented, the decision stated that payment was for that instance only and that congressional authority should be sought if similar awards were considered desirable in the future. A more recent case applying the prohibition is B-223447, October 10, 1986.

As with the gift cases, an occasional exception will be found based on an adequate justification under the necessary expense doctrine. One example, prompted perhaps by wartime considerations, is B-31094, January 11, 1943, approving the purchase of medals or other inexpensive insignia (but not cash payments) to be awarded to civil defense volunteers for heroism or distinguished service.

Similarly, the Comptroller General held in 17 Comp. Gen. 674 (1938) that an appropriation, one of whose purposes was "accident prevention," was available to purchase medals and insignia (but not to make monetary awards) to recognize mail truck drivers with safe driving records. There was sufficient discretion under the appropriation to determine the forms "accident prevention" should take. However, the discretion in recognizing safe job performance does not extend to distributing "awards" of merchandise selected from a catalogue. B-223608, December 19, 1988.[70] The same decision disapproved the distribution of ice scrapers imprinted with a safety message, based on the lack of adequate justification.

The prohibition does not apply to a government corporation with the authority to determine the character and necessity of its expenditures. 64 Comp. Gen. 124 (1984). (The expenditure in the case cited was to be made from donated funds.)

[70]Merchandise in that case was distributed to more than 80% of the work force at one project.

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Several statutes now authorize the making of awards in various contexts. Perhaps the most important is the Government Employees Incentive Awards Act, enacted in 1954[71] and now found at 5 U.S.C. §§ 4501-4507. The Act authorizes an agency to pay a cash award to an employee who "by his suggestion, invention, superior accomplishment, or other personal effort contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paperwork" or performs a special act or service in the public interest related to his or her official employment. The agency may also incur "necessary expenses" in connection with an incentive award. Awards and related expenses under the Act are paid from appropriations available to the activity or activities benefited. The Office of Personnel Management is authorized to prescribe implementing regulations. OPM's regulations are found in 5 C.F.R. Parts 451 and 540, and Chapter 451 of the Federal Personnel Manual. A provision added in 1990, 5 U.S.C. § 4505a, authorizes cash awards for employees with fully successful performance ratings.[72]

The Incentive Awards Act applies to civilian agencies, civilian employees of the various armed services, the District of Columbia Government, and specified legislative branch agencies. 5 U.S.C. § 4501. Within the judicial branch, it applies to the Administrative Office of the United States Courts[73] and the United States Sentencing Commission. Id.[74] While it does not apply to members of the armed forces, the Defense Department has very similar authority for military personnel in 10 U.S.C. § 1124.

GAO has issued a number of decisions interpreting the Government Employees Incentive Awards Act. Thus, where an award is based

[71]68 Stat. 1112. This was an expansion of similar but more limited authority enacted in 1946 (60 Stat. 809). GAO reviewed the Act's effectiveness in its report Federal Workforce: Federal Suggestion Programs Could Be Enhanced, GAO/GGD-89-71 (August 1989). Certain supervisory and management officials are excluded from the Incentive Awards Act, but are covered by virtually identical provisions in 5 U.S.C. § 5407.

[72]Section 207 of the Federal Employees Pay Comparability Act of 1990 (FEPCA), section 529 of the FY 1991 Treasury-Postal Service-General Government appropriation act, Pub. L. No. 101-509 (November 5, 1990), 104 Stat. 1389, 1457. The authority is effective only to the extent provided for in advance in appropriation acts. FEPCA § 301, 104 Stat. 1461.

[73]B-170804, February 2, 1971 (Administrative Office could make award to a judicial branch employee, not directly covered by the Act, for exemplary work on a special assignment on behalf of the Administrative Office).

[74]The Sentencing Commission had not been covered prior to a 1988 amendment to the statute. See 66 Comp. Gen. 650 (1987).

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on a suggestion resulting in monetary savings, the savings must be to government rather than non-government funds. 36 Comp. Gen. 822 (1957). Applying this principle, GAO found that a suggestion for changes in procedures that would decrease administrative expenses of state employment security offices would effect a savings to an appropriation for unemployment service administration grants to the states. Therefore, the appropriation was available to make an award to the employee who made the suggestion. 38 Comp. Gen. 815 (1959). An agency may make an award to an employee on detail from another agency. 33 Comp. Gen. 577 (1954). An agency may also make an award to one of its employees for service to a Federal Executive Board. B-240316, March 15, 1991. See also 70 Comp. Gen. ___ (B-236040, October 9, 1990).

An interesting situation occurred in B-192334, September 28, 1978. There, an employee made a suggestion that resulted in monetary savings to his own agency, but the savings would be offset by increased costs to other agencies. The decision concluded that, if the agency wanted to make an award on the basis of tangible benefits, it must measure tangible benefits to the government, that is, it must deduct the increased costs to other agencies from its own savings. However, the agency could view the suggestion as a contribution to efficiency or improved operations and make a monetary award based on intangible benefits.

As noted, the Act authorizes an agency to incur "necessary expenses" incident to its awards program. Thus, an agency may pay travel and miscellaneous expenses to bring recipients to Washington to participate in award ceremonies. These expenses are not chargeable against the statutory award ceiling (currently $10,000). 32 Comp. Gen. 134 (1952). The agency may also pay travel expenses for the recipient's spouse. 69 Comp. Gen. 38 (1989), overruling 54 Comp. Gen. 1054 (1975). In response to 69 Comp. Gen. 38, OPM issued FPM Letter 451-7 (July 25, 1990), extending the concept to "any individual related by blood or affinity." Travel and miscellaneous expenses may also be paid to a surviving spouse to receive an award on behalf of a deceased recipient. B-111642, May 31, 1957. Where a recipient is handicapped and cannot travel unattended, the travel and miscellaneous expenses of an attendant, whether or not a family member, may be paid. 55 Comp. Gen. 800 (1976).

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The Act does not authorize "necessary expenses" incident to the receipt of an award from a non-federal organization. 40 Comp. Gen. 706 (1961). However, in limited situations where an award from a non-federal organization is closely related to the recipient's official duties, it may be possible to pay certain related expenses on other grounds. See 55 Comp. Gen. 1332 (1976).

In a case previously discussed in our section on entertainment, the Comptroller General held that the "necessary expense" language of the Incentive Awards Act may include refreshments at an agency's awards ceremony. 65 Comp. Gen. 738 (1986). See also B-167835, November 18, 1969. A 1990 decision applied the rationale of 65 Comp. Gen. 738 and held that an agency could pay a fee, which included a luncheon, for attendance at a Federal Executive Board regional award ceremony by agency employees who had been selected for awards and their supervisors. 70 Comp. Gen. ___ (B-236040, October 9, 1990).

Awards under the Act may take forms other than cash. Thus, in 55 Comp. Gen. 346 (1975), the Comptroller General held that the Army Criminal Investigation Command could award marble paperweights and walnut plaques to Command employees, including those who had died in the line of duty, if the awards conformed to the Act and applicable regulations. In situations not covered by the statute (e.g., presentations to non-government persons to recognize cooperation and enhance community relations), however, such awards would be personal gifts and therefore improper. Similarly authorized as "honorary" awards are desk medallions (B-184306, August 27, 1980); telephones of nominal value (67 Comp. Gen. 349 (1988)); and $50 jackets bearing agency insignia (B-243025, May 2, 1991). Administrative leave can also be awarded if and to the extent authorized in OPM's implementing regulations. 5 U.S.C. § 4502(e)(2).[75] See also B-208766, December 7, 1982. Awards of merchandise to be selected from catalogues, however, are not authorized. B-223608, December 19, 1988 (citing OPM regulations). Whether the award is monetary or non-monetary, the act or service prompting it must be related to official employment. 70 Comp. Gen. ___ (B-240001, February 8, 1991) (Incentive Awards Act does not authorize giving T-shirts to Combined Federal Campaign contributors).

[75]Added by FEPCA, supra note 72, § 201, 104 Stat. at 1455.

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The Act does not authorize cash awards based merely on length of service or upon retirement. However, honorary non-cash awards are permissible. For example, the Department of Agriculture wanted to present to retiring members of its Office of Inspector General engraved plastic holders containing their credentials. GAO found this authorized by the Act. 46 Comp. Gen. 662 (1967). The use of incentive awards for good sick leave records is inappropriate. 67 Comp. Gen. 349 (1988).

The making of an award—and therefore the refusal to make an award—under the Government Employees Incentive Awards Act is discretionary. Rosano v. United States, 9 Cl. Ct. 137, 144-45 (1985). As such, it is reviewable only for abuse of discretion. E.g., Shaller v. United States, 202 Ct. Cl. 571 (1973), cert. denied, 414 U.S. 1092. A labor relations arbitrator may order an agency to prepare and submit an award recommendation, but cannot order the agency to actually make the award. 56 Comp. Gen. 57 (1976).

In B-202039, April 3, 1981, affirmed upon reconsideration, B-202039, May 7, 1982, two employees filed a claim where their agency had given them a cash award several years after implementing their suggestion. They claimed interest on the award, lost imputed investment earnings, an inflation adjustment, and compensation for higher income taxes paid as a result of the delay. The claim was denied. In the May 1982 decision, GAO pointed out that an agency's own regulations can have the effect of limiting the discretion it would otherwise have under the statute. See also Griffin v. United States, 215 Ct. Cl. 710 (1978). Thus, agency regulations can commit the agency to making an award if it adopts a suggestion. However, this does not create an entitlement to interest.

Finally, the Government Employees Incentive Awards Act is limited to government employees. Since no similar authority exists for persons other than government employees, an award may not be made to a nongovernment employee who submits a suggestion resulting in savings to the government. B-160419, July 28, 1967. The limitation to government employees is also noted in two internal GAO memoranda. B-224071-O.M., August 3, 1987 (GAO appropriations not available for cash awards to contract security guards); B-176600-O.M., August 18, 1978 (appropriations of agencies funding the Joint Financial Management Improvement Program not available to make cash awards to other than federal employees).

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Similarly, the Bureau of Land Management could use current appropriations to determine fair market value and to initiate negotiations with owners in connection with the acquisition of mineral interests under the Cranberry Wilderness Act, even though actual acquisitions could not be made until funding was provided in appropriation acts. B-211306, June 6, 1983. See also B-153694, October 23, 1964; B-153694, September 2, 1964.

4. Termination of Program

If Congress appropriates money to implement a program, can the agency use that money to terminate the program? (Expenses of terminating a program could include such things as contract termination costs and personnel reduction-in-force expenses.)

If implementation of the program is mandatory, the answer is no. In 1973, for example, the administration attempted to terminate certain programs funded by the Office of Economic Opportunity, relying in part on the fact that it had not requested any funds for OEO for 1974. The programs in question were funded under a multiple-year authorization which directed that the programs be carried out during the fiscal years covered by the authorization. The United States District Court for the District of Columbia held that funds appropriated to carry out the programs could not be used to terminate them. Local 2677, American Federation of Government Employees v. Phillips, 358 F. Supp. 60 (D.D.C. 1973). The court cited 31 U.S.C. § 1301(a) as one basis for its holding. Id. at 76 n.17. See also 63 Comp. Gen. 75, 78 (1983).

Where the program is nonmandatory, the agency has more discretion, but there are still limits. In B-115398, August 1, 1977, the Comptroller General advised that the Air Force could terminate B-1 bomber production, which had been funded under a lump-sum appropriation and was not mandated by any statute. Later cases have stated the rule that an agency may use funds appropriated for a program to terminate that program where (1) the program is nonmandatory, and (2) the termination would not result in curtailment of the overall program to such an extent that it would no longer be consistent with the scheme of applicable program legislation. 61 Comp. Gen. 482 (1982) (Department of Energy could use funds appropriated for fossil energy research and development to terminate certain fossil energy programs); B-203074, August 6, 1981. Several years earlier, GAO had held that the closing of all Public

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In addition to the Government Employees Incentive Awards Act, several other statutes authorize various types of awards. Some examples are:

- 5 U.S.C. § 5384: authorizes lump-sum cash performance awards to members of the Senior Executive Service. Some representative decisions are 68 Comp. Gen. 337 (1989); 64 Comp. Gen. 114 (1984); and 62 Comp. Gen. 675 (1983).
- 10 U.S.C. § 1125 and 14 U.S.C. § 503: authorize the Defense Department and the Coast Guard, respectively, to award trophies and badges for certain accomplishments. The Coast Guard statute includes cash prizes. The statutes have been narrowly construed as limited essentially to proficiency in arms and related skills. 68 Comp. Gen. 343 (1989) (Coast Guard); 27 Comp. Gen. 637 (1948) (discussing predecessor of 10 U.S.C. § 1125).
- 5 U.S.C. §§ 4511–4514: Inspector General of an agency may make cash awards to employees whose disclosure of fraud, waste, or mismanagement results in cost savings for the agency. For an agency without an Inspector General, the agency head is to designate an official to make the awards. The President may make the awards where the cost savings accrue to the government as a whole. GAO reviews under this legislation indicate that the authority has been used sparingly, but that actual or projected cost savings appear reasonable in those cases where awards have been made.[76] The legislation was scheduled to expire on September 30, 1990. Even if it is not renewed, as the Office of Personnel Management pointed out in connection with an earlier sunset (FPM Letter 451-5, November 21, 1984), similar awards can be processed under the Incentive Awards Act.

9. Guard Services: Anti-Pinkerton Act

a. Evolution of the Law Prior to 57 Comp. Gen. 524

On July 6, 1892, in Homestead, Pennsylvania, a riot occurred between striking employees of the Carnegie, Phipps & Company steel mill and approximately 200 Pinkerton guards. The company had brought in the Pinkerton force ostensibly to protect company property. As the Pinkertons were being transported down the

[76]Federal Workforce: Low Activity in Awards Program for Cost Savings Disclosures, GAO/GGD-88-22 (December 1987); Executive Agencies' Employee Cash Awards Program for Disclosure of Fraud, Waste, or Mismanagement, GAO/GGD-84-74 (May 8, 1984).

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Monongahela River, the strikers sighted them and began firing on them. The strikers were heavily armed, and even had a cannon on the river bank. The violence escalated to the point where the strikers spread oil on the water and ignited it. Several of the Pinkerton men were killed and several of the strikers were indicted for murder. The riot received national attention.

The then-common practice of employing armed Pinkerton guards as strike-breakers in labor disputes became an emotionally charged issue. The Homestead riot, together with other similar although less dramatic incidents, made it clear that the use of these guards provoked violence. Although Congress was reluctant to legislate against their use in the private sector, some congressional action became inevitable. The result was the law that came to be known as the Anti-Pinkerton Act. Originally enacted as part of the Sundry Civil Appropriation Act of August 5, 1892, 27 Stat. 368, it was made permanent the following year by the Act of March 3, 1893, 27 Stat. 591. Now found at 5 U.S.C. § 3108, the Act provides:

"An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the Government of the District of Columbia."

As we will see, the statute has little impact today. Nevertheless, it remains on the books and could become relevant, albeit only in unusual circumstances. Therefore, it may be useful to briefly record the administrative interpretations of the law.

Although the Anti-Pinkerton Act was never the subject of any judicial decisions until the late 1970's, it was the subject of numerous decisions of the Comptroller General and the Comptroller of the Treasury. Several principles evolved through the decisions.

(1) The Act applies to contracts with "detective agencies" as firms or corporations as well as to contracts with or appointments of individual employees of such agencies. 8 Comp. Gen. 89 (1928); A–12194, February 23, 1926.

(2) The Act prohibits the employment of a detective agency or its employees, regardless of the character of the services to be performed. The fact that such services are not to be of a "detective" nature is immaterial. Thus, detectives or detective agencies within

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the scope of the Act may not be employed in any capacity. 51 Comp. Gen. 494 (1971); 26 Comp. Gen. 303 (1946).

(3) The statutory prohibition applies only to direct employment. It does not extend to subcontracts entered into with independent contractors of the United States. 26 Comp. Gen. 303 (1946). The legislative history of the original 1892 statute made it clear that Congress did not intend to reach subcontracts. However, the Act does apply to a contract under the Small Business Administration set-aside program since the contract is a prime contract vis-a-vis SBA even though it may be a subcontract vis-a-vis the actual employing agency. 55 Comp. Gen. 1472 (1976).

(4) Although the Comptroller General never defined "detective agency" for purposes of the Anti-Pinkerton Act, the decisions drew a distinction between detective agencies and protective agencies and held that the Act did not forbid contracts with the latter. 38 Comp. Gen. 881 (1959); 26 Comp. Gen. 303 (1946); B-32894, March 29, 1943. Thus, the government could employ a protective agency, but could not employ a detective agency to do protective work. An important test became whether the organization was empowered to do general investigative work.

(5) In determining whether a given firm is within the statutory prohibition, GAO considers the nature of the functions it may perform as well as the functions it in fact performs. Two factors are relevant here—the firm's authority under its corporate charter and its powers under licensing arrangements in the states in which it does business. If a firm is chartered as a detective agency and licensed as a detective agency, then the fact that it does not actually engage in detective work will not permit it to escape the statutory prohibition. Since virtually every corporation inserts in its charter an "omnibus" clause ("engage in any lawful act or activity for which corporations may be organized in this state" or similar language), an omnibus clause alone will not make a company a detective agency. Rather, specific charter authorization is needed. 41 Comp. Gen. 819 (1962); B-146293, July 14, 1961.

(6) The government may employ a wholly-owned subsidiary of a detective agency if the subsidiary itself is not a detective agency, even if the subsidiary was organized primarily or solely to avoid the Anti-Pinkerton Act. As long as there is prima facie separation of corporate affairs, the Act does not compel the government to

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"pierce the corporate veil." 44 Comp. Gen. 564 (1965); 41 Comp. Gen. 819 (1962); B-167723, September 12, 1969.

(7) A telephone listing alone is not sufficient evidence that a given firm is a "detective agency" for purposes of 5 U.S.C. § 3108, although the fact of such a listing should prompt further inquiry by the procuring agency. 55 Comp. Gen. 1472 (1976); B-181684, March 17, 1975; B-176307, March 21, 1973; B-177137, February 12, 1973.

(8) Corrections to charters and licenses may be made prior to contract award to avoid Anti-Pinkerton Act violations. Post-award corrections, while perhaps relevant to future procurements, do not, absent compelling circumstances, retroactively expunge ineligibility existing at the time of the award. 56 Comp. Gen. 225 (1977); B-172587, June 21, 1971; B-161770, November 21, 1967; B-160538, November 15, 1967; B-156424, July 22, 1965.

These principles were discussed and applied in many decisions over the years. For example, a contract for guard services was found to violate the Act where the contractor was expressly chartered and licensed as a detective agency. 55 Comp. Gen. 1472 (1976), affirmed on reconsideration, 56 Comp. Gen. 225 (1977). Similarly, a contract with a sole proprietorship was invalid where the owner was also the president of a corporation chartered and licensed as a detective agency. B-186347/B-185495, October 14, 1976, affirmed on reconsideration, B-186347/B-185495, March 7, 1977.

By the 1970's, the Anti-Pinkerton Act had become a hindrance to the government's guard service contracting activities. The federal government is a major consumer of guard services, and it was the rare solicitation that did not generate a squabble over who was or was not subject to the Act. Many companies, including Pinkerton itself, were forced to form subsidiaries in order to compete for government business.

b. 57 Comp. Gen. 524 and the Present State of the Law

The first reported judicial decision dealing with the Anti-Pinkerton Act was United States ex rel. Weinberger v. Equifax, 557 F.2d 456 (5th Cir. 1977), cert. denied, 434 U.S. 1035. The issue in that case was whether the Act applied to a credit reporting company. The Comptroller General, in B-139965, January 10, 1975, had already held that it did not. The court reached the same result, although on different reasoning. Relying heavily on the Act's legislative history, the court held:

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"In light of the purpose of the Act and its legislative history, we conclude that an organization is not 'similar' to the (quondam) Pinkerton Detective Agency unless it offers quasi-military armed forces for hire." 557 F.2d at 463.

In a June 1978 circular letter to department and agency heads, published at 57 Comp. Gen. 524 (1978), the Comptroller General announced that GAO would follow the Equifax interpretation in the future. Therefore, the statutory prohibition will now be applied only if an organization can be said to offer quasi-military armed forces for hire. The Comptroller General declined, as did the Fifth Circuit, to attempt a definition of a quasi-military armed force but noted that, whatever it might mean, "it seems clear that a company which provides guard or protective services does not thereby become a 'quasi-military armed force,' even if the individual guards are armed." 57 Comp. Gen. at 525. It follows that whether that company also provides investigative or detective services is no longer relevant. The first decision applying this new standard was 57 Comp. Gen. 480 (1978).

Prior to the Equifax decision, GAO had gone on record as favoring repeal of the Anti-Pinkerton Act. See, e.g., 56 Comp. Gen. 225, 230 (1977). In light of the Equifax case and 57 Comp. Gen. 524, the case for repeal is considerably lessened. The statute is no longer a major impediment to legitimate guard service contracting, and certainly most would agree that the government should not deal with an organization that offers quasi-military armed forces for hire.

With the issuance of 57 Comp. Gen. 524 and 57 Comp. Gen. 480, GAO reviewed the prior decisions under the Anti-Pinkerton Act and designated them as either overruled or modified. If the result in the earlier case would have remained the same under the new standard, the decision was only "modified." If the new standard would have produced a different result, the earlier decision was "overruled." This is important because 57 Comp. Gen. 524 did not simply throw out all of the old rules. What it did is eliminate the "protective vs. investigative" distinction and adopt the Equifax standard as the definition of a proscribed entity. Thus, an organization will no longer violate the Act by providing general investigative services; it will violate the Act only if it "offers quasi-military armed forces for hire." If a given organization were found to offer quasi-military armed forces for hire—an event which is viewed as unlikely although not impossible—the rules in the earlier decisions would still be applicable even though the decisions themselves have

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been technically overruled or modified. Thus, the pre-1978 principles set forth previously in this discussion remain applicable, but the focal point is now whether the organization in question offers quasi-military armed forces for hire, not merely whether it provides general detective or investigative services. For purposes of guard service contracting, the burden of proof rests with the party alleging the violation. E.g., B-216534, January 22, 1985.

10. Insurance

a. The Self-Insurance Rule

One frequently hears that the government is a self-insurer. This is not completely true. There are many situations in which the government buys or pays for insurance. Among the more well-known examples are the Federal Employees' Health Benefits Program and Federal Employees' Group Life Insurance. Also, the government frequently pays for insurance indirectly through contracts, grants, and leases. E.g., B-72120, January 14, 1948 (lease). A comprehensive treatment may be found in a report of the Comptroller General entitled Survey of the Application of the Government's Policy on Self-Insurance, B-168106, June 14, 1972. Another useful report, although more limited in scope, is Extending the Government's Policy of Self-Insurance in Certain Instances Could Result in Great Savings, PSAD-75-105 (August 26, 1975).

However, the government is essentially a self-insurer in certain important areas, primarily loss or damage to government property and the liability of government employees insofar as the government is legally responsible or would ultimately bear the loss. The rule to be discussed in this section may be stated thus: In the absence of express statutory authority to the contrary, appropriated funds are not available for the purchase of insurance to cover loss or damage to government property or the liability of government employees. The rule and its evolution are summarized in B-158766, February 3, 1977.

The rationale for the rule is aptly summarized in the following two passages from early decisions:

"The basic principle of fire, tornado, or other similar insurance is the lessening of the burden of individual losses by wider distribution thereof, and it is difficult to conceive of a person, corporation, or legal entity better prepared to

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carry insurance or sustain a loss than the United States Government." 19 Comp. Gen. 798, 800 (1940).

"The magnitude of [the government's] resources obviously makes it more advantageous for the Government to carry its own risks than to shift them to private insurers at rates sufficient to cover all losses, to pay their operating expenses, including agency or broker's commissions, and to leave such insurers a profit." 19 Comp. Gen. 211, 214 (1939).

The "self-insurance rule" dates back to the 19th Century and has been stated and applied in numerous decisions of the Comptroller General and the Comptroller of the Treasury. In one early decision, 13 Comp. Dec. 779 (1907), the question was whether an appropriation for the education of natives in Alaska could be used to buy insurance to cover desks en route to Alaska which had been purchased from that appropriation. The Comptroller of the Treasury held that the insurance could not be considered a necessary expense incident to accomplishing the purpose of the appropriation unless it somehow operated either to preserve and maintain the property for use or to preserve the appropriation which was used to buy it. It did not do the first because insurance does not provide any added means to actually protect the property (life insurance does not keep you alive) but merely transfers the risk of loss. Neither could it "preserve the appropriation" because any recoveries would have to be deposited into the general fund (miscellaneous receipts) of the Treasury. Therefore the appropriation was not available to purchase the insurance.

The following year, the Comptroller held that appropriations for the construction and maintenance of target ranges for the National Guard (then called "organized militias") could not be used to insure buildings acquired for use in target practice. 14 Comp. Dec. 836 (1908). The decision closely followed the reasoning of 13 Comp. Dec. 779—the insurance would not actually protect the property from loss nor would it preserve the appropriation because any proceeds could not be retained by the agency but would have to be paid into the Treasury. Thus, the object of the appropriation "can be as readily accomplished without insurance as with it." Id. at 840.

Citing these and several other decisions, the Comptroller held similarly in 23 Comp. Dec. 269 (1916) that an appropriation for the construction and operation of a railroad in Alaska was not available to

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pay premiums for insurance on buildings constructed as part of the project.

A slightly different situation was presented in 24 Comp. Dec. 569 (1918). The Lincoln Farm Association had donated to the United States a memorial hall enclosing the log cabin in which Abraham Lincoln was born, together with a $50,000 endowment fund to preserve and maintain the property. The question was whether the fund could be used to buy fire insurance on the property. The Comptroller noted that the funds were not appropriated funds in the strict sense, but were nevertheless "government funds" in that legal title was in the United States. Therefore, the self-insurance rule applied. Recalling the reasoning of the earlier decisions, the Comptroller apparently could not resist commenting "[i]t should be remembered that fire insurance does not tend to protect or preserve a building from fire." Id. at 570.

The Comptroller General continued to apply the rule. In a 1927 case, a contracting officer attempted to agree to indemnify a contractor against loss or damage by casualty on buildings under construction. Since the appropriation would not have been available to insure the buildings directly, the stipulation to indemnify was held to exceed the contracting officer's authority and therefore imposed no legal liability against the appropriation. 7 Comp. Gen. 105 (1927). Boiler inspection insurance was found improper in 11 Comp. Gen. 59 (1931).

A more recent decision applying the self-insurance rule is 55 Comp. Gen. 1196 (1976). There, the National Aeronautics and Space Administration (NASA) loaned certain property associated with the Apollo Moon Mission to the Air Force for exhibition. As a condition of the loan, NASA required the Air Force to purchase commercial insurance against loss or damage to its property. The Comptroller General found that the self-insurance rule applied to the loan of property from one federal agency to another, and that commercial coverage should not have been procured. Since the insurance had already been purchased and had apparently been procured and issued in good faith, the voucher could be paid. However, the decision cautioned against similar purchases in the future. See also B-237654, February 21, 1991.

As noted at the outset, the self-insurance rule applies to tort liability as well as property damage. This was established in a 1940

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decision to the Federal Housing Administration, 19 Comp. Gen. 798 (1940). In holding that insurance could not be procured against possible tort liability, the Comptroller General noted that the self-insurance rule "relates to the risk and not to the nature of the risk." Id. at 800. Since the 1946 enactment of the Federal Tort Claims Act, the issue has become largely moot. However, questions still arise concerning the operation of motor vehicles, and these are discussed later in this section. Conceptually related is 65 Comp. Gen. 790 (1986), holding that an agency may not use its appropriations to insure against loss or damage to employee-owned hand tools. If the agency wishes to afford a measure of protection to employees who use their own tools, it may consider loss or damage claims under the Military Personnel and Civilian Employees Claims Act of 1964, 31 U.S.C. § 3721.

Another type of insurance which may not be paid for from appropriated funds is flight insurance. If a federal employee travelling by air on official business wishes to buy flight insurance, it is considered a personal expense and not reimbursable. 47 Comp. Gen. 319 (1967); 40 Comp. Gen. 11 (1960). Similarly non-reimbursable is trip cancellation insurance. 58 Comp. Gen. 710 (1979).

Insurance on household goods placed in storage incident to a permanent change of duty station may not be reimbursed to the employee unless the insurance is required by the storage company as a condition of accepting the goods for storage or is otherwise required by law. 28 Comp. Gen. 679 (1949).

Many of the decisions in this area include a statement to the effect that the government's practice of self-insurance "is one of policy and not of positive law." E.g., 21 Comp. Gen. 928, 931 (1942). While the statement is true, as it has been carried from decision to decision the word "positive" has occasionally been omitted and this has caused some confusion. All the statement means is that the rule is not mandated by statute, but has evolved administratively from the policy considerations summarized above.

b. Exceptions to the Rule

(1) Departments and agencies generally

Exceptions to the self-insurance rule may of course be authorized by statute. The absence of an express prohibition on insurance is not enough to authorize it; rather, specific statutory authority is required. 19 Comp. Gen. 798, 800 (1940); 14 Comp. Dec. 836, 839

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(1908). Although legislation in this area has been minimal, Congress has occasionally authorized the procurement of insurance in some instances and prohibited it in others. By this pattern, congressional recognition of the rule may be inferred.

Also, the existence of statutory authority to buy insurance does not necessarily mean it has to be exercised. In one case, the Comptroller General recommended against the purchase of insurance although recognizing that it was statutorily authorized in that instance. 19 Comp. Gen. 211 (1939).

There are also non-statutory exceptions where the underlying policy considerations do not apply. The standards for exception were summarized in B-151876, April 24, 1964, as follows:

1. Where the economy sought by self-insurance would be defeated;

2. Where sound business practice indicates that a savings can be effected; or

3. Where services or benefits not otherwise available can be obtained by purchasing insurance.

Two World War II cases provide early illustrations of this approach. In B-35379, July 17, 1943, the procurement of airplane hull insurance by the Civil Aeronautics Administration was approved. It was determined that the Administration did not have in its employ, and was unable at the time to recruit, the number of qualified personnel that would be required to appraise damage and arrange for and supervise immediate repairs in connection with the War Training Service and that commercial insurance coverage could provide such services. Also, in B-59941, October 8, 1946, the purchase of pressure vessel insurance including essential inspection services from commercial sources was permissible because of the necessity and economy brought on by wartime conditions.

In 37 Comp. Gen. 511 (1958), GAO considered a provision in a shipbuilding contract which required the contractor to procure builder's risk insurance, including war risk insurance that was obtainable mainly from the government. Under the contract, title vested in the United States to the extent work was completed, but the risk of loss remained in the shipbuilder until the completed vessel was delivered to and accepted by the government. The government would

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Health Service hospitals would exceed the Surgeon General's discretionary authority because a major portion of the Public Health Service Act would effectively be inoperable without the PHS hospital system. B-156510, February 23, 1971; B-156510, June 7, 1965.

The concepts are further illustrated in a series of cases involving the Clinch River Nuclear Breeder Reactor. In 1977, the administration proposed using funds appropriated for the design, development, construction, and operation of the reactor to terminate the project. Construction of a breeder reactor had been authorized, but not explicitly mandated, by statute. As contemplated by the program legislation, the Energy Research and Development Administration, the predecessor of the Department of Energy, had submitted program criteria for congressional approval. GAO reviewed the statutory scheme, found that the approved program criteria were "as much a part of [the authorizing statute] as if they were explicitly stated in the statutory language itself," and concluded that use of program funds for termination was unauthorized. B-115398, June 23, 1977. Two subsequent opinions reached the same conclusion, supported further by a provision in a 1978 supplemental appropriation act which specifically earmarked funds for the reactor. B-164105, March 10, 1978; B-164105, December 5, 1977.

By 1983 the situation had changed. Congressional support for the reactor had eroded considerably, no funds were designated for it for fiscal year 1984, and it became apparent that further funding for the project was unlikely. In light of these circumstances, GAO revisited the termination question and concluded that the Department of Energy now had a legal basis to use 1983 funds to terminate the project in accordance with the project justification data which provided for termination in the event of insufficient funds to permit effective continuation. 63 Comp. Gen. 75 (1983).

B. The "Necessary Expense" Doctrine

1. The Theory

The preceding discussion establishes the primacy of 31 U.S.C. § 1301(a) in any discussion of purpose availability. The next point

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end up paying part of the premiums because their cost was included in the bid price. GAO approved the arrangement, finding that it did not improperly transfer the contractor's risk to the government.

Exceptions may be based on the funding arrangement of a particular agency or program. For example, the rule prohibiting the purchase of insurance does not apply to the Panama Canal Commission because the Commission operates on a self-sustaining basis, deriving its operating funds from outside sources. The vast resources available to the government, upon which the self-insurance rule is founded, are not intended to be available to the Commission. B-217769, July 6, 1987 (holding that the Commission could purchase "full scope" catastrophic insurance coverage if administratively determined to be necessary). In contrast, the fact that an agency's initial appropriation was placed in an interest-earning trust fund was found not sufficient to warrant an exception where the government's resources were nevertheless available to it. B-236022, January 29, 1991 (John C. Stennis Center for Public Service Training and Development).

The Comptroller General has held that the self-insurance rule does not apply to privately-owned property temporarily entrusted to the government. 17 Comp. Gen. 55 (1937) (historical items loaned to the government for exhibition purposes); 8 Comp. Gen. 19 (1928) (corporate books and records produced by subpoena for a federal grand jury); B-126535-O.M., February 1, 1956 (airplane models loaned by manufacturer). Compare 25 Comp. Dec. 358 (1918), disallowing a claim for insurance premiums by West Publishing Company for law books loaned to a federal employee, where correspondence from the claimant made it clear that it was loaning the books to the employee personally and not to the government.

However, insurance may be purchased on loaned private property only where the owner requires insurance coverage as part of the transaction. If the owner does not require insurance, private insurance is not a necessary expense and the government should self-insure. 63 Comp. Gen. 110 (1983) (works of art temporarily loaned by the Corcoran Gallery to the President's Commission on Executive Exchange); 42 Comp. Gen. 392 (1963) (school classrooms used for civil service examinations).

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Foreign art treasures are frequently loaned to the United States for exhibition purposes. While insurance may be purchased by virtue of 17 Comp. Gen. 55, its extremely high cost has been a disincentive. To remedy this situation, Congress in 1975 passed the Arts and Artifacts Indemnity Act, 20 U.S.C. §§ 971–977. This statute authorizes the Federal Council on the Arts and Humanities to enter into agreements to indemnify against loss or damage to works of art and other materials while on exhibition under specified circumstances and within specified limits. Claims under the Act require specific appropriations for payment, but the agreements are backed by the full faith and credit of the United States. The Act constitutes authority to incur obligations in advance of appropriations and the agreements would therefore not violate the Antideficiency Act. See B-115398.01, April 19, 1977 (non-decision letter).

Since nonappropriated fund activities are by definition not financed from public funds, they are not governed by the self-insurance rule. Whether the rule should or should not be followed would generally be within the discretion of the activity or its parent agency. Thus, it is within the discretion of the Department of Defense to establish the rule by regulation for its nonappropriated fund activities. B-137896, December 4, 1958.

Finally, it is important to keep in mind that the self-insurance rule is aimed at insurance whose purpose is to protect the United States from risk of financial loss. Applying the rule from this perspective, GAO found that it would not preclude the Federal Bureau of Investigation from purchasing insurance in connection with certain of its undercover operations. The objective in these instances was not to protect the government against risk of loss, but to maintain the security of the operation itself, for example, by creating the appearance of normality for FBI-run undercover proprietary corporations. Thus, the FBI could treat the expenditure purely as a "necessary expense" question. B-204486, January 19, 1982. For additional exceptions, see 59 Comp. Gen. 369 (1980) and B-197583, January 19, 1981.

(2) Government corporations

In an early case, the Comptroller of the Treasury indicated that the self-insurance rule would not apply to a wholly-owned government corporation and suggested that it would generally take an act of

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Congress to apply the prohibition to a corporation's funds. 23 Comp. Dec. 297 (1916).

The Comptroller General followed this approach in 21 Comp. Gen. 928 (1942), noting that the rule "has not been observed strictly in cases involving insurance of property of government corporations." Id. at 931. The decision held that, while the funds of the Virgin Islands Company were subject to various statutory restrictions on the use of public funds, they could be used to insure the Company's property.

The Federal Housing Administration is treated as a corporation for many purposes although it is not chartered as one. See 53 Comp. Gen. 337 (1973). In 16 Comp. Gen. 453 (1936), the Comptroller General held that the Administration could purchase hazard insurance on acquired property based on a determination of necessity, but in 19 Comp. Gen. 798 (1940), declined to extend that ruling to cover insurance against possible tort liability. See also 55 Comp. Gen. 1321 (1976) (former Federal Home Loan Bank Board, although technically not a corporation, could nevertheless insure its new office building since Board's authority to cover losses by assessments against member banks made rationale of self-insurance rule inapplicable).

c. Specific Areas of Concern

(1) Property owned by government contractors

The cases previously discussed in which insurance was prohibited involved property to which the government held legal title. Questions also arise concerning property to which the government holds less than legal title, and property owned by government contractors.

A contractor will normally procure a variety of insurance as a matter of sound business practice. This may include hazard insurance on its property, liability insurance, and workers' compensation insurance. The premiums are part of the contractor's overhead and will be reflected in its bid price. When this is done, the government is paying at least a part of the insurance cost indirectly. Since the risks covered are not the risks of the government, there is no objection to this "indirect payment" nor, if administratively determined to be necessary, to the inclusion of an insurance stipulation in the contract. 39 Comp. Gen. 793 (1960); 18 Comp. Gen. 285, 298 (1938).

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Similarly differentiating between the government's risk and the contractor's risk, the Comptroller General has applied the self-insurance rule where the government holds "equitable title" under a lease-purchase agreement. 35 Comp. Gen. 393 (1956); 35 Comp. Gen. 391 (1956). In both decisions, the Comptroller General held that, although the government could reimburse the lessor for the cost of insuring against its own (the lessor's) risk, it could not require the lessor to carry insurance for the benefit of the government.

(2) Use of motor vehicles

As noted previously, the self-insurance rule applies to tort liability as well as property damage. 19 Comp. Gen. 798 (1940). At present, the Federal Tort Claims Act provides the exclusive remedy for claims against the United States resulting from the negligent operation of motor vehicles by government employees within the scope of their employment. Thus, insurance questions have become largely moot. Nevertheless, the self-insurance rule has been involved in several situations involving the operation of motor vehicles.

A 1966 decision, 45 Comp. Gen. 542, involved Internal Revenue Service employees classified as "high mileage drivers." They were assigned government-owned cars for official use and, when warranted, could drive the cars home at the close of the workday so that they could proceed directly to an assignment from home the next morning. The Treasury Department asked whether IRS appropriations were available to reimburse the employees for having their commercial liability insurance extended to cover the government vehicles. Applying the self-insurance rule, and noting further that the travel would most likely be considered within the scope of employment for purposes of the Federal Tort Claims Act, the Comptroller General concluded that the funds could not be so used.

In B-127343, December 15, 1976, the Comptroller General concluded that the Federal Tort Claims Act applied to Senate employees operating Senate-owned vehicles within the scope of their employment. Therefore, the purchase of commercial insurance would be neither necessary nor desirable.

In 1972, the Veterans Administration asked whether it could use its appropriations to provide liability insurance coverage for disabled

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veteran patients being given VA-conducted driver training. Since the trainees were not government employees, they would not be covered by the Federal Tort Claims Act. Since the risk was not that of the government, the self-insurance rule was not applicable. Therefore, VA could procure the liability insurance upon administrative determinations that the driver training was a necessary part of a given patient's medical rehabilitation, and that the insurance coverage was necessary to its success. B-175086, May 16, 1972.

The Federal Tort Claims Act does not apply to claims arising in foreign countries and the rules are a bit different for driving overseas. Originally, notwithstanding the nonavailability of the Federal Tort Claims Act, the Comptroller General had prohibited the purchase of insurance for government-owned vehicles operated in foreign countries. 39 Comp. Gen. 145 (1959). Instances of specific statutory authority for the State Department and the Foreign Agricultural Service were viewed as precluding insurance in other situations without similar legislative sanction.

However, GAO reviewed and revised its position in 1976. In 55 Comp. Gen. 1343 (1976), the Comptroller General held that the General Services Administration could provide by regulation for the purchase of liability insurance on government-owned vehicles operated regularly or intermittently in foreign countries, where required by local law or necessitated by legal procedures which could pose extreme difficulties in case of an accident (such as arrest of the driver and/or impoundment of the vehicle). The decision also concluded that GSA could amend its regulations to permit reimbursement of federal employees for the cost of "trip insurance" on both government-owned and privately-owned vehicles in foreign countries where liability insurance is a legal or practical necessity. The decision was extended in 55 Comp. Gen. 1397 (1976) to cover the cost of required insurance on vehicles leased commercially in foreign countries on a long-term basis.

Some confusion may result from the statement in 55 Comp. Gen. 1343, 1347, that "39 Comp. Gen. 145 (1959), 19 Comp. Gen. 798 (1940), and similar decisions" are overruled "to the extent that they are inconsistent with this decision." Since 39 Comp. Gen. 145 prohibited insurance on government-owned vehicles in foreign countries, it is properly viewed as overruled by 55 Comp. Gen. 1343. However, 19 Comp. Gen. 798 and "similar decisions" remain valid insofar as they assert the general applicability of the self-

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insurance rule to tort liability and to motor vehicle usage in the United States. They should be viewed as modified to the extent that they no longer preclude purchase of insurance in the foreign country situations dealt with in 55 Comp. Gen. 1343 and 55 Comp. Gen. 1397.

Collision damage waiver coverage on commercial rental vehicles is discussed in the section entitled "Damage to Commercial Rental Vehicles" in Chapter 12.

A summary of the self-insurance rules as they relate to the operation of motor vehicles on official business may be found in General Services Administration Bulletin FPMR G-176, August 9, 1988.

(3) Losses in shipment

Early decisions had applied the self-insurance rule to the risk of damage or loss of valuable government property while in shipment. Thus, marine insurance could not be purchased for shipment of a box of silverware. 4 Comp. Gen. 690 (1925). Nor could it be purchased to cover shipment of $5,000 in silver dollars from San Francisco to Samoa. 22 Comp. Dec. 674 (1916), affirmed upon reconsideration, 23 Comp. Dec. 297 (1916).

In 1937, Congress enacted the Government Losses in Shipment Act, 40 U.S.C. §§ 721–729. The Act provides a fund for the payment of claims resulting from the loss or damage in shipment of government-owned "valuables" as defined in the Act. The Act also prohibits the purchase of insurance except as specifically authorized by the Secretary of the Treasury. If a given risk is beyond the scope of the Act, for example, if the items in question are not within the definition of "valuables" or if the particular movement does not qualify as "shipment," then the self-insurance rule and its exceptions would still apply. See, e.g., 17 Comp. Gen. 419 (1937).

(4) Bonding of government personnel

Prior to 1972, the federal government frequently required the surety bonding of officers and employees who handled money or other valuables. In 1972, Congress enacted legislation, now found at 31 U.S.C. § 9302, to expressly prohibit the government from requiring or obtaining surety bonds for its civilian employees or

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military personnel in connection with the performance of their official duties. The reasons for this legislation parallel the policy considerations behind the self-insurance rule. Indeed, the objective of the legislation was to substitute the principle of self-insurance for the practice of obtaining surety bonds on federal employees where the risk insured against is a loss of government funds or property in which the United States is the insured.[77] 56 Comp. Gen. 788, 790 (1977). Although 31 U.S.C. § 9302 does not define "officer" or "employee," the definitions in title 5 of the U.S. Code are available for guidance. B-236022, January 29, 1991.

Under the former system, the surety bonds were for the protection of the government, not the bonded employee. If a loss occurred and the government collected on the bond, the surety could attempt to recover against the individual employee. Thus, the elimination of bonding in no way affects the personal liability of federal employees, and 31 U.S.C. § 9302 specifies this. This principle has been noted several times in connection with the liability of accountable officers and the cases are cited in Chapter 9.

In 56 Comp. Gen. 788 (1977), the Comptroller General held that, by virtue of 31 U.S.C. § 9302, the United States became a self-insurer of restitution, reparation, and support moneys collected by probation officers under court order. The decision noted that the same result applied to litigation funds paid into the registry of the court (funds paid into the registry by a litigant pending distribution by the court to the successful party).

However, if an agency requires an employee to serve as a notary public and state law requires bonding of notaries, the employee's expense in obtaining the surety bond may be reimbursed notwithstanding 31 U.S.C. § 9302. The bond in such a situation is neither required by nor obtained by the federal government. It is required by the state and obtained by the employee. Also, the risk involved is not one in which the United States is the insured. B-185909, June 16, 1976.

[77]GAO had recommended the legislation. See report entitled Review of Bonding Program for Employees of the Federal Government, B-8201 (March 29, 1962); B-8201/B-59149, January 18, 1972.

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Similarly, if a federal court designates a state court employee to perform certain functions in connection with the arrest and detention of federal offenders, 31 U.S.C. § 9302 does not preclude the Administrative Office of the United States Courts from requiring that the state employee be bonded since the statute applies only to federal employees. 52 Comp. Gen. 549 (1973).

11. Lobbying and Related Matters

a. Introduction

Lobbying—attempting to influence legislators—is nothing new. The term itself derives from the practice of advocates of a particular measure lying in wait in the corridors or "lobby" of the Capitol Building, there to collar passing members of Congress.[78]

Generally speaking, there are two types of lobbying. "Direct lobbying," as the term implies, means direct contact with the legislators, either in person or by various means of written or oral communication. "Indirect" or "grass roots" lobbying is different. There, the lobbyist contacts third parties, either members of special interest groups or the general public, and urges them to contact their legislators to support or oppose something. Of course, the term "lobbying" can also refer to attempts to influence decisionmakers other than legislators.

There is nothing inherently evil about lobbying. A House select committee investigating lobbying in 1950 put it this way:

> "Every democratic society worthy of the name must have some lawful means by which individuals and groups can lay their needs before government. One of the central purposes of government is that people should be able to reach it; the central purpose of what we call 'lobbying' is that they should be able to reach it with maximum impact and possibility of success. This is, fundamentally, what lobbying is about."[79]

Nevertheless, because of the obvious potential for abuse, there are legal restrictions on lobbying. This section will explore some of

[78]Actually, the term can be traced back at least to 17th century England. 17 Encyclopedia Americana 633 (1978).

[79]General Interim Report of the House Select Committee on Lobbying Activities, H.R. Rep. No. 3138, 81st Cong., 2d Sess. 1 (1950).

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them. Because the focus of this publication is on the use of appropriated funds, coverage is limited for the most part to lobbying by government officials and does not include lobbying by private organizations. Restrictions on lobbying by government officials derive from two sources: criminal statutes and provisions in appropriation acts.

b. Criminal Statutes

Criminal sanctions are provided by 18 U.S.C. § 1913, originally enacted in 1919:

"No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business."

The statute goes on to provide penalties for violation: a $500 fine or a year in jail or both, plus removal from federal employment.

The context in which section 1913 was enacted is reflected in the following passage from the floor debate on the original 1919 legislation:

"The bill also contains a provision which . . . will prohibit a practice that has been indulged in so often, without regard to what administration is in power—the practice of a bureau chief or the head of a department writing letters throughout the country, sending telegrams throughout the country, for this organization, for this man, for that company to write his Congressman, to wire his Congressman, in behalf of this or that legislation. [Applause.] The gentleman from Kentucky . . . during the closing days of the last Congress was greatly worried because he had on his desk thousands upon thousands of telegrams that had been started right here in Washington by some official wiring out for people to wire Congressman Sherley . . . . Now, it was never the intention of Congress to appropriate money for this purpose, and [§ 1913] will absolutely put a stop to that sort of thing. [Applause.]" [80]

[80]58 Cong. Rec. 403 (1919) (remarks of Representative Good), quoted in National Treasury Employees' Union v. Campbell, 654 F.2d 784, 791 (D.C. Cir. 1981).

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Since 18 U.S.C. § 1913 is a criminal statute, its enforcement is the responsibility of the Department of Justice and the courts. Therefore, GAO will not "decide" whether a given action constitutes a violation. GAO will, however, determine whether appropriated funds were used in a given instance, and refer matters to the Justice Department in appropriate cases. E.g., B-192658, September 1, 1978; B-164497(5), March 10, 1977. Generally, GAO will refer matters to the Justice Department if asked to do so by a Member of Congress or where available information provides reasonable cause to suspect that a violation may have occurred. B-145883, April 27, 1962.

In addition, since a violation of section 1913 is by definition an improper use of appropriated funds, such a violation could form the basis of a GAO exception or disallowance. However, GAO can take no action unless the Justice Department or the courts first determine that there has been a violation. B-164497(5), March 10, 1977.

Consistent with the legislative history noted above, the Justice Department construes section 1913 as applying primarily to indirect or "grass roots" lobbying, and not to direct communications between executive branch officials and Congress. 5 Op. Off. Legal Counsel 180 (1981); 2 Op. Off. Legal Counsel 160 (1978); 2 Op. Off. Legal Counsel 30 (1978).[81]

In evaluating particular fact situations to determine possible violations of section 1913, GAO applies the Justice Department's interpretation of that statute. Thus, GAO found that referral to Justice was not warranted in the following situations:

- Various judicial branch activities including direct contacts with legislators by federal judges, legislative liaison activities by the Judicial Conference of the United States, and some grass roots lobbying which did not involve the use of federal funds. 63 Comp. Gen. 624 (1984).
- Providing to a private lobbying group a copy of congressional testimony by the Secretary of State supporting the administration's Central American policies. 66 Comp. Gen. 707 (1987). The answer

[81]For a commentary favoring a broader interpretation, see Richard L. Engstrom and Thomas G. Walker, Statutory Restraints on Administrative Lobbying—"Legal Fiction", 19 Journal of Public Law 89 (1970).

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to emphasize is that 31 U.S.C. § 1301(a) does not require, nor would it be reasonably possible, that every item of expenditure be specified in the appropriation act. While the statute is strict, it is applied with reason.

The spending agency has reasonable discretion in determining how to carry out the objects of the appropriation. This concept, known as the "necessary expense doctrine," has been around almost as long as the statute itself. An early statement of the rule is contained in 6 Comp. Gen. 619, 621 (1927):

> "It is a well-settled rule of statutory construction that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object, unless there is another appropriation which makes more specific provision for such expenditures, or unless they are prohibited by law, or unless it is manifestly evident from various precedent appropriation acts that Congress has specifically legislated for certain expenses of the Government creating the implication that such expenditures should not be incurred except by its express authority."

The necessary expense rule is really a combination of two slightly different but closely related concepts:

(1) An appropriation made for a specific object is available for expenses necessarily incident to accomplishing that object unless prohibited by law or otherwise provided for. For example, an appropriation to erect a monument at the birthplace of George Washington could be used to construct an iron fence around the monument where administratively deemed necessary to protect the monument. 2 Comp. Dec. 492 (1896).

(2) Appropriations, even for broad categories such as salaries, frequently use the term "necessary expenses." As used in this context, the term refers to "current or running expenses of a miscellaneous character arising out of and directly related to the agency's work." 38 Comp. Gen. 758, 762 (1959); 4 Comp. Gen. 1063, 1065 (1925).

Although the theory is identical in both situations, the difference is that expenditures in the second category relate to somewhat broader objects.

The Comptroller General has never established a precise formula for determining the application of the necessary expense rule. In

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would have been different if the State Department had used appropriated funds to develop material for the lobbying group rather than simply providing existing and readily available material. Id. at 712. See also "Assistance to private lobbying groups" later in this section, and B-229069.2, August 1, 1988.

- Contacts with congressional staff members and a briefing for the House Foreign Affairs Committee by State Department officials designed to generate opposition for a legislative measure perceived as inconsistent with administration nuclear non-proliferation policy. B-217896, July 25, 1985.
- Speeches and written materials by the Chairman of the Federal Trade Commission expressing opposition to the Postal Service's "monopoly" status for letter class mail. None of the materials exhorted members of the public to contact their legislators. B-229257, June 10, 1988.
- Written materials prepared and disseminated by the Small Business Administration, none of which included grass roots lobbying, designed to support an administration proposal to transfer the SBA to the Commerce Department. B-223098/B-223098.2, October 10, 1986.
- Transmission of information by the Consumer Product Safety Commission to a private company advising of scheduled congressional hearings on legislation relevant to a problem the company was facing. B-229275-O.M., November 17, 1987. The memorandum stated:

> "We believe it is within the statutory authority of a regulatory agency to advise a regulated company that a remedy it seeks can only be obtained through legislation and that such legislative remedy may be initiated by a particular Congressional Committee."

- Congressional briefings by Department of Energy officials designed to influence views on nuclear weapons testing legislation. A planned media campaign to further that objective would have been more questionable, but it was not carried out. Nuclear Test Lobbying: DOE Regulations for Contractors Need Reevaluation, GAO/RCED-88-25BR (October 1987).

Numerous additional examples may be found in our discussion of "pending legislation" appropriation restrictions later in this section.

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GAO found the following situations sufficiently questionable to warrant referral to Justice:[82]

- An article written by a Commerce Department official and published in Business America, a Commerce Department publication, explicitly urging readers to contact their elected representatives in Congress to support certain amendments to the Export Administration Act. B-212235, November 17, 1983.
- Campaign by Air Force and Defense Department to use contractors' lobbyists and subcontractor network to lobby Congress in support of C-5B aircraft procurement. Improper Lobbying Activities by the Department of Defense on the Proposed Procurement of the C-5B Aircraft, GAO/AFMD-82-123 (September 29, 1982).

Of course, GAO's opinion that section 1913 has been violated—or, for that matter, an independent conclusion by the Justice Department that a violation has occurred—does not necessarily mean that a prosecution will follow. The Attorney General has what is known as "prosecutorial discretion." A great many factors, including the amount of public funds involved, may legitimately influence the prosecutorial decision. Justice states that there were no prosecutions under section 1913 as of early 1978. 2 Op. Off. Legal Counsel 30, 31 (1978). To our knowledge, this has not changed.

Judicial activity under 18 U.S.C. § 1913 has thus far been limited to the issue of whether the statute creates a private right of action. The answer is no. National Treasury Employees' Union v. Campbell, 482 F. Supp. 1122 (D.D.C. 1980), aff'd, 654 F.2d 784 (D.C. Cir. 1981), overruling National Association for Community Development v. Hodgson, 356 F. Supp. 1399 (D.D.C. 1973); Grassley v. Legal Services Corporation, 535 F. Supp. 818 (S.D. Iowa 1982);[83] American Trucking Associations, Inc. v. Department of Transportation, 492 F. Supp. 566 (D.D.C. 1980). The availability of injunctive relief to a private litigant may be inferred from American Public Gas Association v. Federal Energy Administration, 408 F. Supp.

[82]A few earlier cases will be found in which GAO held expenditures illegal under 18 U.S.C. § 1913. E.g., B- 139134-O.M., June 17, 1959 (Air Force paid registration fee for members to enter state rifle association shooting match; portion of fee set aside for fund to fight adverse gun legislation held improper payment); B-76695, June 8, 1948. GAO today would merely refer the cases to the Justice Department.

[83]The Grassley court also noted that section 1913 applies only to federal departments or agencies and their officers or employees. It would not, according to the court, apply to the Legal Services Corporation or its grantees. 535 F. Supp. at 826 n.6.

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640 (D.D.C. 1976), but in view of the Campbell litigation, Public Gas must be regarded as modified to the extent it purports to recognize a private right of action under section 1913.

One other statute with penal sanctions deserves brief mention—the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261–270. Enacted in 1946, it requires the registration of certain persons and organizations engaged in lobbying as defined in the Act. Its constitutionality was upheld in United States v. Harriss, 347 U.S. 612 (1954). While this statute encompasses direct lobbying, it does not apply to the legislative activities of government agencies. B-129874, August 15, 1978; B-164497(5), March 10, 1977.

c. Appropriation Act Restrictions: Publicity and Propaganda

(1) Origin and general considerations

In 1949, a House Resolution created a Select Committee on Lobbying Activities to review the operation of the Federal Regulation of Lobbying Act and to investigate all lobbying activities both by the private sector and by federal agencies. The Committee held extensive hearings and issued several reports. In its final report, the Committee had this to say about lobbying by government agencies:

"The existing law in this field, unlike the law governing lobbying by private interests, is not directed toward obtaining information of such activities, but is prohibitory in concept and character. It forbids the use of appropriated funds for certain types of lobbying activities and is specifically a part of the Criminal Code. Enacted in 1919, it is not a recent or in any sense a novel piece of legislation. Its validity has never been challenged and we consider it sound law. . . .

"It is our conclusion that the long-established criminal statute referred to above should be retained intact and that Congress, through the proper exercise of its powers to appropriate funds and to investigate conditions and practices of the executive branch, as well as through its financial watch dog, the General Accounting Office, can and should remain vigilant against any improper use of appropriated funds and any invasion of the legislative prerogatives and responsibilities of the Congress."[84]

When the Select Committee referred to the "proper exercise" of the congressional power to appropriate funds, it of course had in mind

[84]House Select Committee on Lobbying Activities, Report and Recommendations on Federal Lobbying Act, H.R. Rep. No. 3239, 81st Cong., 2d Sess. 36 (1951).

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the use of that power to restrict the use of funds for activities considered undesirable. While the use of appropriation act restrictions to control lobbying had some earlier precedent, the practice began in earnest shortly after the issuance of the Select Committee's final report with some fiscal year 1952 appropriations, and has continued ever since.

The most common form of appropriation act restriction prohibits the use of funds for "publicity or propaganda." There are several variations of the provision, with varying degrees of specificity. Approximately half of the regular annual appropriation acts include some version. As of 1990, there is no governmentwide "publicity or propaganda" statute. Thus, some agencies will be subject to one version, other agencies to a different version, and still others to none at all. Nevertheless, it is possible to draw some generalizations.

The simplest version of the statute, and the most general, is this:

"No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress."[85]

It prohibits expenditures for all unauthorized "publicity" or "propaganda." Unfortunately, as with most of the publicity and propaganda statutes over the years, there is no definition of either term. Thus, the statutes have been applied through administrative interpretation.

In construing and applying a "publicity or propaganda" provision, it is necessary to achieve a delicate balance between competing interests. On the one hand, every agency has a legitimate interest in communicating with the public and with the Congress regarding its functions, policies, and activities. The Select Committee recognized this, quoting in its Interim Report from the report of the Hoover Commission:

"Apart from his responsibility as spokesman, the department head has another obligation in a democracy: to keep the public informed about the activities of his agency. How far to go and what media to use in this effort

[85]E.g., Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1990, Pub. L. No. 101-162, § 601, 103 Stat. 988, 1031 (1989).

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present touchy issues of personal and administrative integrity. But of the basic obligation there can be little doubt."[86]

In addition, the courts have indicated that it is not illegal for government agencies to spend money to advocate their positions, even on controversial issues. See Joyner v. Whiting, 477 F.2d 456, 461 (4th Cir. 1973); Arrington v. Taylor, 380 F. Supp. 1348, 1364 (M.D.N.C. 1974).[87]

Yet on the other hand, the statute has to mean something. As the court said in National Association for Community Development v. Hodgson in reference to 18 U.S.C. § 1913, "Obviously, Congress intended to remedy some problem or further some cause, otherwise they would not have bothered enacting the statute." 356 F. Supp. at 1403. As long as the law exists, there has to be a point beyond which government action violates it. Testifying before the Select Committee on March 30, 1950, former Assistant Comptroller General Frank Weitzel made the following remarks:

"[I]f you set up an organization in the executive branch for the benefit of the three blind mice they would come up here with a budget program and prospectus which would convince any Member of Congress that that was one of the most important organizations in the executive branch. . . .

"And no doubt by that time there would also be some private organizations with branches which would parallel your Federal agency, which would be devoted to the propagation and dissemination of information about the three blind mice . . . ."[88]

In evaluating whether a given action violates a "publicity or propaganda" provision, GAO will rely heavily on the agency's administrative justification. In other words, the agency gets the benefit of any legitimate doubt. GAO will override the agency's determination only where it is clear that the action falls into one of a very few specific categories. Before discussing what those categories are, two threshold issues must be noted.

[86]H.R. Rep. No. 3138, supra note 79, at 53.

[87]Further useful discussion may be found in cases dealing with different but conceptually related issues such as United States v. Frame, 885 F.2d 1119 (3d Cir. 1989), and Block v. Meese, 793 F.2d 1303 (D.C. Cir. 1986).

[88]The Role of Lobbying in Representative Self-Government, Hearings before the House Select Committee on Lobbying Activities, 81st Cong., 2d Sess., pt. 1, at 158 (1950).

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First, it must be determined, by examining the relevant appropriation act, whether the agency in question is subject to a "publicity or propaganda" restriction. If it is, then the version contained in the agency's appropriation act will determine the category or categories of potential violations. The existence and precise terms of the restriction can change over time, so it is always necessary to check the appropriation act for the year in which the questioned obligation or expenditure was made.

Second, a violation must be predicated on the use of public funds (either direct appropriations or funds which, although not direct appropriations, are treated as appropriated funds). If appropriated funds are not involved, there is no violation no matter how blatant the conduct may be. 56 Comp. Gen. 889 (1977) (involving a newsletter concerning the Clinch River Breeder Reactor Project containing material which would have been illegal had it been financed in any way with appropriated funds).

(2) Self-aggrandizement

As noted above, the broadest form of the publicity and propaganda restriction prohibits the use of appropriated funds "for publicity or propaganda purposes not authorized by the Congress." A variation limits the restriction to activities "within the United States."[89]

The Comptroller General first had occasion to construe this provision in 31 Comp. Gen. 311 (1952). The National Labor Relations Board asked whether the activities of its Division of Information amounted to a violation. Reviewing the statute's scant legislative history, the Comptroller General concluded that it was intended "to prevent publicity of a nature tending to emphasize the importance of the agency or activity in question." Id. at 313. Therefore, the prohibition would not apply to the "dissemination to the general public, or to particular inquirers, of information reasonably necessary to the proper administration of the laws" for which an agency is responsible. Id. at 314. Based on this interpretation, GAO concluded that the activities of the Board's Division of Information were not improper. The only thing GAO found that might be questionable, the decision noted, were certain press releases reporting speeches of members of the Board.

[89]E.g., Treasury, Postal Service and General Government Appropriations Act, 1990, Pub. L. No. 101-136, § 512, 103 Stat. 783, 813 (1989).

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Thus, 31 Comp. Gen. 311 established the important proposition that the statute does not prohibit an agency's legitimate informational activities. See also B-223098/B-223098.2, October 10, 1986; B-177704, February 7, 1973. It is geared at activities whose obvious purpose is "self-aggrandizement" or "puffery."

GAO's approach to this statute is basically the same as its approach to the "pending legislation" version to be discussed in detail later. The statute does not provide adequate guidelines to distinguish the legitimate from the proscribed. Thus, without further clarification from Congress or the courts, GAO is reluctant to find a violation where the agency can provide a reasonable justification for its activities.

In a 1973 case, B-178528, July 27, 1973, the Republican National Committee financed a mass mailing of copies of editorials from British newspapers in praise of the President. The editorials were transmitted with a letter prepared by a member of the White House staff, on State Department letterhead stationery, and signed by the Ambassador to Great Britain. GAO again noted the extreme difficulty in distinguishing between disseminating information to explain or defend administration policies, which is permissible, and similar activities designed for purely political or partisan purposes. (See also B-194776, June 4, 1979.) In addition, a legitimate function of a foreign legation is to communicate information on press reaction in the host country to policies of the United States. Thus, GAO was unable to conclude that there was any violation of the publicity and propaganda law. In any event, the use of appropriated funds was limited to the cost of one piece of paper and the time it took the Ambassador to think about it and sign his name.

Other cases in which GAO found no violation are B-212069, October 6, 1983 (press release by Director of Office of Personnel Management excoriating certain Members of Congress who wanted to delay a civil service measure the administration supported), and B-161686, June 30, 1967 (State Department publications on Vietnam War). In neither case were the documents designed to glorify the issuing agency or official.

GAO did find a violation in B-136762, August 18, 1958. The Deputy Assistant Secretary of Defense for Military Assistance Programs attended a meeting of the Aircraft Industries Association and made

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a speech "clearly designed to enlist the aid of the Aircraft Industries Association in publicizing and selling the Mutual Security program to the American public through the various media available to the Association." Reviewing the text of the speech, GAO found that it went far beyond any legitimate purpose of informing the public and that it therefore violated the publicity and propaganda restriction. However, the officer had been authorized to attend the meeting as related to the performance of official duty and would have been entitled to per diem for the full day even if he had not made the speech. Therefore, since the government incurred no additional expense by virtue of the speech, GAO declined to seek recovery either from the officer himself or from the accountable officers who had made the payment.

Some agencies have authority to disseminate material that is promotional rather than purely informational. For example, the Commerce Department is charged with promoting commerce. In so doing, it entered into a contract with the Advertising Council to undertake a national multi-media campaign to enhance public understanding of the American economic system. Finding that this was a reasonable means of implementing its function and that the campaign did not "aggrandize" the Commerce Department, GAO found nothing illegal. B-184648, December 3, 1975.

If an agency does not have promotional authority, the scope of its permissible activities is correspondingly more restricted. For example, GAO found the publicity and propaganda law violated when a Presidential advisory committee, whose sole function was to advise the President and which had no promotional role, set up and implemented a public affairs program which included the hiring of a "publicity expert." B-222758, June 25, 1986.

(3) Covert propaganda

Another type of activity which GAO has construed as prohibited by the "publicity or propaganda not authorized by Congress" statute is "covert propaganda," defined as "materials such as editorials or other articles prepared by an agency or its contractors at the behest of the agency and circulated as the ostensible position of parties outside the agency." B-229257, June 10, 1988. A critical element of the violation is concealment of the agency's role in sponsoring the material. Id.

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In a 1986 case, the Small Business Administration prepared "suggested editorials" and distributed them to newspapers. The editorials urged support of an administration proposal to merge the SBA with the Department of Commerce. The editorials were clearly "propaganda." This, however, was not enough to violate the law. The problem was that they were misleading as to their origin. The plan presumably was for a newspaper to print the editorial as its own without identifying it as an SBA document. This, the Comptroller General concluded, went beyond the range of acceptable public information activities and therefore violated the publicity and propaganda law. B-223098/B-223098.2, October 10, 1986.

A similar holding is 66 Comp. Gen. 707 (1987), involving newspaper articles and editorials in support of Central American policy. The materials were prepared by paid consultants at government request, and published as the work of nongovernment parties. The decision also found that media visits by Nicaraguan opposition leaders, arranged by government officials but with that fact concealed, constituted another form of "covert propaganda." See also B-129874, September 11, 1978 ("canned editorials" and sample letters to the editor in support of Consumer Protection Agency legislation, had they been prepared, would have violated the law).

In B-229257, June 10, 1988, the Federal Trade Commission prepared a variety of materials critical of the Postal Service's "monopoly" on letter class mail, for distribution at a National Press Club breakfast which the Postmaster General was to attend. While the material was unquestionably "propaganda," it did not violate the law because it identified the FTC as the source.

(4) Providing assistance to private lobbying groups

Another type of "lobbying" activity GAO has found improper is the use of appropriated funds to provide assistance to private lobbying groups. This is largely an outgrowth of the concept that an agency should not be able to do indirectly that which it cannot do directly. The few cases in which violations have been found have involved a version of the publicity and propaganda statute tied in specifically to attempting to influence pending legislation. However, the activity in question would presumably also constitute a violation of the broader "publicity or propaganda not authorized by Congress" version.

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In 1977, the Office of the Special Assistant to the President for Consumer Affairs and the Office of Consumer Affairs within the (then) Department of Health, Education and Welfare mounted an active campaign to obtain passage of legislation to establish a Consumer Protection Agency. As part of the campaign, the Special Assistant had instructed the Office of Consumer Affairs to informally clear its efforts with certain "public interest lobby members." In addition, two of the consumer lobby groups asked HEW to provide material illustrating situations where a Consumer Protection Agency could have had an impact had it been in existence. Before implementing the campaign, however, the Office of Consumer Affairs sought advice from the HEW General Counsel, who advised against certain elements of the plan, including the two items mentioned.

Since, pursuant to the General Counsel's advice, the more egregious elements of the plan were not carried out, the Comptroller General concluded that no laws were violated. However, the Comptroller pointed out that the "publicity and propaganda" statute would prohibit the use of appropriated funds to develop propaganda material to be given to private lobbying organizations to be used in their efforts to lobby Congress. An important distinction must be made. There would be nothing wrong with servicing requests for information from outside groups, lobbyists included, by providing such items as stock education materials or position papers from agency files, since this material would presumably be available in any event under the Freedom of Information Act. The improper use of appropriated funds arises when an agency assigns personnel or otherwise provides administrative support to prepare material not otherwise in existence to be given to a private lobbying organization. B-129874, September 11, 1978. See also 66 Comp. Gen. 707, 712 (1987), drawing the same distinction in the context of 18 U.S.C. § 1913.

In another example, the Maritime Administration ("MarAd") had become intimately involved with the National Maritime Council, a trade association of ship operators and builders. MarAd staff performed the administrative functions of the Council at MarAd headquarters and regional offices. In 1977, at a time when cargo preference legislation was pending in Congress, the Council, with MarAd's active assistance, undertook an extensive advertising campaign in national magazines and on television advocating a strong U.S. merchant marine. Some of the advertisements encouraged

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view of the vast differences among agencies, any such formula would almost certainly be unworkable. Rather, the determination must be made essentially on a case-by-case basis.

For an expenditure to be justified under the necessary expense theory, three tests must be met:

(1) The expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available.

(2) The expenditure must not be prohibited by law.

(3) The expenditure must not be otherwise provided for, that is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme.

E.g., 63 Comp. Gen. 422, 427-28 (1984); B-230304, March 18, 1988.

a. Relationship to the Appropriation

The first test—the relationship of the expenditure to the appropriation—is the one that generates by far the lion's share of questions. On the one hand, the rule does not require that a given expenditure be "necessary" in the strict sense that the object of the appropriation could not possibly be fulfilled without it. Thus, the expenditure does not have to be the only way to accomplish a given object, nor does it have to reflect GAO's perception of the best way to do it. Yet on the other hand, it has to be more than merely desirable or even important. E.g., 34 Comp. Gen. 599 (1955); B-42439, July 8, 1944. An expenditure cannot be justified merely because some agency official thinks it is a good idea.

The important thing is not the significance of the proposed expenditure itself or its value to the government or to some social purpose in abstract terms, but the extent to which it will contribute to accomplishing the purposes of the appropriation the agency wishes to charge. For example, the Forest Service can use its appropriation for "Forest Protection and Utilization" to buy plastic litter bags for use in a national forest. 50 Comp. Gen. 534 (1971). However, operating appropriations of the Equal Employment Opportunity Commission are not available to pay to the Internal Revenue Service taxes due on judgment proceeds recovered by the EEOC in an

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members of the public to contact their elected representatives to urge them to support a strong merchant fleet. Reviewing the situation, GAO concluded that MarAd had violated the publicity and propaganda statute by expending appropriated funds to provide administrative support to the Council in the form of staff time, supplies, and facilities, when it knew the Council was attempting to influence legislation pending before Congress. See B-192746-0.M., March 7, 1979, and GAO report entitled The Maritime Administration and the National Maritime Council—Was Their Relationship Appropriate, CED-79-91, May 18, 1979.

In B-133332, March 28, 1977, the Smithsonian Institution had prepared an exhibit entitled "The Tallgrass Prairie: An American Landscape" and displayed it at a premiere showing for the benefit of the Tallgrass Prairie Foundation, a nonprofit organization. While appropriated funds were used to prepare the exhibit, none were used for the benefit itself since, under the Smithsonian's traveling exhibit program, administrative costs are paid by the host organization. The problem arose because the Tallgrass Prairie Foundation shared a large part of its membership with a lobbying organization known as "Save the Tallgrass Prairie, Inc." (There is no cause that does not have its lobbyists.) In addition, a leading member of both organizations had actually created the exhibit under contract with the Smithsonian. However, the exhibit itself was non-controversial and the Foundation had an independent legal existence. Thus, since no lobbying took place at the benefit, and since any lobbying by "Save the Tallgrass" or by the exhibit's creator could not be imputed to the Foundation nor to the Smithsonian, GAO concluded that the Smithsonian had not used its appropriations for any improper indirect lobbying.

(5) Pending legislation: overview

The version of the publicity and propaganda law which the Comptroller General has had the most frequent occasion to apply is narrower than the "publicity or propaganda not authorized by Congress" version previously discussed; it addresses only one type of publicity or propaganda—that designed to influence pending legislation.

For over 30 years, from the early 1950's to fiscal year 1984, the following provision was enacted every year:

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"No part of any appropriation contained in this or any other Act, or of the funds available for expenditure by any corporation or agency, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress."[90]

As long as this version was in effect, it applied, by virtue of the "this or any other act" language, to all government agencies regardless of which appropriation act provided their funds. It also applied expressly to government corporations, even those which did not receive direct appropriations. See, e.g., B-164497(5), March 10, 1977 (United States Railway Association); B-114823, December 23, 1974 (Export-Import Bank).

For fiscal year 1984, the "this or any other act" provision fell victim to a point of order and was dropped. See 64 Comp. Gen. 281 (1985). As of 1990, there is no governmentwide "pending legislation" provision. However, it continues to appear in individual appropriation acts in various forms. For example, a sampling of 1990 appropriation acts reveals the following versions:

"None of the funds made available by this Act shall be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before the Congress."[91]

"No part of this appropriation shall be used for publicity or propaganda purposes or implementation of any policy including boycott designed to support or defeat legislation pending before Congress or any State legislature."[92]

"No part of any appropriation contained in this Act shall be available for any activity or the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which congressional action is not complete . . . ."[93]

"No part of any appropriation contained in this Act shall be used, other than for normal and recognized executive-legislative relationships, for publicity or

[90]E.g., Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, § 607(a), 93 Stat. 559, 575 (1979).

[91]Department of Defense Appropriations Act, 1990, Pub. L. No. 101-165, § 9026, 103 Stat. 1112, 1135 (1989).

[92]District of Columbia Appropriations Act, 1990, Pub. L. No. 101-168, § 116, 103 Stat. 1267, 1278 (1989).

[93]Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, § 304, 103 Stat. 701, 741 (1989).

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propaganda purposes, for the preparation, distribution, or use of any kit, pamphlet, booklet, publication, radio, television, or film presentation designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself."[94]

If a given policy or activity is affected by pending or proposed legislation, any discussion of that policy or activity by officials will necessarily refer to such legislation, either explicitly or by implication, and will presumably be either in support of or in opposition to it. Thus, an interpretation of a "pending legislation" statute which strictly prohibited expenditures of public funds for dissemination of views on pending legislation would preclude virtually any comment by officials on agency or administration policy or activities. Absent a compelling indication of congressional intent, GAO has been unwilling to adopt this approach.

The Comptroller General has construed the "pending legislation" provisions as applying primarily to indirect or "grass roots" lobbying and not to direct contact with Members of Congress. In other words, the statute prohibits appeals to members of the public suggesting that they in turn contact their elected representatives to indicate support of or opposition to pending legislation, thereby expressly or implicitly urging the legislators to vote in a particular manner. This is essentially the same interpretation the Justice Department has given to the previously-discussed criminal statute, 18 U.S.C. § 1913.

The extent to which GAO will investigate an alleged lobbying violation depends in large measure on the amount of money involved. As a minimum, GAO will review materials submitted to it and will solicit the written justification of the agency in any case. The extent to which GAO will investigate beyond that depends on the potential amounts involved balanced against the likelihood of uncovering impropriety. See B-142983, September 18, 1962.

The court cases cited previously in our discussion of 18 U.S.C. § 1913 for the proposition that the criminal statute does not create a private cause of action also discuss, and reach the same conclusion with respect to, the appropriation act provision.

[94]Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-166, § 509, 103 Stat. 1159, 1190 (1989).

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GAO concluded in a 1984 study that further statutory restraints on executive branch lobbying did not appear necessary. GAO did recommend, however, that the restriction on "grass roots" lobbying be enacted into permanent law. No Strong Indication That Restrictions on Executive Branch Lobbying Should Be Expanded, GAO/GGD-84-46 (March 20, 1984). See also B-206391/B-217896, October 30, 1985; B-206391, July 2, 1982. (Both of these are comments on proposed legislation which was not enacted.)

Before proceeding to the specific cases, certain threshold concerns should be noted. Most of the pre-1985 cases were decided under the governmentwide ("this or any other act") restriction. The cases are included to illustrate types of conduct that have been found either legitimate or questionable. The particular agencies involved may or may not still be subject to an anti-lobbying restriction. In addition, different versions of the statute could produce different results. It would also seem logical that the broader "publicity or propaganda not authorized by Congress" version should cover the specific type of publicity or propaganda designed to influence pending legislation, an application that was unnecessary while the "this or any other act" provision existed.[95]

In any event, the cases are relevant in evaluating the types of conduct that are more likely to raise questions under 18 U.S.C. § 1913, with one distinction. The criminal statute by its terms prohibits certain actions even before a bill is introduced; the appropriation act restrictions, unless specified to the contrary, require "pending legislation." Of course, this would include appropriation acts.

Finally, unless a particular provision specifically includes lobbying at the state level, the legislation must be pending before the United States Congress, not a state legislature. E.g., B-193545, March 13, 1979; B-193545, January 25, 1979.

(6) Cases involving "grass roots" lobbying violations

A bill was introduced in the 86th Congress to prohibit the Post Office Department from transporting first class mail by aircraft on a space available basis. The Post Office Department opposed the

[95]Thus far, GAO has not applied the "publicity or propaganda not authorized by Congress" provision to "pending legislation" lobbying. See 66 Comp. Gen. 707 (1987); B-229257, June 10, 1988; B-223098/B-223098.2, October 10, 1986; B-217896, July 25, 1985. However, none of these cases involved forms of "grass roots" lobbying which GAO would have found improper.

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bill and embarked on a campaign to defeat it. Among the tactics used were letters to postal patrons and "canned" editorials asking the public to contact Members of Congress to urge opposition to the bill. GAO found that this activity violated the anti-lobbying statute. B-116331, May 29, 1961.

Another violation resulted from the use of a kit entitled "Battle of the Budget 1973." The White House at the time was opposed to 15 bills then pending in Congress which it felt would exceed the administration's 1974 budget. White House staff writers assembled a package of materials that were distributed to executive branch officials in an effort to defeat the bills. The kit included statements that people should be urged to write their representatives in Congress to support the administration's opposition to the 15 bills. This, the Comptroller General held, violated the publicity and propaganda statute. B-178448, April 30, 1973.

Administration budget battles with Congress produced another violation in B-178648, September 21, 1973. This case involved prerecorded news releases provided to radio stations by executive branch agencies. GAO reviewed over 1,000 of these releases and while most were proper, nevertheless found several that violated the law. Examples of the violations are as follows:

(1)"If the President's position of resisting higher taxes resulting from big spending is to be upheld, the people need to be heard. The voice of America can reach Capitol Hill and can be a positive persuader."

(2)"If we are going to have economic stability and fiscal responsibility, we must all support the President's budget program—and let Congress know we support it."

The next two examples illustrate important points:

(3)"If we don't slow down Federal spending . . . we face a 15-percent increase in income taxes and more inflation. I don't think any American wants this. But, in the final analysis the responsibility rests with the voters and the taxpayers. They must let the Congress know how they feel on this critical issue."

Here, the listener is urged merely to make his or her "views" known to Congress. This is nevertheless a violation if the context

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makes it clear, as in the example, what those "views" are supposed to be.

(4)"All those unneeded new bills headed for the President's desk from Congress—all the unworthy Federal programs and projects—are guns pointed at the heads of American taxpayers. . . . Right now, Congress is getting all kinds of letters from special interest groups. Those groups are pleading their own selfish causes. I think Congress should hear from all Americans on what the President is trying to do whatever their views may be. And I say that regardless of whether those who contact their Congressmen happen to be in agreement with me."

The purported disclaimer in the last sentence does not cure the obvious violation.

A clear violation occurred in B-128938, July 12, 1976. The Environmental Protection Agency, as part of an authorized public information program, contracted with a nonprofit organization to publish a newsletter in California entitled "Water Quality Awareness." One of the articles discussed a pending bill which environmentalists opposed. The article went on to name the California representatives on the House committee that was considering the bill and exhorted readers to "[c]ontact your representatives and make sure they are aware of your feelings concerning this important legislation." As with some of the violations in B-178648, the context of the article left no doubt what those "feelings" were supposed to be. The fact that EPA did not publish the article directly did not matter since an agency has a duty to insure that its appropriations are not used to violate a statutory prohibition. See also B-202975, November 3, 1981.

Two more recent cases in which violations were found are B-212235, November 17, 1983, and Improper Lobbying Activities by the Department of Defense on the Proposed Procurement of the C-5B Aircraft, GAO/AFMD-82-123 (September 29, 1982), both of which are summarized in our previous discussion of 18 U.S.C. § 1913.

It is not necessary for a statement to explicitly refer to the particular piece of pending legislation. Thus, a lobbying campaign using appropriated funds urging the public to write to Members of Congress to support a strong merchant marine at a time when cargo

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preference legislation is pending violates the law. B-192746-0.M., March 7, 1979.

There is one case in which GAO found conduct short of the traditional form of "grass roots" lobbying to constitute a violation, but its precedent value is unclear. The 1979 Interior Department appropriation act (Pub. L. No. 95-465, § 304) included a provision very similar to the 1990 anti-lobbying provision quoted earlier.[96] In 59 Comp. Gen. 115 (1979), GAO reasoned that section 304 must be read as covering certain activities which would have been permissible under the standard "this or any other act" provision then in effect, otherwise there would have been no purpose in enacting section 304. Accordingly, GAO found section 304 violated by a mass mailing by the National Endowment for the Arts of an information package supporting the Livable Cities Program. Although the literature did not directly exhort readers to lobby Congress, its tenor was clearly designed to promote public support for the program, and the mailing was timed to reach the public just before House reconsideration of a prior refusal to fund the program. Since the result in 59 Comp. Gen. 115 was based on the parallel existence of the "this or any other act" statute, it is unclear whether the same result would be reached in the absence of that statute. In any event, the Interior Department provision, as with similar provisions, applies to appeals to the public rather than direct communication with legislators. Id. See also report entitled Alleged Unauthorized Use of Appropriated Moneys by Interior Employees, CED-80-128 (August 13, 1980).

(7) Pending legislation: cases in which no violation was found

As indicated above, GAO has consistently taken the position that the anti-lobbying statute does not prohibit direct communication, solicited or unsolicited, between agency officials and Members of Congress. This is true even where the contact is an obvious attempt to influence legislation. Thus, GAO concluded that the publicity and propaganda statute was not violated in the following cases:

- Contacts with Members of Congress by federal judges and legislative liaison activities by the Judicial Conference of the United States. 63 Comp. Gen. 624 (1984).

[96]Supra note 93.

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- Visits to Members of Congress by National War College students as part of a seminar on the legislative process. B-209584, January 11, 1983.
- Director of the Office of Management and Budget sent a letter to all Members of the House of Representatives urging opposition to a disapproval resolution on a Presidential Reorganization Plan. B-192658, September 1, 1978.

See also B-200250, November 18, 1980 (agency sent position paper to Members of Congress opposing particular piece of pending legislation); B-164497(5), March 10, 1977 (entertainment in form of dinners for Members of Congress); B-114823, December 23, 1974 (personal visits to Capitol Hill by agency officials during floor debate on authorizing legislation, at request of congressional proponents of the legislation); B-164786, November 4, 1969 (cruises with Members of Congress on Presidential yacht, paid for from entertainment appropriation); B-145883, October 10, 1967 (unsolicited letter to Members of Congress from agency head urging support for continuation of agency programs); B-93353, September 28, 1962 (telegram sent by agency head to all Members of Congress).

A government contractor lobbying with its own corporate (i.e., nonfederal) funds would generally not violate the appropriation act restriction. However, applicable contract cost principles may restrict or prohibit reimbursement. See, e.g., Federal Acquisition Regulation, 48 C.F.R. § 31.205-22; B-218952, August 21, 1985; Nuclear Test Lobbying: DOE Regulations for Contractors Need Reevaluation, GAO/RCED-88-25BR (October 9, 1987). In addition, there may be legislation applicable to contractor lobbying.[97]

Also as indicated above, an agency will not violate the anti-lobbying statute by disseminating material to the public which is essentially expository in nature. Even if the material is promotional, there is no violation, at least of the anti-lobbying statute, as long as it is not clearly designed to induce members of the public to contact their elected representatives. Again, several cases will illustrate.

[97]One of the previously-cited "pending legislation" statutes—the Labor-HHS provision—has an additional sentence, not included in our quotation, barring the use of appropriated funds to pay the salary or expenses of any grant or contract recipient, or agent of such recipient, related to any activity designed to influence pending legislation. In addition, 31 U.S.C. § 1352, enacted in October 1989 and summarized later in our discussion of lobbying with grant funds, includes governmentwide restrictions on certain lobbying activities by contractors.

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For example, the Department of Transportation set up displays on U.S. Capitol grounds of passenger cars equipped with passive restraint systems (airbags). DOT employees at the displays distributed brochures, explained the devices, and answered questions from Members of Congress and the public. All this was done while legislation was pending to prohibit mandatory enforcement of the airbag standard. While, considering the timing and location of the displays, one would have to be pretty stupid not to see this as an obvious lobbying ploy, that did not make it illegal since there was no evidence that DOT urged members of the public to contact their elected representatives. Thus, since it was not illegal for DOT to advocate the use of airbags or to communicate with Congress directly, there was no violation. B-139052, April 29, 1980. The apparent intent alone is not enough; it must be translated into action.

Similarly, the statute was not violated by the following actions:

- Speech by Secretary of the Air Force urging defense contractors to direct their advertising towards convincing the public of the need for a strong defense rather than promoting particular weapon systems manufactured by their companies. Speech did not refer to legislation nor urge anyone to contact Congress. B-216239, January 22, 1985.
- Bumper stickers purchased by Department of Transportation and affixed to government vehicles urging compliance with 55 mph speed limit. B-212252, July 15, 1983.
- Various trips by the District of Columbia Police Chief during which he made speeches supporting the administration's law enforcement policy. B-118638, August 2, 1974.
- Statements by cabinet members, distributed to news media, which discussed pending legislation but were limited to an exposition of the administration's views. B-178648, December 27, 1973.
- Mailings by the National Credit Union Administration to federally chartered credit unions consisting of reprints from the Congressional Record giving only one side of a controversial legislative issue. B-139458, January 26, 1972.

See also B-147578, November 8, 1962 (White House Regional Conferences); B-150038, November 2, 1962 (Department of Agriculture press release); B-148206, March 20, 1962 (radio and television announcements by Commerce Department supporting foreign trade legislation).

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Generally speaking, funds appropriated to carry out a particular program would not be available for political purposes, i.e., for a propaganda effort designed to aid a political party or candidate. See B-147578, November 8, 1962. If for no other reason, such an expenditure would be improper as a use of funds for other than their intended purpose in violation of 31 U.S.C. § 1301(a). However, the publicity and propaganda statute does not provide adequate guidelines to distinguish between legitimate and purely political activities and is therefore applicable to "political" activities only to the extent that the activities would otherwise constitute a violation. See B-130961, October 26, 1972.

In more general terms, it is always difficult to find that conduct is so purely political as to constitute a purpose violation. As stated in B-144323, November 4, 1960:

> "[The question is] whether in any particular case a speech or a release by a cabinet officer can be said to be so completely devoid of any connection with official functions or so political in nature that it is not in furtherance of the purposes for which Government funds were appropriated, thereby making the use of such funds . . . unauthorized. This is extremely difficult to determine in most cases as the lines separating the nonpolitical from the political cannot be precisely drawn.
>
> ". . . As a practical matter, even if we were to conclude that the use of appropriated funds for any given speech or its release was unauthorized, the amount involved would be small, and difficult to ascertain; and the results of any corrective action might well be more technical than real."

Apart from considerations of whether any particular law has been violated, GAO has taken the position that the government should not disseminate misleading information. On occasion, the Comptroller General has characterized publications as "propaganda" and attacked them from an audit perspective.

In 1976, the former Energy Research and Development Administration published a pamphlet entitled "Shedding Light on Facts About Nuclear Energy." Ostensibly created as part of an employee motivational program, ERDA printed copies of the pamphlet far in excess of any legitimate program needs, and inundated the State of California with them in the months preceding a nuclear safeguards initiative vote in that state. The pamphlet had a strong pro-nuclear bias and urged the reader to "Let your voice be heard." On the legal side, the pamphlet did not violate any anti-lobbying statute because

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enforcement action. While the payment would further a purpose of the IRS, it would not contribute to fulfilling the purposes of the EEOC appropriation. 65 Comp. Gen. 800 (1986).

If the basic test is the relationship of the expenditure to the appropriation sought to be charged, it should be apparent that the "necessary expense" concept is a relative one. As stated in 65 Comp. Gen. 738, 740 (1986):

"We have dealt with the concept of 'necessary expenses' in a vast number of decisions over the decades. If one lesson emerges, it is that the concept is a relative one: it is measured not by reference to an expenditure in a vacuum, but by assessing the relationship of the expenditure to the specific appropriation to be charged or, in the case of several programs funded by a lump-sum appropriation, to the specific program to be served. It should thus be apparent that an item that can be justified under one program or appropriation might be entirely inappropriate under another, depending on the circumstances and statutory authorities involved."

The evident difficulty in stating a precise rule emphasizes the role and importance of agency discretion. It is in the first instance up to the administrative agency to determine that a given item is reasonably necessary to accomplishing an authorized purpose. Once the agency makes this determination, GAO will normally not substitute its own judgment for that of the agency. In other words, the agency's administrative determination of necessity will be given considerable deference. The standard GAO uses in evaluating purpose availability is summarized in the following passage from B-223608, December 19, 1988:

"When we review an expenditure with reference to its availability for the purpose at issue, the question is not whether we would have exercised that discretion in the same manner. Rather, the question is whether the expenditure falls within the agency's legitimate range of discretion, or whether its relationship to an authorized purpose or function is so attenuated as to take it beyond that range."

A decision on a "necessary expense" question therefore involves (1) analyzing the agency's appropriations and other statutory authority to determine whether the purpose is authorized, and (2) evaluating the adequacy of the administrative justification, to decide whether the agency has properly exercised, or exceeded, its discretion.

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applicable restrictions did not extend to lobbying at the state level. B-130961-0.M., September 10, 1976. However, GAO's review of the pamphlet found it to be oversimplified and misleading. GAO characterized it as "propaganda" not suitable for distribution to anyone, employees or otherwise, and recommended that ERDA cease further distribution and recover and destroy any undistributed copies. See GAO report entitled Evaluation of the Publication and Distribution of "Shedding Light on Facts About Nuclear Energy," EMD-76-12 (September 30, 1976).

In a later report, GAO reviewed a number of publications related to the Clinch River Breeder Reactor Project and found several of them to be oversimplified and distorted propaganda and as such questionable for distribution to the public. However, the publications were produced by the private sector components of the Project and paid for with utility industry contributions and not with federal funds. While GAO was thus powerless to recommend termination of the offending publications, it nevertheless recommended that the Department of Energy work with the private sector components in an effort to eliminate this kind of material, or at the very least insure that such publications include a prominently displayed disclaimer statement making it clear that the material was not government-approved. GAO report entitled Problems with Publications Related to the Clinch River Breeder Reactor Project, EMD-77-74 (January 6, 1978).

d. Lobbying With Grant Funds

The use of grant funds by a federal grantee for lobbying presents somewhat more complicated issues. On the one hand, there is the principle, noted in various contexts throughout this publication, that an agency should not be able to do indirectly what it cannot do directly. Thus, if an agency cannot make a direct expenditure of appropriated funds for certain types of lobbying, it should not be able to circumvent this restriction by the simple device of passing the funds through to a grantee. Yet on the other hand, there is the seemingly countervailing rule that where a grant is made for an authorized grant purpose, grant funds in the hands of the grantee largely lose their identity as federal funds and are no longer subject to many of the restrictions on the direct expenditure of appropriations.

In some instances, Congress has dealt with the problem by legislation. For example, legislation enacted late in 1989, known as the Byrd Amendment, imposes limited governmentwide restrictions.

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Section 319 of the 1990 Interior Department appropriation act, Pub. L. No. 101-121, 103 Stat. 701, 750 (1989), is a piece of permanent legislation to be codified at 31 U.S.C. § 1352. Subsection (a)(1) provides:

"None of the funds appropriated by any Act may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any Federal action described in paragraph (2) of this subsection."

The actions identified in paragraph (2) are the awarding of any federal contract, the making of any federal grant or loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan, or cooperative agreement. The law includes detailed disclosure requirements and civil penalties. Subsection (e)(1)(C) stresses that the new section 1352 should not be construed as permitting any expenditure prohibited by any other provision of law. Thus, the new law supplements other anti-lobbying statutes; it does not supersede them.

Subsection (b)(7) of 31 U.S.C. § 1352 directs the Office of Management and Budget to issue guidance for agency implementation. OMB published "interim final guidance" on December 20, 1989 (54 Fed. Reg. 52306), supplemented on June 15, 1990 (55 Fed. Reg. 24540). An "interim final rule" for grants was issued jointly by OMB and 28 grantor agencies as a common rule on February 26, 1990 (55 Fed. Reg. 6736). For contracts, interim rules amending the Federal Acquisition Regulations were published on January 30, 1990 (55 Fed. Reg. 3190).

Another example is the legislation governing the Legal Services Corporation. Under the Legal Services Corporation Act, recipients of funds, both contractors and grantees, may not use the funds directly or indirectly to attempt to influence the passage or defeat of legislation. The prohibition covers legislation at the state and local level as well as federal legislation. The statute permits three exceptions: (1) recipients may testify before and otherwise communicate with legislative bodies upon request; (2) they may initiate contact with legislative bodies to express the views of the Corporation on legislation directly affecting the Corporation; and (3) they

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may engage in certain otherwise prohibited lobbying activities when necessary to the proper representation of an eligible client. 42 U.S.C. § 2996f(a)(5).[98] For a general discussion of these provisions, see B-129874-O.M., October 30, 1978. See also B-202569, April 27, 1981.

Three 1981 cases illustrate the application of the Legal Services Corporation statute. In one case, the Board of Aldermen for the City of Nashua, New Hampshire, was considering a resolution to authorize a "food stamp workfare" demonstration project. An attorney employed by the New Hampshire Legal Assistance group, a Legal Services Corporation grantee, wrote to members of the Board urging them to reject the resolution. Since the letter was not related to the representation of any specific client or group of clients but rather had been self-initiated by the attorney, the use of federal funds to prepare and distribute the letter was illegal. B-201928, March 5, 1981.

In the second case, 60 Comp. Gen. 423 (1981), the Corporation and its grantees conducted a lobbying campaign to drum up support for the Corporation's reauthorization and appropriation legislation. The Corporation argued that the actions were permissible under the exception authorizing contact with legislative bodies on legislation directly affecting the Corporation. While recognizing that the statute permitted direct self-initiated contact in these circumstances, GAO reviewed the legislative history and concluded that the exception did not permit "grass roots" lobbying either by the Corporation itself or by its grantees.

In the third case, the Managing Attorney of a Legal Services Corporation grantee made a mass mailing of a form letter to local attorneys. The letter solicited their support for continuation of the LSC program and urged them to contact a local Congressman opposed to reauthorization of the LSC to try to persuade him to change his vote. This too constituted impermissible "grass roots" lobbying. B-202787, December 29, 1981.[99]

[98]Similar provisions, found in 42 U.S.C. § 2996e(c), apply to the Corporation itself. An illustrative case is B-231210, June 7, 1988, aff'd upon reconsideration, B-231210, June 4, 1990, holding that the Corporation is not authorized to retain a private law firm to lobby Congress on its behalf.

[99]Government lobbying has a tendency to adjust to changes in the political climate. A 1988 case, B-231210, June 7, 1988, found the Corporation lobbying to reduce its appropriations.

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More recently, GAO found the statute violated when a grantee used LSC grant funds to oppose the confirmation of Judge Robert Bork to the United States Supreme Court. The finding was based largely on LSC regulations which broadly define "legislation" to include action on appointments. B-230743, June 29, 1990.

Another provision in the LSC enabling legislation prohibits both the Corporation and its grantees from contributing or making available "corporate funds or program personnel or equipment for use in advocating or opposing any ballot measures, initiatives, or referendums." 42 U.S.C. § 2996e(d)(4). The Corporation and one of its grantees violated this one by providing funds and personnel for a campaign to defeat a ballot measure in California. 62 Comp. Gen. 654 (1983).

In addition to the Corporation's enabling legislation, appropriation acts providing funds for the Corporation have included a version of the "publicity and propaganda" restriction, known as the "Moorhead Amendment," which prohibits the use of Corporation funds for publicity or propaganda designed to support or defeat legislation pending before Congress or any state legislature. While serving largely to reemphasize the prohibitions contained in the Corporation's enabling legislation, the Moorhead Amendment makes it clear that the exception for the proper representation of eligible clients does not extend to grass roots lobbying. See 60 Comp. Gen. 423 (1981); B-163762, November 24, 1980.[100]

Still another example of legislation expressly applicable to grantees is discussed in B-202787(1), May 1, 1981. The appropriation act providing funds for the Community Services Administration contained a variety of the "publicity and propaganda" provision which prohibited the use of funds "to pay the salary or expenses of any grant or contract recipient . . . to engage in any activity designed to influence legislation or appropriations pending before the Congress." GAO found this provision violated when a local community action agency used grant funds for a mass mailing of a letter to members of the public urging them to write to their Congressmen to

[100]The Moorhead Amendment has not always been obvious. For example, the Corporation's 1988 appropriation barred the use of funds "for any purpose prohibited or limited by or contrary to any of the provisions of Public Law 99-180." Pub. L. No. 100-202, 101 Stat. 1329, 1329-33. Public Law 99-180 was the Corporation's 1986 appropriation act and contained the Moorhead Amendment (99 Stat. 1162).

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oppose abolition of the agency. In addition, CSA had issued a regulation purporting to exempt CSA grantees from the appropriation act restriction. Finding that CSA had exceeded its authority, the Comptroller General recommended that CSA rescind its ruling. The Justice Department also found the CSA regulations invalid, construing the statute as constituting "an unqualified prohibition against lobbying by federal grantees" and not merely a restriction on grass roots lobbying. 5 Op. Off. Legal Counsel 180 (1981).

The provision discussed in the preceding paragraph was also violated when a university, using grant funds received from the Department of Education, encouraged students to write to Members of Congress to urge their opposition to proposed cuts in student financial aid programs. GAO report entitled Improper Use of Federal Student Aid Funds for Lobbying Activities, GAO/HRD-82-108 (August 13, 1982).

The question of lobbying with grant funds becomes more difficult when the situation is not covered by the new 31 U.S.C. § 1352 and applicable appropriation act restrictions do not expressly cover grantees. Until late in 1981, whether "publicity and propaganda" provisions silent as to grantees applied to grantee expenditures had not been definitively addressed in a decision of the Comptroller General. An early case held that telegrams to Members of Congress by state agencies funded by Labor Department grants constituted an improper use of federal funds where they were clearly designed to influence pending legislation. B-76695, June 8, 1948. This case pre-dated the "publicity and propaganda" provisions and was decided under 18 U.S.C. § 1913. While, as noted earlier, GAO would today be more circumspect in drawing conclusions under the criminal statute,[101] the concept of applying the prohibition to grantee expenditures would arguably be the same under the appropriation act restrictions. In a 1977 letter, GAO noted the principle that funds in the hands of a grantee largely lose their identity as federal funds and said that the applicability of the publicity and propaganda statute was therefore "questionable." B-158371, November 11, 1977 (non-decision letter). A 1978 letter to a Member of the Senate said that the issue should be addressed on a case-by-case basis. B-129874, August 15, 1978.

[101]In fact, 18 U.S.C. § 1913 is now regarded as applicable only to officers and employees of the federal government and not to contractors or grant recipients. See B-214455, October 24, 1984 (citing a May 24, 1983 letter to GAO from the Justice Department's Criminal Division).

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In B-128938, July 12, 1976, GAO said that an agency has a responsibility to insure that its appropriations are not used to violate the anti-lobbying statute. While the case involved expenditures by a contractor, the principle would seemingly apply as well to a grantee.

Finally, in B-202975, November 3, 1981, the Comptroller General resolved the uncertainty, applied the concept of B-128938, and concluded that:

"Federal agencies and departments are responsible for insuring that Federal funds made available to grantees are not used contrary to [the publicity and propaganda] restriction."

The case involved the Los Angeles Downtown People Mover Authority, a grantee of the Urban Mass Transportation Administration, Department of Transportation. Fearing that its funding was in jeopardy, the Authority prepared and distributed a newsletter urging readers to write to their elected representatives in Congress to support continued funding for the People Mover project. The Comptroller General found that this newsletter, to the extent it involved UMTA grant funds, violated the anti-lobbying statute.

In our preceding discussion of lobbying by government agencies, we noted that publicity and propaganda statutes are usually limited to lobbying the United States Congress and do not apply to lobbying at the state level unless expressly so provided. The same principle applies with respect to lobbying with grant funds. B-214455, October 24, 1984; B-206466, September 13, 1982.

e. Government Employees Training Act

A restriction on the use of appropriated funds in connection with lobbying, although not by government officials, is contained in the Government Employees Training Act. The law prohibits the training of government employees (and hence the expenditure of appropriated funds to support such training) "by, in, or through a non-Government facility a substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." 5 U.S.C. § 4107(b)(1).

As of 1990, there have been no Comptroller General decisions applying this provision. However, the statute contains a similarly-worded restriction on subversive activities—5 U.S.C. § 4107(a)(1)—and decisions under that restriction are relevant in construing the

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identical language in the lobbying restriction. Thus, the term "non-Government facility" applies to individuals contracting with or employed by the government to provide training as well as to organizations. 38 Comp. Gen. 857 (1959). However, where an organization is conducting the training, the term does not apply to individual employees of that organization where there is no contractual relationship between those employees and either the government or the government employees receiving the training. Id. See also B-182398, October 24, 1979 (non-decision letter). A test of whether an organization violates the subversive activities prohibition is to determine if it is included in the Attorney General's subversive organization list. See 51 Comp. Gen. 199 (1971); 38 Comp. Gen. 857 (1959). An analog for the lobbying restriction would be to determine if the organization has registered under the Federal Regulation of Lobbying Act.

f. Informational Activities

As we have noted previously, a government agency has a legitimate interest in informing the public about its programs and activities. Just how far it can go depends on the nature of its statutory authority. Certainly there is no need for statutory authority for an agency to issue a press release describing a recent speech by the agency head, or for the agency head or some other official to participate in a radio, television, or magazine interview. Activities of this type are limited only by applicable restrictions on the use of public funds such as the anti-lobbying statutes previously discussed.

A 1983 decision illustrates another form of information dissemination which is permissible without the need for specific statutory support. Military chaplains are required to hold religious services for the commands to which they are assigned. 10 U.S.C. § 3547. Publicizing such information as the schedule of services and the names and telephone numbers of installation chaplains is an appropriate extension of this duty. Thus, GAO advised the Army that it could procure and distribute calendars on which this information was printed. 62 Comp. Gen. 566 (1983). Applying a similar rationale, the decision also held that information on the Community Services program, which provides various social services for military personnel and their families, could be included.

Some agencies have specific authority to disseminate information. Such authority will permit a broader range of activities and gives

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the agency discretion to choose the appropriate means, the selection being governed by the necessary expense doctrine.

The agency may use common devices such as newsletters (e.g., B-128938, July 12, 1976) or conferences or seminars (e.g., B-166506, July 15, 1975). In one case, the Comptroller General approved a much less conventional means. Shortly after World War II, the Labor Department wanted to publicize its employment services for veterans. It did this by discharging balloons from a float in a parade. Attached to the balloons were mimeographed messages asking employers to list their available jobs. Since the Department was charged by statute with publishing information on the program, the cost of the balloons was permissible. B-62501, January 7, 1947. Other pertinent cases are 32 Comp. Gen. 487 (1953) (publication of Public Health Service research reports in scientific journals); 32 Comp. Gen. 360 (1953) (the recording of Office of Price Stabilization forum discussions to be used at similar meetings in other regions); B-89294, August 6, 1963 (use of motion picture by United States Information Agency); B-15278, May 15, 1942 (photographs); A-82749, January 7, 1937 (radio broadcasts).

However, in 18 Comp. Gen. 978 (1939), radio broadcasts by the Veterans Administration were held to violate 31 U.S.C. § 1301(a) because the agency did not have statutory authority to disseminate information about its activities. Similarly, the Bureau of Printing and Engraving needed statutory authority to publish a 100-year history to commemorate its centennial because the Bureau is essentially an "industrial and service" establishment and lacked authority to disseminate information. 43 Comp. Gen. 564 (1964).

g. Advertising and the Employment of Publicity Experts

(1) Commercial advertising

Suppose you opened this publication and found on the inside front cover a full-page advertisement for somebody's soap or underwear or aluminum siding or the local pool parlor. We assume most readers would find this offensive. There is in fact a long-standing policy against involving the government in commercial advertising. In the case of government publications, the policy is codified in section 13 of the Government Printing and Binding Regulations issued by the Joint Committee on Printing (1986 reprint):

"No Government publication or other Government printed matter, prepared or produced with either appropriated or nonappropriated funds or identified

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with an activity of the Government, shall contain any advertisement inserted by or for any private individual, firm, or corporation; or contain material which implies in any manner that the Government endorses or favors any specific commercial product, commodity, or service."

An explanatory paragraph included in the regulations summarizes many of the reasons for this prohibition. Advertising would be unfair to competitors in that it would, regardless of intent, unavoidably create the impression of government endorsement. It would also be unfair to non-government publications which compete for advertising dollars and need those dollars to stay in business. Acceptance of advertising could also pose ethical, if not legal, problems. (Imagine, for example, lobbyists scrambling to purchase advertising space in the Congressional Record.)

A different situation was presented in 67 Comp. Gen. 90 (1987). The United States Information Agency is authorized to accept donations of radio programs from private syndicators for broadcast over the Voice of America. Some donations were conditioned on the inclusion of commercial advertising. GAO noted that, in the case of public broadcast stations (which are supported by the Corporation for Public Broadcasting), commercial advertising is expressly prohibited by 47 U.S.C. § 399b(b). However, there is no comparable statute applicable to USIA. Therefore, the conditional donations were not subject to any legal prohibition. In view of the traditional policy against commercial advertising, GAO suggested that USIA first consult the appropriate congressional committees.

(2) Advertising of government programs, products, or services

Even the casual viewer of commercial television will note that the government is heavily "into" advertising. Turn on one channel and "Smokey Bear" is pleading with you not to ignite the national forests. Flip to another channel and a feathered character named "Woodsy Owl" admonishes against pollution.[102] Try still another and someone may be telling you to observe the speed limit or join a carpool or collect postage stamps or write for a catalogue of available government publications. A brief description of some of the methods the government uses to advertise may be found in a GAO report entitled Federal Energy Administration's Contract with the

[102]Should anyone have any doubt, both of these characters are recognized (and protected) by act of Congress. See 16 U.S.C. § 580p. Mess with Smokey or Woodsy and you can go to jail. 18 U.S.C. §§ 711 and 711a.

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Advertising Council, Inc., for a Public Relations Campaign on the Need to Save Energy, PSAD-77-151 (August 31, 1977).

Whether an agency's appropriations are available for advertising, like any other expenditure, depends on the agency's statutory authority. Whether to advertise and, if so, how far to go with it are determined by the precise terms of the agency's program authority in conjunction with the necessary expense doctrine and general restrictions on the use of public funds such as the various anti-lobbying statutes. E.g., B-229732, December 22, 1988 (Department of Housing and Urban Development had no authority to incur promotional expenses at a trade show in the Soviet Union the purpose of which was to enhance the potential for sale of American products and services in the Soviet Union, a purpose unrelated to HUD's mission).

As noted previously, some agencies have express promotional authority. For example, the Department of Energy may promote energy conservation. See B-139965, April 16, 1979 (non-decision letter). Similarly, the United States Postal Service has statutory authority to advertise its philatelic services to encourage stamp collecting. B-114874.30, March 3, 1976 (non-decision letter).

As with the dissemination of information, where promotional authority exists, agencies have reasonable discretion, subject to "necessary expense" considerations, in selecting appropriate means. Thus, the Navy could exercise its statutory authorization to promote safety and accident prevention by procuring book matches with safety slogans printed on the covers and distributing them without charge at naval installations. B-104443, August 31, 1951. Another example is B-184648, December 3, 1975.

Activities of the United States Mint furnish additional illustrations. While the Postal Service has long been in the business of promoting the sale of its products to collectors (see, e.g., B-119784, May 18, 1954), the Mint is a relative newcomer. Several statutes in recent years have authorized the Mint to produce and market various commemorative coins. Sales proceeds are applied first to recover production costs, with the balance going to the Treasury or other specified source. In B-206273, September 2, 1983, GAO considered the Mint's promotional authority under legislation authorizing coins to commemorate the 1984 Los Angeles Summer Olympics. GAO concluded that the Mint could stage media events and receptions, and

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The role of discretion in purpose availability is further complicated by the fact that not all federal establishments have the same range of discretion. For example, a government corporation with the authority to determine the character and necessity of its expenditures has, by virtue of its legal status, a broader measure of discretion than a "regular" agency. But even this discretion is not unlimited and is bound at least by considerations of sound public policy. See 14 Comp. Gen. 755 (1935), affirmed upon reconsideration in A-60467, June 24, 1936.

Two decisions involving the Bonneville Power Administration will illustrate. In 1951, the Interior Department asked whether funds appropriated to BPA could be used to enter into a contract to conduct a survey to determine the feasibility of "artificial nucleation and cloud modification" (artificial rainmaking in English) for a portion of the Columbia River drainage basin. If the amount of rainfall during the dry season could be significantly increased by this method, the amount of marketable power for the region would be enhanced. Naturally, BPA did not have an appropriation specifically available for rainmaking. However, in view of BPA's statutory role in the sale and disposition of electric power in the region, GAO concluded that the expenditure was authorized. B-104463, July 23, 1951.

The Interior Department then asked whether, assuming the survey results were favorable, BPA could contract with the rainmakers. GAO thought this was going too far and questioned whether BPA's statutory authority to encourage the widest possible use of electric energy really contemplated artificial rainmaking. GAO emphasized that the expenditure would be improper for a department or agency with the "ordinary authority usually granted" to federal agencies. However, the legislative history of BPA's enabling statute indicated that Congress intended that it have a degree of freedom similar to public corporations and that it be largely free from "the requirements and restrictions ordinarily applicable to the conduct of Government business." Therefore, while the Comptroller General expressly refused to "approve" the rainmaking contract, he felt compelled to hold that BPA's funds were legally available for it. B-105397, September 21, 1951.

For the typical federal department or agency, the range of discretion will be essentially the same, with variations in the kinds of things justifiable under the necessary expense umbrella stemming

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could give away occasional sample coins at these events, if (1) the expenditures were deemed necessary to further the statutory objectives, (2) a reasonable relationship were found to exist between a given expenditure and a marketing benefit for the program, and (3) promotional expenses were recouped from sales proceeds. In 68 Comp. Gen. 583 (1989), GAO applied the same standards to the commemorative coin program generally, but declined to expand the scope of legitimate promotional activities to include the printing of business cards for sales representatives.

The line between promotion and information dissemination is occasionally thin, but the concepts are nevertheless different. Thus, an agency may be authorized to disseminate information but not to promote. If so, its "advertising" must be tailored accordingly. For example, the Federal Housing Administration could disseminate authentic information on available benefits or related procedures under a loan insurance program, but could not use its funds for an advertising campaign to create demand. 14 Comp. Gen. 638 (1935). Similarly, when the United States Metric Board was first created, it could provide information, assistance, and coordination for voluntary conversion to metrics but could not advocate metric conversion. See GAO report entitled Getting A Better Understanding of the Metric System—Implications If Adopted by the United States, CED-78-128, October 20, 1978, and letters B-140399, June 19, 1979, and B-140399, May 29, 1979.

(3) Publicity experts

A statute originally enacted in 1913, now found at 5 U.S.C. § 3107, provides:

"Appropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose."

GAO has had little occasion to interpret or apply 5 U.S.C. § 3107 and, from the earliest cases, has consistently noted certain difficulties in enforcing the statute. In GAO's first substantive discussion of 5 U.S.C. § 3107, the Comptroller General stated "[i]n its present form, the statute is ineffective." A-61553, May 10, 1935. The early cases[103]

[103]There is no mention of the 1913 statute before the 1930's. A small group of cases then arose. In addition to A-61553, cited in the text, see B-26689, May 4, 1943; A-93988, April 19, 1938; A-82332, December 15, 1936; A-57297, September 11, 1934. Another stretch of silence followed and the statute did not arise again until B-181254, February 28, 1975.

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identified three problem areas, summarized in B-181254, February 28, 1975.

First, the prohibition is against compensating any "publicity expert," but the statute does not define the term "publicity expert" nor does it provide criteria for determining who is one. Traditionally, persons employed for or engaged in so-called publicity work have not been appointed as "publicity experts" but under some other designation, and often have other duties as well. Everyone who prepares a press release is not a "publicity expert." Testifying before the House Select Committee on Lobbying Activities in 1950, Assistant Comptroller General Weitzel said:

> "I might mention one of the great difficulties in enforcing that language is it is very, very rare, if ever, the case that a man is on the pay roll as publicity experts [sic]. He can be called almost anything else, and usually and frequently will have other duties, so that that in itself, is a very difficult statute to enforce."[104]

Second, employees engaged in so-called publicity work are normally assigned to their duties by their supervisors. It would be harsh, in the absence of much more definitive legislative or judicial guidance, to withhold the compensation of an employee who is merely doing his or her assigned job. Some thought was given in the 1930's and early 1940's to amending the statute to cure this problem, but the legislation was not enacted. See B-181254, February 28, 1975; B-26689, May 4, 1943; A-82332, December 15, 1936.

Third, the effective implementation of the duties of some agencies requires the acquisition and dissemination of information, although agencies normally do not receive specific appropriations for the required personnel.

Based on these considerations, GAO does not view 5 U.S.C. § 3107 as prohibiting an agency's legitimate informational functions or legitimate promotional functions where authorized by law. The apparent intent of the statute is to prohibit publicity activity "for the purpose of reflecting credit upon an activity, or upon the officials charged with its administration, rather than for the purpose of furthering the work which the law has imposed upon it." A-82332, December 15, 1936. See also B-181254, February 28, 1975. In this

[104]Hearings, supra note 88, at 156.

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sense, 5 U.S.C. § 3107 is closely related to the prohibition on self-aggrandizement previously discussed, although the focus is different in that, to violate 5 U.S.C. § 3107, the activity must be performed by a "publicity expert."

In the only two cases in the 1970's with any substantial discussion of 5 U.S.C. § 3107, GAO considered a mass media campaign by the Federal Energy Administration, now part of the Department of Energy, to educate the American public on the need for and means of energy conservation. Based on the considerations discussed above and on the FEA's statutory authority to disseminate information and to promote energy conservation, GAO found no basis on which to assess a violation of 5 U.S.C. § 3107. B-181254, February 28, 1975; B-139965, April 16, 1979 (non-decision letter). In both cases GAO stressed its view that the statute is not intended to interfere with the dissemination of information which an agency is required or authorized by statute to disseminate, or with promotional activities authorized by law.

The only case in the 1980's to apply 5 U.S.C. § 3107 is B-222758, June 25, 1986. The Chemical Warfare Review Commission, a Presidential advisory committee, hired a public affairs consultant. The Commission's functions were solely advisory; it had no authority to engage in promotional activities or to maintain a public affairs program. In view of the consultant's duties, job title, and reputation, GAO found that he was a "publicity expert." As such, and given the nature of the Commission's functions and its lack of statutory authority, the hiring was held to violate 5 U.S.C. § 3107.

12. Membership Fees

a. 5 U.S.C. § 5946

Appropriated funds may not be used to pay membership fees of an employee of the United States or the District of Columbia in a society or association. 5 U.S.C. § 5946. The prohibition does not apply if an appropriation is expressly available for that purpose, or if the fee is authorized under the Government Employees Training Act. Under the Training Act, membership fees may be paid if the fee is a necessary cost directly related to the training or a condition precedent to undergoing the training. 5 U.S.C. § 4109(b).

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The rule that has evolved under 5 U.S.C. § 5946 is that membership fees for individuals may not be paid, regardless of the resulting benefit to the agency. An agency may, however, purchase a membership in its own name, upon an administrative determination that the expenditure would further the authorized activities of the agency, and this is not affected by any incidental benefits that may accrue to individual employees.[105]

In 24 Comp. Gen. 814 (1945), the Veterans Administration asked whether it could pay membership fees for VA facilities in the American Hospital Association. Facility membership would enable individual employees to apply for personal membership at reduced rates. The Comptroller General responded that the facility memberships were permissible if administratively determined necessary to accomplish the objectives of the appropriation to be charged. The indirect benefit to individual officials would not operate to invalidate the agency membership. However, the expenditure would be improper if its purpose was merely to enable the officials to obtain the reduced rates for personal memberships. VA could not, of course, pay for the individual memberships.

Similarly, GAO advised the Environmental Protection Agency that it could not pay the membership fees for its employees in professional organizations (such as the National Environment Research Center and the National Solid Waste Management Association), notwithstanding the allegation that the benefits of membership would accrue more to the agency than to the individuals. EPA could, however, purchase a membership in its own name if it justified the expenditure as being of direct benefit to the agency and sufficiently related to carrying out the purposes of its appropriation. 53 Comp. Gen. 429 (1973).[106]

In another 1973 decision, the Comptroller General held that the Department of Justice could not reimburse an electronics engineer employed by the Bureau of Narcotics and Dangerous Drugs for membership in the Institute of Electrical and Electronic Engineers.

[105]A few very early decisions will be found to the effect that 5 U.S.C. § 5946 prohibits agency memberships as well as individual memberships. E.g., 19 Comp. Gen. 838 (1940); 24 Comp. Dec. 473 (1918). While these decisions do not appear to have been explicitly overruled or modified, they must be regarded as implicitly repudiated by the subsequent body of case law to the extent they purport to prohibit adequately justified agency memberships.

[106]The last sentence of the decision uses the term "essential." This word is too strong. The necessary expense doctrine does not require that an expenditure be "essential."

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The Department had argued that the government benefited from the membership by virtue of reduced subscription rates to Institute publications and because the membership contributed to employee development. These factors were not sufficient to overcome the prohibition of 5 U.S.C. § 5946. Once again, GAO pointed out that the Bureau could become a member of the Institute in its own name if administratively determined to be necessary. 52 Comp. Gen. 495 (1973). To the same effect is B-205768, March 2, 1982 (Federal Mediation and Conciliation Service can purchase agency membership in Association of Labor Related Agencies upon making appropriate administrative determinations).

In another case, the Comptroller General held that the National Oceanic and Atmospheric Administration could not pay the membership fee of one of its employees in Federally Employed Women, Inc., notwithstanding the employee's designation as the agency's regional representative. The mere fact that membership may be job-related does not overcome the statutory prohibition. B-198720, June 23, 1980. See also 19 Comp. Dec. 650 (1913) (Army could not pay for Adjutant General's membership in International Association of Chiefs of Police). Similarly, the fact that membership may result in savings to the government, such as reduced travel rates for members, does not overcome the prohibition against individual memberships. 3 Comp. Gen. 963 (1924).

As noted, an agency may purchase membership in its own name in a society or association since 5 U.S.C. § 5946 prohibits only memberships for individual employees. The distinction, however, is not a distinction in name only. An expenditure for an agency membership must be justified on a "necessary expense" theory. To do this, the membership must provide benefits to the agency itself. For example, in 31 Comp. Gen. 398 (1952), the Economic Stabilization Agency was permitted to become a member of a credit association because members could purchase credit reports at reduced cost and the procurement of credit reports was determined to be necessary to the enforcement of the Defense Production Act. In 33 Comp. Gen. 126 (1953), the Office of Technical Services, Commerce Department, was permitted to purchase membership in the American Management Association. The appropriation involved was an appropriation under the Mutual Security Act to conduct programs including technical assistance to Europe, and the membership benefit to the agency was the procurement of Association publications for foreign trainees and foreign productivity centers.

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Citing 31 Comp. Gen. 398 and 33 Comp. Gen. 126, the Comptroller General held in 57 Comp. Gen. 526 (1978), that the Department of Housing and Urban Development could purchase, in the name of the Department, air travel club memberships to obtain discount air fares to Hawaii. Similarly, the General Services Administration could join a shippers association to obtain the benefit of volume transportation rates. B-159783, May 4, 1972.

GAO has also approved membership by the Federal Law Enforcement Center in the local Chamber of Commerce, B-213535, July 26, 1984, and by a naval installation in the local Rotary Club, 61 Comp. Gen. 542 (1982). In the latter decision, however, GAO cautioned that the result was based on the specific justification presented, and that the decision should not be taken to mean that "every military installation or regional Government office can use appropriated funds to join the Rotary, Kiwanis, Lions, and similar organizations." Id. at 544.

The acquisition of needed publications for the agency is sufficient benefit to justify purchase of an agency membership. 20 Comp. Gen. 497 (1941) (membership of Naval Academy in American Council on Education); A-30185, February 5, 1930 (membership of Phoenix Indian School in National Education Association). See also 33 Comp. Gen. 126 (1953). Compare 52 Comp. Gen. 495 (1973), holding that acquisition of publications is not sufficient to justify an individual, as opposed to agency, membership.

A variation occurred in 19 Comp. Gen. 937 (1940). The Cleveland office of the Securities and Exchange Commission desired access to a law library maintained by the Cleveland Law Library Association. Access was available only to persons who were stockholders in the Association. The alternative to the SEC would have been the purchase of its own library at a much greater cost. Under the circumstances, GAO advised that 5 U.S.C. § 5946 did not prohibit the stock purchases or the payment of stockholders assessments. GAO further noted, however, that a preferable alternative would be a contract with the Association for a flat-rate service charge.

Where there is no demonstrable benefit to the agency, the membership expense is improper. Thus, in 32 Comp. Gen. 15 (1952), the cost of membership fees for the New York Ordnance District of the

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Army in the Society for Advancement of Management was disallowed. The membership was in actuality four separate memberships for four individuals and the primary purpose was to enhance the knowledge of those individuals.

Since the benefit to the agency must be in terms of furthering the purposes for which its appropriation was made, a benefit to the United States as a whole rather than the individual agency may not be sufficient. In 5 Comp. Gen. 645 (1926), the former Veterans Bureau owned herds of livestock and wanted to have them registered. Reduced registration costs could be obtained by joining certain livestock associations. The benefit of registration would be a higher price if the agency sold the livestock. However, sales proceeds would have to be deposited in the Treasury as miscellaneous receipts and would thus not benefit the agency's appropriations. Membership was therefore improper. (The agency's appropriation language was subsequently changed and the membership was approved in A-38236, March 30, 1932.)

Several of the decisions have pointed out that an agency may accept a gratuitous membership without violating the Antideficiency Act. 31 Comp. Gen. 398, 399 (1952); A-38236, March 30, 1932, quoted in 24 Comp. Gen. 814, 815 (1945).

In addition, payment of a membership fee at the beginning of the period of membership does not violate the prohibition on advance payments found in 31 U.S.C. § 3324. B-221569, June 2, 1986. What is being purchased is a "membership," and the "membership" is received upon payment.

The evolution of the statutory law on membership fees produced a somewhat anomalous result in some of the early cases. 5 U.S.C. § 5946 originally prohibited—and still prohibits—not only membership fees but also the expenses of attending meetings. In the early decades of the statute, some agencies received specific authority to pay the expenses of attendance at meetings, but many did not. Thus, as the individual vs. agency membership distinction developed, some of the decisions were forced to conclude that an agency could purchase a membership in an association but that nobody could attend the meetings since attending meetings could not be done by "the agency" but only through an individual. See, e.g., 24 Comp. Gen. 814, 815 (1945); A-30185, February 5, 1930. Two provisions of the Government Employees Training Act, 5 U.S.C.

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§§ 4109 and 4110, now permit attendance at meetings in certain situations. Thus, as a general proposition, if an organization is closely enough related to an agency's official functions to justify agency membership, it is presumably closely enough related to justify sending a representative to its meetings.

As noted above, the prohibition in 5 U.S.C. § 5946 against individual memberships does not apply if the fee is authorized by the Government Employees Training Act. An illustration is 61 Comp. Gen. 162 (1981), holding that the Defense Department could pay the licensing fees of Methods Time Measurement instructors for the Army Management Engineering Training Agency. The instructors had to be trained and certified—hence the fee—before they could train others. Further, the fee was not a matter of "personal qualification" since the certifications would be restricted to the training of Defense Department personnel and would be of no personal use to the instructors apart from their Defense Department jobs.

Another example is B-223447, October 10, 1986, approving certain individual memberships for U.S. Army Corps of Engineers employees in the Toastmasters International organization as a source of public speaking training. The organization required membership in order to obtain the training. Because the Government Employees Training Act does not apply to active duty members of the uniformed services (68 Comp. Gen. 127 (1988)), the Act's exception to 5 U.S.C. § 5946, and cases applying the Act or the exception, apply to civilian employees of the military departments but not to uniformed personnel.

b. Attorneys

A number of cases have dealt with the expenses of admission to the bar and related items for attorneys employed by the government.

The question first came up in 22 Comp. Gen. 460 (1942), when the Federal Trade Commission asked if it could reimburse one if its attorneys the fee he paid to be admitted to the bar of the Tenth Circuit Court of Appeals. The attorney had paid the fee in order to make an appearance to represent the agency in a suit filed against it. The Comptroller General said no, stating the rule as follows:

"It has been the consistent holding of the accounting officers of the United States that an officer or employee of the Government has upon his own shoulders the duty of qualifying himself for the performance of his official duties

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and that if a personal license is necessary to render him competent therefor, he must procure it at his own expense." Id. at 461.

In 1967, the National Labor Relations Board asked GAO to reconsider the rule in a fact situation similar to that in 22 Comp. Gen. 460. GAO reviewed the basis for the prior decision in light of the Government Employees Training Act, but found no reason to change it. Pointing out that "the privilege to practice before a particular court is personal to the individual and is his for life unless disbarred regardless of whether he remains in the Government service," the Comptroller General again held that the bar admission fee was personal to the attorney and could not be paid from appropriated funds. 47 Comp. Gen. 116 (1967).

The same result was reached in B-161952, June 12, 1978, again to the National Labor Relations Board. The fact that an attorney might require admission to several courts rather than just one in the performance of official duties was found immaterial and GAO rejected the suggestion that the court admission would be of very limited value to the attorney after leaving the government.

Questions have also arisen over the requirement for a government attorney to remain a member in good standing of the bar of some state or the District of Columbia. In a jurisdiction with a "unified" or "integrated" bar, the attorney must pay an annual fee to remain a member in good standing, and membership in the state's bar association goes along with the fee. (Some states require annual fees to remain on the active rolls but do not include bar association membership.) In B-171667, March 2, 1971, the annual fee for an Internal Revenue Service attorney to remain in good standing in the California bar, an integrated bar jurisdiction, was held not reimbursable from appropriated funds. The fee remains a matter of personal qualification and the principle is the same whether applied to a one-time fee or to dues or fees charged on a recurring basis. The decision cited 5 U.S.C. § 5946 as an additional reason. GAO reached the same result in 51 Comp. Gen. 701 (1972), concerning a Patent Office attorney's membership in the unified bar of the District of Columbia; again in B-204213, September 9, 1981, concerning mandatory dues for continued membership in the North Carolina bar; and still again in B-204215, December 28, 1981, concerning the membership of an Internal Revenue Service estate tax attorney in the New Jersey bar.

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Another case applying the prohibition is B-187525, October 15, 1976. The decision further pointed out that an agency may not pay the costs incurred by one of its attorneys in taking a bar examination since the examination is part of the employee's personal qualification process. See also 55 Comp. Gen. 759 (1976) concerning examinations in general.

In 61 Comp. Gen. 357 (1982), GAO held that the Merit Systems Protection Board could not pay the bar membership fees of its appeals officers. It made no difference that the requirement for appeals officers to be bar-admitted attorneys was a new one the Board had imposed on incumbent employees. In addition, the Board could not pay bar review course fees. (The decision distinguished B-187525, cited above, which had permitted bar review course fees in a very limited situation.)

13. Personal Expenses and Furnishings

Items which are classified as personal expenses or personal furnishings may not be purchased with appropriated funds without specific statutory authority. Most of the cases tend to involve government employees, the theory being simply that there are certain things an employee is expected to provide for him(her)self. A prime example is food, covered in detail previously in this chapter.

The rule on personal expenses and furnishings was stated as follows in 3 Comp. Gen. 433 (1924):

> "[P]ersonal furnishings are not authorized to be purchased under appropriations in the absence of specific provision therefor contained in such appropriations or other acts, if such furnishings are for the personal convenience, comfort, or protection of such employees, or are such as to be reasonably required as a part of the usual and necessary equipment for the work on which they are engaged or for which they are employed."

This decision is still cited frequently and the rule is applied in many contexts. Of course, over the years, exceptions have evolved, both statutory and non-statutory. The remainder of this section explores several categories of personal expenses.

a. Business or Calling Cards

Business cards or calling cards are commonly used in the commercial world. (We use the terms synonymously here even though there may be technical distinctions.) As far as the government is concerned, they are inherently personal in nature. Therefore, they are

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from program differences. For example, necessary expenses for an agency with law enforcement responsibilities may include items directly related to that authority which would be inappropriate for agencies without law enforcement functions. Thus, the Immigration and Naturalization Service could use its "salaries and expenses" appropriation to purchase and install lights, automatic warning devices, and observation towers along the boundary between the United States and Mexico. 29 Comp. Gen. 419 (1950). See also 7 Comp. Dec. 712 (1901). Similarly, in B-204486, January 19, 1982, the Federal Bureau of Investigation could buy insurance on an undercover business not so much to insure the property but to enhance the credibility of the operation.

The procurement of evidence is also authorized as a necessary expense for an agency with law enforcement responsibilities. For example, Forest Service appropriations could be used to pay towing and storage charges for a truck seized as evidence of criminal activities in a national forest. B-186365, March 8, 1977. See also 27 Comp. Gen. 516 (1948); 26 Comp. Dec. 780, 783 (1920); B-56866, April 22, 1946.

Cases involving fairs and expositions provide further illustration. For the most part, when Congress desires federal participation in fairs or expositions, it has authorized it by specific legislation. See, e.g., B-160493, January 16, 1967, discussing legislation which authorized federal participation in HemisFair 1968 in San Antonio. For another example, U.S. participation in the 1927 International Exposition in Seville, Spain, was specifically authorized by statute. See 10 Comp. Gen. 563, 564 (1931).

However, specific statutory authority is not essential. If participation is directly connected with and is in furtherance of the purposes for which a particular appropriation has been made, and an appropriate administrative determination is made to that effect, the appropriation is available for the expenditure. 16 Comp. Gen. 53 (1936); 10 Comp. Gen. 282 (1930); 7 Comp. Gen. 357 (1927); 4 Comp. Gen. 457 (1924).[6] Authority to disseminate information will generally provide adequate justification. E.g., 7 Comp. Gen. 357; 4 Comp. Gen. 457.

[6]A few early cases purporting to require specific authority, such as 2 Comp. Gen. 581 (1923), must be regarded as implicitly modified by the later cases.

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considered a personal expense and not payable from appropriated funds without specific statutory authority.

The rule is long-standing and has been applied in a number of decisions. In 20 Comp. Dec. 248 (1913), the Comptroller of the Treasury considered the argument that has been presented in every case—that the cards are used for official business purposes. Be that as it may, business or calling cards are more a matter of personal convenience than necessity. Therefore, the Comptroller advised the State Department that their cost is a personal expense and not chargeable to public funds.[107] The decision also pointed out a practical basis for the rule: If the cards were permitted for certain officials, it would be impossible to draw a fair and enforceable line.

The rule was reiterated in 41 Comp. Gen 529 (1962), in which the purchase of business cards from appropriated funds was held improper for Department of Agriculture officials at overseas posts.

In a more recent case, the Comptroller General applied the prohibition to deny reimbursement to an employee of the National Highway Traffic Safety Administration who had purchased business cards at his own expense. B-195036, July 11, 1979. More recently still, GAO advised the Forest Service that appropriated funds were not available to buy "identification cards" for use by a public affairs officer. The cards were the same as traditional business cards and were to be used for the same purposes. 68 Comp. Gen. 467 (1989). See also B-149151, July 20, 1962, in which the cards were called "cards of introduction." Devising a new name for the same thing does not make a difference. For other cases holding business cards to be personal expenses and therefore unauthorized, see 68 Comp. Gen. 583 (1989); 12 Comp. Gen. 565 (1933); 12 Comp. Dec. 661 (1906); 10 Comp. Dec. 506 (1904); B-131611, February 15, 1968; B-131611, May 24, 1957. The fact that the cost is to be charged to a revolving fund rather than a "direct" appropriation is immaterial. B-234603, August 11, 1989.

The rule is also reflected in the Government Printing & Binding Regulations, section 20 (1986 reprint):

[107]"[I]n official life it has been the practice for the official himself to furnish his own cards, the salaries in most instances being adequate for such expenditures," the Comptroller chided. 20 Comp. Dec. at 250.

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"Printing or engraving of calling or greeting cards is considered to be personal rather than official and shall not be done at Government expense."

A variation occurred in B-173239, June 15, 1978. The Board for International Broadcasting wanted to use what it termed "transmittal slips" to accompany the distribution of its annual report. The "transmittal slip" resembled a business card and contained the words "With the compliments of (name and title), Board for International Broadcasting." It was not necessary to decide whether the "slips" were business cards or not, because 44 U.S.C. § 1106 expressly provides that documents distributed by an executive department or independent establishment may not contain or include a notice that they are being sent with "the compliments" of a government official. Use of the transmittal slips was therefore unauthorized.

For the application of these rules to Members of Congress, see B-198419, November 25, 1980, and B-198419, July 8, 1980.

There is one significant exception. Reception and representation (or comparable forms of "entertainment") appropriations may be used to purchase business cards for employees whose jobs include representation. B-223678, June 5, 1989 (noting that business cards are a "legitimate and accepted" representation device); 68 Comp. Gen. 467, 468 n.1 (1989).

Finally, "name tags" to be worn on the person are not the same as business cards and may be provided from appropriated funds. 69 Comp. Gen. 82 (1989). A name tag is more closely analogous to a government identification card, which is clearly not a personal expense. 2 Comp. Gen. 429 (1923). See also 11 Comp. Gen. 247 (1931) (identification insignia to be worn on caps).

b. Health, Medical Care and Treatment

(1) Medical care

The rule for medical care is that, except for illness directly resulting from the nature of the employment, medical care and treatment are personal to the employee and payment may not be made from appropriated funds unless provided for in a contract of employment or by statute or valid regulation. 57 Comp. Gen. 62 (1977); 53 Comp. Gen. 230 (1973). The case most frequently cited

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for this rule is 22 Comp. Gen. 32 (1942), which contains citations to many of the earlier decisions.[108]

Exceptions have been recognized where a particular item could be justified as being primarily for the benefit of the government rather than the employees. The exceptions involve primarily physical examinations and inoculation. For example, appropriated funds were held available in the following cases:

- 41 Comp. Gen. 387 (1961) (desensitization treatment for a Department of Agriculture horticulturist with a known history of severe reaction to bee and wasp stings).
- 23 Comp. Gen. 888 (1944) (purchase of drugs and their administration by private doctor to employees exposed to spinal meningitis in line of duty; otherwise, agency would have risked having to quarantine the employees and close the facility).
- B-108693, April 8, 1952 (X-rays for Weather Bureau personnel being assigned to Alaska, presumably necessitated by a high incidence of tuberculosis among Eskimos).

By virtue of legislation enacted in 1946 and now found at 5 U.S.C. § 7901, each agency is authorized to establish a health service program to promote and maintain the physical and mental fitness of employees under its jurisdiction. The statute expressly limits authorized health service programs to (1) treatment of on-the-job illness and dental conditions requiring emergency attention; (2) preemployment and other examinations; (3) referral of employees to private physicians and dentists; and (4) preventive programs relating to health.

Under this legislative authority, the Comptroller General advised, for example, that an agency could, upon determining that it will be in the government's interest to do so, provide immunization against specific diseases without charge to employees. 47 Comp. Gen. 54 (1967).

[108]Although not directly related to medical care, there is a very early group of cases, on which the earlier medical care cases partly relied, standing for the proposition that appropriated funds are not available for the burial of a deceased civilian employee unless necessary for the health and/or safety of other employees, in which event the "reasonable expenses of a decent burial" are permissible. 3 Comp. Gen. 111 (1923); 11 Comp. Dec. 789 (1905); 6 Comp. Dec. 447 (1899); 2 Comp. Dec. 347 (1896).

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In 57 Comp. Gen. 62 (1977), the Comptroller General held that the Environmental Protection Agency was authorized by 5 U.S.C. § 7901 to procure diagnostic and preventive psychological counseling services for its employees. The service could encompass problem identification, referral for treatment or rehabilitation to an appropriate service or resource, and follow-up to help an employee readjust to the job during and after treatment, but could not include the actual treatment and rehabilitation. Actual treatment and rehabilitation remain the employee's responsibility.

In B-198804, December 31, 1980, GAO refused to expand the holding in 57 Comp. Gen. 62 to permit an agency to pay the expenses of alcoholism treatment and rehabilitation for one of its employees. Treatment and rehabilitation, as stressed in 57 Comp. Gen. 62, are the employee's responsibility. It made no difference that the employee had been erroneously advised that the expenses would be covered by her health insurance and had already incurred the expenses, since the government cannot be bound by the unauthorized acts or representations of its agents.

Federal agencies are authorized under 5 U.S.C. § 7901 to establish smoking cessation programs for their employees, and may use their operating appropriations to pay the costs. 68 Comp. Gen. 222 (1989). In light of the body of evidence of the health hazards of smoking, the decision reasoned, programs to help employees quit smoking are clearly "preventive programs relating to health" for purposes of the statute.[109]

Physical fitness programs may qualify as preventive health programs under 5 U.S.C. § 7901 to the extent permissible under applicable regulations such as OMB Circulars, the Federal Personnel Manual, and regulations of the General Services Administration. In addition, it may be possible to justify some programs under the necessary expense concept without the need to invoke the statute. For example, in 63 Comp. Gen. 296 (1984), GAO applied the necessary expense doctrine to conclude that Bureau of Reclamation funds were available for physical exercise equipment to be used in a mandatory physical fitness program for firefighters.

[109]The 1989 decision modified 64 Comp. Gen. 789 (1985), which had found smoking cessation programs unauthorized. The 1985 case had correctly held that such programs were not a form of "medical care," but had failed to properly evaluate them as preventive programs.

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In 64 Comp. Gen. 835 (1985), GAO considered the scope of a permissible fitness program under section 7901, concluding that a program could include comprehensive physical fitness evaluations and laboratory blood tests. Based on the statute alone, it could also include physical exercise. However, regulations then in effect precluded use of appropriated funds for physical exercise as part of a health service program. The decision further noted, as 63 Comp. Gen. 296 had held, that physical exercise costs incident to a mandatory program necessitated by the demands of designated positions could be paid as a necessary expense without the need to rely on 5 U.S.C. § 7901. See also B-216852-O.M., March 6, 1985 (discussing GAO's own authority to establish a fitness program); B-216852, December 17, 1984 (non-decision letter).

Subsequent to 64 Comp. Gen. 835, the Office of Personnel Management revised its regulations to include physical fitness programs and facilities as permissible preventive health services. Based on the revised regulations, an agency may now use appropriated funds to provide access to a private fitness center's exercise facilities, although both GAO and OPM caution that expenditures of this type should be carefully monitored and should be undertaken only where all other resources have been considered and rejected. 70 Comp. Gen. ___ (B-240371, January 18, 1991).

Medical treatment not within the scope of 5 U.S.C. § 7901 remains subject to the general rule expressed in cases such as 22 Comp. Gen. 32. Thus, the cost of an ambulance called by an agency medical officer to take an employee to a hospital could not be paid from appropriated funds. B-160272, November 14, 1966. (This is the kind of expense that can be covered by employee health insurance plans.) In another case, GAO rejected the contention that medical expenses are automatically "necessary expenses," and concluded that Internal Revenue Service appropriations were not available to reimburse the State Department for medical services provided to IRS overseas employees and their dependents under the Foreign Service Act of 1946. 53 Comp. Gen. 230 (1973). The decision noted that several other agencies had received specific statutory authority to participate in the program.

A review of the decisions involving medical examinations will further illustrate the relationship of 5 U.S.C. § 7901 to the decisional rules. Prior to the enactment of section 7901, a pre-employment physical examination, the purpose of which was to determine an

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applicant's eligibility for a federal job, was the applicant's responsibility and was not chargeable to appropriated funds. 22 Comp. Gen. 243 (1942).

Applying the "primary benefit of the government" standard, however, the Comptroller General found post-employment examinations permissible in certain situations. Thus, in 22 Comp. Gen. 32 (1942), GAO told the Army that it could use its appropriations to provide periodic physical examinations to detect arsenic poisoning in civilian workers in a chemical warfare laboratory. The decision noted that instances of arsenic poisoning "might have a depressing effect on the morale of fellow workers"[110] and might make it more difficult to find qualified people to do the work.[111] In another case, a civilian employee joined the Army during World War II. He received a medical discharge, and thereafter applied for reinstatement to his former civilian job. GAO advised that the agency could pay for a physical examination which it required prior to reinstatement. 23 Comp. Gen. 746 (1944).

In 1946, 5 U.S.C. § 7901 was enacted. Now, agencies have specific authority to include medical examinations, including pre-employment examinations, without charge to applicants, in the health programs they are authorized to establish. 30 Comp. Gen. 493 (1951). While the statute authorizes establishment of government programs, it does not authorize the reimbursement of privately-incurred expenses. Thus, an applicant who declines to use an available government doctor for a pre-employment examination and instead chooses to have it performed by a private doctor may not be reimbursed. 31 Comp. Gen. 465 (1952).

In situations not covered by the statute, the "primary benefit of the government" test continues to apply. Thus, based on the earlier precedents, the cost of medical examinations by private physicians was approved in the following cases:

[110]The morale of the poisoned workers wouldn't be particularly enhanced either.

[111]While this may sound heartless, the expenditure could be justified only if it was determined to be necessary to carry out the objects of the appropriation, and the appropriation in this instance was for chemical warfare service, not for employee health.

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- 30 Comp. Gen. 387 (1951) (physical examinations of Department of Agriculture employees engaged in testing repellents and insecticides for use by the armed forces; no government medical facilities available).
- 41 Comp. Gen. 531 (1962) (annual physical examinations for Saint Lawrence Seaway Development Corporation employees engaged in strenuous physical work, often under severe weather conditions; no public health facilities in area).

The examinations in both of the above cases could have been included in an authorized health service program. As noted, however, facilities were not available in either case. Thus, since the examinations were for the primary benefit of the government, appropriated funds were available to have them performed by private physicians.

In 65 Comp. Gen. 677 (1986), the Navy could pay for a medical examination required for a private individual joining a government research exercise under invitational travel orders. Although government medical facilities were presumably available, there was no need to note this fact in the decision. Since the individual was neither a government employee nor an applicant for a government job, she could not be required to use the government facility and, since the Navy wanted her participation, it could not very well expect her to bear the expense.

(2) Purchase of health-related items [112]

The purchase of health-related items, while conceptually related to the medical care cases, is also an application of the "personal expense" rule set forth in 3 Comp. Gen. 433, cited at the beginning of this section, that personal equipment needed to qualify an employee to perform the regular duties of his or her position may not be paid from appropriated funds. The rule is illustrated in B-187246, June 15, 1977. There, a Community Services Administration employee's doctor had placed him under certain restrictions because of a back injury. Specifically, he was to use a "sacro-ease positioner" for his office chair and could drive cars only with a minimum 116-inch wheel base, bucket seats, and full power. While the equipment may have been necessary for that particular individual to perform his duties, it was not essential to the transaction

[112]See also "Wearing Apparel," Section C.13.h, for related cases.

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of official business from the government's standpoint. Therefore, the items could not be provided from appropriated funds.

In B-166411, September 3, 1975, an employee who, as a result of a back injury, needed a bedboard while travelling could not be reimbursed beyond the normal per diem. The bedboard was a personal expense. Similarly, gratuities for wheelchair services while travelling were held non-reimbursable in B-151701, July 3, 1963.

A different type of situation arose in B-215640, January 14, 1985. An agency asked whether it could purchase a heavy-duty office chair for an employee who needed extra physical support because he weighed over 300 pounds and had broken 15 regular chairs. While the particular type of chair in question was necessitated by the employee's physical condition, it is nevertheless the case that an office chair is not "personal equipment" but is an item the government is normally expected to provide for its employees. The purchase was therefore authorized.

Another exception occurred in 23 Comp. Gen. 831 (1944). There, GAO approved the rental of an amplifying device to be attached to an official telephone for use by an employee with a hearing handicap. The device was seen as a means of obtaining the best results from available personnel. The precedent value of this decision is somewhat speculative. On the one hand, the device would not become the property of the individual. Yet on the other hand, the decision seems to have been based largely on the difficulty of hiring "qualified" employees in view of the wartime draft situation. (Whether consideration was given to hiring women is not mentioned.)

Generally, however, exceptions stem from some statutory basis. Thus, in 56 Comp. Gen. 398 (1977), the Comptroller General approved the purchase of a motorized wheelchair for use by a Social Security Administration employee. The decision emphasized that a wheelchair is normally the employee's personal expense. In this case, however, the employee had his own non-powered wheelchair and needed a motorized wheelchair only because the agency had not complied with the Architectural Barriers Act of 1968. The wheelchair would, of course, become the property of the government and was approved only as a temporary expedient pending compliance with the statute. More recently, GAO advised that the purchase of a motorized wheelchair for a quadriplegic employee

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who spent half of his time on official travel could be regarded as a "reasonable accommodation" in accordance with regulations implementing the Rehabilitation Act of 1973, again on condition that the wheelchair remain the property of the government. B-240271, October 15, 1990.

In B-188710, September 23, 1977, training funds were held available to procure the taping and brailling of training materials and to provide related services such as interpreters for the deaf and readers for the blind. The decision pointed out that these items would be personal expenses if used in connection with regular duties in that each employee is presumptively qualified to perform the official duties of his or her position. However, in view of the policy in the Rehabilitation Act of providing equal opportunity for handicapped employees, the expenditures were held proper in the limited context of training under the Government Employees Training Act. In contrast, expenses for personal attendants to provide handicapped employees attending training with required personal care (such as help in dressing, bathing, getting in and out of bed) were held not to be proper expenditures from training funds because they are not directly related to training. B-188710, March 23, 1978. (For non-training situations, the employment of reading assistants for blind employees and interpreting assistants for deaf employees is now covered by 5 U.S.C. § 3102.)

Health-related items may also be authorized as "special protective equipment" under 5 U.S.C. § 7903, discussed later under "Wearing Apparel." Thus, prescription ground safety glasses may be purchased for employees engaged in hazardous duties. The glasses become and remain the property of the government. The government can also pay the cost of related eye refraction examinations in limited circumstances. 51 Comp. Gen. 775 (1972); 42 Comp. Gen. 626 (1963).

Relying on 3 Comp. Gen. 433 rather than 5 U.S.C. § 7903, GAO, in 45 Comp. Gen. 215 (1965), approved the purchase of special prescription filter spectacles and clinical eye examinations necessary to obtain the proper prescription for employees operating stereoscopic map plotting instruments. Employees who did not use special glasses frequently lost the required visual skills before reaching the normal retirement age. Also, the special glasses would be of no personal use to the employees except during working hours and would remain the property of the government. However, the purchase of

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eyeglasses for employees who work at video display terminals is not authorized. There is no applicable safety standard in the Occupational Safety and Health Act, the work is not (or at least has not yet been found to be) hazardous to the eyes if proper care is used, and not all employees who work at terminals need eyeglasses. 63 Comp. Gen. 278 (1984).

The 1980's saw a veritable flood of cases involving the purchase of air purifiers ("smokeeaters") as the campaign against smoking became a fashionable "cause celebre." The rules, distilled from several decisions,[113] are as follows:

- Appropriated funds are not available to purchase air purifiers for the private office of an employee who objects to tobacco smoke unless the employee's hypersensitivity to smoke qualifies him or her as handicapped under the Rehabilitation Act of 1973.
- Air purifiers may be purchased for "common areas" such as reading rooms.
- Air purifiers may be placed on the desks of employees who smoke if they will provide a general benefit to all employees working in the area.

c. Office Furnishings (Decorative Items)

An agency's appropriations are available without question to furnish the space it occupies with such necessary items as desks, filing cabinets, and other ordinary office equipment. Questions occasionally arise when the item to be procured is decorative rather than utilitarian.

The availability of appropriations for certain decorative items has long been recognized. In 7 Comp. Dec. 1 (1900), the Comptroller of the Treasury advised the Secretary of the Treasury that "paintings suitable for the decoration of rooms" were within the meaning of the term "furniture." Therefore, an appropriation for the furnishing of public buildings was available to purchase cases and glass coverings for paintings of deceased judges. The paintings had been donated to the government for display in a courtroom.

[113]64 Comp. Gen. 789 (1985), modified on other grounds, 68 Comp. Gen. 222 (1989); 63 Comp. Gen. 115 (1983); 62 Comp. Gen. 653 (1983); 61 Comp. Gen. 634 (1982); B-213666, July 26, 1984; B-215108, July 23, 1984.

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In the absence of either statutory authority or an adequate justification under the necessary expense doctrine, the expenditure, like any other expenditure, is illegal. Thus, the Department of Housing and Urban Development had no authority to finance participation at a trade exhibition in the Soviet Union where HUD's primary purpose was to enhance business opportunities for American companies. 68 Comp. Gen. 226 (1989); B-229732, December 22, 1988. Regardless of whether it may or may not have been a good idea, commercial trade promotion is not one of the purposes for which Congress appropriates money to HUD.

No discussion would be complete without some mention of the "marauding woodpecker" case. It appears that in 1951, "marauding woodpeckers" were causing considerable damage to government-owned transmission lines and the Southwestern Power Administration, Department of the Interior, wanted to buy guns with which to shoot the woodpeckers. Interior first went to the Army, but the Army advised that the types of guns and ammunition desired were not available, so Interior next came to GAO. The Comptroller General held that, if administratively determined to be necessary to protect the transmission lines, Interior could buy the guns and ammunition from the Southwestern Power Administration's construction appropriation. The views of the woodpeckers were not solicited. B-105977, December 3, 1951. Actually, this was not a totally novel issue. Several years earlier, GAO had approved the use of an Interior Department "maintenance of range improvements" appropriation for the control of coyotes, rodents, and other "predatory animals." A-82570, December 30, 1936. See also A-82570/B-120739, August 21, 1957.[7]

[7]Everyone loves a good animal case. Unfortunately, the animals in most GAO decisions are dead or, as in the cases cited in the text, soon to become dead. Readers interested more in amusement than precedent might also check out 7 Comp. Gen. 304 (1927) (removal of a horse "found dead lying on its back in a hole"); 18 Comp. Gen. 109 (1938) (another dead horse); B-86211, July 26, 1949 (death of hogs allegedly caused by being fed garbage purchased from Navy installation; it was pointed out that other hogs had eaten the same government-furnished garbage and managed to survive); B-47255, February 6, 1945 (burial of three dead bulls); B-37205, October 19, 1943 (mule fell off cable swing bridge); A-92649, April 22, 1938 (still another dead horse); B-115434-O.M., June 19, 1953 (agency borrowed a bull from another agency for breeding purposes, then had it slaughtered when it became vicious). These cases are being memorialized here because they will probably never be cited anywhere else. Insects do not escape either. See 34 Comp. Gen. 236 (1954) (grasshopper control in national forests). We're still looking for cases on fish.

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The Comptroller followed this decision in 9 Comp. Dec. 807 (1903), holding that Treasury appropriations were available to buy portraits as furniture for the Ellis Island immigration station if administratively determined "necessary for the public service."

Citing both of these decisions, the Comptroller General held in B-178225, April 11, 1973, that the appropriation for salaries and expenses of the Tax Court was available for portraits of the Chief Judges of the Tax Court, to be hung (the portraits, not the judges) in the main courtroom. Similarly, the Tax Court could purchase artwork and other decorative items for judges' individual offices. 64 Comp. Gen. 796 (1985).

Other decisions approving the use of appropriated funds for decorative items are B-143886, September 14, 1960 (oil painting of agency head for "historical purposes" and public display); B-121909, December 9, 1954 ("solid walnut desk mount attached to a name plate"); B-114692, May 13, 1953 (framing of Presidential Certificates of Appointment for display in the appointee's office).

Purchase of decorative items for federal buildings is now covered in the Federal Property Management Regulations. The regulations authorize expenditures for pictures, objects of art, plants, flowers (both artificial and real), and other similar items. However, such items may not be purchased solely for the personal convenience or to satisfy the personal desire of an official or employee.

The regulation was discussed and the rule restated in 60 Comp. Gen. 580 (1981). Decorative items may be purchased if the purchase is consistent with work-related objectives and the items to be purchased are not "personal convenience" items.[114] The determination of "necessity" is within the agency's discretion, subject to the regulations. The regulations apply equally to space leased by an agency in a privately-owned building. See also 64 Comp. Gen. 796 (1985); 63 Comp. Gen. 110, 113 (1983).

As noted, one type of permissible decorative item is plants. A restriction in a 1980 appropriation act prohibited the use of funds

[114]The decision also noted that the items must be for permanent rather than "seasonal" use. 60 Comp. Gen. at 582. The rule prohibiting use of appropriated funds for seasonal (e.g., Christmas) decorations has since been modified. See 67 Comp. Gen. 87 (1987), discussed in Section C.13.f.

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for plant maintenance contracts. The Comptroller General construed this provision to apply to office space to which particular federal employees were actually assigned. The provision's legislative history suggested that it was not intended to apply to outdoor plants or to plants in common areas which were not the assigned work space of any particular employee or group of employees. 59 Comp. Gen. 428 (1980).

d. Personal Qualification Expenses

Expenses necessary to qualify a government employee to do his or her job are personal expenses and not chargeable to appropriated funds. As stated in an early decision:

> "That which is required of a person to become invested with an office must be done at his own expense unless specific provision is made by law for payment by the Government."

2 Comp. Dec. 262, 263 (1895). Somewhat coldly, the Comptroller added, "if he does not desire the office, he need not accept it." Id. See also United States v. Van Duzee, 140 U.S. 169, 171 (1890) ("[I]t is the duty of persons receiving appointments from the government . . . to qualify themselves for the office"). One example of this rule, bar membership expenses for attorneys, has already been covered in the section on membership fees.

Another commonly encountered example is a license to operate a motor vehicle. A driver's license is considered a personal expense incident to qualifying for the position for which employed. 21 Comp. Gen. 769, 772 (1942); 6 Comp. Gen. 432 (1926); 23 Comp. Dec. 386 (1917). An exception was recognized in B-115463, September 18, 1953, for Army civilian employees on temporary duty of at least six months' duration in foreign countries, where the employees did not already possess driver's licenses, operating a motor vehicle was not part of the job for which the employees were hired but the Army wanted to include driving as part of their TDY duties as a less expensive alternative to hiring additional personnel, and the license was required by the host country. See also B-87138-O.M., July 19, 1949 (Virgin Islands).

The rule has also been applied in the following situations:

- License to practice medicine. 49 Comp. Gen. 450 (1970); 46 Comp. Gen. 695 (1967).

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- License for pesticide applicators. B-235727, February 28, 1990; B-186512, January 17, 1977.
- License to operate motion picture projection equipment. 31 Comp. Gen. 81 (1951).
- License to operate a gasoline pump. 3 Comp. Gen. 663 (1924).

Several of the decisions note that licenses of this nature amount to taxes and should not be imposed on federal employees performing federal functions. Whether a particular item does or does not amount to a tax, the result is the same: An employee who pays cannot be reimbursed.

It is not uncommon for agencies to have some of their employees commissioned as notaries public. By statute, an employee whose job includes serving as a notary public may be reimbursed the expense required to obtain the commission. 5 U.S.C. § 5945. The expense is reimbursable even though the employee uses the notarial power for private as well as government business. 36 Comp. Gen. 465 (1956).

e. Photographs

General rule: The cost of photographs of individual government employees is a personal expense not chargeable to appropriated funds in the absence of specific statutory authority. 31 Comp. Gen. 452 (1952). Thus, the dissemination to the press of photographs of a new agency official upon his appointment was held to be an improper expenditure in B-111336, September 16, 1952.

The rule is intended to prevent the use of public funds for the personal publicity of a particular individual. Exceptions have accordingly been recognized where there is adequate justification that the expenditure is necessary to accomplish some purpose for which the appropriation was made. For example, the distribution of photographs of an area director of the Equal Employment Opportunity Commission was held permissible in 47 Comp. Gen. 321 (1967) where the purpose was to increase cooperation with the EEOC by publicizing its activities and functions. The decision further pointed out that the expense was chargeable to the fiscal year in which the photographs were taken rather than the year in which they were actually used.

Another acceptable justification is illustrated in B-123613, June 1, 1955, involving photographs of the Under Secretary of the Interior. One of the Under Secretary's functions is to represent the Secretary in various parts of the country. The photographs were obtained in

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order to respond to requests by organizations in preparing programs or by the press, in connection with this official travel. Similar justifications were found sufficient in B-114344, May 19, 1953, and B-47547, February 15, 1945.

Photographs for use on identification cards or badges are permissible when administratively determined necessary to protect government property or for security reasons. 23 Comp. Gen. 494 (1944); 20 Comp. Gen. 566 (1941); 20 Comp. Gen. 447 (1941); 2 Comp. Gen. 429 (1923).

At one time, travel regulations did not provide for the reimbursement of passport photographs, and they were held to be non-reimbursable personal expenses unless and until the regulations should be amended. 9 Comp. Gen. 311 (1930). The regulations were subsequently amended and passport photographs are now reimbursable. See 52 Comp. Gen. 177 (1972).

While earlier decisions state the rule in terms of photographs of individual employees, it applies to other photographs as well. The expense will be permitted where it clearly constitutes a means of effecting a proper agency function and disallowed where adequate justification does not exist.

For example, distribution of photographs of a department store display was viewed as a proper means of carrying out a statutory function of encouraging public cooperation toward economic stabilization. B-113464, January 29, 1953. Similar types of justification were found sufficient in B-175434, April 11, 1972; B-113026, January 19, 1953; and B-15278, May 15, 1942. However, inadequate justification was found in B-149493, December 28, 1977, in which a group photograph of interagency participants in a training symposium, sent free to participants, was held a personal, rather than a necessary, expense. Similarly, photographs taken at the dedication of the Klondike Gold Rush Visitor Center to be sent by the National Park Service as "mementos" to persons attending the ceremony were disallowed as a personal gift in B-195896, October 22, 1979.

f. Seasonal Greeting Cards and Decorations

(1) Greeting cards

The cost of seasonal greeting cards is a personal expense to be borne by the officer who ordered and sent them, and may not be charged to public funds.

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In a 1957 case, an agency with overseas posts wanted to send Christmas cards to "important individuals" in the countries where the posts were located. The agency tried to justify the expense as a means of disseminating information and thereby to promote mutual understanding. The Comptroller General ruled, however, that the expense was a personal one and could not be paid from the agency's appropriations. 37 Comp. Gen. 360 (1957). As to the purported justification, the Comptroller said "it seems to us that very little, if any, information in that regard is contained on the ordinary Christmas greeting card." Id. at 361. See also 7 Comp. Gen. 481 (1928) and B-115132, June 17, 1953.

It is immaterial that the card is "nonpersonal," that is, sent by the agency and not containing the names of any individuals. The expenditure is still improper. 47 Comp. Gen. 314 (1967); B-156724, July 7, 1965.

In 47 Comp. Gen. 314, it was also held immaterial that the expenditure had been charged to a trust fund in which donations, which the agency was statutorily authorized to accept, had been deposited.

Transmitting the greetings in the form of a letter rather than a card does not legitimize the expenditure. In 64 Comp. Gen. 382 (1985), an agency head sent out a letter stating that the entire staff of the agency "joins me in wishing you a joyous holiday. We look forward to working with you and your staff throughout the coming year." A Member of Congress questioned the propriety of sending these letters in penalty mail envelopes. GAO noted that the letter "transacts no official business" and "is the essence of a Christmas card." Id. at 384. Therefore, the costs should not have been charged to appropriated funds.

While all of the above cases deal with Christmas greetings, the rule would presumably apply equally to other holiday or seasonal cards. It would also apply to "greetings" not tied in to any particular holiday. B-149151, July 20, 1962 ("thank you for hospitality" cards). The point is that while sending greetings may be a nice gesture, it is not the sort of thing that should be charged to the taxpayers.

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(2) Seasonal decorations

Prior to 1987, based in part on the reasoning that seasonal decorations are significantly different from ordinary office furnishings designed for permanent use, it had been GAO's position that Christmas decorations (trees, lights, ornaments, etc.) were not a proper charge to appropriated funds. 52 Comp. Gen. 504 (1973); B-163764, February 25, 1977 (non-decision letter).

In 1987, GAO overruled 52 Comp. Gen. 504, concluding that the rules for office decorations should be the same whether the decorations are seasonal or permanent. 67 Comp. Gen. 87 (1987). Thus, seasonal decorations are now permissible "where the purchase is consistent with work-related objectives [such as enhancement of morale], agency or other applicable regulations, and the agency mission, and is not primarily for the personal convenience or satisfaction of a government employee." Id. at 88. See also B-226781, January 11, 1988. In implementing this decision, agencies should be appropriately sensitive (whatever that means) with respect to the display of religious symbols. 67 Comp. Gen. at 89.

The rationale of 67 Comp. Gen. 87 does not apply to Christmas cards, which remain "basically individual good will gestures and are not part of a general effort to improve the work environment." Id.

g. Traditional Ceremonies

Expenditures which might otherwise be prohibited as personal may be permissible when they are incurred incident to certain traditional ceremonies. Groundbreaking ceremonies and dedication ceremonies for the laying of cornerstones in public buildings are the most common examples of such traditional ceremonies.

For example, in B-158831, June 8, 1966, the cost of flowers used as centerpieces at a dedication ceremony was held to be a proper expenditure. Similarly, the cost of engraving and chrome-plating a ceremonial shovel used in a groundbreaking ceremony was viewed as a necessary expense of the ceremony. 53 Comp. Gen. 119 (1973). In the cited decision, however, the voucher could not be paid because there was no evidence as to who authorized the work, where the shovel originated, the subsequent use to be made of the shovel, and why there was a year's delay between the ceremony and the engraving.

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Expenses necessarily incident to a groundbreaking or cornerstone ceremony are chargeable to the appropriation for the construction of the building. B-158831, June 8, 1966; B-11884, August 26, 1940 (cost of printing programs and invitations to cornerstone ceremony); A-88307, August 21, 1937 (recording of presidential speech and group photograph at cornerstone ceremony); B-107165-0.M., April 3, 1952 (cost of dedication ceremony).

In 56 Comp. Gen. 81 (1976), the rationale of the above cases was extended to Armed Forces change of command ceremonies. The decision held that the cost of printing invitations to a change of command ceremony for a Coast Guard vessel could be paid from the Coast Guard's appropriations for operating expenses. In view of the traditional role of change of command ceremonies in the military, the Comptroller General concluded that the invitations were not inherently personal. The case was therefore distinguishable from the decisions previously discussed prohibiting the use of public funds for business cards and greeting cards.

The "traditional ceremony" concept has also been applied to a vessel "christening" ceremony at a Navy Yard (A-74436, May 19, 1936), and a Uniformed Services University of the Health Sciences annual graduation ceremony (B-211700, March 16, 1984).

The precise scope of the "traditional ceremony" concept still needs some clarification. One early Comptroller of the Treasury decision, 7 Comp. Dec. 31 (1900), not overruled or modified as of 1990, disallowed expenses for printing, decorations, music, and refreshments at opening exercises for new buildings at the Ellis Island immigrant station. If a building opening is to be distinguished from a cornerstone ceremony, then the decision may still be valid. If not, then the holding as it relates to printing, and probably decorations, has been implicitly superseded by the later cases. Whether music and refreshments are permissible has yet to be discussed.

h. Wearing Apparel

The starting point is the principle that "every employee of the Government is required to present himself for duty properly attired according to the requirements of his position." 63 Comp. Gen. 245, 246 (1984), quoting from B-123223, June 22, 1955. In other words, the government will not clothe the naked, at least where the naked are receiving government salaries.

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Nevertheless, there are certain out-of-the-ordinary items, required by the nature of the job, that the government should furnish. The test was described in 3 Comp. Gen. 433 (1924), and that discussion is still relevant today:

"In the absence of specific statutory authority for the purchase of personal equipment, particularly wearing apparel or parts thereof, the first question for consideration in connection with a proposed purchase of such equipment is whether the object for which the appropriation involved was made can be accomplished as expeditiously and satisfactorily from the Government's standpoint, without such equipment. If it be determined that use of the equipment is necessary in the accomplishment of the purposes of the appropriation, the next question to be considered is whether the equipment is such as the employee reasonably could be required to furnish as part of the personal equipment necessary to enable him to perform the regular duties of the position to which he was appointed or for which his services were engaged. Unless the answer to both of these questions is in the negative, public funds can not be used for the purchase. In determining the first of these questions there is for consideration whether the Government or the employee receives the principal benefit resulting from use of the equipment and whether an employee reasonably could be required to perform the service without the equipment. In connection with the second question the points ordinarily involved are whether the equipment is to be used by the employee in connection with his regular duties or only in emergencies or at infrequent intervals and whether such equipment is assigned to an employee for individual use or is intended for and actually to be used by different employees."

Id. at 433-34. Under the rule set forth in 3 Comp. Gen. 433, most items of apparel were held to be the personal responsibility of the employee. E.g., 5 Comp. Gen. 318 (1925) (rubber boots and coats for custodial employees in a flood-prone area); 2 Comp. Gen. 258 (1922) (coats and gloves for government drivers). But there were limited exceptions. Thus, caps and gowns for staff workers at Saint Elizabeths Hospital in Washington were viewed as for the protection of the patients rather than the employees and could therefore be provided from appropriated funds as part of the hospital equipment. 2 Comp. Gen. 652 (1923). See also 5 Comp. Gen. 517 (1926). Similarly, aprons for general laboratory use were held permissible in 2 Comp. Gen. 382 (1922). Another exception was wading trousers for Geological Survey engineers as long as the trousers remained the property of the government and were not for the regular use of any particular employee. 4 Comp. Gen. 103 (1924). One category of apparel not permissible under the early decision was uniforms. Uniforms were viewed as personal furnishings to be procured at the expense of the wearer. 24 Comp. Dec. 44 (1917).

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There are now three statutory provisions which permit the purchase of items of apparel from appropriated funds in certain circumstances.

The first is 5 U.S.C. § 7903, enacted as part of the Administrative Expenses Act of 1946. It provides:

"Appropriations available for the procurement of supplies and material or equipment are available for the purchase and maintenance of special clothing and equipment for the protection of personnel in the performance of their assigned tasks. For the purpose of this section, 'appropriations' includes funds made available by statute [to wholly-owned government corporations]."

In order for an item to be authorized by 5 U.S.C. § 7903, three tests must be met: (1) the item must be "special" and not part of the ordinary and usual furnishings an employee may reasonably be expected to provide for himself; (2) the item must be for the benefit of the government, that is, essential to the safe and successful accomplishment of the work, and not solely for the protection of the employee, and (3) the employee must be engaged in hazardous duty. See 32 Comp. Gen. 229 (1952); B-193104, January 9, 1979. Thus, this provision is but a slight liberalization of the rule in 3 Comp. Gen. 433.

Applying 5 U.S.C. § 7903, the Comptroller General has held that raincoats and umbrellas for employees who must frequently go out in the rain are not special equipment but are personal items which the employee must furnish. B-193104, January 9, 1979; B-122484, February 15, 1955. Similarly unauthorized are coveralls for mechanics (B-123223, June 22, 1955) and running shoes for Department of Energy nuclear materials couriers (B-234091, July 7, 1989). Nor does 5 U.S.C. § 7903 authorize reimbursement for ordinary clothing and toiletry items purchased by narcotics agents on a "moving surveillance." B-179057, May 14, 1974.

An illustration of the type of apparel authorized by 5 U.S.C. § 7903 is found in 51 Comp. Gen. 446 (1972). There, the Comptroller General advised the Department of Agriculture that snowmobile suits, mittens, boots, and crash helmets for personnel required to operate snowmobiles over rough and remote forest terrain were clearly authorized by the statute. Similarly authorized are down-filled parkas for Office of Surface Mining employees temporarily

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assigned to Alaska or the high country of the Western states. 63 Comp. Gen. 245 (1984).[115]

Items other than wearing apparel may be furnished under 5 U.S.C. § 7903 if the tests set forth above have been met. See, e.g., 28 Comp. Gen. 236 (1948) (mosquito repellent for certain Forest Service employees).

Continuing the old rule, however, the Comptroller General held that 5 U.S.C. § 7903 does not constitute general authority for the purchase of uniforms. 32 Comp. Gen. 229 (1952).

Congress addressed the uniform problem with the second statutory provision under consideration, 5 U.S.C. § 5901, the so-called Federal Employees Uniform Act, most recently amended by section 202 of the Federal Employees Pay Comparability Act of 1990, section 529 of the FY 1991 Treasury-Postal Service-General Government appropriation act, Pub. L. No. 101-509 (November 5, 1990), 104 Stat. 1389, 1456. This provision authorizes annual appropriations to each agency, on a showing of necessity or desirability, to provide a uniform allowance of up to $400 a year (or more if authorized under Office of Personnel Management regulations) to each employee who wears a uniform in the performance of official duties. The agency may pay a cash allowance or may furnish the uniform.

Note that 5 U.S.C. § 5901 is merely an authorization of appropriations. An appropriation is still required in order for payments to be made or obligations incurred. 35 Comp. Gen. 306 (1955). While the decision stated that specific appropriation language is preferable, it recognized that the inclusion of an item for uniforms in an agency's budget request which is then incorporated into a lump-sum appropriation is legally sufficient.

An example of an item that could properly be required under 5 U.S.C. § 5901 is frocks for Department of Agriculture meat grader employees. 57 Comp. Gen. 379, 383 (1978). Another example is robes for administrative law judges of the Occupational Safety and

[115]The distinction between this case and the "foul weather" cases cited in the preceding paragraph is that an employee is expected to provide his or her own clothing suitable for the climate in which the employee normally works or resides. See B-230820, April 25, 1988 (non-decision letter). For example, it is not reasonable to expect an employee who normally lives and works in Florida to own clothing suitable for Alaska in January.

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b. Expenditure Otherwise Prohibited

The second test under the necessary expense doctrine is that the expenditure must not be prohibited by law. As a general proposition, neither a necessary expense rationale nor the "necessary expense" language in an appropriation act can be used to overcome a statutory prohibition. E.g., 38 Comp. Gen. 758 (1959); 4 Comp. Gen. 1063 (1925). In the two cited decisions, the Comptroller General held that the necessary expense language did not overcome the prohibition in 41 U.S.C. § 12 against contracting for public buildings or public improvements in excess of appropriations for the specific purpose. In large measure, this is little more than an application of the rule against repeal by implication discussed in Chapter 2.

There are exceptions where applying the rule would make it impossible to carry out a specific appropriation. A very small group of cases stands for the proposition that, where a specific appropriation is made for a specific purpose, an expenditure which is "absolutely essential" to accomplishing the specific object may be incurred even though the expenditure would otherwise be prohibited. In order for this exception to apply, the expenditure must literally be "absolutely essential" in the sense that the object of the appropriation could not be accomplished without it. Also, the rule would not apply to the use of a more general appropriation.

For example, in 2 Comp. Gen. 133 (1922), modifying 2 Comp. Gen. 14 (1922), an appropriation to provide air mail service between New York, Chicago, and San Francisco was held available to construct hangars and related facilities at a landing field in Chicago notwithstanding the requirement for a specific appropriation in 41 U.S.C. § 12. The reason was that it would have been impossible to provide the service, and hence to accomplish the purpose of the appropriation, without erecting the facilities. See also 17 Comp. Gen. 636 (1938) and 22 Comp. Dec. 317 (1916). (The 1938 decision cites the rule but the decision itself is an ordinary necessary expense case.)

An 1899 case, 6 Comp. Dec. 75, provides another good illustration of the concept. The building housing the Department of Justice had become unsafe and overcrowded. Congress enacted legislation to authorize and fund the construction of a new building for the Department. The statute specifically provided that the new building be constructed on the site of the old building, but did not address the question of how the Department would function during the construction period. The obvious solution was to rent another

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Health Review Commission. B-199492, September 18, 1980. (The decision concluded merely that the expenditure would be legal, not that it was an especially good idea, pointing out that federal judges pay for their own robes.)

In 48 Comp. Gen. 678 (1969), a National Park Service employee was given a uniform allowance but, in less than a year, was promoted to a higher position which required substantially different uniforms. The Comptroller General held that the employee could receive the uniform allowance of his new position even though the sum of the two allowances would exceed the statutory annual ceiling. To hold otherwise would have been inconsistent with the statutory purpose.

While the uniform allowance under 5 U.S.C. § 5901 may be in cash or in kind, there is no similar option for "special clothing or equipment" under 5 U.S.C. § 7903. The latter statute authorizes the furnishing of covered items in kind only. 46 Comp. Gen. 170 (1966).

The third piece of legislation which may permit the purchase of items of apparel from appropriated funds is the Occupational Safety and Health Act of 1970 (OSHA). Section 19 of OSHA, 29 U.S.C. § 668, requires each federal agency to establish an occupational safety and health program and to acquire necessary safety and protective equipment. Thus, protective clothing may be furnished by the government if the agency head determines that it is necessary under OSHA and its implementing regulations.

Under the OSHA authority, the following items have been held permissible:

- Snowmobile suits, mittens, boots, and crash helmets for Department of Agriculture employees required to operate snowmobiles over rough and remote terrain. 51 Comp. Gen. 446 (1972). (This decision has already been noted in the discussion of 5 U.S.C. § 7903 above. The decision held that the items were justifiable on either basis.)
- Down-filled parkas for Interior Department employees temporarily assigned to Alaska or the high country of the Western states during the winter months. 63 Comp. Gen. 245 (1984). (This decision is also noted under 5 U.S.C. § 7903. As with 51 Comp. Gen. 446, the items could be justified under either statute.)

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- Protective footwear for Drug Enforcement Administration agents assigned to temporary duty in jungle environments. The footwear remains the property of the United States and must be disposed of in accordance with the Federal Property Management Regulations. B-187507, December 23, 1976.
- Cooler coats and gloves for Department of Agriculture meat grader employees. 57 Comp. Gen. 379 (1978).
- Ski boots for Forest Service snow rangers, where determined to be necessary protective equipment in a job-hazard analysis. B-191594, December 20, 1978.
- Steel-toe safety shoes for an Internal Revenue Service supply clerk whose work includes moving heavy objects. 67 Comp. Gen. 104 (1987). This item also could have been justified under 5 U.S.C. § 7903. Id.

If an item is authorized under OSHA, it is unnecessary to determine whether it meets the tests under 5 U.S.C. § 7903. E.g., B-187507, cited above. As noted in the above listing, however, several of the decisions have discussed both statutes. If an item does not qualify under OSHA, it is still necessary to examine the other possibilities. E.g., B-234091, July 7, 1989 (running shoes unauthorized under either statute).

Thus, there are three statutes under which purchase of wearing apparel may be authorized—5 U.S.C. § 7903 (special clothing for hazardous occupations), 5 U.S.C. § 5901 (uniform allowances), and OSHA (protective clothing). A decision summarizing all three is 63 Comp. Gen. 245 (1984). If none of these applies, then the rule of 3 Comp. Gen. 433 continues to govern.

An illustration of the continued applicability of the decisional rules is the rental of formal evening wear, a situation which, thus far at least, no one has suggested fits under any of the three statutes.

In a 1955 case, an employee on travel status in England rented a dinner jacket to attend a dinner related to the purposes of the trip. Based on the rule of 3 Comp. Gen. 433, the Comptroller General denied reimbursement for the cost of renting the jacket. 35 Comp. Gen. 361 (1955). "The claimant's failure to take with him necessary clothing to meet reasonably anticipated personal necessities is not considered sufficient to shift the burden of the cost of procuring such clothing from personal to official business." Id. at 362. This decision was followed in a similar situation involving the rental of a

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tuxedo in 45 Comp. Gen. 272 (1965), and again in 64 Comp. Gen. 6 (1984).

A different situation was presented in 48 Comp. Gen. 48 (1968), in which it was held that the Secret Service could pay the rental charges on formal dress attire required to be used by special agents when attending formal functions incident to their furnishing protective services to persons whom they are assigned to protect. In this situation, the purpose of the formal attire is not merely to be "socially acceptable," but is necessary for security purposes, to make the agents less readily identifiable as such.

Similarly, in the not-too-distant past, attorneys arguing before the Supreme Court were required to wear formal cutaway coats and striped pants. In B-164811, July 28, 1969, GAO approved reimbursement for the rental of these items by Justice Department attorneys who were only occasionally required to appear before the Supreme Court. A more recent case restating the rules is 67 Comp. Gen. 592 (1988) (advising agency to resolve certain conflicting information and pay or deny the claim accordingly).

Finally, the rules we have been discussing for wearing apparel apply to government employees. Questions may arise with respect to nongovernment employees, in which event the answer is a pure application of the necessary expense doctrine, in light of whatever statutory authority may exist. For example, in B-62281, December 27, 1946, the State Department was administering a training program for citizens of the Philippines to assist in post-war rehabilitation. The decision held that the government could provide "special purpose" clothing required for the training, such as uniforms, overalls, or work aprons. However, this could not include the furnishing of complete wardrobes adaptable to the cooler climate of the United States; this was a personal expense. See also 29 Comp. Gen. 507 (1950) (clothing for indigent narcotic patients upon release from Public Health Service Hospitals, as therapeutic measure to aid rehabilitation).

i. Miscellaneous Personal Expenses

Several "personal expense" matters are dealt with elsewhere in this chapter, for example, the sections on entertainment and membership fees. Apart from those topics specifically covered elsewhere, the preceding portions of this section cover the situations which have generated the largest number of cases. There are, however, other frequently encountered situations.

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(1) Commuting and parking

One personal expense everyone is familiar with is commuting to and from work (more precisely, between permanent residence and permanent duty location). The employee is expected to be at work; how the employee chooses to get there is entirely his or her own business. 27 Comp. Gen. 1 (1947); 16 Comp. Gen. 64 (1936).

Along with commuting goes parking. It is equally clear that parking incident to ordinary commuting is also a personal expense. 63 Comp. Gen. 270 (1984); 43 Comp. Gen. 131 (1963); B-162021, July 6, 1977. These cases stand for the proposition that the government may not be required to provide parking facilities for its employees. However, an agency may provide employee parking facilities if it determines that the lack of parking facilities will significantly impair the operating efficiency of the agency and will be detrimental to the hiring and retention of personnel. 49 Comp. Gen. 476 (1979); B-168946, February 26, 1970; B-155372-O.M., November 6, 1964. If severely disabled employees are forced to pay parking costs higher than those paid by non-disabled employees working at the same facility,[116] the agency can subsidize the difference. 63 Comp. Gen. 270 (1984).

As several of the cases cited in the preceding paragraph discuss, agencies must generally obtain parking accommodations through the General Services Administration under the Federal Property and Administrative Services Act unless they have independent statutory authority or a delegation from GSA. GSA regards a delegation of authority to lease parking facilities as a delegation of authority to enter into a service contract, which can be approved at the regional level, rather than a delegation of leasing authority. GSA Temp. Reg. No. D-73, § 101-17.201-2 (1989). If an agency has independent statutory or delegated authority to procure space and facilities and has made the requisite morale and efficiency determinations, it may provide for employee parking in a collective bargaining agreement. See 55 Comp. Gen. 1197 (1976).

A governmentwide provision in the 1991 Treasury-Postal Service-General Government Appropriation Act authorizes federal agencies to participate in state or local government programs designed to encourage employees to use public transportation. Pub. L. No.

[116]For example, the disabled employee may have to park closer to the facility at higher rates.

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101-509, § 629, 104 Stat. 1478 (1990). Thus, an agency may use its general operating appropriations to subsidize the use of discounted transit passes by its employees. The "subsidy" is not additional pay for purposes of the prohibition in 5 U.S.C. § 5536. Id.; B-243677/ B-243674, May 13, 1991. The legislation has a sunset date of December 31, 1993.

(2) Miscellaneous employee expenses

Personal expense questions may occur in contexts which arise infrequently and for which there is little precedent. The rationale of the decisions cited and discussed throughout this section should provide the approach necessary to analyze the problem.

For example, the Forest Service requested a lodge owner to furnish lodging and meals to a group of summer employees on temporary duty on a forest project in Maine. While the Forest Service made the request on behalf of the employees, it did not contract directly with the lodge owner. The individual employees received a per diem allowance and were expected to settle their own accounts with the lodge. One of the employees left at the end of the summer without paying his bill and the lodge owner filed a claim against the government. Under these circumstances, the unpaid bill was nothing more than a personal debt of the individual and there was therefore no basis for government liability. B-191110, September 25, 1978. (Had the government contracted directly with the lodge, the result might have been different. See section entitled "Cancelled Hotel Reservations" in Chapter 12.)

In another case, the Navy asked whether it could use appropriated funds to buy luggage for use by members of the Navy's Recruit Mobile Training Team. Normally, luggage is a personal expense. The employee who travels on government business is generally expected to provide his or her own luggage. In this case, however, the members of the team travelled an average of 26 weeks a year. The Comptroller General applied the test set forth in 3 Comp. Gen. 433, discussed at various points throughout this section, and accepted the Navy's judgment that it would be unreasonable to require the team members to furnish their own luggage in view of this excessive amount of travel. Therefore, Navy could buy the luggage, but only on the conditions that it would become Navy property and be stored in Navy facilities. In other words, the members

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could not use the luggage for any personal business. B-200154, February 12, 1981. The Comptroller General declined to state a precise rule as to how much travel is enough to justify government purchase of luggage, and emphasized that the purchase would be permitted only in highly unusual circumstances.

The payment of a federal employee's union dues is the employee's personal obligation even though payment by payroll withholding is authorized. If an agency wrongfully fails to withhold the dues, it may use appropriated funds to reimburse the labor union, but must then recover the payment from the employee unless the debt can be waived. 60 Comp. Gen. 93 (1980); B-235386, November 16, 1989.

A new situation for the federal government is "flexiplace"—permitting an employee to work at home. An agency may compensate an employee for work done at home in limited circumstances. However, increased utility expenses (heating, air conditioning, lighting, etc.) incurred by the employee by virtue of working at home are personal expenses and may not be reimbursed in the absence of statutory authority. 68 Comp. Gen. 502 (1989). As the decision points out, along with the increased utility costs, the employee also incurs savings from reduced commuting, child care, meal, and/or clothing expenses. "How the balance should be struck, if at all, . . . is a legislative judgment." Id. at 506.

14. Rewards

This section discusses when appropriated funds may be used to offer and pay rewards. As a general proposition, statutory authority is needed. Exactly how explicit this statutory authority has to be depends somewhat on the nature of the information or services for which the reward is contemplated and its relationship to the authority of the paying agency.

a. Rewards to Informers

(1) Reward as "necessary expense"

One group of decisions deals with rewards for the furnishing of information regarding violations of civil and criminal laws. The rule is that, if the information is "essential or necessary" to the effective administration and enforcement of the laws, a reward may be offered if it can be tied in to a particular appropriation under the "necessary expense" theory. In that situation, the statutory authority does not have to expressly provide for the payment of

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rewards. If, however, the information is merely "helpful or desirable," then more explicit statutory authority is needed. Since the distinction is difficult to administer as a practical matter, statutory authority has been granted in many situations.[117]

The Comptroller General addressed the issue in 8 Comp. Gen. 613, 614 (1929), stating:

> "An appropriation general in terms is available to do the things essential to the accomplishment of the work authorized by the appropriation to be done. As to whether such an appropriation may properly be held available to pay a reward for the furnishing of information, not essential but probably helpful to the accomplishment of the authorized work, the decisions of the accounting officers have not been uniform. The doubt arises generally because such rewards are not necessarily in keeping with the value of the information furnished and possess elements of a gratuity or gift made in appreciation of helpful assistance rendered."

While the reward in that particular case was permitted, the decision announced that specific legislative authority would be required in the future. See also 9 Comp. Gen. 309 (1930); A-26777, May 22, 1929.

Whether a reward to an informer is necessary or merely helpful depends largely on the nature of the agency's organic authority and its appropriations language. For example, the Forest Service is responsible for protecting the national forests "against destruction by fire and depredations." 16 U.S.C. § 551. It receives appropriations for expenses necessary for "forest protection and utilization." Under this authority, the Comptroller General held that information relating to violations (such as deliberately set forest fires, theft of timber, unauthorized occupancy, and vandalism) could be considered necessary rather than just helpful, and the Forest Service could therefore offer rewards to informers without more specific statutory authority. B-172259, April 29, 1971. See also 5 Comp. Dec. 118 (1898). The ruling was extended in B-172259, August 2,

[117]In addition to the statutes discussed in the text, other examples are: 16 U.S.C. § 668 (information on capturing, buying or selling of bald eagles); 16 U.S.C. § 1540(d) (violations of Endangered Species Act); 16 U.S.C. § 2409 (Antarctic Conservation Act of 1978); 18 U.S.C. § 1751(g) (information concerning Presidential assassinations or attempted assassinations); 18 U.S.C. § 3056 (rewards by the Secret Service); 18 U.S.C. § 3059 (information leading to arrest of person charged with violation of criminal laws of United States or District of Columbia); 21 U.S.C. § 886 (Drug Abuse Act); 39 U.S.C. § 404(a)(8) (violations of postal laws); 50 U.S.C. § 47a (illegal introduction, manufacture, acquisition, or export of special nuclear material or atomic weapons).

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1972, to cover "endorsements" (the "endorsement" by an informant of an undercover agent to help him gain acceptance with the suspects).

Similarly, the Commerce Department could pay rewards to informers as a necessary expense under a provision of the Export Control Act of 1949 which authorized the obtaining of confidential information incident to enforcement of the act. B-117628, January 21, 1954.

The rule was also applied in B-106230, November 30, 1951, in which GAO advised the Treasury Department that rewards to informers for information or evidence on violations of the revenue, customs, or narcotics laws could be offered under an appropriation for the necessary expenses of law enforcement. As long as the information was necessary and not just helpful, more specific appropriations language was not needed. The result would be different if the agency did not have specific law enforcement authority. A.D. 6669, May 15, 1922.

(2) Payments to informers: Internal Revenue Service

One reward to informers most people are familiar with is the reward offered by the Internal Revenue Service for the detection of tax cheats. While the pertinent Internal Revenue Code provision does not use the term "reward," it authorizes the payment of sums deemed necessary "for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws." 26 U.S.C. § 7623. Where information leads to an actual recovery of back taxes or penalties, IRS may pay the informer a reward based on a percentage of the amount recovered, up to a 10 percent maximum set by regulation. GAO approved this scheme as within the statutory authority in 3 Comp. Gen. 499 (1924). The determinations of whether to pay a reward and, if so, its amount are discretionary and, short of a showing of no rational basis, are not reviewable by the courts or by GAO. Saracena v. United States, 508 F.2d 1333 (Ct. Cl. 1975); Thomas v. United States, 22 Cl. Ct. 749 (1991); B-131689, June 7, 1957; B-10761, June 29, 1940; B-5768, September 16, 1939; A-96942, August 23, 1938. The same statute has been held to authorize rewards for information on violations where no tax or fine is collected. 24 Comp. Dec. 430 (1918).

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The IRS statute has been held to constitute an "indefinite reward offer." The informant responds by his conduct, and an "enforceable contract" arises when the parties fix the amount of the reward. Merrick v. United States, 846 F.2d 725 (Fed. Cir. 1988). The plaintiff in that case provided information on an illegal tax shelter in which 1,585 persons had invested, resulting in the recovery of over $10 million. The court upheld the position of the IRS that the taxpayers were "related taxpayers" in a single tax avoidance scheme, thereby limiting the reward to $50,000 for the aggregate recovery rather than $50,000 per person as the plaintiff had sought. Merrick v. United States, 18 Cl. Ct. 718 (1989).

The issue in B-137762.32, July 11, 1977 was whether IRS could contract with an attorney representing an unnamed informant (i.e., a "partially disclosed principal"). The decision discussed the general prohibition against contracting with a partially disclosed principal, but approved the proposed agreement, noting that the reasons for the rule in the ordinary procurement context did not apply to the IRS reward situation. See also B-117628, January 21, 1954. However, Treasury regulations required that the informant's identity be disclosed before any claim could actually be paid. Therefore, disclosure would be necessary if and when a reward became payable but not before then.

An additional issue in B-137762.32 was when an obligation has to be recorded under 31 U.S.C. § 1501(a). No contractual liability to make payment exists until IRS has evaluated the worth of the information and has assessed and collected any underpaid taxes and penalties. This is when the appropriate IRS official determines that a reward should be paid and its amount, and it is at this point that a recordable obligation arises. This is consistent with the Federal Circuit's holding in Merrick.

The Internal Revenue Service may also make "support and maintenance" payments to informers under its general investigation and enforcement authority. In B-183922, August 5, 1975, the Comptroller General held that IRS could not make payments to an informer who was simultaneously being paid by the Justice Department under its Witness Protection Program. However, IRS could make the payments if administratively determined to be necessary after the informer had been disenrolled from the Justice Department's program.

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(3) Payments to informers: Customs Service

The Customs Service also has statutory authority to pay rewards. Under 19 U.S.C. § 1619, a person (other than a government employee) who detects and seizes any vessel, vehicle, aircraft, merchandise, or baggage subject to seizure and forfeiture under the customs or navigation laws, or who furnishes original information, leading to a monetary recovery, may be paid a reward of 25 percent of the amount recovered, not to exceed $250,000 in any case. Rewards are payable from "appropriations available for the collection of the customs revenue." Id. § 1619(d).

This reward is in the nature of compensation for services rendered rather than a personal gratuity. 5 Comp. Gen. 665 (1926). The statute has been deemed mandatory in the sense that an informant who complies with its terms has a legal and judicially-enforceable claim for the reward. Wilson v. United States, 135 F.2d 1005 (3d Cir. 1943); Tyson v. United States, 32 F. Supp. 135 (Ct. Cl. 1940); Rickard v. United States, 11 Cl. Ct. 874 (1987); B-217636, March 4, 1985 (non-decision letter).

The information furnished must be "original" information, that is, the first information the Customs Service has concerning the particular fraud or violation. Lacy v. United States, 607 F.2d 951, 953 (Ct. Cl. 1979); Cornman v. United States, 409 F.2d 230, 234 (Ct. Cl. 1969); Tyson, 32 F. Supp. at 136.

In cases where the furnishing of information leads to recoveries from multiple parties, the monetary ceiling on the reward "for any case" applies to the information furnished, not to the number of recoveries it produces. Cornman v. United States, citing and following 24 Comp. Dec. 17 (1917).

Liquidated damages assessed under customs bonds are "recoveries" for purposes of 19 U.S.C. § 1619. 34 Comp. Gen. 70 (1954). So are recoveries under bail bonds. 19 U.S.C. § 1619(e). Moneys received by customs officers as bribes, however, are not "recoveries" for purposes of the reward. 11 Comp. Gen. 486 (1932).

The statute applies to recoveries under the "customs laws or the navigation laws." See 16 Comp. Gen. 1051 (1937). Recoveries under other laws do not qualify. Thus, in 32 Comp. Gen. 405 (1953), a reward could not be paid where recovery was made under several

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building until the new one was ready, but 40 U.S.C. § 34 prohibits the rental of space in the District of Columbia except under an appropriation specifically available for that purpose, and the Department had no such appropriation. On the grounds that any other result would be absurd, the Comptroller of the Treasury held that the Department could rent interim space notwithstanding the statutory prohibition. While the decision was not couched in terms of the expenditure being "absolutely essential," it said basically the same thing. Since the Department could not cease to function during the construction period, the appropriation for construction of the new building could not be fulfilled without the expenditure for interim space.

c. Expenditure Otherwise Provided for

The third test is that an expenditure cannot be authorized under a necessary expense theory if it is otherwise provided for under a more specific appropriation or statutory funding mechanism. The fact that the more specific appropriation may be exhausted is immaterial. Thus, in B-139510, May 13, 1959, the Navy could not use its shipbuilding appropriation to deepen a channel in the Singing River near Pascagoula, Mississippi, to permit submarines then under construction to move to deeper water. The reason was that this was a function for which funds were traditionally appropriated to the Corps of Engineers, not the Navy. The fact that appropriations had not been made in this particular instance was irrelevant.

Similarly, the Navy could not use appropriations made for the construction or procurement of vessels and aircraft to provide housing for civilian employees engaged in defense production activities because funds for that purpose were otherwise available. 20 Comp. Gen. 102 (1940).

In a more recent case, Federal Prison Industries could use its revolving fund to build industrial facilities incident to a federal prison, or to build a residential camp for prisoners employed in federal public works projects, but could not use that fund to construct other prison facilities because such construction was statutorily provided for elsewhere. B-230304, March 18, 1988.

In these cases, the existence of a more specific source of funds, or a more specific statutory mechanism for getting them, is the governing factor and overrides the "necessary expense" considerations.

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laws and the amount attributable to the customs laws or navigation laws could not be ascertained. Similarly, a violation of the Anti-Dumping Act is not a violation of the customs laws for purposes of 19 U.S.C. § 1619. Fraters Valve & Fitting Co. v. United States, 347 F.2d 990 (Ct. Cl. 1965). Nor is a violation of the internal revenue laws. Wilson v. United States, 135 F.2d 1005 (3d Cir. 1943).

The reward is authorized, based on appraised value, if the item forfeited is destroyed or "delivered to any governmental agency for official use" rather than sold. Under this provision, seized merchandise donated to state governmental agencies under General Services Administration regulations qualifies for the reward since the statutory language is not limited to federal agencies. B-146223, November 27, 1961. Similarly, where forfeited distilled spirits, wines, or beer, which are required by statute to be delivered to GSA for disposal, are subsequently given to "eleemosynary institutions" for medicinal purposes, the reward is payable because the initial delivery to GSA counts as delivery to a "governmental agency for official use" under 19 U.S.C. § 1619. B-146223, February 2, 1962.

b. Missing Government Employees

The only decisions that exist on rewards for locating missing government employees concern military deserters. No decision has been found discussing whether a reward could be offered for the apprehension of a military deserter in the absence of statutory authority, although one early case stated that "[t]here is no reward for the apprehension or delivery of a deserter by operation of law." 20 Comp. Dec. 767 (1914). The reason the issue has not been discussed is probably that the authority has existed by statute for a long time. For many years, a provision in the annual Defense Department appropriation acts authorized payment of expenses of the apprehension and delivery of deserters, including a small reward. In 1984, the provision was made permanent and is now found at 10 U.S.C. § 956(1). The Coast Guard also has permanent authority to offer rewards for the apprehension of deserters. 14 U.S.C. § 644.

Thus, the decisions that do exist concern mainly questions of interpretation under the statutory language and implementing regulations. For example, the term "apprehension" was construed to permit payment of the reward where an Army deserter voluntarily surrendered to a civil officer. 6 Comp. Gen. 479 (1927).

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The statute and implementing regulations limit the amount payable as expenses, but this limitation applies only to the period before the deserter is returned to military control. Expenses incurred after return to military control, for example, continued civil detention at the request of military authorities, are not subject to the limitation and may be paid. B-179920, July 18, 1974; B-147496-0.M., January 4, 1962. Three early decisions permitted payment of expenses incurred in apprehending a deserter in excess of the statutory limit where the deserter was also wanted for other criminal offenses (such as forgery or embezzlement). 16 Comp. Dec. 132 (1909); 11 Comp. Dec. 124 (1904); B-3591, May 27, 1939.[118]

c. Lost or Missing Government Property

It has long been established that no payment may be made to one who finds lost government property unless a reward has been offered prior to the return of the property. 11 Comp. Dec. 741 (1905); 5 Comp. Dec. 37 (1898); A-23019, May 24, 1928; B-117297-0.M., February 12, 1954. To offer a reward for the recovery of lost or missing property, an agency needs some statutory basis. Examples are 10 U.S.C. § 2252 (Defense, military departments) and 14 U.S.C. § 643 (Coast Guard). While the degree of explicitness required has not been definitively addressed, the rules appear to be the same as in the case of rewards for information discussed above.

Two early decisions permitted the use of military "contingent expense" appropriations. In 6 Comp. Gen. 774 (1927), GAO told the Army that it could offer a reward from its contingent expense appropriation for the recovery of stolen platinum. In B-33518, April 23, 1943, prior to the enactment of 10 U.S.C. § 2252, the Navy wanted to use a general appropriation to offer rewards for locating lost aircraft. The Comptroller General advised that the general appropriation could not be used since the reward was not essential to carrying out its purposes, but, relying on 6 Comp. Gen. 774, the Navy could use its contingent expense appropriation.

In 41 Comp. Gen. 410 (1961), the Treasury Department asked if the Coast Guard had any general authority beyond 14 U.S.C. § 643 to make reasonable payments to persons who found lost property. The Comptroller General replied that he knew of none. Based on these decisions, it appears that a general operating appropriation is

[118]The excess payment in each of these cases was authorized from the Army's appropriation for "contingent expenses." While the "contingent expense" language is no longer used, the military departments receive similar appropriations for "emergencies and extraordinary expenses." See 53 Comp. Gen. 707 (1974).

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not available to offer or pay rewards for the recovery of lost property.

In B-79173, October 18, 1948, the Civil Aeronautics Administration had an appropriation for the temporary relief of distressed persons. The question presented was whether the appropriation was available to pay a reward to someone who had found a lost airplane four months after it disappeared. The Comptroller General said no, because the passengers could all be presumed dead after four months, but expressly declined to decide whether the appropriation would have been available if the airplane had been found "with such promptness as to afford reasonable hope that survivors might be found and given relief." The reasoning is similar to that in the information cases—the reward might have been considered necessary to carrying out the relief appropriation if there was a reasonable chance of survivors, but after the passage of several months it would be at best helpful. As with the necessary expense theory in general, "necessary" relates not to the importance of the object itself but to carrying out the purposes of the particular appropriation.

Stolen property was involved in 53 Comp. Gen. 707 (1974). The Air Force asked if it could pay a reward, pursuant to local custom, to two Thai police officers whose services had been instrumental in recovering a stolen road grader. Based on 6 Comp. Gen. 774, the Comptroller General held that the Air Force could pay the reward from its appropriation for emergencies and extraordinary expenses, successor to the old "contingent expense" appropriation. However, apart from that particular appropriation, the decision held that there was no authority for the reward. This part of the decision was based on 8 Comp. Gen. 613, once again implying that the rules in the information cases would apply to missing property as well. (This case would now be covered by 10 U.S.C. § 2252.)

d. Contractual Basis

The basis of the right to a reward is contractual; that is, there must be an offer and an acceptance. The rationale is that "no person by his voluntary act can constitute himself a creditor of the Government." 20 Comp. Dec. 767, 769 (1914).

Where a reward is based on the "necessary expense" theory rather than on explicit statutory authority, the decisions hold that there must be an offer of reward before a reward can be claimed. Performance of the service constitutes the acceptance. See, e.g., 26

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Comp. Gen. 605 (1947); 3 Comp. Gen. 734 (1924). The offer may be in the form of a "standing offer" promulgated by regulation. See, e.g., B-131689, June 7, 1957, in which a Treasury Decision constituted the offer for an IRS reward. Another example is 28 C.F.R. Part 7, a "standing offer" by the Attorney General for rewards for the capture, or information leading to the capture, of escaped federal prisoners.

Consistent with contract theory in general, it is also possible for an offer to be implied from practice or course of conduct. For example, a reward was held payable to an informer under the prohibition laws without a specific offer in 4 Comp. Gen. 255 (1924). The informer was a member of a "gang of whiskey thieves" and the Comptroller General noted that "[u]nder such conditions no specific agreement for compensation is generally made, but with a man of such character there is, and practically must be, to obtain the information, an understanding that there will be compensation." Id. at 256. The course of conduct and standing offer concepts were combined in A-23019, May 24, 1928, involving a reward for finding a lost Navy torpedo. In view of the prevailing understanding in the area and past practice, the Navy's regulations were viewed as "implicitly" making a standing offer.

Similarly, where a reward is based on express statutory authority and the statute either is discretionary or authorizes the agency to "offer and pay" a reward, there must be an offer before payment can be made. 41 Comp. Gen. 410 (1961) (14 U.S.C. § 643); 20 Comp. Dec. 767 (1914) (apprehension of a deserter). On the other hand, if a statute provides for a reward as a matter of entitlement, the reasons for requiring an offer are less compelling; the terms of the statute and any implementing regulations will determine precisely how and when the "contract" comes into existence. E.g., Merrick v. United States, discussed above in connection with the Internal Revenue Service statute.

As to whether the claimant must have knowledge of the offer, the decisions are not entirely consistent. Cases involving the apprehension of deserters have held that performance of the service gives rise to an obligation on the part of the government to pay the offered reward notwithstanding the claimant's lack of knowledge of the offer when he performed the service. 27 Comp. Dec. 47 (1920); 20 Comp. Dec. 767 (1914); B-41659, May 26, 1944. On the other hand, cases involving the finding of lost property have held

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that knowledge is required. Thus, in 26 Comp. Gen. 605 (1947), a reward the Navy had offered for the discovery of a lost airplane was denied where the person discovering the airplane had no knowledge of the offer at the time he performed the service. This ruling was followed in 41 Comp. Gen. 410 (1961), holding that the Coast Guard could not pay a reward under 14 U.S.C. § 643 to one who had no knowledge of the published offer. See also A-35247, April 1, 1931 (escaped prisoner). The latter group of decisions purports to be based on the "great weight of authority." 26 Comp. Gen. at 606.

Since reward payments for information furnished to the government are in the nature of compensation for services rendered rather than personal gratuities, the right to file a claim for the reward vests at the time the compensation is earned (i.e., the services performed). Consequently, that right is not defeated where the informant dies prior to filing a claim or receiving the reward. The issue was discussed in 5 Comp. Gen. 665 (1926), in which GAO approved the payment of a reward to the legal representative of an informant's estate for information furnished under the predecessor of 19 U.S.C. § 1619, even though the informant had not filed a claim prior to his death. See also 2 Comp. Dec. 514 (1896) (customs); B-131689, June 7, 1957 (internal revenue); B-129886-0.M., December 28, 1956 (internal revenue).

e. Rewards to Government Employees

A reward may not be paid to a government employee for services rendered within the scope of his or her official duties. For example, in 4 Comp. Gen. 687 (1925), a Deputy United States Marshal claimed a reward for apprehending a military deserter. The Comptroller General held that the reward could not be paid since the Marshal had been acting in his official capacity (i.e., doing his job) rather than his personal capacity. See also 7 Comp. Gen. 307 (1927); A-35247, April 1, 1931; A-17808, March 30, 1927. Under the Defense Department's statutory authority to pay expenses plus a small reward, a federal employee may be reimbursed actual expenses incurred, but may not be paid the reward. 32 Comp. Gen. 219 (1952). In addition, some statutes, 19 U.S.C. § 1619 for one example, expressly exclude government employees from eligibility.

However, if an employee performs services beyond the scope of his official duties for which a reward has been offered, the reward may be paid since the employee was acting in his capacity as a private citizen. Thus, a reward was held payable to a patrol inspector for

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the Immigration Service who had apprehended a military deserter since the action was outside the scope of his official duties. 5 Comp. Gen. 447 (1925). See also A-17066, March 2, 1927.

The prohibition against an employee's receiving a reward for services performed in the course of his official duties applies as well to rewards offered by non-government sources. The principle is illustrated in 49 Comp. Gen. 819 (1970). An Air Force Major, flying a low-level training mission in the Republic of Colombia, spotted a cargo plane unloading in a suspicious location. He notified the Colombian authorities who seized what turned out to be a load of contraband. Under Colombian law, the informant was entitled to a reward of 25 percent of the total value of the contraband. However, any earnings of an employee in excess of his regular compensation, earned in the course of performing his official duties, belong to the government. Therefore, the Major could not keep the reward but had to turn it in for deposit in the Treasury. Another reason the Major could not keep the reward is the prohibition in the Constitution (Art. I, § 9, cl. 8) against the acceptance by a government officer or employee of gifts or emoluments from a foreign government without the consent of Congress.

15. State and Local Taxes

a. Introduction

It has long been held that the doctrine of sovereign immunity and the Supremacy Clause of the Constitution (Art. VI, cl. 2) combine to prohibit the states from taxing the federal government or its activities. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). This early interpretation was aimed essentially at the preservation of the federal system. Chief Justice Marshall penned his famous dictum in McCulloch that "the power to tax is the power to destroy." 17 U.S. at 431.

Since Justice Marshall's time, federal activities and state taxing schemes have grown in complexity and sophistication. Today, while the basic rule of federal immunity from state and local taxation is easy to state, it is far less easy to apply. In the words of the Supreme Court, federal immunity from state and local taxation is a "much litigated and often confused field." United States v. City of Detroit, 355 U.S. 466, 473 (1958). It "has been marked from the

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beginning by inconsistent decisions and excessively delicate distinctions" (United States v. New Mexico, 455 U.S. 720, 730 (1982)), with the line between taxability and immunity "drawn by an unsteady hand" (United States v. County of Allegheny, 322 U.S. 174, 176 (1944)).

In the simplest situation, federal tax immunity applies to attempts to directly tax the property or activities of a federal department or agency. More difficult problems arise when the entity being taxed is not a "traditional" federal agency. The test enunciated by the Supreme Court is whether the entity is "so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." United States v. New Mexico, 455 U.S. 720, 735 (1982). The most common situation calling for the application of this test, the taxation of government contractors, will be discussed later.

Funds paid over to a grantee under a federal grant program may be used to pay a nondiscriminatory state sales tax on purchases made with grant funds. 37 Comp. Gen. 85 (1957). The same result would apply to purchases by a contractor under a contract with a grantee financed from federal grant funds (B-177215, November 30, 1972), and to state or local taxation of the income of a grantee's employees (14 Comp. Gen. 869 (1935)). The reason is that the funds, once paid over to the grantee, lose their identity as federal funds and are no longer subject to many of the restrictions on the direct expenditure of appropriations. Appropriations for National Guard operations, however, are not grants to the states and the government's immunity from taxation therefore applies. 42 Comp. Gen. 631 (1963).

The government's constitutional immunity from state taxation has been held to extend to federal credit unions. United States v. Michigan, 851 F.2d 803 (6th Cir. 1988). However, a municipal sales tax imposed on a "village corporation" established under the Alaska Native Claims Settlement Act and funded in part by federal funds is not a tax on the United States since the village corporation is not a federal agency and the funds, once distributed to the corporation, are essentially private funds. B-205150, January 27, 1982 (non-decision letter).

In 46 Comp. Gen. 363 (1966), the Comptroller General considered a program under which the United States was to share the cost of

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materials and services procured by farmers to carry out a conservation program. The Department of Agriculture had proposed a procedure whereby the United States would make its cost-sharing payments directly to the vendors. Since the materials purchased would not become the property of the United States, the procedure was viewed as essentially a "credit device" provided to the farmers, and the Comptroller General concluded that the payments could include state sales taxes.

Evidence of tax-exempt status may take various forms, depending on the circumstances. For example, use of a government credit card or purchase order identifies the purchaser as an agency or instrumentality of the United States. Other forms are listed in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 29.305. When other evidence is not available or is inapplicable, immunity is normally established by use of a "tax exemption certificate." This is a printed form (Standard Form 1094) and is usually processed individually. It is prescribed by and illustrated in the FAR. 48 C.F.R. §§ 29.302(b), 53.229, 53.301-1094.

Consistent with the guidance in 48 C.F.R. § 29.302(b), the GAO Policy and Procedures Manual for Guidance of Federal Agencies (title 7, Appendix 4, Section E (1990)), advocates cost-effectiveness in the use of the certificates. This does not mean that small taxes should automatically be paid without attempting to assert the government's immunity. What it means is that taxes in small amounts should be paid regardless of the government's entitlement to immunity where no other evidence is at hand and where a tax exemption certificate would otherwise be required to take advantage of the immunity. The use of blanket exemption certificates and multiple exemption certificates is discussed in 41 Comp. Gen. 560 (1962).

In some jurisdictions, tax exemption can be established by reciting a "tax exempt number" obtained from the taxing authority. Where this procedure exists, it is governed by state regulation. Where available, this can be a simple and cost-effective way of invoking the government's tax immunity in situations where the amounts involved do not justify obtaining a tax exemption certificate. See B-206804-O.M., February 7, 1983.

State taxation problems center on two distinct types of taxing schemes: taxes linked to business transactions involving the federal government, typically sales and use taxes, and property-oriented

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taxes linked to ownership or use of various types of real and personal property located within the geographical boundaries of a state. In addition, government employees frequently incur various types of state and local taxes while performing government business. These three broad categories form the framework of our discussion.

b. Tax on Business Transactions to Which the Federal Government Is a Party

(1) General principles [119]

The key question in determining whether the federal government may pay a sales or other tax imposed on its purchase of goods or services within a state depends on where the legal incidence of the tax falls. This concept was enunciated by the Supreme Court in Alabama v. King and Boozer, 314 U.S. 1 (1941). There, a construction contractor building a federal project objected to the state's imposition of sales tax on its purchase of building materials used in construction. It argued that such purchases should be exempt from state taxation as the costs would ultimately be borne by the federal government and thereby violate federal immunity from state taxation. The Supreme Court disagreed, drawing a distinction between the economic burden imposed on the United States when it must pay more for goods and services because of sales taxes levied against the seller of goods to the government, and the constitutionally impermissible burden which occurs when the government, as a purchaser of goods, is directly liable to the state for taxes imposed on a transaction. In other words, if the "legal incidence" of a tax falls on the seller and the seller alone is obligated to pay, the government may reimburse the seller for his total cost including tax. But if the buyer is in any way legally responsible for the payment of the tax, the federal government as a buyer cannot be required to pay.

A few years earlier, the Court had applied the same distinction in sustaining a state gross receipts tax imposed on a government contractor. James v. Dravo Contracting Co., 302 U.S. 134 (1937).

[119]Two points must be emphasized at the outset. First, there are dozens of cases in this area and it is impossible to treat them all here. The cases included have been selected to illustrate the more important principles and the kinds of problems that arise. Second, mention of a particular state in the following discussion is designed primarily to illustrate a type of tax and is not presented as a definitive statement of the law of that state. State laws and their judicial interpretations may change from time to time. Thus, while a cited decision may still reflect the law of that state, there is no guarantee of this and other decisions involving that state may exist which are not cited.

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The rule that the government may pay a valid "vendor tax" even if it ends up bearing the ultimate economic burden, but is constitutionally immune from a "vendee tax," has been recognized and applied in numerous decisions of the Comptroller General. E.g., 46 Comp. Gen. 363 (1966); 24 Comp. Gen. 150 (1944); 23 Comp. Gen. 957 (1944); 21 Comp. Gen. 1119 (1942); 21 Comp. Gen. 733 (1942). Where a state tax applies to rentals as well as purchases, the rule will apply to rentals also. See 49 Comp. Gen. 204 (1969); B-168593, January 13, 1971; B-170899, November 16, 1970. In the context of sales taxes, the hallmark of a vendor tax is that the law establishing the tax requires the seller to pay it notwithstanding any inability or unwillingness on the part of the seller to collect it from the purchaser. E.g., B-225123, May 1, 1987 (non-decision letter).

In determining whether the legal incidence of a particular tax is on the vendor or the vendee, GAO will follow judicial precedent where available. If there are no federal judicial decisions on point, the determination of the highest court of the state in question will be controlling. 21 Comp. Gen. 843 (1942); B-211093, May 10, 1983; B-172025, March 30, 1971.

Nowhere is the vendor/vendee concept more clearly illustrated than in the many cases considered by GAO on the payment of state gasoline taxes. In 57 Comp. Gen. 59 (1977), the Comptroller General held that, under the Vermont tax on gasoline distributors which was required by law to be passed along to dealers and which dealers in turn were required to collect from consumers, the consumer was legally obligated to pay the tax. This tax collection mechanism constituted a vendee tax, and where the government was the vendee, it was constitutionally immune. Subsequently, the Comptroller General advised a certifying officer that, based on 57 Comp. Gen. 59, he could not properly certify vouchers covering the Vermont fuel tax. B-190293, September 22, 1978. In 1979, Vermont amended its tax law to delete the requirement for pass-through to dealers and consumers. With this amendment, the tax became a vendor tax and the government's immunity no longer applied. 63 Comp. Gen. 49 (1983). It is immaterial that, as a practical matter, the tax will be reflected in the retail price of the fuel. While the economic incidence might still fall on the purchaser, the legal incidence no longer did.

Another example of a vendee tax was the California state gasoline tax, which the dealer was required to collect from a consumer

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2. General Operating Expenses

An illustration of how the necessary expense concept works common to all agencies is the range of expenditures permissible under general operating appropriations. All agencies, regardless of program differences, have certain things in common. Specifically, they all have employees, occupy space in buildings, and maintain an office environment. To support these functions, they incur a variety of administrative expenditures. Some are specifically authorized by statute; others flow logically from the requirements of maintaining a workforce.

All agencies receive general operating appropriations for these administrative expenses. Depending largely on the size of the agency, they may be separate lump-sum appropriations or may be combined with program funds. The most common (but not the only) form of general operating appropriation is entitled "Salaries and Expenses." Although an "S&E" appropriation may contain earmarks, it for the most part does not specify the types of "expenses" for which it is available. Employee salaries, together with related items such as agency contributions to health insurance and retirement, of course comprise the bulk of an S&E appropriation. This section summarizes some of the other items chargeable to S&E funds as necessary expenses of running the agency which are not covered elsewhere in this chapter.

a. Training

Training of government employees is governed by the Government Employees Training Act, 5 U.S.C. Chapter 41, aspects of which are discussed in several places in this chapter. The authority of the Government Employees Training Act is broad, but it is not unlimited. For example, tryouts for the United States Olympic Shooting Team do not constitute training under the Act. 68 Comp. Gen. 721 (1989). Nor do routine meetings, however formally structured, qualify as training. 68 Comp. Gen. 606 (1989). See also 68 Comp. Gen. 604 (1989).

For an entity not covered by the definition of "agency" in the Act, the authority to conduct training is limited. The particular training program must be (1) necessary to carry out the purpose for which the appropriation is made, (2) for a period of brief duration, and (3) special in nature. 36 Comp. Gen. 621 (1957) (including extensive citations to earlier decisions). See also 68 Comp. Gen. 127 (1988).

Training of nonfederal personnel, where necessary to the implementation of a federal program, is a straightforward "necessary

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"insofar as possible." 55 Comp. Gen. 1358 (1976). That finding was predicated in part on the Supreme Court's determination in Diamond National Corp. v. State Board of Equalization, 425 U.S. 268 (1976), that the California sales tax, which had an identically worded requirement, was imposed on the vendee.

In 55 Comp. Gen. 1358, GAO also considered gasoline taxes in Pennsylvania, New Mexico, and Hawaii. Pennsylvania's tax was an excise tax on dealer-users (meaning retail service station operators). The statute did not provide any mechanism for the dealer-user to seek reimbursement from the consumer and therefore it was assumed that the tax levied against the dealer-user would become a part of that retailer's operating expenses. Accordingly, the government could pay, as a part of the purchase price, the amount of tax on the retailer who was required by statute to assume that tax as a cost of doing business.

The New Mexico gasoline tax was a tax on the users of state highways, collected by the retail dealer of gasoline. The tax was added at the pump to the per-gallon cost of gasoline. Since the incidence of this tax was on the vendee, when the United States purchased fuel in New Mexico, it was exempt from the tax. In Hawaii the tax was in the form of a license fee paid by retail distributors of gasoline. This license fee was imposed directly on the distributors with no direct recourse against the consumers of gasoline, although the amount of the license fee was undoubtedly considered in setting the basic cost of fuel sold by those retailers. For this reason the government was authorized to pay the full retail price including whatever amount was attributable to the tax.[120]

In a 1963 case, California law provided for a refund of the tax paid on gasoline for vehicles operated entirely off state highways. The state courts had found that the term "highway" did not encompass roads running in and through national parks. Therefore, relying on the state's interpretation of its own statute, GAO concluded that no tax was payable on gasoline used in vehicles driven only on the grounds of a national monument. 42 Comp. Gen. 593 (1963).

[120]In 28 Comp. Gen. 706 (1949), a Washington State tax on gasoline distributors was similarly found to be a vendor tax and the United States was therefore required to pay the amount added to the purchase price of gasoline to represent the tax. See also B-154266, June 25, 1964, considering the same tax as applied to government-rented commercial vehicles.

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Even if a tax is a valid vendor tax, a state may not apply it discriminatorily to the United States and not to other buyers. See, e.g., B-156561, June 22, 1965.

Thus the immunity of the United States from taxation depends on whether the government is itself being taxed, in which case the seller of goods is merely a collection agent for the state. Similarly, an agency relationship between the United States and a contractor whereby the contractor is acting solely as the government's purchasing agent and title to goods purchased never vests in the contractor, has been held to create a situation where constitutional immunity from tax can be invoked. See Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954); B 177215, November 30, 1972. However, the "contractor as agent" concept is a very limited one. See United States v. New Mexico, 455 U.S. 720, 742 (1982).

A type of "vendor tax" which the federal government must nearly always pay is a business privilege or gross receipts tax, a personal tax on domestic and foreign concerns for the privilege of doing business in the state commonly measured as a percentage of gross receipts. An example of this kind of tax is the Illinois Retailers Occupational Tax discussed in 43 Comp. Gen. 721 (1964), 42 Comp. Gen. 517 (1963), and B-162452, October 6, 1967. Similar taxes have been held to be payable in the states of Arizona (27 Comp. Gen. 767 (1948) and B-167150, February 17, 1970), Hawaii (49 Comp. Gen. 204 (1969) and 37 Comp. Gen. 772 (1958)), New Mexico (B-147615, December 14, 1961), and South Dakota (B-211093, May 10, 1983). A "business privilege" tax on motor fuel sellers imposed by Kansas City, Missouri, was held payable in 32 Comp. Gen. 423 (1953).

The imposition of state taxes—sales, use, gross receipts, etc.—on government contractors has produced more than its share of litigation. Questions arise, for example, because the tax may be based on the value of property in the contractor's possession but owned by the government, or purchased for use in performing the contract. For the most part, the taxes will be upheld. The most comprehensive recent discussion by the Supreme Court is United States v. New Mexico, 455 U.S. 720 (1982). The Court reviewed prior cases and concluded:

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"[T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." Id. at 735.

Government contractors will generally be unable to meet this test except in very limited circumstances such as the Kern-Limerick case noted above. 455 U.S. at 742. In New Mexico, the Court sustained use and gross receipts taxes imposed on government contractors which, in that case, operated under an "advance funding" system whereby the contractors met their obligations by using Treasury funds which had been placed in a special bank account. Id. at 725–26.[121]

In imposing taxes on government contractors, a state may not discriminate against the federal government or substantially interfere with its activities. New Mexico, 455 U.S. at 735 n.11; Phillips Chemical Co. v. Dumas Independent School District, 361 U.S. 376 (1960); City of Detroit v. Murray Corp., 355 U.S. 489, 495 (1958); United States v. City of Manassas, 830 F.2d 530 (4th Cir. 1987), aff'd mem., 485 U.S. 1017 (1988).

The Federal Acquisition Regulation provisions on state and local taxes are found in 48 C.F.R. Subpart 29.3, and the prescribed contract clauses at 48 C.F.R. § 52.229. The typical language in government contracts for the purchase of goods or services recites that the offered price includes all applicable state and local taxes. The purpose of this language is to shift to the contractor the burden of determining which taxes apply, the theory being that the contractor is in a better position than the contracting agency to know this. B-220977, January 15, 1986; B-209430, January 25, 1983. Under this clause, the government cannot be required to pay any additional amount for tax. B-162667, December 19, 1967; B-134347, March 1, 1966. Unless otherwise specified in the contract, this applies even to taxes which are first imposed while the contract is in existence. B-160129, December 7, 1966. In such circumstances it is not relevant that the tax involved has been found to be a valid

[121]Some additional Supreme Court cases sustaining the imposition of state taxes on government contractors in various contexts are Washington v. United States, 460 U.S. 536 (1983); United States v. Boyd, 378 U.S. 39 (1964); City of Detroit v. Murray Corp., 355 U.S. 489 (1958); Alabama v. King and Boozer, 314 U.S. 1 (1941); James v. Dravo Contracting Co., 302 U.S. 134 (1937). There are others. Dravo is regarded as starting the current trend. New Mexico, 455 U.S. at 731-32.

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vendor tax from which the United States is not immune; there can be no liability unless the contract agrees to reimburse taxes. 45 Comp. Gen. 192 (1965); 23 Comp. Gen. 957 (1944); B-148311-0.M., April 20, 1962.

A contract can include a contingency clause for after-imposed state and local taxes. Failure to include such a clause is regarded as the contractor's business decision, in which event the government will not be liable for any additional taxes. Midcon of New Mexico, Inc., ASBCA No. 37249, 90-1 BCA ¶ 22,621 (1990).

Other contract language, of course, may dictate different results. A contract for the "actual costs" would justify reimbursement to a contractor of back taxes and interest assessed against him when a court found that the contractor was not exempt on a constitutional basis. B-147316-0.M., January 9, 1962. The same result would apply in the case of a contract for a cost plus fixed fee, such as the contract in Alabama v. King and Boozer, cited above. 35 Comp. Gen. 378 (1955). Likewise, a contract to pay 50 percent of any new tax imposed by a state would include a business privilege tax assessed against a corporate contractor. B-152325, December 12, 1963.

A contractor may be entitled to equitable relief in certain limited circumstances where both the contractor and the government are mistaken as to the applicability of a state tax to a particular contract and where the contractor reasonably relies on an innocent representation of a government agent that no tax applies. In such cases, the contract may be reformed and the price increased to include the applicable state tax. Cases reaching this result in various fact situations include 64 Comp. Gen. 718 (1985); B-186949, October 20, 1976; B-180071, February 25, 1974; B-169959, August 3, 1970; B-159064, May 11, 1966; and B-153472, December 2, 1965. The underlying legal concept is unjust enrichment resulting from mutual mistake, the theory being that a party, in this case the government, making a misrepresentation, however innocently, should not benefit at the expense of a party who reasonably relies on that misrepresentation. Mutual mistake is an essential element of recovery in these cases. If the contractor cannot establish mutual mistake, the contract is payable as written and the contractor must absorb the additional expense. E.g., Hugh S. Ferguson Co., PSBCA No. 2178, 89-1 BCA ¶ 21,294 (1988) (distinguishing 64 Comp. Gen. 718).

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If a contractor entitled under the contract to be reimbursed for state taxes pays a state tax which is later judicially determined to be invalid, the contractor is nevertheless entitled to reimbursement (43 Comp. Gen. 721 (1964)), unless the contractor paid the tax without being required to do so (38 Comp. Gen. 624 (1959)).

Throughout the preceding discussion, the government has been the buyer. Tax problems may also arise where the government is the seller, although there have been few decisions in this area. In one case, the Texas use tax statute required sellers to obtain a permit, collect the tax, and remit collections to the State Comptroller. The Comptroller General held that the state could not impose these requirements on the disposal of surplus federal property by the General Services Administration under the Federal Property and Administrative Services Act of 1949. 41 Comp. Gen. 668 (1962). The theory is that a state may not infringe on the right of the federal government to conduct its official activities free from state control or regulation.

(2) Public utilities

As with any other occupant of a building, the federal government is a consumer of services from public utilities. A utility bill may include various elements in addition to the basic charge for services used. Some of these elements may be taxes which the government may properly pay; others may be taxes from which the government is immune; still others may not be taxes at all.

In determining whether appropriated funds may be used to pay taxes appearing on or included in utility bills, the principles described above apply—such as the distinction between vendor and vendee taxes—with one additional feature based on the nature of the rate-fixing process. Utility rates are usually set by the state legislature or by a public service commission to which the power has been delegated. Rates established through this process apply to federal and nonfederal users alike. Unless they are unreasonable or discriminatory, federal agencies are expected to pay them. E.g., 27 Comp. Gen. 580 (1948).

For example, state sales taxes which qualify as vendor taxes and which have been factored into the utility rates through the applicable rate-setting process are payable by the government. 45 Comp. Gen. 192 (1965); B-134602, December 26, 1957; B-123206, June 30,

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1955. The same result applies with respect to a vendor sales tax on the utility which is billed separately to the agency. B-211093, May 10, 1983.

Business privilege or gross receipts taxes are frequently imposed on public utilities. When this is done by law and the utility company is permitted to treat the tax as an operating expense and incorporate the amount of tax into its basic billing rate, a constitutionally permissible vendor tax is created. B-144504, June 9, 1967; B-148667, May 15, 1962. This is true even where the pass-through is required by a state utility regulatory body, as long as the tax itself, based on the statute that established it, qualifies as a "vendor tax." The Comptroller General applied this principle in 61 Comp. Gen. 257 (1982), concluding that Veterans Administration Medical Centers were liable for that portion of their electric bills attributable to a rate increase reflecting the Alabama public utility license tax. The Justice Department considered the same situation and reached the same result. 6 Op. Off. Legal Counsel 273 (1982).

Where the business privilege tax is a valid vendor tax, it can be paid even if it is attributed as a tax and stated on the utility bill as a separate item. 32 Comp. Gen. 577 (1953); B-171756, February 22, 1971; B-144504, June 30, 1970; B-225123, May 1, 1987 (non-decision letter).[122] The theory is that the "tax," even though separately stated, is, in effect, an authorized rate increase designed to recover the revenue necessary to permit the utility to maintain the allowed rate of return on its investment. See B-167999, December 31, 1969. However, payment may not be approved where the tax is collected only from the federal government or where the collection of the tax would have a discriminatory effect on federal activities. B-159685, April 7, 1967.

Another charge occasionally encountered is a "lifeline" surcharge. This is a surcharge designed to subsidize the providing of reduced-cost utility service to low-income or elderly customers. GAO regards a lifeline surcharge as not a tax at all, but merely part of the

[122]Another type of "tax" appearing on utility bills is a charge for 9-1-1 emergency service, discussed in Section C.7.c of this chapter.

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authorized rate, and therefore properly payable by federal users. 67 Comp. Gen. 220 (1988); B-189149, September 7, 1977.

c. Property-Related Taxes

Federal land located within state borders is also exempt from state property taxes on the same constitutional theory discussed above. E.g., Clallam County v. United States, 263 U.S. 341 (1923); Van Brocklin v. Tennessee, 117 U.S. 151 (1886). However, as with the contractor cases previously discussed, the immunity is generally limited to attempts to levy the tax directly against the federal government. Thus, the Supreme Court has sustained a state property tax on federally-owned land leased to a private party for the conduct of for-profit activities (United States v. City of Detroit, 355 U.S. 466 (1958)), and on the "possessory interest" of Forest Service employees living in government-owned housing (United States v. County of Fresno, 429 U.S. 452 (1977)).[123]

For loss of income due to the presence of large federal holdings of real property within a particular district or state, Congress may compensate local taxing authorities by means of payments in lieu of taxes. See B-149803, May 15, 1972. The rationale is that Congress chooses specifically to compensate a local taxing authority for the hardship which the exemption of federal lands from property tax works on the local government's activities.[124] Payments may also be made pursuant to specific legislation setting up a new federal enclave. See B-145801, September 20, 1961.

Just as states and their political subdivisions are barred from levying general property taxes against federal property, they are likewise prevented from making assessments against federal land for local improvements. Such assessments are typically made for

[123]A tax lien which attaches to property before title passes to the government is not a tax on government property. The lien is a valid encumbrance against the property, although it is unenforceable as long as the government holds the property. United States v. Alabama, 313 U.S. 274 (1941). In a series of early decisions, however, GAO advised that the acquiring agency could use its appropriations to extinguish the lien if administratively determined to be in the best interests of the government, for example, to clear title prior to disposition of the property. B-46548, January 26, 1945; B-41677, May 8, 1944; B-28443, December 9, 1943; B-21817, February 12, 1942.

[124]The most important statute in this area is the Payments in Lieu of Taxes Act, 31 U.S.C. §§ 6901-6907, which authorizes the Secretary of the Interior to make payments, pursuant to statutory criteria, to units of local government in which "entitlement land" is located. GAO has issued a number of decisions and opinions construing the PILT statute. See, e.g., 65 Comp. Gen. 849 (1986); 58 Comp. Gen. 19 (1978); B-212145, October 2, 1984; B-214267, August 28, 1984.

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paving or repairing streets or sidewalks, installing sewers, and similar local governmental services. An assessment for local improvements is an involuntary exaction in the nature of a tax. Hagar v. Reclamation District No. 108, 111 U.S. 701, 707 (1884). As such, the decisions have uniformly held that the United States may not be required to pay. E.g., National Railroad Passenger Corp. v. Pennsylvania Public Utility Commission, 665 F. Supp. 402 (E.D. Pa. 1987);[125] United States v. Harford County, 572 F. Supp. 239 (D. Md. 1983); 27 Comp. Gen. 20 (1947); 18 Comp. Gen. 562 (1938); B-226503, September 24, 1987; B-184146, August 20, 1975; B-160936, March 13, 1967; B-155274, October 7, 1964; B-150207, November 8, 1962. Any assessment which is related to a fixed dollar amount multiplied by the number of front feet of the government's property, or computed on a square footage basis, is not payable on the grounds that it is a tax. E.g., Harford County; B-168287, February 12, 1970; B-159084, May 11, 1966; B-178517-O.M., April 22, 1974.

It makes no difference whether the land on which the improvements are to be made is federally-owned or state-owned. B-157435, October 6, 1965. See also 32 Comp. Gen. 296 (1952). Also, the determination of whether a particular assessment can be paid does not depend on the taxing authority's characterization of the payment. Thus, payment has been denied where the assessment was termed a "benefit assessment" (B-168287, November 9, 1970), a "systems development charge" (B-183094, May 27, 1975), or an "invoice for services" (49 Comp. Gen. 72 (1969)). Regardless of the designation, if the charge is computed on a footage basis or in the same manner as the taxes levied against other property owners, it cannot be paid.

However, even though an assessment may not be paid as such, a state or municipality may be compensated on a quantum meruit basis for the fair and reasonable value of the services actually received by the United States. United States v. Harford County; 49 Comp. Gen. 72 (1969); 18 Comp. Gen. 562 (1938); B-226503, September 24, 1987; B-168287, November 9, 1970.

[125]The cited case deals with Amtrak. Whether Amtrak should be regarded as an instrumentality of the United States for purposes of tax immunity was not necessary to decide, however, as Amtrak's enabling legislation specifically provides for tax immunity. 665 F. Supp. at 411; 45 U.S.C. § 546b.

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The method of computation is the primary means of determining whether the charge represents the fair value of services received. Thus, in order to be paid on a quantum meruit basis, the claimant must show how it arrived at the amount claimed. An unsupported statement that the sum represents the fair and reasonable value of the services rendered is not sufficient. Although the claim need not be presented on a strict "quantity of use" basis, only when it is clearly shown that the specified method of computation is based purely upon the value of the particular services rendered to the government may any payment be made. B-177325, November 27, 1972; B-168287-O.M., July 28, 1972; B-168287-0.M., March 29, 1971. However, where a precise determination of the benefit received by the government cannot reasonably be made, payment has been allowed where the method of computation used did not appear unreasonable under the circumstances. B-168287-0.M., July 28, 1972. In any event, the quantum meruit payment cannot exceed the amount of the statutory assessment. B-168287-0.M., May 15, 1973.

Applying the above principles, the Comptroller General concluded in one case that a special assessment based on the federal property's ratable share of the cost of necessary repairs and improvements to a septic sewage system could be paid on a quantum meruit basis. B-177325, November 27, 1972. However, in B-179618, November 13, 1973, an assessment against an Air Force base for maintenance of a drainage ditch based on the "benefit" to the land could not be paid since there was no indication of how the amount of the "benefit" had been computed and no showing that the assessment represented the fair and reasonable value of the services rendered to the government. Similarly, a municipal assessment based on such factors as land area, structure value, and size was found to be a tax and therefore not payable in B-183094, May 27, 1975.

Using the same analysis, GAO advised the Air Force in B-207695, June 13, 1983, that it was not required to pay fees for well registration and withdrawal of groundwater which a state had attempted to impose on the Air Force's right to draw water from wells on federal property. There was no showing that the fees bore any relationship to any services provided to the government. However, fees for permits or certificates for the right to use state-owned water represent charges for services rendered rather than taxes and may therefore be paid. 5 Comp. Gen. 413 (1925); 1 Comp. Gen. 560

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(1922). Similarly, one-time connection fees for hooking up federal facilities, whether new construction or improvements, to local sewer systems are payable as authorized service charges. 39 Comp. Gen. 363 (1959); 9 Comp. Gen. 41 (1929). Where the hook-up is incident to new construction, the fee is chargeable to the construction appropriation. 19 Comp. Gen. 778 (1940).

The principle that a state or municipality may be paid on a quantum meruit basis for services actually rendered is another way of saying that a "service charge" for services rendered is not a tax. E.g., 49 Comp. Gen. 72 (1969). However, this has no relevance to services which the governmental unit is required by law to provide, such as police or firefighting services. (Section C.7, this chapter.)

Where a local government finances major improvements, such as sewers, by means of issuing revenue bonds, and levies a surcharge on its service charge to liquidate the bonded indebtedness, a federal user of the sewer service under a contractual obligation to pay the service charge may also pay the surcharge. 42 Comp. Gen. 653 (1963). However, GAO has questioned the payment of bond interest where that interest was attributable to the municipality's share of initial construction costs. B-180221-0.M., March 19, 1974.

The assessments we have been discussing thus far are assessments levied by governmental entities. Tax immunity would not apply to assessments levied by private entities, in which case the government's liability is determined by application of traditional concepts of contract and property law, subject of course to any applicable federal statutory provisions. For example, in B-210361, August 30, 1983, GAO advised that the Forest Service was liable for assessments levied by a private homeowners' association on a parcel the Forest Service had acquired by donation. The obligation to pay the assessments amounted to a covenant running with the land, and the United States became contractually bound by accepting the deed with notice of the covenant.

The principles we have discussed in the context of real property apply equally to personal property. E.g., 27 Comp. Gen. 273 (1947) (no legal basis to pay state registration fee on government-owned outboard motors). Several earlier decisions applied the government's immunity in the context of state motor vehicle license plate and title registration fees. 21 Comp. Gen. 769 (1942); 4 Comp. Gen. 412 (1924); 1 Comp. Gen. 150 (1921); 15 Comp. Dec. 231 (1908).

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expense" question under the relevant program appropriation. E.g., 18 Comp. Gen. 842 (1939).

In B-148826, July 23, 1962, the Comptroller General held that the Defense Department could pay $1 each to students participating in a civil defense training course as consideration for a release from liability.

b. Travel

Reimbursement for travel expenses incurred on official travel is now authorized by statute. E.g., 5 U.S.C. § 5702. However, even before the legislation was enacted, expenses incurred on authorized official travel were reimbursable as a necessary expense. 4 Comp. Dec. 475 (1898).

Of course there are limits, and expenses are reimbursable only to the extent authorized by statute and implementing regulations. Thus, in an early case, expenses of a groom and valet incurred by an Army officer in Belgium could not be regarded as necessary travel expenses and therefore could not be reimbursed from Army appropriations. 21 Comp. Dec. 627 (1915). See GAO's Personnel Law Manuals for extensive coverage of travel entitlements.

Senior-level officials frequently travel for political purposes. As the Justice Department has pointed out, it is often impossible to neatly categorize travel as either purely business or purely political. To the extent it is possible to distinguish, appropriated funds should not be used for political travel. 6 Op. Off. Legal Counsel 214 (1982). GAO has conducted occasional reviews in this area, and has commented on the lack of legally binding guidelines against which to evaluate particular expenditures. E.g., Review of White House and Executive Agency Expenditures for Selected Travel, Entertainment, and Personnel Costs, AFMD-81-36 (March 6, 1981); Review of the Propriety of White House and Executive Agency Expenditures for Selected Travel, Entertainment, and Personnel Costs, FGMSD-81-13 (October 20, 1980).

Finally, there are situations in which expenses of congressional travel may be chargeable to the appropriations of other agencies. Under 31 U.S.C. § 1108(g):

"Amounts available under law are available for field examinations of appropriation estimates. The use of the amounts is subject only to regulations prescribed by the appropriate standing committees of Congress."

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(Most government-owned vehicles today would have government plates.)

A final type of property-related state tax we may briefly mention is the so-called "death tax." Death taxes are of two types, estate taxes and inheritance taxes. An estate tax is based on the value of the taxable estate in its entirety; an inheritance tax is based on the value of taxable property passing to a particular beneficiary. Property given to the United States by testamentary disposition may be subject to a state inheritance tax. The Supreme Court has held that a state may impose an inheritance tax on property bequeathed to the United States, and indeed may completely prohibit testamentary gifts to the United States by its domiciliaries. Death taxes on gifts to the United States do not involve federal immunity because the taxes are imposed before the property reaches the hands of the beneficiary. (See also Chapter 6, section on donations to the government, which includes citations to the leading cases.)

There may be situations, although they should be uncommon, in which it may be desirable to pay a state death tax from appropriated funds. In an early case, the Comptroller of the Treasury advised the Smithsonian Institution that it could use its appropriation for "preservation of collections" to pay a state inheritance tax on a legacy bequeathed to the Smithsonian. 26 Comp. Dec. 480 (1919). This type of situation could arise, for example, if a decedent bequeathed specific real or personal property to the United States and the estate contained insufficient assets to pay an applicable death tax without liquidating the property.

d. Taxes Paid by Federal Employees

Another way in which the federal government sometimes pays a state or local tax is by way of reimbursement to a federal employee who incurred the tax during the performance of official business or other activities which qualify for reimbursement. For example, a member of the Armed Services was entitled to reimbursement under a government-supported health insurance plan for the full amount of a doctor's bill, including the amount which was attributable to New Mexico gross receipts tax, a valid vendor tax. B-130520, November 30, 1970. See also 36 Comp. Gen. 681 (1957) (state gasoline tax); B-203151, September 8, 1981 (local sales tax on rental vehicle); B-160040, July 13, 1976 (certain intangible property taxes reimbursable as relocation expenses incident to transfer). Some other commonly encountered situations are described below.

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(1) Parking taxes

Questions here arise in two contexts—parking meter fees and municipal taxes on parking in parking lots or garages.

The rule for parking meters on public streets is: Unless and until there is a contrary judicial determination, appropriated funds may be used to reimburse a federal employee for street parking meter fees incurred while driving a government-owned vehicle on official business, except (1) where the fee would impose an impermissible burden on the performance of a federal function, or (2) where the particular fee has been held by a court to be a tax or a revenue raising measure (as opposed to a traffic regulation device). 46 Comp. Gen. 624 (1967).[126]

To the extent a parking meter fee may be held to be a tax under the above rule, it can be imposed neither against the government nor against the employee-driver as the government's agent. 41 Comp. Gen. 328 (1961). However, even where the fee is a tax, if the car is unmarked and being used in investigative work, the fee can be reimbursed as a necessary cost of the investigation. 38 Comp. Gen. 258 (1958).

The two preceding paragraphs apply to government-owned vehicles. If the employee is using a privately-owned vehicle on official business, 5 U.S.C. § 5704 expressly authorizes reimbursement of parking fees. 41 Comp. Gen. 328 (1961).

Parking meter fees in a municipally owned off-street parking lot are not viewed as taxes for purposes of the rule stated in 46 Comp. Gen. 624. These fees may therefore be reimbursed whether the employee is driving a government-owned or privately-owned vehicle. 44 Comp. Gen. 578 (1965).

A local tax on parking in a parking lot or garage cannot be imposed on a government-owned vehicle on official business. 51 Comp. Gen. 367 (1971). However, if the amount of the tax is so small as not to justify issuance of a tax exemption certificate, the employee may be reimbursed notwithstanding the government's immunity. 52 Comp. Gen. 83 (1972). The rationale is that the administrative cost

[126]46 Comp. Gen. 624 overruled several earlier decisions and modified several others. The text attempts to reflect those elements of the modified decisions which remain valid.

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of asserting the immunity by using the certificate would be prohibitive for very small amounts. As with the parking meter fees, an employee using a privately-owned vehicle on official business may be reimbursed under 5 U.S.C. § 5704 for local taxes levied on parking in lots or garages. 51 Comp. Gen. 367 (1971).

To sum up the rules on parking taxes and fees:

1. Privately-owned vehicles on official business: Employee may be reimbursed for meter fees either on a street or in a municipal lot, and for taxes on parking in a lot or garage.

2. Government-owned vehicle, metered parking: Employee may be reimbursed for meter fees on a public street unless one of the exceptions in 46 Comp. Gen. 624 applies, and for meter fees in a municipal lot.

3. Government-owned vehicle, unmetered parking: Employee may be reimbursed for local taxes on parking in a lot or garage if the amount is too small for the issuance of a tax exemption certificate, at least where the taxing entity requires the certificate as evidence of tax-exempt status.

(2) Hotel and meal taxes

A frequent occurrence is the addition of a tax to the price of lodging secured by government employees travelling on official business. When a federal employee rents a room directly from the proprietor, the employee becomes personally liable for the amount of the rental, including tax. The government is not a party to the transaction and the tax is therefore not viewed as a tax on the government. Accordingly, the employee must pay the tax and cannot assert the government's immunity from local taxes. The fact that the government may reimburse the full rental price as part of the employee's travel expenses does not transform the tax into a tax on the government. 55 Comp. Gen. 1278 (1976); B-172621-O.M., August 10, 1976. If local law exempts federal employees from the tax, the employees should use tax exemption certificates to claim the exemption. See B-172621, April 4, 1973 (non-decision letter).

However, if the government rents the rooms directly, that is, if there is a direct contractual relationship between the United States and a hotel or motel for the rental of rooms to federal employees or

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others, the government is entitled to assert its immunity from local taxes. 55 Comp. Gen. 1278 (1976). The Justice Department reached the same result in 5 Op. Off. Legal Counsel 348 (1981), holding that the Office of the Vice President was not required to pay local hotel taxes when reserving a block of rooms for an official trip.[127]

Similar results would occur where a tax was imposed on commercial rental of a vehicle or any other travel-related activity such as meals or other transportation. B-167150, April 3, 1972. On the theory that the contract defines the limits of liability, however, a meal ticket good for the purchase of food up to a maximum dollar amount may include amounts attributable to a valid vendor tax up to the specified dollar limit. In the event the dollar limit were exceeded, however, the remainder of the expense would be personal, including the extra amounts for tax. 41 Comp. Gen. 719 (1962).

(3) Tolls

As anyone who drives in certain areas of the United States well knows, state authorities frequently charge tolls for the use of state-owned highways, bridges, or tunnels. It has long been established that a toll is not a tax, but is a charge for the use of the road, bridge, or tunnel. Sands v. Manistee River Improvement Co., 123 U.S. 288, 294 (1887). Thus, tolls do not raise questions of federal tax immunity and are properly payable where necessarily incurred in the performance of official business. 9 Comp. Gen. 41, 42 (1929); 4 Comp. Gen. 366 (1924); 24 Comp. Dec. 45 (1917). Statutory authority now exists for the reimbursement of tolls incurred by government employees on official travel. 5 U.S.C. § 5704(b); 35 Comp. Gen. 92 (1955).

GAO has also held that appropriated funds may be used to purchase annual toll road permits where justified by anticipated usage. Such purchase does not violate the statutory prohibition on advance payments. 36 Comp. Gen. 829 (1957). Similarly, if an employee who frequently uses a toll road on official business purchases an annual permit for his or her own automobile, the agency may reimburse the toll charges that would otherwise have been incurred, on a per-

[127]The Justice Department opinion notes that even where an individual employee is procuring the accommodation, the government could, if it wanted to change existing practice, compel recognition of federal immunity. 5 Op. Off. Legal Counsel at 349 n.2.

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trip basis, not to exceed the cost of the annual permit. 34 Comp. Gen. 556 (1955).

Some of the early decisions state that a toll may not be paid if the particular highway, bridge, or tunnel was constructed with the aid of federal funds. 9 Comp. Gen. at 42; 24 Comp. Dec. at 48. The statement in 24 Comp. Dec. was based on legislation which authorized federal financial assistance but also prohibited the charging of "tolls of all kinds." Id. at 47. The Federal-Aid Highway Act includes an almost identical prohibition (23 U.S.C. § 301), but also authorizes tolls in certain circumstances (23 U.S.C. § 129). The editors have found no discussion of this issue under the modern legislation, nor have we found any guidance as to how, apart from the interstate highway system, an employee is supposed to know which items have received federal aid. Be that as it may, it would seem prudent to apply the concept of 52 Comp. Gen. 83, discussed above under parking taxes, in conjunction with the reimbursement authority of 5 U.S.C. § 5704.

(4) State and local income taxes

Payment of state and local income taxes is basically the responsibility of the individual employee. In the absence of statutory authority, state or local withholding requirements would not apply to the federal government because a state may not "regulate" the governmental activities of the United States. 27 Comp. Gen. 372 (1948). The requisite statutory authority now exists. For the District of Columbia and any other state, city, or county which provides for the collection of income tax by withholding, the Secretary of the Treasury must enter into an agreement with the applicable jurisdiction to withhold the tax from federal employees. 5 U.S.C. §§ 5516, 5517, 5520.

(5) Possessory interest taxes

This is essentially a type of property tax. An example is the California tax on "possessory interests" in improvements on tax-exempt land. The Supreme Court upheld the validity of the tax in a suit brought by federal employees required to live in housing owned by the Forest Service. The Court found that the tax was nondiscriminatory and that its legal incidence falls upon the employees and not the United States. United States v. County of Fresno, 429 U.S. 452 (1977). See also B-191232, June 20, 1978.

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Where the government provides quarters for employees and collects rent under 5 U.S.C. § 5911, the rental rate may be adjusted to discount an applicable possessory interest tax, but the adjustment must be approved by the Office of Management and Budget and may not be retroactive. B-194420, October 15, 1981.

(6) Occupational license fees

Occupational license fees or employment taxes are fees imposed by a state or local jurisdiction, usually on members of a particular occupation or profession, such as doctors, as a prerequisite to being able to work or practice in that jurisdiction. Federal employees may or may not be exempted. Apart from the question of a state's authority to impose such fees on federal employees performing federal functions, even if the fee is valid, it is considered a personal expense and not reimbursable from appropriated funds. For further discussion and case citations, see Sections C.13.d (Personal Qualification Expenses) and C.12.b (Membership Fees—Attorneys) of this chapter. As in the case of state and local income taxes, state or local withholding requirements for employment taxes do not apply to the federal government absent statutory authority. 28 Comp. Gen. 101 (1948). Statutory authority now exists in 5 U.S.C. § 5520 where withholding is provided by city or county ordinance.

e. Refund and Recovery of Tax Improperly Paid

GAO has held that improperly paid taxes may be recovered by setoff against other moneys payable to a state. B-150228, August 5, 1973; B-100300, March 12, 1965. Setoff may be asserted against any money payable to any other agency of the state, whether or not related to the source of the erroneous payments. B-154778, August 6, 1964; B-154113, June 24, 1964; B-150228, August 5, 1963. With the enactment of the Debt Collection Act of 1982, the question of using offset against state or local governments has become much more controversial and is explored more fully in Chapter 13. Also, as discussed in Chapter 10, setoff against advances under a federal grant program may be improper in some instances.

Some states provide for refunds of certain taxes paid by the United States. In evaluating these refund provisions, it is important to determine whether the tax subject to refund is a vendor tax or a vendee tax. If the tax is a vendor tax, the United States is not constitutionally immune from payment. Thus, any right to a refund is purely a creature of state law and the United States must comply with any conditions and limitations imposed by state law.

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B-100300, June 28, 1965. The fact that state law may permit refunds to the United States as the ultimate bearer of the tax in certain situations does not transfer the legal incidence of the tax to the vendee. B-152995, January 30, 1964. See also 27 Comp. Gen. 179 (1947).

If, however, the tax is a vendee tax, the government's right to a refund is based on the Constitution and is wholly independent of state law. Therefore, in claiming a refund in this situation, the United States is not bound by restrictions in state law, such as state statutes of limitations. United States v. Michigan, 851 F.2d 803, 809-10 (6th Cir. 1988); B-100300, June 28, 1965; B-154778, August 6, 1964.

If a refund mechanism is available, this would be the preferred method of recovering improperly paid taxes. 42 Comp. Gen. 593 (1963). Thus, upon the request of a state, and as long as the interests of the government will be adequately protected, setoff may be deferred pending the filing of a formal claim with the appropriate state agency. B-151095, January 2, 1964. However, if the state refuses a refund to which the United States is entitled, setoff is again, to the extent legally available, the proper remedy. 39 Comp. Gen. 816 (1960); B-162005, April 8, 1968.

Where a sales tax has been improperly paid, the vendor is little more than a collection agent for the state and the state is the ultimate beneficiary of the improper payment. Therefore, collection action should proceed against the state rather than by setoff against the vendor. 42 Comp. Gen. 179 (1962).

In the course of resolving problems over the liability of the United States to pay a particular tax, the government has entered into various arrangements with states pending the outcome of litigation. In one case, the government agreed with a state taxing authority to file tax forms without remitting any money, and to make the actual payments upon a final judicial determination in a pending test case that the tax was valid. B-160920, May 10, 1967. (The decision, after the Supreme Court upheld the validity of the tax, held that the back taxes should be paid notwithstanding expiration of the state statute of limitations.) In another case, the government negotiated an agreement with contractors whose contracts were being subjected to a questionable state sales tax, under which the General Services Administration agreed to pay the tax and the contractors

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promised to refund the amounts paid if it was ultimately determined that the government's immunity applied. B-170899, November 16, 1970. See also 50 Comp. Gen. 343 (1970).

16. Telephone Services

a. Telephone Service to Private Residences

(1) The statutory prohibition

A problem which existed during the early years of the 20th century was an apparent tendency on the part of government officials to have telephones installed in their homes at government expense. See 53 Comp. Gen. 195, 197 (1973); 19 Comp. Dec. 350, 352 (1912). It must be remembered that telephones were much more of a novelty in those days; we were still decades from the point where almost every American home has a private telephone. In any event, Congress enacted legislation in 1912 to prevent the use of public funds for private telephone service for government officials. The portion of the statute we are concerned with here, 31 U.S.C. § 1348(a)(1), provides:

"Except as provided in this section, appropriations are not available to install telephones in private residences or for tolls or other charges for telephone service from private residences."

The decisions are fond of saying that the statute has, for the most part, been strictly applied. Indeed, the earlier decisions are packed with the "reflex" observations that the language of the statute is "plain and comprehensive," the "prohibition is mandatory," and the statute "leaves no room for the exercise of discretion on the part of the accounting officers of the Government." E.g., 21 Comp. Gen. 997, 999 (1942). Thus, except for long-distance calls properly certified as necessary (discussed later), the rule is that charges for residential telephones (installation, connection, monthly equipment rental, and basic service charges) may not be paid from appropriated funds. As we will see, however, there are some exceptions.

(2) Funds to which the statute applies

The statute is a direct restriction on the use of appropriated funds. As such, it applies not only to direct appropriations from the Treasury but also to funds which constitute appropriated funds by operation of law. Thus, the statute applies to expenditures from the

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revolving fund established by the Federal Credit Union Act since the authority to maintain a revolving fund constitutes a continuing appropriation. 35 Comp. Gen. 615, 618 (1956). Similarly, the authority to retain rentals from certain defense housing projects and to use the funds for maintenance of the housing units makes them appropriated funds and therefore subject to 31 U.S.C. § 1348(a)(1). 21 Comp. Gen. 239 (1941).

Along these same lines, the Comptroller General held in 4 Comp. Gen. 19 (1924) that the Alaska Railroad could not designate residential telephones as "operating expenses" and pay for them from revenues derived from operating the railroad. The Comptroller pointed out in that case that the authority to do "all necessary things" to accomplish a statutory purpose confers legal discretion, not unlimited discretion, and the authority is therefore subject to statutory limitations such as 31 U.S.C. § 1348. Id. at 20. The same point was made in 35 Comp. Gen. at 618, and in B-130288, February 27, 1957.

(3) What is a private residence?

Simply stated, a private residence is where you live as opposed to where you work, assuming the two can be distinguished. Cases where the two cannot be distinguished are discussed later. For purposes of 31 U.S.C. § 1348, it makes no difference that the residence is government-owned or on public land. 35 Comp. Gen. 28 (1955); 7 Comp. Gen. 651 (1928); 19 Comp. Dec. 198 (1912). The statute therefore fully applies to permanent residential quarters on a military installation. 21 Comp. Gen. 997 (1942); B-61938, September 8, 1950; A-99355, January 11, 1939. It does not apply, however, to tents or other temporary structures on a military post which are not available for family occupancy, notwithstanding that military personnel may use them as temporary sleeping quarters. 21 Comp. Gen. 905 (1942).

In 41 Comp. Gen. 190 (1961), the statutory prohibition was held not applicable to the installation of telephones in hotel rooms occupied by officials on temporary duty where necessitated by the demands of the mission. (One would have thought that all hotel rooms were already equipped with telephones by 1961.)

An early decision stated that "private" means set apart for the exclusive personal use of any one person or family. 19 Comp. Dec.

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198, 199 (1912). Following this approach, the Comptroller General held that appropriated funds could be used to install and operate local-service telephones in Army barracks occupied by large numbers of enlisted personnel. 53 Comp. Gen. 195 (1973). An earlier decision, 35 Comp. Gen. 28 (1955), applied the prohibition to several government-owned residences, one of which was used to house a number of employees. While these two cases may appear inconsistent at first glance in that the telephones in both instances would be available for the personal use of the residents, the apparent distinction is that Army appropriations are available for the welfare and recreation of military personnel so that the "personal use" aspect in the Army barracks case was not necessarily dispositive.

Since the statute uses only the term "residence," it has been held not to prohibit service charges for a dedicated telephone line, on which a Navy-supplied fax machine was installed for official use, in the private business office of a Naval Reserve officer. B-236232, October 25, 1990.

(4) Application of the general rule

A large number of decisions has established that the prohibition applies even though the telephones are to be extensively used in the transaction of public business and even though they may be desirable or necessary from an official standpoint. 59 Comp. Gen. 723, 724 (1980) and cases cited therein. In this respect, there is no discretion involved.

Relevant factors are whether the telephone will be freely available for the employee's personal use and whether facilities other than the employee's residence exist for the transaction of official business. The employee's personal desires are irrelevant. Thus, it makes no difference that the employee doesn't want the telephone and has asked to have it removed. 33 Comp. Gen. 530 (1954); A-99355, January 11, 1939. The fact that a telephone is unlisted is also immaterial. 15 Comp. Gen. 885 (1936).

The rule is well illustrated in a 1980 decision in which the District Commander of the Seventh Coast Guard District sought to be reimbursed for a telephone installed in his residence. The Commander was in charge of the Cuban Refugee Freedom Flotilla in the Florida Straits. He was in daily contact with the various federal, state, and local agencies involved and was required to be available 24 hours a

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Thus, travel expenses of congressional committee members and staff incident to "field examinations" of appropriation requests may be charged to the agency whose programs and budget are being examined. B-214611, April 17, 1984; B-129650, January 2, 1957. Before the above provision was enacted as permanent legislation, similar provisions had appeared for many years in various appropriation acts. See 6 Comp. Gen. 836 (1927); 23 Comp. Dec. 493 (1917).

Travel expenses of congressional spouses (Members and staff) may not be paid from appropriated funds. B-204877, November 27, 1981.

c. Postage Expenses

Agencies are required to reimburse the Postal Service for mail sent by or to them as penalty mail. Reimbursement is to be made "out of any appropriations or funds available to them." 39 U.S.C. § 3206(a). This statute amounts to an exception to the general purpose statute, 31 U.S.C. § 1301(a), in that the expenditure may be charged to any appropriation available to the agency. Penalty mail costs do not have to be charged to the particular bureau or activity which generated the cost. 33 Comp. Gen. 206 (1953). By virtue of this statutory authority, the use of appropriations for one component of an agency to pay penalty mail costs of another component funded under a separate appropriation does not constitute an unauthorized transfer of appropriations. 33 Comp. Gen. 216 (1953). The same principle applies to reimbursement for registry fees. 36 Comp. Gen. 239 (1956).

While agencies are not required by the statute to allocate penalty mail costs among using components on a pro rata basis, the Office of Management and Budget could require it for accounting and budgetary reasons. B-117401, February 13, 1957.

d. Books and Periodicals

Expenditures for books and periodicals are evaluated under the necessary expense rule. Thus, the American Battle Monuments Commission could use its Salaries and Expenses appropriation to buy books on military leaders to help it decide what people and events to memorialize. 27 Comp. Gen. 746 (1948).[8]

[8]Decisions in this area prior to 1946 applying a stricter standard, such as 21 Comp. Gen. 339 (1941) and 22 Comp. Dec. 317 (1916), should be disregarded as they reflected prohibitory legislation enacted in 1898 (30 Stat. 316) and repealed in 1946.

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day. Since this situation placed a burden on the Commander's immediate family by restricting their personal use of the home telephone, he had another telephone installed for official business. In view of the statutory prohibition, and since the Commander was already provided with an office by the Coast Guard, reimbursement could not be allowed. 59 Comp. Gen. 723 (1980). For an earlier decision applying the prohibition notwithstanding the need for employees to be available on a 24-hour basis, see 11 Comp. Gen. 87 (1931).

A somewhat similar situation was presented in B-130288, February 27, 1957. There, the Federal Mediation and Conciliation Service sought authority to pay for telephones in the homes of mediators stationed in cities where office accommodations were not provided. The mediators had to work out of their homes and were required to be available 24 hours a day. Applying the statutory prohibition, the Comptroller General concluded that the agency could not pay for the telephones, nor could it pay for an answering service. However, there was no reason a mediator couldn't list his private telephone number under the agency's name, and the government could pay for this listing. By doing this, the government would not be paying for personal use of the telephone.

In B-175732, May 19, 1976, it was proposed to install a telephone in the "galley" (kitchen) of the Coast Guard Commandant's home, for use by a "subsistence specialist" who worked there and presumably had no access to other telephones. The argument was that while the galley may have been part of the Commandant's private residence, it was the subsistence specialist's duty station and since he had no other office, he had to conduct government business from the galley. GAO found the proposal prohibited by 31 U.S.C. § 1348(a)(1). Although the duties of the subsistence specialist—the procurement of food, supplies, and services—were official to him, they nevertheless accrued largely if not exclusively to the personal benefit of the Commandant and were not sufficient to justify an exception.

(5) Exceptions

To say that the statute is strictly applied is not to suggest that there are no exceptions.

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First, there are statutory exceptions. One example is 31 U.S.C. § 1348(a)(2), for residences owned or leased by the United States in foreign countries for use of the Foreign Service. Another statutory exception is 31 U.S.C. § 1348(c), enacted in 1922, covering telephones deemed necessary in connection with the construction and operation of locks and dams for navigation, flood control, and related water uses, under regulations of the Secretary of the Army. Still another is 16 U.S.C. § 580f, for telephones necessary for the protection of national forests.

Next, there are some nonstatutory exceptions. They fall generally into two categories. The first, dictated by common sense, involves situations where private residence and official duty station are one and the same. If the government has made available office facilities elsewhere, it is clear that a residential telephone cannot be charged to appropriated funds no matter how badly it is needed for official business purposes. E.g., 59 Comp. Gen. 723 (1980); 22 Comp. Dec. 602 (1916). However, exceptions have been recognized where a government-owned private residence was the only location available under the circumstances for the conduct of official business. E.g., 4 Comp. Gen. 891 (1925) (isolated lighthouse keeper); 19 Comp. Dec. 350 (1912) (lock tender); 19 Comp. Dec. 212 (1912) (national park superintendent).

Note that in all of these cases the combined residence/duty station was government-owned. The exception has not been extended to privately-owned residences which are also used for the conduct of official business. 26 Comp. Gen. 668 (1947); B-130288, February 27, 1957; B-219084-O.M., June 10, 1985. The theory seems to be that, in a privately-owned residence, the degree of personal use as opposed to likely official need is considered so great as to warrant a stricter prohibition since there would be no other practical way to control abuse, whereas some flexibility is afforded for government-owned residences where sufficient official use for telephones exists. 53 Comp. Gen. 195, 197-98 (1973). Cf. 68 Comp. Gen. 502 (1989).

It should also be noted that isolation alone is not sufficient to justify an exception. In 35 Comp. Gen. 28 (1955), 31 U.S.C. § 1348(a)(1) was held to prohibit payment for telephones in government-owned residences of Department of Agriculture employees at a sheep experiment station. The employees claimed need for the telephones because they frequently received calls outside of normal office

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hours from Washington or to notify them of unexpected visitors and shipments of perishable goods, and because they were sometimes stranded in their residences by severe blizzards. 4 Comp. Gen. 891 was distinguished because the telephone in that case was installed in a room equipped and used only as an office and was not readily available for personal use.

The second category of nonstatutory exceptions stems from the recognition that the "evil" 31 U.S.C. § 1348(a)(1) is intended to address is not the physical existence of a telephone, but the potential for charging the government for personal use. Thus, a series of cases has approved exceptions where (1) there is an adequate justification of necessity for a telephone in a private residence, and (2) there are adequate safeguards to prevent abuse.

This category seems to have first developed in the context of "military necessity" and national security justifications. For example, an exception was made to permit the installation in the residence of the Pearl Harbor Fire Marshal (a civilian employee) of a telephone extension which was mechanically limited to emergency fire calls. 32 Comp. Gen. 431 (1953), modifying 32 Comp. Gen. 271 (1952). See also 21 Comp. Gen. 905 (1942). In B-128144, June 29, 1956, GAO approved a proposal to install direct telephone lines from an Air Force Command Post switchboard to the private residences of certain high level civilian and military officials to ensure communications in the event of a national emergency. Air Force regulations prohibited the use of these lines for anything but urgent official business in the event of a national emergency and authorized the recording of conversations as a safeguard against abuse.

However, a "necessity" which is little more than a matter of convenience is not enough to overcome the prohibition. For example, in A-99355, January 11, 1939, a telephone could not be maintained at government expense in the private quarters of the Officer-in-Charge on a Navy installation because several telephones were available in established offices on the station. This decision was followed in 21 Comp. Gen. 997 (1942) and 33 Comp. Gen. 530 (1954).

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The prohibition applies equally to an intra-base system not connected to outside commercial trunk lines. B-61938, September 8, 1950.[128]

Relying largely on B-128144, GAO approved a General Services Administration proposal to install Federal Secure Telephone Service telephones in the residences of certain high level civilian and military officials certified by their agency heads as having national security responsibilities. 61 Comp. Gen. 214 (1982). The system was designed to provide a secure communications capability to permit the discussion of classified material that could not be discussed over private telephones. As in B-128144, the proposal included a number of safeguards against abuse, which GAO deemed adequate.

The concept established in the military necessity/national security cases would subsequently be applied in other contexts as well. Thus, GAO approved exceptions in the following cases:

- Installation of telephone equipment by the Internal Revenue Service in the homes of customer "assistors" who were intermittent, part-time employees. The phones to be installed had no outcall capability and could receive calls only from IRS switching equipment. Separate lines were essential because the employees' personal phones could not be used with the IRS equipment. B-220148, June 6, 1986.
- Installation of telephones in the homes of Internal Revenue Service criminal investigators who were authorized to work from their homes, to be used for portable computer data transmission. GAO found the agency's justification adequate and approved the expenditure, contingent upon the establishment of adequate safeguards, such as those in 61 Comp. Gen. 214, to prevent personal use. 65 Comp. Gen. 835 (1986).
- Installation of separate telephone lines in the homes of IRS data transcribers authorized to work at home under a "flexiplace" program, again subject to the establishment of adequate safeguards. 68 Comp. Gen. 502 (1989).

[128]The Navy now has statutory authority to use its appropriations to pay for the installation and use (except for personal long-distance calls) of extension telephones connecting public quarters occupied by naval personnel (but not civilian employees) with station switchboards. 10 U.S.C. § 7576.

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- Installation of telephones in the homes of certain high level Nuclear Regulatory Commission officials to assure immediate communication capability in the event of a nuclear accident. The phones would be capable of dialing only internal NRC numbers, with any other calls to be placed through the NRC operator. B-223837, January 23, 1987.

Some of the cases noted earlier in which the prohibition was applied, such as 59 Comp. Gen. 723, also presented strong justifications. The primary feature distinguishing these cases from the exceptions described above is the existence in the latter group of adequate safeguards against abuse.

Finally, a couple of cases have dealt with payment for telephone services during periods of non-occupancy. In order to ensure continuous service, the government secures telephone service for the residence of the Air Deputy for the Allied Forces Northern Europe in Norway by long-term lease with the Norwegian Telephone Company. Normally, the Air Deputy pays the charges. The question presented in 60 Comp. Gen. 490 (1981) was who should pay the charges accruing during a vacancy in the position. The Comptroller General held that since the quarters were not the private residence of either the outgoing or the incoming Air Deputy during the period of vacancy, no public official received the benefit of the service during that period. Therefore, payment from appropriated funds would not thwart the statutory purpose.

The decision distinguished an earlier case, 11 Comp. Gen. 365 (1932), denying payment for telephone service to the residence of the U.S. Ambassador to Mexico during a period when the position was vacant. In the 1932 case, the service had been retained during the interim period mainly through inadvertence. In 60 Comp. Gen. 490, on the other hand, retention of the service was necessary to avoid delays in reinstallation when the new Air Deputy moved in. The decision did note, however, that except in limited situations of public necessity such as the one involved, telephone service should ordinarily be cancelled during periods of non-occupancy.

b. Long-Distance Calls

(1) Residential telephones

"Appropriations of an agency are available to pay charges for a long-distance call if required for official business and the voucher to pay for the call is sworn to by the head of the agency. Appropriations of an executive agency are

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available only if the head of the agency also certifies that the call is necessary in the interest of the Government." 31 U.S.C. § 1348(b).

Note that the statute requires two different things. As a practical matter, the requirement that the voucher be "sworn to" by the agency head is met by the normal certification of the payment voucher by an authorized certifying officer. However, the official business certification prescribed in the second sentence, further described under "Government telephones" below, is a separate requirement.

In any event, the import of section 1348(b) is that, if properly certified as necessary, a long-distance call made from an employee's personal telephone can be paid by the employing agency. Presumably, although we have found no cases, the same principle would apply to a call made from a public pay phone and billed to the employee, or to a call made from any other residential phone.

Calls billed on a message unit basis are regarded as local calls. B-75124, May 10, 1948; A-13067, April 30, 1940; A-13067, June 17, 1939. Thus, multi-message unit charges are not reimbursable even if incurred on official business. This is true regardless of whether the calls are dialed directly or placed through an operator. 35 Comp. Gen. 615 (1956); B-126760, August 21, 1972.

Normally, the original itemized bill from the telephone company is required in order to obtain reimbursement. However, in one case where the agency lost the original invoice and the telephone company was unable to furnish a copy of the original itemized bill, a letter from the telephone company indicating the exact amount representing long-distance toll charges was held acceptable as the best evidence obtainable. 32 Comp. Gen. 432 (1953).

In B-149048, July 18, 1962, GAO evaluated a proposed Department of Justice regulation which would have required Federal Marshals to pay the cost of long-distance telephone calls from their homes to their offices on evenings and weekends. The Department felt that a marshal's choice not to live in the city of his headquarters was a matter of personal convenience and therefore the cost of communication should be a personal expense. Since there was no requirement for marshals to live near their work site, and since statutory authority existed to reimburse long-distance calls necessary for

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official business, GAO recommended against the proposed regulation.

(2) Government telephones

The provisions of 31 U.S.C. § 1348(b), quoted above, apply to government as well as residential telephones. The official business certification requirement is particularly significant in the context of government telephones. An employee who wants reimbursement for a long-distance call placed from his or her home must present the bill to the agency and establish that the call was necessary for official business. Certification should thus be a simple matter, at least in most cases. Long-distance calls are routine occurrences on government telephones, however, and for the most part the agency cannot determine from the bill itself which calls are business and which are personal.

The cost of a call is a factor to be considered in determining whether the call was necessary. B-149048, July 18, 1962. The administrative approval of a travel voucher, including long-distance telephone calls, will satisfy 31 U.S.C. § 1348(b) and separate certification is not required. 56 Comp. Gen. 28 (1976). A certifying officer will not be liable for improperly certified long-distance calls as long as the "official business certification" was made by the agency head or an agency official to whom the authority has been specifically delegated. Id.

The certification can be a simple statement such as:

"Pursuant to 31 U.S.C. § 1348(b), I certify that the use of the telephone for the official long-distance calls listed herein was necessary in the interest of the government." (Adapted from 18 Comp. Gen. 1017 (1939).)

Agencies should maintain documentation of the officials authorized to make the certification. GAO, Policy and Procedures Manual for Guidance of Federal Agencies, title 7, Appendix IV (1990). Statements, such as that in 18 Comp. Gen. 1017, that copies of the documentation should be submitted to GAO are obsolete and should be disregarded.

As noted above, calls billed on a message unit basis are regarded as local calls. Therefore, message unit calls do not have to be certified

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under 31 U.S.C. § 1348(b). See cases cited under "Residential telephones" above. In addition, calls made using the Federal Telecommunications System (FTS) do not have to be certified since the flat rate charge to agencies under FTS is a rental payment for the lease of the lines rather than a payment for long-distance tolls within the meaning of 31 U.S.C. § 1348(b). 43 Comp. Gen. 163 (1963).[129]

In 57 Comp. Gen. 321 (1978), the Internal Revenue Service asked how to apply the certification requirement to its Hartford, Connecticut office, where the telephone company did not use a message unit system but rather listed and billed all calls separately as toll calls. The Comptroller General pointed out that all calls billed as long-distance calls must be certified under 31 U.S.C. § 1348(b). However, certification for "short haul" toll calls may be based on statistical sampling. The sampling procedure must include a large enough number of calls to assure probable accuracy. The decision contains further guidelines on establishing an adequate statistical sampling system.

A few years later, GAO took the logical next step, determined that there was no reason to distinguish between "short haul" and other toll calls for statistical sampling purposes, and advised that the official business certification requirement of 31 U.S.C. § 1348(b) could generally be satisfied through an appropriate statistical sampling system. 63 Comp. Gen. 241 (1984).

What do you do if the volume of calls is not large enough to make statistical sampling feasible? GAO addressed this question in 65 Comp. Gen. 19 (1985). In that case, the Nuclear Regulatory Commission proposed to base certification on an annually-adjusted percentage estimate reflecting past experience. The NRC would pay this percentage immediately to minimize Prompt Payment Act penalties, pending completion of internal verification. GAO approved the proposal, but cautioned that the person making the certification must have reasonable assurance that the verification process provides a high degree of accuracy.

[129]If an agency withdraws from the FTS system, the General Services Administration is authorized to charge that agency with direct costs associated with the termination, and is not required to assess those costs among remaining users. 69 Comp. Gen. 65 (1989). This authority was not affected by the 1987 amendment to 40 U.S.C. § 757 which merged the former Federal Telecommunications Fund into the newly established Information Technology Fund. 70 Comp. Gen. ___ (B-231044.3, February 6, 1991) (Army and Air Force Exchange Service); 70 Comp. Gen. ___ (B-231044.2, February 6, 1991) (Tennessee Valley Authority); B-238181, January 9, 1991 (National Trust for Historic Preservation).

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The 1985 decision emphasized the distinction between a certifying officer's certification of a payment voucher and the "administrative certification" required by 31 U.S.C. § 1348(b), which is not a certification for payment even if it appears on the payment voucher, and reiterated the point made in 56 Comp. Gen. 29 that a certifying officer may rely on the "official business certification" without risking personal liability for improper payments. 65 Comp. Gen. at 20-21.

Several cases have dealt with the government's liability to a telephone company for calls placed in violation of 31 U.S.C. § 1348(b). A contract for telephone services must be viewed as having been made subject to 31 U.S.C. § 1348(b), and no authority exists to waive the statutory requirements. Thus, where the agency cannot make the required certification, it cannot pay that portion of the bill unless it first collects from the individual(s) responsible for the unauthorized calls. B-172155, August 13, 1971; B-165102, September 10, 1968; B-164699, July 8, 1968; B-90487, November 29, 1949; B-36190, August 12, 1943.

To illustrate, in B-172155, August 13, 1971, an airman had applied for telephone service in a barracks and was assigned a special billing identification number. Another airman used the telephone and special billing number without permission and made several unauthorized long-distance calls. Since the statute amounts to a legislative limitation on an agency's contracting authority, the Air Force could not use appropriated funds to pay the telephone company for the unauthorized calls.

Questions also arise under 31 U.S.C. § 1348 concerning telephone installation and use charges incident to travel, temporary duty, or relocation. See, e.g., 68 Comp. Gen. 307 (1989) (government may pay installation and reinstallation charges where employee is required to temporarily vacate government-furnished residence through government action over which employee has no control); 56 Comp. Gen. 767 (1977) (same result with respect to relocation of mobile home required by government); 44 Comp. Gen. 595 (1965); B-196549, January 31, 1980. Further coverage of these areas may be found in GAO's Personnel Law Manuals.

c. Telephones in Automobiles

If having your own personal telephone in your home was the status symbol of the early 1900's, car phones appear well on their way to becoming the status symbol of the 1990's. There is at the present

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time very little case law in this area, and no government-wide statutory guidance.

In a 1988 case, B-229406, December 9, 1988, an agency official used his own funds to purchase a cellular telephone and have it installed in his personal automobile. GAO considered the relevance of both 31 U.S.C. § 1348(a) and § 1348(b). With respect to § 1348(a), the simple fact is that the statute addresses residences, not automobiles. Concluding that "section 1348 does not apply to cellular phones located in private automobiles," GAO advised that the agency could reimburse local business calls as long as there were adequate safeguards to prevent abuse. The safeguards existed in this case because all local calls were individually itemized on a monthly basis. The agency could also reimburse necessary long-distance calls provided it makes the certification required by section 1348(b). The decision cautioned, however, that "agency heads should strictly scrutinize automobile telephone calls before certifying them for reimbursement," to ensure that the most economical means of communication are being used.

With respect to the purchase price of the phone itself, the decision found the agency's appropriations unavailable. However, it was clear in that case that the official intended the phone to be his own property. What about purchase and installation of a car phone that is to remain the property of the government? An early decision held that appropriated funds were not available to install radio equipment in a private automobile even though the equipment was to remain government-owned. 15 Comp. Gen. 260 (1935). Whether this decision can withstand B-229406 is open to question. It is certainly possible to argue that the rationale of the cases recognizing exceptions in the case of residences, where there is a statutory prohibition, should apply as well to automobiles, where there is no comparable statutory prohibition. Under this approach, the answer would depend on the administrative justification and the existence of adequate safeguards. In any event, these issues must await future resolution.

GAO has also considered the purchase of cellular telephones for use by Members of the Senate and concluded that the expenditure is authorized from the Senate's contingent fund. B-227763, September 17, 1987; B-186877, August 12, 1976. The 1976 opinion took a negative view of the question from the policy perspective, however, and suggested that more specific legislative authority would be

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The National Science Foundation could subscribe to a publication called "Supervisory Management" to be used as training material in a supervisory training program under the Government Employees Training Act. If determined necessary to the course, the subscription could be paid from the Foundation's Salaries and Expenses appropriation. 39 Comp. Gen. 320 (1959). Similarly, the Interior Department's Mining Enforcement and Safety Administration could subscribe to the "Federal Employees News Digest" if determined to be necessary in carrying out the agency's statutory functions. 55 Comp. Gen. 1076 (1976).

Subsequently, when the Federal Employees News Digest came under some criticism, it became necessary to explain that a decision such as 55 Comp. Gen. 1076 is neither an endorsement of a particular publication nor an exhortation for agencies to buy it. It is merely a determination that the purchase is legally authorized. B-185591, February 7, 1985.

In B-171856, March 3, 1971, the Interior Department was permitted to purchase newspapers to send to a number of Eskimo families in Alaska. Members of the families had been transported to Washington (state) to help in fighting a huge fire, and the newspapers were seen as necessary to keep the families advised of the status of the operation and also as a measure to encourage future voluntarism.

e. Miscellaneous Items Incident to the Federal Workplace

Agencies may spend their appropriations, within reason, to cooperate with government-sanctioned charitable fund-raising campaigns, including such things as permitting solicitation during working hours, preparing campaign instructions, and distributing campaign materials. 67 Comp. Gen. 254 (1988) (Combined Federal Campaign); B-155667, January 21, 1965; B-154456, August 11, 1964; B-119740, July 29, 1954. This does not, however, extend to giving T-shirts to Combined Federal Campaign contributors. 70 Comp. Gen. ___ (B-240001, February 8, 1991).

An agency may use its general operating appropriations to fund limited amounts of promotional material in support of the United States savings bond campaign. B-225006, June 1, 1987.

Support which agencies are authorized by law to provide to federal credit unions may, if administratively determined to be necessary, include automatic teller machines. 66 Comp. Gen. 356 (1987). The

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appropriate. This was done and there is now express statutory authority to use the contingent fund of the Senate to provide telecommunications services and equipment. 2 U.S.C. §§ 58(a)(1) and 58a.

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Chapter 5

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Availability of Appropriations: Time

A. General Principles—Duration of Appropriations

1. Introduction

As we have emphasized in several places in this publication, the concept of the "legal availability" of appropriations is defined in terms of three elements—purpose, time, and amount. Chapter 4 focused on purpose; this chapter addresses the second element, time.

The two basic "uses" of appropriations are obligations and expenditures. An obligation is a binding commitment against an appropriation which will require an expenditure at some later time. An expenditure is the actual disbursement of funds. This chapter will discuss the limitations on the use of appropriations relating to time—when they may be obligated and when they may be expended. Many of the rules are statutory and will be found in the provisions of Title 31, United States Code, cited throughout this chapter.

Our starting point is the firmly established proposition that—

> "Congress has the right to limit its appropriations to particular times as well as to particular objects, and when it has clearly done so, its will expressed in the law should be implicitly followed."

13 Op. Att'y Gen. 288, 292 (1870). The placing of time limits on the availability of appropriations is one of the primary means of congressional control. By imposing a time limit, Congress reserves to itself the prerogative of periodically reviewing a given program or agency's activities.

When an appropriation is by its terms made available for a fixed period of time or until a specified date, the general rule is that the availability relates to the authority to obligate the appropriation, and does not necessarily prohibit payments after the expiration date for obligations previously incurred, unless the payment is otherwise expressly prohibited by statute. 37 Comp. Gen. 861, 863 (1958); 23 Comp. Gen. 862 (1944); 18 Comp. Gen. 969 (1939); 16 Comp. Gen. 205 (1936). Thus, a time-limited appropriation is

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available for obligation only during the period for which it is made, but remains available beyond that period, within limits, for expenditures to liquidate properly made obligations. In this connection, 31 U.S.C. § 1502(a) provides:

"The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law."

In addition, there are situations in which appropriations may be "held over" for obligation beyond their expiration date by judicial decree. The concepts summarized in this paragraph will be explored in depth elsewhere in this chapter.

2. Types of Appropriations

Classified on the basis of duration, appropriations are of three types: annual, multiple-year, and no-year.

Annual appropriations (also called fiscal year or one-year appropriations) are made for a specified fiscal year and are available for obligation only during the fiscal year for which made. The federal government's fiscal year begins on October 1 and ends on September 30 of the following year. 31 U.S.C. § 1102. Thus, fiscal year 1991 begins on October 1, 1990, and ends on September 30, 1991. Routine activities of the federal government are, for the most part, financed by annual appropriations.

All appropriations are presumed to be annual appropriations unless the appropriation act expressly provides otherwise. There are several reasons for this. First, as required by 1 U.S.C. § 105, the title and enacting clause of all regular and supplemental appropriation acts specify the making of appropriations "for the fiscal year ending September 30, 19XX." Thus, everything in an appropriation act is presumed to be applicable only to the fiscal year covered unless specified to the contrary. Second, 31 U.S.C. § 1301(c) provides that, with specified exceptions:

"(c) An appropriation in a regular, annual appropriation law may be construed to be permanent or available continuously only if the appropriation—

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"(2) expressly provides that it is available after the fiscal year covered by the law in which it appears."

Third, appropriation acts commonly include the following general provision:

"No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein."[1]

Under the plain terms of this provision, the origin of which has previously been discussed in Chapter 2, Section C.2.d, the availability of an appropriation may not be extended beyond the fiscal year for which it is made absent express indication in the appropriation act itself. See 58 Comp. Gen. 321 (1979); B-118638, November 4, 1974.

A limitation item included in an appropriation (for example, a lump-sum appropriation with a proviso that not to exceed a specified sum shall be available for a particular object) is subject to the same fiscal year limitation attaching to the parent appropriation unless the limitation is specifically exempted from it in the appropriation act. 37 Comp. Gen. 246, 248 (1957).

Annual appropriations are available only to meet bona fide needs of the fiscal year for which they were appropriated. The so-called "bona fide needs rule" is covered in detail in Section B.

If an agency fails to obligate its annual funds by the end of the fiscal year for which they were appropriated, they cease to be available for obligation and are said to have "expired" for obligational purposes. This rule—that time-limited budget authority

[1]See, for example, the following fiscal year 1990 appropriation acts: Pub. L. No. 101-101, § 501, 103 Stat. 641, 666 (energy/water development); Pub. L. No. 101-121, § 305, 103 Stat. 701, 742 (Interior); Pub. L. No. 101-136, § 504, 103 Stat. 783, 812 (Treasury/General Government); Pub. L. No. 101-144, § 504, 103 Stat. 839, 869 (Housing and Urban Development/Veterans Affairs); Pub. L. No. 101-161, § 609, 103 Stat. 951, 982 (Agriculture); Pub. L. No. 101-162, § 602, 103 Stat. 988, 1031 (State/Justice/Commerce); Pub. L. No. 101-163, § 302, 103 Stat. 1041, 1063 (legislative branch); Pub. L. No. 101-164, § 307, 103 Stat. 1069, 1092 (Transportation); Pub. L. No. 101-165, § 9005, 103 Stat. 1112, 1129 (Defense); Pub. L. No. 101-166, § 508, 103 Stat. 1159, 1190 (Labor/Health and Human Services); Pub. L. No. 101-167, § 517, 103 Stat. 1195, 1220 (foreign operations); Pub. L. No. 101-168, § 108, 103 Stat. 1267, 1276 (District of Columbia government).

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ceases to be available for obligation after the last day of the specified time period—has been termed an "elementary principle" of federal fiscal law. West Virginia Association of Community Health Centers, Inc. v. Heckler, 734 F.2d 1570, 1576 (D.C. Cir. 1984); Population Institute v. McPherson, 797 F.2d 1062, 1071 (D.C. Cir. 1986). See also 18 Comp. Gen. 969, 971 (1939). Annual appropriations remain available for an additional five fiscal years beyond expiration, however, to make payments to liquidate liabilities arising from obligations made within the fiscal year for which the funds were appropriated. 31 U.S.C. § 1553(a), as amended by Pub. L. No. 101-510, § 1405(a), 104 Stat. at 1676 (1990). The principles summarized in this paragraph are discussed in Section D.

The above principles are illustrated in 56 Comp. Gen. 351 (1977). In that case, the Interior Department proposed to obtain and exercise options on certain land, obligate the full purchase price, and take immediate title to and possession of the property. Payment of the purchase price, however, would be disbursed over a period of up to 4 years. The reason for this was that, in view of the capital gains tax, the seller would have insisted on a higher purchase price if payment was to be made in a lump sum. The Comptroller General concluded that the proposal was not legally objectionable, provided that (a) a bona fide need for the property existed in the fiscal year in which the option was to be exercised, and (b) the full purchase price was obligated against appropriations for the fiscal year in which the option was exercised. As long as these conditions were met—obligation within the period of availability for a legitimate need existing within that period—the timing of actual disbursements over a 4-year period was irrelevant.

Just as Congress can by statute expand the obligational availability of an appropriation beyond a fiscal year, it can also reduce the availability to a fixed period less than a full fiscal year. To illustrate, a fiscal year 1980 appropriation for the now-defunct Community Services Administration included funds for emergency energy assistance grants. Since the program was intended to provide assistance for increased heating fuel costs, and Congress did not want the funds to be used to buy air conditioners, the appropriation specified that awards could not be made after June 30, 1980.[2]

[2]Department of the Interior and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-126, 93 Stat. 954, 978 (1979). Due to a severe heat wave in the summer of 1980, the program was expanded to include fans and the appropriation was subsequently extended to the full fiscal year. Pub. L. No. 96-321, 94 Stat. 1001 (1980).

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Appropriations available for obligation for less than a full fiscal year are, however, uncommon.

Multiple-year appropriations are available for obligation for a definite period in excess of one fiscal year. 37 Comp. Gen. 861, 863 (1958). For example, if a fiscal year 1990 appropriation act includes an appropriation which specifies that it shall remain available until September 30, 1991, it is a 2-year appropriation. As a more specific illustration, the Navy's "Shipbuilding and Conversion" appropriation, found in the annual Defense Department appropriation acts, is typically a 5-year appropriation.[3]

Apart from the extended period of availability, multiple-year appropriations are subject to the same principles applicable to annual appropriations and do not present any special problems.

A no-year appropriation is available for obligation without fiscal year limitation. In order for an appropriation to be a no-year appropriation, the appropriating language must expressly so provide. 31 U.S.C. § 1301(c). The standard language used to make a no-year appropriation is "to remain available until expended." 40 Comp. Gen. 694, 696 (1961); 3 Comp. Dec. 623, 628 (1897). However, other language will suffice as long as its meaning is unmistakable, such as "without fiscal year limitation." See 57 Comp. Gen. 865, 869 (1978).

The rules relating to no-year appropriations are simple. Apart from one important restriction (31 U.S.C. § 1555, discussed later in connection with the closing of accounts), all statutory time limits as to when the funds may be obligated and expended are removed, and the funds remain available for their original purposes until expended. 43 Comp. Gen. 657 (1964); 40 Comp. Gen. 694 (1961). Thus, there has been little occasion for the Comptroller General to render decisions on the availability of no-year appropriations, at least from the time perspective.

A small group of decisions involves the effect of subsequent congressional action on the availability of a prior year's no-year appropriation. In one case, Congress had made a no-year appropriation to the Federal Aviation Administration for the purchase of aircraft. A question arose as to the continued availability of the appropriation

[3]E.g., Pub. L. No. 101-165, 103 Stat. 1112, 1121 (1989) (FY 1990).

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because, in the following year, Congress explicitly denied a budget request for the same purpose. The Comptroller General held that the subsequent denial did not restrict the use of the unexpended balance of the prior no-year appropriation. The availability of the prior appropriation could not be changed by a later act "except in such respects and to such extent as is expressly stated or clearly implied by such act." 40 Comp. Gen. 694 (1961). See also B-200519, November 28, 1980.

In another case, a no-year appropriation for the National Capital Park and Planning Commission included a monetary ceiling on non-contract services during the fiscal year. Based on the apparent intent of the ceiling, GAO concluded that the specific restriction had the effect of suspending the "available until expended" provision of prior unrestricted no-year appropriations as far as personal services were concerned, for any fiscal year in which the restriction was included. Thus, unobligated balances of prior unrestricted no-year appropriations could not be used to augment the ceiling. 30 Comp. Gen. 500 (1951). A similar issue was considered in 62 Comp. Gen. 692 (1983). The Nuclear Regulatory Commission received a no-year appropriation which included a prohibition on compensating intervenors. The decision held that the unobligated balance of a prior unrestricted no-year appropriation could be used to pay an Equal Access to Justice Act award to an intervenor made in a restricted year, where part of the proceeding giving rise to the award was funded by an unrestricted appropriation. Unlike the situation in 30 Comp. Gen. 500, the restriction in the 1983 case was expressly limited to "proceedings funded in this Act," and thus could have no effect on the availability of prior appropriations.

Similar issues were considered in the context of multiple-year appropriations in 31 Comp. Gen. 368 (1952) and 31 Comp. Gen. 543 (1952), overruling 31 Comp. Gen. 275 (1952). In both of these cases, based on a determination of congressional intent, it was held that the current restriction had no effect on the availability of unobligated balances of prior unrestricted appropriations.

Deobligated no-year funds, as well as no-year funds recovered as a result of cost reductions, are available for obligation on the same basis as if they had never been obligated, subject to the restrictions of 31 U.S.C. § 1555. 40 Comp. Gen. 694, 697 (1961); B-211323, January 3, 1984; B-200519, November 28, 1980. One early decision concerned the disposition of liquidated damage penalties deducted

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justification was adequate in that case because the facility in question operated on three shifts 7 days a week and the credit union could not remain open to accommodate workers on all shifts.

The Salaries and Expenses appropriation of the Internal Revenue Service could be used to procure credit bureau reports if administratively determined to be necessary in connection with investigating applicants for employment with the IRS. B-117975, December 29, 1953.

Outplacement assistance to employees may be regarded as a legitimate matter of agency personnel administration if the expenditures are found to benefit the agency and are reasonable in amount. 68 Comp. Gen. 127 (1988). The Government Employees Training Act authorizes training in preparation for placement in another federal agency under conditions specified in the statute. 5 U.S.C. § 4103(b).

Otherwise unrestricted operating appropriations are available to protect a government official who has been threatened or is otherwise in danger, if the agency determines that the risk impairs the official's ability to carry out his or her duties and hence adversely affects the efficient functioning of the agency. Certain officials, specified in 18 U.S.C. § 3056(a), are entitled to Secret Service protection. 54 Comp. Gen. 624 (1975), as modified by 55 Comp. Gen. 578 (1975).

Payment of an honorarium to an invited guest speaker (other than a government employee) is permissible under a necessary expense rationale. See A-69906, March 16, 1936, in which payment of an honorarium by an agency of the District of Columbia Government was found to be an allowable administrative expense. See also B-20517, September 24, 1941.

Fees for the notarization of documents are properly payable from appropriated funds where no government notary is available. B-33846, April 27, 1943.

An agency's appropriations are not available to reimburse the Civil Service Retirement Fund for losses due to overpayments to a retired employee resulting from the agency's erroneous processing of information. 54 Comp. Gen. 205 (1974).

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from payments made to a contractor. The Comptroller General concluded that, if the contractor had not objected to the deduction within two years, the funds could be treated as unobligated balances available for expenditure in the same manner as other funds in the account, assuming the no-year account contained a sufficient balance for the discharge of unanticipated claims. 23 Comp. Gen. 365 (1943). There was nothing magic about the suggested two-year period. It was simply GAO's estimate of a point beyond which the likelihood of a claim by the contractor would be sufficiently remote. Id. at 367.

No-year appropriations have advantages and disadvantages. The advantages to the spending agency are obvious. From the legislative perspective, a key disadvantage is a loss of congressional control over actual program levels from year to year. GAO has expressed the position that no-year appropriations should not be made in the absence of compelling programmatic or budgetary reasons. See GAO report entitled No-Year Appropriations in the Department of Agriculture, PAD-78-74 (September 19, 1978).

3. Permissible Actions Prior to Start of Fiscal Year

In considering what may and may not be done before the start of a fiscal year, it is necessary to keep in mind the Antideficiency Act, 31 U.S.C. § 1341(a), which prohibits obligations or expenditures in advance of appropriations. By virtue of this law, certainly no obligations may be incurred before the appropriation act is enacted, unless specifically authorized by law.

If the appropriation act is enacted prior to the start of the fiscal year for which the appropriation is being made, contracts may be entered into upon enactment and before the start of the fiscal year, provided that no payments or expenditures may be made under them until the start of the fiscal year. Any such contract should make this limitation clear. 20 Comp. Gen. 868 (1941); 16 Comp. Gen. 1007 (1937); 4 Comp. Gen. 887 (1925); 2 Comp. Gen. 739 (1923); B-20670, October 18, 1941; A-19524, August 26, 1927; B-213141-O.M., March 29, 1984; 11 Comp. Dec. 186 (1904); 4 Lawrence, First Comp. Dec. 132 (1883). The contract is not regarded as an obligation in violation of the Antideficiency Act since, even though the time period covered by the appropriation to be charged has not yet started, the appropriation has already been enacted into law.

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Of course, Congress may by statute authorize the actual expenditure of appropriations prior to the beginning of the fiscal year, in which event the above rule does not apply. 4 Comp. Gen. 918 (1925). This result may also follow if an appropriation is made to carry out the provisions of another law which clearly by its terms requires immediate action. E.g., 1 Comp. Dec. 329 (1895). However, the general rule remains that (a) expenditures prior to the beginning of the fiscal year(s) covered by the appropriation are unauthorized; and (b) obligations prior to the start of the fiscal year are permissible only if the relevant appropriation act has already been enacted and only where actual disbursements are deferred until after the start of the new fiscal year.

The Comptroller General has also held that the awarding of a "conditional contract" prior to the enactment of the relevant appropriation act does not violate statutory funding restrictions. A "conditional contract" must expressly provide that the government's liability is contingent upon the future availability of appropriations. Under this arrangement, performance cannot begin prior to the date of enactment of the appropriation, although it may begin after the enactment of the appropriation but before the start of the fiscal year. The contract must also provide that the government is under no obligation to make any contract payments until the start of the fiscal year. 39 Comp. Gen. 776 (1960); 39 Comp. Gen. 340 (1959); 21 Comp. Gen. 864 (1942); B-171798(1), August 18, 1971, at 11–12.

B. The Bona Fide Needs Rule

1. The Concept

One of the fundamental principles of appropriations law is the so-called bona fide needs rule: A fiscal year appropriation may be obligated only to meet a legitimate, or bona fide, need arising in, or in some cases arising prior to but continuing to exist in, the fiscal year for which the appropriation was made. Citations to this principle are numerous. See, e.g., 68 Comp. Gen. 170, 171 (1989); 58 Comp. Gen. 471, 473 (1979); 54 Comp. Gen. 962, 966 (1975); 33 Comp. Gen. 57, 61 (1953); B-183184, May 30, 1975.

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Bona fide need questions arise in many forms. An agency may wish to enter into or modify a contract or make some other obligation or expenditure, the question being which fiscal year to charge. The question may be whether an obligation previously recorded was a proper charge against that fiscal year's appropriation. An agency may have taken certain actions which it should have recorded as an obligation but did not; when the time for payment arrives, the question again is which fiscal year to charge. These are all facets of the same basic question—whether an obligation, proposed or made, recorded or unrecorded, voluntarily incurred or imposed by operation of law, bears a sufficient relationship to the legitimate needs of the period of obligational availability of the appropriation charged or sought to be charged.

The bona fide needs rule has a statutory basis. As noted in Chapter 1, the first general appropriation act in 1789 made appropriations "for the service of the present year," and this concept continues to this time. This "one-year" concept is also reflected in 31 U.S.C. § 1502(a), sometimes called the "bona fide needs statute." Originally enacted in 1870 (16 Stat. 251), section 1502(a) provides that the balance of a fixed-term appropriation "is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period . . . ." The key word here is "properly"—expenses "properly incurred" or contracts "properly made" within the period of availability. See, e.g., 37 Comp. Gen. 155 (1957). Additional statutory support for the rule may be found in the Antideficiency Act, 31 U.S.C. § 1341(a), and the so-called Adequacy of Appropriations Act, 41 U.S.C. § 11. (Bona fide need questions may involve other statutory restrictions as well. It also should be apparent that they are closely related to the subject matter covered in Chapter 7 on obligations.) For an early but still relevant and useful discussion, see 6 Comp. Dec. 815 (1900).

While the rule itself is universally applicable, determination of what constitutes a bona fide need of a particular fiscal year depends largely on the facts and circumstances of the particular case. 44 Comp. Gen. 399, 401 (1965); 37 Comp. Gen. 155, 159 (1957).

In its most elementary form—where the entire transaction (contract or purchase, delivery or other performance, and payment) takes place during the same fiscal year—the rule means simply

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that the appropriation is available only for the needs of the current year. A common application of the rule in this context is that an appropriation is not available for the needs of a future year. For example, suppose that, as the end of a fiscal year approaches, an agency purchases a truckload of pencils when it is clear that, based on current usage, it already has in stock enough pencils to last several years into the future. It would seem apparent that the agency was merely trying to use up its appropriation before it expired, and the purchase would violate the bona fide needs rule.

We do not mean to suggest that an agency may purchase only those supplies which it will actually use during the fiscal year. Agencies normally maintain inventories of common use items. The bona fide needs rule does not prevent maintaining a legitimate inventory at reasonable and historical levels, the "need" being to maintain the inventory level so as to avoid disruption of operations. The problem arises when the inventory crosses the line from reasonable to excessive. Future years' needs and year-end spending are covered further in Section B.2 of this chapter.

What about the needs of a prior year? The rules here are not quite so simple. There are situations in which current appropriations may (and even must) be used to satisfy unmet needs arising in a prior year, and situations in which current appropriations are not available for that purpose. Prior years' needs are covered in Section B.3.

Bona fide need questions also frequently involve transactions which cover more than one fiscal year. In the typical situation, a contract is made (or attempted to be made) in one fiscal year, with performance and payment to extend at least in part into the following fiscal year. The question is which fiscal year should be charged with the obligation. In this context, the rule is that, in order to obligate a fiscal year appropriation for payments to be made in a succeeding fiscal year, the contract imposing the obligation must have been made within the fiscal year sought to be charged, and the contract must have been made to meet a bona fide need of the fiscal year to be charged. E.g., 35 Comp. Gen. 692 (1956); 33 Comp. Gen. 57, 61 (1953); 20 Comp. Gen. 436 (1941); 16 Comp. Gen. 37 (1936); 21 Comp. Dec. 822 (1915). More detailed discussion of the rule and its rationale is contained in 4 Comp. Dec. 553 (1898) and 37 Comp. Gen. 155 (1957).

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The principle that payment is chargeable to the fiscal year in which the obligation is incurred as long as the need arose, or continued to exist in, that year applies even though the funds are not to be disbursed and the exact amount owed by the government cannot be determined until the subsequent fiscal year. E.g., 21 Comp. Gen. 574 (1941). Thus, in a case where the United States entered into an agreement with a state to provide assistance for the procurement of civil defense items for the state and to pay a specified percentage of the cost, the Comptroller General found that the need arose in the year the agreement with the state was made. Therefore, appropriations current at that time were to be charged with the cost, notwithstanding the fact that the actual procurement contracts with suppliers, including the exact price, were not negotiated and executed until a subsequent fiscal year. 31 Comp. Gen. 608 (1952).

Several sections of this chapter, starting with B.4, explore the application of the bona fide needs rule in various aspects of government contracting in which transactions cover more than one fiscal year. We have structured these sections in large measure on a comprehensive and well-documented article entitled Legal Aspects of Funding Department of the Army Procurements by Capt. Dale Gallimore, 67 Mil. L. Rev. 85 (1975).

The bona fide needs rule applies to multiple-year as well as fiscal-year appropriations. 68 Comp. Gen. 170 (1989); 55 Comp. Gen. 768, 773-74 (1976); B-235678, July 30, 1990. See also 64 Comp. Gen. 163, 166 (1984). In other words, an agency may use a multiple-year appropriation for needs arising at any time during the period of availability.

An argument can be made, not wholly without logic, that a multiple-year appropriation can be obligated at any time during its availability, but only to meet a bona fide need of the year in which the funds were appropriated. Suppose, for example, that an agency receives a two-year appropriation every year. For FY 1989, it receives an appropriation available through FY 1990; for FY 1990, it receives an appropriation available through FY 1991, and so on. It is possible to apply the bona fide needs rule to require that the FY 1990 appropriation be used only for needs arising in FY 1990, although obligation may occur any time prior to the end of FY 1991. The Comptroller General specifically rejected this approach in 68 Comp. Gen. 170, holding that the Defense Logistics Agency

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could use its FY 1987 2-year Research and Development appropriation for a need arising in FY 1988. "There is no requirement that 2-year funds be used only for the needs of the first year of their availability." Id. at 172.

It follows that the bona fide needs rule does not apply to no-year funds. 43 Comp. Gen. 657, 661 (1964).

2. Future Years' Needs

An appropriation may not be used for the needs of some time period subsequent to the expiration of its period of availability. As most appropriations are annual appropriations, a more common statement of the rule is that an appropriation for a given fiscal year is not available for the needs of a future fiscal year.[4] Determining the year to which a need relates is not always easy. Some illustrative cases are listed below:

- Rent on property leased by National Park Service from National Park Foundation could be paid in advance, but lease could not cross fiscal year lines. Proposal was for lease to run from May 1 through April 30 and for the full annual rent to be paid in advance on May 1. However, appropriations available as of May 1 could not be used for period of October 1 through April 30 since rent for these months constituted a need of the following fiscal year. B-207215, March 1, 1983.
- Envelopes ordered near the end of one fiscal year, which were delivered in and were intended for use in the following fiscal year, could be charged only to appropriations for the latter year. 5 Comp. Dec. 486 (1899). (Maintaining an inventory level was not a factor in this case.)
- Balance of an appropriation for salaries remaining unexpended at the end of one fiscal year could not be used to pay salaries for services rendered in the following fiscal year. 18 Op. Att'y Gen. 412 (1886).
- Department of Housing and Urban Development recorded certain obligations for public housing subsidies on estimated basis. At end of fiscal year, obligations were found to be in excess of actual needs. It was held improper to send excess funds to state agency's operating reserve to offset subsidy for following year, since this amounted to using the funds for the needs of a subsequent year.

[4]The topic of obligating for needs of a future year arises in a variety of contexts and is also involved in several later sections of this chapter (e.g., B.4, B.5, B.8).

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Proper course of action was to deobligate the excess. 64 Comp. Gen. 410 (1985).

Any discussion of obligating for future years' needs inevitably leads to the question of year-end spending. Federal agencies as a fiscal year draws to a close are often likened to sharks on a feeding frenzy, furiously thrashing about to gobble up every appropriated dollar in sight before the ability to obligate those dollars is lost. While there can be no doubt that this happens, the issue is far from one-sided.

The legal issue was stated very simply in an early decision of the Comptroller of the Treasury:

"An appropriation should not be used for the purchase of an article not necessary for the use of a fiscal year in which ordered merely in order to use up such appropriation. This would be a plain violation of the law."

8 Comp. Dec. 346, 348 (1901). Thus, where an obligation is made toward the end of a fiscal year and it is clear from the facts and circumstances that the need relates to the following fiscal year, the bona fide needs rule has been violated. The obligation is not a proper charge against the earlier appropriation, but must be charged against the following year's funds. This was the result, for example, in 1 Comp. Gen. 115 (1921), in which an order for gasoline had been placed three days before the end of FY 1921, with the gasoline to be delivered in monthly installments in FY 1922. The Comptroller General stated:

"It is not difficult to understand how the need for an article of equipment, such as a typewriter, might arise during the fiscal year 1921 and its purchase be delayed until the latter part of June, but as to supplies that are consumed as used, such as gasoline, it can not be held that they were purchased to supply a need of the fiscal year 1921 when the contract is made late in the month of June and expressly precludes the possibility of delivery before July 1, 1921."

Id. at 118. See also 4 Comp. Dec. 553 (1898) (cement ordered late in one fiscal year to be delivered several months into the following fiscal year).[5]

[5]"There is no authority in an appropriation made specifically for the service of a particular fiscal year to enter into contracts for supplies, etc., for the service of a subsequent fiscal year, and therefore as to that appropriation such a contract is not 'properly made within that year.'" 4 Comp. Dec. at 556.

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Yet this is only one side of the coin. The other side is illustrated in another passage from 8 Comp. Dec. at 348:

"An appropriation is just as much available to supply the needs of the [last day] of a particular year as any other day or time in the year."

Thus, a year-end obligation perhaps raises the possibility that the agency is trying to "dump" its remaining funds and warrants a further look, but the timing of the obligation does not, in and of itself, establish anything improper. 38 Comp. Gen. 628, 630 (1959); 6 Comp. Dec. 815, 818 (1900).

GAO has conducted several studies of year-end spending and has consistently reported that year-end spending is not inherently more or less wasteful than spending at any other time of the year. In one report, GAO suggested that year-end spending surges are really symptomatic of a larger problem—inadequate management of budget execution—and that the apportionment process could be more effectively used to provide the desired management. Federal Year-End Spending: Symptom of a Larger Problem, PAD-81-18 (October 23, 1980), pp. 7–9.[6]

GAO also noted in its October 1980 report that there are several reasons for year-end spending, some of which are perfectly valid. For example, some programs have predictable fourth quarter surges due to cyclical or seasonal fund requirements. If, for example, you are administering a fire suppression program, you should expect a fourth quarter surge because the fourth quarter of the federal fiscal year is the major fire season in many states. PAD-81-18 at 3. In other situations, it may be desirable to delay obligations to have funds available for emergencies that may arise during the year. Id. at 4.

In evaluating a year-end obligation, it is important to determine exactly what the need is from the agency's perspective. In one case, for example, the Small Business Administration awarded cooperative agreements to certain Small Business Development Centers on

[6]Other GAO reports in this area are: Federal Year-End Spending Patterns for Fiscal Years 1982, 1983, and 1984, GAO/AFMD-85-75 (November 4, 1985); Limitations on Fiscal Year 1981 Fourth Quarter Obligations in Certain Agencies, GAO/PAD-82-43 (July 16, 1982); Government Agencies Need Effective Planning to Curb Unnecessary Year-End Spending, PSAD-80-67 (July 28, 1980).

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the last day of a fiscal year. The Centers then provided management and technical assistance to small businesses, all of which would obviously be done in the following year. GAO found no bona fide need violation because the need, from the perspective of implementing SBA's appropriation, was merely to provide assistance to the Centers, and there was no reason this could not be done on the last day of the year. B-229873, November 29, 1988.

One device Congress has employed to control year-end spending surges is legislation limiting the amount of obligations that may be incurred in the last month or two-month period or quarter of the fiscal year. For example, the Defense Department's 1990 appropriation contained a provision limiting obligations during the last two months of the fiscal year to not more than 20 percent of the total fiscal-year appropriations.[7] In comments on legislative proposals of this type, GAO has pointed out that they are difficult to administer, but has supported them as temporary measures pending more fundamental improvements in budget execution management and procurement planning.[8] In addition, there is the risk that limitations of this type may have the effect of simply moving the spending surges back a few months, accomplishing nothing.

3. Prior Years' Needs

There are situations in which it is not only proper but mandatory to use currently available appropriations to satisfy a need which arose in a prior year. We refer to this as the "continuing need." If a need arises during a particular fiscal year and the agency chooses not to satisfy it during that year, perhaps because of insufficient funds or higher priority needs, and the need continues to exist in the following year, the obligation to satisfy that need is properly chargeable to the later year's funds. "An unfulfilled need of one period may well be carried forward to the next as a continuing need with the next period's appropriation being available for funding." B-197274, September 23, 1983. Thus, an important corollary to the bona fide needs rule is that a continuing need is chargeable to funds current for the year in which the obligation is made, regardless of the fact that the need may have originated in a prior year.

[7]Pub. L. No. 101-165, § 9007, 103 Stat. 1112, 1130 (1989).

[8]E.g., B-198666, June 29, 1981; B-198666, May 20, 1980.

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An illustration is B-207433, September 16, 1983. The Army contracted for a specific quantity of thermal viewers. The contract provided for a downward adjustment in the contract price in the case of an "underrun," that is, if the contractor was able to perform at less than the contract price. After the appropriation charged with the contract had expired, the contractor incurred an underrun and proposed to use the excess funds to supply an additional quantity of viewers. It was undisputed that the need for additional viewers could be attributed to the year in which the contract was entered into, and that the need continued to exist. GAO agreed with the Army that the proper course of action was to deobligate the excess funds and to charge the obligation for the additional quantity, if the Army still wished to procure them, to current year's appropriations. The fact that the need arose in a prior year was immaterial. The decision, at pages 4–5, offered the following explanation:

"The essence of the [bona fide needs] rule is simply that an appropriation may be validly obligated only to meet a legitimate need existing during the period of availability. Under this concept, payments are chargeable to the year in which the obligation took place, even though not actually disbursed until a later year, as long as the need existed when the funds were obligated. . . .

"Certainly the Army could have used underrun funds to procure additional viewers at any time during the period those funds remained available for obligation. Also, we are of course aware that an unmet need does not somehow evaporate merely because the period of availability has expired. However, nothing in the bona fide needs rule suggests that expired appropriations may be used for an item for which a valid obligation was not incurred prior to expiration merely because there was a need for that item during that period. . . . Once the obligational period has expired, the procurement of an increased quantity must be charged to new money, and this is not affected by the fact that the need for that increased quantity may in effect be a 'continuing need' that arose during the prior period."

Another illustration is B-226198, July 21, 1987. In late FY 1986, the U.S. Geological Survey ordered certain microcomputer equipment, to be delivered in early FY 1987, charging the purchase to FY 1986 funds. The equipment was delivered and accepted, but was stolen before reaching the ordering office. The decision held that a reorder, placed in FY 1987, had to be charged to FY 1987 funds. As with the thermal viewers in B-207433, the fact that the need for the equipment arose in 1986 was immaterial.

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The Federal Reserve Board could not match employee contributions to an employee savings plan established by the Board. B-174174, September 24, 1971.

C. Specific Purpose Authorities and Limitations

1. Introduction

This section will explore a number of specific topics concerning purpose availability. Sections C.2 through C.16 cover areas which have generated considerable activity over the years and which require somewhat detailed presentation. While our topic selection is designed to highlight certain restrictions, our objective is to describe what is authorized as well as what is unauthorized. Most of the topics are a mixture of both.

Restrictions on the purposes for which appropriated funds may be spent come from a variety of sources. Some may stem from the Constitution itself. An example is the prohibition on paying certain state and local taxes, Section C.15. Others are found in permanent legislation, such as the restrictions on residential and long distance telephone service discussed in Section C.16.

A common source of purpose restrictions is the appropriation act itself. Restrictions are often included as provisos to the appropriating language or as general provisions or "riders." For example, B-202716, October 29, 1981, construes an appropriation act restriction prohibiting the use of Legal Services Corporation funds for the representation of illegal aliens. Another example is the restriction on "publicity and propaganda" expenditures found in some appropriation acts, discussed in Section C.11.

Finally, a number of restrictions have evolved from decisions of the Comptroller General and his predecessor, the Comptroller of the Treasury. An example is the government's policy on self-insurance, Section C.10. The restrictions that have evolved administratively usually date back to the 19th Century, are firmly embedded in appropriations law, and for the most part have been recognized by

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In another case, cost overruns caused the Army to delete certain items from a FY 1979 procurement. The Army repurchased the canceled items in 1981, charging 1981 appropriations. GAO agreed that the repurchase was properly chargeable to 1981, rather than 1979, funds. B-206283-O.M., February 17, 1983.

The essential requirements of the "continuing need" corollary are that (1) the need, unmet in the year in which it arose, must continue to exist in the subsequent obligational period; (2) the incurring of an obligation must have been discretionary with the agency to begin with; and (3) no obligation was in fact incurred during the prior year.

If the agency has no discretion as to the timing of an obligation (for example, in situations where the obligation arises by operation of law), or, even in discretionary situations, if the agency has actually incurred a valid obligation in the prior year (whether recorded or unrecorded), then the "continuing need" concept has no application and the obligation must be charged to the prior year. Absent statutory authority, current appropriations are not available to fund an obligation or liability (as opposed to an unmet and unobligated-for need) of a prior obligational period. If insufficient funds remain in the prior year's appropriation, the agency must seek a supplemental or deficiency appropriation and must further consider the possibility that the Antideficiency Act has been violated.

In an early case, for example, an agency had contracted for repairs to a building toward the end of fiscal year 1904. Since it was clear that the repairs were needed at the time they were ordered, they were chargeable to FY 1904 appropriations, and the exhaustion of the 1904 appropriation did not permit use of 1905 funds. 11 Comp. Dec. 454 (1905). (The contract constituted a valid obligation against the 1904 appropriation.) See also 21 Comp. Dec. 822 (1915).

Similarly, an obligation occurs under 5 U.S.C. § 504, the administrative portion of the Equal Access to Justice Act, when the agency renders its decision approving a fee application. The obligation is against funds current as of the time of the award. If funds are not currently available to satisfy the award, the agency may not use the following year's appropriation. 62 Comp. Gen. 692, 698-700 (1983).

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In B-226801, March 2, 1988, GAO considered various entitlement programs administered by the Department of Veterans Affairs. Under these programs, the obligation arises when the VA determines eligibility through its adjudication process, and must be recorded at that time. If the obligations would exceed available funds, it is not proper to defer the recording and charge the following year's appropriation. Since the obligations are required by law, overobligation would not violate the Antideficiency Act, but they must still be recognized and recorded when they arise. Congress subsequently began including an administrative provision in the VA's appropriation act permitting the use of appropriations for these programs to pay obligations required to be recorded in the last quarter of the preceding fiscal year.[9]

For additional cases, see 55 Comp. Gen. 768, 773-74 (1976) (current year's appropriations not available to fund prior year's Antideficiency Act violation); 54 Comp. Gen. 393, 395 (1974) (deficiency appropriation necessary to pay claims against exhausted appropriation); B-133001, March 9, 1979 (fiscal-year refugee assistance appropriation not available to pay for services performed in prior year); B-14331, January 24, 1941; A-76081, June 8, 1936 (appropriations not available for past obligations unless clearly indicated by language and intent of appropriation act); B-221204-O.M., January 31, 1986 (meals under child nutrition program served in September of one fiscal year may not be charged to subsequent year's appropriation). Congressional denial of a request for a deficiency appropriation does not make current appropriations available to satisfy the prior year's obligation. B-114874, September 16, 1975 (postage charges under 39 U.S.C. § 3206).

4. Delivery of Materials Beyond the Fiscal Year

When the government purchases goods or materials in one fiscal year and delivery occurs in whole or in part in a subsequent fiscal year, the question is whether the contract meets a bona fide need of the fiscal year in which it was made. This was the central legal issue in our discussion of year-end spending in Section B.2, but the issue exists regardless of when in the fiscal year the contract is made. This section will explore the topic in more general terms.

[9]E.g., Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1990, Pub. L. No. 101-144, title I, 103 Stat. 839, 843-44 (1989).

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An agency may not obligate funds when it is apparent from the outset that there will be no requirement until the following fiscal year. For example, it was found that annual appropriations obligated to fund an agreement between the General Services Administration and the Federal Power Commission whereby GSA agreed to renovate space in a federal building incident to relocation of FPC personnel, were not available since the relocation was not required to, and would not, take place by the end of the fiscal year, and because the space in question would not be made "tenantable" until the following fiscal year. B-95136-O.M., August 11, 1972.

However, the timing of delivery, while obviously a relevant factor, is not conclusive. There are perfectly legitimate situations in which an obligation may be incurred in one year with delivery to occur in a subsequent year. Thus, where materials cannot be obtained in the same fiscal year in which they are needed and contracted for, provisions for delivery in the subsequent fiscal year do not violate the bona fide needs rule as long as the time intervening between contracting and delivery is not excessive and the procurement is not for standard commercial items readily available from other sources. 38 Comp. Gen. 628, 630 (1959).

Similarly, an agency may contract in one fiscal year for delivery in a subsequent year if the material contracted for will not be obtainable on the open market at the time needed for use, provided the intervening period is necessary for production or fabrication of the material. 37 Comp. Gen. 155, 159 (1957).

If an obligation is proper when made, unforeseen delays which cause delivery or performance to extend into the following fiscal year will not invalidate the obligation. In one case, for example, although work under a construction contract was performed during the fiscal year following its execution, the Comptroller General approved payment to the contractor under the original obligation since the agency had awarded the contract as expeditiously as possible and had made provision for the work to begin within the current fiscal year, but experienced a delay in obtaining certain materials the government had agreed to provide. 1 Comp. Gen. 708 (1922). See also 23 Comp. Gen. 82 (1943); 20 Comp. Gen. 436 (1941).

If deliveries are scheduled only for a subsequent fiscal year, or if contract timing effectively precludes delivery until the following

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fiscal year, it will be presumed that the contract was made in the earlier fiscal year only to obligate funds from an expiring appropriation and that the goods or materials were not intended to meet a bona fide need of that year. See 38 Comp. Gen. 628, 630 (1959); 35 Comp. Gen. 692 (1956); 33 Comp. Gen. 57, 60-61 (1953); 21 Comp. Gen. 1159 (1941) (circular letter); 1 Comp. Gen. 115 (1921); 27 Comp. Dec. 640 (1921).

In 44 Comp. Gen. 695 (1965), where an agency had requisitioned the printing of sales promotion material near the end of a fiscal year, the Comptroller General determined that the material did not meet a bona fide need of the fiscal year in which the order was placed. Because the items were especially created for a particular purpose and required a lengthy period for creation, the printing requisitions could not be viewed as "replacement of stock" and did not lawfully obligate the current annual appropriation. Further, since the manuscript copy did not accompany the original order and was not furnished to the Government Printing Office until seven months after the end of the fiscal year, the printing could not have fulfilled a need of the fiscal year in which the requisition was issued.

As suggested in 44 Comp. Gen. 695, an order or contract for the replacement of stock is viewed as meeting a bona fide need of the year in which the contract is made as long as it is intended to replace stock used in that year, even though the replacement items will not be used until the following year. This being the case, scheduling delivery for the following year would seem irrelevant. "Stock" in this context refers to "readily available common-use standard items." Id. at 697. See also 32 Comp. Gen. 436 (1953). There are limits, however. GAO has questioned the propriety, from the bona fide needs perspective, of purchases of materials carried in stock for more than a year prior to issuance for use. B-134277, December 18, 1957.

A 1935 decision, A-60589, July 12, 1935, concerned a "requirements contract" for supplies in which no definite quantity was required to be purchased and under which no legal obligation would be imposed on the government until an order was placed, other than the requirement not to purchase the items elsewhere. The decision held that such a contract could extend into the following fiscal year, i.e., could cross fiscal year lines, as long as the

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contract term was not for more than one year.[10] However, in 42 Comp. Gen. 272 (1962), the type of requirements contract involved in A-60589 was distinguished from a three-year "requirements" contract for equipment and services to maintain an Air Force base at Wake Island, to be funded from an annual appropriation of the first contract year, on the grounds that, under the Wake Island contract, the need for the equipment and services was certain to arise as long as the base remained open. The Wake Island contract was held to violate not only the bona fide needs rule but the Antideficiency Act as well.

Both decisions—42 Comp. Gen. 272 and A-60589—were discussed several years later in 48 Comp. Gen. 497 (1969), in which the Comptroller General stated:

"For the reasons stated in 42 Comp. Gen. 272, we are not convinced that the decision of July 12, 1935, A-60589, permitting requirements contracts under fiscal year appropriations to cover 1-year periods extending beyond the end of the fiscal year is technically correct. Since that practice, however, has been followed for over 30 years apparently in reliance upon the July 12, 1935, decision, no objection will be made to its continuance." Id. at 500.

If, however, a variable quantity contract does not include the requirement not to purchase the items elsewhere and does not guarantee a minimum purchase, then there is really no "contract" and obligations arise only as orders are actually placed. A given payment must be charged to the fiscal year in which the order creating the obligation was definitely placed. See 60 Comp. Gen. 219 (1981).

5. Services Rendered Beyond the Fiscal Year

Services are generally viewed as chargeable to the appropriation current at the time the services are rendered. E.g., 38 Comp. Gen. 316 (1958) (salaries of government employees). However, a need may arise in one fiscal year for services which, by their nature, cannot be separated for performance in separate fiscal years. The Comptroller General has held that the question of whether to charge the appropriation current on the date the contract is made,

[10]A-60589 was also based in part on 41 U.S.C. § 13, which prohibits the making of contracts for "stationery or other supplies" for terms in excess of one year. See, e.g., 37 Comp. Gen. 155, 159 (1957), stating that "[w]hen a continuing supply of materials is needed over a period of time, the contract term may not exceed one year, and only the needs of the first fiscal year may be considered a bona fide need of the year in which the contract is made." Most agencies are now exempt from 41 U.S.C. § 13. See 63 Comp. Gen. 129, 135 (1983).

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or to charge funds current at the time the services are rendered, depends upon whether the services are "severable" or "entire."

"The fact that the contract covers a part of two fiscal years does not necessarily mean that payments thereunder are for splitting between the two fiscal years involved upon the basis of services actually performed during each fiscal year. In fact, the general rule is that the fiscal year appropriation current at the time the contract is made is chargeable with payments under the contract, although performance thereunder may extend into the ensuing fiscal year."

23 Comp. Gen. 370, 371 (1943). A contract which is viewed as "entire" is chargeable to the fiscal year in which it was made, notwithstanding that performance may have extended into the following fiscal year. The determining factor for whether services are severable or entire appears to be whether they represent a single undertaking. Thus, in 23 Comp. Gen. 370, a contract for the cultivation and protection of a tract of rubber-bearing plants, payable upon the completion of the services, was chargeable against fiscal year funds for the year in which the contract was made. Because the services necessarily covered the entire growing period which extended into the following fiscal year, the Comptroller General characterized them as a single undertaking which "although extending over a part of two fiscal years, nevertheless was determinable both as to the services needed and the price to be paid therefor at the time the contract was entered into." Id. at 371.

The rationale of 23 Comp. Gen. 370 was applied in 59 Comp. Gen. 386 (1980) (requisition for printing accompanied by manuscript sufficient for Government Printing Office to proceed with job). See also 65 Comp. Gen. 741 (1986) (contract for study and final report on psychological problems among Vietnam veterans); 10 Comp. Dec. 284 (1903).

However, where the services are continuing and recurring in nature, the contract is severable and the services must be charged to the fiscal year(s) in which they are rendered. 65 Comp. Gen. at 743; 33 Comp. Gen. 90 (1953) (trucking services). As stated in 33 Comp. Gen. at 92:

"The need for current services, such as those covered by the contract here under consideration, arises only from day to day, or month to month, and the Government cannot, in the absence of specific legislative authorization, be obligated for such services by any contract running beyond the fiscal year."

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See also 35 Comp. Gen. 319 (1955), modified by B-125444, February 16, 1956 (gardening and window cleaning services). Service contracts which are "severable" may not cross fiscal year lines unless authorized by statute. 58 Comp. Gen. 321, 324 (1979); B-192518, August 9, 1979; B-133001, March 9, 1979; B-187881, October 3, 1977.

Another factor identified in some of the decisions is whether the services are viewed as personal or nonpersonal. Personal services are presumptively severable by their nature and are properly chargeable to the fiscal year in which the services are rendered. B-187881, October 3, 1977 (overseas school teachers with employment contracts); B-174226, March 13, 1972 (performance on an evaluation team). Legal services have been viewed as either personal or nonpersonal, depending on the nature of the work to be done. B-122596, February 18, 1955; B-122228, December 23, 1954.

The distinction appears to have derived from the distinction between services performed under an employer-employee relationship (personal) and those performed under an independent contractor relationship (nonpersonal). In the context of applying the bona fide needs rule, however, the distinction is not particularly useful since it is still necessary to look at the nature of the services involved in the particular case. In other words, characterizing services as personal or nonpersonal does not provide you with an automatic answer. In fact some of the more recent cases have merely considered the nature of the work without characterizing it as personal or nonpersonal, which would have added nothing to the analysis. E.g., 50 Comp. Gen. 589 (1971) (fees of attorneys appointed under Criminal Justice Act chargeable to appropriations current at time of appointment); B-224702, August 5, 1987 (contract for legal support services held severable since it consisted primarily of clerical tasks and required no final report or end product).

Research may also be severable or nonseverable, depending on the particular facts. See B-235678, July 30, 1990. A contract for cancer research services viewed as an "entire job" was found nonseverable in B-141839-O.M., May 2, 1960. In 64 Comp. Gen. 359 (1985), biomedical research grants awarded by the National Institutes of Health were held severable because they represented continuous, ongoing work and did not contemplate a required outcome or end product.

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A 1981 decision applied the above principles to agreements made by the Small Business Administration with private organizations to provide technical and management assistance to businesses eligible for assistance under the Small Business Act. The typical agreement covered one calendar year and crossed fiscal year lines. Under the agreement, payment was to be made only for completed tasks and SBA was under no obligation to place any orders, or to place all orders with any given contractor. The question was whether the "contract" was chargeable to the fiscal year in which it was executed. The Comptroller General found that the services involved were clearly severable and that the agreement was not really a contract since it lacked mutuality of obligation. Accordingly, SBA created a contract obligation only when it placed a definite order, and each fiscal year could be charged only with obligations incurred during that fiscal year. 60 Comp. Gen. 219 (1981). The principles were reiterated in 61 Comp. Gen. 184 (1981).

In another 1981 case, GAO considered the District of Columbia's recording of obligations for social security disability medical examinations. A person seeking to establish eligibility for disability benefits is given an appointment for a medical examination and a purchase order is issued at that time. However, for a number of reasons beyond the District's control, the examination may not take place until the following fiscal year (for example, person makes application at end of fiscal year or does not show up for initial appointment). Nevertheless, the need for the examination arises when the applicant presents his or her claim for disability benefits. The decision concluded that the obligation occurs when the purchase order is issued and is chargeable to that fiscal year. 60 Comp. Gen. 452 (1981).

Training tends to be nonseverable. Thus, where a training obligation is incurred in one fiscal year, the entire cost is chargeable to that year, regardless of the fact that performance may extend into the following year. B-233243, August 3, 1989; B-213141-O.M., March 29, 1984. In 70 Comp. Gen. ___ (B-238940, February 25, 1991), training which began on the first day of FY 1990 was held chargeable to 1989 appropriations where the training had been identified as a need for 1989, scheduling was beyond the agency's control, and the time between procurement and performance was not excessive. If some particular training were severable (it is not entirely clear when this might be the case), the contract could not cross fiscal year lines and payment would have to be apportioned

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between the fiscal years in which the training is actually conducted. See 34 Comp. Gen. 432 (1955).

A "level-of-effort" contract is a type of cost-reimbursement contract in which the scope of work is defined in general terms, with the contractor being obligated to provide a specified level of effort (e.g., a specified number of person-hours) for a stated time period. Federal Acquisition Regulation, 48 C.F.R. § 16.306(d)(2). Level-of-effort contracts may be severable or nonseverable. The determination is based not on the contract type but on the nature of the work being performed, and is, in the first instance, the responsibility of the contracting agency. B-235678, July 30, 1990. A 1985 case, 65 Comp. Gen. 154, had implied that all level-of-effort contracts were severable by definition (id. at 156), and to that extent was modified by B-235678.

As a final thought, there is a fairly simple test which is often helpful in determining whether a given service is severable or nonseverable. Suppose that a service contract is to be performed half in one fiscal year and half in the next. Suppose further that the contract is terminated at the end of the first fiscal year and is not renewed. What do you have? In the case of a window-cleaning contract, you have half of your windows clean, a benefit which is not diminished by the fact that the other half is still dirty. What you paid for the first half has not been wasted. These services are clearly severable. Now consider a contract to conduct a study and prepare a final report, as in 65 Comp. Gen. 741 (1986). If this one is terminated halfway through, you essentially have nothing. The partial results of an incomplete study, while perhaps beneficial in some ethereal sense, do not do you very much good when what you needed was the complete study and report. Or suppose the contract is to repair a broken frammis. If the repairs are not completed, certainly some work has been done but you still don't have an operational frammis. The latter two examples are nonseverable.

6. Replacement Contracts

In an early decision, the Comptroller of the Treasury was asked whether fiscal year 1902 funds originally obligated under a contract but unexpended because of contractor default could be used in the following year to continue the original object of the contract. The Comptroller stated:

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"A contract was properly made within the fiscal year 1902, and it would seem that any part of the consideration of that contract which failed of use owing to the default of the contractor could still be used in carrying out the object of the original contract within the meaning of [31 U.S.C. § 1502(a)]. Appropriations are made to be used and not to be defeated in their use, and it would be a narrow construction to hold that a default on a properly made contract would prevent the use of the appropriation for the object for which it was made and for carrying out which the contract was executed."

9 Comp. Dec. 10, 11 (1902). This marked the beginning of the replacement contract theory.

The rule in its traditional form is well-settled, that where it becomes necessary to terminate a contract because of the contractor's default, the funds obligated under the original contract are available, beyond their original period of obligational availability, for the purpose of engaging another contractor to complete the unfinished work. 60 Comp. Gen. 591 (1981); 55 Comp. Gen. 1351 (1976); 44 Comp. Gen. 623 (1965); 40 Comp. Gen. 590 (1961); 32 Comp. Gen. 565 (1953); 2 Comp. Gen. 130 (1922); 21 Comp. Dec. 107 (1914); B-160834, April 7, 1967; B-105555, September 26, 1951; A-22134, April 12, 1928.

Implicit in the rule is the premise that the original contract validly obligated then-current funds. See 34 Comp. Gen. 239 (1954). In addition, the rule is based on the notion that the default termination does not eliminate the bona fide need of the fiscal year in which the original contract was executed. 44 Comp. Gen. 399, 401 (1965). Accordingly, the replacement contract seeks only to meet the pre-existing and continuing need.

In order for funds to remain available beyond expiration for a replacement contract, three conditions must be met:

- A bona fide need for the work, supplies, or services must have existed when the original contract was executed, and it must continue to exist up to the award of the replacement contract. E.g., 55 Comp. Gen. 1351, 1353 (1976); 34 Comp. Gen. 239, 240 (1954). If a terminated contract is found to have been improperly made to fulfill a need of a fiscal year other than the year against which the obligation was recorded, it would also be improper to charge that same appropriation for obligations incident to a replacement contract. 35 Comp. Gen. 692 (1956).

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Availability of Appropriations: Purpose

A. General Principles

1. Introduction: 31 U.S.C. § 1301(a)

This chapter introduces the concept of the "availability" of appropriations. The decisions are often stated in terms of whether appropriated funds are or are not "legally available" for a given obligation or expenditure. This is simply another way of saying that a given item is or is not a legal expenditure. Whether appropriated funds are legally available for something depends on three things:

(1) The purpose of the obligation or expenditure must be authorized;

(2) The obligation must occur within the time limits applicable to the appropriation; and

(3) The obligation and expenditure must be within the amounts Congress has established.

Thus, there are three elements to the concept of availability: purpose, time, and amount. All three must be observed for the obligation or expenditure to be legal. Availability as to time and amount will be covered in Chapters 5 and 6. This chapter discusses availability as to purpose.

One of the most fundamental statutes dealing with the use of appropriated funds is 31 U.S.C. § 1301(a):

> "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

Simple, concise, and direct, this statute was originally enacted in 1809 (2 Stat. 535) and is one of the cornerstones of congressional control over the federal purse. Since money cannot be paid from the Treasury except under an appropriation (U.S. Const. art. I, § 9, cl. 7), and since an appropriation must be derived from an act of Congress, it is for Congress to determine the purposes for which an appropriation may be used. Simply stated, 31 U.S.C. § 1301(a) says that public funds may be used only for the purpose or purposes for which they were appropriated. It prohibits charging authorized items to the wrong appropriation, and unauthorized items to any

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Congress at least implicitly by the practice of legislating the occasional exception.

Purpose restrictions will commonly prohibit the use of funds for an item except "under specific statutory authority," or except under "an appropriation specifically available therefor," or similar language. The "specific authority" needed to create an exception in these situations need not be found in the appropriation act itself, but may be contained in authorizing or enabling legislation as long as it is clearly applicable to the appropriation sought to be charged. 23 Comp. Gen. 859 (1944); 16 Comp. Gen. 773 (1937). Of course, Congress is always free to legislate exceptions whether it has specifically reserved that prerogative to itself or not. Thus, an "unless otherwise authorized by law" clause largely restates what the law would be even without that language.

2. Attendance at Meetings and Conventions

Meetings have become a way of life in contemporary American society and the federal bureaucracy is no exception. It seems that there are meetings on just about everything. Quite often they can be very useful. They can also be expensive. It is no surprise that lots of meetings are held in places like Honolulu and San Francisco. This section will explore when appropriated funds may be used to send people, government employees and others, to meetings. Congress has passed a number of statutes in this area and the cases usually involve the interpretation and application of the various statutory provisions. For purposes of this discussion, the term "meeting" includes other designations such as conference, congress, convention, seminar, symposium, and workshop; what the particular gathering is called is irrelevant.

a. Government Employees

(1) Statutory framework

To understand the law in this area, it is necessary to understand the interrelationship of several statutes. Listed in the order of their enactment, they are: 5 U.S.C. § 5946, 31 U.S.C. § 1345, 5 U.S.C. § 4109, and 5 U.S.C. § 4110. This interrelationship is best seen by outlining the statutory evolution.

The first piece of legislation was enacted in 1912. As relevant here, section 8 of the Act of June 26, 1912, 37 Stat. 139, 184, prohibited the payment, without specific statutory authority, of the expenses

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- The replacement contract must not exceed the scope of the original contract. If it does, it is a new obligation and must be charged to funds currently available for obligation at the time the replacement contract is entered into. E.g., 44 Comp. Gen. 399 (1965); B-181176-O.M., June 26, 1974.
- The replacement contract must be awarded within a reasonable time after termination of the original contract. E.g., 60 Comp. Gen. 591, 593 (1981). Excessive delay raises the presumption that the original contract was not intended to meet a then-existing bona fide need. The same result may follow if there is unwarranted delay in terminating the original contract. 32 Comp. Gen. 565 (1953).

At one time, the replacement contract rule was mostly (but not exclusively) limited to the default situation. E.g., 24 Comp. Gen. 555 (1945) (overruled by 55 Comp. Gen. 1351 (1976)). It has, however, been expanded. Thus, in 34 Comp. Gen. 239 (1954), a default termination was found to be erroneous and was converted to a termination for convenience by agreement of the parties to permit settlement of the contractor's claim for damages. The decision held that, in view of the original termination, the funds originally obligated were available for the timely execution of a new contract for the performance of the unfinished work.[11] A further question in that case was whether the replacement contract rule was affected by the newly-enacted 31 U.S.C. § 1501(a), which requires that contractual obligations be supported by a binding agreement in writing executed prior to expiration of the appropriation's availability. No problem, the decision noted, since the original contract met these requirements. Id. at 241.

More recently, a contract for flooring repairs was awarded in FY 1975 obligating FY 1975 funds, conditioned upon a determination from the Small Business Administration that the contractor qualified as a small business. The SBA found the contractor not to be a small business. Concluding that the original award was sufficient to support an obligation under 31 U.S.C. § 1501(a), the Comptroller General applied the replacement contract rule and held that the

[11]A 1981 case, 60 Comp. Gen. 591, drew a distinction based on whether the awarding of the replacement contract preceded or followed the conversion, suggesting that the original obligation was extinguished in the latter situation, the precise sequence involved in 34 Comp. Gen. 239. Although 60 Comp. Gen. 591 cites 34 Comp. Gen. 239 several times, it does not address this point. Especially in view of later decisions, the distinction would not appear relevant. See 68 Comp. Gen. 158 (1988).

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funds obligated for the contract in FY 1975 could be used to resolicit in FY 1976. 55 Comp. Gen. 1351 (1976).

In 66 Comp. Gen. 625 (1987), however, the Comptroller General declined to extend the rule in a situation involving a voluntary modification reducing the scope of a contract. The Navy had contracted for the construction of 12 ships. The contractor encountered financial difficulties and filed for reorganization under Chapter 11 of the Bankruptcy Act under which the contractor could, with court approval, reject the contract. To avert this possibility, the Navy agreed to a contract modification which, among other things, reduced the number of ships to be provided from 12 to 10. The question was whether the funds originally obligated for the two ships deleted by the modification were available post-expiration to fund a reprocurement. GAO concluded that they were not, because there had been no default, nor was there an actual rejection under the Bankruptcy Code. "[T]he modification was an essentially voluntary act on the part of the Navy, and as such is beyond the scope of the replacement contract rule." Id. at 627. Therefore, any replacement contract for the two deleted ships would have to be charged to appropriations current at the time it was made.

Cases involving the termination of erroneously or improperly awarded contracts have been less than consistent, although a clear direction now appears evident. The earliest decisions applied the replacement contract rule. Thus, 17 Comp. Gen. 1098 (1938) held, without much discussion, that funds obligated by an award to a bidder subsequently determined not to have been the low bidder could be used for an award to the otherwise low bidder in the following fiscal year. In a 1953 case, a contract had to be partially canceled because the contractor's bid had not conformed to the advertised specifications. GAO noted that "the obligating instrument was legally defective in such a way as to render the contract voidable at the election of the Government," but nevertheless applied the replacement contract rule. B-116131, October 19, 1953. See also B-89019, May 31, 1950.

GAO's position seemed to change with the enactment of 31 U.S.C. § 1501(a) in 1954, on the theory that a contract award found to be invalid did not constitute a binding agreement so as to support a recordable obligation. 38 Comp. Gen. 190 (1958); B-118428, September 21, 1954, overruling B-116131 and B-89019. However, B-116131 was at least arguably "reinstated" by B-152033, May 27,

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1964, which followed both the "voidable at the election of the government" rationale and the result of B-116131, without citing either it or the case which presumably overruled it. See also B-173244(2), August 10, 1972; B-158261, March 9, 1966. This latter group of cases was in turn cited with approval in 55 Comp. Gen. 1351, 1353 (1976).

The apparent direction indicated by 55 Comp. Gen. 1351 and the cases it cited was called into question by statements in 60 Comp. Gen. 591 (1981) to the effect that the replacement contract rule does not apply to terminations for the convenience of the government, whether initiated by the contracting agency or on recommendation of some other body such as GAO. Of course, the typical situation in which a replacement contract is needed following a termination for convenience is where the original contract is found to have been improperly awarded. An important clarification occurred in 68 Comp. Gen. 158 (1988), which modified 60 Comp. Gen. 591 and held the replacement contract rule applicable where a contract must be terminated for convenience, without a prior default termination, pursuant to a determination by competent administrative or judicial authority (court, board of contract appeals, GAO) that the contract award was improper. As noted previously, the bona fide need of the original contract must continue, and the replacement contract must be made without undue delay after the original contract is terminated and must be awarded on the same basis as, and be substantially similar in scope and size to, the original contract.

Logically and inevitably, the next question would be why the rule shouldn't be the same regardless of whether the defect leading to termination is determined by an external reviewing body or by the contracting agency itself. It should make no difference, GAO concluded in 70 Comp. Gen. ___ (B-238548, February 5, 1991). The essence of the problem—a legal impropriety in the procurement process requiring corrective action—is no different. Thus, the replacement contract rule, with its attendant conditions, applies where the contracting agency determines that a contract award was improper and terminates the contract for the convenience of the government, provided there is clear evidence that the award was erroneous and the agency documents its determination with appropriate findings of fact and law. Id.

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7. Contract Modifications and Amendments Affecting Price

Contract performance may extend over several years. During this time, the contract may be modified or amended for a variety of reasons at the instigation of either party. An amendment within the general scope of the contract which does not increase the contract price remains an obligation of the year in which the contract was executed. B-68707, August 19, 1947. If the modification results in an increase in contract price and the appropriation charged with the original contract has expired for obligation purposes, the question from the bona fide needs perspective is which fiscal year to charge with the modification.

If the modification exceeds the general scope of the original contract, for example, by increasing the quantity of items to be delivered, the modification amounts to a new obligation and is chargeable to funds current at the time the modification is made. 37 Comp. Gen. 861 (1958); B-207433, September 16, 1983.

In the case of a contract for services which are severable, a modification providing for increased services must be charged to the fiscal year or years in which the services are rendered, applying the principles discussed in Section B.5. 61 Comp. Gen. 184 (1981), aff'd upon reconsideration, B-202222, August 2, 1983; B-224702, August 5, 1987. In 61 Comp. Gen. 184, for example, a contract to provide facilities and staff to operate a project camp was modified in the last month of FY 1980. The modification called for work to be performed in FY 1981. Regardless of whether the contract was viewed as a service contract or a contract to provide facilities, the modification did not meet a bona fide need of FY 1980. The modification amounted to a separate contract and could be charged only to FY 1981 funds, notwithstanding that it purported to modify a contract properly chargeable to FY 1980 funds.

For modifications within the general scope of the original contract, the situation is a bit more complicated. Most government contracts contain provisions which, under certain conditions, render the government liable to make equitable adjustments in the contract price. Such liability may arise due to changes in specifications, government-caused delay, changed conditions, increased overhead rates, etc. These conditions are set out in standard contract clauses such as the "Changes" clause, "Government Property" clause, or "Negotiated Overhead Rates" clause.

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Because there is no way to know whether the government will actually incur liability under these provisions, and if so, the amount of such liability, until the occurrence of the specified conditions (cf. 50 Comp. Gen. 589, 591 (1971)), the appropriations charged with the cost of the contract are not firmly obligated to cover future price increases which arise due to the operation of these clauses. Nevertheless, as noted, government contracts frequently contemplate that performance will extend into subsequent fiscal years. When an upward price adjustment is necessitated in a subsequent year, the general approach is to ask whether the adjustment is attributable to "antecedent liability"—that is, whether it arises and is enforceable under a provision in the original contract. If the answer to this question is yes, then a within-scope price adjustment which is requested and approved in a subsequent fiscal year, for example, under the "Changes" clause, will—with one important qualification to be noted later—be charged against the appropriation current at the time the contract was originally executed. Cases supporting this proposition in various contexts are 59 Comp. Gen. 518 (1980); 23 Comp. Gen. 943 (1944); 21 Comp. Gen. 574 (1941); 18 Comp. Gen. 363 (1938); A-15225, September 24, 1926; B-146285-O.M., September 28, 1976.[12] See also B-197344, August 21, 1980, where supplemental work was done without issuance of a formal contract modification. This principle is occasionally referred to as the doctrine of "relation back." E.g., 37 Comp. Gen. 861, 863 (1958).

The reasoning is that a change order does not give rise to a new liability, but instead, only renders fixed and certain the amount of the government's pre-existing liability to adjust the contract price. Since that liability arises at the time the original contract is executed, the subsequent price adjustment is viewed as reflecting a bona fide need of the same year in which funds were obligated for payment of the original contract price. The concept was stated as follows in 23 Comp. Gen. 943, 945 (1944):

"It is true that at the time the contract was executed it was not known that there would, in fact, be any changes ordered . . . for which the contractor would be entitled to be paid an amount in addition to amounts otherwise payable under the contract. Also, it is true that [the Changes clause] contemplates the execution of amendments to the contract from time to time covering such changes. However, the fact remains that the obligations and liabilities of the

[12]Similarly, costs incurred under a termination for convenience are chargeable to the appropriation originally obligated for the contract. B-203074, August 6, 1981.

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parties respecting such changes are fixed by the terms of the original contract, and the various amendments merely render definite and liquidated the extent of the Government's liability in connection with such changes."

In order to avoid over-obligating the original appropriation, the contracting officer must estimate the expected net additional obligations to insure that available appropriations are not committed to other purposes. E.g., 61 Comp. Gen. 609, 612 (1982); B-192036, September 11, 1978. It is also true, however, that estimated liabilities of this type require constant review to insure that appropriations do not remain encumbered in excess of the amounts which will actually be needed to meet the total liability under the contract.

For contracts spanning lengthy periods of time, funding of within-scope modifications involves the use of expired appropriations. As discussed later in this chapter, the balances in expired accounts prior to closing are available without further congressional action. Thus, within-scope modifications can result in significant cost escalation with minimal congressional oversight.

Not all price adjustments arising from contract modifications or amendments represent a bona fide need of the year in which the agreement was made. If, as noted above, the change or amendment exceeds the general scope of the contract, or is not made pursuant to a provision in the original contract, then it is not based on any antecedent liability, in which event it may obligate only appropriations current at the time it is issued. 56 Comp. Gen. 414 (1977). See also 25 Comp. Gen. 332 (1945) (purported change order issued after completion of contract, covering work contractor was not legally bound to do under original contract, amounted to new contract).

As noted above, there is an important exception or qualification to the antecedent liability rule. In cost reimbursement contracts, discretionary cost increases (i.e., increases which are not enforceable by the contractor) which exceed funding ceilings established by the contract may be charged to funds currently available when the discretionary increase is granted by the contracting officer. 61 Comp. Gen. 609 (1982). It would be unreasonable, the decision pointed out, to require the contracting officer to reserve funds in anticipation of increases beyond the contract's ceiling. Id. at 612. Changes which do not exceed the stipulated ceiling continue to be chargeable to

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funds available when the contract was originally made (id. at 611), as do amounts for final overhead in excess of the ceiling where the contractor has an enforceable right to those amounts (id. at 612). Since prior decisions such as 59 Comp. Gen. 518 had not drawn the below-ceiling/above-ceiling distinction, 61 Comp. Gen. 609 modified them to that extent. A more recent case applying 61 Comp. Gen. 609 is 65 Comp. Gen. 741 (1986).

Once an account has been closed (generally five fiscal years after the expiration of obligational availability), questions of antecedent liability or relation back are no longer relevant since account balances upon closing cease to be available for any purpose and only current funds may be used, up to specified limits, for such obligations. 31 U.S.C. §§ 1552 and 1553, as amended by Pub. L. No. 101-510, § 1405(a), 104 Stat. 1485, 1676 (1990).

For contract changes which would require the contractor to perform additional work, as opposed to increases under an escalation clause or to pay claims, the use of expired fixed-year appropriations is subject to two approval requirements. If a proposed contract change chargeable to an expired account would cause a cumulative increase of more than $4 million during a fiscal year for contract changes for the relevant program, project, or activity, the obligation must be approved by the agency head or by an official within the agency head's immediate office to whom the authority has been delegated. If the cumulative increase would exceed $25 million, the agency head must report the proposed obligation to the relevant authorizing committees and the appropriations committees of the Senate and House of Representatives, and must defer making the obligation for 30 days after submitting the report. 31 U.S.C. § 1553(c), as amended by Pub. L. No. 101-510, § 1405(a), 104 Stat. at 1677 (1990).

8. Multi-Year Contracts

Any discussion of multi-year contracting must inevitably combine the bona fide needs rule with material from Chapter 6 on the Antideficiency Act and from Chapter 7 on obligations.

The term "multi-year contract" has been used in a variety of situations to describe a variety of contracts touching more than one fiscal year. To prevent confusion, we think it is important to start by establishing a working definition. A multi-year contract, as we will use the term in this discussion, is a contract covering the

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requirements of more than one fiscal year.[13] A contract for the needs of the current year, even though performance may extend over several years, is not a "multi-year contract." Thus, a contract to construct a ship which will take 3 years to complete is not a multi-year contract; a contract to begin constructing one ship a year for the next 3 years is.

Multi-year contracting, like most things in life, has advantages and disadvantages. Some of the potential benefits are:[14]

- Multi-year contracting can reduce costs by permitting the contractor to amortize nonrecurring "start up" costs over the life of the contract. Without multi-year authority, the contractor may insist on recovering these costs under the one-year contract (since there is no guarantee of getting future contracts), thus resulting in increased unit prices.
- Multi-year contracting may enhance quality by reducing the uncertainty of continued government business and enabling the contractor to maintain a stable work force.
- Multi-year contracting may increase competition by enabling small businesses to compete in situations where nonrecurring start-up costs would otherwise limit competition to larger concerns.

However, the situation is not one-sided. Multi-year contracting authority also has potential disadvantages:[15]

- Competition may decrease because there will be fewer opportunities to bid.
- A contractor who is able to amortize start-up costs in a multi-year contract has, in effect, a government-funded competitive price advantage over new contractors in subsequent solicitations. This could evolve into a sole-source posture.

[13]This is essentially the same as the definition in the Federal Acquisition Regulation, "contracts covering more than 1-year's but not in excess of 5-year's [sic] requirements, unless otherwise authorized by statute." 48 C.F.R. § 17.101.

[14]S. Rep. No. 98-417, 98th Cong., 2d Sess. 4-8 (1984). This is a report by the Senate Committee on Governmental Affairs on a bill (S. 2300) designed to extend limited multi-year contracting authority to civilian agencies. The legislation was not enacted.

[15]H.R. Rep. No. 97-71, Part 3, 97th Cong., 1st Sess. 21 (1981) (report of the House Committee on Government Operations on the 1982 Defense Department authorization bill).

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- Being locked into a contract for several years is not always desirable, particularly where the alternative is to incur cancellation charges which could offset initial savings.

An agency may use multi-year contracting only (1) if it has no-year funds or multiple-year funds covering the entire term of the contract, or (2) under specific statutory authority. 67 Comp. Gen. 190, 192 (1988); B-171277, April 2, 1971 (multi-year contract permissible under no-year trust fund); Federal Acquisition Regulation (FAR), 48 C.F.R. § 17.102-1(a). To restate this, an agency may enter into a multi-year contract with fiscal year appropriations (or for a term exceeding the period of availability of a multiple-year appropriation) only if it has specific statutory authority to do so. Thus far, Congress has seen fit to grant this authority sparingly.

If neither of the above situations applies, a multi-year contract violates several statutory funding restrictions, including the Antideficiency Act and the bona fide need statute (31 U.S.C. § 1502(a)). E.g., 67 Comp. Gen. 190 (1988); 66 Comp. Gen. 556 (1987); 64 Comp. Gen. 359 (1985); 48 Comp. Gen. 497 (1969); 42 Comp. Gen. 272 (1962); 27 Op. Att'y Gen. 584 (1909). Multi-year commitments were found illegal in various contexts in each of these cases, although each case does not necessarily discuss each funding statute. See also FAR, 48 C.F.R. § 17.102-1(a).

In 42 Comp. Gen. 272, for example, the Air Force had awarded a three-year contract for aircraft maintenance, troop billeting, and base management services on Wake Island. The Air Force contended that no funds were obligated under 31 U.S.C. § 1501 until requisitions were issued, thereby exempting the contract from the statutory funding restrictions. However, the Comptroller General refused to adopt this characterization of the contract as, in effect, a requirements contract. Although the contractor had expressly agreed to perform only services for which he had received the contracting officer's order, GAO found that there was no need for an administrative determination that requirements existed, since the contract services were "automatic incidents of the use of the air field." Id. at 277. Only a decision to close the base would eliminate the requirements. Consequently, the contract was found to be an unauthorized multi-year contract.

If an agency is contracting with fiscal year appropriations and does not have multi-year contracting authority, the only authorized

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course of action, apart from a series of separate fiscal-year contracts, is a fiscal-year contract with renewal options, with each renewal option (1) contingent on the availability of future appropriations, and (2) to be exercised only by affirmative action on the part of the government (as opposed to automatic renewal unless the government refuses). Leiter v. United States, 271 U.S. 204 (1926); 67 Comp. Gen. 190 (1988); 66 Comp. Gen. 556 (1987); 36 Comp. Gen. 683 (1957); 33 Comp. Gen. 90 (1953); 29 Comp. Gen. 91 (1949); 28 Comp. Gen. 553 (1949); B-88974, November 10, 1949. Thus, in 42 Comp. Gen. 272, the Comptroller General, while advising the Air Force that under the circumstances it could complete that particular contract, also advised that the proper course of action would be either to use an annual contract with renewal options or to obtain specific multi-year authority from Congress. Id. at 278.

Statutory authority for multi-year contracting with annual funds does exist in certain situations. For example, the military departments are authorized by 10 U.S.C. §§ 2306(g) and (h) to enter into multi-year contracts for periods of not more than five years if certain administrative determinations are made. Subsection (g), enacted in response to the Wake Island decision (see 67 Comp. Gen. 190, 193 (1988)), applies to such things as installation maintenance and support, maintenance or modification of aircraft and other complex military equipment, specialized training, and base services. Subsection (h) extends the concept to the acquisition of weapon systems and associated items and services. If funds are not made available for continuation in a subsequent fiscal year, cancellation or termination costs may be paid from appropriations originally available for the contract, appropriations currently available for the same general purpose, or appropriations made specifically for those payments. 10 U.S.C. §§ 2306(g)(3), (h)(5). Subsection (g) is also available to the Coast Guard and the National Aeronautics and Space Administration. 10 U.S.C. § 2303(a).

A multi-year contract entered into under authority of 10 U.S.C. § 2306 is binding on both parties for the full term of the contract unless terminated as provided in the statute. Beta Systems, Inc. v. United States, 838 F.2d 1179, 1183 n.2 (Fed. Cir. 1988); Beta Systems v. United States, 16 Cl. Ct. 219, 228 (1989).

A contract under section 2306 must relate to the bona fide needs of the contract period. The statute does not authorize the advance

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of attendance of an individual at meetings or conventions of members of a society or association. With exceptions to be noted below, this statute is now found at 5 U.S.C. § 5946. For the most part, it has always been viewed as applying to attendance by federal employees at non-federally sponsored meetings. See, e.g., B-140912, November 24, 1959.

There were many early cases under the 1912 statute. Since the prohibition is directed at meetings of a "society or association," other types of meetings were not covered. Thus, the Federal Power Commission could, if determined to be in the furtherance of authorized activities, send a representative to the World Power Conference (in Basle, Switzerland) since it was not a meeting of a "society or association." 5 Comp. Gen. 834 (1926). Similarly, the statute did not prohibit travel by United States Attorneys "to attend a conference of attorneys not banded together into a society or association, but called together for one meeting only for conference in a matter bearing directly on their official duties." 1 Comp. Gen. 546 (1922).

However, if a given gathering was viewed as a meeting or convention of a society or association, the expenses were consistently disallowed. E.g., 16 Comp. Gen. 252 (1936); 5 Comp. Gen. 599 (1926), affirmed by 5 Comp. Gen. 746 (1926); 3 Comp. Gen. 883 (1924). GAO often told agencies in those days that if they thought attendance would be in the interest of the government, they should present the matter to Congress. E.g., 5 Comp. Gen. at 747. In fact Congress granted specific authority to a number of agencies (for an example, see B-136324, August 1, 1958), and later, as will be seen below, enacted general legislation which renders 5 U.S.C. § 5946, as it relates to attendance at meetings, of very limited applicability.

The next congressional venture in this field was Public Resolution No. 2, 74th Congress, 49 Stat. 19 (1935), aimed primarily at restricting the use of appropriated funds to pay expenses of nongovernment persons at conventions. This statute, now codified at 31 U.S.C. § 1345, provides in relevant part:

"Except as specifically provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting. This section does not prohibit—

"(1) an agency from paying the expenses of an officer or employee of the United States Government carrying out an official duty; . . . ."

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procurement of materials not needed during the 5-year term of the contract. 64 Comp. Gen. 163 (1984); B-215825-O.M., November 7, 1984. Cf. 35 Comp. Gen. 220 (1955).

Another example of statutory authority for multi-year contracting is 40 U.S.C. § 481(a)(3), which authorizes contracts for public utility services for periods not exceeding ten years. The purpose of the statute is to enable the government to take advantage of discounts offered under long-term contracts. 62 Comp. Gen. 569, 572 (1983); 35 Comp. Gen. 220, 222-23 (1955). For purposes of applying this statute, the nature of the product or service and not the nature of the provider is the governing factor. Thus, the statute applies to obtaining utility services from other than a "traditional" form of public utility. 62 Comp. Gen. 569. When entering into a contract under 40 U.S.C. § 481(a)(3), the contracting agency need have sufficient budget authority only to obligate the first year's costs. 62 Comp. Gen. at 572; 44 Comp. Gen. 683, 687-88 (1965).

In contrast, if an agency does not have specific multi-year contracting authority but is using a multi-year contract solely under authority of a multiple-year or no-year appropriation, it has been held that the full contract amount must be obligated. B-195260, July 11, 1979. However, GAO approved the incremental funding of a multi-year contract using no-year funds in 43 Comp. Gen. 657 (1964). Under the scheme involved in that case, funds would be made available, and obligated, on a year-by-year basis, together with a "commitment" to cover maximum cancellation costs. The cancellation costs represented amortized start-up costs, which would be adjusted downward each year. Thus, funds would be available to cover the government's maximum potential liability in each year. See also 62 Comp. Gen. 143 (1983) (similar approach for long-term vessel charters under Navy Industrial Fund); 51 Comp. Gen. 598, 604 (1972) (same); 48 Comp. Gen. 497, 502 (1960) (either obligational approach acceptable under revolving fund).[16] (As we will see later, this type of arrangement under a fiscal-year appropriation presents problems.)

Other examples of specific multi-year authority are 40 U.S.C. § 490(h), which authorizes the General Services Administration to enter into leases for periods of up to 20 years; 40 U.S.C. § 757(c),

[16]While 43 Comp. Gen. 657 had used the somewhat cryptic term "commitment," the three subsequent decisions require the actual obligation of the cancellation costs.

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which authorizes GSA to use the Information Technology Fund for contracts of up to five years for information technology hardware, software, or services; and 10 U.S.C. § 2828(d), under which the military departments may lease family housing units in foreign countries for periods of up to 10 years, to be paid from annual appropriations.

Multi-year arrangements may be permissible without specific statutory authority if they are structured in such a way as not to violate the Antideficiency Act or the bona fide needs rule. An example was discussed in 63 Comp. Gen. 129 (1983). The General Services Administration proposed using 3-year "Multiple Award Schedule" contracts for Federal Supply Schedule items. There was no commitment to order any specific quantity of items. Rather, the commitment was for an agency with a requirement for a scheduled item to order it from the contractor if the contractor has offered the lowest price. If an agency found the item elsewhere for less than the contract price, it was free to procure the item from that other source without violating the contract. Since entering into the MAS contracts did not require the obligation of funds, there was no violation of statutory funding restrictions. Obligations would occur only when agencies placed specific orders, presumably using funds currently available to them at that time.[17]

Also, contracts which do not require the expenditure of appropriated funds are not subject to the same fiscal year strictures. E.g., 10 Comp. Gen. 407 (1931) (no legal objection to multi-year leases or contracts for the operation of concessions on federal property).

In a one-year contract with renewal options, the contractor can never be sure whether the renewal options will be exercised, thereby enabling the contractor to amortize initial investment costs. To protect against this possibility, contractors occasionally seek to provide for a contract termination penalty equal to the unamortized balance of initial investment costs if the government fails to renew the contract for any fiscal year. However, the Comptroller General has held that these provisions contravene the bona fide needs rule:

[17]Although the MAS proposal was similar to the proposal considered in A-60589, July 12, 1935, discussed above in Section B.4, GSA had since been exempted from the one-year requirement of 41 U.S.C. § 13. See 63 Comp. Gen. at 135.

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"The theory behind such obligations (covering amortized facility costs unrecovered at time of termination) has been that a need existed during the fiscal year the contracts were made for the productive plant capacity represented by the new facilities which were to be built by the contractor to enable him to furnish the supplies called for by the contracts. After thorough consideration of the matter, we believe that such obligations cannot be justified on the theory of a present need for productive capacity.

". . . The real effect of the termination liability is to obligate the Commission to purchase a certain quantity of magnesium during each of five successive years or to pay damages for its failure to do so. In other words, the termination charges represent a part of the price of future, as distinguished from current, deliveries and needs under the contract, and for that reason such charges are not based on a current fiscal year need."

36 Comp. Gen. 683, 685 (1957). See also 37 Comp. Gen. 155 (1957).

Attempts to impose penalty charges for early termination (sometimes called "separate charges") have occurred in a number of cases involving automated data processing (ADP) procurements. In one case, a competitor for a contract to acquire use of an ADP system for a 65-month period proposed to include a provision under which the government would be assessed a penalty if it failed to exercise its annual renewal options. The Comptroller General noted that the penalty was clearly intended to recapitalize the contractor for its investment based upon the full life of the system in the event the government did not continue using the equipment. Accordingly, he concluded that the penalty did not reasonably relate to the value of the equipment's use during the fiscal year in which it would be levied. The penalty charges would, therefore, not be based on a bona fide need of the current fiscal year and their payment would violate statutory funding restrictions. 56 Comp. Gen. 142 (1976), aff'd, 56 Comp. Gen. 505 (1977). See also 56 Comp. Gen. 167 (1976); B-190659, October 23, 1978.

One scheme, however, has been found to be legally sufficient to permit the government to realize the cost savings that may accrue through multi-year contracting. The plan approved by the Comptroller General in 48 Comp. Gen. 497, 501-02 (1969) provided for a one-year rental contract with an option to renew each subsequent year. If the government completed the full rental period by continuing the contract on a year-by-year basis, it would be entitled to have monthly rental credits applied during the final months of the rental period. The Comptroller General noted that:

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"Under this arrangement the Government would not be obligated to continue the rental beyond the fiscal year in which made, or beyond any succeeding fiscal year, unless or until a purchase order is issued expressly continuing such rental during the following fiscal year. In effect, the company is proposing a one-year rental contract with option to renew. Also, under this proposal rental for any contract year would not exceed the lowest rental otherwise obtainable from [the contractor] for one fiscal year. We have no legal objection to this type of rental plan for ADP equipment."

GAO has recommended the enactment of legislation to authorize all federal agencies to engage in limited multi-year procurement. See GAO report Federal Agencies Should Be Given General Multiyear Contracting Authority for Supplies and Services, PSAD-78-54 (January 10, 1978). However, its use should be based on case-by-case assessments of the benefits and drawbacks noted previously. B-214545, August 7, 1985 (comments on proposed legislation).

9. Exceptions to the Bona Fide Needs Rule

Congress may, of course, grant exceptions from the bona fide needs requirement, either in general or for a particular agency or program, and may do so either in permanent legislation or in appropriation acts.

An example is 41 U.S.C. § 11a, which authorizes the Secretary of the Army "to incur obligations for fuel in sufficient quantities to meet the requirements for one year without regard to the current fiscal year," and to pay from appropriations either for the fiscal year in which the obligation is incurred or for the ensuing fiscal year. See 28 Comp. Gen. 614 (1949) (construing the term "fuel" in that statute to include gasoline and other petroleum fuel products).

Another example is 31 U.S.C. § 1308, which permits charges for telephone and other utility services for a time period beginning in one fiscal year and ending in another to be charged against appropriations current at the end of the covered time period.

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C. Advance Payments

1. The Statutory Prohibition

Advance payments in general are prohibited by 31 U.S.C. § 3324, which provides in part:

"(a) Except as provided in this section, a payment under a contract to provide a service or deliver an article for the United States Government may not be more than the value of the service already provided or the article already delivered.

"(b) An advance of public money may be made only if it is authorized by—

"(1) a specific appropriation or other law . . . ."

The quoted portion of 31 U.S.C. § 3324 is derived from legislation originally enacted in 1823 (3 Stat. 723).

The primary purpose of 31 U.S.C. § 3324 is to protect the government against the risk of non-performance—"to preclude the possibility of loss to the Government in the event a contractor—after receipt of payment—should fail to perform his contract or refuse or fail to refund moneys advanced." 25 Comp. Gen. 834, 835 (1946). See also 65 Comp. Gen. 806, 809 (1986); B-180713, April 10, 1974. Thus, in its simplest terms, the statute prohibits the government from paying for goods before they have been received or for services before they have been rendered. The Floyd Acceptances, 74 U.S. (7 Wall.) 666, 682 (1868); 10 Op. Att'y Gen. 288, 301 (1862). The statute has been described as "so plain that construction of it is unnecessary." 27 Comp. Dec. 885, 886 (1921). While that may be true if section 3324 is viewed in isolation, the situation today is nowhere near that simple. Advance payments are now permissible in a number of situations. What we now have is a basic statutory prohibition with a network of exceptions, both statutory and non-statutory, some of which are of major importance.

The advance payment statute permits exceptions, which may be found in appropriation acts or in "other law." Examples of specific exemptions are: 10 U.S.C. § 2396, 31 U.S.C. §§ 3324(b)(2) and (d), 19

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U.S.C. §§ 2076–2078 and 2080. Numerous other statutory exemptions exist in various contexts. A major exception, discussed in Section C.2, permits advance and progress payments under procurement contracts in certain situations.

Another major exception exists in the case of grants. Since many grants by their nature anticipate payment in advance, it has been held that 31 U.S.C. § 3324 does not preclude advance funding in authorized grant relationships. 60 Comp. Gen. 208 (1981); 59 Comp. Gen. 424 (1980); 41 Comp. Gen. 394 (1961). There are, however, limitations on the advance funding of grants. For example, the grantee must establish or demonstrate the willingness and ability to establish procedures to minimize the time elapsing between the advance of funds and their disbursement by the grantee. These concepts are further explored in Chapter 10.

Advance payment problems may nevertheless arise in grant-related cases. Under the College Work-Study Program, a student is placed with an employer, which may be a federal agency. The student's salary is paid from two sources: 80 percent is paid by the college under a Department of Education grant, and the remaining 20 percent is paid by the employer. In one case, a proposal for the employing federal agency to pay 100 percent of the student's salary and to collect 80 percent from the college at a later date was found to violate 31 U.S.C. § 3324. B-159715, August 18, 1972. Several years later, a proposal for the agency/employer to advance its 20 percent share to the college which would in turn place the funds in an escrow account for payment to the student after the work was performed was similarly found to contravene 31 U.S.C. § 3324. 56 Comp. Gen. 567 (1977). In the latter decision, the Comptroller General rejected a suggestion that the proposed arrangement might be authorized by 41 U.S.C. § 255.

Payments to or on behalf of federal civilian employees and military personnel constitute another area in which exceptions exist. For example, section 303 of the Career Compensation Act of 1949, 37 U.S.C. § 404, authorizes advance payments of certain travel and transportation allowances to military personnel. The authority does not, however, extend to station housing allowances, 56 Comp. Gen. 180 (1976), nor does it authorize the advance payment of trailer allowances, 39 Comp. Gen. 659 (1960), or rental vehicle expenses, 54 Comp. Gen. 764 (1975). The advance payment statute has also been held to prohibit advances to a military member for the travel

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of dependents incident to the member's release from active duty. 40 Comp. Gen. 77 (1960). Advances of travel and transportation allowances for federal civilian employees are authorized by 5 U.S.C. §§ 5705 and 5724(f).

Prior to late 1990, the advance payment of salary, as opposed to the various allowances discussed in the preceding paragraph, remained prohibited, with a limited exception in 5 U.S.C. § 5522 for certain emergency or "national interest" evacuations. This situation caused occasional hardship for new employees resulting from delay in receiving their first regular paycheck. In 58 Comp. Gen. 646 (1979), GAO had concurred in a proposal to minimize this hardship by using imprest funds to make partial salary payments to new federal employees early in the week following the first week of employment, but cautioned that, in view of 31 U.S.C. § 3324, no payments could be made before the work had been performed. Section 107 of the Federal Employees Pay Comparability Act of 1990 (FEPCA), section 529 of the FY 1991 Treasury-Postal Service-General Government appropriation act, Pub. L. No. 101-509 (November 5, 1990), 104 Stat. 1389, 1449, added a new 5 U.S.C. § 5524a, authorizing agencies to make advance payments of up to two pay periods of basic pay to new employees.[18]

Advance payment of salary remains prohibited in situations not covered by the statutes noted above. Thus, GAO has advised that partial or emergency salary payments can be made if a salary check is lost in the mail or an electronic deposit goes astray, but must be subject to "advance payment" safeguards similar to those discussed in 58 Comp. Gen. 646. B-193867.2, January 12, 1990 (non-decision letter). Similarly, the Nuclear Regulatory Commission can reschedule its commissioners' pay days that fall on weekends or holidays to the preceding work day, provided that payments made prior to the end of a pay period may not include salary applicable to days remaining in the pay period. B-237963, June 28, 1990.

Certain tuition payments may be paid in advance. For example, legislation authorizing the Coast Guard to provide training for its personnel at private or state colleges and universities and to pay certain expenses including tuition was viewed as authorization by "other law" within the meaning of 31 U.S.C. § 3324. Tuition could

[18]The authority is effective only to the extent provided for in advance in appropriation acts. FEPCA § 301, 104 Stat. at 1461.

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therefore be paid at the time of enrollment if required by the educational institution. 41 Comp. Gen. 626 (1962). See also B-70395, October 30, 1947 (tuition payments by Public Health Service in connection with research fellowships); B-56585, May 1, 1946 (tuition payments by the [former] Veterans Administration in connection with schooling of veterans). Exceptions are also provided in the Government Employees Training Act, 5 U.S.C. § 4109, and in 10 U.S.C. § 2396(a)(3) for the Defense Department. (Military personnel are not covered by the Training Act.)

Exceptions to the advance payment prohibition may appear in appropriation acts as well as permanent legislation. An exception in an appropriation act will, of course, be limited to the appropriation(s) in the act to which it applies, unless it can be construed as permanent legislation. Also, the bona fide needs rule would apply. In one case, a FY 1955 appropriation for an Indian education program included authority for the Bureau of Indian Affairs to make certain payments in advance. The Comptroller General held that the funds could be obligated only for the bona fide needs of the period for which appropriated. Therefore, the advance payment authority was limited to the portion of the program to be furnished during FY 1955 and could not operate to extend the period of availability of the appropriation, i.e., could not be used to pay for portions of the program extending into FY 1956. 34 Comp. Gen. 432 (1955).[19] This principle would be equally applicable to advance payment authority contained in permanent legislation.

If a given situation does not fall within any existing exception, the statutory prohibition will apply. E.g., 65 Comp. Gen. 806 (1986) (advance payment for published advertisement); 64 Comp. Gen. 710 (1985) (advance payments under contract for office equipment maintenance found to violate statute notwithstanding Federal Supply Schedule contract language to the contrary).

[19]This case is cited for the limited purpose of illustrating that advance payment authority does not negate application of the bona fide needs rule. It does not illustrate the general application of the bona fide needs rule to training obligations. On the contrary, as noted earlier in this chapter, most training tends to be non-severable.

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2. Government Procurement Contracts

a. Contract Financing

First, it is important to define a few terms. We take our definitions from the Federal Acquisition Regulation (FAR), 48 C.F.R. § 32.102. In the context of government contracting, "advance payments" are payments to a prime contractor "before, in anticipation of, and for the purpose of complete performance under one or more contracts." Advance payments are not measured by performance. "Progress payments" are payments made to the contractor as work progresses on the contract. They may be based on costs incurred by the contractor or a percentage or stage of completion. "Partial payments" are payments "for accepted supplies and services that are only a part of the contract requirements." Advance payments and progress payments based on costs incurred are regarded as forms of "contract financing." Partial payments and progress payments based on a percentage or stage of completion are viewed simply as payment methods.

Generally speaking, the government's preference is that the contractor be able to perform using private financing, i.e., the contractor's own resources or financing obtained in the private market. FAR, 48 C.F.R. § 32.106. However, the need for government assistance in various situations has long been recognized. In this context, it must be remembered that government contracting, while primarily intended to serve the government's needs, is also designed to foster a variety of social and economic objectives.

The extent to which various forms of what we now call "contract financing" are permissible under the advance payment statute was the subject of many early decisions. In one early case, the advance payment statute was applied to a question regarding the legality of government partial (progress) payments for materials which had not been delivered. The Comptroller General held that the statute does not necessarily require withholding of payment under a contract until the entire subject has been completed and delivered to the government. The statute "was not intended to prevent a partial payment in any case in which the amount of such payment had actually been earned by the contractor and the United States had received an equivalent therefor." 1 Comp. Gen. 143, 145 (1921). The partial payments proposed in that case were not in excess of the amount actually expended by the contractor in performance of

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the contract, and because the contract provided that title to all property upon which payment was made vested in the government, the government would receive the corresponding benefit. Partial payments in advance of complete delivery were therefore permissible.

In 20 Comp. Gen. 917 (1941), the Comptroller General approved a proposed contract amendment to provide for partial payment of the contract price prior to delivery to the government on the condition that title to the materials would pass to the government at the time of payment.

From these and similar cases, a rule evolved, applied both by the accounting officers and by the Attorney General, that partial payments for equipment or land made in advance of their delivery into the actual possession of the United States would not violate the advance payment statute if title therein had vested in the government at the time of payment, or if the equipment or land was impressed with a valid lien in favor of the United States in an amount at least equal to the payment. 28 Comp. Gen. 468 (1949); 20 Comp. Gen. 917 (1941).[20]

Applying this rule, GAO has approved the payment of "earnest money" under a contract for the sale of real estate to the government. The arrangement was found sufficient to protect the government's interests because the contract (a) vested equitable title in the government prior to the vesting of legal title, which remained in the seller only to secure payment of the purchase price, and (b) obligated the seller to deliver title insurance commitment. 34 Comp. Gen. 659 (1955).

Authority to make advance payments under certain contracts is now recognized by statute, and this is one of the major exceptions to 31 U.S.C. § 3324. The Federal Property and Administrative Services Act (41 U.S.C. § 255) and the Armed Services Procurement Act (10 U.S.C. § 2307) authorize advance, partial, progress or other payments, not to exceed the unpaid contract price, under contracts for property or services. Within their discretion, agencies may include in bid solicitations a provision limiting advance or progress payments to small business concerns. Under both statutes, advance

[20]Some other cases in this evolution are: 17 Comp. Dec. 894 (1911); 17 Comp. Dec. 231 (1910); 29 Op. Att'y Gen. 46 (1911); 20 Op. Att'y Gen. 746 (1894); 18 Op. Att'y Gen. 105 (1885).

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Significantly, 31 U.S.C. § 1345 does not apply to government employees in the discharge of official duties. Thus, as of 1935, attendance by private parties at government expense was prohibited by 31 U.S.C. § 1345; attendance by government employees was prohibited by the 1912 statute for meetings of a society or association (regardless of the relationship to official duties), and by 31 U.S.C. § 1345 for other types of meetings unless attendance was in the discharge of official duties.

The next relevant legislative action came in 1958 with two provisions of the Government Employees Training Act, 72 Stat. 327. Section 10 of the Act, 5 U.S.C. § 4109, authorizes payment of certain expenses in connection with authorized training. Section 19(b) of the Act, 5 U.S.C. § 4110, makes travel appropriations available for expenses of attendance at meetings "which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities." When Title 5 of the United States Code was recodified in 1966, qualifying language was added to 5 U.S.C. § 5946 to make it clear that the requirement for specific statutory authority no longer applied to the extent payment was authorized by 5 U.S.C. § 4109 or § 4110. See 38 Comp. Gen. 800 (1959).

With this statutory framework as background, it is now possible to attempt to state some rules.

A government employee may attend a non-government sponsored meeting at government expense (1) if it is part of an authorized training program under 5 U.S.C. § 4109, or (2) if it is related to agency functions or management under 5 U.S.C. § 4110.

For example, the Labor Department could use its Salaries and Expenses appropriation to pay the attendance fees of its Director of Personnel at a conference of the American Society of Training Directors since the meeting qualified under the broad authority of 5 U.S.C. § 4110. 38 Comp. Gen. 26 (1958). The expenses of attendance may not be paid if the employing agency refuses to authorize attendance, even if authorization would have been permissible under the statute. B-164372, June 12, 1968. (This was sort of an odd case. An employee wanted to attend a conference in Tokyo, Japan. The agency refused authorization because the employee had announced his intention to resign after the conference. The

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payments may be made only if (a) the agency head determines that advance payments are in the public interest, and (b) adequate security is provided. The authority under both of these statutes applies to both advertised and negotiated procurements. See B-158487, April 4, 1966.

Detailed guidance on the use of the authority granted by 41 U.S.C. § 255 and 10 U.S.C. § 2307 is contained in the Federal Acquisition Regulation. Advance payments are covered by 48 C.F.R. Subpart 32.4. Application for advance payments may be made, before or after the award of a contract, in accordance with the procedures set forth in the FAR, 48 C.F.R. § 32.408. Short of following these procedures, a bid conditioned upon the receipt of advance payments at variance with the terms of the solicitation may be rejected as nonresponsive. 57 Comp. Gen. 89 (1977); B-205088, October 28, 1981; B-197471.2, August 14, 1981.

"Adequate security" will normally include a lien in favor of the government, paramount to all other liens, covering property being acquired, balances in the bank account in which the advance payments are deposited, and property acquired by the contractor for performance of the contract. 41 U.S.C. § 255(c); 10 U.S.C. § 2307(c); 48 C.F.R. § 32.409-3(c). Other forms of security which may be required are outlined in the FAR.

Security requirements may vary to fit the circumstances of the particular case. 48 C.F.R. § 32.409-3(d). In B-214446, October 29, 1984, GAO considered a proposal to certify payment before the services were rendered. The check would be held in escrow under the government's control until contract obligations were met, at which time it would be released to the contractor. This arrangement was deemed adequate for purposes of 41 U.S.C. § 255. In an earlier case, GAO declined approval of a "purchase order draft" procedure which called for the government to send a blank check to the supplier upon placing an order. The supplier was to fill in the check for the actual amount due, not to exceed a sum specified on the check, thereby effecting immediate payment and eliminating the need for the supplier to bill the government. GAO concluded that an agency head could not reasonably find that this plan would provide adequate security for the government. B-158873, April 27, 1966.

The advance payment authority of 41 U.S.C. § 255 and 10 U.S.C. § 2307 is a financing tool to be used sparingly. It is considered the

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least preferred method of contract financing. 48 C.F.R. §§ 32.106 and 32.402(b); 57 Comp. Gen. 89, 94 (1977).

Advance payments are also authorized under Public Law 85-804, 50 U.S.C. §§ 1431–35. This law permits agencies designated by the President to enter into contracts, or to modify or amend existing contracts, and to make advance payments on those contracts, "without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever [the President] deems that such action would facilitate the national defense." 50 U.S.C. § 1431. Agencies authorized to utilize Public Law 85-804 are listed in Executive Order No. 10789, November 14, 1958, as amended (reprinted as note following 50 U.S.C. § 1431). The FAR subpart on advance payments includes provisions addressing Public Law 85-804, which applies only during a declared national emergency. 50 U.S.C. § 1435.[21]

Progress payments based on costs incurred, as opposed to advance payments (see definitions at beginning of this section), are covered in the FAR at 48 C.F.R. Subpart 32.5.

Progress payments, where authorized, are made periodically based on costs incurred, with the total not to exceed 80 percent of the total contract price. 48 C.F.R. §§ 32.501-1 and 52.232-16 (required contract clause for fixed-price contracts). In an incrementally funded fixed-price contract, GAO has construed "total contract price" as the price for complete performance rather than the amount already allotted to the contract, provided that payment may not exceed the total amount allotted. 59 Comp. Gen. 526 (1980). See also 48 C.F.R. § 32.501-3.

A key condition where cost-based progress payments are authorized is the vesting in the government of title to work in process and certain other property allocable to the contract. 48 C.F.R. §§ 32.503-14 and 52.232-16. These title provisions are an outgrowth of the case law noted earlier in this section.

[21]The National Emergencies Act, enacted in 1976, provided that powers and authorities resulting from the existence of any national emergency still in effect on September 14, 1976, were to terminate two years from that date. 50 U.S.C. § 1601. Specifically, the national emergency declared by President Truman in 1950 for the Korean conflict had never been revoked. However, 50 U.S.C. § 1651 makes the termination inapplicable with respect to certain provisions of law, one of which is Public Law 85-804. Thus, for purposes of Public Law 85-804, the Korean War has never ended. This is discussed in more detail in B-193687, August 22, 1979.

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The nature of the government's interest under this title-vesting provision has produced disagreement among the courts. The majority view is that title means full, absolute title, which cannot be defeated by subsequent liens. In re American Pouch Foods, Inc., 30 Bankr. 1015 (N.D. Ill. 1983), aff'd, 769 F.2d 1190 (7th Cir. 1985), cert. denied, 475 U.S. 1082; In re Reynolds Manufacturing Co., 68 Bankr. 219 (Bankr. W.D. Penn. 1986); In re Denalco Corp., 51 Bankr. 77 (Bankr. N.D. Ill. 1985); In re Economy Cab and Tool Co., 47 Bankr. 708 (Bankr. D. Minn. 1985). The minority view is that the title-vesting provision gives the government a security interest in the form of a lien relative to progress payments identified with specific property, paramount to the liens of general creditors. Marine Midland Bank v. United States, 687 F.2d 395 (Ct. Cl. 1982), cert. denied, 460 U.S. 1037; Welco Industries, Inc. v. United States, 8 Cl. Ct. 303 (1985), aff'd mem., 790 F.2d 90 (Fed. Cir. 1986).[22] The American Pouch and Marine Midland decisions, while reaching different conclusions, contain detailed discussions of the evolution of contract financing in relation to the advance payment statute.

b. Payment

Under a strict interpretation of 31 U.S.C. § 3324 standing alone, payment could not be made until property being acquired was actually received and accepted by the government. Thus, in one early case, a supply contract provided for payment "for articles delivered and accepted" and for the contractor to retain responsibility for the supplies or materials until they were actually in the possession of a government representative at their destination. The Comptroller General held that payments on the basis of vouchers or invoices supported by evidence of shipment only, without evidence of arrival of the supplies at destination and without assurance of receipt or acceptance by the government, would be unauthorized. 20 Comp. Gen. 230 (1940).

As with the forms of contract financing discussed above, the enactment of 41 U.S.C. § 255 and 10 U.S.C. § 2307 permitted more latitude in payment procedures. In view of this statutory authority, the Comptroller General, in B-158487, April 4, 1966, approved an advance payment procedure under which the General Services Administration would make payments on direct delivery vouchers prior to the receipt of "receiving reports" from the consignees. The

[22]Under the lien theory, however, it has also been held that the government's interest under the title-vesting provision will not be paramount to perfected security interests of other creditors where the government's progress payments have not been used to put value in the specific property involved. First Nat'l Bank of Geneva v. United States, 13 Cl. Ct. 385 (1987).

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proposal was designed to effect savings to the government by enabling GSA to take advantage of prompt payment discounts.[23] GAO's approval was conditioned upon compliance with the conditions specified in 41 U.S.C. § 255 that advance payment be in the public interest and that adequate security be provided.

GAO has since approved similar accelerated payment or "fast pay" procedures for other agencies in B-155253, March 20, 1968 (Defense Department) and B-155253, August 20, 1969 (Federal Aviation Administration), and reaffirmed them for GSA in 60 Comp. Gen. 602 (1981).

The Federal Acquisition Regulation provides for fast payment procedures in 48 C.F.R. Subpart 13.3. An agency may pay for supplies based on the contractor's submission of an invoice under, among others, the following conditions:

- The individual order does not exceed $25,000. Agencies have discretionary authority to set higher limits for specified items or activities.
- Geographical separation and lack of adequate communications facilities between receiving and disbursing activities make it impractical to make timely payment based on evidence of acceptance.
- Title vests in the government upon delivery to a post office or common carrier or, if shipment is by means other than Postal Service or common carrier, upon receipt by the government.
- The contractor agrees to repair, replace, or otherwise correct any items not received at destination, damaged in transit, or not conforming to purchase requirements.

The invoice is the contractor's representation that the goods have been delivered to a post office, common carrier, or point of first receipt by the government.

Accelerated payment procedures should have adequate internal controls. GAO's recommended controls are outlined in 60 Comp. Gen. 602 (1981) and B-205868, June 14, 1982. "Fast pay" procedures should be subject to monetary ceilings (now required by the FAR),

[23]For the method of determining the correct date of payment for prompt payment discount purposes, see Foster Co. v. United States, 128 Ct. Cl. 291 (1954); 61 Comp. Gen. 166 (1981); B-214446, October 29, 1984; B-107826, July 29, 1954.

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limited to contractors which have an ongoing relationship with the agency, and reviewed periodically to ensure that benefits outweigh costs. The agency must keep records adequate to determine that the agency is getting what it pays for. The system should permit the timely discovery of discrepancies and require prompt follow-up action. GAO has also recommended that an agency test the procedure before agencywide implementation. B-205868 at 3.

It has also been held that the use of imprest or petty cash funds to purchase supplies under C.O.D. (cash on delivery) procedures does not violate 31 U.S.C. § 3324, even where payment is made prior to examination of the shipment. 32 Comp. Gen. 563 (1953).[24]

Another "fast pay" issue was discussed in B-203993-O.M., July 12, 1982, in which GAO's General Counsel advised the GAO finance office that it could pay the invoice amount, without the need for further verification, if goods are shipped "f.o.b. origin" and the difference between the estimated price in the purchase order and the amount shown on the invoice is based solely on transportation costs. Any discrepancy regarding the transportation costs could be determined and adjusted through post-audit procedures under 31 U.S.C. § 3726. This would not apply to goods shipped "f.o.b. destination" because transportation charges are included as part of the purchase price.

As a general proposition, since fast pay procedures permit the agency to dispense with pre-payment voucher audits, GAO's approval of fast pay procedures has been based on the assumption that the agency would conduct 100 percent post-payment audits. In 67 Comp. Gen. 194 (1988), GAO approved in concept a General Services Administration proposal to combine fast pay procedures with the use of statistical sampling in post-audit for utility invoices. "We see no reason why these two techniques cannot be combined in appropriate circumstances if they result in economies and adequately protect the interests of the government." Id. at 199. However, GAO found that the specific proposal did not provide adequate controls. GSA modified its proposal, and the Comptroller General approved it in 68 Comp. Gen. 618 (1989).

[24]The decision refers to something called "Joint Regulations for Small Purchases Utilizing Imprest Funds." This was a regulation, issued jointly by GAO, GSA, and the Treasury Department, and published at 31 Comp. Gen. 768 (1952). It was rescinded in 1959.

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3. Lease and Rental Agreements

The advance payment statute has been consistently construed as applicable to lease or rental agreements as well as purchases, and applies with respect to both real and personal property. 18 Comp. Gen. 839 (1939); 3 Comp. Gen. 542 (1924); B-188166, June 3, 1977. Thus, when the government acquires land by leasing, payments must be made "in arrears" unless the applicable appropriation act or other law provides an exemption from 31 U.S.C. § 3324. 19 Comp. Gen. 758, 760 (1940). The FAR advance payment provisions do not apply to rent. 48 C.F.R. § 32.404(a)(1).

In 57 Comp. Gen. 89 (1977), the Comptroller General held that a leasing arrangement of telephone equipment called "tier pricing," under which the government would be obligated to pay the contractor's entire capital cost at the outset of the lease, would violate 31 U.S.C. § 3324. See also 58 Comp. Gen. 29 (1978).

The advance payment of annual rent on property leased from the National Park Foundation, a statutorily created charitable nonprofit organization, was found permissible in B-207215, March 1, 1983, based on the "unique status" of the lessor.

Certain long-term lease/rental agreements may present more complicated problems in that they may involve not only 31 U.S.C. § 3324 but also the Antideficiency Act, 31 U.S.C. § 1341. Since appropriations are made only for the bona fide needs of a particular fiscal year, and since a lease purporting to bind the government for more than one fiscal year would necessarily include the needs of future years, such a lease would be contrary to the Antideficiency Act prohibition against contracting for any purpose in advance of appropriations made for such purpose. Thus, a lease agreement for the rental of nitrogen gas cylinders for a 25-year period, the full rental price to be paid in the first year, would violate both statutes. 37 Comp. Gen. 60 (1957). A contractual arrangement on an annual basis with an option in the government to renew from year to year was seen as the only way to accomplish the desired objective. Id. at 62. See also 19 Comp. Gen. 758 (1940).

4. Publications

Advance payment is authorized for "charges for a publication printed or recorded in any way for the auditory or visual use of the agency." 31 U.S.C. § 3324(d)(2).

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The original exemption for publications was enacted in 1930 (46 Stat. 580) and amended in 1961 (75 Stat. 211). It authorized advance payments for "subscriptions or other charges for newspapers, magazines, periodicals, and other publications for official use." Prior to 1974, a seemingly endless stream of cases arose over the meaning of the terms "publications" or "other publications" as used either in the general exemption or in specific appropriation acts.[25] Based on judicial precedent, GAO construed the terms to mean publications in the customary and commonly understood sense of the word, that is, books, pamphlets, newspapers, periodicals, or prints. B-125979, June 14, 1957. The exemption was also held to include other types of "visual" material such as microfilm products, 41 Comp. Gen. 211 (1961), and 35-millimeter slides, 48 Comp. Gen. 784 (1969). However, the term "publications" was held not to include items made to be heard rather than read, such as phonograph records (21 Comp. Gen. 524 (1941), B-125979, June 14, 1957) or tape-recorded material (46 Comp. Gen. 394 (1966), B-137516, October 28, 1958). In 35 Comp. Gen. 404 (1956), the use of advance payments for the procurement of books through "book club" facilities was held permissible.[26]

In 1974, Congress resolved the problems over the interpretation of "other publications" by enacting legislation to codify some of the GAO decisions and modify others, by defining "other publications" as including "any publication printed, microfilmed, photocopied, or magnetically or otherwise recorded for auditory or visual usage" (88 Stat. 1731). This was condensed into the present version of 31 U.S.C. § 3324(d)(2) when Title 31 was recodified in 1982.

[25]The 1930 version of the exemption authorized advance payment only for "newspapers, magazines, and other periodicals," although a few agencies had broader authority under agency-specific legislation. For agencies subject to the quoted language, the sole issue in several decisions was whether a given publication could also be regarded as a "periodical" and thus within the statute. E.g., 37 Comp. Gen. 720 (1958); 17 Comp. Gen. 455 (1937); A-90102, September 3, 1938. The 1961 amendment expanded the authority to include "other publications," rendering these decisions obsolete. In addition, the 1974 legislation discussed in the text further expanded the definition of "publication." Thus, most pre-1974 decisions in this area are wholly or partly obsolete; their continuing validity must be assessed in light of the present statutory language.

[26]This decision originally applied only to the former Veterans Administration, which had specific authority. It did not apply to agencies subject to the then-existing version of the general exemption since the books were not "periodicals." This part of the decision should now be disregarded (see supra note 25), and the holding in 35 Comp. Gen. 404 would now apply to any agency which can justify the need.

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A 1978 decision considered the question of whether a microfilm library could be acquired under a lease/rental arrangement or whether the advance payments were authorized only where the government actually purchased the library. The Comptroller General concluded that in the absence of statutory language or evidence of legislative intent to the contrary, there is no meaningful difference between the purchase and rental of publications needed by the government, and that the rental or leasing of a microfilm library for official government use fell within the purview of the publications exemption. 57 Comp. Gen. 583 (1978). However, advance payments for items of equipment necessary for use in conjunction with a microfilm library are still prohibited. B-188166, June 3, 1977. (The cited decision, although not clear from the text itself, dealt with reader/printers.)

More recent decisions have construed the publications exemption found in 31 U.S.C. § 3324(d)(2) as permitting advance payment for coupons to be used for the purchase of articles from medical journals and redeemable for cash if unused (67 Comp. Gen. 491 (1988)); verification reports of physicians' board certifications (B-231673, August 8, 1988); and hospital evaluation reports based on data submitted by participating government hospitals and including, as part of the subscription price, a laboratory kit for use in obtaining the data required for the reports, the kit being regarded as "a part of the publication process" (B-210719, December 23, 1983).

The FAR advance payment provisions do not apply to subscriptions to publications. 48 C.F.R. § 32.404(a)(6).

5. Other Governmental Entities

The Comptroller General has not applied the advance payment prohibition to payments to other federal agencies. As noted previously, the primary purpose of the prohibition is to preclude the possibility of loss in the event a contractor, after receipt of payment, should fail to perform and fail or refuse to refund the money to the United States. The danger of such a loss is minimized when the contractor is another government agency. Thus, 31 U.S.C. § 3324 does not prohibit advance payment of post office box rentals. 25 Comp. Gen. 834 (1946). Also, the Economy Act, 31 U.S.C. § 1535, expressly authorizes advance payments for transactions within its scope.

GAO has applied the same rationale to exempt state and local governments from the advance payment prohibition. E.g., 57 Comp.

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Gen. 399 (1978) (no objection to advance payment of rent under lease of land from state). This exception, however, applies only where the state is furnishing noncommercial services reasonably available only from the state. 39 Comp. Gen. 285 (1959) (sewer service charge); B-118846, March 29, 1954 (expenses of state water commissioner administering Indian irrigation project pursuant to court order); B-109485, July 22, 1952 (repair, operation, and maintenance of roads in conjunction with permanent transfer of federal roads to county); B-34946, June 9, 1943, and B-65821, May 29, 1947 (state court fees and other items of expense required to litigate in state courts in compliance with the requirements of state law); B-36099, August 14, 1943 (lease of state lands); B-35670, July 19, 1943 (state forest fire prevention and suppression services).

Conversely, where a state provides the federal government with services that are freely and readily available in the commercial market, the statutory advance payment restrictions applicable to private contractors govern. 58 Comp. Gen. 29 (1978) (telephone services).

In B-207215, March 1, 1983, GAO advised the National Park Service that it could make advance payments of annual rent on property leased from the National Park Foundation. The National Park Foundation is a charitable nonprofit organization created by statute to accept and administer gifts to the National Park Service, and its board of directors includes the Secretary of the Interior and the Director of the Park Service. GAO concluded that the Foundation's "unique status virtually assures that there is no threat of loss to the Government." Even though technically the Foundation is neither a state nor a federal agency, it is, in effect, tantamount to one for advance payment purposes.

The exception recognized in the case of state and local governments has not been extended to public utilities. 42 Comp. Gen. 659 (1963) (telephone services). See also 27 Comp. Dec. 885 (1921). Thus, a government agency cannot use a utility "budget plan" which would provide for level monthly payments in a predetermined amount throughout the year. B-237127, December 12, 1989 (non-decision letter). Similarly, monthly charges under a utility service contract for cable television service to a Naval hospital may not be paid in advance. B-237789, December 10, 1990.

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D. Disposition of Appropriation Balances

1. Terminology

Annual funds which remain unobligated at the end of the fiscal year for which they were appropriated are said to "expire" for obligational purposes.[27] In other words, they cease to be available for new obligations. The same principle applies to multiple-year appropriations as of the end of the last fiscal year for which they were provided. For purposes of this discussion, annual and multiple-year appropriations are referred to cumulatively as "fixed appropriations." 31 U.S.C. § 1551(a)(3).[28]

The portion of an appropriation which has not actually been spent at the end of the fiscal year (or other definite period of availability) is called the "unexpended balance."[29] It consists of two components—the obligated balance and the unobligated balance.

The obligated balance is defined as "the amount of unliquidated obligations applicable to the appropriation less amounts collectible as repayments to the appropriation." 31 U.S.C. § 1551(a)(1). Restated, obligated balance means the amount of undisbursed funds remaining in an appropriation against which definite obligations have been recorded.

The unobligated balance is "the difference between the obligated balance and the total unexpended balance." Id. § 1551(a)(2). It represents that portion of the unexpended balance unencumbered by obligations recorded under 31 U.S.C. § 1501.

[27]The term "lapse" is also sometimes used in this context although there is a technical distinction. Traditionally, an appropriation was said to "lapse" when it ceased to be available to the spending agency to liquidate prior obligations.

[28]Throughout this section, except as otherwise specified, references to 31 U.S.C. §§ 1551 through 1557 reflect amendments made by Pub. L. No. 101-510, § 1405(a), 104 Stat. 1485, 1675 (1990).

[29]Depending on the specific context in which the term is used, "unexpended balance" may refer to the entire undisbursed balance or to the unobligated balance only. 22 Comp. Gen. 59 (1942). We use it here in the broader sense.

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employee went anyway, and for some reason filed a claim for his expenses. GAO said no.) Where attendance is authorized, the fact that the sponsor is a profit-making organization is immaterial. B-161777, July 11, 1967.

The express inclusion of "management" in 5 U.S.C. § 4110 is significant. Before the Training Act, GAO had strictly construed grants of statutory authority for attendance at meetings as excluding meetings concerning general problems such as management which are common to all agencies. 37 Comp. Gen. 335 (1957). This type of meeting is now expressly authorized.

If neither 5 U.S.C. § 4109 nor 5 U.S.C. § 4110 applies and the meeting is a meeting of a "society or association," then it is subject to the prohibition of 5 U.S.C. § 5946.

The continuing viability of 5 U.S.C. § 5946 requires further elaboration. GAO held in 38 Comp. Gen. 800 (1959) that the Government Employees Training Act repealed section 5946 by implication to the extent that the two statutes were incompatible. While this is true, some of the language in that decision has generated some confusion. The decision stated that the restriction in section 5946 "is inapplicable so far as agencies and personnel covered by the Government Employees Training Act are concerned," and that those agencies no longer need to obtain specific appropriation provisions to authorize attendance at meetings. Of course this statement is based on the premise that an agency is not likely to seek, nor is Congress likely to grant, specific appropriation authority for an agency to send its employees to meetings which have nothing to do with agency business. Thus, it is not accurate to say that section 5946 simply no longer applies to civilian employees of the government. It does apply, except that its scope is considerably reduced by virtue of the broad authority of the Training Act. If attendance cannot be authorized under either of the Training Act provisions, 5 U.S.C. § 5946 still applies. This relationship is correctly stated in 55 Comp. Gen. 1332, 1335-36 (1976). For cases where expenses were disallowed because they could not be justified under these standards, see B-202028, May 14, 1981; B-195045, February 8, 1980; B-166560, May 27, 1969.

It is also possible for 31 U.S.C. § 1345 to apply to government employees, although it would be the rare case. As noted above,

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Unexpended balances are both necessary and unavoidable. There are, however, potential adverse implications if those balances should become too large. GAO studied the area in a report entitled Budget Issues: Governmentwide Analysis of the Growth in Unexpended Balances, GAO/AFMD-86-24BR (January 17, 1986). GAO discovered a trend reflecting increased growth in unexpended balances during the first half of the 1980's. Since much of these balances represent actual or potential liabilities which will eventually have to be liquidated through future revenues or borrowing, GAO cautioned that a high growth rate in unexpended balances could adversely affect deficit reduction efforts.

2. Evolution of the Law

Congressional treatment of unexpended balances has changed a number of times over the years, most recently in November 1990. Some knowledge of the past is useful in understanding the pre-1991 decisions and in determining which portions of them remain applicable.

Prior to 1949, unexpended balances of annual appropriations retained their fiscal year identity for two full fiscal years following expiration, after which time the remaining undisbursed balance had to be covered into the surplus fund of the Treasury. The agency involved no longer had access to the balance for any purpose, and subsequent claims against the appropriation had to be settled by GAO. E.g., B-24565, April 2, 1942; B-18740, July 23, 1941. The appropriation was said to "lapse" when it was covered into the surplus fund of the Treasury. See 24 Comp. Gen. 942, 945 (1945); 21 Comp. Gen. 46 (1941).

The problem with this arrangement was that, in view of Article I, section 9 of the Constitution, once the money was covered into the Treasury, another appropriation was needed to get it back out. E.g., 23 Comp. Gen. 689, 694 (1944). This was true even for simple, undisputed claims. Congress tried various devices to pay claims against lapsed appropriations—reappropriation of lapsed funds, definite and indefinite appropriations for the payment of claims under $500, and appropriations for specific claims—but none proved entirely satisfactory.

In 1949, Congress enacted the Surplus Fund-Certified Claims Act (63 Stat. 407), intended to permit payment of claims against lapsed appropriations without the need for specific appropriations or

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reappropriations. The statute provided for the transfer of unexpended balances remaining after two years to a Treasury account designated "Payment of Certified Claims." Funds in this account remained available until expended for the payment of claims certified by the Comptroller General to be lawfully due and chargeable to the respective balances in the account. See B-61937, September 17, 1952. Like the pre-1949 system, this arrangement too proved unsatisfactory in that all claims payable from the certified claims account, undisputed invoices included, still had to come through GAO.

The system changed again in 1956 (Pub. L. No. 84-798, 70 Stat. 647), upon the recommendation of the second Hoover Commission.[30] The most significant change made by the 1956 law was to pass the direct responsibility for making payments from lapsed appropriations from GAO to the cognizant agencies. For the first time, agencies could dispose of clearly valid claims against prior year appropriations without the need for any action by either Congress or GAO. The statutory evolution is discussed in more detail in B-179708-O.M., November 20, 1973.

The 1956 law, which was to remain in effect until late 1990, prescribed different procedures for obligated and unobligated balances. The obligated balance retained its fiscal year identity for two full fiscal years following the expiration date, at which time any remaining obligated but unexpended balance was transferred to a consolidated successor account, where it was merged with the obligated balances of all other appropriation accounts of that department or agency for the same general purpose. These successor accounts were known as "M" accounts. Funds in an "M" account were available indefinitely to liquidate obligations properly incurred against any of the appropriations from which the account was derived. Upon merger in the "M" account, the obligated but unexpended balances of all annual and multiple-year appropriations of the agency lost their fiscal-year identity for expenditure purposes.

With fiscal-year identity no longer a concern, there was no need to relate a payment from the "M" account to the specific balance which had been transferred from the particular year in which the

[30]Second Commission on Organization of the Executive Branch of the Government, created by Pub. L. No. 83-108, 67 Stat. 142 (1953).

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obligation had occurred. Thus, as a practical matter, once an appropriation balance reached the "M" account, the potential for violations of the Antideficiency Act became highly remote. B-179708-O.M., June 24, 1975. An Antideficiency Act violation could occur only if identifiable obligations exceeded the entire "M" account balance plus the aggregate of all funds potentially restorable from withdrawn unobligated balances.

The unobligated balances of fixed-year appropriations were "withdrawn" upon expiration of the period of obligational availability, and were returned to the general fund of the Treasury. A withdrawn unobligated balance retained its fiscal year identity on the books of the Treasury for two fiscal years, during which time it was called "surplus authority." At the end of the two-year period, the balances were transferred to "merged surplus" accounts, at which point they lost their fiscal-year identity.

Withdrawn unobligated balances could be restored to adjust previously recorded obligations where the amount originally recorded proved to be less than the actual obligation, or to liquidate obligations which arose but were not formally recorded prior to the appropriation's expiration, provided that the obligations met one of the criteria specified in 31 U.S.C. § 1501(a) and were otherwise valid. Some cases discussing this restoration authority are 68 Comp. Gen. 600 (1989); 63 Comp. Gen. 525 (1984); B-236940, October 17, 1989; B-232010, March 23, 1989; B-164031(3).150, September 5, 1979.

From the perspective of congressional control, one weakness of the system described above was that it permitted the accumulation of large amounts in "M" accounts. While agencies were supposed to review their "M" accounts annually and return any excess to the Treasury, this was not always done. This situation, in conjunction with the previously discussed rules on the funding of contract modifications, created the potential for large transactions with minimal congressional oversight. For example, a 1989 GAO report discussed an Air Force proposal, completely legal under existing legislation, to use over $1 billion from expired accounts to fund B-1B contract modifications. Strategic Bombers: B-1B Program's Use of Expired Appropriations, GAO/NSIAD-89-209 (September 1989).

Congressional concern mounted during 1990, and the treatment of expired appropriations was changed once again by section 1405 of the National Defense Authorization Act for Fiscal Year 1991, Pub.

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L. No. 101-510 (November 5, 1990), 104 Stat. 1485, 1675. Section 1405 applies to both military and civilian agencies, and includes transition provisions to deal with existing merged surplus and "M" accounts. Unrestored merged surplus authority was canceled as of December 5, 1990, with no further restorations authorized after that date. "M" accounts are to be phased out over a three-year period, with any remaining "M" account balances canceled on September 30, 1993.

3. Expired Appropriations and Closing of Accounts [31]

Section 1405(a) of Pub. L. No. 101-510 amended 31 U.S.C. §§ 1551–1557. Two of the key provisions are quoted below:

"On September 30th of the 5th fiscal year after the period of availability for obligation of a fixed appropriation account ends, the account shall be closed and any remaining balance (whether obligated or unobligated) in the account shall be canceled and thereafter shall not be available for obligation or expenditure for any purpose." 31 U.S.C. § 1552(a).

"After the end of the period of availability for obligation of a fixed appropriation account and before the closing of that account under section 1552(a) of this title, the account shall retain its fiscal-year identity and remain available for recording, adjusting, and liquidating obligations properly chargeable to that account." 31 U.S.C. § 1553(a).

Just as under the prior system, a one-year or multiple-year appropriation expires on the last day of its period of availability and is no longer available for new obligations, although unobligated balances no longer revert immediately to the general fund of the Treasury.

Upon expiration of a fixed appropriation, the obligated and unobligated balances retain their fiscal-year identity in an "expired account" for that appropriation for an additional five fiscal years. As a practical matter, agencies must maintain separate obligated and unobligated balances within the expired account as part of their internal financial management systems in order to insure compliance with the Antideficiency Act. Also relevant in this connection is 31 U.S.C. § 1554(a), under which applicable audit

[31] This section summarizes the provisions enacted in November 1990. Decisions and opinions cited in the text predating the 1990 legislation reflect principles which should still remain valid. Requirements and procedures under the 1990 law are set forth in OMB Circular No. A-34, Part XI (January 1991).

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requirements, limitations on obligations, and reporting requirements remain applicable to the expired account.

During this five-year period, treatment of the balances is similar to the first two post-expiration fiscal years under the 1956 legislation. Obligated balances for any of those five years may be used to liquidate obligations properly chargeable to that fiscal year. The unobligated balance remains available to make legitimate obligation adjustments, i.e., to record previously unrecorded obligations and to make upward adjustments in previously underrecorded obligations.

The authority to use unobligated balances to make obligation adjustments is analogous to the restoration authority of the law prior to the 1990 revision, again with the exception that there is no longer a point at which balances merge and lose their fiscal-year identity. The authority is available only to satisfy an unrecorded or underrecorded obligation properly chargeable to the funds of that particular year, and cannot be used to satisfy an obligation properly chargeable to current appropriations (see 50 Comp. Gen. 863 (1971)), or to any other year of the five-year period. The authority of 31 U.S.C. § 1553(a) is intended to permit agencies to adjust their accounts to more accurately reflect obligations and liabilities actually incurred during the period of availability. See 63 Comp. Gen. 525, 528 (1984). However, arbitrary deobligation in reliance upon the authority to make subsequent adjustments is not consistent with the statutory purpose. See B-179708-O.M., July 10, 1975.

During the five-year period, the potential for an Antideficiency Act violation exists if identifiable obligations chargeable to one of those five years exceed the sum of the obligated balance for that year plus the amount available for adjustment from the unobligated balance for the same year. Should this happen, the excess can be liquidated only pursuant to a supplemental or deficiency appropriation or other congressional action. See B-179708-O.M., June 24, 1975 (applying same principle during first two post-expiration years under prior law).

At the end of the five-year period, the account is closed. Any remaining unexpended balances, both obligated and unobligated,

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are canceled, returned to the general fund of the Treasury,[32] and are thereafter no longer available for any purpose.

Once an account has been closed:

"[O]bligations and adjustments to obligations that would have been properly chargeable to that account, both as to purpose and in amount, before closing and that are not otherwise chargeable to any current appropriation account of the agency may be charged to any current appropriation account of the agency available for the same purpose."

31 U.S.C. § 1553(b)(1). This is a major exception to the rule previously discussed that current appropriations are not available to satisfy obligations properly chargeable to a prior year. The authority is limited, however. The cumulative total of old obligations payable from current appropriations under 31 U.S.C. § 1553(b)(1) may not exceed one percent of the current appropriation. 31 U.S.C. § 1553(b)(2). The authority to use current appropriations to pay obligations attributable to canceled balances may not be used to exceed the original appropriation.[33]

Congress may, by specific legislation, exempt an appropriation from the above rules and may otherwise fix the period of its availability for expenditure. 31 U.S.C. §§ 1551(b), 1557. An agency should consider seeking an exemption if it administers a program which by its nature requires disbursements beyond the five-year period. One form of exemption simply preserves the availability for disbursement of previously obligated funds. An example is discussed in B-243744, April 24, 1991 (concluding that the exemption does not create new budget authority). Another form is a provision applicable to certain Agency for International Development one-year appropriations which effectively converts them to no-year funds upon proper obligation (thereby permitting reobligation for authorized purposes should the funds be deobligated after the end of the

[32]We commonly talk about "returning" appropriation balances to the Treasury. In point of fact, for the most part, they never left the Treasury to begin with. An appropriation does not represent cash actually set aside in the Treasury. Government obligations are liquidated as needed through revenues and borrowing. Thus, the reversion of funds to the Treasury is not a movement of actual cash, but a bookkeeping adjustment which, in the various ways discussed in the text, affects the government's legal authority to make obligations and expenditures.

[33]In view of this requirement, it will be necessary to maintain records of the balances returned to the Treasury upon cancellation beyond the end of the five-year period, and to adjust these balances as subsequently presented obligations are liquidated, as there is no other way to ensure that payments do not exceed the original appropriation.

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fiscal year). Although not originally conceived as an exemption from the account closing requirement, the AID provision amounts to one because the account closing requirement applies only to fixed appropriations. Foreign Assistance: Funds Obligated Remain Unspent for Years, GAO/NSIAD-91-123 (April 1991), at 21.

To the extent of its applicability, the statutory scheme found at 31 U.S.C. §§ 1551–1557 provides the exclusive method for the payment of obligations chargeable to expired appropriations. See B-101860, December 5, 1963. Thus, there is generally no authority to transfer appropriations to some form of trust fund or working fund for the purpose of preserving their availability. Id. (See also 31 U.S.C. § 1532, which prohibits the transfer of appropriations to a working fund without statutory authority.)

The rules for certain legislative branch appropriations are a bit different. The provisions of 31 U.S.C. §§ 1551–1557 do not apply to appropriations to be disbursed by the Secretary of the Senate or the Clerk of the House of Representatives. 31 U.S.C. § 1551(c)(2). For these appropriations, unobligated balances more than two years' old cannot be used short of an act of Congress. Instead, obligations chargeable to appropriations which have been expired for more than two years "shall be liquidated from any appropriations for the same general purpose, which, at the time of payment, are available for disbursement." 2 U.S.C. § 102a. See B-213771.3, September 17, 1986.

4. No-Year Appropriations

There is one important statutory restriction on the availability of no-year funds. Under 31 U.S.C. § 1555, a no-year account is to be closed if (a) the agency head or the President determines that the purposes for which the appropriation was made have been fulfilled, and (b) no disbursement has been made against the appropriation for two consecutive fiscal years. Upon closing, any remaining balance in the account, obligated or unobligated, is canceled and is no longer available for obligation or expenditure for any purpose. The purpose of section 1555 is to permit the closing of inactive appropriations. 39 Comp. Gen. 244 (1959); B-182101, October 16, 1974.

This principle also applies to revenues earned by a government agency where Congress has authorized the agency to retain such

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revenues without any fiscal year limitations. For example, in section 111(h) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5821(h), Congress authorized the Department of Energy, when so specified in appropriation acts, to retain revenues from uranium enrichment services and use them to offset the costs of providing such services, the funds to remain available until expended. In light of 31 U.S.C. § 1555, however, the Department of Energy could not retain or set aside the revenues indefinitely. B-159687-O.M., October 25, 1979.

As with fixed appropriations, obligations attributable to the canceled balance of a no-year account may be paid from current appropriations for the same purpose, and subject to the same one-percent limitation. 31 U.S.C. § 1553(b).

Like a no-year appropriation, a permanent indefinite appropriation (e.g., 31 U.S.C. § 1304) is not subject to fiscal year limitations. However, 31 U.S.C. § 1555 does not apply to permanent indefinite appropriations since the "remaining balance" by definition is the general fund of the Treasury. Cf. 11 Comp. Dec. 400 (1905).

5. Repayments and Deobligations

To prevent the overstatement of obligated balances, the term "obligated balance" is defined in 31 U.S.C. § 1551(a)(1), for purposes of 31 U.S.C. §§ 1551–1557, as the amount of unliquidated obligations applicable to the appropriation "less amounts collectible as repayments to the appropriation." Once an account has been closed pursuant to either 31 U.S.C. § 1552(a) or 31 U.S.C. § 1555, collections received after closing which could have been credited to the appropriation account if received prior to closing, must be deposited in the Treasury as miscellaneous receipts. 31 U.S.C. § 1552(b).

The term "repayment" is a general term referring to moneys received by a federal agency which are authorized to be credited to the receiving agency's appropriation and are not required to be deposited in the Treasury as miscellaneous receipts. Treasury Department-General Accounting Office Joint Regulation No. 1, September 22, 1950, § 2, published at 30 Comp. Gen. 595, divides repayments into two subcategories, reimbursements (statutory authority for agency to retain receipts) and refunds (certain nonstatutory situations such as recovery of overpayments and erroneous payments).

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Reimbursements are considered a budgetary resource subject to apportionment by the Office of Management and Budget, whereas refunds are treated as reductions of expenditures and obligations. Reimbursements operate to augment the original amount appropriated by Congress. Refunds are reductions of, and must be directly related to, previous disbursements. See 30 Comp. Gen. 614 (1950).[34]

As a general proposition, where the appropriation to be credited has expired, reimbursements must be credited to the expired account and not to the current account. See "Augmentation of Appropriations" in Chapter 6 for case citations. A prominent example is the Economy Act, 31 U.S.C. § 1535. Where a transaction between government agencies is governed solely by the Economy Act, reimbursements for work, services, or other materials must be credited to the fiscal year appropriations which earned them, regardless of when the reimbursements are collected. If the appropriation which earned the reimbursement remains available for obligation at the time of collection, there is no distinction between a credit to the year earned or to the year collected. If, however, the appropriation which earned the reimbursement has expired for obligation purposes at the time of collection, then reimbursement can be credited only to the expired account. B-194711-O.M., January 15, 1980; B-179708-O.M., December 1, 1975. After closing, the reimbursement would have to go to miscellaneous receipts.

Excess obligations which are later deobligated are accounted for in the same manner as repayments. The difference, of course, is that the excess obligations are already in the expired account. Deobligated amounts which are not needed to liquidate recorded obligations should be accounted for under the "unobligated balance" portion of the expired account. See 52 Comp. Gen. 179 (1972).

If an agency deobligates funds after the expiration of the period of availability, the funds are not available for any new obligation. To avoid this result, Congress may, by statute, authorize an agency to reobligate any such deobligated sums. This is called deobligation-reobligation ("deob-reob") authority. The reobligation will usually be for the same general purpose as the original obligation, although the precise purposes will depend on the terms of the legislation. See

[34]The citation refers to an "Accounting Systems Memorandum," an obsolete form of GAO guidance. They used to be published as appendices in the annual "Comp. Gen." volumes. Although obsolete as GAO documents, they often, as in this case, contain useful background and explanatory discussion.

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B-218762-O.M., September 18, 1985, for an illustration. Deobligation-reobligation authority is not necessary for no-year funds, and this is true even though Congress may have eliminated such authority with respect to certain fiscal year appropriations of the same agency. B-200519, November 28, 1980.

E. Effect of Litigation on Period of Availability

If the entitlement to unobligated funds is tied up in litigation, the statutory expiration and closing procedures could come into conflict with a claimant's right to pursue a claim with the courts.

Suppose, for example, Congress made an appropriation directing the Comptroller General to pay a huge bonus to the editors of this book. Suppose further that the agency refused to make payment because it thought the idea economically unsound or just plain ridiculous. Maybe the agency would rather use the money for other purposes or simply let it revert to the Treasury. The editors of course could sue and would presumably be entitled to pursue the suit through the appellate process if necessary. But this could take years. If the obligational availability of the appropriation were to expire at the end of the fiscal year, the suit might very well have to be dismissed as moot. See, e.g., Township of River Vale v. Harris, 444 F. Supp. 90, 93 (D.D.C. 1978). What, then, can be done to prevent what one court has termed (presumably with tongue in judicial cheek) "the nightmare of reversion to the federal treasury"?[35]

The answer is two-fold: the equitable power of the federal judiciary and a statute, 31 U.S.C. § 1502(b). While the cases discussed in this section predate the 1990 revision of 31 U.S.C. §§ 1551–1557 and thus use language that is in some respects obsolete, the concepts would appear applicable either directly or by analogy to the new procedures. For example, if a court could enjoin reversion to the Treasury under the old law, it can presumably equally enjoin expiration under the new law.

The cases establishing the equitable power of the courts involve two distinct situations—the normal expiration of annual appropriations at the end of the fiscal year and the expiration of budget authority in accordance with the terms of the applicable authorizing legislation. For purposes of the principles to be discussed, the distinction is not material. See B-115398.48, December 29, 1975

[35]Burton v. Thornburgh, 541 F. Supp. 168, 174 (E.D. Pa. 1982).

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31 U.S.C. § 1345 does not apply to government employees in the discharge of official duties. A number of earlier cases will be found which cite the statute in passing for this proposition. E.g., 27 Comp. Gen. 627 (1948); 26 Comp. Gen. 53 (1946); 22 Comp. Gen. 315 (1942); B-117137, September 25, 1953; B-87691, August 2, 1949; B-80621, October 8, 1948; B-77404, June 29, 1948; B-77613, June 23, 1948; B-13888, December 10, 1940.[9]

Since the exception for government employees in 31 U.S.C. § 1345 is limited to the discharge of official duties, the statutory prohibition applies to government employees to the extent that a given meeting is not part of the discharge of official duties. If a meeting is not part of authorized training under 5 U.S.C. § 4109 and cannot qualify as related to agency functions under 5 U.S.C. § 4110, it would certainly not be within the exception in 31 U.S.C. § 1345 for the discharge of official duties. If the meeting is a meeting of a "society or association," it is, as noted above, subject to 5 U.S.C. § 5946. If the meeting is not a meeting of a "society or association" and is not within the exception for the discharge of official duties, 31 U.S.C. § 1345 would apply. An example of a situation in which this rationale might apply is B-195045, February 8, 1980, in which attendance expenses at an executive board meeting of the Combined Federal Campaign were disallowed. (The case was decided on the basis of regulations and prior decisions.)

(2) Inability to attend

If an employee is scheduled to participate in a meeting or conference and is unable to attend, the government may be liable for attendance fees in certain situations. Two cases will illustrate.

In B-159059, June 28, 1966, an Interior Department employee had been accepted to attend an energy seminar. The seminar announcement provided a cut-off date for cancellation of reservations but permitted substitutions. Due to the press of other necessary work, the employee did not attend the seminar, nor did he send a substitute or request cancellation before the cut-off date. GAO found that the sponsor's acceptance of the employee's application, which had

[9]All of these cases also involve the pre-Training Act version of 5 U.S.C. § 5946 and may no longer be valid to that extent. The editors have made no attempt to examine each of the cases from this perspective. Thus, while the pre-1958 cases remain valid to the limited extent that they involve 31 U.S.C. § 1345, the results in those cases may no longer apply in view of the subsequent enactment of 5 U.S.C. §§ 4109 and 4110.

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(non-decision letter). Thus, we have generally not specified which of the two each case involves.

The concept of applying the courts' equity powers to stave off the expiration of budget authority seems to have first arisen, at least to any significant extent, in a group of impoundment cases in the early 1970's. A number of potential recipients under various grant and entitlement programs filed suits to challenge the legality of executive branch impoundments. The device the courts commonly used was a preliminary injunction for the express purpose of preventing expiration of the funds. For example, in National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897 (D.D.C. 1973), plaintiffs challenged the impoundment of grant funds under the Community Mental Health Centers Act. Pending the ultimate resolution on the merits, the court issued a preliminary injunction to prevent expiration of unobligated funds for the grant programs in question. Id. at 900.

Other cases employing similar devices to preserve the availability of funds are: Maine v. Fri, 486 F.2d 713 (1st Cir. 1973); Bennett v. Butz, 386 F. Supp. 1059 (D. Minn. 1974); Guadamuz v. Ash, 368 F. Supp. 1233 (D.D.C. 1973); Community Action Programs Executive Directors Ass'n of New Jersey, Inc. v. Ash, 365 F. Supp. 1355 (D.N.J. 1973); Oklahoma v. Weinberger, 360 F. Supp. 724 (W.D. Okla. 1973).

In several of the cases (e.g., National Council of Community Mental Health Centers v. Weinberger, Community Action Programs Executive Directors Ass'n v. Ash, Bennett v. Butz), the court not only enjoined expiration of the funds but directed the agency to record an obligation under 31 U.S.C. § 1501(a). One of these cases, Bennett v. Butz, spawned a decision of the Comptroller General, 54 Comp. Gen. 962 (1975), in which GAO confirmed that such an order would constitute a valid obligation under 31 U.S.C. § 1501(a)(6).

The concept has also been applied in non-impoundment cases. An example is City of Los Angeles v. Adams, 556 F.2d 40 (D.C. Cir. 1977). The Airport and Airway Development Act of 1970 established a formula for the apportionment of airport development grant funds. The statute also established minimum aggregate amounts for the grants, but subsequent appropriation acts imposed monetary ceilings lower than the authorized amounts. The court held that the appropriation ceilings controlled, but that the money

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still had to be apportioned in accordance with the formula in the enabling legislation. To preserve the availability of the additional grant funds the plaintiff was seeking, the district court had ordered the Federal Aviation Administration to obligate the amount in question prior to the statutory deadline, and the court of appeals confirmed this as proper. Id. at 51.[36]

Thus, what we may view as the "first wave" of cases firmly established the proposition that a federal court can enjoin the statutory expiration of budget authority. Inevitably, the next group of cases to arise would involve the power of the courts to act after the funds have expired for obligational purposes—in other words, the power of the courts to "revive" expired budget authority.

The "leading case" in this area appears to be National Association of Regional Councils v. Costle, 564 F.2d 583 (D.C. Cir. 1977). The plaintiff sued to force the Environmental Protection Agency to make available unobligated contract authority under the Federal Water Pollution Control Act Amendments of 1972. The court first noted that contract authority is a form of budget authority, and when made available for a definite period, terminates at the end of that period the same as direct appropriations.[37] The court then reaffirmed the proposition that courts may "order that funds be held available beyond their statutory lapse date if equity so requires." 564 F.2d at 588. However, the court found the rule inapplicable because the suit had not been filed prior to the relevant expiration date, and the court therefore did not acquire jurisdiction of the case prior to expiration. The essence of the Costle decision is the following excerpt:

"Decisions that a court may act to prevent the expiration of budget authority which has not terminated at the time suit is filed are completely consistent with the accepted principle that the equity powers of the courts allow them to take action to preserve the status quo of a dispute and to protect their ability to decide a case properly before them. In such situations, the courts simply suspend the operation of a lapse provision and extend the term of already existing budget authority. If, however, budget authority has lapsed before suit is brought, there is no underlying congressional authorization for the court to

[36]The court also noted that the district court could "obtain assistance from the Comptroller General's expertise in matters of expenditures, reductions by appropriations, and impoundments." 556 F.2d at 51.

[37]GAO had previously expressed the same view. 32 Comp. Gen. 29, 31 (1952), cited in Costle, 564 F.2d at 587 n.10.

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preserve. It has vanished, and any order of the court to obligate public money conflicts with the constitutional provision vesting sole power to make such authorizations in the Congress. [Footnote omitted.] Equity empowers the courts to prevent the termination of budget authority which exists, but if it does not exist, either because it was never provided or because it has terminated, the Constitution prohibits the courts from creating it no matter how compelling the equities." 564 F.2d at 588-89.

Costle is also significant in that it explained and clarified several prior cases which had purported to establish a similar, and in one instance even broader, principle. Specifically:

- National Association of Neighborhood Health Centers, Inc. v. Mathews, 551 F.2d 321 (D.C. Cir. 1976). This was a suit challenging the administration of the Hill-Burton Act. The court found that certain funds had been improperly used, and directed their recovery and reallocation. The court further noted that the district court could order that the funds be held available if necessary to prevent their expiration upon recovery. However, the Costle court pointed out that the funds in Mathews had already been obligated and thus had not expired before suit was filed. 564 F.2d at 588.
- Jacksonville Port Authority v. Adams, 556 F.2d 52 (D.C. Cir. 1977). The plaintiff, in a suit to obtain additional funds under the Airport and Airway Development Program, had sought a temporary restraining order to prevent expiration of the funds, which the district court denied. The court of appeals found denial of the TRO to be an abuse of discretion, and held that, in the words of the Costle court, "relief was still available because it would have been available if the district court had initially done what should have been done," that is, grant the preservation remedy. 564 F.2d at 588. A similar case is Wilson v. Watt, 703 F.2d 395 (9th Cir. 1983) (reversing district court's denial of preliminary injunction and directing preservation of funds as necessary).
- Pennsylvania v. Weinberger, 367 F. Supp. 1378 (D.D.C. 1973). This was an impoundment suit involving the Elementary and Secondary Education Act of 1965. Noting the then-existing authority of agencies to restore expired unobligated balances, the court concluded that it had even broader equitable power to order the restoration of expired appropriations. The Costle court expressly rejected the broad view that "once it is shown that Congress has authorized the restoration of lapsed authority under some circumstances then the courts may order the restoration and obligation of lapsed authority

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whenever they deem it appropriate." 564 F.2d at 589. The Pennsylvania decision was nevertheless correct, however, in that a separate statutory provision had extended the availability of the funds in question. 564 F.2d at 589 n.12. A case similar to Pennsylvania is Louisiana v. Weinberger, 369 F. Supp. 856 (E.D. La. 1973). The analog under current legislation would be obligation adjustments under 31 U.S.C. § 1553(a).

Thus, under Costle, the crucial test is not whether the court actually acted before the budget authority expired, but whether it had jurisdiction to act. As long as the suit is filed prior to the expiration date, the court acquires the necessary jurisdiction and has the equitable power to "revive" expired budget authority, even where preservation is first directed at the appellate level.

The principles set forth in Costle have been followed and applied in several more recent cases. Connecticut v. Schweiker, 684 F.2d 979 (D.C. Cir. 1982), cert. denied, 459 U.S. 1207 (1983); International Union, UAW v. Donovan, 570 F. Supp. 210 (D.D.C. 1983); Burton v. Thornburgh, 541 F. Supp. 168 (E.D. Pa. 1982); Grueschow v. Harris, 492 F. Supp. 419 (D.S.D. 1980), aff'd, 633 F.2d 1264 (8th Cir. 1980); Sodus Central School District v. Kreps, 468 F. Supp. 884 (W.D.N.Y. 1978); Township of River Vale v. Harris, 444 F. Supp. 90 (D.D.C. 1978). See also Dotson v. Department of Housing and Urban Development, 731 F.2d 313, 317 n.2 (6th Cir. 1984).

The application of the Costle doctrine "assumes that funds remain after the statutory lapse date." West Virginia Association of Community Health Centers, Inc. v. Heckler, 734 F.2d 1570, 1577 (D.C. Cir. 1984). Consequently, where all funds have properly been disbursed (the key word here is "properly"), the Costle doctrine no longer applies. Id. To an extent, this gives agencies the potential to circumvent the Costle doctrine simply by spending the money, as long as the obligations and disbursements are "proper." Recognizing this, the West Virginia court cautioned that "we do not mean to suggest our approval, in every case, of government decisions to expend funds over which a legal controversy exists." 734 F.2d at 1577 n.8. In addition, to prevent this potential loophole from swallowing up the rule, there is a logical corollary to the Costle doctrine to the effect that courts may enjoin the disbursement of funds

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already obligated where disbursement would have the effect of precluding effective relief and thereby rendering the case moot. Population Institute v. McPherson, 797 F.2d 1062 (D.C. Cir. 1986).[38] Similarly, the district court's injunction in Bennett v. Butz, quoted in 54 Comp. Gen. 962, included a provision mandating retention of the obligated balances until further order of the court.

In addition to the judicial authority noted above, there is a statute that seems to point in the same direction, 31 U.S.C. § 1502(b), which provides:

"A provision of law requiring that the balance of an appropriation or fund be returned to the general fund of the Treasury at the end of a definite period does not affect the status of lawsuits or rights of action involving the right to an amount payable from the balance."

The statute was enacted as part of a continuing resolution in 1973 (87 Stat. 134). Its legislative history, which is extremely scant, is found at 119 Cong. Rec. 22326 (June 29, 1973), and indicates that it was generated by certain impoundment litigation then in process.

For the most part, the courts have relied on their equitable powers and have made little use of 31 U.S.C. § 1502(b). Connecticut v. Schweiker cited the statute in passing in a footnote. 684 F.2d 979, at 996 n.29. The court in Township of River Vale v. Harris noted the statute, 444 F. Supp. at 94, but found it inapplicable because the funds in that case would have reverted to a revolving fund rather than the general fund of the Treasury. In Population Institute v. McPherson, 797 F.2d at 1081, and International Union v. Donovan, 570 F. Supp. at 220, the court cited section 1502(b) essentially as additional support for the rule that courts have the equitable power to prevent the expiration of budget authority in appropriate cases.

Note that the statute uses the words "lawsuits or rights of action." One court has relied on this language to reach a result perhaps one step beyond Costle. In Missouri v. Heckler, 579 F. Supp. 1452 (W.D. Mo. 1984), the plaintiff state sued the Department of Health and Human Services for reimbursement of expenditures under the Medicaid program. Based on Connecticut v. Schweiker, the court

[38]The premise underlying all of these cases is that any monetary relief ultimately granted to the plaintiff is payable only from, and to the extent of, the preserved balances. See Chapter 14, section entitled "Impoundment/Assistance Funds" for case citations.

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concluded that the plaintiff was clearly entitled to be paid. The court then reviewed a provision of the Department's FY 1983 continuing resolution and directed that the claims be paid in fiscal years 1984 through 1986. Alternatively, the court applied 31 U.S.C. § 1502(b) and held that the claims were payable from and to the extent of the unobligated balance of FY 1981 funds. Although Missouri had not filed its lawsuit prior to the end of FY 1981, it had filed its claims for reimbursement with HHS before then. The court found that "Missouri's right to reimbursement arose when it filed its claims in a timely fashion . . . and otherwise complied with the law and regulations then in effect. With this right to reimbursement came the concomitant right of action to enforce the claim for reimbursement." 579 F. Supp. at 1456.

The Missouri court further noted that if section 1502(b) is to meaningfully preserve the "status" of rights of action, it should also be construed as preserving the availability of funds. 579 F. Supp. at 1456 n.4.

The Comptroller General followed a similar approach in 62 Comp. Gen. 527 (1983). A labor union had filed an unfair labor practice charge with the statutorily created Foreign Service Labor Relations Board, based on a refusal by the United States Information Agency to implement a decision of the Foreign Service Impasse Disputes Panel. The dispute concerned fiscal year 1982 performance pay awards for members of the Senior Foreign Service. The question presented to GAO was the availability of FY 1982 funds to pay the awards after the end of the fiscal year. GAO first found 31 U.S.C. § 1501(a)(6) inapplicable, and then concluded that, by virtue of 31 U.S.C. § 1502(b), the unobligated balance of FY 1982 funds remained available for the awards. The unfair labor practice proceeding was a "right of action," and the statute therefore operated to preserve the availability of the funds.

Under the 1990 revision of 31 U.S.C. §§ 1551–1557, funds are "returned to the general fund of the Treasury" only when the account is closed, raising the question whether section 1502(b) continues to apply to expiration in addition to closing. If section 1502(b) is to be construed in light of its purpose, the answer would appear to be yes. See 70 Comp. Gen. ___ (B-238615, February 4, 1991).

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Similar problems exist in the case of bid protests. If a protest is filed near the end of a fiscal year and the contract cannot be awarded until the protest is resolved, the contracting agency risks expiration of the funds. Congress addressed this situation in late 1989 by enacting a new 31 U.S.C. § 1558(a) as follows:[39]

"(a) [F]unds available to an agency for obligation for a contract at the time a protest is filed in connection with a solicitation for, proposed award of, or award of such contract shall remain available for obligation for 90 working days after the date on which the final ruling is made on the protest. A ruling is considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such an appeal or request, whichever is later."

This provision applies to protests filed with GAO, the contracting agency, or a court under 31 U.S.C. §§ 3552 and 3556, and to protests filed with the General Services Board of Contract Appeals, the contracting agency, or a court under 40 U.S.C. § 759(f). 31 U.S.C. § 1558(b).

[39]National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 813, 103 Stat. 1352, 1494 (1989). The provision applies governmentwide.

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been duly approved (in this particular case, the applicant was also the approving official), obligated the government to pay the seminar fee subject to timely cancellation. Since the agency failed to give timely notice of cancellation, it was liable for the seminar fee.

In another 1966 case, a Defense Department employee was scheduled to attend a training seminar in New York but a severe snow storm prevented him from leaving Washington. (By Washington standards, this could have been two inches.) Since the employee's nonattendance was in no way attributable to the organization conducting the seminar, GAO concluded (citing B-159059) that the seminar fee should be paid. GAO rejected a contention that the government's obligation should be excused on the grounds of impossibility (the employee's nonattendance resulted from natural forces) since the arrangement permitted substitution of personnel. B-159820, September 30, 1966.

(3) Federally-sponsored meetings

Federally-sponsored meetings for employees (intra–agency or interagency), such as management or planning seminars, are not prohibited by 5 U.S.C. § 5946 since they are not meetings of a "society or association," nor are they prohibited by 31 U.S.C. § 1345 because they concern the discharge of official duties. The authority for this type of meeting is essentially a "necessary expense" question.

An increasingly common type of agency meeting is the "retreat type" conference. In this situation, some agency official with authority to do so determines that the participants should get away from their normal work environment and its associated interruptions such as telephones. Frequently, they need to get just far enough away to justify the payment of per diem allowances. While this type of meeting may be criticized as extravagant, it is within the agency's administrative discretion under the "necessary expense" rule and therefore not illegal. See B-193137, July 23, 1979.

Agency meetings at or near the participant's normal duty station may present special problems with respect to reimbursement for meals. In many cases, meals or snacks will be unauthorized even though there is nothing improper about conducting the meeting itself. This area is discussed in detail in Section C.5.

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(4) Rental of space in District of Columbia

Originally enacted in 1877 (19 Stat. 370), 40 U.S.C. § 34 provides:

"No contract shall be made for the rent of any building, or part of any building, to be used for the purposes of the Government in the District of Columbia, until an appropriation therefor shall have been made in terms by Congress, and this clause shall be regarded as notice to all contractors or lessors of any such building or any part of building."

The statute does not prohibit the procurement of short-term conference facilities if otherwise proper. 54 Comp. Gen. 1055 (1975). In rendering this decision, which overruled several earlier cases, the Comptroller General relied heavily on the Federal Property Management Regulations, in which the General Services Administration construed the procurement of short-term conference facilities as a service contract rather than a rental contract.

However, the statute does prohibit the procurement of lodging accommodations in the District of Columbia in connection with a meeting or conference without specific statutory authority. 56 Comp. Gen. 572 (1977), modifying and affirming B-159633, September 10, 1974; 49 Comp. Gen. 305 (1969).[10] In 56 Comp. Gen. 572, GAO approved payment to the hotel of the difference between full per diem and the reduced per diem actually paid to the participating employees. This is because the agency could, without violating the statute, have paid full per diem to the employees if they had made the arrangements themselves on an individual basis. Thus, the difference represented a cost the agency would have properly incurred had it not procured the accommodations directly.

(5) Military personnel

Attendance at meetings by military personnel is governed by 37 U.S.C. § 412:

"Appropriations of the Department of Defense that are available for travel may not, without the approval of the Secretary concerned or his designee, be used for expenses incident to attendance of a member of an armed force under that department at a meeting of a technical, scientific, professional, or similar organization."

[10]49 Comp. Gen. 305 was one of the decisions listed as overruled in 54 Comp. Gen. 1055. However, the overruling action was later recognized to be erroneous and 49 Comp. Gen. 305 was reinstated in 56 Comp. Gen. 572, 574.

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This statute, designed to provide a broad exception for the Defense Department from 5 U.S.C. § 5946, originated as an appropriation act rider in the mid-1940's and was enacted as permanent legislation by section 605 of the Department of Defense Appropriation Act for 1954, 67 Stat. 349.

The Government Employees Training Act, enacted in 1958 and discussed above, applies to civilian employees of the military departments but not to members of the uniformed services. 38 Comp. Gen. 312 (1958). Accordingly, the Comptroller General held in 1959 that the administrative approval specified in 37 U.S.C. § 412 was no longer required for civilian employees covered by the Training Act. However, the requirement of 37 U.S.C. § 412 remains applicable to members of the uniformed services. 38 Comp. Gen. 800 (1959). See also 55 Comp. Gen. 1332, 1335 (1976). The recodification of Title 37 in 1962 recognized this distinction and reworded the statute to its present form so as to apply only to members of the armed forces.

The administrative approval required by the statute is a prerequisite to the availability of the appropriation, and has the effect of removing the appropriation from the prohibition of 5 U.S.C. § 5946 to the extent of such approval. 34 Comp. Gen. 573, 575 (1955). Oral approval, if satisfactorily established by the record, is sufficient to meet the requirement of the statute. B-140082, August 19, 1959. However, where implementing departmental regulations establish more stringent requirements, such as advance approval in writing, the regulations will control. B-139173, June 2, 1959.

The administrative approval requirement of 37 U.S.C. § 412 does not apply to meetings sponsored by a federal department or agency. 50 Comp. Gen. 527 (1971).

b. Non-Government Personnel

(1) 31 U.S.C. § 1345

Quoted previously, 31 U.S.C. § 1345 prohibits the payment of travel, transportation, or subsistence expenses of private parties at meetings without specific statutory authority.

The Comptroller General set the tone for GAO's approach to 31 U.S.C. § 1345 in two cases decided shortly after the statute was enacted. In 14 Comp. Gen. 638 (1935), the Comptroller held that the Federal Housing Administration could not pay the travel and lodging

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expenses for attendance at meetings of private citizens who were cooperating with the FHA in a campaign to encourage the repair and modernization of real estate. GAO had no difficulty in finding that the statute barred payment:

> "There seems very little if any room for doubt as to the reasonable meaning and legal effect of [31 U.S.C. § 1345]. Simply stated, it is that no convention or other form of assemblage or gathering may be lodged, fed, conveyed, or furnished transportation at Government expense unless authority therefor is specifically granted by law." Id. at 640.

A few months later, relying on 14 Comp. Gen. 638, the Comptroller General held similarly that 31 U.S.C. § 1345 prohibited the American Battle Monuments Commission from providing transportation and refreshments for private individuals at monument dedication ceremonies in Europe. 14 Comp. Gen. 851 (1935). Other early decisions applying the statutory prohibition are 15 Comp. Gen. 1081 (1936); B-53554, November 6, 1945; B-27441, August 25, 1942; and A-66869, January 31, 1936.

Some more recent cases in which GAO found expenditures prohibited by 31 U.S.C. § 1345 are summarized below:

- The Environmental Protection Agency could not pay transportation and lodging expenses of state officials attending a National Solid Waste Management Association Convention. B-166506, July 15, 1975, affirmed in 55 Comp. Gen. 750 (1976).
- The Mine Safety and Health Administration, Department of Labor, could not pay travel and subsistence expenses of miners and mine operators attending safety and health training seminars. B-193644, July 2, 1979.
- Maritime Administration could not pay transportation and subsistence expenses of non-federal participants in a 2-week seminar for general publication maritime writers. B-168627, May 26, 1970.
- Navy could not pay for a dinner and cocktail party for non-government minority group leaders. B-176806-0.M., September 18, 1972.
- National Highway Traffic Safety Administration could not pay travel and lodging expenses of state officials at a workshop on odometer fraud. 62 Comp. Gen. 531 (1983).

GAO has not attempted to define precisely what types of gatherings are within the scope of the statutory prohibition. The determination is made on a case-by-case basis. The statutory language is

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broad and could presumably be construed to cover any situation where two or more persons are gathered together in one place. However, GAO has never adopted such a rigid view. For example, in 45 Comp. Gen. 476 (1966), a certifying officer of the Department of Agriculture asked whether he could "properly certify for payment a voucher covering payment for rental of a chartered bus for the transportation of female guests from Albuquerque to Grants, New Mexico, and return, for purposes of providing social and recreational services to Job Corps enrollees." (This is what the case says. The editors are not making it up.) The Comptroller General found that this was simply not the kind of "meeting" 31 U.S.C. § 1345 was intended to prohibit. Further, there was statutory authority for providing "recreational services" for the enrollees. Therefore, the expenditure was not illegal. The decision does not specify precisely what "social and recreational services" the women were bused in to provide.

As noted, the prohibition of 31 U.S.C. § 1345 can be overcome by specific statutory authority. An example of such authority is language in an appropriation act making the appropriation available for "expenses of attendance at meetings" or similar language.[11] See 34 Comp. Gen. 321 (1955); 24 Comp. Gen. 86 (1944); 17 Comp. Gen. 838 (1938); 16 Comp. Gen. 839 (1937); B-117137, September 25, 1953. (This is the same language used before enactment of the Government Employees Training Act to grant exceptions from 5 U.S.C. § 5946.)

In one case, less-than-specific authority was found adequate. In 35 Comp. Gen. 129 (1955), GAO considered a statute which (1) provided for a "White House Conference on Education;" (2) specified that the conference be broadly representative of educators and other interested persons from all parts of the United States; and (3) authorized appropriations necessary for the "administration" of the act. The decision held this sufficient to make the ensuing appropriations available for the travel costs of the invitees. While the decision does not mention 31 U.S.C. § 1345, the distinction is readily apparent. Here, holding the conference was more than merely a legitimate means of implementing the enabling statute; it was the very purpose of the statute and hence the only means. See also

[11] In some cases, the authority has been made permanent. An example is 31 U.S.C. § 326(a) for the Treasury Department, construed in 37 Comp. Gen. 708 (1958). Another example is subsection (2) of 31 U.S.C. § 1345 concerning meetings of 4-H Clubs, noted in B-166506, July 15, 1975.

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appropriation. Anything less would render congressional control largely meaningless. One early Treasury Comptroller was of the opinion that the statute did not make any new law, but merely codified what was already required under the Appropriations Clause of the Constitution. 4 Lawrence, First Comp. Dec. 137, 142 (1883).

Administrative applications of the purpose statute can be traced back almost to the time the statute was enacted. See, for example, 36 Comp. Gen. 621, 622 (1957), which quotes part of a decision dated February 21, 1821. In an 1898 decision captioned "Misapplication of Appropriations," the Comptroller of the Treasury talked about 31 U.S.C. § 1301(a) in these terms:

> "It is difficult to see how a legislative prohibition could be expressed in stronger terms. The law is plain, and any disbursing officer disregards it at his peril." 4 Comp. Dec. 569, 570 (1898).

The starting point in applying 31 U.S.C. § 1301(a) is that, absent a clear indication to the contrary, the common meaning of the words in the appropriation act and the program legislation it funds governs the purposes to which the appropriation may be applied. To illustrate, the Comptroller General held in 41 Comp. Gen. 255 (1961) that an appropriation available for the "replacement" of state roads damaged by nearby federal dam construction could be used only to restore those roads to their former condition, not for improvements such as widening. Similarly, funds provided for the modification of existing dams for safety purposes could not be used to construct a new dam, even as part of an overall safety strategy. B-215782, April 7, 1986.

If a proposed use of funds is inconsistent with the statutory language, the expenditure is improper, even if it would result in substantial savings or other benefits to the government. Thus, while the Federal Aviation Administration could construct its own roads needed for access to FAA facilities, it could not contribute a share for the improvement of county-owned roads, even though the latter undertaking would have been much less expensive. B-143536, August 15, 1960. See also 39 Comp. Gen. 388 (1959).

The concept of purpose permeates much of this publication. Thus, many of the rules discussed in Chapter 2 relate to purpose. For example:

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35 Comp. Gen. 198 (1955) (discussing other funding issues under the same legislation). A more recent case applying 35 Comp. Gen. 129 to a similar situation is B-242880, March 27, 1991.

However, general statutory authority to disseminate information to the public, or to promote or encourage cooperation with the private sector, or to provide technical assistance or education to specified segments of the private sector, is not sufficiently specific to overcome 31 U.S.C. § 1345. See 62 Comp. Gen. 531 (1983); B-193644, July 2, 1979; B-166506, July 15, 1975; B-168627, May 26, 1970.

A distinction must be drawn between the authority to sponsor a meeting and the authority to pay the types of expenses prohibited by 31 U.S.C. § 1345. An agency may be able to do the former but not the latter. Thus, in B-166506, July 15, 1975, GAO pointed out that the Environmental Protection Agency could hold a solid waste management convention as a legitimate means of implementing its functions under the Solid Waste Disposal Act. What it could not do without more specific statutory authority was pay the travel and lodging expenses of the state participants. Sponsoring the meeting itself is essentially a "necessary expense" question. See also 62 Comp. Gen. 531 (1983). Cf. 45 Comp. Gen. 333 (1965); B-147552, November 29, 1961.

Thus, depending on the agency's statutory authority, it may be authorized to incur such expenses as renting conference facilities, financing the participation of its own employees, bringing in guest speakers, both federal and non-federal, and preparing and disseminating literature. The prohibition of 31 U.S.C. § 1345 comes into play only when the agency purports to pay the travel, transportation, or subsistence expenses of non-federal attendees.

Another thing the agency may be able to do is permit the use of government facilities for the meeting. For example, in B-168627, May 26, 1970, while the Maritime Administration could not pick up the tab for the participation of non-government persons at a seminar, it could permit the seminar to be held at the United States Merchant Marine Academy. The rule, stated in that decision, is that an agency has authority to grant to a private individual or business a "revocable license" to use government property, subject to termination at any time at the will of the government, provided that such use does not injure the property in question and serves some purpose useful or beneficial to the government.

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(2) Invitational travel

Another statute we should note is 5 U.S.C. § 5703, which provides:

"An employee serving intermittently in the Government service as an expert or consultant . . . or serving without pay or at $1 a year, may be allowed travel or transportation expenses, under this subchapter, while away from his home or regular place of business and at the place of employment or service."

This statute originated as an appropriation act rider in 1945 and was enacted as permanent legislation the following year as section 5 of the Administrative Expenses Act of 1946 (60 Stat. 608). To the extent it authorizes payment in the so-called "invitational travel" situation—a private party called upon by the government to confer or advise on government business—it represents a limited exception to 31 U.S.C. § 1345.

Even before 5 U.S.C. § 5703 was enacted, GAO had recognized that a private individual "invited" by the government to confer on official business was entitled to reimbursement of travel expenses if specified in the request and justified as a necessary expense. 8 Comp. Gen. 465 (1929); 4 Comp. Gen. 281 (1924); A-41751, April 15, 1932.

The enactment of 31 U.S.C. § 1345 in 1935 did not change this. Thus, the Comptroller General recognized in 15 Comp. Gen. 91, 92 (1935) that while the newly-enacted statute might prohibit the payment of expenses of private individuals called together as a group, it would not apply to "individuals called to Washington or elsewhere for consultation as individuals." See also A-81080, October 27, 1936. Viewed in this light, the 1946 enactment of 5 U.S.C. § 5703 in large measure merely gave express congressional sanction to a rule that had already developed in the decisions.

Although GAO did not directly address the relationship between 5 U.S.C. § 5703 and 31 U.S.C. § 1345 until 1976 (55 Comp. Gen. 750, below), the relevant principles were established in several earlier cases. In one of GAO's earliest decisions under 5 U.S.C. § 5703, the Comptroller General held that persons who are not government officers or employees may, "when requested by a proper officer to travel for the purpose of conferring upon official Government matters," be regarded as persons serving without pay and therefore entitled to travel expenses under 5 U.S.C. § 5703. 27 Comp. Gen. 183 (1947). See also 39 Comp. Gen. 55 (1959). Thus, the rule of 8 Comp.

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Gen. 465 now had a statutory basis. A critical prerequisite is this: In order to qualify under 5 U.S.C. § 5703, the individual must be performing a direct service for the government. 37 Comp. Gen. 349 (1957).

Once the proposition of 27 Comp. Gen. 183 is accepted, it is but a short step to recognizing that a private individual called upon to advise on government business may be called upon to do so in the form of making a presentation at a meeting or conference. See, for example, B-111310, September 4, 1952, and 33 Comp. Gen. 39 (1953), in which payment under 5 U.S.C. § 5703 was authorized. The statute could not reasonably be limited to "one-on-one" consultations. As stated in B-196088, November 1, 1979, "[i]t is not unusual for the Government to invite an individual with a particular expertise to attend a meeting and to share the benefit of his views without compensation other than by way of reimbursement for his travel and transportation expenses."

Thus, travel expenses of private individuals "invited" to participate in meetings sponsored by the National Center for Productivity and Quality of Working Life were properly paid under 5 U.S.C. § 5703. B-192734, November 24, 1978. Similarly, the Internal Revenue Service could invoke 5 U.S.C. § 5703 to buy lunches for guest speakers invited to participate in a ceremony observing National Black History Month since the ceremony was an authorized part of the agency's formal program to advance equal opportunity objectives. 60 Comp. Gen. 303 (1981).

There is a limit to this rationale and a point at which 5 U.S.C. § 5703 collides head-on with 31 U.S.C. § 1345. This point was discussed in 55 Comp. Gen. 750 (1976) and reiterated in B-193644, July 2, 1979. As noted above, 55 Comp. Gen. 750 affirmed B-166506, July 15, 1975, holding that 31 U.S.C. § 1345 prohibited the Environmental Protection Agency from paying travel and lodging expenses of state officials at a solid waste management convention; B-193644 reached the same result for safety and training seminars for miners and mine operators. In both cases, the Comptroller General rejected the suggestion that the expenses could somehow be authorized under the "invitational travel" statute. In neither case were the attendees providing a direct service for the government, even though in both cases the government may have derived some incidental benefit in terms of enhancement of program objectives. The following passage illustrates the "collision point:"

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"We thus do not believe that [5 U.S.C. § 5703] was ever intended to establish the proposition that anyone may be deemed a person serving without compensation merely because he or she is attending a meeting or convention, the subject matter of which is related to the official business of some Federal department or agency . . . . We believe that being called upon to confer with agency staff on official business is different from attending a meeting or convention in which a department or agency is also interested." 55 Comp. Gen. at 752-53.

Thus, 5 U.S.C. § 5703 permits an agency to invite a private individual (or more than one) to a meeting or conference at government expense, but only if that individual is legitimately performing a direct service for the government such as making a presentation or advising in an area of expertise. However, it is not a device for circumventing 31 U.S.C. § 1345. The "direct service" test is not met merely because the agency is interested in the subject matter of the conference or because the conference will enhance the agency's program objectives.

(3) Use of grant funds

One of the principles of grant law is that, where a grant is made for an authorized grant purpose, the grant funds in the hands of the grantee largely lose their identity as federal funds and are no longer subject to many of the restrictions applicable to the direct expenditure of appropriations. One of those restrictions which does not apply to grant funds in the hands of a grantee is 31 U.S.C. § 1345.

For example, the American Law Institute could use funds provided by the Environmental Protection Agency in the form of a statutorily authorized training grant to defray transportation and subsistence expenses of law students and practicing environmental lawyers at an environmental law seminar. 55 Comp. Gen. 750 (1976). For this result to apply, the grant must be made for an authorized grant purpose and there must be no provision to the contrary in the grant agreement. Once these conditions are met, the grantee's use of the funds is not impaired by 31 U.S.C. § 1345. However, an agency may not use the grant mechanism for the sole purpose of circumventing 31 U.S.C. § 1345, that is, to do indirectly that which it could not do directly. In other words, if an agency makes a grant for an authorized purpose, and the grantee sponsors a meeting or conference as a means of implementing that purpose, the grantee's use of the funds will not be restrained by 31 U.S.C.

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§ 1345. However, unless otherwise authorized, the agency could not make the grant for the purpose of sponsoring the conference and thereby permitting payments it could not make by direct expenditure.

Depending on the precise statutory authority involved, there may be situations in which sponsoring or helping to sponsor a conference is itself an authorized grant purpose. One example is B-83261, February 10, 1949 (grant to American Cancer Society under Public Health Service Act).

The treatment of grant funds described above does not apply to procurement contracts. 62 Comp. Gen. 531 (1983).

3. Attorney's Fees

a. Introduction

Questions on the availability of appropriated funds to pay attorney's fees arise in many contexts. Attorney's fees awarded by courts are discussed in Chapter 14. This section deals with administrative payments.

Traditionally, the United States has followed what has come to be known as the "American Rule," that each party in litigation or administrative proceedings is personally responsible for his or her own attorney's fees. In other words, in the absence of statutory authority to the contrary, the losing party may not be forced to pay the winner's attorney. Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975).

One application of the American Rule is that a claimant who prosecutes an administrative claim against the United States is not entitled to reimbursement of legal fees unless authorized by statute. E.g., 57 Comp. Gen. 554 (1978); 49 Comp. Gen. 44 (1969); 37 Comp. Gen. 485, 487 (1958); B-189045, January 26, 1979. To illustrate, a vendor who successfully filed a claim for the payment of goods sold and delivered to a Navy vessel was not entitled to reimbursement of attorney's fees. B-187877, April 14, 1977. Similarly non-reimbursable were legal fees incurred incident to prosecuting a claim for damages for breach of an oral agreement. B-188607, July 19, 1977. "Fairness" and "decency," however appealing, do not compensate

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for the lack of statutory authority. 67 Comp. Gen. 574, 576 (1988); 57 Comp. Gen. 856, 861 (1978).

Payments to attorneys also arise in a number of situations which are, strictly speaking, not applications of the American Rule, that is, which do not involve payment of fees to a "prevailing party." The approach in these cases is to look first for statutory authority and if express statutory authority does not exist, apply the various principles discussed throughout this publication, such as the necessary expense doctrine.

For example, a private attorney sought reimbursement for out-of-pocket expenses he incurred incident to a "special proceeding" initiated by the Nuclear Regulatory Commission to investigate charges of misconduct raised by the attorney against NRC staff members and by the staff members against the attorney. There was no statutory authority to reimburse the attorney, nor could the payment be justified as a necessary expense since it was not reasonably necessary to carrying out NRC functions. Therefore, payment was unauthorized. B-192784, January 10, 1979. In another case, the Small Business Administration could not reimburse a bank for legal fees the bank incurred in protecting its interest in an SBA-guaranteed loan since SBA neither contracted with the attorney nor did it benefit from his services. B-187950, April 26, 1977.

The Justice Department has held that legal fees incurred by a Cabinet nominee in connection with Senate confirmation hearings, for services rendered before the nominating administration took office, could be paid either from Presidential Transition Act appropriations or from private sources. 5 Op. Off. Legal Counsel 126 (1981).

The remainder of this section will discuss the situations which have been most commonly addressed in decisions of the Comptroller General.

b. Hiring of Attorneys by Government Agencies

During the first century of the Republic, government agencies who needed lawyers either as counsellors or litigators simply went out and hired them. Not only was this system expensive (payments from the public treasury are not conducive to reduced fees), it resulted in inconsistencies in the government's legal position. Congress remedied the situation in 1870 by creating the Department of Justice, headed by the Attorney General. Act of June 22, 1870, 41st Cong., 2d Sess., ch. 150, 16 Stat. 162.

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To assure that the objectives of the 1870 legislation would be achieved, Congress included section 17 which (a) prohibited executive agencies from employing attorneys at the expense of the United States, and (b) prohibited payments to attorneys, except those employed by the Justice Department, unless the Attorney General certified that the services could not be performed by the Justice Department. The two parts of section 17 subsequently became Revised Statutes §§ 189 and 365.

As the federal government grew in size and complexity, it became apparent that the need for centralization of legal services within the Justice Department related primarily to the specialty of litigation. Thus, with congressional approval, federal agencies regularly employed attorneys to serve as legal advisers. (The term "Attorney-Adviser" is still commonly used to designate staff attorneys in many government agencies.) When Title 5 of the United States Code was recodified in 1966, the successors of Revised Statutes §§ 189 and 365 were combined into the new 5 U.S.C. § 3106. This statute, reflecting the evolved state of the law, prohibits agencies, unless otherwise authorized by law, from employing attorneys "for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested." The agencies are required to refer such matters to the Justice Department.[12] Thus, agencies routinely employ attorneys to provide legal services other than litigation, but may not employ attorneys as litigators unless they have statutory authority to conduct their own litigation or unless that authority has been delegated to them by the Attorney General.

Normally, in view of the existence of the Justice Department and the agency's own staff attorneys, the need for a federal agency to retain private counsel should rarely occur. Indeed, GAO has found it unauthorized for an agency to retain private counsel to provide legal opinions on matters within the Justice Department's jurisdiction under statutes such as 28 U.S.C. §§ 511-514. 16 Comp. Gen. 1089 (1937). In limited situations, the Comptroller General has held that the retention of private attorneys as experts or consultants under 5 U.S.C. § 3109 is authorized. For example, in B-192406, October 12,

[12]Many early decisions will be found dealing with Revised Statutes §§ 189 and 365. E.g., 6 Comp. Gen. 517 (1927); 5 Comp. Gen. 382 (1925). For the most part they may be disregarded as applying statutory provisions which have since become obsolete. However, decisions under R.S. §§ 189 and 365 remain valid to the extent they concern the elements of those statutes which survived into 5 U.S.C. § 3106. E.g., 32 Comp. Gen. 118 (1952).

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1978, GAO concluded that the (then) Civil Service Commission could hire a private law firm under 5 U.S.C. § 3109 to serve as "special counsel" to the Chairman to investigate alleged merit system abuses, since the matter was not covered by 5 U.S.C. § 3106 nor otherwise under the jurisdiction of the Justice Department. Similarly, the Navajo and Hopi Indian Relocation Commission could retain a private attorney under 5 U.S.C. § 3109 as an independent contractor to handle matters beyond the Justice Department's jurisdiction, where the workload was insufficient to justify hiring a full-time attorney. B-114868.18, February 10, 1978.

For similar holdings, see Boyle v. United States, 309 F.2d 399 (Ct. Cl. 1962) (retired government patent lawyer retained on part-time basis); 61 Comp. Gen. 69 (1981) (U.S. Advisory Commission on Public Diplomacy could hire law firm to provide legal analysis of its authority and independence); B-210518, January 18, 1984 (Environmental Protection Agency could retain private counsel to provide independent analysis of issues relating to congressional contempt citation of Administrator); B-133381, July 22, 1977; B-141529, July 15, 1963.

Agencies may have specific authority to retain special counsel in addition to the lawyers on the regular payroll. For example, appropriations for the Federal Communications Commission have traditionally included "special counsel fees." The Comptroller General has construed this authority as permitting contractual arrangements with former employees as retired annuitants to perform functions for which they were uniquely qualified. Since the appropriation provision constitutes independent authority, the contracts are not subject to the salary limitations of 5 U.S.C. § 3109. 53 Comp. Gen. 702 (1974); B-180708, January 30, 1976. However, the authority is limited to services of the legal profession and does not embrace "counsel" in a broader sense. B-180708, July 22, 1975.

c. Suits Against Government Officers and Employees

At one time, government employees were considered largely immune from being sued for actions they took while performing their official duties. This is no longer true. For a variety of reasons, it is no longer uncommon for a government employee to be sued in his individual capacity for something he did (or failed to do) while performing his job. For example, the Supreme Court held in 1978 that an Executive official has only a "qualified immunity" for so-called "constitutional torts" (alleged violations of constitutional rights). Butz v. Economou, 438 U.S. 478 (1978). In any event,

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regardless of whether the employee ultimately wins or loses, he has to defend the suit and therefore will need professional legal representation.

As a general proposition, GAO considers the hiring of an attorney to be a matter between the attorney and the client, and this is no less true when the client is a government officer or employee. E.g., 55 Comp. Gen. 1418, 1419 (1976). However, the decisions have long recognized another principle as well: Where an officer of the United States is sued because of some official act done in the discharge of an official duty, the expense of defending the suit should be borne by the United States. E.g., 6 Comp. Gen. 214 (1926). This section will discuss when appropriated funds may be used for attorney's fees to defend a government officer or employee.

Generally, when a present or former employee is sued for actions performed as part of his official duties, his defense is provided by the Department of Justice. In order for a given case to be eligible for Justice Department representation, the Justice Department must determine that the employee's action which gave rise to the suit was performed within the scope of federal employment, and that providing representation is in the interest of the United States.

The role of the Justice Department derives from a number of statutory provisions: 28 U.S.C. §§ 515-519, 543, and 547. See also Executive Order No. 6166, § 5 (1933). These provisions establish the Justice Department as the government's litigator,[13] which for the most part means representation by Justice Department attorneys. To reinforce these provisions, 5 U.S.C. § 3106, previously noted, prohibits executive or military agencies from employing attorneys for the conduct of litigation in which the United States or one of its agencies or employees is a party or is interested. The agencies must refer such matters to the Justice Department. The Justice Department has also issued implementing regulations, found at 28 C.F.R. §§ 50.15 and 50.16.[14] This statutory and regulatory scheme is designed to encourage employees to vigorously carry out their

[13]For a discussion of the historical evolution and current legal basis of the Attorney General's role as "chief litigator," see 6 Op. Off. Legal Counsel 47 (1982). In addition, an agency may call upon the Justice Department for help in performing the legal investigation of any claim pending in that agency. 28 U.S.C. § 514.

[14]For cases where the Federal Tort Claims Act is the exclusive remedy, see 28 C.F.R. Part 15.

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duties by assuring them of an adequate defense at no cost if they should be sued in the course of executing their responsibilities.

However, the Attorney General's decision to provide or not provide counsel to an individual employee sued for official actions is discretionary and not subject to judicial review. Falkowski v. Equal Employment Opportunity Commission, 783 F.2d 252 (D.C. Cir. 1986), cert. denied, 478 U.S. 1014. The Attorney General may take into consideration "how blameworthy or litigation-prone the employee seeking representation may be." Id. at 254.

In addition, the Comptroller General has recognized that the statutes cited above authorize the Justice Department to retain private counsel, payable from Justice Department appropriations, if determined necessary and in the interest of the United States. E.g., B-22494, January 10, 1942. For example, the Justice Department will not provide representation if the employee is the target of a criminal investigation, but may authorize private counsel at Justice Department expense if a decision to seek an indictment has not yet been made. The Justice Department may also authorize private counsel if it perceives a conflict of interest between the legal or factual positions of different government defendants in the same case. 28 C.F.R. §§ 50.15 and 50.16. See 2 Op. Off. Legal Counsel 66 (1978); 56 Comp. Gen. 615, 621-624 (1977);[15] B-150136/B-130441, May 19, 1978; B-130441, May 8, 1978; B-130441, April 12, 1978.

Thus, an employee who learns that he is being sued should first explore the possibility of obtaining representation through the Justice Department. Procedures for requesting representation are found in 28 C.F.R. § 50.15(a). The importance of this step must be emphasized. If the employee fails to immediately seek Justice Department representation, he may find, as discussed below, that he is stuck footing the bill for his attorney's fees even in cases where the expense might otherwise have been paid by the government.

If Justice Department representation is unavailable, there are limited situations in which appropriations of the employing agency may be available to retain private counsel. Generally, before an

[15]56 Comp. Gen. 615 dealt with civil actions against employees under section 7217 of the Internal Revenue Code for improper disclosure of tax returns. Section 7217 has since been repealed, and the remedy is now a suit for damages against the United States under 26 U.S.C. § 7431.

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- A specific appropriation must be used to the exclusion of a more general appropriation which might otherwise have been viewed as available for the particular item. Chapter 2, Section B.2.
- Transfer between appropriations is prohibited without specific statutory authority, even where reimbursement is contemplated. Chapter 2, Section B.3.

It follows that deliberately charging the wrong appropriation for purposes of expediency or administrative convenience, with the expectation of rectifying the situation by a subsequent transfer from the right appropriation, violates 31 U.S.C. § 1301(a). 36 Comp. Gen. 386 (1956); 26 Comp. Gen. 902, 906 (1947); 19 Comp. Gen. 395 (1939); 14 Comp. Gen. 103 (1934); B-97772, May 18, 1951; B-104135, August 2, 1951.[1] The fact that the expenditure would be authorized under some other appropriation is irrelevant. Charging the "wrong" appropriation, unless authorized by some statute such as 31 U.S.C. § 1534, violates the purpose statute. For several examples, see GAO report entitled Improper Accounting for Costs of Architect of the Capitol Projects, PLRD-81-4 (April 13, 1981).

The transfer rule illustrates the close relationship between 31 U.S.C. § 1301(a) and statutes relating to amount such as the Antideficiency Act, 31 U.S.C. § 1341. An unauthorized transfer violates 31 U.S.C. § 1301(a) because the transferred funds would be used for a purpose other than that for which they were originally appropriated. If the receiving appropriation is exceeded, the Antideficiency Act is also violated.

Although every violation of 31 U.S.C. § 1301(a) is not automatically a violation of the Antideficiency Act, and every violation of the Antideficiency Act is not automatically a violation of 31 U.S.C. § 1301(a), cases frequently involve elements of both. Thus, an expenditure in excess of an available appropriation violates both statutes. The reason the purpose statute is violated is that, unless the disbursing officer used personal funds, he or she must necessarily have used money appropriated for other purposes. 4 Comp. Dec. 314, 317 (1897). The relationship between purpose violations and the Antideficiency Act is explored further in Chapter 6.

[1]The situation dealt with in B-97772 and B-104135, advances of travel expenses to government employees serving as witnesses, is now authorized by 5 U.S.C. § 5751.

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agency can consider using its own funds, Justice Department representation must first have been sought and must be appropriate but unavailable, and representation must be in the interest of the United States. The employee's personal interest in the outcome does not automatically preempt a legitimate government interest. The two may exist side-by-side.

One case, 53 Comp. Gen. 301 (1973), dealt with suits against federal judges and other judicial officers. The suits arise in a variety of contexts, often involving collateral attacks on the judges' rulings in original actions. While many of the suits are frivolous, some sort of defense, even if only a pro forma submission, is almost always necessary. In many cases, such as actions where no personal relief is sought against the judicial officer, or in potential conflict of interest situations, the Justice Department has determined that it cannot or will not provide representation. The Comptroller General held that judiciary appropriations are available to pay the costs of litigation, including "minimal fees" to private attorneys, if determined to be in the best interest of the United States and necessary to carry out the purposes of the appropriation. However, the Comptroller General added that (1) the Justice Department must have declined representation, although individual requests are not required for cases falling within the Attorney General's stated policy; (2) the determination of necessity cannot be made by the individual defendant but must be made by the Administrative Office of the U.S. Courts; and (3) the Administrative Office should make full disclosure to the appropriate congressional committees. Under similar circumstances, appropriations for the public defender service are available to defend federal public defenders appointed under the Criminal Justice Act who are sued for actions taken within the scope of their duties. Id. at 306.

In 55 Comp. Gen. 408 (1975), the United States Attorney had agreed to defend a former Small Business Administration employee who was sued for acts performed within the scope of his employment. The U.S. Attorney later withdrew from the case even though the government's interest in defending the former employee continued. In order to protect his own interests, the employee retained the services of a private attorney. Since the Justice Department had determined that it was in the interest of the United States to defend the employee and had undertaken to provide him with legal representation, the Comptroller General held that SBA could reimburse the employee for legal fees incurred as a result of his

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obtaining private counsel when representation by the United States subsequently became unavailable.

While 53 Comp. Gen. 301 and 55 Comp. Gen. 408 are widely viewed as establishing the concept that, in appropriate circumstances, agency appropriations may be available to pay private attorney's fees to defend an employee, several later cases established some of the limits on the concept.

If the employee fails to request Justice Department representation in a timely fashion, the employee may be forced to bear the expense of any private legal fees incurred. In B-195314, June 23, 1980, an employee of the Internal Revenue Service was sued for improper disclosure of confidential information. The employee requested Justice Department representation, but not until after she had hired a private attorney to file an answer in order to avoid a default judgment. The Justice Department agreed to provide representation, but declined to pay the private legal fees since the case was not within either of the situations permitted under the Justice Department regulations. Since the facts could not support a finding that Justice Department representation was appropriate but unavailable, IRS appropriations could not be used either. The need to take prompt action to avoid a default judgment makes no difference since the regulations expressly provide for provisional representation on the basis of telephone contact.

If the actions giving rise to the suit are not within the scope of the employee's official duties, even though related, there is no entitlement to government representation and hence no legal basis to reimburse attorney's fees. For example, in 57 Comp. Gen. 444 (1978), a Department of Agriculture employee was sued for libel by his supervisor because of allegations contained in letters the employee had written to various public officials. At the employee's insistence, Agriculture wrote to the Justice Department to request representation. However, Agriculture concluded that, while some of the employee's actions had been within the scope of his official duties, others—such as writing letters to the President and to a Senator—were not. Before Justice reached its decision, the employee retained private counsel and was successful in having the suit dismissed. Subsequently, Justice determined that the employee would not have been eligible for representation since Agriculture had been unwilling to say that all of the employee's actions were within the scope of his official duties. On this basis, GAO found no

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entitlement to government representation and disallowed the employee's claim for reimbursement of his legal fees.

Similarly, GAO denied a claim for legal fees where an Army Reserve member on inactive duty was arrested by the FBI, charged with larceny of government property, and the charge was later dismissed. The government property involved consisted of service weapons and ammunition. The member had been authorized to retain weapons and ammunition in his personal possession, although it is not clear from the decision how this authority justified the possession of seven guns and over 100,000 rounds of ammunition, which is what the FBI found. In any event, the member's actions did not result from the performance of required official duties but were at best permissible under existing regulations. Therefore, there was no entitlement to either government-furnished or government-financed representation. B-185612, August 12, 1976.

A related situation is where an employee incurs legal fees defending against a fine. In the section of this chapter on Fines and Penalties, a distinction is drawn between an action which is a necessary part of an employee's official duties and an action which, although taken in the course of performing official duties, is not a necessary part of them. By logical application of this reasoning, where the fine itself is not reimbursable, related legal fees are similarly non-reimbursable. Thus, in 57 Comp. Gen. 270 (1978), the Comptroller General held that the employing agency could not pay legal fees incurred by one of its employees defending against a reckless driving charge, where the Justice Department had declined to provide representation or to authorize retention of private counsel. See also B-192880, February 27, 1979 (non-decision letter).

Questions over reimbursement of legal fees also arise in a number of non-judicial contexts. In B-193712, May 24, 1979, GAO concluded that the Central Intelligence Agency could reimburse a staff psychiatrist, who had been directed to prepare a psychological profile of Daniel Ellsberg as part of his official duties, for the cost of legal representation before congressional investigating committees and professional organizations. While the Justice Department regulations authorize representation at congressional proceedings on the same basis as in lawsuits (28 C.F.R. § 50.15(a)), this is not an area within Justice's exclusive representation authority. Therefore,

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while it may be desirable to first request Justice Department representation, failure to do so in this case did not preclude the use of CIA appropriations, based on an administrative determination that the psychiatrist's activities were necessary to carry out authorized CIA functions. As in the judicial context, payment is generally unauthorized where it is not in furtherance of an official agency interest. See GAO report, Postal Service: Board of Governors' Contract for Legal Services, GAO/GGD-87-12 (February 1987) (questioning propriety of payment of legal fees of Board member incident to congressional investigation of pre-nomination activities).

The Justice Department will not provide representation in administrative disciplinary proceedings because of the potential conflict in the event the employee later sues the government. In one case, GAO concluded that the Nuclear Regulatory Commission could retain private counsel to represent two NRC staff members at a disciplinary proceeding where the agency determined that the employees had been acting within the scope of their authority. B-127945, April 5, 1979. See also B-192784, January 10, 1979.

In another case, however, 58 Comp. Gen. 613 (1979), the Securities and Exchange Commission could not reimburse the legal fees of an SEC employee at a disciplinary hearing even though the proceeding was ultimately resolved in the employee's favor. The distinction is that in the NRC case, the misconduct charge had been raised and pursued by a third party, whereas in the SEC case, while the charge was initially raised by an outside party, it was pursued based on the SEC's independent determination to investigate the allegation. Also, the determination to provide legal representation must be made at the outset of the proceedings and not at the end based on the outcome. GAO reached the same result in B-212487, April 17, 1984 (Inspector General misconduct investigation).

An agency may use its appropriated funds to provide legal representation for an employee brought before the Merit Systems Protection Board on complaint by the MSPB Special Counsel, if the agency determines that the employee's conduct was in furtherance of or incident to carrying out his or her official duties, and that providing representation would be in the government's interest. 67 Comp. Gen. 37 (1987); 61 Comp. Gen. 515 (1982). If the agency makes the required determinations, the expenditure is viewed as a "necessary expense" of the agency or function. While the necessary

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expense theory is the legal basis, the underlying policy is expressed in the following excerpt:

"Surely federal employees must be answerable for illegal conduct. Yet it can be in the interest of neither the government as a whole nor the taxpayers we serve to have employees afraid to function out of fear of being bankrupted by a lawsuit arising out of the good faith performance of their jobs." 67 Comp. Gen. at 37-38.

Appropriated funds may not be used to pay legal fees incurred by an "alleged discriminating official" in a discrimination complaint. 61 Comp. Gen. 411 (1982); B-201183, February 1, 1985.

Government-financed legal counsel was also held improper at a grievance hearing where the legal liability of the employee was not an issue and the purpose of the hearing was solely to develop facts. 55 Comp. Gen. 1418 (1976).

Where reimbursement of legal fees under the above principles is authorized, it is a discretionary payment and not a legal entitlement of the employee. The agency's responsibilities and discretion are summarized in the following paragraph from 67 Comp. Gen. 37, 38 (1987):

"[I]t should be understood that payment in this type of case is not a legal liability on the part of the agency, but is essentially a discretionary payment. As such, an agency is not required to pay the entire amount of the fees actually charged in any given case. The controlling concept under fee-shifting statutes is a 'reasonable' attorney's fee, and there is a vast body of judicial precedent applying this concept under statutes such as the Back Pay Act and Title VII of the Civil Rights Act. This body of precedent is available to provide guidance to agencies in evaluating the reasonableness of claims. Also, since payment is discretionary, an agency is free to formulate administrative policies with respect to treatment of claims of this type. Of course, any such policies should be applied fairly and consistently."

The preceding cases have all involved legal fees incurred for representation of the employee. A different situation occurred in 59 Comp. Gen. 489 (1980). In 1969, local police raided a Chicago apartment housing members of the Black Panther Party. The raid erupted into violence and two of the occupants were killed. Subsequently, the surviving occupants and the estates of the deceased sued state law enforcement officials and several agents of the Federal Bureau of Investigation, alleging violations of civil rights and

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the Illinois wrongful death statute. The Justice Department represented the federal defendants, who were being sued in their individual capacities.

As the litigation progressed, a possibility emerged that the court might grant the plaintiffs an award of attorney's fees, in part against the FBI agents. The Justice Department asked whether FBI appropriations would be available to reimburse such an award. In the past, the Comptroller General has at times declined to render decisions on questions which are premature and essentially hypothetical. Here, however, in view of the legal strategy proposed by the Justice Department (the case also involved issues raising the potential liability of the United States), it was important to know if the fees could be reimbursed because if they could not, it might be necessary for the defendants to retain private counsel to represent their interests. The Comptroller General resolved the question by applying the necessary expense doctrine. If the FBI made an administrative determination, supported by substantial evidence, that the actions giving rise to the award constituted officially authorized conduct and were taken as a necessary part of the defendants' official duties, it could reimburse the award from its Salaries and Expenses appropriation.

Finally, the concept of using agency appropriations for legal fees when Justice Department representation is unavailable has arisen in one context that is unrelated to suits against government employees. Under 25 U.S.C. § 175, the United States Attorneys will generally represent Indian tribes, and under 25 U.S.C. § 13, the Bureau of Indian Affairs may spend money appropriated for the benefit of Indians for general and incidental expenses relating to the administration of Indian affairs. Construing these provisions, the Comptroller General has held that the Bureau of Indian Affairs could use appropriated funds to pay legal fees incurred by Indian tribes in judicial litigation, including intervention actions and cases where the tribe is the plaintiff, when conflict of interest makes Justice Department representation unavailable. However, the Bureau must first give the Justice Department the option of providing or declining to provide representation. The Bureau may also use appropriated funds for legal fees of Indian tribes in administrative

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proceedings in which the Justice Department does not participate. 56 Comp. Gen. 123 (1976).

d. Claims by Federal Employees

(1) Discrimination proceedings

Title VII of the Civil Rights Act of 1964, made applicable to the federal government by the Equal Employment Opportunity Amendments of 1972, broadly prohibits employment discrimination based on race, color, religion, sex, or national origin. Two statutory provisions are relevant to the awarding of attorney's fees. Judicial awards, covered in Chapter 14, are governed by 42 U.S.C. § 2000e-5(k), which authorizes courts to award reasonable attorney's fees to non-federal prevailing parties. In addition, 42 U.S.C. § 2000e-16(b) directs the (former) Civil Service Commission to enforce Title VII in the federal government "through appropriate remedies . . . as will effectuate the policies of this section." The enforcement function was transferred to the Equal Employment Opportunity Commission in 1978.

The concept of administrative fee awards developed largely as the result of a series of court decisions. First, the courts held that a court can award attorney's fees to include compensation for services performed in related administrative proceedings as well as the lawsuit itself. Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977); Johnson v. United States, 554 F.2d 632 (4th Cir. 1977). Then, the District Court for the District of Columbia held that Title VII authorized the administrative awarding of attorney's fees. Patton v. Andrus, 459 F. Supp. 1189 (D.D.C. 1978); Smith v. Califano, 446 F. Supp. 530 (D.D.C. 1978). However, this view was not unanimous. The court in Noble v. Claytor, 448 F. Supp. 1242 (D.D.C. 1978), held that there was no authority for administrative awards and that only the court could award fees.

GAO was initially inclined towards the view expressed in the Noble decision. See B-167015, April 7, 1978. However, GAO reconsidered its position and subsequently announced that it would not object to the issuance of regulations by the Equal Employment Opportunity Commission to include the awarding of attorney's fees at the administrative level. B-193144, November 3, 1978; B-167015, September 12, 1978; B-167015, May 16, 1978 (all non-decision letters).

EEOC issued interim regulations on April 9, 1980 (45 Fed. Reg. 24130) and subsequently finalized them. The regulations, found at

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29 C.F.R. § 1613.271, provide for awards of reasonable attorney's fees both by EEOC and by the agencies themselves. With the issuance of these regulations, federal agencies now have the requisite authority. B-199291, June 19, 1981; B-195544, May 7, 1980 (nondecision letter).

Attorney's fees awarded under the EEOC regulations are payable from the employing agency's operating appropriations and not from the permanent judgment appropriation established by 31 U.S.C. § 1304. 64 Comp. Gen. 349, 354 (1985); B-199291, June 19, 1981.

GAO will not review awards of, nor consider claims for, attorney's fees under Title VII. 69 Comp. Gen. 134 (1989); 61 Comp. Gen. 326 (1982).

Title VII is not the only statute prohibiting discrimination in federal employment. Discrimination on the basis of age or handicap is prohibited, respectively, by the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq., and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq. The EEOC has enforcement responsibility for federal employment under these statutes as well as Title VII.[16]

Initially, GAO had held that the EEOC could provide by regulation for the awarding of attorney's fees at the administrative level under the Age Discrimination in Employment Act and the Rehabilitation Act, just as in the Title VII situation. 59 Comp. Gen. 728 (1980). Subsequently, the courts held that the Age Discrimination in Employment Act did not authorize fees at the administrative level, and GAO partially overruled 59 Comp. Gen. 728 in 64 Comp. Gen. 349 (1985). However, that portion of 59 Comp. Gen. 728 dealing with the Rehabilitation Act remains valid. See also B-204156, September 13, 1982. This treatment is consistent with the EEOC regulations, which authorize administrative fee awards under Title VII and the Rehabilitation Act, but not the Age Discrimination Act. See 29 C.F.R. § 1613.271(d).

The situation may become more complicated where an employee alleges discrimination on more than one grounds. In 69 Comp. Gen. 469 (1990), an agency settled a complaint in which the employee

[16]EEOC is not responsible for the entire Rehabilitation Act. The Architectural and Transportation Barriers Compliance Board is responsible for insuring compliance with the standards prescribed in the Architectural Barriers Act of 1968. 29 U.S.C. § 792.

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had alleged both age and sex discrimination. Based on the agency's assertion that the result would have been the same if the employee had pursued only the sex discrimination charge, GAO concluded that the agency was not required to "apportion" the attorney's fee claim between the two charges and that the entire fee claim could be paid.

(2) Other employee claims

Prior to October 1978, there was no authority to award attorney's fees to federal employees in connection with claims, grievances, or administrative proceedings involving back pay, adverse personnel actions, or other personnel matters. During this time period, GAO consistently denied claims for attorney's fees based on the general rule barring the payment of legal fees in the absence of statutory authority. E.g., 52 Comp. Gen. 859 (1973) (administrative grievance proceeding); B-167461, August 9, 1978 (unfair labor practice proceeding); B-184200, April 13, 1976 (reduction in grade); B-183038, May 9, 1975 (improper removal for disciplinary reasons).

In October 1978, the Civil Service Reform Act added two attorney's fee provisions as part of its general overhaul of the system.

First, it authorized the Merit Systems Protection Board to require the employing agency to pay reasonable attorney's fees if the employee is the prevailing party and the Board determines that the fee award is "warranted in the interest of justice." 5 U.S.C. § 7701(g). Fees awarded under this provision are payable directly to the attorney, not the party. Jensen v. Department of Transportation, 858 F.2d 721 (Fed. Cir. 1988).

Second, it added an attorney's fee provision to the Back Pay Act, 5 U.S.C. § 5596. Now, if an employee, on the basis of a timely appeal or an administrative determination, including grievance or unfair labor practice proceedings, is found by "appropriate authority"[17] to have suffered a loss or reduction of pay as a result of an "unjustified or unwarranted personnel action," the employee is entitled to

[17]The term "appropriate authority" includes the head of the employing agency, a court, the Office of Personnel Management, the Merit Systems Protection Board (but not the MSPB Special Counsel, 59 Comp. Gen. 107 (1979)), the Comptroller General (see, e.g., 63 Comp. Gen. 170 (1984) and 62 Comp. Gen. 464 (1983)), the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, plus a few others. 5 C.F.R. § 550.803.

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recover reasonable attorney's fees in addition to back pay. Id. § 5596(b). See generally B-231813, August 22, 1989.

Regulations to implement the Back Pay Act are issued by the Office of Personnel Management and are found at 5 C.F.R. Part 550, Subpart H. Under the regulations, fees may be awarded only if the "appropriate authority" determines that payment is in the interest of justice, applying standards established by the Merit Systems Protection Board under 5 U.S.C. § 7701. 5 C.F.R. § 550.807(c)(1). The standards are set forth in Allen v. United States Postal Service, 2 M.S.P.R. 420 (1980), and discussed in Sterner v. Department of the Army, 711 F.2d 1563 (Fed. Cir. 1983), and in 62 Comp. Gen. 464 (1983).

GAO will not review decisions awarding or declining to award, nor consider claims for, fees under 5 U.S.C. § 7701. 63 Comp. Gen. 170, 174 (1984); 61 Comp. Gen. 578 (1982); 61 Comp. Gen. 290 (1982). The Back Pay Act regulations provide for review of fee determinations only "if provided for by statute or regulation." 5 C.F.R. § 550.806(g). Thus, absent some statute or regulation to the contrary, GAO will similarly decline to review fee determinations under 5 U.S.C. § 5596 where the "appropriate authority" is someone other than the Comptroller General. 61 Comp. Gen. 290 (1982).

Under a provision added in 1989, if an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board, and the Board's decision is based on a finding of a "prohibited personnel practice" (defined in 5 U.S.C. § 2302), "the agency involved shall be liable" to the complainant for reasonable attorney's fees. The same liability applies with respect to appeals from the Board, regardless of the basis of the decision. 5 U.S.C. § 1221(g), added by the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16, 30.

Employee claims outside the scope of the Back Pay Act or the MSPB authority remain subject to the general rule prohibiting fee awards except under specific statutory authority. Thus, administrative claims for attorney's fees were denied in the following situations:

- Applicant for employment with Nuclear Regulatory Commission successfully challenged adverse information in security investigation file. B-194507, August 20, 1979.

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In addition, several other chapters of this publication are related to purpose availability, for example, Chapter 14 on the payment of judgments. Thus, the concept of purpose must always be kept in mind when analyzing an appropriations problem.

Brief mention should also be made of the axiom that an agency cannot do indirectly what it is not permitted to do directly. Thus, an agency cannot use the device of a contract or grant to accomplish a purpose it could not do by direct expenditure. See 18 Comp. Gen. 285 (1938) (contract stipulation to pay wages in excess of Davis-Bacon Act rates held unauthorized). Similarly, a grant of funds for unspecified purposes would be improper. 55 Comp. Gen. 1059, 1062 (1976).

2. Determining Authorized Purposes

a. Statement of Purpose

Where does one look to find the authorized purposes of an appropriation? The first place, of course, is the appropriation act itself and its legislative history. If the appropriation is general, it may also be necessary to consult the legislation authorizing the appropriation, if any, and the underlying program or organic legislation, together with their legislative histories.

The actual language of the appropriation act is always of paramount importance in determining the purpose of an appropriation. Every appropriation has one or more purposes in the sense that Congress does not provide money for an agency to do with as it pleases, although purposes are stated with varying degrees of specificity. One end of the spectrum is illustrated by this old private relief act:

"[T]he Secretary of the Treasury . . . is hereby authorized and directed to pay to George H. Lott, a citizen of Mississippi, the sum of one hundred forty-eight dollars . . . ." Act of March 23, 1896, ch. 71, 29 Stat. 711.

This is one extreme. There is no need to look beyond the language of the appropriation; it was available to pay $148 to George H. Lott, and for absolutely nothing else. Language this specific leaves no room for administrative discretion. For example, the Comptroller General has held that language of this type does not authorize reimbursement to an agency where the agency erroneously paid the

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- Employee obtained continuance in divorce proceedings. Continuance was necessitated by temporary duty assignment. B-197950, September 30, 1980.
- Former employee successfully prosecuted administrative patent interference action against National Aeronautics and Space Administration. B-193272, August 21, 1981.
- Fees incurred incident to prosecution of claim for relocation expenses. 68 Comp. Gen. 456 (1989); B-186763, March 28, 1977.
- Employee, selling residence incident to transfer of duty station, incurred legal fees in excess of customary range of charges for services rendered. B-200207, September 29, 1981. (Legal fees within customary range of charges are reimbursable. See cases cited in B-200207.)
- Administrative grievance proceeding involving neither an appeal to the Merit Systems Protection Board nor a reduction or denial of pay or allowances. 68 Comp. Gen. 366 (1989); 61 Comp. Gen. 411 (1982).

The same rule applies to expert witness expenses incurred by an employee. They are reimbursable only under specific statutory authority. In 67 Comp. Gen. 574 (1988), a Department of Energy employee had requested an administrative hearing incident to a security clearance. The agency, due to the sudden unavailability of its witness, was forced to reschedule the hearing. The employee's witness, a clinical psychologist, was unable to reschedule his patients to fill the now freed-up time slot, and charged the employee for the 3 hours he had set aside to testify. GAO found no authority to reimburse the employee.

e. Criminal Justice Act

The Criminal Justice Act, 18 U.S.C. § 3006A, was originally enacted in 1964 and substantially amended on several subsequent occasions. Reflecting a series of Supreme Court decisions on the right of a criminal defendant to counsel, the Act establishes a system of government-financed counsel for indigent defendants in federal criminal cases. In general, any person charged with a felony or misdemeanor, including juvenile delinquency, and who is "financially unable to obtain adequate representation" is eligible for counsel under the Act. Counsel is to be provided at every stage of the proceeding, from the first appearance before a magistrate through appeal, including appropriate ancillary matters. As the Supreme Court has expanded the right to counsel to encompass every meaningful stage at which significant rights may be affected (see, e.g.,

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Miranda v. Arizona, 384 U.S. 436 (1966)), the right to counsel under the Criminal Justice Act has similarly expanded.

The lawyers, who are court-appointed, may be private attorneys appointed on an individual basis or members of a Federal Public Defender Organization or Community Defender Organization established and funded under the Act. The attorneys are paid at rates of compensation specified in the statute. Appropriations are made to the Judiciary to carry out the Act and payments are supervised by the Administrative Office of the United States Courts.

(1) Types of actions covered

Originally, GAO had held that the Criminal Justice Act did not apply to probation revocation proceedings. 45 Comp. Gen. 780 (1966). Subsequently, following the Supreme Court's holding in Mempa v. Rhay, 389 U.S. 128 (1967), GAO modified the 1966 decision to recognize the applicability of the Act to probation proceedings coupled with deferred sentencing. However, GAO continued to hold the Act inapplicable to a "simple" probation revocation proceeding (one not involving deferred sentencing). 50 Comp. Gen. 128 (1970). Two months after the issuance of 50 Comp. Gen. 128, Congress passed Public Law 91-447, substantially amending the Criminal Justice Act. One of the changes made by these amendments was to expressly cover probation proceedings. The legislative history of Public Law 91-447 indicates that it was intended to recognize Mempa v. Rhay. H.R. Rep. No. 1546, 91st Cong., 2d Sess. 7 (1970). GAO has not had occasion to issue any further decisions on probation proceedings.

Another change made by the 1970 amendments was to add parole revocation proceedings, with counsel to be provided at the discretion of the court or magistrate. Subsequent legislation made appointment of counsel mandatory, and the Comptroller General held that appropriations under the Criminal Justice Act are available to provide counsel for indigents at parole revocation and parole termination proceedings under the Parole Commission and Reorganization Act. B-156932, June 16, 1977.

Representation may be provided, at the discretion of the court or magistrate, to an indigent prosecuting a writ of habeas corpus (28 U.S.C. §§ 2241, 2254, 2255). 18 U.S.C. § 3006A(a)(2). This authority does not extend to civil rights actions brought by indigent prisoners

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under 42 U.S.C. § 1983. 53 Comp. Gen. 638 (1974); B-139703, June 19, 1975.

In 51 Comp. Gen. 769 (1972), GAO held that the Criminal Justice Act applied to prosecutions brought in the name of the United States in the District of Columbia Superior Court and Court of Appeals. In 1974, Congress passed the District of Columbia Criminal Justice Act (Public Law 93-412), which established a parallel criminal justice system for the District of Columbia patterned after 18 U.S.C. § 3006A. With the enactment of this legislation, the Criminal Justice Act was amended to remove the District of Columbia courts from its coverage. GAO considered the D.C. statute in 61 Comp. Gen. 507 (1982) and construed it to include sentencing. The result should apply equally to the federal statute inasmuch as the language being construed is virtually identical in both laws.

(2) Miscellaneous cases

When a court appoints an attorney under the Criminal Justice Act, the government's contractual obligation, and hence the obligation of appropriations, occurs at the time of the appointment and not when the court reviews the voucher for payment, even though the exact amount of the obligation is not determinable until the voucher is approved. Where fiscal year appropriations are involved, the Administrative Office of the U.S. Courts must record the obligation based on an estimate, and the payment is chargeable to the fiscal year in which the appointment was made. 50 Comp. Gen. 589 (1971).

An attorney appointed and paid under the Criminal Justice Act does not thereby enter into an employer-employee relationship with the United States for purposes of the dual compensation laws. 44 Comp. Gen. 605 (1965). (This decision pre-dated the 1970 amendments to the Criminal Justice Act which created the Federal Public Defender Organizations, and would presumably not apply to full-time salaried attorneys employed by such organizations.)

An attorney regularly employed by the federal government who is appointed by a court to represent an indigent defendant, in either federal or state cases, may not be excused from duty without loss of pay or charge to annual leave. 61 Comp. Gen. 652 (1982); 44 Comp. Gen. 643 (1965).

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An attorney appointed under the Criminal Justice Act is expected to use his or her usual secretarial resources. As a general proposition, secretarial and other overhead expenses are reflected in the statutory fee and are not separately reimbursable. However, there may be exceptional situations, and if the attorney can demonstrate to the court that extraordinary stenographic or other secretarial-type expenses are necessary, they may be reimbursed from Criminal Justice Act appropriations. 53 Comp. Gen. 638 (1974).

f. Equal Access to Justice Act

A significant diminution of the American Rule occurred in 1980 with the enactment of the Equal Access to Justice Act (EAJA), which authorizes the awarding of attorney's fees and expenses in a number of administrative and judicial situations where fee-shifting had not been previously authorized. This section describes the authority for administrative awards.

The administrative portion of the EAJA is found in 5 U.S.C. § 504. There are four key elements to the statute:

(1) The administrative proceeding generating the fee request must be an "adversary adjudication," defined as an adjudication under the Administrative Procedure Act in which the position of the United States is represented by counsel or otherwise. §§ 504(a)(1), (b)(1)(C). The definition excludes adjudications to fix or establish a rate or to grant or renew a license, but proceedings involving the suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license are covered if they otherwise qualify.[18] (Application in the context of government procurement is discussed separately later.)

(2) The party seeking fees must be a "prevailing party other than the United States." § 504(a)(1). The meaning of "prevailing party" is to be determined by reference to case law under other fee-shifting statutes.[19] Of course before you can be a "prevailing party" you must first be a "party," and the law prescribes financial and other eligibility criteria. § 504(b)(1)(B).

(3) The law is not self-executing. The party must, within 30 days after final disposition of the adversary adjudication, submit an

[18]S. Rep. No. 253, 96th Cong., 1st Sess. 17 (1979) (report of the Senate Judiciary Committee).

[19]S. Rep. No. 253, supra note 18, at 7; H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11 (1980) (report of House Judiciary Committee).

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application to the agency showing that it is a prevailing party and meets the eligibility criteria, documenting the amount sought, and alleging that the position of the United States was not "substantially justified." § 504(a)(2). If the United States appeals the underlying merits, action on the application must be deferred until final resolution of the appeal. Id.

(4) If the above criteria are met, the fee award is mandatory unless the agency adjudicative officer finds that "the position of the agency was substantially justified or that special circumstances make an award unjust." § 504(a)(1).[20] Substantial justification or lack thereof is to be determined "on the basis of the administrative record as a whole, which is made in the adversary adjudication." Id. The "position of the agency" includes the agency's action or failure to act which generated the adjudication as well as the agency's position in the adjudication itself. § 504(b)(1)(E). A party who "unreasonably protracts" the proceedings risks reduction of the award. Id.; § 504(a)(3).

The award includes "fees and other expenses." "Fees" means a reasonable attorney's fee, generally capped at $75 per hour unless the agency determines by regulation that cost of living increases or other special factors justify a higher rate.[21] "Other expenses" include such items as expert witness expenses and the necessary cost of studies, analyses, engineering reports, etc. § 504(b)(1)(A).

Agencies are required to establish, by regulation, uniform procedures for administering the statute, in consultation with the Administrative Conference of the United States (ACUS). § 504(c)(1). ACUS has published a set of non-binding model rules, found at 1 C.F.R. Part 315. In addition, the supplementary information statement to these rules, found at 51 Fed. Reg. 16659 (May 6, 1986), contains much useful information. The requirement to consult with ACUS will be met by simply notifying ACUS of the publication of proposed regulations, or by sending ACUS a prepublication draft for review and comment. Id.

[20]A position is "substantially justified" if it is "justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1988).

[21]Pierce v. Underwood, supra note 20, identified a number of factors that may not be used as "special factors" to justify exceeding the cap: novelty and difficulty of issues; undesirability of the case; work and ability of counsel (except for counsel with "distinctive knowledge or specialized skill" relevant to the case); results obtained; customary fees and awards in other cases; contingent nature of the fee. 487 U.S. at 571-74.

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Payment of awards under 5 U.S.C. § 504 is addressed in § 504(d):

"Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise."[22]

As with judicial awards under 28 U.S.C. § 2412(d), § 504 awards are payable from agency operating appropriations with no need for specific, line-item, or "earmarked" appropriations.[23]

The obligation of the agency's appropriations occurs when the agency issues its decision on the fee application. 62 Comp. Gen. 692, 699 (1983). This determines the fiscal year to be charged.

Section 504 permits fee awards to intervenors who otherwise meet the statutory criteria. 62 Comp. Gen. at 693. As noted in that decision, the Administrative Conference expressed the same position in the preamble to an earlier version of the model rules, although commenting further that intervenors would rarely be in a position to actually receive awards. Id. at 693-94. A specific appropriation act restriction on compensating intervenors will override the more general authority of 5 U.S.C. § 504. 62 Comp. Gen. 692; Electrical District No. 1 v. Federal Energy Regulatory Commission, 813 F.2d 1246 (D.C. Cir. 1987); Business and Professional People for the Public Interest v. Nuclear Regulatory Commission, 793 F.2d 1366 (D.C. Cir. 1986) (court agreed with result in 62 Comp. Gen. 692, implicitly accepting premise that EAJA itself could apply to intervenors).

We previously reviewed statutory authorities for awarding attorney's fees in a variety of matters involving federal employees. Some mention of EAJA in this context is necessary, if only to point out that the law is not entirely settled. The Court of Appeals for the Federal Circuit has held that 5 U.S.C. § 504 does not authorize the MSPB to award attorney's fees in cases involving employee selection or tenure. Gavette v. Office of Personnel Management, 808 F.2d 1456 (Fed. Cir. 1986); Olsen v. Department of Commerce, Census Bureau, 735 F.2d 558 (Fed. Cir. 1984). This is because the

[22]This provision was added in 1985. The payment provision in the original EAJA was complex and confusing. The amendment was designed to preclude payment under 31 U.S.C. § 1304, the permanent judgment appropriation.

[23]Authorities for this proposition are cited in Chapter 14 in our discussion of the judicial portion of EAJA, which has an identical payment provision.

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definition of "adversary adjudication" in section 504 refers to 5 U.S.C. § 554 (part of the Administrative Procedure Act), which expressly excludes "the selection or tenure of an employee." This was consistent with an earlier decision of the District of Columbia Circuit. Hoska v. Department of the Army, 694 F.2d 270 (D.C. Cir. 1982). However, the court in Miller v. United States, 753 F.2d 270 (3d Cir. 1985), reached a contrary result.

Prior to Gavette, the Board had taken the position that the existence of other fee-shifting statutes made EAJA inapplicable. Social Security Administration v. Goodman, 28 M.S.P.R. 120, 126 (1985). However, in view of the implication of Gavette that EAJA might apply in cases not involving employee selection or tenure, the Board reopened the Goodman appeal, found that fees could be awarded in that case under 5 U.S.C. § 7701, and declined to comment further on the applicability of EAJA. Social Security Administration v. Goodman, 33 M.S.P.R. 325, 326-27 n.1 (1987).

GAO held in 68 Comp. Gen. 366 (1989) that EAJA did not authorize a fee award to an employee who prevailed in an agency grievance proceeding which did not meet the standard of an "adversary adjudication." (This being the case, it was irrelevant whether or not the grievance involved selection or tenure.)

Where a Board decision is appealed to the courts, including a decision involving selection or tenure, the majority view is that EAJA permits the court to award fees for the judicial proceedings, the relevant standard now being a "civil action" under 28 U.S.C. § 2412(d) rather than an "adversary adjudication" under 5 U.S.C. § 504. Brewer v. American Battle Monuments Commission, 814 F.2d 1564 (Fed. Cir. 1987); Gavette, 808 F.2d at 1462-65; Miller, 753 F.2d at 274-75; Olsen, 735 F.2d at 561. Here, however, the Hoska case is in disagreement.

To the extent EAJA is inapplicable either to the Board or to a court reviewing a Board action, all is not necessarily lost to the fee applicant because EAJA is not exclusive in these situations. The Board and the courts both may award fees under the Back Pay Act in appropriate cases, and the Board additionally has 5 U.S.C. § 7701. Thus, for example, Hoska, while finding EAJA inapplicable, awarded fees under the Back Pay Act.

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g. Contract Matters

(1) Bid protests

Prior to 1984, attorney's fees incurred by a bidder for a government contract in pursuing a bid protest with GAO were not compensable. 57 Comp. Gen. 125, 127 (1977); B-197174, August 25, 1980; B-192910, April 11, 1979. The question arose again upon enactment of the Equal Access to Justice Act in 1980. However, since a bid protest at GAO is not an adversary adjudication governed by the Administrative Procedure Act, EAJA was equally unavailing. 63 Comp. Gen. 541 (1984); 62 Comp. Gen. 86 (1982); B-211105.2, January 19, 1984.

Fee-shifting authority came with enactment of the Competition in Contracting Act of 1984.[24] Now, upon determining that a solicitation or contract award violates a statute or regulation, the Comptroller General "may declare an appropriate interested party to be entitled to" bid and proposal preparation costs and the costs of filing and pursuing the protest, including reasonable attorney's fees. The costs and fees are payable from the contracting agency's procurement appropriations. 31 U.S.C. § 3554(c).

GAO's approach under 31 U.S.C. § 3554(c) is to determine the entitlement and leave it to the protester and agency to negotiate the appropriate amount. If the parties cannot agree, GAO will determine the amount. 4 C.F.R. §§ 21.6(d) and (e). Sample cases involving awards under section 3554(c) are 67 Comp. Gen. 442 (1988) and 67 Comp. Gen. 131 (1987).

GAO's bid protest authority is not exclusive. A protester may seek resolution with the contracting agency, or may go directly to court in lieu of filing a protest with GAO, or may seek judicial review of a GAO decision. 31 U.S.C. § 3556. Once a case is in court, 31 U.S.C. § 3554(c) is out of the picture, and the court may consider a fee application under the judicial portion of EAJA. E.g., Essex Electro Engineers, Inc. v. United States, 757 F.2d 247 (Fed. Cir. 1985); Laboratory Supply Corporation of America v. United States, 5 Cl. Ct. 28 (1984).

Another portion of the Competition in Contracting Act amended the so-called Brooks Act, 40 U.S.C. § 759, to authorize the General Services Administration Board of Contract Appeals to hear protests

[24]Title VII of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 1175 (1984).

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involving automatic data processing procurements. Upon finding that the contracting agency has violated a statute, regulation, or delegation of procurement authority, the GSBCA may award the costs of filing and pursuing the protest, including reasonable attorney's fees, and bid and proposal preparation costs. The awards are payable, at least in the first instance, from the permanent judgment appropriation, 31 U.S.C. § 1304. 40 U.S.C. § 759(f)(5). Questions have arisen as to whether the payments must be reimbursed from the contracting agency's appropriations, but there has thus far been no definitive determination. E.g., United States v. Julie Research Laboratories, Inc., 881 F.2d 1067 (Fed. Cir. 1989) (question viewed as an "intra-government dispute" not presenting a justiciable controversy).

The Brooks Act fee provision does not authorize contracting agencies to pay attorney's fees as part of an agency settlement of a protest (i.e., where there is no order from the GSBCA based on one of the violations specified in the statute), nor does it authorize contracting agencies to make monetary settlements of any type solely to avoid operational delays by "buying off" the protester (a practice which has been termed "Fedmail"). See GAO report, ADP Bid Protests: Better Disclosure and Accountability of Settlements Needed, GAO/GGD-90-13 (March 1990), at 31.

(2) Contract disputes

Under the original (1980) version of the Equal Access to Justice Act, the Court of Appeals for the Federal Circuit held that (1) a court, reviewing a decision of an agency board of contract appeals, could, under the judicial portion of EAJA, make a fee award covering services before both the board and the court, but that (2) boards of contract appeals were not authorized to independently make EAJA fee awards. Fidelity Construction Co. v. United States, 700 F.2d 1379 (Fed. Cir. 1983), cert. denied, 464 U.S. 826.

The 1985 EAJA amendments legislatively overturned Fidelity to the extent it held 5 U.S.C. § 504 inapplicable to boards of contract appeals. Specifically, the law amended the definition of "adversary adjudication" to expressly include appeals to boards of contract appeals under the Contract Disputes Act. The 1985 amendments also added language to 28 U.S.C. § 2412(d) to make it clear that fee awards are authorized when a contractor appeals a contracting officer's decision directly to court instead of to a board of contract

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appeals, as authorized by the Contract Disputes Act. (As noted in the preceding paragraph, appeals to court from board decisions were already covered.)

h. Public Participation in Administrative Proceedings: Funding of Intervenors

A number of regulatory agencies conduct administrative proceedings and take actions that have a direct public impact. A prime example is licensing. An important concern has been that the agency may not receive a balanced presentation of viewpoints. The reason is that the industries being regulated usually have adequate resources to ensure representation of their interests, while lack of resources may preclude participation by various non-industry "public interest" representatives.

The Comptroller General has had frequent occasion to consider questions of intervenor funding. An "intervenor" in this context means someone who is not a direct party to the proceedings. Stated briefly, the rule is that an agency may use its appropriations to fund intervenor participation, including attorney's fees, if—

1. Intervenor participation is authorized, either expressly by statute or by necessary implication derived from a regulatory or licensing function;

2. The agency determines that the participation is reasonably necessary to a full and fair determination of the issues before it; and

3. The intervenor could not otherwise afford to participate.

This is essentially an application of the "necessary expense" doctrine discussed previously in this chapter. Thus, intervenor funding does not require express statutory authority, but it must relate to accomplishing the objectives of the appropriation sought to be charged, and of course must not be otherwise prohibited. The agency must have authority to encourage or accept intervenor participation in connection with an authorized function for which its appropriations are available. In this sense, it may be said that intervenor funding must have a statutory foundation.

Historically the concept of intervenor funding emerged in the early 1970's. In 1970, the Federal Trade Commission held that an indigent respondent in an FTC hearing was entitled to government-furnished counsel. American Chinchilla Corp., 1970 Trade Reg. Rep. ¶ 19059. Following the Chinchilla case, the FTC asked whether it

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individual before the private act had been passed. In this situation, the purpose for which the appropriation was made had ceased to exist. B-151114, August 26, 1964.

At the other extreme, smaller agencies may receive only one appropriation. The purpose of the appropriation will be to enable the agency to carry out all of its various authorized functions. For example, the Consumer Product Safety Commission receives but a single appropriation "for necessary expenses of the Consumer Product Safety Commission."[2] To determine permissible expenditures under this type of appropriation, it would be necessary to examine all of the agency's substantive legislation, in conjunction with the "necessary expense" doctrine discussed later in this chapter.

Between the two extremes are many variations. A common form of appropriation funds a single program. For example, the Interior Department receives a separate appropriation to carry out the Payments in Lieu of Taxes Act.[3] While the appropriation is specific in the sense that it is limited to PILT payments and associated administrative expenses, it is nevertheless necessary to look beyond the appropriation language and examine the PILT statute to determine authorized expenditures.

Once the purposes have been determined by examining the various pieces of legislation, 31 U.S.C. § 1301(a) comes into play to restrict the use of the appropriation to these purposes only, together with one final generic category of payments—payments authorized under general legislation applicable to all or a defined group of agencies and not requiring specific appropriations. For example, legislation enacted in 1982 amended 12 U.S.C. § 1770 to authorize federal agencies to provide various services, including telephone service, to employee credit unions. Prior to this legislation, an agency would have violated 31 U.S.C. § 1301(a) by providing telephone service to a credit union, even on a reimbursable basis, because this was not an authorized purpose under any agency appropriation. 60 Comp. Gen. 653 (1981). The 1982 amendment

[2]E.g., Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1990, Pub. L. No. 101-144, 103 Stat. 839, 855 (1989).

[3]E.g., Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, 103 Stat. 701, 702 (1989) ("For expenses necessary to implement the Act of October 20, 1976 . . ., $105,000,000, of which not to exceed $400,000 shall be available for administrative expenses").

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could pay certain related expenses for the indigent respondent, such as transcript costs and attorney's expenses. It also asked whether it could pay the same expenses when incurred by an indigent intervenor rather than the respondent.

In the first of the intervenor cases, B-139703, July 24, 1972, GAO answered "yes" to both questions. Noting that FTC had statutory authority to grant intervention "upon good cause shown," the Comptroller General responded to the intervenor question as follows:

> "Thus, if the Commission determines it necessary to allow a person to intervene in order to properly dispose of a matter before it, the Commission has the authority to do so. As in the case of an indigent respondent, and for the same reasons, appropriated funds of the Commission would be available to assure proper case preparation."

A few years later, the Nuclear Regulatory Commission asked whether it was authorized to provide financial assistance to participants in its adjudicatory and rulemaking proceedings. Finding that NRC had statutory authority to admit intervenors, the Comptroller General applied the "necessary expense" rationale of B-139703, and answered "yes." B-92288, February 19, 1976.

In this decision, GAO explained why the "American rule" as set forth in Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975), does not apply to bar the payment of attorney's fees. The distinction is that the American rule limits the power of a court or an agency to require an unwilling defendant to pay the attorney's fees of a prevailing plaintiff or intervenor. In cases like B-139703 and B-92288, an administrative body, exercising its rulemaking function, is attempting to encourage public participation in its proceedings. It does this by willingly assuming representation costs for intervenors who would otherwise be financially unable to participate, in order to obtain their input for a balanced rulemaking effort. Only by obtaining a balanced view can the agency perform its function of protecting the public interest.

Next, in a letter to the Chairman of the Oversight and Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce, GAO advised that the rationale of B-92288, February 19, 1976, applied equally to nine agencies under the Subcommittee's jurisdiction. The nine were: Federal Communications

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Commission, Federal Trade Commission, Federal Power Commission, Interstate Commerce Commission, Consumer Product Safety Commission, Securities and Exchange Commission, Food and Drug Administration, Environmental Protection Agency, and National Highway Traffic Safety Administration. B-180224, May 10, 1976.

GAO pointed out in the same letter that there were several possible ways of providing assistance to qualifying participants:

1. Provision of funds directly to participants.

2. Modification of agency procedural rules so as to ease the financial burdens of public participation.

3. Provision of technical assistance by agency staff. However, this cannot include assigning staff members to participants to help them with their advocacy positions.

4. Provision of legal assistance by agency staff, but again not as advocates.

5. Creation of an independent public counsel. However, the public counsel cannot be beyond the agency's jurisdiction and control.

6. Creation of a consumer assistance office, as long as it remains under the agency's jurisdiction and control and does not act as an advocate.

In subsequent decisions and advisory opinions, GAO examined aspects of the programs of several specific agencies. In each case, GAO consistently applied the rationale of the earlier decisions. The cases are:

- Environmental Protection Agency: 59 Comp. Gen. 424 (1980); B-180224, April 5, 1977.
- Federal Communications Commission: B-139703, September 22, 1976.
- Food and Drug Administration: 56 Comp. Gen. 111 (1976).
- Nuclear Regulatory Commission: 59 Comp. Gen. 228 (1980).
- Economic Regulatory Administration (a component of the Department of Energy): B-192213-0.M., August 29, 1978; letter report EMD-78-111, October 2, 1978.

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While the decisions have consistently upheld the legality of intervenor funding under the necessary expense theory, GAO has nevertheless emphasized the desirability of an agency's seeking specific statutory authority to embark on a public participation program. E.g., B-180224, May 10, 1976; B-92288, February 19, 1976. Congress has acted in several instances, authorizing intervenor funding in some cases and prohibiting it in others.

For example, the Federal Trade Commission was given specific authority to fund intervenor participation in 1975 by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. § 57a(h). Under this legislation, payments for legal services may not exceed the costs actually incurred, even though the participant uses "house counsel" whose rate of pay is lower than prevailing rates. 57 Comp. Gen. 610 (1978). Similarly, the Environmental Protection Agency has intervenor funding authority under the Toxic Substances Control Act, 15 U.S.C. § 2605(c), and the Consumer Product Safety Commission has such authority under the Consumer Product Safety Act, 15 U.S.C. § 2056(c).

Restrictions in appropriation acts have prohibited intervenor funding programs for several agencies. For example, a provision in the Nuclear Regulatory Commission's 1981 appropriation prohibited the use of funds for the expenses of intervenors. The Comptroller General construed this restriction as prohibiting the NRC from adopting a "cost reduction program" of providing transcripts and other documents free to intervenors. B-200585, December 3, 1980. However, NRC could reduce the number of copies of documents required to be filed. Id. Also, NRC could decide to provide free transcripts to all parties, intervenors included, without violating the restriction. B-200585, May 11, 1981. Other cases construing the NRC restriction, or successor versions, are Business and Professional People for the Public Interest v. Nuclear Regulatory Commission, 793 F.2d 1366 (D.C. Cir. 1986); 67 Comp. Gen. 553 (1988); and 62 Comp. Gen. 692 (1983).

Appropriation act restrictions have also prohibited intervenor funding by the Economic Regulatory Administration and the Federal Energy Regulatory Commission. A case involving the FERC prohibition is Electrical District No. 1 v. Federal Energy Regulatory Commission, 813 F.2d 1246 (D.C. Cir. 1987). In addition, the conference committee on the 1980 appropriation for the National

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Highway Traffic Safety Administration and the former Civil Aeronautics Board directed that no funds be allocated by these agencies for intervenor funding programs.[25]

A restriction contained solely in legislative history and not carried into the statutory language itself is not legally binding on the agency. The history of the NRC prohibition will illustrate this. For fiscal year 1980, the prohibition was expressed in committee reports but not in the appropriation act itself. Accordingly, GAO told NRC that, while it would be well advised to postpone its program, the restriction was not legally binding. 59 Comp. Gen. 228 (1980). For fiscal year 1981, the prohibition was written into NRC's appropriation act. Similarly, the restriction noted above for the transportation agencies later "graduated" to a general provision in the statute.[26]

One court has disagreed with the GAO decisions. Greene County Planning Board v. Federal Power Commission, 559 F.2d 1227 (2d Cir. 1976), cert. denied, 434 U.S. 1086.[27] There, after several years of litigation, the plaintiff Board had finally prevailed in its attempt to compel relocation of a proposed high kilovolt power line through a scenic portion of the county. The only question remaining was the ability of the Federal Power Commission to reimburse the plaintiff's attorney's fees. (Though not "indigent," the counsel fees had drained a disproportionate amount of the county's resources.) The FPC had denied reimbursement on the grounds that the Board was protecting its own, not the public, interest and because it thought it lacked authority to reimburse the fees. After first concluding that the issue should be remanded to the FPC so that it could determine the propriety of reimbursement in accordance with the Comptroller General's decisions, the Second Circuit Court of Appeals granted a rehearing en banc. On rehearing, the majority opinion held that the FPC lacked authority to reimburse the attorney's fees. 559 F.2d at 1238.

[25]H.R. Rep. No. 610, 96th Cong., 1st Sess. 9, 14 (1979) (on H.R. 4440, 1980 appropriations bill for Department of Transportation and related agencies).

[26]E.g., Department of Transportation and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-164, § 306, 103 Stat. 1069, 1092 (1989).

[27]The Greene County litigation produced several published decisions: 455 F.2d 412 (2d Cir. 1972), 490 F.2d 256 (2d Cir. 1973), 528 F.2d 38 (2d Cir. 1975), and the decision cited in the text, known as "Greene County IV."

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Subsequently, both GAO and the Justice Department's Office of Legal Counsel took the position that Greene County IV applied only to the former Federal Power Commission, and not to other federal agencies or even to the agencies which succeeded to the FPC's responsibilities. 59 Comp. Gen. 228 (1980); 2 Op. Off. Legal Counsel 60 (1978). In addition, the United States District Court for the District of Columbia has likewise determined that Greene County IV does not extend generally to all agencies. Chamber of Commerce v. United States Department of Agriculture, 459 F. Supp. 216 (D.D.C. 1978), upholding the authority of the Department of Agriculture to fund a consumer study on the impact of certain proposed rules.

Thus, to determine whether a given agency has intervenor funding authority, it is necessary first to examine the legislation, including appropriation acts, applicable to that agency, as well as pertinent judicial decisions. In the absence of statutory direction one way or the other, and if there are no judicial decisions on point, it is then appropriate to apply the necessary expense rationale of the GAO decisions.

The more recent decisions have somewhat refined the standards expressed in the earlier cases. For example, in order to constitute a "necessary expense," the participation does not have to be absolutely indispensable in the sense that the issues could not be decided without it. It is sufficient for the agency to determine that a particular expenditure for participation can reasonably be expected to contribute substantially to a full and fair determination of the issues. 56 Comp. Gen. 111 (1976). This is consistent with the application of the necessary expense doctrine in other contexts as discussed throughout this chapter. Assuming the requisite statutory basis for intervention exists, the determination of necessity must be made by the administering agency itself, not by GAO. Id. See also B-92288, February 19, 1976.

The standard of the participant's financial status was discussed in 59 Comp. Gen. 424 (1980). While the participant need not be literally indigent, the authority to fund intervenor participation extends only to individuals and organizations which could not afford to participate without the assistance. In making this determination, the agency should consider the income and expense statements, as well as the net assets, of an applicant. An applicant does not qualify for assistance merely because it cannot afford to participate in all activities it desires. The applicant is expected to

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choose those activities it considers most significant and to allocate its resources accordingly.

Some of the earlier cases held that advance funding was prohibited by 31 U.S.C. § 3324. 56 Comp. Gen. 111 (1976); B-139703, September 22, 1976. However, in view of the Federal Grant and Cooperative Agreement Act of 1977, an agency with statutory authority to extend financial assistance in the form of grants may be able to utilize advance funding in its public participation program. A 1980 decision, 59 Comp. Gen. 424, applied this concept to the program of the Environmental Protection Agency.

The decisions have all dealt with participation in the agency's own proceedings. There would generally be no authority to fund intervenor participation in someone else's proceedings, for example, participation by a state agency in a state utility ratemaking proceeding. B-178278, April 27, 1973 (non-decision letter).

Finally, the GAO decisions in no way imply that an agency is compelled to fund intervenor participation. They hold merely that, if the various standards are met, an agency has the authority to do so if it wishes. See B-92288, February 19, 1976.

A summary and discussion of intervenor funding through early 1981 may be found in a GAO report entitled Review of Programs for Reimbursement for Public Participation in Federal Rulemaking Proceedings, PAD-81-30 (March 4, 1981). See also "Payment of Intervenors' Expenses in Agency Regulatory Proceedings" by Rollee H. Efros, in Cases in Accountability: The Work of the GAO, Erasmus H. Kloman ed. (Westview Press 1979), pp. 171-181.

4. Compensation Restrictions

"If an officer is not satisfied with what the law gives him for his services, he may resign." Embry v. United States, 100 U.S. 680, 685 (1879), quoted in Lincoln v. United States, 418 F. Supp. 1094, 1095 (N.D. Cal. 1976).

As a general proposition, restrictions on the compensation of federal employees are regarded as matters of personnel law, and are covered in GAO's Civilian and Military Personnel Law Manuals. However, they may also be viewed as restrictions on the "purpose availability" of appropriations. We treat two compensation-related topics in this chapter—the restriction on employing aliens and the statutes concerning forfeiture of retirement annuities and retired

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pay—as illustrations of the different ways in which Congress may exercise its constitutional role of controlling the public purse by prescribing the purposes for which appropriated funds may be used. The provision on aliens is a restriction appearing in annual appropriation acts. The forfeiture statutes are permanent provisions found in the United States Code; while not phrased in terms of appropriation restrictions, the effect is the same.

a. Employment of Aliens

For many years, with minor variations from year to year, various appropriation acts have included provisions restricting the federal employment of aliens. The typical prohibition, with exceptions to be noted below, bars the use of appropriated funds to pay compensation to any officer or employee of the United States whose post of duty is in the continental United States unless that person is a United States citizen. In more recent years, the prohibition has appeared as a general provision in the Treasury, Postal Service, and General Government appropriation acts, applicable to funds contained "in this or any other act."[28] A recurring general provision in the Defense Department appropriation act exempts Defense Department personnel from the alien restriction.[29]

The prohibition applies to all appropriated funds unless expressly provided otherwise. Therefore, it applies to the special deposit accounts established by statute for the Senate and House restaurants since these accounts amount to permanent indefinite appropriations. 50 Comp. Gen. 323 (1970). It also applies to working capital funds supported by appropriations. B-161976, August 10, 1967.[30]

There are a number of statutory exceptions to the restriction on compensating aliens. As noted, one significant exemption is for Defense Department personnel. See B-188507, December 16, 1977; B-110831, August 4, 1952. Others are 42 U.S.C. § 2473(c)(10)

[28]For example, the 1990 provision is found in Pub. L. No. 101-136, § 603, 103 Stat. 783, 816 (1989).

[29]The 1990 provision is Pub. L. No. 101-165, § 9003, 103 Stat. 1112, 1129 (1989).

[30]The cited decision refers to the Naval Industrial Fund established under 10 U.S.C. § 2208. The decision makes no mention of the statutory exemption for the Defense Department, which was in effect in 1967. For purposes of this discussion, whether B-161976 could have been disposed of more simply based on the DOD exemption is irrelevant. The decision is cited here merely for the proposition noted in the text.

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(National Aeronautics and Space Administration, permanent legislation); 2 U.S.C. § 169 (Library of Congress, derived from annual appropriation acts); 22 U.S.C. § 1474(1) (limited permanent authority for United States Information Agency); and 22 U.S.C. § 2672 (limited permanent authority for State Department). Since appropriation act exceptions may appear, disappear, or vary from time to time, it is important to scrutinize the relevant appropriation act for any given year. Absent an applicable exception, the general prohibition will apply. For an illustration of the complexities that may arise when the provisions vary from year to year, see 57 Comp. Gen. 172 (1977). GAO has supported enactment of the general restriction as permanent legislation. B-130733, March 6, 1957.

In addition to the agency-wide exemptions noted above, the alien restriction itself contains a number of exceptions. Several of these are summarized below.

Declaration of intention exception. The prohibition does not apply to a person in the federal service on the date of enactment of the appropriation act who is actually residing in the United States, is eligible for citizenship, and has filed a declaration of intention to become a citizen. The employee must have filed the declaration prior to the date of enactment. Subsequent filing will not cure the disqualification. 17 Comp. Gen. 1104 (1938). A declaration timely filed but which had become void by operation of law due to lapse of time has also been held insufficient. B-138854, April 1, 1959.

Specific country exceptions. The statute typically exempts nationals of certain specified countries. The countries specified in any given appropriation act change from time to time according to the political climate. The exception usually includes the Philippines and the Baltic countries (Lithuania, Latvia, and Estonia). B-134230, November 18, 1957. Dual citizenship will not negate the exception as long as one of the countries is within the exception, even where the individual has entered the United States from the non-exempt country. B-194929, June 20, 1979.

Allied country exception. The prohibition does not apply to nationals of "countries allied with the United States in the current defense effort." GAO will not decide whether a country meets this test. The determination is the responsibility of the employing agency, perhaps with the assistance of the State Department. GAO will not question a determination based on reasonable grounds.

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35 Comp. Gen. 216 (1955); B-151064, March 25, 1963; B-146142, June 22, 1961; B-139667, June 22, 1959. The reason for GAO's position is that "it is not the responsibility nor the proper province of the accounting officers to initially determine political facts." B-107288, February 14, 1952; B-107579, February 14, 1952.

GAO will, however, venture an assertion in the more obvious cases. Thus, Canada meets the test. B-133877, October 16, 1957; B-188852, July 19, 1977. So does Japan. B-113780, March 4, 1953. Russia was allied with the United States during World War II but no longer is, or at least wasn't in 1955. 35 Comp. Gen. 216 (1955). The Republic of China was allied with the United States during World War II. B-178882, May 7, 1974. The Republic of China (Taiwan) still is. B-161976, August 10, 1967. Romania probably is not, or at least was not as of B-119760, April 27, 1954. Even in these cases, the determination, strictly speaking, is up to the employing agency.

Allegiance exception. The prohibition does not apply to a person who "owes allegiance to the United States." This means "absolute and permanent allegiance" as distinguished from "qualified and temporary allegiance." 17 Comp. Gen. 1047 (1938); B-119760, April 27, 1954. The exemption was apparently prompted by a concern for a very limited class—"Filipinos in the service of the United States on March 28, 1938." 17 Comp. Gen. at 1048.

The allegiance exception includes a clause to the effect that a signed affidavit will be regarded as prima facie evidence of allegiance. This clause has been construed to apply to non-citizen nationals and not to non-national aliens. Yuen v. Internal Revenue Service, 497 F. Supp. 1023 (S.D.N.Y. 1980), aff'd, 649 F.2d 163 (2d Cir. 1981). The district court opinion includes an exhaustive review of legislative history.

Emergency exception. The prohibition does not apply to "temporary employment in the field service . . . as a result of emergencies." The term "emergency" in this context means "flood, fire, or other catastrophe." B-146142, June 22, 1961.

An alien appointed in contravention of the statutory prohibition may not retain compensation already paid. 35 Comp. Gen. 216 (1955); 18 Comp. Gen. 815 (1939). (The statute expressly gives the United States the right to recover.) If there is no statutory bar—for

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example, if the employment would have qualified under the "allied country" exception but the agency failed to make the required determination—the alien may be paid as a "de facto employee." Earlier decisions distinguished between appointments "void ab initio" and those that are merely "voidable." E.g., 37 Comp. Gen. 483 (1958); 35 Comp. Gen. 216 (1955); B-178882, August 29, 1973; B-188852, July 19, 1977. The distinction proved confusing and GAO has moved away from it. The current rule is stated in 58 Comp. Gen. 734 (1979). For further information on de facto employees and their specific entitlements, see GAO's Civilian Personnel Law Manual.

As a final note, the Supreme Court in 1976 invalidated a Civil Service Commission regulation requiring citizenship as a prerequisite to federal employment. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). The Court did not, however, invalidate the appropriation act restrictions. See B-188507, December 16, 1977. The Yuen litigation cited earlier specifically upheld the restriction against a charge of violation of the Equal Protection clause.

b. Forfeiture of Annuities and Retired Pay

(1) General principles

Under 5 U.S.C. § 8312 (the so-called "Hiss Act"), a civilian employee of the United States or a member of the uniformed services who is convicted of certain criminal offenses relating to the national security will forfeit his or her retirement annuity or retired pay. Further, the annuity or retired pay may not be paid to the convicted employee's survivors or beneficiaries. The offenses which will result in forfeiture are specified in the statute. Examples are: gathering or delivering defense information to aid a foreign government; gathering, transmitting, or losing defense information; disclosure of classified information; espionage; sabotage; treason; rebellion or insurrection; seditious conspiracy; advocating the overthrow of the government; enlistment to serve in an armed force against the United States; and certain violations of the Atomic Energy Act. In addition, perjury by falsely denying the commission of one of the specified offenses is itself an offense for purposes of forfeiture.

An employee for purposes of 5 U.S.C. § 8312 includes a Member of Congress and an individual employed by the government of the District of Columbia. 5 U.S.C. § 8311(1). The specific types of retirement

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made the providing of special services to credit unions an authorized agency function, and hence an authorized purpose, which it could fund from unrestricted general operating appropriations. 66 Comp. Gen. 356 (1987). Other examples are interest payments under the Prompt Payment Act and administrative settlements under $2,500 under the Federal Tort Claims Act.

b. Specific Purpose Stated in Appropriation Act

Where an appropriation specifies the purpose for which the funds are to be used, 31 U.S.C. § 1301(a) applies in its purest form to restrict the use of the funds to the specified purpose. For example, an appropriation for topographical surveys in the United States was held not available for topographical surveys in Puerto Rico. 5 Comp. Dec. 493 (1899). Similarly, an appropriation to install an electrical generating plant in the custom-house building in Baltimore could not be used to install the plant in a nearby post office building, even though the plant would serve both buildings and thereby reduce operating expenses. 11 Comp. Dec. 724 (1905). An appropriation for the extension and remodeling of the State Department building was not available to construct a pneumatic tube delivery system between the State Department and the White House. 42 Comp. Gen. 226 (1962). And, as noted previously, an appropriation for the "replacement" of state roads could not be used to make improvements on them. 41 Comp. Gen. 255 (1961).

The following cases will further illustrate the interpretation and application of appropriation acts denoting a specific purpose to which the funds are to be dedicated. In each of the examples, the appropriation in question was the United States Forest Service's appropriation for the construction and maintenance of "Forest Roads and Trails."

In 37 Comp. Gen. 472 (1958), the Forest Service sought to construct airstrips on land in or adjacent to national forests. The issue was the extent to which the costs could be charged to the Roads and Trails appropriation as opposed to other Forest Service appropriations such as "Forest Protection and Utilization." At hearings before the appropriations committees, Forest Service officials had announced their intent to charge most of the landing fields to the Roads and Trails appropriation. The appropriation act in question provided that "appropriations available to the Forest Service for the current fiscal year shall be available for" construction of the landing fields up to a specified dollar amount, but the item was not mentioned in any of the individual appropriations. GAO concluded

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annuities and retired pay subject to forfeiture are enumerated in 5 U.S.C. §§ 8311(2) and (3).

Since 5 U.S.C. § 8312 imposes a forfeiture, it is penal in nature. Therefore, it must be strictly construed. GAO will not construe the statute as applicable to situations which are not expressly covered by its terms. 35 Comp. Gen. 302 (1955).

In the absence of an authoritative judicial decision to the contrary, the effective date of a conviction for stoppage of retired pay should be determined in a manner which will result in the least expenditure of public funds. Thus, the date a guilty verdict is returned should be considered the date of conviction rather than a later date when the judgment is ordered executed, and retired pay should be stopped the following day. 39 Comp. Gen. 741 (1960). Using the cited decision to illustrate: the jury returned a guilty verdict on December 2, 1959; judgment was entered on January 29, 1960; the date of conviction is December 2, 1959, and retired pay should be stopped effective December 3.

In the absence of an authoritative judicial decision to the contrary, a plea of "nolo contendere" should be regarded as a conviction for purposes of 5 U.S.C. § 8312. 41 Comp. Gen. 62 (1961).

(2) The Alger Hiss case

The event which, more than any other single incident, gave rise to the original enactment of 5 U.S.C. § 8312, was the case of Alger Hiss. A former State Department employee, Hiss was convicted in 1950 of perjury stemming from testimony before a grand jury investigating alleged espionage violations. When Hiss was released from prison after serving his sentence, considerable public and congressional attention was directed at the fact that he was still entitled to receive his government pension. Given the political climate of the times, the result was the enactment of 5 U.S.C. § 8312 in 1954 (68 Stat. 1142).

Hiss applied for his pension in 1967 and the (then) Civil Service Commission denied the application based on 5 U.S.C. § 8312. Hiss subsequently sued for restoration of his forfeited pension. In Hiss v. Hampton, 338 F. Supp. 1141 (D.D.C. 1972), the court, finding that the statute had been aimed more at punishing Alger Hiss than regulating the federal service, held 5 U.S.C. § 8312 to be an ex post

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facto law and therefore unconstitutional as it had been applied to Hiss for conduct which occurred prior to the date of its enactment. Therefore, the court ordered the Civil Service Commission to pay Hiss his annuity retroactively with interest.

The Hiss case gave rise to two GAO decisions—52 Comp. Gen. 175 (1972), affirmed by B-115505, December 21, 1972—holding that the interest payable to Hiss, as with the annuity itself, must be paid from the Civil Service Retirement Fund rather than the permanent judgment appropriation, 31 U.S.C. § 1304. The court case and decisions are summarized in B-115505, May 15, 1973.

(3) Types of offenses covered

Under the original version of 5 U.S.C. § 8312, forfeiture was not strictly limited to national security offenses. An employee could lose his or her retirement annuity or retired pay simply by committing a felony "in the exercise of his authority, influence, power, or privileges as an officer or employee of the Government." There were numerous examples of forfeitures for such infractions as falsifying a travel voucher or using a government-owned vehicle for personal purposes.[31]

Recognizing that in many cases the punishment was too severe for the offense, especially in cases where the offense occurred after many years of government service, Congress amended the statute in 1961 (75 Stat. 640) to limit it to offenses relating to national security and to "retroactively remove therefrom those provisions of the statute which prohibited payment of annuities and retired pay to persons who commit offenses, acts or omissions which do not involve the security of the United States." 41 Comp. Gen. 399, 400 (1961). Thus, numerous offenses which would have caused forfeiture before 1961 no longer do. See, e.g., B-155823, September 15, 1965 (conspiracy to embezzle government funds); B-155558, November 25, 1964 (false statement). Of course, to the extent that the pre-1961 decisions establish principles apart from the specific offenses involved, such as the general principles noted above, they remain valid.

The original 1954 enactment of 5 U.S.C. § 8312 did not expressly cover offenses under the Uniform Code of Military Justice, and this

[31]See, e.g., 41 Comp. Gen. 114 (1961); 40 Comp. Gen. 364 (1960); 40 Comp. Gen. 176 (1960).

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omission generated many GAO decisions prior to the 1961 amendment. E.g., 40 Comp. Gen. 601 (1961); 38 Comp. Gen. 310 (1958); 35 Comp. Gen. 302 (1955). The UCMJ decisions came to an abrupt halt with the enactment of the 1961 amendment. The current version of 5 U.S.C. § 8312 expressly covers UCMJ offenses, again limited to national security violations. Now, a conviction under the UCMJ will produce a forfeiture if the offense involves certain UCMJ articles specified in the statute, or if it involves any other article of the UCMJ where the charges and specifications describe a violation of certain of the U.S. Code offenses, and if the "executed sentence" includes death, dishonorable discharge, or dismissal from the service.

(4) Related statutory provisions

When a forfeiture is invoked under 5 U.S.C. § 8312, the individual is entitled to a refund of his contribution toward the annuity less any amounts already paid out or refunded. 5 U.S.C. § 8316.

Forfeiture may not be invoked where an individual is convicted of an offense "as a result of proper compliance with orders issued, in a confidential relationship, by an agency or other authority" of the United States Government or the District of Columbia government. 5 U.S.C. § 8320.

If a payment of annuity or retired pay is made in violation of 5 U.S.C. § 8312 "in due course and without fraud, collusion, or gross negligence," the relevant accountable officer will not be held responsible. 5 U.S.C. § 8321.

In addition to 5 U.S.C. § 8312, retirement annuities or retired pay may be forfeited for willful absence from the United States to avoid prosecution for a section 8312 offense (5 U.S.C. § 8313); refusal to testify in national security matters (5 U.S.C. § 8314);[32] or knowingly falsifying certain national security-related aspects of a federal or District of Columbia employment application (5 U.S.C. § 8315).

[32]Construed by the Justice Department as applicable to proceedings involving the individual's own loyalty or knowledge of activities or plans that pose a serious threat to national security. 1 Op. Off. Legal Counsel 252 (1977).

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5. Entertainment—Recreation—Morale and Welfare

a. Introduction

The concept to be explored in this section is the rule that appropriated funds may not be used for entertainment except when specifically authorized by statute and also authorized or approved by proper administrative officers. E.g., 43 Comp. Gen. 305 (1963). The basis for the rule is that entertainment is essentially a personal expense even where it occurs in some business-related context. Except where specifically appropriated for, entertainment cannot normally be said to be necessary to carry out the purposes of an appropriation.

The reader will readily note the sharp distinction between government practice and corporate practice in this regard. "Entertainment" as a business-related expense is an established practice in the corporate sector. No one questions that it can be equally business-related for a government agency. The difference—and the policy underlying the rule for the government—is summarized in the following passage from B-223678, June 5, 1989:

> "The theory is not so much that these items can never be business-related, because sometimes they clearly are. Rather, what the decisions are really saying is that, because public confidence in the integrity of those who spend the taxpayer's money is essential, certain items which may appear frivolous or wasteful—however legitimate they may in fact be in a specific context—should, if they are to be charged to public funds, be authorized specifically by the Congress."

(1) Application of the rule

As a general proposition, the rule applies to all federal departments and agencies operating with appropriated funds. For example, it has been held applicable to the Alaska Railroad. B-124195-0.M., August 8, 1977.

The question in B-170938, October 30, 1972, was whether the entertainment prohibition applied to the revolving fund of the National Credit Union Administration. The fund is derived from fees collected from federal credit unions and not direct appropriations from the Treasury. Nevertheless, the authority to retain and use the collections constitutes a continuing appropriation since, but

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for that authority, the fees would have to be deposited in the Treasury and Congress would have to make annual appropriations for the agency's expenses. Therefore, the revolving fund could not be used for entertainment.

There are three situations in which the rule has not been applied. The first is certain government corporations. For example, the Corporation for Public Broadcasting, since it was established as a private non-profit corporation and is not an agency or establishment of the United States Government (notwithstanding that it receives appropriations), could use its funds to hold a reception in the Cannon House Office Building. B-131935, July 16, 1975.

The rule has also been held not to apply to government corporations which are classed as government agencies but which have statutory authority to determine the character and necessity of their expenditures. B-127949, May 18, 1956 (Saint Lawrence Seaway Development Corporation); B-35062, July 28, 1943. There are limits, however. See, e.g., B-45702, November 22, 1944, disallowing the cost of a "luncheon meeting" of government employees.

The second exception is donated funds where the recipient agency has statutory authority to accept and retain the gift. The availability of donated funds for entertainment is discussed further, with case citations, in Chapter 6.

The third exception, infrequently applied, is for certain commissions with statutory authority to procure supplies, services, or property, and to make contracts, without regard to the laws and procedures applicable to federal agencies, and to exercise those powers that are necessary to enable the commission to carry out the purposes for which it was established efficiently and in the public interest. B-138969, April 16, 1959 (Lincoln Sesquicentennial Commission); B-138925, April 15, 1959 (Civil War Centennial Commission); B-129102, October 2, 1956 (Woodrow Wilson Foundation).

(2) What is entertainment?

The Comptroller General has not attempted a precise definition of the term "entertainment." In one decision, GAO noted that one court had defined the term as "a source or means of amusement, a diverting performance, especially a public performance, as a concert, drama, or the like." Another court said that entertainment

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"denotes that which serves for amusement and amusement is defined as a pleasurable occupation of the senses, or that which furnishes it, as dancing, sports, or music." 58 Comp. Gen. 202, 205 (1979),[33] overruled on other grounds by 60 Comp. Gen. 303 (1981).

For purposes of this discussion, the term "entertainment," as used in decisions of the Comptroller General and Comptroller of the Treasury, is an "umbrella" term which includes: food and drink, either as formal meals or as snacks or refreshments; receptions, banquets, and the like; music, live or recorded; live artistic performances; and recreational facilities. Our treatment includes one other category which, even though not "entertainment" as such, is closely related to the entertainment cases: facilities for the welfare or morale of employees.

Earlier decisions from time to time had occasion to address the components of entertainment. Can it include liquor? Responding to an inquiry from the Navy, a Comptroller of the Treasury, obviously not a teetotaler, said: "Entertainments . . . without wines, liquors or cigars, would be like the play of Hamlet with the melancholy Dane entirely left out of the lines." 14 Comp. Dec. 344, 346 (1907).[34]

In a 1941 decision (B-20085, September 10, 1941), the Coordinator of Inter-American Affairs asked whether authorized entertainment could include such items as cocktail parties, banquets and dinners, theater attendance, and sightseeing parties. The Comptroller General, recognizing that an appropriation for entertainment conferred considerable discretion, replied, in effect, "all of the above."

That's entertainment.

b. Food for Government Employees

It may be stated as a general rule that appropriated funds are not available to pay subsistence or to provide free food to government employees at their official duty stations ("at headquarters"). In addition to the obvious reason that food is a personal expense and government salaries are presumed adequate to enable employees to

[33]Citing, respectively, People v. Klaw, 106 N.Y.S. 341, 351 (Ct. Gen. Sess. 1907), and Young v. Board of Trustees of Broadwater County High School, 90 Mont. 576, 4 P.2d 725, 726 (1931).

[34]The Comptroller's comments should not be confused with the rule that alcoholic beverages are not reimbursable as subsistence expenses. B-164366, March 31, 1981; B-164366, August 16, 1968; B-157312, May 23, 1966. The exclusion applies even against a claim that consumption of alcohol is required by religious beliefs. B-202124, July 17, 1981.

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eat regularly,[35] furnishing free food might violate 5 U.S.C. § 5536, which prohibits an employee from receiving compensation in addition to the pay and allowances fixed by law. See, e.g., 68 Comp. Gen. 46, 48 (1988); 42 Comp. Gen. 149, 151 (1962); B-140912, November 24, 1959.

The "free food" rule applies to snacks and refreshments as well as meals. For example, in 47 Comp. Gen. 657 (1968), the Comptroller General held that Internal Revenue Service appropriations were not available to serve coffee to either employees or private individuals at meetings. Similarly prohibited was the purchase of coffeemakers and cups. Although serving coffee or refreshments at meetings may be desirable, it is not a "necessary expense" in the context of appropriations availability. See also B-159633, May 20, 1974.

The question of food for government employees arises in many contexts and there are certain well-defined exceptions. For example, the government may pay for the meals of civilian and military personnel in travel status because there is specific statutory authority to do so.[36] The rule and exception are illustrated by 65 Comp. Gen. 16 (1985), in which the question was whether the National Oceanic and Atmospheric Administration could provide in-flight meals, at government expense, to persons on extended flights on government aircraft engaged in weather research. The answer was yes for government personnel in travel status, no for anyone else, including government employees not in official travel status.

While feeding employees may not be regarded as a "necessary expense" as a general proposition, it may qualify when the agency is carrying out some particular statutory function where the necessary relationship can be established. Thus, in B-201186, March 4, 1982, it was a permissible implementation of a statutory accident prevention program for the Marine Corps to set up rest stations on highways leading to a Marine base to serve coffee and doughnuts to Marines returning from certain holiday weekends. Another

[35]"Feeding oneself is a personal expense which a Government employee is expected to bear from his or her salary." 65 Comp. Gen. 738, 739 (1986).

[36]5 U.S.C. § 5702 (civilian employees); 37 U.S.C. § 404 (military personnel). We do no more here than note the existence of the authority. The entitlements of government employees while on official travel or temporary duty are covered in GAO's Personnel Law Manuals. Brief mention should be made, however, of the rule that snacks and refreshments which are not part of a regular meal are not necessary subsistence expenses and hence not reimbursable. B-185826, May 28, 1976; B-167820, October 7, 1969.

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example is 65 Comp. Gen. 738 (1986) (refreshments at awards ceremonies), discussed later in this section. Exceptions of this type illustrate the relativity of the necessary expense doctrine pointed out earlier in our general discussion.

We turn now to a discussion of the rule and its exceptions in several other contexts.

(1) Working at official duty station under unusual conditions

The well-settled rule is that the government may not furnish free food (the decisions sometimes get technical and use terms like "per diem" or "subsistence") to employees at their official duty station, even when they are working under unusual circumstances.[37]

An early illustration is 16 Comp. Gen. 158 (1936), in which the expense of meals was denied to an Internal Revenue investigator who was required to maintain a 24-hour surveillance. The reason payment was denied is that the investigator would presumably have eaten (and incurred the expense of) three meals a day even if he had not been required to work the 24-hour shift.

Payment was also denied in 42 Comp. Gen. 149 (1962), where a postal official had bought carry-out restaurant food for postal employees conducting an internal election who were required to remain on duty beyond regular working hours.[38]

Similarly, the general rule was applied in the following situations:

- Federal mediators required to conduct mediation sessions after regular hours. B-169235, April 6, 1970; B-141142, December 15, 1959.
- District of Columbia police officers involved in clean-up work after a fire in a municipal building. B-118638.104, February 5, 1979.
- Geological Survey inspectors at offshore oil rigs who had little alternative than to buy lunch from private caterers at excessive prices. B-194798, January 23, 1980. See also B-202104, July 2, 1981 (Secret Service agents on 24-hour-a-day assignment required to buy meals at high cost hotels).

[37]The cases under this heading obviously do not involve "entertainment" as most of us understand the term. The rule, however, fits under the same conceptual umbrella.

[38]This and several other cases cited in the text also involve the "voluntary creditor" rule, discussed in Chapter 12.

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- Law enforcement personnel retained at staging area for security purposes prior to being dispatched to execute search warrants. B-234813, November 9, 1989.
- Air Force enlisted personnel assigned to a security detail at an off-base social event. B-232112, March 8, 1990.

An exception was permitted in 53 Comp. Gen. 71 (1973). In that case, the unauthorized occupation of a building in which the Bureau of Indian Affairs was located necessitated the assembling of a cadre of General Services Administration special police, who spent the whole night there. Agency officials purchased and brought in sandwiches and coffee for the cadre. GAO concluded that it would not question the agency's determination that the expenditure was incidental to the protection of government property during an extreme emergency, and approved reimbursement. The decision emphasized, however, that it was an exception and that the rule still stands.

A similar exception was permitted in B-189003, July 5, 1977, where agents of the Federal Bureau of Investigation had been stranded in their office during a severe blizzard in Buffalo, New York. The area was in a state of emergency and was later declared a national disaster area. GAO agreed with the agency's determination that the situation presented a danger to human life.

The rationale of 53 Comp. Gen. 71 and B-189003 was applied in B-232487, January 26, 1989, for government employees required to work continually for a 24-hour period to evacuate and secure an area threatened by the derailment of a train carrying toxic liquids.

The exception, however, is limited. The requirement to remain on duty for a 24-hour period, standing alone, is not enough. In B-185159, December 10, 1975, for example, the cost of meals was denied to Treasury Department agents required to work over 24 hours investigating a bombing of federal offices. The Comptroller General pointed out that dangerous conditions alone are not enough. Under the exception established in 53 Comp. Gen. 71, it is necessary to find that the situation involves imminent danger to human life or the destruction of federal property. Also, in that case, the agents were only investigating a dangerous situation which had already occurred and there was no suggestion that any further bombings were imminent. A similar case is B-217261, April 1, 1985, involving a Customs Service official required to remain in a motel

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room for several days on a surveillance assignment. See also 16 Comp. Gen. 158 (1936) and B-202104, July 2, 1981.

Short of the emergency situation described in B-189003, July 5, 1977, inclement weather is not enough to support an exception. There are numerous cases in which employees have spent the night in motels rather than returning home in a snowstorm, in order to be able to get to work the following day. Reimbursement for meals has consistently been denied. 68 Comp. Gen. 46 (1988); 64 Comp. Gen. 70 (1984); B-226403, May 19, 1987; B-200779, August 12, 1981; B-188985, August 23, 1977. It makes no difference that the employee was directed by his or her supervisor to rent the room (B-226403 and B-188985),[39] or that the federal government in Washington was shut down (68 Comp. Gen. 46).[40]

Naturally, statutory authority will overcome the prohibition. Thus, where the Veterans Administration had statutory authority to accept uncompensated services and to contract for related "necessary services," the VA could, upon an administrative determination of necessity, contract with local restaurants for meals to be furnished without charge to uncompensated volunteer workers at VA outpatient clinics when their scheduled assignment extended over a meal period. B-145430, May 9, 1961. There is also authority to make subsistence payments to law enforcement officials and members of their immediate families when threats to their lives force them to occupy temporary accommodations. 5 U.S.C. § 5706a.

(2) Attendance at meetings and conferences

In Section C.2 of this chapter, we discuss when appropriated funds may be used to finance the attendance of government employees at meetings and conferences. This section addresses when the government may pay for meals at meetings and conferences when attendance is authorized under the principles and statutes set forth in Section C.2.

[39]A supervisor has no authority to do so. As noted in B-226403, such an erroneous exercise of authority does not bind the government.

[40]While the storm in 68 Comp. Gen. 46 was certainly more than flurries, it nevertheless remains the case that the government in Washington will be disrupted by storms that do not approach the severity of the Buffalo blizzard in B-189003. There is also a practical distinction. To feed and lodge a potentially large number of employees every time it snows in Washington is simply not realistic.

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that the proposal to indiscriminately charge the landing fields to Roads and Trails would violate 31 U.S.C. § 1301(a). The Roads and Trails appropriation could be used for only those landing fields that were directly connected with and necessary to accomplishing the purposes of that appropriation. Landing fields not directly connected with the purposes of the Roads and Trails appropriation, for example, airstrips needed to assist in firefighting in remote areas, had to be charged to the appropriation to which they were related, such as Forest Protection and Utilization. The mere mention of intent at the hearings was not sufficient to alter the availability of the appropriations.

Later, in 53 Comp Gen. 328 (1973), the Comptroller General held that the Forest Roads and Trails appropriation could not be charged with the expense of closing roads or trails and returning them to their natural state, such activity being neither "construction" nor "maintenance."

Again, in B-164497(3), February 6, 1979, GAO decided that the Forest Service could not use the Roads and Trails appropriation to maintain a part of a federally-constructed scenic highway on Forest Service land in West Virginia, although the state was prevented from maintaining it due to the fact that the scenic highway was closed to commercial traffic. The Roads and Trails account was improper to charge with the maintenance because the term "forest road" was statutorily defined as a service or access road "necessary for the protection, administration, and utilization of the [national forest] system and the use and development of its resources." The highway, a scenic parkway reserved exclusively for recreational and passenger travel through a national forest, was not the type of forest road the appropriation was available to maintain. The decision further noted, however, that the Forest Protection and Utilization appropriation was somewhat broader and could be used for the contemplated maintenance.

A 1955 case illustrates a type of expenditure which could properly be charged to the Roads and Trails account. Construction of a timber access road on a national forest uncovered a site of old Indian ruins. Since the road construction itself was properly chargeable to the Roads and Trails appropriation, the Forest Service could use the same appropriation to pay the cost of archaeological and exploratory work necessary to obtain and preserve historical data from the ruins before they were destroyed by the

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For meetings sponsored by non-government organizations, the attendee will commonly be charged a fee, usually but not necessarily called a registration fee. If a single fee is charged covering both attendance and meals and no separate charge is made for meals, the government may pay the full fee, assuming of course that funds are otherwise available for the cost of attendance. 38 Comp. Gen. 134 (1958); B-66978, August 25, 1947. The same is true for an evening social event where the cost is a mandatory non-separable element of the registration fee. 66 Comp. Gen. 350 (1987).

If a separate charge is made for meals, the government may pay for the meals if there is a showing that (1) the meals are incidental to the meeting, (2) attendance of the employee at the meals is necessary to full participation in the business of the conference, and (3) the employee is not free to take the meals elsewhere without being absent from essential formal discussions, lectures, or speeches concerning the purpose of the conference. B-160579, April 26, 1978; B-166560, February 3, 1970. Absent such a showing, the government may not pay for the meals. B-154912, August 26, 1964; B-152924, December 18, 1963; B-95413, June 7, 1950; B-88258, September 19, 1949. As an examination of the cited cases will reveal, these rules apply regardless of whether the conference takes place within the employee's duty station area or someplace else.

Where the government is authorized to pay for meals under the above principles, the employee normally cannot be reimbursed for purchasing alternate meals. See B-193504, August 9, 1979; B-186820, February 23, 1978. Personal taste is irrelevant. Thus, an employee who, for example, loathes broccoli will either have to eat it anyway, pay for a substitute meal from his or her own pocket, or go without. For an employee on travel or temporary duty status, which is where this rule usually manifests itself, per diem is reduced by the value of the meals provided. E.g., 60 Comp. Gen. 181, 183-84 (1981). The rule will not apply, however, where the employee is unable to eat the meal provided (and cannot arrange for an acceptable substitute) because of bona fide medical or religious reasons. B-231703, October 31, 1989 (per diem not required to be reduced where employee, an Orthodox Jew who could not obtain kosher meals at conference, purchased substitute meals elsewhere).

For the most part, the above rules will not apply to agency-sponsored meetings. Attendance at agency-sponsored meetings and conferences will generally be subject to the prohibition on furnishing

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free food to employees at their official duty stations. Thus, the cost of meals and coffee breaks could not be provided for government officials attending a one-day conference on implementation of the Speedy Trial Act. B-188078, May 5, 1977. Similarly, meals could not be provided at a conference of field examiners of the National Credit Union Administration. B-180806, August 21, 1974. Use of appropriated funds was prohibited for coffee breaks at a management seminar, B-159633, May 20, 1974; meals served during "working sessions" at Department of Labor business meetings, B-168774, January 23, 1970; and meals at monthly luncheon meetings for officials of law enforcement agencies, B-198882, March 25, 1981. See also 47 Comp. Gen. 657 (1968); B-45702, November 22, 1944.

In B-137999, December 16, 1958, the commissioners of the Outdoor Recreation Resources Review Commission had statutory authority to be reimbursed for actual subsistence expenses. This was held to include the cost of lunches during meetings at a Washington hotel. However, the cost of lunches for staff members of the Commission could not be paid.

Merely calling the cost of meals a "registration fee" will not avoid the prohibition. In a 1975 case, the cost of meals was disallowed for Army employees at an Army-sponsored "Operations and Maintenance Seminar." The charge had been termed a registration fee but covered only luncheons, dinner, and coffee breaks. B-182527, February 12, 1975. See also B-195045, February 8, 1980.

In B-187150, October 14, 1976, grant funds provided to the Government of the District of Columbia under the Social Security Act for personnel training and administrative expenses could not be used to pay for a luncheon at a 4-hour conference of officials of the D.C. Department of Human Resources. The conference could not be reasonably characterized as training and did not qualify as an allowable administrative cost under the program regulations.

This is not to say that the rules for meals at non-government meetings and conferences will never apply to government-sponsored meetings at the employee's duty station. In 1980, the President's Committee on Employment of the Handicapped held its annual meeting in the Washington Hilton Hotel. The affair was to last for three days and included a luncheon and two banquets. There was no registration fee for the meeting but there were charges for the

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meals. GAO's Equal Employment Opportunity Office planned to send three employees to the meeting and asked whether the agency could pick up the tab for the meals.

The three employees were to make a presentation at the meeting and it seemed clear that attendance was authorized under 5 U.S.C. § 4110. Also, if a registration fee were involved, the prior decisions noted above would presumably have answered the question. The Comptroller General reviewed the precedents such as B-160579, April 26, 1978, and B-166560, February 3, 1970, and took the logical step of applying them to the situation at hand. Thus, GAO could pay for the meals if administrative determinations were made that (1) the meals were incidental to the meeting, (2) attendance at the meals was necessary for full participation at the meeting, and (3) the employees would miss essential formal discussions, lectures, or speeches concerning the purpose of the meeting if they took their meals elsewhere. B-198471, May 1, 1980.[41]

This decision, so it seems, became perceived as the loophole through which the lunch wagon could be driven. So apparently compelling is the quest for free food that it became necessary to issue several additional decisions to clarify B-198471 and to explain precisely what the rationale of that decision does and does not authorize.

In 64 Comp. Gen. 406 (1985), the Comptroller General held that the cost of meals could not be reimbursed for employees attending monthly meetings of the Federal Executive Association within their duty station area. The meetings were essentially luncheon meetings at which representatives of various government agencies could discuss matters of mutual interest. The decision stated:

"What distinguishes [B-198471] . . . is that the President's annual meeting was a 3-day affair with meals clearly incidental to the overall meeting, while in [the cases in which reimbursement has been denied] the only meetings which took place were the ones which took place during a luncheon meal. . . . In order to meet the three-part test [of B-198471], a meal must be part of a formal meeting or conference that includes not only functions such as speeches or business carried out during a seating at a meal but also includes substantial

[41]This is a relatively rare instance of the Comptroller General's issuing a formal decision to a GAO requester. Although it doesn't happen often, it will be done when the situation warrants it.

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functions that take place separate from the meal. [W]e are unwilling to conclude that a meeting which lasts no longer than the meal during which it is conducted qualifies for reimbursement." Id. at 408.

A similar case the following year, 65 Comp. Gen. 508 (1986), reiterated that the above-quoted test of 64 Comp. Gen. 406 must precede the application of the three-part test of B-198471. The three-part test, and hence the authority to reimburse, relates to a meal which is incident to a meeting, not a meeting which is incident to a meal. 65 Comp. Gen. at 510; 64 Comp. Gen. at 408.

Two 1989 decisions, 68 Comp. Gen. 604 and 68 Comp. Gen. 606, defined the rules further, holding that 5 U.S.C. § 4110 and B-198471 do not apply to purely internal business meetings or conferences sponsored by government agencies. Noting that this result is consistent with the legislative history of 5 U.S.C. § 4110 as summarized in prior decisions,[42] both decisions stated:

"We think . . . that there is a clear distinction between the payment of meals incidental to formal conferences or meetings, typically externally organized or sponsored, involving topical matters of general interest to governmental and nongovernmental participants, and internal business or informational meetings primarily involving the day-to-day operations of government. With respect to the latter, 5 U.S.C. § 4110 has little bearing . . . ." 68 Comp. Gen. at 605 and 608.

One of the decisions went a step further and commented that the claim in 65 Comp. Gen. 508 "should have been summarily rejected based on the application of the general rule." 68 Comp. Gen. at 609.

Naturally, if the meeting or conference does not have the necessary connection with official agency business, the cost of meals may not be paid regardless of who sponsors the meeting or where it is held. Thus, a registration fee consisting primarily of the cost of a luncheon was disallowed for three Community Services Administration employees attending a Federal Executive Board meeting at which Combined Federal Campaign awards were to be presented.

[42] E.g., 46 Comp. Gen. 135, 136-37 (1966); B-140912, November 24, 1959.

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B-195045, February 8, 1980.[43] Similarly, an employee of the Department of Housing and Urban Development could not be reimbursed for meals incident to meetings of a local business association. B-166560, May 27, 1969.

In a 1981 case, the Internal Revenue Service bought tickets for several of its agents to attend the Fourth Annual Awards and Scholarship Dinner of the National Association of Black Accountants. The purposes of attending the banquet were to establish contacts for recruitment purposes and to demonstrate the commitment of the IRS to its equal opportunity program. However, attendance could not be authorized under either 5 U.S.C. § 4109 or 5 U.S.C. § 4110, and the expenditure was therefore prohibited by 5 U.S.C. § 5946. B-202028, May 14, 1981.

Before we depart the topic, two cases involving a different twist—payment for meals not eaten—deserve mention. In B-208729, May 24, 1983, the Army Missile Command sponsored a luncheon to commemorate Dr. Martin Luther King, Jr., open to both government employees and members of the local community. Attendees were to be charged a fee for the lunch. In order to secure the necessary services, the Army contracted with a caterer (in this case the local Officers Club), guaranteeing a minimum revenue based on the anticipated number of guests. Bad weather on the day of the luncheon resulted in reduced attendance. Under the circumstances, GAO approved payment of the guaranteed minimum as a program expense.

GAO similarly approved payment of a guaranteed minimum balance in B-230382, December 22, 1989, this time involving the Army's "World-Wide Audio Visual Conference." As in B-208729, attendees were charged for the meal but attendance was less than expected. This case had two additional complications. First, the official who made the arrangements lacked the authority to do so. Payment could therefore be authorized only on a quantum meruit basis.

[43]A later decision, 67 Comp. Gen. 254 (1988), held that agencies may spend appropriated funds, within reason, to support efforts to solicit contributions to the CFC from their employees. While 67 Comp. Gen. 254 did not involve meals, it nevertheless raises the question of whether this aspect of B-195045 (insufficient relationship for purposes of 5 U.S.C. § 4110) would still be followed. Either way, the disallowance in B-195045 was correct because the meeting was within the "duty station area" and the fee was little more than a disguised charge for the lunch.

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Second, the arrangements also included a buffet, open bar, and several coffee breaks. Payment for these items could not be authorized, even under the quantum meruit concept, since they would not have been authorized had proper procurement procedures been followed.

(3) Government Employees Training Act

Under the Government Employees Training Act, an agency may pay, or reimburse an employee for, necessary expenses incident to an authorized training program. 5 U.S.C. § 4109. The Comptroller General has held that the government can provide meals under this authority if the agency determines that the providing of meals is necessary to achieve the objectives of the training program. 48 Comp. Gen. 185 (1968); 39 Comp. Gen. 119 (1959); B-193955, September 14, 1979. The government may also furnish meals to non-government speakers as an expense of conducting the training. 48 Comp. Gen. 185.

In 50 Comp. Gen. 610 (1971), the Training Act was held to authorize the procurement of catering services for a Department of Agriculture training conference where government facilities were deemed inadequate in view of the nature of the program.

The fact that an agency characterizes its meeting as "training" is not controlling. In other words, for purposes of authorizing the government to feed participants, something does not become "training" simply because it is called "training." In B-168774, September 2, 1970, headquarters employees of the (then) Department of Health, Education, and Welfare met with consultants in a nearby hotel at what the agency termed a "research training conference." However, the conference consisted of little more than "working sessions" and included no employee training as defined in the Government Employees Training Act. Therefore, the cost of meals could not be paid. See also 68 Comp. Gen. 606 (1989); B-208527, September 20, 1983; B-187150, October 14, 1976; B-140912, November 24, 1959.

In 65 Comp. Gen. 143 (1985), GAO held that a Social Security Administration employee who had been invited as a guest speaker at the opening day luncheon of a legitimate agency training conference in the vicinity of her duty station could be reimbursed for the cost of the meal. The decision unfortunately confuses 5 U.S.C.

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§§ 4109 and 4110 by analyzing the case under section 4110 yet concluding that reimbursement is authorized "as a necessary training expense," which is the standard under section 4109.

(4) Award ceremonies

General operating appropriations may be used to provide refreshments at award ceremonies under the Government Employees Incentive Awards Act. 65 Comp. Gen. 738 (1986). This result, as noted in the decision, is consistent with guidance from the Office of Personnel Management contained in the Federal Personnel Manual.

In 65 Comp. Gen. 738, the Social Security Administration asked whether it could use operating appropriations, apart from its limited entertainment appropriation, to provide refreshments at its annual awards ceremony. GAO observed that the Incentive Awards Act (5 U.S.C. § 4503) authorizes agencies to "pay a cash award to, and incur necessary expense for the honorary recognition of" employees. The decision reasoned that the concept of a necessary expense is, within limits, a relative one based on the relationship of the expenditure to the particular appropriation or program involved. Thus, while the necessary relationship does not exist with respect to an agency's day-to-day operations, the agency would be within its legitimate discretion to determine that refreshments would materially enhance the effectiveness of a ceremonial function, specifically in this case an awards ceremony which is a valid component of the agency's statutorily authorized awards program.

The decision essentially followed B-167835, November 18, 1969, which had concluded that the Incentive Awards Act authorized the National Aeronautics and Space Administration to fund part of the cost of a banquet at which the President was to present the Medal of Freedom to the Apollo 11 astronauts. What made the fuller treatment in 65 Comp. Gen. 738 necessary was that a 1974 decision, B-114827, October 2, 1974, had found the cost of refreshments at an awards ceremony under the Incentive Awards Act payable only from specific entertainment appropriations. The 1986 case partially modified B-114827 to the extent it had held that an entertainment appropriation was the only available funding source. Finally, 65 Comp. Gen. 738 distinguished 43 Comp. Gen. 305 (1963), which had disallowed the cost of refreshments at an awards ceremony for persons who were not federal employees (and therefore not authorized

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under the Incentive Awards Act nor governed by the "necessary expense" language of that statute).

The Government Employees Incentive Awards Act does not apply to members of the armed forces. However, the uniformed services have similar authority, including the identical "necessary expense" language, in 10 U.S.C. § 1124. Therefore, 65 Comp. Gen. 738 applies equally to award ceremonies conducted under the authority of 10 U.S.C. § 1124. 65 Comp. Gen. at 739 n.2.

(5) Cafeterias and lunch facilities

The government has no general responsibility to provide luncheon facilities for its employees. 10 Comp. Gen. 140 (1930).[44] However, plans for the construction of a new government building may include provision for a lunch room or cafeteria, in which event the appropriation for construction of the building will be available for the lunch facility. 9 Comp. Gen. 217 (1929).

An agency may subsidize the operation of an employees' cafeteria if the expenditure is administratively determined to be necessary to the efficiency of operations and a significant factor in the hiring and retaining of employees and in promoting employee morale. B-216943, March 21, 1985; B-169141, November 17, 1970; B-169141, March 23, 1970. See also B-204214, January 8, 1982 (temporarily providing paper napkins in new government cafeteria) and GAO report entitled Benefits GSA Provides by Operating Cafeterias in Washington, D.C., Federal Buildings, LCD-78-316 (May 5, 1978).

The purchase of equipment for use in other than an established cafeteria may also be authorized in certain circumstances. In B-173149, August 10, 1971, GAO approved the purchase of a set of stainless steel cooking utensils for use by air traffic controllers to prepare food at a flight service station. There were no other readily accessible eating facilities and the employees were required to remain at their post of duty for a full 8-hour shift. Similar cases are:

- B-180272, July 23, 1974: purchase of a sink and refrigerator to provide lunch facilities for the Occupational Safety and Health Review

[44]By way of contrast, it has long been conceded that drinking water is a necessity. See 22 Comp. Dec. 31 (1915) and 21 Comp. Dec. 739 (1915).

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Commission where there was no government cafeteria on the premises.

- B-210433, April 15, 1983: purchase of microwave oven by Navy facility to replace non-working stove. Facility was in operation 7 days a week, some employees had to remain at their duty stations for 24-hour shifts, and there were no readily accessible eating facilities in the area during nights and weekends.

c. Entertainment for Government Employees Other Than Food

(1) Miscellaneous cases

There have been relatively few cases in this area, probably because there are few situations in which entertainment for government employees could conceivably be authorized.

An early decision held that 10 U.S.C. § 4302, which authorizes training for Army enlisted personnel "to increase their military efficiency and to enable them to return to civilian life better equipped for industrial, commercial, and business occupations," did not include sending faculty members and students of the Army Music School to grand opera and symphony concerts. 4 Comp. Gen. 169 (1924). Another decision found it improper to hire a boat and crew to send federal employees stationed in the Middle East on a recreational trip to the Red Sea. B-126374, February 14, 1956.

A 1970 decision deserves brief mention although its application will be extremely limited. Legislation in 1966 established the Wolf Trap Farm Park in Fairfax County, Virginia, as a park for the performing arts and directed the Interior Department to operate and maintain it. A certifying officer of the National Park Service asked whether he could certify a voucher for symphony, ballet, and theater tickets for Wolf Trap's Artistic Director. The Comptroller General held that such payments could be made if an appropriate Park Service official determined that attendance was necessary for the performance of the Artistic Director's official duties. The justification was that the Artistic Director attended these functions not as personal entertainment but so that he could review the performances to determine which cultural and theatrical events were appropriate for booking at Wolf Trap. B-168149, February 3, 1970. As noted, this case would seem to have little precedent value except for the Artistic Director at Wolf Trap.

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(2) Cultural awareness programs

One area that has generated several decisions, and a change in GAO's position, has been equal employment opportunity special emphasis or cultural awareness programs. There are many areas in which the law undergoes refinement from time to time but remains essentially unchanged. There are other areas in which the law has changed to reflect changes in American society. This is one of those latter areas.

The issue first arose in 58 Comp. Gen. 202 (1979). In that case, the Bureau of Mines, Interior Department, in conjunction with the Equal Employment Opportunity Commission, sponsored a program of live entertainment for National Hispanic Heritage Week. The program consisted of such items as a lecture and demonstration of South American folk music, a concert, a slide presentation, and an exhibit of Hispanic art and ceramics. The decision concluded that, while the Bureau's Spanish-Speaking Program was a legitimate component of the agency's overall EEO program, appropriated funds could not be used to procure entertainment. This holding was followed in two more cases, B-194433, July 18, 1979, and B-199387, August 22, 1980.

In 1981, however, GAO reconsidered its position. The Internal Revenue Service asked whether it could certify a voucher covering payments for a performance by an African dance troupe and lunches for guest speakers at a ceremony observing National Black History Month. The Comptroller General held the expenditure proper in 60 Comp. Gen. 303 (1981). The decision stated:

"[W]e now take the view that we will consider a live artistic performance as an authorized part of an agency's EEO effort if, as in this case, it is part of a formal program determined by the agency to be intended to advance EEO objectives, and consists of a number of different types of presentations designed to promote EEO training objectives of making the audience aware of the culture or ethnic history being celebrated." Id. at 306.

Further, the lunches for the guest speakers could be paid under 5 U.S.C. § 5703 if they were in fact away from their homes or regular places of business. The prior inconsistent decisions—58 Comp. Gen. 202, B-194433, and B-199387—were overruled.

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Principles of Federal Appropriations Law

Second Edition

Volume II

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prescribe precisely how this is to be done. Apart from subsection (b), the substance of section 1514 derives from a 1950 amendment to the Antideficiency Act (64 Stat. 765). In testimony on that legislation, the Director of the (then) Bureau of the Budget stated:

"At the present time, theoretically, I presume the agency head is about the only one that you could really hold responsible for exceeding [an] apportionment. The revised section provides for going down the line to the person who creates the obligation against the fund and fixes the responsibility on the bureau head or the division head, if he is the one who creates the obligation."[56]

Thus, depending on the agency regulations and the level at which administrative responsibility is fixed, the violating individual could be the person in charge of a major agency bureau or operating unit, or it could be a contracting officer or finance officer.

Identifying the person responsible for a violation will be easy in probably the majority of cases. However, where there are many individuals involved in a complex transaction, and particularly where the actions producing the violation occurred over a long period of time, the pinpointing of responsibility can be much more difficult. Hopkins and Nutt, in their study of the Antideficiency Act, present the following as a sensible approach:

"Generally, [the individual to be held responsible] will be the highest ranking official in the decision-making process who had knowledge, either actual or constructive, of (1) precisely what actions were taken and (2) the impropriety or at least questionableness of such actions. There will be officials who had knowledge of either factor. But the person in the best and perhaps only position to prevent the ultimate error—and thus the one who must be held accountable—is the highest one who is aware of both."[57]

Thus, Hopkins and Nutt conclude, where multiple individuals are involved in a violation, the individual to be held responsible "must not be too remote from the cause of the violation and must be in a position to have prevented the violation from occurring."[58]

[56]Hearings Before Senate Comm. on Appropriations on H.R. 7786, 81st Cong., 2d Sess. 10 (1950), quoted in Hopkins & Nutt, The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis, 80 Mil. L. Rev. 51, 128 (1978).

[57]Memorandum for the Assistant Secretary of the Army (Financial Management), 1976, quoted in Hopkins & Nutt, supra note 56, at 130.

[58]Id.

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h. Expenditures in Excess of Apportionment

The former subsection (h) of the Antideficiency Act, now 31 U.S.C. § 1517(a), provides:

"(a) An officer or employee of the United States Government or of the District of Columbia government may not make or authorize an expenditure or obligation exceeding—

"(1) an apportionment; or

"(2) the amount permitted by regulations prescribed under section 1514(a) of this title."

Section 1517(a) must be read in conjunction with sections 1341, 1512, and 1514, previously discussed.

Subsection (a)(1) is self-explanatory—it prohibits obligations or expenditures in excess of an apportionment. Thus, an agency must observe the limits of its apportionments just as it must observe the limits of its appropriations.

There is, however, one difference. It has been held that, under some circumstances, an agency may have a legal duty to seek an additional apportionment from OMB. Berends v. Butz, 357 F. Supp. 143, 155–56 (D. Minn. 1973); Blackhawk Heating & Plumbing Co. v. United States, 622 F.2d 539, 552 n.9 (Ct. Cl. 1980). In Berends v. Butz, the Secretary of Agriculture had terminated an emergency farm loan program, allegedly due to a shortage of funds. The court found the termination improper and directed reinstatement of the program. Since the shortage of funds related to the amount apportioned and not the amount available under the appropriation, the court found that the Secretary had a duty to request an additional apportionment in order to continue implementing the program. The case does not address the nature and extent of any duty OMB might have in response to such a request.

Subsection (a)(2) makes it a violation to obligate or expend in excess of an administrative subdivision of an apportionment to the extent provided in the agency's fund control regulations. The import of 31 U.S.C. § 1514 becomes much clearer when it is read in conjunction with 31 U.S.C. § 1517(a)(2). The statute does not prescribe the level of fiscal responsibility for violations below the apportionment level. It merely recommends that the agency set the level at the highest practical point and suggests no more than one subdivision below the

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apportionment level. The agency thus, under the statute, has a measure of discretion. If it chooses to elevate overobligations or overexpenditures of lower-tier subdivisions to the level of Antideficiency Act violations, it is free to do so in its fund control regulations.

At this point, it is important to return to OMB Circular No. A-34. Since agency fund control regulations must be approved by OMB, OMB has a role in determining what levels of administrative subdivision should constitute Antideficiency Act violations. Under A-34, overobligation or overexpenditure of an allotment or suballotment are always violations. Overobligation or overexpenditure of other administrative subdivisions are violations only if and to the extent specified in the agency's fund control regulations. OMB Circular No. A-34, §§ 21.1 and 32.2.

In 37 Comp. Gen. 220 (1957), GAO considered proposed fund control regulations of the Public Housing Administration. The regulations provided for allotments as the first subdivision below the apportionment level. They then authorized the further subdivision of allotments into "allowances," but retained responsibility at the allotment level. The "allowances" were intended as a means of meeting operational needs rather than an apportionment control device. GAO advised that this proposed structure conformed to the purposes of 31 U.S.C. § 1514, particularly in light of the 1956 addition of section 1514(b), and that expenditures in excess of an "allowance" would not constitute Antideficiency Act violations.

For further illustration, see 35 Comp. Gen. 356 (1955) (overobligation of allotment stemming from misinterpretation of regulations); B-95136, August 8, 1979 (overobligation of regional allotments would constitute reportable violation unless sufficient unobligated balance existed at central account level to adjust the allotments); B-179849, December 31, 1974 (overobligation of allotment held a violation of section 1517(a) where agency regulations specified that allotment process was the "principal means whereby responsibility is fixed for the conduct of program activities within the funds available"); B-114841.2-O.M., January 23, 1986 (no violation in exceeding allotment subdivisions termed "work plans").

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5. Penalties and Reporting Requirements

a. Administrative and Penal Sanctions

Violations of the Antideficiency Act are subject to sanctions of two types, administrative and penal. The Antideficiency Act is the only one of the Title 31 funding statutes to prescribe penalties of both types, a fact which says something about congressional perception of the Act's importance.

An officer or employee who violates 31 U.S.C. § 1341(a) (obligate/expend in excess or advance of appropriation), § 1342 (voluntary services prohibition), or § 1517(a) (obligate/expend in excess of an apportionment or administrative subdivision as specified by regulation) "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. §§ 1349(a), 1518. For a case in which an official was reduced in grade and reassigned to other duties, see Duggar v. Thomas, 550 F. Supp. 498 (D.D.C. 1982) (upholding the agency's action against a charge of discrimination).

In addition, an officer or employee who "knowingly and willfully" violates any of the three provisions cited above "shall be fined not more than $5,000, imprisoned for not more than 2 years, or both." 31 U.S.C. §§ 1350, 1519. As far as the editors are aware, it appears that no officer or employee has ever been prosecuted, much less convicted, for a violation of the Antideficiency Act as of this writing. The knowing and willful failure to record an overobligation in order to conceal an Antideficiency Act violation is also a criminal offense. See 71 Comp. Gen. ___ (B-245856.7, August 11, 1992).

Earlier in this chapter, we pointed out that factors such as the absence of bad faith or the lack of intent to commit a violation are irrelevant for purposes of determining whether a violation has occurred. However, intent is relevant in evaluating the assessment of penalties. Note that the criminal penalties are linked to a determination that the law was "knowingly and willfully" violated, but the administrative sanction provisions do not contain similar language. Thus, intent or state of mind may (and probably should) be taken into consideration when evaluating potential administrative sanctions (whether to assess them and, if so, what type), but must be taken into consideration in determining applicability of the criminal sanctions. Understandably,

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the provisions for fines and/or jail are intended to be reserved for particularly flagrant violations.

Finally, it should be emphasized that the administrative and penal sanctions apply only to violations of the three provisions cited—31 U.S.C. §§ 1341(a), 1342, and 1517(a). They do not, for example, apply to violations of 31 U.S.C. § 1512. 36 Comp. Gen. 699 (1957).

b. Reporting Requirements

Once it is determined that there has been a violation of 31 U.S.C. § 1341(a), 1342, or 1517(a), the agency head "shall report immediately to the President and Congress all relevant facts and a statement of actions taken." 31 U.S.C. §§ 1351, 1517(b). The report to the President is to be forwarded through the Director of OMB. Further instructions on preparing the reports may be found in OMB Circular No. A-34, §§ 32.2–32.4. The reports are to be signed by the agency head. Id. § 32.7.

As noted, the report is to include all pertinent facts and a statement of all actions taken (any administrative discipline imposed, referral to the Justice Department where appropriate, new safeguards imposed, etc.), presumably including a request for additional appropriations where necessary. It is also understood that the agency will do everything it can lawfully do to mitigate the financial effects of the violation. E.g., 55 Comp. Gen. 768, 772 (1976); B-114841.2-O.M., January 23, 1986. In view of the explicit provisions of 31 U.S.C. § 1351, it has been held that there is no private right of action for declaratory, mandatory, or injunctive relief under the Antideficiency Act. Thurston v. United States, 696 F. Supp. 680 (D.D.C. 1988).

Factors such as mistake, inadvertence, lack of intent, or the minor nature of a violation do not affect the duty to report. Of course, if the agency feels there are extenuating circumstances, it is entirely appropriate to include them in the report. 35 Comp. Gen. 356 (1955).

What if GAO uncovers a violation in the course of its audit activities but the agency thinks GAO is wrong? The agency should still make the required reports, and should include an explanation of the disagreement. OMB Circular No. A-34, § 32.5. See also GAO report entitled Anti-Deficiency Act: Agriculture's Food and Nutrition Service Violates the Anti-Deficiency Act, GAO/AFMD-87-20 (March 1987).

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6. Funding Gaps

The term "funding gap" refers to a period of time between the expiration or exhaustion of an appropriation and the enactment of a new one. A funding gap is one of the most difficult fiscal problems a federal agency may have to face. As our discussion here will demonstrate, the case law reflects an attempt to forge a workable solution to a bad situation.

Funding gaps occur most commonly at the end of a fiscal year when new appropriations, or a continuing resolution, have not yet been enacted. In this context, a gap may affect only a few agencies (if, for example, only one appropriation act remains unenacted as of October 1), or the entire federal government. A funding gap may also occur if a particular appropriation becomes exhausted before the end of the fiscal year, in which event it may affect only a single agency or a single program, depending on the scope of the appropriation.

Funding gaps occur for a variety of reasons. For one thing, the complexity of the budget and appropriations process makes it difficult at best for Congress to get everything done on time. Add to this the enormity of some programs and the need to address budget deficits and the scope of the problem becomes more apparent. Also, to some extent, funding gaps are perhaps an inevitable reflection of the political process.

As GAO has pointed out, funding gaps, actual or threatened, are both disruptive and costly.[59] They also produce extremely difficult legal problems under the Antideficiency Act. The basic question, easy to state but not quite as easy to try to answer, is what is an agency permitted or required to do when faced with a funding gap? Can it continue with "business as usual," or must it lock up and go home, or is there some acceptable middle ground?

In 1980, a congressional subcommittee asked whether agency heads could legally permit employees to come to work when the applicable appropriation for salaries had expired and Congress had not yet enacted either a regular appropriation or a continuing resolution for the next fiscal year. The Comptroller General replied that 31 U.S.C. §§ 1341(a) and 1342 were both violated if employees reported for work under those circumstances. The salaries of federal employees

[59]GAO, Funding Gaps Jeopardize Federal Government Operations, PAD-81-31 (March 3, 1981); Government Shutdown: Permanent Funding Lapse Legislation Needed, GAO/GGD-91-76 (June 1991).

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are generally fixed by law. Thus, permitting the employees to come to work would result in an obligation to pay salary for the time worked, an obligation in advance of appropriations in violation of section 1341(a). With respect to section 1342, no one was suggesting that the employees were offering to work gratuitously, even assuming they could lawfully do so, which for the most part they cannot. The fact that employees were willing to take the risk that the necessary appropriation would eventually be enacted did not avoid the violation. Clearly, the employees still expected to be paid eventually. B-197841, March 3, 1980. "During a period of expired appropriations," the Comptroller General stated, "the only way the head of an agency can avoid violating the Antideficiency Act is to suspend the operations of the agency and instruct employees not to report to work until an appropriation is enacted." Id. at 3.

However, GAO, like all other agencies, had been groping for a better solution. Whatever might be the cause of a particular funding gap, it seemed clear that it was not the intent of Congress that the federal government simply shut down. At the beginning of FY 1980, GAO prepared an internal memorandum to address its own operations. The memorandum said, in effect, that employees could continue to come to work, but that operations would have to be severely restricted. No new obligations could be incurred for contracts or small purchases of any kind, and of course the employees could not actually be paid until appropriations were enacted. The memorandum was printed in the Congressional Record, and at least one Senator viewed the approach as "commonsense guidelines."[60] The memorandum was noted in B-197841, discussed above, but it was conceded that those guidelines, however sensible they might appear, would nevertheless "legally produce widespread violations of the Antideficiency Act." Id. at 4.

Less than two months after B-197841 was issued, the Attorney General issued a formal opinion to the President. The Attorney General essentially agreed with GAO's analysis that permitting employees to work during a funding gap would violate the Antideficiency Act, but concluded further that the approach outlined in the GAO internal memorandum went beyond what the Act permitted. 43 Op. Att'y Gen. ___ (No. 24), 4A Op. Off. Legal Counsel 16 (1980). The opinion stated:

[60]125 Cong. Rec. 26974 (October 1, 1979).

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"[T]here is nothing in the language of the Antideficiency Act or in its long history from which any exception to its terms during a period of lapsed appropriations may be inferred. . . .

. . . .

"[F]irst of all . . ., on a lapse in appropriations, federal agencies may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law. There are no exceptions to this rule under current law, even where obligations incurred earlier would avoid greater costs to the agencies should appropriations later be enacted.

"Second, the Department of Justice will take actions to enforce the criminal provisions of the Act in appropriate cases in the future when violations of the Antideficiency Act are alleged. This does not mean that departments and agencies, upon a lapse in appropriations, will be unable logistically to terminate functions in an orderly way. . . . [A]uthority may be inferred from the Antideficiency Act itself for federal officers to incur those minimal obligations necessary to closing their agencies." 4A Op. Off. Legal Counsel at 19, 20.

This opinion seemed to say that agencies had little choice but to lock up and go home. A second formal opinion, 43 Op. Att'y Gen. ___, 5 Op. Off. Legal Counsel 1 (1981), went into much more detail on possible exceptions and should be read in conjunction with the 1980 opinion.

As set forth in the 1981 Attorney General opinion, the exceptions fall into two broad categories. The first category is obligations "authorized by law." Within this category, there are four types of exceptions:

(1) Activities under funds which do not expire at the end of the fiscal year, i.e., multiple-year and no-year appropriations.[61]

(2) Activities authorized by statutes which expressly permit obligations in advance of appropriations.

(3) Activities "authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, the agency." To take the example given in the opinion, there will be cases where benefit payments under an

[61]This would also include certain revolving fund operations, but not those whose use requires affirmative authorization in annual appropriation acts. B-241730.2, February 14, 1991 (Government Printing Office revolving fund).

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entitlement program are funded from other than one-year appropriations, e.g., a trust fund, but the salaries of personnel who administer the program are funded by one-year money. As long as money for the benefit payments remains available, administration of the program is, by necessary implication, "authorized by law," unless the entitlement legislation or its legislative history provides otherwise or Congress takes affirmative measures to suspend or terminate the program.

(4) Obligations "necessarily incident to presidential initiatives undertaken within his constitutional powers." Example: the power to grant pardons and reprieves.[62]

The second broad category reflects the exceptions authorized under 31 U.S.C. § 1342—emergencies involving the safety of human life or the protection of property. The Attorney General suggested the following rules for interpreting the scope of this exception:

"First, there must be some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question."

5 Op. Off. Legal Counsel at 8. The Attorney General then cited the identical exception language in the deficiency apportionment prohibition of 31 U.S.C. § 1515, and noted that OMB followed a similar approach in granting deficiency apportionments over the years. Given the wide variations in agency activities, it would not be feasible to attempt an advance listing of functions or activities that might qualify under this exception. Accordingly, the Attorney General made the following recommendation:

"To erect the most solid foundation for the Executive Branch's practice in this regard, I would recommend that, in preparing contingency plans for periods of lapsed appropriations, each government department or agency provide for the Director of the Office of Management and Budget some written description, that could be transmitted to Congress, of what the head of the agency, assisted by its general counsel, considers to be the agency's emergency functions."

[62]The same rationale would apply to the legislative branch. B-241911, October 23, 1990 (non-decision letter).

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5 Op. Off. Legal Counsel at 11. Lest this approach be taken too far, Congress added the following sentence to 31 U.S.C. § 1342:

"As used in this section, the term 'emergencies involving the safety of human life or the protection of property' does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property."

Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 13213(b), 104 Stat. 1388, 1388-621 (1990). The conference report on the 1990 legislation explains the intent:

"The conference report also makes conforming changes to title 31 of the United States Code to make clear that . . . ongoing, regular operations of the Government cannot be sustained in the absence of appropriations, except in limited circumstances. These changes guard against what the conferees believe might be an overly broad interpretation of an opinion of the Attorney General issued on January 16, 1981, regarding the authority for the continuance of Government functions during the temporary lapse of appropriations, and affirm that the constitutional power of the purse resides with Congress."

H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 1170 (1990).

The Ninth Circuit Court of Appeals added to the list of exceptions, holding the suspension of the civil jury trial system for lack of funds unconstitutional. Armster v. United States District Court, 792 F.2d 1423 (9th Cir. 1986). Faced with the potential exhaustion of appropriations for juror fees, the Administrative Office of the United States Courts, at the direction of the Judicial Conference of the United States, had sent a memorandum to all district court judges advising that civil jury trials would have to be suspended until more money was available. Basing its holding on the Constitution and expressly declining to rule on the Antideficiency Act, the court held that a suspension for more than a "most minimal" time violated the seventh amendment. Id. at 1430. See also Hobson v. Brennan, 637 F. Supp. 173 (D.D.C. 1986).

Since the appropriation was not yet actually exhausted, and since there was still ample time for Congress to provide additional funds, the court noted that its decision did not amount to ordering Congress to appropriate money. The court noted, but did not address, the far more difficult question of what would happen if the appropriation became exhausted and Congress refused to appropriate additional funds. Id. at 1430–31 and 1431 n.14.

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Chapter 11 Federal Assistance: Guaranteed and Insured Loans

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This, then, is the basic framework. There are a number of exceptions to the Antideficiency Act which would permit certain activities to continue during a funding gap. For activities not covered by any of the exceptions, however, the agency must proceed with prompt and orderly termination or violate the Act and risk invocation of the criminal sanctions. A very brief restatement may be found in 6 Op. Off. Legal Counsel 555 (1982).

Within this framework, GAO and the Justice Department have addressed a number of specific problems agencies have encountered in coming to grips with funding gaps. For example, towards the end of FY 1982, the President vetoed a supplemental appropriations bill. As a result, the Defense Department did not have sufficient funds to meet the military payroll. The total payroll obligation consisted of (1) the take-home pay of the individuals, and (2) various items the employing agency was required to withhold and transfer to someone else, such as federal income tax and Social Security contributions. The Treasury Department published a change to its regulations permitting a temporary deferral of the due date for payment of the withheld items, and the Defense Department, relying on the "safety of human life or protection of property" exception, used the funds it had available to pay military personnel their full take-home pay. The Attorney General upheld the legality of this action. 43 Op. Att'y Gen.___, 6 Op. Off. Legal Counsel 27 (1982). The Comptroller General agreed, but questioned the blanket assumption that all military personnel fit within the exception. B-208985, October 5, 1982; B-208951, October 5, 1982. The extent to which this device might be available to civilian agencies would depend on (1) Treasury's willingness to grant a similar deferral, and (2) the extent to which the agency could legitimately invoke the emergency exception.

Additional cases dealing with funding gap problems are:

- Salaries of commissioners of Copyright Royalty Tribunal attach by virtue of their status as officers without regard to availability of funds. Salary obligation is therefore viewed as "authorized by law" for purposes of Antideficiency Act, and commissioners could be retroactively compensated for periods worked without pay during a funding gap. 61 Comp. Gen. 586 (1982).
- Richmond district office of Internal Revenue Service shut down for half a day in October 1986 due to a funding gap. Subsequent legislation authorized retroactive compensation of employees

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affected. GAO concluded that the legislation applied to intermittent as well as regular full-time employees, and held that the intermittent employees could be compensated in the form of administrative leave for time lost during the half-day furlough. B-233656, June 19, 1989.

- Witness who had been ordered to appear in federal court was stranded without money to return home when court did not convene due to funding gap. Cash disbursement to permit witness to return home or secure overnight lodging was held permissible since hardship circumstances indicated reasonable likelihood that safety of witness would be jeopardized. 5 Op. Off. Legal Counsel 429 (1981).

There are also a few cases addressing actions an agency has taken to forestall the effects of a funding gap. In 62 Comp. Gen. 1 (1982), the Merit Systems Protection Board, faced with a substantial cut in its appropriation, placed most of its employees on half-time, half-pay status in an attempt to stretch its appropriation through the end of the fiscal year. A subsequent supplemental appropriation provided the necessary operating funds. GAO advised that it was within the Board's discretion, assuming the availability of sufficient funds, to grant retroactive administrative leave to the employees who had been affected by the partial shutdown.

GAO reviewed another furlough plan in 64 Comp. Gen. 728 (1985). The Interstate Commerce Commission had determined that if it continued its normal rate of operations, it would exhaust its appropriation six weeks before the end of the fiscal year. To prevent this from happening, it furloughed its employees for one day per week. GAO found that the ICC's actions were in compliance with the Antideficiency Act. While the ICC was thus able to continue essential services, the price was financial hardship for its employees, plus "serious backlogs, missed deadlines and reduced efficiency." Id. at 732.

GAO has issued several reports on funding gaps. The first was Funding Gaps Jeopardize Federal Government Operations, PAD-81-31 (March 3, 1981). In that report, GAO noted the costly and disruptive effects of funding gaps, and recommended the enactment of permanent legislation to permit federal agencies to incur obligations, but not disburse funds, during a funding gap. In the second report, Continuing Resolutions and an Assessment of Automatic Funding Approaches, GAO/AFMD-86-16 (January 1986), GAO compared several possible options but this time made no specific recommendation. OMB

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had pointed out, and GAO agreed, that automatic funding legislation could have the undesirable effects of (1) reducing pressure on Congress to make timely funding decisions, and (2) permitting major portions of the government to operate for extended periods without action by either House of Congress or the President. The ideal solution, both agencies agreed, is the timely enactment of the regular appropriation bills.

GAO continues to support the concept of an automatic continuing resolution in a form that does not reduce the incentive to complete action on the regular appropriation bills. Managing the Cost of Government: Proposals for Reforming Federal Budgeting Practices, GAO/AFMD-90-1 (October 1989) at 28–29. A 1991 report analyzed the impact of a funding gap which occurred over the 1990 Columbus Day weekend and again renewed the recommendation for permanent legislation to, at a minimum, allow agencies to incur obligations to compensate employees during temporary funding gaps but not pay them until enactment of the appropriation. Government Shutdown: Permanent Funding Lapse Legislation Needed, GAO/GGD-91-76 (June 1991). The report stated:

"In our opinion, shutting down the government during temporary funding gaps is an inappropriate way to encourage compromise on the budget. Beyond being counterproductive from a financial standpoint, a shutdown disrupts government services. In addition, forcing agency managers to choose who will and will not be furloughed during these temporary funding lapses severely tests agency management's ability to treat its employees fairly." Id. at 9.

D. Supplemental and Deficiency Appropriations

A supplemental appropriation may be defined as "an act appropriating funds in addition to those in an annual appropriation act."[63] The purpose of a supplemental appropriation is to fund projects and activities not included in the budget request for the current annual appropriation and which cannot be postponed until the next regular appropriation. Factors generating the need for supplemental appropriations include the following:

- Enactment of legislation adding new or increased functions
- Unanticipated surge in workload
- Inflation higher than that projected for the fiscal year
- Emergency situations involving unforeseen expenditures

[63]GAO, A Glossary of Terms Used in the Federal Budget Process, PAD-81-27, at 79.

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- Pay increases not previously budgeted
- Items not included in regular appropriation for lack of timely authorization
- Poor program planning

There is a technical distinction between supplemental appropriations and deficiency appropriations.[64] However, Congress stopped enacting separate "deficiency appropriation acts" in the 1960s and now, supplemental appropriations and deficiency appropriations are combined in "supplemental appropriation acts." The rules governing the availability of supplemental and deficiency appropriations are essentially the same. Thus, the term "supplemental appropriation" for purposes of the following discussion should be construed as including both types.

A supplemental appropriation "supplements the original appropriation, partakes of its nature, and is subject to the same limitations as to the expenses for which it can be used as attach by law to the original appropriation" unless otherwise provided. 4 Comp. Dec. 61 (1897). See also 27 Comp. Gen. 96 (1947); 25 Comp. Gen. 601 (1946); 20 Comp. Gen. 769 (1941). This means that a supplemental appropriation is subject to the purpose and time limitations, plus any other applicable restrictions, of the appropriation being supplemented.

Thus, an appropriation made to supplement the regular annual appropriation of a given fiscal year is available beyond the expiration of that fiscal year only to liquidate obligations incurred within the fiscal year. The unobligated balance of a supplemental appropriation will expire at the end of the fiscal year in the same manner as the regular annual appropriation. See 27 Comp. Gen. 96 (1947); 4 Comp. Dec. 61 (1897); 3 Comp. Dec. 72 (1896). Of course, a supplemental appropriation, just like any other appropriation, can be made available until expended (no-year). E.g., 36 Comp. Gen. 526 (1957); B-72020, January 9, 1948.

[64]A deficiency appropriation is an appropriation made to pay obligations legally created but for which sufficient funds are not available in the appropriation originally made for that purpose. 27 Comp. Gen. 96 (1947); 25 Comp. Gen. 601, 604 (1946); 4 Comp. Dec. 61, 62 (1897). The need for deficiency appropriations often results from violations of the Antideficiency Act, and they can be made in the same fiscal year as the overobligated appropriation or in a later year. Since they serve essentially the same purpose as supplemental appropriations, the distinction had become recognized by the late 1950s as a "distinction without a difference." See 103 Cong. Rec. 6420 (1957).

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Unless otherwise provided, a restriction contained in an annual appropriation act will apply to funds provided in a supplemental appropriation act even though the restriction is not repeated in the supplemental. For example, a restriction in a foreign assistance appropriation act prohibiting the use of funds for assistance to certain countries would apply equally to funds provided in a supplemental appropriation for the same fiscal year. B-158575, February 24, 1966. Similarly, a provision in an annual appropriation act that "no part of any appropriation for the Bureau of Reclamation contained in this Act shall be used for the salaries and expenses" of certain officials who were not qualified engineers would apply as well to funds appropriated in supplemental appropriation acts for the same fiscal year. B-86056, May 11, 1949. The rule applies to supplemental authorizations as well as supplemental appropriations. B-106323, November 27, 1951. If a supplemental appropriation act includes a new appropriation which is separate and distinct from the appropriations being supplemented, restrictions contained in the original appropriation act will not apply to the new appropriation unless specifically provided. Id. The fiscal year limitations of the original appropriation, however, would still apply.

The rule that supplemental appropriations are subject to restrictions contained in the regular appropriation act being supplemented applies equally to specific dollar limitations. Thus, if a regular annual appropriation act specifies a maximum limitation for a particular object, either by using the words "not to exceed" or otherwise, a more general supplemental appropriation for the same fiscal year does not authorize an increase in that limitation. 19 Comp. Gen. 324 (1939); 4 Comp. Gen. 642 (1925); B-71583, February 20, 1948; B-66030, May 9, 1947. Naturally, this principle will not apply if the supplemental appropriation specifically provides for the object in question. 19 Comp. Gen. 832 (1940).

Restrictions appearing in a supplemental appropriation act may or may not reach back and apply to balances remaining in the original annual appropriation, depending on the precise statutory language used. Thus, without more, a restriction in a supplemental applicable by its terms to "this appropriation" would apply only to the supplemental funds. B-31546, January 12, 1943. See also 31 Comp. Gen. 543 (1952).

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At one time, supplemental appropriation acts specified that the funds were for the same objects and subject to the same limitations as the appropriations being supplemented. The (then) Bureau of the Budget wanted to delete this language pursuant to its mandate to eliminate unnecessary words in appropriations.[65] The Comptroller General agreed that the appropriation language was unnecessary, pointing out that these conditions would apply even without being explicitly stated in the supplemental appropriation acts themselves. B-13900, December 17, 1940.

In addition to supplementing prior appropriations, a supplemental appropriation act may make entirely new appropriations which are separate and distinct from those made by an earlier appropriation act. Where a supplemental appropriation act contains new legislation, whether permanent or temporary, the new legislation will take effect on the date the supplemental is enacted absent a clear intent to make it retroactive. 20 Comp. Gen. 769 (1941). In the cited decision, an appropriation included in a supplemental appropriation act enacted late in fiscal year 1941 which for the first time permitted payment of transportation expenses of certain military dependents was held effective on the date of enactment of the supplemental act and not on the first day of FY 1941.

A supplemental appropriation may also provide for a new object within a lump-sum appropriation. If the original appropriation was not available for that object, then the supplemental amounts to a new appropriation. For example, a FY 1957 supplemental appropriation for the Maritime Administration provided $18 million for a nuclear-powered merchant ship under the heading "ship construction." Funds for the nuclear-powered ship had been sought under the regular "ship construction" lump-sum appropriation for FY 1957, but had been denied. Under the circumstances, the Comptroller General found that the supplemental appropriation amounted to a specifically earmarked maximum for the vessel, and that the agency could not exceed the $18 million by using funds from the regular appropriation. 36 Comp. Gen. 526 (1957).

[65]Prior to the 1982 recodification of Title 31, the mandate was found in 31 U.S.C. § 623. The recodifiers thought those words themselves were unnecessary, and the concept is now included in the general mandate in 31 U.S.C. § 1104(a) to "use uniform terms" in requesting appropriations.

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E. Augmentation of Appropriations

1. The Augmentation Concept

As a general proposition, an agency may not augment its appropriations from outside sources without specific statutory authority. The prohibition against augmentation is a corollary of the separation of powers doctrine. When Congress makes an appropriation, it is also establishing an authorized program level. In other words, it is telling the agency that it cannot operate beyond the level that it can finance under its appropriation. To permit an agency to operate beyond this level with funds derived from some other source without specific congressional sanction would amount to a usurpation of the congressional prerogative. Restated, the objective of the rule against augmentation of appropriations is to prevent a government agency from undercutting the congressional power of the purse by circuitously exceeding the amount Congress has appropriated for that activity.

There is no statute which, in those precise terms, prohibits the augmentation of appropriated funds. The concept does nevertheless have an adequate statutory basis, although it must be derived from several separate enactments. Specifically:

- 31 U.S.C. § 3302(b), the "miscellaneous receipts" statute.
- 31 U.S.C. § 1301(a), restricting the use of appropriated funds to their intended purposes. Early decisions often based the augmentation prohibition on the combined effect of 31 U.S.C. §§ 3302(b) and 1301(a). See, e.g., 17 Comp. Dec. 712 (1911); 9 Comp. Dec. 174 (1902).
- 18 U.S.C. § 209, which prohibits the payment of, contribution to, or supplementation of the salary of a government officer or employee as compensation for his or her official duties from any source other than the government of the United States.

The augmentation concept manifests itself in a wide variety of contexts. One application is the prohibition against transfers between appropriations without specific statutory authority. An unauthorized transfer is an improper augmentation of the receiving appropriation. E.g., 23 Comp. Gen. 694 (1944); B-206668, March 15, 1982. In B-206668, for example, a department received a General Administration appropriation plus separate appropriations for the

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administration of its component bureaus. The unauthorized transfer of funds from the bureau appropriations to the General Administration appropriation was held to be an improper augmentation of the latter appropriation. As with the transfer prohibition itself, however, the augmentation rule has no application at the agency allotment level within the same appropriation account. 70 Comp. Gen. 601 (1991).

It should also be apparent that the augmentation rule is related to the concept of purpose availability. For example, a very early case pointed out that charging a general appropriation when a specific appropriation is exhausted not only violates 31 U.S.C. § 1301(a) by using the general appropriation for an unauthorized purpose, but also improperly augments the specific appropriation. [1] Bowler, First Comp. Dec. 257, 258 (1894). However, it is most closely related to the subject of this chapter—availability as to amount—because it has the effect of restricting executive spending to the amounts appropriated by Congress. In this respect, it is a logical, perhaps indispensable, complement to the Antideficiency Act.

For the most part, although the cases are not entirely consistent, GAO has distinguished between receipts of money and receipts of services, dealing with the former under the augmentation rule and the latter under the voluntary services prohibition (31 U.S.C. § 1342). For example, in B-13378, November 20, 1940, a private organization was willing to donate either funds or services. Since the agency lacked statutory authority to accept gifts, acceptance of a cash donation would improperly augment its appropriations. Acceptance of services was distinguished, however, and addressed under 31 U.S.C. § 1342. GAO drew the same distinction in B-125406, November 4, 1955. More recently, acceptance by the Federal Communications Commission of free space at industry trade shows was found not to constitute an augmentation of the Commission's appropriation because there had been no donation of funds. 63 Comp. Gen. 459 (1984).

In apparent conflict with these cases, however, is B-211079.2, January 2, 1987, which stated that, without statutory authority, an agency would improperly augment its appropriations by accepting the uncompensated services of "workfare" participants to do work which would normally be done by the agency with its own personnel and funds. Logic would seem to support the formulation in B-211079.2. Certainly, if I wash your car without charge or if I give you money to

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have it washed, the result is the same—the car gets washed and your own money is free to be used for something else. Be that as it may, the majority of the cases support limiting the augmentation rule to the receipt of money. In the final analysis, the distinction probably makes little practical difference. In view of 31 U.S.C. § 1342, limiting the augmentation rule to the receipt of funds does not mean that the rule can be negated by the unrestricted acceptance of services.

In a 1991 case, 70 Comp. Gen. 597, GAO concluded that the Interstate Commerce Commission would not improperly augment its appropriations by permitting private carriers to install computer equipment at the ICC headquarters, to facilitate access to electronically filed rate tariffs. Installation was viewed as a reasonable exercise of the ICC's statutory authority to prescribe the form and manner of tariff filing by those over whom the agency has regulatory authority. Somewhat similar in concept to the workfare case, however, the decision suggests that use of the equipment for other purposes, such as word processing by ICC staff, would be an improper augmentation, and advised the ICC to establish controls to prevent this.

2. Disposition of Moneys Received: Repayments and Miscellaneous Receipts

a. General Principles

(1) The "miscellaneous receipts" statute

A very important statute in the overall scheme of government fiscal operations is 31 U.S.C. § 3302(b), known as the "miscellaneous receipts" statute. Originally enacted in 1849 (9 Stat. 398), 31 U.S.C. § 3302(b) provides:

> "Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."

Penalties for violating 31 U.S.C. § 3302(b) are found in 31 U.S.C. § 3302(d), and include the possibility of removal from office. In addition, if funds which should have been deposited in the Treasury but were not are lost or stolen, there is the risk of personal liability. E.g., 20 Op. Att'y Gen. 24 (1891) (liability would attach where funds,

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which disbursing agent had placed in bank which was not an authorized depositary, were lost due to bank failure).

"It is difficult to see," said an early decision, "how a legislative prohibition could be more clearly expressed." 10 Comp. Gen. 382, 384 (1931). Simply stated, any money an agency receives from a source outside of the agency must be deposited into the Treasury. This means deposited into the general fund ("miscellaneous receipts") of the Treasury, not into the agency's own appropriations, even though the agency's appropriations may be technically still "in the Treasury" until the agency actually spends them.[66] The Comptroller of the Treasury explained the distinction in the following terms:

> "It [31 U.S.C. § 3302(b)] could hardly be made more comprehensive as to the moneys that are meant and these moneys are required to be paid 'into the Treasury.' This does not mean that the moneys are to be added to a fund that has been appropriated from the Treasury and may be in the Treasury or outside. [Emphasis in original.] It seems to me that it can only mean that they shall go into the general fund of the Treasury which is subject to any disposition which Congress might choose to make of it. This has been the holding of the accounting officers for many years. [Citations omitted.] If Congress intended that these moneys should be returned to the appropriation from which a similar amount had once been expended it could have been readily so stated, and it was not."

22 Comp. Dec. 379, 381 (1916). See also 5 Comp. Gen. 289 (1925).

The term "miscellaneous receipts" does not refer to any single account in the Treasury. Rather, it refers to a number of receipt accounts under the heading "General Fund." These are all listed in the Treasury Department's "Federal Account Symbols and Titles" publication.

[66]As a general proposition, an agency's appropriations do remain "in the Treasury" until needed for a valid purpose. Unless Congress expressly so provides, an agency may not have its appropriations paid over directly to it to be held pending disbursement. 21 Comp. Gen. 489 (1941).

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4. Liability of the Borrower 11-57
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(1) Loans closed prior to 1990 11-58
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In addition to 31 U.S.C. § 3302(b), several other statutes require that moneys received in various specific contexts be deposited as miscellaneous receipts.[67] Examples are:

- 7 U.S.C. §§ 2241, 2242, 2246, 2247 (proceeds from sale of various products by Secretary of Agriculture)
- 10 U.S.C. § 2667 (moneys received by the military departments from authorized leases)
- 16 U.S.C. § 499 (revenue from the national forests, such as timber sales, subject to the deductions specified in 16 U.S.C. §§ 500 and 501)
- 19 U.S.C. § 527 (customs fines, penalties, and forfeitures)
- 40 U.S.C. § 485(a) (proceeds from sale of surplus public property, except as provided in other subsections of section 485)[68]

Although it is preferable, it is not necessary that the statute use the words "miscellaneous receipts." A statute requiring the deposit of funds "into the Treasury of the United States" will be construed as meaning the general fund of the Treasury. 27 Comp. Dec. 1003 (1921).

To understand the significance of 31 U.S.C. § 3302(b) and related statutes, it is necessary to recall the provision in Article I, section 9 of the Constitution directing that "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law." Once money is deposited into a "miscellaneous receipts" account, it takes an appropriation to get it back out. E.g., 3 Comp. Gen. 296 (1923); 2 Comp. Gen. 599, 600 (1923); 13 Comp. Dec. 700, 703 (1907). Thus, the effect of 31 U.S.C. § 3302(b) is to ensure that the executive branch remains dependent upon the congressional appropriation process. Viewed from this perspective, 31 U.S.C. § 3302(b) emerges as another

[67]Several specific references to miscellaneous receipts in the pre-1982 version of Title 31 were deleted in the recodification because they were regarded as covered by the general prescription of the new section 3302. An example is the so-called User Charge Statute. The pre-recodification version, 31 U.S.C. § 483a, required fees to be deposited as miscellaneous receipts. The current version, 31 U.S.C. § 9701, omits the requirement because, as the Revision Note points out, it is covered by § 3302. Other examples are 31 U.S.C. §§ 485 and 487 (1976 ed.).

[68]Section 485 stems from the Federal Property and Administrative Services Act of 1949. Prior to this law, proceeds from the sale of public property were required to be deposited as miscellaneous receipts under the more general authority of what is now 31 U.S.C. § 3302(b). See Mammoth Oil Co. v. United States, 275 U.S. 13, 34 (1927); Pan American Petroleum and Transport Co. v. United States, 273 U.S. 456, 502 (1927). (These are the notorious "Teapot Dome" cases.) Property sales not governed by 40 U.S.C. § 485, such as the situation in 28 Comp. Gen. 38 (1948), for example, would remain subject to 31 U.S.C. § 3302.

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element in the statutory pattern by which Congress retains control of the public purse under the separation of powers doctrine. See 51 Comp. Gen. 506, 507 (1972); 11 Comp. Gen. 281, 283 (1932); 10 Comp. Gen. 382, 383 (1931) (the intent is that "all the public moneys shall go into the Treasury; appropriations then follow").

Accordingly, for an agency to retain and credit to its own appropriation moneys which it should have deposited into the general fund of the Treasury is an improper augmentation of the agency's appropriation. This applies even though the appropriation is a no-year appropriation. 46 Comp. Gen. 31 (1966). (No-year status relates to duration, not amount.)

Receipts in the form of "monetary credits" are treated for deposit and augmentation purposes the same as cash. 28 Comp. Gen. 38 (1948) (use by government of monetary credits received as payment for sale of excess electric power held unauthorized unless agency transfers corresponding amount from its appropriated funds to miscellaneous receipts). This will not apply, however, where it is clear that the appropriation or other legislation involved contemplates a different treatment. B-125127, February 14, 1956 (transfer to miscellaneous receipts not required where settlement of accounts was to be made on "net balance" basis). See also 62 Comp. Gen. 70, 74–75 (1982) (credit procedure which would differ from treatment of cash receipts recognized in legislative history).

(2) Exceptions

Exceptions to the "miscellaneous receipts" requirement fall into two broad categories, statutory and nonstatutory:

1. An agency may retain moneys it receives if it has statutory authority to do so. In other words, 31 U.S.C. § 3302(b) will not apply if there is specific statutory authority for the agency to retain the funds.

2. Receipts that qualify as "repayments" to an appropriation may be retained to the credit of that appropriation and are not required to be deposited into the General Fund. 6 Comp. Gen. 337 (1926); 5 Comp. Gen. 734, 736 (1926); B-138942-O.M., August 26, 1976.

These exceptions are embodied in Treasury Department-GAO Joint Regulation No. 1, § 2, reprinted at 30 Comp. Gen. 595 (1950), which

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defines authorized repayments in terms of two general classes, reimbursements and refunds, as follows:

"a. Reimbursements to appropriations which represent amounts collected from outside sources for commodities or services furnished, or to be furnished, and which by law may be credited directly to appropriations.

"b. Refunds to appropriations which represent amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed, including returns of authorized advances."

As used in the above definitions, the term "reimbursement" generally refers to situations in which retention by the agency is authorized by statute. The term "refund" embraces a category of mostly nonstatutory exceptions in which the receipt is directly related to, and is a direct reduction of, a previously recorded expenditure. Thus, the recovery of an erroneous payment or overpayment which was erroneous at the time it was made qualifies as a refund to the appropriation originally charged. E.g., B-139348, May 12, 1959 (utility overcharge refund); B-138942-O.M., August 26, 1976 (collections resulting from disallowances by GAO under the "Fly America Act"). Also, the return of an authorized advance, such as a travel advance, is a "refund."

At this point, an important distinction must be made. Moneys collected to reimburse the government for expenditures previously made are not automatically the same as "adjustments for previous amounts disbursed." Reimbursements must generally, absent statutory authority to the contrary, be deposited as miscellaneous receipts. The mere fact that the reimbursement is related to the prior expenditure—although this is an indispensable element of an authorized "refund"—is not in itself sufficient to remove the transaction from the scope of 31 U.S.C. § 3302(b). See, for example, 16 Comp. Gen. 195 (1936); 24 Comp. Dec. 694 (1918); 22 Comp. Dec. 253 (1915); B-45198, October 27, 1944. The controlling principles were stated as follows in two early decisions:

"The question as to whether moneys collected to reimburse the Government for expenditures previously made should be used to reimburse the appropriations from which the expenditures were made or should be covered into the general fund of the Treasury has often been before the accounting officers of the Treasury and this office, and it has been uniformly held that in the absence of an express provision in the statute to the contrary, such funds should be covered in as miscellaneous receipts." 5 Comp. Gen. 289, 290 (1925).

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"On the other hand, if the collection involves a refund or repayment of moneys paid from an appropriation in excess of what was actually due such refund has been held to be properly for credit to the appropriation originally charged . . . ." 5 Comp. Gen. 734, 736 (1926).

The key language in the above passage is "in excess of what was actually due." Apart from the more obvious situations—refunds of overpayments, erroneous payments, unused portions of authorized advances—the type of situation contemplated by the "adjustments for previous amounts disbursed" portion of the definition is illustrated by 23 Comp. Gen. 652 (1944). The Agriculture Department was authorized to enter into cooperative agreements with states for soil conservation projects. Some states were prohibited by state law from making advances and were limited to making reimbursements after the work was performed. In these cases, Agriculture initially put up the state's share and was later reimbursed. The Comptroller General held that Agriculture could credit the reimbursements to the appropriation charged for the project. The distinction between this type of situation and the simpler "related to a previous expenditure" situation in which the money must go to miscellaneous receipts lies in the nature of the agency's obligation. Here, Agriculture was not required to contribute the state's share; it could simply have foregone the projects in those states which could not advance the funds. This is different from a situation in which the agency is required to make a given expenditure in any event, subject to later reimbursement. In 23 Comp. Gen. 652, the agency made payments larger than it was required to make, knowing that the "excess" of what it paid over what it had to pay would (or at least was required to) be returned. See also 64 Comp. Gen. 431 (1985); 61 Comp. Gen. 537 (1982); B-69813, December 8, 1947; B-220911.2-O.M., April 13, 1988.

For other examples of refunds as that term is used in the Joint Regulation, see 69 Comp. Gen. 260 (1990) (recoveries under False Claims Act to the extent of reimbursing erroneous payments); 65 Comp. Gen. 600 (1986) (rebates from Travel Management Center contractors); 62 Comp. Gen. 70 (1982) (partial repayment of contribution to International Natural Rubber Organization occasioned by addition of new members); B-139348, May 12, 1959 (refund of overcharge by public utility); B-209650-O.M., July 20, 1983 (same).

A repayment is credited to the appropriation initially charged with the related expenditure, whether current or expired. If the appropriation is still current, then the funds remain available for further obligation

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within the time and purpose limits of the appropriation. However, if the appropriation has expired for obligational purposes (but has not yet been closed), the repayment must be credited to the expired account, not to current funds. See 23 Comp. Gen. 648 (1944); 6 Comp. Gen. 337 (1926); B-138942-O.M., August 26, 1976. If the repayment relates to an expired appropriation, crediting the repayment to current funds is an improper augmentation of the current appropriation unless authorized by statute. B-114088, April 29, 1953. These same principles apply to a refund in the form of a credit, such as a credit for utility overcharges. B-139348, May 12, 1959; B-209650-O.M., July 20, 1983.[69] Once an appropriation account has been closed in accordance with 31 U.S.C. §§ 1552(a) or 1555, repayments must be deposited as miscellaneous receipts regardless of how they would have been treated prior to closing. 31 U.S.C. § 1552(b), as amended by Pub. L. No. 101-510, § 1405 (1990).

Where funds are authorized to be credited to an appropriation, restrictions on the basic appropriation apply to the credits as well as to the amount originally appropriated. A-95083, June 18, 1938.

The fact that some particular reimbursement is authorized or even required by law is not, standing alone, sufficient to overcome 31 U.S.C. § 3302(b). E.g., 67 Comp. Gen. 443 (1988); 22 Comp. Dec. 60 (1915); 1 Comp. Dec. 568 (1895). The accounting for that reimbursement—whether it may be retained by the agency and, if so, how it is to be credited—will depend on the terms of the statute. Some statutes, for example, permit reimbursements to be credited to current appropriations regardless of which appropriation "earned" the reimbursement. As a general proposition, however, this practice, GAO has pointed out, diminishes congressional control. For further discussion of these concepts in the context of statutes applicable to the Defense Department, see GAO report entitled Reimbursements to Appropriations: Legislative Suggestions for Improved Congressional Control, FGMSD-75-52 (November 1, 1976).

As might be expected, there have been a great many decisions involving the "miscellaneous receipts" requirement. It is virtually impossible to draw further generalizations from the decisions other

[69]It should not be automatically assumed that every form of "credit" accruing to the government under a contract will qualify as a "refund" to the appropriation. See, e.g., A-51604, May 31, 1977.

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than to restate the basic rule: An agency must deposit into the General Fund of the Treasury any funds it receives from sources outside of the agency unless the receipt constitutes an authorized repayment or unless the agency has statutory authority to retain the funds for credit to its own appropriations.

(3) Timing of deposits

As to the timing of the deposit in the Treasury, 31 U.S.C. § 3302(b) says merely "as soon as practicable." There is another statute, however, now found at 31 U.S.C. § 3302(c), which provides in relevant part:

"(1) A person having custody or possession of public money, including a disbursing official having public money not for current expenditure, shall deposit the money without delay in the Treasury or with a depositary designated by the Secretary of the Treasury under law. Except as provided in paragraph (2), money required to be deposited pursuant to this subsection shall be deposited not later than the third day after the custodian receives the money. . . .

"(2) The Secretary of the Treasury may by regulation prescribe that a person having custody or possession of money required by this subsection to be deposited shall deposit such money during a period of time that is greater or lesser than the period of time specified by the second sentence of paragraph (1)."

This statute, formerly designated as Revised Statutes § 3621, originated in 1857 (11 Stat. 249). It was amended in 1896 (29 Stat. 179) to specify a deadline of 30 days. The time limit was reduced to three days by section 2652(b)(1) of the Deficit Reduction Act of 1984 (98 Stat. 494, 1152).

Treasury Department regulations provide:

"An agency will achieve same day deposit of monies. Where same day deposit is not cost-effective or is impracticable, next day deposit of monies must be achieved."

31 C.F.R. § 206.5(a)(1) (1991). However, receipts of less than $1,000 may be accumulated and deposited when the total reaches $1,000. Id. § 206.5(b)(1). Further procedural guidance is contained in I Treasury Financial Manual Chapter 5-4000.

As a general proposition, section 3302(c) and the Treasury regulations place an outer limit on what is "practicable" under section 3302(b). 11 Comp. Gen. 281, 283–84 (1932); 10 Comp. Gen. 382,

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385 (1931). The deadline applies to all receipts, including those to be credited to an appropriation account (which, of course, is "in the Treasury"), not just those for deposit as miscellaneous receipts. E.g., 10 Comp. Gen. 382 (1931).

(4) Money not received "for the Government"

As originally enacted, 31 U.S.C. § 3302(b) required deposit in the Treasury of moneys received "for the use of the United States" (9 Stat. 398). The 1982 recodification of Title 31 changed this language to moneys received "for the Government." The meaning, of course, is the same. Although the Comptroller General has not attempted to define this phrase in any detail, its scope, consistent with the statutory purpose, is broad. There is no distinction between money received for the use of the United States and money received for the use of a particular agency; such a distinction would largely nullify the statute.

As will be seen from the following case summaries, situations in which the "for the use of the United States" clause was the primary basis for the decision do not fall into any particular pattern.

In B-205901, May 19, 1982, a railroad had furnished 15,000 gallons of fuel to the Federal Bureau of Investigation for use in an undercover investigation of thefts of diesel fuel from the railroad. The railroad and FBI agreed that the fuel or the proceeds from its sale would be returned upon completion of the investigation. In view of 31 U.S.C. § 3302(b), the FBI then asked whether money generated from the sale of the fuel had to be deposited in the Treasury as miscellaneous receipts.

In one sense, it could be argued that the money was received "for the use of the United States," in that the FBI planned to use it as evidence. However, the Comptroller General pointed out, this is not the kind of receipt contemplated by 31 U.S.C. § 3302(b). Citing 33 Op. Att'y Gen. 316, 321 (1922), the decision concluded that "[f]unds are received for the use of the United States only if they are to be used to bear the expenses of the Government or to pay the obligations of the United States." Therefore, there was no legal barrier to returning the funds to the railroad.

In another case, GAO held that misconduct fines levied on Job Corps participants by the Labor Department need not be treated as money

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received for the use of the United States for purposes of 31 U.S.C. § 3302(b). The governing legislation specifically authorized "reductions of allowances" as a disciplinary measure. Labor felt that, in some cases, immediate collection of a cash fine from the individual's pocket would be more effective. Finding a legislative intent to confer broad discretion in matters of enrollee discipline, GAO agreed that the cash fines could be regarded as a form of disciplinary allowance reduction, and accordingly credited to Job Corps appropriations. B-130515, August 18, 1970. GAO followed the same approach in a similar question several years later in 65 Comp. Gen. 666, 671 (1986).

In 64 Comp. Gen. 217 (1985), a food service concession contract required the contractor to reserve a percentage of income to be used for the replacement of government-owned equipment. The reserve was found not to constitute money "for the Government" within the meaning of 31 U.S.C. § 3302(b). GAO distinguished an earlier decision, 35 Comp. Gen. 113 (1955), because the reserve here was merely a bookkeeping entry whereas the proposal in the 1955 case would have required the actual transfer of funds to a bank account. 64 Comp. Gen. at 219.

Two cases deal with fees paid to contractors. In B-166506, October 20, 1975, the Environmental Protection Agency had a number of contracts with private firms for the processing, storage, and retrieval of various kinds of recorded environmental information. Much of this information was of value to private parties and available under the Freedom of Information Act. Fees collected by an agency under FOIA must be deposited as miscellaneous receipts. Here, however, EPA proposed advising requesting parties to deal directly with the contractors, who would charge and retain fees for providing the data, although the requestors would retain the right to deal with EPA. GAO approved the proposal, concluding that fees charged by the contractors in these circumstances were not money received for the use of the United States. The decision cautioned, however, that the fees charged and retained by the contractors could not exceed the fees which EPA could charge if it provided the services directly. Thus, the fees could include the direct costs of document search and duplication, but not costs associated with developing the information. In 61 Comp. Gen. 285 (1982), GAO provided similar advice to the Federal Election Commission in connection with requests from the public for microfilm copies of its reports.

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Finally, several of the trust fund cases noted later in this chapter have employed the "not received for the use of the United States" rationale. E.g., 60 Comp. Gen. 15, 26–27 (1980); B-241744, May 31, 1991; B-166059, July 10, 1969; B-43894, September 11, 1944; B-24117-O.M., April 21, 1942.

b. Contract Matters

(1) Excess reprocurement costs

We use the term "excess reprocurement costs" here to include two factually different but conceptually related situations:

1. Original contractor defaults. Agency still needs the work done and contracts with someone else to complete the work, almost invariably at a cost higher than the original contract price. Original contractor is liable to the government for these "excess reprocurement costs."

2. Agency incurs additional expense to correct defective work by original contractor. Contractor is liable for the amount of this additional expense.

Disposition of amounts recovered in these situations has generated numerous cases. As a general proposition, the answer depends on the timing of the recovery in relation to the agency's reprocurement or corrective action and the status of the applicable appropriation. The objective is to avoid the depletion of currently available appropriations to get what the government was supposed to get under the original obligation. The rules were most recently summarized, and the case law reviewed, in 65 Comp. Gen. 838 (1986).

The rules are as follows:

1. If, at the time of the recovery from the original contractor, the agency has not yet incurred the additional expense, the agency may retain the amount recovered to the extent necessary to fund the reprocurement or corrective measures. The collection is credited to the appropriation obligated for the original contract, without regard to the status of that appropriation.

2. If, at the time of recovery from the original contractor, the agency has already incurred the additional reprocurement or corrective expense, the agency may retain the recovery for credit to the applicable appropriation, to the extent necessary to reimburse itself,

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if that appropriation is still available for obligation. If the appropriation is no longer available for obligation, the recovery should go to miscellaneous receipts.

These rules apply equally to default and defective work situations. To restate them from the perspective of the type of appropriation involved, if the appropriation used to fund the original contract is a no-year appropriation, the recovery may be credited to that appropriation regardless of whether the agency has or has not yet actually incurred the additional costs. If the appropriation is an annual or multiple-year appropriation and the agency has not yet incurred the additional costs as of the time of recovery, the agency may credit the collection to the appropriation regardless of whether it is still current or expired. In the case of an annual or multiple-year appropriation where the agency has already incurred the reprocurement or corrective costs as of the time of recovery, the agency may retain the recovery if the appropriation is still available for obligation, but not if it has expired. (Where the excess costs have already been incurred and the appropriation has expired at the time of recovery, depletion of currently available funds is clearly not a concern.)

Prior to 1983, there were essentially two separate lines of cases, one dealing with defective work and the other dealing with default. The defective work cases, if one examines the facts and types of appropriations involved, had always applied the principles stated above, although not necessarily in those terms. Some illustrative cases are summarized below:

- 8 Comp. Gen. 103 (1928). Supplies delivered by a contractor were found upon inspection to be unsatisfactory for use, that is, not in accordance with the terms of the contract. It was held that a refund by the contractor could be credited to the appropriation originally charged, on the theory that the payment was improperly made from the appropriation in the first instance. The appropriation involved was an annual appropriation, and the corrective costs had not been paid as of the time of the recovery.
- 34 Comp. Gen. 577 (1955). An amount recovered from a contractor's surety because the work failed to meet specifications after the contractor received final payment was regarded as in the nature of a reduction in contract price representing the value of unfinished work, and therefore amounted to the recovery of an unauthorized overpayment. As such, it could be deposited in the appropriation

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charged with the contract and expended for completion of the work. The appropriation involved was a no-year appropriation.

- 44 Comp. Gen. 623 (1965). Recovery for defective work could be credited to an expired annual appropriation. Since the corrective work had not yet been undertaken, the funds would remain available for that corrective work under the "replacement contract" theory.
- 65 Comp. Gen. 838 (1986). Recovery for faulty design could be used for necessary corrective work. The appropriation involved was a multiple-year appropriation still available for obligation at the time of the recovery.

In the default situation, the earliest decisions held that the agency could retain excess reprocurement costs recovered from the defaulting contractor. Consistent with the defective work cases, the early default cases involved situations in which the recovered funds would still be available for obligation, either because the appropriation used for the contract was still available or under the replacement contract theory. 21 Comp. Dec. 107 (1914) (expired annual appropriation, reprocurement not yet effected); 16 Comp. Dec. 384 (1909) (no-year appropriation). However, the decisions inexplicably changed course, starting apparently with 23 Comp. Dec. 352 (1916), and for several decades thereafter consistently held, without attempting much further analysis, that excess reprocurement costs recovered from defaulting contractors had to be deposited as miscellaneous receipts.[70]

The two lines of cases met in a 1983 decision, 62 Comp. Gen. 678. That decision recognized that there was no real reason to distinguish between default and defective work for purposes of accounting for recoveries. The rules should be the same in both situations. Accordingly, 62 Comp. Gen. 678 modified the prior default cases and held, in effect, that the rules previously applied in the defective work cases should be applied in the future to all excess reprocurement cost cases "without reference to the event that gave rise to the need for the replacement contract—that is, whether occasioned by a default or by defective workmanship." Id. at 681. The decision went on to hold that the Bureau of Prisons could retain damages recovered from a

[70]E.g., 46 Comp. Gen. 554 (1966); 40 Comp. Gen. 590 (1961); 27 Comp. Gen. 117 (1947); 14 Comp. Gen. 729 (1935); 14 Comp. Gen. 106 (1934); 10 Comp. Gen. 510 (1931); 8 Comp. Gen. 284 (1928); 26 Comp. Dec. 877 (1920); A-26073, March 20, 1929, aff'd upon reconsideration, A-26073, August 8, 1929; A-24614, June 20, 1929. The rule was applied regardless of whether the funds were actually collected or merely withheld from contract payments due. 52 Comp. Gen. 45 (1972).

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contractor charged with defective work, for credit to the appropriation which had been used to replace the defective work. Although not noted in the decision, the appropriation to be credited was a no-year appropriation. 65 Comp. Gen. 838, 841 n.3 (1986).

The decision added another new element: The rules would apply even where the recovery, by virtue of factors such as inflation or underbidding, exceeds the amount paid to the original contractor. Of course, the reason behind permitting retention of the funds is to enable the agency to get what it originally bargained for, not for the agency to make a "profit" on the transaction. Thus, any amounts recovered over and above what is actually necessary to fund the reprocurement or corrective work (or to reimburse the appropriation charged with that work, if it is still currently available) must be deposited in the Treasury as miscellaneous receipts. 62 Comp. Gen. at 683.

It follows logically from what has been said that the proceeds of a forfeited performance bond should be available to the contracting agency if and to the extent necessary to fund a replacement contract to complete the work of the original contract, and this was the holding in 64 Comp. Gen. 625 (1985). It had been held in an earlier case that, under a contract for the exchange of government property for private property, when the government delivers its property but the contractor defaults, moneys received from a surety under a performance bond, presumably representing the value of the government property delivered, could be regarded as in recoupment of the "advance payment" and used for a replacement purchase. 27 Comp. Gen. 117 (1947).[71]

In 65 Comp. Gen. 838 (1986), GAO reviewed the evolution of the case law on excess reprocurement costs, restated the rules, and pointed out that in no case had GAO approved agency retention of recovered funds where the reprocurement or corrective costs "had already been paid from an appropriation which, at the time of the recovery, was no longer available for obligation." Id. at 841 n.5.

Before leaving the subject, it may be helpful to once again summarize the rules in a slightly different manner. From the perspective of

[71]27 Comp. Gen. 117 went on to state that any moneys recovered from the contractor over and above the amount of the performance bond had to go to miscellaneous receipts. It was this portion of the decision that was modified by 62 Comp. Gen. 678.

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appropriation status and the timing of agency action, the fact patterns may be categorized as follows:

1. No-year appropriation; recovery made before agency incurs additional costs.

2. No-year appropriation; additional costs incurred prior to recovery.

3. Annual or multiple-year appropriation; recovery made before agency incurs additional costs; appropriation still current at time of recovery.

4. Annual or multiple-year appropriation; additional costs incurred prior to recovery; appropriation still current at time of recovery.

5. Annual or multiple-year appropriation; recovery made before agency incurs additional costs; appropriation expired at time of recovery.

6. Annual or multiple-year appropriation; additional costs incurred prior to recovery; appropriation expired at time of recovery.

In the first five situations, the agency may retain amounts recovered to the extent necessary to fund the reprocurement or corrective work, or to reimburse itself for costs already incurred. In the sixth situation, the recovery goes to the Treasury as miscellaneous receipts.[72]

(2) Other contract situations

The traditional rule for liquidated damages is that they may be retained in the appropriation originally charged. 44 Comp. Gen. 623 (1965); 23 Comp. Gen. 365 (1943); 9 Comp. Gen. 398 (1930); 18 Comp. Dec. 430 (1911). See also B-237421, September 11, 1991. The rationale for retaining liquidated damages in the appropriation account rather than depositing them in the Treasury as miscellaneous receipts is that they effect an authorized reduction in the price of the individual contract concerned, and also that this would make them available for return to the contractor should the liability subsequently

[72]It is entirely possible that some of the default cases modified by 62 Comp. Gen. 678 involved this precise situation, in which event the result in those cases would still be correct. However, since this cannot be known with certainty from the text of the decisions alone, it is best to disregard them.

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be relieved. However, where this rationale does not apply—for example, in a case where the contractor did nothing and therefore earned nothing and the Comptroller General had denied the remission of liquidated damages under 41 U.S.C. § 256a—the liquidated damages should be deposited in the Treasury as miscellaneous receipts. 46 Comp. Gen. 554 (1966).

In some liquidated damage situations, the agency will not have incurred any additional reprocurement or corrective costs. This might happen in a case where an agency received liquidated damages for delay in performance but the contractor's performance, though late, was otherwise satisfactory. In other cases, however, the agency will incur additional costs. In the situation described in 46 Comp. Gen. 554, for example, the agency would presumably need to reprocure, in which event it could retain the liquidated damages in accordance with the rules for excess reprocurement costs just discussed. 64 Comp. Gen. 625 (1985) (modifying 46 Comp. Gen. 554 to that extent). Consistent with these rules, liquidated damages credited to an expired appropriation may not be used for work which is not part of a legitimate replacement contract. B-242274, August 27, 1991.

Compensation paid by an insurance company for damage to government property caused by a contractor may not be used to augment the agency's appropriation used for the contract, absent specific statutory authority, and the moneys, whether paid to the government or to the contractor, are for deposit into the Treasury as miscellaneous receipts. 67 Comp. Gen. 129 (1987); 48 Comp. Gen. 209 (1968). The retention of insurance proceeds was also involved in B-93322, April 19, 1950, an apparent exception based on the particular circumstances involved. In that case, the General Services Administration had entered into a contract for renovation of the Executive Mansion. The contract required the contractor to carry adequate fire and hazard insurance. The renovation project had been undertaken under a specific appropriation which was enough for the initial cost but would not have been sufficient for repairs in the event of a fire or other hazard. Since the renovation was a "particular job of temporary nature," and since a contrary result would defeat the purpose of the appropriation, the Comptroller General held that insurance proceeds received in the event a covered risk occurred could be retained and used for the cost of repairs.

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Somewhat similarly, it was held in 39 Comp. Gen. 647 (1960) that to require amounts refunded to the United States for contract violations under the Great Plains Conservation Program to be deposited as miscellaneous receipts would deplete the appropriation to that extent and would thereby defeat the statutory purpose. However, the exception was permitted only for the refund of "unearned payments," that is, violations which amounted to a failure of consideration such that the payments did not result in any benefit to the program. Refunds of "earned payments," that is, where the payments had resulted in some benefit to the program, would have to go to miscellaneous receipts since their retention would constitute an improper augmentation. In recognizing the limited exception, the Comptroller General noted that the terms of 31 U.S.C. § 3302(b) "are general in nature and should receive a reasonable construction with respect to any particular form of income or receipt." Id. at 649. The decision also noted that the "contracts" involved were not procurement contracts but were more in the nature of grants. Id.

Refunds received by the government under a price redetermination clause may be credited to the appropriation from which the contract was funded. 33 Comp. Gen. 176 (1953). However, if the refund is entirely voluntary on the part of the contractor, the money goes to miscellaneous receipts. 24 Comp. Gen. 847, 851 (1945).

Refunds received by the government under a warranty clause may be considered as an adjustment in the contract price and therefore credited to the appropriation originally charged under the contract. 34 Comp. Gen. 145 (1954). The same result applies where the warranty refund is in the form of a replacement purchase credit. 27 Comp. Gen. 384 (1948). (These cases are conceptually related to the "defective work" cases discussed earlier, and the result follows logically from the result in those cases.)

A different type of credit was discussed in 53 Comp. Gen. 872 (1974). It was proposed to require prospective timber sale purchasers to make certain property surveys, the cost of which would be credited against the sale price. The surveys had previously been financed from Forest Service appropriations. GAO viewed the proposal as an unauthorized augmentation of those appropriations. Similarly, the Department of Agriculture could not apply savings in the form of credits accrued under a contract for the handling of food stamp sales receipts to offset the cost of a separate data collection contract, even

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though both contracts were necessary to the same program objective. A-51604, May 31, 1977.

The rule that money received by the government under a contract is governed by 31 U.S.C. § 3302(b) unless one of the established exceptions applies is underscored by the case of Reeve Aleutian Airways, Inc. v. Rice, 789 F. Supp. 417 (D.D.C. 1992). The Air Force had awarded a contract to a commercial air carrier to provide passenger and cargo service to a remote base in the Aleutian Islands. The carrier's revenue would be derived almost entirely from fares either purchased directly or reimbursed by the United States (military personnel, their dependents, and government contractor employees). The contract granted the carrier landing rights and ground support at the base, and the contractor agreed to return a specified portion of its receipts as a "concession fee," to be deposited in the base morale, welfare, and recreation fund. "[I]nnovation consistent with the law should be encouraged," said the court, "but this transaction so plainly violates the express terms of 31 U.S.C. § 3302(b) . . . that it should be nipped in the bud." Id. at 421. Since there was no authority to divert the funds from the Treasury to the welfare fund, and since the diversion would actually increase the cost to the government, the court found the contract award to be arbitrary and capricious, and declared the contract "null, void and of no force and effect." Id. at 423.

A similar GAO decision is 35 Comp. Gen. 113 (1955), holding that a provision in a food services contract under which a portion of gross receipts would be set aside in a reserve fund for the repair and replacement of government-owned equipment was contrary to 31 U.S.C. § 3302(b).

If a contract requires the government to pay a deposit on containers and provides for a refund by the contractor of the deposit upon return of the empty containers by the government, the refund may be credited to the appropriation from which the deposit was paid. B-8121, January 30, 1940. However, if the contract establishes a time limit for the government to return the empty containers and provides further that thereafter title to the containers shall be deemed to pass to the government, a refund received from the contractor after expiration of the time limit is treated as a sale of surplus property and must be deposited as miscellaneous receipts. 23 Comp. Gen. 462 (1943).

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c. Damage to Government Property and Other Tort Liability

As a general proposition, amounts recovered by the government for loss or damage to government property cannot be credited to the appropriation available to repair or replace the property, but must be deposited in the Treasury as miscellaneous receipts. 64 Comp. Gen. 431 (1985) (damage to government motor vehicle); 26 Comp. Gen. 618 (1947) (recovery from insurance company for damage to government vehicle); 3 Comp. Gen. 808 (1924) (loss of Coast Guard vessel resulting from collision).[73] While the recovery may well be "related" to a prior expenditure for repair of the property, it is not an "adjustment" of a previous disbursement for purposes of Treasury-GAO Joint Regulation No. 1. 64 Comp. Gen. 431, 433 (1985).

There are statutory exceptions. One involves property purchased and maintained by the General Services Administration from the General Supply Fund, a revolving fund established by 40 U.S.C. § 756. By virtue of 40 U.S.C. § 756(c), recoveries for loss or damage to General Supply Fund property are credited to the General Supply Fund. This includes recoveries from other federal agencies for damage to GSA motor pool vehicles. 59 Comp. Gen. 515 (1980).

Another is 16 U.S.C. § 579c, which authorizes the Forest Service to retain the proceeds of bond forfeitures resulting from failure to complete performance under a permit or timber sale contract, and money received from a judgment, compromise, or settlement of a government claim for present or potential damage to lands or improvements under the administration of the Forest Service. If the receipt exceeds the amount necessary to complete the required work or make the needed repairs, the excess must be transferred to miscellaneous receipts. This provision is discussed in 67 Comp. Gen. 276 (1988), holding that the proceeds of a bond forfeiture could be used to reimburse a general Forest Service appropriation which had been charged with the cost of repairs.

In addition, where an agency has statutory authority to retain income derived from the use or sale of certain property, and the governing legislation shows an intent for the particular program or activity to be self-sustaining, the agency may retain recoveries for loss or damage to that property. 24 Comp. Gen. 847 (1945); 22 Comp. Gen. 1133

[73]Further cases for this proposition are 35 Comp. Gen. 393 (1956); 28 Comp. Gen. 476 (1949); 15 Comp. Gen. 683 (1936); 5 Comp. Gen. 928 (1926); 20 Comp. Dec. 349 (1913); 14 Comp. Dec. 87 (1907); 9 Comp. Dec. 174 (1902).

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(1943). While the two cited decisions involve recoveries from insurers, the principle applies equally to recoveries directly from the party responsible for the loss or damage. 27 Comp. Gen. 352 (1947).

There is also a nonstatutory exception. Where a private party responsible for loss or damage to government property agrees to replace it in kind or to have it repaired to the satisfaction of the proper government officials and to make payment directly to the party making the repairs, the arrangement is permissible and the agency is not required to transfer an amount equal to the cost of the repair or replacement to miscellaneous receipts.[74] The principle was first recognized in 14 Comp. Dec. 310 (1907), and has been followed, either explicitly or implicitly, ever since. E.g., 67 Comp. Gen. 510 (1988); B-87636, August 4, 1949; B-128209-O.M., July 12, 1956. The exception applies even though the money would have to go to miscellaneous receipts if the responsible party paid it directly to the government. 67 Comp. Gen. at 511; B-87636, August 4, 1949. For an apparent "exception to the exception" based on the specific legislation involved, see 28 Comp. Gen. 476 (1949).

If one regards 14 Comp. Dec. 310 from the standpoint of pure logic, it appears difficult to support. It is, in fact, one of the extremely few instances in which the decisions have sanctioned doing indirectly something that cannot be done directly. Be that as it may, the exception has been followed since 1907 and appears to be firmly entrenched. Thus, for example, in B-128209-O.M., July 12, 1956, GAO addressed the relationship between 14 Comp. Dec. 310 and 28 Comp. Gen. 476, stating that "14 Comp. Dec. 310 has been followed for almost 50 years and we have never expressed disagreement with the conclusion reached therein." The exception does not disturb the rule itself; it is "nothing more than an exception that may be advantageous if the timing of repair and payment can be made to coincide." 64 Comp. Gen. 431, 433 (1985).

The rule that recoveries for loss or damage to government property must be deposited as miscellaneous receipts applies equally to recoveries from common carriers for government property lost or

[74]A 1943 case suggested a different result, i.e., the agency might have to transfer the value of the repairs to miscellaneous receipts, if the agency had a specific appropriation for repair or replacement of the property in question. 22 Comp. Gen. 1133, 1137 (1943). GAO indicated in 67 Comp. Gen. 510 (1988) that this would not be the case, although 67 Comp. Gen. 510 did not deal with a specific repair appropriation, which would appear to be a rare case in any event.

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damaged in transit. 46 Comp. Gen. 31 (1966). See also 28 Comp. Gen. 666 (1949); 2 Comp. Gen. 599 (1923); 22 Comp. Dec. 703 (1916); 22 Comp. Dec. 379 (1916). There is a narrow exception in cases where the freight bill on the shipment of the property lost or damaged exceeds the amounts paid for repairs and both are payable from the same appropriation, in which event the bill is reduced and the amount deducted to cover the cost of repairs is allowed to remain to the credit of the appropriation. 21 Comp. Dec. 632 (1915), as amplified in 8 Comp. Gen. 615 (1929) and 28 Comp. Gen. 666 (1949). The rule and exception are discussed in 46 Comp. Gen. 31 and in B-4494, September 19, 1939. Also, as with receipts in general, the miscellaneous receipts requirement does not apply if the appropriation or fund involved is made reimbursable by statute. 46 Comp. Gen. at 33.

The requirement to deposit as miscellaneous receipts recoveries from carriers for property lost or damaged in transit does not apply to operating funds of the National Credit Union Administration since, even though the funds are treated as appropriated funds for most other purposes, they are technically not direct appropriations but fees and assessments collected from member credit unions. 50 Comp. Gen. 545 (1971).

While the preceding cases have all involved loss or damage to property, the United States may also recover amounts resulting from tortious injury to persons, for example, under the so-called Federal Medical Care Recovery Act, 42 U.S.C. § 2651. See, e.g., 57 Comp. Gen. 781 (1978). Such recoveries must be deposited in the Treasury as miscellaneous receipts. 52 Comp. Gen. 125 (1972).

A case involving the Military Personnel and Civilian Employees Claims Act of 1964, 31 U.S.C. § 3721, provides a good illustration of an adjustment to a prior disbursement, i.e., an authorized refund which the agency may retain for credit to the disbursing appropriation. The statute authorizes agencies to pay claims by their employees for personal property lost or damaged incident to service. In cases where there may be third-party liability (e.g., an insurer or carrier), the agency has a choice. It may pay the entire amount of the employee's claim and be subrogated to the employee's claim against the third party, or it may require the employee to pursue the third-party claim first. If the agency chooses the former option, it may retain any third-party recoveries for credit to the appropriation used to pay the

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claim. 61 Comp. Gen. 537 (1982). An agency adopting the former policy, the decision stated—

> "will be making payments in some cases that are, strictly speaking, higher than are required. In such cases, it is entirely legitimate to treat a third-party recovery as a reduction in the amount previously disbursed rather than as an augmentation of the agency's appropriation." Id. at 540.

A comparison of 61 Comp. Gen. 537 with the Federal Medical Care Recovery Act case, 52 Comp. Gen. 125, illustrates the distinction previously discussed with respect to applying the definition of "refund"— 61 Comp. Gen. 537 is an example of an adjustment to an amount previously disbursed; 52 Comp. Gen. 125 illustrates a collection which must go to miscellaneous receipts even though it is "related" to a prior expenditure. See 61 Comp. Gen. at 539—40; 64 Comp. Gen. 431, 432—33 (1985). In this respect, the situation in 61 Comp. Gen. 537 is very similar to the situation in 23 Comp. Gen. 652 (1944), described in our earlier discussion.

d. Fees and Commissions

Fees and commissions paid either to the government itself or to a government employee for activities relating to official duties must be deposited in the Treasury as miscellaneous receipts absent statutory authority to the contrary.

In the case of fees paid directly to the government, the result is a simple application of 31 U.S.C. § 3302(b). Thus, the following items, it has been held, must be deposited as miscellaneous receipts:

- Commissions from the use of pay telephones in government buildings. 59 Comp. Gen. 213 (1980); 44 Comp. Gen. 449 (1965); 23 Comp. Gen. 873 (1944); 14 Comp. Gen. 203 (1934); 5 Comp. Gen. 354 (1925); B-4906, October 11, 1951.
- Fees and related reimbursable incidental expenses paid to the Department of Agriculture in connection with the investigation of and issuance of certifications of quality on certain farm products. 2 Comp. Gen. 677 (1923).
- Fees collected under the Freedom of Information Act. 4B Op. Off. Legal Counsel 684, 687 (1980).

Of course, an agency may retain fees and use them to offset operating costs if and to the extent expressly authorized by statute. Examples are 28 U.S.C. § 1921(c) (fees collected by the United States Marshals

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Chapter 6

Availability of Appropriations: Amount

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Service for service of civil process and judicial execution seizures and sales, to the extent provided in advance in appropriation acts); 28 U.S.C. § 1931 (specified portions of filing fees paid to the clerk of court, to the extent provided in annual appropriation acts). The relevant legislation will determine precisely what may be retained. E.g., 34 Comp. Gen. 58 (1954).

Training fees illustrate both the general rule and statutory exceptions. Under the Government Employees Training Act, an agency may extend its training programs to employees of other federal agencies on a reimbursable or nonreimbursable basis. 5 U.S.C. § 4104. The agency may, unless it receives appropriations for interagency training, retain the fees. B-241269, February 28, 1991 (non-decision letter). Similarly, an agency may admit state and local government employees to its training programs, and may charge a fee or waive it in whole or in part. Fees received are credited to the appropriation to which the training costs were charged. 42 U.S.C. § 4742. The agency may also admit other private persons to its training programs on a space-available and fee basis, but unless it has statutory authority to the contrary, must deposit the fees as miscellaneous receipts. 42 Comp. Gen. 673 (1963); B-241269, February 28, 1991; B-190244, November 28, 1977.

Parking fees assessed by federal agencies under the authority of 40 U.S.C. § 490(k) are to be credited to the appropriation or fund originally charged for providing the service. However, any amounts collected in excess of the actual cost of providing the service must be deposited as miscellaneous receipts. 55 Comp. Gen. 897 (1976). Parking fees may be authorized by statutes other than 40 U.S.C. § 490(k), in which event the terms of the particular statute must be examined. For example, parking fees at Department of Veterans Affairs medical facilities are addressed in 38 U.S.C. § 5009. Originally, the fees had to go to miscellaneous receipts under 31 U.S.C. § 3302(b). 45 Comp. Gen. 27 (1965). However, 38 U.S.C. § 5009 was later amended and the fees now go into a revolving fund.

Income derived from the installation and operation of vending machines on government-owned or controlled property is generally for deposit as miscellaneous receipts. 32 Comp. Gen. 124 (1952); A-44022, August 14, 1944. However, there are two major exceptions. First, if the contractual arrangement with the vendor is made by an employee association with administrative approval, the employee

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group may retain the income. 32 Comp. Gen. 282 (1952); B-112840, February 2, 1953. Second, under the Randolph-Sheppard Act, 20 U.S.C. § 107d-3, vending machine income in certain cases must go to blind licensee-operators or state agencies for the blind. See B-238937, March 22, 1991 and B-199132, September 10, 1980 (non-decision letters).

For purposes of determining the disposition of amounts collected, there is a distinction between donations, which are voluntary, and fees and assessments, which are not. Statutory authority to accept gifts and donations does not include fees and assessments exacted involuntarily. 25 Comp. Gen. 637, 639 (1946); B-195492, March 18, 1980; B-225834.2-O.M., April 11, 1988. This is more of a presumption than a rule, however, and specific circumstances may warrant different treatment. E.g., B-232482, June 4, 1990 (not improper for Commerce Department to treat certain registration fees as "contributions" within scope of 22 U.S.C. § 2455(f); interpretation ratified first by appropriation, later by specific legislation).

Fees paid to individual employees require a two-step analysis. The first step is the principle that the earnings of a government employee in excess of the regular compensation gained in the course of or in connection with his or her services belong to the government and not to the individual employee. The second step is then the application of 31 U.S.C. § 3302(b). Using this analysis, GAO has held that fees were required to be deposited as miscellaneous receipts in the following instances:

- An honorarium paid to an Army officer for delivering a lecture at a university in his capacity as an officer of the United States. 37 Comp. Gen. 29 (1957).
- Fees collected from private individuals by government employees for their services as notaries public. 16 Comp. Gen. 306 (1936).
- Witness fees and any allowances for travel and subsistence, over and above actual expenses, paid to federal employees for testifying in certain state court proceedings. 36 Comp. Gen. 591 (1957); 23 Comp. Gen. 628 (1944); 15 Comp. Gen. 196 (1935); B-160343, November 23, 1966.

Applying the same analysis, a proposal under which a nonprofit corporation funded entirely by private industry would pay monthly "bonuses" to Army enlistees to encourage enlistment and satisfactory

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service, even if otherwise proper, could not be implemented without specific statutory authority because the payments could not be retained by the enlistees but would have to be deposited in the Treasury under 31 U.S.C. § 3302(b). B-200013, April 15, 1981.

e. Economy Act

The Economy Act, 31 U.S.C. §§ 1535 and 1536, authorizes the inter- and intra-departmental furnishing of materials or performance of work or services on a reimbursable basis. It is a statutory exception to 31 U.S.C. § 3302(b), authorizing a performing agency to credit reimbursements to the appropriation or fund charged in executing its performance. However, this is not mandatory. The performing agency may, at its discretion, deposit reimbursements for both direct and indirect costs in the Treasury as miscellaneous receipts. 57 Comp. Gen. 674, 685 (1978), modifying 56 Comp. Gen. 275 (1977).

There is one area in which the agency has no discretion. Reimbursements may not be credited to an appropriation against which no charges have been made in executing the order. This would constitute an improper augmentation. Such reimbursements must therefore be deposited into the General Fund as miscellaneous receipts. An example would be depreciation in some cases. 57 Comp. Gen. at 685–86.

f. Setoff

Collections by setoff may be factually distinguishable from direct collections, but the effect on the appropriation is the same. If crediting an agency appropriation with a direct collection in a particular instance would result in an improper augmentation, then retaining an amount collected by setoff would equally constitute an improper augmentation. Thus, setoffs must be treated the same as direct collections. If an agency could retain a direct collection in a given situation, it can retain the setoff. However, if a direct collection would have to go to miscellaneous receipts, the setoff also has to go to miscellaneous receipts. In this latter situation, the agency must take the amount of the setoff from its own appropriation and transfer it to the General Fund of the Treasury. E.g., 2 Comp. Gen. 599 (1923); 20 Comp. Dec. 349 (1913).

A hypothetical situation will illustrate. Suppose a contractor negligently damages a piece of government equipment and becomes liable to the government in the amount of $500. Suppose further that an employee of the contracting agency, in a separate transaction,

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negligently damages property of the contractor. The contractor files a claim under the Federal Tort Claims Act and the agency settles the claim for $600. Neither party disputes the validity or amount of either claim. The agency sets the contract debt off against the tort claim and makes a net payment to the contractor of $100. However, if the agency stops here, it has augmented its appropriation to the tune of $500. If the tort claim had never occurred and the agency collected the $500 from the contractor, the $500 would have to go to miscellaneous receipts (see "Contract Matters," above). Conversely, if the contract claim did not exist, the agency would end up paying $600 on the tort claim. Now, combining both claims, if both were paid without setoff, the net result would be that the agency is out $600. The setoff cannot operate to put the agency's appropriation in a better position than it would have been in had the agency and contractor simply exchanged checks. Thus, in addition to paying the contractor $100, the agency must deposit $500 from its own appropriation into the Treasury as miscellaneous receipts.

A different type of "setoff" occurs under the Back Pay Act, 5 U.S.C. § 5596. When an agency pays an employee back pay under the Back Pay Act, it must deduct amounts the employee earned through other employment during the time period in question. The agency simply pays the net amount. There is no requirement to transfer the amount of the deduction for outside earnings to miscellaneous receipts. 31 Comp. Gen. 318 (1952). The deduction for outside earnings is not really a collection; it is merely part of the statutory formula for determining the amount of the payment.

g. Revolving Funds

A major exception to the requirements of 31 U.S.C. § 3302(b) is the revolving fund. Under the revolving fund concept, receipts are credited directly to the fund and are available, without further appropriation by Congress (unless the legislation specifies otherwise), for expenditures to carry out the purposes of the fund. An agency must have statutory authority to establish a revolving fund. The enabling statute will specify the receipts that may be credited to the fund and the purposes for which they may be expended. An example is the General Services Administration's "General Supply Fund," noted above under "Damage to Government Property." Receipts that are properly for deposit to a revolving fund are, obviously, exempt from the miscellaneous receipts requirement of § 3302(b). E.g., 33 Op. Att'y Gen. 316 (1922).

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However, the existence of a revolving fund does not automatically signal that 31 U.S.C. § 3302(b) will never apply. In other words, it should not be assumed that a revolving fund is incapable of being improperly augmented. Thus, where the statute establishing the fund does not authorize the crediting of receipts of a given type back into the fund, those receipts must be deposited in the Treasury as miscellaneous receipts. See 69 Comp. Gen. 260 (1990); 40 Comp. Gen. 356 (1960); 23 Comp. Gen. 986 (1944); 20 Comp. Gen. 280 (1940).

Augmentation of a revolving fund may occur in other ways, depending on the nature of the fund and the terms of the governing legislation. Examples are:

- Statute authorizes Bureau of Land Management to retain funds collected as a result of coal trespasses on federal lands, to use those funds to repair damage to the specific lands involved in the trespass, and, within the Bureau's discretion, to refund any excess. An excess of collections over repair costs which the Bureau determines is inappropriate to refund should not be retained in the revolving fund to be used for other purposes, but must be deposited in the Treasury as miscellaneous receipts. B-204874, July 28, 1982.
- Corps of Engineers has a revolving fund used to provide supervision and administration of certain construction work for other agencies on a reimbursable basis. It charges a flat rate calculated to recover actual costs over the long run. Recovery from a contractor for faulty design may be reimbursed to the fund to the extent of the amount actually charged, but any excess must go to the Treasury. 65 Comp. Gen. 838 (1986). However, an "excess" representing costs which were not calculated into the flat rate may be reimbursed to the fund. B-237421, September 11, 1991.

Legislation which merely authorizes, or even requires, that certain expenditures be reimbursed is not sufficient to create a revolving fund. Reimbursements must be deposited as miscellaneous receipts unless the statute specifically authorizes retention by the agency. 67 Comp. Gen. 443 (1988); 22 Comp. Dec. 60 (1915); 1 Comp. Dec. 568 (1895).

h. Trust Funds

Moneys properly received by a federal agency in a trust capacity are not subject to 31 U.S.C. § 3302(b) and thus do not have to be deposited in the Treasury as miscellaneous receipts. 60 Comp. Gen.

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15, 26 (1980); 27 Comp. Gen. 641 (1948). In the latter case, the government of Persia had made a payment to the United States government to reimburse expenses incurred in sending an American vessel to Persia to return to the United States the body of an American official killed by a mob in Tehran. The State Department suggested that the money be used as a trust fund for the education of Persian students. However, the Comptroller General found that the funds had not been received under conditions which would constitute a "proper and legal trust" and therefore were properly deposited as miscellaneous receipts, the clear implication being that 31 U.S.C. § 3302(b) would not apply to money received in a valid trust capacity.

Other authorities supporting this general proposition are Emery v. United States, 186 F.2d 900, 902 (9th Cir. 1951) (money paid to United States under court order as refund of overcharges by persons who had violated rent control legislation was held in trust for tenants and could be disbursed to them without need for appropriation); Varney v. Warehime, 147 F.2d 238, 245 (6th Cir. 1945) (assessments levied against milk handlers to defray certain wartime expenses were trust funds and did not have to be covered into the Treasury); United States v. Sinnott, 26 F. 84 (D. Ore. 1886) (proceeds from sale of lumber made at Indian sawmill were to be applied for benefit of Indians and were not subject to 31 U.S.C. § 3302(b)); 62 Comp. Gen. 245, 251–52 (1983) (proceeds from sale of certain excess stockpile materials where federal agency was acting on behalf of foreign government); B-223146, October 7, 1986 (moneys received by Pension Benefit Guaranty Corporation when acting in its trustee capacity); B-43894, September 11, 1944; B-23647, February 16, 1942 (taxes and fines collected in foreign territories occupied by American armed forces); B-24117-O.M., April 21, 1942 (penalty on defaulted bond received by United States as trustee for Indians).

In addition, receipts generated by activities financed with trust funds are generally credited to the trust fund and not deposited as miscellaneous receipts. B-166059, July 10, 1969 (recovery for damage to property purchased with trust funds); B-4906, October 11, 1951 (receipts accruing from activities financed from Federal Old-Age and Survivors Insurance Trust Fund). See also 50 Comp. Gen. 545, 547 (1971) (summarizing the holding in B-4906). In 51 Comp. Gen. 506 (1972), GAO advised the Smithsonian Institution that receipts generated by various activities at the National Zoo need not be deposited as miscellaneous receipts. The Smithsonian is financed in

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part by trust funds and in part by appropriated funds, although the activities in question were supported mostly by appropriated funds.

The Justice Department's Office of Legal Counsel has cautioned against carrying this theory too far in the case of nonstatutory trusts created by executive action. For example, the United States and the Commonwealth of Virginia sued a transportation company for causing an oil spill in the Chesapeake Bay. A settlement was proposed under which the defendant would donate money to a private waterfowl preservation organization. The OLC found that the proposal would contravene 31 U.S.C. § 3302(b), stating:

> "In our view, the fact that no cash actually touches the palm of a federal official is irrelevant for purposes of § [3302(b)], if a federal agency could have accepted possession and retains discretion to direct the use of the money. The doctrine of constructive receipt will ignore the form of a transaction in order to get to its substance. . . . Since we believe that money available to the United States and directed to another recipient is constructively 'received' for purposes of § [3302(b)], we conclude that the proposed settlement is barred by that statute."

4B Op. Off. Legal Counsel 684, 688 (1980). There was a solution in that case, however. Since the United States had not suffered any monetary loss, it was not required to seek damages. The proposed contribution by the defendant could be attributed to the co-plaintiff, Virginia, which of course is not subject to 31 U.S.C. § 3302(b). Id. [75]

GAO reached a similar conclusion in B-210210, September 14, 1983, holding that the Commodity Futures Trading Commission lacked authority to enter into a settlement agreement under which a party charged with violation of the Commodity Exchange Act would donate funds to an educational institution with no relationship to the violation. A more recent case concluded that, without statutory authority, permitting a party who owes a penalty to contribute to a research project in lieu of paying the penalty amounts to a circumvention of 31 U.S.C. § 3302(b) and improperly augments the agency's research appropriations. 70 Comp. Gen. 17 (1990). A case saying essentially the same thing in the context of Clean Air Act violations is B-247155, July 7, 1992.

[75]The opinion noted that the proposed settlement would be authorized under subsequent amendments to the governing legislation.

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GAO considered similar issues in several cases involving consent orders between the Department of Energy and oil companies charged with violation of federal oil price and allocation regulations. The Department has limited authority to use recovered overcharge funds for restitutionary purposes, and in fact has a duty to attempt restitution. However, to the extent this cannot reasonably be accomplished or funds remain after restitution efforts have been exhausted, the funds may not be used for energy-related programs with no restitutionary nexus but must be deposited in the Treasury pursuant to 31 U.S.C. § 3302(b). 62 Comp. Gen. 379 (1983); 60 Comp. Gen. 15 (1980). It is equally unauthorized to give the funds to charity or to use them to augment appropriations for administering the overcharge refund program. B-200170, April 1, 1981.

In a 1991 case, an agency had discovered a $10,000 bank account belonging to an employee morale club which had become defunct. No documentation of the club's creation or dissolution could be located. Thus, if the club had ever provided for the disposition of its funds, it could no longer be established. Clearly, the money was not received for the use of the government for purposes of 31 U.S.C. § 3302(b). It was equally clear that the money could not be credited to the agency's appropriations. GAO advised that the money could be turned over to a successor employee morale organization to be used for its intended purposes. If no successor organization stepped forward, the funds would have to be deposited in a Treasury trust account in accordance with 31 U.S.C. § 1322. B-241744, May 31, 1991.

i. Miscellaneous Cases: Money to Treasury

In addition to the categories discussed above, there have been numerous other decisions involving the disposition of receipts in various contexts. Some cases in which the Comptroller General held that receipts of a particular type must be deposited in the Treasury as miscellaneous receipts under 31 U.S.C. § 3302(b) or related statutes are set forth below.

- Costs awarded to the United States by a court under 28 U.S.C. § 2412. 47 Comp. Gen. 70 (1967).
- Moneys collected as a fine or penalty. 70 Comp. Gen. 17 (1990) (civil penalties assessed against Nuclear Regulatory Commission licensees); 69 Comp. Gen. 260 (1990) (penalties—as opposed to the recovery of actual losses—under the False Claims Act); 47 Comp. Gen. 674 (1968) (dishonored checks); 23 Comp. Dec. 352 (1916);

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B-235577.2-O.M., November 9, 1989 (civil penalties under Food Stamp Act). See also 39 Comp. Gen. 647, 649–50 (1960).

- Interest earned on grant advances by grantees other than states. E.g., 69 Comp. Gen. 660 (1990).
- Reimbursements received for child care services provided by federal agencies for their employees under authority of 40 U.S.C. § 490b. 67 Comp. Gen. 443, 448–49 (1988).
- Receipts generated by undercover operations by law enforcement agencies. 67 Comp. Gen. 353 (1988); 4B Op. Off. Legal Counsel 684, 686 (1980). In GAO's opinion, however, short-term operations (a card game or dice game, for example) may be treated as single transactions. 67 Comp. Gen. 353, clarifying B-201751, February 17, 1981. Thus, 31 U.S.C. § 3302(b) need not be read as requiring an undercover agent participating in a card game to leave the table to make a miscellaneous receipts deposit after every winning hand. If, however, the agent ends up with winnings at the end of the game, the money cannot be used to offset expenses of the operation.[76] Related cases are 5 Comp. Gen. 289 (1925) and 3 Comp. Gen. 911 (1924) (moneys used to purchase evidence for use in criminal prosecutions and recovered when no longer needed for that purpose must be deposited as miscellaneous receipts).
- Proceeds from silver and gold sold as excess property by the Interior Department as successor to the American Revolutionary Bicentennial Administration. (The silver and gold had been obtained by melting down unsold commemorative medals which had been struck by the Treasury Department for sale by the ARBA.) B-200962, May 26, 1981.
- Income derived from oil and gas leases on "acquired lands" (as distinguished from "public domain lands") of the United States used for military purposes. B-203504, July 22, 1981.

j. Miscellaneous Cases: Money Retained by Agency

Most cases in which an agency may credit receipts to its own appropriation or fund involve the areas previously discussed: authorized repayments, Economy Act transactions, revolving funds,

[76]Starting in FY 1979, the Federal Bureau of Investigation, and later the Drug Enforcement Administration as well, received authority annually, first in authorization acts and later in appropriation acts, to use proceeds from undercover operations to offset reasonable and necessary expenses of the operations. E.g., Pub. L. No. 102-140, § 102(b), 105 Stat. 782, 791–93 (1991) (FY 1992 Justice Department appropriation act). As soon as the proceeds or the balance thereof are no longer necessary for the conduct of the operation, they are to be deposited as miscellaneous receipts. Id. § 102(b)(2). The Internal Revenue Service, the subject of 67 Comp. Gen. 353, received similar authority late in 1988 (Pub. L. No. 100-690, § 7601(c), 102 Stat. 4181, 4504), but it appears to have expired as of December 31, 1991 (Pub. L. No. 101-647, § 3301(a), 104 Stat. 4789, 4917).

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or the other specific situations noted. There is another group of cases, not susceptible of further generalization, in which an agency simply has specific statutory authority to retain certain receipts. Examples are:

- Forest Service may retain moneys paid by permittees on national forest lands representing their pro rata share under cooperative agreements for the operation and maintenance of waste disposal systems under the Granger-Thye Act. 55 Comp. Gen. 1142 (1976).
- Customs Service may, under 19 U.S.C. § 1524, retain charges collected from airlines for preclearance of passengers and baggage at airports in Canada, for credit to the appropriation originally charged with providing the service. 48 Comp. Gen. 24 (1968).
- Overseas Private Investment Corporation may retain interest on loans of excess foreign currencies made under the Foreign Assistance Act of 1961, as amended. 52 Comp. Gen. 54 (1972).
- Payroll deductions for government-furnished quarters under 5 U.S.C. § 5911 are retained in the appropriation(s) or fund(s) from which the employee's salary is paid. 59 Comp. Gen. 235 (1980), as modified by 60 Comp. Gen. 659 (1981). However, if the employee pays directly rather than by payroll deduction, the direct payments must go to miscellaneous receipts unless the agency has specific statutory authority to retain them. 59 Comp. Gen. at 236.[77]
- Under the Mineral Lands Leasing Act of 1920, receipts from the sale or lease of public lands are distributed in the manner specified in the statute. This was held to include the proceeds of bid deposits forfeited by successful mineral lease bidders who fail to execute the lease. 65 Comp. Gen. 570 (1986).
- By virtue of provisions in the Job Training Partnership Act and annual appropriation acts, certain receipts generated by Job Corps Centers may be retained for credit to the Labor Department appropriation from which the Centers are funded. 65 Comp. Gen. 666 (1986).
- Legislation establishing the Commission on the Bicentennial of the United States Constitution authorized the Commission to retain revenues derived from its licensing activities but did not address sales revenues. Sales revenues, therefore, had to be deposited as miscellaneous receipts. B-228777, August 26, 1988.

[77]For agencies funded under the annual Interior Department and Related Agencies appropriation acts, the rentals, whether collected by payroll deduction or otherwise, go into a "special fund" maintained by each agency to be used for maintenance and operation of the quarters. 5 U.S.C. § 5911 note.

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In the occasional case, the authority may be less than specific. In B-114860, March 20, 1975, for example, based on the broad authority of the National Housing Act, GAO advised that the Department of Housing and Urban Development could require security deposits from tenants in HUD-owned multifamily projects. Consistent with practice in the private sector, the deposit would be considered the property of the tenant and held in an escrow account, to be either returned to the tenant upon completion of the lease or forfeited to the government in cases of breach.

A final case we will note is 24 Comp. Gen. 514 (1945), an exception stemming from the particular funding arrangement involved rather than a specific statute. The case dealt with certain government corporations which did not receive regular appropriations but instead received annual authorizations for expenditures from their capital funds for administrative expenses. An appropriation act had imposed a limit on certain communication expenditures and provided that savings resulting from the limit "shall not be diverted to other use but shall be covered into the Treasury as miscellaneous receipts." The Comptroller General construed this as meaning returned to the source from which made available. In the case of the corporations in question, this meant that the savings could be returned to their capital funds.

k. Money Erroneously Deposited as Miscellaneous Receipts

The various accounts that comprise the heading "miscellaneous receipts" are just that—they are receipt accounts, not expenditure or appropriation accounts. As noted earlier, by virtue of the Constitution, once money is deposited into miscellaneous receipts, it takes an appropriation to get it back out. What, therefore, can be done if an agency deposits some money into miscellaneous receipts by mistake?

This question really involves two separate situations. In the first situation, an agency receives funds which it is authorized, under the principles discussed above, to credit to its own appropriation or fund, but erroneously deposits them as miscellaneous receipts. The decisions have always recognized that the agency can make an appropriate adjustment to correct the error. In an early case, the Interior Department sold some property and deposited the proceeds as miscellaneous receipts when in fact it was statutorily authorized to credit the proceeds to its reclamation fund. The Interior Department then requested a transfer of the funds back to the reclamation fund, and the Secretary of the Treasury asked the Comptroller of the

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Treasury if it was authorized. Of course it was, replied the Comptroller:

"This is not taking money out of the Treasury in violation of paragraph 7, section 9, Article I of the Constitution . . . .

"The proceeds of the sale . . . have been appropriated by law. Taking it from the Treasury and placing it to the credit in the Treasury of the appropriation to which it belongs violates neither the Constitution nor any other law, but simply corrects an error by which it was placed to the unappropriated surplus instead of to the appropriation to which it belongs." 12 Comp. Dec. 733, 735 (1906).

This concept has consistently been followed. See 45 Comp. Gen. 724 (1966); 3 Comp. Gen. 762 (1924); 2 Comp. Gen. 599 (1923).[78]

In the second situation, a private party pays money to a federal agency, the agency deposits it as miscellaneous receipts, and it is subsequently determined that the party is entitled to a refund. Here, in contrast to the first situation, an appropriation is necessary to get the money out. E.g., 3 Comp. Gen. 296 (1923).

There is a permanent indefinite appropriation for refunding collections "erroneously received and covered" which are not properly chargeable to any other appropriation. 31 U.S.C. § 1322(b)(2). The availability of this appropriation depends on exactly where the receipts were deposited. If the amount subject to refund was credited to some specific appropriation account, the refund is chargeable to the same account. If, however, the receipt was deposited in the general fund as miscellaneous receipts, then the appropriation made by 31 U.S.C. § 1322(b)(2) is available for the refund, provided that the amount in question was "erroneously received and covered." 61 Comp. Gen. 224 (1982); 55 Comp. Gen. 625 (1976); 17 Comp. Gen. 859 (1938).

Examples of cases in which use of the "Moneys Erroneously Received and Covered" appropriation was found authorized are 71 Comp. Gen. ___ (B-239769.2, July 24, 1992) (refund to investment company of late filing fee upon issuance of order by Securities and Exchange Commission exempting company from filing deadline for fiscal year in

[78]The reverse adjustment is made when funds which should have been deposited as miscellaneous receipts are erroneously credited to an appropriation. The remedy is a transfer from the appropriation to the appropriate miscellaneous receipts account. E.g., B-48722, April 16, 1945.

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question); 63 Comp. Gen. 189 (1984) (Department of Energy deposited overcharge recoveries from oil companies into general fund instead of first attempting to use them to make restitutionary refunds); B-217595, April 2, 1986 (interest collections subsequently determined to have been erroneous).

One case, 53 Comp. Gen. 580 (1974), combined elements of both situations. The Army Corps of Engineers had been authorized to issue discharge permits under the Refuse Act Permit Program. The program was statutorily transferred in 1972 to the Environmental Protection Agency. Under the User Charge Statute, 31 U.S.C. § 9701, both the Corps and EPA had charged applicants a fee. In some cases, the fees had been deposited as miscellaneous receipts before the applications were processed. The legislation that transferred the program to EPA also provided that EPA could authorize states to issue the permits. However, there was no provision that authorized EPA to transfer to the states any fees already paid. Thus, some applicants found that they had paid a fee to the Corps or EPA, received nothing for it, and were now being charged a second fee by the state for the same application. EPA felt that the original fees should be refunded. So did the applicants.

GAO noted that the User Charge Statute contemplates that the federal agency will furnish something in exchange for the fee. Since this had not been done, the fees could be viewed as having been erroneously deposited in the general fund. However, the fees had not been erroneously received—the Corps and EPA had been entirely correct in charging the fees in the first place—so the appropriation made by 31 U.S.C. § 1322(b)(2) could not be used. There was a way out, but the refunds would require a two-step process. The Corps and EPA should have deposited the fees in a trust account[79] and kept them there until the applications were processed, at which time depositing as miscellaneous receipts would have been proper. Thus, EPA could first transfer the funds from the general fund to its suspense account as the correction of an error, and then make the refunds directly from the suspense account.

In cases where the "Moneys Erroneously Received and Covered" appropriation is otherwise available, it is available without regard to

[79]See also B-3596/A-51615, November 30, 1939. Use of a deposit fund suspense account is equally acceptable. B-158381, June 21, 1968.

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whether the original payment was made under protest. 55 Comp. Gen. 243 (1975). Payments under 31 U.S.C. § 1322(b)(2) are made by the Treasury Department without the need for settlement action by GAO, except in doubtful cases. B-142380, March 24, 1960 (circular letter). The procedure is for the finance office of the agency making the refund to submit a Standard Form 1166 to the Treasury Department, citing account 20X1807 in the "appropriation summary" block. See B-217595, April 2, 1986; B-210638, July 5, 1984 (non-decision letter).

The appropriation made by 31 U.S.C. § 1322(b)(2) is available only to refund amounts actually received and deposited. If a given refund bears interest, for example, a refund claim approved by a contracting officer under the Contract Disputes Act, the interest portion must be charged to the contracting agency's operating appropriations for the fiscal year in which the award is made. B-217595, April 2, 1986.

If an agency collects money from someone to whom it owes a refund from a prior transaction, it should not simply deposit the net amount. The correct procedure is to deposit the new receipt into the general fund (assuming that's the proper receptacle), and then make the refund using the "Moneys Erroneously Received and Covered" appropriation. B-19882, October 28, 1941; A-96279, September 15, 1938. However, GAO has approved offsetting a refund against future amounts due from the same party in cases where there is a continuing relationship, but suggested that the party be given the choice. B-217595, April 2, 1986, at 4.

Clearly, if the receipt cannot be regarded as erroneous, 31 U.S.C. § 1322(b)(2) is not available. 53 Comp. Gen. 580 (1974); B-146111, July 6, 1961. Also, the "Moneys Erroneously Received and Covered" appropriation is available only where the amount to be refunded was deposited into the general fund. E.g., 11 Comp. Dec. 300 (1904). If a refund is due of moneys deposited somewhere other than the general fund, some other basis must be sought.

3. Gifts and Donations to the Government

a. Donations to the Government

It has long been recognized that the United States (as opposed to a particular agency) may receive and accept gifts. No particular

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statutory authority is necessary. As the Supreme Court has said, "[u]ninterrupted usage from the foundation of the Government has sanctioned it." United States v. Burnison, 339 U.S. 87, 90 (1950). The gifts may be of real property or personal property, and they may be testamentary (made by will) or inter vivos (made by persons who are not dead yet). Since monetary gifts to the United States go to the general fund of the Treasury, there is no augmentation problem.

However, as the Supreme Court held in the Burnison case, a state may prohibit testamentary gifts by its domiciliaries to the United States. Also, a state may impose an inheritance tax on property bequeathed to the United States. United States v. Perkins, 163 U.S. 625 (1896). The tax is not regarded as a constitutionally impermissible tax on federal property "since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax . . . ." Id. at 630.

While gifts to the United States do not require statutory authority, gifts to an individual federal agency stand on a different footing. The rule is that a government agency may not accept for its own use (i.e., for retention by the agency or credit to its own appropriations) gifts of money or other property in the absence of specific statutory authority. 16 Comp. Gen. 911 (1937). As the Comptroller General said in that decision, "[w]hen the Congress has considered desirable the receipt of donations . . . it has generally made specific provision therefor . . . ." Id. at 912. See also B-13378, November 20, 1940; A-44015, March 17, 1937.

Thus, acceptance of a gift by an agency lacking statutory authority to do so is an improper augmentation. If an agency does not have statutory authority to accept donations, it must turn the money in to the Treasury as miscellaneous receipts. E.g., B-139992, August 31, 1959 (proceeds of life insurance policy designating federal agency as beneficiary).

For purposes of this discussion, the term "gifts" may be defined as "gratuitous conveyances or transfers of ownership in property without any consideration." 25 Comp. Gen. 637, 639 (1946); B-217909, September 22, 1986. A receipt that does not meet this definition does not become a gift merely because the agency characterizes it as one. For example, a fee paid for the privilege of

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filming a motion picture in a national park is not a gift and must be deposited as miscellaneous receipts rather than in the agency's trust fund. 25 Comp. Gen. 637 (1946). See also B-61938, April 16, 1948. Similarly, a reduction of accrued liability in fulfillment of a contractual obligation is not a donation for purposes of a statute authorizing appropriations to match "donations." B-183442, October 21, 1975.

A number of departments and agencies have statutory authority to accept gifts. A partial listing is contained in B-149711, August 20, 1963. The statutory authorizations contain varying degrees of specificity as to precisely what may be accepted (money, property, services, etc.). For example, the State Department's gift statute, 22 U.S.C. § 2697, authorizes the acceptance of gifts of money or property, real or personal, and, in the Secretary's discretion, conditional gifts. A case discussing this statute is 67 Comp. Gen. 90 (1987) (United States Information Agency may accept donations of radio programs prepared by private syndicators for broadcast over Voice of America facilities). Another is 70 Comp. Gen. 413 (1991) (United States Information Agency may accept donations of foreign debt). Authority to accept voluntary services does not include donations of cash. A-86115, July 15, 1937; A-51627, March 15, 1937.

The authority of the Defense Department to accept gifts is found in several statutes. First, the Defense Department may accept contributions of money or real or personal property "for use by the Department of Defense" from any person, foreign government, or international organization. The money and proceeds from the sale of property are credited to the Defense Cooperation Account in the Treasury. The money is not automatically available to Defense, but is available for obligation or expenditure only in the manner and to the extent provided in appropriation acts. 10 U.S.C. § 2608 (Supp. III 1991). Second, the Department may accept services, supplies, real property, or the use of real property under a mutual defense or similar agreement or as reciprocal courtesies, from a foreign government for the support of any element of United States armed forces in that country. 10 U.S.C. § 2350g (Supp. III 1991). These authorities formed the basis for the United States to accept contributions from foreign governments and others to defray the costs of the 1991 military operations in the Persian Gulf. See GAO report, Operations Desert Shield/Storm: Foreign Government and Individual Contributions to the Department of Defense, GAO/NSIAD-92-144 (May 1992). Other

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limited-purpose authorities available to the military are found in 10 U.S.C. §§ 2601–2607.

We may also note a statute tailor-made for the philanthropist desiring to make a donation for the express purpose of reducing the national debt. (Some people think they already do this in April of each year.) The Secretary of the Treasury may accept gifts of money, obligations of the United States, or other intangible personal property made for the express purpose of reducing the public debt. Gifts of other real or personal property for the same purpose may be made to the Administrator of the General Services Administration. 31 U.S.C. § 3113.

Assuming the existence of the requisite statutory authority, it is quite easy to make a gift to the government. There are no particular forms required. A simple letter to the appropriate agency head transmitting the funds for the stated purpose will suffice. See B-157469, July 24, 1974 (non-decision letter).

A 1980 GAO study found that, during fiscal year 1979, 41 government agencies received a total of $21.6 million classified as gift revenue. See report entitled Review of Federal Agencies' Gift Funds, FGMSD-80-77 (September 24, 1980). The report pointed out that the use of gift funds dilutes congressional oversight because the funds do not go through the appropriation process. The report recommended that agencies be required to more fully disclose gift fund operations in their budget submissions.

The issue raised in most gift cases is the purpose for which gift funds may be used. This ultimately depends on the scope of the agency's statutory authority and the terms of the gift. Gift funds are accounted for as trust funds. They must be deposited in the Treasury as trust funds under 31 U.S.C. § 1321(b), to be disbursed in accordance with the terms of the trust. In 16 Comp. Gen. 650, 655 (1937), the Comptroller General stated:

> "Where the Congress authorizes Federal officers to accept private gifts or bequests for a specific purpose, often subject to certain prescribed conditions as to administration, authority must of necessity be reposed in the custodians of the trust fund to make expenditures for administration in such a manner as to carry out the purposes of the trust and to comply with the prescribed conditions thereof without reference to general regulatory and prohibitory statutes applicable to public funds."

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While this passage correctly states the trust theory, agencies have sometimes misconstrued it to mean that they have free and unrestricted use of donated funds. This is not the case. On the one hand, donated funds are not subject to all of the restrictions applicable to direct appropriations. Yet on the other hand, they are still "public funds" in a very real sense. They can be used only in furtherance of authorized agency purposes and incident to the terms of the trust. See B-195492, March 18, 1980.

An interesting illustration of this point occurred in B-16406, May 17, 1941. A citizen had bequeathed money in her will to a hospital. When the will was made, the hospital belonged to the state of Louisiana. By the time the will was probated, however, it had been acquired by the United States. Louisiana was concerned that the bequest might, if deposited in the United States Treasury, be diverted from the decedent's intent. There was no need for concern, the Comptroller General advised. The money would have to be deposited as trust funds and would be available for expenditure only for the purposes specified in the trust, i.e., for the hospital.

Since gift funds are accounted for as trust funds, they are presumably subject to the Antideficiency Act. See OMB Circular No. A-34, § 21.1 (1985), which includes trust fund expenditure accounts in the definition of "appropriation or fund."

In evaluating the propriety of a proposed use of gift funds, it is first necessary to examine the precise terms of the statute authorizing the agency to accept the gift. Limitations imposed by that statute must be followed. Thus, under a statute which authorized the Forest Service to accept donations "for the purpose of establishing or operating any forest research facility," the Forest Service could not turn over unconditional gift funds to a private foundation under a cooperative agreement, with the foundation to invest the funds and use the proceeds for purposes other than establishing or operating forest research facilities. 55 Comp. Gen. 1059 (1976). See also 40 Op. Att'y Gen. 66 (1941) (Library of Congress could not, without statutory authority, share income from donated property with Smithsonian Institution); B-198730, December 10, 1986 (funds donated to Library of Congress to further purposes of Library's Center for the Book could not be used for unrelated Library programs).

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Under a statute authorizing the Federal Board for Vocational Education to accept donations to be used "in connection with the appropriations hereby made or hereafter to be made, to defray the expenses of providing and maintaining courses of vocational rehabilitation," the funds could be used only to supplement the Board's regular appropriations and could not be used for any expense not legally payable from the regular appropriation. The statute here conferred no discretion. 27 Comp. Dec. 1068 (1921).

If an agency is authorized to accept conditional gifts (gifts made on the condition that the funds be used for a specific authorized purpose), the funds may be used to augment a "not to exceed" earmark applicable to that purpose. B-52501, November 9, 1945. (Although the statute involved in B-52501, the predecessor of 10 U.S.C. § 2608 noted above, no longer exists, the point of the decision is still valid.)

Once it is determined that the proposed use will not contravene the terms of the agency's authorizing statute, the agency will have some discretion under the trust theory. The area in which this discretion has most often manifested itself in the decisions is entertainment. Although appropriated funds are generally not available for entertainment, several decisions have established the proposition that donated funds may be used for entertainment. This does not mean any entertainment agency officials may desire. Donated funds may be used for entertainment only if the entertainment will further a valid function of the agency, if the function could not be accomplished as effectively from the government's standpoint without the expenditure, and if the expenditure does not violate any restrictions imposed by the donor on the use of the funds. 46 Comp. Gen. 379 (1966); B-170938, October 30, 1972; B-142538, February 8, 1961. See also B-195492, March 18, 1980; B-152331, November 19, 1975. (B-152331 involved a trust fund which included both gift and non-gift funds.) It follows that donated funds may not be used for entertainment which does not bear a legitimate relationship to official agency purposes. 61 Comp. Gen. 260 (1982), affirmed upon reconsideration, B-206173, August 3, 1982 (donated funds improperly used for breakfast for Cabinet wives and Secretary's Christmas party); B-198730, April 13, 1981 (non-decision letter).

The trust fund concept was also applied in 36 Comp. Gen. 771 (1957). The Alexander Hamilton Bicentennial Commission had been

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given statutory authority to accept gifts and wanted to use the donations to award Alexander Hamilton Commemorative Scholarships. The Commission was to have a brief existence and would not have sufficient time to administer the scholarship awards. The Comptroller General held that the Commission could, prior to the date of its expiration, transfer the funds to a responsible private organization for the purpose of enabling proper administration of the scholarship awards. The distinction between this case and 55 Comp. Gen. 1059, mentioned above, is that in 36 Comp. Gen. 771, the objective of transferring the funds to a private organization was to better carry out an authorized purpose. In 55 Comp. Gen. 1059, the objective was to enable the funds to be used for unauthorized purposes.

Another case illustrating permissible administrative discretion under the trust theory is B-131278, September 9, 1957. A number of persons had made donations to St. Elizabeth's Hospital to enable it to buy an organ for its chapel. The donors (organ donors?) had made the gifts on the condition that the Hospital purchase a high-quality (expensive) organ. When the Hospital issued its invitation for bids on the organ, the specifications were sufficiently restrictive so as to preclude offers on lower quality organs. The decision found this to be entirely within the Hospital's discretion in using the gift funds in accordance with their terms.

As noted above, however, the agency's discretion in administering its gift funds is not unlimited. Thus, for example, an agency may not use gift funds for purely personal items such as greeting cards. 47 Comp. Gen. 314 (1967); B-195492, March 18, 1980.

The particular statutory scheme will determine the extent to which donated funds are subject to other laws governing the expenditure of public funds. In two cases, for example, where it was clear that a designated activity was to be carried out solely or primarily with donated funds, GAO found that the recipient agency could invest the gift funds in non-Treasury interest-bearing accounts, and was not required to comply with the Federal Property and Administrative Services Act of 1949 or the Federal Acquisition Regulation. 68 Comp. Gen. 237 (1989) (Christopher Columbus Quincentenary Jubilee Commission); B-211149, December 12, 1985 (Holocaust Memorial Council).

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Availability of Appropriations: Amount

A. Introduction

The two preceding chapters have discussed the purposes for which appropriated funds may be used and the time limits within which they may be obligated and expended. This chapter will discuss the third major element of the concept of the "legal availability" of appropriations—restrictions relating to amount. It is not enough to know what you can spend appropriated funds for and when you can spend them. You must also know how much you have available for a particular object.

In this respect, the legal restrictions on government expenditures are different from those governing your spending as a private individual. For example, as an individual, you can buy a house and finance it with a mortgage that may run for 25 or 30 years. Of course you don't have enough money to cover your full legal obligation under the mortgage. You sign the papers on the hope and assumption that you will continue to have an income. If your income stops and you can't make the payments, you lose the house. The government cannot operate this way. The main reason why is the Antideficiency Act, discussed in Section C.

Under the "separation of powers" doctrine established by the Constitution, Congress makes the laws and provides the money to implement them; the executive branch carries out the laws with the money Congress provides. Under this system, Congress must have the "final word" as to how much money can be spent by a given agency or on a given program. In exercising this power, Congress may give the executive branch considerable discretion within broad limits, but it is ultimately up to Congress to determine how much the executive branch can spend. In applying this theory to the day-to-day operations of the federal government, it should be readily apparent that restrictions on purpose, time, and amount are very closely related. Again, the Antideficiency Act is one of the primary "enforcement devices." Its importance is underscored by the fact that it is the only one of the funding statutes to include both civil and criminal penalties for violation.

If the Antideficiency Act's prohibition against overobligating or overspending an appropriation is to be at all meaningful, agencies must be restricted to the appropriations Congress provides. The rule prohibiting the unauthorized "augmentation" of appropriations, covered in Section E, is thus a crucial complement to the Antideficiency Act.

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Gifts which involve continuing expense present special problems. Although there are no recent cases, indications are that the agency needs specific statutory authority—not merely general authority to accept gifts—since the agency's appropriations would not otherwise be available to make the continuing expenses. For example, an individual made a testamentary gift to a United States naval hospital. The will provided that the money was to be invested in the form of a memorial fund, with the income to be used for specified purposes. The Comptroller General found this objectionable in that "the United States would become, in effect, a trustee for charitable uses, would never gain a legal title to the money, but would have the burden and obligation of administering in perpetuity a trust fund . . . ." Also, absent specific authorization by Congress, appropriations would not be available for the expenses of administering the trust. Therefore, absent congressional authorization to accept the donation "as made," it could not be accepted either by the naval hospital, 11 Comp. Gen. 355 (1932), or by the Treasury Department, A-40707, December 15, 1936. See also Story v. Snyder, 184 F.2d 454, 456 (D.C. Cir. 1950), cert. denied, 340 U.S. 866 ("[g]ifts to the United States which involve any duty, burden, or condition, or are made dependent upon some future performance by the United States, are not accepted by the Government unless by the express authority of Congress"); 10 Comp. Gen. 395 (1931); 22 Comp. Dec. 465 (1916)[80]; 30 Op. Att'y Gen. 527 (1916). A few of the cases (e.g., 10 Comp. Gen. 395 and 30 Op. Att'y Gen. 527) have tied the result in with the Antideficiency Act prohibition against incurring obligations in advance of appropriations.

A question which appears to have received little attention is whether an agency with statutory authority to accept gifts may use either appropriated funds or donated funds to solicit the gifts. GAO found that the Holocaust Memorial Council may use either appropriated or donated funds to hire a fund-raiser, but the cases have little precedent value since the legislation involved included specific authority to solicit as well as accept donations. See B-211149, December 12, 1985; B-211149, June 22, 1983.

An interesting, and hopefully unique, situation presented itself in B-230727, August 1, 1988. Congress had enacted legislation to establish a Commission on Improving the Effectiveness of the United

[80]Some wag once said, jokingly we think, that if you looked hard enough you could probably find a case dealing with the use of appropriated funds to buy dog food. 22 Comp. Dec. 465 is it.

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Nations, to be funded solely from private contributions. The effective date of the legislation was March 1, 1989. Unfortunately, the legislation failed to provide a mechanism for anyone (Treasury Department or General Services Administration, for example) to accept and account for donations prior to the effective date, and the Commission itself could not do so since it had no legal existence. Thus, unless the statute were amended to authorize some other agency to act on the Commission's behalf, potential donors could not make contributions prior to the effective date since there was no one authorized to accept them.

Occasionally, someone makes a gift to the United States and later wants the money back. Where the elements of an unconditional gift have been satisfied (intent to make a gift, delivery, and acceptance), claims for refund have been denied. A-94582, June 6, 1938; B-151432-O.M., June 3, 1963.

Finally, if an agency is authorized to accept gifts, it may also accept a loan of equipment by a private party without charge to be used in connection with particular government work. The agency's appropriations for the work will be available for repairs to the equipment, but only to the extent necessary for the continued use of the equipment on the government work, and not after the government's use has terminated. 20 Comp. Gen. 617 (1941). In one case, GAO approved the loan of private property to a federal agency by one of its employees, without charge and apparently without statutory authority, where the agency administratively determined that the equipment was necessary to the discharge of agency functions and the loan was in the interest of the United States. 22 Comp. Gen. 153 (1942). The decision stressed, however, that the practice should not be encouraged. The decision seems to have been based in part on wartime needs and its precedent value would therefore seem minimal. See, e.g., B-168717, February 12, 1970.

b. Donations to Individual Employees

(1) Contributions to salary or expenses

As a general proposition, unless authorized by statute, private contributions to the salary or expenses of a federal employee are improper. First, they may in some circumstances violate 18 U.S.C. § 209, which prohibits the supplementation of a government employee's salary from private sources. "The evils of such, were it permitted, are obvious." Exchange National Bank v. Abramson, 295

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F. Supp. 87, 90 (D. Minn. 1969). For purposes of 18 U.S.C. § 209, the proverb that it is better to give than to receive doesn't work. Both the giving and the receiving are criminal offenses under the statute. The employee would presumably violate the law by receiving more than he or she is entitled to receive under applicable statutes and regulations. 33 Op. Att'y Gen. 273 (1922).

Second, they are improper as unauthorized augmentations. To the extent the private contribution replaces the employee's government salary, it is a direct augmentation of the employing agency's appropriations. To the extent the contribution supplements the government salary, it is an augmentation in an indirect sense, the theory being that when Congress appropriates money for an activity, all expenses of that activity must be borne by that appropriation unless Congress specifically provides otherwise.

An early case in point is 2 Comp. Gen. 775 (1923). The American Jewelers' Protective Association offered to pay the salary and expenses of a customs agent for one year on the condition that the agent be assigned exclusively for that year to investigate jewelry smuggling. The Comptroller General found the arrangement improper, for the two reasons noted above. Whether the payments were to be made directly to the employee or to the agency by way of reimbursement was immaterial.

Most questions in this area involve schemes for private entities to pay official travel expenses. From the sheer number of cases GAO has considered, one cannot help feeling that the bureaucrat must indeed be a beloved creature. Prior to 1991, a long series of decisions established the proposition that donations from private sources for official travel to conduct government business constituted an unlawful augmentation unless the employing agency had statutory authority to accept gifts. If the agency had such authority, the donation could be made to the agency, not the individual employee, and the agency would then reimburse the employee in accordance with applicable travel laws and regulations, with the allowances reduced as appropriate in the case of contributions in kind.[81]

[81]Some cases from this series are 59 Comp. Gen. 415 (1980); 55 Comp. Gen. 1293 (1976); 49 Comp. Gen. 572 (1970); 46 Comp. Gen. 689 (1967); 36 Comp. Gen. 268 (1956); 26 Comp. Dec. 43 (1919).

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One problem with this system was the lack of uniformity in treatment, varying with the agency's statutory authority. Congress addressed the situation in the Ethics Reform Act of 1989, Pub. L. No. 101-194, § 302, 103 Stat. 1716, 1745, codified at 31 U.S.C. § 1353. Subsection (a) provides as follows:

"Notwithstanding any other provision of law, the Administrator of General Services, in consultation with the Director of the Office of Government Ethics, shall prescribe by regulation the conditions under which an agency in the executive branch (including an independent agency) may accept payment, or authorize an employee of such agency to accept payment on the agency's behalf, from non-Federal sources for travel, subsistence, and related expenses with respect to the attendance of the employee (or the spouse of such employee) at any meeting or similar function relating to the official duties of the employee. Any cash payment so accepted shall be credited to the appropriation applicable to such expenses. In the case of a payment in kind so accepted, a pro rata reduction shall be made in any entitlement of the employee to payment from the Government for such expenses."

GSA's implementing regulations, published on March 8, 1991 (56 Fed. Reg. 9878), are found at 41 C.F.R. Parts 304-1 and 304-2. Thus, as long as acceptance complies with the statute and regulations, there is no longer an augmentation problem. The existence or lack of separate statutory authority to accept gifts is immaterial.

Another relevant statute, which seemingly overlaps 31 U.S.C. § 1353 to some extent but was left untouched by it, is 5 U.S.C. § 4111, enacted as part of the Government Employees Training Act. Under this provision, an employee may accept (1) contributions and awards incident to training in nongovernment facilities, and (2) payment of travel, subsistence, and other expenses incident to attendance at meetings, but only if the donor is a tax-exempt nonprofit organization.[82] If an employee receives a contribution in cash or in kind under this section, travel and subsistence allowances are subject to an "appropriate reduction."

Section 4111 authorizes the employee to accept the donation. It does not authorize the agency to accept the donation, credit it to its appropriations, and then reimburse the employee. 55 Comp. Gen.

[82]The rules under 5 U.S.C. § 4111 are stated and applied in a number of sources in addition to the cases cited in the text. See, for example, B-171751, February 11, 1971, and two GAO reports involving the Agency for International Development (Travel Practices: Private Funding of AID Employees' Travel, GAO/NSIAD-87-92, March 1987, and Travel Practices: Use of Airline Bonus Coupons and Privately Funded Travel by AID Employees, GAO/NSIAD-86-26, November 1985).

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1293 (1976). An employee who receives an authorized donation after the government has already paid the travel expenses cannot keep everything. The employee must refund to the government the amount by which his or her allowances would have been reduced had the donation been received before the allowances were paid. The agency may then credit this refund to its travel appropriation as an authorized repayment. Id. at 1294–95.

The statute requires an "appropriate reduction" in travel payments in order to preclude the agency from paying for something that has already been reimbursed by an authorized private organization. An employee being reimbursed on an "actual expense" basis should not be claiming items which would duplicate private reimbursements. Thus, the agency is not required to reduce the actual expense entitlement by the value of provided meals. 64 Comp. Gen. 185 (1985). However, the value of subsistence items furnished in kind must be deducted where the employee is being reimbursed on a per diem basis. Id. at 188; 49 Comp. Gen. 572, 576 (1970).

The authority conferred by 5 U.S.C. § 4111 is expressly limited to organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3) (religious, charitable, scientific, educational, etc.). It does not extend to organizations which may be tax-exempt under other portions of § 501. B-225986, March 2, 1987. Also, it does not apply to an organization whose application for exemption under § 501(c)(3) has not yet been approved; subsequent approval is not retroactive for purposes of 5 U.S.C. § 4111. B-225264, November 24, 1987 (non-decision letter).

Donations made under the express condition that they be used for some unauthorized purpose should be returned to the donor. 47 Comp. Gen. 319 (1967).

(2) Promotional and other travel-related items

In recent years, commercial airlines and others have devised a variety of schemes, which change from time to time, to reward frequent customers. Promotional materials awarded to customers may take various forms—bonus trips, reduced-fare coupons, cash, merchandise, credits toward future goods or services, etc. Government employees traveling on government business are eligible for these promotional items the same as anyone else. There is,

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however, one important distinction. "Anyone else" may keep them; the government employee, with certain exceptions, may not.

The fundamental principle underlying the decisions and regulations in this area is that any benefit, cash payment or otherwise, received by a government employee from private sources incident to or resulting from the performance of official duty is regarded as having been received on behalf of the government and is the property of the government.[83] It should also be noted that the promotional items are not really "gifts"; they are more in the nature of benefits "earned" as a result of the expenditure of federal funds. B-216052, January 29, 1985 (non-decision letter). While the cases are not "augmentation of appropriations" cases, they are sufficiently related to the subject matter of this section to warrant brief treatment here.

GAO's "leading case" in this area is 63 Comp. Gen. 229 (1984), and many of the points noted below will be found in that decision. In addition, the basic rules are reflected in the Federal Property Management Regulations (FPMR), 41 C.F.R. § 101-25.103, and Federal Travel Regulations (FTR), 41 C.F.R. Parts 301-1 and 301-3.

The primary rule is that, except as noted below, promotional items or benefits of any type received by a government employee resulting in whole or in part from official travel are the property of the government and may not be retained by the employee for personal use. 63 Comp. Gen. 229.[84] The fact that the individual obtains the benefit through a combination of official and personal travel is immaterial. Id.[85] An employee wishing to take advantage of promotional benefits should maintain separate accounts for official and personal travel. FTR, 41 C.F.R. § 301-1.6(f)(1). Whether the benefit is transferable or nontransferable is also immaterial. 63 Comp. Gen. 229, 232–33; B-215826, January 23, 1985.

[83]There are common-sense exceptions to this. For example, a 1977 Justice Department opinion, summarized in B-199656, March 21, 1984 (non-decision letter), held that a government employee may retain a public service award in the form of cash from a private organization even though the service was performed as a government employee.

[84]See also 69 Comp. Gen. 643 (1990); 67 Comp. Gen. 79 (1987); 59 Comp. Gen. 203, 206 (1980); B-210717.2, February 24, 1984; B-199656, July 15, 1981; GAO report, Use of Airline Bonus Coupons and Privately Funded Travel by AID Employees, GAO/NSIAD-86-26 (November 1985).

[85]See also B-215826, January 23, 1985; B-212559, February 24, 1984; B-235185, August 18, 1989 (non-decision letter); B-218524, April 1, 1986 (non-decision letter).

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Items such as promotional coupons that provide for future free or reduced-cost travel should be integrated into the agency's travel plans. FPMR, 41 C.F.R. § 101-25.103-2(b). Merchandise items which the receiving agency cannot use must be disposed of in accordance with General Services Administration regulations. Id. §§ 101-25.103-2(d), 101-25.103-4.

Since the benefit is the property of the government from the moment the employee receives it, an employee who uses it for personal travel or other personal use becomes indebted to the government for the full value of the benefit received. 63 Comp. Gen. 233 (1984); B-216822, March 18, 1985.[86]

The typical bonus program is not automatic, but requires the traveler to submit an application and, in some cases, pay a fee. An employee who has paid such a fee may be reimbursed, not to exceed the amount of expected savings to the government. FTR, 41 C.F.R. § 301-1.6(f)(2); 63 Comp. Gen. 229, 231.

The employee may retain two types of promotional "gift":

- Merchandise items of nominal intrinsic value (pens, pencils, note pads, calendars, etc.). 63 Comp. Gen. 229, 233.
- Benefits which have no value to the government, such as free upgrades to first class. 63 Comp. Gen. 229, 232; B-212559, February 24, 1984. The free upgrade should be used only for official travel. B-223387-O.M., August 22, 1986.

In addition, the Federal Travel Regulations were amended in 1989 to permit an employee, subject to agency approval, to obtain premium-class accommodations through the redemption of frequent traveler benefits.[87]

[86]At the time B-216822 was issued, the indebtedness could not be waived. The waiver statute, 5 U.S.C. § 5584, has since been amended to include debts arising from travel or transportation allowances, so this portion of the decision should be disregarded.

[87]41 C.F.R. § 301-3.3(d)(3)(ii)(F), added by 54 Fed. Reg. 47523, 47524 (November 15, 1989). GAO supported the amendment. See 67 Comp. Gen. 79, 83 (1987); B-235185, August 18, 1989 (non-decision letter). Prior to the amendment, such a redemption would not have been authorized under the guidelines set forth in the decisions. See GAO report, Frequent Fliers: Use of Airline Bonus Awards by AID Employees, GAO/NSIAD-86-217 (September 1986).

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An employee may keep a prize won in a contest or lottery sponsored by an air carrier if the contest was open to the general public and not limited to ticket-holding passengers. B-199656, July 15, 1981.

Also, there is no problem with the acceptance of life insurance benefits offered to federal employees by travel management contractors at no additional cost to the government where the government would receive no financial benefit by declining. B-222234, December 9, 1986.

Similarly, if an employee chooses to charge official travel expenses to a personal credit card and subsequently receives a cash or credit rebate on purchases made with that card, the employee may keep the entire rebate since it is not directly related to official travel. B-236219, May 4, 1990. As the decision suggests, the answer would presumably be different if the rebate were based solely on use of the card for official travel.

Denied boarding compensation (compensation paid by an air carrier when a passenger is involuntarily "bumped") is payable to the government and not to the individual employee. 59 Comp. Gen. 95 (1979); B-227280, October 14, 1988; B-224590, November 10, 1986; B-148879, July 20, 1970, affirmed upon reconsideration, B-148879, August 28, 1970; FTR, 41 C.F.R. § 301-3.5(b). Since this is not a gift, but is more in the nature of damages, it must be deposited into miscellaneous receipts. 41 Comp. Gen. 806 (1962); FTR, supra. However, an employee who voluntarily vacates his or her seat and takes a later flight may retain overbooking compensation received from the airline, subject to offset for any additional travel expenses caused by the employee's voluntary action. 59 Comp. Gen. 203 (1980); B-196145, January 14, 1980.

A strange result occurs if a federal agency makes a mandatory space requisition that forces an airline to "bump" a passenger who turns out to be another federal employee. The airline can charge the agency for the overbooking compensation it is required to pay. 62 Comp. Gen. 519 (1983). The bumped employee turns the money in to his or her employing agency, which in turn deposits it in the Treasury. The net result is the transfer of the amount of the overbooking compensation from the requisitioning agency to the general fund of the Treasury. While 62 Comp. Gen. 519 did not expressly address the case of a bumped federal employee, there is no apparent reason why the result

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should be any different since the airline is entitled to be made whole in either case.

4. Other Augmentation Principles and Cases

As pointed out earlier in our introductory comments, the augmentation theory is relevant in a wide variety of contexts. The most common applications are the areas previously discussed—the spectrum of situations involving the miscellaneous receipts statute and the acceptance of gifts. This portion of the discussion will present a sampling of cases to illustrate other applications of the theory.

Another way of stating the augmentation rule is that when Congress appropriates funds for an activity, the appropriation represents a limitation Congress has fixed for that activity, and all expenditures for that activity must come from that appropriation absent express authority to the contrary. Thus, a federal institution is normally not eligible to receive grant funds from another federal institution. It is not necessary for the grant statute to expressly exclude federal institutions as eligible grantees; the rule will apply based on the augmentation theory unless the grant statute expressly includes federal institutions. 57 Comp. Gen. 662, 664 (1978); 23 Comp. Gen. 694 (1944); B-114868, April 11, 1975.

The improper treatment of reimbursable transactions may result in an augmentation. Thus, if a given reimbursement must be credited to the appropriation that "earned" it, i.e., that financed the transaction, and that appropriation has expired, crediting the reimbursement to current funds is an improper augmentation. An example of this type of transaction is the Economy Act, 31 U.S.C. § 1535.

An agency may have the option of crediting reimbursements either to current funds or to the appropriation which financed the transaction. An example here is the Arms Export Control Act (Foreign Military Sales Act). Even here, however, crediting a reimbursement to an account which bears no relationship to the transaction would be an unauthorized augmentation. B-132900-O.M., November 1, 1977. Several statutes applicable to the Defense Department provide similar options. For a detailed discussion of these statutes, see B-179708-O.M., December 1, 1975; B- 179708-O.M., July 21, 1975; GAO report entitled Reimbursements to Appropriations: Legislative Suggestions for Improved Congressional Control, FGMSD-75-52 (November 1, 1976).

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Failure to recover all required costs in a reimbursable Economy Act transaction improperly augments the appropriations of the ordering agency. 57 Comp. Gen. 674, 682 (1978).

Similarly, treating a transaction which should be reimbursed as nonreimbursable may result in an improper augmentation. For example, an agency receives appropriations to do its own work, not that of another agency. Accordingly, as a general proposition, interdepartmental loans of personnel on a nonreimbursable basis improperly augment the appropriations of the receiving agency. 65 Comp. Gen. 635 (1986); 64 Comp. Gen. 370 (1985).

Reimbursement by one agency to another in situations which are not the proper subject of an Economy Act agreement or where reimbursement is not otherwise statutorily authorized is improper for several reasons: It is an unauthorized transfer of appropriations; it violates 31 U.S.C. § 1301(a) by using the reimbursing agency's appropriations for other than their intended purpose; and it is an improper augmentation of the appropriations of the agency receiving the reimbursement. (The cases do not always cite all of these theories; they again illustrate the close interrelationship of the various concepts discussed throughout this publication.) The situation arises, for example, when agencies attempt to use the Economy Act for a "service" which is a normal part of the providing agency's mission and for which it receives appropriations.

To illustrate, an agency acquiring land cannot reimburse the Justice Department for the legal expenses incurred incident to the acquisition because these are regular administrative expenses of the Justice Department for which it receives appropriations. 16 Comp. Gen. 333 (1936). Similarly, an agency cannot reimburse the Treasury Department for the administrative expenses incurred in making disbursements on its account. 17 Comp. Gen. 728 (1938).

Federal agencies may not reimburse the Patent Office for services performed in administering the patent and trademark laws since the Patent Office is required by law to furnish these services and receives appropriations for them. 33 Comp. Gen. 27 (1953). Nor may they reimburse the Library of Congress for recording assignments of copyrights to the United States. 31 Comp. Gen. 14 (1951). See also 40 Comp. Gen. 369 (1960) (Interior Department may not charge other agencies for the cost of conducting hearings incident to the

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While Congress retains, as it must, ultimate control over how much an agency can spend, it does not attempt to control the disposition of every dollar. We began our general discussion of administrative discretion in Chapter 3 by quoting Justice Holmes' statement that "some play must be allowed to the joints if the machine is to work." This is fully applicable to the expenditure of appropriated funds. An agency's discretion under a lump-sum appropriation is discussed in Section F.

B. Types of Appropriation Language and the Concept of Earmarking

Congress has been making appropriations since the beginning of the Republic. Over the course of this time, certain forms of appropriation language have become standard. This section will point out the more commonly used language with respect to amount.

Congress may wish to specifically designate, or "earmark," part of a more general lump-sum appropriation for a particular object, as either a maximum, a minimum, or both.[1] For simplicity of illustration, let us assume that we have a lump-sum appropriation of $1,000 for "smoking materials" and a particular object within that appropriation is "Cuban cigars."

If the appropriation specifies "not to exceed" $100 for Cuban cigars or "not more than" $100 for Cuban cigars, then $100 is the maximum available for Cuban cigars. 64 Comp. Gen. 263 (1985).[2] A specifically earmarked maximum may not be augmented with funds from the general appropriation.

Statutory transfer authority will permit the augmentation of a "not to exceed" earmark in many, but not all, cases. In 12 Comp. Gen. 168 (1932), it was held that general transfer authority could be used to increase maximum earmarks for personal services, subject to the percentage limitations specified in the transfer statute. The decision pointed out that if the personal services earmark had been a separate

[1]We use the term "earmarking" here to mean a specific statutory designation of a portion of a lump-sum appropriation or authorization. The term is also used to refer to the statutory designation of revenues for particular uses. For a brief but nevertheless useful discussion of earmarking in this latter sense, see GAO report entitled Budget Issues: Earmarking in the Federal Government, GAO/AFMD-90-8FS (January 1990).

[2]A "not to exceed" earmark was held not to constitute a maximum in 19 Comp. Gen. 61 (1939), where the earmarking language was inconsistent with other language in the general appropriation.

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validation of unpatented mining claims, although it may charge for other services in connection with the validation which it is not required to furnish); B-211953, December 7, 1984 (General Services Administration may not seek reimbursement for costs of storing records which it is required by law to store and for which it receives appropriations).

The Merit Systems Protection Board may not accept reimbursement from other federal agencies for travel expenses of hearing officers to hearing sites away from the Board's regular field offices. Holding the hearings is not a service to the other agency, but is a Board function for which it receives appropriations. The inadequacy of the Board's appropriations to permit sufficient travel is legally irrelevant. 59 Comp. Gen. 415 (1980), affirmed upon reconsideration, 61 Comp. Gen. 419 (1982). Where an agency provides personnel to act as hearing officers for another agency, it may be reimbursed if it is not required to provide the officers (B-192875, January 15, 1980), but may not be reimbursed if it is required to provide them (32 Comp. Gen. 534 (1953)).

Similar issues can arise when an agency is trying to decide which of its appropriations to use for a given object. In 68 Comp. Gen. 337 (1989), for example, the Railroad Retirement Board wanted to make performance awards to personnel in its Office of Inspector General, and was unsure whether to charge its appropriation for the IG's office or its general appropriation. A reasonable argument could be made to support either choice. Thus, the Board could make an election as long as it remained consistent thereafter. Since there was no indication that the IG appropriation was intended to be the exclusive funding source for the performance awards, using the general appropriation would not result in an improper augmentation of the IG appropriation.

A somewhat analogous situation could arise if an agency agrees to reduce or forgo receipts to which it is entitled, and the party owing those receipts agrees in return to make some expenditure which would otherwise have to be borne by a separate appropriation of the same agency. GAO examined such a situation in B-77467, November 8, 1950, involving the leasing of lands under the Bankhead-Jones Farm Tenant Act at reduced rentals on condition that the lessees in return perform certain improvements to the land. There was no augmentation in that case, however, since the statute expressly authorized the leasing with or without consideration and on such

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terms as the Secretary of Agriculture determined would best accomplish the purposes of the act.

The following cases illustrate other situations which GAO found would result in unauthorized augmentations:

- The Customs Service may not charge the party-in-interest for travel expenses of customs employees incurred incident to official duties performed at night or on a Sunday or holiday. 43 Comp. Gen. 101 (1963); 3 Comp. Gen. 960 (1924). See also 22 Comp. Dec. 253 (1915).
- Department of Energy may not use overcharge refunds collected from oil companies to pay the administrative expenses of its Office of Hearings and Appeals. B-200170, April 1, 1981.
- Proposal for airlines to reimburse Treasury to permit Customs Service to hire additional staff to reduce clearance delays at Miami airport was unauthorized in that it would augment appropriations made by Congress for that service. 59 Comp. Gen. 294 (1980).

F. Lump-Sum Appropriations

1. The Rule—General Discussion

A lump-sum appropriation is one that is made to cover a number of specific programs, projects, or items. (The number may be as small as two.) In contrast, a line-item appropriation is available only for the specific object described.

Lump-sum appropriations come in many forms. Many smaller agencies receive only a single appropriation, usually termed "Salaries and Expenses" or "Operating Expenses." All of the agency's operations must be funded from this single appropriation. Cabinet-level departments and larger agencies receive several appropriations, often based on broad object categories such as "operations and maintenance" or "research and development." For purposes of this discussion, a lump-sum appropriation is simply one that is available for more than one specific object.

In earlier times when the federal government was much smaller and federal programs were (or at least seemed) much simpler, very specific line-item appropriations were more common. In recent

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decades, however, as the federal budget has grown in both size and complexity, a lump-sum approach has become a virtual necessity. For example, an appropriation act for an establishment the size of the Defense Department structured solely on a line-item basis would rival the telephone directory in bulk.

The amount of a lump-sum appropriation is not derived through guesswork. It is the result of a lengthy budget and appropriation process. The agency first submits its appropriation request to Congress through the Office of Management and Budget, supported by detailed budget justifications. Congress then reviews the request and enacts an appropriation which may be more, less, or the same as the amount requested. Variations from the amount requested are usually explained in the appropriation act's legislative history, most often in committee reports.

All of this leads logically to a question which can be phrased in various ways: How much flexibility does an agency have in spending a lump-sum appropriation? Is it legally bound by its original budget estimate or by expressions of intent in legislative history? How is the agency's legitimate need for administrative flexibility balanced against the constitutional role of the Congress as controller of the public purse?

The answer to these questions is one of the most important principles of appropriations law. The rule, simply stated, is this: Restrictions on a lump-sum appropriation contained in the agency's budget request or in legislative history are not legally binding on the department or agency unless they are carried into (specified in) the appropriation act itself, or unless some other statute restricts the agency's spending flexibility. Of course, the agency cannot exceed the total amount of the lump-sum appropriation, and its spending must not violate other applicable statutory restrictions. The rule applies equally whether the legislative history is mere acquiescence in the agency's budget request or an affirmative expression of intent.

The rule recognizes the agency's need for flexibility to meet changing or unforeseen circumstances, yet preserves congressional control in several ways. First, the rule merely says that the restrictions are not legally binding. The practical wisdom of making the expenditure is an entirely separate question. An agency that disregards the wishes of its oversight or appropriations committees will most likely be called

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upon to answer for its digressions before those committees next year. An agency that fails to "keep faith" with the Congress may find its next appropriation reduced or limited by line-item restrictions. That Congress is fully aware of this relationship is evidenced by the following statement from a 1973 House Appropriations Committee report:

"In a strictly legal sense, the Department of Defense could utilize the funds appropriated for whatever programs were included under the individual appropriation accounts, but the relationship with the Congress demands that the detailed justifications which are presented in support of budget requests be followed. To do otherwise would cause Congress to lose confidence in the requests made and probably result in reduced appropriations or line item appropriation bills."[88]

Second, restrictions on an agency's spending flexibility exist through the operation of other laws. For example, a "Salaries and Expenses" appropriation may be a large lump sum, but much of it is in fact nondiscretionary because the salaries of agency employees are fixed by law.[89] Third, reprogramming arrangements with the various committees provide another safeguard against abuse. Finally, Congress always holds the ultimate trump card. It has the power to make any restriction legally binding simply by including it in the appropriation act.[90] Thus, the treatment of lump-sum appropriations may be regarded as yet another example of the efforts of our legal and political systems to balance the conflicting objectives of executive flexibility and congressional control.[91]

[88]Report of the House Committee on Appropriations on the 1974 Defense Department appropriation bill, H.R. Rep. No. 662, 93d Cong., 1st Sess. 16 (1973).

[89]Fisher, Presidential Spending Power 72 (1975).

[90]For possible limitations on this statement, see New York v. United States, ___ U.S. ___, 112 S. Ct. 2408, 2426 (1992); Nevada v. Skinner, 884 F.2d 445, 447 (9th Cir. 1989).

[91]The effort has not always been free from controversy. One senator, concerned with what he felt was excessive flexibility in a 1935 appropriation, tried to make his point by suggesting the following:

"Section 1. Congress hereby appropriates $4,880,000,000 to the President of the United States to use as he pleases.

"Sec. 2. Anybody who does not like it is fined $1,000."

79 Cong. Rec. 2014 (1935) (remarks of Sen. Arthur Vandenberg), quoted in Fisher, supra note 89, at 62–63.

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Two common examples of devices Congress uses when it wants to restrict an agency's spending flexibility are line-item appropriations and earmarks. Another approach is illustrated by the following provision, the most restrictive we have seen, from the 1988 continuing resolution:

"Amounts and authorities provided by this resolution shall be in accordance with the reports accompanying the bills as passed by or reported to the House and the Senate and in the Joint Explanatory Statement of the Conference accompanying this Joint Resolution."[92]

The 1983 appropriation act for the Department of Housing and Urban Development contained this restriction:

"Where appropriations in titles I and II of this Act are expendable for travel expenses and no specific limitation has been placed thereon, the expenditures for such travel expenses may not exceed the amounts set forth therefor in the budget estimates submitted for the appropriations . . . ."[93]

A provision prohibiting the use of a construction appropriation to start any new project for which an estimate was not included in the budget is discussed in 34 Comp. Gen. 278 (1954).

Also, the availability of a lump-sum appropriation may be restricted by provisions appearing in statutes other than appropriation acts, such as authorization acts. For example, if an agency receives a line-item authorization and a lump-sum appropriation pursuant to the authorization, the line-item restrictions and earmarks in the authorization act will apply just as if they appeared in the appropriation act itself. The topic is discussed in more detail, with citations, in Chapter 2.

2. Specific Applications

a. Effect of Budget Estimates

Perhaps the easiest case is the effect of the agency's own budget estimate. The rule here was stated in 17 Comp. Gen. 147, 150 (1937) as follows:

[92]Pub. L. No. 100-202, § 107, 101 Stat. 1329, 1329-434 (1987).

[93]Pub. L. No. 97-272, § 401, 96 Stat. 1160, 1178 (1982).

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"The amounts of individual items in the estimates presented to the Congress on the basis of which a lump sum appropriation is enacted are not binding on administrative officers unless carried into the appropriation act itself."

See also B-63539, June 6, 1947; B-55277, January 23, 1946; B-35335, July, 17, 1943; B-48120-O.M., October 21, 1948.

It follows that the lack of a specific budget request will not preclude an expenditure from a lump-sum appropriation which is otherwise legally available for the item in question. To illustrate, the Administrative Office of the U.S. Courts asked for a supplemental appropriation of $11,000 in 1962 for necessary salaries and expenses of the Judicial Conference in revising and improving the federal rules of practice and procedure. The House of Representatives did not allow the increase but the Senate included the full amount. The bill went to conference but the conference was delayed and the agency needed the money. The Administrative Office then asked whether it could take the $11,000 out of its regular 1962 appropriation even though it had not specifically included this item in its 1962 budget request. Citing 17 Comp. Gen. 147, and noting that the study of the federal rules was a continuing statutory function of the Judicial Conference, the Comptroller General concluded as follows:

"[I]n the absence of a specific limitation or prohibition in the appropriation under consideration as to the amount which may be expended for revising and improving the Federal Rules of practice and procedure, you would not be legally bound by your budget estimates or absence thereof.

"If the Congress desires to restrict the availability of a particular appropriation to the several items and amounts thereof submitted in the budget estimates, such control may be effected by limiting such items in the appropriation act itself. Or, by a general provision of law, the availability of appropriations could be limited to the items and the amounts contained in the budget estimates. In the absence of such limitations an agency's lump-sum appropriation is legally available to carry out the functions of the agency."

This decision is B-149163, June 27, 1962. See also 20 Comp. Gen. 631 (1941); B-198234, March 25, 1981; B-69238, September 23, 1948. The same principle would apply where the budget request was for an amount less than the amount appropriated, or for zero. 2 Comp. Gen. 517 (1923); B-126975, February 12, 1958.

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b. Restrictions in Legislative History

The issue raised in most of the decisions results from changes to or restrictions on a lump-sum appropriation imposed during the legislative process. The "leading case" in this area is 55 Comp. Gen. 307 (1975), the so-called "LTV case." The Department of the Navy had selected the McDonnell Douglas Corporation to develop a new fighter aircraft. LTV Aerospace Corporation protested the selection, arguing that the aircraft McDonnell Douglas proposed violated the 1975 Defense Department Appropriation Act. The appropriation in question was a lump-sum appropriation of slightly over $3 billion under the heading "Research, Development, Test, and Evaluation, Navy." This appropriation covered a large number of projects, including the fighter aircraft in question. The conference report on the appropriation act had stated that $20 million was being provided for a Navy combat fighter, but that "[a]daptation of the selected Air Force Air Combat Fighter to be capable of carrier operations is the prerequisite for use of the funds provided." It was conceded that the McDonnell Douglas aircraft was not a derivative of the Air Force fighter and that the Navy's selection was not in accord with the instructions in the conference report. The issue, therefore, was whether the conference report was legally binding on the Navy. In other words, did Navy act illegally in choosing not to follow the conference report?

The ensuing decision is GAO's most comprehensive statement on the legal availability of lump-sum appropriations. Pertinent excerpts are set forth below:

"[C]ongress has recognized that in most instances it is desirable to maintain executive flexibility to shift around funds within a particular lump-sum appropriation account so that agencies can make necessary adjustments for 'unforeseen developments, changing requirements, . . . and legislation enacted subsequent to appropriations.' [Citation omitted.] This is not to say that Congress does not expect that funds will be spent in accordance with budget estimates or in accordance with restrictions detailed in Committee reports. However, in order to preserve spending flexibility, it may choose not to impose these particular restrictions as a matter of law, but rather to leave it to the agencies to 'keep faith' with the Congress. . . .

"On the other hand, when Congress does not intend to permit agency flexibility, but intends to impose a legally binding restriction on an agency's use of funds, it does so by means of explicit statutory language. . . .

"Accordingly, it is our view that when Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and

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indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on Federal agencies. . . .

. . . .

"We further point out that Congress itself has often recognized the reprogramming flexibility of executive agencies, and we think it is at least implicit in such [recognition] that Congress is well aware that agencies are not legally bound to follow what is expressed in Committee reports when those expressions are not explicitly carried over into the statutory language. . . .

. . . .

"We think it follows from the above discussion that, as a general proposition, there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into the law that which is not there.

. . . .

"As observed above, this does not mean agencies are free to ignore clearly expressed legislative history applicable to the use of appropriated funds. They ignore such expressions of intent at the peril of strained relations with the Congress. The Executive branch . . . has a practical duty to abide by such expressions. This duty, however, must be understood to fall short of a statutory requirement giving rise to a legal infraction where there is a failure to carry out that duty."

55 Comp. Gen. at 318, 319, 321, 325. Accordingly, GAO concluded that Navy's award did not violate the appropriation act and the contract therefore was not illegal.

The same volume of the Comptroller General's decisions contains another often-cited case, 55 Comp. Gen. 812 (1976), the Newport News case. This case also involved the Navy. This time, Navy wanted to exercise a contract option for construction of a nuclear powered guided missile frigate, designated DLGN 41. The contractor, Newport News Shipbuilding and Dry Dock Company, argued that exercising the contract option would violate the Antideficiency Act by obligating more money than Navy had in its appropriation.

The appropriation in question, Navy's "Shipbuilding and Conversion" appropriation, provided "for the DLGN nuclear powered guided missile frigate program, $244,300,000, which shall be available only for construction of DLGN 41 and for advance procurement funding

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for DLGN 42 . . . ." The committee reports on the appropriation act and the related authorization act indicated that, out of the $244 million appropriated, $152 million was for construction of the DLGN 41 and the remaining $92 million was for long lead time activity on the DLGN 42. It was clear that, if the $152 million specified in the committee reports for the DLGN 41 was legally binding, obligations resulting from exercise of the contract option would exceed the available appropriation.

The Comptroller General applied the "LTV principle" and held that the $152 million was not a legally binding limit on obligations for the DLGN 41. As a matter of law, the entire $244 million was legally available for the DLGN 41 because the appropriation act did not include any restriction. Therefore, in evaluating potential violations of the Antideficiency Act, the relevant appropriation amount is the total amount of the lump-sum appropriation minus sums already obligated, not the lower figure derived from the legislative history.[94] As the decision recognized, Congress could have imposed a legally binding limit by the very simple device of appropriating a specific amount only for the DLGN 41, or by incorporating the committee reports in the appropriation language.

This decision illustrates another important point: The terms "lump-sum" and "line-item" are relative concepts. The $244 million appropriation in the Newport News case could be viewed as a line-item appropriation in relation to the broader "Shipbuilding and Conversion" category, but it was also a lump-sum appropriation in relation to the two specific vessels included. This factual distinction does not affect the applicable legal principle. As the decision explained:

"Contractor urges that LTV is inapplicable here since LTV involved a lump-sum appropriation whereas the DLGN appropriation is a more specific 'line item' appropriation. While we recognize the factual distinction drawn by Contractor, we nevertheless believe that the principles set forth in LTV are equally applicable and controlling here. . . . [I]mplicit in our holding in LTV and in the other authorities cited is the view that dollar amounts in appropriation acts are to be interpreted differently from statutory words in general. This view, in our opinion, pertains whether the dollar amount is a lump-sum appropriation available for a large number

[94]Of course, all this meant was that there would be no Antideficiency Act violation at the time the option was exercised. The decision recognized that subsequent actions could still produce a violation. 55 Comp. Gen. at 826.

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of items, as in LTV, or, as here, a more specific appropriation available for only two items." 55 Comp. Gen. at 821–22.

A precursor of LTV and Newport News provides another interesting illustration. In 1974, controversy and funding uncertainties surrounded the Navy's "Project Sanguine," a communications system for sending command and control messages to submerged submarines from a single transmitting location in the United States. The Navy had requested $16.6 million for Project Sanguine for FY 1974. The House deleted the request, the Senate restored it, the conference committee compromised and approved $8.3 million. The Sanguine funds were included in a $2.6 billion lump-sum Research and Development appropriation. Navy spent more than $11 million for Project Sanguine in FY 1974. The question was whether Navy violated the Antideficiency Act by spending more than the $8.3 million provided in the conference report. GAO found that it did not, because the conference committee's action was not specified in the appropriation act and was therefore not legally binding. Significantly, the appropriation act did include a proviso prohibiting use of the funds for "full scale development" of Project Sanguine (not involved in the $11 million expenditure), illustrating that Congress knows perfectly well how to impose a legally binding restriction when it desires to do so. GAO report, Legality of the Navy's Expenditures for Project Sanguine During Fiscal Year 1974, LCD-75-315 (January 20, 1975); B-168482-O.M., August 15, 1974.

Similarly, the Department of Health, Education, and Welfare received a $12 billion lump-sum appropriation for public assistance in 1975. Committee reports indicated that $9.2 million of this amount was being provided for research and development activities of the Social and Rehabilitation Service. Since this earmarking of the $9.2 million was not carried into the appropriation act itself, it did not constitute a statutory limit on the amount available for the program. B-164031(3), April 16, 1975.

GAO has applied the rule of the LTV and Newport News decisions in a number of additional cases and reports, several of which involve variations on the basic theme.[95]

[95]See 64 Comp. Gen. 359 (1985); 59 Comp. Gen. 228 (1980); B-247853.2, July 20, 1992; B-231711, March 28, 1989; B-222853, September 29, 1987; B-204449, November 18, 1981; B-204270, October 13, 1981; B-202992, May 15, 1981; B-157356, August 17, 1978; B-159993, September 1, 1977; B-163922, October 3, 1975; Internal Controls: Funding of International Defense Research and Development Projects, GAO/NSIAD-91-27 (October 1990).

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line-item appropriation, the transfer authority would clearly apply. Id. at 170. Also, the transfer authority was remedial legislation designed to mitigate the impact of reduced appropriations. Somewhat similarly, in 36 Comp. Gen. 607 (1957), funds transferred to an operating appropriation from a civil defense appropriation could be used to exceed an administrative expense limitation in the former which had been calculated without including the increased administrative expenses the added civil defense functions would entail. However, in 33 Comp. Gen. 214 (1953), the Comptroller General held that general transfer authority could not be used to exceed a maximum earmark on an emergency assistance program where it was clear that Congress, aware of the emergency, intended that the program be funded only from the earmark. See also 18 Comp. Gen. 211 (1938).

Under a "not to exceed" earmark, the agency is not required to spend the entire amount on the object specified. See, e.g., Brown v. Ruckelshaus, 364 F. Supp. 258, 266 (C.D. Cal. 1973) ("the phrase 'not to exceed' connotes limitation, not disbursement"). If, in our hypothetical, the entire $100 is not used for Cuban cigars, unobligated balances may—within the time limits for obligation—be applied to other unrestricted objects of the appropriation. 31 Comp. Gen. 578, 579 (1952); 15 Comp. Dec. 660 (1909); B-4568, June 27, 1939.

If later in the fiscal year a supplemental appropriation is made for "smoking materials," the funds provided in the supplemental may not be used to increase the $100 maximum for Cuban cigars unless the supplemental appropriation act so specifies. See Section D of this chapter.

Words like "not to exceed" are not the only way to establish a maximum limitation. If the appropriation includes a specific amount for a particular object (such as "For Cuban cigars, $100"), then the appropriation is a maximum which may not be exceeded. 36 Comp. Gen. 526 (1957); 19 Comp. Gen. 892 (1940); 16 Comp. Gen. 282 (1936).

Another device Congress has used to designate earmarks as maximum limitations is the following general provision:

"Whenever in this Act, an amount is specified within an appropriation for particular purposes or objects of expenditure, such amount, unless otherwise specified, shall be

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The treatment of lump-sum appropriations as described above has been considered by the Department of Justice and the courts as well as GAO, and all have reached the same result. For example, the Justice Department's Office of Legal Counsel concluded in one case that the Department could, in the Attorney General's discretion, reallocate funds within the same lump-sum appropriation in order to avoid an impending deficiency for the United States Marshals Service. 4B Op. Off. Legal Counsel 701 (1980). Another case applying these principles is 4B Op. Off. Legal Counsel 674 (1980).

The United States Court of Appeals for the District of Columbia Circuit has noted that lump-sum appropriations have a "well understood meaning" and stated the rule as follows:

"A lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit."

International Union v. Donovan, 746 F.2d 855, 861 (D.C. Cir. 1984), cert. denied, 474 U.S. 825. The court in that case refused to impose a "reasonable distribution" requirement on the exercise of the agency's discretion, and found that discretion unreviewable. Id. at 862–63. See also McCarey v. McNamara, 390 F.2d 601 (3d Cir. 1968); Blackhawk Heating & Plumbing Co. v. United States, 622 F.2d 539, 547 n.6 (Ct. Cl. 1980).

One court, seemingly at odds with the weight of authority, has concluded that an agency was required by 31 U.S.C. § 1301(a) (purpose statute) to spend money in accordance with an earmark appearing only in legislative history. Blue Ocean Preservation Society v. Watkins, 767 F. Supp. 1518 (D. Haw. 1991). An additional factor in that case was that the agency had unsuccessfully sought congressional approval to reprogram the funds in question.

c. "Zero Funding" Under a Lump-Sum Appropriation

Does discretion under a lump-sum appropriation extend so far as to permit an agency to "zero fund" a particular program? Although there are few cases, the answer would appear, for the most part, to be yes, as long as the program is not mandatory and the agency uses the funds for other authorized purposes to avoid impoundment complications. E.g., B-209680, February 24, 1983 (agency could properly decide not to fund a program where committee reports on appropriation stated that no funds were being provided for that

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program, although agency would have been equally free to fund the program under the lump-sum appropriation); B-167656, June 18, 1971 (agency has discretion to discontinue a function funded under a lump-sum appropriation to cope with a shortfall in appropriations); 4B Op. Off. Legal Counsel 701, 704 n.7 (1980) (same point).

The more difficult question is whether the answer is the same where there is no shortfall problem and where it is clear that Congress wants the program funded. In International Union v. Donovan, cited above, the court upheld an agency's decision to allocate no funds to a program funded by a lump-sum appropriation. Although there was in that case a "congressional realization, if not a congressional intent, that nothing would be expended" for the program in question, 746 F.2d at 859, it seems implicit from the court's discussion of applicable law that the answer would have been the same if legislative history had "directed" that the program be funded. The same result would seem to follow from 55 Comp. Gen. 812 (1976), discussed above, holding that the entire unobligated balance of a lump-sum appropriation should be considered available for one of the objects included in the appropriation, at least for purposes of assessing potential violations of the Antideficiency Act.

In B-114833, July 21, 1978, the Department of Agriculture wanted to use its 1978 lump-sum Resource Conservation and Development appropriation to fund existing projects rather than starting any new ones, even though Congress had expressly provided funds for certain new RC&D projects. Since the congressional action was stated in committee reports but not in the statute itself, the Department's proposed course of action was legally permissible.

An early decision reaching a different result is 1 Comp. Gen. 623 (1922). The appropriation in question provided for "rent of offices of the recorder of deeds, including services of cleaners as necessary, not to exceed 30 cents per hour, . . . $6,000." The Comptroller General held that the entire $6,000 could not be spent for rent. The decision stated:

"[S]ince [the appropriation act] provides that the amount appropriated shall cover both rent and cleaning services, it must be held that the entire amount can not be used for rent alone.

". . . The law leaves to the discretion of the commissioners the question as to what portion of the amount appropriated shall be paid for rent and what portion shall be

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paid for services of cleaners, but it does not vest in the commissioners the discretion to determine that the entire amount shall be paid for rent and that the cleaning services shall be left unprovided for, or be provided for from other funds."

Id. at 624. Although this result may at first glance seem inconsistent with the authorities previously cited, it would not have been possible as a practical matter to rent office space and totally eliminate cleaning services, and the use of any other appropriation would have been clearly improper. A factor which apparently influenced the decision was that the "regular office force" was somehow being coerced to do the cleaning, and these were employees paid from a separate appropriation. Id. Thus, 1 Comp. Gen. 623 should be viewed as an exception based on its own particular circumstances.

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Chapter 7

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Obligation of Appropriations

A. Introduction: Nature of an Obligation

You, as an individual, use a variety of procedures to spend your money. Consider the following transactions:

(1) You walk into a store, make a purchase, and pay at the counter with cash or check.

(2) You move to another counter and make another purchase with a credit card. No money changes hands at the time, but you sign a credit form which states that you promise to pay upon being billed.

(3) You call the local tree surgeon to remove some ailing limbs from your favorite sycamore. He quotes an estimate and you arrange to have the work done. The tree doctor arrives while you are not at home, does the work, and slips his bill under your front door.

(4) You visit your family dentist to relieve a toothache. The work is done and you go home. No mention is made of money. Of course, you know that the work wasn't free and that the dentist will bill you.

(5) You now visit your family lawyer to sue the dentist and the tree surgeon. The lawyer takes your case and you sign a contingent fee contract in which you agree that the lawyer's fee will be one-third of any amounts recovered.

Numerous other variations could be added to the list but these are sufficient to make the point. Case (1) is a simple cash transaction. The legal liability to pay and the actual disbursement of money occur simultaneously. Cases (2) through (5) all have one essential thing in common: You first take some action which creates the legal liability to pay—that is, you "obligate" yourself to pay—and the actual disbursement of money follows at some later time. The obligation occurs in a variety of ways, such as placing an order or signing a contract.

The government spends money in much the same fashion except that it is subject to many more statutory restrictions. The simple "cash transaction" or "direct outlay" involves a simultaneous obligation and disbursement and represents a minor portion of government expenditures. The major portion of appropriated funds are first obligated and then expended. The subsequent disbursement "liquidates" the obligation. Thus, an agency "uses" appropriations in two basic ways—direct expenditures (disbursements) and obligations.

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There is no legal requirement for you as an individual to keep track of your "obligations." For the government, there is.

The concept of "obligation" is central to appropriations law. This is because of the principle, one of the most fundamental, that an obligation must be charged against the relevant appropriation in accordance with the rules relating to purpose, time, and amount. The term "available for obligation" is used throughout this publication to refer to availability as to purpose, time, and amount. This chapter will explore exactly what an obligation is.

It would be nice to start with an all-inclusive and universally applicable definition of "obligation." Unfortunately, because of the immense variety of transactions in which the government is involved, such a definition does not exist. In fact, the Comptroller General has noted that formulating an all-inclusive definition would be impracticable, if not impossible. B-116795, June 18, 1954. As stated in B-192282, April 18, 1979, GAO—

> "has generally avoided a universally applicable legal definition of the term 'obligation,' and has instead analyzed the nature of the particular transaction at issue to determine whether an obligation has been incurred."

At first glance, this passage appears to beg the question. (How can you determine whether an obligation has been incurred if you don't first define what an obligation is?) It is perhaps more accurate to say that GAO has defined "obligation" only in the most general terms, and has applied the concept to individual transactions on a case-by-case basis.

The most one finds in the decisions are general statements referring to an obligation in such terms as "a definite commitment which creates a legal liability of the Government for the payment of appropriated funds for goods and services ordered or received." B-116795, June 18, 1954. See also 21 Comp. Gen. 1162, 1163 (1941) (circular letter); B-222048, February 10, 1987; B-82368, July 20, 1954; B-24827, April 3, 1942; B-190, June 12, 1939. From the earliest days, the Comptroller General has cautioned that the obligating of appropriations must be "definite and certain." A-5894, December 3, 1924.

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Thus, in very general and simplified terms, an "obligation" is some action that creates a liability or definite commitment on the part of the government to make a disbursement at some later time.

An advance of funds to a working fund does not in itself serve to obligate the funds. See 23 Comp. Gen. 668 (1944); B-180578-O.M., September 26, 1978. The same result holds for funds transferred to a special "holding account" established for administrative convenience. B-118638, November 4, 1974 (appropriations for District of Columbia Public Defender Service under control of the Administrative Office of the U.S. Courts are not obligated by transfer to a "Judicial Trust Fund" established by the Administrative Office).

The typical question on obligations is framed in terms of when the obligation may or must be "recorded," that is, officially charged against the spending agency's appropriations. Restated, what action is necessary or sufficient to create an obligation? This is essential in determining what fiscal year to charge, with all the consequences that flow from that determination. It is also essential to the broader concern of congressional control over the public purse.

Before proceeding with the specifics, two general points should be noted:

- For appropriations law purposes, the term "obligation" includes both matured and unmatured commitments. A matured commitment is a legal liability that is currently payable. An unmatured commitment is a liability which is not yet payable but for which a definite commitment nevertheless exists. For example, a contractual liability to pay for goods which have been delivered and accepted has "matured." The liability for monthly rental payments under a lease is largely unmatured although the legal liability covers the entire rental period. Both types of liability are "obligations." The fact that an unmatured liability may be subject to a right of cancellation does not negate the obligation. A-97205, February 3, 1944, at 9–10. An "unmatured liability" as described in this paragraph is different from a "contingent liability" as discussed later in this chapter.
- The obligation takes place when the definite commitment is made, even though the actual payment may not take place until the following fiscal year. 56 Comp. Gen. 351 (1977); 23 Comp. Gen. 862 (1944).

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B. Criteria for Recording Obligations (31 U.S.C. § 1501)

The overrecording and the underrecording of obligations are equally improper. Overrecording (recording as obligations items which are not) is usually done to prevent appropriations from expiring at the end of a fiscal year. Underrecording (failing to record legitimate obligations) makes it impossible to determine the precise status of the appropriation and may result in violating the Antideficiency Act. A 1953 decision put it this way:

"In order to determine the status of appropriations, both from the viewpoint of management and the Congress, it is essential that obligations be recorded in the accounting records on a factual and consistent basis throughout the Government. Only by the following of sound practices in this regard can data on existing obligations serve to indicate program accomplishments and be related to the amount of additional appropriations required." 32 Comp. Gen. 436, 437 (1953).

The standards for the proper recording of obligations are found in 31 U.S.C. § 1501(a), originally enacted as section 1311 of the Supplemental Appropriation Act of 1955 (68 Stat. 830). A Senate committee has described the origin of the statute as follows:

"Section 1311 of the Supplemental Appropriation Act of 1955 resulted from the difficulty encountered by the House Appropriations Committee in obtaining reliable figures on obligations from the executive agencies in connection with the budget review. It was not uncommon for the committees to receive two or three different sets of figures as of the same date. This situation, together with rather vague explanations of certain types of obligations particularly in the military department[s], caused the House Committee on Appropriations to institute studies of agency obligating practices.

. . . .

"The result of these examinations laid the foundation for the committee's conclusion that loose practices had grown up in various agencies, particularly in the recording of obligations in situations where no real obligation existed, and that by reason of these practices the Congress did not have reliable information in the form of accurate obligations on which to determine an agency's future requirements. To correct this situation, the committee, with the cooperation of the General Accounting Office and the Bureau of the Budget, developed what has become the statutory criterion by which the validity of an obligation is determined. . . ."[1]

Thus, the primary purpose of 31 U.S.C. § 1501 is to ensure that agencies record only those transactions which meet specified

[1]Senate Committee on Government Operations, Financial Management in the Federal Government, S. Doc. No. 11, 87th Cong., 1st Sess. 85 (1961).

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considered as the maximum amount that may be expended for said purpose or object rather than an amount set apart exclusively therefor."[3]

By virtue of the "unless otherwise specified" clause, the provision does not apply to amounts within an appropriation which have their own specific earmarking "words of limitation" such as "exclusively." 31 Comp. Gen. 578 (1952).

If a lump-sum appropriation includes several particular objects and provides further that the appropriation "is to be accounted for as one fund" or "shall constitute one fund," then the individual amounts are not limitations, the only limitation being that the total amount of the lump-sum appropriation cannot be exceeded. However, individual items within that lump-sum appropriation that include the "not to exceed" language will still constitute maximum limitations. 22 Comp. Dec. 461 (1916); 3 Comp. Dec. 604 (1897); A-79741, August 7, 1936. The "one fund" language is still occasionally encountered, but has become uncommon.

If Congress wishes to specify a minimum for the particular object but not a maximum, the appropriation act may provide "Smoking materials, $1,000, of which not less than $100 shall be available for Cuban cigars." B-137353, December 3, 1959. See also 64 Comp. Gen. 388 (1985); B-131935, March 17, 1986. If the phrase "not less than" is used, in contrast with the "not to exceed" language, portions of the $100 not obligated for Cuban cigars may not be applied to the other objects of the appropriation. 64 Comp. Gen. at 394–95; B-128943, September 27, 1956.

Another phrase Congress often uses to earmark a portion of a lump-sum appropriation is "shall be available." There are variations. For example, our hypothetical $1,000 "smoking materials" appropriation may provide that, out of the $1,000, $100 "shall be available" or "shall be available only" or "shall be available exclusively" for Cuban cigars. Still another variation is "$1,000, including $100 for Cuban cigars."

If the "shall be available" phrase is combined with the maximum or minimum language noted above ("not to exceed," "not less than,"

[3]District of Columbia Appropriations Act, 1992, Pub. L. No. 102-111, § 103, 105 Stat. 559, 567 (1991).

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standards for legitimate obligations. 54 Comp. Gen. 962, 964 (1975); 51 Comp. Gen. 631, 633 (1972); B-192036, September 11, 1978.[2]

Subsection (a) of 31 U.S.C. § 1501 prescribes specific criteria for recording obligations. The subsection begins by stating that "[a]n amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of . . . ." Subsection (a) then goes on to list nine criteria for recording obligations. Note that the statute requires "documentary evidence" to support the recording in each instance. In one sense, these nine criteria taken together may be said to comprise the "definition" of an obligation.[3]

If a given transaction does not meet any of the criteria, then it is not a proper obligation and may not be recorded as one. Once one of the criteria is met, however, the agency not only may but must at that point record the transaction as an obligation. While 31 U.S.C. § 1501 does not explicitly state that obligations must be recorded as they arise or are incurred, it follows logically from an agency's responsibility to comply with the Antideficiency Act. GAO has made the point in reports and decisions in various contexts. E.g., Substantial Understatement of Obligations for Separation Allowances for Foreign National Employees, B-179343, October 21, 1974, at 6; FGMSD-75-20, February 13, 1975, at 3 (letter report); 65 Comp. Gen. 4, 6 (1985); B-226801, March 2, 1988; B-192036, September 11, 1978; A-97205, February 3, 1944, at 10.

It is important to emphasize the relationship between the existence of an obligation and the act of recording. Recording evidences the obligation but does not create it. If a given transaction is not sufficient to constitute a valid obligation, recording it will not make it one. E.g., B-197274, February 16, 1982 ("reservation and notification" letter held not to constitute an obligation, act of recording notwithstanding, where letter did not impose legal liability on government and

[2]Although 31 U.S.C. § 1501 does not expressly apply to the government of the District of Columbia, GAO has expressed the view that the same criteria should be followed. B-180578-O.M., September 26, 1978. This is because the proper recording of obligations is the only way to assure compliance with 31 U.S.C. § 1341, a portion of the Antideficiency Act, which does expressly apply to the government of the District of Columbia. District of Columbia Self-Government and Governmental Reorganization Act (so-called "Home Rule" Act), Pub. L. No. 93-198, § 603(e), 87 Stat. 774, 815 (1973).

[3]Financial Management in the Federal Government, supra note 1, at 86.

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subsequent formation of contract was within agency's control). Conversely, failing to record a valid obligation in no way diminishes its validity or affects the fiscal year to which it is properly chargeable. E.g., B-226782, October 20, 1987 (letter of intent, executed in FY 1985 and found to constitute a contract, obligated FY 1985 funds, notwithstanding agency's failure to treat it as an obligation); 63 Comp. Gen. 525 (1984); 38 Comp. Gen. 81, 82–83 (1958).

The precise amount of the government's liability should be recorded as the obligation where that amount is known. However, where the precise amount is not known at the time the obligation is incurred, the obligation should be recorded on the basis of the agency's best estimate. E.g., 56 Comp. Gen. 414, 418 (1977) and cases cited therein; 21 Comp. Gen. 574 (1941). See also OMB Circular No. A-34, §§ 22.1, 22.2. Where an estimate is used, the basis for the estimate must be shown on the obligating document. As more precise data on the liability becomes available, the obligation must be periodically adjusted. GAO, Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 3.4.D (1990).

Retroactive adjustments to recorded obligations, like the initial recordings themselves, must be supported by documentary evidence. The use of statistical methods to make adjustments "lacks legal foundation if the underlying transactions cannot be identified and do not support the calculated totals." GAO report, Financial Management: Defense Accounting Adjustments for Stock Fund Obligations Are Illegal, GAO/AFMD-87-1 (March 11, 1987) at 6; B-236940, October 17, 1989.

A related concept is the allocation of obligations for administrative expenses (utility costs, computer services, etc.) between or among programs funded under separate appropriations. There is no rule or formula for this allocation apart from the general prescription that the agency must use a supportable methodology. Merely relying on the approved budget is not sufficient. See GAO report, Financial Management: Improvements Needed in OSMRE's Method of Allocating Obligations, GAO/AFMD-89-89 (July 1989). An agency may initially charge common-use items to a single appropriation as long as it makes the appropriate adjustments from other benefiting appropriations before or as of the end of the fiscal year. 31 U.S.C. § 1534. The allocation must be in proportion to the benefit. 70 Comp. Gen. 592 (1991).

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Further procedural guidance may be found in OMB Circular No. A-34 (Instructions for Budget Execution); the Treasury Financial Manual; and GAO's Policy and Procedures Manual for Guidance of Federal Agencies. For the most part, the statutory criteria in 31 U.S.C. § 1501(a) reflect standards that had been developed in prior decisions of the Comptroller General over the years. See, e.g., 18 Comp. Gen. 363 (1938); 16 Comp. Gen. 37 (1936). The remainder of this section will explore the nine specific recording criteria.

1. Subsection (a)(1): Contracts

Subsection (a)(1) of 31 U.S.C. § 1501 establishes minimum requirements for recording obligations for contracts. Specifically, there must be documentary evidence of—

"(1) a binding agreement between an agency and another person (including an agency) that is—

"(A) in writing, in a way and form, and for a purpose authorized by law; and

"(B) executed before the end of the period of availability for obligation of the appropriation or fund used for specific goods to be delivered, real property to be bought or leased, or work or service to be provided."

As seen in Chapter 5, the general rule for obligating fiscal year appropriations by contract is that the contract imposing the obligation must be made within the fiscal year sought to be charged and must meet a bona fide need of that fiscal year. E.g., 37 Comp. Gen. 155 (1957). This discussion will center on the timing of the obligation from the perspective of 31 U.S.C. § 1501(a)(1).

Subsection (a)(1) actually imposes several different requirements: (1) a binding agreement; (2) in writing; (3) for a purpose authorized by law; (4) executed before the expiration of the period of obligational availability; and (5) a contract calling for specific goods, real property, work, or services.

a. Binding Agreement

While the agreement must be legally binding (offer, acceptance, consideration, made by authorized official), it does not have to be the final "definitized" contract. The legislative history of subsection (a)(1) makes this clear. The following excerpt is taken from the conference report:

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"Section 1311(a)(1) precludes the recording of an obligation unless it is supported by documentary evidence of a binding agreement between the parties as specified therein. It is not necessary, however, that the binding agreement be the final formal contract on any specified form. The primary purpose is to require that there be an offer and an acceptance imposing liability on both parties. For example, an authorized order by one agency on another agency of the Government, if accepted by the latter and meeting the requirement of specificity, etc., is sufficient. Likewise, a letter of intent accepted by a contractor, if sufficiently specific and definitive to show the purposes and scope of the contract finally to be executed, would constitute the binding agreement required."[4]

The following passage from 42 Comp. Gen. 733, 734 (1963) remains a useful general prescription:

"The question whether Government funds are obligated at any specific time is answerable only in terms of an analysis of written arrangements and conditions agreed to by the United States and the party with whom it is dealing. If such analysis discloses a legal duty on the part of the United States which constitutes a legal liability or which could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States, an obligation of funds may generally be stated to exist."

In 35 Comp. Gen. 319 (1955) and more recently in 59 Comp. Gen. 431 (1980), the Comptroller General set forth the factors that must be present in order for a binding agreement to exist for purposes of 31 U.S.C. § 1501(a)(1) with respect to contracts awarded under competitive procedures:

1. Each bid must have been in writing.

2. The acceptance of each bid must have been communicated to the bidder in the same manner as the bid was made. If the bid was mailed, the contract must have been placed in the mails before the close of the fiscal year. If the bid was delivered other than by mail, the contract must have been delivered in like manner before the end of the fiscal year.

3. Each contract must have incorporated the terms and conditions of the respective bid without qualification. Otherwise, it must be viewed as a counteroffer and there would be no binding agreement until accepted by the contractor.

[4]H.R. Rep. No. 2663, 83d Cong., 2d Sess. 18 (1954), quoted in B-118654, August 10, 1965.

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To illustrate, where the agency notified the successful bidder of the award by telephone near the end of FY 1979 but did not mail the contract document until FY 1980, there was no valid obligation of FY 1979 funds. 59 Comp. Gen. 431 (1980). See also 35 Comp. Gen. 319 (1955).[5] A document is considered "mailed" when it is placed in the custody of the Postal Service (given to postman or dropped in mailbox or letter chute in office building); merely delivering the document to an agency messenger with instructions to mail it is insufficient. 59 Comp. Gen. at 433.

Similarly, there was no recordable obligation of FY 1960 funds where the agency erroneously mailed the notice of award to the wrong bidder and did not notify the successful bidder until the first day of FY 1961. 40 Comp. Gen. 147 (1960).

It is important to note that, in the above cases, the obligation was invalid only with respect to the fiscal year the agency wanted to charge. The agency could still proceed to finalize the obligation but would have to charge funds current in the subsequent fiscal year. 59 Comp. Gen. at 433; 40 Comp. Gen. at 148.

A mere request for an additional allocation with no indication of acceptance does not create a recordable obligation. 39 Comp. Gen. 829 (1960). Similarly, a work order or purchase order may be recorded as an obligation only where it constitutes a binding agreement for specific work or services. 34 Comp. Gen. 459 (1955).

A "letter of intent" is a preliminary document that may or may not constitute an obligation. At one extreme, it may be nothing more than an "agreement to agree" with neither party bound until execution of the formal contract. E.g., B-201035, February 15, 1984, at 5. At the other extreme, it may contain all the elements of a contract, in which event it will create binding obligations. The crucial question is whether the parties intended to be bound, determinable primarily from the language actually used. Saul Bass & Associates v. United States, 505 F.2d 1386 (Ct. Cl. 1974). For a good example of a letter

[5]This is a relatively rare situation in which the early decisions were somewhat more "liberal." E.g., A-28429, August 27, 1929 (FY 1929 funds held obligated where bids were solicited and received and the lowest bid authorized to be accepted during FY 1929 although formal contract not executed until early FY 1930). The explicit language of 31 U.S.C. § 1501 would preclude this result today, although use of a preliminary letter contract, discussed later in the text, would at least partially solve the problem.

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of intent creating contractual obligations, see B-226782, October 20, 1987.

A letter of intent which amounts to a contract is also called a "letter contract." In the context of government procurement, it is used most commonly when there is insufficient time to prepare and execute the full contract before the end of the fiscal year. As indicated in the legislative history quoted earlier, a "letter of intent" accepted by the contractor may form the basis of an obligation if it is sufficiently specific and definitive to show the purpose and scope of the contract. 21 Comp. Gen. 574 (1941); B-127518, May 10, 1956. Letters of intent should be used "only under conditions of the utmost urgency." 33 Comp. Gen. 291, 293 (1954). Under the Federal Acquisition Regulation, letter contracts may be used—

"when (1) the Government's interests demand that the contractor be given a binding commitment so that work can start immediately and (2) negotiating a definitive contract is not possible in sufficient time to meet the requirement."

FAR, 48 C.F.R. § 16.603-2(a).

The amount to be obligated under a letter contract is the government's maximum liability under the letter contract itself, without regard to additional obligations anticipated to be included in the definitive contract or, restated, the amount necessary to cover expenses to be incurred by the contractor prior to execution of the definitive contract. The obligation is recorded against funds available for obligation at the time the letter contract is issued. 34 Comp. Gen. 418, 421 (1955); B-197274, September 23, 1983; B-197274, February 16, 1982; B-127518, May 10, 1956. See also FAR, 48 C.F.R. §§ 16.603-2(d) and 16.603-3(a).

Once the definitive contract is executed, the government's liability under the letter contract is merged into it. If definitization does not occur until the following fiscal year, the definitive contract will obligate funds of the latter year, usually in the amount of the total contract price less an appropriate deduction for obligations under the letter contract. B-197274, September 23, 1983. In this regard, the cited decision states, at page 5:

"The definitized contract then supports obligating against the appropriation current at the time it is entered into since it is, in fact, a bona fide need of that year. The amount of the definitized contract would ordinarily be the total contract cost less

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either the actual costs incurred under the letter contract (when known) or the amount of the maximum legal liability permitted by the letter contract (when the actual costs cannot be determined)."[6]

Letter contracts should be definitized within 180 days. FAR, 48 C.F.R. § 16.603-2(c). Also, letter contracts should not be used to record excess obligations as this distorts the agency's funding picture. See GAO report, Contract Pricing: Obligations Exceed Definitized Prices on Unpriced Contracts, GAO/NSIAD-86-128 (May 1986).

b. Contract "in Writing"

Although the binding agreement under 31 U.S.C. § 1501(a)(1) must be "in writing," the "writing" is not necessarily limited to words on a piece of paper. The traditional mode of contract execution is to affix original handwritten signatures to a document (paper) setting forth the contract terms, and this is likely to remain the norm for the foreseeable future. Change is in the winds, however, and traditional interpretations are being reassessed in light of advancing computer technologies. In 1983, GAO's legal staff, in an internal memorandum to one of GAO's audit divisions, took note of modern legal trends and advised that the "in writing" requirement could be satisfied by computer-related media which produce tangible recordings of information, such as punch cards, magnetic cards, tapes, or disks. B-208863(2)-O.M., May 23, 1983.

Eight years later, the Comptroller General issued his first formal decision on the topic, 71 Comp. Gen. 109 (1991). The National Institute of Standards and Technology asked whether federal agencies could use certain Electronic Data Interchange (EDI) technologies to create valid contractual obligations for purposes of 31 U.S.C. § 1501(a). Yes, replied the Comptroller, as long as there are adequate safeguards and controls to provide no less certainty and protection of the government's interests as under a "paper and ink" method. The decision states:

"We conclude that EDI systems using message authentication codes which follow NIST's Computer Data Authentication Standard (Federal Information Processing

[6]In the opinion of the editors, it is questionable whether, for obligation purposes, limiting the deduction to actual costs where known should be viewed as a general rule. Where the obligation under the letter contract is not excessive and is otherwise proper (meets bona fide needs test, etc.), it is arguable that the full obligation under the letter contract, even if not fully performed prior to definitization, should nevertheless stand as an obligation against the prior year's appropriation.

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Standard (FIPS) 113) [footnote omitted] or digital signatures following NIST's Digital Signature Standard, as currently proposed, can produce a form of evidence that is acceptable under section 1501."

While there may be some room for interpretation as to what constitutes a "writing," the writing, in some acceptable form, must exist. Under the plain terms of the statute, an oral agreement may not be recorded as an obligation. In United States v. American Renaissance Lines, Inc., 494 F.2d 1059 (D.C. Cir. 1974), cert. denied, 419 U.S. 1020, the court found that 31 U.S.C. § 1501(a)(1) "establishes virtually a statute of frauds" for the government[7] and held that neither party can judicially enforce an oral contract in violation of the statute.

However, the Court of Claims and its successor, the Claims Court, have taken the position that 31 U.S.C. § 1501(a)(1) does not bar recovery "outside of the contract" where sufficient additional facts exist for the court to infer the necessary "meeting of minds" (contract implied-in-fact). Narva Harris Construction Corp. v. United States, 574 F.2d 508 (Ct. Cl. 1978); Johns-Manville Corp. v. United States, 12 Cl. Ct. 1, 19–20 (1987). Cf. Kinzley v. United States, 661 F.2d 187 (Ct. Cl. 1981). In addition, according to the Claims Court, it is also possible to have an express oral contract if the required elements are present– "mutuality of intent to be bound, definite offer, unconditional acceptance, and consideration"–and if the government official involved had actual authority to bind the government. Edwards v. United States, 22 Cl. Ct. 411, 420 (1991).

These would be examples of subsequently imposed liability where the agency did not record–and lawfully could not have recorded–an obligation when the events giving rise to the liability took place. If a contractor received a judgment in this type of situation, the obligational impact on the "contracting agency" would depend on whether the case was subject to the Contract Disputes Act. If the Act applies, the judgment would be payable initially from the permanent judgment appropriation (31 U.S.C. § 1304), to be reimbursed by the agency from currently available appropriations. If the Act does not apply, the judgment would be paid from the judgment appropriation

[7]A "statute of frauds" is a law requiring contracts to be in writing in order to be enforceable. Most, if not all, states have some version of such a statute. Strictly speaking, as the Comptroller General has noted, there is no federal statute of frauds. 39 Comp. Gen. 829, 831 (1960). See also 55 Comp. Gen. 833 (1976).

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without reimbursement, and there would thus be no obligational impact on the agency.

In B-118654, August 10, 1965, GAO concluded that a notice of award signed by the contracting officer and issued before the close of the fiscal year did not satisfy the requirements of 31 U.S.C. § 1501(a)(1) where it incorporated modifications of the offer as to price and other terms which had been agreed to orally during negotiations. The reason is that there was no evidence in writing that the contractor had agreed to the modifications. GAO conceded, however, that the agency's argument that there was documentary evidence of a binding agreement for purposes of section 1501(a)(1) did have some merit. A similar issue arose in a 1977 case. While the decision implies (without mention of B-118654) that an obligation based on an award letter which incorporated telephone conversations relating to pricing might not be defeated if otherwise sufficient to satisfy 31 U.S.C. § 1501(a)(1), the potential defect in any event would not afford a basis for a third party (in this case a protesting unsuccessful offeror) to object to the contract's legality. 56 Comp. Gen. 768, 775 (1977).

c. Requirement of Specificity

The statute requires documentary evidence of a binding agreement for specific goods or services. An agreement that fails this test is not a valid obligation.

For example, a State Department contract under the Migration and Refugee Assistance Program establishing a contingency fund "to provide funds for refugee assistance by any means, organization or other voluntary agency as determined by the Supervising Officer" did not meet the requirement of specificity and therefore was not a valid obligation. B-147196, April 5, 1965.

Similarly, a purchase order which lacks a description of the products to be provided is not sufficient to create a recordable obligation. B-196109, October 23, 1979. In the cited decision, a purchase order for "regulatory, warning, and guide signs based on information supplied" on requisitions to be issued did not validly obligate FY 1978 funds where the requisitions were not sent to the supplier until after the close of FY 1978.

d. Invalid Award/Unauthorized Commitment

Where a contract award is determined to be invalid, the effect is that no binding agreement ever existed as required by 31 U.S.C.

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§ 1501(a)(1) and therefore there was no valid obligation of funds. 38 Comp. Gen. 190 (1958); B-157360, August 11, 1965. Under more recent authorities discussed in Chapter 5, however, the original obligation is not extinguished for all purposes, and the funds remain available post-expiration to fund a valid "replacement contract." 70 Comp. Gen. 230 (1991); 68 Comp. Gen. 158 (1988). Where the invalidity is determined under a bid protest, which will presumably cover most such instances, the extended availability described in the GAO decisions is statutorily defined as 90 working days after the final ruling on the protest. 31 U.S.C. § 1558. Thus, cases like 38 Comp. Gen. 190 must be regarded as modified to this extent. Of course, the obligation does not survive post-expiration for anything other than a valid replacement contract.

Where the Comptroller General awards bid preparation costs to a successful protester under authority of 31 U.S.C. § 3554(c), payment should be charged to the agency's procurement appropriations current at the time GAO issued its decision. If the amount must be verified prior to payment, the agency should record an estimated obligation, using GAO's decision as the obligating document. Upon verification, the obligation is adjusted up or down as necessary, on the basis of the documents substantiating the amount. B-199368.4, January 19, 1983 (non-decision letter).

Claims resulting from unauthorized commitments raise obligation questions in two general situations. If the circumstances surrounding the unauthorized commitment are sufficient to give rise to a contract implied-in-fact, it may be possible for the agency to ratify the unauthorized act. If the ratification occurs in a subsequent fiscal year, the obligation is chargeable to the prior year, i.e., the year in which the need presumably arose and the claimant performed. B-208730, January 6, 1983. If ratification is not available for whatever reason, the only remaining possibility for payment is a quantum meruit recovery under a theory of contract implied-in-law. The quantum meruit theory permits payment in limited circumstances even in cases where there was no valid obligation, for example, where the contractor has made partial delivery operating under what he believed to be a valid contract. B-118428, September 21, 1954. The obligational impact is the same as for ratification—payment is chargeable to the fiscal year in which the claimant performed. B-210808, May 24, 1984; B-207557, July 11, 1983.

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etc.), then the above rules apply and the phrase "shall be available" adds little. See, e.g., B-137353, December 3, 1959. However, if the earmarking phrase "shall be available" is used without the "not to exceed" or "not less than" modifiers, the rules are not quite as firm.

Cases interpreting the "shall be available" and "shall be available only" earmarks are somewhat less than consistent. The earlier decisions proclaimed "shall be available" to constitute a maximum but not a minimum (B-5526, September 14, 1939), although it could be a minimum if Congress clearly expressed that intent (B-128943, September 27, 1956). Later cases held the earmark to constitute both a maximum and a minimum which could neither be augmented nor diverted to other objects within the appropriation. B-137353, December 3, 1959; B-137353-O.M., October 14, 1958. Another early decision held summarily that "shall be available only" results in a maximum which cannot be augmented. 18 Comp. Gen. 1013 (1939). More recent decisions, however, have expressed the view that the effect of "shall be available only"—whether it is a maximum or a minimum—depends on the underlying congressional intent. 53 Comp. Gen. 695 (1974); B-142190, March 23, 1960. Applying this test, the earmark in 53 Comp. Gen. 695 was found to be a maximum; similar language was found to be a minimum which could be exceeded in B-142190 and in B-70933, March 1, 1948.

Thus, if the phrase "shall be available" may be said to contain an element of ambiguity, addition of the word "only" does not produce a plain meaning. The Claims Court, reviewing an authorization earmark for a Navy project known as RACER, commented:

> "[I]t is not apparent from the language of the authorization ($45 million 'is available only for') that Congress necessarily mandated the Navy to spend all $45 million on the RACER system. Rather, Congress may have merely intended to preclude the Navy from spending that $45 million on any other activities, i.e., the money would be forfeited if not spent on the RACER system."
>
> Solar Turbines, Inc. v. United States, 23 Cl. Ct. 142, 158 (1991).

Use of the word "exclusively" is somewhat more precise. The earmark "shall be available exclusively" is both a maximum which cannot be augmented from the general appropriation, and a minimum which cannot be diverted to other objects within the appropriation. B-102971, August 24, 1951. Once again, however, clearly expressed congressional intent can produce a different result. B-113272-O.M.,

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e. Variations in Quantity to Be Furnished

In some types of contracts, the quantity of goods to be furnished or services to be performed may vary. The quantity may be indefinite or it may be stated in terms of a definite minimum with permissible variation. Variations may be at the option of the government or the contractor. The obligational treatment of this type of contract depends on the exact nature of the contractual liability imposed on the government.

Before proceeding, it is important to define some terms. A requirements contract is one in which the government agrees to purchase all of its needs for the particular item or service during the contract period from the contractor, and the contractor agrees to fill all such needs. An indefinite-quantity contract is one in which the contractor agrees to supply whatever quantity the government may order, within limits, with the government under no obligation to use that contractor for all of its requirements. FAR, 48 C.F.R. §§ 16.503(a), 16.504(a); Mason v. United States, 615 F.2d 1343 (Ct. Cl. 1980); Hemet Valley Flying Service Co. v. United States, 7 Cl. Ct. 512, 515–16 (1985). Under either type of contract, the government orders specific quantities from time to time by issuing a document variously termed a work order, task order, delivery order, etc.

In a requirements contract, the government must state a realistic and good faith estimate of its total anticipated requirements, based on the best and most current information available. 48 C.F.R. § 16.503(a)(1); B-190855, March 31, 1978; B-188426, September 20, 1977. Maximum and minimum quantities may be specified but are not required. 48 C.F.R. § 16.503(a)(2); B-226992.2, July 13, 1987; Unlimited Enterprises, Export-Import, Inc., ASBCA No. 34825, 88-3 BCA ¶ 20,908 (1988). Needs must relate to the contract period. 21 Comp. Gen. 961, 964 (1942).

If, in the exercise of good faith, the anticipated requirements simply do not materialize, the government is not obligated to purchase the stated estimate or indeed, if no requirements arise, to place any orders with the contractor beyond any required minimum. AGS-Genesys Corp., ASBCA No. 35302, 89-2 BCA ¶ 21,702 (1989); World Contractors, Inc., ASBCA No. 20354, 75-2 BCA ¶ 11,536 (1975); 47 Comp. Gen. 365, 370 (1968). The contractor assumes the risk that non-guaranteed requirements may fall short of expectations, and has no claim for a price adjustment if they do. Medart, Inc. v. Austin, 967 F.2d 579 (Fed. Cir. 1992); 37 Comp. Gen. 688 (1958). If,

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however, the government attempts to meet its requirements elsewhere, including the development of in-house capability, or if failure to place orders with the contractor for valid needs is otherwise found to evidence lack of good faith, liability will result. E.g., Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982); Cleek Aviation v. United States, 19 Cl. Ct. 552 (1990); Viktoria Transport GmbH & Co., ASBCA No. 30371, 88-3 BCA ¶ 20,921 (1988); California Bus Lines, ASBCA No. 19732, 75-2 BCA ¶ 11,601 (1975); Henry Angelo & Sons, Inc., ASBCA No. 15082, 72-1 BCA ¶ 9356 (1972); B-182266, April 1, 1975.

An indefinite-quantity contract, under current regulations, must include a minimum purchase requirement which must be more than nominal. 48 C.F.R. § 16.504(a). An indefinite-quantity contract without a minimum purchase requirement is regarded as illusory and unenforceable. It is no contract at all. Mason v. United States, 615 F.2d at 1346 n.5; Torncello v. United States, 681 F.2d at 761; Modern Systems Technology Corp. v. United States, 24 Cl. Ct. 360 (1991). Apart from the specified minimum, the government is free to obtain its requirements from other contractors. Government Contract Services, Inc., GSBCA No. 8447, 88-1 BCA ¶ 20,255 (1987); Alta Construction Co., PSBCA No. 1395, 87-2 BCA ¶ 19,720 (1987).

What does all this signify from the perspective of obligating appropriations? As we noted at the outset, the obligational impact of a variable quantity contract depends on exactly what the government has bound itself to do. A fairly simple generalization can be deduced from the decisions: In a variable quantity contract (requirements or indefinite-quantity), any required minimum purchase must be obligated when the contract is executed; subsequent obligations occur as work orders or delivery orders are placed, and are chargeable to the fiscal year in which the order is placed.

Thus, in a variable quantity contract with no guaranteed minimum—or any analogous situation in which there is no liability unless and until an order is placed—there would be no recordable obligation at the time of award. 63 Comp. Gen. 129 (1983); 60 Comp. Gen. 219

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(1981); 34 Comp. Gen. 459, 462 (1955); B-124901, October 26, 1955 ("call contract").[8] Obligations are recorded as orders are placed.

The same approach applies to a contract for a fixed quantity in which the government reserves an option to purchase an additional quantity. The contract price for the fixed quantity is an obligation at the time the contract is entered into; the reservation of the option ripens into an obligation only if and when the government exercises the option. 19 Comp. Gen. 980 (1940).

A more recent application of these concepts is B-192036, September 11, 1978. The National Park Service entered into a construction contract for the development of a national historic site. Part of the contract price was a "contingent sum" of $25,000 for "Force Account Work," described in the contract as miscellaneous items of a minor nature not included in the bid schedule. No "Force Account Work" was to be done except under written orders issued by the contracting officer. Since a written order was required for the performance of work, no part of the $25,000 could be recorded as an obligation unless and until such orders were issued and accepted by the contractor. That portion of the master contract itself which provided for the Force Account Work was not sufficiently specific to create an obligation.

In a 1955 case, the Army entered into a contract for the procurement of lumber. The contract contained a clause permitting a ten-percent overshipment or undershipment of the quantity ordered. This type of clause was standard in lumber procurement contracts. The Comptroller General held that the Army could obligate the amount necessary to pay for the maximum quantities deliverable under the contract. 34 Comp. Gen. 596 (1955). Here, the quantity was definite and the government was required to accept the permissible variation.

In another 1955 case, the General Services Administration had published in the Federal Register an offer to purchase chrome ore up to a stated maximum quantity. Formal agreements would not be executed until producers made actual tenders of the ore. The program

[8]As cases such as 63 Comp. Gen. 129 illustrate, there can be many variations on the basic indefinite-quantity theme. It should not be assumed that every variation will violate the current FAR minimum purchase requirement.

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published in the Federal Register was a mere offer to purchase and GSA could not obligate funds to cover the total quantity authorized. Reason: there was no mutual assent and therefore no binding agreement in writing until a producer responded to the offer and a formal contract was executed. B-125644, November 21, 1955.

So-called "level of effort" contracts are conceptually related to the "variation in quantity" cases. In one case, the Environmental Protection Agency entered into a cost-plus-fixed-fee contract for various services at an EPA facility. The contractor's contractual obligation was expressed as a "level of effort" in terms of staff-hours. The contractor was to provide up to a stated maximum number of direct staff-hours, to be applied on the basis of work orders issued during the course of the contract. Since the government was obligated under the contract to order specific tasks, the contract was sufficiently definitive to justify recording the full estimated contract amount at the time of award. B-183184, May 30, 1975. See also 58 Comp. Gen. 471, 474 (1979); B-199422, June 22, 1981 (non-decision letter).

f. Amount to Be Recorded

In the simple firm fixed-price contract, the amount to be recorded presents no problem. The contract price is the recordable obligation. However, in many types of contracts, the final contract price cannot be known at the time of award and an estimate must be recorded. The basic principle—record your best estimate, adjusting the obligation up or down periodically as more precise information becomes available—has already been summarized in our preliminary discussion of 31 U.S.C. § 1501(a).

Under a fixed-price contract with escalation, price redetermination, or incentive provisions, the amount to be obligated initially is the fixed price stated in the contract or the target price in the case, for example, of a contract with an incentive clause. 34 Comp. Gen. 418 (1955); B-133170, January 29, 1975; B-206283-O.M., February 17, 1983. Thus, in an incentive contract with a target price of $85 million and a ceiling price of $100 million, the proper amount to record initially as an obligation is the target price of $85 million. 55 Comp. Gen. 812, 824 (1976).

When obligations are recorded based on a target price, the agency should establish appropriate safeguards to guard against violations of the Antideficiency Act. This usually means the administrative

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reservation of sufficient funds to cover potential liability. 34 Comp. Gen. 418 at 420–21; B-206283-O.M., February 17, 1983.

g. Administrative Approval of Payment

In some cases, the contractual arrangement or related statutory or regulatory requirements may provide a process for administrative review and approval as a prerequisite to payment. This may or may not affect the obligational process, depending on the purpose of the review. (The review and approval here refers to a process in addition to the normal review and approval of the voucher by a certifying officer which is always required.)

To illustrate, in 46 Comp. Gen. 895 (1967), GAO approved a Veterans Administration procedure under which charges for fee-basis outpatient treatment of eligible veterans would be recorded as obligations at the time VA administratively approved the vouchers. Since the review and approval process was necessary to determine whether the government should accept liability, no contractual obligation arose until that time. See also B-133944, January 31, 1958, and B-92679, July 24, 1950.

A 1977 case, B-137762.32, July 11, 1977, will further illustrate the concept. The case concerned a contract between the Internal Revenue Service and an informant. Under IRS regulations, there is no liability to make payment until IRS has evaluated the worth of the information and has assessed and collected any underpaid taxes and penalties. It is at this point that an appropriate IRS official determines that a reward should be paid and its amount, and it is at this point that a recordable obligation arises.

By way of contrast, the obligation for a court-appointed attorney under the Criminal Justice Act occurs at the time of appointment and not when the court approves the payment voucher, even though the exact amount of the obligation is not determinable until the voucher is approved. This is because the government becomes contractually liable by the order of appointment, with subsequent court review of the voucher intended only to insure the reasonableness of the expenses incurred. Thus, payment must be charged to the fiscal year in which the appointment was made. 50 Comp. Gen. 589 (1971).

h. Miscellaneous Contractual Obligations

The core issue in many of the previously discussed cases has been when a given transaction ripens into a recordable obligation, that is,

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precisely when the "definite commitment" occurs. Many of the cases do not fit neatly into categories. Rather, the answer must be derived by analyzing the nature of the contractual or statutory commitments in the particular case.

A 1979 case dealt with a lease arrangement entered into by the Peace Corps in Korea. Under a particular type of lease recognized by Korean law, the lessee does not make installment rental payments. Instead, the lessee makes an initial payment of approximately 50 percent of the assessed valuation of the property. At the end of the lease, the lessor is required to return the entire initial payment. The lessor makes his profit by investing the initial payment at the local interest rate. Since the lease is a binding contractual commitment and since the entire amount of the initial payment may not be recoverable for a number of reasons, GAO found it improper to treat the initial payment as a mere advance or an account receivable (as in the case of travel advances) and thus not reflected as an obligation. Rather, the amount of the initial payment must be recorded as an obligation chargeable to the fiscal year in which the lease is entered into, with subsequent returns to be deposited in the Treasury as miscellaneous receipts. B-192282, April 18, 1979.

Several cases deal with court-related obligations. For example, the obligation for fees of jurors—including retroactive increases authorized by 28 U.S.C. § 1871—occurs at the time the jury service is performed. 54 Comp. Gen. 472 (1974). See also 50 Comp. Gen. 589 (1971), dealing with obligations under the Criminal Justice Act, discussed above under "Administrative Approval of Payment."

The recording of obligations for land commissioners appointed to determine just compensation in land condemnation cases was discussed in B-184782, February 26, 1976, and 56 Comp. Gen. 414 (1977). The rules derived from these decisions are as follows:

- The obligation occurs at the time of appointment and is chargeable to the fiscal year of appointment if a specific case is referred to the commission in that fiscal year.
- Pendency of an action will satisfy the bona fide needs rule and will be sufficient to support the obligation even though services are not actually performed until the following fiscal year.
- Appointment of a "continuous" land commission creates no obligation until a particular action is referred to it.

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- An amended court order increasing the compensation of a particular commissioner amounts to a new obligation and the full compensation is chargeable to the appropriation current at the time of the amended order.
- A valid obligation occurs under the above principles even though the order of appointment does not expressly charge the costs to the United States because, under the Constitution, the costs cannot be assessed against the condemnee.

(Beginning with fiscal year 1978, the appropriation to compensate land commissioners was switched from the Justice Department to the Judiciary and since then has been a no-year appropriation. We retain the above summary here to illustrate the analysis and because it may have use by analogy in similar situations.)

i. Interagency Transactions

It is not uncommon for federal agencies to provide goods or services to other federal agencies. Subsection (a)(1) of 31 U.S.C. § 1501 expressly applies to interagency contracts. This, however, does not embrace all interagency transactions. When an agency obtains goods or services from another agency, the obligational treatment of the transaction depends on whether or not the order is "required by law" to be placed with the other agency. If it is "required by law," the transaction is governed by subsection (a)(3) of 31 U.S.C. § 1501, discussed later in this section. If it is not "required by law," subsection (a)(1) applies. Interagency orders not required by law are sometimes termed "voluntary orders." Thus, except for "required by law" situations, the recording criteria are the same whether the contract is with a private party or another federal agency.

(1) Economy Act vs. other authority

A major source of authority for voluntary interagency agreements is the Economy Act, 31 U.S.C. § 1535. An Economy Act

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agreement—assuming it meets the criteria of subsection (a)(1)—is recorded as an obligation the same as any other contract.[9] However, Economy Act agreements are subject to one additional requirement. Under 31 U.S.C. § 1535(d), the period of availability of funds transferred pursuant to an Economy Act agreement may not exceed the period of availability of the source appropriation. Thus, one-year appropriations obligated by an Economy Act agreement must be deobligated at the end of the fiscal year charged to the extent that the performing agency has not performed or incurred valid obligations under the agreement. 39 Comp. Gen. 317 (1959); 34 Comp. Gen. 418, 421–22 (1955). It was, for example, improper for the Library of Congress to use annual funds transferred to it under Economy Act agreements and unobligated by it prior to the end of the fiscal year to provide services in the following fiscal year. Financial Audit: First Audit of the Library of Congress Discloses Significant Problems, GAO/AFMD-91-13 (August 1991). The reason for this requirement is to prevent the Economy Act from being used to extend the obligational life of an appropriation beyond that provided by Congress in the appropriation act. 31 Comp. Gen. 83, 85 (1951). The deobligation requirement of 31 U.S.C. § 1535(d) does not apply to obligations against no-year appropriations. 39 Comp. Gen. 317, 319 (1959).

Where the agreement is based on some statutory authority other than the Economy Act, the recording of the obligation is still governed by 31 U.S.C. § 1501(a)(1). However, 31 U.S.C. § 1535(d) does not apply. In this situation, the obligation will remain payable in full from the appropriation initially charged, regardless of when performance occurs, in the same manner as contractual obligations generally, subject, of course, to the bona fide needs rule and to any restrictions in the legislation authorizing the agreement. Thus, it is necessary to determine the correct statutory authority for any interagency agreement in order to apply the proper obligational principles.

[9]The determination of whether an interagency agreement is "binding" for purposes of recording under 31 U.S.C. § 1501(a)(1) is made in the same manner as if the contract were with a private party—examining precisely what the parties have "committed" themselves to do under the terms of the agreement. However, an agreement between two government agencies cannot be legally "enforced" against a defaulting agency in the sense of compelling performance or obtaining damages. Enforcement against another agency is largely a matter of comity and good faith. Thus, the term "binding" in the context of interagency agreements reflects the undertakings expressed in the agreement without regard to the legal consequences (or lack thereof) of non-performance.

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The following three cases, involving interagency provision of services, will illustrate these principles.

- Agreement under which funds were transferred from Department of Health, Education, and Welfare to Federal Aviation Administration to provide training for air traffic control trainees was found authorized by Manpower Development and Training Act of 1962 rather than Economy Act. Therefore, while initial recording of obligation was governed by 31 U.S.C. § 1501(a)(1), funds remained available for further obligation by FAA subject to time limits of Manpower Act rather than deobligation requirement of 31 U.S.C. § 1535(d). 51 Comp. Gen. 766 (1972).
- Agreement entered into in FY 1976 between Administrative Office of U.S. Courts and General Services Administration for design and implementation of automated payroll system was authorized by Federal Property and Administrative Services Act rather than Economy Act. Since agreement met requirements of 31 U.S.C. § 1501(a)(1), it was properly recordable as a valid obligation against FY 1976 funds and was not subject to 31 U.S.C. § 1535(d). 55 Comp. Gen. 1497 (1976).
- Army Corps of Engineers entered into agreement with Department of Housing and Urban Development to perform flood insurance studies pursuant to orders placed by HUD. Since the agreement presumably required the Corps to perform as HUD placed the orders, a recordable obligation would arise when HUD placed an order under the agreement. Since agreement was authorized by National Flood Insurance Act rather than Economy Act, funds obligated by order would remain obligated even though Corps did not complete performance (or contract out for it) until following fiscal year. B-167790, September 22, 1977.

A voluntary interagency order for goods is subject to the same basic rules as a voluntary interagency order for services. If the order is governed by the Economy Act and otherwise meets the criteria of 31 U.S.C. § 1501(a)(1), it is recordable as an obligation when the order is placed but is subject to the deobligation requirement of 31 U.S.C. § 1535(d). If the order is not governed by the Economy Act, it constitutes an obligation only to the extent that the performing agency has completed the work or has awarded contracts to fill the order. For example, Military Interdepartmental Procurement Requests (MIPR) are viewed as authorized by the Economy Act. Therefore, while a MIPR may be initially recorded as an obligation under 31 U.S.C.

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§ 1501(a)(1), it is subject to the deobligation requirement of 31 U.S.C. § 1535(d) and is thus ultimately chargeable to appropriations current when the performing component incurs valid obligations. 59 Comp. Gen. 563 (1980); 34 Comp. Gen. 418, 422 (1955).

Regardless of the statutory basis for the agreement, an obligation is recordable under subsection (a)(1) only if the criteria of that subsection—binding agreement, sufficiently specific, etc.—are met.

In B-193005, October 2, 1978, GAO considered the procurement of crude oil for the Strategic Petroleum Reserve. Under the Federal Property and Administrative Services Act, the General Services Administration may procure materials for other federal agencies and may delegate this authority. GSA had delegated the authority to procure fuel commodities to the Secretary of Defense. Thus, the Department of Energy could procure the oil through the Defense Fuel Supply Center in a non-Economy Act transaction. An order placed by the Department of Energy could be recorded as an obligation under 31 U.S.C. § 1501(a)(1) if it constituted a "binding agreement," and the funds would remain available for contracts awarded by Defense beyond the original period of obligational availability.[10] This result would have been precluded by 31 U.S.C. § 1535(d) had the transaction been governed by the Economy Act. An order would constitute a binding agreement for recording purposes if accepted by the requisitioned agency, or if the requisitioned agency were required to perform under the terms of a "master" agreement.

In 59 Comp. Gen. 602 (1980), GAO considered the procedure by which the Bureau of Alcohol, Tobacco, and Firearms ordered "strip stamps" from the Bureau of Engraving. (These are the excise tax stamps one sees pasted across the caps of liquor bottles.) GAO reviewed pertinent legislation and concluded that ATF was not "required by law" to procure its strip stamps from the Bureau of Engraving. Since individual orders were not binding agreements, it was essentially immaterial in one important respect whether the order was governed by the Economy Act or some other law; in neither event could ATF's funds remain obligated beyond the last day of a fiscal

[10]In a subsequent letter to the Senate Committee on Energy and Natural Resources, the Comptroller General pointed out that the 1978 decision would not affect the applicability of the Impoundment Control Act to the Strategic Petroleum Reserve program since the statutory definition of "deferral" applies to expenditures as well as obligations. B-200685, December 23, 1980.

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May 21, 1953; B-111392-O.M., October 17, 1952 (earmark held to be a minimum only in both cases).

Similarly, the term "including" has been held to establish both a maximum and a minimum. A-99732, January 13, 1939. As such, it cannot be augmented from a more general appropriation (19 Comp. Gen. 892 (1940)), nor can it be diverted to other uses within the appropriation (67 Comp. Gen. 401 (1988)).

To sum up, the most effective way to establish a maximum (but not minimum) earmark is by the words "not to exceed" or "not more than." The words "not less than" most effectively establish a minimum (but not maximum). These are all phrases with well-settled plain meanings. The "shall be available" family of earmarking language presumptively "fences in" the earmarked sum (both maximum and minimum), but is more subject to variation based upon underlying congressional intent.

Our discussion thus far has centered on the use of earmarking language to prescribe the amount available for a particular object. Earmarking language may also be used to vary the period of availability for obligation. An illustrative case is B-231711, March 28, 1989 (appropriation provision earmarked portion of lump sum to remain available for an additional fiscal year, but was neither maximum nor minimum limitation on amount available for particular object).

Finally, earmarking language may be found in authorization acts as well as appropriation acts. The same meanings apply. Several of the cases cited above involve authorization acts, e.g., 64 Comp. Gen. 388 (1985) and B-131935, March 17, 1986.

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year to the extent an order remained unfilled. Funds could be considered obligated at the end of a fiscal year only to the extent that stamps were printed or in process or that the Bureau of Engraving had entered into a contract with a third party to provide them.

Thus, a voluntary interagency order, whether authorized by the Economy Act or some other law, is recordable under 31 U.S.C. § 1501(a)(1) only if it constitutes a binding agreement and meets the other criteria of that subsection. If it does, the applicability or non-applicability of 31 U.S.C. § 1535(d) then becomes relevant. If it does not, the order constitutes an obligation only to the extent the performing agency has completed the work or has awarded contracts to have it done. In addition to 59 Comp. Gen. 602 and B-193005, see 39 Comp. Gen. 829 (1960); 34 Comp. Gen. 705, 708 (1955); 23 Comp. Gen. 88 (1943); B-180578-O.M., September 26, 1978.

Similarly, an order for an item not stocked by the requisitioned agency (or, if out of stock, not routinely on order) is not a recordable obligation until the requisitioned agency purchases the item or executes a contract for it. The reason is that the order is not a binding agreement. It is merely an offer which is accepted by the requisitioned agency's performance. The basic rules in this area were established by 34 Comp. Gen. 705 (1955).

(2) Orders from stock

The obligational treatment of orders for items to be delivered from stock of the requisitioned agency derives from 32 Comp. Gen. 436 (1953). An order for items to be delivered from stock is a recordable obligation if (1) it is intended to meet a bona fide need of the fiscal year in which the order is placed or to replace stock used in that fiscal year,[11] and (2) the order is firm and complete. To be firm and complete, the order must request prompt delivery of specific available stock items for a stated consideration and must be accepted by the supplying agency in writing. "Available" means on hand or routinely on order. However, acceptance is not required for common-use stock items which are on hand or on order and will be delivered promptly.

[11]The fact that the replacement stock will not be used until the following year will not defeat an otherwise valid obligation. See 44 Comp. Gen. 695 (1965).

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Although these rules were developed prior to the enactment of 31 U.S.C. § 1501(a)(1), they continue to govern the recording of obligations under that statute. 34 Comp. Gen. 705 (1955); 34 Comp. Gen. 418, 422 (1955). Materials which are specially created for a particular purpose are not "stock." 44 Comp. Gen. 695 (1965).

(3) Project orders

"Project orders" are authorized by 41 U.S.C. § 23, which provides:

> "All orders or contracts for work or material or for the manufacture of material pertaining to approved projects heretofore or hereafter placed with Government-owned establishments shall be considered as obligations in the same manner as provided for similar orders or contracts placed with commercial manufacturers or private contractors, and the appropriations shall remain available for the payment of the obligations so created as in the case of contracts or orders with commercial manufacturers or private contractors."[12]

This statute, derived from earlier appropriation act provisions appearing shortly after World War I, applies only to the military departments, although the orders may be placed with any "Government-owned establishment." B-95760, June 27, 1950.[13] Precisely why the statute was enacted is not clear. Some discussion of its origins may be found in 26 Comp. Dec. 1022 (1920). The Coast Guard has virtually identical authority in 14 U.S.C. § 151.

A project order is a valid and recordable obligation when the order is issued and accepted, regardless of the fact that performance may not be accomplished until after the expiration of the fiscal year. 1 Comp. Gen. 175 (1921); B-135037-O.M., June 19, 1958. The statute does not, however, authorize the use of the appropriations so obligated for the purpose of replenishing stock used in connection with the order. A-25603, May 15, 1929. The requirement of specificity applies to project orders the same as any other recordable obligations under 31 U.S.C. § 1501(a)(1). B-126405, May 21, 1957.

[12]The term "approved projects," as used in 41 U.S.C. § 23, has no special meaning. It refers simply to "projects that have been approved by officials having legal authority to do so." B-171049-O.M., February 17, 1972. Cf. 26 Comp. Dec. 1022, 1023–24 (1920).

[13]The rationale of B-95760 is not clearly stated. The provision first appeared as permanent authority in the Army's FY 1921 appropriation (41 Stat. 975). Had it been intended to apply to all agencies, it would not have been necessary to repeat it for the Navy in 1922 (42 Stat. 812) and the Coast Guard in 1942 (56 Stat. 328).

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Since a project order is not an Economy Act transaction, the deobligation requirement of 31 U.S.C. § 1535(d) does not apply. 34 Comp. Gen. 418, 422 (1955). See also 16 Comp. Gen. 752 (1937). Also, unlike the Economy Act, 41 U.S.C. § 23 does not authorize advance payment. Thus, advance payment for project orders is not authorized unless permitted by some other statute. B-95760, June 27, 1950.

2. Subsection (a)(2): Loans

Under 31 U.S.C. § 1501(a)(2), a recordable obligation exists when there is documentary evidence of "a loan agreement showing the amount and terms of repayment."

A loan agreement is essentially contractual in nature. Thus, to have a valid obligation, there must be a proposal by one party and an acceptance by another. Approval of the loan application must be communicated to the applicant within the fiscal year sought to be charged, and there must be documentary evidence of that communication. B-159999-O.M., March 16, 1967. Where a loan application is made in one fiscal year and approval is not communicated to the applicant until the following fiscal year, the obligation is chargeable to the later year. Id.; B-159999-O.M., December 14, 1966.

Telegraphic notification of approval of a loan application where the amount of the loan and terms of repayment are thereby agreed upon is legally acceptable. B-159999-O.M., December 14, 1966.

To support a recordable obligation under subsection (a)(2), the agreement must be sufficiently definite and specific, just as in the case of subsection (a)(1) obligations. To illustrate, the United States and the government of Brazil entered into a loan agreement in 1964. As a condition precedent to any disbursement under the agreement, Brazil was to furnish a statement covering utilization of the funds. The funds were to be used for various economic and social development projects "as may, from time to time, be agreed upon in writing" by the governments of the United States and Brazil. While the loan agreement constituted a valid binding contract, it was not sufficiently definite or specific to validly obligate FY 1964 funds. The basic agreement was little more than an "agreement to agree," and an obligation of funds could arise only when a particular "utilization

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statement" was submitted and approved. B-155708-O.M., April 26, 1965.

Prior to fiscal year 1992, the amount to be recorded in the case of a loan was quite simple—the face amount of the loan. From the budgetary perspective, this was undesirable because the obligation was indistinguishable from any other cash outlay. By disregarding at the obligational stage the fact that loans are supposed to be repaid, this treatment did not reflect the true cost to the government of direct loan programs. Congress addressed the situation in the Federal Credit Reform Act of 1990, enacted as section 13201 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388, 1388-609, and codified at 2 U.S.C. §§ 661—661f (Supp. III 1991). The general approach of the FCRA is to require the advance provision of budget authority to cover the subsidy portion of direct loans (in recognition of the fact that not all loans are repaid), with the non-subsidy portion (the portion expected to be repaid) financed through borrowings from the Treasury. The Office of Management and Budget has issued detailed implementing instructions in OMB Circular No. A-34, Part VI (1991). The FCRA applies to new direct loan obligations incurred on or after October 1, 1991.

FCRA defines "direct loan" as "a disbursement of funds by the Government to a non-Federal borrower under a contract that requires the repayment of such funds with or without interest." 2 U.S.C. § 661a(1). A direct loan obligation is "a binding agreement by a Federal agency to make a direct loan when specified conditions are fulfilled by the borrower." Id. § 661a(2). The "cost" of a direct loan is the estimated long-term cost to the government, taking into consideration disbursements and repayments, calculated on a net present value basis at the time of disbursement. Id. § 661a(5).

Unless otherwise provided by statute, new direct loan obligations may be incurred only to the extent that budget authority to cover their costs is provided in advance. Id. § 661c(b). Under this provision, the typical appropriation will include both an appropriation of budget authority for the subsidy costs and a program ceiling (total face amount of loans supportable by the cost appropriation). The appropriation is made to a "program account." When a direct loan obligation is incurred, its cost is obligated against the program account. The actual financing is done through a revolving, non-budget "financing account." Loan repayments are credited to the financing

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account. See generally OMB Circular No. A-34, § 62.6. The overobligation or overexpenditure of either the loan subsidy or the credit level supportable by the enacted subsidy violates the Antideficiency Act. Id. § 63.2.

3. Subsection (a)(3): Interagency Orders Required by Law

The third standard for recording obligations, 31 U.S.C. § 1501(a)(3), is "an order required by law to be placed with [a federal] agency."

Subsection (a)(3) means exactly what it says. An order placed with another government agency is recordable under this subsection only if it is required by statute or statutory regulation to be placed with the other agency. The subsection does not apply to orders which are merely authorized rather than required. 34 Comp. Gen. 705 (1955).

An order required by law to be placed with another agency is not an Economy Act transaction. Therefore, the deobligation requirement of 31 U.S.C. § 1535(d) does not apply. 35 Comp. Gen. 3, 5 (1955).

The fact that the work will be performed in the next fiscal year does not defeat the obligation as long as the bona fide need test is met. 59 Comp. Gen. 386 (1980); 35 Comp. Gen. 3 (1955). Also, the fact that the work is to be accomplished and reimbursement made through use of a revolving fund is immaterial. 35 Comp. Gen. 3 (1955); 34 Comp. Gen. 705 (1955).

A common example of "orders required by law" is printing and binding to be done by the Government Printing Office. The rule is that a requisition for printing services may be recorded as an obligation when placed if (1) there is a present need for the printing, and (2) the requisition is accompanied by copy or specifications sufficient for GPO to proceed with the job.

Thus, a requisition by the Commission on Fine Arts for the printing of "Sixteenth Street Architecture, Volume I" placed with GPO in FY 1977 and accompanied by manuscript and specifications obligated FY 1977 funds and was chargeable in its entirety to FY 1977, notwithstanding that the printing would be done in the following fiscal year. 59 Comp. Gen. 386 (1980). However, a requisition for U.S. Travel Service sales promotional literature placed with GPO near the end of FY 1964 did not obligate FY 1964 funds where no copy or manuscript was furnished to GPO until FY 1965. 44 Comp. Gen. 695 (1965). For other

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printing cases illustrating these rules, see 29 Comp. Gen. 489 (1950); 23 Comp. Gen. 82 (1943); B-154277, June 5, 1964; B-123964, August 23, 1955; B-114619, April 17, 1953; B-50663, June 30, 1945; B-35807, August 10, 1943; B-35967, August 4, 1943; B-34888, June 21, 1943.

An agency may use a printing estimate furnished by GPO to establish the level of funds to be obligated pending receipt of a bill reflecting actual cost. However, the printing estimate alone, even if written, unaccompanied by the placement of an order, is not sufficient to create a valid and recordable obligation. B-182081, January 26, 1977, affirmed in B-182081, February 14, 1979. In the cited decision, there was no valid obligation before the ordering commission went out of existence and its appropriations ceased to be available for further obligation. Therefore, there was no appropriation available to reimburse GPO for work done under the invalid purported obligation.

GPO is required by law to print certain congressional materials such as the Congressional Record, and receives a "Printing and Binding" appropriation for this purpose. For such items where no further request or authorization is required, a copy of the basic law authorizing the printing plus a copy of the appropriation constitute the obligating documents. B-123964, August 23, 1955.

Another common "order required by law" situation is building alteration, management, and related services to be performed by the General Services Administration. For example, a job order by the Social Security Administration for building repairs validly obligated funds of the fiscal year in which the order was placed, by virtue of subsection (a)(3), notwithstanding that GSA was unable to perform the work until the following fiscal year. 35 Comp. Gen. 3 (1955). See also B-158374, February 21, 1966. However, this result assumes compliance with the bona fide need concept. Thus, an agreement for work incident to the relocation of Federal Power Commission employees placed in FY 1971 did not validly obligate FY 1971 funds where it was clear that the relocation was not required to, and would not, take place, nor would the space in question be made tenantable, until the following fiscal year. B-95136-O.M., August 11, 1972. Orders placed with GSA are further discussed in 34 Comp. Gen. 705 (1955).

As noted earlier, GAO has expressed the view that the recording criteria of 31 U.S.C. § 1501(a) should be followed in evaluating

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obligations of the government of the District of Columbia. Thus, orders by a department of the D.C. government for repairs and improvements which are required by statute or statutory regulation to be placed with the D.C. Department of General Services and performed through use of the Repairs and Improvements Working Fund create valid obligations when the orders are placed. B-180578-O.M., September 26, 1978.

4. Subsection (a)(4): Orders Without Advertising

The fourth recording standard in 31 U.S.C. § 1501(a) is—

"an order issued under a law authorizing purchases without advertising (A) when necessary because of a public exigency; (B) for perishable subsistence supplies; or (C) within specific monetary limits."

Subsection (a)(4) is limited to statutorily authorized purchases without advertising in the three situations specified. The subsection must be self-explanatory as there appear to be no Comptroller General decisions under it.

5. Subsection (a)(5): Grants and Subsidies

In the case of federal assistance program funds, 31 U.S.C. § 1501(a)(5) requires that the obligation be supported by documentary evidence of a grant or subsidy payable:

"(A) from appropriations made for payment of, or contributions to, amounts required to be paid in specific amounts fixed by law or under formulas prescribed by law;

"(B) under an agreement authorized by law; or

"(C) under plans approved consistent with and authorized by law."

a. Grants

In order to properly obligate an appropriation for an assistance program, some action creating a definite liability against the appropriation must occur during the period of the obligational availability of the appropriation. In the case of grants, the obligating action will usually be the execution of a grant agreement. The particular document will vary and may be in the form of an agency's approval of a grant application or a letter of commitment. See 39 Comp. Gen. 317 (1959); 37 Comp. Gen. 861, 863 (1958); 31 Comp. Gen. 608 (1952); B-128190, June 2, 1958; B-114868.01-O.M., March 17, 1976.

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In this connection, GAO's Accounting Principles and Standards state:

"Accounting for a federal assistance award begins with the execution of an agreement or the approval of an application or similar document in which the amount and purposes of the grant, the performance periods, the obligations of the parties to the award, and other terms are set out. A legal obligation to disburse the assistance funds, in accordance with the terms of the agreement, generally occurs with an executed agreement or an approved application or similar document."[14]

As a general proposition, four requirements must be met to properly obligate assistance funds:

- There must be some action to establish a firm commitment on the part of the United States.
- The commitment must be unconditional on the part of the United States. See 50 Comp. Gen. 857, 862 (1971).
- There must be documentary evidence of the commitment. Champaign County v. Law Enforcement Assistance Administration, 611 F.2d 1200 (7th Cir. 1979) (court refused to regard documentation requirement as "form over substance"); B-126372, September 18, 1956.
- The award terms must be communicated to the official grantee, and where the grantee is required to comply with certain prerequisites, such as putting up matching funds, it must also be accepted by the grantee during the period of availability of the grant funds.

An illustration of this latter requirement is B-220527, December 16, 1985. The Economic Development Administration made an "offer of grant" to a Connecticut municipality which would have required a substantial outlay of funds by the municipality. The offer was accepted by a town official who had no authority to accept the grant. By its own municipal ordinance, only the town council could accept a grant offer. By the time the town marshalled the resources to fulfill its obligations under the grant and the unauthorized acceptance was ratified by the town council, the funds had expired for obligational purposes. GAO held that no valid grant obligation on the part of the government had ever been made. See also B-164990, January 10, 1969, finding an attempted obligation invalid where the program legislation required approval of a proposed grant by the state

[14]GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 2, Appendix I, § G10, para. .03 (1984).

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governor and he had not yet agreed, even though the award instruments had already been executed.

Once the appropriation has been properly obligated, performance and the actual disbursement of funds may carry over beyond the period of obligational availability. 31 Comp. Gen. 608, 610 (1952); 20 Comp. Gen. 370 (1941); B-37609, November 15, 1943; B-24827, April 3, 1942; B-124374-O.M., January 26, 1956.

Applying the above principles, the Comptroller General found that a document entitled "Approval and Award of Grant" used by the Economic Development Administration was sufficient for recording grant obligations under the local public works program because it "reflects the Administration's acceptance of a grant application; specifies the project approved and the amount of funding; and imposes a deadline for affirmation by the grantee." B-126652, August 30, 1977.

If the above requirements are not met, then the appropriation is not validly obligated. Thus, the Comptroller General found an attempted obligation invalid in B-164990, September 6, 1968, where the grantee corporation was not in existence when the obligation was recorded. Also, the relevant program legislation must be examined to see if there are any additional requirements.

The preceding cases mostly involve obligations evidenced by the issuance of an award instrument. Questions may also arise over exactly when an obligation "fixed by law" or under a required plan takes place. For example, under the Medicaid program, the obligation occurs under a state plan when an entitlement is created in favor of the state. This happens when a covered medical service is provided. See B-164031(3).150, September 5, 1979.

Also, where an agency is required to allocate funds to states on the basis of a statutory formula, the formula establishes the obligation to each recipient rather than the agency's allocation since, if the allocation is erroneous, the agency must adjust the amounts paid each recipient. See 41 Comp. Gen. 16 (1961); B-164031(3).150, September 5, 1979. In this type of situation, the obligation occurs by operation of law, even though there may have been no formal recording. A decision discussing this concept in the context of the Job Training Partnership Act is 63 Comp. Gen. 525 (1984). For a

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discussion of obligation and deobligation of funds under the now defunct Comprehensive Employment and Training Act (the predecessor of the Job Training Partnership Act) in the context of the Impoundment Control Act, see B-200685, April 27, 1981.

The rules for deobligation and reobligation of assistance funds are the same as for appropriated funds generally. Program legislation in a given case may, of course, provide for different treatment. For example, B-211323, January 3, 1984, considered a provision of the Public Works and Economic Development Act of 1965 under which funds apportioned to states remained available to the state until expended. Under that particular provision, funds deobligated as the result of a cost underrun could be reobligated by the state, without fiscal year limitation, for purposes within the scope of the program statute.

b. Subsidies

There have been relatively few cases dealing with the obligational treatment of subsidies, although the principles should parallel those for grants since they both derive from subsection (a)(5). In one case, GAO considered legislation authorizing the former Federal Home Loan Bank Board to make "interest adjustment" payments to member banks. The payments were designed to adjust the effective rates of interest charged by member banks on short- and long-term borrowing, the objective being to stimulate residential construction for low- and middle-income families. Funds were appropriated to the Board for this purpose on a fiscal year basis. GAO concluded that an obligation arose for purposes of 31 U.S.C. § 1501(a)(5) when a Federal Home Loan Bank made a firm and unconditional commitment in writing to a member institution, provided that the commitment letter included a reasonable expiration date. The funds would have to be deobligated to the extent that a member institution failed to execute loans prior to the specified expiration date. 50 Comp. Gen. 857 (1971).

In 65 Comp. Gen. 4 (1985), GAO advised the Department of Education that mandatory interest subsidies under the Guaranteed Student Loan Program should be recorded as obligations on a "best estimate" basis as they arise, even if the recordings would exceed available budgetary resources. Since the subsidies are not discretionary obligations but are imposed by law, there would be no Antideficiency Act violation. The decision overruled an earlier case (B-126372, September 18, 1956) which had held that the recording of obligations for mail rate

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C. The Antideficiency Act

1. Introduction and Overview

The so-called Antideficiency Act is one of the major laws in the statutory pattern by which Congress exercises its constitutional control of the public purse. It has been termed "the cornerstone of Congressional efforts to bind the Executive branch of government to the limits on expenditure of appropriated funds."[4]

As with the series of funding statutes as a whole, the Antideficiency Act did not hatch fully grown but evolved over a period of time in response to various abuses. As we noted in Chapter 1, as late as the post-Civil War period, it was not uncommon for agencies to incur obligations in excess of or in advance of appropriations. Perhaps most egregious of all, some agencies would spend their entire appropriations during the first few months of the fiscal year, continue to incur obligations, and then return to Congress for appropriations to fund these "coercive deficiencies."[5] These were obligations to others who had fulfilled their part of the bargain with the United States and who now had at least a moral—and in some cases also a legal—right to be paid. Congress felt it had no choice but to fulfill these commitments, but the frequency of deficiency appropriations played havoc with the United States budget.

The congressional response to abuses of this nature was the Antideficiency Act. Its history is summarized in the following paragraphs:[6]

"Control in the execution of the Government's budgetary and financial programs is based on the provisions of section 3679 of the Revised Statutes, as amended . . ., commonly referred to as the Antideficiency Act. As the name . . . implies, one of the principal purposes of the legislation was to provide effective control over the use of appropriations so as to prevent the incurring of obligations at a rate which will lead to deficiency (or supplemental) appropriations and to fix responsibility on those

[4]Hopkins & Nutt, The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis, 80 Mil. L. Rev. 51, 56 (1978).

[5]Id. at 57–58; Louis Fisher, Presidential Spending Power 232 (1975).

[6]Source: Senate Committee on Government Operations, Financial Management in the Federal Government, S. Doc. No. 11, 87th Cong., 1st Sess. 45–46 (1961). The statute is cited as "section 3679 of the Revised Statutes," a designation that is now obsolete.

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subsidies to air carriers could be deferred until the time of payment. 65 Comp. Gen. at 8 n.3.

In 64 Comp. Gen. 410 (1985), GAO considered obligations by the Department of Housing and Urban Development for operating subsidies to state public housing authorities for low-income housing projects. Under the governing statute and regulations, the amount of the subsidy was determined upon HUD's approval of the state's annual operating budget, although the basic commitment stemmed from an annual contribution contract. HUD's practice, primarily for states whose fiscal year coincides with that of the federal government, was to record the obligation on the basis of an estimate, issued in a letter of intent. GAO found this to be legally permissible, but cautioned that HUD was required to adjust the obligation up or down once it approved the operating budget.

A 1983 decision, B-212145, September 27, 1983, discusses the use of estimates subject to subsequent adjustment for the recording of obligations under the Payments in Lieu of Taxes Act, 31 U.S.C. §§ 6901–6906.

From the perspective of the recording of obligations, these two decisions—64 Comp. Gen. 410 and B-212145—are simply applications of the general principle, previously noted, that best estimates should be recorded when more precise information is not available, subject to later adjustment.

6. Subsection (a)(6): Pending Litigation

The sixth standard for recording obligations is "a liability that may result from pending litigation." 31 U.S.C. § 1501(a)(6).

Despite its seemingly broad language, subsection (a)(6) has very limited application. Most judgments against the United States are paid from a permanent indefinite appropriation, 31 U.S.C. § 1304, covered in detail in Chapter 14. Accordingly, since the expenditure of agency funds is not involved, judgments payable under 31 U.S.C. § 1304 have no obligational impact on the respondent agency.

Not all judgments against the United States are paid from the permanent judgment appropriation. Several types are payable from agency funds. However, the mere fact that a judgment is payable from agency funds does not make it subject to subsection (a)(6). Thus far,

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the Comptroller General has applied subsection (a)(6) in only two situations—land condemnation (35 Comp. Gen. 185 (1955)) and certain impoundment litigation (54 Comp. Gen. 962 (1975)).

In land condemnation proceedings, the appropriation is obligated when the request is made to the Attorney General to institute the proceedings. 34 Comp. Gen. 418, 423 (1955); 34 Comp. Gen. 67 (1954); 17 Comp. Gen. 664 (1938); 4 Comp. Gen. 206 (1924).

As stated in 35 Comp. Gen. 185, 187, subsection (a)(6) requires recording an obligation in cases where the government is definitely liable for the payment of money out of available appropriations and the pending litigation is for the purpose of determining the amount of the government's liability. Thus, for judgments payable from agency appropriations in other than land condemnation and impoundment cases, the standard of 35 Comp. Gen. 185 should be applied to determine whether an obligation must be recorded.

In cases where a judgment will be payable from agency funds but recording is not required, 35 Comp. Gen. 185 suggested that the agency should nevertheless administratively reserve sufficient funds to cover the contingent liability to avoid a possible violation of the Antideficiency Act. Id. at 187. While the administrative reservation may still be a good idea for other reasons, the majority of more recent cases (cited and summarized in Chapter 6 under the heading Intent/Factors Beyond Agency Control) have taken the position that overobligations resulting from court-ordered payments do not violate the Antideficiency Act.

It should be apparent that the preceding discussion applies to money judgments—judgments directing the payment of money. In some types of litigation, a court may order an agency to take some specific action. While compliance will result in the expenditure of agency funds, this type of judgment is not within the scope of 35 Comp. Gen. 185. While we have found no cases, it seems clear from the application of 31 U.S.C. § 1501(a) in other contexts that no recordable obligation would arise while this type of litigation is still "pending."

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7. Subsection (a)(7): Employment and Travel

Under 31 U.S.C. § 1501(a)(7), obligations are recordable when supported by documentary evidence of "employment or services of persons or expenses of travel under law." This subsection covers a variety of loosely related obligations.

a. Wages, Salaries, Annual Leave

Salaries of government employees, as well as related items that flow from those salary entitlements such as retirement fund contributions, are obligations at the time the salaries are earned, that is, when the services are rendered. 24 Comp. Gen. 676, 678 (1945).[15] For example, in 38 Comp. Gen. 316 (1958), the Commerce Department wanted to treat the salaries of employees performing administrative and engineering services on highway construction projects as part of the construction contract costs. Under this procedure, the anticipated expenses of the employees, salaries included, would be recorded as an obligation at the time a contract was awarded. However, the Comptroller General held that this would not constitute a valid obligation under 31 U.S.C. § 1501. The employee expenses were not part of the contract costs and could not be obligated before the services were performed.

Subsection (a)(7) is not limited to permanent federal employees. It applies as well to persons employed in other capacities, such as temporary or intermittent employees or persons employed under a personal services contract. In Kinzley v. United States, 661 F.2d 187 (Ct. Cl. 1981), for example, the court found various agency correspondence sufficient compliance with subsection (a)(7) to permit a claim for compensation for services rendered as a project coordinator. Unlike subsection (a)(1), the court pointed out, subsection (a)(7) does not require a binding agreement in writing between the parties, but only documentary evidence of "employment or services of persons." Id. at 191.

For persons compensated on an actual expense basis, it may be necessary to record the obligation as an estimate, to be adjusted when the services are actually performed. Documentation requirements to support the obligation or subsequent claims are up to the agency. E.g., B-217475, December 24, 1986.

[15]The Federal Labor Relations Authority has also applied this principle in evaluating the negotiability of various union proposals. See Fort Knox Teachers Ass'n and Board of Education, 27 F.L.R.A. 203 (No. 34, 1987); Fort Knox Teachers Ass'n and Fort Knox Dependent Schools, 26 F.L.R.A. 934 (No. 108, 1987).

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When a pay increase is granted to wage board employees, the effective date of the increase is governed by 5 U.S.C. § 5344. This effective date determines the government's liability to pay the additional compensation. Therefore, the increase is chargeable to appropriations currently available for payment of the wages for the period to which the increases apply. 39 Comp. Gen. 422 (1959). This is true regardless of the fact that appropriations may be insufficient to discharge the obligation and the agency may not yet have had time to obtain a supplemental appropriation. The obligation in this situation is considered "authorized by law" and therefore does not violate the Antideficiency Act. Id. at 426.

Annual leave status "is synonymous with a work or duty status." 25 Comp. Gen. 687 (1946). As such, annual leave obligates appropriations current at the time the leave is taken. Id.; 50 Comp. Gen. 863, 865 (1971); 17 Comp. Gen. 641 (1938). A separate obligation for annual leave is necessary only when it becomes due and payable as terminal leave. OMB Circular No. A-34, § 23.2. Except for employees paid from revolving funds (25 Comp. Gen. 687 (1946)), or where there is some statutory indication to the contrary (B-70247, January 9, 1948), the obligation for terminal leave is recorded against appropriations for the fiscal year covering the employee's last day of active service. 25 Comp. Gen. 687, 688 (1946); 24 Comp. Gen. 578, 583 (1945).

Bonuses such as performance awards or incentive awards obligate appropriations current at the time the awards are made. Thus, for example, where performance awards to Senior Executive Service officials under 5 U.S.C. § 5384 were made in FY 1982 but actual payment had to be split between FY 1982 and FY 1983 to stay within statutory compensation ceilings, the entire amount of the awards remained chargeable to FY 1982 funds. 64 Comp. Gen. 114, 115 n.2 (1984). The same principle would apply to other types of discretionary payments; the administrative determination creates the obligation. E.g., B-80060, September 30, 1948.

Employees terminated by a reduction in force (RIF) are entitled by statute to severance pay. Severance pay is obligated on a pay period by pay period basis. Thus, where a RIF occurs near the end of a fiscal year and severance payments will extend into the following fiscal year, it is improper to charge the entire amount of severance pay to the

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fiscal year in which the RIF occurs. B-200170, July 28, 1981; OMB Circular No. A-34, § 23.2.[16]

GAO reached a different result in B-200170, September 24, 1982. The United States Metric Board was scheduled to terminate its existence on September 30, 1982. Legislative history indicated that the Board's FY 1982 appropriation was intended to include severance pay, and no appropriations had been requested for FY 1983. Under these circumstances, severance payments to be made in FY 1983 were held chargeable to the FY 1982 appropriation. A contrary result would have meant that the FY 1982 funds would expire, and Congress would have had to appropriate the same funds again for FY 1983.

b. Compensation Plans in Foreign Countries

By statute, the State Department is required to establish compensation plans for foreign national employees of the Foreign Service in foreign countries. The plans are to be "based upon prevailing wage rates and compensation practices . . . for corresponding types of positions in the locality of employment," to the extent consistent with the public interest. 22 U.S.C. § 3968(a)(1).

Under subsection (b) of 22 U.S.C. § 3968, other government agencies are authorized to administer foreign national employee compensation programs in accordance with the applicable provisions of the Foreign Service Act. This provision, for example, authorized the Defense Department to establish a pension and life insurance program for foreign national employees in Bermuda, provided that it corresponded to prevailing local practice. 40 Comp. Gen. 650 (1961).

Subsection (c) of 22 U.S.C. § 3968 authorizes the Secretary of State to prescribe regulations for local compensation plans applicable to all federal agencies. To the extent this authority is not exercised, however, the statute does not otherwise require that a plan established by another agency conform to the State Department's plan. An agency establishing a local plan should, to the extent not regulated by State, coordinate with other agencies operating in the locality. 40 Comp. Gen. at 652. (As a practical matter, two agencies operating in the same locality should not develop substantially

[16]GAO had previously equivocated on the issue of obligating for severance pay, preferring to coordinate with OMB's budget procedures, subsequently issued in OMB Circular No. A-34. See 45 Comp. Gen. 584 (1966).

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different plans, assuming both legitimately reflect prevailing local practice.)

To the extent the authority of 22 U.S.C. § 3968 is exercised in a given country, the obligational treatment of various elements of compensation may vary from what would otherwise be required. For example, Colombian law provides for the advance payment of accrued severance pay to help the employee purchase or make improvements on a home. Thus, under a compensation plan for foreign national employees in Colombia, severance pay would be recorded as an obligation against the fiscal year appropriation current at the time of accrual. B-192511, February 5, 1979.

While 22 U.S.C. § 3968 authorizes compensation plans based on local practice, it does not permit automatic disregard of all other laws of the United States. Thus, under the Colombian severance pay program noted above, if the employee subsequently is terminated for cause or otherwise loses eligibility, the agency must proceed with collection action under the Federal Claims Collection Act, local practice to the contrary notwithstanding. B-192511, June 8, 1979. Similarly, accrued severance pay retains its status as United States funds up to actual disbursement and is therefore subject to applicable fiscal and fund control requirements. B-199722, September 15, 1981 (severance pay plan in Jordan).

In several foreign countries, foreign nationals employed by the United States are entitled to be paid a "separation allowance" when they resign, retire, or are otherwise separated through no fault of their own. The allowance is based on length of service, rate of pay at time of separation, and type of separation. Unlike severance pay for federal employees, these separation allowances represent binding commitments which accrue during the period of employment. As such, they should be recorded as obligations when they are earned rather than when they are paid. FGMSD-76-25, October 17, 1975; FGMSD-75-20, February 13, 1975; Substantial Understatements of Obligations for Separation Allowances for Foreign National Employees, B-179343, October 21, 1974. (These three items are GAO reports, the first two being untitled letter reports.)

c. Training

The obligation for training frequently stems from a services contract and to that extent is recordable under subsection (a)(1) rather than

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subsection (a)(7). The rules for training obligations are summarized in Chapter 5, Section B.5.

d. Uniform Allowance

The Federal Employees Uniform Act, 5 U.S.C. § 5901, authorizes a uniform allowance for each employee required by statute or regulation to wear a uniform. The agency may furnish the uniform or pay a cash allowance. Where an agency elects to pay an allowance, the obligation arises when the employee incurs the expense and becomes entitled to reimbursement. Thus, the appropriation chargeable is the one currently available at the time the employee makes the expenditure or incurs the debt. 38 Comp. Gen. 81 (1958).

e. Travel Expenses [17]

The obligation of appropriations for expenses relating to travel was an extremely fertile area and generated a large number of decisions before 31 U.S.C. § 1501 was enacted. The cases seem to involve every conceivable permutation of facts involving trips or transactions covering more than one fiscal year. The enactment of 31 U.S.C. § 1501 logically prompted the question of how the new statute affected the prior decisions. It did not, replied the Comptroller General. Thus, the starting point is that subsection (a)(7) incorporates prior GAO decisions on obligations for travel. 35 Comp. Gen. 183 (1955); 34 Comp. Gen. 459 (1955).

The "leading case" in this area appears to have been 35 Comp. Gen. 183 (1955), which states the pertinent rules. The rules for travel may be summarized as follows: The issuance of a travel order in itself does not constitute a contractual obligation. The travel order is merely an authorization for the person specified to incur the obligation. The obligation is not incurred until the travel is actually performed or until a ticket is purchased, provided in the latter case the travel is to be performed in the same fiscal year the ticket is purchased. 35 Comp. Gen. at 185. A 1991 decision, 70 Comp. Gen. 469, reaffirmed the principle that the expenses of temporary duty travel are chargeable to the fiscal year or years in which they are actually incurred.

Some of the earlier cases in this evolutionary process are as follows:

[17]This section does not apply to travel incident to employee transfers. The rules for employee transfers are set forth separately later.

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- Where tickets are purchased in one fiscal year and the travel is performed in the following fiscal year, the obligation is chargeable to the year in which the travel is performed, even though early purchase of the tickets may have been necessary to assure reservations. 27 Comp. Gen. 764 (1948); 26 Comp. Gen. 131 (1946).
- A "continuous journey" involving more than one segment obligates funds of the year in which the ticket was purchased, as long as the trip starts in that same fiscal year. However, procurement of transportation en route is a new obligation. Similarly, a round-trip ticket obligates funds at the time of purchase as long as the trip starts in the same fiscal year. However, if the return portion of the ticket cannot be used and a separate return ticket must be purchased, a new obligation is created. 26 Comp. Gen. 961 (1947); A-36450, May 27, 1931.
- Per diem incident to official travel accrues from day to day. Per diem allowances are chargeable to appropriations current when the allowances accrue (i.e., when the expenditures are made). Thus, where travel begins in one fiscal year and extends into the next fiscal year, the per diem obligation must be split along fiscal year lines, even though the cost of the travel itself may have been chargeable in its entirety to the prior fiscal year. 23 Comp. Gen. 197 (1943).
- Reimbursement on a mileage basis is chargeable to the fiscal year in which the major portion of the travel occurred. If travel is begun sufficiently prior to the end of a fiscal year to enable the employee to complete a continuous journey before the close of the fiscal year, the obligation is chargeable entirely to that year. However, if the travel is begun so late in the fiscal year that the major portion of it is performed in the succeeding fiscal year, it is chargeable to appropriations for the succeeding year. 9 Comp. Gen. 458, 460 (1930); 2 Comp. Dec. 14 (1895).
- Where (1) an employee is authorized to travel by privately owned vehicle at not to exceed the constructive cost of similar travel by rail, (2) the trip starts in one fiscal year and extends into the following fiscal year, and (3) the journey would have been completed in the prior year had rail travel been used, the travel expense is chargeable to the fiscal year in which the travel began. 30 Comp. Gen. 147 (1950).

Other cases involving obligations for travel expenses are: 16 Comp. Gen. 926 (1937); 16 Comp. Gen. 858 (1937); 5 Comp. Gen. 1 (1925); 26 Comp. Dec. 86 (1919); B-134099, December 13, 1957;

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A-30477, April 20, 1939; A-75086, July 29, 1936; A-69370, April 10, 1936.

f. State Department: Travel Outside Continental United States

By virtue of 22 U.S.C. § 2677, appropriations available to the State Department for travel and transportation outside the continental United States "shall be available for such expenses when any part of such travel or transportation begins in one fiscal year pursuant to travel orders issued in that year, notwithstanding the fact that such travel or transportation may not be completed during that same fiscal year." This provision appeared in appropriation acts starting in 1948 and was subsequently made permanent and codified. It has the effect of excluding State Department travel or transportation outside the continental United States from some of the earlier decisions. The authority is permissive rather than mandatory. 42 Comp. Gen. 699 (1963).

Section 2677 applies to temporary duty travel as well as travel incident to change of duty station. 71 Comp. Gen.___ (B-246702, August 6, 1992). In either case, expenses are chargeable to the year in which the travel is ordered as long as some travel-related expense is also incurred in that year, even though the physical travel may not begin until the following year. Id. Travel-related expenses in this context include miscellaneous incidental expenses such as inoculations and passports as long as they are not incurred at a time so far removed from the actual travel as to question their legitimacy as incident to the travel. 30 Comp. Gen. 25 (1950). The statute also permits charging the prior year for expenses incurred under amended travel orders issued in the subsequent fiscal year as long as some part of the travel or transportation began in the prior fiscal year. 29 Comp. Gen. 142 (1949).

The statute does not permit retroactive charging of an expired appropriation. Thus, the Comptroller General found it improper to issue a travel authorization in one fiscal year designating the succeeding fiscal year as the appropriation to be charged, and then, at the start of the succeeding fiscal year, cancel the authorization and replace it with a new authorization retroactively designating the prior year. 42 Comp. Gen. 699 (1963).

g. Employee Transfer/Relocation Costs

A government employee transferred to a new duty station is entitled to various allowances, primarily travel expenses of the employee and his

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or her immediate family, and transportation and temporary storage of household goods. 5 U.S.C. § 5724. In addition, legislation enacted in 1967, now found at 5 U.S.C. § 5724a, authorized several new types of relocation expenses for transferred employees. Specifically, they are: (1) per diem allowance for employee's immediate family en route between old and new duty station; (2) expenses of one house-hunting trip to new duty station; (3) temporary quarters allowance incident to relocation; (4) certain expenses of real estate transactions incurred as a result of the transfer; and (5) a miscellaneous expense allowance.

The leading case on the obligation of employee transfer expenses is 64 Comp. Gen. 45 (1984). The rule is that "for all [reimbursable] travel and transportation expenses of a transferred employee, the agency should record the obligation against the appropriation current when the employee is issued travel orders." Id. at 48. This treatment applies to expenses stemming from employee transfers; it does not apply to expenses stemming from temporary duty. 70 Comp. Gen. 469 (1991).

The rule of 64 Comp. Gen. 45 applies to obligations for extensions of temporary quarters subsistence expenses—the obligation is chargeable to the year in which the transfer order was issued. 64 Comp. Gen. 901 (1985). It also applies to dislocation allowances payable to members of the armed services incident to a permanent change of station move. 67 Comp. Gen. 474 (1988).

Agencies have discretionary authority under 5 U.S.C. § 5724c to contract with private firms for arranging the purchase of a transferred employee's old residence. Since this service is wholly discretionary and in no way an "entitlement," the agency's obligation to a relocation firm stems from its contract with the firm, not from the employee's transfer. Thus, the obligation under one of these arrangements occurs when a purchase order under the contract is awarded. 66 Comp. Gen. 554 (1987). (Since the obligation is evidenced by a written contract, it would be recorded under subsection (a)(1).)

The decision at 64 Comp. Gen. 45 overruled prior inconsistent decisions such as 28 Comp. Gen. 337 (1948) (storage) and B-122358, August 4, 1976 (relocation expenses under 5 U.S.C. § 5724a). In assessing the impact of 64 Comp. Gen. 45, however, care must be taken to determine precisely what has been overruled and what has not. For example, since 64 Comp. Gen. 45 dealt with reimbursable

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officials of Government who incur deficiencies or obligate appropriations without proper authorization or at an excessive rate.

"The original section 3679 . . . was derived from legislation enacted in 1870 [16 Stat. 251] and was designed solely to prevent expenditures in excess of amounts appropriated. In 1905 [33 Stat. 1257] and 1906 [34 Stat. 48], section 3679 . . . was amended to provide specific prohibitions regarding the obligation of appropriations and required that certain types of appropriations be so apportioned over a fiscal year as to 'prevent expenditures in one portion of the year which may necessitate deficiency or additional appropriations to complete the service of the fiscal year for which said appropriations are made.' Under the amended section, the authority to make, waive, or modify apportionments was vested in the head of the department or agency concerned. By Executive Order 6166 of June 10, 1933, this authority was transferred to the Director of the [Office of Management and Budget]. . . .

"During and following World War II, with the expansion of Government functions and the increase in size and complexities of budgetary and operational problems, situations arose highlighting the need for more effective control and conservation of funds. In order to effectively cope with these conditions it was necessary to seek legislation clarifying certain technical aspects of section 3679 of the Revised Statutes, and strengthening the apportionment procedures, particularly as regards to agency control systems. Section 1211 of the General Appropriation Act, 1951 [64 Stat. 765], amended section 3679 . . . to provide a basis for more effective control and economical use of appropriations. Following a recommendation of the second Hoover Commission that agency allotment systems should be simplified, Congress passed legislation in 1956 [70 Stat. 783] further amending section 3679 to provide that each agency work toward the objective of financing each operating unit, at the highest practical level, from not more than one administrative subdivision for each appropriation or fund affecting such unit. In 1957 [71 Stat. 440] section 3679 was further amended, adding a prohibition against the requesting of apportionments or reapportionments which indicate the necessity for a deficiency or supplemental estimate except on the determination of the agency head that such action is within the exceptions expressly set out in the law. The revised Antideficiency Act serves as the primary foundation for the Government's administrative control of funds systems."

In its current form, the law prohibits

1. Making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law;

2. Involving the government in any contract or other obligation for the payment of money for any purpose in advance of appropriations made for such purpose, unless the contract or obligation is authorized by law;

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expenses, prior decisions addressing the transportation of household goods shipped directly by the government presumably remain valid.[18]

Also, 35 Comp. Gen. 183 (1955) should not be regarded as "overruled," notwithstanding language to the contrary in 64 Comp. Gen. 45. There are two reasons for this. First, 35 Comp. Gen. 183 was not limited to employee transfers, but dealt with travel in other contexts as well, situations not involved in the 1984 decision. Second, 35 Comp. Gen. 183 states, at page 185:

"It may be stated, however, that we have no objection to recording tentatively as obligations the estimated cost of transportation to be purchased and reimbursements therefor to be earned, including reimbursements for transportation of household effects, within the current fiscal year at the time the travel orders are actually issued where it is administratively determined desirable in order to avoid certain additional accounting requirements; but all estimated amounts for travel and related expenses so recorded should be adjusted to actual obligations periodically . . . ."

This is not very different from the holding of 64 Comp. Gen. 45.

8. Subsection (a)(8): Public Utilities

Under 31 U.S.C. § 1501(a)(8), a recordable obligation arises when there is documentary evidence of "services provided by public utilities."[19]

Government agencies are not required to enter into contracts with public utilities when charges are based on rates that are fixed by regulatory bodies. However, contracts may be used if desired by the utility or the agency. GAO, Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 6.2.C.5 (1990).

If there is a contract, monthly estimates of the cost of services to be performed, based on past experience, may be recorded as obligations. If there is no contract, obligations should be recorded only on the basis of services actually performed. 34 Comp. Gen. 459, 462 (1955).

[18]If the government ships the goods, the obligation occurs when a carrier picks up the goods pursuant to a government bill of lading. If separate bills of lading are issued covering different segments of the shipment, each bill of lading is a separate and distinct obligation. E.g., 31 Comp. Gen. 471 (1952).

[19]Prior to the 1982 recodification of Title 31, subsection (a)(7) included public utilities as well as employment and travel expenses. The recodification logically separated public utilities into a new subsection since it is unrelated to the other items. Thus, pre-1982 materials refer to eight subsections whereas there are now nine.

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A statute relating to obligations for public utility services is 31 U.S.C. § 1308. Under this law, in making payments for telephone services and for services like gas or electricity where the quantity is based on metered readings, the entire payment for a billing period which begins in one fiscal year and ends in another is chargeable to appropriations current at the end of the billing period. If the charge covers several fiscal years, 31 U.S.C. § 1308 does not apply. A charge covering several fiscal years must be prorated so that the charge to any one fiscal year appropriation will not exceed the cost of service for a one-year period ending in that fiscal year. 19 Comp. Gen. 365 (1939). GAO has construed this statute as applicable to teletypewriter services as well. 34 Comp. Gen. 414 (1955).

The General Services Administration is authorized to enter into contracts for public utility services for periods not exceeding 10 years. 40 U.S.C. § 481(a)(3). A contract for the procurement of telephone equipment and related services has been held subject to this provision even where the provider was not a "traditional" form of public utility. 62 Comp. Gen. 569 (1983). Noting that the concept of what constitutes "public utility service" is flexible, the decision emphasized that the nature of the product or service provided rather than the nature of the provider should govern for purposes of 40 U.S.C. § 481(a)(3). 62 Comp. Gen. at 575. The decision also concluded that GSA is not required to obligate the total estimated cost of a multi-year contract under 40 U.S.C. § 481(a)(3), but is required to obligate only its annual costs. Id. at 572, 576.

9. Subsection (a)(9): Other Legal Liabilities

The final standard for recording obligations, 31 U.S.C. § 1501(a)(9), is documentary evidence of any "other legal liability of the Government against an available appropriation or fund."

This is sort of a catch-all category designed to pick up valid obligations which are not covered by subsections (a)(1) through (a)(8). 34 Comp. Gen. 418, 424 (1955).

Thus far, the decisions provide very little guidance on the types of situations that might be covered by subsection (a)(9). The few decisions that mention subsection (a)(9) generally cite it in conjunction with one of the other subsections and stop short of a definitive statement as to its independent applicability. See, e.g., 54

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Comp. Gen. 962 (1975) (impoundment litigation); B-192511, February 5, 1979 (severance pay plan under 22 U.S.C. § 3968).

Another case, although not specifically citing subsection (a)(9), pointed out a situation that would seemingly qualify under that subsection: estimates of municipal tax liabilities on United States property located in foreign countries, based on tax bills received in prior years. 35 Comp. Gen. 319 (1955).

Thus, subsection (a)(9) must be applied on a case-by-case basis. If a given item is a legal liability of the United States, if appropriations are legally available for the item in terms of purpose and time, and if the item does not fit under any of the other eight subsections, then subsection (a)(9) should be considered.

C. Contingent Liabilities

A "contingent liability" is a potential liability which may become an actual liability if some particular event happens or does not happen. A more formal definition is:

"An existing condition, situation, or set of circumstances involving uncertainty as to a possible loss to an agency that will ultimately be resolved when one or more future events occur or fail to occur."[20]

If and when the contingency materializes, the liability ripens into a recordable obligation. GAO, Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 3.4.C. See also, e.g., 62 Comp. Gen. 143, 145 (1983).

The contingent liability poses somewhat of a fiscal dilemma. On the one hand, it is by definition not sufficiently definite or certain to support the formal recording of an obligation. Yet on the other hand, sound financial management, as well as Antideficiency Act considerations, dictates that it somehow be recognized. The middle ground between recording an obligation and doing nothing is the "administrative reservation" or "commitment" of funds.[21] Reserves for contingencies are recognized in both the Antideficiency Act (31 U.S.C. § 1512(c)) and the Impoundment Control Act (2 U.S.C. § 684(b)). Also, a contingent liability which is less than an obligation

[20]GAO, Glossary of Terms Used in the Federal Budget Process, PAD-81-27, at 86.

[21]See 7 GAO-PPM § 3.4.E; B-238201, April 15, 1991 (non-decision letter).

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but nevertheless sufficiently important to warrant recognition should be reflected in a footnote to pertinent financial statements. See 37 Comp. Gen. 691, 692 (1958); see also 62 Comp. Gen. 143, 146 (1983).

The treatment of contingent liabilities is largely a matter of sound judgment. "No hard and fast rule can be laid down as to the circumstances that would require disclosure. Judgment would have to be exercised with respect to the possible financial implications." 37 Comp. Gen. at 694. The general question to ask in this context is whether a given situation is sufficiently probable to justify recognition or is little more than a mere possibility. Some guidance may be found in GAO's Accounting Principles and Standards,[22] and in 37 Comp. Gen. 691.

One example of a contingent liability which should be recognized is a pending claim under the "changed conditions" clause of a contract. 37 Comp. Gen. 691 (1958). It is not a recordable obligation until adjudicated and allowed. Another is an authorized indemnification provision limited to appropriations available at the time of a loss. 54 Comp. Gen. 824, 826–27 (1975), overruling in part 42 Comp. Gen. 708 (1963) to the extent the latter decision held establishment of a reserve unnecessary.

Termination liability under a renewal option or similar contract is another type of contingent liability. As a general proposition, "an amount equal to the maximum contingent liability of the Government [must be] always available for obligation from appropriations current at the time the contract is made and at the time renewals thereof are made." 37 Comp. Gen. 155, 160 (1957). See also 43 Comp. Gen. 657 (1964); 8 Comp. Gen. 654 (1929). In some circumstances, GAO has held that termination liability amounts to an actual obligation. 62 Comp. Gen. 143 (1983); B-238581, October 31, 1990.

Obligating funds for potential termination liability can tie up large sums for a long period of time. Administrative reservation is also an imperfect solution because the reserved funds may have to give way to higher priority items as the fiscal year progresses. Also, reservation does not preserve the funds beyond their period of availability and has

[22]GAO, Policy and Procedures Manual for Guidance of Federal Agencies, title 2, Appendix I, § C50 (1984).

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to be repeated each fiscal year. Congress in several instances has provided for varying forms of alternative treatment of termination liability. See 51 Comp. Gen. 598, 604 (1972); B-174839, March 20, 1984; B-159141, August 18, 1967; B-112131, July 27, 1953.

D. Reporting Requirements

When 31 U.S.C. § 1501 was originally enacted in 1954, it required each agency to prepare a report each year on the unliquidated obligations and unobligated balance for each appropriation or fund under the agency's control. The reports were to be submitted to the Senate and House Appropriations Committees, the (then) Bureau of the Budget, and GAO. GAO was often asked by the appropriations committees to review these reports.

After several years of reviewing reports, the appropriations committees determined that the requirement had served its purpose, and Congress amended the law in 1959 to revise and relax the reporting procedures. The current reporting requirements are found at 31 U.S.C. §§ 1108(c) and 1501(b).

Under 31 U.S.C. § 1108(c), each agency, when submitting requests for appropriations to the Office of Management and Budget, must report that "the statement of obligations submitted with the request contains obligations consistent with section 1501 of this title." See 39 Comp. Gen. 422, 425 (1959). Implementing instructions are contained in OMB Circular No. A-11 (Preparation and Submission of Budget Estimates), § 11.7. The reports must be certified by officials designated by the agency head. The certification must be supported by adequate records, and the agency must retain the records and certifications in such form as to facilitate audit and reconciliation. Officials designated to make the certifications may not redelegate the responsibility.[23]

The conference report on the original enactment of 31 U.S.C. § 1501 specified that the officials designated to make the certifications should be persons with overall responsibility for the recording of obligations, and "in no event should the designation be below the level

[23]Sample certification statements may be found in OMB Circular No. A-11, § 11.7, and GAO's Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 3.8.A.

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of the chief accounting officer of a major bureau, service, or constituent organizational unit."[24]

The person who makes certifications under 31 U.S.C. § 1108(c) is not a "certifying officer" for purposes of personal accountability for the funds in question. Although he or she may be coincidentally an "authorized certifying officer," the two functions are legally separate and distinct. B-197559-O.M., May 13, 1980.

The statute does not require 100 percent verification of unliquidated obligations prior to certification. Agencies may use statistical sampling. B-199967-O.M., December 3, 1980.

In the case of transfer appropriation accounts under interagency agreements, the certification official of the spending agency must make the certifications to the head of the advancing agency and not to the head of the spending agency. GAO, Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 3.8.A.

Finally, 31 U.S.C. § 1501(b) provides that any statement of obligations furnished by any agency to the Congress or to any congressional committee "shall include only those amounts that are obligations consistent with subsection (a) of this section."

E. Deobligation

The definition of the term "deobligation" is a "downward adjustment of previously recorded obligations."[25] Deobligations occur for a variety of reasons. Examples are:

- Liquidation in amount less than amount of original obligation. E.g., B-207433, September 16, 1983 (cost underrun); B-183184, May 30, 1975 (agency called for less work than maximum provided under level-of-effort contract).
- Cancellation of project or contract.
- Initial obligation determined to be invalid.

[24]H.R. Rep. No. 2663, 83d Cong., 2d Sess. 18 (1954), quoted in Financial Management in the Federal Government, S. Doc. No. 11, 87th Cong., 1st Sess. 88 (1961), and in 50 Comp. Gen. 857, 862 (1971).

[25]GAO, Glossary of Terms Used in the Federal Budget Process, PAD-81-27, at 56.

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- Reduction of previously recorded estimate.
- Correction of bookkeeping errors or duplicate obligations.

In addition, deobligation may be statutorily required in some instances. An example is 31 U.S.C. § 1535(d), requiring deobligation of appropriations obligated under an Economy Act agreement to the extent the performing agency has not incurred valid obligations under the agreement by the end of the fiscal year.

For the most part, there are no special rules relating to deobligation. Rather, the treatment of deobligations follows logically from the principles previously discussed in this and preceding chapters. Thus—

- Funds deobligated within the original period of obligational availability are once again available for new obligations just as if they had never been obligated in the first place. Naturally, any new obligations are subject to the purpose, time, and amount restrictions governing the source appropriation.
- Funds deobligated after the expiration of the original period of obligational availability are not available for new obligations. 64 Comp. Gen. 410 (1985); 52 Comp. Gen. 179 (1972). They may be retained as unobligated balances in the expired account until the account is closed, however, and are available for adjustments in accordance with 31 U.S.C. § 1553(a), as amended by Pub. L. No. 101-510, § 1404 (1990).

A proper and unliquidated obligation should not be deobligated unless there is some valid reason for doing so. Absent a valid reason, it is improper to deobligate funds solely to "free them up" for new obligations. To do so risks violating the Antideficiency Act. For example, where a government check issued in payment of some valid obligation cannot be promptly negotiated (if, for example, it is returned as undeliverable), it is improper to deobligate the funds and use them for new obligations. 15 Comp. Gen. 489 (1935); A-44024, September 21, 1942. (The two cited decisions deal with provisions of law which have since changed, but the thrust of the decisions remains the same.) The Antideficiency Act violation would occur if the payee of the original check subsequently shows up and demands payment but the funds are no longer available because they have been reobligated and the account contains insufficient funds.

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Under some programs, an agency provides funds to an intermediary which in turn distributes the funds to members of a class of beneficiaries. The agency records the obligation when it provides, or legally commits itself to provide, the funds to the intermediary. It is undesirable for many reasons to permit the intermediary to hold the funds indefinitely prior to reallocation. Unless the program legislation provides otherwise, the agency may establish a reasonable cutoff date at which time unused funds in the hands of the intermediary are "recaptured" by the agency and deobligated. GAO recommended such a course of action in 50 Comp. Gen. 857 (1971). If recapture occurs during the period of availability, the funds may be reobligated for program purposes; if it occurs after the period of availability has ended, the funds expire absent some contrary direction in the governing legislation. Id.; Dabney v. Reagan, No. 82 Civ. 2231-CSH (S.D.N.Y. March 21, 1985).

Congress may occasionally by statute authorize an agency to reobligate deobligated funds after expiration of the original period of availability. This is called "deobligation-reobligation" (or "deob-reob") authority. Such authority exists only when expressly granted by statute. Deobligation-reobligation authority generally contemplates that funds will be deobligated only when the original obligation ceases to exist and not as a device to effectively augment the appropriation. See B-173240-O.M., January 23, 1973. Also, absent statutory authority to the contrary, "deob-reob" authority applies only to obligations and not to expenditures. Thus, repayments to an appropriation after expiration of the original period of obligational availability are not available for reobligation. B-121836, April 22, 1955.

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3. Accepting voluntary services for the United States, or employing personal services in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property; and

4. Making obligations or expenditures in excess of an apportionment or reapportionment, or in excess of the amount permitted by agency regulations.[7]

Subsequent sections of this chapter will explore these concepts in detail. However, the fiscal principles inherent in the Antideficiency Act are really quite simple. The idea is to "pay as you go." Government officials are warned not to make payments—or to commit the United States to make payments at some future time—for goods or services unless there is enough money in the "bank" to cover the cost in full. The "bank," of course, is the available appropriation.

The combined effect of the Antideficiency Act, in conjunction with the other funding statutes discussed throughout this publication, was summarized in a 1962 decision. The summary has been quoted in numerous later Antideficiency Act cases and bears repeating here:

"These statutes evidence a plain intent on the part of the Congress to prohibit executive officers, unless otherwise authorized by law, from making contracts involving the Government in obligations for expenditures or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriation under which they are made; to keep all the departments of the Government, in the matter of incurring obligations for expenditures, within the limits and purposes of appropriations annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose, in advance of appropriations made for such purpose; and to restrict the use of annual appropriations to expenditures required for the service of the particular fiscal year for which they are made." 42 Comp. Gen. 272, 275 (1962).

[7]Id. at 48; B-131361, May 9, 1957. Further discussion from varying perspectives will be found in the following sources: Efros, Rollee H., Statutory Restrictions on Funding of Government Contracts, 10 Public Contract Law Journal 254 (Dec. 1978); Fenster, Herbert H., and Christian Volz, The Antideficiency Act: Constitutional Control Gone Astray, 11 Public Contract Law Journal 155 (No. 1, Nov. 1979); Frazier, John R., Col., Use of Annual Funds with Conditional, Option, or Indefinite Delivery Contracts, 8 A.F. JAG L. Rev. 50 (No. 2, Mar.-Apr. 1966); Hopkins, Gary L., Major, and Lt. Col. Robert M. Nutt, The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis, 80 Mil. L. Rev. 51 (1978); Spriggs, William J., The Anti-Deficiency Act Comes to Life in U.S. Government Contracting, 10 National Contract Management Journal 33 (Winter 1976–77).

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Chapter 8

Continuing Resolutions

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Continuing Resolutions

A. Introduction

1. Definition and General Description

The term "continuing resolution" may be defined as follows:

"Legislation enacted by Congress to provide budget authority for Federal agencies and/or specific activities to continue in operation until the regular appropriations are enacted. Continuing resolutions are enacted when action on appropriations is not completed by the beginning of a fiscal year."[1]

For the most part, continuing resolutions are temporary appropriation acts. With a few exceptions to be noted later, they are intended by Congress to be stop-gap measures enacted to keep existing federal programs functioning after the expiration of previous budget authority and until regular appropriation acts can be enacted. Congress resorts to the continuing resolution when there is no regular appropriation for a program or agency, perhaps because the two Houses have not yet agreed on common language, because authorizing legislation has not yet been enacted, or because the President has vetoed an appropriation act passed by Congress. 58 Comp. Gen. 530, 532 (1979). Also, given the size and complexity of today's government, the consequent complexity of the budget and appropriations process, and the occasionally differing policy objectives of the executive and legislative branches, it has become increasingly difficult for Congress to enact all of the regular appropriation acts before the fiscal year ends.

Continuing resolutions are nothing new. We have found administrative decisions discussing them as far back as the 1880s.[2] At one time, they were called "temporary resolutions." The term "continuing resolution" came into widespread use in the early 1960s.[3]

In the 20 years from FY 1962 to FY 1981, 85 percent of the appropriation bills for federal agencies were enacted after the start of

[1]GAO, Glossary of Terms Used in the Federal Budget Process, PAD-81-27 (3d ed. March 1981), at 44.

[2]4 Lawrence, First Comp. Dec. 116 (1883); 3 Lawrence, First Comp. Dec. 213 (1882).

[3]For a brief historical sketch, see Library of Congress, Congressional Research Service, Budget Concepts and Terminology: The Appropriations Phase, by Louis Fisher, GGR 74-210, Chapter V (1974). Fisher identifies what may have been the first continuing resolution, an 1876 resolution (19 Stat. 65) requested by President Grant. Id. at 31–32.

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the fiscal year and thus necessitated continuing resolutions. GAO has discussed the problems inherent in this situation in several reports: Funding Gaps Jeopardize Federal Government Operations, PAD-81-31 (March 3, 1981), Continuing Resolutions and an Assessment of Automatic Funding Approaches, GAO/AFMD-86-16 (January 1986), and Government Shutdown: Permanent Funding Lapse Legislation Needed, GAO/GGD-91-76 (June 1991). Funding gaps and the legal problems they present are discussed separately in Chapter 6.

Continuing resolutions are enacted as joint resolutions making continuing appropriations for a certain fiscal year. Although enacted in this form rather than as an "act," once passed by both Houses of Congress and approved by the President, a continuing resolution becomes a public law and has the same force and effect as any other statute. B-152554, December 15, 1970; Oklahoma v. Weinberger, 360 F. Supp. 724, 726 (W.D. Okla. 1973). Since a continuing resolution is a form of appropriation act, it often will include the same types of restrictions and conditions that are commonly found in regular appropriation acts. E.g., B-210603, February 25, 1983 (ship construction appropriation in continuing resolution making funds available "only under a firm, fixed price type contract"). Having said this, however, it is necessary to note that continuing resolutions, at least those in what we will call the "traditional form," differ considerably from regular appropriation acts.

Continuing resolutions may take different forms. The "traditional" form, used consistently (with some variation) into the 1980s, employed essentially standard language and was clearly a temporary measure. An example of this form is the 1982 continuing resolution, Pub. L. No. 97-92, 95 Stat. 1183 (1981). When enacting continuing resolutions in this form, there is clear indication that Congress intends and expects that the normal authorization and appropriation process will eventually produce appropriation acts which will replace or terminate the budget authority contained in the resolution. Thus, a continuing resolution of this type generally provides that funds appropriated for an activity by the resolution will no longer be available for obligation if the activity is later funded by a regular appropriation act, or Congress indicates its intent to end the activity by enacting an applicable appropriation act without providing for the activity. 58 Comp. Gen. 530, 532 (1979). Obligations already incurred under the resolution, however, may be liquidated.

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Unlike regular appropriation acts, continuing resolutions in their traditional form do not usually appropriate specified sums of money. Rather, they usually appropriate "such amounts as may be necessary" for continuing projects or activities at a certain "rate for operations." The rate for operations may be the amount provided for the activity in an appropriation act that has passed both Houses but has not become law; the lower of the amounts provided when each House has passed a different act; the lower of the amounts provided either in an act which has passed only one House or in the administration's budget estimate; the amount specified in a particular conference report; the lower of either the amount provided in the budget estimate or the "current rate"; or simply the current rate. Therefore, in order to determine the sum of money appropriated for any given activity by this type of continuing resolution, it is necessary to examine documents other than the resolution itself. Some continuing resolutions have used a combination of "formula appropriations" of the types described in this paragraph and appropriations of specific dollar amounts. An example is the 1984 continuing resolution, Pub. L. No. 98-107, 97 Stat. 733 (1983).

There are times when Congress acknowledges at the outset that it is not likely to enact one or more regular appropriation acts during the current fiscal year. See, for example, the 1980 continuing resolution, Pub. L. No. 96-86, 93 Stat. 656 (1979), which provided budget authority for the legislative branch for the entire fiscal year.

For a few years in the 1980s, Congress used a very different form of continuing resolution, simply stringing together the complete texts of appropriation bills not yet enacted and enacting them together in a single "omnibus" package. This approach reached its extreme in the 1988 continuing resolution, Pub. L. No. 100-202, 101 Stat. 1329 (1987), which included the complete texts of all 13 of the regular appropriation bills. This form of continuing resolution differs from the traditional form in two key respects:

- Unlike the traditional continuing resolution, the "full text" version amounts to an acknowledgement that no further action on the unenacted bills will be forthcoming, and consequently provides funding for the remainder of the fiscal year.
- When the entire text of an appropriation bill is incorporated into a continuing resolution, the appropriations are in the form of specified dollar amounts, the same as if the individual bill had been enacted.

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The "full text" format generally does not raise the same issues of statutory interpretation that arise under the traditional format. However, it produces new ones. For example, in a continuing resolution which consolidates the full texts of what would otherwise have been several separate appropriation acts, GAO has construed the term "this act" as referring only to the individual "appropriation act" in which it appears rather than to the entire continuing resolution. B-230110, April 11, 1988.

While the omnibus approach of the 1988 resolution may appear convenient, it generated considerable controversy because, among other reasons, it is virtually "veto-proof"—the President has little choice but to sign the bill or bring the entire government to an abrupt halt.

There was no continuing resolution for fiscal year 1989. All 13 of the appropriation bills were enacted on time, for what was reported to be the first time in 12 years.[4] For fiscal year 1990, Congress reverted to the traditional type of continuing resolution. See Pub. L. No. 101-100, 103 Stat. 638 (1989).

Questions arising under continuing resolutions can be grouped loosely into two broad categories. First are questions in which the fact that a continuing resolution is involved is purely incidental, in other words, questions which could have arisen just as easily under a regular appropriation act. For example, one of the issues considered in B-230110, April 11, 1988, was whether certain provisions in the 1988 resolution constituted permanent legislation. Cases in this category are included with their respective topics throughout this publication and are not repeated in this chapter.

Second are issues that are unique to continuing resolutions, and these are the focus of the remainder of this chapter. For the most part, the material deals with the traditional form of continuing resolution as it is this form that uses concepts and language found only in continuing resolutions.

One point that should emerge from the GAO decisions and opinions is the central role of legislative intent. To be sure, legislative intent cannot change the plain meaning of a statute; Congress must enact

[4]All Spending Bills Completed on Time, New York Times, October 2, 1988, at 27.

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what it intends in order to make it law. However, there are many cases in which the statutory language alone does not provide a clear answer, and indications of congressional intent expressed in well-established methods, viewed in light of the purpose of the continuing resolution, will tip the balance.

In one case, for example, a continuing resolution provided a lump-sum appropriation for the National Oceanic and Atmospheric Administration's research and facilities account, and provided further for the transfer of $1.8 million from the Fisheries Loan Fund. The first continuing resolution for 1987 included the transfer provision and was signed into law on October 1, 1986. The Fisheries Loan Fund was scheduled to expire at "the close of September 30, 1986." Under a strictly technical reading, the $1.8 million ceased to be available once the clock struck midnight on September 30. However, the Comptroller General found the transfer provision effective, noting that a contrary result would "frustrate the obvious intent of Congress." B-227658, August 7, 1987.

While many of the continuing resolution provisions to be discussed will appear highly technical (because they are highly technical), there is an essential logic to them, evolved over many years, which is more readily seen from the perspective not of a specific case or problem, but of the overall goals and objectives of continuing resolutions and their relationship to the rest of the budget and appropriations process.

2. Use of Appropriation Warrants

Funds, including funds appropriated under a continuing resolution, are drawn from the Treasury by means of an appropriation warrant (TFS Form 6200).[5] A warrant is the official document issued pursuant to law by the Secretary of the Treasury that establishes the amount of money authorized to be withdrawn from the Treasury.[6] Under 31 U.S.C. § 3323(a), warrants authorized by law are to be signed by the Secretary of the Treasury and countersigned by the Comptroller General.

[5]Treasury Financial Manual, Vol. I, § 2-2040.

[6]Terms Used in the Federal Budget Process, supra note 1, at 81.

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Requirements relating to Treasury warrants may be waived. Section 115(a) of the Budget and Accounting Procedures Act of 1950, 31 U.S.C. § 3326(a), states:

"(a) When the Secretary of the Treasury and the Comptroller General decide that, with sufficient safeguards, existing procedures may be changed to simplify, improve, and economize the control and accounting of public money, they may prescribe joint regulations for waiving any part of the requirements in effect on September 12, 1950, that—

"(1) warrants be issued and countersigned for the receipt, retention, and disbursement of public money and trust funds . . . ."

Under the authority of this section, the Secretary of the Treasury and the Comptroller General have issued several joint regulations.[7]

In the specific context of appropriation warrants, the joint regulations have been used to phase out the countersignature requirement. First, Department of the Treasury-General Accounting Office Joint Regulation No. 5 (October 18, 1974) waived the requirement for all appropriations except continuing resolutions. Next, Treasury-GAO Joint Regulation No. 6 (October 1, 1983) further simplified the process by requiring issuance of a warrant and countersignature under a continuing resolution only once, for the total amount appropriated, unless a subsequent resolution changed the annual amount. Finally, Treasury-GAO Joint Regulation No. 7, effective January 1, 1991, eliminated the countersignature requirement completely.

[7]Treasury-GAO Joint Regulations are included as an appendix to Title 7 of the GAO Policy and Procedures Manual for Guidance of Federal Agencies. Because of their nature, they are not published in the Federal Register. Some of the earlier ones, but not those noted in the text, were published in the annual "Comp. Gen." volumes. Title 7 of the Policy and Procedures Manual is the only GAO reference in which the regulations and amendments can be found together in a single location.

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B. Rate for Operations

1. Current Rate

The current rate, as that term is used in continuing resolutions, is equivalent to the total amount of money which was available for obligation for an activity during the fiscal year immediately prior to the one for which the continuing resolution is enacted.

The term "current rate" is used in continuing resolutions to indicate the level of spending which Congress desires for a program. For example, a resolution may appropriate sufficient funds to enable a program to operate at a rate for operations "not in excess of the current rate," or at a rate "not in excess of the lower of the current rate" or the rate provided in a certain bill. It is possible to read the term "current rate" as referring to either the amount of money available for the program in the preceding year, or an amount of money sufficient to enable continuation of the program at the level of the preceding year. The two can be very different.

As a general proposition, GAO regards the term "current rate" as referring to a sum of money rather than a program level. E.g., 58 Comp. Gen. 530, 533 (1979); B-194362, May 1, 1979. Thus, when a continuing resolution appropriates in terms of the current rate, the amount of money available under the resolution will be limited by that rate, even though an increase in the minimum wage may force a reduction in the number of people participating in an employment program (B-194063, May 4, 1979), or an increase in the mandatory level of assistance will reduce the number of meals provided under a meals for the elderly program (B-194362, May 1, 1979).

The term "current rate" refers to the rate of operations carried on within the appropriation for the prior fiscal year. B-152554, December 6, 1963. The current rate is equivalent to the total appropriation, or the total funds which were available for obligation, for an activity during the previous fiscal year. Edwards v. Bowen, 785 F.2d 1440 (9th Cir. 1986); 64 Comp. Gen. 21 (1984); 58 Comp. Gen. 530, 533 (1979); B-194063, May 4, 1979; B-194362, May 1, 1979; B-164031(1), December 13, 1972. Funds administratively transferred from the account during the fiscal year, under authority contained in substantive legislation, should not be deducted in determining the current rate. B-197881, April 8, 1980; B-152554, November 4, 1974.

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It follows that funds transferred into the account during the fiscal year pursuant to statutory authority should be excluded. B-197881, April 8, 1980.

In those instances in which the program in question has been funded by one-year appropriations in prior years, the current rate is equal to the total funds appropriated for the program for the previous fiscal year. E.g., 64 Comp. Gen. 21, 22 (1984); 58 Comp. Gen. 530 (1979); B-194362, May 1, 1979. In those instances in which the program has been funded by multiple-year or no-year appropriations in prior years, the current rate is equal to the total funds appropriated for the previous fiscal year plus the total of unobligated budget authority carried over into that year from prior years. 58 Comp. Gen. 530 (1979); B-152554, October 9, 1970.

One apparent deviation from this calculation of current rate occurred in 58 Comp. Gen. 530 (1979), a case involving the now obsolete CETA (Comprehensive Employment and Training Act) program. In that decision, the Comptroller General, in calculating the current rate under the 1979 continuing resolution, included funds appropriated in a 1977 appropriation act and obligated during 1977. Ordinarily, only funds appropriated by the fiscal year 1978 appropriation act, and carryover funds unobligated at the beginning of fiscal year 1979, would have been included in the current rate. However, in this instance the funds appropriated in 1977 were included because it was clear from the legislative history of the appropriation act that Congress intended these funds to be an advance of appropriations for fiscal year 1978. Accordingly, Congress did not appropriate funds for this activity in the fiscal year 1978 appropriation act. Thus, in order to ascertain the actual amount available for the activity for fiscal year 1978, it was necessary to include the advance funding provided by the 1977 appropriation act. The rationale used in this decision would apply only when it is clear that Congress was providing advance funding for the reference fiscal year in an earlier year's appropriation act.

Where funding for the preceding fiscal year covered only a part of that year, it may be appropriate to "annualize" the previous year's appropriation in order to determine the current rate. This was the result in 61 Comp. Gen. 473 (1982), in which the FY 1981 appropriation for a particular program had been contained in a supplemental appropriation act and was intended to cover only the

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last quarter of the fiscal year. The current rate for purposes of the FY 1982 continuing resolution was four times the FY 1981 figure.

There are exceptions to the rule that "current rate" means a sum of money rather than a program level. For example, GAO construed the FY 1980 continuing resolution as appropriating sufficient funds to support an increased number of Indochinese refugees in view of explicit statements by both the Appropriations and the Budget Committees that the resolution was intended to fund the higher program level. B-197636, February 25, 1980. Also, the legislative history of the FY 1981 continuing resolution (Pub. L. No. 96-369, 94 Stat. 1351) indicated that in some instances "current rate" must be interpreted so as to avoid reducing existing program levels.

It is always preferable for the exception to be specified in the resolution itself. Starting with the first continuing resolution for fiscal year 1983 (Pub. L. No. 97-276, 96 Stat. 1186 (1982)), Congress began appropriating for the continuation of certain programs "at a rate to maintain current operating levels." GAO has construed this language as meaning sufficient funds to maintain the program in question at the same operating level as at the end of the immediately preceding fiscal year. B-209676, April 14, 1983; B-200923, November 16, 1982 (non-decision letter) (including some discussion of legislative history).

2. Rate Not Exceeding Current Rate

When a resolution appropriates funds to continue an activity at a rate for operations "not in excess of the current rate," the amount of funds appropriated by the resolution is equal to the current rate less any unobligated balance carried over into the present year.

As discussed in the preceding section, the current rate is equivalent to the total amount of funds that was available for obligation for a project or activity in the preceding fiscal year. When the continuing resolution appropriates funds to continue an activity at a rate for operations "not in excess of the current rate," it is the intent of Congress that the activity have available for obligation in the present fiscal year no more funds than it had available for obligation in the preceding fiscal year. Therefore, if there is a balance of unobligated funds which can be carried over into the present fiscal year, this balance must be deducted from the current rate in determining the amount of funds appropriated by the continuing resolution. If this

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To the extent it is possible to summarize appropriations law in a single paragraph, this is it. Viewed in the aggregate, the Antideficiency Act and related funding statutes "[restrict] in every possible way the expenditures and expenses and liabilities of the government, so far as executive offices are concerned, to the specific appropriations for each fiscal year." Wilder's Case, 16 Ct. Cl. 528, 543 (1880).

2. Obligation/Expenditure in Excess or Advance of Appropriations

The key provision of the Antideficiency Act is 31 U.S.C. § 1341(a)(1):[8]

"(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—

"(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or

"(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."

Not only is section 1341(a)(1) the key provision of the Act, it was originally the only provision, the others being added to ensure enforcement of the basic prohibitions of section 1341.

The law is not limited to the executive branch, but applies to any "officer or employee of the United States Government" and thus extends to all branches. Examples of legislative branch applications are B-107279, January 9, 1952 (Office of Legislative Counsel, House of Representatives); B-78217, July 21, 1948 (appropriations to Senate for expenses of Office of Vice President); 27 Op. Att'y Gen. 584 (1909) (Government Printing Office). Within the judicial branch, it applies to the Administrative Office of the United States Courts. E.g., 50 Comp. Gen. 589 (1971). However, whether a federal judge is an officer or employee for purposes of 31 U.S.C. § 1341(a)(1) appears to remain an open question, at least in some contexts. See Armster v. United States District Court, 792 F.2d 1423, 1427 n.7 (9th Cir. 1986).

Some government corporations are also classified as agencies of the United States Government, and their officials are therefore "officers

[8]Prior to the 1982 recodification of title 31 of the United States Code, the Antideficiency Act consisted of 9 lettered subsections of what was then 31 U.S.C. § 665. The recodification scattered the law among several new sections. To better show the relationship of the material, our organization in this chapter retains the sequence of the former subsections.

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were not done, the program would be funded at a higher level in the present year than it was in the preceding year, which is not permitted by the language of the resolution. E.g., 58 Comp. Gen. 530, 535 (1979).

For example, suppose the continuing resolution for fiscal year 1992 appropriates sufficient funds to continue an activity at a rate not exceeding the current rate. The current rate, or the total amount which was available for obligation in fiscal year 1991, is $1,000,000. Of this amount, $100,000 remains unobligated at the end of 1991, and is available for obligation in 1992. If the activity is to operate at a rate not to exceed the current rate, $1,000,000, then the resolution can appropriate no more than the difference between the current rate and the carryover from 1991 to 1992, or $900,000. If the resolution were interpreted as appropriating the full current rate, then a total of $1,100,000 would be available for fiscal year 1992, and the activity would be able to operate at a rate in excess of the current rate, a result prohibited by the language of the resolution.

An unobligated balance which does not carry over into the present fiscal year (the more common situation) does not have to be deducted. B-152554, November 4, 1974.

A commonly encountered form of continuing resolution formula appropriation is an amount not in excess of the current rate or the rate provided in some reference item, whichever is lower. The reference item may be an unenacted bill, a conference report, the President's budget estimate, etc. When the current rate produces the lower figure—the situation encountered in 58 Comp. Gen. 530—the above rule applies and an unobligated carryover balance must be deducted to determine the amount appropriated by the continuing resolution. However, when the current rate is not the lower of the two referenced items, the rule does not necessarily apply.

To illustrate, a continuing resolution appropriated funds for the Office of Refugee Resettlement at a rate for operations not in excess of the lower of the current rate or the rate authorized by a bill as passed by the House of Representatives. The rate under the House-passed bill was $50 million. The current rate was $77.5 million, of which $39 million remained unobligated at the end of the preceding fiscal year and was authorized to be carried over into the current fiscal year. If the continuing resolution had simply specified a rate not in excess of

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the current rate, or if the rate in the House-passed bill had been greater than the current rate, it would have been necessary to deduct the $39 million carryover balance from the $77.5 million current rate to determine the maximum funding level for the current year. Here, however, the rate in the House-passed bill was the lower of the two.

Reasoning that the "current rate" already includes an unobligated carryover balance, if any, whereas the rate in the House-passed bill did not include a prior year's balance, and supported by the legislative history of the continuing resolution, the Comptroller General concluded that the amount available for the current year was the amount appropriated by the resolution, $50 million, plus the unobligated carryover balance of $39 million, for a total of $89 million. 64 Comp. Gen. 649 (1985). The decision distinguished 58 Comp. Gen. 530, stating that "the rule with respect to deduction of unobligated balances in 58 Comp. Gen. 530 is not applicable where the lower of two referenced rates is not the current rate." Id. at 652–53. The case went to court, and the Ninth Circuit Court of Appeals reached the same result. Edwards v. Bowen, 785 F.2d 1440 (9th Cir. 1986).

In sum, if a continuing resolution appropriates the lower of the current rate or the rate in some reference item, you compare the two numbers to determine which is lower before taking any unobligated carryover balance into account. If the current rate is lower, you then deduct the carryover balance to determine the funding level under the continuing resolution. If the rate in the reference item is lower, the funding level is the reference rate plus the carryover balance unless it is clear that this is not what was intended.

3. Spending Pattern Under Continuing Resolution

a. Pattern of Obligations

An agency may determine the pattern of its obligations under a continuing resolution so long as it operates under a plan which will keep it within the rate for operations limit set by the resolution. If an agency usually obligates most of its annual budget in the first month or first quarter of the fiscal year, it may continue that pattern under the resolution. If an agency usually obligates funds uniformly over the entire year, it will be limited to that pattern under the resolution,

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unless it presents convincing reasons why its pattern must be changed in the current fiscal year.

Continuing resolutions are often enacted to cover a limited period of time, such as a month or a calendar quarter. The time limit stated in the resolution is the maximum period of time during which funds appropriated by the resolution are available for obligation.

However, this limited period of availability does not affect the amount of money appropriated by the resolution. The rate for operations specified in the resolution, whether in terms of an appropriation act which has not yet become law, a budget estimate, or the current rate, is an annual amount. The continuing resolution, in general, regardless of its period of duration, appropriates this full annual amount. See B-152554, November 4, 1974.

Because the appropriation under a continuing resolution is the full annual amount, an agency may generally follow any pattern of obligating funds, so long as it is operating under a plan which will enable continuation of activities throughout the fiscal year within the limits of the annual amount appropriated. Thus, under a resolution with a duration of one month, and which appropriates funds at a rate for operations not in excess of the current rate, the agency is not necessarily limited to incurring obligations at the same rate it incurred them in the corresponding month of the preceding year. B-152554, December 6, 1963. The same principle applies when the resolution appropriates funds at a rate to maintain current operating levels. B-209676, April 14, 1983.

However, the pattern of obligations in prior years does provide a framework for determining the proper pattern of obligations under the continuing resolution. For example, if the activity is a formula grant program in which nearly all appropriated funds are normally obligated at the beginning of the fiscal year, then the full annual amount should be made available to the agency under the resolution, even though the resolution may be in effect for only one month. However, if the activity is salaries and expenses, in which funds are normally obligated uniformly throughout the year, then the amount made available to the agency should be only one-twelfth of the annual amount under a one-month resolution or one-fourth of the annual amount under a calendar quarter resolution. B-152554, February 17, 1972.

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Congress can, of course, alter the pattern of obligations by the language of the resolution. For example, if the resolution limits obligations in any calendar quarter to one-fourth of the annual rate, the agency is limited to that one-fourth rate regardless of its normal pattern of obligations. B-152554, October 16, 1973. Further, even if the resolution itself does not have such limitations, but the legislative history clearly shows the intent of Congress that only one-fourth of the annual rate be obligated each calendar quarter, only this amount should be made available unless the agency can demonstrate a real need to exceed that rate. B-152554, November 4, 1974.

b. Apportionment

The requirement that appropriations be apportioned by the Office of Management and Budget, imposed by the Antideficiency Act, applies to funds appropriated by continuing resolution as well as regular appropriations. See generally OMB Circular No. A-34, Part IV (1985).

Typically, OMB has permitted some continuing resolution funds to be apportioned automatically. For example, if a given continuing resolution covers 10 percent of a fiscal year, OMB may permit 10 percent of the appropriation to be apportioned automatically, meaning that the agency can obligate this amount without seeking a specific apportionment. Under such an arrangement, if program requirements produced a need for additional funds, the agency would have to seek an apportionment from OMB for the larger amount.

Apportionment requirements may vary from year to year because of differences in duration and other aspects of applicable continuing resolutions. A device OMB has commonly used to announce its apportionment requirements for a given fiscal year is an OMB Bulletin reflecting the particular continuing resolution for that year.

With the change in warrant procedures brought about by the Treasury-GAO Joint Regulations discussed earlier, the apportionment process plays an even more vital role in controlling an agency's pattern of obligations under a continuing resolution.

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4. Liquidation of Contract Authority

When in the preceding fiscal year Congress has provided an agency with contract authority, the continuing resolution must be interpreted as appropriating sufficient funds to liquidate that authority to the extent it becomes due during the period covered by the continuing resolution.

When an activity operates on the basis that in one year Congress provides contract authority to the agency and in the next year appropriates funds to liquidate that authority, then a continuing resolution in the second year must be interpreted as appropriating sufficient funds to liquidate the outstanding contract authority. The term "contract authority" means express statutory authority to incur contractual obligations in advance of appropriations. Thus, there is no "rate for operations" limitation in connection with the liquidation of due debts based on validly executed contracts entered into under statutory contract authority. In this context, rate for operations limitations apply only to new contract authority for the current fiscal year. B-114833, November 12, 1974.

5. Rate for Operations Exceeds Final Appropriation

If an agency operating under a continuing resolution incurs obligations within the rate for operations limit, but Congress subsequently appropriates a total annual amount less than the amount of these obligations, the obligations remain valid. B-152554, February 17, 1972.

For example, a continuing resolution for a period of one month may have a rate for operations limitation of the current rate. The activity being funded is a grant program and the agency obligates the full annual amount during the period of the resolution. Congress then enacts a regular appropriation act which appropriates for the activity an amount less than the obligations already incurred by the agency. Under these circumstances, the obligations incurred by the agency remain valid obligations of the United States.

Having established that the "excess" obligations remain valid, the next question is how they are to be paid. At one time, GAO took the position that an agency finding itself in this situation must not incur any further obligations and must attempt to negotiate its obligations downward to come within the amount of the final appropriation. B-152554, February 17, 1972. If this is not possible, the agency would have to seek a supplemental or deficiency appropriation. This

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position was based on a provision commonly appearing in continuing resolutions along the following lines:

"Expenditures made pursuant to this joint resolution shall be charged to the applicable appropriation, fund, or authorization whenever a bill in which such applicable appropriation, fund, or authorization is contained is enacted into law."[8]

However, the 1972 opinion failed to take into consideration another provision commonly included in continuing resolutions:

"Appropriations made and authority granted pursuant to this joint resolution shall cover all obligations or expenditures incurred for any program, project, or activity during the period for which funds or authority for such project or activity are available under this joint resolution."[9]

When these two provisions are considered together, it becomes apparent that the purpose of the first provision is merely to emphasize that the funds appropriated by the continuing resolution are not in addition to the funds later provided when the applicable regular appropriation act is enacted. Accordingly, GAO modified the 1972 opinion and held that funds made available by a continuing resolution remain available to pay validly incurred obligations which exceed the amount of the final appropriation. 62 Comp. Gen. 9 (1982). See also 67 Comp. Gen. 474 (1988); B-207281, October 19, 1982.

Thus, obligations under a continuing resolution are treated as follows:

"When an annual appropriation act provides sufficient funding for an appropriation account to cover obligations previously incurred under the authority of a continuing resolution, any unpaid obligations are to be charged to and paid from the applicable account established under the annual appropriation act. Similarly, to the extent the annual act provides sufficient funding, those obligations which were incurred and paid during the period of the continuing resolution must be charged to the account created by the annual appropriation act. On the other hand, to the extent the annual appropriation act does not provide sufficient funding for the appropriation account to cover obligations validly incurred under a continuing resolution, the obligations in excess of the amount provided by the annual act should be charged to and paid from the appropriation account established under authority of the continuing resolution.

[8]E.g., Pub. L. No. 101-100, § 104, 103 Stat. 638, 640 (1989) (1990 continuing resolution). Comparable provisions have been included in continuing resolutions for over a century. See, for example, the FY 1883 continuing resolution (22 Stat. 384) discussed in 3 Lawrence, First Comp. Dec. 213 (1882).

[9]E.g., Pub. L. No. 101-100, supra note 8, § 103.

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[Footnote omitted.] Thus the funds made available by the resolution must remain available to pay these obligations."

62 Comp. Gen. 9, 11—12 (1982). However, to comply with the intent of the lower appropriation, OMB requires that agencies "reduce obligations in the most cost-effective way and to the maximum extent possible." OMB Circular No. A-34, § 22.1. Thus, as GAO had advised in 1972, agencies are still required to make their best efforts to remain within the amount of the final appropriation. The change recognized in 62 Comp. Gen. 9 is that, to the extent an agency is unable to do so, the appropriation made by the continuing resolution remains available to liquidate the "excess" obligations.

C. Projects or Activities

"Projects or activities" as used in continuing resolutions may have two meanings. When determining which government programs are covered by the resolution, and the rate for operations limit, the term "project or activity" refers to the total appropriation rather than to specific activities. When determining whether an activity was authorized or carried out in the preceding year, the term "project or activity" may refer to the specific activity. The following paragraphs will elaborate.

The term "projects or activities" is used in two contexts in continuing resolutions. First, it is used in the appropriating language to indicate which government programs are to be funded and at what rate. Thus a resolution might appropriate sufficient funds to continue "projects or activities provided for" in a certain appropriation bill "to the extent and in the manner" provided in the bill. Occasionally Congress will use only the term "activities" by appropriating sufficient funds "for continuing the following activities, but at a rate for operations not in excess of the current rate."

When used in this context, "projects or activities" or simply "activities" does not refer to specific items contained as activities in the administration's budget submission or in a committee report.

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Rather, the term refers to the appropriation for the preceding fiscal year. B-204449, November 18, 1981.[10] Thus, if a resolution appropriates funds to continue "projects or activities" under a certain authorizing act at a rate for operations not exceeding the current rate, the agency is operating within the limits of the resolution so long as the total of obligations under the appropriation does not exceed the current rate. Within the appropriation, an agency may fund a particular activity at a higher rate than that activity was funded in the previous year and still not violate the current rate limitation, assuming of course that the resolution itself does not provide to the contrary.

An exception to the interpretation that "projects or activities" refers to the appropriation in existence in the preceding fiscal year occurred in 58 Comp. Gen. 530 (1979). In prior years, Comprehensive Employment and Training Act programs had been funded in two separate appropriations, Employment and Training Assistance and Temporary Employment Assistance. The individual programs under the two appropriations differed only in that the number of jobs provided under Temporary Employment Assistance depended on the condition of the national economy.

Concurrently with the enactment of the 1979 continuing resolution, Congress amended the CETA authorizing legislation so that certain programs previously operating under the Temporary Employment Assistance appropriation were to operate in fiscal year 1980 under the Employment and Training Assistance appropriation. Under these circumstances, if the phrase "activities under the Comprehensive Employment and Training Act" in the continuing resolution had been interpreted as referring to the two separate appropriations made in the preceding year, and the current rates calculated accordingly, there would have been insufficient funds available for the now increased programs under the Employment and Training Assistance appropriation, and a surplus of funds available for the decreased programs under the Temporary Employment Assistance appropriation. To avoid this result, the Comptroller General

[10]This position also follows from decisions such as B-162447, March 8, 1971, read in conjunction with decisions on the availability of lump-sum appropriations. Of course, if the appropriation for the preceding fiscal year was a line-item appropriation, then the scope of "project or activity" will be limited accordingly. See 66 Comp. Gen. 484 (1987) (Special Defense Acquisition Fund, a revolving fund made available by annual "limitation on obligations" provisions, held a "project or activity" for purposes of appropriating language in a continuing resolution).

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interpreted the 1979 continuing resolution as appropriating a single lump-sum amount for all CETA programs, based on the combined current rates of the two appropriation accounts for the previous year. See 58 Comp. Gen. at 535–36.

The term "projects or activities" has also been used in continuing resolutions to prohibit the use of funds to start new programs. Thus, many resolutions have contained a section stating that no funds made available under the resolution shall be available to initiate or resume any project or activity which was not conducted during the preceding fiscal year. When used in this context, the term "projects or activities" refers to the individual program rather than the total appropriation. See 52 Comp. Gen. 270 (1972); 35 Comp. Gen. 156 (1955).

One exception to this interpretation occurred in B-178131, March 8, 1973. In that instance, in the previous fiscal year funds were available generally for construction of buildings, including plans and specifications. However, a specific construction project was not actually under way during the previous year. Nonetheless it was decided that, because funds were available generally for construction in the previous year, this specific project was not a new project or activity and thus could be funded under the continuing resolution.[11]

In more recent years, Congress has resolved the differing interpretations of "project or activity" by altering the language of the new program limitation. Rather than limiting funds to programs which were actually conducted in the preceding year, the more recent resolutions prohibit use of funds appropriated by the resolution for "any project or activity for which appropriations, funds, or other authority were not available" during the preceding fiscal year.[12] Thus, if an agency had authority and sufficient funds to carry out a particular program in the preceding year, that program is not a new project or activity regardless of whether it was actually operating in the preceding year.

A variation occurred in 60 Comp. Gen. 263 (1981). A provision of the Higher Education Act authorized loans to institutions of higher

[11]Cf. 4 Lawrence, First Comp. Dec. 116 (1883), which concluded that obligations made under a continuing resolution for certain building repairs not then authorized violated the Antideficiency Act.

[12]See, for example, Pub. L. No. 101-100, § 101(c), 103 Stat. 638 (1989) (1990 continuing resolution).

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education from a revolving fund, not to exceed limitations specified in appropriation acts. Congress had not released money from the loan fund since 1978. The FY 1981 continuing resolution provided funds to the Department of Education based on its regular FY 1981 appropriation bill as passed by the House of Representatives. The House-passed version included $25 million for the higher education loans. Since the continuing resolution did not include a general prohibition against using funds for projects not funded during the preceding fiscal year, the $25 million from the loan fund was available under the continuing resolution, notwithstanding that the program had not been funded in the preceding year.

D. Relationship to Other Legislation

1. Not Otherwise Provided For

Continuing resolutions often appropriate funds to continue projects "not otherwise provided for." This language limits funding to those programs which are not funded by any other appropriation act. Programs which received funds under another appropriation act are not covered by the resolution even though the authorizing legislation which created the program is mentioned specifically in the continuing resolution. See B-183433, March 28, 1979. For example, if a resolution appropriates funds to continue activities under the Social Security Act, and a specific program under the Social Security Act has already been funded in a regular appropriation act, the resolution does not appropriate any additional funds for that program.

2. Status of Bill or Budget Estimate Used as Reference

When a continuing resolution appropriates funds at a rate for operations specified in a certain bill or in the administration's budget estimate, the status of the bill or estimate on the date the resolution passes is controlling, unless the resolution specifies some other reference date.

A continuing resolution will often provide funds to continue activities at a rate provided in a certain bill that has passed one or both Houses of Congress, or at the rate provided in the administration's budget estimate. In such instances, the resolution is referring to the status of

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and employees of the United States." To the extent they operate with funds which are regarded as appropriated funds, they too are subject to 31 U.S.C. § 1341(a)(1). E.g., B-223857, February 27, 1987 (Commodity Credit Corporation); B-135075-O.M., February 14, 1975 (Inter-American Foundation). It follows that section 1341(a)(1) does not apply to a government corporation which is not an agency of the United States Government. E.g., B-175155, July 26, 1976 (Amtrak). These principles are, of course, subject to variation if and to the extent provided in the relevant organic legislation.

There are two distinct prohibitions in section 1341(a)(1). Unless otherwise authorized by law, no officer or employee of the United States may make (or authorize the making of) an expenditure, or create or involve (or authorize the creation or involvement of) the United States in any contract or obligation to make future expenditures, in the absence of sufficient funds in the account to cover the payment or the obligation at the time it is made or incurred. Put another way, the two sets of prohibitions are concerned with

- Making expenditures or incurring obligations in excess of available appropriations; and
- Making expenditures or incurring obligations in advance of appropriations.

The distinction between obligating in excess of an appropriation and obligating in advance of an appropriation is clear in the majority of cases, but can occasionally become blurred. For example, an agency which tries to meet a current shortfall by "borrowing" from (i.e., obligating against) the unenacted appropriation for the next fiscal year is clearly obligating in advance of an appropriation. E.g., B-236667, January 26, 1990. However, it is also obligating in excess of the currently available appropriation. Since both are equally illegal, determining precisely which subsection of 31 U.S.C. § 1341(a) has been violated is of secondary importance. In any event, the point to be stressed here is that the law is violated not only if there are insufficient funds in an account when a payment becomes due. The very act of obligating the United States to make a payment when the necessary funds are not already in the account is also a violation of 31 U.S.C. § 1341(a).

Note that the statute refers to overspending the amount available in an "appropriation or fund." OMB Circular No. A-34 specifies:

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the bill or budget estimate on the date the resolution became law. B-164031(2).17, December 5, 1975; B-152098, January 30, 1970.

For example, the resolution may provide that activities are to be continued at the current rate or at the rate provided in the budget estimate, whichever is lower. The budget estimate referred to is the one in existence at the time the resolution is enacted, and the rate for operations cannot be increased by a subsequent upward revision of the budget estimate. B-164031(2).17, December 5, 1975.

Similarly, if a resolution provides that activities are to continue at the rate provided in a certain appropriation bill, the resolution is referring to the status of the bill on the date the resolution is enacted. A later veto of the bill by the President would not affect the continuation of programs under the resolution. B-152098, January 15, 1973.

Where a continuing resolution provides funds based on a reference bill, this includes restrictions or limitations contained in the reference bill, as well as the amounts appropriated, unless the continuing resolution provides otherwise. 33 Comp. Gen. 20 (B-116069, July 10, 1953);[13] B-199966, September 10, 1980. In National Treasury Employees Union v. Devine, 733 F.2d 114 (D.C. Cir. 1984), the court construed a provision in a reference bill prohibiting the implementation of certain regulations, accepting without question the restriction as having been "enacted into law" by a continuing resolution which provided funds "to the extent and in the manner provided for" in the reference bill. See also Connecticut v. Schweiker, 684 F.2d 979 (D.C. Cir. 1982), cert. denied, 459 U.S. 1207. Obviously, the same result applies under a "full text" continuing resolution. B-221694, April 8, 1986.

A provision in a continuing resolution using a reference bill may incorporate legislative history, in which event the specified item of legislative history will determine the controlling version of the reference bill. For example, an issue in American Federation of Government Employees v. Devine, 525 F. Supp. 250 (D.D.C. 1981), was whether the 1982 continuing resolution prohibited the Office of Personnel Management from funding coverage of therapeutic abortions in government health plans. The resolution funded employee health benefits "under the authority and conditions set forth

[13]Two decisions begin on the same page, hence the variation in citation format.

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in H.R. 4121 as reported to the Senate on September 22, 1981." An earlier version of H.R. 4121 had included a provision barring the funding of therapeutic abortions. However, the bill as reported to the full Senate by the Appropriations Committee on September 22, 1981, dropped the provision. Accordingly, the continuing resolution could not form the basis for refusing to fund therapeutic abortions in the plaintiff's 1982 health plan.

It is also not uncommon for a continuing resolution to appropriate funds as provided in a particular reference bill at a rate for operations provided for in the conference report on the reference bill. At a minimum, this will include items on which the House and Senate conferees agreed, as reflected in the conference report. If the resolution also incorporates the "joint explanatory statement" portion of the conference report, then it will enact those amendments reported in "technical disagreement" as well. See B-221694, April 8, 1986; B-205523, November 18, 1981; B-204449, November 18, 1981.

3. More Restrictive Authority

The "more restrictive authority," as that term is used in continuing resolutions, is the version of a bill which gives an agency less discretion in obligating and disbursing funds under a certain program.

Continuing resolutions will often appropriate funds to continue projects or activities at the rate provided in either the version of an appropriation act that has passed the House or the version that has passed the Senate, whichever is lower "or under the more restrictive authority." Under this language, the version of the bill which appropriates the lesser amount of money for an activity will be controlling. If both versions of the bill appropriate the same amount, the version which gives the agency less discretion in obligating and disbursing funds under a program is the "more restrictive authority" and will be the reference for continuing the program under the resolution. B-210922, March 30, 1984; B-152098, March 26, 1973; B-152554, December 15, 1970.

However, this provision may not be used to amend or nullify a mandatory provision of prior permanent law. To illustrate, the Federal Housing Administration was required by a provision of permanent law to appoint an Assistant Commissioner to perform certain functions. The position subsequently became controversial. For the first month

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of fiscal year 1954, the agency operated under a continuing resolution which included the "more restrictive authority" provision. Language abolishing the position had been contained in one version of the reference bill, but not both. The bill, when subsequently enacted, abolished the position.

Under a strict application of the "more restrictive authority" provision, it could be argued that there was no authority to continue the employment of the Assistant Commissioner during the month covered by the continuing resolution. Noting that "laws are to be given a sensible construction where a literal application thereof would lead to unjust or absurd consequences, which should be avoided if a reasonable application is consistent with the legislative purpose," the Comptroller General held that the Assistant Commissioner could be paid his salary for the month in question. B-116566, September 14, 1953. The decision concluded:

"[M]anifestly the [more restrictive authority] language . . . was not designed to amend or nullify prior permanent law which theretofore required, or might thereafter require, the continuance of a specific project or activity during July 1953. . . .

. . . .

". . . Accordingly, it is concluded that the words 'the lesser amount or the more restrictive authority' as used in [the continuing resolution] had reference to such funds and authority as theretofore were provided in appropriations for [the preceding fiscal year], and which might be changed, enlarged or restricted from year to year."

In addition, continuing resolutions frequently provide that a provision "which by its terms is applicable to more than one appropriation" and which was not included in the applicable appropriation act for the preceding fiscal year, will not be applicable to funds or authority under the resolution unless it was included in identical form in the relevant appropriation bill as passed by both the House and the Senate. Thus, in 52 Comp. Gen. 71 (1972), a provision in the House version of the 1973 Labor Department appropriation act prohibited the use of "funds appropriated by this Act" for Occupational Safety and Health Act inspections of firms employing 25 persons or less. The Senate version contained the identical version except that "15" was substituted for "25." The continuing resolution for that year contained both the "more restrictive authority" and the "applicable to more than one appropriation" provisions. The Comptroller General concluded that, even though the House provision was more

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restrictive, the OSHA provision did not apply to funds under the continuing resolution since it had not been contained in the 1972 appropriation act and by its terms it was applicable to more than one appropriation (i.e., it applied to the entire appropriation act). See also B-142011, August 6, 1969.

For purposes of the "applicable to more than one appropriation" provision, GAO has construed the "applicable appropriation act for the preceding fiscal year" as meaning the regular appropriation act for the preceding year and not a supplemental. B-210922, March 30, 1984. (The cited decision also illustrates some of the complexities encountered when the appropriation act for the preceding year was itself a continuing resolution.)

4. Lack of Authorizing Legislation

In order for a government agency to carry out a program, the program must first be authorized by law and then funded, usually by means of regular appropriations. This section deals with the relationship of continuing resolutions to programs whose authorization has expired or is about to expire. The common issue is the extent to which a continuing resolution provides authority to continue the program after expiration of the underlying authorization.

As the following discussion will reveal, there are no easy answers. The cases frequently involve a complex interrelationship of various legislative actions (or inactions), and are not susceptible to any meaningful formulation of simple rules. For the most part, the answer is primarily a question of intent, circumscribed of course by statutory language and aided by various rules of statutory construction.

We start with a fairly straightforward case. Toward the end of FY 1984, Congress was considering legislation (S.2456) to establish a commission to study the Ukrainian famine of 1932–33. The bill passed the Senate but was not enacted into law before the end of the fiscal year. The FY 1985 continuing resolution provided that "[t]here are hereby appropriated $400,000 to carry out the provisions of S.2456, as passed by the Senate on September 21, 1984."[14] If this provision were not construed as authorizing the establishment and operation of the commission as well as the appropriation of funds, it would have been absolutely meaningless. Accordingly, GAO concluded

[14]Pub. L. No. 98-473, § 136, 98 Stat. 1837, 1973 (1984).

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that the appropriation incorporated the substantive authority of S.2456. B-219727, July 30, 1985. The result was supported by clear and explicit legislative history.

In a 1975 case, GAO held that the specific inclusion of a program in a continuing resolution will provide both authorization and funding to continue the program despite the expiration of the appropriation authorization legislation. Thus, for example, if the continuing resolution specifically states that the School Breakfast Program is to be continued under the resolution, the program may be continued although funding authorization legislation for the program expires prior to or during the period the resolution is in effect. 55 Comp. Gen. 289 (1975). The same result would follow if the intent to continue the program was made particularly clear in legislative history. 65 Comp. Gen. 318, 320–21 (1986).

The result in 55 Comp. Gen. 289 flows from two concepts. First, the continuing resolution, as the later enactment, is the more recent expression of congressional intent. Second, if Congress can appropriate funds in excess of a specific ceiling in authorizing legislation, which it can, then it should be able to appropriate funds to continue a program whose funding authorization is about to expire, at least where the authorization of appropriations is not a legal prerequisite to the appropriation itself.

However, the "rule" of 55 Comp. Gen. 289 is not an absolute and the result in any given case will depend on several variables. Although not spelled out as such in any of the decisions, the variables may include: the degree of specificity in the continuing resolution; the apparent intent of Congress with respect to the expired program; whether what has expired is an authorization of appropriations or the underlying program authority itself; and the duration of the continuing resolution (short-term vs. full fiscal year).

In one case, for example, "all authority" under the Manpower Development and Training Act terminated on June 30, 1973. The program was not specifically provided for in the 1974 continuing resolution, and the authority in fact was not reestablished until enactment of the Comprehensive Employment and Training Act six months later. Under these circumstances, the Claims Court held that, in the absence of express language in the continuing resolution or elsewhere, contracts entered into during the gap between expiration

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of the MDTA and enactment of CETA were without legal authority and did not bind the government. Consortium Venture Corp. v. United States, 5 Cl. Ct. 47 (1984), aff'd mem., 765 F.2d 163 (Fed. Cir. 1985).

In another case, recent Defense Department authorization acts, including the one for FY 1985, had authorized a test program involving payment of a price differential to "labor surplus area" contractors. The test program amounted to an exemption from permanent legislation prohibiting the payment of such differentials. The 1985 provision expired, of course, at the end of FY 1985. The 1986 continuing resolution made no specific provision for the test program nor was there any evidence of congressional intent to continue the test program under the resolution. (This lack of intent was confirmed when the 1986 authorization act was subsequently enacted without the test program provision.) GAO found that the Defense Logistics Agency's failure to apply the price differential in evaluating bids on a contract awarded under the continuing resolution (even though the differential had been included in the solicitation issued prior to the close of FY 1985) was not legally objectionable. 65 Comp. Gen. 318 (1986).

A more difficult case was presented in B-207186, February 10, 1989. Congress enacted two pieces of legislation on December 22, 1987. One was a temporary extension of the Solar Bank, which had been scheduled to go out of existence on September 30, 1987. Congress had enacted several temporary extensions while it was considering reauthorization, the one in question extending the Bank's life to March 15, 1988. The second piece of legislation was the final continuing resolution for 1988 which funded the government for the remainder of the fiscal year. The resolution included a specific appropriation of $1.5 million for the Solar Bank, with a two-year period of availability.

If the concept of 55 Comp. Gen. 289 were applied, the result would have been that the specific appropriation in the continuing resolution, in effect, reauthorized the Solar Bank as well. However, the "later enactment of Congress" concept has little relevance when both laws are enacted on the same day. In addition, in contrast to 55 Comp. Gen. 289, there was no indication of congressional intent to continue

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the Solar Bank beyond the March 1988 expiration date. Therefore, GAO distinguished prior cases, [15] found that the two pieces of legislation could be reconciled, and concluded that the resolution merely appropriated funds for the Bank to use during the remainder of its existence.

Another case involving a sunset provision is 71 Comp. Gen. 378 (1992). The legislation establishing the United States Commission on Civil Rights provided for the Commission to terminate on September 30, 1991. During fiscal year 1991, Congress was working on the Commission's reauthorization and its regular FY 1992 appropriation. Although both bills passed both Houses of Congress, neither was enacted into law by September 30. The first continuing resolution for FY 1992, with a cutoff date of October 29, 1991, expressly provided funds for activities included in the Commission's yet-unenacted 1992 appropriations bill. It was clear from all of this that Congress intended the Commission to continue operating beyond September 30. Thus, the continuing resolution effectively suspended the sunset date and authorized the Commission to operate until October 28, 1991, when the regular 1992 appropriation act was enacted, at which time the regular appropriation provided similar authority until November 26, when the reauthorization was enacted.

Appropriation bills sometimes contain provisions making the availability of the appropriations contingent upon the enactment of additional authorizing legislation. If a continuing resolution used a bill with such a provision as a reference, and if the authorizing legislation was not enacted, the amount contained in the appropriation bill, and therefore the amount appropriated by the continuing resolution, would be zero. To avoid this possibility, a continuing resolution may contain a provision suspending the effectiveness of such "contingency" provisions for the life of the resolution.[16] Such a suspension provision will be applicable only until the referenced appropriation bill is enacted into law. 55 Comp. Gen. 289, 294 (1975).

[15]GAO had also applied the concept of 55 Comp. Gen. 289 in 65 Comp. Gen. 524 (1986), holding that a specific provision in a regular appropriation act permitted the continuation of an activity whose organic authority had expired at the end of the preceding fiscal year. See also B-164031(3), January 3, 1973.

[16]E.g., Pub. L. No. 102-109, § 109, 105 Stat. 551, 553 (1992 continuing resolution).

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E. Duration

1. Duration of Continuing Resolution

Continuing resolutions generally provide that the budget authority provided for an activity by the resolution shall remain available until (a) enactment into law of a regular appropriation for the activity, (b) enactment of the applicable appropriation by both Houses of Congress without provision for the activity, or (c) a fixed cutoff date, whichever occurs first.[17] Once either of the first two conditions occurs, or the cutoff date passes, funds appropriated by the resolution are no longer available for obligation and new obligations may be incurred only if a regular appropriation is made or if the termination date of the resolution is extended.

The period of availability of funds under a continuing resolution can be extended by Congress by amending the fixed cutoff date stated in the resolution. B-165731(1), November 10, 1971; B-152098, January 30, 1970. The extension may run beyond the session of Congress in which it is enacted. B-152554, December 15, 1970.

Thus, some fiscal years have seen a series of continuing resolutions, informally designated "first," "second," etc., up to "final." This happens as Congress extends the fixed cutoff date for short time periods until either all the regular appropriation acts are enacted or Congress determines that some or all of the remaining bills will not be enacted individually, in which event relevant portions of the resolution will continue in effect for the remainder of the fiscal year.

The second condition of the standard duration provision—enactment of the appropriation by both Houses without provision for the activity—will be considered to have occurred only when it is clear that Congress intended to terminate the activity. Thus, in B-164031(1), March 14, 1974, although regular and supplemental appropriation acts had been enacted without provision for a program, the Comptroller General decided that funds for the program were still available under the continuing resolution. In this case, the legislative history indicated that in enacting the regular appropriation act, Congress was providing funding for only some of the programs normally funded by this act and was deferring consideration of other

[17] E.g., Pub. L. No. 102-109, § 106, 105 Stat. at 553.

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programs, including the one in question. Therefore, the second condition was not applicable. Moreover, because supplemental appropriations are intended to provide funding only for new or additional needs, omission of the program from the supplemental did not trigger the second cutoff provision.

As discussed previously, once the applicable appropriation is enacted into law, expenditures made under the continuing resolution are charged to that appropriation, except that valid obligations incurred under the continuing resolution in excess of the amount finally appropriated are charged to the account established under the continuing resolution.

2. Duration of Appropriations

For the most part, the duration (period of obligational availability) of an appropriation under a short-term continuing resolution does not present problems. If you have, say, only one month to incur obligations under a continuing resolution, it matters little that the corresponding appropriation in a regular appropriation act might be a multiple-year or no-year appropriation. Also, once the regular appropriation is enacted, it supersedes the continuing resolution and governs the period of availability. Questions may arise, however, under continuing resolutions whose duration is the balance of the fiscal year.

For example, the continuing resolution for fiscal year 1979 included the standard duration provision described above, with a cutoff date of September 30, 1979, the last day of the fiscal year. However, a provision in the Comprehensive Employment and Training Act stated that "notwithstanding any other provision of law, unless enacted in specific limitation of the provisions of this subsection," appropriations to carry out the CETA program shall remain available for two years. Applying the principle that a specific provision governs over a more general one, it was held that funds appropriated for CETA under the continuing resolution were available for obligation for two years in accordance with the CETA provision. B-194063, May 4, 1979; B-115398.33, March 20, 1979.

A few years earlier, the United States District Court for the District of Columbia had reached the same result in a case involving grants to states under the Elementary and Secondary Education Act. Pennsylvania v. Weinberger, 367 F. Supp. 1378, 1384–85 (D.D.C.

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1973). The court stated, "[i]t is a basic premise of statutory construction that in such circumstances the more specific measure . . . is to be held controlling over the general measure where inconsistencies arise in their application." Id. at 1385.

Application of the same principle produced a similar result in B-199966, September 10, 1980. The 1980 continuing resolution appropriated funds for foreign economic assistance loans by referencing the regular 1980 appropriation bill which had passed the House but not the Senate. For that type of situation, the resolution provided for continuation of projects or activities "under the appropriation, fund, or authority granted by the one House [which had passed the bill]." The House-passed bill gave the economic assistance loan funds a two-year period of availability. The continuing resolution also included the standard duration provision with a cutoff date of September 30, 1980. Since the duration provision applied to the entire resolution whereas the provision applicable to the loan funds had a narrower scope, the latter provision was the more specific one and the loan funds were therefore held to be available for two years. See also 60 Comp. Gen. 263 (1981) for further discussion of similar continuing resolution language.

In some instances, an extended period of availability is produced by a specific exemption from the standard duration provision. For example, the 1983 continuing resolution provided foreign assistance funds "under the terms and conditions" set forth in the Foreign Assistance Appropriation Act of 1982, and further exempted that appropriation from the duration provision. Since under the 1982 act, appropriations for the African Development Fund were to remain available until expended, appropriations to the Fund under the continuing resolution were also no-year funds. B-212876, September 21, 1983. In view of the express exemption from the duration provision, there was no need to apply the "specific vs. general" rule because there was no conflict. See also B-210922, March 30, 1984.

3. Impoundment

The duration of a continuing resolution is relevant in determining the application of the Impoundment Control Act. Impoundment in the context of continuing resolutions was discussed in a letter to the Chairman of the House Budget Committee, B-205053, December 31, 1981. Generally, a withholding from obligation of funds provided

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"As used in this Circular, the phrase 'appropriation or fund accounts' refers to general fund expenditure accounts, special fund expenditure accounts, public enterprise revolving funds, intragovernmental revolving funds, management funds, trust fund expenditure accounts, and trust revolving fund accounts . . . ."[9]

Thus, for example, the Antideficiency Act applies to Indian trust funds managed by the Bureau of Indian Affairs. However, the investment of these funds in certificates of deposit with federally insured banks under authority of 25 U.S.C. § 162a does not, in GAO's opinion, constitute an obligation or expenditure for purposes of 31 U.S.C. § 1341. Accordingly, overinvested trust funds do not violate the Antideficiency Act unless the overinvested funds, or any attributable interest income, are obligated or expended by the Bureau. B-207047-O.M., June 17, 1983. GAO also views the Act as applicable to presidential and vice-presidential "unvouchered expenditure" accounts. B-239854, June 21, 1990 (internal memorandum).

a. Exhaustion of an Appropriation

When we talk about an appropriation being "exhausted," we are really alluding to any of several different but related situations:

- Depletion of appropriation account (i.e., fully obligated and/or expended).
- Similar depletion of a maximum amount specifically earmarked in a more general lump-sum appropriation.
- Depletion of an amount subject to a monetary ceiling imposed by some other statute (usually, but not always, the relevant program legislation).

(1) Making further payments

In simple terms, once an appropriation is exhausted, the making of any further payments, apart from using unexpended balances to liquidate valid obligations recorded against that appropriation, violates 31 U.S.C. § 1341. When the appropriation is fully expended, no further payments may be made in any case. If an agency finds itself in this position, unless it has transfer authority or other clear statutory basis for making further payments, it has little choice but to seek deficiency or supplemental appropriations from Congress, and to adjust or curtail operations as may be necessary. E.g., 61 Comp. Gen.

[9]OMB Circular No. A-34, Instructions on Budget Execution, Part II, § 21.1 (August 1985).

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under a continuing resolution would constitute an impoundment. Where the continuing resolution runs for only part of the fiscal year, the withholding, even if proposed for the duration of the continuing resolution, should be classified as a deferral rather than a rescission. Withholding funds during a temporary continuing resolution is different from withholding them for the life of a regular annual appropriation in that, in the former situation, Congress is still deliberating over the regular funding levels. Also, deferred funds are not permanently lost when a continuing resolution expires if a subsequent funding measure is passed.

Under this interpretation, classification as a rescission would presumably still be appropriate where a regular appropriation is never passed, the agency is operating under continuing resolution authority for the entire fiscal year, and the timing of a withholding is such that insufficient opportunity would remain to utilize the funds. See B-115398, May 9, 1975.

The concepts in the two preceding paragraphs are reflected in OMB Circular No. A-34, § 71.6 (1985).

Impoundment issues under continuing resolutions may arise in other contexts as well. See, e.g., 64 Comp. Gen. 649 (1985) (failure to make funds available based on good faith disagreement over treatment of carryover balances in calculating rate for operations held not to constitute an illegal rescission); B-209676, April 14, 1983 (no improper impoundment where funds were apportioned on basis of budget request although continuing resolution appropriated funds at rate to maintain program level, as long as apportionment was sufficient to maintain requisite program level).

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661 (1982); 38 Comp. Gen. 501 (1959). If the appropriation account has expired but has not yet been closed, the agency has the alternative of asking Congress for authority to use current appropriations to liquidate the obligations, an option which may enable more prompt liquidation. B-123964, November 27, 1956.

In many ways, the prohibitions in the Adequacy of Appropriations Act, 41 U.S.C. § 11, parallel those of 31 U.S.C. § 1341(a). For example, a contract in excess of the available appropriation violates both statutes. E.g., 9 Comp. Dec. 423 (1903). However, a contract in compliance with 41 U.S.C. § 11 can still result in a violation of the Antideficiency Act. Presumably, if a contract is entered into and there are sufficient funds available when the contract is signed, there is no violation of 41 U.S.C. § 11. The Antideficiency Act, however, anticipates a further development. Suppose there are sufficient funds available when a particular contract is signed, but during the period before payment becomes due, the agency makes a number of payments to other contractors or incurs a number of other obligations, all charged to the same appropriation account, and finds it has nothing left to pay the contract in question. The Antideficiency Act is violated when the contract payment becomes due even though there was no violation when the contract was signed.

To restate the point, the fact that the incurring of an obligation passes Antideficiency Act muster is no guarantee against future violations with respect to that obligation. Assessment of Antideficiency Act violations is not frozen at the point when the obligation is incurred. Certainly the Act is violated if there are insufficient unobligated balances to support the obligation at the time it is incurred. However, even if the initial obligation was well within available funds, the Act can still be violated if insufficient funds remain to liquidate the obligation when actual payment is due or if upward adjustments cause the obligation to exceed available funds. E.g., 55 Comp. Gen. 812, 826 (1976).

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What one authority termed the "granddaddy of all violations" [10] occurred when the Navy overobligated and overspent nearly $110 million from its "Military Personnel, Navy" appropriation during the years 1969-1972, initially discovered in an internal audit. GAO summarized the violation in a letter report, B-177631, June 7, 1973. While there may have been some concealment, GAO concluded that the violation was not the result of some evil scheme; rather, the "basic cause of the violation was the separation of the authority to create obligations from the responsibility to control them." The authority to create obligations had been decentralized while control was centralized in the Bureau of Naval Personnel.

Granddaddy was soon to lose his place of honor on the totem pole. Around November of 1975, the Department of the Army discovered that, for a variety of reasons, it had overobligated four procurement appropriations in the aggregate amount of more than $160 million and consequently had to halt payments to some 900 contractors. The Army asked and received the Comptroller General's advice on a number of potential courses of action it was considering. The resulting decision was 55 Comp. Gen. 768 (1976). The Army acknowledged that there were adequate funds available when all the contracts were signed and therefore the contractors generally had valid, enforceable obligations. However, the Army also recognized its duty to mitigate the Antideficiency Act violation. [11] It was clear that without a deficiency appropriation, all the contractors could not be paid. One option—to use current appropriations to pay the deficiencies—had to be rejected because there is no authority to apply current funds to pay off debts incurred in a previous year.[12] An option GAO sanctioned was to reduce the amount of the deficiencies by terminating some of the contracts for convenience, although the termination costs would still have to come from a deficiency appropriation unless there was enough left in the appropriation accounts to cover them.

[10]Fisher, Presidential Spending Power 236 (1975).

[11]"We believe it is obvious that, once an Antideficiency Act violation has been discovered, the agency concerned must take all reasonable steps to mitigate the effects of the violation insofar as it remains executory." 55 Comp. Gen. at 772.

[12]This statement applies to appropriation accounts which have expired but have not yet been closed. 71 Comp. Gen. ___ (B-245856.7, August 11, 1992). Once an account has been closed, typically 5 fiscal years after expiration, obligations chargeable to that account must, within certain limits, be charged to current appropriations. 31 U.S.C. § 1553(b).

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Foreword

This is Volume II of Principles of Federal Appropriations Law, second edition. Publication of this volume continues our process of revising and updating the first (1982) edition of the "Red Book" and reissuing it in what will ultimately be a 4-volume looseleaf set. Volumes I and II supersede all of the completed chapters of the first edition except Chapters 11 and 12, which will be renumbered and covered in Volume III. The fourth and final volume will cover material not included in the first edition.

As we noted in our first volume, our objective in Principles is to present a basic reference work covering those areas of law in which the Comptroller General renders decisions and which are not covered in other GAO publications. We measure our success in this endeavor by Principles' day-to-day utility to its federal and nonfederal audience. In this regard, we appreciate the many comments and suggestions we have received to date, and hope that our publication will continue to serve as a useful reference.

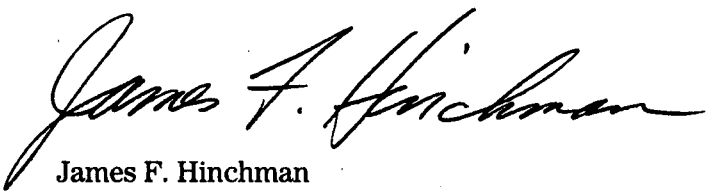

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(2) Status of contracts

If the Antideficiency Act prohibits any further payments when the appropriation is exhausted, where does this leave the contractor? Is the contractor expected to know how and at what rate the agency is spending its money? There is a small body of judicial case law which discusses the effect of the exhaustion of appropriations on government obligations. The fate of the contractor seems to depend on the type of appropriation involved and the presence or absence of notice, actual or constructive, to the contractor on the limitations of the appropriation.

Where a contractor is but one party out of several to be paid from a general appropriation, the contractor is under no obligation to know the status or condition of the appropriation account on the government's books. If the appropriation becomes exhausted, the Antideficiency Act may prevent the agency from making any further payments, but valid obligations will remain enforceable in the courts. For example, in Ferris v. United States, 27 Ct. Cl. 542 (1892), the plaintiff had a contract with the government to dredge a channel in the Delaware River. The Corps of Engineers made him stop work halfway through the job because it had run out of money. In discussing the contractor's rights in a breach of contract suit, the court said:

"A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects. An appropriation per se merely imposes limitations upon the Government's own agents; it is a definite amount of money intrusted to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties." Id. at 546.

The rationale for this rule is that "a contractor cannot justly be expected to keep track of appropriations where he is but one of several being paid from the fund." Ross Construction Corp. v. United States, 392 F.2d 984, 987 (Ct. Cl. 1968). Other illustrative cases are Dougherty ex rel. Slavens v. United States, 18 Ct. Cl. 496 (1883), and

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Joplin v. United States, 89 Ct. Cl. 345 (1939). The Antideficiency Act may "apply to the official, but [does] not affect the rights in this court of the citizen honestly contracting with the Government." Dougherty, 18 Ct. Cl. at 503. Thus, it is settled that contractors paid from a general appropriation are not barred from recovering for breach of contract even though the appropriation is exhausted.

However, under a specific line-item appropriation, the answer is different. The contractor in this situation is deemed to have notice of the limits on the spending power of the government official with whom he contracts. A contract under these circumstances is valid only up to the amount of the available appropriation. Exhaustion of the appropriation will generally bar any further recovery beyond that limit. E.g., Sutton v. United States, 256 U.S. 575 (1921); Hooe v. United States, 218 U.S. 322 (1910); Shipman v. United States, 18 Ct. Cl. 138 (1883); Dougherty, 18 Ct. Cl. at 503.

The distinction between the Ferris and Sutton lines of cases follows logically from the old maxim that ignorance of the law is no excuse. If Congress appropriates a specific dollar amount for a particular contract, that amount is specified in the appropriation act and the contractor is deemed to know it. It is certainly not difficult to locate. If, on the other hand, a contract is but one activity under a larger appropriation, it is not reasonable to expect the contractor to know how much of that appropriation remains available for it at any given time. A requirement to obtain this information would place an unreasonable burden on the contractor, not to mention a nuisance for the government as well.

In two cases in the 1960s, the Court of Claims permitted recovery on contractor claims in excess of a specific monetary ceiling. See Anthony P. Miller, Inc. v. United States, 348 F.2d 475 (Ct. Cl. 1965) (claim by Capehart Housing Act contractor), and Ross Construction Corp. v. United States, 392 F.2d 984 (Ct. Cl. 1968) (claim by contractor for "off-site" construction ancillary to Capehart Act housing). The court distinguished between matters not the fault or responsibility of the contractor (for example, defective plans or specifications or changed conditions under the "changed conditions" clause), in which case above-ceiling claims are allowable, and excess costs resulting from what it termed "simple extras," in which case they are not. Without attempting to detail the fairly complex Capehart legislation here, we note merely that Ross is more closely analogous

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to the Ferris situation (392 F.2d at 986), while Anthony P. Miller is more closely analogous to the Sutton situation (392 F.2d at 987). The extent to which the approach reflected in these cases will be applied to the more traditional form of exhaustion of appropriations remains to be developed, although the Ross court intimated that it saw no real distinction for these purposes between a specific appropriation and a specific monetary ceiling imposed by other legislation (id.).

b. Contracts or Other Obligations in Excess or Advance of Appropriations

It is easy enough to say that the Antideficiency Act prohibits you from obligating a million dollars when you have only half a million left in the account, or that it prohibits you from entering into a contract in September purporting to obligate funds for the next fiscal year that have not yet been appropriated. Many of the situations that actually arise from day to day, however, are not quite that simple. A useful starting point is the relationship of the Antideficiency Act to the recording of obligations under 31 U.S.C. § 1501.

(1) Recording obligations

Proper recording practices are essential to sound fund control. However, it should be apparent that, if the Antideficiency Act is to mean anything, the actual recording of obligations cannot by itself provide a sufficient basis on which to assess potential violations. Reliance solely on the recording of obligations can produce error in two directions. It can suggest violations which in fact do not exist, and it can overlook violations which do exist.

If it appears that the total amount of recorded obligations exceeds the available appropriation, there may be several reasons for this other than an Antideficiency Act violation. Excessively high estimates may have been recorded, through either error or an excess of caution, which subsequent liquidation reveals can be reduced. Items may have been incorrectly posted or improperly recorded as obligations. Or, accounts receivable that should be credited to the appropriation may not have been properly identified and taken into consideration.

For these reasons, an amount of recorded obligations in excess of the available appropriation is prima facie evidence of a violation of the Antideficiency Act, but is not conclusive. B-134474-O.M., December 18, 1957. Similarly, GAO has cautioned that an Antideficiency Act violation should not be determined solely on the basis of year-end

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reports prior to reconciliation and adjustment. B-114841.2-O.M., January 23, 1986.

If an examination of recorded obligations can be misleading in the sense of indicating violations which in fact do not exist, the converse is also true. Violations may exist which recorded obligations alone will not disclose. Again, there are several reasons. One important principle is stated in the following passage:

> "[T]he recording of obligations under 31 U.S.C. § [1501] is not the sole consideration in determining violations of 31 U.S.C. § [1341] . . . . We believe that the words 'any contract or other obligation' as used in [the predecessor of 31 U.S.C. § 1341] encompass not merely recorded obligations but other actions which give rise to Government liability and will ultimately require the expenditure of appropriated funds."

55 Comp. Gen. 812, 824 (1976). See also 42 Comp. Gen. 272, 277 (1962) (Act forbids not only the incurring of obligations beyond the period of availability but also "any other obligation or liability which may arise thereunder and ultimately require the expenditure of funds"); B-163058, March 17, 1975; B-133170, January 29, 1975. An example of action of this type might be conduct by an agency which, under a clear line of administrative or judicial precedent, would result in government liability to a contractor through claims proceedings. 55 Comp. Gen. at 824; B-163058, March 17, 1975.

Also, in many situations, the amount of the government's liability is not definitely fixed at the time the obligation is incurred. An example is a contract with price escalation provisions. In other situations, such as certain contingent liability cases, the government is not required to record any obligation unless and until the contingency materializes. Thus, while examining the actual recording of obligations is a necessary first step, it is also essential to look at what happens as the contract is performed.

Finally, the possibility exists that there are valid obligations which the agency has failed or neglected to record. The incurring of an obligation in excess or advance of appropriations violates the Act, and this is not affected by the agency's failure to record the obligation. E.g., 65 Comp. Gen. 4, 9 (1985); 62 Comp. Gen. 692, 700 (1983); 55 Comp. Gen. 812, 824 (1976).

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In sum, for purposes of assessing violations of the Antideficiency Act, you must start by looking at the actual recording of obligations, but you cannot end there.

(2) Obligation in excess of appropriation

Incurring an obligation in excess of the available appropriation violates 31 U.S.C. § 1341(a)(1).[13] As the Comptroller of the Treasury advised an agency head many years ago, "your authority in the matter was strictly limited by the amount of the appropriation . . .; otherwise there would be no limit to your power to incur expenses for the service of a particular fiscal year . . . ." 9 Comp. Dec. 423, 425 (1903). If you want higher authority, the Supreme Court has stated that, absent statutory authorization, "it is clear that the head of the department cannot involve the government in an obligation to pay any thing in excess of the appropriation." Bradley v. United States, 98 U.S. 104, 114 (1878).

To take a fairly simple illustration, the statute was violated by an agency's acceptance of an offer to install automatic telephone equipment for $40,000 when the unobligated balance in the relevant appropriation was only $20,000. 35 Comp. Gen. 356 (1955).

In a 1969 case, the Air Force wanted to purchase computer equipment but did not have sufficient funds available. It attempted an arrangement whereby it made an initial down payment, with the balance of the purchase price to be paid in installments over a period of years, the contract to continue unless the government took affirmative action to terminate. This was nothing more than a sale on credit, and since the contract constituted an obligation in excess of available funds, it violated the Antideficiency Act. 48 Comp. Gen. 494 (1969).

[13]Determining the amount of available budgetary resources against which obligations may be incurred is covered later in this chapter under the heading "Amount of Available Appropriation or Fund."

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(3) Variable quantity contracts

A leading case discussing the Antideficiency Act ramifications of "variable quantity" contracts (requirements contracts, indefinite quantity contracts, and similar arrangements)[14] is 42 Comp. Gen. 272 (1962). That decision considered a three-year contract the Air Force had awarded to a firm to provide any service or maintenance work necessary for government aircraft landing on Wake Island. GAO questioned the legality of entering into the contract for more than one year, since the Air Force had only a one-year appropriation available. The Air Force argued that it was a "requirements" contract. No obligation would arise unless or until some maintenance work was ordered. The only obligation was a negative one—not to buy service from anyone else but the contractor should the services be needed. GAO disagreed. The services covered were "automatic incidents of the use of the air field." There was no place for a true administrative determination that the services were or were not needed. There was no true "contingency" as the services would almost certainly be needed if the base were to remain operational. Accordingly, the contract was not a true requirements contract but amounted to a firm obligation for the needs of future years, and was therefore an unauthorized multi-year contract. As such, it violated the Antideficiency Act. GAO recognized that the rules in this area could create difficult problems, especially in remote spots like Wake Island, but felt that the only solution was to ask Congress for multi-year procurement authority.[15]

The Wake Island decision noted that the contract contained no provision permitting the Air Force to reduce or eliminate requirements short of a termination for convenience. Id. at 277. If the contract had included such a provision—and in the unlikely event that, given the nature of the contract, such a provision could have been meaningful—a somewhat different analysis might have resulted. Compare, for example, the situation in 55 Comp. Gen. 812 (1976). The exercise of a contract option required the Navy to furnish various items of government-furnished property (GFP), but another contract clause authorized the Navy to unilaterally delete items of GFP. If the entire quantity of GFP had to be treated as a firm obligation at the

[14]We cover the obligational treatment of contracts of this type in Chapter 7, Section B.1.e, which should be read in conjunction with this section.

[15]The authority was subsequently sought and granted, and is found at 10 U.S.C. § 2306(g).

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time the option was exercised, the obligation would have exceeded available appropriations, resulting in an Antideficiency Act violation. However, since the Navy was not absolutely obligated to furnish all the GFP items at the time the option was exercised, it was inappropriate to use the full value of all GFP items under the contract to assess a violation of 31 U.S.C. § 1341 at that time. The Navy could avert a violation if it were able to delete enough GFP to stay within the available appropriation; if it found that it could not do so, the violation would then exist.[16] See also B-134474-O.M., December 18, 1957.

In 47 Comp. Gen. 155 (1967), GAO considered an Air Force contract for mobile generator sets which specified minimum and maximum quantities to be purchased over a 12-month period. Since the contract committed the Air Force to purchase only the minimum quantity, it was necessary to obligate only sufficient funds to cover that minimum. Subsequent orders for additional quantities up to the maximum were not legally objectionable as long as the Air Force had sufficient funds to cover the cost when it placed those orders. See also 19 Comp. Gen. 980 (1940). The fact that the Air Force did not, at the time it entered into the contract, have sufficient funds available to cover the maximum quantity was, for Antideficiency Act purposes, irrelevant. The decision distinguished the Wake Island case on the basis that nothing in the mobile generator contract purported to commit the Air Force to obtain any requirements over and above the specified minimum from the contractor.

In a more recent case, GAO found no Antideficiency Act problems with a General Services Administration "Multiple Award Schedule" contract under which no minimum purchases were guaranteed and no binding obligation would arise unless and until a using agency made an administrative determination that it had a requirement for a scheduled item. 63 Comp. Gen. 129 (1983).

[16]The rationale worked in that case because the Navy could stay within the appropriation by deleting a relatively small percentage of GFP. If the numbers had been different, such that the amount of GFP to be deleted were so large as to effectively preclude contractor performance, the analysis might well have been different. In a 1964 report, for example, GAO found the Antideficiency Act violated where the Air Force, to keep within a "minor military construction" ceiling, deleted needed plumbing, heating, and lighting from a building alteration contract, resulting in an incomplete facility, and subsequently charged the deleted items to Operation and Maintenance appropriations. Continuing Inadequate Control Over Programing [sic] and Financing of Construction, B-133316, July 23, 1964, at 12–15.

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Regardless of whether we are dealing with a requirements contract, indefinite quantity contract, or some variation, two points apply as far as the Antideficiency Act is concerned:

- Whether or not there is a violation at the time the contract is entered into depends on exactly what the government is obligated to do under the contract.
- Even if there is no violation at the time the contract is entered into, a violation may occur later if the government subsequently incurs an obligation under the contract in excess of available funds, for example, by electing to order a maximum quantity without sufficient funds to cover the quantity ordered.

A conceptually related situation is a contract which gives the government the option of two performances at different prices. The government can enter into such a contract without violating the Antideficiency Act as long as it has sufficient appropriations available at the time the contract is entered into to pay the lesser amount. For example, the Defense Production Act of 1950 authorizes the President to contract for synthetic fuels, but the contract must give the President the option to refuse delivery and instead pay the contractor the amount by which the contract price exceeds the prevalent market price at the time the delivery is made. Such a contract would not violate the Antideficiency Act at the time it is entered into as long as sufficient appropriations are available to pay any anticipated difference between the contract price and the estimated market price at the time of performance. 60 Comp. Gen. 86 (1980). Of course, the government could not choose to accept delivery unless there were sufficient appropriations available at that time to cover the full cost of the fuel under the contract.

(4) Multi-year or "continuing" contracts

A multi-year contract is a contract covering the needs or requirements of more than one fiscal year. Our discussion here presupposes a general familiarity with relevant portions of Chapter 5, primarily the nature of a fixed-term appropriation and the bona fide needs rule as it relates to multi-year contracts.

We start with some very basic propositions:

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- A fixed-term appropriation (fiscal year or multiple-year) may be obligated only during its period of availability.
- A fixed-term appropriation may be validly obligated only for the bona fide needs of that fixed term.
- The Antideficiency Act prohibits the making of contracts which exceed currently available appropriations or which purport to obligate appropriations not yet made.

As we have seen in Chapter 5, performance may extend into a subsequent fiscal year in certain situations. Also, as long as a contract is properly obligated against funds for the year in which it was made, actual payment can extend into subsequent years. Apart from these situations, and unless the agency either has specific multi-year contracting authority (e.g., 62 Comp. Gen. 569 (1983)) or is operating under a no-year appropriation (e.g., 43 Comp. Gen. 657 (1964)), the Antideficiency Act, together with the bona fide needs rule, prohibits contracts purporting to bind the government beyond the obligational duration of the appropriation.[17] This is because the current appropriation is not available for future needs, and appropriations for those future needs have not yet been made. Citations to support this proposition are numerous.[18] The rule applies to any attempt to obligate the government beyond the end of the fiscal year, even where the contract covers a period of only a few months. 24 Comp. Gen. 195 (1944).

The guiding principle still followed today stems from a 1925 decision of the United States Supreme Court. An agency had entered into a long-term lease for office space with one-year money, but its contract specifically provided that payment for periods after the first year was subject to the availability of future appropriations. In Leiter v. United States, 271 U.S. 204 (1925), the Supreme Court specifically rejected that theory. The Court held that the lease was binding on the government only for one fiscal year, and it ceased to exist at the end of the fiscal year in which the obligation was incurred. It takes

[17]Every violation of the bona fide needs rule does not necessarily violate the Antideficiency Act as well. Determinations must be made on a case-by-case basis. B-235086.2, January 22, 1992 (non-decision letter).

[18]E.g., 67 Comp. Gen. 190 (1988); 66 Comp. Gen. 556 (1987); 61 Comp. Gen. 184, 187 (1981); 48 Comp. Gen. 471, 475 (1969); 42 Comp. Gen. 272 (1962); 37 Comp. Gen. 60 (1957); 36 Comp. Gen. 683 (1957); 33 Comp. Gen. 90 (1953); 29 Comp. Gen. 91 (1949); 27 Op. Att'y Gen. 584 (1909).

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affirmative action to bring the obligation back to life. The Court stated its position as follows:

"It is not alleged or claimed that these leases were made under any specific authority of law. And since at the time they were made there was no appropriation available for the payment of rent after the first fiscal year, it is clear that in so far as their terms extended beyond that year they were in violation of the express provisions of the [Antideficiency Act]; and, being to that extent executed without authority of law, they created no binding obligation against the United States after the first year. [Citations omitted.] A lease to the Government for a term of years, when entered into under an appropriation available for but one fiscal year, is binding on the Government only for that year. [Citations omitted.] And it is plain that, to make it binding for any subsequent year, it is necessary, not only that an appropriation be made available for the payment of the rent, but that the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year; thereby, in effect, by the adoption of the original lease, making a new lease under the authority of such appropriation for the subsequent year." Id. at 206–07.

GAO has relied heavily on Leiter in subsequent decisions. For example, GAO refused to approve an automatic, annual renewal of a contract for repair and storage of automotive equipment, even though the contract provided that the government had a right to terminate. The reservation of a right to terminate does not save the contract from the prohibition against binding the government in advance of appropriations. 28 Comp. Gen. 553 (1949).

The Post Office wanted to enter into a contract for services and storage of government-owned highway vehicles for periods up to four years because it could obtain a more favorable flat rate per mile of operations instead of an item by item charge required if the contract was for one year only. GAO held that any contract for continuous maintenance and storage of the vehicles would be prohibited by 31 U.S.C. § 1341 because it would obligate the government beyond the extent of the existing appropriation. However, there would be no legal objection to including a provision which gave the government an affirmative option to renew the contract from year to year, not to exceed four years. 29 Comp. Gen. 451 (1950).[19]

Where a contract gives the government a renewal option, it may not be exercised until appropriations for the subsequent fiscal year

[19]Some additional cases are 67 Comp. Gen. 190 (1988); 66 Comp. Gen. 556 (1987); 42 Comp. Gen. 272, 276 (1962); 37 Comp. Gen. 155, 160 (1957); 37 Comp. Gen. 60, 62 (1957); 36 Comp. Gen. 683 (1957); 9 Comp. Gen. 6 (1929); B-116427, September 27, 1955. See also B-97718, October 9, 1950 (similar point but Leiter not cited).

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"I was gratified to be able to answer promptly, and I did. I said I didn't know."

Mark Twain

Life on the Mississippi

Abbreviations

C.F.R.	Code of Federal Regulations
EDA	Economic Development Administration
FAR	Federal Acquisition Regulation
FCRA	Federal Credit Reform Act of 1990
FFB	Federal Financing Bank
FHA	Federal Housing Administration
FY	Fiscal Year
GAO	General Accounting Office
GSA	General Services Administration
HUD	Department of Housing and Urban Development
OMB	Office of Management and Budget
REA	Rural Electrification Administration
SBA	Small Business Administration
SBIC	Small Business Investment Company
TFM	Treasury Financial Manual
U.S.C.	United States Code
VA	Department of Veterans Affairs

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actually become available. 61 Comp. Gen. 184, 187 (1981). Under a one-year contract with renewal options, the fact that funds become available in subsequent years does not place the government under an obligation to exercise the renewal option. Government Systems Advisors, Inc. v. United States, 13 Cl. Ct. 470 (1987), aff'd, 847 F.2d 811 (Fed. Cir. 1988).[20]

Note that, in Leiter, the inclusion of a contract provision conditioning the government's obligation on the subsequent availability of funds was to no avail. In this connection, see also 67 Comp. Gen. 190, 194 (1988); 42 Comp. Gen. 272, 276 (1962); 36 Comp. Gen. 683 (1957). If a "subject to availability" clause were sufficient to permit multi-year contracting, the effect would be automatic continuation from year to year unless the government terminated. If funds were not available and the government nevertheless permitted or acquiesced in the continuation of performance, the contractor would obviously be performing in the expectation of being paid.[21] Apart from questions of legal liability, the failure by Congress to appropriate the money would be a serious breach of faith. Congress would, as a practical, if not a legal matter, have little real choice. This is another example of a type of "coercive deficiency" the Antideficiency Act was intended to prohibit. Thus, it is not enough for the government to retain the option to terminate at any time if sufficient funds are not available. Under Leiter and its progeny, the contract "dies" at the end of the fiscal year, and may be revived only by affirmative action by the government. This "new" contract is then chargeable to appropriations for the subsequent year.

This is not to say that "subject to availability" clauses are not important. They are, and are in fact required by the Federal Acquisition Regulation in several situations: (1) contract actions initiated prior to the availability of funds;[22] (2) certain requirements

[20]The Claims Court based its conclusion in part on Leiter and the Antideficiency Act; the Federal Circuit relied on the language of the contract.

[21]The Federal Acquisition Regulation states that encouraging a contractor to continue performance in the absence of funds violates the Antideficiency Act. 48 C.F.R. § 32.704(c).

[22]Availability of Funds, 48 C.F.R. § 52.232-18.

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and indefinite-quantity contracts;[23] (3) fully funded cost-reimbursement contracts;[24] (4) facilities acquisition and use;[25] and (5) incrementally funded cost-reimbursement contracts.[26] FAR, 48 C.F.R. Subpart 32.7. While the prescribed contract clauses vary in complexity, they all have one thing in common—each requires the contracting officer to specifically notify the contractor of the availability of funds and to confirm the notification in writing. The objective of these clauses is compliance with the Antideficiency Act and other funding statutes. See ITT Federal Laboratories, ASBCA No. 12987, 69-2 BCA ¶ 7,849 (1969). What is not sufficient is a simple "subject to availability" clause which would permit automatic continuation subject to the government's right to terminate.

It may be useful at this point to reiterate the basic principle that compliance with the Antideficiency Act is determined on the basis of when an obligation occurs, not when actual payment is scheduled to be made. In the renewal option situation, for example, as long as sufficient funds are available to cover the first year's obligations, there is no violation at the time the contract is made, and this is not affected by the fact that payment may not be made until the following year or later. Of course, a violation would occur when payment becomes due if the appropriation has become exhausted by that time.

Termination charges under renewal option contracts may also present Antideficiency Act complications. As a general proposition, the government has the right to terminate a contract "for the convenience of the government" if that action is determined to be in the government's best interests. The Federal Acquisition Regulation

[23]Availability of Funds for the Next Fiscal Year, 48 C.F.R. § 52.232-19.

[24]Limitation of Cost, 48 C.F.R. § 52.232-20.

[25]Limitation of Cost (Facilities), 48 C.F.R. § 52.232-21.

[26]Limitation of Funds, 48 C.F.R. § 52.232-22.

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prescribes the required contract clauses. 48 C.F.R. Subpart 49.5 (1991).[27] Under a termination for convenience, the contractor is entitled to be compensated, including a reasonable profit, for the performed portion of the contract, but may not recover anticipatory profits on the terminated portion. E.g., 48 C.F.R. §§ 49.201, 49.202. Total recovery may not exceed the contract price. Id. § 49.207. In a renewal option situation, the government may also simply decline to exercise the option.

In the typical fiscal-year contract, termination does not pose a problem because the basic contract obligation will be sufficient to cover potential termination costs. Under a renewal option contract, however, the situation may differ. A contractor who must incur substantial capital costs at the outset has a legitimate concern over recovering these costs if the government does not renew. A device used to address this problem is a clause requiring the government to pay termination charges or "separate charges" upon early termination. As discussed in Chapter 5, separate charges have been found to violate the bona fide needs rule to the extent they do not reasonably relate to the value of current fiscal year requirements. E.g., 36 Comp. Gen. 683 (1957), aff'd, 37 Comp. Gen. 155 (1957). As such, whether we regard them as obligations against funds not yet appropriated or obligations against current funds for the needs of future years, they also violate the Antideficiency Act.

The leading case in this area is 56 Comp. Gen. 142 (1976), aff'd, 56 Comp. Gen. 505 (1977). The Burroughs Corporation protested the award of a contract to the Honeywell Corporation to provide automatic data processing (ADP) equipment to the Mine Enforcement and Safety Administration. If all renewal options were exercised, the contract would run for 60 months after equipment installation. The contract included a "separate charges" provision under which, if the government failed to exercise any renewal option or otherwise terminated prior to the end of the 60-month systems life, the government would pay a percentage of all future years' rentals based on Honeywell's "list prices" at the time of discontinuance or termination. This provision violated the Antideficiency Act for two reasons. First, it would amount to an obligation of fiscal-year funds for the requirements of future years. And second, it would commit the

[27]Where a Termination for Convenience clause is required by regulation, it will be read into the contract whether expressly included or not. G.L. Christian and Associates v. United States, 312 F.2d 418 and 320 F.2d 345 (Ct. Cl. 1963), cert. denied, 375 U.S. 954.

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government to indeterminate liability because the contractor could raise its list or catalog prices at any time. The government had no way of knowing the amount of its commitment. Similar cases involving separate charges are 56 Comp. Gen. 167 (1976), B-216718.2, November 14, 1984, and B-190659, October 23, 1978.

The Burroughs decision also offers guidance on when separate charges may be acceptable. One instance is where it is the only way the government can obtain its needs. Cited in this regard was 8 Comp. Gen. 654 (1929), a case involving the installation of equipment and the procurement of a water supply from a town. There, however, the town was the only source of a water supply, a situation clearly inapplicable to a competitive industry like ADP. 56 Comp. Gen. at 157. In addition, separate charges are permissible if they, together with payments already made, reasonably represent the value of requirements actually performed. Thus, where the contractor has discounted its price based on the government's stated intent to exercise all renewal options, separate charges may be based on the "reasonable value (e.g., ADP schedule price) of the actually performed work at termination based upon the shortened term." Id. at 158. However, termination charges may not be inconsistent with the Termination for Convenience clause remedy; for example, they may not exceed the value of the contract or include costs not cognizable under a "T for C." Id. at 157.

Where termination charges are otherwise proper, the Antideficiency Act also requires that the agency have sufficient funds available to pay them if and when the contingency materializes. E.g., 62 Comp. Gen. 143 (1983). See also 8 Comp. Gen. 654, 657 (1929) (same point but Antideficiency Act not cited). This requirement is sometimes specified in multi-year contracting legislation. An example is 40 U.S.C. § 757(c)(1), the Information Technology Fund. Congress may also, of course, provide exceptions. E.g., B-174839, March 20, 1984.

c. Indemnification

(1) Prohibition against unlimited liability

Under an indemnification agreement, one party promises, in effect, to cover another party's losses. It is no surprise that the government is often asked to enter into indemnification agreements. The rule is that, absent express statutory authority, the government may not enter into an agreement to indemnify where the amount of the government's liability is indefinite, indeterminate, or potentially unlimited. Such an

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agreement would violate both the Antideficiency Act, 31 U.S.C. § 1341, and the Adequacy of Appropriations Act, 41 U.S.C. § 11, since it can never be said that sufficient funds have been appropriated to cover the contingency. In plain English, you cannot purport to bind the government to unlimited liability. The rule is not some arcane GAO concoction. The Court of Claims stated in California-Pacific Utilities Co. v. United States, 194 Ct. Cl. 703, 715 (1971):

"The United States Supreme Court, the Court of Claims, and the Comptroller General have consistently held that absent an express provision in an appropriation for reimbursement adequate to make such payment, [the Antideficiency Act] proscribes indemnification on the grounds that it would constitute the obligation of funds not yet appropriated. [Citations omitted.]"

For example, in an early case, the Interior Department, as licensee, entered into an agreement with the Southern Pacific Company under which the Department was to lay telephone and telegraph wires on property owned by the licensor in New Mexico. The agreement included a provision that the Department was to indemnify the Company against any liability resulting from the operation. Upon reviewing the indemnity provision, the Comptroller General found that it purported to impose indeterminate contingent liability on the government. By including the indemnity provision, the contracting officer had exceeded his authority, and the provision was held void. 16 Comp. Gen. 803 (1937).

Similarly, an indefinite and unlimited indemnification provision in a lease entered into by the General Services Administration without statutory authority was held to impose no legal liability on the government. 35 Comp. Gen. 85 (1955).

More recently, in 59 Comp. Gen. 369 (1980), the National Oceanic and Atmospheric Administration desired to undertake a series of hurricane seeding experiments off the coast of Australia in cooperation with its Australian counterpart. The State Department, as negotiator, sought GAO's opinion on an Australian proposal under which the United States would agree to indemnify Australia against all damages arising from the activities. State recognized that an unlimited agreement would violate the Antideficiency Act and asked whether the proposal would be acceptable if it specified that the government's liability would be subject to the appropriation of funds by Congress for that purpose. GAO conceded that an agreement expressly providing that the United States would not be obligated unless

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Congress chooses to appropriate the funds would not violate the letter of the law. However, it would violate the spirit of the law because, even though it would impose no legal obligation, it would impose a moral obligation on the United States to make good on its promise. This is still another example of the so-called "coercive deficiency." There was a way out, however. GAO concluded that the government's policy of self-insurance did not apply here. NOAA could therefore purchase private insurance, with the premiums hopefully to be shared by the government of Australia. NOAA's share of the insurance premium would simply be a necessary expense of the project.

Another decision applying the general rule held that the Federal Emergency Management Agency could not agree to provide indeterminate indemnification to agents and brokers under the National Flood Insurance Act. B-201394, April 23, 1981. If FEMA considered indemnification necessary to the success of its program, it could either insert a provision limiting the government's liability to available appropriations or seek broader authority from Congress.

In B-201072, May 3, 1982, the Department of Health and Human Services questioned the use of a contract clause entitled "Insurance—Liability to Third Persons," found in the Federal Procurement Regulations (predecessor to the Federal Acquisition Regulation). The clause purported to permit federal agencies to agree to reimburse contractors, without limit, for liabilities to third persons for death, personal injury, or property damage, arising out of performance of the contract and not compensated by insurance, whether or not caused by the contractor's negligence. Since the clause purported to commit the government to an indefinite liability which could exceed available appropriations, the Comptroller General found it in violation of the Antideficiency Act and the Adequacy of Appropriations Act. This decision was affirmed upon reconsideration in 62 Comp. Gen. 361 (1983), one of GAO's more comprehensive discussions of the indemnification problem.

For other cases applying or discussing the general rule, see 20 Comp. Gen. 95, 100 (1940); 7 Comp. Gen. 507 (1928); 15 Comp. Dec. 405 (1909); B-117057, December 27, 1957; A-95749, October 14, 1938; 2 Op. Off. Legal Counsel 219, 223–24 (1978). A brief letter report making the same point is Agreements Describing Liability in Undercover Operations Should Limit the Government's Liability, GGD-83-53 (March 15, 1983).

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Some court cases are Frank v. United States, 797 F.2d 724, 727 (9th Cir. 1986); Lopez v. Johns Manville, 649 F. Supp. 149 (W.D. Wash. 1986), aff'd on other grounds, 858 F.2d 712 (Fed. Cir. 1988); In re All Asbestos Cases, 603 F. Supp. 599 (D. Hawaii 1984); Wm. T. Thompson Co. v. United States, 26 Cl. Ct. 17, 29 (1992); Hercules Inc. v. United States, 25 Cl. Ct. 616 (1992); Johns-Manville Corp. v. United States, 12 Cl. Ct. 1 (1987). (Several of these are asbestos cases in which the courts rejected claims of an implied agreement to indemnify.) In Johns-Manville Corp. v. United States, the court stated:

> "Contractual agreements that create contingent liabilities for the Government serve to create obligations of funds just as much as do agreements creating definite or certain liabilities. The contingent nature of the liability created by an indemnity agreement does not so lessen its effect on appropriations as to make it immune to the limitations of [the Antideficiency Act]." 12 Cl. Ct. at 25.

The Federal Labor Relations Authority has also applied the anti-indemnity rule. National Federation of Federal Employees and U.S. Department of the Interior, 35 F.L.R.A. 1034 (No. 113, 1990) (proposal to indemnify union against judgments and litigation expenses resulting from drug testing program held contrary to law and therefore nonnegotiable); American Federation of State, County and Municipal Employees and U.S. Department of Justice, 42 F.L.R.A. 412, 515–17 (No. 33, 1991) (same).

In some of the earlier cases—for example, 7 Comp. Gen. 507 (1928) and 16 Comp. Gen. 803 (1937)—GAO noted as further support for the prohibition the then-existing principle that the United States was not liable for the tortious conduct of its employees. Of course, since the enactment of the Federal Tort Claims Act in 1946, this is no longer true. Thus, the reader should disregard any discussion of the government's lack of tort liability appearing in the earlier cases. The thrust of those cases, namely, the prohibition against open-ended liability, remains valid.

A limited exception to the rule was recognized in 59 Comp. Gen. 705 (1980). In that case, the Comptroller General held that the General Services Administration could agree to certain indemnity provisions in procuring public utility services for government agencies under the Federal Property and Administrative Services Act.

The extent of the exception carved out by 59 Comp. Gen. 705 was discussed in a later decision, B-197583, January 19, 1981. There, GAO

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once again applied the general rule and held that the Architect of the Capitol could not agree to indemnify the Potomac Electric Power Company for loss or damages resulting from PEPCO's performance of tests on equipment installed in government buildings or from certain other equipment owned by PEPCO which could be installed in government buildings to monitor electricity use for conservation purposes. GAO pointed to two distinguishing factors that justified—and limited—the exception in 59 Comp. Gen. 705. First, in 59 Comp. Gen. 705, there was no other source from which the government could obtain the needed utility services. Here, the testing and monitoring could be performed by government employees. The second factor is summarized in the following excerpt from B-197583:

"An even more important distinction, though, is that unlike the situation in the GSA case [59 Comp. Gen. 705], the Architect has not previously been accepting the testing services or using the impulse device from PEPCO and has therefore not previously agreed to the liability represented by the proposed indemnity agreements. In the GSA case, GSA merely sought to enter a contract accepting the same service and attendant liability, previously secured under a non-negotiable tariff, at a rate more advantageous to the Government. Here, however, the Government has other means available to provide the testing and monitoring desired."

Thus, the case did not fall within the "narrow exception created by the GSA decision," and the proposed indemnity agreement was improper. Citing 59 Comp. Gen. 369 (the hurricane seeding case previously discussed), however, GAO suggested that the Architect consider the possibility of obtaining private insurance.

The prohibition against incurring indefinite contingent liabilities is not limited to indemnification agreements. It applies as well to other types of contingent liabilities such as contract termination charges. The cases are included in our preceding discussion of multi-year contracting.

(2) When indemnification may be authorized

Indemnification agreements may be proper if they are limited to available appropriations and are otherwise authorized. Before ever getting to the question of amount, for an indemnity agreement to be permissible in the first place, it must be authorized either expressly or under a necessary expense theory. For example, in 1958, the National Gallery of Art asked if it could enter into an agreement to indemnify a corporation which was providing air conditioning equipment maintenance training to members of the Gallery's engineering staff.

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Under the proposal, the Gallery would indemnify the corporation for losses resulting from death or injury to Gallery employees caused by the negligence of the corporation or its employees. In reviewing the proposal, GAO did not find it necessary to address the definite vs. indefinite issue. There was simply no authority for the Gallery to use appropriated funds to pay claims of this type, nor could they be considered authorized training expenses under the Government Employees Training Act. B-137976, December 4, 1958. See also 63 Comp. Gen. 145, 150 (1984); 59 Comp. Gen. 369 (1980); B-201394, April 23, 1981.

Once you cross the purpose hurdle—that is, once you determine that the indemnification proposal you are considering is a legitimate object on which to spend your appropriations—you are ready to grapple with the unlimited liability issue.

One way to deal with this issue is, of course, to specifically limit the amount of the liability assumed to available appropriations. Such a limitation of an indemnity agreement may come about in either of two ways: it may follow necessarily from the nature of the agreement itself, coupled with an appropriate obligation or administrative reservation of funds, or it may be expressly written into the agreement. The latter alternative is the only acceptable one where the government's liability would otherwise be potentially unlimited.

For example, where the government rented buses to transport Selective Service registrants for physical examination or induction, there was no objection to the inclusion of an indemnity provision which was a standard provision in the applicable motor carrier charter coach tariff. 48 Comp. Gen. 361 (1968). Potential liability was not indefinite since it was necessarily limited to the value of the motor carrier's equipment.

Similarly, under a contract for the lease of aircraft, the Federal Aviation Administration could agree to indemnify the owner for loss or damage to the aircraft in order to eliminate the need to reimburse the owner for the cost of "hull insurance" and thereby secure a lower rental rate. The liability could properly be viewed as a necessary expense incident to hiring the aircraft, FAA had no-year appropriations available to pay for any such liability, and, as in the Selective Service case, the agreement was not indefinite because maximum liability was measurable by the fair market value of the

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aircraft. 42 Comp. Gen. 708 (1963). See also 22 Comp. Gen. 892 (1943) (Maritime Commission could amend contract to agree to indemnify contractor against liability to third parties, in lieu of reimbursing contractor for cost of liability insurance premiums, to the extent of available appropriations and provided liability was limited to coverage of existing insurance policies).[28]

In B-114860, December 19, 1979, the Farmers Home Administration asked whether it could purchase surety bonds or enter into an indemnity agreement in order to obtain the release of deeds of trust for borrowers in Colorado where the original promissory notes had been lost while in FmHA's custody. Colorado law required one or the other where the canceled original note could not be delivered to the Colorado public trustee. GAO concluded that the indemnity agreement was permissible as long as it was limited to an amount not to exceed the original principal amount of the trust deed. The decision further advised that FmHA should administratively reserve sufficient funds to cover its potential liability. This aspect of the decision was reconsidered in B-198161, November 25, 1980. Reviewing the particular circumstances involved, GAO was unable to foresee situations in which the government might be required to indemnify the public trustee, and accordingly advised FmHA that the administrative reservation of funds would not be necessary.

In 63 Comp. Gen. 145 (1984), certain indemnification provisions in a ship-chartering agreement were found not to impose indefinite or potentially unlimited contingent liability because liability could be avoided by certain separate actions solely under the government's control.

In cases like the Selective Service bus case (48 Comp. Gen. 361) and the FAA aircraft case (42 Comp. Gen. 708), even though the government's potential liability is limited and determinable, this fact alone does not guarantee that the agency will have sufficient funds available should the contingency ripen into an obligation. This concern is met in one of two ways. The first is the obligation or administrative reservation of sufficient funds to cover the potential liability. In particular cases, reservation may be determined

[28]22 Comp. Gen. 892 is discussed in 62 Comp. Gen. 361, 362–63 (1983), and Johns-Manville Corp. v. United States, 12 Cl. Ct. 1, 23 (1987). The Claims Court noted the "significant deficiency" of 22 Comp. Gen. 892 in that it nowhere mentions the Antideficiency Act.

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unnecessary, as in B-198161, above. Also, naturally, a specific directive from Congress will render reservation of funds unnecessary. See B-159141, August 18, 1967. The second way is for the agreement to expressly limit the government's liability to appropriations available at the time of the loss with no implication that Congress will appropriate funds to make up any deficiency.

This second device—the express limitation of the government's liability to available appropriations—is sufficient to cure an otherwise fatally defective (i.e., unlimited) indemnity proposal. GAO has considered this type of provision in several contexts.

For example, the government may in limited circumstances assume the risk of loss to contractor-owned property. While the maximum potential liability would be determinable, it could be very large and the "administrative reservation" of funds is not feasible. Thus, without some form of limitation, such an agreement could result in obligations in excess of available appropriations. The rules concerning the government's assumption of risk on property owned by contractors and used in the performance of their contracts are set forth in 54 Comp. Gen. 824 (1975), modifying B-168106, July 3, 1974. The rules are summarized below:[29]

- If administratively determined to be in the best interest of the government, the government may assume the risk for contractor-owned property which is used solely in the performance of government contracts.
- The government may not assume the risk for contractor-owned property which is used solely for nongovernment work. If the property is used for both government and nongovernment work and the nongovernment portion is separable, the government may not assume the risk relating to the nongovernment work.
- Where the amount of a contractor's commercial work is so insignificant when compared to the amount of the contractor's government work that the government is effectively bearing the entire risk of loss by in essence paying the full insurance premiums, the government may assume the risk if administratively determined to be in the best interest of the government.

[29]54 Comp. Gen. 824 overruled a portion of 42 Comp. Gen. 708, discussed in the text, to the extent it held that there was no need to either obligate or reserve funds. Thus, in a situation like 42 Comp. Gen. 708, the agency would presumably have to either obligate or administratively reserve funds or include a provision like the one described in 54 Comp. Gen. 824.

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- Any agreement for the assumption of risk by the government under the above rules must clearly provide that, in the event the government has to pay for losses, payments may not exceed appropriations available at the time of the losses, and that nothing in the contract may be considered as implying that Congress will at a later date appropriate funds sufficient to meet deficiencies.

A somewhat different situation was discussed in 60 Comp. Gen. 584 (1981), involving an "installment purchase plan" for automatic data processing equipment. Under the plan, the General Services Administration would make monthly payments until the entire purchase price was paid, at which time GSA would acquire unencumbered ownership of the equipment. GSA's obligation was conditioned on its exercising an option at the end of each fiscal year to continue payments for the next year. The contract contained a risk of loss provision under which GSA would be required to pay the full price for any equipment lost or damaged during the term. GAO concluded that the equipment should be treated as contractor-owned property for purposes of the risk of loss provision, and that the provision would be improper unless one of the following conditions were met:

1. The contract must include the provisions specified in 54 Comp. Gen. 824 limiting GSA's liability to appropriations available at the time of the loss and expressly precluding any inference that Congress would appropriate sufficient funds to meet any deficiency; or

2. If the contract does not include these provisions, then GSA must obligate sufficient funds to cover its possible liability under the risk of loss provision.

If neither of these conditions are met, the assumption of risk clause could potentially violate the Antideficiency Act by creating an obligation in excess of available appropriations if the contingency occurs.

In a 1982 case, the Defense Department and the state of New York entered into a contract for New York to provide certain support functions for the 1980 Winter Olympic Games at Lake Placid, New York. The contract provided for federal reimbursement of any disability benefits which New York might be required to pay in case of death or injury of persons participating in the operation. The contract

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specified that the government's liability could not exceed appropriations for assistance to the Games available at the time of a disabling event, and that the contract did not imply that Congress would appropriate funds sufficient to meet any deficiencies. Since these provisions satisfied the test of 54 Comp. Gen. 824, the indemnity agreement was not legally objectionable. B-202518, January 8, 1982. Under this type of arrangement, the time to record an obligation would be when the agency is notified that a disabling event has occurred. The initial recording of course would have to be based on an estimate.

Also, the decision in the National Flood Insurance Act case mentioned above (B-201394, April 23, 1981) noted that the defect could have been cured by inserting a clause along the lines of 54 Comp. Gen. 824. The same point was made in B-201072, May 3, 1982, also discussed earlier. See also National Railroad Passenger Corp. v. United States, 3 Cl. Ct. 516, 521 (1983) (indemnification agreement between Federal Railroad Administration and Amtrak did not violate Antideficiency Act where liability was limited to amount of appropriation).

When we first stated the anti-indemnity rule at the outset of this discussion, we noted that the rule applies in the absence of express statutory authority to the contrary. Naturally, an indemnification agreement, however open-ended it may be, will be "legal" if it is authorized by some express provision of law.

One statutory exception to the indemnification rules exists for certain defense-related contracts by virtue of 50 U.S.C. § 1431, often referred to by its Public Law designation, Public Law 85-804. The statute evolved from a temporary wartime measure, section 201 of the First War Powers Act, 1941, 55 Stat. 838, 839. The implementing details on indemnification are found in Executive Order No. 10789, as amended.[30]

Another statutory exception is 42 U.S.C. § 2210, the Price-Anderson Act, which authorizes indemnification agreements with Nuclear

[30]A decision approving an indemnity agreement under authority of the First War Powers Act is B-33801, April 19, 1943. A later related decision is B-33801, October 27, 1943. Both of these decisions involved the famed "Manhattan Project," although that fact is well-concealed. The decisions had been classified, but were declassified in 1986.

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Regulatory Commission licensees and Department of Energy contractors to pay claims resulting from nuclear accidents.

Some of the more recent cases have expressed the view that indemnity agreements, even with limiting language, should not be entered into without congressional approval in view of their potentially disruptive fiscal consequences to the agency.[31] 63 Comp. Gen. 145, 147 (1984); 62 Comp. Gen. 361, 368 (1983); B-242146, August 16, 1991. Precisely what form this approval should take in cases where the contractual language is sufficient to minimally satisfy the Antideficiency Act is not entirely clear.

In 1986, the Chairman of the Subcommittee on Nuclear Regulation, Senate Committee on Environment and Public Works, in connection with proposed Price-Anderson amendments the committee was considering, asked GAO to identify possible funding options for a statutory indemnification provision. GAO's response, B-197742, August 1, 1986, lists several options and notes the benefits and drawbacks of each from the perspective of congressional flexibility. The options range from creating a statutory entitlement with a permanent indefinite appropriation for payment (indemnity guaranteed but no congressional flexibility), to making payment fully dependent on the appropriations process (full congressional flexibility but no guarantee of payment). In between are various other devices such as contract authority, use of contract provisions such as those in 54 Comp. Gen. 824, and various forms of limited funding authority.

The discussion in B-197742 highlights the essence of the indemnification funding problem:

"An indemnity statute should generally include two features—the indemnification provisions and a funding mechanism. Indemnification provisions can range from a legally binding guarantee to a mere authorization. Funding mechanisms can similarly vary in terms of the degree of congressional control and flexibility retained. It is impossible to maximize both the assurance of payment and congressional flexibility. Either objective is enhanced only at the expense of the other. . . .

. . . .

[31]To illustrate the potential fiscal consequences, an authorized indemnity agreement entered into in 1950 produced liability of over $64 million plus interest more than four decades later. See E.I. Du Pont De Nemours & Co. v. United States, 24 Cl. Ct. 635 (1991).

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"If payment is to be assured, Congress must yield control over funding, either in whole or up to specified ceilings . . . . Conversely, if Congress is to retain funding control, payment cannot be assured in any legally binding form and the indemnification becomes less than an entitlement."

GAO's bottom line: Whatever funding approach Congress may deem desirable in a particular situation should be spelled out in the legislation. Funding should never occur by default.

(3) Summary

Absent specific statutory authority, the government may generally not enter into an indemnification agreement which would impose an indefinite or potentially unlimited liability on the government. Since the obligation or administrative reservation of funds is not a feasible option in the indefinite liability situation, the only cure is for the agreement to expressly limit the government's liability to available appropriations with no implication that Congress will appropriate the money to meet any deficiencies. If the government's potential liability is limited and determinable, an agreement to indemnify will be acceptable if it is otherwise authorized and if appropriate safeguards are taken to protect against violation of the Antideficiency Act. These safeguards may be either the obligation or administrative reservation of sufficient funds to cover the potential liability, or the inclusion in the agreement of a clause expressly limiting the government's liability to available appropriations.

While the preceding discussion reflects the relevant case law as of the date of this publication, GAO is aware that the guidance provided does not solve all problems. For example, limiting an indemnification agreement to appropriations available at the time of the loss, as in B-202518 (the New York Winter Olympics case), may remove the "unlimited liability" objection, but it remains entirely possible that liabilities incurred under such an agreement could exhaust the agency's appropriation and produce further Antideficiency Act complications. Also, from the standpoint of the contractor or other "beneficiary," indemnification under these circumstances can prove largely illusory, as it will obviously make a big difference whether the incident giving rise to the claim occurs at the beginning or the end of a fiscal year.

The indemnification area is concededly a troublesome one. While there are devices that may be employed to structure indemnification

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agreements in such a way as to make them legally acceptable, they are no substitute for clear legislative authority. If an agency thinks that indemnification agreements in a particular context are sufficiently in the government's interests, the preferable approach is for the agency to go to Congress and seek specific statutory authority.

d. Specific Appropriation Limitations/Purpose Violations

In Chapter 4 we covered in some detail 31 U.S.C. § 1301(a), which prohibits the use of appropriations for purposes other than those for which they were appropriated. As seen in that chapter, violations of purpose availability can arise in a wide variety of contexts—charging an obligation or expenditure to the wrong appropriation, making an obligation or expenditure for an unauthorized purpose, violating a statutory prohibition or restriction, etc. The question we explore in this section is the relationship of purpose availability to the Antideficiency Act. In other words, when and to what extent does a purpose violation also violate the Antideficiency Act?

Why does it matter whether you have violated one statute or two statutes? To our knowledge, nobody is keeping score. The reason here is that, if the second statute is the Antideficiency Act, there are reporting requirements and potential penalties to consider.

A useful starting point is the following excerpt from 63 Comp. Gen. 422, 424 (1984):

> "Not every violation of 31 U.S.C. § 1301(a) also constitutes a violation of the Antideficiency Act. . . . Even though an expenditure may have been charged to an improper source, the Antideficiency Act's prohibition against incurring obligations in excess or in advance of available appropriations is not also violated unless no other funds were available for that expenditure. Where, however, no other funds were authorized to be used for the purpose in question (or where those authorized were already obligated), both 31 U.S.C. § 1301(a) and § 1341(a) have been violated. In addition, we would consider an Antideficiency Act violation to have occurred where an expenditure was improperly charged and the appropriate fund source, although available at the time, was subsequently obligated, making readjustment of accounts impossible."

First, suppose an agency charges an obligation or expenditure to the wrong appropriation account. This can involve either charging the wrong appropriation for the same time period, or charging the wrong fiscal year. The answer is found in the above passage from 63 Comp. Gen. 422. If the appropriation that should have been charged in the first place has sufficient available funds to enable the adjustment of

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accounts, there is no Antideficiency Act violation. A violation exists if the proper account does not have enough money to permit the adjustment, and this includes cases where sufficient funds existed at the time of the error but have since been obligated or expended. See also 70 Comp. Gen. 592 (1991); B-222048, February 10, 1987; B-95136, August 8, 1979.

Other cases illustrating or applying this principle are 57 Comp. Gen. 459 (1978) (grant funds charged to wrong fiscal year); B-224702, August 5, 1987 (contract modifications charged to expired accounts rather than current appropriations); B-208697, September 28, 1983 (items charged to General Services Administration Working Capital Fund which should have been charged to other operating appropriations). Actually, the concept of "curing" a violation by making an appropriate adjustment of accounts is not new. See, e.g., 16 Comp. Dec. 750 (1910); 4 Comp. Dec. 314, 317 (1897). The Armed Services Board of Contract Appeals has also followed this principle. New England Tank Industries of New Hampshire, Inc., ASBCA No. 26474, 88-1 BCA ¶ 20,395 (1987).[32]

The next situation to consider is an obligation or expenditure in excess of a statutory ceiling. This may be an earmarked maximum in a more general appropriation or a monetary ceiling imposed by some other legislation. An obligation or expenditure in excess of the ceiling violates 31 U.S.C. § 1341(a). See, for example, the following:

- Monetary ceilings on minor military construction (10 U.S.C. § 2805): 63 Comp. Gen. 422 (1984); Continuing Inadequate Control Over Programing [sic] and Financing of Construction, B-133316, July 23, 1964; Review of Programing [sic] and Financing of Selected Facilities Constructed at Army, Navy, and Air Force Installations, B-133316, January 24, 1961. (The latter two items are audit reports.)[33]

[32]Although the Board's decision was vacated and remanded on other grounds by the Court of Appeals for the Federal Circuit, New England Tank Industries of New Hampshire v. United States, 861 F.2d 685 (Fed. Cir. 1988), the court noted its agreement with the Board's Antideficiency Act conclusions. Id. at 692 n.15.

[33]Another report in this series, making similar findings under a different statutory ceiling, is Illegal Use of Operation and Maintenance Funds for Rehabilitation and Construction of Family Housing and Construction of a Related Facility, B-133102, August 30, 1963.

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- Monetary ceiling on lease payments for family housing units in foreign countries (10 U.S.C. § 2828(e)): report entitled Leased Military Housing Costs in Europe Can Be Reduced by Improving Acquisition Practices and Using Purchase Contracts, GAO/NSIAD-85-113 (July 24, 1985), at 7–8; 66 Comp. Gen. 176 (1986); B-227527/B-227325, October 21, 1987 (non-decision) letter.
- Ceiling in supplemental appropriation: B-204270, October 13, 1981 (dollar limit on Standard Level User Charge payable by agency to General Services Administration). [34]
- Ceiling in authorizing legislation: 64 Comp. Gen. 282 (1985) (dollar limit on two Small Business Administration direct loan programs).

In a statutory ceiling case, the account adjustment concept described above may or may not come into play. If the ceiling represents a limit on the amount available for a particular object, then there generally will be no other funds available for that object and hence no "correct" funding source from which to reimburse the account charged. If, however, the ceiling represents only a limit on the amount available from a particular appropriation and not an absolute limit on expenditures for the object, as in the minor military construction cases, for example, then it may be possible to cure violations by an appropriate adjustment. 63 Comp. Gen. at 424.

The final situation—and from this point on, the law gets a bit murky—is an obligation or expenditure for an object which is prohibited or simply unauthorized. In 60 Comp. Gen. 440 (1981), a proviso in the Customs Service's 1980 appropriation expressly prohibited the use of the appropriation for administrative expenses to pay any employee overtime pay in an amount in excess of $20,000. By allowing employees to earn overtime pay in excess of that amount, the Customs Service violated 31 U.S.C. § 1341. The Comptroller General explained the violation as follows:

"When an appropriation act specifies that an agency's appropriation is not available for a designated purpose, and the agency has no other funds for that purpose, any officer of the agency who authorizes an obligation or expenditure of agency funds for that purpose violates the Antideficiency Act. Since the Congress has not appropriated funds for the designated purpose, the obligation may be viewed either as being in excess of the amount (zero) available for that purpose or as in advance of

[34]This case also illustrates that the Antideficiency Act applies to interagency transactions the same as any other obligations or expenditures.

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appropriations made for that purpose. In either case the Antideficiency Act is violated." Id. at 441.

In B-201260, September 11, 1984, the Comptroller General advised that expenditures in contravention of the Boland Amendment would violate the Antideficiency Act (although none were found in that case). The Boland Amendment, an appropriation rider, provided that "[n]one of the funds provided in this Act may be used" for certain activities in Central America. In B-229732, December 22, 1988, GAO found the Antideficiency Act violated when the Department of Housing and Urban Development used its funds for commercial trade promotion activities in the Soviet Union, an activity beyond its statutory authority. Similarly, a nonreimbursable interagency detail of an employee, contrary to a specific statutory prohibition, produced a violation in B-247348, June 22, 1992 (letter to Public Printer). All three cases also involved purpose violations and are consistent with 60 Comp. Gen. 440, the rationale being that expenditures would be in excess of available appropriations, which were zero.[35]

However, one court has reached a result which may interpret the Antideficiency Act somewhat differently. In Southern Packaging and Storage Co. v. United States, 588 F. Supp. 532 (D.S.C. 1984), the court found that the Defense Department had purchased certain combat meal products ("MRE") in violation of a "Buy American" appropriation rider, which provided that "[n]o part of any appropriation contained in this Act . . . shall be available" to procure items not grown or produced in the United States. The court rejected the contention that the violation also contravened the Antideficiency Act, stating:

"There is no evidence in this case to show that [the Defense Personnel Supply Center] authorized expenditures beyond the amount appropriated by Congress for the procurement of the MRE rations and the component foods thereof." Id. at 550.

Given the sparse discussion in the decision and the fact that Congress does not make specific appropriations for MRE rations, it is difficult to discern precisely how the Southern Packaging court would apply the Antideficiency Act. While it is possible to reconcile Southern

[35]There are also a few older cases finding violations of both statutes, but they are of little help in attempting to formulate a reasoned approach. Examples are 39 Comp. Gen. 388 (1959), which does not discuss the relationship, and 22 Comp. Gen. 772 (1943), which includes a rationale, now obsolete, based on the then-existing lack of authority to include interest stipulations in contracts.

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Packaging with the GAO cases, it is also possible to find an element of inconsistency. In the opinion of the editors, this area requires further careful thought. On the one hand, every expenditure for an unauthorized purpose should not also violate the Antideficiency Act. It does not seem to have been the intent of Congress that every unauthorized entertainment expenditure or every payment for an unauthorized long-distance telephone call be reported to Congress and the President as an Antideficiency Act violation, a result that could be reached by a broad application of the language of 60 Comp. Gen. 440. Yet on the other hand, where Congress has expressly prohibited the use of appropriated funds for some particular expenditure, it seems clear that the "available appropriation" for that item is zero. Further refinement in this area appears necessary.

e. Amount of Available Appropriation or Fund

Questions occasionally arise over precisely what assets an agency may count for purposes of determining the amount of available resources against which it may incur obligations.

The starting point, of course, is the unobligated balance of the relevant appropriation. In Section F of this chapter, we discuss the rule that subdivisions of a lump-sum appropriation appearing in legislative history are not legally binding on the agency. They are binding only if carried into the appropriation act itself, or are made binding by some other statute. Thus, the entire unobligated balance of an unrestricted lump-sum appropriation is theoretically available for Antideficiency Act purposes. 55 Comp. Gen. 812 (1976).[36]

Where an agency is authorized to retain certain receipts or collections for credit to an appropriation or fund under that agency's control, those receipts are treated the same as direct appropriations for purposes of obligation and the Antideficiency Act, subject to any applicable statutory restrictions. E.g., 71 Comp. Gen. 224 (1992) (National Technical Information Service may use subscription payments to defray its operating expenses but, under governing legislation, may use customer advances only for costs directly related to firm orders).

[36]We say "theoretically available" because matching an obligation against the entire unobligated balance will in many cases do little more than postpone the violation until later in the fiscal year.

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In addition, certain other assets may be "counted," that is, obligated against. For example, OMB Circular No. A-34 includes certain accounts receivable (also referred to as a form of "offsetting collection") as a "budgetary resource."[37] See also B-134474-O.M., December 18, 1957. This does not mean anticipated receipts from transactions that have not yet occurred or orders that have not yet been placed. Obligations cannot be charged against anticipated proceeds from an anticipated sale of property. 35 Comp. Gen. 356 (1955) (sale of old telephone equipment to be replaced with new equipment); B-209758-O.M., September 29, 1983 (sale of assets seized from embezzler). Thus, the Customs Service violated the Antideficiency Act by obligating against anticipated receipts from future sales of seized property unless it had sufficient funds available from other sources to cover the obligation. B-237135, December 21, 1989. Similarly, the Comptroller General found that the Air Force violated the Antideficiency Act by overobligating its Industrial Fund based on estimated or anticipated customer orders. See report entitled The Air Force Has Incurred Numerous Overobligations in its Industrial Fund, AFMD-81-53 (August 14, 1981); 62 Comp. Gen. 143, 147 (1983). Even where receivables are properly included as budgetary resources, an agency may not incur obligations against receipts expected to be received after the end of the current fiscal year without specific statutory authority. 51 Comp. Gen. 598, 605 (1972).

GAO considered another aspect of the question in 60 Comp. Gen. 520 (1981). The General Services Administration buys furniture and other equipment for other agencies through the General Supply Fund, a revolving fund established by statute. Agencies pay GSA either in advance or by reimbursement. For reasons of economy, GSA normally makes consolidated and bulk purchases of commonly used items. Concern over the application of the Antideficiency Act arose when, for several reasons, the Fund began experiencing cash flow problems. GSA wanted to obligate against the value of inventory in the Fund. In other words, GSA wanted to consider the amount of the available appropriation as the cash assets, including advances, in the Fund, plus inventory.

[37]Budgetary resources include (a) orders from other government accounts that represent valid obligations of the ordering account, and (b) orders from the public, including state and local governments, but only to the extent accompanied by an advance. OMB Circular No. A-34, § 31.4.

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The Comptroller General held that inventory in the General Supply Fund did not constitute a "budgetary resource" against which obligations could be incurred. The items in the inventory had already been purchased with appropriated funds and could not be counted again as a new budgetary resource. This was in accord with OMB Circular No. A-34, which does not include inventory as a "budgetary resource" for budget execution purposes. Thus, a violation of the Antideficiency Act would occur at the moment GSA incurs obligations in excess of available "budgetary resources."

Supplemental appropriations, requested but not yet enacted, may not be counted as a budgetary resource. B-230117-O.M., February 8, 1989. See also OMB Circular No. A-34, § 31.4.

f. Intent/Factors Beyond Agency Control

A violation of the Antideficiency Act does not depend on intent or lack of good faith on the part of contracting or other officials who obligate or pay in advance or in excess of appropriations. Although these factors may influence the applicable penalty, they do not affect the basic determination of whether a violation has occurred. 64 Comp. Gen. 282, 289 (1985). The Comptroller General once expressed the principle in the following passage which, although stated in a slightly different context, is equally applicable here:

> "Where a payment is prohibited by law, the utmost good faith on the part of the officer, either in ignorance of the facts or in disregard of the facts, in purporting to authorize the incurring of an obligation the payment of which is so prohibited, cannot take the case out of the statute, otherwise the purported good faith of an officer could be used to nullify the law." A-86742, June 17, 1937.

To illustrate, a contracting officer at the United States Mission to the North Atlantic Treaty Organization accepted an offer for installation of automatic telephone equipment at twice the amount of the unobligated balance remaining in the applicable account. The Department of State explained that the contracting officer had misinterpreted General Accounting Office regulations and implementing State Department procedures. But for this misinterpretation, additional funds could have been placed in the account. State therefore felt that the transaction should not be considered in violation of the Act. GAO did not agree and held that the overobligation must be immediately reported as required by 31 U.S.C. § 1517(b). The official's state of mind was not relevant in deciding whether a violation had occurred. 35 Comp. Gen. 356 (1955).

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An overobligation may result from external factors beyond the agency's control. Whether this will produce an Antideficiency Act violation depends on the particular circumstances.

In 58 Comp. Gen. 46 (1978), the Army asked whether it could make payments to a contractor under a contract requiring payment in local (foreign) currency where the original dollar obligation was well within applicable funding limitations but, due to subsequent exchange rate fluctuations, payment would exceed those limitations. The Army argued that a payment under these circumstances should not be considered a violation of the Act because currency fluctuations are totally beyond the control of the contracting officer or any other agency official. GAO disagreed. The fact that the contracting officer was a victim of circumstances does not make a payment in excess of available appropriations any less illegal. (It is, of course, as with state of mind, relevant in assessing penalties for the violation.) See also 38 Comp. Gen. 501 (1959) (severe adverse weather conditions or prolonged employee strikes generally not sufficient to justify overobligation by former Post Office Department, but facts in particular case could justify deficiency apportionment).

In apparent contrast, the Comptroller General stated in 62 Comp. Gen. 692, 700 (1983) that an overobligation resulting from a judicial award of attorney's fees under 28 U.S.C. § 2412(d), the Equal Access to Justice Act, would not violate the Antideficiency Act. See also 63 Comp. Gen. 308, 312 (1984) (judgments or board of contract appeals awards under Contract Disputes Act, same answer); B-227527/B-227325, October 21, 1987 (non-decision letter) (amounts awarded by court judgment need not be counted in determining whether statutory ceiling on lease payments has been exceeded and Antideficiency Act thereby violated); A-37316, July 11, 1931 (land condemnation under Declaration of Taking Act which results in deficiency judgment would not violate Antideficiency Act).[38]

The distinction appears to be based on the extent to which the agency can act to avoid the overobligation even though it is imposed by some external force beyond its control. Thus, the currency fluctuation decision stated:

[38]In apparent contradiction to A-37316 is 54 Comp. Gen. 799 (1975).

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"[W]hen a contracting officer finds that the dollars required to continue or make final payment on a contract will exceed a statutory limitation he may terminate the contract, provided the termination costs will not exceed the statutory limitations. Alternatively, the contracting officer may issue a stop work order and the agency may ask Congress for a deficiency appropriation citing the currency fluctuation as the reason for its request."

58 Comp. Gen. at 48. Similarly, the Postmaster General could curtail operations if necessary. 38 Comp. Gen. at 504. See also 66 Comp. Gen. 176 (1986) (Antideficiency Act would not preclude Air Force from entering into lease for overseas family housing without provision limiting annual payments to statutory ceiling, even though certain costs could conceivably escalate above ceiling, where good faith cost estimates were well below ceiling and lease included termination for convenience clause). Where the agency could have acted to avert the overobligation but did not, the violation will not be excused. In contrast, in the case of a payment ordered by a court, comparable options (apart from seeking a deficiency appropriation) are not available. (Curtailing activities after the overobligation has occurred to avoid compounding the violation is a separate question.)

g. Exceptions

An exception to the Antideficiency Act is built right into 31 U.S.C. § 1341(a). The statute prohibits contracts or other obligations in advance or excess of available appropriations, "unless authorized by law." This is nothing more than the recognition that Congress can authorize exceptions to the statutes it enacts.

(1) Contract authority

At the outset, it is necessary to distinguish between "contract authority" and the "authority to enter into contracts." A contract is simply a legal device employed by two or more parties to create binding and legally enforceable obligations in furtherance of some objective. The federal government uses contracts every day to procure a wide variety of goods and services. An agency does not need specific statutory authority to enter into contracts. It has long been established that a government agency has the inherent authority to enter into binding contracts in the execution of its duties. Van Brocklin v. Tennessee, 117 U.S. 151, 154 (1886); United States v. Maurice, 26 F. Cas. 1211, 1216–17 (C.C.D. Va. 1823) (No. 15,747). It should be apparent that these contracts, "authorized by law" though

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they may be, cannot be sufficient to constitute exceptions to the Antideficiency Act, else the Act would be meaningless.

For purposes of the Antideficiency Act exception, a "contract authorized by law" requires not only authority to enter into a contract, but authority to do so without regard to the availability of appropriations. While the former may be inherent, the latter must be conferred by statute. The most common example of this is "contract authority" as that term is defined and described in Chapter 2—statutory authority which specifically authorizes an agency to enter into a contract in excess of, or prior to enactment of, the applicable appropriation.

In some cases, the "exception" language will be unmistakably explicit. An example is the Price-Anderson Act, which provides authority to "make contracts in advance of appropriations and incur obligations without regard to" the Antideficiency Act. 42 U.S.C. § 2210(j). Other examples of clear authority, although perhaps not as explicit as the Price-Anderson Act, may be found in 27 Comp. Gen. 452 (1948) (long-term operating-differential subsidy agreements under the Merchant Marine Act); B-211190, April 5, 1983 (contracts with states under the Federal Boat Safety Act); B-164497(3), June 6, 1979 (certain provisions of the Federal-Aid Highway Act of 1973); B-168313, November 21, 1969 (interest subsidy agreements with educational institutions under the Housing Act of 1950).

In an earlier case involving contract authority, GAO insisted that the Corps of Engineers had to include a "no liability unless funds are later made available" clause for any work done in excess of available funds. 2 Comp. Gen. 477 (1923). The Corps had trouble with this clause because a Court of Claims decision, C.H. Leavell and Co. v. United States, 530 F.2d 878 (Ct. Cl. 1976), allowed the contractor an equitable adjustment for suspension of work due to a delay in enacting an appropriation to pay him, notwithstanding the "availability of funds" clause. In 56 Comp. Gen. 437 (1977), GAO overruled 2 Comp. Gen. 477, deciding that section 10 of the River and Harbor Act of 1922, by expressly authorizing the Corps to enter into large multi-year civil works projects without seeking a full appropriation in the first year, constituted the necessary exception to the Antideficiency Act and a "funds available" clause was not necessary. This applies as well to contracts financed from the Corps'

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Civil Works Revolving Fund. B-242974.6, November 26, 1991 (internal memorandum).

The rationale of 56 Comp. Gen. 437 has also been applied to long-term fuel storage facilities contracts authorized by 10 U.S.C. § 2388. New England Tank Industries of New Hampshire, Inc., ASBCA No. 26474, 88-1 BCA ¶ 20,395 (1987), vacated on other grounds, New England Tank Industries of New Hampshire v. United States, 861 F.2d 685 (Fed. Cir. 1988).

In 28 Comp. Gen. 163 (1948), the Commissioner of Reclamation was authorized in an appropriation act to enter into certain contracts in advance of appropriations but subject to a monetary ceiling. Since the contract authority was explicit, with no language making it contingent on appropriations being made at some later date, the statute authorized the Commissioner to enter into a firm and binding contract.

Contract authority may be "transferred" from one agency to another in certain circumstances. The Bureau of Mines was authorized to enter into a contract (in advance of the appropriation) to construct and equip an anthracite research laboratory. The Bureau asked the General Services Administration to enter into the contract on its behalf pursuant to section 103 of the Federal Property and Administrative Services Act of 1949, which provided that "funds appropriated to . . . other Federal agencies for the foregoing purposes [execution of contracts and supervision of construction] shall be available for transfer to and expenditure by the [General Services Administration]." GAO held that the transfer language merely authorized the transfer of funds appropriated to the various agencies to GSA. It did not, however, preclude GSA from entering into contracts before the funds were appropriated, in this instance, because GSA was acting for the Bureau of Mines which clearly did have the necessary authority. 29 Comp. Gen. 504 (1950).[39]

A somewhat different kind of contract authority is found in 41 U.S.C. § 11, the so-called Adequacy of Appropriations Act. An exception to the requirement to have adequate appropriations—or any appropriation at all—is made for procurements by the military

[39]The provisions of the 1949 legislation discussed in 29 Comp. Gen. 504 have been superseded by the Public Buildings Act of 1959. The case is included here merely to illustrate the concept.

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departments for "clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year." By administrative interpretation, the Defense Department has limited this authority to emergency circumstances where immediate action is necessary. Department of Defense Directive No. 7220.8.

It should again be emphasized that to constitute an exception to 31 U.S.C. § 1341(a), the "contract authority" must be specific authority to incur the obligation in excess or advance of appropriations, not merely the general authority any agency has to enter into contracts to carry out its functions.

Congress may grant authority to contract beyond the fiscal year in terms which amount to considerably less than the type of "contract authority" described above. An example is 43 U.S.C. § 388, which authorizes the Secretary of the Interior to enter into certain contracts relating to reclamation projects "which may cover such periods of time as the Secretary may consider necessary but in which the liability of the United States shall be contingent upon appropriations being made therefor." While this provision has been referred to as an exception to the Antideficiency Act (B-72020, January 9, 1948), it authorizes only "contingent contracts" under which there is no legal obligation to pay unless and until appropriations are provided. 28 Comp. Gen. 163 (1948). A similar example, discussed in B-239435, August 24, 1990, is 38 U.S.C. § 230(c) (Supp. II 1990), which authorizes the Department of Veterans Affairs to enter into certain leases for periods of up to 35 years but further provides that the government's obligation to make payments is "subject to the availability of appropriations for that purpose."

(2) Other obligations "authorized by law"

The "authorized by law" exception in 31 U.S.C. § 1341(a) applies to non-contractual obligations as well as to contracts. The basic approach is the same. The authority must be more than just authority to undertake the particular activity. In the broader sense, everything government officials do should be authorized by law, otherwise they shouldn't be doing it. To constitute an Antideficiency Act exception, the authority must be authority to incur the obligation in excess or advance of appropriations.

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For example, statutory authority to acquire land and to pay for it from a specified fund is not an exception to the Antideficiency Act. It merely authorizes acquisitions to the extent of funds available in the specified source at the time of purchase. 27 Comp. Dec. 662 (1921). Similarly, the authority to conduct hearings does not, without more, confer authority to do so without regard to available appropriations. 16 Comp. Dec. 750 (1910). Provisions in the District of Columbia Code requiring Saint Elizabeth's Hospital to treat all patients who meet admission eligibility requirements were held not to authorize the Hospital to operate beyond the level of its appropriations. If mandatory expenditures would cause a deficiency, the Hospital would have to reduce nonmandatory expenditures. 61 Comp. Gen. 661 (1982).

Several cases have considered the effect of various statutory salary or compensation increases. If a statutory increase is mandatory and does not give anyone discretion to determine the amount, or if it gives some administrative body discretion to determine the amount, payment of which then becomes mandatory, the obligation is deemed "authorized by law" for Antideficiency Act purposes. 39 Comp. Gen. 422 (1959) (salary increases for Wage Board employees); 22 Comp. Gen. 570 (1942); 21 Comp. Gen. 335 (1941); B-168796, February 2, 1970 (mandatory statutory increase in retired pay for Tax Court judges); B-107279, January 9, 1952 (mandatory increases for certain legislative personnel). GAO has not treated the granting of increases retroactively to correct past administrative errors as creating the same type of exception. See 24 Comp. Gen. 676 (1945). Increases which are discretionary do not permit the incurring of obligations in excess or advance of appropriations. 31 Comp. Gen. 238 (1951) (discretionary pension increases); 28 Comp. Gen. 300 (1948).[40]

Some other examples of obligations "authorized by law" for Antideficiency Act purposes are:

- Mandatory pilot program in Vermont under Farms for the Future Act of 1990 (loan guarantees and interest assistance). B-244093, July 19, 1991.

[40]28 Comp. Gen. 300 concerned increases to Wage Board employees under legislation which is now obsolete (see 39 Comp. Gen. 422, cited in the text). However, it is still useful for the basic proposition, stated on page 302, that nonmandatory increases are not obligations "authorized by law" as that term is used in 31 U.S.C. § 1341(a).

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- Mandatory entitlement programs administered by Department of Veterans Affairs. B-226801, March 2, 1988.
- Mandatory transfer from one appropriation account to another where "donor" account contained insufficient unobligated funds. 38 Comp. Gen. 93 (1958).
- Statute authorizing Interstate Commerce Commission to order a substitute rail carrier to service shippers abandoned by their primary carrier in emergency situations, and to reimburse certain costs of the substitute carrier. B-196132, October 11, 1979.
- Provision in Criminal Justice Act of 1964 imposing mandatory deadline on commencement of certain programs which would necessarily involve creation of financial obligations. B-156932, August 17, 1965.

What are perhaps the outer limits of the "authorized by law" exception are illustrated in B-159141, August 18, 1967. The Federal Aviation Administration had entered into long-term, incrementally funded contracts for the development of a civil supersonic aircraft (SST). To ensure compliance with the Antideficiency Act, the FAA each year budgeted for, and obligated, sufficient funds to cover potential termination liability. The appropriations committees became concerned that unnecessarily large amounts were being tied up this way, especially in light of the highly remote possibility that the SST contracts would be terminated. In considering the FAA's 1968 appropriation, the House Appropriations Committee reduced the FAA's request by the amount of the termination reserve, and in its report directed the FAA not to obligate for potential termination costs. The Comptroller General advised that if the Senate Appropriations Committee did the same thing—a specific reduction tied to the amount requested for the reserve, coupled with clear direction in the legislative history—then an overobligation resulting from a termination would be regarded as "authorized by law" and not in violation of the Antideficiency Act.

3. Voluntary Services Prohibition

a. Introduction

The next portion of the Antideficiency Act is 31 U.S.C. § 1342:

"An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or

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employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. . . ."

This provision first appeared, in almost identical form, in a deficiency appropriation act enacted in 1884 (23 Stat. 17). Although the original prohibition read "hereafter, no department or officer of the United States shall accept . . .," it was included in an appropriation for the (then) Indian Office of the Interior Department, and the Court of Claims held that it was applicable only to the Indian Office. Glavey v. United States, 35 Ct. Cl. 242, 256 (1900), reversed on other grounds, 182 U.S. 595 (1901). The Comptroller of the Treasury continued to apply it across the board. See, e.g., 9 Comp. Dec. 181 (1902). In any event, the applicability of the 1884 statute soon became moot because Congress reenacted it as part of the Antideficiency Act in 1905 (33 Stat. 1257) and again in 1906 (34 Stat. 48).

Prior to the 1982 recodification of Title 31, section 1342 was subsection (b) of the Antideficiency Act, while the basic prohibitions of section 1341, previously discussed, constituted subsection (a). The proximity of the two provisions in the Code reflects their relationship, as section 1342 supplements and is a logical extension of section 1341. If an agency cannot directly obligate in excess or advance of its appropriations, it should not be able to accomplish the same thing indirectly by accepting ostensibly "voluntary" services and then presenting Congress with the bill, in the hope that Congress will recognize a "moral obligation" to pay for the benefits conferred—another example of the so-called "coercive deficiency." In this connection, the chairman of the House committee responsible for what became the 1906 reenactment of the voluntary services prohibition stated:

"It is a hard matter to deal with. We give to Departments what we think is ample, but they come back with a deficiency. Under the law they can [not] make these deficiencies, and Congress can refuse to allow them; but after they are made it is very hard to refuse to allow them . . . ."[41]

In addition, as we have noted previously, the Antideficiency Act was intended to keep an agency's level of operations within the amounts Congress appropriates for that purpose. The unrestricted ability to use voluntary services would permit circumvention of that objective. Thus, without section 1342, section 1341 could not be fully effective.

[41]39 Cong. Rec. 3687 (1906), quoted in 30 Op. Att'y Gen. 51, 53–54 (1913).

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Chapter 9
Liability and Relief of Accountable Officers

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Note that 31 U.S.C. § 1342 contains two distinct although closely related prohibitions: It bans, first, the acceptance of any type of voluntary services for the United States, and second, the employment of personal services "exceeding that authorized by law."

b. Appointment Without Compensation and Waiver of Salary

(1) The rules—general discussion

One of the evils which the "personal services" prohibition was designed to correct was a practice which was controversial in 1884 but is much less so today. Lower-grade government employees were being asked to "volunteer" their services for overtime periods in excess of the periods allowed by law, thus enabling the agency to economize at the employees' expense but nevertheless generating claims by the employees.[42] Although this practice appears to have receded, the applicability of 31 U.S.C. § 1342 remains relevant in a number of contexts involving services by government employees or services which would otherwise have to be performed by government employees.

One of the earliest questions to arise under 31 U.S.C. § 1342—and the issue that seems to have generated the greatest number of cases—was whether a government officer or employee, or an individual about to be appointed to a government position, could voluntarily work for nothing or for a reduced salary. Initially, the Comptroller of the Treasury ducked the question on the grounds that it did not involve a payment from the Treasury, and suggested that the question was appropriate to take to the Attorney General. 19 Comp. Dec. 160, 163 (1912).

The very next year, the Attorney General tackled the question when asked whether a retired Army officer could be employed as superintendent of an Indian school without additional compensation. In what has become the leading case construing 31 U.S.C. § 1342, the Attorney General replied that the appointment would not violate the voluntary services prohibition. 30 Op. Att'y Gen. 51 (1913). In reaching this conclusion, the Attorney General drew a distinction which the Comptroller of the Treasury thereafter adopted, and which GAO and the Justice Department continue to follow to this day—the distinction between "voluntary services" and "gratuitous services."

[42] 15 Cong. Rec. 3410–11 (1884), quoted in 30 Op. Att'y Gen. 51, 54-55 (1913).

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The key passages from the Attorney General's opinion are set forth below:

"[I]t seems plain that the words 'voluntary service' were not intended to be synonymous with 'gratuitous service' and were not intended to cover services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be nonsalaried. In their ordinary and normal meaning these words refer to service intruded by a private person as a 'volunteer' and not rendered pursuant to any prior contract or obligation . . . . It would be stretching the language a good deal to extend it so far as to prohibit official services without compensation in those instances in which Congress has not required even a minimum salary for the office.

"The context corroborates the view that the ordinary meaning of 'voluntary services' was intended. The very next words 'or employ personal service in excess of that authorized by law' deal with contractual services, thus making a balance between 'acceptance' of 'voluntary service' (i.e., the cases where there is no prior contract) and 'employment' of 'personal service' (i.e., the cases where there is such prior contract, though unauthorized by law).

. . . .

"Thus it is evident that the evil at which Congress was aiming was not appointment or employment for authorized services without compensation, but the acceptance of unauthorized services not intended or agreed to be gratuitous and therefore likely to afford a basis for a future claim upon Congress. . . ." Id. at 52–53, 55.

The Comptroller of the Treasury agreed with this interpretation:

"[The statute] was intended to guard against claims for compensation. A service offered clearly and distinctly as gratuitous with a proper record made of that fact does not violate this statute against acceptance of voluntary service. An appointment to serve without compensation which is accepted and properly recorded is not a violation of [31 U.S.C. § 1342], and is valid if otherwise lawful." 27 Comp. Dec. 131, 132–33 (1920).

Two main rules emerge from 30 Op. Att'y Gen. 51 and its progeny. First, if compensation for a position is fixed by law, an appointee may not agree to serve without compensation or to waive that compensation in whole or in part (these are two different ways of saying the same thing). Id. at 56. This portion of the opinion did not

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break any new ground. The courts had already held, based on public policy, that compensation fixed by law could not be waived.[43] Second, and this is really just a corollary to the rule just stated, if the level of compensation is discretionary, or if the relevant statute prescribes only a maximum (but not a minimum), the compensation can be set at zero, and an appointment without compensation or a waiver, entire or partial, is permissible. Id.; 27 Comp. Dec. at 133.

Both GAO and the Justice Department have had frequent occasion to address these issues, and there are numerous decisions illustrating and applying the rules.[44]

In a 1988 opinion, the Justice Department's Office of Legal Counsel considered whether the Iran-Contra Independent Counsel could appoint Professor Laurence Tribe as Special Counsel under an agreement to serve without compensation. Applying the rules set forth in 30 Op. Att'y Gen. 51, the OLC concluded that the appointment would not contravene the Antideficiency Act since the statute governing the appointment set a maximum salary but no minimum. Independent Counsel's Authority to Accept Voluntary Services – Appointment of Laurence H. Tribe, Op. Off. Legal Counsel, May 19, 1988.

Similarly, the Comptroller General held in 58 Comp. Gen. 383 (1979) that members of the United States Metric Board could waive their salaries since the relevant statute merely prescribed a maximum rate of pay. In addition, since the Board had statutory authority to accept gifts, a member who chose to do so could accept compensation and then return it to the Board as a gift. Both cases make the point that compensation is not "fixed by law" for purposes of the "no waiver" rule where the statute merely sets a maximum limit for the salary.

[43]Glavey v. United States, 182 U.S. 595 (1901); Miller v. United States, 103 F. 413 (C.C.S.D.N.Y. 1900). See also 9 Comp. Dec. 101 (1902). Later cases following Glavey are MacMath v. United States, 248 U.S. 151 (1918), and United States v. Andrews, 240 U.S. 90 (1916). The policy rationale is that to permit agencies to disregard compensation prescribed by statute could work to the disadvantage of those who cannot, or are not willing to, accept the position for less than the prescribed salary. See Miller, 103 F. at 415–16.

[44]Some cases in addition to those cited in the text are 32 Comp. Gen. 236 (1952); 23 Comp. Gen. 109, 112 (1943); 14 Comp. Gen. 193 (1934); 34 Op. Att'y Gen. 490 (1925); 30 Op. Att'y Gen. 129 (1913); 3 Op. Off. Legal Counsel 78 (1979).

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A good illustration of the kind of situation 31 U.S.C. § 1342 is designed to prevent is 54 Comp. Gen. 393 (1974). Members of the Commission on Marihuana and Drug Abuse had, apparently at the chairman's urging, agreed to waive their statutory entitlement to $100 per day while involved on Commission business. The year after the Commission ceased to exist, one of the former members changed his mind and filed a claim for a portion of the compensation he would have received but for the waiver. Since the $100 per day had been a statutory entitlement, the purported waiver was invalid and the former commissioner was entitled to be paid. Similar claims by any or all of the other former members would also have to be allowed. If insufficient funds remained in the Commission's now-expired appropriation, a deficiency appropriation would be necessary.

A few earlier cases deal with fact situations similar to that considered in 30 Op. Att'y Gen. 51—the acceptance by someone already on the federal payroll of additional duties without additional compensation. In 23 Comp. Gen. 272 (1943), for example, GAO concluded that a retired Army officer could serve, without additional compensation, as a courier for the State Department. The voluntary services prohibition, said the decision, does not preclude "the assignment of persons holding office under the Government to the performance of additional duties or the duties of another position without additional compensation." Id. at 274. Another World War II decision held that American Red Cross Volunteer Nurses' Aides who also happened to be full-time federal employees could perform volunteer nursing services at Veterans Administration hospitals. 23 Comp. Gen. 900 (1944).

One thing the various cases discussed above have in common is that they involve the appointment of an individual to an official government position, permanent or temporary. Services rendered prior to appointment are considered purely voluntary and, by virtue of 31 U.S.C. § 1342, cannot be compensated. Lee v. United States, 45 Ct. Cl. 57, 62 (1910); B-181934, October 7, 1974.[45] It also follows that post-retirement services, apart from appointment as a reemployed annuitant, are not compensable. 65 Comp. Gen. 21 (1985). In that case, an alleged agreement to the contrary by the individual's supervisor was held unauthorized and therefore invalid.

[45]B-181934 was overruled by 55 Comp. Gen. 109 (1975) because additional information showed that the individual was a "de facto employee" performing under color of appointment and with a claim of right to the position. A "voluntary" employee has no such "color of appointment" or indicia of lawful employment.

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It has also been held that experts and consultants employed under authority of 5 U.S.C. § 3109 may serve without compensation without violating the Antideficiency Act as long as it is clearly understood and agreed that no compensation is to be expected. 27 Comp. Gen. 194 (1947); 6 Op. Off. Legal Counsel 160 (1982). Cf. B-185952, August 18, 1976 (uncompensated participation in pre-bid conference, on-site inspection, and bid opening by contractor engineer who had prepared specifications regarded as "technical violation" of 31 U.S.C. § 1342).

Several of the decisions note the requirement for a written record of the agreement to serve without compensation. Proper documentation is important for evidentiary purposes should a claim subsequently be attempted. E.g., 27 Comp. Gen. 194, 195 (1947); 26 Comp. Gen. 956, 958 (1947); 27 Comp. Dec. 131, 132–33 (1920); 2 Op. Off. Legal Counsel 322, 323 (1977).

The rule that compensation fixed by statute may not be waived does not apply if the waiver or appointment without compensation is itself authorized by statute. The Comptroller General stated the principle as follows in 27 Comp. Gen. 194, 195 (1947):

> "[E]ven where the compensation for a particular position is fixed by or pursuant to law, the occupant of the position may waive his ordinary right to the compensation fixed for the position and thereafter forever be estopped from claiming and receiving the salary previously waived, if there be some applicable provision of law authorizing the acceptance of services without compensation." (Emphasis in original.)

In B-139261, June 26, 1959, GAO reiterated the above principle, and gave several examples of statutes sufficient for this purpose. Another example may be found in 2 Op. Off. Legal Counsel 322 (1977).

At this point a 1978 case, 57 Comp. Gen. 423, must be noted although its effect is not entirely clear. The decision held that a statute authorizing the Agency for International Development to accept gifts of "services of any kind" did not meet the test of 27 Comp. Gen. 194, and therefore did not permit waiver of salary by employees whose compensation is fixed by statute. While 57 Comp. Gen. 423 did not purport to overrule or modify any prior cases, it seems to say that statutory authority to accept gifts of personal service is no longer adequate to permit waiver of compensation fixed by statute. However, in B-139261, June 26, 1959, not cited in 57 Comp. Gen. 423, one of the examples given of statutes that would authorize waiver of compensation fixed by law was a gift statute very similar to the AID

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statute involved in 57 Comp. Gen. 423. If 57 Comp. Gen. 423 is in fact a modification of the prior case law, then an agency would need explicit authority to employ persons without compensation. For an example of such authority, see 32 Comp. Gen. 236 (1952).

The rules for waiver of salary or appointment without compensation may be summarized as follows:

- If compensation is not fixed by statute, i.e., if it is fixed administratively or if the statute merely prescribes a maximum but no minimum, it may be waived as long as the waiver qualifies as "gratuitous." There should be an advance written agreement waiving all claims.
- If compensation is fixed by statute, it may not be waived, the voluntary vs. gratuitous distinction notwithstanding, without specific statutory authority. Unfortunately, the decisions are not consistent as to what form this authority must take, and the extent to which authority to accept donations of services (as opposed to explicit authority to employ persons without compensation) will suffice is not entirely clear.
- If the employing agency has statutory authority to accept gifts, the employee can accept the compensation and return it to the agency as a gift. Even if the agency has no such authority, the employee can still accept the compensation and donate it to the United States Treasury.

(2) Student interns

In 26 Comp. Gen. 956 (1947), the (then) Civil Service Commission asked whether an agency could accept the uncompensated services of college students as part of a college's internship program. The students "would be assigned to productive work, i.e., to the regular work of the agency in a position which would ordinarily fall in the competitive civil service." The answer was no. Since the students would be used in positions the compensation for which was fixed by law, and since compensation fixed by law cannot be waived, the proposal would require legislative authority.

Thirty years later, the Justice Department's Office of Legal Counsel considered another internship program and provided similar advice. Without statutory authority, uncompensated student services that furthered the agency's mission, i.e., "productive work," could not be accepted. 2 Op. Off. Legal Counsel 185 (1978).

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In view of the long-standing rule, supported as we have seen by decisions of the Supreme Court, prohibiting the waiver of compensation for positions required by law to be salaried, GAO and Justice had little choice but to respond as they did. Clearly, however, this was not a very useful answer. It meant that uncompensated student interns could be used only for essentially "make-work" tasks, a result of benefit to neither the students nor the agencies.

The solution, apparent from both cases, was legislative authority, which Congress provided later in 1978 by the enactment of 5 U.S.C. § 3111. The statute authorizes agencies, subject to regulations of the Office of Personnel Management, to accept the uncompensated services of high school and college students, "[n]otwithstanding section 1342 of Title 31," if the services are part of an agency program designed to provide educational experience for the student and will not be used to displace any employee.

In a 1981 decision, GAO held that 5 U.S.C. § 3111 does not authorize the payment of travel or subsistence expenses for the students. 60 Comp. Gen. 456 (1981).

A paper entitled A Part-Time Clerkship Program in Federal Courts for Law Students by the Honorable Jack B. Weinstein and William B. Bonvillian, written in 1975 and printed at 68 F.R.D. 265, considered the use of law students as part-time law clerks, without pay, to mostly supplement the work of the regular law clerks in furtherance of the official duties of the courts. Based on the statute's legislative history and 30 Op. Att'y Gen. 51, previously discussed, Judge Weinstein concluded that the program did not violate the Antideficiency Act. Although this aspect of the issue is not explicitly discussed in the paper, it appears that the compensation of regular law clerks is fixed administratively. See 28 U.S.C. § 604(a)(5). In any event, the Administrative Office of the United States Courts was given authority in 1978 to "accept and utilize voluntary and uncompensated (gratuitous) services." 28 U.S.C. § 604(a)(17).

(3) Program beneficiaries

Programs are enacted from time to time to provide job training assistance to various classes of individuals. The training is intended to enable participants to enter the labor market at a higher level of skill and thereby avoid the need for public assistance. Also, in more recent

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years, the concept of "workfare" (work as a requirement for the receipt of public assistance) has begun to evolve. Questions have arisen under programs of this nature as to the authority of federal agencies to serve as employers.

A 1944 case, 24 Comp. Gen. 314, considered a vocational rehabilitation program for disabled war veterans. GAO concluded that 31 U.S.C. § 1342 did not preclude federal agencies from providing on-the-job training, without payment of salary, to program participants. The decision is further discussed in 26 Comp. Gen. 956, 959 (1947).

In 51 Comp. Gen. 152 (1971), GAO concluded that 31 U.S.C. § 1342 precluded federal agencies from accepting work by persons hired by local governments for public service employment under the Emergency Employment Act of 1971. Four years later, GAO modified the 1971 decision, holding that a federal agency could provide work without payment of compensation to (i.e., accept the free services of) trainees sponsored and paid by nonfederal organizations from federal grant funds under the Comprehensive Employment and Training Act of 1973. 54 Comp. Gen. 560 (1975). The decision stated:

"[C]onsidering that the services in question will arise out of a program initiated by the Federal Government, it would be anomalous to conclude that such services are proscribed as being voluntary within the meaning of 31 U.S.C. § [1342]. That is to say, it is our opinion that the utilization of enrollees or trainees by a Federal agency under the circumstances here involved need not be considered the acceptance of 'voluntary services' within the meaning of that phrase as used in 31 U.S.C. § [1342]." Id. at 561.

Several issues under a workfare program (Community Work Experience Program) are discussed in B-211079.2, January 2, 1987. The relevant program legislation expressly authorizes program participants to perform work for federal agencies "notwithstanding section 1342 of title 31." 42 U.S.C. § 609(a)(4)(A). The decision seems to say that the statutory authority was necessary not because of the Antideficiency Act but to avoid an impermissible augmentation of appropriations. It is in any event consistent in result with 24 Comp. Gen. 314 and 54 Comp. Gen. 560. The relationship between voluntary service and the augmentation concept is explored later in this chapter in our discussion of augmentation of appropriations.

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(4) Applicability to legislative and judicial branches

The applicability of 31 U.S.C. § 1342 to the legislative and judicial branches of the federal government does not appear to have been seriously questioned.

The salary of a Member of Congress is fixed by statute and therefore cannot be waived without specific statutory authority. B-159835, April 22, 1975; B-123424, March 7, 1975; B-123424, April 15, 1955; A-8427, March 19, 1925; B-206396.2, November 15, 1988 (non-decision letter). However, as each of these cases points out, nothing prevents a Senator or Representative from accepting the salary and then, as several have done, donate part or all of it back to the United States Treasury.

In 1977, GAO was asked by a congressional committee chairman whether section 1342 applies to Members of Congress who use volunteers to perform official office functions. GAO responded first that section 1342 seems clearly to apply to the legislative branch. GAO then summarized the rules for appointment without compensation and advised that, to the extent that a particular employee's salary could be fixed administratively by the Member in any amount he or she chooses to set, that employee's salary can be fixed at zero. (This once again was essentially an application of the rules set down decades earlier in 30 Op. Att'y Gen. 51 and 27 Comp. Dec. 131.) B-69907, February 11, 1977.

The salary of a federal judge is also "fixed by law"—even more so because of the constitutional prohibition against diminishing the compensation of a federal judge while in office. A case applying the standard "no waiver" rules to a federal judge is B-157469, July 24, 1974.

c. Other Voluntary Services

Before entering the mainstream of the modern case law, two very early decisions should be noted. In 12 Comp. Dec. 244 (1905), the Comptroller of the Treasury held that an offer by a meat-packing firm to pay the salaries of Department of Agriculture employees to conduct

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a pre-export pork inspection could not be accepted because of the voluntary services prohibition.[46] Similar cases have since come up, but they have been decided under the augmentation theory without reference to 31 U.S.C. § 1342. See 59 Comp. Gen. 294 (1980) and 2 Comp. Gen. 775 (1923), discussed later in Section E of this chapter. To restate, apart from the 1905 decision, which has not been followed since, the voluntary services prohibition has not been applied to donations of money.

In another 1905 decision, a vendor asked permission to install an appliance on Navy property for trial purposes at no expense to the government. Presumably, if the Navy liked the appliance, it would then buy it. The Comptroller pointed out an easily overlooked phrase in the voluntary service prohibition—the services that are prohibited are voluntary services "for the United States." Here, temporary installation by the vendor for trial purposes amounted to service for his own benefit and on his own behalf, "as an incident to or necessary concomitant of a proper exhibition of his appliance for sale." Therefore, the Navy could grant permission without violating the Antideficiency Act as long as the vendor agreed to remove the appliance at his own expense if the Navy chose not to buy it. 11 Comp. Dec. 622 (1905). This case, although it has not been cited since, would appear to be still valid.

For the most part, the cases have been resolved by applying the "voluntary vs. gratuitous" distinction first enunciated by the Attorney General in 30 Op. Att'y Gen. 51, discussed above. The underlying philosophy is perhaps best conveyed in the following statement by the Justice Department's Office of Legal Counsel:

"Although the interpretation of § [1342] has not been entirely consistent over the years, the weight of authority does support the view that the section was intended to eliminate subsequent claims against the United States for compensation of the 'volunteer,' rather than to deprive the government of the benefit of truly gratuitous services." 6 Op. Off. Legal Counsel 160, 162 (1982).

In an early formulation that has often been quoted since, the Comptroller General noted that:

[46]It would also contravene 18 U.S.C. § 209, which prohibits payment of salaries of government employees from nongovernment sources. This statute did not exist at the time of the 1905 decision.

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"The voluntary service referred to in [31 U.S.C. § 1342] is not necessarily synonymous with gratuitous service, but contemplates service furnished on the initiative of the party rendering the same without request from, or agreement with, the United States therefor. Services furnished pursuant to a formal contract are not voluntary within the meaning of said section." 7 Comp. Gen. 810, 811 (1928).

In 7 Comp. Gen. 810, a contractor had agreed to prepare stenographic transcripts of Federal Trade Commission public proceedings and to furnish copies to the FTC without cost, in exchange for the exclusive right to report the proceedings and to sell transcripts to the public. The decision noted that consideration under a contract does not have to be monetary consideration, and held that the contract in question was supported by sufficient legal consideration. While the case is thus arguably not a true "voluntary services" case, it has often been cited since, not so much for the actual holding but for the above-quoted statement of the rule.

For example, in B-13378, November 20, 1940, the Comptroller General held that the Secretary of Commerce could accept gratuitous services from a private agency, created by various social science associations, which had offered to assist in the preparation of official monographs analyzing census data. The services were to be rendered under a cooperative agreement which specified that they would be free of cost to the government. The Commerce Department agreed to furnish space and equipment, but the monographs would not otherwise have been prepared.

Applying the same approach, GAO found no violation of 31 U.S.C. § 1342 for the Commerce Department to accept services by the Business Advisory Council, agreed in advance to be gratuitous. B-125406, November 4, 1955. Likewise, the Commission on Federal Paperwork could accept free services from the private sector as long as they were agreed in advance to be gratuitous. B-182087-O.M., November 26, 1975.

In a 1982 decision, the American Association of Retired Persons wanted to volunteer services to assist in crime prevention activities (distribute literature, give lectures, etc.) on Army installations. GAO found no Antideficiency Act problem as long as the services were agreed in advance, and so documented, as gratuitous. B-204326, July 26, 1982.

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In B-177836, April 24, 1973, the Army had entered into a contract with a landowner under which it acquired the right to remove trees and other shrubs from portions of the landowner's property incident to an easement. A subsequent purchaser of the property complained that some tree stumps had not been removed, and the Army proceeded to contract to have the work done. The landowner then submitted a claim for certain costs he had incurred incident to some preliminary work he had done prior to the Army's contract. Since the landowner's actions had been purely voluntary and had been taken without the knowledge or consent of the government, 31 U.S.C. § 1342 prohibited payment.

In 7 Comp. Gen. 167 (1927), a customs official had stored, in his own private boathouse, a boat which had been seized for smuggling whiskey. The customs official later filed a claim for storage charges. Noting that "the United States did not expressly or impliedly request the use of the premises and therefore did not by implication promise to pay therefor," GAO concluded that the storage had been purely a voluntary service, payment for which would violate 31 U.S.C. § 1342.

As if to prove the proverb that there is nothing new under the sun (Ecclesiastes 1:9), GAO considered another storage case over 50 years later, B-194294, July 12, 1979. There, an Agriculture Department employee had an accident while driving a government-owned vehicle assigned to him for his work. A Department official ordered the damaged vehicle towed to the employee's driveway, to be held there until it could be sold. Since the government did have a role in the employee's assumption of responsibility for the wreck, GAO found no violation of 31 U.S.C. § 1342 and allowed the employee's claim for reasonable storage charges on a quantum meruit basis.

Section 1342 covers any type of service which has the effect of creating a legal or moral obligation to pay the person rendering the service. Naturally, this includes government contractors. The prohibition includes arrangements in which government contracting officers solicit or permit—tacitly or otherwise—a contractor to continue performance on a "temporarily unfunded" basis while the agency, which has exhausted its appropriations and can't pay the contractor immediately, seeks additional appropriations. This was one of the options considered in 55 Comp. Gen. 768 (1976), discussed previously in connection with 31 U.S.C. § 1341(a). The Army proposed a contract modification which would explicitly recognize the

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government's obligation to pay for any work performed under the contract, possibly including reasonable interest, subject to subsequent availability of funds. The government would use its best efforts to obtain a deficiency appropriation. Certificates to this effect would be issued to the contractor, including a statement that any additional work performed would be done at the contractor's own risk. In return, the contractor would be asked to defer any action for breach of contract.

GAO found this proposal "of dubious validity at best." Although the certificate given to the contractor would say that continued performance was at the contractor's own risk, it was clear that both parties expected the contract to continue. The government expected to accept the benefits of the contractor's performance and the contractor expected to be paid—eventually—for it. This is certainly not an example of a clear written understanding that work for the government is to be performed gratuitously. Also, the proposal to pay interest was improper as it would compound the Antideficiency Act violation. Although 55 Comp. Gen. 768 does not specifically discuss 31 U.S.C. § 1342, the relationship should be apparent.

d. Exceptions

Two kinds of exceptions to 31 U.S.C. § 1342 have already been discussed—where acceptance of services without compensation is specifically authorized by law, and where the government and the volunteer have a written agreement that the services are to be rendered gratuitously with no expectation of future payment.

There is a third exception, written into the statute itself: "emergencies involving the safety of human life or the protection of property." As can be seen from the cases discussed, with very few exceptions, GAO has not been called upon to construe the scope of the safety of human life or protection of property exceptions in recent decades. However, the Attorney General in 1981 considered the exceptions in the context of funding gaps, and articulated a somewhat broader standard than that applied in the early GAO decisions. The opinion, published at 5 Op. Off. Legal Counsel 1 (1981), and a 1990 amendment to 31 U.S.C. § 1342 designed to retrench somewhat from that broader view, are discussed in more detail later under the Funding Gaps heading.

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(1) Safety of human life

The services provided to protect human life must have been rendered in a true emergency situation. What constitutes an emergency is discussed in several decisions.

In 12 Comp. Dec. 155 (1905), a municipal health officer disinfected several government buildings to prevent the further spread of diphtheria. Several cases of diphtheria had already occurred at the government compound, including four deaths. The Comptroller of the Treasury found that the services had been rendered in an emergency involving the loss of human life, and held accordingly that the doctor could be reimbursed for the cost of materials used and the fair value of his services.

In another case, the S.S. Rexmore, a British vessel, deviated from its course to London to answer a call for help from an Army transport ship carrying over 1,000 troops. The ship had sprung a leak and appeared to be in danger of sinking. The Comptroller General allowed a claim for the vessel's actual operating costs plus lost profits attributable to the services performed. The Rexmore had rendered a tangible service to save the lives of the people aboard the Army transport, as well as the transport vessel itself. 2 Comp. Gen. 799 (1923).

On the other hand, GAO denied payment to a man who was boating in the Florida Keys and saw a Navy seaplane make a forced landing. He offered to tow the aircraft over two miles to the nearest island, and did so. His claim for expenses was denied. The aircraft had landed intact and the pilot was in no immediate danger. Rendering service to overcome mere inconvenience or even a potential future emergency is not enough to overcome the statutory prohibition. 10 Comp. Gen. 248 (1930).

(2) Protection of property

The main thing to remember here is that the property must be either government-owned property or property for which the government has some responsibility. The standard was established by the Comptroller of the Treasury in 9 Comp. Dec. 182, 185 (1902) as follows:

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"I think it is clear that the statute does not contemplate property in which the Government has no immediate interest or concern; but I do not think it was intended to apply exclusively to property owned by the Government. The term 'property' is used in the statute without any qualifying words, but it is used in connection with the rendition of services for the Government. The implication is, therefore, clear that the property in contemplation is property in which the Government has an immediate interest or in connection with which it has some duty to perform."

In the cited decision, an individual had gathered up mail scattered in a train wreck and delivered it to a nearby town. The government did not "own" the mail but had a responsibility to deliver it. Therefore, the services came within the statutory exception and the individual could be paid for the value of his services.

Applying the approach of 9 Comp. Dec. 182, the Comptroller General held in B-152554, February 24, 1975, that section 1342 did not permit the Agency for International Development to make expenditures in excess of available funds for disaster relief in foreign countries.

A case clearly within the exception is 3 Comp. Gen. 979 (1924), allowing reimbursement to a municipality which had rendered firefighting assistance to prevent the destruction of federal property where the federal property was not within the territory for which the municipal fire department was responsible.

An exception was also recognized in 53 Comp. Gen. 71 (1973), where a government employee brought in food for other government employees in circumstances which would justify a determination that the expenditure was incidental to the protection of government property in an extreme emergency.

e. Voluntary Creditors

A related line of decisions are the so-called "voluntary creditor" cases. A voluntary creditor is an individual, government or nongovernment, who pays what he or she perceives to be a government obligation from personal funds. The rule is that the voluntary creditor cannot be reimbursed, although there are significant exceptions. For the most part, the decisions have not related the voluntary creditor prohibition to the Antideficiency Act, with the exception of one very early case (17 Comp. Dec. 353 (1910)) and two more recent ones (53 Comp. Gen. 71 (1973) and 42 Comp. Gen. 149 (1962)). The voluntary creditor cases are discussed in detail in Chapter 12.

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4. Apportionment of Appropriations

a. Statutory Requirement for Apportionment

As a general proposition, an agency does not have the full amount of its appropriations available to it at the beginning of the fiscal year. This is because of what, prior to the 1982 recodification of Title 31, was subsection (c) of the Antideficiency Act and is now 31 U.S.C. § 1512. Subsection (a) of section 1512 establishes the basic requirement:

"(a) Except as provided in this subchapter, an appropriation available for obligation for a definite period shall be apportioned to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period. An appropriation for an indefinite period and authority to make obligations by contract before appropriations shall be apportioned to achieve the most effective and economical use. An apportionment may be reapportioned under this section."

Although apportionment was first required legislatively in 1905 (33 Stat. 1257), the current form of the statute derives from a revision enacted in 1950 as section 1211 of the General Appropriation Act, 1951. The 1950 revision was part of an overall effort by Congress to amplify and enforce the basic restrictions against incurring deficiencies in 31 U.S.C. § 1341.

Section 1512(a) requires that all appropriations be administratively apportioned so as to ensure their obligation and expenditure at a controlled rate which will prevent deficiencies from arising before the end of a fiscal year. Although section 1512 does not tell you who is to make the apportionment, section 1513, discussed later, specifies the President as the apportioning official for most executive branch agencies. The function was delegated to the Director of the Bureau of the Budget in 1933,[47] and now reposes in the successor to that office, the Director, Office of Management and Budget (OMB).

The term "apportionment" may be defined as—

"A distribution made by the Office of Management and Budget of amounts available for obligation . . . in an appropriation or fund account. Apportionments divide amounts available for obligation by specific time periods (usually quarters), activities,

[47]Executive Order No. 6166, § 16 (June 10, 1933).

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projects, objects, or a combination thereof. The amounts so apportioned limit the amount of obligations that may be incurred."[48]

Apportionment is required not only to prevent the need for deficiency or supplemental appropriations, but also to insure that there is no drastic curtailment of the activity for which the appropriation is made. 36 Comp. Gen. 699 (1957). See also 38 Comp. Gen. 501 (1959). In other words, the apportionment requirement is designed to prevent an agency from spending its entire appropriation before the end of the fiscal year and then putting the Congress in a position in which it must either grant an additional appropriation or allow the entire activity to come to a halt.

In 36 Comp. Gen. 699 (1957), the Director of OMB reapportioned Post Office funds in such a way that the fourth quarter funds were substantially less than those for the third quarter. The Comptroller General stated:

"A drastic curtailment toward the close of a fiscal year of operations carried on under a fiscal year appropriation is a prima facie indication of a failure to so apportion an appropriation 'as to prevent obligation or expenditure thereof in a manner which would indicate a necessity for deficiency or supplemental appropriations for such period.' In our view, this is the very situation the amendment of the law in 1950 was intended to remedy." 36 Comp. Gen. at 703.

Therefore, the very fact that a deficiency or supplemental appropriation is necessary or that services in the last quarter must be drastically cut suggests that the apportioning authority has violated 31 U.S.C. § 1512(a).

A more recent case involved the Department of Agriculture's Food Stamp Program. The program was subject to certain spending ceilings which, it seemed certain, the Department was going to exceed if it continued its present rate of expenditures. The Department feared that, if it was bound by a formula in a different section of its authorizing act to pay the mandated amount to each eligible recipient, it would have to stop the whole program when the funds were exhausted. Based on both the Antideficiency Act and the program legislation, GAO concluded that there had to be an immediate pro rata reduction for all participants. Discontinuance of the program when

[48]GAO, A Glossary of Terms Used in the Federal Budget Process, PAD-81-27, at 34 (1981). See also OMB Circular No. A-34, § 21.1; B-167034, September 1, 1976.

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the funds ran out would violate the purpose of the apportionment requirement. A-51604, March 28, 1979.

This is not to say that every sub-activity or project must be carried out for the full fiscal year, on a reduced basis, if necessary. Section 1512(a) applies to amounts made available in an appropriation or fund. Where, for example, the Veterans Administration nursing home program was funded from moneys made available in a general, lump-sum VA medical care appropriation, the agency was free to discontinue the nursing home program and reprogram the balance of its funds to other programs also funded under that heading. B-167656, June 18, 1971. (It would be different if the nursing home program had received a line-item appropriation.)

The requirement to apportion applies not only to "one year" appropriations and other appropriations limited to a fixed period of time, but also to "no-year" money and even to contract authority (authority to contract in advance of appropriations). 31 U.S.C. §§ 1511(a), 1512(a). In the case of indefinite appropriations and contract authority, the requirement states only that the apportionment is to be made in such a way as "to achieve the most effective and economical use" of the budget authority. Id. § 1512(a).

Prior to the 1982 recodification of Title 31, the apportionment requirement applied explicitly to government corporations which are instrumentalities of the United States.[49] While the applicability of the requirement has not changed, the recodification dropped the explicit language, viewing it as covered by the broad definition of "executive agency" in 31 U.S.C. § 102.[50] The authority of some government corporations to determine the necessity of their expenditures and the manner in which they shall be incurred is not sufficient to exempt a corporation from the apportionment requirement. 43 Comp. Gen. 759 (1964).

b. Establishing Reserves

Section 1512(c) of 31 U.S.C. provides as follows:

"(c)(1) In apportioning or reapportioning an appropriation, a reserve may be established only–

[49]31 U.S.C. § 665(d)(2) (1976 ed.).

[50]See codification note following 31 U.S.C. § 1511.

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"(A) to provide for contingencies;

"(B) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or

"(C) as specifically provided by law.

"(2) A reserve established under this subsection may be changed as necessary to carry out the scope and objectives of the appropriation concerned. When an official designated in section 1513 of this title to make apportionments decides that an amount reserved will not be required to carry out the objectives and scope of the appropriation concerned, the official shall recommend the rescission of the amount in the way provided in chapter 11 of this title for appropriation requests. Reserves established under this section shall be reported to Congress as provided in the Impoundment Control Act of 1974 (2 U.S.C. 681 et seq.)."

Section 1512(c) seeks to limit the circumstances in which the full appropriation is not apportioned or utilized and a reserve fund is established. Under this provision, the apportioning official is authorized to establish reserves only to provide for contingencies or to effect savings, unless the reserve is specifically authorized by statute.

At one time, this section was a battleground between the executive and legislative branches over which had ultimate control over government program and fiscal spending policy. The executive branch had relied on this portion of the Antideficiency Act to impound funds for general fiscal or economic policy reasons such as containment of federal spending and executive judgment of the relative merits, effectiveness, and desirability of competing federal programs. See 54 Comp. Gen. 453, 458 (1974); B-135564, July 26, 1973.

The reason for this was that prior to 1974, the predecessor of 31 U.S.C. § 1512(c) contained rather expansive language to the effect that a reserve fund could be established pursuant to "other developments subsequent to the date on which [the] appropriation was made available." 31 U.S.C. § 665(c)(2) (1970 ed.). Despite this expansive language, the Comptroller General's position had been that the authority to establish reserves under the Antideficiency Act was limited to providing for contingencies or effecting savings which are in furtherance of, or at least consistent with, the purposes of an appropriation. B-130515, July 10, 1973. The law was not regarded as authorizing reserve funds (i.e., impoundments) based upon general

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economic, fiscal, or policy considerations which are extraneous to the individual appropriation or are in derogation of the appropriation's purpose. B-125187, September 11, 1973; B-130515, July 10, 1973. See also State Highway Commission of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973), which held that the right to reserve funds in order to "effect savings" or due to "subsequent events," etc., must be considered in the context of the applicable appropriation statute. Id. at 1118. If the apportioning authority goes beyond the authority delegated, section 1512(c) is violated.

The Impoundment Control Act of 1974 amended section 1512(c) by eliminating the "other developments" clause and by prohibiting the establishment of appropriation reserves except as provided under the Antideficiency Act for contingencies or savings, or as provided in other specific statutory authority. The intent was to preclude reliance on section 1512(c) as authority for "policy impoundments." City of New Haven v. United States, 809 F.2d 900, 906 (D.C. Cir. 1987); 54 Comp. Gen. 453 (1974); B-148898, August 28, 1974.

Examples of permissible reserves were discussed in 51 Comp. Gen. 598 (1972) and 51 Comp. Gen. 251 (1971). The first case concerned the provisions of a long-term charter of several tankers for the Navy. The contract contained options to renew the charter for periods of 15 years. In the event that the Navy declined to renew the charter short of a full 15-year period, the vessels were to be sold by a Board of Trustees, acting for the owners and bondholders. Any shortfall in the proceeds over the termination value was to be unconditionally guaranteed by the Navy. GAO held that it would not violate the Antideficiency Act to cover this contingent liability by setting up a reserve. 51 Comp. Gen. 598 (1972). In 51 Comp. Gen. 251 (1971), GAO said that it was permissible to provide in regulations for a clause to be inserted in future contracts for payment of interest on delayed payments of a contractor's claim. Reserving sufficient funds from the appropriation used to support the contract to cover these potential interest costs would protect against potential Antideficiency Act violations.

In 1981, the Community Services Administration established a reserve as a cushion against Antideficiency Act violations while the agency was terminating its operations. Grantees argued that the reserve improperly reduced amounts available for discretionary grants. In Rogers v. United States, 14 Cl. Ct. 39, 46–47 (1987), the court held

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that a reasonable reserve for contingencies was properly within the agency's discretion.

c. Method of Apportionment

The remaining portions of 31 U.S.C. § 1512 are subsections (b) and (d), set forth below:

"(b)(1) An appropriation subject to apportionment is apportioned by—

"(A) months, calendar quarters, operating seasons, or other time periods;

"(B) activities, functions, projects, or objects; or

"(C) a combination of the ways referred to in clauses (A) and (B) of this paragraph."

"(d) An apportionment or reapportionment shall be reviewed at least 4 times a year by the official designated in section 1513 of this title to make apportionments."

These two provisions are largely technical, implementing the basic apportionment requirement of 31 U.S.C. § 1512(a).

Section 1512(b) makes it clear that apportionments need not be made strictly on a monthly, quarterly, or other fixed time basis, nor must they be for equal amounts in each time period. The apportioning officer is free to take into account the "activities, functions, projects, or objects" of the program being funded and the usual pattern of spending for such programs in deciding how to apportion the funds. Absent some statutory provision to the contrary, OMB's determination is controlling. Thus, for example, in Maryland Department of Human Resources v. Department of Health and Human Services, 854 F.2d 40 (4th Cir. 1988), the court upheld OMB's quarterly apportionment of social services block grant funds, rejecting the state's contention that it should receive its entire annual allotment at the beginning of the fiscal year.

Section 1512(d) requires a minimum of four reviews each year to enable the apportioning officer to make reapportionments or other adjustments as necessary.

d. Control of Apportionments

The former subsection (d) of the Antideficiency Act, now 31 U.S.C. § 1513, deals with the mechanisms for making the apportionments or

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reapportionments of appropriations which are required by section 1512.

Section 1513(a) applies to appropriations of the legislative and judicial branches of the federal government, as well as appropriations of the International Trade Commission and the District of Columbia government.[51] The authority to apportion is given to the "official having administrative control" of the appropriation. Apportionment must be made no later than 30 days before the start of the fiscal year for which the appropriation is made, or within 30 days after the enactment of the appropriation, whichever is later. The apportionment must be in writing.

Section 1513(b) deals with apportionments for the executive branch. The President is designated as the apportioning authority. As we have seen, the function has been delegated to the Director, OMB. Time limits are established, first for submission of information by the various agency heads to OMB to enable it to make reasonable apportionments. Although primary responsibility for a violation of section 1512 lies with the Director of OMB, the head of the agency concerned may also be found responsible if he or she fails to send the Director accurate information on which to base an apportionment. Secondly, the Director of OMB has up to 20 days before the start of the fiscal year or 30 days after enactment of the appropriation act, whichever is later, to make the actual apportionment and notify the agency of the action taken. Again, the apportionments must be in writing.

In B-163628, January 4, 1974, GAO responded to a question from the chairman of a congressional committee about the power of OMB to apportion the funds of independent regulatory agencies, such as the Securities and Exchange Commission. The Comptroller General agreed with the chairman that independent agencies should generally be free from executive control or interference. The response then stated:

[51]A permanent provision of law included in the 1988 District of Columbia appropriation act states that appropriations for the D.C. government "shall not be subject to apportionment except to the extent specifically provided by statute." Pub. L. No. 100-202, § 135, 101 Stat. 1329, 1329-102 (1987). Thus, the applicability of 31 U.S.C. § 1513(a) to the D.C. government will be extremely limited.

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"[T]he apportionment power may not lawfully be used as a form of executive control or influence over agency functions. Rather, it may only be exercised by OMB in the manner and for the purposes prescribed in 31 U.S.C. § [1512]—i.e., to prevent obligation or expenditure in a manner which would give rise to a need for deficiency or supplemental appropriations, to achieve the most effective and economical use of appropriations and to establish reserves either to provide for contingencies or to effect savings which are in furtherance of or at least consistent with, the purposes of an appropriation.

"As thus limited, the apportionment process serves a necessary purpose—the promotion of economy and efficiency in the use of appropriations. . . .

. . . .

"[S]ince a useful purpose is served by OMB's proper exercise of the apportionment power, we do not believe that the potential for abuse of the power is sufficient to justify removing it from OMB."

Thus, the appropriations of independent regulatory agencies like SEC are subject to apportionment by OMB, but OMB may not lawfully use its apportionment power to compromise the independence of those agencies. To use the example given in B-163628, if OMB tried to use apportionment to prevent the SEC from hiring personnel authorized by Congress, that would be an abuse of its apportionment powers. But this possibility does not justify denying OMB's basic apportionment authority altogether.

The Impoundment Control Act may permit OMB, in effect, to delay the apportionment deadlines prescribed in 31 U.S.C. § 1513(b). For example, when the President sends a rescission message to Congress, the budget authority proposed to be rescinded may be withheld for up to 45 days pending congressional action on a rescission bill. 2 U.S.C. §§ 682(3), 683(b). In B-115398.33, August 12, 1976, GAO responded to a congressional request to review a situation in which an apportionment had been withheld for more than 30 days after enactment of the appropriation act. The President had planned to submit a rescission message for some of the funds but was late in drafting and transmitting his message. If the full amount contained in the rescission message could be withheld for the entire 45-day period, and Congress ultimately disallowed the full rescission, release of the funds for obligation would occur only a few days before the budget authority expired. The Comptroller General suggested that, where Congress has completed action on a rescission bill rescinding only a part of the amount proposed, OMB should immediately apportion the

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amounts not included in the rescission bill without awaiting the expiration of the 45-day period. See also B-115398.33, March 5, 1976.

e. Apportionments Requiring Deficiency Estimate

In our discussion of the basic requirement for apportionment, we quoted 31 U.S.C. § 1512(a) to the effect that appropriations must be apportioned "to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation." Thus, GAO has held that the Antideficiency Act requires that fixed-term appropriations be obligated and expended in such a way as to avoid situations in which Congress must either make a deficiency or supplemental appropriation or face exhaustion of the appropriation and the consequent drastic curtailment of the activity the appropriation was intended to fund. 64 Comp. Gen. 728, 735 (1985); 36 Comp. Gen. 699, 703 (1957).

The requirement that appropriations be apportioned so as to avoid the need for deficiency or supplemental appropriations is fleshed out in 31 U.S.C. § 1515 (formerly subsection (e) of the Antideficiency Act):

"(a) An appropriation required to be apportioned under section 1512 of this title may be apportioned on a basis that indicates the need for a deficiency or supplemental appropriation to the extent necessary to permit payment of such pay increases as may be granted pursuant to law to civilian officers and employees (including prevailing rate employees whose pay is fixed and adjusted under subchapter IV of chapter 53 of title 5) and to retired and active military personnel.

"(b)(1) Except as provided in subsection (a) of this section, an official may make, and the head of an executive agency may request, an apportionment under section 1512 of this title that would indicate a necessity for a deficiency or supplemental appropriation only when the official or agency head decides that the action is required because of—

"(A) a law enacted after submission to Congress of the estimates for an appropriation that requires an expenditure beyond administrative control; or

"(B) an emergency involving the safety of human life, the protection of property, or the immediate welfare of individuals when an appropriation that would allow the United States Government to pay, or contribute to, amounts required to be paid to individuals in specific amounts fixed by law or under formulas prescribed by law, is insufficient.

"(2) If an official making an apportionment decides that an apportionment would indicate a necessity for a deficiency or supplemental appropriation, the official shall

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submit immediately a detailed report of the facts to Congress. The report shall be referred to in submitting a proposed deficiency or supplemental appropriation."

Section 1515 provides certain exceptions to the requirement of section 1512(a) that apportionments be made in such manner as to assure that the funds will last throughout the fiscal year and there will be no necessity for a deficiency appropriation. Under subsection 1515(a), deficiency apportionments are permissible if necessary to pay salary increases granted pursuant to law to federal civilian and military personnel. Under subsection 1515(b), apportionments can be made in an unbalanced manner (e.g., an entire appropriation could be obligated by the end of the second quarter) if the apportioning officer determines that (1) a law enacted subsequent to the transmission of budget estimates for the appropriation requires expenditures beyond administrative control, or (2) there is an emergency involving safety of human life, protection of property, or immediate welfare of individuals in cases where an appropriation for mandatory payments to those individuals is insufficient.

Prior to 1957, what is now subsection 1515(b) prohibited only the making of an apportionment indicating the need for a deficiency or supplemental appropriation, so the only person who could violate this subsection was the Director of OMB. An amendment in 1957 made it equally a violation for an agency to request such an apportionment. See 38 Comp. Gen. 501 (1959).

The exception for expenditures "beyond administrative control" required by a statute enacted after submission of the budget estimate may be illustrated by statutory increases in compensation, although many of the cases would now be covered by subsection (a). We noted several of the cases in our consideration of when an obligation or expenditure is "authorized by law" for purposes of 31 U.S.C. § 1341. Those cases established the rule that a mandatory increase is regarded as "authorized by law" so as to permit overobligation, whereas a discretionary increase is not. The same rule applies in determining when an expenditure is "beyond administrative control" for purposes of 31 U.S.C. § 1515(b). Thus, statutory pay increases for Wage Board employees granted pursuant to a wage survey meet the test. 39 Comp.

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Gen. 422 (1959); 38 Comp. Gen. 538, 542 (1959). See also 45 Comp. Gen. 584, 587 (1966) (severance pay in fiscal year 1966).[52] Discretionary increases, just as they are not "authorized by law" for purposes of 31 U.S.C. § 1341, are not "beyond administrative control" for purposes of section 1515(b). 44 Comp. Gen. 89 (1964) (salary increases to Central Intelligence Agency employees); 31 Comp. Gen. 238 (1951) (pension increases to retired District of Columbia police and firefighters).

The Wage Board exception was separately codified in 1957 and now appears at 31 U.S.C. § 1515(a), quoted above. Subsection 1515(a) reached its present form in 1987 when Congress expanded it to include pay increases granted pursuant to law to non-Wage Board civilian officers and employees and to retired and active military personnel.[53]

The exceptions in subsection 1515(b)(1)(B) do not appear to have been discussed in any GAO decisions as of the date of this publication, although a 1989 internal memorandum suggested that the exception would apply to Forest Service appropriations for fighting forest fires. B-230117-O.M., February 8, 1989. The exceptions for safety of human life and protection of property appear to be patterned after the identical exceptions under 31 U.S.C. § 1342, so the case law under that section should be equally relevant for construing the scope of the exceptions under section 1515(b).

It is important to note that the exceptions in 31 U.S.C. § 1515(b) are exceptions only to the prohibition against making or requesting apportionments requiring deficiency estimates; they are not exceptions to the basic prohibitions in 31 U.S.C. § 1341 against obligating or spending in excess or advance of appropriations. The point was discussed at some length in B-167034, September 1, 1976. Legislation had been proposed in the Senate to repeal 41 U.S.C. § 11, which prohibits the making of a contract, not otherwise authorized by law, unless there is an appropriation "adequate to its fulfillment," except in the case of contracts made by a military department for "clothing, subsistence, forage, fuel, quarters, transportation, or

[52]The law mandating payment of severance pay was enacted after the start of FY 1966, which is why the expenditures in that case would qualify under 31 U.S.C. § 1515(b).

[53]Pub. L. No. 100-202, § 105, 101 Stat. 1329, 1329-433 (1987) (1988 continuing resolution).

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medical and hospital supplies." It had been suggested that 41 U.S.C. § 11 was unnecessary in light of 31 U.S.C. § 1515(b). The question was whether, if 41 U.S.C. § 11 were repealed, the military departments would have essentially the same authority under section 1515(b).

The Defense Department expressed the view that section 1515(b) would not be an adequate substitute for the 41 U.S.C. § 11 exception which allows the incurring of obligations for limited purposes even though the applicable appropriation is insufficient to cover the expenses at the time the commitment is made. Defense commented as follows:

"The authority to apportion funds on a deficiency basis in [31 U.S.C. § 1515(b)] does not, as alleged, provide authority to incur a deficiency. It merely authorizes obligating funds at a deficiency rate under certain circumstances, e.g., a $2,000,000 appropriation can be obligated in its entirety at the end of the third quarter, but it does not provide authority to obligate one dollar more than $2,000,000." Letter from the Deputy Secretary of Defense to the Chairman, House Armed Services Committee, April 2, 1976 (quoted in B-167034, September 1, 1976).

The Comptroller General agreed with the Deputy Secretary, stating:

"[Section 1515(b)] in no way authorizes an agency of the Government actually to incur obligations in excess of the total amount of money appropriated for a period. It only provides an exception to the general apportionment rule set out in [31 U.S.C. § 1512(a)] that an appropriation be allocated so as to insure that it is not exhausted prematurely. [Section 1515(b)] says nothing about increasing the total amount of the appropriation itself or authorizing the incurring of obligations in excess of the total amount appropriated. On the contrary, as noted above, apportionment only involves the subdivision of appropriations already enacted by Congress. It necessarily follows that the sum of the parts, as apportioned, could not exceed the total amount of the appropriations being apportioned.

"Any deficiency that an agency incurs where obligations exceed total amounts appropriated, including a deficiency that arises in a situation where it was determined that one of the exceptions set forth in [section 1515(b)] was applicable, would constitute a violation of 31 U.S.C. § [1341(a)] . . . ." B-167034, September 1, 1976.

f. Exemptions From Apportionment Requirement

A number of exemptions from the apportionment requirement, formerly found in subsection (f) of the Antideficiency Act, are now gathered in 31 U.S.C. § 1516:

"An official designated in section 1513 of this title to make apportionments may exempt from apportionment—

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"(1) a trust fund or working fund if an expenditure from the fund has no significant effect on the financial operations of the United States Government;

"(2) a working capital fund or a revolving fund established for intragovernmental operations;

"(3) receipts from industrial and power operations available under law; and

"(4) appropriations made specifically for–

"(A) interest on, or retirement of, the public debt;

"(B) payment of claims, judgments, refunds, and drawbacks;

"(C) items the President decides are of a confidential nature;

"(D) payment under a law requiring payment of the total amount of the appropriation to a designated payee; and

"(E) grants to the States under the Social Security Act (42 U.S.C. 301 et seq.)."

Section 1516 is largely self-explanatory and the various enumerated exceptions appear to be readily understood. Note that the statute does not make the exemptions mandatory. It merely authorizes them, within the discretion of the apportioning authority (OMB). OMB's implementing instructions, OMB Circular No. A-34, § 41.1, have not adopted all of the exemptions permitted under the statute. In several cases—for example, trust funds and intragovernmental revolving funds—the funds are subject to apportionment unless OMB grants an exemption for a particular account. Id.

In addition, 10 U.S.C. § 2201(a) authorizes the President to exempt appropriations for military functions of the Defense Department from apportionment upon determining "such action to be necessary in the interest of national defense."

Another exemption, this one mandatory, is contained in 31 U.S.C. § 1511(b)(3), for "the Senate, the House of Representatives, a committee of Congress, a member, officer, employee, or office of either House of Congress, or the Office of the Architect of the Capitol or an officer or employee of that Office." Apart from this specific exemption, the remainder of the legislative branch, and the judicial branch, are subject to apportionment. 31 U.S.C. § 1513(a).

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g. Administrative Division of Apportionments

Thus far, we have reviewed the provisions of the Antideficiency Act directed at the appropriation level and the apportionment level. The law also addresses agency subdivisions.

The first provision to note is 31 U.S.C. § 1513(d):

"An appropriation apportioned under this subchapter may be divided and subdivided administratively within the limits of the apportionment."

Thus, administrative subdivisions are expressly authorized. The precise pattern of subdivisions will vary based on the nature and scope of activities funded under the apportionment and, to some extent, agency preference. The levels of subdivision below the apportionment level are, in descending order, allotment, suballotment, and allocation. OMB Circular No. A-34, § 21.1. Additional subdivisions may exist with varying designations such as allowance, operating budget, etc. Id. § 32.2(7). As we will see later in our discussion of 31 U.S.C. § 1517(a), there are definite Antideficiency Act implications flowing from how an agency structures its fund control system.

The next relevant statute is 31 U.S.C. § 1514:[54]

"(a) The official having administrative control of an appropriation available to the legislative branch, the judicial branch, the United States International Trade Commission, or the District of Columbia government, and, subject to the approval of the President, the head of each executive agency (except the Commission) shall prescribe by regulation a system of administrative control not inconsistent with accounting procedures prescribed under law. The system shall be designed to—

"(1) restrict obligations or expenditures from each appropriation to the amount of apportionments or reapportionments of the appropriation; and

"(2) enable the official or the head of the executive agency to fix responsibility for an obligation or expenditure exceeding an apportionment or reapportionment.

"(b) To have a simplified system for administratively dividing appropriations, the head of each executive agency (except the Commission) shall work toward the objective of financing each operating unit, at the highest practical level, from not more than one administrative division for each appropriation affecting the unit."

[54]Prior to the 1982 recodification of Title 31, sections 1513(d) and 1514 had been combined as subsection (g) of the Antideficiency Act.

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Section 1514 is designed to ensure that the agencies in each branch of the government keep their obligations and expenditures within the bounds of each apportionment or reapportionment. The official in each agency who has administrative control of the apportioned funds is required to set up, by regulation, a system of administrative controls to implement this objective. The system must be consistent with any accounting procedures prescribed by or pursuant to law, and must be designed to (1) prevent obligations and expenditures in excess of apportionments or reapportionments, and (2) fix responsibility for any obligation or expenditure in excess of an apportionment or reapportionment. Agency fund control regulations in the executive branch must be approved by OMB. See OMB Circular No. A-34, §§ 31.3 and 31.5.

Subsection (b) of 31 U.S.C. § 1514 was added in 1956 (70 Stat. 783) and was intended to simplify agency allotment systems. Prior to 1956, it was not uncommon for agencies to divide and subdivide their apportionments into numerous "pockets" of obligational authority called "allowances." Obligating or spending more than the amount of each allowance was a violation of the Antideficiency Act as it then existed. The Second Hoover Commission (Commission on Organization of the Executive Branch of the Government) had recommended simplification in 1955. The Senate and House Committees on Government Operations agreed. Both committees reported as follows:

"The making of numerous allotments which are further divided and suballotted to lower levels leads to much confusion and inflexibility in the financial control of appropriations or funds as well as numerous minor violations of [the Antideficiency Act]."

S. Rep. No. 2265, 84th Cong., 2d Sess. 9 (1956), reprinted in 1956 U.S. Code Cong. & Admin. News 3794, 3802; H.R. Rep. No. 2734, 84th Cong., 2d Sess. 7 (1956). The result was what is now 31 U.S.C. § 1514(b).[55]

As noted, one of the objectives of 31 U.S.C. § 1514 is to enable the agency head to fix responsibility for obligations or expenditures in excess of apportionments. The statute encourages agencies to fix responsibility at the highest practical level, but does not otherwise

[55]The historical summary in this paragraph is taken largely from 37 Comp. Gen. 220 (1957).

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legality of proposed payments, and are liable for the amount of illegal or improper payments resulting from their certifications.

A great many government officials make official "certifications" of one type or another, but this does not make them "certifying officers" for purposes of accountability and liability. The concepts of accountability and relief discussed in this chapter apply only to "authorized certifying officers" who certify vouchers upon which moneys are to be paid out by disbursing officers in discharging a debt or obligation of the government. 23 Comp. Gen. 953 (1944). This may in appropriate circumstances include the head of a department or agency. 31 U.S.C. § 3325(a)(1); 21 Comp. Gen. 976, 979 (1942); 40 Op. Att'y Gen. 284 (1943). An authorized certifying officer must be so designated in writing. 31 U.S.C. § 3325(a)(1).

Thus, an employee who "certified" overtime assignments in the sense of a timekeeper verifying that employees worked the hours of overtime claimed could not be held liable for resulting overpayments under an accountable officer theory. B-197109, March 24, 1980. Similarly, an official who certifies that long-distance telephone calls are necessary for official business as required by 31 U.S.C. § 1348(b) is not an accountable officer. 65 Comp. Gen. 19, 20–21 (1985). The same approach applies to various post-certification administrative actions, the rule being that once a voucher has been duly certified by an authorized official, subsequent administrative processing does not constitute certification for purposes of 31 U.S.C. § 3528. 55 Comp. Gen. 388, 390 (1975). For example, the Comptroller General has held that 31 U.S.C. § 3528 does not apply to an "approving officer" who approves vouchers after they have been duly certified. 21 Comp. Gen. 841 (1942).

b. Disbursing Officers

A disbursing officer is an officer or employee of a federal department or agency, civilian or military, designated to disburse moneys and render accounts in accordance with laws and regulations governing the disbursement of public funds. The term is essentially self-defining. As one court has stated:

"We do not find the term 'disbursing officer' statutorily defined, probably because it is self-definitive. It can mean nothing except an officer who is authorized to disburse funds of the United States."

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statute applies to legislative branch (and presumably judicial branch) agencies as well as executive branch agencies. 64 Comp. Gen. 152 (1984). The Treasury Department is authorized to issue implementing regulations and may delegate that authority to other agencies. 31 U.S.C. § 3342(d).

Of particular relevance here are 31 U.S.C. §§ 3342(c)(2) and (c)(3):

"(2) The head of an agency having jurisdiction over a disbursing official may offset, within the same fiscal year, a deficiency resulting from a transaction under subsection (a) of this section with a gain from a transaction under subsection (a). A gain in the account of a disbursing official not used to offset deficiencies under subsection (a) shall be deposited in the Treasury as miscellaneous receipts.

"(3) Amounts necessary to adjust for deficiencies in the account of a disbursing official because of transactions under subsection (a) of this section are authorized to be appropriated."

One important application of the offsetting authority of 31 U.S.C. § 3342(c)(2) is losses resulting from certain foreign currency exchange transactions, and cases involving this application are noted later in this chapter. However, nothing in the statute limits it to foreign exchange transactions. The offsetting authority applies by its terms to "a deficiency resulting from a transaction under subsection (a)," and this includes check cashing operations as authorized by subsections (a)(1) and (b).

Decisions rendered shortly after the statute was enacted applied it to uncollectible checks cashed over forged endorsements and explicitly recognized the statute as a form of relief. The first such case was 27 Comp. Gen. 211 (1947), stating at 213:

"Since the cashing of a check is an operation authorized under the act, any loss arising out of such transaction properly may be considered as coming within the purview of the term 'any deficiencies' for which relief is contemplated under the act."

This holding was followed in 27 Comp. Gen. 663 (1948). The original version of 31 U.S.C. § 3342, enacted in 1944 (58 Stat. 921), did not include the offsetting authority. See B-39771, September 26, 1950. It was added in 1953 (67 Stat. 62). Thus, the "relief" referred to in 27 Comp. Gen. 211 and 27 Comp. Gen. 663 was simply the authority to use agency appropriations to adjust the deficiencies. Both cases involved the Army, which at the time received annual appropriations

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for this purpose. The Army was thus in a position to invoke the statute, and the adjustments had the effect of relieving the disbursing officers.

For the next four decades, the principles established by 27 Comp. Gen. 211 saw little use, and check cashing losses during that period were mostly treated as improper payments requiring relief under whatever authorities were available (31 U.S.C. § 3527(c) since 1955). A 1991 decision to the Air Force, 70 Comp. Gen. 616, changed this and, in effect, reverted to the approach of 27 Comp. Gen. 211, now augmented by the offsetting authority. After reviewing precedent and legislative history, the decision concluded that—

"section 3342 may be applied to check cashing losses. Thus, an agency may use section 3342 to offset losses from cashing uncollectible checks with gains from other section 3342(a) activities."

Offsetting under section 3342(c)(2) is done on a fiscal-year basis. An uncollectible check becomes a deficiency not when it is cashed by the disbursing officer, but when it is dishonored and returned to be charged to the disbursing officer's account. If these events occur in different fiscal years, the deficiency is chargeable to the latter year. B-120737, December 27, 1954. If an item is charged as a deficiency in one year and collected in a subsequent year, the collection should be charged to the fiscal year account in which the collection is made regardless of the fiscal year in which the deficiency was charged. Id.

For checks cashed within the authority of 31 U.S.C. § 3342, following the procedures of that statute eliminates the need to pursue relief under 31 U.S.C. § 3527(c). If there is a net gain in an account for a given fiscal year, the net gain is deposited in the Treasury as miscellaneous receipts, and that ends the matter. If there is a net loss, and the agency is able to make an adjustment from an available appropriation, the adjustment clears the disbursing officer's account and similarly ends the matter. A net loss resulting from the application of 31 U.S.C. § 3342(c) is not an Antideficiency Act violation. 61 Comp. Gen. 649 (1982).

It must be emphasized that 31 U.S.C. § 3342 does not make an agency's appropriations available for these adjustments. It merely authorizes appropriations for that purpose. For disbursing officers within the Department of Defense, permanent authority exists to use appropriated funds for "losses in the accounts of disbursing officials

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and agents in accordance with law." 10 U.S.C. § 2781(2). Civilian agencies will need comparable authority which may be in the form of permanent legislation, specific appropriations, or specific language in a lump-sum appropriation (for example, "including adjustments as authorized by 31 U.S.C. § 3342").

The July 1991 decision made two other very important points. First, the offsetting authority of 31 U.S.C. § 3342 is discretionary. An agency is not required to use it, but retains the option of refusing to adjust a disbursing officer's account, in which event the relief avenue of 31 U.S.C. § 3527(c) remains available.

Second, while good faith and due care are prerequisites to relief under 31 U.S.C. § 3527(c), section 3342 contains no comparable requirement. Thus, the use of section 3342 does not require findings of good faith and due care. Decisions stating or implying the contrary, such as 27 Comp. Gen. 211, were modified to that extent. Be that as it may, it is undesirable as a matter of policy to use 31 U.S.C. § 3342 to relieve a disbursing officer for losses attributable to bad faith or lack of due care, and an agency is well within its discretion to decline use of those procedures in such cases.

The discretion to use 31 U.S.C. § 3342 applies only to checks cashed within the scope of the statute. Losses resulting from checks cashed beyond the scope of that authority (i.e., not for an official purpose or for a person not within one of the classes specified in subsection 3342(b)) may not be offset or adjusted under the authority of section 3342, but are improper payments for which administrative relief is available only under 31 U.S.C. § 3527(c). 70 Comp. Gen. 420 (1991); B-127608-O.M., May 28, 1956.

The losses under consideration—uncollectible check losses resulting from check cashing operations—fall into several distinct but related fact patterns. Cases cited below which predate GAO's July 1991 decision are all section 3527(c) relief cases resolved under the principles and standards previously discussed; all could now be resolved under the offset and adjustment authority of 31 U.S.C. § 3342.

1. Uncollectible personal check. Cases in this category tend to involve either of two general situations:

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- Thief steals someone else's personal checks and cashes them in conjunction with stolen or fraudulent identification. B-246418, February 3, 1992; B-240440, March 27, 1991; B-212588, August 14, 1984.
- Thief cashes checks from a fraudulently established checking account in the name of some other real or fictitious person. B-229827, January 14, 1988; B-221415, March 26, 1986; B-220737/B-220981, December 10, 1985.

2. Fraudulent endorsement of government check. In this situation, a thief steals a legitimately issued government check (paycheck, tax refund check, etc.) and cashes it with the aid of stolen or fraudulent identification. E.g., B-227436, July 2, 1987; B-216726, January 9, 1985; and B-214436, April 6, 1984.

3. Fraudulent alteration of amount on government check. If the amount is fraudulently raised by the payee, the liability of the disbursing officer is the difference between the original amount and the fraudulent amount. B-228859, September 11, 1987. If the amount is altered and the check cashed by someone other than the payee, the disbursing officer's liability is the full amount of the payment. B-221144, April 22, 1986.

The opportunity for fraudulent alteration of amounts naturally decreases when the amount is also spelled out in words on the face of the check. 62 Comp. Gen. 476, 481 (1983). However, spelling the amount out in words is not required on government checks, and Treasury checks generally do not do so. See I Treasury Financial Manual § 4-5050.45c (T/L 496). If a disbursing officer is in compliance with the TFM and applicable agency regulations, relief will not be denied solely because the amount is not written out in words. 65 Comp. Gen. 299 (1986); B-209697, November 21, 1983.

4. Postal money order. The authority of 31 U.S.C. § 3342(a)(1) is not limited to checks but applies to "negotiable instruments" generally, which includes postal money orders. E.g., B-217663, July 16, 1985 (fraudulent alteration of amount); B-213874, September 6, 1984 (forged endorsement).

b. Duplicate Check Losses

A duplicate check loss, as we use the term here, is a loss resulting when (1) a payee claims nonreceipt of an original check, (2) the

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government issues a replacement check, and (3) both checks are negotiated.

Replacement checks are issued under the authority of 31 U.S.C. § 3331. If an original check "is lost, stolen, destroyed in any part, or is so defaced that the value to the owner or holder is impaired," the Secretary of the Treasury may issue a replacement check, and may delegate that authority to other agencies. 31 U.S.C. §§ 3331(b), (f). The Secretary has discretionary authority to require an indemnification agreement from the owner or holder prior to issuing the replacement check. Id. § 3331(e).

The current system for issuing replacement checks, developed by the Treasury Department in the mid-1980s, is reflected in 31 C.F.R. Parts 245 and 248, I Treasury Financial Manual Chapter 4-7000, and TFM Bulletin No. 83-28 (August 2, 1983).[33] In brief, upon receipt of a claim for loss or nonreceipt of an original check, the spending agency may certify a new payment. 31 C.F.R. § 245.5. In agencies for which Treasury disburses, an agency certifying officer certifies the replacement check to a Treasury disbursing officer. For agencies which do their own disbursing, most notably the military departments, the "recertification" is an internal procedure based on agency as well as Treasury regulations. The replacement check, which has a different serial number from the original check, is called a "recertified check." Formerly, most replacement checks were "substitute checks" with the same serial number as the original check. With the implementation of the recertification procedure, Treasury announced that substitute checks would generally no longer be available. TFM Bulletin No. 83-28, para. 2.[34]

The Treasury regulations specify the responsibilities of the payee. If the original check shows up before the claimant receives the replacement check, the claimant should notify the agency and follow the agency's instructions. 31 C.F.R. § 245.8(a). If the original check shows up after receipt of the replacement check, the claimant is to return the original to the issuing agency. "Under no circumstances

[33]Prior approaches had produced complex problems and were unsatisfactory. See 62 Comp. Gen. 91 (1982) and GAO report Millions Paid Out in Duplicate and Forged Government Checks, AFMD-81-68 (October 1, 1981).

[34]The regulations now use the term "substitute check" only in 31 C.F.R. Part 248 in the context of "depositary checks," checks drawn on accounts maintained in depositary banks in U.S. territories or foreign countries.

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should both the original and replacement checks be cashed." Id. § 245.8(b).

Payees do not always read Treasury regulations, however, and sometimes cash both checks. Since the agency's obligation is to make payment once, cashing both checks results in an erroneous payment for which some accountable officer is liable unless relieved. In the most common situation, the payee cashes both checks. The first check satisfies the government's original obligation, and issuing the replacement check is an authorized transaction. Thus, the loss occurs "when the second check is wrongfully presented and paid. (The actual sequence in which the payee negotiates the original check and the replacement check is immaterial.)" 62 Comp. Gen. 91, 94 (1982). Depending on the agency and the nature of the error, the proper relief statute will be either 31 U.S.C. § 3528 (certifying officer) or 31 U.S.C. § 3527(c) (disbursing officer). For the military departments, even though they may employ a "recertification" procedure, the proper statute is section 3527(c). 66 Comp. Gen. 192, 194 (1987).

GAO's first relief decision under the recertification procedure was 65 Comp. Gen. 811 (1986). Relief for a duplicate check loss is granted if (1) the accountable officer followed applicable regulations and procedures, (2) there is no indication of bad faith, and (3) the agency has pursued or is pursuing adequate collection action to recover the overpayment. Id. at 812. This is essentially the same standard that had been applied under the former "substitute check" system. E.g., 65 Comp. Gen. 812, 813 (1986); 62 Comp. Gen. 91, 97 (1982). A few more recent cases applying this standard are 70 Comp. Gen. 298 (1991) (Navy); B-237343, January 23, 1991 (Army); and B-232773, January 12, 1989 (Defense Logistics Agency). Of course, relief cannot be granted until a loss actually occurs. 70 Comp. Gen. 9, 12 (1990); 66 Comp. Gen. 192, 194 (1987). The documentation required to support a relief request in a duplicate check case is spelled out in B-221720, May 8, 1986, and includes such things as copies of both checks, the claim of nonreceipt, the agency's stop payment request, Treasury's debit voucher, and documentation of collection efforts.

If the disbursing officer is a supervisor and the duplicate check is actually issued by a subordinate, both are accountable officers for purposes of liability and relief. 62 Comp. Gen. 476, 479–80 (1983); B-213471 et al., January 24, 1984; B-212576 et al., December 2, 1983. The relief standards are those set forth in Section D.3.a of this

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chapter for improper payments generally. As with other relief situations, lack of due care, failure to follow established procedures for example, will not preclude relief if it was not the proximate cause of the loss. 70 Comp. Gen. 298 (1991); B-225932, March 27, 1987.

Treasury regulations encourage, but do not require, the agency to obtain a signed statement from the claimant before issuing or certifying a replacement check. I TFM § 4-7060.20a. If the agency's own regulations require the statement, failure to obtain it will generally be regarded as lack of due care. Relief is granted or denied based on application of the proximate cause concept. 70 Comp. Gen. 298 (1991); B-225932, March 27, 1987. If the statement is obtained but turns out to be a misrepresentation, it is not the accountable officer's fault. B-247062, June 9, 1992. In 70 Comp. Gen. 9 (1990), GAO advised the Navy that it could waive its own requirement for claimant statements where a box containing over 4,600 checks was lost en route to the Philippines, and obtaining individual statements prior to issuing replacement checks would have caused undue delay and hardship.

GAO has expressed concern over issuing replacement checks prematurely, that is, without giving the original check a reasonable time to arrive. While the timing is essentially a matter of agency discretion, it is also a factor which may bear upon the issue of due care. 63 Comp. Gen. 337 (1984). Timing should include risk assessment. Thus, a shorter waiting period may be appropriate where the payee has a continuing relationship with the agency and recoupment by offset is therefore presumably easier. I TFM § 4-7060.20e; B-226116, February 20, 1987. As a general proposition, GAO will not question a waiting period of at least 3 working days. 63 Comp. Gen. 337; I TFM § 4-7060.20a. For checks mailed prior to the actual payment date, the 3-day period may include mailing days. B-230658, June 14, 1988. A waiting period of less than 3 days needs to be specifically justified. See B-215433/B-215515, July 2, 1984. A good example is B-246369, February 3, 1992 (payee who was in Virginia could not have received original check inadvertently mailed to Florida).

It is possible, although the cases are (and should be) rare, for duplicate check losses to occur with checks issued to a bank under direct deposit procedures. Recoupment efforts should be directed against the bank which made the error, leaving it to the bank to then

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recover from the individual depositor as an independent transaction. B-215431/B-215432, January 2, 1985. Related decisions arising from the same set of losses are B-215432.3, August 22, 1991 (finally granting relief upon documentation of collection efforts), and B-215432 et al., July 6, 1984.

An agency's internal controls and procedures form an important line of defense against duplicate check losses. One agency, for example, will issue a recertified check prior to obtaining the status of the original check only if the employee has sufficient funds in his or her retirement account to cover a potential loss, and requires specific clearances upon termination of employment. These procedures, GAO commented, "will better safeguard federal funds." B-232615, September 28, 1988. Agencies should also develop guidelines for dealing with persons requesting several replacement checks within a relatively short time period. Three replacement check requests within an 11-month period, for example, should trigger some concern. B-221398, September 19, 1986. Guidelines may include such things as counselling employees to take advantage of direct deposit procedures and delaying recertification until the status of the original check has been determined. The exact content of any such guidelines is up to the agency. B-217947/B-226384, March 27, 1987; B-220500, September 12, 1986. Indemnification agreements may be desirable in some circumstances, even where not required. See 66 Comp. Gen. 192, 194–95 (1987). Chargeback data received from Treasury should be processed and forwarded to the pertinent finance office as promptly as possible. B-226316 et al., April 9, 1987.

Cases occasionally present variations on the factual theme, but the basic relief approach is the same. E.g., B-226769, July 29, 1987 (agency issued replacement for wrong check); B-195396, October 1, 1979 (agency inadvertently issued two replacement checks).

In our coverage of physical losses, we discussed the dollar amount GAO has established, currently $3,000, below which agencies may grant relief without the need for GAO involvement. In October 1991, GAO started extending the limit selectively to certain categories of improper payments, one of which is duplicate check losses. For duplicate check losses not exceeding $3,000, agencies may grant or deny relief administratively, without the need for GAO concurrence, in accordance with applicable statutes, regulations, and GAO decisions. B-243749, October 22, 1991 (civilian); B-244972, October 22, 1991

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(military).[35] Section C.2 of this chapter contains more detail on how the $3,000 limit operates.

In the cases cited and discussed thus far, it was the payee who negotiated both checks. Where the original check is fraudulently negotiated by someone else, the situation is a bit different. Here, the replacement check rather than the original check satisfies the government's obligation to the payee, and the loss results from negotiating the original check. 66 Comp. Gen. 192, 194 (1987). More precisely, the loss results from payment on the original check since there is nothing improper or incorrect in issuing it. Id. If forgery is established, Treasury will seek to recover from the bank which negotiated the check. See B-232772, October 17, 1989.

c. Errors in Check Issuance Process

The October 1991 decisions just cited authorizing administrative resolution of duplicate check losses not exceeding $3,000 extended the authorization to another category of erroneous payments—those resulting from "mechanical and/or clerical errors during the check issuance process." Thus, agencies may grant or deny relief for losses in this category within the monetary ceiling, as with duplicate check losses, in accordance with applicable statutes, regulations, and GAO decisions. B-243749, October 22, 1991 (civilian); B-244972, October 22, 1991 (military). The relief standards are the same as those previously discussed for other types of improper or erroneous payments.

Cases under this heading may result from any type of check payment—salary payments, payments to contractors, benefit payments, etc.—and include a variety of fact patterns. A few cases involving erroneous tax refund checks will illustrate. In each case, the disbursing officer was a director of one of Treasury's regional financial centers (formerly called disbursing centers), a supervisory official. In B-241098/B-241137, December 27, 1990, the printing system rejected two checks and automatically produced substitutes; the printing operator failed to remove and void the original checks; the originals and substitutes were issued and cashed by the payees. In B-187180, September 21, 1976, a keypunching error transposed two numerals, resulting in issuance of a check for $718 instead of the

[35]The process actually started with a limited authorization for the Army, B-214372, October 9, 1987, revoked by the more inclusive B-244972.

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correct amount of $178. In B-235037, September 18, 1989, an overpayment was made due to an error during the "typing operation and proof reading process." Relief was granted in the first two cases by applying the standards for relieving a supervisor; in the third, it was denied because the request contained neither a description of relevant controls and procedures nor statements by the individuals concerned.

One more tax refund case illustrates the immutable law that anything that can happen will happen. A tax refund check intended for John and Ruth Puncsak of San Francisco was drawn payable to "J. and R. Puncsak," and erroneously sent to Joe and Rose Puncsak, also of San Francisco, who were not entitled to a refund but instead owed money to the Internal Revenue Service. The check was cashed, Joe and Rose claiming that they endorsed the check but then lost it. GAO advised the IRS to raise a charge against the account of the responsible accountable officer. B-112491, April 17, 1953. (Since this case predated the enactment of 31 U.S.C. § 3527(c), there was no way to consider administrative relief.)

As B-241098/B-241137 demonstrates, most mechanical errors are not purely mechanical, but involve human error as well, such as failure to spot the error during a verification process. Also, many of these cases involve the issuance of duplicate checks, the difference between these and the previously discussed duplicate check losses being that these losses do not result from a claim of nonreceipt but from the simultaneous issuance of duplicate checks attributable to government error. Similar cases involving other types of payments are B-239371, June 13, 1990; B-239094, June 13, 1990; B-237082 et al., May 8, 1990; B-235044 et al., March 20, 1990; and B-235036, October 17, 1989. Some factual variations follow:

- Machine that stuffs checks into envelopes was misaligned, obscuring the names and addresses. Treasury decided to shred the original checks and reissue them. One of the originals was inadvertently delivered rather than shredded, causing a duplicate payment. B-245586, November 12, 1991.
- Due to mechanical failure, a check printing machine failed to advance a voucher schedule and a second check was issued to a person with the same name but different middle initial than the correct payee. A clerk failed to notice the error during verification. In view of the volume of work at the disbursing center, the error was viewed as the

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Romney v. United States, 167 F.2d 521, 526 (D.C. Cir. 1948), cert. denied, 334 U.S. 847.

Whether an employee is a "disbursing officer" depends more on the nature of the person's duties than on the title of his or her position. In some cases, the job title will be "disbursing officer." This is the title for the disbursing officers of the Treasury Department who disburse for most civilian agencies under 31 U.S.C. § 3321. For the military departments, which generally do their own disbursing, the title may be "finance and accounting officer." As a general proposition, any employee to whom public funds are entrusted for the purpose of making payments from those funds will be regarded as a disbursing officer. See B-151156, December 30, 1963.

There may be more than one disbursing officer for a given transaction. Military disbursing operations provide an example. The account is often held in the name of a supervisory official such as a Finance and Accounting Officer, with the actual payment made by some subordinate (agent, cashier, deputy, etc.). Both are regarded as disbursing officers for purposes of liability and relief although, as we will discuss later, the standards for relief differ. E.g., 62 Comp. Gen. 476, 479–80 (1983); B-245127, September 18, 1991.

c. Cashiers

A cashier is an officer or employee of a federal department, agency, or corporation who, having been recommended by the head of the activity, has been designated as a cashier by the officer responsible for making disbursements and is thereby authorized to perform limited cash disbursing functions or other cash operations. Treasury Financial Manual (TFM), Vol. I, § 4-3020. Cashiers must be designated in writing. Id. § 4-3025.

With respect to disbursing functions under 31 U.S.C. § 3321, cashiers are divided into five categories: (1) Class A Cashier (may not advance imprest funds to another cashier except an alternate); (2) Class B Cashier (may advance imprest funds to alternate or subcashier); (3) Class D Cashier (receives funds solely for change-making purposes); (4) Subcashier (may receive imprest funds from a Class B or D cashier and is under supervision of same local office); and (5) Alternate to a Cashier or Subcashier (functions during absence of principal cashier but may act simultaneously if required by work load). Fuller descriptions may be found in the Treasury Department's

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type that will occasionally escape even in a well-established and carefully supervised system. B-195106, July 12, 1979.

- Malfunction of feed mechanism on printing machine caused one check to skip, printing the inscription on the next check. The first check was replaced without noticing the duplicate; both checks were issued. Relief was granted on the same basis as in B-195106. B-212431, November 21, 1983.

"Clerical error" means human error without contributing mechanical malfunction. Relief standards remain the same. The cases noted in the following groupings, as with the last three tax refund cases cited above, are intended to illustrate factual variations.

1. Payment of wrong amount. The person preparing a check for a military separation voucher misread a dollar sign as the number "8," and printed a check for $899 instead of the correct amount of $99. B-238863, July 11, 1991. A voucher examiner preparing a partial payment to a contractor erroneously used the total amount due on the contract instead of the amount of the partial payment. B-227410, August 18, 1987.

2. Payment to wrong person. A clerk consolidating two contract payment vouchers in a single check payable to a credit union erroneously listed only one account number, causing an overpayment to one contractor and necessitating a replacement check to the other. B-238802, December 31, 1990. Further examples are B-234197, March 15, 1989 (misreading of documents resulted in payment to subcontractor instead of prime contractor); B-229126, November 3, 1987 (keypunch error generated payment to wrong contractor); B-212336, August 8, 1983 (voluntary child support allotment paid to wrong person due to error in assignment of organization code); B-192109, June 3, 1981 (check issued to wrong person with slightly different name than correct payee); B-194877, July 12, 1979 (amounts of two checks inadvertently switched).

3. Duplicate payment. Treasury Financial Center was issuing replacements for a batch of mutilated checks. One mutilated check became separated from the rest and was erroneously released along with its replacement. A computer operator had failed to verify each replacement check against the corresponding mutilated check. Because controls were in place which would have prevented the error had they been followed, and considering the large volume of work at

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the disbursing center, relief was granted to the disbursing officer, the center's director. (The computer operator is not an accountable officer.) B-231551, September 12, 1988.

Most duplicate payments are recovered, but many either are not or involve the expense of collection action or litigation. Especially in the area of payments to contractors, duplicate payment losses can involve large amounts. GAO surveyed a number of agencies in the mid-1980s, and emphasized the importance of adequate internal controls. E.g., General Services Administration Needs to Improve its Internal Controls to Prevent Duplicate Payments, GAO/AFMD-85-70 (August 20, 1985); Strengthening Internal Controls Would Help the Department of Justice Reduce Duplicate Payments, GAO/AFMD-85-72 (August 20, 1985). A case involving a duplicate payment to a contractor in which relief was granted on the basis of adequate controls is B-241019.2, February 7, 1992.

5. Statute of Limitations

The accounts of accountable officers must be settled by GAO within three years "after the date the Comptroller General receives the account." 31 U.S.C. § 3526(c)(1). Once this 3-year period has expired, no charges may be raised against the account except for losses due to fraud or criminal action on the part of the accountable officer. Id. § 3526(c)(2). Enacted in 1947 (61 Stat. 101), this legislation effectively operates as a limitation on establishing an accountable officer's liability for improper expenditures. As the Defense Department pointed out in recommending the legislation, a time limitation is desirable because passage of time diminishes the chances of recovering from the payee or recipient, leaving the liability solely with the accountable officer. S. Rep. No. 99, 80th Cong., 1st Sess. (1947), reprinted in 1947 U.S. Code Cong. Serv. 1075, 1077–78.

Unlike other statutes of limitations which merely affect the remedy (for example, by barring the commencement of legal proceedings), 31 U.S.C. § 3526(c) completely eliminates the debt. B-181466, November 19, 1974 (non-decision letter). Once an account has been settled, it cannot be reopened (except for fraud or criminality, as noted above), and the authority to grant or deny relief no longer exists. Thus, an accountable officer can escape liability for an improper expenditure if the government does not raise a charge against the account within the 3-year period. E.g., 62 Comp. Gen. 498 (1983); B-223372, December 4, 1989; B-198451.2,

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September 15, 1982. Once an accountable officer's liability has been timely established, section 3526(c) does not limit the government's recovery from that officer. 31 U.S.C. § 3526(c)(4)(B).

The statute of limitations of 31 U.S.C. § 3526(c) applies only to improper payments and not to physical losses or deficiencies. 60 Comp. Gen. 674 (1981). An accountable officer's liability for a physical loss or deficiency is wholly independent of anyone's "raising a charge" against that officer's account.

The original version of 31 U.S.C. § 3526(c) was enacted at a time when all accounts were physically transmitted to GAO for settlement, GAO reviewed every piece of paper, and then issued a certificate of settlement to the accountable officer, "disallowing" credit for questionable items. As a result of changes in audit methods, this is no longer done. Rather, accounts are now retained by the various agencies, and an account is regarded as settled by operation of law at the end of the 3-year period except for unresolved items. GAO Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 8.7.

To reflect these changes in audit procedures, the date a "substantially complete" account is in the hands of the agency and available for audit is now generally considered as the point from which the 3-year period begins to run. E.g., B-181466, July 10, 1974 (non-decision letter). Assuming that supporting documents are available at the end of the time period covered by an accountable officer's statement of accountability, this will usually mean the date on which that statement of accountability is certified. 7 GAO-PPM § 8.7. There are situations, however, in which the 3-year period does not begin to run until some later date. Where a loss is due to fraud, the period begins when the loss is discovered and reported to appropriate agency officials. B-239802, April 3, 1991; B-239122, February 21, 1991. Where an agency has no way of knowing that an improper payment has occurred until it receives a debit voucher from the Treasury Department (duplicate check losses, for example), the 3-year period begins to run when the agency receives the debit voucher. B-226393,

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April 29, 1988. If the date of receipt cannot be determined, the date of the debit voucher is used. Id.[36]

If an irregularity has not been resolved by the agency within two years from the time the statute of limitations begins to run, the irregularity should at that time be reported to GAO. This may be in the form of a relief request or a copy of the agency's irregularity report. This is designed to provide adequate time to consider a relief request or to otherwise prevent expiration of the statute of limitations where necessary. 7 GAO-PPM § 8.4.C. See also, e.g., 62 Comp. Gen. 476, 480 (1983); B-227538, July 8, 1987; B-217741, October 15, 1985. Of course, nothing prevents an agency from seeking relief sooner if appropriate.

As noted above, the 3-year limitation does not apply to losses attributable to fraud or other criminal action by the accountable officer. 31 U.S.C. § 3526(c)(2). It is automatically suspended during war. Id. § 3526(c)(3). And it may be suspended by the Comptroller General with respect to a specific item to get additional evidence or explanation necessary to settle an account. Id. § 3526(g). This may be in the form of a timely Notice of Exception (B-226176, May 26, 1987), or other written notification (B-239592, August 23, 1991; B-239140, July 12, 1991). The mere submission of a relief request within the 3-year period, however, is not enough. 62 Comp. Gen. 91, 98 (1982); B-220689, September 24, 1986.

Finally, 31 U.S.C. § 3526(c) deals solely with the liability of an accountable officer. It has no effect on the liability of the payee or recipient of an improper payment. It does not establish a limitation on recoveries against the improper payee or recipient, nor does it affect the agency's obligation to pursue collection action against the payee or recipient. 31 U.S.C. § 3526(c)(4)(A); Arnold v. United States, 404 F.2d 953 (Ct. Cl. 1968); B-205587, June 1, 1982.

[36]Prior decisions had not been entirely clear on precisely which date to use. E.g., B-220689, September 24, 1986 (date of debit voucher); B-213874, September 6, 1984 (inclusion in statement of accountability). B-226393 established the propositions stated in the text and modified prior decisions accordingly.

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E. Other Relief Statutes

The relief statutes discussed thus far—31 U.S.C. §§ 3527(a), (b), (c), and 3528—are the ones most commonly encountered and will cover the vast majority of cases. Several others exist, however. Our listing here is not intended to be complete.

1. Statutes Requiring Affirmative Action

The statutes in this group are similar to 31 U.S.C. §§ 3527 and 3528 in that they require someone to actually make a relief decision.

a. United States Claims Court

The relief authority of the Claims Court is found in two provisions of law:

"The United States Claims Court shall have jurisdiction to render judgment upon any claim by a disbursing officer of the United States or by his administrator or executor for relief from responsibility for loss, in line of duty, of Government funds, vouchers, records, or other papers in his charge." 28 U.S.C. § 1496.

"Whenever the United States Claims Court finds that any loss by a disbursing officer of the United States was without his fault or negligence, it shall render a judgment setting forth the amount thereof, and the General Accounting Office shall allow the officer such amount as a credit in the settlement of his accounts." 28 U.S.C. § 2512.

These provisions, which originated together in legislation enacted in 1866 (14 Stat. 44), predate all of the other relief statutes and were once the only relief mechanism available apart from private relief legislation. The Supreme Court has termed the Claims Court legislation "a very curious provision" in that it permits a disbursing officer to establish a defense to a claim which "the government can only establish judicially in some other court." United States v. Clark, 96 U.S. (6 Otto) 37, 43 (1877). In effect, it authorizes the Claims Court to render a declaratory (as opposed to money) judgment. Ralcon, Inc. v. United States, 13 Cl. Ct. 294, 300 (1987). Now, in view of the comprehensive scheme of administrative relief Congress has enacted, the Claims Court statute is rarely used.

b. Legislative Branch Agencies

Since 31 U.S.C. § 3728, the primary certifying officer relief statute, does not apply to the legislative branch, Congress has enacted specific statutes for several legislative branch agencies authorizing or requiring the designation of certifying officers, establishing their accountability, and authorizing the Comptroller General to grant relief. Patterned after 31 U.S.C. § 3728, they are: 2 U.S.C. § 142b (Library of Congress); 2 U.S.C. § 142e (Congressional Budget Office);

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2 U.S.C. § 142f (Office of Technology Assessment); and 44 U.S.C. § 308 (Government Printing Office).

c. Savings Bond Redemption Losses

Losses resulting from the redemption of savings bonds are replaced from the fund used to pay claims under the Government Losses in Shipment Act. 31 U.S.C. § 3126(a). The statute further provides that "an officer or employee of the Department of the Treasury is relieved from liability to the United States Government for the loss when the Secretary [of the Treasury] decides that the loss did not result from the fault or negligence of the . . . officer, or employee." Relief is mandatory if the government does not give the officer or employee written notice of his or her liability or potential liability within 10 years from the date of the erroneous payment. Id.

2. Statutes Providing "Automatic" Relief

The statutes in this group either (1) provide that taking a certain authorized action which might otherwise be regarded as creating a loss will not result in accountable officer liability, or (2) authorize the resolution of certain losses in such a manner as not to produce liability.

a. Waiver of Indebtedness

Many statutes authorize the government to waive the recovery of indebtedness resulting from various overpayments or erroneous payments if certain conditions are met. Waiver statutes commonly include a provision to the effect that accountable officers will not be held liable for any amounts waived. For example, the statutes authorizing waiver of overpayments of pay and allowances require that full credit be given in the accounts of accountable officers for any amounts waived under the statute. 5 U.S.C. § 5584(d) (civilian employees); 10 U.S.C. § 2774(d) (military personnel); 32 U.S.C. § 716(d) (National Guard). Once waiver is granted, the payment is deemed valid and there is no need to consider the question of relief. E.g., B-184947, March 21, 1978. This result applies even where relief has been denied under the applicable relief statute. B-177841-O.M., October 23, 1973.

Examples of comparable provisions in other waiver statutes are 5 U.S.C. § 8129(c) (overpayments under Federal Employees Compensation Act), 38 U.S.C. § 5302(d) (overpayment of veterans' benefits) and 42 U.S.C. § 404(c) (Social Security Act).

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b. Compromise of Indebtedness

Under the Federal Claims Collection Act, if a debt claim is compromised in accordance with the statute and implementing regulations, no accountable officer will be held liable for the portion unrecovered by virtue of the compromise. 31 U.S.C. § 3711(d).

c. Foreign Exchange Transactions

Earlier in this chapter we discussed 31 U.S.C. § 3342(c), which authorizes, with respect to activities authorized under section 3342(a), losses to be offset against gains on a fiscal-year basis, and also authorizes appropriations to make adjustments for net losses. Our prior discussion was in the context of check cashing operations. Another important use of 31 U.S.C. § 3342(c) is accounting for certain foreign exchange losses. To implement this authority in the foreign exchange area, the Treasury Department has issued regulations (Treasury Department Circular No. 830 and I Treasury Financial Manual Chapter 4-9000), and has established an account entitled "Gains and Deficiencies on Exchange Transactions" (I TFM § 4-9090.10). As with the check cashing context, the relevant point here is that the use of 31 U.S.C. § 3342(c) accomplishes the necessary account adjustment and obviates the need to seek relief for any accountable officer.

One use of the Gains and Deficiencies account is the adjustment of losses due to exchange rate fluctuations. E.g., 64 Comp. Gen. 152 (1984) (restoration of losses in Library of Congress foreign currency accounts attributable to currency devaluations); 61 Comp. Gen. 649 (1982) (determination of proper exchange rate); B-245760, January 16, 1992 (devaluation of Laotian currency). However, in order to use the Gains and Deficiencies account, losses must result from "disbursing officer transactions" of the type authorized by 31 U.S.C. § 3342(a). 45 Comp. Gen. 493 (1966). In that case, the American Embassy in Cairo had made a payment for certain property in Egyptian pounds. The sales agreement was not executed and the money was refunded. At the time of the refund, the exchange rate had changed and the same amount of Egyptian pounds was worth less in U.S. dollars, resulting in a loss to the account. GAO agreed with the Treasury Department that the loss resulted from an administrative collection and not from a disbursing officer transaction, and should therefore be borne by the relevant program appropriation rather than the Gains and Deficiencies account.

GAO has also considered the use of the Gains and Deficiencies account in a number of cases involving Vietnamese and Cambodian currency

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after the American evacuation from those countries in the mid-1970s. 56 Comp. Gen. 791 (1977), overruled in part by 61 Comp. Gen. 132 (1981) (piaster currency physically abandoned or left in accounts in Vietnam chargeable to Gains and Deficiencies); B-197708, April 8, 1980 (Vietnamese and Cambodian currency received by Treasury from U.S. disbursing officers at exchange rate in effect at time of evacuation subsequently became valueless; loss held to be of the type contemplated by 31 U.S.C. § 3342(c)). However, U.S. currency which was thought to have been burned but which subsequently turned up in the United States had to be treated as a physical loss. 56 Comp. Gen. at 793–96. (Relief was granted for this loss under 31 U.S.C. § 3527(a) in B-209978, July 18, 1983.)

d. Check Forgery Insurance Fund

The Check Forgery Insurance Fund is a revolving fund the purpose of which is to make replacement payments to payees whose Treasury checks have been lost or stolen and cashed over a forged endorsement in limited situations. 31 U.S.C. § 3343. Before the Fund may be used, four conditions must be satisfied: (1) the check is lost or stolen without fault of the payee; (2) the check is subsequently negotiated over the payee's forged endorsement; (3) the payee did not participate in any part of the proceeds of the check; and (4) recovery from the forger or other liable party has been or will be delayed or unsuccessful.[37] Id. § 3343(b). Any recoveries are restored to the Fund. Id. § 3343(d).

A forged endorsement for purposes of the statute has been held to include an unauthorized endorsement purported to be made in a representative capacity. Strann v. United States, 2 Cl. Ct. 782 (1983) (plaintiff's attorney endorsed tax refund check without authority). The third condition, participation in the proceeds, does not require a knowing participation. Koch v. Department of Health, Education, and Welfare, 590 F.2d 260 (8th Cir. 1978); Duden v. United States, 467 F.2d 924 (Ct. Cl. 1972). In Duden, for example, the plaintiff's former husband endorsed her name on a tax refund check and subsequently paid her part of the proceeds for support. She had no way of knowing that the payment came from those proceeds. While the endorsement was held not to be a forgery under the facts involved, the court also

[37]To facilitate prosecution, GAO has advocated the enactment of a federal misdemeanor law for forged Treasury checks. Forgery of U.S. Treasury Checks—Federal Misdemeanor Law Needed, GAO/GGD-84-6 (November 17, 1983).

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noted that the plaintiff's participation in the proceeds would preclude recovery from the Check Forgery Insurance Fund. 467 F.2d at 930.

The bank presenting a check to the Treasury for payment guarantees the genuineness of prior endorsements. 31 C.F.R. § 240.5. Thus, in many cases, the government will be able to recover from the presenting bank. E.g., Olson v. United States, 437 F.2d 981, 986–87 (Ct. Cl. 1971), cert. denied, 404 U.S. 939.

There is no mention of accountable officers in 31 U.S.C. § 3343. However, a payment from the Check Forgery Insurance Fund means that only one payment is charged to the appropriations of the agency incurring the original obligation, with the effect that no accountable officer of that agency incurs any liability. See B-10929, February 1, 1972.

e. Secretary of the Treasury

Enacted in 1947 (61 Stat. 730), 31 U.S.C. § 3333 provides that the Secretary of the Treasury will not be liable for payments made "in due course and without negligence" of checks drawn on the Treasury or a depositary, or other obligations guaranteed or assumed by the United States, and that the Comptroller General "shall credit" the appropriate accounts for such payments. At one time, many duplicate check losses were handled under 31 U.S.C. § 3333. See 62 Comp. Gen. 91 (1982). It was Treasury's practice to accumulate the cases and submit them in groups, e.g., B-115388, October 12, 1976, and B-71585, February 24, 1948, with credit being allowed as a matter of routine. With the development of Treasury's previously discussed recertification procedure, much of the need to invoke 31 U.S.C. § 3333 evaporated. While many of the earlier cases involved an exchange of correspondence between Treasury and GAO, nothing in the statute requires it, especially since GAO no longer maintains accounts and "relief" is mandatory anyway.

f. Other Statutes

There are several other statutes affecting the liability of accountable officers in a variety of contexts. A few of them are:

- 5 U.S.C. § 8321. Accountable officers are not liable for payments in violation of statutes prescribing forfeiture of retirement annuities or retired pay as long as the payments are made "in due course and without fraud, collusion, or gross negligence." The reason for this statute was to avoid having to deny relief under 31 U.S.C. § 3528(b) for

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payments made in good faith solely because the payments are specifically prohibited by law. B-122068, March 18, 1955.

- 31 U.S.C. § 3521(c). Previously noted, this statute protects accountable officers from liability for losses under an authorized statistical sampling procedure.
- 42 U.S.C. § 659(f). Disbursing officers are not liable for payments under garnishment process which is "regular on its face" and in compliance with 42 U.S.C. § 659. See 61 Comp. Gen. 229 (1982).

F. Procedures

1. Reporting of Irregularities

Agencies are required to document each fiscal irregularity that affects the account of an accountable officer, regardless of how it is discovered. The report is retained as part of the account records and a copy provided to the accountable officer and, in certain situations, to GAO. GAO, Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 8.4.B. The contents of the report are set forth in 7 GAO-PPM § 8.12.A, and include such things as a description of how the irregularity occurred and a description of any known procedural deficiencies and corrective action.

The agency's next job is to attempt to resolve the irregularity, most importantly by pursuing collection action against the improper payee or recipient where possible. Recovery of the funds of course ends the matter. If the funds cannot be recovered and the case is one in which the agency may grant relief without GAO involvement, consideration of relief is the next step. If the matter is resolved administratively in either of these ways, the record should be further documented as specified in 7 GAO-PPM § 8.12.B (required administrative determinations, etc.). There is no need to report resolved irregularities to GAO.

If the irregularity cannot be resolved administratively within two years after the date the account is available for audit, and if the loss exceeds the monetary limit established for administrative resolution, the agency should then submit to GAO either a copy of the updated irregularity report or a relief request if appropriate. 7 GAO-PPM § 8.4.C. This 2-year guideline is especially important for improper payments in view of the 3-year statute of limitations of 31 U.S.C. § 3526(c). Thus, below-ceiling losses need not be reported to GAO at

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supplement to the TFM entitled Manual of Procedures and Instructions for Cashiers Operating Under 31 U.S.C. 3321 (July 1985).

Cashiers who are authorized to make payments from funds advanced to them are regarded as a category of disbursing officer. They are personally liable for any loss or shortage of funds in their custody unless relieved by proper authority. Further discussion of the role and responsibilities of cashiers may be found in I TFM Chapter 4-3000 and in the Cashiers Manual.

For the most part, a cashier will be operating with funds advanced by his or her own employing agency. In some situations, however, such as an authorized interagency agreement, the funds may be advanced by another agency. Liability and relief are the same in either case. 65 Comp. Gen. 666, 675–77 (1986).

d. Collecting Officers

Collecting officers are those who receive or collect money for the government, such as Internal Revenue collectors or Customs collectors. Collecting officers are accountable for all money collected. E.g., 59 Comp. Gen. 113, 114 (1979); 3 Comp. Gen. 403 (1924); 1 Comp. Dec. 191 (1895); B-201673 et al., September 23, 1982. For example, an Internal Revenue collector is responsible for the physical safety of taxes collected, must pay over to the government all taxes collected, and must make good any money lost or stolen while in his or her custody unless relieved. E.g., 60 Comp. Gen. 674 (1981). However, under a lockbox arrangement whereby tax payments are mailed to a financial institution at a post office box and then wired to a Treasury account, Internal Revenue Service officials are not accountable for funds in the possession of the financial institution since they do not gain custody or control over those funds. B-223911, February 24, 1987.

The clerk of a bankruptcy court, if one has been appointed under 28 U.S.C. § 156(b), is the accountable officer with respect to fees paid to the court, as prescribed by 28 U.S.C. § 1930, by parties commencing a case under the Bankruptcy Code. 28 U.S.C. § 156(f). This provision, added in 1986, essentially codified the result of two GAO decisions issued the previous year, 64 Comp. Gen. 535 (1985) and B-217236, May 22, 1985.

In some situations, certain types of receipts may be collected by a contractor. Since the contractor is not a government officer or

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all; above-ceiling losses should be reported only if unresolved at the end of the 2-year period. Of course, the agency may request relief sooner if desired.

2. Obtaining Relief

The GAO official designated to exercise the Comptroller General's authority under the various relief statutes is the Associate General Counsel, Accounting and Financial Management Division, Office of General Counsel. Relief requests where GAO action is necessary should be addressed to GAO's Office of General Counsel. The request may be in simple letter format and should include all items specified in 7 GAO-PPM § 8.12.C. These include a copy of the irregularity report, a description of collection actions taken, and any required administrative determinations. Of particular importance is a written statement by the accountable officer or a notation that the accountable officer chooses not to submit a separate statement. Relief will be granted or denied in the form of a letter addressed to the official who submitted the request.

In any case in which GAO has denied relief, the agency, or the accountable officer through appropriate administrative channels, may ask GAO to reconsider. GAO will not hesitate to reverse a decision shown to be wrong. Any request for reconsideration should set forth the errors which the applicant believes have been made, and should include evidence (not mere unsupported allegations) to support the basis for relief, for example, that the original denial failed to consider certain evidence or to give it appropriate weight or relied too heavily on other evidence in the record. Denials of relief are often based not so much on the merits of the case but simply on the failure of the original request to include sufficient information to enable an independent evaluation. Of course, if the agency cannot or is unwilling to make a required statutory determination, there is nothing GAO can do and a request for reconsideration is pointless.

3. Payments of $100 or Less

In B-161457, July 14, 1976, a circular letter to all department and agency heads, disbursing and certifying officers, the Comptroller General advised as follows:

"[I]n lieu of requesting a decision by the Comptroller General for items of $25 or less, disbursing and certifying officers may hereafter rely upon written advice from an agency official designated by the head of each department or agency. A copy of the document containing such advice should be attached to the voucher and the propriety

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of any such payment will be considered conclusive on the General Accounting Office in its settlement of the accounts involved."

The amount has since been raised to $100. 7 GAO-PPM § 8.3. This does not preclude a certifying or disbursing officer from seeking a decision if deemed necessary since the entitlement to advance decisions is statutory, but it does provide a means for simplifying the payment of very small amounts. An accountable officer is not liable for a payment made under this authority even if the payment is subsequently found to be improper or erroneous. The $100 threshold applies equally to questions arising after payment has been made. 61 Comp. Gen. 646, 648 (1982).

4. Relief vs. Grievance Procedures

Federal employees have the right to organize and to bargain collectively with respect to conditions of employment. 5 U.S.C. § 7102. Collective bargaining agreements may include negotiated grievance procedures, which may in turn provide for dispute resolution by binding arbitration. Id. § 7122. The Federal Labor Relations Authority decides questions over an agency's duty to bargain in good faith under 5 U.S.C. § 7105(a)(2)(E). Agencies have a duty to bargain in good faith to the extent not inconsistent with federal law. Id. § 7117. The FLRA also decides appeals alleging that an arbitration award is contrary to federal law. Id. § 7122.

Since the authority to relieve accountable officers is provided by statute, both GAO and the FLRA have determined that negotiated grievance procedures may not be used as a substitute for making the relief decision. B-213804, August 13, 1985; National Treasury Employees Union and Internal Revenue Service, 14 F.L.R.A. 65 (No. 15, 1984). The same result applies to the State Department's separate statutory grievance procedures. 67 Comp. Gen. 457 (1988).

However, a grievance procedure may encompass an agency head's determination that an accountable officer is negligent, as distinguished from the actual relief decision. National Treasury Employees Union and Internal Revenue Service, 33 F.L.R.A. 229 (No. 26, 1988), citing 59 Comp. Gen. 113 (1979) for the proposition that GAO's statutory role does not arise until after the agency head has made the requisite determination.

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G. Collection Action

1. Against Recipient

A person who receives money from the government to which he or she is not entitled, however innocently, has no right to keep it. The recipient is indebted to the government, and the agency making the improper or erroneous payment has a duty to attempt to recover the funds, wholly independent of any question of liability or relief of an accountable officer. The duty to aggressively pursue collection action and the means of doing so are found primarily in the Federal Claims Collection Act, 31 U.S.C. ch. 37, subch. II, and the Federal Claims Collection Standards, 4 C.F.R. Parts 101–105, the details of which are covered elsewhere in this publication. Indeed, many of the statutes we have previously discussed emphasize that the relief process does not diminish this duty. E.g., 31 U.S.C. §§ 3333(b), 3343(e), 3526(c)(4), 3527(d)(2).

Recovery from the improper payee or recipient removes the accountable officer's liability regardless of whether relief has or has not been sought because there is no longer any loss. However, merely "flagging" the retirement account of an employee who has received an overpayment, for possible collection at some unpredictable future time, is not enough as it would delay indefinitely the final settlement of the account. 31 Comp. Gen. 17 (1951).

In a sense, the recipient and the unrelieved accountable officer share an element of joint liability. The occasional decision has referred to this as "joint and several" liability, but it has been pointed out that this is incorrect. E.g., B-228946, January 15, 1988. If two debtors are "jointly and severally" liable, the creditor has the option of collecting the full amount from either, with the debtor who pays then having a right of contribution against the remaining debtor(s). Certainly no one would suggest that someone who has defrauded the government and repays the debt has any right of contribution against the accountable officer. Also, under joint and several liability, the creditor may seek to collect a portion from each debtor. The agency in an accountable officer loss has no such option. B-212602, April 5, 1984. The agency's first obligation is to seek recovery from the recipient. The recipient of an improper payment is liable for the full amount, with any amounts collected used to reduce the accountable officer's liability. Id.; 30 Comp. Gen. 298, 300 (1951). See also 62 Comp. Gen. 476, 478–79 (1983); 54 Comp. Gen. 112, 114 (1974).

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So strong is this duty to seek recovery from the improper payee or recipient that the two primary relief statutes for improper payments explicitly authorize GAO to deny relief if the agency has failed to diligently pursue collection action against the recipient. 31 U.S.C. §§ 3527(c) (disbursing officers), 3528(b)(2) (certifying officers). GAO is extremely reluctant to deny relief solely on the basis of inadequate collection action because often the failure is attributable to the agency rather than the accountable officer. However, it has been done. E.g., B-234815, October 3, 1989 (disbursing officer failed to initiate collection action despite repeated advice from agency counsel).

Adequate collection action means compliance with the Federal Claims Collection Act and Standards. 62 Comp. Gen. 476, 478—79 (1983); B-233870, May 30, 1989. A single demand letter is not enough. 62 Comp. Gen. 91, 98 (1982). Resort to the Federal Claims Collection Act and Standards includes those collection measures, as and to the extent authorized, which result in collection of less than the full amount, for example, compromise. A compromise, including one by the Justice Department, not only resolves the claim against the recipient but operates as well to relieve the accountable officer for any amounts unrecovered because of the compromise. 31 U.S.C. § 3711(d); 65 Comp. Gen. 371 (1986). Whether or not the accountable officer is entitled to relief does not affect the compromise authority. B-154400-O.M., January 29, 1968; B-156846-O.M., October 25, 1967. However, 31 U.S.C. § 3711(d) does not apply to any liability which may fall upon one who is not an accountable officer. B-235048, April 4, 1991. The authority to suspend or terminate collection action is also available, but only in accordance with the claims collection act and regulations. 67 Comp. Gen. 457, 464 (1988); B-212337, February 17, 1984; B-211660, December 15, 1983. Unlike compromise, the termination of collection action against the recipient does not eliminate the accountable officer's liability for any unrecovered balance. 67 Comp. Gen. at 464.

Adequate collection action also requires referral of the claim to the appropriate collection office within the agency without undue delay. GAO has advised the Army, for example, that a delay of more than three months will generally not be regarded as diligent. 65 Comp. Gen. 812 (1986).

While diligent collection action is a necessary element of the relief equation, the fact that collection efforts have been unsuccessful,

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however diligent, does not by itself provide the basis for relieving the accountable officer. B-141838, February 8, 1960; B-114042, October 31, 1956.

2. Against Accountable Officer

If a loss cannot be recovered from the thief or other improper payee or recipient, and relief cannot be granted to the accountable officer, the accountable officer becomes indebted to the government for the amount involved. At that point, it is the agency's responsibility to initiate collection action against the accountable officer in accordance with the Federal Claims Collection Act and Standards. E.g., B-177430, October 30, 1973.

If the accountable officer is still employed by the government, additional statutes come into play. Offset against salary is prescribed by 5 U.S.C. § 5512(a):

"The pay of an individual in arrears to the United States shall be withheld until he has accounted for and paid into the Treasury of the United States all sums for which he is liable."

This statute does not apply to ordinary debtors but only to accountable officers. 37 Comp. Gen. 344 (1957); 23 Comp. Gen. 555 (1944); 26 Op. Att'y Gen. 77 (1906). It has also been held that the provisions of 5 U.S.C. § 5512(a) are mandatory and cannot be waived. 64 Comp. Gen. 606 (1985); 39 Comp. Gen. 203 (1959); 19 Comp. Gen. 312 (1939).

The application of 5 U.S.C. § 5512(a) to certain military accountable officers is limited by 37 U.S.C. § 1007(a), which prohibits withholding the pay "of an officer" under section 5512 unless the indebtedness is "admitted by the officer or shown by the judgment of a court, or upon a special order issued in the discretion of the Secretary concerned." Subsection 1007(a) applies to "officers," meaning commissioned or warrant officers, and not to enlisted personnel or civilian accountable officers. 37 Comp. Gen. 344, 348 (1957). The admission may be oral or written but, if oral, should be clear and unequivocal and preferably witnessed. 42 Comp. Gen. 83 (1962). The discretion to apply 5 U.S.C. § 5512(a) exists only in the absence of an admission or court judgment. Id.

The original version of 5 U.S.C. § 5512(a), enacted in 1828 (4 Stat. 246), provided that "no money shall be paid" to the person in arrears

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until the debt is repaid. Thus, several early decisions exist for the somewhat barbaric proposition that the statute requires complete stoppage of pay. E.g., 9 Comp. Gen. 272 (1930); 7 Comp. Gen. 4 (1927). While these and similar early decisions have not been explicitly overruled, the current view is that the statute will be satisfied by withholding in reasonable installments. 64 Comp. Gen. 606 (1985); B-180957-O.M., September 25, 1979. Collection in installments is also authorized when operating under 37 U.S.C. § 1007(a). 42 Comp. Gen. 83, 85 (1962). For employees no longer on the payroll, offset under 5 U.S.C. § 5512(a) has been held to embrace collection from retirement funds to the extent authorized. Parker v. United States, 187 Ct. Cl. 553, 559 (1969); 39 Comp. Gen. 203, 206 (1959). GAO has also approved "flagging" the retirement account of an accountable officer still on the payroll. B-217114, February 29, 1988.

When applying 5 U.S.C. § 5512(a) or 37 U.S.C. § 1007(a), the procedures to be followed are those prescribed by 4 C.F.R. §§ 102.3 and 102.4 for administrative offsets under 31 U.S.C. § 3716. 64 Comp. Gen. 142 (1984).

If pay is withheld under 5 U.S.C. § 5512(a), the statute provides a means to obtain judicial review of the indebtedness. Under 5 U.S.C. § 5512(b), GAO is required, upon the request of the individual or his or her agent or attorney to immediately report the balance due to the Attorney General, and the Attorney General is required within 60 days to order suit to be commenced against the individual. This provision was part of the original 1828 legislation, several decades prior to either the Tucker Act or the establishment of the Court of Claims, at a time when there was no other means available for the accountable officer to initiate judicial proceedings. It now exists as one way among several. Installment deductions are not required to stop during the litigation; if the accountable officer prevails, amounts collected are refunded. 64 Comp. Gen. 606, 608 (1985). Sample referrals under 5 U.S.C. § 5512(b) are 64 Comp. Gen. 605 (1985); B-217114.7, May 6, 1991; and B-220492, December 10, 1985.

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H. Restitution, Reimbursement, and Restoration

1. Restitution and Reimbursement

In the present context, restitution means the repayment of a loss by an accountable officer from personal funds; reimbursement means the refunding to an accountable officer of amounts previously paid in restitution. Prior to 1955, there was no statutory authority to permit the reimbursement of an accountable officer who had made restitution to the government for a physical loss. Once an accountable officer made restitution (if, for example, the agency required it), the decisions held that there was no longer a deficiency in the account for which relief could be considered. 27 Comp. Gen. 404 (1948); B-101301, July 19, 1951.

Legislation in 1955 (69 Stat. 626) amended what is now 31 U.S.C. § 3527(a) and 31 U.S.C. § 3527(b) to expressly authorize reimbursement of the accountable officer for any amounts paid in restitution, if relief is granted. Accordingly, restitution by the accountable officer in physical loss cases is no longer an impediment to the granting of relief. E.g., B-155149, October 21, 1964; B-126362, February 21, 1956. The 1955 legislation amended only the physical loss relief statutes. There is no comparable reimbursement authority in the improper payment relief statutes, 31 U.S.C. §§ 3527(c) and 3528. B-226393, April 29, 1988; B-223840, November 5, 1986; B-128557, September 21, 1956.

An obvious limitation on the reimbursement authority was illustrated in B-187021, January 19, 1978. An imprest fund cashier sought reimbursement, claiming that she had discovered money missing from her cash box and replaced it from personal funds. However, by virtue of her actions in initially concealing the loss, she was unable to show that the loss had in fact ever occurred. Since the loss could not be established, reimbursement was denied. Thus, an accountable officer should always report a loss before making restitution.

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2. Restoration

Restoration of an account suffering a loss or deficiency—an accounting adjustment to restore the shortage with funds from some other source—is authorized under two provisions of law, 31 U.S.C. §§ 3527(d) and 3530. The Comptroller General is required by 31 U.S.C. § 3530(c) to prescribe implementing regulations. These are found in title 7 of GAO's Policy and Procedures Manual for Guidance of Federal Agencies, § 8.14.

a. Adjustment Incident to Granting of Relief

If relief is granted under either 31 U.S.C. § 3527(a) or 31 U.S.C. § 3527(c), GAO may authorize restoration of the account. Restoration is accomplished by charging either an appropriation specifically available for that purpose or, if there is no such appropriation, the appropriation or fund available for the accountable function. The charge is made to the fiscal year in which the adjustment is made, and not the fiscal year in which the loss occurred. 31 U.S.C. § 3527(d). Subsection (d) applies only to subsections (a) and (c), and not to subsection (b) (military disbursing officers). However, the military departments have separate authority in 10 U.S.C. §§ 2777(b) and 2781. There is no restoration provision in 31 U.S.C. § 3528.

Whenever account adjustment is deemed necessary, the agency should include in its relief request a citation (account symbol) to the appropriation it proposes to charge. 7 GAO-PPM § 8.14.A. In cases where agencies are authorized to grant relief without GAO involvement, they may also exercise the restoration authority of 31 U.S.C. § 3527(d) without GAO involvement. Id. § 8.14.C.

A 1957 decision, 37 Comp. Gen. 224, considered the application of 31 U.S.C. § 3527(d) where one agency is disbursing funds on behalf of other agencies. State Department disbursing officers overseas, acting under delegations from the Treasury Department, were authorized to receive and disburse funds on behalf of other government agencies as well as the State Department. If the services were sufficiently extensive to warrant reimbursement, State charged the "user" agencies. Construing 31 U.S.C. § 3527(d), the Comptroller General held that losses in such a situation for which relief was granted but which could not be related to the functions of any particular agency or agencies should be charged to State Department appropriations because they were the appropriations available for the accountable function. "This phraseology clearly is intended to mean the appropriation of the department or agency to which the expenses of carrying on the particular disbursing function are chargeable." Id. at

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226. Such adjustments could then be considered as part of the costs of the disbursing function for purposes of determining charges assessed against the user agencies and thus distributed to all user agencies in the same manner as other costs. Id. Twenty years later, GAO reached the same result with respect to losses of United States currency incident to the 1975 evacuation from Vietnam. 56 Comp. Gen. 791, 796–97 (1977).

b. Other Situations

If a loss is due to fault or negligence by an accountable officer, and the agency head determines that the loss is uncollectible, the amount of the loss may be restored by a charge to the appropriation or fund available for the expenses of the accountable function. 31 U.S.C. § 3530(a). Uncollectible includes uncollectible from the accountable officer. E.g., B-177910, February 20, 1973. As with adjustments under 31 U.S.C. § 3527(d), section 3530(a) requires the loss to be charged to the appropriation available for the fiscal year in which the adjustment is made (appropriation "currently available"). This authority applies (1) where relief is denied, or (2) where the agency does not seek relief, the uncollectibility determination being required in either event. Representative cases are B-235405, March 19, 1990; B-219246, September 9, 1985; B-188715, January 31, 1978; and B-167827, February 4, 1975.

Assuming the statutory conditions are met, adjustments under 31 U.S.C. § 3530 are made directly by the agency with no need for specific authorization or concurrence from GAO. 7 GAO-PPM § 8.14.D. Restoration under section 3530 is merely an accounting adjustment and does not affect the accountable officer's personal liability. 31 U.S.C. § 3530(b). Thus, although the adjustment is premised on a determination of uncollectibility, collection efforts should resume if warranted by future developments.

The statutes described above, 31 U.S.C. §§ 3527(d) and 3530, will cover most situations in which restoration is needed in that relief is mostly either granted or denied or not sought. There are, however, situations in which neither statute applies. For example, a thief fraudulently obtained over $10,000 from the patients trust account at a VA hospital. He was convicted and ordered to make restitution. The restitution order was lifted 3 years later, but the VA had by then recovered only a small portion of the loss. The VA decided that pursuing the thief any further would be fruitless, and it had previously

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determined that there had been no fault or negligence by the accountable officer.

The VA was faced with a dilemma. Clearly the loss had to be restored since the trust account consisted of money belonging to patients, and just as clearly VA's operating appropriations were the only available source. The problem was how to get there. Since the 3-year statute of limitations on account settlement (31 U.S.C. § 3526(c)) had expired, relief could no longer be considered, so 31 U.S.C. § 3527(d) could not be used. Equally unavailing was 31 U.S.C. § 3530 since the loss did not result from the accountable officer's fault or negligence. However, since the VA had an undisputed obligation as trustee to return the trust funds to their rightful owners upon demand, the loss could be viewed as an expense of managing the trust fund. The solution therefore was to restore funds from the unobligated balance of VA's operating appropriation for the fiscal year in which the loss occurred. 68 Comp. Gen. 600 (1989). The authority to make adjustments from the unexpended balances of prior years' appropriations is now found in 31 U.S.C. § 1553(a). Once an account has been closed, generally 5 fiscal years after expiration, 31 U.S.C. § 1553(b) requires that the adjustment be charged, within certain limits, to current appropriations. Thus, the authority now found in 31 U.S.C. § 1553 may provide an alternative if neither 31 U.S.C. § 3527(d) nor 31 U.S.C. § 3530 is available. Of course, if the account to be restored has itself been closed pursuant to 31 U.S.C. §§ 1552(a) or 1555, restoration is no longer possible.

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employee, the various accountable officer statutes discussed throughout this chapter do not apply, and the contractor's liability is governed by the terms of the contract. For example, a parking service contract with the General Services Administration required the contractor to collect parking fees at certain government buildings and to remit those fees to GSA on a daily basis. One day, instead of remitting the receipts, an official of the contractor took the money home in a paper bag and claimed to have been robbed in a parking lot near her residence. When GSA withheld the amount of the loss from contract payments, the contractor tried to argue that the risk of loss should fall upon the government. The Claims Court disagreed. Since the contract terms were clear and the contractor failed to comply, the contractor was held responsible for the loss. Miracle Contractors, Inc. v. United States, 5 Cl. Ct. 466 (1984).

The Department of Agriculture has statutory authority to use volunteers to collect user fees in national forests. The volunteers, private individuals, are to be bonded, with the cost of the bonds paid by the Department. 16 U.S.C. § 460l-6a(k). In 68 Comp. Gen. 470 (1989), GAO concurred with the Department that the volunteers could be regarded as agents of the Forest Service and, as such, eligible for relief for non-negligent losses. The practical significance of this decision is that it would be difficult to recruit volunteers if they faced potential liability for non-negligent losses, a possibility that would exist even under a surety bond. Id. at 471.

e. Other Agents and Custodians

Occasionally, officers and employees who do not fit into any of the preceding categories, and who may not even be directly involved in government fiscal operations, are given custody of federal funds and thereby become accountable officers for the funds placed in their charge. Note in this connection that the "safekeeping" mandate of 31 U.S.C. § 3302(a) (made unmistakably clear by reference to the original 1846 language quoted earlier), applies to any government employee, regardless of job description, to whom public funds are entrusted in connection with the performance of government business. See, e.g., B-170012, February 3, 1972.

Examples of employees in this general custodial category include: a special messenger delivering cash to another location, B-188413, June 30, 1977; a messenger sent to the bank to cash checks, B-226695, May 26, 1987; State Department employees responsible for packaging and shipping funds to an overseas embassy, B-193830,

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Federal Assistance: Grants and Cooperative Agreements

A. Introduction

The federal government provides assistance in many forms, financial and otherwise. Assistance programs are designed to serve a variety of purposes. Objectives may include fostering some element of national policy, stimulating private sector involvement, or furnishing aid of a type or to a class of beneficiaries the private market cannot or is unwilling to otherwise accommodate. A broad definition of "assistance" in this context is found in 31 U.S.C. § 6101(3) (Federal Program Information Act)– "the transfer of anything of value for a public purpose of support or stimulation authorized by [law]." A similar definition occurs in 31 U.S.C. § 6501(1) (Intergovernmental Cooperation Act of 1968).

A federal grant may be defined as a form of assistance authorized by statute in which a federal agency (the grantor) transfers something of value to a party (the grantee) usually, but not always, outside of the federal government, for a purpose, undertaking, or activity of the grantee which the government has chosen to assist, to be carried out without substantial involvement on the part of the federal government. The "thing of value" is usually money, but may, depending on the program legislation, also include property or services.[1] The grantee, again depending on the program legislation, may be a state or local government, a nonprofit organization, or a private individual or business entity. Programs administered by state governments comprise the largest category, involving federal outlays of over $100 billion a year.[2]

The 1990 edition (24th ed.) of the Catalog of Federal Domestic Assistance, updated as of December 1990,[3] lists 1,183 assistance programs administered by 52 federal agencies. To be sure, a large number of these are not grant programs since the catalog includes loan and loan guarantee programs plus certain types of non-financial assistance. Nevertheless, it is a safe statement that there are hundreds

[1]The earliest grant programs were land grants. Monetary grants appear to have entered the stage in 1879 although they are largely a 20th century development. Madden, The Constitutional and Legal Foundations of Federal Grants, in Federal Grant Law 9 (M. Mason ed. 1982).

[2]H.R. Rep. No. 696, 101st Cong., 2d Sess. 5 (1990) (report of the House Committee on Government Operations on the Cash Management Improvement Act of 1990). For a summary listing of federal assistance programs for state and local governments, cross-referenced to the Catalog of Federal Domestic Assistance, see Federal Aid: Programs Available to State and Local Governments, GAO/HRD-91-93FS (May 1991).

[3]The Catalog of Federal Domestic Assistance is published annually by the General Services Administration and the Office of Management and Budget pursuant to 31 U.S.C. § 6104 and OMB Circular No. A-89.

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of federal grant programs administered by dozens of agencies. Many of the programs are governed by detailed legislation and even more detailed regulations, and many of the cases, since they hinge on specific statutory or regulatory provisions, are not amenable to treatment in this chapter. Nevertheless, it is still possible to extract a number of principles of "grant law" from the perspective of the availability and use of appropriated funds.

B. Grants vs. Procurement Contracts

1. Nature of a Grant

From the perspective of legal analysis, what precisely is a grant? Not too long ago, it was commonplace to discuss the grant relationship in contract terms with little further analysis. Under this approach, the acceptance of a grant of federal funds subject to conditions which must be met by the grantee creates a contract between the United States and the grantee. The need to clearly distinguish grants from procurement contracts, however, has given rise to an emerging body of opinion which attempts to reject the analogy.[4] Thus far, although the contract analogy has not been abandoned, the courts have become increasingly cautious in their characterizations, and elements of both approaches will be found, depending on the precise issue involved.

The "grant as a type of contract" approach evolved from early Supreme Court decisions. In what may be the earliest case on the issue, the government had made a grant of land to a state on the condition that the state would use the land, or the proceeds from its sale, for certain reclamation purposes. The Court stated:

"It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the State, constituted a contract. All the elements of a contract met in the transaction,—competent parties, proper subject-matter, sufficient consideration, and consent of minds."

[4]E.g., Federal Grant Law (M. Mason ed. 1982) at 2. For further discussion, see P. Dembling & M. Mason, Essentials of Grant Law Practice, Chapter 1 (1991).

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McGee v. Mathis, 71 U.S. (4 Wall.) 143, 155 (1866). See also United States v. Northern Pacific Railway Co., 256 U.S. 51, 63–64 (1921).

Lower courts applied the contract theory in various contexts, often to enforce grantee compliance with grant conditions,[5] to determine jurisdiction under the Tucker Act,[6] or to analyze the nature of the government's obligations under a particular grant statute or agreement.[7]

GAO followed suit. E.g., 68 Comp. Gen. 609 (1989); 50 Comp. Gen. 470 (1970); 42 Comp. Gen. 289, 294 (1962); 41 Comp. Gen. 134, 137 (1961); B-232010, March 23, 1989; B-167790, January 15, 1973. In 50 Comp. Gen. 470, for example, a medical teaching facility, recipient of a reimbursement-type construction grant under the Public Health Service Act, was caught in a cash flow crisis because disbursement of grant funds was much less frequent than its contractor's need for progress payments. The question was whether the grant could be regarded as a "contract or claim" so the recipient could assign future grant proceeds to a bank in return for an interim loan, pursuant to the Assignment of Claims Act. Noting that the accepted grant constituted a "valid contract," and that assignment was not prohibited by the program legislation, regulations of the grantor agency, or the terms of the grant agreement, GAO concluded that assignment under the Assignment of Claims Act was permissible.

Thus, the researcher will find a body of case law standing for the proposition that there are certain contractual aspects to a grant relationship. What this does is provide a known body of law which, together with the relevant program legislation and regulations, is

[5]E.g., United States v. Frazer, 297 F. Supp. 319, 322–23 (M.D. Ala. 1968); United States v. Sumter County School Dist. No. 2, 232 F. Supp. 945, 950 (E.D.S.C. 1964); United States v. County School Bd., 221 F. Supp. 93, 99–100 (E.D. Va. 1963).

[6]E.g., Missouri Health and Medical Org., Inc. v. United States, 641 F.2d 870 (Ct. Cl. 1981); Texas v. United States, 537 F.2d 466 (Ct. Cl. 1976); County of Suffolk v. United States, 19 Cl. Ct. 295 (1990); Kentucky ex rel. Cabinet for Human Resources v. United States, 16 Cl. Ct. 755, 762 (1989); Rogers v. United States, 14 Cl. Ct. 39, 44 (1987); Idaho Migrant Council, Inc. v. United States, 9 Cl. Ct. 85, 88–89 (1985). While most of these cases, Missouri Health for example, use language carefully crafted to avoid confusion between a grant agreement and a "traditional," i.e., procurement, contract, the essence of the jurisdictional finding is that the claim is based on some form of "contract."

[7]E.g., City of Manassas Park v. United States, 633 F.2d 181 (Ct. Cl. 1980), cert. denied, 449 U.S. 1035 (claim found to be noncontractual, but agreement referred to as "grant contract" and grantor-grantee relationship as "privity of contract"); Arizona v. United States, 494 F.2d 1285 (Ct. Cl. 1974).

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available to be applied in determining basic rights and obligations. It does not have to follow, nor has GAO or, to our knowledge, any court suggested, that all of the trappings of a procurement contract somehow attach.

The problem, perhaps, is not so much whether a grant relationship can or cannot be said to contain certain "contractual" elements, but in failing to recognize that the analogy is a limited one. Clearly, proponents of the "grant contract" theory must tread cautiously to avoid untenable positions. As we will see in our discussion of the Federal Grant and Cooperative Agreement Act, going too far with the analogy bred confusion which led the Commission on Government Procurement to recommend, and the Congress to enact, legislation to attempt to distinguish between the two types of relationship.

Where all of this will go will be determined in future litigation. For now, in any event, it must be emphasized that whatever one's views on the contractual nature of a grant relationship, a grant and a procurement contract are two very different things.

Take, for example, the issue of consideration. While the typical grant agreement may well include sufficient legal consideration from the standpoint of supporting a legal obligation, it may be quite different from the consideration found in procurement contracts. As we noted in our introduction to this chapter, a grant is a form of assistance to a designated class of recipients authorized by statute to meet recognized needs. Grant needs, by definition, are not needs for goods or services required by the federal government itself. The needs are those of a nonfederal entity, whether public or private, which the Congress has decided to assist as being in the public interest.

An illustration of where this distinction can lead is 41 Comp. Gen. 134 (1961). A provision of the Federal Water Pollution Control Act authorized grants to states for the construction of sewage treatment works, up to a stated percentage of estimated costs, with the grantee to pay all remaining costs. Strong demand for limited funds meant that grants were frequently awarded for amounts less than the permissible ceiling. The question was whether these grants could be amended in a subsequent fiscal year to increase the amount to, or at least closer to, the statutory ceiling. If a straight "grant equals contract" approach had been applied, the answer would have been no, unless the government received additional consideration. However,

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GAO concluded that the amendments were authorized, noting that the "consideration" flowing to the government under these grants—in sharp contrast with procurement contracts—consisted only of "the benefits to accrue to the public and the United States" through use of the funds to construct the desired facilities. Id. at 137.

In recognition of the essential distinctions between a "grant contract" and a "procurement contract," the Supreme Court has stated:

> "Although we agree . . . that . . . grant agreements had a contractual aspect, . . . the program cannot be viewed in the same manner as a bilateral contract governing a discrete transaction. . . . Unlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy."[8]

Bennett v. Kentucky Department of Education, 470 U.S. 656, 669 (1985). The state in that case had argued that, since the grant was "in the nature of a contract,"[9] the Court should apply the principle, drawn from contract law, that ambiguities in the grant agreement should be resolved against the government as the drafting party. Based on the analysis summarized in the quoted passage, the Court declined to do so, at least in that case.

Similarly, the contractual doctrine of "impossibility of performance" has been held inapplicable to a grant. Maryland Department of Human Resources v. Department of Health and Human Services, 762 F.2d 406 (4th Cir. 1985). In that case, the government had imposed a zero error standard on states under the Aid to Families with Dependent Children program. The state argued that error-free administration was impossible. While agreeing with that factual proposition, the court nevertheless held that the zero tolerance level was permissible under the governing statute and regulations. The impossibility of performance doctrine "relates to commercial contracts and not to grant in aid programs." Id. at 409.

[8]This passage is a good illustration of the difficulties one can encounter trying to resolve the "grant vs. contract" debate, at least pending further evolution of the case law. On the basis of this passage, which side does the Supreme Court now support? Both to some extent, it would seem.

[9]Bennett v. New Jersey, 470 U.S. 632, 638 (1985), quoting Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

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A 1971 decision, 51 Comp. Gen. 162, illustrates another distinction. In that case, the Comptroller General concluded that an ineligible grantee could not be reimbursed for expenditures under quantum meruit principles. In the typical grant situation, the grantee's activities are not performed solely for the direct benefit of the government and the government does not receive any measurable, tangible benefit in the traditional contract sense.

Still another distinction is the reluctance of the courts to apply the "contract implied in fact" concept in the grant context. E.g., Somerville Technical Services v. United States, 640 F.2d 1276 (Ct. Cl. 1981). The reasoning in part is that a grant is a sovereign act binding the government only to the extent of its express undertakings.

In American Hospital Association v. Schweiker, 721 F.2d 170 (7th Cir. 1983), cert. denied, 466 U.S. 958, the court rejected the contention that otherwise valid regulations of the Department of Health and Human Services impaired contractual rights of grantees under the Hill-Burton hospital assistance program.

"[T]he relationship between the government and the hospitals here cannot be wholly captured by the term 'contract' and the analysis traditionally associated with that term. . . . The contract analogy thus has only limited application."

Id. at 182–83. Finally, the court in United States v. Kensington Hospital, 760 F. Supp. 1120 (E.D. Pa. 1991), refused to apply the Anti-Kickback Act to government claims for fraud under the Medicare and Medicaid programs, finding that the government's relationship with its grantees under these programs could not be characterized as "prime contracts" for purposes of the Act.

In sum, it seems clear that many of the rules and principles of contract law will not be automatically applied to grants. Nevertheless, whether one prefers to regard a grant as a type of contract, or "in the nature of" a contract, or as a generically different creature, it is equally clear that the creation of a grant relationship results in certain legal obligations flowing in both directions, enforceable by the application of basic contract rules. As the Claims Court has stated:

"[A] notice of a federal grant award in return for the grantee's performance of services can create cognizable obligations to the extent of the government's undertakings therein."

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Community Relations-Social Development Commission v. United States, 8 Cl. Ct. 723, 725 (1985). Thus, if a grantee does what it has committed itself to do and incurs allowable costs, the government is obligated to pay. E.g., B-181332, December 28, 1976.

Conversely, the government has a right to expect that the grantee will use the grant funds only for authorized grant purposes and only in accordance with the terms and conditions of the grant. 42 Comp. Gen. 289, 294 (1962); 41 Comp. Gen. 134, 137 (1961). The right of a grantor agency to oversee the expenditure of funds by the grantee to ensure that the money is used only for authorized purposes, and the grantee's corresponding duty to account to the grantor for its use of the funds, are implicit in the grant relationship and are not dependent upon specific language in the authorizing legislation. 64 Comp. Gen. 582 (1985).

2. The Federal Grant and Cooperative Agreement Act

A long-standing confusion between grant relationships and procurement relationships led the Commission on Government Procurement, in its 1972 report, to recommend the enactment of legislation to distinguish assistance from procurement, and to further refine the concept of assistance by clearly distinguishing grants from cooperative agreements.[10] While Congress did not enact all of the Commission's recommendations in this area, it did enact these two, in the form of the Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. §§ 6301–6308.

Prior to the enactment of this statute, most relationships between the federal government and organizations that received direct federal assistance funding were characterized simply as "grants" or "grants-in-aid."[11] As is still the case, it had always been understood that an agency could make grants only if it was authorized by statute to do so. Prior to the Act, however, it was generally felt that the

[10]Report of the Commission on Government Procurement, Volume 3, Chapters 1–3 generally (December 1972).

[11]Although the terms are often used interchangeably, there is a technical distinction. A "grant-in-aid" is a grant to a state or local government. The term "grant" is broader and includes nongovernmental recipients. See GAO, A Glossary of Terms Used in the Federal Budget Process, PAD-81-27 (March 1981), at 61–62. The Federal Grant and Cooperative Agreement Act was intended to eliminate the term "grant-in-aid" in favor of the simpler "grant," regardless of the identity of the recipient. S. Rep. No. 449, 95th Cong., 2d Sess. 9 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 11, 18.

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October 1, 1979; an officer in charge of a laundry operation on an Army base who had been advanced public funds to be held as a change fund, B-155149, October 21, 1964; and a Department of Energy special counsel with control over petroleum overcharge refunds, B-200170, April 1, 1981.

As with disbursing officers, there may be more than one accountable officer in a given case, and the concept of accountability is not limited to the person in whose name the account is officially held nor is it limited to the person or persons for whom relief is officially requested. For example, accounts in the regional offices of the U.S. Customs Service are typically held in the name of the Regional Commissioner. While the Regional Commissioner is therefore an accountable officer with respect to that account, subordinate employees who actually handle the funds are also accountable officers. B-197324, March 7, 1980; B-193673, May 25, 1979. The same principle applies to the various service centers of the Internal Revenue Service. E.g., 60 Comp. Gen. 674 (1981).

As demonstrated by the Customs and IRS situations, as well as the many cases involving military finance and accounting officers, a supervisory official will be an accountable officer if that official has actual custody of public funds, or if the account is held in the official's name, regardless of who has physical custody. Absent these factors, however, a supervisor is not an accountable officer and does not become one merely because he or she supervises one. E.g., B-214286, July 20, 1984; B-194782, August 13, 1979.

In each case, it is necessary to examine the particular facts and circumstances to determine who had responsibility for or custody of the funds during the relevant stages of the occurrence or transaction. Thus, in B-193830, October 1, 1979, money shipped from the State Department to the American Embassy in Paraguay never reached its destination. While the funds were chargeable to the account of the Class B cashier at the Embassy, the State Department employees responsible for packaging and shipping the funds were also accountable officers with respect to that transaction. In another case, a new Class B cashier had been recommended at a Peace Corps office in Western Samoa, and had in fact been doing the job, but his official designation was not made until after the loss in question. Since the new cashier, even though not yet formally designated, had possession of the funds at the time of the loss, he was an accountable officer.

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legislation pretty much had to mention "grants" explicitly in order to confer that authority.

The Act established standards that agencies are to use in selecting the most appropriate funding vehicle—a procurement contract, a grant, or a cooperative agreement. The standards are contained in sections 4, 5, and 6 of the Act, 31 U.S.C. §§ 6303–6305, summarized below:

- Procurement contracts. An agency is to use a procurement contract when "the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government." 31 U.S.C. § 6303.
- Grant agreements. An agency is to use a grant agreement when "the principal purpose of the relationship is to transfer a thing of value [money, property, services, etc.] to the . . . recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government," and "substantial involvement is not expected" between the agency and the recipient when carrying out the contemplated activity. 31 U.S.C. § 6304.
- Cooperative agreements. An agency is to use a cooperative agreement when "the principal purpose of the relationship is to transfer a thing of value to the . . . recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government," and "substantial involvement is expected" between the agency and the recipient when carrying out the contemplated activity. 31 U.S.C. § 6305.

Under the Act, grants and cooperative agreements are more closely related to one another than either is to a procurement contract. The essential distinction between a grant and a cooperative agreement is the degree of federal involvement.

Each agency's program authority must be analyzed to identify the type of relationships authorized, and the circumstances under which each authorized relationship can be entered into without regard to the presence of specific words such as "grant" in the program legislation. Once authority is found, the legal instrument (contract, grant, or cooperative agreement) that fits the arrangement as contemplated

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must be used, using the statutory definitions for guidance as to which instrument is appropriate. The Office of Management and Budget is authorized to provide guidance on the implementation of the Act. 31 U.S.C. § 6307. OMB published "final guidance" on August 18, 1978 (43 Fed. Reg. 36860).

It is important to note that the Federal Grant and Cooperative Agreement Act does not expand an agency's substantive authority. While the Act provides the basis for examining whether an arrangement should be a contract, grant, or cooperative agreement, determinations of whether an agency has authority to enter into the relationship as spelled out in the instrument, whatever its label, must be based on the agency's authorizing or program legislation, not the Federal Grant and Cooperative Agreement Act. Unless legislatively prohibited, every agency has inherent authority to enter into contracts to procure goods or services for its own use, as long as the purpose of the procurement is reasonably related to the agency's mission. However, there is no comparable inherent authority to give away the government's money or property, either directly or by the release of vested rights, to benefit someone other than the government; this must be authorized by Congress. E.g., 51 Comp. Gen. 162, 165 (1971). Therefore, the agency's basic legislation must be studied to determine whether an assistance relationship is authorized at all, and if so, under what circumstances and conditions.

Where an agency has authority to enter into both a procurement and an assistance relationship to carry out the particular program, it has authority to exercise discretion in choosing which relationship to form in each particular case, but must use the instrument which suits the relationship, as provided in the Act. In this sense, the analysis of an agency's program authority is not really a matter of discretion—the statutory authority either is there or is not there, regardless of agency preference. The significance of the Federal Grant and Cooperative Agreement Act is that it emphasizes the substance of an agency's program authority rather than the particular labels used or not used.

In this connection, the Senate Committee on Governmental Affairs has stated:

"[The Federal Grant and Cooperative Agreement Act] was never intended to be an independent grant of authority to agencies to enter into assistance or contractual relationships where no such authority can be found in authorizing legislation. Rather, it was and is intended to force agencies to use a legal instrument that, according to

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the criteria established by the Act, matches the intended and authorized relationship—regardless of the terminology used in existing legislation to characterize the instrument to be used in the transaction."[12]

Further discussion may be found in B-196872-O.M., March 12, 1980 and a GAO report entitled Agencies Need Better Guidance for Choosing Among Contracts, Grants, and Cooperative Agreements, GGD-81-88, September 4, 1981.[13]

The approach used in the Federal Grant and Cooperative Agreement Act is illustrated in several decisions. In one case, the Interior Department asked whether it could use its appropriation for expenses of the American Samoan Judiciary for certain expenses, including entertainment and the purchase of motor vehicles. Using the guidelines of the Federal Grant and Cooperative Agreement Act, the Comptroller General reviewed the relationship between the Interior Department and the American Samoan Judiciary and concluded that it was essentially a grant relationship. (Congress confirmed this interpretation by inserting the word "grant" in the next year's appropriation.) Therefore, restrictions such as those relating to entertainment and motor vehicles, which would apply to the direct expenditure of appropriations by the federal government or through a contractor did not apply to expenditures by the grant recipient, absent some provision to the contrary in the appropriation, agency regulations, or grant agreement. B-196690, March 14, 1980.

In 59 Comp. Gen. 424 (1980), the Environmental Protection Agency's public participation program of providing financial assistance to certain intervenors was viewed as essentially a grant relationship rather than a contractual one. Accordingly, 31 U.S.C. § 3324 was held not to preclude participants from receiving funds in advance of the completion of participation, subject to the provision of adequate fiscal controls.

[12]S. Rep. No. 180, 97th Cong., 1st Sess. 4 (1981), reprinted in 1982 U.S. Code Cong. & Admin. News 3, 6. While this is not direct legislative history with respect to the 1977 statute, it is nevertheless important as a clear statement from one of the relevant jurisdictional committees.

[13]Controversy over whether the Federal Grant and Cooperative Agreement Act constituted an independent source of authority stemmed from an ambiguous provision in the original enactment. See Pub. L. No. 95-224, § 7(a), 92 Stat. 5. When the statute was moved to Title 31 as part of the 1982 recodification of that title, section 7(a) was omitted as duplicative. Thus, while the proposition discussed in the text remains valid, many of the authorities cite to a provision which is no longer found in the U.S. Code.

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In several more recent cases, GAO's analysis of the relationship and of relevant legislation and legislative history led it to conclude that a contract, rather than a grant or cooperative agreement, was the proper instrument. 67 Comp. Gen. 13 (1987), affirmed upon reconsideration, B-227084.6, December 19, 1988 (operation of research and training programs at government facility funded by Maritime Administration); 65 Comp. Gen. 605 (1986) (proposed study, sponsored by Council on Environmental Quality, of risks and benefits of certain pesticides, intended for use by federal regulatory agencies); B-222665, July 2, 1986 (awards to Indian tribes by Interior Department under Indian Self-Determination and Education Assistance Act, which contained an express exemption from the Federal Grant and Cooperative Agreement Act); B-210655, April 14, 1983 (funding by Department of Energy of college campus forums on nuclear energy). In 61 Comp. Gen. 428 (1982), however, GAO agreed with the Department of Energy's use of a cooperative agreement to design and construct a "prototype solar parabolic dish/sterling engine system module," finding that the proposal's primary purpose was to encourage development and early market entry rather than to acquire the particular item for its own use, although it would eventually have governmental applications.

These questions are important because procurement contracts are subject to a variety of statutory and regulatory requirements which may not be generally applicable to assistance transactions. If the type of relationship is not determined properly, assistance arrangements could be used to evade otherwise applicable legal requirements. Conversely, legitimate assistance awards should not be burdened by all of the formalities of procurement contracts.

The analysis required by the Federal Grant and Cooperative Agreement Act may also be relevant in determining the applicability of other laws. See, e.g., Hammond v. Donovan, 538 F. Supp. 1106 (W.D. Mo. 1982) holding that the relationship between the Labor Department and a state employment office was a grant, and therefore not subject to a statute which required that certain procurement contracts contain an affirmative action for veterans provision.

Another situation that has generated some controversy is the so-called "third party" or "intermediary" situation—where a federal agency provides assistance to specified recipients by using an intermediary. Again, it is necessary to examine the agency's program authority to

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determine the authorized forms of assistance. The agency's relationship with the intermediary should normally be a procurement contract if the intermediary is not itself a member of a class eligible to receive assistance from the government. In other words, if an agency program contemplates provision of technical advice or services to a specified group of recipients, the agency may provide the advice or services itself or hire an intermediary to do it for the agency. In that case, the proper vehicle to fund the intermediary is a procurement contract. The agency is "buying" the services of the intermediary for its own purposes, to relieve the agency of the need to provide the advice or services with its own staff.

On the other hand, if the program purpose contemplates support to certain types of intermediaries to provide consultation or other specified services to third parties, GAO has approved the agency's choice of a grant rather than a contract as the preferred funding vehicle. Thus, in 58 Comp. Gen. 785 (1979), GAO found that the Department of Commerce's Office of Minority Business Enterprise (now the Minority Business Development Agency) could properly award a noncompetitive grant to an intermediary organization to provide management and technical assistance to minority business firms. Although the point was not detailed in the decision, the agency clearly had the requisite program authority to provide grant assistance to the intermediary.

Sometimes the program legislation is much less clear about the status of an intermediary as a grantee. GAO applied 58 Comp. Gen. 785 in another 1979 case, B-194229, September 20, 1979, upholding the Department of Health, Education, and Welfare's authority to provide grant assistance to an intermediary to in turn provide technical assistance to public schools. There, however, it was doubtful that HEW had the requisite program authority to deal with the intermediary by grant rather than procurement contract. The decision appears to have interpreted the Federal Grant and Cooperative Agreement Act as independently enlarging HEW's program authority.

While GAO has not explicitly stated that B-194229 was wrongly decided, subsequent items, starting with GAO's analysis in GGD-81-88 and B-196872-O.M., previously cited, have cast considerable doubt on that decision's validity. In a 1982 decision, 61 Comp. Gen. 637, the Department of Housing and Urban Development awarded a cooperative agreement to a nonprofit organization to provide

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technical assistance to certain block grant recipients. While HUD's authority to provide technical assistance to the block grant recipients was clear, there was no authority to provide assistance to the intermediary organization. The essence of the intermediary transaction was the acquisition of services for ultimate delivery to authorized recipients. Thus, GAO concluded that a procurement contract should have been used. The decision largely repudiated (although it did not expressly overrule) B-194229. 61 Comp. Gen. at 641.

The Senate Committee on Governmental Affairs, in its 1981 report mentioned earlier in this discussion, also addressed the intermediary issue and agreed with GAO's interpretation:

"The choice of instrument for an intermediary relationship depends solely on the principal federal purpose in the relationship with the intermediary. The fact that the product or service produced by the intermediary may benefit another party is irrelevant. What is important is whether the federal government's principal purpose is to acquire the intermediary's services, which may happen to take the form of producing a product or carrying out a service that is then delivered to an assistance recipient, or if the government's principal purpose is to assist the intermediary to do the same thing. Where the recipient of an award is not receiving assistance from the federal agency but is merely used to provide a service to another entity which is eligible for assistance, the proper instrument is a procurement contract."

S. Rep. No. 180 at 3; 1982 U.S. Code Cong. & Admin. News at 5.

Most of the cases discussed in the remainder of this chapter are expressed in "grant" terms. However, the principles discussed in the cases should generally apply to cooperative agreements as well.

3. Competition for Discretionary Grant Awards

Grant programs are either mandatory or discretionary. In a mandatory grant program, Congress directs awards to one or more classes of prospective recipients who meet specific criteria for eligibility, in specified amounts. These grants, sometimes called "entitlement" grants, are often awarded on the basis of statutory formulas. While the grantor agency may disagree on the application of the formula, it has no basis to refuse to make the award altogether. City of Los Angeles v. Coleman, 397 F. Supp. 547 (D.D.C. 1975). Thus, questions of grantee selection, and hence of competition, do not arise. The concept of competition can only apply when the grantor has discretion to choose one applicant over another. Therefore, the following discussion is limited to discretionary grants.

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The Federal Grant and Cooperative Agreement Act encourages competition in assistance programs where appropriate, in order to identify and fund the best possible projects to achieve program objectives. 31 U.S.C. § 6301(3). This, however, is merely a statement of purpose, and there are few other legislative pronouncements specifying how this objective is to be achieved, certainly nothing approaching the detail and specificity of the legislation applicable to procurement contracts, such as the Competition in Contracting Act of 1984. Statutory requirements for competition in grantee selection do exist in certain contexts, but they tend to be very general and do not specify actual procedures. Examples are 10 U.S.C. § 2361(a) (competitive procedures required for Defense Department research grants), and 10 U.S.C. § 2196(i) (ditto for Defense Department manufacturing engineering education grants).

At the request of the Senate Committee on Governmental Affairs, the General Accounting Office surveyed the administrators of 355 discretionary grant programs listed in the Catalog of Federal Domestic Assistance, and studied the award processes for 26 of those programs, to determine the extent of competition. The 355 programs represented about 98,000 awards in fiscal year 1984 to state and local governments and other organizations and individuals, amounting to about $12 billion. GAO found that nearly 2/3 of the programs attempted to solicit applications from all eligible applicants; public interest groups expressed overall satisfaction with agency solicitation practices. Over 3/4 of the programs consistently used persons outside the program office to provide an independent perspective in reviewing applications. Nevertheless, GAO did note some departures from the competitive process which did not appear to have been subjected to internal review and justification. GAO recommended that the President's Council on Management Improvement (established by Executive Order No. 12479, May 24, 1984) work with the agencies in a governmentwide effort to improve managerial accountability for discretionary grant programs. GAO's report is Discretionary Grants—Opportunities to Improve Federal Discretionary Award Practices, GAO/HRD-86-108 (September 1986).

In view of the essential differences between grants and procurement contracts, GAO has declined to use its bid protest mechanism, prescribed to assure the fairness of awards of contracts, to rule on the propriety of individual grant awards—that is, GAO will not consider a complaint by a rejected applicant that it should have received the

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grant rather than the recipient to whom it was actually awarded. B-203096, May 20, 1981; B-199247, August 21, 1980; B-199147, June 24, 1980; B-190092, September 22, 1977. This does not affect the Comptroller General's jurisdiction to render decisions on the legality of federal expenditures, however, so GAO can and will render decisions on the legality of grant awards in terms of compliance with applicable statutes and regulations.

GAO has adopted a similar position with respect to cooperative agreements. GAO will not consider a "protest" against the award of a cooperative agreement unless it appears that a conflict of interest exists or that the agency is using the cooperative agreement to avoid the competitive requirements of the procurement laws (i.e., in violation of the Federal Grant and Cooperative Agreement Act) and regulations. 64 Comp. Gen. 669 (1985); 61 Comp. Gen. 428 (1982); B-216587, October 22, 1984. Again, this refers to review under GAO's "bid protest" jurisdiction and does not affect review under GAO's other available authorities.

In summary, assuming the proper instrument has been selected, GAO will not question funding decisions in discretionary federal assistance programs. B-228675, August 31, 1987 (denial of application for funding renewal held to be a policy matter within grantor agency's discretion where nothing in program legislation provided otherwise and agency had complied with applicable procedural requirements). See also City of Sarasota v. Environmental Protection Agency, 813 F.2d 1106 (11th Cir. 1987) (court declined jurisdiction over issue which it characterized as a grant funding decision); Massachusetts Department of Correction v. Law Enforcement Assistance Administration, 605 F.2d 21 (1st Cir. 1979) (court upheld agency's refusal to award grant, finding that procedural deficiencies, even though they amounted to "sloppiness," were not sufficiently grave as to deprive applicant of fair consideration).

The law in this area is still developing in terms of the kinds of issues the courts will look at and the standards and remedies they will apply. Trends and case law are discussed in detail in Richard B. Cappalli, Federal Grants and Cooperative Agreements—Law, Policy, and Practice, Chapter 3 (1982). Cappalli sees an emerging "right to fair process" at least to the extent of requiring agencies to follow applicable procedures (id. at § 3:26), although its precise scope and parameters await further legislative or judicial definition.

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C. Some Basic Concepts

1. General Rules

A number of principles have evolved that are unique to grant law. These will be discussed in subsequent sections of this chapter. Many cases, however, involve the application of principles of law which are not unique to grants. As a general proposition, the fundamental principles of appropriations law discussed in preceding chapters apply to grants just as they apply to other expenditures. This section is designed to highlight a few of these areas, each of which is covered in detail elsewhere in this publication, and to show how they may apply in assistance contexts.

a. Statutory Construction

Established principles of statutory construction apply equally to grant legislation. Examples are: 49 Comp. Gen. 411 (1970) (resolution of conflicting elements of legislative history); 49 Comp. Gen. 104 (1969) (principle that meaning should be given to every word in a statute used to construe language in disaster relief assistance legislation); 46 Comp. Gen. 699 (1967) (use of legislative history to clarify reapportionment of unused funds under a formula grant program); B-133001, January 30, 1979 (construing the term "unexpected urgent need" in the Migration and Refugee Assistance Act).

Sometimes they may not apply equally. Under traditional thinking, statutes were viewed as applying prospectively only, unless retroactive application was indicated by the statutory language or legislative history. In most contexts, grant law followed this approach. See, e.g., 32 Comp. Gen. 141 (1952); 30 Comp. Gen. 86 (1950). There were occasional exceptions. For example, in 50 Comp. Gen. 750 (1971), GAO held that an amendment to a program statute which eased certain restrictions could be applied retroactively with respect to funds previously awarded but not yet obligated by the grantees. In 1974, the Supreme Court ruled that a court should "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley v. Richmond School Board, 416 U.S. 696, 711 (1974). Post-Bradley litigation has produced a fairly complex pattern of analysis and, as discussed in Chapter 2, the precise scope of Bradley is unsettled. In any event, the Supreme Court

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has declined to apply the Bradley presumption to grant law. In a 1985 decision, the Court held:

"[A]bsent a clear indication to the contrary in the relevant statutes or legislative history, changes in the substantive standards governing federal grant programs do not alter obligations and liabilities arising under earlier grants."

Bennett v. New Jersey, 470 U.S. 632, 641 (1985). Thus, for purposes of grant law, "obligations generally should be determined by reference to the law in effect when the grants were made." Id. at 638.

b. The Grant as an Exercise of Congressional Spending Power

When Congress enacts grant legislation and provides appropriations to fund the grants, it is exercising the spending power conferred upon it by the Constitution.[14] As such, it is clear that Congress has the power to attach terms and conditions to the availability or receipt of grant funds, either in the grant legislation itself or in a separate enactment. Oklahoma v. Civil Service Commission, 330 U.S. 127 (1947) (provision of Hatch Act prohibiting political activity by employees of state or local government agencies receiving federal grant funds upheld as within congressional power).

In Fullilove v. Klutznick, 448 U.S. 448 (1980), the Court upheld a provision of the Public Works Employment Act of 1977 imposing minority set-aside requirements on purchases by state and local grantees. The Court said:

"Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy."

Id. at 474. See also Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 15–17 (1981); King v. Smith, 392 U.S. 309, 333 n.34 (1968). It follows that, under the Supremacy Clause, valid federal legislation will prevail over inconsistent state law. Townsend v. Swank, 404 U.S. 282 (1971) (state statute inconsistent with

[14]It may be acting under other enumerated powers as well. "Congress is not required to identify the precise source of its authority when it enacts legislation." Nevada v. Skinner, 884 F.2d 445, 449 n.8 (9th Cir. 1989), cert. denied, 493 U.S. 1070.

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However, since the former cashier retained responsibility for the imprest fund until formally replaced, he too was an accountable officer. B-188881, May 8, 1978.

In sum, any government officer or employee who physically handles government funds, even if only occasionally, is accountable for those funds while in his or her custody.

It may be impossible, although this will happen only in extremely rare cases, to specify exactly who the proper accountable officer is. For example, the Drug Enforcement Administration used a flash roll of 650 $100 bills and discovered that 15 bills had been replaced by counterfeits scattered throughout the roll. (The "roll" was actually a number of stacks.) The roll had been used in a number of investigations and in each instance, the transactions (transfers from cashier to investigators, returns to cashier, transfers between different groups of investigators) were recorded on receipts and the money was counted. While it was thus possible to determine precisely who had the roll on any given day, there was no way to determine when the substitution took place and hence to establish to whom the loss should be attributed. B-191891, June 16, 1980.

3. Funds to Which Accountability Attaches

When we talk about the liability of accountable officers, we deliberately use the broad term "public funds." As a general proposition, for purposes of accountability, "public funds" consists of three categories: appropriated funds, funds received by the government from nongovernment sources, and funds held in trust. It is important to emphasize that when we refer to certain funds as "nonaccountable" in the course of this discussion, all we mean is that the funds are not subject to the laws governing the liability and relief of accountable officers. Liability for losses may still attach on some other basis.

a. Appropriated Funds

Appropriated funds are accountable funds. The funds may be in the Treasury, which is where most appropriated funds remain pending disbursement, or they may be in the form of cash advanced to a government officer or employee for some authorized purpose.

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eligibility criteria of Aid to Families with Dependent Children legislation held invalid).[15]

More recently, the Supreme Court has reaffirmed the power of Congress to attach conditions to grant funds, provided that the conditions are (1) in pursuit of the general welfare, (2) expressed unambiguously, (3) reasonably related to the purpose of the expenditure, and (4) not in violation of other constitutional provisions. New York v. United States, ___ U.S. ___, 112 S. Ct. 2408, 2426 (1992); South Dakota v. Dole, 483 U.S. 203, 207–08 (1987). Dole upheld legislation directing the Department of Transportation to withhold a percentage of federal highway funds from states which do not adopt a minimum drinking age of 21. Similarly, legislation conditioning the receipt of federal highway funds on state adoption of the national speed limit has been upheld. Nevada v. Skinner, 884 F.2d 445 (9th Cir. 1989), cert. denied, 493 U.S. 1070.

Where Congress has imposed an otherwise valid condition on the receipt of grant funds by states, the condition is, in effect, a "condition precedent" to a state's participation in the program. Unless permitted under the program legislation, the condition may not be waived or omitted even though a given state may not be able to participate because state law or the state constitution precludes compliance. North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977), aff'd mem., 435 U.S. 962; 43 Comp. Gen. 174 (1963).

Of course, it is also within the power of Congress to authorize the making of unconditional grants. See B-80351, September 30, 1948.

c. Availability of Appropriations

As with obligations and expenditures in general, a federal agency may provide financial assistance only to the extent authorized by law and available appropriations. Thus, the three elements of legal availability—purpose, time, and amount—apply equally to assistance funds.

[15]It has also been recognized that the regulations of a grantor agency, if otherwise valid, may preempt state law. S.J. Groves & Sons v. Fulton County, 920 F.2d 752, 763–64 (11th Cir. 1991).

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(1) Purpose

Appropriations may be used only for the purpose(s) for which they were made. 31 U.S.C. § 1301(a). One of the ways in which this fundamental proposition manifests itself in the grant context is the principle that grant funds may be obligated and expended only for authorized grant purposes. What is an "authorized grant purpose" is determined by examining the relevant program legislation, legislative history, and appropriation acts.

Disaster relief assistance legislation, found at 42 U.S.C. Chapter 68, authorizes, among other things, federal financial contributions to state and local governments for the repair or replacement of public facilities damaged by a major disaster. Decisions under a prior version of this legislation had construed public facilities as including municipal airports (42 Comp. Gen. 6 (1962)), including airport facilities which had been leased to private parties for the purpose of generating income for airport maintenance (49 Comp. Gen. 104 (1969)). Assistance could also extend to a sewage treatment plant, but not one which was not completed, and thus not in operation, at the time of the damage. 45 Comp. Gen. 409 (1966). Unlike the earlier legislation, the current statute defines "public facility," 42 U.S.C. § 5122(8), and specifically includes airport and sewage treatment facilities. Some other examples are:

- Airport development grants under Federal Airport Act may include runway sealing projects which are shown to be part of reconstruction or repair rather than normal maintenance. 35 Comp. Gen. 588 (1956). See also B-60032, September 9, 1946 (grants under same legislation may be made for acquisition of land or existing privately owned airports, to be used as public airports, regardless of whether construction or repair work is immediately contemplated).
- Mining Enforcement and Safety Administration is authorized to make grants to a labor union to fund emergency medical technician training program for coal miners since the proposal bears a sufficiently close relationship to coal mine safety to come within the scope of the governing program legislation. B-170686, November 8, 1977.
- Public Health Service grants for support of research training were found authorized under the Public Health Service Act. B-161769, June 30, 1967.

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A grant for unspecified purposes would, unless expressly authorized by Congress, be improper. 55 Comp. Gen. 1059, 1062 (1976).

A case from the 7th Circuit Court of Appeals illustrates the proposition that an agency may reallocate discretionary funds within a lump-sum appropriation as long as it uses those funds for other authorized purposes of the appropriation and does not violate the applicable program legislation. Under the Clean Air Act, the Environmental Protection Agency may prescribe plans to implement air quality standards for states which fail to submit adequate plans. The Act also authorizes air pollution control grants to states, funded under EPA's lump-sum Abatement, Control, and Compliance appropriation. Under its regulations, EPA divides available funds into nonmandatory annual allotments for each state. The regulations also authorize EPA to set aside a portion of the unawarded allotments to support federal implementation programs where required because of the absence of adequate state programs. One state argued that the set-aside policy amounted to a diversion of funds from their intended purpose and therefore violated 31 U.S.C. § 1301(a). The court first upheld the regulation as a permissible interpretation of EPA's authority under the Clean Air Act. The court then found that there was no purpose violation because (a) the relevant appropriation act did not earmark any specific amount for grants to states, and (b) EPA was still using the set-aside funds for air pollution abatement programs, which was their intended purpose. Illinois Environmental Protection Agency v. United States EPA, 947 F.2d 283 (7th Cir. 1991).

This is essentially the same reasoning the Comptroller General had applied in B-157356, August 17, 1978. The (then) Department of Health, Education, and Welfare received a lump-sum appropriation for its Office of Human Development Services covering a number of grant programs. The Department wanted to make what it termed "cross-cutting" grants to fund research or demonstration projects which would benefit more than one target population (e.g., aged, children, Native Americans). To do this, each office receiving grant funds under the lump-sum appropriation was asked to set aside a portion of its grant funds. This pool would then be used for approved cross-cutting grants. Since the lump-sum appropriation did not restrict the Department's internal allocation of funds for any given program, GAO approved the concept, provided that the grants were limited to projects within the scope or purpose of the appropriation, a condition necessary to assure compliance with 31 U.S.C. § 1301(a).

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(2) Time

Funds must be obligated by the grantor agency within their period of obligational availability. This includes all actions necessary to constitute a valid obligation. For example, an "offer of grant" made by the Economic Development Administration to a Connecticut municipality in 1983 was accepted by a town official who did not have authority to accept the grant, and the funds expired for obligational purposes before the town was able to ratify the unauthorized acceptance. Under these circumstances, GAO concluded that a valid grant never came into existence. B-220527, December 16, 1985. The town later submitted a claim for reimbursement of its expenses, based on an "equitable estoppel" argument. Since the non-existence of the grant was attributable to the town's actions and not those of the EDA, the claim could not be allowed. B-220527, August 11, 1987. See also B-206244, June 8, 1982.

The "bona fide needs" rule applies to grants and cooperative agreements just as it applies to other types of obligations or expenditures. 64 Comp. Gen. 359 (1985); B-229873, November 29, 1988. In 64 Comp. Gen. 359, obligation of fiscal year appropriations for 3-year biomedical research grants was found improper where not authorized by statute and where the grants did not contemplate a required outcome or end product.

(3) Amount

Restrictions on the availability of a lump-sum appropriation are not legally binding unless incorporated expressly or by reference in the appropriation act itself. Thus, a plan to fund National Institutes of Health biomedical research grants, funded under a lump-sum appropriation, in a number less than that specified in committee reports was not unlawful, as long as all funds were properly obligated for authorized grant purposes. 64 Comp. Gen. 359 (1985). See also B-157356, August 17, 1978.

Minimum earmarks (e.g., "not less than" or "shall be available only") in an authorization act were found controlling where a later-enacted appropriation act provided a lump sum considerably less than the amount authorized but nevertheless sufficient to meet the earmark requirements. 64 Comp. Gen. 388 (1985). The grantor agency will have more discretion where the earmark is a maximum ("not to

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exceed"), or where it is expressed only in legislative history. B-171019, March 2, 1977.

Similar rules apply to expenditures by grantees. In the absence of an earmark or other controlling provision in the applicable program statute, regulations, or the grant agreement, there is no basis to object to a grantee's allocation of grant funds as long as the funds were spent for eligible grant activities. 69 Comp. Gen. 600 (1990).

The concept of augmentation of appropriations also applies to assistance funds. One illustration is the rule that a federal institution is generally not eligible to receive grant funds from another federal institution unless the program legislation expressly so provides. The reason is that the grant funds would improperly augment the appropriations of the receiving institution. For example:

- Federal grant funds for nurse training programs could not be allotted to St. Elizabeths Hospital since it was already receiving appropriations to maintain and operate its nursing school. 23 Comp. Gen. 694 (1944).
- Haskell Indian Junior College, fully funded by the Bureau of Indian Affairs, was not eligible to receive grant funds from federal agencies other than the Bureau of Indian Affairs, since Congress had already provided for its needs by direct appropriations. B-114868, April 11, 1975.
- The Office of Education could not make a library support grant under the Higher Education Act of 1965 to the National Commission on Libraries and Information Science as it would be an improper augmentation of the Commission's appropriations. 57 Comp. Gen. 662, 664 (1978).

The appropriations which would be augmented by the grant do not have to be specific appropriations for the prohibition to apply. B-69616, November 19, 1947. Of course, Congress may legislatively authorize exceptions. E.g., B-217093, January 9, 1985.

d. Agency Regulations

(1) General principles

Legislation establishing an assistance program frequently will define the program objectives and leave it to the administering agency to fill in the details by regulation. Thus, agency regulations are of paramount importance in assessing the parameters of grant authority.

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These regulations, if properly promulgated and within the bounds of the agency's statutory authority, have the force and effect of law and may not be waived on a retroactive or ad hoc basis. 57 Comp. Gen. 662 (1978) (eligibility standards); B-163922, February 10, 1978 (grantee's liability for improper expenditures); B-130515, July 17, 1974; B-130515, July 20, 1973 (matching share requirements). However, the prohibition against waiver does not necessarily apply to regulations which are merely "internal administrative guidelines" as long as the government's interests are adequately protected. See 60 Comp. Gen. 208, 210 (1981).

The operation of several of these principles is illustrated in B-203452, December 31, 1981. The Federal Aviation Administration revised its regulations to permit indirect costs to be charged to Airport Development Aid Program grants. A grantee filed a claim for reimbursement of indirect costs incurred prior to the change in the FAA regulations, arguing that the charging of indirect costs was required by a Federal Management Circular even before FAA recognized it in its own regulations. GAO first pointed out that Federal Management Circulars are internal management tools. They do not have the binding effect of law so as to permit a third party to assert them against a non-complying agency. This being the case, there was no impediment to FAA's revising its regulations without making the revision retroactive, as long as both the old and the new regulations were within the scope of FAA's legal authority. See also Pueblo Neighborhood Health Centers, Inc. v. Department of Health and Human Services, 720 F.2d 622, 625–26 (10th Cir. 1983) (HHS Grant Application Manual was an internal agency publication rather than a regulation with force and effect of law, such that deviation by agency—in this case use of an ineligible member on a funding review panel—did not require reversal of agency action).

Regulations of the grantor agency will generally be upheld, even if they are not specifically addressed in the program legislation, as long as they are within the agency's statutory authority, issued in compliance with applicable procedural requirements, and not arbitrary or capricious. For example, courts have upheld the authority of the Department of Agriculture to impose by regulation strict liability on states for lost or stolen food stamp coupons. Gallegos v. Lyng, 891 F.2d 788 (10th Cir. 1989); Louisiana v. Bergland, 531 F. Supp. 118 (M.D. La. 1982), aff'd sub nom. Louisiana v. Block, 694 F.2d 430 (5th Cir. 1982); Hettleman v. Bergland, 642 F.2d 63 (4th

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Cir. 1981). Similarly, it was within the discretion of the Environmental Protection Agency under the Clean Water Act to prescribe regulations making wastewater treatment grants available only for the construction of new facilities and not for the acquisition of preexisting facilities. Cole County Regional Sewer District v. United States, 22 Cl. Ct. 551 (1991). "The EPA, like all government agencies, is subject to funding constraints and must effectuate policy objectives with available resources." Id. at 557. Another illustration is American Hospital Association v. Schweiker, 721 F.2d 170 (7th Cir. 1983), cert. denied, 466 U.S. 958, upholding regulations imposing community service and uncompensated care requirements on recipients of Hill-Burton hospital construction grants.

Wholly apart from what the courts might or might not do, an agency's discretion in funding matters is subject to congressional oversight as well. Congress, if it disfavors an agency's actual or proposed exercise of otherwise legitimate discretion, can statutorily restrict that discretion, at least prospectively, either by amending the program legislation or by inserting the desired restrictions in appropriation acts. For an example of the latter, see B-238997.4, December 12, 1990.

The informal rulemaking requirements (notice and comment) of the Administrative Procedure Act do not apply to grant regulations. 5 U.S.C. § 553(a)(2). Several agencies, however, have published statements committing themselves to compliance with the APA and have thereby effectively waived the exemption. Where regulations are required to be published in the Federal Register, failure to do so may render them ineffective. The issue has been before the courts on several occasions. See, e.g., B-130515, July 17, 1974. (See Chapter 3 for further elaboration and case citations.)

A case not cited in Chapter 3 which applies several important Administrative Procedure Act principles in the grant context is Abbs v. Sullivan, 756 F. Supp. 1172 (W.D. Wis. 1990). A grantee university and one of its professors challenged a set of scientific misconduct investigation guidelines which the National Institutes of Health had published in a grants administration manual but not in the Federal Register. The court first found that the guidelines met the APA's definition of a "rule." Id. at 1187. The court then noted that the Department of Health and Human Services had voluntarily waived the exemption in 5 U.S.C. § 553 for rules relating to grants, and was

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thereby bound to follow the notice and comment procedures of the APA. Id. at 1188. The court also rejected the government's contention that the guidelines were "procedural" and therefore exempt. "Although an agency's label is relevant, it is not dispositive of the true character of the agency statement." Id. Accordingly, the court held the guidelines "invalid unless and until they are promulgated in compliance with the procedures required by the APA." Id. at 1189.

(2) The "common rules"

The importance of agency regulations and management guidance from the Office of Management and Budget is apparent throughout this chapter. Since the structure of that material changed drastically in the late 1980s, a summary of the new structure may be helpful.

For a number of years, uniform administrative requirements from OMB have been contained in two key circulars, A-102 (assistance to state, local, and Indian tribal governments) and A-110 (institutions of higher education, hospitals, and other nonprofit organizations). The structure of each circular was similar—a brief introduction followed by more than a dozen attachments with detailed guidance on specific topics.

In 1987, a memorandum from the President directed OMB to revise Circular A-102 to specify uniform, governmentwide terms and conditions for grants to state and local governments, and directed executive branch departments and agencies to propose and issue common regulations adopting these terms and conditions verbatim, modified where necessary to reflect inconsistent statutory requirements. 23 Weekly Comp. Pres. Doc. 254 (March 12, 1987).

A proposed common rule was published on June 9, 1987 (52 Fed. Reg. 21819), and the final common rule was published on March 11, 1988 (53 Fed. Reg. 8033), generally effective as of October 1, 1988. The rule was adopted by over 20 agencies, including all of the major grantor agencies. The title is identical for each agency: Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments. The revised Circular A-102 was issued on March 3, 1988. It is much simplified from its predecessor, much of the detail having been shifted to the individual agency regulations.

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Under the common rule, the pertinent Code of Federal Regulations title and part number will, of course, vary with the agency. Section numbers, however, are identical for each agency. For example, the definition section is ___.3 and the provision dealing with program income is ___.25.

The common rule itself is published at 53 Fed. Reg. 8087–8103. Pages 8042–8087 give the preambles and variations of the adopting agencies. References to the common rule in this chapter will cite the rule itself and not the regulations of any particular agency. The reader is therefore cautioned to check individual agency regulations for possible variations.

The common rule is intended to supersede uncodified manuals and handbooks unless required by statute or approved by the Office of Management and Budget. Common Rule §___ .5, 53 Fed. Reg. 8090. With respect to grants and grantees covered by the common rule, additional administrative requirements are to be in the form of codified regulations published in the Federal Register. Id. §___.6(a).

In addition to the A-102 implementation, the "common rule" format has been used in several other grant-related contexts.

On February 18, 1986, as part of the government's effort to combat fraud, waste, and abuse, the President signed Executive Order No. 12549, which directed the establishment of a system for debarment and suspension in the assistance context. OMB implemented the executive order by publishing a common rule, this one entitled "Governmentwide Debarment and Suspension (Nonprocurement)," adopted by over 25 grantor agencies and patterned generally on comparable provisions for procurement contracts in the Federal Acquisition Regulation. 53 Fed. Reg. 19160 (May 26, 1988). A person (including business entities and units of government) who is debarred is excluded from federal assistance and benefits, financial and nonfinancial, under federal programs and activities for a period of up to three years, possibly longer. Common Rule §§___.100(a) (purpose), ___.105(n) (definition of person), ___.320 (period of debarment), 53 Fed. Reg. at 19204–05, 19208. Causes of debarment are listed in §___.305, 53 Fed. Reg. at 19207. They include certain criminal convictions, antitrust violations, a history of unsatisfactory performance, and failure to pay a single substantial debt or a number of outstanding debts owed to the federal government.

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Suspension is a temporary exclusion, usually pending the completion of an investigation involving one or more of the causes for debarment. See generally Common Rule Subpart D, 53 Fed. Reg. 19208–09.

The General Services Administration is responsible for compiling and distributing a list of debarred or suspended persons. Id. §___.500, 53 Fed. Reg. 19209. The list, entitled Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs, is issued monthly by GSA's Office of Acquisition Policy and is also available electronically.

Another common rule, in the form of an "interim final rule" adopted by 28 grantor agencies, was issued on February 26, 1990 (55 Fed. Reg. 6736) to implement restrictions on grantee lobbying enacted in late 1989 and described in our section on lobbying in Chapter 4.

Still another common rule was issued on May 25, 1990 (55 Fed. Reg. 21681) to implement the Drug-Free Workplace Act of 1988 (41 U.S.C. § 702), which requires that grant recipients, including individuals, certify as a precondition of receiving federal funds that they have taken certain anti-drug abuse measures. Violation of the statute or regulations may result in suspension of grant payments, suspension or termination of the grant, and/or suspension or debarment of the grantee for a period of up to 5 years. 41 U.S.C. § 702(b); Common Rule §___.620, 55 Fed. Reg. at 21689.

2. Contracting by Grantees

Grantees commonly enter into contracts with third parties in the course of performing their grants. While the United States is not a party to the contracts, the grantee must nevertheless comply with any requirements imposed by statute, regulation, or the terms of the grant agreement, in awarding federally assisted contracts. 54 Comp. Gen. 6 (1974). Violation of applicable procurement standards may result in the loss of federal funding. E.g., Town of Fallsburg v. United States, 22 Cl. Ct. 633 (1991).

For a period of nearly 10 years, GAO undertook a limited review of the propriety of contract awards made by a grantee in furtherance of grant purposes, upon request of a prospective contractor. This limited review role was announced in 40 Fed. Reg. 42406 (September 12, 1975). (GAO called these "complaints" rather than "protests.") GAO

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(1) Imprest funds

The definitions of the various types of cashier refer primarily to the use of "imprest funds." An imprest fund is essentially a petty cash fund. More specifically, it is a fixed-cash fund (i.e., a fixed dollar amount) advanced to a cashier for cash disbursements or other cash requirement purposes as specifically authorized. An imprest fund may be either a stationary fund, such as a change-making fund, or a revolving fund. Treasury Financial Manual (TFM), Vol. I, § 4-3020.

Imprest funds are commonly used for such things as small purchases, travel advances, and authorized emergency salary payments. Guidance on the use of imprest funds may be found in GAO's Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 6.8, I TFM chapter 4-3000, and the Federal Acquisition Regulation (FAR), 48 C.F.R. subpart 13.4. Agencies using imprest funds are required to issue implementing regulations. I TFM § 4-3030; FAR, 48 C.F.R. § 13.403(c). Except to the extent specified in an agency's own regulations (e.g., B-220466 et al., December 9, 1986), there are no subject matter limitations on the kinds of services payable from imprest funds. 65 Comp. Gen. 806 (1986).

Imprest funds of the revolving type are replenished to the fixed amount as spent or used. As replenishments are needed, replenishment vouchers are submitted through the certifying officer to the disbursing officer. Replenishment vouchers must be supported by receipts or other evidence of the expenditures.

At any given time, an imprest fund may consist of cash, uncashed government checks, and other documents such as unpaid reimbursement vouchers, sales slips, invoices, or other receipts for cash payments. An imprest fund cashier must at all times be able to account for the full amount of the fund. I TFM § 4-3040.80. For example, if a cash box containing a $1,000 imprest fund disappears, and at the time of disappearance the box contained $500 in cash and $500 in receipts for which reimbursement vouchers had not yet been issued, the loss to the government is the full $1,000 and the cashier is accountable for that full amount. A cashier's failure to keep adequate records, thus making proper reconciliation impossible, is negligence. B-189084, January 15, 1980.

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applied the same limited review to contracts awarded under cooperative agreements. 59 Comp. Gen. 758 (1980).

GAO's review was designed primarily to ensure that the "basic principles" of competitive bidding were applied. 55 Comp. Gen. 390, 393 (1975). Numerous decisions were rendered in this area. E.g., 57 Comp. Gen. 85 (1977) (non-applicability of Buy American Act); 55 Comp. Gen. 1254 (1976) (state law applicable when indicated in grant); 55 Comp. Gen. 413 (1975) (non-applicability of Federal Procurement Regulations).

By 1985, many agencies had developed their own review procedures, and the number of complaints filed with GAO steadily decreased. Determining that its review of grantee contracting was no longer needed, GAO discontinued its limited review in January 1985. 50 Fed. Reg. 3978 (January 29, 1985); 64 Comp. Gen. 243 (1985). The body of decisions issued during the 1975–1985 period should nevertheless remain useful as guidance in this area.

In a 1980 report, GAO reviewed the procurement procedures of selected state and local government grantees and nonprofit organizations in five states. The report concluded that the state and local governments generally had and followed sound procurement procedures (somewhat less so for the nonprofits), but also found a number of weak spots, many of which are now addressed in OMB directives. The report is Spending Grant Funds More Efficiently Could Save Millions, PSAD-80-58 (June 30, 1980).

With respect to state and local governments, standards for grantee procurement are set forth in §___.36 of the Common Rule, 53 Fed. Reg. 8096. Grantor agencies are authorized, but not required, to establish formal review procedures for grantee procurements. See id. §§___.36(b)(11), (12); Supplementary Information Statement, 53 Fed. Reg. 8034, 8039 (March 11, 1988).

An agency which establishes a review procedure for grantee procurement will be held to established precepts of administrative law in applying those procedures. For example, in Niro Atomizer, Inc. v. Environmental Protection Agency, 682 F. Supp. 1212 (S.D. Fla. 1988), the court instructed EPA to either follow its established procedures or announce that it was changing them, giving the parties notice and an opportunity to rebut.

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3. Liability for Acts of Grantees

It is often said that the federal government is not liable for the unauthorized acts of its agents, "agents" in this context referring to the government's own officers and employees. If this is true with respect to those who clearly are agents of the government, it logically must apply with even greater force with respect to those who are not its agents. Grantees, for purposes of imposing legal liability on the United States, are not "agents" of the government. While the demarcation is not perfect, we divide our discussion into two broad areas, contractual liability and tortious conduct.

a. Contractual Liability to Third Parties

In order for the United States to be contractually liable to some other party, there must be "privity of contract," that is, a direct contractual relationship, between the parties. When a grantee under a federal grant enters into a contract with a third party (contractor), there is privity between the United States and the grantee, and privity between the grantee and the contractor, but no privity between the United States and the contractor and hence, as a general proposition, no liability.

Perhaps the leading case in this area is D.R. Smalley & Sons, Inc. v. United States, 372 F.2d 505 (Ct. Cl. 1967), cert. denied, 389 U.S. 835. The plaintiff contractor had entered into a highway construction contract with the state of Ohio. The project was funded on a cost-sharing basis, with 90 percent of total costs to come from federal-aid highway funds. The contractor lost nearly $3 million on the project, recovered part of its loss from the state of Ohio, and then sued the United States to recover the unpaid balance. The contractor argued that Ohio was really the agent of the United States for purposes of the project because, among other things, the contract had been drafted pursuant to federal regulations, the United States approved the contract and all changes, and the United States was funding 90 percent of the costs.

The court disagreed. Since there was no privity of contract between the United States and the contractor, the government was not liable. The involvement of the government in various aspects of the project did not make the state the agent of the federal government for purposes of creating contractual liability, express or implied. The court stated:

"The National Government makes many hundreds of grants each year to the various states, to municipalities, to schools and colleges and to other public organizations and

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agencies for many kinds of public works, including roads and highways. It requires the projects to be completed in accordance with certain standards before the proceeds of the grant will be paid. Otherwise the will of Congress would be thwarted and taxpayers' money would be wasted. . . . It would be farfetched indeed to impose liability on the Government for the acts and omissions of the parties who contract to build the projects, simply because it requires the work to meet certain standards and upon approval thereof reimburses the public agency for a part of the costs."

Id. at 507. Some later cases applying the Smalley concept are Somerville Technical Services v. United States, 640 F.2d 1276 (Ct. Cl. 1981); Housing Corporation of America v. United States, 468 F.2d 922 (Ct. Cl. 1972); Cofan Associates, Inc. v. United States, 4 Cl. Ct. 85 (1983); 68 Comp. Gen. 494 (1989).

The Cofan case presented an interesting variation in that the claimant was a disappointed bidder rather than a contractor, trying to recover under the theory, well-established in the law of procurement contracts, that there is an implied promise on the part of the government to fairly consider all bids. This did not help the plaintiff, however, since again there was no privity with the government.

"[I]t is now firmly established that a person who enters into a contract with a [grantee] to perform services on a project funded in part by loans or grants-in-aid from the United States may not thereby be deemed to have entered into a contract with the United States. Nor is the result any different because the United States has imposed guidelines or restrictions on the use of the funds, including procurement procedures." 4 Cl. Ct. at 86.

Another variation occurred in 47 Comp. Gen. 756 (1968). A contractor had succeeded in recovering increased costs from a state grantee. Under Smalley, it was clear that the government could not be held legally liable for a proportionate share of the recovery. However, it was apparent that the increased costs were due to the fact that erroneous soil profile information furnished by the state had contributed to an unrealistically low bid by the contractor. Under these circumstances, GAO advised that the grantor agency and the state could enter into a voluntary modification of the grant agreement to recognize the damage recovery as a project cost. See also B-167310, July 31, 1969.

In limited circumstances, there is a device that may be available to a contractor to have its claim considered by the federal government, illustrated by B-181332, December 28, 1976. In that case, an agency had erroneously refused to fund a grant after it had been approved

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and the grantee's contractor had incurred expenses in reliance on the approval. There clearly was no privity between the contractor and the United States. However, GAO recognized a procedural device drawn from the law of procurement contracts, and accepted a claim filed by the grantee (with whom the United States did have privity) "for and on behalf of" the contractor, in which the grantee acknowledged liability to the contractor only if and to the extent that the government was liable to the grantee. In effect, the contractor was prosecuting the claim in the name of the grantee. This device is potentially useful only where the government's liability to the grantee can be established. See also 68 Comp. Gen. 494, 495–96 (1989); 9 Comp. Gen. 175 (1929).

A different type of contract, an employment contract, was the subject of 66 Comp. Gen. 604 (1987), in which GAO concluded, applying Smalley, that the United States was not liable to a former employee of a grantee for unpaid salary. The grantor agency had funded all allowable costs under the grant, and the grantee's transgression was not the liability of the United States.

As if to prove the adage that anything that can happen will happen, a 1983 case combined all of the elements noted above. The Agency for International Development made a rural development planning grant to Bolivia. Bolivia contracted with a private American company to perform certain functions under the grant, and the company in turn entered into employment contracts with various individuals. The contract with the private company (but not the grant itself) was terminated, the company terminated the employment contracts, and the individuals then sought to recover benefits provided under Bolivian law. Clearly, AID was not legally liable to the individual claimants. However, some of the benefits to some of the claimants could qualify as allowable costs under the grant and could be paid, if approved by AID and the grantee, to the extent grant funds remained available. B-209649, December 23, 1983.

b. Tortious Conduct

A number of cases have involved attempts to impose liability on the United States under the Federal Tort Claims Act or similar situations. The Federal Tort Claims Act makes the United States liable, with various exceptions, for the tortious conduct of its officers, employees, or agents acting within the scope of their employment. As a general proposition, a grantee is not an agent or agency of the government for purposes of tort liability.

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An important Supreme Court case is United States v. Orleans, 425 U.S. 807 (1976), holding that a community action agency funded under the Economic Opportunity Act is not a "federal agency" for purposes of Federal Tort Claims Act. The case arose from a motor vehicle accident involving plaintiff Orleans and an individual acting on behalf of a grantee. The Court first noted that the Federal Tort Claims Act "was never intended, and has not been construed by this Court, to reach employees or agents of all federally funded programs that confer benefits on people." Id. at 813. The Court then stated, and answered, the controlling test:

> "[T]he question here is not whether the [grantee] receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government.
>
> . . . .
>
> ". . . The Federal Government in no sense controls 'the detailed physical performance' of all the programs and projects it finances by gifts, grants, contracts, or loans." Id. at 815–16.

Thus, the general rule is that the United States is not liable for torts committed by its grantees. Neither the fact of federal funding nor the degree of federal involvement encountered in the typical grant (approval, oversight, inspection, etc.) is sufficient to make the grantee an agent of the United States for purposes of tort liability. Liability could result, however, if the federal involvement reached the level of detailed supervision of day-to-day operations noted in Orleans. An example is Martarano v. United States, 231 F. Supp. 805 (D. Nev. 1964) (state employee under cooperative agreement working under direct control and supervision of federal agency).

The same rules apply for purposes of determining the liability of the United States for a taking of private property under the Fifth Amendment. E.g., Hendler v. United States, 11 Cl. Ct. 91, 98–99 (1986). For actions which may have taking implications, agencies should also be familiar with the policies and requirements of Executive Order No. 12630, March 15, 1988.

In another group of cases, attempts have been made to find the United States liable under the Federal Tort Claims Act for the allegedly negligent performance of its oversight role under a grant. The courts have found these claims covered by the "discretionary function"

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exception to Federal Tort Claims Act liability. Mahler v. United States, 306 F.2d 713 (3d Cir. 1962), cert. denied, 371 U.S. 923, followed in Daniel v. United States, 426 F.2d 281 (5th Cir. 1970), and Rayford v. United States, 410 F. Supp. 1051 (M.D. Tenn. 1976).

In areas not covered by the Federal Tort Claims Act, such as the so-called constitutional tort, the potential for individual liability cannot be disregarded. For example, an official of the Indian Health Service, acting jointly with a state official, told a nonprofit intermediary that further funding would be conditioned on the dismissal of an employee whom they thought was performing inadequately. The intermediary fired the employee, who then sued the state official and the federal official in their individual capacities. The suit against the federal defendant was based directly on the Fifth Amendment, for deprivation of a property interest (the plaintiff's job) without due process. The court first found that there had been a due process violation, and that the defendants were not entitled to qualified immunity because their conduct exceeded the scope of their authority. Merritt v. Mackey, 827 F.2d 1368 (9th Cir. 1987). The court noted that there was no basis for imposing liability on the United States. Id. at 1373–74. In the second published appellate decision in the case, the court affirmed a monetary damage award and an award of attorney's fees against the individual officials. The federal official was personally liable for the fee award under 42 U.S.C. § 1988 because he had acted in concert with a state official. Merritt v. Mackey, 932 F.2d 1317 (9th Cir. 1991).

Finally, a case deserving brief mention, although not involving the monetary liability of the United States, is Dixson v. United States, 465 U.S. 482 (1984), in which the Supreme Court held that two officers of a private, nonprofit corporation, who were assigned to administer two federal community development block grants awarded by the Department of Housing and Urban Development to the city of Peoria, were "public officials" who could be prosecuted under the federal bribery statute.

4. Types of Grants: Categorical vs. Block

A categorical grant is a grant to be used only for a specific program or for narrowly defined activities. A categorical grant may be allocated on the basis of a distribution formula prescribed by statute or regulation ("formula grant"), or it may be made for a specific project ("project grant"). A block grant is a grant given to a governmental

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unit, usually a state, to be used for a variety of activities within a broad functional area.[16] Block grants are usually formula grants. Under a block grant, the state is responsible for further distribution of the money. States naturally prefer block grants because they increase the states' spending flexibility and at least in theory reduce federal control.

During the 1960s and 1970s, although some block grant programs were in existence, the emphasis was largely on categorical grants. The Omnibus Budget Reconciliation Act of 1981 (OBRA), Public Law 97-35, attempted to put a halt to this trend. The statute merged and consolidated several dozen categorical grant programs into block grants. The following programs stem from, or were significantly revised by, the 1981 OBRA (the OBRA title and page citation and U.S. Code location are indicated parenthetically for each program):

- Community Development Block Grant (Title III, 95 Stat. 384, 42 U.S.C. Ch. 69).
- Elementary and Secondary Education Block Grant (Title V, 95 Stat. 463. The law was overhauled in 1988; the successor version is found at 20 U.S.C. Ch. 47).
- Community Services Block Grant (Title VI, 95 Stat. 511, 42 U.S.C. Ch. 106).
- Preventive Health and Health Services Block Grant (Title IX, 95 Stat. 535, 42 U.S.C. Ch. 6A, Subch. XVII, Part A).
- Alcohol and Drug Abuse and Mental Health Services Block Grant (Title IX, 95 Stat. 543, 42 U.S.C. Ch. 6A, Subch. XVII, Part B).
- Maternal and Child Health Services Block Grant (Title XXI, 95 Stat. 818, 42 U.S.C. Ch. 7, Subch. V).
- Social Services Block Grant (Title XXIII, 95 Stat. 867, 42 U.S.C. Ch. 7, Subch. XX).
- Low-Income Home Energy Assistance Block Grant (Title XXVI, 95

[16]GAO, A Glossary of Terms Used in the Federal Budget Process, PAD-81-27, at 61–62 (March 1981).

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Stat. 893, 42 U.S.C. Ch. 94, Subch. II).[17]

Block grants do reduce federal involvement in that they transfer much of the decision-making to the grantee and reduce the number of separate grants that must be administered by the federal government. However, it is a misconception to think that block grants are "free money" in the sense of being totally free from federal "strings."

Restrictions on the use of block grant funds may derive from the organic legislation itself. For example, several of the OBRA programs include such items as limitations on allowable administrative expenses, prohibitions on the use of funds to purchase land or construct buildings, "maintenance of effort" provisions, and anti-discrimination provisions. Other OBRA provisions of general applicability (Pub. L. No. 97-35, §§ 1741–1745, 95 Stat. 762–64) impose reporting and auditing requirements, and require states to conduct public hearings as a prerequisite to receiving funds in any fiscal year.

Applicable restrictions are not limited to those contained in the program statute itself. Other federal statutes applicable to the use of grant funds must also be followed. See, e.g., Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971), holding that the National Historic Preservation Act and the National Environmental Policy Act applied to a block grant made by the Law Enforcement Assistance Administration to Virginia under the Safe Streets Act. A later and related decision in the same case is 497 F.2d 252 (4th Cir. 1974). See also Maryland Department of Human Resources v. Department of Health and Human Services, 854 F.2d 40 (4th Cir. 1988) (requirement for apportionment by Office of Management and Budget applicable to funds under Social Services Block Grant); 6 Op. Off. Legal Counsel 605 (1982) (Uniform Relocation Assistance Act applicable to Community Development block grant); 6 Op. Off. Legal Counsel 83 (1982) (various

[17]GAO has issued a number of studies and reports on the OBRA block grants. Some of them are Early Observations on Block Grant Implementation, GAO/GGD-82-79 (August 24, 1982); Lessons Learned From Past Block Grants: Implications for Congressional Oversight, GAO/IPE-82-8 (September 23, 1982); A Summary and Comparison of the Legislative Provisions of the Block Grants Created by the 1981 Omnibus Budget Reconciliation Act, GAO/IPE-83-2 (December 30, 1982); Block Grants: Overview of Experiences to Date and Emerging Issues, GAO/HRD-85-46 (April 3, 1985); and Community Development: Oversight of Block Grant Needs Improvement, GAO/RCED-91-23 (January 30, 1991). GAO has also published a comprehensive catalog of formula grants, intended for use as a resource document. It is: Grant Formulas: A Catalog of Federal Aid to States and Localities, GAO/HRD-87-28 (March 1987).

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anti-discrimination statutes applicable to Elementary and Secondary Education and Social Services block grants).

Thus, the block grant mechanism does not totally remove federal involvement nor does it permit the circumvention of federal laws applicable to the use of grant funds. In this latter respect, a block grant is legally no different from a categorical grant.

The common rule for uniform administrative requirements does not apply to the OBRA block grants. Common Rule §___.4(a), 53 Fed. Reg. 8089.

5. The Single Audit Act

We noted in our Introduction to this chapter that federal grants to state and local governments exceed $100 billion a year. With expenditures of this magnitude, it is essential that there be some way to assure accountability on the part of the grantees. The traditional means of assuring accountability has been the audit.

Prior to 1984, there were no statutory uniform audit requirements for state and local government grantees. Audits were performed on a grant or program basis and requirements varied with the program legislation. Under this system, gaps in audit coverage resulted because some entities were audited infrequently or not at all. Also, overlapping requirements produced duplication and inefficiency with multiple audit teams visiting the same entity and reviewing the same financial records. Congress addressed the problem by enacting the Single Audit Act of 1984, Pub. L. No. 98-502, codified at 31 U.S.C. §§ 7501–7507.[18] An informative discussion of the need for the legislation, with references to several reports by GAO and the Joint Financial Management Improvement Program, may be found in the report of the House Committee on Government Operations, H.R. Rep. No. 708, 98th Cong., 2d Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 3955.

[18]For an early review of the law's implementation, see Single Audit Act: Single Audit Quality Has Improved but Some Implementation Problems Remain, GAO/AFMD-89-72 (July 1989).

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As a general proposition, a state or local government which receives at least $100,000 in federal financial assistance[19] in any fiscal year must have an audit, of the type prescribed in the statute, performed for that fiscal year by an independent auditor. The requirement differs if federal financial assistance is less than $100,000. 31 U.S.C. §§ 7502(a)(1) and (c). Audits are to be conducted annually. However, biennial audits are permissible if the grantee has, prior to January 1, 1987, so provided in its constitution or statutes. Id. § 7502(b). The audit is to be conducted "in accordance with generally accepted government auditing standards." Id. § 7502(c). These standards are found in GAO's publication Government Auditing Standards (1988), informally known as GAO's "yellow book." The Office of Management and Budget, in consultation with GAO, is required to prescribe "policies, procedures, and guidelines" to implement the Single Audit Act. 31 U.S.C. § 7505(a). These are found in OMB Circular No. A-128, Audits of State and Local Governments (1985).

The audit may be a single comprehensive audit covering the entire state or local government or a series of audits of individual agencies, and may be limited to those agencies which actually received or administered federal financial assistance. 31 U.S.C. §§ 7502(d)(1), (d)(6).

The audit required by the Single Audit Act is essentially a financial and compliance audit and does not include "economy and efficiency audits, program results audits, or program evaluations." Id. § 7502(c).[20] The statute prescribes the major components of the audit:

- Determinations that the grantee's financial statements fairly present its financial position and the results of its financial operations, and that it has complied with laws and regulations that may materially affect its financial statements.
- Evaluation of the recipient's internal control systems.

[19]While we have framed our discussion in terms of grants, "federal financial assistance" for purposes of the Single Audit Act includes "grants, contracts, loans, loan guarantees, property, cooperative agreements, interest subsidies, insurance, or direct appropriations," but excludes direct federal cash assistance to individuals. 31 U.S.C. § 7501(4).

[20]The different types of government audits are described in GAO's Government Auditing Standards, Chapter 2.

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Loss of a replenishment check before it reaches the cashier is not a situation requiring relief of the cashier. The proper procedure in such a situation is to report the loss to the disbursing office which issued the check to obtain a replacement. B-203025, October 30, 1981.

If in the government's interests, a checking account may be set up in a private bank for imprest fund disbursements as long as adequate control procedures are developed. B-117566, April 29, 1959. Use of depositary accounts must be approved by the agency head or designee, is authorized only for cash withdrawal transactions, and should be limited to situations in which there is "strong justification." I TFM § 4-3040.60. The account may be interest-bearing, in which event any interest earned must be deposited in the Treasury as miscellaneous receipts. Id.

The method of imprest fund accountability changed starting with fiscal year 1985. Prior to that time, funds advanced to cashiers by Treasury disbursing officers were not "charged" to the agency's appropriations at the time of the advance but were carried on the disbursing officers' records of accountability. The cashiers were regarded as agents of the disbursing officers. In fact, it was common to refer to cashiers as "agent cashiers." E.g., A-89775, March 21, 1945. Charges were made to the applicable appropriation or fund accounts only when replenishment checks were issued. Relief requests had to be submitted through the Treasury's Chief Disbursing Officer.

In 1983, the Treasury Department proposed removing imprest fund advances from the disbursing officers' accountability inasmuch as the transactions were beyond the disbursing officers' control. GAO concurred. B-212819-O.M., May 25, 1984. The current procedures are discussed in 70 Comp. Gen. 481 (1991). In brief, the charge to the agency's appropriation is now made at the time of the initial advance. However, since the advance does not qualify as an obligation under 31 U.S.C. § 1501, the charge must be in the form of a "commitment" or "reservation." In general, the actual obligation occurs when the advance is used and the cashier seeks replenishment. The preliminary charge is necessary to protect against violating the Antideficiency Act. Except for certain procedural matters (relief requests are no longer processed through the applicable disbursing officer), the changes have no effect on the cashier's liability as an accountable officer.

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- Compliance with laws and regulations that may have a material effect upon applicable major federal assistance programs. This includes the testing of a representative number of transactions from each major program. ("Major" programs are determined under criteria specified in 31 U.S.C. § 7501(12).)

31 U.S.C. § 7502(d)(2)–(d)(4); H.R. Rep. No. 708 at 10, reprinted in 1984 U.S. Code Cong. & Admin. News 3964. The state or local government must submit to the appropriate federal officials a plan for corrective action to address any material noncompliance with applicable laws and regulations or material weakness in internal controls uncovered by the audit. 31 U.S.C. § 7502(g).

The "single audit" replaces financial or financial and compliance audits which state or local governments are required to conduct under various program statutes. 31 U.S.C. § 7503(a). Thus, for example, absent a statutory exception to the Single Audit Act, the Environmental Protection Agency is not authorized to require a state to provide a separate financial or financial and compliance audit of its water pollution revolving fund in addition to the "single audit." B-241096, January 30, 1991 (internal memorandum). However, the Act does not limit the authority of any federal agency to conduct additional audits or evaluations authorized by federal law or regulation, including economy/efficiency and program audits. 31 U.S.C. §§ 7503(c), (e).

The cost of a single audit is to be shared by the state or local government and the federal government, generally in the same proportion that federal financial assistance bears to the recipient's total expenditures for the fiscal year(s) covered by the audit. 31 U.S.C. § 7505(b); OMB Circular No. A-128, § 16. The federal government's share, determined under this formula, becomes an allowable cost to the relevant programs. Federal agencies which conduct additional audits or evaluations as authorized by 31 U.S.C. § 7503(c) are responsible for their funding. Id. § 7503(e).

The law also directs the Comptroller General to monitor provisions in bills and resolutions reported by committees of the Senate and House of Representatives that require financial or financial and compliance audits, and to report to appropriate congressional committees any such provisions which are inconsistent with the Single Audit Act. 31 U.S.C. § 7506.

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As noted above, the Single Audit Act applies only to state and local governments. The need for reliable and comprehensive auditing, however, applies equally to all grantees. In recognition of this, the Office of Management and Budget issued OMB Circular No. A-133, Audits of Institutions of Higher Education and Other Nonprofit Institutions (1990), which establishes auditing requirements for nonprofits similar to those of the Single Audit Act. Regardless of the identity of the grantee, whether a governmental organization or a nonprofit institution, sound auditing practices of the type envisioned by the Single Audit Act and the OMB Circulars are indispensable to assuring the efficient use of audit resources and to improving the financial management of federal assistance programs. See, e.g., GAO report Promoting Democracy: National Endowment for Democracy's Management of Grants Needs Improvement, GAO/NSIAD-91-162 (March 1991).

D. Funds in Hands of Grantee: Status and Application of Appropriation Restrictions

Expenditures by grantees for grant purposes are not subject to all of the same restrictions and limitations imposed on direct expenditures by the federal government. For this reason, grant funds in the hands of a grantee have been said to largely lose their character and identity as federal funds. The Comptroller General has stated the principle as follows:

> "It consistently has been held with reference to Federal grant funds that, when such funds are granted to and accepted by the grantee, the expenditure of such funds by the grantee for the purposes and objects for which made [is] not subject to the various restrictions and limitations imposed by Federal statute or our decisions with respect to the expenditure, by Federal departments and establishments, of appropriated moneys in the absence of a condition of the grant specifically providing to the contrary." 43 Comp. Gen. 697, 699 (1964).

Thus, except as otherwise provided in the program statute, regulations, or the grant agreement, the expenditure of grant funds by a state government grantee is subject to the applicable laws of that state rather than federal laws applicable to direct expenditures by federal agencies. 16 Comp. Gen. 948 (1937). The rule applies "with equal if not greater force" when the grantee is another sovereign nation. B-80351, September 30, 1948.

This does not mean that an agency can circumvent a statutory restriction by making a grant to do something it could not do directly. What it does mean is that when an agency makes a grant for a valid

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grant purpose, the grantee has a measure of discretion in choosing the means to implement the grant, subject to applicable statutes, regulations, and the terms of the grant agreement. In exercising that discretion, restrictions that would apply to direct expenditures by the grantor agency do not necessarily apply to the grantee. Of course, the expenditure must be for an otherwise valid grant purpose and must not be prohibited by the terms of the grant agreement.

One group of cases[21] involves restrictions on employee compensation and related payments. Examples are:

- Provision in Labor-Federal Security Appropriation Act, 1948, prohibiting use of federal funds to pay salaries of persons engaging in a strike against the United States Government, did not apply to funds granted to states to assist in enforcing Fair Labor Standards Act and Walsh-Healey Public Contracts Act. The funds were not "salaries" as such; they were grant funds to reimburse states for services of state employees, and therefore were state rather than federal funds. 28 Comp. Gen. 54 (1948). See also 39 Comp. Gen. 873 (1960).
- Requirement for specific authorizing legislation to use public funds to pay employer contributions for federal employees' health and life insurance benefits does not apply to use of federal grant funds to contribute to state group health and life insurance programs for state employees. 36 Comp. Gen. 221 (1956).
- Restrictions on retired pay not applicable to retired military officer working on grant-funded state project. 14 Comp. Gen. 916 (1935), modified on other grounds by 36 Comp. Gen. 84 (1956).
- Federal restrictions on dual compensation for federal employees are inapplicable to grantee employees. B-153417, February 17, 1964.

The rule has been applied in a variety of other contexts as well. One example is the area of state and local taxes. Thus, federal immunity from payment of certain sales taxes does not apply to a state grantee since the grantee is not a federal agent. The grant funds lose their federal character and become state funds. Therefore, the state grantee may pay a state sales tax on purchases made with federal grant funds if the tax applies equally to purchases made from all nonfederal funds. 37 Comp. Gen. 85 (1957). See also B-177215, November 30, 1972, applying the same reasoning for purchases made by a contractor who

[21]Some of the decisions cited may involve statutory restrictions on federal expenditures which have been changed or repealed since the decisions were issued. The cases are cited solely to illustrate the application of the grant rule and thus remain valid to that extent.

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was funded by a federal grantee. Similarly, a state tax on the income of a person paid from federal grant funds involves no question of federal tax immunity. 14 Comp. Gen. 869 (1935).

The following is a sampling of other restrictions which have been found inapplicable to grantee expenditures:

- Adequacy of Appropriations Act (41 U.S.C. § 11) and prohibition on entering into contracts for construction or repair of public buildings, or other public improvements, in excess of amount specifically appropriated for that purpose (41 U.S.C. § 12). B-173589, September 30, 1971.
- Prohibition in 31 U.S.C. § 1343 on purchasing aircraft without specific statutory authority. 43 Comp. Gen. 697 (1964) (permissible for grantee under National Science Foundation research grant). See also B-196690, March 14, 1980 (purchase of motor vehicles). However, an agency may not acquire excess aircraft or passenger vehicles by transfer for use by its grantees. 55 Comp. Gen. 348 (1975).
- Prohibition in 31 U.S.C. § 1345 on payment of nonfederal persons' travel and lodging expenses to attend a meeting. 55 Comp. Gen. 750 (1976).
- Requirement for specific authority in order to establish a revolving fund. (Federal agency would need specific authority in view of 31 U.S.C. § 3302(b)). 44 Comp. Gen. 87 (1964).
- A grantee's entertainment expenses may be allowable if incurred in furtherance of grant purposes and if not otherwise prohibited by statute, regulation, or the grant agreement. 64 Comp. Gen. 582, 587 (1985); B-196690, March 14, 1980; B-187150, October 14, 1976. Having said this, however, it should be the rare occasion when entertainment expenses are in fact allowable, assuming agencies follow the Office of Management and Budget's instructions to treat them as unallowable. (See OMB Circulars A-21, A-87, A-122.)

Where assistance funds are provided to the District of Columbia under a program of assistance to the states which defines "state" as including the District of Columbia, statutory restrictions expressly applicable to the District of Columbia remain applicable with respect to the assistance funds even though they would not necessarily apply to the assistance funds in the hands of the other states. 34 Comp. Gen. 593 (1955); 17 Comp. Gen. 424 (1937); A-90515, December 23, 1937.

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When applying the general proposition that grantee expenditures are not subject to the same restrictions as direct federal expenditures, it is important to keep in mind that grantees are obligated upon acceptance of grant funds to spend them for the purposes and objectives of the grant, subject to any statutory or special conditions imposed on the use of assistance funds. See, e.g., 42 Comp. Gen. 682 (1963); 2 Comp. Gen. 684 (1923). These conditions may include implied requirements, such as the implied requirement of the "basic principles" of open and competitive bidding in the case of grantee contracts. 55 Comp. Gen. 390 (1975). They also include statutorily authorized requirements, as in the case of the Office of Personnel Management's authority to establish merit standards for grantees under 42 U.S.C. § 4728(b) (Intergovernmental Personnel Act of 1970). Statutory restrictions on lobbying with public funds may also apply to grantee expenditures.

In addition, several federal statutes prohibit various types of discrimination.[22] Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) prohibits discrimination on the basis of race, color, or national origin under any program or activity receiving federal financial assistance. The Rehabilitation Act of 1973, as amended in 1978 (29 U.S.C. § 794), similarly prohibits discrimination against handicapped individuals. The Age Discrimination Act of 1975 extends the prohibition to discrimination on the basis of age (42 U.S.C. § 6102).

Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681) prohibits sex discrimination under certain education programs, and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2) would prohibit employment discrimination by grantees on the basis of sex as well as race, color, religion, or national origin. In addition, several block grant statutes contain their own anti-discrimination provisions and include sex discrimination. As of the date of this publication, however, the editors have found no general statutory prohibition against sex discrimination in the awarding of federal assistance funds. (The extent to which the equal protection clause of the Constitution might come into play is a question left to the courts.)

[22]For a detailed Justice Department opinion on the applicability of the major anti-discrimination statutes to federal assistance funds, with particular emphasis on block grants, see 6 Op. Off. Legal Counsel 83 (1982).

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Statements in some of the cases to the effect that grant funds upon being paid over to the grantee are no longer federal funds should not be taken out of context. The fact that grant funds in the hands of a grantee are no longer viewed as federal funds for certain purposes does not mean that they lose their character as federal funds for all purposes. It has been held that the government retains a "property interest" in grant funds until they are actually spent by the grantee for authorized purposes. This property interest may take the form of an "equitable lien," stemming from the government's right to ensure that the funds are used only for authorized purposes, or a "reversionary interest" (funds that can no longer be used for grant purposes revert to the government). By virtue of this property interest, the funds—and property purchased with those funds to the extent unrestricted title has not vested in the grantee—are not subject to judicial process without the government's consent. E.g., Henry v. First National Bank of Clarksdale, 595 F.2d 291, 308–09 (5th Cir. 1979), cert. denied, 444 U.S. 1074.

The concept is illustrated in two cases from the Court of Appeals for the Seventh Circuit. In Palmiter v. Action, Inc., 733 F.2d 1244 (7th Cir. 1984), the court rejected the argument that grant funds lose their federal character when placed in the grantee's bank account, and held that federal grant funds in the hands of a grantee are not subject to garnishment to satisfy a debt of the grantee. The holding would presumably not apply where the grantee had actually spent its own money and the federal funds were paid over as reimbursement. Id. at 1249. More recently, the court considered a similar issue in the context of a bankruptcy petition filed by a grantee under Chapter 7 of the Bankruptcy Code. The issue was whether grant funds in the hands of the grantee, as well as personal property purchased with grant money, were assets of the bankrupt and therefore subject to the control of the trustee in bankruptcy. Directing the trustee to abandon the assets, the court held that they remained the property of the federal government. In the course of reaching this result, the court noted that unpaid creditors of the bankrupt could, to the extent their claims were within the scope of the grant, be paid by the grantor agency out of the recovered funds. In re Joliet-Will County Community Action Agency, 847 F.2d 430 (7th Cir. 1988).

A case discussing both Palmiter and Joliet-Will, and reaching a similar result, is In re Southwest Citizens' Organization for Poverty Elimination, 91 Bankr. 278 (Bankr. D.N.J. 1988). A grantee, which

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had purchased a number of motor vehicles with Head Start grant funds, filed a Chapter 11 bankruptcy petition. The Department of Health and Human Services sought turnover of the property, contending that the bankrupt's title was subject to the government's right to require transfer to another grantee under the program legislation and regulations. The trustee argued that the motor vehicles were property of the bankruptcy estate, and that the trustee's interest superseded any interest of the government. After a detailed review of precedent, the court directed turnover of the vehicles, concluding that the government's rights amounted to a reversionary interest.

Another theory occasionally encountered but which appears to have received little in-depth discussion is the trust theory—that a grantee holds grant funds, and property purchased with those funds, in the capacity of a trustee. In Joliet-Will, for example, the court found that the grantee was essentially "a trustee, custodian, or other intermediary, who . . . is merely an agent for the disbursal of funds belonging to another," and that the grantee's "ownership" was nominal, like that of a trustee. 847 F.2d at 432. The trust concept finds support in an early Supreme Court decision, Stearns v. Minnesota, 179 U.S. 223 (1900), a land grant case in which the Court discussed the grant in trust terms. Id. at 243, 249. Some agencies have incorporated the trust concept in their program regulations. Examples are cited in B-239907, July 10, 1991 (Economic Development Administration), and United States v. Rowen, 594 F.2d 98, 100 (5th Cir. 1979) (former Department of Health, Education, and Welfare). See also 64 Comp. Gen. 103, 106 (1984).

A final area in which grant funds in the hands of a grantee continue to be treated as federal funds is the application of federal criminal statutes dealing with theft of money or property belonging to the United States. There are numerous cases in which the courts have applied various provisions of the Criminal Code, such as 18 U.S.C. § 641, to the theft or embezzlement of grant funds or grant property in the hands of grantees. Examples involving a variety of grant programs are Hayle v. United States, 815 F.2d 879 (2d Cir. 1987); United States v. Harris, 729 F.2d 441 (7th Cir. 1984); United States v. Hamilton, 726 F.2d 317 (7th Cir. 1984); United States v. Montoya, 716 F.2d 1340 (10th Cir. 1983); United States v. Smith, 596 F.2d 662 (5th Cir. 1979); United States v. Rowen, 594 F.2d 98 (5th Cir. 1979).

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In each of these cases, the court rejected the argument that the statute did not apply because the funds or property were no longer federal funds or property. It makes no difference whether the funds are paid to the grantee in advance or by reimbursement (Montoya, 716 F.2d at 1344), or that the funds may have been commingled with nonfederal funds (Hayle, 815 F.2d at 882). The holdings are based on the continuing responsibility of the federal government to oversee the use of the funds. E.g., Hayle, 815 F.2d at 882; Hamilton, 726 F.2d at 321. The result would presumably be different in the case of grant funds paid over outright with no continuing federal oversight or supervision. E.g., Smith, 596 F.2d at 664.

E. Grant Funding

1. Advances of Grant/Assistance Funds

The statutory prohibition on the advance payment of public funds, 31 U.S.C. § 3324, does not apply to grants. Since assistance awards are made to assist authorized recipients and are not primarily for the purpose of obtaining goods or services for the government, the policy behind the advance payment prohibition has much less force in the case of assistance awards than in the case of procurement contracts. Accordingly, it has been held that 31 U.S.C. § 3324 does not preclude advance funding in authorized grant relationships. Unless restricted by the program legislation or the applicable appropriation, the authority to make grants is sufficient to satisfy the requirements of 31 U.S.C. § 3324. 60 Comp. Gen. 208 (1981); 59 Comp. Gen. 424 (1980); 41 Comp. Gen. 394 (1961). As stated in 60 Comp. Gen. at 209, "[t]he policy of payment upon receipt of goods or services is simply inconsistent with assistance relationships where the Government does not receive anything in the usual sense."

This does not mean that there can never be an advance payment problem in a grant case. Two cases involving violations—56 Comp. Gen. 567 (1977) and B-159715, August 18, 1972—are discussed in Chapter 5. Also, since the authority to advance funds must, at least in a general sense, be founded on the program legislation, advance payments would probably not be authorized under an assistance program that provided for payment by reimbursement.

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2. Cash Management Concerns and Requirements

One problem with the advance funding of assistance awards is that the recipient may draw down funds before they are actually needed. This is a matter of concern for several reasons. For one thing, advances under an assistance program are intended to accomplish the program purposes and not to profit the recipient other than in the manner and to the extent specified in the program.

But there is another reason. When money is drawn from the Treasury before it is needed, or in excess of current needs, the government loses the use of the money. The principle was expressed as follows in B-146285, October 2, 1973:

> "When Federal receipts are insufficient to meet expenditures, the difference is obtained through borrowing; when receipts exceed expenditures, outstanding debt can be reduced. Thus, advancing funds to organizations outside the Government before they are needed either unnecessarily increases borrowings or decreases the opportunity to reduce the debt level and thereby increases interest costs to the Federal Government."

Thus, premature drawdown not only profits the recipient, but does so at the expense of the rest of the taxpayers. GAO has made the same point in several reports, such as Improving Medicaid Cash Management Will Reduce Federal Interest Costs, HRD-81-94 (May 29, 1981), and Better Cash Management Can Reduce the Cost of the National Direct Student Loan Program, FGMSD-80-5 (November 27, 1979).[23]

Congress has recognized these concerns in several ways, one of which was the October 1990 enactment of section 4 of the Cash Management Improvement Act of 1990, Pub. L. No. 101-453, 104 Stat. 1058, 31 U.S.C. § 3335. This legislation requires executive agencies to provide for the "timely disbursement" of federal funds in accordance with Treasury Department regulations.

If an agency's failure to comply with Treasury disbursement regulations results in increased cost to the General Fund of the Treasury (for example, increased interest expenses resulting from increased borrowing needs), the Secretary of the Treasury may collect this amount from the offending agency for credit as miscellaneous

[23]This principle is not limited to premature drawdown but applies equally to other types of premature or excess payments. E.g., GAO report entitled Unnecessary Interest Costs Incurred by the Government Because of Excess Progress Payments to Contractors (B-118662, March 22, 1965).

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receipts. 31 U.S.C. §§ 3335(b) and (c). The legislative history stresses that this penalty authority is to be "restricted to cases of egregious or repeated noncompliance, and [not to] be used in a routine manner to finance interest costs incurred by the Federal Government." H.R. Rep. No. 696, 101st Cong., 2d Sess. 7 (1990).

If an agency could pay its noncompliance penalty to the Treasury simply by reducing awards under its assistance programs, the penalty would effectively "cost" the agency nothing, the program beneficiaries would suffer, and little would be accomplished. The legislation addresses this by requiring that penalties be paid from administrative rather than program appropriations, "to the maximum extent practicable." 31 U.S.C. § 3335(d); H.R. Rep. No. 696 at 7.

Regulations applicable to all assistance recipients are found in Treasury Department Circular No. 1075 (31 C.F.R. Part 205) and pertinent Office of Management and Budget circulars. The essence of the government's policy is stated in 31 C.F.R. § 205.4(a):

"Cash advances to a recipient organization shall be limited to the minimum amounts needed and shall be timed to be in accord only with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project. The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program costs and the proportionate share of any allowable indirect costs."

Thus, it is within the discretion of the Social Security Administration to determine that a period of 15 months between drawdown and disbursement for state employee retirement contributions is excessive, and to make an appropriate disallowance. B-244617, December 24, 1991. The requirement to minimize the time elapsing between transfer of funds to the recipient and disbursement by the recipient is also stated in OMB Circulars A-102 (para. 7a) and A-110 (Attachment I, para. 1). It is also reflected in the Common Rule §§___.20(b)(7) and ___.21(b), 53 Fed. Reg. 8091.

Until the Cash Management Improvement Act is fully implemented, current Treasury regulations provide that, if annual advances to a grantee total less than $120,000, or there is no continuing grantor-grantee relationship for at least one year, advances are made by direct Treasury check scheduled to make funds available only immediately prior to grantee disbursement. 31 C.F.R. § 205.4(c).

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An alternative approach to managing imprest funds is the "third-party draft" procedure described in I TFM § 4-3040.70. In brief, an agency may, with written approval from its Treasury Financial Center, retain a contractor to provide the agency with payment instruments, not to exceed a face value of $1,000 each, drawn on the contractor's account. The agency then uses these drafts for its imprest fund transactions, and reimburses the contractor for properly payable drafts which the contractor has paid. Since the funds being disbursed from the imprest fund under this system are not government funds, personal liability does not attach to the cashier. Id.; GAO Policy and Procedures Manual, title 7, § 6.8.B.

(2) Flash rolls

Law enforcement officers on undercover assignments frequently need a supply of cash to support their operations, for example, to purchase contraband or to use as a gambling stake. This money, often advanced from an imprest fund, is called a "flash roll." By the very nature of the activities involved, flash roll money is at high risk to begin with.

It is clear that a flash roll in the hands of a law enforcement agent retains its status as government funds. Garcia v. United States, 469 U.S. 70 (1984) (flash roll held to be money of the United States for purposes of 18 U.S.C. § 2114, which makes it a criminal offense to assault a custodian of government money). However, flash roll money will be accountable in some situations and nonaccountable in others, depending on the nature of the loss. If the loss is within the risk inherent in the operation, such as the suspect absconding with the money, it is not viewed as an "accountable officer" loss but may be handled internally by the agency. If the agency, under its internal investigation procedures, finds the agent with custody of the funds to have been negligent, it should hold the agent liable to the extent provided in its regulations. Otherwise, it may simply record the loss as a necessary expense against the appropriation which financed the operation. If, on the other hand, the loss occurs in the course of the operation but is unrelated to carrying out its purpose, the accountable officer laws apply. The decision first recognizing this distinction is 61 Comp. Gen. 313 (1982), applying it in the context of Drug Enforcement Administration undercover operations.[8]

[8]Prior decisions, such as B-192010, August 14, 1978, which had treated all flash roll losses as accountable officer losses, were modified accordingly. 61 Comp. Gen. at 316.

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If annual advances aggregate $120,000 or more and the relationship is expected to continue for at least one year, advances are made by "letter of credit." 31 C.F.R. § 205.4(b). A letter of credit is an instrument (Standard Form 1193A) executed by an authorized certifying officer of the grantor agency permitting a grantee to draw funds needed for immediate disbursement. A letter of credit is irrevocable and is the equivalent of cash "to the extent the recipient organization has obligated funds in good faith thereunder in executing the authorized Federal program in accordance with the grant, contract, or other agreement." 31 C.F.R. § 205.5. The Treasury Department's letter of credit procedures are found in the Treasury Financial Manual, Vol. I, Part 6, Chapters 2000 and 2500. Disbursements under most letters of credit are made by electronic fund transfer to a financial institution designated by the recipient organization.

If a recipient is unwilling or unable to establish procedures to minimize the gap between drawdown and disbursement, advance funding may be terminated and payments made only on a reimbursement basis. 31 C.F.R. § 205.7.

In Maryland Department of Human Resources v. Department of Health and Human Services, 854 F.2d 40 (4th Cir. 1988), the plaintiff state argued that it should receive its entire annual Social Services Block Grant allotment at once at the beginning of the fiscal year. The court disagreed, upholding quarterly apportionment by the Office of Management and Budget under 31 U.S.C. § 1512.

3. Interest on Grant Advances

a. In General

The Comptroller General has consistently held that except as otherwise provided by law, interest earned by a grantee on funds advanced by the United States under an assistance agreement pending their application to grant purposes, belongs to the United States rather than to the grantee. All such interest is required to be accounted for as funds of the United States, and must be deposited in the Treasury as miscellaneous receipts under 31 U.S.C. § 3302(b). 71 Comp. Gen. 387 (1992); 69 Comp. Gen. 660 (1990); 42 Comp. Gen. 289 (1962); 40 Comp. Gen. 81 (1960); B-203681, September 27, 1982; B-192459, July 1, 1980; B-149441, April 16, 1976; B-173240,

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August 30, 1973. See also Common Rule §___.21(i), 53 Fed. Reg. 8091. If the grantee is unable to document the actual amount of interest earned on the grant advances, the grantor agency should use the "Treasury tax and loan account" rate prescribed by 31 U.S.C. § 3717 for debts owed to the United States. 69 Comp. Gen. 660 (1990).

Except for states, discussed separately later, the rule applies whether the grantee is a public or private agency. The rationale for the rule is that unless expressly provided otherwise, funds are paid out to a grantee to accomplish the grant purposes, not for the grantee to invest the money and earn interest at the expense of the Treasury. Thus, funds paid out to a grantee are not to be held, but are to be applied promptly to the grant purposes. 1 Comp. Gen. 652 (1922).

In 40 Comp. Gen. 81 (1960), the Comptroller General held that interest on foreign currencies advanced by the Department of Agriculture under cooperative agreements, earned between the time the funds were advanced and the time they were used, could not be retained for program purposes but had to be returned to the Treasury for deposit as miscellaneous receipts.

In 42 Comp. Gen. 289 (1962), the rule was applied with respect to State Department grants to American-sponsored schools and libraries overseas. The Comptroller General stated, "[t]here can be no doubt that only the Congress is legally empowered to give away the property or money of the United States." Id. at 293. The decision further concluded that the enabling legislation did not provide sufficient authority to use the grant funds to establish a permanent interest-bearing endowment fund. In B-149441, February 17, 1987, GAO found that since the National Endowment for the Humanities had no authority in its program legislation to permit its grantees to establish an endowment fund with grant moneys, it could not authorize its grantees to accomplish the same purpose with matching funds.

Citing both 42 Comp. Gen. 289 and B-149441, the Comptroller General held in 70 Comp. Gen. 413 (1991) that legislative authority would be required for a proposal whereby the United States Information Agency would purchase discounted foreign debt from commercial lenders and transfer the notes to grantees in the foreign country, who would in turn exchange the notes for local currency or

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local currency denominated bonds and use the income for program activities. However, since USIA has statutory authority to accept conditional gifts, it could accept a donation of foreign debt and use the principal and income for authorized activities in accordance with the conditions specified.

Once grant funds are applied by the grantee to the accomplishment of the purpose of the grant, the rule no longer applies. Thus, in B-230735, July 20, 1988, where use of grant funds to establish an endowment trust was authorized by law, GAO concluded that the grantee could use income from the endowment as nonfederal matching funds on other grants, as long as such use was consistent with the terms and conditions of the grant agreement.

In B-192459, July 1, 1980, a grantee transferred grant funds to a trustee under a complex construction financing arrangement. The trustee was independent rather than an agent of the grantee and the grantee could not get the funds back upon demand. GAO determined that the transfer to the trustee was in the nature of a disbursement for grant purposes. Therefore, interest earned by the trustee after the transfer could be treated as grant income and retained under the terms of the grant agreement. However, interest on grant funds placed in bank accounts and certificates of deposit by the grantee prior to transfer had to be returned to the Treasury. The grantor agency lacked the authority to permit the grantee to retain interest earned on grant funds prior to their application to grant purposes.

In 64 Comp. Gen. 103 (1984), the Agency for International Development advanced grant funds to the government of Egypt, which in turn advanced them to certain local and provincial elements of that government. Since the purpose of the grant was to assist Egypt in its efforts to decentralize certain governmental functions by developing experience at the local level in managing and financing selected projects, GAO concluded that the advances of funds by the government of Egypt to the local and provincial entities could legitimately be viewed as disbursements for grant purposes. Thus, the subgrantees could retain interest earned on those advances. However, in another 1984 case also involving the Agency for International Development, GAO found that subgrantees could not retain interest on funds advanced to them by the recipient under a cooperative agreement whose purpose was to help develop certain technologies, where the funds had been advanced prior to any legitimate program

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need. 64 Comp. Gen. 96 (1984). Both decisions followed the approach set forth in B-192459, summarized above.

In evaluating the disposition of interest income, an important determinant is whether the interest was earned before or after the grant funds were applied to authorized grant purposes. The key word here is "authorized." For example, under the Community Development Block Grant program, grantees may use the funds to make loans for certain community projects. Grantees may retain interest earned on those loans as a type of "program income." However, if a loan is later found to be ineligible under the program, the funds were never used for an authorized grant purpose, and interest earned by the grantee must be paid over to the United States for deposit as miscellaneous receipts. 71 Comp. Gen. 387 (1992).

Congress can, of course, legislatively make exceptions to the rule, by providing assistance in the form of an unconditional gift or by other appropriate statutory provisions. See, e.g., 44 Comp. Gen. 179 (1964) (provision in appropriation act exempting educational institutions from liability for interest under certain Public Health Service Act grants); B-175155, June 11, 1975 (interest rule not applicable with respect to "grants" to Amtrak); B-202116-O.M., February 12, 1985 (Legal Services Corporation grantees).[24]

b. Grants to State Governments

Prior to 1968, the prohibition on retention of interest income applied to states as well as to other grantees. 20 Comp. Gen. 610 (1941); 3 Comp. Gen. 956 (1924); 26 Comp. Dec. 505 (1919); 24 Comp. Dec. 403 (1918); A-46031, January 16, 1933. There was no reason to draw a distinction. This, of course, was premised on the absence of any statutory guidance.

The treatment of interest on grant advances to state governments is now governed by the so-called Intergovernmental Cooperation Act of 1968 (IGCA), as amended, 31 U.S.C. Chapter 65. The law evolved in two stages. The original IGCA created what was to be, for 22 years, the major exception to the rule that interest on grant advances belongs to the United States. The law first codified the requirement for agencies to schedule the transfer of grant funds so as to minimize

[24]A conceptually related case is 71 Comp. Gen. 310 (1992), upholding a Small Business Administration regulation providing for a reasonable profit to grantees under the Small Business Innovation Development Act.

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the time elapsing between transfer and grantee disbursement.[25] It then provided: "A State is not accountable for interest earned on grant money pending its disbursement for program purposes." 31 U.S.C. § 6503(a) (1988).

The theory behind the Intergovernmental Cooperation Act was to control the release of grant funds and thereby preclude situations from arising in which state grantees would be in a position to earn excessive interest on grant advances. If funds were properly released, interest the state might earn would be too small to be a matter of concern. The statutory exception was not intended to create a windfall for state grantees. The situation did not prove satisfactory, however. Grantor agencies complained of premature drawdown of grant advances; states complained of slow federal payment in reimbursement situations. Congress responded by amending the IGCA by section 5 of the Cash Management Improvement Act of 1990 (CMIA), Pub. L. No. 101-453, 104 Stat. 1058, 1059.

The revised 31 U.S.C. § 6503 retains the general requirement to minimize the time elapsing between transfer of funds from the Treasury and grantee disbursement for program purposes. Id. § 6503(a). It then requires the Secretary of the Treasury to enter into an agreement with each state which receives federal grant funds prescribing fund transfer methods and procedures, as chosen by the state and approved by the Secretary. Id. § 6503(b). If an agreement cannot be reached with a particular state, the Secretary is authorized to establish procedures for that state by regulation. Id. § 6503(b)(3).

For advance payment programs, unless inconsistent with program purposes, the state must pay interest to the United States from the time the funds are transferred to the state's account to the time they are paid out by the state for program purposes. Interest payments are to be deposited in the Treasury as miscellaneous receipts. Id. § 6503(c). For reimbursement situations, the United States must pay interest to the state from the time of payout by the state to the time the federal funds are deposited in the state's bank account. The law includes a permanent, indefinite appropriation from the general fund

[25]In B-146285, April 10, 1978, GAO concluded that this provision did not repeal by implication a statute which prescribed both the timing schedule and the amount of payments under a particular assistance program, but rather was geared primarily to programs without statutory payment schedules.

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of the Treasury for this purpose. Id. § 6503(d). Interest in both directions is to be paid annually, at a rate based on the yield of 13-week Treasury bills, using offset to the extent provided in Treasury regulations. Id. §§ 6503(c), (d), and (i). The interest provisions of the CMIA take effect during the second half of 1993. Pub. L. No. 101-453, § 5(e), as amended by Pub. L. No. 102-589, § 2 (1992).

The original IGCA applied only to states and their agencies or "instrumentalities." It did not extend to governments of "political subdivisions" of states such as cities, towns, counties, or special districts created by state law. The CMIA revision applies to "an agency, instrumentality, or fiscal agent" of a state, including territories and the District of Columbia, but retains the exclusion for "a local government of a State." 31 U.S.C. § 6501(9), amended by CMIA § 5(a), 104 Stat. at 1059. Thus, decisions under the 1968 law should remain relevant in determining which entities and situations are now covered by the CMIA and which remain subject to the decisional rules.

In 56 Comp. Gen. 353 (1977), the Comptroller General considered the basis for determining which state entities were covered by the IGCA, concluding as follows:

> "[A] Federal grantor agency is not required by the Intergovernmental Cooperation Act of 1968 and its legislative history to accept the Bureau of the Census' classification of an entity . . . in determining whether that entity is a State agency or instrumentality or a political subdivision of the State. It is bound by the classification of the entity in State law. Only in the absence of a clear indication of the status of the entity in State law may it make its own determination based on reasonable standards, including resort to the Bureau of the Census' classifications." Id. at 357.

If the classification under state law is not clear and unambiguous, the grantee may be required to obtain a legal opinion from the state Attorney General in order to assist in making the determination. Id.

The exception for states in the 1968 IGCA was held to apply to pass-through situations where states are the primary recipients of grant funds which are then passed on to subgrantees. In B-171019, October 16, 1973, the Comptroller General concluded that the exception applied to political subdivisions which were subgrantees of states. The Justice Department reached the same conclusion in 6 Op. Off. Legal Counsel 127 (1982). Subsequent decisions applied the exception to nongovernmental subgrantees as well, recognizing that

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there was no basis to distinguish between governmental and nongovernmental subgrantees. 59 Comp. Gen. 218 (1980), aff'd, B-196794, February 24, 1981.

The authority of a state to require its own grantees to account to it for funds it makes available to them is a matter within the discretion of the state. See B-196794, January 28, 1983 (non-decision letter).

Other cases under the pre-CMIA version of the IGCA may remain relevant as well. For example, the statute does not necessarily apply to funds in contexts other than those specified. Thus, in 62 Comp. Gen. 701 (1983), the Comptroller General concluded that a subgrantee under a Labor Department grant to a state was not entitled to retain interest it had earned by investing funds received from the Internal Revenue Service as a refund of Federal Insurance Contributions Act (social security) taxes. In North Carolina v. Heckler, 584 F. Supp. 179 (E.D.N.C. 1984), the court found the statute inapplicable in a situation where the state had wrongfully obtained federal funds and earned interest on them pending repayment to the government.

4. Program Income

Once grant funds have been applied to their grant purposes, they still can generate income, directly or indirectly, in various ways. This—as distinguished from interest on grant advances—is called "program income."

Program income may be defined as "gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period." Common Rule §___.25(b), 53 Fed. Reg. 8093. It may include such things as income from the sale of commodities, fees for services performed, and usage or rental fees. Id. §___.25(a); OMB Circular No. A-110, Attachment D. Grant generated income may also include investment income, although this will be uncommon. See B-192459, July 1, 1980.

In contrast with income earned on grant advances, program income does not automatically acquire a federal character and is not required to be deposited in the Treasury as miscellaneous receipts. It may, unless the grant provides otherwise, be retained by the grantee for grant-related use. 44 Comp. Gen. 87 (1964); 41 Comp. Gen. 653

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(1962); B-192459, July 1, 1980; B-191420, August 24, 1978. In 44 Comp. Gen. 87, the Comptroller General concluded that a grantee could establish a revolving fund with grant income in the absence of a contrary provision in the grant agreement. However the initial amount of a revolving fund established from either the principal of a grant or the income generated under the grant, when returned to the grantor agency upon completion of the grant, may not be considered a return of grant funds for further use by the grantor but must be deposited in the Treasury as miscellaneous receipts. B-154996, November 5, 1969.

There are three generally recognized methods for the treatment of program income:

(1) Deduction. Deduct program income from total allowable costs to determine net costs on which grantor and grantee shares will be based. This approach results in savings to the federal government because the income is used to reduce contributions rather than to increase program size.

(2) Addition. Add income to the funds committed to the project, to be used for program purposes. This approach increases program size.

(3) Cost-sharing. Use income to meet any applicable matching requirements. Under this approach, the federal contribution and program size remain the same.

Both OMB and GAO have expressed preference for the deduction method since it results in savings to the federal government and to grantees, and it is the preferred method under OMB Circular A-102, although grantor agencies have a measure of discretion. See OMB Circular A-102, para. 7.e; Supplementary Information Statement on revised circular, 53 Fed. Reg. at 8029; Common Rule §___.25(g), 53 Fed. Reg. at 8093; Supplementary Information Statement on common rule, 53 Fed. Reg. at 8038. See also GAO report entitled Improved Standards Needed for Managing and Reporting Income Generated Under Federal Assistance Programs, GAO/GGD-83-55 (July 22, 1983). (This report was issued several years prior to the revision of OMB Circular A-102 and issuance of the Common Rule).

Some types of program income are subject to special rules:

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- Rules relating to proceeds from the sale of real and personal property provided by the federal government or purchased in whole or in part with federal funds are set forth in the Common Rule §§___.25(f), ___.31, and ___.32, 53 Fed. Reg. 8093–95. See also OMB Circular A-110, Attachment N.
- Royalties received as a result of copyrights or patents produced under a grant may be treated as other program income if specified in applicable agency regulations or the grant agreement. Common Rule §___.25(e), 53 Fed. Reg. 8093. See also B-186284, June 23, 1977; GAO report entitled Administration of the Science Education Project "Man: A Course of Study"(MACOS), MWD-76-26 (October 14, 1975).

5. Cost-Sharing

When the federal government chooses to provide financial assistance to some activity, it may also choose to fund the entire cost, but it is not required to do so. City of New York v. Richardson, 473 F.2d 923, 928 (2d Cir. 1973), cert. denied, 412 U.S. 950. "[T]he judgment whether to [provide assistance], and to what degree, rests with [Congress]." Id. Thus, a program statute may provide for full funding, or it may provide for "cost-sharing," that is, financing by a mix of federal and nonfederal funds. Reasons for cost-sharing range from budgetary considerations to a desire to stimulate increased activity on the part of the recipient. The two primary cost-sharing devices are "matching share" provisions and "maintenance of effort" provisions. For a detailed analysis and critique of both devices, see GAO's report Proposed Changes in Federal Matching and Maintenance of Effort Requirements for State and Local Governments, GGD-81-7 (December 23, 1980) (hereafter cited as "GGD-81-7").

Federal grant funds constitute a significant portion of the total expenditures of state and local governments. Thus, cost-sharing clearly has an impact on the relationship between the federal government and the states, and on the executive-legislative relationship at the state level. This gives rise to many interesting problems,[26] discussed in detail in GAO's report Federal Assistance System Should Be Changed to Permit Greater Involvement by State Legislatures, GGD-81-3 (December 15, 1980).

[26]For example, can a state legislature appropriate federal grant funds? State courts have split on the issue. See GGD-81-3 at 27–30.

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a. Local or Matching Share

(1) General principles

A matching share provision is one under which the grantee is required to contribute a portion of the total project cost. The "match" may be 50-50, or any other mix specified in the governing legislation. A matching share provision typically prescribes the percentages of required federal and nonfederal shares. However, the legislation need not provide explicitly for a nonfederal share. A statute authorizing assistance not in excess of a specified percentage of project costs will normally be interpreted as requiring a local share of nonfederal funds to make up the difference. (The rest of the money has to come from someplace.) B-214278, January 25, 1985 (construing a provision of the Consolidated Farm and Rural Development Act authorizing water and waste disposal grants).

When a federal agency enters into an assistance agreement with an eligible recipient, an entire project or program is approved. Where a local share is required, this agreement includes an estimate of the total costs, that is, a total which will exceed the amount to be borne by the federal government. The additional contribution which is needed to supply full support for the anticipated costs is the local or nonfederal matching share. Once the agreement is accepted, the assistance recipient is committed to provide the nonfederal share if it wishes to continue with the grant. E.g., B-130515, July 20, 1973. Failure to meet this commitment may result in the disallowance of all or part of otherwise allowable federal share costs.

Matching share requirements are often intended to "assure local interest and involvement through financial participation." 59 Comp. Gen. 668, 669 (1980). They may also serve to hold down federal costs. The theory behind the typical matching share requirement may be summarized as follows:

> "In theory, the fiscal lure of Federal grants entices State and local governments into allocating new resources to satisfy the non-Federal match for programs they otherwise would not have funded on their own. While State and local jurisdictions may not be willing or able to fully fund a program from their own resources, they would most likely agree to spend new resources on the same project if most of the project costs were paid by the Federal Government."

GGD-81-7 at 9. This approach has been termed "cooperative federalism." E.g., King v. Smith, 392 U.S. 309, 316 (1968). It is also

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The fact pattern in the Garcia case illustrates the nonaccountable situation. A Secret Service agent had been given a flash roll to buy counterfeit currency from suspects in Miami. The agent met the suspects in a park. One of the suspects pulled a semi-automatic pistol and demanded the money. Other Secret Service agents rushed to the scene and apprehended the suspects, one of whom was trying to run off with the money. Of course there was no loss since the money was recovered. If the second suspect had gotten away with the money, however, the loss could have been treated as an expense of the operation, without the need to seek relief for anyone. GAO decisions finding flash roll losses "nonaccountable" under the standards of 61 Comp. Gen. 313 are B-238222, February 21, 1990 (suspect stole flash roll during drug arrest); B-232253, August 12, 1988 (informant stole money provided to rent undercover apartment); and B-205426, September 16, 1982 (federal agent robbed at gunpoint while trying to purchase illegal firearms).

An example of a case which remains subject to the accountable officer laws is B-218858, July 24, 1985. A federal agent, posing as a narcotics trafficker, stopped at a telephone booth to make a call. Two women approached the booth, which did not have a door. One diverted the agent's attention while the other picked his pocket. The loss, while certainly incident to the undercover operation, was unrelated to its central purpose. Relief was granted. Other cases are:

- 64 Comp. Gen. 140 (1984) (agent set shoulder bag containing flash money on airport counter and left it unattended for several minutes while making ticket arrangements; relief denied).
- B-210507, April 4, 1983 (briefcase containing funds stolen when agent set it down in coffee shop for 15—20 seconds to remove jacket; relief granted).
- B-220492, December 10, 1985 (agent left funds in glove compartment while making phone call in high crime area; agency found him negligent).

As 64 Comp. Gen. 140 and B-210507 point out, losses which occur while flash money is being transported to the location where it is intended to be used are at best incidental to the operation and are thus governed by the accountable officer laws.

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known as the "federal carrot." See City of New York v. Richardson, 473 F.2d at 928.

Matching requirements are most commonly found in the applicable program legislation. However, they may also be found in appropriation acts. E.g., 58 Comp. Gen. 524 (1979); 31 Comp. Gen. 459 (1952). A matching provision in an appropriation act, like any other provision in an appropriation act, will apply only to the fiscal year(s) covered by the act or the appropriation to which it applies, unless otherwise specified. 58 Comp. Gen. at 527.

If a program statute authorizes grants but neither provides for nor prohibits cost-sharing, the grantor agency may in some cases be able to impose a matching requirement administratively by regulation. The test is the underlying congressional intent. If legislative history indicates an intent for full federal funding, then the statute will generally be construed as requiring a 100 percent federal share. B-226572, June 25, 1987; B-169491, June 16, 1980. However, cost-sharing regulations have been regarded as valid where the statute was silent and it could reasonably be concluded that Congress left the matter to the judgment of the administering agency. B-130515, July 17, 1974; B-130515, July 20, 1973. Such regulations may be waived uniformly and prospectively, but may not be waived on a retroactive and ad hoc basis. Id.

Matching funds, as with the federal assistance funds themselves, can be used only for authorized grant purposes. B-230735, July 20, 1988; B-149441, February 17, 1987. In the latter case, GAO concluded that the National Endowment for the Humanities could not divert state matching funds to establish private endowments which, under existing authorities, could not have been created by a direct award of NEH funds. See also 42 Comp. Gen. 289, 295 (1962).

Unless otherwise specified in the governing legislation, a grantee may match only a portion of the funds potentially available to it, and thereby receive a correspondingly smaller grant. 16 Comp. Gen. 512 (1936).

Under a cost-sharing assistance program funded by advance payments of the federal contribution, the Comptroller General has held that the advances may be made prior to the disbursement of the nonfederal share as long as adequate assurances exist (e.g., by

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contractual commitments) that the local share will be forthcoming. 60 Comp. Gen. 208 (1981). See also 23 Comp. Gen. 652 (1944) (payment by federal agency of local share under cooperative agreement, subject to contractual agreement to reimburse).

Where the statute authorizing federal assistance specifies the federal share of an approved program as a specific percentage of the total cost, the grantor agency is required to make awards to the extent specified and has no discretion to provide a lesser (or greater) amount. Manatee County v. Train, 583 F.2d 179, 183 (5th Cir. 1978); 53 Comp. Gen. 547 (1974); B-197256, November 19, 1980. However, where the federal share is defined by statutory language which specifies a maximum federal contribution but no minimum, the agency can provide a lesser amount. 50 Comp. Gen. 553 (1971).

Although most cost-sharing programs are in terms of a fixed federal share, some programs may provide for a declining federal share. Under a declining share program in the Regional Rail Reorganization Act, GAO concluded that the federal share could be determined in the year the grant was made, notwithstanding the fact that the grantee would not actually incur the costs until the following fiscal year. B-175155, July 29, 1977. Another cost-sharing variation is the "aggregate match," in which the nonfederal share is determined by cumulating the grantee's contributions from prior time periods. An example is discussed in 58 Comp. Gen. 524 (1979).

(2) Hard and soft matches

The program statute may define or limit the types of assets which may be applied to the nonfederal share. A provision limiting the nonfederal share to cash contributions is called a "hard match." In 31 Comp. Gen. 459 (1952), the matching share was described in the appropriation act that required it as an "amount available." In the absence of legislative history to support a broader meaning, GAO concluded that the matching share must be in the form of money and that the value of other non-monetary contributions could not be considered. A more explicit "hard match" requirement is discussed in 52 Comp. Gen. 558 (1973), in which GAO concluded that the matching share, while it must be in the form of money, could include donated funds as well as grantee funds. While the program discussed in 52 Comp. Gen. 558 no longer exists, the case remains useful for this

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point and for the detailed review of legislative history illuminating the purpose and intent of the "hard match" provision.

The program legislation may expressly authorize the inclusion of assets other than cash in the nonfederal contribution. See 56 Comp. Gen. 645 (1977). If the legislation is silent with respect to the types of assets which may be counted, the statute will generally be construed as permitting an "in-kind" or "soft" match, that is, the matching share may include the reasonable value of property or services as well as cash. 52 Comp. Gen. 558, 560 (1973); B-81321, November 19, 1948. The valuation of in-kind contributions can get complicated. An example is 31 Comp. Gen. 672 (1952) (value of land could not include the cost or value of otherwise unallowable improvements to the land previously added by the grantee). Current valuation standards for state and local governments are found in the Common Rule, §___.24, 53 Fed. Reg. 8092.

(3) Matching one grant with funds from another

An important and logical principle is that neither the federal nor the nonfederal share of a particular grant program may be used by a grantee to match funds provided under another federal grant program, unless specifically authorized by law. In other words, a grantee may not (1) use funds received under one federal grant as the matching share under a separate grant, nor may it (2) use the same grantee dollars to meet two separate matching requirements. 56 Comp. Gen. 645 (1977); 47 Comp. Gen. 81 (1967); 32 Comp. Gen. 561 (1953); 32 Comp. Gen. 141 (1952); B-214278, January 25, 1985; B-212177, May 10, 1984; B-130515, July 20, 1973; B-229004-O.M., February 18, 1988; B-162001-O.M., August 17, 1967. See also Common Rule §___.24(b), 53 Fed. Reg. 8092. A contrary rule would largely nullify the cost-sharing objective of stimulating new grantee expenditures.[27]

Normally, exceptions to the rule are in the form of express statutory authority. A prominent example is section 105(a)(9) of the Housing and Community Development Act of 1974, 42 U.S.C. § 5305(a)(9),

[27]By way of contrast, the rule that funds received under one federal grant may not, absent congressional authorization, be used to finance the local match under another federal grant, does not apply to federal loans. The reason is that loans, unlike grants, are expected to be repaid and the recipient is thus, at least ultimately, using its own funds. Of course, the proposed use of the funds must be authorized under the loan program legislation. B-207211-O.M., July 9, 1982. See also B-214278, January 25, 1985.

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which authorizes community development block grant funds to be used as the nonfederal share under any other grant undertaken as part of a community development program. See 59 Comp. Gen. 668 (1980); 56 Comp. Gen. 645 (1977); B-239907, July 10, 1991. The latter opinion concluded that community development block grant regulations no longer apply once the funds have been applied as a match under another grant program, at least where applying the regulations would substantially interfere with use of the funds under the receiving grant. For other examples, see 52 Comp. Gen. 558, 564 (1973) and 32 Comp. Gen. 184 (1952).

In 59 Comp. Gen. 668, GAO considered a conflict between two statutes—the Housing and Community Development Act which, as noted, permits federal grant funds to fill a nonfederal matching requirement, and the Coastal Zone Management Act, which provides for cost-sharing grants but expressly prohibits the use of federal funds received from other sources to pay a grantee's matching share. Finding that the statutory language could not be reconciled, and noting further that there was no helpful legislative history under either statute, the Comptroller General concluded, as the most reasonable result consistent with the purposes of both statutes, that community development block grant funds were available to pay the nonfederal share of Coastal Zone Management Act grants for projects properly incorporated as part of a grantee's community development program. See also B-229004-O.M., February 18, 1988, which essentially followed 59 Comp. Gen. 668 and concluded that community development block grant funds could be used for the matching share of certain grants under the Stewart B. McKinney Homeless Assistance Act of 1987.

A somewhat less explicit exception is discussed in 57 Comp. Gen. 710 (1978), holding that funds distributed to states under Title II of the Public Works Employment Act of 1976, 42 U.S.C. §§ 6721–6736 (called the "countercyclical revenue sharing program"), may be applied to the states' matching share under the Medicaid program. GAO agreed with the Treasury Department that Title II payments amounted to "general budget support as opposed to categorical or block grants or contracts" (57 Comp. Gen. at 711)—a form of revenue sharing—and thus should be construed in the context of the (since repealed) General Revenue Sharing Program. General Revenue Sharing was characterized by a "no strings on local expenditures" policy, evidenced by the fact that a provision in the original legislation

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barring the use of funds as the nonfederal share in other federal programs had been repealed. Stressing the strong analogy between Title II and General Revenue Sharing, the decision concluded that implicit in the "no strings" policy was the authority to apply Title II funds to a state's matching share under Medicaid.

It should also be noted that where any federal assistance funds are used as nonfederal matching funds for another grant, such use must be consistent with the grant under which they were originally awarded as well as the grant they are intended to implement. 59 Comp. Gen. 668 (1980); 57 Comp. Gen. at 715; B-230735, July 20, 1988.

Funds received by a property owner from a federal agency as just compensation for property taken by eminent domain belong to the owner outright and do not constitute a "grant." Therefore, they may be used as the nonfederal share of a grant from another federal agency, even where the taking and the grant relate to the same project. B-197256, November 19, 1980.

(4) Relocation allowances

Federally assisted programs which result in the displacement of individuals and business entities may, apart from eminent domain payments, result in the payment of relocation allowances under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. Under the statute, authorized relocation payments provided by a state incident to a federally assisted project which results in relocations are to be treated in the same manner as other project costs. Thus, under a program statute which provides for a 90 percent federal contribution, 90 percent of authorized relocation payments will be reimbursable as an allowable program cost. In other words, any applicable matching share requirement will apply equally to the relocation payments. B-215646, August 7, 1984.

(5) Payments by other than grantor agency

Of course there is nothing wrong with grantees receiving funds under more than one grant for which they are eligible. If the grants are administered by different agencies, each agency is making payments under its own program. Occasionally, an agency is asked to make payments not associated with any of its own assistance programs, to a

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grantee or grant beneficiary under some other agency's program. The cases fall into two groups.

The first situation involves services performed by an assistance beneficiary to an agency other than the grantor agency. Under the College Work-Study Program, not to exceed 70 percent of the student's salary is paid by the college under a Department of Education grant, with the remainder paid by the employer. 42 U.S.C. § 2753(b)(5). The "employer" may be another federal agency. 46 Comp. Gen. 115 (1966). In addition to the salary contribution, the employing agency may pay unreimbursed administrative costs such as social security taxes and compensation insurance. 50 Comp. Gen. 553 (1971); 46 Comp. Gen. 115. However, an agency may not, without statutory authority, participate in a work-study program authorized by state law and not coordinated with the federal program. B-159715, December 18, 1978.

The authority to pay administrative costs under the work-study program is based on the cost-sharing nature of that program. Absent cost-sharing, there is no comparable authority. 61 Comp. Gen. 242 (1982) (agency to which employee had been assigned under former Comprehensive Employment and Training Act lacked authority to reimburse grantee for retirement contributions).

The second group of cases involves projects which benefit other federal facilities. Under program legislation which does not give the grantor agency discretion to reduce the federal share, the grantor agency is not authorized to exclude from total cost a portion of an otherwise eligible project solely because that portion would provide service to another federal facility. 59 Comp. Gen. 1 (1979). Where the grantor agency has reduced its contribution because a portion of the project would serve another federal facility, the "benefited agency" normally would not be authorized to make up the shortfall without receiving additional consideration above and beyond the improved service it would have received anyway. B-189395, April 27, 1978. However, if Congress chooses to appropriate funds to the benefited agency to make up the shortfall, the benefited agency may make otherwise proper contributions without requiring additional legal consideration as long as its contribution, when added to the amount contributed by the grantor agency, does not exceed the statutorily specified federal share. 59 Comp. Gen. 1; B-198450, October 2, 1980; B-199534/B-200086, October 2, 1980.

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The illustration given in 59 Comp. Gen. 1 may help to clarify these principles. Suppose the statutory federal share is 75 percent and the total project cost is $10 million. The federal share is 75 percent of 10 million, or $7.5 million. Now suppose the grantor agency determines that 20 percent of the project will serve another federal facility. Under 59 Comp. Gen. 1, it is improper for the grantor agency to reduce total cost by 20 percent (i.e., from $10 million to $8 million) and to then contribute only 75 percent of the $8 million, for a federal share of $6 million. The correct federal share should have remained 75 percent of $10 million.

Suppose further that the grantor agency has made the reduction and Congress appropriates money to the benefited agency to make up the shortfall. Using the same hypothetical figures, the benefited agency may contribute $1.5 million (20 percent of the federal share of $7.5 million) as the federal share of that portion of the project attributable to its use, without further legal consideration. However, as mentioned above, its contribution, when added to the contribution of the grantor agency, may not exceed the specified statutory share unless further legal consideration is received by the government.

The decision at 59 Comp. Gen. 1 and the two October 1980 unpublished decisions resulted from a disagreement between GAO and the Environmental Protection Agency over grant funding policy under the Federal Water Pollution Control Act. The Act authorized EPA to make 75 percent [28] construction grants for wastewater treatment systems. EPA construed the statute as permitting it to proportionately reduce its contribution to the extent a project benefits other federal facilities. As noted, GAO concluded that EPA lacked authority to reduce its contribution below 75 percent, and that the benefited agencies could not make up the shortfall. EPA disagreed, and to resolve the funding impasse, Congress, apparently as a temporary expedient, provided funds to certain agencies, specifically the Army and the Navy. However, Congress did not provide funds for the Air Force to offset the reduced grants, and the issue arose again in B-194912, August 24, 1981. The Comptroller General reaffirmed GAO's position and concluded that, absent specific congressional approval, the appropriations of the Air Force were not available to make up for the reduced grant amounts.

[28]Subsequent legislation reduced the percentage of the federal share under this program. See B-207211-O.M., July 9, 1982, for a general discussion of matching share requirements in Federal Water Pollution Control Act wastewater treatment construction grants.

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b. Maintenance of Effort

Suppose the state of New Euphoria spends around a million dollars a year for the control of noxious pests. After several years, the continued proliferation of noxious pests leads Congress to conclude that the program is not going as well as everyone might like, and that federal financial assistance is in order. Congress therefore enacts legislation and appropriates funds to provide annual pest-control grants of half a million dollars to each affected state.

New Euphoria applies for and receives its grant. Like most other states, however, New Euphoria is strapped for money and faced with various forms of taxpayer revolt. While the state government certainly believes that noxious pests merit control, it would, if it had free choice in the matter, rather use the money on what it regards as higher priority programs. The state uses the $500,000 federal grant for its pest control program—it has no choice because it has contractually committed itself with the federal government to do so as a condition of receiving the grant. However, it then takes $500,000 of its own money away from pest control and applies it to other programs. If the purpose of the federal grant legislation is simply to provide general financial support to New Euphoria, that purpose has been accomplished and the state has clearly benefited. But if the federal purpose is to fund an increased level of pest control activity, the objective has just as clearly been frustrated.

When Congress wants to avoid this result, a device it commonly uses is the "maintenance of effort" requirement. Under a maintenance of effort provision, the grantee is required, as a condition of eligibility for federal funding, to maintain its financial contribution to the program at not less than a stated percentage (which may be 100 percent or less) of its contribution for a prior time period, usually the previous fiscal year. The purpose of maintenance of effort is to ensure that the federal assistance results in an increased level of program activity, and that the grantee, as did New Euphoria, does not simply replace grantee dollars with federal dollars. GAO has observed that maintenance of effort, since it requires a specified level of grantee spending, "effectively serves as a matching requirement." GGD-81-7 at 2.

GAO has also observed that a grant for something the grantee is already spending its own money on is, without maintenance of effort, little more than another form of revenue sharing.

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"When Federal grant money is used to substitute for ongoing or planned State and local expenditures, the ultimate effect of the Federal program funds is to provide fiscal relief for recipient States and localities rather than to increase service levels in the program area. When fiscal substitution occurs, narrow-purpose categorical Federal programs enacted to augment service levels are transformed, in effect, into broad purpose fiscal assistance like revenue sharing. Maintenance of effort provisions, if effective, can prevent substitution and ensure that the Federal grant is used by the grantee for the specific purpose intended by the Congress." GGD-81-7 at 48–49.

One type of maintenance of effort requirement is illustrated by the following provision from the Clean Air Act:

"No [air pollution control] agency shall receive any grant under this section during any fiscal year when its expenditures of non-Federal funds for recurrent expenditures for air pollution control programs will be less than its expenditures were for such programs during the preceding fiscal year. . . ."

42 U.S.C. § 7405(c), amended by Pub. L. No. 101-549, § 802(e), 104 Stat. 2399, 2688 (1990).

A variation is found in 20 U.S.C. § 2971, applicable to certain education grants, which we chose because it includes most of the points we will note in this discussion. The basic requirement is subsection (a)(1):

"[A] State is entitled to receive its full allocation of funds . . . for any fiscal year if the Secretary finds that either the combined fiscal effort per student or the aggregate expenditures within the State with respect to the provision of free public education for the preceding fiscal year was not less than 90 percent of such combined fiscal effort or aggregate expenditures for the second preceding fiscal year."

Maintenance of effort statutes will invariably provide fiscal sanctions if the grantee does not meet its commitment. Sanction provisions are of two types. Under one version, the grantee's allocation of federal funds is reduced in the same proportion as its contribution fell below the required level. For example, 20 U.S.C. § 2971(a)(2) provides:

"The Secretary shall reduce the amount of the allocation of funds under this division in any fiscal year in the exact proportion to which the State fails to meet the requirements of paragraph (1) by falling below 90 percent of both the fiscal effort per student and aggregate expenditures . . . ."

The second and more draconian version is illustrated by the Clean Air Act provision quoted above and discussed in B-209872-O.M., March 23, 1984, an internal GAO memorandum. Under this version,

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the grantee falling short of its maintenance of effort commitment loses all grant funds under the program for that fiscal year. GAO has endorsed the enactment of legislation making proportionate reduction the standard rather than total withdrawal. GGD-81-7 at 71.

Some maintenance of effort statutes authorize the administering agency to waive the requirement for a specified time period if some natural disaster or other unforeseen event caused the funding shortfall. An illustration is 20 U.S.C. § 2971(a)(3):

"The Secretary may waive, for 1 fiscal year only, the requirements of this subsection if the Secretary determines that such a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State."

If a grantee fails to meet its commitment and the noncompliance cannot be waived, any disbursement of federal funds in excess of the amount permitted by the program statute must generally be recovered. 51 Comp. Gen. 162 (1971). Failure to require repayment of such funds "would, in effect, constitute the giving away of United States funds without authority of law." Id. at 165.

A variation of the maintenance of effort provision is the so-called "nonsupplant" provision, which requires that federal funds be used to supplement, and not supplant, nonfederal funds which would otherwise have been made available. Nonsupplant is sometimes used in conjunction with maintenance of effort, an example again being the education statute, 20 U.S.C. § 2971(b):

"A State or local educational agency may use and allocate funds received under this division only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of Federal funds made available under this division, be made available from non-Federal sources, and in no case may such funds be used so as to supplant funds from non-Federal sources."

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Chapter 9

Liability and Relief of Accountable Officers

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The conspicuous display of a flash roll is not in and of itself negligence where necessary to the agent's undercover role. B-194919, November 26, 1980.

(3) Travel advances

Travel advances are authorized by 5 U.S.C. § 5705. The statute expressly directs the recovery, from the traveler or from his or her estate, of advances not used for allowable travel expenses.

A travel advance is "based upon the employee's prospective entitlement to reimbursement" (B-178595, June 27, 1973), and is essentially for the convenience of the traveler. If it were not authorized, the traveler would have little choice but to use personal funds and then seek reimbursement at the end of the travel. Travel advances in the hands of the traveler are regarded as nonaccountable and hence not governed by the accountable officer laws. Rather, they are treated as loans for the personal benefit of the traveler. As such, if the funds are lost or stolen while in the traveler's custody, regardless of the presence or absence of fault attributable to the traveler, the funds must be recovered as provided by 5 U.S.C. § 5705, and the accountable officer relief statutes do not apply. 54 Comp. Gen. 190 (1974); B-206245, April 26, 1982; B-183489, June 30, 1975. The same principle applies to traveler's checks. 64 Comp. Gen. 456, 460 (1985).

In many cases, a messenger or some other clerical employee picks up the funds for the traveler. If the funds are lost or stolen while in the intermediary's custody, and use of the intermediary was the traveler's choice, the intermediary is the agent of the traveler and the traveler, having constructively received the funds, remains liable. B-204387, February 24, 1982; B-200867, March 30, 1981. However, if use of the intermediary is required by agency or local policy, then the intermediary is the agent of the government and the traveler is not liable. 67 Comp. Gen. 402 (1988).

Even though the accountable officer relief statutes do not apply, it may be possible to effectively "relieve" the non-negligent traveler by considering a claim under the Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 3721, to the extent permissible under the agency's implementing regulations. B-208639, October 5, 1982; B-197927, September 12, 1980.

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The Clean Air Act provision, quoted in part above, also includes a nonsupplant clause. GAO's 1980 study concluded that nonsupplant provisions were largely unenforceable, and recommended against their use. GGD-81-7 at 71.[29]

F. Obligation of Appropriations for Grants

1. Requirement for Obligation

As with any other type of expenditure, the expenditure of federal assistance program funds requires an obligation that is proper in terms of purpose, time, and amount, and the obligation must be properly recorded. The purpose, time, and amount requirements are essentially the same for grants as for other expenditures. With respect to recording of the obligation, 31 U.S.C. § 1501(a)(5) requires that the obligation be supported by documentary evidence of a grant payable—

"(A) from appropriations made for payment of, or contributions to, amounts required to be paid in specific amounts fixed by law or under formulas prescribed by law;

"(B) under an agreement authorized by law; or

"(C) under plans approved consistent with and authorized by law."

What constitutes an obligation in the grant context, and what will or will not satisfy 31 U.S.C. § 1501(a)(5), are discussed in more detail in Chapter 7.

[29]"Most Federal program officials we contacted agreed that nonsupplant is difficult, if not impossible, to enforce because it calls for an external judgment on what grantees would have done if Federal funds were not available. Basically, this calls for a Federal agency to assess the motives behind particular changes in State and local plans or budgets and to judge whether the presence of Federal grant funds drove the particular State or local action." GGD-81-7 at 54.

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2. Changes in Grants—Replacement Grants vs. New Obligations

a. The Replacement Grant Concept

Changes in grants may come about for a variety of reasons—the original grantee may be unable to perform, the grant amount may be increased, there may be a redefinition of objectives, etc. If the change occurs in the same fiscal year (or longer period if a multiple-year appropriation is involved) in which the original grant was made, there is no obligation problem as long as the amount of the appropriation is not exceeded. If, however, the change occurs in a later fiscal year, the question becomes whether the amended grant remains chargeable to the appropriation initially obligated or whether it constitutes a new obligation chargeable to appropriations current at the time the change is made.

As a general proposition, a grant amendment which changes the scope of the grant or which makes the award to an entirely different grantee (not a successor to the original grantee), and which is executed after the appropriation under which the original grant was made has ceased to be available for obligation, may not be charged to the original appropriation. E.g., 58 Comp. Gen. 676 (1979). If the amendment amounts to a substitute grant, it extinguishes the old obligation and creates a new one. The new obligation is chargeable to the appropriation available at the time the new obligation is created. There are also situations where a grant amendment creates a new obligation chargeable to the later appropriation without extinguishing the original obligation. In either event, if the grantor agency does not recognize that the change creates a new obligation when the change is made, there is a potential Antideficiency Act violation. On the other hand, a change which qualifies as a "replacement grant" remains chargeable to the original appropriation. Of course, an agency with the requisite program authority can change the scope of a grant if current appropriations are used. 60 Comp. Gen. 540 (1981).

The clearest example of a change that creates a new obligation is where the amount of the award is increased. If the grantee has no legal right stemming from the original grant agreement to compel execution of the amendment, the increase in amount is a new obligation chargeable to appropriations current when the change is made. 41 Comp. Gen. 134 (1961); 39 Comp. Gen. 296 (1959); 37 Comp. Gen. 861 (1958). However, an upward adjustment in a

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"provisional indirect cost rate" contained in a grant award, which contemplated a possible increase in the indirect cost rate at a later date, does not constitute an additional or new award. Payments resulting from such an adjustment are chargeable to the appropriation originally obligated by the grant. 48 Comp. Gen. 186 (1968).

Where a change involves some other aspect of the grant, it is necessary to determine whether the change, viewed as a whole, will create a new and separate undertaking or will enlarge the scope of the grant, thereby creating a new obligation. As pointed out in 58 Comp. Gen. 676, 680 (1979), the cases have identified three closely related areas of concern that must be satisfied before a change may be viewed as a "replacement grant" and not as creating a new obligation:

(1) The bona fide need for the grant project must continue;

(2) The purpose of the grant from the government's standpoint must remain the same; and

(3) The revised grant must have the same scope.

The "scope" of a grant, as stated in 58 Comp. Gen. at 681:

> "grows out of the grant purposes. These purposes must be referred to in order to identify those aspects of a grant that make up the substantial and material features of a particular grant which in turn fix the scope of the Government's obligation."

b. Substitution of Grantee

As a general rule, when a recipient of a grant is unable to implement the grant as originally contemplated, and an alternative grantee is designated subsequent to the expiration of the period of availability for obligation of the grant funds, the award to the alternative grantee must be treated as a new obligation and is not properly chargeable to the appropriation current at the time the original grant was made. B-164031(5), June 25, 1976; B-114876/A-44014, January 21, 1960.

However, it is possible in certain situations to make an award to an alternative grantee after expiration of the period of availability for obligation where the alternative award amounts to a "replacement grant" and is substantially identical in scope and purpose to the original grant. 57 Comp. Gen. 205 (1978); B-157179, September 30, 1970. In the latter decision, the Comptroller General did not object to the use of unexpended grant funds originally awarded to the

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University of Wisconsin to engage Northwestern University in a new fiscal year to complete the unfinished project. Approval was granted because the project director had transferred from the University of Wisconsin to Northwestern University and he was viewed by all the parties as the only person capable of completing the work. The decision also noted that the original grant was made in response to a bona fide need then existing, and that the need for completing the project continued to exist.

GAO has also indicated that it might be possible in certain situations to develop procedures to designate an alternate grantee at the time an award is made to the principal grantee, provided that all of the criteria for selection of the principal and required administrative action are also met concerning the alternate, with the sole exception that the award to the alternate is not mailed to it pending a determination as to whether the principal actually complies with the terms of the award. The validity of any such procedure would have to be assessed on a case-by-case basis. B-114876, July 29, 1960; B-114876, March 15, 1960.

c. Other Changes

A shift in the community to be served by the grant has been held to constitute a new obligation. Thus, in B-164031(5), June 25, 1976, the original grantee ran into financial difficulties and was unable to utilize a hospital modernization award under the Hill-Burton program. The Comptroller General found that a proposal to shift the award to another hospital would constitute a new undertaking rather than a replacement grant since the hospitals were over 100 miles apart and served essentially different communities.

An enlargement of the community to be served will not necessarily constitute a new obligation. The grant in 58 Comp. Gen. 676 (1979) was to set up a demonstration community service volunteer program. The grant defined the number of participants deemed necessary to generate the desired test results. The geographic site for which the grant was awarded was expected to produce the necessary number of volunteers, but did not. It was held that the geographical area could be expanded to produce the desired number of volunteers. The modification in these circumstances would not constitute a new and separate undertaking and could be funded from the appropriation originally obligated.

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A change in the research objectives of a grant will constitute a new obligation notwithstanding that some aspects of the original grant and the modification may be related. 57 Comp. Gen. 459 (1978). See also 39 Comp. Gen. 296 (1959).

A 1969 decision involved amendments by the National Institute of Mental Health which would change the use of grant funds from construction to renovation and vice-versa beyond the period of obligational availability. Since the amendments met the statutory eligibility criteria, since they would still accomplish the original grant objectives, and since they involved neither a change in grantees nor an increase in amount, they were held permissible under the original obligations. B-74254, September 3, 1969.

G. Grant Costs

1. Allowable vs. Unallowable Costs

a. The Concept of Allowable Costs

Recipients of assistance awards are expected to use the assistance funds for the purposes for which they were awarded, subject to any conditions that may attach to the award. Expenditures or costs that meet the grant purposes and conditions are termed "allowable costs." An expenditure which is not for grant purposes or is contrary to a condition of the grant is not an allowable cost and may not be properly charged to the grant.

Where a cost is not allowable, as far as the government is concerned the recipient still has the funds. If the grant funds have already been paid over to the grantee and no allowable costs of an equal amount are subsequently incurred, the recipient is required to return the amount of the improper charge to the government. E.g., Utah State Board for Vocational Education v. United States, 287 F.2d 713 (10th Cir. 1961). The United States "has a reversionary interest in the unencumbered balances of such grants, including any funds improperly applied." 42 Comp. Gen. 289, 294 (1962). See also B-198493, July 7, 1980. This requirement cannot be waived. B-171019, June 3, 1975. Thus, the Comptroller General has held that an agency cannot waive its statutory regulations to relieve a grantee of its liability for improper expenditures. B-163922, February 10,.1978.

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Similarly, an agency may not amend its regulations to relieve a grantee's liability for expenditures for administrative costs in excess of a statutory limitation. B-178564, July 19, 1977, reaffirmed in 57 Comp. Gen. 163 (1977).

Guidance from the Office of Management and Budget on cost principles is found in a series of OMB Circulars: A-21 (Cost Principles for Educational Institutions); A-87 (Cost Principles for State and Local Governments); A-122 (Cost Principles for Nonprofit Organizations). These circulars are expressly incorporated in the common rule adopted under OMB Circular No. A-102. Common Rule §___.22, 53 Fed. Reg. 8092.

Costs are of two types, direct and indirect. Direct costs are items that are specifically identifiable and attributable to a particular cost objective.[30] In other words, direct costs are obligations or expenditures of a recipient which can be tied to a particular award. For example, if a recipient purchases an item of equipment necessary to carry out a particular award, the purchase price is a direct cost under that award. Indirect costs are costs incurred for common objectives which cannot be directly charged to any single cost objective.[31] A common example is depreciation. The concept of indirect costs is essentially an accounting device to permit the allocation of overhead in proportion to benefit. See B-203681, September 27, 1982. Indirect cost rates are usually negotiated by the grantor and grantee.

The overallocation of indirect costs is unauthorized and therefore unallowable. The reason is that 31 U.S.C. § 1301(a) restricts the use of appropriated funds to the purposes for which they were appropriated, and payment of the overallocation would not serve the purposes of the appropriation. B-203681, September 27, 1982.

A grantee may generally substitute other allowable costs for costs which have been disallowed, subject to any applicable cost ceiling. If additional funds become available as the result of a cost disallowance, those funds should be used to pay any "excess" allowable costs which could not be paid previously because of the ceiling. B-208871.2, February 9, 1989.

[30]E.g., OMB Circular No. A-87, para. E.1.

[31]GAO, A Glossary of Terms Used in the Federal Budget Process, PAD-81-27, at 87 (1981).

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Allowable costs are determined on the basis of the relevant program legislation, regulations, including OMB directives, and the terms of the grant agreement. First and foremost, of course, is the program statute. Thus, where the legislation and legislative history of a program clearly limited the purposes for which grant funds could be used, grantees could not use grant funds for non-specified purposes, including one for which Congress had provided funds under a separate appropriation. 35 Comp. Gen. 198 (1955). In 55 Comp. Gen. 652 (1976), however, a statute prohibiting certain costs was held to apply only to direct costs and, absent legislative history to the contrary, did not preclude use of standard indirect cost rates even though technically a percentage of the indirect cost rates could be attributed to the prohibited items.

The role of agency regulations is illustrated by California v. United States, 547 F.2d 1388 (9th Cir. 1977), cert. denied, 434 U.S. 824. Under the Federal-Aid Highway Act, the United States pays 90 percent of the "total cost" of certain highway construction, with "cost" being defined to include the cost of right-of-way acquisition. The Federal Highway Administration had issued a policy memorandum stating that program funds would not be used to pay interest on any portion of a condemnation award or settlement for more than 30 days after the money is deposited with the court. California challenged the restriction. The court said:

> "Certainly, Congress must have intended that the statutory obligation to pay 90 percent of the total cost must include some corresponding right to impose reasonable limitations upon such costs, rather than to leave the Federal Treasury at the mercy of unfettered discretion by the State as to what expenditures may be made and charged accordingly."

Id. at 1390. The court saw no need to decide whether the policy memorandum rose to the level of a "regulation." Either way, it was a reasonable exercise of the agency's authority to administer the program. See also Louisiana Department of Highways v. United States, 604 F.2d 1339 (Ct. Cl. 1979) (Federal Highway Administration regulation disallowing costs of grantee settlements of worthless claims).

Several GAO decisions illustrate the significance of the grant agreement. For example, where a grant application specified that certain costs would be incurred and the program legislation was ambiguous as to whether those costs should be allowed, the grantor

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agency was held bound by the grant agreement, i.e., by its acceptance of the application. B-118638.101, October 29, 1979.

The familiar cost overrun is not the exclusive province of the government contractor. Assistance recipients may also incur overruns. A claim resulting from an overrun under a cooperative agreement was denied in B-206272.5, March 26, 1985, because, under the agreement, the agency was not obligated to fund overruns unless it chose to amend the agreement and, in its discretion, it had declined to do so. Cf. B-209649, December 23, 1983 (labor benefits awarded by court to employees of grantee's contractor could be regarded as indirect costs under grant terms, as long as applicable ceiling on indirect costs was not exceeded).

GAO is occasionally asked to review allowable cost determinations. Two examples are Nuclear Waste: DOE Needs to Ensure Nevada's Conformance With Grant Requirements, GAO/RCED-90-173 (July 1990), and Job Training Partnership Act: Review of Audit Findings Related to the Downriver Community Conference Program, GAO/HRD-90-105 (May 1990). The analytical framework employed is that outlined above.

b. Grant Cost Cases

Grant cost cases are extremely difficult to categorize because what is allowable under one assistance program may not be allowable under another. Accordingly, summaries of a number of cases are given below with no further attempt to generalize.

Recovery of antitrust damages by a state grantee stemming from a grant-financed project serves to reduce the actual costs of the grantee and must be accounted for to the government. This is true even where the United States has declined to participate in the cost of the antitrust action. 57 Comp. Gen. 577 (1978). However, the government is not entitled to share in treble damages. 47 Comp. Gen. 309 (1967). Out-of-pocket expenses incurred by the state in effecting the recovery should be shared by the federal government in the same proportion as the recovered damages. B-162539, October 11, 1967.

Where a grantee paid a nondiscriminatory sales tax on otherwise proper expenditures with grant funds, the taxes are not taxes imposed on the United States and are allowable. 37 Comp. Gen. 85 (1957). However, property taxes were held not allowable under a construction

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grant because they represent operating costs rather than construction costs. B-166506, February 14, 1973.

The payment of expert witness fees was found unrelated to the purposes of a research grant. 42 Comp. Gen. 682 (1963).

Construction of a bridge could not be paid for out of federal aid highway funds where the construction was necessitated by a flood control project and not as a highway project. 41 Comp. Gen. 606 (1962).

Buses acquired by a city under a "mass transportation" grant could be used for charter service, an unauthorized grant purpose, where such use was merely incidental to the primary use of the buses for authorized mass transit purposes. B-160204, December 7, 1966.

The salary of an individual hired to evaluate the Upward Bound Program at a grantee college was disallowed as a grant cost, because the grant document contained no provision for such an expenditure and the applicable program guidelines specified that evaluation was not an allowable expense. B-161980, November 23, 1971.

The cost of a luncheon for top officials of the Department of Human Resources, District of Columbia Government, was disallowed as an improper administrative expense under a social services program grant under Title XX of the Social Security Act. B-187150, October 14, 1976.

Ordinarily, increased project costs resulting from grantee negligence giving rise to justified claims for damages would not be allowable. However, a damage award was viewed as a recognizable cost element where the grantee's error had contributed to an unrealistically low initial cost, but an amendment to the grant was required before the increased costs could be allowed. 47 Comp. Gen. 756 (1968).

Under a Federal Airport Act program providing for federal payment of a specified percentage of allowable project costs, the fair value of land and equipment donated to the grantee could be treated as an allowable cost because failure to do so would, in effect, penalize the grantee for the contributions of "public spirited citizens." B-81321, November 19, 1948.

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Litigation costs incurred by grantees in suing the United States were found unallowable under the Nuclear Waste Policy Act of 1982. Nevada v. Herrington, 827 F.2d 1394 (9th Cir. 1987).

c. Note on Accounting

Cost principles on which a grant award is conditioned are binding on the grantee. B-203681, September 27, 1982. It is the grantee's responsibility to maintain adequate fiscal records to support the allowable costs claimed. With respect to state and local governments, see generally Common Rule §___.20, 53 Fed. Reg. 8090. Where a grantee has not kept adequate records, evidence of satisfactory progress on the grant may nevertheless justify a limited "presumption of regularity" since by inference the grantee must have incurred some allowable expenses. However, it does not follow that all expenses claimed should be allowed. Where a particular accounted-for time period includes disallowed costs, similar disallowable costs must be projected as present during prior unaccounted-for periods unless there is proof to the contrary, the presumption being that similar errors occurred during the prior periods. B-186166, August 26, 1976. Although the agency has discretion to determine the precise method of calculation, one approach is to disallow the same proportion of funds for the unaccounted-for periods as were disallowed for the period for which accounts were available. Id.

GAO has questioned the assessment of fiscal sanctions by a grantor agency against a grantee on the basis of error rate statistical data, such as errors imputed from a quality control system. See B-194548, July 10, 1979. In Georgia v. Califano, 446 F. Supp. 404, 409–10 (N.D. Ga. 1977), however, the court upheld the determination of overpayments under the Medicaid program on the basis of statistical sampling, in view of the "practical impossibility" of individual claim-by-claim audit. The court also noted that, under the pertinent federal regulations, the state was given the opportunity to present evidence before the disallowance became final.

In Maryland v. Mathews, 415 F. Supp. 1206 (D.D.C. 1976), a case involving the Aid to Families with Dependent Children program, the court held that an agency can establish by regulation a withholding of federal financial participation in a specified amount set by a tolerance level, as long as the tolerance level is reasonable and supported by an adequate factual basis. The regulation involved in the specific case, however, did not meet the test and was found to be arbitrary and therefore invalid. It has also been held that, if setting a tolerance level

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Travel advances returned to government custody for reasons such as postponement of the travel regain their status as accountable funds, and an employee receiving custody of these funds is governed by the laws relating to the liability and relief of accountable officers. B-200404, February 12, 1981; B-170012, March 14, 1972; B-170012, May 3, 1971. Also, where an advance greatly exceeds the employee's legitimate travel expense needs and it is clear that the excess is intended to be used for operational purposes, the excess over reasonable needs may be treated as accountable funds and not part of the "loan." B-196804, July 1, 1980.

b. Receipts

In our definitions of governmental receipts and offsetting collections in Chapter 2, we noted that the government receives funds from nongovernment sources (a) from the exercise of its sovereign powers (e.g., tax collections, customs duties, court fines), and (b) from a variety of business-type activities (e.g., sale of publications). These collections, whether they are to be deposited in the Treasury as miscellaneous receipts or credited to some agency appropriation or fund, are accountable funds from the moment of receipt. Some examples are 64 Comp. Gen. 535 (1985) (fees paid to bankruptcy court); 60 Comp. Gen. 674 (1981) (tax collections); B-200170, April 1, 1981 (petroleum overcharge refunds); B-194782, August 25, 1980 (recreational fee collections).

c. Funds Held in Trust

When the government holds private funds in a trust capacity, it is obligated, by virtue of its fiduciary duty, to pay over those funds to the rightful owners at the proper time. Thus, although the funds are not appropriated funds, they are nevertheless accountable funds. The principle has been stated as follows:

> "[T]he same relationship between an accountable officer and the United States is required with respect to trust funds of a private character obtained and held for some particular purpose sanctioned by law as is required with respect to public funds."

6 Comp. Gen. 515, 517 (1927). The Court of Claims said the same thing in Woog v. United States, 48 Ct. Cl. 80 (1913).

A common example is the Department of Veterans Affairs "Personal Funds of Patients" (PFOP) account. Patients, upon admission to a VA hospital, may deposit personal funds in this account for safekeeping and use as needed. Upon release, the balance is returned to the

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is discretionary, the agency can set it at zero. Maryland Department of Human Resources v. Department of Health and Human Services, 762 F.2d 406 (4th Cir. 1985); California v. Settle, 708 F.2d 1380 (9th Cir. 1983).

2. Pre-Award Costs (Retroactive Funding)

"Retroactive funding" means the funding of costs incurred by a grantee before the grant was awarded. Three separate situations arise: (1) costs incurred prior to award but after the program authority has been enacted and the appropriation became available; (2) costs incurred prior to award and after program authority was enacted but before the appropriation became available; and (3) costs incurred prior to both program authority and appropriation availability.

Situation (1): In this situation, the grantee seeks to charge costs incurred before the grant was awarded (in some cases even before the grantee submitted its application) but after both the program legislation and the implementing appropriation were enacted.

There is no rule or policy that generally restricts allowable costs to those incurred after the award of a grant. However, agencies may adopt such a policy by regulation. B-197699, June 3, 1980.

Thus, in a number of cases, grant-related costs incurred prior to award, but after the program was authorized and appropriated funds were available for obligation, have been allowed where (a) there was no contrary indication in the language or legislative history of the program statute or the appropriation, (b) allowance was not prohibited by the regulations of the grantor agency, and (c) the agency determined that allowance would be in the best interest of carrying out the statutory purpose. 32 Comp. Gen. 141 (1952); 31 Comp. Gen. 308 (1952); B-197699, June 3, 1980; B-133001, March 9, 1979; B-75414, May 7, 1948. (The above criteria are not specified as such in any of the cases cited but are derived from viewing all of the cases as a whole.)

Situation (2): In this situation, pre-award costs are incurred after program legislation has been enacted, but before an appropriation becomes available.

Prior to the Comptroller General's decision in 56 Comp. Gen. 31 (1976), a "general rule" was commonly stated to the effect that

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absent some indication of contrary intent, an appropriation could not be used to pay grant costs where the grantee's obligation arose before the appropriation implementing the enabling legislation became available. 45 Comp. Gen. 515 (1966); 40 Comp. Gen. 615 (1961); 31 Comp. Gen. 308 (1952); A-71315, February 28, 1936.

In 56 Comp. Gen. 31, the Comptroller General reviewed the earlier decisions and concluded that there was no legal requirement for a general rule prohibiting the use of grant funds to pay for costs incurred prior to the availability of the applicable appropriation. Rather, the determination should be made on a case-by-case basis. Thus, the decision announced:

"We would prefer to base each decision from now on on the statutory language, legislative history, and particular factors operative in the particular case in question, rather than on a general rule." Id. at 35.

In reviewing the earlier decisions, the Comptroller General found that each had been correctly decided on its own facts. Thus, retroactive funding was prohibited in 40 Comp. Gen. 615 (1961), 31 Comp. Gen. 308 (1952), and A-71315, February 28, 1936. However, in each of those cases, there was some manifestation of an affirmative intent that funds be used only for costs incurred subsequent to the appropriation. For example, 31 Comp. Gen. 308 concerned grants to states under the Federal Civil Defense Act. The committee reports and debates on a supplemental appropriation to fund the program contained strong indications that Congress did not intend that the money be used to retroactively fund expenses incurred by states prior to the appropriation. By way of contrast, there were no such indications in the situation considered in 56 Comp. Gen. 31 (matching funds provided to states under the Land and Water Conservation Fund Act of 1965). Accordingly, 56 Comp. Gen. 31 did not overrule the earlier decisions, but merely modified them to the extent that GAO would no longer purport to apply a "general rule" in this area.

In determining whether retroactive funding is authorized, relevant factors are evidence and clarity of congressional intent, the degree of discretion given the grantor agency, and the proximity in time of the cost being incurred to the grant award. As in Situation (1), significant factors also include the agency's own regulations and the agency's determination that funding the particular costs in question will further the statutory purpose. Accordingly, the authority will be easier to find where an agency has broad discretion and favorable legislative

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history. Using this approach, retroactive funding authority may be found to exist (as in 56 Comp. Gen. 31), or not to exist (as in 40 Comp. Gen. 615).

If an agency wishes to recognize retroactive funding in limited situations in its regulations, it must, in order to avoid potential Antideficiency Act problems, make it clear that no obligation on the part of the government can arise prior to the availability of an appropriation. Of course, the grant itself cannot be made until the appropriation becomes available. 56 Comp. Gen. 31, 36 (1976).

Situation (3): In this situation, the grantee seeks to charge costs incurred not only before the appropriation became available, but also before the program authority was enacted.

Costs incurred prior to both the program authorization and the availability of the appropriation may generally not be funded retroactively. See 56 Comp. Gen. 31 (1976); 32 Comp. Gen. 141 (1952); B-11393, July 25, 1940. GAO recognizes that there may possibly be exceptions even to this rule (56 Comp. Gen. at 35), but thus far there are no decisions identifying any.

One final situation deserves mention. In each of the retroactive funding cases cited above, the grant was in fact subsequently awarded. In B-206244, June 8, 1982, a state had applied for an Interior Department grant under the Youth Conservation Corps Act and later withdrew its application due to funding uncertainties. The state then filed a claim for various expenses it had incurred in anticipation of the grant. GAO held that payment would violate both the program legislation and the purpose statute, 31 U.S.C. § 1301(a). Interior's appropriation was intended to accomplish grant purposes, but the state's expenses did not accomplish any grant purposes since the grant was never made.

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H. Recovery of Grantee Indebtedness

1. Government's Duty to Recover

This section is intended to summarize the application of "debt collection law" (covered in detail in Chapter 13) in the context of assistance programs, and to highlight a few issues in which the fact that a grant is involved may be of special relevance. This brief discussion is intended to supplement the detailed coverage in Chapter 13; it is not a substitute.

Claims in favor of the United States against an assistance recipient may arise for a variety of reasons. As a general proposition, it has been the view of both GAO and the executive branch that the United States has not only a right but a duty to recover amounts owed to it, and that this duty exists without the need for specific statutory authority. This applies to assistance recipients just as it would apply to other debtors. The Federal Claims Collection Standards require each agency to "take aggressive action . . . to collect all claims of the United States for money or property arising out of the activities of, or referred to, that agency." 4 C.F.R. § 102.1(a). See also Common Rule §___.52, 53 Fed. Reg. 8102.

For example, grant funds erroneously awarded to an ineligible grantee must be recovered by the agency responsible for the error, including expenditures the grantee incurred before receiving notice that the agency's initial determination had been made in error. 51 Comp. Gen. 162 (1971); B-146285/B-164031(1), April 19, 1972. The cited decisions recognize that there might be exceptional circumstances in which full recovery might not be required, but exceptions would have to be considered on an individual basis.

Similarly, where an agency misapportions formula grant funds so that some states receive excess funds, the excess must be recovered. If the misapportionment resulted in other states receiving less than their formula amount, the apportionments of all of the states involved must be appropriately adjusted. 41 Comp. Gen. 16 (1961).

Where, under an assistance program, the government is authorized or required to recover funds for whatever reason, the Federal Claims Collection Act of 1966, as amended by the Debt Collection Act of 1982 (31 U.S.C. Chapter 37, Subchapter II), and the joint GAO-Justice

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Department implementing regulations (Federal Claims Collection Standards, 4 C.F.R. Parts 101–105) apply unless the program legislation under which the claim arises or some other statute provides otherwise. See 4 C.F.R. § 101.4; B-163922, February 10, 1978; B-182423, November 25, 1974.

Indebtedness to the United States may also result from the misuse of grant funds. E.g., Utah State Board for Vocational Education v. United States, 287 F.2d 713 (10th Cir. 1961); Mass Transit Grants: Noncompliance and Misspent Funds by Two Grantees in UMTA's New York Region, GAO/RCED-92-38 (January 1992). The cases usually arise when the grantor agency disallows certain costs. Here again the government's position has been that the right to recover exists independent of statute, supplemented or circumscribed by any statutory provisions that may apply. See, e.g., B-198493, July 7, 1980; B-163922, February 10, 1978. In this area, however, the government's right to recover has come under increasing attack by recipients, particularly during the 1980s.

What we present here is by no means an exhaustive cataloguing of the cases. Our selection is designed to serve three purposes: (1) summarize what the law appears to be as of the date of this publication; (2) reflect any discernible trends; and (3) point out some issues that may be of more general relevance. As a general proposition, the courts have looked first to the program legislation and, with some exceptions, have declined to rule on the government's common-law right of recovery where adequate authority could be found in, or deduced from, the enabling statute.

The cases we selected for purposes of illustration are drawn largely from two programs—Title I of the Elementary and Secondary Education Act (ESEA), and the Comprehensive Employment and Training Act (CETA). ESEA was extensively revised by the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988 (Pub. L. No. 100-297, 102 Stat. 130); CETA was replaced in 1982 by the Job Training Partnership Act. Nevertheless, we chose these programs because they both generated a large volume of litigation on a variety of relevant topics. Apart from whatever value specific cases may have by analogy to other programs, the material illustrates the kinds of issues that have arisen and the approach the courts, including the Supreme Court, have taken in resolving them.

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ESEA included a provision, very common in grant program legislation, requiring the states to provide adequate assurances to the Department of Education that grant funds would be used only on qualifying programs. In addition, the law was amended in 1978 to give the Secretary of Education explicit authority to direct the repayment of misspent grant funds from non-ESEA sources. 20 U.S.C. § 2835(b) (1982). Prior to this amendment, the statute had provided simply that payments under Title I shall take into account the extent to which any previous payment to the same state was greater or less than it should have been.

Two states argued that the 1978 amendments did not apply to misspent funds prior to 1978, and that the government's sole remedy with respect to pre-1978 funds was to withhold future grant funds, in which event the state would simply undertake a smaller Title I program. The government argued that the right to recover existed both under the pre-1978 law and under the common law. The Supreme Court held that the pre-1978 version of the law clearly gave the government the right to recover misspent funds. Bell v. New Jersey, 461 U.S. 773 (1983). Apart from the holding itself and its significance with respect to any program statutes with similar language, several other points from this decision are noteworthy:

- The existence and amount of the state's debt are to be determined administratively by the agency in the first instance, subject to judicial review. Id. at 791–92. (This is the same approach used in the Federal Claims Collection Standards for debt collection generally.)
- The Court rejected the argument that the government had a remedy by withholding future funds, with the state correspondingly reducing its program level.
- Because the Court found adequate authority in the statute, it declined to rule on the existence of a common-law right. Id. at 782 n.7.

In a 1981 case, a lower court had found a common-law right of recovery along with the ESEA statutory right. West Virginia v. Secretary of Education, 667 F.2d 417 (4th Cir. 1981). A 1987 case also upheld the government's common-law right of recovery, at least to the extent of overallocations or other erroneous payments. California Department of Education v. Bennett, 829 F.2d 795, 798 (9th Cir. 1987).

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Two years after Bell v. New Jersey, the Supreme Court considered another issue arising from the same litigation and held that the 1978 amendments to ESEA were not retroactive for purposes of determining whether funds had been misspent. Bennett v. New Jersey, 470 U.S. 632 (1985). What is important here is the more general rule the Court announced, namely, that substantive rights and obligations under federal grant programs are to be determined by reference to the law in effect when the grants were made. Id. at 638–41.

The Court also rejected an argument that recovery would be inequitable because the state acted in good faith. The role of the reviewing court is to determine if the proper legal standards are applied. If they are, a court has "no independent authority to excuse repayment based on its view of what would be the most equitable outcome." Id. at 646. In any event, said the Court, "we find no inequity in requiring repayment of funds that were spent contrary to assurances provided by the State in obtaining the grants." Id. at 645.

In Bennett v. Kentucky Department of Education, 470 U.S. 656 (1985), decided on the same day as Bennett v. New Jersey, the Court reaffirmed the government's right of recovery under ESEA Title I:

"The State gave certain assurances as a condition for receiving the federal funds, and if those assurances were not complied with, the Federal Government is entitled to recover amounts spent contrary to the terms of the grant agreement." 470 U.S. at 663.

The Court further concluded that neither "substantial compliance" by the state nor the absence of bad faith would absolve the state from its liability. Id. at 663–65. See also B-229068-O.M., December 23, 1987, applying Kentucky to grants under Title V of the Surface Mining Control and Reclamation Act.

One point in Bell v. New Jersey seems to have generated some uncertainty. The Court noted that the Secretary "has not asked us to decide what means of collection are available to him, but only whether he is a creditor. Since the case does not present the issue of available remedies, we do not address it." Bell, 461 U.S. at 779 n.4. Thus, the Court did not approve or disapprove of any particular remedy. This led one court to conclude that the Bell analysis requires two separate questions: whether the federal government has a right of recovery and, if so, what remedies are available to it. Maryland Department of

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Human Resources v. Department of Health and Human Services, 763 F.2d 1441, 1455 (D.C. Cir. 1985) (holding that government has statutory right of recovery under Title XX of Social Security Act). However, another court expressed doubt over the existence of such a dichotomy, construing the Supreme Court's silence in Bennett v. Kentucky Department of Education as approval of the means of recovery employed in that case, a direct repayment order. St. Regis Mohawk Tribe v. Brock, 769 F.2d 37, 49 (2d Cir. 1985), cert. denied, 476 U.S. 1140 (right of recovery under Comprehensive Employment and Training Act). The St. Regis court went on to conclude that "Congress left it to the Secretary to establish additional remedial procedures, consistent with the purposes of the legislation, to insure compliance by prime sponsors." 769 F.2d at 50. Where this issue may lead in the future is unclear, although as noted briefly later in this chapter and discussed more fully in Chapter 13, the availability of a particular remedy sometimes is a very different question from the existence of the underlying right to recover.

Another group of cases involves the former CETA program. There is a strong parallel to the ESEA cases in that the original CETA included general authority to adjust payments to reflect prior overpayments or underpayments, and was amended in 1978 to explicitly authorize the Secretary of Labor to recover misspent funds by ordering repayment from non-CETA funds. Essentially following Bell v. New Jersey, a rather long line of cases upheld the Labor Department's right, under the pre-1978 CETA, to recover misspent funds and to do so by directing repayment from non-CETA funds. City of Gary v. United States Department of Labor, 793 F.2d 873 (7th Cir. 1986); St. Regis Mohawk Tribe v. Brock, 769 F.2d 37 (2d Cir. 1985), cert. denied, 476 U.S. 1140; Mobile Consortium v. United States Department of Labor, 745 F.2d 1416 (11th Cir. 1984); California Tribal Chairman's Association v. United States Department of Labor, 730 F.2d 1289 (9th Cir. 1984); North Carolina Commission of Indian Affairs v. United States Department of Labor, 725 F.2d 238 (4th Cir. 1984), cert. denied, 469 U.S. 828; Texarcana Metropolitan Area Manpower Consortium v. Donovan, 721 F.2d 1162 (8th Cir. 1983); Lehigh Valley Manpower Program v. Donovan, 718 F.2d 99 (3d Cir. 1983); Atlantic County v. United States Department of Labor, 715 F.2d 834 (3d Cir. 1983).

The St. Regis (769 F.2d at 47), California Tribal (730 F.2d at 1292), and North Carolina (725 F.2d at 240) courts, as had the Supreme

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Court in Bell v. New Jersey, declined to comment on the existence of a common-law right of recovery. The Texarcana court noted that its decision was consistent with prior decisions recognizing the common-law right. 721 F.2d at 1164. None of the cases purported to deny that right.

Another group of CETA cases concerned a provision which required the Secretary of Labor to investigate any complaint alleging improprieties and to issue a final determination not later than 120 days after receiving the complaint. The consequences of failing to meet the 120-day deadline became a hotly litigated issue. The lower courts split, some holding that failure to meet the deadline barred the Labor Department from attempting to recover misused funds, while others held that the failure did not bar further action. Using an analysis which should be useful in a variety of situations, the Supreme Court resolved the conflict in Brock v. Pierce County, 476 U.S. 253 (1986), holding that the mere use of the word "shall" in the statute did not remove the power to act after 120 days.

One additional CETA case deserves mention. In Board of County Commissioners v. United States Department of Labor, 805 F.2d 366 (10th Cir. 1986), the court held that funds embezzled by an employee of a CETA grantee are "misspent" for purposes of the government's right of recovery. The grantee had argued that the funds were not "misspent" because it had never spent them. "No CETA regulation lists embezzlement as an allowable cost," rejoined the court. Id. at 368.

Where does all this leave us? Certainly the government's right to recover under programs with statutory provisions similar to the former ESEA Title I and CETA programs would seem to be settled. In more general terms, several lower courts have recognized the government's basic right to recover under the common-law,[32] although as we shall see, the means of recovery has become controversial. While the Supreme Court declined to address the common law issue in Bell v. New Jersey, its later decision in West Virginia v. United States, 479 U.S. 305 (1987) seems instructive.

[32]See, in addition to the cases cited in the text, Tennessee v. Dole, 749 F.2d 331, 336 (6th Cir. 1984), cert. denied, 472 U.S. 1018 (Federal-Aid Highway Act); Woods v. United States, 724 F.2d 1444 (9th Cir. 1984) (Food Stamp Act); Mount Sinai Hosp. v. Weinberger, 517 F.2d 329 (5th Cir. 1975), cert. denied, 425 U.S. 935 (Medicare); Pennsylvania Dep't of Transp. v. United States, 643 F.2d 758, 764 (Ct. Cl. 1981), cert. denied, 454 U.S. 826 (Federal-Aid Highway Act).

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The issue in West Virginia was whether the United States could recover "prejudgment interest on a debt arising from a contractual obligation to reimburse the United States for services rendered by the Army Corps of Engineers." 479 U.S. at 306. Applying federal common law, a unanimous Court held that it could.[33] While this was not a grant case nor was the government's right to collect the underlying debt in dispute, it would not seem to require a huge leap in logic to infer a recognition of an inherent right in the government to recover amounts owed to it.

In sum, the government's assertion of an inherent (i.e., common law) right to recover sums owed to it under assistance programs thus far seems to have withstood assault. However, it is safe to say that the question is by no means as simple as it once might have seemed.

2. Offset and Withholding of Claims Under Grants

Offset and withholding are two closely related remedies. While the terms are sometimes used interchangeably, they are not the same. Offset, in the context of grantee indebtedness, refers to a reduction in grant payments to a grantee who is indebted to the United States where the debt arises under a separate assistance program or is owed to an agency other than the grantor agency. Withholding is the act of holding back funds from the same grant or program in which the violation or other basis for creating the government's claim occurred. In a sense, withholding may be viewed as a type of offset.

GAO has adopted a "policy rule" that offset or withholding should not be used where it would have the effect of defeating or frustrating the purposes of the grant. E.g., B-171019, December 14, 1976; B-186166, August 26, 1976. The application of this rule depends upon the nature and purpose of the assistance program. "Individual consideration must be given to each instance." B-182423, November 25, 1974. Naturally, this consideration must include any relevant provisions of the program legislation, agency regulations, or the grant agreement.

In 43 Comp. Gen. 183 (1963), for example, a farmer who was receiving payments under the Soil Bank Act, administered by the

[33]Complications resulting from the Debt Collection Act of 1982, discussed in Chapter 13, did not apply in this case because the transaction predated the effective date of that statute. West Virginia, 479 U.S. at 312 n.6.

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patient. Patient funds in the PFOP account have been consistently treated as accountable funds. 68 Comp. Gen. 600 (1989); 68 Comp. Gen. 371 (1989); B-226911, October 19, 1987; B-221447, April 2, 1986; B-215477, November 5, 1984; B-208888, September 28, 1984.

Another example is private funds of litigants deposited in a registry account of a court of the United States, to be held pending distribution by order of the court in accordance with 28 U.S.C. §§ 2041 and 2042. These are also accountable funds under the trust fund concept. 64 Comp. Gen. 535 (1985); 6 Comp. Gen. 515 (1927); B-200108/B-198558, January 23, 1981. See also Osborn v. United States, 91 U.S. 474 (1875) (court can summarily compel restitution of funds improperly withdrawn from registry account by former officers).

Other situations applying the trust fund concept are 67 Comp. Gen. 342 (1988) (Indian trust accounts administered by Bureau of Indian Affairs); 17 Comp. Gen. 786 (1938) (United States Naval Academy laundry fund); B-190205, November 14, 1977 (foreign currencies accepted in connection with accommodation exchanges authorized by 31 U.S.C. § 3342); and A-22805, November 30, 1929 (funds taken from prisoners at the time of their confinement, to be held in their behalf). See also 69 Comp. Gen. 314 (1990) (BIA may contract with private bank for ministerial aspects of trust fund disbursements, but government disbursing officer must retain responsibility for managerial and judgmental aspects).

Not all nongovernment funds in the custody of a government official are held in a trust capacity. For example, in B-164419-O.M., May 20, 1969, GAO distinguished between funds of a foreign government held by the United States incident to a cooperative agreement (trust funds), and funds of a private contractor held by a government official for safekeeping as a favor to the contractor. The latter situation was a mere bailment for the benefit of the contractor, and the official was not an accountable officer with respect to those funds.

d. Items Which Are the Equivalent of Cash

The concepts of accountability and liability discussed in this chapter apply primarily to money. However, for reasons which should be apparent, accountability also attaches to certain non-cash items which are negotiable by the bearer or are otherwise the equivalent of cash. Examples are:

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Department of Agriculture, was indebted to the United States for unpaid taxes. Since the basic purpose of the Soil Bank Act was to protect and increase farm income, GAO decided that whether those payments should be applied to the recovery of an independently arising debt was a matter within Agriculture's discretion, based on Agriculture's determination "as to the extent to which such withholding would tend to effectuate or defeat the purposes of the [Soil Bank Act]." Id. at 185. Similarly, relying heavily on the Treasury Department's interpretation of the State and Local Fiscal Assistance Act of 1972 (general revenue sharing, since repealed), GAO concluded in B-176781-O.M., December 6, 1974, that offset against revenue sharing funds payable to a city was inappropriate to recover an overpayment to that city under a Federal Aviation Administration grant. Thus, agencies have some discretion in the matter.

It has been somewhat easier to conclude that offset will frustrate grant objectives where grant payments are made in advance of grantee performance. E.g., 55 Comp. Gen. 1329 (1976); B-171019, December 14, 1976. This is true to the extent the grantee is able to reduce its level of performance. Take, for example, a grant to construct a hospital. If a debt is offset against grant advances and the grantee can simply forgo the project and not build the hospital, there is no meaningful recovery. The federal government ends up keeping its own money, the grantee pays nothing, and the losers are the intended beneficiaries of the assistance, the patients who would have used the hospital. To this extent, an offset would accomplish nothing. This was the explicit grounds for rejecting offset, for example, in B-171019, December 14, 1976.

The problem was highlighted in a 1982 GAO report, Federal Agencies Negligent in Collecting Debts Arising From Audits, AFMD-82-32 (January 22, 1982). The report first noted GAO's policy and its rationale:

"[I]t is normally inappropriate for the Government to offset debts against an advance of funds to a grantee unless there is assurance that the same level of grant performance will be maintained.

"... When the offset is not replaced with non-Federal funds, there has, in effect, been no repayment. The scope of the program has simply been reduced and the intended recipient of the benefits loses by the amount of the audit disallowance."

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Id. at 26. The report then recommended that grantor agencies "require grantee debtors to certify that their payment of audit-related debts has not reduced the level of performance of any Federal program," and monitor those assurances through grant management and audit follow-up. Id. at 28.

The concept also appeared in B-186166, August 26, 1976, in which the Department of Agriculture was exploring options to recover misapplied and unaccounted-for funds advanced to a university under research grants. Agriculture proposed crediting the indebtedness against allowable indirect grant costs. This would be done by requiring the university to document that it was expending the amount of earned indirect costs on approved program grants, thus maintaining the agreed-upon performance level. GAO concurred cautiously, on the condition that the grantee voluntarily agree to this approach. Should this method fail to satisfy the indebtedness, GAO further noted that the grantee was a state university and advised Agriculture to seek offset against other amounts owed to the state by the federal government.

A solution to the problem would be a rule that offset or withholding implicitly carries with it an obligation that the grantee not reduce its level of performance. As demonstrated by GAO's caution in B-186166, however, GAO has been reluctant to state such a rule in the absence of solid judicial precedent. As discussed later, this precedent may now exist, at least to some extent.

Whatever impediments may exist in the case of grant advances, offset will be more readily available under reimbursement-type grants. E.g., 55 Comp. Gen. 1329, 1332 (1976). Nevertheless, the general policy rule still applies. Thus, in B-163922.53, April 30, 1979, the Comptroller General advised the Departments of Labor and Transportation that disallowed costs under a Labor Department grant could be offset against reimbursements due under a Federal Highway Administration grant, but that Transportation still "must make the determination on a case-by-case basis as to whether offset will impair the program objectives."

When the GAO decisions cited in the preceding paragraphs were issued, the offset referred to was essentially nonstatutory. Administrative offset received a statutory basis with the enactment of section 10 of the Debt Collection Act of 1982, 31 U.S.C. § 3716. The

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corresponding portion of the Federal Claims Collection Standards, revised to reflect the 1982 legislation, is 4 C.F.R. § 102.3.

The administrative offset provided by 31 U.S.C. § 3716 does not apply to debts owed by state and local governments. 31 U.S.C. § 3701(c). Whether common-law offset remains against state and local governments has become a highly controversial issue. The position of GAO and the executive branch is that the government's common-law right of offset has not been abrogated with respect to state and local governments. See 4 C.F.R. § 102.3(b)(4); Common Rule §___.52(a)(1), 53 Fed. Reg. 8103. The issue is explored more fully in Chapter 13.

As noted above, offset and withholding are technically different. Many program statutes include withholding provisions. E.g., Perales v. Heckler, 762 F.2d 226 (2d Cir. 1985) (withholding provision in Medicaid legislation may be used to recoup overpayments from state even though state has not yet recovered from provider).

The theory behind withholding is that where a grantee has misapplied grant funds, or in other words, where a grantee's costs are disallowed, the grantee has, in effect, spent its own money and not funds from the grant. Since the issue frequently comes to light in a subsequent budget period, withholding may be viewed as the determination that an amount equal to the disallowed cost remains available for expenditure by the grantee and is therefore carried over into the new budget period. Accordingly, the amount of new money that must be awarded to the grantee to carry on the grant program is reduced by the amount of the disallowance. This may not be strictly applicable where the statutory program authority establishes an entitlement to the funds on the part of the grantee or provides other specific limitations on the use of withholding.

Under the Federal Claims Collection Standards, an agency to whom a debt is owed is required in all cases to explore the possibility of collecting by offset from other sources. 4 C.F.R. § 102.3(a). If offset is not available, a withholding provision may provide the basis to accomplish a similar result, at least in part. In 55 Comp. Gen. 1329 (1976), for example, the former Community Services Administration was statutorily authorized to suspend (withhold) grant payments to satisfy certain grantee tax delinquencies. Under this authority, the CSA could pay the suspended amounts over to the Internal Revenue

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Service to satisfy a grantee's tax liability to the extent that it was incurred by the grantee in carrying out CSA grants. Since funds previously advanced under the grant should have been used to pay the required taxes in the first place, transfer of the suspended funds to the IRS amounted to payment of an authorized grant purpose. See also B-171019, December 14, 1976 (withholding authority of former Law Enforcement Assistance Administration).

In any event, withholding under a limited statutory withholding provision does not satisfy the requirement for the agency to seek offset from other sources to the extent of any remaining liability for which withholding is not available. B-163922, February 10, 1978.

Statutory withholding provisions may include procedural safeguards, most typically notice and opportunity for hearing. Any such procedural requirements must, of course, be satisfied. See B-226544, March 24, 1987; Common Rule § ___.43(b), 53 Fed. Reg. 8102. The Common Rule authorizes withholding against advances, but cautions agencies to use sound judgment in exercising that authority. Common Rule § ___.52(a)(2), 53 Fed. Reg. 8103; Supplementary Information statement, id. at 8042.

As with offset, it should be kept in mind that nothing is accomplished by withholding unless the grantee carries out its program at the same level as would otherwise have been the case. The Supreme Court considered this issue in Bell v. New Jersey, 461 U.S. 773 (1983), upholding the statutory authority of the Department of Education to recover misspent grant funds. The Court rejected the state's suggestion that the federal government was free to reduce future grant advances, with the state then undertaking a smaller program. The Court recognized that, under this approach, the government would recover nothing and the states would effectively have no liability for misspent funds. Congress, said the Court, must have contemplated that the government would receive a net recovery by paying less for the same program level. Id. at 781 n.5 and 783 n.8.

A 1985 decision of the Court of Appeals for the District of Columbia Circuit took the analysis one step further. The case is Maryland Department of Human Resources v. Department of Health and Human Services, 763 F.2d 1441 (D.C. Cir. 1985). After discussing the Bell analysis, the court went on to conclude:

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"[W]here a statute gives the federal government a right of recovery and also authorizes prospective withholding [withholding funds for services not yet rendered] as a remedy, the state remains obligated to provide all the services that it promised to supply in return for the funds that were then prospectively withheld in satisfaction of the state's debt to the federal government. If a state then proceeds to reduce the size of its federally funded program, the state has committed a new and independent breach of the funding conditions, which gives rise to a new debt to the federal government." 763 F.2d at 1455–56.

Under this approach, the remedy is clearly a meaningful one. How far the courts will go in applying it remains to be seen. Issues still to be resolved are the extent to which the principle may apply to an offset as opposed to a withholding, or to a nonstatutory offset or withholding.

In Housing Authority of the County of King v. Pierce, 701 F. Supp. 844 (D.D.C. 1988), modified on other grounds, 711 F. Supp. 19 (D.D.C. 1989), the court considered the recoupment of overpayments under advance-funded Department of Housing and Urban Development housing subsidies. HUD regulations (but not the program statute) authorized recoupment by reducing future subsidy payments. The court upheld HUD's common-law right to recover in the manner specified in the regulations. The court further commented that the teachings of Bell and Maryland Department of Human Resources "might and perhaps should guide HUD in the course of the recovery here," but found those cases not dispositive because they dealt with statutory rather than common-law remedies. 701 F. Supp. at 850 n.11.

Thus, there is a direct relationship between the appropriateness of offset or withholding against grant advances and the grantee's obligation to maintain the agreed-upon program level. Future litigation or legislation will determine the details of this relationship.

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Federal Assistance: Guaranteed and Insured Loans

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Federal Assistance: Guaranteed and Insured Loans

A. Introduction

1. General Description

The preceding chapter dealt with one of the major forms of federal financial assistance, the grant. Another major form is credit assistance, which includes direct loans and, the subject of this chapter, guaranteed and insured loans. In essence, a guaranteed loan is a loan or other advance of credit made to a borrower by a participating lending institution, where the United States Government, acting through the particular federal agency involved, "guarantees" payment of all or part of the principal amount of the loan, plus interest, in the event the borrower defaults. A statutory definition along these lines is found in 2 U.S.C. § 661a(3) (Supp. III 1991).[1] Depending on the particular program, the borrower may be a private individual, business entity, educational institution, or a state, local, or foreign government. In some cases, the guarantee may be created when a loan originally made by a government agency is subsequently sold by the agency to a third party with the government's assurance of repayment.

Strictly speaking, an insured loan and a guaranteed loan are two different things. An insured loan is one made initially by the federal agency and then sold, while a guaranteed loan is a loan made by a private lender. Occasionally, the agency's program legislation may draw the distinction. For example, the Rural Electrification Administration has authority both to make insured loans and to guarantee loans made by other lenders. Under 7 U.S.C. § 935, REA can make insured loans, defined in subsection 935(c) as loans that are "made, held, and serviced by the Administrator, and sold and insured by the Administrator hereunder." Under 7 U.S.C. § 936, REA can guarantee loans which are "initially made, held, and serviced by a legally organized lending agency."[2] Another example is the business and industrial loan program of the Farmers Home Administration established by 7 U.S.C. § 1932, again authorizing both insured and guaranteed loans. For purposes of this chapter, we use the term

[1]Similar definitions are found in GAO's Glossary of Terms Used in the Federal Budget Process, PAD-81-27 (3d ed. 1981), and in OMB Circular No. A-34, Part VI (1991). Summary information on individual programs may be found in the Catalog of Federal Domestic Assistance, published annually by the General Services Administration and Office of Management and Budget.

[2]For a detailed discussion of REA credit assistance programs, see GAO report entitled Financing Rural Electric Generating Facilities: A Large and Growing Activity, CED-81-14 (November 28, 1980).

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"guarantee" to refer to both guaranteed and insured loans unless otherwise indicated.

The objective of this chapter is to illustrate the kinds of issues and problems that arise in this area and the approaches used in resolving them. We have for the most part emphasized several of the better-known guarantee programs. Naturally, the extent to which any given case will have more general applicability will depend on the agency's organic legislation, program regulations, and the particular circumstances. Since program statutes and regulations are subject to change, the reader should view the discussion as merely illustrative of the particular issue involved.

The primary purpose of loan guarantees is to induce private lenders to extend financial assistance to borrowers who otherwise would not be able to obtain the needed capital on reasonable terms, if at all. Or, as a congressional subcommittee put it, loan guarantee programs are designed to redirect capital resources by intervening in the private market decision process, in order to further objectives deemed by Congress to be in the national interest.[3] These objectives may be social (veterans' home loan guarantees), economic (small business programs), or technological (guarantees designed to foster emerging energy technologies).[4]

When the federal government guarantees a loan, the guarantee is extended to the original lender supplying the funds, generally either a private lender or the Federal Financing Bank, as well as to any subsequent assignees or purchasers of the guaranteed portion of the loan. The subsequent purchase of a guaranteed loan from the original lender is called the "secondary market." See, for example, 51 Comp. Gen. 474 (1972). Secondary market purchasers are frequently large investment entities such as mutual funds or pension funds.

Secondary market purchasers are not always waiting in the wings, checkbooks in hand. Congress has on several occasions taken action to help create, stimulate, or facilitate secondary markets by

[3]Subcomm. on Economic Stabilization, House Comm. on Banking, Finance and Urban Affairs, 95th Cong., 1st Sess., Catalog of Federal Loan Guarantee Programs x (Comm. Print 1977).

[4]In the technological area, GAO has suggested that the loan guarantee device is best suited to situations in which the technology has been known to work and is marginally economical, with the primary investment constraint being financial. EMD-77-39, B-178726, May 9, 1977 (comments on proposed legislation).

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- Traveler's checks in the custody of an accountable officer. 64 Comp. Gen. 456 (1985); B-235147.2, August 14, 1991.
- Food stamps. B-221580, October 24, 1986 (non-decision letter).
- Government Transportation Requests. B-239387, April 24, 1991.
- Military payment certificates. B-127937-O.M., August 2, 1956.
- Treasury bonds with interest coupons attached. B-190506, November 28, 1977, affirmed on reconsideration, B-190506, December 20, 1979.

In the second decision in B-190506, it was contended that loss of the bonds did not really result in a loss to the government because neither the bonds nor the coupons had been cashed and a "stop notice" had been placed with the Federal Reserve Bank. GAO could not agree, however, since the bonds were bearer bonds and the stop notice does not completely extinguish the government's liability to pay on them. (The Treasury Department no longer issues coupon bonds, although many older ones are still outstanding.)

4. What Kinds of Events Produce Liability?

The generic term for losses which trigger an accountable officer's liability is "fiscal irregularity." See GAO, Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 8.2. Fiscal irregularities are divided into two broad categories: (1) physical loss or deficiency, and (2) illegal or improper payment. Since, as we will see, the relief statutes are expressly tied to these categories, the proper classification of a fiscal irregularity is the essential first step in determining which statute to apply.

A working definition of "physical loss or deficiency" may be found in B-202074, July 21, 1983:

> "In sum, 'physical loss or deficiency' includes such things as loss by theft or burglary, loss in shipment, and loss or destruction by fire, accident, or natural disaster. It also includes the totally unexplained loss, that is, a shortage or deficiency with absolutely no evidence to explain the disappearance. . . . Finally, . . . losses resulting from fraud or embezzlement by subordinate finance personnel may . . . be treated as physical losses."

This definition has been repeated in several subsequent decisions such as 70 Comp. Gen. 616, 621 (1991) and 65 Comp. Gen. 881, 883 (1986). A loss resulting from a bank failure would also be treated as a physical loss. See 18 Comp. Gen. 639 (1939); 20 Op. Att'y Gen. 24 (1891).

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establishing privately owned but federally chartered corporations known as "government-sponsored enterprises" (GSE). Since a GSE is a creature of Congress, the actions it may take are those authorized in its enabling legislation. 71 Comp. Gen. 49 (1991) (Federal Agricultural Mortgage Corporation, or "Farmer Mac"). For a discussion from the programmatic perspective, see Federal Agricultural Mortgage Corporation: Issues Facing the Secondary Market for FmHA Guaranteed Loans, GAO/RCED-91-138 (June 1991).[5]

Under a loan guarantee, the risk against which the guarantee is made is, for the most part, default by the borrower. In some cases, however, other risks may be covered as well, and a few examples will be noted later in this chapter.

In the typical loan guarantee program, the lender is charged a fee by the agency, prescribed in the program legislation. However, there are statutory exceptions. For example, 7 U.S.C. § 936 provides that no fee shall be charged for Rural Electrification Administration loan guarantees. Where a fee is charged, its disposition, discussed later, is governed by (1) the Federal Credit Reform Act of 1990, or (2) where the Credit Reform Act does not apply, the applicable program legislation, or (3) in the absence of any guidance in the program legislation, the miscellaneous receipts statute (31 U.S.C. § 3302(b)).

A guarantee may extend to 100 percent of the amount of the underlying loan, or some lesser percentage as specified in the program legislation. E.g., 7 U.S.C. § 936 (REA, 100 percent); 42 U.S.C. § 3142(a) (Economic Development Administration business loan guarantees, 90 percent of outstanding unpaid balance). Unless otherwise provided, a maximum guarantee percentage applies only to restrict the amount the administering agency is authorized to guarantee. E.g., B-137514, November 3, 1958 (no objection to proposal for borrower to "guarantee" portion of loan not covered by government guarantee by making "irrevocable deposit" financed by separate loan, thereby providing lender with 100 percent guarantee).

[5]Since GSEs are essentially privately owned corporations, we do not address them further in this publication. Readers needing more may consult several GAO reports such as Government-Sponsored Enterprises: A Framework for Limiting the Government's Exposure to Risks, GAO/GGD-91-90 (May 1991); Budget Issues: Profiles of Government-Sponsored Enterprises, GAO/AFMD-91-17 (February 1991); and Government-Sponsored Enterprises: The Government's Exposure to Risks, GAO/GGD-90-97 (August 1990).

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Banks do not loan money without interest, and the typical loan guarantee therefore covers accrued but unpaid interest as well as unpaid principal. The program statute may set a maximum acceptable rate of interest, or may authorize the administering agency to do so by regulation. Assuming there is nothing to the contrary in the enabling legislation, an agency may, within its discretion, extend its guarantees to loans with variable interest rates (rates which rise or fall with changes in prevailing rates) as well as loans with fixed interest rates. B-184857, June 11, 1976.

Credit assistance legislation frequently vests considerable discretion in the administering agency. E.g., B-202568, September 11, 1981 (imposition of "no credit elsewhere" eligibility test to meet funding shortfall within SBA's broad discretion under section 7(b) of Small Business Act); B-134628, January 15, 1958 (Civil Aeronautics Board authorized within its discretion to make payments to lender immediately upon debtor's default rather than after completion of foreclosure proceedings).

For non-entitlement programs, just as in the case of grants and cooperative agreements, GAO will not, at the request of a rejected applicant, review the exercise of an agency's discretion in rejecting an application for a loan guarantee. B-178460, June 6, 1973 (non-decision letter). Nevertheless, GAO may become involved under its other authorities (decision, account settlement, claims settlement), and may review an agency's conduct of a program under its general audit authority. For example, the Emergency Loan Guarantee Act, 15 U.S.C. §§ 1841–1852, specifically authorized GAO to audit any borrower applying for a loan guarantee, but made no mention of auditing the Emergency Loan Guarantee Board which administered the program. The issue arose in connection with the Lockheed Aircraft Corporation assistance program, carried out under this statute. GAO took the position that it had the authority to audit the Board's conduct of the program to evaluate whether the Board and borrower were complying with the statutory provisions and whether the government's interests were being adequately protected. This authority derives from GAO's basic audit statutes and does not have to be repeated in every piece of legislation. B-169300, September 6, 1972; B-169300, September 21, 1971.

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2. Sources of Guarantee Authority

The authority to guarantee the repayment of indebtedness must be derived from some statutory basis. In most cases, this takes the form of express statutory authorization. Typically, the statute will authorize the administering agency to establish the terms and conditions under which the guarantee will be extended, but may also impose various limitations. An example is section 202(a)(1) of the Public Works and Economic Development Act of 1965, as amended, 42 U.S.C. § 3142(a)(1), which authorizes the Economic Development Administration to provide financial assistance to eligible borrowers through direct business loans and loan guarantees:

> "The Secretary is authorized to aid in financing, within a redevelopment area, the purchase or development of land and facilities (including machinery and equipment) for industrial or commercial usage . . . by (A) purchasing evidences of indebtedness, (B) making loans (which for purposes of this section shall include participation in loans), (C) guaranteeing loans made to private borrowers by private lending institutions, for any of the purposes referred to in this paragraph upon application of such institution and upon such terms and conditions as the Secretary may prescribe, except that no such guarantee shall at any time exceed 90 per centum of the amount of the outstanding unpaid balance of such loan."

Program authority, as in the example cited, is most commonly in the form of permanent legislation authorizing an ongoing program. In addition, guarantee programs are occasionally enacted to deal with a specific crisis of limited duration, and are either not codified or removed from the United States Code when the program is completed. An example of this latter type is the Chrysler Corporation Loan Guarantee Act of 1979, Pub. L. No. 96-185, 93 Stat. 1324 (1980), dropped from the 1988 edition of the U.S. Code because the authority to issue commitments and guarantees expired at the end of 1983 and all loans guaranteed were repaid in full. Guarantee programs may also be enacted as part of appropriation acts. An example is discussed in GAO's report Israel: U.S. Loan Guaranties for Immigrant Absorption, GAO/NSIAD-92-119 (February 1992).

It is also possible for loan guarantee authority to be derived by necessary implication from a statutory program of financial assistance, that is, under program legislation which does not explicitly use the term "guarantee" or "insure." For example, the current version of section 7(a) of the Small Business Act, 15 U.S.C. § 636(a), authorizes the Small Business Administration to make loans to small business concerns as follows:

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"The Administration is empowered to the extent and in such amounts as provided in advance in appropriation Acts to make loans for plant acquisition, construction, conversion, or expansion, including the acquisition of land, material, supplies, equipment, and working capital, and to make loans to any qualified small business concern . . . for purposes of this chapter. Such financings may be made either directly or in cooperation with banks or other financial institutions through agreements to participate on an immediate or deferred (guaranteed) basis."

The statute then goes on to list a number of limitations. A 1981 amendment (95 Stat. 357, 767) added the word "guaranteed." Even before the amendment, GAO had concluded that a loan guarantee program was within the SBA's discretion under section 7. 51 Comp. Gen. 474 (1972). An earlier decision, B-140673, October 12, 1959, had upheld a "deferred participation" program under section 7(a), under which SBA would purchase the agreed portion of the deferred participation loan immediately upon demand and reserve the right to recover from the lender if SBA subsequently determined that the lender had not substantially complied with the participation agreement. In view of the broad discretion granted SBA under the statute, SBA was not required to make the "substantial compliance" determination before making payment to the lender.[6]

The evolution of SBA's authority to conduct its disaster loan program, 15 U.S.C. § 636(b), followed a similar pattern. In B-121589, October 19, 1954, the Comptroller General tentatively approved a deferred participation program, strongly urging that the statute be amended to include "immediate or deferred participation" language patterned after the pre-1981 version of section 636(a). This was done and, based on 51 Comp. Gen. 474, was found sufficient to authorize SBA to guarantee disaster loans to eligible borrowers by participating lending institutions. 58 Comp. Gen. 138, 145 (1978). To remove any doubt, the same amendment which added the word "guaranteed" to section 636(a) added it as well to section 636(b) (95 Stat. at 778).

In connection with credit assistance under the Small Business Investment Act of 1958, GAO recognized the SBA's implied authority to establish a program in which SBA would guarantee loans made by private lending institutions to small business investment companies,

[6]The primary difference between a loan guarantee program and a deferred participation loan program is that the lending institution can demand that SBA pay the outstanding balance of a deferred participation loan at any time, but can demand SBA's purchase of the outstanding balance of a guaranteed loan only under the conditions prescribed in the regulations—generally only upon default of the borrower.

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even though the statute authorized only a direct loan program. 42 Comp. Gen. 146 (1962). The decision pointed out that the legislative history of a 1961 amendment to the act clearly demonstrated that Congress intended to continue the nonstatutory "standby" guaranteed loan program that had existed for several years, and concluded therefore that the absence of specific language authorizing the program was due to the apparent belief by both Congress and SBA that such language was unnecessary and did not reflect an intent to deny SBA the authority. See also B-149685, March 20, 1968. The guarantee program is now expressly authorized in 15 U.S.C. § 683.

Authority by necessary implication cannot be derived solely from a purpose clause, but must be supported by the operative provisions of the statute. 71 Comp. Gen. 49 (1991).

Regardless of whether a loan guarantee program is established under an express statutory provision or by necessary implication, the basic responsibility for administering the program clearly rests with the agency involved. This includes the authority to determine whether or not to extend a guarantee in a particular case, and the manner in which the guarantees are to be handled. The agency has considerable discretion, subject of course to any applicable statutory requirements or restrictions.

B. Budgetary and Obligational Treatment

When a federal agency guarantees a loan, there is no immediate cash outlay. The need for an actual cash disbursement, apart from administrative expenses, does not arise unless and until the borrower defaults on the loan and the government is called upon to honor the guarantee. Depending on the terms of the loan, this may not happen until many years after the guarantee is made. It is thus apparent that loan guarantees require budgetary treatment different from ordinary government obligations and expenditures. This treatment is prescribed generally by the Federal Credit Reform Act of 1990 (FCRA). Before describing the FCRA, it is important to first describe the pre-credit reform situation because it illustrates the objectives of credit reform and because FCRA does not cover all programs.

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1. Prior to Federal Credit Reform Act

Prior to credit reform, the authority to guarantee or insure loans generally was not regarded as budget authority. Indeed, the original enactment of the Congressional Budget Act of 1974 expressly excluded loan guarantees from the statutory definition of budget authority. Pub. L. No. 93-344, § 3(a)(2), 88 Stat. 297, 299 (1974). Under this treatment, the extension of a loan guarantee was an off-budget transaction and was, at the extension stage, largely not addressed by the budget and appropriations process. If and when the government had to pay on the guarantee, i.e., upon default, the administering agency would seek liquidating appropriations, and these liquidating appropriations counted as budget authority. Of course, by the time a liquidating appropriation became necessary, the United States was contractually committed to honor the guarantee, and Congress had little choice but to appropriate the funds. This is an example of so-called "backdoor spending." By the time the budget and appropriations process became involved, there was no meaningful role for it to play.

When a loan guarantee is committed or issued, it cannot be known with absolute certainty when or to what extent the government might be called upon to honor it. Accordingly, and since budget authority was not provided in advance, the making of a loan guarantee, however binding on the government the commitment may have been, was treated only as a contingent liability and did not result in a recordable obligation for purposes of 31 U.S.C. § 1501(a). A recordable obligation did not arise until the contingency occurred (default by the borrower or other event as authorized in the program legislation), at which time it was recorded against the appropriation or fund available for liquidation. 65 Comp. Gen. 4 (1985); 60 Comp. Gen. 700, 703 (1981).

Under this approach, the obligation was viewed as "authorized by law" for purposes of the Antideficiency Act, and there was no violation if obligations resulting from authorized guarantees exceeded available budgetary resources. 65 Comp. Gen. 4 (1985); B-226718.2, August 19, 1987.

In a limited sense, there was a certain logic to this approach. Many loans are repaid in whole or in part, with the result that the government is never called upon to pay under the guarantee, the only disbursements being the administrative expenses of running the program. To require budget authority in the full amount being

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guaranteed would artificially inflate the budget. The problem was that the pre-credit reform approach went to the opposite extreme, by reflecting the cost to the government in the year the guarantee was made as zero. Since there was no longer any room for discretion by the time liquidating appropriations became necessary, loan guarantee programs were not forced to compete with other programs for increasingly scarce budgetary resources. No one involved in the budget process—Congress, OMB, GAO—particularly liked this system, and reform became inevitable.

At an absolute minimum, GAO strongly encouraged the imposition of limits, either in the enabling legislation or in appropriation acts, on the total amount of loans to be guaranteed. E.g., Legislation Needed to Establish Specific Loan Guarantee Limits for the Economic Development Administration, FGMSD-78-62 (January 5, 1979). Ceilings of this type may limit the amount of guarantees that can be issued in a given fiscal year, or the total amount of guarantees that can be outstanding at any one time. An example of the former is discussed in 60 Comp. Gen. 700 (1981).

A device that became common in the 1980s was the granting of loan guarantee authority only to the extent provided in advance in appropriation acts. The device was reinforced in 1985 when Congress (1) added to the Congressional Budget Act a definition of "credit authority" ("authority to incur direct loan obligations or to incur primary loan guarantee commitments"), and (2) subjected to a point of order any bill providing new credit authority unless it also limited that authority to the extent or amounts provided in appropriation acts. 2 U.S.C. §§ 622(10), 652(a).

While this device provided a measure of congressional control, it still did not require the advance provision of actual budget authority. For example, the Chrysler Corporation Loan Guarantee Act, which predated the 1985 legislation noted above, limited the authority to guarantee loans to the amounts provided in advance in appropriation acts. The Comptroller General and the Attorney General both concluded that this provision did not require advance budget authority, but was satisfied by an appropriation act provision placing a ceiling on the total amount of loans that could be guaranteed, i.e., on contingent liability. B-197380, April 10, 1980; Loan Guarantees—Authority of Chrysler Corporation Loan Guarantee Board to Issue Guarantees, 43 Op. Att'y Gen. No. 27 (April 23, 1980).

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Both opinions also concluded that the appropriation act ceiling related only to outstanding loan principal, with contingent liability for loan interest being in addition to the stated amount.

Where loan guarantee authority is limited to amounts provided in appropriation acts—and we emphasize that we are addressing situations not governed by the Federal Credit Reform Act—those "amounts," as noted, are not actual budget authority but ceilings on contingent liability. Therefore, while exceeding the ceiling may be illegal for other reasons,[7] it does not violate the Antideficiency Act. 64 Comp. Gen. 282, 288–90 (1985). Analogous to budget authority, loan guarantee authority must generally be used (i.e., commitments made) in the fiscal year or years for which it is provided unless the appropriation act provides otherwise. B-212857, November 8, 1983. Also, where advance authority in appropriation acts is statutorily required and Congress does not provide it, the agency's authority to carry out the program may be effectively suspended for the fiscal year in question. B-230951, March 10, 1989.[8]

Congress may set a minimum program level as well as a ceiling. Again for programs not governed by the Credit Reform Act, failure to achieve the minimum commitment level would not constitute an impoundment since the commitment amount is not budget authority. B-195437.2, September 17, 1986. However, under a loan insurance program where the loan itself is made by the agency, failure to achieve a mandated minimum program level would be an impoundment unless the failure results from programmatic factors. Id.; B-195437.3, February 5, 1988.

2. Federal Credit Reform Act of 1990

Consideration of various reform proposals during the 1980s centered on the recognition that there is a "subsidy element" to a government loan guarantee program. If all loans were repaid, there would be no cost to the government apart from administrative expenses. Were this the case, however, there would probably have been no need for the program to begin with. Since the objective of a loan guarantee

[7]An "unusual" case where exceeding a ceiling was not illegal, because of rather explicit legislative history, is 53 Comp. Gen. 560 (1974).

[8]Standing alone, 2 U.S.C. § 652(a) is not a statutory requirement for advance appropriation authority. A point of order may not be raised or may be defeated, in which event the validity of any ensuing legislation is not affected. As in the situation discussed in B-230951, many program statutes independently impose the requirement.

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program is to enhance the availability of credit which the private lending market alone cannot or will not provide, it is reasonable to expect that there will be defaults, most likely at a higher rate than the private lending market experiences. It became apparent that credit reform had to do two things. First, it had to devise a meaningful way of measuring the true cost to the government; and second, it had to bring those costs fully within the budget and appropriations process. See, e.g., Budget Issues: Budgetary Treatment of Federal Credit Programs, GAO/AFMD-89-42 (April 1989).

The culmination of these reform efforts was the Federal Credit Reform Act of 1990, enacted by section 13201(a) of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388, 1388-609, and codified at 2 U.S.C. §§ 661—661f (Supp. III 1991). The approach of the FCRA is to require the advance provision of budget authority to cover the subsidy portion of a loan guarantee program, with the non-subsidy portion (i.e., the portion expected to be repaid) financed through borrowings from the Treasury. The Office of Management and Budget has issued detailed implementing instructions in OMB Circular No. A-34, Part VI, transmitted by OMB Bulletin No. 92-01, October 1, 1991. The FCRA applies to loan guarantee commitments made on or after October 1, 1991, with exceptions to be noted later.

a. Post-1991 Guarantee Commitments

One of the major purposes of the FCRA is to "measure more accurately the costs [the subsidy element, in essence] of Federal credit programs." 2 U.S.C. § 661(1). Before the budgetary and appropriations aspects of FCRA can come into play, the administering agency, working with OMB, must determine the cost of its programs. The law defines "cost" as the "estimated long-term cost to the Government . . . calculated on a net present value basis, excluding administrative costs." Id. § 661a(5)(A). More specifically for purposes of this chapter, the cost of a loan guarantee is the—

"net present value when a guaranteed loan is disbursed of the cash flow from—

"(i) estimated payments by the Government to cover defaults and delinquencies, interest subsidies, or other payments, and

"(ii) the estimated payments to the Government including origination and other fees, penalties and recoveries." Id. § 661a(5)(C).

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Historical experience is obviously a relevant factor in determining cost. Risk assessment is also very important, and OMB requires agencies to develop risk categories for their credit programs. OMB Circular No. A-34, § 62.3. Agencies should not blindly rely on historical experience when the risk factor has changed. See Loan Guarantees: Export Credit Guarantee Programs' Long-Run Costs Are High, GAO/NSIAD-91-180 (April 1991) at 3. For example, it is not unreasonable to expect the default rate under a guaranteed student loan program to increase during a recession, resulting in a higher cost. Established secondary market experience is also relevant in assessing risk. NSIAD-91-180 at 15.

The second major purpose of FCRA is to "place the cost of credit programs on a budgetary basis equivalent to other Federal spending." 2 U.S.C. § 661(2). To accomplish this, 2 U.S.C. § 661c(b), perhaps the key provision of FCRA, provides:

"Notwithstanding any other provision of law, . . . new loan guarantee commitments may be made for fiscal year 1992 and thereafter only to the extent that—

"(1) appropriations of budget authority to cover their costs are made in advance;

"(2) a limitation on the use of funds otherwise available for the cost of a . . . loan guarantee program is enacted; or

"(3) authority is otherwise provided in appropriation Acts."

Thus, unless Congress specifically provides otherwise, loan guarantees may be made only if budget authority to cover their cost has been provided in advance. The cost of a loan guarantee is regarded as new budget authority for the fiscal year "in which definite authority becomes available or indefinite authority is used." 2 U.S.C. § 661c(d)(1).

To implement these new concepts, the law defines two new accounts for credit programs, a "credit program account" and a "financing account." The program account is the budget account into which appropriations of budget authority are made. The financing account is a revolving, non-budget account from which the guarantees are actually administered. It receives cost payments from the program account and includes all other cash flows resulting from the guarantee commitment. 2 U.S.C. §§ 661a(6) and (7). Administrative expenses are

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The second type of fiscal irregularity is the "illegal, improper, or incorrect payment." 31 U.S.C. §§ 3527(c), 3528(a)(4). The key word here is "payment"—"the disbursement of public funds by a disbursing officer or his subordinate." B-202074, July 21, 1983. Improper payments include such things as payments obtained by fraud, whether by nongovernment persons or by government employees other than subordinate finance personnel; erroneous payments or overpayments resulting from human or mechanical error attributable to the government; payments prohibited by statute; and disbursements for unauthorized purposes. The legislative history of 31 U.S.C. § 3527(c), the improper payment relief statute for disbursing officers, describes an improper payment as a payment "which the Comptroller General finds is not in strict technical conformity" with the law. Excerpts from the pertinent committee reports are quoted in 49 Comp. Gen. 38, 40 (1969) and in B-202074, cited above.

A loss resulting from an uncollectible personal check may be an improper payment or a physical loss, depending on the circumstances. If the loss results from an authorized check-cashing transaction, it is an improper payment because government funds were disbursed to the bearer. 70 Comp. Gen. 616 (1991). However, if the check is tendered to pay an obligation owed to the United States or to purchase something from the government, the loss, to the extent an accountable loss exists, would be a physical loss. In this connection, Treasury regulations provide:

> "All checks received by any Government officer are accepted subject to collection. If any check cannot be collected in full or is lost or destroyed before collection, the administrative agency concerned is responsible for obtaining the proper payment. A payment by check is not effective unless and until the full proceeds have been received."

I Treasury Financial Manual § 5-2010. If a personal check is accepted subject to collection, and if the government does not exchange value for the check, any resulting loss is not a loss within the scope of the accountable officer laws and may be adjusted administratively by the agency. If, however, an accountable officer purports to accept a personal check in satisfaction of an obligation due the United States (rather than for collection only), or if the government parts with something of value in exchange for the check (e.g., sale of government property), a resulting loss is treated as a physical loss. B-201673 et al., September 23, 1982. See also 3 Comp. Gen. 403

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shown as a separate and distinct line item within the program account. Id. § 661c(g).

A review of 1992 appropriation acts disclosed several variations in the way Congress made the appropriations contemplated by 2 U.S.C. § 661c.

- The Federal Housing Administration General and Special Risk Program Account received an appropriation of costs and a ceiling on the total loan principal to be guaranteed ($55 million to support a program level of $8.6 billion).[9]
- The program account for Economic Development Administration guaranteed loans received an appropriation of costs with no program ceiling specified.[10]
- The Small Business Administration Business Loans Program Account received separate cost appropriations for direct and guaranteed loans with a total loan ceiling for direct, but not guaranteed, loans.[11]

Each of these appropriations also includes a separate specific appropriation for administrative expenses.[12]

From a chronological perspective, the first step is to determine the cost of a guaranteed loan program in accordance with 2 U.S.C. § 661a(5). The President's annual budget is to reflect these costs and

[9]Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1992, Pub. L. No. 102-139, 105 Stat. 736, 749 (1991).

[10]Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-140, 105 Stat. 782, 806 (1991).

[11]Pub. L. No. 102-140, supra n.10, 105 Stat. at 815.

[12]A very general definition of "administrative expenses" may be found in B-24341, March 12, 1942, at 5:

"The term 'administrative expenses' would appear to relate, generally, to those expenses necessarily incurred in administering, executing, or carrying out the primary purposes of legislative enactments. Whether a particular expense should be classified as an 'administrative expense' would appear to be governed by the particular program involved, the provisions of the act in which the term appears or to which it relates, and the intention of the legislative body in using the expression, and what might be regarded as an item of 'administrative expense' within the meaning of one statute might not be so regarded under another statute enacted for entirely different purposes."

For FCRA purposes, see also OMB Circular No. A-34, § 62.5.

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the planned level of new guarantee commitments. 2 U.S.C. § 661c(a). Congress then makes the appropriation of costs and administrative expenses to the program account.

The appropriation of costs "shall constitute an obligation of the credit program account to pay to the financing account." Id. § 661c(d)(1). When a loan for which a guarantee commitment has been made is disbursed by the lender, the cost of the guarantee is obligated against the program account and paid into the financing account. Id. § 661c(d)(2). If the loan is disbursed in a single payment, the cost is paid into the financing account in a single payment. If the loan is disbursed in more than one payment, costs are paid into the financing account in the same proportion. OMB Circular No. A-34, § 62.7(e). The cost payments are carried in the financing account as unobligated balances until obligations are incurred to make payments under the terms of the guarantee, at which time they become obligated balances until disbursed. Id.

The law recognizes that estimating costs is not an exact science and that cost estimates are subject to change over time. Accordingly, costs are to be reestimated annually as long as the loans are outstanding. OMB Circular No. A-34, § 62.8. If a reestimation results in an increase to the cost estimate, the law provides permanent indefinite budget authority for the program account. 2 U.S.C. § 661c(f). The agency requests an apportionment of this indefinite authority from OMB, and then immediately records an obligation against the program account and pays the funds into the financing account. OMB Circular No. A-34, § 62.8.

The law also provides for the treatment of "modifications." For purposes of FCRA, a modification is any government action that alters the cost of an outstanding loan guarantee from the most recent estimate or reestimate, except actions permitted under the terms of existing contracts. 2 U.S.C. § 661a(5)(D); OMB Circular No. A-34, § 62.9(a). The law prohibits the modification of a loan guarantee commitment "in a manner that increases its cost unless budget authority for the additional cost is appropriated, or is available out of existing appropriations or from other budgetary resources." 2 U.S.C. § 661c(e). Modifications include such things as forgiveness, forbearance, reductions in interest rate, prepayments without penalty, and extensions of maturity, except where permitted under an existing contract. OMB Circular No. A-34, § 62.9(a). They also include the sale

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of loan assets and actions resulting from new legislation, such as a statutory restriction on debt collection. Id. As with reestimates, at the time a modification is made, the agency records an obligation of the estimated cost increase against the program account and pays the amount into the financing account. Id. § 62.9(c).

If an agency's original cost estimates, reestimates, and modification estimates have been accurate, the balances of financing accounts for loan guarantees should always be sufficient to make any required payments. However, if a balance is not sufficient, the "Secretary of the Treasury shall . . . lend to, or pay to the financing accounts such amounts as may be appropriate." 2 U.S.C. § 661d(c). The Secretary is also authorized to borrow or receive amounts from the financing accounts. Id. All of these transactions between the Treasury and financing accounts are subject to the apportionment requirements of the Antideficiency Act. Id.

Under the FCRA structure as outlined above, there are two separate sets of "obligations"—obligations against the program account when budget authority is paid over to the financing account, and obligations against the financing account when claims are made for payment under a guarantee.

OMB Circular A-34, § 63.2, identifies four actions that will result in Antideficiency Act violations:

(1) Overobligation or overexpenditure of the amounts appropriated for costs. This includes a modification resulting in an overobligation.

(2) Overobligation or overexpenditure of the credit level supported by the enacted cost appropriation.

(3) Overobligation or overexpenditure of the amount appropriated for administrative expenses.

(4) Obligation or expenditure of the lapsed unobligated balance of the cost appropriation, except to correct mathematical or data input errors in calculating subsidy amounts. However, error correction will be considered a violation if it exceeds the amount of the lapsed unobligated balance.

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Finally, the law emphasizes that the provisions of the FCRA are not to be construed as changing or overriding the administering agency's authority to determine the terms and conditions of eligibility for, or amount of, a loan or loan guarantee. 2 U.S.C. § 661d(g).

As a result of FCRA, guarantee programs should no longer be unrestricted. Even if the applicable appropriation act does not explicitly set a maximum program level, the program level that can be supported by the enacted cost appropriation, reenforced by the Antideficiency Act, constitutes an effective ceiling. Programs not governed by FCRA may have their own ceilings. Although a loan or guarantee may not exceed a statutory ceiling, it may nevertheless be possible to extend assistance if the borrower qualifies under another program. For example, in 35 Comp. Gen. 219 (1955), the Small Business Administration could not make a disaster loan to a small business concern which had suffered damage in a flood because SBA had already used up the applicable ceiling on disaster loans. However, it could make a business loan to the same borrower if the transaction otherwise met the criteria under SBA's business loan program.

b. Pre-1992 Commitments

The treatment described above applies to loan guarantee commitments made on or after October 1, 1991. Commitments made prior to fiscal year 1992 were made under the rules summarized in Section B.1. Given the varying maturities under different credit programs, pre-1992 guarantees are likely to be around for many years. Since pre-1992 guarantees were not subject to any requirement to determine subsidy costs or to obtain advance appropriations of budget authority, they require different treatment and are addressed in separate provisions of the FCRA.

Three provisions are particularly relevant. First, the law establishes "liquidating accounts," defined as budget accounts which include all cash flows to and from the government resulting from pre-1992 commitments. 2 U.S.C. § 661a(8). Second, all collections resulting from pre-1992 guarantee commitments are to be credited to the liquidating account and are available to liquidate obligations to the same extent they were under the applicable program legislation prior to enactment of FCRA. Id. § 661f(b). At least once a year, unobligated balances in the liquidating account which are in excess of current needs are to be transferred to the general fund of the Treasury. Id.

Third, 2 U.S.C. § 661d(d) provides:

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"If funds in liquidating accounts are insufficient to satisfy the obligations and commitments of said accounts, there is hereby provided permanent, indefinite authority to make any payments required to be made on such obligations and commitments."

Thus, for pre-1992 guarantees which are liquidated in accordance with the terms of the original commitment, payment will still be made from liquidating appropriations. The main change under FCRA is the provision of these liquidating appropriations on a permanent, indefinite basis.

A "modification" to a pre-1992 loan guarantee—the term having the same meaning as described in Section B.2.a for post-1991 guarantees—is treated differently. See OMB Circular No. A-34, §§ 62.1(c) and 62.9 for applicable procedures.

c. Entitlement Programs

A partial exemption from FCRA is found in 2 U.S.C. § 661c(c), which provides that the requirement for the advance appropriation of budget authority to cover estimated costs does not apply to (1) a loan guarantee program which constitutes an entitlement, or (2) programs of the Commodity Credit Corporation existing on FCRA's date of enactment (November 5, 1990). An entitlement program is one in which the provision of assistance is mandatory with respect to borrowers and lenders who meet applicable statutory and regulatory eligibility requirements. The statute gives two examples—the guaranteed student loan program and the veterans' home loan guarantee program. Since the exemption is from the appropriation requirement of 2 U.S.C. § 661c(b) and not the entire act, other provisions of FCRA and OMB Circular A-34 presumably apply to the extent not inconsistent with the exemption.

The pre-FCRA rules summarized in Section B.1 form the starting point with respect to obligational treatment and the application of the Antideficiency Act. A 1985 decision, 65 Comp. Gen. 4, reiterated these rules in the context of the Guaranteed Student Loan Program. GAO advised the Department of Education that (1) a guarantee itself is only a contingent liability and is not recordable as an obligation; (2) an obligation must be recorded upon occurrence of one of the contingencies specified in the program legislation which will require the government to honor the guarantee (in this case, loan default or the death, disability or bankruptcy of the borrower); and (3) the Antideficiency Act does not require that sufficient budget authority be

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available at the time the obligation is recorded because, by virtue of the requirements of the program legislation, incurring the obligation is "authorized by law" for Antideficiency Act purposes.

For fiscal year 1992, Congress appropriated to the program accounts for both the guaranteed student loan and the veterans' home loan programs, for costs as defined in FCRA, "such sums as may be necessary to carry out the purposes of the program," together with a definite (specific dollar amount) appropriation for administrative expenses.[13]

d. Certain Insurance Programs

Another provision of FCRA, 2 U.S.C. § 661e(a)(1), exempts from the entire act—

> "the credit or insurance activities of the Federal Deposit Insurance Corporation, National Credit Union Administration, Resolution Trust Corporation, Pension Benefit Guaranty Corporation, National Flood Insurance, National Insurance Development Fund, Crop Insurance, or Tennessee Valley Authority."

Thus, to the extent the rules in Section B.1 would apply to any of the programs conducted by these entities to begin with, they continue to apply unaffected by FCRA.

C. Extension of Guarantees

1. Coverage of Lenders (Initial and Subsequent)

a. Eligibility of Lender/Debt Instrument

Program legislation may prescribe eligibility criteria for lending institutions, or may otherwise limit the types of lending institutions to which guarantees may be extended, either as the initial lender or as a subsequent transferee, or may address the manner in which the debt instrument covered by the guarantee may be treated. The safest generalization in this area, and the common strain throughout the

[13]Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-170, 105 Stat. 1107, 1132 (1991) (guaranteed student loans); Pub. L. No. 102-139, supra n.9, 105 Stat. at 737 (veterans' home loans).

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cases, is that any proposed action must be consistent with the terms and intent of the agency's statutory authority.

For example, in B-194153, September 6, 1979, GAO considered a proposed pilot program in which the Economic Development Administration, an agency within the Department of Commerce, would guarantee loans made to private borrowers by participating lending institutions, with the guaranteed portion of the loan to be subsequently assigned to the city of Chicago and financed through the issuance of bonds. The statutory basis for the proposal, 42 U.S.C. § 3142, authorizes the Secretary of Commerce to guarantee up to 90 percent of the outstanding balance of loans for certain specified purposes "made to private borrowers by private lending institutions." GAO concluded that allowing the guarantee to be assigned to an entity that was neither private nor a lending institution and could not have qualified for a guarantee initially, would exceed EDA's statutory authority since EDA would be doing something indirectly—guaranteeing a loan by a non-private lender—that the statute would not permit it to do directly.

GAO revisited the issue a few years later, and reaffirmed the ineligibility of public lenders to participate as secondary market purchasers under the "private lending institution" requirement of 42 U.S.C. § 3142. Since a secondary market purchaser effectively becomes the lender, it makes no difference whether sale to the public lender is contemplated from the loan's inception or merely occurs in the ordinary course of secondary market operations. 61 Comp. Gen. 517 (1982).

Another issue in B-194153 was whether EDA could legally allow a guaranteed loan to be evidenced by two notes, one to be fully guaranteed and the second with no guarantee. The Comptroller General found the proposed arrangement within EDA's administrative discretion under the statute since the two-note arrangement would still conform to the statutory requirement that no more than 90 percent of a loan be guaranteed, and furthermore was apparently intended to effectuate the basic legislative purpose. The decision pointed out, however, that since the two notes represented one loan, their substantive terms such as maturity dates and interest rates must be the same, and the two-note mechanism must not increase the government's potential liability. This portion of the decision was later modified in 60 Comp. Gen. 464 (1981), to the extent that GAO

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approved use of a "split interest rate" in which the interest on the EDA-guaranteed note was lower than the interest rate on the unguaranteed note. The split-interest scheme was consistent with programs by other agencies under similar legislation and would be more favorable to the government.

A related type of question arose under the now defunct New Community Development Program authorized by the Urban Growth and New Community Development Act of 1970. The legislation authorized various forms of financial assistance to stimulate the development of new communities, including the guarantee of obligations of private new community developers and state development agencies. A question arose as to whether the Department of Housing and Urban Development was authorized or required to guarantee the indebtedness of a private developer to contractors and subcontractors who had supplied goods and services to the developer. Finding that the intent of the program legislation was that HUD guarantee only obligations issued to private investors, the Comptroller General concluded that HUD was neither required nor authorized to issue guarantees that would run to a developer's contractors and subcontractors. B-170971, August 22, 1975; B-170971, July 22, 1975.

b. Substitution of Lender

As a general proposition, substitution of lenders is permissible as long as it is not prohibited by the program legislation or regulations and the "replacement lender" meets any applicable eligibility requirements.

In 60 Comp. Gen. 700 (1981), GAO considered the effect of a change in lenders in the Farmers Home Administration's rural development loan guarantee program. The program operated under an annual ceiling, and the specific question was whether a guarantee could continue to be charged against the ceiling for the fiscal year in which it was initially approved, when a change in lenders took place in a subsequent fiscal year. As to the programmatic significance of the change, the decision stated:

"[T]he basic purpose of the FmHA rural development loan guarantee program is to provide assistance to eligible borrowers to enable them to accomplish one or more of the statutory objectives. In other words, although the guarantee is extended to the lender, it is clear that the purpose of doing so is not to provide a Federal benefit to the lending institution but to induce the lender to make the loan to the borrower. In this

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sense, the lender is just a conduit or funding mechanism through which FmHA provides assistance to an eligible borrower so that the statutory objectives can be realized. Thus, the particular lender involved is of relatively little consequence."

Id. at 708–09. Therefore, the decision held that where a guarantee is charged against the ceiling for a particular fiscal year, it can continue to be charged against the same ceiling notwithstanding a substitution of lenders in a subsequent fiscal year, provided that the other relevant terms of the agreement (borrower, loan purpose, loan terms) remain substantially the same. Id. at 709. The statement that the particular lender is of little consequence presumes, as was in fact the case, that the program legislation does not contain any specific eligibility requirements for lenders. Any such requirements (for example, the "private lender" requirement in the EDA cases discussed above) would of course have to be followed.

c. Existence of Valid Guarantee

In order for a loan guarantee commitment to be valid and hence binding on the government, the government official making the commitment must be authorized to do so, and the guarantee must be made to an eligible lender extending credit to an eligible borrower for an authorized purpose. Questions as to whether a valid guarantee was ever created often do not arise until the lender calls upon the government to pay under the guarantee. The answer depends on the program statute and regulations, the terms of the guarantee instrument, and the conduct of the parties.

In 54 Comp. Gen. 219 (1974), GAO considered the authority of the Small Business Administration to reimburse three different lenders. In each case, the borrower had applied to SBA for financial assistance, the lender (at the request or with the approval of an SBA official) had provided interim funds to the borrower, but, for various reasons, the financial assistance was ultimately not extended.

In the first case, an SBA official who was authorized to approve loan guarantees advised the bank in writing that the guarantee had been approved. SBA subsequently issued a formal loan authorization, but later canceled it because the bank did not comply with all of the terms and conditions of the guarantee agreement, one of which was that the bank disburse the loan within 3 months. Although the initial written approval created a valid guarantee, the bank's noncompliance caused it to lapse, and SBA was therefore not obligated to purchase the interim note, i.e., to reimburse the bank for the advance.

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In the second case, an authorized SBA official had similarly advised the bank in writing that the guarantee had been approved. Here, however, SBA subsequently determined that the borrower was not eligible for the guarantee, and therefore never issued a formal loan authorization. Since the bank relied on the prior approval and was not legally required to comply with the conditions of the guarantee agreement (such as payment of the guarantee fee) until SBA issued the formal authorization, the bank was entitled to reimbursement for the interim loan.

In the third case, SBA had formally approved a direct loan to a borrower and had issued a written loan authorization. Because of its inability to immediately disburse the funds, SBA requested a private lender to disburse the funds on an interim basis, with SBA's assurance of repayment. SBA later refused to disburse the loan funds because the borrower had disappeared and his business had become defunct. Under the circumstances, SBA's written commitment to reimburse the lender did constitute SBA's "guarantee" of any advances the lender made in reasonable and justified reliance on it. Therefore, even though the direct loan by SBA was never disbursed, SBA was authorized to reimburse the lender.

The decision discussed two earlier cases—B-178250, August 6, 1973, and B-164162, September 20, 1968—involving direct rather than guaranteed loans. GAO had concluded in these cases that, under the specific circumstances involved, SBA could not reimburse a lender for losses suffered on interim disbursements made after SBA had authorized loans to the borrower. In both cases, the claimant bank was unable to adequately establish that any SBA official had made a promise or commitment on which the bank could justifiably rely.

Essentially, the primary theory of recovery in all of these cases, although not specifically identified as such, is estoppel—conduct by the government sufficient to later preclude it from denying the existence of a valid guarantee. Several similar cases have specifically raised the estoppel theory.[14] For example, the issue in B-187445, January 27, 1977, was whether SBA was legally obligated for a $10,000 loss suffered by a bank on a loan made to a small business

[14]Estoppel claims against the government can rarely succeed, and even those few cases in which GAO has sanctioned them would, in light of the Supreme Court's decision in Office of Personnel Management v. Richmond, 496 U.S. 414 (1990), have to be reassessed before being used as precedent. Estoppel claims arise in many contexts and are discussed further in Chapter 12.

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(1924); A-44019, March 15, 1934; A-24693, October 30, 1929. The distinction is summarized in the following passage from B-201673:

"If a check tendered in payment of a fine, duty, or penalty becomes uncollectible, it may be argued that the Government incurs a loss in the sense that it does not have money to which it was legally entitled, but it has not lost anything that it already had. When the check is in exchange for property, the Government has lost the property, the value of which is measured by the agreed-upon sales price. Of course, recovery of the property will remove or mitigate the loss."

The concept of B-201673 has also been applied to a check seized as forfeiture under the Currency and Foreign Transactions Reporting Act and subsequently returned as uncollectible. B-208398, September 29, 1983.

A conceptually similar case is B-216279, October 9, 1984. A teller at a Customs Service auction gave a receipt to a customer and negligently failed to collect the tendered funds. It was suggested that there was no loss because the teller never had physical possession of the funds. However, the applicable relief statute (31 U.S.C. § 3527) uses the terms "physical loss or deficiency" in the disjunctive, and there was clearly a deficiency in the teller's account to the extent of the property turned over in exchange for the lost payment.

While every fiscal irregularity by definition involves a loss or deficiency for which someone is accountable, not every loss or deficiency is a fiscal irregularity which triggers accountability. For example, an accountable officer is not liable for interest lost on collections which should have been deposited promptly but were not. 64 Comp. Gen. 303 (1985) (failure to deposit collections in designated depositary); B-190290, November 28, 1977 (increased interest charges on funds borrowed from Treasury, no net loss to United States).

Also, losses resulting from the imperfect exercise of judgment in routine business operations, where no law has been violated, do not create accountable officer liability. 65 Comp. Gen. 881 (1986) (loss to Internal Revenue Service Tax Lien Revolving Fund caused by sale of property for substantially less than amount for which it had been redeemed).

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contractor under section 8(a) of the Small Business Act. The bank alleged that the loan was made on the basis of assurances from an SBA official that the loan would be guaranteed. GAO found, however, that the loan was not in fact guaranteed since it was never approved in writing as required by the applicable provision in the guarantee agreement between SBA and the bank. Also, SBA had no liability to the bank under an estoppel theory since the bank was aware that the SBA official involved lacked authority to approve a loan guarantee or otherwise assure the bank of repayment. Further, the bank could not demonstrate that it had made the loan primarily in reliance on the alleged misrepresentations.

In another 1977 case, a bank argued that SBA was liable under an estoppel theory to reimburse the bank for a loss suffered as a result of SBA's approval of a direct disaster loan to the borrower. However, the facts did not support an estoppel since SBA made no misrepresentations to the bank, and the bank did not make the loan in reliance on the representations that SBA did make. B-181432, February 4, 1977. A somewhat similar case involving the Farmers Home Administration denied the claim of a creditor who alleged that he had advanced supplies and services to a borrower on the basis of assurances from a Farmers Home employee that the borrower's obligation would be guaranteed by the government. Since FmHA regulations then expressly prohibited employees from guaranteeing repayment of non-FmHA loans, either personally or on behalf of the government, the creditor was necessarily on notice of the employee's lack of authority to make such assurances. B-168300, December 4, 1969; B-168300, December 3, 1969.

Another estoppel case is B-198310, April 23, 1981. SBA had sent a letter to a borrower confirming approval of a direct handicapped assistance loan. Allegedly in reliance on this letter, the claimant bank advanced funds to the borrower. SBA then issued its formal loan authorization, but canceled it shortly thereafter based on the borrower's failure to disclose all pertinent information on its loan application. The bank sought reimbursement on a theory of "promissory estoppel." The Comptroller General held that SBA was under no obligation to reimburse the bank for two reasons. First, SBA's letter had been to the borrower, not the bank. Thus, SBA had made no representations to the bank. Second, the bank's reliance on the letter was not reasonable because the letter contained no mention of the possibility that the loan might be used to obtain interim

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financing, nor did the bank attempt to obtain any assurance from SBA that the borrower would be required to use the proceeds of the SBA loan to repay the interim loan.

The existence of a valid guarantee also was an issue in 60 Comp. Gen. 700 (1981) in a different context. Farmers Home Administration regulations required written notification to the lender of the approval or disapproval of a guarantee application. Based on these regulations, and citing B-187445, January 27, 1977, discussed above, GAO concluded that oral notification of a loan guarantee approval was not sufficient to create a valid guarantee for purposes of charging that guarantee against the FmHA's annual ceiling. 60 Comp. Gen. at 709–10.

d. Small Business Investment Companies

A "small business investment company" (SBIC) is a private company organized under the Small Business Investment Act of 1958, as amended (15 U.S.C. §§ 661–697c), and licensed by the Small Business Administration. Its purpose is to provide financial assistance to small business concerns.

A series of decisions in the 1960s upheld SBA's authority to provide various forms of financial assistance to SBICs. First, SBA may guarantee loans made to SBICs by private financial institutions. 42 Comp. Gen. 146 (1962). While the guarantee authority was not explicit at the time of the 1962 decision, it was later added and is now found at 15 U.S.C. § 683. SBA also has "secondary guarantee" authority, authority to sell to private investors, with recourse (SBA's guarantee), debt instruments representing loans SBA had made to SBICs. 44 Comp. Gen. 549 (1965). The proposal considered in 44 Comp. Gen. 549 involved loans with a maturity of 5 or 6 years. Later that same year, SBA proposed extending its program to loans with 15-year maturities. GAO again approved, noting that the difference in maturity did not affect the basic authority. 45 Comp. Gen. 253 (1965). The 15-year period also is now specified in 15 U.S.C. § 683. See also 45 Comp. Gen. 370 (1965) (same holding for similar program under different provision of Small Business Investment Act).

The Comptroller General concluded further in 45 Comp. Gen. 253 that SBA could make the sales through an agent or broker with reasonable compensation if administratively determined to be necessary or more economical. However, the broker's compensation

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may not be paid from the proceeds of the loan sales but must be charged to SBA's appropriation for administrative expenses.

A small business investment company may be either a corporation or a limited partnership. 15 U.S.C. § 681(a). The scope of authorized SBA assistance includes non-recourse loans to a limited partnership SBIC (by purchasing or guaranteeing its debentures). B-149685, January 12, 1978. Non-recourse in this context means that SBA would "waive" its right to recover, provided under the laws of most states, against the separate assets of the general partner.

In B-149685, March 25, 1971, GAO considered SBA's authority to sell guaranteed SBIC debentures to a group of underwriters for resale to private investors. Under this program, SBA would first purchase $30 million of newly issued debentures from SBICs and then immediately sell them to private investors, with SBA's guarantee of payment of principal and interest according to the terms of the instrument. SBA would act as servicing agent for the holders, receiving payment on the debentures from the SBICs and then paying the holders in accordance with the terms of the debentures. The Comptroller General concluded that the proposed sale and guarantee of debentures in this manner was within the scope of SBA's statutory authority, provided SBA did not exceed any existing statutory program level limitations. See also B-149685, June 3, 1969.

Another issue is whether a small business investment company is eligible to participate, as a lending institution, in a government guaranteed loan program. In 49 Comp. Gen. 32 (1969), the Comptroller General held that SBICs were not eligible lenders for purposes of SBA's guaranteed loan program under section 7(a) of the Small Business Act, 15 U.S.C. § 636(a). The decision relied heavily on the legislative history of the Small Business Investment Act.

Some years later, GAO again considered the eligibility of SBICs to be guaranteed lenders in SBA's section 7(a) guaranteed loan program as well as the Farmers Home Administration's business and industrial loan program (7 U.S.C. § 1932). SBA's new proposal was somewhat different from the arrangement considered in 49 Comp. Gen. 32, because after originating the loan, the SBIC would then immediately sell the guaranteed portion to another lending institution and remain the servicing agent. GAO's conclusion remained the same, again based on the legislative history of the Small Business Investment Act which

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indicated that Congress intended SBICs to operate independently of other federal loan programs. With respect to the Farmers Home Administration program, nothing in either the Small Business Investment Act or the Consolidated Farm and Rural Development Act or their legislative histories supported a different conclusion. 56 Comp. Gen. 323 (1977).

One type of small business investment company is the "minority enterprise small business investment company," or "MESBIC." As the name implies, a MESBIC is a small business investment company formed to aid minority-owned small businesses. In 59 Comp. Gen. 635 (1980), aff'd on reconsideration, B-197439, November 26, 1980, GAO considered SBA's authority to "leverage" against federal funds invested in MESBICs. "Leveraging" means investing on a partial matching basis through the purchase or guarantee of debentures or the purchase of preferred securities. The specific issue was whether SBA could leverage against Federal Railroad Administration investments in MESBICs. Since the Small Business Investment Act authorizes SBA to leverage only against private money, the decision concluded that, absent specific statutory authority, SBA could not leverage against federal funds invested in MESBICs. The MESBICs took the case to court, arguing that "private" meant simply "non-SBA." Based on the plain meaning of the statutory language, the court agreed with GAO. Inner City Broadcasting Corp. v. Sanders, 733 F.2d 154 (D.C. Cir. 1984). "[P]rivate means private and not governmental." Id. at 157.[15]

GAO and the court had both recognized that leveraging against other federal funds would be permissible if authorized by the statute under which those other funds were provided. One such example is community development block grant funds provided under the Housing and Community Development Act of 1974. 60 Comp. Gen. 210 (1981).

e. The Federal Financing Bank

The Federal Financing Bank was created by the Federal Financing Bank Act of 1973, 12 U.S.C. §§ 2281–2296. Its purpose is to

[15]A 1989 amendment added 15 U.S.C. § 683(e), providing that federal, state, or local government funds received by a small business investment company from non-SBA sources shall be included in determining private capital "solely for regulatory purposes, and not for the purpose of obtaining financial assistance from or licensing by [SBA], providing such funds were invested prior to November 21, 1989."

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coordinate federal credit programs with overall government economic and fiscal policies. It is a corporate instrumentality of the United States Government, subject to the general direction and supervision of the Secretary of the Treasury. Id. § 2283. The Bank acts essentially as an intermediary. Its powers include purchasing agency debt securities and federally guaranteed borrowings. Specifically, it is authorized by 12 U.S.C. § 2285 to—

"purchase and sell on terms and conditions determined by the Bank, any obligation which is issued, sold, or guaranteed by a Federal agency. Any Federal agency which is authorized to issue, sell, or guarantee any obligation is authorized to issue or sell such obligations directly to the Bank."

The Bank obtains funds by issuing its own securities, almost entirely to the Treasury. Id. §§ 2288(b), (c). The decisions summarized below illustrate the varying roles the Bank plays in the credit financing arena.

In 58 Comp. Gen. 138 (1978), GAO considered the SBA's authority to issue certificates to the Federal Financing Bank evidencing transfer of title of a number of individual loans and setting forth SBA's guaranteed assurance of payment, either in cash or by loan substitution. Even though this arrangement contemplated the sale of certificates evidencing ownership of a group of SBA loans rather than individual loans, it was sufficiently similar to the arrangement upheld in B-149685, March 25, 1971, discussed above in connection with SBICs, and was therefore permissible. Since the certificate did refer to specific loans and, when transferred to the Bank, would represent a transfer of ownership of the loans to the Bank, the plan would not constitute borrowing by SBA, which would have required specific statutory authority.[16]

The same decision, while noting that SBA's authority to sell loans to the Federal Financing Bank with its guarantee was "neither greater nor less" than its authority to sell loans to other purchasers (58 Comp. Gen. at 139), nevertheless concluded that SBA lacked the authority to sell direct disaster loans (15 U.S.C. § 636(b)) to the Federal Financing Bank on a guaranteed basis. Although SBA does have authority to guarantee disaster loans made to eligible borrowers by participating lending institutions, it is not authorized, in the

[16]SBA now has such borrowing authority in 15 U.S.C. § 633(c)(5).

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absence of specific statutory authority or a clear expression of congressional intent, to sell and guarantee disaster loans that it had originally made directly. Since there was at the time no statutory ceiling on the type of loans in question, the proposal would enable SBA to "replenish its disaster loan revolving fund so as to enable it to make new disaster loans and repeat the process indefinitely," potentially resulting in an unlimited contingent liability against the United States with no congressional restraint. Id. at 146. In addition, the proposal contemplated a 100 percent guarantee which would have violated the statutory 90 percent maximum guarantee of disaster loans.

Another case involving the Bank as "guaranteed lender" is B-162373-O.M., July 31, 1979, finding that an agreement between the Rural Electrification Administration and the Bank by which the Bank made loans to borrowers that REA guaranteed under the authority of section 306 of the Rural Electrification Act of 1936 (7 U.S.C. § 936), was within the statutory authority of both agencies. The legality of the arrangement was considered from the perspectives both of REA's authority to guarantee loans made by a non-private entity such as the Bank and of the Bank's authority to act as the initial lender, making loans directly to a private nongovernmental borrower with REA's guarantee. Since REA has authority to guarantee loans made by "any legally organized lending agency," it could guarantee loans made by the Federal Financing Bank. At the same time, the Bank was acting within its statutory authority to purchase obligations guaranteed by a federal agency, since the transaction was in the form of its purchasing the borrower's note from the borrower with payment being guaranteed by REA. Although the arrangement was legal, GAO was critical because it did not involve the private credit sector in the REA program as contemplated by the Rural Electrification Act. See GAO report, Financing Rural Electric Generating Facilities: A Large and Growing Activity, CED-81-14 (November 28, 1980), pages 16—17.

Congress subsequently confirmed the REA-FFB arrangement by amending 7 U.S.C. § 936 to provide that the loans, upon request of the borrower, "shall be made by the Federal Financing Bank." Under the statute, loan servicing is the responsibility of the lender. Thus, REA's funds are available to perform the loan servicing function as the Bank's agent only on a reimbursable basis. 62 Comp. Gen. 309 (1983).

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Two 1987 opinions discussed the Federal Financing Bank's role in the foreign military sales program. The Bank finances credit sales under the Arms Export Control Act, with the loans being guaranteed by the Defense Security Assistance Agency. If the debtor nation defaults, DSAA pays the Bank. One opinion concluded that the Bank is not authorized to deliberately delay making demand on DSAA for payment upon default. B-226718.2, August 19, 1987. The second advised that two refinancing options under consideration, one involving prepayment without penalty and one involving the partial capitalization of interest, would result in a financial loss to the United States or the substantial risk of one, and should not be implemented without clear evidence of congressional approval. 66 Comp. Gen. 577 (1987). Congress subsequently approved a prepayment option. See Security Assistance: Foreign Military Sales Debt Refinancing, GAO/NSIAD-89-175 (August 1989); Federal Financing Bank: The Government Incurred a Cost of $2 Billion on Loan Prepayments, GAO/AFMD-89-59 (August 1989).

A 1985 transaction illustrates a very different role for the Bank. In October 1985, the Treasury Department had reached its statutory public debt ceiling and was in danger of defaulting on its obligations pending congressional action to raise the ceiling. The Bank effectively borrowed $5 billion from the Civil Service Retirement and Disability Fund by issuing securities to the Fund and accepting Treasury obligations in payment. The Bank then used these securities to prepay part of its outstanding debt to Treasury. This in turn reduced Treasury's outstanding debt, enabling it to borrow an additional $5 billion from the public to meet its obligations. Based on the Bank's statutory authority and the conclusion that its obligations do not count against the public debt limit set by 31 U.S.C. § 3101(b), the Comptroller General found the transaction legally unobjectionable. B-138524, October 30, 1985.

When the Federal Financing Bank was first created, its transactions were entirely off-budget. 12 U.S.C. § 2290(c) ("receipts and disbursements of the Bank . . . shall not be included in the totals of the budget of the United States Government"). With the budget reforms of the Congressional Budget Act and subsequent legislation, this treatment came under increasing criticism and GAO, among others, recommended that Bank transactions involving other government entities be reflected in the budget. E.g., Government Agency Transactions With the Federal Financing Bank Should Be Included on

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the Budget, PAD-77-70 (August 3, 1977) (detailed analysis); 58 Comp. Gen. 138, 142–44 (1978); B-178726, September 16, 1976 (pointing out that purchase by the Bank of a loan guaranteed by another agency amounts to a direct loan).

While the Federal Financing Bank Act itself has not been amended, Congress in 1985 added 2 U.S.C. § 655(b) to the Congressional Budget Act:

"All receipts and disbursements of the Federal Financing Bank with respect to any obligations which are issued, sold, or guaranteed by a Federal agency shall be treated as a means of financing such agency for purposes of section 1105 of Title 31 [submission of President's budget] and for purposes of [the Congressional Budget] Act."

Under this provision, direct loans of the Bank are accounted for as loans of the guaranteeing agency. See B-226718.2, August 19, 1987.

2. Coverage of Borrowers

a. Eligibility of Borrowers

Loan guarantee program legislation may or may not establish criteria for lender eligibility; it will almost invariably address borrower eligibility. This is because the primary purpose of a guarantee program is to enhance credit availability to a particular class of borrowers (farmers, veterans, small businesses, etc.). The significance of any such eligibility requirements is that an agency is not authorized to issue a guarantee or reimburse a lender on behalf of an ineligible borrower.

For example, one portion of the National Housing Act, 12 U.S.C. § 1703, authorizes the insurance of loans made to finance repairs or improvements to real property by owners or lessees. Under this statute, it is the lending institution's responsibility to determine borrower eligibility. Thus, a lending institution making a loan to someone who is neither the owner nor the lessee of the property involved is not entitled to be reimbursed for losses resulting from borrower default. B-180015, November 28, 1973; B-174739, January 19, 1972.

While most eligibility requirements are found in the program statute itself, they may appear in other legislation. For example, the Military Selective Service Act provides that any person who is required to

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register for the draft and knowingly and willfully fails to do so shall be ineligible for guaranteed student loan assistance. 50 U.S.C. App. § 462(f). The Department of Education is authorized to issue implementing regulations, discussed in B-210733, February 25, 1983.

b. Substitution of Borrowers

Generally, the substitution of borrowers within the same fiscal year will not present problems. However, as with contracts and grants, the substitution may or may not be proper when made in a subsequent fiscal year. Loan guarantee authority—whether it is an advance appropriation of budget authority under the Federal Credit Reform Act or a program level ceiling in a situation not governed by the Credit Reform Act—is granted on an annual, multiple-year, or no-year basis. It thus has a period of availability analogous to a regular appropriation. Where the period of availability is a fixed time period, the authority ceases to be available when that period expires.

The issue in B-164031(5), June 25, 1976, was the transferability of a loan guarantee and interest subsidy originally approved under a program of federal assistance for the construction and modernization of hospitals. The question was whether the guarantee could be transferred from one hospital to another in the following fiscal year, when the original hospital became unable to take advantage of the guarantee due to apparent financial difficulties. The Comptroller General found that, since the period of availability of the guarantee authority had expired, the transfer would be authorized only if it could be viewed as a "replacement." Since the second hospital did not serve the same community as the first, the transfer of the loan guarantee to the new "borrower" was not merely a "replacement" and therefore could not be approved.

A few years later, the Farmers Home Administration asked whether it could continue to charge a guarantee to the annual ceiling for the fiscal year in which it was originally approved when a new borrower was substituted in a later fiscal year. As a general rule, the answer is no, and the substitution would have to be treated as a new undertaking. This is different from the substitution of lenders discussed previously in this chapter because the approval of a guaranteed loan to a particular borrower requires a specific eligibility determination. Thus, while the identity of the particular lender may be of relatively little consequence, the identity and eligibility of the borrower are essential to the transaction. However, the substitution may be treated as a continuation of the original guarantee where the

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substituted borrower bears a "close and genuine relationship" to the originally approved borrower (for example, a corporation and partnership controlled by the same individuals), provided of course that the loan purpose remains substantially unchanged. 60 Comp. Gen. 700 (1981).[17]

c. Loan Purpose

The authority to make a loan guarantee commitment depends not only on the eligibility of the particular borrower, but also on whether the purpose for which the guaranteed loan is to be made is consistent with the applicable program statute and regulations. The analysis is essentially an application of the "necessary expense" doctrine used in other purpose availability contexts.

A number of illustrative cases have arisen under section 301 of the Defense Production Act of 1950, 50 U.S.C. App. § 2091, which authorizes loan guarantees to finance the performance of contracts where deemed "necessary to expedite production and deliveries or services under Government contracts for the procurement of materials or the performance of services for the national defense." Id. § 2091(a)(1). For example, B-115791-O.M., September 3, 1953, concluded that section 301, ordinarily used to provide short-term working capital, could also be used to guarantee loans for the expansion of plant facilities if determined necessary to expedite production and deliveries or services under defense contracts.

Contracts to purchase equipment for civil defense stockpiling purposes may be regarded as contracts for the national defense and therefore eligible for loan guarantees under section 301. 37 Comp. Gen. 417 (1957). The issue in that case was whether a 1953 amendment to the act, which narrowed the definition of "national defense," had the effect of excluding civil defense which clearly would have been covered before the amendment. GAO found no evidence of congressional intent to exclude civil defense, and concluded therefore that the loans could be guaranteed.

While section 301 was intended primarily to assist small and medium-size defense contractors, its language is not so limited and is

[17]Both 60 Comp. Gen. 700 and B-164031(5) applied the basic principles of decisions on the substitution of grantees discussed in Chapter 10.

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5. Amount of Liability

As a general proposition, the amount for which an accountable officer is liable is easy to determine: It is the amount of the physical loss or improper payment, reduced by any amounts recovered from the recipient (thief, improper payee, etc.). E.g., 65 Comp. Gen. 858, 863–64 (1986); B-194727, October 30, 1979.

There is an exception, discussed in 65 Comp. Gen. 858, 863–64, in which amounts recovered from the recipient should not be used to reduce the amount of the accountable officer's liability. A loss may result from a series of transactions spanning several years, each transaction giving rise to a separate debt. By the time the loss is discovered, recovery from the accountable officer may be partially barred by the 3-year statute of limitations found in 31 U.S.C. § 3526(c). This, however, does not affect the indebtedness of the recipient which, in this situation, will exceed the liability of the accountable officer. Under the Federal Claims Collection Standards, a debtor owing multiple debts may specify the allocation of a voluntary partial payment. If the recipient/debtor fails to so specify, or if payment is involuntary, the collecting agency may allocate the money among the various debts in accordance with the best interests of the United States. Generally, "the best interests of the United States are clearly served by applying payments made by the recipients to the class of debt for which only the recipients are liable" (id. at 864), i.e., those for which recovery from the accountable officer is time-barred. Thus, in this type of situation, partial recoveries from the recipient should first be applied to the time-barred debt of the accountable officer until any such amounts have been recouped, and only thereafter used to reduce the accountable officer's remaining liability.

A judgment obtained against some third party (improper payee, thief, etc.) is only "potential unrealized value" and does not reduce the accountable officer's liability until it is actually collected. B-147747, December 28, 1961; B-194727, October 30, 1979 (non-decision letter).

The liability of an accountable officer does not include interest and penalties assessed against the recipient. B-235037, September 18, 1989.

The liability of an accountable officer resulting from the payment of fraudulent travel claims is the amount of the fraudulent payment and does not include non-fraudulent amounts paid for the same day(s). 70

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sufficiently broad to permit guarantees to large-size defense contractors as well. B-170109, July 21, 1970 (large railroad carrier).

GAO considered a different loan guarantee program in 38 Comp. Gen. 640 (1959). The question in that case was whether the Civil Aeronautics Board, under a statute authorizing the guarantee of aircraft purchase loans, could guarantee the indebtedness of an air carrier for the conversion of an existing aircraft. The case involved the conversion of piston engine aircraft to turbo-powered aircraft. GAO found that the conversion was such an extensive modification as to amount to a new type of aircraft for all practical purposes. Also, it was clear that if the manufacturer had performed the conversion and then sold the converted aircraft to the carrier, the purchase would have been eligible for the guarantee. The conversion was therefore within the statutory purpose and the guarantee was authorized.

An analogous situation occurred in 34 Comp. Gen. 392 (1955), involving the Maritime Administration's ship mortgage insurance authority under the Merchant Marine Act. Noting that purchase plus reconstruction was the equivalent of new construction for purposes of the program, the Comptroller General held that the insurance could extend to the purchase money mortgage and reconstruction costs for a vessel acquired by purchase (in this case from the government) instead of under a construction contract. This decision was amplified in 35 Comp. Gen. 18 (1955), which held that the Maritime Administration could insure a second-lien reconstruction mortgage to a private lending institution where the first-lien (purchase money) mortgage was held by the United States. There was nothing in the statute limiting the insurance authority to first-lien mortgages.

The Rural Electrification Administration's financial assistance programs have generated a number of purpose-related cases. Generally, REA may make direct loans and loan guarantees to finance rural electrification facilities for persons not already receiving central station service.

Several cases have established the proposition that REA can include elements in a project that are arguably beyond a literal reading of the statutory language, where those elements are merely incidental to accomplishing the statutory purpose. Thus, early cases on REA's direct loan program held that REA cannot make a loan where the only persons to be benefitted are already receiving central service, but it

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can finance the acquisition of existing facilities which are to be incorporated into a larger system, where the acquisition is necessary for the effective operation of the overall system. B-48590, April 3, 1945; B-32920, March 12, 1943; B-29463, December 1, 1942. This principle applies whether the acquisition is by direct purchase or the purchase of securities to be exchanged for the physical property. B-42486, July 25, 1944.

REA loans are not intended to parallel existing facilities. Thus, where Plant A and Plant B are located less than 200 feet apart, and Plant A is receiving central service from a power supplier who has offered to provide adequate service to Plant B, Plant B cannot properly be considered a person not receiving central service for purposes of qualifying for REA financial assistance. B-134138, October 15, 1958.

In B-195437, February 15, 1980, GAO applied the principles of the above direct loan cases to REA's loan guarantee program. The issue was REA's authority to approve a loan guarantee to finance certain expenditures associated with the construction of a coal-fired electric generating plant, including cancellation charges if two contracts for components of the plant were terminated. The decision held that, since the contractors would not begin to build the components without a commitment that the cancellation costs would be paid, approval of a loan guarantee to assure funding to pay such charges was consistent with the basic statutory purpose of providing electricity to persons in rural areas and therefore authorized.

Finally, loans and loan guarantees to provide housing for the elderly may include the purchase of related necessary equipment such as refrigerators and laundry equipment. 42 Comp. Gen. 528 (1963).

d. Change in Loan Purpose

A decision previously cited in the discussion of changes in lenders and borrowers, 60 Comp. Gen. 700 (1981), also addressed changes in loan purpose under the Farmers Home Administration rural development loan guarantee program. Again, the issue was when changes could be deemed a continuation of the original transaction, so that the guarantee would remain chargeable to the annual ceiling for the fiscal year in which it was originally approved.

Similar questions had arisen frequently in the grant context, and the Comptroller General applied the grant principles to loan guarantees, stating:

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"Applying these grant decisions to the area of loan guarantees, when a major change to the 'character' of the project supported by the guarantee is made, the revised loan guarantee must be charged against the ceiling in effect when the revision is made. We believe that just as a significant change in the terms and conditions under which a grant was made would be viewed as creating a new grant, a significant change in the terms and conditions under which a loan guarantee was approved would create a new loan."

Id. at 707. Thus, major changes will result in the treatment of the transaction as a new guarantee. However, less substantial changes where the purpose and scope of the revised agreement are consistent with the purpose and scope of the original agreement may be treated as a continuation as long as the need for the project continues to exist. This test must be applied on a case-by-case basis.

3. Terms and Conditions of Guarantees

a. Introduction

Just as with any other contractual obligation, a loan guarantee has terms and conditions which the parties must follow. If a valid guarantee has been created, the borrower defaults, and the lender has complied with all applicable terms and conditions, the government is obligated to pay on the guarantee. Conversely, if the lender does not comply with applicable requirements, it may find that it has lost the benefit of the guarantee. The applicable terms and conditions are found in the program statute, agency regulations, and the guarantee agreement.

This section will discuss the effect of noncompliance, especially by the lender. The cases fall into two broad categories. In one group, the loan may not have been eligible for the guarantee from its inception based on a failure to satisfy applicable requirements such as a statutory limitation on the maximum amount or maturity of the loan. The result will usually be that the guarantee itself was never valid. In the second group, the loan to be guaranteed complies with all pertinent statutory or regulatory requirements, but the guarantee never takes effect or is nullified as a result of the lender's failure to comply with one or more of the terms and conditions upon which the government's guarantee is contingent.

To illustrate these concepts, we have selected two areas—property insurance programs under the National Housing Act and loan

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guarantee programs of the Small Business Administration. The specific requirements discussed are the more common ones and apply of course only to the particular program. Nevertheless, our selection is intended to illustrate types of issues, approaches to problem-solving, and the crucial role of agency regulations, and from this perspective is of more general relevance. Also, program details such as maximum loan amount, whether prescribed by statute or regulation, are subject to change from time to time. Accordingly, individual cases do not necessarily reflect current program requirements, but are intended to illustrate or support propositions of continuing validity with respect to requirements of that type.

b. Property Insurance Programs Under the National Housing Act

The National Housing Act, 12 U.S.C. ch. 13, authorizes a number of housing assistance programs. Several of the programs were formerly administered by the Federal Housing Administration (FHA) and were transferred to the Department of Housing and Urban Development (HUD) upon its creation in 1965. Although the programs are now administered by HUD's Office of Housing, they are still popularly known as "FHA programs."

(1) Maximum amount of loan

Under 12 U.S.C. § 1703, the Secretary of HUD is authorized to insure lenders against losses sustained in extending loans to borrowers for various purposes, including home construction, repair, and improvement, and the purchase of manufactured (mobile) homes. The statute establishes the maximum amount of loans that may be insured for the various authorized purposes, for example, $25,000 for repairs and improvements to an existing single-family structure. Id. § 1703(b)(1) (1988 and Supp. III 1991). While the specific dollar amounts have changed several times, the basic maximum loan amount requirement has existed in one form or another since the program was established in 1934.

Where a single loan is involved, its face amount cannot exceed the statutory limitation. If a loan which is reported by the lender to HUD for insurance exceeds the statutory limitation in effect when the loan was made, the lender cannot be reimbursed for any of its losses since the loan was ineligible for insurance from its inception. E.g., B-127167, July 15, 1970; B-127243, May 21, 1956.

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In applying this limitation where more than one loan is involved, the approach of HUD's program regulations is to consider whether the total amount of all outstanding insured loans made to a borrower under Title I of the Housing Act with respect to the same property or structure exceeds the maximum permissible amount. In this situation, the ceiling applies to the outstanding aggregate loan balance rather than the sum of the face amounts. 24 C.F.R. § 201.10 (1991). Thus, for a second loan, the ceiling is compared with the face amount of the second loan (which represents the outstanding balance of that loan at the time the determination is made) plus the outstanding balance of the first loan. B-148894, June 29, 1962; B-137493, November 20, 1958. The method used to compute the outstanding balance is within HUD's discretion. In considering claims, GAO will apply the method prescribed in the regulations. The fact that other reasonable methods may exist is irrelevant. B-162961, January 19, 1968.

The ceiling applies only to loans for the same property. In B-148804, June 7, 1962, the Comptroller General advised that a lender could be reimbursed for a loss it suffered when the borrower defaulted, even though the original loan of $4,000 exceeded the then-existing $3,500 limitation. Although only one application for a $4,000 loan had been made, the record revealed that two separate properties were involved, with $3,000 of the loan funds intended for the improvement of one property, and $1,000 for the other. Therefore, the limitation which applied only to loans for the same property was not violated.

This decision points out another important provision of 12 U.S.C. § 1703. The Secretary of HUD is authorized to waive a requirement in the regulations if in the Secretary's judgment enforcement would impose an injustice on an insured lender, provided that the lender has substantially complied with the regulations in good faith and waiver would not increase the government's obligation beyond what it would have been under full compliance. Id. § 1703(e). Thus, in B-148804, the regulations required separate applications for separate properties, but GAO advised that FHA could waive the requirement. Prior to enactment of the waiver authority, GAO had applied the general rule that agencies have no authority to waive statutory regulations. 15 Comp. Gen. 869 (1936). The waiver provision was enacted three weeks after the decision. The authority has been applied in a variety of contexts. E.g., B-127026, March 27, 1956 (bank disbursed loan after a change in regulations under which loan would have been ineligible, but had approved loan in good faith before receiving notice of the

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change). The Secretary of HUD may delegate the waiver authority to a "substantial compliance committee." B-127167, December 17, 1968.

Several decisions have emphasized that the waiver authority applies only to regulations. It does not apply to a requirement imposed by statute, such as the maximum loan amount. A purported waiver of a statutory requirement is ineffective. E.g., B-127243, May 21, 1956. A waiver inconsistent with the statutory authority, for example, lack of good faith by the lender, is also unauthorized. B-127167, December 5, 1957.

Exercise of the waiver authority is up to HUD, not GAO. While GAO may, in settling a claim or rendering a decision, find a waiver invalid if it violates one of the above principles, GAO cannot positively exercise the authority where HUD has chosen not to do so. As in B-148804, June 7, 1962, GAO can only advise HUD that in its opinion waiver is authorized.

(2) Maximum loan maturity

The Housing Act also prescribes, by category, the maximum maturity term of loans which may be insured under 12 U.S.C. § 1703. For example, the maturity of a loan for repairs and improvements to an existing single-family structure may not exceed 20 years and 32 days. Id. § 1703(b)(3). As with the maximum loan amount, maturity limitations have existed since the program's inception.

The maturity date is computed based on the payment due date indicated on the note. If the period exceeds the statutory maximum, the loan is not insurable. It is the responsibility of the lender rather than the government to make certain that notes do not have maturities in excess of the statutory maximum. 55 Comp. Gen. 126 (1975); B-172121, April 12, 1971. Thus, in 55 Comp. Gen. 126, a bank's claim for reimbursement was denied where a note submitted and accepted for insurance had a projected maturity date 17 days in excess of the maximum in effect when the loan was made.

The decision at 55 Comp. Gen. 126 also held that, since the statutory limitation applies to the maturity of the obligation or note underlying the loan, the date on the note is controlling, and not the date on which the note was assigned or the funds disbursed. However, this is not an absolute and there are certain circumstances in which the date on the

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note has been found not controlling. For example, in B-162542, October 24, 1967, GAO approved a lender's claim even though the note stated a final payment due date after the existing statutory limitation. The holding was based on a letter from the lender to the borrower which agreed to move up the date of the first payment and, by implication, all of the others as well, including the final payment. As a result, the maturity date fell within the statutory period.

Somewhat similarly, B-166521, April 25, 1969, involved a 60-month note which, as written, would have exceeded the statutory maximum. The note was dated June 20, 1963, but provided that the first payment was not due until July 1, 1968. Based on the borrower's actual payment record, it was obvious that the maturity date had been inadvertently entered on the note as the first payment due date. Thus, the maturity date was within the then-existing statutory maximum and the lender could be paid.

Again in B-191660, March 5, 1979, GAO upheld a bank's claim where the note had a projected maturity date two days in excess of the then-existing statutory limitation. The borrower's payment record and other evidence supported the bank's allegation that, due to inadvertence, the note as written did not reflect the intention of the parties at the time the loan was made. The decision emphasized that, where extraneous evidence is to be used to correct an alleged error on a note, merely changing the due date after default and after HUD has refused insurance is legally irrelevant. The extraneous evidence must establish that the allegedly correct due date is what the parties intended at the time the note was executed.

Problems may also arise when the term of the initial insured loan is within the statutory maximum but a subsequent extension agreement results in exceeding the maximum maturity period. For example, in B-131963, July 17, 1957, FHA could not reimburse a bank for a loss suffered on a defaulted loan where the bank had agreed in writing to extend the maturity date of the note beyond the statutory maximum.

As pointed out in that decision, 12 U.S.C. § 1703(b)(6) permits a loan to be refinanced, but the authority does not include a mere extension of payment. Thus, a lender may extend the time for paying a note beyond the maximum time limitation and still retain insurability only by actually refinancing the loan, that is, by executing a new note. Short of an actual refinancing, a mere extension of payment beyond

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the maximum will result in the loss of insurability. See also B-164118, November 19, 1969; B-149800, September 28, 1962; B-148816, May 21, 1962. Several cases have rejected arguments by the lender either that it had not intended to extend the final maturity date beyond the permissible maximum, or that it should have been allowed to subsequently rescind or reform the extension agreement to conform with the statutory limitation. E.g., B-188240, August 10, 1977; B-164118, December 30, 1969; B-164118, August 14, 1968.

Insurability may be retained if the extension is merely a temporary deferral of certain payments, with the deferred payments to be made up prior to the original maturity date. However, if this is the case, it must be spelled out in the extension agreement. B-164118, December 30, 1969.

In 51 Comp. Gen. 222 (1971), the extension agreement was not merely an extension of time but also changed other terms such as the period of payment and the amount of the monthly installment. In these circumstances, the Comptroller General found that the terms of the extension agreement differed so substantially from those of the original note that it was "tantamount to a new note" and could be considered as a refinancing. Although the "refinancing" had not been accomplished in accordance with applicable regulations, GAO advised HUD that it could consider waiving those particular regulatory requirements under 12 U.S.C. § 1703(e).

(3) Owner/lessee requirement

Another requirement of the Housing Act is that property improvement loans can be made only to borrowers who are owners of the property, or who are lessees under a lease expiring not less than six months after the maturity of the loan or other advance of credit. 12 U.S.C. § 1703(a). A loan made to a borrower who is neither the owner nor the lessee of the property involved is not insurable. For example, where the property was owned by a corporation and the loan application and note were signed by two individuals who were officers of the corporation, but with no indication that they were signing as representatives of the corporation, the loan was not made to the owner of the property and was ineligible for insurance. B-180015, November 28, 1973. Similarly, where the same person was president of two different corporations and signed the note as president of corporation "A" but had signed the lease on the property involved as

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president of corporation "B", the loan was not made to the lessee and was not insurable. B-174739, January 19, 1972.

The lease must expire "not less than six months after the maturity of the loan." A loan to a lessee is not insurable where the lease expires before the maturity date (B-194145, December 12, 1980), or on the maturity date (B-172965, July 16, 1971). Time "after" an event is traditionally computed by excluding the date of the happening. Thus, a loan with a maturity date of July 1, 1956, to a lessee whose lease was due to expire on December 31, 1956, was not insurable. "Not less than six months after" the maturity date would have been on or after January 1, 1957. B-129898, December 28, 1956.

In B-194145, December 12, 1980, a loan was refinanced after the borrower, under a lease with option to purchase, had exercised the option. The bank argued that the loan should be insurable since the refinancing note had been executed to the owner. However, the Comptroller General held that a refinancing loan is insurable only where the prior loan being refinanced was itself validly insured. Since the original loans in that case were ineligible, the refinancing loan was equally ineligible. Also, the refinancing loan could not be considered an entirely new loan for purposes of insurability, since the statute authorizes insurance to finance improvements, not to repay outstanding uninsured loans.

In B-124410, July 25, 1955, GAO allowed a bank's claim on a loan to a borrower who was not the owner of the property. The decision was based on FHA regulations which provided that a lender, acting in good faith, may in the absence of any information to the contrary, rely on statements of fact in a credit application, and the credit application in that case had been misleading. Compare, however, 17 Comp. Gen. 604 (1937), in which a claim was denied for a loss suffered when a lender advanced funds to an individual other than the borrower upon a forged authorization, where a simple comparison with the signature on the note would have disclosed the forgery.

While a bank is generally entitled to rely on statements of fact in a credit application, it is nevertheless required to exercise good credit judgment. Thus, payment was denied in A-88143, August 21, 1937, where the borrower had previously defaulted on a different loan with the same bank. The result applies equally to a bank with several branches where the contract of insurance is with the home office.

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19 Comp. Gen. 92 (1939). An apparent exception occurred in B-124438, July 26, 1955, where a borrower listed on his credit application a prior loan with a branch of the same bank located 110 miles away, but failed to note that it was in default. The bank checked several local credit references and received favorable reports, but did not check with its branch. Since the bank had diligently checked the local references, the borrower cured the default on the prior loan, and FHA waived the bank's violation of regulations which prohibited accepting a loan when a prior loan was in default, GAO concluded that the bank could be reimbursed for its losses on the second note.[18] For cases on the requirement to approve the credit statement, see 16 Comp. Gen. 958 (1937); A-71945, June 16, 1937.

(4) Execution of the note

Another requirement of the regulations is that the note evidencing the indebtedness bear the genuine signature of the borrower, be valid and enforceable against the borrower, and be complete and regular on its face. 24 C.F.R. § 201.12 (1991). In a number of cases where either signatures were forged or terms of the note were altered—potentially making the note ineligible for insurance under the regulations—GAO has allowed claims by a lender for reimbursement based on the lender's apparent good faith and the previously discussed authority to waive regulatory requirements. B-127167, December 17, 1968 (forged signature); B-127167, December 5, 1957 (false representation as to age); B-130955, May 2, 1957 (alteration of amount); B-127167, April 10, 1956 (forged signature). Where HUD declines to exercise its waiver authority, it may treat the note as ineligible for insurance. United States v. deVallet, 152 F. Supp. 313 (D. Mass. 1957). "The government had the right to make such limitations on its insurance undertaking as it saw fit." Id. at 315.

One court has held that the validity/regularity requirement applies "not at the point at which a bank submits its claim, but at the point at which the loan itself is being arranged." Guardian Federal Savings and Loan Association v. Harris, 441 F. Supp. 789, 791 (D.D.C. 1977). While this seems clear enough with respect to items such as the validity of the signature and the "regularity" of the note, subsequent events may affect the enforceability of a note, a situation implicitly

[18]The same facts in today's computerized environment could well produce a different result.

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Comp. Gen. 463 (1991). Previously GAO had included both, under the so-called "tainted day" rule. The 1991 decision distinguishes fraudulent payees from fraudulent claimants, concluding that the tainted day rule does not apply to paid claims.

When determining the amount of a loss for which an accountable officer is to be held liable, the government does not "net" overages against shortages. In GAO's view, such "netting" would weaken internal controls over the accounting for cash balances. B-212370, November 15, 1983; B-199447, March 17, 1981.[9] As noted in B-199447, overages must generally be deposited in the Treasury as miscellaneous receipts.

In almost all cases, the amount of an accountable officer's liability is precisely determinable at the outset. It may be reduced by recoveries, but it will not increase. One exception is illustrated in B-239387, April 24, 1991, in which an agency held an employee accountable for a booklet of missing or stolen Government Transportation Requests. Because the amount of the government's loss could not be known until the GTRs were actually used and the government forced to honor them, additional liability accrued as each GTR was used over time.

6. Effect of Criminal Prosecution

As we noted previously, the body of law governing the liability and relief of accountable officers is designed not only to induce proper care but also to protect against dishonesty by the officers themselves. This section summarizes the relationship between criminal prosecution and civil liability.

a. Acquittal

Acquittal in a criminal proceeding does not extinguish civil liability and does not bar subsequent civil actions to enforce that liability as long as they are remedial rather than punitive. Helvering v. Mitchell, 303 U.S. 391 (1938). The reason is the difference in burden of proof. Acquittal means only that the government was unable to prove guilt beyond a reasonable doubt, a standard higher than that for civil liability. "That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been

[9]A statutorily authorized instance of "netting" gains and deficiencies in an account is 31 U.S.C. § 3342(c)(2) (certain check-cashing and exchange transactions), discussed later in this chapter.

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recognized in the Harris case. In B-127483, April 26, 1956, it was held that the enforceability requirement was not affected by a mistrial in a suit brought by the lender resulting in a dismissal without prejudice. In 37 Comp. Gen. 857 (1958), GAO held that a lender could be reimbursed where the note had become unenforceable due to the passage of time notwithstanding the lender's diligent collection efforts. The result would at least arguably be different if a note became unenforceable through the fault or neglect of the lender.

(5) Reporting requirement

The four requirements discussed thus far relate to the eligibility of a loan for insurance from its inception. This one is different because the loan itself is eligible but the lender's failure to comply may result in the loss of insurability. Program regulations require lenders to report loans to HUD on a prescribed form within 31 days from the date of the note or the date the note was purchased. 24 C.F.R. § 201.30(a) (1991). HUD then accepts the loan for insurance or rejects it. The reporting requirement also applies to refinancing loans. Id.

Under present regulations, HUD has discretion to accept a late report as long as the loan is not in default. Id. § 201.30(b). Once the loan has gone into default, that discretion no longer exists and it is too late to establish coverage. An illustrative case is B-194822, September 24, 1980. A bank inadvertently failed to report a property improvement loan to HUD. More than a year later, after the loan was in default, the bank submitted its report along with its claim for indemnification. Concluding that the loan was never insured, HUD denied the claim, and GAO agreed. The fact that HUD had inadvertently billed the bank for the required premiums, which the bank paid, was not enough to establish coverage. Of course, refund of the premiums was appropriate.

Prior to 1968, the regulations did not limit HUD's discretion, and a late report could be accepted even after default. Cases addressing the exercise of discretion under this version of the regulations are B-165239, October 4, 1968, and B-153971, June 17, 1964.

(6) Payment of premiums

The statute requires that HUD charge the financial institution a premium for the insurance. 12 U.S.C. § 1703(f). The premium is a prerequisite to insurability. Id. § 1703(b)(5). This is closely related to

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the reporting requirement discussed above in that it is the report that triggers HUD's billing of the bank. The sequence is: (1) bank reports loan to HUD on manifest form; (2) HUD includes the loan on its monthly statement to the bank; (3) upon receipt of monthly statement, bank pays premium to HUD; (4) when HUD receives the premium, loan achieves insured status.

Subsection 1703(f) further requires that the premium charge "shall be payable in advance by the financial institution." Thus, advance payment of the premium is necessary for the loan to be eligible for insurance, at least where nonpayment is solely the fault of the bank. B-172965, July 16, 1971 (loan not covered where bank failed to report the loan and was thus never billed by HUD). See also B-194822, September 24, 1980 (no authority to accept premiums after default). For loans with a maturity in excess of 25 months, the insurance charge is payable in annual installments. 24 C.F.R. § 201.31(b)(2) (1991).

In 55 Comp. Gen. 891 (1976), the bank claimed that it had reported the loan to HUD. HUD, however, had no record of the report and consequently had neither requested nor received any premium payments from the bank prior to default. Apart from the fact that the advance payment requirement appears in a federal statute, the bank had actual notice that a loan is not insured until it appears on the monthly statement and the premium is paid. Adequate review of the monthly statements would have revealed that the particular loan was not listed and that therefore either HUD never received the report or failed to acknowledge it. Since it is the bank's responsibility to assure payment of premiums in advance, its claim was denied. The decision once again reiterated that HUD's waiver authority does not apply to statutory requirements.

A related case, 55 Comp. Gen. 658 (1976), reaffirmed the proposition that timely payment of the insurance premiums is a prerequisite to continued insurance coverage. The decision also held that claims by a lending institution which is currently delinquent in its premium payments may be allowed if the borrower's default occurred prior to the delinquency. However, if the lending institution was delinquent before the default occurred or became imminent, its claim may not be allowed.

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The decision in 55 Comp. Gen. 658 was expanded (and modified with respect to matters not relevant here) in 56 Comp. Gen. 279 (1977), holding that timely payment of insurance premiums under 12 U.S.C. § 1703 is a continuing obligation of the lender and cannot be voluntarily terminated by the lender before the end of the term of the underlying loan. Unpaid insurance premiums constitute a debt presently due and payable by the lender to the United States. Therefore, HUD may offset delinquent premiums against insurance claims otherwise payable to the lender. However, estimated future premiums may not be offset against currently payable claims because they are not certain in amount. (Under the program regulations, the premium may be abated after an insurance claim has been filed or if the loan is paid in full prior to maturity. 24 C.F.R. § 201.31(e).)

c. Small Business Administration Business Loan Program

(1) Payment of guarantee fee

Like the National Housing Act insurance programs, a loan guarantee under section 7(a) of the Small Business Act is not free to the lender. The Small Business Administration is required to charge a guarantee fee, based on a percentage of the amount guaranteed, on most loans guaranteed under 15 U.S.C. § 636(a). Id. § 636(a)(18). The fee is payable by the participating lending institution, but may be passed through to the borrower. Id. SBA's implementing regulations are found at 13 C.F.R. § 120.104-1 (1991).

For many years prior to the enactment of 15 U.S.C. § 636(a)(18) in 1986 (Pub. L. No. 99-272, § 18007, 100 Stat. 82, 366), SBA charged a guarantee fee under the authority of its program regulations and guarantee agreement. Thus, pre-1986 GAO decisions dealing with section 7(a) fees must be regarded as modified to the extent they were addressing a nonstatutory requirement. They, however, along with elements of the program regulations which pre-date the 1986 legislation, establish the proposition that an agency may charge a guarantee fee without specific statutory authority as long as it is not prohibited, and outline the general parameters of a nonstatutory fee requirement.

As with the Housing Act fees, a fundamental issue is the effect of nonpayment or late payment. Unlike the Housing Act, the SBA provision does not require that the fees be paid in advance. Thus, by itself, 15 U.S.C. § 636(a)(18) neither makes payment of the fee an essential condition of guarantee eligibility, nor does it prohibit such

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treatment. Under SBA's regulations, the fee is payable when the lender applies for a guarantee for loans with maturities of 12 months or less, and within 90 days after SBA's approval for loans with maturities greater than 12 months. 13 C.F.R. § 120.104-1(b). Absent statutory direction one way or the other, the effect of missing these deadlines is a matter within SBA's discretion to establish by regulation or terms of the guarantee agreement.

At one time, SBA's guarantee agreement expressly provided that a loan is not guaranteed until the fee has been paid. Under this provision, payment of the fee was a condition precedent to coverage. SBA had the discretion to accept late payment provided the loan was not in default, but the loan was not protected by the guarantee until the fee was paid. B-181432, November 12, 1975; B-181432, March 13, 1975. In cases where the fee remained unpaid at the time the borrower defaulted, claims by lenders were consistently denied in the face of arguments such as estoppel (B-181432, May 21, 1979, and B-181432, October 20, 1978), "constructive payment" (B-181432, July 7, 1978), or inexperience on the part of bank personnel (B-181432, August 15, 1977). Since the requirement was explicitly stated in the guarantee agreement, virtually all of these cases reiterated the proposition that no government official may give away the government's contractual rights without either statutory authority or adequate legal consideration. The courts reached the same result. See Union Nat'l Bank of Chicago v. Weaver, 604 F.2d 543 (7th Cir. 1979); Union State Bank v. Weaver, 526 F. Supp. 29 (S.D.N.Y. 1981).

Under SBA's current regulations, if the fee is not paid within the specified time period, SBA will send the lender a written notice. "The guarantee shall be subject to termination if SBA does not receive the fee within the time period stated in the notice." 13 C.F.R. § 120.104-1(b). Implicit in this language is the premise that the guarantee will be regarded as in effect until SBA terminates it.

A 1983 decision considered similar issues under a different SBA program, the Surety Bond Guarantee Program established by 15 U.S.C. § 694a. Since nothing in the legislation or implementing regulations made payment of the guarantee fee a condition precedent to the existence of the guarantee, and since the surety bond guarantee agreement contained no provision comparable to the provision then being used in the business loan guarantee agreement, the decision concluded that nonpayment of the fee prior to default would not void

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SBA's obligation to honor the guarantee, although SBA should deduct the unpaid fee from the surety's claim. B-206893, March 18, 1983.

SBA has the discretion to reinstate a guarantee which has been terminated for nonpayment of the fee. However, SBA will not reinstate a guarantee once the loan goes into default unless the borrower "cures" the default—by bringing the loan into a fully paid and current status—within 60 days. 13 C.F.R. § 120.104-1(d); B-181432, April 5, 1979.

A 1979 case considered the effect of another provision in the guarantee agreement. A bank, conceding that it had not paid the guarantee fee prior to default on the loan as originally written, argued that it had effectively modified the agreement by granting the borrower additional time to begin repayment. However, the guarantee agreement explicitly required SBA's prior written approval of any change in the terms of the loan, which the bank had neither requested nor received. The modification was therefore not legally effective as against SBA. B-193134, July 27, 1979.

The issue in 58 Comp. Gen. 693 (1979) was the effect of a refinancing loan. In view of SBA's discretion to accept refinancing, GAO concluded that the effect of a bank's failure to timely pay the fee on the original loan was terminated when the original loan was repaid by the refinancing loan. Thus, the fact that the guarantee on the original loan may have been extinguished will not necessarily defeat an otherwise valid guarantee on a subsequent refinancing loan.

Cases involving late payment or nonpayment of the guarantee fee may be useful in analyzing the treatment and consequences of other terms and conditions of the guarantee agreement, but should not be blindly applied. For example, the court in Eastern Illinois Trust & Savings Bank v. Sanders, 826 F.2d 615 (7th Cir. 1987), drew a distinction between provisions expressly declared to be conditions precedent to SBA's obligation, such as the fee provision, and those which are not so declared. If a lender violates a provision in the latter category, the issue becomes "whether the violation was a material breach of the agreement, or rather whether [the lender] substantially complied with the agreement." Id. at 616. The lender's violation in the cited case, making "side loans" to a borrower, was found not to constitute a material breach and therefore did not justify repudiation of SBA's guarantee. By way of contrast, a lender who violates a provision in the

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"condition precedent" category cannot enforce the guarantee, and you never get to the material breach vs. substantial compliance analysis. See, e.g., First Nat'l Bank of Louisa, Kentucky v. United States, 6 Cl. Ct. 241 (1984).

(2) Notice of default

Another type of provision an agency may include in its program regulations is a requirement that the lender notify the agency in writing within a specified time period after a default occurs. SBA's regulations included such a requirement for many years. See 13 C.F.R. § 122.10(a) (1980). The provision was dropped in a 1985 revision of the regulations. Under current regulations, SBA's obligation under a guarantee is extinguished if the lender fails to demand purchase of the unpaid guaranteed portion within one year after maturity of the note. 13 C.F.R. § 120.202-5(e) (1991).

Pre-1985 decisions on the notice requirement are no longer applicable to SBA under the current regulations. Nevertheless, we briefly note a few of them because they illustrate the scope of an agency's authority to implement a guarantee program by regulation and may have relevance by analogy to similar requirements in other programs. Since the requirement itself is a creature of agency regulations, the agency has discretion to determine the consequences of noncompliance, ranging from an interest penalty (B-181432, September 4, 1979) to termination of the guarantee commitment (B-201388, September 23, 1981). The agency may also make the consequences contingent upon the extent to which noncompliance prejudices the interests of the government. See B-187945, March 22, 1977. While the basic requirement may not be waived except to the extent permissible under the regulations (see B-181432, February 19, 1976), the particular form of notice, a matter of procedure, is subject to waiver. B-188741, January 25, 1978 (oral notice accepted and acknowledged by agency held to be substantial compliance). See also B-181432-O.M., February 19, 1976 (agency may waive requirement in guarantee agreement that lender provide it with a copy of the executed note and settlement sheet).[19]

[19]For a detailed discussion of waiver of agency regulations in the context of Commodity Credit Corporation export assistance guarantees, see B-208610, September 1, 1983.

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D. Rights and Obligations of Government Upon Default

1. Nature of the Government's Obligation

When a government agency guarantees a loan, it is promising to indemnify someone in case of default. The "someone" includes both the lending institution that originated the loan and subsequent purchasers of the guaranteed portion of the loan. The default results from the borrower's failure to make payment when due or other breach of a material covenant of the loan. In the simple situation, a borrower borrows money from a lender. The government guarantees the loan, with the commitments of the lender and the government usually reduced to writing in the form of a guarantee agreement. If the borrower defaults on his or her payments, the lender looks to the government to pay on the guarantee.

In some instances, Congress has explicitly provided in the program legislation that the guarantee will be backed by the "full faith and credit" of the United States. Examples are 12 U.S.C. § 635k (guarantees and insurance issued by the Export-Import Bank), 15 U.S.C. § 683(c) (Small Business Investment Act of 1958), and 20 U.S.C. § 1075(b)(4) (Robert T. Stafford Student Loan Program).[20] Language of this type has been held to be "the highest assurance the Government can give, its plighted faith." Perry v. United States, 294 U.S. 330, 351 (1935).

There is a long line of opinions of the Attorney General addressing the effect of statutory language pledging the "faith" or "credit" of the United States, or the absence of such language. While the opinions are not limited to loan guarantee commitments, almost all of the cases arose under loan guarantee programs. This is understandable because (1) lenders are being asked to extend credit to a somewhat riskier universe of borrowers which they most likely would not accommodate without the guarantee; and (2) at least prior to the Federal Credit

[20]This and similar language has, and is intended to have, connotations of constitutional significance, although the words "full faith and credit" appear in the Constitution only once, in the requirement that each state recognize the laws, records, and judicial proceedings of other states (Art. IV, sec. 1). In addition, Art. I, sec. 8, cl. 2 empowers the Congress to borrow money "on the credit of the United States."

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Reform Act, the government's commitment was not backed by enacted budget authority. To encourage lender participation in a variety of programs, the Attorney General was asked, in effect, "Does the government really mean it?"

Perhaps the leading case is 41 Op. Att'y Gen. 363 (1958), dealing with ship mortgage and loan insurance under the Merchant Marine Act of 1936. The opinion makes several important points. First, what does the language mean? It means that the government's obligation is to be considered on the same footing as the interest-bearing obligations of the United States such as Treasury bills, notes, and bonds. Id. at 366 (citing 41 Op. Att'y Gen. 138 (1953)).

Second and more important, what is the language's practical significance? None, answered the Attorney General. Although recognizing that Congress can establish such distinctions, the Attorney General stated that, in the absence of such congressional action, there is no "order of solemnity of valid general obligations of the United States," nor does an obligation with the statutory faith and/or credit language have any legal priority over a valid general obligation of the United States without the language. 41 Op. Att'y Gen. at 369.

Finally, the Attorney General addressed the lack of advance budget authority:

> "If . . . the existence of an appropriation is not a condition of or limitation on the authority of an officer to contract on behalf of the United States, the need for appropriations to meet an obligation incurred under the contract does not affect the existence or validity of the obligation."

Id. at 370. The following year, the Attorney General made the same points with respect to Interstate Commerce Commission loan guarantees to rail carriers. 41 Op. Att'y Gen. 403 (1959). After emphasizing that the validity of the guarantee "is not affected by the absence from the act of any language expressly pledging the faith or credit of the United States," the opinion states that "It is enough to create an obligation of the United States if an agency or officer is

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validly authorized to incur such an obligation on its behalf and validly exercises that power." Id. at 405.[21]

Thus, reading all of the opinions together, we may state that a loan guarantee is a valid obligation of the United States the same as any other valid obligation, regardless of the presence or absence of full faith and credit language and regardless of the presence or absence of advance budget authority, provided (1) the program statute is constitutional; (2) Congress has not disclaimed liability at the time or before the commitment is made; (3) the guarantee is made by a federal agency or official with the legal authority to do so; and (4) the guarantee complies with applicable statutory and regulatory requirements.

In an opinion concerning guarantees issued by the former Federal Savings and Loan Insurance Corporation incident to its resolution of failed or failing savings and loan institutions, the Comptroller General expressly adopted the criteria and analysis of the Attorney General opinions. 68 Comp. Gen. 14 (1988).

2. Scope of the Government's Guarantee

As noted earlier, a loan guarantee statute will typically specify the permissible purpose(s) of the loans to be guaranteed, establish eligibility requirements, and give the administering agency considerable discretion to determine the terms and conditions of the guarantee. Subject to the terms of the program legislation, there is also an element of discretion in determining the permissible scope of a guarantee, that is, the types and degree of risk to which the agency may expose itself. This section presents a few issues GAO has considered regarding the limits of that discretion.

As with any other payment situation, the government is not expected to close its eyes to indications of fraud or misrepresentation. For example, an agency should not make payment to a lender where it has knowledge of the possibility of fraud, negligence, or misrepresentation on the part of the lender. Making payment in the

[21]Other opinions in this family are 42 Op. Att'y Gen. 327 (1966); 42 Op. Att'y Gen. 323 (1966); 42 Op. Att'y Gen. 21 (1961); 41 Op. Att'y Gen. 424 (1959); 6 Op. Off. Legal Counsel 262 (1982). Since the opinions all said basically the same thing and seemed to arise under every program in sight, the Attorney General stopped issuing formal opinions on routine full faith and credit questions in this context in 1973. 6 Op. Off. Legal Counsel 262, 262 n.2.

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face of such knowledge exposes the certifying officer to potential liability. 51 Comp. Gen. 474 (1972); B-174861, February 23, 1972. In these two cases, however, GAO advised that the Small Business Administration could, upon default of the borrower, purchase the guaranteed portion of the loan from an innocent holder who had purchased it in the secondary market and who had no knowledge of the possible misconduct by the originating lender. Payment to the innocent holder in these circumstances would not waive any of SBA's rights against the original lender, and, as a practical matter, would avoid a result adverse to the holder that could seriously jeopardize the secondary market. Thus, paying the innocent holder is an acceptable level of risk whereas paying the suspected wrongdoer is not.

It follows that there is no objection to honoring the claim of an innocent lender who is the victim of fraud by the borrower. B-167329, October 6, 1969.

Similarly, GAO held in 17 Comp. Gen. 604 (1938) that the Federal Housing Administration was not liable to reimburse a lender bank for a loss sustained as a result of a payment made, on the basis of a forged authorization, to an individual other than a bona fide borrower. This situation was distinguished from a case where a lender bank, in the exercise of due care, suffered a loss as a result of a forged note. A-94717-O.M., August 12, 1938. The bank in 17 Comp. Gen. 604 already possessed a validly signed note but suffered the loss by accepting a forged authorization for payment. Comparison of the authorization with the note would have disclosed the forgery.

A 1974 decision expanded somewhat on 51 Comp. Gen. 474. GAO determined in B-140673, December 3, 1974, that the SBA has sufficiently broad statutory authority to repurchase the guaranteed portion of a loan from an innocent secondary-market holder where the borrower is not in default but the primary lender negligently or unlawfully withholds payments. (Under the arrangement in question, the primary lender was to continue servicing the loan and remit payments, minus a servicing fee, to the holder.) This decision clearly enlarged the scope of SBA's guarantee since the "triggering event" could be something other than a default by the borrower in repaying the loan. However, the holding in that case was for the relatively limited purpose of allowing SBA to avoid the security registration requirements of the Securities Act of 1933. The Securities and Exchange Commission had determined that these requirements would

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settled." Id. at 397. See also B-239134, April 22, 1991 (non-decision letter) (conviction on only a portion of the loss).

The rules are the same for acquittal (or reversal of a conviction) by a military court-martial. Serrano v. United States, 612 F.2d 525 (Ct. Cl. 1979) (acquittal held not to bar agency from imposing civil liability and withholding pay of accountable officer).

It follows that an accountable officer's civil liability will be unaffected by the fact that a grand jury has refused to return an indictment. B-186922, April 8, 1977.

b. Order of Restitution

A court may order a defendant to make monetary restitution to the victim, either as part of the sentence (18 U.S.C. § 3556) or as a condition of probation (18 U.S.C. § 3563(b)(3)). In either case, the relevant terms and procedures are governed by 18 U.S.C. §§ 3663 and 3664. Restitution may be ordered in a lump sum or in installments. 18 U.S.C. § 3663(f). These are general criminal statutes, and would apply fully where the defendant is an accountable officer and the United States is the victim as well as the prosecutor.

The statutory scheme clearly recognizes the possibility of subsequent civil proceedings by the United States as victim against the accountable officer. Any amounts paid to a victim under a restitution order must be set off against amounts recovered in a subsequent civil action. 18 U.S.C. § 3663(e)(2). In such an action, the previously convicted defendant cannot deny the "essential allegations" of the offense. 18 U.S.C. § 3664(e).

Where restitution is ordered in full, payable in installments, it has been held that the victim may nevertheless obtain a civil judgment for the unpaid balance, even though there has been no default in the installment payments. Teachers Insurance and Annuity Association v. Green, 636 F. Supp. 415 (S.D.N.Y. 1986). "Future payments that do not fully compensate a victim in present value terms cannot be a bar to a civil judgment." Id. at 418. See also B-128437-O.M., August 3, 1956.

Where restitution is ordered in an amount less than the full amount of the loss, civil liability for the balance would remain, subject to the statutory setoff requirement. See 64 Comp. Gen. 303 (1985), reaching this result under a prior version of the legislation. The

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apply to SBA-guaranteed loans that were resold in the secondary market, unless SBA's guarantee was absolute and fully protected the purchaser of the guaranteed portion in all circumstances, including instances where the lender did not forward all payments received from the borrower.

A few years later, B-181432, August 11, 1978, explored what are perhaps the outer limits of the "risk discretion" recognized in B-140673. SBA proposed to contract with a private entity to serve as the centralized fiscal agent in the secondary market for SBA guaranteed loans. The fiscal agent would have responsibility for receiving payments from borrowers, remitting these payments to the holders, and certifying the amount of the outstanding balance each time a guaranteed loan was transferred. SBA further proposed to unconditionally guarantee all such actions and representations of the fiscal agent to the holder of the guaranteed portion of a loan. GAO agreed that SBA could contract with a fiscal agent and, consistent with B-140673, guarantee a holder against the agent's failure to properly forward the borrower's loan payments. However, to unconditionally guarantee holders against certification errors by the fiscal agent would significantly enlarge SBA's existing guarantee responsibility, would subject SBA to substantially new risks, and would therefore require additional legislative authority. The increased risk would include new types of events that could trigger SBA's obligation to purchase a guaranteed loan, as well as the maximum amount of SBA's liability (should the fiscal agent erroneously certify the outstanding balance of a loan to be larger than it actually was).

3. Amount of Government's Liability

A program statute may or may not provide guidance on determining the amount the government is obligated to pay under a guarantee or the manner in which a loss is to be computed. If it does not, the agency's discretion again comes into play. As long as they are consistent with whatever statutory guidance does exist, the agency's regulations will generally be controlling.

For example, the computation of claims under Title I of the National Housing Act is prescribed by regulation. See 24 C.F.R. § 201.55 (1991). In very simplified form, the claim is a specified percentage of the sum of several elements: the unpaid amount of the loan (subject to certain reductions), plus accrued interest, plus uncollected court costs, plus attorney's fees actually paid, plus certain recording

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expenses. Claims by lenders using unauthorized computations have been disallowed. E.g., B-133924, December 4, 1957.

In another case involving the Title I loan program, a lender claimed an amount representing partial reimbursement of attorney's fees incurred in collecting on a defaulted note. Although the borrower's obligation on the note was discharged and the note did not contain a stipulation for attorney's fees in the event of default (which would have been ineffective under state law), payment of the claim was proper since it was specifically provided for in the regulations. B-163029, February 16, 1968.

Validly issued program regulations are controlling even though applying them in a particular case may produce an anomalous result to the lender's advantage, at least where the lender has fully complied. For example, regulations governing defaulted Title I mobile home loans provide that reimbursement is computed by deducting from the unpaid amount of the loan either the actual sales price upon repossession or the appraised value of the mobile home, whichever is greater. GAO has found this formula to be within HUD's statutory authority. 71 Comp. Gen. ___ (B-245138, July 7, 1992). At one time, the regulations also prohibited the filing of a claim until after default, repossession, and sale of the mobile home. These regulations occasionally produced a situation in which a particular model could not be found in current rating publications (such as the so-called "blue book") and the mobile home was no longer available for appraisal by HUD because, in compliance with the regulations, it had already been sold. Since the impossibility of appraisal was due to the regulations and was through no fault of the lender, the Comptroller General held that the actual sales price could be used in computing the reimbursement, as long as it was administratively determined to be reasonable. 55 Comp. Gen. 151 (1975); B-184016, September 16, 1975. The solution, of course, was to amend the regulations.

Several early decisions involved the language in 12 U.S.C. § 1703(a) which authorizes HUD to insure lending institutions against "losses which they may sustain" in making Title I home improvement loans or other advances of credit. If the loan does not either provide for the automatic acceleration of maturity upon default or give the lender the option to accelerate which the lender in fact exercises, the government cannot pay the lender the full unpaid balance of an unmatured loan because payments not yet due do not represent a loss

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actually sustained by the lending institution. A-74701, May 22, 1936. While this result was consistent with the statutory language, it was not practical from an administrative standpoint. It meant that HUD was limited to paying the lender the monthly installments as they became due, with what was termed "a corresponding annoyance and dissatisfaction to the insured institution with the program." Two later decisions effectively modified A-74701 and established that, if there is no acceleration provision (an event which would be unlikely today), or if exercising an acceleration option would be undesirable because of state law, HUD can nevertheless reimburse a lending institution for the entire unpaid balance of the loan if it is clear that the entire unpaid balance will be a claim of the lending institution against the government and if the lender assigns the note or other evidence of indebtedness to the government. 16 Comp. Gen. 723 (1937); 16 Comp. Gen. 336 (1936).

4. Liability of the Borrower

When the government guarantees a loan and the borrower defaults, the lender is not required to make special efforts toward collection. Rather, the lender may fall back on the government's guarantee and leave the entire responsibility for collection to the government. See, e.g., 16 Comp. Gen. 336 (1936); B-134628, January 15, 1958. Naturally, it is invariably to the lender's advantage to do just that. Payment by the government, however, does not mean that the borrower is off the hook. Unless the program legislation provides otherwise, the government becomes subrogated to the rights of the lender, and the borrower is indebted to the government for the amount it has paid out. The government is not required to collect more than the amount it has actually paid out to the lender, plus interest and collection costs to the extent authorized. See 15 Comp. Gen. 256 (1935). A variety of issues relating to borrower liability can be illustrated by an examination of the Veterans' Home Loan Guarantee Program.

a. Veterans' Home Loan Guarantee Program

Title III of the Servicemen's Readjustment Act of 1944, as amended and codified, 38 U.S.C. §§ 3701–3751 (Supp. III 1991),[22] authorizes the Department of Veterans Affairs (the former Veterans Administration) to guarantee loans to enable veterans to purchase or

[22]Section numbers for 38 U.S.C. ch. 37 were redesignated by Pub. L. No. 102-83, § 5, 105 Stat. 378, 406 (1991).

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construct homes and for other specified purposes. This is the well-known "G.I. loan." The guarantee is an entitlement in the sense that a loan meeting the statutory requirements and made for one of the statutory purposes is "automatically guaranteed." Id. § 3710(a). For certain loans closed after January 1, 1990, the liability of the veteran-borrower to the government was considerably restricted by the Veterans Home Loan Indemnity and Restructuring Act of 1989, Pub. L. No. 101-237, Title III, 103 Stat. 2062, 2069 (1989). A description of the "old" rules is nevertheless useful to understand what has and has not been changed, and because loans under the old and new programs will exist side-by-side for many years into the future.[23]

(1) Loans closed prior to 1990

Upon proper payment of a guarantee, the VA acquires both the right of subrogation and an independent right of indemnity against the defaulting veteran. United States v. Shimer, 367 U.S. 374 (1961); Vail v. Derwinski, 946 F.2d 589 (8th Cir. 1991); McKnight v. United States, 259 F.2d 540 (9th Cir. 1958). As the Supreme Court noted in Shimer, a contrary result would convert the guarantee into a grant. 367 U.S. at 387. The right of indemnity is reenforced by the guarantee agreement and by a regulation in effect since the early days of the program which provides that any amount paid out by the VA under a guarantee by reason of default "shall constitute a debt owing to the United States by such veteran." 38 C.F.R. § 36.4323(e) (1991).

In the simple situation, the veteran defaults, the bank forecloses, the VA pays the bank under the guarantee and then proceeds to attempt recovery from the defaulting veteran. E.g., McKnight; B-104273, August 20, 1951.

Sale of the property by the veteran does not automatically exonerate the veteran from liability. Where a veteran who bought a home under a VA-guaranteed loan sells the property to a purchaser who assumes the mortgage and subsequently defaults, the veteran may still be liable to the government for the amount VA is required to pay under the guarantee. B-155317, October 21, 1964; B-131120, July 26, 1957; B-131210, April 9, 1957. This result applies unless the transaction

[23]For a comprehensive discussion of the program, see Ingold, The Department of Veterans' Affairs Home Loan Guaranty Program: Friend or Foe?, 132 Mil. L. Rev. 231 (1991).

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amounts to a novation, that is, unless the mortgagee releases the original mortgagor and extinguishes the old debt. B-108528, December 3, 1952. Breach by the lender of an agreement to notify the veteran (original borrower) if the subsequent purchaser defaults does not affect the veteran's liability to the United States. B-154496, July 9, 1964.

The potential harshness of the result in many of these cases is largely mitigated through statutory release and waiver provisions. When a veteran disposes of residential property securing a guaranteed loan, the veteran may be released at the time of the sale from all further liability to the VA resulting from the loan, including default by the transferee or subsequent purchaser, if (1) the loan is current, (2) the purchaser is obligated by contract to assume the full liability and responsibility of the veteran under the loan, and (3) the purchaser qualifies from a credit standpoint, that is, if the purchaser would qualify for a guarantee if he or she were an eligible veteran. For loan commitments made before March 1, 1988, the veteran must apply to the VA for the release, but issuance of the release is mandatory if the statutory conditions are met. 38 U.S.C. § 3713(a). If the veteran fails to obtain a release at the time of the sale and a default subsequently occurs, the VA may issue the release retroactively upon determining that it would have issued the release had it been timely requested. Id. § 3713(b). For loan commitments on or after March 1, 1988, the release is issued by the holder of the loan upon receipt of written notification by the veteran, subject to the same conditions and subject to the veteran's right to appeal an adverse determination to the VA. Sale of the property without notifying the holder may result in acceleration of the loan. Id. § 3714.

In addition, the VA is required to waive a veteran's indebtedness upon determining that collection would be against equity and good conscience, and that there is no indication of fraud, misrepresentation, or bad faith on the part of any interested person. Waiver must be requested within one year from receipt of the notification of indebtedness. 38 U.S.C. § 5302(b) and (c), as amended by Pub. L. No. 102-54, § 5, 105 Stat. 267, 268 (1991).[24] This is a "mandatory" waiver statute, imposing upon the VA a duty to actually exercise its discretion once waiver has been requested. See

[24]Section numbers for 38 U.S.C. ch. 53 were redesignated by Pub. L. No. 102-40, § 402(b), 105 Stat. 187, 238 (1991).

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Beauchesne v. Nimmo, 562 F. Supp. 250 (D. Conn. 1983) (discussing mandatory nature of 38 U.S.C. § 5302(a) dealing with waiver of benefit overpayments).

As with many waiver statutes, 38 U.S.C. § 5302 eliminates the potential liability of certifying and disbursing officers with respect to any amounts waived. "Certifying officer" in this context means the authorized certifying officer of the VA who certified the payment in question, and has no reference to any official of any private institution involved in the transaction. Colorado v. Veterans Administration, 430 F. Supp. 551, 561 (D. Colo. 1977), aff'd, 602 F.2d 926 (10th Cir. 1979), cert. denied, 444 U.S. 1014.

Adverse waiver determinations may be appealed to the Board of Veterans Appeals established by 38 U.S.C. § 7101. 38 C.F.R. § 19.2. If waiver is granted, amounts previously paid may be refunded. Id. § 1.967. GAO reviewed these regulations when they were first issued and agreed that they were within the VA's authority. B-158337, March 11, 1966.

Absent either release or waiver, the VA may pursue recovery against the veteran. See, e.g., Davis v. National Homes Acceptance Corp., 523 F. Supp. 477 (N.D. Ala. 1981); B-188814, March 8, 1978; B-172672, June 22, 1971. In B-188814, for example, the veteran had failed to obtain a release, would not have been eligible for it anyway, and VA refused to waive the indebtedness. Therefore, the veteran was held liable even though the purchaser who subsequently defaulted had assured him that he would no longer be liable to VA.

Most of the cases cited thus far concern the liability of the original borrower where a subsequent purchaser defaults. The purchaser of property for which VA has guaranteed a loan, whether or not the purchaser is a veteran, may also become liable to VA for amounts VA is required to pay out upon default. For example, in B-141888, July 21, 1960, a veteran purchased a home, obtained a VA guarantee, and later sold the home to a non-veteran who assumed the mortgage. The non-veteran purchaser defaulted. The lender foreclosed and obtained a deficiency judgment against both the veteran and the non-veteran, which VA paid. VA waived the veteran's indebtedness, but was still entitled to collect from the defaulting purchaser. See also B-155932, February 23, 1971; B-155932, October 13, 1970 (same case).

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One of the most contested issues under the program has been the availability of state law as a defense to a VA claim. For example, it is not uncommon for states to prohibit, or impose various restrictions on, lenders' obtaining deficiency judgments against defaulting purchasers after a foreclosure sale. Since VA's rights under subrogation are limited to the rights of lenders, these statutes would limit VA's right to obtain deficiency judgments under a subrogation theory. However, VA's regulations have been held to "create a uniform system" for administering the guarantee program, a system which displaces state law. United States v. Shimer, 367 U.S. at 377. These regulations, as noted earlier, include a provision giving the VA an independent right of indemnity. Thus, to avoid the possibility of being hampered by state law, VA has generally proceeded under its independent right of indemnity rather than under a subrogation theory. E.g., B-126500, February 3, 1956; B-124724, December 21, 1955.

In one group of cases, the right of indemnity was held to prevail over state laws which flatly prohibited VA from obtaining deficiency judgments through subrogation. Jones v. Turnage, 699 F. Supp. 795 (N.D. Cal. 1988), aff'd mem., 914 F.2d 1496 (9th Cir. 1990); cert. denied, 111 S. Ct. 1309; United States v. Rossi, 342 F.2d 505 (9th Cir. 1965); B-174343, November 17, 1971; B-143844, November 15, 1960; B-124724, October 3, 1955. Other cases applied the same approach to dismiss other aspects of state deficiency laws. E.g., B-173007, June 29, 1971; B-162193, September 1, 1967; B-122929, June 24, 1955.

Several more recent cases have dealt with state statutes that do not flatly prohibit VA from obtaining a deficiency judgment through subrogation, and have reached differing results. In Whitehead v. Derwinski, 904 F.2d 1362 (9th Cir. 1990), a Washington state statute would have allowed the lender to obtain a deficiency judgment if judicial foreclosure procedures were used. However, VA had instructed the lender to use a faster and less expensive nonjudicial foreclosure procedure. The statute authorizing the nonjudicial procedure prohibited obtaining a deficiency judgment against the borrower. Id. at 1363. The court acknowledged that cases like McKnight, Jones (which the same court affirmed 3 months after it decided Whitehead), and Rossi correctly held that VA has an independent right of indemnity when state law flatly prohibits deficiency judgments. Id. at 1368–69.

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However, the court distinguished the Washington statute because it did not flatly prohibit deficiency judgments; they were prohibited only when the nonjudicial foreclosure procedures were used. The court quoted language from Shimer to the effect that the VA regulatory scheme did not displace all state law but only inconsistent state law. Id. at 1367. The court then held that since the Washington statute allowed VA a means to obtain a deficiency judgment, it was not inconsistent with the regulatory scheme and therefore not displaced. Id. at 1369. Thus, according to the court, the state law in question could prohibit VA from seeking a deficiency judgment through its indemnity rights, and did so in this case because VA's inability to obtain a deficiency judgment resulted from its own choice of remedy under that state law. A case following Whitehead is Carter v. Derwinski, 758 F. Supp. 603 (D. Idaho 1991).

The analysis in Whitehead was criticized in Vail v. Derwinski, 946 F.2d 589 (8th Cir. 1991), involving similar facts under a similar Minnesota statute. Disagreeing with Whitehead, the court held that VA did not forfeit its independent right of indemnity merely because it declined to exercise a means to obtain a deficiency judgment through subrogation. The VA's right of indemnity, said the court, derives from its direct relationship with the borrower of a guaranteed loan. Id. at 592. As such, it is not defeated by a state statute which limits the lender's ability to pursue the borrower. A case that also disagrees with some of the reasoning in Whitehead, but which reached the same result, is United States v. Davis, 756 F. Supp. 1162 (E.D. Wis. 1991).

The defense of minority has also been raised on occasion. State law generally provides that a contract entered into by a minor is voidable at the minor's option. Several states have statutes which expressly make the defense of infancy inapplicable to contracts under the Servicemen's Readjustment Act, and the few cases GAO has considered have involved statutes of this type. See B-126500, February 3, 1956; B-124750, October 3, 1955; B-105429, December 11, 1951. In addition, the United States has sovereign immunity from defenses arising under state statutes of limitations unless expressly waived. United States v. Summerlin, 310 U.S. 414 (1940) (FHA claim under National Housing Act); B-134523, March 19, 1958 (Summerlin applied to VA claim).

Another provision of the program legislation makes the "financial transactions" of the VA "incident to, or arising out of" the guarantee

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program "final and conclusive upon all officers of the Government." 38 U.S.C. § 3720(c). Thus, GAO will not review the amount of indebtedness determined by the VA. B-105655, October 10, 1951; B-105551, September 25, 1951. Similarly, apart from advising persons that the options exist, GAO will not review the VA's exercise of its waiver and release authorities. B-216270, September 25, 1984; B-108528, October 6, 1952.

(2) Loans closed after January 1, 1990

Under 38 U.S.C. § 3729, the VA will charge the veteran a loan fee based on a percentage of the loan amount. The fee may be included in the loan and paid from its proceeds. Payment of the loan fee is a prerequisite to the guarantee. Disabled veterans receiving compensation or their surviving spouses are exempt. Subsequent transferees assuming a loan are also charged a loan fee.

A veteran who pays the loan fee or is exempt from paying it—

> "shall have no liability to the Secretary with respect to the loan for any loss resulting from any default of such individual except in the case of fraud, misrepresentation, or bad faith by such individual in obtaining the loan or in connection with the loan default."

Id. § 3703(e)(1). This provision was added by the Veterans Home Loan Indemnity and Restructuring Act of 1989. An explanatory statement on the final House-Senate compromise (there was no conference report) emphasizes that "bad faith" is intended to include abandonment of a mortgage by one with the financial ability to make the payments. 135 Cong. Rec. H 9113 (daily ed. November 20, 1989). The limited liability of 38 U.S.C. § 3703(e)(1) does not apply to persons assuming a loan, or to veterans who receive mobile home loans. Id. § 3703(e)(2). Apart from the limited liability of 38 U.S.C. § 3703(e), the VA's right of subrogation is preserved. Id. § 3732(a)(1).

b. Debt Collection Procedures

Debt collection is governed by the Federal Claims Collection Act of 1966, the Debt Collection Act of 1982, and the Federal Claims Collection Standards. Authorities available to federal agencies in varying degrees include assessment of interest and penalties, offset, collection in installments, compromise, use of commercial collection agencies, and, if none of this works, referral to the Department of

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Justice for suit. These authorities are all explored in detail in Chapter 13 and, as a general proposition, are the same for a debt arising from a loan guarantee as for any other debt. We note the topic here to emphasize one point—the governmentwide authorities do not apply to the extent an agency has its own debt collection authority, either agency-specific or program-specific. This may be in the form of positive authority or restrictions. We turn again to the Department of Veterans Affairs for several illustrations.

The VA has the authority to compromise any claim arising from its guarantee or insurance programs, independent of the governmentwide compromise authority under the Federal Claims Collection Act. 38 U.S.C. §§ 3720(a)(3), (a)(4). Exercise of this authority is entirely up to the VA. See B-153726, May 4, 1964. See also 71 Comp. Gen. ___ (B-245138, July 7, 1992) (HUD); B-228857, February 22, 1988 (SBA). The HUD decision, B-245138, upheld HUD's policy of charging interest at the lower of the note rate or the Treasury "current value of funds" rate as an authorized exercise of HUD's compromise authority.

Subject to its own implementing regulations and procedures specified in the statute, the VA may offset debts arising from veterans' benefit programs against future payments under any law administered by the VA. 38 U.S.C. § 5314. However, offset against a veteran or his or her surviving spouse by any other agency to collect a debt owed to the VA under a guarantee program is prohibited except with the written consent of the debtor or under a judicial determination. Id. § 3726. Under this legislation, for example, the Defense Department may not deduct the amount of indebtedness to VA from the pay of active duty or retired military personnel absent either consent or a court determination. (The statutory definition of veteran includes certain active duty personnel.) B-167880, January 28, 1970. This protection against setoff applies only where the veteran (debtor) has incurred the debt through use of his or her VA loan entitlement. Thus, setoff is not prohibited where a veteran, upon purchasing a home, assumes a VA loan in the ordinary course of the real estate transaction without involving his or her own loan entitlement. B-167880, December 2, 1969.

The VA also has independent statutory authority to assess interest and reasonable administrative costs on debts arising from its benefit programs, including debts arising from guarantee programs to the

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decision further suggests that, if the record indicates that the court thought it was ordering restitution in full, it might be desirable to seek amendment of the restitution order. Obviously, the fact of conviction precludes any consideration of administrative relief. Id. at 304.

The preceding paragraphs are presented from the perspective of restitution by the accountable officer. Similar principles would apply with respect to restitution by a responsible party other than the accountable officer. See, e.g., B-193673, May 25, 1979, modified on other grounds by B-201673 et al., September 23, 1982 (partial restitution by thief reduces amount of accountable officer's liability).

C. Physical Loss or Deficiency

1. Statutory Provisions

The two principal statutes authorizing administrative relief from liability for the physical loss or deficiency of public funds are 31 U.S.C. §§ 3527(a) and 3527(b). Subsection (a) applies to the civilian agencies and to accountable officers of the armed forces other than disbursing officers. Subsection (b) applies to disbursing officers of the armed forces.

a. Civilian Agencies

The physical loss or deficiency relief statute applicable to accountable officers generally, 31 U.S.C. § 3527(a), was originally enacted in 1947 (61 Stat. 720). Its justification, similar to that for all relief statutes, was summarized by the Senate Committee on Expenditures in the Executive Departments as follows:

> "The justification . . . is that, at the present time, relief of the kind with which this bill is concerned is required to be granted either through passage of a special relief bill by the Congress or by the filing of suit by the responsible person in the United States Court of Claims, the latter to be done at the personal expense of the responsible person. Both methods are costly and time consuming."

S. Rep. No. 379, 80th Cong., 1st Sess., reprinted in 1947 U.S. Code Cong. Service 1546.

Before the actual relief mechanism is triggered, two threshold issues must be satisfied. First, the loss must be a physical loss or deficiency

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extent not precluded by the terms of the loan instrument. 38 U.S.C. § 5315. For debts within the scope of the statute, 38 U.S.C. § 5315, rather than 31 U.S.C. § 3717 (Federal Claims Collection Act), is the controlling provision. 66 Comp. Gen. 512 (1987).

If reasonable administrative collection efforts fail, the VA may use its own attorneys to sue the debtor, subject to the direction and supervision of the Attorney General. 38 U.S.C. § 5316.

The VA legislation cited above deals with specific debt collection tools. An example of more general authority is 7 U.S.C. § 1981(b)(4) (Supp. III 1991), which authorizes the Farmers Home Administration to "compromise, adjust, reduce, or charge-off debts or claims," and, within certain limits, to release debtors, other than Housing Act debtors, "from personal liability with or without payment of any consideration at the time of the compromise, adjustment, reduction, or charge-off." Under this law, for example, the Farmers Home Administration is authorized to terminate the accrual of interest on the guaranteed portion of defaulted loans. 67 Comp. Gen. 471 (1988) (noting, however, that the agency had restricted its statutory discretion by its own regulations).

5. Collateral Protection

In administering a loan guarantee program, it may become desirable for an agency to make expenditures other than merely paying out on the guarantee. From a program or even economical standpoint, it may be desirable, for example, to make expenditures to protect and preserve the government's interest in the collateral, such as custodial care, insurance costs, or the purchase of prior liens. For purposes of this discussion, we use the term "collateral protection" to cover two types of expenditure—preservation of the collateral itself and protection of the government's interest in the collateral.

Whether or not such expenditures are proper is essentially a question of "purpose availability." The first step is to analyze the terms and intent of the agency's program authority to determine whether the agency's funds are available for the contemplated expenditure either expressly or by necessary implication. If this does not provide the answer, the next step is to apply the "necessary expense" doctrine.

An example of specific authority is 38 U.S.C. § 3727, which authorizes the Department of Veterans Affairs to make expenditures to correct

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structural defects in certain homes encumbered by a VA-guaranteed mortgage. The Department of Housing and Urban Development has similar authority to use funds available under Title I of the National Housing Act to correct structural defects in FHA-insured housing. 12 U.S.C. § 1735b; B-114860-O.M., January 15, 1974. An example of somewhat less specific authority is another provision of the Housing Act, 12 U.S.C. § 1713(k), which authorizes HUD "to take such action and advance such sums as may be necessary to preserve or protect the lien of such mortgage." In 54 Comp. Gen. 1061 (1975), GAO agreed that this provision authorizes HUD to advance money from its insurance fund to make repairs to multifamily projects covered by insured mortgages assigned to HUD upon default, until either the default is cured or HUD acquires title to the property.

Absent specific authority, collateral protection expenditures may still be permissible under a "necessary expense" theory. As a general proposition, the authority to require collateral implies the authority to make reasonable expenditures to care for and preserve the collateral where administratively determined to be necessary. 54 Comp. Gen. 1093 (1975).

The limits of the necessary expense approach are illustrated by B-170971, January 22, 1976, a case involving the now-defunct New Community Development Program. The Department of Housing and Urban Development questioned whether it could use the revolving fund established by the Urban Growth and New Community Development Act of 1970 to make two types of collateral protection expenditures: (1) expenditures to repair, maintain, and operate the security and (2) payments to senior lienholders. The expenditures were intended to advance program objectives by preventing deterioration of the security pending possible acquisition by HUD, or perhaps in some cases enable a developer to regain financial health and successfully continue with the project.

The Comptroller General reviewed the program legislation and legislative history and concluded that the proposed expenditures would constitute a new and major type of financial assistance entirely beyond the intended scope of the statute, and were not authorized except in cases where HUD had made a bona fide determination to acquire the security. A later decision, B-170971, July 9, 1976, discussed HUD's specific authority under the program legislation to

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make collateral protection expenditures after it had acquired the security.

Where an agency acquires property through a loan or loan guarantee program it administers, it may not transfer the management and disposition of that property to another federal agency without specific statutory authority, nor may it effect such a transfer under the Economy Act, 31 U.S.C. § 1535. B-156010-O.M., March 16, 1965 (concluding that VA could not transfer the management and disposition of acquired property to HUD without specific authority).

A similar type of payment is one designed to protect the government's interest in the transaction as opposed to maintaining the particular piece of property. Again, the question is one of purpose availability in light of the agency's statutory authority. Thus, where FHA had acquired a second mortgage on real property through payment of a loss to an insured financial institution under Title I of the National Housing Act, it could use Title I funds to redeem the property to protect its junior lien, under a right of redemption conferred by state law, if it determined that redemption was in the best interests of the government and necessary to carry out the provisions of Title I. 36 Comp. Gen. 697 (1957). See also 34 Comp. Gen. 47 (1954).

Collateral protection may take forms other than direct expenditures. For example, the Small Business Administration could subordinate a senior lien to enable a borrower to obtain necessary surety bonds upon an administrative determination that the action would be consistent with the statutory purposes and would improve the prospects for repayment of the loan. 42 Comp. Gen. 451 (1963). (Under the governing legislation, SBA had the discretion not to require security at all on loans sufficiently sound as to reasonably assure repayment.) Another 1963 case held that a statute authorizing the Maritime Administration to take necessary steps to protect or preserve collateral securing indebtedness authorized it to agree to reschedule payments under an insured ship mortgage to avert impending default. 43 Comp. Gen. 98 (1963).

In 63 Comp. Gen. 465 (1984), a borrower defaulted on a loan guaranteed by the SBA. SBA purchased the guaranteed portion of the loan from the lending bank and proceeded to place the loan in liquidation. However, a prior lienholder scheduled a foreclosure sale. SBA was unable to get a Treasury check in time to submit a protective

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bid, and asked the lending bank to advance funds to purchase the property at the foreclosure sale, promising to reimburse the bank with interest. Obviously, a government agency does not normally have the authority to borrow money from a commercial bank to carry out its programs. Under the particular circumstances involved, however, GAO found that the transaction, including the commitment to pay interest, could be justified under SBA's broad authority[25] in 15 U.S.C. § 634(b)(7) to "take any and all actions" deemed necessary in liquidating or otherwise dealing with authorized loans or guarantees. The decision emphasized that it was nothing more than an interpretation of SBA's legal authority under the "unique circumstances of this case," and should not be regarded as establishing a "broad legal precedent." Id. at 469.

[25]The Supreme Court has noted in another context that Congress has given the SBA "extraordinarily broad powers" to accomplish the objectives of the Small Business Act. SBA v. McClellan, 364 U.S. 446, 447 (1960).

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and not an improper payment. 31 U.S.C. § 3527(a)(2). Second, the person for whom relief is desired must be an "accountable officer."[10] The legislative history confirms that this includes the general custodial category:

> "There are many agents of the Government who do not disburse but who, nevertheless, are fully responsible for funds . . . entrusted to their charge and, for that reason, the committee bill has been broadened to include that class of personnel."
>
> S. Rep. No. 379, 1947 U.S. Code Cong. Service at 1547.

Once it has been determined that there has been a physical loss or deficiency of "public money, vouchers, checks, securities, or records" for which an accountable officer is liable, the statute authorizes the Comptroller General to grant relief from that liability if the head of the agency involved makes two administrative determinations (31 U.S.C. § 3527(a)(1)), and if the Comptroller General agrees with those determinations (§ 3527(a)(3)).

First, the agency head must determine that the accountable officer was carrying out official duties at the time of the loss, or that the loss was attributable to the act or omission of a subordinate of the accountable officer. Note that this is stated in the disjunctive. The second part, loss attributable to a subordinate, is designed to cover the situation, found in several agencies such as the Internal Revenue Service and the Customs Service, in which the account is in the name of a supervisory official who does not actually handle the funds. In this situation, both persons are accountable, and relief of one does not necessarily mean relief of the other.

Second, the agency head must determine that the loss was not attributable to fault or negligence on the part of the accountable officer. This determination is necessary regardless of which part of the first determination applies. Thus, while lack of fault does not affect the automatic imposition of liability, it does provide the basis for relief.

[10]This statute will not apply to certifying officers since they do not have actual custody of funds. However, a certifying officer could conceivably have other duties or supervisory responsibilities and thus be accountable, and eligible for relief under 31 U.S.C. § 3527(a), in that capacity.

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Generally, the requirement that the accountable officer must have been acting in the discharge of official duties does not present problems. Thus, in the typical case, the central question becomes whether GAO is able to concur with the administrative determination that the loss occurred without fault or negligence on the part of the accountable officer. In reviewing relief cases over the years, GAO has developed a number of standards, the application of which to a given case requires a careful analysis of the particular facts. Many factors may bear on the conclusion in any given case, and the result will be determined by the interrelationship of these factors.

Section 3527(a) applies to accountable officers of "an agency," defined in 31 U.S.C. § 101 as any "department, agency, or instrumentality of the United States Government." Thus, section 3527(a) has been construed as applicable to the judicial branch (B-200108/B-198558, January 23, 1981; B-197021, May 9, 1980; B-191440, May 25, 1979; B-185486, February 5, 1976), and to agencies of the legislative branch (B-192503-O.M., January 8, 1979, denying relief to a GAO employee). Whether it applies to the Senate or House of Representatives is unclear. It has also been construed as applicable to those government corporations which are subject to GAO's account settlement authority. B-88578, August 21, 1951; B-88578-O.M., August 21, 1951.

b. Military Disbursing Officers

The need for physical loss relief authority for military disbursing officers became highlighted during World War I when several ships were sunk with funds and records on board. The first permanent administrative relief statute was enacted in 1919 and applied only to the Navy (41 Stat. 132). The Army received similar legislation in 1944 (58 Stat. 800). The two were combined in 1955 and expanded to cover all of the military departments (69 Stat. 687). The legislation is now codified at 31 U.S.C. § 3527(b). The origins of the 1919 law are described in 7 Comp. Gen. 374, 377–78 (1927); the statutory evolution is detailed in B-202074, July 21, 1983. The statute applies to both civilian and military personnel of the various military departments. B-151156, December 30, 1963.

As with section 3527(a), two threshold issues must be satisfied before the relief mechanism comes into play. First, like section 3527(a), section 3527(b) applies only to physical losses or deficiencies and not to improper payments. 31 U.S.C. § 3527(b)(1)(B); 7 Comp. Gen. 374 (1927); 2 Comp. Gen. 277 (1922); B-202074, July 21, 1983. The

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statute was intended to authorize relief in appropriate cases for losses "such as losses by fire, ship sinkings, thefts or physical losses resulting from enemy action or otherwise." B-75978, June 1, 1948. Thus, a loss in shipment is cognizable under section 3527(b). B-200437, October 21, 1980. However, the making of a travel advance to an employee who terminated his employment without accounting for the advance is not a physical loss but rather "a payment voluntarily made by the disbursing officer in the course of his duties." B-75978, June 1, 1948.

Second—and here the two statutes differ—section 3527(b) applies only to disbursing officers and not to nondisbursing accountable officers. B-194782, August 13, 1979; B-194780, August 8, 1979; B-151156, December 30, 1963; B-144467, December 19, 1960 ("while all disbursing officers are accountable officers, all accountable officers are not disbursing officers"). As each of the cited cases points out, physical loss relief for nondisbursing accountable officers of the military departments must be sought under 31 U.S.C. § 3527(a).

Section 3527(b) is also similar to section 3527(a) in that, once it has been determined that a loss is properly cognizable under the statute, the applicable agency head must determine that (1) the disbursing officer was carrying out official duties at the time of the loss or deficiency (prior versions of the statute, and hence many GAO decisions, use the military term "line of duty status"), and (2) the loss occurred without fault or negligence on the part of the disbursing officer. The first determination, 31 U.S.C. § 3527(b)(1)(A), does not expressly include the "loss attributable to subordinate" clause found in section 3527(a). However, it is applied in the same manner. See B-155149, October 21, 1964; B-151156, December 30, 1963.

The administrative determinations are conclusive on GAO. 31 U.S.C. § 3527(b)(2). Thus, once the determinations are made, the granting of relief is mandatory. Unlike section 3527(a), if the situation is properly cognizable under section 3527(b), GAO has no discretion in the matter. Agency determinations on the threshold issues—what is a physical loss and who is a disbursing officer—are not conclusive. B-151156, December 30, 1963.

Section 3527(b) is not the "exclusive remedy" with respect to physical losses of military disbursing officers. It exists side-by-side

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with section 3527(a). Thus, for losses cognizable under 31 U.S.C. § 3527(b), the disbursing officer (or the applicable Secretary) has an option to proceed under either statute. B-151156, December 30, 1963. Of course, for the most part there would be little to gain by electing to proceed under section 3527(a) if section 3527(b) is also available.

2. Who Can Grant Relief?

a. 31 U.S.C. § 3527(a)

The statute confers the authority to grant relief on the Comptroller General. At one time, every case, no matter how small the amount, involved an exchange of correspondence—a letter from the agency to GAO requesting relief, and a letter from GAO back to the agency granting or denying it. By 1969, after 20 years of experience under the statute, a set of standards had developed, and it became apparent that there was no need for GAO to actually review every case. In that year, GAO inaugurated the practice of setting a dollar amount, initially $150, below which agencies could apply the standards and grant or deny relief accordingly without the need to obtain formal concurrence from GAO.

GAO has raised the amount several times over the years and has used various formats to announce the increase.[11] The current ceiling is $3,000. B-243749, October 22, 1991. The authorization applies to physical losses or deficiencies and, with a few exceptions to be noted later, not to improper payments. 61 Comp. Gen. 646 (1982); 59 Comp. Gen. 113 (1979). As stated in 61 Comp. Gen. at 647:

"For the most part, the law governing the physical loss or deficiency of Government funds is clear, and most cases center around the determination of whether there was any contributing negligence on the part of the accountable officer. Our numerous decisions in this area should provide adequate guidance to agencies in resolving most smaller losses."

The $3,000 limitation applies to "single incidents or the total of similar incidents which occur about the same time and involve the

[11]The $150 authorization was established by B-161457, August 1, 1969 (circular letter). It was raised to $500 in 1974. B-161457, August 14, 1974 (circular letter); 54 Comp. Gen. 112 (1974). A 1983 revision to title 7 of GAO's Policy and Procedures Manual for Guidance of Federal Agencies (7 GAO-PPM § 28.14, TS No. 7-40, July 14, 1983) raised it to $750. Another revision of the Policy and Procedures Manual raised it to $1,000. 7 GAO-PPM § 8.9.C (TS No. 7-42, February 12, 1990).

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same accountable officer." GAO, Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 8.9.C (1990). Thus, two losses arising from the same theft, one under the limit and one over, should be combined for purposes of relief. B-189795, September 23, 1977. In B-193380, September 25, 1979, an imprest fund cashier discovered a $300 shortage while reconciling her cash and subvouchers. A few days later, her supervisor, upon returning from vacation, found an additional $500 missing. Since the losses occurred under very similar circumstances, GAO agreed with the agency that they should be treated together for purposes of seeking relief. Another case, B-187139, October 25, 1978, involved losses of $1,500, $60, and $50. Since there was no indication that the losses were related, the agency was advised to resolve the $60 and $50 losses administratively. (The ceiling was $500 at the time of B-193380 and B-187139.)

Thus, in cases of physical loss or deficiency, it is necessary to request relief from GAO only if the amount involved is $3,000 or more. For below-ceiling losses, GAO's concurrence is, in effect, granted categorically provided the matter is properly cognizable under the statute, the agency makes the required determinations, and the administrative resolution is accomplished in accordance with the standards set forth in the GAO decisions. E.g., B-206817, February 10, 1983; B-204740, November 25, 1981. Each agency should maintain a central control record of its below-ceiling resolutions, should document the basis for its decisions, and should retain that documentation for subsequent internal or external audit or review. 7 GAO-PPM § 8.9.C (1990). Also, agencies should ensure the independence of the official or entity making the relief decisions. B-243749, October 22, 1991.

If an agency inadvertently submits a relief request to GAO for a below-ceiling loss, GAO's policy is simply to return the case with a brief explanation. E.g., B-214086, February 2, 1984. GAO will also provide any further guidance that may appear helpful.

As a practical matter, GAO's authorization for below-ceiling administrative resolution is relevant only where the agency believes relief should be granted. In these cases, the need for an exchange of correspondence is eliminated, and the relief process is quicker, more streamlined, and less costly. If the agency believes relief should not be granted, its refusal to support relief effectively ends the matter

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regardless of the amount. GAO will not review an agency's refusal to grant relief in a below-ceiling case. 59 Comp. Gen. 113, 114 (1979).

b. 31 U.S.C. § 3527(b)

Like 31 U.S.C. § 3527(a), section 3527(b) also specifies the Comptroller General as the relieving authority. However, by virtue of the mandatory nature of section 3527(b), the monetary ceiling concept used in civilian relief cases has much less relevance to military disbursing officer losses.

By circular letter B-198451, February 5, 1981, GAO notified the military departments of a change in procedures under 31 U.S.C. § 3527(b). Since GAO has no discretion with respect to the agency determinations and relief is mandatory as long as the determinations are made, there is no need for GAO to review any of those determinations on a case-by-case basis. Thus, there is no need for the agency to submit a formal request for relief regardless of the amount involved. As long as the case is properly cognizable under 31 U.S.C. § 3527(b) (i.e., it involves a disbursing officer and a physical loss or deficiency), it is sufficient for purposes of compliance with the statute for the agency to make the required determinations and to retain the documentation on file for audit purposes. Of course, should there be a question as to whether a particular case is properly cognizable under the statute, GAO is available to provide guidance.

c. Role of Administrative Determinations

Both of the relief statutes described above require two essentially identical administrative determinations as prerequisites to granting relief. It is the making of those determinations that triggers the ability to grant relief. If the agency cannot in good faith make those determinations, the legal authority to grant administrative relief simply does not exist, regardless of the amount involved and regardless of who is actually granting relief in any given case. GAO will not review an agency's refusal to make the determinations under either statute, and has no authority to "direct" an agency to make them. In this sense, an agency's refusal to make the required determinations is final. The best discussion of this point is found in 59 Comp. Gen. 113 (1979) (case arose under section 3527(a) but point applies equally to both statutes).

While GAO's role under section 3527(a) is somewhat greater than under section 3527(b), that role is still limited to concurring with determinations made by the agency. GAO cannot make those

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determinations for the agency. If they are absent, whatever the reason, relief cannot be granted regardless of the apparent merits of the case. There are numerous decisions to this effect. A few of them are B-217209, December 11, 1984; B-204464, January 19, 1982; and B-197616, March 24, 1980. The determinations are as much required in below-ceiling cases as they are in cases submitted to GAO. 59 Comp. Gen. 113 (1979).

On occasion GAO has been willing to infer a determination that the loss occurred while the accountable officer was carrying out official duties where that determination was not expressly stated but the facts make it clear and there is no question that relief will be granted. E.g., B-244723, October 29, 1991; B-235180, May 11, 1989; B-199020, August 18, 1980; B-195435, September 12, 1979. However, the determination of no contributing fault or negligence will not be inferred but must be expressly stated. It is not sufficient to state that the investigative report did not produce affirmative evidence of fault or negligence. B-167126, August 9, 1976. Nor is it sufficient to state that there is "no evidence of willful misconduct." B-217724, March 25, 1985.

As a practical matter, it will simplify the relief process if the agency's request explicitly states all required determinations. It is best simply to follow the wording of the statute.

Agency determinations required by a relief statute must be made by an agency official authorized to do so. E.g., B-184028, October 24, 1975. Section 3527(a) requires determinations by the "head of the agency." Section 3527(b) specifies the "appropriate Secretary." Of course in most cases the authority under either statute will be delegated. It has been held that, absent a clear expression of legislative intent to the contrary, the authority to make determinations under these statutes may be delegated only to officials authorized by law to act in place of the agency head, or to an Assistant Secretary. 29 Comp. Gen. 151 (1949). Many agency heads have separate statutory authority to delegate and redelegate, and this of course will be sufficient. See, e.g., 22 U.S.C. § 2658 (Secretary of State). As far as GAO is concerned, the form of the delegation is immaterial although it should, of course, be in writing. Documentation of delegations need not be furnished to GAO, nor need it be specified in relief requests, but should be available if requested. 7 GAO-PPM § 8.9.B (1990).

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If, under agency procedures, the determinations are made in the first instance by someone other than the designated official (e.g., a board of inquiry), the relief request must explicitly state the designated official's concurrence. B-207062, July 20, 1982.

3. Standards for Granting Relief

a. Standard of Negligence

Again, it is important to distinguish between liability and relief. The presence or absence of negligence has nothing to do with an accountable officer's basic liability. The law is not that an accountable officer is liable for negligent losses. The officer is strictly liable for all losses, but may be relieved if found to be free from fault or negligence. It has frequently been stated that an accountable officer must exercise "the highest degree of care in the performance of his duty." E.g., 48 Comp. Gen. 566, 567–68 (1969); B-186922, August 26, 1976; B-182386, April 24, 1975. Statements of this type, however, have little practical use in applying the relief statutes.

In evaluating the facts to determine whether or not an accountable officer was negligent, GAO applies the standard of "reasonable care." 54 Comp. Gen. 112 (1974); B-196790, February 7, 1980. This is the standard of simple or ordinary negligence, not gross negligence. 54 Comp. Gen. at 115; B-158699, September 6, 1968. The standard has been stated as what the reasonably prudent and careful person would have done to take care of his or her own property of like description under like circumstances. B-209569, April 13, 1983; B-193673, May 25, 1979; Malone v. United States, 5 Ct. Cl. 486, 489 (1869). This is an objective standard, that is, it does not vary with such factors as the age and experience of the particular accountable officer.

The doctrine of comparative negligence (allocating the loss based on the degree of fault) does not apply under the relief statutes. B-211962, July 20, 1983; B-190506, November 28, 1977.

b. Presumption of Negligence/Burden of Proof

The mere fact that a loss or deficiency has occurred gives rise to a presumption of negligence on the part of the accountable officer. The presumption may be rebutted by evidence to the contrary, but it is the accountable officer's burden to produce the evidence. The government does not have to produce evidence to establish that the

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accountable officer was at fault in order to hold the officer liable. Rather, to be entitled to relief, the accountable officer must produce evidence to show that there was no contributing fault or negligence on his or her part, i.e., that he or she exercised the requisite degree of care.

This rule originated in decisions of the Court of Claims under 28 U.S.C. § 2512, before any of the administrative relief statutes existed, and has been consistently followed. An early and often quoted statement is the following from Boggs v. United States, 44 Ct. Cl. 367, 384 (1909):

"[T]here is at the outset a presumption of liability, and the burden of proof must rest upon the officer who has sustained the loss."

A later case quoting and applying Boggs is O'Neal v. United States, 60 Ct. Cl. 413 (1925). More recently, the court said:

"[T]he Government does not have the burden of proving fault or negligence on the part of plaintiff; plaintiff has the sole burden of proving that he was without fault or negligence in order to qualify for [relief]."

Serrano v. United States, 612 F.2d 525, 532–33 (Ct. Cl. 1979).

GAO follows the same rule, stating it in literally dozens of relief cases. E.g., 67 Comp. Gen. 6 (1987); 65 Comp. Gen. 876 (1986); 54 Comp. Gen. 112 (1974); 48 Comp. Gen. 566 (1969).[12]

The amount and types of evidence that will suffice to rebut the presumption vary with the facts and circumstances of the particular case. However, there must be affirmative evidence. It is not enough to rely on the absence of implicating evidence, nor is the mere administrative determination that there was no fault or negligence, unsupported by evidence, sufficient to rebut the presumption. E.g., 70 Comp. Gen. 12, 14 (1990); B-204647, February 8, 1982; B-167126, August 9, 1976.

[12]Many decisions prior to 1970, such as 48 Comp. Gen. 566, deal with postal employees. Since enactment of the Postal Reorganization Act of 1970, responsibility for the relief of postal employees is with the United States Postal Service. 39 U.S.C. § 2601; 50 Comp. Gen. 731 (1971); B-164786, October 8, 1970. While the Comptroller General no longer relieves postal employees, the principles enunciated in the earlier decisions are nonetheless applicable to other accountable officers.

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If the record clearly establishes that the loss resulted from burglary or robbery, the presumption is easily rebutted. But the evidence does not have to explain the loss with absolute certainty. If the evidence is not all that clear, the accountable officer may still be able to rebut the presumption by presenting evidence tending to corroborate the likelihood of theft or showing that some factor beyond his control was the proximate cause of the loss. If such evidence exists, and if the record shows that the accountable officer complied fully with all applicable regulations and procedures, the agency's determination of no fault or negligence will usually be accepted and relief granted.

GAO will consider the results of a polygraph (lie detector) test as an additional factor in the equation, but does not regard those results, standing alone, as dispositive. This applies whether the results are favorable (B-206745, August 9, 1982; B-204647, February 8, 1982; B-142326, March 31, 1960; B-182829-O.M., February 3, 1975) or unfavorable (B-209569, April 13, 1983; see also B-192567, August 4, 1983, aff'd upon reconsideration, B-192567, June 21, 1988).

Another situation in which the presumption is easily rebutted is where the accountable officer does not have control of the funds at the time of the loss. An example is losses occurring while the accountable officer is on leave or duty absence. As a practical matter, relief will be granted unless there is evidence of actual contributing negligence on the part of the accountable officer. B-196960, November 18, 1980; B-184028, March 2, 1976; B-175756-O.M., June 14, 1972. Of course, where contributing negligence exists, relief will be denied and the role of the presumption never comes into play. B-182480, February 3, 1975.

The presumption of negligence is occasionally criticized as unduly harsh. However, it is necessary both in order to preserve the concept of accountability and to protect the government against dishonesty as well as negligence. See B-167126, August 28, 1978; B-191440, May 25, 1979. As stated in one decision, the presumption of negligence—

"is a reasonable and legal basis for the denial of relief where the accountable officers have control of the funds and the means available for their safekeeping but the shortage nevertheless occurs without evidence of forcible entry or other conclusive explanation which would exclude negligence as the proximate cause of the loss."

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Liability and Relief of Accountable Officers

A. Introduction

The concept that a person should be held accountable for funds in his or her care is not peculiar to the government. If you get a job as a cashier at your local supermarket and come up short at the end of the day, you will probably be forced to make up the shortage from your own pocket. The store manager does not have to prove the loss was your fault. The very fact that the money is not there is sufficient to make you liable. Of course, if your cash register is emptied by an armed robber and you are in no way implicated, you will be off the hook.

Just like the private business enterprise, the government loses money in many ways. It is lost; it is stolen; it is paid out improperly; it is embezzled. Sometimes the money is recovered; often it is not. If government funds are lost because of some employee's misconduct or carelessness, and if the responsible employee is not required to make up the loss, the result is that the taxpayer ends up paying twice for the same thing, or paying for nothing.

When you accept the job at the supermarket, you do so knowing perfectly well that you will be potentially liable for losses. There is no reason why the government should operate any differently. If anything, there is a stronger case for the liability of government employees since they are, in effect, trustees for the taxpayers (themselves included). As the Comptroller General once stated, "A special trust responsibility exists with regard to public monies and with this special trust goes personal financial responsibility." B-161457, October 30, 1969. This chapter will explore these concepts—the liability and relief of government officers and employees who are entrusted with public funds or who have certain specific responsibilities in their disbursement. In government language, they are called "accountable officers."[1]

[1]This chapter deals solely with accountability for funds by those classified as accountable officers. Other types of accountability—accountability by employees who are not accountable officers or accountability for property other than funds—are covered in Chapter 13.

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B-166519, October 6, 1969. Indeed, if liability is strict and automatic, a legal presumption against the accountable officer is virtually necessary as a starting point.

c. Actual Negligence

If the facts indicate negligence on the part of the accountable officer, and if it appears that the negligence was the proximate cause of the loss, then relief must be denied.

One group of cases involves failure to lock a safe. It is negligence for an accountable officer to place money in a safe in an area which is accessible to others, and then leave the safe unlocked for a period of time when he or she is not physically present. E.g., B-190506, November 28, 1977; B-139886, July 2, 1959. It is also negligence to leave a safe unattended in a "day lock" position. B-199790, August 26, 1980; B-188733, March 29, 1979, aff'd, B-188733, January 17, 1980; B-187708, April 6, 1977. Compare B-180863, April 24, 1975, in which an accountable officer who had left a safe on "day lock" was relieved in view of her lack of knowledge or instruction regarding the day lock mechanism. Thus, an accountable officer who leaves a safe unlocked (either by leaving the door open or closing the door but not rotating the combination dial), and then leaves the office for lunch or for the night will be denied relief. B-204173, January 11, 1982, aff'd, B-204173, November 9, 1982; B-183559, August 28, 1975; B-180957, April 24, 1975; B-142597, April 29, 1960; B-181648-O.M., August 21, 1974.

Merely being physically present may not be enough. A degree of attentiveness, dictated by the circumstances and common sense, is also required. In B-173710-O.M., December 7, 1971, relief was denied where the cashier did not lock the safe while a stranger, posing as a building maintenance man, entered the cashier's cage ostensibly to repair the air conditioning system and erected a temporary barrier between the cashier and the safe.

Another group involves the failure to use available security facilities. As we will see in our discussion of agency security, a good rule-of-thumb for the accountable officer is: You do the best you can with what is available to you. Failure to do so, without compelling justification, does not meet the standard of reasonable care. Some examples in which relief was denied are:

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- Funds disappeared from bar-locking file cabinet. Combination safe was available but not used. B-192567, June 21, 1988.
- Cashier left funds overnight in locked desk drawer instead of safe provided for that purpose. B-177730-O.M., February 9, 1973.
- Cashier left funds in unlocked drawer while at lunch instead of locked drawer provided for that purpose. B-161229-O.M., April 20, 1967.
- Accountable officer left unlocked cash box in safe to which several other persons had access. B-172614-O.M., May 4, 1971; B-167596-O.M., August 21, 1969.

Inattentiveness or simple carelessness which facilitates a loss may constitute negligence and thus preclude relief. 64 Comp. Gen. 140 (1984) (shoulder bag with money left unattended on airport counter for several minutes); B-233937, May 8, 1989 (bag with money set on ledge in crowded restaurant); B-208888, September 28, 1984 (evidence suggested that funds were placed on desk and inadvertently knocked into trash can); B-127204, April 13, 1956 (pay envelopes left on top of desk in cashier's cage 19 inches from window opening on hallway to which many persons had access).

The best way to know how much cash you have is to count it. Failure to do so where reasonable prudence would dictate otherwise is negligence. B-247581, June 4, 1992 (alternate cashier failed to count cash upon receipt from principal or upon return to principal); B-206820, September 9, 1982 (accountable officer handed money over to another employee without counting it or obtaining receipt); B-193380, September 25, 1979 (cashier cashed checks at bank and failed to count the cash received).

A deficiency in an accountable officer's account caused by the acceptance of a counterfeit note constitutes a physical loss for purposes of 31 U.S.C. § 3527(a). B-140836, October 3, 1960; B-108452, May 15, 1952; B-101301, July 19, 1951. Whether accepting counterfeit money is negligence depends on the facts of the particular case, primarily whether the counterfeit was readily detectable. B-239724, October 11, 1990; B-191891, June 16, 1980; B-163627-O.M., March 11, 1968. (Relief was granted in these three cases.) If the quality of the counterfeit is such that a prudent person in the same situation would question the authenticity of the bill, relief should not be granted. B-155287, September 5, 1967. Also, failure to check a bill against a posted list of serial numbers will generally be viewed as negligence. B-155287, September 5, 1967; B-166514-O.M.,

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July 23, 1969. Finally, failure without compelling justification to use an available counterfeit detection machine is negligence. B-243685, July 1, 1991.

Other examples of conduct which does or does not constitute negligence are scattered throughout this chapter, e.g., the sections on compliance with regulations and agency security. In all cases, including those which cannot be neatly categorized, the approach is to apply the standard of reasonable care to the conduct of the accountable officer in light of all surrounding facts and circumstances. For example, in B-196790, February 7, 1980, a patient at a Veterans Affairs hospital, patient "X", had obtained a cashier's check from a bank on May 9, 1978. On September 12, 1978, another patient, patient "Y", presented the check at the hospital for deposit to patient X's personal funds account. On the following day, patient X withdrew the money and left. The bank refused to honor the check because, unknown to hospital personnel, patient X had gone to the bank on May 17, stated that he had never received the check, and the bank had refunded its face value. As noted in the decision, patient X had "cleverly managed to double his bank account by collecting the same funds twice." The issue was whether it was negligence for the hospital cashier to accept the check dated four months earlier or to permit patient X to withdraw the funds the day after the check was deposited. GAO considered the nature of a cashier's check, noted the absence of applicable regulations, applied the reasonable care standard, and granted relief, but recommended that the agency pursue further collection efforts against the bank.

d. Proximate Cause

An accountable officer may be found negligent and nevertheless relieved from liability if it can be shown that the negligence was not the "proximate cause" of the loss or shortage. A precise definition of the term "proximate cause" does not exist.[13] The concept means that, first, there must be a cause-and-effect relationship between the negligence and the loss. In other words, the negligence must have contributed to the loss. However, as one authority notes, the cause of an event can be argued in a philosophical sense to "go back to the

[13]"There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion." Prosser and Keeton, The Law of Torts, § 41 (5th ed. 1984).

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dawn of human events" and its consequences can "go forward to eternity."[14] Obviously a line must be drawn someplace. Thus, the concept also means that the cause-and-effect relationship must be reasonably foreseeable; that is, a reasonably prudent person should have anticipated that a given consequence could reasonably follow from a given act.

Before proceeding, we must refer again to the accountable officer's burden of proof. The Court of Claims said, in Serrano v. United States, 612 F.2d 525, 531–32 (Ct. Cl. 1979):

"It is argued that the . . . fault or negligence involved must be the proximate cause of the loss. Thus the Secretary . . . could not deny relief unless the loss was proximately attributable to plaintiff. This argument has no merit. If such an argument were to be accepted by this court, it would shift the burden of proof . . . to the Government. . . .

"Shifting of the burden of proof, and forcing the Government to prove that plaintiff's conduct was a proximate cause of the loss, would be intolerable. This shift would negate the special responsibility that disbursing officers have in handling public funds." (Emphasis in original.)

Thus, the government does not have to prove causation any more than it has to prove negligence. Rather, the accountable officer who has been negligent must, in order to be eligible for relief, show that some other factor or combination of factors was the proximate cause of the loss, or at least that the totality of evidence makes it impossible to fix responsibility.

In analyzing proximate cause, it may be helpful to ask certain questions. First, if the accountable officer had not been negligent, would the loss have occurred anyway? If the answer to this question is yes, the negligence is not the proximate cause of the loss and relief will probably be granted. However, it may not be possible to answer this question with any degree of certainty. If not, the next question to ask is whether the negligence was a "substantial factor" in bringing about the loss. If this question is answered yes, relief will probably be denied. A couple of simple examples will illustrate:

(a) An accountable officer leaves cash visible and unguarded on a desk top while at lunch, during which time the money disappears.

[14] Id.

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There can be no question that the negligence was the proximate cause of the loss.

(b) As noted previously, failure to count cash received at a bank window is negligence. Suppose, however, that the accountable officer is attacked and robbed by armed marauders while returning to the office. The failure to count the cash, even though negligent, would not be the proximate cause of the loss since presumably the robbers would have taken the entire amount anyway.

A good illustration is B-201173, August 18, 1981. Twelve armed men in two Volkswagen minibuses broke into the West African Consolidated Services Center at the American Embassy in Lagos, Nigeria. They forcibly entered the cashier's office and proceeded to carry the safe down the stairs. The burglars dropped the safe while carrying it, the safe opened upon being dropped, and the burglars took the money and fled. The reason the safe opened when dropped was that the cashier had not locked it, clearly an act of negligence. However, even if the safe had been locked, the burglars would presumably have continued to carry it away, loaded it onto their minibus, and forcibly opened it somewhere else. Thus, the cashier's failure to lock the safe, while negligent, was not the proximate cause of the loss.

Proximate cause considerations are often relevant in cases involving weaknesses in agency security, and the topic is explored further under the Agency Security heading.

The following are a few additional examples of cases in which relief was granted even though the accountable officer was or may have been negligent, because the negligence was found not to be the proximate cause of the loss or deficiency.

- Accountable officer left safe combination in unlocked desk drawer. Burglars found combination and looted safe. Had this been the entire story, relief could not be granted. However, burglars also pried open locked desk drawers throughout the office. Thus, locking the desk drawer would most likely not have prevented the theft. B-229587, January 6, 1988.
- Accountable officer in Afghanistan negligently turned over custody of funds to unauthorized person. Money was taken by rioters in severe civil disturbance. Relief was granted because negligence was not the

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proximate cause of the loss. (Whether the person holding the funds was or was not an authorized custodian was not a matter of particular concern to the rioters.) B-144148-O.M., November 1, 1960.

- Cashier discovered loss upon return from two-week absence. It could not be verified whether she had locked the safe when she left. However, time of loss could not be pinpointed, other persons worked out of the same safe, and it would have been opened daily for normal business during her absence. Thus, even if she had failed to lock the safe (negligence), proximate cause chain was much too conjectural. B-191942, September 12, 1979.

Even if there is a clearly identified intervening cause, relief may still be denied depending on the extent to which the accountable officer's negligence facilitated the intervening cause or contributed to the loss. In such a case, the negligence will be viewed as the proximate cause notwithstanding the intervening cause. The following cases will illustrate.

- Accountable officer failed to make daily deposits of collections as required by regulations. Funds were stolen from locked safe in burglary. Relief was denied because officer's negligence was proximate cause of loss in that funds would not have been in the safe to be stolen if they had been properly deposited. B-71445, June 20, 1949. See also B-203726, July 10, 1981; B-164449, December 8, 1969; B-168672-O.M., June 22, 1970.
- Accountable officer negligently left safe on "day lock" position (door closed, dial or handle partially turned but not rotated, so that partial turning in one direction, without knowledge of combination, will permit door to open). Thief broke into premises, opened safe without using force, and stole funds. Relief was denied because negligence facilitated theft by making it possible for thief to open safe without force or knowledge of combination. B-188733, March 29, 1979, aff'd, B-188733, January 17, 1980.

e. Unexplained Loss or Shortage

The cases cited under the Actual Negligence heading all contained clear evidence of negligence on the part of the accountable officer. Absent a proximate cause issue, these cases are relatively easy to resolve. Such evidence, however, is not necessary in order to deny relief in the situation we refer to as the "unexplained loss or shortage." In the typical case, a safe is opened at the beginning of a business day and money is found missing, or an internal audit reveals a shortage in an account. There is no evidence of negligence or

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misconduct on the part of the accountable officer; there is no evidence of burglary or any other reason for the disappearance. All that is known with any certainty is that the money is gone. In other words, the loss or shortage is totally unexplained. In many cases, a formal investigation confirms this conclusion.

The presumption of negligence has perhaps its clearest impact in the unexplained loss situation. If the burden of proof is on the accountable officer to establish eligibility for relief, the denial of relief follows necessarily. Since there is no evidence to rebut the presumption, there is no basis on which to grant relief. The presumption and its application to unexplained losses were discussed in 48 Comp. Gen. 566, 567–68 (1969) as follows:

"While there is no positive or affirmative evidence of negligence on the part of [the accountable officer] in connection with this loss, we have repeatedly held that positive or affirmative evidence of negligence is not necessary, and that the mere fact that an unexplained shortage occurred is, in and of itself, sufficient to raise an inference or presumption of negligence. A Government official charged with the custody and handling of public moneys . . . is expected to exercise the highest degree of care in the performance of his duty and, when funds . . . disappear without explanation or evident reason, the presumption naturally arises that the responsible official was derelict in some way. Moreover, granting relief to Government officials for unexplained losses or shortages of this nature might tend to make such officials lax in the performance of their duties."[15]

The rationale is fairly simple. Money does not just get up and walk away. If it is missing, there is an excellent chance that someone took it. If the accountable officer exercised the requisite degree of care and properly safeguarded the funds, it is unlikely that anyone else could have taken the money without leaving some evidence of forced entry. Therefore, where there is no evidence to explain a loss, the leading probabilities are that the accountable officer either took the money or was negligent in some way that facilitated theft by someone else. Be that as it may, denial of relief in an unexplained loss case is not intended to imply dishonesty by the particular accountable officer; it means merely that there was insufficient evidence to rebut the applicable legal presumption. See B-122688, September 25, 1956.

Despite the strictness of the rule, there are many unexplained loss cases in which the presumption can be rebutted and relief granted. By

[15]A few additional examples are 70 Comp. Gen. 389 (1991); B-213427, December 13, 1983, aff'd upon reconsideration, B-213427, March 14, 1984; B-159987, September 21, 1966.

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definition, the evidence will not be sufficient to "explain" the loss, otherwise there wouldn't be an unexplained loss to begin with. There is no simple formula to apply in determining the kinds or amount of evidence that will rebut the presumption. It is necessary to evaluate the totality of available evidence, including statements by the accountable officer and other agency personnel, investigation reports, and any relevant circumstantial evidence.

In some cases, for example, it may be possible to reasonably conclude that any negligence that may have occurred was not the proximate cause of the loss. These cases tend to involve security weaknesses and are discussed under the Agency Security heading. The evidence, in conjunction with the lack of any evidence to the contrary and the agency's "no fault or negligence" determination, supports the granting of relief.

Since the burden of proof rests with the accountable officer, the accountable officer's own statements take on a particular relevance in establishing due care, and relief should never be denied without obtaining and carefully analyzing them. Naturally, the more specific and detailed the statement is, and the more closely tied to the time of the loss, the more helpful it will be. While the accountable officer's statement is obviously self-serving and may not be enough if there are no other supporting factors, it has been enough to tip the balance in favor of granting relief when combined with other evidence, however slight or circumstantial, which by itself would not have been sufficient.[16]

f. Compliance With Regulations

If a particular activity of an accountable officer is governed by a regulation, failure to follow that regulation will be considered negligence. If that failure is the proximate cause of a loss or deficiency, relief must be denied. 70 Comp. Gen. 12 (1990); 54 Comp. Gen. 112, 116 (1974). The relationship of this rule to the standard of reasonable care discussed earlier is the premise that the prudent person exercising the requisite degree of care will become familiar with, and will follow, applicable regulations. Indeed, it has

[16]E.g., B-242830, September 24, 1991 (cashier's statement supported by another employee; safe had been opened for only one transaction in early afternoon); B-214080, March 25, 1986 (cashier made sworn and unrefuted statement to local police and Secret Service); B-210017, June 8, 1983 (cashier's statement corroborated by witness); B-188733, March 29, 1979 (forcible entry to office but not to safe itself; cashier's statement that he locked safe on day of robbery accepted).

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been stated that accountable officers have a duty to familiarize themselves with pertinent Treasury Department and agency rules and regulations. B-229207, July 11, 1988; B-193380, September 25, 1979.

Treasury Department regulations on disbursing, applicable to all agencies for which Treasury disburses under 31 U.S.C. § 3321, are found in the Treasury Financial Manual. Treasury regulations governing cashiers are found in I TFM Part 4, Chapter 3000, and in the Treasury Department's TFM supplement entitled Manual of Procedures and Instructions for Cashiers. The Treasury manuals establish general requirements for sound cash control, and failure to comply may result in the denial of relief. E.g., 70 Comp. Gen. 12 (1990) (cashier, contrary to Cashiers' Manual, kept copy of safe combination taped to underside of desk pull-out panel).

The same principle applies with respect to violations of individual agency regulations and written instructions. E.g., B-193380, September 25, 1979 (cashier violated agency regulations by placing the key to a locked cash box in an unlocked cash box and then leaving both in a locked safe to which more than one person had the combination). The decision further pointed out that oral instructions to the cashier to leave the cash box unlocked could not be considered to supersede published agency regulations. However, if agency regulations are demonstrably ambiguous, relief may be granted. B-169848-O.M., December 8, 1971.

Negligence will not be imputed to an accountable officer who fails to comply with regulations where full compliance is prevented by circumstances beyond his or her control. This recognizes the fact that compliance is sometimes up to the agency and beyond the control of the individual. For example, violating a regulation which requires that funds be kept in a safe is not negligence where the agency has failed to provide the safe. B-78617, June 24, 1949.

Also, as with other types of negligence, failure to follow regulations will not prevent the granting of relief if the failure was not the proximate cause of the loss or deficiency. B-229207, July 11, 1988; B-229587, January 6, 1988; B-185666, July 27, 1976; Libby v. United States, 81 F. Supp. 722, 727 (Ct. Cl. 1948). In B-185666, for example, a cashier kept her cash box key and safe combination in a sealed envelope in an unlocked desk drawer, in violation of the

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Treasury Cashiers' Manual. Relief was nevertheless granted because the seal on the envelope had not been broken and the negligence could therefore not have contributed to the loss.

While failure to comply with regulations is generally considered negligence, the converse is not always true. To be sure, the fact that an accountable officer has complied with all applicable regulations and instructions is highly significant in evaluating eligibility for relief. It is not conclusive, however, because the accountable officer might have been negligent in a matter not covered by the regulations. In a 1979 case, an accountable officer accepted a $10,000 personal check at a Customs auction sale and turned over the property without attempting to verify the existence or adequacy of the purchaser's account. The check bounced. It was not clear whether existing regulations applied to that situation. Even without regulations, however, accepting a personal check for a large amount without attempting verification was viewed as not meeting the standard of reasonable care, and relief was denied. B-193673, May 25, 1979, modified on other grounds, B-201673 et al., September 23, 1982.

g. Losses in Shipment

Government funds are occasionally lost or stolen in shipment. The Postal Service or other carrier is the agent of the sender, and funds in shipment remain in the "custody" of the accountable officer who shipped them until delivered, notwithstanding the fact that they are in the physical possession of the carrier. B-185905-O.M., April 23, 1976. Thus, a loss in shipment is a physical loss for which an accountable officer is liable.

For the most part, relief for losses in shipment is the same as relief for other losses, and the rules discussed in this chapter with respect to negligence and proximate cause apply. For example, relief was denied in one case because transmitting cash by ordinary first-class mail rather than registered or certified mail was held not to meet the reasonable care standard. B-164450-O.M., September 5, 1968.

However, relief for losses in shipment differs from relief for other losses in one important respect. A loss in shipment is not viewed as an "unexplained loss" and there is no presumption of negligence. B-164450-O.M., September 5, 1968. The reason for this distinction is that there is no basis to infer negligence when a loss occurs while funds are totally beyond the control of the accountable officer. Thus, where funds are lost in shipment, in the absence of positive evidence

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B. General Principles

1. The Concepts of Liability and Relief

a. Liability

The concept of accountability for public funds in the form of strict personal liability evolved during the 19th century. Its origins can be traced to a number of congressional enactments, some dating back to the Nation's infancy. The legislation establishing the Department of the Treasury in 1789 included a provision directing the Comptroller of the Treasury to "direct prosecutions for all delinquencies of officers of the revenue" (1 Stat. 66). A few years later, in 1795, Congress authorized the Comptroller to require "any person who has received monies for which he is accountable to the United States" to render "his accounts and vouchers, for the expenditure of the said monies," and to commence suit against anyone failing to do so (1 Stat. 441).

In 1846, Congress mandated that all government officials safeguard public funds in their custody. The statute provided that—

> "all public officers of whatsoever character, be, and they are hereby, required to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by this act, all the public money collected by them, or otherwise at any time placed in their possession and custody, till the same is ordered, by the proper department or officer of the government, to be transferred or paid out . . . ."

Act of August 6, 1846, ch. 90, § 6, 9 Stat. 59, 60. This statute still exists, in modernized form, at 31 U.S.C. § 3302(a).

These are civil provisions. Congress also addressed fiscal accountability in a variety of criminal statutes. An important one is the Act of June 14, 1866, ch. 122, 14 Stat. 64, which declared it to be the duty of disbursing officers to use public funds entrusted to them "only as . . . required for payments to be made . . . in pursuance of law," and made it a felony for a disbursing officer to, among other things,

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of fault or negligence, an accountable officer will be relieved if he or she conformed fully with applicable regulations and procedures for the handling and safeguarding of the funds and they were nevertheless lost or stolen. B-142058, March 18, 1960; B-126362, February 21, 1956; B-119567, January 10, 1955; B-95504, June 16, 1950.

The Government Losses in Shipment Act (GLISA), 40 U.S.C. §§ 721–729, authorizes agencies to file claims with the Treasury Department for funds or other valuables lost or destroyed in shipment. The Treasury Department has a revolving fund for the payment of these claims and has issued regulations, found at 31 C.F.R. Parts 361 and 362, to implement the statute. The Treasury Department will generally disallow a claim unless there has been strict compliance with the statute and regulations. See, e.g., B-200437, October 21, 1980.

If a loss in shipment occurs, the agency should first consider filing a claim under the Government Losses in Shipment Act, and should seek relief only if this fails. Denial of a GLISA claim should prompt further inquiry since it suggests the possibility that someone at the point of shipment may have been negligent, but it will not automatically preclude the granting of relief. For example, it is possible for a claim to be denied for reasons that do not suggest negligence. In B-126362, February 21, 1956, the accountable officer had reimbursed the government from personal funds, and a claim under GLISA was denied because there was no longer any loss. GAO nevertheless granted relief and the accountable officer was reimbursed.

Disallowance of a GLISA claim for failure to strictly comply with the regulations carries with it an even stronger suggestion of negligence, but it is still appropriate to examine the facts and circumstances of the particular case to evaluate the relationship of the noncompliance to the loss. For example, GAO granted relief in B-191645, October 5, 1979, despite the denial of a GLISA claim, because there was no question that the funds had arrived at their initial destination although they never reached the intended recipient. Even if there had been negligence at the point of shipment, it could not have been the proximate cause of the loss. See also B-193830, October 1, 1979, and B-193830, March 30, 1979 (both cases arising from the same loss).

h. Fire, Natural Disaster

Earlier in this chapter, we noted the Supreme Court's conclusion in United States v. Thomas, 82 U.S. (15 Wall.) 337, 352 (1872), that

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strict liability (and hence the need for relief) would not attach in two situations: funds destroyed by an "overruling necessity" and funds taken by a "public enemy," provided there is no contributing fault or negligence by the accountable officer. The Court gave only one example of an "overruling necessity":

> "Suppose an earthquake should swallow up the building and safe containing the money, is there no condition implied in the law by which to exonerate the receiver from responsibility?"

Id. at 348. We are aware of no subsequent judicial attempts to further define "overruling necessity," although some administrative formulations have used the term "acts of God." E.g., 48 Comp. Gen. 566, 567 (1969). Thus, at the very least, assuming no contributing fault or negligence, an accountable officer is not liable for funds lost or destroyed in an earthquake, and hence there is no need to seek relief. Contributing negligence might occur, for example, if an accountable officer failed to periodically deposit collections and funds were therefore on hand which should not have been. See B-71445, June 20, 1949.

GAO granted relief in one case involving an earthquake, B-229153, October 29, 1987, in which most of the funds were recovered. While arguably there was no need to seek relief in that case, it makes no difference as a practical matter since relief would be granted as a matter of routine unless there is contributing negligence, in which event the accountable officer would be liable even under Thomas.

Whatever the scope of the "overruling necessity" exception, it is clear that it does not extend to destruction by fire, even though money destroyed by fire is no longer available to be used by anyone else and can be replaced simply by printing new money. In Smythe v. United States, 188 U.S. 156, 173–74 (1903), the Supreme Court declined to apply Thomas and expressly rejected the argument that an accountable officer's liability for notes destroyed by fire should be limited to the cost of printing new notes. See also 1 Comp. Dec. 191 (1895), in which the Comptroller of the Treasury similarly declined to apply the Thomas exception to a loss by fire. Thus, a loss by fire is a physical loss for which the accountable officer is liable, but for which relief will be granted under 31 U.S.C. § 3527 if the statutory conditions are met. Examples are B-212515, December 21, 1983, and B-203726, July 10, 1981.

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i. Loss by Theft

If money is taken in a burglary, robbery, or other form of theft, the accountable officer will be relieved of liability if the following conditions are met:

1. There is sufficient evidence that a theft took place;[17]

2. There is no evidence implicating, or indicating contributing negligence by, the accountable officer; and

3. The agency has made the administrative determinations required by the relief statute.

The fact patterns tend to fall into several well-defined categories.

(1) Burglary: forced entry

Forced entry cases tend to be fairly straightforward. In the typical case, a government office is broken into while the office is closed for the night or over a weekend, and money is stolen. Evidence of the forced entry is clear. As long as there is no evidence implicating the accountable officer, no other contributing fault or negligence, and the requisite administrative determinations are made, relief is granted. A few examples follow:[18]

- Burglars broke into the welding shop at a government laboratory, took a blowtorch and acetylene tanks to the administrative office and used them to cut open the safe. B-242773, February 20, 1991.
- Cashier's office was robbed over a weekend. Office had been forcibly entered, but there was no evidence of forced entry into the safe. Federal Bureau of Investigation found no evidence of negligence or breach of security by any government personnel associated with the office. B-193174, November 29, 1978.
- Persons unknown broke front door lock of Bureau of Indian Affairs office in Alaska and removed safe on sled. Sled tracks led to an abandoned building in which the safe was found with its door removed. B-182590, February 3, 1975.

[17]The mere designation of a loss as a "burglary" without supporting evidence is not enough to remove it from the "unexplained loss" category. E.g., B-210358, July 21, 1983.

[18]There are numerous forced entry cases in which GAO granted relief under similar circumstances. A few additional examples are B-230607, June 20, 1988; B-205428, December 31, 1981; B-201651, February 9, 1981.

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- Unsecured bolt cutters found on premises used to remove safe padlock. No contributing negligence because there was no separate facility in which to secure the tools. B-202290, June 5, 1981.

The same principles apply to theft from a hotel room. 69 Comp. Gen. 586 (1990); B-229847, January 29, 1988.

(2) Armed robbery

In this situation, one or more individuals, armed or credibly pretending to be armed, robs an accountable officer. Again, as long as there is no evidence implicating the accountable officer and no contributing negligence, relief is readily granted. The accountable officer is not expected to risk his or her life by resisting. Some illustrative cases follow:[19]

- Gunman entered cashier's office, knocked cashier unconscious, and robbed safe. B-235458, August 23, 1990.
- Man entered cashier's office in a veterans hospital and handed cashier a note demanding all of her $20 bills. Although he did not display a weapon, he said he was armed. B-191579, May 22, 1978. A very similar case is B-237420, December 8, 1989 (man gave cashier note indicating bomb threat; upon running off with the money, he left a second note saying "no bomb").

Depending on the circumstances, it is not necessary that the thief be, or pretend to be, armed. An example is the common purse-snatching incident. B-197021, May 9, 1980; B-193866, March 14, 1979.

(3) Riot, public disturbance

This category includes the popular pastime of ransacking American embassies. The Supreme Court's second exception in United States v. Thomas (see Fire, Natural Disaster heading) to an accountable officer's strict liability is funds taken by a "public enemy." That case concerned the Civil War. As with the "overruling necessity" exception, we are aware of no further definition of "public enemy" in this context, and the cases cited here have consistently been treated as accountable officer losses. In any event, relief is routinely granted

[19]Some other examples are B-217773, March 18, 1985; B-211945, July 18, 1983; B-201126, January 27, 1981.

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unless there is contributing negligence. Thus, GAO granted relief in the following cases:[20]

- Funds taken during attack on American Embassy in Tehran, Iran. B-229753, December 30, 1987; B-194666, August 6, 1979 (separate attacks, both occurring in 1979).
- Armed soldiers forced entry into U.S. Information Agency compound in Beirut, Lebanon, and looted safe. B-195435, September 12, 1979.
- Safes looted by Cuban detainees during prison riot. B-232252, January 5, 1989; B-230796, April 8, 1988.

(4) Evidence less than certain

In all of the cases cited above dealing with forced entry, armed robbery, or rioting, the fact that a theft had taken place was beyond question. However, there are many cases in which the evidence of theft is not all that clear. The losses are unexplained in the sense that what happened cannot be determined with any certainty. The problem then becomes whether the indications of theft are sufficient to classify the loss as a theft and to rebut the presumption of negligence.

These tend to be the most difficult cases to resolve. The difficulty stems from the fact, which we have noted previously, that the accountable officer laws are designed to protect the government against dishonesty as well as negligence. On the one hand, an accountable officer who did all he or she could to safeguard the funds should be relieved of liability. But on the other hand, the application of the relief statutes should not provide a blueprint for (or absolution from) dishonesty. Recognizing that complete certainty is impossible in many if not most cases, the decisions try to achieve a balance between these two considerations. Thus, GAO gives weight to the administrative determinations and to statements of the individuals concerned, but these factors cannot be conclusive and the decision will be based on all of the evidence. Other relevant factors include how and where the safe combination was stored, when it was last changed, whether the combination dial was susceptible of observation while the safe was being opened, access to the safe and to the facility itself, and the safeguarding of keys to cash boxes.

[20]Further examples are B-249372, August 13, 1992 (Somalia); B-230606.2, September 6, 1988 (Iran); B-227422, June 18, 1987 (Tripoli); B-207059, July 1, 1982 (Chad); B-190205, November 14, 1977 (Zaire).

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For example, in B-198836, June 26, 1980, funds were kept in the bottom drawer of a four-drawer file cabinet. Each drawer had a separate key lock and the cabinet itself was secured by a steel bar and padlock. Upon arriving at work one morning, the cashier found the bottom drawer slightly out of alignment with several pry marks on its edges. A police investigation was inconclusive. GAO viewed the evidence as sufficient to support a conclusion of burglary and, since the record contained no indication of negligence on the part of the cashier, granted relief.

In another case, a safe was found unlocked with no signs of forcible entry. However, there was evidence that a thief had entered the office door by breaking a window. The accountable officer stated that he had locked the safe before going home the previous evening, and there was no evidence to contradict this or to indicate any other negligence. GAO accepted the accountable officer's uncontroverted statement and granted relief. B-188733, March 29, 1979. See also B-210017, June 8, 1983.

In B-170596-O.M., November 16, 1970, the accountable officer stated that she had found the padlock on and locked in reverse from the way she always locked it. Her statement was corroborated by the agency investigation. In addition, the lock did not conform to agency specifications, but this was not the cashier's responsibility. She had used the facilities officially provided for her. Relief was granted.

Relief was also granted in B-170615-O.M., November 23, 1971, reversing upon reconsideration B-170615-O.M., December 2, 1970. In that case, there was some evidence that the office lock had been pried open but there were no signs of forcible entry into the safe. This suggested the possibility of negligence either in failing to lock the safe or in not adequately safeguarding the combination. However, the accountable officer's supervisor stated that he (the supervisor) had locked the safe at the close of business on the preceding workday, and two safe company representatives provided statements that the safe was vulnerable and could have been opened by anyone with some knowledge of safe combinations.

The occurrence of more than one loss under similar circumstances within a relatively short time will tend to corroborate the likelihood of theft. B-199021, September 2, 1980; B-193416, October 25, 1979. In B-199021, two losses occurred in the same building within several

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weeks of each other. All agency security procedures had been followed and the record indicated that the cashier had exercised a very high degree of care in safeguarding the funds. In B-193416, the first loss was totally unexplained and the entire cash box disappeared a week later. The safe combination had been kept in a sealed envelope in a "working safe" to which other employees had access. Although the seal on the envelope was not broken, an investigation showed that, while the combination could not be read by holding the envelope up to normal light, it could be read by holding it up to stronger light. In neither case was there any evidence of forcible entry or of negligence on the part of the accountable officer. Balancing the various relevant factors in each case, GAO granted relief.

The disappearance of an entire cash box will also be viewed as an indication of theft. However, this factor standing alone will not be conclusive since there is nothing to prevent a dishonest employee from simply taking the whole box rather than a handful of money from it. Signs of forced entry to the safe or file cabinet will naturally reinforce the theft conclusion. E.g., B-229136, January 22, 1988; B-186190, May 11, 1976. Far more difficult are cases in which a cash box disappears with no signs of forcible entry to the container in which it was kept. Note the various additional factors viewed as relevant in each of the following cases:

- B-223602, August 25, 1986. Police were able to open file cabinet with a different key, and other thefts had occurred around the same time. Relief granted.
- B-189658, September 20, 1977. Safe was not rated for burglary protection and could have been opened fairly easily by manipulating the combination dial. Relief granted.
- B-189896, November 1, 1977. Supervisor's secretary maintained a log of all safe and bar-lock combinations, a breach of security which could have resulted in the compromise of the combination. Relief granted.
- B-173133-O.M., December 10, 1973. Cashier locked safe and checked it in the presence of a guard. Several other employees had access to the safe combination. Relief granted. Multiple access also contributed

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to the granting of relief in B-217945, July 23, 1985, and B-212605, April 19, 1984.[21]

- B-183284, June 17, 1975. Safe was malfunctioning at time of loss. Relief granted.
- B-211649, August 2, 1983. Extensive security violations attributable to agency. Relief granted. A similar case is B-197799, June 18, 1980.
- B-185666, July 27, 1976. Some evidence of forced entry to door of cashier's office but not to safe or safe drawer. Cash box later found in men's room. Negligence by cashier in improperly storing keys and safe combination in unlocked desk drawer not proximate cause of loss since seal on envelope was found intact. Relief granted.
- B-191942, September 12, 1979. Cash box disappeared during two-week absence of cashier. Even assuming cashier negligently failed to lock safe prior to her absence, there was no way to establish this as the proximate cause of the loss since box had been kept in a "working safe" which would have been opened daily in her absence. Relief granted.
- B-182480, February 3, 1975. Cashier went on leave without properly securing key to file cabinet or entrusting it to an alternate. Relief denied.
- B-184028, March 2, 1976. Cashier had been experiencing difficulty trying to lock the safe and stated she might have left it unlocked inadvertently. Relief denied.

To summarize the "cash box" cases, the disappearance of an entire cash box suggests theft but is not conclusive. In such cases, even though the cause of the loss cannot be definitely attributed, relief will probably be granted if there is uncontroverted evidence that the safe was locked, no other evidence of contributing fault or negligence on the part of the accountable officer, and especially if there are other factors present tending to corroborate the likelihood of theft. In no case has relief been granted based solely on the fact that a cash box disappeared; without more, it is simply another type of unexplained loss for which there is no basis for relief.

(5) Embezzlement

The term "embezzlement" means the fraudulent misappropriation of property by someone to whom it has lawfully been entrusted. Black's

[21]A key inquiry in this type of case, and a crucial factor in deciding whether to grant or deny relief, is the extent to which the accountable officer is responsible for the non-exclusive access to the safe combination.

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Law Dictionary 522 (6th ed. 1990). Losses due to embezzlement or fraudulent acts of subordinate finance personnel, acting alone or in collusion with others, are treated as physical losses and relief will be granted if the statutory conditions are met. B-202074, July 21, 1983, at 6; B-211763, July 8, 1983; B-133862-O.M., November 29, 1957; B-101375-O.M., April 16, 1951.

An illustrative group of cases involves the embezzlement of tax collections, under various schemes, by employees of the Internal Revenue Service. In each case the IRS pursued the perpetrators, and most were prosecuted and convicted. The IRS recovered what it could from the (now former) employees, and sought relief for the balance for the pertinent supervisor in whose name the account was held. In each case, GAO agreed with the "no fault or negligence" determination and granted relief. B-244113, November 1, 1991; B-226214 et al., June 18, 1987; B-215501, November 5, 1984; B-192567,November 3, 1978; B-191722, August 7, 1978; B-191781, June 30, 1978.

The accountable officer in each of the IRS cases was a supervisor who did not actually handle the funds. The approach to evaluating the presence or absence of negligence when the accountable officer is a supervisor is to review the existence and adequacy of internal controls and procedures and to ask whether the accountable officer provided reasonable supervision. If internal controls and management procedures are reasonable and were being followed, relief will be granted. As noted in B-226214, the standard does not expect perfection and recognizes that a clever criminal scheme can outwit the most carefully established and supervised system.

Losses resulting from the fraudulent acts of other than subordinate finance personnel (e.g., payments on fraudulent vouchers) are not physical losses but must be treated as improper payments. 2 Comp. Gen. 277 (1922); B-202074, July 21, 1983; B-76903, July 13, 1948; B-133862-O.M., November 29, 1957.

j. Agency Security

In evaluating virtually any physical loss case, physical security—the existence, adequacy, and use of safekeeping facilities and procedures—is a crucial consideration. The Treasury Department's Manual of Procedures and Instructions for Cashiers sets forth many of the requirements. For example, the cashiers' manual provides that

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safe combinations should be changed annually, whenever there is a change of cashiers, or when the combination has been compromised, and prescribes procedures for safeguarding the combination. It also reflects what is perhaps the most fundamental principle of sound cash control—that an employee with custody of public funds should have exclusive control over those funds. In addition, agencies should have their own specific regulations or instructions tailored to individual circumstances.

The first step in analyzing the effect of a security violation or deficiency is to determine whether the violation or deficiency is attributable to the accountable officer or to the agency. Two fundamental premises drive this analysis: (1) the accountable officer is responsible for safeguarding the funds in his or her custody; and (2) the agency is responsible for providing adequate means to do so. Adequate means includes both physical facilities and administrative procedures.

Basically, if the accountable officer fails to use the facilities and procedures that have been provided, this failure will be viewed as negligence and, unless some other factor appears to be the proximate cause of the loss, will preclude the granting of relief. Several examples have been previously cited under the Actual Negligence heading.

Another element of the accountable officer's responsibility is the duty to report security weaknesses to appropriate supervisory personnel. E.g., 63 Comp. Gen. 489, 492 (1984), rev'd on other grounds, 65 Comp. Gen. 876 (1986). If the agency fails to respond, a loss attributable to the reported weakness is not the accountable officer's fault. E.g., B-235147.2, August 14, 1991; B-208511, May 9, 1983.

Ultimately, an accountable officer can do no more than use the best that has been made available, and relief will not be denied for failure to follow adequate security measures which are beyond the accountable officer's control. E.g., B-226947, July 27, 1987 (U.S. Mint employees stole coins from temporarily leased facility which was incapable of adequate security); B-207062, May 12, 1983 (agent kept collections in his possession because, upon returning to office at 4:30 p.m., he found all storage facilities locked and all senior officials had left for the day); B-210245, February 10, 1983 (lockable gun cabinet was the most secure item available); B-186190, May 11, 1976 (funds kept in safe with padlock because combination safe, which had been

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"apply any portion of the public money intrusted to him" for any purpose not prescribed by law.[2]

The strict liability of accountable officers became firmly established in a series of early Supreme Court decisions. In 1845, the Court upheld liability in a case where money had been stolen with no fault or negligence on the part of the accountable officer. In an often-quoted passage, the Court said:

"Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public?"

United States v. Prescott, 44 U.S. (3 How.) 578, 588–89 (1845). While some might view this passage as unduly cynical of human nature, it makes the important point that the laws relating to the liability and relief of accountable officers are intended not only to give the officers incentive to guard against theft by others, but also to protect against dishonesty by the officers themselves.

An 1872 case, United States v. Thomas, 82 U.S. (15 Wall.) 337, recognized that the liability announced in Prescott, while strict, was not absolute. In that case, the Court refused to hold a customs official liable for funds which had been forcibly taken by Confederate forces during the Civil War. In formulating its conclusion, the Court recognized two exceptions to the strict liability rule:

"[N]o rule of public policy requires an officer to account for moneys which have been destroyed by an overruling necessity, or taken from him by a public enemy, without any fault or neglect on his part."

[2]This statute also still exists and is found at 18 U.S.C. § 653. Other provisions of the Criminal Code relevant to accountable officers include 18 U.S.C. §§ 643 (failure to render accounts), 648 (misuse of public funds), and 649 (failure to deposit). The four provisions of Title 18 cited in this note apply to "all persons charged with the safe-keeping, transfer, or disbursement of the public money." 18 U.S.C. § 649(b).

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ordered, had not yet arrived); B-78617, June 24, 1949 (agency failed to provide safe). Of course, the accountable officer is expected to act to correct weaknesses which are subject to his or her control. B-127204, April 13, 1956.

The principle that relief will be granted if the agency fails to provide adequate security and that failure is viewed as the proximate cause of the loss manifests itself in a variety of contexts. One group of cases involves multiple violations. In B-182386, April 24, 1975, imprest funds were found missing when a safe was opened for audit. The accountable officer was found to be negligent for failing to follow approved procedures. However, the agency's investigation disclosed a number of security violations attributable to the agency. Two cashiers operated from the same cash box; transfers of custody were not documented; the safe combination had not been changed despite several changes of cashiers; at least five persons knew the safe combination. The agency, in recommending relief, concluded that the loss was caused by "pervasive laxity in the protection and administration of the funds . . . on all levels." GAO agreed, noting that the lax security "precludes the definite placement of responsibility" for the loss, and granted relief.

In several later unexplained loss cases (no sign of forcible entry, no indication of fault or negligence on the part of the accountable officer), GAO has regarded overall lax security on the part of the agency, similar to that in B-182386, as the proximate cause of the loss and thus granted relief. B-243324, April 17, 1991; B-229778, September 2, 1988; B-226847, June 25, 1987; B-217876, April 29, 1986; B-211962, December 10, 1985; B-211649, August 2, 1983. All of these cases involved numerous security violations beyond the accountable officer's control, and several adopt the "pervasive laxity" characterization of B-182386.

However, in order for relief to be granted, security weaknesses attributable to the agency need not rise to the level of "pervasive laxity" encountered in the cases cited in the preceding paragraph. Thus, relief will usually be granted where several persons other than the accountable officer have access to the funds through knowledge of the safe combination since "multiple access" makes it impossible to attribute the loss to the accountable officer. B-235072, July 5, 1989; B-228884, October 13, 1987; B-214080, March 25, 1986; B-211233, June 28, 1983; B-209569, April 13, 1983; B-196855,

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December 9, 1981; B-199034, February 9, 1981. Additional cases are cited in our earlier discussion of missing cash boxes.

If multiple access to a safe will support the granting of relief for otherwise unexplained losses, it follows that multiple access to a cash box or drawer will have the same effect. The Treasury cashiers' manual provides that cashiers should never work out of the same cash box or drawer. Violation of this requirement, where beyond the control of the accountable officer, is a security breach which, in appropriate cases, has supported the granting of relief. B-227714, October 20, 1987; B-204647, February 8, 1982. If it is necessary for more than one cashier to work out of the same safe, the safe should preferably have separate built-in locking drawers rather than removable cash boxes. B-191942, September 12, 1979.

The following security deficiencies have also contributed to the granting of relief:

- Safe malfunctioning, defective, or otherwise not secure. B-221447, June 1, 1987; B-215477, November 5, 1984; B-183284, June 17, 1975.
- Cash box could be opened with other keys. B-203646, November 30, 1981; B-197270, March 7, 1980.
- Failure to change safe combination as required by Treasury regulations. B-211233, June 28, 1983; B-196855, December 8, 1981. (Both cases also involve multiple access.)
- Safe combination and key to cash drawer were kept in an unlocked desk drawer. B-177963-O.M., March 21, 1973. (The result would most likely be different if the violation were the fault of the accountable officer or if the accountable officer passively acquiesced in the breach. See B-185666, July 27, 1976.)
- Crimping device used to seal cash bags did not use sequentially numbered seals and was accessible to several employees. B-246988, February 27, 1992.

The preceding cases are mostly unexplained losses. It naturally follows that security violations of the type noted will contribute to rebutting the presumption of negligence in cases where there is clear evidence of theft. In B-184493, October 8, 1975, for example, there was evidence of forced entry to the office door but not to the safe. The record showed that, despite the accountable officer's best efforts, it was impossible for him to shield the dial from observation while

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opening the safe. In view of the office layout, the position of the safe, and the number of persons allowed access to the office, GAO granted relief.[22] Other examples are B-180664-O.M., April 23, 1974 (multiple access to safe), and B-170251-O.M., October 24, 1972 (insecure safe).

If there is evidence of negligence on the part of the accountable officer in conjunction with security deficiencies attributable to the agency, the accountable officer's negligence must be balanced against the agency's negligence. Relief may be granted or denied based largely on the proximate cause analysis. As with the unexplained loss cases, relief has been granted in a number of cases where the agency's violations could be said to amount to "pervasive laxity." B-235147.2, August 14, 1991; B-197799, June 19, 1980; B-182386, April 24, 1975; B-169756-O.M., July 8, 1970. Similarly, agency security violations which do not amount to pervasive laxity may support the granting of relief. Such violations must either be the proximate cause of the loss or make it impossible to attribute the loss to the accountable officer. In a 1971 case, for example, a cashier kept the combinations to three safes on an adding machine tape in her wallet. The agency failed to change the combinations after the wallet was stolen. Also, safe company representatives stated that one safe was vulnerable and could readily have been opened. The fact that only the vulnerable safe had been robbed supported the conclusion that the stolen combinations had not been used. B-170615-O.M., November 23, 1971. Other cases in which agency security violations were found to override negligence by the accountable officer are B-232744, December 9, 1988 (safe combination not changed despite several requests by accountable officer following possible compromise); B-205985, July 12, 1982 (multiple access, safe combination not changed as required); B-199128, November 7, 1980 (multiple access); B-191440, May 25, 1979 (two cashiers working out of same drawer).

The result in these cases should not be taken too far. Poor agency security does not guarantee relief; it is merely another factor to consider in the proximate cause equation. Another relevant factor is the nature and extent of the accountable officer's efforts to improve the situation.

[22]An explanation of this type may or may not be sufficient, depending on the particular facts. See B-170012, August 11, 1970; B-127204, April 13, 1956.

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Where security weaknesses exist, a supervisor will normally be in a better position to take or initiate corrective action, and a supervisor who is also an accountable officer may be found negligent for failing to do so. 63 Comp. Gen. 489 (1984), reversed upon reconsideration (new evidence), 65 Comp. Gen. 876 (1986); 60 Comp. Gen. 674, 676 (1981). However, a new supervisor should not be held immediately responsible for the situation he or she inherited. B-209715, April 4, 1983 (supervisor relieved in pervasive laxity situation where loss occurred only a week after he became accountable).

A close reading of the numerous security cases reveals the somewhat anomalous result that an accountable officer who works in a sloppy operation stands a much better chance of being relieved than one who works in a well-managed office. True as this may be, it would be wrong to hold accountable officers liable for conditions beyond their control. Rather, the solution lies in the proper recognition and implementation of the responsibility of each agency, mandated by the Federal Managers' Financial Integrity Act of 1982, 31 U.S.C. § 3512(c)(1), to safeguard its assets against loss and misappropriation.

k. Extenuating Circumstances

Since relief under 31 U.S.C. §§ 3527(a) and (b) is a creature of statute, it must be granted or denied solely in accordance with the statutory conditions. When Congress desires that "equitable" concerns be taken into consideration, it expressly so states. Examples are waiver statutes such as 5 U.S.C. § 5584 and 10 U.S.C. § 2774. In contrast, the physical loss relief statutes do not authorize the granting of relief on the basis of equitable considerations or extenuating or mitigating circumstances.

Thus, where an accountable officer has been found negligent, the following factors have been held not relevant, nor are they sufficient to rebut the presumption of negligence:

- Heavy work load. 67 Comp. Gen. 6 (1987); 48 Comp. Gen. 566 (1969); B-241201, August 23, 1991.
- Good work record; long period of loyal and dependable service; evidence of accountable officer's good reputation and character. B-204173, November 9, 1982; B-170012, August 11, 1970; B-158699, September 6, 1968.
- Inexperience; inadequate training or supervision. 70 Comp. Gen. 389 (1991); B-189084, January 3, 1979; B-191051, July 31, 1978.

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- Financial hardship of having to repay loss. B-241478, April 5, 1991; B-216279.2, December 30, 1985.
- Acceptance of extra duties by the accountable officer; shortage of personnel. B-186127, September 1, 1976.

D. Illegal or Improper Payment

1. Disbursement and Accountability

In order to understand the laws governing liability and relief for improper payments, and how the application of those laws has evolved over the last quarter of the 20th century, it is helpful to start by summarizing, from the accountability perspective, a few points relating to how the federal government disburses its money.

a. Statutory Framework: Disbursement Under Executive Order 6166

For most of the 19th century and the early decades of the 20th century, federal disbursement was decentralized. Each agency had its own disbursing office(s), and the function was performed by a small army of disbursing officers and clerks (who were accountable officers) scattered among the various agencies and throughout the country. In part, the reason for this was the primitive state of communication and transportation then existing. One of the weaknesses of this system was that, in many cases, vouchers were prepared, examined, and paid by the same person. 20 Comp. Dec. 859, 869 (1914). This resulted in the growth of large disbursing offices in several agencies, some of which exceeded in size that of the Treasury Department. Annual Report of the Comptroller General of the United States for the Fiscal Year Ended June 30, 1939, at 98.

From the perspective of accountability for improper payments, the modern legal structure of federal disbursing evolved in three major steps. First, Congress enacted legislation in 1912 (37 Stat. 375), the remnants of which are found at 31 U.S.C. § 3521(a), to prohibit disbursing officers from preparing and auditing their own vouchers. With this newly mandated separation of voucher preparation and examination from actual payment, payment was accomplished by having some other administrative official "certify" the correctness of the voucher to the disbursing officer. The 1912 legislation was thus the genesis of what would later become a new class of accountable officer—the certifying officer.

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Disbursing officers remained accountable for improper payments, the standard now reflecting the more limited nature of the function. Since the 1912 law was intended to prohibit the disbursing officer from duplicating the detailed voucher examination already performed by the "certifying officer," disbursing officers were held liable only for errors apparent on the face of the voucher, as well as, of course, payments prohibited by law or for which no appropriation was available. 20 Comp. Dec. 859 (1914). In a sense, the 1912 statute operated in part as a relief statute, with credit being allowed or disallowed in the disbursing officer's account based on the application of this standard. E.g., 4 Comp. Gen. 991 (1925); 3 Comp. Gen. 441 (1924).

The second major step in the evolution was section 4 of Executive Order No. 6166, signed by President Roosevelt on June 10, 1933. The first paragraph of section 4, codified at 31 U.S.C. § 3321(a), consolidated the disbursing function in the Treasury Department, eliminating the separate disbursing offices of the other executive departments. The second paragraph, 31 U.S.C. § 3321(b), authorizes Treasury to delegate disbursing authority to other executive agencies for purposes of efficiency and economy. The third paragraph gave new emphasis to the certification function:

> "The Division of Disbursement [Treasury Department] shall disburse moneys only upon the certification of persons by law duly authorized to incur obligations upon behalf of the United States. The function of accountability for improper certification shall be transferred to such persons, and no disbursing officer shall be held accountable therefor."

The following year, Executive Order No. 6728, May 29, 1934, exempted the military departments, except for salaries and expenses in the District of Columbia, from the centralization. This exemption, and an exemption for the United States Marshals Service which originated in a 1940 reorganization plan, are codified at 31 U.S.C. § 3321(c). Executive Order 6166 provided the framework for the disbursing system still in effect today. Apart from the specified exemptions, the certifying officer is now an employee of the spending agency, and the disbursing officer is an employee of the Treasury Department.

Disbursing officers continued to be liable for their own errors, as under the 1912 legislation. E.g., 13 Comp. Gen. 469 (1934). However, a major consequence of Executive Order 6166 was to make

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the certifying officer an accountable officer as well. The certifying officer became liable for improper payments "caused solely by an improper certification as to matters not within the knowledge of or available to the disbursing officer." 13 Comp. Gen. 326, 329 (1934). See also 15 Comp. Gen. 986 (1936); 15 Comp. Gen. 362 (1935).

Over the next few years, confusion and disagreement developed as to the precise relationship of certifying officers and disbursing officers with respect to liability for improper payments. In the Annual Report of the Comptroller General of the United States for the Fiscal Year Ended June 30, 1940, at pages 63–66, GAO summarized the problem and recommended legislation to specify the allocation of responsibilities "to provide the closest possible relationship between liability and fault" (id. at 64).

The third major evolutionary step was the enactment of Public Law 77-389, 55 Stat. 875 (1941) to implement GAO's recommendation. Section 1, 31 U.S.C. § 3325(a), reflects the substance of the third paragraph of Executive Order 6166, § 4, quoted above. It requires that a disbursing officer disburse money only in accordance with a voucher certified by the head of the spending agency or an authorized certifying officer who, except for some interagency transactions, will also be an employee of the spending agency. As with the amended Executive Order 6166 itself, section 3325(a) does not apply to disbursements of the military departments except for salaries and expenses in the District of Columbia. 31 U.S.C. § 3325(b). The rest of the statute, which we will discuss in detail later, delineates the responsibilities of certifying and disbursing officers, and provides a mechanism for the administrative relief of certifying officers. (Comparable authority to relieve disbursing officers from liability for improper payments was not to come about until 1955.) Further detail on the federal disbursement system may be found in I Treasury Financial Manual, Chapter 4, and GAO's Policy and Procedures Manual for Guidance of Federal Agencies, title 7, chapter 6.

It should be apparent that control of the public treasury must repose in the hands of federal officials. However, this does not mean that every task in the disbursement process must be performed by a government employee. For example, GAO has advised that the Bureau of Indian Affairs is authorized as a matter of law to contract with a private bank to perform certain ministerial or operational aspects of disbursing Indian trust fund money, such as printing checks,

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delivering checks to payees, and debiting amounts from accounts. However, in order to comply with 31 U.S.C. §§ 3321 and 3325, a federal disbursing officer must retain managerial and judgmental responsibility. 69 Comp. Gen. 314 (1990). The decision concluded:

"[W]e see no reason to object to a contractual arrangement whereby a private contractor provides disbursement services, so long as a government disbursing officer remains responsible for reviewing and overseeing the disbursement operations through agency installed controls designed to assure accurate and proper disbursements." Id. at 278.

To intrude further into this responsibility would require clear statutory authority. E.g., B-210545-O.M., June 6, 1983 (Indian Health Service would need statutory authority to use fiscal intermediaries to pay claims by providers; memorandum cites examples of such authority in Medicare legislation).

b. Automated Payment Systems

The statutory framework we have just described came into existence at a time when all disbursing was done manually. The certifying officer and his or her staff would review the supporting documentation for each payment voucher. The certifying officer would then sign the voucher, certifying to its legality and accuracy, and send it on to the disbursing officer. Many disbursements are still processed manually. However, the increased use of automated payment systems has changed the way certifying officers must operate. Perhaps the clearest example is payroll certification. A certifying officer may be asked to certify a grand total accompanied by computer tapes containing payrolls involving millions of dollars. There is no way the certifying officer can verify that each payment is accurate and legal. Even if it were reasonably possible, the cost of doing it would be prohibitive.

With the onslaught of the computer age, it was natural and inevitable to ask how accountability would function in a computerized environment. Since many of the assumptions of a manual system were unrealistic under an automated system, something had to change. GAO reviewed the impact of computerization in a report entitled New Methods Needed for Checking Payments Made by Computers, FGMSD-76-82 (November 7, 1977). The report recognized that, while the certifying officer's basic legal liability remains, the conditions under which a certifying officer may be relieved under an automated payment system must be different to reflect the new realities. The

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approach to relief in this context stems from the following premises discussed in the report:

(1) In automated systems, evidence that the payments are accurate and legal must relate to the system rather than to individual transactions.

(2) Certifying and disbursing officers should be provided with information showing that the system on which they are largely compelled to rely is functioning properly.

(3) Reviews should be made at least annually, supplemented by interim checks of major system changes, to determine that the automated systems are operating effectively and can be relied on to produce payments that are accurate and legal.

The report then concluded:

"In the future, when a certifying or disbursing officer requests relief from an illegal, improper, or incorrect payment made using an automated system, GAO will continue to require the officer to show that he or she was not negligent in certifying payments later determined to be illegal or inaccurate. However, consideration will be given to whether or not the officer possessed evidence at the time of the payment approval that the system could be relied on to produce accurate and legal payments. In cases in which the designated assistant secretary or comparable official provides the agency head and GAO with a written statement that effective system controls could not be implemented prior to voucher preparation and certifies that the payments are otherwise proper, GAO will not consider the absence of such controls as evidence of negligence in determining whether the certifying official should be held liable for any erroneous payment prior to receipt of an advance decision. Of course, the traditional requirements that due care be exercised in making the payments and that diligent effort be made to recoup any erroneous payments will still be considered in any requests for waiver of liability. Also, should the certifying official fail to take reasonable steps to establish adequate controls for future payments, the reasons for such failure will be taken into account in any requests for waiver of liability concerning such future payments." FGMSD-76-82 at 17–18.

A few years later, the concepts and premises of the GAO report were explored and reported, with implementing recommendations, in a key study by the Joint Financial Management Improvement Program

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entitled Assuring Accurate and Legal Payments—The Roles of Certifying Officers in Federal Government (June 1980).[23] Further guidance from the internal control perspective may be found in OMB Circulars A-123 and A-127, title 7 of the GAO Policy and Procedures Manual, and a GAO pamphlet entitled Critical Factors in Developing Automated Accounting and Financial Management Systems (1987).

Thus, in considering requests for relief under an automated payment system where verification of individual transactions is impossible as a practical matter, the basic question will be the reasonableness of the certifying officer's reliance on the system to continually produce legal and accurate payments. B-178564, January 27, 1978 (confirming the conceptual feasibility of using automated systems to perform preaudit functions under various child nutrition programs). See also B-201965, June 15, 1982. Contexts in which system reliance is relevant are discussed in 69 Comp. Gen. 85 (1989) (automated "ZIP plus 4" address correction system) and 59 Comp. Gen. 597 (1980) (electronic funds transfer program).

Regardless of what system is used, there is of course no authority to make known overpayments. B-205851, June 17, 1982; B-203993-O.M., July 12, 1982.

c. Statistical Sampling

Statistical sampling is a procedure whereby a random selection of items from a universe is examined, and the results of that examination are then projected to the entire universe based on the laws of probability. In 1963, the Comptroller General held that reliance on a statistical sampling plan for the internal examination of vouchers prior to certification would not operate to relieve a certifying officer from liability for improper or erroneous payments. 43 Comp. Gen. 36 (1963). GAO recognized in the decision that an adequate statistical sampling plan could produce overall savings to the government, but was forced to conclude that it was not authorized under existing law.

In response to this, Congress enacted legislation in 1964, now found at 31 U.S.C. §§ 3521(b)—(d). The statute authorizes agency heads, upon determining that economies will result, to prescribe the use of adequate and effective statistical sampling procedures in the

[23]The JFMIP is a joint undertaking of GAO, the Office of Management and Budget, the Treasury Department, and the Office of Personnel Management.

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Id. at 352. The exceptions, however, are limited. In Smythe v. United States, 188 U.S. 156 (1903), the Court reviewed its precedents, including Prescott and Thomas, and upheld the liability of a Mint official for funds which had been destroyed by fire, finding the loss attributable neither to "overruling necessity" nor to a public enemy.

The standard that has evolved from the cases and statutes noted is one of strict liability. It is often said that an accountable officer is, in effect, an "insurer" of the funds in his or her charge. E.g., 64 Comp. Gen. 303, 304 (1985); 54 Comp. Gen. 112, 114 (1974); 48 Comp. Gen. 566, 567 (1969); 6 Comp. Gen. 404, 406 (1926); United States v. Heller, 1 F. Supp. 1, 6 (D. Md. 1932). The liability is automatic, and arises by operation of law at the moment a physical loss occurs or an erroneous payment is made. 70 Comp. Gen. 12, 14 (1990); 54 Comp. Gen. at 114.

Apart from whatever statutory provisions may exist from time to time, an accountable officer's strict liability is based on public policy. E.g., Prescott, 44 U.S. at 587–88 ("The liability of the defendant . . . arises out of . . . principles which are founded upon public policy"); Heller, 1 F. Supp. at 6 (strict liability "is imposed as a matter of public policy").

b. Surety Bonding

The early cases based liability on two grounds. One, as noted above, was public policy, a consideration no less important now than it was then. The second basis was the terms of the officer's bond. Prior to 1972, the fidelity bonding of accountable officers was required by law. See, e.g., 22 Comp. Gen. 48 (1942); 21 Comp. Gen. 976 (1942). As an examination of the statement of the case in decisions such as Prescott, Thomas, and Smythe will reveal, the terms of the bond were very similar to, and in fact were derived from, the 1846 "keep safely" legislation quoted above. Thus, while the bond gave the government a more certain means of recovery, it did not impose upon accountable officers any duties that were not already required by statute.[3]

[3]The bonding requirement had been for the protection of the government, not the accountable officer. Under the bonding system, if the United States was compensated for a loss by the bonding company, the company succeeded to the rights of the United States and could seek reimbursement from the accountable officer. 68 Comp. Gen. 470, 471 (1989); B-186922, April 8, 1977.

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prepayment examination of disbursement vouchers. GAO has applied this authority, for example, to conclude that agencies may use statistical sampling for the long-distance telephone call certifications required by 31 U.S.C. § 1348(b), which are a necessary prerequisite to certifying the payment vouchers. 63 Comp. Gen. 241 (1984); 57 Comp. Gen. 321 (1978).

As originally enacted, 31 U.S.C. § 3521(b) was limited to vouchers not exceeding $100. A 1975 amendment to the statute removed the $100 limit and authorized the Comptroller General to prescribe maximum dollar limits. The current limit is $2,500. GAO Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 7.4.E (1990). For further guidance, see the Policy and Procedures Manual, title 7, Appendix III, and GAO, Program Evaluation and Methodology Division, Using Statistical Sampling (April 1986). For vouchers over the prescribed limit, unless GAO has approved an exception (7 GAO-PPM App. III, sec. B), 43 Comp. Gen. 36 would continue to apply.

The relevance of all this to accountable officers is spelled out in the statute. A certifying or disbursing officer acting in good faith and in conformity with an authorized statistical sampling procedure will not be held liable for any certification or payment on a voucher which was not subject to specific examination because of the procedure. However, this does not affect the liability of the payee or recipient of the improper payment, and relief may be denied if the agency has not diligently pursued collection action against the recipient. 31 U.S.C. §§ 3521(c), (d).

GAO has approved the use of statistical sampling to test the reliability of accelerated payment or "fast pay" systems. E.g., 60 Comp. Gen. 602, 606 (1981). In 67 Comp. Gen. 194 (1988), GAO for the first time considered the use of statistical sampling for post-payment audit in conjunction with "fast pay" procedures. The question arose in connection with a General Services Administration proposal to revise its procedures for paying and auditing utility invoices. GAO approved the proposal in concept, subject to several conditions: (1) the economic benefit to the government must exceed the risk of loss; (2) the plan must provide for a meaningful sampling of all invoices not subject to 100 percent audit; and (3) the plan must provide a reliable and defensible basis for the certification of payments. GAO then considered and approved GSA's specific plan in 68 Comp. Gen.

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618 (1989). As a general proposition, however, approaching the problem through system improvements is preferable to an alternative that involves relaxing controls or audit requirements. 7 GAO-PPM § 7.4.F (1990).

d. Provisional Vouchers and Related Matters

Apart from questions of automation or statistical sampling, proposals arise from time to time, prompted by a variety of legitimate concerns, to expedite or simplify the payment process. Proposals of this type invariably raise the potential for overpayments or erroneous payments. Therefore, their consequences in terms of the liability and relief of certifying and disbursing officers must always be considered.

A 1974 case involved a proposal by the Environmental Protection Agency for the certification of "provisional vouchers" for periodic payments under cost-type contracts. Under the proposal, monthly vouchers certified for payment would be essentially unaudited except for basic mathematical and cumulative cost checks, subject to adjustment upon audit when the contract is completed. Under this system, as with statistical sampling, some errors could escape detection. However, certifying officers would not have the benefit of the protection afforded by the statistical sampling legislation. Since there would be a complete audit upon contract completion, the provisional vouchers could be certified upon a somewhat lesser standard of prepayment examination, but GAO pointed out that any such system should provide, at a minimum, for periodic audit of the provisional vouchers. To better protect the certifying officers, GAO suggested following a Defense Department procedure under which "batch audits" of accumulated vouchers are conducted as frequently as deemed necessary based on the reliability of each contractor's accounting and billing procedures, but not less than annually, again subject to final audit upon contract completion. B-180264, March 11, 1974.

In order to meet processing deadlines, time and attendance forms are often "certified" by appropriate supervisory personnel before the end of the pay period covered, raising the possibility that information for the latter days of the pay period may turn out to be erroneous. Since necessary adjustments can easily be made in the subsequent pay period and since the risk of loss to the government is viewed as remote, the provisional certification of payroll vouchers based on these "provisional" time and attendance records is acceptable. B-145729, August 17, 1977 (internal memorandum).

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Simplification plans may be prompted by nothing more exotic than understaffing of audit resources. In B-201408, April 19, 1982, an agency proposed an "audit resources utilization plan" whereby it would (1) attempt to identify high risk contractors through preaward questionnaires; (2) for low risk contracts below a monetary limit, substitute desk audits for field contract audits; and (3) encourage the use of systems audits where possible. GAO found no "conceptual objection" to the proposal, noting that the final audits discussed in B-180264 did not necessarily have to be field audits, but emphasized that high risk contractors should be subject to contract audits in all cases. The decision also discusses the certifying officer's role.

Another type of simplification proposal involves lessening the degree of scrutiny on small payments. For example, the Department of Veterans Affairs is authorized to reimburse certain low-cost supplies furnished to veterans under statutory training and rehabilitation programs. Experience taught the VA that participants could reasonably be expected to incur at least $35 of reimbursable supply expenses. The VA proposed to waive documentation and review requirements on invoices of up to $35 for miscellaneous supplies, and to pay essentially unsupported invoices up to that amount.[24] GAO concurred, but added that the VA should be able to demonstrate that prior audits have not revealed a significant number of false or inappropriate claims, and that it has internal controls adequate to detect multiple claims for the same individual. B-221949, June 30, 1987. An unstated consequence of the decision is that a certifying officer who relied on the system, assuming it was set up in accordance with the specified criteria, would be relieved from liability should any of the payments turn out to be erroneous.

One of the precedents relied on in B-221949 is B-179724, January 14, 1974, holding that, in certain circumstances, a cash register checkout tape identifying at least the general category for each item is sufficient documentation for small purchase certifications. The rationale was the reality of commercial practice:

"Certain businesses selling consumer type products, such as grocery stores and hardware stores, whose sales frequently comprise small numbers of items having low unit costs, do not as a matter of ordinary business practice provide customers

[24]Invoices may be used in place of vouchers to support disbursements as long as they contain all required information. GAO Policy and Procedures Manual for Guidance of Federal Agencies, title 7, § 6.2.C (1990); I Treasury Financial Manual § 4-2025.20.

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receipts containing detailed descriptions for each item. It is impractical to develop more detailed descriptive type receipts for such purchases."

As with B-221949, the unstated consequence is that an accountable officer relying on the decision and otherwise exercising due care would be relieved from liability for improper payments.

e. Facsimile Signatures and Electronic Certification

Signature devices other than the traditional pen-and-ink signature are called "facsimile signatures." The term has been defined as "an impression of a signature made by a rubber stamp, metal plate, or other mechanical contrivance." B-194970, July 3, 1979. As a general proposition, there is no prohibition on the use of facsimile signatures on financial documents as long as adequate controls and safeguards are observed. The rule was stated as follows in B-48123, November 5, 1965 (non-decision letter):

"Generally, an acceptable facsimile of a signature may be made by a rubber stamp impression or may be reproduced on a metal plate or by other mechanical contrivances, the validity of which is derived from a signed original. An otherwise proper document may be so authenticated mechanically with the knowledge and consent or under an express delegation of authority from the signer of the original provided that appropriate safeguards are observed in those respects."

The rule has statutory recognition. In any federal statute unless otherwise specified, the term "signature" includes "a mark when the person making the same intended it as such." 1 U.S.C. § 1; 65 Comp. Gen. 806, 810 (1986).

When facsimile signatures are to be used by government officials, the safeguards should include:

- Standards for the authorization of the use of facsimile signatures.
- An enumeration of the types of documents on which facsimile signatures may be used.
- Physical control of the signature device to prevent unauthorized use.
- Notification to officials authorized to use facsimile signatures that use of a signature device in no way lessens their responsibility or liability.

B-140697, October 28, 1959 (approving use of facsimile signatures in the execution of contracts). Other cases approving the use or acceptance of facsimile signatures are 40 Comp. Gen. 5 (1960) (use by Air Force on purchase orders for small purchases); 33 Comp. Gen. 297 (1954) (certification of invoice bearing only rubber stamp

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signature of vendor); B-194970, July 3, 1979 (certification of voucher/purchase order bearing only facsimile signature of contracting officer); B-150395, December 21, 1962 (use by Navy on purchase orders); B-104590, September 12, 1951 (use on vouchers in federal educational grant programs); B-126776-O.M., March 5, 1956 (use by Army on certificates of availability of government quarters and/or mess in support of military travel vouchers).[25]

A more recent case held that payment could be certified on the basis of a contractor's facsimile ("fax") invoice, again provided that the agency has adequate internal controls to guard against fraud and overpayments. B-242185, February 13, 1991, citing several cases authorizing the acceptance of carbon copies.

One place where facsimile signatures are not permitted is the Standard Form 210, the signature/designation card for certifying officers which must be filed with the Treasury Department and which must bear the certifying officer's original, manual signature. I Treasury Financial Manual § 4-2040.30e.

Most of the cases cited thus far have involved relatively primitive devices such as rubber stamps or signature machines. When we move into the realm of computerized data transmission, the equipment is far more sophisticated but the underlying principles are the same—there is no prohibition but there must be adequate safeguards.

In the 1980s, GAO and the Treasury Department began to consider the feasibility of electronic certification of payment vouchers. In a 1984 memorandum to one of GAO's audit divisions, GAO's General Counsel agreed with the Treasury Department that there is no specific legal requirement that a certifying officer's certification be limited to writing on paper. Then, applying the precedent of the earlier rubber stamp cases, the memorandum concluded that electronic certification, with adequate safeguards, was not legally objectionable. The "signature" could be an appropriate symbol adopted by the certifying officer, which should be unique, within the certifying officer's sole control or custody, and capable of verification by the disbursing officer. B-216035-O.M., September 20, 1984. Treasury subsequently developed a proposal for a prototype electronic certification system,

[25]An early case, B-36459, April 6, 1944, suggesting that use of facsimile signatures somehow required GAO approval has not been followed and should be disregarded.

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which GAO found to adequately satisfy the statutory requirements for voucher certification and payment. B-216035-O.M., September 25, 1987.[26]

f. GAO Audit Exceptions

"Taking an exception" is a device GAO uses to formally notify an accountable officer of a fiscal irregularity which may result in personal liability. Today, this device is very rarely used. At one time, accountable officers had to submit all of their account documents to GAO, and GAO "settled" the accounts (31 U.S.C. § 3526(a)) by physically examining each piece of paper. Exceptions were common during that era. The nature of the process has evolved in recent decades in recognition of the increased responsibility of agencies in establishing their own financial systems and controls. Account settlement now is more a matter of systems evaluation and the review of administrative surveillance and the effectiveness of collection and disbursement procedures. Examination of individual transactions by GAO is minimal. See 7 GAO-PPM § 8.5 (1990). However, fiscal irregularities still come to GAO's attention in various ways (through its normal audit activities, agency irregularity reports, etc.), and GAO may invoke the exception procedure when warranted by the circumstances. The process is summarized in 7 GAO-PPM § 8.6 (1990). Examples are noted in 65 Comp. Gen. 858, 861 (1986) (massive travel fraud scheme), and B-194727, October 30, 1979 (fraudulent misappropriation of mass transit grant funds by government employee).

The first step in the exception process is the issuance of a "Notice of Exception" to the agency concerned. The issuance of a Notice of Exception does not itself constitute a definite determination of liability. It has been described as "in the nature of a challenge to the propriety of a certifying officer's action in certifying the voucher for payment." B-69611, October 27, 1947. The certifying or disbursing officer, through his or her agency, then has the opportunity to respond to the exception. It is the accountable officer's responsibility to establish the propriety of the payment. 13 Comp. Gen. 311 (1934). If the reply to the exception is satisfactory, the exception is withdrawn. E.g., B-78091, November 2, 1948. If the reply does not

[26]A related issue is the use of electronic technology in creating obligations under 31 U.S.C. § 1501. The topic is covered, with citations, in Chapter 7.

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provide a satisfactory basis to remove the exception, the item is "disallowed" in the account.

Technically, the term "disallowance" applies only to disbursing officers since a certifying officer does not have physical custody of funds and does not have an "account" in the same sense that a disbursing officer does. Thus, strictly speaking, GAO "disallows an expenditure" in the account of a disbursing officer and "raises a charge" against a certifying officer. See 32 Comp. Gen. 499, 501 (1953); A-48860, April 14, 1950. For account settlement purposes, a certifying officer's "account" consists of the certified vouchers and supporting documents on the basis of which payments have been made by a disbursing officer and included in the disbursing officer's account for a particular accounting period. B-147293-O.M., February 21, 1962.

The taking of an exception does not preclude submission of a relief request under applicable relief legislation. As a practical matter, if the agency has been unable to respond satisfactorily to the Notice of Exception, the likelihood of there being adequate basis for relief is diminished correspondingly. However, as in 65 Comp. Gen. 858, it can happen, and the possibility should therefore not be dismissed.

2. Certifying Officers

a. Duties and Liability

As we have seen, a certifying officer is the official who certifies a payment voucher to a disbursing officer. The responsibility and accountability of certifying officers are specified in 31 U.S.C. § 3528(a), part of the previously noted 1941 legislation enacted to clarify the roles of accountable officers under Executive Order 6166. The certifying officer is responsible for (1) the existence and correctness of the facts stated in the certificate, voucher, and supporting documentation; (2) the correctness of computations on the voucher; and (3) the legality of a proposed payment under the appropriation or fund involved. The statute further provides that a certifying officer will be accountable for the amount of any "illegal, improper, or incorrect" payment resulting from his or her false or misleading certification, as well as for any payment prohibited by law or which does not represent a legal obligation under the appropriation or fund involved.

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There is a recurring appropriation act provision, discussed in Chapter 4 under the heading "Employment of Aliens," which bars the use of appropriated funds to pay the compensation of a government employee who is not a United States citizen, subject to certain exceptions. The provision applies only to employees whose post of duty is in the continental United States. Thus, a certifying officer (or disbursing officer) in the continental United States must be a U.S. citizen unless one of the exceptions applies. There is no comparable requirement applicable to employees outside the continental United States. B-206288-O.M., August 4, 1982.

A certifying officer must normally be an employee of the agency whose funds are being spent, but may be an employee of another agency under an authorized interagency transaction or agreement. 59 Comp. Gen. 471 (1980); 44 Comp. Gen. 100 (1964).

A certifying officer is liable the moment an improper payment is made as the result of an erroneous or misleading certification. E.g., 54 Comp. Gen. 112, 114 (1974). This is true whether the certification involves a matter of fact, a question of law, or a mixed question of law and fact. 55 Comp. Gen. 297, 298 (1975) (citing several other cases). As a general proposition, the government looks first to the certifying officer for reimbursement even though some other agency employee may be liable to the certifying officer under administrative regulations. 32 Comp. Gen. 332 (1953); 15 Comp. Gen. 962 (1936). Also, the certifying officer's liability does not depend on the government's ability or lack of ability to recoup from the recipient of the improper payment. 31 Comp. Gen. 17 (1951); 28 Comp. Gen. 17, 20 (1948). What this means is that the government is not obligated to seek first to recoup from the recipient, although it frequently does so, and of course any recovery from the recipient will reduce the certifying officer's liability, at least in most cases.

Occasionally there may be two certifying officers involved with a given payment, so-called "successive certifications." The rule is that the responsibility of the certifying officer certifying the basic voucher is not diminished by the subsequent action. GAO stated the principle as follows in a letter to the Secretary of the Treasury, B-142380, March 30, 1960, quoted in 67 Comp. Gen. 457, 466 (1988):

"Where the certifying officer who certifies the voucher and schedule of payments is different from the certifying officer who certifies the basic vouchers, . . . the certifying officer who certifies the basic vouchers is responsible for the correctness of such

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vouchers and the certifying officer who certifies the voucher-schedule is responsible only for errors made in the preparation of the voucher-schedule."

An illustration of how this principle may apply is 55 Comp. Gen. 388 (1975), involving the liability of General Services Administration certifying officers under interagency service and support agreements with certain independent agencies. Under the arrangement in question, the agency would assume certification responsibility for the basic expenditure vouchers, but they would be processed for final payment through GSA, with GSA preparing and certifying a master voucher and schedule to be accompanied by a master magnetic tape. Again quoting the above passage from B-142380, GAO concluded that the legal liability of the GSA certifying officer would be limited to errors made in the final processing.

Similarly, the statutory accountability does not apply to an official who certifies an "adjustment voucher" used to make adjustments between accounts or funds in the Treasury in respect of an obligation already paid and which therefore does not involve paying money out of the Treasury to discharge an obligation. 23 Comp. Gen. 953 (1944). Although certification even in this situation should not be reduced to a "matter of form," the accountability would attach to the certifying officer who certified the basic payment voucher. See 23 Comp. Gen. 181, 183–84 (1943).

The function of certification is not perfunctory, but involves a high degree of responsibility. 55 Comp. Gen. 297, 299 (1975); 20 Comp. Gen. 182, 184 (1940). This responsibility is not alleviated by the press of other work. B-147747, December 28, 1961.[27] It also involves an element of verification, the extent of which depends on the circumstances. For example, a voucher for goods or services should be supported by evidence that the goods were received or the services performed. 39 Comp. Gen. 548 (1960). Generally, an independent investigation of the facts is not contemplated. E.g., 28 Comp. Gen. 571 (1949). Similarly, where proper administrative safeguards exist, certifying officers need not examine time, attendance, and leave

[27]But see B-138601, January 18, 1960, in which the volume of work was taken into consideration in a somewhat extreme case.

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records in order to certify the correctness of amounts shown on payrolls submitted to them. 31 Comp. Gen. 17 (1951).[28] A 1982 decision, 61 Comp. Gen. 477, reviewed the safeguards proposed by a Bonneville Power Administration certifying officer for certifying recurring payments to a regional planning body, and found them adequate to satisfy 31 U.S.C. § 3528.

Whatever else the certifying officer's verification burden may or may not involve, it certainly involves questioning items on the face of vouchers or supporting documents which simply do not look right. For example, a certifying officer who certifies a voucher for payment in the full amount claimed, disregarding the fact that the accompanying records indicate an outstanding indebtedness to the government against which the sum claimed is available for offset, is accountable for any resulting overpayment. 28 Comp. Gen. 425 (1949). Similarly, certifying a voucher in the full amount within a prompt payment discount period without taking the discount will result in liability for the amount of the lost discount. However, a certifying officer is not liable for failing, even if negligently, to certify a voucher within the time discount period. 45 Comp. Gen. 447 (1966).

A clear illustration of a certifying officer's responsibility and liability occurred when a Department of Transportation employee fraudulently misappropriated more than $850,000 in 1977. The fraud was discovered by virtue of the employee's ostentatious purchases, including several luxury automobiles and a "topless" bar in Washington, D.C. The employee was found guilty and sent to jail. However, investigation revealed negligence on the part of a Department certifying officer. The employee had perpetrated the fraud by inserting his own name on six payment vouchers for Urban Mass Transportation Administration grants. Each voucher contained a list of approximately ten payees with individual amounts, and the total amount, and each had been certified by the certifying officer. The negligence occurred in one of two ways. If the employee inserted his own name and address on the voucher before presenting it to the certifying officer, the certifying officer was negligent in not spotting the name of an individual (whose name he should have known) with

[28]Many of the cases noted in the text, such as 31 Comp. Gen. 17, arose under manual systems. While they would still apply under a manual system, it is important to keep in mind the previously discussed differences in approach between manual and automated systems.

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In a 1962 report, GAO concluded that bonding was not cost-effective,[4] and recommended legislation to repeal the bonding requirement. Review of the Bonding Program for Employees of the Federal Government, B-8201, March 29, 1962. Congress repealed the requirement in 1972, and accountable officers are no longer bonded. 31 U.S.C. § 9302. The last sentence of 31 U.S.C. § 9302 states explicitly that the prohibition on requiring surety bonds "does not affect the personal financial liability" of individual officers or employees. Thus, elimination of the bonding requirement has no effect on the legal liability of accountable officers. 54 Comp. Gen. 112 (1974); B-191440, May 25, 1979.

c. Relief

The early cases and statutes previously noted made no mention of relief from liability.[5] "Relief" in this context means an action, taken by someone with the legal authority to do so, which absolves an accountable officer from liability for a loss. Prior to the World War II period, with limited exceptions for certain accountable officers of the armed forces, an accountable officer had but two relief options available. First, a disbursing officer could bring an action in what was then the Court of Claims under 28 U.S.C. § 2512. Of course, the officer would probably need legal representation and would incur other expenses, none of which were reimbursable. Second, and this became the most common approach, was private relief legislation, a burdensome process for amounts which were often relatively small. There was no mechanism for providing relief at the administrative level, however meritorious the case. 4 Comp. Gen. 409 (1924); 27 Comp. Dec. 328 (1920).

Starting in 1941, Congress enacted a series of relief statutes, and there is now a comprehensive statutory scheme for the administrative relief of accountable officers who are found to be without fault. The major portion of this chapter deals with the application of this legislation.

It is important to distinguish between liability and relief. It is not the denial of relief that makes an accountable officer liable. The basic

[4]Originally, accountable officers had to pay for their own bonds. 33 Comp. Gen. 7 (1953). Legislation effective January 1, 1956, authorized the government to pay (69 Stat. 618).

[5]The "public enemy" situation dealt with in the Thomas case is not an example of relief. It is an example of a situation in which liability does not attach to begin with.

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an address in suburban Maryland on a list of payees the rest of which were mass transit agencies. If the employee presented a partial voucher and added his own name after it was certified, the total as presented to the certifying officer could not have agreed with the sum of the individual amounts, and the certifying officer was negligent in not verifying the computation. GAO raised exceptions to the certifying officer's account, and advised the Department of Transportation that it must proceed with collection action against the certifying officer for the full amount of the excepted payments less any amounts recovered from the employee or through the sale of assets, like the topless bar, which the Justice Department seized. See B-194727, October 30, 1979. Apparently in view of the clear negligence, relief was never requested.

At this point, it should be noted that no one involved in the process remotely expects that the government will be able to recover several hundred thousand dollars from a certifying officer, or from any other accountable officer, except perhaps one who has him(her)self stolen the money. However, the burden of having to repay even a portion in cases of losses of this size sends an important message and reenforces the certain if indeterminable deterrent effect of the statute.

Certifying officers should not certify payment vouchers that are unsupported by pertinent documentation indicating that procedural safeguards regarding payment have been observed. Vouchers that are deficient in this regard should be returned to the appropriate administrative officials for proper approvals and supporting documents. B-179916, March 11, 1974.

An area in which a certifying officer's duty to question is minimal is payments to a contractor determined under a statutory or contractual disputes procedure. In the absence of fraud or bad faith by the contractor, a payment determination made under a disputes clause procedure is final and conclusive and may not be questioned by a certifying officer, GAO, or the Justice Department. S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972); B-201408, April 19, 1982. It does not follow that any administrative settlement is entitled to the same effect. In B-239592, August 23, 1991, GAO found that an "informal settlement" of a personnel action between an agency and one of its employees was without legal authority, and found the certifying officer liable for the unauthorized payments. (A subsequent letter, B-239592.2, September 1, 1992, clarified that this meant the

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authorized certifying officer, not an official who had signed certain documents as "approving official" but was not responsible for determining the legality of the payment.)

A different issue involving an administrative settlement arose in 67 Comp. Gen. 385 (1988). After an investigation by federal and state officials, the Forest Service determined that it was responsible for a fire in a national forest in Oregon, and reimbursed the state for fire suppression expenses incurred under a cooperative agreement. Subsequently, a private landowner sued for damages resulting from the same fire, and the court made a finding of fact that the Forest Service was not liable. The certifying officer was concerned that the court's finding might have the effect of invalidating the prior payment to Oregon and making him liable for an erroneous payment. The decision concluded that the payment was proper when made, and that the court finding did not impose any duty on the certifying officer to reopen and reexamine it.

A certifying officer has the statutory right to seek and obtain an advance decision from the Comptroller General regarding the lawfulness of any payment to be certified. 31 U.S.C. § 3529. This procedure will insulate against liability. Following the advice of agency counsel, on the other hand, does not guarantee protection against liability. E.g., 55 Comp. Gen. 297 (1975). Having said this, we do not wish to imply that consulting agency counsel is a pointless gesture. On the contrary, it is to be encouraged. Seeking internal legal advice prior to certification of matters on which the certifying officer is unsure will in many cases obviate any need for an advance decision. In other cases it may help define those situations in which consulting GAO may be desirable.

As a final note, the Treasury Department has published a supplement to the Treasury Financial Manual entitled Now That You're a Certifying Officer (1983). Written expressly for certifying officers, it provides a good overview of the importance of the job and the responsibilities which accompany it.

b. Applicability of 31 U.S.C. § 3528

There are two major exceptions to 31 U.S.C. § 3528(a). First, it applies only to the executive branch. While section 3528(a) is not limited by its terms to the executive branch, 31 U.S.C. § 3325(a), the basic requirement that disbursing officers disburse only upon duly certified vouchers, is expressly limited to the executive branch, and sections

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3325(a) and 3528(a) originated as sections 1 and 2 of the same 1941 enactment. Thus, GAO has concluded that 31 U.S.C. § 3528(a) does not apply to the legislative branch. 21 Comp. Gen. 987 (1942); B-191036, July 7, 1978; B-236141.2, February 23, 1990 (internal memorandum). See also B-39695, March 27, 1945. It has also been held that 31 U.S.C. § 3325(a) does not apply to the judicial branch. B-6061/A-51607, April 27, 1942. It follows that section 3528(a) would be equally inapplicable to the judicial branch. B-236141.2, cited above.

The second major exception, previously noted, is the exemption contained in 31 U.S.C. § 3528(d) for the military departments except for salaries and expenses in the District of Columbia.

Some legislative branch agencies now have their own legislation patterned after 31 U.S.C. § 3528. Those that do not, as well as the military departments, nevertheless have the authority, within their discretion, to create their own certifying officers and to make them accountable by administrative regulation. The degree of accountability is up to the agency. The 1990 memorandum cited above, B-236141.2, contains a detailed discussion. An arrangement of this type can include a mechanism for administrative relief. Id. However, relief would have to be granted or denied by the agency itself, not by GAO. 21 Comp. Gen. at 989; B-191036, July 7, 1978. Also, a system of certifying officer accountability established by an agency exempt from 31 U.S.C. § 3528 would not automatically eliminate the statutory accountability of the disbursing officer, who remains the primary accountable officer. 22 Comp. Gen. 48, 51 (1942); 21 Comp. Gen. at 988–89; B-213720, October 2, 1984.

Notwithstanding 31 U.S.C. § 3528(d), it is possible for section 3528 to apply to military departments, albeit only in rare situations. The exemption "was intended to relate to the functions of actually disbursing funds—to the paying of vouchers, etc." B-24356, March 18, 1942, quoted in 44 Comp. Gen. 818, 820 (1965). Thus, if a situation were to occur in which a military disbursing officer were functioning as a certifying officer with the actual disbursement to be made by another agency, such as Treasury, section 3528 would apply. For example, prior to the Treasury Department's recertification procedures for replacement checks, discussed later in this chapter, the military departments issued their own replacement checks by virtue of a specific delegation from Treasury under 31 U.S.C.

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§ 3331(f). Replacement checks beyond the scope of the delegation had to be issued by Treasury, with the military disbursing officer functioning essentially as a certifying officer. Relief for losses in these cases was handled under 31 U.S.C. § 3528. The case with the most detailed discussion is B-215380 et al., July 23, 1984.

c. Relief

Informally known as the Certifying Officers' Relief Act, 31 U.S.C. § 3528(b) establishes a mechanism for the administrative relief of certifying officers governed by 31 U.S.C. § 3528(a). There are two standards for relief. The Comptroller General may relieve a certifying officer from liability for an illegal, improper, or incorrect payment upon determining that—

(1) the certification was based on official records and the certifying officer did not know, and by reasonable diligence and inquiry could not have discovered, the actual facts; or

(2) the obligation was incurred in good faith, the payment was not specifically prohibited by statute, and the United States received value for the payment.

Under either standard, relief may be denied if the agency fails to diligently pursue collection action against the recipient of the improper payment. 31 U.S.C. § 3528(b)(2).

Unlike the physical loss relief statutes previously discussed, 31 U.S.C. § 3528(b) does not require administrative determinations by the agency as a prerequisite to relief. The determinations under section 3528(b) are made by the Comptroller General. Also, the relief standards under section 3528(b) are stated in the alternative; relief may be granted if either of the two standards can be established. It makes no difference whether the improper payment is discovered by GAO or the agency concerned. B-137435-O.M., October 14, 1958. Relief is discretionary (the statute says "may relieve"), although no case has been discovered in which a certifying officer who met either of the standards was not relieved.

There is no special form of request under 31 U.S.C. § 3528(b). Relief may be requested by the agency on behalf of the certifying officer, or directly by the certifying officer. See, e.g., 31 Comp. Gen. 653 (1952) for an example of the latter. Relief requests must present sufficient

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information to permit GAO to make one of the required findings. E.g., B-191900, July 21, 1978.

One of the objectives of 31 U.S.C. § 3528(b) was to reduce the volume of private relief legislation recommended on behalf of certifying officers. The legislative history of the statute indicates that an agency should seek relief from GAO before considering relief legislation. As to those "less meritorious cases" in which relief may be denied, relief legislation remains an available option. 30 Comp. Gen. 298 (1951).

The first relief standard, 31 U.S.C. § 3528(b)(1)(A), relates essentially to the certification of incorrect facts, and permits relief if the certification was based on official records and if the certifying officer did not know, and could not reasonably have learned, the actual facts. GAO has never attempted to formulate a general rule as to what acts may support relief from the certification of incorrect facts. Rather, the approach is as stated in 55 Comp. Gen. 297, 299–300 (1975):

"[W]e have sought to apply the relief provisions by considering the practical conditions and procedures under which certifications of fact are made. Consequently, the diligence to be required of a certifying officer before requests for relief under the act will be considered favorably is a matter of degree dependent upon the practical conditions prevailing at the time of certification, the sufficiency of the administrative procedures protecting the interest of the Government, and the apparency of the error."

For example, Social Security Administration certifying officers who certify large numbers of awards each month may, apart from obvious errors, rely on the award documents presented for certification. B-119248-O.M., April 14, 1954.

In B-237419, December 5, 1989, relief was granted to a Forest Service certifying officer who certified the refund of a timber purchaser's cash bond deposit without knowing that the refund had already been made. The certifying officer had followed proper procedures by checking to see if the money had been refunded, but did not discover the prior payment because it had not been properly recorded. Also, the agency was pursuing collection efforts against the payee.

Another case in which relief was granted under subsection (b)(1)(A) is B-246415, July 28, 1992. A certifying officer paid a contract invoice to a financing institution to which payments had been assigned under

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the Assignment of Claims Act without discovering that the contract file contained a prior assignment. The contracting officer had erroneously acknowledged the second assignment when he should have either rejected it or invalidated the first one. The agency remained liable to the first assignee and was unable to recover the improper payment from the second. The certifying officer had checked the contract file, and neither agency procedures nor reasonable diligence required her to keep looking once she found what appeared on its face to be a properly acknowledged assignment. The case also illustrates how an agency (the Panama Canal Commission in this case) should respond to a loss—by reviewing its procedures to determine if they can be improved, within reason, to prevent recurrence. In this instance, the agency began requiring that contract files include a "milestone" log, and that assignments be tabbed in the file and reviewed prior to acknowledgment.

As a general rule, a certifying officer may not escape liability for losses resulting from improper certification merely by stating either that he was not in a position to determine that each item on a voucher was correctly stated, or that he must depend on the correctness of the computations of his subordinates. A certifying officer who relies upon statements and computations of subordinates must assume responsibility for the correctness of their statements and computations, unless it can be shown that neither the certifying officer nor his or her subordinates, in the reasonable exercise of care and diligence, could have known the true facts. 55 Comp. Gen. 297, 299 (1975); 26 Comp. Gen. 578 (1947); 20 Comp. Gen. 182 (1940).

In 49 Comp. Gen. 486 (1970), a certifying officer asked if he would be held accountable where his own agency would not tell him exactly what he was being asked to certify. The agency took the position that the expenses in question were confidential and could be disclosed only to those with a need to know, which did not include the certifying officer. GAO disagreed. The situation would be different if the agency were operating under "unvouchered expenditure" authority such as 31 U.S.C. § 3526(e)(2). Under that type of authority, a certifying officer who is not informed of the object or purpose of the expenditure is not accountable for its legality. 24 Comp. Gen. 544 (1945). In the case at hand, however, the agency had no such authority. Therefore, the certifying officer would not be protected against liability if he certified a voucher without knowing what it represented. As GAO pointed out several years later, any other answer

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would defeat the purpose of the certification requirement, which is to protect the United States against illegal or erroneous payments. 55 Comp. Gen. 297, 299 (1975). Except for statutorily authorized unvouchered expenditures, "I don't know and they wouldn't tell me" cannot be sufficient.

The second relief standard, 31 U.S.C. § 3528(b)(1)(B), contains three elements, all of which must be satisfied—obligation incurred in good faith, payment not specifically prohibited, United States received value for the payment. If a certifying officer qualifies for relief under this standard, it becomes irrelevant whether he or she could also have qualified under the first standard. This is particularly useful because, in many cases, what would constitute reasonable diligence and inquiry for purposes of the first standard is far from clear.

There is no simple formula for determining good faith. One authority attempts to define the term as follows:

> "Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud . . . . Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry."

Black's Law Dictionary 693 (6th ed. 1990). An important factor in evaluating good faith for purposes of 31 U.S.C. § 3528 is whether the certifying officer had, or reasonably should have had, doubt regarding the propriety of the payment and, if so, what he or she did about it. Whether the certifying officer reasonably should have been in doubt depends on a weighing of all surrounding facts and circumstances and cannot be resolved by any "hard and fast rule." 70 Comp. Gen. 723, 726 (1991). In many cases, good faith is found simply by the absence of any evidence to the contrary. Id.

At one time, the failure to obtain an advance decision from GAO on matters considered doubtful was viewed as an impediment to establishing good faith. E.g., 14 Comp. Gen. 578, 583 (1935). Depending on the circumstances, following the advice or instructions of some administrative official in lieu of seeking an advance decision may not constitute "reasonable inquiry" under the first relief standard of 31 U.S.C. § 3528. 31 Comp. Gen. 653 (1952). However, it has become increasingly recognized that consulting agency counsel is a

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relevant factor in demonstrating good faith under the second standard. B-191900, July 21, 1978; B-127160, April 3, 1961.

To understand the second element– "no law specifically prohibited the payment"–it is helpful to note the language of the original 1941 enactment, which was "the payment was not contrary to any statutory provision specifically prohibiting payments of the character involved" (55 Stat. 875–76). This means statutes which expressly prohibit payments for specific items or services. 70 Comp. Gen. 723, 726 (1991); B-191900, July 21, 1978. An example would be 40 U.S.C. § 34, which prohibits the rental of space in the District of Columbia without specific authority. 46 Comp. Gen. 135 (1966).[29] Other examples are 31 U.S.C. § 1348(a) (telephones in private residences) and 44 U.S.C. § 3702 (newspaper advertisements).

Under this interpretation, the phrase "no law specifically prohibited the payment" is not the same as the more general "payment prohibited by law." It does not include violations of general fiscal statutes such as the Antideficiency Act (31 U.S.C. § 1341) or the general purpose statute (31 U.S.C. § 1301(a)). B-142871-O.M., September 15, 1961.[30]

The third element, value received, normally implies the receipt of goods or services with a readily determinable dollar value. E.g., B-241879, April 26, 1991 (automatic data processing equipment maintenance contract extended without proper delegation of procurement authority, services were performed). However, in appropriate circumstances, an intangible item may constitute value received where the payment in question has achieved a desired program result. B-191900, July 21, 1978; B-127160, April 3, 1961.

[29]Although the statute is no longer construed as prohibiting the rental of short-term conference facilities, it is still an example of a specific prohibition as contemplated by 31 U.S.C. § 3528.

[30]One case, B-222048, February 10, 1987, implying that an Antideficiency Act violation would preclude relief under 31 U.S.C. § 3528(b)(1)(B), is inconsistent with the weight of authority as discussed in the text.

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3. Disbursing Officers

a. Standards of Liability and Relief

As with certifying officers, the responsibilities and accountability of disbursing officers are mandated by statute. A disbursing officer in the executive branch must (1) disburse money only in accordance with vouchers certified by the head of the spending agency or an authorized certifying officer, and (2) examine the vouchers to the extent necessary to determine that they are (a) in proper form, (b) certified and approved, and (c) correctly computed on the basis of the facts certified. The disbursing officer is accountable for these functions, except that accountability for the correctness of computations lies with the certifying officer. 31 U.S.C. § 3325(a).[31] Disbursing officers render their accounts quarterly. 31 U.S.C. § 3522(a)(1).

The administrative relief provision for disbursing officers is 31 U.S.C. § 3527(c), enacted in 1955 (69 Stat. 687). The Comptroller General is authorized to relieve present or former disbursing officers from liability for deficiencies in their accounts resulting from illegal, improper, or incorrect payments, upon determining that the payment was not the result of bad faith or lack of reasonable care by the disbursing officer. The determination may be made by the agency and concurred in by GAO, or it may be made by GAO on its own initiative. As in the case of certifying officers, relief may be denied if the agency concerned fails to diligently pursue collection action against the recipient of the improper payment.

The statute further provides that the granting of relief under section 3527(c) does not affect the liability or authorize the relief of the beneficiary or recipient of the improper payment, nor does it diminish the government's duty to pursue collection action against the beneficiary or recipient. 31 U.S.C. § 3527(d)(2).

In contrast with the certifying officer relief statute, 31 U.S.C. § 3527(c) is not limited to the executive branch. E.g., B-200108/B-198558,

[31]Since 31 U.S.C. § 3325(a) originated as part of the 1941 legislation designed to clarify responsibilities under 31 U.S.C. § 3321(a) (Executive Order 6166), and since section 3321(a) does not apply to the military departments except for salaries and expenses in the District of Columbia, section 3325(a) has the same exemption, found at 31 U.S.C. § 3325(b). Military disbursing officers are nevertheless fully accountable.

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January 23, 1981 (judicial branch). Within the executive branch, it applies to military and civilian agencies alike.[32] Thus, the relief authority of 31 U.S.C. § 3527(c) is not limited only to those disbursing officers whose duties are prescribed by 31 U.S.C. § 3325(a).

The relief statute contemplates the consideration of individual cases and does not authorize the blanket relief of unknown disbursing officers for unknown amounts. B-165743, May 11, 1973.

Once it is determined that there has been an improper payment for which a disbursing officer is accountable, and that relief is desired, the primary issue is whether the payment was or was not the result of bad faith or lack of reasonable care on the part of the disbursing officer. "Bad faith" is difficult to define with any precision. It is somewhere between negligence and actual dishonesty, and closer to the latter. One authority gives us the following:

"The opposite of 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Term 'bad faith' is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; . . . ."

Black's Law Dictionary 139 (6th ed. 1990). Bad faith cases tend to be relatively uncommon. Far more common are cases involving the reasonable care standard. This standard—whether the disbursing officer exercised reasonable care under the circumstances—is the legal definition of negligence, and is the same standard applied in physical loss cases. 65 Comp. Gen. 858, 861–62 (1986); 54 Comp. Gen. 112 (1974).

The determination of whether a payment was or was not the result of bad faith or lack of due care must be made on the basis of the facts and circumstances surrounding the particular payment in question. A high error rate in the disbursing office involved does not automatically establish lack of due care in the making of a particular payment, nor does a low error rate and a record of an exemplary operation automatically establish due care. B-141038-O.M., November 17,

[32]Apart from the absence of any limiting language in the statute itself, this is clear from references to Defense Department input in the legislative history. S. Rep. No. 1185, 84th Cong., 1st Sess. 3 (1955); H.R. Rep. No. 996, 84th Cong., 1st Sess. 2 (1955).

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legal liability of an accountable officer arises automatically by virtue of the loss and is not affected by any lack of fault or negligence on the officer's part; relief is a separate process, and may take lack of fault into consideration to the extent authorized by the governing statute.[6] 54 Comp. Gen. 112 (1974); B-167126, August 28, 1978.

2. Who Is an Accountable Officer?

An accountable officer is any government officer or employee who by reason of his or her employment is responsible for or has custody of government funds. 62 Comp. Gen. 476, 479 (1983); 59 Comp. Gen. 113, 114 (1979); B-188894, September 29, 1977. Accountable officers encompass such officials as certifying officers, civilian and military disbursing officers, collecting officers, and other employees who by virtue of their employment have custody of government funds. With rare exceptions,[7] other officials who may have a role in authorizing expenditures (contracting officers, for example) are not accountable officers for purposes of the laws discussed in this chapter, although they may be made accountable in varying degrees by agency regulation. See B-241856.2, September 23, 1992.

a. Certifying Officers

Accountability for public funds in civilian agencies rests primarily with the certifying officer, a government officer or employee whose job is or includes certifying vouchers (including voucher schedules or invoices used as vouchers) for payment. A certifying officer differs from other accountable officers in one key respect: the certifying officer has no public funds in his or her physical custody. Rather, accountability is based on the nature of the function. A certifying officer's liability, discussed in detail later in this chapter, is prescribed by 31 U.S.C. § 3528. In brief, certifying officers are responsible for the

[6]While the generalizations in the text are true, as discussed later in this chapter, passage of time can eliminate the government's ability to enforce liability in improper payment cases, even without relief. In order to protect the government's position, agencies should move promptly to address an accountable officer's liability. Implications in a few cases such as 70 Comp. Gen. 616, 622–23 (1991), that an agency can never enforce an accountable officer's liability for an improper payment unless it has first submitted the matter to GAO are misleading. See GAO's Policy and Procedures Manual for Guidance of Federal Agencies, title 7, chap. 8, which describes agencies' specific responsibilities in this area.

[7]On a few occasions, GAO has treated an official who directs the making of an expenditure as accountable even though not falling into one of the traditional categories of accountable officer. 61 Comp. Gen. 260, 266 (1982) (illegal entertainment expenditures "must be paid by the . . . officials who authorized the expenditures"); 37 Comp. Gen. 360, 361 (1957) (cost of greeting cards "is a personal expense to be borne by the officer who ordered and sent the cards"); 7 Comp. Gen. 481, 482 (1928) (same).

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1959; B-136027-O.M., June 13, 1958. The continued existence of an "inherently dangerous" procedure, however, does indicate lack of due care on the part of the responsible disbursing officer. B-162629-O.M., November 9, 1967.

It is difficult, if not impossible, to state hard and fast rules applicable inflexibly to all cases involving relief under the provisions of 31 U.S.C. § 3527(c). What may be considered good faith and the exercise of due care in one set of circumstances may not be so considered in another. However, it may be stated generally that GAO will grant relief where (1) the agency has made proper efforts to collect from the recipient of the improper payment, (2) the agency has determined that the payment was not the result of bad faith or lack of due care on the part of the disbursing officer, and (3) no evidence to the contrary is available. Also, relief may be granted without the administrative determination where due care and the absence of bad faith are evident from the facts.

Actual negligence which contributes to an improper payment will, of course, preclude the granting of relief. For example, making a payment on the basis of documents which have been obviously altered, without first seeking clarification, is not the exercise of due care. B-233276, October 31, 1989, aff'd upon reconsideration, B-233276, June 20, 1990; B-138593-O.M., February 18, 1959; B-135910-O.M., July 14, 1958. Similarly, relief was denied in the following cases:

- Disbursing officer made duplicate payments on voucher schedule covering payments already made. Disbursing officer had requested guidance on new procedures, and "duplicate" schedule with instructions had been sent to her in response to that request, with a cover letter clearly stating that the schedule covered payments previously made. The payment could only have been due to lack of due care. B-142051, March 22, 1960.
- Disbursing officer continued to pay New Mexico gasoline tax after State Attorney General and Judge Advocate General had both concluded that the United States was not liable for the tax. Although the disbursing officer was aware of the rulings, he claimed that he had not received specific instructions to stop paying. B-135811, May 29, 1959.

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- Disbursing officer reimbursed imprest fund on the basis of fictitious requisitions not supported by dealers' invoices or delivery slips. B-137723-O.M., December 10, 1958.

As with physical losses, failure to follow applicable regulations is generally regarded as negligence, and if an improper payment is attributable to that failure, relief will be denied. 54 Comp. Gen. 112, 116 (1974); 44 Comp. Gen. 160 (1964). Compliance with regulations will help establish due care, but the mere fact of compliance with regulations which are clearly insufficient may not always satisfy the standard. B-192558, December 7, 1978.

The concept of proximate cause is also applicable, and relief is appropriate where any negligence that may have existed was not the proximate cause of the improper payment. In one case, for example, local operating procedures at a military installation were found inadequate because they permitted personal checks to be cashed without checking identification cards. However, since the cashiers checked ID cards on their own initiative, and did so in the case for which relief was sought, the inadequacy could not have contributed to the loss. B-221415, March 26, 1986. For other examples, see B-227436, July 2, 1987, and B-217663, July 16, 1985.

The essence of negligence is the existence of a duty to exercise reasonable care in a particular situation and the violation of that duty. In B-188744, July 15, 1977, a Bureau of Indian Affairs disbursing officer erroneously made a payment to the wrong heir. Unknown to him, the probate and title determinations on which he had based the payment had been reopened and revised. Under established procedures, the disbursing officer was neither required nor expected to verify inheritance determinations. Since the verification was not within the scope of his duty, and was not something anyone in his position would reasonably be expected to do, there was no lack of due care. See also B-137223-O.M., January 18, 1960. Thus, negligence will generally not be imputed to a disbursing officer where payment is made on the basis of facts of record upon which the disbursing officer is or reasonably can be expected to rely, even though such facts are subsequently found to be erroneous. This assumes that there is nothing on the face of the documents presented to the disbursing officer which should reasonably have alerted him or her that something appeared to be wrong.

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A disbursing officer is accountable for payments made by his or her subordinates. However, relief may be granted under 31 U.S.C. § 3527(c) if the improper payment was not the result of bad faith or lack of due care attributable to the disbursing officer personally. B-141038-O.M., November 17, 1959. Where the actual disbursement is made by a subordinate, relief for the supervisory disbursing officer requires a showing that the disbursing officer exercised adequate supervision. Adequate supervision in this context means that the disbursing officer (1) maintained an adequate system of controls and procedures to avoid errors, and (2) took appropriate steps to ensure that the system was effective and was being followed at the time of the payment in question. E.g., 62 Comp. Gen. 476, 480 (1983). A relief request must contain sufficient information to enable an independent evaluation. B-235037, September 18, 1989.

GAO has not attempted to define the elements of an adequate supervisory system. There can in fact be no fixed formula, as the system will vary based on such factors as the size of the disbursing operation and the types of payments or transactions involved. Nevertheless, several elements which commonly appear in good systems can be identified (although no single case lists them as such):

(1) Compliance with agency regulations. For example, a military disbursing office will need to ensure compliance with any pertinent directives of the Defense Department, the particular military department involved, and the parent command.

(2) Locally developed instructions (often called standard operating procedures or SOPs) tailored to the needs of the particular disbursing office. Relief requests should include copies of any relevant SOPs. While SOPs are extremely helpful, the lack of a written SOP will not in and of itself cause a system to "flunk" the relief standard. E.g., B-215226, April 16, 1985.

(3) Training. This includes both initial training for new personnel and periodic refresher training, again tailored to the needs of the particular office. Training in this context does not necessarily mean formal classroom training, but may be in the form of on-the-job training and may include such devices as reading files which are circulated periodically and especially when pertinent changes occur.

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(4) Periodic review or inspection by the supervisor. The forms this may take will vary with the size and nature of the operation.

The adequacy of a supervisory system is not, nor could it realistically be, measured against a zero-error standard. Many cases have made the point that a skillfully executed criminal scheme can occasionally outwit an adequate and well-supervised system. E.g., B-241880, August 14, 1991; B-202911, June 29, 1981. Similarly, human error will occur even in the most carefully established and supervised system. The best system cannot be expected to eliminate or detect every clerical error by a subordinate. E.g., B-224961, September 8, 1987; B-212336, August 8, 1983.

The cases also recognize that, in a large operation, the supervisory disbursing officer cannot reasonably be expected to personally review every check that is issued or every cash payment that is made. E.g., B-215734, November 5, 1984 (check cashed with fraudulent endorsement); B-194877, July 12, 1979 (amounts of two payments inadvertently switched, resulting in overpayment to one payee); B-187180, September 21, 1976 (wrong amounts inserted on checks). Thus, it is possible for a supervisor to be relieved for an error by a subordinate which, if attributable to the disbursing officer personally, would have resulted in the denial of relief. We previously cited several cases denying relief for payments made on the basis of obviously altered documents. These were cases in which the disbursing officer saw or should have seen the documents. Relief has been granted for similar losses occurring in otherwise adequate systems under which the supervisor was not required to see, and in fact did not see, the altered document. B-141038-O.M., November 17, 1959.

Where the subordinate who made the payment is also an accountable officer (a cashier, for example), the standard for relieving the subordinate is whether the individual complied with established procedures and whether anything occurred which should reasonably have made the individual suspicious that something was wrong. E.g., B-233997.3, November 25, 1991; B-241880, August 14, 1991. Depending on the particular facts, in cases involving two disbursing officers accountable for a payment, one a supervisor and the other a subordinate, it is possible for relief to be granted to both, denied to both, or granted to one and denied to the other. Examples of cases applying the above standards in which relief was granted to the supervisor but not the subordinate are B-231503, June 28, 1988

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(cashier failed to observe annotations on voucher), and B-214436, April 6, 1984 (agency declined to seek relief for subordinate who had failed to follow established procedures).

In our coverage of physical loss cases, we emphasized the importance of statements by the accountable officer. The principle applies equally in improper payment cases. The existence of adequate controls and procedures is usually documented, but this is not always the case, and the passage of time may make it impossible to locate a copy of the specific version of the SOPs in effect at the time of the payment. Also, testimony of the accountable officer(s) and other involved persons is often the only way of establishing how the controls and procedures were being implemented at the time of the payment. While the disbursing officer's own statement is obviously not disinterested and cannot be regarded as conclusive, it is always given appropriate weight and, as with unexplained loss cases, has often been enough to tip the balance in favor of relief where the record contains no controverting evidence or where documentary evidence is no longer available. Examples are B-234962, September 28, 1989; B-215226, April 16, 1985; B-217637, March 18, 1985; B-216726, January 9, 1985; B-215833, December 21, 1984; and B-212603 et al., December 12, 1984.

Finally, a disbursing officer has the same statutory right as a certifying officer to obtain an advance decision from the Comptroller General. 31 U.S.C. § 3529. Obviously, if the decision is to serve the purpose of protecting the disbursing officer, the request must include the facts which gave rise to the doubt. 20 Comp. Gen. 759 (1941). Following administrative advice in lieu of seeking a GAO decision may, depending on the circumstances, bear upon the issue of whether the disbursing officer exercised due care. E.g., 49 Comp. Gen. 38 (1969). We previously noted that consulting agency counsel will help a certifying officer establish good faith. There is no reason why it should not equally help a disbursing officer establish good faith and due care, although it may not be enough if the advice received flies in the face of contrary information in the hands of the disbursing officer. E.g., 65 Comp. Gen. 858 (1986), aff'd upon reconsideration, B-217114.5, June 8, 1990. Whichever course of action is chosen, the disbursing officer faced with a doubtful payment needs to do something. The road to relief will be very difficult if a disbursing officer who is admittedly in doubt proceeds to make the payment

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without consulting either GAO or appropriate agency officials. See 23 Comp. Gen. 578 (1944).

b. Some Specific Applications

The federal government disburses money in an immense variety of situations—payments to employees (salary, allowances, awards), payments to contractors, payments under assistance programs, payments to various claimants, etc. Every situation in which proper payments can be made presents the potential for improper payments, resulting from such things as fraud, government error, or the misapplication of legal authority or limitations. To illustrate some of the situations that may arise, we present here a selection of improper payments for which relief has been sought under 31 U.S.C. § 3527(c). In each case, the relief question was approached by applying the principles and standards discussed in Section D.3.a.

In view of the differences in disbursement systems between the military departments and the civilian agencies, a large proportion of the cases involve military disbursing officers, and several would be certifying officer cases if they occurred in civilian agencies. A few of the situations can arise only in the military departments.

(1) Fraudulent travel claims

Cases under this heading range from single payments to massive schemes. They involve two distinct situations—fraudulently obtained travel advances and payments based on fraudulent travel vouchers.

In B-240654, February 6, 1991, an imposter, using falsified travel orders and a phony military identification card, obtained travel advances at six Air Force bases totalling nearly $74,000. The Air Force was able to identify the imposter and he was arrested, but committed suicide before trial. In another case, an individual stole an identification card from an athletic locker at the Pentagon and used it to obtain travel advances at several Army installations. The fraud was successful because the thief bore a sufficient resemblance to the card's owner. B-217440/B-217440.2, April 16, 1985; B-217440, February 13, 1985. The losses in these cases were attributed to skillfully executed criminal activities. Other cases involving fraudulently obtained travel advances include B-246371, June 23, 1992; B-234962, September 28, 1989; B-221395, March 26, 1986; and B-210648, March 15, 1984.

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The second group of cases is similar except that the fraudulent document is a travel voucher rather than a travel order. Several related cases involve a conspiracy carried out over several years by employees of the Army Corps of Engineers. Basically, the employees presented vouchers based on fraudulent lodging receipts, often provided by friends or relatives. The scheme eluded detection for several years until it was discovered that the providers of the receipts, who had "verified" the accuracy of the receipts to the Corps, were themselves participants in the fraud. The disbursing officer in one district was relieved in part, but relief was denied for payments made after he had received information putting him on notice of the possibility of fraud. 65 Comp. Gen. 858 (1986). In another district, the disbursing officer stopped making payments immediately upon being advised of the investigation, and was relieved in full. B-217114.2, February 3, 1988.

A simpler situation is B-215737, November 5, 1984, in which an individual presented to an Army cashier a travel voucher which had been issued to someone else. Relief was granted to the Finance and Accounting Officer, but denied to the cashier because she failed to compare the name on the presenter's identification card with the (different) name on the voucher. Some additional fraudulent travel voucher cases are B-229274, January 15, 1988; B-222915, September 16, 1987; B-213824, July 13, 1987; and B-224832, July 2, 1987.

(2) Other cash payments fraudulently obtained

It may be noted, somewhat cynically, that if there is a way to obtain cash from the federal government, someone will try to do it fraudulently. In some cases, losses can be prevented by the exercise of due care. In 68 Comp. Gen. 371 (1989), for example, an individual deposited two "Greenback Money Drafts" in the patients' account at a VA hospital. These are drafts, resembling checks, which the issuing bank provides to various public places. A person with an account in the issuing bank can sign one of the forms and cash it elsewhere. The back of the form explicitly states, "You must call [the issuing bank] before cashing," so that the bank can verify the existence of the account and the sufficiency of funds. In this instance, the cashier accepted the drafts without calling the issuing bank, the patient withdrew the funds shortly thereafter, and it was subsequently discovered that the drafts had been fraudulently negotiated. Relief was

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denied because of the cashier's negligent failure to follow the explicit printed instructions.

In another case, relief was denied to a cashier who made a cash payment to a courier without requiring any identification. The courier turned out to be an imposter. B-178953, August 2, 1973.

In many cases, due care will not prevent the loss, and relief is granted. Illustrative cases involving miscellaneous military cash payments, similar to the travel advance cases noted above, are B-245127, September 18, 1991 (transient/reaccession payment); B-226174, June 18, 1987 (casual payment); B-215226, April 16, 1985 (special reenlistment bonus); and B-209717.2, July 1, 1983 (military pay voucher with separation orders). Relief was denied to a cashier in another casual payment case, B-227209, August 5, 1987, for neglecting to spot inconsistencies on the face of the voucher.

(3) Military separation vouchers

The cases under this heading involve overpayments on military separation vouchers attributable to government error rather than fraud on the part of the recipient. In each case, the supervisory disbursing officer was relieved, illustrating the previously noted proposition that even a well-established and carefully supervised system of controls and procedures cannot be expected to totally eliminate human error.

In B-230842, April 13, 1988, and B-227412, July 2, 1987, a cashier made an overpayment by using the amount from the wrong block on the voucher. In B-228946, January 15, 1988, the cashier failed to clear a previous transaction from her adding machine. In all three cases, the agency sought relief for the supervisor while holding the cashier liable. Similar cases are B-222685, June 20, 1986; B-221453, June 18, 1986; and B-212293, November 21, 1983. Relief has been granted to the cashier in cases where the cashier followed applicable procedures and the error was attributable to someone else. E.g., B-226614, May 6, 1987; B-221471, January 7, 1986.

(4) Assignment of contract payments

Under the Assignment of Claims Act, 31 U.S.C. § 3727 and 41 U.S.C. § 15, when a contractor assigns future contract payments to a

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financing institution (assignee), the assignee must file written notice of the assignment and a copy of the assignment with the pertinent disbursing officer. Once this is done, the government's obligation is to make future payments to the assignee, and payments made directly to the contractor are erroneous.

In B-213720, October 2, 1984, an assignment under an Army Corps of Engineers contract was properly filed with the disbursing officer, who acknowledged receipt but neglected to retain a copy. Also, a copy was inexplicably not placed in the contract file. A few months later, an invoice was submitted clearly stating that payment should be made to the assignee bank. A voucher examiner functioning as a certifying officer failed to make appropriate inquiry to confirm the existence of the assignment, and instead followed the advice of the purchasing agent to pay the contractor. The disbursing officer then made payment to the contractor, notwithstanding the information on the face of the invoice indicating the existence of an assignment. Since the Army voucher examiner was not a statutory certifying officer, primary liability remained with the disbursing officer. Given the disbursing officer's failure to retain a copy of the assignment and to verify the proper payee, relief was denied.

In other cases in which a military finance and accounting officer is responsible for both certifying and disbursing functions, relief has been granted where the errors are solely those of subordinates and there is no lack of due care attributable to the disbursing officer personally. B-216246, May 22, 1985 (voucher examiner/certifying officer failed to follow standard operating procedures, nothing on face of voucher to suggest existence of assignment); B-214273, December 11, 1984 (unknown clerk had misfiled notice of assignment, office processed over 3,000 vouchers a month and could pre-audit only on random basis).

(5) Improper purpose/payment beyond scope of legal authority

Most improper purpose and similar cases will be certifying officer cases. Those that involve disbursing officers are either military cases or disbursements by imprest fund cashiers. The point to remember is that relief is governed by the standards of 31 U.S.C. § 3527(c), and the fact that a payment is unauthorized does not automatically indicate lack of due care.

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Several imprest fund cashiers have been relieved where the vouchers were proper on their face and included approvals by appropriate agency officials, including a contracting officer. B-221940, October 7, 1987 (refreshments at seminar); B-211265, June 28, 1983 (air purifier); B-203553, February 22, 1983 (air purifier). Prior approvals of similar purchases may also be relevant in establishing due care. 61 Comp. Gen. 634, 637 (1982). Note that the purchase in each case was not plainly illegal. (Refreshments may be authorized under the Government Employees Training Act and air purifiers are authorized in some situations.)

In B-217668, September 12, 1986, relief was denied to an Army Finance and Accounting Officer who purchased beer for troops engaged in a joint military exercise. While the beer could have been purchased with nonappropriated funds (or—dare we suggest—paid for by the individuals who drank it), it is not an appropriate use of the taxpayers' money. The decision recognized that relief might nevertheless be possible if the standards for relief of a supervisor under 31 U.S.C. § 3527(c) were met, but the record did not contain sufficient information to enable an independent judgment.

4. Check Losses

a. Check Cashing Operations

Check cashing by disbursing officers is governed by 31 U.S.C. § 3342. Subsection (a) authorizes disbursing officers to:

"(1) cash and negotiate negotiable instruments payable in United States currency or currency of a foreign country;

"(2) exchange United States currency, coins, and negotiable instruments and currency, coins, and negotiable instruments of foreign countries; and

"(3) cash checks drawn on the Treasury to accommodate United States citizens in a foreign country [only if presented by a payee who is a United States citizen and satisfactory local banking facilities are not available]."

Transactions under subsections (a)(1) and (a)(2) are authorized for official purposes or to accommodate certain classes of persons, including government personnel, hospitalized veterans, contractors working on government projects, and authorized nongovernment agencies operating with government agencies. 31 U.S.C. § 3342(b). These are sometimes called "accommodation transactions." The

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authority does exist, agencies should take "positive action" to minimize the need to resort to it. 48 C.F.R. § 1.602-3(b)(1).[33]

If the authority of 48 C.F.R. § 1.602-3 is not available, ratification may nevertheless be possible under the "extraordinary relief" authority of Public Law 85-804 for those agencies eligible to use it. See FAR, 48 C.F.R. §§ 50.101(b) (eligible agencies), 50.302-3 (formalizing informal commitments).

For appropriations accounting purposes, ratification is treated the same as if there had been a valid contract all along. If the need arose and the work was performed in the same fiscal year, then the obligation is chargeable to that fiscal year regardless of when the ratification takes place. 58 Comp. Gen. 789 (1979); B-208730, January 6, 1983. If the need arose in one year and performance took place in another year, or if performance relates to a contract executed in a prior year, the chargeable fiscal year is determined by applying the relevant element of the bona fide needs rule covered in Chapter 5, again as if there had been a valid contract all along. See B-197344, August 21, 1980.

(3) Quantum meruit claims

If the agency determines that it cannot ratify the transaction in question, it should then proceed with the only remaining possibility, a quantum meruit[34] analysis. The underlying premise is that the government should not be unjustly enriched by retaining a benefit conferred in good faith, even where there is no enforceable contractual obligation, as long as the "benefit" is not prohibited by law. See 40 Comp. Gen. 447, 451 (1961). This is the pure "contract implied-in-law" situation. The Court of Federal

[33]Unauthorized commitments can also violate the voluntary services prohibition of the Antideficiency Act. See GAO report, Unauthorized Commitments: An Abuse of Contracting Authority in the Department of Energy, EMD-81-12 (December 4, 1980).

[34]Quantum meruit means "as much as deserved" and is used in the case of services. Black's Law Dictionary 1243 (6th ed. 1990). Quantum valebant means "as much as they were worth" and is used in the case of goods sold and delivered. Id. at 1244. The legal elements of each are identical. For the sake of simplicity, we use quantum meruit for both situations.

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Claims[35] and the boards of contract appeals[36] decline jurisdiction over contract implied-in-law claims because there is no "contract" for purposes of their jurisdictional statutes (Contract Disputes Act, Tucker Act). The district courts similarly lack Tucker Act jurisdiction[37], but may be able to find some other basis. E.g., Niagara Mohawk Power Corp. v. Bankers Trust Co. of Albany, 791 F.2d 242, 244 (2d Cir. 1986). However, GAO regards claims of this type as coming within its general claims settlement jurisdiction (31 U.S.C. § 3702). E.g., 65 Comp. Gen. 692, 695 (1986); 64 Comp. Gen. 727, 727-28 (1985). Thus, contract implied-in-law claims can be settled administratively even though judicial review may be unavailable in many, if not most, cases.

At one time, for all claims of this type, if the agency could not or chose not to ratify, and the claimant continued to request payment, the required procedure was referral to GAO. See B-210808, May 24, 1984. Now, however, GAO applies the general standard of 4 C.F.R. § 31.4—agencies should adjudicate all claims in the first instance, with referral to GAO only (a) if the agency regards a claim as doubtful, or (b) if a claimant seeks review of a disallowance. Agencies should, of course, apply the criteria set forth in GAO's numerous quantum meruit decisions.

In order to allow a quantum meruit claim, four elements must be established:

(1) The goods or services would have been a permissible procurement if correct procedures had been followed.

(2) The government must have received and accepted a benefit.

(3) The contractor or other performing party must have acted in good faith.

(4) The amount claimed—or in any event the amount that can be paid on the claim—must represent the reasonable value of the benefit received.

[35]E.g., Army and Air Force Exchange Service v. Sheehan, 456 U.S. 728, 738 n.10 (1982); United States v. Minnesota Mutual Investment Co., 271 U.S. 212, 217 (1926); Aerolineas Argentinas v. United States, 31 Fed. Cl. 25, 36 (1994); Haberman v. United States, 18 Cl. Ct. 302 (1989); Alta Verde Industries, Inc. v. United States, 18 Cl. Ct. 595 (1989), aff'd mem., 907 F.2d 158 (Fed. Cir. 1990), cert. denied, 498 U.S. 1082; Gratowski v. United States, 6 Cl. Ct. 458 (1984); Russell Corp. v. United States, 537 F.2d 474, 482 (Ct. Cl. 1976), cert. denied, 429 U.S. 1073.

[36]E.g., Energroup, Inc., EBCA No. 413-5-88, 89-1 BCA ¶ 21,233 (1988); David Contractors, Inc., HUD BCA No. 87-2452-C15, 88-3 BCA ¶ 20,963 (1988); General Security Services Corp., GSBCA No. 7684, 85-3 BCA ¶ 18,380 (1985); J. Brinton Rowdybush, ASBCA No. 24955, 83-1 BCA ¶ 16,188 (1982).

[37]Minnesota Mutual, 271 U.S. at 217; Weisberg v. United States Department of Justice, 745 F.2d 1476, 1494 (D.C. Cir. 1984); Alnor Check Cashing v. Katz, 821 F. Supp. 307, 316 (E.D. Pa.), aff'd, 11 F.3d 27 (3d Cir. 1993).

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E.g., 70 Comp. Gen. 664 (1991); 69 Comp. Gen. 13 (1989); 66 Comp. Gen. 351 (1987); B-215651, March 15, 1985; B-210808, May 24, 1984.[38]

The first element, the "permissible procurement" test, is not concerned with procedural deficiencies, even where the procedures are statutorily mandated; it was procedural deficiencies that got the parties to this point in the first place. 63 Comp. Gen. 579, 584 (1984). In applying the test, it is important to distinguish between a procedurally deficient procurement of otherwise authorized goods or services, and a procurement of goods or services which are themselves unauthorized. See 71 Comp. Gen. 145 (1992). Thus, the question is whether the government could have made a binding express contract for the goods or services in question. B-187593, June 26, 1978 (applying the standard of Grismac Corp. v. United States, noted earlier in connection with contracts implied-in-fact).

For example, violation of an old statute, since repealed, which required that certain contracts be in writing did not preclude payment on a quantum meruit basis where the goods procured were not unauthorized. Salomon v. United States, 86 U.S. 17 (1873); 8 Comp. Dec. 526 (1902). Examples of expenditures which did not meet the "permissible procurement" test are 71 Comp. Gen. 145 (1992) (T-shirts to be given to Combined Federal Campaign donors); 64 Comp. Gen. 467 (1985) (security equipment purchased by bank on military installation in circumstances beyond scope of regulations authorizing reimbursement); B-252780, August 26, 1993 (printing by private establishment in violation of statutes requiring printing to be done by Government Printing Office); B-251541, July 21, 1993 (procurement of interpreter services from active duty military officer on fee basis); B-230382, December 22, 1989 (meals for federal employees attending a conference at their official duty station); B-195566, March 17, 1980 (another printing case). Similarly, expenditures for permanent improvements to non-government property, generally prohibited subject to a few exceptions, would not be a permissible procurement for quantum meruit purposes. B-226843-O.M., October 13, 1987.

The second element is the firmly established principle that the government must have received some tangible benefit to support a quantum meruit payment. United States v. Mississippi Valley Generating Co., 364 U.S. 520,

[38]Decisions prior to the early 1980s also specified express or implied ratification by the agency involved as a required condition. E.g., 58 Comp. Gen. 94, 100 (1978); B-202744, May 4, 1981. While this was intended to signify essentially that the agency recommended payment, it was too easily confused with the concept of ratification as expressed in the FAR. See, e.g., B-204388, January 5, 1982. The language is no longer used and should be disregarded.

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566 n.22 (1961); 46 Comp. Gen. 348 (1966); 40 Comp. Gen. 447, 451 (1961). Without such benefit, loss to the claimant is not enough, regardless of good faith. If there is no benefit, there can be no unjust enrichment. The benefit must be clear and not merely speculative. B-215145, August 13, 1985.

Determining the benefit is usually a fairly simple matter, at least in most cases. It either exists or it doesn't. Cases in which the benefit was clear include 70 Comp. Gen. 664 (1991) (repairs to government vehicles); 66 Comp. Gen. 351 (1987) (supplies which the government actually used); 64 Comp. Gen. 727 (1985) (emergency service to restore telephone service after power outage); B-215651, March 15, 1985 (dental services to Coast Guard recruits). Cases in which claims were denied because there was no demonstrable benefit to the government include B-221226, July 6, 1987 (goods allegedly shipped but it could not be established that they were ever received or used); B-215792, January 8, 1985 (claim by instructor for salary for period of unemployment following discontinuance of training course); B-212529, May 31, 1984, aff'd upon reconsid., B-212529, June 8, 1987 (expenses incurred in preparation for conducting laboratory accreditation program which agency decided not to implement); B-189266, September 7, 1977, aff'd upon reconsid., B-189266, March 29, 1978 (expenses incurred in preparation for contract where solicitation was subsequently canceled). A case involving consultant services which required a much greater degree of factual analysis is B-214529, January 19, 1988.

A case in which a court seems to have stretched the concept a bit is Niagara Mohawk Power Corp. v. Bankers Trust Co. of Albany, 791 F.2d 242 (2d Cir. 1986). The claimant was a utility which had provided service to a housing complex for which the Department of Housing and Urban Development had provided mortgage insurance. The court found "unjust enrichment" to HUD on the theory that if the utility had stopped providing service, the tenants would inevitably have stopped paying rent, thereby hastening the development's insolvency and increasing HUD's financial exposure. An earlier similar holding on which the court relied is S.S. Silberblatt, Inc. v. East Harlem Pilot Block, 608 F.2d 28 (2d Cir. 1979).

The third required element is that the claimant must have acted in good faith. Good faith will normally include the exercise of reasonable diligence. B-215145, August 13, 1985. However, negligence alone has been found insufficient to negate a finding of good faith. B-226733-O.M., October 13, 1987. A history of satisfactory prior dealings between the

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claimant and the government is evidence of good faith. 69 Comp. Gen. 13, 15 (1989). See also B-210808, May 24, 1984. Sometimes, especially when all other elements are clearly present, a finding of good faith can be based on the absence of any evidence in the record to suggest anything else. E.g., 70 Comp. Gen. 664, 666 (1991).

Performance by a claimant entirely on his, her, or its own initiative, without the knowledge or consent of any government official, authorized or unauthorized, raises a question as to the claimant's good faith. The fact that services were provided on an emergency basis is an adequate answer. 64 Comp. Gen. 727 (1985).

If the above three elements are satisfied, the claim may be allowed, but—and this is the fourth and final element—only for the fair value of the benefit received. The claim is not measured by the loss to the claimant nor necessarily by the value the claimant places on the goods or services, but on the reasonable value of those goods or services to the government, which may or may not be the same as the amount claimed.[39]

The "reasonable value of services and materials is generally considered to be the amount for which they could be obtained under like circumstances." Wunderlich Contracting Co. v. United States, 240 F.2d 201, 205 (10th Cir. 1957), cert. denied, 353 U.S. 950. In 66 Comp. Gen. 351 (1987), for example, where an unauthorized official ordered supplies, agency contracting personnel determined that those supplies could have been procured for a lesser amount under competitive procedures. The supplier's quantum meruit claim was allowed, but only for that lesser amount. A quantum meruit payment may not exceed the price under a mandatory Federal Supply Schedule contract. 63 Comp. Gen. 579 (1984); B-213489, March 13, 1984; B-195123, July 11, 1979. The same rule applies with respect to non-mandatory schedules. 69 Comp. Gen. 13 (1989). The reason is that Supply Schedule prices are derived through competition and are therefore presumptively fair and reasonable. Id. at 16.

Similarly, in a quantum meruit claim for transportation services, the measure of recovery is the lowest rate available to the government for the same or similar services. 64 Comp. Gen. 612, 614 (1985); B-212991, November 28, 1983.

[39]This is also the measure of payment in certain contract implied-in-fact situations, a notable example being contracts in violation of the cost-plus-percentage-of-cost prohibition in 41 U.S.C. § 254(b) and 10 U.S.C. § 2306(a). Urban Data Systems, Inc. v. United States, 699 F.2d 1147 (Fed. Cir. 1983); 58 Comp. Gen. 654 (1979); 38 Comp. Gen. 38 (1958); 33 Comp. Gen. 533 (1954); B-252378, September 21, 1993; Alisa Corp., AGBCA No. 84-193-1, 94-2 BCA ¶ 26,952 (1994).

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If there has been a prior contractual relationship between the parties, the most recent contract price is a relevant indication of fair value. B-212430, June 11, 1984. If there is no other evidence one way or the other, and all other elements of the claim have been satisfied, the agency may pay the "contract price" or the amount claimed if it regards that amount as fair and reasonable. E.g., B-251728.2, June 9, 1993 (services provided to Office of Independent Counsel). However, the agency should make some attempt at an independent determination and should not blindly agree to whatever is claimed. B-197057-O.M., August 22, 1980. Also, a quantum meruit payment may, in appropriate circumstances, include an allowance for profit. 67 Comp. Gen. 507 (1988); 38 Comp. Gen. 38 (1958); B-167790, April 12, 1973.

Whatever measure is used, the payment must relate to the benefit received by the government. In B-232148, October 3, 1988, for example, a towing company towed a government trailer which had caught fire on the highway, and subsequently made a quantum meruit claim for towing and storage services. The payment could properly include storage charges up to the time the government was ready to remove the trailer, but not for a period beyond that point, during which the company held the trailer as security for its payment. Storage during this "excess" period was of no benefit to the government.

If the amount claimed is questioned, the claimant must be prepared to support it. Unsupported, blanket statements are not enough. 65 Comp. Gen. 692, 696 (1986). If the primary source documents are no longer available, reasonable secondary evidence may be used. B-226733-O.M., October 13, 1987 (agency's audit recommendation).

Applying the standards described above, GAO has approved quantum meruit payments in a wide variety of situations. Examples in addition to the cases previously cited include B-249075, September 16, 1992 (use of space in a nongovernment building without a written lease); B-245433, December 26, 1991 (computer software package installed and used without contracting officer approval); B-240994, October 15, 1990 (security services, obtained without following formal contracting procedures, to guard alleged member of Colombian drug cartel); B-228637, October 16, 1987 (emergency repair services to restore air conditioning and hot water to military facility); B-221604, March 16, 1987 (emergency assistance in cleaning up oil spill); B-212968, April 10, 1984 (repairs to barge damaged when it ran aground); B-209582, November 22, 1982 (press clipping service requested orally by temporary commission which subsequently ceased existence).

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There is no authority to pay interest on a quantum meruit claim. 70 Comp. Gen. 664 (1991); B-252778, August 19, 1993; B-245433, December 26, 1991; B-195123, July 11, 1979. Since by definition there is no "contract," neither the Contract Disputes Act nor the Prompt Payment Act applies. 70 Comp. Gen. at 666–67; B-215505, February 19, 1985.

The determination of which fiscal year to charge for a quantum meruit payment is the same as under a ratification, previously discussed. Thus, where services are rendered in one fiscal year and a quantum meruit claim is allowed in a subsequent year, the payment is properly chargeable to the prior year, the year in which the services were rendered. B-210808, May 24, 1984; B-207557, July 11, 1983. The rationale is that the government incurred the obligation to pay when it received the benefit.

As with ratification, the quantum meruit theory provides a way to reach a fair and equitable result in appropriate cases. While it is thus a useful and important concept, it should not be construed as encouraging a permissive view of informal commitments and, again like ratification, "should not be viewed as a routine alternative to proper contracting procedures." B-197057-O.M., August 22, 1980.

We noted earlier that the Court of Federal Claims and its predecessors have traditionally declined jurisdiction over contract implied-in-law claims. The situation has become somewhat unclear, however, in view of a line of cases in which the Court of Appeals for the Federal Circuit seems to recognize a "contract implied-in-fact for a quantum meruit." The leading case for this concept is United States v. Amdahl Corp., 786 F.2d 387 (Fed. Cir. 1986). The rationale is very hard to distinguish from the traditional implied-in-law unjust enrichment reasoning. See 786 F.2d at 393. See also Gould, Inc. v. United States, 935 F.2d 1271, 1275 (Fed. Cir. 1991), citing Amdahl for the proposition that a "court may grant equitable relief under an illegal contract if the government received a benefit from the contractor's performance"; United International Investigative Services v. United States, 26 Cl. Ct. 892, 899–900 (1992) ("Actual mental assent is not required for the formation of an implied-in-fact contract for a quantum meruit"). An earlier case consistent with Amdahl at least in result is Yosemite Park v. United States, 582 F.2d 552 (Ct. Cl. 1978).

Precisely what Amdahl means and how far the courts or the boards of contract appeals may be willing to take it are far from clear. See, e.g., Mega Construction Co. v. United States, 29 Fed. Cl. 396 (1993) (recognizing that Amdahl blurs the implied-in-fact vs. implied-in-law distinction and

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declining to apply it); Eastern Trans-Waste of Maryland, Inc. v. United States, 27 Fed. Cl. 146, 150–52 (1992) (similarly regarding Amdahl and its progeny as an exception to the jurisdictional ban on implied-in-law claims); Chavez v. United States, 18 Cl. Ct. 540, 545–47 (1989) (characterizing the Amdahl theory as more of a contract implied-in-law); H. Landau & Co. v. United States, 16 Cl. Ct. 35, 38–40 (1988), vacated and remanded, 886 F.2d 322 (Fed. Cir. 1989). In any event, at least in terms of what relief may be available in the Court of Federal Claims and the Court of Appeals for the Federal Circuit, what was once regarded as "black letter law" (Chavez v. United States, 15 Cl. Ct. 353, 357 n.2 (1988)) is perhaps now best characterized as "gray letter law."

In addition, relief in unauthorized commitment cases is conceptually related to the doctrine of estoppel, although the extent of the relationship has yet to be definitively determined. The question is the extent to which the unauthorized commitment/quantum meruit cases are affected by the Supreme Court's decision in Office of Personnel Management v. Richmond, 496 U.S. 414 (1990), holding that estoppel cannot form the basis of a monetary claim against the United States, at least where the payment would contravene a statute. One court opined that Richmond is distinguishable from, and has no effect on, Amdahl and its progeny. Janowsky v. United States, 23 Cl. Ct. 706, 716 (1991), rev'd in part and vacated in part, 989 F.2d 1203 (Fed. Cir. 1993). A later case disagreed, holding that Richmond bars relief, regardless of any benefit analysis, based on a contract, express or implied, in violation of a federal statute. Gould, Inc. v. United States, 29 Fed. Cl. 758 (1993)

c. Priority to Contract Balances

In the ideal world, every contractor is financially healthy, and every contractor fulfills all contractual and financial obligations. In the real world, of course, this is not always the case. If a contractor defaults, or falls short in some other aspect of, or incident to, performing a government contract, those who are financially damaged as a result of the contractor's actions or inactions often seek to recoup their losses from the unexpended contract balance. The term "unexpended contract balance" in this context means all funds remaining in the government's hands under the contract, including, without distinction, withheld percentages (retainage) and progress payments. See, e.g., Balboa Ins. Co. v. United States, 775 F.2d 1158, 1161–63 (Fed. Cir. 1985); National Surety Corp. v. United States, 319 F. Supp. 45, 49 (N.D. Ala. 1970); Reliance Ins. Co. v. United States, 15 Cl. Ct. 62, 67 (1988). GAO's formulation of this principle has consistently excluded any liquidated damages to which the government is entitled under the contract. B-192237, January 15, 1979;

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B-155504, July 8, 1966, modifying B-155504, November 16, 1965. The number of claimants in a given case can range from one to as many as five or six, and a body of law has developed to determine relative priorities.

(1) The players

The players (claimants) may include, as applicable, sureties, government agencies, assignees, a trustee in bankruptcy, subcontractors, and of course the contractor itself.

The Miller Act, 40 U.S.C. §§ 270a–270f, requires a performance bond and a payment bond, both with sureties, on federal construction contracts exceeding $100,000. Id. § 270a(a), as amended by Pub. L. No. 103-355, § 4104(b) (1994). The performance bond surety guarantees that the project will be completed if the contractor defaults. The payment bond surety guarantees payment to subcontractors, laborers, and materialmen if the prime contractor fails to pay any of them. Dependable Ins. Co. v. United States, 846 F.2d 65, 66–67 (Fed. Cir. 1988); Aetna Casualty and Surety Co. v. United States, 845 F.2d 971, 973-74 (Fed. Cir. 1988); Morrison Assurance Co. v. United States, 3 Cl. Ct. 626, 632 (1983).

While the Miller Act requires the bonds and sureties only in certain construction contracts, it recognizes the discretionary authority of contracting officers to require them in other situations. 40 U.S.C. § 270a(c). The general policy of the Federal Acquisition Regulation is against requiring performance and payment bonds in other than construction contracts, although agencies may require them when necessary to protect the government's interests. FAR, 48 C.F.R. §§ 28.103-1(a), 28.103-2(a). The FAR gives four examples of situations which may warrant bond requirements: (1) government property or funds provided to contractor for use in performance; (2) government wants assurance from successor in interest which has merged with, or purchased assets of, original contractor; (3) substantial progress payments made before delivery of end items starts; and (4) contracts for dismantling, demolition, or removal of improvements. Id. § 28.103-2(a).

The contracting agency's decision to require surety bonding in non-Miller Act cases should not be disturbed if reasonable and made in good faith; permissible justifications are not limited to the four examples given in the FAR. E.g., 69 Comp. Gen. 22 (1989); B-225738, June 2, 1987, aff'd upon reconsid., B-225738.2, July 28, 1987; Vikonics, Inc., GSBCA No. 10575-P, 90-3 BCA ¶ 23,044 (1990). Applying this standard and based on varying

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justifications, GAO has upheld surety bonding requirements in contracts for security guard services (70 Comp. Gen. 165 (1991)); laundry services (68 Comp. Gen. 204 (1989)); custodial services (64 Comp. Gen. 593 (1985); B-233983, March 21, 1989); and food services (B-208317, November 2, 1982; B-204303, December 1, 1981).

If a contractor defaults, the performance bond surety may fulfill its obligation in several ways. It may formally take over the project and find a new contractor to finish the work. This is usually, but not always, done by means of a "takeover agreement." See FAR, 48 C.F.R. § 49.404; B-225115, February 20, 1987. It may let the government arrange to complete the work and then be liable to the government for any excess reprocurement costs. 48 C.F.R. §§ 49.405, 49.406. Or it may simply pay the original contractor to complete the work. Which of these methods to use is essentially the surety's option. E.g., Aetna Casualty and Surety Co., 845 F.2d at 975.

The primary purpose of the performance bond is to protect the government by assuring completion of the contract at the original contract price, more or less. E.g., Trinity Universal Ins. Co. v. United States, 382 F.2d 317, 321 (5th Cir. 1967), cert. denied, 390 U.S. 906. The payment bond, on the other hand, is designed to protect the laborers, subcontractors, and suppliers rather than the government. It does this by providing an alternative to mechanics' liens, which cannot attach to government property. Goldman Services Mechanical Contracting, Inc. v. Citizens Bank & Trust Co., 812 F. Supp. 738, 741 (W.D. Ky. 1992); 70 Comp. Gen. 165, 168 (1991). The payment bond does not protect the government directly because the creditors it guarantees lack privity of contract with the government and thus can have no legal claims against the government. United States v. Munsey Trust Co., 332 U.S. 234, 241 (1947); United States Fidelity & Guaranty Co. v. United States, 475 F.2d 1377 (Ct. Cl. 1973); United Pacific Ins. Co. v. United States, 319 F.2d 893, 896 (Ct. Cl. 1963).[40] The laborers, subcontractors, and suppliers must look first to the prime contractor for payment. If the prime contractor fails to pay, they then turn to the surety. Morrison Assurance Co., 3 Cl. Ct. at 632. The payment bond surety has no claim against the contract balance until all of the claims of the laborers, subcontractors, and suppliers have been satisfied. American Surety Co. v. Westinghouse Electric Mfg. Co., 296 U.S. 133, 137 (1935); United States Fidelity & Guaranty Co., 475 F.2d at 1381; International

[40]An agency may be able to recognize a subcontractor's "equitable claim" in limited circumstances, but must be sure that the rights of all parties have been adequately determined before making any payment. 57 Comp. Gen. 176 (1977); B-231719, December 29, 1988. If this cannot be done, the agency should let a court sort it all out rather than risk having to pay twice. B-218813, April 9, 1986.

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Fidelity Ins. Co. v. United States, 25 Cl. Ct. 469, 474 (1992); B-192237, January 15, 1979.

More often than not, the same surety provides both the performance bond and the payment bond. If the situation is at all complicated, it may not be particularly clear under which bond the surety is making payments. The determination is based on "an objective analysis of all the facts and circumstances of the particular case." Aetna Casualty and Surety Co., 845 F.2d at 975.

The next group of claimants are federal agencies, several of which may have claims against the unexpended balance. The most common is probably tax claims asserted by the Internal Revenue Service. Another group consists of claims asserted by the Department of Labor for unpaid or underpaid wages under laws such as the Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 327–333, and the Service Contract Act of 1965, 41 U.S.C. §§ 351–358. The contracting agency itself may have claims, e.g., liquidated damages, excess reprocurement costs, claims arising under separate contracts. Another government claim occasionally encountered is a claim by the Small Business Administration for the recovery of authorized advance payments to a "section 8(a)" subcontractor.

Other potential claimants are (1) a bank or other financing institution to which the contractor has made a valid assignment under the Assignment of Claims Act; (2) a trustee in bankruptcy, if the contractor has filed for bankruptcy under the Bankruptcy Code; and (3) last and probably least, the contractor him/her/itself.

(2) The priorities

The first item to be paid is liquidated damages to which the contracting agency is entitled under the contract in question. See 68 Comp. Gen. 269 (1989); B-225115, February 20, 1987.[41] Liquidated damages are consistently excluded from the unexpended balance before determining the remaining priorities. E.g., 65 Comp. Gen. 29 (1985); B-192237, January 15, 1979; B-155504, November 16, 1965, modified on other grounds by B-155504, July 8, 1966. The FAR provides that a takeover agreement may not waive the government's right to liquidated damages for delays in completion, "except to the extent that they are excusable under the contract." 48 C.F.R. § 49.404(e)(2).

[41]These cases do not state explicitly that liquidated damages come first. However, the conclusion clearly follows from the fact that they are withheld before paying the claim of the performance bond surety which beats everything else.

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The next three priorities, in order, are:

1. The performance bond surety, to the extent of its expenses actually incurred in completing the contract;

2. Offsets for debts owed to the United States; and

3. The payment bond surety, to the extent of payments made to laborers, suppliers, and subcontractors.

If the contracting agency has no liquidated damage claim, the claim of the performance bond surety will be the first priority. The relationship of the performance and payment bond sureties to government claims is well-settled:

"A surety that pays on a performance bond in order to complete the subject contract has priority over the United States to the retainages in its hands. A surety that pays on its payment bond, however, does not have priority when the United States is asserting a tax or other obligation owed by the prime contractor."

United States Fidelity & Guaranty Co. v. United States, 475 F.2d 1377, 1383 (Ct. Cl. 1973). See also Aetna Casualty and Surety Co. v. United States, 845 F.2d 971 (Fed. Cir. 1988); Security Ins. Co. of Hartford v. United States, 428 F.2d 838 (Ct. Cl. 1970); International Fidelity Ins. Co. v. United States, 27 Fed. Cl. 107 (1992); Dependable Ins. Co. v. United States, 12 Cl. Ct. 711 (1987), aff'd, 846 F.2d 65 (Fed. Cir. 1988); Morrison Assurance Co. v. United States, 3 Cl. Ct. 626 (1983). As one court explained:

"The [performance bond] surety is not only a subrogee of the contractor, and therefore a creditor, but also a subrogee of the government and entitled to any rights the government has to the retained funds. . . . The surety who undertakes to complete the project is entitled to the funds in the hands of the government not as a creditor and subject to setoff, but as a subrogee having the same rights to the funds as the government." (Footnotes omitted.)

Trinity Universal Ins. Co. v. United States, 382 F.2d 317, 320 (5th Cir. 1967), cert. denied, 390 U.S. 906. The Comptroller General has consistently followed the same order of priorities. E.g., 68 Comp. Gen. 269 (1989); 65 Comp. Gen. 29 (1985); 64 Comp. Gen. 763 (1985); B-192237, January 15, 1979; B-187456, November 4, 1976, aff'd upon reconsid., B-187456, March 8, 1977; B-169420, October 22, 1970.

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The performance bond surety not only prevails over government and payment bond claims, it beats all other competition as well, such as an assignee (65 Comp. Gen. 719 (1986); 64 Comp. Gen. 763 (1985); 58 Comp. Gen. 295 (1979)), and a trustee in bankruptcy (58 Comp. Gen. 295).

Cases on the surety vs. assignee question have not been unanimous. The assignee won over a surety claiming on both its performance and payment bonds in Coconut Grove Exchange Bank v. New Amsterdam Casualty Co., 149 F.2d 73 (5th Cir. 1945). However, the Coconut Grove holding is generally regarded as limited to funds already paid to the assignee which, by virtue of the Assignment of Claims Act, cannot be recovered. For example, a performance bond surety received priority to unpaid contract balances over an assignee in Industrial Bank of Washington v. United States, 424 F.2d 932 (D.C. Cir. 1970), and National Shawmut Bank of Boston v. New Amsterdam Casualty Co., 411 F.2d 843 (1st Cir. 1969). See also 63 Comp. Gen. 533 (1984) (same point in a payment bond case).

A surety may be the surety on more than one contract for the same contractor, raising the question of whether the balance sought must be from the same contract as that for which the completion expenses were incurred. In one case, the Court of Appeals for the Federal Circuit held, in effect, that a claimant could not use its status as performance bond surety on contract A to enhance its priority position with respect to contract B on which it was only a payment bond surety. Dependable Ins. Co. v. United States, 846 F.2d 65 (Fed. Cir. 1988). However, as the court explained a few years later, this was because the government had a competing tax claim to the contract B funds. In a case where the government was merely a stakeholder, the court held that a performance bond surety could assert a claim for expenses incurred under contract A against an equitable adjustment payable to the contractor under contract B under which the surety had incurred no expenses. Transamerica Ins. Co. v. United States, 989 F.2d 1188 (Fed. Cir. 1993).

Next after the performance bond surety are government claims. Within the category of government claims, there is also a more-or-less established "pecking order":

- Claims for unpaid/underpaid wages asserted by the Department of Labor.
- Liquidated damages claimed by the Labor Department under the wage statutes it administers.
- Claims for excess reprocurement costs by the contracting agency.
- Tax claims.

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This listing is derived by a process of deduction as no single case includes each item. First, the Labor Department claims have priority over tax claims. 56 Comp. Gen. 499 (1977), overruled in part on other grounds, 60 Comp. Gen. 510 (1981); B-216549, December 5, 1984; B-214905, May 15, 1984, aff'd upon reconsid., B-214905.2, July 10, 1984; B-210243, April 22, 1983. The unpaid wage portion of Labor's claim takes precedence over the liquidated damage portion. B-210243, April 22, 1983.

An excess reprocurement cost claim also has priority over a tax claim. B-211539, September 26, 1983; B-189902, October 5, 1977; B-180333, April 2, 1974. However, excess reprocurement cost claims may be subordinated to unpaid wage claims. B-189137, August 1, 1977, overruled in part on other grounds, B-189137, May 19, 1978; B-178198, August 30, 1973; B-161460, May 25, 1967. The only uncertainty in the above listing is the relationship between a Labor Department liquidated damage claim, not involved in any of the cases just cited, and an excess reprocurement cost claim.

A case involving a tax claim and a Small Business Administration claim was resolved by applying the "first in time" rule, with the tax claim winning because it was assessed first. B-189679, September 7, 1977.

Next in line after government claims is the payment bond surety. The subordination of the payment bond surety to government claims, noted in many of the previously cited cases, stems from the Supreme Court's decision in United States v. Munsey Trust Co., 332 U.S. 234 (1947). The most common government claim in this situation is a tax claim, which invariably wins. E.g., In re Lanny Jones Welding & Repair, 106 B.R. 446 (Bankr. E.D. Va. 1988); 65 Comp. Gen. 29 (1985); 64 Comp. Gen. 763 (1985); 54 Comp. Gen. 823 (1975); B-189125, June 7, 1977; B-187903, December 21, 1976; B-174488, December 29, 1971. The principle applies equally to a Labor Department wage underpayment claim (B-181695, April 7, 1975), or a Small Business Administration advance payment claim (68 Comp. Gen. 269 (1989)). Munsey Trust itself involved an excess reprocurement cost claim. An agreement purporting to commit the government to pay the surety without regard to government claims is unauthorized. 40 Comp. Gen. 85 (1960).

After the payment bond surety is the assignee. The Court of Federal Claims and its predecessors have consistently held an assignee subordinate to a payment bond surety. E.g., Great American Ins. Co. v.

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United States, 492 F.2d 821, 824 (Ct. Cl. 1974); Royal Indemnity Co. v. United States, 93 F. Supp. 891 (Ct. Cl. 1950); Reliance Ins. Co. v. United States, 15 Cl. Ct. 62 (1988). Starting with 63 Comp. Gen. 533 (1984), GAO has followed suit. See also 64 Comp. Gen. 763 (1985) and 67 Comp. Gen. 309 (1988). If a payment bond surety takes priority over an assignee, logic suggests that any claim with priority over the payment bond surety also has priority over the assignee.

The principle of the preceding paragraph works neatly when the surety and assignee are the only competing claimants. It runs into conceptual difficulties when a tax claim enters the picture. As discussed in more detail under the Assignment of Claims heading of this chapter, an assignee is protected against tax offsets if the contract contains an authorized no-setoff clause. E.g., 65 Comp. Gen. 554 (1986). Even without a no-setoff clause, the assignee will prevail over a tax claim arising after perfection of the assignment. 67 Comp. Gen. 505 (1988). The problem is that integrating this relationship with the payment bond surety's subordination to tax claims resembles the proverbial dog chasing its tail—the IRS beats the surety who beats the assignee who beats the IRS who beats the surety, ad infinitum. See 63 Comp. Gen. at 536; 64 Comp. Gen. at 767. As both of these cases state, the solution is to recognize that the assignee is entitled to its priority over the tax claim only if it can show that it is otherwise entitled to the funds, which it cannot do by virtue of the surety's dominant claim. Id.

If a payment bond surety could qualify as an assignee, it could in some cases enhance its position by taking advantage of a no-setoff clause. As a general proposition, this cannot happen since a surety is not a financing institution for purposes of the Assignment of Claims Act. E.g., B-187456, November 4, 1976; B-169420, October 22, 1970. Consistent with the rule for assignments in general, one board of contract appeals has held that an agency can waive the statutory protections and accept an otherwise non-qualifying assignment to a surety, at least for limited purposes. Rodgers Construction, Inc., and Federal Insurance Co., IBCA Nos. 2777 et al., 92-1 BCA ¶ 24,503 (1991). Rodgers did not involve competing claims, however, and it is doubtful that the concept could be used to defeat an otherwise valid government claim.

Next in line is the contractor's trustee in bankruptcy. If it can be said that the funds in question never became the property of the contractor, a payment bond surety will prevail over the trustee in bankruptcy. Pearlman v. Reliance Ins. Co., 371 U.S. 132 (1962); Great American Ins. Co. v. United

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States, 492 F.2d 821, 824 (Ct. Cl. 1974); B-221519, July 1, 1986; B-211539, September 26, 1983. Absent a preferential transfer, the trustee's claim has also been held subordinate to that of an assignee whose assignment has been perfected. 56 Comp. Gen. 499 (1977), overruled in part on other grounds, 60 Comp. Gen. 510 (1981). It may also be subordinate to certain government claims. 68 Comp. Gen. 215 (1989); B-211539, September 26, 1983. However, the government must comply with the automatic stay provisions of the Bankruptcy Code before attempting an offset. 68 Comp. Gen. at 219. If the contractor is not in bankruptcy, the contractor will occupy this rung on the ladder. See B-169420, October 22, 1970.

To sum up, the priorities, in descending order, are:

1. Liquidated damages arising under the same contract.
2. Performance bond surety.
3. Government claims.
    a. Labor Department unpaid/underpaid wage claims.
    b. Labor Department liquidated damage claims.
    c. Excess reprocurement costs on same contract.
    d. Tax claims.
4. Payment bond surety.
5. Assignee under a proper assignment.
6. Trustee in bankruptcy or contractor, as applicable.

(3) Government's obligations and liability as stakeholder

Where performance of the contract is complete and there are no government claims to the unexpended balance, the government is a mere stakeholder with respect to that balance. The government doesn't particularly care who gets paid as long as it pays the right party and protects itself against the possibility of having to pay twice.

As a general proposition, the government when acting as stakeholder has a duty to pay the proper party or parties, and will be held liable for breaches of this duty. For example, in Newark Ins. Co. v. United States, 169 F. Supp. 955 (Ct. Cl. 1959), the government was found liable to a payment bond surety when it made a final contract payment to an assignee after being put on notice of the surety's claim. The court said:

"Surely a stakeholder, caught in the middle between two competing claimants, cannot, in effect, decide the merits of their claims by the mere physical act of delivering the stake to one of them."

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Id. at 957. The result is the same where the government erroneously pays the contractor. Home Indemnity Co. v. United States, 376 F.2d 890 (Ct. Cl. 1967); International Fidelity Ins. Co. v. United States, 25 Cl. Ct. 469 (1992); 58 Comp. Gen. 64 (1978); B-200374, October 21, 1980. See also National Surety Corp. v. United States, 319 F. Supp. 45 (N.D. Ala. 1970).

In another assignee case, the court held that "the Government improperly abandoned its role as a stakeholder and elected to decide the merits of the conflicting claims by paying the amount in dispute to the assignee without a valid reason for doing so." Great American Ins. Co. v. United States, 492 F.2d 821, 825 (Ct. Cl. 1974). This should not be construed to mean that the government should not try to resolve claims administratively. Following precedent would presumably be a "valid reason," although we have no case to cite for this proposition. Also, a good faith attempt to follow precedent would be more than "the mere physical act of delivering the stake." Certainly, however, if the claims cannot be resolved by applying precedent, the solution is to let a court sort it out. B-190181, December 8, 1977.

Where a payment is found to be erroneous in disregard of a surety's superior claim, the fact that the payment depleted the stake is no defense and the government will still lose. Newark Ins. Co., 169 F. Supp. at 956–57; 62 Comp. Gen. 498 (1983). The stake is measured as of the time of default and is deemed to include amounts subsequently paid out in error. See Universal Surety Co. v. United States, 10 Cl. Ct. 794, 797–98 (1986); 62 Comp. Gen. 498. If the erroneous payment was made to the contractor, the government can and should pursue recovery against the contractor. 62 Comp. Gen. at 502. If the erroneous payment was made to an assignee, the Assignment of Claims Act prevents recovery from the assignee, but the government may still be able to recover from the contractor. Great American Ins. Co., 492 F.2d at 826–27.

A variation occurred in B-214985, May 22, 1984, in which the contracting agency erroneously paid the contractor instead of a payment bond surety. Before the contractor could pay the surety, the IRS grabbed the money under a tax lien. Notwithstanding the government's error, the surety's claim was denied because of the tax claim's priority.

In the preceding cases, the government was merely a stakeholder. Where a surety notifies the government of a claim while the contractor is still performing, the situation is different. The government "is primarily concerned with completion of performance under the contract and is far

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from being a simple stakeholder." United States Fidelity & Guaranty Co. v. United States, 475 F.2d 1377, 1384 (Ct. Cl. 1973). In this situation, the contracting officer must balance the interests of the government against possible harm to the surety, and must exercise reasoned discretion in deciding whether to pay the contractor, the surety, or neither. Id.; Argonaut Ins. Co. v. United States, 434 F.2d 1362 (Ct. Cl. 1970); Peerless Ins. Co., ASBCA No. 28887, 88-2 BCA ¶ 20,730 (1988). This duty to exercise discretion arises "when a . . . surety alleges that the contractor has breached the contract by defaulting under one of the bonds." Balboa Ins. Co. v. United States, 775 F.2d 1158, 1162 (Fed. Cir. 1985).

The contracting officer's discretion is very broad. The Court of Claims has stated:

> "[S]o long as there is no showing of bad faith or an abuse of discretion, the decision of a Government contracting officer that a progress payment to a financially strapped contractor should not be withheld will be accorded deference by this court, and the surety's burden of proving to the contrary is high."

United States Fidelity & Guaranty Co. v. United States, 676 F.2d 622, 628 (Ct. Cl. 1982). One reason for this broad range of discretion, as a district court has cautioned, is that "contractors rely upon contract proceeds administered through progress payments to properly finance the contract" and the government therefore should not "lightly withhold funds the contractor may need for this purpose." Fireman's Fund Ins. Co. v. United States, 362 F. Supp. 842, 846 (D. Kans. 1973).

The Court of Appeals for the Federal Circuit, in Balboa Ins. Co. v. United States, 775 F.2d at 1164–65, identified eight factors that are relevant in evaluating an agency's discretion in distributing funds. The "Balboa factors," minus case citations, are:

(1) Attempts by the government after notification by the surety to determine that the contractor had the capacity and intent to complete the job.

(2) Percentage of contract performance completed at time of notification by surety.

(3) Efforts by government to determine progress made on the contract after notice by the surety.

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(4) Whether the contract was subsequently completed by the contractor. This is not conclusive but is relevant to show reasonableness of contracting officer's determination of the progress on the project.

(5) Whether the payments to the contractor subsequently reached the subcontractors and suppliers. This relates to the government's "equitable obligation" to the subcontractors and suppliers and, in view of the surety's liability to these creditors, furthers the surety's objectives as well as those of the government.

(6) Whether the contracting agency had notice of the problems with the contractor's performance prior to the surety's notification of default.

(7) Whether the government's action violated any of its own statutes or regulations.

(8) Evidence that the contract could or could not be completed as quickly or cheaply by a successor contractor.

For applications of the Balboa factors, see Ohio Casualty Ins. Co. v. United States, 12 Cl. Ct. 590 (1987); Indiana Lumbermen's Mutual Ins. Co., VABCA No. 3197, 92-3 BCA ¶ 25,065 (1992); Peerless Ins. Co., ASBCA No. 28887, 88-2 BCA ¶ 20,730 (1988).

In any event, whether the surety lodges its claim during performance or after completion, notice by the surety to the government is essential, as it is this notice which triggers the government's duty. Fireman's Fund Ins. Co. v. United States, 909 F.2d 495 (Fed. Cir. 1990); Indiana Lumbermen's Mutual Ins. Co., 93-2 BCA at 124,918–919.

As with the stakeholder cases, if applicable precedent fails to produce an answer in which the contracting officer can be reasonably confident, the solution may be to simply withhold payment and let a court decide. A decision to withhold, if reasonable under the circumstances, is a valid exercise of the contracting officer's discretion. Reliance Ins. Co. v. United States, 15 Cl. Ct. 62 (1988).

d. Bid Protests

Bid protests—challenges to the award of government contracts by unsuccessful bidders—give rise to one type of monetary claim against the government, a claim to recover bid preparation and/or protest costs. The claims may be considered by the courts, GAO, and the General Services Administration Board of Contract Appeals.

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Whenever someone submits a bid or proposal in response to a government solicitation, an implied-in-fact contract comes into existence under which the government is obligated to treat the bid or proposal fairly and honestly. If the government violates this obligation, it may be held liable for bid preparation costs. The earliest case to state this proposition appears to be Heyer Products Co. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956). Since that time, the government's duty to treat all bids fairly and honestly has become firmly established and has been recognized in a great many cases. E.g., Prineville Sawmill Co. v. United States, 859 F.2d 905, 909 (Fed. Cir. 1988); Tonya, Inc. v. United States, 28 Fed. Cl. 727, 730 (1993); Durable Metals Products, Inc. v. United States, 27 Fed. Cl. 472, 478 (1993); Joseph L. DeClerk and Associates v. United States, 26 Cl. Ct. 35, 41 (1992); Compliance Corp. v. United States, 22 Cl. Ct. 193, 198 (1990), aff'd mem., 960 F.2d 157 (Fed. Cir. 1992).

This implied promise of fair treatment is not limited to competitive bidding, but applies as well to noncompetitive situations such as the Small Business Administration's section 8(a) program. Refine Construction Co. v. United States, 12 Cl. Ct. 56 (1987). It has also been held applicable to the SBA's issuance of Certificates of Competency. Thomas Creek Lumber and Log Co. v. United States, 22 Cl. Ct. 559 (1991). However, it does not apply to a non-bidder. Motorola, Inc. v. United States, 988 F.2d 113 (Fed. Cir. 1993).

A court can award bid protest costs as well as bid preparation costs. Crux Computer Corp. v. United States, 24 Cl. Ct. 223 (1991). However, there is no authority to award lost profits. Id. at 225–26; Heyer, 140 F. Supp. at 412, 413.

The standard the courts apply is whether the government's actions were arbitrary and capricious. The factors to be applied in making this determination are (1) the presence or absence of bad faith on the part of the government; (2) whether there is a reasonable basis for the administrative decision; (3) the amount of discretion entrusted to the procurement officials; and (4) whether the government violated applicable statutes and regulations. Keco Industries, Inc. v. United States, 492 F.2d 1200, 1203–04 (Ct. Cl. 1974). See also, e.g., Durable Metals Products, 27 Fed. Cl. at 479; Joseph L. DeClerk, 26 Cl. Ct. at 42; 54 Comp. Gen. 1021, 1024 (1975).

The implied contract to treat bids fairly is not a contract for the procurement of goods or services and therefore not subject to the

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Contract Disputes Act. Coastal Corp. v. United States, 713 F.2d 728 (Fed. Cir. 1983); Monchamp Corp. v. United States, 19 Cl. Ct. 797 (1990). Accordingly, unless expressly authorized by statute, the boards of contract appeals lack jurisdiction to consider bid preparation cost claims. Coastal Corp., 713 F.2d at 730.

Prior to 1984, following the judicial precedents such as Heyer and Keco, GAO considered claims for bid preparation and protest costs on the same basis as did the courts. E.g., 60 Comp. Gen. 36 (1980); 54 Comp. Gen. 1021 (1975). In 1984, Congress enacted 31 U.S.C. § 3554(c) as part of the Competition in Contracting Act. Subsection (1), as amended by Pub. L. No. 103-355, § 1403(b) (1994), provides:

"If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may recommend that the Federal agency conducting the procurement pay to an appropriate interested party the costs of—

"(A) filing and pursuing the protest, including reasonable attorneys' fees and consultant and expert witness fees; and

"(B) bid and proposal preparation."

The parties should first try to negotiate the amount. If they cannot agree and the "interested party" so requests, GAO will determine the amount. Id. § 3554(c)(4). Once the amount is determined, the agency must either pay promptly or report to GAO its reasons for refusing to pay, in which event GAO is to then promptly report the matter to specified congressional committees. GAO's report is to include recommendations appropriate to the circumstances, which may include such things as relief legislation and/or the legislative rescission or cancellation of funds. Id. §§ 3554(c)(3) and (e)(1).

The original (1984) version of 31 U.S.C. § 3554(c) specified that payment is to come from the agency's procurement appropriations. While the 1994 amendments left out this detail, there is no substantive change because the only funds from which the agency can pay are its own operating appropriations. Prior to 1995, the obligation was chargeable to appropriations current at the time of GAO's decision. B-199368.4, January 19, 1983 (non-decision letter). The extent to which the 1994 law may have changed this remains to be addressed.

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The General Services Administration Board of Contract Appeals decides bid protests involving automatic data processing contracts under the Brooks Automatic Data Processing Act, 40 U.S.C. § 759(f). The law provides remedies if the board finds that the agency involved has violated a statute or regulation. Subsection 759(f)(5)(C), as amended by Pub. L. No. 103-355, § 1435(a) (1994), provides:

"Whenever the board [determines that the agency has violated a statute or regulation], it may, in accordance with section 1304 of Title 31, United States Code, further declare an appropriate prevailing party to be entitled to the cost of filing and pursuing the protest (including reasonable attorneys' fees and consultant and expert witness fees), and bid and proposal preparation."

Under this statute, the GSBCA has held that it will not simply rubber-stamp a cost stipulation, but must actually make the award. Systemhouse Federal Systems, Inc., GSBCA No. 9446-C(9313-P), 89-2 BCA ¶ 21,773 (1989). However, in a case where the parties entered into a monetary settlement agreement after the board had rendered its decision on the merits, the Court of Appeals for the Federal Circuit held that the board was bound to accept it. Federal Data Corp. v. SMS Data Products Group, Inc., 819 F.2d 277 (Fed. Cir. 1987).

In awarding costs under the Brooks Act, the GSBCA is not limited to items taxable under the statutes applicable to the courts. Sterling Federal Systems, Inc. v. Goldin, 16 F.3d 1177 (Fed. Cir. 1994).

Unlike 31 U.S.C. § 3554(c), the Brooks Act as quoted above provides for payment "in accordance with" 31 U.S.C. § 1304, the permanent judgment appropriation. This potential access to the Treasury gave rise to concern over an abuse known as "fedmail" (derived from "blackmail"), under which an agency simply throws money at a protester to get rid of the interruption, or someone files a protest with this expectation. If the agency is not financially accountable for its settlements, and it is not to the extent of unreimbursable payments from the general fund of the Treasury, there is no effective control. To address the "fedmail" problem, GAO recommended that the Brooks Act be amended to require payment from agency appropriations. ADP Bid Protests: Better Disclosure and Accountability of Settlements Needed, GAO/GGD-90-13 (March 1990) at 34. The GSBCA tried various approaches, finally declaring that it would refuse to make an award of protest costs in "fedmail" cases, aptly characterizing the situation as an attempt to buy off a protester with someone else's appropriated funds. ICF Severn, Inc. v. NASA, GSBCA No. 11552-C-R

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(11334-P), 94-3 BCA ¶ 27,162 (1994). Congress acted in late 1994, amending the Brooks Act to (1) require public disclosure of all protest settlements calling for the expenditure of appropriated funds, (2) provide for payment from the judgment appropriation, and (3) require that contracting agencies reimburse the judgment appropriation for all Brooks Act payments, both GSBCA awards and payments under dismissal settlements. 40 U.S.C. §§ 759(f)(5)(D) and (E), added by Pub. L. No. 103–355, § 1436 (1994). The tortured history of the reimbursement issue is discussed further in Chapter 14.

e. Damage to Leased Property

Since a lease is a contract, damage claims under a lease are governed by the Contract Disputes Act. Goodfellow Bros., Inc., AGBCA No. 80-189-3, 81-1 BCA ¶ 14,917 (1981). GAO had been active in this area prior to the CDA and, although GAO no longer settles individual claims, it may nevertheless be useful from the perspective of the proper use of appropriated funds to summarize the applicable principles.

Where the United States enters into a leasehold agreement, the validity and the construction of the lease and its consequences on the rights and obligations of the parties are governed by federal, rather than state, law. Goodfellow, 81-1 BCA at 73,814; B-174588, September 6, 1972. If there are no federal cases on point, it is then appropriate to resort to state landlord-tenant law. 49 Comp. Gen. 532, 533 (1970). The starting point, of course, is the terms of the lease agreement.

Claims against the government for damage to leased real property frequently arise from the government's agreement in the lease to surrender the leased premises in some designated condition of repair, generally either in good order and repair, or in the same state and condition as when received. This general covenant to surrender the premises in good condition or repair is often expressly qualified. Common express exceptions are usual wear and tear, action of the elements, and so-called "acts of God." Absent an applicable exception, the United States will be held liable for violating this covenant. See, e.g., San Nicolas v. United States, 617 F.2d 246 (Ct. Cl. 1980). Claims for damages to or restoration of leased property, however, must be considered in light of the purpose for which the property was leased. That is, the government is not liable unless the damage is over and above the normal wear and tear incident to the purpose for which the property was leased. 5 Comp. Gen. 522 (1926); 4 Comp. Gen. 211 (1924); B-192230, November 27, 1978.

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The government's liability does not derive solely from the terms of the lease. Even in the absence of specific "good repair" and "ordinary wear and tear" clauses, unless the lease expressly provides to the contrary, there is in every lease an implied obligation on the tenant to surrender the leased property at the end of the tenancy in as good condition as at the beginning of the tenancy, except for reasonable wear and tear and damage over which the tenant had no control. 26 Comp. Gen. 585 (1947); 25 Comp. Gen. 349 (1945); 23 Comp. Gen. 477, 479–80 (1944). One way to determine compliance with this requirement, whether express or implied, is to compare the initial and terminal inspection surveys. B-193722, March 29, 1979.

A lease provision exempting the government from liability for "acts of a stranger" has been held to include window breakage by vandals. 49 Comp. Gen. 532 (1970).

The measure of damages is the actual cost of repair or restoration, not to exceed the diminution in fair market value of the property caused by the government's nonperformance. San Nicolas, 617 F.2d at 249; Missouri Baptist Hospital v. United States, 555 F.2d 290 (Ct. Cl. 1977); Dodge Street Building Corp. v. United States, 341 F.2d 641 (Ct. Cl. 1965). Some lease provisions may permit the government to make a cash payment in lieu of restoration so long as the payment does not exceed the diminution in value of the premises resulting from the federal use and occupancy. E.g., B-181236, October 20, 1977.

The lease may require timely notice of the lessor's demand for restoration. If so, compliance with the notice requirement will be a condition precedent to the lessor's restoration rights. 6 Comp. Gen. 533 (1927). However, if there has been substantial compliance with the notice requirement—that is, if notice is given within a reasonable time after the premises are vacated—and if the lessor's failure to strictly comply with the requirement does not affect the merits of the restoration claim or operate to the prejudice of the United States, the failure will not defeat an otherwise proper restoration claim. 40 Comp. Gen. 300, 304 (1960); 26 Comp. Gen. 585, 588 (1947). The "reasonable notice" principle would generally apply even in the absence of a notice requirement in the lease. 26 Comp. Gen. at 588.

Because the government can restore or further destroy realty so long as its occupancy continues, restoration claims should generally not be settled until the government's occupancy rights terminate. 40 Comp. Gen. 300

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(1960) (failure to give timely notice of demand for restoration held not to destroy lessor's restoration rights where government continued to occupy premises under subsequent lease). Thus, in a case where the government occupied land under a lease and subsequently decided to acquire the land in fee simple by condemnation, with the just compensation to be based on the current value of the property as if in undamaged condition, claims for restoration of the land could not be paid so long as the government continued to occupy the premises under the lease. B-181236, October 20, 1977. If, however, improvements to the land have been completely destroyed and the government does not intend to restore them, the considerations which mandate delaying claims for damage to the land itself do not exist with regard to the obligation to restore the improvements. Thus, claims for the restoration of the improvements in B-181236 could be settled without awaiting the government's acquisition by condemnation.

Although land with improvements and appurtenances is ordinarily considered a single unit for valuation purposes (the "unit rule"), departures from the unit rule have been sanctioned in appropriate circumstances. One such circumstance where improvements can be valued apart from the rest of the premises to settle a restoration claim is where the improvements have been completely lost or destroyed during a temporary occupation by the government, as in B-181236. Claims for restoration of improvements only should be computed on the basis of the replacement or reproduction cost. Thus, in order to account for the ordinary wear and tear which has occurred over a period of years, it is necessary to depreciate the improvements' replacement value as determined on the termination date of the lease so that the amount allowed reflects only the damage done by the government. B-181236, cited above.

Although a lease agreement may expressly exempt the government from restoration liability for certain types of damage, if the government subleases the property and later assesses its sublessee for the exempted damage, the government may be found to hold such amounts as are assessed in constructive trust for the lessor. B-177989-O.M., March 23, 1973.

Even if damage exceeds that attributable to normal wear and tear, the government may avoid liability for restoration if the damage can be attributed to the lessor's breach of an express covenant in the lease to maintain the premises or property in good repair and tenantable condition.

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A lessor's obligation to maintain premises or property in good repair and tenantable condition "embraces acts of repair to prevent a decline in the condition of the premises." 48 Comp. Gen. 289, 290 (1968). Painting has been held to be an expense of maintenance included within the "good repair" provisions of a lease. Id.; 21 Comp. Gen. 90 (1941); 6 Comp. Gen. 215 (1926).

If the government incurs expenses for painting or other services which a lessor is obligated to perform under a lease but has failed or refused to perform, the costs may be recovered by setoff against payments to be made under the lease. 48 Comp. Gen. 289 (1968); 15 Comp. Gen. 1064 (1936).

The doctrine of "constructive eviction" applies to the government as tenant just as it would apply to any other tenant. Under this concept, if a lessor allows the premises to become untenantable, the lessee is relieved from the obligation to pay rent provided the lessee vacates within a reasonable time. The case of Richardson v. United States, 17 Cl. Ct. 355, 356 (1989), illustrates one set of facts which the court found to justify termination of the lease and cessation of rental payments:

> "As a result of the failure to repair roof leaks and water seepage, [the Social Security Administration] repeatedly experienced problems and inconveniences, including: being forced to mount computer equipment necessary to the daily operation of the office on boards to protect it from flooding; soaked and slippery carpets; mildewed walls; water-damaged supplies; having to vacate offices due to dampness; and employees being forced to mop water during business hours."

Where there is a factual dispute involving either discrepancies in the extent of damage, the cost of repairs, or the kind and extent of repair necessary in order to restore items to their original condition less ordinary wear and tear, claimant must satisfactorily establish their claim by convincing evidence. In cases where claimants were unable to meet the burden of proof, GAO has accepted the findings of fact in the government agency's administrative report. B-193722, March 29, 1979; B-192230, November 27, 1978; B-169876, July 12, 1972.

Finally, the very existence of a landlord-tenant relationship may be an issue. A 1964 decision involved a claim by the University of Mississippi for damage to University property resulting from the occupation of the University by federal troops under presidential order. The University argued that the occupation constituted an implied contract of lease and

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thus created a landlord-tenant relationship. Under this theory, the government was under an implied obligation to return the premises in the same condition as they were in when federal occupancy began, reasonable wear and tear excepted. Noting the University's opposition to the presence of the federal troops and the absence of any indication in the record that the United States contemplated paying rent, GAO was unwilling to allow the claim under the implied lease theory absent a judicial determination. However, GAO advised that the claim appeared cognizable under the Military Claims Act. 43 Comp. Gen. 711 (1964).

Claims may also involve the rental of personal property. The principles involved are generally similar. As in the case of real property, the terms of the lease agreement control. Several cases have found the government not liable where there was no negligence on the part of the government and the lease did not impose a more stringent standard of liability. 55 Comp. Gen. 356 (1975) (no liability for typewriter destroyed in fire where no government negligence, "absent any contractual provision increasing the Government's liability beyond its duty of ordinary care as a bailee"); 23 Comp. Gen. 907 (1944) (truck overturned after driving over a shovel handle which was thrown up and managed to lock the steering mechanism); 18 Comp. Gen. 17 (1938) (equipment destroyed in fire caused by unknown person); 15 Comp. Gen. 929 (1936) (stolen equipment); 4 Comp. Gen. 1028 (1925) (lost horse); 1 Comp. Gen. 192 (1921) (injured horse). Conversely, negligence will make the government liable.[42] E.g., 8 Comp. Gen. 448 (1929). As in the case of real property, the duty to use due care and to return the property in the same condition as when received, reasonable wear and tear excepted, is implied by law even where not expressly stated in the lease. 21 Comp. Gen. 411, 419 (1941). A summary of bailment principles and an extensive discussion of early cases may be found in A-89545-O.M., March 15, 1938.

[42]As this paragraph suggests, a claim may have elements of both contract and tort. Depending on such factors as the precise terms of the contract, the relationship of the tortious conduct to the government's obligations under the contract, and the law of the state in which the tortious conduct occurred, the claimant may or may not have an option as to which remedy to pursue. Unfortunately, there is no simple rule and the jurisdictions are not in total harmony. Some cases holding the contract remedy to be exclusive are United States v. Peter Kiewit Sons' Co., 345 F.2d 879 (8th Cir. 1965); Blanchard v. St. Paul Fire and Marine Ins. Co., 341 F.2d 351 (5th Cir. 1965); Woodbury v. United States, 313 F.2d 291 (9th Cir. 1963); Coffey v. United States, 626 F. Supp. 1246 (D. Kans. 1986). Cases permitting a claimant to proceed under the Federal Tort Claims Act include Fort Vancouver Plywood Co. v. United States, 747 F.2d 547 (9th Cir. 1984); Aleutco Corp. v. United States, 244 F.2d 674 (3d Cir. 1957); Green Construction Co. v. Williams Form Eng. Corp., 506 F. Supp. 173 (W.D. Mich. 1980). The Court of Federal Claims will take Tucker Act jurisdiction if the claim is "primarily contractual," without regard to the possible existence of a tort claim. Wood v. United States, 961 F.2d 195 (Fed. Cir. 1992); Estate of Dunaway v. United States, 18 Cl. Ct. 492 (1989).

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f. Canceled Hotel Reservations

Ordinarily the cancellation of hotel reservations within a reasonable time prior to the dates of the reservations involves no liability on the part of the government. 41 Comp. Gen. 780 (1962). However, a claim for the actual cost of unused hotel rooms may be allowed when (1) it is clear that the reservations were made by and on behalf of the government; (2) there is sufficient basis to conclude that the making of reservations gave rise to a contractual relationship between the hotel and the government; (3) the government failed to cancel within a reasonable time; and (4) the hotel attempted to mitigate its damages. Since the basis of the government's liability is contractual, either express or implied-in-fact, the claims should be resolved under the Contract Disputes Act. As with the preceding section on leased property, GAO had looked at a number of these claims prior to the CDA.

Allowable claims must be distinguished from cases in which an employee is reimbursed on a per diem basis and makes a hotel or motel reservation himself or through an agent on his behalf. Under such circumstances, there is no basis for the government to pay a claim because the government was not a party to the agreement. 48 Comp. Gen. 75 (1968). The distinction is between cases in which a block reservation is made on a contractual basis between the government and the hotel through official administrative action, and cases in which the agreement is essentially one between the individual and the hotel, even though the reservation may have been made by some other government employee on the traveler's behalf. Thus, in B-190503-O.M., December 19, 1977, a member of the Casualty Branch on an Army post, determined by the Army to have been acting "in his official capacity," made motel reservations for an 11-member funeral detail. The bus carrying the detail broke down and the detail had to travel through the night to reach the funeral on time. The reservations were never canceled and the motel held the rooms open. GAO viewed the agreement to reserve the rooms as an obligation of the government and allowed the motel's claim for the cost of the rooms. Similarly, GAO allowed payment for reservations made by military officials acting in their official capacity where the members for whom the reservations were made had been notified that, because of the nature of their mission, the reservations could not be altered without official approval. B-192767, May 3, 1979.

In contrast is B-181266, December 5, 1974. An employee was scheduled to travel from Washington to Kansas City on official business and agency employees in Kansas City made a hotel reservation for him. The trip was canceled and the Kansas City office canceled the reservation but not until after the employee had been scheduled to arrive. The situation was viewed

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as a transaction between the individual and the hotel which did not obligate the government. A similar decision is B-192804, December 18, 1978.

Since claims may be allowed only on the basis of legal liability, it is necessary to find some contractual or similar binding arrangement between the government and the hotel whereby the government agrees to either pay for the rooms reserved or cancel within a reasonable time. However, evidence of the contractual arrangement need not necessarily be in writing. In B-194389-O.M., June 25, 1979, the reservations were initially made by telephone. Later, an advance party inspected and approved the accommodations and follow-up telephone calls were made to remind the hotel of the booking. The hotel relied on the conduct and representations of the government and incurred a loss as a result of that reliance. GAO concluded that the booking was viewed by the parties as more than only tentative, and that a contractual relationship existed despite the absence of written evidence. On the other hand, where such facts do not exist, even subsequent issuance of a purchase order by the government will not provide adequate evidence of a contract. B-181266, December 5, 1974.

Once the existence of a contractual agreement to either pay for the rooms reserved or cancel within a reasonable time is established, the government can avoid liability only by showing that the time of cancellation was reasonable. What is "reasonable" depends on the specific circumstances involved. For example, in 41 Comp. Gen. 780 (1962), payment was approved for unused rooms when the reservations were canceled late in the afternoon of the day for which the rooms had been reserved, and the hotel was unable to rent all the rooms after the receipt of the cancellation notice. That holding was followed in 51 Comp. Gen. 453 (1972), in which the reservations were canceled a week ahead but it was found that the hotel was unable to use the space reserved by the government despite attempts to do so. Other circumstances such as special events taking place in the city and the relative difficulty of re-letting accommodations on short notice may also have a bearing on reasonableness. B-194389-O.M., June 25, 1979.

The hotel must generally attempt to mitigate its loss, and its attempts to do so will be relevant in evaluating the claim. For example, in one case when the hotel received three days notice of the cancellation of all accommodations being held, it immediately took steps to insure that the canceled accommodations were re-let. By moving some guests, utilizing its waiting list, and accepting new bookings for the vacancies, the hotel was

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able to re-let the majority of the rooms canceled. These efforts were held sufficient to discharge the hotel's duty to mitigate its losses. B-194389-O.M., June 25, 1979. See also 41 Comp. Gen. 780 and 51 Comp. Gen. 453, previously cited.

The government's liability for canceled hotel reservations is ordinarily limited to the actual cost of the rooms. B-121198, August 1, 1955. Certain other elements of damage may be allowed if it can be established that they represent a liability of the hotel regardless of occupancy. Thus, a Value Added Tax and a service charge were allowed on a claim by a hotel in London. The tax was based on revenues received by the hotel and payment of the claim counted as revenue. The service charge represented staff wages for which the hotel was also liable regardless of occupancy. B-194389-O.M., June 25, 1979. However, loss of anticipated profits and miscellaneous revenue is too remote and speculative and is not allowable. B-121198, August 1, 1955. Interest was disallowed prior to the Contract Disputes Act (B-194389-O.M.), but would now be payable on a claim processed under the CDA.

Claims may also arise in contexts not governed by the CDA. For example, in B-256156, June 15, 1994, an employee used her credit card to guarantee reservations made in her official capacity. The card was charged when the reservations were canceled. Since the government would have been liable to the hotel under the circumstances, the claimant could be reimbursed.

g. Commercial Rental Vehicles

Government employees are often authorized to use commercial rental vehicles in the performance of their jobs, particularly on temporary duty assignments. A set of rules and procedures for handling damage claims had developed over the years. In the late 1980s, the Defense Department's Military Traffic Management Command (MTMC) negotiated an agreement with the majority of rental companies on behalf of the entire government. Situations not covered by the MTMC agreement continue to be governed by the "old" rules. Thus, two systems for handling rental vehicle damage claims exist side-by-side.

(1) Collision damage waiver

Under the traditional form of rental agreement, the rental company assumes responsibility for damage to the vehicle, whether or not caused by the renter's negligence, except for the deductible portion of its commercial insurance policy. The standard rental contract gives the renter the option to purchase what is commonly called "collision damage waiver"

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(CDW) coverage, or something similar, for an additional daily charge.[43] If the optional coverage is purchased, the renter will generally have no liability to the rental company for damage to the vehicle. If the optional coverage is not purchased, the renter is liable to the rental company for damage to the vehicle up to an amount specified in the contract, regardless of whether or not the damage was caused by the renter's negligence. See Federal Travel Regulations (FTR), 41 C.F.R. § 301-3.2(c). Not too many years ago, the specified amount tended to represent the rental company's own deductible and was relatively small, $100 or $250 being fairly common. The amount jumped substantially in the 1970s and 1980s, and amounts in the thousands are now encountered, and even "actual cash value" in some cases.

At one time, both civilian employees and military personnel who purchased the optional collision damage waiver coverage could be reimbursed. E.g., 35 Comp. Gen. 553 (1956); B-172721, July 19, 1971. The rationale was that the employee's election to purchase the CDW was not an unreasonable exercise of discretion. However, in view of the government's general policy of self-insurance, GAO also recognized that an employee's failure to purchase this optional coverage should not be viewed as unreasonable. Thus, it was held in 47 Comp. Gen. 145 (1967) that an employee could be reimbursed who had declined the collision damage waiver and who was required to pay the rental company $100 (the rental company's exclusion as specified in the rental contract) for damage to the vehicle incident to the performance of official business but not attributable to the employee's negligence.

Subsequently, because it was viewed as more economical to the government to assume the risk of loss covered by a collision damage waiver than to reimburse federal personnel for the continually growing cost of these waivers, the travel regulations applicable to civilian employees and military personnel were revised to prohibit reimbursement of the cost of optional CDW coverage. GAO endorsed the change. B-158712, November 16, 1970.

Now, if an employee chooses to purchase this optional coverage, it is viewed as a personal expense and not reimbursable by the government. FTR, 41 C.F.R. § 301-3.2(c)(1); B-215614, April 18, 1985; B-190698, April 6, 1978; B-184623, October 21, 1975; B-172721, March 13, 1972. This is true even if the employee has been erroneously advised by his agency that he

[43]The rental companies are quick to point out that CDW is not insurance. From the customer's perspective, however, it functions in much the same way.

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should purchase this coverage. B-181180/B-181187, June 27, 1974. Absent special circumstances, it makes no difference that the rental occurs in a foreign country. B-185454, July 1, 1976. The prohibition applies to direct payment to the rental company as well as reimbursement of the employee, notwithstanding an erroneous authorization by a contracting officer. B-208630, March 22, 1983.

However, collision damage waiver is not always optional. If an employee has no choice but to purchase the CDW as a condition of renting the vehicle (if, for example, it is required by law or procedure in certain foreign countries), then reimbursement may be permitted. B-242309, March 21, 1991; B-189770, September 12, 1978; B-189082-O.M., December 16, 1977; B-179336-O.M., January 23, 1974. The determination of whether CDW should be reimbursable is within the scope of the applicable travel regulations, and in 55 Comp. Gen. 1343 (1976), GAO advised the General Services Administration that there was no legal objection to amending the Federal Travel Regulations to permit reimbursement of CDW in foreign countries if determined to be in the best interest of the government. This is now reflected in the regulations at 41 C.F.R. § 301-3.2(c)(2). See also 55 Comp. Gen. 1397 (1976).

(2) Non-MTMC damage claims

An employee who does not purchase the optional collision damage waiver will, as noted above, be liable to the rental company for damage to the vehicle up to the deductible amount, whether or not the damage was caused by the employee's fault or negligence. Under both GAO's decisions and the FTR, where an employee has declined to purchase the CDW and is subsequently required to pay the rental company for damage to the vehicle, the employing agency may allow a claim by the employee for reimbursement, whether or not the damage was caused by the employee's negligence, as long as it occurred within the employee's scope of employment. E.g., B-162186, January 7, 1970; B-176235 August 2, 1972; B-158712-O.M., December 13, 1974. Cf. 47 Comp. Gen. 145 (1967). The FTR states that—

"[A]gencies are authorized to pay for damage to the rented vehicle up to the deductible amount contained in the rental contract if the damage occurs while the vehicle is being used for official business."

41 C.F.R. § 301-3.2(c)(1). The concept of "official business" or "scope of employment"—in the context of rental vehicle damage claims—does not

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limit payment to situations in which the employee is actually performing his or her job at the time of the accident. Rather, in recognition of the realities of temporary duty, the FTR provisions relating to use of government-furnished vehicles should be applied by analogy to define the parameters of "official business." 65 Comp. Gen. 253 (1986) (trip to drug store to obtain required medication). Under these regulations—

> "[The vehicle's] use shall be limited to official purposes . . . which include transportation between places where the employee's presence is required incident to official business; between such places and places of temporary lodging when public transportation is unavailable or its use is impractical; and between either of the above places and suitable eating places, drug stores, barber shops, places of worship, cleaning establishments, and similar places necessary for the sustenance, comfort, or health of the employee to foster the continued efficient performance of Government business."

FTR, 41 C.F.R. § 301-2.6(a). Other cases allowing claims under these principles include 68 Comp. Gen. 318 (1989); 65 Comp. Gen. 799 (1986); and B-220779, April 30, 1986. In B-209951, June 7, 1983, an accident occurred while the employee was outside the primary duty area on his way to a restaurant with friends, one of whom he had allowed to drive. The agency determined that he did not meet the "official business" test, and his claim for reimbursement was denied.

In some instances, the rental company may be willing to file its claim directly with the government. However, the rental contract is between the company and the employee, and the government is not a party. Therefore, in many cases, the company will demand payment from the employee, with the employee then filing a claim for reimbursement.

If the damage was caused by the negligence of a third party, the government, upon paying a claim, will become subrogated to the employee's rights against the third party. There is no requirement that the employee first seek to recover from the third party before filing the reimbursement claim. B-176235, August 2, 1972.

The "third party" may be another government employee. In a 1989 case, a military officer who had rented a car under travel orders left the keys with two colleagues so they could go to dinner. Another member of the group took the car, however, consumed a quantity of beer, and drove the car through the hotel wall. Certainly the officer who had rented the car did nothing wrong and the rental company was entitled to be paid. The

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solution: pay the rental company's claim and get the money back from the person who assaulted the hotel. 68 Comp. Gen. 309 (1989).

In B-202186, March 9, 1982, GAO considered a claim for damage to a commercial rental vehicle under a Federal Supply Schedule contract. Under the contract, the contractor assumed full responsibility for loss or damage to the vehicle, except that the contractor could exclude "the deductible amount as set forth in its normal commercial insurance policy." A rental company in a state where collision insurance was not required argued that its "normal commercial insurance policy" did not include collision coverage and therefore the government should be liable for the full amount of the damage. However, the apparent intent of the relevant contract provision was that the rental company bear the full risk of loss or damage to its vehicles, except to the limited extent of the deductible that is commonly included in insurance policies. The rental company's decision not to procure commercial collision insurance could not operate to shift that risk to the government. The claim was therefore denied.

(3) The MTMC agreement

In the late 1980s, the Military Traffic Management Command, Department of Defense, negotiated a standard rental car agreement with many of the rental companies. The MTMC agreement greatly simplifies the damage claim process. The agreement is not mandatory for government agencies or employees, although the General Services Administration strongly encourages its use. The terms of the agreement are summarized in the "Rental Car Information" section of GSA's Federal Travel Directory, published monthly.

The rental company agrees to carry liability insurance, or to self-insure, up to specified limits, for death, personal injury, and property damage. This insurance is designated as "primary in all respects." MTMC Agreement, para. 9.a. Thus, claims by a third party should be referred to the rental company rather than processed under the Federal Tort Claims Act.[44]

For government employees renting a car on government business, CDW is included in the basic daily rate. Contract forms may still include the option boxes because the companies are unlikely to redesign their forms to accommodate just one segment of their business. The MTMC agreement (para. 1) anticipates this by providing that its terms "take precedence over

[44]In non-MTMC situations, it is necessary to examine the rental agreement to determine the types and extent of insurance coverage provided.

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any contrary policies and provisions of any Company rental document that the Government employee signs when renting a vehicle."

Damage to the vehicle is covered in para. 9.b of the agreement. Basically, the company "assumes and shall bear the entire risk of loss" or damage "from any and every cause whatsoever," unless the loss or damage is caused by one of several listed factors. One of the factors listed is operation of the vehicle by a person other than an authorized driver. Another is "willful or wanton misconduct" on the part of a driver. Under para. 9.c, the company agrees to submit any damage claims to the employee's agency and not to the employee, and not to include loss of use in any such claim.

Exactly what "willful or wanton misconduct" means is not entirely clear. What is clear, at a minimum, is that it requires more than ordinary negligence. The best approach in any given case, whether or not required as a matter of law, would appear to be to examine the law of the state where the accident occurred. In one case, for example, GAO looked to Florida law and found that it defined three separate degrees of negligence—ordinary, gross, and willful and wanton—with "willful and wanton" being very close to intentional conduct. Under this standard, GAO denied a claim where an employee had driven a car down a boat ramp into a lake. While, under the particular facts and circumstances, it would have been difficult to deny ordinary negligence, the conduct did not amount to "willful and wanton misconduct." B-230064, April 14, 1988.

Maximum use of the MTMC program should substantially reduce the number of rental vehicle damage claims agencies must consider. Participating companies and locations are listed in the monthly Federal Travel Directory. For nonparticipating companies and/or locations, damage claims continue to be handled under the pre-MTMC rules described above.

3. Miscellaneous Statutory Claims

a. International Claims Settlement Act of 1949

The International Claims Settlement Act of 1949 (22 U.S.C. Chapter 21) establishes a mechanism for the adjudication of claims by the Government of the United States and by nationals of the United States against a foreign government arising out of the nationalization or other taking of property, in situations where the United States and the foreign

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government have entered into an agreement whereby the United States has agreed to accept payment of a lump sum in settlement of all such claims. The statute was intended to implement the 1948 settlement agreement with Yugoslavia and any similar agreements with other governments in the future. S. Rep. No. 800, 81st Cong., 1st Sess., reprinted in 1950 U.S. Code Cong. Serv. 1949, 1950–51. The Act has been amended from time to time to add agreements with several other governments such as Czechoslovakia, the German Democratic Republic, and Vietnam. While, strictly speaking, these are not claims against the United States, they are claims by U.S. nationals adjudicated by U.S. government agencies and paid from funds under the control of the U.S. Treasury.

The Foreign Claims Settlement Commission, an agency within the Department of Justice, adjudicates claims, renders final decisions, and makes awards under the Act. 22 U.S.C. §§ 1622a, 1623(a). The Commission's implementing regulations are found at 45 C.F.R. Part 531. Payments received from foreign governments under claims settlement agreements are deposited in special funds in the Treasury and are permanently appropriated for making payments of awards under the Act. 22 U.S.C. § 1627. Awards in favor of the Government of the United States are credited to miscellaneous receipts. Id. § 1623(g). Other awards are certified by the Foreign Claims Settlement Commission to the Treasury Department for payment from the applicable special fund, in accordance with priorities specified in the Act. Id. §§ 1624, 1627. Treasury has implementing regulations on the Act's payment provisions, found at 31 C.F.R. Part 250. A 1987 amendment to the statute "authorizes and directs" Treasury to invest the amounts held in the special funds "in public debt securities with maturities suitable for the needs of the separate accounts and bearing interest at rates determined by the Secretary, taking into consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities." 22 U.S.C. § 1627(g).

In adjudicating claims under the Act, the Commission relies first on the relevant provisions of the claims agreement itself, and second, on applicable principles of "international law, justice, and equity." Id. § 1623(a). The Commission's decisions on claims are final and conclusive, and not subject to review by any other agency or court. Id. §§ 1622g, 1623(h). Thus, apart from constitutional issues, there is no judicial review of Commission decisions. E.g., De Vegvar v. Gillilland, 228 F.2d 640 (D.C. Cir. 1955), cert. denied, 350 U.S. 994; Gutwein v. United States, 17 Cl. Ct. 720 (1989). There is also no private right of action under the Act, at least in

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the context of a suit by a claimant's executor against a law firm that had allegedly taken a fee in excess of the 10 percent permitted by 22 U.S.C. § 1623(f). Leinwander v. Newman, Aronson & Neumann, 625 F. Supp. 1269 (S.D.N.Y. 1985).

By virtue of the "final and conclusive" provisions, GAO cannot review Commission decisions any more than the courts can. GAO does, however, have a role under the Act and is responsible for making determinations of entitlement in certain situations. GAO's role is spelled out in 22 U.S.C. §§ 1626(c)(1) and (2), under which payments must be made only to the person(s) on behalf of whom the award is made, except that—

"(1) if any person to whom any payment is to be made pursuant to this subchapter is deceased or is under a legal disability, payment shall be made to his legal representative, except that if any payment to be made is not over $1,000 and there is no qualified executor or administrator, payment may be made to the person or persons found by the Comptroller General to be entitled thereto, without the necessity of compliance with the requirements of law with respect to the administration of estates;

"(2) in the case of a partnership or corporation, the existence of which has been terminated and on behalf of which an award is made, payment shall be made, except as provided in paragraphs (3) and (4) of this subsection, to the person or persons found by the Comptroller General of the United States to be entitled thereto[.]"

The exceptions referred to in subsections (3) and (4) relate to corporations for which a receiver or trustee has been appointed. Payment in accordance with section 1626 "shall be an absolute bar to recovery by any other person against the United States, its officers, agents, or employees with respect to such payment. Id. § 1626(d).

Awards by the Foreign Claims Settlement Commission are frequently divided into installments which are then paid out over a number of years. A 1968 amendment to the statute raised the dollar amount of 22 U.S.C. § 1626(c)(1) from $500 to $1,000 and substituted the words "any payment" for "total award." Consequently, GAO is authorized to make determinations under subsection (c)(1) where the amount of an individual payment does not exceed $1,000, regardless of the amount of the total award. B-167253, July 15, 1969. If an award is to be paid in installments over a number of years, GAO's determination on the initial claim may be used as precedent for the duration of the payout, as long as the claim remains the same, the amount of payment does not exceed $1,000, and the probative evidence does not change. Id.

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The distribution of estates is ordinarily a matter of state rather than federal law. Therefore, in making determinations under 22 U.S.C. § 1626(c)(1), GAO will normally apply the laws of descent and distribution of the state of the deceased payee's domicile at the time of death. For example, in B-186611, November 9, 1976, GAO determined that a claim awarded by the Foreign Claims Settlement Commission was to be divided equally among the awardee's widower and two surviving children. The awardee, a domiciliary of California, died intestate and no administrator was appointed. In determining the proper recipients for this award, GAO applied the California law governing intestate succession, under which the separate property of a decedent survived by a spouse and more than one child passes one-third to the spouse, and two-thirds equally among the children.

Also, any priority state law may create in favor of the payment of funeral expenses should be given effect. In B-172238-O.M., April 9, 1971, an award under the International Claims Settlement Act was claimed by both the awardee's widow and his daughter, the named executrix. The awardee was a New York resident who died testate, although the value of the estate did not justify probate costs. In support of her claim, the widow filed an itemized receipt, signed by the funeral home manager, for funeral expenses she had paid. Citing the New York law requiring that reasonable funeral expenses be preferred to all debts and claims against a decedent's estate, GAO determined that the widow was the proper recipient of the full award, which amounted to less than half of the total funeral expenses. See also B-169969-O.M., September 30, 1970.

A will is often a useful source of evidence of the testator's intent. E.g., B-167740-O.M., September 17, 1969. However, as B-172238-O.M. illustrates, an unprobated will cannot be given precedence over the provisions of the applicable state law.

The second situation in which GAO makes entitlement determinations under 22 U.S.C. § 1626 is where a recipient partnership or corporation has been terminated. In B-143052, February 1, 1965, a corporate recipient had been dissolved under New York law for nonpayment of taxes. The Comptroller General considered a number of claims for the award, and determined that the proper recipients were the named president and treasurer of the corporation, who in their official capacities were authorized to endorse all checks payable to the corporation. Accordingly, GAO advised the Treasury Department to make the award check payable to both parties jointly, and suggested further that Treasury consider notifying

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federal and state tax offices. B-143052, September 15, 1961, and B-143052, June 14, 1960, are earlier considerations of this same matter and include discussion of the applicable standards and necessary documentation.

A simpler determination is B-160559, June 12, 1967, in which an award was found payable to two individuals and a corporation to whom the assets of the dissolved corporation had been transferred. See also B-188312-O.M., April 18, 1977 (payment to terminated partnership determined payable in equal shares to former partners as individuals). More recently, B-202723, July 22, 1981, involved an award to a corporation which had terminated by operation of law in 1959. Since none of the corporation's directors was still living, the award was held payable to the heirs of the deceased sole shareholder of the corporation. The approach of B-202723 was followed in B-223618, October 10, 1986, advising that Treasury could either seek to have a former receiver reappointed, or make payment to the shareholders of the defunct corporation in proportion to the interest they held at the time of dissolution.

Claims involving International Claims Settlement Act awards often present evidentiary problems. This is because the events giving rise to the awards may have occurred many years ago, under unusual circumstances, and the claimants are often heirs or descendants of the original property owners with little "hard evidence" to support their claims. GAO's approach, as with other types of claims, is to require the "best evidence obtainable." Exactly what this will be depends on the circumstances of the particular case. The mere uncorroborated statement of a claimant will not be sufficient to support a claim. When "primary" evidence is unobtainable, GAO has accepted "secondary" evidence in the form of pertinent data from which the necessary information can reasonably be constructed. This is really nothing more than an application of the eminently sensible axiom of life that "you do the best you can with what you've got." For the application of these principles to a group of related claims under the China Claims Program, see B-201150, July 11, 1983; B-201150, January 18, 1983; B-201150, December 1, 1981; and B-201150, May 13, 1981.

b. Estates of United States Citizens Who Die Overseas

When an American citizen (except a seaman who is a member of a crew of an American vessel) dies overseas, or at the time of death is domiciled overseas, and leaves no legal representative in that country, the State Department and, under certain circumstances, the General Accounting Office, have statutory responsibilities concerning the decedent's estate. Detailed provisions governing the disposition of such estates are contained in 22 U.S.C. § 4195. The statutory procedures apply when

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authorized by treaty provisions or permitted by the laws of the country in which the death occurs or the decedent is domiciled, or when permitted by established usage.

The appropriate United States consular officer, or other diplomatic officer in his or her absence, becomes the "provisional conservator" of the estate, with duties spelled out in the statute. The provisional conservator must: (1) take possession of the personal estate; (2) after taking possession of the personal property, inventory and appraise the effects; (3) collect the debts due to the decedent in his or her jurisdiction and pay from the estate the obligations owed there by the decedent;[45] (4) sell at public auction any perishable items in the estate and, after reasonably attempting to notify the next of kin, such other portions of the estate as may be necessary to pay the decedent's debts and funeral expenses. At the expiration of one year from the date of death (or longer if necessary for final settlement of the estate), the provisional conservator is to sell the residue of the estate "with the exception of investments of bonds, shares of stock, notes of indebtedness, jewelry or heirlooms, or other articles having a sentimental value," and then transmit the proceeds of the sale and any unsold effects to the General Accounting Office. If the decedent's legal representative appears at any time prior to transmission of the estate to GAO, the consular or diplomatic officer is authorized to deliver the estate to the legal representative.

Once the State Department transmits an estate to GAO under 22 U.S.C. § 4195, the Comptroller General or his designee becomes the conservator of the estate, with the duty to hold the estate in trust for the legal claimant. For a period of six years from the date GAO receives the estate, GAO may consider and settle claims against the estate presented by a "legal claimant." During the six-year "holding period," GAO may take necessary actions to conserve the estate, including selling portions of it. The proceeds of any such sale are deposited in the Treasury in a fund in trust for the legal claimant.

A question open to some debate is whether conservation of the estate includes the duty to make interest-bearing investments in order to guard against diminution of its value through inflation. The requirement in the statute that any money received by GAO be deposited in the Treasury obviously restricts options, but GAO regards investment in Treasury or

[45]The authority to collect debts due to the decedent does not include the unpaid compensation of a deceased government employee. 7 Comp. Gen. 396 (1927).

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other government securities as consistent with the statute, whether or not absolutely required. B-220775-O.M., September 25, 1986.

If no claim has been received from a legal claimant by the end of the six-year period, and the state or territory of the decedent's last domicile in the United States is known, GAO is to transmit the proceeds of any trust accounts established in the Treasury plus any remaining unsold effects to the proper officer of that state or territory. If the decedent's last domicile in the United States is not known, the trust funds must be deposited in the general fund of the Treasury as miscellaneous receipts, and GAO may dispose of any remaining effects as it deems appropriate, including the destruction of any items considered "no longer possessed of any value." Any expenses GAO incurs in the administration and disposition of the estate are to be deducted from the proceeds of the estate.

In B-174465-O.M., January 10, 1972, the Comptroller General served as conservator under 22 U.S.C. § 4195 for an American citizen who died intestate in Hungary. Based on a birth certificate and other evidence (and in the absence of any other claimants), it was determined that a German-born woman was the acknowledged daughter and only surviving heir of the decedent. Accordingly, she was the "legal claimant" and therefore the proper recipient of the residue of the estate then being held by GAO, consisting of a watch, a wedding ring, personal papers and photographs, and approximately $1,000 in cash. See also B-184160-O.M., October 3, 1975 (where GAO determined that under New York law a public administrator had the same standing as a private, court-appointed administrator and was, therefore, a proper claimant under 22 U.S.C. § 4195) and B-159357-O.M., July 8, 1966 (claim of a cousin of the deceased would precede that of a public administrator).

In A-33582, October 14, 1930, a Post Office Inspector requested the residue of the estate of an American citizen who died in Mexico. The (then) Post Office Department had received information from various government agencies that the personal papers of the decedent contained evidence that he had been living under an assumed name and was in fact a man sought for mail fraud. Apparently, the trial of a second man charged in the same case had been continued while investigators sought his accomplice. As conservator, the Comptroller General refused the request because the inspector was neither a proper heir nor a legal representative of the decedent. However, qualified representatives of the Post Office Department were invited to inspect the effects being held, and GAO offered to provide copies of any documents relevant to the pending court action.

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In B-169616-O.M., May 8, 1970, the Comptroller General received the residue of the estate of an American citizen who died in Malta. Among the items of personal property to be held in trust were two checkbooks representing deposits with a Maltese bank. When GAO requested transmission of the funds on deposit, the bank declined, citing a bank policy requiring a letter of indemnity prior to the release of funds to any party other than a depositor's legal heirs. It was determined, however, to be inappropriate for GAO to agree to indemnify the bank for any payments which it might make upon presentment of a claim by a lawful claimant of the decedent. In explaining this position, the memorandum stated:

"Remittance of the funds to this Office, as the statutory conservator of the deceased's estate, is equivalent to payment of the estate and would relieve the bank of any further obligation to [the decedent's] heirs or lawful claimants. As trustee of the funds, it is this Office's obligation, and not the bank's, to determine to whom the funds are properly payable and thus the bank should refer to this Office any claim to moneys which it receives."

See also B-171430-O.M., March 29, 1971 (Mexican bank refused to transmit proceeds of bank account to GAO because it was prohibited by Mexican law; procedures under 22 U.S.C. § 4195 do not apply where not permitted by laws of country where death occurs).

On June 3, 1962, 120 Americans (mainly from Atlanta, Georgia) died in a plane crash near Paris, France. Following the tragedy, several hundred dollars in United States and foreign currencies was delivered to the American Embassy by French authorities. The money belonged to the deceased Americans, but under the circumstances individual ownership could not be established. In 43 Comp. Gen. 52 (1963), the State Department asked whether a proposal to donate the "unidentified effects" to two Atlanta charities would be authorized. The plan was apparently the result of correspondence between the American Consul General in Paris and the mayor of Atlanta, who had been in contact with the decedents' next of kin. Two charities were named because the relatives could not agree upon a single beneficiary. The Comptroller General held that the plan was not authorized by 22 U.S.C. § 4195, stating:

"Notwithstanding the practical and ethical considerations giving rise to the Embassy's proposed distribution, we cannot view the contemplated action as a proper extension of the duties and responsibilities imposed by section [4195], both upon the Foreign Service and our Office. In the absence of unanimous concurrence by the various legal claimants, effectuation of the proposed distribution would not be authorized."

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43 Comp. Gen. at 54. The proper course of action was to follow the statutory procedures, with the money to be turned over to the state of Georgia to the extent unclaimed after the six-year waiting period.

Problems under 22 U.S.C. § 4195 also arose after a 1977 plane crash at Tenerife, Canary Islands, in which a number of American citizens were killed. Personal effects were recovered initially by Spanish authorities and turned over to Pan American Airlines to aid in establishing the identity of victims. The airline flew the bodies and personal effects to an Air Force base in the United States where the State Department took possession of the effects and transported them to Washington. Some of the items in the State Department's possession could be identified with certainty, but many could not. The circumstances had precluded application of the "provisional conservation" portions of 22 U.S.C. § 4195 and State Department regulations (notice and inventory) and strict compliance with the statute had become impossible.

The airline had offered to appraise the effects, attempt to locate heirs, and consider claims, but GAO had informally advised that this procedure was not consistent with 22 U.S.C. § 4195. Subsequently, the State Department proposed to send a letter to each victim's legal representative, asking the legal representative to submit a description of items believed to be in the victim's possession at the time of the disaster. GAO approved this proposal as a reasonable approach under the circumstances, but further advised that, notwithstanding that more than a year and a half had passed since the accident, the State Department should nevertheless comply with those portions of the statute that were still reasonably capable of being satisfied with respect to the items which could be positively identified. B-193039, December 12, 1978 (non-decision letter).

c. Government Losses in Shipment Act

The Government Losses in Shipment Act (GLISA), 40 U.S.C. §§ 721–729, was enacted in 1937. It applies to shipments by government agencies and was designed to save the government money by eliminating the need for the government to purchase private insurance to obtain protection against losses of valuables in transit. S. Rep. No. 738, 75th Cong., lst Sess. 5–6 (1937). Although the self-insurance rule discussed in Chapter 4 was in full bloom in 1937, agencies often purchased commercial insurance when shipping valuables because the amounts involved tended to be too large to be absorbed immediately by existing appropriations, and the appropriation process was considered inadequate to meet the need for prompt duplication or reimbursement. Id. The Act is administered by the Treasury

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Department, which has issued implementing regulations at 31 C.F.R. Parts 361 and 362.

The Act applies to "valuables" as defined in 40 U.S.C. § 729 and 31 C.F.R. § 362.1. Claims procedures are set forth in 40 U.S.C. § 723. In the event of a loss (loss, damage, or destruction) of valuables shipped in accordance with the regulations, the agency must file a claim for replacement in writing with the Secretary of the Treasury. If the Secretary allows the claim, replacement is made out of a revolving fund established by 40 U.S.C. § 722. The money in the fund comes from congressional appropriations and recoveries and repayments under the Act. The Secretary's determination that a loss occurred or that a given shipment was in accordance with regulations is final and conclusive. If the Secretary determines that replacement can be effected in whole or in part without loss to the United States by a credit to the account of the department or agency which made the claim, the revolving fund is not used to the extent the credit is deemed sufficient.

There is one situation in which GLISA applies to a loss other than a loss in shipment. In the event of loss, damage, or destruction to certain categories of Treasury paper (for example, Documentary Internal Revenue Stamps) while in the custody or possession of the Postal Service acting as sales agent for or on behalf of the Treasury Department, the loss is to be replaced from the GLISA revolving fund. 40 U.S.C. § 724; B-171400, August 4, 1971.

Although GAO will not review the Treasury Department's decisions on GLISA claims, it has considered a number of issues relating to GLISA. They tend to fall generally into three categories. The first group deals with threshold issues of applicability. Thus, a "shipment" for purposes of GLISA includes the local transportation of valuables in the custody of government employees (messengers). 19 Comp. Gen. 369 (1939), modifying 18 Comp. Gen. 782 (1939). It also includes contract armored car service. 19 Comp. Gen. 490 (1939). However, it does not include the transportation of valuables in the privately-owned automobile of an employee in travel status. 17 Comp. Gen. 419 (1937). Also, the Act applies only with respect to those items declared by the Secretary of the Treasury to be "valuables." 32 Comp. Gen. 153 (1952); 21 Comp. Gen. 928 (1942).

The second group of cases involves requests for the relief of accountable officers and the relationship between GLISA and accountable officer liability. These are discussed in Chapter 9.

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The third group of decisions concerns 40 U.S.C. § 726, which prohibits the purchase by a government agency of insurance against loss, damage or destruction in the shipment of valuables except as specifically authorized by the Secretary of the Treasury. The Secretary may authorize such insurance upon finding that the risk cannot be adequately guarded against by the facilities of the United States or that adequate replacement cannot be provided under GLISA and other relevant statutory authorities.

Where transportation charges are regularly fixed at a rate which includes the cost to the carrier of indemnity insurance, and the carrier will not accept a government shipment at a rate exclusive of such cost, the total sum paid to the carrier for the shipment may be considered as a transportation cost and payment does not violate 40 U.S.C. § 726. 17 Comp. Gen. 139 (1937). Similarly, payment of a transportation rate based on the real worth of "valuables," higher than the minimum or "release" value provided by tariff rates, does not violate GLISA. Payment of such higher rate places a greater measure of responsibility on the carrier and is thus calculated to minimize the risk of loss. 17 Comp. Gen. 741 (1938).

These two decisions were followed in 34 Comp. Gen. 175 (1954), in which the Comptroller General concluded that the payment of charges for armored car service for the shipment of coins by the Treasury Department, under contracts requiring the contractor to carry designated insurance and where the charges included the cost to the carrier of the indemnity insurance, would not violate GLISA where the carrier would not accept the shipments at a rate exclusive of the additional costs. The decision pointed out that GLISA would provide an inadequate alternative in that the loss of one individual armored car shipment could conceivably exhaust the revolving fund. If the value of a shipment exceeds the carrier's commercial insurance coverage, the GLISA revolving fund is available for the amount of a loss in excess of that coverage. B-214326, October 19, 1984.

Similarly, an agency shipping "valuables" by Federal Express should not pay an "excess declared value" charge to obtain indemnification beyond Federal Express's basic liability. GLISA would apply to any loss beyond that amount. B-244473.2, May 13, 1993. Paying for insurance coverage up to a stated limit as part of the basic rate is authorized under decisions such as 34 Comp. Gen. 175. Id.

A 1943 decision, 22 Comp. Gen. 832, held that GLISA did not prohibit the purchase of postal insurance. Postal insurance had also been permissible

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prior to GLISA. 3 Comp. Gen. 391 (1923). Both of these decisions were modified in 58 Comp. Gen. 14 (1978), in which the issue was the application of 40 U.S.C. § 726 to insured and registered mail. The decision concluded that GLISA prohibits the use of insured mail by the government since it offers no special or additional service apart from the indemnity feature. Registered mail, on the other hand, affords additional protection as well as insurance. Thus, since the insurance is only incidental to the protective features, GLISA does not prohibit the use of registered mail where administratively determined to be necessary. Registered mail should not be used, however, for the sole or primary purpose of obtaining indemnity.

The General Services Administration suggested that the Postal Service should provide a separate fee schedule for federal agencies which would eliminate the charge for indemnity insurance from registered mail. The Postal Service expressed the opinion that any new fee structure would have to be applicable to all registered mail users. 58 Comp. Gen. at 16. While GAO agrees with the GSA suggestion as a matter of policy, whether the Postal Service has the authority to establish a special rate for federal agencies is not an issue to be decided by the Comptroller General but must be determined by the Postal Service and the Postal Rate Commission. 58 Comp. Gen. 640 (1979).

d. Published Advertisements

Originally enacted in 1870, 44 U.S.C. § 3702 provides:

> "Advertisements, notices, or proposals for an executive department of the Government, or for a bureau or office connected with it, may not be published in a newspaper except under written authority from the head of the department; and a bill for advertising or publication may not be paid unless there is presented with the bill a copy of the written authority."

The statute applies only to discretionary advertising and not to advertising required by law (statute, statutory regulation, court order). 27 Comp. Gen. 48 (1947); 5 Lawrence, First Comp. Dec. 382, 389–90 (1884).

The statute applies to all departments, agencies, boards, commissions, or establishments of the executive branch, whether or not part of a cabinet-level department. 60 Comp. Gen. 379 (1981) (Environmental Protection Agency); 27 Comp. Dec. 134 (1920) (Federal Power Commission); 25 Comp. Dec. 348 (1918); 5 Comp. Dec. 700 (1899) (Interstate Commerce Commission); B-126299, January 5, 1956. It does not, however, apply to a legislative branch agency. B-194074, April 11, 1979 (National Commission on Air Quality).

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The statute applies to the publication of advertisements in a "newspaper." This includes newspapers devoted exclusively to specialized fields of activity if they include "news and information of a general and current nature such as may be found in the ordinary newspaper." 26 Comp. Gen. 76 (1946). See also 25 Comp. Gen. 734 (1946), holding that the entertainment journal "Variety" is a "newspaper." A telephone directory, however, is not a "newspaper." 22 Comp. Gen. 606 (1943). Nor is a business directory published by a police benevolent association (B-182938-O.M., February 26, 1975); nor a high school yearbook or high school "newspaper" distributed to the students and staff and containing mostly items of interest to the students and teachers (B-187099-O.M., February 2, 1977).

Given the mandatory language of the statute,[46] a voucher cannot be paid nor can a claim by a newspaper be allowed without the prior written authority required by section 3702. E.g., 35 Comp. Gen. 235 (1955); 17 Comp. Gen. 693 (1938); 3 Comp. Gen. 737 (1924). The statute does not permit any exception for hardship. 4 Comp. Gen. 841 (1925). If an agency cannot pay the newspaper directly, it follows that an employee who pays the newspaper from personal funds may not be reimbursed. 60 Comp. Gen. 379 (1981).

However, an agency head may delegate the approval authority required by 44 U.S.C. § 3702. 5 U.S.C. § 302(b)(2); 28 Comp. Gen. 305 (1948). A line of early cases recognized that an agency head may, by order or regulation, authorize subordinate officials, such as officials at geographically dispersed field stations, to place or approve advertisements. The order may be general or specific and may or may not designate the newspapers by name, but it should be limited at least as to territory. The order should also direct the officials to whom it is addressed to place the advertisements in writing. 27 Comp. Dec. 134 (1920); 19 Comp. Dec. 628 (1913); 13 Comp. Dec. 446 (1907). These cases were based on United States v. Odeneal, 10 F. 616 (C.C.D. Ore. 1882), holding that a general order issued to superintendents of Indian affairs constituted compliance.

More recent decisions have also recognized that a written delegation from the agency head is "written authority from the head" of the agency and have applied a "substantial compliance" approach. E.g., B-206625, July 26, 1982; B-242413, July 12, 1991. This in turn permits resort to the concept of ratification in appropriate cases. As the earlier cases recognized, you cannot ratify something which is prohibited by statute. However, under

[46]"If any statute is mandatory this is . . . ." 5 Comp. Dec. 166, 168 (1898).

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the "substantial compliance" established by a written delegation, procedural deviations at the operating level may be cured by ratification. B-226248, May 13, 1987. See also 65 Comp. Gen. 806 (1986).

GAO has expressed the opinion that the application of current procurement procedures should be adequate to safeguard the government's interests, and has recommended that 44 U.S.C. § 3702 be repealed. B-203115, May 8, 1981; B-114829, October 2, 1978; B-181337(2), November 25, 1974. As long as it remains on the books, however, it cannot be ignored. The equitable position of the newspapers in claims under section 3702 is clear in that they provided a service in good faith upon the request (albeit unauthorized) of a government official and the government received the benefit of that service. Thus, while the claims cannot be allowed administratively, at least where there has been total noncompliance with the statute, the Comptroller General has submitted a number of them to Congress with a recommendation for the enactment of relief legislation under the Meritorious Claims Act. E.g., B-199453, October 2, 1980; B-196440, April 3, 1980; B-181337, November 25, 1974; B-160052, January 22, 1969. Taking advantage of the delegation/ratification approach outlined above can eliminate many claims arising under 44 U.S.C. § 3702.

4. Miscellaneous Nonstatutory Claims

a. Estoppel

Estoppel, as simply as we can put it, is a concept under which, if you talk a certain way or act a certain way, a court may hold you to that position, even if it is wrong, if letting you deny your previous position would damage someone else. There are several types of estoppel, although we will note only two. "Promissory estoppel" is a type of estoppel which arises when one party makes a promise with the expectation that it will induce reliance by the party to whom it was made. If it in fact induces reliance to the detriment of the second party, courts will enforce the promise.[47] Black's Law Dictionary 1214 (6th ed. 1990). "Equitable estoppel" is a related concept "by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had." Id. at 538. The Ninth Circuit has explained the difference as follows:

[47]Where the United States is concerned, it has been held that the courts lack Tucker Act jurisdiction over promissory estoppel claims because a promissory estoppel is neither an express nor an implied-in-fact contract. Jablon v. United States, 657 F.2d 1064, 1070 (9th Cir. 1981); Biagioli v. United States, 2 Cl. Ct. 304 (1983).

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"The difference between the doctrines can best be explained by observing that promissory estoppel is used to create a cause of action, whereas equitable estoppel is used to bar a party from raising a defense or objection it otherwise would have, or from instituting an action which it is entitled to institute. Promissory estoppel is a sword, and equitable estoppel is a shield."

Jablon v. United States, 657 F.2d 1064, 1068 (9th Cir. 1981). See also American Maritime Transport, Inc. v. United States, 18 Cl. Ct. 283, 292 (1989).

The principal focus of this section is equitable estoppel. Equitable estoppel cannot by itself form the basis for a monetary claim against the United States. E.g., ATC Petroleum, Inc. v. Sanders, 860 F.2d 1104, 1111 (D.C. Cir. 1988). However, it rears its head in the claims context in various ways.

At the outset, everyone concedes that "equitable estoppel will not lie against the Government as it lies against private litigants." Office of Personnel Management v. Richmond, 496 U.S. 414, 419 (1990). Exactly what the differences are, however, has yet to be definitively determined. The "leading case" (id. at 420) is Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). A farmer had applied for federal crop insurance, and had been told by government officials that his entire crop was insurable. After a drought destroyed most of the crop, he learned that, under regulations published in the Federal Register, over 80 percent of the crop was not covered. Cautioning that courts must "observe the conditions defined by Congress for charging the public treasury" (id. at 385), the Court held that the government was not bound by the unauthorized representations of its agents. In other words, telling the farmer that his entire crop would be insured did not "estop" the government from later denying coverage with respect to the legally ineligible portion. Although Merrill nowhere uses the word "estoppel," it cites to Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917), which contains the often-quoted statement that "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."

In subsequent Supreme Court decisions, the camel managed to poke its nose into the tent in the guise of "dicta" suggesting that some forms of "affirmative misconduct" might be sufficient to support an estoppel against the government, although the Court refused to find estoppels in

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each instance. See Montana v. Kennedy, 366 U.S. 308, 314–15 (1961); Immigration and Naturalization Service v. Hibi, 414 U.S. 5, 8 (1973).

Given this "encouragement," the lower courts and the Comptroller General became more inclined to find estoppels against the government where the traditional elements of equitable estoppel were met. Those elements, repeated verbatim in numerous cases, are:

1. The party to be estopped must know the facts.

2. He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended.

3. The latter (the party asserting the estoppel) must be ignorant of the true facts.

4. He must rely on the former's conduct to his injury.

E.g., United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970); Emeco Industries, Inc. v. United States, 485 F.2d 652, 657 (Ct. Cl. 1973); 55 Comp. Gen. 911, 931 (1976); 53 Comp. Gen. 502, 506 (1974); B-183799, September 23, 1975. Restated, one who does not know the facts must rely on the conduct or representations of one who does know the facts, the reliance must be reasonable under the circumstances, and it must produce injury.

Georgia-Pacific is one of the more frequently cited examples of government estoppel. The government sought to enforce a 30-year old agreement under which a lumber company had agreed to convey certain land to the government for national forest purposes. The government had let the contract lie dormant for most of that time, and successive owners had spent a considerable amount of money on forest management. Applying the four elements cited above, and finding further that the government was acting in its proprietary rather than sovereign capacity, and that the government officials involved were acting within the scope of their authority, the court found that "the dictates of both morals and justice" warranted a finding of equitable estoppel. 421 F.2d at 103. The Emeco case, as well as a number of GAO decisions such as 53 Comp. Gen. 502 and B-188607, July 19, 1977, applied the four-part test and concluded that the government was estopped from denying the existence of a contract in various contexts.

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A 1973 case, United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973), represents perhaps the outer limits of the trend started by cases like Georgia-Pacific and Emeco. Without so much as mentioning the four traditional elements of estoppel, the court held simply that the United States, even when acting in its sovereign capacity, can be estopped "where justice and fair play require it." Id. at 988.

The Supreme Court revisited estoppel in Heckler v. Community Health Services of Crawford County, 467 U.S. 51 (1984), a challenge to the government's right to recoup erroneous payments made to a Medicare health care provider. The government urged the Court to rule that there can be no estoppel against the United States. The Court was unwilling to go that far, but emphasized once again that the rules for private litigants and the government are different. Id. at 60. Exactly how they differ is an issue the Court was not forced to address. At an absolute minimum, the traditional elements of estoppel must be present. Id. at 61. Since the Court found the facts insufficient to support an estoppel even against a private litigant, it was not necessary to address what further elements would be necessary to make a case against the government. One thing to keep in mind, however, is that the government is spending the taxpayers' money. "Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law . . . ." Id. at 63.

Heckler confirmed that estoppel will not be found if any of the four traditional elements are missing.[48] Apart from this, it resolved nothing, and left the lower courts free to continue forging their own paths. In Phelps v. Federal Emergency Management Agency, 785 F.2d 13 (1st Cir. 1986), the plaintiff, a claimant under a flood insurance policy, had been told by a FEMA official that he did not have to file a written report required by the policy. FEMA subsequently raised the failure to file a written report as one reason for denying the claim. The traditional elements of equitable estoppel were all present, but the court found the case very similar to Federal Crop Insurance Corp. v. Merrill and, feeling constrained to follow the Supreme Court, denied the estoppel. In a pre-Heckler case also involving a FEMA claimant who did not file a formal proof of loss, the court held FEMA estopped from denying coverage because it did not provide the claimant with the form and had the required information from other sources. Meister Bros., Inc. v. Macy, 674 F.2d 1174 (7th Cir. 1982). The Meister court noted that "it is far from clear when the Government

[48]GAO cases denying estoppel for failure to establish one or more of the traditional elements include 55 Comp. Gen. 911, 931-32 (1976); B-220527, August 11, 1987; B-197872.2, October 9, 1981; B-200815, August 31, 1981; B-187445, January 27, 1977.

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may be estopped." Id. at 1177. Heckler does not tell us which approach is right.

In ATC Petroleum, Inc. v. Sanders, 860 F.2d 1104, 1111 (D.C. Cir. 1988), the District of Columbia Circuit also struggled with the estoppel concept, noting that it could apply to the government, but that its application "must be rigid and sparing" and must include all of the traditional elements.

The next landmark in this evolutionary process is Office of Personnel Management v. Richmond, 496 U.S. 414 (1990). Richmond was a retired federal employee receiving a disability annuity. There are statutory limits on how much an annuitant can earn from wages or self-employment and still qualify for the annuity. Richmond sought advice on these limits from a federal employee, was given erroneous information, and as a result lost 6 months of benefits. Richmond first took his case to the Merit Systems Protection Board, which denied his estoppel argument. The Court of Appeals for the Federal Circuit reversed. Finding that the government could be estopped upon establishing the four traditional elements plus affirmative misconduct, the court held that the erroneous information was sufficient "misconduct" and remanded the case to the MSPB with instructions to direct payment of the withheld benefits. Richmond v. Office of Personnel Management, 862 F.2d 294 (Fed. Cir. 1988).

As it had done in Heckler, the government again urged the Supreme Court to rule flatly that estoppel may not run against the United States. The Court first reviewed its own precedents (Utah Power & Light, Merrill, Hibi, Heckler, etc.) and noted that it has "reversed every finding of estoppel that we have reviewed." 496 U.S. at 422. Yet in doing so it has been unwilling to declare absolutely that "no estoppel will lie against the Government in any case." Id. at 423. By the Court's own admission, the lower courts had been taking this unwillingness "as an invitation to search for an appropriate case in which to apply estoppel against the Government." Id. at 422. The Court further admitted that its approach to estoppel cases "has provided inadequate guidance for the federal courts and served only to invite and prolong needless litigation." Id. at 422–23. Unfortunately, however, after setting the patient up for the certain cure, the Court then ordered a relapse:

> "[I]t remains true that we need not embrace a rule that no estoppel will lie against the Government in any case in order to decide this case. We leave for another day whether an estoppel claim could ever succeed against the Government."

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Id. at 423. Having once again refused to prescribe a treatment, the Court recognized its responsibility "to state the law and to settle the matter of estoppel as a basis for money claims against the Government." Id. at 426. It did this by resorting to a fiscal rationale not previously used in estoppel cases. The rationale proceeds along these lines:

- By virtue of the Appropriations Clause of the Constitution, any payment of money from the United States Treasury must be authorized by an act of Congress.
- Richmond's award is not only not authorized by an act of Congress, it is in direct contravention of one.
- This being the case, there is no appropriation lawfully available for the payment, and payment would therefore violate the Appropriations Clause.

A contrary result, the Court explained, could effectively transfer the power of the purse to the Executive Branch. If Congress enacted a restriction the Executive Branch didn't like, the Executive Branch could simply make contrary representations, which the courts would then uphold as estoppels. Id. at 428. The Court concluded with the following statement:

"Whether there are any extreme circumstances that might support estoppel in a case not involving payment from the Treasury is a matter we need not address. As for monetary claims, it is enough to say that this Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds. In this context there can be no estoppel, for courts cannot estop the Constitution."

Id. at 434.

We present the Richmond case in some detail because a survey of post-Richmond cases shows a lack of consensus on precisely what Richmond stands for, and suggests that the Court may have further spawned one of the "evils" it apparently set out to correct—inviting the lower courts to continue searching for loopholes. The impact of Richmond depends on whether it is broadly or narrowly applied. As one court correctly stated:

"The precise holding of Richmond is that the Court will not uphold an estoppel claim against the government for money in violation of a statute."

United States v. Alaska Public Utilities Commission, 800 F. Supp. 857, 862 (D. Alaska 1992). Thus, at an absolute minimum, equitable estoppel cannot be used if the result would be a payment contrary to statute (as opposed to

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one which is merely not expressly authorized by statute). Some examples are Koyen v. Office of Personnel Management, 973 F.2d 919 (Fed. Cir. 1992) (claim for survivor annuity where deceased spouse had not made timely election of benefit options); United States v. Fowler, 913 F.2d 1382 (9th Cir. 1990) (recovery of payment made under flood insurance policy which had been erroneously issued to someone not eligible for the program); Mullens v. United States, 785 F. Supp. 216 (D. Maine), aff'd mem., 976 F.2d 724 (1st Cir. 1992) (contrary indications from agency officials could not estop U.S. from denying claim for misrepresentation expressly excluded from Federal Tort Claims Act).

Reaching back to Federal Crop Insurance Corp. v. Merrill, this principle would appear to apply equally to statutory regulations. See Kinnucan v. United States, 25 Cl. Ct. 355, 359–60 (1992) (estoppel under Richmond not applicable in claim for travel and transportation expenses at variance with Joint Federal Travel Regulations). See also Schweiker v. Hansen, 450 U.S. 785, 790 (1981); Augusta Aviation, Inc. v. United States, 671 F.2d 445, 449 (11th Cir. 1982); 56 Comp. Gen. 85 (1976).

Also, it would seem undisputed that nothing in Richmond weakened the principle that there can be no estoppel if any of the traditional elements are missing. E.g., United States v. Guy, 978 F.2d 934, 938 (6th Cir. 1992); Tri-O, Inc. v. United States, 28 Fed. Cl. 463, 473–74 (1993); Wm. T. Thompson Co. v. United States, 26 Cl. Ct. 17, 35 (1992). From this point on, however, the law remains murky.

Under a broader application of Richmond, some courts have received what appear to be the Supreme Court's pretty clear signals that it is not particularly excited over using estoppel in any monetary claim against the public treasury, not just those that are explicitly prohibited by statute. E.g., United States v. Walcott, 972 F.2d 323, 327 (11th Cir. 1992) ("Supreme Court has recently held that equitable estoppel cannot apply against the United States in a suit to recover 'public funds'"); Andrews v. United States, 805 F. Supp. 126, 132 (W.D.N.Y. 1992) ("Since plaintiffs' claim has not been authorized by an Act of Congress, it is prohibited by the Appropriations Clause"); Shearin v. United States, 25 Cl. Ct. 294, 297, aff'd mem., 983 F.2d 1085 (Fed. Cir. 1992) (government not estopped from asserting lack of authority to pay fees of court-appointed attorney in civil case because "[t]here was no express statutory basis for payment of fees").

What we call the narrow application is illustrated by Burnside-Ott Aviation Training Center, Inc. v. United States, 985 F.2d 1574 (Fed. Cir. 1993), an

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equitable adjustment claim by a contractor, in which the Court of Appeals for the Federal Circuit reversed and remanded a finding that equitable estoppel was barred as a matter of law. The court said:

"In particular, the Claims Court erred in concluding that Richmond stands for the proposition that equitable estoppel will not lie against the government for any monetary claim. . . . Richmond is limited to 'claim[s] for the payment of money from the Public Treasury contrary to a statutory appropriation.' . . . [Richmond's] holding must be limited to claims of entitlement contrary to statutory appropriations." [Emphasis in original.]

Id. at 1581. In another contract case, the Court of Federal Claims said:

"The precise effect of Richmond on contract cases is unclear, primarily because the awards sought by Government contractors are generally based on contract principles that do not contravene the eligibility requirements contained in federal statutes."

Tri-O, Inc. v. United States, 28 Fed. Cl. 463, 473 (1993). In sum, if the Supreme Court was looking for "another day" (496 U.S. at 423), the inevitability of that day seems assured.

An interesting case which would appear to stand on its own regardless of whether Richmond is broadly or narrowly applied is United States v. Cox, 964 F.2d 1431 (4th Cir. 1992). A dispute arose as to whether the costs of a psychiatric examiner at a release hearing should be paid by the Department of Justice or from funds appropriated to the Federal Public Defender and administered by the Administrative Office of the United States Courts. The court held Justice estopped from declining payment because it had previously concurred in guidelines issued by the Administrative Office indicating Justice would pay in that type of situation and, to the extent Justice was in the process of changing its position, it had not adequately communicated that change to the Administrative Office. The fact that the case involved a payment of public funds did not bar the estoppel because "the disputed sum will, one way or the other, be paid by an agency of the federal government." Id. at 1435. The lesson of Cox is that Richmond does not apply where it is clear that the claim in question must be paid from the public treasury, the only question being which government pocket will bear the expense.

b. Expiration of Agency or Commission

Government agencies may cease to exist for a variety of reasons. They may be abolished or Congress may simply refuse to appropriate further funds. Also, a board or commission may be created as a temporary

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organization for a limited purpose, for example, to conduct a particular study and prepare a report.

A temporary organization may have an expiration date specified in its enabling legislation. This may be a fixed date or a fixed period of time after the happening of some event. The standard government formula for computing a period of time between two events is to exclude the former and include the latter. Also, a statute takes effect on the date of its approval by the President unless some other date is fixed. Combining these two principles, where a commission was established by a statute approved on September 22, 1922, which provided that the commission would cease to exist "one year after the taking effect of this act," the commission was in existence through September 22, 1923. 3 Comp. Gen. 123 (1923). The expiration date may also be a fixed number of days after the submission of a report. See, e.g., B-182081, January 26, 1977.

When an agency or commission ceases to exist, the service of all of its officers and employees is automatically terminated, and none of those officers or employees can thereafter undertake activities on its behalf, whether for the purpose of concluding the affairs of the agency or commission, or otherwise. 14 Comp. Gen. 738 (1935); B-182081, January 26, 1977, aff'd, B-182081, February 14, 1979.

Once an agency or commission expires, its appropriations cease to be available for the incurring of any new obligations. 16 Comp. Gen. 15 (1936); 14 Comp. Gen. 490 (1934); B-182081, February 14, 1979. However, obligations properly incurred during the life of the agency or commission may of course be liquidated as long as the account remains open.

In B-182081, cited above, the National Commission on State Workmen's Compensation Laws was created by statute as a temporary organization and was directed to report its findings, conclusions, and recommendations to the President and the Congress not later than July 31, 1972. On the 90th day after submitting its report, it was to cease to exist. The Commission submitted its report on July 31, 1972, and thus, according to statute, ceased to exist on October 29, 1972. After the Commission expired, one of its former officials placed several requisition orders with the Government Printing Office for the printing of several documents relating to the Commission's report. GPO did the printing and then sought reimbursement for its services. The Comptroller General concluded that the person who placed the orders had no authority to obligate funds after

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the Commission had expired, and that there were therefore no appropriations legally available to reimburse GPO.

As noted, obligations validly incurred prior to expiration may be liquidated subsequently, at least until the expired account is closed. Under authority of the Economy Act, 31 U.S.C. § 1535, the General Services Administration may contract with another agency or commission to provide administrative support services, to include the certification for payment of valid claims against the agency or commission not presented until after its expiration. In such a situation, a GSA certifying officer can certify the expired agency's vouchers for payment. However, this authority is limited to instances where the authority is expressly included in a written Economy Act agreement, and only with respect to obligations validly incurred prior to the expiration of the agency or commission. 59 Comp. Gen. 471 (1980). GSA may, of course, seek GAO's help in doubtful matters. E.g., B-210226, May 28, 1985.

In the absence of such a written Economy Act agreement, and if Congress has not statutorily designated a successor agency, claims against an expired agency or commission may be paid only upon submission to GAO for direct settlement. 33 Comp. Gen. 384 (1954); 14 Comp. Gen. 738 (1935); 14 Comp. Gen. 490 (1934); 3 Comp. Gen. 123 (1923). This is perhaps the only remaining instance where direct settlement by GAO is required because there is simply no one else left to do it. Whether a claim is being settled by GSA under an Economy Act agreement or by GAO under direct settlement, an interesting problem arises if the account in question has been closed. There would be no appropriation available to pay the claim, however valid it may be, and it would appear necessary to seek appropriations from Congress, or perhaps invoke the Meritorious Claims Act.

c. Voluntary Creditors

(1) Introduction

A "voluntary creditor" for purposes of this discussion is someone who makes a payment from personal funds which he or she is not legally required or authorized to make, ostensibly on behalf of the government, and then claims reimbursement from the government. Voluntary creditors may be government employees or private parties, although they tend more often than not to be government employees. The term is not intended to have any connotation as to the person's motives. B-129004, October 25, 1956.

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The government is under no obligation to reimburse a voluntary creditor, although there are situations in which, as a matter of public policy, voluntary creditors can be, should be, and are reimbursed. The Supreme Court discussed the basic concept in an early case:

"No individual can be made a debtor against his will. Voluntary benefits may be conferred on him, which may excite his gratitude, and which, in the exercise of his generosity, he may suitably reward. But this depends on his own volition.

". . . To find an obligation in such a case, we must look into those writers on ethics who speak of imperfect obligations, which cannot be enforced. The rule is the same, whether the voluntary benefit be conferred on an individual, or on the government."

Heirs of Emerson v. Hall, 38 U.S. (13 Pet.) 409, 412–13 (1839). The reason for the rule should be pretty obvious. If a voluntary creditor acquired an enforceable claim, the government would lose control over the creation of monetary obligations. "If in this form debts could be originated against the government . . ., there would be no security against such demands." Id. at 413.

Early decisions of the accounting officers recognized this principle and established the proposition that:

"Except for certain personal expenses, including those of duly authorized travel, officers of the Government are not entitled to reimbursement for expenditures from their own private funds unless such expenditures are made under urgent and unforeseen public necessity . . . ."

12 Comp. Dec. 308 (1905). The rule is much older than that, however. In 4 Comp. Dec. 409, 410 (1898), the Comptroller of the Treasury quoted the following passage from an 1855 Treasury decision:

"It has been so often decided by the accounting officers that no person could acquire a legal claim against the United States by such advances, that it must now be considered as the settled adjudication of the question, at least, by that branch of the Government." (Emphasis in original.)

Note that these cases talk about legal claims or entitlement to reimbursement. This is the real rule, to which there are no exceptions. A voluntary creditor has no right to be reimbursed. If the government does not find sufficient equitable or public policy reasons to make

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reimbursement, the voluntary creditor may not go to court, and has no other recourse but to seek private relief legislation.

A point we noted earlier in this chapter is that the claims settlement jurisdiction of 31 U.S.C. § 3702(a) extends only to claims based on legal liability and not to claims based on equity or moral obligations. Early decisions struggled with this principle in the voluntary creditor context, and some cited it as one of the reasons for prohibiting reimbursement. E.g., 8 Comp. Dec. 582, 586 (1902); 4 Comp. Dec. 409, 410 (1898).

At the same time, however, it was clear that some voluntary creditors should be paid. For example, a 1901 case, 8 Comp. Dec. 43, approved reimbursement for an Army medical officer who had hired laundresses to wash bed and table linen in an Army hospital. Ten years later, the Comptroller of the Treasury approved reimbursement of a Justice Department employee who had used personal funds to pay the fees of witnesses summoned to testify in a court action where there was insufficient time to follow normal authorization and payment procedures. 18 Comp. Dec. 297 (1911). The decision states at page 299 that the voluntary creditor prohibition "is a rule of accounting and should not be permitted to hinder the public business or prevent the payment of just and lawful claims against the Government." In any event, no case in recent decades has denied a voluntary creditor claim on the basis of perceived jurisdictional limitations under 31 U.S.C. § 3702(a). Voluntary creditor claims, therefore, may be viewed as an exception to the principle that claims may be allowed only on the basis of legal liability.

Thus, by the time GAO took over the claims settlement function in 1921, it was already established that (a) a voluntary creditor has no legal claim against the government, (b) although there is no right to reimbursement, neither is there an absolute prohibition, and (c) there are cases in which voluntary creditors should be reimbursed as a matter of public policy. Once these fundamental tenets are accepted, the role of the decisions becomes to develop a set of guidelines so that claims can be resolved on the basis of rational principles and not extraneous factors such as the grade or position of the claimant.

At one time, GAO wanted all voluntary creditor claims forwarded to it for direct settlement. 62 Comp. Gen. 419, 425 (1983). This is no longer the case. Agencies should treat voluntary creditor claims the same as any other claims, referring only "doubtful claims" to GAO. 4 C.F.R. § 31.4.

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(2) Underlying expenditure improper

The cases under this heading are easy. If a given payment is improper—either expressly prohibited or beyond the agency's authority—a claim for reimbursement by a voluntary creditor must be denied because no basis for reimbursement can exist where the agency could not have made the payment directly. 64 Comp. Gen. 467 (1985); 62 Comp. Gen. 419, 423 (1983).

An early decision, 3 Comp. Gen. 681 (1924), involved a claim by the Dry Branch Coal Company for the expense of hiring a private detective. A mine superintendent discovered that two men had broken into the Dry Branch post office and that "one had been shot in the leg and the other had fled up the creek." He called a company official who, being unable to contact post office authorities, called a private detective. (The decision does not disclose why he did not call the police.) The detective pursued and apprehended the suspect as he was about to board a train. The company paid the detective and filed a claim for reimbursement. In view of the statutory prohibition against the employment of private detectives (5 U.S.C. § 3108), the claim had to be denied. The decision further stated, at page 682:

"[T]he voluntary intervention of claimant in the matter can not operate to authorize the making indirectly of a payment that could not legally be made directly."

In 2 Comp. Gen. 581 (1923), a federal prohibition officer for the State of Indiana sought reimbursement for the cost of materials he had purchased in order to paint several signs. He had painted the signs for the Indiana Health Exposition after state officials asked him to maintain a prohibition booth at the fair. Concluding that appropriations for the enforcement of the National Prohibition Act were not available for the expenses of participation in fairs or expositions without further statutory authority, and also noting the voluntary creditor rule, the Comptroller General denied the claim.

More recently, an employee of the Environmental Protection Agency had certain notices placed in newspapers in violation of 44 U.S.C. § 3702. He paid the newspapers from personal funds and filed a claim for reimbursement. Since the agency could not have paid the claim directly, GAO denied the claim for reimbursement, citing 3 Comp. Gen. 681 and the voluntary creditor rule. 60 Comp. Gen. 379 (1981).

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Several cases have involved the prohibition against paying from appropriated funds the cost of food furnished to government employees at their normal duty station without specific authority. In a case which predated the Postal Reorganization Act of 1971, a Post Office official brought in carry-out restaurant food, purchased from personal funds, for a group of employees who were presiding as election officials at a union election which lasted well past the normal dinner hour. The lives of the employees were not a stake and they were not there for the purpose of protecting government property. In view of the prohibition on furnishing free food to civilian employees, and further noting the voluntary creditor rule, the Comptroller General denied reimbursement. 42 Comp. Gen. 149 (1962). See also B-185159, December 10, 1975, and B-129004, September 6, 1956.

Another case involving food, 53 Comp. Gen. 71 (1973), recognized an exception. In that case, the unauthorized occupation of a building in which the Bureau of Indian Affairs was located necessitated the assembling of a cadre of General Services Administration special police, who spent the whole night there. Agency officials purchased and brought in sandwiches and coffee for the cadre. GAO concluded that it would not question the agency's determination that the expenditure was incidental to the protection of government property during an extreme emergency, and approved reimbursement. The decision cautioned against getting carried away, however—emergency means emergency. A similar exception occurred in B-189003, July 5, 1977 (FBI agents stranded in office during severe blizzard).

(3) Voluntary vs. involuntary creditors

The cases under this heading involve items the government provides for its employees at government expense. If an employee uses personal funds to purchase an item which is authorized, but not required, to be furnished at government expense, and the item is primarily for the employee's personal use even though used in the performance of official duties, the employee is nothing more than a voluntary creditor and reimbursement will usually be denied.

For example, employees at an Air Force hospital who bought their own uniforms were voluntary creditors and could not be reimbursed. 46 Comp. Gen. 170 (1966). Similarly, an Army employee who purchased safety orthopedic shoes for use in his work as an automotive mechanic could not by his own voluntary action obligate the government to pay. B-162606,

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November 22, 1967. The fact that the government could have furnished the items but failed to do so (the uniforms under 5 U.S.C. § 5901 and the safety shoes as special equipment under 5 U.S.C. § 7903) did not give the employees the right to, in effect, make the determinations on their own and circumvent the failure by buying the items themselves and then expecting the government to pay.

On the other hand, if the item is something the government is required to furnish at government expense and fails to do so, the employee who uses personal funds is more of an "involuntary creditor" and may be reimbursed. E.g., 8 Comp. Dec. 377 (1901); A-24089, October 8, 1928. Both of these cases involved transportation allowances to which the employee was entitled by law. Of course, in order to become an "involuntary creditor," the employee must attempt to obtain payment from the government before resorting to personal funds. 8 Comp. Dec. at 379; 8 Comp. Gen. 627 (1929).

(4) Consent

One early formulation of the voluntary creditor principle is that "a person can not make himself the creditor of another without that other's consent." 4 Comp. Dec. 409, 411 (1898). The essence of the rule is unilateral action by the voluntary creditor.

Consent was the dispositive factor in 61 Comp. Gen. 575 (1982). It is frequently necessary for the Internal Revenue Service to file tax liens with state or local recording offices, which customarily charge a filing fee. Many states and localities have worked out periodic billing arrangements with the IRS. Others, however, require payment at the time the lien is filed. The amounts are small and getting a government check in advance for each individual filing would be an enormous nuisance. In the cited decision, a certifying officer of the IRS questioned whether the voluntary creditor rule was a bar to an arrangement under which an agent paid the filing fees from his own pocket and submitted vouchers periodically for reimbursement. While there would have been a problem if the agent had acted entirely on his own, he had acted in accordance with formal IRS policy which sanctioned the arrangement in question. Therefore, the agent was not a "voluntary creditor" for purposes of the prohibition. He did, however, have to pay his own check printing charges.

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(5) Procurement of goods or services

The unauthorized procurement of goods or services generates the bulk of the voluntary creditor cases, and some of the more difficult ones. The guidelines in this area stem from 62 Comp. Gen. 419 (1983). In brief, the commanding officer of a National Guard unit spent over $300 of his own money to buy food for his troops on a weekend training exercise when the paperwork required to obtain the necessary purchasing authority was not completed in time. He then sought reimbursement. The resulting decision is GAO's most extensive discussion of the voluntary creditor rule.

The decision first reviewed the early cases and the foundations of the rule. Does it continue to serve a useful purpose? Yes it does, GAO concluded. The system the federal government uses to obligate and disburse public funds is not some haphazard concoction. It exists for a reason—more precisely, several reasons—and permitting reimbursement for payments made from personal funds allows the individual, at least to some extent, to usurp the government's prerogative.

"There are well-established procedures for making purchases, submitting and adjudicating claims, and making disbursements. Keeping in mind that we are spending the taxpayers' money, the interests of the Government are best served when these procedures are followed. It is, we think, clearly undesirable for individual employees to presume to make these decisions on their own and beyond their authority based on what they believe should happen."

Id. at 422. This had been a concern, and one of the foundations of the voluntary creditor rule, from the earliest days. E.g., 12 Comp. Dec. 308 (1905); 8 Comp. Dec. 582, 585 (1902). Disregard of established procedures "would produce endless confusion and lead to double payment and serious embarrassments." 8 Comp. Dec. at 585.[49] However, since the time of the Treasury decisions which had sought to achieve a balance, the rule somehow tightened up. The "'rule of accounting' . . . became treated, in effect, as a rule of law and acquired a rigidity it was never intended to have," 62 Comp. Gen. at 422–23. The decision then set out to formulate guidelines for the evaluation of voluntary creditor claims involving the acquisition of goods or services.

The first step is the threshold test of "public necessity." Id. at 424. Prior cases, such as 12 Comp. Dec. 308 quoted earlier, used language like "urgent and unforeseen" public necessity or emergency. While this may be

[49]An example of a double payment occasioned by a voluntary creditor's intervention is B-220689, September 24, 1986. GAO recommended that the government recover the duplicate payment from the voluntary creditor, leaving it to him to chase the recipient since it was all his fault to begin with.

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appropriate where the expenditure is otherwise unauthorized, examples being the emergency food cases noted above, the voluntary creditor case in which underlying authority is not a factor requires no such stringency. The standard, as defined in 62 Comp. Gen. 419 and subsequent cases, is merely whether the claimant has a mission-related reason to act. The situation in 62 Comp. Gen. 419 is a good example: failure to act would have disrupted the mission. Another good example is B-195002, May 27, 1980, in which an Air Force sergeant purchased certain items from personal funds to be used in connection with the installation of Air Force communications equipment in Italy. For various reasons, the items could not be promptly acquired through established procedures and the mission would have been impaired without them. The Comptroller General approved reimbursement, stating:

> "Of course, when an employee expends his own funds in what he judges to be the interest of the Government, he does so at his own risk; no legal liability of the Government is created unless the Government ratifies his action as falling within the exception . . . and agrees to reimburse him. However, it would be shortsighted indeed not to recognize that this kind of initiative by the employee in an emergency is very valuable and, when it results in preserving a Government property interest, the employee should not be penalized through denial of reimbursement."

Other cases which passed the "public necessity" test are:

- Upon receipt of shipment of contaminated drinking water and in view of past problems in receiving timely shipments, Army officer used personal funds to buy bottled water for his troops in Saudi Arabia. B-236330, August 14, 1989.
- Claimant used personal funds to place recruitment advertisements upon discovery that purchase order had, through administrative error, not been issued. B-242413, July 12, 1991.
- Claimant used her own funds to purchase replacement picture mats for a lounge at an Army facility because she thought that using the normal procurement process would not result in delivery in time for scheduled inspection by base officials. B-242412, July 22, 1991.

Thus, there does not have to be an "emergency." All there has to be is a duty-related act by an individual who believes in good faith that failure to act will be detrimental to the interests of the government. An even lesser standard may be sufficient where an employee is induced, directed, or "pressured" by a superior to make the expenditure. 62 Comp. Gen. at 424; 62 Comp. Gen. 595 (1983). An employee is not expected to risk his or her

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job, even if the superior is clearly wrong. There must, however, be something. If there is no colorable reason to act other than personal convenience or desire, reimbursement will be denied. E.g., 11 Comp. Dec. 486 (1905); B-232686, December 7, 1988.

Another case in which a lesser standard was acceptable is B-204073, September 7, 1982. An officer at the Naval War College was told that he could buy certain computer software with personal funds and file a claim for reimbursement. The software was needed for a research project, and there was an assertion that time was of the essence. This would have been sufficient if true, but there was nothing in the record to back it up. Be that as it may, the case was different in one important respect. The typical case involves either services already performed or property which cannot be returned to the claimant. Here, the War College could have returned the software to the claimant, but it would then have had to go out immediately and repurchase the same thing, a rather pointless course of events. The claim was allowed, the decision reiterating that unauthorized purchases create no legal liability on the part of the government.

A 1984 case presented a "mixed bag." A trial attorney for the Equal Employment Opportunity Commission needed to get several indigent witnesses from San Diego to San Francisco to appear at a court hearing. When the witnesses arrived at the San Diego airport the night before the hearing, the airline refused to honor the Government Transportation requests. The attorney paid the fares from his own funds and also advanced money to the witnesses for their hotel and meal expenses. The air fares clearly qualified for reimbursement under the standard of 62 Comp. Gen. 419. Failure to act would have jeopardized the litigation. With respect to the funds advanced for lodging and subsistence, however, there was nothing in the record to support a need to act—or a reasonable perception of such a need—so this portion of the claim was denied. B-210986, May 21, 1984.

If the public necessity test is satisfied, the next step is for the agency to look at the transaction as if the contractor or vendor had not been paid, and to ask if it could have ratified the transaction under whatever authority it may possess, such as the Federal Acquisition Regulation, 48 C.F.R. § 1.602-3. If the agency could have ratified the transaction to pay the contractor, it may reimburse the voluntary creditor. 62 Comp. Gen. at 424.

If for whatever reason ratification is not available, the next step is for the agency to apply the standards for quantum meruit recovery—again looking

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at the transaction as if the contractor had not yet been paid. The standards are:

- Procurement would have been permissible if proper procedures were followed. This knocks out the cases in which the underlying expenditure would be unauthorized even if made directly by the agency.
- Government received a benefit. For the most part, this will already have been answered by virtue of the "public necessity" determination.
- Claimant acted in good faith. Again, the "public necessity" analysis will almost certainly take care of this item as well.
- Measure of recovery is the fair value of the benefit received by the government. The government should not be paying $100 for a $10 item, and this is true regardless of whether the government is paying the contractor directly or reimbursing a voluntary creditor.

Based on this analysis, if the agency could have made a quantum meruit payment directly to the contractor or vendor, it can reimburse the voluntary creditor. 62 Comp. Gen. at 424–25. The claimant in 62 Comp. Gen. 419 clearly met these standards and was reimbursed.

(6) Monetary claims

Just as there is an established mechanism for making purchases, there is also an established system for the settlement and payment of claims against the government, and the voluntary creditor who short-circuits the system by paying a claim from personal funds takes a heavy risk.

In 33 Comp. Gen. 20 (1953), a certifying officer paid a portion of a disputed travel voucher to another government employee from personal funds. It took GAO only half a page to deny reimbursement. The certifying officer's belief that the payment was correct was immaterial. In another case, a National Park Service employee used personal funds as a security deposit against a claim for rent due by the government for space in a privately-owned trailer park. The federal employee, under the impression, later found to be erroneous, that the rental claim was valid, used his own funds in order to secure the release of a government-owned trailer which the trailer park owner had originally threatened to hold as security. The Comptroller General held that, although time was a factor (the vehicle had to be winterized for use in another location), release of the trailer could have been accomplished through other means and therefore there was no basis for an exception to the rule. The claim for reimbursement was denied. B-184982, October 13, 1976.

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As with the other types of cases, there are exceptions here, too, although this category is expressly excluded from 62 Comp. Gen. 419 (id. at 423), and the standards have not been defined to the extent that 62 Comp. Gen. 419 defined them for the procurement cases. The answer will depend on the strength of the justification which must, of course, be more than mere convenience or an employee's belief that something is a good idea. Thus, reimbursement was authorized in B-177331, December 14, 1972, when an employee paid a claim resulting from an automobile accident in a foreign country in order to avoid detention by the local police and to obtain release of the impounded government vehicle. See also B-186474, June 15, 1976 (government driver paid tort claim from personal funds, claimant executed release protecting United States from any further claims).

(7) Conclusion

It must be emphasized that the voluntary creditor always acts at his or her own risk and never has a right to be reimbursed. GAO has cautioned in numerous cases that payments from personal funds are undesirable and should be discouraged. E.g., 62 Comp. Gen. at 424; 60 Comp. Gen. 379, 381 (1981); B-186474, June 15, 1976. Nevertheless, the voluntary creditor rule is nowhere near as harsh as it is sometimes perceived to be. Many claims are allowed, and this is as it should be.

In closing, we reach back to another old Comptroller of the Treasury decision for a passage upon which we would not attempt to improve:

> "I do not wish . . . to be understood as countenancing indiscriminate payments of this character. Officers and employees in the field should, before using their own funds to pay legitimate expenses of the Government, ascertain whether there is a feasible means of making payments in the usual and prescribed manner, and the measure of such feasibility should not be their own convenience or desire. Where the stress of public necessity requires officers to use their own funds, they should represent the facts when claiming reimbursement."

12 Comp. Dec. 308, 309 (1905).

5. Government Checks and Electronic Transfer

a. Source of Law: The Clearfield Trust Doctrine

In the private sector, the rights and liabilities of parties to a check or other negotiable instrument are governed by the Uniform Commercial Code

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(UCC), which has been adopted at least in part, with some variations, by all 50 states and the District of Columbia. Rights and liabilities under checks issued by the federal government, however, are governed by federal law. Since the United States is exercising constitutional functions when it disburses funds or pays its debts, the Supreme Court has held that the "rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law." Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943). The Court reaffirmed the doctrine two years later in National Metropolitan Bank v. United States, 323 U.S. 454 (1945).

The governing federal law may be found in three places. First, of course, is any statutes Congress may choose to enact. Several will be noted later in this section. Second is Treasury Department regulations. See Clearfield, 318 U.S. at 366 n.2; Metropolitan Bank, 323 U.S. at 458; United States v. City National Bank & Trust Co., 491 F.2d 851, 853 (8th Cir. 1974); 54 Comp. Gen. 75, 77 (1974). The Clearfield Court identified the third element when it stated that, absent an applicable statute, "it is for the federal courts to fashion the governing rule of law according to their own standards." 318 U.S. at 367.

The virtually universal adoption of the Uniform Commercial Code occurred well after the Supreme Court's Clearfield and Metropolitan Bank decisions. Once this development had taken place, litigants began arguing that the courts should dump or ignore Clearfield because the uniformity it sought to achieve now existed by virtue of the UCC. Uniformity is not the whole story, however. There is a second underpinning to Clearfield, discussed as follows by one district court:

"It is quite clear that the Supreme Court in Clearfield was pointing the federal courts in a new direction. . . . [T]he Court went further when it spoke for the first time of the duty of the federal courts to choose 'a federal rule designed to protect a federal right.' [Emphasis in original.]

. . . .

". . . The Clearfield Trust doctrine gives a federal court the added function of developing a body of law consonant with those interests which are uniquely federal.

. . . .

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". . . Because the several states have adopted a different rule does not mean that the federal interest . . . has been since diluted."

United States v. Bank of America National Trust and Savings Ass'n, 288 F. Supp. 343, 346–47 (N.D. Cal. 1968), aff'd, 438 F.2d 1213 (9th Cir. 1971), cert. denied, 404 U.S. 864. See also United States v. Philadelphia National Bank, 304 F. Supp. 955, 956 (E.D. Pa. 1969). Responding to the same argument, another district court said in a 1993 case, "Clearfield Trust is still the law of the land" and where federal commercial paper is involved, "federal law preempts the Uniform Commercial Code." Alnor Check Cashing v. Katz, 821 F. Supp. 307, 312 (E.D. Pa.), aff'd, 11 F.3d 27 (3d Cir. 1993).

The UCC still has a role, however. GAO's position is that "the Government should follow [the UCC] to the maximum extent practicable in the interest of uniformity where not inconsistent with Federal interest, law or court decisions." 51 Comp. Gen. 668, 670 (1972). See also 54 Comp. Gen. 397, 400 (1974); 54 Comp. Gen. 75, 79 (1974).

b. Time Limit on Negotiating Government Checks

The time limit on negotiating government checks has changed several times over the years. For 30 years prior to 1987, there was no time limit. See 31 U.S.C. § 3328(a)(1) (1982 ed.). During this period, it was not uncommon for checks to be presented for payment literally decades after they were issued. E.g., 62 Comp. Gen. 121 (1983) (claim for proceeds of checks issued in 1936 and 1937). Checks thought to be lost might resurface many years later. E.g., B-140628, September 24, 1959 (no authority to cancel an indemnity bond given by a bank on a check issued 17 years earlier because the check was still "good").[50]

In 1987, Congress tried to bring some order to the system by the enactment of title X of the Competitive Equality Banking Act, Pub. L. No. 100-86, 101 Stat. 552, 657. Treasury checks issued on or after the law's effective date must be negotiated within one year.[51] 31 U.S.C. § 3328(a)(1)(A); 31 C.F.R. § 240.3(a)(1). The checks are to bear the legend "Void After One Year." 31 C.F.R. § 240.3(b). Treasury provides each agency with a monthly list of the agency's checks which became stale (i.e., were unnegotiated for 12 months) during the preceding month. Treasury then

[50]This situation was not necessarily all bad, however. Since the government must borrow—and pay interest on—money needed to pay its debts, the failure to cash government checks for extended periods results in reduced interest costs. B-207224, September 20, 1982.

[51]The Treasury Department was given discretion in setting the Act's effective date, which it set at October 1, 1989. 53 Fed. Reg. 3584 (February 8, 1988). Treasury is also authorized to issue implementing regulations. Pub. L. No. 100-86, § 1005, 101 Stat. 659, 31 U.S.C. § 3328 note.

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cancels those checks and the proceeds are returned to the accounts originally charged. 31 U.S.C. § 3334(a); 31 C.F.R. § 240.4(a).

Checks issued prior to the effective date had to be negotiated not later than October 1, 1990. 31 U.S.C. § 3328(a)(1)(B). The law directed Treasury to cancel all such checks still outstanding six months later, i.e., on April 1, 1991 (id. § 3334(b)(1)), and authorized it to use the proceeds to clear balances in certain Treasury accounts (id. § 3334(b)(2)). The cancellation and disposition requirements of 31 U.S.C. § 3334(b) applied to all Treasury checks without exception. 70 Comp. Gen. 705 (1991) (Railroad Unemployment Insurance Act benefit checks).

Whether we are talking about pre-effective date checks or post-effective date checks, it is important to emphasize that cancellation relates only to the check and not the underlying obligation. The statute makes this clear:

"Nothing in this subsection shall be construed to affect the underlying obligation of the United States, or any agency thereof, for which a Treasury check was issued."

31 U.S.C. § 3328(a)(3). For a statute notable for its lack of legislative history, the conference report stressed this point. H.R. Conf. Rep. No. 261, 100th Cong., 1st Sess. 188, reprinted at 1987 U.S. Code Cong. & Admin. News 588, 657. The proper course of action for a payee whose check has been canceled is to file a claim with the agency which authorized issuance of the check. Upon verification, the agency is authorized to certify a new payment. 31 C.F.R. § 245.5.

While the law thus preserves underlying obligations, it does not resurrect dead claims. 70 Comp. Gen. 416, 418 n.2. The underlying claims remain governed by the 6-year statute of limitations of 31 U.S.C. § 3702(b). B-244431.2, September 13, 1994 (containing a comprehensive discussion of the CEBA changes); B-243536, September 7, 1993; B-250212, April 15, 1993; B-251044, April 14, 1993; B-244431, October 8, 1991. Two examples will illustrate:

- Agency issued a paycheck in September 1989 (pre-effective date). The recipient, a wealthy government employee, didn't bother cashing it. It became stale in October 1990 and was canceled in April 1991. The underlying salary obligation was not affected, and the recipient could file a claim for a new check until September 1995. The same principle applies to post-effective date checks.

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- Same situation except original check was issued in 1980. If it wasn't negotiated prior to cancellation in April 1991, the underlying obligation is time-barred since the statute of limitations expired in 1986. Again, the same principle would apply to a post-effective date check.

A post-cancellation claim is chargeable to the same appropriation initially charged when the first check was issued, to the extent funds remain available. If that account has been closed pursuant to 31 U.S.C. §§ 1551–1557, the payment must be charged to current appropriations, subject to the one-percent limitation of 31 U.S.C. § 1553. This applies regardless of whether the original check was issued before or after October 1, 1989. This is because, for pre-effective date checks, while the specific funds may have been diverted upon cancellation, the underlying obligation—and hence the fiscal year chargeable—was unaffected. 70 Comp. Gen. 416 (1991); B-243536, September 7, 1993; B-239249.2, May 21, 1991 (applying these principles to appropriations for the Senate and House of Representatives).

For checks negotiated within the one-year period, if Treasury is on notice of a question of law or fact, it may, at its discretion, defer payment and refer the matter to GAO. 31 U.S.C. § 3328(a)(2). An example of such a referral under the pre-1987 law is 62 Comp. Gen. 121 (1983) (no evidence to support allegation that checks were gifts to claimants).

Checks drawn on "designated depositaries" are addressed in 31 U.S.C. § 3328(b). A "designated depositary" is a commercial bank or banking institution designated by the Treasury Department to hold government funds for the account of the United States. See 31 C.F.R. Part 202. If a check drawn on a designated depositary has not been paid by the end of the fiscal year following the fiscal year in which the check was issued, the amount must be withdrawn from the depositary and deposited for credit to a consolidated Treasury account (20X6045, Proceeds and Payment of Certain Unpaid Checks). Claims for the proceeds of unpaid checks are payable from this consolidated account upon settlement by GAO. This does not mean that all transactions involving stale designated depositary checks require GAO settlement. The distinction is between transactions which involve claims for the proceeds of a check and transactions which represent essentially bookkeeping adjustments. GAO settlement is required in the former situation but not the latter. B-254649, October 20, 1993 (internal memorandum); B-112924-O.M., May 13, 1974; B-112924-O.M., July 6, 1973.

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c. Withholding Checks to Be Sent to Foreign Countries

If a government check is to be sent to a payee in a foreign country (other than a foreign government), and the Secretary of the Treasury determines that conditions in that country do not reasonably ensure that the payee will receive the check and be able to negotiate it for full value, the Secretary may, subject to certain exceptions, prohibit transmission of the check. 31 U.S.C. § 3329(a). Treasury has implementing regulations at 31 C.F.R. Part 211 and I Treasury Financial Manual § 4-2085.

Countries subject to this prohibition naturally vary from time to time with the international climate. Countries which are expected to remain subject to the prohibition for a reasonable length of time are published in 31 C.F.R. § 211.1.[52] In addition, if warranted by conditions such as natural disaster or political upheaval, Treasury may subject countries to temporary withholding without publishing their names in the regulation. I TFM § 2085.10.

A withheld check may be released during the same calendar quarter if conditions change. Otherwise, the amount is to be transferred at the end of the calendar quarter to a special deposit account entitled "Proceeds of Withheld Foreign Checks" (20X6048). 31 U.S.C. § 3329(b)(4). A claim for an amount deposited in the special account may be paid if the person making the claim can provide reasonable assurance that he or she will receive the check and be able to negotiate it for full value. Id. § 3329(c).

The statute also provides that the withheld checks be sent to GAO for credit to the proper accounts. Id. § 3329(b)(4). Given the evolution of GAO's approach to account settlement, there is no longer any need to send the checks to GAO. In any event, Treasury has developed an alternative procedure for implementing the statute. Agencies are instructed to withhold payment and establish the liability (i.e., record an obligation) on their books, but not to actually issue checks. I TFM § 2085.10. Claims are to be filed with and adjudicated by the agency responsible for originally authorizing the withheld payment. 31 C.F.R. § 211.2; I TFM § 2085.20. If a claim is allowed, payment will be made either by Treasury from the special account or by the authorizing agency from its appropriations, depending on whether funds were actually transferred to the special account or withheld under the checkless procedure. Id.

The special deposit account authorized by 31 U.S.C. § 3329(b) is essentially a trust account for the benefit of the intended payees. Therefore, consistent with GAO's position that the Barring Act (31 U.S.C. § 3702(b))

[52]The 1993 edition of 31 C.F.R. § 211.1(a) lists Cuba, Kampuchea, North Korea, and Vietnam.

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does not apply to claims against trust funds, there is no statute of limitations on administrative claims by proper claimants against that account. 70 Comp. Gen. 612 (1991); 55 Comp. Gen. 1234, 1236 (1976); B-155963, March 19, 1965; B-144046, October 31, 1960. Similarly, as 70 Comp. Gen. 612 held, there is no statute of limitations on administrative claims under the checkless procedure. The decision states, at 615:

"[T]he right of a claimant to recover money that the government is required by law to hold in trust for the claimant's benefit cannot be diminished because the government adopts an alternative procedure as a matter of administrative convenience, and does not actually deposit any funds into a trust fund."

d. Statutes of Limitations on Certain Check Claims

The statute of limitations applicable to claims against the United States on government checks is found at 31 U.S.C. § 3702(c)(1):

"Any claim on account of a Treasury check shall be barred unless it is presented to the agency that authorized the issuance of such check within 1 year after the date of issuance of the check . . . ."

Subsection (c)(2) reiterates that the underlying obligation is not affected. Prior to the Competitive Equality Banking Act of 1987, the limitation period was 6 years, but only with respect to checks which government records showed to have been paid. 31 U.S.C. § 3702(c) (1982 ed.); B-201707, July 14, 1981; B-180143, February 26, 1974. This was because, if government records did not indicate that the check was paid, there could be no statute of limitations on claims on the check because there was no time limit on negotiation.

It is helpful to read 31 U.S.C. § 3702(c) in conjunction with 31 U.S.C. § 3328(c), which provides:

"A limitation imposed on a claim against the United States Government under section 3702 of this title does not apply to an unpaid check drawn on the Treasury or a designated depositary."

A comparison of the two statutes illustrates the distinction between a claim on the check and a claim on the underlying obligation. A claim on the check is subject to the 1-year limitation. This is consistent with 31 U.S.C. § 3328(a) because the check will be canceled if unnegotiated after a year. In contrast, a claim on the underlying obligation is governed by the statute of limitations applicable to claims of that type. See generally B-244431.2, September 13, 1994.

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The Competitive Equality Banking Act also reduced to one year the limitation in 31 U.S.C. § 3712(a) on actions brought by the United States to enforce the liability of endorsers in forgery and unauthorized signature cases. The revised section 3712(a) provides in part:

"(1) Period for claims.—If the Secretary of the Treasury determines that a Treasury check has been paid over a forged or unauthorized endorsement, the Secretary may reclaim the amount of such check from the presenting bank or any other endorser that has breached its guarantee of endorsements prior to—

"(A) the end of the 1-year period beginning on the date of payment; or

"(B) the expiration of [an additional 6-month period] if a timely claim is received under section 3702.

"(2) Civil actions.—(A) Except as provided in subparagraph (B), the United States may bring a civil action to enforce the liability of an endorser, transferor, depository, or fiscal agent on a forged or unauthorized signature or endorsement . . . not later than 1 year after a check or warrant is presented to the drawee for payment."

Subparagraph (B) extends the period by 3 years if the government gives the endorser written notice of the claim within one year after presentment.

In United States v. Duncan, 527 F.2d 1278 (3d Cir. 1976), the court discussed the origin and purpose of what is now 31 U.S.C. § 3712(a)(2), and held that the term "endorser" does not include—and hence suit is not barred against—"someone who improperly signs the name of another in order to benefit persons who are not entitled to the proceeds." Id. at 1281. In other words, the statute exists to protect innocent third parties. Id. at 1280.

e. Forged, Altered, or Fraudulently Endorsed Checks

An important Treasury regulation, 31 C.F.R. § 240.5, states:

"The presenting bank and the indorsers of a check presented to the Treasury for payment are deemed to guarantee to the Treasury that all prior indorsements are genuine."

When the Treasury pays a check bearing a forged endorsement, the government can, given the primacy of the Treasury regulations under the Clearfield Trust doctrine, seek recovery ("reclamation") from a guarantor under section 240.5, subject to the limitation period of 31 U.S.C. § 3712(a). 31 C.F.R. § 240.6. This is the essence of the Clearfield Trust decision and applies even where the government was negligent in failing to discover the fraud prior to the guarantee. National Metropolitan Bank v. United States,

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323 U.S. 454 (1945). It also applies regardless of the fact that the perpetrators of the fraud were government employees. United States v. Philadelphia National Bank, 304 F. Supp. 955 (E.D. Pa. 1969); United States v. Bank of America National Trust and Savings Ass'n, 288 F. Supp. 343 (N.D. Cal. 1968), aff'd, 438 F.2d 1213 (9th Cir. 1971), cert. denied, 404 U.S. 864.[53]

The government's right of reclamation applies to unauthorized as well as forged endorsements. E.g., Alnor Check Cashing v. Katz, 11 F.3d 27 (3d Cir. 1993); United States v. National Bank of Commerce in New Orleans, 438 F.2d 809 (5th Cir. 1971). For reclamation purposes, unauthorized signature includes the unauthorized use of a rubber-stamp imprint of the payee's name. 53 Comp. Gen. 19 (1973).

A check made payable to two parties jointly must be endorsed by both to be properly negotiated. Negotiation by only one of the parties, without authority from the other, is a form of unauthorized endorsement for purposes of 31 C.F.R. §§ 240.5 and 240.6. 51 Comp. Gen. 668 (1972); B-196485, January 15, 1980; B-187957, July 1, 1977; B-155599, December 11, 1964; B-129118, December 4, 1956. As several of these cases illustrate (51 Comp. Gen. 668, B-196485, B-187957), this situation commonly arises when a spouse or former spouse negotiates a joint tax refund check.

Suppose a check falls into the hands of someone with the same name as the payee. Is it forgery to sign your own name? Perhaps not, but at minimum it is still another form of unauthorized endorsement. Fulton National Bank v. United States, 197 F.2d 763 (5th Cir. 1952) (bank which guaranteed prior endorsements held liable to government). GAO decisions in "same name" cases have examined whether it is reasonable to place the burden on the endorser under the particular circumstances involved. Thus, reclamation should proceed where a check bearing the payee's address is negotiated by someone with the same name but different address. However, GAO has recommended against reclamation where the check gave the address of the actual recipient with the same name as the intended payee, or where there was no address on the check. 26 Comp. Gen. 834 (1947); 14 Comp. Gen. 840 (1935); 6 Comp. Gen. 532 (1927); B-121119, October 27, 1954; B-112491, April 17, 1953.

The "same name" cases may be distinguished from the so-called "imposter rule" which provides that—

[53]Other cases upholding the government's right of reclamation under Clearfield Trust include United States v. City National Bank & Trust Co., 491 F.2d 851 (8th Cir. 1974), and United States v. First National Bank of Atlanta, 441 F.2d 906 (5th Cir. 1971).

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"a drawer, having made payable and delivered an instrument to an impostor [sic] whom the drawer believes to be the person whose name he has assumed and who is the very person intended by the drawer to present and endorse the instrument, must as against the drawee or a bona fide holder in due course bear the loss where the impostor has obtained payment or negotiated the instrument. The intent of the drawer having been effectuated, the impostor's endorsement is regarded as genuine and not as a forgery nor, accordingly, is a guarantee of prior endorsements regarded as breached . . . ."

United States v. Union Trust Co., 139 F. Supp. 819, 822 (D. Md. 1956). GAO has tried to construe the imposter rule narrowly but has not visited the issue for some time. E.g., 18 Comp. Gen. 880 (1939); B-141231, December 15, 1959.

Of course the government is not entitled to recover twice. If the government manages to collect from both the bank and the fraudulent endorser, the bank gets the refund. 6 Comp. Gen. 513 (1927).

In a claim by the payee for the proceeds of a check allegedly cashed over a forged endorsement, the opinion of the government's handwriting expert will be given great weight and will certainly prevail over the unsubstantiated allegation of the payee. B-128696, August 27, 1956; B-47755, June 2, 1945.

Another group of cases involves the rights of the parties when a payee fraudulently alters the amount of a government check. In 3 Comp. Gen. 626 (1924), the payee of a government check fraudulently raised the amount from $153.83 to $653.83. The City National Bank of Tuscaloosa, Alabama, the claimant in the case, accepted the check and credited the payee's account for the higher amount. The bank sent the check to the Federal Reserve Bank of Atlanta and was given credit for $653.83. The Treasury Department subsequently discovered the alteration. It was determined that the bank, as a holder in due course, was entitled to payment of $153.83 on the forged check, based on the principle that "a holder of the instrument in due course . . . not a party to the alteration may enforce payment of it according to its original tenor." Id. at 627. See also B-133923-O.M., November 18, 1957.

Where an alteration is so apparent as to put a person of average prudence on notice that something is wrong, the bank cashing the check will not qualify as a holder in due course and its claim for the original amount will be denied. 27 Comp. Gen. 674 (1948); B-131762, June 17, 1957; B-126761, March 8, 1956.

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Alteration of the amount generally voids the check as to the payee. E.g., B-131762, June 17, 1957. Under Treasury's general procedure, a payee who fraudulently alters a government check is held to have extinguished the government's obligation to him or her and is therefore no longer entitled to the original amount. An exception occurred in B-54418, January 25, 1946, in which a payee had raised the amount from $73 to $78 because he believed the government's amount was in error. Under the circumstances, GAO felt that the alteration should not be regarded as a material alteration. The solution: accept the payee's refund of $5 and forget the matter.

A revolving fund, known as the "Check Forgery Insurance Fund," is authorized to be established in the Treasury for making payments to an innocent payee or special endorsee where a check has been negotiated on a forged endorsement. 31 U.S.C. § 3343. The CFIF is described and discussed in 72 Comp. Gen. 295 (1993) and in Chapter 9.

f. Miscellaneous Check Cases

(1) Government error

The government pays many of its employees by direct deposit. In a 1981 case, an employee had submitted a change-of-address form to cancel a direct deposit arrangement, which his payroll office processed one pay period earlier than it should have, resulting in one less check going to the bank. The employee incurred overdraft charges when he wrote checks on the deposit he thought was in his bank account but was not. His claim for reimbursement of the overdraft charges was denied. 60 Comp. Gen. 450 (1981). Even though the government had made a mistake, it was nevertheless the employee's responsibility to make sure there was enough money in his account to cover his checks.

A case which we suspect brought a sigh of relief (no pun intended) to a heavily perspiring accountable officer is United States v. Hibernia National Bank, 841 F.2d 592 (5th Cir. 1988). The Army issued a check to pay a contractor. The amount due was $24,844.50. In the center of the check (where nonfederal checks spell out the amount in words) was the correct amount. On the right side of the check, however, the amount appeared as $244844.50. The bank credited the payee with the higher amount, most of which was withdrawn and spent before Treasury caught the error. The government sued to get its money back. The court held that, although Treasury checks do not state the amount in words, "the figure in the body of the check, in the place customarily reserved for words, is the controlling amount." Id. at 595. The bank was liable because it failed to exercise ordinary care in processing the check. While it is difficult to argue

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with the bank's allegation that the government was negligent too, the court pointed out that comparative negligence does not apply in commercial transactions. Id. at 596. Recovery from the bank obviated any need to consider enforcing liability against the relevant accountable officer(s).

(2) Holder in due course

The Uniform Commercial Code defines "holder in due course" as a holder who takes a negotiable instrument for value, in good faith, without notice that it is overdue or has been dishonored, and without notice of any claims or defenses. UCC § 3-302(1). As we have seen, even a holder in due course is subordinated to the government's right of reclamation in the case of forged or unauthorized endorsements. However, in situations not involving the guarantee of prior endorsements, the holder in due course usually wins.

In 54 Comp. Gen. 397 (1974), for example, GAO applied the UCC in the absence of any contrary federal law or countervailing federal interest, and held that the claim of a holder in due course should prevail over transportation overcharge claims asserted by GAO and a tax indebtedness claim of the Internal Revenue Service.

An earlier case upheld the claim of a holder in due course to a benefit check issued to an ineligible person. The erroneous initial determination of the payee's eligibility was a mistake of fact, not the type of defense that can be asserted against a holder in due course. 12 Comp. Gen. 492 (1933).

(3) Government as endorser

We include one case which does not involve a government check because it illustrates the "flip side" of some of the concepts we have been discussing. The case is First National Bank of Fort Worth v. United States, 8 Cl. Ct. 774 (1985).

An Internal Revenue Service agent went to the premises of a delinquent taxpayer to seize business assets. To avoid the seizure, the proprietor gave the agent a check payable to the IRS for $100,000. The agent ran to the bank, endorsed the check and converted it to a certified check, which he promptly forwarded to the appropriate IRS district office. Of course, you guessed it—the original check bounced. When the bank was unable to collect from the person who had written the check, it sued the IRS.

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The Claims Court noted the broader policy issue of "whether, as a matter of federal tax policy, the United States ought to be relieved of an endorser's duty to repay where it negotiates taxpayer checks in the course of collecting the revenue." Id. at 777. Whatever the answer might be from the policy perspective, the bank lost this case. When the bank gave the IRS agent the cashier's check, it "paid" the taxpayer's check as effectively as if it had given the agent cash, thereby extinguishing the government's liability as endorser.

g. Electronic Funds Transfer

More and more payments these days are being made by electronic funds transfer (EFT)—the so-called "paperless check."[54] Treasury regulations state that payments are to be made by EFT "when cost-effective, practicable, and consistent with current statutory authority." 31 C.F.R. § 206.4(a). Additional Treasury regulations are found in 31 C.F.R. Parts 210 and 370. No reason is apparent why the Clearfield Trust doctrine shouldn't apply with equal force to EFT payments, and it seems fair to regard Treasury's EFT regulations as having the same primacy vis-a-vis EFT that Part 240 has vis-a-vis paper checks.

The cases thus far tend to cluster around two basic issues. First is the government's liability if it fails to make a deposit or sends a deposit to the wrong place. Under the regulations, the government is liable to the recipient for the amount of the payment. In other words, the government is liable to do what it should have done in the first place. 31 C.F.R. § 210.10(a).

The government is not liable, however, for any overdraft or other charges the recipient may incur. The government's liability, states the Treasury regulation, "shall be limited to the amount of the payment." Id. As noted earlier, GAO has denied a claim for reimbursement of overdraft charges resulting from a direct deposit error using a check. 60 Comp. Gen. 450 (1981). There would seem to be no basis for a different answer under EFT, and the Federal Labor Relations Authority has so held. Federal Union of Scientists and Engineers, NAGE, 25 F.L.R.A. 615 (1987) (overdraft penalties are employee's personal responsibility).

The second broad issue is the rights and liabilities of the government and the bank when a recipient dies. If the recipient is getting a recurring payment, a retirement annuity for example, and nobody notifies the government or the bank, the payments will continue to come and, too often, someone with access to the account will keep spending them.

[54]See GAO report, Electronic Funds Transfer—Its Potential for Improving Cash Management in Government, FGMSD-80-80 (September 19, 1980).

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Under the regulations, a bank is liable to the government for the amount of all benefit payments received after the death or legal incapacity of the recipient. However, there are procedures under which the bank can limit its liability to payments made within 45 days after the recipient's death or legal incapacity. 31 C.F.R. § 210.12. In 63 Comp. Gen. 293 (1984), a bank which failed to take advantage of these procedures was found liable. Specifically, it had failed to provide Treasury with the names and addresses of those who made withdrawals from the account after the recipient's death as required by the regulations. See also B-201557, September 28, 1981 (bank which fully complied with regulations not liable for government's error).

Another decision, 59 Comp. Gen. 597 (1980), regarded the Treasury regulations as a "reasonable exercise of discretion" (id. at 600), but noted that the limitation of a bank's liability has no effect on a disbursing officer's liability for the full amount of an improper payment, subject of course to relief under the appropriate relief statute.

Legislation enacted in late 1994 makes EFT the preferred method of payment for federal "wage, salary, or retirement payments." Persons beginning to receive these payments on or after January 1, 1995, are required to use EFT, except that anyone may have the requirement waived on written request. Waivers may also be granted by recipient group. 31 U.S.C. § 3332, as amended by Pub. L. No. 103-356, § 402(a) (1994).

D. Interagency Claims

1. Damage Claims Between Federal Agencies: The General Rule

As a general proposition, a federal agency or establishment which damages public property, real or personal, under the control of another federal agency or establishment may not pay a claim for that damage. Put another way, federal agencies may generally not assert damage claims against one another. E.g., 65 Comp. Gen. 464 (1986); 25 Comp. Gen. 49 (1945); 6 Comp. Dec. 74 (1899). The rule is sometimes referred to as the "interdepartmental waiver doctrine."[55] The rule applies equally to components of a single agency funded under separate appropriations. See

[55]See, e.g., 60 Comp. Gen. 406 (1981); 59 Comp. Gen. 93 (1979). The term seems to have evolved from language in 25 Comp. Gen. 49, 55 (1945), approving a "mutual waiver" of damage claims by the Navy and two government corporations. The term is somewhat curious in that, if there is no legal basis for a claim to begin with, there is really nothing to "waive."

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65 Comp. Gen. 910, 911 (1986); 3 Comp. Gen. 74 (1923); B-35478, July 24, 1943.

The rule is based in large measure on the premise that ownership of public property is in the United States as a single entity and not in the individual departments or agencies. 41 Comp. Gen. 235, 237 (1961); 22 Comp. Dec. 390 (1916). A number of cases also rely in part on 31 U.S.C. § 1301(a), which restricts the use of appropriations to the purposes for which they were made. 26 Comp. Gen. 235, 239 (1946); 6 Comp. Gen. 171, 172 (1926). The theory is that an agency which is authorized to acquire property is also authorized to maintain or repair that property to keep it suitable for its intended use; its appropriations, if not expressly available for repairs, are nevertheless available by necessary implication without regard to what caused the damage. See 6 Comp. Dec. at 75. If, as these cases indicate, payment by the agency causing the damage would be a payment for an unauthorized purpose, it follows that it would also improperly augment the appropriations of the claimant agency. 29 Comp. Gen. 470, 471 (1950); 6 Comp. Gen. at 172.

The elements of the rule are indicated in the following excerpt from 46 Comp. Gen. 586, 587–88 (1966):

"In those cases where the rule has been applied, there are uniformly involved agencies or instrumentalities of the United States performing governmental functions with Federal funds and replacement of the loss or repair of the damage incurred was required to be effected with Federal funds."

Viewed from the perspective of this passage, the rule is seen merely as a way of determining which government pocket will bear the expense in certain situations, in other words, a formula for allocating loss. Whether it will apply in a given case depends on whether all of the cited factors are present—(1) federal agencies or instrumentalities, (2) performing governmental functions, (3) using federal funds, and (4) in circumstances under which the damage must be borne by federal funds.[56]

This rule, as with any other rule, applies only in the absence of statutory direction to the contrary. For example, the General Services Administration is required by law to establish and maintain an interagency motor pool system. The law (40 U.S.C. § 491) authorizes GSA to recover all

[56]Some of the cases suggest that a further test is whether the funds are "subject to the control of the accounting officers of the Government." E.g., 25 Comp. Gen. 49, 54 (1945). However, analysis of the cases reveals that this is not a material factor as long as both parties are government agencies or instrumentalities and the funds involved are federal funds.

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costs connected with operating the system from agency users. Since the expense of repairing damaged vehicles is clearly a cost of operating and maintaining a motor pool, GSA is authorized to charge the using agency with the cost of repair of GSA vehicles damaged through the negligence or misconduct of a driver employed by that agency. 59 Comp. Gen. 515 (1980). The most important statutory exception is the Economy Act, discussed later.

There are also nonstatutory exceptions, usually where one or more of the previously noted elements of the rule is not present. In 41 Comp. Gen. 235 (1961), the San Carlos Irrigation Project was damaged by the crash of a Civil Air Patrol plane. The question was whether the claim of the Bureau of Indian Affairs on behalf of the Pima Indians, the project beneficiaries, against the Air Force would represent a claim by one government agency against another. GAO found that, although the San Carlos Irrigation Project was an instrumentality of the United States, the project funds were moneys held in trust by the government for the Pima Indians. If the general rule were applied, the expense of repairing the damage would be borne not by the government but by the project beneficiaries. Thus, the BIA could present its claim. The decision cautioned, however, that Air Force claims regulations precluded claims by government instrumentalities, and GAO could not require the Air Force to treat the claim as cognizable.

Applying similar reasoning, the Comptroller General found Navy appropriations available to pay a claim for damage to property of the Ryukyu Electric Power Corporation. B-159559, August 12, 1968. The Corporation, while an instrumentality of the United States Civil Administration of the Ryukyu Islands, was not an instrumentality of the United States Government. Further, while funds available to the Civil Administration were government funds, they were in the nature of a trust account held for the sole benefit of the Ryukyuan people. Another case applying the trust reasoning is B-35478, July 24, 1943.

The reverse situation was presented in 46 Comp. Gen. 586 (1966), when the Department of Agriculture sought to file a claim against the government of American Samoa for losses due to improper storage of donated agricultural commodities. Following the rationale of 41 Comp. Gen. 235, GAO found that the general rule would not have prevented a claim by the Interior Department on behalf of the Samoan people against a federal agency for damage to Samoan Government property. Therefore, a federal agency, in this case the Department of Agriculture, could present a claim against the Samoan Government. The decisive factor was that the

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Government of American Samoa was not an instrumentality of the United States Government, at least for purposes of this rule, and the fact that the funds of both parties were subject to audit by GAO was immaterial. The same result applied to a claim against the Trust Territory of the Pacific Islands. B-160506, August 15, 1967; B-160506, April 10, 1970. A claim for damage to donated agricultural commodities was held subject to the general rule, and therefore precluded, in B-136949, September 8, 1958, where both parties were government agencies.

The "trust exception" of cases like 41 Comp. Gen. 235 and B-159559, August 12, 1968, has its limits and does not apply where the so-called trust is form over substance. An illustrative case is 65 Comp. Gen. 464 (1986), in which a Navy plane crashed into and destroyed a Federal Aviation Administration instrument landing system. Although the FAA used funds from the Airport and Airway Trust Fund to repair its facility, this "trust fund" is little more than an earmarked appropriation and does not involve the same kind of trust relationship as in the San Carlos and Ryukyu cases. Accordingly, the general rule controlled, and Navy appropriations were not available to reimburse the FAA.

Another element of the rule, noted above, is that the agency sought to be charged must have been performing a governmental function. The absence of this element justified an exception in 14 Comp. Gen. 256 (1934), where a claim was allowed for damage to an Army dredge caused by a government-owned vessel employed solely as a merchant vessel. A similar case is A-36441, May 19, 1931 (government-owned vessel used as merchant ship dragged its anchor across Army cable).

2. Interagency Loans of Personal Property

For the most part, the cases previously cited involve accidental damage to property still in the custody or control of the acquiring agency. The issue of interagency reimbursement for property damage also arises when government property has been loaned by one agency to another. Again, it is well-established that where public property in the custody of one federal agency or establishment is temporarily loaned to another, the cost of repairs or replacement upon return of the property, being for the future use and benefit of the loaning agency, may not be charged against the borrowing agency's appropriations.

A case often cited for this proposition is 10 Comp. Gen. 288 (1930), holding that the Bureau of the Census was not authorized to reimburse the Marine Corps for the cost of replacing and repairing furniture temporarily

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borrowed by the Bureau, notwithstanding an understanding between the parties that the furniture would be returned to the Corps in as good condition as when loaned. In reaching this conclusion the decision stated, at page 289:

"The rule has long been established that where one department loans property or equipment to another it is not entitled to charge for its use or depreciation, or to have lost property replaced or damaged property repaired upon its return to the loaning establishment. . . . [T]he ownership of public property is in the Government and not in a department or branch thereof having possession of the property, and, accordingly, an executive department may not lawfully be reimbursed for the value of such property loaned to, and lost by, another department. . . . If appropriations of an establishment to which property is loaned are not chargeable with the cost of replacing articles lost or for use and depreciation of the property, obviously they are not chargeable with the costs of repairs to restore the property to its former condition upon its return to the loaning establishment. Such repairs are not for the benefit of the borrowing establishment but are for the future use and benefit of the establishment to which the property is returned."

Early applications of this principle include 22 Comp. Dec. 390 (1916) (cost of replacing lantern loaned by Commerce Department's Lighthouse Service and washed away during heavy storm could not be charged to borrowing agency); and 10 Comp. Dec. 222 (1903) (no authority to reimburse lending agency for borrowed mule which drowned). An exception occurred in 10 Comp. Gen. 563 (1931) for property loaned for exhibit purposes only. The Architect of the Capitol loaned a model of the United States Capitol to a commission established to administer the government's participation in the 1927 International Exposition in Seville, Spain. At the close of the Exposition, the model was returned with its dome shattered. GAO construed the resolution establishing the commission as requiring by implication that property be returned in as good condition as when borrowed. An additional factor in that case may have been that there appeared to be no funds under the control of the Architect of the Capitol remaining available to make the repairs.

Another application of the general rule, noted in the above quotation from 10 Comp. Gen. 288, is that an agency may not charge another agency for depreciation of property loaned to it or made available for its use. 8 Comp. Gen. 600 (1929); 25 Comp. Dec. 682 (1919).

a. Revolving Funds

The rule prohibiting reimbursement between federal agencies does not apply when the appropriation to be charged with the cost of the use or depreciation of loaned property is a reimbursable or revolving fund. In 3

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Comp. Gen. 74 (1923), the Interior Department asked which account it should charge for the depreciation of certain Bureau of Reclamation equipment used for general Interior Department investigations. Concluding that the cost of depreciation of the Bureau's equipment should be charged against the Interior appropriation for general investigations, the Comptroller General stated:

> "The general rule is that where a branch of the service permits the use of its equipment by another there is no authority to demand a return or compensation based on the use alone. [Citation omitted.] This applies equally with respect to interbureau matters; however, the rule is predicated on appropriations not reimbursable. The reclamation fund is reimbursable, and the use of equipment purchased therefrom is on a somewhat different basis, the equipment being an asset which should not be permitted to be depreciated from use on other than objects for which the fund was created." Id. at 74–75.

More than 60 years later, GAO considered a case involving damaged property. An engineering team on an Air Force base had borrowed two vehicles from the local office of the Air Force Industrial Fund (a working capital fund), and damaged the vehicles on work unrelated to the Industrial Fund. Applying the rationale and result of 3 Comp. Gen. 74, GAO advised that the Industrial Fund should be reimbursed. 65 Comp. Gen. 910 (1986).

b. Repairs for the Future Use of the Borrowing Agency

The general rule is based on the premise that repairs will be for the primary use and benefit of the loaning agency. This assumes that the repairs will be made when the borrowing agency's use of the property is completed or substantially completed. It therefore does not apply when the borrowing agency's use of the property is not completed. Thus, where repairs are necessary for further use of loaned property by the borrowing agency, and therefore for its benefit, the cost is properly charged to the borrowing agency. For example, in 5 Comp. Gen. 162 (1925), the Comptroller General held that repairs to the engine of a seaplane loaned by the Navy to the Coast Guard were authorized under Coast Guard appropriations if the repairs were required for the continued use of the plane by the Coast Guard. See also unpublished decision of September 1, 1921, 1 MS Comp. Gen. 712 (no file number).

c. Economy Act Exceptions

Section 601 of the Economy Act of 1932, 31 U.S.C. § 1535, provides general authority for government agencies to enter into reimbursable interagency agreements. In view of this authority, 10 Comp. Gen. 288 and similar decisions prohibiting the payment of claims for damage to property loaned by one agency to another do not apply where the transaction is

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undertaken under an Economy Act agreement which provides for the borrowing agency to pay for repairs.

The earliest case to discuss the Economy Act authority in this context appears to be 30 Comp. Gen. 295 (1951). The Bureau of Land Management of the Interior Department loaned a motorboat to the Agriculture Department's Soil Conservation Service under a written agreement that the Soil Service would "return the boat in as good condition as when received, normal wear and tear excepted." Repairs to the boat's motor were necessary to satisfy this agreement and the question was whether the repair cost was a proper charge against Soil Service appropriations. Responding in the affirmative, the Comptroller General stated:

"[Since the Economy Act permits] for a consideration, the total transfer between departments of material, supplies, and equipment on a permanent basis, [it] would appear to sanction, as well, lesser transactions between departments on a temporary loan basis . . . . [N]o good reason appears why the loaning department may not provide by agreement with the borrowing department that the property be returned in as good condition as when loaned and that the expense of placing the property in such condition be borne by the latter department provided, of course, that its appropriation is available therefor." Id. at 296.

In another case, the Air Force loaned two planes to the Army under an agreement which provided that the Army would be liable for damage to or destruction of the property from any cause. One plane was completely destroyed in a crash. In B-146588, August 23, 1961, GAO held that the Army could properly reimburse the Air Force for the lost property, stating:

"[T]he rule prohibiting replacements of or repairs to property generally, no longer applies to loans of personal property as between Government agencies when the loan agreement provides that the borrowing agency must return the property in as good condition as when loaned and that the expense of placing the property in such condition would be borne by that agency, subject, of course, to the availability of its appropriations."

Apart from the repair provision, the loan transaction may be otherwise nonreimbursable, although indefinite-term Economy Act agreements may not be used to effect a permanent transfer of property without reimbursement. 59 Comp. Gen. 366 (1980); 38 Comp. Gen. 558 (1959).

In the absence of an agreement under the Economy Act or similar statutory authority that the borrowing agency will reimburse the loaning agency for the use, repair or replacement of the property, the

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"interdepartmental waiver" rule continues to apply. For example, in 25 Comp. Gen. 322 (1945), the Army lost a 50-ton ball bearing jack borrowed from another Defense establishment. The parties had not entered into an Economy Act agreement providing for reimbursement, although they could have done so. Therefore, the general rule applied and the Army was not authorized to pay for the lost property. See also B-137208, December 16, 1958, in which the Navy had agreed to help the Interior Department transport supplies at a fixed per diem rate of reimbursement. Since no property was actually loaned, the "exception" of 30 Comp. Gen. 295 did not apply and there was no authority for Interior to pay the cost of repairing damage to the Navy ships.

One district court, in the context of a criminal case, has expressed the view, without further discussion, that the Economy Act does not authorize interagency loans of personal property. United States v. Banks, 383 F. Supp. 368, 376 (D.S.D. 1974). While GAO has not formally addressed the effect of Banks in the interdepartmental waiver context, there does not appear to be any compelling reason to change the decades of precedent starting with 30 Comp. Gen. 295.

3. Claims Involving Real Property

The Economy Act applies only to personal property. Therefore, interagency claims for damage to real property not subject to some other statutory exception are governed by the interdepartmental waiver rule and payment is generally not authorized. E.g., 31 Comp. Gen. 329, aff'd, 32 Comp. Gen. 179 (1952) (national forest).

One group of cases involves damage by military departments to real property under the control of other federal agencies in the course of military maneuvers or training exercises. The decisions consistently held that claims for restoration of the property could not be honored. 59 Comp. Gen. 93 (1979) (national forest); 44 Comp. Gen. 693 (1965) (national park recreation area). The military departments now have statutory authority to use operations and maintenance or military construction appropriations "to restore land used by that military department by permit or lease from another military department or Federal agency if the restoration is required by the permit or lease making that land available to the military department." 10 U.S.C. § 2691(a). The cases remain useful for the limited purpose of expressing the rule that applies in the absence of statutory authority.

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Other cases involve damage to government-owned buildings. In a case predating the Federal Property and Administrative Services Act of 1949, GAO advised the Selective Service System that, upon vacating premises in a federal building, it was not liable to reimburse the agency controlling the property for damage to that property. 26 Comp. Gen. 585 (1947). In 57 Comp. Gen. 130 (1977), GAO determined that the 1949 legislation did not affect the interdepartmental waiver rule where the General Services Administration is landlord. Thus, GSA is responsible for making repairs to the buildings it controls, but, as the cited decision held, is not required to reimburse the tenant agency for damages to the tenant agency's property resulting from "building failures," regardless of whether a commercial landlord would be liable in like circumstances.

Applying the interdepartmental waiver rule to a real property case involves the same type of analysis and the same elements of the rule as described previously for personal property cases. For example, 71 Comp. Gen. 1 (1991) involved the noninterfering use by the Commerce Department of a Bonneville Power Administration radio station site to broadcast weather information to the general public. Finding a close analogy to the trust theory of 41 Comp. Gen. 235 in that unreimbursed damage costs would fall upon Bonneville's customers, the decision concluded that Bonneville could charge Commerce for damage costs. A rental charge, however, is unauthorized because it would effectively subsidize those customers in a manner inconsistent with Bonneville's governing legislation. See also B-34528, May 22, 1943 (rule not applicable to property intended to be revenue-producing).

Other cases using the rationale of 71 Comp. Gen. 1 to find the interdepartmental waiver rule inapplicable are B-253291.2, February 14, 1994 (National Guard truck hit Western Area Power Administration transmission structure), and B-253613, December 3, 1993 (Federal Highway Administration construction caused damage to Tennessee Valley Authority transmission towers). In each case, if a damage claim were not permitted, the burden would have fallen not upon the government itself but upon the customers of the claimant agency.

The claim prohibition does not apply with respect to damage occurring while the property was in private ownership prior to being conveyed to the government. B-165067, September 20, 1968. Nor does it apply to property held in trust. 20 Comp. Gen. 581 (1941).

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An exception to the interdepartmental waiver rule also exists for lands in the public domain which, by definition, are not dedicated to any specific purpose. Under the Federal Land Policy and Management Act of 1976, the Interior Department's Bureau of Land Management administers lands withdrawn from the public domain for agency use. In reference to a proposed regulation, Interior asked whether, when such land is withdrawn and then relinquished by the using agency, reimbursement by the "borrowing" agency to restore the land to its original condition would be authorized. The BLM is not a typical "lending agency" because the relinquished land is not for its future use and benefit, as in other instances. Accordingly, it would be within the BLM's authority to require the borrowing agency to restore the land in the event of relinquishment. 60 Comp. Gen. 406 (1981).

4. Settlement of Interagency Claims

As a general proposition, the government cannot sue itself because the same party cannot be both plaintiff and defendant in the same lawsuit. E.g., Defense Supplies Corp. v. United States Lines Co., 148 F.2d 311 (2d Cir. 1945), cert. denied, 326 U.S. 746; United States v. Easement and Right of Way, 204 F. Supp. 837 (E.D. Tenn. 1962); 1 Op. Off. Legal Counsel 79 (1977).[57] Thus, as discussed further in Chapter 13, the resolution of interagency claims is largely a matter of comity. Agencies should first pursue good faith negotiations. If this doesn't work, GAO is available to help. See 4 C.F.R. § 101.3(c). Alternatively, the agencies may invoke the aid of the Attorney General pursuant to Executive Order 12146, § 1-4 (1979). It should be understood, however, that both of these approaches are nothing more than administrative efforts to break the impasse, and that neither GAO nor the Justice Department has enforcement authority.

It is GAO's position that the use of offset to collect an interagency claim is inappropriate. For example, tenant agencies may not reduce Standard Level User Charges (SLUC, or rent in English) payable to the General Services Administration as a collection device. 59 Comp. Gen. 515 (1980) (supplies damaged by roof leak in GSA warehouse); 59 Comp. Gen. 505 (1980) (offset against SLUC payment to recover unrelated debt not authorized). See also 57 Comp. Gen. 130 (1977).

A federal agency may use setoff to collect a claim against the Government of the District of Columbia since the United States Government and the

[57]There are exceptions, the leading one being United States v. Interstate Commerce Commission, 337 U.S. 426 (1949), in which the Attorney General appeared for both sides. The case is discussed and distinguished in United States v. Easement and Right of Way and in the 1977 Justice Department opinion.

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District of Columbia Government are separate and distinct legal entities. However, for reasons of public policy, it should not use setoff against amounts withheld from the salaries of its employees for payment of the employees' D.C. income tax. 60 Comp. Gen. 710 (1981).

E. Statutes of Limitations

1. Introduction

We are tempted to start this discussion by saying that if statutes of limitations didn't exist, we would still be litigating Revolutionary War claims. We suspect, however, that without a citation we might be accused of exaggerating, so try Lunaas v. United States, 936 F.2d 1277 (Fed. Cir. 1991), cert. denied, 112 S. Ct. 967.

During the winter of 1777–78, General George Washington made an urgent plea on behalf of his troops at Valley Forge.[58] They were short of just about everything—food, clothing, shelter, ammunition. Without help in a hurry, said G.W., the army would either have to disband or starve. Among those responding to the General's plea was a wealthy Pennsylvania merchant named Jacob DeHaven. Mr. DeHaven allegedly lent the Continental Congress $50,000 in gold and an estimated $400,000 in supplies, presumably to be repaid with 6 percent interest. Mr. DeHaven's descendants contend that the loan was never repaid, despite several attempts to petition Congress during the 1800s and early 1900s.

In 1989, plaintiff Lunaas, a descendant of Jacob DeHaven, sued on behalf of all descendants to recover a proportionate share of the repayment, then estimated to be worth as much as $140 billion, depending on whether and how the interest was compounded. An interesting twist was Article VI, clause 1 of the Constitution, which declared valid all debts contracted by the United States prior to its adoption. This clause, the plaintiffs argued, insulated their claim from the scope of any congressionally enacted statute of limitations. The courts disagreed, and held the suit time-barred under the 6-year statute of limitations of 28 U.S.C. § 2501. There was room for debate as to precisely when the claim can be said to have "accrued" for statute of limitations purposes, but under any theory it had been time-barred for over a century.

[58]We draw our facts from two sources—the Lunaas case cited in the text and a story entitled 213 Years After Loan, Uncle Sam Is Dunned by Lisa Belkin, appearing in the New York Times for May 27, 1990.

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As the Lunaas case illustrates, a statute of limitations is a statutorily prescribed deadline for filing a claim or lawsuit. The purpose of a statute of limitations is to bar stale claims. It promotes justice "by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348–49 (1944). See also Friedman v. United States, 310 F.2d 381, 401 (Ct. Cl. 1962), cert. denied sub nom. Lipp v. United States, 373 U.S. 932. The theory is that "even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." Railroad Telegraphers, 321 U.S. at 349; Twitchco, Inc. v. United States, 348 F. Supp. 330, 335 (M.D. Ala. 1972).

If there is no applicable statute of limitations, and no indication that the absence means that Congress doesn't want one in that particular context, an agency may include a reasonable limitation period administratively by regulation or contract. B-206439, October 27, 1982.

A statute of limitations may use varying terminology to make its point. Ideally, it will use language like "received by" which leaves no room for interpretation. It may also use the word "filed." The Court of Appeals for the Federal Circuit has held that "filed" is ambiguous and can be interpreted as either "received" or "postmarked." Parker v. Office of Personnel Management, 974 F.2d 164 (Fed. Cir. 1992). An agency administering a statute of limitations which uses "file" or "filed" should define the term in its regulations. Id. at 168.

2. The Barring Act

a. Applicability and General Requirements

Informally known as the "Barring Act," 31 U.S.C. § 3702(b) provides a 6-year statute of limitations on the filing of claims cognizable by GAO. Although, as we have seen, administrative claims settlement authority has existed since 1817, it was not subject to a statute of limitations until 1940. GAO first recommended enactment of a statute of limitations in its 1939 annual report. Annual Report of the Comptroller General of the United States for the Fiscal Year Ended June 30, 1939 at 90–92 (1939). Congress agreed. As the pertinent Senate report noted, "claims which accrued during the period of the Spanish-American War and the period immediately following are not uncommon and claims growing out of the Civil War period are not yet so unusual as to cause comment." S. Rep. No. 1338, 76th Cong., 3d

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Sess. 2 (1940). Originally enacted in 1940, the statute provided a 10-year limitation which was reduced to 6 years in 1975. See 58 Comp. Gen. 738 (1979).

The law provides that claims within the scope of 31 U.S.C. § 3702 "must contain the signature and address of the claimant or an authorized representative" and, with certain exceptions, "must be received by the Comptroller General within 6 years after the claim accrues." 31 U.S.C. § 3702(b)(1). A claim which does not satisfy the signature requirement does not satisfy the Barring Act. 68 Comp. Gen. 681 (1989), aff'd, 69 Comp. Gen. 455 (1990); B-201936, April 21, 1981. Unless the claimant has first made a timely filing, a communication from an agency on behalf of a claimant is not a "claim" for purposes of the Barring Act. 25 Comp. Gen. 670, 673 (1946). Nor is an agency's request for an advance decision, unless accompanied by a voucher signed by the claimant. B-201936, April 21, 1981. See also 60 Comp. Gen. 354 (1981).

While the statute no longer spells out the consequences of late filing, the version in effect prior to the 1982 recodification of Title 31—31 U.S.C. § 71a (1976)—made those consequences abundantly clear: the claim is "forever barred." While a claimant who files a barred claim may be furnished an explanation as a matter of courtesy, the statute authorizes a rather abrupt response. It is legally sufficient to simply return the claim with a copy of the Barring Act, and "no further communication is required." 31 U.S.C. § 3702(b)(3).

The Barring Act expressly exempts claims by "a State, the District of Columbia, or a territory or possession of the United States." Id. § 3702(b)(1)(B).[59] It therefore applies essentially to claims by individuals, business entities, and foreign governments. The exemption for claims by a state does not extend to claims by a city, county, or other political subdivision. B-199838, October 20, 1981; B-159110, June 27, 1966. Nor does it extend to state institutions not acting in a sovereign or governmental capacity. B-212848, October 24, 1983 (University of Virginia).

The Barring Act is limited to claims cognizable by GAO under 31 U.S.C. § 3702(a). Thus, if an agency has authority to make "final and conclusive" settlement of claims of a given type, the Barring Act will not apply. See 42 Comp. Gen. 337, 339 (1963). However, for claims within GAO's claims settlement jurisdiction, the Barring Act will apply and this is not affected

[59]Neither GAO nor the courts have apparently had the occasion to address whether a concept of "laches" might nevertheless apply to claims subject to this exemption. Application of the Barring Act to interagency claims also does not appear to have been considered.

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by the fact that the administrative agency involved may perform the actual adjudication. Id. See also 61 Comp. Gen. 295 (1982) (administrative correction of erroneously withheld deductions). The Barring Act does not apply to court judgments even though GAO issues a "settlement" on them since this authority does not stem from 31 U.S.C. § 3702(a). B-49485-O.M., June 3, 1946. Nor does it bar the defense of recoupment. 63 Comp. Gen. 462 (1984).

GAO has repeatedly stated that it has no authority to waive the Barring Act or to extend the time limit. E.g., 62 Comp. Gen. 80, 83 (1982); 42 Comp. Gen. 622, 624 (1963); 25 Comp. Gen. 670, 672 (1946); B-196634, December 13, 1979. Cf. O'Callahan v. United States, 451 F.2d 1390, 1394 (Ct. Cl. 1971) (court "cannot restructure [28 U.S.C. § 2501] to satisfy our own ideas of what is right and just").[60]

The year 1989 saw an important change in GAO's interpretation of the Barring Act. Prior to that year, GAO had been consistently literal in insisting that the claim be filed with GAO itself. E.g., 57 Comp. Gen. 281, 283 (1978); 32 Comp. Gen. 267 (1952). Filing with any other agency did not count even though that agency rather than GAO would actually adjudicate the claim and regardless of the reason for the failure to file with GAO. E.g., B-199521, August 19, 1980; B-195564, September 10, 1979. By the late 1980s, it became apparent that a new look at this position was in order. When the Barring Act was first enacted in 1940, agencies could not pay undisputed invoices, let alone claims, once the relevant appropriation had expired. All of these had to come to GAO. As discussed in Chapter 5, this changed starting in 1956. At the same time, GAO's claims settlement role was evolving into essentially an appellate one, with agencies now adjudicating all of their own claims in the first instance. There was no longer any reason for a rigidly literal interpretation.

Consequently, in December 1989, GAO amended 4 C.F.R. § 31.5(a) to read as follows:

"All claims against the United States Government, except as otherwise provided by law, are subject to the 6-year statute of limitations contained in 31 U.S.C. 3702(b). To satisfy the statutory limitation, a claim must be received by the General Accounting Office, or by the department or agency out of whose activities the claim arose, within 6 years from the date the claim accrued. The burden of establishing compliance . . . rests with the claimant."

[60]In applying the Barring Act, GAO mostly follows whatever the Court of Federal Claims does with respect to its similar statute of limitations, 28 U.S.C. § 2501. See, e.g., 71 Comp. Gen. 398, 399 (1992).

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Thus, a timely filing with the cognizant agency is sufficient, and there is no longer a need to send claims to GAO solely for Barring Act purposes. While the regulation gives claimants the option of filing with either the agency or GAO, as a practical matter a claimant has nothing to gain by filing a claim with GAO in the first instance. Note also that it is the receipt and not the mailing that counts.

The Barring Act does not apply to claims for money held by the government in trust for others. This concept embraces funds deposited with the government under various statutory authorities which the government holds in the Treasury as funds of the depositor rather than as appropriated funds of the government. 42 Comp. Gen. 622, 623 (1963). It has also been applied to the special deposit account for the proceeds of checks withheld from delivery to certain foreign countries under 31 U.S.C. § 3329. 70 Comp. Gen. 612 (1991). Further examples are 66 Comp. Gen. 40 (1986) (savings deposits of enlisted members of the uniformed services) and B-201669, November 26, 1985 (trust account for Unclaimed Moneys of Individuals Whose Whereabouts Are Unknown established by 31 U.S.C. § 1322). Money erroneously transferred from a trust account to a non-trust account does not lose its trust fund status for purposes of the Barring Act. B-134569-O.M., January 13, 1958.

If securing the necessary evidentiary support is likely to cause substantial delay, claimants may protect their rights by filing their claims subject to later completion of the supporting evidence. See B-197661, May 22, 1980. See also United States v. Kales, 314 U.S. 186 (1941).

b. Accrual of the Claim

The Barring Act, as does any statute of limitations, starts to run when the claim first "accrues." The rule is that a claim first accrues on the date when all events have occurred which fix the liability, if any, of the United States, entitling the claimant to sue or to file a claim. E.g., Chevron U.S.A., Inc. v. United States, 923 F.2d 830 (Fed. Cir. 1991), cert. denied, 112 S. Ct. 167. Lins v. United States, 688 F.2d 784 (Ct. Cl. 1982), cert. denied, 459 U.S. 1147; Empire Institute of Tailoring, Inc. v. United States, 161 F. Supp. 409 (Ct. Cl. 1958); Kinsey v. United States, 13 Cl. Ct. 585 (1987), aff'd, 852 F.2d 556 (Fed. Cir. 1988); 42 Comp. Gen. 622 (1963); 42 Comp. Gen. 337 (1963).

Where a claim is based upon a contractual obligation of the government to pay money, the claim first accrues on the date when the payment becomes due and is wrongfully withheld in breach of the contract. 44 Comp. Gen. 1, 7 (1964); B-203624, July 7, 1982 (both cases citing Cannon v. United States, 146 F. Supp. 827 (Ct. Cl. 1956)). Thus, in one case, a school claimed tuition

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payments for courses of instruction given to veterans. The pertinent agreement provided for payments to be made "each four weeks in arrears." GAO found that a new claim accrued when each payment became due (that is, during each four-week period), notwithstanding that the school may have reserved an option to delay billing until courses had been completed. B-147497, August 31, 1964. See also B-196982, September 4, 1980.[61]

The best summary of the accrual of claims for back pay is 62 Comp. Gen. 275 (1983). The claims fall into two categories for Barring Act purposes. First are claims which are payable at the time the employee performs the services in question, with no other condition precedent to payment. These accrue at the time the work is performed. Id. at 276–77; 58 Comp. Gen. 3 (1978). Second are claims under statutes which require an administrative determination of the claim's validity before they can be paid, an example being the Back Pay Act. These accrue on the date of the administrative determination. 62 Comp. Gen. at 277, amplifying 61 Comp. Gen. 57 (1981).

Several other types of claims accrue as follows, many of which are based on common sense:

- Claims stemming from military discharges accrue on the date of discharge. Mitchell v. United States, 26 Cl. Ct. 1329 (1992); Jones v. United States, 25 Cl. Ct. 235 (1992).
- A claim for a Fifth Amendment taking accrues at the time the taking occurs. Alliance of Descendants of Texas Land Grants v. United States, 27 Fed. Cl. 837, 842 (1993).
- A claim for travel expenses accrues when the travel is performed. B-233352, June 11, 1990.
- A claim for benefits under the Missing Persons Act accrues when the administrative determination of death is made. 35 Comp. Gen. 600 (1956).
- A claim for a death gratuity under 10 U.S.C. Chapter 75 accrues on the date of death or determination of presumptive death. 42 Comp. Gen. 622 (1963).
- A claim for reimbursement of an amount refunded to the government accrues on the date of the refund. 42 Comp. Gen. 337 (1963).

Both GAO and the Court of Federal Claims and its predecessors have recognized what has come to be known as the "continuing claim" doctrine under which, in the case of compensation due and payable periodically, each failure to pay is regarded as giving rise to a new claim. For example,

[61]As noted earlier in this chapter under the Contract Disputes Act heading, the CDA provides its own time limitation on the contractor's initial filing of the claim with the contracting officer. We include this paragraph of text because not all "contractual obligations" are procurement contracts governed by the CDA.

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numerous cases state GAO's view that pay claims accrue on a daily basis, i.e., as the work is performed. E.g., 29 Comp. Gen. 517 (1950); B-214533, July 23, 1984; B-210748, August 3, 1983. Thus, where an agency used the wrong rate to calculate an employee's pay, the employee's claim for the correct amount could be allowed for 6 years back from the date the claim was filed. B-214245, July 23, 1984. As this case illustrates, under the continuing claim theory, as long as the recurring situation continues, the claimant is never totally barred but can claim or sue for the last 6 years of the allegedly wrongful deprivation.

Overtime claims are also continuing claims, accruing at the end of each pay period for which the agency fails to pay the correct amount. Doyle v. United States, 20 Cl. Ct. 495 (1990); Blair v. United States, 15 Cl. Ct. 763 (1988). Perhaps the most detailed discussion of the continuing claim doctrine may be found in Friedman v. United States, 310 F.2d 381 (Ct. Cl. 1962), cert. denied sub nom. Lipp v. United States, 373 U.S. 932.

The continuing claim concept has not been without criticism. In Hart v. United States, 910 F.2d 815 (Fed. Cir. 1990), the court limited its application, holding the concept inapplicable to a claim for annuity benefits under the military Survivor Benefit Plan on the grounds that all events fixing the government's liability had occurred by the day after the death of the claimant's spouse. The precise scope of Hart is not clear. For example, in one case, the Claims Court stated that, as a result of Hart, "this court no longer recognizes the continuing claim doctrine." Sankey v. United States, 22 Cl. Ct. 743, 746, aff'd mem., 951 F.2d 1266 (Fed. Cir. 1991). Other cases disagree with Sankey, taking the position that Hart limited the doctrine but did not overrule it. Polite v. United States, 24 Cl. Ct. 508 (1991); Acker v. United States, 23 Cl. Ct. 803 (1991). Still others straddle the fence. E.g., Tabbee v. United States, 30 Fed. Cl. 1, 5 (1993).

GAO has said that it will follow Hart in those situations in which it is clear that all events necessary to establish the claim occurred more than 6 years before the claim was filed. 71 Comp. Gen. 398 (1992). Thus, GAO has applied Hart to deny annuity claims under the Survivor Benefit Plan. Id.; B-249968, February 16, 1993. However, GAO has continued to apply the continuing claim doctrine in claims for back pay (B-251301, April 23, 1993) and military retired pay (B-244827, September 9, 1992; B-246871, June 4, 1992).

c. Tolling

To "toll" a statute of limitations means to suspend it or temporarily stop it from running. Black's Law Dictionary 1488 (6th ed. 1990). The Barring Act

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contains a tolling provision for certain wartime claims. When a claim of any person serving in the United States military or naval forces accrues in time of war, or when war intervenes within 5 years after its accrual, the claim may be presented within 5 years after peace is established or 6 years after accrual, whichever is later. 31 U.S.C. § 3702(b)(2). By its terms this provision applies to members of the Armed Forces and not to civilian employees. Therefore, it could not help a civilian employee of the Navy Department interned with the crew of the U.S.S. Pueblo in North Korea in 1968 who filed a claim for overtime compensation for his internment which was not received until after the statute of limitations had expired. B-194474, October 24, 1979.

Another statutory provision relevant to claims of military personnel is section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 525, which provides that periods of military service shall not be included in applying a statute of limitations, whether the claim or cause of action accrued prior to or during the service. It is not necessary for the claimant to demonstrate hardship or prejudice resulting from military service in order to qualify for tolling. Conroy v. Aniskoff, 113 S. Ct. 1562 (1993). GAO decisions applying the Soldiers' and Sailors' Relief Act in various contexts include 63 Comp. Gen. 70 (1983), 41 Comp. Gen. 812 (1962), and 35 Comp. Gen. 527 (1956). GAO does not regard it as applicable to the 3-year limitation period on requesting waiver under 10 U.S.C. § 2774. B-234163, March 8, 1990.

Another form of tolling is the rule that when a right depends upon the happening of an event or contingency, the claim based on that right does not accrue, and hence the statute of limitations does not begin to run, until the happening of that event or contingency. 20 Comp. Gen. 734 (1941). Under a common application of this principle, if a particular administrative determination or remedy is mandatory, then the statute of limitations will not begin to run until it takes place. If, however, it is permissive, it will not toll the statute. Brighton Village v. Assoc. United States, 31 Fed. Cl. 324, 331–33 (1994); P.B. Dirtmovers, Inc. v. United States, 30 Fed. Cl. 474, 476–77 (1994). Thus, where, by statute, a claim is not cognizable until some particular determination is made by a designated government agency, the claim does not accrue until that determination has been made. E.g., Camacho v. United States, 494 F.2d 1363 (Ct. Cl. 1974); File v. United States, 17 Cl. Ct. 823 (1989); 62 Comp. Gen. 227 (1983); 50 Comp. Gen. 607 (1971); 34 Comp. Gen. 605 (1955). A previously noted example is the entitlement to benefits under the Missing Persons Act. 35 Comp. Gen. 600 (1956). Another is determinations under

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the Back Pay Act. 62 Comp. Gen. 275 (1983), amplifying 61 Comp. Gen. 57 (1981).

Seeking help from GAO is permissive. Therefore, coming to GAO for a decision or for review of a claim does not toll the statute of limitations for commencing a lawsuit. Withers v. United States, 69 Ct. Cl. 584 (1930); Carlisle v. United States, 29 Ct. Cl. 414 (1894). Nor, if an administrative claim has not already been timely filed, does it toll the Barring Act. 58 Comp. Gen. 3 (1978).

For purposes of the mandatory versus permissive distinction in the tolling context, mandatory means required by statute as a prerequisite to filing the claim or lawsuit. File, 17 Cl. Ct. at 830–31. Where an administrative remedy is not required by statute, a court has no authority to impose it by rule. Clyde v. United States, 80 U.S. (13 Wall.) 38 (1871).

The doctrine of "equitable tolling" permits a court to waive a statute of limitations when the court finds that considerations of equity warrant it. Prior to 1990, equitable tolling had extremely limited application to claims or suits against the United States. One situation was where the claimant did not know that he or she had a claim. This was limited mostly to cases where the government concealed relevant facts or where the claim was "inherently unknowable" at the accrual date. Welcker v. United States, 752 F.2d 1577, 1580 (Fed. Cir. 1985); 70 Comp. Gen. 292 (1991). In 1990, the Supreme Court held in Irwin v. Department of Veterans Affairs, 498 U.S. 89, that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." Id. at 95–96. "Congress, of course, may provide otherwise if it wishes to do so." Id.

The full impact of Irwin is not likely to be known for some time. For one good discussion, see the opinion of Chief Judge Nies concurring and dissenting in part in Wood-Ivey Systems Corp. v. United States, 4 F.3d 961, 964–68 (Fed. Cir. 1993). The Court of Federal Claims has indicated that it will be inclined to look for factors like those the Supreme Court noted in Irwin, for example, where a plaintiff actively pursued his remedy but filed a defective pleading, or where a claimant is induced or tricked by his adversary's misconduct into missing the deadline. D'Andrea v. United States, 27 Fed. Cl. 612 (1993); Glick v. United States, 25 Cl. Ct. 435 (1992). One court has applied equitable tolling to permit a suit under the Federal Tort Claims Act where there were no apparently compelling reasons for the late filing. Schmidt v. United States, 933 F.2d 639 (8th Cir. 1991).

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d. Barring Act vs. Other Statutes

Numerous other statutes of limitations exist in various contexts. For example, under 31 U.S.C. § 3726(a), a claim for transportation services must be received within 3 years after it accrues (generally when the shipment is delivered). The claims are adjudicated by the General Services Administration. An illustrative case is B-197661, May 22, 1980. A claimant may seek GAO review within the 3-year period or not later than 6 months after GSA's decision, whichever is later. 31 U.S.C. § 3726(g); B-227179.2, January 5, 1990.

If a more specific statute of limitations relates to claims cognizable by GAO, its relationship to the Barring Act will depend on whether it applies to the administrative settlement of claims or is limited to the filing of suit. As a general proposition, a specific statute of limitations applicable to administrative settlement will take precedence over 31 U.S.C. § 3702(b), the more general provision. See 4 C.F.R. § 31.5(a) (all claims subject to Barring Act "except as otherwise provided by law"), 31.5(c).

However, the Comptroller General has frequently held that time limitations applicable to the commencement of "actions at law" do not affect the authority to settle claims administratively under 31 U.S.C. §§ 3702(a) and (b). An early discussion of this point appears in B-15487, February 16, 1948, in which it was held that the expiration of the time limit for filing suit in the Court of Claims did not preclude administrative settlement by GAO.[62] The principle was restated in 29 Comp. Gen. 54 (1949). To take a more recent illustration, the time limit for filing a claim under the Fair Labor Standards Act is the six years prescribed by 31 U.S.C. § 3702(b), notwithstanding a two-year statute of limitations for commencing actions at law. Thus, a claim filed under the FLSA more than two years but less than six years after it accrues can still be considered administratively, although the claimant will have lost the right of recourse to the courts. 57 Comp. Gen. 441 (1978). The theory in all of these cases is that expiration of the limitation period for filing suit eliminates that particular remedy but does not destroy the underlying right.

The principle has also been applied with respect to shorter statutes of limitations in the Communications Act (51 Comp. Gen. 20 (1971); B-199458-O.M., February 23, 1981), and the Suits in Admiralty Act (29 Comp. Gen. 54 (1949); B-158984-O.M., June 13, 1966). The Attorney General reached similar conclusions in 41 Op. Att'y Gen. 80 (1951) and 20

[62]The general statutes of limitations applicable to filing suit in the district courts and the Court of Federal Claims, 28 U.S.C. §§ 2401(a) and 2501, are 6 years. Prior to the 1975 amendment to 31 U.S.C. § 3702(b), the Barring Act was 10 years. Now they are all the same. Thus, while B-15487 remains valid to illustrate the point, that specific situation could no longer arise.

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Op. Att'y Gen. 753 (1894). Also in accord are McClure v. United States, 19 Ct. Cl. 18 (1883), and 5 Comp. Dec. 255 (1898).

F. Assignment of Claims

1. Anti-Assignment Statutes: Origins and Overview

Since the early days of the Republic, the statutes of the United States have reflected a policy against the assignment of claims in transactions involving the federal government. At the present time, this policy is found in two statutes, 31 U.S.C. § 3727 and 41 U.S.C. § 15, which include the traditional prohibitions and a major exception. The authorities have used a variety of names to refer to these statutes, with no real consistency. As do most courts, we will refer to them collectively as the Assignment of Claims Act.

Subsection (b) of 31 U.S.C. § 3727 prohibits the assignment of claims against the United States except under fairly rigid conditions. It originated as section 1 of legislation enacted in 1853 entitled "An Act to prevent Frauds upon the Treasury of the United States" (10 Stat. 170). The anti-assignment concept was not new even then, however, having its roots in earlier anti-assignment statutes, 9 Stat. 41 (1846) and 1 Stat. 245 (1792).

Subsection (a) of 41 U.S.C. § 15 prohibits the transfer of any government contract or interest therein. This provision derives from Civil War legislation, specifically the Act of July 17, 1862, ch. 200, § 14, 12 Stat. 594, 596.

From the contract perspective, 31 U.S.C. § 3727(b) "pertains to claims for work already done," while 41 U.S.C. § 15, involving executory contracts, is more concerned with continuing obligations. Tuftco Corp. v. United States, 614 F.2d 740, 744 n.4 (Ct. Cl. 1980). Of course this is only one application of 31 U.S.C. § 3727(b), which on its face applies to all claims. "It would seem to be impossible to use language more comprehensive than this." Spofford v. Kirk, 97 U.S. 484, 488 (1878).

The remainder of both statutes stems from the Assignment of Claims Act of 1940, Pub. L. No. 76-811, 54 Stat. 1029, designed to aid national defense contracting by authorizing the assignment of contract proceeds within limits. The 1940 legislation added identical provisions to both

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anti-assignment statutes.[63] The authority granted by the 1940 amendments has become a very important element in the financing of government contracts. Pertinent provisions of the Federal Acquisition Regulation (FAR) are found in 48 C.F.R. Subparts 32.8 and 42.12.

2. The Prohibitions

a. 31 U.S.C. § 3727(b): Assignment of Claims

The portion of the statute prohibiting the assignment of claims is 31 U.S.C. § 3727(b):

> "An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued. The assignment shall specify the warrant, must be made freely, and must be attested to by 2 witnesses. . . . An assignment under this subsection is valid for any purpose."

Subsection (a) makes clear that subsection (b) applies to any claim, portion of a claim, interest in a claim, or authorization to receive payment. Thus, in order for an assignment to be valid, (1) the claim must have been allowed and its amount determined; (2) the assignment must be executed in the presence of two attesting witnesses; and (3) the warrant for payment must have been issued and must be recited on the assignment.

The third condition—issuance of the warrant—is the most problematic. When the statute was first enacted, the payment process was very different than it is today. In brief, after a claim was examined and allowed, a warrant was issued, signed by an appropriate department official, countersigned by one of the Treasury comptrollers, and then presented to the Treasurer for payment. The process is described in detail in McKnight's Case, 13 Ct. Cl. 292 (1877). Under modern payment procedures, there is no document which corresponds precisely to the old warrant. "Warrant" in this context has since been interpreted to mean the check itself. 8 Comp. Gen. 184 (1928).[64]

The Supreme Court has stated that the primary purpose of the prohibition on the assignment of claims "was undoubtedly to prevent persons of

[63]The difference in language today results from the 1982 recodification of Title 31 and the reorganization of 41 U.S.C. § 15 by the Federal Acquisition Streamlining Act of 1994 (Pub. L. No. 103-355, § 2451).

[64]As a practical matter, this is of little value to the parties to the assignment and makes compliance a near impossibility. The statute was intended to make assignments difficult, but not impossible. Perhaps a document one step closer to the now-obsolete warrant—although still no great favor to the parties—would be a properly certified payment voucher.

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influence from buying up claims against the United States, which might then be improperly urged upon officers of the Government." United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 373 (1949); United States v. Shannon, 342 U.S. 288, 291 (1952). In other words, it was designed to protect the United States from secret assignment arrangements. American Nat'l Bank and Trust Co. v. United States, 23 Cl. Ct. 542, 546 (1991). Additional purposes are "to prevent possible multiple payment of claims, to make unnecessary the investigation of alleged assignments, and to enable the Government to deal only with the original claimant." Aetna, 338 U.S. at 373; Shannon, 342 U.S. at 291. Still another is to save to the United States defenses by way of setoff and counterclaim which may be available to the United States against an assignor but not an assignee. Shannon, 342 U.S. at 291–92; B-194029, June 18, 1979.

All of these purposes have one thing in common—the protection of the government. Indeed, it has long been recognized that 31 U.S.C. § 3727(b) exists solely to protect the government, not the parties to the assignment. E.g., Martin v. National Surety Co., 300 U.S. 588, 594 (1937); Goodman v. Niblack, 102 U.S. 556, 560 (1880); 47 Comp. Gen. 522, 524 (1968). The courts have interpreted the statute in light of this overall purpose. National Surety, 300 U.S. at 596. Under this approach, the courts have developed two important principles which largely ameliorate the apparent strictness of the statutory language:

- Subsection 3727(b) applies only to voluntary assignments and not to assignments by operation of law.
- Since 31 U.S.C. § 3727(b) is for the protection of the government, most (but not all) courts hold that it can be waived by the government.

Prior to 1982, the statute declared noncomplying assignments to be "null and void," and the courts often reached precisely this result. E.g., National Bank of Commerce of Seattle v. Downie, 218 U.S. 345 (1910); Amoco Oil Co. v. United States, 3 Cl. Ct. 785 (1983). With the development of the waiver doctrine, it is now more accurate to say that a noncomplying assignment is voidable at the option of the government. Apparently to reflect this judicial evolution, the 1982 recodification of Title 31 dropped the "null and void" language. See Matter of Topgallant Lines, Inc., 125 B.R. 682, 690–91 (Bankr. S.D. Ga. 1991).

Even before the recodification, "null and void" did not mean null and void for all purposes. The Assignment of Claims Act addresses the validity of assignments as against the United States. It does not purport to address

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the validity of the assignment as between the assignor and assignee, which is a separate question. Thus, an assignment which is invalid with respect to the government may nevertheless be valid between the parties. Segal v. Rochelle, 382 U.S. 375 (1966); Martin v. National Surety Co., 300 U.S. 588 (1937); 55 Comp. Gen. 744, 746 (1976); B-176890, April 18, 1973; B-169420, October 22, 1970.

b. Assignments to Which 31 U.S.C. § 3727(b) Applies

The rule is firmly established that 31 U.S.C. § 3727(b) applies to voluntary assignments and not to assignments by operation of law. E.g., National Bank of Commerce v. Downie, 218 U.S. 345, 356 (1910); Erwin v. United States, 97 U.S. 392 (1878); 36 Comp. Gen. 157 (1956). Thus, a judgment or court order directing payment to someone other than the claimant is not an assignment prohibited by section 3727(b). Houston v. Ormes, 252 U.S. 469, 473–74 (1920) (payment to court-appointed receiver); 24 Comp. Dec. 779 (1918) (payment to plaintiff's counsel). Some other examples of assignments arising by "operation of law" are as follows:

- Transfer by intestate succession. Erwin v. United States, 97 U.S. 392 (1878).
- Transfer by consolidation or merger with the successor of a claimant corporation. Seaboard Air Line Ry. v. United States, 256 U.S. 655 (1921).
- Transfer by judicial sale. Western Pacific RR Co. v. United States, 268 U.S. 271 (1925).
- Transfer by subrogation to an insurer. United States v. Aetna Casualty & Surety Co., 338 U.S. 366 (1949); Quarles Petroleum Co. v. United States, 551 F.2d 1201 (Ct. Cl. 1977); 36 Op. Att'y Gen. 553 (1932).
- Transfer by statutory provision to a trustee or receiver in bankruptcy. Erwin, 97 U.S. at 397; McKay v. United States, 27 Ct. Cl. 422 (1892). Similarly, a subsequent assignment by the assignee in bankruptcy is also exempt from the statute when judicially mandated. 3 Comp. Gen. 623 (1924); B-183058, March 7, 1975. However, the exemption does not extend to a "limited receiver" appointed solely to collect funds from the government on behalf of a single creditor. Patterson v. United States, 354 F.2d 327 (Ct. Cl. 1965); B-244992.2, November 16, 1993.
- Assignment pursuant to court order where there is no suggestion of collusive or sham litigation. Keydata Corp. v. United States, 504 F.2d 1115 (Ct. Cl. 1974). See also 36 Comp. Gen. 157 (1956); B-183058, March 7, 1975.

In addition, the Supreme Court has recognized exceptions for two types of voluntary assignments because of their close relationship to "operation of law" situations. First is transfer by testamentary disposition (will), by analogy to intestate succession. Erwin, 97 U.S. at 397 (the reference to

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"devisees" means those taking under a will); Shannon, 342 U.S. at 292. Second is the voluntary assignment by an insolvent debtor for the benefit of creditors, by analogy to assignments in bankruptcy. Goodman v. Niblack, 102 U.S. 556 (1880); Shannon, 342 U.S. at 292; 47 Comp. Gen. 522 (1968). With these two exceptions, voluntary assignments are subject to the Assignment of Claims Act and must meet the requirements of 31 U.S.C. § 3727(b) in order to bind the government.

(1) Attorney's liens

A common application of the rule that voluntary assignments are subject to the Assignment of Claims Act is the attorney's lien. An early Supreme Court case, Nutt v. Knut (we do not make these up), 200 U.S. 12 (1906), dealt with a contingent fee agreement under which an attorney was to receive one-third of the amount allowed on a claim against the United States. By itself, no problem with that, said the Court. It does no more than establish the basis for determining the attorney's compensation. Id. at 21. See also Wright v. Tebbitts, 91 U.S. 252 (1875). However, the agreement also purported to give the attorney a lien on the claim. "In effect or by its operation it transferred or assigned to the attorney in advance of the allowance of the claim such an interest as would secure the payment of the fee stipulated to be paid," and this violated the Assignment of Claims Act. Knut, 200 U.S. at 20. This was followed some years later in Calhoun v. Massie, 253 U.S. 170, 175 (1920).

There is now a considerable body of case law for the proposition that an attorney's retainer or contingent fee agreement based on either a percentage of the amount to be recovered or a specific dollar amount to be paid from the recovery does not create an enforceable lien against the United States, regardless of its validity as between the attorney and client.[65] An often-cited Court of Claims case is Pittman v. United States, 116 F. Supp. 576 (Ct. Cl. 1953), cert. denied, 348 U.S. 815. A contractor hired an attorney to prosecute a claim against the government and agreed to pay the attorney 15 percent of the amount recovered, to be paid from the recovered funds. The government allowed the claim but offset the entire amount of the award on account of other outstanding liabilities. The attorney sued, arguing that he had a lien against the award from the time it was made. Wrong, held the court. "Call it an attorney's lien, an equitable interest, or by any other name, the contract between plaintiff and his client gave over to plaintiff an interest in his client's claim against the

[65]Of course an assignment in compliance with section 3727(b) would be effective, but this is unlikely since fee agreements are customarily entered into at a very early stage of the representation.

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Government," a violation of the statute. Id. at 579. The court discussed and applied Nutt v. Knut, which—

"stands for the broad principle that any attempt to impress a lien upon the proceeds of a claim against the United States as security for the payment of an attorney's fee is within the ends to which the prohibition of [31 U.S.C. § 3727(b)] was aimed."

Id. at 580.[66] The fact that the attorney's lien is prescribed by state statute makes no difference. Tucker v. United States, 7 Cl. Ct. 374 (1985).[67]

A variation occurred in Schwartz v. United States, 16 Cl. Ct. 182 (1989). Plaintiff attorney had represented a client in prosecuting a claim with the Bureau of Indian Affairs. The plaintiff, pursuant to a contingent fee agreement with his client, asked the BIA to issue the check to the attorney and client jointly, which a BIA employee apparently agreed to do. Instead, however, the BIA deposited the money in the client's Individual Indian account, whereupon the client withdrew the money. The attorney then sued the government for his fee. The court held that the purported assignment was not binding on the government, and that the BIA employee's alleged promise was not enough to constitute a waiver of 31 U.S.C. § 3727(b).

(2) Tax refunds

Tax refund claims are fully subject to the Assignment of Claims Act. E.g., In re Freeman, 489 F.2d 431 (9th Cir. 1973). An assignment to a "discounter"—one who advances funds to a taxpayer and obtains in return an assignment of the refund—is not enforceable against the government. The Internal Revenue Service cannot be required to transmit the refund to the discounter. Knight v. United States, 596 F. Supp. 540 (M.D. Ga. 1984), aff'd mem., 762 F.2d 1022 (11th Cir. 1985); In re R & L Refunds, Inc., 96 B.R. 105 (Bankr. W.D. Ky. 1988). An assignment of a tax refund to the taxpayer's attorney is similarly unenforceable against the government, but may nevertheless be valid between the parties. Danning v. Mintz, 367 F.2d 304 (9th Cir. 1966); In re Lagerstrom, 300 F. Supp. 538 (S.D. Ill. 1969).

[66]See also United States v. Transocean Air Lines, Inc., 386 F.2d 79 (5th Cir. 1967), cert. denied, 389 U.S. 1047; Conlon v. Adamski, 77 F.2d 397 (D.C. Cir. 1935); Jung v. United States, 701 F. Supp. 175 (E.D. Wis. 1988); Kearney v. United States, 285 F.2d 797 (Ct. Cl. 1961); 49 Comp. Gen. 44, 47 (1969); B-179424, November 13, 1973; B-63597, February 21, 1952; B-68587, November 10, 1949; B-68587, July 14, 1949.

[67]There is lack of unanimity on this point. The court in Malman v. United States, 202 F.2d 483 (2d Cir. 1953), found an assignment by operation of law. In Knight v. United States, 982 F.2d 1573 (Fed. Cir. 1993), the court found a similar lien ineffective, basing its holding on sovereign immunity and the supremacy clause.

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Under one type of arrangement, the refund is paid into an account at a bank which has made a "refund anticipation loan" to the taxpayer. Noncompliance with the Assignment of Claims Act does not impede payment of the refund into the account since the account is in the name of the taxpayer. With the IRS thus out of the picture, the rights and liabilities of the nonfederal parties are determined under state law. E.g., In re Martin, 167 B.R. 609 (Bankr. D. Ore. 1994).

In United States v. Sinton Dairy Foods Co., 775 F. Supp. 1417 (D. Colo. 1991), the IRS issued a refund check to a corporation and it was negotiated by a successor corporation which had acquired all of the payee corporation's assets, including potential tax refunds, by assignment. Finding that the assignment was voidable at the government's discretion, and that the government retained a property interest in the check until cashed by the payee, the court held the IRS entitled to recover the refund.

A provision of the Bankruptcy Code, 11 U.S.C. § 1325(c), authorizes the court, upon confirmation of a Chapter 13 plan, to "order any entity from whom the debtor receives income to pay all or any part of such income to the trustee." In In re I.C. Cochran, 141 B.R. 270 (M.D. Ga. 1992), the court found this provision in conflict with the Assignment of Claims Act and held that it impliedly modified the Act to permit the assignment of tax refunds to a trustee by means of income deduction orders. The court distinguished the type of assignment considered in cases like Knight. Id. at 273.

(3) Just compensation claims

The relationship of the Assignment of Claims Act to claims resulting from Fifth Amendment takings depends on the type of proceeding involved. It has been held that the Assignment of Claims Act does not apply to the distribution phase in a Declaration of Taking Act condemnation. United States v. 717.42 Acres of Land, 955 F.2d 376 (5th Cir. 1992). In this type of proceeding, the government files a declaration of taking and deposits the estimated just compensation into the registry fund of the court.[68] Title passes by operation of law upon filing the declaration, and the United States becomes irrevocably committed to pay.

[68]Another case involving money paid into a court's registry fund is Martin v. National Surety Co., 300 U.S. 588 (1937), upon which the 717.42 Acres court relied. Rival claims in that case were an assignment to a contractor's surety and a power of attorney given to a creditor. The Court found the Assignment of Claims Act inapplicable because the "fund is in court to be distributed to rival claimants, with the Government discharged irrespective of the outcome." 300 U.S. at 595.

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In contrast, in a "complaint only" condemnation, the court's determination of just compensation is essentially an offer which the government is free to accept or reject, and a taking does not occur unless and until the government makes payment. In this type of condemnation, an assignment of the landowner's interest in the award is subject to the Assignment of Claims Act. United States v. Certain Lands in the Town of Highlands, 46 F. Supp. 386 (S.D.N.Y. 1942).

The assignment of an inverse condemnation claim is also subject to 31 U.S.C. § 3727(b). Cooper v. United States, 8 Cl. Ct. 253 (1985). Cooper was a suit by a person who had acquired land which had been flooded by actions of the Corps of Engineers. The court held that only the owner at the time of the taking is entitled to be compensated for the taking, and that an attempt by the owner to assign his claim to a subsequent owner was prohibited by the Assignment of Claims Act.

(4) Federal salaries

Early cases found the Assignment of Claims Act fully applicable to requests by a government employee to a disbursing officer to pay the employee's salary to some third person. 11 Comp. Dec. 790 (1905). Combining the Assignment of Claims Act with 31 U.S.C. § 3322(a), which directs disbursing officers to draw checks only in favor of the person to whom payment is to be made, agencies could not, without statutory authority, issue composite salary checks (lump-sum check payable to a bank covering the salaries of several employees with accounts in that bank). 39 Comp. Gen. 372 (1959); 12 Comp. Dec. 227 (1905); B-141025, December 20, 1960. The cases drew an exception to permit employees to purchase United States Savings Bonds by payroll deduction and have them registered in the name of some other person. 21 Comp. Gen. 942 (1942).

There is now statutory authority for direct deposit and for the issuance of composite checks for federal salaries. 31 U.S.C. § 3332. The background of the legislation is discussed in 48 Comp. Gen. 138 (1968). As amended in 1994 by Pub. L. No. 103-356, § 402(a), the statute no longer explicitly addresses composite checks, although the authority would still be included. There is also authority for a federal employee "to make allotments and assignments of amounts out of his pay for such purpose as [the employing agency] considers appropriate." 5 U.S.C. § 5525. This statute permits, for example, the collection of union dues by payroll deduction. 42 Comp. Gen. 342 (1963).

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(5) Other voluntary assignments

It is difficult to draw any further generalizations except to restate the rule that voluntary assignments do not bind the government unless made in compliance with 31 U.S.C. § 3727(b). Some illustrations reaching this result follow:

- Claim brought by a subsequent purchaser for damage to buildings caused by military personnel under a lease with the prior owner. United States v. Shannon, 342 U.S. 288 (1952). The difference between this case and the inverse condemnation case noted above is that the damage in Shannon was only temporary, thereby generating a tort, rather than an inverse condemnation, claim. The Assignment of Claims Act application, however, is the same.
- Assignment of claim under federal flood insurance policy. Diamond v. Federal Emergency Management Agency, 689 F. Supp. 163 (E.D.N.Y. 1988).
- Assignment of claim for compensation for oil spill cleanup expenses under Federal Water Pollution Control Act. Amoco Oil Co. v. United States, 3 Cl. Ct. 785 (1983).

A final case is Kingsbury v. United States, 563 F.2d 1019 (Ct. Cl. 1977), which we are tempted to subtitle "the ballad of Bruce and Valerie." Bruce, an enterprising young man, was arrested in 1971 for importing marijuana, convicted, fined, and slapped in jail. Disappointed that the parole board would not consider parole after only 3 months of the sentence, he escaped, stole a prison vehicle, and went to meet his wife, Valerie, with whom he had planned the escape, at a prearranged location. Before they could get away in Valerie's car, however, they were caught and the FBI seized over $42,000 in cash, most of it from Valerie's purse. Of the seized funds, $15,000 went to the court for Bruce's fine and the IRS took the rest.

Bruce and Valerie pleaded guilty to new charges stemming from the escape. Valerie, now pregnant, was placed on probation and Bruce was lodged temporarily in a local treatment center until the baby was born. Shortly after delivering the baby, Valerie executed an assignment to Bruce's father, ostensibly in repayment of a loan, of most of the money the FBI had seized. A week later, Bruce escaped again and Bruce, Valerie, and baby disappeared into the sunset.

Bruce's father then hired a lawyer and filed suit to collect on the assignment he was left holding. The court found the claim barred by the Assignment of Claims Act. Whatever else the statute may or may not have

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been intended to cover, surely it reached "an assignment made by a convicted criminal on the eve of her flight from justice." Id. at 1024. And you thought this stuff was boring!

c. 41 U.S.C. § 15: Transfer of Contracts

Subsection (a) of 41 U.S.C. § 15 provides:

"No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States."

In one sense, the purposes of 41 U.S.C. § 15(a) are similar to those of 31 U.S.C. § 3727(b), and it is not uncommon for courts to state that the purposes of both statutes, considered together, are to prevent fraud and avoid multiple litigation. E.g., United International Investigative Services v. United States, 26 Cl. Ct. 892, 897–98 (1992). More specifically, from the government contracting perspective, 41 U.S.C. § 15(a) was intended to ensure that the government would not enter into a contract with "A" only to have "B" show up on its doorstep to perform, or to learn that "A" is not a legitimate contractor but merely a speculator who intended all along to sell the contract to someone else. As the Court of Claims put it in an early case, 41 U.S.C. § 15(a) was enacted "to secure to the United States the personal attention and services of the contractor," and "to secure Government contracts to bona-fide contractors, who intended to perform . . ., and to prevent parties from acquiring mere speculative interests." Francis v. United States, 11 Ct. Cl. 638, 640–41 (1875). See also Thompson v. Commissioner, 205 F.2d 73, 76 (3d Cir. 1953); 52 Comp. Gen. 462, 465–66 (1973). Another objective was to prevent a bidder "from making several bids, one by himself and others by his friends and employees, to be afterwards consummated by assignments of the contract by them to the real bidder, for whom they all acted." 19 Op. Att'y Gen. 186, 187 (1888).

However one may choose to cast the specific objectives, the overall purpose of 41 U.S.C. § 15(a), as with 31 U.S.C. § 3727(b), is to protect the government. Hobbs v. McLean, 117 U.S. 567, 576 (1886); 68 Comp. Gen. 53, 55 (1988); 32 Comp. Gen. 227, 228 (1952); 4 Comp. Gen. 184, 185 (1924).

There is one structural difference between 41 U.S.C. § 15(a) and 31 U.S.C. § 3727(b). Unlike 31 U.S.C. § 3727(b), 41 U.S.C. § 15(a) does not prescribe procedures for a valid assignment; it simply prohibits them. As with 31 U.S.C. § 3727(b), however, the courts and other bodies which consider 41

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U.S.C. § 15(a) do not apply it literally but construe it in accordance with its perceived purposes. Other significant similarities with 31 U.S.C. § 3727(b) are:

- 41 U.S.C. § 15(a) does not apply to assignments or transfers occurring by operation of law. E.g., United International Investigative Services v. United States, 26 Cl. Ct. 892, 898 (1992); 10 Comp. Dec. 159 (1903).
- Since 41 U.S.C. § 15(a) is for the government's protection, the government can waive it and choose to accept the assignment. E.g., Thompson v. Commissioner, 205 F.2d 73, 78 (3d Cir. 1953) (statute "does not act as a self-executing nullification").

A lease, of course, is a form of contract and a common question has been the application of 41 U.S.C. § 15(a) where the government leases property and the owner subsequently sells the property to a new owner. Early cases established the proposition that the transfer of title to premises leased to the government, where the lessor has nothing to do but collect the rent, does not violate the statute and the rent may be paid to the transferee. Freedman's Saving and Trust Co. v. Shepherd, 127 U.S. 494, 504 (1888); 4 Comp. Gen. 193 (1924). However, this principle does not apply to the more contemporary form of lease under which the lessor does not merely collect rent but is obligated to provide a variety of supplies and services. Broadlake Partners, GSBCA No. 10713, 92-1 BCA ¶ 24,699 (1991).

Also, transfers of government contracts incident to a corporate merger or consolidation, the sale of an entire business, or the transfer of the entire portion of the business embraced by the contract have been held valid. 51 Comp. Gen. 145, 147 (1971);[69] 48 Comp. Gen. 196, 198 (1968); 9 Comp. Gen. 72 (1929); B-184665, September 25, 1975. In applying this principle, there is a distinction between the sale of an entire business and the sale of the assets of an enterprise. A transfer incident to the former is not a transfer for purposes of 41 U.S.C. § 15(a); one incident to the latter is. CBI Services, Inc., ASBCA No. 34983, 88-1 BCA ¶ 20,430 (1987); Mancon Liquidating Corp., ASBCA No. 18304, 74-1 BCA ¶ 10,470 (1974).

Where a prime contractor retains responsibility for contract performance, subcontracting of a substantial portion of the work under the contract is

[69]This case also considered a different type of transfer—the transfer of a bid as part of a transfer of assets by a financially troubled bidder after bid opening but prior to award. GAO found the attempted novation improper under these circumstances. The FAR mandates rejection of the bid "unless the transfer is effected by merger, operation of law, or other means not barred by [the Assignment of Claims Act]." 48 C.F.R. § 14.404-2(l).

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Claims Against the United States

"The Auditors and Comptrollers, and the accountants under them, constitute the safeguard of the National Treasury, and have to withstand the whole army of claimants and their interested clamor." 4 Lawrence, First Comp. Dec. xix (emphasis omitted) (Introduction) (1883).

A. Introduction

A "claim" may be defined simply as a demand for money or property.[1] The settlement of claims against the United States, called "payment claims," is the subject of this chapter. Claims by the government against others, called "debt claims," are covered in Chapter 13.

Claims against the government can arise out of virtually any aspect of federal operations. Any federal program that involves the disbursement of funds can generate claims. Claims may arise in areas covered by other chapters of this publication. For example, Chapter 4 discusses a number of restrictions on the purposes for which appropriated funds may be used. Questions in these areas frequently arise in the form of claims which cannot be paid because of a particular restriction. Assistance programs generate claims. Also, a great many claims involve areas covered by GAO's Civilian and Military Personnel Law Manuals. The purpose of this chapter is to present an overview of the claims settlement process, a description of GAO's claims settlement functions, and a brief discussion of several types of claims not covered elsewhere.

When, over 100 years ago, First Comptroller Lawrence wrote the words quoted at the top of this page, claims settlement was viewed as largely an adversarial process. "They" (the claimants) were out there, like a horde of invading Huns, trying to get money from the Treasury; "we" (government officials) were the army of the righteous trying to prevent them from doing so. Claims settlement was much simpler back then. Many of the key claim-generating statutes, such as the Federal Tort Claims Act, had not yet been enacted. Most claimants who bothered to file with the accounting officers were denied for lack of a legal basis. Of this group, most lacked access to the courts and could do little else but seek private relief legislation.

To say that the law has changed over the last hundred years is to barely hint at the enormity of the change. Literally dozens of statutes, in varying degrees of detail, now permit claims against the United States in a wide variety of contexts. Persons injured by negligent acts of government

[1]Black's Law Dictionary 247 (6th ed. 1990). A claim against the United States, said the Supreme Court, "is well understood. It is a right to demand money from the United States." Hobbs v. McLean, 117 U.S. 567, 575 (1886).

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not considered an assignment or transfer of that contract. B-186341, September 7, 1976.

Finally, nothing in the Assignment of Claims Act limits it to procurement contracts. The prohibition and exclusions apply equally to contracts of sale. Examples are Benjamin v. United States, 318 F.2d 728 (Ct. Cl. 1963); Maffia v. United States, 163 F. Supp. 859 (Ct. Cl. 1958); and Monchamp Corp. v. United States, 19 Cl. Ct. 797 (1990).

3. Contract Financing: The Assignment of Contract Payments

a. The Assignment of Claims Act of 1940: A Synopsis

With much of the planet already engulfed in war and many seeing America's involvement just over the horizon, Congress enacted legislation in late 1940 to aid defense production by inducing financing institutions to lend money to government contractors with which to finance the performance of their government contracts. The inducement was security in the form of assignment of the contract proceeds. This financing scheme was intended to broaden competition by better enabling small businesses to compete for defense contracts. See Continental Bank and Trust Co. v. United States, 416 F.2d 1296, 1299 (Ct. Cl. 1969); 55 Comp. Gen. 155, 157–58 (1975). The 1940 legislation was cast as an exception to the existing prohibitions of 41 U.S.C. § 15 and what is now 31 U.S.C. § 3727, and made identical amendments to both statutes.

What contracts are eligible? The Act applies to any government contract providing for payments aggregating at least $1,000. 31 U.S.C. § 3727(c); 41 U.S.C. § 15(b); FAR, 48 C.F.R. § 32.802(a). This includes purchase orders. See 48 C.F.R. § 32.806(a)(1). Although defense contracts may have been the motivating force behind the law, no such restriction appears in the statute.

Assignments may be made under Letters of Intent or comparable documents to the extent that they give rise to valid contracts. B-29624, October 29, 1942. Assignments may not be made, however, until a contract obligation actually arises. B-24402, September 21, 1942. One instrument of assignment may cover several contracts. Id.

Payments under bills of lading which are themselves contracts may be assigned so long as each bill provides for payment of $1,000 or more. 21

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Comp. Gen. 265 (1941). Where goods are transported pursuant to a previously executed contract, the bills of lading are merely a receipt for the goods to be transported, and payment for the transportation is made under the previously executed master contract rather than under a particular bill of lading covering the service. In this situation, the $1,000 limit in the Assignment of Claims Act applies to the aggregate. 23 Comp. Gen. 989 (1944).

Payments under a requirements or indefinite-quantity contract cannot be assigned unless the contract gives rise to a definite commitment on the part of the government to order services or supplies requiring a minimum expenditure of $1,000. 50 Comp. Gen. 434, 440 (1970); 26 Comp. Gen. 873 (1947); 23 Comp. Gen. 989 (1944). If the contract authorizes ordering and payment by multiple government activities, the $1,000 threshold applies to individual orders. FAR, 48 C.F.R. § 32.803(c).

Who can receive the assignment? The assignee must be a bank, trust company, or other financing institution. More about this requirement later.

What can be assigned? The law authorizes the assignment of accounts receivable under a government contract—money "due or to become due" under the contract. 31 U.S.C. § 3727(c); 41 U.S.C. § 15(b). The FAR puts it in plain English: what you can assign is "the right to be paid by the Government for contract performance." 48 C.F.R. § 32.801. This is all you can assign. The law does not permit an assignment of the contract itself, which remains prohibited by 41 U.S.C. § 15(a). 52 Comp. Gen. 462, 464 (1973); 20 Comp. Gen. 295 (1940). Also, the authority to assign contract proceeds does not include the authority to assign the right to settle, adjust, or compromise claims. A purported assignment of this right need not be recognized by the United States. 35 Comp. Gen. 104 (1955).

The assignment must cover all amounts payable under the contract and not already paid. Partial assignments are invalid unless expressly permitted by the contract. 31 U.S.C. § 3727(c)(2)(A); 41 U.S.C. § 15(b)(2); FAR, 48 C.F.R. § 32.802(d)(1); B-172059, June 29, 1971.

Assignment of an amount payable or to become payable under a government contract includes any additional amounts which may become due pursuant to a change order or modification of the original contract. 23 Comp. Gen. 943 (1944).

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Is the government required to recognize the assignment? The agency has some discretion at the contract formation stage. The agency may prohibit assignments if determined to be in the government's interest, and the FAR prescribes a contract clause to be used in that situation. 48 C.F.R. §§ 32.803(b), 32.806(b), 52.232-24. If the agency does not elect to prohibit assignments, the FAR prescribes another clause generally setting forth what the Assignment of Claims Act authorizes. 48 C.F.R. §§ 32.806(a), 52.232-23. The choice is up to the contracting agency. 20 Comp. Gen. 458, 460 (1941). If the agency does not insert the prohibition clause, there is authority for the proposition that the authorization clause will be deemed to be incorporated into the contract by operation of law whether expressly included or not. Rodgers Construction, Inc., and Federal Insurance Co., IBCA Nos. 2777 et al., 92-1 BCA ¶ 24,503, at 122,295 (1991).

If the contract does not include a no-assignment clause, then an assignment made in compliance with the statute is a valid assignment for all purposes. 41 U.S.C. § 15(c).[70] There is no requirement to obtain government consent or approval, and the government cannot arbitrarily refuse or disavow the assignment. Produce Factors Corp. v. United States, 467 F.2d 1343, 1351 (Ct. Cl. 1972); 60 Comp. Gen. 510, 513 (1981).

Is there any required nexus between the assignor and assignee? Yes. The assignee must render financial assistance which facilitates the performance of a government contract. 68 Comp. Gen. 215 (1989). Without this financial participation by the assignee, the assignment is not valid against the government. E.g., American National Bank and Trust Co. v. United States, 22 Cl. Ct. 7 (1990); B-175670, May 25, 1972; B-171552, April 27, 1971. Generally, the financial participation will take the form of a loan which the assignee has made to the assignor to finance the assignor's performance of the contract. In this connection, the FAR defines assignments as assignments given "as security for a loan to the contractor." 48 C.F.R. § 32.801.

This does not mean that there must be a one-to-one relationship between a particular loan and a specific contract. The assignment does not have to be contemporaneous with the loan. Manufacturers Hanover Trust Co. v. United States, 590 F.2d 893, 897 (Ct. Cl. 1978). However, the proceeds of the loan must either have been used in the performance of, or at least available for use in the performance of, the contract whose proceeds are being assigned Id. at 896–97; First National City Bank v. United States, 548

[70]When Title 31 was recodified in 1982, the recodifiers erroneously attached the corresponding "valid for all purposes" language to subsection (b) when in fact it applies to the 1940 portion of the statute, correctly reflected in the structure of 41 U.S.C. § 15.

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F.2d 928 (Ct. Cl. 1977). As both of these cases point out, this obviously excludes contracts which are fully performed at the time of the loan.[71] See also 68 Comp. Gen. 215, 218–19 (1989). The same principle applies where the purported assignment predates the contract by several years. B-216549, December 5, 1984. In any event, as long as the "used or available" test is met, the loan need not have been made to finance performance of the particular contract whose proceeds are being assigned; if the assignor has several government contracts, it is sufficient that the loan was made for the purpose of financing government contracts in general. Peterman Lumber Co. v. Adams, 128 F. Supp. 6 (W.D. Ark. 1955); 49 Comp. Gen. 44, 46 (1969). See also Continental Bank and Trust Co. v. United States, 416 F.2d 1296, 1301–02 (Ct. Cl. 1969) (recognizing validity of assignment of several contracts under revolving credit financing under which it would be difficult to associate specific amounts loaned with particular contracts).

In addition, it has been held that the Act does not prohibit indirect financing. Coleman v. United States, 158 Ct. Cl. 490, 495 (1962); 55 Comp. Gen. 155, 157 (1975). "[T]he financial assistance from the bank does not have to pass directly from the assignee to the assignor." 68 Comp. Gen. 215, 217 (1989).

GAO feels that, as a general proposition, an assignment to a financing institution should specify the particular contract involved, and therefore, a blanket assignment (an assignment of all accounts receivable) does not meet the requirements of the Act. B-216549, December 5, 1984; B-195629, September 7, 1979; B-120222, October 27, 1955. However, the lack of specificity of a blanket assignment can be cured for purposes of perfecting a valid assignment under the Act when "there are in existence later amendment schedules [specifying the government contract] signed by the assignor, which purport to be an integral part of the original [blanket] assignment instrument." B-171125, February 4, 1971. Likewise, an assignor's secured note which assigned its accounts receivable to a bank and which was executed during the period of the government contract, was recognized under the Assignment of Claims Act where the contractor/assignor's schedule of accounts receivable listed the government contract account. 58 Comp. Gen. 619 (1979).

[71]One GAO decision suggests that an assignment may be made at any time before the contract is closed, which includes some period after performance has been completed. B-125205, November 14, 1955. The continued validity of this case must be questioned in light of the court's "used or available" test and later GAO decisions which follow and apply it. E.g., 62 Comp. Gen. 683 (1983); B-216549, December 5, 1984.

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Are multiple or successive assignments permissible? The law provides that an assignment may be made to only one party, except that the one party may be an agent or trustee for two or more parties participating in the financing. 31 U.S.C. § 3727(c)(2)(B); 41 U.S.C. § 15(b)(2). "Trustee" in this context does not require a formal designation. Chelsea Factors, Inc. v. United States, 181 F. Supp. 685, 689 (Ct. Cl. 1960).

Both portions of the statute also prohibit reassignment. This prohibition is limited essentially to subassignments by the original assignee. If the original assignee releases the initial assignment, a subsequent assignment made in compliance with the statute is perfectly valid. FAR, 48 C.F.R. §§ 32.802(d)(3), 32.803(a); 39 Comp. Gen. 533 (1960); B-155400, December 3, 1964; B-33501, April 1, 1943. However, the mere fact of a purported subsequent assignment does not operate to release the original assignment; there must be an actual release by the original assignee, without which the subsequent assignment is ineffective against the government. 22 Comp. Gen. 520, 524–26 (1942); B-40491, March 17, 1944.

b. What Is a "Financing Institution"?

The Assignment of Claims Act of 1940 defined an eligible assignee as a "bank, trust company, or other financing institution, including any Federal lending agency." 54 Stat. 1029. In their quest to eliminate words, the Title 31 recodifiers reduced this to simply "financing institution" in 31 U.S.C. § 3727(c). However, the original language still appears in 41 U.S.C. § 15(b), and the FAR has retained it as well in 48 C.F.R. § 32.802(b). Thus, banks, trust companies, and federal lending agencies[72] qualify without further question under the plain language of the statute. Any other entity qualifies only if it can be said to be a "financing institution," which the statute does not define. The significance is that if the assignee is not a financing institution, the assignment will be valid only if it meets the rigid criteria of 31 U.S.C. § 3727(b). B-171125, February 4, 1971.

A "financing institution" for purposes of the Assignment of Claims Act is "one which deals in money as distinguished from other commodities as the primary function of its business activity." 43 Comp. Gen. 138, 139 (1963); 40 Comp. Gen. 174, 175 (1960); 22 Comp. Gen. 44, 46 (1942). It may be an individual or a partnership as well as a corporate organization. 43 Comp. Gen. at 139; 40 Comp. Gen. at 175; 22 Comp. Gen. at 46; 20 Comp. Gen. 415 (1941).

[72]An example is the Small Business Administration. E.g., Keco Industries v. United States, 157 Ct. Cl. 691 (1962).

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The Comptroller General offered the following additional guidance in 43 Comp. Gen. 138, 139:

"A firm . . . which as a primary function is regularly engaged in the financing business may be regarded as a financing institution. [Citation omitted.] However, a firm whose credit extension and lending operations, although carried on regularly, are merely incidental or subsidiary to another [and], in the light of the firm's overall operations, more important purpose, is not a financing institution. [Citations omitted.]"

Thus, an ordinary business corporation which incidentally provides financing to its suppliers or to others with whom it deals does not thereby become a "financing institution" for Assignment of Claims Act purposes. 22 Comp. Gen. 44 (1942). On the other hand, a firm primarily engaged in the financing of small and undercapitalized businesses, either through loans or direct purchase and resale, is a financing institution. 31 Comp. Gen. 90 (1951).

Financing institutions under the Act include the following:

- "Factors" or factoring companies (firms which purchase accounts receivable). 20 Comp. Gen. 415 (1941). See also, e.g., Produce Factors Corp. v. United States, 467 F.2d 1343 (Ct. Cl. 1972) (one of several cases involving a factor as assignee in which the factor's status as financing institution was accepted without question).
- Small business investment companies organized under the Small Business Investment Act of 1958. 43 Comp. Gen. 138 (1963).
- State government small business financing agencies. Maryland Small Business Development Financing Authority v. United States, 4 Cl. Ct. 76 (1983).
- Insurance companies. 40 Op. Att'y Gen. 269 (1943). However, GAO reached a different conclusion with respect to an individual owner of an insurance agency whose credit activities were only incidental. 21 Comp. Gen. 120 (1941).

The following have been held not to qualify as financing institutions under the Assignment of Claims Act:

- A surety. General Casualty Co. of America v. Second Nat'l Bank of Houston, 178 F.2d 679 (5th Cir. 1949); Royal Indemnity Co. v. United States, 93 F. Supp. 891 (Ct. Cl. 1950); B-187456, November 4, 1976; B-155944, February 10, 1965; B-153608, March 17, 1964.

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- A subcontractor completing performance. Beaconwear Clothing Co. v. United States, 355 F.2d 583 (Ct. Cl. 1966); Pan Arctic Corp. v. United States, 8 Cl. Ct. 546 (1985); Diamond Manufacturing Co. v. United States, 3 Cl. Ct. 424 (1983); 68 Comp. Gen. 215, 218 (1989).
- A holding company. 55 Comp. Gen. 155 (1975).
- A manufacturer or materialman who agrees to fill orders under a government contract by extending credit to the contractor in consideration of an assignment of the contract proceeds. Uniroyal, Inc. v. United States, 454 F.2d 1394 (Ct. Cl. 1972); B-183305, March 25, 1975 (non-decision letter).

A trust, pension or non-pension, is not an "institution" and therefore cannot be a "financing institution." 36 Comp. Gen. 290 (1956). However, since the Assignment of Claims Act expressly recognizes a "trust company" as a proper assignee, trust funds under the control of a trust company may be used for loans secured by the assignment of proceeds under government contracts. Id. Accordingly, an assignment will not be regarded as invalid solely by reason of the source of funds for the loan consideration for which the assignment is made so long as the assignee qualifies as a financing institution.

A 1960 case upheld the validity of an assignment to a corporate pension trust on the grounds that "the trust corpus, together with the trustees, whether individual, corporate or otherwise, having as a primary function the investing of assets of the trust, may be regarded as a financing institution." 40 Comp. Gen. 174, 175 (1960). When applying this principle, it is not necessary to distinguish between private (corporate) pension trusts and public (governmental) pension trusts. 50 Comp. Gen. 613 (1971) (holding that the California Public Employees' Retirement System and the California State Teachers' Retirement System qualified as financing institutions for Assignment of Claims Act purposes).

As noted previously, an assignment may not be made to more than one party, but it may be made to one party as agent or trustee for two or more parties participating in the financing. This is not a device to circumvent the statute. The Comptroller General has stated that "an assignment to a party or parties not eligible under the act cannot be validated by the simple expedient of having ineligible assignees designate a bank as a trustee for collection." 52 Comp. Gen. 462, 465 (1973). In that case, following the rationale of 50 Comp. Gen. 613, GAO concluded that a group of municipal bondholders, viewed as an unincorporated totality, had as a group the function of lending money, and could therefore qualify as a financing

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institution. The decision further concluded that the bondholders could make a valid assignment to a bank, also a bondholder, acting as trustee for the group, even though some of the bondholders as individuals could not qualify as financing institutions.

In 54 Comp. Gen. 80 (1974), GAO considered a financing scheme used by, and tailored to the needs of, smaller computer firms, and concluded that a company which provides financing by purchasing equipment which has been leased to the government could be regarded as a financing institution for purposes of assigning the government's lease payments. See also 62 Comp. Gen. 368 (1983). However, GAO refused to extend the same mantle to an entity whose primary purpose was obtaining government contracts for data processing equipment (B-200603, November 4, 1980), or to a leasing company dealing with refuse collection equipment (B-244992, October 25, 1991).

c. The Notice Requirement

The Assignment of Claims Act and the FAR, read together, spell out precisely what must be done to validate an assignment with respect to the government. The assignee must file an original and three copies of the notice of assignment, together with one "true copy" of the assignment instrument (a certified duplicate or photostat of the original), with the following:

(1) the contracting officer or the head of the contracting department or agency;

(2) the applicable surety or sureties, if any; and

(3) the disbursing officer, if any, designated in the contract to make payment.

31 U.S.C. § 3727(c)(3); 41 U.S.C. § 15(b)(3); FAR, 48 C.F.R. §§ 32.802(e), 32.805(b). A sample notice of assignment is found at 48 C.F.R. § 32.805(c). Under the original 1940 legislation, GAO was also listed as a recipient, but was removed in 1951 (Pub. L. No. 82-30, 65 Stat. 41).

These notice requirements are extremely important. If they are not satisfied, the assignment is not valid against the United States. Uniroyal, Inc. v. United States, 454 F.2d 1394 (Ct. Cl. 1972); United California Discount Corp. v. United States, 19 Cl. Ct. 504 (1990); 63 Comp. Gen. 42 (1984); 20 Comp. Gen. 424 (1941) (must be at least substantial compliance). In a 1992 case, for example, a subcontractor filed an

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assignment with the Navy but the Navy rejected it because it was not signed by the assignee. The subcontractor apparently didn't bother correcting the defect, and when payment time arrived, the Navy—properly—paid the prime contractor, who "promptly dissipated" the proceeds. Because the assignee bank did not comply with the statutory notice requirements, its suit was dismissed. Trust Company Bank of Middle Georgia v. United States, 24 Cl. Ct. 710 (1992).

It is the assignee's responsibility to comply with the notice requirements. The best way to do this is to do what the statute says. Thus, a simple request to change the remittance address is not the notification of an assignment. Uniroyal, 454 F.2d at 1398. Nor is a "payment address" notation on a purchase order. B-234103, August 24, 1989. See also B-185846, May 11, 1977.

It is not sufficient for the assignee to rely on the contracting officer's representation that he or she will notify the disbursing officer, or on an agency regulation directing the contracting officer to do so. It is the assignee's responsibility and therefore the assignee's risk. American Financial Associates, Ltd. v. United States, 5 Cl. Ct. 761 (1984), aff'd, 755 F.2d 912 (Fed. Cir. 1985); B-159494, September 2, 1966. Thus, there is no "constructive notification," and an assignee wishing to avoid problems is well-advised to notify both officials even if they occupy adjacent offices in the same building. Also, to trigger the duty to notify the disbursing officer, the contract does not have to identify him or her by name; identification of the pertinent payment office is sufficient. American Financial Associates, 5 Cl. Ct. at 768.

An assignment becomes effective when the government actually receives the notice. Id. at 767; Central National Bank of Richmond v. United States, 91 F. Supp. 738, 740 (Ct. Cl. 1950); 62 Comp. Gen. 683, 689 (1983). Of course, the assignee will not know when the government receives the notice unless the government tells it. To this end, the FAR provides for acknowledgment of the notice. In addition, the government has a "reasonable time" to determine the validity of the assignment before making payment. Produce Factors Corp. v. United States, 467 F.2d 1343, 1349 (Ct. Cl. 1972); Central National Bank of Richmond, 91 F. Supp. at 741. The FAR recognizes this concept by advising contracting officers to make necessary verifications prior to acknowledgment. 48 C.F.R. § 32.805(d). If there is some reason to do so, the agency can reverse the sequence and provide an acknowledgment immediately on the understanding that it is nothing more than advice that the document has been received, and then

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proceed to make the verifications without delay. Central National Bank of Richmond, 91 F. Supp. at 741; 22 Comp. Gen. 161 (1942).

As noted above, the Act also requires written notice of the assignment to applicable sureties, but does not prescribe any time limit within which the written notice must be given. Thus, in 22 Comp. Gen. 520 (1942), it was held that a delay of five months by an assignee bank in filing written notice with the surety did not subordinate its rights to those of the surety with respect to future payments, at least where the surety was unable to show that the delay had operated to its (the surety's) prejudice. There is no requirement to obtain the surety's consent to an assignment. Id. at 523.

Once an assignment has been "perfected," it continues in effect unless and until formally released by the assignee. A release must be filed with, and acknowledged by, the same addressees who were notified of the original assignment. FAR, 48 C.F.R. § 32.805(e). A release, of course, should be explicit. See B-122052-O.M., January 18, 1955 (letter to contracting agency stating that loans have been paid in full and that assignee's only interest in matter was to collect for subcontractor regarded as nothing more than a "gratuitous explanation of the intended disposition of any further payments").

d. Rights and Liabilities Under a Valid Assignment

An assignment of contract payments under 31 U.S.C. § 3727 and 41 U.S.C. § 15 does not give the assignee privity of contract with the government. Produce Factors Corp. v. United States, 467 F.2d 1343, 1348 (Ct. Cl. 1972); Thomas Funding Corp. v. United States, 15 Cl. Ct. 495, 500 (1988). Notwithstanding, it must give the assignee some protection or the assignment would be pointless. The assignee's interest has been termed a "qualified interest" commensurate with the debt secured. Beaconwear Clothing Co. v. United States, 355 F.2d 583, 590 (Ct. Cl. 1966); 62 Comp. Gen. 368 (1983). It has also been called a "limited interest in the financing aspects of the contract, not the performance aspects," wholly dependent on performance by the contractor. Produce Factors, 467 F.2d at 1348. In brief, what the assignee gets is the right to receive future contract payments, to the extent the contractor performs and earns them. Id.; Thomas Funding, 15 Cl. Ct. at 502. Assuming compliance with the notice requirements of the Assignment of Claims Act, there is no need for the assignee to make a specific claim. 20 Comp. Gen. 295, 297 (1940).

If the assignee under a valid assignment has a right to receive the payments, then the government must have a corresponding duty. Once the government has been properly notified of an assignment which meets the

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employees have the Federal Tort Claims Act. There is now a highly sophisticated mechanism for settling contract claims. Victims of certain types of discrimination have avenues of redress unheard of in Lawrence's era. And the list goes on and on. It can scarcely be disputed that the United States has taken huge strides in recent decades towards the goal of a fair and just relationship with its citizens.

Along with these changes in the law, attitudes have also begun to change. To be sure, there is still an adversarial element in claims settlement, especially when a claim is taken to court. There is nothing wrong with this. Certainly the government has the right, if not the duty, to present and argue available defenses, and to the extent the American adversarial approach to litigation has value to begin with, that value applies equally to federal claims litigation. At the administrative level, however, federal claims officials are increasingly recognizing the duality of their role. On the one hand, they are, and will remain, guardians of the Treasury. Claims settlement must be more than just giving away the taxpayers' money. Yet on the other hand, the function of claims settlement is to provide fair compensation, as and to the extent authorized by law, to those harmed by actions of the government. Claims settlement succeeds to the extent it is able to do this in a fiscally responsible manner.

B. Claims Settlement in the Federal Government

1. Sources of Authority and Role of the Administrative Process

The fundamental tenet of this entire publication is that the expenditure of public funds must be authorized by law. The payment of claims is no exception. As with other fiscal contexts, "authorized by law" may take various forms. A few claims are authorized directly by the Constitution. For example, the Fifth Amendment mandates the payment of just compensation for governmental takings of private property. You may find statutes telling you what courts to use (28 U.S.C. §§ 1346(a)(2), 1491), but you do not need a statute authorizing you to assert the claim. The Fifth Amendment itself fills that role.

Contractual relationships provide another source of authority. A contract is a legal instrument from which legal rights, duties, and obligations flow. A federal agency has the inherent power—no statute is needed—to enter

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requirements of the Assignment of Claims Act, it can no longer discharge its obligations under the contract by paying the contractor/assignor. It must pay the assignee, including invoices which predate the assignment or cover services rendered prior to it. B-122071, December 1, 1954. If the government through mistake or inadvertence pays the contractor, it is still liable to the assignee.

The leading case on this proposition is Central National Bank of Richmond v. United States, 91 F. Supp. 738 (Ct. Cl. 1950). A contractor with the Department of the Navy took a loan from the plaintiff bank and assigned the contract proceeds to the bank as security for the loan. Proper notice was given and acknowledged, but the Navy erroneously sent a check to the contractor, who cashed it and kept the money. Since the assignee had acted in good faith and complied with the statute, the government paid the contractor at its peril. Judgment for plaintiff. Other cases reaching the same result include Florida National Bank of Miami v. United States, 5 Cl. Ct. 396 (1984); Maryland Small Business Development Financing Authority v. United States, 4 Cl. Ct. 76 (1983); 65 Comp. Gen. 598 (1986); B-216246, October 2, 1984; B-214273, June 21, 1984; B-206902, June 1, 1982; B-158212, February 21, 1966. The government's obligation is not diminished by the fact that "the assignor corporation is beneficially owned or controlled by some of the same parties who own or control the assignee." American Financial Associates, Ltd. v. United States, 5 Cl. Ct. 761, 773 (1984), aff'd, 755 F.2d 912 (Fed. Cir. 1985).

As several of these cases point out, there is no entitlement to interest on the assignee's claim. Florida National Bank; Maryland Financing Authority; 65 Comp. Gen. 598; B-206902. Since the assignee is not a "contractor" (Thomas Funding, 15 Cl. Ct. at 501), the interest provisions of the Contract Disputes Act do not apply.

Several of the cases also point out that the government has a valid claim against the contractor whom it erroneously paid, and can pursue appropriate collection action to try to get its money back. Central Bank of Richmond; Maryland Financing Authority; American Financial Associates; B-216246; B-214273; B-158212.[73] However. the assignee's claim is not dependent upon recovery from the contractor, and the government is not justified in delaying payment to the assignee while it pursues recovery. B-214273, June 21, 1984.

[73]While this may sound like a "wash," it is not. In far too many cases, the contractor is insolvent or no longer in operation and the government ends up paying twice. Since the payment to the contractor is erroneous, some accountable officer is liable although it is usually possible to grant relief. See, e.g., B-206902, June 1, 1982, and further discussion in Chapter 9.

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There are limits on the government's right to recoup from the contractor. In Bank of America Nat'l Trust and Savings Ass'n v. United States, 23 F.3d 380 (Fed. Cir. 1994), the court held that the government had no such right where it had made the payment to the contractor, in erroneous disregard of a valid assignment, under a voluntary settlement of a contract dispute which included a stipulation waiving the government's right to appeal or seek reconsideration.

The government's obligation is to pay the assignee. The precise mechanics of how it does this are essentially irrelevant as long as the assignee receives the payment. Fairchild Industries, Inc. v. United States, 620 F.2d 807 (Ct. Cl. 1980) (check payable to assignee delivered to contractor's representative). As the Fairchild court pointed out, even if the assignment documents specified the method of delivery, it would not bind the government because the government was not a party to the assignment. Id. at 810.

The government's liability to the assignee is contingent upon the assignee's compliance with the statutory notice requirement, and claims have been denied where this compliance is lacking. American Financial Associates, 5 Cl. Ct. at 768–69 (notice not filed until after payment); 63 Comp. Gen. 42 (1984) (no notice to disbursing officer); B-159494, September 2, 1966 (same). Also, if the assignment is otherwise invalid, timely notice will not make the government liable. E.g., B-175670, May 25, 1972 (no financial participation by assignee in the contract). As we will discuss later, the government may be found to have waived the protection of the Assignment of Claims Act, in which event it may be liable to the assignee notwithstanding noncompliance with some of the more "technical" aspects of the statute. E.g., Tuftco Corp. v. United States, 614 F.2d 740 (Ct. Cl. 1980); 61 Comp. Gen. 53 (1981).

An important protection for the assignee was added in 1951 (Pub. L. No. 82-30, 65 Stat. 41) and is now found at 31 U.S.C. § 3727(e)(1) and 41 U.S.C. § 15(d). It provides, quoting from the latter:

> "In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount . . . received under the assignment."

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The corresponding provision of the FAR is 48 C.F.R. § 32.804(a). Thus, when the government pays an assignee under a valid assignment, it cannot get that money back to satisfy a debt of the contractor. Under a literal reading of this provision, it is possible to argue that the government cannot recover even if the payment was erroneously made. See United States v. Hadden, 192 F.2d 327 (6th Cir. 1951). Just how far this proposition may go is not clear, although it is not an absolute. One court has suggested, for example, that the assignee's protection might not extend to payments induced by fraud, although it is probably not possible to generalize. American Fidelity Co. v. National City Bank of Evansville, 266 F.2d 910, 916 (D.C. Cir. 1959). See also Matter of Tailortowne, Inc., 198 F. Supp. 477 (D.N.J. 1961) (payment induced by representations of bankruptcy receiver which could not be implemented); Mercantile National Bank at Dallas v. United States, 280 F.2d 832, 837 (Ct. Cl. 1960) (statute is "so drastic" that courts are likely to depart from a literal application in appropriate cases, for example, an obvious arithmetical mistake).

Mercantile is a significant case for another reason. A dispute arose between the government and a Mexican contractor over the amount of the government's liability under the contract due to the devaluation of the peso. The contractor had made a valid assignment, and the government withheld post-assignment payments to recoup asserted prior overpayments. Noting that the assignee would not have made the loan if it knew that there weren't going to be any future payments, the court invalidated the government's offsets accruing prior to the assignment. The court relied in part on the "no repayment" provision, reasoning that the government should not be able to frustrate the statute by the simple device of "paying itself by offset." Id. at 836–37. The government should keep in mind, the court chided, that the purpose of these assignments is to encourage private financing as an alternative to having to advance public funds, and then said, id. at 836:

> "If the Government knows that the right of the contractor to receive payments is worthless because the contractor has already been paid, the Government is under a duty to so advise the bank, so that the bank will not lend its money on worthless collateral. If the Government has the facilities for knowing that the collateral is worthless, and is unconscious of the fact only because of its carelessness in the handling of public money, we think it may not take advantage of its own negligence, and recoup its negligent overpayments by accepting supplies bought with money loaned by the assignee bank on the faith of the assignment."

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The court took note of this duty again several years later in Produce Factors Corp. v. United States, 467 F.2d 1343, 1349 (Ct. Cl. 1972), but it appears to have received little further exploration. A case applying Mercantile to deny an offset based on the "no repayment" provision is Sigmon Fuel Co. v. Tennessee Valley Authority, 709 F.2d 440 (6th Cir. 1983).

e. Setoff

The Assignment of Claims Act authorizes certain agencies to include in their contracts a clause protecting assignees against certain offsets. Those agencies are the Department of Defense, the General Services Administration, and the Department of Energy. 31 U.S.C. § 3727(d); 41 U.S.C. § 15(e). The list can be expanded by statute or presidential designation, and the FAR reflects two additions—the National Aeronautics and Space Administration and the Federal Aviation Administration. 48 C.F.R. §§ 32.801, 32.803(d).

Under the terms of the statute, an authorized no-setoff provision will protect the assignee against setoff for:

- any liability of the assignor to the United States arising independently of the assigned contract; and
- liabilities, whether arising under the contract or independently, on account of statutory renegotiation, fines, penalties (except those imposed for noncompliance with the contract), taxes, or social security contributions.

31 U.S.C. § 3727(d); 41 U.S.C. § 15(f); FAR, 48 C.F.R. § 32.804(b). The no-setoff authority was originally granted only for use in time of war or national emergency. See 60 Comp. Gen. 510, 512 (1981). Under 41 U.S.C. § 15(e) as amended in 1994 by Pub. L. No. 103-355, it requires a "determination of need by the President," with each such determination to be published in the Federal Register.

An illustration of the first category of offsets proscribed under a no-offset clause—liabilities independent of the contract—is 31 Comp. Gen. 90 (1951). The contractor under a supply contract delivered the requisite supplies and submitted an invoice for payment. The same contractor had an outstanding judgment against it for the balance due on surplus property purchased from the government several years earlier. The supply contract included a no-setoff clause, and the contractor had made a valid assignment of its proceeds. Since the contractor's debt to the government arose independently of the contract whose proceeds had been assigned, it could not be collected by offset against payments due the assignee.

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The second category of prohibited offsets—liabilities which do not arise independently of the contract—is limited to the items specified in the statute. A liability arising under the contract which is not one of the enumerated items is not protected by the no-setoff clause and may be recovered by offset against the assignee. One example is liquidated damages provided for in the contract. B-110730, September 18, 1952. As B-110730 points out, the theory is that an assignment carries with it the right to receive only such amounts as are due and owing to the contractor under the contract; there is no right to payment in excess of those amounts. Another example is excess reprocurement costs resulting from a default termination. Modern Industrial Bank v. United States, 101 Ct. Cl. 808 (1944); 35 Comp. Gen. 149 (1955).

The purpose of the no-setoff authority is to protect the assignee under the types of assignments contemplated by the Assignment of Claims Act, not to insulate the contractor from liability for just debts by making an assignment merely for collection. 35 Comp. Gen. 104, 108 (1955). Accordingly, a no-setoff clause does not apply with respect to payments in excess of the assignor's remaining indebtedness to the assignee under the assignee's financing loans. Id.; 62 Comp. Gen. 683, 686–87 (1983); 37 Comp. Gen. 9 (1957); FAR, 48 C.F.R. § 32.804(c)(2). Nor does it apply where there has been no financial participation by the assignee in the contract in question. 62 Comp. Gen. at 688–89; 54 Comp. Gen. 137 (1974); 49 Comp. Gen. 44, 46 (1969); B-176905, November 1, 1972; FAR, 48 C.F.R. § 32.804(c)(1).

The competition between assignments and federal tax claims has been the subject of numerous decisions. It has been said that the no-setoff authority "defeats the operation of the Internal Revenue Service lien for taxes and reduces the Government's common law right of set-off to the extent the assignor is indebted to the assignee." B-166531, November 10, 1969. GAO reviewed applicable principles and precedents in detail in 60 Comp. Gen. 510 (1981), as clarified by 62 Comp. Gen. 683 (1983), and made the following key points:

(1) If the proceeds of a contract containing a no-setoff clause have been validly assigned, the government cannot offset a tax debt of the contractor against money to be paid to the assignee, except to the extent unpaid contract proceeds exceed the contractor's remaining indebtedness to the assignee. However, if a loan secured by an assignment was not used, or available for use, in performing the assigned contract—and this includes situations in which performance was completed at the time of the loan,

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there is no valid assignment and offset is permissible even in the face of a no-setoff clause. See also B-216549, December 5, 1984.

(2) A no-setoff clause protects the assignee even against tax claims which have matured prior to the effective date of the assignment. See also 65 Comp. Gen. 554 (1986); 37 Comp. Gen. 318 (1957).

(3) If the contract does not contain a no-setoff clause, the assignee stands in the shoes of the assignor, and the government may offset a tax debt of the assignor that was in existence before the assignment became effective. The actual offset cannot be made until the tax debt has matured (i.e., liability assessed), but the fact that the IRS does not actually make the assessment before the assignment becomes effective will not defeat the offset. See also 56 Comp. Gen. 499, 503 (1977); 37 Comp. Gen. 808 (1958); B-152008, September 10, 1963.

(4) An assignment becomes effective on the date the contracting agency receives notification of the assignment. Failure to record or perfect an assignment as a security interest under state law (such as the Uniform Commercial Code) does not affect the validity of the assignment with respect to the federal government.

If the contract does not contain a no-setoff clause, then offset is governed by whatever common-law or statutory authorities are available. E.g., B-152008, September 10, 1963. Under common-law principles, the government may set off against the assignee any claims of the government against the assignor which matured prior to the effective date of the assignment, whether arising out of the contract or independently. South Side Bank & Trust Co. v. United States, 221 F.2d 813 (7th Cir. 1955); B-177648, December 14, 1973; FAR, 48 C.F.R. § 32.803(e). However, even under the common law, debts of the assignor which mature after an assignment is made, at least those arising under separate transactions, may not be set off against payments otherwise due the assignee. 20 Comp. Gen. 458 (1941); 29 Comp. Gen. 40, 45 (1949). Another limitation on the availability of offset is the case of Mercantile National Bank at Dallas v. United States, 280 F.2d 832 (Ct. Cl. 1960), discussed previously under the "Rights and Liabilities" heading.

The contractor's bankruptcy complicates the picture. While the Bankruptcy Code protects most pre-petition offsets (11 U.S.C. § 553), the creditor agency must be careful not to violate the automatic stay imposed

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by 11 U.S.C. § 362(a)(7). The agency may need to petition the bankruptcy court to have the stay lifted. See 68 Comp. Gen. 215, 219 (1989).

f. Prompt Payment Discounts

Logically, an assignment should not defeat the government's right to take a prompt payment discount when provided in the contract since what is being assigned is what the contractor is entitled to be paid. Nevertheless, an incomplete or defective notice of assignment raises the question of the proper starting date for computing the discount period. Normally, the starting point is the date of the invoice (31 U.S.C. § 3904). Yet if the contracting agency has received a defective or incomplete notice of assignment, it faces somewhat of a dilemma. It cannot pay the assignee until it receives the proper assignment documents. Nor should it pay the contractor since the government is on notice, however imperfectly, of the intent to make an assignment. Meanwhile, while the deficiency is being corrected, the clock on the discount period continues to tick.

In these circumstances, GAO and the Armed Services Board of Contract Appeals have taken the position that the government may take the discount if it makes payment within the specified number of days after receipt of the necessary assignment documents. For example, the contract in B-185846, May 11, 1977, included a 20-day prompt payment discount. The contractor submitted an invoice with an assignment notation on it, but the assignment documents themselves had not been filed. The agency (Navy) asked the assignee to furnish the necessary documents. By the time the documents showed up and the Navy made payment, more than 20 days had elapsed from receipt of the original invoice. GAO agreed with the Navy that it was entitled to take the discount as long as it paid within 20 days after receipt of the assignment documents. In reaching this result, GAO relied on the decision of the Armed Services Board of Contract Appeals in Carolina Paper Mills, Inc., ASBCA Nos. 4488 and 4614, 58-2 BCA ¶ 1832 (1958).

GAO considered the same issue, and reached the same result, in B-194981, December 12, 1979, and B-192774, April 16, 1979, pointing out in B-194981 that, under the Assignment of Claims Act, it is the assignee's responsibility to provide appropriate documentation to the disbursing officer, and the government should not be penalized for the assignee's failure or delay in fulfilling this obligation.

At the time these GAO and ASBCA decisions were rendered, the clock for taking a prompt payment discount was considered to start upon receipt of a "proper invoice." In 1988, Congress specified the invoice date as the

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starting date and gave it a statutory basis. While the effect of the 1988 legislation on the decisions has yet to be addressed, their result still seems reasonable.

g. Fraud

Fraud on the part of the contractor may or may not adversely affect the assignee's position. It has been held that the contractor's fraud may not be imputed to an innocent assignee for purposes of forfeiture under 28 U.S.C. § 2514 or the False Claims Act, at least with respect to nonfraudulent elements and where the fraud was committed after notification of the assignment. Chelsea Factors, Inc. v. United States, 181 F. Supp. 685 (Ct. Cl. 1960) (invoices overstated quantity of goods shipped); Arlington Trust Co. v. United States, 100 F. Supp. 817 (Ct. Cl. 1951) (fraudulently padded termination claim). Similarly, the court in In re Gulf Apparel Corp., 140 B.R. 593 (M.D. Ga. 1992), held that the government could not assert "fraud in the inducement" (contract obtained by fraudulent representations) as a defense against an innocent assignee.

However, in First National Bank of Birmingham v. United States, 117 F. Supp. 486 (N.D. Ala. 1953), the government's offset against an innocent assignee was upheld where the contractor submitted fraudulent vouchers before the government received notice of the assignment. The assignee in that case delayed notifying the government for 4 months, and could presumably have avoided, or at least minimized, liability but for that delay. The contract did not include a no-setoff clause, but it would not have made any difference because the court found that the government's claim "did not arise independently of such contract." Id. at 489. In contrast, the Gulf Apparel court found that "fraud in the inducement, by its nature, is outside of the contract." 140 B.R. at 598.

Another case, 50 Comp. Gen. 434 (1970), involved fraud by a contractor against its own assignee. The assignment involved an unusual arrangement under which the contractor would submit invoices to the assignee, presumably representing work done. The assignee paid the contractor a percentage of the invoice amount and then submitted the invoices to the government for reimbursement. Over a period of time, the contractor submitted false invoices, got paid by the assignee, and then visited the government disbursing office to retrieve the invoices before the government was able to process them, claiming various errors. The assignee caught on when it realized that, under a contract with an annual value of less than $14,000, it had paid out over $50,000 in just 3 months and had received very little reimbursement. Naturally, the contractor had dissipated its assets by then. The assignee first came to GAO to seek relief

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under a variety of theories, but GAO could find no legal basis to allow the claim, noting that the Assignment of Claims Act does not make the government "an insurer as to fraudulent schemes devised by an assignor as against an assignee." Id. at 441. GAO clearly sympathized with the assignee, however, and hinted that it might fare better in court. The assignee took the hint but lost there too, in Produce Factors Corp. v. United States, 467 F.2d 1343 (Ct. Cl. 1972). The court and GAO agreed that there was no basis to conclude either that the government should not have returned the invoices or that it should have notified the assignee when it did so. 467 F.2d at 1350, 50 Comp. Gen. at 439.

4. Waiver—Voluntary and Involuntary

If a particular protection exists for the sole or primary benefit of a particular party, logically that party should be able to determine when it does not need the protection, and this is essentially how the Assignment of Claims Act has evolved. It has become firmly established that the government may waive the protections of the Assignment of Claims Act. Put another way, the government may, at its option, choose to recognize an assignment which is not in compliance with the statute. When citing cases for this proposition, it has become common to intermingle cases dealing with different provisions of the statute. As the Court of Claims has noted, it really doesn't make any difference because "the concerns . . . and the legal concepts involved in their applicability are the same." Tuftco Corp. v. United States, 614 F.2d 740, 744 n.4 (Ct. Cl. 1980). True as that may be, it is nevertheless useful to start by relating the rule to the different elements of the statute.

First is the prohibition on the assignment of claims or interests in claims, 31 U.S.C. § 3727(b). It is commonly accepted that the government may waive section 3727(b) and recognize the assignment. E.g., United States v. Sinton Dairy Foods Co., 775 F. Supp. 1417, 1419 (D. Colo. 1991) (assignment is "voidable at the government's discretion"); Schwartz v. United States, 16 Cl. Ct. 182 (1989); Radiatronics, Inc., ASBCA No. 15133, 75-2 BCA ¶ 11,349, at 54,069; 47 Comp. Gen. 522, 524 (1968); 19 Comp. Gen. 171 (1939). An illustrative case involved a claim for damage to premises leased to the United States in Vietnam in the 1960s. Originally, the claimant was paid only half of the amount allowed because GAO was concerned that his former wife might be entitled to half under a divorce settlement. The former wife gave the claimant a notarized power of attorney appointing him to collect her share. While the power of attorney did not meet the requirements of 31 U.S.C. § 3727(b), GAO felt this was an

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appropriate case to waive the statute, and approved payment of the remaining half. B-200402, June 10, 1983.

Next is 41 U.S.C. § 15(a), prohibiting the transfer of contracts. As the Court of Claims said in a frequently cited case, "Despite the bar of [41 U.S.C. § 15], the Government, if it chooses to do so, may recognize an assignment." Maffia v. United States, 163 F. Supp. 859, 862 (Ct. Cl. 1958). This provision had to be construed as giving the government an option, noted the Comptroller of the Treasury in a 1903 case. Otherwise, anyone who made a contract with the government and then discovered that he, she, or it had made a bad deal could get out of it simply by concocting a phony transfer. 10 Comp. Dec. 159, 162–63 (1903). Quoting the above statement from Maffia, the Court of Claims noted in Tuftco, 614 F.2d at 745, that the rule is further strengthened by the fact that every forum which deals with government contract controversies has adopted it.[74]

An illustrative case is 68 Comp. Gen. 53 (1988). The Navy had contracted for the construction of two fleet oilers with options for two more. After Navy exercised the option, the contractor advised that it was experiencing financial difficulties. Concerned that the contractor might file for bankruptcy, Navy considered various alternatives, including transferring the option contract to another shipbuilder. Although 41 U.S.C. § 15(a) prohibits the transfer of contracts, GAO agreed that Navy could waive the statute and recognize the transfer.

The "soundest and most accepted" method of waiving 41 U.S.C. § 15(a)—although not the exclusive method—is a novation agreement. Tuftco, 614 F.2d at 745. A novation is a three-party agreement (old contractor, new contractor, government) the legal effect of which "is the substitution of a new agreement or obligation for the old one, which is thereby extinguished or discharged." 58 Comp. Gen. 108, 111 (1978). The FAR includes detailed and important instructions on novation agreements, including a format. 48 C.F.R. Subpart 42.12. Cases approving novations in various contexts are 58 Comp. Gen. 108 (1978); 53 Comp. Gen. 124 (1973); 51 Comp. Gen. 145 (1971); B-184665, September 25, 1975; B-173331, August 19, 1971.

[74]E.g., Thompson v. Commissioner, 205 F.2d 73, 78 (3d Cir. 1953); Benjamin v. United States, 318 F.2d 728 (Ct. Cl. 1963); G.L. Christian and Associates v. United States, 312 F.2d 418, 423 (Ct. Cl. 1963), cert. denied, 375 U.S. 954; Federal Manufacturing and Printing Co. v. United States, 41 Ct. Cl. 318 (1906); Monchamp Corp. v. United States, 19 Cl. Ct. 797, 801 (1990); Radiatronics, Inc., ASBCA No. 15133, 75-2 BCA ¶ 11,349 (1975); Mancon Liquidating Corp., ASBCA No. 18304, 74-1 BCA ¶ 10,470 (1974); 32 Comp. Gen. 227 (1952); B-155480, December 2, 1964; 16 Op. Att'y Gen. 277 (1879); 15 Op. Att'y Gen. 235, 245–46 (1877).

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into contracts in the execution of its duties. E.g., United States v. Tingey, 30 U.S. (5 Pet.) 115, 127–28 (1831). While contract claims are now governed by statute, there is authority for the proposition that agencies have the inherent authority, as an incident to the power to enter into contracts, to settle at least certain types of contract claims. United States v. Corliss Steam-Engine Co., 91 U.S. 321 (1875); Cannon Construction Co. v. United States, 319 F.2d 173 (Ct. Cl. 1963); Brock & Blevins Co. v. United States, 343 F.2d 951 (Ct. Cl. 1965). Cannon contains the best discussion.[2]

Another broad source of claims activity is statutes which create a right or entitlement, whether or not they specifically address claims. For example, under 5 U.S.C. § 5702(a), an employee traveling on official business "is entitled to" certain travel allowances. An employee who is erroneously not paid travel allowances otherwise due does not need a statute to authorize him or her to file a claim for the proper allowance. The right to file a claim derives from the entitlement. Similarly, if an agency misapplies a mandatory allocation formula under an assistance program, the beneficiary who got too little does not need specific statutory authority to file a claim for the right amount.

Finally, there is a fairly large universe of claims statutes that serve a wide range of functions. Some establish the authority to settle certain types of claims in situations where that authority would not otherwise exist. A prime example here is the Federal Tort Claims Act. Others, the Contract Disputes Act for example, do not necessarily create the right to file claims but nevertheless provide a statutory basis and establish procedures. Some, as the two cited, are governmentwide. Many others are agency-specific. An example is 31 U.S.C. § 3724, which authorizes the Attorney General to settle claims of not more than $50,000 for personal injury or property damage caused by law enforcement officers employed by the Department of Justice which cannot be settled under the Federal Tort Claims Act.

Thus, while claims settlement must be authorized by law, there is no particular form that authority must take. When dealing with statutes, however, whether they specifically address claims or create entitlements from which the right to file claims is inferred, the guiding principle is that "liability . . . is not to be imposed upon a government without clear words." Pine Hill Coal Co. v. United States, 259 U.S. 191, 196 (1922). Where the

[2]The issue has been controversial and the authorities far from unanimous. For a good discussion, see Joel P. Shedd, Jr., "Administrative Authority to Settle Claims for Breach of Government Contracts," 27 Geo. Wash. L. Rev. 481 (1959). GAO disagreed at one time, at least with respect to breach claims, but later retrenched. See 44 Comp. Gen. 353, 356 (1964), modified by 56 Comp. Gen. 289 (1977). Also, an agency's authority to settle a claim must be distinguished from the right to bring a lawsuit. The two are not necessarily coexistent.

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The third major element of the Assignment of Claims Act is the financing institution exception. Waiver questions arise most often in connection with the notice requirement and, consistent with the approach applied to the other elements of the statute, this too can be waived. The Comptroller General addressed the issue in 20 Comp. Gen. 424, 426 (1941), just a few months after the 1940 legislation was enacted:

"In any case in which there is but one assignment, and not conflicting assignments, the fact that there is not a strict compliance with the statute with respect to 'written notice' should not give rise to any serious question, since it has been held that [the Assignment of Claims Act was] enacted for the benefit of the Government and may be waived by it."

As noted above, the waiver rule is not unanimous. There is some authority on the district court side for the proposition that 31 U.S.C. § 3727(b) cannot be waived until after the claim has been allowed. United States v. Shannon, 186 F.2d 430, 432–33 (4th Cir. 1951), rev'd on other grounds, 342 U.S. 288; Knight v. United States, 596 F. Supp. 540, 542 (M.D. Ga. 1984), aff'd mem., 762 F.2d 1022 (11th Cir. 1985); Marger v. Bell, 510 F. Supp. 9, 12–13 (D. Maine 1980). Most Assignment of Claims Act cases which end up in court tend to be litigated in the Court of Federal Claims, however, which does not follow this precedent. See Schwartz v. United States, 16 Cl. Ct. 182, 188 (1989).

Thus far we have been talking about voluntary waiver by the government. Once it is established that the government can waive something voluntarily, it is perhaps inevitable that the courts will start finding that they can, in effect, waive it too, whether the government intended this result or not. The leading "involuntary waiver" case is Tuftco Corp. v. United States, 614 F.2d 740 (Ct. Cl. 1980). The Department of Housing and Urban Development had entered into contracts for the purchase of mobile homes. The contractor assigned the contracts—the contracts themselves, not just the proceeds—to another party. Before each assignment, the parties informed the contracting officer who agreed and said that HUD would make the payments to the assignee. Instead, HUD made several payments to the original contractor. When the assignee sued, the government raised 41 U.S.C. § 15 as a defense, arguing that the contracting officer had no authority to recognize the assignments.

The court reviewed the evolution of the Assignment of Claims Act and the waiver doctrine, and concluded as follows:

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"[W]e conclude the contracting officer was fully aware of the assignments, recognized them, and communicated such recognition to plaintiff. In this case the action of defendant constituted a waiver of the Act's provisions, including the notice provision applicable to banks and financial institutions. Having chosen to recognize the assignments, defendant was bound to act in accordance with their terms."

614 F.2d at 743–44. Therefore, the government was liable to the assignee for losses sustained as a result of HUD's payments to the original contractor. Of course the assignee wanted interest too, which the court denied. Id. at 747.

The post-Tuftco cases fall into two camps. The first group involves—as did Tuftco itself—the transfer prohibition of 41 U.S.C. § 15(a). These cases tend to come before the boards of contract appeals (jurisdiction under the Contract Disputes Act is frequently an issue), with the assignee trying to establish an implied or de facto novation. A "Tuftco waiver" is either found[75] or not found,[76] based on the board's analysis of the particular facts. The Interior Board provided the following summary:

"In all the cases in which the Government has been found to have recognized an assignment and waived the anti-assignment statutes, the notice of the transfer or assignment has been clear and unambiguous and the Government has either expressly agreed to the assignment . . . or has so conducted itself that the assignee was warranted in concluding that recognition of the assignment or transfer had occurred."

Rodgers Construction, Inc., IBCA Nos. 2777 et al., 92-1 BCA ¶ 24,503, at 122,307 (1991).

The second group involves defective assignments to financing institutions (no notice, defective notice, no financial participation, etc.). Since the assignee is not a contractor, these do not come under the Contract Disputes Act but usually go directly to court. The Court of Federal Claims applies Tuftco's "totality of the circumstances test based on three factors: the government's knowledge of, assent to, and actions in accordance with the assignment." United California Discount Corp. v. United States, 19 Cl. Ct. 504, 509 (1990). As with the implied novation cases, the result turns on an analysis of the government's conduct. In addition to United California, some cases in which the court refused to find an involuntary waiver are

[75]Rodgers Construction, Inc., IBCA Nos. 2777 et al., 92-1 BCA ¶ 24,503 (1991); In-Vest Corporation, GSBCA No. 6365, 83-1 BCA ¶ 16,502 (1983). A pre-Tuftco case is Vertical Aviation Transport Systems, Inc., ASBCA No. 18266, 74-1 BCA ¶ 10,617 (1974).

[76]Broadlake Partners, GSBCA No. 10713, 92-1 BCA ¶ 24,699 (1991); Morrison-Smith, Inc., ASBCA No. 38028, 90-1 BCA ¶ 22,308 (1989); CBI Services, Inc., ASBCA No. 34983, 88-1 BCA ¶ 20,430 (1987).

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Trust Co. Bank of Middle Georgia v. United States, 24 Cl. Ct. 710 (1992); American National Bank and Trust Co. v. United States, 23 Cl. Ct. 542 (1991); and American Financial Associates, Ltd. v. United States, 5 Cl. Ct. 761 (1984), aff'd, 755 F.2d 912 (Fed. Cir. 1985). GAO has also considered a few of these cases, finding a waiver in 61 Comp. Gen. 53 (1981) but not in B-225051, February 19, 1988.

It should be apparent that the rationale of Tuftco and its progeny is basically an estoppel theory. What these cases teach is that the government can find itself bound by its own conduct. In the context of voluntary waiver, GAO has rejected the suggestion that waiver "is permitted only where the government is otherwise estopped from disavowing the assignment." 68 Comp. Gen. 53, 55 (1988). For involuntary waiver, however, Tuftco remains the standard.

G. Interest

1. The No-Interest Rule

Any discussion of the payment of interest by the federal government must start with the "no-interest rule"—the firmly established principle, derived from the concept of sovereign immunity, that the United States is not liable for interest unless expressly authorized in the relevant statute or contract. E.g., Library of Congress v. Shaw, 478 U.S. 310 (1986).[77] A detailed discussion may be found in United States v. Mescalero Apache Tribe, 518 F.2d 1309 (Ct. Cl. 1975). The no-interest rule has also been consistently recognized and applied by the accounting officers and the Attorney General. E.g., 9 Comp. Gen. 421 (1930); 8 Comp. Dec. 498 (1902); 9 Op. Att'y Gen. 449 (1860). Restated, the government is not liable for interest unless it has consented to be liable for interest either by the enactment of legislation or by contractual agreement. The rule does not permit the payment of interest on equitable grounds and applies even where the government has unreasonably delayed payment. "Justice and equity will not give [the claimant] one cent more than he is entitled to by law." 9 Op. Att'y Gen. at 450.

In the context of administrative claims, the no-interest rule manifests itself in virtually every area in which monetary claims can be brought against

[77]Shaw is but one in a long line of Supreme Court decisions recognizing the rule. A few others are United States v. Louisiana, 446 U.S. 253, 264–65 (1980); United States v. Thayer West Point Hotel Co., 329 U.S. 585, 588 (1947); United States v. Goltra, 312 U.S. 203, 207 (1941); United States v. North Carolina, 136 U.S. 211, 216 (1890). The no-interest rule is set out more fully, and with additional case citations, under the Interest heading in Chapter 14.

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the United States. Examples in which claims for interest have been disallowed are: 65 Comp. Gen. 533 (1986) (refund of amounts set off against Individual Indian Money trust account); B-251228, July 20, 1993 (late payment of California possessory interest tax, an obligation of the employee and not the government); B-241592.3, December 13, 1991 (duties collected by the Customs Service for the Virgin Islands); B-236330.2, February 14, 1990 (voluntary creditor); B-206101, May 20, 1982 (late payment of Treasury bill); B-195265, August 17, 1979 (delayed reimbursement by Labor Department of benefit payments to employee trust); B-154102, June 16, 1974 (award under Military Claims Act). Two of the major claims areas—contract-related claims and claims by government employees relating to pay or allowances—are addressed by statute and are covered separately later in this section.

The interest prohibition applies to claims arising in foreign countries as well as to claims arising in the United States. 45 Comp. Gen. 169 (1965). It does not apply, however, to contract obligations of the District of Columbia government, which is liable for interest on its contract obligations the same as a private corporation. 33 Comp. Gen. 263 (1953). (There must of course be some underlying legal obligation to which interest liability can attach. See B-180565, May 31, 1974.)

The no-interest rule also applies to payments under private relief legislation. United States ex rel. Angarica v. Bayard, 127 U.S. 251, 260 (1888). However, consistent with the rule, such legislation may provide for interest in situations where it would not otherwise be payable. See, e.g., B-182574-O.M., July 19, 1979. In B-187866, April 12, 1977, the Comptroller General concluded that interest could be paid on a claim for which Congress had made a specific appropriation where the appropriation language did not specify interest but it was clear from the legislative history that the amount appropriated included interest. (The specific claim involved in B-187866 would now be covered by the Contract Disputes Act.)

A statute originating in 1841 provides that amounts held in trust by the United States shall be invested in government obligations and shall bear interest at a minimum annual rate of 5 percent. 31 U.S.C. § 9702. Despite its seemingly broad language, however, this statute applies only where trust funds are otherwise required by statute, treaty, or contract to be invested, and is not an independent authorization for the payment of interest. United States v. Mescalero Apache Tribe, 518 F.2d 1309, 1323–31 (Ct. Cl. 1975); White Mountain Apache Tribe of Arizona v. United States, 20 Cl. Ct. 371, 380–81 (1990); B-241592.3, December 13, 1991.

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If the necessary authority for the payment of interest does not exist in a particular context, it follows that appropriations are not legally available for that purpose. Thus, appropriations of federal agencies are not available for the payment of interest or penalties to the Internal Revenue Service on account of late forwarding or underpayment of employment taxes in the absence of legislation expressly making federal agencies liable for interest and penalties the same as private parties. B-161457, May 9, 1978. Similarly, the Internal Revenue Service is not liable for interest on overpayments of employer taxes by federal agencies. B-161457, December 5, 1983.

2. Contract Matters

a. The No-Interest Rule in the Contract Context

At one time, GAO took the position that interest could be provided for in a contract only if supported by statutory authority. The rationale was that a contractual stipulation to pay interest for a delay in payment could end up obligating the government beyond the period of obligational availability of the appropriation, thereby violating the Antideficiency Act. This rule was expressed in 22 Comp. Gen. 772 (1943). However, Supreme Court formulations in cases like United States v. Thayer-West Point Hotel Co., 329 U.S. 585 (1947), made it clear that the two bases for interest liability—statute or contract—were indeed alternatives. Consequently, GAO changed its position in 51 Comp. Gen. 251 (1971), overruling 22 Comp. Gen. 772 and recognizing that the government could become liable for interest by contract even without express statutory authority. The potential Antideficiency Act problem could be averted by a reservation of funds. Thus, the United States can be liable for interest either (1) if it is expressly provided by statute, or (2) even in the absence of applicable statutory authority, if it is provided in the relevant contract.[78] See, e.g., 56 Comp. Gen. 55 (1976) (military transportation contracts with air carriers). Absent authority from either source, interest may not be paid. E.g., B-187877, April 14, 1977.

With this issue resolved, the federal procurement regulations began to require the inclusion of a "Payment of Interest" clause in procurement contracts, and the boards of contract appeals awarded interest to the extent permitted by that clause. E.g., Proserv, Inc., ASBCA No. 20768, 78-1 BCA ¶ 13,066 (1978); General Research Corp., ASBCA No. 21005, 77-2 BCA ¶ 12,767 (1977). Indeed, some boards applied the so-called "Christian

[78]Pre-1971 cases must be read with caution. Although 51 Comp. Gen. 251 expressly overruled only 22 Comp. Gen. 772, other early decisions exist which hold that statutory authority is required in order for a contract to provide for interest. E.g., 5 Comp. Gen. 649 (1926). To the extent inconsistent with 51 Comp. Gen. 251, any such decisions must be regarded as implicitly overruled or modified.

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doctrine"[79] and incorporated the Payment of Interest clause into the contract in cases where it had been inadvertently omitted. E.g., MR's Landscaping and Nursery, HUD BCA No. 76-29, 76-30, 78-1 BCA ¶ 13,077 (1978); Commonwealth Electric Co., IBCA No. 1048-11-74, 77-2 BCA ¶ 12,649 (1977).

Interest on payments to contractors is now governed by two statutes—the Contract Disputes Act (interest on claims) and the Prompt Payment Act (interest on delayed payments). As we will see, the Federal Acquisition Regulation includes several implementing provisions, although there is no longer a separate "Payment of Interest" clause.

While the Contract Disputes Act and Prompt Payment Act cover most contract-related payments, they do not cover all situations. Those that are not covered remain subject to the no-interest rule. Thus, as we have noted elsewhere in this chapter, payments to an assignee under the Assignment of Claims Act do not bear interest because the assignee is not a contractor, nor do payments under a contract implied-in-law (quantum meruit). In addition:

- Interest is not payable on a claim for bid protest costs. 69 Comp. Gen. 679, 684 (1990); B-226941.3, April 13, 1989.
- The Contract Disputes Act and Prompt Payment Act apply to contracts under which the government is acquiring goods or services. They do not apply when the government is providing goods or services. E.g., B-226231, October 23, 1987 (no interest on claim for refund of overcharges).

Traditionally, interest on borrowings is not an allowable cost. E.g., Myerle v. United States, 31 Ct. Cl. 105, 137 (1896); Radcliffe Construction Co., ASBCA Nos. 39252, 39253, 90-2 BCA ¶ 22,651 (1990); 27 Comp. Gen. 690 (1948). This is based on the policy of encouraging contractors "to finance the performance of Government contracts with their working capital rather than with borrowed capital." B-185016, July 8, 1976. If interest on borrowings were reimbursable, the Myerle court noted, a contractor would never use its own money to finance performance. This principle is now reflected in the FAR at 48 C.F.R. § 31.205-20 with respect to commercial contractors. However, the cost of capital committed to facilities is treated as an imputed cost which may be allowable, whether derived from equity or borrowed capital, under 48 C.F.R. § 31.205-10 ("Cost of Money"). In addition, there is authority for allowing the recovery of interest, under

[79]Under the "Christian doctrine," a clause required by federal law will be read into a contract whether physically there or not. G.L. Christian and Associates v. United States, 312 F.2d 418 (Ct. Cl. 1963), cert. denied, 375 U.S. 954.

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limited circumstances, on borrowings made necessary by a government-ordered change. E.g., Gulf Contracting, Inc. v. United States, 23 Cl. Ct. 525 (1991). See also Gevyn Construction Corp. v. United States, 827 F.2d 752 (Fed. Cir. 1987); Dravo Corp. v. United States, 594 F.2d 842 (Ct. Cl. 1979); Bell v. United States, 404 F.2d 975 (Ct. Cl. 1968); A.T. Kearney, Inc., DOT CAB No. 1580, 86-1 BCA ¶ 18,613 (1985). But see Servidone Construction Corp. v. United States, 19 Cl. Ct. 346, 383 (1990), aff'd, 931 F.2d 860 (Fed. Cir. 1991).

For contracts with other than commercial organizations, the FAR instructs contracting officers to determine cost allowability under the applicable OMB circular—A-21 for educational institutions, A-87 for state, local, and Indian tribal governments, and A-122 for nonprofits—using the version in effect as of the date of the contract. 48 C.F.R. §§ 31.303, 31.603, 31.703.

b. Contract Disputes Act

The no-interest rule applies to contract disputes just as it applies to any other monetary claim against the government. Monroe M. Tapper & Associates v. United States, 611 F.2d 354, 357 (Ct. Cl. 1979). As noted above, for some years interest was payable on contract claims by virtue of a mandatory "Payment of Interest" clause. Section 12 of the Contract Disputes Act of 1978, 41 U.S.C. § 611, patterned generally after the old Payment of Interest clause, provides:

> "Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board."

Public Law 92-41 had amended the Renegotiation Act to prescribe interest on Renegotiation Board excess profit determinations. Rates are set by the Secretary of the Treasury for 6-month periods beginning January 1 and July 1 of each year, "taking into consideration current private commercial rates of interest for new loans maturing in approximately five years." Pub. L. No. 92-41, § 2(a), 85 Stat. 97. The Renegotiation Board ceased to exist in 1979, and the Renegotiation Act was dropped from the United States Code although it has never been repealed. Nevertheless, section 2(a) remains alive for other purposes such as the Contract Disputes Act. The rates are referred to as "Renegotiation Act rates" or "Contract Disputes Act rates."

Interest is payable under 41 U.S.C. § 611 whether the claim is allowed by the contracting officer, a board of contract appeals, or a court.

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The statute talks about interest "on claims." Therefore, there must be an underlying claim to which an award of interest can attach. Absent an underlying claim, 41 U.S.C. § 611 does not authorize the payment of interest even though the underlying transaction may have resulted in the payment of money by the government to the contractor. E.g., Mayfair Construction Co. v. United States, 841 F.2d 1576 (Fed. Cir. 1988); Nab-Lord Associates v. United States, 682 F.2d 940 (Ct. Cl. 1982); Hoffman Construction Co. v. United States, 7 Cl. Ct. 518 (1985); A.L.M. Contractors, Inc., ASBCA No. 23792, 79-2 BCA ¶ 14,099 (1979).

In Hoffman, for example, the contractor submitted cost proposals on change order work which the parties negotiated and the government paid. No "claim" was ever submitted to the contracting officer. Therefore, there was no entitlement to interest on the change order payments. The Mayfair court reached the same result with respect to termination settlement proposals which the contractor submitted and then tried to characterize as a "claim." As Mayfair illustrates, what the contractor chooses to call the submission is not controlling. See also CPT Corp. v. United States, 25 Cl. Ct. 451, 455 (1992). Another way of saying all of this is that a demand for interest alone is not a "claim" for purposes of 41 U.S.C. § 611. Hoffman, 7 Cl. Ct. at 522; Esprit Corp. v. United States, 6 Cl. Ct. 546 (1984), aff'd mem., 776 F.2d 1062 (Fed. Cir. 1985).

The GSA Board of Contract Appeals has held that an unreasonable delay in the payment of a negotiated settlement is a "claim" which can support an interest award under 41 U.S.C. § 611. Dawson Construction Co., GSBCA No. 5777, 80-2 BCA ¶ 14,817 (1980). However, the GSBCA declined to extend Dawson to the delayed payment of invoices, in part because of the existence of the Prompt Payment Act. Safeguard Maintenance Corp., GSBCA No. 6054, 83-1 BCA ¶ 16,276 (1983). Interest was awarded on an oral settlement agreement in Elkhorn Construction Co., VABCA Nos. 1493 et al., 84-2 BCA ¶ 17,435 (1984).

Interest begins to run "from the date the contracting officer receives the claim . . . from the contractor." Congress chose this "red-letter date" for purposes of certainty, and it applies even though the contractor at the time of filing has not yet incurred the total costs involved in the claim. Servidone Construction Corp. v. United States, 931 F.2d 860, 862–63 (Fed. Cir. 1991). The claim must nevertheless "be in sufficient detail so that the contracting officer may reasonably take some action upon it." A.T. Kearney, Inc., DOT CAB No. 1580, 86-1 BCA ¶ 18,613, at 93,510.

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To qualify for interest under 41 U.S.C. § 611, the claim must be presented to the contracting officer by the contractor, not by the government. Youngdale & Sons Construction Co. v. United States, 27 Fed. Cl. 516, 566–67 (1993); Ruhnau-Evans-Ruhnau Associates v. United States, 3 Cl. Ct. 217 (1983). This, however, should not be elevated to the level of form over substance, and a claim will not be disqualified merely because the contractor delivers it to some other government official who in turn presents it to the contracting officer. Dawco Construction Co. v. United States, 930 F.2d 872, 879–80 (Fed. Cir. 1991).

Prior to late 1992, the courts had held that interest on claims of more than $50,000 did not begin to run until the claim had been properly certified by the contractor as required by 41 U.S.C. § 605(c)(1). Fidelity Construction Co. v. United States, 700 F.2d 1379 (Fed. Cir. 1983), cert. denied, 464 U.S. 826. In October 1992, Congress enacted the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506. Section 907 of the Act, 106 Stat. 4518, permits the correction of defective certifications, in which event interest will run from the date of the contracting officer's initial receipt of the claim. The portion of the amendment dealing with interest, section 907(a)(3), is not codified but is found as a note following 41 U.S.C. § 611.

Interest under 41 U.S.C. § 611 is applied on a "variable-rate" basis; that is, the rate to be applied to a particular claim will rise or fall each January 1 and July 1 during the accrual period, to mirror rate changes in effect for that period.[80] Brookfield Construction Co. v. United States, 661 F.2d 159 (Ct. Cl. 1981); Honeywell, Inc., GSBCA No. 5458, 81-2 BCA ¶ 15,383 (1981); FAR, 48 C.F.R. § 33.208. Once Brookfield came out, the courts and boards started applying the variable-rate method to their residual pre-CDA claims under the old standard "Payment of Interest" clause.[81] J.F. Shea Co. v. United States, 754 F.2d 338 (Fed. Cir. 1985); McCollum v. United States, 7 Cl. Ct. 709 (1985), vacating in part the court's prior opinion at 6 Cl. Ct. 373 (1984); Joseph Penner, GSBCA No. 6820, 83-1 BCA ¶ 16,282 (1983).[82]

[80]The opposing method is the "fixed-rate" method under which the interest rate, once determined with respect to a particular claim, remains the same for that claim throughout the accrual period.

[81]While the FAR no longer includes a separate Payment of Interest clause, an interest provision along the lines of 48 C.F.R. § 33.208 is included as subsection (h) of the Disputes clause, 48 C.F.R. § 52.233-1.

[82]The variable-rate conclusion of the cases cited in the text is perhaps open to question in light of the Supreme Court's holding in Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 838–39 (1990), that interest under 28 U.S.C. § 1961(a) which, like 41 U.S.C. § 611, refers to "rate" in the singular, is to be applied on a fixed-rate basis. Cf. Honeywell, 81-2 BCA at 76,215, in which the board conceded that its variable-rate conclusion "in effect ignores the literal word of the statute."

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Interest under 41 U.S.C. § 611 is simple interest. The Contract Disputes Act does not authorize compound interest. ACS Construction Co. v. United States, 230 Ct. Cl. 845 (1982). Thus, interest for the first 6-month period is not added to principal to form a new principal for the second 6-month period.

The interest period may be tolled by unreasonable delay in claim processing attributable to the contractor. A.T. Kearney, Inc., 86-1 BCA at 93,509 (contrary result "could be tantamount . . . to providing a contractor with a better investment than his own business might afford").

Finally, the interest provision of 41 U.S.C. § 611 applies only to claims under the Contract Disputes Act. It does not apply to awards by boards of contract appeals or courts on other than CDA claims. For example, there is no statute authorizing interest on awards of costs and attorney's fees under the Brooks Act (40 U.S.C. § 759), and in fact the General Services Administration Board of Contract Appeals commonly makes these awards "without interest." E.g., The Newman Group, Inc. v. NASA, GSBCA No. 11878-C, 93-1 BCA ¶ 25,345 (1992); Horizon Data Corp. v. Department of the Navy, GSBCA No. 11018-C, 92-2 BCA ¶ 24,852 (1992); Berry Computer, Inc., GSBCA No. 11017-C, 92-1 BCA ¶ 24,441 (1991).

Similarly, the Contract Disputes Act does not authorize interest on an indemnification agreement between a pesticide manufacturer and the Environmental Protection Agency under 7 U.S.C. § 136m. Cedar Chemical Corp. v. United States, 18 Cl. Ct. 25 (1989). Such an agreement is not a procurement contract, and the clause in 41 U.S.C. § 602(a) making the CDA applicable to contracts for the disposal of personal property refers to government-owned property. Id. at 32.

c. Prompt Payment Act

(1) Introduction

The Contract Disputes Act of 1978 provides for interest on claims under a contract; for the most part, it does not deal with simple delay in making a payment which is not in dispute. Congress addressed this latter situation with the Prompt Payment Act, originally enacted in 1982 (Pub. L. No. 97-177, 96 Stat. 85), and substantially amended in 1988 (Pub. L. No. 100-496, 102 Stat. 2455). The Act is codified at 31 U.S.C. §§ 3901–3907.

The purpose of the Prompt Payment Act, as the House Committee on Government Operations said in reporting the original legislation, is "to accomplish what administrative rules and regulations have failed to

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liability is potentially large, "only the plainest language" will suffice. Id. See also United States v. Zazove, 334 U.S. 602, 616–17 (1948); Brookfield Construction Co. v. United States, 661 F.2d 159, 163–64 (Ct. Cl. 1981); Schellfeffer v. United States, 343 F.2d 936, 942 (Ct. Cl. 1965).

It should also be noted that, absent an authorizing statute, an agency has no authority to create liability by regulation. Illinois Central RR Co. v. United States, 52 Ct. Cl. 53 (1917).[3] See also, e.g., Mitzelfelt v. Department of Air Force, 903 F.2d 1293 (10th Cir. 1990); B-201054, April 27, 1981. This principle follows logically and directly from the more fundamental principle that—

"Agents and officers of the Government have no authority to give away the money or property of the United States, either directly or under the guise of a contract that obligates the Government to pay a claim not otherwise enforcible against it."

Bausch & Lomb Optical Co. v. United States, 78 Ct. Cl. 584, 607 (1934), cert. denied, 292 U.S. 645.

If there is no common basis of claims authority throughout the federal government, there is also no common set of procedures. Certainly the courts often have the final word, but the first step in the process is usually an administrative determination, and the care (or lack thereof) with which the agency handles the initial administrative stage can and often does influence the rest of the process. Indeed, most claims against the federal government are resolved administratively without the need for court action. No one has any idea how many claims are processed by the federal government each year. If, however, every claim against the United States had to go to court, the federal court system would sink without a trace.

The role of the administrative process varies depending on the particular statutory scheme involved. As the Supreme Court has stated:

"The United States may create rights in individuals against itself and provide only an administrative remedy. . . . It may provide a legal remedy, but make resort to the courts available only after all administrative remedies have been exhausted. . . . It may give to the individual the option of either an administrative or a legal remedy. . . . Or it may provide only a legal remedy."

[3]"We have been unable to find any authority or even suggestion that the heads of departments can, by regulation, require from the Government the payment of money for any purpose not specifically authorized by law." Id. at 59.

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do—provide incentives for the Federal Government to pay its bills on time." H.R. Rep. No. 461, 97th Cong., 2d Sess. 1 (1982), reprinted at 1982 U.S. Code Cong. & Admin. News at 111.[83] The essence of the statute is the requirement in 31 U.S.C. § 3902(a) that—

"the head of an agency acquiring property or service from a business concern, who does not pay the concern for each complete delivered item of property or service by the required payment date, shall pay an interest penalty to the concern on the amount of the payment due."

All interest statutes share a common purpose—compensation for the loss of the use of money over some period of time, in other words, a recognition of the time value of money. The Prompt Payment Act has an additional objective, reflected by the use of the term "interest penalty" in the above quotation. The House Government Operations Committee explained as follows:

"By using the word 'penalties' to characterize interest payments, the Committee is emphasizing to Government managers that a stigma is attached to the necessity for interest payments caused by an agency's failure to pay bills on time. Use of the word 'penalty' in the context of the Prompt Payment Act connotes inefficient management."

H.R. Rep. No. 461 at 8; 1982 U.S. Code Cong. & Admin. News at 118.

Without speculating whether two sets of regulations, like the proverbial two heads, may be better than one, we note that the Prompt Payment Act is in that somewhat unusual posture. First, the law directs the Office of Management and Budget to prescribe implementing regulations, and goes on to tell OMB in some detail what those regulations should say. 31 U.S.C. § 3903. These regulations are published as OMB Circular No. A-125, "Prompt Payment" (1989). They are entitled to the deference required by Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), discussed in Chapter 3. International Business Investments, Inc. v. United States, 21 Cl. Ct. 79 (1990); Ocean Technology, Inc. v. United States, 19 Cl. Ct. 288 (1990); Technology for Communications International, ASBCA Nos. 36265, 36841, 93-3 BCA ¶ 26,139 (1993). In addition, an uncodified provision of the 1988 amendments directs modification of the Federal Acquisition Regulation to include solicitation provisions and contract clauses to implement the statute and the OMB regulations. This provision, section 11 of Pub. L. No. 100-496, s 102 Stat. at 2463, 31 U.S.C.

[83]A 1978 GAO study had concluded that the government made approximately 70 percent of its payments on time. The Federal Government's Bill Payment Performance Is Good But Should Be Better, FGMSD-78-16 (February 24, 1978).

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§ 3903 note, also includes considerable detail on the content of the modifications. The FAR coverage is found at 48 C.F.R. Subpart 32.9. Thus, to fully understand or properly apply the Prompt Payment Act, one needs the statute, the OMB circular, and the FAR, as well as any individual agency regulations.

The statute and regulations go into excruciating detail in some areas, most of which we do not reflect here. A well-documented and comprehensive reference to fill in the gaps is Michael J. Renner, "Prompt Payment Act: An Interest(ing) Remedy for Government Late Payment," 21 Pub. Cont. L.J. 177 (1992).

(2) Which government agencies are covered?

To define the term "agency," the Prompt Payment Act incorporates the definition in the Administrative Procedure Act, 5 U.S.C. § 551(1). 31 U.S.C. § 3901(a)(1). The APA broadly defines agency as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," but there are several exceptions, most notably the Congress, the courts of the United States, the governments of the territories or possessions of the United States, and the government of the District of Columbia. Further, the APA definition does not include the President. Franklin v. Massachusetts, 112 S. Ct. 2767, 2775 (1992).

Thus, case law under the APA definition is directly relevant because an entity which is an agency for purposes of the APA is, by virtue of that fact, also an agency for purposes of the Prompt Payment Act. E.g., Ramer v. Saxbe, 522 F.2d 695 (D.C. Cir. 1975) (Bureau of Prisons); Buckeye Power, Inc. v. Environmental Protection Agency, 481 F.2d 162 (6th Cir. 1973) (EPA); Blackwell College of Business v. Attorney General, 454 F.2d 928 (D.C. Cir. 1971) (Immigration and Naturalization Service).

Cases under the Freedom of Information Act also may be relevant, but must be applied with caution. Prior to 1974, FOIA simply used the APA definition, so pre-1974 cases are directly applicable. E.g., Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) (agencies within the Executive Office of the President, as distinguished from the President himself, are within the APA definition). FOIA received its own definition of "agency" in 1974 (5 U.S.C. § 552(f)) which, as the court noted in Cotton v. Adams, 798 F. Supp. 22, 24 (D.D.C. 1992), was intended to expand upon the APA definition. Thus, an agency under FOIA is not necessarily an agency under APA/Prompt Payment Act, but an entity which is excluded under the FOIA definition

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would also be excluded under the APA/Prompt Payment Act definition. For example, the Library of Congress is not an agency under FOIA. Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 145 (1980). Therefore, it is also not an agency under the APA definition. Ethnic Employees of the Library of Congress v. Boorstin, 751 F.2d 1405, 1416 n.15 (D.C. Cir. 1985).

In addition, the Prompt Payment Act applies to the following:

- An entity being operated exclusively as an instrumentality of a federal agency to administer one or more programs of that agency, and identified as such by the agency head. 31 U.S.C. § 3901(a)(1).
- The Tennessee Valley Authority, except that the TVA may issue its own implementing regulations. Id. § 3901(b).
- The United States Postal Service, except that the USPS may prescribe its own implementing procurement regulations, solicitation provisions, and contract clauses. Id. § 3901(c). This provision was added in the 1988 amendments and is not retroactive. See Brak-Hard Concrete Co., PSBCA No. 2762, 90-3 BCA ¶ 23,067 (1990).

An agency to which the Prompt Payment Act does not apply may nevertheless bind itself by contract to pay interest on a comparable basis. See, e.g., B-223857, February 27, 1987, in which GAO expressed the opinion that the Commodity Credit Corporation was clearly an "agency" under the Prompt Payment Act definition, but that, even if it were not, it would be bound by interest clauses it had included in meat purchase contracts. (The 1988 amendments, in what is now 31 U.S.C. § 3902(h), specifically address certain Commodity Credit Corporation contracts.)

(3) Who is entitled to receive interest?

The Prompt Payment Act applies to payments made by a government agency to a "business concern." The term "business concern" is defined in 31 U.S.C. § 3901(a)(2) to include two elements. First is "a person carrying on a trade or business." The term is not limited to any particular form of business entity (corporation, partnership, sole proprietorship, etc.) as long as that entity is "carrying on a trade or business." E.g., 65 Comp. Gen. 842, 843 (1986).

The second element of 31 U.S.C. § 3901(a)(2) is "a nonprofit entity operating as a contractor." This may include state and local governments, but not federal entities. OMB Cir. No. A-125, § 1.g. In an interagency agreement,

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however, a provision under which the ordering agency agrees to reimburse the performing agency for expenses incurred in the course of performance will, without further limitation, be construed as referring to ordinary business expenses, including Prompt Payment Act interest incurred by the performing agency. Thus, a federal agency dealing with a nonfederal business concern in the course of performing an interagency agreement is fully subject to the Prompt Payment Act vis-a-vis the business concern; which federal agency will ultimately bear the interest expense depends on the terms of the interagency agreement. 65 Comp. Gen. 795 (1986).

A federal employee is not a "business concern" for Prompt Payment Act purposes. B-231512, September 21, 1989; B-219526, May 25, 1988; B-224628, January 12, 1988.

(4) To what transactions does the statute apply?

The key to the Prompt Payment Act's applicability is the reference in the first sentence of 31 U.S.C. § 3902(a) to an agency "acquiring property or service from a business concern." The Act applies to payments stemming from the acquisition of goods or services by the government. It does not apply when the government is providing goods or services. E.g., B-226231, October 23, 1987 (refund of overcharge).

Next, the payment must arise under a contract. OMB Cir. No. A-125, § 2.a; New York Guardian Mortgagee Corp. v. United States, 916 F.2d 1558 (Fed. Cir. 1990); Consolidated Technologies, Inc., ASBCA No. 33560, 88-1 BCA ¶ 20,470 (1987); B-217698, May 16, 1985. OMB defines "contract" as "any enforceable agreement, including rental and lease agreements, purchase orders, delivery orders (including obligations under Federal Supply Schedule contracts), requirements-type (open-ended) service contracts, and blanket purchase agreements," plus certain Commodity Credit Corporation agreements. OMB Cir. No. A-125, § 1.e. The statute mandates the inclusion of rental contracts (31 U.S.C. § 3901(a)(6)) and the Commodity Credit Corporation transactions (id. § 3902(h)).

Combining these points, the black-letter rule is that the Prompt Payment Act applies when a covered agency is acquiring goods or services by contract from a business concern.

Applying this standard, the Prompt Payment Act does not authorize interest on a quantum meruit payment (contract implied-in-law), even though the government ended up acquiring goods or services, because

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there is no legal contract. 70 Comp. Gen. 664, 666–67 (1991). Similarly, it does not include the Department of Veterans Affairs' statutory obligations under its home loan guarantee program (acquisition of property from lender upon borrower's default). New York Guardian Mortgagee Corp. v. United States, cited above. It does not apply to delayed payments under a grant. Rough Rock Community School Board, IBCA No. 3037, 93-2 BCA ¶ 25,837 (1993). Nor does it authorize interest on an award of attorney's fees under the Equal Access to Justice Act, because the services were acquired by the opposing party, not the government. FDL Technologies, Inc. v. United States, 967 F.2d 1578 (Fed. Cir. 1992); D.E.W., Incorporated, ASBCA No. 42914, 92-1 BCA ¶ 24,540 (1991).

Unless prohibited by the contract, agencies are expected to make periodic (partial) payments to reflect partial delivery of goods or partial performance of services, and the Prompt Payment Act applies to these partial payments. See 31 U.S.C. § 3903(a)(5); OMB Cir. No. A-125, § 4.o; FAR, 48 C.F.R. § 32.903.

The Prompt Payment Act also applies to certain progress payments. For construction contracts, the statute mandates applicability to progress payments, "including a monthly percentage-of-completion progress payment or milestone payments for completed phases, increments, or segments of any project" which are approved as payable by the contracting agency. 31 U.S.C. § 3903(a)(6).

For other than construction contracts, applicability depends on whether or not the progress payments amount to more than "contract financing payments." Under the implementing regulations, the Prompt Payment Act does not apply to the late payment of contract financing payments. OMB Cir. No. A-125, § 7.c(2); 48 C.F.R. § 32.907-2.[84] Contract financing payments include advance payments, progress payments based on cost, progress payments based on a percentage or stage of completion (except, as noted above, for construction contracts), and interim payments on cost-type contracts. OMB Cir. No. A-125, § 1.f; 48 C.F.R. § 32.902. The exclusion of financing payments is a logical application of the statute. See, e.g.,

[84]The specific provision for construction contracts was added to the statute as part of the 1988 amendments, although the Act as implemented by A-125 had previously applied. Many of the progress payment cases applying the then-existing version of the OMB circular are construction cases. Some are B.F. Carvin Construction Co., VABCA No. 3224, 92-1 BCA ¶ 24,481 (1991); Professional Design Constructors, GSBCA Nos. 7937 et al., 91-1 BCA ¶ 23,363 (1990); Sol Flores Construction, ASBCA Nos. 31557, 32608, 90-1 BCA ¶ 22,365 (1989); Batteast Construction Co., ASBCA No. 34420, 87-3 BCA ¶ 20,044 (1987); Zinger Construction Co., ASBCA No. 31858, 87-3 BCA ¶ 20,043 (1987); Steven E. Jawitz, ASBCA No. 31173, 86-1 BCA ¶ 18,564 (1985). See also Reddick & Sons of Gouverneur, Inc. v. United States, 31 Fed. Cl. 558 (1994).

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Northrop Worldwide Aircraft Services, Inc. v. Department of the Treasury, GSBCA Nos. 11162-TD, 11184-TD, 92-2 BCA ¶ 24,765, at 123,561. Paying interest on an advance payment, for example, would be an unjustified windfall.

For the most part, the Prompt Payment Act is concerned only with payments by the federal government to a prime contractor. There are two exceptions. First, a rather complicated provision of the Act, 31 U.S.C. § 3905, extends its protections to subcontractors at all tiers under federal construction contracts. The statute makes clear that a contractor's interest liability to a subcontractor under section 3905 is not an obligation of the United States and may not be reimbursed to the contractor. Id. § 3905(k).

Second, a grantee under a federal grant may include "interest penalty" provisions in its contracts for the acquisition of property or services from business concerns. However, federal grant funds may not be used to pay this interest, nor may expenditures of nonfederal funds by the grantee for interest penalties be counted as matching funds. 31 U.S.C. § 3902(g). A grantee's liability under section 3902(g), like a contractor's liability under section 3905, is not an obligation of the United States.

(5) Public utilities

Public utilities differ from most other providers of goods or services in one important respect. Most utilities are regulated by some state or local governmental authority, and have rate structures approved by the regulating body in the form of a published tariff. Federal agencies acquiring utility services may or may not do so under a formal contract. In cases where there is no formal contract, the agency acquires the services in much the same way an individual customer does—the agency requests the services, the utility provides them and bills the agency periodically. Acceptance of the services with knowledge of the published rate schedule also constitutes a contract which, depending on the precise facts and circumstances, may be an express oral contract or a contract implied-in-fact. The distinction is immaterial to this discussion. The rate structure typically includes a late payment charge. As every reader of this page well knows, utilities tend not to give their customers an overabundance of time to pay their bills before the late payment charge kicks in.

Even before the Prompt Payment Act, based essentially on the principle that the government can bind itself contractually to pay interest, the rule

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developed that the government was liable for late payment charges on overdue utility bills where the terms of the utility company's applicable published rate schedule so provided. B-189149, September 7, 1977; B-188616, May 12, 1977; B-184962, November 14, 1975; B-173725, September 16, 1971. As stated in B-173725, "since the Government accepted this utility service with the understanding that its obligation for payment would be governed by the published rate schedule, it is also bound by the late payment clause contained within that schedule."

The Prompt Payment Act does not explicitly address utilities. Nevertheless, GAO has noted that nothing in the statute or its legislative history provides a basis for removing utilities from the statute's coverage. 65 Comp. Gen. 842, 843–44 (1986). Since the Prompt Payment Act defers to specific terms in a contract, the statute and decisional rules are viewed as complementary rather than contradictory. 63 Comp. Gen. 517, 518 (1984).

The rules for utility payments are as follows:

- If the utility services are being acquired under a formal contract, the agency must follow the interest/late payment charge terms specified in the contract. OMB Cir. No. A-125, § 2.b.
- If the contract is silent with respect to interest/late payment charges, or if there is no formal contract, and the utility has a published tariff, the agency must follow the interest/late payment charge provisions of the tariff. Id. This is so even though the payment period under the tariff may be (and often is) much shorter than what would be available under the Prompt Payment Act. 63 Comp. Gen. 517 (1984). If interest is payable under a tariff, it cannot also be claimed under the Prompt Payment Act; the utility cannot collect twice. Id. at 519.
- If the applicable tariff does not provide for interest/late payment charges and there is no governing clause of a formal contract, interest is payable on late payments in accordance with the Prompt Payment Act. 65 Comp. Gen. 842 (1986).
- If there is no formal contract and the utility is unregulated or otherwise not governed by an approved tariff, the government may nevertheless be bound by the company's customary late payment policy (rather than the Prompt Payment Act) if the relationship amounts to a contract implied-in-fact. 67 Comp. Gen. 24 (1987). In the cited decision, the utility's payment terms were printed on the back of each invoice and became part of the "contract."

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Although the decisions tend to use the terms "late payment charge" and "interest charge" interchangeably, courts in some jurisdictions have held that a late payment charge by a utility is not really "interest" but is a device to permit the utility to recoup its costs which are directly attributable to payment delays and thereby avoid indiscriminately charging all users for the delays of some. In two cases predating the Prompt Payment Act, GAO accepted this rationale and held that the government may be liable for late payment charges contained in a utility's published rate schedule under the general terms of a contract, even in the face of a specific contract clause prohibiting the payment of any "penalty or interest." B-194905, July 6, 1979; B-186494, July 22, 1976. The effect of the Prompt Payment Act on these cases, if any, has yet to be addressed.

When an agency acquires a utility service such as electric power from another federal entity rather than a business concern, the Prompt Payment Act does not apply and the question of late payment charges depends on the "vendor" entity's authority under the governing legislation. For example, the Western Area Power Administration, part of the Department of Energy, may assess late payment fees incident to power supplied to other federal agencies under the Reclamation Project Act. 67 Comp. Gen. 426 (1988). See also 44 Comp. Gen. 683 (1965) (similar analysis for Tennessee Valley Authority).

(6) Accrual of the interest penalty

An agency acquiring goods or services from a business concern by contract becomes liable for interest under the Prompt Payment Act if it fails to pay "for each complete delivered item of property or service by the required payment date." 31 U.S.C. § 3902(a). To determine the "required payment date," the Prompt Payment Act first defers to the contract. A payment date specified in the contract controls, however strict or lenient it may be. If the contract does not establish a payment date, the statute fills the gap. The law specifies payment dates for a number of specialized situations such as Commodity Credit Corporation payments (§ 3902(h)(2)); meat, fish, dairy products[85], and perishable agricultural commodities (§§ 3903(a)(2)–(4)); and construction contract progress payments (§ 3903(a)(6)). For all other situations, the required payment

[85]Includes "edible fats." Makes your mouth water, doesn't it?

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date where not otherwise specified in the contract is "30 days after a proper invoice for the amount due is received." Id. § 3903(a)(1).[86]

Thus, the first step is for the contractor to submit a "proper invoice," defined as an invoice containing or accompanied by the information required by OMB Cir. No. A-125, the regulations of the contracting agency, and the contract. 31 U.S.C. § 3901(a)(3). The required information is spelled out in OMB Cir. No. A-125, § 5.b, and FAR, 48 C.F.R § 32.905(e), and includes such things as the contractor's name and address, invoice date, and description and price of the goods delivered or services rendered.

A contractor's "informal calculations" are not a "proper invoice." Radcliffe Construction Co., ASBCA Nos. 39252, 39253, 90-2 BCA ¶ 22,651 (1990). Nor is an Economic Price Adjustment request. Onan Corp., ASBCA No. 41925, 93-1 BCA ¶ 25,261 (1992). An invoice for change order work is not a "proper invoice" until the value of that work has been recognized in a contract modification. Columbia Engineering Corp., IBCA No. 2322, 98-2 BCA ¶ 21,762 (1989); Ricway, Inc., ASBCA No. 30205, 86-1 BCA ¶ 18,539 (1985).

In determining when an invoice is "received," the law recognizes that the government is entitled to a reasonable interest-free period to inspect and either accept or reject the performance for which payment is being sought. Therefore, an invoice is considered "received" for interest accrual purposes on the later of (1) the date it is actually received, or (2) the 7th day after delivery or the completion of performance, unless actual acceptance has already occurred or the contract specifies a longer acceptance period. 31 U.S.C. § 3901(a)(4).

It is important to emphasize that the 7-day limit is no more than part of the formula for determining interest accrual. It "does not require the Government to pay for goods or services (including construction) that it has not had the opportunity to inspect and actually accept." H.R. Rep. No. 784, 100th Cong., 2d Sess. 16 (1988), reprinted in 1988 U.S. Code Cong. & Admin. News 3036, 3044. It recognizes the need for government acceptance while simultaneously precluding excessive uncompensated payment delays.

The contract should tell the contractor where to submit invoices—that is, it should specify a "designated billing office." An invoice is "actually

[86]The original Prompt Payment Act provided an additional 15-day "grace period." See, e.g., Hettich and Company GmbH, ASBCA No. 38781, 93-1 BCA ¶ 25,442 (1992). The 1988 amendments eliminated it.

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received" for interest accrual purposes when it is received by this designated office. 31 U.S.C. § 3901(a)(4)(A)(i); 48 C.F.R. § 32.907-1(a)(1). What counts is receipt or acceptance as provided in the statute, not when the contractor submitted the invoice. Rhondalyn Teel, AGBCA No. 91-224-1, 93-1 BCA ¶ 25,265 (1992).

Also, the agency should note the date of receipt on the invoice. If it fails to do so, the date of the invoice will be considered the date of receipt. 31 U.S.C. § 3901(a)(4)(B).

The next step is for the agency to review the invoice to determine whether it is a "proper invoice." If it is not, the agency must return it within 7 days of receipt along with an explanation. Id. § 3903(a)(7). If the agency acts within the prescribed 7 days, notification time and response time do not count for interest purposes, and the corrected invoice is treated as the proper invoice. 48 C.F.R. § 32.907-1(b). If the agency delays its notification beyond seven days, the payment due date is adjusted by subtracting the number of days over seven. Id.; 31 U.S.C. § 3903(a)(7)(C). The deferral of interest accrual pending invoice correction does not contemplate frivolous rejections. Tyger-Sayler, A Joint Venture, ASBCA Nos. 33922 et al., 91-2 BCA ¶ 23,726 (1991) (interest payable from date of initial receipt where agency had rejected submission because of essentially harmless typographical errors).

Summing up, then, you determine the required payment date by counting days after receipt of a proper invoice (original or corrected, as the case may be) by the designated billing office. If the government has not paid by the required payment date, interest will start to accrue on the following day. 31 U.S.C. § 3902(b). If the due date falls on a Saturday, Sunday, or legal holiday on which federal offices are closed, the next business day is treated as the due date. OMB Cir. No. A-125, § 4.n; 68 Comp. Gen. 355 (1989).

Interest under the Prompt Payment Act continues to accrue until (1) the delayed payment is made, (2) the business concern files a claim for the unpaid interest under the Contract Disputes Act, or (3) one year from the initial accrual of interest, whichever occurs first. 31 U.S.C. §§ 3902(b) and 3907(b)(1); OMB Cir. No. A-125, §§ 7.a(2) and (5); 48 C.F.R. § 32.907-1(e). The reason for this limitation is that Prompt Payment Act interest is not intended to serve as a substitute investment for the contractor. If the agency has dragged its heels for a full year, the contractor must at that

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Tutun v. United States, 270 U.S. 568, 576–77 (1926). Taking these in reverse order, at one extreme there may be no administrative process at all. A statute may require that claims of a given type be resolved only by court adjudication. Statutes of this type usually deal with temporary or "ad hoc" situations. An example is the so-called "Tris Act," Pub. L. No. 97-395, 96 Stat. 2001 (1982), enacted to provide a mechanism to indemnify manufacturers, distributors, and retailers adversely affected when the Consumer Product Safety Commission banned the chemical known as "Tris" in 1977. The statute did not provide for administrative adjudication, but required that claims be filed in what was then the United States Claims Court.

At the other extreme, the administrative process may be the only process there is. Congress may make administrative decisions final and is not required to provide for judicial review. United States v. Babcock, 250 U.S. 328, 331 (1919); Milliken v. Gleason, 332 F.2d 122 (1st Cir. 1964), cert. denied, 379 U.S. 1002; Gross v. United States, 505 F.2d 1271 (Ct. Cl. 1974); Simons v. United States, 25 Cl. Ct. 685 (1992). Under one type of statute known as a "statute of grace," Congress gives agencies discretionary authority to settle claims of a particular type for which legal liability does not otherwise exist. The statute provides for administrative settlement, but not judicial review. An example is the Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 3721. Under this type of statute, the courts may compel an agency to actually exercise its discretion and may enforce constitutional requirements, but may not otherwise review the merits of the agency's decision on an individual claim. E.g., Work v. Rives, 267 U.S. 175 (1925).

In between the two extremes one encounters a variety of situations. Under some of the major claim statutes, an attempt at administrative resolution is a mandatory prerequisite to being able to sue. Examples are the Federal Tort Claims Act and Contract Disputes Act. Under statutes of this type, the merits of the agency's decision will be subject to judicial scrutiny.

As we have noted, a great many claims arise under statutes which do not directly address claims settlement or procedures. For example, 19 U.S.C. § 1619 authorizes rewards to persons furnishing information concerning violations of the customs laws. The statute nowhere mentions the processing of claims. As discussed in Chapter 4, a person claiming a reward under this statute can file suit under the Tucker Act. This being the case, it follows that the claimant should be able to pursue the presumably faster and less expensive route of administrative adjudication, without the

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time either initiate resolution through the Contract Disputes Act claims procedures or see the accrual of interest stop at that point.

Interest does not accrue if there is a dispute between the agency and business concern over the amount of the payment or other issues concerning compliance with the contract. Rather, the contractor should pursue the dispute under the Contract Disputes Act. 31 U.S.C. § 3907(c); OMB Cir. No. A-125, § 7.c(1); 48 C.F.R. § 32.907-1(f). E.g., James Lowe, Inc., ASBCA No. 42026, 92-2 BCA ¶ 24,835 (1992) (no interest on deduction from progress payment due to disagreement over claimed value of completed work). Merely reviewing a billing or claim to determine whether it is legal and proper is not a "dispute" for purposes of this provision. Arkansas Best Freight System, Inc. v. United States, 20 Cl. Ct. 776 (1990). Also, a request by a certifying officer to GAO for a decision is regarded as an internal government matter and not a "dispute" for purposes of postponing interest accrual. 64 Comp. Gen. 835 (1985).

If the dispute is over some minor matter, there is authority for the proposition that the government should pay the undisputed amount or incur Prompt Payment Act penalties for failing to do so. N & P Construction Co., VABCA Nos. 3283, 3286, 93-1 BCA ¶ 25,251 (1992).

(7) Payment

It is important to know exactly what constitutes "payment" for Prompt Payment Act purposes and when it is deemed to occur (a) to determine whether or not there has been a "failure to pay" which will begin the accrual of interest, and (b) to know when to terminate the accrual of interest.

The statute specifies that the date of payment is "the date a check for payment is dated or an electronic transfer is made." 31 U.S.C. § 3901(a)(5). The reason for selecting this date was to make the law "as easy to administer as possible." S. Rep. No. 302, 97th Cong., 1st Sess. 11 (1981) (report of Senate Committee on Governmental Affairs on original Prompt Payment Act). Using the date of receipt by the payee would have created an administrative nightmare in that claims would have to be filed and processed in every case, often for very small amounts.

Of course, when a check is dated and when it is mailed can be two very different things. OMB Circular A-125, § 4.n, addresses this by telling agencies to mail or transmit checks on the same day they are dated. (The

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FAR says "on or about" the same day. 48 C.F.R. § 32.903.) Payment may be made up to 7 days prior to the required payment date. 31 U.S.C. § 3903(a)(8). However, OMB cautions that, in the interest of effective cash management, agencies should strive to release their payments "so as to pay proper invoices as close as possible to the due date without exceeding it," and should experiment with the timing of release with this objective in mind. OMB Cir. No. A-125, § 4.1. This mirrors the guidance of the House Government Operations Committee. See H.R. Rep. No. 784, 100th Cong., 2d Sess. 31 (1988), 1988 U.S. Code Cong. & Admin. News at 3059.

The concern here is to minimize early payment which, just as late payment does, costs the government in a very real sense. This was a concern of the original legislation as well as the 1988 amendments, as noted in the report of the Senate Committee on Governmental Affairs on the original Prompt Payment Act. See S. Rep. No. 302, 97th Cong., 1st Sess. 4 (1981), referring to premature payment as another form of "sloppy cash management." GAO has also been critical. See GAO report, Prompt Payment Act: Agencies Have Not Fully Achieved Available Benefits, GAO/AFMD-86-69 (August 1986), at 25–26. In addition, OMB Circular No. A-125, § 4.q, directs agencies to make payment consistent with the Treasury Financial Manual, which in turn states that payments should be "neither early nor late." I TFM § 6-8040.20.

Thus, payment is determined by the date on the check, at least in most cases, provided the check is mailed on or extremely close to that date. If all of this occurs on the required payment date, the agency has complied with the letter of the law and will not incur an interest penalty, although an agency should not make this its general practice as it is inconsistent with the intent of both the statute and the OMB regulations.[87]

Failure to pay generally means any action or inaction by the contracting agency which results in payment not being made by the due date. For example, Prompt Payment Act interest has been awarded on the refund of liquidated damages improperly withheld from an invoice request. Youngdale & Sons Construction Co. v. United States, 27 Fed. Cl. 516 (1993). The determination that the withholding was improper meant that the invoice should have been paid by its due date, and failure to do so violated the Prompt Payment Act.

An interesting variation occurred in 64 Comp. Gen. 32 (1984). A contractor submitted a proper invoice to the Forest Service, which issued a check for

[87]Decisions inconsistent with what is stated in the text, such as 61 Comp. Gen. 166 (1981) and 63 Comp. Gen. 391 (1984), were rendered prior to current statutory and/or regulatory guidance, and are obsolete to the extent of the inconsistency.

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payment in full well before the required payment date (in fact, 4 days after receipt of the invoice). The contractor apparently never received the check and asked Forest Service for a replacement. Forest Service notified the Treasury Department which, after a delay of several weeks, issued the replacement check. Since by now the required payment date had been exceeded, the contractor claimed interest. The Comptroller General found that the Prompt Payment Act did not require interest in that situation. The Forest Service had done everything it was required to do, and had done it promptly. While there may have been a delay in receipt of payment by the contractor, there had been no "failure to pay" on the part of the contracting agency.

Noting the penalty aspect of the Prompt Payment Act, the decision also pointed out that "[t]here is no indication that Congress intended to insure contractors against all eventualities, especially where there is no fault on the part of the contracting agency in effectuating the original payment." Id. at 34. A few years later, GAO explained that this language should not be pulled out of context to suggest that the Prompt Payment Act would never apply to delays beyond the contracting agency's control. B-223857, February 27, 1987 (Act applicable to delay in payment due to exhaustion of funding). The Armed Services Board of Contract Appeals distinguished 64 Comp. Gen. 32 in a 1993 case and awarded interest where a check was stolen by an employee of a courier service before being placed in the mail system. Sun Eagle Corp., ASBCA Nos. 45985, 45986, 94-1 BCA ¶ 26,425 (1993).

(8) Rate and computation

The applicable interest rate under the Prompt Payment Act is the rate prescribed by 41 U.S.C. § 611 for the Contract Disputes Act. 31 U.S.C. § 3902(a). There is one significant difference in the method of application, however. Interest under the Prompt Payment Act is computed on a fixed-rate basis. The statute provides that "interest shall be computed at the rate . . . which is in effect at the time the agency accrues the obligation to pay a late payment interest penalty." Id. The implementing regulatory provisions are OMB Cir. No. A-125, § 1.d, and FAR, 48 C.F.R. § 32.907-1(d).

Another significant difference is that, while Contract Disputes Act interest is simple interest, Prompt Payment Act interest is compounded monthly. 31 U.S.C. § 3902(e).

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An agency which fails to pay a required interest penalty may be subject to an additional penalty. If an agency's failure to pay interest required by the Prompt Payment Act continues for 10 days after the underlying payment is made, and if the business concern makes a written demand not later than 40 days after that payment date, the agency will owe an additional penalty based on a percentage of the basic interest penalty determined under the OMB regulations. 31 U.S.C. § 3902(c)(3); 48 C.F.R. § 32.907-1(g).

The additional penalty is 100 percent of the original interest penalty, with a minimum of $25 and a maximum of $5,000. OMB Cir. No. A-125, §§ 8.b, 8.c. The additional penalty does not apply to utility payments. Id. § 8.d.

(9) Procedures and funding

Prompt Payment Act interest is a statutory entitlement. The business concern does not have to file any sort of claim as a prerequisite to payment. The law provides:

"A business concern shall be entitled to an interest penalty of $1.00 or more which is owed . . . under this section, and such penalty shall be paid without regard to whether the business concern has requested payment of such penalty."

31 U.S.C. § 3902(c)(1). See also OMB Cir. No. A-125, § 4.p; 48 C.F.R. § 32.903; B.F. Carvin Construction Co., VABCA No. 3224, 92-1 BCA ¶ 24,481 at 122,188 (1991) ("the interest penalty is self-executing"). Thus, the agency has the primary responsibility to keep track of its payments and to add interest where required. Payment should be accompanied by a notice which specifies how much of the payment represents interest and identifies the rate and accrual period upon which the agency based its computation. 31 U.S.C. § 3902(c)(2). OMB Circular A-125, § 6.a, reminds agencies of the common-sense point to also include the contract and invoice numbers.

For interest amounts of under $1.00, GAO's position in other contexts has been to pay it only if specifically claimed. E.g., 58 Comp. Gen. 372, 375 (1979). Whether this should apply as well to the Prompt Payment Act or whether an agency can refuse to waste the money to process a claim for pennies has yet to be addressed, although we are sure it is just a matter of time until someone with nothing better to do raises the issue.[88]

[88]There is some legislative history to support the conclusion that the agency need not process the claim. See Michael J. Renner, "Prompt Payment Act: An Interest(ing) Remedy for Government Late Payment," 21 Pub. Cont. L.J. 177, 229 n.245 (1992).

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Prompt Payment Act interest is to be absorbed by applicable program appropriations. The law emphasizes that it does not authorize additional appropriations for the penalties, which are to be paid "out of amounts made available to carry out the program for which the penalty is incurred." 31 U.S.C. § 3902(f). This includes amounts which an agency may be authorized by law to transfer to the program account from other accounts. H.R. Rep. No. 461, 97th Cong., 2d Sess. 9 (1982), 1982 U.S. Code Cong. & Admin. News at 119. Thus, for example, the "General Expenses" appropriation of the Army Corps of Engineers is not available to pay Prompt Payment Act penalties incurred by civil works projects which receive their own line-item appropriations. B-248150, August 17, 1993. Payments are chargeable to the fiscal year or years in which the interest liability accrued. See 63 Comp. Gen. 517, 519 (1984).

The law also emphasizes that the temporary unavailability of funds does not affect the accrual of interest. 31 U.S.C. § 3902(d). See also B-223857, February 27, 1987 (temporary depletion of borrowing authority did not diminish obligation to pay interest on Commodity Credit Corporation contracts), the case which prompted section 3902(d).

Even though Prompt Payment Act interest is cast in terms of a statutory entitlement, a contractor can waive its right to receive the interest. The waiver may be express, or it may be implied from conduct as long as the conduct shows a clear intent. 62 Comp. Gen. 673 (1983). There is a practical underpinning to this decision in that the government cannot force a contractor to accept the interest payment. The law might as well permit waiver because a contractor wishing for whatever reason to waive the interest is always free to take the payment and give it right back to the government. Id. at 674.

Although interest payments are supposed to be automatic, they often have not been. See H.R. Rep. No. 784, 100th Cong., 2d Sess. 18 (1988), 1988 U.S. Code Cong. & Admin. News at 3046. Accordingly, the law provides a collection mechanism by authorizing the contractor to file a claim for unpaid Prompt Payment Act interest under the Contract Disputes Act. 31 U.S.C. § 3907(a). This means a written claim submitted to the contracting officer, whose decision may be appealed to the appropriate board of contract appeals or directly to court.[89] The Contract Disputes Act procedures are a "jurisdictional prerequisite to adjudicating a claim" under the Prompt Payment Act. CPT Corp. v. United States, 25 Cl. Ct. 451, 456

[89]A contractor who has filed a written claim under the Prompt Payment Act need not submit a separate claim in order to satisfy the CDA requirement. General Electric Co., ASBCA No. 33227, 87-1 BCA ¶ 19,484 (1986).

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(1992). While GAO has addressed a number of Prompt Payment Act issues, it will not, in view of this explicit statutory procedure, adjudicate or review individual Prompt Payment Act claims. B-213383, November 7, 1983; B-212103, September 22, 1983.

As noted earlier, Prompt Payment Act interest ceases to accrue upon filing the Contract Disputes Act claim or after one year, whichever is sooner. If the claim is allowed, interest on it is payable under the Contract Disputes Act. 31 U.S.C. § 3907(b)(2). Thus, as long as the CDA claim is filed within one year, there is no gap in interest accrual. An award illustrating these principles is Batteast Construction Co., ASBCA No. 34420, 87-3 BCA ¶ 20,044 (1987). The computational aspects can be summarized in the following steps:

- If the government fails to pay for goods or services acquired by contract by the required payment date, interest at the Contract Disputes Act rate begins to accrue on the following day.
- Interest is applied on a fixed-rate basis, and is compounded monthly.
- Interest is payable until the underlying payment is made, the claimant files a claim under the CDA, or one year elapses, whichever is sooner.
- If the claimant files a CDA claim, the amount of unpaid interest, "frozen" as of that point, becomes part of the claim along with any unpaid principal. CDA interest will then accrue on the amount of the claim in accordance with 41 U.S.C. § 611, on a variable-rate basis but not compounded.

The CDA claim may include the "additional penalty" or "double whammy" authorized by 31 U.S.C. § 3902(c)(3). OMB Cir. No. A-125, § 13.a(1). OMB specifies that, if the basic interest penalty ceases to accrue at the end of one year in accordance with 31 U.S.C. § 3907(b)(1), the additional penalty will nevertheless continue to accrue. OMB Cir. No. A-125, § 8.c. Once a CDA claim is filed, however, the additional penalty presumably stops accruing along with the basic penalty, although the regulations could be more explicit on this point.

(10) Prompt payment discounts

The Prompt Payment Act also deals with prompt payment discounts. The pertinent provision is 31 U.S.C. § 3904:

"The head of an agency offered a discount by a business concern from an amount due under a contract for property or service in exchange for payment within a specified time may pay the discounted amount only if payment is made within the specified time. For the

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purpose of the preceding sentence, the specified time shall be determined from the date of the invoice. The head of the agency shall pay an interest penalty on an amount remaining unpaid in violation of this section. The penalty accrues as provided under sections 3902 and 3903 of this title, except that the required payment date for the unpaid amount is the last day specified in the contract that the discounted amount may be paid."

The implementing regulations are OMB Cir. No. A-125, §§ 4.i and 4.m; FAR, 48 C.F.R. §§ 32.905(g) and 52.232-8 (contract clause); and the Treasury Financial Manual, I TFM § 6-8040.30.

Section 3904 does several things. First, it codifies the obvious point that an agency is not authorized to take a prompt payment discount beyond the terms under which it is offered. This is nothing new. See, e.g., 6 Comp. Gen. 545 (1927); B-130542, February 15, 1957 (circular letter discouraging the taking of unearned discounts).

Second, it establishes the rule that the period for taking the discount begins on the date of the invoice. This sentence was added to the Prompt Payment Act as part of the 1988 amendments. Prior to 1988, the rule had been that the period starts when the designated government office receives a correct or proper invoice. E.g., B-169682(2), February 2, 1971. While it is clear that the pertinent date is now the date of the invoice rather than the date of receipt, it is certainly reasonable to continue to interpret "invoice" as meaning "proper invoice," as OMB and the Treasury Department have done. OMB Cir. No. A-125, § 4.i; I TFM § 6-8040.30. Both specify that the discount period "is calculated from the date placed on the proper invoice by the contractor."

If there is no date on the invoice, the prior rule continues to apply and the discount period will start on the date the designated billing office receives a proper invoice and (on the same day) annotates it with the date of receipt. Id.

Third, it establishes the date of the government's check as the date of payment, the same as for the rest of the Prompt Payment Act.[90] Section 3904 does not say this directly, but since it is part of the Prompt Payment Act, 31 U.S.C. § 3901(a)(5) applies to it as well. Thus, the determination of "payment" in the context of late payments, previously discussed, applies equally to prompt payment discounts.

[90]Much ink had been spilled on this question prior to the Prompt Payment Act. A brief summary of some of it may be found in B-214446, October 29, 1984.

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Finally, it requires the government to pay interest if it improperly takes a prompt payment discount. The required payment date is the last day specified for taking the discount. As with late payments in general, if this day falls on a Saturday, Sunday, or legal holiday on which federal offices are closed, the next business day becomes the due date. 68 Comp. Gen. 355 (1989). See also 65 Comp. Gen. 53 (1985); 56 Comp. Gen. 187 (1976); B-187824, February 28, 1977.

3. Employee Claims

The quest to recover interest from the federal government has touched every conceivable type of monetary claim that may be brought against the government, and claims by federal civilian employees and military personnel are no exception. For the most part, the traditional answer was a simple application of the no-interest rule—there was no authority for it. Starting in 1987, two pieces of legislation have interrupted the unbroken line of disallowances, and the answer now is more of a "mixed bag."

First is the Back Pay Act, 5 U.S.C. § 5596. Prior to 1987, claims for interest under the Back Pay Act were consistently denied for the simple reason that neither the Back Pay Act nor any other statute provided for interest. E.g., 63 Comp. Gen. 170 (1984); 63 Comp. Gen. 156 (1984); 61 Comp. Gen. 578 (1982). The law was amended in 1987 to require the payment of interest on back pay payable under section 5596. 5 U.S.C. § 5596(b)(2). Implementing regulations by the Office of Personnel Management are found at 5 C.F.R. § 550.806.

Interest is payable from the effective date of the withdrawal or reduction of pay to a date not more than 30 days prior to the date of payment, at the rate for tax overpayments determined under 26 U.S.C. § 6621(a)(1), and is compounded daily. 5 U.S.C. § 5596(b)(2)(B). The accrual date will usually represent one or more pay dates on which the claimant would have received the pay or allowances in question. 5 C.F.R. § 550.806(a). Subject to the 30-day limitation, agencies have discretion to fix the termination date. 70 Comp. Gen. 711, 713 (1991).

Under this authority, interest is payable on awards, administrative or judicial, made under the Back Pay Act and OPM regulations. For example, the delayed payment of an incentive award normally does not create an entitlement to interest. B-202039, May 7, 1982. However, failure to pay an incentive award by a deadline established in a collective bargaining agreement does trigger the interest provision of the Back Pay Act. 70 Comp. Gen. 711 (1991). Other examples are 70 Comp. Gen. 560

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(1991) (award of overtime compensation by grievance arbitrator);[91] B-242277, September 12, 1991 (refund of amounts erroneously withheld from salary and credited to retirement fund).

For interest to be payable under 5 U.S.C. § 5596(b)(2), the underlying award must be made under the authority of the Back Pay Act, not some other statute. E.g., Markey v. United States, 27 Fed. Cl. 615 (1993) (interest not authorized on back pay award under Rehabilitation Act). Similarly, travel and transportation expenses have not been regarded as "allowances" for Back Pay Act purposes. Hurley v. United States, 624 F.2d 93 (10th Cir. 1980); Morris v. United States, 595 F.2d 591 (Ct. Cl. 1979). As long as this interpretation stands, delayed reimbursement of these expenses would not trigger interest under 5 U.S.C. § 5596(b)(2). B-249171, August 21, 1992 (non-decision letter).

Interest under the Back Pay Act is payable from the same funding source as the back pay itself (agency operating appropriations, permanent judgment appropriation, etc.). 5 U.S.C. § 5596(b)(2)(C). For awards payable from agency appropriations, interest is chargeable to the same fiscal year or years as the underlying back pay to which it relates, and in the same proportions. 69 Comp. Gen. 40 (1989); B-242277, September 12, 1991.

The second relevant piece of legislation is Title VII of the Civil Rights Act of 1964. As with the Back Pay Act, there was no authority for the payment of interest on monetary awards under Title VII prior to 1987. E.g., 58 Comp. Gen. 5 (1978); B-207176, January 6, 1983. Responding to the suggestion that Title VII might ride the coattails of the 1987 amendment to the Back Pay Act, the Justice Department determined that the 1987 amendment did not apply to Title VII awards. Payment of Interest on Awards of Back Pay in Employment Discrimination Claims Brought by Federal Employees, Op. Off. Legal Counsel (September 18, 1989). GAO was inclined to agree. B-234398, July 14, 1989 (non-decision letter). While some courts strained to reach a contrary result,[92] the issue became moot when Congress amended Title VII in 1991 to provide that "the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties." 42 U.S.C. § 2000e-16(d) (Supp. IV 1992). While interest on monetary Title VII awards is now clearly payable, the statute does not

[91]Interest was not payable in the cited case because the final decision occurred before the effective date of the 1987 amendment to the Back Pay Act.

[92]See the corresponding headings in Chapter 14 for further discussion of the Title VII and Back Pay Act interest provisions, with additional citations.

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specify the applicable rate nor does it provide any further detail on how the interest is to be computed.

Pending a more definitive determination, it is possible to argue that, at least for back pay awards, Title VII interest should be the same as Back Pay Act interest. This is because the Equal Employment Opportunity Commission's Title VII regulations, specifically, 29 C.F.R. § 1613.271(c)(1), talk about back pay "computed in the same manner prescribed by 5 CFR 550.805" (the OPM Back Pay Act regulations), and section 805(f) refers to the inclusion of Back Pay Act interest.

For employee claims not subject to either of these statutes, interest remains unauthorized. A partial listing of situations in which interest has been denied—and would continue to be denied unless the item were part of an award authorized under either the Back Pay Act or Title VII—is set forth below:

- Overtime. 53 Comp. Gen. 264, 269 (1973); B-189181, June 20, 1978.
- Relocation expenses. 70 Comp. Gen. 571 (1991) (mileage expenses to retrieve stored household goods); B-231512, September 21, 1989 (temporary quarters subsistence expenses); B-219526, May 25, 1988 (relocation income tax allowance); B-224628, January 12, 1988; B-182276, April 10, 1975.
- Interest charged an employee for late deposit to Civil Service Retirement System for credit for post-1956 military service. B-232231, February 23, 1989.
- Reimbursement for collection of excess charges on shipment of household goods. B-193856, March 26, 1980.
- Severance pay. B-213346, May 30, 1986; B-165072, May 13, 1969.
- Reimbursement for erroneous deduction of allotment. B-178330, March 11, 1974.
- Delay in issuance of allotment check. 65 Comp. Gen. 541 (1986).
- Payments resulting from the correction of military records under 10 U.S.C. § 1552. B-195129, April 28, 1980; B-173513, August 10, 1971.
- Delayed payment of reenlistment bonus. B-179968-O.M., May 24, 1974.
- Payments received under the Missing Persons Act. B-159399, October 14, 1981.
- Refund of amounts erroneously deducted from retired pay under Survivor Benefit Plan. 72 Comp. Gen. ___ (B-243671, October 8, 1992).
- Payment to state retirement fund on account of state employee temporarily assigned to federal agency under Intergovernmental Personnel Act of 1970. B-192415, March 1, 1979.

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need to file a lawsuit. For claims in this broad category, administrative settlement is an available option, although it is not legally required as a prerequisite to suit.

For now, the point to emphasize is that every federal agency is exposed to claims. At an absolute minimum, the agency will have employees with various entitlements; it will enter into contracts of one sort or another; and it will be exposed to potential tort liability. Thus, every agency engages in administrative claims settlement. The degree of formality and sophistication will vary with the agency's size and the types of programs it administers, but every agency does it and must therefore be prepared to do it.

There can be no doubt that the policy of the United States Government is to encourage the resolution of claims at the administrative level and thereby minimize the need to resort to the courts. The success of this system requires public confidence in the basic fairness and integrity of the administrative process. This, apart from the fact that we have to do it anyway, is why administrative claims settlement is important.

2. Claims Settlement Under 31 U.S.C. § 3702(a)

a. The Statute

The basis of GAO's claims settlement authority and jurisdiction is 31 U.S.C. § 3702(a):

"Except as provided in this chapter or another law, the Comptroller General shall settle all claims of or against the United States Government."

This statute is derived from legislation originally enacted in 1817 (3 Stat. 366).[4] The claims settlement function was originally lodged in the Treasury Department, and was transferred to GAO by the Budget and Accounting Act of 1921. The origins and history of the statute are discussed in Lambert Lumber Co. v. Jones Engineering & Construction Co., 47 F.2d 74 (8th Cir. 1931), cert. denied, 283 U.S. 842. GAO's regulations on claims settlement are found in 4 C.F.R. Parts 30–36 and Title 4 of GAO's Policy and Procedures Manual for Guidance of Federal Agencies.

[4]The original statute addressed both claims settlement and account settlement. The 1982 recodification of Title 31 separated them and placed the account settlement portion in 31 U.S.C. § 3526(a).

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Interest questions also arise under government savings programs. For example, agencies are not authorized to make payments to employee Thrift Savings Plan accounts to compensate for lost earnings attributable to insufficient agency contributions resulting from administrative error. 68 Comp. Gen. 220 (1989). The decision did not consider the effect, if any, of the then newly enacted Back Pay Act interest provision (id. at 222 n.3), but in any event suggested the desirability of corrective legislation.

Considering the Serviceman's Deposit Program enacted in 1990 for the benefit of participants in Operation Desert Shield/Storm, GAO found no authority to pay interest on amounts withdrawn by persons who were ineligible to participate when they made their original deposits. B-248439 et al., October 22, 1992. Under an earlier program (Uniformed Services Savings Deposit Program), however, interest was authorized in a case where the Army had erroneously retained a member's funds beyond the program's planned phase-out. Since the statute authorizing interest on the deposits had not been repealed, the government was obligated to pay interest until the deposit was actually returned. B-183769-O.M., April 6, 1976.

4. Computation

When interest is payable, it is computed by a very precise formula, stated as follows in B-60952, July 2, 1953:

> "In the absence of clear authority to the contrary, it has been a rule long followed by the accounting officers of the Government that the computation of interest in Government transactions [is] calculated for a fractional part of a year on the basis of the actual number of days within the period involved, using such number of days as the numerator and the actual number of days in the particular (calendar) year as the denominator—including either the beginning or ending date of the period, but not both . . . . [I]nterest is computed on the basis of 365 days per year, or 366 days in a leap year."

This is not quite as complicated as it sounds. For simple interest, the computation involves the following steps:

(a) Determine the amount of interest for a full year by multiplying the principal by the annual interest rate.

(b) Determine the daily interest amount by dividing (a) by 365 or 366, as applicable.

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(c) Determine the actual number of days in the accrual period but do not count both the beginning date and the ending date.

(d) Multiply (b) x (c).

See also 22 Comp. Gen. 656 (1943); 15 Comp. Gen. 992 (1936); 15 Comp. Gen. 871 (1936); 1 Comp. Gen. 411 (1922); A-51618, November 21, 1934. Naturally, this formula will apply only where some other formula is not specifically prescribed by law. For example, for interest computations under the Prompt Payment Act, OMB Circular No. A-125, § 7.a(11), states that "calculations are to be based on a 360 day year."

The portion of the formula which says to count either the beginning date or the ending date but not both is nothing more than an application of the well-established rule that when measuring time "from" a certain day, the designated day is excluded. Burnet v. Willingham Loan & Trust Co., 282 U.S. 437, 439 (1931); United States v. Tawab, 984 F.2d 1533 (9th Cir. 1993); 56 Comp. Gen. 187 (1976); 9 Op. Att'y Gen. 131 (1858). We suspect the rule has been stated somewhat differently in the interest context because it made no difference which day was excluded, whereas it could make a significant difference in other contexts (for example, expiration of a statute of limitations, as in Tawab). With the advent of variable-rate computations such as under the Contract Disputes Act, it could now make a difference, however slight, in the interest context too, so it is probably more accurate to consistently exclude the beginning date.

Statutes authorizing the recovery of interest from the United States usually, but not always, identify the applicable rate. An exception was discussed in 72 Comp. Gen. 122 (1993). The Outer Continental Shelf Lands Act authorizes the Secretary of the Interior to cancel leases, in which event the lessee is entitled to compensation with interest. The statute is silent as to the applicable rate. GAO advised that Interior has discretion to select an appropriate rate to include in its program regulations, but in exercising this discretion Interior should take a "conservative approach and adopt a rate that will minimize costs to the government while still being fair to lessees." Consistent with traditional government practice, whatever rate is selected should be applied as simple interest since the governing statute does not specify compounding.

H. False or Fraudulent Claims

Several statutes deal with false or fraudulent claims and impose both civil and criminal penalties. Perhaps most important is the False Claims Act, 31

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U.S.C. §§ 3729–3733, amended to its present form in 1986. Any person who presents a false or fraudulent claim against the government or uses false documents in connection with such a claim is liable "for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains" as a result of the fraud, plus the costs of suit. Id. § 3729(a). Cooperation by the person committing the violation can reduce the treble damages to double damages. Id. There is no requirement to prove specific intent to defraud. Id. § 3729(b); Gravitt v. General Electric Co., 680 F. Supp. 1162 (S.D. Ohio 1988).

The statute was intended, so said one district court, "to protect the treasury against the hungry and unscrupulous host that encompasses it on every side." United States v. Griswold, 24 F. 361, 366 (D. Ore. 1885), aff'd, 30 F. 762 (C.C. Ore. 1887). Its constitutionality has been upheld against a variety of attacks. E.g., United States ex rel. Kreindler v. United Technologies Corp., 985 F.2d 1148 (2d Cir. 1993) (statute does not violate Article III).

Suit may be brought by the United States or by any person in the name of the United States. 31 U.S.C. §§ 3730(a), (b). A suit brought by a private informer is known as a "qui tam" action and the informer is called the "relator." The suit is styled "United States ex rel. (name of relator) v. (defendant)." If suit is brought by an informer, the government may elect to take it over or may elect not to proceed, in which event the informer has the right to continue. Id. §§ 3730(b), (c). The government, however, remains the real party in interest. Kreindler, 985 F.2d at 1154. Either way, the informer gets a percentage of any recovery plus reasonable costs and attorney's fees. 31 U.S.C. § 3730(d). In a suit brought against the United States by a contractor under the Contract Disputes Act, the government may present a counterclaim under the False Claims Act which was not the subject of a contracting officer's decision. Martin J. Simko Construction, Inc. v. United States, 852 F.2d 540 (Fed. Cir. 1988).

The False Claims Act includes a statute of limitations of 6 years after the violation or 3 years after the time material facts are or should have been known, whichever occurs last, not to exceed 10 years after the violation. Id. § 3731(b).

A "claim" for purposes of the False Claims Act includes—

"any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government

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provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." Id. § 3729(c).

Thus, the claim does not have to be filed directly with the United States. The statute encompasses, for example, claims filed with state agencies channeled to the federal government for payment under the Medicaid program. United States ex rel. Fahner v. Alaska, 591 F. Supp. 794 (N.D. Ill. 1984). The Act has been found applicable not only where an individual convinces the government to pay out money or to pay out too much money, but also where an individual fraudulently pays too little to the government. United States v. Douglas, 626 F. Supp. 621 (E.D. Va. 1985) (noting that the courts were not unanimous on this point).

Damages under the False Claims Act means actual damages suffered by the government. United States v. Cooperative Grain and Supply Co., 476 F.2d 47, 63 (8th Cir. 1973); United States v. Aerodex, Inc., 469 F.2d 1003, 1011 (5th Cir. 1972) (damages "must be measured by the amount wrongfully paid to satisfy the false claim"); United States v. Woodbury, 359 F.2d 370, 379 (9th Cir. 1966) ("measure of the government's damages would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful"). The amount of double or treble damages is computed before deducting any compensatory payments received by the government from any source. United States v. Bornstein, 423 U.S. 303, 315–16 (1976). Otherwise the perpetrator could defeat the statute by tendering the actual damages any time prior to judgment. Id. at 316. However, the government does not need to show actual damages to pursue the civil penalty. United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991); United States v. Hughes, 585 F.2d 284 (7th Cir. 1978).

The costs of suit referred to in 31 U.S.C. § 3729(a) do not include the administrative costs of an agency's investigation. B-164031(4).100-O.M., November 21, 1975. However, the statute recognizes, by virtue of the civil penalty and treble damage provisions, that the government incurs indirect administrative expenses over and above the amount actually paid out when it pays a false claim. See Bornstein, 423 U.S. at 315 (statute reflects congressional judgment that multiple damages "are necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims"); United States ex rel. Marcus v. Hess, 317 U.S. 537, 551–52 (1943) (multiple damages plus

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specific sum "chosen to make sure that the government would be made completely whole").

Amounts recovered under the False Claims Act may be credited to the appropriate agency appropriation or fund (if not closed) to reimburse the agency for its losses resulting from the fraud. Amounts recovered in excess of those losses must be deposited in the Treasury as miscellaneous receipts. 69 Comp. Gen. 260 (1990). If the fund involved is a revolving fund, it may also be possible for the agency to retain an additional amount representing interest on the loss, depending on the terms of the governing legislation. Id.

In addition to the civil penalties under the False Claims Act, there are criminal penalties for making false or fraudulent statements or representations to government agencies (18 U.S.C. § 1001) and for possessing false documents with the intent to defraud the United States (18 U.S.C. § 1002). Apart from tangential fiscal matters such as 69 Comp. Gen. 260, GAO will not render decisions under any of these statutes because their enforcement is the responsibility of the Department of Justice, in the case of the False Claims Act because the statute expressly places it there (Martin J. Simko Construction, Inc. v. United States, 852 F.2d 540, 547 (Fed. Cir. 1988)), and in the case of the Title 18 provisions because they are penal statutes. See B-149372, February 14, 1978.

One of the drawbacks of the False Claims Act is that it is not cost-effective for the government to use in cases involving small amounts. Congress addressed this problem by enacting the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. §§ 3801–3812. The Program Fraud Act complements the False Claims Act by providing an administrative remedy for cases involving relatively small dollar amounts. It applies generally to claims of not more than $150,000. Id. § 3803(c)(1); B-239597, January 23, 1991 (internal memorandum). Penalties for making a false or fraudulent claim include a civil penalty of up to $5,000 plus an assessment of up to twice the amount of the claim. 31 U.S.C. § 3802(a)(1). The Act establishes procedures for conducting investigations and determining liability, including the opportunity for the person allegedly liable to request a hearing. Id. § 3803. The Act also provides for limited judicial review (§ 3805) and judicial enforcement by the Attorney General (§ 3806).[93]

[93]A 1991 review of the Act's implementation indicated limited success. See Program Fraud: Implementation of the Program Fraud Civil Remedies Act of 1986, GAO/AFMD-91-73 (September 1991).

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Except for recoveries by the Postal Service and recoveries under certain titles of the Social Security Act, amounts recovered under the Program Fraud Act, both penalties and assessments, must be deposited in the Treasury as miscellaneous receipts. 31 U.S.C. § 3806(g).

Still another relevant statute is 28 U.S.C. § 2514:

"A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.

"In such cases the United States Court of Federal Claims shall specifically find such fraud or attempt and render judgment of forfeiture."

This provision applies only to claims filed in the Court of Federal Claims. It does not apply to a claim which has been settled by payment, nor does it affect the recovery of money paid out as a result of fraud. 41 Comp. Gen. 285 (1961); 41 Comp. Gen. 206 (1961); B-158404-O.M., August 1, 1966. The court applies the statute on a case-by-case basis and applies the common-law elements of fraud—(1) misrepresentation of a material fact, (2) intent to deceive, (3) justifiable reliance by the party deceived, and (4) injury resulting from the reliance. Colorado State Bank of Walsh v. United States, 18 Cl. Ct. 611, 629 (1989).

In Brown Construction Trades, Inc. v. United States, 23 Cl. Ct. 214 (1991), the court held that a contractor who had been convicted of fraud for paying a bribe in connection with a contract modification forfeited all claims arising under the tainted contract. The court cited both public policy and 28 U.S.C. § 2514 as grounds for its holding. "The practice of a fraud on part of a contract condemns the whole." 23 Cl. Ct. at 216.

The fact that only the Court of Federal Claims has power to declare a forfeiture under 28 U.S.C. § 2514 by no means suggests that an agency should pay a claim if fraud is suspected. In addition to the various statutes mentioned above, decisions of the Comptroller General have developed a set of principles for the handling of false or fraudulent claims at the administrative level.

The starting point is the rule that the fraudulent presentation of a claim vitiates the claimant's rights in the entire claim. 23 Comp. Gen. 907 (1944); 20 Comp. Gen. 507 (1941); 17 Comp. Gen. 61 (1937); 14 Comp. Gen. 150 (1934). If fraud is suspected, the claim should be viewed as one of doubtful

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validity and should be disallowed, leaving the claimant to pursue the matter in the Court of Federal Claims which has the authority to declare a forfeiture under 28 U.S.C. § 2514. 41 Comp. Gen. 285 (1961); 41 Comp. Gen. 206 (1961); B-186020, June 28, 1976. The government's failure to prosecute criminally does not preclude appropriate administrative action. 68 Comp. Gen. 108 (1988); 57 Comp. Gen. 664, 669 (1978); B-219887, January 21, 1986.

A case applying the above principles to a contract claim is 44 Comp. Gen. 110 (1964). The Comptroller General stated, at page 116:

"[U]nder the rule which has been judicially recognized for so long and so often declared in decisions of our Office that it has become a landmark in the disposition of claims involving irregularities and possibly fraudulent practices against the United States, it is the plain duty of administrative, accounting and auditing officers of the Government to refuse approval and to prevent payment of public moneys under any agreement on behalf of the United States as to which there is a reasonable suspicion of irregularity, collusion, or fraud, thus reserving the matter for scrutiny in the courts when the facts may be judicially determined upon sworn testimony and competent evidence and a forfeiture declared or other appropriate action taken."

See also 17 Comp. Gen. 61 (1937) (payment under rental agreement); 23 Comp. Gen. 907 (1944) (bailment); 14 Comp. Gen. 150 (1934); 20 Comp. Gen. 507 (1941); B-219809, September 17, 1985; B-152676, August 26, 1968. The principle has also been applied with respect to fraudulently altered government checks. See B-54418, January 25, 1946.

In the decision from which the above quotation was taken, 44 Comp. Gen. 110, the Armed Services Board of Contract Appeals made an award to a contractor suspected of fraud. The Justice Department had declined to proceed under the False Claims Act, but stated that its decision had been prompted by practical considerations and that it nevertheless believed that there was "substantial evidence of fraud." Id. at 112. The Board thereafter rendered its decision but expressly disclaimed jurisdiction over the issue of fraud. The Board noted, however, that the issue of fraud was not foreclosed because appropriate officials might decline payment and thus reserve the matter for the courts.

Faced with this, the Army asked whether it could properly pay the ASBCA award. Noting that determinations of fraud are beyond the power of contracting officers and boards (which the ASBCA had expressly recognized), and noting further the forfeiture provisions of 28 U.S.C. § 2514,

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GAO concluded that the Board's decision did not impose an obligation on the United States and payment was therefore not authorized. The effect of this was to leave the contractor to his remedy in the courts which would have the power to try the issue of fraud and declare a forfeiture if appropriate. Cf. B-154628, May 31, 1966. Although 44 Comp. Gen. 110 predates the Contract Disputes Act of 1978, the Act expressly recognizes that agencies are not authorized to settle or pay claims involving fraud and exempts such claims from its coverage. See 41 U.S.C. §§ 604, 605(a), 608(d); United States v. Rockwell Int'l Corp., 795 F. Supp. 1131 (N.D. Ga. 1992); United States v. JT Construction Co., 668 F. Supp. 592 (W.D. Tex. 1987).

In subsequent decisions, GAO has recognized that partial settlement might be authorized where the government has received direct benefit for services performed, has suffered no monetary loss as a result of the fraud, and where the fraud was not committed for the purpose of securing payment of the claim. 45 Comp. Gen. 406 (1966); B-171759, June 10, 1971. Generally, however, the rule remains that a claim tainted by fraud cannot be divided so as to allow recovery on part of it.

Although the above principles apply equally to claims for pay and allowances by civilian employees and military personnel, the Comptroller General has held that each separate item of pay and allowances may be treated as a separate claim even though they are included on a single voucher. 41 Comp. Gen. 285 (1961). Thus, the suspicion that some items on a voucher may be false or fraudulent does not necessarily require disallowance of the entire voucher. This approach—treating separate items on a voucher as separate claims—has also been applied to claims under the Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 3721. B-192978, February 28, 1979.

With respect to fraudulent travel claims, GAO for many years followed what came to be known as the "tainted day rule," under which a fraudulent claim for any part of a day's subsistence expenses was viewed as tainting the entire claim for that day, thereby requiring disallowance of the entire claim for any days so tainted. E.g., 68 Comp. Gen. 517 (1989); 68 Comp. Gen. 399 (1989); 59 Comp. Gen. 99 (1979); 57 Comp. Gen. 664 (1978). In 70 Comp. Gen. 463 (1991), GAO modified the tainted day rule in recognition of the distinction between fraudulent claimants and fraudulent payees. Based on an analysis of case law under the False Claims Act, and the fact that the Program Fraud Act now provided an administrative remedy for small-dollar cases, the decision concluded that the tainted day rule should no longer be applied in assessing liability against fraudulent payees and

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accountable officers. The 1991 decision is discussed and explained further in 72 Comp. Gen. 154 (1993).

An employee whose claim is disallowed because of fraud cannot reclaim if he or she later actually incurs the expenses for which the fraudulent claim was submitted. B-247574, March 18, 1992; B-220119.1, November 14, 1988; B-186020, June 28, 1976.

In all types of claims, there is a presumption in favor of honesty and fair dealing and the burden of establishing fraud rests with the party alleging it. E.g., B-220119.1, November 14, 1988; B-187975, July 28, 1977. With respect to claims within GAO's settlement jurisdiction, an agency's decision that a claim is fraudulent does not foreclose the claimant's right to seek GAO review. 57 Comp. Gen. 664, 667 (1978).

I. Private Relief Legislation

1. Congressionally Sponsored Bills

We noted earlier in this chapter that claims settlement in the federal government is based on legal liability; no agency may pay out the taxpayers' money based on a perceived moral obligation. Congress may, however, choose to recognize a "moral obligation" legislatively. The time-honored method of pursuing a claim against the United States when all else fails has been to persuade a member of your state's congressional delegation to sponsor a private relief bill. The practice dates back to the beginning of the Republic, and the power of Congress to appropriate funds in this manner is beyond question. The Supreme Court said a century ago:

"Payments to individuals, not of right or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of moral obligation to support them, have been made by the government by virtue of acts of Congress, appropriating the public money, ever since its foundation. Some of the acts were based on considerations of pure charity."

United States v. Realty Co., 163 U.S. 427, 441 (1896). See also Pope v. United States, 323 U.S. 1, 9 (1944).

In earlier times, when waivers of sovereign immunity were few and far between, private relief legislation was plentiful. Now, we have comprehensive schemes for the resolution of tort claims, contract claims,

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discrimination claims, admiralty claims, etc., and the need for private legislation has correspondingly diminished. A random survey of the Statutes at Large will bear this out.[94] Be that as it may, there will always be a need for a legislative procedure to recognize the occasional claim that cannot be satisfied any other way.

Private relief legislation is usually enacted in the form of a "Private Law" although it is occasionally found inserted in regular or supplemental appropriation acts. The most common form of relief legislation has been a simple direction to pay a sum of money to a named individual or other entity. Since the device may be used for debt claims as well as payment claims, another form is a bill relieving someone of indebtedness to the government. A third form permits someone to have a claim adjudicated by removing a jurisdictional bar or waiving some other legal defense. The latter type is discussed in United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). There are other forms as well, but these are the most important from the perspective of monetary claims. A provision imposing a percentage limitation on attorney's fees is also sometimes used. E.g., A-91199, December 16, 1937.

A private relief act may or may not include an appropriation. The test, as described in Chapter 2 for all appropriations, is whether it includes both a direction, as opposed to a mere authorization, to pay, and a designation of the source of funds. A direction to pay without designating the source of funds does not constitute an appropriation. 21 Comp. Dec. 867 (1915); B-26414, January 7, 1944. Relief acts which do include appropriations may specify payment from the funds of a designated agency. An example is Priv. L. No. 97-21, 96 Stat. 2620 (1982), directing payment "from the applicable appropriations" of named agencies. More commonly, however, the act will direct payment by the Secretary of the Treasury "out of any money in the Treasury not otherwise appropriated." E.g., 23 Comp. Dec. 167, 170 (1916).

At one time, GAO settlement was required on all payments under private relief legislation. See, e.g., B-141722-O.M., January 29, 1960. This is no longer the case. GAO settlement is now required only in cases referred to GAO because of aspects of doubt or where the legislation expressly provides for GAO settlement. In all other cases, payment is made directly by the agency designated in the relief act. If a relief act directs payment by the Secretary of the Treasury "out of any money in the Treasury not

[94]For example, 56 Stat. lists almost 400 private laws for 1942; 82 Stat. lists over 150 for 1968; 1990, according to 104 Stat., saw only 14.

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The authority embraced by 31 U.S.C. § 3702(a), reaching back to the original 1817 language, is the authority to "settle and adjust" claims. While the term "settlement" in the litigation context means compromise, it has a different meaning in the administrative claims context. The Supreme Court has defined the term as follows:

> "The word 'settlement' in connection with public transactions and accounts has been used from the beginning to describe administrative determination of the amount due. . . . The words 'settled and adjusted' [as used in the predecessor of 31 U.S.C. § 3702(a)] were taken to mean the determination . . . for administrative purposes of the state of the account and the amount due. . . .
>
> "We should not say, of course, that instances may not be found in which the word 'settlement' has been used in acts of Congress in other senses, or in the sense of 'payment.' But it is apparent that the word 'settlement' in connection with public contracts and accounts, which are the subject of prescribed scrutiny for the purpose of ascertaining the rights and obligations of the United States, has a well defined meaning as denoting the appropriate administrative determination with respect to the amount due."

Illinois Surety Co. v. United States ex rel. Peeler, 240 U.S. 214, 219–221 (1916).

Thus, to settle a claim means to administratively determine the validity of that claim. Peeler at 220; Cooke v. United States, 91 U.S. 389, 399 (1875); Antrim Lumber Co. v. Hannan, 18 F.2d 548, 549 (8th Cir. 1927); 20 Comp. Gen. 573 (1941). Settlement includes the making of both factual and legal determinations. 20 Comp. Gen. at 577. The authority to settle and adjust claims does not, however, include the authority to compromise. B-200112, May 5, 1983; B-133616, October 25, 1957; B-122319, August 21, 1956. In the context of payment claims, the rationale for this is simply that a claim determined to be valid should be paid in full. Likewise, public funds should not be used to pay any part of a claim determined not to be valid. Thus, the authority to compromise a given claim against the United States depends on the existence of statutory authority above and beyond the authority to "settle and adjust" claims of that type. A survey of claims legislation will bear this out. One example is the specific inclusion of the word "compromise" in 28 U.S.C. § 2672 (Federal Tort Claims Act).

A number of agencies and government corporations are empowered by statute to "sue and be sued." This has been held to include the authority to compromise a claim without a lawsuit. 25 Comp. Gen. 685 (1946); B-190806, April 13, 1978. However, compromise authority in this context is

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otherwise appropriated," and does not indicate any more specific source of funds for payment or expressly require GAO settlement, payment is charged to the permanent, indefinite account 20X1706 (Relief of Individuals and Others by Private and Public Laws) and is made directly by the Treasury Department with no need for GAO involvement. See B-142380, March 24, 1960 (circular letter).

The amount specified in a private relief act effectively constitutes a "final adjudication" and confers no authority to do anything other than pay it in accordance with its terms. United States v. Price, 116 U.S. 43 (1885); United States v. Jordan, 113 U.S. 418 (1885); 22 Op. Att'y Gen. 295 (1899); 5 Op. Att'y Gen. 94 (1849). Except for the possibility of bringing the matter to the attention of Congress, it must be paid even if it is believed to be erroneous. United States v. Louisville, 169 U.S. 249 (1898); 2 Comp. Dec. 629 (1896). As the Court of Claims said in Mumford v. United States, 31 Ct. Cl. 210, 215 (1896):

> "The disposition of public money is in the discretion of Congress, and its reasons for passing an act and the consideration thereof can not be inquired into nor its will thwarted by any executive officers or by the courts."

In Chapter 2 we discuss the principle that, except for errors in the amount appropriated, obvious clerical or typographical errors in a statute which could change the meaning or render execution impossible may be disregarded if the intent is clear. This principle applies equally to private relief acts. Thus, a relief act appropriating money to pay a claim of Martin and P.W. Murphy which erroneously designated the payees as "Martin and P.B. Murphy" could be paid to the rightful claimants because the context clearly established the "B" as a clerical error. 18 Op. Att'y Gen. 501 (1886).

An interesting case is A-33329, September 22, 1930. An individual had filed a lawsuit in the Court of Claims. The court threw it out and entered a judgment against the individual for costs in the amount of $416. He then went to Congress and managed to get his claim paid by private relief legislation. GAO at first set off the $416 against the relief payment, but later reversed the setoff. Since the relief act was based on the same claim the court had dismissed, the congressional action was viewed as "equivalent to a reversal by a higher jurisdiction," effectively removing the basis for the cost judgment.

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2. Meritorious Claims Act

a. General

In its annual report for 1927, GAO recommended the enactment of legislation which would authorize it to report favorably to the Congress on claims which in its judgment should be paid but could not be under existing law.[95] The legislation, which has come to be known as the Meritorious Claims Act,[96] was enacted in 1928 (45 Stat. 413) and is now codified at 31 U.S.C. § 3702(d):

> "The Comptroller General shall report to Congress on a claim against the Government that is timely presented under this section that may not be adjusted by using an existing appropriation, and that the Comptroller General believes Congress should consider for legal or equitable reasons. The report shall include recommendations of the Comptroller General."

As we will discuss in more detail later, "timely presented" means filed within the 6-year limitation prescribed in 31 U.S.C. § 3702(b).

It is important to note that the Meritorious Claims Act does not authorize the actual payment of anything. It merely authorizes GAO to submit a favorable recommendation to Congress. Since the law's enactment, it has been the practice of Congress to act on Meritorious Claims Act recommendations in the form of private relief bills rather than including the items in general appropriation acts. A-25269, April 8, 1929. Thus, the Act in effect authorizes GAO to recommend private relief legislation. GAO's practice is to include draft language for the bill along with its recommendation. Of course, nothing would prevent Congress from including language in a regular or supplemental appropriation act if it chose to do so. Also, at least one Meritorious Claims Act recommendation has been enacted in the form of a public law.[97]

Obviously, anything the Comptroller General can submit under the Meritorious Claims Act can be handled by regular private relief legislation. The difference is that the Meritorious Claims Act case comes to Congress over the recommendation of an agency with expertise in investigating and

[95]Annual Report of the Comptroller General of the United States for the Fiscal Year Ended June 30, 1927 at 9–11.

[96]Early documents occasionally use the name "Equitable Claims Act." E.g., B-36492, August 27, 1943. However, "Meritorious Claims Act" has become much more common.

[97]Pub. L. No. 99-330, 100 Stat. 509 (1986), was enacted in response to GAO's recommendation in B-2059984, June 15, 1982. Relief does not normally take this long, although the Meritorious Claims Act at best is not a particularly swift procedure.

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adjudicating claims, presumably making the congressional task easier. In fact this was the purpose of the Act. S. Rep. No. 684, 70th Cong., lst Sess. 3–4 (1928); H.R. Rep. No. 491, 70th Cong., 1st Sess. 1–4 (1928).

While the Act does permit GAO to recommend action on certain claims not otherwise payable, it is nevertheless quite limited. By its terms it applies only in cases not payable under existing appropriations; it does not apply to claims which, if otherwise allowable, could be paid from existing appropriations. For example, in B-155149, October 21, 1964, the Comptroller General advised that the Meritorious Claims Act was not the appropriate vehicle to consider the claim of an accountable officer who had restored a loss of public funds from personal funds and was later found to be free from fault or negligence. Upon the granting of relief under the pertinent accountable officer relief statute, the officer could be reimbursed from agency operating appropriations. For other illustrations, see A-63014, September 19, 1935; A-21129, January 17, 1929; A-18647, October 25, 1928.

Also, GAO has construed the Act as applicable only to claims within its settlement jurisdiction. Of course this means all claims except those for which settlement authority has been expressly granted to some other agency. Numerous decisions state this position,[98] and several of the earlier cases (e.g., B-121302, October 6, 1954) point out that it is supported by the Act's legislative history. The rationale here is that the Act should not be construed to permit GAO to circumvent a determination that has been expressly committed by statute to another agency.

Combining these two concepts, a claim is cognizable under the Meritorious Claims Act if it is a claim which GAO:

"could consider with a view of making an allowance thereon but for the lack of any authority in previously enacted statutory law, or appropriation made in pursuance of law authorizing the payment of such claims."

A-18647, October 25, 1928. This formulation has been repeated in numerous cases. E.g., 13 Comp. Gen. 406, 408 (1934); B-121302, October 6, 1954.

There are therefore three conditions which must be met before GAO will report a claim under the Meritorious Claims Act: (1) the claim must be

[98]A few examples are 62 Comp. Gen. 280 (1983); B-215494, September 4, 1984; B-151903, July 11, 1963; B-144735/B-144817, February 10, 1961.

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cognizable by GAO under its claims settlement jurisdiction; (2) the claim must be one for whose payment existing appropriations are not available; and (3) the Comptroller General must judge the claim to have sufficient legal or equitable merit to warrant special consideration by Congress. The third condition introduces the element of discretion.

One commenter noted in 1966 that the Meritorious Claims Act "was rarely used until recently." Note, Private Bills in Congress, 79 Harv. L. Rev. 1684, 1688 (1966). While the source of this may have been interviews with GAO employees (Id. at 1684, note), in fact the opposite is true. The Act was used quite often in its early years—17 claims were submitted to Congress in 1928, 16 in 1929, and 20 in 1930. Usage dropped sharply and there were few submissions in the 1940s and 1950s. Usage increased somewhat since then, but the decades since the 1950s have seen on the average only a very few claims submitted each year (for example, 22 for the period 1977–1987). Perhaps the major reason for this overall decline is that the statutory framework for the settlement and payment of claims against the government is vastly more sophisticated than it was in 1928. The trend in favor of the government's waiver of its sovereign immunity was still in its infancy in 1928 and there are now many more types of claims for which administrative or judicial recourse is available.

In any event, GAO has not considered it appropriate to flood the Congress with Meritorious Claims Act recommendations, and it may certainly be said that GAO has used the Act sparingly. Perhaps in part because of this, most of the Comptroller General's recommendations under the Act have been enacted. Thus, of the 53 claims reported in 1928 through 1930, 51 were enacted. Out of 31 submitted between 1948 and 1976, 28 were enacted.[99]

GAO views the Meritorious Claims Act as "an extraordinary [remedy] limited to extraordinary circumstances." E.g., 53 Comp. Gen. 157, 158 (1973); B-232057, February 9, 1989; B-160743, March 24, 1967. Thus, cases reported for congressional consideration have generally involved equitable circumstances of an unusual nature which are unlikely to constitute a recurring problem. 63 Comp. Gen. 93, 95 (1983); 53 Comp. Gen. at 158; B-186000, September 22, 1976. GAO feels that frequently recurring problems are preferably dealt with by general remedial legislation. See B-36492, August 27, 1943; 17 Comp. Gen. 720, 724 (1938).

[99]The statistics in the text are drawn from two studies by GAO attorneys, B-150882-O.M., March 17, 1977, and B-230950-O.M., August 29, 1988.

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The Meritorious Claims Act does not apply with respect to transactions to which the United States is not a party. B-172991, February 23, 1972; B-163051, May 2, 1968. Nor does it apply to disallowances in the accounts of disbursing or other accountable officers. A-46674, January 25, 1933; A-12928, January 5, 1929. As demonstrated by B-155149, October 21, 1964, summarized above, the subsequent enactment of the accountable officer relief statutes reinforces this conclusion.

Also, read literally, the Act applies only to claims against the United States and not to claims by the United States. A-5249, June 18, 1928. Thus, the Act would not be available in general debt cases, especially since the Federal Claims Collection Act provides standards for compromise and termination. However, it has been applied in cases involving overpayments to government employees where termination of collection action was viewed as inapplicable. These have generally been cases involving "mixed" claims, that is, claims including both the cancellation of remaining indebtedness and the refunding of amounts already repaid (B-177097, January 19, 1973; B-160178, January 27, 1969; B-165384, November 13, 1968), although some more recent cases involve only the cancellation of indebtedness (B-195167, February 21, 1980, an "erroneous advice" case). Also, these are cases either (a) which at the time were not covered by applicable waiver statutes (B-195167 and B-186218), or (b) for which waiver would not provide adequate relief (B-160178). In any event, the nonapplicability of the Act to debt cases is no longer rigidly followed.

Some of the earlier documents suggest that a Meritorious Claims Act request may be considered only if submitted directly by the claimant. However, the statute does not require this, and as a practical matter it is necessary only if the statute of limitations is likely to be a problem. Thus, GAO will consider a request submitted by the cognizant agency or a Member of Congress. In addition, GAO will self-initiate a report in appropriate circumstances.

The approach used in evaluating Meritorious Claims Act requests was summarized in 18 Comp. Gen. 454, 457 (1938):

"The propriety of affording relief under the [Meritorious Claims Act] is a matter of discretion to be exercised according to the circumstances of each particular case. However, this discretion is not an arbitrary one, but is required to be exercised in accordance with fixed principles and precedents."

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There are no formal standards for judging if a specific claim is one which GAO is likely to endorse under the Act. Rather, each claim is considered on its own merit and in light of available precedent to determine if it contains the necessary elements of legal liability or equity. B-137604, February 13, 1959.

It must be emphasized that there have been literally hundreds of requests for relief under the Meritorious Claims Act. Many of the older cases have become obsolete by virtue of changes in legislation. Many others are simply not susceptible of generalization. With this in mind, the remainder of this section attempts to draw some guidelines for the presentation and consideration of these claims.

b. Categories of Claims Generally Not Reported

(1) Statute of limitations

A claim which is time-barred, either by the Barring Act (31 U.S.C. § 3702(b)) or by some other more specific statutory or regulatory limitation, will not be submitted under the Meritorious Claims Act.

When the Meritorious Claims Act was enacted in 1928, there was no general statute of limitations applicable to the administrative adjudication of claims within GAO's settlement jurisdiction. The Barring Act, as originally enacted in 1940, applied expressly to the Meritorious Claims Act as well as to GAO's general claims settlement statute. Prior to the 1982 recodification of Title 31, the identical barring provision was carried in both locations. The recodification eliminated the duplication by adding the language "timely presented under this section" to the Meritorious Claims Act. Therefore, the "timely presented" language of 31 U.S.C. § 3702(d) clearly incorporates the limitation and tolling provisions of section 3702(b). Thus, if a claim is not filed within 6 years after it accrues (or longer for certain wartime claims or if the period is extended by the Soldiers' and Sailors' Civil Relief Act of 1940), GAO is precluded as a matter of law from submitting it under the Meritorious Claims Act, regardless of the equities.

For example, B-153568, March 16, 1964, involved the claim of a veteran for the redemption of certain military payment certificates he had received during his service in World War II. The claim was not filed until 1964. Because the claim was not filed within the period prescribed by the Barring Act nor within 5 years after the establishment of peace, the Comptroller General had no authority to report the claim to Congress under the Meritorious Claims Act. Similarly, there was no authority to

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invoke the Act on behalf of a contractor who filed a claim in 1981 for sums withheld by a contracting officer in 1971. B-208290, September 7, 1982. In both cases, any considerations of equity had become irrelevant. There are numerous other decisions illustrating the effect of the Barring Act on GAO's authority under the Meritorious Claims Act. See, e.g., B-189816, August 29, 1977; B-171732, March 24, 1971; B-106890, August 11, 1970; B-150129, November 15, 1962; B-144246, November 10, 1960.

A claim may be presented which is still within the period of the Barring Act, but which is barred by some other more specific limitation period provided by statute or regulation. Early decisions established the proposition that a claim which is time-barred by any statutory or regulatory limitation period will not be reported to Congress under the Meritorious Claims Act. As stated in 14 Comp. Gen. 324 (1934), the Act "was not intended for employment as a means to revive claims barred by a statutory or regulatory limitation." See also A-74206, August 4, 1936; A-44115, December 12, 1932.

This conclusion follows from the application of established principles of equity, stated as follows in 18 Comp. Gen. 454, 457 (1938):

> "It is a principle of long standing, governing the exercise of equitable jurisdiction, that when there is a complete and adequate remedy at law, and the party aggrieved fails to take advantage of such remedy, such party will not be permitted to assert it in equity unless he was prevented by fraud or mistake or by circumstances beyond his control. [Citation omitted.] Where an adequate remedy at law has been lost through either positive negligence or mere failure to seek it at the proper time, equity will not interpose to grant relief."

These early decisions predated the Barring Act—that is, the limitation period involved in the pre-1940 cases was the only available time limitation. However, since a specific provision governs over a more general one, the principle continues to be applicable and has been followed after the enactment of the Barring Act. For example, GAO denied Meritorious Claims Act relief to a claimant seeking a customs refund who had failed to pursue available administrative remedies within the time periods prescribed by the customs laws (B-115724, August 7, 1953), and to a person who missed the time limit on claiming statutory relocation benefits with respect to land acquired by the Interior Department (B-172189, September 22, 1972). Other post-Barring Act cases involving various shorter limitation periods are B-230421, December 22, 1988;

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B-126162, March 16, 1956; B-124678, August 31, 1955; and B-40645, April 21, 1944.

(2) Tort claims

GAO does not view the Meritorious Claims Act as applicable to tort claims. This result follows from the application of two somewhat related principles, not always stated in the decisions. First, the Meritorious Claims Act applies only to claims which are within GAO's settlement jurisdiction, and second, where Congress has enacted legislation providing relief for a certain type of claim, it must be presumed that Congress intended for that legislation to prescribe the limits of available relief.

The first wave of cases involved mostly allegations of negligence by some government employee and arose before the 1946 enactment of the Federal Tort Claims Act, at a time when only limited relief was available under the Small Claims Act and a few other miscellaneous statutory provisions. Although the equities clearly favored the claimant in most cases, GAO consistently refused to submit Meritorious Claims Act recommendations. E.g., 16 Comp. Gen. 642 (1937); 15 Comp. Gen. 1114 (1936); 14 Comp. Gen. 429 (1934); 13 Comp. Gen. 406 (1934); 10 Comp. Gen. 175 (1930). An additional factor mentioned in some of the cases was that numerous tort claim bills had been introduced in Congress but had never passed, presumably indicating the congressional attitude towards them. 16 Comp. Gen. at 643.

The expanded relief available under the Federal Tort Claims Act has greatly reduced the number of Meritorious Claims Act requests arising from tort claims. If anything, the comprehensive nature of the Federal Tort Claims Act makes the rationale of GAO's pre-1946 Meritorious Claims Act cases even stronger, and GAO has reiterated that position in a number of post-FTCA cases. For example, the Comptroller General declined to invoke the Meritorious Claims Act on behalf of an individual who alleged that his truck had been damaged by government negligence (B-204766, March 2, 1982); and a claimant who sought reimbursement for the loss of a rutabaga crop which was destroyed by the application of a pesticide recommended by a Department of Agriculture official (B-160780, February 8, 1967). See also B-147909, January 22, 1962; B-141810, February 10, 1960; B-120853, October 4, 1954.

The rationale applies equally to claims under the various FTCA exemptions in 28 U.S.C. § 2680. The concept that the FTCA prescribes the limits of

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available relief is just as true for the exemptions as for the allowable claims. Thus, GAO has declined to report tort claims arising in foreign countries, regardless of the availability of some other avenue of administrative relief. E.g., B-120691, July 28, 1954 (possible relief under Foreign Claims Act).

In a related group of cases, the Comptroller General has declined to proceed under the Meritorious Claims Act on behalf of government employees who paid tort claims from personal funds. 34 Comp. Gen. 490 (1955) (employee sued in individual capacity claimed amount paid in out-of-court settlement plus attorney's fees incurred in defending suit); B-145191, April 7, 1961 (employee paid damages to avoid being sued). These cases were based in part on the traditional nonapplicability of the Meritorious Claims Act to tort claims and in part on the absence of government liability where the employee is sued in his individual capacity. Another case in this group, B-152070, October 3, 1963, offered another reason—the employee's negligence "negates any element of equity in the claim." Since the Federal Tort Claims Act is now the exclusive remedy for scope-of-employment torts and the option of suing the negligent employee individually no longer exists, these cases should presumably no longer arise.

Relief was recommended in a 1957 case in a claim resulting from the wrongdoing of a government employee. The Western Union Telegraph Company had installed equipment on an Army installation and by agreement permitted the equipment to be used for unofficial messages by military personnel. Army personnel collected the charges for the Company's credit. An Army employee embezzled several thousand dollars of these receipts. The employee was prosecuted but recoupment was not possible. Since there was no way to pay the Company's claim from appropriated funds, the Comptroller General reported it to Congress under the Meritorious Claims Act, stating that "the Government's responsibility for the funds attached immediately upon their receipt, and is not merely that of an employer for an employee's tort." B-131464, September 4, 1957.

There is an additional reason why it would be inappropriate for GAO to use the Meritorious Claims Act on behalf of a claimant whose claim is cognizable under the Federal Tort Claims Act. A statute enacted in 1946 along with the Federal Tort Claims Act provides that no private bill authorizing or directing "the payment of money for property damages, for personal injuries or death for which suit may be instituted under the Federal Tort Claims Act . . . shall be received or considered" in the

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Congress. 2 U.S.C. § 190g. The statute also applies to private bills for a pension, the construction of a bridge across a navigable stream, and the correction of military or naval records. Section 190g has been repealed insofar as it relates to the Senate (S. Res. 274, 96th Congress, November 14, 1979), but now appears as Rule XIV, para. 10, Standing Rules of the Senate. It remains in statutory force for the House of Representatives. Thus, it would be inappropriate for GAO to recommend private relief legislation of a type that both Houses of Congress have clearly said they do not want to receive. See B-180597, May 10, 1974; B-162545, October 10, 1967.

(3) Res judicata

The Meritorious Claims Act is targeted at claims for which existing law does not make provision. It was not designed to give a second shot to claimants who have already adjudicated their claims and lost. Thus, a claim which has been unsuccessfully pursued in court will not be submitted under 31 U.S.C. § 3702(d). A-55736, June 25, 1934 (no basis for GAO to "in effect, reverse the orders and judgments of courts" by applying Meritorious Claims Act); A-28480, September 19, 1929. The same result would apply to a claimant who won in court but later comes back for more money. B-215494, September 4, 1984.

While there is certainly some logic to this position, it does not justify an unyielding application in that a judicial determination of no legal liability does not preclude the existence of strong equities. The preferable approach is to look at the merits and there has in fact been at least one exception, B-145318, December 16, 1969, in which GAO supported relief for a contractor who had lost in the Court of Claims.

(4) Interest

As discussed earlier in this chapter, interest is not recoverable on claims against the United States unless expressly authorized in the relevant statute or contract. Where interest is not otherwise authorized, a claim for interest will not be submitted under the Meritorious Claims Act. A-28455, March 1, 1930; A-27042, September 10, 1929; A-22423, February 1, 1929; A-14295, September 10, 1928. At the time of the cited decisions, there were few situations in which interest was recoverable against the government. The rationale now for GAO's position would be somewhat different and perhaps even stronger. As evidenced by laws such as the Contract Disputes Act, the Back Pay Act, and the Internal Revenue Code, Congress

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incident to the specific "sue and be sued" power and not to more general claims settlement authority.

The settlement function also includes the determination of whether an appropriation is legally available for making payment. 18 Comp. Gen. 285, 292 (1938).

b. GAO vs. Agency Adjudication

A cornerstone of GAO's claims settlement policy is the belief that each agency should adjudicate its own claims. Thus, GAO does not adjudicate claims against other agencies in the first instance. GAO's claims settlement regulations, 4 C.F.R. § 31.4, reflect this policy:

"A claimant should file his or her claim with the administrative department or agency out of whose activities the claim arose. The agency shall initially adjudicate the claim."

A claimant submitting a claim to GAO which has not been adjudicated by the responsible agency will simply be told to go to that agency. E.g., B-249168, July 30, 1992.

GAO adjudicates claims against other agencies in only two situations. First, an agency can refer to GAO a claim which is otherwise within GAO's settlement jurisdiction and which the agency considers "doubtful." A "doubtful claim" is defined in GAO's Policy and Procedures Manual for Guidance of Federal Agencies, title 4, § 5.2, as follows:

"A claim is doubtful when in the exercise of reasonable prudence either a person having final responsibility for deciding appropriate administrative action or the person who, in accordance with applicable statutes, will be held accountable if the claim were paid and then found to be incorrect, illegal, or improper, is unable to decide with reasonable certainty the validity and correctness of the claim."

Claims of $100 or less, however "doubtful" they may appear, may be settled by the agency involved on the basis of written advice from an appropriately designated agency official, and GAO will regard any payment resulting from this procedure as conclusive.[5]

Second, a claimant who believes that his or her claim was wrongfully denied by the adjudicating agency can request GAO review of the agency's

[5]This procedure, directed at advance decisions in general as well as claims, was originally limited to $25 or less. It was raised to $100 for advance decisions by GAO's Policy and Procedures Manual, title 7, § 8.3. Since the simplified procedure stemmed from the same source for both claims and decisions, the increase is regarded as applicable to claims as well.

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has made a conscious decision as to the types of claims which bear interest and, for the most part, the applicable rate and method of computation.

(5) Voluntary creditors

Another topic previously covered in this chapter is the so-called voluntary creditor. The rule is that one who attempts to make him(her)self a "voluntary creditor" of the United States by making a payment of a government obligation from personal funds may not be reimbursed, although a considerably body of exceptions has evolved. The claim of a voluntary creditor which cannot be paid under the principles previously discussed will not be reported to Congress under the Meritorious Claims Act. B-157057(2), July 12, 1965; B-127799, August 24, 1956; B-87319, May 16, 1950.

One reason for this, although not stated in the decisions, is that a voluntary creditor claim is not a claim which could be allowed but for the lack of an available appropriation. If the claim were otherwise allowable, existing appropriations would be available for its payment. Also, while this was not true at the time of the cases cited above, existing precedent should be adequate to pay most voluntary creditor claims with compelling equities.

(6) Personal expenses

GAO will not recommend relief under the Meritorious Claims Act to reimburse a claimant for expenditures which are essentially personal in nature and for which there is no basis for government liability. E.g., B-147628, December 28, 1961 (occupancy tax levied on military member by French municipality). Cases under this heading have most commonly involved attorney's fees in situations where government payment was not authorized. B-185734, June 14, 1977; B-185612, August 12, 1976; B-136707, December 14, 1962. The answer was "no" in all three cases.

A claim for attorney's fees was submitted under the Meritorious Claims Act in B-181660, September 30, 1974. The claimant, a General Services Administration employee, had separated a GSA supervisor and another GSA employee who were fighting and, as a result, was named a co-defendant in a civil suit brought by the employee. When GSA denied the claimant's request for government representation, he retained private counsel. Claimant renewed his request for representation and this time

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GSA referred it to the local United States Attorney who provided the necessary legal representation. GAO felt that the claim for the cost of retaining private counsel prior to being represented by the U.S. Attorney had sufficient equity to merit congressional consideration.

(7) Cost or eligibility limitations

A statute or regulation may impose various limitations and the party affected is charged with knowledge of these restrictions. A cost limitation may be a ceiling on the amount of funds that can be spent on a project or may be a limit on the amount payable on a certain type of claim, for example, the $40,000 limit in the Military Personnel and Civilian Employees' Claims Act of 1964. An eligibility limitation for purposes of this discussion refers to a time limit on some entitlement, for example, an allowance payable for a specified number of days.

As a general proposition, a claim for an amount in excess of a cost or eligibility limitation set by statute or valid regulation will not be reported to Congress under the Meritorious Claims Act. Illustrations are the time limitations on storage of household goods (B-210170, July 6, 1983; B-201277, February 20, 1981; B-98615, November 2, 1950); the weight limitations on shipment of household goods (B-210113, March 2, 1983; B-134650, May 14, 1959); and the time limitation on incurring expenses incident to a permanent change of station (B-232057, February 9, 1989). See also B-147496-O.M., January 4, 1962 (monetary cap on reward for return of military deserter); B-142433-O.M., May 4, 1960 (time limit on temporary lodging allowance).

Another relevant limitation is the cost limitation in 10 U.S.C. § 2805 on "minor construction" projects for the military departments. In B-147086, September 20, 1961, GAO found it inappropriate to report to Congress a contractor's claim in an amount which would have caused the minor construction limitation to be exceeded. However, a claim for an amount in excess of the minor construction limitation was reported in B-154061, February 15, 1965. In that case, the contractor (claimant) was only one of several on the project and had no way of knowing that the limit might be exceeded. Therefore, adherence to the cost limitation was not a matter within the contractor's control.

The Comptroller General also recommended relief in B-145318, December 16, 1969. A construction contractor on a housing project offered to perform certain additional work and the contracting officer accepted.

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However, a change order could not be issued because the maximum insurable mortgage amount was subsequently obligated for other work on the project. Relief was deemed appropriate because the contractor had acted in good faith, the government retained the benefit of the work, and the work could have been paid for at the time the additional cost was agreed to without exceeding the statutory limitation.

(8) Contributing fault by claimant

Older court decisions on equity jurisdiction frequently state that a party seeking equitable relief must have "clean hands." Although not in those terms, the Comptroller General applies this concept in considering requests for relief under the Meritorious Claims Act. Simply stated, GAO does not view the Meritorious Claims Act as an appropriate means to rescue someone who has contributed to his or her own predicament.

In A-27639, February 25, 1930, a civilian clerk at an Army installation prepared fraudulent vouchers and had checks drawn to fictitious payees. He then indorsed the names of the fictitious payees and cashed the checks. The crook was caught and put in jail. The government recovered its money from the bank to which Treasury had paid the proceeds, with the loss ultimately falling on the bank which had cashed the checks. GAO denied the bank's request for Meritorious Claims Act relief because the bank, as required by negotiable instruments law, had guaranteed all prior endorsements. "As between the bank and the Government, it would seem that the bank should bear the loss." Id.

The following cases in which Meritorious Claims Act relief was denied will further illustrate:

- B-186000, September 22, 1976: Claim by Air Force officer for tuition payments to a foreign university. Even after counseling, claimant did not follow applicable regulations for having payments approved.
- B-177437, March 9, 1973: Claim for lost equity in real property sold at foreclosure sale as result of nonpayment of mortgage. Claimant alleged that default resulted from Army's erroneous discontinuance of his allotment. Army records revealed that claimant had signed a form requesting discontinuance of the allotment.
- B-165901, January 28, 1969: Air Force member shipped household goods knowing that applicable regulations did not authorize shipment at government expense in his particular situation.

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- B-154149, June 5, 1964: Government employee induced claimant's husband to endorse benefit check and leave it with him for later delivery. Employee then cashed the check and pocketed the proceeds. Claimant argued that the dishonest employee had obtained the check under false pretenses, which was obviously true, but claimant had been present when her husband turned over the check and had acquiesced in the transaction.
- 8 Comp. Gen. 239, 243 (1928): Lapse of insurance because of nonpayment of premiums by claimant.

The claimant's own negligence was also one of the grounds for denying relief in some of the previously discussed cases involving the payment of tort claims from personal funds. E.g., B-152070, October 3, 1963.

(9) Statutory prohibition

It should come as no surprise that claims for items expressly prohibited (as opposed to merely not authorized) by statute or regulation are generally not reported to Congress under the Meritorious Claims Act. The premise is that one who works for or deals with the government must be charged with knowledge of pertinent restrictions.

An example is 32 Comp. Gen. 337 (1953). Under Interior Department regulations then in existence, a qualified person could request that certain public lands be sold at auction. If the request was approved, the applicant was required to publish notice of the sale at his own expense. The regulations expressly provided that the lands could be withdrawn from sale even after publication of the notice and that such withdrawal would create no liability on the part of the United States. GAO advised that the Department could amend its regulations to permit reimbursement of the notice expenses in withdrawal cases. Absent such an amendment, however, the claimant must be held to have assumed the risk that the lands might be withdrawn. Since the claimant must be charged with notice of the regulations, neither legal nor equitable basis would exist to justify a Meritorious Claims Act recommendation. See also 17 Comp. Gen. 720 (1938).

The statutory prohibition rule is not an absolute. Exceptions have been recognized where the equities are particularly strong and especially where the government has received clear benefit from work or services performed. See, for example, the published advertisement cases discussed later in this section. See also B-154061, February 15, 1965, discussed above under "cost or eligibility limitations." The statutory prohibition rule,

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therefore, presents a strong presumption against Meritorious Claims Act relief but can be overcome by sufficiently strong equities.

(10) Availability of other administrative settlement procedures

As a general proposition, the Comptroller General will not report to Congress under the Meritorious Claims Act claims for which other administrative settlement procedures are available by law, particularly where those procedures produce determinations which are "final and conclusive." For the most part, this is merely an application of the previously noted principle that GAO views the Act as applicable only to claims within its settlement jurisdiction. Also, the existence of another administrative settlement procedure suggests that appropriations are available to pay the claim if otherwise allowable and that, therefore, the claim is not one which could be allowed but for the lack of an available appropriation. The most frequently recurring cases in this category have been tort claims, treated separately earlier.

A further illustration is B-163051, May 2, 1968. A construction company claimed reimbursement for expenditures made in connection with a proposed construction project in the Sudan. The Sudanese government was to fund the project with a loan from the U.S. Agency for International Development. However, following the 1967 Middle East war, AID financing for projects in the Sudanese Republic was suspended, and a guaranty contract was executed between AID and the contractor. Under foreign assistance legislation, the President was given the authority to settle claims involving investment guaranty operations and these settlements were to be final and conclusive. Since the claim was not within GAO's settlement jurisdiction, the Comptroller General declined to invoke the Meritorious Claims Act, stating:

"[I]nsofar as the claim might be considered a claim against the United States under the Contract of Guaranty . . . Congress has specifically conferred jurisdiction to make final settlements of claims arising under such guaranty operations upon the President, and pursuant to delegations of authority that jurisdiction has been vested in the Agency for International Development."

This principle has also been applied in the following contexts:

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- Claims cognizable under the Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 3721, and its predecessors. B-222198, April 10, 1986; B-203204, July 24, 1981; B-144926, February 23, 1961.[100]
- Claims cognizable under the Military Claims Act (10 U.S.C. § 2733) or Foreign Claims Act (10 U.S.C. § 2734). 62 Comp. Gen. 280 (1983); B-149624, October 10, 1962; B-136099, July 3, 1958; B-121302, October 6, 1954; B-117677, December 21, 1953.
- Claims under the disability compensation laws administered by the Department of Veterans Affairs. B-170252, July 23, 1970.
- Claims arising under the Tariff Act of 1930. B-138338, February 12, 1959.

Under each of the claim statutes noted above, the agency's determination is "final and conclusive." The tariff case, B-138338, offered the following further explanation:

"[W]e feel that the act was intended to cover only those claims which are considered and passed on in the course of our regular business since otherwise we would have to develop a full factual record and examine into the merits of all claims filed here merely to determine whether the claim should be reported to the Congress even where the Congress has specifically conferred jurisdiction on some other agency to consider and settle the claim."

(11) Preferential treatment

As noted previously, claims submitted to Congress under the Meritorious Claims Act are generally limited to those cases which are unusual. For the most part, the Comptroller General has declined to report claims which reflect recurring situations. The rationale is that to recommend relief in a case where the circumstances are common or likely to recur might result in the preferential treatment of one individual over others similarly situated. A statement frequently found in the decisions is that:

"[T]o report to the Congress a particular case when similar equities exist or are likely to arise with respect to other claimants would constitute preferential treatment over others in similar circumstances."

53 Comp. Gen. 157, 158 (1973); B-210831, August 2, 1983; B-209292, February 1, 1983; B-164814, August 10, 1970.

The preferential treatment rule is often used as additional support in cases involving the previously discussed denial categories, for example,

[100]This type of claim was not viewed as reportable to Congress under the Meritorious Claims Act even before the 1964 legislation. See 38 Comp. Gen. 314 (1958)

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B-134038/B-138771, May 23, 1968 (claim barred by statute of limitations). However, it is also used as independent grounds for denial in many cases which do not fall within any of the other categories. See, e.g., B-197982, February 26, 1981; B-171483, March 19, 1971; B-165886, March 24, 1969. B-171483 illustrates a fairly common situation, a loss incurred by a government employee incident to a permanent change-of-station assignment which was subsequently canceled.

A 1975 case involved claims by several employees of a government contractor for reimbursement for loss and damage to personal property resulting from a fire in government-owned quarters on a United States island possession in the Pacific. Contractor employees are not covered by the Military Personnel and Civilian Employees' Claims Act of 1964, and relief was unavailable under the Federal Tort Claims Act because there was no evidence of negligence by government personnel. Based on a straight application of the preferential treatment concept, GAO declined to invoke the Meritorious Claims Act. B-183208, June 30, 1975.

It is important to note that the denial of a claim under the Meritorious Claims Act because it reflects a common or recurring situation refers to the nature of the claim and not to the particular fact pattern. Two cases in which Meritorious Claims Act requests were denied will illustrate. In both cases the fact patterns were certainly unusual but the nature of the claim was viewed as not particularly unusual and therefore within the preferential treatment rule.

In B-201284, April 21, 1981, the claimant corporation had expended a substantial sum to develop an exhibition of works from the Hermitage Museum of Leningrad. The exhibit was scheduled to tour the United States as part of a government-sanctioned effort to promote trade and cultural relations with the USSR. However, when the administration declined to issue a certification necessary to protect the art objects from judicial process in this country, the exhibition was canceled. Alleging unique circumstances, the claimant requested reimbursement of its costs.

It was determined, however, that the loss was caused by a change in U.S. foreign policy following the Soviet invasion of Afghanistan, and that as a result the claim was neither unusual nor unlikely to recur. In declining to submit the case under the Meritorious Claims Act, the Comptroller General noted losses to other U.S. concerns as a result of the invasion and stated:

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"[M]any individuals and businesses were affected to their detriment in this particular shift of policy. It is also true that we can expect that others may in the future suffer from changes in United States Government relations with foreign governments. Economic damages may well be wide spread when significant deterioration occurs in the relations between governments. We have specifically declined to recommend relief to the Congress under similar circumstances. See 53 Comp. Gen. 157 (1973). To recommend relief for some parties and not others would be unfair."

In B-199071, July 16, 1980, the claims of two U.S. servicemen who participated in a failed mission to rescue American hostages held in Iran were considered for possible submission under 31 U.S.C. § 3702(d). Both men had accrued annual leave in excess of 60 days, by statute the reimbursable maximum. One of the soldiers was killed during the raid and the other received serious injuries resulting in his retirement. Despite the unusual factual circumstances, the claims for reimbursement for accrued annual leave in excess of the 60-day limit were not submitted under the Meritorious Claims Act because forfeitures of excess annual leave are not uncommon.

From a philosophical perspective, the preferential treatment rule is discomforting in that it amounts to saying, "We aren't going to help you because the government has done the same thing to others." Therefore, it should be applied with scrutiny and should not be taken to extremes. On the one hand, anything that happens once may happen again and this alone should not be enough to eliminate a case from consideration. Yet on the other hand, the failure of Congress to deal in more general terms with a demonstrably recurring situation may indicate a congressional view that the situation should not be compensable from public funds. At the very least it suggests that remedial legislation might be desirable as an alternative to the piecemeal approach of individual relief bills. Also, there are situations where the preferential treatment rule is subordinated by compelling equities, such as the published advertising cases discussed later.

c. Categories of Claims Which Have Been Reported

Because GAO has viewed the Meritorious Claims Act as an extraordinary remedy to be used only in unusual circumstances, it is much more difficult to generalize with respect to the claims which have been reported to Congress. Nevertheless, some categorization is possible. As with several of the denial categories, placement of a case within a particular category does not guarantee that it will be reported. Each case must be examined on its own merit.

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(1) Act of God or the public enemy

GAO will generally recommend relief for claims resulting from a so-called "act of God" (natural disaster) or of the "public enemy." In B-177096, December 22, 1972, relief was recommended where a transferred government employee was unable to sell his house within the statutory period required for reimbursement of real estate expenses because damage caused by Hurricane Agnes necessitated extensive repairs to the property. In B-69985, June 10, 1948, relief was recommended where the claimant had purchased government property located at a U.S. Marine detachment in China, but was unable to take possession due to the Japanese occupation of the base on December 8, 1941. More recently, private funds temporarily in the custody of the State Department were lost during the seizure of the American Embassy in Tehran, Iran, in 1979. Although the incident produced no legal liability on the part of the United States, GAO found sufficient equitable considerations to warrant a recommendation of relief under the Meritorious Claims Act. B-205984, June 15, 1982.

One older and seemingly inconsistent case exists. Meritorious Claims Act relief was denied in B-44825, October 17, 1944, where a contractor incurred increased costs when performance was delayed by a tornado.

The natural disaster or hostile act must be the direct cause of the loss for which relief is sought. In 17 Comp. Gen. 1012 (1938), the claimant had imported and paid the customs duties on 30,000 pounds of seed. The seed was released to the claimant pending final clearance by the Department of Agriculture. Shortly after release but before the claimant could be notified, the seed, while in storage in the claimant's plant, was destroyed in a flood. The claimant sought refund of the customs duties. Since the government's right to the duties accrued on importation and was not affected by the subsequent destruction of the goods, there was no legal basis for the refund, nor did GAO find sufficient equities to warrant a Meritorious Claims Act recommendation.

(2) Congressional precedent

GAO will generally recommend relief under the Meritorious Claims Act where Congress has enacted private relief legislation in similar circumstances. In B-165541, January 29, 1969, relief was recommended where the parents of a U.S. soldier incurred the expense of transporting their son's car from North Carolina (where it was stored prior to the son's

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departure and subsequent death in Vietnam) to California since the amount was considerably less than the government's cost of transportation would have been, and Congress had previously granted relief in similar circumstances. See also B-163823, April 29, 1968, for a nearly identical situation. Relief was also recommended in B-165384, November 13, 1968, involving the erroneous overpayment of special diving pay to a Navy diver. The claimant had acted in good faith and Congress had enacted relief legislation in the identical case of another member of the same diving team.

Conversely, the Comptroller General has declined to recommend relief under the Meritorious Claims Act where private relief legislation has been introduced but not enacted (9 Comp. Gen. 175, 178–79 (1929); A-30375, February 12, 1930), or vetoed by the President (B-141780, March 28, 1966; B-141780, February 15, 1965). This may be viewed as analogous to the "res judicata" cases previously noted. Presumably the same result would apply if it were known that relief bills for different claimants with similar claims had been unsuccessful.

(3) Unconsummated offer of employment

On several occasions, the Comptroller General has recommended relief under the Meritorious Claims Act on behalf of a claimant who had received an offer of government employment and incurred a loss when, through no fault of his or her own, the offer could not be consummated.

An illustrative case is 64 Comp. Gen. 617 (1985). The claimant was offered, and accepted, a job in a "manpower shortage" position. She was given a travel authorization and incurred a variety of expenses incident to relocating to the new job site (rental expense, utility deposits, etc.). Due to budget constraints (that's what they all say), the agency rescinded the offer, leaving her with several items of expense which could not be reimbursed under existing law. Since the claimant had acted in good faith, was "ready, willing, and able to begin work on the job," and incurred the loss through absolutely no fault of her own, GAO submitted a Meritorious Claims Act recommendation for relief (B-215511(2), June 12, 1985).

GAO also recommended relief in the following cases:

- Claimant, given an appointment by the Interior Department as a home economics teacher at an Indian school, traveled to her new job at her own expense. Upon arrival, she discovered that the school did not have a home

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action. 4 C.F.R. § 31.4. Again, this applies only to claims otherwise within GAO's settlement jurisdiction.

Thus, the sequence is as follows:

- Claimant files claim with the agency involved.
- The agency may, if it regards the claim as doubtful, refer it to GAO.
- If the agency does not regard the claim as doubtful, it proceeds to allow or disallow the claim. If the agency pays the claim, the matter is ended, subject to subsequent GAO audit.
- If the agency denies the claim, the claimant may (1) "reclaim," that is, seek reconsideration by the agency in accordance with whatever regulations the agency may have, or (2) seek review by GAO.

As should be apparent, the overwhelming majority of claims against the United States are processed without GAO involvement. With respect to these, GAO fulfills its claims settlement role by virtue of its audit and account settlement functions. GAO Policy and Procedures Manual, title 4, § 3.1.

c. Limitations on GAO's Claims Settlement Authority

(1) Monetary vs. nonmonetary claims

A claim for purposes of GAO's claims settlement authority means a monetary claim—a claim for the payment of money. Without specific statutory authority, GAO is not authorized to consider nonmonetary claims, such as specific performance (B-179702, October 10, 1973). Also, GAO does not regard its claims settlement jurisdiction as extending to issues involving title to land. 19 Comp. Gen. 196 (1939); B-227438, November 13, 1987; B-223750, March 13, 1987; B-207613, April 6, 1983.

Claims for the recrediting of annual or sick leave, while not calling for the immediate payment of money, are nevertheless regarded as monetary claims within GAO's settlement jurisdiction. 67 Comp. Gen. 188 (1988).

(2) Authority otherwise provided for

Even with respect to monetary claims, GAO's claims settlement jurisdiction under 31 U.S.C. § 3702(a) applies only in the absence of some other statutory scheme. This can come about in several ways. If an agency has statutory authority to settle its own claims, either generally or of some particular type, this specific authority will take precedence over 31 U.S.C. § 3702(a). Thus:

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economics department, whereupon she returned home. The claimant was unable to start the job for which she had been hired through no fault of her own. A-30416, February 17, 1930.

- Claimant was offered a Forest Service position in Wisconsin, accepted the offer and sold his home in Michigan. Upon reporting for work, he was informed of a delay in his formal appointment because of a question over his veteran's preference eligibility, whereupon he returned to Michigan and accepted private employment. Claimant had acted in good faith at all times. B-148149, May 16, 1962.
- Claimant accepted what he understood to be a firm offer of employment. It turned out to be merely an invitation to participate in a training session as part of a selection process. He was advised that he would not be considered for regular employment at a particular location, but he might be considered for placement elsewhere, and was told to return home to await a possible phone call. B-158406, March 23, 1966.

In B-160747, August 2, 1967, a case somewhat similar to B-158406 but factually distinguishable in several respects, GAO declined to recommend relief. The claimant in B-160747 had not resigned his prior position and continued to receive pay during the period he was enrolled in the government training program. Also, upon being advised of his failure to qualify for the desired position, he was never asked to simply stand by to await a possible further assignment. This claimant was therefore not in the same equitable position as the claimant in B-158406.

(4) Published advertisements

As discussed earlier in this chapter, claims by newspapers for published advertisements procured in violation of 44 U.S.C. § 3702 must be disallowed. However, GAO has routinely reported these to Congress under the Meritorious Claims Act. A few examples are B-208306, August 18, 1982; B-199453, October 2, 1980; B-196440, April 3, 1980; B-181337, November 25, 1974; and B-160052, January 22, 1969.

The basis for submitting these is essentially an "unjust enrichment" theory—the newspaper provided a service in good faith expecting to be compensated and the government received the benefits of that service. Also, although 44 U.S.C. § 3702 is a prohibitory statute, it merely establishes a procedural requirement as a condition precedent to payment and does not prohibit the procurement of advertisements per se.

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However, in a case where the government had merely asked for a price quotation and the newspaper ran the advertisement based on that request, the newspaper did not stand in the same equitable position and GAO declined to make a Meritorious Claims Act recommendation. B-198568-O.M., October 21, 1980. Similarly, where an employee paid a newspaper from personal funds, GAO refused to submit the employee's claim for reimbursement to Congress under the Meritorious Claims Act. B-1586, March 20, 1939.

(5) Miscellaneous unjust enrichment and related cases

If the government receives the benefit of work or services performed in good faith by someone—a government employee or otherwise—who justifiably expected to be paid, it is inequitable for the government not to pay. In some instances, however, as illustrated by the newspaper advertisement cases, there may be valid legal reasons why direct payment cannot be made. In such cases, and where the claimant is free from fault (for example, has not missed the statute of limitations), GAO will be inclined to favorably consider Meritorious Claims Act relief.

In B-160178, January 27, 1969, the claimant took a GS-9 job with the Army after working only 12 days as a GS-6 with the Justice Department, a violation of the so-called Whitten Amendment which required at least one year in the next lower grade. Payment of his salary was therefore technically illegal. However, since the claimant had successfully performed his GS-9 duties for over a year, GAO recommended relief under the Meritorious Claims Act. The effect of requiring recoupment of the salary would have been that the government received the benefit of the claimant's work without having to pay him.

Similarly, relief was recommended in B-153742, July 8, 1964, where a temporary civilian employee continued to work under the good faith impression that his temporary appointment had been extended for a second time although such an extension was prohibited.

In an early case, a Treasury agent employed a Canadian attorney to help with the extradition of a fugitive who had violated the narcotics laws. Because of a statutory prohibition then in existence, there was no authority to pay the attorney. Since the services had been rendered in good faith and the government received the benefit, GAO submitted a Meritorious Claims Act recommendation. A-30342, February 12, 1930.

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The essence of these cases is that the government would be unjustly enriched at the claimant's expense by benefiting from uncompensated services performed in good faith. Note also that this rationale has been sufficient to overcome a statutory prohibition in several cases, as noted previously under the Statutory Prohibition heading.

Relief has also been recommended in a few cases for services performed in good faith where it turned out that the government did not receive the contemplated benefit or the benefit was speculative. The claimant in A-26703, July 10, 1929, rendered undertaker's services at the request of the (then) Veterans Bureau, but it was later discovered that the deceased had never performed any military service. The claimant had no way of knowing and had acted in good faith. Undertaker's services were also involved in B-104517, February 9, 1953, in which the claimant had buried four unidentified individuals killed in an Air Force plane crash, but could not be paid because it could not be clearly established that the decedents were Air Force or Air National Guard members.

d. Contract Claims

Contract claims generated many requests to the Comptroller General for Meritorious Claims Act relief in the early years of the statute. There have been much fewer in recent years, largely because many claims are cognizable under modern contract claims authorities and procedures (e.g., government-caused delays). And, the removal of many contract claims from GAO's settlement jurisdiction by virtue of the Contract Disputes Act provides another reason for non-reporting.

Because of their variety, contract claims are impossible to categorize as either reportable or not reportable although, as with most other claim types, Meritorious Claims Act recommendations have been made on only a small percentage. In addition to the principles already discussed in this section, some further guidelines may be noted for contract cases.

One who contracts with the government is not automatically guaranteed a profit, and the mere fact that a contractor incurs a loss rather than a profit does not justify a Meritorious Claims Act recommendation. 37 Comp. Gen. 688, 690–91 (1958); 9 Comp. Gen. 378 (1930); B-163274, December 20, 1968. "[C]onsiderations of sympathy for the misfortune of a contractor" aren't enough. 37 Comp. Gen. at 690.

Losses sustained by a contractor occasioned by the suspension of work due to exhaustion of funds will not be reported to Congress under the Act.

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B-118869, March 30, 1954; A-37562, April 30, 1932; A-29731, January 13, 1930. See also B-147197-O.M., October 27, 1961.

Also not reportable under the Meritorious Claims Act are claims for bid preparation costs. A-90260, December 6, 1937. (If otherwise allowable, these could be paid from existing appropriations.)

Ordinarily, in a requirements contract, the government has no liability if it orders less than the stated estimate. E.g., B-158239, March 11, 1966. Losses resulting from this situation will not justify a Meritorious Claims Act recommendation. 37 Comp. Gen. 688 (1958). However, relief has been recommended where the government did not correctly state its estimate. In an early case, a contracting officer erroneously put 4,000 sacks of flour instead of 4,000 pounds in the solicitation. Upon being notified that its bid was accepted, the contractor made commitments for 4,000 sacks, much more than the government needed. Since the contractor's loss was directly attributable to the government's error in stating the estimate, GAO recommended relief under the Meritorious Claims Act. A-26191, April 30, 1929.

GAO has declined to recommend relief where a contractor's costs have increased due to inflation (54 Comp. Gen. 1031 (1975)) or to the devaluation of the dollar (53 Comp. Gen. 157 (1973)).

A number of contract claims have been reported to Congress under the Meritorious Claims Act. They tend to be cases where there is a direct connection between the government's actions and the claimant's loss, and frequently involve elements of unjust enrichment (benefit to the government from work for which the contractor justifiably contemplated payment). Two cases have been noted above in the discussion of cost or eligibility limitations (B-154061, February 15, 1965, and B-145318, December 16, 1969). A few other examples are summarized below:

- B-194135, November 19, 1979: Contract with Army required contractor to upgrade three Army wastewater treatment facilities. After performance was successfully completed and the contractor partially paid, it was discovered that one of the facilities was the property of the local school board and not the Army.
- B-136117, August 26, 1958: Contractor suffered losses under a salvage timber sales contract due to the government's error in estimating the amount of timber to be cut. Although a small percentage of error in such estimates is normal, this contract was "believed to have contained the

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largest percentage of error ever made in the Government's estimate of timber to be sold."

- B-164582, May 6, 1969: Claim by logger for losses sustained under timber sale contract due to work stoppage required to clear insect-infested timber purchased at government's urging and in purported reliance on government's promise to give favorable consideration to time extension for performance.
- B-134386, October 7, 1958: Claim for costs incurred in preparation for anticipated contract, sustained when claimant was erroneously notified that it was the successful bidder.
- B-136897/B-139976, February 8, 1961: Claim for losses incurred in performance of contract for manufacture of sleeping bag cases as a result of government's failure to furnish proper drawings. Armed Services Board of Contract Appeals had denied claim because actual loss was not susceptible to a reasonable adjustment supported by a preponderance of evidence. Contractor subsequently agreed to accept $50,000, which Army considered a reasonable estimate of the damages the contractor had suffered, and based on this agreement, GAO recommended relief.
- B-163778, December 21, 1970: Claimant purchased land from Post Office Department under agreement to construct vehicle maintenance facility and lease it back to the Post Office Department. Claimant incurred substantial expenses incident to mutual termination of contract when it was discovered that the construction was precluded by a city zoning ordinance.

A final case we may note, involving a different type of "contract" issue, is A-34155, December 30, 1931. A tugboat off the coast of Washington (state) spotted two "white sailor bags" floating in the water. The bags, deeply anchored, were filled with tins of "smoking opium." The tugboat crew retrieved the bags and turned them in to the local customs office. The crew claimed a reward but it could not be paid because pertinent legislation at the time did not authorize a reward except pursuant to an offer. GAO found the equities of the situation sufficient to warrant a Meritorious Claims Act recommendation.

e. Erroneous Advice by Government Employee

Elsewhere in this chapter we have discussed the well-established rule that, except as otherwise provided by statute, the government is not bound by erroneous acts done, or erroneous advice given, by its officers or employees. E.g., 53 Comp. Gen. 834 (1974). This rule has generated a large number of requests for Meritorious Claims Act relief. Typically, an erroneous payment is made as the result of administrative oversight, or expenses are incurred in reliance on representations by a government

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employee which turn out to be wrong. Having no legal recourse, the claimant seeks equitable relief. The "erroneous advice" cases cannot be categorically labeled as either reportable or not reportable. Although most have been denied, many have been reported. Our objective here, therefore, is merely to point out the various lines of cases and to emphasize that each case will turn on its own particular equities.

GAO's current policy, at least where the claimants are government employees, is stated in 65 Comp. Gen. 679, 682–83 (1986):

"It has been our general policy not to report to Congress under the Meritorious Claims Act, claims which are based on erroneous official advice furnished to Government employees, even where the employee acted reasonably in reliance on the erroneous advice and incurred substantial costs. . . .

"We now conclude that a change in this policy is warranted. While erroneous advice cases are not unusual, each such case deserves to be considered on its own merits. The fact that we are unable to seek relief in all cases should not prevent the submission of those worthy cases that do come before us. Therefore, we now will submit to Congress erroneous advice cases which, in our judgment, meet the standards for relief under the Meritorious Claims Act."

A survey of the cases suggests that the policy change announced in 65 Comp. Gen. 679 was more a matter of degree than of kind, and that it applies equally to claimants who are not government employees.

Prior to 65 Comp. Gen., as indicated, most requests were denied. Some examples are: B-209292, February 1, 1983 (improper payment of educational travel expenses); B-199612, January 15, 1981 (erroneous per diem payments); B-195242, August 29, 1979 (unauthorized travel of dependents); B-191121, March 20, 1979 (erroneous reimbursement of real estate expenses); B-191039, June 16, 1978 (improper designation of duty station for reemployed annuitant). A couple of cases not involving government employees are B-168300, December 4, 1969, and B-168300, December 3, 1969 (Farmers Home Administration employee, contrary to regulations, represented to a creditor that the government would guarantee a borrower's obligations). The denials were almost invariably based on the preferential treatment concept, the decisions frequently noting that the situation is a recurring one. That this was (and is) unfortunately true is evidenced by the large number of claims.

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However, GAO was never as stingy as 65 Comp. Gen. 679 might suggest, and had made Meritorious Claims Act recommendations in erroneous advice cases where the equities clearly favored the claimant, as evidenced by the following illustrations:

- B-148568, September 27, 1962: Court-martial denied claimant's request for a civilian expert witness, based on a GAO decision which was inapplicable to the facts at hand, whereupon claimant procured the witness himself.
- B-154694, August 11, 1964: Claimant shipped maple sugar products to the United States exhibition at a trade fair in Sweden in reliance on representations by Commerce Department officials that the products could be sold. Claimant returned the goods to the United States upon learning that retail sales would not be permitted.
- B-171598, March 24, 1971: Claimant was sued by a former landlord in Rhodes, Greece. His superiors erroneously advised him that he was diplomatically immune and therefore did not have to appear in court to defend the suit. A default judgment was rendered against the claimant which he was required to pay.
- B-190014, August 30, 1978: Several employees were paid per diem at the wrong rate after a change in regulations had reduced the rate. Overpayment was due to administrative failure in implementing the regulatory change. Rate reduction was substantial and employees acted in good faith. A similar case is B-189537, December 11, 1978.
- B-201059, March 9, 1981: Military member on temporary active duty incurred medical expenses for treatment of a non-emergency condition at a civilian facility. Member had been advised that Army would pay, but Army could not pay because member had not obtained prior authorization required for use of civilian facility.

The situation that prompted 65 Comp. Gen. 679 was a person appointed to a manpower shortage position who incurred substantial expenses in reliance on erroneous travel orders. Following the favorable recommendation in that case, a minor deluge of manpower shortage cases appeared, and GAO made similar recommendations in B-246004, March 23, 1992; B-240395, January 23, 1991; B-237667, April 27, 1990; and B-234157, August 17, 1989. However, submission is not automatic. Based on its evaluation of two key factors—the amount of the claim and the extent to which the claimant was influenced by the erroneous representations—GAO declined to make reports in B-229395, November 4, 1988, and again in B-245203.2, June 15, 1992.

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Apart from the slight surge of manpower shortage cases, the cases after 65 Comp. Gen. 679 fall into a pattern very similar to the pre-1986 cases with one important difference. As with the older cases, most requests continue to be denied. However, the denials are mostly not based on a preferential treatment rationale but on an analysis of the reasonableness and extent of the claimant's reliance on the government's misrepresentation. Thus, a new appointee who was advised of the government's error prior to accepting the employment offer has no great claim to equity. B-227469, October 17, 1988. Nor could the claimants establish sufficient reliance in B-250892, March 31, 1993 (improper payment of severance pay); B-240089.2, May 14, 1991 (real estate closing costs on property not located at former duty station); B-237607, May 21, 1990 (unauthorized real estate expenses); and B-234931, November 29, 1989 (real estate expenses on property not at former duty station).

A situation which has resulted in denial both before and after 65 Comp. Gen. 679 is the disposal of household goods by a new employee based on erroneous advice that the government would not pay to transport them, when the new duty station was in a location to which transportation was authorized. B-241984, May 13, 1991; B-204372, February 8, 1982.

GAO made favorable recommendations in the following cases:

- Employee who was permanently disabled from prior on-the-job injury and was receiving disability compensation was offered reemployment, and was induced to move by offer of relocation expenses which existing law did not authorize. 67 Comp. Gen. 295 (1988).
- Spouse of military officer was issued invitational travel orders to accompany him to conference and award ceremony. Upon submitting her voucher, she learned that payment was expressly prohibited by the Joint Travel Regulations. B-227726.2, September 9, 1988.

Even in non-erroneous advice cases, reliance is a key concept, although the equities can tip the balance either way. In a 1983 case, for example, a transferred employee shipped excess household goods knowing that he would have to pay for the excess. Prior to the move, he had obtained rate quotes and, in reliance on them, decided what to ship and what to sell. Upon being billed, he found that the mover had more than doubled its rates under procedures which were apparently permissible at that time. There was no basis to allow the employee's claim for the difference, but the strong equities in the claimant's favor prompted GAO to recommend relief. B-210561, September 13, 1983. Where there are no reasonable

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grounds for the claimant to rely on an expectation of reimbursement, GAO will not be inclined to support relief however unfortunate the loss may be. E.g., B-224711, January 8, 1987.

Trying to sum up the erroneous advice cases is not easy. On the one hand, denial in the majority of cases is probably the right answer. In terms of equity, GAO's position can be justified because, as a general proposition, it is not inequitable for individuals to have to bear expenses they would have incurred in any event, or to have to give back money they never should have received in the first place. As stated in B-236008, May 7, 1991, "It is not the purpose of the Meritorious Claims Act to provide for payment whenever expenses are incurred pursuant to erroneous authorization." Yet on the other hand, if fairness is to be the hallmark, there are many cases which should not go uncompensated. The judicious application of the Meritorious Claims Act permits the government to mitigate the occasional harsh or inequitable result of the erroneous advice or anti-estoppel rule.

J. Unclaimed Money/Property

The government may end up holding unclaimed funds for a variety of reasons. The applicable program statute may contain guidance as to their disposition, or Congress may address the point in separate legislation. For example, Congress directed that most of the unclaimed funds remaining after the Postal Savings System was terminated in 1966 be distributed to the states. See B-230421, December 22, 1988. In the absence of legislation providing otherwise, unclaimed money is held in the Treasury in a trust capacity. Subsection (a) of 31 U.S.C. § 1321 identifies 90 trust funds. Subsection (b) instructs agencies who receive funds as trustee analogous to any of the 90 listed accounts to deposit those funds in a trust account in the Treasury. At the end of each fiscal year, money which has been in any of those accounts for more than a year and which represents money belonging to individuals whose location is unknown is transferred to a Treasury trust fund receipt account entitled "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown." 31 U.S.C. § 1322(a). Subsection 1322(b)(1) establishes a permanent, indefinite appropriation to pay claims from the Unclaimed Moneys account.

Instructions to implement 31 U.S.C. § 1322 are contained in the Treasury Financial Manual (TFM), Volume I, Chapter 6-3000. Agencies should clear their accounts at least once a year of balances due individuals whose whereabouts are unknown, by transferring those balances to one of two Treasury accounts. If a given balance meets 4 criteria—(1) the amount is $25 or more, (2) a refund if claimed would be absolutely justified, (3) there

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is no doubt as to legal ownership of the funds, and (4) a named individual, business, or other entity can be identified with the item—the balance should be transferred to trust account 20X6133, the fund permanently appropriated by 31 U.S.C. § 1322(b)(1). Balances of less than $25 or larger balances which have been held for more than one year and do not meet all of the specified criteria are transferred to miscellaneous receipts account —1060, Forfeitures of Unclaimed Money and Property. I TFM §§ 6-3030, 6-3040.10.

The transferring agencies must keep records to support the amounts transferred. Id. § 6-3085. The rightful owners may file claims without time limitation since the Barring Act does not apply to funds held in trust such as the Unclaimed Moneys account. B-201669, November 26, 1985; B-103575, August 27, 1951. Claims are handled by the agency which transferred the funds. If a claim is determined to be valid, the agency may certify a payment voucher to Treasury. If the money was transferred to trust account 20X6133, payment is made directly from that account. If the money was transferred to miscellaneous receipts (account —1060), the refund is paid from account 20X1807, "Refund of Moneys Erroneously Received and Covered" (31 U.S.C. § 1322(b)(2)). I TFM §§ 6-3040.10, 6-3060, 6-3075. No GAO action is required in either case unless the agency regards the matter as doubtful. Id. § 6-3050; B-142380, March 24, 1960 (circular letter).

In one case, the Equal Employment Opportunity Commission brought a sex discrimination complaint against a private company and received back pay awards under a settlement agreement. The EEOC was unable to locate two of the claimants. GAO advised the EEOC to proceed in accordance with 31 U.S.C. § 1322 and the TFM. B-245254, December 31, 1991. A similar holding is B-201669, November 26, 1985 (unrefunded distributive shares held by the Department of Housing and Urban Development under the FHA mortgage insurance program). That case further pointed out that the agency's failure to transfer the money to the Unclaimed Moneys account did not affect its status as money held in trust, and a claim could therefore be paid without regard to any statute of limitations.

During the 1980s, a number of companies appeared on the scene which track down unclaimed money and then offer to help the owners secure their refunds for a finder's fee. They are sometimes called "third-party tracers." GAO has received several inquiries on the use of third-party tracers, and has replied that GAO regards these arrangements as a matter between private citizens, and is aware of no legal prohibition on their use.

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(a) The United States Postal Service has specific authority under the Postal Reorganization Act to settle its own claims. B-179464, March 27, 1974.

(b) GAO has no jurisdiction to settle claims against the District of Columbia Government. 1 Comp. Gen. 451 (1922); B-168704, January 16, 1970; B-129677, October 22, 1957. See also 36 Comp. Gen. 457 (1956). (Part of the rationale here is based on the status of the District of Columbia Government as a separate legal entity.)

(c) GAO's claims settlement authority does not extend to government corporations where the corporation has authority to sue and be sued and to determine the character and necessity of its expenditures. 53 Comp. Gen. 337 (1973); 27 Comp. Gen. 429 (1948); B-190806, April 13, 1978; B-156202, March 9, 1965. (These decisions involve the Federal Housing Administration and the Pension Benefit Guaranty Corporation.)

(d) Prior to 1979 legislation implementing the Panama Canal Treaty of 1977, the Panama Canal Company, as a government corporation, could settle its own claims but the Canal Zone Government was an independent agency of the United States subject to 31 U.S.C. § 3702(a). B-179464, March 27, 1974. In 1979, both agencies were replaced by the Panama Canal Commission which has its own claims settlement authority in certain areas. This authority is discussed in B-197052, April 22, 1980, as modified by B-197052, February 4, 1981.

In the absence of legislation expressly placing the authority elsewhere, however, as in the examples noted above, GAO's claims settlement jurisdiction under 31 U.S.C. § 3702(a) extends to all federal agencies. E.g., B-203638, December 23, 1981 (former Federal Home Loan Bank Board).

If a statute authorizes agencies in general to settle claims of a particular type, and provides further that the agency's settlement shall be "final and conclusive," GAO has no authority to review the merits of agency settlements. Examples are the Federal Tort Claims Act and the Military Personnel and Civilian Employees' Claims Act of 1964, discussed later in this chapter.

A statutory scheme may be regarded as exclusive even without explicit "final and conclusive" language. An example is claims subject to negotiated grievance procedures under collective bargaining agreements authorized by the Civil Service Reform Act of 1978. GAO's initial inclination

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See letters B-230906, June 22, 1988; B-229799, February 4, 1988; B-229152.2, December 2, 1987; B-229152, October 29, 1987.

An area which appears to have received relatively little attention is the question of escheat. "Escheat" is a concept under which unclaimed property becomes the property of the state. Black's Law Dictionary 545 (6th ed. 1990). For example, in most if not all states, the property of a person who dies intestate and who has no legal heirs goes to the state. It appears that the United States has never attempted to assert any general power of escheat,[101] so questions regarding unclaimed funds in the hands of the federal government will involve escheat under state statutes.

One group of cases involves 28 U.S.C. § 2042, which requires that money which has been deposited in the registry fund of any court of the United States and which has gone unclaimed for 5 years after the right to withdraw it has been adjudicated, be deposited in the Treasury "in the name and to the credit of the United States." Any claimant who is entitled to the money and who can prove it may petition the court for an order directing payment. Id. One court has used the term "escheat" in discussing section 2042, but conceded that the "escheat" is not permanent. In re Folding Carton Antitrust Litigation, 744 F.2d 1252, 1255 (7th Cir. 1984), cert. dismissed, 471 U.S. 1113. In any event, it appears to be settled that a state's power of escheat can reach funds deposited in the Treasury pursuant to 28 U.S.C. § 2042. United States v. Klein, 303 U.S. 276 (1938); Matter of Moneys Deposited in and Now Under the Control of the United States District Court for the Western District of Pennsylvania, 243 F.2d 443 (3d Cir. 1957); B-76023, August 18, 1967.

Klein, noting that the United States had not asserted any right, title, or interest in the funds in question, nor had it claimed any federal power of escheat, held that a state court can issue a decree of escheat. This alone, however, would not and could not affect the Treasury's possession of the money. 303 U.S. at 280, 282. In order to actually recover the funds, the state would have to seek an order from the United States district court. This is precisely what the state did in that case, and the state got the money. See United States v. Klein, 106 F.2d 213 (3d Cir. 1939), cert. denied, 308 U.S. 618.

More recently, 23 states sued the Secretary of the Treasury and the Comptroller General to obtain custody of the money in the Unclaimed

[101]One court has stated, "There is never a permanent escheat to the United States." Hodgson v. Wheaton Glass Co., 446 F.2d 527, 535 (3d Cir. 1971).

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Moneys account attributable to citizens of their respective states. Of course, they had no idea how much of the account related to any given state, so they also sought information which would enable them to figure it out. Once the states had custody of the money, they would then presumably proceed to declare escheats. The district court described the operation of the Unclaimed Moneys account, discussed the Supreme Court's Klein decision, found Treasury's implementation of 31 U.S.C. § 1322 to be reasonable, and held that the states had failed to exhaust their administrative remedies. They must, like any other claimants, first file claims with the agencies which had transferred the funds. Alabama v. Bowsher, 734 F. Supp. 525 (D.D.C. 1990).

The states appealed, and the Court of Appeals for the District of Columbia Circuit affirmed the district court. Arizona v. Bowsher, 935 F.2d 332 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 584. The court of appeals did not foreclose the possibility of escheat against funds in the Unclaimed Moneys account:

"As to some of the trust funds, escheat of the claimant's right might well substitute the state for the claimant and entitle it to payment. This would clearly not be true for claims that by federal law expire as a result of the events that trigger escheat under state law (e.g., death intestate without heirs). Obviously nothing we say prevents state substitution for the claimant where that is consistent with § 1322 and other relevant federal statutes."

Id. at 335.

From time to time, Congress has considered legislative proposals to transfer unclaimed funds to the states. GAO analyzed some of the proposals in a 1989 report and pointed out that any such transfer would put a strain on federal deficit reduction efforts. Unclaimed Money: Proposals for Transferring Unclaimed Funds to States, GAO/AFMD-89-44 (May 1989).

Thus far, it should be apparent that we have been talking about money belonging to some private individual which has come into the government's hands, as opposed to a claim against appropriated funds. However, escheat questions can arise in the latter context as well, for example, claims by the estate of a deceased employee for unpaid compensation. The rule GAO has followed is stated in 17 Comp. Gen. 49, 50 (1937):

"[W]here the claim against the United States is the sole asset, there must be a showing of heirs, creditors, etc., before the payment of the claim may be allowed and . . . such payment

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will not be allowed where the sole result would be an escheat to the State. However, where the claim against the United States is not the sole asset, payment may be made to the executor or administrator duly appointed and qualified notwithstanding that an escheat may result."

See also 11 Comp. Gen. 104 (1931); 7 Comp. Gen. 478 (1928); B-147328, November 8, 1961; B-222096-O.M., July 7, 1986.

Unclaimed personal property is governed by statute, 40 U.S.C. § 484(m) for the civilian agencies and 10 U.S.C. § 2575 for the military departments. Under 40 U.S.C. § 484(m), the General Services Administration is authorized to take possession of unclaimed property on premises owned or leased by the government, to determine when title vested in the United States, and to "utilize, transfer, or otherwise dispose of such property." Former owners may file claims within 3 years from the date title vested in the United States. GSA's implementing regulations are found in 41 C.F.R. Part 101-48.

Under 10 U.S.C. § 2575, the agency must first try to locate the owner or the owner's heirs or legal representative. If diligent effort to do so fails, the agency may dispose of the property but, for property with a fair market value of more than $300, must wait 45 days after receipt at a designated storage point. If the owner or the owner's heirs or legal representative is determined but not found, the agency must wait 45 days after sending notice to that person's last known address. Net proceeds from the sale of unclaimed property must be deposited in the Treasury as miscellaneous receipts. The owner or the owner's heirs or legal representative may file a claim for those proceeds with GAO within 5 years after the date of disposal.

There is no authority to waive or make exceptions to the 5-year limitation on filing claims. B-163551, April 1, 1968. An insurance company may be a proper claimant under 10 U.S.C. § 2575. B-166231-O.M., May 7, 1969. A lienholder is not a proper claimant. However, in cases where the agency sold vehicles without first obtaining release of the liens, in violation of regulations, GAO has advised that the proceeds can be paid to the lienholders. If the proceeds have been deposited as miscellaneous receipts, payment may be charged to the permanent appropriation for "Refunding Moneys Erroneously Received and Covered." B-210638, February 8, 1984; B-217944, October 25, 1985 (non-decision letter).

GAO does not regard 10 U.S.C. § 2575 as applicable to money. In B-119290-O.M., April 27, 1954, someone found money in a parking lot on a military installation. Viewing section 2575 as inapplicable, and noting the

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absence of any other statute providing otherwise, GAO concluded that the money could be returned to the finder.

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was to accept jurisdiction where neither the agency nor the union objected. See 62 Comp. Gen. 274 (1983); 61 Comp. Gen. 20 (1981); 61 Comp. Gen. 15 (1981). To implement this policy, GAO issued regulations defining when it would and would not accept jurisdiction in this area. See, e.g., 60 Comp. Gen. 578 (1981); B-235624.2, December 4, 1989.

Subsequent to GAO's regulations, the courts issued a series of decisions holding that, by virtue of the exclusivity language of 5 U.S.C. § 7121, the grievance procedure is the exclusive means of resolving matters within the scope of a negotiated agreement, except for matters specifically excluded by statute or by the agreement itself. E.g., Aamodt v. United States, 976 F.2d 691 (Fed. Cir. 1992); Carter v. Gibbs, 909 F.2d 1452 (Fed. Cir. 1990), cert. denied sub nom. Carter v. Goldberg, 498 U.S. 811; Adams v. United States, 20 Cl. Ct. 542 (1990); Adkins v. United States, 16 Cl. Ct. 294 (1989). See also United States v. Fausto, 484 U.S. 439 (1988). In 71 Comp. Gen. 374 (1992), GAO announced that it was adopting the result of these decisions, and repealed its regulations shortly thereafter. 57 Fed. Reg. 31272 (July 14, 1992). Since that time, GAO has declined jurisdiction over claims subject to negotiated grievance procedures regardless of who consents. E.g., B-251784, February 19, 1993. Of course, GAO's jurisdiction continues to extend to claims involving employees who are not covered by a collective bargaining agreement. E.g., B-249168, July 30, 1992. It also continues to extend to claims subject to the grievance procedures of the Foreign Service Act of 1980, which does not contain an exclusivity provision comparable to that of 5 U.S.C. § 7121, unless the claimant has elected to proceed before the Foreign Service Grievance Board. B-254556, January 21, 1994.

Another area in which GAO has declined settlement jurisdiction is claims for patent infringement. B-209159, October 21, 1982; B-160745, February 13, 1967, aff'd, B-160745, July 27, 1967; B-149392, August 1, 1962. The main reason for this is that the remedy provided by 28 U.S.C. § 1498(a) (action in the Court of Federal Claims) is viewed as exclusive. The Comptroller General may nevertheless render decisions on the use of appropriated funds in patent-related contexts. For example, 37 Comp. Gen. 199 (1957) held that 10 U.S.C. § 2386 authorizes the military departments to enter into agreements, using procurement appropriations, for the settlement of claims arising out of patent infringements. Absent such a statute, however, this authority would not exist. 11 Comp. Gen. 44 (1931).

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Also, GAO cannot resolve issues of mental competency. B-191904, July 19, 1978 (non-decision letter); B-196052-O.M., January 7, 1980. Both of these were claims for the refund of money allegedly donated to the United States in which the claimant contended that mental incompetency precluded the donor from forming the necessary donative intent. This type of issue must be resolved by court action.[6]

(3) Merits vs. cognizability

Even though GAO may not question the merits of a settlement under a statute which makes an agency's settlement action final and conclusive, GAO retains the authority to consider the threshold question of whether a given claim is cognizable under the statute. As stated in 47 Comp. Gen. 316, 318 (1967) with respect to the Military Personnel and Civilian Employees' Claims Act of 1964, an agency's settlement "if made in accordance with the provisions of the . . . act and applicable regulations, would be final and conclusive."

To take a simple illustration, if an agency settles a tort claim resulting from an automobile accident, GAO has no authority to question the agency's determination that its employee was negligent, nor can it question the amount of the award (assuming, of course, that it does not exceed the amount claimed). However, if the claim arose in a foreign country, the agency's settlement would not be entitled to "final and conclusive" status because, in view of the specific exception in the Federal Tort Claims Act for claims arising in foreign countries, the claim would not be properly cognizable under the statute. If the claim is not of the type covered by the statute to begin with, the agency never acquires the authority to make a "final and conclusive" settlement.

The concept was discussed in an early decision of the Comptroller of the Treasury, 21 Comp. Dec. 250 (1914). In that case, the Secretary of Agriculture asked whether he could pay a claim under a statute (now 16 U.S.C. § 502(d)) which authorized the Secretary to reimburse owners of horses, vehicles, and other equipment lost or damaged while being used for official business. The claim was for a mule, owned by a Forest Service employee, which had died presumably while engaged in official business. The Comptroller pointed out that the statute gave the Secretary jurisdiction to determine the facts as to whether loss or damage occurred

[6]GAO has the jurisdiction to settle claims of this type because no statute places them elsewhere and 31 U.S.C. § 3702(a) refers to "all claims," but because of the practical considerations, the policy has evolved that they may not be allowed. The distinction is discussed in 21 Comp. Dec. 134, 136-139 (1914). Disallowance in these cases does not result from jurisdictional limitations.

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incident to official business and the amount of the loss or damage. However, this conclusion "does not deprive the Comptroller of his jurisdiction to determine generally the scope and purpose of the legislation and to limit expenditures thereunder to the contemplated purposes . . . ." 21 Comp. Dec. at 251. See also 4 Comp. Gen. 876 (1925); B-190106, March 6, 1978; B-153031, January 28, 1964.

In 34 Op. Att'y Gen. 55 (1923), the Secretary of War asked the Attorney General if he was bound by the actions of his predecessor in approving certain claims. A World War I relief statute provided that claims could be considered only if they were filed before a specified date, and the former Secretary had proceeded to approve claims filed after that date. Although the statute did not include explicit "final and conclusive" language, the Attorney General's discussion is nevertheless useful in illustrating the distinction between second-guessing the merits of an authorized settlement and questioning a settlement which is not within the scope of the statute to begin with. In attempting to approve claims filed after the statutory deadline, the former Secretary—

"was without jurisdiction, his decision is not binding upon anyone. Such findings and decisions are wholly void.

". . . [T]he Secretary of War was and is absolutely without power or jurisdiction to settle, adjust, or pay such claims."

Id. at 60.

In a more recent decision, the Comptroller General held that an agency could not pay a claim by an employee under the Military Personnel and Civilian Employees' Claims Act of 1964 when it was also paying a claim under the Federal Tort Claims Act arising from the same incident. The reason is that allowance of a tort claim must be based on a determination that the employee was negligent while an agency may allow a claim under the 1964 Act only if it determines that the employee was not negligent. Thus, allowance of the tort claim precluded allowance of the employee's claim. 58 Comp. Gen. 291 (1979).

3. Standards and Procedures

Over the years, GAO has developed a set of standards for use in implementing 31 U.S.C. § 3702(a). Some are reflected in GAO's published claims regulations (4 C.F.R. Parts 11 and 30–36); others are noted in GAO's Policy and Procedures Manual for Guidance of Federal Agencies, mostly

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Title 4; some have evolved through the decision and adjudication process; a few have a statutory basis. These are general standards intended to apply in the absence of other governing authority. See 4 C.F.R. § 30.1. When setting up their own claims settlement operations, agencies must of course take into consideration any of their own agency-specific or program-specific requirements.

a. Necessity for Filing Claim

As a general proposition, a person who thinks the government owes him or her money must file a claim to get it. The government is not legally required to initiate payments in the absence of claims or to encourage the filing of claims. For example, the Comptroller General has noted that an agency is not required to notify employees or former employees that they were underpaid in some past transaction. 24 Comp. Gen. 9 (1944); 26 Comp. Gen. 102, 106 (1946). See also 41 Comp. Gen. 761, 764 (1962).

However, GAO has not objected to proposed additional payments of compensation, otherwise legally due, without awaiting the filing of specific claims, particularly where a relatively short time has elapsed between the original payments and the additional payments, or where retroactive rights have been expressly granted by statute. 38 Comp. Gen. 56 (1958); 36 Comp. Gen. 459 (1956); 31 Comp. Gen 166, 173 (1951); B-115800, December 8, 1964. In some instances, a distinction has been drawn between employees or members still on the rolls and those who have been separated, with claims required from the latter category. See 41 Comp. Gen. 812, 819 (1962); 23 Comp. Gen. 721, 723 (1944); 23 Comp. Gen. 398, 401 (1943). GAO has also approved procedures under which an agency sends a notice of entitlement to former employees, with actual payment to be made upon receipt of written instructions. 50 Comp. Gen. 266 (1970); 38 Comp. Gen. 56 (1958). Similarly, an erroneous overdeduction may be refunded without the need for a specific claim. B-148953, July 13, 1962.

An agency may refund an overpayment when otherwise proper without the need for a formal claim. This is based on public policy. 58 Comp. Gen. 372, 375 (1979) (overpayments of reclamation fees to Interior Department); B-217595, April 2, 1986 (overassessment of late payment charges to timber purchasers). However, in view of the cost to the government of issuing checks and processing payments, the agency should establish a minimum amount below which refunds will not be made unless a claim is filed. 58 Comp. Gen. at 375. GAO's current minimum is $5. B-220942, January 7, 1986; B-181373-O.M., August 16, 1974. Agencies should provide notice of their refund policies in regulations or other

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appropriate form. 65 Comp. Gen. 893, 900 (1986); 58 Comp. Gen. at 375; B-220942, January 7, 1986.

In sum, while there are situations in which payments may be made without requiring the submission of claims, they are probably best viewed as exceptions and the prospective claimant will be well-advised to file a claim if there is any question.

GAO considered a different aspect of the situation in B-251728.3, December 23, 1993, in which the question was whether a law firm's failure to bill the government for services furnished to an Independent Counsel could be viewed as an unauthorized augmentation of appropriations for that function. The answer was no, although the discussion did not rule out the augmentation possibility in all situations.

b. Who May File

A claimant is free to pursue a claim individually or through a representative. The choice is entirely up to the claimant. 4 C.F.R. § 11.1. If the claimant chooses to employ an agent or attorney, an appropriate power of attorney must accompany the claim. Id. §§ 11.3, 31.3. The claimant may, at any time while the matter is pending, revoke the representative's authority but must do so in writing. Id. § 11.5.

A subrogee is a legal claimant under a proper subrogation relationship. The doctrine was summarized as follows in B-190771, April 17, 1978:

> "The doctrine of subrogation applies where one person pays a debt for which another is primarily liable provided that the payment was made under compulsion or for the protection of some interest of the one making the payment and in discharge of an existing liability; it applies where a party is compelled to pay the debt of a third person to protect his own right or interest, or to save his own property. . . . [I]t is well settled that subrogation never lies where one who is merely a volunteer pays the debt of one person to another."

A common example is a claim by an insurance company to recover amounts it has paid to its policyholder.

c. Form of Claim

Although some types of claims require specific forms, there is, as a general proposition, no particular form required for filing a claim. 4 C.F.R. § 31.2; B-190771, April 17, 1978; B-171732, March 24, 1971. See also B-210986, May 21, 1984 (noting that an agency could, if it wished, prescribe forms for specific types of claims).

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However, claims must be in writing and must contain the signature and address of the claimant or an authorized agent or attorney. 31 U.S.C. § 3702(b)(1); 4 C.F.R. § 31.2; 69 Comp. Gen. 455 (1990); 18 Comp. Gen. 84, 89 (1938). The purpose of the signature requirement is to "fix responsibility for the claim and the representations made therein." Bialowas v. United States, 443 F.2d 1047, 1050 (3d Cir. 1971). Otherwise, "there would be no assurance that the claimant is still alive, that the record address is still the proper address, that the claimant himself may not have waived or forfeited [the claim], or that the check in payment of the claim would reach the claimant himself." 24 Comp. Gen. 9, 11 (1944). If GAO involvement in the claim becomes necessary, GAO will accept a copy bearing a legible facsimile signature. B-235749.1, June 8, 1989 (internal memorandum).

While a simple letter format will generally do the job, it must be clear that a claim is being asserted. The receiving agency should not be expected to engage in interpretation to divine the letter's intent. A letter making an inquiry or requesting information is not sufficient. B-150008, October 12, 1962.

Also, the claim should be as specific as possible and must identify the circumstances giving rise to it. A practice apparently developed around the turn of the century of submitting claims for, in effect, "anything that may be due me under any and all statutes or decisions." Attorneys presented these on a contingent-fee basis, apparently hoping to get lucky. The Comptroller of the Treasury held that these "dragnet claims" were too general and indefinite to constitute claims against the United States, and that the government was under no obligation to respond. 6 Comp. Dec. 692 (1900). The Comptroller also had a few choice words for lawyers who would present such "claims," calling them "as useless as the fifth wheel to a wagon." Id. at 696.

If a particular form is required in some specific context, using the wrong form is not a fatal error. B-190771, April 17, 1978. Whether to require resubmission on the correct form is up to the agency, depending on such factors as the kinds of information the form is intended to elicit.

d. No Minimum Amount or Filing Fee

There is no minimum amount for filing of claims. B-180163, January 9, 1974. However, to keep the system from getting too far out of hand, GAO does not want to see claims for $100 or less and will accept the agency's action on them as conclusive. See "GAO vs. Agency Adjudication" above. See also 62 Comp. Gen. 168 (1983); B-192246, January 8, 1979.

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Also, there is no filing fee charged for filing a claim against the government. E.g., B-152922, March 6, 1967 (dollar and postage stamp returned to claimant).

e. Aiding in Prosecution of Claims

It is a criminal offense for any officer or employee of the United States, in any branch of the government, to act as agent or attorney, except in the proper discharge of official duties, for prosecuting any claim against the United States or, with certain exceptions, representing anyone before a court or agency in a matter in which the United States is interested. 18 U.S.C. § 205(a). A willful violation may draw a jail sentence of up to 5 years. Id. § 216(a). In addition, the Attorney General can seek a civil penalty of up to $50,000 or the amount of any compensation the violator received, whichever is greater. Id. § 216(b). Since this is a criminal statute, its enforcement is up to the Department of Justice and the courts, and GAO will not determine what constitutes a violation. 38 Comp. Gen. 56 (1958). The Justice Department's Office of Legal Counsel has issued a number of opinions on section 205. E.g., 1 Op. Off. Legal Counsel 148 (1977) (government employee who prepared his daughter's tax return may appear on her behalf at an IRS audit).

The statute today seems pretty clear. For more than 100 years, however, its predecessor also made it an offense to "aid or assist in the prosecution or support" of any claim against the United States. 18 U.S.C. § 283 (1958 ed.), originating at 10 Stat. 170 (1853). One purpose of the "aid or assist" prohibition was to prevent employees from using their access to government files to identify potential claimants and then solicit representation for a fee. United States v. 679.19 Acres of Land, 113 F. Supp. 590, 593 (D.N.D. 1953). As long as this statute was on the books, it had to be taken into account and doubtlessly contributed to the adversarial nature of claims settlement to which we alluded in our introductory observations. A reading of the older cases suggests a paranoia under which employees were afraid to so much as refer a claimant to the right statute. See, e.g., A-32922, August 8, 1930. In any event, the "aid or assist" language was dropped in 1962. The 1962 legislation, the source of the present 18 U.S.C. § 205, is discussed in the Attorney General's "Memorandum re the Conflict of Interest Provisions of Public Law 87-849," published in the Federal Register for February 1, 1963, 28 Fed. Reg. 985.

Even under the old law, GAO had ventured opinions in some of the more obvious cases that certain actions were unobjectionable at least as far as GAO was concerned. Thus, the mere request to a vendor or contractor to

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submit an invoice so that timely payment can be made, where there is no question of the government's liability nor dispute as to the facts, is within the discharge of official duties. 30 Comp. Gen. 266 (1951). Similarly unobjectionable is the notification to prospective claimants of their entitlement to a refund where the government's liability is undisputed and especially where the claimants would have no other way of knowing of their entitlement. 34 Comp. Gen. 517 (1955).

f. Basis of Settlement

GAO's claims settlement regulations state, at 4 C.F.R. § 31.7:

> "Claims are settled on the basis of the facts as established by the Government agency concerned and by evidence submitted by the claimant. Settlements are founded on a determination of the legal liability of the United States under the factual situation involved as established by the written record. . . . The settlement of claims is based upon the written record only."

The above passage makes two key points. First, claims are settled on the basis of the written record presented by the parties. GAO does not conduct adversary hearings or take oral testimony. B-197884, July 15, 1980; B-196686, January 17, 1980; B-192831, April 17, 1979; B-188023, July 1, 1977. In appropriate circumstances, GAO may hold an informal conference with both parties to discuss the issues (e.g., B-186763, March 28, 1977), but these are not formal, adversarial hearings.

The settlement of claims by GAO on the basis of the written record has been held not a denial of due process. 21 Comp. Gen. 244 (1941); B-196924, May 20, 1980. The procedure's advantages are that it—

> "is free from technicalities and formal rules and, regardless of the amount involved or the financial status of the claimant, he is permitted without expenditure of funds for counsel or witnesses to have his claim considered on the written record in a manner at least in the first instance less formal than ordinarily prevails in the courts."

B-129874, January 3, 1957.

The second key point of 4 C.F.R. § 31.7 is that settlement is based on legal liability and not on the basis of so-called moral obligations. B-175670, May 25, 1972; B-125839, February 9, 1956; A-29009, October 21, 1929. This follows from the principle that no government official is authorized to give away the money or property of the United States. B-124769, August 4, 1955. If substantial defenses in law exist, GAO must disallow the claim. 42 Comp. Gen. 124, 142 (1962). This is a corollary of the same principle. If, for

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example, the statute of limitations has expired and there is no applicable basis for tolling, paying the claim amounts to giving away the taxpayers' money. Another corollary is that, absent a statutory basis, an agency has no authority to issue regulations purporting to accept liability on claims it perceives to be fair and equitable. B-201054, April 27, 1981. Claims may be paid on the basis of moral or equitable rather than legal considerations only under specific statutory authority. An example is 38 U.S.C. § 503 (Supp. IV 1992), authorizing the Secretary of Veterans Affairs to grant certain equitable relief in administrative error cases.

Although allowing a claim requires an adequate legal basis, the claimant may not know what that basis is. Of course, including references to relevant legal authorities, where known, will help any claim. But, especially since there is no requirement that claimants be represented by counsel, they may not know the applicable law or, perhaps worse, may think they know and cite something wrong or irrelevant. If a claimant cites a wrong basis and a proper basis exists and the agency knows it, the agency should act accordingly. GAO's policy in this regard—and one which it urges upon all agencies—mirrors that of the Supreme Court as reflected in the following passage:

> "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."

Kamen v. Kemper Financial Services, Inc., 500 U.S. 90, 99 (1991). This principle is limited by reason and common sense and does not require an agency to accede to what we earlier referred to as "dragnet claims," such as the one denied in B-153385, November 16, 1964, in which a gentleman tried to argue that it was the government's responsibility to consider his claim "under any applicable statute on the books."

g. Burden of Proof; Evidentiary Requirements

The burden of proof in establishing the liability of the United States is on the claimant. 4 C.F.R. § 31.7; 31 Comp. Gen. 340 (1952); 18 Comp. Gen. 980 (1939); 20 Comp. Dec. 263 (1913).

There is no hard-and-fast rule as to what evidence is required to support a claim. GAO views 31 U.S.C. § 3702(a) as giving it discretion in determining the quantum of evidentiary support necessary to establish the liability of the United States. 55 Comp. Gen. 402 (1975); 22 Comp. Gen. 269 (1942); B-255037, March 18, 1994; B-190771, April 17, 1978; B-188238, May 20, 1977. Generally, the claimant should submit the "best evidence obtainable." 55

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Foreword

Volume III of this second edition continues the process of revising and updating Principles of Federal Appropriations Law, originally published in 1982. This is our "claims and judgments" title, consolidating in one volume our coverage of claims against the United States, claims by the United States (debt collection), and the payment of judgments and related litigation awards.

While we will publish a fourth (and final) volume, the first (1982) edition of Principles is now completely superseded with the issuance of this Volume III.

We thank our readers for their expressions of support and hope they will continue to find Principles a useful reference.

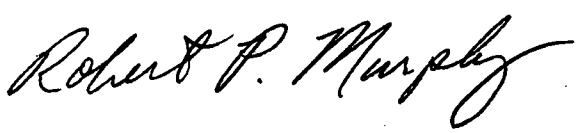

Robert P. Murphy
General Counsel

November 1994

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Comp. Gen. at 404; B-184305, December 22, 1976. A phrase frequently found in the decisions is that the evidence must be "clear and convincing." E.g., B-247541, June 19, 1992; B-187857, July 26, 1977; B-177639, March 9, 1973.

For example, in a claim for payment for goods sold to the government, the claimant must be able to establish that the goods were delivered to and received by the government. B-230581, March 28, 1988; B-187857, July 26, 1977; B-184712, March 3, 1976. An employee filing a claim for the cost of transportation and temporary storage of household goods must present receipted copies of the bills of lading and storage. B-191539, July 5, 1978. In a claim for loss of goods in a sealed carton marked "packed by owner," the claimant has a "heavy burden" in establishing the contents. B-198815, April 13, 1982. (Precisely how this burden may be satisfied is not clear.)

In many if not most cases, the information necessary to establish liability will be found in records maintained by the government. B-179942, July 9, 1974. Nonavailability of government records will present evidentiary problems. The general rule is that, where government records have been destroyed pursuant to law or are unavailable due to lapse of time, and there is no other documentation available from any source to establish the liability of the United States, the claim must be denied. B-241592, March 13, 1991 (claim by Virgin Islands for proceeds of customs collections); B-214533, July 23, 1984 (claim for travel and overtime filed just within statute of limitations but after records had been destroyed); B-213654, March 6, 1984 (claim for accrued leave at time of discharge from armed forces 30 years earlier); B-190599, December 9, 1977 (appeal from settlement 28 years later); B-187523, November 9, 1976 (1976 claim for mustering-out pay from Korean War); B-179942, July 9, 1974 (claim alleging non-receipt of government check; neither claimant nor agency could identify date, amount, or purpose of check). The burden is on the claimant to produce other evidence to overcome the lack of government records, not on the government to refute unsupported claims. 53 Comp. Gen. 181, 184 (1973).

While government records are the best evidence, the absence of government records is not necessarily an absolute bar to allowance if competent secondary evidence is available. E.g., Northup v. United States, 45 Ct. Cl. 50 (1909); B-217562, September 30, 1985. An illustrative group of cases involves claims for supplies or services provided to Navy vessels. In B-193023-O.M., January 18, 1979, a claim by the United Kingdom for fuel delivered to a Navy vessel was allowed where the Navy verified receipt of

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the fuel but was unable to determine from official records whether payment had been made. A claim was allowed under similar circumstances in B-187877, April 14, 1977. In B-244304, July 26, 1991, a claim was denied because there was no evidence of receipt or acceptance and the Navy was not willing to recommend payment. Claims were allowed in 67 Comp. Gen. 52 (1987) and B-238239, March 19, 1991. In both cases, there was no hard evidence of receipt, but the probabilities (reasonable inferences drawn from available facts) supported the validity of the claims, the claimants were foreign governments, and the Navy recommended payment.

Cases involving military records destroyed in the 1973 fire at the Personnel Records Center, St. Louis, Missouri, further illustrate these evidentiary problems. In B-183900, August 3, 1976, a claim was disallowed because no other records could be produced to substantiate the claim. In another case, GAO reviewed regulations to determine whether the department's policy during the times in question supported the claimant's allegations, but disallowed the claim because the regulations did not provide the alleged support. B-188489, April 5, 1977.

The premature destruction of records cannot be used as an excuse to avoid liability. For example, given the 6-year statute of limitations on administrative claims, an agency cannot destroy time and attendance records after 3 years and then deny claims over 3 years old because government records are no longer available. 62 Comp. Gen. 42 (1982). The Court of Federal Claims takes a similar approach. See Dean v. United States, 10 Cl. Ct. 563, 570 (1986) (unavailability of evidence attributable to "defendant's own short-sighted and ill-conceived regulation under which that document was prematurely but officially destroyed"); McCarthy v. United States, 10 Cl. Ct. 573, 577 (1986).

There is a relevant statute in this connection as well, 44 U.S.C. § 3309:

"Records pertaining to claims and demands by or against the Government of the United States . . . may not be disposed of by the head of an agency under authorization granted under this chapter, until the claims . . . have been settled and adjusted in the General Accounting Office, except upon the written approval of the Comptroller General of the United States."

If the record presents an irreconcilable dispute of fact, GAO will accept the agency's version and disallow the claim. B-192831, April 17, 1979. An "irreconcilable dispute of fact" does not mean merely that the claimant

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and the agency disagree on something. It means a conflict that cannot be resolved without adversary proceedings. B-187891, June 3, 1977. Cf. 21 Comp. Dec. 134, 138 (1914). This policy stems in part from the "strong, but rebuttable, presumption that [government officials] discharge their duties correctly, lawfully, and in good faith." Sanders v. United States, 594 F.2d 804, 813 (Ct. Cl. 1979). Also, it must be kept in mind that the claimant would still have recourse to the courts whereas the agency would not.

h. Administrative Correction of Claims

At one time, GAO took the position that only the claimant could make corrections to a claim; the government could not correct even the smallest and simplest of errors. E.g., 9 Comp. Gen. 251 (1929). This position proved unduly rigid and generated many small claims. Accordingly, GAO said in the 1950s that agencies could adjust minor errors not in excess of $10 up or down without requiring the claimant to amend the claim. 36 Comp. Gen. 769 (1957). The amount jumped to $20 in B-131105, May 23, 1973. In 57 Comp. Gen. 298 (1978), GAO raised the ceiling on upward adjustments to $30, and said that administrative reductions could be made in any amount.

The next change came about with the 1993 revision of Title 7 of GAO's Policy and Procedures Manual for Guidance of Federal Agencies. Section 6.5.C authorizes agencies to establish an amount, not to exceed $100, for upward administrative adjustments, "based on the risk to the government, extent of internal controls in operation, and the type of claims involved." The ceiling may vary for different categories of claims. The adjustments may be made without requiring the claimant to amend the claim in cases of obvious error. Agencies should periodically review their procedures to guard against fraud or abuse. As before, downward adjustments may be made in any amount.

Agencies which do not establish procedures to implement section 6.5.C may presumably still use the $30 authority of 57 Comp. Gen. 298 on an ad hoc basis.

i. Expenses of Claim Preparation

One who is victorious over the United States in court is generally able to recover at least some types of costs. No comparable general authority exists in the realm of administrative claims. Thus, it has long been held that, in the absence of statutory authority, expenses incurred by a claimant in the preparation, presentation, and proof of an administrative claim may not be reimbursed. 8 Comp. Dec. 498 (1902); 17 Comp. Gen. 831 (1938) (cost of procuring evidence); B-208166, October 31, 1983 (travel expenses so claimant could come to Washington to discuss claim); B-121929, December 8, 1954; B-35644, April 19, 1948. Of course this

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principle includes attorney's fees. Situations in which attorney's fees and expenses are recoverable are discussed in Chapter 4.

j. Foreign Law

A claimant presenting a claim governed by American law does not have to establish what the law is. The claimant is entitled to presume that the forum—court or agency—is familiar with American law. Someone filing a claim under the Federal Tort Claims Act, for example, does not have to establish what the FTCA says. The court or agency is responsible for getting it right.

The status of foreign law is different, however. There is no presumption of familiarity. Foreign law is treated as a matter of fact. E.g., Liverpool Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 445 (1889). As such, it is the claimant's burden to "prove" it the same as any other fact. Id.; 37 Comp. Gen. 485 (1958); B-209649, December 23, 1983; B-189121, April 15, 1983.

k. Effect of Claim Settlement

The settlement of an individual claim at GAO, while it may well be useful in providing guidance for the future as a practical matter, does not constitute a decision of the Comptroller General and will not necessarily be followed as precedent. This principle has been stated in numerous decisions. E.g., 52 Comp. Gen. 751 (1973); 20 Comp. Gen. 403 (1941); 18 Comp. Gen. 609 (1939). The same applies to an internal memorandum addressing the disposition of a particular claim (B-153419, November 2, 1964), although again they are often useful because GAO will follow its own precedent, in whatever form it may exist, unless it is shown to be wrong.

l. Reconsideration

The opportunity to seek administrative reconsideration should be an element of any claims settlement program. GAO's policy on reconsideration of claims settlements is stated in 4 C.F.R. § 32.1:

> "Settlements made pursuant to 31 U.S.C. 3702 will be reviewed: (a) in the discretion of the Comptroller General upon the written application of (1) a claimant whose claim has been settled or (2) the head of the department or Government establishment to which the claim or account relates, or (b) upon motion of the Comptroller General at any time."

A request for reconsideration should specify its basis (legal error, new information not previously considered, etc.). 4 C.F.R. § 32.2. A request which is little more than a diatribe is likely to be summarily rejected. The regulations further provide that "the check issued upon a settlement must not be cashed when its amount includes any item as to which review is applied for, but should accompany the application for review." Id. § 32.3. GAO will consider requests to waive this provision.

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As reflected in the above-quoted regulation, reconsideration of a claim settlement by the Comptroller General is discretionary and not a requirement of "due process." 21 Comp. Gen. 244 (1941). GAO has never imposed a definite time limit on filing a request for reconsideration. The standard is one of reasonableness based on the facts and circumstances of the particular case. 32 Comp. Gen. 107 (1952). Requests for reconsideration have been found untimely in the following cases:

- Personnel claims: B-184971, June 4, 1976 (27 years); B-185026, May 27, 1976 (11 years); B-164378, April 28, 1976 (9 years); 32 Comp. Gen. 107 (1952) (1 year and 8 months).
- Transportation claims: B-155521, February 23, 1965 (8 years); B-147781, September 21, 1967 (5 years); B-157883, December 30, 1965 (3 years).

m. Judicial Review; Res Judicata

In B-129874, January 3, 1957, a letter to the House Committee on Government Operations describing certain GAO procedures, the Comptroller General made the following statement:

> "[I]t should be emphasized that the authority in the General Accounting Office to settle claims . . . is neither exclusive nor final. In the vast majority of cases persons having claims cognizable by this Office may present them to the Court of Claims or the United States district court before, during, or after consideration here; provided, of course, that they do so during the period of limitations fixed by statute, wherein the law and the facts are determined de novo. Therefore, if any dispute with a claimant does exist respecting essential facts, or if for any reason a claimant is dissatisfied with the action of the General Accounting Office and desires a formal hearing in the matter with an opportunity to present oral evidence, and to examine and cross-examine witnesses, he has an adequate remedy under existing law in those forums mentioned above, and is not prejudiced by any action taken here." (Emphasis in original.)

It can be seen from this passage that GAO review of a claim is an optional procedure. No one is ever required to seek GAO review as a prerequisite to bringing a lawsuit. Iran National Airlines Corp. v. United States, 360 F.2d 640, 642 (Ct. Cl. 1966); B-163046, December 19, 1967. In other words, the doctrine of exhaustion of administrative remedies has never been applied in the context of claims settlement under 31 U.S.C. § 3702(a).

Since a claimant is not required to pursue an administrative resolution, a claimant who initiates an administrative claim may abort it at any time, whether it is before GAO or the agency involved, and go directly to court. See B-219738, April 16, 1986 (agency should not pay settlement agreement where claimant abrogated it and filed lawsuit).

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Similarly, disallowance of a claim by GAO does not preclude the claimant from seeking judicial relief, assuming recourse to the courts would have been available in the first place. E.g., St. Louis, Brownsville & Mexico Ry. Co. v. United States, 268 U.S. 169, 174 (1925); B-163046, December 19, 1967; A-87280, January 22, 1938. A claimant wishing to preserve all possible options, however, will need to keep an eye on the calendar, since presenting a claim to GAO does not toll the statute of limitations. Iran National Airlines, 360 F.2d at 642. Once the case is in court, as indicated in the 1957 letter quoted above, it receives a "de novo" review. In this connection, one will find a variety of statements on the "deference" or lack thereof given GAO determinations in various contexts.[7] The simple fact is that a court will agree or disagree with what GAO did and will proceed accordingly.

While disallowance by GAO has no effect on judicial review, the converse is not the case. Once a court has ruled on a claim, GAO will apply the doctrine of res judicata and will regard the court action as a bar to further consideration by GAO. 62 Comp. Gen. 399 (1983); 47 Comp. Gen. 573 (1968); 7 Comp. Gen. 658 (1928); B-215253, October 30, 1984. The same principle applies to a claim for amounts in excess of the $10,000 jurisdictional limitation of the "little Tucker Act" (28 U.S.C. § 1346(a)(2)) where the claimant won in court and the claim would concern the same parties and issues. 59 Comp. Gen. 624 (1980).

And of course, GAO will not settle a claim which is already pending in court. 33 Comp. Gen. 479, 481 (1954).

n. Referral to Court of Federal Claims

GAO may refer claims directly to the Court of Federal Claims in accordance with 28 U.S.C. § 2510, which provides:

"(a) The Comptroller General may transmit to the United States Court of Federal Claims for trial and adjudication any claim or matter of which the Court of Federal Claims might take jurisdiction on the voluntary action of the claimant, together with all vouchers, papers, documents, and proofs pertaining thereto.

"(b) The Court of Federal Claims shall proceed with the claims or matters so referred as in other cases pending in such Court and shall render judgment thereon."

The Comptroller General has consistently viewed this statutory authority as discretionary. E.g., B-131612, October 31, 1957.

[7]E.g., Baggett Transportation Co. v. United States, 23 Cl. Ct. 263 (1991); Kinne v. United States, 21 Cl. Ct. 104 (1990).

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Referrals under 28 U.S.C. § 2510 have been limited to only two specific categories of claims, as follows:

"These provisions . . . have not been regarded by this Office as having any application to a claim which has been considered and finally determined by this Office. They have only been regarded by us as being for application in the following instances: (1) where there are two or more claimants who have a conflicting interest in a certain and specific sum of money which has been determined to be clearly due and is in the control of the Government as a stakeholder, the adjudication of which by the Court of [Federal] Claims is deemed necessary to protect the Government against a later claim by unsuccessful claimants, and (2) where the rights of claimant are definite and clearly established under applicable provisions of law, but the amount due is too uncertain to permit settlement by this Office."

B-176997, March 27, 1973. See also B-200923, December 17, 1982. Thus, the Comptroller General will not refer claims which GAO has settled and disallowed.

Further examples of cases denying claimants' specific requests that GAO refer their claims under 28 U.S.C. § 2510(a) are: B-154118, July 23, 1964 (claim for additional retired pay disallowed in prior GAO settlement); B-147203, February 7, 1963 (claim for lump-sum payment in lieu of annual leave disallowed in prior GAO settlement); B-134121, November 7, 1957 (GAO lacked authority under statute to refer claimant's case previously dismissed by Court of Claims for lack of jurisdiction); B-131612, October 31, 1957 (claim for travel and moving expenses disallowed in prior GAO settlement and on reconsideration).

Since the statute authorizes referral of claims only where the court "might take jurisdiction on the voluntary action of the claimant," GAO will not refer a claim on which suit is barred by the statute of limitations. B-126471, May 11, 1956.

One of the few instances where the authority of 28 U.S.C. § 2510(a) has been exercised, B-150968, May 20, 1963, involved conflicting claims arising under a construction contract for improvements to an airport. When the work was completed and accepted according to the contract provisions, approximately $10,000 remained due, plus an additional claim by the contractor for $2,700. However, because the contractor had apparently left outstanding bills for labor and materials on the project, the surety on the performance and payment bonds claimed the funds remaining in government control. Additional claims for this money were filed by a bank

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assigned the funds under the contract, and by the IRS for back taxes owed by the contractor. Thus, several claimants had conflicting interests in a specific sum which was due and in the control of the government as stakeholder. Therefore, in order to protect the government, the Comptroller General referred the matter directly to the court for trial and adjudication.

Finally, as obvious as this statement may appear, there is a difference between a referral under 28 U.S.C. § 2510 and merely advising a claimant of the availability of the judicial process. In a case involving a claim by a subcontractor against the United States for termination of a government contract, the claimant attempted to construe a referral from language used by GAO in denying the claim on reconsideration. In this way the claimant hoped to avoid the bar of the statute of limitations. The Court of Claims held that the Comptroller General's conclusion, "to resolve the doubt in favor of that course which will result in the conservation of appropriated funds and leave to the proper judicial authority the final determination of the matter" (B-147131, March 2, 1962), did not constitute a formal referral. Steel Improvement and Forge Co. v. United States, 355 F.2d 627 (Ct. Cl. 1966). The court noted:

> "There are no words of transmittal or referral in the above-quoted language. Plaintiff was merely being advised of the option of seeking judicial review of its claim. Had the Comptroller General intended to refer or transmit the case to this court, we believe that, in the least, the Comptroller General would have either mentioned the applicable statute or the Court of Claims."

Id. at 632. Of course the court was correct. A referral under 28 U.S.C. § 2510(a) will be addressed to the court and will expressly state that the claim is being referred pursuant to section 2510, with a copy sent to the claimant. See B-150968, May 20, 1963.

o. Alternative Dispute Resolution

In late 1990, Congress enacted the Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736, to authorize generally the use of alternative dispute resolution (ADR) techniques in the federal government. The law defines ADR as "including, but not limited to, settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, or any combination thereof." 5 U.S.C. § 571(3) (Supp. IV 1992). The ADR Act has a sunset date of October 1, 1995. Pub. L. No. 101-552, § 11, 104 Stat. at 2747, 5 U.S.C. § 571 note.

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From the perspective of claims settlement, arbitration is probably the most significant of the various ADR procedures. Arbitration has often been characterized as a "split the baby in half" approach. Under the classic form of arbitration, assuming a two-party dispute, each party selects an arbitrator, those two arbitrators then select a third, and the parties agree to be bound by the outcome. Arbitration under the ADR Act is somewhat different.

Agencies may use arbitration if all parties to the dispute consent. Id. § 575(a)(1). The law makes clear that all authorized ADR techniques "are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques." Id. § 572(c). The major difference between arbitration under the ADR Act and arbitration in the private sector is that arbitration under the ADR Act is not binding for 30 days after an award. Within that 30-day period, the head of the agency involved can vacate the award, in which event the award is "null and void." Id. §§ 580(b), (c). An agency's decision to vacate an arbitration award, as well as the decision to use or not use ADR, is regarded as "committed to agency discretion" and is not subject to judicial review. Id. § 581(b). If an agency vacates an award, nonfederal parties to the arbitration may recover those attorney's fees and expenses, as defined in the Equal Access to Justice Act, which they would not have incurred in the absence of the arbitration. Id. § 580(g).

Section 580(g) also requires that the fees and expenses "be paid from the funds of the agency that vacated the award." Thus, if a party has to go to court to get the award of fees and expenses, payment is "otherwise provided for" and cannot be paid from the permanent judgment appropriation (31 U.S.C. § 1304).

The ADR Act also amended two of the major federal claims statutes. First, it amended the Contract Disputes Act to authorize the contractor and contracting officer to use ADR procedures to resolve claims. An arbitration award is subject to judicial review under the standards of 9 U.S.C. §§ 9–13, and the court is expressly authorized to modify or set aside any award that violates limitations imposed by federal statute. Pub. L. No. 101-552, § 6, 104 Stat. at 2745, 41 U.S.C. §§ 605(d) and 607(g)(3) (Supp. IV 1992).

Second, it amended the administrative settlement portion of the Federal Tort Claims Act. An agency is authorized to use arbitration or other ADR procedures to settle tort claims up to the limit of the agency's authority to

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settle without obtaining the prior approval of the Attorney General. That limit is $25,000, except that the Attorney General can raise it by delegation, not to exceed the authority delegated to the United States Attorneys. Pub. L. No. 101-552, § 8(a), 104 Stat. at 2746, 28 U.S.C. § 2672 (Supp. IV 1992). The Justice Department cautions that agencies should use informal negotiation and settlement whenever feasible rather than a formal or structured process, and reminds agencies that if they do resort to an ADR procedure, they must reserve the discretion to accept or reject the outcome. 28 C.F.R. §§ 14.6(a)(1) and (2).

Prior to the ADR Act, both the Comptroller General[8] and the Attorney General[9] had expressed the view that government agencies may not submit claims and disputes to binding arbitration unless authorized by statute. The essence of the objection was the proposition that a "federal official may not delegate to a private party decisionmaking authority which has been vested in him or her by Congress." 4B Op. Off. Legal Counsel 709, 715 (1980). In the context of monetary claims, submitting to binding arbitration would amount to delegating the authority to obligate public funds. The ADR Act addresses this concern by virtue of the provision authorizing an agency head to vacate an arbitration award within 30 days. Thus, the final decisionmaking power remains, as it should, in government hands.

Some other examples of statutes authorizing the federal government to submit various matters to arbitration are 5 U.S.C. §§ 7121, 7122 (part of grievance procedure under collective bargaining agreement); 20 U.S.C. § 107d-2 (Randolph-Sheppard Act); 46 U.S.C. App. § 749 (Suits in Admiralty Act); 46 U.S.C. App. § 786 (Public Vessels Act).

4. Payment

a. Obligation and Source of Funds

Claims settled at the administrative level are paid in one of three ways: (1) from operating appropriations available to the agency whose activities gave rise to the claim; (2) from some existing appropriation or fund other than the agency's operating appropriations; or (3) by submitting the claim to Congress for a specific appropriation. There is no option involved. For

[8]E.g., 32 Comp. Gen. 333 (1953); 19 Comp. Gen. 700 (1940); 8 Comp. Gen. 96 (1928); 7 Comp. Gen. 541 (1928). GAO did not object to using arbitrators for making certain factual determinations such as valuations as long as they were not also determining the legal liability of the United States. E.g., 20 Comp. Gen. 95 (1940); B-191484, May 11, 1978; B-184526, August 11, 1975.

[9]33 Op. Att'y Gen. 160 (1922); 4B Op. Off. Legal Counsel 709 (1980). See also 3 Op. Off. Legal Counsel 226 (1979) (exception for Export-Import Bank based on its enabling legislation).

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"He who lives a long life and never changes his opinions may value himself upon his consistency; but rarely can be complimented for his wisdom."

Justice Joseph Story in a letter written in 1818, quoted in 75 Harv. L. Rev. 707, 720 (1962).

Abbreviations

CDA	Contract Disputes Act of 1978
C.F.R.	Code of Federal Regulations
FAR	Federal Acquisition Regulation
FCCS	Federal Claims Collection Standards
FTCA	Federal Tort Claims Act
FY	Fiscal Year
GAO	General Accounting Office
MTMC	Military Traffic Management Command
OMB	Office of Management and Budget
TFM	Treasury Financial Manual
UCC	Uniform Commercial Code
U.S.C.	United States Code

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any given claim, one of these methods will apply to the exclusion of the other two. The first place to look, of course, is the statute authorizing the settlement, although this will not always provide the complete answer.

(1) Payment from agency appropriations

This is by far the most common source of payment and will apply unless one of the other methods is expressly directed by statute. In some cases, the relevant claims statute will specifically address payment. For example, under the Federal Tort Claims Act, administrative settlements of $2,500 or less are paid "by the head of the Federal agency concerned out of appropriations available to that agency." 28 U.S.C. § 2672. Another example is 16 U.S.C. § 574, which authorizes the Secretary of Agriculture to reimburse property owners up to $2,500 for loss or damage caused by the government in connection with the administration or protection of the national forests, "payment to be made from any funds appropriated for the protection, administration, and improvement of the national forests." This authority has been used, for example, to compensate landowners for damage caused by aerial spraying for pest control. B-117720, December 23, 1953. Still another example is 16 U.S.C. § 502(d), which authorizes the Secretary of Agriculture to reimburse owners for loss or damage to horses, vehicles, or other equipment borrowed or rented for use by the Forest Service, payment to be made "from the applicable appropriations of the Forest Service."[10]

If the statute authorizes agencies to settle claims but is silent with respect to payment, the implication is that the agency will pay from its operating appropriations. A common example is the Military Personnel and Civilian Employees Claims Act of 1964, 31 U.S.C. § 3721. B-143673, November 11, 1976, overruled on other grounds by 56 Comp. Gen. 615 (1977); B-174762, January 24, 1972; B-206856, April 7, 1982 (non-decision letter). Similarly, settlements under the Contract Disputes Act at the contracting officer level are paid from the contracting agency's procurement appropriations. Another example is 31 U.S.C. § 3724, which authorizes the Attorney General to settle claims for death, personal injury, or property damage caused by investigative or law enforcement officers of the Department of Justice acting within the scope of their employment, which cannot be settled under the Federal Tort Claims Act. Settlement authority is limited to "not more than $50,000 in any one case." Id. § 3724(a). The statute makes no mention of how the claims are to be paid, but the legislative history of a

[10]The relationship between this authority and the Federal Tort Claims Act is discussed in B-153618, April 9, 1964.

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1989 revision explains that they are paid from the operating funds of the Justice Department. H.R. Rep. No. 46, 101st Cong., 1st Sess. 3 (1989), reprinted at 1989 U.S. Code Cong. & Admin. News 1226, 1228. Still another statute in this category is 33 U.S.C. § 853, which authorizes the Secretary of Commerce to settle damage claims not exceeding $2,500 attributable to the National Oceanic and Atmospheric Administration.

For the Department of Defense and the military departments, claims payable from agency funds are paid from Operation and Maintenance appropriations in accordance with 10 U.S.C. § 2732. While the terms of the statute are general ("claims authorized by law to be paid"), its scope is clarified by its origin. Until fiscal year 1989, the Defense Department received a separate lump-sum appropriation entitled "Claims, Defense." It was available for all noncontractual claims payable from agency funds, including "personnel claims, tort claims, admiralty claims, and miscellaneous claims."[11] Starting with FY 1989, Congress discontinued the Claims, Defense appropriation and instructed Defense to charge the claims to O&M appropriations.[12] The authority was made permanent in 1990.[13]

If payment is to be made from agency appropriations, it is necessary to determine when the obligation occurs and hence what fiscal year to charge. The governing principle, stated in a number of earlier decisions, is that a claim against an annual appropriation is chargeable to the appropriation for the fiscal year in which the liability was incurred. E.g., 18 Comp. Gen. 363, 365 (1938). Exactly when this happens depends on the type of claim.

As a general proposition, claims involving property damage or personal injury will be chargeable to the fiscal year in which the final determination of the government's liability is made. The theory is that there is no obligation on the part of the government until the claim is adjudicated and allowed. Thus, administrative awards of $2,500 or less under the Federal Tort Claims Act are payable from funds current when the award is made. 38 Comp. Gen. 338 (1958); 35 Comp. Gen. 511, 512 (1956); 27 Comp. Gen. 445 (1948); 27 Comp. Gen. 237 (1947). Similarly, payments under the

[11]S. Rep. No. 325, 95th Cong., 1st Sess. 191 (1977). This is the report of the Senate Appropriations Committee on the 1978 Defense appropriation. The Claims, Defense appropriation for that year is found at Pub. L. No. 95-111, 91 Stat. 886, 891 (1977).

[12]Department of Defense Appropriations Act, 1989, Pub. L. No. 100-463, § 8098, 102 Stat. 2270, 2270–35 (1988).

[13]National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1481(j), 104 Stat. 1485, 1708 (1990).

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Military Personnel and Civilian Employees' Claims Act of 1964 are chargeable to funds current at the time of award. B-174762, January 24, 1972.

These cases are an outgrowth of an earlier decision which had reached the same result under a statute authorizing the (then) War Department to pay claims for damage caused by American forces abroad. 1 Comp. Gen. 200 (1921). This decision would still apply to similar statutes such as 10 U.S.C. § 2734 to the extent payment must come from agency appropriations. GAO applied the same reasoning and result to expenses of hospitalization and related transportation paid by the State Department under the discretionary authority of the Foreign Service Act of 1946. Under the statute, there is no obligation until the State Department administratively determines that the illness or injury occurred in the line of duty and not as the result of misconduct. B-80060, September 30, 1948.

Contract claims settled at the contracting officer level are chargeable to appropriations current at the time the basic contract was executed if they are based on "antecedent liability." A contract claim is based on antecedent liability if the modification or adjustment is within the general scope of the original contract and is made pursuant to a provision, such as a "Changes" clause, in the original contract. Contract claims not based on antecedent liability are chargeable to appropriations current when the claim is allowed. For example, a contractor provided supplemental research services under a contract with the Interior Department without the issuance of written contract amendments. Since the government received the benefit of the services and ratified the transaction, the contractor was entitled to be paid. The work was within the general scope of the original contract and the government's liability was viewed as deriving from the "Changes" clause. Therefore, the contractor's claim was chargeable to funds available at the time the original contract was executed. B-197344, August 21, 1980. See also B-208730, January 6, 1983.

In a contract implied-in-law (quantum meruit) situation, there is no contract to which the allowance of the claim can relate. The payment is chargeable to the fiscal year in which the goods were received or the services rendered. B-210808, May 24, 1984; B-207557, July 11, 1983.

When GAO allows bid preparation costs incident to a successful bid protest, the obligation relates to the fiscal year in which GAO issued its decision. B-199368.4, January 19, 1983.

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Claims by federal employees for compensation and related allowances are chargeable to appropriations for the fiscal year in which the work was performed. If the claim covers more than one fiscal year, the payment must be prorated accordingly. If the applicable appropriation account is insufficient to pay the claim, the agency must seek a deficiency appropriation. 69 Comp. Gen. 40 (1989) (administrative awards of back pay); 54 Comp. Gen. 393 (1974) (claim for statutory salary which claimant had previously improperly waived); 47 Comp. Gen. 308 (1967) (payment resulting from recrediting of sick leave); B-171786, March 2, 1971 (overtime). If the applicable account for a prior year has been closed pursuant to 31 U.S.C. § 1552(a), the portion chargeable to that year must be charged to current appropriations, subject to the one-percent limitation of 31 U.S.C. § 1553(b). Interest under the Back Pay Act is chargeable to the same fiscal year or years as the back pay to which it relates. 69 Comp. Gen. at 43.

The rule is the same in situations where the claimant did not perform any work, for example, restoration after an improper termination where the period of wrongful termination is deemed valid service under the Back Pay Act. 69 Comp. Gen. 40, 42 (1989); 58 Comp. Gen. 115 (1978). The latter case held that agency contributions to an employee's retirement account, where not payable from the permanent judgment appropriation, must be prorated among the fiscal years covered. While the case does not discuss administrative payments of back pay, it implies that back pay under the Back Pay Act, Title VII of the Civil Rights Act, and the Veterans Preference Act should be treated similarly.[14]

(2) Payment from separate appropriation or fund

In a number of instances, Congress has prescribed that claims of a particular type be paid from a separate fund established for that purpose. If this is the case, the agency does not have a choice. Since a specific statutory provision governs over a more general one, the agency must use the prescribed source and may not use its regular operating appropriations. In these cases, you simply do what the statute says.

A number of examples may be found elsewhere in this chapter. Claims under the Federal Employees Compensation Act are paid from the Employees' Compensation Fund administered by the Department of

[14]One older case reached a contrary result, concluding that back pay resulting from restoration could be charged to current year funds since the administrative action directing the restoration could be viewed as creating the government's obligation. B-113279-O.M., January 30, 1953. However, it does not appear to have been followed.

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Labor. Claims under the Government Losses in Shipment Act are paid from a revolving fund administered by the Treasury Department.

Several types of administrative claims are payable from the permanent judgment appropriation established by 31 U.S.C. § 1304. The primary example is administrative awards in excess of $2,500 under the Federal Tort Claims Act. 28 U.S.C. § 2672. Monetary awards by agency boards of contract appeals are payable in the first instance from the judgment appropriation, subject to reimbursement by the contracting agency from current appropriations. 41 U.S.C. §§ 612(b) and (c); 63 Comp. Gen. 308 (1984). A 1978 amendment to the judgment appropriation added several categories which previously had required specific appropriations. Those covered elsewhere in this chapter are the Small Claims Act, 31 U.S.C. § 3723, and amounts in excess of amounts payable from agency appropriations under the Military Claims Act, 10 U.S.C. § 2733, Foreign Claims Act, 10 U.S.C. § 2734, and National Guard Claims Act, 32 U.S.C. § 715. Claims payable from the judgment appropriation are not reimbursable unless provided by statute, such as the Contract Disputes Act.

One additional category covered by the 1978 amendment to 31 U.S.C. § 1304 is claims under section 203 of the National Aeronautics and Space Act of 1958, 42 U.S.C. § 2473(c)(13). This statute authorizes the Administrator of the National Aeronautics and Space Administration to settle claims for death, personal injury, or property damage resulting from the conduct of NASA's functions, if presented in writing within 2 years after the incident giving rise to the claim. Claims of $25,000 or less are paid directly by NASA from its own funds. Claims in excess of $25,000 are paid from the judgment appropriation. The NASA statute differs from the Military, Foreign, and National Guard Claims Acts in one important respect. Under the military statutes, if a claim exceeds the amount payable from agency funds, only the excess over that amount is paid from the judgment appropriation, Under the NASA statute, the entire amount of claims in excess of $25,000 is paid from the judgment appropriation.[15]

A key point about the claims under this heading—payable from separate appropriation or fund—is that, even though the agency may not use its own appropriations, a source is available for immediate payment.

[15]The statute still refers to reporting the claim to Congress. 42 U.S.C. § 2473(c)(13)(B). However, this is effectively overridden by 31 U.S.C. § 1304(a)(3)(D).

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(3) Payment from specific congressional appropriation

There are several instances in which there is no source of funds available for immediate payment. If the legislation governing a particular type of claim requires specific appropriations, then payment must await congressional action. Statutes of this type frequently require that the agency's determination be reported to Congress for its consideration or certified to Congress as a "legal claim." Examples are:

- Admiralty claims settled by the Army, Navy, Air Force, and Coast Guard under, respectively, 10 U.S.C. §§ 4802, 7622, 9802, and 14 U.S.C. § 646. Under these statutes, the applicable agency head may settle and pay admiralty claims up to a specified limit ($500,000 for the Army and Air Force, $1,000,000 for the Navy, and $100,000 for the Coast Guard). If the settlement exceeds the specified limit, the claim must be certified to Congress. GAO has no settlement jurisdiction under these admiralty statutes. B-126162, March 16, 1956.
- 20 U.S.C. § 975(b): Claims for losses under indemnity agreements authorized by the Arts and Artifacts Indemnity Act. Certification to Congress is made by the Federal Council on the Arts and Humanities.
- 31 U.S.C. § 3725: Claims for death or personal injury of a foreign national caused by a government employee in a foreign country in which the United States has privileges of extraterritoriality. Settlement authority is conferred upon the State Department and is limited to $1,500. See B-120773, March 22, 1955.
- 42 U.S.C. § 2207: Claims resulting from certain nuclear or other explosive detonations in the conduct of programs undertaken by the Department of Energy.
- 42 U.S.C. § 2211: Claims resulting from a nuclear incident involving the nuclear reactor of a United States warship, excluding combat activities.
- Administrative settlements under the Suits in Admiralty Act, 46 U.S.C. App. § 749, where there is no available agency appropriation or insurance fund. At one time, a permanent appropriation existed for these but it was repealed in 1935. See 46 U.S.C. App. § 748 note.

b. Who Gets Paid

(1) Payment to right person

The guiding principle is the rather common-sense proposition that payment should be made to the person or entity entitled to receive it. Common sense in this instance is reinforced by 31 U.S.C. § 3322(a), which instructs disbursing officers to draw public money from the Treasury only

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"payable to persons to whom payment is to be made."[16] The government's motives are not purely benevolent. To quote a phrase used in innumerable GAO decisions, the government's objective in making payment is to secure a "good acquittance" or a "valid acquittance" for the United States. 62 Comp. Gen. 302, 307 (1983); 24 Comp. Gen. 261, 262 (1944). This means the assurance that the payment is discharging the government's obligation and that the government will not find itself embroiled in controversy between competing claimants with the resulting possibility of being required to pay twice. Also relevant is the government's policy against serving as agent for the collection of private debts. E.g., 54 Comp. Gen. 424, 427 (1974).

If the payee is an individual who is (a) alive, (b) not a minor, (c) mentally competent, and (d) at a known location, the matter is simple. The check is drawn payable to the individual and sent to his or her address of record. See, e.g., B-217468, June 25, 1985 (where individual who was also incorporated had been retained to provide services as an individual, payment should be made to the individual and not to the corporation). If any of the 4 elements noted are not present, the matter becomes more complicated.

If the payee is deceased, payment should be made to the legal representative (executor or administrator) of the payee's estate. Normally, this refers to probate proceedings in the state of the decedent's domicile at the time of death. In appropriate circumstances, however, this does not preclude a person from qualifying as legal representative where the decedent's will has been properly probated in a state other than the state of domicile, for example, a state in which the decedent's property is located. See Miniafee v. United States, 17 Cl. Ct. 571, 577 (1989) (reaching this conclusion with respect to final settlement of accounts of deceased members of armed forces under 10 U.S.C. § 2771).[17] If the estate has been closed and state law has a procedure for handling the distribution of property found after closing, that procedure should be followed. B-234425, May 30, 1989.

Procedures may be relaxed for small amounts. The Annual Report of the General Accounting Office, 1923, H.R. Doc. No. 101, 68th Cong., 1st Sess. 37 (1923), contains the following policy statement:

[16]This provision has never been regarded as impeding the negotiability of government instruments. See, e.g., 22 Op. Att'y Gen. 637, 643 (1899); 15 Comp. Dec. 604 (1909).

[17]The court expressed disagreement with 33 Comp. Gen. 346 (1954) and 52 Comp. Gen. 113 (1972), purportedly reaching a different result. There is no inconsistency, however, in that neither case involved a legal representative duly appointed in a nondomiciliary state.

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"In a large number of cases, where the Government is found indebted to a person who dies before payment can be effected, it happens that the amount of the indebtedness is so small that to insist upon the appointment of an administrator before payment would result in a virtual confiscation of the amount due or at least reduce it so as to leave little for the beneficiaries of the estate."

See also 12 Comp. Dec. 439, 440 (1906). GAO's current policy stems from B-69787-O.M., May 2, 1979. Payments of $3,000 or less may be made without requiring the appointment of a legal representative. For payments larger than $3,000, appointment should be required if and only if required by the law of the decedent's domicile at the time of death. If there are no probate proceedings, payment is made in accordance with the law of the decedent's domicile.

Similarly, if a settlement involves payment to or on behalf of a minor, appointment of a legal guardian generally will be required where required by state law, for example, if state law limits the amount payable to a parent or natural guardian and the award exceeds that amount. B-176252-O.M., September 5, 1972. See 4 C.F.R. § 35.5 for documentation requirements. For payments to "incompetent public creditors," see 4 C.F.R. Part 36. If the payee's whereabouts are unknown, the money is credited to a trust account described later in this chapter under the Unclaimed Money/Property heading.

Payments to a corporate payee which is no longer in existence also present complications. Some guidance exists in GAO's determinations under the International Claims Settlement Act discussed later in this chapter. In a case where a corporation had been dissolved and potential claimants (e.g., creditors, stockholders) were unknown, GAO advised the agency to simply close its file and deobligate the money. If a claimant should subsequently surface, payment could be made in accordance with 31 U.S.C. § 1553 for expired or closed accounts. B-203676, September 21, 1981. In Automatic Sprinkler Corp. v. Darla Environmental Specialists, Inc., 852 F. Supp. 16 (N.D. Ill. 1994), the General Services Administration was holding money concededly owed to a contractor which had been dissolved under state law. To prevent what it regarded as a "windfall" for the government, the court ordered the money paid to a state court judgment creditor of the defunct corporation, subject to an outstanding federal tax lien.

There will be the occasional case in which the proper payee cannot be determined short of an adversary proceeding, in which event the proper

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course of action is to deny payment administratively and leave the competing claimants to their remedy in the courts. E.g., 68 Comp. Gen. 284 (1989).

As a general proposition, government checks should be delivered directly to the payees. 16 Comp. Gen. 840 (1937). However, they may be delivered to the agency involved for subsequent forwarding to the payees where there is some valid reason for doing so. 65 Comp. Gen. 81 (1985).

(2) Payment to wrong person

Payment to the wrong person does not discharge the government's obligation. If, through administrative mistake of fact or law, or clerical error, a payment is made to a person not entitled to it, the government is still obligated to make payment to the proper claimant. The agency should take action to recover from the first payee, but payment to the proper claimant should not be held up pending recovery of the erroneous payment, even though this may result in a duplicate payment. Illustrative cases are 66 Comp. Gen. 617 (1987), affirmed upon reconsideration, B-226540.2, August 24, 1988 (agency which breached joint payment agreement by erroneously sending check to only one of the parties was liable to co-payee); 37 Comp. Gen. 131 (1957) (payment of death gratuity to erroneously designated payee); 19 Comp. Gen. 104 (1939) (payment to wrong beneficiary under Social Security Act); B-249869, January 25, 1993 (agency which made payment to agent after receiving notice of termination of agent's association with contractor remains liable to contractor). Two additional situations where this rule comes into play are discussed later in this chapter—payment to a contractor or assignee in derogation of the superior claim of a surety, and payment to a contractor after being notified of a valid assignment to a financing institution.

C. Specific Types of Claims

1. Claims "Sounding in Tort"

The traditional classification of claims starts with the two major categories of tort and contract. It is difficult to define "tort" with any precision. One authority defines the term simply as "[a] legal wrong committed upon the person or property independent of contract." Black's Law Dictionary 1489 (6th ed. 1990). Common examples are motor vehicle accidents, medical

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malpractice, and slip-and-fall cases. The common law also recognizes non-physical torts, such as libel, slander, and misrepresentation. The essence of a tort is (a) a noncontractual legal duty owed by one party to another, and (b) a breach of that duty. In the motor vehicle context, for example, a driver owes other drivers and pedestrians the duty to exercise reasonable care and to observe the traffic laws.

a. Federal Tort Claims Act

(1) Overview [18]

Prior to 1946, with limited exceptions, the United States was not liable for the tortious conduct of its employees. E.g., 1 Comp. Gen. 178 (1921). Congress rectified this situation with the enactment of the Federal Tort Claims Act (FTCA), Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 812, 842, now codified at 28 U.S.C. §§ 1346(b) and 2671–2680.

The first section of the FTCA, 28 U.S.C. § 2671, defines "Federal agency" and "employee of the government" for FTCA purposes. The term "Federal agency" is broadly defined to include—

> "the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States."

Consistent with the manifest intent of this definition and its predecessors, GAO regards the FTCA as applicable to all federal agencies and employees unless specifically excluded. 35 Comp. Gen. 511 (1956); 26 Comp. Gen. 891 (1947). Examples include 67 Comp. Gen. 142 (1987) (FTCA applies to Federal Retirement Thrift Investment Board but should not be used as a device to cover program losses); B-236022, January 29, 1991 (Stennis Center for Public Service Training and Development, a legislative branch agency); B-229660, April 28, 1989 (office of the Market Administrator of the Agriculture Department's Federal Milk Order Program).

An important part of the definition of federal agency is the exclusion of contractors. By virtue of this provision, the United States is not liable for the tortious conduct of its independent contractors. E.g., Berkman v. United States, 957 F.2d 108 (4th Cir. 1992). However, the independent contractor exception may not preclude liability if there is also negligence

[18]The body of law that has evolved under the Federal Tort Claims Act is voluminous. Our objective here is merely to provide an overview of the statute with emphasis on administrative settlement authority and payment. A comprehensive reference on all aspects of the Federal Tort Claims Act is Lester S. Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies.

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attributable to some government employee. Phillips v. United States, 956 F.2d 1071 (11th Cir. 1992) (negligence in carrying out safety responsibilities).

The definition of "employee" in 28 U.S.C. § 2671 includes temporary as well as permanent employees and those serving without compensation.

The next section of the statute, 28 U.S.C. § 2672, which we will address in detail later, is perhaps the most important for our purposes. It authorizes agencies to settle claims resulting from the tortious conduct of federal employees committed within the scope of their employment, and addresses how the settlements are to be paid. Agency settlements are final and conclusive. Therefore, except for claims involving GAO employees, GAO's claims settlement jurisdiction does not extend to claims under the FTCA. B-176147, July 5, 1972; B-161131, April 18, 1967.

Section 2674 provides that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances." The elements or extent of damages allowable are thus determined by local law (which usually means the law of the state in which the tort occurred) and matters over which GAO has no jurisdiction. B-130096, January 25, 1957; B-115538, July 2, 1953. Section 2674 also provides that the United States shall not be liable for punitive damages nor for interest prior to judgment. The Supreme Court addressed the meaning of "punitive damages" for purposes of 28 U.S.C. § 2674 in Molzof v. United States, 112 S. Ct. 711 (1992), holding that the term is limited to the traditional common-law concept of punitive damages whose purpose is to punish.

Section 2675 establishes the important requirement to exhaust administrative remedies before going to court. The statute prohibits the filing of a lawsuit unless a claim has first been filed with the appropriate agency. This requirement means exactly what it says. Complying with the administrative claim requirement before substantial progress is made in the litigation is not enough. McNeil v. United States, 113 S. Ct. 1980 (1993).

Judgment will operate as a release to the employee as well as to the government. 28 U.S.C. § 2676. Section 2677 authorizes the Attorney General or his or her designee to compromise claims after the commencement of suit. A requirement in the original FTCA for court approval was deleted in 1966.

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The next section, 28 U.S.C. § 2678, sets maximum attorney's fees—20 percent of administrative awards (section 2672) and 25 percent of judgments (section 1346(b)) and settlements (section 2677). Penal sanctions are provided for excessive fees. The attorney's fees are a portion of the amount recovered and not in addition to it. Section 2678 has been held to preempt state statutes imposing limits on attorney's fees. Jackson v. United States, 881 F.2d 707 (9th Cir. 1989).

Under 28 U.S.C. § 2679(b), the FTCA remedy—

"is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee."

Prior to 1988, the FTCA was the exclusive remedy for motor vehicle accident claims (part of the then-existing 28 U.S.C. § 2679 was known as the "Federal Drivers Act") and, by virtue of several other statutes, medical malpractice cases. See B-114839, January 25, 1979. The Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, broadened the "exclusive remedy" protection in response to the Supreme Court's decision in Westfall v. Erwin, 484 U.S. 292 (1988) which had seriously eroded the immunity of government employees from state-law tort liability. The exclusive remedy protection does not apply to constitutional torts or to statutes which specifically authorize suits against individual officers or employees. 28 U.S.C. § 2679(b)(2).

If an employee is sued in a state court for something within the scope of the FTCA's exclusive remedy protection, and the Attorney General certifies that the employee was acting within the scope of his or her employment at the time of the incident in question, the suit must be removed to a federal court and the United States substituted as defendant. Id. § 2679(c)(2).

The exclusive remedy provision of 28 U.S.C. § 2679 applies to bar suit against an individual employee even where one of the specific exceptions in the FTCA precludes recovery against the United States. United States v. Smith, 499 U.S. 160 (1991).

Finally, section 2680 lists several exceptions to the FTCA. They include the following:

- The "discretionary function" exception: The FTCA does not waive sovereign immunity with respect to an employee exercising due care in the

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execution of a statute or regulation, or to the exercise or performance or the failure to exercise or perform a discretionary function. § 2680(a). The scope and meaning of this exception have generated much litigation. Two of the leading Supreme Court cases are United States v. Gaubert, 499 U.S. 315 (1991), and Dalehite v. United States, 346 U.S. 15 (1953). GAO will not review an agency's finding that a claim is within the "discretionary function" exception. B-190362, December 14, 1977.

- The FTCA does not apply to claims arising out of the loss or miscarriage of letters or postal matter. § 2680(b). E.g., Kissell v. Mann, 750 F. Supp. 55 (D.N.H. 1990) (suit dismissed alleging that package was stolen because mail carrier failed to leave card in plaintiff's mailbox notifying him that it had been delivered).
- The FTCA does not apply to claims in respect of the assessment or collection of any tax or customs duty. § 2680(c). E.g., B-178232, April 13, 1973 (claim for erroneous filing of tax lien by Internal Revenue Service not cognizable). The customs exception precludes liability under the FTCA, but does not preclude liability for breach of an implied contract of bailment in appropriate cases. Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980).
- The FTCA does not apply to claims cognizable under the Suits in Admiralty Act or the Public Vessels Act. § 2680(d).
- The FTCA does not apply to claims for libel, slander, misrepresentation, deceit, or interference with contract rights; nor does it apply to claims for assault, battery, or false arrest or imprisonment except with respect to investigative or law enforcement officers. § 2680(h).
- The FTCA does not apply to any claim "for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system." § 2680(i).
- The FTCA does not apply to claims arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war. § 2680(j).
- The FTCA does not apply to any claim arising in a foreign country. § 2680(k). Antarctica is regarded as a foreign country for purposes of this exception. Smith v. United States, 113 S. Ct. 1178 (1993).

(2) Administrative settlement

As noted above, the first step in the process is the filing of an administrative claim, and a lawsuit cannot be maintained until this has been done. Administrative settlement is authorized by the first paragraph of 28 U.S.C. § 2672, as follows:

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"The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred . . . ."

The Justice Department's implementing regulations are found at 28 C.F.R. Part 14.

The above excerpt from 28 U.S.C. § 2672 makes several important points:

1. The agency head may delegate settlement authority. The number of persons to whom it is delegated is discretionary with the agency head. 40 Op. Att'y Gen. 503 (1947).

2. Settlement authority expressly includes compromise.

3. A claim under the FTCA must be for money damages. The FTCA does not cover nonmonetary claims such as a claim for the restoration of annual leave. B-171716, March 26, 1971.

4. The damage must be caused by the "negligent or wrongful act or omission" of a federal employee. This includes intentional torts not expressly excluded. Waters v. United States, 812 F. Supp. 166 (N.D. Cal. 1993).

5. The federal employee must have been acting within his or her scope of employment. What is or is not within the scope of employment is determined under the law of the state (or District of Columbia, as the case may be) in which the incident occurred. Williams v. United States, 350 U.S. 857 (1955); Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986); Rallis v. M.P.W. Stone, 821 F. Supp. 466 (E.D. Mich. 1993). State law applies even where the incident occurred on federal property. Lutz v. United States, 685 F.2d 1178, 1184 (9th Cir. 1982).

The claimant will usually be the injured person or his or her legal representative (or estate), or the owner of the damaged property. 28 C.F.R. §§ 14.3(a)-(c). An insurance company which has become subrogated to the rights of its insured by virtue of making payments under a policy can

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file a claim in its own name. United States v. Aetna Casualty & Surety Co., 338 U.S. 366 (1949); 28 C.F.R. § 14.3(d).

The administrative claim must be filed within two years after it accrues. 28 U.S.C. § 2401(b). The claim must be in writing and must specify a "sum certain" (specific dollar amount). 28 C.F.R. § 14.2(a). There is a claim form, Standard Form 95, prescribed for FTCA claims, but other written notification is acceptable. Id. If the claimant files with the wrong agency, the receiving agency should transfer the claim to the proper agency. If the receiving agency can't determine the proper agency, it should return the claim to the claimant. Id. § 14.2(b)(1). For purposes of satisfying the two-year limitation, the claim is received when received by the correct agency. Id.

Upon receipt of a claim, the agency must first make its own scope of employment determination in accordance with applicable state law. While there are variations from state to state in some respects, the basic elements tend to be fairly constant. For example, ordinary home-to-work commuting (travel between one's permanent residence and permanent place of duty) is not within the scope of employment for purposes of the FTCA. E.g., Perez v. United States, 253 F. Supp. 619 (D. Mass.), aff'd, 368 F.2d 320 (1st Cir. 1966). However, for employees on official travel, travel between temporary lodging and the temporary duty or training site normally is considered within the scope of employment. E.g., Dunaville v. Carnago, 485 F. Supp. 545 (S.D. Ohio 1980).

Assuming the claimant has filed on time and the claim meets the scope of employment test, the agency then proceeds to conduct whatever investigation may be warranted,[19] and to consider the merits of the claim. The agency has six months to respond to the claim. More precisely, the claimant cannot sue until either (a) the agency finally denies the claim in writing, or (b) the agency fails to make final disposition within six months, whichever first occurs. 28 U.S.C. § 2675(a). If there has been no final denial, the claimant does not have to file suit at the end of six months. As long as the administrative claim has been filed within the prescribed two-year period and the agency has not issued a final denial, there is no statute of limitations on filing a lawsuit. Upon expiration of the six-month period, filing the lawsuit is at the claimant's option.

[19]The regulations specify the kinds of information or evidence the agency may require the claimant to submit, and authorize agencies to request other agencies to conduct investigations for them, which may be reimbursable where authorized or required. 28 C.F.R. §§ 14.4, 14.8.

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If the agency allows the claim, or if the parties reach a compromise agreement, the award or settlement is paid and that is usually the end of the matter. A proposed award in excess of $5,000 must be reviewed by the agency's legal department. 28 C.F.R. § 14.5. Awards in excess of $25,000 require the prior written approval of the Attorney General, except that the Attorney General may delegate increased settlement authority to any agency, up to the limit delegated to the United States Attorneys. 28 U.S.C. § 2672. Unless procured by fraud, awards made under the authority of 28 U.S.C. § 2672 are final and conclusive on the government. Id., 2d paragraph. Acceptance of the award is final and conclusive on the claimant and operates as a "complete release of any claim against the United States and against the employee of the government, whose act or omission gave rise to the claim, by reason of the same subject matter." Id., 4th paragraph.

If the claim is one that should not be allowed (no scope of employment, agency employee not negligent, claim time-barred, claim subject to one of the exclusions of 28 U.S.C. § 2680, etc.), or if the parties are unable to reach agreement on the amount of damages, the agency should issue a "final denial" which must be transmitted by certified or registered mail. 28 U.S.C. § 2675(a); 28 C.F.R. § 14.9(a). The claimant then has an option. Within six months from the date of mailing of the final denial, the claimant may (a) submit a written request to the agency for reconsideration, in which event the agency has another six months to respond, or (b) file a lawsuit. 28 U.S.C. § 2401(b); 28 C.F.R. § 14.9(b). A final denial letter must advise the claimant of the right to file suit within six months. 28 C.F.R. § 14.9(a).

The United States district courts have exclusive jurisdiction over FTCA actions. 28 U.S.C. § 1346(b). Trial is before a judge without a jury. Id. § 2402.

To sum up the pertinent time limitations:

- The claimant must file the administrative claim not later than two years after it accrues, and cannot sue unless this has been done.
- Upon filing the administrative claim, the claimant must give the agency 6 months to respond. If the agency does not issue a final denial within 6 months after the claim is filed, the claimant may file suit any time thereafter.
- Once the agency issues its final denial, whether during or after the initial 6-month period, the claimant must sue or seek reconsideration not later than 6 months from the date the final denial is mailed.

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(3) Payment

The third paragraph of 28 U.S.C. § 2672 provides for the payment of administrative settlements. If the award is $2,500 or less, the agency must pay "out of appropriations available to that agency." If the award exceeds $2,500, it is paid "in a manner similar to judgments and compromises in like causes." This means that awards in excess of $2,500 are paid, upon certification by GAO, from the permanent indefinite appropriation for judgments established by 31 U.S.C. § 1304. Compromise settlements made by the Attorney General under 28 U.S.C. § 2677 are payable under 31 U.S.C. § 1304 regardless of amount.[20]

The $2,500 limit refers to the amount awarded to each claimant and not to the aggregate. B-168705-O.M., January 27, 1970. Thus, if three claimants are awarded $1,000 each from the same incident, the agency must pay. If two are awarded $1,000 each and the third is awarded $3,000, the agency pays the first two and the third will be paid from the judgment appropriation. For purposes of applying the $2,500 limitation, the claims of an insurance company (subrogee) and its insured (subrogor), even though presented separately, are viewed as interests in the same claim; if the total award exceeds $2,500, it is payable under 31 U.S.C. § 1304. 49 Comp. Gen. 758 (1970). See also 41 Op. Att'y Gen. 70 (1950).

Occasionally, an award which will be ultimately distributed among several individuals may be stated in a lump sum in accordance with state law. For example, the award in B-173975-O.M., September 14, 1971, was made under the Arizona wrongful death statute, under which an action is brought in the name of the surviving spouse or legal representative on behalf of other survivors such as children. The award is made in a lump sum to be distributed in accordance with the Arizona intestacy statute. In this particular case, an FTCA award was made in this form to the surviving spouse and decedent's administrator. The total award exceeded $2,500 although some of the beneficiaries would receive less than $2,500 under Arizona law. The award was held payable under 31 U.S.C. § 1304.

For awards payable from agency funds, there is no obligation on the part of the United States until a final determination of the government's liability is made by the person authorized to do so. Thus, the appropriation to be

[20]Prior to 1966, FTCA judgments were payable from the permanent appropriation but compromise settlements had to be paid from agency funds, a fact not particularly conducive to compromise settlements. The judgment appropriation was amended in that year to make it available for administrative FTCA settlements in excess of $2,500 and compromise settlements by the Attorney General. See 31 U.S.C. § 1304(a)(3)(A). References in pre-1966 cases to payment of compromise settlements from agency funds are thus no longer valid. E.g., 45 Comp. Gen. 514 (1966).

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charged is the appropriation current at the time such final action is taken. 35 Comp. Gen. 511, 512 (1956); 27 Comp. Gen. 445 (1948); 27 Comp. Gen. 237 (1947). Specific appropriations are not required for the payment of tort claims. Section 2672 authorizes the agency—

> "to select for the payment of such claims any appropriation of that agency which is currently available for obligation at the time the claim is determined to be proper for payment and the use of which for such purpose is not specifically proscribed or limited. Also, the word agency is not confined to a particular bureau but embraces the whole of the department or independent establishment. . . . Thus, any appropriation selected by the head of the agency, the use of which is not specifically proscribed or limited and which is currently available . . . for obligation may be used to make such settlements."

38 Comp. Gen. 338, 340 (1958). The General Supply Fund of the General Services Administration (40 U.S.C. § 756) is an appropriation for purposes of 28 U.S.C. § 2672. B-148229-O.M., May 15, 1962.

Awards payable under 31 U.S.C. § 1304 should be submitted to GAO on a Standard Form 1145 payment voucher, together with other required documentation, in accordance with 28 C.F.R. § 14.10(a). GAO's certification for payment will be in the form of a certification stamp made directly on the voucher. When the voucher so designates, payment will be made jointly to the claimant and his or her attorney. Id. For the most part, payment is made in a lump sum directly to the claimant or the claimant's legal representative. In appropriate cases, however, the award may be in the form of a reversionary trust or structured settlement. See B-162924, December 22, 1967, and the discussion of structured settlements under the Requirement for Money Judgment heading in Chapter 14.

The provision in section 2672 that awards in excess of $2,500 shall be payable "in a manner similar to judgments and compromises in like causes," combined with the express inclusion of section 2672 in 31 U.S.C. § 1304, not only makes the judgment appropriation available but also incorporates those limitations which exist with respect to "judgments and compromises in like causes." Thus, to be payable under 31 U.S.C. § 1304, an award must be "final," payment must be "not otherwise provided for," and the payment must be certified by GAO. For the most part, agency appropriations will not be available and there will be relatively few "otherwise provided for" situations, at least with respect to noncorporate agencies. E.g., B-189652, July 17, 1979 (FTCA settlements by the Alaska Railroad).

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Administrative expenses incurred by an agency in investigating an FTCA claim are chargeable to the agency's regular operating appropriations current at the time the expenses are incurred. 29 Comp. Gen. 111 (1949).

In 53 Comp. Gen. 214 (1973), a federal employee was involved in an accident while operating a motor vehicle within her scope of employment. She was given a traffic citation and a summons to appear in court. GAO found that, in view of the government's potential liability under the FTCA, it had a direct interest in the disposition of the traffic charge. Therefore, the employee's appearance in court could be regarded as the performance of official duty and the agency could reimburse her travel expenses. (It could not, however, pay or reimburse the amount of any resulting fine.)

Nothing in the Federal Tort Claims Act or elsewhere specifically authorizes reimbursement of a government employee who has paid a claim cognizable under the FTCA from personal funds. However, reimbursement has been permitted in rare cases where the payment was made in urgent and unforeseen emergency circumstances and where the interest of the government in being released from future claims was protected. B-186474, June 15, 1976; B-177331, December 14, 1972. However, as a general proposition, reimbursement is not authorized. See, e.g., B-152070, October 3, 1963.

When the government pays a claim under the Federal Tort Claims Act, it may not recoup the payment from the employee whose actions or inactions gave rise to the claim. United States v. Gilman, 347 U.S. 507 (1954); Garrett v. Jeffcoat, 483 F.2d 590, 592 (4th Cir. 1973); B-121593, February 7, 1955. The right of the United States to recover from a third-party tortfeasor is discussed in 57 Comp. Gen. 781 (1978).

If a claimant under the FTCA is indebted to the United States, the amount of the indebtedness should be set off against the award. If the award is $2,500 or less, the agency should make the setoff administratively under 31 U.S.C. § 3716. If the award exceeds $2,500, GAO will apply 31 U.S.C. § 3728. B-135984, May 21, 1976.

In a different type of setoff situation, a nonveteran claimant had been furnished emergency care by a Veterans Administration hospital and was billed pursuant to statutory authority which required reimbursement to the VA appropriation. The claim was subsequently settled for $25,000 plus the care which had been billed but not paid. The agency was instructed to prepare the voucher for the total amount ($25,000 plus the cost of the

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care), with the setoff to be credited to the VA appropriation account and the balance paid to the claimant. 51 Comp. Gen. 180 (1971). See also B-138962, July 7, 1959. The cost of the care was viewed as a setoff of indebtedness because the claimant would have been liable for it but for its inclusion in the tort settlement.

b. Small Claims Act

Prior to the enactment of the Federal Tort Claims Act, Congress had provided limited settlement authority for tort claims in the Act of December 28, 1922, 42 Stat. 1066, known as the "Small Claims Act" or "Small Tort Claims Act." Now found at 31 U.S.C. § 3723, the statute authorizes civilian agencies to settle claims for loss or damage to privately owned property caused by the negligence of government employees acting within their scope of employment, which cannot be settled under the Federal Tort Claims Act. Claims under 31 U.S.C. § 3723 may not exceed $1,000, and must be filed within one year after they accrue.

For many years, the existence of the Small Claims Act was under a cloud. The repealer provision of the Federal Tort Claims Act (section 424, 60 Stat. 846–47), listed the 1922 statute as repealed, yet at the same time expressly preserved any settlement authority with respect to claims not cognizable under the new FTCA. See 26 Comp. Gen. 452, 455 (1947); 26 Comp. Gen. 149 (1946); 40 Op. Att'y Gen. 527 (1947). Due to an apparent misreading of the repealer language, the Small Claims Act was dropped from the United States Code upon enactment of the FTCA and not restored until the 1982 recodification of Title 31.

In any event, while the Small Claims Act was repealed to the extent of claims cognizable under the FTCA, it was not repealed to the extent it authorized settlement of claims not cognizable under the FTCA, and this is true even for the period it was missing from the U.S. Code. Therefore, 31 U.S.C. § 3723 remains as a vehicle for the administrative settlement of negligence claims not exceeding $1,000 which are not cognizable under the FTCA nor covered by any other statute. For example, it has been used to settle tort claims arising in foreign countries. B-120773, March 22, 1955; B-123479-O.M., June 21, 1955. It has also been used to settle claims resulting from the detention of goods or merchandise by customs officers which are specifically excluded from the FTCA by 28 U.S.C. § 2680(c). The Treasury Department has regulations on the application of the Small Claims Act to claims against that department. See 31 C.F.R. §§ 3.20–3.24.

The Small Claims Act is limited to property damage claims and does not include death or personal injury. 10 Comp. Gen. 175 (1930); 2 Comp. Gen.

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529, 531 (1923). Loss of use of the property is compensable. 39 Op. Att'y Gen. 122 (1937). Subrogation claims by insurers are cognizable. United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 376–78 (1949); 21 Comp. Gen. 341 (1941); 19 Comp. Gen. 503 (1939); 36 Op. Att'y Gen. 553 (1932).

One decision noted that the Small Claims Act had been used to settle certain property damage claims by government employees. 20 Comp. Gen. 339, 341 (1941). This would presumably still be true, at least to the extent the claims are not cognizable under the Military Personnel and Civilian Employees' Claims Act of 1964, discussed later in this chapter.

Agency appropriations cannot be used to pay awards under the Small Claims Act. Under the statute as originally enacted, a proposed award had to be certified to Congress as a legal claim and Congress had to make a specific appropriation to pay it. See, e.g., 4 Comp. Gen. 876 (1925). In 1978, 31 U.S.C. § 1304 was amended so that awards under the Small Claims Act are now payable, upon certification by GAO, from the permanent judgment appropriation. 31 U.S.C. §§ 1304(a)(3)(B), 3723(c). The award must be accepted in full settlement of the claim. 31 U.S.C. § 3723(c).

As with the Federal Tort Claims Act, when the government pays a claim under the Small Claims Act, it cannot recoup its payment from the employee whose negligence generated the claim. 40 Op. Att'y Gen. 38 (1941).

Claims under 31 U.S.C. § 3723 are settled by the cognizant agency and are beyond GAO's settlement jurisdiction. 3 Comp. Gen. 22, 24 (1923).

c. Tort Claims Arising in Foreign Countries

As noted previously, the Federal Tort Claims Act does not apply to "any claim arising in a foreign country." 28 U.S.C. § 2680(k). However, certain agencies have specific authority to settle tort claims arising in foreign countries. Agencies with such authority in the form of permanent legislation are the State Department (22 U.S.C. § 2669(f)), United States Information Agency (22 U.S.C. § 1474(5)), and the Department of Veterans Affairs (38 U.S.C. § 515(b)).

In addition, similar authority is sometimes found in appropriation acts. For example, the 1993 Department of Commerce Appropriations Act includes foreign tort settlement authority for the International Trade Administration, Export Administration, and United States Travel and

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Tourism Administration. Pub. L. No. 102-395, Title II, 106 Stat. 1828, 1851–53 (1992).

All of the "foreign tort" provisions cited above are worded similarly and authorize the payment of tort claims "in the manner authorized in the first paragraph of" 28 U.S.C. § 2672. GAO has construed this as authorizing payment of awards under the "foreign tort" statutes in the same manner as payment of "domestic torts" under 28 U.S.C. § 2672—awards of $2,500 or less are paid from agency appropriations and awards in excess of $2,500 are payable, upon certification by GAO, from the permanent judgment appropriation, 31 U.S.C. § 1304. B-199449-O.M., August 7, 1980.

Where "foreign tort" settlement authority derives from annual appropriation acts, its continuing existence will, of course, depend on its continuing inclusion in the appropriation acts. Id.

Awards payable from agency funds should be charged to appropriations current at the time of settlement. This follows from the decisions involving the Federal Tort Claims Act discussed previously. 38 Comp. Gen. 338 (1958); 27 Comp. Gen. 445 (1948); 27 Comp. Gen. 237 (1947).

In B-177331, December 14, 1972, a Veterans Administration employee in the Philippines paid a claim cognizable under 38 U.S.C. § 515(b) from personal funds and requested reimbursement. He made the payment to avoid detention by the Philippine police and to obtain release of a government vehicle which had been impounded. Since payment was made in an urgent and unforeseen emergency situation, and since the effectiveness of the release provision of 28 U.S.C. § 2672 was not involved, GAO agreed that the employee could be reimbursed. However, the general rule remains that reimbursement of a claim paid from personal funds is not authorized.

The reason for the specific reference in the various foreign tort statutes to the "first paragraph" of 28 U.S.C. § 2672 is not entirely clear, especially since the foreign tort statutes all mention "payment" and the first paragraph of 28 U.S.C. § 2672 has never addressed payment authorities or procedures. One possible reason might have been to make it clear that the authority conferred is limited to administrative settlement authority and does not include the right to sue. B-199449-O.M., August 7, 1980.

In sum, agencies with specific "foreign tort" settlement authority are not subject to the exclusion of 28 U.S.C. § 2680(k), at least to the extent of

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administrative settlement. Agencies which do not have such specific authority may still administratively settle negligence claims arising in foreign countries under authority of the Small Claims Act, 31 U.S.C. § 3723, but are subject to the limitations of that statute ($1,000 ceiling and property damage claims only).

One court has considered the State Department's responsibilities under 22 U.S.C. § 2669(f) and refused to impose procedural requirements beyond what was provided in departmental regulations. Tarpeh-Doe v. United States, 904 F.2d 719 (D.C. Cir. 1990), cert. denied, 498 U.S. 1083.

Finally, the military departments have authority to settle tort claims arising in foreign countries by virtue of the Foreign Claims Act, 10 U.S.C. § 2734, discussed in our next section.

d. Military Claims Act and Similar Statutes

The military departments have a variety of authorities, in addition to the Federal Tort Claims Act, for the settlement of tort claims in different contexts.

First is the Military Claims Act, 10 U.S.C. § 2733. It authorizes the military departments, and the Coast Guard, to settle claims for death, personal injury, or loss or damage to real or personal property caused by a member of the armed forces or a civilian employee of the department acting within his or her scope of employment, or otherwise incident to noncombat activities, which cannot be settled under the Federal Tort Claims Act or Foreign Claims Act. Id. §§ 2733(a), (b)(2). The reference to the Foreign Claims Act means that the Military Claims Act applies essentially to incidents occurring in the United States.

Claims must be presented within two years. Id. § 2733(b)(1). The statute does not apply to claims for death or personal injury of federal civilian or military personnel occurring incident to service. Id. § 2733(b)(3). Nor does it apply if there is any contributing fault or negligence on the part of the claimant except to the extent permitted under the law of the place where the incident occurred. Id. § 2733(b)(4).

Next is 10 U.S.C. § 2734, the Foreign Claims Act. It authorizes the military departments to settle claims arising in foreign countries for the death of or personal injury to any inhabitant of a foreign country, or for loss or damage to real or personal property of a foreign country or subdivision or inhabitant of foreign country. It applies to damage or injury incident to noncombat activities or caused by a member of the armed forces or

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civilian employee of a military department. Id. § 2734(a). The statute is intended to "promote and to maintain friendly relations through the prompt settlement of meritorious claims." Id. As with the Military Claims Act, there is a 2-year statute of limitations. Id. § 2734(b)(1). Subrogation claims are expressly precluded. Id. § 2734(a).

Chapter 163 of 10 U.S.C. includes three additional claim statutes:

- 10 U.S.C. § 2734a: authorizes payment or reimbursement under international agreements for damage caused in a foreign country by a member of the armed forces or civilian employee of the United States.
- 10 U.S.C. § 2734b: authorizes the settlement of claims arising out of the activities of armed forces or civilian employees of foreign countries in the United States under international agreements (such as the NATO Status of Forces Agreement).
- 10 U.S.C. § 2737: authorizes the military departments to settle and pay claims, if presented in writing within two years after accrual, for up to $1,000 for death, personal injury, or property damage caused by a civilian employee or member of the armed forces "incident to the use of a vehicle of the United States at any place, or any other property of the United States on a Government installation."

These statutes have several common elements. Settlement authority is discretionary. Aaskov v. Aldridge, 695 F. Supp. 595 (D.D.C. 1988) (addressing 10 U.S.C. § 2734). "Settle" is defined as "consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance." 10 U.S.C. § 2731. Settlement under each of the statutes is final and conclusive. Id. § 2735. Sections 2733, 2734, and 2737 authorize the issuance of implementing regulations. Advance payments not to exceed $100,000, even in advance of the submission of a claim, are authorized in situations covered by 10 U.S.C. § 2733 or 2734. Id. § 2736.

One final statute which belongs with this group is 32 U.S.C. § 715, the National Guard Claims Act. It is patterned after, and very similar to, the Military Claims Act, and covers the Army and Air National Guard. As with 10 U.S.C. § 2733, the National Guard Claims Act has a 2-year statute of limitations, applies only to claims which cannot be settled under the Federal Tort Claims Act, and settlements are final and conclusive. 32 U.S.C. §§ 715(b)(1), (b)(2), (g). The $100,000 advance payment authority applies. 10 U.S.C. § 2736(a)(2).

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GAO has no jurisdiction to settle claims under any of the statutes which are subject to the "final and conclusive" provisions of 10 U.S.C. § 2735 or 32 U.S.C. § 715(g). 41 Comp. Gen. 235 (1961); B-180082, March 1, 1974; B-113727, April 6, 1953. However, GAO may address the kinds of claims that are cognizable under those statutes. Thus, in 43 Comp. Gen. 711 (1964), the University of Mississippi filed a claim for damage resulting from the occupation of the university by federal troops under presidential order in the racial conflicts of the early 1960s. GAO saw no basis to consider the claim under the "implied contract of lease" theory proposed by the claimant, but noted that it didn't see why the claim could not be considered under the Military Claims Act as incident to the noncombat activities of the Army. See also 51 Comp. Gen. 125 (1971).

GAO has further noted that an agency's regulations under the Military Claims Act have the force and effect of law. 40 Comp. Gen. 691 (1961). An agency cannot be required to construe its regulations to permit cognizability in a given case. 41 Comp. Gen. 235 (1961).

Except for allegations of the violation of constitutional rights, the courts have generally held that determinations subject to the "final and conclusive" authority of 10 U.S.C. § 2735 are not subject to judicial review. Schneider v. United States, 27 F.3d 1327 (8th Cir. 1994); Hata v. United States, 23 F.3d 230 (9th Cir. 1994); Rodrigue v. United States, 968 F.2d 1430 (1st Cir. 1992); Poindexter v. United States, 777 F.2d 231 (5th Cir. 1985); Broadnax v. United States, 710 F.2d 865 (D.C. Cir. 1983); Labash v. U.S. Department of the Army, 668 F.2d 1153 (10th Cir. 1982), cert. denied, 456 U.S. 1008; MacCaskill v. United States, 834 F. Supp. 14 (D.D.C. 1993); Bryson v. United States, 463 F. Supp. 908 (E.D. Pa. 1978); Towry v. United States, 459 F. Supp. 101 (E.D. La. 1978), aff'd, 620 F.2d 568 (5th Cir. 1980), cert. denied, 449 U.S. 1078. The same result applies to 32 U.S.C. § 715(g). Rhodes v. United States, 760 F.2d 1180 (11th Cir. 1985). One district court case, Welch v. United States, 446 F. Supp. 75 (D. Conn. 1978), suggests a broader scope of judicial review, but it seems to stand alone, especially in light of the First Circuit's Rodrigue decision.

There is no authority to pay interest on a claim under the Military Claims Act. B-154102, June 16, 1964.

Claims under 10 U.S.C. §§ 2734a and 2734b are paid from the Operation and Maintenance appropriations of the department involved. Id. §§ 2732, 2734a(c), 2734b(d). Claims under 10 U.S.C. §§ 2733 and 2734 and 32 U.S.C. § 715 have their own payment structure. Claims not in excess of $100,000

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are paid directly by the agency concerned, presumably from Operation and Maintenance funds in accordance with 10 U.S.C. § 2732. Id. §§ 2733(a), 2734(a); 32 U.S.C. § 715(a). If a claim in excess of $100,000 is determined to be meritorious and otherwise cognizable under the particular statute, the agency pays the first $100,000 and submits the excess to GAO for payment under 31 U.S.C. § 1304. 10 U.S.C. §§ 2733(d) and 2734(d); 32 U.S.C. § 715(d); 31 U.S.C. § 1304(a)(3)(D). There is one exception to this payment structure. If a claim under 10 U.S.C. § 2734 is for damage caused by a civilian employee of the Department of Defense other than an employee of one of the military departments, the claim is payable from Defense Department Operation and Maintenance appropriations. Id. § 2734(h). GAO regards the $100,000 limit under these statutes as applicable to each individual claim and not to the aggregate payment resulting from a single incident. See B-249060.2, October 19, 1993, and B-249060, April 5, 1993 (non-decision letters).

Claims under the Military, Foreign, and National Guard Claims Acts submitted to GAO for payment under 31 U.S.C. § 1304 are subject to the requirements in the permanent appropriation that payment be certified by GAO and that the award be final. The concept of finality with respect to a National Guard Claims Act settlement was discussed in B-198029, May 19, 1980. The claim was for damage resulting when an Air National Guard plane crashed into a grain elevator in Montana, totally destroying the business. Some elements of damage could readily be determined with certainty, such as the expenses of removing debris and the destroyed inventory. Other elements, however, primarily the value of the building, would take much longer. In view of the hardship imposed on the claimant through no fault of his own, the Air Force requested payment of a partial settlement, to consist of those elements which had been determined with certainty and agreed upon, with the balance of the settlement to be submitted after the value of the building had been determined. GAO noted that the purpose of the finality requirement was to protect the government against loss by premature payment of an award or judgment which might later be modified upon review or appeal. However, there is no judicial review of a settlement under the National Guard Claims Act, nor is the settlement subject to review by any other administrative body. Therefore, since further review was unavailable, the claimant had signed a release covering the items of damage included in the partial settlement, and the award for each item was complete and final with respect to that item, GAO concluded that the partial settlement could be certified for payment. GAO cautioned that the decision would not be applicable in any situation which might ultimately come before a court, such as the Federal Tort Claims Act.

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e. Federal Employees Compensation Act

The Federal Employees Compensation Act (FECA), found at Title 5, United State Code, Chapter 81, provides a broad and comprehensive plan for the compensation of injured government employees. The Act is a federal worker's compensation law which provides compensation for disability and death and medical care for civilian employees of the United States who suffer injuries in the performance of their duties. 5 U.S.C. §§ 8102, 8103; 35 Comp. Gen. 646 (1956). Compensation is not available if the death or injury was caused by the employee's willful or intentional misconduct or proximately by the employee's intoxication. 5 U.S.C. § 8102(a).

In order to be entitled to compensation under FECA, the employee or someone on his or her behalf must file a claim in writing and on a form approved by the Secretary of Labor. Id. § 8121. There is a three-year statute of limitations but it does not apply if written notice of the injury or death was given to the immediate superior, or if the immediate superior had actual knowledge of the injury or death, within 30 days. Also, the Secretary of Labor may waive the time limitation in "exceptional circumstances." Id. § 8122. Assignment of a claim for compensation under FECA is void, and FECA compensation is exempt from claims of creditors. Id. § 8130.

FECA claims are paid from a fund in the United States Treasury known as the "Employees' Compensation Fund." Congress appropriates money to the Fund on the basis of appropriation requests made by each agency and instrumentality covered by FECA. Id. § 8147.

The responsibility for administering FECA and deciding all questions arising under it rests with the Secretary of Labor. Id. § 8145. Implementing regulations are found at 20 C.F.R. Part 10. The Secretary's action in allowing or denying a FECA claim is final and conclusive and not subject to review by any other official of the United States or by a court. 5 U.S.C. § 8128. Accordingly, GAO has no direct role in adjudicating FECA claims. B-172722, October 12, 1971; B-165874, February 10, 1969. However, GAO occasionally addresses certain ancillary areas, for example, the provision in 5 U.S.C. § 8116 that an employee while receiving FECA compensation may not receive any other salary or remuneration from the United States except "in return for service actually performed." See, e.g., 35 Comp. Gen. 646 (1956).

If it appears that the injury was caused by some third party and that the third party is legally liable, the Labor Department may require the beneficiary to assign any right of action against the third party to the

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United States, or may require the beneficiary to pursue the third-party claim. 5 U.S.C. § 8131(a). Whichever option the department chooses, a beneficiary who refuses will have his or her FECA claim denied. Id. § 8131(b).

A beneficiary who receives a third-party recovery may deduct the costs of suit and a reasonable attorney's fee, but must refund the balance to the government, for credit to the Employees' Compensation Fund. Id. § 8132. This applies regardless of whether the recovery represents medical expenses and lost wages or noneconomic losses like pain and suffering. United States v. Lorenzetti, 467 U.S. 167 (1984).

FECA is the exclusive remedy for injuries within its coverage and expressly takes precedence over other federal tort statutes. 5 U.S.C. § 8116(c). E.g., Woodruff v. U.S. Department of Labor, 954 F.2d 634 (11th Cir. 1992) (employee's car hit by military bus); Joyce v. United States, 474 F.2d 215 (3rd Cir. 1973) (postal employee hit on head by bar of soap dropped or thrown from restroom window on third floor of federal building.)

The relationship between FECA and the Federal Tort Claims Act may be illustrated with two court decisions. Suppose a federal employee, riding as a passenger in a vehicle being driven by a federal employee within the scope of his employment, is injured in a collision with another vehicle driven by another federal employee also within the scope of his employment. The injured employee alleges negligence by both drivers. If the injured person were a private party, he could proceed under the Federal Tort Claims Act. However, since he is a federal employee, his sole and exclusive remedy is compensation under FECA. Van Houten v. Ralls, 411 F.2d 940 (9th Cir. 1969), cert. denied, 396 U.S. 962 (identical fact situation).

The mere fact that the injured person is a federal employee does not automatically eliminate the Federal Tort Claims Act. In order for FECA to be the exclusive remedy, the employee must have been injured "while in the performance of his duty." 5 U.S.C. § 8102(a).[21] In Walker v. United States, 322 F. Supp. 769 (D. Alaska 1971), an employee was driving to visit a personal friend while on her lunch break. Her vehicle was struck by a government-owned and operated train while she was somewhat remote

[21]The Federal Tort Claims Act uses the term "scope of employment." The Military Claims Act and the Military Personnel and Civilian Employees' Claims Act of 1964 use the term "incident to service." FECA uses the term "performance of duty." The differences in terminology have caused some confusion since, while the concepts are obviously similar, the terms are not identical.

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from her actual place of employment although still within the confines of the Air Force base on which she worked. The court held that the injury did not occur while she was in the performance of official duties. Therefore she was not covered by FECA and could proceed under the Federal Tort Claims Act.

f. Inverse Condemnation: Tort vs. Taking

The term "inverse condemnation" refers to a claim for the taking of a property interest by the government for which just compensation is payable under the Fifth Amendment. E.g., United States v. Clarke, 445 U.S. 253, 257 (1980). It is called "inverse" because it is the property owner who files the claim or brings the lawsuit, whereas in a direct condemnation the government brings the action. Id. at 255.

The concept covers a wide range of actions. At one extreme, the government action may amount to a "de facto" exercise of the power of eminent domain, as in Althaus v. United States, 7 Cl. Ct. 688 (1985). At the other extreme is the so-called "regulatory taking," in which some government regulatory action or inaction is deemed a sufficient invasion of property rights as to constitute a compensable taking. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2892–95 (1992); Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986); United Nuclear Corp. v. United States, 912 F.2d 1432 (Fed. Cir. 1990). A variety is regulation through land use planning. The Supreme Court's approach to this is discussed in Dolan v. City of Tigard, 114 S. Ct. 2309 (1994). In between is a variety of situations, the test being whether "the government by its actions deprives the owner of all or most of his or her interest in the property." Poorbaugh v. United States, 27 Fed. Cl. 628, 632 (1993); Aris Gloves, Inc. v. United States, 420 F.2d 1386, 1391 (Ct. Cl. 1970).

There is no rule or formula for determining whether a taking has occurred; the determination depends on the particular circumstances of each case. Aris Gloves, 420 F.2d at 1391; Althaus, 7 Cl. Ct. at 693. The mere indication of ownership, such as the publication of a map inadvertently indicating government ownership of the claimant's land, does not amount to a taking. Poorbaugh, 27 Fed. Cl. at 632. Destruction of trees without the taking of the underlying land is also not a taking for Fifth Amendment purposes. Id. at 633.

The taking need not be a fee simple taking but may be the taking of an easement, such as an air easement. Aircraft flights which are sufficiently low, loud, and frequent may support inverse condemnation liability if the interference is permanent, or at least constructively permanent. Some of

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the cases are Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946); Batten v. United States, 306 F.2d 580 (10th Cir. 1962), cert. denied, 371 U.S. 955; Wilfong v. United States, 480 F.2d 1326 (Ct. Cl. 1973); Brown v. United States, 30 Fed. Cl. 23 (1993).

Inverse condemnation claims resulting from damage to land, as opposed to the "de facto eminent domain" cases, are conceptually related to tort claims in that the same kinds of government action may give rise to both. The distinction is based generally on the permanency of the damage. One of the more common situations is flood damage caused by government construction activities such as levee construction by the Corps of Engineers. In order for the damage to constitute an inverse condemnation, either the land must be permanently flooded or it must be subject to frequent and inevitably recurring overflows. Damage short of this is a tort. Turner v. United States, 17 Cl. Ct. 832, 835 (1989), rev'd on other grounds, 901 F.2d 1093 (Fed. Cir. 1990); B-190362, December 14, 1977; B-137765, December 19, 1958.

The tort vs. taking distinction is important because different remedies and procedures apply. See B-226619, July 2, 1987; B-127766, February 13, 1959. For example, if the case is a tort, the claimant must file an administrative claim before going to court; there is no similar requirement for inverse condemnations. Tort claims must go to a United States district court; inverse condemnation claims over $10,000 must go to the Court of Federal Claims. E.g., Myers v. United States, 323 F.2d 580 (9th Cir. 1963). It has also been suggested that the Military Claims Act might be an available remedy in appropriate cases. See B-215491, June 13, 1984; B-134854, January 29, 1958.

In addition, if the claim is viewed as a tort claim, any administrative consideration must be by the agency whose activities gave rise to the claim; GAO review is not available. On the other hand, an inverse condemnation claim is within GAO's claims settlement jurisdiction inasmuch as it is a monetary claim against the United States and there is no other statutory settlement procedure. B-139543-O.M., June 10, 1959. An example is 71 Comp. Gen. 60 (1991) (claim for flood damage caused by Corps of Engineers construction of hydroelectric plant denied because project was a legitimate exercise of government's dominant servitude over navigable waters under the Commerce Clause). An older example is B-22355, January 7, 1942 (damage to private property resulting from water wave caused by launching of Navy vessel not a compensable taking). Since the claims are within GAO's settlement jurisdiction, they are subject to the

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6-year statute of limitations of 31 U.S.C. § 3702(b). B-192917-O.M., March 6, 1980.

GAO's role in settling inverse condemnation claims is limited. GAO settles claims based on the written record, and inverse condemnation claims often involve issues which are not amenable to resolution in this manner. GAO has been able to settle taking claims where there is no disagreement as to amount. E.g., B-146291-O.M., August 3, 1961. In a case where the parties had not reached agreement, GAO authorized settlement in the amount determined by the agency. B-157405, August 30, 1965. In many cases, however, when faced with conflicts which could not be resolved from the written record, GAO has been forced to disallow the claims, leaving the claimants to their remedy in the courts. B-218982, November 1, 1985; B-162853, November 30, 1967; B-152725, February 19, 1964; B-136783, December 18, 1958.

Finally, although we have been talking mostly about real property, the Fifth Amendment is not limited to real property, and the inverse condemnation concept can apply to personal property as well. E.g., King v. United States, 427 F.2d 767 (Ct. Cl. 1970) (substantial and permanent interference with crops).

g. Military Personnel and Civilian Employees' Claims Act of 1964

The Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 3721, authorizes agencies to settle claims by government employees for loss or damage to personal property. Prior to the 1964 statute, similar authority had existed for the military departments, the immediate predecessor being the Military Personnel Claims Act of 1945 (59 Stat. 225), but no such authority existed for the civilian agencies. E.g., 45 Comp. Gen. 468 (1966); B-146256, August 16, 1961.[22] The 1964 enactment incorporated the existing authority and extended it to the civilian agencies.

The Act authorizes the President to prescribe uniform implementation policies, at least for the civilian agencies (31 U.S.C. § 3721(j)), but the authority has not been exercised. Thus, it is up to each department and agency to determine its own policies subject to the statutory criteria.

The Act applies to all federal agencies, but does not apply to nonappropriated fund activities or contractors. 31 U.S.C. §§ 101, 3721(a)(1).

[22]Legislation authorizing personal property claims by military personnel goes back to 1816 (3 Stat. 261). That statute was concerned primarily with dead horses, as were its successor versions into the early 20th century. See, e.g., 11 Comp. Dec. 364 (1905) (horse had to be killed after contracting "loathsome disease, dangerous alike to man and beast"); 3 Comp. Dec. 636 (1897) (horse "alleged to have died from constipation"). We won't comment further on that.

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Apart from the specified exclusions, GAO has liberally construed the Act as applicable to all branches of the government. For example, it applies to the Library of Congress. 44 Comp. Gen. 402 (1965); B-163125, February 12, 1968. It also applies to the judicial branch. B-155877, June 22, 1971.

"Settle" is defined as "consider, determine, adjust, and dispose of a claim by disallowance or by complete or partial allowance." 31 U.S.C. § 3721(a)(3). Denial of a claim therefore constitutes settlement. Macomber v. United States, 335 F. Supp. 197 (D.R.I. 1971). There is no mention of compromise.

An agency's settlement of a claim is "final and conclusive." 31 U.S.C. § 3721(k). Thus, GAO has no jurisdiction to settle claims under the Act except for claims by GAO employees, nor may it question an agency's settlement as long as it was made in accordance with the statutory criteria and applicable regulations. E.g., 62 Comp. Gen. 641, 642 (1983); 47 Comp. Gen. 316 (1967); B-219094, December 5, 1985; B-185513, March 24, 1976; B-185008, October 29, 1975. Also, judicial review is not available. Meade v. Federal Aviation Administration, 855 F. Supp. 619 (E.D.N.Y. 1994); Macomber, 335 F. Supp. at 199; Merrifield v. United States, 14 Cl. Ct. 180 (1988).

Another consequence of the "final and conclusive" authority is that a certifying officer will not be held liable for an erroneous determination by an agency claims officer. B-187913, February 9, 1977; B-185497, August 6, 1976. However, a certifying officer (or disbursing officer, as the case may be) who suspects fraud is not expected to don blinders and pay the claim anyway, but rather has a duty to inquire further. B-192978, February 28, 1979.

It has been said that payment of a claim under the Act "is not a matter of right but of grace resting in administrative discretion." 62 Comp. Gen. 641, 642 (1983), quoting B-144926, February 23, 1961 (statement originally made in context of military predecessor of 1964 statute). Within the limits of cognizability (e.g., claimant must be a government employee, loss or damage must be to personal property, etc.), each agency is free to determine what claims it will or will not consider. There are limits, however, in the sense that an agency must actually exercise its discretion and cannot merely refuse to consider all claims. 62 Comp. Gen. 641 (1983). Thus, if GAO advises an agency that it may consider claims of a particular type, this does not mean that the agency must consider them. The decision either way is within the agency's discretion. Stating this from the

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claimant's perspective, unless the agency has limited its discretion in its regulations, an employee does not have the right to have a particular claim paid; he or she, however, does have the right to submit a claim and to have the agency respond to it. Of course, the agency must exercise its discretion fairly and consistently.

The authority and limitations of the statute may be described in the form of nine elements which must be present for an agency to settle a claim and to have that settlement entitled to "final and conclusive" status. These elements, which in effect comprise a checklist of the statutory requirements, are listed separately below.

1. The claimant must be a member of the uniformed services or a civilian officer or employee. 31 U.S.C. § 3721(b). A claim by anyone else may not be considered. Thus, the Comptroller General held that the Federal Aviation Agency "community club" in Guam, the property of which was either donated by club members or purchased with club funds, was not a proper claimant and that its claim was therefore not cognizable under the Act. B-190106, March 6, 1978.

The Vice President of the United States is an "officer of the United States" for purposes of the statute. B-202683, December 9, 1981.

2. The claim must be for damage to or loss of personal property. 31 U.S.C. § 3721(b). The Act does not cover damage to real property. B-197240-O.M., March 17, 1980.[23] Within the universe of personal property, it generally applies to tangible property but not to intangible property such as the loss of a nonrefundable airline ticket when the employee is called back to duty. B-244256, June 14, 1991 (non-decision letter). It does cover lost or stolen cash, such as money representing an advance payment of per diem for temporary duty, if and to the extent permitted by agency regulations. B-208639, October 5, 1982; B-197927, September 12, 1980; B-190125, December 28, 1977. For example, where several Navy members gave their paychecks to an enlisted member to get them cashed and the enlisted member was robbed at gunpoint, the loss was viewed as a loss of personal property cognizable under section 3721. B-185008, October 29, 1975.

The Act does not require that claims be filed only by the owner of the property. Thus, an employee who has borrowed property may file a claim

[23]For purposes of guidance, we have included several internal "Office Memoranda" addressing claims by GAO employees, to illustrate some of the things GAO considers permissible or not permissible under the Act.

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under appropriate circumstances, generally where he or she has reimbursed the owner for the loss. B-192088-O.M., May 28, 1980.

The claimant does not have to show that the loss or damage was caused by someone else's negligence, or indeed even be able to explain how it occurred. All the claimant needs to establish is that the loss or damage occurred and, if questioned by the agency, that there was no contributing fault attributable to the claimant. Anton v. Greyhound Van Lines, 591 F.2d 103, 109 (1st Cir. 1978); B-208627, September 16, 1983.

3. Maximum settlement authority is $40,000. 31 U.S.C. § 3721(b). Of course, the loss may have been much greater, but a maximum of $40,000 is recoverable from the government.[24] The claim may be paid in money or the property replaced in kind, presumably at the agency's discretion. Id. The monetary ceiling in 31 U.S.C. § 3721(b) was intended to provide equal treatment and a uniform level of benefits for all covered employees. Thus, a provision in the Foreign Assistance Act of 1961 authorizing the use of funds without regard to laws and regulations governing the obligation and expenditure of United States funds as necessary to accomplish the Act's purposes does not authorize settlement in excess of the $40,000 limit. B-246211.2, December 7, 1992.

If household goods are lost or destroyed in transit incident to a change of duty station, and it is necessary for the employee to ship replacement items, the cost of shipping the replacement items was at one time regarded as an allowable component of a section 3721 claim. In 68 Comp. Gen. 143 (1988), GAO advised that the cost of shipping the replacement items can be borne by the government wholly independent of 31 U.S.C. § 3721 and its monetary limit. 68 Comp. Gen. 143 (1988).

The statute does not require that payments received from another source, such as an insurance company, be applied against the $40,000. However, a claimant should not recover twice for the same loss. Thus, the more common approach, which GAO views as consistent with the legislative history, is to deduct third-party recoveries from the statutory limit when the loss does not exceed that limit. If the loss exceeds the $40,000 limit, third-party recoveries should be applied against the dollar amount of the loss, with the $40,000 ceiling then relating to the balance. B-91607-O.M., August 1, 1974. Thus, a claimant with a $10,000 loss who receives $10,000 in insurance payments should be entitled to claim nothing. A claimant with

[24]The original ceiling was $6,500. It reached its present level in stages. It was raised to $40,000 by Pub. L. No. 100-565, 102 Stat. 2833 (1988).

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a $50,000 loss who receives $10,000 in insurance payments, however, would still be able to file a claim for up to the $40,000 limit.

For claims involving possible third-party liability (carrier, insurer, etc.), the agency has a choice. It can require the employee/claimant to first pursue any third-party recoveries before filing a claim with the agency, or it can accept a claim for the full amount up to the monetary ceiling. 61 Comp. Gen. 537 (1982). The choice is discretionary with the agency, but the agency should declare its policy in its regulations and apply that policy consistently. Id. at 540. If the agency chooses the latter policy—that is, if it is willing to consider claims without requiring the employee to first pursue any third-party recoveries—settlement with the employee operates as an assignment of the third-party claim to the government. Id. at 537–38; 53 Comp. Gen. 61 (1973).

If the agency then recovers from the liable third party, the recovery does not have to be deposited in the Treasury as miscellaneous receipts, but may be retained by the agency for credit to the appropriation used to pay the original claim. 61 Comp. Gen. 537 (1982); B-208627, September 16, 1983.

4. The loss or damage must be "incident to service". 31 U.S.C. § 3721(b). The decisions have frequently pointed out that neither the Act nor its legislative history defines the term "incident to service." E.g., B-187913, February 9, 1977; B-185513, March 24, 1976; B-169236, April 21, 1970. One court has stated that the loss must bear some substantial relation to the claimant's service or employment. Fidelity-Phenix Fire Ins. Co. v. United States, 111 F. Supp. 899 (N.D. Cal. 1953), aff'd sub nom. Preferred Ins. Co. v. United States, 222 F.2d 942 (9th Cir. 1955), cert. denied, 350 U.S. 837. The phrase is somewhat analogous to "scope of employment" in the Federal Tort Claims Act but the exact relationship has not been definitively established.

While there is no definition as such, a review of legislative materials is instructive in identifying situations Congress thought it was covering. For example, the report of the House Judiciary Committee on the bill to increase the ceiling to $40,000 contains the following statement:

"The Committee is also informed that most major losses of property by military and civilian personnel occur through no fault of the individual, but arise from fires in on-base military quarters, fires in warehouses where goods are being stored at government expense,

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destruction of moving vans transporting goods during permanent change-of-station moves, and losses at sea."

H.R. Rep. No. 1037, 100th Cong., 2d Sess. 2 (1988), reprinted in 1988 U.S. Code Cong. & Admin. News 3678, 3679. The Federal Aviation Administration, which recommended the 1964 legislation, gave several examples in its letter to Congress transmitting the draft bill: typhoons on Wake Island and Guam; loss of personal belongings when employees were forced to evacuate from an aircraft while on government business; theft of employee-owned hand tools stored in government buildings; fire at government buildings. S. Rep. No. 1423, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S. Code Cong. & Admin. News 3407, 3415–16.

Legislation in 1980 specifically added loss or damage (1) incident to an evacuation of United States personnel in response to political unrest or hostile acts, and (2) resulting from acts of mob violence, terrorist attacks, or other hostile acts directed against the United States Government or its personnel. Pub. L. No. 96-519, 94 Stat. 3031 (1980). The 1988 amendments deleted the detail as redundant; the situations are now covered by the general provisions of section 3721(b). H.R. Rep. No. 1037 at 7, 1988 U.S. Code Cong. & Admin. News at 3684.

Some of the more common situations embraced within the term "incident to service" are listed below. It must be emphasized that the extent to which these situations—or any others—are covered by a given agency will depend on that agency's regulations.

- Loss of or damage to household goods or other personal property while in shipment incident to a transfer of official duty station. 62 Comp. Gen. 641, 645 (1983); B-155619, January 18, 1965; B-181483-O.M., July 30, 1974. This may include motor vehicles. B-190652-O.M., December 15, 1977.
- Loss or damage incident to authorized nontemporary storage. 44 Comp. Gen. 290, 292 (1964); B-178243, May 1, 1973; B-180778-O.M., April 17, 1974. The claimant's failure to insure the property does not require disallowance. B-163125, February 12, 1968.
- Loss or damage to a privately-owned motor vehicle while being used for official business other than ordinary commuting. B-185513, March 24, 1976; B-174669, February 8, 1972; B-187262-O.M., January 25, 1977.

If the employee received a mileage allowance under 5 U.S.C. § 5704, no reimbursement may be claimed under that provision since the mileage allowance is a commutation of all operating expenses except for the items

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specified in section 5704. 15 Comp. Gen. 735 (1936). However, this does not preclude consideration of a claim under 31 U.S.C. § 3721. B-185513, March 24, 1976; B-174669, February 8, 1972; B-190853-O.M., November 6, 1979.

Also, as noted above, ordinary home-to-work commuting, including parking incident thereto, is not "incident to service." B-199074-O.M., February 23, 1981. In B-180994, June 12, 1974, the Comptroller General expressed doubt that an agency could properly consider a claim for a bicycle stolen from a federally-leased garage. The bicycle was used for commuting to and from work and the parking facility was provided for the convenience of the employees. GAO recognized an exception in B-241443, March 14, 1991, for theft from a car parked in government-furnished space where the employee's duties required her to use her own car when a government vehicle was not available.

Other situations which GAO has advised might properly be considered "incident to service" are:

- Suitcase damaged by airline while employee was traveling at government expense to attend training session. B-187913, February 9, 1977.
- U-Haul trailer stolen from motel garage incident to transfer of duty station where agency had approved use of trailer. B-180161, January 8, 1974.
- Claim for residential fumigation and related costs upon discovery that household goods had been damaged by termites while in storage. B-173369-O.M., June 22, 1977.
- Loss or damage during inactive training duty by members of the Army and Air Force National Guard. 40 Comp. Gen. 31 (1960).
- Loss or damage to employee-owned hand tools used on the job voluntarily or under a union agreement. 65 Comp. Gen. 790 (1986); B-206183-O.M., July 6, 1982.

As we have indicated, agencies have considerable discretion to determine, and announce in their regulations, what types of claims they will or will not consider. This being the case—that is, if an agency can decide to completely exclude some particular type of claim—it follows that the agency can set monetary limits on what it will allow. For example, an agency should be able to decide that it will consider claims for stolen cash but only up to some specified limit, or motor vehicle claims up to a specified amount.

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5. The claim must be "substantiated". 31 U.S.C. § 3721(f)(1). The degree of evidence necessary to satisfy this requirement is up to the agency. Thus, GAO denied a claim by one of its own employees for sterling silver flatware lost in shipment where the flatware was not listed on the shipper's inventory and there was no other documentary evidence to substantiate that the flatware was in fact included in the shipment. B-201703-O.M., June 8, 1981.

If an agency suspects fraud or misrepresentation, in addition to pursuing other appropriate actions, the agency must decide how much of the claim should be denied. Thus, GAO found in B-192978, February 28, 1979, that it was within an agency's discretion under the statute to treat each item claimed as a separate claim for adjudication purposes.

6. The agency must determine that possession of the property was "reasonable or useful under the circumstances." 31 U.S.C. § 3721(f)(2). This determination is up to the agency and GAO will not question it. See 58 Comp. Gen. 291, 293 (1979) (use of privately-owned vehicle when government vehicles were apparently available); B-195295, November 14, 1979 (transporting liquor on Coast Guard aircraft).

7. A claim must be presented within two years after it accrues. The period of limitation may be tolled during time of war or armed conflict. 31 U.S.C. § 3721(g). Standard concepts of accrual used under other statutes of limitation apply to this one as well.

8. A claim for loss or damage occurring at "quarters" occupied by the claimant within the 50 states or the District of Columbia is cognizable only if the quarters were "assigned or provided in kind" by the government. 31 U.S.C. § 3721(e). This limitation does not apply to quarters outside of the 50 states or the District of Columbia.

Claims by military personnel for damage occurring in government-owned quarters occupied on a rental basis have been held not excluded under this provision. Fidelity-Phenix Fire Ins. Co. v. United States, cited above; B-142446-O.M., June 3, 1960. Similarly, government-owned rental housing at a remote ranger station in a national forest can be regarded as "assigned" for purposes of 31 U.S.C. § 3721. 64 Comp. Gen. 93 (1984).

Loss occurring in a rental trailer in a private trailer court is not cognizable. 52 Comp. Gen. 487 (1973). However, the Fidelity-Phenix court held that a trailer park on an Air Force base, regulated and maintained by the base, on

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which lots were assigned to specific trailers on a rental basis, constitutes "assigned" quarters.

Note that the exclusion does not say "in" quarters; it says "at" quarters. Thus, the loss or damage does not have to occur within the four walls of a house for the exclusion to apply. GAO has advised one of its own employees that the theft of property from a car parked in the employee's driveway adjacent to his home occurred "at quarters" within the meaning of this provision. B-234189, January 13, 1989

9. The loss must not have been caused in whole or in part by negligent or wrongful conduct attributable to the claimant or the claimant's agent or employee. 31 U.S.C. § 3721(f)(3). Thus, a determination of negligence for purposes of the Federal Tort Claims Act precludes a determination of non-negligence for the same incident under 31 U.S.C. § 3721. 58 Comp. Gen. 291 (1979); B-187844-O.M., July 7, 1977.

If property is shipped using the "commuted rate" method authorized by 5 U.S.C. § 5724(c) in lieu of the "actual expense" method, the carrier is the agent of the employee and a claim for loss or damage attributable to the carrier's negligence is not cognizable under 31 U.S.C. § 3721. B-153031, January 28, 1964; B-91607-O.M., March 12, 1973; B-155208-O.M., November 13, 1964. Under the "actual expense" method, the carrier is deemed the agent of the government. E.g., B-190652-O.M., December 15, 1977.

To sum up, 31 U.S.C. § 3721 gives federal agencies the authority and the discretion to pay up to $40,000 on a claim by a federal employee, civilian or military, for loss or damage to personal property incurred incident to service, provided the claim is filed within 2 years after accrual, the claimant is free from contributing fault or negligence, and a few other conditions are met.

Most claims under 31 U.S.C. § 3721 are filed and pursued without the need to retain counsel. If the claimant does hire a lawyer, the law establishes a maximum fee of 10 percent of the amount paid in settlement of the claim. Charging a fee in excess of this amount can earn a fine of up to $1,000. 31 U.S.C. § 3721(i).

Claims under 31 U.S.C. § 3721 are payable from the regular operating appropriations of the settling agency. B-143673, November 11, 1976, overruled on other grounds by 56 Comp. Gen. 615 (1977); B-206856,

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April 7, 1982 (non-decision letter). As to which fiscal year to charge, the principle is the same as under the Federal Tort Claims Act:

"Where . . . there is no obligation on the part of the United States for the payment of any amount on a claim until a final determination of the Government's liability is made by the person authorized to do so thereunder, the appropriation current at the time such final action is taken is the appropriation obligated for and chargeable with the payment of the amount of the adjudicated claim. [Citations omitted.]"

B-174762, January 24, 1972.

2. Contract and Quasi-Contract

a. Contract Disputes Act

In 1969, Congress created the Commission on Government Procurement to study all aspects of federal procurement and to recommend improvements, legislative and administrative, to promote economy and efficiency. Pub. L. No. 91-129, 83 Stat. 269. The Commission issued its final report in 1972. One outgrowth of the Commission's recommendations was the enactment of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601–613. The CDA is intended "to provide for a fair and balanced system of administrative and judicial procedures for the settlement of claims and disputes relating to Government contracts." H.R. Rep. No. 1556, 95th Cong., 2d Sess. 5 (1978).

The CDA applies to certain contracts of "executive agencies." The statute defines "executive agency" as including (a) cabinet-level departments listed in 5 U.S.C. § 101, (b) military departments as listed in 5 U.S.C. § 102, (c) independent establishments of the executive branch as defined in 5 U.S.C. § 104(1), (d) wholly owned government corporations as listed in the Government Corporation Control Act, 31 U.S.C. § 9101(3), and (e) the United States Postal Service and Postal Rate Commission. 41 U.S.C. § 601(2). This is a precise definition. A given entity is either included in one of these groupings or it is not. Thus, for example, the CDA does not apply to the Government Printing Office. Tatelbaum v. United States, 749 F.2d 729 (Fed. Cir. 1984). Nor does it apply to the judiciary. Erwin v. United States, 19 Cl. Ct. 47 (1989).

The statute also defines the types of contracts to which it applies—any express or implied contract (including certain nonappropriated fund contracts) for "(1) the procurement of property, other than real property

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in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair or maintenance of real property; or (4) the disposal of personal property." 41 U.S.C. § 602(a). Under this definition, the CDA has been held applicable to a lease of real property. Forman v. United States, 767 F.2d 875 (Fed. Cir. 1985); United States v. Black Hawk Masonic Temple Ass'n, 798 F. Supp. 646 (D. Colo. 1992). However, a contest sponsored by the American Battle Monuments Commission to design a memorial to honor Korean War veterans, although a form of contract, is not a "procurement" for CDA purposes. Lucas v. United States, 25 Cl. Ct. 298 (1992). Also, the CDA does not apply when the government is providing a service. Cedar Chemical Corp. v. United States, 18 Cl. Ct. 25 (1989); Rider v. United States, 7 Cl. Ct. 770 (1985), aff'd mem., 790 F.2d 91 (Fed. Cir. 1986).

As discussed later in our section on quantum meruit claims, an implied contract under 41 U.S.C. § 602(a) means a contract implied-in-fact but not a contract implied-in-law because the latter is not really a contract at all. One type of implied-in-fact contract not covered by the CDA is the implied contract to treat all bids fairly and honestly. Coastal Corp. v. United States, 713 F.2d 728 (Fed. Cir. 1983). Noting that the CDA "does not cover all government contracts," the court went on to say, id. at 730:

"Congress explicitly specified the types of contract that it intended the Act to cover. An implied contract to treat bids fairly and honestly is not one of them."

Once the threshold issues of applicability have been met, the first step in the CDA process is the first sentence of 41 U.S.C. § 605(a):

"All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision."

This sentence includes several points: there must be a "claim," the claim must be by a "contractor," the claim by the contractor must "relate to" an express or implied-in-fact contract, etc.

The statute itself does not define the term "claim." The Federal Acquisition Regulation (FAR) includes the following definition:

"[A] written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. . . . A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a

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claim. The submission may be converted to a claim . . . if it is disputed either as to liability or amount or is not acted upon in a reasonable time."

48 C.F.R. § 33.201. Thus, for the most part, a claim for CDA purposes requires dispute or disagreement. E.g., Santa Fe Engineers, Inc. v. Garrett, 991 F.2d 1579 (Fed. Cir. 1993); Dawco Construction, Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991); CPT Corp. v. United States, 25 Cl. Ct. 451 (1992); Essex Electro Engineers, Inc. v. United States, 22 Cl. Ct. 757 (1991), aff'd, 960 F.2d 1576 (Fed. Cir. 1992), cert. denied, 113 S. Ct. 408.[25] As one GAO decision stated:

"While in its broadest sense, 'claim' could be read to include such routine matters as progress payment requests, price proposals on formal changes and even invoices, the context of the Act itself clearly indicates that 'claim' as used in the Act is intended to refer to situations where the entitlement to recovery or the amount of recovery is disputed by the Government."

59 Comp. Gen. 232, 233 (1980).

The claim must be by a "contractor," which the CDA defines as "a party to a Government contract other than the Government." 41 U.S.C. § 601(4). That narrows it down. This preserves the traditional requirement of "privity of contract" (i.e., a direct contractual relationship). Thomas Funding Corp. v. United States, 15 Cl. Ct. 495, 501 (1988). Accordingly, an assignee under the Assignment of Claims Act is not a "contractor" and cannot assert a claim under the CDA. Id. Nor is a subcontractor. 62 Comp. Gen. 633 (1983). Nor a bidder. Straga v. United States, 8 Cl. Ct. 61 (1985).

For claims greater than $100,000, the contractor must certify that the claim is being made in good faith and that it is accurate and complete to the best of his knowledge and belief. 41 U.S.C. § 605(c)(1), as amended by Pub. L. No. 103-355, § 2351(b) (1994). A defective certification is not a jurisdictional bar to a court or board of contract appeals, but it must be corrected before entry of a final judgment or award. Id. § 605(c)(6).

The claim must be submitted to the "contracting officer," defined in 41 U.S.C. § 601(3) as "any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer

[25]Some of the cases, Santa Fe and Essex Electro, for example, have used the term "impasse." One authority argues that a dispute should be enough without requiring that the parties reach an "impasse." John Cibinic, "No Dispute—No Claim: The Impasse Requirement," 7 Nash & Cibinic Report ¶ 40 (July 1993).

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contracts and make determinations and findings with respect thereto." The contractor should normally know precisely who this is because it is the contracting officer who signs the contract for the government and his or her name and title are required to be "typed, stamped, or printed on the contract." FAR, 48 C.F.R. § 4.101(a). Life is not always this simple, of course. One court has held the CDA applicable to transportation services contracts.[26] Since there was no designated contracting officer, claims filed by an airline in bankruptcy with the General Services Administration and Justice Department lawyers representing the government were held to satisfy the statute. In re Frontier Airlines, Inc., 146 B.R. 574 (D. Colo. 1992).

The contracting officer must render a written decision on the claim. 41 U.S.C. § 605(a). The decision must state the reasons for the result reached, and must be issued within a "reasonable time" and in accordance with any applicable agency regulations. Id. §§ 605(a), 605(c)(3). For claims under $100,000, if the contractor asks that a decision be issued within 60 days, the contracting officer must comply, the 60 days running from the receipt of the request. For claims over $100,000, the contracting officer must, within 60 days from receipt of a certified claim, either issue a decision or notify the contractor when to expect it. Id. §§ 605(c)(1), (c)(2), as amended by Pub. L. No. 103-355, § 2351(b) (1994). Failure to issue a decision by a specified deadline is regarded as a denial of the claim. Id. § 605(c)(5). Other requirements for the contracting officer's decision are in the FAR, 48 C.F.R. § 33.211.

The first sentence of 41 U.S.C. § 605(b) provides:

"The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter."

This provision, in conjunction with the mandatory language of section 605(a) (all claims shall be submitted to contracting officer), makes the CDA the exclusive remedy for claims within its scope. Therefore, claims to which the CDA applies are not within GAO's claims settlement jurisdiction, and GAO will not consider them. 64 Comp. Gen. 330 (1985) (mistake in bid claims alleged after award); 63 Comp. Gen. 338 (1984) (claim alleging improperly taken prompt payment discount); 61 Comp. Gen. 114 (1981) (claim for improper cancellation); B-212984, February 3, 1984.

[26]GAO reached a different conclusion in 62 Comp. Gen. 203 (1983).

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While GAO will not address the merits of a CDA claim, it can and will continue to address threshold or ancillary issues. For example, in 63 Comp. Gen. 338 (1984), the Commerce Department, the contracting agency, deducted the amount of a prompt payment discount, but a malfunction in the Treasury Department's check-issuing equipment caused the check to arrive too late. When the contractor then claimed the amount of the improperly taken discount, Commerce argued that the delay was attributable to Treasury. True as this may have been, the contractor had a contractual relationship ("privity") with Commerce, not Treasury, so Commerce was the proper agency against which to assert the claim.

If the contracting officer renders a decision adverse to the contractor, the contractor has two avenues of appeal. The contractor may, within 12 months from receipt of the decision, appeal directly to the Court of Federal Claims (except that actions against the Tennessee Valley Authority must be brought in a United States district court). 41 U.S.C. § 609(a). Alternatively, and this is the preferred and far more common method, the contractor may, within 90 days from receipt of the decision, appeal to the appropriate board of contract appeals. Id. § 606.[27]

The concept of an administrative board of contract appeals apparently originated shortly after the Civil War, although they did not become commonplace until the World War II period.[28] Thus, the CDA did not create the boards of contract appeals. What it did was, for the first time, give them a statutory foundation. It also eliminated the longstanding jurisdictional distinction between claims "under the contract" and breach claims, giving the boards jurisdiction over both. See Z.A.N. Co. v. United States, 6 Cl. Ct. 298, 303 (1984).

The CDA authorizes the establishment of a board of contract appeals within an executive agency if justified by the work load.[29] 41 U.S.C. § 607(a)(1).

[27]Prior to 1994, the CDA did not provide a limitation period on filing a claim with the contracting officer. Farmers Grain Co. v. United States, 29 Fed. Cl. 684, 687 (1993); Board of Governors of the University of North Carolina v. United States, 10 Cl. Ct. 27, 30 (1986); B-219337, December 30, 1985. Notwithstanding, it was possible to find a claim barred under the doctrine of laches (unreasonable and unexcused delay which prejudices another party). LaCoste v. United States, 9 Cl. Ct. 313 (1986). In 1994, Congress amended 41 U.S.C. § 605(a) to require that claims be submitted to the contracting officer within 6 years after accrual. Pub. L. No. 103-355, § 2351(a).

[28]4 Report of the Commission on Government Procurement 14 (1972).

[29]The number of boards has varied from time to time. As of 1994, there were 12 major boards: Agriculture, Armed Services (the biggest, of course), Corps of Engineers, Energy, General Services Administration, Housing and Urban Development, Interior, Labor, NASA, Postal Service, Transportation, and Veterans Affairs. In addition, the Tennessee Valley Authority has its own board because it is explicitly authorized by 41 U.S.C. § 607(a)(2).

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Upon appeal by a contractor, the board of contract appeals must issue a written decision and may grant any relief that would be available to a litigant asserting a contract claim in the Court of Federal Claims. Id. §§ 607(d), (e). Board rules must provide procedures for the expedited and nonprecedential disposition, at the contractor's sole election, of "small claims" of $50,000 or less. Id. § 608, as amended by Pub. L. No. 103-355, § 2351(d) (1994).

Either the contractor or the agency may seek judicial review of a board decision in the Court of Appeals for the Federal Circuit,[30] except that there is no appeal from a determination under the "small claims" procedure unless fraud is involved. Appeal by the agency requires the prior approval of the Attorney General. Except for appeal to the Federal Circuit, a board decision is final. Id. §§ 607(g), 608(d).

Payment of CDA claims is governed by 41 U.S.C. § 612. The Commission on Government Procurement had recommended that contract claims be paid from the appropriations of the contracting agency to the extent feasible. There were two reasons for this. First, prior to the CDA, board awards were paid directly by the agency whereas court judgments were paid from the permanent judgment appropriation established by 31 U.S.C. § 1304 without any form of charge-back to the agency. Under this system, it actually paid agencies to resist settlement and force the case to court. Second, charging agency appropriations would more accurately reflect the "true economic costs" of the agency's procurement activities. 4 Report of the Commission on Government Procurement 29–30 (1972). These considerations formed the backdrop of what became the CDA's payment provision.

Subsection (a) of 41 U.S.C. § 612 provides:

"Any judgment against the United States on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of Title 31."

There is nothing new here; subsection (a) merely states what the law was prior to the CDA.

Subsection (b) provides:

"Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) of this section."

[30]Note the distinction. A contractor electing to go directly to court from the contracting officer's decision goes to the Court of Federal Claims, with the usual right of appeal to the Court of Appeals for the Federal Circuit. Appeals from a board decision go directly to the Federal Circuit.

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This was new. Board of contract appeals awards had never before been payable from the judgment appropriation. Without more, however, this would have stood the Procurement Commission's recommendation on its head by virtually assuring that claims would almost never end at the contracting officer's level.

Subsection (c) provides:

"Payments made pursuant to subsections (a) and (b) of this section shall be reimbursed to the fund provided by section 1304 of Title 31 by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes."

Thus, subsections (a) and (b) assure prompt payment to the successful claimant; subsection (c) implements the Procurement Commission's recommendation.

Since payment of board awards is to be made "in accordance with the procedures provided by" 31 U.S.C. § 1304, the requirements relating to judgments discussed in Chapter 14 will be generally applicable. In view of the CDA's reimbursement requirement, the provision in 31 U.S.C. § 1304 that payment be "not otherwise provided for" will generally not be an issue in Contract Disputes Act payments. However, payment may be made only upon certification by the Comptroller General, and the award or judgment must be "final." Since the CDA authorizes the Court of Federal Claims to enter partial judgments (41 U.S.C. § 609(e)), and authorizes a board to grant the same relief available from the Court of Federal Claims (id. § 607(d)), it is possible to have two or more partial judgments or awards in the same case, a result that is normally not permissible under 31 U.S.C. § 1304. Thus, in one case, the principal portion of a board award was held payable notwithstanding that an appeal had been taken on the interest award. 60 Comp. Gen. 573 (1981).

Generally, a prerequisite for payment will be the certification by both parties that no further review will be sought. This tells GAO that the award or judgment is final and therefore ready for payment. There are no uniform procedures for obtaining payment of board awards although a system has evolved informally under which the board's clerk or recorder gathers the necessary documentation from both parties and submits the package to GAO.

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Note that 41 U.S.C. § 612(b) refers to "monetary awards" by boards of contract appeals. There is no provision for payment if the parties reach a settlement while the case is still pending before a board. Of course, the agency can simply pay just as it would pay an award by the contracting officer. If the agency is faced with insufficient funds, however, it can take advantage of section 612(b) by consenting to the entry of an award by the board based on the settlement. E.g., Casson Construction Co., GSBCA No. 7276, 84-1 BCA ¶ 17,010 (1983). See also Bath Iron Works Corp. v. United States, 20 F.3d 1567, 1583 (Fed. Cir. 1994) (one purpose of CDA's payment scheme was to permit payment without regard to adequacy of contracting agency's appropriations). No harm is done because the reimbursement requirement of section 612(c) will apply in all cases.

Reimbursement under 41 U.S.C. § 612(c) is chargeable to appropriations available for the agency's procurement activities current at the time of the award or judgment. 63 Comp. Gen. 308 (1984). If the agency has insufficient funds available for reimbursement, the statute permits it to seek additional appropriations. This does not require a specific, line-item appropriation, but can be satisfied from subsequent lump-sum appropriations available for the agency's procurement. Id. at 312. This is a common-sense proposition. If it were not the case, an agency could avoid reimbursement simply by never making the request.

While reimbursement is a statutory requirement, the statute does not require that it occur within any specified time. The agency has some discretion in the matter. How much discretion is addressed in the following excerpt from B-217990.25-O.M., October 30, 1987:

> "It is clear that Congress wanted the ultimate accountability to fall on the procuring agency, but we do not think the statute requires the agency to disrupt ongoing programs or activities in order to find the money. If this were not the case, Congress could just as easily have directed the agencies to pay the judgments and awards directly. Clearly, an agency does not violate the statute if it does not make the reimbursement in the same fiscal year that the award is paid. Similarly, an agency may not be in a position to reimburse in the following fiscal year without disrupting other activities, since the agency's budget for that fiscal year is set well in advance. In our opinion, the earliest time an agency can be said to be in violation of 41 U.S.C. § 612(c) is the beginning of the second fiscal year following the fiscal year in which the award is paid."

b. Unauthorized Commitments/Contracts Implied-in-Law

Justice Holmes once wrote, "Men must turn square corners when they deal with the Government." Rock Island, Arkansas & Louisiana R.R. Co. v. United States, 254 U.S. 141, 143 (1920). What he meant, of course, is that

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private citizens dealing with the government who do not follow applicable laws do so at their own risk. Some years later, speaking through Justice Frankfurter, the Court endorsed this statement, explaining that it "does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury." Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 385 (1947). From the perspective of government contracting, the Court stated the point as follows:

"Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."

Id. at 384. The lesson of Merrill is that the United States is not bound by the unauthorized acts of those who purport to act for it.[31] While this rule can produce the occasional harsh result, a moment's reflection will confirm its necessity. "Clearly," the Federal Circuit has stated, "federal expenditures would be wholly uncontrollable if Government employees could, of their own volition, enter into contracts obligating the United States." City of El Centro v. United States, 922 F.2d 816, 820 (Fed. Cir. 1990), cert. denied, 111 S. Ct. 2851. See also 46 Comp. Gen. 348, 349 (1966). This section discusses some ways in which, in the interest of basic fairness, the corners have become somewhat rounded.

(1) Contract implied-in-fact vs. contract implied-in-law

Contract-related claims fall into three categories—express, implied-in-fact, implied-in-law. An express contract is "an agreement or mutual assent by the parties manifested in words, oral or written." People's Bank & Trust Co. v. United States, 11 Cl. Ct. 554, 566 (1987). While an oral contract is thus possible, "express contract" usually refers to the traditional piece of paper signed by both parties. As we have seen, claims under an express contract are governed by the Contract Disputes Act.

A contract implied-in-fact is an agreement—

"founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding."

[31]See also the Supreme Court's more recent decision in Office of Personnel Management v. Richmond, 496 U.S. 414 (1990), discussed in detail later in this chapter under the Estoppel heading.

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Baltimore & Ohio R.R. Co. v. United States, 261 U.S. 592, 597 (1923); DeRoo v. United States, 12 Cl. Ct. 356, 361 (1987); 55 Comp. Gen. 768, 777 (1976); B-238112, July 30, 1990. The requirements for an implied-in-fact contract are the same as for an express contract—offer and acceptance, consideration, mutuality of intent. Haberman v. United States, 26 Cl. Ct. 1405, 1411 (1992); Chavez v. United States, 18 Cl. Ct. 540, 544–45 (1989); Eliel v. United States, 18 Cl. Ct. 461, 466 (1989), aff'd mem., 909 F.2d 1495 (Fed. Cir. 1990); New America Shipbuilders, Inc. v. United States, 15 Cl. Ct. 141, 143 (1988), aff'd, 871 F.2d 1077 (Fed. Cir. 1989). In addition, whether the contract is express or implied, the person purporting to act for the government must have actual authority to do so. Construction Equipment Lease Co. v. United States, 26 Cl. Ct. 341, 346 (1992); Eliel, 18 Cl. Ct. at 466; New America Shipbuilders, 15 Cl. Ct. at 143; Pollack v. United States, 15 Cl. Ct. 46, 48–49 (1988). (All four cases cite Merrill.) This can be "implied actual authority" as well as "express actual authority." H. Landau & Co. v. United States, 886 F.2d 322 (Fed. Cir. 1989). The essential difference between an express contract and an implied-in-fact contract is the nature of the evidence (Chavez, 18 Cl. Ct. at 545)—under an implied contract, the meeting of minds is not expressed but is inferred from the conduct of the parties. Thus, a contract implied-in-fact is a "real" contract and as such, it too is governed by the Contract Disputes Act. 41 U.S.C. § 602(a).

A contract implied-in-fact can be found only in situations in which the government would have the authority to make a binding express contract. Grismac Corp. v. United States, 556 F.2d 494 (Ct. Cl. 1977).

In contrast, a contract implied-in-law, also called a "quasi contract,"[32] is not a contract at all. It is a legal fiction whose purpose is to prevent unjust enrichment. Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 998 (3d Cir. 1987). It is "imposed by operation of law without regard to the intent of the parties" and is treated as a contract "for purposes of remedy only." Nitol v. United States, 7 Cl. Ct. 405, 415 (1985). Unlike a contract implied-in-fact, there is no mutuality of intent. Hickman v. United States, 135 F. Supp. 919, 922 (W.D. La. 1955). A simple example will illustrate. Your neighbors hire someone to paint their house. The painter arrives but mistakenly starts to paint your house. You watch from the window, chuckling, thinking you are going to get your house painted for nothing. Wrong. There was certainly no "contract"—no meeting of minds between you and the housepainter—but, in order to prevent unjust enrichment, you will be held liable for the fair value of the work as if there were.

[32]Black's Law Dictionary 1245 (6th ed. 1990).

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(2) Ratification

When analyzing a claim "sounding in contract"—i.e., a claim for goods furnished or services performed—for which no contractual obligation can be found, the agency should first ask whether it can ratify the transaction. The FAR addresses the subject in 48 C.F.R. § 1.602-3, "Ratification of unauthorized commitments." The authority applies to agreements that are not binding on the government solely because the official purporting to represent the government lacked the authority to enter into that agreement. Id. § 1.602-3(a). This is not limited to officials with no contracting authority, but includes officials with limited authority who exceed the applicable limit. E.g., B-169745, May 27, 1970; B-169557, May 4, 1970. (Both cases involved regional officials who procured services in excess of a delegated monetary ceiling, with GAO advising in both cases that the transactions should be ratified under a prior version of the regulation.)

The ratifying official must have had the authority to enter into the agreement at the time it was made, and must still have that authority at the time of ratification. Id. § 1.602-3(c)(2). This is a fundamental element of ratification under agency law. See 22 Comp. Gen. 1083, 1086 (1943). See also Consortium Venture Corp. v. United States, 5 Cl. Ct. 47, 51 (1984), aff'd mem., 765 F.2d 163 (Fed. Cir. 1985) (same requirement under prior version of regulation). The courts have occasionally noted the concept of "institutional ratification" (ratification by agency action such as acceptance of benefits), but it is not clear under what circumstances it might form the basis of government liability. See City of El Centro v. United States, 922 F.2d 816, 821 (Fed. Cir. 1990), cert. denied, 111 S. Ct. 2851.

The FAR also provides that the agreement to be ratified must have been "otherwise proper." 48 C.F.R. § 1.602-3(c)(3). GAO has cautioned not to equate "otherwise proper" with "otherwise perfect." If the unauthorized individual either didn't know that he or she lacked the necessary legal authority or didn't care, one shouldn't be too surprised to find other procedural defects as well, but these should not preclude ratification of an otherwise ratifiable transaction. B-210808, May 24, 1984. In addition, the price must be "fair and reasonable." 48 C.F.R. § 1.602-3(c)(4).

The FAR cautions that the ratification of unauthorized commitments should not be viewed as an alternative to sound contracting procedures. While the

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Finally, GAO's various audit authorities are relevant. GAO, in the performance of its audit and oversight functions, has issued numerous reports on debt collection. They range from governmentwide reviews, several of which will be noted later, to reviews of particular agencies or programs[6].

3. Governmentwide Statutes and Regulations: An Overview

Prior to 1966, there were no uniform policies or procedures for debt collection throughout the federal government. While GAO made some efforts by virtue of its audit and claims settlement functions, debt collection lacked a governmentwide statutory basis and procedures varied greatly from agency to agency. As a general proposition, debt collection received little emphasis during this time period.

While some authority existed under the common law, lack of adequate statutory powers hampered debt collection. For example, as discussed in Chapter 12, the authority to "settle and adjust" claims had long been construed as not including the authority to compromise. Although a few agencies had specific compromise authority, most, GAO included, did not. To make things worse, to simply terminate collection action would have been viewed as giving away government property, which, as noted above, no government official has the right to do without statutory authority.

Thus, the administrative agency—if it did anything at all—had to attempt to collect the full amount of the debt. If the agency was unsuccessful, it had to refer the claim to GAO, which again could do nothing more than attempt to collect the full amount. If GAO's efforts were similarly fruitless, the claim went to the Justice Department, and it was only there that compromise could be considered.[7] Under this system, the Justice Department was burdened with referrals of worthless as well as collectible debts. Congress was also burdened with many requests for private relief legislation.

[6]Some examples are Farmers Home Administration: Debt Relief Actions for Business Entity Borrowers Are Questionable, GAO/RCED-92-29 (December 1991); Debt Collection: More Aggressive Action Needed to Collect Debts Owed by Health Professionals, GAO/AFMD-88-23 (February 1988); Debt Collection: Interior's Efforts to Collect Delinquent Royalties, Fines, and Assessments, GAO/AFMD-87-21BR (June 1987); Defaulted Student Loans: Guaranty Agencies' Collection Practices and Procedures, GAO/HRD-86-114BR (July 1986); Action Needed to Reduce, Account for, and Collect Overpayments to Federal Retirees, GAO/AFMD-83-19 (June 1983).

[7]This is an oversimplification. Older materials often refer to 31 U.S.C. § 194 (1976 ed.), a statute enacted in 1863, prior to the creation of the Justice Department, giving the Secretary of the Treasury a role in approving compromises. The significance of this statute during the first several decades of the 20th century is unclear. See Executive Order No. 6166, § 5 (June 10, 1933); 38 Op. Att'y Gen. 98 (1934). In any event, it was repealed in 1978.

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In 1966, Congress enacted the Federal Claims Collection Act which gave agencies an affirmative duty to pursue collection action and authorized issuance of the Federal Claims Collection Standards. While the Federal Claims Collection Act did not specifically mention offset, the Standards since their inception included a provision instructing agencies to use administrative offset whenever feasible. See 31 Fed. Reg. 13381, 13382 (1966) (original 4 C.F.R. § 102.3).

Thus, it has been suggested that, since 1966, administrative offset has had somewhat of a statutory basis, albeit not an explicit one, and was no longer purely a common-law offset. See Louisiana v. Bergland, 531 F. Supp. 118, 122 (M.D. La. 1982), aff'd sub nom. Louisiana v. Block, 694 F.2d 430, 432 n.4 (5th Cir. 1982).

b. 31 U.S.C. § 3716

With the enactment of section 10 of the Debt Collection Act of 1982, codified at 31 U.S.C. §§ 3701(a)(1) and 3716, Congress provided an explicit governmentwide statutory basis for administrative offset. The corresponding provision of the Federal Claims Collection Standards is 4 C.F.R. § 102.3.

The statute defines "administrative offset" as "withholding money payable by the United States Government to, or held by the Government for, a person to satisfy a debt the person owes the Government." 31 U.S.C. § 3701(a)(1). The basic authority for administrative offset is found in 31 U.S.C. § 3716(a):

"After trying to collect a claim from a person under section 3711(a) of this title, the head of an executive or legislative agency may collect the claim by administrative offset."

This does not require the agency to attempt the full range of administrative collection actions, but it does mean that offset cannot be the sole first step. As noted in our discussion of demand letters, an offset opportunity justifies deviation from the normal demand cycle. The agency's first letter to the debtor can combine demand for payment with notification of intent to collect by offset, but it must give the debtor the opportunity to avoid the offset by making voluntary payment. 4 C.F.R. § 102.2(e).

The Standards contain the following general prescription:

"Collection by administrative offset will be undertaken in accordance with these standards and implementing regulations established by each agency on all claims which are

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liquidated or certain in amount in every instance in which such collection is determined to be feasible and not otherwise prohibited." 4 C.F.R. § 102.3(a).

The phrase "liquidated or certain in amount" is merely an incorporation of the limitation applicable to setoff generally. E.g., 56 Comp. Gen. 279, 288 (1977). The regulations do not further define it, but it has been held not to preclude setoff merely because the claim is disputed or the dispute has not yet been finally resolved. E.g., B-193432/B-211194, January 5, 1984. It also does not preclude setoff of an estimated amount. See B-187178, October 7, 1976. However, under certain circumstances, a claim whose amount is derived from statistical sampling may not be sufficiently "liquidated or certain in amount" to support offset under 4 C.F.R. § 102.3(a). 56 Comp. Gen. 963 (1977). See also B-210600, September 18, 1984 (claim against airline calculated from experience of other airlines too conjectural for offset purposes).

Section 102.3(a)(2) discusses when offset is "feasible." Offset is not mandatory in every case in which there is an available source of funds. Rather, the determination is "to be made by the creditor agency on a case-by-case basis, in the exercise of sound discretion." Id. The agency should weigh all relevant factors, including the debtor's financial condition and the extent to which offset might thwart the purposes of the program against whose funds the offset is contemplated. Id. As one court put it, section 102.3(a)(2) "makes explicit the non-mandatory nature of the offset authority and the considerations involved in its exercise." American Bankers Association v. Bennett, 618 F. Supp. 1528, 1531 (D.D.C. 1985), vacated on other grounds, 802 F.2d 1483 (D.C. Cir. 1986). The standard of feasibility had always been viewed as incorporating the exercise of discretion. E.g., B-167635, November 18, 1975. The detail which is now in section 102.3(a)(2) was taken largely from 62 Comp. Gen. 599 (1983). The regulation does not specify cost effectiveness as one of the factors in the equation. However, as the 1984 preamble notes, "the concept of feasibility is sufficiently broad so as to encompass cost effectiveness in appropriate situations." 49 Fed. Reg. at 8890.

Agencies are required to issue regulations on administrative offset. 31 U.S.C. § 3716(b); 4 C.F.R. § 102.3(b)(1). An agency attempting an administrative offset without regulations risks having the offset invalidated, although the subsequent issuance and application of regulations which satisfy all requirements have been found to cure violations. Allison v. Madigan, 951 F.2d 869 (8th Cir. 1991); Moseanko v. Yeutter, 944 F.2d 418 (8th Cir. 1991). One thing an agency may do in its regulations is flesh out the definition of

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"person" against whose assets offset may be taken. McCall Stock Farms, Inc. v. United States, 14 F.3d 1562 (Fed. Cir. 1993) (upholding an application of the "alter ego" doctrine).

Section 3716(a) gives the debtor certain procedural rights. The agency must give the debtor written notice of the nature and amount of the debt, the agency's intent to collect by offset, and an explanation of the following rights:

- Opportunity for review within the agency of the agency's determination as to the existence and amount of the debt;
- Opportunity to inspect and copy agency records relating to the debt; and
- Opportunity to enter into a written repayment agreement.[62]

The Federal Claims Collection Standards, specifically 4 C.F.R. § 102.3(c), prescribe when "review within the agency" must take the form of an oral hearing, and when a "paper hearing" will suffice. The objective, as explained in the preamble to the 1984 revision of the Standards, is to assure compliance with constitutional due process as well as the statute itself. 49 Fed. Reg. at 8891. To do this, the Standards use the Supreme Court's Yamasaki test described previously, under which the type of hearing depends on whether issues of credibility or veracity are involved. If an oral hearing is required under section 102.3(c), it does not have to be a formal, trial-type evidentiary hearing unless otherwise required by law. 4 C.F.R. § 102.3(c)(1).

How should an agency evaluate a debtor's offer to enter into a repayment agreement? The determination is largely discretionary, although the Standards provide some guidance:

"The determination should balance the Government's interest in collecting the debt against fairness to the debtor. If the debt is delinquent and the debtor has not disputed its existence or amount, an agency should accept a repayment agreement in lieu of offset only if the debtor is able to establish that offset would result in undue financial hardship or would be against equity and good conscience." 4 C.F.R. § 102.3(b)(2)(i).

"An agency," added the 1984 preamble, "is not required to accept an unreasonable proposal." 49 Fed. Reg. at 8891.

[62]This is an example of Congress going beyond the constitutionally required minimum. Constitutional due process does not include the right to negotiate a repayment agreement. Wisdom v. Department of Housing and Urban Development, 713 F.2d 422, 425 (8th Cir. 1983).

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In our previous capsule summary of constitutional due process, we noted that the government can seize first and give the hearing later if warranted by a sufficient governmental interest. The Standards incorporate this point in 4 C.F.R. § 102.3(b)(5), which permits taking the offset prior to completion of the required procedures if necessary to protect the government's ability to collect the debt. The preamble emphasizes that this permits deviation from the time sequence, not elimination of the procedures. 49 Fed. Reg. at 8891. An agency availing itself of this deviation must provide the appropriate procedures promptly after the offset. B-246307.2, August 5, 1992.

As with constitutional due process, rights under 31 U.S.C. § 3716 may be waived as long as the waiver is voluntarily, knowingly, and intelligently made. Similarly, the parties may contractually agree to different procedures, in which event the agreement takes precedence. 64 Comp. Gen. 493, 498 (1985).

An agency is not required to duplicate procedures already provided under some other authority. 4 C.F.R. § 102.3(b)(2)(ii). The debtor may be entitled to due process, but is not entitled to get it twice on the same debt.

If a creditor agency is seeking to offset against a payment to be made by another agency, it is the creditor agency's responsibility to provide the required procedures. In its request for offset, the creditor agency must certify in writing that it has complied with section 102.3. 4 C.F.R. § 102.3(f). The agency receiving the request is expected to cooperate. Id. § 102.3(d). It is not the receiving agency's responsibility to look behind a compliance certification that is sufficient on its face. Agency offset regulations should address both ends of this situation—making offset requests to other agencies and processing requests received from other agencies. Id. § 102.3(b)(2). "[A]ppropriate regulations are necessary for agencies at both ends of the offsetting process." American Bankers Association v. Bennett, 618 F. Supp. at 1532.

How is an agency to know if it is about to make a payment to someone who is indebted to another agency? There is, as of the date of this publication, no centralized data bank of persons or organizations indebted to the government. Some favor such a concept because it would greatly facilitate collection. Others, invoking undesirable Orwellian imagery, oppose it. Whatever one's views on this question, the fact is that a centralized governmentwide data base for debt collection purposes does not exist.

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There is only a partial and limited solution, based on probabilities and common sense. It is clearly not feasible for an agency to check with every other federal agency before making a payment. A selective check, however, may be useful in appropriate cases. For example, an agency making payment to a group of individuals might check with the Department of Education for delinquent student loans. If farmers are involved, the Agricultural Stabilization and Conservation Service (ASCS), Department of Agriculture, may be able to help. The ASCS maintains a listing at the county level of persons indebted under ASCS programs. This is called the Federal Debt Register or Claims Control Record.[63] In addition, the ASCS will cooperate in offsetting debts owed by ASCS program participants to other agencies. 7 C.F.R. § 13.6. For contract debts, a useful device is the Army Holdup List, described later.

An agency may not use administrative offset under 31 U.S.C. § 3716 to collect a debt which has been outstanding for more than 10 years. Id. § 3716(c)(1); 4 C.F.R. § 102.3(b)(3).

Under the definition of administrative offset noted earlier, any money payable to the debtor, or held by the government for the debtor, is "fair game" for offset unless prohibited by some other law. This would include a Treasury check drawn payable to the debtor and deposited with the clerk of a court pending disposition at the court's order. The funds evidenced by the check are considered sufficiently within the possession and control of the United States for offset purposes. United States v. Trinity Universal Insurance Co., 249 F.2d 350 (5th Cir. 1957). (While this case predates the Federal Claims Collection and Debt Collection Acts, the point would appear equally valid under 31 U.S.C. § 3716.)

c. Contract Debts

(1) Right of setoff generally [64]

In our discussion of the common-law foundation of federal debt collection, we noted the fundamental principle of United States v. Wurts that the government has the inherent right, independent of statute, to collect debts owed to it. This right applies with full force to contract claims. Consortium

[63]One court has overbroadly described this as a listing of "all those whom the government reasonably believes owes it money." United States v. Medlin, 767 F.2d 1104, 1106 (5th Cir. 1985).

[64]Section 6(a) of the Contract Disputes Act of 1978, 41 U.S.C. § 605(a), provides that "[a]ll claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer." While a contracting officer or agency head is still free to seek GAO's advice, appeals from the contracting officer's decision go to a board of contract appeals or directly to court. Thus, the boards of contract appeals now constitute the primary source of administrative case law in this area, with GAO's involvement correspondingly decreasing.

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Venture Corp. v. United States, 5 Cl. Ct. 47 (1984); Burnett Electronics Laboratory, Inc., ASBCA No. 23938, 80-2 BCA ¶ 14,619 (1980); Foreman Industries, Inc., ASBCA No. 23948, 80-2 BCA ¶ 14,501 (1980).

Contract debts arise in many ways. The Federal Acquisition Regulation, at 48 C.F.R. § 32.602, gives several examples, a few of which are:

- Damages or excess costs resulting from default in performance.
- Government expense of correcting defects.
- Overpayments resulting from errors in quantity or billing.
- Retroactive price reductions resulting from price redetermination clauses.

Because a contractor is more likely to have an ongoing, or at least recurring, relationship with the government, and because of the nature of contract financing, offset opportunities tend to be more common in the context of contract claims. Administrative offset has traditionally been a pivotal means of collecting contract debts, and the government's right to use it has been recognized in a wide variety of situations.

As a general proposition, if a contractor is indebted to the government, the government may set off the indebtedness against contract payments. E.g., Madden v. United States, 371 F.2d 469 (Ct. Cl. 1967); Tatelbaum v. United States, 10 Cl. Ct. 207, 210 (1986); 62 Comp. Gen. 337 (1983); 28 Comp. Gen. 543 (1949); 4 Comp. Gen. 177 (1924).

The debt and payment may be attributable to the same transaction or contract. For example, the Navy could set off against the final contract payment the cost of work remaining to be performed under a warranty clause. B-187178, October 7, 1976. Similarly, the Air Force could set off, for payment to the Internal Revenue Service, underpayments of the contractor's share of Federal Insurance Contribution Act (Social Security) payments. B-196064, November 18, 1980. Setoff under a Bonneville Power Administration contract was appropriate in B-188473, August 3, 1977, to reimburse the Forest Service, pursuant to a clause in the contract, for firefighting costs the Forest Service incurred suppressing a fire caused by the contractor's operations.

The debt may also result from a separate and independent transaction. Thus, indebtedness under one contract may be set off against payments due under another contract. 2 Comp. Gen. 479 (1923); B-176791, September 8, 1972; B-168619, January 14, 1970; 4-J Sales & Service, DOT

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BCA No. 1904, 89-1 BCA ¶ 21,209 (1988). As the Supreme Court said in Barry v. United States, 229 U.S. 47, 53 (1913):

"It would be folly to require the Government to pay under the one contract what it must eventually recover for a breach of the other."

The indebtedness to be offset need not be contractual. For example, in B-184506, October 29, 1975, GAO found setoff against contract payments a proper means to collect improperly refunded license fees.

If the amount of the government's claim has not yet been finalized, the government may set off a reasonable estimate. E.g., B-187178, October 7, 1976; B-176791, September 8, 1972. The setoff of an estimate is authorized notwithstanding the absence of a final resolution of a contract dispute (administrative or judicial) underlying the debt. B-188473, August 3, 1977; B-178368, September 24, 1973; B-163625, March 14, 1968.[65] Although the government may base its setoff on an estimate, it may not base its estimate on statistical sampling. 56 Comp. Gen. 963 (1977).

Where a new corporation is in essence a mere continuation of an old (debtor) corporation, debts of the old corporation may be set off against contract payments to the new corporation. The new corporation seeking to avoid liability has the burden of establishing that it is not a mere continuation. B-212991, November 28, 1983; B-191129, September 8, 1978. However, the fact that two corporations were organized by the same officers and shareholders and that one is carrying on the business of the other with the same assets and personnel, while raising a strong presumption, does not automatically establish liability. Thus, setoff against a "buyer" corporation meeting these tests was held improper where the "buyer" had been in existence for several years prior to acquisition, the debtor remained in corporate existence, and the transfer was supported by a fair cash consideration. B-193966, April 12, 1979. The same concepts apply to two co-existent corporations. A creditor agency may "pierce the corporate veil" if it has sufficient factual basis to conclude that the two are essentially different names for the same entity, and the corporation adversely affected then has the burden of showing that the agency is wrong. B-230158.2, March 1, 1991.

The concept of "piercing the corporate veil" usually involves finding individuals liable for debts incurred by a corporation. A case involving a

[65]This is not really a setoff. It is more akin to a preliminary withholding pending completion of the dispute resolution, which the government is entitled to do. E.g., Cord Moving & Storage Co. v. United States, 17 Cl. Ct. 741, 743 (1989).

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"reverse pierce" is McCall Stock Farms, Inc. v. United States, 14 F.3d 1562 (Fed. Cir. 1993), upholding an offset against a corporation for a debt incurred by its principals as individuals.

A corporation is not liable for debts incurred by one of its officers in his or her individual capacity after leaving the corporation. Thus, contract payments to a corporation could not be used to set off debts the former president of the corporation incurred under government contracts he had entered into as an individual after leaving the corporation. 56 Comp. Gen. 499 (1977).

With respect to a partnership or joint venture, the general rule is that a payment to the partnership or joint venture may not be used to offset the prior, independent indebtedness of an individual partner or co-venturer. 48 Comp. Gen. 365 (1968); 39 Comp. Gen. 438 (1959). However, if there is an agreement by all parties to the contract that the individual's liability will be borne by partnership or joint venture assets, the rule does not apply. 48 Comp. Gen. at 368.

The government's right of setoff applies to debts owed to the Small Business Administration by a "section 8(a)" subcontractor. B-189183, January 12, 1979; B-177648, August 10, 1973, aff'd upon reconsideration, B-177648, December 14, 1973.

In 46 Comp. Gen. 178 (1966), the Comptroller General held that moneys withheld from a contractor under the Davis-Bacon Act were available for setoff of government claims against the contractor, at least before the contracting agency transferred the funds to GAO. The Comptroller General modified this decision in 55 Comp. Gen. 744 (1976), holding that the claims of underpaid workers have priority over an IRS tax levy to withheld Davis-Bacon funds.

However, funds withheld under the Davis-Bacon Act are not available to pay the claims of underpaid laborers arising from the performance of a different contract by the same contractor. B-189535, August 9, 1977; B-187142, December 28, 1976; B-187761-O.M., April 15, 1977. GAO has applied the same principle to the Contract Work Hours and Safety Standards Act. 48 Comp. Gen. 387 (1968); B-187142, December 28, 1976; B-170784, February 17, 1971.

Debts resulting from violations of the Walsh-Healey Act, 41 U.S.C. §§ 35–45, may be collected by withholding from "any amounts due on any

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such contracts." 41 U.S.C. § 36. This provision has been construed to permit offset against other contracts subject to the Walsh-Healey Act, whether or not there were violations under those other contracts, but not against contracts not subject to the Walsh-Healey Act. Unexcelled Chemical Corp. v. United States, 149 F. Supp. 383 (Ct. Cl. 1957); Ready-Mix Concrete Co. v. United States, 130 F. Supp. 390 (Ct. Cl. 1955); B-144604(1), December 18, 1961.

A claim for excess costs under one contract may be set off against the balance due under another contract with the same contracting agency, and a tax claim is subordinate to the excess cost claim. B-189902, October 5, 1977.

Setoff issues frequently arise in cases involving competing claims to unpaid contract balances. The claimants may include assignees under the Assignment of Claims Act, Miller Act performance and payment bond sureties, the Internal Revenue Service, and other government agencies. These cases are discussed in Chapter 12 under the headings "Contract Financing: The Assignment of Contract Payments" and "Priority to Contract Balances."

The government is under no obligation to exercise the right of setoff against money due a contractor on unrelated contracts for the benefit of a surety, for example, for the purpose of holding a surety harmless on a defaulted contract. B-160641, April 28, 1967.

An award by a board of contract appeals is subject to setoff just like any other contract payment. When a monetary board award is submitted to GAO for payment from the permanent judgment appropriation (31 U.S.C. § 1304), GAO uses the procedures prescribed by 31 U.S.C. § 3728 for setoff against court judgments.

A different type of contract setoff question arose in B-186852, October 21, 1976. The General Services Administration was selling excess zinc and inadvertently overstated the remaining undelivered quantity. Based on GSA's error, the purchaser overpaid the purchase price. The Comptroller General held that GSA could retain the overpayment to set off a prior unrelated debt of the purchaser.

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(2) Repayment bond in lieu of setoff

Prior to the Federal Claims Collection Act of 1966, GAO had held that there was no authority to accept a repayment bond in lieu of setoff. The reasons were set forth in B-71886, January 28, 1948, as follows:

"[T]here is no express provision of law authorizing this Office to accept a bond of indemnity as security for the payment of such an account. The practical effect of the action urged by you would be to deprive the United States of the use of the amount involved for an indefinite period of time, in order to confer an equal benefit upon the company, which company would be permitted to substitute for its obligation a bond upon which the United States well might be required to initiate legal proceedings. Manifestly, such action would be contrary to the interests of the United States. The hardship, if there be any, may not be assumed by the Government but must rest where it falls. Moreover, the offset of amounts due the company obviously is best fitted to protect the United States, especially in cases of disputed liability."

Under the Federal Claims Collection Act and Standards, as noted earlier, an agency has authority to determine whether collection by offset is feasible in a particular instance. Therefore, the agency has discretionary authority to accept a repayment bond if it determines that offset is not feasible. B-167635, November 18, 1975. The factors noted in the 1948 decision are, of course, relevant in making this determination, keeping in mind that an officer of the United States is expected to protect the interests of the United States. The device should therefore be used sparingly.

(3) Setoff against security deposit

As a general proposition, a security deposit being held by the government should not be used to offset a debt which arose under a separate contract, unless authorized by the solicitation or contract under which the deposit was given. The cases generally involve contracts for the sale of government property (timber sales, surplus property sales, etc.), and range from deposits by unsuccessful bidders to default situations to disposition upon contract completion.

A key decision is 33 Comp. Gen. 262 (1953). A contractor had obtained an excessive weight permit to transport logs from a national forest, and refused to pay the permit fee. The National Park Service held two separate sums of money against which it wanted to offset the debt owed under the permit—a cash bond the contractor had deposited to insure compliance with the permit, and a cash bond submitted under a separate logging

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In 1966, Congress took the first major step toward establishing a governmentwide system of debt collection, by enacting the Federal Claims Collection Act of 1966, Pub. L. No. 89-508, 80 Stat. 308. The legislation had been recommended by the Justice Department and was largely a joint GAO-Justice effort. Enactment stemmed from the congressional belief that giving agencies the authority to compromise claims would result in increased collections since agencies would be able to settle claims while they were fresh and while the debtors still had the ability to pay. Also, Congress considered it a better business practice for agencies to handle their own claims since agency staffs are more likely to be familiar with the facts and legalities of the claims. A further congressional objective was to reduce congestion in the courts. See generally S. Rep. No. 1331 (reprinted in 1966 U.S. Code Cong. & Admin. News 2532) and H.R. Rep. No. 1533, 89th Cong., 2d Sess. (1966).

The Federal Claims Collection Act of 1966, as amended, provides the basic legal framework for agency collection of debts owed to the United States, with oversight by the General Accounting Office and the Department of Justice.[8] It directs all agencies to pursue collection efforts and, subject to a monetary ceiling, authorizes compromise, suspension, or termination of collection action in limited circumstances. All of these concepts will be explored fully later in this chapter.

While the 1966 legislation was a major development in federal debt collection, it did not do the job. A 1978 GAO report, The Government Needs to Do a Better Job of Collecting Amounts Owed by the Public, FGMSD-78-61 (October 20, 1978), called attention to serious deficiencies in federal debt collection programs. Continuing its emphasis on debt collection, GAO issued several further reports of governmentwide significance.[9] The heightened awareness generated in part by this series of reports produced improvements in government debt collection through increased management focus. See GAO report entitled Significant Improvements Seen in Efforts to Collect Debts Owed the Federal Government, GAO/AFMD-83-57 (April 28, 1983).

During the same time period, Congress had also once again turned its attention to debt collection, culminating in the next major piece of debt

[8]A brief description of the 1966 legislation may be found in Sidney B. Jacoby, The 89th Congress and Government Litigation, 67 Colum. L. Rev. 1212 (1967).

[9]Federal Agencies Negligent in Collecting Debts Arising from Audits, AFMD-82-32 (January 2, 1982); Unresolved Issues Impede Federal Debt Collection Efforts—A Status Report, CD-80-1 (January 15, 1980); The Government Can Be More Productive in Collecting Its Debts by Following Commercial Practices, FGMSD-78-59 (February 23, 1979).

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contract which had been completed. The Comptroller General concluded that the cash bond given in connection with the permit could be retained as an offset, but that the bond given under the separate contract should be returned to the contractor. "The general rule of law is that a pledge to secure a specific debt or obligation may not be held by the pledgee as security for any other obligation, and a refusal to return the pledge after the obligation it secures has been performed [is improper]." Id. at 263.

A few years later, the 1953 decision was overruled by 38 Comp. Gen. 476 (1959), based essentially on the "bird in the hand" theory. However, a 1961 decision, 41 Comp. Gen. 86, concluded that 38 Comp. Gen. 476 had been ill-advised and overruled it, effectively reinstating 33 Comp. Gen. 262. A decision similar to 33 Comp. Gen. 262 is B-150897, May 6, 1963.

GAO reviewed the earlier cases in 45 Comp. Gen. 504 (1966), another case involving timber sale contracts, and summarized the state of the law as follows:

"In view of the various reasons for requiring these deposits, or payments, and the numerous clauses governing the disposition of their unused portions, we are unable to give categorical answers . . . . Each case must be considered on its own merits in light of the existing circumstances. We can only state generally that where an amount is required in lieu of a security bond or is intended to secure one or more particular obligations, that amount may not be retained after full performance of the secured obligations; however, where an amount is intended to apply on the contract price, and is not otherwise restricted, any residual amount may be retained for extinguishment of other obligations of the party." Id. at 505–06.

Offset of a security deposit to satisfy prior indebtedness is permissible to the extent authorized under the terms of the contract. Id. at 506; B-169731, June 29, 1970.

As some of the decisions indicate, offset is less of a problem where the debt arises under the same contract. In B-154380, June 24, 1964, the Forest Service incurred costs in suppressing a fire caused by the contractor's use of explosives in disregard of contract provisions. The contract provided that the purchaser would bear the costs of suppressing negligently caused fires, but was silent as to the disposition of deposit balances. The decision concurred with the Forest Service's proposal to offset its claim against the deposit balance.

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While a security deposit under one contract cannot be used to offset a debt under another contract unless the contract so provides, the deposit has been held available to satisfy a tax levy issued by the Internal Revenue Service. B-156868, July 19, 1965.

In the cases discussed thus far, the contract under which the deposit had been made was either completed or defaulted. Another group of cases involves bid deposits by unsuccessful bidders. Two early decisions held that the deposits could be used to offset debts arising under other contracts.[66] While these decisions have not been expressly overruled or modified, the position of the more recent cases is that bid deposits submitted by unsuccessful bidders may not be used to offset prior claims unless so provided in the solicitation. B-160149(2), December 29, 1966. See also B-153100, October 27, 1965; B-147004, September 11, 1961.

One clever bidder tried to avoid the offset exposure by writing on the back of his deposit check that the check would be dishonored unless an award and contract resulted from the bid. Good try, but it didn't work. The bid was rejected as nonresponsive. 47 Comp. Gen. 401 (1968).

To sum up, a bid deposit by an unsuccessful bidder may not be retained to offset prior claims unless provided in the solicitation. Where there is an actual contract, whether completed or defaulted, a security deposit may be used to offset claims arising under the same contract unless otherwise restricted, but may not be used to offset debts under other contracts unless expressly provided. The terms of the contract or solicitation under which the deposit is provided will be the controlling factor.

(4) The Army Holdup List

A highly useful aid in offsetting contract debts is the "List of Contractors Indebted to the United States," more commonly known as the "Army Holdup List," published by the Defense Finance and Accounting Service (DFAS), Indianapolis Center.[67] It is revised and reissued semi-quarterly and distributed to federal agencies on DFAS' mailing list. To hold down costs for DFAS, agencies should request only those copies that are absolutely necessary, locally reproducing whatever else they may need.

[66]17 Comp. Gen. 923 (1938); 14 Comp. Gen. 430 (1934).

[67]Prior to the 1991 reorganization which created DFAS, the Indianapolis Center was for a very long time the Army Finance and Accounting Center, hence the informal designation.

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Use of the Army Holdup List is encouraged. 4 C.F.R. § 102.3(d). Procedures and instructions are found on the list itself and in Title 4 of GAO's Policy and Procedures Manual for Guidance of Federal Agencies.

Contract debts of $200 or more may be reported to DFAS for inclusion on the list. The information will thus be available to other federal agencies for offset purposes. A case in which the Holdup List was successfully used is 4-J Sales & Service, DOT BCA No. 1904, 89-1 BCA ¶ 21,209 (1988). It is the responsibility of the creditor agency to report any changes, corrections, or deletions.

Any administrative procedures required in establishing the debt should be completed by the creditor agency prior to reporting the debt to DFAS, and the report should so state.

While the Army Holdup List is designed primarily for contract debts, noncontractual debts may be reported as well. B-184506, October 29, 1975 (claim for return of refunded license fee). However, debts of individuals who have no contracts with the government should not be reported.

(5) Debt Collection Act vs. Contract Disputes Act

The preceding sections, for the most part, have discussed the government's basic right to use offset to collect contract debts. They have not addressed what procedures must be followed.

Until the 1980s, it was fairly well settled that the Federal Claims Collection Act and Standards applied to government claims arising from procurement contracts. For example, in Commercial Building Maintenance Service, DOT CAB Nos. 72-14, 72-15, 72-2 BCA ¶ 9527 (1972), the Federal Aviation Administration had asserted a claim for excess reprocurement costs against a defaulted contractor, and the only issue was the contractor's assertion of financial inability to pay. The board held that there was nothing for it to resolve, and remanded the case to the contracting officer for appropriate action under the Federal Claims Collection Act and Standards.

The Contract Disputes Act of 1978 established new procedures for the adjudication of claims by and against the government relating to procurement contracts. The Contract Disputes Act does not address collection techniques and, by itself, had little impact on debt collection

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apart from designating the contracting officer and the boards of contract appeals as the appropriate tribunals for adjudicating contract claims.

With the enactment of the Debt Collection Act of 1982, primarily 31 U.S.C. § 3716, what had been a simple matter became controversial. Questions soon arose over the extent to which the Debt Collection Act applied to procurement contracts. The heart of the issue seems to be the procedural requirements of section 3716 and whether they mandate another layer of procedures over and above the Contract Disputes Act. Nothing in the Debt Collection Act itself or its legislative history addresses the question.

While GAO never had the occasion to address this issue in a formal decision, GAO saw no conflict between the two statutes.[68] The Contract Disputes Act tells you how to determine the existence and amount of a government claim. The Federal Claims Collection Act and Standards tell you how to go about collecting it. In addition, the Federal Claims Collection Standards—specifically 4 C.F.R. §§ 101.7 and 102.3(b)(2)(ii)—make it clear that the government is not required to provide duplicate procedures on the same debt. Under this approach, if the existence and amount of the debt have been determined under Contract Disputes Act procedures, which would presumably include reasonable discovery, there should be no need to duplicate these procedures for purposes of 31 U.S.C. § 3716 in those cases where it is deemed to apply. Compliance with the Contract Disputes Act certainly provides adequate "due process." See, e.g., 4-J Sales & Service, DOT BCA No. 1904, 89-1 BCA ¶ 21,209 at 107,011, in which the board noted:

"Contrary to its allegations, 4-J has not been deprived of due process. The requirements of due process were satisfied by the Contract Disputes Act having afforded 4-J the opportunity to contest the two Army contracting officer decisions. Having failed to exercise the rights given by the Act, 4-J cannot now be heard to allege that it has been deprived of due process."

Be that as it may, others did perceive a conflict, and a minor flood of litigation ensued. The first wave of cases generally found 31 U.S.C. § 3716 inapplicable where the amount due the government and the payment against which it is to be offset arise under the same contract. This was the result in the following cases:

[68]See B-222029, February 13, 1986 (internal comments on proposed legislation); letter dated November 13, 1987, no file designation, from GAO Associate General Counsel to Administrative Conference of the United States (comments on draft ACUS recommendation) (copy on file with editors). A private commentary which also saw no conflict is Debt Collection by Offset: What's Wrong?, 1 Nash & Cibinic Report ¶ 5 (January 1987).

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- Reduction in contract price under Defective Cost or Pricing Data clause. Fairchild Republic Co., ASBCA No. 29385, 85-2 BCA ¶ 18,047 (1985), aff'd on reconsideration, 86-1 BCA ¶ 18,608 (1985), dismissed for lack of jurisdiction, Fairchild Republic Co. v. United States, 810 F.2d 1123 (Fed. Cir. 1987).
- Reduction in contract price pursuant to Changes clause. A. J. Fowler Corp., ASBCA No. 28965, 86-2 BCA ¶ 18,970 (1986); Atlantic States Construction, Inc., ASBCA No. 27681, 85-3 BCA ¶ 18,501 (1985).
- Liquidated damages in form of contract price reduction for degradation in performance. Information Consultants, Inc., GSBCA Nos. 8130-COM, 8528-COM, 86-3 BCA ¶ 19,198 (1986).
- Liquidated damages for delay in completion of work. Rivera Construction Co., ASBCA Nos. 29391, 30207, 88-2 BCA ¶ 20,750 (1988).

These decisions seem to view the withholdings in question as contract price adjustments pursuant to various contract clauses rather than administrative offsets within the scope of section 3716. They further appear to draw a distinction between situations in which the government is trying to recoup a payment previously made and situations in which the price adjustment is to be offset against payments not yet made, finding section 3716 inapplicable in the latter situation. Fairchild, 85-2 BCA at 90,600; A. J. Fowler, 86-2 BCA at 95,794; Information Consultants, 86-3 BCA at 97,101; Rivera, 88-2 BCA at 104,858. Cf. 62 Comp. Gen. 337 (1983), in which a contract with an illegal cost-plus-percentage-of-cost clause was to be modified by substituting a fixed fee, with GAO suggesting that any overpayments under the illegal clause be "recaptured" during the fixed-fee negotiations.

In Avco Corp. v. United States, 10 Cl. Ct. 665 (1986), the Air Force withheld progress payments from Avco because of alleged performance deficiencies. Avco argued that failure to comply with 31 U.S.C. § 3716 invalidated the offsets. The government argued that section 3716 did not apply. Noting that the question of whether section 3716 applies to contracts governed by the Contract Disputes Act was a question of first impression in the courts, the Claims Court found it unnecessary to address the broader issue, holding instead as follows:

"The kind of debts targeted by the Debt Collection Act are not intra-contractual disputes like ours. . . . Invoking the Debt Collection Act in this type of case would add a new procedural matrix to every contract. Absent explicit statutory authorization, the court will not infer so significant an expansion of procedural requirements in contract administration. . . . Therefore, pretermitting the question of whether the Debt Collection Act applies to

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government contracts generally, the court concludes it does not apply when payment is withheld because of disputes over performance of a contract." 10 Cl. Ct. at 667–68.

In one pre-Avco case, a board had held the Debt Collection Act applicable where the agency had tried to recover an erroneous overpayment by offset against an unrelated fund under the same contract. Pat's Janitorial Service, Inc., ASBCA No. 29129, 84-3 BCA ¶ 17,549 (1984). Post-Avco cases holding that section 3716 does not apply to the recovery of overpayments by offset against future payments due under the same contract include Flag Real Estate, Inc., HUD BCA No. 84-899-C14, 88-3 BCA ¶ 20,866 (1988), and Snowbird Industries, Inc., ASBCA No. 33171, 87-2 BCA ¶ 19,862 (1987).

The next case to note is Allied Signal, Inc. v. United States, 941 F.2d 1194 (Fed. Cir. 1991). The Air Force reduced the contract price on a multi-year contract pursuant to an Economic Price Adjustment clause, and withheld progress payments to recoup the resulting overpayment. The contractor tried to invalidate the withholding because of noncompliance with 31 U.S.C. § 3716. The Federal Circuit reviewed the Claims Court's decision in Avco and the ASBCA's decision in Fairchild Republic, and agreed with the analysis in those cases:

"We find the reasoning of the Claims Court and the ASBCA persuasive. 'Debt' as used in the [Debt Collection Act] contemplates an existing liability by the contractor, rather than a denial of further liability by the Government within an on-going contract." 941 F.2d at 1198.

While the courts and boards were in general agreement that section 3716 should not apply to the use of offset to collect a debt arising under the same contract, the Armed Services Board of Contract Appeals found the Debt Collection Act applicable where the debt arose under a different contract. In DMJM/Norman Engineering Co., ASBCA No. 28154, 84-1 BCA ¶ 17,226 (1984), IBM Corporation, ASBCA Nos. 28821, 29106, 84-3 BCA ¶ 17,689 (1984), and Snowbird Industries, Inc., ASBCA No. 33171, 87-2 BCA ¶ 19,862 (1987), the board invalidated offsets because of noncompliance with the procedural requirements of 31 U.S.C. § 3716.

However, the Debt Collection Act was found inapplicable in B & A Electric Co., ASBCA No. 33667, 88-2 BCA ¶ 20,553 (1987). In that case, the Air Force withheld money due under one contract to satisfy a Labor Department claim for violation of the labor standards provisions of another contract. Because the Labor Department has exclusive jurisdiction over labor standards disputes, the board dismissed the appeal for want of jurisdiction, but expressed the opinion that the Debt Collection

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Act would not apply. The board pointed out that the withholding in that case was authorized by labor standards contract clauses which served the same purpose and had the same effect as contract price reductions. Thus:

> "Appellant's non-compliance with the labor standards provisions triggered the Government's right to withhold payments pursuant to these specific provisions. This was an act of contract administration and did not constitute an administrative offset . . . . Hence, there was no debt to require the application of the DCA procedures."

88-2 BCA at 103,822. The board further noted that imposition of the Debt Collection Act offset procedures on the specific Labor Department procedures would result in duplication inconsistent with 4 C.F.R. § 101.7. Id. at 103,823,

The next case in this evolutionary process is Cecile Industries v. Cheney, 995 F.2d 1052 (Fed. Cir. 1993). The contractor had delivered goods which did not conform to specifications, and the government incurred substantial corrective costs which it offset against payments due under both the contract in question and two separate contracts. Emphasizing that the Debt Collection Act did not abrogate the government's common-law right of offset, which applies to both inter-contractual and intra-contractual debts, the court not only held 31 U.S.C. § 3716 inapplicable to the offset under the same contract (the Avco result), but went a step further and held it inapplicable as well to the offsets under the separate contracts.

It would thus appear settled that 31 U.S.C. § 3716 will for the most part not apply to offsets under the same contract. The extent to which Cecile Industries may or may not mandate the same result for offsets under separate contracts is likely to engender further debate.

d. Other Specific Contexts

(1) Transportation claims

As a general proposition, the Federal Claims Collection Act and the government's right of setoff apply fully to transportation claims against carriers, augmented by a separate provision of law, 31 U.S.C. § 3726(b), which authorizes the government to use administrative offset to recoup overcharges not later than 3 years after payment of a carrier's bill.

The Court of Claims has held that 31 U.S.C. § 3726(b) does not extinguish the government's common-law right of offset. IML Freight, Inc. v. United States, 639 F.2d 676 (Ct. Cl. 1980); Burlington Northern Inc. v. United

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States, 462 F.2d 526 (Ct. Cl. 1972). Thus, administrative offset is not limited to the recovery of overcharges, but may be used to collect claims resulting from such things as freight loss damage (IML) and unauthorized use of government property (Burlington).

The government becomes entitled to invoke setoff when it establishes a prima facie case of carrier liability which the carrier is unable to rebut. The government establishes a prima facie case of liability by showing that the shipment was delivered to the carrier at origin in good condition (evidenced, for example, by a bill of lading signed by the carrier without exception), that the shipment arrived at its destination in damaged condition, and by establishing the amount of damages. Decisions applying the government's right of setoff to transportation claims include 56 Comp. Gen. 264 (1977); B-193101, March 12, 1979; B-191889, October 2, 1978, aff'd upon reconsideration, B-191889, May 16, 1979; B-181871, February 11, 1977.

Other cases under 31 U.S.C. § 3726(b) involve issues of corporate identity resulting from mergers, corporate acquisitions, etc. The rules are discussed in 61 Comp. Gen. 526 (1982) and B-193966, April 12, 1979.

(2) Trust funds

As a general proposition, funds which the government is holding as trustee are not subject to setoff to liquidate government claims against the beneficiaries, at least where the funds cannot be regarded as government funds. For example, federal prisoners' trust funds are not subject to setoff to satisfy government claims against the inmates. 48 Comp. Gen. 249 (1968). The same result would presumably apply to the trust accounts of patients in Department of Veterans Affairs hospitals. Similarly, funds received from the Government of Poland awarded to a claimant by the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949 could not be used to set off the claimant's indebtedness to the United States. B-180825-O.M., July 23, 1974. A similar situation would be funds withheld from a contractor and transferred to GAO under the Davis-Bacon Act in specific amounts for specified employees. See 46 Comp. Gen. 178 (1966).

However, where the funds constitute government funds, they may be subject to setoff even though held in a trust capacity. 34 Comp. Gen. 152 (1954) (moneys held in trust for Indians available to set off indebtedness of Indian to government); B-121910, November 29, 1954 (same); B-121946,

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January 5, 1956 (claimant's debt to government may be set off against award by Foreign Claims Settlement Commission under War Claims Act of 1948). Thus, in determining whether setoff is available, it is necessary to examine the nature of the funds as well as their status as trust funds, plus, of course, any applicable statutory restrictions.

(3) Setoff and bankruptcy

This section will summarize the effect of a debtor's bankruptcy on the government's right of setoff. The debtor may be a corporation or other business entity or an individual, including a government employee. The bankruptcy laws are complicated, and our objective here is merely to point out some of the more important principles involved.

The bankruptcy laws have traditionally recognized the right of setoff. Subject to certain refinements specified in the statute, the Bankruptcy Code (Title 11 of the United States Code) preserves "any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case . . . ." 11 U.S.C. § 553(a).[69] These are called "pre-petition" debts.

The administrative offset authority of 31 U.S.C. § 3716 does not apply in Title 11 bankruptcy cases. Matter of Mehrhoff, 88 B.R. 922, 931 (Bankr. S.D. Iowa 1988); In re Britton, 83 B.R. 914, 917 (Bankr. E.D.N.C. 1988). This is because subsection 3716(c)(2) expressly makes section 3716 inapplicable "when a statute explicitly provides for or prohibits using administrative offset to collect the claim or type of claim involved," and the Bankruptcy Code is such a statute.

Setoff under 11 U.S.C. § 553 is neither mandatory nor automatic. Under 11 U.S.C. § 362, the filing of a petition, voluntary or involuntary, under Title 11 operates as an automatic stay of all further collection efforts, including:

"(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

"(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; . . ." Id. §§ 362(a)(6), (a)(7).

[69]The debtor's right to offset against allowed government claims is found in 11 U.S.C. § 106(b).

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Thus, in order to invoke setoff under 11 U.S.C. § 553, even if the government has filed a proof of claim, it is first necessary to petition the court for relief from the automatic stay. E.g., United States v. Rinehart, 88 B.R. 1014, 1018 (D.S.D. 1988), aff'd in part, rev'd in part, 887 F.2d 165 (8th Cir. 1989); In re Britton, 83 B.R. at 919; 68 Comp. Gen. 215, 219 (1989). Whether or not to grant the motion for relief is within the "equitable discretion" of the bankruptcy court. Rinehart, 88 B.R. at 1018. An attempted offset without obtaining relief from the automatic stay is illegal. Further, an agency may be found to have "waived" its right to setoff by failing to timely assert it in the bankruptcy proceeding. In re Apex Int'l Management Services, Inc., 155 B.R. 591, 595–96 (Bankr. M.D. Fla. 1993).

The automatic stay also applies to the commencement or continuation of any judicial or administrative proceeding against the debtor that was or could have been commenced prior to filing. 11 U.S.C. § 362(a)(1). Whether a proceeding is "against the debtor" is determined by reference to the posture of the initial proceeding. Thus, if a proceeding was initiated by the debtor, a subsequent bankruptcy filing does not require the stay of appellate proceedings. Freeman v. Commissioner, 799 F.2d 1091 (5th Cir. 1986).

The non-applicability of the automatic stay to proceedings initiated by the debtor may operate to permit certain setoffs. One such case is 4-J Sales & Service, DOT BCA No. 1904, 89-1 BCA ¶ 21,209 (1988). The Army had asserted a claim against a defaulted contractor for excess reprocurement costs. Unable to collect, the Army added the contractor to the Army Holdup List. The Coast Guard noticed the listing and notified the contractor of its intent to offset against a Coast Guard contract. It did so, and transmitted the funds to the Army. Subsequently, the contractor filed a claim with the Coast Guard for return of the money, which the contracting officer denied, and also filed a petition in bankruptcy. The board found the setoff proper and unaffected by the automatic stay provision of 11 U.S.C. § 362.

A debtor may be able to avoid a setoff made within 90 days prior to the filing of the bankruptcy petition. Depending on the case law in the particular jurisdiction, the legal basis may be 11 U.S.C. § 547(b) (preferential transfer) or 11 U.S.C. § 553(b) (avoidable offset). Cases discussing each approach, respectively and in detail, are In re Hancock, 137 B.R. 835 (Bankr. N.D. Okla. 1992), and In re Hankerson, 133 B.R. 711 (Bankr. E.D. Penn. 1991). Both cases involved attempted offsets against tax refunds under 31 U.S.C. § 3720A.

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collection legislation, the Debt Collection Act of 1982, Pub. L. No. 97–365, 96 Stat. 1749.[10] The 1982 law provides a statutory basis for a number of specific collection tools such as interest, offset, and the use of private collection agencies.[11]

The Federal Claims Collection Act authorizes GAO and the Justice Department to jointly issue governmentwide implementing regulations. Individual agency regulations are to conform to these joint regulations. This provision, part of the 1966 legislation, is now found at 31 U.S.C. § 3711(e). The selection of GAO and the Justice Department was quite deliberate—GAO because of its expertise in administrative debt collection, the Justice Department because of its expertise in litigation.[12] The joint GAO-Justice Department regulations are known as the Federal Claims Collection Standards (FCCS). The original version of the FCCS was published on October 15, 1966 (31 Fed. Reg. 13381). The regulations have been amended several times, and were comprehensively revised and reissued in their entirety on March 9, 1984 (49 Fed. Reg. 8889). The regulations themselves are found in 4 C.F.R. Parts 101–105. Those who work regularly in the debt collection area should also have a copy of the preamble (supplementary information statement) accompanying the 1984 reissuance, since it contains much useful explanatory material. It appears at 49 Fed. Reg. 8889–8896.

In issuing the Federal Claims Collection Standards, GAO and the Justice Department have broad authority to "regulate" federal debt collection activities. Many provisions in the Standards correspond to specific provisions in the governing statutes. Others implement the general debt collection mandate found in 31 U.S.C. § 3711(a)(1). The Standards "can be [and are] used to prescribe any method or procedure which could reasonably be said to enhance debt collection efforts so long as it is not inconsistent with other law." B-117604(3)-O.M., January 16, 1979.

[10]Several sections of the Debt Collection Act were phrased in terms of amendments to the Federal Claims Collection Act. Other sections amended provisions appearing in other titles of the U.S. Code. As a result of the 1982 recodification of Title 31, the Federal Claims Collection Act, as amended by the Debt Collection Act, appears in Title 31 of the United States Code, with other debt collection provisions, at Chapter 37, Subchapters I (specifically § 3701) and II (§§ 3711–3719).

[11]An early review of selected problems in the implementation of the Debt Collection Act is Debt Collection: Billions Are Owed While Collection and Accounting Problems Are Unresolved, GAO/AFMD-86-39 (May 1986). A more recent study, centering more on the extent to which selected agencies are using available authorities, is Debt Management: More Aggressive Actions Needed to Reduce Billions in Overpayments, GAO/HRD-91-46 (July 1991).

[12]H.R. Rep. No. 1533, 89th Cong., 2d Sess. 4 (1966); S. Rep. No. 1331, 89th Cong., 2d Sess. 3 (1966), 1966 U.S. Code Cong. & Admin. News at 2534.

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Setoff under 11 U.S.C. § 553 requires "mutuality of parties." The debts must be "in the same right and between the same parties, standing in the same capacity." 4 Collier on Bankruptcy ¶ 553.04[3] (15th ed. 1985). The question of whether the requisite mutuality exists between different federal agencies has engendered considerable litigation. The majority of courts have held that it does. For example, in United States v. Rinehart, 88 B.R. 1014 (D.S.D. 1988), the Small Business Administration wanted to set off a claim for defaulted loan repayments against program payments owed to the debtor by the Commodity Credit Corporation. Although the setoff was found to be improper because SBA had violated the automatic stay provision, the court held that SBA and CCC stood in mutual capacity for purposes of section 553. Other cases expressing the majority rule are In re Apex Int'l Management Services, Inc., 155 B.R. 591, 594 (Bankr. M.D. Fla. 1993); Matter of Butz, 154 B.R. 541 (S.D. Iowa 1993); Waldron v. Farmers Home Administration, 75 B.R. 25 (N.D. Tex. 1987); In re Sound Emporium, Inc., 70 B.R. 22 (W.D. Tex. 1987), aff'g 48 B.R. 1 (Bankr. W.D. Tex. 1984); In re Mohar, 140 B.R. 273 (Bankr. D. Mont. 1992); In re Fryar, 93 B.R. 101 (Bankr. W.D. Tex. 1988); In re Britton, 83 B.R. 914 (Bankr. E.D.N.C. 1988).

Cases taking a contrary view and denying mutuality where different agencies are involved include In re Ionosphere Clubs, Inc., 164 B.R. 839 (Bankr. S.D.N.Y. 1994); In re Hancock, 137 B.R. 835 (Bankr. N.D. Okla. 1992); Matter of Mehrhoff, 88 B.R. 922 (Bankr. S.D. Iowa 1988). Mehrhoff relied on the bankruptcy court's decision in In re Rinehart, 76 B.R. 746 (Bankr. D.S.D. 1987). However, that portion of the decision was subsequently repudiated by the district court in United States v. Rinehart, cited above.[70]

In addition, the mutuality for purposes of 11 U.S.C. § 553 must exist "before the commencement of the case." In other words, the debt owing to the government and the debtor's claim against the government must both be pre-petition. Thus, if both claims are in existence at the time the petition in bankruptcy is filed, setoff will generally be appropriate. 7 Comp. Gen. 186 (1927); 7 Comp. Gen. 576 (1928); 18 Comp. Gen. 301 (1938).[71]

For example, in two cases involving bankrupt carriers, setoff was proper where both the credit due the carrier for services rendered and the carrier's debt to the government arose prior to the filing of the petition in

[70]Most of these cases are the result of the farm crisis of the 1980s.

[71]Most of the GAO decisions and opinions cited in the text predate the automatic stay requirement. We include them to illustrate the types of situations in which setoff has been permitted. In applying them today, however, we caution that the requirements of 11 U.S.C. § 362 must be read in.

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bankruptcy. B-150463-O.M., March 18, 1963; B-149191-O.M., August 3, 1962. Similarly, the Navy could set off a member's indebtedness stemming from various overpayments against unpaid leave rations where both obligations pre-dated the member's filing of a voluntary petition in bankruptcy. B-195066, September 22, 1980. See also 56 Comp. Gen. 279 (1977); B-123016, April 11, 1955; B-129669-O.M., December 11, 1956; B-117500-O.M., November 4, 1953.

Where one obligation arises prior to filing the petition and the other obligation arises after the filing, setoff is improper. For example, overcharges for transportation performed before the carrier filed its petition in bankruptcy could not be set off against post-petition bills payable to the carrier by the General Services Administration. B-192974, March 29, 1979. Reversing the sequence, overcharges for services rendered subsequent to the filing could not be collected by setoff against credits for pre-petition services. B-150294-O.M., March 27, 1963. See also B-129669-O.M., December 11, 1956.

The fact that a debt is contingent and unliquidated does not necessarily preclude setoff under 11 U.S.C. § 553. The Bankruptcy Code defines "debt" as "liability on a claim," and "claim" as including "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Id. §§ 101(11), 101(4). The Britton and Fryar cases cited above include discussions of this issue.

While setoff under 11 U.S.C. § 553 usually involves pre-petition debts, there is some authority for allowing the setoff of mutual post-petition debts. In re Apex Int'l Management Services, Inc., 155 B.R. 591, 594–95 (Bankr. M.D. Fla. 1993). Of course, if both obligations arise post-petition and the bankrupt's debt to the government is not included in the discharge in bankruptcy, the bankruptcy proceedings have no bearing and setoff is proper. 45 Comp. Gen. 342, 345 (1965).

The concept of mutuality is also relevant to setoffs against an employee's retirement account. An employee is not entitled to the sums in his or her retirement account until the employee leaves federal service by retirement or resignation. Thus, where an employee files bankruptcy and continues in federal employment, the money in the employee's retirement account does not become part of the estate in bankruptcy and is not available for setoff since it does not constitute an obligation owed by the government at the

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time the bankruptcy petition is filed. See 22 Comp. Gen. 330 (1942); B-185731, March 3, 1976 (non-decision letter).

The mutuality concept has also been applied by analogy in state court liquidation and insolvency proceedings. In B-167886/B-174985, June 1, 1978, the Comptroller General held setoff proper against a surety which was being liquidated in a state court proceeding, since the debts and credits being set off accrued before commencement of the liquidation proceeding. The government did not waive its right of setoff by filing proofs of claim in the proceeding.

In a 1986 Claims Court case, the Government Printing Office was trying to collect a claim for excess reprocurement costs from a defaulted contractor by offset against the proceeds of other completed contracts. A state court had declared the contractor insolvent and had appointed an assignee for benefit of creditors. Since the assignee had been appointed prior to the default termination, the court found that mutuality of parties existed. Noting that federal bankruptcy law had no direct application in the case, the court affirmed a board of contract appeals decision sustaining the setoff. Tatelbaum v. United States, 10 Cl. Ct. 207 (1986).

A completing surety has priority over a trustee in bankruptcy. 8 Comp. Gen. 58 (1928). Also, a completing performance bond surety is entitled to reimbursement of its actual completion costs free from setoff of the contractor's debts. Combining these two concepts, where a performance bond surety has undertaken to complete the remaining work left by a defaulted contractor which had filed a bankruptcy petition, contract funds in the hands of the government are payable first to the completing surety to reimburse its completion costs, without setoff for the contractor's tax indebtedness. 58 Comp. Gen. 295 (1979).

A discharge in bankruptcy releases the bankrupt from legal liability on all debts included in the discharge. 45 Comp. Gen. 342 (1965); 22 Comp. Gen. 1119 (1943); 22 Comp. Gen. 330 (1942); B-194360, February 15, 1980; B-192974, March 29, 1979. A debt is included in the discharge if it was listed on the bankrupt's schedule of debts, even though the creditor was not served with notice of the proceedings or had no actual knowledge of them. A debt is discharged even if not listed on the schedule if the creditor has notice or actual knowledge of the proceedings. Failure by the creditor to file a proof of claim will not prevent operation of the discharge as a bar to a claim which is provable and which otherwise would be released. 22 Comp. Gen. 1119, 1120 (1943).

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A discharge in bankruptcy

"operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor, or from property of the debtor, whether or not discharge of such debt is waived."

11 U.S.C. § 524(a)(2). Thus, a debt discharged in bankruptcy cannot be set off against currently payable obligations (such as salary or a new claim) that arose subsequent to the discharge. 45 Comp. Gen. 342 (1965); B-194360, February 15, 1980. Nor may the debt be set off against retirement funds when they become payable. 22 Comp. Gen. 1119 (1943); 22 Comp. Gen. 330 (1942); B-185731, March 3, 1976. Similarly, the withholding of current social security benefit payments to recoup a discharged pre-petition benefit overpayment violates the injunction and may subject the government to sanctions. In re Cost, 161 B.R. 856 (Bankr. S.D. Fla. 1993).

However, a setoff allowable under 11 U.S.C. § 553 may survive a discharge. For example, the Ninth Circuit has held that the right of setoff under 11 U.S.C. § 553 is not defeated by a discharge of pre-petition debts in a Chapter 11 bankruptcy. In re De Laurentiis Entertainment Group, 963 F.2d 1269 (9th Cir. 1992).[72] Similarly, the Internal Revenue Service can offset a tax claim against a refund, both pre-petition, notwithstanding the taxpayer's discharge in a Chapter 7 proceeding. Posey v. United States Department of the Treasury—Internal Revenue Service, 156 B.R. 910 (W.D.N.Y. 1993).[73]

Prior to the 1978 revision of the Bankruptcy Act, GAO had taken the position that a discharge in bankruptcy did not extinguish the debt. It merely provided a legal defense against enforcement, and the decisions frequently noted that a moral obligation to pay continued. E.g., 45 Comp. Gen. 342 (1965); B-192974, March 29, 1979. The Comptroller General had pointed out that this moral obligation should be viewed as particularly strong where the bankrupt continued to receive a government paycheck, stating in one decision that if the employee did not share this concept of morality:

"[I]t would appear advisable in the interest of efficient and sound administration of Government affairs that officials of the department in which the person is currently

[72]The De Laurentiis court noted that courts have reached a different result under Chapter 13. 963 F.2d at 1275.

[73]This is clearly the majority view although it is not unanimous. De Laurentiis, 963 F.2d at 1276.

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employed be informed of the situation so as to enable them to decide whether it would be in the interest of the United States to permit that type of employee to continue in the service." 22 Comp. Gen. 330, 334 (1942).

Times have changed, and the current Bankruptcy Act provides increased protection for debtors. Senate Report No. 95-989, quoted in the Revision Note following 11 U.S.C. § 524, states:

"The injunction is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts. . . . [Section 524] is intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it. In effect, the discharge extinguishes the debt, and creditors may not attempt to avoid that."

In addition, a governmental unit may not "deny employment to, terminate the employment of, or discriminate with respect to employment against" a bankrupt solely because of the bankruptcy. 11 U.S.C. § 525. In view of this, except to the extent the right of setoff has been expressly preserved, the discharged debtor's "moral obligation" remains purely moral, and dicta to the contrary such as the quoted passage from 22 Comp. Gen. 330 should be disregarded.

Special instructions for debt collection where the debtor is involved in bankruptcy proceedings are contained in Title 4 of the GAO Policy and Procedures Manual for Guidance of Federal Agencies.

(4) Miscellaneous cases

The propriety of collection by setoff may come into question in a wide variety of situations. Following are miscellaneous cases in which GAO upheld the government's right of setoff. For the most part, the cases merely discuss the basic right and do not address applicable procedures, which have generally changed anyway since enactment of the Debt Collection Act.

- Government claims against insurance companies may be set off against subrogation awards under the Federal Tort Claims Act. If the award is $2,500 or less, the settling agency makes the setoff directly. If the award exceeds $2,500, GAO makes the setoff in accordance with 31 U.S.C. § 3728. B-135984, May 21, 1976.

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- Indebtedness resulting from default on a Veterans Administration loan could be set off against back pay payable to the debtor under private relief legislation. B-139924, November 21, 1960.
- Social Security payments are subject to setoff. A-89228, April 29, 1938. So are railroad unemployment insurance benefits. B-10614, August 26, 1940.
- The Railroad Retirement Board could set off amounts owed by railroads under the Railroad Unemployment Insurance Act against reimbursements due to those railroads from the Regional Rail Transportation Protective Account for employee protection payments. 59 Comp. Gen. 143 (1979). (The legislation involved in this case was changed in 1981.)
- Where a lessor failed to repaint the leased premises in violation of the lease, the lessee agency could set off the costs of repainting against lease payments. 48 Comp. Gen. 289 (1968). (This case can be viewed as a variety of contract setoff.)
- Where a lending institution files a claim with the Department of Housing and Urban Development under the mobile home loan insurance program authorized by Title I of the National Housing Act, HUD may set off against allowable payments the amount of unpaid premiums attributable to that claim prior to the date the claim was filed. 56 Comp. Gen. 279 (1977).
- A federal agency may use setoff to collect a debt owed by the District of Columbia government since the D.C. government is not another federal agency.[74] However, setoff against funds withheld from salaries of agency employees for payment of D.C. income tax is improper on public policy grounds. 60 Comp. Gen. 710 (1981).

e. State and Local Governments

The government's common-law right of offset has traditionally been held applicable to claims against states or municipalities. E.g., Georgia v. Califano, 446 F. Supp. 404, 412 (N.D. Ga. 1977). The government's position has been that the United States may set off its claims against any moneys payable to any agency of the state or municipality. E.g., B-154778, August 6, 1964; B-143573, May 7, 1962; B-141018, February 11, 1960 (non-decision letter). Administrative offset against state and local governments has also been upheld under the pre-1982 version of the Federal Claims Collection Act and its implementing regulations. E.g., Missouri ex rel. Freeman v. Block, 690 F.2d 139, 144 (8th Cir. 1982) (offset by Department of Agriculture to recover lost receipts from sale of food stamp coupons).

[74]Since the District of Columbia is not an agency of the United States, it follows that money owed by the United States to one who is indebted to the District of Columbia is not available for offset to liquidate the debt. 36 Comp. Gen. 457 (1956) (retirement funds); B-39254, February 10, 1944 (contract payments).

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Government claims often arise from improperly collected state and local taxes. If the state or municipality refuses to refund the tax, setoff has been held to be the proper remedy. For example, the government's claim for the refund of real estate taxes on government-owned property collected from a contractor who was reimbursed by the government was properly set off against payments in lieu of taxes due the municipality in a subsequent year. 36 Comp. Gen. 713 (1957). Similarly, the overpayment by the government of a state motor vehicle fuel tax on gasoline used in government vehicles was properly set off against funds payable to the state under the Mineral Leasing Act of 1920. B-154113, June 24, 1964. See also, e.g., B-162005, April 8, 1968, and B-150228, August 5, 1963.

The Debt Collection Act of 1982 complicated the picture. As we have seen, section 10 of the Debt Collection Act, 31 U.S.C. § 3716, did not create a new right of offset. It merely gave a statutory basis, with procedural protections, to a right which had long existed under the common law. Section 10 applies to "persons," and defines "person" as not including units of state or local government. 31 U.S.C. § 3701(c). The Federal Claims Collection Standards construe section 3701(c) as merely an exemption from the statutory authorities and procedures of section 3716, thus preserving the common-law right of offset against state and local governments. 4 C.F.R. § 102.3(b)(4); 49 Fed. Reg. at 8891 (Supplementary Information Statement). The controversy over the effect of section 3701(c) is identical to that arising under 31 U.S.C. § 3717 with respect to the assessment of interest. The issue and case law are fully discussed earlier in this chapter under the Interest heading.

4. Government Employees

a. Law Prior to the Debt Collection Act

A long line of Comptroller General decisions established the proposition that the current salary of a government employee is not subject to setoff to liquidate the employee's indebtedness to the United States unless specifically authorized by statute or unless the employee consents to the setoff. 58 Comp. Gen. 501, 502 (1979); 32 Comp. Gen. 499 (1953); 29 Comp. Gen. 99 (1949); 26 Comp. Gen. 907 (1947); 23 Comp. Gen. 911 (1944); 23 Comp. Gen. 555 (1944); 17 Comp. Gen. 12 (1937). The rule applies equally to the current pay of members of the armed services. E.g., 42 Comp. Gen. 83 (1962); 38 Comp. Gen. 788 (1959). GAO applied the rule regardless of the size of the debt. A-20456, February 27, 1928

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One court of appeals has suggested that the rule restricts the government's common-law right of setoff more than is necessary. United States v. Tafoya, 803 F.2d 140, 142 (5th Cir. 1986). Be that as it may, the question has become largely moot since all salary offsets now have a statutory basis.

Salary offset prior to the Debt Collection Act was not entirely a common-law offset. Several statutes in Title 5 of the U.S. Code, the pre-Debt Collection Act version of 5 U.S.C. § 5514 for example, authorized salary offset in specific situations. However, these statutes filled only part of the gap. Unless one of them applied, current salary was not subject to setoff without the employee's consent.

The rule prohibiting salary offset without either statutory authority or the employee's consent applied only to current salary. Other moneys payable to an employee were subject to setoff. One example was retirement benefits. Others are:

- "Final pay" for both civilian employees and military personnel. 38 Comp. Gen. 788 (1959); 33 Comp. Gen. 443 (1954); 29 Comp. Gen. 99, 100 (1949). This includes final salary payments on behalf of a deceased employee. B-190291, January 3, 1978.
- Lump-sum payment for accrued leave. 29 Comp. Gen. 99, 100 (1949); B-190291, January 3, 1978.
- Payments, either periodic or lump-sum, under the Federal Employees Compensation Act. 41 Comp. Gen. 178 (1961).

Thus, prior to 1982, employee setoffs fell into one of three categories: (1) setoff against current salary under one of the specific statutes; (2) setoff against payments other than current salary, authorized under the common law; and (3) setoff against current salary in situations not covered by statute. The setoff could be made in categories (1) and (2); in category (3), the employee's consent was required.

b. Salary Offset: 5 U.S.C. § 5514

The most widely applicable salary offset statute is 5 U.S.C. § 5514, originally enacted in 1954 and substantially amended by section 5 of the Debt Collection Act of 1982.

Prior to the 1982 amendments, section 5514 applied only to the recovery of erroneous payments made by the employing agency. It did not extend to debts owed to other agencies (34 Comp. Gen. 170, 173 (1954); B-127814, October 29, 1956), or to debts to the employing agency resulting from

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other than erroneous payments (42 Comp. Gen. 619 (1963)). Thus, for example, an agency could use section 5514 to offset an erroneous overpayment of salary to one of its employees, but not to recover a delinquent student loan. Section 5 of the Debt Collection Act extensively revised 5 U.S.C. § 5514 to include general indebtedness and to provide procedural protections for the debtor.

Agencies are required to issue implementing regulations which must be consistent with the Federal Claims Collection Standards and approved by the President. 5 U.S.C. §§ 5514(a)(3), (b)(1). The President has delegated approval authority to the Office of Personnel Management (OPM).[75] The Federal Claims Collection Standards do not address salary offset under section 5514. OPM has issued governmentwide regulations, found at 5 C.F.R. Part 550, Subpart K, which include minimum requirements for individual agency regulations.

The Treasury Department's Financial Management Service has issued detailed guidance on the use of 5 U.S.C. § 5514 in a publication entitled Guidelines for the Federal Employee Salary Offset Program: A Practical Guide for Collecting Debt Through Salary Offset (May 1988).

Perhaps the best way to outline the key aspects of 5 U.S.C. § 5514 is through a question-and-answer format.

(1) Which agencies may use 5 U.S.C. § 5514?

The statute itself, 5 U.S.C. § 5514(a)(1), refers merely to the "head of an agency." The original section 5514 had been construed as not limited to the executive branch. 34 Comp. Gen. 170, 173 (1954). Nothing in the Debt Collection Act suggests a contrary intent. Thus, section 5514 applies to all agencies and independent establishments in the executive, legislative, and judicial branches of the federal government. 5 C.F.R. § 550.1103; B-217402.2, July 15, 1988; B-217402, June 10, 1985.[76]

(2) Which employees are subject to setoff under section 5514?

For purposes of 5 U.S.C. § 5514, the term "employee" includes all current civilian employees and all current members of the Armed Forces and Armed Forces Reserves. 5 U.S.C. § 5514(a)(1); 5 C.F.R. § 550.1103.

[75]Executive Order No. 11609, § 8 (1971); Executive Order No. 12107, § 2-101 (1978).

[76]Although GAO has questioned the applicability of 5 U.S.C. § 5514 to the Senate and House of Representatives (B-217402.2, July 15, 1988), they are included in the OPM regulations.

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Through a definitional quirk, however, section 5514 does not apply to commissioned officers of the Public Health Service. 64 Comp. Gen. 395, 401 (1985).

(3) What kinds of debts may be set off?

One of the primary objectives of section 5 of the Debt Collection Act was to expand 5 U.S.C. § 5514 to include "general debts." S. Rep. No. 378, 97th Cong., 2d Sess. 10–11 (1982), reprinted at 1982 U.S. Code Cong. & Admin. News 3377, 3386–87. Thus, any debt owed by an employee to the United States—including debts resulting from fraudulent claims (e.g., B-224750, September 25, 1987)—may be set off under section 5514, except (a) debts to which the Debt Collection Act of 1982 does not apply,[77] and (b) debts for which salary offset is expressly provided for or prohibited by some other statute.

(4) What payments are available for setoff under section 5514?

Setoff is made against the individual's "current pay account." The statute refers to "basic pay, special pay, incentive pay, retired pay, retainer pay, or, in the case of an individual not entitled to basic pay, other authorized pay." 5 U.S.C. § 5514(a)(1). This includes "retired pay" payable to members or former members of the uniformed services, but not the "retirement pay" of civilian employees. 64 Comp. Gen. 907, 909–10 (1985).

What about allowances? In the parlance of federal employee compensation, pay and allowances are usually regarded as two different things. While GAO has not addressed this issue in a formal decision, it has expressed the opinion in an internal memorandum that section 5514 does not apply to offset against allowances. B-213507-O.M., September 12, 1984.

Offset against an individual's final salary check or lump-sum leave payment upon retirement or resignation is not governed by 5 U.S.C. § 5514 unless it is the continuation of an offset against current salary initiated under section 5514. 64 Comp. Gen. 907 (1985).

(5) What procedures are required?

[77]In the salary offset context, this means debts arising under the Internal Revenue Code, the Social Security Act, or the tariff laws of the United States. See Pub. L. No. 97-365, § 8(e), 5 U.S.C. § 5514 note; 5 C.F.R. § 550.1102(b)(1).

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While the Standards can thus address both policies and procedures, GAO and the Justice Department have chosen to emphasize the former. The approach is expressed in the following passage from the preamble to the 1984 reissuance of the FCCS:

"Many commenters felt that the Standards are not sufficiently detailed. Several commenters suggested uniform and more detailed procedures either throughout the Standards or in some particular area. . . . However, since their inception in 1966, the Standards have never been intended to prescribe detailed procedures. Rather, they are designed primarily to address policies, and to provide general guidance on sound debt collection principles. It is our belief that detailed procedures are best developed in the context of individual agency regulations, where they can be tailored to meet the needs and experiences of particular programs and activities. Each Federal agency is required to develop its own implementing regulations, based on and consistent with these Standards, and it is there that we believe the detailed procedures belong. While uniformity of policy is desirable throughout the Federal Government, we have never been convinced that uniformity of operating procedures is either necessary or beneficial." (Emphasis in original.)

49 Fed. Reg. 8889. GAO provides further procedural guidance in title 4 of the GAO Policy and Procedures Manual for Guidance of Federal Agencies. See 4 C.F.R. § 101.1.

Two additional agencies have key roles in the management and oversight of federal debt collection—the Office of Management and Budget and the Treasury Department.

The principal OMB document is Managing Federal Credit Programs, OMB Circular No. A-129 (November 25, 1988). The underlying debt collection philosophy is similar to GAO's. The circular (Part I, sec. 1) is designed to ensure "fair but aggressive collection" of amounts due the government.

In a 1986 Memorandum of Understanding, OMB designated the Treasury Department's Financial Management Service as "lead agency" for credit management and debt collection. Treasury has issued several relevant publications. Some of them are:

- Treasury Financial Manual (TFM), Volume I, Part 6, Chapter 8000 (Cash Management).
- Managing Government Credit: A Supplement to the Treasury Financial Manual (January 1989).

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Before taking an offset against an employee's salary under section 5514, the agency must give the employee at least 30 days' written notice of its intent to use salary offset, and must provide the following rights:

- Opportunity to inspect and copy government records relating to the debt;
- Opportunity to negotiate a written repayment agreement; and
- Opportunity for a hearing on the existence and amount of the debt and on repayment terms where not established by written agreement.

The agency must provide a hearing if the employee requests one within 15 days after receipt of the agency's notification. The hearing must be conducted by someone not under the supervision or control of the agency, or by an administrative law judge.[78] The hearing official must issue a decision not later than 60 days after the request. 5 U.S.C. § 5514(a)(2). Hearings are not required for pay adjustments resulting from an employee's election of, or change in, coverage under a federal benefits program requiring periodic deductions from pay if the debt accumulated over no more than four pay periods. 5 C.F.R. § 550.1104(c).

The Federal Labor Relations Authority has held that the procedures under 5 U.S.C. § 5514 are not exclusive, and that a proposal to establish the negotiated grievance procedure as an alternative, with respect to debts owed to the employing agency, is negotiable. American Federation of Government Employees, AFL-CIO, Local 1592, 33 F.L.R.A. 691 (1988). However, the alternative procedure cannot extend to debts owed to other agencies. National Association of Government Employees, Local R1-109, 37 F.L.R.A. 500 (1990); National Federation of Federal Employees, Local 29, 32 F.L.R.A. 721 (1988).

(6) How much can be set off?

The pre-1982 version of 5 U.S.C. § 5514 permitted the offset of up to two-thirds of the debtor's paycheck after certain deductions. See, e.g., 34 Comp. Gen. 164 (1954). The revised statute sets a maximum of "15 percent of disposable pay" unless the employee consents in writing to a larger amount. 5 U.S.C. § 5514(a)(1).

The OPM regulations, 5 C.F.R. § 550.1103, define "disposable pay" as:

[78]The type of hearing (oral or paper) is determined by applying the standard of 4 C.F.R. § 102.3(c) (the Supreme Court's Yamasaki test, discussed earlier in this chapter under the Due Process heading). 5 C.F.R. § 550.1104(g). Agencies are to cooperate in furnishing hearing officers to one another when needed. Id. § 550.1107.

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"that part of current basic pay, special pay, incentive pay, retired pay, retainer pay, or in the case of an employee not entitled to basic pay, other authorized pay remaining after the deduction of any amount required by law to be withheld. Agencies must exclude deductions described in 5 CFR 581.105(b) through (f) to determine disposable pay subject to salary offset."

Thus, disposable pay is determined by deducting from gross pay those items listed in OPM's garnishment regulations, 5 C.F.R. §§ 581.105(b) through (f). This includes such items as amounts withheld for federal, state, and local income taxes, health insurance premiums, and required retirement contributions.

The 15 percent limitation does not apply to offsets against final salary or lump-sum leave payments. 64 Comp. Gen. 907, 911 n.1 (1985).

(7) What about routine adjustments?

In GAO's view, one of the major flaws of the revised section 5514 is its failure to explicitly exempt "routine salary adjustments"—adjustments resulting from such things as clerical error or delay in the processing of pay documents. If, for example, a clerical error results in the issuance of two paychecks, or if the decimal point is put in the wrong place resulting in a check for $5,000 rather than $500, the full range of procedures under section 5514 should not be required to recoup the overpayment.

Both GAO[79] and the Administrative Conference of the United States[80] have recommended remedial legislation to deal with the "routine adjustment" problem. The military departments, whose pay systems produce the most exposure to these problems, have obtained statutory authority to apply less stringent procedures to debts owed by military personnel.[81]

c. Salary Offset: Other Statutes

In addition to 5 U.S.C. § 5514, offset against the salary of government employees is authorized under a number of other statutes dealing with more specific situations. This section will identify several of these statutes and note their relationship to section 5514. Some of the statutes permit offset against payments other than current salary. The terms of each statute must be examined to determine its precise scope.

[79]Debt Collection: Billions Are Owed While Collection and Accounting Problems Are Unresolved, GAO/AFMD-86-39 (May 1986), at 48–51.

[80]ACUS Recommendation No. 87-9, 1 C.F.R. § 305.87-9.

[81]37 U.S.C. § 1007(c), discussed later in the text.

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(1) Statutes in 5 U.S.C.

Title 5 of the United States Code contains several provisions authorizing offset against the salary or other entitlements of government personnel. Examples are:

- 5 U.S.C. § 4108(c): violation of employment agreement under Government Employees Training Act.
- 5 U.S.C. § 5511(b): indebtedness of employee removed for cause.
- 5 U.S.C. § 5512(a): withholding of individual's pay "until he has accounted for and paid into the Treasury . . . all sums for which he is liable." Since this provision is clearly directed at persons holding funds for which they must account to the government, it has been construed as applying only to accountable officers. 39 Comp. Gen. 203, 206 (1959); 37 Comp. Gen. 344 (1957); 23 Comp. Gen. 555 (1944); 26 Op. Att'y Gen. 77 (1906).
- 5 U.S.C. § 5513: authorizes setoff against current salary of the recipient of a payment for which GAO has disallowed credit in the account of a disbursing officer or raised a charge against a certifying officer. This statute was enacted in 1950 and was unaffected by the subsequent enactment of 5 U.S.C. § 5514. 34 Comp. Gen. 170 (1954). Its interpretation is discussed in 32 Comp. Gen. 101 (1952) and 32 Comp. Gen. 499 (1953).
- 5 U.S.C. § 5522(c): advance payments made to facilitate the evacuation of employees or their families and dependents from situations of imminent danger.
- 5 U.S.C. § 5705: unused or misused travel advances. A sample case is B-246056, March 10, 1992.
- 5 U.S.C. § 5724(f): travel and transportation advances incident to permanent change of station. The statute does not explicitly mention setoff but provides that the advances may be made "with the same safeguards required under section 5705 of this title." This has been construed as authorizing offset to the extent authorized under section 5705. 58 Comp. Gen. 501, 502 (1979); B-194159, October 30, 1979.

Section 5 of the Debt Collection Act did not repeal these pre-existing statutes by implication. 64 Comp. Gen. 142 (1984). Where one of these more specific statutes applies, then it, rather than 5 U.S.C. § 5514, provides the basis for and governs the offset. Id.; 5 C.F.R. § 550.1102(b)(1).

When operating under one of the more specific statutes which does not provide its own administrative procedures (as those cited do not), the agency should follow the procedural requirements of 31 U.S.C. § 3716 and 4

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C.F.R. § 102.3, rather than the more stringent requirements of 5 U.S.C. § 5514. 64 Comp. Gen. 142 (1984).

(2) Public Law 97-276, section 124

The Debt Collection Act of 1982 was enacted on October 25, 1982. Three weeks earlier, on October 2, Congress enacted Pub. L. No. 97-276, 96 Stat. 1186, the continuing resolution for fiscal year 1983. Section 124 of Pub. L. No. 97-276, 96 Stat. 1195, 5 U.S.C. § 5514 note, provides for offset against the current pay account of an employee against whom the government has obtained a court judgment. Offset is to be in reasonable amounts not to exceed "one-fourth of the pay from which the deduction is made."

The Department of Justice has construed section 124 as permanent legislation and not implicitly repealed by the Debt Collection Act. Collection of Debts by Offset from Salary under § 124 of the October 1982 Continuing Resolution, Op. Off. Legal Counsel, March 11, 1983. It has also been construed as applicable only to civilian employees and not members of the armed services. United States v. Tafoya, 803 F.2d 140 (5th Cir. 1986); B-230865, October 17, 1990.

Offset under section 124 is not addressed in the Federal Claims Collection Standards or in the OPM salary offset regulations. It is included, however, in Office of Management and Budget Circular No. A-129 (part IV, sec. 4.f) and several Treasury Department publications.[82]

The most detail is found in Chapter 552 of the Federal Personnel Manual (FPM). Offset under section 124 is initiated by a request to the employing agency (called a "Requisition for Offset") from the agency which litigated the claim (usually the Justice Department). Id. § 2-1. A copy of the requisition letter is sent to the employee. Id. § 2-2.a(2). The offset is made against "disposable pay," determined in the same manner as under 5 U.S.C. § 5514. Id. §§ 1-2, 1-3.e. Amounts deducted are applied first to court costs, second to accrued post-judgment interest, and third to principal. Id. § 3-1.c. No further administrative procedures are required. In this connection, the FPM states:

"Since due process was provided to the employee by a court of the United States prior to the entry of the judgment and a Requisition submitted according to this chapter, judgment offsets do not require further due process procedures." Id. § 2-2.c.

[82]E.g., Guidelines for the Federal Employee Salary Offset Program at 15; Managing Government Credit: A Supplement to the Treasury Financial Manual at 4-19.

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(The FPM was abolished on December 31, 1993, However, Chapter 552 has been "provisionally retained" through 1994 and will presumably be incorporated into some other document. Office of Personnel Management, FPM Sunset Document, OPM Doc. No. 157-53-8, at 74 (1993).)

(3) 37 U.S.C. § 1007(c)

An important salary offset statute is 37 U.S.C. § 1007(c):

"Under regulations prescribed by the Secretary concerned, an amount that a member of the uniformed services is administratively determined to owe the United States or any of its instrumentalities may be deducted from his pay in monthly installments. However, after the deduction of pay forfeited by the sentence of a court-martial, if any, or otherwise authorized by law to be withheld, the deductions authorized by this section may not reduce the pay actually received for any month to less than one-third of his pay for that month."

This statute was originally enacted in 1928 (45 Stat. 698) and prior to fiscal year 1985 was applicable only to enlisted members of the Army and Air Force. It was extended in 1984 to all members of the armed forces (98 Stat. 2492, 2613), and again in 1985 to all members of the uniformed services (99 Stat. 583, 666). The 1985 amendment picks up commissioned officers of the Public Health Service who, as noted earlier, are not covered by 5 U.S.C. § 5514.

The legislative history of the 1984 amendment makes it clear that one of its purposes was to permit routine pay adjustments without the rigorous procedures of 5 U.S.C. § 5514. Given the nature of the military pay system, the ability to make these routine adjustments is especially important to the military departments. See S. Rep. No. 500, 98th Cong., 2d Sess. 215 (1984).

Prior to the 1982 revision of 5 U.S.C. § 5514 and the 1984 amendment to 37 U.S.C. § 1007(c), GAO had struggled with the relationship of the two statutes, drawing distinctions based on the type of debt involved. E.g., 39 Comp. Gen. 46, 51 (1959); 34 Comp. Gen. 164, 168 (1954). The legislative changes of the 1980s have rendered these earlier cases obsolete. The apparent relationship today is that 37 U.S.C. § 1007(c) takes precedence over 5 U.S.C. § 5514 as the more specific and later enactment, with no distinction as to the type of debt. 69 Comp. Gen. 226 (1990). See also in this connection 5 U.S.C. § 5514(c), which expressly preserves section 1007(c).

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When collecting by offset under 37 U.S.C. § 1007(c), the applicable procedures are those specified in 31 U.S.C. § 3716 and 4 C.F.R. § 102.3. 64 Comp. Gen. 142 (1984).

(4) 31 U.S.C. § 3716

Since all nonjudicial offsets, salary offset included, are varieties of "administrative offset,"[83] they are subject to the "umbrella" provision of 31 U.S.C. § 3716 unless some other more specific statute applies. In the context of federal employees, the maze of offset statutes described above has sharply reduced—but did not totally eliminate—the universe of situations in which there would be any need to look to section 3716.

For example, offset against an employee's final salary check or lump-sum leave payment is governed by 5 U.S.C. § 5514 only where it is a continuation of a salary offset initiated under section 5514. Where not a continuation of a section 5514 offset, an offset against a final salary check or lump-sum leave payment, formerly a common-law offset, is now governed by 31 U.S.C. § 3716. 64 Comp. Gen. 907 (1985); 5 C.F.R. § 550.1104(l).

Miscellaneous offsets against payments owing to government employees which are not covered by any other offset statute would be subject to 31 U.S.C. § 3716. For example, suppose an agency allows a claim by one of its employees for personal property damage under 31 U.S.C. § 3721. An offset of a debt owed to the United States against that award would be an administrative offset within the scope of section 3716.

We have devoted several pages to describing the various statutory bases for different types of employee offsets. Determining the proper statutory basis for a given offset is important because several things flow from that determination—the applicable procedural requirements, the types of payments available for offset, and, in many cases, the amount that can be deducted.

There is one common-law exception to the government's right of offset that deserves mention. Debts owed by an enlisted member of the armed forces may not be set off against allowances payable at the time of discharge for the purpose of returning the individual to his or her home or place of enlistment. The rule is based on policy considerations described as follows in a 1902 decision:

[83]64 Comp. Gen. 142, 146 (1984); 5 C.F.R. § 550.1102(b).

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"The practice of returning soldiers and marines to their places of enlistment upon the expiration of their terms of service or when discharged, except by way of punishment for an offense, is based not wholly upon the contract of enlistment, but also upon the grounds of public policy. It would be highly injurious to the service, to say nothing of the country at large, to discharge soldiers without fault of their own in places distant from their homes and leave them without the means of returning thereto."

8 Comp. Dec. 624, 625 (1902).[84] The exception does not apply to a tax levy under section 6331 of the Internal Revenue Code. 36 Comp. Gen. 106 (1956). Nor does it apply to claims for reimbursement after the individual has completed his or her separation travel since the reason for the exception no longer applies. 65 Comp. Gen. 497 (1986) (discussing the exception generally and citing several of the earlier cases).

d. Offset Against Retirement Fund

This section deals with offsets against the Civil Service Retirement and Disability Fund. We start by reiterating a distinction noted above in our discussion of 5 U.S.C. § 5514—retired pay vs. retirement pay. The "retired pay" of military personnel is governed by 5 U.S.C. § 5514, and has been since its enactment. E.g., 51 Comp. Gen. 303 (1971). This is because "retired pay" is specified in the statute.

However, unlike retired pay, which is paid by the department in which the individual served, the "retirement pay" of federal civilian employees is paid not by the employing agency but by the Office of Personnel Management. Civilian retirement benefits have never been viewed as subject to 5 U.S.C. § 5514, and the Debt Collection Act did not change this.

Moneys held in an employee's retirement account are not available for setoff as long as they are required by law to remain in the Fund. However, once they become payable to the employee, by virtue of either retirement or withdrawal upon separation, they are available for setoff. Prior to the Debt Collection Act, this was viewed as a common-law offset or an offset implicitly authorized under the Federal Claims Collection Act of 1966. Wisdom v. Department of Housing and Urban Development, 713 F.2d 422 (8th Cir. 1983); Atwater v. Roudebush, 452 F. Supp. 622 (N.D. Ill. 1976); United States v. United States Fidelity & Guaranty Co., 35 F. Supp. 959, 962 (E.D. Pa. 1940); 58 Comp. Gen. 501, 502 (1979); B-195126, January 17,

[84]See also 34 Comp. Gen. 504, 506–07 (1955) (noting that the exception has never been extended to officers); 34 Comp. Gen. 164, 167 (1954); 8 Comp. Gen. 233 (1928); 20 Comp. Dec. 707 (1914); 18 Comp. Dec. 621 (1912).

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1980.[85] The government's right of offset applies as well to disability retirement benefits (B-194159, October 30, 1979) and to Foreign Service retirement benefits (A-54780, February 11, 1935).

The enactment of the Debt Collection Act of 1982 did not affect the government's basic right to offset against the Civil Service Retirement and Disability Fund, except that it is now viewed as a variety of administrative offset under the umbrella provision of 31 U.S.C. § 3716. 64 Comp. Gen. 907 (1985). See also 5 C.F.R. § 550.1104(m).

Retirement Fund offsets are addressed in a separate section of the Federal Claims Collection Standards, 4 C.F.R. § 102.4. The required procedures are those specified in 4 C.F.R. § 102.3 for administrative offsets under 31 U.S.C. § 3716 generally. The creditor agency must provide the necessary procedures and, in its offset request to OPM, certify that it has done so. Id. § 102.4(b)(3). In addition, retirement fund offsets are subject to OPM regulations, found at 5 C.F.R. Part 845, Subpart D.[86]

In some cases, the creditor agency will have no way of knowing when the retirement moneys might be available. This could pose a problem under the 10-year statute of limitations of 31 U.S.C. § 3716(c)(1). In such situations, the agency should provide the administrative procedures and make the offset request to OPM right away. Then, at such future time as the debtor makes a claim for payments from the Fund, OPM can complete the offset. 4 C.F.R. § 102.4(c).

Since several years may pass between the initiation and completion of the offset under section 102.4(c), the next logical question is whether due process has a "shelf life." Certainly the passage of time should not affect the initial determination of the existence and amount of the debt. However, other relevant circumstances might change. The Standards take this into consideration:

"At such time as the debtor makes a claim for payments from the Fund, if at least a year has elapsed since the offset request was originally made, the debtor should be permitted to offer a satisfactory repayment plan in lieu of offset upon establishing that changed financial circumstances would render the offset unjust." Id.

[85]Retirement fund offsets were common long before enactment of the Federal Claims Collection Act. E.g., 39 Comp. Gen. 203 (1959); 27 Comp. Gen. 703 (1948); 21 Comp. Gen. 1000 (1942); 16 Comp. Gen. 962 (1937); 16 Comp. Gen. 161 (1936); 3 Comp. Gen. 98 (1923).

[86]OPM also has regulations for collecting debts owed to the Civil Service Retirement and Disability Fund. See 5 C.F.R. Part 831, Subpart M, and Part 845, Subparts B and C.

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How much may be set off against retirement payments? The Standards provide merely that offset be "in reasonable amounts in order to collect in one full payment or a minimal number of payments." Id. § 102.4(a). The 1984 preamble, 49 Fed. Reg. at 8892, commented as follows:

"The circumstances of an offset from the Retirement Fund can be extremely variable. In one case, annuities from the Fund may be a retired employee's sole source of support. In another case, a younger debtor may be withdrawing a large lump sum upon resignation. We think agencies should have discretion to tailor the amount of the offset to the circumstances of the particular case. In general, it is our intent that the maximum possible amount be offset when a debtor is withdrawing from the Fund in a single lump sum unless there is a demonstration of undue financial hardship. When payments are in the form of annuities, however, agencies should offset in a reasonable percentage, based on such factors as the size of the debt and the age and financial condition of the debtor. We have added language, however, to emphasize that the preferred practice should be to collect in a single lump sum or a limited number of installments wherever reasonably possible.

"As a general proposition, we contemplate that the creditor agency will specify the monthly amount to be offset, subject to any ceiling the Office of Personnel Management may wish to establish by regulation."

For installment deductions, OPM has established a ceiling of "50 percent of net annuity, unless a higher percentage is needed to satisfy a judgment against a debtor within 3 years or the annuitant has consented to the higher amount in writing." 5 C.F.R. § 845.407(b).

There have been many cases affirming the right of setoff against retirement funds involving the indebtedness of postal employees resulting from mail theft, embezzlement, and other offenses. A prima facie case of liability is established by a showing that (1) the loss occurred, (2) the employee has been caught committing a similar offense, (3) the employee had access to the item in question, and (4) there is no evidence implicating anyone else. Boerner v. United States, 30 F. Supp. 35 (E.D.N.Y. 1939), aff'd, 117 F.2d 387 (2d Cir. 1941), cert. denied, 313 U.S. 587. If the employee is unable to overcome the prima facie case by more than a mere categorical denial of liability, he or she becomes indebted to the government for the amount of the loss and setoff against the employee's retirement account is proper. B-195126, January 17, 1980.[87] The rationale of the postal employee

[87]See also 23 Comp. Gen. 723 (1944); 21 Comp. Gen. 1003 (1942); 19 Comp. Gen. 88 (1939); 18 Comp. Gen. 524 (1938); 7 Comp. Gen. 593 (1928); B-170316, April 12, 1971, aff'd upon reconsideration, B-170316, November 16, 1971; B-164193, June 5, 1968; B-155160, November 9, 1964; B-150407, April 4, 1963. Cf. Parker v. United States, 187 Ct. Cl. 553 (1969) (retirement offset upheld on basis of 5 U.S.C. § 5512).

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cases has been applied to other federal employees as well. B-139796, July 10, 1959.

e. Nonappropriated Fund Activities

Unless provided by statute, setoff is not available to satisfy a debt owed to a nonappropriated fund activity since a debt to a nonappropriated fund activity is not a debt owed to the United States. 43 Comp. Gen. 431 (1963); 11 Comp. Gen. 161 (1931); 9 Comp. Gen. 411 (1930); 9 Comp. Gen. 353 (1930); B-170400, September 21, 1970, aff'd upon reconsideration, B-170400, February 2, 1971; B-128671-O.M., August 22, 1956.

The same rule applies to a debt owed to a Federal Credit Union since the funds belong to the employees and are not appropriated funds. 31 Comp. Gen. 363 (1952). See also B-113003, March 5, 1953 (non-trust funds of an Indian tribe generated by local activities).

At one time, setoff was permitted to collect debts owed to nonappropriated fund activities in certain situations. E.g., 5 Comp. Gen. 25 (1925); 19 Comp. Dec. 515 (1913); 8 Comp. Dec. 860 (1902). The later prohibitory rule appears to have developed in large measure in response to Kenny v. United States, 62 Ct. Cl. 328 (1926), holding that the property of a nonappropriated fund instrumentality is not the property of the United States, in conjunction with Taggart v. United States, 17 Ct. Cl. 322 (1881) (no government official can make the United States agent or trustee for the collection of private debts). 43 Comp. Gen. 431, 433 (1963); 11 Comp. Gen. 161 (1931).

Statutory setoff authority now exists for military personnel by virtue of 37 U.S.C. § 1007(c), discussed above. The language "United States or any of its instrumentalities" in that statute has consistently been construed as encompassing nonappropriated fund instrumentalities. B-148581.13-O.M., November 2, 1976. In addition, under 10 U.S.C. § 6032, the pay of Marines who are discharged, desert, or are sentenced to prison may be set off to satisfy indebtedness to Marine Corps Exchanges. (In view of the 1984 amendment to 37 U.S.C. § 1007(c), 10 U.S.C. § 6032 would appear no longer necessary.)

Military personnel may consent to setoff to liquidate indebtedness to a nonappropriated fund activity by authorizing allotments from current salary. B-148581.13-O.M., November 2, 1976.

5. Offset Against Tax Refunds

If one is poking through the federal bushes looking for money against which to offset debts, it should not take very long to realize that tax

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- The Debt Collection Process (December 1987).[13]

Next, it is important to emphasize that our focus in this chapter is on governmentwide authorities and restrictions. Many agencies are subject to additional agency-specific or program-specific statutory provisions, some existing prior to the Federal Claims Collection Act, others enacted subsequently. For example, the Small Business Administration has specific compromise authority. 15 U.S.C. § 634(b)(2). So does the Department of Veterans Affairs with respect to certain of its programs. 38 U.S.C. § 3720(a)(4). Another example is the Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651–2653.

The point to note is that the Federal Claims Collection Act was not intended to increase or diminish the existing authority of any agency to settle, compromise, close, or litigate debt claims. This was specified in section 4 of the 1966 legislation (Pub. L. No. 89–508, § 4, 80 Stat. 309).[14] One of the objectives of section 4 was to preserve existing authority to compromise claims in excess of the monetary limit applicable under the Federal Claims Collection Act. However, it does not make the existing authority exclusive so as to preclude GAO's compromise authority within the limits of the Federal Claims Collection Act. B-160819-O.M., February 10, 1967.

Another statute which should be mentioned is the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692o. This statute regulates debt collectors by prohibiting a number of harassing or abusive activities (§ 1692d), false or misleading representations (§ 1692e), and unfair practices (§ 1692f). Among the prohibited items are threats of violence, use of obscene or profane language, and threats to take actions that cannot legally be taken.

The Fair Debt Collection Practices Act does not apply to officers or employees of the United States acting in the performance of their official

[13]We have not attempted to cross-reference the OMB and Treasury publications for each point covered in this chapter, but emphasize that the reader should always consult the relevant OMB and Treasury issuances for additional guidance.

[14]Prior to the 1982 recodification of Title 31, section 4 was found at 31 U.S.C. § 953. The provision was viewed as being of "limited interest" and was not retained in the recodified Title 31. Revision of Title 31, United States Code, "Money and Finance," Report of the Committee on the Judiciary, H.R. Rep. No. 651, 97th Cong., 2d Sess. 340 (1982) (Table 3—Laws Omitted but not Repealed). Nevertheless, it is still good law.

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refunds are a fertile source. This is not a new idea. GAO studied the matter in the 1970s and concluded that there was no reason why the government's right of offset should not apply to tax refunds. B-137762.21-O.M., January 3, 1977. In fact, offset against tax refunds had been used in the past, although not widely, and had been upheld by the courts. Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536 (1946); Luther v. United States, 225 F.2d 495 (10th Cir. 1954); Belgard v. United States, 232 F. Supp. 265 (W.D. La. 1964).

In 1979, GAO formalized its position in a report entitled The Government Can Collect Many Delinquent Debts by Keeping Federal Tax Refunds as Offsets, FGMSD-79-19 (March 9, 1979). The Internal Revenue Service had misgivings, however, largely on policy grounds. In essence, the IRS felt that the nature of its mission made its agents unpopular enough to begin with, and adding this new role could adversely affect tax administration. GAO recognized the validity of IRS' concern, but nevertheless thought the offset idea was a good one:

"It is patently unfair to the honest citizen who pays his debts to the Government to allow other debts to go uncollected. This inequity is especially acute when the individual owing the debt has the ability to pay but does not, and the validity or amount of the debt is not in dispute." FGMSD-79-19 at 17.

Congress dipped its legislative toe into this new water first in 1981 by authorizing past-due child and spousal support payments under the Aid to Families with Dependent Children program to be offset against tax refunds and paid over to the respective states. 42 U.S.C. § 664; 26 U.S.C. § 6402(c).

Three years later, Congress expanded the concept to cover debts owed to the United States. The pertinent legislation is section 2653 of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 1153, codified at 31 U.S.C. § 3720A and 26 U.S.C. § 6402(d). Under this legislation, as amended by section 3 of the Cash Management Improvement Act Amendments of 1992, Pub. L. No. 102-589, 106 Stat. 5133, federal agencies, including government corporations, are required to report "past-due legally enforceable" debts to the IRS at least once a year, to be offset against tax refunds. Before referring a debt to the IRS, the agency must (1) notify the debtor of its intent to report the debt to IRS; (2) give the debtor at least 60 days to present evidence that all or part of the debt is not past due or legally enforceable; and (3) consider any evidence so presented. 31 U.S.C. § 3720A(b). The agency must also certify that it has made reasonable efforts to collect. Id.

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The original legislation applied to refunds payable prior to January 1, 1988. The sunset date was extended in 1988,[88] and the program made permanent in 1991.[89] The program operated as a pilot program for its first two years. Five agencies were included for the first year (1986); three more were added for 1987. All federal agencies are now supposed to be included.

The Treasury Department is required to issue regulations to implement the tax refund offset program, and agencies in turn are required to follow these regulations. 31 U.S.C. §§ 3720A(a), (d). Treasury's regulations are found at 26 C.F.R. § 301.6402-6. To be eligible to participate, a federal agency must have its own offset regulations. Id. § 301.6402-6(b)(1). Under other subsections of this regulation, the debt must be at least $25, and the agency must have explored offset possibilities under other authorities and, for debts over $100, must have reported the debt to a consumer reporting agency under 31 U.S.C. § 3711(f). A debtor wishing to challenge the offset may sue the creditor agency but may not sue the Treasury Department or the IRS. 26 U.S.C. § 6402(e). There is no requirement to exhaust any administrative remedy which might be available. Bolden v. Equifax Accounts Receivable Services, 838 F. Supp. 507 (D. Kan. 1993).

The Treasury regulations expressly provide that using a taxpayer's most recent address obtained from the IRS will satisfy the agency's duty to give notice, unless the taxpayer has provided "clear and concise notification" to use a different address. 26 C.F.R. § 301.6402-6(d)(1). Use of the mailing address obtained from the IRS has been upheld as reasonable. Setlech v. United States, 816 F. Supp. 161 (E.D.N.Y. 1993). "The means used to provide notice need not eliminate all risk of non-receipt." Id. at 167.

The refund offset program has been upheld against a constitutional due process challenge. Richardson v. Baker, 663 F. Supp. 651 (S.D.N.Y. 1987). Offset under 31 U.S.C. § 3720A is not subject to state law personal property exemptions. Bosarge v. United States Department of Education, 5 F.3d 1414 (11th Cir. 1993).

The program has been studied extensively. GAO's conclusion is reflected in the title of its report, Tax Policy: Refund Offset Program Benefits Appear

[88]Family Support Act of 1988, Pub. L. No. 100-485, § 701(a), 102 Stat. 2343, 2425 (1988).

[89]Emergency Unemployment Compensation Act of 1991, Pub. L. No. 102-164, § 401, 105 Stat. 1049, 1061 (1991).

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to Exceed Costs, GAO/GGD-91-64 (May 1991).[90] The Office of Management and Budget has reported that the refund offset program is succeeding in collecting delinquent debt. For calendar year 1988, collections totalled over $318 million, of which $82 million was voluntarily repaid upon the receipt of notification letters.[91] A congressional report states that from January 1986 through July 1992, the program resulted in the collection of almost $2.8 billion in delinquent debt.[92]

6. The Federal Tax Levy

As noted previously in this chapter, the Debt Collection Act of 1982 and the Federal Claims Collection Standards do not apply to debts arising under the Internal Revenue Code. Thus, for the most part, this chapter has not dealt with tax claims. However, a discussion of offset would not be complete without some mention of the tax levy.

If a taxpayer neglects or refuses to pay a tax after receiving notice and demand, the Internal Revenue Service may "levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax." 26 U.S.C. § 6331(a). Section 6334(a) lists a number of exemptions, such as wearing apparel, tools of the trade up to a specified limit, unemployment benefits, worker's compensation, and a minimum salary exemption. Section 6334(c) then provides:

> "Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)."

This authority is extremely broad, and indicates that "Congress meant to reach every interest in property that a taxpayer might have." United States v. National Bank of Commerce, 472 U.S. 713, 720 (1985). The constitutionality of the levy provisions has been upheld. Id. at 721.

Prior to the 1954 version of the Internal Revenue Code, applicability of a tax levy to property in the hands of another federal agency varied, based largely on the availability of common-law offset. Thus, for example, GAO had found a tax levy inapplicable to the current salary of a government employee. 26 Comp. Gen. 907 (1947); 23 Comp. Gen. 911 (1944). The

[90]Prior GAO and Treasury Department reports include Tax Administration: Collecting Federal Debts by Offsetting Tax Refunds, GAO/GGD-87-39BR (February 1987); Department of the Treasury, Financial Management Service, Federal Tax Refund Offset: Pilot Program 1986–1987 (July 1988).

[91]OMB, Management of the United States Government - Fiscal Year 1990, page 3-12.

[92]S. Rep. No. 420, 102d Cong., 2d Sess. 5 (1992), reprinted at 1992 U.S. Code Cong. & Admin. News 4304, 4308. This is the report of the Senate Governmental Affairs Committee on the Cash Management Improvement Act Amendments of 1992.

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Internal Revenue Code of 1954 re-enacted the basic levy authority, and added what is now 26 U.S.C. § 6334(c), quoted above. This provision had the effect of nullifying the previously recognized exemptions, limiting them to those specified in section 6334(a). 49 Comp. Gen. 150 (1969); 36 Comp. Gen. 106 (1956). The revised section 6331(a) deals specifically with federal salaries, making the levy expressly applicable to "the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia."

In post-1954 decisions, the Comptroller General has consistently held that the levy authority applies to property in the hands of another federal agency, and that the agency in possession must therefore comply with a Notice of Levy served upon it by the IRS. 63 Comp. Gen. 498 (1984) (individual share of Indian judgment funds held by the Bureau of Indian Affairs); 49 Comp. Gen. 150 (1969) (savings deposits of military personnel stationed overseas); 38 Comp. Gen. 23 (1958) (postal savings accounts); 36 Comp. Gen. 106 (1956) (payments to military personnel upon discharge); B-177789, January 26, 1973 (Civil Service retirement annuities); B-156868, July 19, 1965 (cash deposit posted by contractor under timber sale contract); B-201511-O.M., April 8, 1981 (contract funds withheld under Davis-Bacon Act and determined payable to person against whose property IRS had levied). The test is a simple one:

> "[A]ll that is necessary to determine for the purposes of applicability of section 6331(a) is whether [the property in question is] 'property or rights to property' belonging to the delinquent taxpayer."

38 Comp. Gen. at 24. The courts are generally in accord. E.g., Expoimpe v. United States, 609 F. Supp. 1098 (S.D. Fla. 1985), upholding a tax levy against property which had been seized by the Drug Enforcement Administration. However, the levy authority has been held not to apply to Treasury checks in the hands of a depositary bank which had become a holder in due course. 54 Comp. Gen. 397 (1974).

The authority of 26 U.S.C. § 6331 applies to intangible property such as debts. United States v. Eiland, 223 F.2d 118, 121 (4th Cir. 1955). Under Treasury regulations, the obligation must be "fixed and determinable" in order to be subject to levy. However, this does not mean that it must be "beyond dispute and be calculated to the last penny." Reiling v. United States, 77-1 U.S.T.C. ¶ 9269 (N.D. Ind. 1977).

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A GAO decision applying these concepts is B-217475, May 5, 1986. An individual had been retained as an independent contractor by the National Mediation Board to serve as an arbitrator. For several years, he had not submitted vouchers for his compensation and expenses. The IRS wanted to levy against this unpaid compensation. Without the vouchers, however, the Board had no way of determining what it owed the individual and its obligation therefore was not sufficiently "fixed and determinable" for tax levy purposes. If the individual should file a claim in the future that was supported by vouchers and not time-barred, the IRS could then seek to enforce any surviving lien it might have under 26 U.S.C. § 6321.[93]

The Supreme Court has characterized the tax levy as a "provisional remedy." United States v. National Bank of Commerce, 472 U.S. at 720. It "does not determine whether the Government's rights to the seized property are superior to those of other claimants; it, however, does protect the Government against diversion or loss while such claims are being resolved." Id. at 721. The Comptroller General has taken a similar view with respect to competing government claims. In a 1962 case, for example, the IRS had filed a levy with the State Department against moneys being withheld from a former employee. The Justice Department asserted a claim against the same funds to satisfy a fine resulting from a criminal conviction. GAO concluded that the funds should be applied first to satisfy the fine, which had been imposed prior to the assessment of the tax. "[T]here appearing to be no overriding equities, we perceive no reason why the monies due from the Government should not be applied with regard to the priority in time of the indebtedness." B-147557, January 2, 1962.

Whether a tax levy served on a federal agency is just another form of administrative offset or is a separate legal creature has produced a fair amount of litigation. The answer determines such things as the applicable jurisdictional statutes for challenging the levy/offset and the applicable statute of limitations. Thus far, the courts are divided. The majority view holds that a tax levy is not the same as a setoff. Capuano v. United States, 955 F.2d 1427 (11th Cir. 1992); Arford v. United States, 934 F.2d 229 (9th Cir. 1991); United Sand and Gravel Contractors, Inc. v. United States, 624 F.2d 733 (5th Cir. 1980). As the Capuano court put it, "If it is called a levy, and it acts like a levy, then it is a levy." 955 F.2d at 1431. In disagreement is United States ex rel. P.J. Keating Co. v. Warren Corp., 805 F.2d 449 (1st Cir. 1986), holding that the transfer of funds by another federal agency to

[93]A tax lien under 26 U.S.C. § 6321 survives as long as the underlying tax liability is enforceable. Id. § 6322.

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the IRS is properly characterized as a setoff, even if it occurs under a formal notice of levy. The only GAO decision addressing the issue agrees with the First Circuit. 70 Comp. Gen. 41 (1990) (transfer by Government Printing Office to IRS of payments on contractor invoices submitted after receipt of notice of levy proper as a setoff).

7. Disposition of Amounts Set Off

How does an agency making an offset account for the amount recovered? There are three possibilities: (1) transfer the amount set off to the general fund of the Treasury as miscellaneous receipts; (2) transfer the amount set off to the credit of some other appropriation or fund; (3) take no action, with the result being that the amount of the setoff remains to the credit of the appropriation used to make the payment against which the debt was set off.

The rule is that a setoff must be accounted for in the same manner as if the debtor had made the payment directly. Whichever of the above three options would apply to a direct payment will apply as well to a setoff. In other words, for appropriations accounting purposes, there is no difference between a direct collection and a setoff.

Thus, if a debt represents tax indebtedness, the amount set off should be paid over to the Internal Revenue Service. See, e.g., B-189125, June 7, 1977; B-187903, December 21, 1976. Similarly, amounts set off against a final contract payment to satisfy a Labor Department claim under the Contract Work Hours and Safety Standards Act should be transferred to GAO for disposition in accordance with that statute. B-181695, April 7, 1975.

If the setoff is not payable to some other agency as in the above examples, again the rule is that the agency must account for the setoff as if the debtor had made the payment directly. Generally, this means that the agency must transfer the amount of the setoff to the Treasury as miscellaneous receipts unless there is statutory authority for retention of the funds, or unless the setoff constitutes a repayment to the appropriation. The agency may not retain the setoff if it would amount to an unauthorized augmentation of the agency's appropriations.

The Comptroller of the Treasury expressed the principle as follows:

"The amount of the claim of the Government against the railroad company for the value of a mule negligently killed is just as much a receipt when deducted from the claim of the railroad company as it would be if collected in cash from some party who had negligently

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killed the mule and had no claim against the Government from which a set-off could be made. . . . The appropriation benefiting by the set-off should be charged with the amount of the set-off and miscellaneous receipts credited with a like amount."

20 Comp. Dec. 349, 351 (1913). See also 64 Comp. Gen. 395, 402 (1985); 52 Comp. Gen. 45 (1972); 19 Comp. Gen. 88, 90 (1939); 2 Comp. Gen. 599, 600 (1923); 22 Comp. Dec. 703 (1916); B-208064, November 15, 1983.

For a more recent illustration, when an agency sets off a debt owed by an insurance company against a subrogation award under the Federal Tort Claims Act, it cannot simply settle the claim for the difference. It must first settle the tort claim, then pay the net amount, if any, to the insurance company and transfer the amount of the setoff to miscellaneous receipts. B-135984, May 21, 1976.

Similarly, receipts collected by setoff from a common carrier for the value of government property lost or damaged in transit must be credited to miscellaneous receipts. 46 Comp. Gen. 31 (1966); 28 Comp. Gen. 666 (1949); B-4494, September 19, 1939. A narrow exception exists in cases where a single appropriation is involved and the freight bill on the shipment of the property lost or damaged exceeds the amounts paid for repairs. 21 Comp. Dec. 632 (1915), as amplified in 8 Comp. Gen. 615 (1929) and 28 Comp. Gen. at 667.

Where a debt is collected by setoff against retirement funds, the Office of Personnel Management pays over the amount of the setoff by check from the retirement fund to the agency that made the request. The requesting agency then must dispose of the funds in accordance with the above principles. 35 Comp. Gen. 38 (1955). If the requesting agency is no longer in existence, the check is sent to GAO for disposition. Id. at 39.

F. Statutes of Limitations

1. Limitations on Commencing a Lawsuit

The primary statute of limitations on the commencement of actions brought by the United States is 28 U.S.C. § 2415. Enacted in 1966, this was the first general statute of limitations on civil actions brought by the government. It is relevant to the administrative debt collection process because any referrals to the Justice Department for litigation must be

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made in sufficient time to permit the filing of a lawsuit before the statute runs. The time periods in 28 U.S.C. § 2415 apply with respect to the types of actions specified unless there is some other more specific statute of limitations applicable to a particular case. The statute applies only to actions for money damages.

Subsection (a) of section 2415 covers contract actions. The limitation period for filing a complaint on "any contract express or implied in law or fact" is six years after the right of action accrues, or one year after the final decision in any applicable administrative proceeding required by contract or law, whichever is later.

The subsection contains a proviso which codifies the common-law principle that a later partial payment or written acknowledgement of a debt starts the time period running anew. The acknowledgement or partial payment may occur before or after the barring period initially expires. United States v. Glens Falls Ins. Co., 546 F. Supp. 643, 645 (N.D.N.Y. 1982).

Whether a partial payment will trigger this proviso depends on the intent of the debtor at the time of payment. The circumstances must permit the inference that the debtor recognizes the whole of the debt and intends to repay it. United States v. Glass Nursing & Convalescent Homes, Inc., 550 F. Supp. 1149, 1152 (S.D. Ohio 1982); Glens Falls Ins. Co., 546 F. Supp. at 645–46. In the latter case, a payment of less than the amount claimed, accompanied by a letter which clearly indicated that payment was being tendered in full satisfaction of the claim, was held not to constitute "partial payment" for purposes of re-starting the statute of limitations.

Subsection (b) provides a 3-year statute of limitations for tort actions brought by the United States (damage or injury from a wrongful or negligent act or omission). However, certain specified tort actions have a 6-year statute of limitations. These are: trespass on federal land; damages resulting from fire on federal land; conversion of federal property; and actions to recover for the diversion of money paid out under a grant program. An action to recover based on the misapplication of social security benefits has been held to be within the grant diversion exception and therefore subject to the 6-year limitation. United States v. Dimeo, 371 F. Supp. 95 (N.D. Ga. 1974).

Subsection (c) provides that 28 U.S.C. § 2415 shall not apply to actions to establish the title to, or right of possession of, real or personal property.

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Subsection (d) provides a 6-year limitation period for actions to recover money erroneously paid to or on behalf of any civilian employee of the government or any member or dependent of the uniformed services. The payment must have been incident to the employment or service. As with the contract limitation discussed above, subsection (d) also provides that a later partial payment or written acknowledgement of the debt will start the clock running anew.

Subsection (e) deals with the recommencement of actions. Where an action has been dismissed without prejudice, the government may recommence the action within one year regardless of whether the action would then otherwise be barred. The defendant in a recommenced action may assert any claims which would not have been barred in the original action.

Subsection (h) excludes from the coverage of 28 U.S.C. § 2415 actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

Cases under 28 U.S.C. § 2415 often involve determining when the government's cause of action accrued. For example, under the student loan program, the cause of action accrues when the government pays the lender. United States v. Olavarrieta, 812 F.2d 640 (11th Cir. 1987), cert. denied, 484 U.S. 851; United States v. Tilleraas, 709 F.2d 1088 (6th Cir. 1983); United States v. Frisk, 675 F.2d 1079 (9th Cir. 1982); United States v. Bellard, 674 F.2d 330 (5th Cir. 1982).

For suits to recover overpayments to a provider under the Medicare program, the majority of courts hold that the 6-year statute of limitations under 28 U.S.C. § 2415(a) begins to run when the fiscal intermediary makes its final retroactive adjustment, thus fixing the exact amount of the overpayment. United States v. Hughes House Nursing Home, Inc., 710 F.2d 891 (1st Cir. 1983); United States v. Gravette Manor Homes, Inc., 642 F.2d 231 (8th Cir. 1981); United States v. White House Nursing Home, Inc., 484 F. Supp. 29 (M.D. Fla. 1979). The cases are not in total agreement, however, and some courts use the date of completion of the final audit. E.g., United States v. Pisani, 646 F.2d 83, 89 (3d Cir. 1981).

A 1971 GAO memorandum, B-158275-O.M., December 9, 1971, discussed the date of accrual in several contexts. In contract default cases, the limitation period begins to run from the date of breach. In an action to recover for delivery of defective goods, the limitation period would commence on the

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date of delivery if the defects are apparent, and from the time of discovery if the defects are latent at the time of delivery. In actions to recover pension overpayments by the Department of Veterans Affairs, the limitation period runs from the date of discovery of the debtor's disqualification. The limitation on debt claims based on a veteran's indemnity obligation runs from the date the government reimburses the lending institution.

It is important to emphasize that 28 U.S.C. § 2415 does not cover all actions brought by the United States. As noted above, it is limited to suits to recover money damages and expressly excludes tax suits and suits to establish title to or possession of property. Apart from these express exceptions, must all other actions be squeezed into one of the covered categories (contract, tort, or money erroneously paid out)? In other words, is every action by the United States subject to some statute of limitations? In general, the answer is no. It has been held, for example, that certain actions founded on statute are not covered by any of the specified categories and hence are not subject to any limitation period. E.g., United States v. Lutheran Medical Center, 680 F.2d 1211 (8th Cir. 1982), aff'g 524 F. Supp. 421 (D. Neb. 1981) (suit under Hill-Burton Act to recover construction grant funds when facility was sold to profit-making organization); United States v. City of Palm Beach Gardens, 635 F.2d 337 (5th Cir. 1981) (facility constructed with Hill-Burton funds ceased to be used as community health center); B-179245-O.M., August 20, 1973 (action to recover statutory reenlistment bonus when payee failed to complete reenlistment term for which it was paid).

In addition, 28 U.S.C. § 2415 does not apply to an action by the United States to enforce a judgment. United States v. Hannon, 728 F.2d 142 (2d Cir. 1984) (default judgment); United States v. Kellum, 523 F.2d 1284 (5th Cir. 1975) (consent judgment); United States v. Johnson, 454 F. Supp. 762 (D. Idaho 1978) (default judgment).

There is language in a few cases to the effect that, for purposes of 28 U.S.C. § 2415, suits for damages by the United States must be characterized as sounding in either tort, contract, or quasi-contract. United States v. Limbs, 524 F.2d 799, 801 (9th Cir. 1975) (suit against employee for restitution of compensation benefits under Federal Employees Compensation Act held to be quasi-contractual and thus subject to 6-year limitation); United States v. Neidorf, 522 F.2d 916, 919 (9th Cir. 1975), cert. denied, 423 U.S. 1087 (suit to recover distributions to shareholders which rendered debtor

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duties. 15 U.S.C. § 1692a(6)(C).[15] While the statute may not apply as a matter of law, engaging in abusive practices of the type prohibited is certainly undesirable as a matter of policy. It is, for example, the policy of the Department of Justice for United States Attorneys to follow the limitations of the Fair Debt Collection Practices Act with respect to prohibited activities.[16] While GAO has not addressed the point formally, this strikes the editors as sound guidance for all federal debt collectors.

4. Scope of the Federal Claims Collection Act and Standards

a. What Is a Debt?

In its simplest terms, a debt, for purposes of the Federal Claims Collection Act and Standards, is something you owe the federal government. The Standards define "debt" as "an amount of money or property which has been determined by an appropriate agency official to be owed to the United States from any person, organization, or entity, except another Federal agency." 4 C.F.R. § 101.2(a).

When GAO and the Justice Department were preparing the 1984 version of the Standards, several commenters asked for clarification of the difference between a "debt" and a "claim." In one sense, there is a logical distinction. Suppose, for example, you buy a house and take out a mortgage for $100,000 with your local bank. You have a "debt" to the bank in the full amount of the note you signed. However, as long as you continue making your payments on time, the bank cannot take any collection action against you. In this sense, the bank does not have a "claim" against you unless and until you fall behind in your payments. Be that as it may, as the 1984 preamble notes, the Debt Collection Act of 1982 appears to use the terms interchangeably.[17] It was decided that creating a distinction in the Standards would not serve a useful purpose. "In the final analysis, following the substance of the regulations is more important than specific nomenclature." 49 Fed. Reg. at 8889. Thus, the Standards also use the terms interchangeably. 4 C.F.R. § 101.2(a).

[15]Occasional statutory exceptions exist. For example, a provision in recent Treasury, Postal Service and General Government Appropriations Acts requires compliance with certain provisions of the Fair Debt Collection Practices Act by Internal Revenue Service employees in the collection of tax underpayments. E.g., Pub. L. No. 103-123, Treasury Department General Provisions § 104, 107 Stat. 1226, 1233 (1993) (FY 1994).

[16]United States Attorneys' Manual, title 11, § 11-10-1.120 (April 1986).

[17]The names of the two key statutes bear this out—the Federal Claims Collection Act of 1966 and the Debt Collection Act of 1982.

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corporation insolvent). The extent of any real inconsistency between the two lines of cases has yet to be determined.

The typical statute of limitations contains various tolling provisions—periods of time that are to be excluded in computing the limitation period. The tolling provisions for 28 U.S.C. § 2415 are found in 28 U.S.C. § 2416. There are four general situations which will toll the limitation periods prescribed in section 2415: (a) defendant outside the United States; (b) defendant exempt from legal process because of infancy, mental incompetence, diplomatic immunity, or for any other reason; (c) material facts not known and could not reasonably be known by responsible government official; and (d) United States in declared state of war. In addition, section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. § 525, tolls the statute for periods of military service.

While 28 U.S.C. § 2415 is the most common statute of limitations on actions brought by the government, there are others dealing with specific situations. Some of them are:

- 31 U.S.C. § 3712(d): United States waives claim under dual compensation laws if claim has not been reported to GAO within six years from the last date of any period of dual compensation. (For implementing procedures, see Title 4 of GAO's Policy and Procedures Manual for Guidance of Federal Agencies.)
- 49 U.S.C. app. § 1502 note: 2-year statute of limitations on loss and damage claims resulting from international air transportation under Article 29 of the Warsaw Convention.
- 31 U.S.C. § 3731(b) (False Claims Act): Suit must be brought (1) within six years after the date of the violation, or (2) within three years after the date material facts were or reasonably should have been known by the responsible government official, but in no event more than ten years after the date of the violation, whichever occurs last.

2. Administrative Offset

Judicial offsets are covered by statute. Since its enactment, 28 U.S.C. § 2415 has expressly preserved the government's right to assert offsets and counterclaims in actions brought against it. Under 28 U.S.C. § 2415(f), in a suit against the United States, the United States may assert any claim arising out of the same transaction or occurrence (counterclaim). The United States may also assert, by way of offset, a claim not arising out of the same transaction or occurrence, even if time-barred, but the claim is

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allowable only in an amount not in excess of the opposing party's recovery.

What about administrative offsets? Does the running of a statute of limitations on bringing lawsuits preclude subsequent administrative offset? As a general proposition, the answer is no, unless the statute expressly provides that running of the time period will extinguish the liability as well as bar the remedy of a lawsuit.

For example, 15 U.S.C. § 714b(c) imposes a 6-year statute of limitations on suits by or against the Commodity Credit Corporation. Expiration of the 6-year period does not bar the CCC from collecting debts by administrative offset. Doko Farms v. United States, 956 F.2d 1136 (Fed. Cir. 1992); United States v. Missouri Pacific R.R. Co., 250 F.2d 805 (5th Cir. 1958), cert. denied, 358 U.S. 821; Union Pacific R.R. Co. v. United States, 147 F. Supp. 483 (Ct. Cl. 1957), cert. denied, 353 U.S. 950. The Doko Farms court stated the rule as follows (956 F.2d at 1140):

"Courts have recognized and held that the fact that the statute of limitations bars a government suit to collect an amount due to it does not bar the government from invoking its administrative remedies to offset the indebtedness against other claims by the debtor."

Similarly, setoff against a contractor for violations of the Walsh-Healey Act (41 U.S.C. §§ 35–45) is proper even after expiration of the applicable 2-year period for filing suit (29 U.S.C. § 255). 33 Comp. Gen. 66 (1953). See also Unexcelled Chemical Corp. v. United States, 149 F. Supp. 383 (Ct. Cl. 1957); Ready-Mix Concrete Co. v. United States, 130 F. Supp. 390 (Ct. Cl. 1955); B-144604(1), December 18, 1961.

However, administrative offset after expiration of the statute of limitations in Article 29 of the Warsaw Convention is improper because Article 29 expressly provides that running of the 2-year period will extinguish the debt. 54 Comp. Gen. 633 (1975).

When the issue began to arise in the context of 28 U.S.C. § 2415, opinions split. GAO and one district court held that expiration of a period of limitations under section 2415 merely bars judicial enforcement but does

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not preclude subsequent administrative setoff.[94] The Department of Justice and another district court concluded that offset was barred.[95]

Congress came to the rescue, at least in part, with two provisions of the Debt Collection Act of 1982. First, section 9 of the Debt Collection Act added a new subsection (i) to 28 U.S.C. § 2415:

"The provisions of this section shall not prevent the United States or an officer or agency thereof from collecting any claim of the United States by means of administrative offset, in accordance with section 3716 of title 31."[96]

However, Congress did not want to leave administrative offset open-ended. Therefore, it provided in section 10 of the Debt Collection Act that "no claim under this Act [Federal Claims Collection Act] that has been outstanding for more than ten years may be collected by means of administrative offset." This provision is codified at 31 U.S.C. § 3716(c)(1), which renders section 3716 inapplicable "to a claim under this subchapter that has been outstanding for more than 10 years."). Thus, administrative offset under 31 U.S.C. § 3716 is not affected by 28 U.S.C. § 2415, but now has its own 10-year statute of limitations.

The Federal Claims Collection Standards, in 4 C.F.R. § 102.3(b)(3), define "outstanding" in terms of when the government's right to collect the debt first accrued, and provide that the case law under 28 U.S.C. § 2415 should be used to determine the date of accrual. The Standards also incorporate the "knew or reasonably should have known" tolling provision of 28 U.S.C. § 2416, noted previously. See, e.g., 64 Comp. Gen. 395 (1985).

The next question is whether the 10-year limitation of 31 U.S.C. § 3716(c)(1) applies only to offset under the authority of 31 U.S.C. § 3716, or whether it applies to all administrative offsets, such as offset under 5 U.S.C. § 5514 or the various other offset statutes described previously in this chapter. Plausible arguments can be made both ways. On the one hand, it was enacted as part of section 3716 and, at least on its face, does not purport to affect any other statute. Following this approach, GAO

[94]58 Comp. Gen. 501 (1979); Atwater v. Roudebush, 452 F. Supp. 622 (N.D. Ill. 1976). See also Sidney B. Jacoby, The 89th Congress and Government Litigation, 67 Colum. L. Rev. 1212, 1231 (1967) ("The legislative history of the new 28 U.S.C. § 2415(f) makes it clear that the permissibility of making administrative setoffs remains unchanged.").

[95]Effect of Statute of Limitations on Administrative Collection of United States Claims, Op. Off. Legal Counsel, September 29, 1978, summarized in 58 Comp. Gen. 501, 503-04 (1979); Tomakin v. United States, No. C 75 1079 RHS (N.D. Cal. September 2, 1975) (unpublished order).

[96]Another statutory codification of the principle is 38 U.S.C. § 5314(c) (indebtedness under veterans' benefit programs).

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concluded in 63 Comp. Gen. 462 (1984) that the 10-year limitation did not apply to offsets under 5 U.S.C. §§ 5705 and 5724(f).

Yet on the other hand, if all non-judicial offsets are varieties of administrative offset,[97] there is no logical reason why the 10-year period, like the due process procedures of section 3716,[98] should not apply to administrative offset under other statutes which do not contain their own limitation periods. Following this approach, the Office of Personnel Management has applied the 10-year limitation to offsets under 5 U.S.C. § 5514. 5 C.F.R. § 550.1106, added by 51 Fed. Reg. 21325, June 12, 1986. The Secretary of the Treasury has done the same thing under the Tax Refund Offset Program. 26 C.F.R. § 301.6402-6(c)(1). GAO has applied the OPM regulations without question. B-232454, September 1, 1989.

The question of taking administrative offset after expiration of a statute of limitations on bringing a lawsuit raised its head with increased vigor under the Tax Refund Offset Program, this time with a new twist. Under 31 U.S.C. § 3720A, "legally enforceable" debts may be reported to the IRS for potential offset. A number of student loan recipients[99] have argued that once the 6-year period for filing suit has expired, the debt is no longer "legally enforceable" for purposes of the offset program. Thus far, the courts have uniformly rejected this argument, holding that expiration of the statute of limitations bars a lawsuit but does not preclude subsequent administrative offset. Grider v. Cavazos, 911 F.2d 1158 (5th Cir. 1990);[100] Jones v. Cavazos, 889 F.2d 1043 (11th Cir. 1989); Thomas v. Bennett, 856 F.2d 1165 (8th Cir. 1988); Roberts v. Bennett, 709 F. Supp. 222 (N.D. Ga. 1989); Gerrard v. United States Office of Education, 656 F. Supp. 570 (N.D. Cal. 1987).[101] Cf. Swaney v. Secretary of Education, 664 F. Supp. 172, 177 (D. Del. 1987) (court found that government's position had a "reasonable basis in law" for purposes of an attorney's fee petition under the Equal Access to Justice Act).

[97]E.g., 64 Comp. Gen. 142 (1984); 5 C.F.R. § 550.1102(b).

[98]64 Comp. Gen. 142 (1984).

[99]For some reason, the cases thus far have all involved defaulted student loans. Perhaps one should be gratified in some small way that the recipients are at least learning their way to court.

[100]As Grider illustrates, there is disagreement over how to apply the 10-year limitation on administrative offset, but there is no disagreement on the basic proposition for which we cite the case.

[101]Language in Hurst v. U.S. Dep't of Education, 695 F. Supp. 1137, 1139 (D. Kan. 1988) could be used to support a contrary proposition, but the offset in that case was made within the 6-year lawsuit period. A separate issue in Hurst was appealed and affirmed in 901 F.2d 836 (10th Cir. 1990).

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G. Deceased Debtors

It should be apparent that many of the collection tools we have been discussing throughout this chapter will be of little value against a deceased debtor. If a debtor is deceased, the government may be able to collect from the estate or from a distributee of property from the estate. However, different rules and procedures come into play. This section will attempt to describe some of them.

The key statute to be aware of is 31 U.S.C. § 3713. Subsection (a) gives priority to claims of the United States when "the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor." In other words, if the estate is insolvent (insufficient assets to pay all claims), a claim of the United States must be paid first. The statute is, as one court has put it, "remarkably straightforward and free from significant ambiguity." Carter v. Carter, 681 F. Supp. 323, 326 (E.D. Va. 1988).

Subsection (b) gives real teeth to the priority. It provides that a personal representative of an estate (executor, administrator, etc.) who pays other debts owed by the decedent before paying debts owed to the United States will be personally liable to the extent of the unpaid government claims.[102] This means exactly what it says. Thus, an executor of a Texas estate who paid the state inheritance tax before paying the federal estate tax was found personally liable for the outstanding federal tax. United States v. Blakeman, 750 F. Supp. 216 (N.D. Tex. 1990).

This statute was not part of the Federal Claims Collection Act of 1966 or the Debt Collection Act of 1982. In fact, 31 U.S.C. § 3713 is one of the oldest federal statutes on the books. The priority portion was originally enacted in 1797 (1 Stat. 515). The personal liability portion was added two years later, in 1799 (1 Stat. 676). A capsule history may be found in United States v. Moore, 423 U.S. 77, 80–82 (1975).

The purpose of 31 U.S.C. § 3713 is a simple one: to aid in raising revenue to help support the operations of the government. United States v. State Bank of North Carolina, 31 U.S. (6 Pet.) 29, 35 (1832). As such, it is to be construed liberally to serve that purpose. United States v. Emory, 314 U.S. 423, 426 (1941); In re Kuhn's Estate, 21 A.2d 513 (Pa. Super. Ct. 1941). Its constitutionality against challenges of interference with state sovereignty

[102]In addition to deceased debtors, 31 U.S.C. § 3713 also applies to insolvency of a living debtor in certain circumstances, except for cases under the Bankruptcy Code. We are limiting our coverage to deceased debtors, although a few of the cases cited for the more general propositions are insolvency cases.

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has long been settled. United States v. Fisher, 6 U.S. (2 Cranch) 358, 395-96 (1805) (Chief Justice Marshall); In re Kuhn's Estate, 21 A.2d at 514–15.

Debts for purposes of 31 U.S.C. § 3713 are not limited to debts which are delinquent or past due, or even currently payable. The Supreme Court stated, in United States v. State Bank of North Carolina, 31 U.S. at 36:

"What debt is here referred to? A debt which is then actually payable to the United States? Or a debt then arising to the United States, whether then payable, or payable only in futuro? We think the latter is the true construction of the term of the act."

See also Leggett v. Southeastern People's College, 234 N.C. 595, 68 S.E.2d 263, 267 (1951) (term merely "denotes a state of indebtedness").

Debts for purposes of 31 U.S.C. § 3713 clearly embrace federal income taxes. Viles v. Commissioner, 233 F.2d 376, 379 (6th Cir. 1956); United States v. Weisburn, 48 F. Supp. 393, 396 (E.D. Pa. 1943); In re Kuhn's Estate, 21 A.2d at 515. In fact many of the cases under section 3713 have involved tax claims. E.g., Meyerson v. Council Bluffs Savings Bank, 824 F. Supp. 173 (S.D. Iowa 1991) (tax lien given priority over claim of former spouse for unpaid alimony); Westmoreland v. Westmoreland, 716 F. Supp. 217 (D.S.C. 1988) (tax claim entitled to priority over prior recorded judgment lien).

The United States does not have priority under section 3713 over funeral expenses and expenses of administration of the estate. This is because these are debts of the estate and not of the decedent. Weisburn, 48 F. Supp. at 397; Martin v. Dennett, 626 P.2d 473 (Utah 1981); In re Henke's Estate, 39 Misc. 2d 705, 241 N.Y.S.2d 788 (Sur. Ct. 1963). However, the United States does have priority over the expenses of the decedent's last illness because they would have been liabilities of the decedent had he or she survived. Estate of Shoptaw, 54 Wash. 2d 602, 343 P.2d 740 (Wash. 1959); Estate of Muldoon, 128 Cal. App. 2d 284, 275 P.2d 597 (Cal. Dist. Ct. App. 1954).

For purposes of personal liability under 31 U.S.C. § 3713(b), the amount of the government's claim need not have been definitely determined at the time the estate assets were distributed. United States v. Purdome, 240 F. Supp. 221, 223 (W.D. Mo. 1963). If an estate is solvent at the time of death but later becomes insolvent, the statute applies, but one court has held that personal liability will attach only to the extent of post-insolvency distributions. Schwartz v. Commissioner, 560 F.2d 311 (8th Cir. 1977).

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Thus, the United States has a statutory right to have its claims paid before other debts of the decedent, and has the imposing threat of personal liability to enforce this right. We next consider how the government goes about asserting its priority.

Many decedents' estates will have to pass through some form of probate. There is no such thing as federal probate law. Probate is a creature of state law. Thus, probate rules and procedures can and do vary from state to state. State law commonly includes a statute of limitations on filing claims with the probate court. For openers, it is clear that state statutes of limitations do not apply to the federal government. State law cannot invalidate a claim of the United States. United States v. Summerlin, 310 U.S. 414 (1940); United States v. Vibradamp Corp., 257 F. Supp. 931 (S.D. Cal. 1966); United States v. Gibson, 101 F. Supp. 225 (D. Idaho 1951); United States v. Luce, 78 F. Supp. 241 (D. Minn. 1948); United States v. Anderson, 66 F. Supp. 870 (D. Minn. 1946).

The United States has an option. It may file and prosecute its claim in the probate court the same as any other creditor. Alternatively, it may simply notify the personal representative of its claim and otherwise ignore the probate proceedings, leaving it to the personal representative (under the spectre of personal liability) to preserve the government's priority. Vibradamp, 257 F. Supp. at 937; Luce, 78 F. Supp. at 243–44; 58 Comp. Gen. 778 (1979).

If the United States chooses to pursue the probate proceedings, it will be bound by the state court's determination. For example, in United States v. Pate, 47 F. Supp. 965 (W.D. Ark. 1942), the government filed a formal proof of claim. The probate court assigned it a low priority. The government did not appeal the probate court's determination, but instead filed suit to hold the administrator personally liable. Can't do it, held the court.

> "Had the Government seen fit to do so, it could have held aloof from said proceedings and given the administrator notice of its claim, and then he, at his peril, would have been bound to see that the priority rights of the Government were fully protected. . . . But it saw fit to pursue another course, and to submit its claim against the Meadors estate to the Probate Court of Howard County, a court having jurisdiction to administer said estate; and, having done so, it is bound by the judgment of said Court." Id. at 968.

If the government chooses to avoid probate and instead serve notice on the personal representative, the notification should obviously be in

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writing, and should assert the priority and cite 31 U.S.C. § 3713. See B-212728, August 27, 1984 (non-decision letter).

As a general proposition, if the government notifies the personal representative of its claim, or if the estate otherwise has actual knowledge, the government will be able to enforce personal liability against the representative. The facts that all assets have been distributed, the estate has been closed and the personal representative discharged are irrelevant. United States v. Boots, 675 F. Supp. 550 (E.D. Mo. 1987); Vibradamp, 257 F. Supp. at 937; Gibson, 101 F. Supp. at 227; Luce, 78 F. Supp. at 243; United States v. Munroe, 65 F. Supp. 213 (W.D. Pa. 1946); United States v. Fisher, 57 F. Supp. 410 (E.D. Mich. 1944). Some of the cases (Fisher for example) indicate that the government can also recover from persons to whom the assets have been distributed.

What if the United States does absolutely nothing until the estate has been closed and the assets distributed? The cases are divided. Vibradamp held that the United States cannot recover from either the personal representative or the distributees. The government may have an option, but it must actually exercise it and follow one of the alternatives. However, other courts have held that the United States can still recover from the distributees. United States v. Snyder, 207 F. Supp. 189 (E.D. Pa. 1962); United States v. Anderson, 66 F. Supp. 870 (D. Minn. 1946). See also B-136335, August 18, 1958; B-130974, June 4, 1957. (Personal liability of the executor or administrator was not an issue in Snyder and Anderson because the estates in those cases were not insolvent.)

If a personal representative is liable under 31 U.S.C. § 3713(b), the United States can collect by administrative offset should the opportunity present itself. In 10 Comp. Gen. 425 (1931), for example, the Comptroller General held that a government claim against an executrix could be set off against moneys payable to her under private relief legislation. Should a similar situation arise today, the offset would be accomplished under 31 U.S.C. § 3716. And, if the fiduciary should die before paying the government an amount owed under 31 U.S.C. § 3713(b), the government's claim survives against the fiduciary's estate. King v. United States, 379 U.S. 329, 330 n.1 (1964).

A GAO decision, 58 Comp. Gen. 778 (1979), illustrates many of the principles noted in this section. The debtor, a Wisconsin domiciliary who had received overpayments of Supplemental Security Income benefits, died without repaying the debt. The agency did not file a claim with the

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Wisconsin probate court, but did notify the estate's attorney, who indicated that the decedent's daughter, one of the distributees, would pay the claim after the estate was closed. Once the estate was closed and the assets distributed, the daughter argued that she should not be held liable because the government had failed to participate in the formal probate proceedings. GAO concluded that the government had acted properly and was entitled to recover the debt, which was otherwise undisputed, from the decedent's daughter. Wisconsin law provided that its probate filing requirements did not apply to claims by the United States, but the result would have been the same even without such a provision.

H. Liability of Government Employee for Loss Resulting From Error or Neglect of Duty

Federal employees may find themselves indebted to the government not only by receiving overpayments of various types, but also by causing the government to suffer losses due to their error, mistake in judgment, or neglect of duty. For losses in this latter category, there is a distinction, and a corresponding difference in standards of accountability, between funds and other types of property (although money is concededly a form of "property"). E.g., B-167126, August 28, 1978; B-151156, December 30, 1963. Accountability for funds is strict and is discussed in detail in Chapter 9; this section addresses accountability in situations not governed by the "accountable officer" laws—losses of property other than funds and losses attributable to employees who are not accountable officers.

The following examples will illustrate the variety of contexts in which the problem may arise:

- Example 1: John Q. Bureaucrat is given a General Services Administration motor pool vehicle to use on some official business. Instead of proceeding directly to his destination, he stops at his favorite watering hole for some liquid refreshment. Pleasantly stimulated by the diversion, he returns to the car and proceeds to ram it into a telephone pole.
- Example 2: John Q. is assigned some dictating equipment for use in his work. When he goes home for the night, he leaves it out on top of his desk in an unlocked office, instead of securing it in a locked desk or filing cabinet. The next morning, it is gone.
- Example 3: John's new job is processing payment vouchers. He inadvertently misplaces some invoices under a pile of unpaid traffic tickets, and the resulting delay in payment causes the government to lose a prompt payment discount.

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The question in all of these examples is the same: To what extent can the government recoup its losses from John Q's pocket?

At the outset, it is important to distinguish the employee's potential liability to the government from the government's liability under the Federal Tort Claims Act. Suppose in our first example that John ran into another vehicle instead of the telephone pole and the owner of that vehicle, a private citizen, filed a claim under the Federal Tort Claims Act. If John's agency paid the tort claim, it could not recoup from John. However, there would still be the question of liability for the damage to the government car. That is what we are concerned with here.

Before discussing monetary liability, we should point out that the agency can always consider non-pecuniary sanctions in the form of "adverse actions"—firing, suspension, demotion, etc. This was summarily recognized in a very early decision, A-25502, February 2, 1929, again in 25 Comp. Gen. 299, 301 (1945) and 45 Comp. Gen. 447, 450 (1966), and discussed in more detail in B-125045-O.M., June 29, 1977.

Turning to pecuniary liability, the first question to ask is whether the agency has any specific statutory direction in this area. Most agencies do not, but a few do. For example, in the Army and Air Force, pecuniary liability for the loss, damage, or destruction of government property is assessed by means of the "Report of Survey." 10 U.S.C. § 4835 (Army); 10 U.S.C. § 9835 (Air Force). This is an official investigation conducted by military personnel in accordance with regulations of the particular service.

The Report of Survey has been used to assess liability for such things as damage to a government-owned motor vehicle (B-135297, March 28, 1958) and the disappearance of two cases of sunglasses due to negligence by supply personnel (B-192609, September 18, 1978). The Report of Survey statutes apply to civilian employees as well as military personnel. B-154960, August 27, 1964. As the three cases cited in this paragraph point out, determinations resulting from a Report of Survey are final, except for any possible judicial review, and not subject to review by GAO.

If a member of the Army or Air Force damages "arms or equipment" by abuse or negligence, the amount of the damage may be deducted from current salary. 37 U.S.C. § 1007(e). See 51 Comp. Gen. 226 (1971).

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It should be readily apparent that a "debt," for purposes of the Federal Claims Collection Act and Standards, requires two elements: there must be an amount of money or property which is owed to the United States, and the government must be entitled to receive it immediately. If it is not immediately payable (as, for example, in the case of loan payments which have not yet become due), then there is no "debt" upon which collection action can be taken, regardless of the terminology used. Thus, the Standards opted for substance over semantics.[18]

One very important point emerges from the definition in section 101.2(a): a debt comes into existence when the government agency determines that there is a debt, unless some statute provides otherwise. The government does not have to go to court to establish the indebtedness. The existence and amount of the debt are determined in the first instance by the agency involved. At first glance, this may seem heavy-handed, but it is not. Obviously, the debtor retains the right to contest the debt through available administrative or judicial channels. Also, the government must follow any required procedures in connection with any particular form of collection action. But it is the agency's initial determination that triggers or sets in motion the debt collection process. See Bell v. New Jersey, 461 U.S. 773, 791 (1983), in which the Supreme Court applied the same concept to government claims under the Elementary and Secondary Education Act. See also Old Republic Ins. Co. v. Federal Crop Ins. Corp., 947 F.2d 269, 276 (7th Cir. 1991) (argument that agency's overpayment determinations were not "debts" subject to offset held to be without merit); DiSilvestro v. United States, 405 F.2d 150, 155 (2d Cir. 1968) ("the right of set-off arose when . . . the V.A. found that its prior decision granting DiSilvestro service-connected disability benefits was [erroneous]").

What kinds of debts are covered? The Debt Collection Act of 1982 contained a definition of "claim," now found at 31 U.S.C. § 3701(b): "amounts owing on account of loans insured or guaranteed by the Government and other amounts due the Government." This is one instance in which the language of the recodification lost some of the flavor of the original. The original Debt Collection Act language was as follows:

"For purposes of this Act, the term 'claim' includes amounts owing on account of loans insured or guaranteed by the United States and all other amounts due the United States

[18]For an early discussion of the ambiguities in words such as "due," see United States v. State Bank of North Carolina, 31 U.S. (6 Pet.) 29, 36–37 (1832). More recently, a "form over substance" argument was rejected in United States v. Luce, 78 F. Supp. 241, 243 (D. Minn. 1948).

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However, as noted, most agencies have no similar statutory direction. Absent statutory direction one way or the other, the rule is this: There is no authority to assess pecuniary liability against a government employee for losses resulting from error in judgment or neglect of duty unless the agency has issued regulations specifically providing for such liability. Restating the rule from a different perspective, a government employee may be held liable for losses resulting from his or her error or neglect if and to the extent the agency has issued regulations to that effect. The regulations serve to put the employee on notice of the potential liability.

The earliest published decision spelling out the rule is 25 Comp. Gen. 299 (1945). In that case, the Comptroller General held that since the (then) National Housing Agency had not promulgated administrative regulations, it could not set off against the retirement accounts of two employees a loss it suffered by virtue of the employees' failure to have certain property properly surveyed.

The concept arose again in 26 Comp. Gen. 866 (1947), in which a Commerce Department employee ordered fuel in violation of established procurement procedures, as a result of which the vendor billed the government in excess of the amount authorized under the General Supply Schedule. Since the employee had exceeded his authority, the government was not liable for the excess amount. As to the potential liability of the employee, the Comptroller General said that this was a matter to be resolved between the employee and the vendor. If, under the rule of 25 Comp. Gen. 299, the employee could not be charged for losses to the government in the absence of regulations, it followed that the government could not force the employee to pay for a loss sustained by a third party.

The rule has been applied to bar recovery from an employee for a loss due to the negligent failure to take advantage of a prompt payment discount. 45 Comp. Gen. 447 (1966). However, an employee could be subjected to liability for this type of loss if the agency had so provided by regulation. See A-25502, February 2, 1929. GAO further pointed out that certifying a voucher in the full amount within the discount period could subject the certifying officer to liability under 31 U.S.C. § 3528(a). 45 Comp. Gen. at 450.

Two early decisions affirmed the government's right of setoff against retirement funds in cases where the agency had regulations providing for employee liability. 5 Comp. Gen. 932 (1926) (negligent damage to Post Office truck); 3 Comp. Gen. 878 (1924) (Bureau of Printing and Engraving regulations assessing liability for excess spoilage). For other cases

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discussing or applying the rule, see 52 Comp. Gen. 964, 967 (1973); 32 Comp. Gen. 332 (1953); A-31814, May 29, 1930.[103]

Naturally, there are limits beyond which, with or without regulations, an employee may not escape the consequences of his or her own carelessness. Thus, for example, the rule of 25 Comp. Gen. 299 has been held not to apply to a situation where excess travel or transportation expenses result solely from the traveler's negligence. 34 Comp. Gen. 640 (1955).

In cases involving loss or damage to items of personal property, the legal basis for liability is the concept of bailment, under which a person with custody of property is liable for loss or damage due to ordinary negligence (lack of reasonable care under the circumstances). B-180160-O.M., March 18, 1974. Since the liability in the context of government employees is imposed by regulation, however, the agency can, in its discretion, apply a lesser standard (e.g., gross negligence) or a stricter one. GAO has cautioned that too strict a standard would not be wise. Id. Most reasonable people can understand having to bear the consequences of their own negligence. A stricter standard, however, apart from basic fairness, could adversely affect both employee morale and work productivity, since employees may well refuse to accept items of equipment for which they may be held strictly liable.

Assessing negligence in cases involving loss or damage to items of office equipment (calculators, personal computers, dictating equipment, etc.) often boils down to questions of physical security. An employee has an obligation to take reasonable precautions to safeguard government property entrusted to his or her custody. What is adequate, however, depends on the circumstances. You cannot, for example, be faulted for not locking your office if you work in a cubicle without a door. The rule, to the extent one can be said to exist, is "you do the best you can with what is available to you." In addition, common sense dictates that employees should bring security weaknesses to the attention of appropriate supervisory personnel. If, for example, you request some sort of anchoring device for a personal computer and the agency fails to provide it, it is not your fault. An internal GAO memorandum discussing employee liability for loss of computer equipment is B-180160-O.M., October 15, 1985.

[103]Any discussion in pre-1972 cases of surety bonding of employees is now obsolete in light of 31 U.S.C. § 9302.

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Employees against whom liability has been assessed occasionally ask GAO to review their cases. GAO will do so under its general claims settlement statute (31 U.S.C. § 3702(a)), but will apply a narrow standard of review. GAO will review basically two things: the agency's legal basis for assessing liability (i.e., the existence of statutory authority or appropriate regulations) and whether the agency has followed its own regulations. GAO will not second-guess the agency's determination that a given set of facts constitutes negligence unless the finding can be said to lack a rational basis. 65 Comp. Gen. 177, 179–80 (1986). See also B-212502, July 12, 1984; B-208108, July 8, 1983.

For example, in a 1982 case, a Forest Service employee was driving a leased vehicle on official business. The vehicle was damaged as a result of the employee's negligence in (a) leaving the vehicle unattended with the motor running, and (b) failing to set the parking brake in disregard of a memorandum which had advised that vehicles of that particular make had a tendency to jump from "park" into "reverse" gear. GAO found that the Forest Service acted properly in assessing pecuniary liability against the employee pursuant to its regulations. B-202807, March 25, 1982.

In a 1981 case, GAO considered a variation on the theme of employee liability. The Army proposed a program under which a member who lost, damaged, or destroyed an item of government property issued to him or her would be permitted to purchase a replacement at an Army Self-Service Supply Center for a sum equivalent to the value of the depreciated item. The difference between the purchase price of the replacement item and the amount paid by the individual soldier would be charged to appropriated funds. The Comptroller General found the proposal legally unobjectionable, but cautioned that the Army should establish adequate fund control procedures to ensure that the "automatic obligation" feature of the program would not violate the Antideficiency Act, 31 U.S.C. § 1341. The Comptroller General also found that the use of appropriated funds to pay the "depreciation allowance" would not constitute an unauthorized diversion of the funds from their intended purpose in violation of 31 U.S.C. § 1301(a), since the Army's appropriations were available to acquire replacement property. 60 Comp. Gen. 688 (1981).

Liability for damage to General Services Administration fleet management system (motor pool) vehicles is covered by regulation. 41 C.F.R. Subpart 101-39.4. If the damage is attributable to misconduct or negligent or improper operation by a government employee, GSA will charge the repair or replacement costs to the employing agency. The Comptroller General

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upheld the validity of these regulations in 59 Comp. Gen. 515 (1980). If the damage is not the employee's fault and the responsible party can be reasonably identified, GSA will absorb the cost or try to recover from the responsible party. The regulations specify that each agency is responsible for disciplining its employees who are guilty of damaging GSA vehicles through negligence or misconduct. 41 C.F.R. § 101-39.406(c). Under the rule of 25 Comp. Gen. 299, if an agency issues regulations to that effect, the forms of discipline could include pecuniary liability. See, e.g., A-31814, May 29, 1930.

One issue that has received little attention in the decisions is how to determine the amount of damages to charge the employee. Presumably, the agency can use any of the "standard" methods of computing damages—cost of repairs, value of item at time of loss less salvage value, etc. See 60 Comp. Gen. 688 (1981); 15 Comp. Gen. 927 (1936).

Once liability has been assessed, the agency should then proceed to collect in accordance with the legal authorities available to it as described elsewhere in this chapter. Since most forms of involuntary collection require varying types of due process procedures, agencies should integrate their procedures as much as they can to avoid duplication.

I. Right of Redemption and Release of Lien

1. Government's Right of Redemption

The United States may acquire liens to real property in many ways. A major source is the tax lien (26 U.S.C. § 6321). Also, the government may acquire a lien by virtue of paying a loss to a lender under an insured or guaranteed loan program. E.g., 36 Comp. Gen. 697 (1957). A lien may also result from the nonpayment of a criminal fine. E.g., B-100584, April 6, 1951.

Where the United States is a junior lienholder to real property, it may have the right of redemption to protect its interest against a senior lien. In this connection, 28 U.S.C. § 2410(c) provides in part:

"Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of the sale within which to redeem . . . ."

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Also, the right of redemption may be granted by state law.

There are statutory exceptions to the one-year right of redemption provided by 28 U.S.C. § 2410(c). For example, the statute itself further provides that the redemption period for a tax lien shall be 120 days or the period allowed by state law, whichever is longer. Federal tax liens are governed by detailed provisions of the Internal Revenue Code. The statute also refers to two other exceptions found elsewhere in the U.S. Code. The right to redeem provided by 28 U.S.C. § 2410(c) does not apply where the government's lien derives from (1) the issuance of insurance under the National Housing Act (12 U.S.C. § 1701k), or (2) a loan guaranteed or insured by the Department of Veterans Affairs (38 U.S.C. § 3720(d)).

At one point, based on the statutory context, the Comptroller General had expressed the view that the right of redemption under 28 U.S.C. § 2410(c) relates only "insofar as foreclosure sales are concerned, to such sales made pursuant to judicial action in a judicial proceeding, and not to a foreclosure sale made under a power of sale in a deed of trust without a judicial proceeding." B-100584, April 6, 1951. A later judicial opinion, however, concluded that the United States (with a junior lien) also has a right to redeem under 28 U.S.C. § 2410(c) when the superior lien has been foreclosed by a nonjudicial sale. United States v. Boyd, 246 F.2d 477 (5th Cir. 1957), cert. denied, 355 U.S. 889. If the right to redeem applies to a foreclosure of a superior lien by nonjudicial sale, it would logically apply also to a foreclosure by judicial sale where the United States, as junior lienholder, was not made a party to the action. B-169602, June 30, 1970 (non-decision letter).

In a number of cases, the purchaser at a foreclosure sale has asked GAO to release the government's right of redemption under 28 U.S.C. § 2410(e), discussed below. Whether the right of redemption under 28 U.S.C. § 2410(c) qualifies as a "lien" for purposes of release under section 2410(e) is not clear. The cases have all been decided on some other basis, usually that the applicant is the owner of the property rather than a senior lienholder. E.g., B-194391, July 16, 1979. From this perspective, the issue seems largely moot.

In any event, there may be other ways for a purchaser to remove the government's right of redemption, depending on the program agency's statutory authority. For example, in B-194391, July 16, 1979, the Comptroller General noted that the Small Business Administration has discretionary authority by statute to sell or otherwise dispose of claims or

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security, and to collect or compromise obligations. Under this authority, SBA could accept a monetary payment in exchange for the release of its right of redemption. In effect, SBA could "sell" its right of redemption to the owner of the property. See also B-141234-O.M., March 10, 1960.

As noted above, a right of redemption may exist by virtue of state law. A statute which bars rights of redemption under 28 U.S.C. § 2410(c) does not bar similar rights arising under state law. Thus, in one case the Federal Housing Administration had a right of redemption under state law even though the application of 28 U.S.C. § 2410(c) was expressly prohibited by 12 U.S.C. § 1701k. The Comptroller General held that FHA could expend Title I funds to redeem the property if redemption was determined to be in the best interests of the government and necessary to carry out the provisions of Title I. 36 Comp. Gen. 697 (1957).

Even assuming that a right of redemption under 28 U.S.C. § 2410(c) is a lien for purposes of the Comptroller General's release authority in section 2410(e), the Comptroller General has no authority to release or otherwise waive a right of redemption arising under state law. B-165746, December 26, 1968.

Whether the right of redemption stems from 28 U.S.C. § 2410(c) or from state law, the agency, before exercising it, must have appropriations available for that purpose. Indeed, the Supreme Court has noted that the purpose of the one-year period in 28 U.S.C. § 2410(c) is to give the agency involved sufficient time to obtain appropriations to protect the government's interests. United States v. John Hancock Mutual Life Ins. Co., 364 U.S. 301, 306 (1960). Absent a specific appropriation, the availability of appropriations is determined by applying the "necessary expense" concept developed under 31 U.S.C. § 1301(a). 36 Comp. Gen. 697 (1957); 34 Comp. Gen. 47 (1954). For example, in A-42511, August 24, 1932, GAO concluded that the Internal Revenue Service could charge redemption expenses to its appropriation for collecting the internal revenue, since the sole purpose of exercising the right in that case was to effect the collection of taxes due the United States.

2. Release of Junior Lien

If the United States holds a junior lien, other than a tax lien, to any real or personal property, the Comptroller General is authorized to issue a certificate releasing the property from the lien. 28 U.S.C. § 2410(e). The statute prescribes the procedures to follow in obtaining a release, and the

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requirements which must be met as a prerequisite to invoking the statute. Those requirements are:

(1) The applicant for the release must be a senior lienholder and must apply in writing to the officer responsible for the administration of the laws giving rise to the government's lien.

(2) The applicant's lien must be duly recorded in the jurisdiction in which the property is located.

(3) The government's lien must be junior to the applicant's lien, and must not be a tax lien.

(4) The officer to whom the application is made must find and report to the Comptroller General that the proceeds from the property's sale would be insufficient to wholly or partly satisfy the lien, or that the government's claim has been satisfied or that it is no longer enforceable because of lapse of time or for some other reason.

Thus, the sequence is: applicant applies in writing to program agency; program agency makes required findings; program agency reports findings to Comptroller General. The statute does not authorize GAO to cancel a lien generally, only to release it with respect to specific real or personal property. A-81605, November 25, 1936.

Issuance of a certificate of release is not an absolute right, but is contingent on compliance with the statutory conditions. Thus, all of the above conditions must be met in order for a release to be issued. E.g., 58 Comp. Gen. 732 (1979); 30 Comp. Gen. 268 (1951); 17 Comp. Gen. 180 (1937).

Most requests under 28 U.S.C. § 2410(e) have been denied, invariably because of noncompliance with one or more of the statutory conditions. The most common situation involves a request by the fee simple owner of the property, who usually bought it at a foreclosure sale. The owner of the property is not a lienholder and therefore does not qualify under the statute to obtain a certificate of release. For example, in 58 Comp. Gen. 732 (1979), the applicant was an individual who had purchased the property at a foreclosure sale and was concerned because the United States had an outstanding unsatisfied judgment against one of the former owners. Although it was doubtful whether, under state law, the United States actually had a lien, the release could not be granted in any event

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because the applicant was the owner of the property rather than a senior lienholder.[104]

Failure to serve notice of the foreclosure proceeding on the United States, as required by 28 U.S.C. § 2410(b), does not affect the owner's status as owner for purposes of entitlement to a certificate of release under subsection (e). B-178601, December 13, 1973.

Not only must the statutory conditions be met, they must continue to exist up to the time the release is issued. An intervening change in the conditions may operate to disqualify an applicant. Thus, a senior lienholder who acquires fee simple title to the property before the release is issued thereby loses eligibility as an applicant. 17 Comp. Gen. 180 (1937); B-194391, July 16, 1979; B-165746, December 26, 1968.

The requirement that the applicant be a senior lienholder would seem to be the most substantive of the conditions. Some of the other conditions tend to be more procedural, for example, the requirement that the program agency report its findings. Be that as it may, all of the conditions, including the procedural ones, must be satisfied before the release may be issued. While it seems clear that the absence of any of the conditions would be sufficient for the Comptroller General to decline to issue the release, the cases that have arisen so far tend to combine a procedural deficiency with one or more substantive failures. See, e.g., B-178601, June 4, 1973; B-162827, December 4, 1967; B-152569, October 21, 1963; B-147347, October 11, 1961. Deficiencies which are purely procedural can presumably be cured and the request resubmitted.

Where all of the statutory conditions have been met, the Comptroller General will issue the certificate of release. In B-180526, April 3, 1974, the applicant, who held a senior mortgage on real property on which the Federal Housing Administration held a junior deficiency judgment lien, desired to extinguish the government's junior lien before foreclosing. FHA found that there were two additional senior liens on the property, and that the sum of the three senior liens was approximately three times the fair market value of the property. Based on this, FHA found that sale of the property would not produce sufficient proceeds to wholly or partly satisfy

[104]Other cases holding that the Comptroller General is not authorized under 28 U.S.C. § 2410(e) to issue a certificate of release at the request of the owner of the property include 30 Comp. Gen. 268 (1951); B-214696, May 1, 1984; B-178601, June 4, 1973, aff'd upon reconsideration, B-178601, December 13, 1973; B-173705, January 17, 1972; B-152569, February 17, 1964; B-152569, October 21, 1963; B-147347, October 11, 1961; B-125310, October 14, 1955.

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the government's lien, reported its findings to the Comptroller General, and the Comptroller General issued the certificate of release.

Certificates of release were also issued in B-158387, February 9, 1966, and B-146068, June 21, 1961. In both of those cases, as in B-180526, it was found that the outstanding senior liens exceeded the fair market value of the property. Fair market value may be derived from appraisals. B-158387, cited above. An earlier case granting a release is B-111161, April 16, 1953.

The nature of the government's junior lien, so long as it is not a tax lien,[105] does not affect the availability of the release under 28 U.S.C. § 2410(e). Thus, the Comptroller General may release the lien whether it arose by judgment, as in B-180526, or otherwise, as in B-158387 and B-146068.

A 1935 case, A-67909, December 2, 1935, specified the documents the agency should submit in requesting the certificate of release. In addition to the senior lienholder's initial application, the "ideal" package should include:

- A statement of the nature of the proceeding out of which the lien of the United States arose, including court record references.
- A description of the property, including plat record references. (This should be taken from a deed or document containing a similar description, as this is the description GAO will use on the certificate.)
- A certificate of the tax assessor, or other officer having custody of such records, as to the assessed value of the property for two taxable years, including the current taxable year.
- The opinion of the trust officer or real estate officer of a bank, trust, or title company, or a recognized appraiser as to the market value of the property. If neither of these is available, the statement of a local real estate dealer or broker as to the value should be furnished.
- A definite finding by the requesting agency as to the present market value of the property, the amount of the debt secured by the senior lien, and whether the lien of the United States has been satisfied or, by lapse of time or otherwise, has become unenforceable.

As a practical matter, GAO will not insist on rigid compliance with this listing, and will accept "substantial compliance" as long as what is submitted is sufficient to enable GAO to independently verify that the statutory conditions are satisfied. In addition, A-67909 said that GAO would

[105]As noted earlier, the statute expressly excludes tax liens. See, e.g., B-208277, September 7, 1982 (non-decision letter). Tax liens have their own procedures, governed by the Internal Revenue Code. E.g., 26 U.S.C. § 6325.

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require the originals of all documents and supporting papers. GAO does not insist on this either.

Three cases arising in the late 1980s in which the Comptroller General issued certificates of release illustrate the kinds of situations in which 28 U.S.C. § 2410(e) has been invoked:

- B-226839, June 15, 1987. Government's lien arose from criminal penalties imposed by judgment. Senior lien was a pre-existing mortgage held by a bank.[106]
- B-230612, March 25, 1988. Government's lien arose from money judgment obtained by Department of Labor under Fair Labor Standards Act. Bank holding pre-existing mortgages was the senior lienholder.
- B-235853, August 14, 1989. Government's lien was a judgment for the balance due on a student loan. Debtor was making installment payments on a house under a contract for deed. The contract seller's interest was the senior lien. Release of the government's lien was necessary so that debtor could convey clear title to his interest under the contract.

[106]Prior to this case, it was GAO's practice to issue a formal decision along with the certificate. Commencing with B-226839, GAO changed its procedure and now issues the certificate accompanied by a simple transmittal letter. The letter itself includes very little information, with somewhat more detail on the certificate itself.

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from fees, duties, leases, rents, royalties, services, sales of real or personal property, overpayments, fines, penalties, damages, interest, taxes, forfeitures, and other sources."[19]

While the flavor was thus diluted in the recodification, the substance is clearly the same since the specific items would all be included in the phrase "other amounts due the Government" and, more importantly, the recodification was not intended to make any substantive changes.

It becomes rather clear from this definition that Congress intended that the Act and Standards have a very broad scope. The quoted language has been incorporated by the Office of Management and Budget (OMB Circular No. A-129, Appendix 1 at 2) and by the Treasury Department (Managing Government Credit: A Supplement to the Treasury Financial Manual, at 7–9).

Note that the definition in 4 C.F.R. § 101.2(a) refers to claims for "money or property." The Standards specifically include conversion claims. Where someone is holding property belonging to the government, the creditor agency can demand either return of the specific property or the payment of its value. 4 C.F.R. § 101.5.

Thus far, the only case we have found construing the definition in 31 U.S.C. § 3701(b) is United States v. Excellair, Inc., 637 F. Supp. 1377 (D. Colo. 1986). In that case, the court held that, for purposes of enforcing the government's priority under 31 U.S.C. § 3713 against a preferential transfer by an insolvent debtor, the government had a "claim" under a guaranteed loan even though at the time of the transfer the guarantee had not yet been honored. Id. at 1394–95. While the holding is relevant for purposes of the priority statute, it would seem to have limited application to other forms of collection action.

As noted above, the debt collection process is triggered by the agency's initial determination of the existence and amount of the debt. While this is enough to start the process, several collection tools, as we will see later in the chapter, apply only to a debt which has become "delinquent." Thus, for collection purposes, there is a difference between a "debt" and a "delinquent debt." The theory is that certain collection actions should be employed only after the debtor has been given a chance to pay voluntarily. For purposes of the Federal Claims Collection Act and Standards, a debt becomes "delinquent" (1) if it has not been paid by the date specified in the agency's initial written notification (i.e., the agency's first demand

[19]Federal Claims Collection Act of 1966, § 3(g), added by Pub. L. No. 97-365, § 13(b), 96 Stat. 1758.

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Payment of Judgments

A. Introduction

If you had read the Washington Post for September 30, 1985, you would have seen an article boldly proclaiming "SUING UNCLE SAM BECOMES GROWTH INDUSTRY." To those of us who are involved either with the litigation itself or with the payment process, this was not exactly high revelation. It is no secret that America in the last third of the 20th century has become the most litigious society in the recorded history of the human race. We sue each other and everyone else in sight[1] over just about everything these days, so it seems, and suits against the government are no exception.

In the early years of the Republic, this was not the case, because our legal system adopted from the English common law the concept of "sovereign immunity"—the firmly imbedded rule that the United States, as sovereign, cannot be sued without its consent.[2] Consent is given (or, in other words, sovereign immunity is "waived") by the enactment of a statute authorizing suits of a given type. Waivers of sovereign immunity must be explicit.[3] Congress may attach conditions to the waiver.[4] And, what Congress gives, Congress can take away. Although it happens infrequently, Congress can at any time withdraw the consent to be sued.[5]

The history of litigation involving the United States is largely the history of congressional waivers of sovereign immunity. Some milestones in this evolution have been: 1855—creation of United States Court of Claims; 1863—amendment to that legislation to empower the Court of Claims to render final judgments (all the court could do under the original legislation was report cases to Congress); 1887—Tucker Act; 1920—Suits in Admiralty Act; 1946—Federal Tort Claims Act. The 1960s and 1970s saw a variety of environmental and civil rights legislation, perhaps the most important of which was the 1972 amendment to the Civil Rights Act of 1964 which made its employment discrimination provisions applicable to the federal government.

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[1]And occasionally some not in sight. See, for example, United States ex rel. Mayo v. Satan and His Staff, 54 F.R.D. 282 (W.D. Pa. 1971). The complaint was defective on several grounds, however, one of which was the failure to include instructions for the service of process.

[2]E.g., United States v. Sherwood, 312 U.S. 584 (1941); United States v. Mescalero Apache Tribe, 518 F.2d 1309 (Ct. Cl. 1975).

[3]United States v. Mitchell, 445 U.S. 535, 538 (1980).

[4]Sherwood, 312 U.S. at 587; Federal Housing Administration v. Burr, 309 U.S. 242, 251 (1940).

[5]Lynch v. United States, 292 U.S. 571 (1934) (consent to sue is not a property right but a privilege); Juda v. United States, 13 Cl. Ct. 667, 689 (1987) (citing several other cases); 4B Op. Off. Legal Counsel 516 (1980).

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Sovereign immunity is still a rule of law in the United States, but it now applies to a much smaller universe. Why has the United States given up such a favorable position? One rather mundane reason is that the flood of private relief bills became too much of a drain on congressional time and resources. (If you can't sue, the only thing left is to ask Congress for help). More importantly, however, there has been increasing recognition of the philosophy expressed by a Comptroller of the Treasury many years ago in 8 Comp. Dec. 12, 18 (1901): "The Government should not be permitted to wrong a citizen any more than a citizen should be permitted to wrong the Government."

Thus, federal courts can now render judgments against the United States in a great variety of actions. This chapter will explore how those judgments are paid.

The payment of judgments against the United States and GAO's role in that process are prescribed by statute. District court judgments are addressed in 28 U.S.C. § 2414, which provides that final judgments rendered by a district court against the United States shall be paid "on settlements by the General Accounting Office." Final judgments rendered by the Court of Federal Claims are paid, pursuant to 28 U.S.C. § 2517(a), "on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court." In addition, 31 U.S.C. § 1304 provides a permanent indefinite appropriation for the payment of certain judgments against the United States as "certified by the Comptroller General."

Although these statutes are worded differently, GAO's function under them is the same: to certify judgments for payment. It has been termed an essentially ministerial function in the sense that it does not contemplate review of the merits of a particular judgment. B-129227, December 22, 1960. See also 22 Comp. Dec. 520 (1916). Be that as it may, both because the expenditure of appropriated funds is involved and because the scope and complexity of litigation involving the government are constantly increasing, the payment process gives rise to a number of problem areas.

At the present time, neither GAO nor anyone else in the federal government knows how much the United States pays out in judgments every year. The largest single source of judgment payments is the permanent appropriation established by 31 U.S.C. § 1304. Annual totals from this appropriation are listed in the President's budget submission (nearly $791 million for fiscal year 1992, for example), and GAO collects data as well. However, as we will see, several types of judgments are paid from

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other sources, and no centralized mechanism exists for the collection of data on judgments which do not pass through GAO.

B. Source of Funds

1. Requirement for Appropriation

A waiver of sovereign immunity may result in a judgment against the government but, without more, will not get it paid. This is because the "Appropriations Clause" of the United States Constitution (art. I, § 9, cl. 7), which prohibits the withdrawal of money from the United States Treasury except under an appropriation, applies with equal force to payments directed by a court. Office of Personnel Management v. Richmond, 496 U.S. 414, 424–26 (1990); Reeside v. Walker, 52 U.S. (11 How.) 272, 291 (1850); Rochester Pure Waters District v. EPA, 960 F.2d 180, 184–85 (D.C. Cir. 1992); Hughes Aircraft Co. v. United States, 534 F.2d 889, 906 (Ct. Cl. 1976). While this constitutional requirement may not prohibit a court from entering a judgment, it comes into play with respect to the payment of that judgment. As the former Court of Claims said in Collins v. United States, 15 Ct. Cl. 22, 36 (1879):

> "When this court gives judgment against the United States, the constitutional prohibition referred to applies to the judgment as it did to the claim upon which it is founded."

Thus, the Appropriations Clause must be satisfied before any judgment against the federal government can be paid. This may take the form of (1) a specific appropriation for a particular judgment or judgments, (2) a general appropriation for judgments, or (3) legislative authorization, which itself can take various forms, to use existing operating appropriations. For 150 years, number (1) was the primary payment mechanism; the payment structure now is a combination of (2) and (3).

2. The Permanent Judgment Appropriation: Overview

a. Origin

At the start of the 20th century, various statutes had the effect of requiring specific appropriations for the payment of most judgments against the United States. This being the case, the Comptrollers of the Treasury began holding that agency operating appropriations were not available to pay

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those judgments. The Comptrollers saw an element of illogic, at least in some situations, in saying that an appropriation which would have been clearly available to pay something if the matter never went to court ceased being available because the agency failed or refused to pay and a court told the agency to pay it. E.g., 8 Comp. Dec. 261, 262 (1901); 8 Comp. Dec. 145, 149 (1901). Despite these misgivings, the result in most cases was that specific appropriations were required.

The practice of specifically appropriating for judgments became further solidified in 1904 by a statute (33 Stat. 422) which required that estimates for the payment of judgments be transmitted to Congress the same as other requests for appropriations. Against this legislative background, the rule became firmly entrenched that agency operating appropriations were not available to pay judgments. Exceptions were (and continue to be) recognized only where Congress had made some other provision, or established some other mechanism, for payment. E.g., 15 Comp. Gen. 933 (1936); 5 Comp. Gen. 203 (1925); 1 Comp. Gen. 540 (1922); 27 Comp. Dec. 262 (1920); 11 Comp. Dec. 169 (1904).

In 1950, Congress repealed the requirement for specific budget submissions for judgments. The reason, legislative history suggested, was that Congress viewed the thrust of the 1904 statute as having been superseded by 31 U.S.C. § 1105, which provides generally for the submission of the President's budget to Congress. Therefore, the repeal did not produce any change in the way judgments were paid. This legislative development is outlined, and the rule restated, in 34 Comp. Gen. 221 (1954). Thus, prior to 1956, judgments against the United States could be paid, for the most part, only upon enactment of specific congressional appropriations. Under this system, it was possible for Congress to refuse to appropriate the funds for a given judgment, leaving the judgment creditor with a valid entitlement against the United States but no funds legally available to satisfy it. Although there were instances where this happened (see, e.g., 47 Stat. 28 and 33 Stat. 422), it was rare. In Glidden Co. v. Zdanok, 370 U.S. 530, 570 (1962), the Supreme Court noted a 1933 study which had found 15 instances in a 70-year period where Congress had refused to pay a judgment.

In the early 1950s, GAO recommended the enactment of a permanent general appropriation for judgments. The recommendation was designed to expedite the payment of judgments by eliminating the need for specific congressional appropriations, and to save the government money both by eliminating the largely ministerial appropriations and by reducing interest

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costs. The executive branch supported the proposal. It was not immediately enacted, however, because the original proposal contained language which some felt would authorize the Comptroller General to review the merits of a judgment prior to payment. The Judiciary especially expressed concern over this possibility, fearing that it could destroy the finality of judgments and lead to a situation in which the Comptroller General might deny a claim administratively, with the claimant then suing successfully and the Comptroller General refusing to pay the judgment for the same reasons he had originally denied the claim.

The proposal was refined and, on July 27, 1956, was enacted as section 1302 of the Supplemental Appropriation Act of 1957, 70 Stat. 678, 694, now codified at 31 U.S.C. § 1304.[6] As originally enacted, section 1304 applied only to judgments rendered pursuant to 28 U.S.C. §§ 2414 and 2517, and then only to judgments not in excess of $100,000,[7] which it was then estimated would cover 98–99 percent of all judgments against the United States.[8]

Thus, as of July 1956, judgments less than $100,000 could be paid promptly under section 1304. Until the $100,000 limit was removed in 1977, however, judgments in excess of $100,000 continued to require specific congressional appropriations, which were made in supplemental appropriation acts. Under this procedure, summarized in B-162076, August 7, 1967, the Justice Department reported all judgments in excess of $100,000 to the Treasury Department as soon as they became final. As the time for the next supplemental appropriation request approached, the Office of Management and Budget notified Treasury and Treasury forwarded its recommendations for inclusion in the request. Congress generally provided the funds in the form of a lump-sum appropriation, with the specific judgments to which it applied listed in Senate and House Documents. Upon enactment of the appropriation, Treasury sent the judgments to GAO for settlement.

b. Major Amendments

As noted above, the original version of 31 U.S.C. § 1304 was fairly limited. The appropriation reached its present scope through a series of

[6]Occasionally called the Automatic Payment of Judgments Act, 31 U.S.C. § 1304 is more commonly referred to as the "Judgment Fund."

[7]GAO and the courts construed the $100,000 limitation as applicable to the amount awarded either to a single plaintiff or to two or more plaintiffs jointly, rather than the aggregate judgment amount. United States v. Varner, 400 F.2d 369 (5th Cir. 1968); United States v. Maryland ex rel. Meyer, 349 F.2d 693 (D.C. Cir. 1965); 40 Comp. Gen. 307 (1960); B-183576, August 26, 1977; B-163682, May 24, 1968.

[8]Hearings on Supplemental Appropriation Bill, 1957, Before Subcomm. of the House Comm. on Appropriations, 84th Cong., 2d Sess., pt. 2, at 884 (1956).

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amendments, the most important of which are summarized below in chronological sequence.

(1) Compromise settlements

Public Law 87-187, 75 Stat. 416 (1961), amended the judgment appropriation, and made corresponding amendments to 28 U.S.C. § 2414, to add (1) judgments of state and foreign courts upon the Attorney General's certification that it is in the interest of the United States to pay, and (2) compromise settlements.

The addition of compromise settlements was particularly significant. A compromise settlement is an agreement reached by the parties involving mutual concessions. 38 Op. Att'y Gen. 94, 95–96 (1933). The Attorney General, as the government's chief litigator, has broad authority to compromise cases referred to the Justice Department for prosecution or defense. Executive Order No. 6166, § 5 (June 10, 1933); United States v. Hercules, Inc., 961 F.2d 796, 798 (8th Cir. 1992); 38 Op. Att'y Gen. 124 (1934); 38 Op. Att'y Gen. 98 (1934). The power attaches "immediately upon the receipt of a case in the Department of Justice." 38 Op. Att'y Gen. at 102. However, a compromise settlement which exceeds the authority of the official purporting to make it does not bind the government. White v. United States Department of Interior, 639 F. Supp. 82 (M.D. Pa. 1986), aff'd mem., 815 F.2d 697 (3d Cir. 1987); United States v. Irwin, 575 F. Supp. 405 (N.D. Tex. 1983). The Court of Appeals for the Fourth Circuit has held that the Attorney General, in settling a case, is bound by the same laws that control the government agency being represented. Executive Business Media, Inc. v. United States Department of Defense, 3 F.3d 759 (4th Cir. 1993).

As noted earlier, the original version of the judgment appropriation applied only to judgments, not to compromise settlements. In order to take advantage of the judgment appropriation in cases where agency funds were not otherwise available, it became common practice to submit the compromise agreement or stipulation to the court, whether required or not, and to have the court issue it as a consent judgment. It had long been the view of the "accounting officers" that a judgment based upon such a stipulation was nevertheless a judgment and payable as such. E.g., 21 Comp. Dec. 705 (1915). Thus, the device of converting a compromise settlement into a consent judgment enabled it to be paid under 31 U.S.C.

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§ 1304.[9] In view of this practice, the limitation of the 1956 legislation to judgments turned out to make little difference as a practical matter except to require an additional step which, where not otherwise required, served little useful purpose. The extension of the judgment appropriation to include compromise settlements was therefore a logical application of the concept.

The amendment to 28 U.S.C. § 2414 provided a standard for determining when compromise settlements are payable from the judgment appropriation. It states that compromise settlements "shall be settled and paid in a manner similar to judgments in like causes and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements." Thus, the rule is that a compromise settlement is payable from the same source that would apply to a judgment in the same suit. If a given action could result in a money judgment payable from the judgment appropriation, a compromise settlement of that action will be payable from the judgment appropriation. E.g., B-212134, June 29, 1983. If the action would not result in a money judgment payable from the judgment appropriation—either because a resulting judgment would be payable from agency funds or because it would not result in a money judgment at all, such as a suit for an injunction—then the judgment appropriation will not be available for a compromise settlement. E.g., B-248313, April 10, 1992 (internal memorandum); B-246660, March 20, 1992 (internal memorandum). See also B-182219, October 23, 1974 (judgment against official in individual capacity). To restate, a compromise settlement has no effect on the source of funds. This is also the position of the Department of Justice. 13 Op. Off. Legal Counsel 118 (1989) (preliminary print). A contrary view, as Justice points out, might encourage settlements driven by source-of-funds considerations rather than the best interests of the United States. Id. at 125.

The availability of the judgment appropriation for compromise settlements includes compromises of cases arising in foreign countries. B-167543-O.M., August 4, 1969.

(2) Federal Tort Claims Act

Public Law 89-506, 80 Stat. 306 (1966), made major changes to the Federal Tort Claims Act. Prior to 1966, the authority of agencies to settle tort

[9]See B-115234, March 30, 1959, GAO's comments on an early version of the bill which ultimately became Pub. L. No. 87-187. See also 62 Comp. Gen. 12, 16–17 (1982).

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letter), unless other payment arrangements have been made by that date, or (2) if at any time thereafter the debtor defaults on a repayment agreement. 4 C.F.R. § 101.2(b). The following examples will illustrate:

- Example 1: Agency sends first demand letter demanding payment within 30 days. Nothing happens. Debt becomes delinquent on day 31.
- Example 2: Agency sends first demand letter demanding payment within 30 days. Within that time, agency and debtor negotiate a repayment agreement calling for monthly payments. Debtor makes first 6 payments on time but misses the 7th. Debt becomes delinquent the day after the due date for the missed payment.

b. Agencies Covered

As a general proposition, the Federal Claims Collection Act, as amended by the Debt Collection Act of 1982, and the Federal Claims Collection Standards, apply to all agencies and instrumentalities in the executive and legislative branches of the federal government. Those provisions of the Federal Claims Collection Act, as amended, deriving either from the 1966 statute (e.g., 31 U.S.C. §§ 3711(a)–(e)), or from those portions of the Debt Collection Act of 1982 which were enacted as amendments to the Federal Claims Collection Act (e.g., 31 U.S.C. §§ 3711(f), 3716, 3717, 3718), are phrased as applicable to "executive or legislative agencies," which in turn is defined in 31 U.S.C. § 3701(a)(4) as including any "department, agency, or instrumentality in the executive or legislative branch of the Government." The term "executive or legislative agency" in this context has been held to include independent agencies such as the Nuclear Regulatory Commission. Commonwealth Edison Co. v. Nuclear Regulatory Commission, 830 F.2d 610, 618–620 (7th Cir. 1987).

c. Exemptions

There are a number of situations in which the Federal Claims Collection Act and Standards do not apply, either in whole or in part. The exemptions vary in scope because they stem from different sources—the Federal Claims Collection Act of 1966, the Standards themselves, the Debt Collection Act of 1982, or some combination thereof.

(1) Antitrust claims and claims tainted with fraud

Two partial exemptions were specified in the Federal Claims Collection Act of 1966. Section 3 of that legislation expressly made the authority to compromise, and to suspend or terminate collection action, inapplicable to (1) claims involving a violation of the antitrust laws, and (2) claims in which there is an indication of fraud, misrepresentation, or the presentation of a false claim. These exemptions are now found in 31 U.S.C.

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claims administratively was limited to claims not in excess of $2,500. For claims over that amount, a lawsuit had to be filed. Under the pre-1966 version of the Federal Tort Claims Act, compromise settlements, even of the lawsuits, were payable solely from agency funds.[10] The 1966 amendments eliminated the monetary ceiling on administrative settlement authority (although settlements over $25,000 require the Attorney General's approval), and changed the payment process.

Section 6 of Public Law 89-506, 80 Stat. at 307, added to 31 U.S.C. § 1304 two categories of awards under the Federal Tort Claims Act—administrative awards in excess of $2,500 (28 U.S.C. § 2672) and compromise settlements entered into after commencement of suit (28 U.S.C. § 2677). Administrative awards of less than $2,500 continue to be payable from agency funds.

(3) Elimination of $100,000 ceiling

By 1977, the $100,000 limitation on payments under 31 U.S.C. § 1304 had become unrealistically low, and Congress still found itself having to make routine appropriations for judgments, a task it had largely wanted to rid itself of in 1956. For example, Federal Tort Claims Act awards greater than $100,000 had become increasingly common. Pub. L. No. 95–26, 91 Stat. 61, 96 (1977), removed the $100,000 limitation. Thus, since 1977, judgments, awards, and compromise settlements payable under 31 U.S.C. § 1304 are payable without regard to amount. See Temoak Band of Western Shoshone Indians v. United States, 593 F.2d 994, 999 (Ct. Cl. 1979).

(4) Certain administrative awards

It turned out that the elimination of the $100,000 ceiling still did not totally eliminate the need for periodic specific "judgment appropriations" because those appropriations had included, in addition to court judgments, a few administrative claim settlements under statutes which required specific congressional appropriations for payment. Public Law 95–240, § 201, 92 Stat. 107, 116 (1978), further expanded the judgment appropriation to pick up several of these, now specified in 31 U.S.C. §§ 1304(a)(3)(B) and (D): awards under the so-called Small Claims Act (31 U.S.C. § 3723) and awards in excess of amounts payable from agency funds under 10 U.S.C. §§ 2733 or 2734, 32 U.S.C. § 715, and 42 U.S.C. § 2473(c)(13). These are all discussed further in Chapter 12.

[10]Since this limitation was specified in the Federal Tort Claims Act itself, it had been unaffected by the 1961 enactment of Pub. L. No. 87-187.

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(5) Contract Disputes Act of 1978

Prior to 1978, while court judgments on contract disputes were payable from the judgment appropriation, awards by agency boards of contract appeals were payable directly by the contracting agency. The Contract Disputes Act of 1978[11] changed this by making monetary awards by boards of contract appeals payable from the judgment appropriation, and by requiring that the contracting agency reimburse the judgment appropriation for both court judgments and board awards. Contract Disputes Act payments are also discussed further in Chapter 12.

(6) Brooks Act awards

The Brooks Automatic Data Processing Act, 40 U.S.C. § 759, generally establishes procedures for the procurement of automatic data processing (ADP) equipment. In 1984, the Competition in Contracting Act (Pub. L. No. 98-369, § 2713, 98 Stat. 494, 1182) amended the Brooks Act to authorize the General Services Administration Board of Contract Appeals to hear and decide protests against ADP contract awards. 40 U.S.C. § 759(f). If the GSBCA finds that the procuring agency has violated a statute or regulation, it may award (a) costs of filing and pursuing the protest, including reasonable attorney's fees, and (b) costs of bid and proposal preparation. These awards are payable from the judgment appropriation initially, subject to reimbursement "out of funds available for the procurement." Id. § 759(f) (5) (E), added by Pub. L. No. 103-355, § 1436 (1994).

Prior to late 1994, the Brooks Act did not expressly require reimbursement of the judgment appropriation. The GSBCA initially took the position that it could direct reimbursement in particular cases. Federal Computer Corporation, GSBCA No. 10527-C, 92-1 BCA ¶ 24,415 (1991). The Justice Department disagreed. 14 Op. Off. Legal Counsel 126 (1990) (preliminary print). A divided GSBCA subsequently repudiated its previous position. Sysorex Information Systems, Inc. v. Department of the Treasury, GSBCA No. 10781-C (10642-P)-REIN, 93-1 BCA ¶ 25,428 (1992). The Court of Appeals for the Federal Circuit regarded the issue as a nonjusticiable intra-governmental dispute and declined to rule on it. United States v. Julie Research Laboratories, 881 F.2d 1067 (Fed. Cir. 1989). Congress ended the controversy by adding the reimbursement requirement as part of the

[11]Pub. L. No. 95-563, §§ 13 and 14(c), 92 Stat. 2383, 2389-90 (1978), codified at 41 U.S.C. § 612 and 31 U.S.C. § 1304(a)(3)(C).

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Federal Acquisition Streamlining Act of 1994. See the Bid Protest heading of Chapter 12 for further discussion.

c. Key Features

An examination of 31 U.S.C. § 1304 as it now exists discloses several key features which, in effect, define the availability of the appropriation.

First, it is a permanent, indefinite appropriation. This means that it has no fiscal year limitations, there is no limit on the amount of the appropriation, and there is no need for Congress to appropriate funds to it annually or otherwise. It operates completely independent of the congressional authorization and appropriation process. It is, in effect, standing authority to disburse money from the general fund of the Treasury.

Second, it very precisely delineates the items for which it is available—the items listed in 31 U.S.C. §§ 1304(a)(3) and (c)(1).[12]

Third, it is available only for judgments, awards, and compromise settlements which are "not otherwise provided for."

Fourth, it is available only for judgments, awards, and compromise settlements which are "final."

Fifth, it is available only upon the certification of the Comptroller General.

The last three items are discussed in detail later in this chapter.

Finally, it is important to emphasize that the judgment appropriation is not itself a waiver of sovereign immunity; the legal basis for a judgment or award must be found elsewhere. As the Supreme Court has cautioned, 31 U.S.C. § 1304

> "does not create an all-purpose fund for judicial disbursement. . . . Rather, funds may be paid out only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute."

Office of Personnel Management v. Richmond, 496 U.S. 414, 432 (1990). See also In re All Asbestos Cases, 603 F. Supp. 599, 612 n.16 (D. Hawaii

[12]The listing in section 1304 while precise is not exclusive. Congress may include a provision in other legislation making some particular item payable under section 1304. An example is section 6239 of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, 3743, amending 26 U.S.C. § 7430 to authorize the awarding of costs and attorney fees in administrative proceedings before the Internal Revenue Service, and providing expressly for payment under 31 U.S.C. § 1304.

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1984) (31 U.S.C. § 1304 "is irrelevant to the issue of whether . . . the legal predicate for judgment against the government exists").

d. Budgetary and Obligational Treatment

Although, as noted earlier, the judgment appropriation does not receive money transfusions through the regular appropriations process, it is nevertheless included in the President's annual budget submissions. In the "program by function" analysis, it appears under the "general government" heading; in the "program by agency" analysis, it is listed under the Treasury Department. Totals appear in the annual Budget Appendix volumes under the title "Claims, Judgments, and Relief Acts."[13] While the judgment appropriation is thus reflected in the budget in the manner described, disbursements are not accounted for by the agency whose activities gave rise to the judgment.

The judgment appropriation is exempt from reduction or sequestration under the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings Act), as amended. 2 U.S.C. § 905(g).

As discussed in Chapter 7, one of the criteria for recording obligations under 31 U.S.C. § 1501 is subsection (a)(6), documentary evidence of "a liability that may result from pending litigation." The recording requirement of 31 U.S.C. § 1501(a)(6) has never been viewed as applicable to the judgment appropriation. The "obligations" are wholly beyond the control of either GAO or the Treasury Department, and attempting to track pending litigation would present an enormous administrative burden with no compensating benefit. Further, since the judgment appropriation is by definition both permanent and indefinite and thus cannot be overobligated nor can a payment be charged to the "wrong" fiscal year, the separate recording of obligations would serve no purpose. Also, pending litigation which may result in a judgment payable from the judgment appropriation does not obligate the appropriations of the respondent agency since the judgment will have no financial impact on that agency's appropriations.

For judgments payable from agency funds, case law is limited but provides some guidance. The applicability of subsection (6) was first discussed in

[13]The budget presentation generally parallels the four Treasury accounts which comprise the permanent judgment appropriation: Judgments, Court of Federal Claims (20X1740); Judgments, U.S. [District] Courts (20X1741, including administrative settlements under the Federal Tort Claims Act); Claims for damages (20X1742, these being the payments authorized under 31 U.S.C. §§ 1304(a)(3)(B) and (D)); and Claims for contract disputes (20X1743, the reimbursable payments under the Contract Disputes Act). However, it also includes two items which are not part of the judgment appropriation but which are paid under other permanent accounts: claims for firefighting service and private relief laws. Thus, to determine the total expenditures from the judgment appropriation, these two items must be deducted.

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35 Comp. Gen. 185 (1955). Noting that the subsection was enacted to permit obligations to be recorded in land condemnation proceedings under the Declaration of Taking Act, and that it could not have been intended to require recording in every pending case which might or might not result in liability, the Comptroller General concluded that subsection (6) requires the recording of an obligation "only in those cases where the Government is definitely liable for the payment of money out of available appropriations and the pending litigation is for the purpose of determining the amount of the Government's liability." 35 Comp. Gen. at 187.

Twenty years later, the scope of subsection (6) was expanded in a decision involving an anti-impoundment suit, 54 Comp. Gen. 962 (1975). That decision concerned a case in which the plaintiff had alleged the failure of the Department of Agriculture to properly administer the Food Stamp Act. The district court ordered the funds in question recorded as an obligation under subsection (6) to prevent the unexpended balance from expiring. The Comptroller General stated that 35 Comp. Gen. 185 had correctly expressed the general rule, but noted further that anti-impoundment litigation must be considered unique and concluded that the court's order established a valid obligation. See also B-115398.48, December 29, 1975 (non-decision letter); 62 Comp. Gen. 527 (1983).

A few years later, GAO applied its 1975 decision in 61 Comp. Gen. 509 (1982), a case in which the defendant agency, in order to avoid the entry of a temporary restraining order, had entered into a stipulation to obligate the contested funds before the end of the fiscal year. The decision pointed out that the stipulation was sufficient "documentary evidence" to support the recording of the obligation. Id. at 512.

Thus far, these are the only situations—land condemnation and impoundment-related cases—in which GAO has applied 31 U.S.C. § 1501(a)(6). See also Rochester Pure Waters District v. EPA, 960 F.2d 180, 186 (D.C. Cir. 1992); Township of River Vale v. Harris, 444 F. Supp. 90, 94 (D.D.C. 1978). (Both cases cite 35 Comp. Gen. 185.)[14]

Notwithstanding the lack of case law, subsection (6) would presumably apply in any other situation meeting the tests of 35 Comp. Gen. 185—(1) government is definitely liable, (2) purpose of the litigation is to determine the amount of the liability, and (3) resulting judgment is payable from agency funds. Suppose, for example, a court grants an award of

[14]For an additional situation in which recording an obligation under 31 U.S.C. § 1501(a)(6) might be appropriate, see Foley v. Carter, 526 F. Supp. 977, 981 n.9 (D.D.C. 1981).

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attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), with the amount to be determined in subsequent proceedings. The agency should record an obligation under subsection (6) when the determination as to liability becomes final.

3. Scope of the Judgment Appropriation: Some General Considerations

Not all directives issued by a court against the federal government result in the use of 31 U.S.C. § 1304. Several types of judgments are "otherwise provided for," and these will be explored later. Before getting to that discussion, however, it is necessary first to set out some general considerations which help define what kinds of things may be paid from the judgment appropriation or, in other words, define what is a judgment for purposes of section 1304 and what is not.

a. Judgment Appropriation Not Available for Administrative Claim Settlements

As we noted earlier, there are a few situations in which the judgment appropriation has been made available for administrative claim settlements. However, apart from a relatively few explicit statutory exceptions, the important distinction to keep in mind is judicial vs. administrative. See 69 Comp. Gen. 40 (1989) (discussing distinction in context of back pay claims). The judgment appropriation is available for court judgments and certain Justice Department compromise settlements. It is not available for claims settled at the administrative level or awards by administrative tribunals. 64 Comp. Gen. 349 (1985) (administrative settlement of age discrimination complaint); 58 Comp. Gen. 667 (1979) (undisputed administratively imposed penalties under Clean Air Act); B-199291, June 19, 1981 (administrative award of attorney fees under Title VII of Civil Rights Act); B-143673, November 11, 1976, overruled on other grounds by 56 Comp. Gen. 615 (1977) (claims under 31 U.S.C. § 3721); B-130140, January 29, 1957 (claim settled by Comptroller General).

There are many types of administrative claims which agencies routinely pay from their own operating funds. The judgment appropriation does not change this.

b. Requirement for Money Judgment

Essentially, 31 U.S.C. § 1304 contemplates a money judgment, that is, a judgment directing the government to pay money as opposed to a judgment directing the government to perform some specific action. Any judgment can be translated into a monetary amount in the sense that the cost of compliance can be calculated, but this does not mean that the ultimate cost is to be borne by the judgment appropriation. 70 Comp. Gen. 225, 228 (1991). The Justice Department reached the same conclusion in 13 Op. Off. Legal Counsel 118 (1989) (preliminary print). Thus, 31 U.S.C.

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§ 1304 was not available to fund court orders or settlements directing agencies to: reconsider eligibility under a benefit program, 70 Comp. Gen. 225; implement a nondiscriminatory employment system, 69 Comp. Gen. 160 (1990); hire an equal opportunity expert, B-234793.2, June 5, 1989; or correct structural defects in a building, B-193323, January 31, 1980. None of these are money judgments.

Similarly, a judgment ordering the reinstatement of a terminated federal employee might very well result in an entitlement to back pay under the Back Pay Act, but unless the judgment specifically directs the payment of back pay, any resulting payment would have to come from the employing agency's funds. 58 Comp. Gen. 311, 312 (1979).

A remand to an administrative body is not a money judgment, and does not become one simply because the administrative body subsequently directs the payment of money (or the case is settled) pursuant to the remand. B-189449, August 31, 1977. The cited decision dealt with a suit against the District of Columbia government, but the point is equally applicable in the context of 31 U.S.C. § 1304. See also Sullivan v. Department of Navy, 720 F.2d 1266, 1276 n.3 (Fed. Cir. 1983); Brewer v. United States Postal Service, 647 F.2d 1093, 1098–99 (Ct. Cl. 1981) (remand to Merit Systems Protection Board is not a money judgment even where it directs the Board to issue an order requiring payment of back pay).

Once the basic money judgment requirement has been satisfied, the judgment statutes (28 U.S.C. §§ 2414 and 2517, 31 U.S.C. § 1304) do not address the permissible forms the money judgment may take. For example, while a judgment must be a money judgment to be payable from the permanent appropriation, there are situations in which it does not necessarily have to include a sum certain. Thus, judgments awarding back pay under the Back Pay Act or Title VII of the Civil Rights Act of 1964 are money judgments for purposes of section 1304 even where they do not specify the dollar amount to be paid. 58 Comp. Gen. 311 (1979); 55 Comp. Gen. 1447 (1976). As a general proposition, however, payment delays are less likely to occur if the judgment specifies the dollar amount to be paid.

Money judgments have "traditionally taken the form of a lump sum, paid at the conclusion of the litigation." Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 533 (1983). While, in the context of judgments against the federal government, this remains true in the overwhelming majority of cases, the decades of the 1970s and 1980s saw the mushrooming of

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"structured settlements" in personal injury cases requiring long-term care. In a structured settlement, the award is either placed in a reversionary trust or used to purchase an annuity. Depending on the circumstances, the trust or annuity may or may not be accompanied by a separate lump-sum amount paid directly to the plaintiff.

The first consideration of such an arrangement from the payment perspective appears to have been in B-162924, December 22, 1967. The case involved a medical malpractice suit under the Federal Tort Claims Act on behalf of a plaintiff expected to remain comatose for life. The proposed settlement included two parts: (1) a lump-sum payment covering all damages other than future care and treatment, and (2) another lump sum payable in trust to a court-appointed trustee. The trust would include the power to invade the corpus if necessary. Upon the death of the plaintiff, any remaining corpus and income would revert to the United States. The Comptroller General found the proposal legally unobjectionable, cautioning only that the amount paid to the trustee should represent the government's maximum obligation and should not exceed the cost of a reasonable fixed settlement.

Some courts have stated that they lack the authority to order anything other than a lump-sum money judgment. Frankel v. Heym, 466 F.2d 1226, 1228–29 (3d Cir. 1972); Lozada v. United States, 140 F.R.D. 404, 416 (D. Neb. 1991); Andrulonis v. United States, 724 F. Supp. 1421, 1519 n.616 (N.D.N.Y. 1989); Elliott v. United States, 329 F. Supp. 621, 628 (D. Me. 1971). See also Reilly v. United States, 665 F. Supp. 976, 1016–17 (D.R.I. 1987), aff'd in part and remanded on other grounds, 863 F.2d 149 (1st Cir. 1988) (court said it was following Frankel, but then ordered limited reversionary trust).

More recently, the 10th Circuit has held that a district court in a Federal Tort Claims Act case has the inherent power to order that damages be paid in the form of a reversionary trust if in the plaintiff's best interest, as long as the government's obligation to the plaintiff ceases upon payment of a fixed lump sum to fund the trust. Hull v. United States, 971 F.2d 1499, 1505–06 (10th Cir. 1992), cert. denied, 113 S.Ct. 1844. The court viewed this as consistent with Frankel because the proposal the Frankel court disapproved would have required the government to supplement the trust from time to time, something the Hull court agreed could not be imposed on the government. Id. at 1504–05. See also Nemmers v. United States, 795 F.2d 628, 636 (7th Cir. 1986) (court may require purchase of annuity if it fears victim's relatives may misuse lump-sum payment); Hill v. United

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States, 854 F. Supp. 727, 732 (D. Colo. 1994); Wheeler Tarpeh-Doe v. United States, 771 F. Supp. 427, 457 (D.D.C. 1991) (government could be required to fund a reversionary trust).

In any event, whatever inherent powers the courts have or do not have, the parties are free to agree to payment in a "structured" (trust or annuity) form. E.g., Gretchen v. United States, 618 F.2d 177, 181 n.5 (2d Cir. 1980) (suit under Public Vessels Act). See also Wyatt v. United States, 783 F.2d 45 (6th Cir. 1986); Robak v. United States, 503 F. Supp. 982, 983 (N.D. Ill. 1980), aff'd in part and rev'd in part on other grounds, 658 F.2d 471 (7th Cir. 1981). (Both cases involve structured settlements—an annuity in Wyatt, a reversionary trust in Robak—which originated in agreements of the parties.) Of course, a structured award is also permissible where expressly authorized by statute. E.g., Reilly, 863 F.2d at 169 n.16.

Money reverting to the United States under a structured settlement is credited to the appropriation from which the settlement was originally disbursed (usually the judgment appropriation). B-209849, December 2, 1982 (non-decision letter).

c. Form of Judgment

The judgment does not have to be captioned "judgment." It may be, and frequently is, designated as an "order." The caption is immaterial as long as the court's action is a final determination of the rights of the parties. B-164766, June 1, 1979; B-101576, February 3, 1955. Sometimes it may not be called anything. E.g., B-242209, December 17, 1990 (internal memorandum) (judge's handwritten notation in margin of plaintiff's pleading).

Clearly the term "judgment" embraces consent judgments or decrees. See, e.g., 4 Comp. Gen. 834 (1925). Also, as discussed previously, the permanent appropriation is available for compromise settlements of suits otherwise within its scope.

d. What Tribunals May Issue the Judgment

The primary focus of the judgment appropriation is, of course, judgments rendered by a United States district court or the United States Court of Federal Claims. This naturally includes the appellate courts which review judgments of these courts. For example, the United States Courts of Appeals and the Supreme Court occasionally award costs.

The Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980), established the United States Court of International Trade to replace the former Customs Court, authorized it to enter money judgments for or

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against the United States (28 U.S.C. § 2643(a)), and amended 28 U.S.C. § 2414 to include the Court of International Trade. Thus, principles in this chapter applicable to district courts will, to the extent they derive from the authority of 28 U.S.C. § 2414, apply generally to the Court of International Trade as well.

The Tax Court is generally not covered by 31 U.S.C. § 1304. 63 Comp. Gen. 470 (1984). However, by virtue of legislation enacted in 1986, costs and attorney fees awarded by the Tax Court under section 7430 of the Internal Revenue Code are payable from the judgment appropriation. 26 U.S.C. § 7430(a).

As noted earlier in this chapter, legislation in 1961 made the judgment appropriation available for state and foreign court judgments. However, before a state or foreign court judgment may be paid, the Attorney General (or someone to whom the authority has been delegated) must certify that it is in the interest of the United States to pay. 28 U.S.C. § 2414. State courts in this context include the courts of the District of Columbia. 56 Comp. Gen. 592, 595 (1977). Foreign courts may include certain international tribunals, an example being the International Court of Justice. 13 Op. Off. Legal Counsel 240 (1989) (preliminary print).

The "interest of the United States" determination was apparently designed to permit the payment decision to include considerations of policy as well as legal liability. B-206443, June 25, 1984. As with anything else payable from the judgment appropriation, the judgment must be final and payment must be not otherwise provided for. Id.; B-227527/B-227325, October 21, 1987 (non-decision letter). Restrictions in 31 U.S.C. § 1304 on post-judgment interest do not apply to state or foreign court judgments. B-206443, June 25, 1984; B-148111-O.M., February 14, 1962.

e. Imminent Litigation

Apart from the few categories of administrative claims noted earlier in this chapter, the judgment appropriation is available for one type of payment which may be made prior to the commencement of a lawsuit. Under 28 U.S.C. § 2414, the Attorney General or his designee may compromise claims "referred to the Attorney General for defense of imminent litigation . . . against the United States, or against its agencies or officials upon obligations or liabilities of the United States." There has been little occasion to construe this authority, but a 1979 decision set forth some general guidelines. The "imminent litigation" authority is not a device to enable an agency to avoid paying otherwise valid claims from its own funds. There must be a genuine disagreement or impasse. Litigation is not

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§ 3711(c)(1). Note that these exemptions do not extend to the entire Act or Standards; they apply only to the compromise, suspension, and termination authority.

The corresponding provision of the Federal Claims Collection Standards is 4 C.F.R. § 101.3(a). It clearly spells out agency responsibilities with respect to fraud and antitrust claims. Upon identifying a claim subject to one of these exemptions, the agency is to promptly refer the matter to the Justice Department. The Justice Department may retain the claim, or it may return it to the agency with instructions to proceed with administrative collection action. Thus, the scope of agency collection actions will depend on precisely what Justice tells the agency to do.

(2) Tax claims

Tax claims are excluded from the coverage of the Federal Claims Collection Standards. 4 C.F.R. § 101.3(b). This exemption has been in the Standards since their inception. Tax claims "are a special, preferred type of debt and have been from time immemorial." B-156022-O.M., October 25, 1968. Collection of taxes is governed by the Internal Revenue Code, which has its own authorities and procedures. See, for example, 26 U.S.C. §§ 6321–26 (tax liens) and 6331 (tax levy). The exemption of section 101.3(b) now has a partial statutory basis. Section 8(e) of the Debt Collection Act of 1982, codified at 31 U.S.C. § 3701(d), provides that, with certain exceptions, the Debt Collection Act does not apply to debts arising under the Internal Revenue Code. The exemption in the Standards is broader because it is not limited to authorities contained in the Debt Collection Act.[20]

In B-229068.4, August 3, 1988, GAO considered the applicability of the Federal Claims Collection Act and Standards to reclamation fees assessed against coal mining companies under the Surface Mining Control and Reclamation Act of 1977. The question arose because the court in United States v. River Coal Co., 748 F.2d 1103 (6th Cir. 1984), had held that the fees were involuntary exactions and therefore constituted a tax. GAO first noted that the Federal Claims Collection Act itself has no blanket exemption for tax claims. GAO then found it unnecessary to decide whether 4 C.F.R. § 101.3(b) applied to "tax claims" other than those arising under the

[20]The pre-recodification version of the definition of "claim" in the Debt Collection Act of 1982, quoted earlier in the text, expressly includes "taxes." Thus, although they chose not to do so, presumably GAO and the Justice Department could have included tax debts in the Federal Claims Collection Standards, at least to the extent not covered by the Internal Revenue Code and its own implementing regulations nor exempted by section 8(e). What might have been gained by this is not clear.

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"imminent" for purposes of this provision merely because a claimant will sue if the agency does not pay. There must be a legitimate dispute over either liability or amount. Absent such a dispute or impasse, there is nothing to refer to the Attorney General. 58 Comp. Gen. 667 (1979). See also B-198352, June 22, 1981.

Opinions of the Attorney General on compromise authority in other contexts support the approach of 58 Comp. Gen. 667. See, for example, 38 Op. Att'y Gen. 98 (1934) (nothing to compromise where liability is certain; must be a "bona fide dispute as to either a question of fact or of law"); 38 Op. Att'y Gen. 94, 96 (1933), citing 23 Op. Att'y Gen. 18, 20 (1900) (claim "must in some way be doubtful" to be validly compromised).

f. Designation of Defendant

As a general proposition, at least in suits for money damages, the rule is that a federal agency may not be sued in its own name (the cases use the Latin "eo nomine") unless explicitly authorized by Congress. Blackmar v. Guerre, 342 U.S. 512 (1952); Shelton v. U.S. Customs Service, 565 F.2d 1140 (9th Cir. 1977); Economou v. U.S. Dep't of Agriculture, 535 F.2d 688 (2d Cir. 1976), vacated on other grounds, Butz v. Economou, 438 U.S. 478 (1978); Midwest Growers Cooperative Corp. v. Kirkemo, 533 F.2d 455 (9th Cir. 1976).

As one illustration, suits under the Federal Tort Claims Act are supposed to be brought against the United States and not the particular agency involved. City of Whittier v. U.S. Dep't of Justice, 598 F.2d 561 (9th Cir. 1979); Kohlbeck v. Kis, 651 F. Supp. 1233 (D. Mont. 1987); Murray v. U.S. Postal Service, 550 F. Supp. 1211 (D. Mass. 1982). See also 28 U.S.C. §§ 2674, 2679(a). In contrast, suits under Title VII of the Civil Rights Act of 1964 are required to designate the "head of the department, agency, or unit, as appropriate" as the defendant. 42 U.S.C. § 2000e-16(c). They are nevertheless viewed as suits against the United States for purposes of 31 U.S.C. § 1304. 58 Comp. Gen. 311, 315–16 (1979). In some types of cases, the designation of an agency rather than the United States as defendant will be important where it reflects jurisdiction deriving from a "sue and be sued" clause. A 1994 Supreme Court decision discussed exposure to constitutional tort suits under a "sue and be sued" clause. See FDIC v. Meyer, 114 S. Ct. 996 (1994).

Thus, for payment purposes, or more specifically the availability of 31 U.S.C. § 1304, the caption of a case is not in and of itself controlling. It should not be assumed that all cases in which the defendant is the United States will be payable from the judgment appropriation (a good example being a

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Federal Tort Claims Act suit involving the Postal Service), nor should it be assumed that all cases in which a particular agency or agency head is designated as defendant will be payable from agency funds. The nature of the judgment and not the caption of the case is the controlling factor.

Regardless of how the case is captioned, the key question is whether the judgment binds the United States. If it does not (for example, where the government was not a party), there is no basis to invoke 31 U.S.C. § 1304. E.g., B-240135, August 14, 1990. See also 44 Comp. Gen. 86 (1964); B-244911, July 25, 1991 (internal memorandum).

g. Judgment Against Individual Officer or Employee

As seen above, a judgment against an official in his or her official capacity may in appropriate circumstances be viewed as a judgment against the United States for purposes of 31 U.S.C. § 1304. This generally means situations where the official, usually an agency head, is merely a "nominal defendant" and the suit is in reality a suit against the United States. "[A] suit against the head of a federal agency in his official capacity only is considered a suit against the government itself." Anderson v. Transamerica Specialty Insurance Co., 804 F. Supp. 903, 906 (S.D. Tex. 1992). See also Brandon v. Holt, 469 U.S. 464, 471–73 (1985). A prime example is an employment discrimination suit under Title VII of the Civil Rights Act.

However, a judgment against an officer or employee in his or her individual capacity is not a judgment against the United States and is not payable from the permanent judgment appropriation.[15] An individual capacity suit seeks a remedy against the individual rather than against the government. Suits of this nature skyrocketed after the Supreme Court's decision in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), holding that federal employees could be held liable for money damages for certain constitutional violations (the so-called "constitutional tort"). The offense in Bivens, for example, was a violation of the search-and-seizure protections of the Fourth Amendment.

Whether individual capacity judgments can be paid or reimbursed from agency funds is a separate question. There are a few situations in which government liability is established by statute. For example, 26 U.S.C. § 7423 authorizes the Secretary of the Treasury to reimburse any officer or employee of the United States for (a) sums recovered against the employee in any court for any internal revenue taxes collected by the

[15]See Kentucky v. Graham, 473 U.S. 159, 166–67 (1985). The Graham decision includes a brief but useful discussion of the distinction between individual capacity and official capacity actions. An official capacity suit requires a waiver of sovereign immunity. E.g., Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985); Clark v. Library of Congress, 750 F.2d 89, 102–04 (D.C. Cir. 1984).

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employee, and (b) all damages and costs recovered in any suit against the employee for actions taken in the performance of official duties in matters relating to tax administration. Reimbursement under 26 U.S.C. § 7423 is discretionary. Gilbert v. DaGrossa, 756 F.2d 1455, 1460 (9th Cir. 1985). Reimbursement under this statute must be made from agency funds and not from the permanent judgment appropriation. 56 Comp. Gen. 615, 619–20 (1977).

Also, under 28 U.S.C. § 2006, a judgment against a "collector or other revenue officer" arising from the performance of official duty may be converted into a judgment against the government if the court certifies that probable cause existed or that the officer acted under the direction of the Secretary of the Treasury or other proper government official. The Supreme Court discussed the origin of this statute in United States v. Kales, 314 U.S. 186, 197–98 (1941). If a certificate of probable cause is issued and the case falls within the scope of 26 U.S.C. § 7423, payment must come from agency funds in accordance with 56 Comp. Gen. 615. However, GAO has used the judgment appropriation in a case where the certificate was issued and the case did not fall within the scope of 26 U.S.C. § 7423. In either case, it is immaterial whether the government is being asked to pay the judgment directly or to reimburse the employee. B-200431-O.M., December 31, 1981. (B-200431-O.M. traces the history and evolution of payments under 28 U.S.C. § 2006 and 26 U.S.C. § 7423.)

Since judgments to which the provisions of 26 U.S.C. § 7423 or 28 U.S.C. § 2006 apply are judgments against the individual and not the United States, restrictions on interest and costs awardable against the United States do not apply. Thus, interest and costs may be included in the reimbursement or direct payment to the extent awarded in the judgment. 12 Comp. Gen. 474 (1932); 8 Comp. Gen. 126 (1928); 21 Comp. Dec. 705, 707 (1915); B-45014, November 4, 1944; B-200431-O.M., December 31, 1981. If the judgment involves the overpayment of any internal revenue tax, interest is now allowable as a matter of statutory entitlement. 28 U.S.C. § 2411; 8 Comp. Gen. at 128.

Wholly apart from any limited statutory authority that may exist such as 26 U.S.C. § 7423 or 28 U.S.C. § 2006, both GAO and the Justice Department have often stated the proposition that where an officer or employee of the government is sued because of some official act done in the discharge of an official duty, the expense incurred by that officer or employee in the discharge of such duties should be borne by the United States. This principle has deep roots. E.g., 15 Comp. Dec. 621 (1909); 9 Op. Att'y Gen.

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51 (1857); 3 Op. Att'y Gen. 306 (1838). Where payment or reimbursement is proper under this principle, it must be made from agency appropriations.

During the 1980s, largely in response to the flood of Bivens-type suits, approximately a dozen agencies issued regulations establishing programs to indemnify their employees against personal liability for actions taken within their scope of employment. The Justice Department's Office of Legal Counsel has issued several opinions upholding the legality of these programs. 15 Op. Off. Legal Counsel 70 (1991) (preliminary print) (Treasury Department); 13 Op. Off. Legal Counsel 54 (1989) (preliminary print) (Environmental Protection Agency); 10 Op. Off. Legal Counsel 9 (1986) (preliminary print) (Justice Department).

The basis in each case is the "necessary expense" doctrine of purpose availability—that is, an agency can legitimately determine that such a program will materially contribute to the effective accomplishment of its mission. Each opinion points out that payment must come from the agency's general operating appropriations. The agency must review each case individually, and may not indemnify for actions not within the scope of employment even though taken in the course of performing official duties. 15 Op. Off. Legal Counsel at 78. The agency must also guard against Antideficiency Act violations. Id. (This opinion, at 72 nn. 4–6, gives references for all then-existing agency programs.)

GAO has not had the occasion to address any of the formal agency programs (nor should there be any need or reason in light of the OLC opinions), but has considered a number of individual cases. For example, in Merovka v. Allen, 410 F.2d 1307 (10th Cir. 1969), personal-capacity judgments were entered against 3 federal game wardens who, in an attempt to protect waterfowl, had violated federal regulations by placing "no hunting" signs on private property. Although the court found that the agents had exceeded their authority, they had acted in accordance with agency policy and at the direction of their superiors. Accordingly, reimbursement was appropriate. B-168571-O.M., January 27, 1970.

A few years later, this case was distinguished in B-176229, October 5, 1972, affirmed by B-176229, May 1, 1973, in which an employee of the Bureau of Indian Affairs attempted to eject certain individuals from a building and was sued for assault and battery. Reimbursement was denied because the liability did not arise by reason of performance of official duties nor because of compliance with agency instructions nor pursuant to orders of superiors. See also B-182219, October 23, 1974 (National Guard technician,

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dismissed for refusing to participate in a firing squad at a military funeral, sued the Adjutant General who fired him; GAO found appropriated funds unavailable, under 31 U.S.C. § 1304 or otherwise, to pay a judgment or settlement against the defendant).[16]

Most GAO decisions and opinions in this area have dealt with attorney's fees or court-imposed fines, and the cases are covered in the appropriate sections of Chapter 4.

4. The "Otherwise Provided For" Exception

a. Introduction

The permanent judgment appropriation is available only where payment is "not otherwise provided for." 31 U.S.C. § 1304(a)(1). Payment is otherwise provided for if some other appropriation or fund is legally available to satisfy the judgment. E.g., 66 Comp. Gen. 157, 160 (1986); 62 Comp. Gen. 12, 14 (1982).

In order to understand the "otherwise provided for" concept, it is necessary to understand exactly what 31 U.S.C. § 1304 was designed to do. As we have seen, prior to 1956 (and, for judgments over $100,000, prior to 1977), most judgments against the United States could not be paid without a specific congressional appropriation, regardless of the agency's willingness to pay or regardless of how much money the agency had available. These are the judgments section 1304 was intended to pick up. However, not all judgments required specific appropriations. There were, prior to enactment of the judgment appropriation, situations in which agency funds were available to pay judgments. The "otherwise provided for" exception in section 1304 preserved these situations and the concept generally.

Thus, the judgment appropriation was intended to eliminate the need to seek specific appropriations from Congress to pay judgments when that need resulted from the legal unavailability of funds. It was not intended to shift the payment source for items which could always have been paid from agency funds, whether the authority was expressly provided by

[16]The rationale in B-182219 for the unavailability of agency appropriations was a rather summary out-of-context application of the principle that agency funds are normally not available for judgments, citing another out-of-context application which has since been overruled. The evaluation of whether indemnification is appropriate in any given case should instead be based on the factors discussed in B-176229 and the Justice Department opinions.

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statute or was reasonably implied from the nature of the agency's legal status or mission.

Recognition of the "otherwise provided for" concept appears in many places in the legislative history of both the original enactment of 31 U.S.C. § 1304 and subsequent amendments. The most detailed discussion of the original 1956 legislation is a statement by the (then) Bureau of the Budget printed in the hearings of the House Appropriations Committee. The statement begins by noting that some types of judgments could be paid from existing funding sources, and that the rest of the discussion "relates solely to the general types of cases for which specific appropriations are required."[17] When compromise settlements were added in 1961, the reports of both the Senate and House Judiciary Committees quoted a Justice Department statement to the effect that settlements would be payable from the permanent appropriation only "[i]f agency funds or appropriations are not available for this purpose."[18] And, when certain administrative awards were added by the 1978 Supplemental Appropriations Act, the reports of both the Senate and House Appropriations Committees emphasized that the new provision "is not intended to affect claims which are payable from agency appropriations."[19]

There is no single test to determine if something is "otherwise provided for." The determination may flow from the nature of the defendant agency, the type of judgment involved, or the statutory funding scheme applicable to the particular agency or program. Types of judgments which existed prior to the availability of the judgment appropriation and which could have been paid from agency funds remain unaffected—they remain "otherwise provided for." For types of judgments which did not exist prior to enactment of the judgment appropriation, the question usually is whether Congress has established a mechanism which is available for payment. Most situations, as we will see, involve some degree of complexity.

Before proceeding to specific situations, two key points need to be emphasized:

[17]Hearings on Supplemental Appropriation Bill, 1957, Before Subcomm. of the House Comm. on Appropriations, 84th Cong., 2d Sess., pt. 2, at 883 (1956).

[18]S. Rep. No. 733, 87th Cong., 1st Sess. 3 (1961); H.R. Rep. No. 428, 87th Cong., 1st Sess. 3 (1961).

[19]S. Rep. No. 564, 95th Cong., 1st Sess. 76 (1977); H.R. Rep. No. 644, 95th Cong., 1st Sess. 53 (1977).

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- The question of whether payment is "otherwise provided for" is a question of legal availability rather than actual funding status. As a general proposition, if payment of a particular judgment is "otherwise provided for" as a matter of law, the judgment appropriation is not available, and the fact that the defendant agency may have insufficient funds at that particular time does not operate to make the judgment appropriation available. 66 Comp. Gen. 157, 160 (1986); Department of Energy Request to Use the Judgment Fund for Settlement of Fernald Litigation, Op. Off. Legal Counsel, December 18, 1989. The agency's recourse in this situation is to seek funds from Congress, the same as it would have to do in any other deficiency situation.
- There is only one proper source of funds in a given case. The very terms of 31 U.S.C. § 1304—making an appropriation for payments not otherwise provided for—require that a source-of-funds determination be made. There is no election involved, however. If agency funds are available, then the judgment appropriation is not. Conversely, if a judgment is properly payable from the judgment appropriation, then payment of that judgment from agency funds violates 31 U.S.C. § 1301(a) (restricting appropriations to the objects for which made).

If an agency inadvertently or erroneously uses agency funds to pay something which should have been charged to the judgment appropriation, GAO's policy is to reimburse the agency upon proper request. See, e.g., B-178551, January 2, 1976 (letter to Air Force); B-52600/B-97131, May 7, 1952.

For judgments payable from agency appropriations, the rules of availability of appropriations with respect to time and amount as described in Chapters 5 and 6 of this publication apply just as they would to any other expenditure. See, e.g., 70 Comp. Gen. 225 (1991) (use of expired appropriation).

b. Tax Judgments

The method of appropriating for tax refunds has changed several times over the decades, and along with it the method of paying tax judgments.[20] Prior to fiscal year 1921, appropriations for refunding internal revenue taxes were made on an annual, indefinite basis. These appropriations were not available for judgments, however, and tax refund judgments required specific appropriations. 2 Comp. Gen. 501, 502 (1923). As the result of legislation enacted in 1919 (40 Stat. 1145), tax refund appropriations starting with fiscal year 1921 became regular (definite) annual appropriations, based on budget requests submitted by the Treasury

[20]Our source for much of this discussion is B-211389, July 23, 1984.

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Department. These appropriations were available for judgments. 27 Comp. Dec. 442 (1920); 2 Comp. Gen. 501 (1923); A-12287, December 31, 1925.

The tax refund appropriation was converted to a permanent indefinite appropriation in 1948,[21] and is now codified at 31 U.S.C. § 1324. In addition, the Commissioner of the Internal Revenue Service is specifically authorized to pay judgments "for any overpayment in respect of any internal-revenue tax." 28 U.S.C. § 2411. Thus, judgments representing overpayments or amounts improperly collected by IRS are paid by IRS and charged to the IRS "Refunding Internal Revenue Collections" account. Judgments in this category may result from suits for refund under 26 U.S.C. § 7422 or suits for wrongful levy under 26 U.S.C. § 7426. The judgments are paid directly by IRS without the need for settlement action by GAO. A-97256, November 3, 1938.

This treatment of tax judgments makes sense from the accounting perspective as well. Amounts collected by the IRS by way of judgments are credited as internal revenue collections. 26 U.S.C. § 7406. Paying tax judgments from the IRS refund account is therefore logical and gives a more accurate picture of the net effect of the government's tax collecting activities. Cf. 55 Comp. Gen. 625 (1976).

It can be seen from the foregoing that the major types of tax judgments are "otherwise provided for," and their payment does not involve use of 31 U.S.C. § 1304.

However, this does not mean that the judgment appropriation is never available for judgments arising from the activities of the IRS. The distinction is illustrated in B-211389, July 23, 1984. The IRS had seized a building to enforce a delinquent tax lien against a lessee who occupied space in the building. The owner of the building, who was not a delinquent taxpayer, sued for damages it had sustained as a result of the seizure. The governing circuit recognized a cause of action in this type of situation under the Tucker Act, based on an "inverse condemnation" approach. Since the case did not involve the return of anything received by the IRS, nor was it a suit against an individual revenue officer or agent, GAO concluded that a settlement of the suit was payable from the judgment appropriation. To illustrate the difference between this type of case and "tax judgments" that are payable by IRS, the decision gave the following example:

[21]Supplemental Treasury and Post Office Departments Appropriation Act, 1949, Title I, 62 Stat. 560, 561 (1948). The provision is discussed in B-137762.33, August 5, 1977.

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"If, for example, an IRS agent while en route to seizing a building were involved in a motor vehicle accident and negligently injured a private citizen, the citizen would have a claim cognizable under the Federal Tort Claims Act. An adverse judgment in such a case would be payable from the permanent judgment appropriation, even though the IRS agent was in the course of performing revenue-collecting duties at the time of the accident." B-211389 at 4.

There are other situations in which the IRS may be held liable for "damages" separate and distinct from paying back amounts it has received. The Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 (1988), included the following new provisions:

- Section 6240, 102 Stat. 3746, added a new 26 U.S.C. § 7432. It authorizes civil actions for damages and costs if the IRS knowingly or negligently fails to release a tax lien when required to do so under 26 U.S.C. § 6325.
- Section 6241, 102 Stat. 3747, added a new 26 U.S.C. § 7433. It authorizes civil actions for damages and costs if the IRS "recklessly or intentionally disregards" any provision of the Internal Revenue Code or regulations.

Each of these sections includes a payment provision expressly directing payment under 31 U.S.C. § 1304. Since both payment provisions use the word "claims," GAO regards 31 U.S.C. § 1304 as available for administrative settlements as well as court judgments, although the issue has not been addressed in a formal decision or opinion.

Prior to 1982, individual IRS employees could be sued for wrongful disclosure of tax returns or tax return information. As noted above, the Secretary of the Treasury could pay or reimburse any resulting judgments. (Wrongful disclosure was the precise situation involved in 56 Comp. Gen. 615.) In 1982, the statute authorizing suits against the employees (26 U.S.C. § 7217) was repealed and replaced with a new 26 U.S.C. § 7431, under which the remedy is a suit for damages against the United States. Although 26 U.S.C. § 7431 does not include a payment provision, there is no reason to charge judgments or compromise settlements under it to anything other than the permanent judgment appropriation. Administrative settlements under section 7431, however, are payable from IRS appropriations. B-238692, February 26, 1990 (internal memorandum).

With the enactment of the various provisions summarized above for damage suits against the United States, the incidence of suits against individual employees in tax matters should greatly diminish.

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c. Land Condemnation Judgments

The permanent judgment appropriation is, as a general proposition, not available for land condemnation judgments. Rather, these are payable from the funds of the acquiring agency. 66 Comp. Gen. 157 (1986) (GAO's most comprehensive discussion); 54 Comp. Gen. 799 (1975); B-164035, May 1, 1968; B-154988, August 21, 1964.

We noted earlier that the judgment appropriation was not intended to shift the source of funds for judgments which, prior to its enactment, were payable from agency funds. Land condemnation judgments fall into this category. 17 Comp. Gen. 664 (1937); 5 Comp. Gen. 737 (1926); A-25484, January 11, 1929; A-12979, February 10, 1926 ("Judgments in condemnation proceedings . . . are not for reporting to the Congress as are ordinary judgments of Federal courts . . . ."); B-117598-O.M., December 8, 1953.

In brief, any agency with the authority to acquire land has the authority to acquire it by condemnation. 40 U.S.C. § 257. Condemnation necessarily involves litigation and a judicial determination of just compensation. There is no such thing as "administrative condemnation." Condemnation can be accomplished only through judicial process. Thus, an appropriation available for land acquisition is of necessity available for acquisition by condemnation, whether or not it actually uses the term "condemnation." Land condemnation judgments are therefore "otherwise provided for" because they can be paid from funds of the acquiring agency.

As a matter of policy, GAO's position is that the power of eminent domain should not be accompanied, in the hands of an acquiring agency, by unlimited and uncontrolled access to the general fund of the Treasury through use of the judgment appropriation. The exercise of that power, the power to take private property, should be controlled by Congress through the appropriation process. 66 Comp. Gen. at 160. In addition, condemnation judgments are different from other judgments in that condemnation is basically nothing more than the exercise of a normal program activity. Id. at 160–61.

Although the rule is that condemnation judgments may not be paid from the judgment appropriation, there have been a few exceptions. Congress may, of course, provide for use of the judgment appropriation in particular situations. For example, legislation providing for the expansion of the Redwood National Park made the judgment appropriation available for amounts in excess of the amount deposited with the court. 16 U.S.C. § 79g(b); B-212681(1), September 27, 1983. More recently, legislation

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Debt Collection

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Internal Revenue Code because the Interior Department was free to adopt similar provisions in its own regulations, and had in fact done so. Thus, Interior could compromise a claim for reclamation fees in accordance with 31 U.S.C. § 3711. (B-156022-O.M., cited above, indicates that section 101.3(b) was viewed as addressing tax claims under the Internal Revenue Code.)

(3) Section 8(e) exemptions

Section 8(e) of the Debt Collection Act of 1982, noted above in connection with tax claims, also embraces debts arising under the Social Security Act or the tariff laws of the United States. This is not an exemption from the entire Federal Claims Collection Act and Standards, but only from those remedies and procedures prescribed by the Debt Collection Act itself. See 31 U.S.C. § 3701(d); 4 C.F.R. § 102.19(a). The Standards further point out that the exemption "should not be construed as prohibiting use of these authorities and requirements when collecting debts owed by persons employed by agencies administering the laws cited in the preceding paragraph unless the debt 'arose under' those laws." 4 C.F.R. § 102.19(b).

In order for the section 8(e) exemption to apply, two conditions must exist: the collection action in question must derive from the Debt Collection Act of 1982, and the debt must be one "arising under" the Internal Revenue Code, the Social Security Act, or the tariff laws. If either of these conditions is not met, the exemption does not apply. This gets somewhat complicated. A few examples may help:

- The Internal Revenue Service asserts a tax underpayment claim against an employee of the Social Security Administration. The claim cannot be referred to a private collection agency since the claim "arose under" the Internal Revenue Code and the authority to hire private debt collectors was prescribed by the Debt Collection Act.
- The Social Security Administration wishes to compromise a benefit overpayment claim against a private individual. Although the debt "arose under" the Social Security Act, the section 8(e) exemption does not apply because compromise authority was not one of the newly enacted provisions of the Debt Collection Act.
- SSA wants to assess a penalty against one of its employees for delinquent repayment of an unused travel advance. Although the penalty provision was one of the newly enacted Debt Collection Act provisions, SSA may assess the penalty because the debt did not "arise under" the Social Security Act, Internal Revenue Code, or tariff laws.

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providing for expansion of the Manassas National Battlefield Park specified payment from the judgment appropriation. Pub. L. No. 100-647, Title X, § 10002, 102 Stat. 3342, 3810 (1988). It may be significant that both of these were legislative takings.

Another exception arose from legislation in 1977 which gave the district court in Guam jurisdiction to hear, and render judgment on, claims by Guamanians for just compensation for land taken by the United States during and shortly after World War II.[22] The legislative history made it clear that payment from the judgment appropriation was intended. B-212134, June 29, 1983. Given the nature of the case, there would have been no other existing appropriation to charge, and payment from the judgment appropriation would not have the effect of augmenting anyone's land acquisition funds. See also 39 Comp. Gen. 166 (1959).

Another limited exception was recognized by decision. In 1973, Congress directed the Secretary of Agriculture to acquire by condemnation certain Klamath Indian forest lands. Congress then appropriated $49 million for the acquisition, but the judgment awarded just compensation considerably in excess of that amount. The legislative history indicated that Congress fully recognized that the $49 million would not be sufficient. Reasoning that the authorization applied to specifically known and identified lands and conferred no discretion on the condemning agency to determine how much land or which tracts to include, and that the appropriation could not have been applied to the acquisition of any other land nor could it have been exhausted by anything but the condemnation of the Klamath forest lands, the Comptroller General concluded that no purpose would be served by requiring a specific appropriation for the deficiency portion of the judgment and that payment from the judgment appropriation would not offend the established structure of funding land acquisitions. B-198352, April 18, 1980. However, the Comptroller General once again reviewed and reaffirmed the traditional treatment of condemnation judgments in general, noting that land acquisition is a normal activity for a number of agencies for which Congress sets the desired program levels through the appropriation process.

The term "inverse condemnation" refers to a variety of claims for just compensation under the Fifth Amendment. The cases may or may not involve the acquisition of land by the government. About the only thing the judgments have in common is that they reflect a determination that there

[22]Technically, these were not land condemnation suits. In a land condemnation action, the government is the plaintiff. In these cases, the condemnations had been consummated 30 years earlier.

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has been a compensable taking of a property interest—some action by the government which sufficiently interferes with a private property right so as to create a right to compensation under the Fifth Amendment. One example is B-211389, July 23, 1984, discussed in our previous section on tax judgments. Another example is the so-called "regulatory taking," in which a court finds that some government regulatory activity has infringed on a property interest in a manner deemed compensable.

GAO looks at inverse condemnation judgments on a case-by-case basis, and it is difficult to state a "rule." As a general proposition, inverse condemnation judgments are paid from the judgment appropriation, except where an agency, intending to acquire certain property, by delay or otherwise (which may be intentional or unintentional) effectively "forces" the landowner to file an inverse condemnation action and the result would be a clear augmentation of the agency's land acquisition appropriations. B-183692-O.M., September 28, 1982. See also 66 Comp. Gen. at 163, citing Althaus v. United States, 7 Cl. Ct. 688 (1985), as an example of an inverse condemnation judgment which would not be paid from the judgment appropriation.

A related type of suit is an action to quiet title, 28 U.S.C. § 2409a, in which someone other than the federal government brings a civil action against the United States to adjudicate a disputed title to real property in which the government claims an interest. If the government loses, it may nevertheless choose to retain possession or control of the property by paying just compensation. A judgment or settlement of this nature is analogous to a direct condemnation and is payable from funds of the acquiring agency. B-249130, February 23, 1993 (internal memorandum). See also A-25484, January 11, 1929.

d. Judgments for Refunds

In Eastport Steamship Corp. v. United States, 372 F.2d 1002 (Ct. Cl. 1967), the Court of Claims recognized that claims for money fall into two somewhat overlapping but nevertheless different categories: (1) claims "in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum," and (2) "demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury." Id. at 1007. The court went on to give examples of each type. For purposes of this discussion, we use the term "refund" to correspond roughly to the court's first category.

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Judgments directing refunds are materially different from judgments awarding damages. When a court orders a refund, it is directing the government to return money it received and which the court has determined it improperly received and/or retained. In this sense, it may be argued that a judgment directing a refund is not truly a "money judgment" within the scope of 31 U.S.C. § 1304, but is more akin to injunctive relief. Cf. 70 Comp. Gen. 225, 228 (1991). In addition, if an agency has credited the receipt to its own appropriation or fund, charging the refund to the general fund of the Treasury by paying the judgment under 31 U.S.C. § 1304 would result in an augmentation of the receiving appropriation. A refund should be charged to the general fund only where the receipt was covered into the general fund.

The rule with respect to refunds was stated in 17 Comp. Gen. 859, 860 (1938) and repeated in 29 Comp. Gen. 78, 79 (1949) as follows:

"When the amount subject to refund can be traced as having been erroneously credited to an appropriation account the refund claim is chargeable to said appropriation whether it be lapsed or current, or reimbursable or nonreimbursable."

GAO has applied the rule regardless of whether the refund is ordered administratively or judicially.

Several more recent decisions will illustrate. In 55 Comp. Gen. 625 (1976), a court directed the refund of a fine paid to the Internal Revenue Service for violation of wagering tax provisions of the Internal Revenue Code. Since the fine had been deposited in the Treasury as an internal revenue collection, the proper account to charge with the refund was the IRS account for refunding internal revenue collections. (Augmentation was not a concern in this case because the fine had not been credited to an operating appropriation or fund.) A very similar case is B-135312, March 13, 1958.

In 61 Comp. Gen. 224 (1982), a court ordered the Department of the Interior to refund fees collected from 1975 through 1981 for right-of-way permits. For part of this time, the fees had been deposited in the general fund of the Treasury as miscellaneous receipts. For the remaining years, the fees were deposited in a special account which Congress had appropriated for use by Interior. For the years in which the fees had been deposited as miscellaneous receipts, the refund was held chargeable to the appropriation for "Refund of Moneys Erroneously Received and Covered" established by 31 U.S.C. § 1322(b)(2). However, for the years in which the

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fees had been credited to the special account, the refund was held chargeable to that special account.

Both of these decisions applied the rule set forth in 17 Comp. Gen. 859. Since there was an available source of funds in each case, there was no need to consider payment under 31 U.S.C. § 1304.

A somewhat different situation occurred in B-164766, June 1, 1979. There the Court of Claims had approved a contractor's motion to substitute a bond in lieu of money previously paid to the Department of the Army under the Renegotiation Act. The issue was the source of funds for the court-ordered refund of the money previously paid. Since the prior payment had been deposited in the Treasury as miscellaneous receipts, there was no basis to charge the refund to Army appropriations. Also, the "Moneys Erroneously Received and Covered" account could not be charged since the deposit had been proper when made, and the court order directing the refund was not based on any suggestion that the original receipt was in any way erroneous. Since there was no other appropriation or fund that could properly be charged, the refund was held payable from the judgment appropriation. (The Renegotiation Board ceased operations as of March 31, 1979.)

Thus, when a judgment or compromise settlement orders a refund, as opposed to the payment of money damages, the first question to ask is what the agency did with the money. If the agency retained the money for credit to its own appropriations, then the refund is chargeable to the agency's appropriations, and the fact that the agency may have spent the money is irrelevant.[23] If the money was deposited in the Treasury as miscellaneous receipts, a judicially-ordered refund may be charged to the "Erroneously Received and Covered" appropriation if applicable, or if not, to the judgment appropriation. Other cases applying these principles are B-206443, June 25, 1984; B-150624-O.M., April 18, 1963; B-140180-O.M., January 27, 1960.

A somewhat analogous situation is the action in rem in which a court directs return of the "res." The "res" may be tangible property, money, or tangible property which has been sold and converted to cash. In the

[23]In Texas State Commission for the Blind v. United States, 796 F.2d 400, 407 (Fed. Cir. 1986), the court refused to apply the refund theory in a suit seeking a portion of vending machine income which the plaintiff alleged the Defense Department improperly diverted in violation of the Randolph-Sheppard Act, in part because Congress had apparently taken these amounts into consideration in determining DOD appropriations. The question was academic, however, as the plaintiff lost the case.

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typical case, the action is brought against the property itself, and any judgment is satisfied from that property. E.g., B-75900, June 11, 1948.

The Supreme Court considered an in rem situation in Republic National Bank of Miami v. United States, 113 S. Ct. 554 (1992). The government sought forfeiture of a residence alleged to have been purchased with illegal drug money. The bank claimed a lien interest under a mortgage. Upon agreement of the parties and approval of the court, the property was sold and the proceeds held by the United States Marshal. The district court held in favor of the government and directed forfeiture of the proceeds. The bank filed a notice of appeal, but did not try to obtain a stay of execution of the judgment. The Marshal then deposited the proceeds in the Assets Forfeiture Fund (28 U.S.C. § 524(c)) in the Treasury, and the government moved to dismiss the appeal, arguing that deposit of the proceeds removed the matter from the court's jurisdiction.

The main issue before the Supreme Court was whether deposit of the proceeds in the Treasury terminated the in rem jurisdiction. The answer was no, unless deposit of the funds in the Treasury would somehow render further judgments "useless." The government argued that judgment in this case would be useless because there was no authority to refund the deposited proceeds from the Treasury. In multiple opinions, the Court rejected this argument. While the Court split over the precise nature of the authority, it was unanimous in its belief that adequate authority existed to refund the proceeds from the Treasury in the event that the bank prevailed on its appeal from the underlying forfeiture action. Some of the Justices believed that there was no need for an appropriation to authorize the refund in a case like this, while others found the requisite appropriation in 31 U.S.C. § 1304, together with 28 U.S.C. § 2465 which directs the return of seized property upon entry of judgment for the claimant. (There is no indication that the Court considered whether the Assets Forfeiture Fund itself could satisfy the requirement for an appropriation.)

e. United States Postal Service

Prior to the Postal Reorganization Act of 1970, the Post Office Department was largely a "regular" federal agency, and as such was subject to GAO's claims settlement jurisdiction. The version of 31 U.S.C. § 1304 then in effect included a permanent appropriation of the postal revenues to pay judgments. Judgments were submitted to GAO for certification, but were then forwarded to the Post Office Department (rather than the Treasury Department) for actual payment.

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The Postal Reorganization Act replaced the Post Office Department with "an independent establishment of the executive branch of the Government" to be known as the United States Postal Service (USPS). 39 U.S.C. § 201. The USPS was empowered to sue and be sued, and was given its own claims settlement authority. 39 U.S.C. §§ 401(1), 401(8), 2603. It is expressly subject to the Federal Tort Claims Act. 39 U.S.C. § 409(c).

The Postal Reorganization Act addressed the payment of judgments by adding a provision now found at 39 U.S.C. § 409(e):

"A judgment against the Government of the United States arising out of activities of the Postal Service shall be paid by the Postal Service out of any funds available to the Postal Service."

Thus, the Postal Reorganization Act changed nothing in terms of the source of funds. By virtue of 39 U.S.C. § 409(e), the judgments are explicitly "otherwise provided for." See Butz Engineering Corp. v. United States, 499 F.2d 619, 625, 628 (Ct. Cl. 1974). However, the Act did result in a procedural change—USPS judgments are now paid directly by the USPS and do not require GAO certification prior to payment. B-164786, October 8, 1970.

Cases occasionally raise the issue of whether a particular judgment "arose from activities of" the Postal Service. If so, it is payable by the Postal Service; if not, it is payable from the judgment appropriation. A 1978 decision involved a compromise settlement under the Federal Tort Claims Act. A trailer owned by an independent contractor of the Postal Service had become separated from the tractor-trailer rig and struck the plaintiff's automobile. The trailer was clearly on Postal Service business, but it was also subject to the Department of Transportation's motor carrier safety regulations. The decision, while not reflecting any opinion on the merits of the case, concluded that the judgment did arise from Postal Service activities and was therefore properly payable by the Postal Service. B-190593, November 29, 1978.

A 1985 case which did not result in any written GAO decision or opinion provides another good illustration. A USPS employee suffering from chest pains consulted a USPS doctor. The doctor misdiagnosed the situation, but immediately sent the employee to a VA hospital and even arranged for transportation. VA personnel also misdiagnosed the situation. Several days later, the employee died. The chest pains had resulted from a non-work related heart condition. In the ensuing wrongful death action under the

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Federal Tort Claims Act, the government negotiated a settlement. Even assuming that the USPS doctor was negligent, that negligence was not the proximate cause of death since the doctor sent the employee immediately to a hospital and death did not occur until more than a week later. In these circumstances, GAO did not view the claim as "arising out of the activities of" the Postal Service for purposes of 39 U.S.C. § 409(e), and certified the settlement for payment from the judgment appropriation.[24]

Still another useful illustration, again not the subject of any written GAO decision or opinion, resulted from the payment of the class action judgment in Alaniz v. Office of Personnel Management, 728 F.2d 1460 (Fed. Cir. 1984), in which the court found that OPM had improperly determined cost-of-living allowance adjustments for certain years. Postal Service employees were included in the plaintiff class. If OPM's action had been binding on the Postal Service as it was with other executive agencies, then the judgment would have arisen from the activities of OPM, not the Postal Service, and the USPS plaintiffs could have been paid from the judgment appropriation along with the other executive branch plaintiffs. If, however, as was in fact the case, the Postal Service was not legally required to follow OPM's action but had voluntarily chosen to do so, then the judgment arose from the Postal Service's activities for payment purposes.

f. Government Corporations

For the most part, judgments against a government corporation are paid by the corporation rather than from the judgment appropriation. This result is based in part on "otherwise provided for" reasoning and in part on the legal and funding status of the typical corporation.

The theory is that a government corporation is set up to operate in a business-like manner. It is usually given considerable latitude in determining its expenditures; it is free from many of the restrictions on appropriated funds that apply to noncorporate agencies; and its statutory charter typically contains a "sue and be sued" clause. Of particular relevance to the present context, a corporation may generally retain funds it receives in the course of its operations and is not required to deposit them in the Treasury as miscellaneous receipts. Also, unlike a regular government agency, a government corporation may procure liability insurance. This being the case, it is logical that losses incurred by a government corporation, whether by judgment or otherwise, should be treated as liabilities of the corporation and charged to corporate funds.

[24]Dixie Doreen Graham v. United States, GAO Claim No. Z-2870529.

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In an early decision which predated both section 1304 and the Federal Tort Claims Act, the Virgin Islands Company, a wholly owned government corporation, sought to compromise a personal injury claim. In view of the Company's statutory power to sue and be sued, the Comptroller General concluded that, since a judgment obtained against the Company would be payable from funds derived from the operation of the Company, the compromise could be paid from the same source. 25 Comp. Gen. 685 (1946). The Attorney General had also taken the position that corporate funds could be used to pay tort judgments or to procure liability insurance. 39 Op. Att'y Gen. 559 (1938) (noting, at page 566, that to the advantages flowing from corporate status also attach responsibilities). Thus, since judgments and settlements of this type were payable from currently available funds prior to enactment of the judgment appropriation, they should be viewed as unaffected by it.[25]

Similarly, a court of appeals in a 1947 case said:

> "A government corporation can pay costs taxed against it out of its corporate funds without an appropriation by Congress, but costs taxed against the government cannot be so paid. A government corporation engaging in business in the commercial world can deal with a judgment for costs as one of the vicissitudes of business to be charged to profit and loss . . . ."

Walling v. Norfolk Southern Ry. Co., 162 F.2d 95, 96 (4th Cir. 1947). In appropriations jargon, the court was saying that the corporation's funds were legally available to pay judgments as business expenses.

In a later decision involving the Saint Lawrence Seaway Development Corporation, the Comptroller General expressed the view that judgments against the corporation should "at least ultimately" be paid from funds of the corporation. 37 Comp. Gen. 691, 695 (1958). This seemed to contemplate that there might be circumstances in which a judgment would be paid from the permanent appropriation[26] with the United States seeking reimbursement from the corporation. This in fact happened several years later in a suit for tropical differential pay involving the Panama Canal Company. GAO certified the judgment for payment under section 1304 and

[25]Under the Federal Tort Claims Act, which is now the exclusive remedy for tort actions against federal instrumentalities, including government corporations, suit must be brought against the United States. While this provides a uniform procedure for adjudicating tort claims, there is no indication that Congress intended to shift the payment burden from the individual corporations to the general fund of the Treasury. See 13 Op. Off. Legal Counsel 436 (1989) (preliminary print) (Commodity Credit Corporation).

[26]See Breitbeck v. United States, 500 F.2d 556 (Ct. Cl. 1974), for a possible example involving the St. Lawrence Corporation.

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then sought reimbursement from the Panama Canal Company on the grounds that the judgment amounts were properly a cost of operation of the Company. B-164879, December 5, 1973.

Thus, judgments against a government corporation should be paid from corporate assets. The most detailed discussion of this rule is found in an opinion of the Justice Department's Office of Legal Counsel, 13 Op. Off. Legal Counsel 436 (1989) (preliminary print). See, in addition, Far West Federal Bank v. Director, Office of Thrift Supervision, 930 F.2d 883, 890 (Fed. Cir. 1991).(stating general rule); 45 Comp. Gen. 514 (1966);[27] B-142778-O.M., May 19, 1960 (Commodity Credit Corporation); B-213490, October 23, 1985 (non-decision letter) (Amtrak).

g. "Sue and Be Sued" Agencies

Congress has authorized a number of noncorporate agencies to conduct commercial-type programs. Examples are the various loan and insurance programs conducted by the Small Business Administration and the Department of Housing and Urban Development. The agency is usually authorized to sue and be sued and the programs are frequently financed by revolving funds. Where these three factors coincide—a business-type program conducted by a "sue and be sued" agency and financed from a revolving or other special fund—judgments arising from the program are as a general proposition payable by the agency from the fund. The theory is that a judgment of this type should be treated as a necessary expense of the program. 62 Comp. Gen. 12 (1982); B-189443, August 4, 1980 (non-decision letter). This principle is limited to judgments arising directly from the particular program and does not affect other types of judgments such as judgments in tort or discrimination suits to the extent they arise from what B-189443 called the agency's "administrative practices." 62 Comp. Gen. at 14.

This concept is closely related to, and supported by, the approach followed by a number of courts in determining district court jurisdiction under a "sue and be sued" clause. The predominant view finds a direct relationship between "sue and be sued" power and the availability of agency funds to pay a resulting judgment. For example, in S.S. Silberblatt, Inc. v. East Harlem Pilot Block, 608 F.2d 28, 35-36 (2d Cir. 1979), the case that generated GAO's decision at 62 Comp. Gen. 12, the court, citing Federal Housing Administration v. Burr, 309 U.S. 242 (1940), said that when

[27]This case held that the settlement of a tort suit should be paid from assets of the corporation rather than operating appropriations of the parent agency. Since the case predated the availability of the judgment appropriation for compromises of Federal Tort Claims Act suits, the alternative of charging agency operating appropriations is obsolete. The case nevertheless remains valid for the proposition that the settlement should be paid from corporate assets.

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Congress launches a federal agency into the commercial world and gives it "sue and be sued" power, "it is presumed in the absence of an express limitation on the waiver that the agency is suable for claims arising out of the commercial relationships which it enters into in pursuit of its statutory mission." The court then found that any judgment for plaintiff in the case could be paid from funds in the control of the defendant agency, in that case the Department of Housing and Urban Development. See also C.H. Sanders Co. v. BHAP Housing Development Fund Co., 903 F.2d 114, 120 (2d Cir. 1990);[28] Crowell v. Administrator of Veterans' Affairs, 699 F.2d 347, 351 n.1 (7th Cir. 1983); Industrial Indemnity, Inc. v. Landrieu, 615 F.2d 644, 646 (5th Cir. 1980) ("A judgment against the Secretary establishing plaintiff's entitlement can be paid out of money in the General Insurance Fund . . . .").[29] Cf. Taylor v. Administrator of Small Business Administration, 722 F.2d 105 (5th Cir. 1983) ("sue and be sued" clause of Small Business Act).

h. Nonappropriated Fund Judgments

A "nonappropriated fund instrumentality" or "NAFI" is an entity or activity which does not receive its funds from congressional appropriations. E.g., United States v. Hopkins, 427 U.S. 123, 125 n.2 (1976). The most commonly known NAFIs are those which operate within the military departments—such things as base or post exchanges, open messes, and recreation clubs. The very concept of a NAFI implies an activity which raises its own operating funds through product sales, member fees, etc., in contrast to an appropriated fund activity which is supported by taxpayer dollars. Both logic and policy considerations suggest that this concept would be largely a sham if NAFIs had unlimited access to the general fund of the Treasury through use of 31 U.S.C. § 1304. Absent statutory provision to the contrary, the Supreme Court has stated that the United States "assumes none of the financial obligations" of a NAFI. Hopkins, 427 U.S. at 124, quoting Standard Oil Co. v. Johnson, 316 U.S. 481, 485 (1942).

Tort judgments arising from nonappropriated fund activities are generally paid by the activity itself. See B-204703, September 29, 1981 (non-decision letter). In the case of the Army and Air Force Exchange Service, this is specified in a joint Army-Air Force regulation (AR 60-10/AFR 147-7). See also Mignona v. Sair Aviation, Inc., 937 F.2d 37 (2d Cir. 1991) (remanding tort claim against military flying club to state court). However, exceptions are possible, depending on exactly whose negligence caused the damage.

[28]The BHAP court suggested that a court need not waste its time analyzing the source of funds but "should simply direct the Secretary to satisfy the judgment out of funds that are within his control, assuming, of course, that such funds exist. It is only as to such funds that the Secretary's immunity has been waived." 903 F.2d at 120.

[29]While this is the majority view, it is not unanimous. See Marcus Garvey Square, Inc. v. Winston Burnett Construction Co., 595 F.2d 1126 (9th Cir. 1979), also purporting to apply FHA v. Burr.

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(4) Interagency claims

Interagency claims—claims by federal agencies against other federal agencies—are also excluded from the coverage of the Federal Claims Collection Standards. 4 C.F.R. § 101.3(c). In addition, the definition of "debt" in 4 C.F.R. § 101.2(a), discussed above, excludes amounts owed by other federal agencies. The only statutory reference to interagency claims is 31 U.S.C. § 3701(c), under which interagency claims are not subject to 31 U.S.C. §§ 3716 (administrative offset) or 3717 (interest and penalties). These provisions were added by the Debt Collection Act of 1982. As with tax claims, the exemption in the Standards is broader.

The exemption of section 101.3(c) is a blanket exemption, newly added in the 1984 version of the Standards. However, as the preamble noted (49 Fed. Reg. at 8890), this was merely the codification of existing practice. E.g., B-182398-O.M., September 3, 1976. This is not merely an example of the government being good to itself. Rather, it is a recognition that the collection tools set forth in the Standards simply are not available when asserting a claim against another federal agency. The situation was summed up in the following passage from B-217990.25-O.M., October 30, 1987:

> "A claim against another federal agency is different from a claim against a private party. The tools available to collect a debt from the private party are not available when the debtor is another federal agency, either as a matter of law or as a practical matter. We cannot sue the other agency; we cannot hire a private debt collector; we cannot charge interest; we cannot offset the claim against the agency's present or future appropriations."

The range of options in collecting a claim from another federal agency is extremely limited. The Standards instruct agencies to attempt to resolve interagency claims by negotiation. If this fails, the claim should be referred to GAO. 4 C.F.R. § 101.3(c). The agency should not simply "write off" the claim. B-214972-O.M., April 26, 1985. GAO will review the claim and render its objective opinion as to the claim's validity, for whatever persuasive influence that may have. GAO cannot, however, enforce collection any more than the creditor agency itself could.

(5) State and local governments

Another limited exemption deriving from the Debt Collection Act is 31 U.S.C. § 3701(c), which provides that sections 3716 (administrative offset) and 3717 (interest and penalties) do not apply to debts owed by state or

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For example, in a 1961 case, a person was injured on a wooden foot bridge providing access to a base exchange store. Since the negligence (defective planking) was imputable to the base engineer and not to any officer or employee of the exchange, the judgment appropriation was used. B-145762-O.M., May 19, 1961.

The treatment of NAFI contract judgments has had somewhat of a tortuous history. The earlier cases held that the United States could not be sued to enforce the contractual obligations of a NAFI. Jaeger v. United States, 394 F.2d 944 (D.C. Cir. 1968); Kyer v. United States, 369 F.2d 714 (Ct. Cl. 1966). In the Court of Claims, part of the reason was the court's position that, under 28 U.S.C. § 2517(a), its judgments could be paid only from appropriated funds. Kyer, 369 F.2d at 718. Unlike district courts, it felt that it could not direct payment from the NAFI's own funds. Id. at 719.

In 1970, Congress enacted Pub. L. No. 91-350, 84 Stat. 449, to amend the Tucker Act to include express or implied contracts by the Army and Air Force Exchange Service, Navy, Marine, and Coast Guard exchanges, and the Exchange Councils of the National Aeronautics and Space Administration. It also amended the judgment appropriation to make it available for judgments and compromise settlements in this category, and to require reimbursement by the contracting instrumentality. 31 U.S.C. § 1304(c). The amendment has been held applicable to employment contracts as well as traditional procurement contracts. United States v. Hopkins, 427 U.S. 123 (1976). However, it is limited to the entities specified and does not extend to other nonappropriated funds. Swiff-Train Co. v. United States, 443 F.2d 1140 (5th Cir. 1971).

In situations not covered by the 1970 legislation, the Court of Claims continued to apply what had now become known as the "nonappropriated funds doctrine," but refined it so as to accept Tucker Act jurisdiction unless it could be shown that appropriated funds were statutorily precluded. E.g., McCarthy v. United States, 670 F.2d 996, 1002 (Ct. Cl. 1982) (agency "has authority to use appropriated funds if and to the extent appropriated, and that is sufficient"); L'Enfant Plaza Properties, Inc. v. United States, 668 F.2d 1211, 1212 (Ct. Cl. 1982) (Congress not "statutorily prohibited from appropriating funds"). Aware of potential payment implications, the court noted that its judgments were "normally payable" from the judgment appropriation. McCarthy, 670 F.2d at 1002. In cases such as Ford, Powell & Carson, Inc. v. United States, 4 Cl. Ct. 200 (1983), and Corbino v. United States, 488 F.2d 1008 (Ct. Cl. 1973), the court clearly

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recognized the inappropriateness of charging the judgments to the taxpayer.

An important 1984 case, United States v. General Electric Corp., 727 F.2d 1567 (Fed. Cir. 1984), considered the impact of the Contract Disputes Act. The case involved a somewhat newer category of "nonappropriated fund" cases—those involving the foreign military sales program or similar programs intended to operate at no cost to the government. "Nothing in the Contract Disputes Act of 1978 limits its application to appropriated funds." Id. at 1570. Thus, under 41 U.S.C. § 612, the payment provision of the Contract Disputes Act, judgments or board of contract appeals awards involving nonappropriated fund contracts are payable from the judgment appropriation, but payment must be reimbursed by the contracting agency or activity.

The remedies provided by Title VII of the Civil Rights Act extend to nonappropriated fund employees. 42 U.S.C. § 2000e-16(a). Largely by analogy with the tort cases, a few Title VII judgments have been paid from the judgment appropriation where the alleged discriminating officials were regular federal civilian or military officials. See B-234746-O.M., March 10, 1989.

Apart from the situations noted, the rule remains that the United States does not assume the financial obligations of nonappropriated fund activities. In the absence of legislation authorizing suit against the United States, suit, at least in the district courts, must be brought against the particular activity, with any resulting judgment or settlement payable from the activity's nonappropriated funds. E.g., Cosme Nieves v. Deshler, 786 F.2d 445 (1st Cir. 1986), cert. denied, 479 U.S. 824 (suit under Fair Labor Standards Act); Morales v. Senior Petty Officers' Mess, 366 F. Supp. 1305 (D.P.R. 1973) (same).

Cases involving the Farm Credit Administration raise a different type of nonappropriated fund issue. The Farm Credit Administration does not receive direct congressional appropriations but derives its operating funds from assessments levied on the institutions in the system it administers. Normally, funds of that type would still be regarded as appropriated funds on the theory that the agency's authority to retain and use the funds amounts to a continuing appropriation. However, the Administration's governing legislation provides that its operating funds "shall not be construed to be Federal Government funds or appropriated moneys." 12 U.S.C. § 2250(b)(2). This being the case, the funds are not encumbered by

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the traditional prohibition on the use of operating appropriations for judgments. Therefore, since the Administration's operating funds are legally available to pay litigative awards, payment is "otherwise provided for." B-251061.3, September 29, 1993; B-251061.2, February 10, 1993.

i. Impoundment/Assistance Funds

There is a body of case law concerning the power of the courts to either enjoin the expiration of budget authority or "revive" expired budget authority, in order to preserve its availability pending the litigation of claims. The first wave of cases involved challenges to executive branch impoundments by potential recipients under various grant and entitlement programs. The suits then spread to non-impoundment contexts, such as challenges to grant funding decisions or to the application of statutory apportionment formulas. The cases are fully covered in Chapter 5 under the heading Effect of Litigation on Period of Availability.

For purposes of this chapter, the point is that these cases, while they may result in judicial awards of money, do not involve the use of 31 U.S.C. § 1304. The claimant in the typical case is trying to establish entitlement to particular budget authority under some statutory assistance program, and any resulting judgment relates to that budget authority, to the extent any of it remains. (If claims of this sort were viewed as exposing the judgment appropriation, questions as to the expiration of budget authority would be irrelevant.)

Two cases from the Court of Appeals for the District of Columbia Circuit state the principle as follows:

> "[A]n equitable doctrine has been fashioned by the federal courts in recent years to permit funds to be awarded to a deserving plaintiff even after the statutory lapse date, as long as the lawsuit was instituted on or before that date. . . .
>
> "Application of this equitable doctrine, however, assumes that funds remain after the statutory lapse date. . . .
>
> "[T]he equitable doctrine permitting a judicial award of funds after the statutory lapse date will ordinarily, as here, have no application to a case in which all funds have properly been awarded."

West Virginia Association of Community Health Centers v. Heckler, 734 F.2d 1570, 1576–77 (D.C. Cir. 1984).

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"[W]e point out that the scope of that relief is limited to the amount of fiscal year 1981 funds which remain available. Indeed, at oral argument, counsel for the nine states conceded that it is undisputed that the claims in issue may only be satisfied out of whatever balance remains."

Connecticut v. Schweiker, 684 F.2d 979, 999 (D.C. Cir. 1982), cert. denied, 459 U.S. 1207. See also Population Institute v. McPherson, 797 F.2d 1062, 1081 (D.C. Cir. 1986); Ambach v. Bell, 686 F.2d 974, 986 (D.C. Cir. 1982).

j. Garnishment

The wages of federal civilian and military personnel are subject to garnishment only pursuant to statutory authority. This follows from the concept of sovereign immunity, because garnishment involves the serving of legal process, usually issued by a state court, on federal agencies. Garnishment against federal wages is now permissible under two separate statutes.

(1) 42 U.S.C. § 659

In 1975, Congress enacted legislation to permit the garnishment of federal wages for alimony and child support. The basic provision is section 459(a) of the Social Security Act, 42 U.S.C. § 659(a), which states that "moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services" shall be subject to garnishment process for those two items. The terms "child support" and "alimony" are defined to include attorney's fees, interest, and court costs when authorized by state law and specified in the judgment or decree. 42 U.S.C. §§ 662(b), (c).

This legislation does not create any new federal right of action. It is merely a limited waiver of sovereign immunity to permit garnishment as and to the extent specified. 55 Comp. Gen. 517, 520 (1975). A garnishment order that exceeds the extent to which the government has statutorily waived its sovereign immunity imposes no obligation on the United States. See 57 Comp. Gen. 420 (1978).

The Office of Personnel Management has issued implementing regulations for the executive branch. 5 C.F.R. Part 581 (1993). They include detailed listings of moneys which are and are not subject to garnishment. They also designate, as required by 42 U.S.C. § 661(b), agents to accept service of process for each executive branch agency.

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The Merit Systems Protection Board has held that a back pay award, although not listed in the OPM regulations, is subject to garnishment. Morones v. Department of Justice, 49 M.S.P.R. 212 (1991). In the cited case, the award was part of a settlement following a remand by the Court of Appeals for the Federal Circuit. Based on the Board's reasoning in Morones and the language of the statute, a case can be made that the same result would apply to a back pay award which is part of a court judgment payable under 31 U.S.C. § 1304, although there are thus far no cases.

Payments due from the Civil Service Retirement and Disability Fund are also subject to garnishment, but only after application for benefits has been filed. Oshiver v. United States, 618 F. Supp. 172 (E.D. Pa. 1985). (The Oshiver court suggested that it might be possible for the wife of a former employee who had disappeared to file the application.) Income tax refunds are not subject to garnishment.[30] 5 C.F.R. § 581.104(c); Enfinger v. Enfinger, 452 F. Supp. 553 (M.D. Ga. 1978).

Garnishment traditionally has involved an order issued by a court, and this is still the prevalent form. However, some states have developed an administrative garnishment process which, if otherwise proper, may qualify as "legal process" for purposes of 42 U.S.C. § 659. 73 Comp. Gen.—(B-257000, June 14, 1994); 55 Comp. Gen. 517 (1975); B-183433, June 25, 1976.

As a general proposition, garnishment orders will be payable directly by the employing agency from agency funds. Questions have arisen, however, where the agency fails to comply with garnishment process. One such case is 56 Comp. Gen. 592 (1977). The Environmental Protection Agency had negligently failed to withhold funds from an employee's salary under a District of Columbia writ of garnishment. The error was not discovered until after the employee had resigned and his retirement account had been paid over. Under D.C. law, an employer who fails to comply with a writ of garnishment is liable to the judgment creditor, and 42 U.S.C. § 659 makes the United States subject to garnishment process the same as a private party. Here, a judgment entered by a D.C. court against EPA could not be paid from funds under the control of the agency since there were no longer any agency funds to which the garnishment could attach. Therefore, the decision concluded that the judgment could be paid from the judgment appropriation if the Attorney General certified that it was in the interest of the United States to pay, as provided in 28 U.S.C. § 2414.

[30]Separate authority exists, however, to offset certain past-due child support payments against tax refunds. See 26 U.S.C. § 6402(c), 42 U.S.C. § 664.

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A similar issue was considered in Young v. Young, 547 F. Supp. 1 (W.D. Tenn. 1980). That case involved state law under which an employer who failed to comply with garnishment process could be held liable for the full amount of the debt or judgment underlying the garnishment. The court held that the limited waiver of sovereign immunity in 42 U.S.C. § 659 made the United States liable only for the amounts it had failed to withhold, not for the entire amount of the underlying debt. The court also directed the government to take action to recover those amounts from the employee. The judgment itself was found payable under 31 U.S.C. § 1304. 547 F. Supp. at 5.

The case of Loftin v. Rush, 767 F.2d 800 (11th Cir. 1985), is another similar case, in which the judgment creditor had obtained a default judgment against the United States for the full amount of the underlying debt. The court held the default judgment void:

"The judgment entered against the government officer was void. Mrs. Loftin had no remedy by which she could collect the judgment of $37,966 as a lump sum against the Navy. The federal statute involved here . . . does not waive federal immunity. It merely authorizes a federal disbursing officer to withhold funds from the future pay of a federal employee. The state court exceeded its authority in entering a judgment greater than that allowed by the statutes. The Department of Justice through the United States Attorney could have filed an original declaratory action in United States District Court to have the judgment declared void." 767 F.2d at 805.

Then, essentially in agreement with the Young decision, the court concluded that 42 U.S.C. § 659 "evinced no intention to make the government, as employer of a debtor, wholly liable for a debt it did not incur," i.e., the full amount of the underlying debt (767 F.2d at 809), and directed payment of the amounts the government had failed to withhold.

The Young and Loftin decisions both discuss 56 Comp. Gen. 592. Unfortunately, both overbroadly characterize the GAO decision as standing for the proposition that the United States can be held liable for the full amount of the underlying debt, an approach both courts rejected. However, the District of Columbia statute involved in 56 Comp. Gen. 592, quoted on page 594, clearly made the employer liable only for the amounts it failed to withhold, and this is all that was involved in that case. Thus, there is no inconsistency between Young, Loftin, and 56 Comp. Gen. 592. In addition, it should be noted that the OPM regulations provide:

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"[W]here a governmental entity negligently fails to comply with legal process, the United States shall be liable for the amount that the governmental entity would have paid, if the legal process had been properly honored."

5 C.F.R. § 581.305(e). In sum, if a federal agency fails to comply with garnishment process, the United States can, to the extent provided by state law, be held liable for the amounts the agency failed to withhold. If a state court judgment to this effect is obtained, the first question to ask is whether the agency has any other funds of the types described in the OPM regulations. If not, the judgment is payable from the judgment appropriation provided the Attorney General certifies that payment is "in the interest of the United States" pursuant to 28 U.S.C. § 2414.

Our discussion thus far has concerned government liability for failing to honor a garnishment writ. What about when it does honor one?

The statute, 42 U.S.C. § 659(f), provides:

"Neither the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section."

The key phrase here is "regular on its face." This means that the agency does not have to inquire beyond the writ itself. Employees have challenged agency compliance with garnishment process where the court which issued the writ did not have personal (as opposed to subject matter) jurisdiction over the employee-obligor. However, the Supreme Court has held that the government is not liable to the employee in this situation. United States v. Morton, 467 U.S. 822 (1984). If the writ is issued by a court with subject-matter jurisdiction and is otherwise "regular on its face," the agency is bound to comply. The withholding does not become improper so as to make the government liable to its employee merely because the state court lacked personal jurisdiction. As the Court pointed out, the OPM regulations also mandate this result. Further, the fact that the employee may have raised the jurisdictional problem with the agency is irrelevant. Id. at 829. In a similar case in 1982, the Comptroller General had reached the same result. 61 Comp. Gen. 229, quoted in part in Morton, 467 U.S. at 829 n.10.

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(2) 5 U.S.C. § 5520a

In 1993, Congress enacted more general garnishment authority in the Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, § 9, 107 Stat. 1001, 1007, 5 U.S.C. § 5520a, to exist side-by-side with the Title 42 provisions.

The key provision is 5 U.S.C. § 5520a(b), which states that "pay from an agency to an employee is subject to legal process in the same manner and to the same extent as if the agency were a private person." "Agency" is defined in subsection 5520a(a)(1) as including all branches of the federal government, similar to the definition in 42 U.S.C. § 662(a). "Pay" is broadly defined in subsection 5520a(a)(4). "Legal process" is defined in subsection 5520a(a)(3). Like its counterpart in 42 U.S.C. § 662(e), it encompasses administrative process where authorized by state law. However, it does not include process issued by a court of a foreign country.

Where the Title 42 authority is limited to alimony and child support, 5 U.S.C. § 5520a is much broader, applicable to "a legal debt of the employee, or recovery of attorney's fees, interest, or court costs." Id. § 5520a(a)(3)(B). Administrative costs incurred by the employing agency in executing a garnishment may be added to the garnishment and retained by the agency as offsetting collections. Id. § 5520a(j)(2). The law requires implementing regulations to be issued by the same authorities who issue them for the various branches of the government under 42 U.S.C. § 661(a). 5 U.S.C. § 5520a(j)(1).

"Neither the United States, an agency, nor any disbursing officer shall be liable with respect to any payment made from payments due or payable to an employee pursuant to legal process regular on its face," as long as the payment is made in accordance with the statute and implementing regulations. Id. § 5520a(g). This is virtually identical to 42 U.S.C. § 659(f).

The law explicitly provides that it "shall not modify or supersede" the Title 42 provisions and that process under the Title 42 authority has priority over process under 5 U.S.C. § 5520a. 5 U.S.C. §§ 5520a(i), (h)(2).

k. Bankruptcy

In order to analyze how bankruptcy court awards are paid, it is first helpful to examine the kinds of monetary awards a bankruptcy court can make against the federal government, noting that federal bankruptcy law is evolving at a rapid and voluminous pace. Prior to the 1978 revision of the Bankruptcy Code (title 11 of the United States Code), there was no

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waiver of sovereign immunity in the bankruptcy laws. E.g., United States v. Krakover, 377 F.2d 104 (10th Cir. 1967), cert. denied, 389 U.S. 845. For example, under the old Bankruptcy Code, an order of a bankruptcy court directing a federal agency to pay the unpaid compensation of a deceased employee to the employee's trustee under a Wage Earner's Plan could not be enforced in the face of a competing claim by the employee's children under 5 U.S.C. § 5582. 58 Comp. Gen. 644 (1979). However, absent such competing claims, it had been GAO's view that an agency could as a matter of policy require its finance officers to respond to such orders since they would be enforceable against the individual employee. 61 Comp. Gen. 245 (1982); 47 Comp. Gen. 522 (1968).

The 1978 Bankruptcy Code contained a limited "waiver of sovereign immunity" provision, 11 U.S.C. § 106 (1982 ed.). The Supreme Court construed 11 U.S.C. § 106 in United States v. Nordic Village, Inc., 112 S. Ct. 1011 (1992). The Court recognized that the statute explicitly waived the government's sovereign immunity in two situations—compulsory counterclaims to government claims and permissive counterclaims capped by a setoff limitation. Id. at 1015. Apart from these situations, however, Nordic Village held that section 106 waived sovereign immunity only for declaratory or injunctive relief[31] and not for monetary recoveries. As a lower court later noted, monetary relief includes such things as attorney's fees, actual damages, and sanctions. In re Shafer, 146 B.R. 477, 479 (D. Kans. 1992).

In late 1994, Congress revised 11 U.S.C. § 106 in the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 113. The new section 106 expressly preserves the two counterclaim situations recognized in the 1978 law and, in addition, abrogates sovereign immunity in more than 50 named sections of Title 11. Subsection 106(a)(3) authorizes courts to issue "an order or judgment awarding a money recovery, but not including an award of punitive damages." Subsection 106(a)(4) provides that a money judgment against the United States "shall be paid as if it is a judgment rendered by a district court of the United States." This means paid from the judgment appropriation if final and not otherwise provided for. The new 11 U.S.C. § 106 applies to cases commenced "before, on, and after" October 22, 1994. Pub. L. No. 103-394, § 702(b)(2)(B).

Monetary awards against the United States in bankruptcy proceedings frequently involve violations of 11 U.S.C. § 362, the automatic stay. Under

[31]An example the Court cited is In re Neavear, 674 F.2d 1201 (7th Cir. 1982) (government bound by declaration that debt has been discharged). 112 S. Ct. at 1016.

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this provision, the filing of a bankruptcy petition, voluntary or involuntary, operates as an automatic stay of almost all further collection efforts, including setoff, with respect to prepetition debts of the bankrupt. Even where setoff is permitted under other sections of the Code, such as 11 U.S.C. § 553, the creditor must nevertheless petition the court for relief from the automatic stay. It is now settled that 11 U.S.C. § 362 applies to federal agencies or instrumentalities. E.g., In re Inslaw, Inc., 83 B.R. 89, 158 (Bankr. D.D.C. 1988); In re Haffner, 25 B.R. 882, 887 (Bankr. N.D. Ind. 1982).

Subsection (h) of 11 U.S.C. § 362 provides that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages." The term "individual" has been construed to mean any debtor, individual, corporate, or otherwise,[32] although some courts limit it to natural persons.[33] Several pre-Nordic Village cases made awards under section 362(h) against federal agencies, and a few included punitive damages.[34]

Under Nordic Village, the question became whether the violation occurred in the context of one of the two counterclaim situations in which the government's sovereign immunity had unquestionably been waived. If it did, then awards under 11 U.S.C. § 362(h) could be made against the federal government.[35] If it did not, monetary awards were not authorized.[36] The 1994 legislation made the distinction irrelevant by specifying 11 U.S.C. § 362 as one of the sections with respect to which sovereign immunity has been abrogated.

[32]Budget Service Co. v. Better Homes of Virginia, 804 F.2d 289 (4th Cir. 1986); In re NWFX, Inc., 81 B.R. 500 (Bankr. W.D. Ark. 1987); In re Nash Phillips/Copus, Inc., 78 B.R. 798 (Bankr. W.D. Tex. 1987); In re Tel-A-Communications Consultants, Inc., 50 B.R. 250 (Bankr. D. Conn. 1985).

[33]E.g., In re Chateaugay Corp., 920 F.2d 183 (2d Cir. 1990); In re Abacus Broadcasting Corp., 150 B.R. 925 (Bankr. W.D. Tex. 1993).

[34]In re Allen, 83 B.R. 678 (Bankr. E.D. Mo. 1988); In re Advanced Professional Home Health Care, Inc., 82 B.R. 837 (Bankr. E.D. Mich. 1988); In re Ketelsen, 78 B.R. 573 (Bankr. D.S.D. 1987); In re Stucka, 77 B.R. 777 (Bankr. C.D. Cal. 1987); In re Rinehart, 76 B.R. 746 (Bankr. D.S.D. 1987), aff'd, United States v. Rinehart, 88 B.R. 1014 (D.S.D. 1988); In re Santa Rosa Truck Stop, Inc., 74 B.R. 641 (Bankr. N.D. Fla. 1987); Matter of Woloschak Farms, 74 B.R. 261 (Bankr. N.D. Ohio 1987). Ketelsen included an award of punitive damages. The Stucka court said it would have awarded them if the debtor had asked. The matter was left to separate proceedings in Rinehart and Santa Rosa Truck Stop.

[35]In re Pinkstaff, 974 F.2d 113 (9th Cir. 1992); Matter of Flynn, 169 B.R. 1007 (Bankr. S.D. Ga. 1994).

[36]In re Pearson, 917 F.2d 1215 (9th Cir. 1990); Small Business Administration v. Rinehart, 887 F.2d 165 (8th Cir. 1989).

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local governments. The state and local government exemption will be discussed more fully later in this chapter.

(6) Civil vs. criminal claims

Nothing in either the Federal Claims Collection Act of 1966 or the Debt Collection Act of 1982 expressly limits the coverage of those statutes to civil claims. However, since their inception, the Federal Claims Collection Standards have included such a limitation. See 4 C.F.R. § 101.1.

The collection of criminal fines and penalties is the responsibility of the Department of Justice. Authorities and procedures are found in various provisions of Title 18 of the United States Code. Many of the current provisions, including those cited below, stem from the Criminal Fine Improvements Act of 1987, Pub. L. No. 100–185, 101 Stat. 1279.

A criminal fine is imposed by the court as part or all of the sentence. It is payable immediately unless the court provides for installment payments for a period not to exceed five years, excluding any time the defendant is in jail. 18 U.S.C. § 3572(d). The fine is "delinquent" if payment is more than 30 days late, and is "in default" if delinquent for more than 90 days. A fine in default becomes due within 30 days after notification by the Attorney General, notwithstanding any installment schedule. Id. §§ 3572(h) and (i), 3612(e).

Fines in excess of $2,500 bear interest unless waived or limited by the court. In addition, penalties are added to fines which become delinquent or in default. Id. §§ 3612(f), (g). If the government petitions the court upon a showing that reasonable collection efforts are not likely to succeed, the court may remit or defer payment of the fine or may extend an installment schedule. Id. § 3573. The Attorney General may waive interest or penalties on the same grounds. Id. § 3612(h).

In sum, criminal fines have their own detailed collection authorities and procedures prescribed by statute. Because of this, and because of the integral role of the sentencing court in criminal matters, criminal fines are excluded from the coverage of the Federal Claims Collection Standards.

Where a criminal action and civil liability arise out of the same facts, the disposition of the criminal action does not affect the debtor's civil liability for any outstanding balance. B-136570, August 4, 1958; B-133647, October 30, 1957.

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Another common situation is the turnover order—an order directing a federal agency to turn over monies found to have been improperly collected or withheld from the debtor. A turnover order is clearly a form of monetary relief. (Nordic Village involved a turnover situation.)

Still another source of monetary liability is violation of the permanent injunction against attempting to collect a debt which has been discharged (11 U.S.C. § 524). One line of cases distinguished Nordic Village and found no sovereign immunity bar to awarding monetary relief for violation of the discharage injunction.[37] Other cases applied Nordic Village and declined to make monetary awards against the federal government.[38] The 1994 legislation chose the former result by including 11 U.S.C. § 524 in the "abrogation list" of the revised 11 U.S.C. § 106(a).

Awards in bankruptcy proceedings often involve attorney's fees. Where not authorized by a provision of the Bankruptcy Code itself such as 11 U.S.C. § 362(h), it may nevertheless be possible to obtain a fee award under some other fee-shifting statute, although once again the courts are not uniform. The court in O'Connor v. U.S. Department of Energy, 942 F.2d 771 (10th Cir. 1991), held that a bankruptcy court may award attorney's fees under the Equal Access to Justice Act. A case following O'Connor is In re Shafer, 146 B.R. 477 (D. Kans. 1992). However, In re Davis, 899 F.2d 1136 (11th Cir. 1990), reached the opposite result. The Eleventh Circuit has also applied Davis to bar bankruptcy courts from awarding fees under 26 U.S.C. § 7430. In re Bricknell Investment Corp., 922 F.2d 696 (11th Cir. 1991). Other courts have regarded 26 U.S.C. § 7430 as applicable. E.g., In re Germaine, 152 B.R. 619 (Bankr. 9th Cir. 1993); In re Southeast Stores, Inc., 156 B.R. 160 (Bankr. E.D. Va. 1993); In re Kiker, 98 B.R. 103 (Bankr. N.D. Ga. 1988); In re Hill, 71 B.R. 517 (Bankr. D. Colo. 1987). See also Taborski v. IRS, 141 B.R. 959 (N.D. Ill. 1992) (section 7430 not exclusive so as to preclude award under 11 U.S.C. § 362(h)).

Against this background, the source of funds to pay judgments and awards in bankruptcy proceedings can be determined in most cases by referring to other portions of this chapter dealing with analogous judgments in other contexts. For example, reference to the headings Judgments for Refunds and Tax Judgments should resolve most turnover situations. Punitive damages should not pose a problem as they are now expressly prohibited by 11 U.S.C. § 106(a) (3).

[37]In re Cost, 161 B.R. 856 (Bankr. S.D. Fla. 1993); In re Daniels, 150 B.R. 985 (Bankr. M.D. Ga. 1992); In re Moulton, 146 B.R. 495 (Bankr. M.D. Fla. 1992).

[38]In re Shafer, 146 B.R. 477 (D. Kans. 1992); In re Hardy, 161 B.R. 320 (Bankr. S.D. Ga. 1993).

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Attorney's fee awards are discussed in detail later in this chapter, and the general rules set out there would apply equally to fee awards in bankruptcy cases. Thus, awards under section 7430 of the Internal Revenue Code are payable from the judgment appropriation. Awards under 28 U.S.C. § 2412(d) (Equal Access to Justice Act), or under § 2412(b) where there has been a finding of bad faith, are payable from agency funds. Fees awarded under 11 U.S.C. § 362(h) would generally be payable from the judgment appropriation since nothing makes them "otherwise provided for."

Finally, there is some authority for the proposition that the Bankruptcy Code waives sovereign immunity for tort-based suits independent of the Federal Tort Claims Act. In re Town & Country Home Nursing Services, Inc., 963 F.2d 1146 (9th Cir. 1992); In re TPI International Airways, Inc., 141 B.R. 512 (Bankr. S.D. Ga. 1992). Resulting judgments would most likely be payable from the judgment appropriation, at least in non-turnover situations.

1. Other Situations

As the categories previously described make clear, there are few absolutes in making source-of-funds determinations. Most categories involve a "mixed bag" of payments from the judgment appropriation and payments from agency funds. The same holds true for the additional areas summarized below.

(1) Tort-based judgments

The vast majority of claims against the United States stemming from tortious government conduct are adjudicated under the Federal Tort Claims Act (FTCA), which provides for both administrative and judicial resolution. Administrative awards of $2,500 or less are paid from agency appropriations. Administrative awards in excess of $2,500 are paid from the judgment appropriation. Court judgments and compromise settlements by the Department of Justice are paid from the judgment appropriation regardless of amount. 28 U.S.C. §§ 2672, 2677; 31 U.S.C. § 1304(a)(3)(A).

Payments under the Federal Tort Claims Act represent the largest single source of payments under 31 U.S.C. § 1304, whether measured by numbers of cases or aggregate dollar amount, at least in most years. There are several reasons for this: every agency is exposed to tort claims; tort claims may produce very large judgments; and the judgment appropriation is available for the larger administrative awards as well as judgments and compromise settlements.

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The availability of 31 U.S.C. § 1304 to pay FTCA awards is subject to the same basic requirements as other awards, including the requirement that payment be "not otherwise provided for." We have already noted a few "otherwise provided for" situations for FTCA payments (Postal Service, government corporations, nonappropriated fund instrumentalities). Although rare, exceptions may also exist even for "regular" federal agencies. For example, in 67 Comp. Gen. 142 (1987), GAO found the judgment appropriation available for judgments and awards under the FTCA in personal injury or physical property damage cases arising from the activities of the Federal Retirement Thrift Investment Board, the same as for other agencies. However, the decision drew a distinction between the so-called "physical torts," such as motor vehicle accidents, and "program losses" even where attributable to negligence on the part of an agency employee. The reason was that the Board's organic legislation (Federal Employees' Retirement System Act of 1986) contained detailed provisions to address program losses.

Maritime torts are adjudicated under the Suits in Admiralty Act, 46 U.S.C. App. §§ 741–752, or the Public Vessels Act, 46 U.S.C. App. §§ 781–790. At one time, the Suits in Admiralty Act had its own permanent appropriation. Although it is still carried in the U.S. Code at 46 U.S.C. App. § 748 (which also expressly preserves the "otherwise provided for" concept), the corresponding Treasury account was repealed in 1934 and replaced by language requiring specific congressional appropriations (48 Stat. 1226). Now, judgments and compromise settlements under the Suits in Admiralty and Public Vessels Acts are paid the same as FTCA judgments—from the judgment appropriation unless payment is otherwise provided for in a particular case. See B-199073, July 1, 1980 (non-decision letter).

A final case meriting notice is 39 Comp. Gen. 650 (1960). That decision involved a judgment under the Suits in Admiralty Act against the United States for injuries resulting from negligent performance by a Maritime Administration contractor of work under an Economy Act agreement between the Maritime Administration and the Department of the Navy. Maritime Administration paid the judgment from an available revolving fund, and then sought partial reimbursement from Navy. The decision held that the judgment had to be paid as a judgment (that is, from the judgment appropriation unless some other fund was available, as had in fact been the case), and could not be treated as a reimbursable item of direct cost under the Economy Act agreement. While the rationale seems clear enough in the context of a tort judgment, it should not be automatically

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assumed that the same result would apply to other types of judgments such as contract judgments.

(2) Pay, allowances, employment benefits

Judgments awarding compensation or benefits to present or former federal civilian employees or military personnel comprise another major category of judgments, most of which are payable under 31 U.S.C. § 1304. Thus, judgments awarding back pay under the Back Pay Act (unjustified or unwarranted personnel action) or Title VII of the Civil Rights Act of 1964 (employment discrimination) are generally paid from the judgment appropriation. 58 Comp. Gen. 311 (1979). See also 69 Comp. Gen. 40 (1989). The same rule applies to judgments under the Age Discrimination in Employment Act of 1967 (B-193509-O.M., April 19, 1979) and the Rehabilitation Act. It is irrelevant whether the judgment specifies an actual dollar amount as long as it directs the payment of back pay. 58 Comp. Gen. at 313.

Where the judgment does not specify the dollar amount, payment for the period up to the date of the judgment will be made from the permanent appropriation, while payment for any periods after the date of the judgment must be made by the employing agency from its own funds. 55 Comp. Gen. 1447 (1976). A limited exception to this was recognized in 60 Comp. Gen. 375 (1981). There, a court in a discrimination suit had awarded back pay and also ordered the payment of "front pay" until such time as a certain number of the plaintiffs were promoted. The "front pay" was an increment above the employee's current salary and was more in the nature of damages than compensation. Since the agency's salaries appropriation is available only for the compensation prescribed for the employee's actual grade level, the "front pay" was held payable from the judgment appropriation.

As a general proposition, the same rules apply to other compensation-related judgments. E.g., B-246958, February 14, 1992 (internal memorandum) (judgment for severance pay payable from judgment appropriation).

In a few instances, where a particular benefit is funded from a special fund rather than the employing agency's operating appropriations, GAO has found the payment "otherwise provided for." Examples are:

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- Judgments against the Civil Service Retirement Fund. 52 Comp. Gen. 175 (1972); B-115505, December 21, 1972.[39]
- Judgments awarding benefits under the military Survivor Benefit Plan, funded from the Military Retirement Fund. B-236414, February 22, 1991.

(3) Full faith and credit

If an agency enters into an otherwise lawful contractual obligation which binds the full faith and credit of the United States under statutory contract authority which provides no other funding mechanism, and Congress fails or refuses to appropriate money to liquidate the obligation, a resulting final judgment would be payable from the judgment appropriation. B-197742, August 1, 1986; B-211190, April 5, 1983; B-168313, November 21, 1969.

This does not mean that an agency can resort to 31 U.S.C. § 1304 as an alternative to using its own funds or seeking appropriate funding from the Congress. When Congress provides contract authority, it is normally assumed, at least where the governing legislation does not provide otherwise, that liquidating appropriations will be obtained through the normal appropriations process. For example, GAO and the Department of Justice have both reviewed the nature of obligations and funding under the Price-Anderson Act, and both agree that an agency must first use current funds to the extent available. If the agency has no appropriated funds available for that purpose, or if funds available to the agency are not sufficient, the agency must then seek additional funding from Congress. Only if Congress fails or refuses to provide the necessary funds does the potential availability of 31 U.S.C. § 1304 come into play. B-197742, August 1, 1986; Department of Energy Request to Use the Judgment Fund for Settlement of Fernald Litigation, Op. Off. Legal Counsel, December 18, 1989.

Further, an agency is not authorized to force a sham lawsuit to avoid its funding obligations. As the Justice Department emphasized in its Fernald opinion at 11:

"The availability of [31 U.S.C. § 1304] assumes, of course, that there is a good faith dispute over the obligation of the United States to pay on the extant settlement obligation, and that DOE has earnestly attempted, but failed, to obtain the necessary funding from the Congress and monies remain otherwise unavailable. Payment from the judgment fund would not be

[39]The Court of Claims in Ellis v. United States, 657 F.2d 1178, 1180 (Ct. Cl. 1981), suggested that the judgment appropriation would pay. A separate opinion (id. at 1182–83) questioned this assumption.

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authorized were the United States now, in order to permit payment from the judgment fund, purposely to default upon its settlement obligation, were DOE to refuse to seek a special appropriation or to reprogram funds, and the United States thereafter to settle the inevitable lawsuit to enforce the indemnification agreement." (Emphasis in original.)

Such a settlement, as the opinion goes on to point out, would not be a bona fide compromise settlement by the Attorney General within the meaning of 28 U.S.C. § 2414.

(4) Punitive awards

Punitive awards—those intended to punish rather than compensate—may not be made against the United States without specific statutory authority. Missouri Pacific R.R. Co. v. Ault, 256 U.S. 554 (1921); Barry v. Bowen, 884 F.2d 442 (9th Cir. 1989); Smith v. Russellville Production Credit Ass'n, 777 F.2d 1544, 1549-50 (11th Cir. 1985); Painter v. TVA, 476 F.2d 943 (5th Cir. 1973); 55 Comp. Gen. 564 (1975). Punitive awards, as we use the term here, encompass two distinct things—punitive damages (damages over and above those necessary to compensate the injured party) and certain fines or sanctions for contempt of court. Punitive awards, even though they may be viewed as "money judgments" in the sense of court directives to pay money, should not be paid from the judgment appropriation.

In the case of Giancana v. Johnson, 335 F.2d 372 (7th Cir. 1964), an FBI agent was held in criminal contempt (Rule 42, Federal Rules of Criminal Procedure) and fined for refusing to answer certain questions the court had instructed him to answer. GAO was asked if appropriated funds were available to pay the fine. Since the agent had acted in compliance with agency regulations and specific instructions from the Attorney General, the FBI's operating appropriations were available to pay the fine. 44 Comp. Gen. 312 (1964). The reason the judgment appropriation could not be used was not because payment was otherwise provided for, but because

"while a fine imposed for a contempt of court is a judgment of the court, a fine in its nature, principle, and purpose is a very different thing from the judgments the payment of which the Congress had in view in enacting [31 U.S.C. § 1304]." Id. at 314.

More precisely, the judgment appropriation is not available to pay criminal or civil contempt sanctions intended to punish or compel compliance; however, it may be used to pay civil contempt awards, usually in the form of costs and attorney's fees, intended to compensate the opposing party for losses arising from the government's noncompliance. The distinction is

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discussed in two internal memoranda, B-242786, January 31, 1991, and B-239556, October 12, 1990.

Note that where a sanction is assessed against an individual, the availability of agency funds to pick up the tab is a question separate and distinct from the availability of 31 U.S.C. § 1304. The unavailability of the judgment appropriation has no bearing on the availability of agency funds, which may or may not be available depending on whether the test of 44 Comp. Gen. 312 is met. For further elaboration and case citations, see the Fines and Penalties heading in Chapter 4.

Punitive damage awards against the United States are uncommon because they are mostly unauthorized. One exception is 11 U.S.C. § 362(h), which authorizes punitive damages for intentional violations of the automatic stay in bankruptcy proceedings. Although we have found no cases precisely on point, the unavailability of the judgment appropriation should follow logically from the contempt cases.

Whether we are talking about contempt sanctions or punitive damages, the policy underlying the unavailability of 31 U.S.C. § 1304 is the same. In Northwestern National Casualty Co. v. McNulty, 307 F.2d 432, 440 (5th Cir. 1962), Judge Wisdom stated:

"Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct."

Where the "insurer" is in a position to pass the financial burden on to the public, society is, in effect, "punishing itself." Id. at 441. While Judge Wisdom was addressing coverage under a commercial insurance policy, the analogy to "insurance" by virtue of 31 U.S.C. § 1304 should be readily apparent. See also Derechin v. State University of New York, 963 F.2d 513, 519 (2d Cir. 1992), and National Railroad Passenger Corp. v. Consolidated Rail Corp., 698 F. Supp. 951, 972 (D.D.C. 1988), for similar policy expressions.

(5) Miscellaneous statutory provisions

There are a number of situations, not susceptible of further generalization, in which the judgment appropriation may not be used because some other statute explicitly provides for payment in a particular context. Some of them are:

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- 22 U.S.C. § 3776 (Panama Canal Act of 1979, as amended): judgments against Panama Canal Commission in actions for damage or injury to vessels, cargo, crew, or passengers. By statute, these are payable from funds made available for the maintenance and operation of the Panama Canal. See B-206860-O.M., June 7, 1982.
- 33 U.S.C. §§ 1321(i) and (k), section 311 of the Federal Water Pollution Control Act: judgments in suits to recover the cost of removal of oil or hazardous substances. These are payable by the Coast Guard from the revolving fund established by section 311. An example of such a case is Grundy Oil Co. v. United States, 14 Cl. Ct. 759 (1988).
- 38 U.S.C. §§ 1920, 1955, and 1984 (Supp. IV 1992): United States Government Life Insurance Fund and National Service Life Insurance Fund.
- 42 U.S.C. § 405(i): Social Security benefits.
- Judgments of the Court of Federal Claims awarding compensation under the National Vaccine Injury Compensation Program. With respect to vaccines administered prior to October 1, 1988, the judgments are payable from appropriations of the Department of Health and Human Services; with respect to vaccines administered on or after October 1, 1988, judgments are payable from the Vaccine Injury Compensation Trust Fund. 42 U.S.C. § 300aa-15(i); 26 U.S.C. § 9510.

Legislation may include payment provisions which expose the judgment appropriation in certain situations but not others. An example is 7 U.S.C. § 136m, as amended by section 501 of the Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2654, 2674 (1988). Under this law, certain classes of persons are entitled to indemnity payments when the Environmental Protection Agency cancels a pesticide registration. Indemnity payments to end users and, under certain circumstances, to purchasers other than end users, are to be paid under 31 U.S.C. § 1304. 7 U.S.C. § 136m(b)(3). Indemnity payments to other claimants (e.g., manufacturers) require specific line-item appropriations, which EPA must request when it takes an action (cancels a registration) that will require payment of indemnification. Id. § 136m(a)(4).

(6) No appropriation available

It is still possible—although remote—that a court might issue a judgment with no appropriation legally available from which to pay it. For example, B-191208-O.M., June 2, 1978, concerned litigation under the Micronesian Claims Act, which established the Micronesian Claims Fund for the payment of claims. The Court of Appeals for the District of Columbia

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Circuit had remanded the case to the district court with instructions to direct the Micronesian Claims Commission to grant appropriate relief. The Fund was virtually exhausted and Congress had authorized, but not yet appropriated, additional funds. While a definitive determination at the time was not possible, it appeared that the Micronesian Claims Fund was the proper source of payment, meaning that the judgment appropriation would not be available. Therefore, if the Fund were exhausted, there would be no appropriation from which to pay, and the court recognized this possibility. Mister Ralpho v. Bell, 569 F.2d 607, rehearing denied, 569 F.2d 636, 639 (D.C. Cir. 1977). As we noted at the outset of this chapter, the Appropriations Clause of the Constitution prohibits any payment from the Treasury, including one ordered by a court, unless there is an appropriation available for that purpose. Accordingly, if such a situation were to arise, it would be necessary to seek funds from Congress.

Cases concluding that there is no available source of funds are—as they should be—rare. One example, which apparently resulted from legislative oversight and which was later cured legislatively, is 63 Comp. Gen. 470 (1984), discussed later in this chapter in connection with attorney's fees in tax cases.

C. Requirement of Finality

The three primary statutes that govern the payment of judgments against the United States—31 U.S.C. § 1304 and 28 U.S.C. §§ 2414 and 2517—all refer to the payment of "final" judgments. The term "final" in connection with judgments may mean different things in different contexts. See McDonald v. Schweiker, 726 F.2d 311, 313 (7th Cir. 1983); B-58540, August 12, 1946. A final judgment for purposes of taking an appeal (28 U.S.C. § 1291) and a final judgment for payment purposes are two different things.

In simple terms, a judgment against the United States is paid when the litigation is over. The basis for this position is that it is not in the government's interest to pay money out of the Treasury while the payee's entitlement to the money is still subject to change. In other words, the purpose of the finality requirement is to protect the government "against loss by premature payment of a judgment which might later through appeal be amended or reversed." B-129227, December 22, 1960. As stated in B-129227, the term "final judgment" for payment purposes means "such judgments as have become conclusive by reason of loss of the right to appeal—by expiration of time or otherwise—or by determination of the appeal by the court of last resort." See also Campbell v. United States, 809 F.2d 563, 574 (9th Cir. 1987); McDonald v. Schweiker, 726 F.2d at 313;

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Keasler v. United States, 585 F. Supp. 825, 836 (E.D. Ark. 1984); Cedar Chemical Corp. v. United States, 18 Cl. Ct. 25, 31 (1989). Thus, a judgment against the United States is final for payment purposes when the appellate process is completed. Generally speaking and subject to the occasional exception, this can happen in one of three ways: determination by the court of last resort, determination by the parties not to seek further review, or expiration of the time limit for filing appeals. E.g., 73 Comp. Gen. 46 (1993).

To better understand the meaning of "final judgment" as that term is used in 31 U.S.C. § 1304, it is useful to examine the system section 1304 replaced. As we've discussed earlier in this chapter, before the judgment appropriation was enacted, most judgments against the United States required specific congressional appropriations for payment. Traditionally, Congress included very precise finality language when making these appropriations. For example, a 1925 appropriation stated that "[n]one of the judgments contained herein shall be paid until the right of appeal shall have expired." Act of March 4, 1925, 43 Stat. 1347, quoted in 4 Comp. Gen. 834, 835 (1925). A 1904 appropriation act using almost identical language may be found at 33 Stat. 422. A 1912 appropriation with this language is quoted in 20 Comp. Dec. 562 (1914). More recently, the Supplemental Appropriations Act, 1977, Pub. L. No. 95-26, 91 Stat. 61, 96, provided that "no judgment herein appropriated for shall be paid until it shall become final and conclusive against the United States by failure of the parties to appeal or otherwise."

Thus, when Congress decided to commit the payment of most judgments to a permanent appropriation, it was not legislating on a blank slate. The finality requirement, now compressed into the simple term "final judgments,"—

> "stems from the congressional determination, consistently expressed in legislation over many decades, that the United States should not be required to pay money out of the Treasury pursuant to a judgment or order of a court which is susceptible of being modified or reversed on appeal."

B-208999, September 13, 1982 (non-decision letter). Similarly, when the Comptroller General interpreted the finality requirement in B-129227, quoted above, GAO was not treading any new ground. The interpretation in B-129227 was nothing more than the logical continuation of the situation under prior law. E.g., B-102508, April 18, 1951; B-58540, August 12, 1946.

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(7) More specific agency authority

Program legislation or agency organic authority may include provisions dealing with various aspects of debt collection. Where such provisions exist, they, and their implementing regulations, take precedence over the Federal Claims Collection Act and Standards. An example is 19 U.S.C. § 1505(c), specifying the due date, delinquency date, and interest accrual date for customs duties found to be due upon liquidation or reliquidation. Of course, an agency may incorporate part or all of the Standards in its own regulations to the extent consistent with the governing statute. To the extent the agency has not issued its own implementing regulations, the Federal Claims Collection Standards should be followed. 4 C.F.R. § 101.4; 62 Comp. Gen. 489 (1983); B-170686-O.M., April 4, 1972. The same concept applies with respect to the section 8(e) exemption where the authority subject to the exemption can be found elsewhere. A decision discussing all of this in the context of debts arising under the Social Security Act is 62 Comp. Gen. 599 (1983).

5. Agency Regulations

A frequently asked question is whether each federal agency is required to issue its own debt collection regulations. The answer is yes. The basic requirement for individual agency regulations, which must conform to the Federal Claims Collection Standards, stems from section 3(a) of the Federal Claims Collection Act of 1966, now codified at 31 U.S.C. § 3711(e).

In addition, several provisions of the Debt Collection Act of 1982, and of the Standards, require regulations in specific contexts. For example:

- The statute authorizing salary offsets against federal employees requires implementing regulations. 5 U.S.C. § 5514(b). The regulations must be approved by the President, who has delegated approval authority to the Office of Personnel Management.
- Agencies are required to issue regulations for administrative offset under section 10 of the Debt Collection Act of 1982. The regulations should take into consideration the best interests of the government, the likelihood of collecting by offset, and, with respect to offsets beyond the 6-year statute of limitations prescribed by 28 U.S.C. § 2415, the cost effectiveness of leaving the claim unresolved for that period of time.[21] 31 U.S.C. § 3716(b). See 4 C.F.R. § 102.3(b) for additional requirements.

[21]The intent of this latter provision has never been entirely clear inasmuch as, apart from the erosion in the value of money, it presumably costs nothing to do nothing.

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Section 2414, 28 U.S.C., provides that "[w]henever the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same, he shall so certify and the judgment shall be deemed final." The purpose of this provision is to permit a judgment to be paid before it has become final by operation of law, that is, before the time limit for taking an appeal has expired. Thus, strictly speaking, the Attorney General's certification is not necessary in cases where the time limit for taking an appeal has expired and a notice of appeal has in fact not been filed. B-129227, December 22, 1960. However, as a practical matter, GAO cannot track the status of all pending litigation, and therefore, the Attorney General's certification that no further review will be sought is required for all judgments. It is not required for consent judgments and compromise settlements, since no appeal can be taken from these actions. 4 Comp. Gen. 834 (1925). Once again, the concept embodied in the quoted portion of 28 U.S.C. § 2414 was nothing new; the statute in this respect was largely a codification of existing administrative interpretations. See 19 Op. Att'y Gen. 281 (1889); B-58540, August 12, 1946.

The concept of finality for payment purposes was discussed in B-164766, June 1, 1979, involving an order of the Court of Claims. The decision noted that GAO has no authority to make "intermediate" payments, and went on to summarize the situation as follows:

> "[T]he refund order may still be appealed to the Supreme Court and therefore cannot be considered 'final' at this stage of the litigation. Therefore, payment may not lawfully be made prior to such time as the Solicitor General has determined whether to petition for certiorari from the Court of Claims' order. If certiorari is sought, payment cannot be made prior to the time that the Supreme Court finally disposes of the issue, either by denying certiorari or, if granted, until it issues its decision. Thus, the order will become final for payment purposes when one of three things occurs—the Department of Justice determines not to seek further review, the Supreme Court denies a petition for certiorari, or if the petition is granted, the Supreme Court issues its decision."

It follows that GAO has no authority, nor is the permanent appropriation legally available, to make a partial or "good faith" payment, even upon the stipulation of the parties, while the litigation is still in process. B-191208-O.M., June 2, 1978.

On the surface, the preceding discussion would seem to suggest that payment can never be made until the litigation is over, that there can be only one "final judgment" in a given case, and that the entire case must be

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over before there can be finality for purposes of 31 U.S.C. § 1304. This, however, is often not the case. For example, in B-164766, June 1, 1979, the Court of Claims had ordered the United States to refund an amount previously paid by a contractor in return for the contractor's bond. GAO concluded that the issue of the refund was readily severable from the merits of the underlying litigation, and when the appellate process was complete with respect to it, the refund could be certified for payment without regard to the status of the balance of the litigation. In this case, different aspects of the case became final for payment purposes at different times, potentially resulting in more than one "final judgment"

In Barnes v. United States, 678 F.2d 10 (3d Cir. 1982), an appeal from a judgment under the Federal Tort Claims Act, the court held that it could, under 28 U.S.C. § 2106, grant partial summary affirmance with respect to the undisputed portion of the district court's judgment. The judgment in that case consisted of ten distinct elements, one of which was being appealed; there was no appeal on the issue of liability. The partial summary affirmance would be treated as a separate judgment, which could be paid notwithstanding the continuing appeal on the disputed item. Some months earlier, the court in Parker v. Lewis, 670 F.2d 249 (D.C. Cir. 1981), had granted summary affirmance with respect to the uncontested portion of an award of attorney's fees which was being appealed in an employment discrimination action, noting that only the amount (not the liability) was in dispute and a large portion of that was uncontestable. It follows that, in appropriate cases, the government can consent to the motion for partial summary affirmance.

The Contract Disputes Act of 1978 provides an additional situation in which there might be more than one "final judgment" in a given case. Under section 10(e), 41 U.S.C. § 609(e), "where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties." Since the Act authorizes agency boards of contract appeals to grant the same relief that would be available in the Court of Federal Claims, a board of contract appeals may make "partial awards" to the same extent the court can under section 10(e). 60 Comp. Gen. 573 (1981).

Judgments awarding back pay but not specifying the dollar amount to be paid present a somewhat different aspect of finality. On the one hand, the judgments (Back Pay Act, Title VII of the Civil Rights Act, etc.) are money

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judgments and may be paid from the permanent appropriation. However, such a judgment, even though it may be "final" with respect to the plaintiff's right to recover, is not in and of itself "final" for purposes of GAO's certification for payment. The reason for this is that the government's computation would not be binding on the plaintiff and would itself be subject to judicial review. Therefore, before such a judgment may be certified for payment, GAO must be furnished an agreed-upon amount, that is, the employing agency's computation, including any required deductions, together with written indication that the plaintiff will accept the amount in satisfaction of the judgment. If the parties cannot agree, further litigation may be necessary, but this must be done before the judgment is submitted for payment. 58 Comp. Gen. 311 (1979).

Awards of interim attorney's fees have also raised finality issues. Interim fee awards are becoming increasingly common in certain types of litigation which tend to be lengthy and complex, prime examples being employment discrimination suits under Title VII of the Civil Rights Act and suits under the Freedom of Information Act.

In B-190940, September 21, 1978, a district court awarded attorney's fees to the plaintiff in a Title VII suit. The plaintiff filed an appeal from the underlying order denying reinstatement, but neither party appealed the order awarding attorney's fees. Since the litigation had already lasted for several years, and since the order awarding the fees was itself final and was not a part of the order reflecting the court's determination on the merits which was on appeal, the award of attorney's fees could be viewed as a separate "final judgment" and therefore certified for payment. The decision followed the Supreme Court's rationale in Bradley v. Richmond School Board, 416 U.S. 696, 721–23 (1974).

Where, as in B-190940, the government does not intend to appeal an interim fee award, the Attorney General can so certify as provided in 28 U.S.C. § 2414, and there is no payment problem. However, where the government does plan to appeal an interim fee award but cannot do so because it is interlocutory and not appealable until the end of the litigation, it is difficult to see how the award can be deemed a final judgment. Be that as it may, several courts have directed the payment of interim fee awards in situations in which the award was not "final" in the traditional sense.[40]

[40]A comprehensive treatment by a former Justice Department attorney discussing many of the cases cited in the text is Gregory C. Sisk, Interim Attorney's Fees Awards Against the Federal Government, 68 N.C. L. Rev. 117 (1989).

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In McKenzie v. Kennickell, 669 F. Supp. 529 (D.D.C. 1987), a Title VII case, the court directed immediate payment of what the parties had agreed was the "irreducible minimum" owed to the plaintiffs. The court emphasized that if the parties had not been able to agree on the "irreducible minimum," fees could not be paid until the fee litigation was resolved. Id. at 533. The court went on to suggest that, in future cases, courts could satisfy the concerns of both parties by directing payment into an interest-bearing escrow account. This would preserve the value of the award while facilitating repayment if the government were successful on appeal. Id. at 535 n.7.

The McKenzie court cited with approval the case of Jurgens v. EEOC, 660 F. Supp. 1097 (N.D. Tex. 1987), another Title VII case decided several months earlier. While Jurgens did not involve the "irreducible minimum" concept, the court appears to have viewed the possibility that the fee award might be modified on appeal as sufficiently remote in that case as to remove any real substance from the finality argument. E.g., id. at 1103 n.5. The McKenzie and Jurgens courts both concluded that, to the extent of any conflict, the specific provisions governing fee awards under Title VII (42 U.S.C. § 2000e-5(k)) would prevail over the more general provisions of 28 U.S.C. § 2414. The court in Brown v. Marsh, 707 F. Supp. 21 (D.D.C. 1989), reached the same result, citing both McKenzie and Jurgens. Still another Title VII case saying essentially the same thing is Trout v. Lehman, 702 F. Supp. 3 (D.D.C. 1988), appeal dismissed, Trout v. Garrett, 891 F.2d 332 (D.C. Cir. 1989) (district court followed "irreducible minimum" approach of McKenzie). See also Parker v. Lewis, noted above.

In Rosenfeld v. United States, 859 F.2d 717 (9th Cir. 1988), the court reviewed Jurgens and McKenzie and applied their result to an interim fee award in Freedom of Information Act litigation.[41] Cases following Rosenfeld are Allen v. FBI, 716 F. Supp. 667 (D.D.C. 1989), and Allen v. Department of Defense, 713 F. Supp. 7 (D.D.C. 1989).

Before we leave the topic of finality, one related point deserves brief mention. A private litigant who appeals from an adverse judgment must generally post a supersedeas bond to obtain a stay of execution from the original judgment. This requirement does not apply to the United States. 28 U.S.C. § 2408; Rule 62(e), Federal Rules of Civil Procedure. See also

[41]The Rosenfeld court cited two district court cases in which interim fee awards were made against the United States in FOIA suits—Powell v. United States Dept. of Justice, 569 F. Supp. 1192 (N.D. Cal. 1983), and Biberman v. FBI, 496 F. Supp. 263 (S.D.N.Y. 1980). In neither case does the finality argument appear to have been raised as it is not addressed in either opinion.

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Lightfoot v. Walker, 797 F.2d 505, 507 (7th Cir. 1986) (attributing the nonapplicability of Rule 62(e) to the existence of 31 U.S.C. § 1304).

D. Procedures

GAO does not pay judgments; it certifies them for payment. See 31 U.S.C. § 1304(a)(2). GAO does this by issuing a "Certificate of Settlement" (GAO Form 39) to the Treasury Department. The form, signed by an authorized official, specifies the amount due, the payee(s), mailing address, and a citation to the appropriation account from which payment is to be made.

The procedures currently in effect were developed jointly by GAO and the Justice Department in the 1950s after the enactment of 31 U.S.C. § 1304.[42] Presently, once GAO has received all necessary supporting material and assuming the payment does not raise novel legal issues, it takes GAO approximately 30 days to process a judgment, and approximately an additional week for Treasury to issue the check. Thus, adding an allowance for mailing time, a judgment check will normally be received within 6–8 weeks from the time GAO receives the necessary documents.

1. Judgments of the District Courts

Under current procedures, the payment process is automatic with respect to the plaintiff. There is no need for the private litigant to make any formal request or demand on GAO for payment.[43]

When a district court judgment becomes final (either by determination not to seek further review or by completion of the appellate process), the judgment is submitted to GAO, either by the pertinent branch of the Justice Department or in many cases by the cognizant United States Attorney's office. The submission should consist of:

- A copy of the judgment together with any related orders and documentation of any appellate action.
- A transmittal letter which, along with any other pertinent data, should (a) certify that no further review will be sought; (b) contain mailing instructions for the check(s); and (c) include pertinent information on any required deductions.
- An Adverse Judgment Data Sheet which, among other things, specifies the type of case and agency or agencies involved, and identifies any known

[42]See, e.g., B-63622/B-90307-O.M., August 15, 1956, with respect to district court judgments.

[43]The only action by the plaintiff that might be desirable would be a "protective filing" of a copy of the judgment to preserve possible entitlement to post-judgment interest under 31 U.S.C. § 1304(b) in cases where it applies.

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indebtedness by the judgment creditor to the United States. (This is a format developed jointly in the early 1980s by GAO, the Justice Department, and the Office of Management and Budget, to permit GAO to record more precisely what is being paid.)

It is this payment request package from Justice (or an agency other than Justice authorized to handle the litigation) which triggers the payment process. Upon receipt by GAO, the judgment is given a file number for reference and retrieval purposes. If a judgment is transmitted by the private plaintiff or by the agency Justice is representing, GAO contacts the Justice Department (by form letter) to determine if the judgment is ready for payment. If Justice advises that the judgment is not yet ready for payment, nothing further will happen. If the judgment is ready for payment, the certification process begins.

The first and perhaps most important element in the certification process is the determination of the proper source of funds for payment, discussed in prior sections of this chapter. If it is determined that the judgment is not payable from the judgment appropriation, it is returned to the submitter with a brief explanation and advice as to the correct source of payment. Where it is determined that the judgment is payable from the judgment appropriation, the process will then take into consideration, where and to the extent applicable, the offsetting of indebtedness, the making of other required deductions, the payment of costs and/or attorney's fees, and the computation and payment of interest. Once these things are done, the next step is the preparation of the Certificate of Settlement.

The Certificate of Settlement is then sent to the Treasury Department, which prepares and issues the check(s) in accordance with the instructions on the Certificate. The check is mailed to the plaintiff in care of the cognizant U.S. Attorney or designated attorney at the Justice Department, depending on who litigated the case. This person will deliver the check to the judgment creditor in exchange for an appropriate release. As a general rule, the check will not be sent directly to the plaintiff or plaintiff's counsel. There are exceptions to this, based on the exigencies of the particular case and with the Justice Department's concurrence, but they are rare.

During the 1980s, the Treasury Department developed and refined its procedures for the use of electronic transfer ("wire transfer") in lieu of checks. Treasury calls this its Treasury Financial Communication System. Judgment payments will, upon request, be made by wire transfer. If wire

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transfer is desired, the payment request must include the name, city, and state of the receiving bank, the receiving bank's 9-digit American Bankers Association identifier, and the number of the account to which the payment is to be credited. Procedures for wire transfer are found in the Treasury Financial Manual, Vol. I, part 4. (Agencies paying their own judgments should be able to follow similar procedures without problem, except that the "TFCS" instructions will, in accordance with the Treasury Manual, appear on a disbursement voucher instead of a Certificate of Settlement.)

2. Judgments of the Court of Federal Claims

Current procedures for Court of Federal Claims judgments require two submissions, one from the Justice Department and one from the plaintiff. The Justice Department letter merely states that no further review will be sought and that the judgment may therefore be paid. In Contract Disputes Act cases, it also includes a billing address for agency reimbursement. The plaintiff's submission must consist of the following:

- A letter signed by the plaintiff and dated after the date of the judgment, stating that no further review will be sought, requesting payment, and indicating the address to which the check should be sent (plaintiff or plaintiff's counsel); or,
- If the letter is submitted by plaintiff's counsel and requests that the check be sent to counsel, it must be accompanied by a power of attorney dated after the date of the judgment. (A power of attorney executed prior to the date of the judgment is acceptable if it specifically authorizes transmission of payment to counsel on plaintiff's behalf.)
- The original transcript of the judgment, obtained from the Clerk of the Court, to accompany whichever of the above payment request letters is used.[44]

Procedures are otherwise the same as those for district court judgments, except that the check is sent directly to the plaintiff or plaintiff's counsel, in accordance with the plaintiff's instructions. An instruction sheet setting out the foregoing procedures is usually distributed by the office of the Clerk of the Court along with the judgment.

3. Judgments in Favor of Indian Tribes

Judgments obtained by Indian tribes against the United States have their own payment procedure prescribed by statute. The starting point is 25

[44]This is in addition to the "protective filing" necessary to preserve possible entitlement to post-judgment interest under 31 U.S.C. § 1304(b).

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U.S.C. § 118, under which payments to Indians in satisfaction of court judgments must be made "under the direction of the officers of the Interior Department charged by law with the supervision of Indian affairs." This means the Bureau of Indian Affairs. Thus, traditionally, GAO has certified payment to the Bureau of Indian Affairs, which then holds the funds in a trust capacity for ultimate use and distribution.

Initially, the Bureau made distribution from the trust funds without further congressional action. However, beginning in the early 1960s, the annual Interior Department appropriation acts began including provisions prohibiting the distribution of Indian judgment funds (including awards by the now-defunct Indian Claims Commission) until additional legislation was enacted specifying the purposes for which the funds could be used. See, for example, the Interior Department and Related Agencies Appropriation Act for 1974, Pub. L. No. 93-120, 87 Stat. 429, 432 (1973). Under this system, even after a judgment had become final and GAO had certified it for payment, the money could not be paid over to the successful plaintiff until Congress enacted further legislation dealing with that specific judgment.

The prohibition in the 1974 appropriation act was the last such provision. In 1973, Congress enacted permanent legislation, since amended several times and now found at 25 U.S.C. §§ 1401–1407, to eliminate the need for specific distribution statutes in most cases. Under this legislation, the Bureau of Indian Affairs prepares a distribution plan and submits it to the Congress. The plan becomes effective automatically unless a joint resolution of disapproval is enacted within a specified time period. Specific distribution legislation is now necessary only if the Bureau determines that the circumstances of the particular case make it desirable, or if the Bureau's plan is disapproved. The Bureau has published implementing regulations, found at 25 C.F.R. Part 87.

The typical nonstatutory distribution plan, which the Bureau publishes in the Federal Register as a notice, will allocate part of the funds to be used in programs for the social and economic benefit of the tribe, and part for per capita distribution to individual tribal members. The plan may also include procedures for the treatment of the shares of deceased or legally incompetent beneficiaries, and minors. For an example, see 45 Fed. Reg. 57546, August 28, 1980. Examples of statutory distribution plans are Pub. L. No. 100-139, 101 Stat. 822 (1987) (Cow Creek Band of Umpqua Tribe), and Pub. L. No. 99-146, 99 Stat. 780 (1985) (Chippewas of Lake Superior).

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The 1973 legislation applies only to Court of Federal Claims judgments. As a practical matter, however, this will include the major portion of judgments resulting from monetary claims by Indian tribes against the United States. See 28 U.S.C. § 1505.

Unlike other Court of Federal Claims judgments, the judgment in an Indian case is usually transmitted to GAO directly by the Clerk of the Court. Because payment is not made directly to the plaintiff, GAO will certify the judgment for payment upon receipt of a letter from the Justice Department stating that it has no objection to payment. There is no need for any further action by the plaintiff.

Most Indian tribes remain under federal supervision ("federal trust"). Termination of federal supervision is accomplished by statute. This has been done for several tribes, although the termination policy is no longer actively pursued. An example is 25 U.S.C. § 564q(a) (Klamath Indian Tribe). For tribes whose federal trust has been terminated, the judgment procedures set forth above will no longer apply if there is other legislation authorizing the distribution of judgment funds for that tribe. 25 C.F.R. § 87.2.

There appears to be little case law involving the Indian judgment fund distribution legislation. In United States v. Dann, 706 F.2d 919 (9th Cir. 1983), the court held that, for purposes of a statutory bar against further claims arising from the same subject matter, a judgment was not "paid" until Congress had either legislated a distribution plan or permitted the Bureau's plan to become effective. The Supreme Court reversed, holding that payment occurred when the funds were transferred from the permanent judgment appropriation and deposited in the Bureau's trust account. 470 U.S. 39 (1985). The Court applied the common-law principle that funds "transferred from a debtor to an agent or trustee of the creditor constitute payment." Id. at 48.

In United States v. Overlie, 730 F.2d 1159 (8th Cir. 1984), the court held that the Bureau had no authority, in implementing a particular distribution plan, to deposit per capita shares into "Individual Indian Money" accounts and thereby render them subject to garnishment for debts owed to the Farmers Home Administration and Small Business Administration. In a similar type of case involving a terminated tribe, the Comptroller General held that a per capita share was subject to a levy for delinquent federal taxes issued by the Internal Revenue Service under 26 U.S.C. § 6331. 63 Comp. Gen. 498 (1984).

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4. Compromise Settlements

As we have seen, a compromise settlement is paid from the same source that would apply to a judgment in the same suit. Since most cases are settled prior to final judgment, many of the "judgments" submitted to GAO for payment are in fact compromise stipulations.

For district court cases, compromise settlements are expressly provided for in the relevant payment statute (28 U.S.C. § 2414). Under current procedures, unless otherwise required, it is not necessary for a compromise stipulation to be approved by the court in order to be paid. It will be certified for payment if it is properly executed, and if it expressly states that, in consideration of payment, the plaintiff agrees to dismiss the action and to accept the stated sum in full and final satisfaction of the claim. B-199073, July 1, 1980 (non-decision letter). Payment procedures, including submission of a Judgment Data Sheet, are the same as for district court judgments.

When Congress amended 28 U.S.C. § 2414 in 1961 to include compromise settlements, there was no corresponding amendment to the Court of Federal Claims payment provision, 28 U.S.C. § 2517. The legislative history did not explain this omission, but there was no indication of any intent that the same concept should not apply to Court of Federal Claims cases. Be that as it may, because of the difference in statutory language, it has historically been the practice to reduce Court of Federal Claims settlements to what is essentially a pro forma judgment in order to conform to the literal language of 28 U.S.C. § 2517. GAO's view is that while the statute prescribes the procedure for the payment of judgments, it does not prohibit the payment of compromise settlements. Thus, if an otherwise sufficient compromise stipulation in a Court of Federal Claims case is submitted for payment, GAO will not decline certification merely because it has not been reduced to judgment. B-216251[-O.M.], July 25, 1988; B-217990.27-O.M., September 9, 1987. Procedures would otherwise be the same as for judgments, as and to the extent applicable.

5. Board of Contract Appeals Awards

When monetary awards by boards of contract appeals are to be paid from the permanent judgment appropriation, a "certification of finality" is required from both parties. The contractor (a) certifies that no further review of the award will be sought, (b) certifies that the amount of the award, with interest to the extent authorized by law, will be accepted in full and final satisfaction of the claim, and (c) provides an address to which the check is to be sent. The contracting agency also certifies that no further review will be sought and, in addition, provides (a) for interest

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- Waiver of interest and related charges beyond the mandatory 30-day grace period provided under 31 U.S.C. § 3717 may be exercised only in accordance with regulations. 4 C.F.R. § 102.13(g).
- Agencies obtaining mailing addresses from the Internal Revenue Service must, by regulation, ensure appropriate safeguarding of the information. 4 C.F.R. § 102.18(c).

The agency's debt collection regulations, apart from the fact that they are required by law, serve many functions. For example, they

- establish agency-specific procedures, such as identifying who within the agency will have responsibility for various functions;
- tailor the policies in the Standards to the needs and requirements of individual programs; and
- reflect the agency's policy choices in areas where discretionary options exist.

GAO will review agency debt collection regulations as part of its audit function. 4 C.F.R. § 101.1.

Preparing and issuing a comprehensive set of regulations takes time, and the law recognizes this. The general principle that an agency has a reasonable time to issue its regulations is discussed in 64 Comp. Gen. 816 (1985). What is "reasonable" in a particular context depends on several variables, such as the complexity of the subject matter. In the cited decision, GAO advised the Department of Education that it could take administrative offset under 31 U.S.C. § 3716 although it had not yet issued the required regulations, but it must of course comply with all requirements of the statute.

There is also authority for the proposition that the failure to publish regulations will not invalidate agency action with respect to a party with actual knowledge. 5 U.S.C. § 552(a)(1); Rogers v. United States, 14 Cl. Ct. 39, 48 (1987); B-217215, March 20, 1986 (citing several additional court cases).

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computation purposes, the date the claim was filed or, for claims greater than $50,000, certified as required by 41 U.S.C. § 605(c); and (b) where the agency must reimburse the Treasury, an agency billing address to be used for that purpose. There is no required form for these certifications, although GAO has developed one which boards may use or adapt as they wish.

The contractor and contracting agency submit their respective certifications to the board. The board, usually through its clerk or recorder, then transmits these documents to GAO, along with a copy of the board's decision and award. GAO then issues a Certificate of Settlement to the Treasury Department, the same as for court judgments. In reimbursable cases, the Treasury Department will "bill" the contracting agency after payment has been made, using the billing address provided.

6. Designation of Payee

The principle GAO follows here is very simple: GAO will do what the judgment says. If there is any conflict between requests in a transmittal letter and the language of the judgment, the judgment will be followed.

Thus, where a judgment directs that the plaintiff shall recover, the check will be drawn payable to the plaintiff and to the plaintiff only. Absent specific provision in the judgment, GAO has no authority to have a check drawn payable to the plaintiff's attorney or to include the attorney as co-payee, since the attorney is not a judgment creditor of the United States. B-150338/B-152546, April 9, 1964 (non-decision letter). See also 9 Comp. Dec. 610 (1903). The principle involved was stated in an early decision as follows:

> "The primary objective [in] matters involving the disbursement of appropriated moneys, is to secure a valid acquittance to the United States and that, of course, is accomplished by payment to the individual to whom the Government is obligated."

24 Comp. Gen. 261, 262 (1944). This same principle applies to all payments of public funds. See 31 U.S.C. § 3322(a); 53 Comp. Gen. 482, 483 (1974); 14 Comp. Dec. 395 (1907); 17 Op. Att'y Gen. 675 (1884).

If it is desired to have the check drawn payable jointly to plaintiff and plaintiff's counsel, specific instructions must be included in the judgment or compromise stipulation.

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In some cases, it may be desirable to have a judgment check drawn payable to the Clerk of the Court for subsequent distribution by the Clerk's office. To have this done, appropriate instructions must be included in the judgment. See 5 Comp. Gen. 737 (1926); 27 Comp. Dec. 987 (1921); 26 Comp. Dec. 912 (1920).[45] However, there is no authority for the government to pay money into the registry fund of a court for ultimate distribution under a judgment which has not yet been rendered. See 14 Comp. Gen. 567 (1935).

The principle of making payment only to the judgment creditor (plaintiff of record) applies equally where the plaintiff is a business entity (corporation, partnership, etc.). In the case of a defunct business entity, GAO will need evidence of who is legally entitled to receive the assets. If such evidence is not provided, the money will sit in the Treasury pending a judicial determination. E.g., B-127545, August 6, 1957; B-127545-O.M., August 7, 1956.[46]

7. Deceased Payee

If the payee dies before the judgment is paid (either before the check is issued or after issuance but prior to negotiation), the judgment is an asset of the decedent's estate and is therefore payable to whoever is entitled to receive those assets. Where the estate is being probated, this means the legal representative (executor or administrator). If there is no probate estate, it may be necessary to resort to the intestacy laws (laws of descent and distribution) of the state of the decedent's domicile at the time of death.

The government's interest in this situation is in making payment to the person who is legally entitled to receive it. If difficulty is encountered in negotiating a judgment check certified by GAO due to the intervening death of the payee, the check should be returned along with a claim for reissuance using Standard Form 1055 (Claim against the United States for Amounts Due in the Case of a Deceased Creditor). GAO will provide copies of the form upon request. If the estate is being probated, the claim should be submitted by the legal representative and accompanied by documentation of the appointment.

[45]5 Comp. Gen. 737 suggests that judgments may be paid into a registry fund only in cases of "exceptional reason." As a practical matter, no problem will arise as long as the mode of payment is explicitly provided for in the judgment.

[46]Cases involving defunct business entities under the International Claims Settlement Act of 1949, discussed in Chapter 12, provide useful analogies for making similar determinations in the judgment context.

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If there are no probate proceedings, GAO's policy is not to require appointment of a legal representative unless required under state law. See B-69787-O.M., May 2, 1979. If formal administration is not required under state law, GAO will recertify payment to the person(s) properly entitled to payment under the laws of the decedent's domicile.

The above procedures apply equally where the deceased judgment creditor was a federal employee. Since a judgment assumes its own identity irrespective of the nature of the underlying cause of action, 5 U.S.C. § 5582 (which establishes an order of precedence for certain payments due a deceased federal employee) does not apply to judgment payments. B-129994-O.M., January 29, 1957. Of course, an option always available is to return to court and have the court designate the new payee, in which event the court may choose to apply 5 U.S.C. § 5582.

8. Appeal From Settlement

Occasionally, a judgment creditor may take issue with GAO's settlement action. The disagreement may be based on a legal issue or possibly a clerical error. In cases of clerical error, corrective action can frequently be taken on the basis of a telephone call. If this is not sufficient, a judgment creditor may request reconsideration under GAO's regulations for claims settlement published at 4 C.F.R. Part 32.

The regulations provide that "[u]nless otherwise directed by the Comptroller General on the presentation of proper facts in the particular case, the check issued upon a settlement must not be cashed when its amount includes any item as to which review is applied for, but should accompany the application for review." 4 C.F.R. § 32.3. In many judgment cases, this will not be applicable, for example, where the claimant is appealing the disallowance of interest but there is no dispute over the principal judgment amount. Should there be any uncertainty, GAO's policy is to waive this requirement in judgment cases upon request.

It is also possible that the federal agency involved may disagree with GAO's source-of-funds determination. Upon being advised by GAO that a particular item should be paid from agency funds, the agency should proceed to authorize payment and may then seek GAO's reconsideration. If it is determined that the item should have been paid from the judgment appropriation, GAO will authorize reimbursement to the agency.

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E. Deductions

1. Setoff

a. Statutory Basis

As noted previously, part of the settlement process is the offset of known indebtedness. However, since administratively uncollectible debts are no longer routinely referred to GAO, GAO relies heavily on information submitted with the payment request. If a debt exists, 31 U.S.C. § 3728 requires the Comptroller General to withhold payment of the judgment to the extent of the debt.

As the Court of Claims said in Labadie v. United States, 33 Ct. Cl. 476, 480 (1898):

"When the time of payment comes the statutes give the accounting officers . . . abundant authority to set off an indebtedness due from a claimant to the United States against a judgment in his favor."

The statute not only establishes the requirement for setoff but also prescribes the procedures to be followed. GAO must first attempt to obtain the plaintiff's consent to the setoff. If the plaintiff consents, the amount of the debt is deducted from the judgment payment and the debt is discharged. If the plaintiff refuses to consent or denies the indebtedness, the amount must still be withheld, together with the estimated cost of prosecuting the debt to final judgment. GAO must then immediately refer the debt to the Justice Department so that suit may be commenced, unless, as discussed below, suit has already been brought. If judgment is entered against the United States, or if the amount recovered for the debt and costs is less than the amount withheld, the balance must be paid over to the plaintiff with 6 percent interest for the time it has been withheld. 17 Comp. Gen. 503, 509 (1937); 7 Comp. Dec. 585, 588 (1901); B-130754, March 12, 1957.

GAO does not have a formula to determine the amount to withhold as the estimated cost of prosecuting the debt in cases where the plaintiff refuses to consent. The estimate is made on a case-by-case basis.

The statute which is now 31 U.S.C. § 3728 was originally enacted in 1875 (18 Stat. 481). The original version contained language that appeared to make it applicable to administrative claims as well as judgments, although its

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application to administrative claims was not universally viewed as mandatory. 23 Comp. Dec. 68, 69 (1916). Congress amended the statute in 1933 to limit its application to court judgments. The legislative history of the 1933 amendment is explicit:

"The amendments eliminate from the statute the language with respect to claims, limiting the application of the statute to judgment creditors."

S. Rep. No. 1021, 72d Cong., 2d Sess. 8 (1933), quoted in B-123811-O.M., January 14, 1959.

The original (1875) version also referred to the Secretary of the Treasury, since GAO did not then exist. When GAO was created in 1921 and inherited the Comptroller of the Treasury's functions, no corresponding amendment was made to 31 U.S.C. § 3728. The courts got around this simply by reading the statute as if it had been amended. United States v. LaGrange Grocery Co., 31 F.2d 297 (N.D. Ga. 1929); Standard Dredging Co. v. United States, 71 Ct. Cl. 218, 249–50 (1930). The 1933 amendment solved this problem as well by substituting Comptroller General for Secretary of the Treasury. Thus, while many pre-1933 cases remain valid for various purposes, they are obsolete to the extent they purport to apply the statute to administrative claims or refer to the Secretary of the Treasury.

b. Current Application

The requirements of 31 U.S.C. § 3728 with respect to judgment creditors have always been viewed as mandatory. E.g., A-58266, July 29, 1941; 37 Op. Att'y Gen. 215, 217–18 (1933). As such, they may not be defeated by the agreement of the parties. Thus, an agreement purporting to consent to the entry of final judgment without regard to setoff is invalid. Eastern Transportation Co. v. United States, 159 F.2d 349, 352 (2d Cir. 1947). However, "mandatory" does not have to be synonymous with "stupid." It is GAO's opinion that it possesses the discretion to pay a judgment without invoking the offset statute if warranted by the circumstances of a particular case, for example, if the validity of the debt is sufficiently doubtful or if the amount of the debt is too small to justify the effort. B-131865/B-131868, February 16, 1960. Also, the debt to be collected must be a debt owed to the United States. A debt owed to a government corporation is not a debt owed to the United States for purposes of 31 U.S.C. § 3728. A-97085, June 13, 1942 (FDIC).

There is an important distinction for purposes of 31 U.S.C. § 3728 between withholding and offset, reflecting the statute's two stages of operation. The first step is for GAO to withhold payment of the judgment. An

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administrative assertion of indebtedness is sufficient to support the initial withholding. Of course, GAO must then apply the statutory procedures. If the debtor consents, or if the debt is reduced to judgment, the withholding ripens into an offset. See generally Hines v. United States ex rel. Marsh, 105 F.2d 85, 87–88 (D.C. Cir. 1939); 5 Lawrence, First Comp. Dec. 408, 411–12 (1884).

While an administrative determination of indebtedness may be sufficient to invoke the initial withholding under 31 U.S.C. § 3728, the debt must be one which would support administrative collection action at that particular time. Thus, where a purchaser of government property is paying in installments and there has been no default, the balance due, absent provision to the contrary in the purchase agreement, is not a debt for purposes of 31 U.S.C. § 3728. National Bulk Carriers, Inc. v. Warren, 82 F. Supp. 511, 512 (D.D.C. 1949).

Mere delay by the government in paying a judgment pending determination of whether the claimant is indebted to the United States does not constitute a setoff for purposes of 31 U.S.C. § 3728 so as to create an entitlement to interest. 8 Comp. Gen. 668 (1929). (While the cited decision dealt with an administrative claim under the pre-1933 version of the statute, there is no reason why the principle involved would not apply equally to a judgment.)

As noted above, the procedures established by 31 U.S.C. § 3728 do not apply to the government's right of setoff prior to the entry of judgment on the claim against which offset is sought. See Fitzgerald v. Staats, 578 F.2d 435, 439 (D.C. Cir. 1978), cert. denied, 439 U.S. 1004; Whitbeck v. United States, 77 Ct. Cl. 309, 342–43 (1933), cert. denied, 290 U.S. 671. The right of setoff against an administrative claim is wholly independent of 31 U.S.C. § 3728, and there is no requirement to seek the debtor's consent by virtue of that statute.[47] E.g., Project Map, Inc. v. United States, 486 F.2d 1375 (Ct. Cl. 1973); 14 Comp. Gen. 849 (1935); B-188473, August 3, 1977.

However, the procedures of 31 U.S.C. § 3728 have been held to apply to administrative settlements under the Federal Tort Claims Act which are payable from the permanent judgment appropriation (i.e., awards greater than $2,500). B-135984, May 21, 1976. This is because the Federal Tort Claims Act (28 U.S.C. § 2672) provides for payment "in a manner similar to judgments and compromises in like causes." GAO will also apply those procedures to offsets against monetary awards by boards of contract

[47]Procedural requirements for setoffs may nevertheless exist under other laws. See Chapter 13.

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appeals submitted to GAO for payment from the judgment appropriation. B-210316-O.M., September 16, 1983.[48] One court has found that the statute does not permit involuntary offset against seamen's wages protected by the admiralty statutes. Shilman v. United States, 164 F.2d 649, 652 (2d Cir. 1947), cert. denied, 333 U.S. 837.

In United States v. Cohen, 389 F.2d 689 (5th Cir. 1967), the court held that the United States may exercise its right of setoff under 31 U.S.C. § 3728 against a party claiming rights derivatively from a judgment creditor against whom the setoff would be proper, specifically, attorney's fees awarded under the Federal Tort Claims Act. Also, 31 U.S.C. § 3728 takes precedence over an attorney's lien created by state statute. Malman v. United States, 207 F.2d 897 (2d Cir. 1953); Morgan v. United States, 131 F. Supp. 783 (S.D.N.Y. 1955). See also Hornbeck Offshore Operators, Inc. v. Ocean Line of Bermuda, 849 F. Supp. 434 (E.D. Va. 1994) (maritime lien subject to setoff).

Where a judgment is obtained in a suit by one party for the use of another, i.e., "X for the use of Y v. United States," 31 U.S.C. § 3728 applies to the offset of a debt asserted against the "legal plaintiff" (X). See A-58266, July 29, 1941. Under the reasoning in United States v.Cohen, it would presumably also apply to a debt asserted against the "use plaintiff" (Y).

A 1977 decision held that a tax debt against an individual partner cannot be offset under 31 U.S.C. § 3728 against a judgment in favor of the partnership. B-188943, July 19, 1977.

If payment is withheld under 31 U.S.C. § 3728 and the debt is not already in suit, the debtor does not have to wait for the government to sue. The debtor can initiate the litigation by commencing an action for wrongful withholding of the judgment. Eastport Steamship Corp. v. United States, 130 F. Supp. 333 (Ct. Cl. 1955). If the debtor wins, interest is payable on the amount improperly set off the same as if the government had commenced the action. Eastport Steamship Co. v. United States, 140 F. Supp. 773 (Ct. Cl. 1956).

What happens if the United States has already reduced its debt claim to judgment? The statute requires that the government bring a civil action against the unconsenting debtor "if one has not already been brought." 31 U.S.C. § 3728(b)(2)(B). If the government has already prosecuted its claim

[48]GAO had not applied 31 U.S.C. § 3728 to board of contract appeals awards prior to the Contract Disputes Act of 1978. See B-162526, October 9, 1967.

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to judgment, it may offset its judgment against the debtor's judgment without the need to follow 31 U.S.C. § 3728. B-140983-O.M., October 15, 1959. A court martial is not the equivalent of a judgment for this purpose. Shilman, 164 F.2d at 652.

The statute refers to judgments "presented to the Comptroller General [for payment]." 31 U.S.C. § 3728(a). An unresolved issue is how to offset against a judgment of a type which is normally paid without GAO involvement. The issue has surfaced in a number of cases involving tax judgments, but the case law has thus far not produced a clear answer.[49] In view of the various authorities available to the IRS such as 26 U.S.C. § 6402(a), it may be noted that the ultimate resolution in tax judgment cases, whatever it may be, would not necessarily apply to other "otherwise provided for" judgments.

2. Judgments Awarding Back Pay

When an agency pays an employee's salary, it normally makes several deductions from the gross amount for such things as income tax and retirement fund contributions. The treatment of these and similar deductions may also become an issue when an employee is awarded back pay as the result of a lawsuit under statutes such as the Back Pay Act, 5 U.S.C. § 5596.

In a 1961 decision to the Commissioner of Internal Revenue, the Comptroller General concluded that GAO has no authority to withhold federal income tax from a judgment for back pay unless the judgment specifically provides for such withholding. B-124720/B-129346, August 1, 1961. See also 44 Comp. Gen. 729 (1965) (social security withholdings). The reason is that GAO has no authority to administratively and unilaterally deviate from the judgment amount by certifying less than the amount awarded (8 Comp. Gen. 603, 605 (1929)), unless the action involved is itself mandated by statute such as the setoff of indebtedness under 31 U.S.C. § 3728. GAO reaffirmed this ruling 20 years later in B-124720/B-129346, September 23, 1981. The decision states:

"The time to resolve the issue of tax withholding is before the judgment is entered. If the parties agree, this should be a simple matter. If the parties disagree, then that disagreement would have to be resolved by the court and the time to do that is when the judgment itself

[49]See United States v. Rochelle, 363 F.2d 225 (5th Cir. 1966); Empire Ordnance Corp. v. Harrington, 249 F.2d 680 (D.C. Cir. 1957); Snyder v. United States, 630 F. Supp. 182 (D. Md. 1986); Chapman v. United States, 347 F. Supp. 89 (C.D. Cal. 1972), rev'd on other grounds, 485 F.2d 1194 (9th Cir. 1973); Heirich v. United States, 340 F. Supp. 283 (N.D. Ill. 1971); Pugh v. Ladner, 52 F. Supp. 604 (E.D. Pa. 1943).

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is being considered, not after it has become final and has been submitted to GAO for payment."[50]

It is important to distinguish what we are talking about here from the basic issue of whether a given judgment is taxable. Damages received by judgment or settlement on account of personal injuries are excluded from gross income under 26 U.S.C. § 104(a)(2). Back pay awards are excluded in some situations, taxable in others. Back pay awarded under the Age Discrimination in Employment Act is not taxable as wages. Bennett v. United States, 30 Fed. Cl. 396 (1994). In United States v. Burke, 112 S. Ct. 1867 (1992), the Supreme Court resolved a longstanding issue by holding that a monetary settlement under Title VII of the Civil Rights Act of 1964 does not constitute "damages" for purposes of section 104(a)(2) but instead is gross income for federal income tax purposes. However, the holding applies only to Title VII as it existed prior to the Civil Rights Act of 1991, and is not dispositive on the issue of taxability under the amended version. In any event, GAO's position that it has no business unilaterally inserting the tax issue into the certification process has no bearing on whether the judgment is taxable or the recipient's liability for any tax.

There may, of course, be cases where the parties simply do not think of the tax withholding issue until after the judgment has been rendered. In such a case, as long as the parties agree to the withholding, there is no need to have the judgment modified just to reflect the withholding. If the parties agree to the deduction of a specified amount of withholding tax, even where the judgment itself is silent, GAO will implement that agreement in making settlement. B-124720/B-129346, September 23, 1981. Documentation of the agreement should be submitted with the payment request to GAO. If the amount to be withheld is not specified, GAO will withhold a flat 20 percent as a matter of policy. See B-187777, May 30, 1979 (non-decision letter).

If it is desired that appropriate deductions be made, they must be specified in the judgment or a written agreement signed by the judgment creditor. The judgment or agreement should specify the gross amount of the award and should indicate which deductions are to be made. Typical deductions are federal income tax, state income tax, retirement fund or social security contribution, Medicare tax, and Federal Employees' Group Life Insurance (FEGLI).[51] Any deductions made will be specified on the Certificate of

[50]The same principles apply to judgments obtained by the Equal Employment Opportunity Commission in enforcement actions. 65 Comp. Gen. 800 (1986).

[51]Other adjustments may also be appropriate which do not involve payments. E.g., B-213604, May 15, 1984 (restoration of annual and sick leave in wrongful separation case).

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Settlement. If the judgment or agreement does not specify the dollar amount or applicable percentage rate for each deduction to be made, the information should be obtained from the employing agency and, together with an indication that the parties are in agreement, included with the payment request.

Some deductions, such as Civil Service Retirement and Social Security, require a contribution by the government as well as by the employee. If a judgment directs the payment of the government's as well as the employee's share, it is considered part of the judgment and payable from the permanent appropriation. If a judgment directs a particular deduction but is silent with respect to the government's share, the employee's share is payable from the permanent appropriation and the government's share is payable by the employing agency from agency funds. 58 Comp. Gen. 115 (1978). This decision overruled an earlier case (B-124720, May 15, 1961) which had held that there was no appropriation legally available to pay the government's share and it therefore had to be absorbed by the appropriate fund.

The question of deductions also arises in connection with judgments awarding back pay but not specifying the dollar amount to be paid. Under 58 Comp. Gen. 311 (1979), as noted earlier, these judgments may be paid from the permanent appropriation once GAO has been furnished an agreed-upon amount, determined either administratively or judicially as the specific case may require. If the parties cannot agree and the amount is determined in further litigation, the above principles will apply—that is, deductions will be made or not made depending on the terms of the court's order. Where the amount is agreed upon administratively, the employing agency will normally include in its computation the same deductions it would have made had it paid the salary directly. In such a case, it follows from 58 Comp. Gen. 311, although the point was not specifically addressed in that decision, that GAO will follow the terms of the agreement provided the conditions specified in the decision are met, primarily that there be written indication that the designated payment will be accepted in full and final satisfaction of the judgment.

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C. Elements of a Debt Collection Program: Agency Collection Action

1. Affirmative Duty to Collect

The Federal Claims Collection and Debt Collection Acts "express a Congressional mandate that agencies play a more active role in the collection of delinquent claims than merely referring them to the Department of Justice." Lawrence v. Commodity Futures Trading Commission, 759 F.2d 767, 772 (9th Cir. 1985). See also Collins v. Donovan, 661 F.2d 705, 708 (8th Cir. 1981).

To this end, the Federal Claims Collection Act of 1966 included a provision, now found at 31 U.S.C. § 3711(a)(1), which requires each agency to attempt collection of all claims of the United States for money or property arising out of the activities of, or referred to, that agency. As the Comptroller General noted in commenting on the 1966 legislation, this was the first general statutory requirement for government agencies to collect their debts. B-117604, June 3, 1966. The requirement applies without regard to the amount of the debt. Thus, regardless of one's view of the scope of the common-law duty, agencies now have a statutory duty which clearly embraces administrative collection actions.

The corresponding provision of the Federal Claims Collection Standards is 4 C.F.R. § 102.1(a). Agency collection action should be aggressive and timely with effective follow-up. Id. Agencies should use all reasonable means of collection consistent with good business practice and the debtor's ability to pay. Section 102.1(b) states the common-sense proposition that agencies are expected to cooperate with one another in their debt collection activities.

An agency may provide administrative debt collection services to another agency under an Economy Act agreement (31 U.S.C. § 1535), but, since agencies may not use the Economy Act to transfer statutory responsibilities to other agencies, those services cannot include the taking of final compromise or termination action. B-117604(7)-O.M., June 30, 1970.

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F. Costs and Attorney's Fees

1. Costs

Costs are not taxable against the United States unless authorized by statute. 23 Comp. Gen. 805 (1944); United States v. Pacific Fruit & Produce Co., 138 F.2d 367 (9th Cir. 1943). This rule is simply another application of the doctrine of sovereign immunity. Cassata v. Federal Savings and Loan Insurance Corp., 445 F.2d 122, 125 (7th Cir. 1971). In recognition of this, Rule 54(d) of the Federal Rules of Civil Procedure states that "costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law." Prior to 1966, there was no general authority to tax costs against the United States. Under the version of 28 U.S.C. § 2412 then in effect (see 62 Stat. 973), costs were prohibited except under express statutory authority, which existed only in limited situations. Thus, there were many cases in which the United States was not liable for costs when it lost even though it could recover costs when it was the prevailing party.

In 1966, Congress amended 28 U.S.C. § 2412 to allow the taxation of costs against the government in all civil actions unless specifically prohibited. Under section 2412(a), except as otherwise specifically provided by statute—

> "costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity."

The costs are to be "limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation." Id. The purpose of the 1966 amendment was "to put private litigants and the United States on an equal footing regarding cost awards." 54 Comp. Gen. 22, 23 (1974).

Subsection 2412(c)(1) provides that costs awarded under subsection (a) shall be in addition to any relief provided in the judgment, and "shall be paid as provided in sections 2414 and 2517 of this title." This means that

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costs will be payable from the permanent judgment appropriation as long as the award is final and payment is not otherwise provided for.[52]

The authority to award costs under 28 U.S.C. § 2412(a) is not limited to cases involving money judgments. In other words, in order to be payable from the judgment appropriation, costs need not be incident to a money judgment which is payable from that appropriation. B-165149-O.M., September 23, 1968. In addition, the statute applies to costs on appeal to the extent authorized by law. Super Food Services, Inc. v. United States, 416 F.2d 1236, 1241 (7th Cir. 1969).

Costs may be included in a judgment on the merits or may be taxed separately, and may be submitted for payment after the underlying money judgment, if any, has been paid. If an award of costs is submitted after the underlying judgment is paid, it will be treated as a separate "judgment" and a separate Certificate of Settlement will be issued in accordance with the procedures previously described. If the costs are included as part of the judgment, they will be included with the judgment payment and paid in the same manner (i.e., to the plaintiff unless the judgment specifies otherwise).

Costs may be awarded against congressional litigants as well as agencies of the executive branch. However, a Member of Congress or a congressional committee or subcommittee does not have automatic access to the courts on behalf of the United States. To undertake any court action on behalf of the United States, the congressional litigant must be authorized by the appropriate body of Congress. Thus, in one case, an award of costs against a House subcommittee which had attempted to judicially enforce subpoenas without House authorization could not be paid from the permanent appropriation. B-194540-O.M., September 20, 1979.

Section 2412(a) does not authorize the awarding of all costs a party may incur, or all costs a court may feel like awarding. Rather, it authorizes only those costs "as enumerated in section 1920 of this title." Six categories of permissible costs are listed in 28 U.S.C. § 1920.

(1) Fees of the clerk and marshal. The activities for which United States marshals may charge fees are specified in 28 U.S.C. § 1921. In addition, it has been held that the fees of a private process server are taxable under 28

[52]For an unusual case in which a court ordered that certain costs be paid directly by counsel, see Inecon Agricorporation v. United States, 5 Cl. Ct. 507 (1984) (neither attorney showed up for scheduled argument).

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U.S.C. § 1920. E.g., Alflex Corp. v. Underwriters Laboratories, Inc., 914 F.2d 175 (9th Cir. 1990), cert. denied, 112 S. Ct. 61.[53]

Storage charges assessed against the United States in connection with property seized by the Marshals Service pursuant to the execution of a warrant in rem are payable from appropriations of the Marshals Service and not the judgment appropriation. 62 Comp. Gen. 177 (1983).

(2) Fees of the court reporter for necessary stenographic transcripts.

(3) Fees and disbursements for printing and witnesses. Allowable fees and expenses of witnesses are specified in 28 U.S.C. § 1821.

Taxation of the fees and expenses of expert witnesses has been a controversial topic. The legislative history of the 1966 amendments to 28 U.S.C. § 2412 indicates that Congress did not intend to include costs in excess of the statutory amounts authorized by 28 U.S.C. § 1821. E.g., Harrisburg Coalition Against Ruining the Environment v. Volpe, 65 F.R.D. 608 (M.D. Pa. 1974). See also 54 Comp. Gen. 22, 23 (1974). Be that as it may, the courts were not uniform. See discussion in Murphy v. International Union of Operating Engineers, 774 F.2d 114, 132–34 (6th Cir. 1985). The Supreme Court resolved the issue in 1987, holding that federal courts must observe the limits of 28 U.S.C. §§ 1821 and 1920 when taxing the expenses of litigants' expert witnesses (as distinguished from court-appointed expert witnesses, discussed below), absent explicit statutory or contractual authorization to the contrary. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). Similarly, the nontestimonial services of experts are not taxable as costs under section 1920, although they may be recoverable if expressly authorized by a fee-shifting statute. West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991). See also 69 Comp. Gen. 160 (1990).

In United States Marshals Service v. Means, 741 F.2d 1053 (8th Cir. 1984), cert. denied, 492 U.S. 910 (1989), the government sought to evict a group of individuals from federal property. The defendants were indigent and could not afford the fees and expenses of the witnesses they wanted to subpoena. The court held that it could call the witnesses, and that it had discretionary power to order the government to advance the fees and

[53]We must emphasize that our discussion here is intended to provide an overview from the payment perspective, point out the pertinent statutes, and give a sampling of taxable items. There is a plethora of case law on what is or is not allowable, and, as is the case with Alflex (914 F.2d at 178 n.6), the courts are not always in agreement. Accordingly, it should not be assumed that the cases we have selected as illustrations are necessarily followed in all circuits. A useful reference is Laura B. Bartell, Taxation of Costs and Awards of Expenses in Federal Court, 101 F.R.D. 553 (1984).

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expenses, later to be taxed as costs. The court emphasized that "this discretionary power is to be exercised only under compelling circumstances." Id. at 1059. (In this type of situation, the agency would presumably pay in the first instance, and could later be reimbursed from the judgment appropriation if the expenses were ultimately taxed against the United States as costs.)

(4) Necessary document reproduction fees. This includes photographic materials if necessarily obtained for use in the case. Maxwell v. Hapag-Lloyd Aktiengesellschaft, 862 F.2d 767, 770 (9th Cir. 1988). Also, although section 1920 does not specifically mention depositions, courts have generally construed subsections (2) and (4) as authorizing the taxation of the costs of depositions necessarily obtained for use in the case.[54]

(5) Docket fees under 28 U.S.C. § 1923. These were traditionally viewed as a type of attorney's fee. E.g., North Atlantic & Gulf S.S. Co. v. United States, 209 F.2d 487, 489–90 (2d Cir. 1954). They are now taxable as costs under 28 U.S.C. § 2412(a). 54 Comp. Gen. 22 (1974).

(6) Compensation of interpreters and expenses of special interpretation services (28 U.S.C. §§ 1827, 1828), and compensation of court-appointed experts. The inclusion of interpretation costs and expenses was not intended to authorize taxation of these items against the United States in criminal cases or civil actions brought by the United States; payment in these instances is to be made by the Administrative Office of the United States Courts from judiciary appropriations. 28 U.S.C. §§ 1827(g), 1828(c); S. Rep. No. 569, 95th Cong., 1st Sess. 13–14 (1977). The "experts" referred to are expert witnesses appointed by the court under Rule 706 of the Federal Rules of Evidence. See National Organization for the Reform of Marijuana Laws v. Mullen,[55] 828 F.2d 536, 545 n.7 (9th Cir. 1987). These are different from the expert witnesses referred to under subsection (3) above, which are the litigant's experts.

A major issue in the area of costs has been whether, in taxing costs against the United States under 28 U.S.C. § 2412(a), courts are limited to the items specified in 28 U.S.C. § 1920. Although not all agree, the answer appears to be yes. Many courts traditionally viewed their authority as limited by

[54]E.g., West Wind Africa Line, Ltd. v. Corpus Christi Marine Services Co., 834 F.2d 1232, 1237–38 (5th Cir. 1988); Ramos v. Lamm, 713 F.2d 546, 560 (10th Cir. 1983); Corsair Asset Management, Inc. v. Moskovitz, 142 F.R.D. 347, 353 (N.D. Ga. 1992).

[55]Every cause appears to have its champion.

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section 1920. E.g., Commissioners of Highways of Annawan v. United States, 653 F.2d 292, 298 (7th Cir. 1981) (cannot tax attorney's travel expenses or witness fees in excess of amounts authorized by 28 U.S.C. § 1821); Photo Data, Inc. v. Sawyer, 533 F. Supp. 348, 353 (D.D.C. 1982) (disallowed overtime meals, car, local transportation); Norman v. United States, 74 F.R.D. 637 (D. Del. 1977) (disallowed attorney's air fare, meals, hotel accommodations). See also Harrisburg Coalition Against Ruining the Environment v. Volpe, 65 F.R.D. 608, 612 (M.D. Pa. 1974) ("As a general rule, expenses that are incident to the preparation of a case are not recoverable as costs").

However, this view as to the relationship between 28 U.S.C. §§ 2412(a) and 1920 was neither absolutely rigid nor universally held. Thus, for example, in Equal Employment Opportunity Commission v. Kenosha Unified School District No. 1, 620 F.2d 1220, 1227–28 (7th Cir. 1980), the court recognized the limitation of section 1920 but allowed costs of procuring statistical analyses and computer expenses based on a broad reading of subsection 1920(4), calling it an "exceptional case." The case of Engels v. United States, 2 Cl. Ct. 166 (1983), expresses at least what was then the Claims Court's position that it could go beyond section 1920 but must exercise that discretion sparingly. The court relied on language in Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964). Finally, the court in National Organization for the Reform of Marijuana Laws v. Mullen, 828 F.2d 536, 545–46 (9th Cir. 1987), effectively wrote the phrase "as enumerated in section 1920" out of the statute, at least within that circuit, by holding that the language is not "explicitly exclusive," and that a court may, under 28 U.S.C. § 2412(a), award against the United States any costs that it may award against a private party.

The Supreme Court's decision in Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987), should go far to resolve the issue. The Court stated that "§ 1920 now embodies Congress' considered choice as to the kinds of expenses that a federal court may tax as costs against the losing party" (id. at 440), and:

> "If Rule 54(d) grants courts discretion to tax whatever costs may seem appropriate, then § 1920, which enumerates the costs that may be taxed, serves no role whatsoever. We think the better view is that § 1920 defines the term 'costs' as used in Rule 54(d)." Id. at 441.

The Court also, at pages 442–43, specifically disapproved the language in the Farmer case which the Claims Court had relied on in Engels. A few years later, the Court said with respect to Crawford, "we held that [28 U.S.C.

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§§ 1821 and 1920] define the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further," and that Crawford held section 1920 "to be an express limitation upon the types of costs which, absent other authority, may be shifted by federal courts." West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 86–87 (1991). If this is true with respect to private litigants who do not have to overcome a sovereign immunity hurdle, the case is even stronger that section 1920 is exclusive when costs are being taxed against the United States.

Thus far, it appears that the courts are adhering to the seemingly clear signals of Crawford and Casey. See, e.g., Maxwell v. Hapag-Lloyd Aktiengesellschaft, 862 F.2d 767, 770 (9th Cir. 1988), rejecting an argument that Crawford applies only to expert witness fees (Crawford "strictly limits reimbursable costs to those enumerated in § 1920"); Miller v. Cudahy Co., 858 F.2d 1449, 1461 (10th Cir. 1988); Pershern v. Fiatallis North America, Inc., 834 F.2d 136, 140 (8th Cir. 1987); Corsair Asset Management, Inc. v. Moskovitz, 142 F.R.D. 347, 351 (N.D. Ga. 1992); Bee v. Greaves, 669 F. Supp. 372, 378–79 (D. Utah 1987).

There are, however, ripples on the pond. Even after Crawford and Casey, one lower court has cited National Organization for Reform of Marijuana Laws v. Mullen for the proposition that the enumeration in 28 U.S.C. § 1920 is not exclusive. Director, Office of Thrift Supervision v. Lopez, 141 F.R.D. 165, 167 (S.D. Fla. 1992). And another court has noted Crawford and then stated that it may award costs not specified in the statute, citing the language in Farmer that the Crawford court explicitly disapproved. Commercial Credit Equipment Corp. v. Stamps, 920 F.2d 1361, 1368 n.10 (7th Cir. 1990).

An approach more likely to be followed is reflected in the statement that Crawford "limits judicial discretion with regard to the kind of expenses that may be recovered as costs; it does not, however, prevent courts from interpreting the meaning of the phrases used in § 1920." West Wind Africa Line, Ltd. v. Corpus Christi Marine Services Co., 834 F.2d 1232, 1238 (5th Cir. 1988). See also Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble Co., 924 F.2d 633, 643 (7th Cir. 1991); Alflex Corp. v. Underwriters Laboratories, Inc., 914 F.2d 175, 177 (9th Cir. 1990), cert. denied, 112 S. Ct. 61. Continuing litigation in the area seems guaranteed.

Also, it must be emphasized that the fact that an item is not specifically enumerated in 28 U.S.C. § 1920 does not necessarily mean that it may not be recoverable on some other basis. As we will see, certain otherwise

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nontaxable items may be awarded as expenses under an attorney's fee statute. From GAO's perspective, if an item is taxed against the United States under 28 U.S.C. § 2412(a), the award is final and payment is not otherwise provided for, it will be certified for payment under 31 U.S.C. § 1304 regardless of GAO's views as to the propriety of the award. See 41 Comp. Gen. 583 (1962).

The topic of special masters has also generated a measure of controversy. The Department of Justice has concluded that special masters' expenses are not taxable under 28 U.S.C. § 2412(a).[56] Prior to the Supreme Court's decision in Crawford, several courts had held that the expenses of special masters could be taxed as costs against the United States, notwithstanding their absence from 28 U.S.C. § 1920. National Organization for the Reform of Marijuana Laws v. Mullen, 828 F.2d 536, 545–46 (9th Cir. 1987);[57] Young v. Pierce, 640 F. Supp. 1476 (E.D. Tex. 1986), vacated on other grounds, 822 F.2d 1368 (5th Cir. 1987); National Association of Radiation Survivors v. Turnage, 115 F.R.D. 543, 560–61 (N.D. Cal. 1987). Crawford and Casey would seem to support the Justice Department's position. However, a 1989 case followed Mullen, Pierce, and Turnage, without discussing the effect of Crawford. Trout v. Ball, 705 F. Supp. 705 (D.D.C. 1989). Stay tuned.

Finally, note that 28 U.S.C. § 2412(a) is limited to civil actions. There is no comparable statute authorizing the taxation of costs against the United States in criminal cases. B-163717, April 16, 1968; B-137681, November 19, 1958 (stating the rule without further discussion).

[56]Memorandum from the Attorney General, Department Policy Regarding Special Masters, March 13, 1986; Departmental Policy on Special Masters, Op. Off. Legal Counsel, October 2, 1984. As noted in the 1984 opinion, special masters' expenses, while not taxable as costs, may nevertheless be recoverable under some fee-shifting statutes. An example is the Freedom of Information Act. Washington Post v. U.S. Department of Defense, 789 F. Supp. 423 (D.D.C. 1992). As further noted in the 1986 Attorney General memorandum and in Special Masters Project: Authority for the United States to Pay for Special Masters, Op. Off. Legal Counsel, November 8, 1984, the United States may agree to the appointment of a special master in certain cases, in which event the expenses are payable from the litigation budget of the litigating agency. See also B-234793.2, June 5, 1989.

[57]Mullen was decided 3 months after Crawford but makes no mention of it, most likely because it was not brought to the court's attention. Whether the Ninth Circuit would continue to follow Mullen may be questioned, especially in light of that Circuit's subsequent adherence to Crawford in Maxwell v. Hapag-Lloyd Aktiengesellschaft, cited in the text.

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2. Attorney's Fees

"To the old adage that death and taxes share a certain inevitable character, federal judges may be excused for adding attorneys' fees cases." Kennedy v. Whitehurst, 690 F.2d 951, 952 (D.C. Cir. 1982).[58]

a. Introduction

In England, it is customary for the loser to pay the winner's attorney's fees. This is called the "English Rule." The United States follows the so-called "American Rule" that the prevailing litigant or claimant is ordinarily not entitled to recover attorney's fees from the loser absent statutory authorization. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Key Tronic Corp. v. United States, 114 S. Ct. 1960 (1994). Combining this with the explicit exclusion of attorney's fees from recoverable costs in 28 U.S.C. § 2412(a) and the concept of sovereign immunity, the starting point is the established principle that attorney's fees may not be awarded against the United States in the absence of express statutory authority. Statutory authority in this context means federal (not state) statutory authority. See, e.g., Knight v. United States, 982 F.2d 1573 (Fed. Cir. 1993).

These days, fee-shifting in litigation involving the United States seems to have become more the rule than the exception.[59] There are well over 100 federal fee-shifting statutes on the books. A comprehensive (although incomplete) listing may be found in an appendix to the dissenting opinion of Justice Brennan in Marek v. Chesny, 473 U.S. 1, 43–51 (1985). Many of these statutes apply to the United States by their own specific terms; the majority do not. The latter group is now generally applicable to the United States by virtue of the Equal Access to Justice Act, discussed later in this section.

Questions as to when fees are or are not allowable under a particular statute or how they should be calculated are beyond the scope of this work. In an often-quoted passage, the Supreme Court lamented that a

[58]If you don't like this one, we could have used the quote suggesting an analogy between attorney's fees and paying tribute to Genghis Khan. See In re Four Star Terminals, Inc., 42 B.R. 419, 428 n.2 (Bankr. D. Alaska 1984).

[59]Everyone, so it seems, is telling lawyer jokes these days, so we might as well jump in. The following quotation is taken from Judge Wilkey's dissenting opinion in Copeland v. Marshall, 641 F.2d 880, 929–30 n.53 (D.C. Cir. 1980):

"An immediately deceased lawyer arrived at the Pearly Gates to seek admittance from St. Peter. The Keeper of the Keys was surprisingly warm in his welcome: 'We are so glad to see you, Mr. ___. We are particularly happy to have you here, not only because we get so few lawyers up here, but because you lived to the wonderful age of 165.' Mr. ___ was a bit doubtful and hesitant. 'Now, St. Peter, if there's one place I don't want to get into under false pretenses, it's Heaven. I really died at age 78.' St. Peter looked perplexed, frowned, and consulted the scroll in his hand. 'Ah, I see where we made our mistake as to your age. We just added up your time sheets!"

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"request for attorney's fees should not result in a second major litigation." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). Notwithstanding this admonition, the volume of case law has become staggering. As we said in our section on costs, our objective here is a limited one—to present an overview from the payment perspective.

In a few instances, attorney's fees are paid from the amount recovered in the underlying suit, and are allowable up to a specified maximum percentage of the recovery. Examples are the Federal Tort Claims Act (28 U.S.C. § 2678) and the Social Security Act (42 U.S.C. § 406). Statutory restrictions of this type have been upheld, even against a pre-existing contingent fee agreement. Calhoun v. Massie, 253 U.S. 170 (1920); Capital Trust Co. v. Calhoun, 250 U.S. 208 (1919); Paul v. United States, 687 F.2d 364 (Ct. Cl. 1982), cert. denied, 461 U.S. 927. In the far more common situation, however, the statute authorizes the court to award reasonable attorney's fees to the prevailing party separate from and in addition to any monetary recovery in the underlying judgment.

As with costs, an award of attorney's fees may be included in a judgment on the merits or (more commonly) may be made in a separate judgment or order. Like other money judgments against the United States, judgments awarding attorney's fees are generally payable from the permanent judgment appropriation as long as the award is final and payment is not otherwise provided for. If the fee award is separate from the judgment on the merits, then the order awarding the fees must itself be final. B-190940, September 21, 1978. As discussed earlier under the Finality heading, interim awards of attorney's fees have received slightly different treatment in the courts in a number of cases.

Fee-shifting statutes are usually designed to serve several purposes. One is to facilitate the enforcement of the public policy reflected in the underlying legislation. A law making discrimination illegal, for example, would be largely empty if the victims are unable to invoke the law because they cannot afford to go to court. Another frequent purpose is deterrence. E.g., Copeland v. Marshall, 641 F.2d 880, 895 (D.C. Cir. 1980) (Title VII of the Civil Rights Act). The existence of deterrence as an objective points up a major flaw, at least from the broader social perspective, in the unreimbursed use of the permanent judgment appropriation. We quote from Judge Wilkey's dissenting opinion in Copeland v. Marshall:

"Attorney's fees are meant to serve some purpose of deterring discrimination. They doubtless do in the private sector. [Footnote omitted.] But when attorney's fees come

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straight out of the United States Treasury, as in the present case, they exert no deterrent effect whatsoever against the persons responsible for the discrimination. In the private sector there is a justifiable punitive element. Attorney's fees impact on the profit picture of the corporation; the same executive management which is responsible for tolerating or encouraging discrimination are the same executives who are responsible for the profit of the corporation, so they are penalized in the pocketbook. No such deterrence applies to the Government, i.e., the Labor Department budget was never touched, will never be touched, by the award . . . in this case. Both the back pay and the attorney's fee come out of the general taxpayer contributed funds of the U.S. Treasury. By their strict analogy to the private sector, the majority has validated deterrent or punitive action against the U.S. taxpayer." Id. at 912.

In some instances, such as subsection (d) of the Equal Access to Justice Act, Congress has recognized this by requiring payment from agency funds. Of course, agency funds also come from the taxpayer's pocket, so either way the taxpayer foots the bill. To the extent an agency can simply request and receive additional funds to budget for fee awards, deterrence may be frustrated even under a system of agency payment. Real deterrence requires not only agency payment but a requirement that the agency absorb the fee awards in its existing budget. But even here, there is the risk of the agency's funding the awards not by trimming fat or waste but by cutting back on other needed programs, perhaps even programs designed to benefit those the fee awards were intended to help. In sum, while it may be true that use of the judgment appropriation defeats deterrence, a simple requirement to use agency funds, without a consideration of complex budgetary and social issues, does not guarantee it either.

b. Statutes Applicable by Their Terms to the United States

Prior to the enactment of the Equal Access to Justice Act in 1980, Congress had dealt with fee-shifting on a piecemeal basis. Out of the 100-plus fee-shifting statutes on the books, approximately 30 expressly make the United States liable for attorney's fees in specific contexts. They mostly predate the Equal Access to Justice Act and operate independent of it. Prominent examples are 42 U.S.C. § 2000e-5(k) (Title VII of the Civil Rights Act of 1964) and 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act). A number of others were enacted in the 1970s in connection with various "citizen suit" provisions.[60]

As with judgments generally, judicial fee awards under statutes in this category are payable from the judgment appropriation if final and not

[60]E.g., 42 U.S.C. § 6305(d) (Energy Policy and Conservation Act); 42 U.S.C. § 4911(d) (Noise Control Act of 1972); 33 U.S.C. § 1365(d) (Water Pollution Control Act).

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The various collection tools noted in the Federal Claims Collection Standards serve as a checklist for the agency in developing its own debt collection program. However, every tool does not have to be used in every case. The actions to be taken depend on the facts and circumstances of the particular claim. Also, the agency can use any administrative collection remedy not specified in the Standards and not otherwise prohibited. 4 C.F.R. § 102.20.

Agencies are not required to duplicate administrative procedures. 4 C.F.R. § 101.7. The point is repeated in the Standards in the specific context of administrative offset. Id. § 102.3(b)(2)(ii). The 1984 preamble gives an example. If an agency has already provided a within-agency review prior to reporting the debt to a consumer reporting agency, it need not repeat the review for purposes of administrative offset. 49 Fed. Reg. at 8892.

Several of the authorities provided in the Federal Claims Collection Act and Standards require a somewhat detailed discussion and will be covered in subsequent portions of this chapter. The remainder of this section summarizes a number of points not noted elsewhere in the chapter.

Once an agency has determined that a debt exists, the first step in the collection process is to locate the debtor. In doing so, the agency should not overlook the obvious. A number of potential sources, several of which are relatively simple and inexpensive, are listed in 4 C.F.R. § 104.2(a). Examples are motor vehicle license, title, and registration records, and the telephone directory.

If the simpler methods fail, the agency can request the debtor's mailing address from the Internal Revenue Service and may disclose the address to certain third parties. The request must be in writing. This was authorized by section 8 of the Debt Collection Act of 1982, amending 26 U.S.C. § 6103(m). The agency must safeguard the information as provided in 26 U.S.C. § 6103(p). The corresponding provision in the Standards is 4 C.F.R. § 102.18, which does little more than repeat the statute.

Where a debtor corporation has dissolved and, under state law, the corporation's assets become the property of the shareholders, subject to any claims not paid at the time of dissolution, the agency may try to obtain from the appropriate state agency a list of shareholders or an accounting of the distribution of assets, or it may seek payment from a statutory agent. See B-184396-O.M., August 8, 1975.

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otherwise provided for. 63 Comp. Gen. 260, 261 (1984). Some illustrative cases in which fee awards were found payable under 31 U.S.C. § 1304 are:

- Fees awarded against the Equal Employment Opportunity Commission in enforcement actions brought by the EEOC under Title VII of the Civil Rights Act. B-167015, May 31, 1979. Since the statute authorizes awards to a "prevailing party," it made no difference that the EEOC was the losing plaintiff rather than the losing defendant.
- Fees awarded against the government under the Freedom of Information Act. B-173761, April 6, 1976 (internal memorandum).
- Fees awarded to the subject of an independent counsel investigation under 28 U.S.C. § 593 (Ethics in Government Act). B-218727.2-O.M., June 9, 1986.
- Fees awarded against the Environmental Protection Agency in citizen suits under the Federal Water Pollution Control Act. B-193284, May 3, 1979. This question arose because section 517 of the Act authorizes appropriations to EPA "to carry out this Act" but expressly excludes several sections. It does not, however, exclude section 505 which authorizes the fee awards. By itself, a blanket authorization of appropriations applicable to an entire program statute which includes a fee-shifting provision would make no difference. However, the specific exclusions suggested the possibility that, under the maxim "expressio unius est exclusio alterius,"[61] Congress may have intended that the awards be paid from EPA's appropriations. The decision reviewed pertinent legislation and legislative history, and concluded that the authorization provision was not intended to affect the source of funds for payment of the awards.

A somewhat unusual fee provision in this group is 5 U.S.C. § 552b(i), the Government in the Sunshine Act. It states that "[i]n the case of assessment of costs against an agency, the costs may be assessed by the court against the United States." Under this language, the payment source would appear to depend on whether the award is made against the agency (agency funds) or the United States (judgment appropriation).[62]

[61]Literally, "the expression of the one is the exclusion of the other." Where a provision in a statute specifies A, B, and D, it is normally presumed that Congress intended not to include C, absent indications to the contrary.

[62]If there were no difference in payment source, it would make absolutely no difference whether the award was against the agency or the United States, and the legislative history makes clear that the quoted language was intended to give the court discretion. See, e.g., H.R. Rep. No. 880, 94th Cong., 2d Sess., pt. I at 18, reprinted at 1976 U.S. Code Cong. & Admin. News 2183, 2199.

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c. Equal Access to Justice Act

In 1980, Congress enacted a major piece of fee-shifting legislation—the Equal Access to Justice Act, affectionately known as EAJA.[63] EAJA did the following things:

- Created a new 5 U.S.C. § 504 to authorize fee-shifting in certain administrative situations.
- Amended 28 U.S.C. § 2412. The pre-existing provisions for costs were basically re-enacted as subsections (a) and (c)(1). The new judicial fee-shifting provisions became subsections (b), (c)(2), and (d).

In the context of judicial awards, EAJA enacted two significant fee-shifting provisions, subsections (b) and (d). Some confusion in usage has arisen from inconsistent use of the term "EAJA" to refer to all of 28 U.S.C. § 2412, subsections (b) and (d), subsection (d) alone, or any of the foregoing together with 5 U.S.C. § 504. Before jumping to conclusions, the reader should always carefully examine the specific context.

(1) Awards under 28 U.S.C. § 2412(b)

One of EAJA's major fee-shifting provisions is subsection (b). It authorizes fee awards to prevailing parties against the United States in civil actions "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award," unless expressly prohibited by statute. 28 U.S.C. § 2412(b). As the quoted language clearly implies, subsection (b) covers two general situations.

First, we noted earlier that many fee-shifting statutes do not by their terms apply to the United States. Subsection (b) makes the United States liable under these statutes. Thus, if a fee-shifting statute specifically includes the United States or federal agencies, it applies of its own force; if it does not specifically include the United States or federal agencies, it nevertheless applies by virtue of EAJA subsection (b). An example of a statute now

[63]The original EAJA was Pub. L. No. 96-481, Title II, 94 Stat. 2325 (1980). Portions of the original law were experimental, with a 3-year "sunset" date. Those portions were amended and made permanent by Pub. L. No. 99-80, 99 Stat. 183 (1985).

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applicable to the United States under subsection (b) is the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.[64]

In addition, subsection (b) makes the United States liable for fee awards under Rule 37 of the Federal Rules of Civil Procedure (certain discovery violations). S. Rep. No. 253, 96th Cong., 1st Sess. 4 ("Fees may also be recovered against the United States under rule 37"), 19 (1979); M.A. Mortenson Co. v. United States, 996 F.2d 1177 ((Fed. Cir. 1993); National Lawyers Guild v. Attorney General, 94 F.R.D. 600, 615 n.32 (S.D.N.Y. 1982); B-217990.2-O.M., November 29, 1984; 6 Op. Off. Legal Counsel 525 (1982). The same result has been applied to awards under Rule 11. Adamson v. Bowen, 855 F.2d 668 (10th Cir. 1988).[65]

Second, although there had been exceptions, the prevailing view had been that fees could not be awarded against the United States under the various common-law (i.e., judicially-created) exceptions to the American Rule (bad faith, common benefit, common fund). See S. Rep. No. 253 at 3–4; H.R. Rep. No. 1418, 96th Cong., 2d Sess. 8–9, 17 (1980). Subsection (b) makes the United States liable under these common law exceptions as well.

Payment of subsection (b) awards is fairly straightforward. They are paid from the permanent judgment appropriation unless otherwise provided for in a particular case, except that an award based on a finding of bad faith must be paid from agency funds. 28 U.S.C. § 2412(c)(2); 63 Comp. Gen. 260 (1984); B-218504, May 10, 1985; 6 Op. Off. Legal Counsel 525 (1982).

An interesting pre-EAJA case applying the "common fund" theory is Red School House, Inc. v. Office of Economic Opportunity, 386 F. Supp. 1177 (D. Minn. 1974). The OEO had suspended funding on a grant the court found to have been previously approved. The grant funds had already been transferred to a commercial bank. The court found that OEO had acted

[64]This seems to have given birth to a whole new field of litigation. For example, the United States may be liable for fees if it violates one of the provisions of law cited in 42 U.S.C. § 1988, but this does not extend to suits analogous to those brought against state officials under those provisions. E.g., Premachandra v. Mitts, 753 F.2d 635 (8th Cir. 1985); Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, 735 F.2d 895 (5th Cir. 1984); Lauritzen v. Lehman, 736 F.2d 550 (9th Cir. 1984). Also, a suit against a federal official in his or her individual capacity cannot generate a fee award against the United States under section 1988. Kentucky v. Graham, 473 U.S. 159 (1985); Bergman v. United States, 648 F. Supp. 351 (W.D. Mich. 1986).

[65]Rule 11 sanctions may be assessed against the party or the attorney personally. The inclusion of Rule 11 sanctions under EAJA subsection (b) has no relevance in the latter situation. In assessing sanctions against the attorney, several courts have taken an extra step and expressly prohibited reimbursement or indemnification from any source. E.g., Derechin v. State University of New York, 963 F.2d 513, 519 (2d Cir. 1992) (citing several other cases).

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improperly and in bad faith. The court then awarded attorney's fees against OEO based in part on OEO regulations and, drawing an analogy to the "common fund" theory, held that the fees were payable from the funds allocated to the grant and on deposit in the bank. "Common fund" fee awards against the United States or a federal agency are uncommon. Limited experience suggests that payment needs to be reviewed on a case-by-case basis.

(2) Awards under 28 U.S.C. § 2412(d)

EAJA's second major fee-shifting provision in the litigation context is subsection (d). Generally speaking, it applies to any civil action brought by or against the United States except tort cases or cases subject to some other fee-shifting statute. It is thus sort of a "catch-all."

A prevailing party (other than the United States) who meets specified financial eligibility criteria may apply to the court for a fee award under subsection (d). Fees will be awarded unless the court finds that "the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The "substantially justified" determination includes the underlying administrative action as well as the government's position in the lawsuit. Id. § 2412(d)(1)(B). Once the party makes the fee application, the burden shifts to the United States to establish that its position was substantially justified. E.g., Rawlins v. United States, 8 Cl. Ct. 355 (1985). Fees are limited to $75 per hour, but courts may award higher amounts based on cost-of-living increases or other special factors. 28 U.S.C. § 2412(d)(2)(A). An award may be reduced or denied if the prevailing party has "unduly and unreasonably protracted" the case. Id. § 2412(d)(1)(C).

A fee award under EAJA is made to the party, not to the attorney. FDL Technologies, Inc. v. United States, 967 F.2d 1578 (Fed. Cir. 1992); Phillips v. General Services Administration, 924 F.2d 1577 (Fed. Cir. 1991). See also United States v. McPeck, 910 F.2d 509, 513 (8th Cir. 1990).

The meaning of "substantially justified" has been much litigated. The Supreme Court spoke to the issue in Pierce v. Underwood, 487 U.S. 552 (1988), defining the term to mean a position which is justified to a degree that could satisfy a reasonable person, in other words, a position having a reasonable basis in both law and fact. The same case addressed the amount of the fee and identified a number of factors that may not be used as "special factors" to justify exceeding the cap: novelty and difficulty of

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issues; undesirability of the case; work and ability of counsel (except for counsel with "distinctive knowledge or specialized skill" relevant to the case); results obtained; customary fees and awards in other cases; contingent nature of the fee. Id. at 571–74.[66]

The original EAJA encompassed the Court of Claims as well as the district courts. When the Court of Claims was split in 1982 into the Claims Court and Court of Appeals for the Federal Circuit,[67] the applicability of EAJA to the new Claims Court came into question. The courts upheld the jurisdiction of the Claims Court, now the Court of Federal Claims, to make EAJA awards. Essex Electro Engineers, Inc. v. United States, 757 F.2d 247 (Fed. Cir. 1985); Laboratory Supply Corp. v. United States, 5 Cl. Ct. 28 (1984). The 1985 EAJA amendments codified this result (28 U.S.C. § 2412(d)(2)(F)), and added boards of contract appeals (id. § 2412(d)(2)(E)). Legislation in 1992 added the Court of Veterans Appeals.[68]

A perusal of the case annotations in the United States Code Annotated or United States Code Service will indicate the types of actions to which subsection (d) has been applied. Two may be mentioned briefly:

- Subsection (d) awards may be made in Social Security Act cases, but an attorney receiving fees under both EAJA and 42 U.S.C. § 406 must refund the smaller fee to the claimant. Pub. L. No. 99-80, § 3, 99 Stat. 186 (1985).
- Subsection (d) applies to condemnation actions, but only if the amount of the final judgment (settlements are expressly excluded), exclusive of interest, is closer to the property owner's valuation testimony than it is to the government's. 28 U.S.C. § 2412(d)(2)(H). (A different approach was needed to determine "prevailing party" in condemnation cases because, with rare exceptions, the government always "wins" in the sense that it gets the property.)

Prior to the 1985 amendments, the payment provisions for subsection (d) were ambiguous and confusing, indicating that awards should generally be paid from agency funds, but that the judgment appropriation might be available as a "back-up" in certain unspecified situations. By virtue of

[66]A later case confirmed that a "reasonable attorney's fee" may not include a contingency enhancement. City of Burlington v. Dague, 112 S. Ct. 2638 (1992). While Dague dealt with the fee-shifting provisions of the Solid Waste Disposal Act and Clean Water Act, the Court made clear that its holding applies to all similar statutes. Id. at 2641.

[67]Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

[68]Federal Courts Administration Act of 1992, § 506, 106 Stat. 4506, 4513.

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other language in the original EAJA, however, GAO and the Justice Department had concluded that the judgment appropriation could not be used for subsection (d) awards without further legislative action.[69]

The 1985 amendments ended the uncertainty by providing that subsection (d) awards "shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise." 28 U.S.C. § 2412(d)(4). The Senate Judiciary Committee explained that this requires subsection (d) awards to be "paid from the offending agency's budget and not from the judgment fund." S. Rep. No. 586, 98th Cong., 2d Sess. 17 (1984).

Subsection (d) awards are thus payable from agency operating appropriations; specific, line-item, or "earmarked" appropriations are not required. Electrical District No. 1 v. Federal Energy Regulatory Commission, 813 F.2d 1246 (D.C. Cir. 1987); 63 Comp. Gen. 260, 263 (1984); 62 Comp. Gen. 692, 697 (1983); B-231771, December 7, 1988; B-212585, March 29, 1984; B-40342.1, May 15, 1981; 6 Op. Off. Legal Counsel 204, 209–12 (1982).

The Electrical District case considered the effect of an appropriation act provision that "[n]one of the funds in this Act shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in this Act." 813 F.2d at 1247 n.3. While the provision effectively precluded EAJA awards attributable to participation in agency administrative proceedings funded under that appropriation act, the court held that it did not bar a subsection (d) award for fees attributable to participation in judicial proceedings, which of course were not funded under the agency's appropriation act. Congress rejoined by amending the appropriation restriction for the following fiscal year to state that it "bars payment to a party intervening in an administrative proceeding for expenses incurred in appealing an administrative decision to the courts." See 67 Comp. Gen. 553, 556 (1988).

Fees reasonably incurred in pursuit of an EAJA application may also be compensable. Brewer v. American Battle Monuments Commission, 814 F.2d 1564, 1570 (Fed. Cir. 1987); Rawlins v. United States, 8 Cl. Ct. 355, 359 (1985).

[69]63 Comp. Gen. 260 (1984); 62 Comp. Gen. 692 (1983); B-40342.2, October 21, 1981; 7 Op. Off. Legal Counsel 230 (1983) (preliminary print); 6 Op. Off. Legal Counsel 204 (1982).

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d. Tax Cases

Fee-shifting in tax cases has evolved through several permutations. Prior to 1976, there was no general authority to award attorney's fees against the United States in civil tax cases. In that year, Congress amended the Civil Rights Attorney's Fees Awards Act to make it applicable to the United States to the limited extent of actions to enforce, or charging violations of, the Internal Revenue Code. 42 U.S.C. § 1988 (1976 ed.). These awards were viewed as payable from the judgment appropriation. B-158810, February 22, 1977.

When Congress enacted the Equal Access to Justice Act in 1980, it was intended that subsection (d) pick up the tax cases. To that end, the original EAJA repealed that portion of 42 U.S.C. § 1988 which dealt with fee awards against the United States in tax cases. Pub. L. No. 96-481, § 205(c), 94 Stat. 2330. However, while EAJA adequately covered awards by district courts or the Court of Federal Claims, it did not apply to the Tax Court. Bowen v. Commissioner, 706 F.2d 1087 (11th Cir. 1983).

In 1982, as part of the Tax Equity and Fiscal Responsibility Act of 1982, Congress enacted a new provision to deal with fee awards in tax cases. Pub. L. No. 97-248, § 292, 96 Stat. 572 (1982). This new provision became section 7430 of the Internal Revenue Code, 26 U.S.C. § 7430. Section 7430 generally followed the EAJA subsection (d) approach, but did not include a specific payment provision. The 1982 legislation also amended EAJA to make it inapplicable to cases covered by the new IRC § 7430. 28 U.S.C. § 2412(e). Section 7430 is exclusive with respect to matters within its coverage. Smith v. Brady, 972 F.2d 1095, 1099 (9th Cir. 1992).

In 63 Comp. Gen. 470 (1984), the Comptroller General reviewed IRC § 7430 and concluded that payment of the awards was not otherwise provided for. Thus, awards made by the district courts or the Court of Federal Claims were payable from the judgment appropriation. However, there was nothing in 31 U.S.C. § 1304 that could reasonably be construed as covering the Tax Court. The decision therefore concluded that Tax Court awards under section 7430 could not be paid from any existing source of funds. GAO recommended a legislative solution. In 1986, Congress amended section 7430 to make Tax Court awards payable "in the same manner as such an award by a district court." Pub. L. No. 99-514, § 1551(f), 100 Stat. 2753 (1986), codified at 26 U.S.C. § 7430(d)(2). Thus, all awards under IRC § 7430 are now payable from the judgment appropriation.

e. Expenses

As noted above, the fact that a particular item may not be taxable as a cost under 28 U.S.C. § 2412(a) does not necessarily mean that it is not

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recoverable under some other authority. Specifically, the typical attorney's fee statute permits the recovery of certain "expenses" in addition to the fee itself. Expenses authorized as part of a fee award are in addition to costs taxable under 28 U.S.C. § 2412(a).

It has been said that "costs and expenses are not synonymous but are words of art." Bennett v. Department of the Navy, 699 F.2d 1140, 1144 (Fed. Cir. 1983). The term "expenses" for purposes of a fee-shifting statute usually means "those reasonable and necessary out-of-pocket expenses of providing a lawyer's services that are not covered by the hourly rate [and] that are routinely paid by counsel and billed to the client for services rendered." Id. at 1145.[70] There is no uniform test for determining when expenses will qualify as part of an attorney's fee. Id. at 1143. Rather, exactly what items may be recovered will depend in large measure on the language of the particular fee statute, its legislative history, and the case law that has developed under it and similarly-worded statutes.

The characterization of a given item as a cost or an expense may determine whether it is recoverable at all. Depending on the particular case, a prevailing party may be able to recover (a) costs plus fees and expenses, (b) costs but not fees and expenses, or (c) fees and expenses but not costs. For example, in the Bennett case cited above, the court upheld a decision by the Merit Systems Protection Board that it could, as part of a fee award under 5 U.S.C. § 7701(g), include expenses such as travel of counsel, postage, and telephone tolls, but not deposition costs or witness fees. Note that each item is either a cost or an expense, but not both. The items allowed as expenses would not be taxable as costs under 28 U.S.C. § 2412(a). The items disallowed would be taxable costs, except that the MSPB, as an administrative body, does not have the authority to tax costs under section 2412(a). Thus, the deposition costs and witness fees could not be awarded.

The case of Mennor v. Fort Hood National Bank, 829 F.2d 553 (5th Cir. 1987), illustrates the relationship between costs and expenses under Title VII of the Civil Rights Act. Although the case involves private litigants, it is nevertheless relevant because Title VII's fee provision (42 U.S.C. § 2000e-5(k)) makes the United States liable the same as a private party. The plaintiff sought costs of general copying and taking depositions. These

[70]Similar formulations are "incidental expenses of attorneys that are routine to all litigation and routinely billed to private clients," Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43, 54 (D.C. Cir. 1987), vacated in part on other grounds, 857 F.2d 1516 (D.C. Cir. 1988); "reasonable out-of-pocket expenditures of the attorney beyond normal overhead," Allen v. Freeman, 122 F.R.D. 589, 591 (S.D. Fla. 1988).

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were taxable as costs under 28 U.S.C. § 1920. The plaintiff also sought recovery of costs of attorney postage, attorney long-distance telephone use, and attorney mileage (on the attorney's car, not on the attorney). These items, said the court, were not taxable as costs under 28 U.S.C. § 1920, but could be awarded as part of the attorney's fees under the "supplemental power" of the Title VII fee provision.

Similarly, the fee provision of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(d), has been held to permit an award of otherwise nontaxable items. Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43, 53–54 (D.C. Cir. 1987), vacated in part on other grounds, 857 F.2d 1516 (D.C. Cir. 1988).

The fees and expenses of experts have produced a minor flood of litigation. The Supreme Court has held that a fee-shifting statute does not include expert fees unless specified. West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991). The case includes an extensive listing of statutes containing the requisite authority. Id. at 88–89 and n.4. One of the Court's examples was EAJA subsection (d), which authorizes "fees and other expenses" and defines expenses as including the reasonable expenses of expert witnesses and of "any study, analysis, engineering report, test or project" found necessary for the preparation of the case. 28 U.S.C. § 2412(d)(2)(A).

The court considered this authority in City of Brunswick v. United States, 661 F. Supp. 1431 (S.D. Ga. 1987), rev'd on other grounds, 849 F.2d 501 (11th Cir. 1988). The court held that the listing of permissible expenses in subsection (d) is illustrative rather than exclusive, and, consistent with Casey, that expert witness expenses under that subsection are not limited by the statutory amounts specified in 28 U.S.C. § 1821, nor is an award limited to the fees of experts who actually testified as witnesses. 661 F. Supp. at 1444–45. Thus, while the fees and expenses of expert witnesses are limited by 28 U.S.C. § 1821 when they are being taxed as costs under 28 U.S.C. §§ 2412(a) and 1920, they are not so limited when they are allowable as expenses under a fee-shifting statute. In agreement that the listing is not exclusive is, e.g., Oliveira v. United States, 827 F.2d 735, 744 (Fed. Cir. 1987).

In 1991, Congress amended 42 U.S.C. § 1988 (the statute involved in Casey) and the fee-shifting provision of Title VII of the Civil Rights Act of 1964 to expressly add expert fees and thus conform to the requirements of Casey. Civil Rights Act of 1991, Pub. L. No. 102-166, § 113, 105 Stat. 1071, 1079

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(1991). Nevertheless, the Casey holding continues to apply to any fee-shifting statutes which do not expressly include expert fees. E.g., Gray v. Phillips Petroleum Co., 971 F.2d 591 (10th Cir. 1992) (Age Discrimination in Employment Act).

An item starting to appear with increased frequency is the expenses of computerized legal research. While not taxable as a cost, computerized legal research has been viewed as an allowable expense under fee-shifting statutes. E.g., Hirschey v. FERC, 777 F.2d 1, 6 (D.C. Cir. 1985) (EAJA subsection (d)); Allen v. Freeman, 122 F.R.D. 589, 592 (S.D. Fla. 1988) (42 U.S.C. § 1988); Keyava Construction Co. v. United States, 15 Cl. Ct. 135, 140–41 (1988) (EAJA subsection (d)). Contra Corsair Asset Management, Inc. v. Moskovitz, 142 F.R.D. 347, 353 (N.D. Ga. 1992) (court regarded research as an element of overhead, noting that lawyers do not customarily bill separately for use of the firm library).

To sum up, costs and expenses are two different things. A prevailing party may be able to recover either or both, depending on the particular statutory authorities involved. Allowable expenses may also vary under different fee statutes. A useful starting point for further exploration is the previously cited article by Laura B. Bartell, 101 F.R.D. at 589–96.

When expenses are allowed together with attorney's fees under a fee statute, the expenses are part of the same award and will be payable from the same source as the fees.

From the payment perspective, the costs-expenses distinction will be relevant in some cases and not relevant in others. In the typical Title VII case against a federal agency, for example, the distinction is largely immaterial because both are paid from the judgment appropriation. In an EAJA subsection (d) case, however, the distinction becomes important because the costs under 28 U.S.C. § 2412(a) will be payable from the judgment appropriation whereas the fees and expenses are payable from agency funds. See, e.g., B-231771, December 7, 1988.

f. Summary

A prevailing party in a civil action against the United States, a federal agency, or a federal official in his or her official capacity, may be able to recover attorney's fees under one of three mutually exclusive approaches.

First, if there is a fee-shifting statute applicable to the case which specifically includes the United States, such as Title VII of the Civil Rights Act or the Freedom of Information Act, then that statute and the standards

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Agencies should collect claims against a partnership from partnership assets, if any. Otherwise, the government should look to individual assets of any general partners not adjudged bankrupt. See, e.g., B-161821-O.M., August 3, 1967; B-161821, November 28, 1967 (non-decision letter). The government need not forbear collecting from a surety even though there is a possibility of recovery from the principal. See B-160740, February 13, 1969 (non-decision letter).

Where debtors are jointly and severally liable to the United States, the government is not required to collect a proportionate share from each. The government may collect the entire amount from one debtor, leaving it to that debtor to seek contribution from the others, if that is determined to be the best way to liquidate the indebtedness as quickly as possible. 58 Comp. Gen. 778 (1979); 4 C.F.R. § 103.6.

The agency should conduct a personal interview with the debtor whenever feasible. 4 C.F.R. § 102.7. This is subject to common-sense cost effectiveness considerations. You don't, at least without some special reason, send an interviewer across the country on a $50 debt. As the 1984 preamble emphasizes, an interview will almost always be "feasible" where the debtor is a federal employee. 49 Fed. Reg. at 8892.

Executive Order 12674 (Principles of Ethical Conduct for Government Officers and Employees), § 101(l) (1989), directs federal employees to satisfy all just financial obligations, especially those imposed by law such as taxes. While the employing agency is generally not authorized to assist a private creditor collect a debt from an agency employee (see Taggart v. United States, 17 Ct. Cl. 322 (1881); B-171593, March 9, 1971), it is expected to cooperate with another federal agency. 4 C.F.R. § 102.1(b). Thus, in cases where the creditor agency and the employing agency are different and the creditor agency is unable to collect by offset, it should contact the employing agency for assistance in making suitable payment arrangements. 4 C.F.R. § 102.8.

Agencies seeking to collect statutory penalties, forfeitures, or other debts provided for as an enforcement aid or for compelling compliance should consider suspending or revoking licenses or other privileges in cases of inexcusable, prolonged, or repeated failure to repay indebtedness. 4 C.F.R. § 102.9. See also Lawrence v. Commodity Futures Trading Commission, 759 F.2d 767, 772 n.12 (9th Cir. 1985). Section 102.9 also directs agencies which make, guarantee, or insure loans to give serious consideration to disqualifying a debtor (lender, borrower, or otherwise) from doing further

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under it will govern. Cases in this category are wholly independent of the Equal Access to Justice Act.

Second, if there is a fee-shifting statute applicable to the case which does not specifically include the United States, or if there is an applicable common-law basis for a fee award, fees must be sought under EAJA subsection (b). The standards under subsection (b) and the particular statute or common-law exception will govern. The "substantially justified" standard of subsection (d) has no relevance to this category.

Third, if neither of the above is the case, then fees must be sought under EAJA subsection (d), alleging that the government's position was not substantially justified.

Unless otherwise provided for in a particular case, costs taxed under 28 U.S.C. § 2412(a), and fees and expenses awarded under a statute specifically applicable to the United States or under EAJA subsection (b), except for bad faith awards, are payable from the permanent judgment appropriation. Fees and expenses under EAJA subsection (d), and bad faith awards under subsection (b), are payable from agency operating appropriations.

G. Interest

The computation and addition of interest, where proper, is part of GAO's judgment certification process. Entitlement to interest has generated a degree of controversy unapproached by any other aspect of the payment of judgments. The law in this area is complex and often highly technical, as the discussion in this section will reflect.

1. The No-Interest Rule

The starting point is the rule, derived essentially from the concept of sovereign immunity, that interest is not recoverable against the United States unless expressly provided by statute or contract. The Supreme Court has recognized and applied this rule on numerous occasions. E.g., Library of Congress v. Shaw, 478 U.S. 310 (1986);[71] United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951); United States v. N.Y. Rayon Importing Co., 329 U.S. 654 (1947); United States ex rel. Angarica v. Bayard, 127 U.S. 251 (1888).

The right to recover interest from the United States requires a waiver of sovereign immunity "separate from a general waiver of immunity to suit."

[71]The cases cited in the text are cited solely to document the no-interest rule. The right to recover interest in the specific context, as in Shaw for example, may have subsequently changed.

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Shaw, 478 U.S. at 314; Thompson v. Kennickell, 797 F.2d 1015, 1017 (D.C. Cir. 1986), cert. denied, 480 U.S. 905; Jetco, Inc. v. United States, 11 Cl. Ct. 837, 850 (1987). This does not mean that the interest waiver must be in a separate statute; what it means is that a waiver of sovereign immunity with respect to interest must itself be explicit, and will not be inferred from a general waiver of immunity to suit.

Interest may be of two types: postjudgment (interest on the judgment) or prejudgment (interest on the claim upon which the judgment was founded). As the cases cited throughout this discussion make clear, the no-interest rule applies equally to both types. Where prejudgment interest is authorized, it may, depending on the terms of the relevant statute, run to the date of payment or the date of the judgment. In the latter case, the prejudgment interest becomes part of the judgment amount to which any authorized postjudgment interest is applied. See, e.g., B-111945, November 13, 1952.

Courts are not authorized to award interest against the United States on the basis of equity or because payment has been delayed, even if the delay can be termed unreasonable. United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 660 (1947); Tillson v. United States, 100 U.S. 43, 47 (1879); Lichtman v. Office of Personnel Management, 835 F.2d 1427 (Fed. Cir. 1988); Gray v. Dukedom Bank, 216 F.2d 108, 110 (6th Cir. 1954); Muenich v. United States, 410 F. Supp. 944, 947 (N.D. Ind. 1976); United States v. James, 301 F. Supp. 107, 132 (W.D. Tex. 1969); Economy Plumbing & Heating Co. v. United States, 470 F.2d 585, 594 (Ct. Cl. 1972); Hoffman Construction Co. v. United States, 7 Cl. Ct. 518, 527–28 (1985); B-214289, October 23, 1985 (non-decision letter).

Interest is often found in masquerade but the courts will unmask the intruder. In United States v. Mescalero Apache Tribe, 518 F.2d 1309 (Ct. Cl. 1975), cert. denied, 425 U.S. 911 (1976), the Court of Claims stated:

"[The] no-interest rule applies to any incremental damages sought to be assessed against the United States, whether it be designated interest, as such, or is designated by some other terminology which has the same effect . . . . [Emphasis in original.]

"[T]he character or nature of interest cannot be changed by calling it damages, loss, earned increment, just compensation, discount, offset, or penalty, or any other term, because it is still interest and the no-interest rule applies to it." Id. at 1321, 1322 (internal quotation marks omitted).

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In Library of Congress v. Shaw, noted above, the award was not called "interest," but was designated as an increase in a fee award to compensate for delay in payment. In invalidating the award, the Supreme Court brushed aside the designation and looked at the substance. The Shaw Court cited Mescalero Apache Tribe with approval, adding that "the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution." 478 U.S. at 321. Similarly unauthorized is interest disguised as "liquidated damages" under the Fair Labor Standards Act. Doyle v. United States, 931 F.2d 1546 (Fed. Cir. 1991). See also United States ex rel. Angarica v. Bayard, 127 U.S. 251, 259–60 (1888); Ramsey v. United States, 101 F. Supp. 353, 356 (Ct. Cl. 1951), cert. denied, 343 U.S. 977; Moran Brothers Co. v. United States, 61 Ct. Cl. 73, 106 (1925); B-226231, October 23, 1987.

For purposes of the no-interest rule, it makes no difference whether a claimant was obliged to borrow money and pay interest on it, or merely lost the use of the money but was not forced to borrow. Komatsu Manufacturing Co. v. United States, 131 F. Supp. 949 (Ct. Cl. 1955) and cases cited.

There are two nonstatutory exceptions to the no-interest rule, noted in the Shaw decision, 478 U.S. at 317 n.5. The first is a taking of property or a property interest which entitles a claimant to just compensation under the Fifth Amendment of the Constitution. The second is "where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise." Id. Each of these situations will be discussed separately later in this section.

If a judgment is silent as to interest, or if it provides for interest in general terms such as "interest as authorized by law" or "interest as provided by law," the settlement process will include the determination of whether interest is authorized. In cases where interest is payable, the computation of that interest (i.e., the determination of the proper beginning and ending dates and the application of the proper rate of interest) is part of the settlement process. Absent some statutory provision to the contrary, GAO will use the formula traditionally employed by the accounting officers and described in Chapter 12 under the Interest heading. That formula applies to judgments as well as administrative claims. See B-60952, July 2, 1953.

As we will see, the no-interest rule has lost many of its teeth by virtue of the nonstatutory exceptions and a large number of statutory interest provisions. However, in situations not covered by either a statutory

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authorization or one of the nonstatutory exceptions, it continues to apply with full force. A few examples are Doyle v. United States, 931 F.2d 1546 (Fed. Cir. 1991) (Fair Labor Standards Act); Lichtman v. Office of Personnel Management, 835 F.2d 1427 (Fed. Cir. 1988) (wrongfully denied annuity benefits); Sansom v. United States, 707 F. Supp. 1296 (N.D. Fla. 1989) (attorney's fees under 26 U.S.C. § 7430); Ulmet v. United States, 19 Cl. Ct. 527 (1990) (back pay, allowances, and back retirement pay to military officer).

2. Specific Interest Statutes

Congress has authorized the recovery of interest, subject to varying conditions, in a number of specific contexts. If one of these specific interest statutes applies to a given case, then that statute will of course govern. In some cases interest is a statutory entitlement; in others it is merely an authorization and must be affirmatively awarded. The following listing is intended to be reasonably comprehensive as of the date of this publication.

a. Back Pay Act

The Back Pay Act, 5 U.S.C. § 5596, authorizes the payment of back pay to a federal employee who is found by "appropriate authority," including a court, to have suffered a withdrawal or reduction of all or part of his or her pay, allowances, or differentials as the result of an unjustified or unwarranted personnel action.

Prior to late 1987, interest was not authorized on claims or judgments under the Back Pay Act. E.g., Fitzgerald v. Staats, 578 F.2d 435 (D.C. Cir. 1978), cert. denied, 439 U.S. 1004; Van Winkle v. McLucas, 537 F.2d 246 (6th Cir. 1976), cert. denied, 429 U.S. 1093.

This was changed by legislation in December 1987. Public Law 100-202, the continuing resolution for fiscal year 1988, added a new subsection (b)(2) to 5 U.S.C. § 5596 (100 Stat. 1329-430). Under subsection (b)(2), back pay under the Act "shall be payable with interest," calculated from the effective date of the withdrawal or reduction of pay to a date not more than 30 days prior to the date of payment. The applicable interest rate is the rate for tax overpayments determined under section 6621(a)(1) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(1). Interest is payable from the same source as the back pay in a given case, and is to be compounded daily. The interest provision is limited to the back pay itself and does not apply to attorney's fees.

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Subsection (b)(2) applies to administrative awards under the Back Pay Act, which are payable from agency funds, as well as judicial awards. The Office of Personnel Management's implementing regulations are found at 5 C.F.R. § 550.806 (1992).

The Back Pay Act does not apply to military personnel. Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979). Thus, pay cases involving military personnel remain subject to the no-interest rule. Ulmet v. United States, 19 Cl. Ct. 527 (1990).

b. Wrongful Tax Levy

Under section 7426 of the Internal Revenue Code, 26 U.S.C. § 7426, if the Internal Revenue Service has seized money or property under a tax levy, a person claiming an interest in the property levied upon (other than the person against whom the tax was assessed) can sue to challenge the propriety of the levy.

If the court determines that the levy was improper, 26 U.S.C. § 7426(g) provides for the judgment to include interest. If the levy was executed on money, interest runs from the date the IRS received the money to the date of payment of the judgment. If the levy was executed on other property which has been sold, interest runs from the date of the sale to the date of payment of the judgment. The applicable rate of interest is the tax overpayment rate determined under 26 U.S.C. § 6621(a)(1). Interest is to be compounded daily. Id. § 6622(a).

In Hammond Co. v. United States, 568 F. Supp. 309 (S.D. Cal. 1983), the IRS issued a notice of levy on money which had been seized by the Federal Bureau of Investigation. The levy was subsequently found to be improper. The court refused to apply a theory of "constructive possession" under section 7426(g), and denied interest for the time the money had been held by the FBI. Under the statute, the court pointed out, interest runs from the date of receipt by the IRS, not the date of the levy.

c. Tax Refund Judgments

When a taxpayer receives a judgment "for any overpayment in respect of any internal revenue tax," 28 U.S.C. § 2411 provides that "interest shall be allowed" from the date of the payment or collection of the overpayment to a date, to be determined by the IRS, preceding the date of the refund check by not more than 30 days.

As with judgments under 26 U.S.C. § 7426, the applicable interest rate is the tax overpayment rate (26 U.S.C. § 6621(a)(1)), which, under 26 U.S.C. § 6622(a), is to be compounded daily.

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The statute also provides that a tender of payment (with interest) by check any time after the judgment becomes final will stop the running of interest, whether or not the judgment creditor accepts the check.

d. Equal Access to Justice Act

The original enactment of the Equal Access to Justice Act in 1980 made no mention of interest. This did not prevent claimants from seeking interest, but the courts held that there was no authority for interest on fee awards under either subsection (b) or subsection (d) of 28 U.S.C. § 2412. International Woodworkers of America v. Donovan, 769 F.2d 1388 (9th Cir. 1985); Arvin v. United States, 742 F.2d 1301 (11th Cir. 1984); Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, 735 F.2d 895 (5th Cir. 1984).

When EAJA was made permanent in 1985, Congress added an interest provision, codified at 28 U.S.C. § 2412(f):

> "If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance."

Note that this is a limited authorization. Interest is not automatic, but is payable only if there has been an unsuccessful appeal by the government. The rate is the 52-week Treasury bill rate determined under 28 U.S.C. § 1961(a), and the statute specifies the beginning and ending dates. An illustrative case making an award under this provision is Haitian Refugee Center v. Meese, 791 F.2d 1489, 1501 (11th Cir. 1986).

The legislative history states that this provision "was adopted at the recommendation of the Comptroller General and meets the objections found in the President's veto message."[72] A brief explanation may be helpful since the reference to the Comptroller General does not refer to any formal GAO document and this explanatory material, to our knowledge, cannot be found elsewhere.

Legislation to make EAJA permanent had passed both Houses of Congress and had been sent to the President in late 1984. It included a provision which would have required interest on all awards under 28 U.S.C. § 2412 not paid within 60 days from the date of the award. GAO found several

[72]H.R. Rep. No. 120, 99th Cong., 1st Sess. 19 (1985), reprinted in 1985 U.S. Code Cong. & Admin. News 132, 147.

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problems with the interest provision. In many respects, it would have had the undesirable result of giving attorneys more favorable treatment than their clients. Also, although the government's payment record in this area is generally good, payment within 60 days would be impossible in most cases since the payment process cannot begin until a determination is made with respect to appeal. The problems were outlined in a letter to the relevant congressional committees, B-40342.4, October 5, 1984.

The scheduled adjournment of Congress made consideration of these comments impossible. However, the President agreed, found other portions of the bill objectionable as well, and, while endorsing the underlying policy of EAJA, vetoed the legislation on November 8, 1984.[73]

Congress resumed consideration of the legislation the following year. The interest provision now found at 28 U.S.C. § 2412(f) was designed to address the problems identified by the President and the Comptroller General. The basic thrust—interest only in the case of an unsuccessful appeal by the United States—was patterned after similar provisions in 31 U.S.C. § 1304(b) and 28 U.S.C. § 2516(b), to be discussed later in this section. Unlike 31 U.S.C. § 1304(b), however, interest under 28 U.S.C. § 2412(f) is computed from the date of the award and there is no requirement for filing with GAO or with anyone else. The reason is that subsection 2412(f) applies to all awards under section 2412—costs under subsection (a) and fees under subsections (b) and (d). Since some subsection (b) awards and all subsection (d) awards are paid directly by the agency concerned and are not processed through GAO, an attempt to incorporate the filing requirement of 31 U.S.C. § 1304(b) would have produced an interest provision of unwarranted complexity. In informal consultations, GAO agreed that this new provision would adequately meet the concerns expressed in 1984.

e. Court of International Trade

The Court of International Trade was created by the Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727. Under 28 U.S.C. § 2644, if the plaintiff in an action under section 515 of the Tariff Act of 1930 (19 U.S.C. § 1515) obtains monetary relief by judgment or stipulation, interest "shall be allowed." The monetary relief consists of the refunding of liquidated duties or other customs charges or exactions. Interest runs from the date of the filing of the summons to the date of the refund, at the rate established under section 6621 of the Internal Revenue Code.

[73]Memorandum of Disapproval of H.R. 5479, 20 Weekly Comp. Pres. Doc. 1814 (November 8, 1984).

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Through the end of 1993, Congress has not amended 28 U.S.C. § 2644 to reflect the 1986 amendment to 26 U.S.C. § 6621 which established separate overpayment and underpayment rates.

f. Judgment Offsets

As discussed earlier in this chapter, GAO has statutory authority to withhold payment of a judgment in order to set off debts owed to the United States by the judgment creditor. 31 U.S.C. § 3728. The statute includes an interest provision, 31 U.S.C. § 3728(c). If the government ultimately recovers less than the amount withheld, the balance must be paid over to the plaintiff with 6 percent interest for the time it has been withheld.

g. Contract Disputes Act

Section 12 of the Contract Disputes Act of 1978, 41 U.S.C. § 611, directs the payment of interest on contract claims from the date the contracting officer receives the claim to the date of payment. It applies whether the claim is allowed by the contracting officer, a board of contract appeals, or a court. The statute is described and discussed further under the Interest heading in Chapter 12.

h. Reimbursement to Medicare Providers

If a Medicare provider seeks judicial review of an adverse determination by the Provider Reimbursement Review Board, the reviewing court may award interest in accordance with 42 U.S.C. § 1395oo(f)(2). A case discussing the basic statutory requirements is Tucson Medical Center v. Sullivan, 947 F.2d 971 (D.C. Cir. 1991). The courts are not in agreement as to the proper rate of interest under this provision. See Sunshine Health Systems, Inc. v. Bowen, 842 F.2d 1097 (9th Cir. 1988), cert. denied, 488 U.S. 965; St. Joseph's Hospital v. Blue Cross and Blue Shield Ass'n, 721 F. Supp. 1160 (N.D. Cal. 1989); St. Agnes Hospital v. Bowen, 707 F. Supp. 24 (D.D.C. 1989).

i. Title VII of the Civil Rights Act

In the first wave of interest litigation to arise after Title VII was made applicable to the federal government, the courts held that there was no authority to award interest.[74] When the Back Pay Act was amended in 1987 to include an interest provision, some courts found the requisite waiver of

[74]Saunders v. Claytor, 629 F.2d 596 (9th Cir. 1980), cert. denied, 450 U.S. 980; Blake v. Califano, 626 F.2d 891 (D.C. Cir. 1980); DeWeever v. United States, 618 F.2d 685 (10th Cir. 1980); Fischer v. Adams, 572 F.2d 406 (1st Cir. 1978); Richerson v. Jones, 551 F.2d 918 (3d Cir. 1977). This result applied to attorney's fees as well as back pay awards. Library of Congress v. Shaw, 478 U.S. 310 (1986).

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sovereign immunity in the amended Back Pay Act, but they were not sure how far they could stretch this approach.[75]

In 1991, Congress amended Title VII (specifically, 42 U.S.C. § 2000e-16) to specify that "the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties." Civil Rights Act of 1991, Pub. L. No. 102-166, § 114, 105 Stat. 1071, 1079. The legislative history makes clear that this authority is intended to apply to attorney's fees as well as awards of back pay and other monetary damages. H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 85–87 (1991), and H.R. Rep. No. 40(II), 102d Cong., 1st Sess. 33–34 (1991), reprinted in 1991 U.S. Code Cong. & Admin. News 623–25 and 727, respectively. Apart from this, precisely how the authority is to be applied is not specified.

j. Superfund

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted in 1980 and substantially amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986).

Section 120, 42 U.S.C. § 9620, makes federal agencies liable under section 107 to the same extent as any nongovernmental entity. Section 107, 42 U.S.C. § 9607, prescribes liability for response costs and other items resulting from the release of certain hazardous substances. Under the amended section 107(a), a judgment for amounts recoverable under that section is to include interest at the rate specified for interest on investments of the Hazardous Substance Superfund determined in accordance with 26 U.S.C. § 9507(d). Section 106(b)(2), 42 U.S.C. § 9606(b)(2), includes similar language with respect to claims for reimbursement from Superfund. It appears that these provisions apply to judgments against the United States. See Santa Fe Pacific Realty Corp. v. United States, 780 F. Supp. 687, 696–97 (E.D. Cal. 1991); B-245482, April 8, 1992 (internal memorandum).[76]

[75]Brown v. Secretary of the Army, 918 F.2d 214 (D.C. Cir. 1990), aff'g Mitchell v. Secretary of Commerce, 715 F. Supp. 409 (D.D.C. 1989), and Brown v. Marsh, 713 F. Supp. 20 (D.D.C. 1989), cert. denied, 112 S. Ct. 57; Smith v. Brady, 744 F. Supp. 925 (N.D. Cal. 1990); Lee v. Brady, 741 F. Supp. 990 (D.D.C. 1990); Parker v. Burnley, 703 F. Supp. 925 (N.D. Ga. 1988). Contra, Roepsch v. Bentsen, 846 F. Supp. 1363 (E.D. Wis. 1994).

[76]The CERCLA/SARA legislation is enormously complex, and federal liability may arise in different contexts. Judgments and Justice Department compromise settlements for response costs or natural resource damages under CERCLA are, as a general proposition, payable under 31 U.S.C. § 1304 since there is nothing in the Superfund legislation or legislative history to make them "otherwise provided for," although actual determinations are made on a case-by-case basis. 73 Comp. Gen. 46 (1993).

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k. Suits in Admiralty Act and Public Vessels Act

A money judgment against the United States in a "libel in personam" under the Suits in Admiralty Act may include interest to the date of payment. The rate is 4 percent, except that a higher rate is allowable if stipulated in the contract, if any, upon which the suit was based. 46 U.S.C. App. § 743. Interest may not accrue prior to the filing of the suit except pursuant to an express contract stipulation. Id. § 745. Sample cases are Central Rivers Towing, Inc. v. City of Beardstown, 750 F.2d 565 (7th Cir. 1984); SCNO Barge Lines, Inc. v. Sun Transportation Co., 595 F. Supp. 356 (E.D. Mo. 1984).

Compound interest is not authorized. In one case, lower courts had awarded 4 percent prejudgment interest to the date of the decree, and 4 percent postjudgment interest on the sum of principal plus prejudgment interest from the date of the decree to the date of payment. "Compound interest is not presumed to run against the United States" said the Supreme Court, reversing the award of compound interest as improper. United States v. Isthmian Steamship Co., 359 U.S. 314, 325 (1959).

The Public Vessels Act incorporates the interest provisions of the Suits in Admiralty Act, except that interest may not accrue prior to the date of the judgment except pursuant to an express contract stipulation. 46 U.S.C. App. § 782. A sample case is Blevins v. United States, 769 F.2d 175 (4th Cir. 1985).

3. Nonstatutory Exceptions

a. Fifth Amendment Takings

As noted earlier, there are two nonstatutory exceptions to the no-interest rule. The first is Fifth Amendment takings. It must be emphasized that the term "just compensation" does not in and of itself create or imply an entitlement to interest. In order for the right to interest to exist independent of statute, there must be a cognizable claim to just compensation under the Fifth Amendment. Thus, where the Fifth Amendment is not involved, a statute providing for just compensation is not sufficient to authorize interest absent an express provision for interest. United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951); United States v. 106.64 Acres of Land, 264 F. Supp. 199 (D. Neb. 1967). Similarly, if an interest provision is derived from statute in a situation where interest is not required by the Fifth Amendment, Congress can repeal the provision as long as the repeal does not affect rights which have become vested by final judgment. 5 Op. Off. Legal Counsel 235 (1981).

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business with the agency if the debtor fails to pay a debt within a reasonable time. Section 102.9 is an expression of policy, not a mandatory requirement. Before invoking this authority, the agency should review relevant program legislation for possible restrictions. 1984 preamble, 49 Fed. Reg. at 8893.

An agency holding security or collateral should liquidate it if the debtor does not pay within a reasonable time, if the liquidation can be accomplished through the exercise of a power of sale in the security instrument or nonjudicial foreclosure, unless the cost of disposing of the collateral will be disproportionate to its value. The agency should give the debtor reasonable notice of the sale and an accounting of any surplus proceeds. 4 C.F.R. § 102.10.

The agency should document all collection actions taken and should retain the documentation in the appropriate claim file. 4 C.F.R. § 102.15. The Treasury Department has prepared a detailed sample checklist for this purpose, included as Appendix 4 to Managing Government Credit: A Supplement to the Treasury Financial Manual. Apart from its value during the administrative collection process, keeping a running record will greatly facilitate referring the debt to the Justice Department for litigation if that should become necessary. Also, to the extent feasible and cost effective, agencies should automate their debt collection operations. Id. § 102.16.

Agencies should perform periodic cost analyses of their collection operations. Cost data is useful for many purposes, not the least of which is justifying adequate resources for an effective collection program. See 4 C.F.R. § 102.14.

2. Demand Letters

Once the debtor is located, the next step is to inform him, her, or it of the government's claim and to solicit voluntary payment. This begins the "demand cycle." The demand cycle consists of a series of demand letters ("dunning letters") which inform the debtor of the consequences of failure to cooperate. The requirements for demand letters are found in 4 C.F.R. § 102.2.

Normally, the demand cycle will consist of three letters, in progressively stronger language, sent out at not more than 30-day intervals. Id. § 102.2(a). The first letter is particularly important. It should (1) explain the basis of the government's claim; (2) state the amount of the

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The taking exception is a discrete concept and cannot be used to open the back door to otherwise unauthorized interest awards. Thus, failure to pay interest on a claim or judgment, even a claim for refund of an overpayment, is not a "taking" of private property in violation of the Fifth Amendment. Getty Oil Co. v. United States, 767 F.2d 886 (Fed. Cir. 1985). Similarly, delay in paying a judgment is not a constitutional taking. Alaska Airlines, Inc. v. Johnson, 8 F.3d 791, 798 (Fed. Cir. 1993). "A party cannot be said to be deprived of his property in a judgment because at the time he is unable to collect it." Louisiana ex rel. Folsom v. Mayor of New Orleans, 109 U.S. 285, 289 (1883). See also B-173904, February 18, 1972 (GAO rejected claim that delay in payment of judgment resulting from need to get specific congressional appropriation constituted a compensable Fifth Amendment taking).

(1) Direct condemnation

Apart from the relatively infrequent legislative taking, the United States acquires land by condemnation either by invoking the Declaration of Taking Act (40 U.S.C. § 258a), in which event title vests in the United States the moment the declaration is filed, or by following the "complaint only" procedure (authorized generally by 40 U.S.C. § 257), under which the government does not acquire title until it tenders payment.

For takings under the Declaration of Taking Act, the Fifth Amendment would require interest even if the statute were silent. However, the Declaration of Taking Act has always included a provision for interest. Prior to 1986, the rate was fixed by statute at 6 percent. See 40 U.S.C. § 258a (1982 ed.). As interest rates rose dramatically during the 1970s, the courts began to award higher rates, holding that the statutory 6 percent rate was a floor rather than a ceiling. The rationale was that interest is an element of the just compensation mandated by the Constitution, and as such, the right cannot be diminished by Congress, in this instance by failing to amend a statutory rate which had become economically obsolete. United States v. 329.73 Acres of Land, 704 F.2d 800 (5th Cir. 1983); United States v. Blankinship, 543 F.2d 1272 (9th Cir. 1976). See also Miller v. United States, 620 F.2d 812, 837 (Ct. Cl. 1980).

In 1986, Congress amended the Declaration of Taking Act to replace the 6 percent rate with a rate based on the yield of 52-week Treasury bills. 40 U.S.C. § 258e-1, added by Pub. L. No. 99-656, 100 Stat. 3668 (1986). Interest is payable on the amount of the judgment in excess of the amount previously deposited with the court, and runs from the date of taking to

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the date of payment. The rate is the same as the rate determined under 28 U.S.C. § 1961(a), discussed later in this section, and is compounded annually. The one difference is that, under 40 U.S.C. § 258e-1, the rate is adjusted at the beginning of each additional year.

The interest provision of the Declaration of Taking Act applies only in the absence of a governing contract. Albrecht v. United States, 329 U.S. 599 (1947); Oliver v. United States, 155 F.2d 73 (8th Cir. 1946).

In a "complaint only" condemnation, the judgment establishing the value of the property operates essentially as an offer which the government may choose to accept by tendering payment. The taking does not occur unless and until the government tenders payment. Kirby Forest Industries v. United States, 467 U.S. 1 (1984). The judgment does not include interest because the value of the property can rise or fall before the "taking" occurs, but there must be some procedure for modifying the award to account for material changes in value between the time of valuation and time of payment. Id. at 16–19.

(2) Inverse condemnation

The jurisdictional basis for inverse condemnation suits is the Tucker Act—28 U.S.C. §§ 1346(a)(2) (district courts, claims under $10,000) and 1491 (Court of Federal Claims, claims over $10,000). The essence of the suit is a claim for a taking deemed compensable under the Fifth Amendment. Thus, inverse condemnation judgments commonly include interest. The Declaration of Taking Act, of course, does not apply.

The Court of Federal Claims uses the Contract Disputes Act rate for periods commencing January 1, 1980, in Fifth Amendment taking cases. Whitney Benefits, Inc. v. United States, 18 Cl. Ct. 394, 416 (1989), aff'd, 926 F.2d 1169 (Fed. Cir. 1991), cert. denied, 112 S. Ct. 406; Houser v. United States, 12 Cl. Ct. 454 (1987); Jones v. United States, 3 Cl. Ct. 4 (1983).[77] The court adopted this approach "[f]or purposes of uniformity in compensation of claims against the Government, flexibility in administration, notice to the public, and judicial efficiency." Foster v. United States, 3 Cl. Ct. 738, 745 (1983), aff'd mem., 746 F.2d 1491 (Fed. Cir. 1984), cert. denied, 471 U.S. 1053. The interest has traditionally been simple interest. Yaist v. United States, 17 Cl. Ct. 246, 261–62 (1989). However, the Court of Federal Claims has awarded compound interest where there has been a long delay

[77]See also Formanek v. United States, 26 Cl. Ct. 332, 341 n.11 (1992); Economic Development and Industrial Corp. v. United States, 13 Cl. Ct. 590 (1987); Henry v. United States, 8 Cl. Ct. 389 (1985); Cloverport Sand & Gravel Co. v. United States, 6 Cl. Ct. 178 (1984).

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between the "taking" and payment. Bowles v. United States, 31 Fed. Cl. 37 (1994); Whitney Benefits, Inc. v. United States, 30 Fed. Cl. 411 (1994).

(3) Delay compensation in patent infringement cases

The unauthorized manufacture or use of a patented device by or for the use of the United States is viewed as the taking of a property interest analogous to an eminent domain taking. Calhoun v. United States, 453 F.2d 1385, 1391 (Ct. Cl. 1972). The remedy is a suit in the Court of Federal Claims under 28 U.S.C. § 1498 for "reasonable and entire compensation." As an application of the Fifth Amendment taking concept, patent infringement judgments against the United States may include interest. Waite v. United States, 282 U.S. 508 (1931). Interest in patent infringement cases has become known as "delay compensation."

The rate to be applied as delay compensation in patent infringement cases has caused its share of litigation. Prior to 1977, the Court of Claims applied a flat 4 percent rate. In Pitcairn v. United States, 547 F.2d 1106 (Ct. Cl. 1977), cert. denied, 434 U.S. 1051, the court held that the 4 percent rate had become economically outmoded, and established a stepped percentage rate varying from 4 percent for the years 1947–1955 to 7.5 percent for the years 1971–1975. In Tektronix, Inc. v. United States, 552 F.2d 343, 352–53 (Ct. Cl. 1977), the court announced that it would apply the Pitcairn rates in future cases unless, for years after 1975, the claimant could affirmatively demonstrate that the rate should differ from the 7.5 percent rate set for 1971–1975.

In subsequent cases, the Court of Claims and its successors have used the rates determined under section 6621 of the Internal Revenue Code for post-1975 periods. Dynamics Corp. of America v. United States, 5 Cl. Ct. 591 (1984), aff'd in part and rev'd in part on other grounds, 766 F.2d 518 (Fed. Cir. 1985); Bendix Corp. v. United States, 676 F.2d 606 (Ct. Cl. 1982). Subsequent to the 1986 amendment to 26 U.S.C. § 6621 which established separate overpayment and underpayment rates, the court has referred to the rate for "overpayments" in Dynamics Corp., 5 Cl. Ct. at 617, and the "rate paid on tax refunds" in ITT Corp. v. United States, 17 Cl. Ct. 199, 239 (1989). (The court used the 52-week Treasury bill rate in ITT Corp., based on the agreement of the parties.)

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It is also possible that the court may some day establish a common rate for both inverse condemnation and patent infringement cases, although it has thus far declined to do so.[78]

As with inverse condemnation judgments, delay compensation in patent infringement cases has traditionally been limited to simple interest. Dynamics Corp., 5 Cl. Ct. at 619. However, the Court of Appeals for the Federal Circuit has suggested that compound interest may be more appropriate in certain cases. Dynamics Corp., 766 F.2d 518 at 520. Following this suggestion, the Claims Court awarded compound interest in ITT Corp., cited above.

GAO will not automatically add interest in a patent infringement case. It is viewed as a judicial function and must be expressly awarded in the judgment. 59 Comp. Gen. 380 (1980).

Delay compensation has been denied where a judgment under 28 U.S.C. § 1498 was based on a stipulation of settlement which purported to be in full satisfaction of all claims and which did not specifically provide for interest. Simmonds Precision Products, Inc. v. United States, 183 Ct. Cl. 969 (1968); Regent Jack Mfg. Co. v. United States, 179 Ct. Cl. 924 (1967); 59 Comp. Gen. 380 (1980).

b. Commercial Ventures

The second nonstatutory exception to the no-interest rule is what we will call the "commercial venture" exception. It originated essentially with the Supreme Court's decision in Standard Oil Co. v. United States, 267 U.S. 76 (1925). The United States, under World War I legislation, had insured a steamship against certain war risks. The steamship sunk, and the main issue in the litigation was whether the insurance policy applied to the facts of the case. The Supreme Court found the policy applicable, and also awarded interest. Speaking for the Court, Justice Holmes said:

> "Some question was made as to the allowance of interest. When the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business."

Id. at 79. Five years later, in a case often cited in tandem with Standard Oil, the Court distinguished Standard Oil and denied interest to the beneficiary

[78]"This court is of the opinion that the goal of establishing a uniform policy regarding delay compensation in eminent domain cases, although desirable, must give way to the established law that there is no fixed formula for establishing compensation for fifth amendment takings." ITT Corp., 17 Cl. Ct. at 236.

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of a soldier under a government-issued life and disability insurance policy. United States v. Worley, 281 U.S. 339 (1930).

One group of "commercial venture" cases follows fairly directly from Standard Oil. In Bituminous Casualty Corp. v. Lynn, 503 F.2d 636 (6th Cir. 1974), the court awarded interest on a recovery under a reinsurance contract issued by the Department of Housing and Urban Development. Citing the Standard Oil and Worley cases, the court noted the "well defined" exception to the no-interest rule when a federal agency "embarks on a business venture" with the power to sue and be sued. Id. at 643. The court stated three grounds for the interest award: HUD's sue-and-be-sued clause, the "self-supporting nature" of the HUD program, and the fact that the transactions resembled those of private parties. Id. at 645.

More recently, the Court of Appeals for the Fifth Circuit analyzed Standard Oil and Worley and denied interest in R&R Farm Enterprises, Inc. v. Federal Crop Insurance Corp., 788 F.2d 1148 (5th Cir. 1986) (rice crop insurance policy issued by FCIC), and in A.L.T. Corp. v. Small Business Administration, 823 F.2d 126 (5th Cir. 1987). These cases state the test as whether the agency's activity is primarily commercial and whether it aspires to profitability. R&R, 788 F.2d at 1153; A.L.T., 823 F.2d at 128.[79]

Another group of cases involves the United States Postal Service. The court in Nagy v. United States Postal Service, 773 F.2d 1190 (11th Cir. 1985), awarded interest on back pay in a Title VII discrimination case. Similar holdings are Perez v. United States, 830 F.2d 54 (5th Cir. 1987) (Federal Tort Claims Act judgment); Hall v. Bolger, 768 F.2d 1148 (9th Cir. 1985) (interest on attorney's fees in handicap discrimination case); White v. Bloomberg, 501 F.2d 1379 (4th Cir. 1974) (interest on award under pre-1988 version of Back Pay Act). The rationale of these cases is that the Postal Service's sue-and-be-sued clause is a waiver of sovereign immunity which subjects it to liability for interest. The nature of the Postal Service's "business," its funding structure, and its self-sufficiency or lack thereof do not appear to have been significant factors apart from passing mention in Perez that the Postal Service "is designed to be self-supporting and to operate very much like a commercial business." 830 F.2d at 60.

[79]Some years earlier, in Payne v. Panama Canal Company, 607 F.2d 155 (5th Cir. 1979), the court awarded prejudgment interest in a suit under the Back Pay Act. The case was decided before the Back Pay Act was amended to expressly authorize interest. At the time, the (former) Panama Canal Company was a government corporation authorized to sue and be sued, but the extent to which the sue-and-be-sued clause weighed in the court's decision is debatable.

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The courts of appeals split on whether prejudgment interest could be awarded against the Postal Service in Title VII cases under the pre-1991 version of the statute. The Eighth Circuit disagreed with Nagy and held that interest was not authorized. Loeffler v. Carlin, 780 F.2d 1365 (8th Cir. 1985), aff'd en banc, Loeffler v. Tisch, 806 F.2d 817 (8th Cir. 1986). The Supreme Court granted certiorari in the Loeffler case and agreed with the Nagy result. Loeffler v. Frank, 486 U.S. 549 (1988). For our purposes here, the crucial passage in the Court's decision is the following:

> "By launching 'the Postal Service into the commercial world,' and including a sue-and-be-sued clause in its charter, Congress has cast off the Service's 'cloak of sovereignty' and given it the 'status of a private commercial enterprise.' . . . It follows that Congress is presumed to have waived any otherwise existing immunity of the Postal Service from interest awards."

Id. at 556. The Court further noted that the interest award would not be inconsistent with the Postal Service's enabling legislation (Postal Reorganization Act), would not threaten "grave interference" with the Service's operations, and was not contrary to anything in the legislative history of the Service's sue-and-be-sued authority. Id. at 556–57. Thus, since prejudgment interest could be awarded against a private Title VII defendant, it could be awarded against the Postal Service. See also Maksymchuk v. Frank, 987 F.2d 1072 (4th Cir. 1993).

Based on the Supreme Court's Loeffler formulation, it seems clear that the "commercial venture" exception to the no-interest rule requires several things. First, there must be a sue-and-be-sued clause. Second, the agency or program involved must be one that Congress has "launched into the commercial world." A sue-and-be-sued clause alone is not enough. Pender Peanut Corp. v. United States, 21 Cl. Ct. 95 (1990). Finally, liability for interest must not be inconsistent with the relevant enabling or program legislation.

Applying the Loeffler criteria, courts have refused to apply the "commercial venture" exception to federal agencies which do not have sue-and-be-sued clauses and which are engaged in primarily governmental, as opposed to commercial, functions. McGehee v. Panama Canal Commission, 872 F.2d 1213 (5th Cir. 1989) (unlike the Panama Canal Company which it replaced, the Commission is not a corporation and was not given sue-and-be-sued authority); Wilson v. United States, 756 F. Supp. 213 (D.N.J. 1991) (former Veterans Administration).

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4. 28 U.S.C. § 1961 and the Federal Courts Improvement Act

A law has been on the books since 1842 authorizing postjudgment interest on district court civil judgments against private litigants. The statute had been variously designated over the years, most recently as 28 U.S.C. § 1961 (1976 ed.). Prior to 1982, the rate was the rate allowed by state law.

The courts had uniformly held that the pre-1982 version of 28 U.S.C. § 1961 did not apply to suits against the United States. United States v. Sherman, 98 U.S. 565, 567 (1878);[80] Huntley v. Southern Oregon Sales, Inc., 104 F.2d 153 (9th Cir. 1939); Reed v. Howbert, 77 F.2d 227 (10th Cir. 1935); United States v. 125.71 Acres of Land, 54 F. Supp. 193, 195 (W.D. Penn. 1944). See also B-191028, March 27, 1978. The most recent and most definitive ruling on this point was Holly v. Chasen, 639 F.2d 795 (D.C. Cir. 1981), cert. denied, 454 U.S. 822, holding that 28 U.S.C. § 1961 did not authorize interest on a judgment awarding attorney's fees against the United States under the Freedom of Information Act.

In 1982, Congress amended 28 U.S.C. § 1961 by section 302 of the Federal Courts Improvement Act (FCIA), 96 Stat. 25, 55 (1982). Subsections (a) and (b) provide as follows:

"(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. . . .

"(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually."

Thus, subsection (a) replaced the former reference to rates under state law with a uniform federal rate based on the yield of 52-week Treasury bills. Subsection (b) makes interest run to the date of payment except as provided in the two referenced statutes, discussed later in this section, dealing with interest on certain judgments against the United States.

Given the cross-references in subsection (b), or perhaps even without them, it was inevitable that the applicability of 28 U.S.C. § 1961 to the United States would again come into question. It did, and with a vengeance. We cite below decisions of United States Courts of Appeals from six different circuits holding that 28 U.S.C. § 1961, as amended by the

[80]While the Court referred only to "Federal legislation" and did not cite the predecessor of 28 U.S.C. § 1961, there was at the time no other "Federal legislation" providing for postjudgment interest to which the Court could possibly have been referring.

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FCIA, is not a waiver of sovereign immunity and does not by itself authorize postjudgment interest against the United States:

- District of Columbia Circuit: Thompson v. Kennickell, 797 F.2d 1015 (D.C. Cir. 1986), cert. denied, 480 U.S. 905. This case includes a detailed and comprehensive analysis of the law with respect to postjudgment interest against the United States. The court concluded that if Congress had intended "the massive increase in the government's liability for post-judgment interest" (id. at 1025) that would result from construing the FCIA as a waiver of sovereign immunity, it would have done so in a more explicit manner.
- Fourth Circuit: Blevins v. United States, 769 F.2d 175 (4th Cir. 1985).
- Fifth Circuit: A.L.T. Corp. v. Small Business Administration, 823 F.2d 126 (5th Cir. 1987). See also Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, 735 F.2d 895 (5th Cir. 1984).
- Eighth Circuit: Rimmel v. Mercantile Trust Co. National Association, 774 F.2d 279 (8th Cir. 1985).
- Ninth Circuit: Bernardi v. Yeutter, 951 F.2d 971, 976 (9th Cir. 1991); International Woodworkers v. Donovan, 769 F.2d 1388 (9th Cir. 1985).
- Eleventh Circuit: Arvin v. United States, 742 F.2d 1301 (11th Cir. 1984).

Several district courts have made the same point. E.g., Wilson v. United States, 756 F. Supp. 213 (D.N.J. 1991); Easley v. United States, 719 F. Supp. 145 (W.D.N.Y. 1989); Sansom v. United States, 707 F. Supp. 1296 (N.D. Fla. 1989); Squillacote v. United States, 626 F. Supp. 127 (E.D. Wis. 1985). And see In re Tecumseh Construction Co., 157 B.R. 471 (Bankr. E.D. Cal. 1993).

It should be clear from other portions of our discussion that Congress has chosen to deal with the topic of interest against the United States on a situational basis, enacting or amending legislation in specific contexts as deemed necessary or desirable. This long-standing pattern is further evidence that Congress is not likely to have changed the fundamental premise of 28 U.S.C. § 1961 without doing so in a much more explicit manner. See, e.g., Arvin, 742 F.2d at 1304.

Thus, it would appear safe to regard the proposition as settled that 28 U.S.C. § 1961 does not waive the government's sovereign immunity with respect to postjudgment interest. It may be relevant in other ways, such as prescribing the proper rate of interest in certain cases, but the underlying authority to award the interest must be found elsewhere.

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5. Judgments of the Court of Federal Claims

The Court of Claims was established in 1855[81] and empowered to render judgments against the United States in 1863.[82] In 1982, it was replaced with two new courts. The trial function (the former trial commissioners) became the United States Claims Court and the appellate function became the Court of Appeals for the Federal Circuit.[83] In 1992, the Claims Court was renamed the Court of Federal Claims.[84] Prior to 1982, there was no intermediate appellate court and appeals from Court of Claims judgments were taken directly to the Supreme Court. Since 1982, appeals go first to the Federal Circuit and then to the Supreme Court.

We address here situations not governed by any of the previously noted specific interest statutes or nonstatutory exceptions.

Prejudgment interest is governed by 28 U.S.C. § 2516(a), which essentially codifies the traditional no-interest rule:

"Interest on a claim against the United States shall be allowed in a judgment of the United States Court of Federal Claims only under a contract or Act of Congress expressly providing for payment thereof."

The statute means exactly what it says. The authority to award interest may not be implied, nor may it be derived from some expression of intent not reflected in explicit statutory or contractual language. United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 659 (1947).

Postjudgment interest is authorized only when the United States appeals to the Supreme Court and loses, and then only from the date a copy of the judgment is filed with GAO to the mandate of affirmance. The authority is found in 3 statutes which must be read together. First is 28 U.S.C. § 2516(b), as amended in 1982 by the Federal Courts Improvement Act:

"Interest on a judgment against the United States affirmed by the Supreme Court after review on petition of the United States is paid at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately before the date of the judgment.

[81]Act of February 24, 1855, ch. 122, 10 Stat. 612.

[82]Act of March 3, 1863, ch. 92, § 3, 12 Stat. 765.

[83]Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

[84]Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, Title IX, 106 Stat. 4506, 4516.

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Next, 31 U.S.C. § 1304(b)(1)(B) prescribes the beginning and ending dates for interest authorized under 28 U.S.C. § 2516(b) by making the judgment appropriation available for interest—

"on a judgment of the Court of Appeals for the Federal Circuit or the United States Court of Federal Claims under section 2516(b) of title 28, only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance."

The third statute is 28 U.S.C. § 1961, also as amended by the Federal Courts Improvement Act. Subsection (a), quoted earlier in this section, establishes a uniform federal rate for postjudgment interest (which 28 U.S.C. § 2516(b) essentially duplicates). Subsection (b), also quoted earlier, makes section 1961 expressly subject to 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b). Portions of subsection (c) are set forth below:

"(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at [the appropriate rate determined under 26 U.S.C. § 6621].

"(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal Circuit, at the rate provided in subsection (a) and as provided in subsection (b).

"(3) Interest shall be allowed, computed, and paid on judgments of the United States Court of Federal Claims only as provided in paragraph (1) of this subsection or in any other provision of law."

"Any other provision of law" means a statute expressly authorizing interest on Court of Federal Claims judgments against the United States. Jetco, Inc. v. United States, 11 Cl. Ct. 837 (1987). See also Ulmet v. United States, 19 Cl. Ct. 527, 536–37 (1990). One such statute, of course, is 28 U.S.C. § 2516(b).

Analyzing the language of these 3 statutes together, it is possible to formulate some rules. For tax cases, the applicable rate of interest is

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indebtedness; (3) specify the payment due date, which normally should be not more than 30 days after the initial demand; and (4) set forth the applicable requirements for assessing interest. Id. § 102.2(b). Other items, several of which are specified in section 102.2(c), may also be included as appropriate to the circumstances.

The tone of the letter is also important. The objective is to encourage voluntary payment. While the letter should be firm, an overly harsh or threatening tone gains little. The letter should also be written in "plain English." A letter which requires a team of lawyers to decipher is not likely to serve its intended purpose.

It is important to emphasize that the use of three demand letters is not an absolute requirement. The first letter is always necessary, although the Standards recognize that even it may be preceded by other actions when necessary to protect the government's interests, for example, referring the debt to the Justice Department in cases where collection action has not begun until the statute of limitations is about to expire. Id. § 102.2(a). As the 1984 preamble noted, "the agency should not be required to follow the demand cycle if doing so would result in loss of the Government's ability to sue on the debt." 49 Fed. Reg. at 8890.

In addition, the agency may send fewer than three demand letters where the debtor's response to the first or second letter indicates that further letters would be futile. 4 C.F.R. § 102.2(a). Conversely, nothing prohibits the agency from sending more than three letters, although it would be the rare case in which this would be a productive effort.

Demand letters should be mailed or hand-delivered on the same day that they are dated. Id. § 102.2(b). "If a demand letter is going to impose a deadline on a debtor, the time allowed should not be eroded by the agency's delay in processing the letter." 1984 preamble, 49 Fed. Reg. at 8890. Naturally, the agency should respond promptly to any communications from the debtor. 4 C.F.R. § 102.2(d).

The availability of funds for offset is another reason for deviating from the normal demand cycle. If the agency has a source of funds available for offset and intends to use it, it need not pursue any other collection actions. However, the agency still must send the debtor a letter notifying the debtor of the agency's intention to collect by offset. The agency must also comply with the requirements of the applicable offset statute. 4 C.F.R. § 102.2(e). Exactly what else this letter must contain depends on precisely

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governed by the interest provisions of the Internal Revenue Code.[85] For nontax cases not subject to some other specific interest provision:[86]

- If the United States does not appeal from a Court of Federal Claims judgment, there is no interest.[87]
- If a Court of Federal Claims judgment is appealed to the Federal Circuit and affirmed, interest does not accrue during that appeal no matter who files what.
- If the United States appeals from the Federal Circuit to the Supreme Court (petition for certiorari), and the Supreme Court affirms the Federal Circuit, interest is payable, at the 52-week Treasury bill rate set forth in 28 U.S.C. § 2516(b), from the date the plaintiff files a copy of the judgment with GAO to the Supreme Court's mandate of affirmance or the end of the term at which the judgment was affirmed, whichever occurs sooner (31 U.S.C. § 1304(b)(2)).

The concept of 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b)—interest only when the government unsuccessfully takes the case to the Supreme Court and then only between specified beginning and ending dates—goes back to 1863.[88] Historically, interest was not allowable during the period that determinations by trial commissioners were under review by the full Court of Claims. While some details have changed from time to time (for example, the shift in 1982 from a flat 4 percent rate to the Treasury bill rate), the basic concept has been followed ever since.

To understand the effect of the Federal Courts Improvement Act of 1982, resort to the legislative history is very helpful. The substantive changes to 28 U.S.C. §§ 1961 and 2516(b) stem from Unprinted Amendment No. 766, and the legislative history consists of comments by Senator Grassley and two letters from the Office of Management and Budget. This material, found at 127 Cong. Rec. 29865–67 (1981) and discussed in Ulmet v. United States, 19 Cl. Ct. 527 (1990), clearly establishes the intent to retain the concept of interest only in cases of an unsuccessful appeal to the Supreme Court.

[85]"Tax cases" in this context does not mean any case in which the IRS happens to be involved. The term refers to refund actions by "taxpayers who have overpaid their taxes . . . and are within the administrative system providing for the recovery of overpaid taxes." Economy Plumbing & Heating Co. v. United States, 470 F.2d 585, 592 (Ct. Cl. 1972).

[86]These rules also reflect the Justice Department's interpretation. See Department of Justice, Commercial Litigation Branch Monograph, Interest on Claims By and Against the Government 7–9 (June 1984).

[87]Dictum to the contrary in Squillacote v. United States, 626 F. Supp. 127, 130 (E.D. Wis. 1985), apparently prompted by misunderstandings of the parties, is incorrect.

[88]Act of March 3, 1863, ch. 92, § 7, 12 Stat. 765, 766.

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Since the essence of the old law—interest only in cases affirmed by the Supreme Court—has been retained, much of the pre-1982 case law remains relevant. Thus, the "date of the mandate of affirmance" in this context means the date the mandate is issued. 5 Comp. Gen. 832 (1926). Interest is not authorized where the Supreme Court denies the government's petition for certiorari. 30 Comp. Gen. 238 (1950); 7 Comp. Gen. 128 (1927). However, if the Supreme Court reduces and affirms a Court of Federal Claims judgment, interest is payable on the reduced amount if the other statutory conditions are met. 4 Comp. Dec. 571 (1898).

The statutes discussed in this section do not authorize interest in cases of delay resulting from various postjudgment motions or from the government's consideration of whether to seek further review, including any permissible extensions of time. 62 Comp. Gen. 4 (1982). Delays of this sort are compensable only if and to the extent they are included within the permissible range of interest accrual specified in the governing statutes.

What about compound interest, or interest on interest? When might prejudgment and postjudgment interest both be available on the same judgment? As noted earlier, if prejudgment interest is authorized and stops at the date of the judgment, it is considered part of the judgment and any authorized postjudgment interest would be computed on the sum of principal plus prejudgment interest. B-111945, November 13, 1952. However, the postjudgment interest statutes do not apply to a judgment, or portion thereof, which itself provides for interest beyond its entry. Cherokee Nation v. United States, 270 U.S. 476 (1926); 18 Comp. Gen. 873 (1939). Thus, a judgment which awards prejudgment interest to the date of payment does not earn postjudgment interest in addition, regardless of appeals or filings. (This principle would seem equally applicable to district court judgments.)

One final statute, 28 U.S.C. § 2517(b), warrants brief mention. It provides that "[p]ayment of any such judgment and of interest thereon shall be a full discharge to the United States of all claims and demands arising out of the matters involved in the case or controversy," unless designated a partial judgment. This subsection is not an independent authorization of interest. 40 Comp. Gen. 286 (1960); B-158778, April 14, 1966. Rather, it merely states the effect that payment, including interest where authorized, shall have; that is, claims for additional amounts arising out of the same matters may not be allowed. 40 Comp. Gen. at 287; 53 Comp. Gen. 813 (1974). Although not similarly specified by statute, payment of a district court judgment will have the same effect. 59 Comp. Gen. 624 (1980).

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6. District Courts: 31 U.S.C. § 1304(b)

For certain district court judgments, 31 U.S.C. § 1304(b)(1)(A) provides:

"Interest may be paid from the appropriation made by this section—(A) on a judgment of a district court, only when the judgment becomes final after review on appeal or petition by the United States Government, and then only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance[.]"

While this provision may at first glance appear to be an authorization, it is in reality a limitation and by itself authorizes nothing.

a. Applicability

(1) Federal Tort Claims Act

When you eliminate the cases subject to the previously noted specific interest statutes or nonstatutory exceptions, by far the largest remaining category of cases which generate money judgments against the United States are suits under the Federal Tort Claims Act (FTCA).

Prejudgment interest is expressly prohibited by the FTCA itself. Under 28 U.S.C. § 2674, the United States "shall not be liable for interest prior to judgment." The plain meaning of this is to prohibit "compensation for the use of money damages prior to the judgment awarding those damages." Southern Pacific Transp. Co. v. United States, 471 F. Supp. 1186, 1197 (E.D. Cal. 1979).

Prior to the enactment of the judgment appropriation, postjudgment interest was authorized on FTCA judgments, at a statutory rate of 4 percent, from the date of the judgment to a date not to exceed 30 days after enactment of an appropriation to pay the judgment. See 28 U.S.C. § 2411(b) (1976 ed.). This provision never applied to all district court judgments, only to "actions instituted under section 1346 of this title," which included the FTCA.

When the judgment appropriation was originally enacted in 1956, one of the main objectives was "to reduce the total amount of interest paid by the government." H.R. Rep. No. 2638, 84th Cong., 2d Sess. 72 (1956). A more detailed explanation of this purpose is found in a statement by the Office of Management and Budget,[89] relevant portions of which are quoted in 58 Comp. Gen. 67, 71 (1978) and 62 Comp. Gen. 4, 7–8 (1982). The interest reduction would occur by modifying the district court interest

[89]Hearings on Supplemental Appropriation Bill, 1957, Before Subcomm. of the House Comm. on Appropriations, 84th Cong., 2d Sess., pt. 2, at 883–885 (1956).

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provisions—the then-existing 28 U.S.C. § 2411(b)—to make them consistent with those for the Court of Claims (interest only where the government unsuccessfully appeals). Congress did not amend 28 U.S.C. § 2411(b) directly, but instead modified it by enacting 31 U.S.C. § 1304(b)(1)(A). The intent was unmistakable as the original version of subsection (b)(1)(A) explicitly referenced 28 U.S.C. § 2411(b). The very fact that judgments could now be paid promptly upon becoming final would also contribute to reducing the amount of interest the government would otherwise be required to pay.

Since the original judgment appropriation applied only to judgments not in excess of $100,000, the larger judgments continued to be governed by 28 U.S.C. § 2411(b).[90] When the $100,000 ceiling was removed in 1977, once again a stated purpose was to reduce the amount of interest payable by the United States.[91] This would be done by making judgments in excess of $100,000 subject to the restrictions of 31 U.S.C. § 1304(b)(1)(A).

The rationale of subsection (b)(1)(A) is the same as the rationale of the old 28 U.S.C. § 2411(b)—to compensate a successful plaintiff for substantial government-caused delay in receiving payment. Before 1956, the delay was inherent in all cases by virtue of the need to await specific appropriations. Now, with this no longer a concern, subsection (b)(1)(A) recognizes the one situation—an appeal by the government—in which actions by the government (apart from processing delays, which have never been compensable) can still produce a significant delay in payment.

Notwithstanding the apparent clarity of the statutory language, postjudgment interest on FTCA judgments became the subject of seemingly endless litigation. The courts firmly established that interest could not be awarded except in compliance with 31 U.S.C. § 1304(b)(1)(A). E.g., Reminga v. United States, 695 F.2d 1000 (6th Cir. 1982), cert. denied, 460 U.S. 1086; Rooney v. United States, 694 F.2d 582 (9th Cir. 1982); DeLucca v. United States, 670 F.2d 843 (9th Cir. 1982); United States v. Culp, 346 F.2d 35 (5th Cir. 1965).[92]

[90]See, e.g., Bonn v. Puerto Rico Int'l Airlines, Inc., 518 F.2d 89, 95 (1st Cir. 1975); Layne v. United States, 460 F.2d 409, 412 (9th Cir. 1972).

[91]S. Rep. No. 64, 95th Cong., 1st Sess. 206 (1977); H.R. Rep. No. 68, 95th Cong., 1st Sess. 184 (1977).

[92]See also Kelley v. United States, 568 F.2d 259, 268 (2d Cir. 1978), cert. denied, 439 U.S. 830; Black v. United States, 444 F.2d 1215, 1217 (10th Cir. 1971); United States v. Varner, 400 F.2d 369 (5th Cir. 1968); United States v. Maryland ex rel. Meyer, 349 F.2d 693 (D.C. Cir. 1965); United States v. Wells, 337 F.2d 615 (5th Cir. 1964); United States v. Jacobs, 308 F.2d 906 (5th Cir. 1962); Chicago, Rock Island & Pacific Ry. Co. v. United States, 206 F. Supp. 795 (S.D. Iowa 1962).

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Similar claims were presented to the Comptroller General. In the typical case, either the government did not appeal or the judgment was not filed with GAO. The result was consistently the same: interest was not allowable unless the conditions specified in 31 U.S.C. § 1304(b) had been met. The most comprehensive discussion in the GAO decisions is found in B-191028, March 27, 1978.[93]

In 1982, the Federal Courts Improvement Act replaced the old 4 percent interest rate with a rate based on the yield of 52-week Treasury bills. At the same time, the 1982 legislation repealed 28 U.S.C. § 2411(b) and struck the specific reference to it in 31 U.S.C. § 1304(b)(1)(A). This made it possible to argue that Congress intended to withdraw its waiver of sovereign immunity for postjudgment interest on FTCA judgments. However, nowhere in the legislative history of the 1982 legislation is there the slightest hint of an intent to produce this result. Accordingly, although neither agency has formally addressed the point, GAO and the Justice Department continue to regard interest on FTCA judgments as payable if the conditions of subsection (b)(1)(A) are satisfied.

The courts have also continued to apply subsection (b)(1)(A) to judgments under the Federal Tort Claims Act. See, e.g., Andrulonis v. United States, 26 F.3d 1224 (2d Cir. 1994); Transco Leasing Corp. v. United States, 992 F.2d 552 (5th Cir. 1993); Desart v. United States, 947 F.2d 871 (9th Cir. 1991); Starns v. United States, 923 F.2d 34 (4th Cir. 1991); Lucas v. United States, 807 F.2d 414 (5th Cir. 1986); Cardillo v. United States, 767 F.2d 33 (2d Cir. 1985); MacDonald v. United States, 825 F. Supp. 683 (M.D. Pa. 1993).[94] See also Wilson v. United States, 756 F. Supp. 213 (D.N.J. 1991) (court refused to award interest under 28 U.S.C. § 1961).

As a final note, another phrase in 31 U.S.C. § 1304 has caused some confusion. The "appropriating language" found at 31 U.S.C. § 1304(a) makes the appropriation available for "interest and costs specified in the judgments or otherwise authorized by law." On the surface, this appears to

[93]A few others are 44 Comp. Gen. 421 (1965); B-180210, February 27, 1974; B-160583, January 11, 1967; B-144182, October 19, 1960.

[94]Also: Hull by Hull v. United States, 971 F.2d 1499, 1506–09 (10th Cir. 1992); Brooks v. United States, 757 F.2d 734 (5th Cir. 1985); Gross v. United States, 723 F.2d 609 (8th Cir. 1983); Moyer v. United States, 612 F. Supp. 239 (D. Nev. 1985); Goodkin v. United States, 600 F. Supp. 1459 (E.D.N.Y. 1985). With this many cases on the books in addition to the plain language of the statute, one might almost be tempted to regard it as negligence for a plaintiff's attorney to fail to file a copy of the judgment with GAO. In Wolfe v. Gilreath, 699 S.W. 2d 805 (Tenn. App. 1985), clients sued their attorney for legal malpractice on precisely those grounds. While the suit turned out to be barred by the statute of limitations, the court felt that "defendant, in fact, had been guilty of negligence which had caused the loss of the interest on their judgments." Id. at 807.

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permit interest by the simple device of including it in the judgment. Such an interpretation would have the anomalous result of effectively abolishing the no-interest rule with respect to judgments through a statute intended to reduce interest costs. The only legislative history addressing this language is a brief discussion appearing on page 885 of the Hearings cited previously. It explains that the purpose of the "interest . . . specified in the judgment" language was merely to permit the payment of prejudgment interest in cases where awarding it is discretionary with the court, and this has been GAO's consistent interpretation. B-236958, October 3, 1989 (non-decision letter); B-163682, March 18, 1968; B-141540, March 24, 1960.

(2) The "Little Tucker Act"

As noted above, prior to 1982, 31 U.S.C. § 1304(b)(1)(A) was expressly limited to judgments covered by 28 U.S.C. § 2411(b), which in turn applied to "actions instituted under" 28 U.S.C. § 1346. Section 1346 is the jurisdictional provision for three types of suits which can result in money judgments against the United States—tax cases, Federal Tort Claims Act, and the district court portion of the Tucker Act (non-tort claims not exceeding $10,000, the so-called "Little Tucker Act"). Since tax cases were governed by other specific interest provisions, the old 28 U.S.C. § 2411(b) applied essentially to the Federal Tort Claims Act and the "Little Tucker Act." Thus, prior to 1982, the rules for postjudgment interest on Federal Tort Claims Act judgments applied equally to "Little Tucker Act" judgments. E.g., Eastern Service Mgmt. Co. v. United States, 363 F.2d 729 (4th Cir. 1966); United States v. Mississippi Valley Barge Line Co., 285 F.2d 381 (8th Cir. 1960); B-182346, February 4, 1975.[95]

Under the restructuring brought about by the Federal Courts Improvement Act of 1982, Little Tucker Act judgments are now appealed to the Court of Appeals for the Federal Circuit rather than to the numbered circuits. Thus, interest on Little Tucker Act judgments is now governed by the rules applicable to the Court of Federal Claims and Federal Circuit. Zumerling v. Marsh, 783 F.2d 1032 (Fed. Cir. 1986). See also Thompson v. Kennickell, 797 F.2d 1015, 1026 n.7 (D.C. Cir. 1986), cert. denied, 480 U.S. 905.

[95]One will find the occasional aberration. For example, Caola v. United States, 404 F. Supp. 1101 (D. Conn. 1975), was a "Little Tucker Act" case in which the court awarded interest under 28 U.S.C. § 2411(b). However, in a subsequent unpublished order (Civil No. H75-110, April 10, 1978), the court agreed to reconsider the propriety of the interest award. The judgments in that case were in fact paid without interest.

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(3) Other situations

Prior to 1982, there could be no "other situations." The explicit statutory language of 31 U.S.C. § 1304(b)(1)(A) precluded its application beyond the situations noted above. For example, actions under Title VII of the Civil Rights Act are not brought under the jurisdictional authority of 28 U.S.C. § 1346 but under separate jurisdictional provisions of the Civil Rights Act itself. Thus, subsection (b)(1)(A) was inapplicable by its terms, and interest was not payable on Title VII judgments regardless of appeals or filings. B-195809-O.M., March 30, 1981.

By the repeal of 28 U.S.C. § 2411(b) and the elimination of the reference to it in 31 U.S.C. § 1304(b)(1)(A), the Federal Courts Improvement Act at least changed the nature of the analysis. It is now necessary to address whether 31 U.S.C. § 1304 is a waiver of sovereign immunity. If it is, then it can be argued that subsection (b)(1)(A) applies across the board because the language that limited its application from 1956 to 1982 is no longer there. If it is not, then its application has not expanded from what it was before the 1982 amendments.

In Thompson v. Kennickell, 797 F.2d 1015 (D.C. Cir. 1986), cert. denied, 480 U.S. 905, the court considered this precise issue. Although the case involved interest on a Title VII judgment and its result has been presumably superseded by the Civil Rights Act of 1991, it remains important for its extensive discussion of postjudgment interest against the United States both before and after the Federal Courts Improvement Act. The plaintiff argued that, because of the repeal of 28 U.S.C. § 2411(b), postjudgment interest is now payable on all district court judgments because the alternative—the elimination of previously authorized interest on Federal Tort Claims Act and Little Tucker Act judgments—could not have been intended. The court disagreed. While declining to address the possible curtailment of previously available interest, the court found no new waiver of sovereign immunity in the 1982 legislation. Section 1304, noted the court, "refers to statutory provisions other than itself to determine when the United States must pay post-judgment interest." Id. at 1021 n.1.

Similarly, Arvin v. United States, 742 F.2d 1301, 1305 (11th Cir. 1984), found no waiver of sovereign immunity in 31 U.S.C. § 1304.[96] In view of this, in conjunction with the previously cited line of cases holding that 28 U.S.C.

[96]In contrast, the courts in Andrulonis v. United States, 26 F. 3d 1224 (2d Cir. 1994), and MacDonald v. United States, 825 F. Supp. 683 (M.D. Pa. 1993), did regard section 1304 as a waiver of sovereign immunity, but were applying it in the context of a Federal Tort Claims Act judgment.

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§ 1961 does not waive sovereign immunity, and the legislative history of the Federal Courts Improvement Act amendments as detailed in Kennickell, it would appear that the scope of 31 U.S.C. § 1304(b) has not expanded by virtue of the 1982 legislation.

A case we should note although its impact should be minimal is United States v. Wilson, 926 F.2d 725 (8th Cir. 1991). The United States brought a quiet title action as trustee on behalf of an Indian tribe against non-Indian defendants. The tribe prevailed on its claim, but the United States was ordered to compensate the defendants for improvements they had made while in possession of the disputed land. The district court also ordered the United States to pay postjudgment interest in accordance with 31 U.S.C. § 1304. The defendants appealed, seeking interest from the date of judgment to the date of payment. The appellate court affirmed the district court's judgment, noting that the order to pay postjudgment interest had not been appealed and therefore was the "law of the case."

b. Implementation

(1) Filing procedures

Interest begins to accrue from the date a "transcript of the judgment" is filed with GAO. 31 U.S.C. § 1304(b)(1)(A). The editors of this chapter confess that they have not the slightest idea what a "transcript" of a judgment is. Generally speaking, a simple photocopy of the judgment will suffice, and this in fact is what is most commonly filed. Also, an "abstract of judgment" (a form obtained from the court) will be accepted.

A judgment is considered "filed" on the earliest day it is received by any GAO employee. For example, judgments are occasionally submitted to one of GAO's regional offices and then forwarded to Washington. The date of receipt in the regional office is the date of filing.

The statute does not specify who is required to file the copy of the judgment with GAO, but it is clearly the plaintiff's responsibility. The first case to squarely address this issue was Lennon v. United States, E.D.N.Y., No. 76-C-396, mem. op. dated October 1, 1979. The plaintiff had argued that it should be the responsibility of the United States Attorney and that the U.S. Attorney's knowledge of the judgment should be "imputed" to GAO. The court disagreed and denied a motion for interest, concluding that (a) since postjudgment interest is for the plaintiff's benefit, the responsibility of taking the protective measure of filing should also rest with the plaintiff, and (b) construing the statute to place the burden on the government would render it meaningless. Subsequent published decisions

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have removed all doubt, and have consistently refused to adopt a "constructive filing" approach. Reminga v. United States, 695 F.2d 1000 (6th Cir. 1982), cert. denied, 460 U.S. 1086; Rooney v. United States, 694 F.2d 582 (9th Cir. 1982); Moyer v. United States, 612 F. Supp. 239 (D. Nev. 1985).[97] As a practical matter, GAO will not disallow interest if the judgment is filed by someone other than the plaintiff, but it must nevertheless be viewed as the plaintiff's primary responsibility.

In a class action or multiple-plaintiff suit, the statute does not require a filing by each individual plaintiff. A filing by any plaintiff or by class counsel will operate on behalf of the entire class and will satisfy the statutory requirement. See Larionoff v. United States, D.D.C., No. 626-73, mem. op., December 29, 1977, aff'd per curiam, D.C. Cir., No. 78-1010, July 17, 1978.

When filing a judgment with GAO for purposes of 31 U.S.C. § 1304(b), it is desirable for evidentiary purposes to use Certified Mail, Return Receipt Requested. A simple transmittal letter stating that the judgment is being filed in accordance with 31 U.S.C. § 1304(b) also will not hurt. Normally, correspondence received by GAO is machine-stamped with the date of receipt.

(2) Unsuccessful government appeal

One of the essential prerequisites to interest under 31 U.S.C. § 1304(b)(1)(A) is an unsuccessful appeal by the government. If there is no appeal, there is no entitlement to interest even though there may have been substantial delay in settlement of the claim. In B-182346, February 4, 1975, interest was denied where a judgment was not appealed but was nevertheless not submitted for payment until a year after it was issued. However, in a 1978 decision, interest was paid where the plaintiff had filed the judgment with GAO and the government had filed a notice of appeal but failed to prosecute the appeal and, after considerable delay, consented to dismiss the appeal. Even though there was technically no "mandate of affirmance," the filing of the notice of appeal effectively prevented prompt payment. Thus, the case was viewed as falling within the scope of section 1304(b) when construed in light of its purpose—to compensate a plaintiff for substantial delay in payment caused by the government's action in filing an appeal. 58 Comp. Gen. 67 (1978). In 59 Comp. Gen. 259 (1980), this principle was applied, and interest held payable, in a case where the

[97]Earlier cases in which the issue was not raised had also treated the filing as the plaintiff's responsibility. Varner, 400 F.2d at 372; Maryland ex rel. Meyer, 349 F.2d at 694–95; Culp, 346 F.2d at 36. This is also supported by legislative history. Hearings, supra note 89, at 884.

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appeal was unrelated to the merits of the underlying judgment, but rather was an appeal from the denial of a motion to reopen the judgment to direct the withholding of federal income tax. Thus, the appeal may be an appeal on a collateral issue, but there must be an appeal. Postjudgment motions will not suffice to trigger interest under section 1304(b). 62 Comp. Gen. 4 (1982).

In another case, the government filed a notice of appeal with the district court and subsequently changed its mind. Normally, the district court would automatically transmit the notice to the court of appeals. Before that could happen in this case, however, the area suffered an earthquake which disrupted the operation of both the courts and the Postal Service. This allowed the government to retrieve its notice of appeal before it was transmitted to the appellate court. Based on the reasoning of 62 Comp. Gen. 4 and its predecessors, interest was nevertheless allowed. B-239559, May 22, 1990 (internal memorandum).

A 1994 case found the requirement for a government appeal satisfied where the United States did not appeal directly but joined, and filed a brief in support of, an appeal filed by a co-defendant. Andrulonis v. United States, 26 F.3d 1224 (2d Cir. 1994).

(3) Interest accrual period

Interest under section 1304(b) runs "through the day before the date of the mandate of affirmance." Prior to the 1982 recodification of Title 31, the statute read simply "to the date of the mandate of affirmance." An early draft of the recodification changed this to "through the date of the mandate of affirmance." GAO pointed out that, under the interest formula traditionally used by the accounting officers, the computation included the beginning date or the ending date, but not both. E.g., B-60952, July 2, 1953. Thus, the draft would have made a substantive change in the law, which is beyond the scope of a recodification. To avoid this and also remove the perceived ambiguity of the pre-1982 language, the recodifiers settled upon the "through the day before" language.

Where the appeal is dismissed or withdrawn and there is no mandate of affirmance, interest will cease to accrue on the earlier of the date of dismissal or the date the Justice Department certifies to GAO that no further review will be sought. See 59 Comp. Gen. 259, 261 (1980); 58 Comp. Gen. 67, 73 (1978).

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where the agency is in the demand cycle. If the agency has not yet sent any demand letters, the notification of intent to collect by offset must give the debtor the opportunity to avoid the offset by making voluntary payment. Id. In this situation, the notification letter, which is required for offset anyway, "doubles" as the first (and maybe only) demand letter. The situation is explained further in the 1984 preamble, 49 Fed. Reg. at 8890.

Agencies may find it productive to make telephone contact with debtors early in the demand cycle. Finding that private debt collectors and many states use early telephone contact to advantage, GAO has recommended that the Internal Revenue Service try it as a means of increasing tax delinquency collections. GAO report, Tax Administration: New Delinquent Tax Collection Methods for IRS, GAO/GGD-93-67 (May 1993).

3. Collection in Installments

It is the policy of the Federal Claims Collection Standards that debts should be collected in full in one lump-sum payment whenever feasible. 4 C.F.R. § 102.11(a). However, this will not always be possible. Respect for the federal government is not enhanced by attempting to enforce collection in full against someone who simply cannot afford it. Accordingly, the Standards authorize agencies to accept payment in regular installments if the debtor is financially unable to pay the debt all at once. See B-182423, November 25, 1974; B-160158, October 18, 1966.

Requirements for installment payments are contained in 4 C.F.R. § 102.11. The general standard is that the size and frequency of installment payments should be reasonably related to the size of the debt and the debtor's ability to pay. Id. § 102.11(a). For example, in a case in which collection efforts would have been futile because the debtor's assets were heavily mortgaged, GAO did not object to the debtor's proposal to pay ten percent of the debt at once and three percent of the balance monthly thereafter until the debt was liquidated. B-134871, October 20, 1966 (non-decision letter).

Other important points from 4 C.F.R. § 102.11 are as follows:

- Before agreeing to an installment plan, the agency should obtain a financial statement from the debtor. There is no prescribed format for the financial statement.
- If possible, the installment payments should be designed to liquidate the debt in not more than 3 years. This is a target, not a legal requirement. B-256184, May 3, 1994.

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Multiple appeals in the same case may produce more than one mandate of affirmance. This was the case in Transco Leasing Corp. v. United States, 992 F.2d 552 (5th Cir. 1993), in which the appellate court had affirmed the judgment on the first appeal but remanded it for recomputation of damages. The second appeal dealt with interest. The court held that the mandate issuing from the first appeal was the operative mandate for interest accrual purposes. Id. at 556.

(4) Types of appellate action

When the appellate chain in a given case produces more than one judgment, questions may arise as to which judgment should be regarded as the final judgment for interest purposes. Under current law, the question is relevant primarily for fixing the reference point for determining the proper rate of interest under 28 U.S.C. § 1961(a). Although several of the cases noted below dealt with obsolete versions of the statutes and therefore the interest accrual dates are no longer applicable, the cases are nevertheless useful by analogy in answering this question and generally in illustrating how 31 U.S.C. § 1304(b) is applied.

Obviously, a judgment which is affirmed on appeal "qualifies" under section 1304(b). In one case, the original district court judgment was reversed by the court of appeals. The Supreme Court reversed and remanded, and the court of appeals then affirmed the original judgment but reduced the amount. Interest was held payable (under the old 28 U.S.C. § 2411(b)) on the reduced amount from the date of the original district court judgment. B-97757, October 24, 1950. In another case, the original judgment, affirmed on appeal, was lost from the court records during the appeal process, and a new judgment was signed with a later date. The first judgment was regarded as the final judgment for interest purposes. B-185455-O.M., February 9, 1976.

Under one judicial formulation, the original judgment is the operative judgment for interest purposes when it is "substantially affirmed" on appeal, including appellate modification or remand for recalculation of damages. Transco Leasing Corp. v. United States, cited above. Of course, if the recalculation produces a higher award, interest is applied to the original amount as that is the amount which was substantially affirmed. E.g., Desart v. United States, 947 F.2d 871 (9th Cir. 1991).

Where a judgment is reversed and remanded, opinions are split. What appears to be the majority view is that portions of the judgment unaffected

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by the reversal should be treated as though affirmed (whether expressly affirmed or not), and that the original judgment remains the operative judgment for interest purposes, adjusted of course to reflect the results of the appeal. E.g., Brooks v. United States, 757 F.2d 734 (5th Cir. 1985); Perkins v. Standard Oil Co., 487 F.2d 672 (9th Cir. 1973). See also Mascuilli v. United States, 383 F. Supp. 50 (E.D. Pa. 1974), aff'd mem., 519 F.2d 1398 (3d Cir. 1975). Cases reaching a contrary result are Merchants Matrix Cut Syndicate, Inc. v. United States, 284 F.2d 456 (7th Cir. 1960), and Mosby v. United States, 33 Ct. Cl. 58 (1897).

Where a judgment is vacated rather than reversed, precedent is sparse. In United States v. Brooks, 176 F.2d 482 (4th Cir. 1949), a judgment was vacated and remanded with instructions to consider reducing damages. GAO concluded that the vacated judgment was not the final judgment for interest purposes. B-62830, August 31, 1950. In accord is the Mascuilli case cited above, in which the court refused to award interest on a Public Vessels Act judgment from the date of a prior judgment which had been vacated on appeal. After the vacated judgment, there were 3 subsequent judgments, 2 of which were reversed and remanded. The court awarded interest from the date of the first of the "reversed and remanded" judgments on the theory that this was the judgment "that finally settled the issue of liability between the parties." 383 F. Supp. at 53. See also Turner v. Japan Lines, Ltd., 702 F.2d 752, 754 (9th Cir. 1983).

(5) Interest calculation

When interest is payable under 31 U.S.C. § 1304(b), the rate is the 52-week Treasury bill rate determined under 28 U.S.C. § 1961(a) with reference to the original judgment. It is applied on a fixed-rate basis and does not vary with respect to a particular judgment. Once the rate is determined for a given judgment, it remains the same throughout the accrual period. Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 838–39 (1990); Campbell v. United States, 809 F.2d 563, 573 (9th Cir. 1987).

Prior to the Federal Courts Improvement Act of 1982, postjudgment interest under section 1304(b) was simple interest. However, 28 U.S.C. § 1961(b) now provides for annual compounding. The plain terms of the statutes would seem to indicate that compounding against the United States can apply only where the period between the date of filing with GAO and the mandate of affirmance exceeds one year, and this is how GAO in fact applies the statute. E.g., B-219881.4, October 20, 1987 (non-decision letter).

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(6) Addressing interest in the judgment

When the conditions of 31 U.S.C. § 1304(b) are satisfied, interest attaches by force and operation of law. There is no need for the judgment to expressly award interest. Campbell v. United States, 809 F.2d 563, 570 (9th Cir. 1987); United States v. Maryland ex rel. Meyer, 349 F.2d 693, 696 (D.C. Cir. 1965). If it is desired to say something about interest in the judgment, GAO's recommendation is that general language be used, such as "interest as provided by law," which GAO reads as meaning "as and to the extent provided by law," in which event interest is added or not added, depending on compliance with the statute. Courts have viewed the phrase "as provided by law" similarly. See Black v. United States, 444 F.2d 1215, 1217 (10th Cir. 1971); Higginson v. Schoeneman, 190 F.2d 32, 34 (D.C. Cir. 1951); Economy Plumbing & Heating Co. v. United States, 470 F.2d 585, 593–94 (Ct. Cl. 1972).

Occasionally, a court will include an interest provision in a judgment which is clearly inconsistent with 31 U.S.C. § 1304(b) or is otherwise improper. As the many cases cited throughout this section make clear, the inclusion of a contrary interest provision is grounds for the government to seek modification of the judgment. Thus, if a judgment is submitted for payment which contains an award of interest in non-discretionary language inconsistent with existing law, it will be returned with a recommendation to seek appropriate modification. Experience has shown that frequently plaintiff's counsel, upon being confronted with the governing statutes and case law, will agree not to pursue the interest claim, in which event there is no need to go back to court. In other cases, it may be necessary to seek judicial modification by motion or appeal. If attempts at judicial modification are unsuccessful and the Justice Department then determines that judicial modification is not possible, the award will be certified for payment in accordance with its terms. See 38 Comp. Gen. 12 (1958); B-183576, August 26, 1977. In no event, however, can interest be paid for any period beyond the date the judgment itself was paid. See B-200460, November 18, 1980. Payment in these cases merely recognizes the duty to comply with a court order which can no longer be modified through established channels, and is not given precedential value.

7. Government Interest Rates

Throughout this discussion, we have noted several different interest rates the government uses in different contexts. At one time, the congressional approach was to simply set a rate by statute. A few of these survive, examples being 4 percent under the Suits in Admiralty and Public Vessels

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Acts and 6 percent under 31 U.S.C. § 3728, the judgment offset statute. In more recent times, however, presumably in recognition of the volatility of the economy, the trend has been toward the use of fluctuating rates, with the governing statute merely prescribing the process for determining the rate. Our purpose here is simply to present some summary information on the fluctuating rates most commonly encountered in the "claims and judgments" area.

a. 52-Week Treasury Bill Rate

(1) Uses

- Postjudgment interest both in favor of and (where authorized) against the United States. 28 U.S.C. §§ 1961, 2516(b).
- Interest as part of just compensation under the Declaration of Taking Act. 40 U.S.C. § 258e-1.
- Costs and attorney's fees under 28 U.S.C. § 2412 affirmed on appeal. Id. § 2412(f).

(2) How established

A new rate is set with each auction of 52-week Treasury bills, currently once a month. The rate is based on the equivalent coupon issue yield of the average accepted auction price. The equivalent coupon issue yield is sometimes called the "investment rate," to be distinguished from the "discount rate" which is usually somewhat lower.

(3) How applied

The applicable rate is the rate for the last auction held immediately prior to the date of the judgment. See B-231615.2, March 1, 1990 (non-decision letter). The rate is a fixed rate and does not vary with respect to a particular judgment.

(4) How to find it

The Administrative Office of the United States Courts is responsible for notifying all federal judges. 28 U.S.C. § 1961(a). The Bureau of the Public Debt issues a press release for each auction. The Justice Department publishes listings periodically in the United States Attorneys' Bulletin.

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b. Renegotiation Act Rate

(1) Uses

- Payment of claims and judgments under the Contract Disputes Act. 41 U.S.C. § 611.
- "Interest penalties" under the Prompt Payment Act. 31 U.S.C. § 3902(a).
- Inverse condemnation judgments in the Court of Federal Claims.

(2) How established

The Secretary of the Treasury sets a new rate each 6 months, effective January 1 and July 1 of each year, based on current private commercial interest rates for new 5-year loans. Pub. L. No. 92-41, § 2(a), 85 Stat. 97 (1971). (The provision is no longer carried in the United States Code.)

(3) How applied

For Contract Disputes Act payments, the rate is applied on a variable basis unless otherwise specified in the judgment or award. Starting with the rate for the period which includes the date on which interest begins to run (Pub. L. No. 92-41, § 2(a)(1)), the rate then rises or falls for each 6 months or fraction thereof within the accrual period. The Court of Federal Claims uses the same approach in inverse condemnation cases. For Prompt Payment Act procedures, see OMB Circular No. A-125.

(4) How to find it

The Treasury Department publishes each new rate in the Federal Register. 31 U.S.C. § 3902(a).

c. Internal Revenue Code Rate

(1) Uses

- Several uses under the Internal Revenue Code: interest on underpayments and overpayments, suits for wrongful levy, etc. E.g., 26 U.S.C. §§ 6343, 6601, 6602, 6611, 7426; 28 U.S.C. §§ 1961(c)(1), 2411.
- Certain money judgments by the Court of International Trade. 28 U.S.C. § 2644.
- Delay compensation in patent infringement judgments in the Court of Federal Claims.
- Back pay under the Back Pay Act (overpayment rate). 5 U.S.C. § 5596(b)(2)(B).

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(2) How established

Prior to 1987, the Secretary of the Treasury established a single rate for both overpayments (what the IRS pays you) and underpayments (what you pay the IRS). Since January 1, 1987, there have been separate overpayment and underpayment rates. The underpayment rate is one percentage point higher (surprise). The rate is determined quarterly. See 26 U.S.C. § 6621 for details.

(3) How applied

For Internal Revenue Code uses, the relevant Code provision specifies whether to use the overpayment or underpayment rate. For interest payments pursuant to 28 U.S.C. §§ 1961(c)(1) or 2411 or any provision of the Internal Revenue Code, interest is compounded daily. 26 U.S.C. § 6622.

(4) How to find it

The Internal Revenue Service announces each new rate in the form of a Revenue Ruling, usually accompanied by a news release. The Revenue Rulings are eventually incorporated into the hardbound "Cumulative Bulletin" volumes. Current Revenue Rulings can also be found in various commercial tax services.

d. Treasury Tax and Loan Account Rate

(1) Uses

- Interest on debts owed to the United States unless otherwise specified in an applicable statute, statutory regulation, or contract. 31 U.S.C. §§ 3717(a)(1), (g).
- Prejudgment interest on litigated debt claims.
- Evaluation of cost-effectiveness of cash discounts. Treasury Financial Manual, Vol. I, § 6-8040.30.

(2) How established

This rate is also called the "current value of funds" rate. Treasury sets the rate by October 31 of each year, effective the following January 1, based on an average of the current value of funds to Treasury. Treasury may change the rate for a calendar quarter if the average rate at the close of the prior calendar quarter is at least 2 percentage points more or less than the existing published rate. 31 U.S.C. § 3717(a).

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(3) How applied

For purposes of 31 U.S.C. § 3717, the rate is applied as a fixed rate. Once the rate is established for a given debt, it stays the same for the duration of the indebtedness unless the debtor has defaulted on a repayment agreement. 4 C.F.R. § 102.13(c). On litigated debt claims (i.e., claims by the United States, as opposed to claims against the United States), the Justice Department will normally compute interest at the "tax and loan account" rate up to the date of judgment.

(4) How to find it

Treasury publishes the annual rate and any quarterly changes in two formats—a notice in the Federal Register and a Treasury Financial Manual Bulletin.

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- Installment payments should be at least $50 per month, although the agency may accept less if justified by the circumstances.
- An installment plan should be in the form of a legally enforceable written agreement.
- The agreement should contain an acceleration clause.
- If the deferred balance exceeds $750 and the claim is unsecured, the agency may wish to obtain a confess-judgment note from the debtor. If the agency does so, it must give the debtor a written explanation of the consequences. If the debtor refuses to execute the confess-judgment note or to provide other adequate security, the agency may or may not accept an installment plan, at its option.

The requirement for an acceleration clause was added to the Standards in the 1984 revision. This refers to a "default" acceleration, under which, if the debtor fails to make an installment payment when it becomes due, or within any grace period provided in the agreement, all of the remaining installments become immediately due and payable, either automatically or at the creditor's option.[22] The Standards do not authorize the "at will" or "insecurity" type of acceleration under which payment may be accelerated in non-default situations if the creditor deems its position insecure. A case discussing the different types of acceleration is Brown v. Avemco Investment Corp., 603 F.2d 1367 (9th Cir. 1979).

The need for an acceleration clause is summarized in the following passage from Johnson v. McCrackin-Sturman Ford, Inc., 527 F.2d 257, 264 (3d Cir. 1975):

"[T]here is probably not an installment contract in force today that does not contain a clause granting the creditor the right to require immediate payment of all installments upon the happening of a specified event, usually a default in repayment of the loan. Exercise of that right by the creditor shortens, sometimes dramatically, the time period during which the borrower would normally be able to repay the loan. The purpose of such a provision is obvious. Without the right to accelerate payment, the creditor would be forced to sue each month as each installment payment became due and as the borrower defaulted on the installment, a course of action that is both commercially unreasonable and, in all probability, quite expensive to the borrower since he might be liable for 24 or 30 different sets of court costs."

[22]The choice between an automatic or a creditor's option clause has statute of limitations implications. See United States v. Dos Cabezas Corp., 995 F.2d 1486, 1490 (9th Cir. 1993).

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See also Quick v. American Steel and Pump Corp., 397 F.2d 561, 564 (2d Cir. 1968) ("contracts to pay money in instalments are breached one instalment at a time").

It is important to include an acceleration clause in an installment agreement because, in simple debt repayment situations, acceleration is permissible only if provided for in the relevant contract. E.g., New York Life Ins. Co. v. Viglas, 297 U.S. 672, 679–81 (1936); City of Hampton, Va. v. United States, 218 F.2d 401, 405 (4th Cir. 1955); Local 1574, International Association of Machinists and Aerospace Workers v. Gulf and Western Manufacturing Co., 417 F. Supp. 191, 201 (D. Me. 1976); Llewellyn Iron Works v. Littlefield, 74 Wash. 86, 132 P. 867, 868 (1913); Holcomb v. Webley, 185 Va. 150, 37 S.E.2d 762, 765 (1946); B-226918.2-O.M., April 8, 1988. There may be situations in which the agency chooses not to invoke its right of acceleration, but it should always make sure it has that right and the only way to do that is by including a clause in the agreement.

If an installment agreement does not contain an acceleration clause, all may not necessarily be lost, depending on the type of debt. An early Supreme Court decision stated the following principle:

> "By the general commercial law, as well of England as of the United States, a promissory note does not discharge the debt for which it is given unless such be the express agreement of the parties; it only operates to extend until its maturity the period for the payment of the debt. The creditor may return the note when dishonored, and proceed upon the original debt."

The Kimball, 70 U.S. (3 Wall.) 37, 45 (1865). The principle has found its most frequent application in the context of new notes given for previously held notes, with the courts holding that the renewal note does not extinguish the original liability unless the parties have clearly expressed that intention. E.g., Mid-Eastern Electronics, Inc. v. First National Bank of S. Md., 455 F.2d 141, 144–45 (4th Cir. 1970); In re Mid-Atlantic Piping Products of Charlotte, Inc., 24 B.R. 314, 324 (Bankr. W.D.N.C. 1982). Of course, the concept is most useful in cases in which the debt, prior to execution of the renewal note or agreement, was such that the creditor had the right to demand immediate payment in full (as opposed, for example, to the case of a simple loan agreement in which the original liability is defined in terms of installment payments). Also, it presupposes that action may still be taken on the original debt (e.g., applicable statutes of limitations have not expired). See B-226918.2-O.M., April 8, 1988.

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GAO applied the rule of The Kimball in a 1985 decision, 64 Comp. Gen. 493. The debt in that case arose from nonpayment of contractual obligations to the Soil and Conservation Service, Department of Agriculture, under the Great Plains Conservation Program. After several time extensions under the original contract, the agency, at the debtor's urging, accepted an installment workout agreement. Payments still were not made. GAO agreed with the agency that it could treat the workout agreement as void, and proceed to collect the full amount of the pre-existing debt, including offset against payments due the debtor under another program.

Related concepts are rescheduling and refinancing. Rescheduling is not specifically mentioned in the Federal Claims Collection Standards, but is addressed in OMB Circular No. A-129 and the Treasury Department's Managing Government Credit: A Supplement to the Treasury Financial Manual. Rescheduling is a change in the existing terms of a debt, usually a loan. As both OMB and Treasury point out, the creditor agency should determine that recovery of all or a portion of the debt is reasonably assured before agreeing to a rescheduling. Also, a rescheduling agreement should be in legally enforceable form and should contain an acceleration clause. Managing Government Credit at 4–9.

Refinancing usually involves executing a new note which then replaces the original obligation. Refinancing also is not addressed in the Federal Claims Collection Standards. Program legislation may contain applicable authorities or restrictions. An illustrative case is 43 Comp. Gen. 98 (1963), in which GAO advised that a rescheduling of payments under a vessel mortgage to provide for reduced payments over a longer period of time did not contravene a prohibition on refinancing in the Merchant Marine Act.

4. Interest and Related Charges

a. Interest

As discussed in Chapters 12 and 14, interest is payable on claims against the United States only where expressly provided by statute or contract. With respect to claims by the United States, however, the rules are not the same, nor is there any legal requirement that they be the same. See Boston Sand and Gravel Co. v. United States, 278 U.S. 41, 49 (1928); 63 Comp. Gen. 391 (1984). While the difference in the rules is sometimes assailed as unfair, it necessarily follows from the concept of sovereign immunity.

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(1) Common law

Prior to the 1980s, there was no governmentwide statute authorizing the United States to charge interest on debt claims, and the government was forced to rely on the common law. The United States had long asserted the common-law right to charge interest on amounts owed to it, and this right was recognized by the courts. For example, in Billings v. United States, 232 U.S. 261, 286 (1914), the Supreme Court stated:

"[A]s to the necessity for a statute it was long ago here decided in view of the true conception of interest, that a statute was not necessary to compel its payment where in accordance with the principles of equity and justice in the enforcement of an obligation, interest should be allowed."

See also Royal Indemnity Co. v. United States, 313 U.S. 289, 295–97 (1941); Boston Sand and Gravel, 278 U.S. at 49; Swartzbaugh Manufacturing Co. v. United States, 289 F.2d 81, 84 (6th Cir. 1961); United States v. Abrams, 197 F.2d 803, 805–06 (6th Cir. 1952); United States v. Philmac Manufacturing Co., 192 F.2d 517 (3d Cir. 1951). More recent cases are West Virginia v. United States, 479 U.S. 305 (1987) and Riles v. Bennett, 831 F.2d 875 (9th Cir. 1987).

During this time period, the Comptroller General also consistently recognized the government's common-law right to charge interest. E.g., 59 Comp. Gen. 359 (1980); B-192479, September 27, 1978; B-137762.21-O.M., January 3, 1977. The principle applied to contract debts as well as non-contract debts. E.g., 41 Comp. Gen. 222 (1961); B-131925, July 13, 1964.

The government's common-law right to charge interest applied equally to claims against its own employees and retirees. B-192479, September 27, 1978. For example, in a letter report to the Chairman of the Civil Service Commission (now Office of Personnel Management), GAO reviewed the status of government claims against employee retirement accounts and recommended that the Commission start charging interest on these claims. FGMSD-77-41, September 15, 1977.

Since their inception, the Federal Claims Collection Standards included an interest provision based on the common law. See 31 Fed. Reg. 13382 (October 15, 1966). The pre-1982 version of the Treasury Financial Manual also included provisions for interest.

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However, the common-law authority proved to be inadequate. GAO reviews in the 1970s revealed that many agencies were not charging interest on debt claims, and there was no consistency among those that did. See, e.g., The Government Needs to Do a Better Job of Collecting Amounts Owed by the Public, FGMSD-78-61 (October 20, 1978), Chapter 4; FGMSD-77-41, cited above.

(2) Debt Collection Act of 1982

In section 306 of the Supplemental Appropriations and Rescission Act, 1980, Pub. L. No. 96–304, 94 Stat. 857, 928, Congress directed all agencies receiving funds under the act (essentially the entire government) to charge interest in accordance with the Federal Claims Collection Standards. This appears to be the first governmentwide legislative attempt to mandate interest assessments. Whether section 306 could be construed as permanent legislation does not appear to have been addressed, although the issue would soon become moot.

Reporting on what would become the Debt Collection Act of 1982, the Senate Committee on Governmental Affairs discussed the interest problem as follows:

"Generally, there is either no assessment for interest and penalties on debts owed the government or, if there is, the assessment is at rates that are considerably below market rates. This is in spite of the joint GAO/Justice Department regulations issued in the Federal Claims Collection Standards in April 1979 and subsequent Treasury regulations which require agencies to charge debtors interest on overdue payments. . . .

"In the absence of interest charges for delinquent payments, debtors have little or no incentive to make timely payments. Also, debtors are likely to pay their private sector debts first and their government debts last. The Committee has concluded that this factor is a major contributor to the growing amount of delinquent debt owed the government."

S. Rep. No. 378, 97th Cong., 2d Sess. 17 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 3377, 3393.

The resulting legislation was section 11 of the Debt Collection Act of 1982, codified at 31 U.S.C. § 3717. The pertinent provision of the Federal Claims Collection Standards is 4 C.F.R. § 102.13. The preamble to the 1984 Standards noted, somewhat apologetically, that "[t]his portion of the regulation is complex because the corresponding provisions of the Debt Collection Act are complex." 49 Fed. Reg. at 8893.

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Prior to the Debt Collection Act, there was some confusion as to whether charging interest was required or whether it was merely authorized. The Debt Collection Act removed all doubt. It is now a mandatory requirement. 31 U.S.C. § 3717(a)(1); 4 C.F.R. § 102.13(a); Commonwealth Edison Co. v. United States Nuclear Regulatory Commission, 830 F.2d 610, 620–21 (7th Cir. 1987).

Interest begins to accrue from the date on which notice of the interest requirements is mailed or hand-delivered. 31 U.S.C. § 3717(b); 4 C.F.R. § 102.13(b). As pointed out earlier, interest requirements should be included in the agency's first demand letter. Under the common law, there was no requirement for a specific interest notification; notice of the underlying debt was sufficient. See B-217215, March 20, 1986. While 31 U.S.C. § 3717(b)(2) refers merely to "notice of the amount due," the Standards are much more explicit in this regard and require notice of the interest assessment. 4 C.F.R. §§ 102.2(b), 102.13(a). The notice should not be dated prior to the date of actual mailing or hand-delivery. Id. § 102.13(b).

If an agency uses an "advance billing" system—that is, if it mails a bill before payment is actually due—it can include the interest notification in its advance billing, although interest cannot start to accrue until the payment due date. Id.

The rate of interest to be charged is the "Treasury tax and loan account rate," also known as the "current value of funds rate," in effect as of the date on which interest begins to accrue. 31 U.S.C. §§ 3717(a)(1), (c)(1); 4 C.F.R. § 102.13(c). Since 31 U.S.C. § 3717(a)(1) uses the language "minimum annual rate of interest," the Standards recognize that authority exists to charge a higher rate. 4 C.F.R. § 102.13(c). However, noting that the unequal treatment of similarly situated debtors is undesirable, the preamble to the 1984 Standards advises that agencies should charge a higher rate of interest "only under the most compelling circumstances." 49 Fed. Reg. at 8893. Agencies wishing to avail themselves of this possibility might be well-advised to identify any such "compelling circumstances" in their regulations.

Once the applicable rate of interest is determined with respect to a particular debt, it remains fixed for the duration of the indebtedness. 31 U.S.C. § 3717(c)(2); 4 C.F.R. § 102.13(c).[23]

[23]This had been the case even prior to the Debt Collection Act. See B-107871, July 31, 1981 (non-decision letter).

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Interest is generally computed on a "daily rate" basis, although if this is not cost effective, GAO considers the requirement satisfied by any commercially acceptable method which provides approximately the same result. B-222845, December 9, 1987 (non-decision letter). The "daily rate" method is computed as follows:

- Multiply the principal amount of the debt by the interest rate. This gives you the annual interest amount.
- Divide the annual interest amount by 365 (or 366 for a leap year). This gives you the daily interest amount.
- Compute the actual number of days for the period involved.
- Multiply the number of days by the daily interest amount.

This is the same method that has traditionally been used for computing interest on payments by the United States unless otherwise provided by statute.

A simple illustration may help. Suppose you have a principal of $1 million with interest due for a 60-day period at an annual rate of 9 percent:

- Step 1: 1,000,000 x .09 = $90,000, the amount of interest for a full year.
- Step 2: 90,000 divided by 365 = $246.58, the amount of interest accruing each day.
- Step 3: 246.58 x 60 = $14,794.80.

Thus, interest on $1 million at 9 percent for 60 days is $14,794.80. Should the accrual period extend beyond 60 days, interest would continue to accrue at the rate of $246.58 per day.

Although 31 U.S.C. § 3717 does not prohibit charging interest on interest, the Standards permit it in only one situation. If the debtor defaults on a repayment agreement and the agency agrees to a new repayment agreement, the principal amount of the new agreement should consist of the unpaid principal under the old agreement plus any accrued but unpaid interest. The agency may then apply the interest rate in effect at the time of the new agreement to this new principal. 4 C.F.R. § 102.13(c). This is also the only exception to the rule noted above that the initial rate of interest remains fixed for the life of the indebtedness. Interest may not, however, be assessed on penalties or administrative costs, discussed later in this section. 31 U.S.C. § 3717(f); 4 C.F.R. § 102.13(c).

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If a payment is made in less than the full amount due, the Standards apply the so-called "American Rule." The payment is applied first to outstanding penalty and administrative cost charges, second to accrued interest, and third to outstanding principal. 4 C.F.R. § 102.13(f). This is the same approach the government had traditionally followed under the common law. See, e.g., Woodward v. Jewell, 140 U.S. 247, 248 (1891); B-47882, January 11, 1946.

The statute provides a mandatory 30-day grace period. Although interest accrues from the date of the initial interest notification, no interest will be charged if the debt is repaid within 30 days after the accrual date. 31 U.S.C. § 3717(d); 4 C.F.R. § 102.13(g).

In addition, agencies have discretionary authority to waive interest, in whole or in part, (1) beyond the 30-day grace period on a case-by-case basis; (2) under the criteria specified in 4 C.F.R. Part 103 relating to compromise; or (3) if the agency determines that collection of interest would be "against equity and good conscience or not in the best interests of the United States." 31 U.S.C. §§ 3717(d), (h); 4 C.F.R. § 102.13(g). These discretionary waivers may be exercised only in accordance with agency regulations. 4 C.F.R. § 102.13(g). One situation the Standards identify as a good candidate for waiver of interest is where, under an installment plan, the interest rate is sufficiently high in relation to the size of the installment payments that the debt will never be repaid—the so-called "perpetual debtor." Id.

In applying the "equity and good conscience" standard, agencies may look to GAO's waiver regulations under 5 U.S.C. § 5584 for guidance. The preamble to the 1984 Standards contains the following explanation:

> "A commenter asked whether the phrase 'equity and good conscience' as used in § 102.13(g) has the same meaning as in 4 CFR 91.5(c), GAO's waiver regulations under 5 U.S.C. 5584. Although the concepts are not identical, the approach used in 4 CFR 91.5(c) may be useful by analogy in suggesting other situations agencies may wish to consider in their regulations. Under 4 CFR 91.5(c), 'equity and good conscience' is generally satisfied where the indebtedness resulted from the agency's administrative error and there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the debtor. However, waiver should be denied where the agency's actions giving rise to the indebtedness were such as to put a reasonable person on notice that something was wrong and to have reasonably suggested further inquiry by the debtor." 49 Fed. Reg. at 8893.

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Another potential candidate for waiver of interest under 4 C.F.R. § 102.13(g) is during agency consideration of a request for reconsideration or waiver of the underlying debt under a permissive statute. The collection of many debts may be waived under various waiver statutes. If the waiver statute is mandatory—that is, if it prohibits collection action until the waiver process has run its course—interest may not be charged while the underlying debt is under mandatory suspension. 4 C.F.R. § 102.13(h). If the waiver statute is permissive, the agency has several options. It may continue collecting interest, or it may suspend collection of interest under the suspension standards. If waiver of the underlying debt is denied, the agency may still consider waiving interest during the pendency of the waiver request if it has so provided in its regulations. The topic of assessing interest pending waiver determinations is discussed generally in 63 Comp. Gen. 10 (1983).

The Contract Disputes Act of 1978 is a permissive statute for purposes of 4 C.F.R. § 102.13(g). Accordingly, an agency is not required to discontinue the assessment of—and generally should continue assessing—interest and related charges during the pendency of appeals under the Contract Disputes Act. 70 Comp. Gen. 517 (1991).

The government is authorized to charge interest until it actually receives payment. Treasury Financial Manual, I TFM § 6-8025.40; 63 Comp. Gen. 391 (1984) (quoting an earlier version of the TFM); 17 Comp. Dec. 3 (1910). This can produce a practical problem. Even the most conscientious debtor paying by mail will not know exactly when payment is received. Also, many debtors may tend to compute interest up to the date of their check, not including any allowance for mailing time. In these situations, the agency has the right to assert a claim for additional interest up to the date of actual receipt. However, there may be a number of reasons for not doing so, not the least of which is cost effectiveness. E.g., B-134617, January 30, 1958. Thus, although not identified as such in the Standards, this is another situation agencies may consider including in their interest waiver regulations, although they should probably reserve the option of asserting the additional claim where justified by the amounts involved.

The requirements of 31 U.S.C. § 3717 do not apply "if a statute, regulation required by statute, loan agreement, or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges." Id. § 3717(g)(1). Thus, 31 U.S.C. § 3717 defers to any agency-specific or program-specific legislation which addresses late payment charges. For example, interest and related charges assessed by the Department of

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Debt Collection

"It is 'as much the duty of the citizen to pay the Government as it is the duty of the Government to pay the citizen.'" Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536, 540 (1946), quoting from Cong. Globe, 37th Cong., 2d Sess. 1674 (1862).

A. Introduction

Debts owed to the federal government arise from many sources. Some examples are tax assessments; sale of government goods and services; federal housing, farm, and student loan and loan guarantee programs; and overpayments or erroneous payments to employees, contractors, assistance recipients, and annuitants. This chapter will discuss how the government goes about collecting its debts.

As with any business, if the government cannot collect amounts owed to it, it must write off the debts as uncollectible. The losses, however, do not simply disappear. The business passes its debt losses on to the consumer. The government must similarly pass its losses on to its consumer, the taxpayer. This may manifest itself in many ways—higher taxes, reduced government services, increased budget deficit, increased national debt. Thus, in a very real sense, the government owes it to those who pay their debts and taxes to try to collect from those who do not.

Before describing the magnitude of the government's debt collection activities, it is first necessary to distinguish between "receivables" and "delinquent debt." In making this distinction, it may also be helpful to divide the universe of government debt claims into two broad categories.

The first category is debts resulting from programs involving the extension of credit in one form or another. If, for example, the government makes a loan of a million dollars, it has a "receivable" or "account receivable" until the loan is repaid. If the borrower makes payments on the loan in accordance with the agreed-upon schedule,—that is, if the account is kept "current"—the creditor agency's actions with respect to that account (billing, recordkeeping, receiving and depositing payments, etc.) are called "account servicing." At least for purposes of this chapter, however, this is not "debt collection." See 64 Comp. Gen. 366, 369–70 (1985). The concept of debt collection comes into play only if and when the borrower falls behind in payments and thereby becomes "delinquent."[1] (Obviously, the debt collection phase will also include account servicing functions.) For this first category, the total amount of outstanding receivables will be much larger than the amount of delinquent debt.

[1]We use the term "delinquent" here in the broad sense of simply being in arrears in payment. As we will see later, there is a more precise definition of delinquency for debt collection purposes.

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Veterans Affairs are governed by 38 U.S.C. § 5315 (Supp. IV 1992) rather than 31 U.S.C. § 3717. 66 Comp. Gen. 512 (1987).

There are also situations in which more specific agency legislation will not wholly supplant 31 U.S.C. § 3717 but will exist side-by-side with it. For example, the Farmers Home Administration is generally subject to 31 U.S.C. § 3717, although its own legislation prohibits charging interest on the interest portion of loan payments which are less than 90 days overdue. B-199395-O.M., September 13, 1983. Also, the FmHA has its own statutory authority to terminate the accrual of interest on the guaranteed portion of defaulted loans, subject to definition in FmHA regulations. 67 Comp. Gen. 471 (1988).

As noted, 31 U.S.C. § 3717 will also defer to explicit terms in a contract or loan agreement. An illustration is 65 Comp. Gen. 245 (1986), dealing with contract provisions under the Department of Agriculture's Feed Grain, Rice, Upland Cotton and Wheat program. Another is B-235577, August 8, 1989 (internal memorandum) (promissory notes used by FmHA).[24] See also United States v. American Ins. Co., 18 F.3d 1104 (3d Cir. 1994) (court found Internal Revenue Code rate rather than Debt Collection Act rate applicable to surety on a tax obligation).

The Federal Labor Relations Authority has held that the term "contract" in 31 U.S.C. § 3717(g)(1) does not include a collective bargaining agreement. Thus, interest under 31 U.S.C. § 3717 is not a negotiable issue. National Federation of Federal Employees, Local 29, 21 F.L.R.A. 101 (1986).

The exemptions summarized above, together with others previously noted, are listed in 4 C.F.R. § 102.13(i)(1). However, where 31 U.S.C. § 3717 does not apply, agencies may still be authorized to assess interest to the extent authorized under the common law or other applicable statutory authority. 4 C.F.R. § 102.13(i)(2).

The government's right to charge interest applies to debts owed to it by the District of Columbia government. 60 Comp. Gen. 710 (1981) (amounts owed to Government Printing Office for printing and binding services performed under 31 U.S.C. § 1537). Essentially, this is because the District is

[24]The Debt Collection Act also "grandfathered" contracts which had been executed prior to October 25, 1982 (date of enactment of the Debt Collection Act) and which were still in effect as of that date. 31 U.S.C. § 3717(g)(2). E.g., B-203787-O.M., March 22, 1983 (section 3717 not applicable to Department of Energy uranium enrichment contracts executed prior to, and still in effect on, October 25, 1982). In Florida Department of Labor and Employment Security v. U.S. Department of Labor, 893 F.2d 1319 (11th Cir. 1990), the court applied subsection (g)(2) to find section 3717 inapplicable to certain grants under the former Comprehensive Employment and Training Act.

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not a federal agency. Normally, absent statutory authority to the contrary, one federal agency may not assess interest against another federal agency. E.g., B-161457, May 9, 1978 (no authority for Internal Revenue Service to assess interest against another federal agency for late filing or underpayment of income or social security withholding taxes).

Interest recovered on a debt claim must be deposited in the Treasury as miscellaneous receipts unless the creditor agency has statutory authority for some other disposition. I TFM § 6-8025.70. See, e.g., B-217595, April 2, 1986 (interest on late payments under timber sale contracts properly deposited as miscellaneous receipts).

Finally, the subject of interest on penalties merits brief mention. Penalties are of two types, criminal and civil. Absent specific statutory authority, the government may not charge interest on a criminal fine or penalty. Pierce v. United States, 255 U.S. 398, 405–406 (1921). As we have already noted, the Federal Claims Collection Standards do not apply to criminal fines or penalties, although separate statutory authority to charge interest now exists by virtue of the Criminal Fine Improvements Act of 1987. The pre-1984 version of the Standards, based on Rodgers v. United States, 332 U.S. 371 (1947), had also excluded from its interest provision civil penalties and forfeitures designed as punishment or deterrent and not as a revenue-raising device. The 1984 Standards deleted the exclusion for civil penalties and forfeitures because the definition of "claim" in the Debt Collection Act now provides the requisite statutory authority.

b. Late Payment Penalties

Penalties often resemble interest, especially when they are expressed in terms of a percentage rate. The concepts are different, however. Interest is designed to compensate for the loss of use of money. Ideally, it should bear a reasonable relationship to the loss actually incurred. A penalty, on the other hand, is precisely what the term implies. Unlike interest, the government has no common-law right to impose a penalty. Penalties require statutory authority. E.g., Pender Peanut Corp. v. United States, 20 Cl. Ct. 447, 453 (1990). Thus, prior to the establishment of a statutory interest rate in the Debt Collection Act of 1982, GAO had cautioned that an interest rate assessed under common-law authority should not be so high as to constitute a penalty. E.g., 59 Comp. Gen. 359, 360 (1980); B-192479, September 27, 1978.

Statutory authority for penalties now exists. Section 11 of the Debt Collection Act of 1982 mandates a penalty of "not more than 6 percent a

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year for failure to pay a part of a debt more than 90 days past due." 31 U.S.C. § 3717(e)(2).

As we have seen, a debt is "due" on the date specified by the creditor agency in its first demand letter. Therefore, the debt is "past due" when it becomes "delinquent" as defined in 4 C.F.R. § 101.2(b). The penalty attaches when the debt is delinquent for more than 90 days, although it accrues from the date the debt became delinquent. Id. § 102.13(e). Thus, if payment is due within 30 days, it becomes delinquent or "past due" on day 31. The penalty attaches on day 121, computed from day 31.

The rate is expressed as a maximum, "not more than 6 percent a year," and the Standards retain this flexibility. Id. However, setting the penalty rate is not wholly discretionary. The 1984 preamble explains the intent of section 102.13(e) as follows:

"As with interest, the penalty rate should be consistent throughout the Government, and agencies should use a rate of less than 6 percent only with compelling justification." 49 Fed. Reg. at 8893.

While 31 U.S.C. § 3717 prohibits assessing interest on the penalty required by subsection 3717(e)(2), it does not prohibit assessing the penalty on interest. Thus, the penalty should be assessed on all portions of the debt that are delinquent for more than 90 days, including interest and administrative costs. B-222845, December 9, 1987 (non-decision letter).

The portions of the preceding discussion on interest relating to discretionary waiver, non-assessment under a mandatory waiver statute, and the various exemptions apply equally to penalties.

c. Administrative Costs

In addition to interest and penalties, section 11 of the Debt Collection Act mandates a third type of charge: "a charge to cover the cost of processing and handling a delinquent claim." 31 U.S.C. § 3717(e)(1). Administrative costs do not come into play unless and until the debt becomes delinquent.

The corresponding provision of the Federal Claims Collection Standards is 4 C.F.R. § 102.13(d). It gives as examples costs incurred in obtaining a credit report or in using a private debt collector, to the extent attributable to delinquency. Administrative costs should be calculated on the basis of either actual costs incurred or cost analyses establishing an average for debts in similar stages of delinquency. Id.

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The preamble to the 1984 Standards offered the following additional commentary:

"Beyond [the examples cited in § 102.13(d)], further detail is not feasible. For example, if the volume of delinquencies were such that an agency had to hire additional personnel solely to process the delinquencies, then the salaries of these additional personnel might be included. The test agencies must use is whether the particular cost was incurred by virtue of the delinquency or whether it would have been incurred in any event." 49 Fed. Reg. at 8893.

Administrative costs for purposes of 31 U.S.C. § 3717 do not include the costs of appeals brought under the Contract Disputes Act. 70 Comp. Gen. 517 (1991).

The portions of the preceding discussion on interest relating to discretionary waiver, non-assessment under a mandatory waiver statute, and the various exemptions apply equally to administrative costs.

Unless an agency has statutory authority for some other disposition, administrative costs collected under 31 U.S.C. § 3717(e)(1) may not be retained by the agency for credit to its own appropriations but must, as with interest and penalties, be deposited in the Treasury as miscellaneous receipts. Treasury Financial Manual, I TFM § 6-8025.70; B-199395.3-O.M., December 18, 1984.

d. State and Local Governments

As we have seen, section 11 of the Debt Collection Act did not create a new right with respect to the assessment of interest. It merely gave a statutory basis to a right which existed under the common law. Subject to equitable considerations, the common-law right to charge interest applies to debts of state and local governments just as it applies to other debtors. West Virginia v. United States, 479 U.S. 305 (1987); Board of County Commissioners of the County of Jackson, Kan. v. United States, 308 U.S. 343 (1939). However, section 11 defined the term "person" for purposes of the interest, penalty, and administrative cost provisions of that section as not including federal agencies or state or local governments. That exclusion is now codified at 31 U.S.C. § 3701(c).[25]

The exemption for federal agencies added little since interest and offset were not available against other federal agencies to begin with. The "state or local government" language, however, was soon to become a hotly

[25]Section 10 of the Debt Collection Act included an identical provision with respect to administrative offset. It is also included in section 3701(c). Thus, while we are phrasing our discussion here in terms of interest, it applies equally to administrative offset.

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contested issue. The issue, in a nutshell, is whether 31 U.S.C. § 3701(c) is an exemption or a prohibition. If it is an exemption, then 31 U.S.C. § 3717 does not apply to state or local governments, but whatever authority existed under the common law remains. If it is a prohibition, then it totally displaces the common law, and the authority to charge interest on debts owed by state and local governments has been eliminated.

Comments received in connection with the revision of the Federal Claims Collection Standards fell along predictable lines. Federal agencies supported the exemption approach; nonfederal commenters urged the prohibition view. In the final regulations, the Attorney General and the Comptroller General adopted the exemption position. 4 C.F.R. §§ 102.3(b)(4) (administrative offset) and 102.13(i) (interest). Their decision was explained in the 1984 preamble. See 49 Fed. Reg. at 8891 (offset) and 8894 (interest).

GAO had expressed this position—that sections 10 and 11 do not abrogate pre-existing common-law rights beyond the extent required by their terms[26]—in a number of decisions and opinions. E.g., B-212222, January 5, 1984; B-212222, August 23, 1983; B-209669, December 17, 1982. See also 62 Comp. Gen. 599, 601–02 (1983), expressing the same position with respect to the "section 8(e) exemptions."

The courts of appeals split. The majority of circuits which considered the issue held that section 3701(c) was a prohibition and that the United States no longer had a common-law right to assess interest (or use administrative offset[27]) against state or local governments. United States v. Benton, 975 F.2d 511 (8th Cir. 1992); Texas v. United States, 951 F.2d 645 (5th Cir. 1992); Arkansas v. Block, 825 F.2d 1254 (8th Cir. 1987); Pennsylvania Department of Public Welfare v. United States, 781 F.2d 334 (3d Cir. 1986); Perales v. United States, 751 F.2d 95 (2d Cir. 1984), aff'g per curiam 598 F. Supp. 19 (S.D.N.Y. 1984). The Texas, Arkansas and Pennsylvania courts relied explicitly on what they viewed as the "plain meaning" of the statute. Two courts of appeals agreed with the government's position. Gallegos v. Lyng, 891 F.2d 788 (10th Cir. 1989); County of St. Clair, Mich. v. United States Department of Labor, No. 83–3546, slip op. (6th Cir. December 7, 1984).

[26]There would seem to be no real dispute that 31 U.S.C. § 3717 displaces the common law to the extent of its coverage. For example, an agency to which section 3717 applies may no longer rely on the common law to assess interest against an individual debtor. The controversy concerns the continued vitality of the common law in situations in which the statute does not apply.

[27]The cases all deal with interest but, as noted above, application of the same result to administrative offset is inescapable.

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A few lower court cases on administrative offset also supported the government's position. In Housing Authority of the County of King v. Pierce, 701 F. Supp. 844 (D.D.C. 1988), vacated in part on other grounds, 711 F. Supp. 19 (D.D.C. 1989), the Department of Housing and Urban Development claimed to have overpaid a local governmental housing authority, and proposed recovering the overpayments by offsetting them against future payments. The court held that (1) by virtue of 31 U.S.C. § 3701(c), section 10 of the Debt Collection Act, 31 U.S.C. § 3716, and its implementing regulations did not apply; but that (2) HUD retained the authority to use administrative offset under the common law. In Sentry Insurance A Mutual Co. v. United States, 12 Cl. Ct. 320 (1987), the Claims Court upheld the use of administrative offset by the Small Business Administration under both the common law and section 3716.

The Supreme Court first took note of the issue in West Virginia v. United States, 479 U.S. 305 (1987), a case involving the liability of a state for prejudgment interest on a contractual obligation to the Army Corps of Engineers. The Court upheld the government's common-law right to assess interest and found the state liable. However, because the contract in question had been entered into prior to October 25, 1982, 31 U.S.C. § 3717 did not apply. 31 U.S.C. § 3717(g)(2). In view of this, the Court expressly declined to address the effect of the Debt Collection Act on the government's common-law rights. 479 U.S. at 312–13 n.6.

A few years later, the Court squarely addressed the issue, and resolved it in the government's favor, in United States v. Texas, 113 S. Ct. 1631 (1993), reversing Texas v. United States cited above. The Court upheld the government's common-law right to assess prejudgment interest against a state for losses under the food stamp program in excess of the applicable tolerance level. The Court noted three primary grounds for its decision:

- There is an established principle of law that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952). 113 S. Ct. at 1634.
- The Court rejected the lower court's use of the "plain meaning" rule. If anything, the plain meaning of section 3701(c) supports the government's position. "The only obligation from which § 3701 exempts the States is the obligation to pay prejudgment interest in accordance with the mandatory provisions of the [Debt Collection] Act." 113 S. Ct. at 1635.

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- It is appropriate to construe section 3701(c) in a manner consistent with the overall purpose of the act, which was to enhance the government's debt collection efforts, not to seriously erode existing authority. 113 S. Ct. at 1636.

Thus, the federal government may rely on the common law to assess interest and to use administrative offset when collecting debts owed by state or local governments. However, penalties and administrative costs, authorized by 31 U.S.C. § 3717 against other debtors, cannot be assessed against state or local governments since these were not authorized under the common law.

5. Offset

Offset is one of the most important weapons in the government's debt collection arsenal. The creditor agency should always explore the possibility of collecting a debt by offset. Offset is discussed fully in Section E of this chapter.

6. Consumer Reporting Agencies

One of the reasons you pay your private debts is to avoid a bad credit rating and consequent possible denial of credit in the future. Prior to the Debt Collection Act, this motivation was largely absent in the case of debts owed to the United States. Change came about in stages.

Prior to 1979, agencies generally did not report delinquent debts to credit bureaus. Although there was no prohibition against it, neither was there any statute or regulation authorizing it. A 1979 change to the Federal Claims Collection Standards directed agencies to develop and implement procedures for reporting delinquent debts to commercial credit bureaus. 44 Fed. Reg. 22702, April 17, 1979. However, the regulation received very limited use. Problems arose over the application of the Privacy Act, and the credit bureau industry would not participate if the bureaus would be subject to the Privacy Act.

In 1980, Congress experimented with exempting credit bureaus from the Privacy Act, but only in limited situations—the (then) Veterans

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Administration[28] and the Department of Education.[29] GAO supported extending legislation of this type to all government agencies.[30]

Governmentwide legislation was to come in 1982. The Senate Committee on Governmental Affairs explained the need and objective as follows:

"The use of credit bureaus is an essential, integral part of private sector credit management and debt collection. Probably the single most powerful motivation for individuals to pay their private sector debts is the threat of having their credit rating reflect a poor payment record. A poor credit rating often results in the loss of the ability to obtain additional credit. To date, federal agencies have not been able to use credit bureaus for credit management and debt collection purposes. As a result, there is no penalty from a 'credit worthiness standpoint' for debtors who are delinquent or in default on their debts to the government. There is neither an impact on their credit rating for good payment performance nor any public record of their poor payment performance. The theory behind debt reporting by the federal government is that the availability of delinquency information to private sector credit grantors will induce debtors to pay their obligations to the federal government. Those who do not pay may find that other credit is unavailable.

. . . .

"[I]n the private sector, credit reporting is used extensively. In view of the fact that the federal government operates the largest credit institution in the world, the Committee feels that it should have the same collection tools available to private lenders—this is especially true because the federal government is assuming a higher risk than the private sector in lending in most of its programs."

S. Rep. No. 378, 97th Cong., 2d Sess. 8 (1982), 1982 U.S. Code Cong. & Admin. News 3377, 3384. The House Committee on Government Operations cautioned that:

"[I]f the government is not aggressive in collection efforts, other credit grantors may simply ignore government debts when making credit decisions. Debts that are not likely to be collected are clearly of lesser relevance when evaluating the financial capabilities of an individual. Credit reporting will only be effective if the rest of the government's collection efforts are also effective."

[28]Pub. L. No. 96-466, § 606(e), 94 Stat. 2171, 2212. The authority has been retained for the Department of Veterans Affairs and is found at 38 U.S.C. § 5701(g)(2) (Supp. IV 1992).

[29]Pub. L. No. 96-374, § 445(c), 94 Stat. 1367, 1442. The Higher Education Amendments of 1986 included comparable authority, found at 20 U.S.C. § 1080a.

[30]Improving the Collection of Debts Owed the Government, Statement of Milton J. Socolar, Acting Comptroller General of the United States, before the Senate Committee on Governmental Affairs, April 23, 1981, page 4.

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H.R. Rep. No. 42, 97th Cong., 1st Sess. 3 (1981).

The resulting legislation was section 3 of the Debt Collection Act of 1982, codified at 31 U.S.C. §§ 3701(a)(3) and 3711(f). The corresponding provision of the Federal Claims Collection Standards is 4 C.F.R. § 102.5. The legislation exempts credit bureaus from the Privacy Act, although the creditor agencies remain subject to it.

Under 31 U.S.C. § 3711(f), agencies may report debts to consumer reporting agencies, as defined in 31 U.S.C. § 3701(a)(3), under the following conditions:

- The agency must first publish a Privacy Act notice.
- The debt must be delinquent. The statute uses the term "overdue," which the Standards define as delinquent. 4 C.F.R. § 102.5(a).
- The agency must provide the debtor with at least 60 days' written notice of its intent to report the debt, and must provide the debtor an opportunity to seek administrative review or reconsideration of the government's claim. The procedural standards for this review are the same as for administrative offset (4 C.F.R. § 102.3) discussed later in this chapter.
- The agency must establish procedures for promptly notifying the consumer reporting agency of any changes in the status of the claim; for promptly responding to verification requests from the consumer reporting agency; and for obtaining assurances that the consumer reporting agency will comply with applicable federal laws such as the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 et seq. (An important provision, for example, is 15 U.S.C. § 1681c, which lists a number of items that may not be included in credit reports.)

The following information may be disclosed to a consumer reporting agency: information necessary to establish the individual's identity (such as name, address, and taxpayer identification number); amount, status, and history of the claim; and the agency or program under which the debt arose. 31 U.S.C. § 3711(f)(1)(F). If the creditor agency has obtained a mailing address from the Internal Revenue Service, it may disclose that information to a consumer reporting agency, but only for the purpose of preparing a commercial credit report on the taxpayer for use by the government agency in collecting the debt. 26 U.S.C. § 6103(m)(2).

The Federal Claims Collection Standards declined to set a dollar threshold for reporting debts to consumer reporting agencies, but do not inhibit others from doing so. See 1984 preamble, 49 Fed. Reg. at 8892. The

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Treasury Department has set a $100 threshold, but permits reporting of smaller debts at the creditor agency's discretion. Managing Government Credit: A Supplement to the Treasury Financial Manual at 4-13.[31]

OMB and the Treasury Department offer guidance on the use of consumer reporting agencies in a number of documents. Federal debt collection offices should be aware of and consult the following:

- Agency Reporting to Credit Reporting Bureaus, OMB-Treasury Credit Policy Guidelines, Issuance No. G-1-86, February 25, 1986.
- Guidelines and Formats for the Automated Reporting of Commercial Debts to Credit Reporting Bureaus, May 30, 1986 (issued jointly by Treasury and OMB).
- OMB, Guidelines on the Relationship Between the Privacy Act of 1974 and the Debt Collection Act of 1982, March 30, 1983.

7. Commercial Collection Agencies

Another collection tool long used by the private sector but not available to federal agencies until the 1980s is the referral of debts to private debt collectors.

Prior to 1981, GAO had taken the position that the Federal Claims Collection Act did not authorize federal agencies to use private collection agencies. The legal basis for this position was that the Act authorized agencies to refer uncollected debts only to other federal agencies with claims collection responsibilities (GAO and the Justice Department) and not to private parties. From a policy perspective, GAO felt that claims collection should be handled by government agencies themselves. B-117604(11), October 4, 1972; B-171524, January 4, 1971; B-117604.7-O.M., June 30, 1970.

During this time period, GAO also opposed legislation to authorize the use of commercial collection agencies, for two reasons. First, some private collection agencies had acquired unsavory reputations resulting from the use of questionable practices which might be imputed to the United States. Second, commercial services might not have the technical knowledge or resources to provide a debtor with a proper explanation of federal laws and regulations giving rise to the debt. B-117604, October 18, 1973.

[31]Legislation enacted in 1986 directs the Secretary of Defense to invoke 31 U.S.C. § 3711(f) with respect to debts of more than $100 arising out of Defense Department activities and which are delinquent by more than 31 days. 10 U.S.C. § 2780(b).

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The second category is debt claims with respect to which the account servicing and debt collection phases are one and the same. Suppose, for example, an agency makes an overpayment to one of its employees. The debt comes into existence when the agency discovers the overpayment and notifies the employee. The debt is still a receivable, but debt collection commences immediately and there is no separate account servicing phase.

Now for some numbers.[2] As of the end of fiscal year 1991, total receivables owed the federal government amounted to approximately $300 billion. This amount consisted of $230 billion in loans receivable and other non-tax debts, and $70 billion in tax receivables. Much of this will be paid routinely but a sizeable portion will not, forcing the government to pursue claims against its debtors. Out of this $300 billion total, $112.5 billion was reported as delinquent. The largest single category of delinquent debt is tax debt, which accounted for $67 billion, leaving $45.5 billion of delinquent non-tax debt.

The statistics tell you different things, depending on how you look at them. Most certainly, a delinquent debt total of over $112 billion is cause for serious concern at all levels of federal management. This, in anyone's vocabulary, is "real money."[3] This, however, does not necessarily translate into the same level of concern for every program. A useful measuring device is the "delinquency rate." If you divide the delinquent debt for a particular program by the total receivables for that program, you get the delinquency rate. Comparing the delinquency rate for the same program over a period of time will give you useful trend data for that program, which may be the same, better, or worse than the overall rate.

Let us take a simple hypothetical to illustrate. Suppose this year you make ten $100 loans for a total of $1,000 in loans receivable. If one of those loans becomes delinquent, you have a delinquency rate of 10 percent. Next year, you make fifty similar loans, also of $100 each. Five of those become delinquent. You have a fivefold increase in the total amount of delinquent debt, but your delinquency rate is still 10 percent. Both figures tell you something important, but the increase in the dollar amount of delinquent

[2]Section 12 of the Debt Collection Act of 1982, 31 U.S.C. § 3719, requires the Office of Management and Budget, in consultation with GAO and the Treasury Department, to prescribe regulations for agency reporting, at least once a year, on the status of receivables. The statute also lists the types of information required. The governmentwide totals noted in the text, derived from these reports, are taken from OMB's Budget of the United States Government, Fiscal Year 1993, Part One, pages 320-322.

[3]One is reminded of the quip attributed to the late Senator Everett Dirksen—a billion here, a billion there, pretty soon you're talking about real money. Library of Congress, Respectfully Quoted ¶ 800, at 155 (S. Platt ed., 1989).

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In 1981, prompted in part by the 1977 enactment of the Fair Debt Collection Practices Act, GAO reexamined—and changed—its position. GAO's change of heart was reflected in an amendment to the Federal Claims Collection Standards authorizing the use of debt collection contractors. 46 Fed. Reg. 22353, April 17, 1981. However, as with credit bureaus, the Standards extended an invitation to the party, and nobody came. Against this background, Congress decided that statutory authority was warranted. The result was section 13 of the Debt Collection Act of 1982, 31 U.S.C. § 3718(a). The corresponding provision of the Standards is 4 C.F.R. § 102.6.

Under 31 U.S.C. § 3718(a), a debt collection contract must provide for the creditor agency to retain the authority to resolve disputes, compromise claims, suspend or terminate collection action, and refer the matter to the Justice Department for litigation. Id. § 3718(a)(1); 4 C.F.R. § 102.6(a)(1). This does not necessarily require the agency to make all of these decisions on a case-by-case basis. For example, an agency might refer a group of similar claims within its compromise authority to a collection contractor and authorize the contractor to accept compromise offers in excess of a specified percentage.

The contractor is subject to the Privacy Act and to other federal and state laws relating to debt collection practices, such as the Fair Debt Collection Practices Act. 31 U.S.C. § 3718(a)(2); 4 C.F.R. § 102.6(a)(2).

A collection services contract may be funded by payment of a fixed fee, payable from agency operating appropriations. It may also be funded on a contingent-fee basis, by including a contract provision permitting the contractor to deduct its fee from amounts collected. 31 U.S.C. § 3718(d). The Standards state that a contingent fee "should be based on a percentage of the amount collected consistent with prevailing commercial practice." 4 C.F.R. § 102.6(b)(2). Prevailing practice should be determined by geographical area.

The original 31 U.S.C. § 3718 included language making collection service contracts effective only to the extent and in the amount provided in advance in appropriation acts. This is the language required by the Congressional Budget Act of 1974 for new spending authority, including contract authority. It was misplaced in this context, however, as the authority to enter into contracts conferred by 31 U.S.C. § 3718(a) is not "contract authority" as that term is used in the Congressional Budget Act. Congress amended the law the following year to make the appropriation

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act limitation inapplicable to contingent-fee contracts but leaving it intact for fixed-fee contracts. 31 U.S.C. § 3718(e). The appropriation act limitation is also inapplicable to fixed-fee contracts to the extent the agency is using a statutorily authorized revolving fund. 4 C.F.R. § 102.6(b)(3). The reason is that a revolving fund amounts to a continuing appropriation of receipts for authorized expenditures. 1984 preamble, 49 Fed. Reg. at 8892.

The authority to contract for collection services provided by 31 U.S.C. § 3718(a) applies only with respect to delinquent debts. 4 C.F.R. § 102.6(a). It does not apply to routine account servicing of non-delinquent accounts. 64 Comp. Gen. 366 (1985). See also 1984 preamble, 49 Fed. Reg. at 8892. Nor does it apply to the purchase of information identifying abandoned or unclaimed money or other property allegedly belonging to the United States. 72 Comp. Gen. 85 (1993). Such an expenditure, essentially a finder's fee, would have to be charged to some operating appropriation. Id.

Neither the Debt Collection Act nor the Standards address when an agency should refer a debt to a collection services contractor. However, OMB Circular No. A-129, § IV.4.e, directs referral if the account is delinquent by six months or more unless it has been referred to an internal agency workout group[32] or to the Justice Department for litigation, or unless there is an available source of funds for offset. The Department of Defense is directed by statute to use debt collection contractors for debts arising from Defense Department activities that are delinquent by more than three months. 10 U.S.C. § 2780(a)(1).[33]

The General Services Administration has added collection services to the Federal Supply Schedule, and has contracted with a number of private collection firms. Treasury's Financial Management Service has issued guidelines for use of the Federal Supply Schedule contracts. The Federal Supply Schedule permits "secondary referral" (referral to a second debt collection contractor) if the first contractor is unsuccessful and the agency still regards the debt as potentially collectible, or if the first contractor fails to meet the terms of a work order.

In a 1984 decision involving a pre-Federal Supply Schedule contract, a disappointed bidder protested the award of a collection services contract

[32]See Managing Government Credit: A Supplement to the Treasury Financial Manual at 4-15.

[33]A separate piece of legislation, made permanent by section 9019 of the Defense Department's 1990 appropriation act, Pub. L. No. 101-165, 103 Stat. 1112, 1133, authorizes Defense to enter into contracts "pursuant to" 31 U.S.C. § 3718, apparently giving it the option of proceeding under either 31 U.S.C. § 3718 or 10 U.S.C. § 2780.

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to a firm which proposed retaining local attorneys to perform various non-litigative functions, alleging that this approach constituted the unauthorized practice of law. (States generally regulate the practice of law.) GAO denied the protest because the basic responsibility for defining and regulating the practice of law rests with the courts of the particular state, and the solicitation required that the contractor agree to comply with applicable state law. Any question regarding the unauthorized practice of law would be a matter between the contractor and state authorities. While this might give rise to legitimate concern on the part of the contracting agency, it would be a matter either of bidder responsibility or contract administration. B-213790, June 13, 1984.

The authority of 31 U.S.C. § 3718(a) to employ private debt collection contractors applies only with respect to collection services. It does not embrace legal services, although section 3718(a) would not prohibit contracting with a law firm to provide collection services. See B-221099, February 18, 1986. Contracting for legal services in the debt collection area is the subject of another statute, discussed later in the context of referrals to the Department of Justice.

8. Compromise

a. In General

We are all familiar with the concept of compromise. We employ it in many contexts in our day-to-day existence. In essence, it means giving something up in order to get something else. In the claims context, it means accepting less than the full amount owed in full satisfaction of the claim.

We have already noted the long-standing principle that compromise requires specific statutory authority. It may not be inferred, even from the authority to "settle and adjust" claims. In fact, one of the major objectives of the Federal Claims Collection Act of 1966 was to give federal agencies limited compromise authority.

Under 31 U.S.C. § 3711(a)(2) and 4 C.F.R. § 103.1, agencies have authority to compromise debt claims where the principal amount (i.e., exclusive of interest, penalties, and administrative costs) does not exceed $100,000.[34] The statute says merely "excluding interest." The Standards added penalties and administrative costs to reflect the new authorities of the

[34]The original ceiling in the 1966 legislation was $20,000. It was raised to $100,000 in 1990. 31 U.S.C. § 3711(a)(2), as amended by Pub. L. No. 101-552, § 8(b), 104 Stat. 2736, 2746-47 (1990).

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Debt Collection Act of 1982. GAO has the same authority with respect to claims referred to it. The Attorney General is authorized to raise the ceiling from time to time. 31 U.S.C. § 3711(a)(2).

A compromise under the Federal Claims Collection Act and Standards is final and conclusive unless procured by fraud, misrepresentation, or mutual mistake of fact. 31 U.S.C. § 3711(d). Thus, in B-185295, January 21, 1977, a debtor who had made a compromise offer which was accepted, and then paid the compromise amount, could not later claim a refund arguing that he had paid only to avoid involuntary offset and had not intended to make a binding compromise agreement.

If the principal amount of the debt exceeds $100,000, only the Attorney General has the authority to compromise. See B-165667, December 11, 1968; B-165641, December 2, 1968 (non-decision letter). Under 4 C.F.R. § 103.1(b), Justice Department approval is required only where the agency wishes to accept a compromise offer; it is not required in order to reject an offer. Referrals to the Justice Department under section 103.1(b) must use the Claims Collection Litigation Report discussed later. Id.

A debtor's liability arising from a particular transaction or contract is considered a single claim for purposes of the $100,000 limit. An agency may not subdivide a claim to avoid the monetary limit. 4 C.F.R. § 101.6. Bills of lading are viewed as separate contracts and may be considered individually for purposes of the ceiling, however closely related they may be. B-182799-O.M., January 24, 1975; B-170829-O.M., May 13, 1974; B-159553-O.M., February 7, 1973.

At one time, some had questioned the appropriateness of compromising statutory penalties or forfeitures established to aid enforcement and to compel compliance. The Standards include a provision expressly authorizing compromise of claims of this type if the agency determines that compromise will adequately serve its enforcement policy, both present and future. 4 C.F.R. § 103.5. A factor for the agency to consider is whether the violation was willful or merely "accidental or technical." Id.

If two or more debtors are jointly and severally liable on a debt owed to the United States, the government may compromise the indebtedness of one debtor or of all of them. The agency should be careful that a compromise with one joint debtor does not release the other(s) unless this is intended. The amount of a compromise with one joint debtor does not

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bind the government to the same amount with respect to the other joint debtor(s). 4 C.F.R. § 103.6.

An agency's compromise authority ceases once it refers the claim to GAO or the Justice Department. 31 U.S.C. § 3711(a)(2); 4 C.F.R. § 103.1(a).

If an agency has a firm written offer of compromise from a debtor and is uncertain whether to accept the offer, it may refer the matter to GAO or the Justice Department. GAO or Justice will, at their option and within their respective authorities, either act on the offer or return it to the agency with a recommendation. 4 C.F.R. § 103.8.

An agency may not accept a percentage of a debtor's profits or stock in a debtor corporation in compromise of a claim. 4 C.F.R. § 103.9. With this exception, there is no prohibition on accepting property instead of, or in conjunction with, money in compromise of a claim. E.g., 37 Op. Att'y Gen. 298 (1933). Obviously, the agency should use sound judgment.

b. Standards for Compromise

The term compromise "imports the making of mutual concessions by the parties to a dispute in order to arrive at an amicable settlement without recourse to adversary proceedings." B-122319, August 21, 1956. See also 38 Op. Att'y Gen. 94, 95–96 (1933). The Federal Claims Collection Act does not authorize accepting a lesser amount merely for the sake of closing out the claim. To avoid arbitrary decisions, evaluation and acceptance must be governed by enunciated criteria, and these are found in the Federal Claims Collection Standards, specifically 4 C.F.R. Part 103.[35]

As noted earlier in this chapter, several agencies have their own agency-specific or program-specific compromise authority. See, for example, 62 Comp. Gen. 489 (1983) (Economic Development Administration); 28 Comp. Gen. 638 (1949) (insured mortgage claims by predecessor of Department of Housing and Urban Development). Part 103 applies in these situations as well, to the extent the agency has not published its own implementing regulations. 4 C.F.R. § 101.4; 62 Comp. Gen. at 494.

Generally, the regulations permit compromise in three situations, discussed separately below. Compromise may be based on one or any combination of the factors set out in Part 103. 4 C.F.R. § 103.7. While final authority on claims over $100,000 rests with the Justice Department,

[35]Although the relationship between the statute and the Standards has been somewhat obfuscated by the 1982 recodification of Title 31, the original 1966 statutory language clearly expresses the intent. Pub. L. No. 89–508, § 3(b), 80 Stat. 308, 309 (1966).

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agencies should nevertheless use the same factors in deciding whether to recommend acceptance. Id. § 103.1(b).

(1) Inability to pay

An agency may compromise a debt claim if the debtor is unable to pay the full amount within a reasonable time, or if the debtor has refused to pay the debt in full and the government will not be able to collect the full amount by enforced collection proceedings within a reasonable time. 4 C.F.R. § 103.2(a). The regulation lists a number of factors for the agency to consider in evaluating the situation, such as the debtor's age and health, present and potential income, and inheritance prospects. Id. § 103.2(b).

If the agency's files do not contain reasonably up-to-date credit information, the agency may obtain a statement from the debtor, executed under penalty of perjury, showing the debtor's assets, liabilities, income, and expenses. The Department of Justice has several forms available for this purpose, identified in 4 C.F.R. § 103.2(e). Where information available to the government on the debtor's financial status is not sufficient to reach a conclusion as to the debtor's ability to pay, GAO's policy is to recommend against acceptance of a compromise offer. See, e.g., B-186843-O.M., November 24, 1976. (A debtor who is sincere in making a compromise offer is likely to cooperate in providing the information.)

Where a debtor is receiving recurring payments of any substance from the government, it will be correspondingly more difficult to establish inability to pay. E.g., B-217114, August 12, 1988. However, receipt of government benefits is only one factor to be considered and does not automatically preclude compromise under the "inability to pay" standard. 62 Comp. Gen. 599, 604 (1983). Use of the "inability to pay" standard is particularly inappropriate where the debtor is on the federal payroll. 59 Comp. Gen. 28 (1979); B-253640, November 4, 1993.

It is the policy of the Standards to discourage compromises payable in installments. 4 C.F.R. § 103.2(d).[36] However, as stressed in the 1984 preamble, this is policy and not a legal requirement. 49 Fed. Reg. at 8894. An installment plan to implement a compromise should include the same safeguards as any other installment plan—legally enforceable written agreement with a default acceleration clause—plus a provision for the

[36]Although section 103.2(d) is part of the "inability to pay" standard, the point should apply equally to compromise under any of the standards.

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reinstatement of the prior indebtedness less sums already paid in case of default. 4 C.F.R. § 103.2(d).

(2) Doubtful litigation probabilities

An agency may compromise a claim if it has legitimate doubt concerning the government's ability to prove its case in court for the full amount either because of the legal issues involved or because of a bona fide dispute as to the facts. The amount accepted in compromise should reflect the probabilities of the government's prevailing on the legal issue and its actually collecting a full or partial judgment, taking into consideration such factors as the availability of witnesses and other evidentiary support for the government's claim. 4 C.F.R. § 103.3. The cost of litigation is also a legitimate factor to include in the equation. See B-196058-O.M., October 29, 1979.

For example, GAO recommended acceptance of a corporation's offer to compromise for $19,300 an Atomic Energy Commission claim for $49,133.74 for loss of a rocket because of the factual uncertainties and legal principles involved in litigating the case. B-160890, May 14, 1970 (non-decision letter). In another case, GAO recommended acceptance of a debtor's offer of $125,000 to compromise a government claim for $301,833.51, in part because the debtor had some basis to question the forum in which the matter would be litigated, which could result in transfer of the case to a United States district court where the debtor could request a jury trial with its attendant uncertainties. B-170070, December 29, 1971 (non-decision letter).

In B-165667, December 11, 1968, GAO recommended to the Justice Department that it accept a $15,000 compromise offer in satisfaction of a $26,105 government claim for damage to an aircraft under a cost reimbursement Army contract with the builder. Proof of actual damage was considered extremely difficult in the case because the aircraft was never repaired due to a reduction in scope of the contract. In a case where there was serious question as to the admissibility of important documents as evidence and where it appeared that the agency could not furnish better evidence to support its claim, GAO did not object to the acceptance of a $5,000 compromise offer in settlement of a $54,655.70 claim. B-156283, July 20, 1970 (non-decision letter).

In a more recent case involving a claim already in litigation, GAO had set off a debt against an award under the Military Claims Act and the debtor sued

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to recover the amount withheld. It turned out that the government's claim had been based largely on an oral contract which the debtor disputed. In view of the apparent weakness of the government's position, GAO recommended to the Justice Department that it "seek settlement on the best possible terms." B-202732, July 30, 1981 (non-decision letter).

Litigative probabilities also moved GAO to recommend compromise in B-229329, January 30, 1989. The Air Force had asserted a claim of $63,749.83 against a carrier for non-delivery of an "atomic clock" (glows in the dark?). However, the record revealed that the government might have difficulty proving delivery to the carrier. Also, there was some question as to whether the government had a duty to disclose the value of the article, and the amount of damages was open to question since the market for atomic clocks is not particularly large. The carrier had indicated a willingness to compromise for $15,040. In view of the various considerations noted, GAO recommended compromise on these terms.

In evaluating litigative probabilities, the agency should include in its consideration the possibility of an award of attorney's fees against it under the Equal Access to Justice Act if a court should determine that its position was not substantially justified. 4 C.F.R. § 103.3.

When this standard is being applied properly, the agency should be able to point to specific factors justifying the compromise conclusion, over and above the risk of losing which is present whenever one walks into court.

(3) Diminishing returns

An agency may compromise a claim if the cost of collecting it does not justify the enforced collection of the full amount. The agency should consider both the administrative and litigative costs of collection. 4 C.F.R. § 103.4.

Costs for purposes of section 103.4 may include the costs of administrative procedures required by law, such as hearings, but only when there is a substantial likelihood that they will actually be incurred in the particular case. 65 Comp. Gen. 893 (1986); 1984 preamble, 49 Fed. Reg. at 8895.

It is important to emphasize that compromise on the basis of cost effectiveness is discretionary, not mandatory. The concept should not be applied blindly. There will be situations in which cost effectiveness should

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yield to other policy considerations. In this connection, the following portion of 4 C.F.R. § 103.4 is worth quoting:

"Costs of collecting may be a substantial factor in the settlement of small claims, but normally will not carry great weight in the settlement of large claims. In determining whether the cost of collecting justifies enforced collection of the full amount, it is legitimate to consider the positive effect that enforced collection of some claims may have on the collection of other claims. Since debtors are more likely to pay when first requested to do so if an agency has a policy of vigorous collection of all claims, the fact that the cost of collection of any one claim may exceed the amount of the claim does not necessarily mean that the claim should be compromised. The practical benefits of vigorous collection of a small claim may include a demonstration to other debtors that resistance to payment is not likely to succeed."

In other words, while cost effectiveness is important, the agency's entire debt collection program will suffer if it develops the reputation of being an "easy mark."

c. Compromise and Accountable Officers

Two provisions of law stemming from the Federal Claims Collection Act of 1966 are relevant in connection with the liability of accountable officers.

First, agencies are not authorized to compromise a claim "arising out of an exception the Comptroller General makes" in an accountable officer's account. 31 U.S.C. § 3711(b). This includes a claim against the ultimate beneficiary of an improper payment. 4 C.F.R. § 103.1(a). Only the Comptroller General is authorized to compromise in this situation prior to referral to the Justice Department for litigation.

The term "exception" in the statute is construed in its general meaning as an objection raised by GAO to an item or items in an accountable officer's account. The particular form is irrelevant. See B-164729-O.M., April 17, 1969; B-115392-O.M., February 27, 1969; B-117604-O.M., March 24, 1967. Once GAO has raised an exception in an account, a purported compromise by the administrative agency will be legally ineffective. It does not bind the government, nor does it affect the liability of the accountable officer. B-117604.1-O.M., December 29, 1969; B-164729-O.M., April 17, 1969.

The statutory provision barring agency compromise in cases where GAO has raised an exception does not relieve the agency from continuing to pursue aggressive collection action on the debt. B-117604, January 3, 1968. Also, the provision bars only compromise; it does not preclude the agency

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from exercising its authority to suspend or terminate collection action if otherwise appropriate. Id.

The second relevant provision is the second sentence of 31 U.S.C. § 3711(d), which provides that a compromise under section 3711 will operate to relieve the accountable officer. Thus, in improper payment cases, a compromise with the recipient or beneficiary will have the effect of relieving the accountable officer regardless of whether he or she would have been entitled to relief under the various relief statutes. This is an equitable result because the government's compromise effectively bars the accountable officer from pursuing recovery against the recipient.[37]

The authority to compromise with the recipient under the Federal Claims Collection Act does not depend on whether the accountable officer is entitled to relief under the applicable relief statutes. However, the probability of recouping the full amount of an improper payment from the accountable officer is a factor to consider in determining whether a compromise offer from the recipient is adequate. B-154400-O.M., January 29, 1968.

The operation of 31 U.S.C. § 3711(d) is illustrated in a Post Office case which arose prior to the Postal Reorganization Act of 1970. A local postmaster had been held liable for failure to assess and collect proper postage for second-class newspaper mailings. The (then) Post Office Department referred its claim against the newspaper to GAO for further collection action, and GAO accepted a compromise offer. By virtue of 31 U.S.C. § 3711(d), acceptance of the compromise relieved the postmaster of any further accountability for the uncollected amount of the deficiency. B-170841, December 5, 1972.

The "relief aspect" of 31 U.S.C. § 3711(d) applies by its terms only to compromises made under the authority of the Federal Claims Collection Act. However, GAO has applied the same policy to compromises made by the Justice Department under its general litigation authority. In B-156846-O.M., October 25, 1967, GAO had raised an exception to an improper payment and denied relief to the accountable officer under 31 U.S.C. § 3527. Subsequently, the government's claim against the recipient of the improper payment was referred to GAO as uncollectible, and then to the Justice Department. The Justice Department compromised the claim for 50 percent. GAO reviewed the cases prior to the Federal Claims Collection

[37]Prior to 1966, the rule had been that a compromise with the beneficiary did not affect the accountable officer's liability, although in several cases the equitable concerns moved GAO to grant relief. B-156846-O.M., October 25, 1967.

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debt in this particular example may be due to increased program size rather than poor debt collection.

Delinquencies occur for a variety of reasons. We have all seen press accounts of some wealthy professional with a seriously delinquent student loan. However, it must also be kept in mind that many federal programs are intended to provide assistance in one form or another to some segment of society which the private market will not accommodate. If private credit markets were available, the federal programs would presumably not have been necessary. Delinquencies in such programs should not be surprising. In addition, changes in the economy or other factors beyond anyone's control have an impact. A severe drought will produce increased delinquencies in farm credit programs. This by itself obviously does not mean that the administering agencies are ignoring debt collection or that farmers are "deadbeats."

The point of all this is to caution against over-generalization. While it is true that debt collection is a major task for the federal government, delinquent debt occurs for a variety of reasons, and federal agencies should formulate their debt collection approaches accordingly.

GAO's debt collection philosophy stems from two key premises. First, each federal agency should have an aggressive debt collection program, taking advantage of all tools available under the law, tailored to the needs and circumstances of the particular program or case. Second, federal debt collection activities should never be unreasonable. It is frequently said that an agency's actions should always be based on the "interests of the government." While maximum recovery of amounts owed is surely one of these interests, it is not the only one. It is not the intent of federal debt collection to impoverish the citizen.[4]

B. Legal Foundation

1. The Common Law

While debt collection today is largely a creature of statute, this was not always the case. There is a common-law base to federal debt collection, much of which remains relevant. The Supreme Court has recognized that the United States, as sovereign, has the inherent right to collect debts

[4]The preamble to the 1984 reissuance of the Federal Claims Collection Standards, discussed later in the text, throughout stresses the concept of avoiding undue financial hardship. 49 Fed. Reg. 8889–96 (March 9, 1984). See also, e.g., 62 Comp. Gen. 599 (1983).

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Act, some of which had held that the compromise operated to relieve the accountable officer, others that it did not, and decided that the policy expressed in section 3711(d) should apply here as well. Therefore, the compromise with the recipient was held to relieve the accountable officer from any liability for the balance. Since the matter had been referred to the Justice Department for litigation, the fact that a GAO exception was involved was, at that stage, irrelevant.

GAO followed the same approach in 65 Comp. Gen. 371 (1986), involving a compromise as part of a plea agreement in a criminal case. Several Corps of Engineers employees were found to have submitted fraudulent travel vouchers and the cases were referred to the Justice Department for criminal prosecution. The United States Attorney entered into a plea agreement under which the defendants agreed to partial repayment.[38] Payment under the plea agreements not only terminated the government claims against the defendants, but also removed any liability for the unpaid amounts on the part of the accountable officer who had certified the fraudulent payments.[39]

While compromise with the recipient of the improper payment effectively relieves the accountable officer, the converse is not true. Relief of the accountable officer does not affect the liability of the recipient. As discussed further in Chapter 9, 31 U.S.C. § 3527(d)(2) expressly provides that relieving the accountable officer does not relieve the recipient from liability, nor does it in any way diminish the government's responsibility to pursue collection action against the recipient.

d. Reporting to Internal Revenue Service

In some cases—and we emphasize in some cases—a compromise may result in taxable income to the debtor. There are two relevant sections of the Internal Revenue Code—26 U.S.C. §§ 61(a)(12) and 108. Section 61(a)(12) identifies "income from discharge of indebtedness" as a category of gross income. The concept itself is easy to state: "income may be realized by a taxpayer upon the cancellation of indebtedness and the amount canceled is then to be included in gross income." Meyer v. Commissioner, 383 F.2d 883, 888 (8th Cir. 1967). Indebtedness for federal tax purposes has been defined as "an unconditional and legally enforceable obligation for the payment of money." Commissioner v.

[38]Only the Justice Department may compromise claims involving fraud. 4 C.F.R. § 101.3(a).

[39]By virtue of 70 Comp. Gen. 463 (1991), liability in this type of case would now be computed differently. However, 65 Comp. Gen. 371 remains valid to illustrate the effect of compromise on the accountable officer.

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McKay Products Corp., 178 F.2d 639, 644 (3rd Cir. 1949), cert. dismissed, 339 U.S. 961.

Section 108 of the Internal Revenue Code provides a number of significant exclusions. Some of them are:

- If the discharge occurs in a Title 11 (bankruptcy) case, or if it occurs when the taxpayer is insolvent, the discharged amount is not includible in gross income. 26 U.S.C. § 108(a)(1). Insolvency is given the traditional definition of "the excess of liabilities over the fair market value of assets." Id. § 108(d)(3).
- Discharge will not result in taxable income to the extent payment of the debt would have been tax deductible. Id. § 108(e)(2).
- Amendments in 1984 and 1986, codified at 26 U.S.C. §§ 108(f) and (g), provided exclusions for, respectively, student loan debts in cases where the individual is required to work for a certain period of time in certain professions, and for certain farm indebtedness.

There is no statutory requirement for creditor agencies to report discharged indebtedness to the Internal Revenue Service, nor was one included in the 1984 revision of the Federal Claims Collection Standards. See 1984 preamble, 49 Fed. Reg. at 8889. However, various OMB and Treasury publications require such reporting as a matter of executive branch policy. GAO has found, not surprisingly, that "information reporting" enhances taxpayer compliance. See GAO report, Tax Administration: Information Returns Can Improve Reporting of Forgiven Debts, GAO/GGD-93-42 (February 1993).

OMB first announced the requirement for federal agencies to report discharged indebtedness, starting with calendar year 1983, in a memorandum to all debt collection officials dated November 17, 1983 (Subject: Reporting Written-Off Debt to IRS). The requirement was subsequently incorporated into OMB Circular No. A-129.

Treasury's instructions are found in Managing Government Credit: A Supplement to the Treasury Financial Manual, Chapter 5. Agencies are instructed to report amounts discharged by compromise under the "inability to pay" or "diminishing returns" standards. Reporting is not required if the compromise is based on the "litigative probability" standard. Amounts greater than $600 must be reported; amounts of $600 or less may be reported, at the creditor agency's discretion. The discharge is reported on IRS Form 1099-G, a copy of which is furnished to the debtor.

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9. Suspension and Termination of Collection Action

a. In General

Another important authority conferred by the Federal Claims Collection Act of 1966 is the authority to suspend or terminate collection action. As with compromise, the authority of the creditor agency to suspend or terminate applies only to claims whose principal amount does not exceed $100,000[40] and which have not been referred to another federal agency for further collection action. Also, the authority must be exercised in accordance with the Federal Claims Collection Standards. 31 U.S.C. § 3711(a)(3); 4 C.F.R. § 104.1; B-160506, April 10, 1970. GAO has the same authority as the agencies to suspend or terminate collection action on claims referred to it by other agencies. 31 U.S.C. § 3711(b).

For claims whose principal amount less any partial payments received exceeds $100,000, the authority to suspend or terminate rests with the Department of Justice (with one exception, to be discussed under "Termination"). 4 C.F.R. § 104.1(b); B-218989, January 27, 1986; B-215982, October 17, 1984. As with compromise, the agency should use the factors identified in the Standards to evaluate the matter. Justice Department approval is required only if the agency wants to exercise the authority, not if it decides against it. 4 C.F.R. § 104.1(b).

b. Suspension

Suspension is the temporary deferral of collection action. It is authorized by 31 U.S.C. § 3711(a)(3), which originated as part of section 3(b) of the Federal Claims Collection Act of 1966. The standards for suspension are found in 4 C.F.R. § 104.2. In some situations, suspension is mandatory; in others it is permissive or discretionary.

If there is an applicable statute providing for waiver or administrative review of the government's claim, and if that statute is "mandatory" in the sense that it prohibits recovery until the waiver or review decision has been made, then collection action must be suspended until the waiver or review process has run its course. 4 C.F.R. § 104.2(c)(1). The process "runs its course" when either of two things happens: (1) the agency actually considers a request from the debtor, or (2) the agency notifies the debtor of his or her right to seek waiver or review, and the debtor does not request it within the time period prescribed either in the statute or in the agency's implementing regulations. Id. The regulation in this regard is

[40]As with compromise, the ceiling was set at $20,000 in 1966 and was raised to $100,000 in 1990, with the Attorney General authorized to raise it further from time to time.

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based on the Supreme Court's approval in Califano v. Yamasaki, 442 U.S. 682, 694 (1979), of the method used by the Social Security Administration in administering its mandatory waiver statute.

In all other situations, suspension is essentially discretionary. The Federal Claims Collection Standards authorize discretionary suspension in three broad situations.

(1) Inability to locate debtor

An agency may temporarily suspend collection action if, after diligent effort, it is unable to locate the debtor but believes that future possibilities justify periodic review and action on the claim. 4 C.F.R. § 104.2(a). The agency should liquidate any security it may be holding and, if the debtor has executed a confess-judgment note, should refer it for the entry of judgment. Id.

The regulation contemplates a diligent effort to locate the debtor and identifies several possible sources of assistance. Having a single letter returned by the post office normally isn't enough. 62 Comp. Gen. 91, 98–99 (1982).

(2) Debtor's financial condition

Collection action may be suspended if the debtor is financially unable to make reasonable installment payments or to compromise on reasonable terms but future prospects justify retention of the claim, and if the debtor owns no substantial equity in real or personal property against which collection can be enforced. 4 C.F.R. § 104.2(b). In addition, in order to justify suspension under this standard, one of the following factors should be present: the statute of limitations has been tolled or started running anew; a future offset opportunity will be available; or suspension is likely to enhance the debtor's ability to fully pay principal and interest at a later date. Id.

In 62 Comp. Gen. 599 (1983), applying an earlier but substantially similar version of this standard, GAO advised the Social Security Administration that proposed repayment agreements calling for an initial period of little or no payment, to be followed by a period of more substantial payments, were within the agency's discretion under section 104.2.

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The future potential to collect by administrative offset is, by itself, not sufficient to justify suspension. It must be tied to an appropriate evaluation of the debtor's financial condition. 65 Comp. Gen. 245, 251 (1986).

(3) Permissive waiver/review statute

If there is an applicable statute providing for waiver or administrative review and the statute is "permissive" in the sense that it does not prohibit collection action pending consideration of a request for waiver or review, the agency may nevertheless suspend collection action based on "appropriate consideration," on a case-by-case basis, of three factors: (1) whether there is a reasonable possibility that the debtor's request will prevail; (2) whether there is reasonable assurance of recovery if the debtor does not prevail; and (3) whether collection would cause undue hardship. 4 C.F.R. § 104.2(c)(2). This standard was based largely on a Comptroller General decision, B-185466, August 19, 1976.

The regulation deliberately uses the somewhat vague term "appropriate consideration." The 1984 preamble offered the following explanation:

> "Exactly what constitutes 'appropriate consideration' may well vary from case to case. On the one hand, it is not necessary that all 3 factors be present in every case. On the other hand, however, suspension should not be automatic merely because any one of the three is present. The determination to suspend should balance the interests of the Government against fairness to the debtor. The determination should be reasonable in relation to the circumstances of the particular case, and it should be justifiable in terms of the specified factors." 49 Fed. Reg. at 8895.

For purposes of 4 C.F.R. § 104.2(c)(2), administrative review includes referral to GAO for advice or decision. 49 Fed. Reg. at 8895.

Another factor to consider in evaluating suspension under a permissive waiver or review statute is whether the applicable statutes and regulations would authorize the agency to refund payments to the debtor in the event the agency acts favorably on the debtor's request. If refund would not be authorized, collection action should be suspended without regard to the factors listed in subsection 104.2(c)(2), unless it seems clear that the request for waiver or review is frivolous (wholly without merit) or dilatory

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(intended primarily to forestall collection). 4 C.F.R. § 104.2(c)(3); 1984 preamble, 49 Fed. Reg. at 8895.[41]

The Federal Labor Relations Authority has determined that the Federal Claims Collection Standards are governmentwide regulations for purposes of 5 U.S.C. § 7117. Accordingly, proposals for automatic suspension of collection action without regard to the factors identified in 4 C.F.R. § 104.2 are inconsistent with a governmentwide regulation and therefore not within an agency's duty to bargain. National Association of Government Employees, Local R1-109, 37 F.L.R.A. 500, 511–12 (1990); American Federation of Government Employees, AFL-CIO, Local 225, 15 F.L.R.A. 607 (1984).

c. Suspension Pending Congressional Action

Private relief legislation is used not only to authorize payments to claimants but also to relieve debtors of indebtedness. A question often asked is whether collection action must continue while Congress is considering a private relief bill. In the days when GAO had a much more active "accounts receivable" operation, GAO developed a policy in this area, independent of the Federal Claims Collection Standards, which we set forth here for consideration in appropriate cases.

In general, GAO's policy is to suspend collection action pending congressional consideration of private relief legislation, even though there is no requirement to do so. Suspension or abatement should not be automatic, however, but should be based on a request by the sponsor of the bill or an appropriate congressional committee, plus an administrative determination that the circumstances justify suspension. B-168579, February 17, 1970. Basically, in making its determination, the agency must evaluate present vs. future collection prospects.

Normally, suspension, where justified, is allowed until the end of the session of Congress in which the bill is introduced. Id.; B-168762, February 16, 1970; B-161734, July 7, 1967; B-161309, June 13, 1967. If the bill is introduced late in the session, collection action may abate until the end of the next full session. B-152680, October 28, 1966; B-159708, September 23, 1966.

If Congress has not acted on a particular relief bill during the session in which it was introduced, the repeated introduction of the same bill in future Congresses should not in itself form a basis for continuing

[41]This concept also stemmed from a number of prior GAO decisions. See, e.g., B-185466, August 19, 1976; B-184532, September 16, 1975; B-183863, July 18, 1975.

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suspension of collection, especially if prompt collection action is considered necessary to protect the government's interests. B-168579, February 17, 1970. For example, if an accountable officer might also be liable, the agency should be careful not to lose that option through expiration of the 3-year statute of limitations in 31 U.S.C. § 3526(c). Id. However, GAO has agreed to continue suspension for one additional session where the bill passed the House but the Senate did not act during the session of introduction (B-161734, February 9, 1968), and in one case where Congress took no action (B-168762, February 17, 1971).

Although suspension is generally permissible only if relief legislation is actually before the Congress, GAO has not objected to suspension of collection action where a Member of Congress asked GAO to investigate and report on the basis of the government's claim, pending completion of the investigation and GAO's reply. B-159788, October 5, 1966.

d. Termination

(1) Standards for termination

Section 3(b) of the Federal Claims Collection Act of 1966, 31 U.S.C. § 3711(a)(3), authorizes the termination of collection action on debts whose principal amount does not exceed $100,000, "when it appears that no person liable on the claim has the present or prospective ability to pay a significant amount of the claim or the cost of collecting the claim is likely to be more than the amount recovered." The specific criteria are found in the Federal Claims Collection Standards, 4 C.F.R. § 104.3.

The Standards are not merely guidelines. They establish the limits of agency authority. If the standards for compromise or termination cannot be met, and if the debt cannot be waived, the agency has no alternative but to pursue collection of the full amount of the debt. See, e.g., B-163495, February 23, 1968; B-160771, February 24, 1967; B-152680, October 28, 1966. Neither the statute nor the Standards permit termination merely because of the inability to collect within a reasonable time. B-117604-O.M., May 23, 1969.

Application of the Standards cannot be arbitrary. The agency must have adequate support for its decision to terminate. As the Comptroller General has stated, "it was not contemplated [in issuing the termination regulations] that any of these bases would be applied in the absence of detailed support of such application." B-117604.1, May 27, 1968.

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If an agency is not sure whether collection on a particular claim should be suspended or terminated, it may refer the claim to GAO for advice. 4 C.F.R. § 104.4. If a significant enforcement policy is involved in a particular case, or if recovery of a judgment is a prerequisite to desired administrative sanctions, the agency may refer the claim for litigation even though it may otherwise qualify for termination. Id.

The Federal Claims Collection Standards provide five criteria for termination, the two specified in the statute plus three additional logical items added by the regulations:

1. Inability to collect any substantial amount. The agency may terminate collection action if the debtor is financially unable, both presently and prospectively, to pay any substantial amount on the claim. 4 C.F.R. § 104.3(a). For example, termination was justified where the government had obtained a default judgment but could not find any assets on which to levy, and there were other substantial unsatisfied judgments on record. B-161248-O.M., November 9, 1967. Receipt of government benefits does not automatically preclude termination under this standard. 62 Comp. Gen. 599, 604 (1983).

2. Cost will exceed recovery. The agency may terminate when it is likely that the cost of further collection action will exceed the amount recoverable. 4 C.F.R. § 104.3(c). This is the "diminishing returns" standard. As with the corresponding standard for compromise, the costs of hearings or other administrative procedures required by law may be included if there is a substantial likelihood that they will actually be incurred in the particular case. 65 Comp. Gen. 893 (1986).

3. Inability to locate debtor. The agency may terminate when the debtor cannot be located and either (1) there is no remaining security to be liquidated, or (2) the applicable statute of limitations has run and prospects for offset are too remote to justify retention. 4 C.F.R. § 104.3(b). E.g., B-180072-O.M., November 29, 1973.

4. Claim legally without merit. 4 C.F.R. § 104.3(d). A claim is legally without merit if there is no legal basis for recovery by the United States. 68 Comp. Gen. 609 (1989); B-218989, January 27, 1986. This standard is the one exception to the requirement to refer all claims over $100,000 to the Justice Department. If an agency determines that its original assertion of a claim was plainly erroneous, it may terminate collection action without Justice Department approval regardless of the amount of the claim. 4 C.F.R.

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§ 104.1(b). If there is room for reasonable disagreement, Justice should be consulted.[42]

5. Claim cannot be substantiated by evidence. However good a claim may be in theory, if the agency has insufficient evidence to prove it (documentary evidence, witnesses, etc.) and the debtor refuses to pay or compromise, termination is appropriate. 4 C.F.R. § 104.3(e).

(2) Termination and federal employees

A thorny and frequently recurring question is whether the termination authority applies to debtors currently employed by the federal government. On the one hand, the argument goes, federal employees are people too, and should be governed by the same standards as nonfederal employees. On the other hand, however,—and wholly apart from any consideration of what should constitute appropriate conduct by a government employee[43]—a government employee has a steady paycheck and should always be able to repay a debt, at least in reasonable installments.

The statute and its legislative history do not address this issue. GAO has issued several decisions over the years which, at first glance, may not appear entirely consistent. They do, however, when viewed in the aggregate, stand for the proposition that (a) as a matter of law, the termination authority applies to federal employees, but (b) the various criteria specified in the Federal Claims Collection Standards must be examined individually as it will generally be more difficult for a federal employee to meet some of them.

Reviewing the criteria in the order listed in the preceding section, the first is inability to pay. GAO first considered the issue in B-159708, September 23, 1966, a response to a Member of Congress on behalf of a civilian employee of the Navy. The Comptroller General pointed out that the law required collection of the full amount of the indebtedness unless there was a showing that the employee was financially unable to pay "any significant sum" on the debt, an event GAO viewed as "unlikely" since the

[42]Letter dated March 11, 1969, from Assistant Attorney General William D. Ruckelshaus to Agency for International Development (copy on file with editors).

[43]A track record of failing to pay just debts may support a different type of termination—termination of employment. E.g., Dennis v. Blount, 497 F.2d 1305 (9th Cir. 1974). Whether an agency can discharge an employee for failure to pay a single debt is questionable. Id. at 1307–08; White v. Bloomberg, 345 F. Supp. 133, 143–48 (D. Md. 1972). Regardless of the number of debts, filing for bankruptcy will protect the employee from being fired. 11 U.S.C. § 525(a).

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debtor was employed by the government. Thus, while the Comptroller General stopped short of expressing a definitive position, he seemed to be saying that the "inability to pay" standard applies to federal employees just as to any other debtor, but that a federal employee would rarely, if ever, be able to qualify under that standard. See also 49 Comp. Gen. 359, 361 (1969); B-163495, February 23, 1968; B-160569, February 28, 1967.

GAO concluded that termination was unauthorized in B-160633, January 19, 1967, a case involving an Air Force employee who had erroneously been paid overtime compensation. The decision held that there was no authority to discontinue collection action since the debtor "currently is employed and there is no showing of his inability to repay the amount in question." Again, the implication was that the standard applies as a matter of law but that someone receiving a government paycheck is presumptively unable to meet it.[44]

In B-172122-O.M., May 21, 1971, GAO's General Counsel advised the GAO Claims Group that "the present debt should not be terminated or suspended . . . so long as the employee occupies his present position and has a take home pay of $980 a month after tax withholding in addition to his retired military pay." In B-175499, April 21, 1972, overruled on other grounds by 69 Comp. Gen. 72 (1989), GAO held that a particular overpayment could not be waived under 5 U.S.C. § 5584 but advised the agency to consider the various alternatives under the Federal Claims Collection Act, one of which is termination. In that particular case, however, the employee was in the process of resigning and was in a "leave without pay" status.

The cases noted above all involved overpayments or erroneous payments made directly to the debtor. In one case, GAO considered whether termination was available on behalf of an accountable officer where GAO had previously denied relief. Reviewing several of the earlier cases, GAO expressed a general rule that termination is unauthorized where the debtor is currently employed by the government. However, in view of the history of that particular case and the financial hardship which had been demonstrated, GAO advised that no further collection action need be taken. The case was clearly viewed as an exception. B-180957-O.M., September 25, 1979.

[44]The decision makes no mention of the possibility of waiver since 5 U.S.C. § 5584 was not enacted until the following year.

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owed to it. "The Government by appropriate action can recover funds which its agents have wrongfully, erroneously, or illegally paid." United States v. Wurts, 303 U.S. 414, 415 (1938). As another court has stated:

"The only time a government agency is barred from exercising its right to recover overpayments is when Congress has clearly manifested its intention to raise a statutory barrier."

Old Republic Ins. Co. v. Federal Crop Ins. Corp., 746 F. Supp. 767, 770 (N.D. Ill. 1990), aff'd, 947 F.2d 269 (7th Cir. 1991). See also Bechtel v. Pension Benefit Guaranty Corp., 781 F.2d 906 (D.C. Cir. 1986).

The extent to which this right exists under the common law, i.e., without the need for statutory authority, has not been free from debate. At a minimum, it embraces the right to sue. Wurts, 303 U.S. at 415. See also Fansteel Metallurgical Corp. v. United States, 172 F. Supp. 268, 270 (Ct. Cl. 1959); Maryland Small Business Development Financing Authority v. United States, 4 Cl. Ct. 76, 80 (1983).

The government's common-law right to recover amounts owed to it has also been held to embrace administrative recoupment and setoff.[5] E.g., Woods v. United States, 724 F.2d 1444 (9th Cir. 1984) (food stamp program); Collins v. Donovan, 661 F.2d 705 (8th Cir. 1981) (Labor Department recoupment regulations under Trade Act of 1974); Jacquet v. Westerfield, 569 F.2d 1339 (5th Cir. 1978) (Aid to Families with Dependent Children program); DiSilvestro v. United States, 405 F.2d 150 (2d Cir. 1968) (erroneous payment of disability benefits by Veterans Administration). Also, as we will see later in this chapter, the United States has long asserted the common-law right to charge interest.

Some courts have elevated the government's common-law right to recover to the status of a duty. The argument begins with Article IV, section 3, clause 2 of the Constitution, the so-called Property Clause, which gives Congress the power to dispose of property belonging to the United States. The term "property" is not limited to tangible property, but includes legal rights as well. Thus, the Supreme Court has stated:

"Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. Art. IV, § 3, Cl. 2. Subordinate officers of the

[5]Technically, "recoupment" and "setoff" are two different things. In a recoupment, both claims arise from the same transaction. In a setoff, the claims arise from different transactions. Black's Law Dictionary 1275 (6th ed. 1990).

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Thus, in the typical case, it will be difficult at best for a federal employee to qualify for termination under the "inability to pay" standard. The rationale is that the employee cannot legitimately be deemed unable to pay, at least in reasonable installments, where he or she is receiving a steady government paycheck. In many financial hardship cases, if a reasonable installment plan is not feasible, suspension will be the more appropriate course of action. There is, however, no rule of law which prohibits termination if the standard, fairly applied, is satisfied.

The next standard is "diminishing returns." Prior to the Debt Collection Act of 1982, the decisions had consistently held that termination on this basis was unauthorized where salary offset under 5 U.S.C. § 5514 was an available remedy. B-195471, October 26, 1979; B-189701, September 23, 1977; B-180674, November 25, 1974; B-160483, December 9, 1966. See also B-195322, November 27, 1979. When these decisions were rendered, the cost of taking a salary offset was negligible. The process involved little more than contacting the payroll office. Thus, a "diminishing returns" standard would have little application. However, the Debt Collection Act of 1982 changed the rules by requiring various procedural measures in connection with taking an offset.

The post-1982 offset environment caused GAO to reconsider its position. The new rule is that agencies may—but are not required to—take into consideration the costs of administrative procedures required by law when applying the "diminishing returns" standard to any debtor, federal employees included, if there is a substantial likelihood that the costs will actually be incurred in the particular case. 65 Comp. Gen. 893 (1986). As with compromise, the decision cautioned that cost effectiveness is only one factor in the equation:

> "[T]here may be cases in which sound countervailing Government policies dictate that collection be attempted, despite the costs. For example, it may be desirable for the agency to disregard the costs of collection when it wishes to 'set an example,' and thereby discourage or deter other persons from incurring similar debts or resisting payment of them." Id. at 897.

The three remaining termination standards are easily addressed. It is difficult to see how "inability to locate debtor" could ever apply to a person on the federal payroll. As to the final two—claim legally without merit and lack of evidence—there is no reason why these should not apply fully to debts asserted against federal employees.

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(3) Categorical termination

As we have seen, one of the standards for termination is the concept of "diminishing returns." When the cost of collection is likely to exceed the amount recoverable, collection action may be terminated. 4 C.F.R. § 104.3(c). Generally speaking, the termination authority contemplates situations where the agency has already started collection action. 58 Comp. Gen. 372, 374 (1979). There are situations, however, where GAO has construed the Federal Claims Collection Act as permitting an agency to simply forgo collection action before it was actually initiated.

Even before the Federal Claims Collection Act, GAO had advocated that agencies establish realistic points of diminishing returns for their collection activities. E.g., 45 Comp. Gen. 553 (1966). This advice today is found in the Federal Claims Collection Standards, specifically 4 C.F.R. § 102.14, which encourages agencies to use cost benefit analyses to:

"establish guidelines with respect to points at which costs of further collection efforts are likely to exceed recoveries, . . . and establish minimum debt amounts below which collection efforts need not be taken."

See also GAO's Policy and Procedures Manual for Guidance of Federal Agencies (GAO-PPM), title 4, § 69.3.

Note that we are dealing with two separate but nevertheless closely related concepts here: (1) minimum debt amounts, which are thresholds below which collection action need not be initiated, and (2) points of diminishing returns, which are thresholds at which the agency may discontinue collection efforts already started. See 65 Comp. Gen. 893, 896 (1986). For purposes of this discussion, we use the term "categorical termination" to encompass both.

Under the Federal Claims Collection Act and Standards, the rule has developed that an agency may establish reasonable minimum amounts for the pursuit of debt claims of particular types, and reasonable points of diminishing returns beyond which collection action need not be continued. The amounts cannot be arbitrary but must be supported by cost studies. The studies should analyze average recovery rates in relation to the size of the debt, the average cost of collection actions applicable to that type of claim, and the apparent possibilities of collection. 4 GAO-PPM § 69.3. There is no requirement for GAO approval. These amounts are,

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however, subject to review under GAO's regular audit authority. 55 Comp. Gen. 1438, 1439 (1976).

For example, based on cost figures supplied by the General Services Administration, GAO approved a $25 minimum for the filing of loss and damage claims against carriers, including small domestic shipments on commercial forms. 55 Comp. Gen. 1438 (1976). The decision noted that an agency is authorized but not required to observe the minimum, and would retain the option to file a claim in a particular case. Similarly, the Agriculture Department could establish a $35 minimum for the collection of small claims. B-3338, January 11, 1972.

In B-117604, March 6, 1972, based on cost studies conducted by various services, the Comptroller General approved a proposal by the Defense Department to set a $25 minimum on pursuing out-of-service indebtedness claims. A few years later, Defense sought to establish a "floating minimum" or, in the alternative, raise the minimum to $150. While GAO approved the proposal in principle, differences in the findings and accounting concepts among the various services led GAO to conclude that the specific request was not adequately supported. Accordingly, until the cost studies by the various services showed a coordinated and reasonably consistent basis, GAO could not endorse the change. B-115800/B-117604, August 17, 1976.

The authority recognized in this line of decisions applies to claims discovered after the fact. An agency may not "waive" recovery in advance, that is, where the potential overpayment is known or can be readily determined before the payment is made. 49 Comp. Gen. 359 (1969).

Cost benefit analyses do have limitations, as pointed out in the following excerpt from B-197146, September 22, 1980:

> "For example, low collection rates and high collection costs may be symptoms of ineffective and inefficient collection techniques, which if improved, would require a reevaluation of minimums previously established. Also cost benefit analyses should not always be the sole determinant for the termination of claims. Other factors, which are not easily quantifiable, such as maintaining the integrity of a collection program, should also be considered."

While, as we have already noted, the costs of administrative hearings and reviews may be considered when evaluating termination of individual claims under 4 C.F.R. § 104.3(c), they should not be used in establishing

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categorical minimum debt amounts or points of diminishing returns. 65 Comp. Gen. 893 (1986). The practical rationale behind this position should be apparent. If you announce up front that you will not pursue collection action on debts of a particular type under, say, $1,000, you virtually eliminate any incentive for voluntary payment.

There are two exceptions to the requirement for cost studies. The first is for nominal amounts. In 58 Comp. Gen. 372 (1979), the Interior Department asked whether, under the Federal Claims Collection Act, it could forgo collection action on underpayments of $1 or less of reclamation fees paid by coal mine operators under the Surface Mining Control and Reclamation Act of 1977. The Comptroller General noted that "it may safely be presumed, without cost studies, that in cases of $1 or less collection action will always exceed the amount recoverable." Id. at 375. Therefore, construing the termination provision in the Federal Claims Collection Act in light of its purpose, the Comptroller General held that Interior could make a categorical determination to forgo collection action on underpayments of $1 or less, based on the diminishing returns concept, without the need for cost studies. See also 18 Comp. Gen. 838 (1939) ($1); B-134617, January 30, 1958 ($2). The rule applies equally to debts owed by federal civilian and military personnel. 65 Comp. Gen. 893 (1986).

The second exception involves claims against a group or class of persons where the individual amounts are small, the administrative burden of identifying the debtors and computing the amounts would be disproportionately high, and the individual claims would be eligible for waiver consideration. The first case in point was B-181467, July 29, 1976. The Air Force discovered that it had been overpaying night differential and Sunday premium pay to local employees at Clark Air Base in the Philippines. Since (1) the amount of the individual debts was minor, (2) the administrative costs of identifying the overpayments would have been excessive, and (3) the individual debts would have been eligible for waiver anyway, GAO concluded that the Air Force could terminate collection action. This decision was followed in B-188000, October 12, 1977, and again in B-184947, March 21, 1978.

The most recent decision on this point, B-206699.1/B-206699.2, September 15, 1988, jointly considered two separate problems. In the first case, the Air Force uncovered erroneous overpayments of compensation over a one-year period to nearly 5,000 National Guard technicians. In the second case, the Army undertook a project to reconcile personnel and pay records and discovered minor discrepancies that had resulted in small

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overpayments to approximately 10,000 persons. In both cases, it was established that the individual debts were small, administrative costs of identification and collection would be excessively disproportionate, and the individual cases would be subject to consideration for waiver. In both cases, GAO agreed with agency proposals to forgo collection action.

e. Write-off and Close-out

Termination, write-off, and close-out are three different things. Termination, discussed above, refers to the creditor agency's decision to discontinue active collection efforts. Once the decision to terminate collection action has been made, the logical next step is to remove the debt from the agency's accounting records, i.e., to stop carrying it as a receivable. This step is called write-off. Thus, the proper terminology is: you terminate collection action, and then you write off the debt from your receivables.

Termination and write-off occur either simultaneously or in very close time proximity. Since it is undesirable to carry an active receivable on which no further action is being taken or contemplated, there should be no significant delay between termination and write-off.

The concept of write-off applies equally to a judgment debt which has, to the agency's reasonable satisfaction, become uncollectible. 34 Comp. Gen. 148 (1954). There is no need to first attempt execution on the judgment where the facts indicate it would not be warranted. B-120956, October 6, 1955.

The acts of termination and write-off do not preclude re-opening the case if future collection possibilities are discovered. For example, if you see your debtor's smiling face on the evening news holding the winning lottery ticket, you may want to consider reactivating the file. In the more typical situation, of course, an offset opportunity presents itself that was not contemplated at the time of write-off. The principle was stated in 48 Comp. Gen. 365, 369 (1968):

> "Concerning the legality of taking action to satisfy an indebtedness once it has been declared uncollectible, it appears that an administrative determination of uncollectibility is for accounting purposes only and, as such, does not preclude the subsequent satisfaction of the indebtedness should the opportunity to do so thereafter be presented to the administrative office."

See also GAO Policy and Procedures Manual for Guidance of Federal Agencies, title 4, § 70.6; B-182512-O.M., August 6, 1975.

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Largely within their discretion, agencies may retain administrative records (as opposed to accounting records) of inactive debt accounts for possible future reactivation, and may do so indefinitely.

At some point, the agency may determine that even retaining an inactive record is futile. At this point, the agency closes out the debt. Close-out is the agency's final disposition of the debt. Depending on the circumstances, write-off and close-out may occur at the same time, or write-off may precede close-out by a potentially substantial amount of time.

Once the debt is closed out, it should be reported to the Internal Revenue Service on Form 1099-G under the authorities previously discussed in connection with compromise.

Close-out precludes reactivation of the account. The agency may still accept voluntary payments, but may no longer take any further collection action. A written-off account is inactive; a closed-out account is dead.

Further discussion and guidance on the concepts of write-off and close-out may be found in: OMB Circular No. A-129, Managing Federal Credit Programs; Managing Government Credit: A Supplement to the Treasury Financial Manual, chapter 5; and Treasury Financial Management Service, The Governmentwide Task Force Final Report on Write-Off (August 1988).

10. Waiver

If one private individual owes a debt to another, the creditor might decide, for any number of reasons, that it "just isn't right" to enforce collection. A federal agency, as we have seen, is not free to do the same thing. The agency must attempt collection unless that duty is removed in some legally authorized manner. Yet, as we also noted earlier, increasing the ranks of the homeless is not one of the objectives of federal debt collection. We have already discussed some of the ways Congress has provided to relieve an agency of its duty to attempt collection in full in appropriate circumstances, specifically compromise and termination. One more should be noted—waiver.

"Waiver" of a debt is a forgiveness of the debt and relieves the debtor from having to repay it. It has been defined as "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938); 43 Comp. Gen. 311, 314 (1963); B-195188, June 17, 1981. It differs from termination in that termination does not eliminate the debtor's

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liability whereas a debt which has been waived no longer exists and cannot be reopened.

Since waiver amounts to the giving away of government rights or property, it requires statutory authority. Absent a statutory basis, no federal agency is authorized to waive a debt claim owing to the United States. For example, a 1971 decision concluded that the Labor Department was not authorized to waive the recovery of overpayments made under the Disaster Relief Act of 1970. B-171934, April 2, 1971. Similarly, the Federal Emergency Management Agency lacks authority to issue regulations providing for the forgiveness of debts owed to the government. B-201054, April 27, 1981. Along the same lines, the compromise, suspension, and termination authority of the Federal Claims Collection Act applies to overpayments by the Department of Labor under the Redwood Employee Protection Program although there would be no authority to "waive" the claims. B-195188, June 17, 1981.

Neither the Federal Claims Collection Act of 1966 nor the Debt Collection Act of 1982 authorizes anyone (the creditor agency, GAO, or the Justice Department) to waive debt claims. E.g., B-159708, September 23, 1966. Congress has, however, authorized waiver in a number of specific contexts.

Waiver statutes are classified as either mandatory or permissive. See Califano v. Yamasaki, 442 U.S. 682, 693 n.9 (1979). A typical mandatory statute is the Social Security Administration's waiver statute, 42 U.S.C. § 404(b), which was the subject of the Yamasaki decision:

"In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of [the old-age, survivors, or disability insurance programs] or would be against equity and good conscience."[45]

The essence of a mandatory waiver statute is that the agency has a "duty to decide" (Yamasaki, 442 U.S. at 694 n.9) and recovery is prohibited until the decision has been made. The decision may be an actual decision on the merits, or it may take place by default. To illustrate, the Supreme Court in Yamasaki expressly approved the way the Social Security Administration administered 42 U.S.C. § 404(b). In each overpayment case, SSA would send

[45]The "without fault" and "equity and good conscience" standards are common to most waiver statutes, both mandatory and permissive.

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a notice to the recipient advising of his or her right to request waiver. If the recipient made a request, SSA would consider the merits and make a decision. Failure to submit a request within the time limit prescribed by regulation was tantamount to a denial. 442 U.S. at 694.

Other mandatory waiver statutes will generally resemble the SSA provision. Several are cited in Yamasaki, 442 U.S. at 694 n.9. Sometimes it is not quite so clear. One example, described in 63 Comp. Gen. 10, 13 (1983), is found in the Black Lung Benefit Program legislation. Under 30 U.S.C. § 940, amendments made by the Black Lung Benefits Act of 1972 with respect to claims filed on or before December 31, 1973, also apply to claims filed after that date. The 1972 act had amended 30 U.S.C. § 923(b) to make section 204 of the Social Security Act applicable to the Black Lung Program. Section 204 is 42 U.S.C. § 404, the very provision the Supreme Court had considered in Yamasaki. Thus, post-1973 black lung benefit claims are subject to a mandatory waiver statute.

Another example described in 63 Comp. Gen. 10, 14, is the waiver provision of the Federal Employees' Compensation Act, 5 U.S.C. § 8129(b):

"Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."

This looks very much like the SSA statute but the wording is not identical. Title 5 was recodified in 1966. The pre-1966 language was "there shall be no adjustment or recovery" (63 Stat. 864), the same as the SSA provision. Since recodifications are not intended to make substantive changes, this too is clearly a mandatory waiver statute.[46]

Where a mandatory waiver statute applies, notice of the right to request waiver should be included in agency's first demand letter.

Under a permissive or discretionary waiver statute, recovery is not prohibited pending the waiver determination. A common example is 5 U.S.C. § 5584, under which erroneous payments to civilian employees of pay and allowances, including travel, transportation, and relocation payments, "may be waived in whole or in part" by the agency for claims of $1,500 or less ($10,000 or less for the judicial branch), or by GAO for claims

[46]As this example shows, resort to the original source statute is often helpful in understanding a recodified statute.

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exceeding $1,500,[47] when the recipient is without fault and when collection "would be against equity and good conscience and not in the best interests of the United States." GAO has issued implementing regulations, found at 4 C.F.R. Parts 91 and 92, most recently reissued on September 30, 1991 (56 Fed. Reg. 49582). The statute comes into play only when there has been an actual payment for which an employee is indebted to the government; it does not authorize the waiver of erroneous advice. 66 Comp. Gen. 642 (1987). Detailed coverage of 5 U.S.C. § 5584 may be found in GAO's Civilian Personnel Law Manual.

Other examples of permissive waiver statutes are:

- 10 U.S.C. § 2774: same as 5 U.S.C. § 5584, but for military personnel.[48]
- 32 U.S.C. § 716: same as 5 U.S.C. § 5584, but for National Guard personnel.
- 5 U.S.C. § 4108(c): Government Employees Training Act.
- 10 U.S.C. § 1453: Survivor Benefit Plan (military).

In the case of some government corporations, waiver authority, although not explicitly granted, follows from their broad statutory charter. E.g., B-190806, April 13, 1978 (Pension Benefit Guaranty Corporation).

The waiver statutes, at least those GAO helps administer, contemplate considering the circumstances of individual cases. Thus, GAO has been reluctant to grant "blanket waivers." One exception is B-222776, June 16, 1986. Legislation enacted in 1986 retroactively changed the formula for computing the hourly rate of pay for federal employees. The result was a small overpayment for most civilian employees (e.g., 6 cents an hour for a GS-13). In response to a request from the Chairman of the House Post Office and Civil Service Committee, GAO concluded that this was an appropriate situation to grant a blanket waiver for all affected employees.

In our preceding discussion of suspension of collection action, we noted that one of the relevant factors identified in the Federal Claims Collection Standards is whether refund would be authorized. Some waiver statutes provide for refund of amounts already collected if the waiver is granted. E.g., 5 U.S.C. § 5584(c). Others do not. See, e.g., 51 Comp. Gen. 419, 422 (1972), with respect to the waiver provision of the Government Employees Training Act. Under a waiver statute which does not authorize refund,

[47]The threshold in 5 U.S.C. § 5584, 10 U.S.C. § 2774, and 32 U.S.C. § 716 was raised from $500 to $1,500 by Pub. L. No. 102-190, § 657, 105 Stat. 1290, 1393 (1991).

[48]The discretionary nature of 10 U.S.C. § 2774 is discussed in Price v. United States, 621 F.2d 418 (Ct. Cl. 1980). Since the statutes are virtually identical, the discussion in Price would apply to 5 U.S.C. § 5584 and 32 U.S.C. § 716.

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waiver may be ineffective with respect to amounts already paid because waiver is the relinquishment of an existing right, and to the extent payment has already been made, there is no longer a debt and therefore nothing to waive. Id.

In B-146111, July 6, 1961, an employee of the Federal Aviation Agency had received training under the Government Employees Training Act, had signed an agreement to continue working for the FAA for a specified time, and then resigned in violation of the agreement. The FAA recovered the training expenses from the individual and deposited the money in the Treasury as miscellaneous receipts. Seven months later, the individual rejoined the agency. The agency wanted to waive the debt under 5 U.S.C. § 4108(c) and refund the amount recovered. Since the collection and deposit had been entirely proper when made, the permanent appropriation for refunding money "erroneously received and covered" (31 U.S.C. § 1322(b)(2)) could not be used, and there was no other authority to make the refund.

GAO considered a similar fact pattern in B-208064, November 15, 1983. As in B-146111, the question was whether the agency could refund amounts previously collected upon the debtor's re-employment. Part of the debt had been collected by offset against salary and leave payments due at the time of resignation. Essentially following 51 Comp. Gen. 419, GAO concluded that this amount could not be refunded. With respect to the remaining portion of the debt, the agency had contacted the Office of Personnel Management to collect from the debtor's Civil Service Retirement Fund account. However, the agency did not actually receive the money from OPM until after the debtor had become re-employed. The decision held that this portion could be refunded since it had not been "collected" at the time of waiver.

The Supreme Court's Yamasaki decision, and those portions of the Federal Claims Collection Standards which apply it, have altered the rules of some of the earlier decisions. For example, one of the precedents cited in 51 Comp. Gen. 419 for the proposition that waiver is ineffective where the debt has already been extinguished is 8 Comp. Gen. 664 (1929). That case, however, involved what is clearly a mandatory waiver statute. If the question in 8 Comp. Gen. 664 arose today, the answer would be that recovery should not have been made prior to the waiver decision. If the debt had been collected prior to the waiver decision and the money deposited as miscellaneous receipts, the collection would be erroneous and could be refunded using the "erroneously received and covered"

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United States are without that power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted."

Royal Indemnity Co. v. United States, 313 U.S. 289, 294 (1941).

A payment which is erroneous or illegal, it has been held, violates the Property Clause because it amounts to giving away government money without congressional authorization, and gives rise to not only a right but a duty on the part of the government to recover. The Court of Claims stated the proposition as follows in Fansteel Metallurgical Corp., 172 F. Supp. at 270:

"As a matter of fact, when a payment is erroneously or illegally made it is in direct violation of article IV, section 3, clause 2, of the Constitution. [Citation omitted.] Under these circumstances it is not only lawful but the duty of the Government to sue for a refund thereof, and no statute is necessary to authorize the United States to sue in such a case."

See also Aetna Casualty & Surety Co. v. United States, 526 F.2d 1127, 1130 (Ct. Cl. 1975), cert. denied, 425 U.S. 973; Maryland Small Business Development Financing Authority, 4 Cl. Ct. at 80.

It follows that, without a clear statutory basis, an agency has no authority to forgive indebtedness or to waive recovery. Pacific Hardware & Steel Co. v. United States, 49 Ct. Cl. 327, 335 (1914); 14 Comp. Gen. 897, 900 (1935); 14 Comp. Gen. 468 (1934); B-201054, April 27, 1981. See also B-118653, July 15, 1969. This principle applies as well to partial forgiveness without compensating benefit, such as the termination of the accrual of interest. 67 Comp. Gen. 471 (1988).

In exercising its right to recover amounts illegally or erroneously paid, the government cannot be estopped by the mistakes of its officers or agents. Aetna Casualty & Surety Co., 526 F.2d at 1130; 51 Comp. Gen. 162, 165 (1971); B-164031(1).90, December 1, 1976.

Today, many areas of debt collection are governed by statute, and to that extent the need to rely on the common law has been correspondingly reduced. Some legislation has given the government new legal authority; some has restricted existing authority; and some has served to buttress existing authority by giving it a statutory foundation. The common-law principles set forth above continue to arise in various contexts, however, and are by no means obsolete.

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appropriation. E.g., 71 Comp. Gen. 464 (1992). Thus, for the most part, if the waiver statute is mandatory, it no longer makes a difference whether the statute itself authorizes refund in view of Yamasaki and the mandatory suspension provision of 4 C.F.R. § 104.2(c).

If the waiver statute is permissive, lack of refund authority can still present a problem, as in 51 Comp. Gen. 419, although careful application of the suspension standards will eliminate the problem in most cases. We say "most cases" because, for example, in B-146111, July 6, 1961, suspension could not have been justified at the time the debt was collected. A possible solution, at least in offset cases, may be a bit of sleight-of-hand suggested in A-27376, March 12, 1930, and noted in B-146111, cited above—a "tentative withholding" pending the waiver decision, as opposed to an "offset tantamount to recovery." An agency following this approach should not credit any of the "tentative withholding" to miscellaneous receipts prior to the waiver decision.

11. Payment

a. Modes of Payment

(1) Cash

United States coins and currency are legal tender for all debts. 31 U.S.C. § 5103. Thus, cash payments should generally be acceptable. Postage stamps are not currency and generally not acceptable in payment, although acceptance is not legally prohibited where the agency has some practical means of converting the stamps to cash. A-51645, October 19, 1937, at 7.

The rare situation may occur in which cash payment turns out to be no payment at all. To illustrate, we turn to "the strange case of Dr. Alm." In 1972, Dr. Donald J. Alm was a dentist in Eau Claire, Wisconsin, presumably with no particular involvement with the federal government. In March of that year, his minor son was kidnapped. Dr. Alm paid a ransom of $50,000 in $5, $10, and $20 bills, and his son was fortunately returned unharmed.

The day after the ransom payment, someone named Diffie drove his truck to the offices of the Farmers Home Administration in Alma, Wisconsin, carried in a suitcase filled with stacks of $10 and $20 bills, and used the money to repay a $20,000 loan. Two days later, Diffie was arrested and charged with the kidnapping. He pleaded guilty and, along with two

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accomplices, was sent to jail. The cash used to pay the Farmers Home loan was confirmed to be part of the ransom money. Dr. Alm, naturally, asked the FmHA to return his money.

Of course, life is not that simple. There is a rule that a party who accepts cash in the normal course of business, without actual or constructive knowledge that it was illegally obtained, is not required to return it. The rule is premised on the need for certainty in business dealings. E.g., Holly v. Missionary Society, 180 U.S. 284, 293 (1901). Or, put another way, where the equities are equal, the law will not transfer a loss from one innocent party to another, but will leave it where it falls. Id. at 295.

This was little comfort to Dr. Alm, who had done absolutely nothing wrong. GAO reviewed the case at the request of the House Judiciary Committee, and suggested that there might be a way out. The rule noted above is based on the receipt of cash in due course, and "there are few conceivable circumstances more out of harmony with a concept of due course" than the "bizarre factual context presented here." Thus, the facts did not require strict application of the rule. B-177344, April 20, 1973. FmHA apparently agreed and returned the money. The Court of Claims subsequently confirmed what all had conceded—that Dr. Alm did not have a legal claim against the government. Whether he had an equitable claim was mooted by the return of the money. Alm v. United States, 204 Ct. Cl. 791 (1974).

(2) Check

There is no general prohibition on the acceptance of personal checks. If payment is tendered in the form of a personal check, it should be made clear that the check is being accepted subject to collection only. This protects the collecting officer from liability if the check should "bounce." See 3 Comp. Gen. 403 (1924); B-201673 et al., September 23, 1982. In other words, it should be made clear that it is the collection of funds on the check that satisfies the obligation and not the mere acceptance of the check itself. I Treasury Financial Manual § 5-2010.

In the absence of legislation one way or the other, an agency is presumably free to issue regulations imposing limitations on the use of personal checks, for example, by requiring certified or cashier's checks for payments in excess of a specified amount.

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(3) Credit cards

Except where expressly prohibited, a federal agency may accept commercial credit card transactions in payment for goods and services provided by the government or in payment of debts, subject to certain safeguards.[49] Acceptance of payment by credit card:

- should not result in any significant increase in cost to the government;
- should facilitate and enhance the agency's collection activities; and
- should protect the government by means of credit card company guarantees to reimburse the government for all properly conducted transactions.

67 Comp. Gen. 48 (1987) (general discussion); B-219322-O.M., September 25, 1986 (same). See also 56 Comp. Gen. 90 (1976) (credit sales by Government Printing Office); 52 Comp. Gen. 764 (1973) (purchases from National Technical Information Service); B-230374-O.M., February 23, 1988 (coin sales by U.S. Mint under Statue of Liberty-Ellis Island Commemorative Coin Act).

As the decisions cited in the preceding paragraph also note, acceptance of credit cards should also not result in increased cost to the person making the payment. The exception would be where a credit card is being used to pay a delinquent debt, in which case the credit card company's commission may be treated as an administrative cost to be assessed against the debtor under 31 U.S.C. § 3717(e)(1). 67 Comp. Gen. at 49 n.1.

There is one potential drawback to the use of credit cards. In the typical commercial arrangement, the credit card company deducts its fee from the amount to be paid over to the vendor. However, federal agencies are required by 31 U.S.C. § 3302(b) to deposit collections in the Treasury without deduction. Thus, unless the transaction is somehow exempt from 31 U.S.C. § 3302(b), agencies are not authorized to enter into this type of arrangement. 67 Comp. Gen. 48 (1987). For delinquent debts, an exemption exists by virtue of 31 U.S.C. § 3718(d), previously noted under the heading "Commercial Collection Agencies." 67 Comp. Gen. at 50. There is, however, no comparable blanket exemption for non-delinquent payments. GAO supports expanding the concept of 31 U.S.C. § 3718(d) to encompass non-delinquent payments. Id. at 52.

[49]For a brief history and description of the use of credit cards in the United States, see National Bancard Corp. v. VISA U.S.A., Inc., 596 F. Supp. 1231, 1236–39 (S.D. Fla. 1984).

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The Treasury Department has negotiated an arrangement with a number of financial institutions to accept credit card payments to federal agencies. The system is called the Credit Card Collection Network and is described in the Treasury Financial Manual, I TFM Chapter 5-4700. By offering a convenient credit card payment option, the Treasury program is designed to enhance agency collections.

(4) Payment in kind

The Federal Claims Collection Act and Standards generally contemplate payment in money. One provision of the Federal Claims Collection Standards, 4 C.F.R. § 103.9, prohibits accepting a percentage of a debtor's profits or stock in a debtor corporation in compromise of a claim. Apart from this, however, there is no blanket prohibition on accepting payment in kind, at least under a compromise. See generally 37 Op. Att'y Gen. 298 (1933); B-229068.4, August 3, 1988. Of course, this assumes the absence of any other statutory restriction or prohibition applicable to the particular case. An agency proposing to accept payment in kind should exercise common sense and should be careful to assure that the property, when reduced to cash, will provide adequate payment. B-229068.4 at 6.

A 1935 decision in which compromise was not involved held that there is no authority to accept a debtor's offer of merchandise to satisfy a government claim. 14 Comp. Gen. 884 (1935).

(5) Cash Management Improvements Fund

A provision in the Deficit Reduction Act of 1984 (Pub. L. No. 98-369), codified at 31 U.S.C. § 3720, requires executive agencies, in accordance with Treasury Department regulations, to provide for the timely collection and deposit of funds owed to the agency, using such procedures as electronic fund transfer, automatic withdrawals, and post office lockboxes. The objective is to expedite the availability of funds to the Treasury through improved cash management.

If an agency fails to comply with Treasury requirements, the Treasury Department is authorized to charge the agency with the cost to the general fund caused by the noncompliance. Payment of these charges is to come from agency operating appropriations. Noncompliance charges collected by Treasury under 31 U.S.C. § 3720 go into the Cash Management Improvements Fund, a revolving fund available without fiscal year limitation to fund selected cash management improvement projects.

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Further detail may be found in the Treasury Department's implementing regulations, 31 C.F.R. Part 206.

b. Multiple Debts

Suppose a debtor owes more than one debt to the United States and makes a voluntary payment which may or may not be enough to satisfy one of the debts. How should the government apply the payment?

There is a long-established principle of commercial law to the effect that if a debtor owing more than one debt to the same creditor makes a voluntary payment and designates how it is to be applied, the creditor must follow that designation. If the debtor fails to designate the application of the payment, then the creditor may do so within its discretion. The Supreme Court stated the principle over a century ago as follows:

"The rule settled by this court as to the application of payment is, that the debtor or party paying the money may, if he chooses to do so, direct its appropriation; if he fail, the right devolves upon the creditor; if he fail, the law will make the application according to its own notions of justice."

National Bank of the Commonwealth v. Mechanics' Nat'l Bank, 94 U.S. 437, 439 (1876). The rule "rests upon the concept that the money which the debtor is utilizing to make the payment is his own and is free for use as he pleases." St. Paul Fire and Marine Ins. Co. v. United States ex rel. Dakota Elec. Supply Co., 309 F.2d 22, 25 (8th Cir. 1962).

The Federal Claims Collection Standards adopt this rule. 4 C.F.R. § 102.11(b). If the debtor fails to designate the application of a voluntary payment, agencies are cautioned to "apply payments to the various debts in accordance with the best interests of the United States, as determined by the facts and circumstances of the particular case, paying special attention to applicable statutes of limitations." Id. Thus, as a general proposition, an undesignated voluntary payment should be applied first to a debt on which the statute of limitations is approaching expiration. While the Standards place the "freedom of application" rule in the section on installment payments, the rule applies to voluntary payments generally and not just to installment payments.

If a debt is collected by administrative offset, payment is not voluntary and the "freedom of application" rule does not apply. In this situation, agencies are instructed to apply recovered amounts "in accordance with the best interests of the United States, as determined by the facts and circumstances of the particular case, paying special attention to applicable

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statutes of limitations." 4 C.F.R. § 102.3(g). Payment under a tax levy is similarly involuntary and the taxpayer cannot direct its application. Muntwyler v. United States, 703 F.2d 1030 (7th Cir. 1983); Jung v. United States, 701 F. Supp. 175 (E.D. Wis. 1988).

c. Conditional Endorsements

Problem: Debtor owes agency $1,000. Debtor submits check for $500, and writes "payment in full" on the check, either on the "memo" line or on the back. If the agency keeps the money, has it agreed to the debtor's condition and discharged the remaining $500? Answer: maybe, maybe not. It depends on whether the transaction constitutes what the lawyers call an "accord and satisfaction." The term "accord and satisfaction" means, in essence, an agreement to accept in full payment an amount less than the amount claimed, coupled with the actual payment of the agreed-upon amount. Since it is contractual in nature, it requires mutual assent and consideration to be valid. 40 Comp. Gen. 261, 264–65 (1960).

An early GAO decision, somewhat short on analysis, took the easy way out and held that there was no authority for the government to accept a check bearing a conditional (full payment) endorsement. 15 Comp. Gen. 1072 (1936). Subsequent decisions took the huge leap of concluding that 15 Comp. Gen. 1072 did not apply where the check was in the amount which the creditor agency had determined to be due. 29 Comp. Gen. 88 (1949); A-74922, October 6, 1936, modifying 15 Comp. Gen. 1072. In other words, it's OK to say "payment in full" when you're in fact making payment in full. These cases suggest that the real concern was the unauthorized acceptance of a compromise.

Of course, as we have seen, the Federal Claims Collection Act of 1966 provided across-the-board compromise authority. In a 1969 internal memorandum, the Comptroller General effectively overruled 15 Comp. Gen. 1072. A-74922-O.M., October 30, 1969. ("[I]n view of the . . . Federal Claims Collection Act of 1966 . . . [we do not] consider our decision of 15 Comp. Gen. 1072 . . . to be currently effective to preclude the acceptance of checks bearing conditional endorsements.") Unfortunately, the memorandum offered no further guidance except to suggest that a check with a conditional endorsement may be temporarily withheld from deposit in the Treasury to give the agency the opportunity to figure out what to do.

The law on this point at the present time appears to be reflected in the cases of Chesapeake & Potomac Telephone Co. v. United States, 654 F.2d 711 (Ct. Cl. 1981), and McDonald v. United States, 13 Cl. Ct. 255 (1987). The effect of accepting a check with a conditional endorsement is

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governed by federal common law, not the Uniform Commercial Code. McDonald at 260. The McDonald court stated:

> "[I]n order to have an efficacious accord and satisfaction, both parties must agree that the payment ends a then-existing controversy. Otherwise, it is not enough for the debtor to simply write 'payment in full' on the face of his check and, self-servingly, legally attempt to extinguish the unpaid portions of his debt." Id. at 261 (emphasis in original).

Where the amount is in dispute and the debtor tenders payment of less than the amount claimed, along with a clear expression of intent that the tender is being offered in full settlement, acceptance of the payment will probably constitute an accord and satisfaction. Where the amount due is not in dispute, acceptance of payment in less than the amount of the debt will most likely not constitute an accord and satisfaction, regardless of the debtor's expressions of intent. McDonald, 13 Cl. Ct. at 261; Chesapeake & Potomac, 654 F.2d at 716; 40 Comp. Gen. 261, 268 (1960).

The message of all of this is that the agency must be extremely careful to avoid an unintended accord and satisfaction.

One final unreported case may merit brief mention. An individual named Linson took a student loan to go to law school and subsequently defaulted on the loan. The (then) Department of Health, Education, and Welfare purchased the defaulted loan and proceeded to pursue collection. Linson made several partial payments, writing on the back of each check the statement "Endorsement of this check acknowledges that the payor does not waive any defenses, including the statute of limitations, in regard to this alleged obligation." When the partial payments stopped, the government sued. Granting the government's motion for summary judgment, the court found that the endorsement did not express an intent that the check be considered full payment of the debt, and had "no legal significance" in the case. United States v. Linson, No. CV 83-0383-CHH (C.D. Cal. May 2, 1983).

d. Disposition of Amounts Collected

If an agency collects a debt, it must deposit the money in the Treasury as miscellaneous receipts unless the agency has statutory authority to credit the receipts to its own appropriations or the collection qualifies as a "repayment." This is nothing more than an application of 31 U.S.C. § 3302(b), discussed fully in Chapter 6.

Collections received after an account has been closed in accordance with 31 U.S.C. §§ 1552(a) or 1555 must be deposited as miscellaneous receipts,

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notwithstanding that the agency could have retained the funds if collected prior to account closing. 31 U.S.C. § 1552(b).

Prior to 1990, GAO, when collecting debts referred to it by other agencies, had discretionary authority under 31 U.S.C. § 1552(b) to deposit the money as miscellaneous receipts, even where the referring agency could have retained the money if collected directly. Since 1963, it had been GAO's policy to deposit all such collections as miscellaneous receipts except collections involving trust or deposit fund accounts. B-138706, May 13, 1963 (circular letter); B-138706-O.M., October 1, 1963. Requests for exceptions were routinely denied. E.g., B-156343, January 17, 1966 (large amount); B-138706, November 30, 1965 (no-year account); B-156011, April 30, 1965 (revolving fund). In any event, when 31 U.S.C. § 1552 was amended in 1990, the provision in question was dropped. In view of the virtual phase-out of GAO's accounts receivable operation, the statutory change should not have significant impact.

e. Release

GAO has traditionally discouraged the use of a formal release to evidence the discharge of a debtor from liability. Where the debtor wants something, and it is clear that the amount to be paid will fully satisfy the government's claim, GAO has suggested the use of a conditional endorsement. B-158893, November 7, 1966.

There is, however, no prohibition on executing a release, and the government may do so if the debtor insists. The authority to execute a release is viewed as implicit in the authority to collect the claim. B-164535, June 25, 1968. The release may be signed by the official receiving the payment or any other responsible official of the creditor agency. Id.; 29 Comp. Gen. 59 (1941); B-160157, November 1, 1966.

D. Elements of a Debt Collection Program: Referrals to GAO and Justice Department

1. Referral to GAO

Prior to the 1984 revision of the Federal Claims Collection Standards, agencies were required to refer administratively uncollectible debts to GAO for further collection action. If GAO could not collect, compromise, or

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terminate, it then referred the claim to the Justice Department for litigation. Even prior to the Federal Claims Collection Act of 1966, GAO had acted in this capacity under its general claims authorities. See, e.g., 16 Comp. Gen. 956 (1937). The original version of the Standards contained a provision, unchanged until the 1984 revision, instructing agencies to refer uncollectible claims to GAO unless GAO granted an exception, thereby permitting direct referral to the Justice Department. 31 Fed. Reg. 13384, October 15, 1966 (original 4 C.F.R. § 105.1). Thus, GAO's pre-1984 decisions and opinions contain frequent references to claims referred to GAO for further collection action.

GAO's efforts during this time period were reasonably successful. For example, in fiscal year 1979, GAO was able to collect $10.6 million in claims which had been referred to it as uncollectible.[50] However, weaknesses inherent in this system became increasingly apparent during the 1970s. GAO's authority to pursue further collection was limited to the same administrative devices that were available to the agency, things the agency had presumably already done or considered. Thus, having GAO as an intermediate step between the agency and the Justice Department was frequently unproductive. Also, the number of referrals grew to the point where GAO could not devote sufficient resources to handle them in a timely fashion.[51] In many cases, the automatic referral system ended up doing little more than using up more time for purposes of the statute of limitations.

GAO realized during this period that it could perform its role under the Federal Claims Collection Act more effectively by audit and oversight than by direct involvement in individual claims. As the first major step in reducing its "accounts receivable" activities, GAO began to liberally grant exceptions from the automatic referral requirement, doing so mostly on an agency-wide or program-wide basis. This approach produced significant results.[52]

The next major step came with the 1984 reissuance of the Federal Claims Collection Standards. The revised 4 C.F.R. § 105.1 eliminated the requirement for automatic referral of uncollectible debts to GAO. Thus,

[50]U.S. General Accounting Office, Annual Report 1979 at 37 (1980).

[51]For example, there were over 47,000 uncollectible debt referrals to GAO in fiscal year 1977. See GAO report Unresolved Issues Impede Federal Debt Collection Efforts—A Status Report, CD-80-1 (January 15, 1980), at 9.

[52]For FY 1980, referrals to GAO dropped to approximately 2,000 (CD-80-1, supra note 51, at 9), and collections dropped correspondingly to $4.7 million (GAO Annual Report for 1980, at 68).

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most uncollectible debt claims can now go directly to the Justice Department.[53]

Apart from referrals for advice regarding a proposed compromise, suspension, or termination (4 C.F.R. §§ 103.8 and 104.4), the Standards currently provide for referral to GAO in only two instances:

- Claims arising from GAO audit exceptions. Id. § 105.1(b). These occur infrequently.
- Doubtful claims, i.e., cases in which the agency is unable to determine either the merits or the amount of the claim with reasonable certainty. Id. § 105.1(c); GAO Policy and Procedures Manual for Guidance of Federal Agencies, title 4, § 5.2.

Referrals to GAO under these provisions should use the same form, the Claims Collection Litigation Report, used to refer claims to the Department of Justice for litigation.

2. Referral to Justice Department

a. Basic Requirements

If an agency has taken the aggressive collection action prescribed in the Federal Claims Collection Act and Standards, is unable to compromise the claim, and if suspension, termination, or waiver is inappropriate, the debt is at that point considered to be "administratively uncollectible," and the next step is to sue the debtor. Administratively uncollectible debts must be referred to the Department of Justice for litigation unless the agency is authorized to handle its own litigation either by statute or by delegation from the Attorney General. 4 C.F.R. § 105.1(a).

If the gross original amount of the claim is $100,000 or less, the claim should be sent to the United States Attorney for the judicial district in which the debtor is located. If the gross original amount exceeds $100,000, the claim should be sent to the Commercial Litigation Branch of the Justice Department's Civil Division in Washington. Id. Claims of less than $600 should not be referred for litigation unless failure to do so would jeopardize a significant enforcement policy, or unless it is clear that the debtor has the ability to pay and the government can effectively enforce payment. Id. § 105.4.

[53]GAO had studied the matter a decade earlier and had concluded in an internal memorandum that there was no legal objection to discontinuing routine referrals. B-117604-O.M., January 12, 1973.

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2. Role of GAO

GAO's role in the federal debt collection arena stems from several statutes. The first is 31 U.S.C. § 3702(a), the fundamental source of GAO's claims settlement authority. The origin and meaning of 31 U.S.C. § 3702(a) have been discussed in Chapter 12 and are no different in the debt context.

The second statute is the second portion of 31 U.S.C. § 3526(a), which authorizes the Comptroller General to "supervise the recovery of all debts finally certified by the Comptroller General as due the Government." There are no recent decisions discussing the exact meaning of this provision, and it is usually cited in tandem along with 31 U.S.C. § 3702(a) with no further comment. See, e.g., 58 Comp. Gen. 501, 502 (1979). However, it does not mean what a literal reading might suggest, and it is clear that GAO does not view this provision as giving it any special authority in the actual litigation of debt claims in court. The Justice Department is the government's litigator (28 U.S.C. § 516), and GAO has never construed 31 U.S.C. § 3526(a) as in any way pre-empting this. E.g., B-42663, July 26, 1944. What the statute essentially does is confirm or reinforce GAO's oversight role in the debt collection process. See B-117604-O.M., January 12, 1973.

Next is the Federal Claims Collection Act of 1966, as amended. GAO has a special role under this statute and prescribes governmentwide implementing regulations jointly with the Department of Justice. The statute and regulations are discussed in detail in various places throughout this chapter.

GAO's authority to render formal legal decisions also comes into play. On the payment side, decisions of the Comptroller General serve two functions: interpreting statutes and determining the merits of particular claims. On the debt side, there are still decisions interpreting statutes, but there are many fewer decisions adjudicating individual claims. There are several reasons for this. Uniform requirements under the Federal Claims Collection Act eliminate the need for many decisions. Also, the typical debt case tends to be fairly clear-cut at least in terms of its legal foundation, and problems are more likely to relate to collection procedures than to the existence of the debt itself. Finally, while most claimants are aggressive in pursuing payment claims at least through available administrative channels, the average debtor is much less likely to take an active role. As with the payment side, GAO will not intrude into areas committed by statute to the exclusive jurisdiction of another agency. E.g., B-164031(3).125, November 7, 1977 (reasonable cost determinations under Medicare Program).

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The debt should ordinarily be referred for litigation within one year of the agency's final determination of the existence and amount of the debt. 4 C.F.R. § 105.1(a). It is axiomatic that time favors the debtor. The longer the collection process drags out, the less likely collection becomes. In all cases, referral must be made prior to the earliest barring date under an applicable statute of limitations, even if this means cutting short the administrative collection process. Id.; 4 C.F.R. § 102.2(a). Claims may be referred after the barring date if there is some reasonable theory in support of a later date or if there is doubt as to the proper date. B-158275-O.M., July 5, 1974; B-158275-O.M., December 9, 1971. Referral of a time-barred claim is also appropriate if there is a possibility of using the debt as a counterclaim or offset in a pending suit against the government. 28 U.S.C. § 2415(f); B-169175.2, May 23, 1972 (non-decision letter).

There is a prescribed format for referring claims to the Justice Department for litigation. It is called the Claims Collection Litigation Report (CCLR). The CCLR is a form developed jointly by GAO and the Justice Department designed to provide Justice with all the information it will need to effectively litigate a debt claim. GAO transmitted the CCLR, with detailed instructions, to all executive agencies by circular letter dated January 20, 1983. Referrals to the Justice Department for litigation under 4 C.F.R. § 105.1 must use the CCLR unless Justice grants an exception. 4 C.F.R. § 105.2(a). Required information includes a brief summary of collection actions taken, the debtor's current address, and reasonably current credit data. Id. There is also a "short form" CCLR for use in referring claims of $5,000 or less.

The CCLR is also required when requesting the Justice Department's approval of a proposed compromise, suspension, or termination on a claim over $100,000. 4 C.F.R. § 105.2(b).

Obviously, the agency does not know at the outset of the collection process whether a referral to the Justice Department will be required. Nevertheless, it is clearly advantageous to use the CCLR as a "running record" of the agency's collection actions. This will greatly expedite and facilitate submission of the CCLR if and when needed.

The agency may, if it wishes, have the CCLR prepared by a debt collection contractor. The Federal Supply Schedule for debt collection services includes preparation of the CCLR when requested by the ordering agency. For further detail, see Adjunct Services Guidelines issued by the Treasury

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Department's Financial Management Service in 1988 to supplement the Supply Schedule.

Once an agency has referred a claim to the Justice Department (or to GAO) under 4 C.F.R. § 105.1, it should not undertake any further collection actions. It is especially important that the agency promptly notify Justice (or GAO, as applicable) if it receives any further payments from the debtor.

b. Federal Debt Collection Procedures Act

The Department of Justice, upon receipt of a debt claim referred to it by another agency, has a wide range of authorities available to enforce collection. The statutory basis is the Federal Debt Collection Procedures Act of 1990, enacted as title XXXVI of the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, 4933 (1990), codified at 28 U.S.C. ch. 176.

Subchapter A, sections 3001-15, defines terms and sets forth some general provisions. The definition of "debt," 28 U.S.C. § 3002(3), is based in part on the detailed definition contained in the original Debt Collection Act of 1982 but is even more detailed. Under 28 U.S.C. § 3011, the government may, in certain cases, recover a 10 percent surcharge to cover the costs of litigation and enforcement.

Subchapter B, sections 3101-05, covers prejudgment remedies. Subject to notice and hearing requirements, these include obtaining a writ of attachment, establishing a receivership, garnishment of property (except earnings) in the possession or control of some third party, and sequestration of income.

Subchapter C, sections 3201-3206, addresses postjudgment remedies. One provision, 28 U.S.C. § 3201, provides for the creation of a judgment lien on real property, with a maximum duration of 40 years. A debtor subject to such a lien

> "shall not be eligible to receive any grant or loan which is made, insured, guaranteed, or financed directly or indirectly by the United States or to receive funds directly from the Federal Government in any program, except funds to which the debtor is entitled as beneficiary, until the judgment is paid in full or otherwise satisfied."

Id. § 3201(e). Program agencies may, by regulation, provide for waiver of this restriction. Id.

Subchapter D, sections 3301-3308, defines certain transfers of assets by debtors as fraudulent, and permits the government to avoid those transfers

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or to proceed against the assets themselves or other property of the transferee.

c. Contracting for Legal Services

The Justice Department is the government's litigator (28 U.S.C. §§ 516–519). Therefore, individual agencies cannot litigate their own debt claims without either statutory authority or a delegation from the Attorney General. Also, the debt collection contracts authorized by 31 U.S.C. § 3718(a) cannot include legal services as this could constitute the unauthorized practice of law in many states. With increased emphasis on debt collection throughout the federal government, the resulting burden on the Justice Department should be apparent. As of September 30, 1985, the Justice Department was handling nearly 97,000 civil debt cases.[54] Despite the best efforts on everyone's part, this places Justice in an extremely difficult position in terms of allocating its own limited resources.

During the mid-1980s, Congress considered a number of bills to permit contracting with private counsel for legal services in the debt collection area. In commenting on several of these bills, GAO supported the concept, under proper supervision. See, for example, B-221099, February 18, 1986, outlining GAO's views as to what such legislation should contain. Use of private attorneys could have several advantages, such as increasing the government's yield on smaller claims which agencies would otherwise have to write off. E.g., B-212528, September 23, 1985.

The legislation was enacted in the form of Public Law 99–578, 100 Stat. 3305 (1986), codified at 31 U.S.C. §§ 3718(b) and (c). The law authorizes the Attorney General to contract with private counsel for legal services in debt collection cases, subject to the requirements for competition applicable to government procurement generally. Fees are to be based on fees typically charged private clients for similar services in the same geographical area.

As with the debt collection contracts authorized by 31 U.S.C. § 3718(a), the legal service contracts may be structured on a fixed-fee or contingent-fee basis, with fixed-fee contracts to be effective only to the extent provided in advance in appropriation acts. 31 U.S.C. §§ 3718(d) and (e).

The "first life" of Public Law 99–578 was to be a 3-year pilot program to be conducted in 5 to 10 judicial districts in accordance with the Attorney General's implementing regulations (28 C.F.R. Part 11). Pub. L. No. 99–578,

[54]GAO report, Justice Department: Impediments Faced in Litigating and Collecting Debts Owed the Government, GAO/GGD-87-7BR (October 1986), at 23.

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§§ 3–5, 31 U.S.C. § 3718 note. The program was extended for another two years in 1990. Pub. L. No. 101–302, 104 Stat. 213, 216 (1990). It was later extended to September 30, 1996, and the number of judicial districts increased to 15. Pub. L. No. 102–589, § 4, 106 Stat. 5133, 5134 (1992).

GAO reviewed the initial phases of the program and issued a report entitled Department of Justice: Status of Implementing Private Attorney Debt Collection Pilot Program, GAO/GGD-89-90 (August 1989). GAO found that the requirements for competition had generally been followed and that the contract prices were reasonable. However, existing cost data did not permit a meaningful effectiveness comparison between the private attorneys and government attorneys. One district has reported extensive use of the authority in delinquent student loan cases. United States v. Spann, 797 F. Supp. 980, 983 (S.D. Fla. 1992).

d. Bidding In at Execution Sale

Obtaining a judgment against the debtor does not automatically put any money in the Treasury. If the debtor does not pay the judgment voluntarily, it may be necessary to execute the judgment against the debtor's property. When the government is executing against real property, 31 U.S.C. § 3715 authorizes the creditor agency to bid at the execution sale. It provides:

> "The head of an agency for whom a civil action is brought against a debtor of the United States Government may buy real property of the debtor at a sale on execution of the real property of the debtor resulting from the action. The head of the agency may not bid more for the property than the amount of the judgment for which the property is being sold, and costs. The marshal of the district in which the sale is held shall transfer the property to the Government."

This statute is not part of the Federal Claims Collection Act. It has been on the books since 1824 (4 Stat. 51). A 1965 report of the Senate Judiciary Committee revealed that it is used somewhat infrequently.[55] Nevertheless, "it could be useful in some cases in which forced sale values might not otherwise be expected to approximate fair market values." B-186813-O.M., October 14, 1976.

The 1982 recodification of Title 31 omitted one detail specified in the source statute—the explicit authority of the creditor agency to appoint an agent to bid at the sale, language the recodifiers thought "unnecessary."[56]

[55]Twenty-one cases for the period 1946–62, according to S. Rep. No. 234, 89th Cong., 1st Sess., reprinted in 1965 U.S. Code Cong. & Admin. News 1575, 1577.

[56]Compare 31 U.S.C. § 3715 (1988) with 31 U.S.C. § 195 (1976).

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GAO, in its only relatively recent experience under this statute (B-186813-O.M., cited above), appointed the Assistant United States Attorney.

An agency may bid under 31 U.S.C. § 3715 even if it otherwise lacks authority to acquire real property. 34 Comp. Gen. 47, 50 (1954).

Real property acquired under 31 U.S.C. § 3715 is under the control of the General Services Administration. 40 U.S.C. § 301. If, subsequent to transfer of the property to the United States, the debtor pays the debt in full in money, the Administrator of GSA is authorized to reconvey the property to the debtor or the debtor's heirs or devisees. Id. § 306.

E. Government's Right of Setoff

1. Introduction

One of the more logical concepts in the law is setoff. Simply stated, if I owe you $100 and you owe me $50, I "set off" the $50 that you owe me against the $100 that I owe you, and my payment to you of $50 discharges both claims. The concept is "grounded on the absurdity of making A pay B when B owes A." Studley v. Boylston National Bank, 229 U.S. 523, 528 (1913). GAO has frequently stated the rule as follows, quoting from 1 Comp. Gen. 605, 606 (1922):

> "Every creditor has the right to apply the moneys of his debtor in his hands in the extinguishment of claims due him from the debtor."

The right of setoff derives from the common law. It does not require statutory authority, although as we will see, most applications in federal debt collection are now governed by statute. Of course, it is not available in any situation where it is expressly prohibited by statute.

The right of setoff available to the private creditor is equally available to the federal government. The most often-quoted statement of this principle, at least by GAO, is the following statement from United States v. Munsey Trust Co., 332 U.S. 234, 239 (1947):

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"The government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.' [Citations omitted.]"

The government's right of setoff applies to debts arising from unrelated as well as related transactions, and to noncontractual as well as contractual debts. The right has been consistently recognized by the Supreme Court,[57] the Comptroller General,[58] and the Attorney General.[59]

GAO, in the performance of its claims settlement functions (e.g., claims referred to it under 4 C.F.R. § 105.1), may also exercise the government's right of setoff.[60] GAO's setoff authority prior to the Federal Claims Collection and Debt Collection Acts derived by necessary implication from 31 U.S.C. § 3702(a), GAO's basic claims settlement authority, in addition to the common law and GAO's other statutory authorities.[61]

There is no requirement that the government's claim be reduced to judgment before setoff may be used. An administrative determination of indebtedness is sufficient. E.g., United States v. American Surety Co., 158 F.2d 12 (5th Cir. 1946); 56 Comp. Gen. 264 (1977); 3 Comp. Gen. 1006, 1007 (1924); B-195126, January 17, 1980; B-162376, September 20, 1967; B-84150, October 22, 1951. A debtor who disputes an administrative setoff may seek judicial review.

As we noted earlier in this chapter, there is a technical distinction between "setoff" and "recoupment." For purposes of this discussion, we use "setoff" or "offset" to cover both situations. Another synonym for offset, found mostly in older cases involving military personnel, is "checkage."

Offsets can be categorized as either administrative or judicial. An administrative offset is one taken by an agency; a judicial offset is

[57]See, in addition to the Munsey Trust case cited in the text, Pearlman v. Reliance Ins. Co., 371 U.S. 132, 140 (1962); Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536 (1946), aff'g 59 F. Supp. 122 (Ct. Cl. 1945); Barry v. United States, 229 U.S. 47 (1913); McKnight v. United States, 98 U.S. 179 (1878), aff'g 13 Ct. Cl. 292 (1877); Gratiot v. United States, 40 U.S. (15 Pet.) 336 (1841).

[58]E.g., 14 Comp. Gen. 849 (1935); 6 Comp. Gen. 810 (1927); 3 Comp. Gen. 1006 (1924); B-152507, November 29, 1963; B-151895, August 9, 1963; B-146353, August 17, 1961; B-128358, July 9, 1956.

[59]E.g., 37 Op. Att'y Gen. 215, 216 (1933).

[60]E.g., United States v. Munsey Trust Co., 332 U.S. 234, 240 (1947); United States v. American Surety Co., 158 F.2d 12 (5th Cir. 1946); John P. Squire Co. v. United States, 30 F. Supp. 708 (Ct. Cl. 1940), cert. denied, 309 U.S. 689; Taggart v. United States, 17 Ct. Cl. 322 (1881); Bonnafon v. United States, 14 Ct. Cl. 484 (1878).

[61]E.g., 14 Comp. Gen. 849 (1935); 1 Comp. Gen. 605 (1922); B-143573, July 5, 1963.

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accomplished by direction of a court. As we will set out in detail later, the Debt Collection Act of 1982 contained two offset provisions—section 5 dealing with offset against the salary of federal employees, and section 10 dealing with administrative offset generally. The terms "salary offset" and "administrative offset" have come to be associated with these two provisions. In addition, there is at the present time a proliferation of other statutes dealing with offset in various situations—several are cited in 64 Comp. Gen. 142, 144 n.2 (1984)—the result being that the topic has acquired an unfortunate degree of complexity. For purposes of establishing a basic conceptual framework, however, it should be kept in mind that all types of nonjudicial offset, including salary offset, are forms of "administrative offset" in the broader sense, the main difference being the different statutes and regulations applicable to the various types. See 64 Comp. Gen. at 144–47.

2. The Due Process Requirement

One of the fundamental underpinnings of American society is the constitutional rule that no person may be deprived of life, liberty, or property without "due process of law." The Fifth Amendment imposes this requirement on the federal government, the Fourteenth on the states.

Most offset opportunities will likely involve a property right protected under the Due Process Clause. For example, a person's entitlement to earned wages is a protected property right. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). So is the statutorily created interest in the continued receipt of Social Security disability benefits. Mathews v. Eldridge, 424 U.S. 319, 332 (1976). The interest of a retired federal employee in the receipt of his or her retirement benefits is similarly subject to due process. Wisdom v. Department of Housing and Urban Development, 713 F.2d 422 (8th Cir. 1983); Atwater v. Roudebush, 452 F. Supp. 622, 626–27 (N.D. Ill. 1976).

If due process applies, what kind of process, and how much of it, is due? The two essential elements of procedural due process are notice and an opportunity to be heard. Mullane v. Central Bank & Trust Co., 339 U.S. 306, 313 (1950). Note that we did not say "hearing." We said "opportunity to be heard." There is a big difference. Actually, the requirement is for an "opportunity for hearing appropriate to the nature of the case." Id.

The term "hearing" is often misunderstood. People tend to automatically equate the term with a full-blown, trial-type proceeding with lawyers, cross-examination, transcripts, etc. This, however, is not the case. The

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Supreme Court has recognized that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the . . . proceedings." Boddie v. Connecticut, 401 U.S. 371, 378 (1971). A lower court has offered the following definition:

"A 'hearing' means any confrontation, oral or otherwise, between an affected individual and an agency decisionmaker sufficient to allow the individual to present his case in a meaningful manner. Hearings may take many forms, including a 'formal,' trial-type proceeding, an 'informal discuss[ion]' . . . or a 'paper hearing,' without any opportunity for oral exchange."

Gray Panthers v. Schweiker, 652 F.2d 146, 148 n.3 (D.C. Cir. 1981).

Thus, the first question in applying the due process hearing requirement is to determine whether some form of oral hearing is required. A case we have already cited several times in this chapter, Califano v. Yamasaki, 442 U.S. 682 (1979), provides guidance. The test is whether the type of determination involved is likely to involve issues of credibility or veracity. Such issues, the Court explained, cannot be fairly evaluated without personal contact between the person from whom collection is sought and the person deciding the case. Id. at 697. If such issues are usually involved, then an oral hearing is required. If not, then an oral hearing is not required, even though an occasional case of the type in question may raise such an issue. The Court stated:

"[W]e do not think that the rare instance in which a credibility dispute is relevant . . . is sufficient to require the Secretary to sift through all requests for reconsideration and grant [an oral] hearing to the few that involve credibility. . . . [S]ome leeway for practical administration must be allowed."

Id. at 696. The point to emphasize is that the test is applied by category, not by individual case.

If, under the Yamasaki test, an oral hearing is not required, due process is satisfied by a "paper hearing"—a review of the written record including, of course, any written submissions the debtor may wish to have considered.

Another case which is important in helping to make the oral vs. paper hearing determination is Mathews v. Eldridge, 424 U.S. 319 (1976), in which the Supreme Court held that constitutional due process does not

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require an oral hearing prior to termination of Social Security disability insurance benefits. The Court summarized the relevant factors as follows:

"[R]esolution of the issue whether . . . administrative procedures . . . are constitutionally sufficient requires analysis of the governmental and private interests that are affected. . . . More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Id. at 334–35. Applying this test, one court has held that a review of written submissions (paper hearing), with reasonable discovery, would satisfy constitutional due process in a dispute over the offset of overpayments by the Department of Housing and Urban Development under the Housing Act. Housing Authority of the County of King v. Pierce, 701 F. Supp. 844 (D.D.C. 1988), vacated in part, 711 F. Supp. 19 (D.D.C. 1989). (Both decisions must be read together.)

Even in those cases where an oral hearing is required, this still does not automatically mean a trial-type evidentiary hearing. The standard, as noted above, is a hearing "appropriate to the nature of the case." Thus, the form of oral hearings can range from a telephone conference to an informal face-to-face meeting to a trial-type hearing. Unfortunately, there is no simple formula for determining the appropriate level of formality. For further discussion, see Mathews v. Eldridge, in which the Court noted that "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances" (424 U.S. at 348), and noted further that in only one case, Goldberg v. Kelly, 397 U.S. 254 (1970), involving the termination of welfare benefits, has the Court required a trial-type evidentiary hearing (424 U.S. at 333).

To sum up, a hearing may be either an oral hearing or a paper hearing. Yamasaki and Eldridge provide guidance in determining when an oral hearing is required. When an oral hearing is required, a careful study of Mathews v. Eldridge is a good starting point for determining the level of formality.

With respect to constitutional due process, two final points should be noted. First, due process rights may be waived. D.H. Overmyer Co. v. Frick

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Co., 405 U.S. 174, 185–86 (1972); Boddie v. Connecticut, 401 U.S. 371, 378–79 (1971); 64 Comp. Gen. 493, 498–99 (1985). Second, due process must normally precede the deprivation of property, "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Boddie, 401 U.S. at 379. Post-deprivation hearings must be provided promptly. E.g., Bailey v. Secretary of Labor, 810 F. Supp. 261, 263 (D. Alaska 1993).

Prior to the 1984 revision of the Federal Claims Collection Standards, the Standards were largely silent on procedural protections. Since enactment of the Debt Collection Act in 1982 and the 1984 revision of the Standards, the applicable procedures for most administrative offsets are provided by statute or governmentwide regulation. It is nevertheless important to understand constitutional due process, for several reasons:

(1) The constitutional requirement, as interpreted by the Supreme Court, forms the basis against which statutory or regulatory procedures will be measured. (The constitutional standard is the minimum. Congress may—and has done so in certain instances—provide procedural protections by statute beyond what the Constitution would otherwise require.)

(2) Although many offset statutes do not specify procedural protections, a fair reading of judicial precedent compels the conclusion that some will be required. As the Comptroller General has stated, "the question would seem to be not whether procedural protections are required, but what form they should take." 64 Comp. Gen. 142, 148 (1984). This would seem equally true under the common law. E.g., Housing Authority of the County of King v. Pierce, 701 F. Supp. 844 (D.D.C. 1988), vacated in part on other grounds, 711 F. Supp. 19 (D.D.C. 1989).

(3) The procedures provided in the Federal Claims Collection Standards are based heavily on the Supreme Court's decisions, and are designed to satisfy constitutional due process as the Court has thus far interpreted it.

3. Administrative Offset

a. Law Prior to the Debt Collection Act

As noted earlier, the federal government has long asserted its right under the common law to collect debts by means of administrative offset, and the courts, including the Supreme Court, have recognized and upheld this right.

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Counsel's Office, White House

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APPLICABILITY OF THE PRIVACY ACT TO THE WHITE HOUSE

The Privacy Act does not apply to the White House Office, which is also known as the Office of the President.

September 8, 2000

STATEMENT BEFORE THE
SUBCOMMITTEE ON CRIMINAL JUSTICE, DRUG POLICY
AND HUMAN RESOURCES
COMMITTEE ON GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

Good morning, Mr. Chairman and Members of the Subcommittee. I am pleased to be here today to testify regarding the Department's longstanding position that the Privacy Act of 1974 ("Privacy Act"), 5 U.S.C. § 552a (1994 & Supp. IV 1998), does not apply to the White House Office, which is also known as the Office of the President. In my testimony today, I will generally refer to that Office as the White House Office. In explaining our position regarding the White House Office, I will set forth the standards that also govern the applicability of the Privacy Act to the other components of the Executive Office of the President ("EOP").(1)

The Department's legal position that the Privacy Act does not apply to the White House Office was stated in an Office of Legal Counsel opinion in April 1975, less than four months after the Privacy Act was enacted, by then Assistant Attorney General Antonin Scalia,(2) and it has been reiterated in subsequent Office of Legal Counsel opinions and briefs filed by the Department in litigation. As I will explain, the position rests on three premises. First, the Privacy Act, by its terms, applies only to "agencies." Second, the Privacy Act defines the term "agency" to mean the same thing as the term means in the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1994 & Supp. IV 1998). Third, the Supreme Court has concluded that the White House Office is not an "agency" within the meaning of the FOIA.

I.

The Privacy Act governs the collection, maintenance, use, and disclosure of information concerning individuals by federal agencies. As a review of the various provisions of the Privacy Act will reveal, the requirements of the Act by their terms apply only to federal "agencies." See 5 U.S.C. § 552a.(3) See also Dong v. Smithsonian Institution, 125 F.3d 877, 878 (D.C. Cir. 1997) ("requirements of the Act . . . apply to 'agencies'"), cert. denied, 524 U.S. 922 (1998). In defining the term "agency" in the Privacy Act, Congress incorporated by reference the definition of "agency" set forth in the FOIA, providing that "the term 'agency' means agency as defined in section 552(e) of [the FOIA]." 5 U.S.C. § 552a(a)(1).(4) Therefore, the applicability of the Privacy Act to the White House Office turns on whether the White House Office is an "agency" as defined in the FOIA.

Congress enacted the FOIA definition of "agency" in 1974, just 40 days before the Privacy Act was enacted. See 88 Stat. 1561, 1564 (1974). That definition provides

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as follows:

> For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

In enacting this definition, Congress sought to codify the test enunciated by the Court of Appeals for the District of Columbia Circuit in Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), under which the term "agency" as used in the FOIA does not include units within the EOP whose "sole function [is] to advise and assist the President." Id. at 1073-75. The Conference Report to the 1974 FOIA amendments provides that:

> With respect to the meaning of the term "Executive Office of the President" the conferees intend the result reached in Soucie v. David . . . . The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.

H.R. Conf. Rep. No. 93-1380, at 14-15 (1974); S. Conf. Rep. No. 93-1200, at 15 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6285.

The Supreme Court held in Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980), that the FOIA definition of "agency" does not include the Office of the President (which is also known as the White House Office). The Court stated that "[t]he legislative history is unambiguous . . . in explaining that the 'Executive Office' does not include the Office of the President" because the legislative history plainly specified that "'the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President' are not included within the term 'agency' under the FOIA." Id. at 156 (citation omitted).

Adhering to the test set forth in Kissinger and Soucie, the D.C. Circuit Court of Appeals has consistently concluded that the President's immediate personal staff and units in the EOP whose sole function is to advise and assist the President are not considered "agencies" for purposes of the FOIA. See Armstrong v. Executive Office of the President, 90 F.3d 553, 557-66 (D.C. Cir. 1996) (National Security Council not an "agency" under the FOIA), cert. denied, 520 U.S. 1239 (1997); Meyer v. Bush, 981 F.2d 1288, 1292-98 (D.C. Cir. 1993) (President's Task Force on Regulatory Relief not an "agency" under the FOIA); Rushforth v. Council of Economic Advisors, 762 F.2d 1038, 1040-41 (D.C. Cir. 1985) (CEA not an "agency" under the FOIA). See also Ryan v. Department of Justice, 617 F.2d 781, 789 (D.C. Cir. 1980) (the FOIA "defines agencies as subject to disclosure and presidential staff as exempt").(5)

In particular, the D.C. Circuit has made it clear - as did the Supreme Court in Kissinger - that the White House Office is among the components of the EOP that are exempt from the FOIA definition of "agency." See Meyer, 981 F.2d at 1293 & n.3 ("The President's immediate personal staff . . . would encompass at least those approximately 400 individuals employed in the White House Office"); id. at 1310 (Wald, J., dissenting) ("We and the Supreme Court have interpreted immediate personal staff to refer to the staff of the Office of the President, also known as the White House Office . . . ."); National Security Archive v. Archivist of the United States, 909 F.2d 541, 545 (D.C. Cir. 1990) (White House Counsel exempt from the FOIA as an entity within the White House Office forming part of the President's immediate personal staff).

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In sum, because the Privacy Act incorporates by reference the FOIA definition of "agency," and because it is settled that the White House Office is not an agency under the FOIA, the Department has concluded that the White House Office is not an agency under the Privacy Act.

II.

The District Court's decision in Alexander v. Federal Bureau of Investigation, 971 F. Supp. 603 (D.D.C. 1997), which rejected this analysis, is in our opinion incorrectly decided. In that case, Judge Royce Lamberth took the view that the FOIA definition does not govern whether the Privacy Act applies to the "immediate staff of the President." Id. at 606. In his view, "agency" means one thing for the Privacy Act and another for the FOIA because the purposes of the two statutes are different. Congress precluded this interpretative move, however, when it affirmatively stated that the term should have the same meaning in both statutes. The text of the Privacy Act is straight-forward. Section 552a(a)(1) provides that, for purposes of the Privacy Act, "the term 'agency' means agency as defined in section 552(e)" of Title 5 of the United States Code - the FOIA definition of agency.(6)

Congress could not have been more clear about the relationship of the meaning of the word "agency" in the two statutes. Thus, as the D.C. Circuit has observed, the Privacy Act "borrows the definition of 'agency' found in FOIA." Dong v. Smithsonian Institution, 125 F.3d at 878. The Privacy Act language conclusively bars an interpretation that would attach different meanings to the term. As then-Assistant Attorney General Scalia stated in his 1975 Office of Legal Counsel opinion addressing which units of the Executive Office of the President are covered by the Privacy Act: "It is essential, of course, that we apply the same conclusion to both the Freedom of Information Act and the Privacy Act." Scalia Opinion at 2.

The Alexander decision stands in stark contrast to the D.C. Circuit's analysis in Rushforth v. Council of Economic Advisers, 762 F.2d 1038 (D.C. Cir. 1985), in which the court addressed the question of whether the President's Council of Economic Advisers ("CEA") is an agency for purposes of the Government in the Sunshine Act, which, like the Privacy Act, incorporates the FOIA's definition of agency. After determining that the CEA is not an agency under the FOIA, id. at 1040-43, the Court reasoned that "[i]nasmuch as the [CEA] is not an agency for FOIA purposes, it follows of necessity that the CEA is, under the terms of the Sunshine Act, not subject to that statute either. The reason is that the Sunshine Act expressly incorporates the FOIA definition of agency." Id. at 1043 (emphasis added) (citation omitted). The court did not ask whether the Sunshine Act and FOIA served similar purposes; it recognized that Congress had definitively resolved the question whether the term "agency" had different meanings under the two statutes.

Moreover, last month District Judge June Green issued an opinion in which she did not follow Judge Lamberth's analysis, but held instead that the Privacy Act does not apply to the White House Office. See Memorandum Order, Barr v. Executive Office of the President, No. 99-cv-1695 (D.D.C. Aug. 9, 2000) (Green, J.). The Court concluded that:

> It is a fair construction of the Privacy Act to exclude the President's immediate personal staff from the definition of "agency." As the Privacy Act borrows the FOIA definition, it fairly borrows the exceptions thereto as provided in legislative history and by judicial interpretation. This construction of the term "agency," applying the FOIA definition equally to

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the Privacy Act, properly avoids constitutional questions.

Id. at 6.

In light of our disagreement with the analysis in the Alexander decision, the Department does not believe that the decision requires that the White House modify its records management practices to come into compliance with the Privacy Act. The D.C. Circuit agreed with this view in its recent appellate opinion in Alexander, stating that, notwithstanding Judge Lamberth's decision, "[i]n activities unrelated to [the Alexander] case, the White House, as it has done for many years on the advice and counsel of the Department of Justice, remains free to adhere to the position that the Privacy Act does not cover members of the White House Office." (7)

I am happy to answer any questions you may have about this longstanding Department of Justice legal position.

WILLIAM TREANOR
Deputy Assistant Attorney General
Office of Legal Counsel

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1. The EOP is made up of a number of different components, one of which is the White House Office. Other components of the EOP include the Office of Management and Budget, the National Security Council, and the Council of Economic Advisors. As will be discussed infra, both the legislative history of the FOIA and Supreme Court caselaw make clear that certain components of the "Executive Office of the President" are not encompassed in that term as it is used in the FOIA definition of "agency."

2. Letter for the Honorable James T. Lynn, Director, Office of Management and Budget, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel (April 14, 1975) ("Scalia Opinion").

3. See, e.g., 5 U.S.C. §§ 552a(b) ("[n]o agency shall . . ."); 552a(c) ("[e]ach agency, with respect to each system of records under its control, shall . . ."); 552a(d) ("[e]ach agency that maintains a system of records shall . . .").

4. Until 1986, the FOIA's definition of agency was codified at 5 U.S.C. § 552(e). The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1802(b), 100 Stat. 3207, 3207-49, recodified the definition (without substantive change) at 5 U.S.C. § 552(f). No conforming amendment was made to the Privacy Act to reflect the current location of FOIA's definition.

5. The D.C. Circuit has held that the Council on Environmental Quality, another component of the EOP, is an "agency" under FOIA. Pacific Legal Foundation v. Council on Environmental Quality, 636 F.2d 1259 (D.C. Cir. 1980).

6. As a practical matter, the suggestion that Congress had different meanings in mind is rebutted by the legislative history. The Privacy Act was pending in Congress at the same time as the 1974 amendments to the FOIA, and became law on December 31, 1974, only 40 days after passage of the FOIA amendments on November 21, 1974. See . 88 Stat. 1895, 1910; 88 Stat. 1561, 1565; Duffin v. Carlson, 636 F.2d 709, 711 (D.C. Cir. 1980). Indeed, on the same day that the FOIA was passed, Congressman Moorhead, a member

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of the FOIA Conference Committee, stated, during the floor debate on the Privacy Act, that "'[a]gency' is given the meaning [under the Privacy Act] which it carries elsewhere in the Freedom of Information Act." 120 Cong. Rec. 36967 (Nov. 21, 1974) (statement of Cong. Moorhead). There is no indication in the legislative history of the Privacy Act that the very same Congress which had just amended the FOIA's definition of the term "agency" had a different understanding of that term in mind when, only 40 days later, it incorporated that definition by reference, and without further gloss, for purposes of the Privacy Act.

7. In Re: Executive Office of the President, 215 F.3d 20, 24 (D.C. Cir. 2000) (noting that "District Court decisions do not establish the law of the circuit, . . . , nor, indeed, do they even establish 'the law of the district'") (citations omitted).

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REV_00258332

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

Privilege - 30 Years - Constitutional convention

Box _____

Folder 50-3

OA/NARA#: 2179/2090

9799

FAX to Paul Colborn

of the House of Representatives, be, and they are hereby authorized to transmit, free of postage, the message of the President of the United States, of the fourteenth day of March, one thousand eight hundred and eighteen, and the documents accompanying the same, printed by order of the Senate and by order of the House of Representatives, to any post-office within the United States and the territories thereof.

transmit the President's message of 14th March, 1818.

Approved, March 19, 1818.

VIII. Resolution *directing the publication and distribution of the journal and proceedings of the convention which formed the present constitution of the United States.*

March 27, 1818.

Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, That the journal of the convention which formed the present constitution of the United States, now remaining in the office of the Secretary of State, and all acts and proceedings of that convention, which are in the possession of the government of the United States, be published under the direction of the President of the United States, together with the secret journals of the acts and proceedings, and the foreign correspondence of the Congress of the United States, from the first meeting thereof down to the date of the ratification of the definitive treaty of peace between Great Britain and the United States, in the year seventeen hundred and eighty-three, except such parts of the said foreign correspondence as the President of the United States may deem it improper at this time to publish. And that one thousand copies thereof be printed, of which one copy shall be furnished to each member of the present Congress, and the residue shall remain subject to the future disposition of Congress.

Journal, &c. of the convention which formed the constitution of the United States, to be published under the direction of the President.

Secret journals of acts and proceedings, and foreign correspondence, of Congress, prior to the peace of 1783, to be also published.

Distribution.

Approved, March 27, 1818.

IX.—Resolution *directing the distribution of the laws of the fourteenth Congress among the members of the fifteenth Congress.*

March 27, 1818.

Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, That the secretary of the Senate and clerk of the House of Representatives be directed to procure from the Secretary of State as many copies of the laws of the fourteenth Congress as shall be necessary, and to distribute one copy thereof to each senator, representative, and delegate from the territories, of the fifteenth Congress who have not been supplied therewith.

Distribution.

Approved, March 27, 1818.

X. Resolution *directing the Secretary for the Department of State to prepare an index to the acts and resolutions of Congress, after the close of every session.*

April 3, 1818.

Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, That after the close of each session of Congress, an alphabetical index of the acts and joint resolutions passed at the preceding session shall be prepared, printed, and distributed, therewith, under the direction of the Secretary for the Department of State.

An alphabetical index of the acts and resolutions to be prepared, printed, and distributed, therewith.

Approved, April 3, 1818.

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Counsel's Office, White House

Kavanaugh, Brett

Subject Files

[Procedures for Civil Actions]

OA/NARA#: 1650/1518
9601

Box
Folder 50-4

Section 809
("Procedures for Civil Actions")

Analogues to Air Transportation Act Provisions

- **Consolidation**
  - Section 408(b) of the Air Transportation Act consolidates all cases arising out of the September 11 attacks in a single federal court.
  - Section 809 (a)-(c) of the proposed bill would consolidate all cases arising out of a mass terrorism incident in a single federal court.
- **Punitive Damages**
  - Section 405(b)(5) of the Air Transportation Act precludes recovery of punitive damages in the victims' claims process, and Section 408(a) limits any recovery against air carriers to the limits of their liability policies.
  - Section 809(e) of the proposed bill would preclude recovery of punitive damages, and would not cap damages against any defendant.
- **Offset**
  - Section 405(b)(6) of the Air Transportation Act requires that recovery by a claimant in the victims' claims process be reduced by the amount of collateral source compensation the plaintiff has received or is entitled to receive.
  - Section 809(f) of the proposed bill would require that a plaintiff's recovery be reduced by the amount of collateral source compensation the plaintiff has received or is entitled to receive.
- **Non-Economic Damages**
  - Section 408(a) of the Air Transportation Act limits recovery against air carriers to the limits of their liability policies and applies state law limits on joint and several liability.
  - The proposed bill would not limit or cap the liability of any particular defendant (the limit in the Air Transportation Act, which is tied to insurance coverage, would not make sense for future incidents, as it would create perverse incentives). Rather, as a more limited measure to help preserve the pool of defendants' assets in a mass tort incident and allow for an equitable distribution to successful plaintiffs, Section 809(g) of the proposed bill would require that non-economic damages be awarded in proportion to the percentage of the harm caused by the defendant and only to plaintiffs who have suffered physical injury. (The proposed

bill is more modest than many proposals: It would not eliminate non-economic damages entirely, nor would it impose proportional fault for economic damages.)

- **Substantive Standard for Liability**

  - Section 408(b) of the Air Transportation Act provides that the substantive standard for liability is to be derived from the law of the State where the incident occurred.

  - Because the procedure in Section 408(b) of the Air Transportation Act could be unwieldy and unfair in a mass terrorism incident that occurs in multiple states, Section 809(h) of the proposed bill would establish a single federal standard of gross negligence. The gross negligence standard is a middle-ground standard between simple negligence and intentional wrongdoing and is particularly appropriate in tort cases where, by definition, the injury has been caused by the criminal acts of an intervening third party, not by legitimate bystander property and business owners.

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("Procedures for Civil Actions")

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Counsel's Office, White House
Kavanaugh, Brett

Subject Files

Pryor, Bill [Folder 1]

OA/NARA#: 2171/2082
9701

Box
Folder 50-5

REV_00258341



Report of People For the American Way In Opposition to the Confirmation of William H. Pryor, Jr. to the United States Court of Appeals for the Eleventh Circuit

"Right-wing Zealot is Unfit to Judge"
—***Atlanta Journal-Constitution***
May 6, 2003

"Unfit to Judge . . . Mr. Pryor's speeches display a disturbingly politicized view of the role of courts."
—***Washington Post***
Apr. 11, 2003

People For the American Way
Ralph G. Neas, President
June 9, 2003

People For the American Way
2000 M Street, NW • Suite 400 • Washington, D.C. • 20036 • 202-467-4999 • fax 202-293-2672 • www.pfaw.org

REV_00258368

In another case, recently dismissed voluntarily by the petitioner, Pryor filed a brief arguing that it violates sovereign immunity to hold a state agency liable for violating Title II of the Americans with Disabilities Act, which specifically prohibits discrimination on the basis of disability by any public entity. In his amicus brief in Medical Board of California v. Hason, Pryor took even further his troubling arguments in Morrison with respect to congressional findings, claiming that hearings and other legislative history should not even be considered in determining whether there is a proper basis for congressional action. Brief of the Commonwealth of Virginia, the States of Alabama, et al., as Amici Curiae in Support of Petitioner, Medical Board of California v. Hason, 2002 U.S. Briefs 479, *6-*9 (Jan. 10, 2003). Although the Court will not be called upon to rule on Pryor's radical theory since Hason was dismissed, it is important that it be explored fully by the Senate Judiciary Committee.[20]

In fact, views advanced by Pryor on states' rights and federalism are so extreme that they have been rejected on several occasions by this Supreme Court, including three decisions unanimously rejecting Pryor's arguments. Specifically:

- In Reno v. Condon, 528 U.S. 141 (2000), Pryor filed an amicus brief urging the Court to strike down the Driver's Privacy Protection Act, which limits states' ability to sell personal information from driver's license files without the driver's consent. The Court unanimously disagreed and upheld the law.

- In Jinks v. Richland County, 123 S. Ct. 1667 (2003), Pryor filed a brief urging the Court to rule that a federal law preserving a claimant's ability to file a state lawsuit when federal and state claims are involved in the same case should be ruled inapplicable to counties, because counties are created by states and should enjoy similar sovereign immunity. The Court rejected this dangerous effort to expand

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The Court denied review. See Gibbs v. Babbitt, 214 F. 3d 483 (4th Cir. 2000), cert. denied, 2001 U.S. Lexis 1130 (2001); Brief for Amicus Curiae the State of Alabama in Support of Petition for a Writ of Certiorari, Gibbs v. Babbitt (Jan. 26, 2001). Pryor has expressed disappointment that the Court did not hear this case, as he had urged, so that it could "address the limits of the Commerce Clause." Pryor, "Competitive Federalism and Environmental Enforcement," 10th Annual Beach and Bar Symposium, Alabama State Bar Environmental Section (June 8, 2001), at 21-25.

[20] In sharp contrast, when it has suited Pryor's purpose, he has urged the Court to pay great deference to congressional fact findings. An amicus brief that Pryor joined in Ashcroft v. The Free Speech Coalition urged the Court to uphold a federal ban on "virtual" child pornography, arguing that "deference must be accorded to [Congress'] findings. . . " Brief of the States of New Jersey, Alabama, et al. as Amici Curiae in Support of Petitioner, Ashcroft v. The Free Speech Coalition, 2000 U.S. Briefs 795, *8 (Apr. 23, 2001). The Court rejected Pryor's position and struck down the law as a violation of the First Amendment. Ashcroft v. The Free Speech Coalition, 535 U.S. 234 (2002).

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"sovereign immunity" to municipalities, and unanimously ruled that the application of the law to counties is constitutional.

- In Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206 (1998), Pryor joined a brief urging the Court to find that the Americans with Disabilities Act does not apply to state prisons. The Court unanimously disagreed.

- In Nevada Dept. of Human Resources v. Hibbs, 2003 U.S. LEXIS 4272 (May 27, 2003), Pryor joined an amicus brief on behalf of Alabama and several other states, arguing that it is unconstitutional for state employees to be able to sue for damages under the Family and Medical Leave Act (FMLA). Briefs filed by Solicitor General Olson on behalf of the United States and by New York and several other states documented the danger and flaws in Pryor's claims, explaining that the FMLA provides an important remedy against gender discrimination for state as well as private employees. In a 6-3 decision written by Chief Justice Rehnquist, the Court rejected Pryor's claim and upheld the law as applied to state employees.[21]

Overall, it is clear that Pryor has advocated an extreme "states' rights" legal philosophy that has already seriously harmed the ability of Congress to protect the rights and interests of Americans and that would, if fully implemented, even further undermine that authority in the future. This aspect of Pryor's record alone raises serious concerns about his nomination to a powerful lifetime position on the federal court of appeals.[22]

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[21] See Brief of Amici Curiae the States of Alabama, et al. in Support of the Respondents, Reno v.Condon, 1998 U.S. Briefs 1464 (Sept. 3, 1999); Brief of the States of Alabama, et al. as Amici Curiae in Support of Respondent, Jinks v. Richland County, 2002 U.S. Briefs 258 (Jan. 15, 2003); Brief of Amici Curiae States of Nevada, Ohio, Alabama, et al. in Support of Petitioners, Commonwealth of Pennsylvania v. Yeskey, 1997 U.S. Briefs 634 (March 4, 1998); Brief for the States of Alabama, et al. as Amici Curiae in Support of Petitioners, Nevada Department of Human Resources v. Hibbs, 2001 U.S. Briefs 1368 (Aug. 22, 2002). In Condon, Jinks, and Hibbs, Pryor was the lead state Attorney General on the briefs.

[22] Particularly given Pryor's states' rights ideology, it is interesting to note that Pryor -- the Alabama co-chair of the Bush/Cheney campaign -- filed an amicus brief in the Supreme Court against the states' rights position in Bush v. Gore. Pryor's brief, which was not joined by any other state, urged the Court to overturn the ruling of the Florida Supreme Court concerning the recount of presidential election ballots. Moreover, Pryor's otherwise disturbingly narrow view of the Equal Protection Clause when the rights of individuals are at stake — as discussed in the civil rights section below -- suddenly became expansive when it came to protecting the Bush campaign and its supporters. See Brief for the State of Alabama as Amicus Curiae Supporting Reversal, Bush v Gore, 2000 U.S. Briefs 949 (Dec. 10, 2000).

REV_00258378

II. PRYOR'S "MAJORITY RULES" PHILOSOPHY ON KEY CONSTITUTIONAL RIGHTS AND FREEDOMS

Despite Supreme Court rulings to the contrary, Pryor has expressed the view that the Constitution should not apply to certain critical issues pertaining to the rights and freedoms of individual Americans, such as reproductive choice, the civil rights of gay men and lesbians, and religious liberty issues. Instead, Pryor has urged that these rights be determined by majority vote within each state, with the result that these rights could be diluted or eliminated in particular states.

The effective and devastating result of this ideology would be that the fundamental guarantees of the Constitution would not apply equally across the country. Pryor's "majoritarian" views would create an America in which a person's individual rights under the Constitution as the Supreme Court has articulated them would be fewer or greater depending on where that person lives.

Pryor has articulated these troubling views in speeches and in litigation. According to Pryor, America is in the midst of a "moral and spiritual crisis" caused, in part, by the "erosion of self-government," for which he blames the Supreme Court:

> The second and closely related crisis created by our Supreme Court involves the erosion of self-government. On January 22, 1973, seven members of that court swept aside the laws of the fifty states and created — out of thin air — a constitutional right to murder an unborn child. Last year, the Court swept aside the vote of a majority of the people of Colorado to end any preferences or special privileges for homosexuals in their state. Recently, lower federal courts struck down laws that prohibit assisted suicide.
>
> The most important decisions of our time and our country are not being made by the people or their elected representatives. The Supreme Court has restructured our political community without the consent of our people . . .

Commencement Speech by Attorney General Bill Pryor to the 1997 McGill-Toolen Graduating Class (emphasis added), <http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=31>.[23]

Pryor has denominated as "political problems" certain aspects of individual rights guaranteed by the courts under the Constitution — rights that Pryor does not recognize — and has made it clear that he believes these matters should be determined not by the courts applying the Constitution but by "the people." For example, in 1997 Pryor wrote that:

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[23] Pryor expressed the same beliefs in his Baccalaureate Speech to the 1997 Independent Methodist School Graduating Class (unpublished speech identified in his response to the Senate Judiciary Committee questionnaire).

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> For more than 30 years, the liberal agenda has been pushed through the courts, without a vote of either the people or their representatives. The courts have imposed results on a wide range of issues, including racial quotas, school prayer, abortion, and homosexual rights.

Bill Pryor, "Litigators' Smoke Screen," *The Wall Street Journal* (Apr. 7, 1997) (emphasis added). Similarly, Pryor has called important decisions by the Supreme Court applying the Constitution to protect the equal rights of women (the Virginia Military Institute case) and of gay men and lesbians (Romer v. Evans) "antidemocratic." Alabama Attorney General Bill Pryor, "Federalism and the Court: Do Not Uncork the Champagne Yet," Remarks Before the National Federalist Society (Oct. 16, 1997) (hereafter "Do Not Uncork the Champagne Yet").

In his speech before the Federalist Society, Pryor criticized the Court's decision in Romer, 517 U.S. 620 (1996), for "overturn[ing] the vote of the people of Colorado who amended their state constitution to prohibit special privileges or rights for homosexuals."[24] As the Supreme Court explained, however, the vote on Amendment 2 had amended Colorado's Constitution to make it virtually impossible for gay men and lesbians to secure legal protections against discrimination. The amendment also invalidated existing civil rights laws in the state prohibiting discrimination on the basis of sexual orientation. The Court held that Amendment 2 classified gay people "not to further a proper legislative end but to make them unequal to everyone else," and ruled that the measure violated the Equal Protection Clause. 517 U.S. at 635. Pryor would nonetheless consign the rights of gay men and lesbians, and of other minorities, to majority votes.[25]

Under Pryor's majoritarian philosophy, constitutional issues such as these would be determined by majority vote, with the result that these rights could be trampled or extinguished in particular states. For example, Pryor has specifically stated that "[i]n conservative states like Alabama, the regulation of abortion would be different from the regulation of abortion in more liberal states like California." Improving the Image of the Legal Profession by Restoring the Rule of Law, Address by Bill Pryor, Attorney General of Alabama, Montgomery County Bar Association (May 3, 2000). In another speech, Pryor stated that "I submit that a government that does not allow its people, by a majority vote, to restrict the murder of innocent life or the assisted suicide of some of our most

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24 "Do Not Uncork the Champagne Yet."

25 Alabama and six other states had in fact filed an amicus curiae brief in Romer urging the Court to uphold Amendment 2. The brief bears only the names of the respective state attorneys general. See Brief of Amici Curiae States of Alabama, et al., Romer v. Evans, 1994 U.S. Briefs 1039 (Apr. 21, 1995). At the time, Pryor was Alabama's Deputy Attorney General, where, by his own account, he was "lead counsel for the State of Alabama in all major civil and constitutional litigation." (Response to Senate Judiciary Committee questionnaire, at 18.)

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vulnerable citizens is not a rightly ordered political community . . ." McGill-Toolen Commencement Speech (emphasis added). Accord, Baccalaureate Speech to Independent Methodist School Graduating Class.

Pryor calls the courts' application of the Constitution to such rights and liberties that he opposes the politicization of the legal system, and has made it clear he would like to put an end to it: "The greatest threat to the American principle of liberty in law is the politicization of our legal system. In the last few decades, our courts have created constitutional rights that do not appear in the Constitution. . . One of the tasks of the next century will be to restore lawmaking and policymaking to the democratic process, not the legal process." Commencement Speech by Alabama Attorney General Bill Pryor for Spring Graduation at Northeast Louisiana University (May 15, 1999) (emphasis added).

One of Pryor's most recent articulations of this ideology is set forth in the amicus curiae brief he has filed in the pending Supreme Court case of Lawrence v. Texas, in which the Court has been asked to decide the constitutionality of the Texas "Homosexual Conduct Law," which criminalizes private consensual sex between same-sex partners. As discussed in more detail below in the section addressing Pryor's record on civil rights, Pryor has specifically urged the Court to reject the argument that a statute that criminalizes so-called "sodomy" by gay men and lesbians but not by heterosexuals violates the Equal Protection Clause. But when it comes to the rights of gay men and lesbians, Pryor would go even further, and would take this issue out of the hands of the courts altogether. First, in defending the right of Texas and any other state to maintain anti-gay sodomy laws, Pryor has asserted that "[t]he fact that some States, like amici, have not gone along with the trend [toward decriminalizing same-sex "sodomy"] is simply an example of how this country's federalist system works."[26]

Moreover, consistent with his belief that the courts should not decide what he considers to be "political" questions, Pryor in fact does not even believe the Supreme Court should decide the Texas case, or other cases raising important issues of individual freedom. According to Pryor's brief,

> [a]ccepting petitioners' invitation will take this Court perilously down the path toward permanently ensconcing itself as the final arbiter of the kulturkampf that is currently being waged over such sensitive and divisive social issues as abortion, sexual freedom, gender identity, the definition of the family, adoption of children, euthanasia, stem cell research, human cloning, and so forth. If Roe v. Wade and its progeny have taught one lesson, it is that judicial attempts to resolve social disputes of this nature do not have a calming and stabilizing effect on our society.

Pryor's Lawrence Brief, at 22. Pryor argues that the state legislatures, not the courts, should decide issues such as those presented by this case:

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[26] Brief of the States of Alabama, South Carolina, and Utah as Amici Curiae in Support of Respondent, Lawrence v. Texas, No. 02-102 (Feb. 18, 2003) (hereafter "Pryor's Lawrence Brief"), at 21.

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> The proper loci for change of the nature that petitioners and their amici advocate are the legislatures of the 50 States. . . [T]he States should remain free to protect the moral standards of their communities through legislation that prohibits homosexual sodomy.

Id. at 2-3 (emphasis added).

Pryor's "majority rules" ideology is far out of the mainstream of legal thought and constitutional doctrine and would stand the Constitution on its head. The use of phrases like "social disputes" or "political problems," two of Pryor's catch phrases, cannot prevent the Constitution from being applied in cases implicating equal protection, liberty, due process, or other rights that the Constitution protects. Worse, Pryor would allow the fundamental rights of minorities or persons holding minority views in a particular community to be determined by majority vote, completely ignoring the fact that a primary function of the Bill of Rights and of the Fourteenth Amendment is to protect the rights of minorities even from political majorities. Indeed, as the Supreme Court has made clear, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943) (emphasis added).

The United States Court of Appeals for the Eleventh Circuit is often called on to decide cases involving the sorts of "social disputes" that Pryor believes should not be resolved by the courts. Pryor's extremist "majority rules" ideology would pose a significant threat to the rights and interests of all Americans were he to be given a lifetime position on a federal appellate court.

III. PRYOR'S RECORD ON CIVIL RIGHTS

As discussed above, Pryor's efforts on states' rights and federalism have sought to severely undermine federal statutory and other protections against discrimination based on race, gender, age, sexual orientation and disability. In several of these areas, Pryor's record reflects that he has sought to damage such vital protections through other avenues as well.

- **Pryor has urged Congress to consider repealing or modifying provisions of the Voting Rights Act**

In testimony before a subcommittee of the Senate Judiciary Committee in July 1997 entitled "Judicial Activism: Assessing the Impact," Pryor was harshly critical of the implementation by the federal courts and the Department of Justice of the Voting Rights Act of 1965, a federal law that has been crucial in enabling minorities to effectively

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exercise their right to vote. Pryor characterized "the use of the judiciary" under the Voting Rights Act as one aspect of "judicial activism that burden[s] our state government and our citizens everyday."[27] Pryor went even further and told the subcommittee,

> I encourage you to consider seriously, for example, the repeal or amendment of section 5 of the Voting Rights Act, which is an affront to federalism and an expensive burden that has far outlived its usefulness, and consider modifying other provisions of the Act that have led to extraordinary abuses of judicial power.[28]

Pryor's push to weaken the Voting Rights Act is disturbing. Section 5, for example, is an important part of the Act that requires any changes in voting-related procedures in jurisdictions like Alabama with a specific history of voting discrimination as determined by Congress to be pre-cleared by the Justice Department or the federal district court in Washington D.C. to ensure that they have no discriminatory purpose or effect.[29]

The continuing importance of the Voting Rights Act, including Section 5, prompted more than a dozen leading veterans of the civil rights movement, who had recently gathered for a commemoration of the movement, to denounce Pryor's 1997 testimony and oppose his confirmation to the Eleventh Circuit. See Statement of Civil Rights Movement Veterans (May 2003). These civil rights leaders, including Rev. Fred Shuttlesworth, Rev. Jim Lawson, Rev. James Bevel, and Martin Luther King III, stated:

> We view the Voting Rights Act as the most important single piece of legislation laid down in our time, for it has transformed our society and signaled the liberation of African Americans. . . Far from outliving its usefulness, the Voting Rights Act has not yet fulfilled its promise. If we are to achieve a truly just and democratic society, the full panoply of protections guaranteed by the Voting Rights Act must remain inviolate. Pryor's expressed disdain for and extreme position concerning the Voting Rights Act cause us to conclude he is unsuited for the federal bench. If he cannot comprehend the continuing need for voting rights protections for African Americans in the Deep South, then he is unlikely to fairly evaluate

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27 Testimony of Alabama Attorney General Bill Pryor before the U.S. Senate Judiciary Committee, Subcommittee on the Constitution, Federalism & Property Rights (July 15, 1997), <http://www.ago.state.al.us/issue/testimony.htm> (visited June 5, 2003).

28 Id. (emphasis added).

29 Ironically, in one of his efforts to limit another civil rights law, Pryor has praised the Voting Rights Act precisely because at least parts of it do "not apply to all States" but only to those "which have been identified by Congress as having violated voting rights." Brief of the Commonwealth of Virginia, the States of Alabama, et al., as Amici Curiae in Support of Petitioner, Medical Board of California v. Hason, 2002 U.S. Briefs 479, *12 (Jan. 10, 2003) (concerning Title II of the ADA).

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and firmly enforce the provisions of the Voting Rights Act in cases that come before him.

Statement of Civil Rights Movement Veterans (May 2003) (emphasis added).

In an effort to mitigate concerns about Pryor's views on civil rights, Pryor and some of his proponents have pointed to Pryor's support several years ago for repealing the provision of Alabama's Constitution prohibiting interracial marriage. That provision, however, has been null, void, and unenforceable since 1967, when the Supreme Court declared that state bans on interracial marriage violated the U.S. Constitution. See Loving v. Virginia, 388 U.S. 1 (1967). In 2000, Alabama was the only state in the country with such a provision remaining on its books.[30] Pryor's support for removing this unenforceable, repugnant vestige of Alabama's discriminatory past, while commendable, hardly negates the serious concerns posed by such matters as his support for weakening the Voting Rights Act, one of the most important civil rights protections in our country's history.

- **Pryor would deny gay men and lesbians the equal protection of the laws, including upholding the imprisonment of gay men and lesbians for expressing their human sexuality in the privacy of their own homes**

Earlier this year, on behalf of Alabama, South Carolina, and Utah, Pryor filed an amicus curiae brief in the Supreme Court urging the Court to uphold the Texas "Homosexual Conduct Law," which prohibits so-called "sodomy" between people of the same sex but not between heterosexual couples.[31] The case began when sheriff's officers in Harris County, Texas, burst into the home of John Lawrence one evening in response to what turned out to be a false report about a "weapons disturbance."[32] They found Mr. Lawrence in his own home having sex with Tyron Garner, arrested both men, and hauled them off to jail; the men were not released until the next day. The men were later convicted of violating the Texas "Homosexual Conduct Law," and have challenged the constitutionality of that law both on the ground that it violates their liberty and privacy rights under the Due Process Clause to engage as adults in consensual sexual intimacy in the home, and on the ground that the law — which applies only to gay men and lesbians — violates their right to the equal protection of the laws.

Pre-dating the very similar and much criticized remarks of Rep. Rick Santorum, Pryor's brief equates, for purposes of legal analysis, private consensual sex between

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30 See, e.g., Phillip Rawls, "Siegelman Urges Passage of Amendment Two," Associated Press (Oct. 31, 2000).

31 Brief of the States of Alabama, South Carolina, and Utah as Amici Curiae in Support of Respondent, Lawrence v. Texas, No. 02-102 (Feb. 18, 2003) ("Pryor's Lawrence Brief").

32 The facts of the case are as stated in the Brief of Petitioners, Lawrence v. Texas, No. 02-102 (Jan 16, 2003).

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same-sex couples — criminalized by the Texas statute — with "activities like prostitution, adultery, necrophilia, bestiality, possession of child pornography, and even incest and pedophilia (if the child should credibly claim to be 'willing')." Pryor's Lawrence Brief, at 25 (emphasis added). This brief prompted even the *Tuscaloosa News*, which has "cautiously supported Pryor's nomination," not only to call Pryor's opinions "incendiary" and "beyond mainstream," but also to state: "It is a long step from sanctioning, or even tolerating, consensual private activity between two adults to permitting abusive crimes such as pedophilia. The law is perfectly capable of drawing such distinctions in theory and in practice."[33] It is most disturbing that Pryor is either unable or unwilling to recognize these distinctions.

And while Alabama is one of only 13 states with "sodomy" laws still on the books,[34] it is also significant to note that Pryor's amicus brief in the Texas case goes well beyond any legal argument pertinent to protecting whatever interest Alabama may have in maintaining that law.[35] Unlike the Texas law, Alabama's sodomy statute prohibits sodomy by heterosexual as well as same-sex couples. Because the Texas law applies only to gay men and lesbians, the Court could invalidate that statute on equal protection grounds, which would not affect the facial validity of the Alabama sodomy law. However, Pryor's brief specifically addresses the petitioners' equal protection argument, and urges the Court to reject it. Pryor's Lawrence Brief, at 16-20.[36]

Pryor also urges the Court not to engage in any form of heightened scrutiny of the Texas law for equal protection purposes, claiming that "[t]he choice to engage in homosexual sodomy (as opposed to the inclination) is not a suspect classification under the Equal Protection Clause of the Fourteenth Amendment." Id. at 16. According to Pryor, "Texas's anti-sodomy statute does not classify on the basis of status or orientation but rather on the basis of behavior that is chosen." Id. at 19 (emphasis added). Pryor's assertion that gay men and lesbians, as a class, can be — and for purposes of legal analysis, should be — separated from their human sexuality, is appalling and not a legal rule imposed on heterosexuals in this country.[37]

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33 Editorial, "Pryor's Opinion Goes Beyond Mainstream," *Tuscaloosa News* (May 4, 2003).

34 Brief of Petitioners, Lawrence v. Texas, No. 02-102 (Jan 16, 2003), at 6-7.

35 To be clear, we do not believe that such laws, which invade the privacy of adults in the most intimate aspects of their lives, should be considered constitutional.

36 According to Pryor, "Texas is hardly alone in concluding that homosexual sodomy may have severe physical, emotional, psychological, and spiritual consequences, which do not necessarily attend heterosexual sodomy, and from which Texas's citizens need to be protected." Pryor's Lawrence Brief, at 17 (emphasis added).

37 Even a conservative like Charles Fried, Solicitor General during the Reagan Administration, has written of sodomy laws directed at gay people: "[u]nless one takes the implausible line that people generally choose their sexual orientation, then to criminalize any enjoyment of their sexual powers by a whole category of persons is either an imposition of very great cruelty or an exercise in hypocrisy inviting arbitrary and abusive applications of the criminal law." Charles Fried, Order and Law: Arguing the Reagan Revolution – A Firsthand Account, at 82-83 (1991).

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Pryor asserts that there is value in laws such as that of Texas even if they are not enforced, because they send a message of societal condemnation of homosexuality:

> Even legislation that is largely symbolic and infrequently enforced . . . has significant pedagogic value. Laws teach people what they should and should not do, based on the experiences of their elders. The States should not be required to accept, as a matter of constitutional doctrine, that homosexual activity is harmless and does not expose both the individual and the public to deleterious spiritual and physical consequences.

Pryor's Lawrence Brief, at 27.[38]

As the excerpts such as those quoted above reflect, Pryor's brief is disturbing in the harshness of its language and views about gay men and lesbians. In fact, Pryor's brief contemptuously trivializes the very real issues at stake when the government drags two adults out of their home for having engaged in private consensual sex. For example, Pryor asserts that Messrs. Lawrence and Garner have "invite[d] this Court to exalt will above reason and political correctness above the text and history of the United States Constitution. . . This Court should not bend the text and history of the Constitution to facilitate perceived changes in social mores that may turn out to be illusory or misguided." Pryor's Lawrence Brief, at 2. According to Pryor, "[f]or all intents and purposes, petitioners seek to enshrine as the defining tenet of modern constitutional jurisprudence the sophomoric libertarian mantra from the musical 'Hair': 'be free, be whatever you are, do whatever you want to do, just as long as you don't hurt anybody.'" Id. at 25-26.[39]

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[38] Pryor is currently defending his own state's sodomy law in a lawsuit brought by four gay and lesbian plaintiffs who have asserted that the law violates their constitutional rights. Doe v. Pryor, No. 02-14899-BB (11th Cir.). One of the plaintiffs, a lesbian, had custody of her child taken away by the Alabama Supreme Court, which cited the state's sodomy law in support of its holding that she had exposed her daughter "to an illegal lifestyle," and that the law was written "to make all homosexual conduct criminal." Id., Brief of Appellants, at 3-4 (Oct. 21, 2002). Nonetheless, Pryor, whose own brief calls the plaintiffs "practicing homosexuals," Brief of Appellee, at 2 (Dec. 2, 2002), successfully moved the District Court to dismiss the Complaint on the ground that the plaintiffs lacked standing, either because they had suffered no injury or the court could not redress any injury. See Brief of Appellants. The case is currently on appeal before the Eleventh Circuit, and Pryor has urged that court to uphold the dismissal of the case, allowing the sodomy law to stand. Brief of Appellee. Oral argument was held on June 6, 2003.

[39] In his zeal to defend the Texas law, Pryor not only filed an amicus brief in the case, but with the consent of Texas actually filed a motion asking the Court to take the unusual step of allowing Alabama to present oral argument as an amicus. Motion of Respondent and Amicus Curiae Alabama for Divided Argument and For Leave of Amicus Curiae Alabama to Participate in Oral Argument, Lawrence v. Texas, No. 02-102 (Mar. 5, 2003). The Court denied Pryor's motion. Lawrence v. Texas, No. 02-102 (Mar. 21, 2003).

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Report of People For the American Way in Opposition to the Confirmation of William H. Pryor, Jr. to the United States Court of Appeals for the Eleventh Circuit

"Right-wing Zealot is Unfit to Judge"
Atlanta Journal-Constitution (May 6, 2003)

"Unfit to Judge . . . Mr. Pryor's speeches display a disturbingly politicized view of the role of courts."
Washington Post (Apr. 11, 2003)

These editorial conclusions refer to Alabama Attorney General William H. Pryor, Jr., nominated by President Bush to a lifetime seat on the United States Court of Appeals for the Eleventh Circuit. Pryor, 41 years old, has used the power of his office in an effort to push the law in an extreme far right direction harmful to the rights and interests of ordinary Americans. Pryor has done this not only through litigation in which Alabama was a party, but also by electing to file amicus curiae briefs in cases in which Alabama was not involved and Pryor had no obligation to participate. Pryor is also a frequent public speaker whose speeches make clear that the ideological positions he has taken in these cases are his own.

As discussed in this report, many aspects of Pryor's record are troubling, including his record on civil rights, reproductive choice, religious liberty, and the Eighth Amendment. Of particular concern are Pryor's views on the limits on Congress' authority to enact laws protecting individual and other rights and how he would seek to implement those views if confirmed. Over the past decade, the so-called "states' rights" or "federalism" revolution promoted by the Federalist Society and other right-wing advocates has severely limited federal civil rights and other protections, particularly by restricting the authority of Congress to require compliance with laws it has passed.

Pryor is one of the architects of this movement and has been a leading activist in these damaging efforts. He personally has been involved in key Supreme Court cases that, by narrow 5-4 majorities, have hobbled Congress' ability to protect Americans' rights against discrimination and injury based on disability, race, and age. Worse, he has urged the Court to go even further than it has in the direction of restricting congressional authority.

Moreover, Pryor has advocated the view that the Constitution should not apply to some of the most critical issues pertaining to individual rights and freedoms — including reproductive choice, gay rights, and school prayer — and that these matters should be decided by the states, based on majority vote, regardless of whether constitutional rights are violated. Pryor's ideology would effectively create a balkanized America in which individual citizens may have fewer constitutional rights depending on where they live.

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In addition, in April 2000, while Vermont was still considering legislation that it later passed to allow same-sex couples to enter into "civil unions," Pryor issued an Attorney General's opinion that Alabama, its subdivisions, and businesses doing business in the state would not have to recognize civil unions entered into in Vermont. See Attorney General Opinion 2000-129 (Apr. 20, 2000). According to Pryor, despite the Full Faith and Credit Clause of the Constitution, which requires each state to give "full faith and credit" to the "public acts, records, and judicial proceedings of every other state," Alabama could deny such recognition to these legally established relationships on the ground that they conflict with he called the state's "legitimate public policy" expressed in its "Marriage Protection Act." That Alabama law limits marriage to opposite-sex couples and invalidates marriages entered into between same-sex couples. According to Pryor, passage of that law as well as the so-called federal Defense of Marriage Act, "were intended to preserve the traditional moral concept of marriage" and "were not acts of bigotry or animus toward homosexuals." Attorney General Opinion 2000-129, at 13.[40]

The failure by one state to give legal recognition to families legally recognized in another state would wreak havoc on those relationships. The fact that Pryor reached the conclusion that he did, as well as the fact that he considers this particular opinion to be noteworthy, further evidences his disturbing view that gay men and lesbians should not to be given equal treatment under the law.[41]

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[40] Pryor considers his opinion that the rights of lesbian and gay couples joined in civil unions in Vermont would be extinguished in Alabama to be particularly "noteworthy" according to his response to the Senate Judiciary Committee's question asking him to "[d]escribe the most significant legal activities you have pursued." Answers to Senate Judiciary Committee Questionnaire, at 42-44.

[41] The Judiciary Committee should also ask Pryor about another matter pertaining to discrimination against gay people. In Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543 (11th Cir. 1997), the Alabama Attorney General's office defended against a Free Speech challenge a blatantly unconstitutional, anti-gay state statute that prohibited any university from using public funds to "directly or indirectly, sanction, recognize, or support the activities or existence of any organization or group that fosters or promotes a lifestyle or actions prohibited by the sodomy and sexual misconduct laws . . ." 110 F.3d at 1545. As a result of this law, the University of South Alabama, which provided funding to more than 100 registered student organizations, denied funding to one of those officially recognized groups, the Gay Lesbian Bisexual Alliance ("GLBA").

The GLBA sued the Attorney General and University officials, charging that the statute constituted impermissible viewpoint discrimination in violation of the First Amendment. The district court agreed and declared the law to be unconstitutional. GLBA v. Sessions, 917 F. Supp. 1548 (N.D. Ala. 1996). Only the Attorney General appealed. 110 F.3d at 1546. A unanimous Eleventh Circuit affirmed the district court's ruling. Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543 (11th Cir. 1997). Pryor was the Deputy Attorney General when this case was decided by the district court. In that capacity, by his own description, Pryor was "lead counsel for the State of Alabama in

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Pryor's extreme anti-gay views, particularly as expressed in his brief in the Texas case, prompted the *New York Times* to single him out in a recent editorial criticizing the Bush administration for nominating so many individuals to the federal bench who are "hostile to equal rights for gay men and lesbians." "Judicial Nominees and Gay Rights," *New York Times* (May 19, 2003). The *Times* expressly noted that Pryor had no "legal duty" to file a brief in the Texas case, and that "other states with such laws did not do so." Id. The *Times* concluded that "Senators of both parties should speak out against Mr. Pryor." Id. (emphasis added).[42]

- **Pryor's support for sex discrimination in education**

In United States v. Virginia, 518 U.S. 515 (1996), the Supreme Court held, 7-1 (with Justice Thomas not participating) that the denial of admission to women by the Virginia Military Institute, a public, state-supported university, violated the Equal Protection Clause. Disparaging the constitutional rights of women at stake, Pryor criticized this decision:

> the Court ruled that the people of Virginia were somehow prohibited by the fourteenth amendment from maintaining an all male military academy. Even the Chief Justice concurred. Never mind that for more than a century after the fourteenth amendment was enacted both the federal government and many state governments maintained all male military academies. Never mind that the people of the United States did not ratify the Equal Rights Amendment. We now have new rules of political correctness for decisionmaking in the equal protection area.

Alabama Attorney General Bill Pryor, "Federalism and the Court: Do Not Uncork the Champagne Yet," Remarks Before the National Federalist Society (Oct. 16, 1997) (emphasis added). Along with Romer v. Evans, discussed above, Pryor cited the VMI case as an example of the Court's having been "both antidemocratic and insensitive to federalism." Id. Again, Pryor would allow rights guaranteed by the federal Constitution — particularly the fundamental right to the equal protection of the laws — to be taken away in an individual state by majority vote, an ideology completely at odds with our Constitution.

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all major civil and constitutional litigation." (Response to Senate Judiciary Committee questionnaire, at 18.)

[42] Pryor's view of gay men and lesbians as second-class citizens is such that he even re-scheduled a family vacation so that it would not coincide with the annual "Gay Day" at Disney World in Florida. "Pryor Rearranges Vacation Over Homosexuals at Disney World," Associated Press (June 6, 1997). According to AP, "Pryor's family left for Orlando three days early so the six-day trip would end before the homosexuals arrived for the unsanctioned assembly this weekend." Id.

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IV. PRYOR'S RECORD ON PRIVACY AND REPRODUCTIVE FREEDOM

Pryor is a staunch opponent of a woman's right to reproductive choice and has repeatedly and harshly condemned the Supreme Court's decision in Roe v. Wade. For example, in a 1997 speech before the Federalist Society, Pryor stated that "[i]n the 1992 case of Planned Parenthood v. Casey, the Court preserved the worst abomination of constitutional law in our history: Roe v. Wade." Alabama Attorney General Bill Pryor, "Federalism and the Court: Do Not Uncork the Champagne Yet," Remarks Before the National Federalist Society (Oct. 16, 1997). Pryor has said of the day Roe was decided: "I will never forget Jan. 22, 1973, the day seven members of our highest court ripped the Constitution and ripped out the life of millions of unborn children." Kelly Greene, "Bill Pryor Hopes to Ride Court Crusade to the Top," *Wall Street Journal* (May. 21, 1997).

In July 2000, Pryor criticized the Supreme Court for issuing "two awful rulings that preserved the worst examples of judicial activism: Miranda v. Arizona and Roe v. Wade." Bill Pryor, "The Supreme Court as Guardian of Federalism," Federalist Society and Heritage Foundation Speech (July 11, 2000). According to Pryor, Roe was "a political decision, with no basis in the plain language of the Constitution." Bill Pryor, "Improving the Image of the Legal Profession by Restoring the Rule of Law," Address before the Montgomery County Bar Ass'n (May 3, 2000).[43]

Responding in 2002 to a survey of state attorneys general by NARAL Pro-Choice America, Pryor stated, "[a]bortion is murder, and Roe v. Wade is an abominable decision."[44] NARAL has reported that, based on Pryor's response to its survey of state attorneys general, "Pryor opposes abortion even in cases of rape or incest, and would only support a narrow exception for instances in which a woman's life is endangered."[45]

Pryor has not just spoken about his opposition to reproductive freedom, he has also acted on it. For example, in 1999, Pryor endorsed proposed state legislation "[a]uthored by abortion opponents" that would have required the courts in Alabama to appoint a lawyer representing the state whenever a female under age 18 sought to have an abortion without her parents' consent.[46] Alabama law requires minors to have the written

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[43] In an amicus brief in Dickerson v. United States, Pryor urged the Court to hold that Miranda was not a constitutional rule. See Brief for the States of South Carolina, et al., as Amici Curiae Urging Affirmance, 1999 U.S. Briefs 5525 (Mar. 9, 2000). In a 7-2 ruling, with Chief Justice Rehnquist writing the majority opinion, the Court rejected this argument and held that Miranda was a constitutional decision of the Court and therefore could not be overruled by an act of Congress. Dickerson v. United States, 530 U.S. 428 (2000).

[44] <http://www.naral.org/mediaresources/fact/pdfs/pryor_facts.pdf> (visited May 19, 2003).

[45] <http://www.naral.org/mediaresources/fact/pdfs/pryor_facts.pdf> (visited May 19, 2003).

[46] Jay Reeves, "Pryor Backing Bill to Involve State Attorneys in Juvenile Abortion Cases," Associated Press (Feb. 24, 1999). Accord, Amy Bach, "No Choice for Teens (Abortion)," *The Nation* (Oct. 11, 1999).

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consent of a parent in order to obtain an abortion, but, consistent with constitutional requirements, authorizes a judge to grant an exception in specified circumstances, including when the female is mature and informed enough to make the decision on her own. Ala. Code §§26-21-1 to 8. The measure that Pryor endorsed would have turned the bypass process into an adversarial proceeding by requiring that an attorney representing the state be involved in all instances when a minor seeks a judicial bypass of the parental consent requirement.[47] According to the press, "Pryor said an attorney representing the government should be involved to protect the state's interest in preserving life."[48] Pryor apparently intended for such attorneys to pose an obstacle to a minor's exercise of her right to reproductive freedom: "Pryor said he envisioned attorneys with networks like Alabama Lawyers for Life, of which he used to be a member, agreeing to represent the state for free and 'potentially' taking an adversarial stand against abortions."[49] The *Birmingham Post-Herald* criticized the bill and Pryor's support for turning the bypass process into an adversarial proceeding: "The state does not have a legitimate role in that determination. The legislation recommended by Pryor is a bad idea deserving a quick burial."[50] The bill "died in committee."[51]

In addition, Pryor defended an Alabama statute prohibiting so-called "partial birth" abortions even though the law was plainly unconstitutional because it lacked an exception for the preservation of the health of the pregnant woman, as required by Roe v. Wade, 410 U.S. 113, 164-65 (1973) and reaffirmed by Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 879 (1992). A federal court in Alabama declared the law to be unconstitutional, following the Supreme Court's ruling in Stenberg v. Carhart, 530 U.S. 915 (2000), striking down a similar Nebraska law. See Summit Medical Associates, P.C. v. Siegelman, 130 F. Supp.2d 1307 (M.D. Ala. 2001).[52]

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47 Jay Reeves, "Pryor Backing Bill to Involve State Attorneys in Juvenile Abortion Cases," Associated Press (Feb. 24, 1999).

48 Id.

49 Id.

50 Alabama Editorial Roundup, Associated Press (Feb. 26, 1999), quoting "The *Birmingham Post-Herald* on Bill Pryor and Alabama Lawyers for Life: A bad idea."

51 Helena Silverstein, "Article: In the Matter of Anonymous, A Minor," 11 Cornell Journal of Law and Public Policy 69, 90 (Fall 2001).

52 Pryor had filed an amicus curiae brief in the Supreme Court in Stenberg along with a number of other state attorneys general urging the Court to uphold the Nebraska law. Brief Amicus Curiae of Virginia, Alabama, et al. in Support of Petitioners, Stenberg v. Carhart, 1999 U.S. Briefs 830 (Feb. 28, 2000). This brief argued that, consistent with principles of "federalism," the Court should accept the narrowing interpretation of the Nebraska law given by that state's attorney general and uphold the law. The Court rejected this argument, noting that the attorney general's interpretation of a statute did not bind the state courts. Stenberg, 530 U.S. at 940-41.

Pryor also supported the position of those opposed to reproductive choice by filing an amicus brief in Scheidler v. NOW, 123 S. Ct. 1057 (2003). In his brief, Pryor went beyond the Court's holding that the federal RICO law could not be used against anti-abortion advocates because they did not "obtain" property of an abortion clinic under

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Some of Pryor's supporters have asserted that, despite Pryor's unquestionable opposition to women's reproductive freedom, he would uphold the law in this regard, pointing to a letter that he issued to district attorneys the day the Alabama ban on "partial birth" abortions took effect in which he directed that the law was to be enforced only post-viability, though no such limit was contained in the law. See Summit Medical Associates, P.C. v. Siegelman, 130 F. Supp.2d at 1313, n.6. However, Pryor issued this letter after the lawsuit challenging the law had been filed and under the threat that an injunction would be sought; in other words, as his own representatives confirmed at the time, Pryor was attempting to save the statute.[53] Moreover, as noted above, Pryor ignored the fact that the statute lacked the constitutionally required exception to preserve the pregnant woman's health.

Most important, however, this conduct by Pryor does not resolve the serious concerns that, as a lifetime federal judge, Pyror would be influenced by his personal ideology when he is in a position to interpret what the Constitution requires and what the law is. Most cases are not factual or legal clones of prior precedent. In fact, judging often requires subtle and nuanced interpretations of precedent, statutes, and the Constitution. For example, if confirmed to the Eleventh Circuit, Pryor might well hear a case involving a law that attempts to chip away incrementally at the right to reproductive freedom by placing particular burdens on the exercise of that right, a case in which Roe v. Wade provides guidance but not the final answer. In such a case, no one can seriously doubt that Pryor's view of Roe as "the worst abomination of constitutional law in our history" would influence his ruling.[54]

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the federal Hobbs Act, arguing that the RICO law should never be interpreted to permit a clinic or other private party to seek injunctive relief. See Brief for the States of Alabama et al. as Amici Curiae in Support of Petitioners, Scheidler v. NOW, 2001 U.S. Briefs 1118 (July 12, 2002).

53 See Mike Cason, "Activist Says Pryor Killed Abortion Bill," *Montgomery Advertiser* (Dec. 3, 1997) ("Pryor's attorneys defend his move as an effort to keep a federal judge from striking down the law. Abortion clinics have filed a federal lawsuit against the partial-birth ban . . . .")

54 In addition to his record with respect to reproductive choice and "sodomy" laws, Pryor also defended an Alabama statute that prohibited the sale of devices "designed or marketed as useful primarily for the stimulation of human genital organs." Kimberly Mills, "Alabama Legislature's Ban on Sex Devices Violates Civil Rights," *Seattle Post-Intelligencer* (Feb. 24, 1999). When a number of individuals who used such devices filed suit in federal court challenging this law as a violation of their right to privacy and to personal autonomy, Pryor contended that the legislators were within their rights "to address what they perceived to be a problem." Id. The court struck down the law, holding that it "impose[d] a significant burden on the right of married and unmarried persons to sexual privacy. . . ." Williams v. Pryor, 220 F. Supp. 2d 1257, 1298 (N.D. Ala. 2002). The court also noted that "the Attorney General has failed to offer even one state interest for the challenged statute, much less a compelling state interest. Further, the Attorney General has not attempted to prove that the statute is narrowly tailored to meet those phantom interests." Id. at 1300. An appeal by the state is pending.

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V. PRYOR'S RECORD ON THE SEPARATION OF CHURCH AND STATE

- **Pryor opposes the genuine separation of church and state and has used his office to promote religion**

Pryor is contemptuous of what he calls "the so-called wall of separation between church and state," asserting that this doctrine — so essential to the preservation of freedom of conscience in this country — was created by the Supreme Court's "errors of . . . case law."[55] According to Pryor, America is in a "time of moral and spiritual crisis," a crisis that he blames in part on what he calls "the increasing secularization of our Country," and for which he considers "[t]he primary catalyst" to be "the Supreme Court of the United States."[56] Pryor lambasted the Court: "In 1962, with its decision prohibiting prayer in public schools, the Supreme Court began building a wall that has increasingly excluded God and religion from our public life . . . In the years following the school prayer decision, it seems our government has lost God."[57]

Pryor's criticism of the Court reflects the mythology of the Religious Right. The Court's 1962 decision to which Pryor referred, Engel v. Vitale, 370 U.S. 421, did not, as Pryor claimed, prohibit prayer in schools, but rather state-sponsored prayer. The right of students to engage in truly voluntary prayer in schools was not affected by that or any other decision of the Court.

The language of Pryor's speeches indicates a disturbing lack of concern for religious minorities. For example, in 1997 he stated, "[t]he American experiment is not a theocracy and does not establish an official religion, but the Declaration of Independence and the Constitution of the United States are rooted in a Christian perspective of the nature of government and the nature of man. The challenge of the next millennium will be to preserve the American experiment by restoring its Christian perspective." McGill-Toolen Speech (emphasis added). Accord, Baccalaureate Speech of Attorney General Bill Pryor to the 1997 Independent Methodist School Graduating Class.

Pryor concluded the remarks that he gave upon his official investiture as Attorney General in 1997 by stating: "With trust in God, and His Son, Jesus Christ, we will continue the American experiment of liberty in law." Investiture of Bill Pryor as Attorney General (Jan. 2, 1997).

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55 "Do Not Uncork the Champagne Yet."

56 Commencement Speech by Attorney General Bill Pryor to the 1997 McGill-Toolen Graduating Class, <http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=31> (visited June 5, 2003) (hereafter "McGill-Toolen Speech"). Pryor expressed the same sentiments in another 1997 speech, Baccalaureate Speech of Attorney General Bill Pryor to the 1997 Independent Methodist School Graduating Class.

57 McGill-Toolen Speech.

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- **Pryor has sought to promote government-sponsored sectarian prayer**

Pryor's extreme views about church-state separation are particularly evident in his steadfast support — inside the courtroom and out — for the unconstitutional practices of Alabama Judge (now Chief Justice) Roy Moore. Moore is most famous for his efforts to use his judicial office to display the Ten Commandments in his courtroom when he was a trial judge and now in the rotunda of the state's Judicial Building. When he was a trial court judge, Moore also "routinely invited Christian clergy to offer prayer at [the opening of jury] sessions; those prayers have routinely been Christian prayers." Order, Alabama v. ACLU, No. CV-95-919-PR (Circuit Court of Montgomery County, Nov. 22, 1996), at 2.

A lawsuit was filed against Moore in federal court by several local taxpayers and residents, challenging both his sponsorship of sectarian prayers and his display of the Ten Commandments as violative of the Establishment Clause. That suit was ultimately dismissed on the ground that the plaintiffs lacked standing. Alabama Freethought Association v. Moore, 893 F. Supp. 1522 (N.D. Ala. 1995). While that suit was pending, however, Pryor, then the Deputy Attorney General, filed a lawsuit in the name of Alabama in state court asking the court to declare that Moore's practices, including the prayer practice, were constitutional, a lawsuit that the state was under no obligation to file. Complaint for Declaratory Judgment, Alabama v. ACLU, No. CV-95-919-PR (Circuit Court of Montgomery County, Apr. 21, 1995). Pryor personally signed the Complaint. Id. at 7.

The state court rejected Pryor's arguments, and held that a judge's practice of officially sponsoring sectarian prayers before jury assemblies was unconstitutional. As the court explained, "[p]rayers conducted or arranged by a judge or officer of an Alabama court delivered to jurors summoned to perform their legal duty in an Alabama court constitute state-sponsored prayer. State-sponsored prayers that demonstrate a denominational preference are proscribed by the Establishment Clause of the United States Constitution." Order, Alabama v. ACLU, No. CV-95-919-PR (Circuit Court of Montgomery County, Nov. 22, 1996), at 2.

Pryor appealed. The brief that he filed with the Alabama Supreme Court urging the court to overturn the trial court's ruling not only illuminates the sectarian nature of Judge Moore's prayer practice that Pryor voluntarily defended, but is another example of Pryor's trying to push the law in an extreme direction. As Pryor's own brief recounts, Judge Moore would typically open jury assemblies by stating that "we're going to begin as we always do, with prayer;" he would then introduce the clergy member whom "I have with us today," give the name of that person's church, and ask the jurors to "please stand;" the prayer followed. Brief of the State of Alabama, Alabama v ACLU, Consolidated Case Nos. 1960927 et al., at 4 (Ala. Sup. Ct., Apr. 10, 1997). Pryor's brief itself admits that "[t]o Judge Moore's knowledge, each of the clergy who had delivered a prayer in his presence was a Christian. Some of the prayers had ended in Jesus' or Christ's name. . . . Moore did not recall having invited any Jewish, Muslim, or Jehovah's Witness clergy, but explained, '[T]hese jurors are summoned from Etowah County are

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ninety-five percent Christians or persons who believe in God if they are not Christians.'" Id. at 8 (record citations omitted).[58]

That Pryor urged a court to uphold this practice as constitutional raises serious concerns about his view of the First Amendment. The very notion that a judge could lawfully sponsor prayers of a particular religious group because most of his audience was of the same faith has absolutely no basis in the Constitution and would in fact allow government officials to ignore the Establishment Clause by promoting a particular religion as long as their actions took place in front of a majority of co-religionists.

The Alabama Supreme Court did not rule on the merits of the case but instead dismissed the case as lacking any controversy because Pryor had named Judge Moore as a defendant, and Pryor and Moore were plainly in agreement as to the constitutionality of Moore's practices. Alabama v. ACLU, 711 So.2d 952 (Ala. Sup. Ct. 1998). The court was extremely critical that the case had been brought: "We are convinced . . . that 'the Office of the Attorney General [has] . . . sought to 'use' this Court in order to get an advisory ruling.' . . . We will not, however, allow the judiciary of this state to become a political foil, or a sounding board for topics of contemporary interest." Id. at 962. Even after being so castigated, and even though the result of the court's dismissal of the case was to allow Moore to continue his practices, Pryor was so bent on having a court declare them constitutional that he asked the state Supreme Court to rehear the case and uphold Moore's practices. The court refused.[59]

Pryor has tried to gain court approval of government-sponsored, captive audience prayer in other settings as well. In the case of Santa Fe Independent School District v. Doe, 520 U.S. 290 (2000), Pryor joined several other state attorneys general in filing an amicus curiae brief in the U.S. Supreme Court urging the Court to uphold a Texas school district's policy of turning over the public address system to students before high school football games in order to allow a prayer to be delivered. Pryor's brief asserted that the prayer practice should be upheld because there was no impermissible state action. See Brief on the Merits of Amici Curiae State of Texas, et al., Santa Fe Independent School District v. Doe, 1999 U.S. Briefs 62, *5 (Dec. 30, 1999). The Court rejected this argument and struck down the policy, explaining that "[t]hese invocations are authorized by government policy and take place on government property at government-sponsored school-related events. . . The delivery of [a religious] message — over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer — is not properly characterized as 'private' speech." 520 U.S. at 302, 310.

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[58] Moore's explanation as to why he did not invite non-Christians to offer the prayers was: "'We are not a nation founded upon the Hindu god or Buddha.'" "Rally Backs Judge's Display of Ten Commandments," *Dallas Morning News* (Apr. 13, 1997).

[59] "Court Refuses to Rehear Commandments Case," Associated Press (Apr. 10, 1998).

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Pryor's brief gives disturbingly short shrift to the rights of students and others in the audience who are attending a school-sponsored event and who do not desire to participate in prayer as the price of admission. In fact, casting the student-led prayers as free speech, Pryor's brief contends that "[t]he First Amendment focuses on the rights of the speaker, not of the listener." Brief on the Merits of Amici Curiae State of Texas, et al., Santa Fe Independent School District v. Doe, 1999 U.S. Briefs 62, *14, n.9. Such an argument is contrary to Supreme Court precedent. Indeed, citing its ruling in Lee v. Weisman, 505 U.S. 577 (1992), the Court reaffirmed that school officials may not put students and other citizens in the position of having to choose whether to attend a school-sponsored event or "risk facing a personally offensive religious ritual. . . The Constitution .. . demands that the school may not force this difficult choice upon these students for 'it is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.'" Santa Fe Independent School District v. Doe, 530 U.S. at 312 (citation omitted).

- **Supporting religious displays of the Ten Commandments**

In Stone v. Graham, 449 U.S. 39 (1980), the Supreme Court struck down a Kentucky law that required the Ten Commandments to be posted in all public school classrooms. In so ruling, the Court distinguished between displays of the Ten Commandments, such as these, that have the purpose or effect of promoting religion, and government use of the Ten Commandments in a secular, historic context. Despite this ruling, Pryor has been on a crusade to have the courts authorize government displays of the Ten Commandments in circumstances that clearly do not constitute a secular or historic display, but that plainly advance religion and are intended to do so. In his efforts, Pryor has disregarded the Court's recognition that

> [t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such an honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness . . . . Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath day.

Stone v. Graham, 449 U.S. at 41-42 (emphasis added).

Pryor has been critical of the Court's ruling in Stone v. Graham, saying "personally I think it's pretty hard and disingenuous to defend the court's decision . . . unless you're recognizing that children are this special group of citizens who have to be kept away from the dangerous message of religion." Transcript, NPR "Justice Talking," Religious Liberties: Moment of Silence Debate, as published in Engage, Vol. 3 (Aug. 2002).

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In each of the cases discussed below in which Pryor has urged the courts to uphold government displays of the Ten Commandments, the courts have found that the particular displays promote religion. Nonetheless, Pryor has urged higher courts to approve them. In none of these cases did Alabama have any legal obligation to take a position, underscoring Pryor's use of his office to promote his ideology. In fact, in one case, clergy in Alabama, including Christian clergy, have opposed the state's position.

Pryor's most publicized Ten Commandments effort has been in the context of his unwavering support for Judge Roy Moore. In addition to inviting Christian clergy to deliver prayers to jury assemblies when he was a state trial court judge, Moore also displayed alone on the wall of his courtroom behind his bench a hand-carved plaque of the Ten Commandments. This display was also challenged in the federal lawsuit discussed above, which was dismissed for lack of standing. In the lawsuit that Pryor filed in state court asking the court to declare Moore's practice of sponsoring sectarian prayers in courtrooms before jurors to be constitutional — a lawsuit that Alabama was under no obligation to file — Pryor also asked the court to uphold Judge Moore's display of the Ten Commandments. See Complaint for Declaratory Judgment, Alabama v. ACLU, No. CV-95-919-PR (Circuit Court of Montgomery County, Apr. 21, 1995).

After visiting Judge Moore's courtroom and viewing his Ten Commandments display in its particular setting, the state judge held that this particular display, "hanging in the courtroom on the wall alone" behind Judge Moore's bench where it could be seen "from any position in the courtroom [and] more prominently from the jury box," was unconstitutional. Final Order, Alabama v. ACLU, No. CV-95-919-PR (Montgomery County Circuit Court, Feb. 10, 1997). The court found it "obvious that the sole purpose for the plaques hanging in the courtroom is such a fashion is 'purely religious.' In fact, Judge Moore . . . has unequivocally stated that the plaques are not in the courtroom for a historical, judicial or education purpose, but rather, and clearly to promote religion." Id. at 2. The court ordered Moore to take down the display or incorporate it "in a larger display of non-religious and/or historical items." Id. at 2. The court responded to those who had asked it "to save the Ten Commandments" that

> the Ten Commandments are not in peril. They are neither stained, tarnished nor thrashed. They may be displayed in every church, synagogue, temple, mosque, home and storefront. They may be displayed in cars, on lawns, and in corporate boardrooms. Where this precious gift cannot and should not be displayed as an obvious religious text or to promote religion is on government property (particularly in a courtroom).

Id. at 3.

Moore made it plain that he would not comply with the court's order to change his Ten Commandments display,[60] and then-Governor Fob James said that he would

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[60] See, e.g., Bill Poovey, "Judges Battle Over Courtroom Display of the Ten Commandments," Associated Press (Feb. 11, 1997).

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In addition to advocating his harmful states' rights and majoritarian ideology, Pryor has tried to push the law far to the right in other areas as well. For example, Pryor has urged Congress to consider repealing or amending Section 5 of the Voting Rights Act, as well as pushed for other modifications of this critical civil rights law. Pryor's efforts to undermine the Voting Rights Act have prompted more than a dozen leaders of the civil rights movement, including Rev. Fred Shuttlesworth and Martin Luther King III, to oppose his confirmation.

Pryor would deny gay men and lesbians the equal protection of the laws. He believes that it is constitutional to imprison gay men and lesbians for expressing their sexuality in the privacy of their own homes and has voluntarily filed an amicus brief in the Supreme Court urging the Court to uphold a Texas law that criminalizes such private consensual activity. Pryor is also a staunch opponent of a woman's right to choose. He has called Roe v. Wade "the worst abomination of constitutional law in our history" and has supported efforts to erect unconstitutional barriers to the exercise of reproductive freedom.

Pryor has also tried to undermine the separation of church and state, urging the courts to uphold a judge's official sponsorship of sectarian prayers before juries as well as religious displays of the Ten Commandments. Most recently, Pryor has supported the efforts of Alabama Chief Justice Roy Moore to display a nearly three-ton granite monument of the Ten Commandments in the rotunda of the state Judicial Building, a display ruled unconstitutional by a federal district court. More than forty Alabama clergy and other religious leaders, including Christian clergy, have opposed Moore's monument as a violation of the separation of church and state.

Not only is Pryor's ideology extreme, but he also often expresses his views in a manner that is contemptuous of those who disagree with him and of the legal principles that protect the rights and interests of ordinary Americans. In the words of one columnist, Pryor is the opposite of a "stealth" nominee but is rather "a B-52 candidate . . . who has spent his career flying high, carpet-bombing the landscape with conservative views on federalism, abortion, church-state separation and a host of crime and punishment issues."[1] Pryor's extreme positions on so many critical aspects of Americans' individual rights seriously place in doubt his ability to maintain an open mind about these matters were he to be confirmed.

As discussed below, Pryor's crusade to push the law far to the right has been partially successful in terms of his states' rights agenda. In other areas, the courts have rebuffed him. The situation would be far different, however, if Pryor were an appellate judge deciding these critical questions of constitutional and statutory interpretation. And because the Supreme Court hears so few cases, the federal courts of appeal are the courts of last resort for most Americans.

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[1] Jonathan Ringel, "Conservative AG Would Be Controversial 11th Cir. Pick," *Fulton County Daily Report* (Jan. 8, 2003).

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"'use the National Guard and state troopers to prevent their removal.'" Jessica Saunders, "Judge: Ten Commandments Display Must Be Changed Or Removed," Associated Press (Feb. 10, 1997).

Pryor defended Moore in every available forum. On the Today Show, Pryor was asked what was wrong with the state court's suggestion that Moore "simply move those tablets to another wall in his courtroom, near some other historical objects, such as the Declaration of Independence . . ." Transcript, Today Show (Feb. 16, 1997). Pryor's response was that "the Ten Commandments are special, and they deserve a special place on the wall in his courtroom." Id. Pryor attempted to trivialize the genuine First Amendment issues at stake and ignored Supreme Court precedent by claiming that the ACLU was "asking one circuit judge to be the interior decorator of another judge's courtroom." Id.

Also on the Today Show, Pryor was reminded of Governor James's threat to use the National Guard if necessary to preserve Judge Moore's display and Judge Moore's refusal to abide by the court's order. Transcript, Today Show (Feb. 16, 1997). Pryor was asked, "Don't those two positions conjure up images of — of Lester Maddox, George Wallace and — and Little Rock schools and tend to undermine respect for the — the rule of law?" Id. Disturbingly, Pryor did not respond by stating that of course a court's order must be complied with unless and until overturned by a higher court. Instead, he replied that "George Wallace defended an immoral position. I think Judge James — Governor James and Judge Moore are on the right position in this case." Id.

Pryor was also one of the speakers at a large rally held on April 12, 1997 at the state Capitol in Birmingham to support Moore, a rally sponsored by such groups as the Christian Coalition and American Family Association.[61] Reuters described the rally as follows:

> [t]housands of people, including two of Alabama's highest elected officials [Pryor and Governor James], protested the separation of church and state . . . condemning the Supreme Court for keeping religion out of public schools, courtrooms, and other government venues.

Amy Hetzner, "Thousands Rally Against U.S. Supreme Court in Alabama," Reuters News (Apr. 12, 1997). Pryor and others reportedly used the occasion not only to support Moore's unconstitutional practices but also to advance other aspects of their right-wing ideology: "While the rally's invective was aimed mainly at the Supreme Court and the American Civil Liberties Union, its rhetoric at times veered into a condemnation of legal abortion and gay people." Id. Pryor in particular "condemned the 1973 Roe vs. Wade Supreme Court decision that legalized abortion, telling his audience that he became a lawyer to fight the ACLU. 'God has chosen, through his son Jesus Christ, this time and

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61 "Rally Backs Judge's Display of Ten Commandments," *Dallas Morning News* (Apr. 13, 1997).

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this place for all Christians . . . to save our country and save our courts,' he announced." Id.

Moore rode his newfound fame to election as Chief Justice of Alabama in November 2000; his campaign referred to him as the "Ten Commandments Judge."[62] The next summer, "during the night and without forewarning his fellow Supreme Court justices,"[63] but while being filmed by Coral Ridge Ministries, "an evangelical Christian media outreach organization,"[64] Moore installed a nearly three ton granite monument of the Ten Commandments in the rotunda of the Alabama State Judicial Building, which houses the state Supreme Court, the courts of appeals, and other state offices.[65] Designed by Moore himself, the monument, according to Moore, reflects "'the sovereignty of God over the affairs of men.'"[66] As a federal court subsequently found, "[b]y God, the Chief Justice specifically meant the Judeo-Christian God of the Holy Bible and not the God of any other religion."[67]

Moore placed the monument "directly across from the main entrance to the Judicial Building . . . A person entering the Judicial Building through its main entrance, and looking across the large open area of the rotunda, will see the monument immediately. . . The Chief Justice chose to display the monument in this location so that visitors to the Alabama Supreme Court would see the monument. While not in its center, the monument is the centerpiece of the rotunda." 229 F. Supp. 2d at 1294.

Weighing 5,280 pounds, Moore's Ten Commandments monument is approximately three feet wide, three feet deep, and four feet tall. Id. "The top of the monument is carved as two tablets with rounded tops . . . The tablets are engraved with the Ten Commandments as excerpted from the Book of Exodus in the King James Bible. Due to the slope of the monument's top and the religious appearance of the tablets, the tablets call to mind an open Bible resting on a lectern." Id. at 1294-95. Below the Ten Commandments, on the sides of the monument, are quotations from secular sources referring to God, id., "edited so as to emphasize the importance of religion and the sovereignty of God in our society . . . ." Id. at 1303.

Once again, a lawsuit was filed by individual citizens asserting that Moore had violated the Establishment Clause. Once again, Pryor rushed to Moore's defense, appointing three private lawyers as Deputy Attorneys General of Alabama to represent Moore. Stan Bailey, "Pryor Supports Moore Defense," *Birmingham Daily News* (Nov. 3, 2001). Pryor told the media, "'I look forward to providing a vigorous defense . . . .'" Id.

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62 See Glassroth v. Moore, 229 F. Supp. 2d 1290, 1294 (N.D. Ala. 2002), appeal pending.

63 Eddie Curran, "Legal Fees in Commandments Case Could Reach $1 Million," *Mobile Register* (May 2, 2003).

64 Glassroth v. Moore, 229 F. Supp. 2d at 1294.

65 Id.

66 Id.

67 Id.

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The federal court disagreed completely with Pryor. In a ruling issued this past November, the court recognized, as did the Supreme Court in Stone v. Graham, that the Ten Commandments have secular aspects. However, looking at the facts of this particular case, the court found that Moore's Ten Commandments monument violated the Establishment Clause because Moore's "fundamental, if not sole, purpose in displaying the monument was non-secular" and "the monument's primary effect advances religion." Glassroth v. Moore, 229 F. Supp. 2d 1290, 1299 (M.D. Ala. 2002). Consistent with its recognition that the Ten Commandments have secular aspects, the court noted that it was not holding "that it is improper in all instances to display the Ten Commandments in government buildings . . ." 229 F. Supp. 2d at 1293.

In its ruling, the court noted the specific factual aspects of Moore's monument, as well as statements Moore had made confirming the religious purpose of the monument. For example, the court noted that Moore had emphasized that "the secular quotations were placed on the sides of the monument, rather than on its top, because these statements were the words of mere men and could not be placed on the same plane as the Word of God." 229 F. Supp. 2d at 1295. In fact, Moore rejected the request made by a state legislator that another monument be placed in the rotunda containing Martin Luther King, Jr.'s "I Have a Dream" speech, stating "'The placement of a speech of any man alongside the revealed law of God would tend in consequence to diminish the very purpose of the Ten Commandments monument." 229 F. Supp. 2d at 1297.

The court found that "[n]o part of the monument itself, nor sign, nor other decoration in the rotunda, in any way emphasizes the potentially secular nature of the Commandments." Id. at 1303. "No other Ten Commandments display presents such an extreme case of religious acknowledgment, endorsement, and even proselytization." Id. at 1308. Moore appealed, and the Eleventh Circuit heard oral argument in the case on June 4, 2003.

More than 40 Alabama clergy and religious leaders, including clergy and leaders of various Christian denominations, joined members of the national religious community to file an amicus curiae brief in the Eleventh Circuit urging that court to uphold the district court's ruling. Brief of Amici Curiae Alabama Clergy, et al., Glassroth v. Moore, No. 02-16708-D, 02-16949-D (11th Cir.). As these amici explain, Moore's "display of the Ten Commandments in the State Judicial Building flouts the Establishment Clause's command to respect the freedom of conscience because it endorses the Judeo-Christian religious tradition to the exclusion of all others." Id. at 10.[68]

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[68] Even the Liberty Counsel, a religious right legal organization, has recognized the problems with Moore's monument, and hopes the case does not get to the Supreme Court. "The Montgomery monument, and Moore's actions, are too overtly religious, and as such, the case could damage the movement to present religious symbols in government buildings should the U.S. Supreme Court choose to consider it," a Liberty Counsel attorney told the press. "Pro-Moore Rally Planned," Associated Press (Dec. 15, 2002).

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The brief filed in the Eleventh Circuit in support of Moore by one of the Alabama Deputy Attorneys General appointed by Pryor is astonishing in its arguments and in its failure to recognize settled Supreme Court precedent. See Brief for Appellant, Glassroth v. Moore, No. 02-16708-DD, 02-16949-DD (11th Cir.). For example, the brief makes the remarkable assertion that because Moore's Ten Commandments monument is not a "law," the Establishment Clause does not apply. Id. at 17, et seq. This is contrary to decades of Supreme Court precedent holding that the official practices and actions of government representatives must comply with the Establishment Clause. Perhaps most astonishing, the brief argues that because the "police power" is one of the powers reserved to the states by the Tenth Amendment, Moore had the right to install the Ten Commandments monument "to restore the moral foundation of law to the State of Alabama." Id. at 48. The contention that the Establishment Clause has no application to state officials if they are acting in the name of "morality" has absolutely no basis in the Constitution or Supreme Court precedent and would destroy the separation of church and state insofar as state governments are concerned.

In addition to supporting Roy Moore's efforts in Alabama, Pryor has used his office to file amicus curiae briefs in the Supreme Court in two different Ten Commandments cases arising in other states, urging the Court to hear appeals from decisions of the federal appellate courts that have barred public entities from maintaining religious displays of the Ten Commandments. Brief for the States of Alabama, et al. in Support of Petition for a Writ of Certiorari, City of Elkhart v. Books, No. 00-1407 (Apr. 12, 2001); Brief of the States of Texas, Alabama, et al. as Amici Curiae in Support of Petitioner, Russ v. Adland, No. 02-1241 (Mar. 27, 2003).[69] In each instance, the Court declined to hear the case, allowing the rulings to stand.[70]

The positions that Pryor has taken in these and other cases are not only extreme, but the language with which he argues them often trivializes the important concerns and legal rights of the litigants involved. For example, in City of Elkart, which involved a Ten Commandments monument donated to a municipality in 1958 by the Fraternal Order of Eagles, hardly a historic artifact, Pryor's amicus brief, filed on behalf of Alabama and several other states, claimed that there were "disturbing similarities" between the lawsuit seeking the monument's removal and the Taliban's destruction of the historic Buddha monuments in Afghanistan dating from the Third and Fifth Centuries.[71] Pryor's News Release announcing the filing of his brief was even more shrill: "Just as these ancient statues of Buddha were declared to be 'shrines of infidels' and were demolished without regard to their historic and cultural value, so do plaintiffs in cases such as this seek to obliterate any artistic or historic representation with religious references. What happened in Afghanistan was a terrible waste, and I hope the Supreme Court will protect us from

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69 The appellate decisions are Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000); Adland v. Russ, 307 F.3d 471 (6th Cir. 2002).

70 City of Elkhart v. Books, 532 U.S. 1058 (2001); Russ v. Adland, 2003 U.S. LEXIS 3264 (Apr. 28, 2003).

71 Brief for the States of Alabama, et al. in Support of Petition for a Writ of Certiorari, City of Elkhart v. Books, at 2-3.

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losing our own great monuments."[72] Pryor urged the Court to hear the case "before the federal courts are drawn further into a campaign of secular iconoclasm to cleanse public buildings and grounds of religious references." Alabama Amicus Brief in Elkhart, at 11 (emphasis omitted).

Someone who has such fixed and contemptuous views of other Americans who believe strongly in church-state separation and who find government promotion of sectarian beliefs problematic simply cannot be expected to have an open mind when cases raising these very same issues come before him as a judge.

VI. PRYOR'S RECORD ON CRUEL AND UNUSUAL PUNISHMENT

- **Defending the "hitching post"**

In Hope v. Pelzer, 536 U.S. 730 (2002), Pryor vigorously defended Alabama's practice of handcuffing prison inmates to hitching posts in the hot sun if they refused to work on chain gangs or otherwise disrupted them. In 1995, Alabama was the only state in the country that still used chain gangs and the only one that used the hitching post. 536 U.S. at 733. The post was a horizontal bar to which inmates were handcuffed "in a standing position and remain[ed] standing the entire time they [were] placed on the post." 536 U.S. at 734. The plaintiff in this case, Larry Hope, charged that he had been handcuffed to a hitching post twice, one time for seven hours, during which he was shirtless "while the sun burned his skin. . . During this 7-hour period, he was given water only once or twice and was given no bathroom breaks. At one point, a guard taunted Hope about his thirst. According to Hope's affidavit: '[The guard] first gave water to some dogs, then brought the water cooler closer to me, removed its lid, and kicked the cooler over, spilling the water onto the ground.'" 536 U.S. at 734-35.

Pryor's brief contended that Mr. Hope had not been subjected to cruel and unusual punishment in violation of the Eighth Amendment. In fact, Pryor's brief asserted that "the risks to Hope of pain, dehydration, sunburn, wrist injury, and harassment were hardly greater and perhaps even less than that faced by his fellow inmates who dutifully worked in the sun all day" on the chain gangs. Brief for the Respondent, Hope v. Pelzer, 2001 U.S. Briefs 309, *22 (Mar. 25, 2002). Pryor contended that the use of the hitching post was justified because the Alabama Department of Corrections considered it to be "a cost-effective, safe and relatively pain-free way to impel inmates to work." Id. at *31. Pryor also argued than even if Hope's Eighth Amendment rights had been violated, the prison officers named as defendants were immune from suit because they had not violated a "clearly established" right. Id.

The Supreme Court rejected both of Pryor's arguments. According to the Court, "[d]espite the clear lack of an emergency situation, the respondents knowingly subjected [Hope] to a substantial risk of physical harm, to unnecessary pain caused by the

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[72] Bill Pryor, Attorney General, "Pryor Asks U.S. Supreme Court to Stop Removal of Ten Commandments From Indiana City Building," News Release (April 13, 2001).

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handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation. The use of the hitching post under these circumstances violated 'the basic concept underlying the Eighth Amendment, [which] is nothing less than the dignity of man.'" 536 U.S. at 738 (citation omitted).[73] The Court further held that the prison officers were not immune from suit, explaining among other things that "[t]he obvious cruelty inherent in this practice should have provided [them] with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity . . . ." Id. at 746 (emphasis added).

Pryor immediately criticized the Court's ruling. Quoting from a dissent by Justice Thomas (joined by Chief Justice Rehnquist and Justice Scalia), Pryor assailed the Court for ruling based on "'its own subjective views on appropriate methods of prison discipline.'"[74]

- **Defending the use of the electric chair**

Pryor is an ardent supporter of the death penalty. While this is unremarkable in America today, Pryor has taken his support to extremes. For example, on behalf of Alabama and four other states, Pryor in 2002 filed an amicus curiae brief with the Supreme Court in Atkins v. Virginia in which he urged the Court not to adopt a per se constitutional rule prohibiting the execution of the mentally retarded. Brief of the States of Alabama et al. in Support of Respondent, Atkins v. Virginia, No. 00-8452, 2000 U.S. Briefs 8452 (Jan. 14, 2002). According to Pryor, there was no national consensus against executing the mentally retarded. Pryor urged the Court to allow the states "to continue exploring the issue of when mental retardation should be a factor negating a capital defendant's actual responsibility and culpability as opposed to when it is, as it is in Atkins's case, merely an attempt to avoid execution." Id., 2000 U.S. Briefs 8452, *28 (emphasis added). The Court rejected these arguments and held that the 8th Amendment prohibits the execution of the mentally retarded, specifically noting that the Amendment "'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" Atkins v. Virginia, 536 U.S. 304, 311-12 (2002).

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73 The Court also noted that a report of the United States Department of Justice had found "Alabama's systematic use of the hitching post to be improper corporal punishment." 536 U.S. at 737.

74 News Release, Statement of Attorney General Bill Pryor Regarding U.S. Supreme Court Ruling in Hope v. Pelzer (June 27, 2002), <http://www.ago.state.al.us/news_template.cfm?Record_ID=683> (visited May 12, 2003). In a National Public Radio interview about the case on the day it was argued Pryor said, "[a]n Alabama prison is not a fun place. It is not a place where you want to return." NPR: Morning Edition (Apr. 17, 2002).

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In 2000, even as all but two other capital punishment states had moved to more "humane" alternatives to electrocution,[75] Pryor defended Alabama's continued use of the electric chair. Early that year, the Supreme Court temporarily stayed the execution of an inmate in Alabama who was about to be electrocuted. The inmate had sought Supreme Court review of his claim that the use of the electric chair constituted cruel and unusual punishment in violation of the Eighth Amendment.[76] In the press, Pryor defended the use of the electric chair as "almost painless and instantaneous."[77]

The possibility of Supreme Court review of the constitutionality of electrocution prompted Alabama legislators to introduce two different bills concerning the state's method of execution, including one that would have made lethal injection the primary method of execution but would allow an inmate to choose the electric chair. This was similar to legislation that had been adopted by Florida a year earlier and that had ended litigation concerning that state's use of the electric chair.[78] Pryor made clear that he supported the continued use of the electric chair and opposed a switch to lethal injection: "I do not believe that we should be bullied by the fear that the Supreme Court could rule against us. If the court really feels it's so important for this issue to be decided, let's give them a case. . . I do not support this state doing what the state of Florida did."[79] Nevertheless, two years later, Alabama did pass legislation changing the primary means of execution to lethal injection.[80]

In October 2000, Pryor urged the Alabama State Bar Board of Bar Commissioners not to support a proposed moratorium on the death penalty in Alabama. Impugning the motives of those who have raised concerns about execution of the innocent, Pryor claimed that "the death penalty moratorium movement is headed by an

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75 Ashley Estes, "Court Blocks Execution, May Review Use of Alabama Electric Chair," Associated Press (Feb. 5, 2000).

76 Id. The Court, with four justices disagreeing, subsequently declined to hear the case and lifted the stay of execution. In re Robert Lee Tarver, 528 U.S. 1152 (Feb. 22, 2000).

77 Ashley Estes, "Court Blocks Execution, May Review Use of Alabama Electric Chair," Associated Press (Feb. 5, 2000). In sharp contrast, the Georgia Supreme Court, in a 2001 ruling holding that electrocution is unconstitutional, stated that "death by electrocution involves more than the 'mere extinguishment of life' . . . and inflicts purposeless physical violence and needless mutilation that makes no measurable contribution to accepted goals of punishment. . . Accordingly, we hold that death by electrocution, with its specter of excruciating pain and its certainty of cooked brains and blistered bodies, violates the prohibition against cruel and unusual punishment . . . ." Dawson v. State, 554 S.E.2d 137, 143-44 (Ga. 2001) (citations omitted).

78 Phillip Rawls, "AG, Governor Back Lethal Injection as Fallback," Associated Press (Feb. 2, 2000).

79 Ashley Estes, "Court Blocks Execution, May Review Use of Alabama Electric Chair," Associated Press (Feb. 5, 2000) (emphasis added).

80 Bob Johnson, "Governor Signs Law Changing to Lethal Injection," Associated Press (Apr. 25, 2002).

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activist minority with little concern for what is really going on in our criminal justice system."[81]

VII. OTHER CONCERNS

Other concerns about Pryor have been raised by his refusal to join the vast majority of his fellow state attorneys general in bringing suit against the tobacco companies, his open criticism of them for having done so and their criticism of him, and other aspects of his record that raise serious questions about his apparent support for big business interests versus the interests of ordinary citizens.

Although Pryor claimed that the lawsuits against the tobacco industry were not well-founded legally and were an abuse of the legal process,[82] the overwhelming majority of state attorneys general disagreed. This raises questions about whether Pryor, in concluding as he did that the tobacco companies should not be sued when so many other attorneys general disagreed, was exercising bad legal judgment or paying undue deference to corporate interests. It is certainly true that Pryor has portrayed himself publicly as a friend of corporate interests, has frequently spoken to business groups about what he calls the "lawsuit abuse" of his fellow attorneys general, and has urged the business establishment to support the election as attorneys general of others who share his views. In fact, he helped found the Republican Attorney Generals Association, a partisan group that expressly solicits financial contributions from corporations that could find themselves the subjects of lawsuits brought by state attorneys general.

As noted, Pryor was one of the few state attorneys general who refused to join his colleagues in bringing suit on behalf of his state against the tobacco industry to recover health care costs spent by the states in treating smoking-related illnesses.[83] Pryor not only refused to join this nationwide litigation, but he was also openly critical of what his colleagues were doing. In numerous public statements, Pryor criticized these lawsuits, saying that "[t]he tobacco issue, like so many other issues of public health, politics, and economics, does not belong in court."[84] As Pryor himself stated in 2001, "[f]or the last

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81 Bill Pryor, Attorney General of Alabama, Remarks to the Alabama State Bar Board of Bar Commissioners Regarding the Moratorium Issue (Oct. 27, 2000), <http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=38> (visited June 5, 2003).

82 See, e.g., Bill Pryor, Attorney General of Alabama, "What Hath the MSA Wrought? The Consequences of the State Tobacco Litigation," Mississippi Bar Litigation and General Practice Session Annual Meeting (July 13, 2001).

83 See, e.g., "Alabama Would Get Less From National Settlement Than States That Sued and Settled Individually," Associated Press (Oct. 17, 1998). As of Oct. 1998, Alabama was "among eight states that [had] refused to sue tobacco companies to recover tobacco-related health costs." Id.

84 "The Rule of Law and the Tobacco Settlement," Remarks of Alabama Attorney General Bill Pryor before the Policy Forum of the Cato Institute (Aug. 5, 1997), <http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=19> (visited June 5, 2003).

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five years, I have written and spoken widely on this subject, always in opposition to the lawsuits." Bill Pryor, Attorney General of Alabama, "What Hath the MSA Wrought? The Consequences of the State Tobacco Litigation," Mississippi Bar Litigation and General Practice Session Annual Meeting (July 13, 2001). Pryor expressly linked his refusal to join the tobacco litigation with his limited view of the role of the judiciary, his "majority rules" philosophy, and his perception that the courts have implemented "the liberal agenda" on such issues as "racial quotas, school prayer, abortion, and homosexual rights."[85] According to Pryor, "[t]hose issues belong in Congress and the state legislatures. The same is true of tobacco."[86]

A number of state attorneys general, including other Republican attorneys general, severely criticized Pryor. For example: "'He's been attorney general for about five minutes, and already he's acted more poorly than any other attorney general,' says Arizona Attorney General Grant Woods, the first Republican in that post to sue tobacco companies. 'I truly believe Alabama would be better off with Richard Pryor.'" Kelly Greene, "Bill Pryor Hopes to Ride Court Crusade to the Top," *Wall Street Journal* (May 21, 1997).

In August 1997, New York's Attorney General, Dennis Vacco, a Republican, shared a platform with Pryor concerning the proposed national tobacco settlement. Pryor began by defending his decision not to sue the tobacco industry and repeating his then-familiar claim that the tobacco issue "does not belong in court."[87] Vacco responded by explaining "this Republican's perspective on public health and the need for the type of aggressive action that the attorneys general of this nation [took] . . . [T]his is a public health issue of national proportions, so we can't rely exclusively on the domain of the respective state legislatures . . . [T]his is indeed a public health issue that required the collective aggressive efforts of the attorneys general to move the debate on this topic." Id. (emphasis added).[88]

Mike Moore, Attorney General of Mississippi and the first attorney general to sue the tobacco companies, charged that "'Bill Pryor was probably the biggest defender of tobacco companies of anyone I know. He did a better job of defending the tobacco companies than their own defense attorneys.'" Eric Fleischauer, "Pryor Called a Tobacco Sellout," *Decatur Daily News Online* (Oct. 30, 2002). "'We were telling him, "You've

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85 Bill Pryor, "Litigators' Smoke Screen," *Wall Street Journal* (Apr. 7, 1997).

86 Id. (emphasis added).

87 Transcript, The Cato Institute Sponsors a News Conference on the Tobacco Settlement (Aug. 5, 1997).

88 Pryor's exchange with Vacco was testy enough to be reported on by the Associated Press: "Attorney General Bill Pryor's contention that the national tobacco litigation was started by liberal attorneys general drew fire from New York's top prosecutor, a Republican like Pryor. New York Attorney General Dennis Vacco bristled at Pryor's comment, saying the tobacco agreement is conservative because it is an example of states rising up to settle a nationwide health problem." "Alabama AG's Tobacco Views Clash With New York Prosecutor," Associated Press (Aug. 6, 1997).

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got to get in this thing; we can win this," but he fought us every step,' Moore said." Id. Moore was particularly disturbed that a memo Pryor did "'saying the cases were frivolous, saying that we could not win' . . . ended up in the hands of the tobacco companies." Id.

Pryor's refusal to sue the tobacco industry caused divisiveness within his own state, as others in Alabama tried to bring suit when Pryor would not. For example, contending that "his office must approve all suits filed by state entities," Pryor successfully moved to dismiss a lawsuit against the tobacco companies brought by the University of South Alabama, which operates a teaching hospital and was attempting to recover the millions of dollars it spent annually "treating poor people for tobacco-related illness . . ."[89] This prompted the University's President to say, "I told him that Mr. Pryor you have three options: you can sue me in state court, you can sue me in federal court or you can put me in jail."[90]

Don Siegelman, then-Lieutenant Governor of Alabama and a former Attorney General, fared no better when, without Pryor's approval, he brought his own suit representing individual Alabama taxpayers. Phillip Rawls, "Judge Puts Future of Tobacco Lawsuit in Bill Pryor's Hands," Associated Press (Aug. 29, 1997). This suit too was dismissed because Pryor would not participate. "Judge Dismisses Tobacco Lawsuit Seeking Damages for Alabama Taxpayers," Associated Press (Sept. 25, 1997); Jessica Saunders, "Judge Approves Alabama's Participation in National Tobacco Settlement," Associated Press (Mar. 3, 1999).[91]

Finally, in late 1998, then-Governor Fob James of Alabama filed suit against the major tobacco companies. Phillip Rawls, "James, Pryor in Legal Duel, $2.9 Billion at Stake," Associated Press (Nov. 13, 1998). According to the press, James was "tired of delays in the negotiations between attorneys general and tobacco companies aimed at reaching a new national tobacco settlement." Id. This sparked a feud with Pryor, who immediately filed his own lawsuit "to make sure Alabama participates fully in the proposed national settlement." Id. Pryor's suit, however, was described as a breach of contract lawsuit, with Pryor claiming that in not suing the tobacco companies, he was relying on "behind-the-scenes promises from the tobacco industry that Alabama would get a financial deal comparable to that of any state that sued and won a settlement."

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89 Garry Mitchell, "University's Lawyers Say AG Has No Authority To Block Liggett Suit," Associated Press (May 9, 1997). See University of South Alabama v. American Tobacco Company, 1997 U.S. Dist. LEXIS 12379 (S.D. Ala. 1997), rev'd on other grounds, 168 F.3d 405 (11th Cir. 1999).

90 Brian Cabell, "Alabama Attorney General Not Suing Tobacco Industry," CNNfn: Before Hours (May 27, 1997).

91 According to the press, three weeks after Pryor blocked Siegelman's suit, seven tobacco lobbyists helped host a fundraiser for Pryor in Washington, D.C., and four of them made their own contributions to his campaign. See David Pace, "Tobacco Lobbyists Help Host Campaign Fund-raiser for Alabama Attorney General," Associated Press (Oct. 21, 1997); Bill Poovey, "Pryor, Baker Say No Reason For Taxpayers to Know Yet About Tobacco Talks," Associated Press (July 22, 1998).

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As more than 200 law professors wrote to the Senate Judiciary Committee in July 2001, no federal judicial nominee is presumptively entitled to confirmation. Because federal judicial appointments are for life and significantly affect the rights of all Americans, and because of the Senate's co-equal role with the President in the confirmation process, nominees must demonstrate that they meet the appropriate criteria. These include not only an "exemplary record in the law," but also a "commitment to protecting the rights of ordinary Americans," a "record of commitment to the progress made on civil rights, women's rights, and individual liberties," and a "respect for the constitutional role Congress plays in promoting these rights and health and safety protections, and ensuring recourse when these rights are breached."[2] Based on these criteria, as discussed below, Pryor's confirmation to a lifetime position on the important Court of Appeals for the Eleventh Circuit should be rejected.

I. PRYOR'S RECORD ON STATES' RIGHTS AND FEDERALISM

- **Pryor's states' rights ideology and role in 5-4 Supreme Court "federalism" rulings**

Pryor is a leader of the modern states' rights movement, and has actively sought to limit the authority of Congress to enact laws under the Commerce Clause and the Fourteenth Amendment, to the significant detriment of individual rights and freedoms as well as the environment. According to Pryor, "we have departed too much from the Framers' vision of a national government of limited powers — particularly over the last 60 years or so. . . ."[3] Pryor has urged a restrictive interpretation of the Commerce Clause, asserting that Congress

> should not be in the business of public education nor the control of street crimes. . . With real federalism, Congress would . . . make free trade its main domestic concern. Congress would not be allowed to subvert the commerce clause to regulate crime, education, land use, family relations, or social policy. . . With the New Deal, the Great Society, and the growing federal bureaucracy, we have strayed too far in the expansion of the federal government . . . .[4]

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[2] See Law Professors' Letter of July 13, 2001. A full copy of the letter, which elaborates further on these criteria, is available from People For the American Way.

[3] Bill Pryor, Attorney General, Practical Reform of the Constitution of Alabama (Sept. 26, 2000) (emphasis added), <http://www.ago.state.al.us/speeches.cfm?Item=Singel&Case=37> (visited June 3, 2003).

[4] "Should Business Support Federalism?", Remarks of Attorney General Bill Pryor, 1999 National Lawyers Convention, The Federalist Society (Nov. 12, 1999) (emphasis added).

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"Pryor Says He Had Behind-the-Scenes Assurances from Tobacco Industry While Not Suing," Associated Press (Nov. 14, 1998) (emphasis added). Pryor's lawsuit asserted that, "based on the tobacco companies' assurances, 'The State of Alabama did forbear from instituting a lawsuit against the defendants.'" Id.

Alabama ultimately received approximately $3 billion in the settlement with the tobacco companies. Eric Fleischauer, "Pryor Called a Tobacco Sellout," *Decatur Daily News Online* (Oct. 30, 2002). The press reported that Alabama was getting less in the settlement than were states that had sued and settled individually. "Alabama Would Get Less From National Settlement Than States That Sued and Settled Individually," Associated Press (Oct. 17, 1998). According to Mississippi Attorney General Mike Moore, Alabama's $3 billion was half the amount, per capita, that Mississippi received. Eric Fleischauer, "Pryor Called a Tobacco Sellout," *Decatur Daily News Online* (Oct. 30, 2002). Moore told the press, "Pryor's courting of tobacco companies cost Alabama billions." Id.[92]

Pryor, an NRA member and opponent of gun control legislation,[93] has been as vocal a critic of government lawsuits against gun manufacturers as he was of the tobacco litigation, calling such lawsuits "litigation madness."[94] He has exhorted the gun industry "to take these suits seriously; assemble the finest legal teams that you can afford; build a broad coalition to counterattack in the legislative arenas; and never, never surrender."[95]

Pryor has used his opposition to government lawsuits against the tobacco and other industries to urge the election of more attorneys general who share his ideology,

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92 In a 1998 speech, Senator Richard Shelby said that "he would have sued, if the decision had been his." "Alabama Would Get Less From National Settlement Than States That Sued and Settled Individually," Associated Press (Oct. 17, 1998).

93 See Bill Pryor, Attorney General, "Pryor Received N.R.A. Institute's Highest Honor," News Release (May 21, 2001).

94 Bill Pryor, "Trial Lawyers Target Rule of Law," *Atlanta Journal Constitution* (Jan. 13, 1999).

95 "'The Smoking Gun' – The Next Case of Lawsuit Abuse," Address of Alabama Attorney General Bill Pryor to the American Shooting Sports Council, Annual Convention (Feb. 1, 1999). In 2001, Pryor received the NRA's Harlon B. Carter Legislative Achievement Award, "the highest tribute conferred by the National Rifle Association's Institute for Legislative Action." News Release, Bill Pryor, Attorney General, May 21, 2001. In presenting Pryor with this award, the NRA stated: "General Pryor has launched a comprehensive program of Second Amendment advocacy . . . the reach of which has extended far beyond the borders of his own state. General Pryor has taken a leading role in fighting the frivolous municipal lawsuits against the firearm industry." Id. Pryor's release stated that "[i]n Alabama, Pryor helped draft and lobbied for passage of laws that provide the firearms industry immunity from municipal lawsuits, preempted local gun control ordinances, and repealed the two-day waiting period for handgun purchases." Id.

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specifically targeting his remarks to the business community. In a 1999 speech, Pryor stated,

> the business community must be engaged heavily in the election process as it affects legal and judicial offices. Frankly, this need is the most important of all. . . [T]he recent tobacco and gun suits demonstrate the importance of state attorneys general elections. The recent formation by the Republican National Committee of the Republican Attorneys General Association, of which I am Treasurer, hopefully will help elect more conservative and free market oriented Attorneys General.[96]

The Republican Attorneys General Association ("RAGA") was "conceived by" Pryor.[97] According to press accounts, two concerns have been raised about RAGA: the ethics of a state's chief prosecutor soliciting funds from businesses that he or she could be suing, and the fact that corporate funds contributed to RAGA are untraceable because "[t]he money raised by RAGA flows through the Republican National Committee, where it is mingled with other funds and can then be given to state parties, to candidates, or to related issue-oriented campaigns. The public can't follow who specifically gave to RAGA, or how that money was spent."[98] According to one account:

> Republican state attorneys general are soliciting large contributions from corporations that are embroiled in — or seeing to avert — lawsuits by states. . . Membership in RAGA costs anywhere from $5,000 to $25,000, with increasing levels of access to the attorneys general depending on the donation. . . [T]here is no way of knowing which companies have contributed to RAGA or how much. . . . Several present and past attorneys general, Republican and Democrat, complain that RAGA puts attorneys general in the position of asking for money from potential or even actual defendants. . . Asked why he did not join the group, Pennsylvania Attorney General Mike Fisher said, "I'm a Republican and I try to keep politics out of my business as attorney general." "We're a family, and families can disagree," Grant Woods, former Republican attorney general of Arizona, told the National Association of Attorneys General during a discussion about RAGA at its spring meeting here last week. "But don't do this."[99]

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96 "Curbing the Abuses of Government Lawsuits Against Industries," Presentation by Bill Pryor, Attorney General of Alabama, Civil Justice Reform Group Steering Committee (Dec. 8, 1999) (emphasis added), <http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=16> (visited June 5, 2003).

97 George Lardner, Jr. and Susan Schmidt, "GOP Attorneys General Solicit Large Contributions From Corporations that Are Embroiled in Lawsuits," *Washington Post* (Mar. 30, 2000).

98 Robert Tanner, "Questions Raised as Power of Attorneys General Grows," *Houston Chronicle* (July 22, 2001).

99 George Lardner, Jr. and Susan Schmidt, "GOP Attorneys General Solicit Large

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Republican Betty Montgomery, Attorney General of Ohio, initially joined RAGA but withdrew, saying that "I raised some questions about who we were raising money from. It wasn't worth trying to sort out what the ethical land mines are."[100] Republican Carla Stovall, Attorney General of Kansas, also refused to join RAGA, stating "'It's really not for any group of Republican attorneys general or Democratic attorneys general to dictate what Kansas or Colorado or anyplace else ought to have in play.'"[101]

In terms of tracing the monies donated to RAGA, it has been written that

> [i]t is impossible to know the full extent of the support that RAGA received from industries that face state lawsuits because RAGA does not disclose its donors. Instead, it directs individuals, PACs and corporations to make stealth contributions to RAGA in the name of the Republican National State Elections Committee (RNSEC). This much larger PAC does report its expenditures and contributions. But neither RNSEC nor RAGA will reveal which of the $162 million in contributions that RNSEC received in the 2000 election cycle belong to RAGA. Phillip Morris and the National Rifle Association are two of the RNSEC's top donors. Georgetown University election law specialist Roy Schotland has said that RAGA's fundraising scheme is practically akin to money laundering.

Andrew Wheat, "Attorneys General for Sale?", *Multinational Monitor*, Vol. 22, No. 6 (June 2001) (emphasis added).[102]

When Pryor was elected chair of RAGA in early 2001, he said he was "grateful for the confidence of my colleagues to lead this organization as we continue or agenda of . . . promoting the free market and limited government."[103] Pryor himself has specifically solicited the business community for support. For example, in January 2002, he spoke before the U.S. Chamber of Commerce Committee and stated point blank that "I want to address this morning the indispensable role that the business community must play in the election of fair and pro-business state attorneys general." Remarks of Attorney General Bill Pryor to the U.S. Chamber of Commerce Committee (Jan. 26, 2002) (emphasis added). "If you think that the office of state attorney general in your state is an unlikely source of mischief, think again. My warnings this morning are not based on speculation

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Contributions From Corporations that Are Embroiled in Lawsuits," *Washington Post* (Mar. 30, 2000).

100 "Montgomery Leaves Group for GOP Attorneys General," *Columbus Dispatch* (Apr. 4, 2000).

101 Robert Tanner, "Questions Raised as Power of Attorneys General Grows," *Houston Chronicle* (July 22, 2001).

102 <http://www.multinationalmonitor.org/mm2001/01june/june01corp2.html> (visited June 6, 2003).

103 "A.G. Pryor Elected Chairman of Republic Attorneys General Association," Associated Press (Mar. 8, 2001).

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or conjecture. I know my colleagues. We meet regularly at conferences of the National Association of Attorneys General. We discuss our philosophies and agendas. Many of my colleagues are enemies of free enterprise." Id.[104]

Although Pryor's job as Attorney General is to protect the rights of all of Alabama's citizens, he has shown a disturbing tendency to favor the interests of big business. Pryor's record as a friend of big business and as a hostile, vocal critic of so many of his own fellow attorneys general on business-related issues raise serious concerns about how, if confirmed, he would rule with respect to the rights and interests of ordinary Americans.

CONCLUSION

As this report demonstrates, William Pryor has endeavored throughout his career to push the law to conform to his extreme right wing ideology and legal views. Based on Pryor's record, the *Atlanta Journal-Constitution* has concluded that Pryor's nomination "is an affront to the basic premise that a candidate for the federal bench must exhibit respect for established constitutional principles and individual liberties. Pryor may be a good lawyer and a faithful Republican, but his lifelong extremism disqualifies him for a federal judgeship." Editorial, "Right-wing Zealot is Unfit to Judge," *Atlanta Journal-Constitution* (May 6, 2003) (emphasis added).

The federal courts of appeal play a critical role in our judicial system, second in importance only to the Supreme Court. Because the Supreme Court hears so few cases, the courts of appeal really are the courts of last resort for most Americans, giving a federal appellate judge considerable power to impose his or her own jurisprudential views in a particular case. And particularly because the Supreme Court hears so few cases, the protection of civil and constitutional rights by the judiciary depends in large measure on the appellate courts.

William Pryor's record as documented in this report, including his extreme right wing ideology, does not support elevating him to a lifetime position on the Eleventh Circuit. Far from meeting the burden of demonstrating a record of commitment to "protecting the rights of ordinary Americans" and to "the progress made on civil rights, women's rights and individual liberties," Pryor has tried to turn back the clock on these significant matters. In testimony that Pryor gave before a subcommittee of the Senate Judiciary Committee in 1997, Pryor told the committee that "your role of advice and consent in judicial nominations cannot be overstated."[105] We could not agree more. Ordinary Americans cannot afford to have William Pryor sitting in judgment on their rights and interests. The Senate Judiciary Committee should reject Pryor's confirmation.

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104 Pryor expressed the same sentiments to the American Tort Reform Association last year. Remarks of Attorney General Bill Pryor at the 2002 Annual Membership Meeting of the American Tort Reform Association (Mar. 14, 2002).

105 "Judicial Activism: Assessing the Impact," Testimony of Alabama Attorney General Bill Pryor before the U.S. Senate Judiciary Committee, Subcommittee on the Constitution, Federalism & Property Rights (July 15, 1997).

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As discussed below, Pryor has urged the courts in case after case to adopt his views on "federalism." In addition, he has expounded on his ideology in numerous public speeches, many of which are available on his web site,[5] making clear that the states' rights views reflected in his briefs are his own, and that in attempting to push the law in these extreme directions, he has been advancing his own ideology and has not merely been a lawyer representing a client.

Pryor's states' rights activism apparently began in law school, where he founded the Tulane Law School chapter of the Federalist Society.[6] Pryor unabashedly proclaims that federalism is "near and dear to my heart."[7] The title of a speech that Pryor gave before the Atlanta Lawyers' Chapter of the Federalist Society in 2001 — "Fighting For Federalism" — encapsulates Pryor's ideology and agenda.[8]

In that speech, Pryor gave "an outline of the competitive federalism for which I have been fighting."[9] He then praised "the Rehnquist Court" for "promot[ing] federalism with increasing frequency by enforcing" what he calls "constitutional limits on federal power." In particular, Pryor spoke approvingly of a series of 5-4 Supreme Court rulings, and his own role in these cases, limiting congressional power under the Commerce Clause and the Fourteenth Amendment, calling them "steps in favor of federalism [that] represent a breakthrough in the restoration of dual sovereignty and enumerated powers."[10] Although Alabama was a party in several of these cases, Pryor elected in most of them to reach out voluntarily and file amicus curiae briefs arguing for severe restrictions on federal authority to protect civil and individual right. These and subsequent 5-4 cases in which Pryor participated include:

- United States v. Morrison, 529 U.S. 598 (2000), in which the Court ruled 5-4 that the federal remedy for victims of sexual assault and violence in the Violence Against Women Act was unconstitutional. As Pryor proudly stated, Alabama was the only one of 37 states that filed briefs in the case to urge that the provision was unconstitutional; the other 36 supported the law. See "Fighting For Federalism." Pryor co-authored a brief that derided Congress' extensive fact findings as a basis for the constitutionality of VAWA, claiming that this would make "any legislator" or "any aide with a laptop, potentially the final dispositor of what the Constitution means." Brief for the State of Alabama as Amicus Curiae in Support of

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5 <http://www.ago.state.al.us/>

6 See, e.g., Bill Rankin, "Judicial Nominee a Conservative True Believer," *Atlanta Journal-Constitution* (May 25, 2003).

7 "Fighting For Federalism," Remarks by Attorney General Bill Pryor, Atlanta Lawyers' Chapter, Federalist Society (Mar. 28, 2001) (hereafter "Fighting For Federalism"), <http://www.ago.state.al.us/issue/fed032801.htm> (visited June 3, 2003).

8 Id.

9 Id. (emphasis added).

10 Id.

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Respondents, United States v. Morrison, 1999 U.S. Briefs 5 at *1, *15 (Dec. 13, 1999).[11]

- Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), in which the 5-4 Court ruled that state employees who are the victims of age discrimination on the job cannot sue for damages under the Age Discrimination in Employment Act.

- University of Alabama v. Garrett, 531 U.S. 356 (2001), in which the Court ruled 5-4 that it was unconstitutional for Congress under Title I of the Americans with Disabilities Act to permit state employees to bring lawsuits for damages to protect their rights against discrimination. Pryor specifically stated that he was "proud" of his role in "protecting the hard-earned dollars of Alabama taxpayers when Congress imposes illegal mandates on our state" in this case. Bill Pryor, Attorney General of Alabama, "ADA Case is About Protecting Alabama Taxpayers," *Birmingham News* (Nov. 12, 2000).

- Alden v. Maine, 527 U.S. 706 (1999), in which the Court ruled 5-4 that just as state employees cannot sue for damages in federal court for violations of the Fair Labor Standards Act, they similarly may not seek such remedies in state court either. As Justice Souter explained in his dissenting opinion, the net result was to deprive state employees of any remedy for the violation of a clear federally created right. Id. at 811-12.

- Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999), in which the 5-4 Court ruled that a federal law authorizing states to be sued for patent infringement was unconstitutional, despite Congress' plenary power over patents and copyrights under the Constitution.

- Alexander v. Sandoval, 532 U.S. 275 (2001), in which the Court ruled 5-4 that victims of discrimination based on race or national origin cannot file lawsuits to enforce Title VI regulations that prohibit actions with discriminatory effects in federally funded programs. As Justice Stevens explained in dissent, the decision was "unfounded in [the Court's] precedent and hostile to decades of settled expectations." Id. at 294.

- Federal Maritime Commission v. South Carolina Ports Authority, 535 U.S. 743 (2002), in which the 5-4 Court held that federal administrative agencies cannot grant relief to a private individual or party against a state agency. As Justice Breyer stated in dissent, no provision of the Constitution purports to grant such

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[11] In a speech given in 2000, Pryor described Morrison as "[t]he most important decision of this term [1999-2000] regarding federalism." "The Supreme Court as Guardian of Federalism," Bill Pryor, Attorney General of Alabama, before the Federalist Society and Heritage Foundation (July 11, 2000), <http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=8> (visited June 5, 2003).

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immunity, and the decision threatens to "undermine enforcement against state employers of many laws designed to protect worker health and safety." Id. at 786, 777.[12]

- **Pryor's efforts to push "states' rights" and "federalism" further, despite rejection by the Supreme Court**

Although Pryor has praised the Court for these and other decisions, he has expressed very clear concern about the narrow 5-4 margin of many of the rulings, and linked the future of "federalism" to future Supreme Court appointments: "Most of the important federalism decisions of the last decade were reached by a 5 to 4 vote. A single appointment to the Court by the Bush administration could decide the fate of federalism. If all goes well, that future will be bright."[13]

In fact, in July 2000, looking ahead toward the presidential election, Pryor gave a speech in which he offered similar praise for the Court's recent states' rights rulings, and linked his hope for further limitation of congressional power by the Court to the election of George W. Bush and Bush's likely Supreme Court nominees. In that speech, Pryor said, "this term of the Supreme Court convinced me that the Court has become the last best hope for federalism. So I come today to praise three major federalism decisions of the last term of the Supreme Court and to explain my observation that the Rehnquist Court is our last best hope for federalism."[14]

Pryor ended his speech with

> a warning that all is not well with the Court. Each of the decisions I praised today was reached by a five to four majority. We are one vote away from the demise of federalism. And in this term the Rehnquist Court issued two awful rulings that preserved the worst examples of judicial activism: Miranda v. Arizona and Roe v. Wade. The proponents of

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[12] Notwithstanding Pryor's strong support for state authority and sovereignty, he has filed several amicus briefs arguing against the authority and sovereignty of Indian tribes. See Brief Amicus Curiae of the States of Montana, Alabama, et al. in Support of Petitioners, Nevada v. Hicks, 1999 U.S. Briefs 1994 (Nov. 30,2000); Brief of Amicus Curiae States of California, Alabama, et al. Supporting Reversal, Inyo County v. Paiute-Shoshone Indians, 2002 U.S. Briefs 281 (Jan. 23, 2003).

[13] "Fighting for Federalism" (emphasis added). Reviewing the Court's early states' rights decisions in 1997, Pryor said "let's come back in a few years and see if it is time for the party to begin." Alabama Attorney General Bill Pryor, "Federalism and the Court: Do Not Uncork the Champagne Yet," Remarks Before the National Federalist Society (Oct. 16, 1997), <http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=11> (visited June 3, 2003).

[14] "The Supreme Court as Guardian of Federalism," Bill Pryor, Attorney General of Alabama, before the Federalist Society and Heritage Foundation (July 11, 2000), <http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=8> (visited June 3, 2003).

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> federal power realize, however, that these results can be changed in our favor with a few appointments to the Supreme Court. Perhaps that means that our real last hope for federalism is the election of Governor George W. Bush as President of the United States who has said his favorite justices are Antonin Scalia and Clarence Thomas. . . I will end with my prayer for the next administration: Please God, no more Souters.[15]

Leaving no room for doubt as to where he stands and his own role in the movement to curtail the power of Congress, Pryor in a 2001 speech about "federalism" concluded by stating, "If history is any guide, the next frontier of federalism cases will . . . involve spending clause legislation and the constitutional issues of sovereign immunity and enforceability in section 1983 suits. . . The groundwork for significant decisions has been laid in cases of statutory construction starting with Pennhurst and leading to Alexander v. Sandoval. I only hope I can participate in this next phase . . . ."[16]

In fact, in a number of the cases discussed above, Pryor has specifically urged restrictions on federal authority with respect to individual and other rights that were much more severe than the Court's final rulings. In Kimel, Pryor suggested that Congress had no power to legislate under the Fourteenth Amendment with respect to age discrimination because it was not concerned with a "suspect" classification like race and national origin, a radical theory that would further limit Congress' ability to protect individual rights.[17] In Sandoval, Pryor did more than argue that there is no private right of action to enforce Title VI regulations that prohibit actions with a discriminatory impact. He suggested that

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[15] Id. (emphasis added). The day after the Supreme Court's ruling in Bush v. Gore Pryor said, "I'm probably the only one who wanted it 5-4. I wanted Governor Bush to have a full appreciation of the judiciary and judicial selection so we can have no more appointments like Justice Souter." Phillip Rawls, "Bush's Co-chairmen Say No Interest in Federal Jobs," Associated Press (Dec. 13, 2000) (emphasis added).

Pryor has been harshly critical of Congress itself for passing such laws as the Gun Free School Zones Act and the Violence Against Women Act, which were struck down by the Court in whole or in part in Lopez and Morrison. According to Pryor, "[t]hese blockbuster decisions are fundamentally the result of Congress abdicating its responsibility to concentrate on truly national concerns and instead gauging its priorities based on the politics of the moment." Madison's Double Security: In Defense of Federalism, Presentation of Attorney General Bill Pryor before the Louisiana Lawyers Chapter of the Federalist Society (Mar. 1, 2002).

[16] "The Demand for Clarity: Federalism, Statutory Construction, and the 2000 Term," William H. Pryor, Jr., the Federalism Project of the American Enterprise Institute (July 11, 2001), <http://www.federalismproject.org/masterpages/supremecourt/pryor.html> (visited June 3, 2003). And a year later, Pryor called the Spending Clause "my new hobby." Transcript, NPR "Justice Talking," Religious Liberties: Moment of Silence Debate, as published in Engage, Vol. 3 (Aug. 2002).

[17] See Brief For Respondents, Kimel v. Florida Board of Regents, 1998 U.S. Briefs 791 at *13 (Aug. 17, 1999) (claiming that the Court had never "upheld a prophylactic exercise of section 5 power in the context of non-suspect classifications").

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implying such a right would violate state sovereignty and that Title VI "does not authorize federal agencies to create rules barring disparate effects" caused by a statewide program, regardless of the means of enforcement. Brief for Petitioners, Alexander v. Sandoval, 1999 U.S. Briefs 1908, at *4, *26 (Nov. 13, 2000). The brief criticized the discriminatory effects standard, noting derisively that "every law has a disparate impact on someone" and that "efforts to regulate disproportionate impacts wherever federal dollars appear" would have "far-reaching" and negative effects, a view that could significantly undermine federal discrimination protections even beyond the results in Sandoval. Id. at *39, *26.

Pryor also urged the Court to go further than even the 5-4 majority would go in restricting Congress' authority to protect the environment in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC"). The Court ruled 5-4 in SWANCC that Congress had not specifically authorized the Army Corps of Engineers to regulate disposal of solid waste into wetlands, within a state, that serve as important habitats for migratory birds, a result supported in Pryor's amicus brief. But Pryor, who proudly proclaimed that he was the "only" state attorney general to file a brief in SWANCC "in support of federalism,"[18] went a significant step further. He claimed (along with SWANCC) that Congress did not have the authority under the Commerce Clause to grant such ability to the Corps, asserting that this would give Congress a "general police power" over "local zoning and land use matters" and "eminently local activity." Brief for the State of Alabama as Amicus Curiae in Support of Petitioner, SWANCC v. United States Army Corps of Engineers, 1999 U.S. Briefs 1178 at *9, *14 (July 27, 2000).

As four justices explained in SWANCC, however, this theory had "no merit" and could have devastating results. 531 U.S. at 197 (Stevens, J., dissenting). The matter was clearly not truly "local," since "the protection of migratory birds is a textbook example of a national problem." Id. at 195 (emphasis in original). Moreover, accepting Pryor's theory could make Congress powerless to deal effectively with many water pollution and other problems that originate "locally" in one state that produce significant harmful effects across state lines. [19]

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[18] "Fighting For Federalism."

[19] In another recent case concerning environmental issues, Pryor filed an amicus brief arguing that in deference to states' rights, the Army Corps of Engineers should not have the authority under the Clean Water Act to regulate "deep ripping" activity that can harm wetlands. Without reaching Pryor's arguments, the Court affirmed the court of appeals' decision that interpreted the law to grant the Corps such authority, contrary to Pryor's position. See Borden Ranch Partnership v. United States Army Corps of Engineers, 261 F.3d 810 (9th Cir. 2001), aff'd by equally divided court, 537 U.S. 99 (2002); Brief for the States of Alabama, et al. as Amici Curiae in Support of Petitioners, Borden Ranch Partnership v. United States Army Corps of Engineers, 2001 U.S. Briefs 1243 (Aug. 26, 2002).

On behalf of the state of Alabama alone, Pryor also urged the Court to review and reverse an important ruling upholding Congress' power under the Commerce Clause to authorize a regulation protecting the endangered species of red wolves on private land.

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Counsel's Office, White House
Kavanaugh, Brett

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Pryor, Bill [Folder 2]

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EXECUTIVE OFFICE OF THE PRESIDENT AND FUNDS APPROPRIATED TO THE PRESIDENT

Office of National Drug Control Policy

For an additional amount, $7,000,000: Provided, That $5,000,000 shall be available for continued operation of the technology transfer program: Provided further, That $2,000,000, to remain available until expended, shall be available for counternarcotics research and development projects, to be used for the continued development of a wireless interoperability communication project in Colorado.

Unanticipated Needs

For expenses necessary to enable the President to meet unanticipated needs, in furtherance of the national interest, security, or defense which may arise at home or abroad during the current fiscal year, as authorized by 3 U.S.C. 108, $3,500,000: Provided, That, of such amount, $2,500,000 shall become available on March 31, 2001, and shall be provided to the Elections Commission of the Commonwealth of Puerto Rico as a transfer to be used for objective, nonpartisan citizens' education and a choice by voters regarding the islands' future status: Provided further, That none of the funds described in the preceding proviso may be obligated until 45 days after the Elections Commission of the Commonwealth of Puerto Rico submits to the Committees on Appropriations for approval an expenditure plan developed jointly by the Popular Democratic Party, the New Progressive Party, and the Puerto Rican Independence Party: Provided further, That the Elections Commission of the Commonwealth of Puerto Rico shall include in the expenditure plan additional views from any party that does not agree with the plan.

Memorandum on Resolution of Puerto Rico's Status

December 23, 2000

Memorandum for the Heads of Executive Departments and Agencies

Subject: Resolution of Puerto Rico's Status

Although Puerto Rico was acquired in connection with the Spanish-American War and United States citizenship is granted to persons born on the islands, Puerto Rico's ultimate status has not been determined. Until that issue is resolved, questions remain about how United States economic and social policies should apply to the citizens of Puerto Rico.

Further, although our citizens in Puerto Rico have been granted the exercise of authority on local matters similar to that of citizens of a State, they do not have voting representation in the Federal Government.

All three of Puerto Rico's major political parties are based on different visions of what the options for a fully democratic status are, and what the best status would be. And all advocate a substantial change in the islands' status. The Commonwealth held a referendum on options for its future status in December 1998, including the current governing arrangement, and other recognized options, but a majority of the vote was for a "None of the Above" column.

Much of the debate on the issue concerns what options are available to Puerto Rico, in light of the Constitution and the basic laws and policies of the United States. The elected representatives of the people of Puerto Rico have, therefore, repeatedly petitioned the Federal Government to clarify the islands' status options as well as the process by which Puerto Ricans can determine the islands' future status.

The United States has a responsibility to answer such questions. Successive Presidents, and the Congress in 1998, have supported the people of Puerto Rico in determining their status preference from among options that are not incompatible with the Constitution and basic laws and policies of the United States. I have made it the policy of the executive branch to work with the leaders of the Commonwealth and the Congress to enable Puerto Ricans to choose their future status. We also have the responsibility to help Puerto Ricans obtain the necessary transitional legislation toward a new status, if chosen.

To ensure that the Federal Government continues to address the fundamental question concerning the islands until it is resolved, by the authority vested in me as President by the Constitution and the laws of the United States of America, including Public Law 106–346, I have today issued an Executive Order establishing the President's Task Force on Puerto Rico's Status (President's Task Force) and further direct as follows:

1. The Co-Chairs of the President's Task Force shall conduct an ongoing dialogue with the Governor and Resident Commissioner of Puerto Rico, Puerto Rico's major political parties and other groups that advocate a change in the islands' status, and the Chairs and Ranking Minority Members of the House of Representatives Committee on Resources and the Senate Committee on Energy and Natural Resources. This dialogue shall focus on the options for Puerto Rico's future status and the process by which Puerto Ricans can realize such an option. It shall seek to facilitate communications among the offices that the aforementioned officials represent on matters relating to the status of the Commonwealth, and ensure official attention to, and facilitate action on, such matters. In particular, the dialogue shall seek to clarify the options for Puerto Rico's future status and enable Puerto Ricans to choose among those options.

2. The Co-Chairs of the President's Task Force shall monitor the expenditure of funds for public education on and a public choice among Puerto Rico's status options pursuant to Public Law 106–346. This monitoring shall include ensuring that educational materials are accurate, objective, and nonpartisan and that they are consistent with the standards set forth in the Executive Order entitled "Establishment of the President's Task Force on Puerto Rico's Status."
3. The heads of executive departments and agencies shall cooperate with the Co-Chairs in fulfilling the assignments provided for herein and in the accompanying Executive Order.

William J. Clinton

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LEVEL 1 - 1 OF 1 DOCUMENT

Title 3 --
The President
Memorandum for the Heads of Executive Departments and Agencies

Memorandum of November 30, 1992

57 FR 57093

December 2, 1992

TEXT: Puerto Rico is a self-governing territory of the United States whose residents have been United States citizens since 1917 and have fought valorously in five wars in the defense of our Nation and the liberty of others.

On July 25, 1952, as a consequence of steps taken by both the United States Government and the people of Puerto Rico voting in a referendum, a new constitution was promulgated establishing the Commonwealth of Puerto Rico. The Commonwealth structure provides for self-government in respect of internal affairs and administration, subject to relevant portions of the Constitution and the laws of the United States. As long as Puerto Rico is a territory, however, the will of its people regarding their political status should be ascertained periodically by means of a general right of referendum or specific referenda sponsored either by the United States Government or the Legislature of Puerto Rico.

Because Puerto Rico's degree of constitutional self-government, population, and size set it apart from other areas also subject to Federal jurisdiction under Article IV, section 3, clause 2 of the Constitution, I hereby direct all Federal departments, agencies, and officials, to the extent consistent with the Constitution and the laws of the United States, henceforward to treat Puerto Rico administratively as if it were a State, except insofar as doing so with respect to an existing Federal program or activity would increase or decrease Federal receipts or expenditures, or would seriously disrupt the operation of such program or activity. With respect to a Federal program or activity for which no fiscal baseline has been established, this memorandum shall not be construed to require that such program or activity be conducted in a way that increases or decreases Federal receipts or expenditures relative to the level that would obtain if Puerto Rico were treated other than as a State.

If any matters arise involving the fundamentals of Puerto Rico's status, they shall be referred to the Office of the President.

This guidance shall remain in effect until Federal legislation is enacted altering the current status of Puerto Rico in accordance with the freely expressed wishes of the people of Puerto Rico.

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Terms: **"puerto rico" and independence and statehood and constitution and date(aft 1999)** (Edit Search)

*2001 Det. C.L. Rev. 85, **

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2001 Det. C.L. Rev. 85

LENGTH: 7097 words

ARTICLE: PUERTO RICAN **INDEPENDENCE:** WHOSE CHOICE? THE PEOPLE OF **PUERTO RICO** OR THE UNITED STATES GOVERNMENT?

John D. Ingram *

* Professor of Law at the John Marshall Law School; A.B., 1950, Harvard College; C.L.U., 1957, American College of Life Underwriters; J.D., 1966, John Marshall. The valuable contributions of my colleague, Professor Alberto Bernabe-Riefkohl, and of my very capable Research Assistants Chris Sulkson, Nella DiSanto, Christy Fisher, Sara Busche, Erin VanArkel, and David Cybak, are gratefully acknowledged. In fairness to Professor Bernabe-Riefkohl, I want to make clear that he disagrees with many of the opinions, conclusions, and positions I express in this article.

SUMMARY:
... In Dorr, the Court held that the Constitutional guarantee of trial by jury did not apply to the Philippines. ... This was followed by the acquisition of Cuba, **Puerto Rico** and the Philippines after the Spanish-American War in 1898, and of Hawaii, also in 1898. The acquisition of Cuba, **Puerto Rico,** and the Philippines created a substantial controversy as to their future status. ... As I have discussed in Part I, the people of the fifty states and their Congress seem quite content to leave **Puerto Rico** in status quo, though it is likely that **independence** would be granted if requested. ... By the same token, since the United States seems to claim absolute power over the political status of **Puerto Rico,** it could presumably cast **Puerto Rico** adrift, unilaterally declaring that **Puerto Rico** is henceforth an independent nation. ... On the other hand, it might well be in the best interest of the United States to cast off **Puerto Rico** and declare it to be an independent nation. ... It would then be an independent nation, with its own culture, language, and national identity, which are so highly valued by Puerto Ricans. ...

TEXT:
[*85]

2001 L. Rev. M.S.U.-D.C.L. 85

Introduction

The United States obtained sovereignty over the island of **Puerto Rico** as a result of the Spanish American War and the Treaty of Paris in 1898. Ever **[*86]** since, there has been a continuing debate over the proper and preferred status of **Puerto Rico:** the present Commonwealth, perhaps with enhanced rights and privileges, **statehood, or independence.** It always seems to be assumed that the status of **Puerto Rico** can only be determined by the will of the people of **Puerto Rico** and by the action of the United States

n36 Roman, supra note 8, at 27 n.204.

n37 See id. at 27.

n38 See id.

n39 See History of **Puerto Rico,** supra note 8, at *6. Many of those who voted for continuance of commonwealth status apparently believed that they would eventually be granted enhanced rights by Congress. See Roman, supra note 8, at 40.

n40 See History of **Puerto Rico,** supra note 8.

n41 See id.

n42 This information comes from conversations with my faculty colleague, Alberto Bernabe-Riefkohl, a native of **Puerto Rico,** whose personal recollections were enhanced by inquiries to some of his friends. Professor Bernabe-Riefkohl has cautioned that his recollection may not be accurate, or his resources may be wrong. However, he and his sources are consistent with the views of others. See, e.g., Monge, infra note 43.

n43 Jose Trias Monge, Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of **Puerto Rico,** 68 Rev. Jur. U.P.R. 1, 19 (1999). There is an interesting question that is beyond the scope of this article: who should vote on the status of **Puerto Rico?** Should the 2.5 million Puerto Ricans living on the mainland (about 1 million in New York City) be allowed to vote? How do you define "Puerto Rican"? Should United States citizens born elsewhere but residing in **Puerto Rico** be allowed to vote? In 1998, the vote was restricted to residents of **Puerto Rico,** thus following the pattern of state elections, where the right to vote depends on residence, not "nationality." See T. Alexander Aleinikoff, **Puerto Rico and the Constitution:** Conundrums and Prospects, 15 Const. Comment. 15, 16 n.3 (1994).

n44 There were a few exceptions, where land was acquired by purchase and/or fair treaties, such as Manhattan and Pennsylvania.

n45 Alaska had few inhabitants at the time, and little economic value. See Deborah D. Herrera, Unincorporated and Exploited: Differential Treatment for Trust Territory Claimants - Why Doesn't the **Constitution** Follow the Flag?, 2 Const. L.J. 593, 604 n.42 (1992). Later, with the discovery of gold and oil, "Seward's folly" attracted large numbers of immigrants, mostly from the "lower 48," and eventual **statehood** became probable. Much like the other fortyeight states, Alaska became an area with a few "natives" and mostly "Americans."

n46 With the Monroe Doctrine in 1823, the United States had staked out its sphere of influence in the rest of the Western Hemisphere, and realized its intent to bar any European intrusion into that entire area.

n47 In 1898 and later years, the United States also obtained sovereignty or administrative authority over the Virgin Islands, Samoa, the Marianas and Micronesia, by purchase or by League of Nations or United Nations mandate, etc., but the status and future of these territories is beyond the scope of this article.

n48 Roman, supra note 8, at 17 (citation omitted). The United States did not annex Cuba. See supra note 6.

n49 Although Hawaii also had native and Asian inhabitants, its acquisition was primarily due to the influence of immigrants from the United States who dominated the Hawaiian economy. Thus, the Territory of Hawaii was always looked upon as "American."

n50 See Jones Act (Philippine Islands), ch. 416, 39 Stat. 545 (1916) (Preamble).

n51 See Proclamation No. 2695, 3 C.F.R. 86 (1946), reprinted in 22 U.S.C. § 1394 (1994).

n52 See supra Part I.E.

n53 See id.

n54 See Torruella, supra note 1, at 263; Ediberto Roman, Empire Forgotten: The United States's Colonization of **Puerto Rico,** 42 Vill. L. Rev. 1119, 1180 (1997).

n55 See Roman, supra note 54, at 1180; Aleinikoff, supra note 43, at 42.

n56 See Aleinikoff, supra note 43, at 21.

n57 Benefits are at lower levels and are subject to an overall cap. See id.

n58 This program provides aid to the aged, disabled and blind.

n59 See Aleinikoff, supra note 43, at 21.

n60 See id. More than 60% of Puerto Rican families are below the poverty level, compared to 19.9% in Mississippi, the poorest state. See Monge, supra note 43, at 19.

n61 See Roman, supra note 54, at 41.

n62 "According to a 1996 poll, only 25% of the people of **Puerto Rico** consider the United States to be their nation; they see themselves first of all as Puerto Ricans, with a separate Latin American heritage." Monge, supra note 43, at 20.

n63 See id.

n64 In the 1998 plebiscite, only 2.5% of the electorate voted for **independence,** down from 4.4% in the 1993 plebiscite. See History of **Puerto Rico,** supra note 8.

n65 See Jose Julian Alvarez Gonzalez, The Empire Strikes Out: Congressional Ruminations on the Citizenship Status of Puerto Ricans, 27 Harv. J. on Legis. 309, 340 (1990).

n66 See Monge, supra note 43, at 18.

n67 Roman, supra note 54, at 1183.

n68 For example, as a state, maximum benefits for Puerto Ricans under the Supplemental Security Income program would increase from $ 32 a month to $ 368. See Monge, supra note 43, at 19.

n69 See id.

n70 See Roman, supra note 8, at 46.

n71 The Constitutional provision as to **statehood** is remarkably brief: "new States may be admitted by the Congress into this Union." U.S. Const. art. IV, § 3, cl. 2. As to a change in Commonwealth status, since it was created by Congress, it would follow that it could only be changed by Congress.

n72 See id.

n73 See discussion supra Parts II.C & II.D.

n74 Torruella, supra note 1, at 152 (quoting 81st Cong., 2d Sess., 96 Cong. Rec. 9595 (1950)).

n75 Id. at 152.

n76 Id. at 165 (quoting U.N. GAOR, 8th Sess., 459th plen. mtg.).

n77 Are there still "third world countries"?!

n78 As discussed in Part I.B, some feel that since Congress gave Puerto Ricans citizenship, Congress can take it away.

n79 Such things include: (1) obtaining naturalization in a foreign state; (2) making a formal declaration of allegiance to a foreign state; (3) serving in the armed forces of a foreign state if they are engaged in hostilities against the United States, or the person is a commissioned or noncommissioned officer; (4) serving in any office or employment under the government of a foreign state; and (5) making a formal renunciation of nationality. See 8 U.S.C. § 1481 (1994).

n80 See Kawakita v. United States, 343 U.S. 717, 723-24 (1952).

n81 See Afroyim v. Rusk, 387 U.S. 253 (1967) (voting in foreign election not enough; specific intent to renounce citizenship was not evident).

n82 See 8 U.S.C. § 1401.

n83 See supra Part I.B.

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government. But is this assumption correct? Could the people of **Puerto Rico** simply declare their **independence** and become a sovereign state, without the approval and consent of the United States government? Or could the United States government simply divest **Puerto Rico** and declare it an independent, sovereign nation without the consent and approval of the Puerto Rican people, just as the United States acquired dominion over **Puerto Rico** in 1898 without any action by the people of **Puerto Rico?** This article explores these questions.

I. History of **Puerto Rico**

A. 1898

As every student of American history knows, through most of the nineteenth century there was a popular belief that it was the "manifest destiny" of the United States to occupy as much of the land as possible in North America between the Atlantic and Pacific Oceans. [1] After that expansion was completed, it was natural for interest to turn toward the Caribbean, where "the United States had an increasing commercial and strategic concern." [2] This expansionist attitude led almost inevitably to the Spanish-American War, at the end of which Spain ceded Cuba, Porto Rico, [3] Guam, and the Philippine Islands to the United States. [4] The treaty expressly provided that the "civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the **[*87]** Congress." [5] As is almost always the case, none of the people living on any of these islands were consulted as to their wishes concerning their future governance and sovereignty. [6]

B. **Puerto Rico** Before 1898

As was true in North, Central and South America, there were people living in **Puerto Rico** long before the Europeans arrived in 1493. [7] It is estimated that "as many as 50,000 Taino or Arawak Indians" lived there at that time. [8] Spanish colonization began in 1508, and there was an unsuccessful revolt by the native islanders against the Spaniards in 1511. [9] African slaves began arriving in 1513, and marriage was allowed between Spaniards and Taino Indians from 1514 on. [10]

There have been "citizens of **Puerto Rico"** for many centuries. Before 1493 these citizens were Indians of South American ancestry. By 1898, the citizens of **Puerto Rico** were also Spanish subjects, and were primarily a mixture of Spanish, African and indigenous Indians, as they are today. In 1917, the Jones Act [11] conferred United States citizenship on all "citizens of Porto Rico," [12] who were also given the right to reject United States citizenship within six months and remain "citizens of Porto Rico." The wording of the Jones Act suggests that the citizens of **Puerto Rico** were given a choice between being U.S. or Puerto Rican citizens, and could not be both. But since Congress made the offer unilaterally, and the citizens of **Puerto Rico** had no voice in the matter, it can well be argued that they may consider themselves citizens of both **Puerto Rico** and the United States if they wish to, and it seems likely that many Puerto Ricans feel just that way. **[*88]**

C. 1898 to 1952

Not long after the end of the "splendid little war" [13] in 1898, many Americans began to wonder about annexing new territories inhabited by what they deemed to be alien people. [14] This led to much discussion by scholars, politicians, jurists, and others regarding ways to keep the new territories in a status that would not lead to **statehood** or grant their people all of the Constitutional protections enjoyed by American citizens on the mainland. This new status was soon endorsed by the United States Supreme Court in the Insular Cases. [15] In effect, the Insular Cases created a second class of citizens who were not entitled to all of the rights and privileges of the United States **Constitution.** This result was based on the Court's view that, since the Treaty of Paris did not provide for the incorporation of **Puerto Rico** into the United States, **Puerto Rico** was an unincorporated territory, and the Constitutional requirement of uniformity of taxation did not apply. [16] This established a precedent which

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was followed in later cases involving other claims to Constitutional protection.

Justice White's "incorporation" theory was first adopted and applied by a majority of the Court in Dorr v. United States. [17] In Dorr, the Court held that the Constitutional guarantee of trial by jury did not apply to the Philippines. [18] The majority of the Court reaffirmed the holding of Downes v. Bidwell [19] that Congress had plenary power, in legislating for the territories, that was limited only by those "general prohibitions" in the **Constitution** which protect the fundamental rights of the people. [20] The majority held that the right to trial by jury was "merely a method of procedure," not a fundamental right, and thus Congress could decide whether to provide this right in the Philippines or not. [21]

In 1917, Congress enacted the Jones Act, [22] which provided for **Puerto Rico** to become an "organized but unincorporated" territory of the United States; it established a locally elected Senate and House, and a bill of rights; **[*89]** and it granted Puerto Ricans United States citizenship. Thus, Puerto Ricans were granted citizenship by act of Congress, not by the **Constitution,** and their citizenship is not guaranteed by the **Constitution.**

Over the years, the Supreme Court has recognized the following rights as applicable to Puerto Ricans: the Fourth Amendment right to be free from unreasonable searches and seizures; [23] the Due Process Clause of either the Fifth or Fourteenth Amendment; [24] the guarantee of equal protection of either the Fifth or Fourteenth Amendment; [25] freedom of speech under the First Amendment; [26] and the constitutional right to travel. [27] On the other hand, Puerto Ricans do not have a Sixth Amendment right to trial by jury, [28] the right to vote for President and Vice-President of the United States, [29] or the right to equal treatment in regard to welfare benefits. [30] In Califano v. Gautier Torreo, the Court held that Congress "may treat **Puerto Rico** differently from the States so long as there is a rational basis for its actions." [31]

D. 1952 - The Commonwealth

In 1950, a Puerto Rican **constitution** bill was introduced in Congress, and it became law as the "Puerto Rican Federal Relations Act." [32] It provided for holding a referendum to determine if the islanders wanted to "organize a government pursuant to a **constitution** of their own adoption." [33] If so approved by a majority of the voters, the Puerto Rican legislature could call a constitutional convention to adopt a **constitution,** which would be submitted to Congress for approval. [34] **[*90]**

The referendum vote was strongly in favor of a constitutional convention, which then met in 1951 and 1952. The **constitution** adopted by the convention was approved by the Puerto Rican electorate by a majority of more than eighty percent and accepted by Congress with minor amendments. [35]

Puerto Rico thus became a commonwealth, a new form of government for a United States territory. Unlike previous home-rule arrangements for territories which presumed eventual **statehood,** commonwealth status for **Puerto Rico** did not. It appeared to be an attempt to recognize the desire of Puerto Ricans to continue to be part of the United States while still retaining their own distinct culture and language. This new status did not purport to change any of the rights and privileges, or the lack thereof, of Puerto Ricans living in an "unincorporated territory."

E. Plebiscites and Other Movements Toward Change After 1952

A non-binding plebiscite was held in **Puerto Rico** in 1967. Sixty percent of the voters favored "continuation of the present status," [36] Thirty-nine percent favored **statehood** and one percent voted for **independence.** Since Congress had never agreed to be bound by a plebiscite, it simply ignored the results. [37]

In 1989, the Puerto Rican legislature notified Congress that the Puerto Rican people wanted

to declare their preference as to their future political status. As before, Congress took no action, but the people of **Puerto Rico** went ahead and held another plebiscite anyway. [38] This time, commonwealth status was favored by 48.6% of the voters, **statehood** by 46.3%, and **independence** by 4.4%. [39]

Very recently, in 1998, Puerto Rican voters held yet one more non-binding referendum, which gave the electorate five choices: (1) remain a commonwealth, with United States citizenship subject to revocation by Congress; (2) enter into a "free association" with the United States that would be somewhere between commonwealth and **independence;** (3) become a state; (4) declare **independence;** or (5) none of the above. [40] **Statehood** drew 46.5% of the vote; "none of the above" drew 50.3%. [41] The pro-**statehood** party **[*91]** (PNP) controlled the legislature, and had drafted the alternatives to favor **statehood.** Other groups, including the pro-commonwealth party (PPD) joined in support of "none of the above" to deny a majority vote in favor of **statehood,** [42] and to indicate their unwillingness to accept "Commonwealth status if subject to the plenary powers of Congress and entailing a type of American citizenship revocable at the will of Congress." [43]

II. Acquisition of Territory by the United States

Prior to the Civil War, the United States acquired and occupied all of the land between present-day Canada and Mexico westward to the Pacific Ocean. Most of the land between the original states and the Mississippi River was simply taken from the Native Americans living there by settlers who moved in and took possession. [44] The remainder of the land comprising the present continental forty-eight states was acquired by conquest, purchase and treaty: Florida, the Louisiana Purchase, our Southwest, formerly part of Mexico, California, Oregon, the Gadsden Purchase. In acquiring all of this new land, it seemed to be universally assumed that the land would be occupied primarily by "Americans," that territorial governments would be established, and that **statehood** would be achieved at an appropriate time in the future. By 1912, this anticipated process had been completed, and all of the continental United States was included in the forty-eight states.

After the Civil War, however, a new kind of territorial acquisition began, starting with the purchase of Alaska from Russia in 1867. [45] This was followed **[*92]** by the acquisition of Cuba, **Puerto Rico** and the Philippines after the Spanish-American War in 1898, [46] and of Hawaii, also in 1898. [47] The acquisition of Cuba, **Puerto Rico,** and the Philippines created a substantial controversy as to their future status. The concern was that these new territories were different from our previous acquisitions, being already well populated by "racially and culturally distinct peoples." [48] No longer was there a widespread presumption that a new territory would eventually become a state. [49]

Indeed, as to the Philippines, in 1916 Congress declared its intention of eventually granting **independence** to the Philippine Islands, [50] and **independence** was granted in 1946. [51] This was not so with **Puerto Rico.** With its proximity to the mainland, continued control of **Puerto Rico** was desirable because of the economic opportunities there, and its strategic location for defense of the Panama Canal. So the Puerto Rican people simply went from Spanish rule to American rule in 1898, with no real resistance. They had already been ruled by others for over 400 years, and they welcomed the American invaders as hopefully representing more benevolent rule in the future. Unlike the Cubans or Filipinos, who wanted **independence** and did not accept United States rule, Puerto Ricans did not seem to have any expectation of **independence** or self-rule in 1898.

III. Analogous Situations

There really are no analogous situations; **Puerto Rico** seems to be sui generis. As to other United States acquisitions, Cuba became independent immediately; Alaska and Hawaii were presumed to have the potential for **statehood,** with no real pressure for **independence;** the Philippines wanted **[*93] independence** right from the start, it was promised by the

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United States at a fairly early stage, and was granted in due time; and the Canal Zone was returned to Panama, giving freedom and **independence** to the residents of that area. No United States colony or territory has sought to declare its **independence** without the consent of the United States and the United States has never tried to cast off a colony or territory which did not want to be independent.

As to colonies and territories of other nations, a diligent search has not revealed any situation of either kind. Many peoples have become free and independent nations following a revolution. Many others have become independent with the consent, sometimes grudging, of their sovereign nation. But we have found no example of an imperial power casting off a colony or territory against the latter's wishes, or of a colony or territory declaring its **independence** and becoming an independent nation without either a revolution or the consent of the imperial nation.

IV. Advantages and Disadvantages of the Possible Statuses for Puerto Ricans

A. Commonwealth

Despite the general dissatisfaction in **Puerto Rico** with the subservient status created by the Insular Cases and continued by later cases and statutes, it is clear that most Puerto Ricans favor some kind of association with the United States. [52] They believe that there are substantial economic and political benefits emanating therefrom that more than compensate for the loss of such vague rights as **independence** and total self-government. [53] The United States has in fact attempted to nurture economic growth in **Puerto Rico,** and even in its nearly colonial status there have been substantial improvements in public health, education and the standard of living. [54] Commonwealth status also allows **Puerto Rico** to maintain its cultural identity and widespread use of the Spanish language, which probably would not be true if **Puerto Rico** became a state. [55]

While **Puerto Rico** is treated the same as the states under most federal criminal and regulatory statutes, there are some major exceptions. No federal income taxes are paid by corporations or individuals in **Puerto Rico,** though the Puerto Rican legislature largely offsets this by levying its own taxes at **[*94]** about the same level. [56] On the debit side, Puerto Rican citizens are less favorably treated under some federal benefits programs, most notably Aid to Families with Dependent Children, Medicaid and food stamps. [57] The Supplemental Security Income Program [58] does not apply to **Puerto Rico;** instead, under a similar program, benefits for Puerto Ricans are at lower levels and are capped. [59] As a state, Puerto Ricans would receive substantially more money under these programs.

B. **Statehood**

As stated above, **Puerto Rico** would have a substantial financial gain if it became a state. It was recently estimated that in 1995 federal transfers to **Puerto Rico** under these programs would have increased by almost $ 3 billion, and that this gain would far exceed the money lost by becoming subject to federal income taxes. This swing is due to generally low incomes on the island and high poverty levels. [60]

In addition to the economic advantages, as a state **Puerto Rico** would also gain full equality with other states as to Constitutional rights, including trial by jury, all benefit and welfare programs, voting for President and Vice-President of the United States, and representation in Congress.

Despite widespread awareness of the financial, political and other advantages of **statehood,** there are many Puerto Ricans who feel that this does not outweigh the threat of loss of their distinct "culture" as a condition of a grant of **statehood.** [61] Most Puerto Ricans feel that they have a distinctive culture, language and national identity of their own, [62] which they value highly, much like the Quebecois. Even the pro-**statehood** party understands and recognizes

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this, and seeks only a **statehood** which leaves in place the Puerto Rican culture, language and identity. Of course, it is probably unrealistic to think that Congress would ever grant **statehood** on this basis. [63] **[*95]**

C. **Independence**

For the reasons discussed above, there is very little support in **Puerto Rico** for **independence.** [64] In addition to those reasons, many Puerto Ricans value their United States citizenship and fear that it might be revoked if **Puerto Rico** became independent. [65]

Before the 1970s, the United States government was opposed to **independence** and discouraged it for economic, military and other reasons. Since that time, conditions have changed so much that **independence** could probably be had for the asking, but a vast majority of Puerto Ricans are not asking. [66]

Even though there is little if any likelihood of a willingness by Congress to improve the status of **Puerto Rico,** most Puerto Ricans "value . . . the actual and potential benefits of association with the world's greatest economic and military power, [and find that this] simply outweighs autonomy, particularly when considering the economic plight of neighboring nations such as the Dominican Republic, Cuba and Haiti." [67]

V. The View from the North

As I have discussed in Part I, the people of the fifty states and their Congress seem quite content to leave **Puerto Rico** in status quo, though it is likely that **independence** would be granted if requested. For over 100 years the United States has been unwilling to fully accept the Puerto Rican people, and there is little chance that this will change in the foreseeable future and make **statehood** a realistic possibility. **Puerto Rico** has little if any strategic military value in today's world. The economic impact on the United States of Puerto Rican **statehood** would be enormous. As discussed above, there would be a tremendous increase in payments to Puerto Ricans under various welfare and other programs. [68] Nor would this be offset by an inflow of Puerto Rican income tax dollars. Application to the island of the earned income tax **[*96]** credit alone would more than wipe out **Puerto Rico's** total federal tax liability. [69]

Beyond all other reasons why the United States will almost surely continue to deny **statehood to Puerto Rico,** there can be little doubt that many Americans are not willing to accept as fully equal citizens millions of native Spanish-speaking people of color who want to maintain a distinct culture, language and identity of their own. [70] This probable resistance is further evidenced by the recent support for "English-only" language requirements and increasing opposition to affirmative action.

VI. Can Either **Puerto Rico** or the United States Act Unilaterally?

Clearly, **Puerto Rico** cannot become a State or change its status as a Commonwealth without action by Congress. [71] In the past, Congress has never created a new State of the Union without an application for admission supported by a proposed new state **constitution** approved by the citizens of the proposed new state. However, there does not appear to be any barrier to the unilateral granting of **statehood** by Congress. [72] As to a unilateral change in Commonwealth status, it may well be that Congress has such authority, just as it took over sovereignty in 1898 and has exercised it ever since, sometimes seeking the approval of the Puerto Rican people but not feeling bound to do so. [73]

But what about **independence? Could Puerto Rico** simply declare itself to be an independent sovereign nation? On the other hand, could the United States make such a declaration and simply cut **Puerto Rico** loose from all ties to the United States?

As I have indicated in Part I, there is very little sentiment for **independence** among the people of **Puerto Rico.** Thus, it is very unlikely that **Puerto Rico** will attempt to declare its **independence,** even though there would probably be little opposition from the United States if it did. In any case, it would seem that the United States still feels that it has the power and authority to grant or deny **independence to Puerto Rico.** During a 1950 debate in the House of Representatives it was stated that "it will be Congress and Congress **[*97]** alone which ultimately will determine the changes, if any, in the political status of the island." [74] "This statement appeared to represent the consensus of opinion in the House." [75] In 1953, before the General Assembly of the United Nations, the United States Ambassador stated that if the Puerto Rican legislature adopted "a resolution in favor of . . . even absolute **independence,**" he would "recommend to Congress that . . . **independence** be granted." [76] Again, this clearly indicates that the United States feels it has a veto power over Puerto Rican **independence** and nothing in the years since suggests any change in this view.

By the same token, since the United States seems to claim absolute power over the political status of **Puerto Rico,** it could presumably cast **Puerto Rico** adrift, unilaterally declaring that **Puerto Rico** is henceforth an independent nation. There would seem to be no way that **Puerto Rico** could counter this and continue a relationship with the United States against the will of the latter. Nor is it likely, with the strong anti-colonial attitude in world opinion, that other countries or the United Nations would support **Puerto Rico** in its resistance to **independence.**

VII. Should Either **Puerto Rico** or the United States Act Unilaterally?

As I have indicated previously, there seems to be very little interest among Puerto Ricans in **independence.** What they want is an improvement in their status, with full Constitutional rights and full participation in all welfare programs. Although that is not likely to happen in the foreseeable future, the people of **Puerto Rico** are probably much better off in their present relationship with the United States than they would be as an independent nation. They are now United States citizens, free to enter any part of the United States at will, with the backing of a powerful nation anywhere in the world. In economic terms, i.e., taxation, welfare, investment, trade, etc., the balance is heavily in favor of **Puerto Rico. Independence** would immediately make **Puerto Rico** just another poor, struggling third world country, [77] with little hope of improvement in the years ahead.

On the other hand, it might well be in the best interest of the United States to cast off **Puerto Rico** and declare it to be an independent nation. In terms of taxation, welfare benefits, and so on, the United States would be way **[*98]** ahead financially without a relationship with **Puerto Rico.** As to trade and investment, it is virtually certain that an independent **Puerto Rico** would welcome economic relations with the United States on favorable terms. **Puerto Rico** would need that desperately. As to strategic and military concerns, **Puerto Rico** has little if any such value in today's world, and it would probably be fairly easy for the United States to arrange for any bases that might be needed in **Puerto Rico.**

While there may be some question as to the power of Congress to unilaterally revoke the citizenship of Puerto Ricans upon the happening of Puerto Rican **independence,** [78] there does not seem to be any Constitutional basis for such a revocation. Federal law provides that a United States national will lose his nationality by doing certain things with the intention of relinquishing United States nationality. [79] Most United States citizens who became citizens of an independent **Puerto Rico** would have no intention of relinquishing United States nationality, and thus would become citizens of both countries. Many United States citizens hold dual citizenship [80] and vote in both United States elections and those in another country. [81] In addition, descendants of these dual citizens would also often be entitled to dual citizenship. These descendants might be born in the United States; have parents who are both United States citizens, one of whom resided in the United States prior to the birth; have one parent who was present in the United States for a continuous period of one year prior to

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the birth, and the other parent is a United States national; and so on. [82]

Perhaps the best answer would be to try to find an evolutionary process under which **Puerto Rico** could move gradually from its present status to complete **independence. Puerto Rico** could move to "free association," in which it would maintain close political, economic and security relations with the United States, but take on more and more sovereignty and responsibility for its own affairs. Citizens of **Puerto Rico** and their descendants would continue to be eligible for United States citizenship just as they are now, even **[*99]** after **Puerto Rico** became fully independent. And as was the case with the Philippines, **Puerto Rico** would eventually be ready to stand alone (probably with continuing relationships with the United States by treaty). It would then be an independent nation, with its own culture, language, and national identity, which are so highly valued by Puerto Ricans. [83]

FOOTNOTES:

n1 See Frederick Merk, Manifest Destiny and Mission in American History: A Reinterpretation 24-27 (1963). This view was often justified by a belief in "the superior qualities of the Anglo-Saxon race and its democratic institutions." Juan R. Torruella, The Supreme Court and **Puerto Rico:** The Doctrine of Separate and Unequal 7 (1985).

As most readers are probably aware, there are conflicting views on most of the issues discussed in this article. As to many of them I have presented both sides. As to others, I have stated my personal view based on my study and analysis. I am well aware that my view is that of a mainland American, who has never been to **Puerto Rico,** and that many others would disagree, especially those who have lived in **Puerto Rico** or have ties to the island.

n2 Merk, supra note 1, at 24-27.

n3 Congress continued the use of the word "Porto" until it was finally corrected to "Puerto" in 1932. See Act of May 17, 1932, ch. 190, 47 Stat. 158 (1932).

n4 Treaty of Peace Between the United States of America and the Kingdom of Spain, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754.

n5 Id. art. IX.

n6 The United States did not annex Cuba, and expressly "disclaimed any disposition or intention to exercise sovereignty, jurisdiction, or control over Cuba." H.R.J. Res. 24, 55th Cong. (2d Sess. 1898).

n7 Christopher Columbus "discovered" **Puerto Rico** on November 19, 1493.

n8 History of **Puerto Rico,** http://welcome.topuertorico.org/history.html at *1 (last visited Feb. 25, 2001). These tribes migrated over a long period of time from South America. Ediberto Roman, The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism, 26 Fla. St. U. L. Rev. 1, 6 n.34 (1998) (citations omitted).

n9 See History of **Puerto Rico,** supra note 8.

n10 See id. Many of the Spaniards were gold-seekers, and few of the new settlers brought women with them. Thus, it was natural for them to take Indian wives. See id.

n11 See Porto Rico Civil Government (Jones) Act, ch. 145, 39 Stat. 951, 953 (1917).

n12 See supra note 3.

n13 Letter from John Hay, United States Ambassador to England, to President Theodore Roosevelt (1898), quoted in Frank Freidel, The Splendid Little War 3 (1958).

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n14 See id. at 395.

n15 Huus v. New York & Porto Rico S.S. Co., 182 U.S. 392 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Dooley v. United States, 182 U.S. 222 (1901); Goetze v. United States, 182 U.S. 221 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901) (holding that a territory acquired by the United States belongs to the United States and is subject to disposition by Congress).

n16 See Downes, 182 U.S. at 339-42 (White, J., concurring).

n17 See Dorr v. United States, 195 U.S. 138, 153 (1904).

n18 See Dorr, 195 U.S. at 149. The same result was reached as to **Puerto Rico** in Balzac v. Porto Rico, 258 U.S. 298 (1922).

n19 Downes, 182 U.S. at 244.

n20 See Dorr, 195 U.S. at 142.

n21 Id. at 144-45.

n22 See Porto Rico Civil Government (Jones) Act, ch. 145, 39 Stat. 951, 953 (1917).

n23 See Torres v. **Puerto Rico,** 442 U.S. 465, 471 (1979).

n24 See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668-69 n.5 (1974). The Court found it "unnecessary to determine which Amendment applied to **Puerto Rico.**" Id.

n25 See Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 601 (1976) (declining to determine which amendment applied).

n26 See Balzac, 258 U.S. at 314.

n27 See Califano v. Gautier Torres, 435 U.S. 1, 4 (1978) (assuming without deciding).

n28 See Balzac, 258 U.S. at 313-14.

n29 See Igartua de la Rosa v. United States, 32 F.3d 8, 12 (1st Cir. 1994) (per curiam); Attorney General of Guam v. United States, 738 F.2d 1017, 1020 (9th Cir. 1984); Sanchez v. United States, 376 F. Supp. 239, 242 (D.P.R. 1974).

n30 See Harris v. Rosario, 446 U.S. 651 (1980); Califano, 435 U.S. at 4. Residents of **Puerto Rico** are not eligible for Supplemental Security Income (SSI) assistance for aged, blind and disabled people, and they receive lower levels of assistance under the Aid to Families with Dependent Children program [hereinafter AFDC]. See infra text accompanying note 58.

n31 Harris, 446 U.S. at 651-52.

n32 48 U.S.C. § 731b (1951).

n33 Id. § 731b.

n34 See id. § 731d.

n35 See Act of July 3, 1952, ch. 567, 66 Stat. 327 (1952).

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COMMENT: JUDGE OR JURY: WHO SHOULD ASSESS PUNITIVE DAMAGES?

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SUMMARY:
... The constitutionality of judicial assessment has recently been addressed by the highest courts of Kansas and Ohio, with conflicting results. ... The Supreme Court reversed the Fourth Circuit, finding that the developer was entitled to a jury trial for a determination of liability, but was not entitled to a jury assessment of the civil penalty. ... Justice Wright, joined by Chief Justice Moyer, dissented. ... On the state level, the Kansas Supreme Court in Smith v. Printup interpreted its jury trial provision to permit judicial assessment of punitive damages. ... Thus, the Kansas Supreme Court correctly concluded that the Kansas jury trial guarantee does not bar judicial assessment of punitive damages. ... However, a commentator advocating jury assessment of punitive damages has warned of the danger of judicial bias, arguing that judges may be influenced by political pressures and biased in favor of the wealthy and the government. ... Thus, if punitive damage awards are reduced, fewer plaintiffs may choose to expend the trouble and cost necessary to bring suit and vindicate their rights. ... The jury trial guarantees of the Kansas and Ohio constitutions, as discussed above, should be interpreted to permit judicial assessment of punitive damages. ... Similarly, the jury trial provisions of the Kansas and Ohio constitutions should be construed to permit judicial assessment of punitive damages. ...

TEXT:
[*1089]

I. INTRODUCTION

Over the past two decades, state legislatures throughout the nation have sharply altered the manner in which punitive damages are awarded. Many states have capped the total judgment that a plaintiff may receive, [1] heightened the standard of evidence for determining whether punitive damages should be awarded, [2] or permitted bifurcation of trials for the assessment of punitive damages. [3] As part of this trend, the state legislatures of several states took from jurors the power to assess punitive damages and placed it in the hands of the trial judge. [4]

This transfer of power from jury to judge has been controversial. Many commentators have contended that a judge has greater experience in meting out punishment and can therefore better assess punitive damages. [5] However, opponents of this shift of power argue that the

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punitive damages. [218] The recognized purpose of punitive damages in Ohio is to punish a defendant, not to compensate a plaintiff. [219] Thus, the dissent stated that the purpose of punitive damages differed from the essential purpose of a tort action, and an assessment of punitive damages is therefore outside the essential function of a jury in a tort action. [220] The dissent noted that punitive damages, unlike compensatory damages, are not fact sensitive. Instead, the decision-maker must have a broad perspective in order to fairly punish a defendant. [221] In this respect, the dissent argued that an assessment of punitive damages is analogous to criminal sentencing, and that the knowledge and experience of a judge should be called upon in both contexts to ensure adequate and fair punishment of a defendant. [222] Thus, an assessment of punitive dam- **[*1114]** ages should not be deemed a fundamental element. [223] Finally, the dissent argued that a plaintiff is not entitled to punitive damages as a matter of right. [224] In support of this argument, the dissent noted that an assessment of punitive damages in Ohio is permissive, not mandatory. [225] The dissent further noted that its argument is supported by the analysis of the Printup court, which reasoned that because a state legislature has the power to abolish punitive damages, it must also have the power to regulate them. [226] Thus, the dissent concluded that an assessment of punitive damages is not a fundamental element of trial by jury, and it argued that the statute at issue should be found constitutional. [227]

In summary, the constitutionality of judicial assessment of punitive damages has been subject to dispute. On the federal level, the United States Supreme Court in Tull v. United States addressed the constitutionality of judicial assessment of one remedy--civil penalties--but the Court did not directly address judicial assessment of punitive damages. [228] Two circuit court cases have addressed the issue in light of the Tull opinion. The Fourth Circuit, in Shamblin's Ready Mix, Inc. v. Eaton Corp., [229] concluded that the Seventh Amendment did not bar judicial assessment of punitive damages. However, the Fourth Circuit, sitting en banc, overruled Shamblin's in Defender Industries v. Northwestern Mutual Life Insurance Co., [230] concluding that the Seventh Amendment barred judicial assessment of punitive damages. On the state level, the Kansas Supreme Court in Smith v. Printup [231] interpreted its jury trial provision to permit judicial assessment of punitive damages. In contrast, however, the Ohio Supreme Court in Zoppo v. Homestead Insurance Co. [232] construed the Ohio jury trial guarantee to bar judicial assessment of punitive damages. **[*1115]**

IV. DISCUSSION

A resolution of the question of who should hold the power to assess punitive damages entails an examination of both constitutional and policy arguments. Thus, this Section first examines the constitutional arguments regarding the power to assess punitive damages, focusing on the constitutions of the United States, Kansas, and Ohio. Second, this Section evaluates the policy arguments that have been advanced regarding whether judge or jury should assess punitive damages. Finally, this section concludes with recommendations for the courts of the United States, Kansas and, Ohio regarding their practices for the assessment of punitive damages.

A. Constitutionality

An evaluation of the constitutional arguments regarding judicial assessment of punitive damages begins with a discussion of whether an assessment of punitive damages constitutes a fundamental element of trial by jury under the Seventh Amendment. This section proceeds to evaluate the decision of the Kansas Supreme Court in Smith v. Printup, holding that the Kansas Constitution does not bar judicial assessment of punitive damages. [233] Finally, this section examines the reasoning of the court and the dissent of the Ohio Supreme Court in Zoppo v. Homestead Insurance Co., in which the court held that the Ohio Constitution bars judicial assessment of punitive damages. [234]

1. Seventh Amendment

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a. Meeting the Definition of Fundamental Element

The United States Supreme Court has stated that the Seventh Amendment was not intended to preserve every characteristic of the common law right of trial by jury, but only the fundamental elements of trial by jury. [235] A fundamental element is one that is necessary to preserve the "substance of the common-law right of trial by jury." [236] Thus, the Court has evaluated elements to determine whether they are necessary to preserve the substance of the right to trial by jury. [237] It **[*1116]** should also be noted that the Court, in discussing what constitutes a fundamental element, has stated that nothing in the language of the Seventh Amendment or historical evidence presented to the Court indicates that the Seventh Amendment was intended to extend to the remedy phase of a civil trial. [238]

An evaluation of the nature and purpose of punitive damages indicates that an assessment of punitive damages does not meet the Court's definition of a "fundamental element" of trial by jury. [239] Regarding the nature of punitive damages, the United States Supreme Court has recognized that punitive damages do not serve to compensate a plaintiff. [240] Instead, the Court has recognized that punitive damages are by nature a penalty. [241] However, the Court has not deemed a penalty to be a fundamental element, [242] and it has not required jury assessment of other penalties. For example, the Court has explicitly recognized the similarity of the penal nature of punitive damages and civil penalties, [243] and it has concluded that civil penalties need not be assessed by a jury. [244] An assessment of punitive damages is also analogous to criminal sentencing, and criminal sentencing generally has not been performed by a jury. [245] Therefore, the nature of punitive damages indicates that an assessment of punitive damages is not a fundamental element of trial by jury because punitive damages are a penal remedy, **[*1117]** analogous to civil penalties and criminal sentencing, and thus failing to fall under the protection of the Seventh Amendment. [246]

Similarly, the purpose of punitive damages indicates that an assessment of punitive damages is not a fundamental element of trial by jury. The fundamental role of a jury is to resolve questions of liability and compensation. [247] However, punitive damages are not a matter of liability or compensation; they serve to punish and deter wrongful conduct. [248] Therefore, because the purposes of punitive damages fall outside the fundamental role of a jury, it follows that an assessment of punitive damages is not a fundamental element of trial by jury. [249]

b. Consistency of Judicial Assessment with Supreme Court Precedent

The conclusion that judicial assessment of punitive damages is not barred by the Seventh Amendment gains further support when judicial assessment of damages is compared to elements that the Court has evaluated in prior cases. First, judicial assessment of punitive damages can be compared to the twelve-member jury at issue in Colgrove v. Battin. [250] In Colgrove, the Court found that a twelve-member jury is not a fundamental element of trial by jury, reasoning that a twelvemember jury is not necessary to achieve fair and equitable resolution of factual issues. [251] Colgrove can be construed as protecting the interest of **[*1118]** a plaintiff in a fair and equitable resolution of his claim. [252] However, as discussed above, punitive damages generally focus not on a plaintiff's right to compensation, but instead on the reprehensibility of a defendant's conduct. [253] Therefore, jury assessment of punitive damages, like a twelve-member jury, is not necessary to resolve the factual issues of a plaintiff's claim, and judicial assessment of punitive damages can be deemed permissible under the Seventh Amendment consistently with Colgrove.

Second, an assessment of punitive damages can be compared to an assessment of civil penalties, which the Court addressed in Tull v. United States. [254] The Tull court concluded that an assessment of civil penalties was not a fundamental element of trial by jury, [255] and the Court's reasoning can be extended to an assessment of punitive damages. [256] Though

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some minor differences exist between civil penalties and punitive damages, their similarities overpower their differences. [257] Therefore, an assessment of civil penalties, like an assessment of puni- **[*1119]** tive damages, can be performed by a judge consistently with the Seventh Amendment. [258]

Additionally, the Court's reasoning in Tull may be applicable in the area of punitive damages. [259] In Tull, the Court reasoned that because it is undisputed that Congress has the power to fix the amount of civil penalties, it follows that civil penalties need not be assessed by a jury to comply with the Seventh Amendment. Thus, the Court found that the assessment of civil penalties cannot be a fundamental element of trial by jury. [260] Applying this reasoning to the area of punitive damages, it appears that if Congress has the power to fix the amount of punitive damages without violating the Seventh Amendment, then it follows that punitive damages need not be assessed by a jury and are not a fundamental element of trial by jury. [261] Thus, the question is whether Congress has the power under the Seventh Amendment to set statutory caps on punitive damages. Although the United States Supreme Court has not addressed this issue, lower courts have argued persuasively that statutory caps do not violate the Seventh Amendment. [262] Therefore, because it appears that Congress has the power under the Seventh Amendment to set statutory caps of punitive damages, it follows under the Tull reasoning that an assessment of punitive damages is not a fundamental element. [263] **[*1120]**

c. Circuit Court Cases Addressing Judicial Assessment

A discussion of whether the Seventh Amendment bars judicial assessment of punitive damages would be incomplete without an evaluation of the opinions on this issue by the federal circuit courts of appeals. Although the weight of authority in the circuit courts holds that judicial assessment of punitive damages violates the Seventh Amendment, [264] only two circuit court cases have evaluated judicial assessment of punitive damages considering the Supreme Court's decision in Tull. [265] In the first case, Shamblin's Ready Mix, Inc. v. Eaton Corp., the Fourth Circuit concluded that judicial assessment of punitive damages does not violate the Seventh Amendment, [266] but the court overruled this decision in the second case, Defender Industries v. Northwestern Mutual Life Insurance Co. [267] However, the Shamblin's decision was better reasoned and more consistent with precedent. [268]

The Shamblin's decision properly construed precedent in determining whether the Seventh Amendment barred judicial assessment of punitive damages. In Shamblin's, the Fourth Circuit correctly concluded that the United States Supreme Court's decision in Kennon v. Gilmer, which found that a court may not substitute its own judgment for a jury's verdict regarding compensatory damages, did not address punitive damages and was therefore not controlling. [269] The Fourth Circuit then correctly noted that the Supreme Court's reasoning in Tull was applicable to punitive damages. [270] As the Fourth Circuit observed, the **[*1121]** Tull reasoning that civil penalties are not fundamental elements of trial by jury is applicable because civil penalties are analogous to punitive damages. [271] Further, the Fourth Circuit properly argued that punitive damages should not be deemed a fundamental element of trial by jury because punitive damages are by nature a penalty designed to punish and deter misconduct. [272] Therefore, the court correctly held that the Seventh Amendment does not require jury assessment of punitive damages. [273]

However, the Fourth Circuit overruled Shamblin's in Defender Industries v. Northwestern Mutual Life Insurance Co. [274] The Defender court conceded that Tull contained "rather broad language," but the court argued that Tull should not be broadly construed. [275] Instead, the Defender court contended that recent Supreme Court cases have recognized the fundamental role of punitive damages, and it quoted dicta from Supreme Court cases that purportedly supported this contention. [276] However, the reasoning of the court is flawed. [277] As discussed above, the reasoning of Tull should extend to an assessment of punitive damages. [278] The dicta quoted by the Defender court merely explains the traditional procedure regarding the

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doctrine of punitive damages. [279] The Court discussed the traditional role of appellate courts reviewing an assessment of punitive damages, but it never discussed any limitations on their power by the Seventh Amendment. [280] Further, the Court did not discuss the importance of an assessment of punitive damages to trial by jury. [281] Thus, the Defender court's reliance on this **[*1122]** dicta is misplaced. Although the court's conclusion is in line with the weight of authority on this issue, [282] the conclusion is inconsistent with Supreme Court precedent. [283]

2. Kansas Right to Trial by Jury

The Kansas jury trial guarantee, like the Seventh Amendment, preserves the right to jury trial. [284] In determining whether a characteristic must be tried by a jury under the Kansas jury trial guarantee, the Kansas Supreme Court in Smith v. Printup examined whether the characteristic constituted a right at common law. [285] It should be noted that the Printup analysis is similar to the United States Supreme Court's analysis in Tull, which evaluated whether an element of a jury trial should be deemed a fundamental element of trial by jury. [286] Just as a characteristic must be tried by a jury if it is a fundamental element under the Seventh Amendment, [287] so must a characteristic be tried by a jury if it was a right at common law under the Kansas jury trial guarantee. [288]

The Printup court's reasoning in evaluating this issue was solid. The court properly considered the character of punitive damages to determine whether a plaintiff was entitled to them as a matter of right. [289] As the court correctly noted, an award of punitive damages is **[*1123]** generally dependent upon the recovery of compensatory damages. [290] Further, a plaintiff has no general right to punitive damages, and punitive damages serve to punish and deter misconduct. [291] Additionally, as the court indicated, punitive damages may be regarded as equitable in nature. [292] Thus, the court correctly concluded that the character of punitive damages indicates that they were not a right at common law. [293]

Having determined that a plaintiff was not entitled to punitive damages as a matter of right at common law, the court then correctly noted that it follows that a state legislature has the power to abolish punitive damages. [294] Further, as the court argued, because the state legislature can abolish punitive damages, it can accomplish anything short of that, such as requiring judicial assessment of punitive damages. [295] While the Tull court reasoned that an assessment of civil penalties was not a fundamental element of trial by jury because Congress can set the penalties and, therefore, can delegate this power, [296] the Printup court reasoned that a state legislature can abolish punitive damages and, therefore, can require that they be assessed by a judge. [297] Thus, the Kansas Supreme Court correctly concluded that the Kansas jury trial guaran- **[*1124]** tee does not bar judicial assessment of punitive damages. [298]

3. Ohio Right to Trial by Jury

Just as judicial assessment of punitive damages should be deemed constitutional under the constitutions of the United States and Kansas, so should it be deemed constitutional under the Ohio Constitution. As the dissent in Zoppo v. Homestead Insurance Co. argued, an assessment of punitive damages is not fundamental to trial by jury and is therefore not encompassed within the jury trial guarantee of the Ohio Constitution. [299] This conclusion must be reached, as the dissent noted, because the Ohio jury trial provision guarantees a jury determination of elements falling within the fundamental role of the jury, which is to resolve questions of liability and to ensure that a plaintiff is made whole. [300] However, punitive damages are not intended to benefit a plaintiff, but instead to punish a defendant, [301] and a recovery of punitive damages is generally contingent upon a plaintiff's receiving at least nominal damages. [302]

Further, an assessment of punitive damages, similar to criminal sentencing, requires a broad perspective so that the punishment and deterrence goals of punitive damages can be

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achieved. [303] Thus, as the Zoppo dissent correctly argued, the purpose and nature of punitive damages indicate that they are not within the jury's fundamental role **[*1125]** and are therefore outside of the Ohio right to trial by jury. [304]

The decision of the Ohio Supreme Court in Zoppo that the Ohio jury trial guarantee bars judicial assessment of punitive damages, therefore, was mistaken. [305] The court focused in Zoppo on the historical treatment of punitive damages, [306] employing a method of analysis similar to that of prior cases interpreting the jury trial provision. [307] However, the fact that an element historically was part of trial by jury should not determine that the element must forever be part of trial by jury in Ohio. [308] Ohio has recognized some departures from the common law. For example, Ohio civil juries can consist of only eight members, [309] although juries historically consisted of twelve members. [310] Additionally, the Ohio Constitution was amended to permit non- **[*1126]** unanimous jury verdicts, although unanimity was required at common law. [311] Further, the Ohio Supreme Court, like the United States Supreme Court, has cited no historical evidence indicating that the jury trial provision was intended to extend beyond the liability phase of a civil trial. [312] Thus, instead of focusing on historical treatment in examining an element of trial by jury, the court should inquire whether an element constitutes part of the right of trial by jury. [313] This inquiry reveals, as discussed above, that an assessment of punitive damages is not encompassed within the Ohio right to trial by jury, and a judge can therefore assess punitive damages consistently with the Ohio jury trial guarantee.

In summary, the Seventh Amendment should be interpreted to permit judicial assessment of punitive damages. An assessment of punitive damages fails to meet the Court's definition of a fundamental element, and this conclusion is reinforced when an assessment of punitive damages is compared to the elements at issue in Colgrove v. Battin [314] and Tull v. United States. [315] Thus, the Fourth Circuit's decision in Shamblin's Ready Mix. Inc. v. Eaton Corp. [316] was well-reasoned, and the court's decision in Defender Industries v. Northwestern Mutual Life Insurance Co. [317] to overrule Shamblin's was mistaken. On the state level, the decision of the Kansas Supreme Court in Smith v. Printup [318] that judicial assessment of punitive damages was not barred by the Kansas Constitution was solid and consistent with the state's jury trial guarantee. However, the Ohio Supreme Court decision in Zoppo v. Homestead Insurance Co. [319] was wrongly decided, and the court should have construed the Ohio jury trial provision to permit judicial assessment of punitive damages. **[*1127]**

B. Policy Arguments Regarding Power to Assess Punitive Damages

In addition to the constitutional arguments, commentators have debated whether judge or jury should be permitted to assess punitive damages as a matter of policy. [320] As a threshold matter, it is important to note that judges and jurors differ regarding the assessment of punitive damages. [321] Specifically, empirical studies have found, as many commentators have contended, that juries award higher punitive damages than judges. [322] Commentators have disagreed regarding whether the difference reflects bias by either jury or judge or simply indicates a difference in value judgments. [323]

The policy arguments regarding judicial assessment of punitive damages have addressed five distinct areas. First, they have centered on the respective roles of judge and jury, examining whether an assessment of punitive damages falls within the role of judge or jury. [324] In addressing this area, proponents of judicial assessment have noted that a judge often takes the role of performing highly discretionary calculations that require consideration of a multitude of factors. [325] Thus, although a determination of liability may be within the realm of a jury, [326] proponents of judicial assessment have argued it is the role of a judge to distinguish "wrong" from "very wrong" behavior and to mete out appropriate punishment. [327] In support of this argument, the commentators have noted that a judge metes out penalties in criminal sen- **[*1128]** tencing [328] and assesses civil penalties. [329] A judge performs a similar function in the assessment of punitive damages. [330] Thus, the commentators have

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argued that the judicial role of setting penalties is recognized when a judge is permitted to assess punitive damages. [331]

Opponents of judicial assessment of punitive damages, in contrast, have argued that it is the role of a jury to determine whether conduct violates society's standards of decency. [332] In this respect, juries engage in "ad hoc norm elaboration"; in other words, juries draw inferences from facts and reach discretionary judgments, with their verdicts serving as measurements of the conduct deemed acceptable by society. [333] At least one commentator has argued that just as jurors reflect community values and establish norms in determining liability, they serve this same function in assessing punitive damages. [334] Thus, the commentator has argued that jurors can indicate the extent to which society condemns a defendant's conduct through the amount of punitive damages awarded. [335]

An evaluation of these arguments reveals that advocates of judicial **[*1129]** assessment of punitive damages have the stronger argument. [336] Punitive damages are by nature a penalty, [337] and an assessment of punitive damages is analogous to criminal sentencing. [338] Thus, an assessment of punitive damages is fundamentally a calculation of a penalty, rather than an indication of community values, and an assessment of punitive damages is within the role of a judge. [339]

In addition to debating the proper roles of judge and jury, commentators have disagreed regarding whether judge or jury can better achieve punishment and deterrence. [340] Regarding punishment, proponents of judicial assessment have argued that the greater experience and range of knowledge of a judge may enable a judge to reach a more suitable and fair determination of the quantity of a penalty. [341] Similarly, regarding deterrence, the commentators have argued that the experience and legal knowledge of a judge may better enable a judge to weigh social policy concerns and economic factors that must be considered in achieving deterrence. [342] Accordingly, they have argued that the experience of a judge enables the judge to better achieve punishment and deterrence.

In contrast, at least one commentator has argued that juries rival judges at achieving punishment and deterrence. [343] With regard to punishment, the commentator has argued that punishment is essentially a moral judgment, and judges are no better at reaching moral judgments than juries are. [344] Thus, he has argued, because it is the role of juries **[*1130]** to reflect community values, perhaps the moral judgment of the extent to which conduct should be punished with punitive damages is best left in the hands of the jury. [345]

With regard to deterrence, the commentator has argued that juries can make moral judgments and achieve total deterrence. [346] Many commentators have discussed deterrence as if it were a unitary concept, but tort law recognizes two types of deterrence, optimal and total. [347] Optimal deterrence is a system that "would determine the net social cost of the defendant's conduct, enhance that amount to reflect the improbability of detection and judgment, and require the defendant to pay the enhanced amount." [348] Because optimal deterrence focuses on social cost, rather than a defendant's state of mind, some defendants in an optimal deterrence system may choose to persist in their wrongful acts because they are willing to pay the cost. [349] Total deterrence, in contrast, imposes "a penalty tailored to ensure that [a defendant] cannot profit by her wrong, or an in terrorem penalty sufficient to deter virtually any potential tortfeasor." [350] The commentator has acknowledged that judges may be better at achieving optimal deterrence, [351] but he has contended that juries are clearly capable of achieving total deterrence. [352] In fact, the commentator has argued, when juries assess punitive damages, they can clarify society's view of conduct and establish norms regarding the amount of damages necessary to totally deter the conduct at issue. [353] Thus, if total deterrence is sought, jurors can achieve this goal and simultaneously fulfill their role of setting norms and indicating community values. [354]

An evaluation of these arguments reveals that proponents of judicial assessment of punitive

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damages have a stronger argument. It should be noted that even the proponents of jury assessment apparently do not contend that juries are better at achieving punishment and deterrence; they contend only that juries are not worse. [355] However, the arguments **[*1131]** that the greater experience of a judge enables a judge to effectively and fairly assess penalties carry weight; it seems reasonable that a more experienced decision-maker generally would be a more effective decision-maker. [356] Therefore, it appears likely that a judge would be better than a jury at achieving punishment and deterrence. [357]

The policy arguments also have centered around historical intent. [358] In this regard, one commentator has argued that the party which fought for the adoption of the Seventh Amendment, the Anti-Federalists, intended for the functions of a jury to include preventing judicial bias and serving as a vehicle for direct self-government for the community. [359] The commentator has argued that jury assessment of punitive damages is necessary to carry out these functions envisioned by the Anti-Federalists. [360]

An evaluation of these arguments reveals that the issue of whether the framers intended for punitive damages to be assessed by a jury is open to debate. [361] The United States Supreme Court in Tull concluded that very little direct evidence existed concerning the intention of the Seventh Amendment, and the Court stated that it was presented with no evidence that the amendment extended to the remedy phase of a civil trial. [362] The commentator, however, disagreed with the Court and set forth evidence indicating that the framers may have intended for punitive damages to be assessed by a jury. [363] **[*1132]**

In addition to the issue of historical intent, commentators also have addressed the potential for avoiding judge and jury error in the assessment of punitive damages. Proponents of judicial assessment have identified two sources of jury error, confusion and bias, that may be decreased with judicial assessment of damages. [364] Regarding jury confusion, the commentators have noted that empirical studies indicate that it is not uncommon for juries to misunderstand the instructions given to them. [365] Because judges have greater experience working with the doctrine of punitive damages, the critics have contended that judges are less likely to be confused regarding the importance and purpose of punitive damages. [366]

Regarding jury bias, commentators have argued that jurors are biased against wealthy defendants and may play "Robin Hood" in assessing punitive damages against them, whereas judges are better able to avoid this bias. [367] As the commentators have noted, empirical studies confirm that juries assess significantly higher awards against wealthy defendants and the government. [368] Additionally, the commentators have argued that other factors, such as the attractiveness of the parties and the histrionics of the attorneys, may lead juries to be biased in favor of one of the litigants. [369]

However, a commentator advocating jury assessment of punitive damages has warned of the danger of judicial bias, arguing that judges **[*1133]** may be influenced by political pressures and biased in favor of the wealthy and the government. [370] In this regard, the commentator has noted that modern federal judges appear to be more likely than juries to find against a plaintiff in cases involving personal injury, constitutional tort and discrimination. [371] Further, the commentator has contended that judges are subject to political pressures which do not affect jurors, such as the pressures to secure re-election or an appointment to an appellate court. [372] A jury, in contrast, may be considered the only governmental agency without such political ambitions. [373] Additionally, because a jury award is the collective judgment of a group of people, the individual prejudice of any one juror may not be reflected in the award. [374]

An evaluation of these arguments reveals that advocates of judicial assessment of punitive damages have the stronger argument. A risk exists that either a judge or a jury will intentionally act upon bias. [375] However, the risk of indadvertantly acting upon bias appears greater with a jury. [376] In other words, judges may be more likely to recognize and avoid

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their own biases. [377] Further, because judges have greater experience, the risk that an award will reflect confusion appears greater with jury assessment of punitive damages. [378] Accordingly, the risk of jury error appears greater than that of judicial error, and the power of assessing punitive damages may be better placed in the hands of a judge. [379] **[*1134]**

Finally, the policy arguments have addressed other concerns, such as the need to reduce uncertainty costs and preserve incentives for plaintiffs to vindicate their rights. Proponents of judicial assessment of punitive damages have argued that the experience and knowledge of judges allows for greater consistency in the assessment of punitive damages. [380] They have argued that a judge is more likely to have experience assessing punitive damages and, therefore, the judge may achieve greater consistency because the judge is in a better position to compare factors, such as egregiousness of the defendant's conduct, with those of past cases. [381] Further, if greater consistency is achieved in awarding punitive damages, then litigation costs may be reduced. [382] For example, when punitive damages are assessed by a jury, parties may differ greatly in their subjective expectations regarding appropriate punitive damages, and their differing expectations may increase the likelihood that they will be unable to reach an out-of-court settlement. [383] Thus, rather than reach a settlement, both parties may expend the money and resources for a trial. [384] Commentators have argued, therefore, that judicial assessment of punitive damages will result in greater consistency in punitive damages awards and a reduction of litigation costs. [385]

Proponents of jury assessment of punitive damages, however, have cited benefits of jury assessment, such as promoting democracy and en- **[*1135]** couraging vindication of rights. [386] With respect to promoting democracy, at least one commentator has argued that jury assessment of punitive damages provides the opportunity for jurors to participate in government. [387] Accordingly, the decision that the jurors reach constitutes their collective judgment, or a form of direct self-government by the people. [388] Additionally, as the commentator has argued, the decision of who assesses punitive damages may impact whether parties choose to bring suit and vindicate their rights. [389] Many commentators have agreed that juries will give higher awards than judges will, [390] and that a potential litigant will weigh the costs and trouble of litigation against the size of an expected award in deciding whether to settle a dispute, and, possibly, whether to litigate in the first place. [391] Thus, if punitive damage awards are reduced, fewer plaintiffs may choose to expend the trouble and cost necessary to bring suit and vindicate their rights. [392]

An evaluation of these arguments reveals that the arguments for judicial assessment of punitive damages are stronger. The arguments that judicial assessment of punitive damages benefits defendants and the community carry weight; it seems reasonable to seek consistency and fairness in the imposition of penalties. [393] However, arguments favoring jury assessment of punitive damages can be criticized because the goals of achieving democracy and vindicating plaintiffs' rights can be met with judicial assessment of punitive damages. Interests in democracy are served because a jury still determines liability for a cause of action, calculates compensatory damages and determines liability for punitive damages; only the power to assess punitive damages is taken **[*1136]** from the jury. [394] Additionally, plaintiffs still have incentive to vindicate their rights. In fact, the procedure for awarding compensatory damages is unaltered. [395] Only the procedure for assessing punitive damages, which generally are not intended to benefit plaintiffs, is altered. [396] Therefore, judicial assessment of punitive damages should be advocated because it may result in greater consistency and fairness, while still recognizing interests in democracy and permitting the vindication of the rights of plaintiffs.

In summary, judicial assessment of punitive damages should be advocated as a matter of policy. An assessment of punitive damages falls within the role of a judge. Further, judges likely will be better at achieving the goals of punitive damages, punishment and deterrence. The issue of whether the framers intended for jurors to assess punitive damages is open to debate. However, judicial assessment of punitive damages appears likely to redress the

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problems of jury confusion and bias. Finally, judicial assessment likely will benefit defendants and the community by establishing grater consistency in punitive damages awards and reducing uncertainty costs.

C. Recommendations for Courts of the United States, Kansas and Ohio

It is the role of the legislature to determine which policy option will best suit the needs of citizens. [397] In attempting to fulfil this role, state legislatures throughout the nation have adopted several methods of tort reform, [398] including judicial assessment of punitive damages. [399] As a general rule, the policy decision of the legislature, as long as it can be implemented consistently with constitutional guarantees, should be respected. [400] **[*1137]**

1. Judicial Assessment of Punitive Damages in Federal Courts

The United States Congress has not enacted a general requirement that punitive damages must be assessed by a judge. [401] Furthermore, Congress has not expressed an intention to grant judges the power to assess punitive damages. In the absence of such federal legislation, federal courts may be hesitant to exercise the power to assess punitive damages. [402]

An example of a case in which a court should have been hesitant to exercise this power is Defender Industries v. Northwestern Mutual Life Insurance Co. [403] In Defender, a jury awarded $ 5 million in punitive damages, and the trial judge, without submitting the issue to another jury, concluded the award was grossly excessive and reduced it to $ 10,000. [404] Such a drastic reduction of punitive damages, a reduction of more than ninety-nine percent of the award, without consulting a jury may have been an abuse of the court's discretion. [405]

However, a stronger argument for judicial assessment can be made under the facts of Shamblin's Ready Mix, Inc. v. Eaton Corp. [406] Under the unusual facts of Shamblin's, the Fourth Circuit found that jury awards were excessive as a result of impropriety on the part of plaintiff's counsel on two prior occasions. [407] The court decided to assess punitive damages rather than remand for a third jury determination of punitive damages. [408] Under these facts, a strong argument can be made for judicial assessment; the court had already determined that **[*1138]** two prior jury awards of punitive damages were influenced by impropriety on the part of plaintiff's counsel, and the court's decision to conserve resources and assess an appropriate amount of punitive damages may have been a proper exercise of the court's discretion. [409]

2. Judicial Assessment of Punitive Damages in Kansas and Ohio

In contrast to the United States Congress, the legislatures of Kansas and Ohio have enacted statutes requiring judicial assessment of punitive damages. [410] The jury trial guarantees of the Kansas and Ohio constitutions, as discussed above, should be interpreted to permit judicial assessment of punitive damages. [411] Additionally, it should be noted that the decision of the legislatures to require judicial assessment of punitive damages was a sensible policy choice. [412] Therefore, the courts of Kansas and Ohio should respect the choice of the legislatures and permit judicial assessment of punitive damages.

V. CONCLUSION

As states move toward tort reform, the merits of judicial assessment of punitive damages have been subject to debate. Although the weight of authority in the federal courts has concluded that judicial assessment of punitive damages violates the Seventh Amendment, these courts have misconstrued the Seventh Amendment and Supreme Court precedent. [413] The Seventh Amendment should not be interpreted to bar ju- **[*1139]** dicial assessment of punitive damages. [414] Similarly, the jury trial provisions of the Kansas and Ohio constitutions

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should be construed to permit judicial assessment of punitive damages. [415]

The policy arguments regarding judicial assessment of punitive damages also indicate that this practice is a sensible method of tort reform. Judges are likely to be better at achieving punishment and deterrence, [416] and judicial assessment of punitive damages is likely to result in a reduction of uncertainty costs. [417] Thus, in jurisdictions where the legislature constitutionally has chosen this method of tort reform, specifically in Kansas and Ohio, the courts should abide by the decision of the legislature and permit judicial assessment of punitive damages. [418]

FOOTNOTES:

n1 States that cap punitive damages can be divided into two general categories. First, several states set a limit on the total monetary amount of damages. See, e.g., ALA. CODE section 6-11-21 (1993) (setting a cap of $ 250,000 on punitive damages, except in cases involving a pattern of intentional wrongful conduct, actual malice, libel, slander or defamation); VA. CODE ANN. section 8.01-38.1 (Michie 1992) (limiting punitive damages to $ 350,000). Second, several states limit punitive damages based on the amount of recoverable actual damages. See, e.g., COLO. REV. STAT. section 13-21-102 (1987) (requiring that punitive damages shall not exceed actual damages); FLA. STAT. ANN. section 768.73 (West Supp. 1995) (generally limiting punitive damages to three times compensatory damages).

n2 Numerous states have enacted the heightened standard of evidence through statutes. For statutes requiring a heightened standard of evidence, see, for example, ALASKA STAT. section 09.17.020 (1994); GA. CODE ANN. section 51-12-5.1 (Michie Supp. 1995); UTAH CODE ANN. section 78-18-1 (1992).

n3 When a case is bifurcated, the first phase involves a determination of liability by the trier of fact, and the second phase involves assessment of damages. For a discussion of this procedure, see generally 5 MARILYN MINZER ET AL., DAMAGES IN TORT ACTIONS, section 40.64[2] (1991). Many states have enacted statutes permitting bifurcation in cases involving punitive damages, and the majority of these states call for assessment of punitive damages by the trier of fact. See, e.g., GA. CODE ANN. section 51-12-5.1; MINN. STAT. ANN. section 549.20 (West Supp. 1995).

n4 See CONN. GEN. STAT. ANN. section 52-240b (West 1991); KAN. STAT. ANN. section 60-3701 (1994). Additionally, the Ohio legislature enacted a statute requiring judicial assessment of punitive damages, OHIO REV. CODE ANN. section 2315.21 (Anderson 1995), but the statute was found unconstitutional by the Ohio Supreme Court. See infra notes 196-206 and accompanying text.

n5 For commentators advocating judicial assessment, see Richard C. Ausness, Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation, 74 KY. L.J. 1, 96-97 (1985) (discussing the benefits of judicial assessment in products liability actions); Elissa D. Cohen, Popular Disenchantment with our Current Tort System--Reforming Punitive Damages in Ohio, 14 U. DAYTON L. REV. 201, 224-25 (1988); Griffin B. Bell & Perry E. Pearce, Punitive Damages and the Tort System, 22 U. RICH. L. REV. 1, 2 (1987) (suggesting judicial assessment of punitive damages as one of three possible reforms for the tort system); Grant P. DuBois, Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Cases: Bonanza or Disaster, 43 INS. COUNSEL J. 344, 353 (1976); Dorsey D. Ellis, Jr., Punitive Damages, Due Process, and the Jury, 40 ALA. L. REV. 975, 997-99, 1008 (1989) (discussing the benefits of judicial assessment in the context of advocating heightened evidentiary standards for the assessment of damages by juries); Jane Mallor & Barry Roberts, Punitive Damages: Toward a Principled Approach, 31 HASTINGS L.J. 639,

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[*1090] amount of punitive damages should reflect jurors' outrage at a defendant's conduct. [6] Further, they argue that a defendant's right to trial by jury is violated when a judge assesses punitive damages. [7]

The constitutionality of judicial assessment has recently been addressed by the highest courts of Kansas and Ohio, with conflicting results. In Zoppo v. Homestead Insurance Co., [8] the Ohio Supreme Court held that judicial assessment violates the right to trial by jury under the Ohio Constitution. [9] In contrast, the Kansas Supreme Court held in Smith v. Printup [10] that the Kansas Constitution does not bar judicial assessment of punitive damages. [11]

This Comment examines the practice of judicial assessment of punitive damages, both as a matter of constitutional law and as a matter of policy. In Part II, this Comment will provide an overview of the traditional doctrine of punitive damages and the move toward tort reform. In Part III, this Comment will examine the consistency of judicial as- **[*1091]** sessment of punitive damages with the right to trial by jury. Part III will examine the right to trial by jury under the United States Constitution, the Kansas Constitution, and the Ohio Constitution, discussing in detail the reasoning of the courts in Zoppo and Printup. Finally, in Part IV, this Comment will conclude that as a matter of constitutional law and as a matter of policy, judges should be permitted to assess punitive damages.

II. PUNITIVE DAMAGES

A. An Historical Overview

Punitive damages have been known as "exemplary damages," "vindictive damages," and "smart money." [12] The United States Supreme Court has stated that punitive damages are not compensation for an injury. [13] Instead, "they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." [14] Thus, punitive damages focus primarily on the character of a defendant's conduct, rather than on the extent of a plaintiff's injuries. [15]

As a practical matter, an assessment of punitive damages generally involves two phases. In the first phase, a jury [16] determines whether a defendant is liable for punitive damages. [17] Specifically, defendants are liable for punitive damages only if their conduct is deemed worse than "mere negligence," such as a showing of spite or actual malice. [18] The **[*1092]** vast majority of jurisdictions generally require that a plaintiff also establish actual injury and be entitled to at least nominal damages before a defendant will be liable for punitive damages. [19]

In the second phase, the amount of punitive damages is assessed. A jury traditionally has discretion in determining the amount of the award. [20] A court often simply instructs jurors to award punitive damages sufficient to punish the defendant and to deter the defendant and others from similar misconduct. [21] Factors that jurors may consider in assessing punitive damages include the seriousness of the defendant's misconduct, the extent of the plaintiff's injury, and the wealth of the defendant. [22]

A defendant may seek judicial review of the amount of punitive damages assessed against him. A court reviewing the award will consider whether it was reasonable. [23] Courts have reversed awards of punitive damages, for example, after determining that an award was motivated by "passion" or "prejudice," [24] or that it "shocked the conscience" of the court. [25] Upon determining that punitive damages are excessive, a reviewing court generally has the power to order a remittitur [26] or a new trial. [27] At the appellate level, the usual standard **[*1093]** of review is whether the trial court's decision regarding the award constituted an abuse of discretion. [28]

B. The Rationale of Punitive Damages

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664-66 (1980); Note, The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages, 41 N.Y.U. L. REV. 1158, 1171 (1966) [hereinafter Reappraisal]; David G. Owen, Civil Punishment and the Public Good, 56 S. CAL. L. REV. 103, 120-21 (1982) [hereinafter Owen, Public Good]; David G. Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. CHI. L. REV. 1, 52 (1982) (focusing on products liability actions); David G. Owen, Punitive Damages in Products Liability Litigation, 74 MICH. L. REV. 1257, 1320-21 (1976) (focusing on products liability actions) [hereinafter Owen, Products Liability]; Robert W. Pritchard, The Due Process Implications of Ohio's Punitive Damages Law--A Change Must be Made, 19 U. DAYTON L. REV. 1207, 1234-42 (1994); Dan Quayle, Civil Justice Reform, 41 AM. U. L. REV. 559, 565 (1992); James B. Sales & Kenneth B. Cole, Jr., Punitive Damages: A Relic That Has Outlived Its Origins, 37 VAND. L. REV. 1117, 1167-68 (1984).

n6 For commentators arguing in support of jury assessment of damages, see generally Alan H. Scheiner, Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power, 91 COLUM. L. REV. 142 (1991); Margaret M. Koesel, Invading the Province of the Jury: Section 2315.21(C) and Judicial Determination of the Amount of Punitive Damages, 15 OHIO N.U. L. REV. 55 (1988).

n7 See generally Scheiner, supra note 6; Koesel, supra note 6. See also STANTON G. DARLING II, OHIO CIVIL JUSTICE REFORM ACT 120-21 (1987).

n8 644 N.E.2d 397 (Ohio 1994). For a discussion of the majority and dissenting opinions in Zoppo, see infra notes 192-227 and accompanying text.

n9 Zoppo, 644 N.E.2d at 401.

n10 866 P.2d 985 (Kan. 1993). For a discussion of the Printup opinion, see infra notes 165-85 and accompanying text.

n11 Printup, 866 P.2d at 994, 998.

n12 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES section 2.1(A) (2d ed. 1989); Note, Exemplary Damages in the Law of Torts, 70 HARV. L. REV. 517, 517 (1957) (noting the usage of these different terms) [hereinafter Exemplary Damages].

n13 Gertz v. Welch, 418 U.S. 323, 350 (1974).

n14 Id.

n15 5 MINZER ET AL., supra note 3, section 40.10; see also Smith v. Wade, 461 U.S. 30, 54 (1983). The doctrine of punitive damages was first articulated by an English court in 1763. See Wilkes v. Wood, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (C.P. 1763). For a discussion of the English common law recognition of punitive damages, see generally 1 SCHLUETER & REDDEN, supra note 12, section 1.3; Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 275 n.20 (1989). The American courts adopted the doctrine by the late eighteenth century. See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15 (1991). By the middle of the nineteenth century, the United States Supreme Court recognized that the doctrine of punitive damages was a wellsettled principle of American law. Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851) (stating that "to question the awarding of punitive damages will not admit of argument"). Id.

n16 In most cases at common law, jurors acted as triers of fact and assessed punitive damages. However, it should be noted that in some cases a trial judge can take the role of trier of fact and assess punitive damages in this capacity.

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n17 A plaintiff is not entitled to punitive damages as a matter of right; the jury has discretion to determine whether punitive damages should be awarded. 1 SCHLUETER & REDDEN, supra note 12, section 6.1(A); 5 MINZER ET AL., supra note 3, section 40.11.

n18 The level of culpability varies with the jurisdiction, but courts generally require "circumstances of aggravation or outrage, such as spite or "malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, section 2, at 9-10 (5th ed. 1984) (footnotes omitted).

n19 1 SCHLUETER & REDDEN, supra note 12, section 6.1(D)(3); 5 MINZER ET AL., supra note 3, section 40.30.

n20 Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15 (1991); see also 1 SCHLUETER & REDDEN, supra note 12, section 6.1.

n21 Haslip, 499 U.S. at 15 (noting that "under the traditional common law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct"); see also 5 MINZER ET AL., supra note 3, section 40.14 n.2 (listing examples of courts that have instructed jurors to assess punitive damages to punish the defendant and to deter the defendant and others).

n22 See 5 MINZER ET AL., supra note 3, section 40.14.

n23 In determining whether a verdict is excessive, courts may consider the particular circumstances of a case and whether the award is consistent with the goals of punitive damages. 5 MINZER ET AL., supra note 3, section 40.83.

n24 1 SCHLUETER & REDDEN, supra note 12, section 6.1(B); 5 MINZER ET AL., supra note 3, section 40.82.

n25 See 5 MINZER ET AL., supra note 3, section 40.82.

n26 Remittitur is defined as follows:

The procedural process by which an excessive verdict of the jury is reduced. If money damages awarded by a jury are grossly excessive as a matter of law, the judge may order the plaintiff to remit a portion of the award. In the alternative, the court may order a complete new trial or a trial limited to the issues of damages. The court may also condition a denial of a motion for new trial upon the filing by the plaintiff of a remittitur in a stated amount.

BLACK'S LAW DICTIONARY 1295 (6th ed. 1990) (citations omitted).

n27 1 SCHLUETER & REDDEN, supra note 12, sections 6.2-.3; see also Browning Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 279 (1989).

n28 1 SCHLUETER & REDDEN, supra note 12, section 6.1(A); 5 MINZER ET AL., supra note 3, section 40.82; Browning-Ferris, 492 U.S. at 279.

n29 5 MINZER ET AL., supra note 3, section 40.12. For cases noting the deterrence and punishment purposes of punitive damages, see, for example, Smith v. Wade, 461 U.S. 30, 54 (1983); Gertz v. Welch, 418 U.S. 323, 350 (1974). Other purposes of punitive damages have

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been recognized. For example, some states have recognized that punitive damages can serve the purpose of providing compensation to the plaintiff, such as for the plaintiff's attorney's fees. See generally 5 MINZER ET AL., supra note 3, section 40.12[3].

n30 1 SCHLUETER & REDDEN, supra note 12, section 2.2(A)(1); 5 MINZER ET AL., supra note 3, section 40.12. For cases discussing the two purposes together, see, for example, Wade, 461 U.S. at 54; Preston v. Murty, 512 N.E.2d 1174, 1176 (Ohio 1987). A minority of jurisdictions recognize only one of the two rationales. See generally 5 MINZER ET AL., supra note 3, section 40.12.

n31 Dorsey D. Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. CAL. L. REV. 1, 4-8 (1982). For a discussion of the level of culpability required for the imposition of punitive damages, see supra note 18 and accompanying text.

n32 Ellis, supra note 31, at 8. Punitive damages also may play a quasi-criminal role, creating a bridge between the tort policy of finding fault and the criminal law policy of punishing wrongs to society. 5 MINZER ET AL., supra note 3, section 40.12[1]. Further, punitive damages may provide adequate punishment when compensatory damages alone would not suffice. See Exemplary Damages, supra note 12, at 524.

n33 5 MINZER ET AL., supra note 3, section 40.12[2]; RESTATEMENT (SECOND) OF TORTS section 908 (1979); see also Wade, 461 U.S. at 54.

n34 Ellis, supra note 31, at 8; Charles T. McCormick, Some Phases of the Doctrine of Exemplary Damages, 8 N.C. L. REV. 129, 130 (1930) (noting that in some cases, compensatory damages are a great deterrent, but "the danger of the addition of punitive damages seems calculated to increase decidedly the deterrent value of the verdict").

n35 See Mallor & Roberts, supra note 5, at 648.

n36 See id.; Exemplary Damages, supra note 12, at 522.

n37 For a discussion of the criticism, see Michael Rustad & Thomas Koenig, The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers, 42 AM. U. L. REV. 1269, 1275-76 (1993).

n38 See Quayle, supra note 5, at 564 (contending that if the traditional approach to punitive damages was not reformed, it would "continue to generate disproportionately high awards in a random and capricious manner").

n39 Justice O'Connor has criticized the traditional doctrine of punitive damages in several cases. See, e.g., Browning-Ferris Indus. v. Kelco Disposal, Inc., 482 U.S. 257, 282 (1989) (O'Connor, J, concurring in part and dissenting in part) (stating that "punitive damages are skyrocketing"); TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2728-29 (1993) (O'Connor, J., dissenting) (contending that "arbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for jury decisionmaking. . . . This is especially true in the area of punitive damages . . .").

n40 Browning-Ferris, 492 U.S. at 282 (O'Connor, J., dissenting). However, the issue of whether punitive damages are, in fact, skyrocketing has been subject to debate. See, e.g., RAND INSTITUTE FOR CIVIL JUSTICE, ANNUAL REPORT (1992-93) (finding that the frequency of punitive damages awards has increased, especially against businesses); Michael Rustad, In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data, 78 IOWA L. REV. 1 (1993) (presenting statistical data and contending that there is no crisis in punitive damages awards for products liability).

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n41 Quayle, supra note 5, at 564.

n42 For a discussion of states' approaches to tort reform, see generally 1 SCHLUETER & REDDEN, supra note 12, section 9.13.

n43 See Neil A. Lewis, Senate, 61-37, Approves Narrow Punitive-Damages Curb, N.Y. TIMES, May 10, 1995, at B10. The United States House of Representatives moved to limit punitive damages in all civil suits to $ 250,000 or three times the amount awarded for medical bills and lost wages, whichever was greater. Id. However, the Senate in May of 1995 instead adopted a measure that was narrower in scope, limiting damages only in products liability actions to $ 250,000 or twice the amount awarded for medical bills, lost wages, and pain and suffering. Id. A conference committee was to be established to attempt to reach a compromise. Id.

n44 See supra note 1.

n45 See, e.g., FLA. STAT. ANN. section 768.73; UTAH CODE ANN. section 78-18-1.

n46 Several states prohibit recovery of punitive damages unless a law expressly provides for recovery. See, e.g., CONN. GEN. STAT. ANN. section 47-212 (West 1995) (applying to cases under the Common Interest Ownership Act); S.D. CODIFIED LAWS ANN. section 21-1-4 (1987); VT. STAT. ANN. tit. 9A, section 1-106 (1994) (applying to cases arising under the Uniform Commercial Code).

n47 See supra note 4.

n48 See CONN. GEN. STAT. ANN. section 52-240b.

n49 See KAN. STAT. ANN. section 60-3701; OHIO REV. CODE ANN. section 2315.21. However, the Ohio statute was found unconstitutional by the Ohio Supreme Court, see infra notes 192-206 and accompanying text.

n50 For a discussion of the Ohio Supreme Court's holding on the constitutionality of judicial assessment, see infra notes 192-206 and accompanying text. For a discussion of the Kansas Supreme Court's holding on the constitutionality of judicial assessment, see infra notes 165-85 and accompanying text.

n51 U.S. CONST. amend. VII.

n52 See Pearson v. Yewdall, 95 U.S. 294, 296 (1877).

n53 ALA. CONST. art. 1, section 11; ALASKA CONST. art I, section 16; ARK. CONST. art. II, section 7; CAL. CONST. art. I, section 16; CONN. CONST. art. 1, section 19; DEL. CONST. art. 1, section 4; FLA. CONST. art. 1, section 22; GA. CONST. art. 1, section 1 1 11; HAW. CONST. art. 1, section 13; IDAHO CONST. art I, section 7; ILL. CONST. art I, section 13; IND. CONST. art. I, section 20; IOWA CONST. art I, section 9; KAN. CONST. Bill of Rights section 5; KY. CONST. section 242; ME. CONST. art I, section 20; MD. CONST., Declaration of Rights art. 23; MASS. CONST. pt. I, art. 15; MICH. CONST. art. 1, section 14; MINN. CONST. art I, section 4; MISS. CONST. art. III, section 31; MO. CONST. art I, section 22(a); MONT. CONST. art. III, section 26; NEB. CONST. art. I, section 6; NEV. CONST. art I, section 3; N.H. CONST. pt. 1, art. 20; N.J. CONST. art. 1, 1 9; N.M. CONST. art. II, section 12; N.Y. CONST. art. I, section 2; N.C. CONST. art. I, section 25; N.D. CONST. art I, section 13; OHIO CONST. art. 1, section 5; OKLA. CONST. art. II, section 19; OR. CONST. art VII, section 3; PA. CONST. art. I, section 6; R.I. CONST. art. I, section 15; S.C. CONST. art. I, section 14; S.D. CONST. art. VI, section 6; TENN. CONST. art. I, section 6; TEX. CONST. art I, section 15; UTAH CONST. art. I, section 10; VT. CONST. ch. 1, art. 12; VA. CONST. art. 1, section

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11; WASH. CONST. art. 1, section 21; W. VA. CONST. art. III, section 13; WIS. CONST. art I, section 5; WYO. CONST. art. I, section 9.

n54 See, e.g., Digital & Analog Design Corp. v. North Supply Co., 590 N.E.2d 737, 742 n.1 (Ohio 1992); Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 403 n.2 (Wright, J., dissenting) (Ohio 1994).

n55 For a discussion of Printup, see infra notes 165-85 and accompanying text. For a discussion of Zoppo, see infra notes 192-206 and accompanying text.

n56 U.S. CONST. amend. VII.

n57 The two different approaches can be seen in the Tull opinion. See infra notes 71-93 and accompanying text.

n58 See Tull v. United States, 481 U.S. 412, 417-25 (1987).

n59 See, e.g., Tull, 481 U.S. at 425-27; Colgrove v. Battin, 413 U.S. 149, 156 n.11 (1973).

n60 413 U.S. at 149.

n61 Id. at 149-51. In Colgrove, a Montana district court empaneled a six-member jury for a diversity case in compliance with a local procedural rule. Id. at 150. The petitioner sought a writ of mandamus from the Court of Appeals for the Ninth Circuit, alleging, inter alia, that the rule violated the Seventh Amendment. Id. The Ninth Circuit Court of Appeals sustained the legality of the rule and denied the writ. Id. at 151. The United States Supreme Court, in an opinion written by Justice Brennan, affirmed the denial of the writ. Id. Four justices dissented from the Court's holding. See id. at 165-88.

n62 Id. at 152. The Court stated: "On its face, this language is not directed to jury characteristics, such as size, but rather defines the kind of cases for which jury trial is preserved, namely "suits at common law.' " Id. The Court also noted that it had found six-member juries constitutional in certain criminal cases. Id. at 151 (citing Williams v. Florida, 399 U.S. 78 (1970)).

n63 Id. at 152-56.

n64 Id. at 156-57.

n65 Id. at 156 (quoting Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935)).

n66 Id. at 156 (citing Galloway v. United States, 319 U.S. 372 (1943)). The court added that new devices may be used to adapt the institution to meet present needs, provided that the substance of the right to trial by jury is preserved. Id. at 157 (citing Ex Parte Peterson, 253 U.S. 300, 309-10 (1920); Funk v. United States, 290 U.S. 371, 382 (1933)).

n67 Id. at 157-60.

n68 Id. at 157 (citing Gasoline Prods. Co. v. Champlin Co., 283 U.S. 494, 498 (1931)).

n69 Id.

n70 Id. The Court went on to find that dicta stating trial by jury meant trial by a twelvemember jury was unpersuasive, id. at 157-58, and that a six-member jury was

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adequate to meet the mandates of the Seventh Amendment, id. at 158-60.

n71 481 U.S. 412 (1987).

n72 Id. at 414. At issue was the Clean Water Act's prohibition of the discharge of dredged or fill material into navigable waters. Id. (citing 33 U.S.C. sections 1311, 1344 & 1362(7); 33 C.F.R. sections 323.2(a)(1)-(7) (1986)).

n73 Id. at 414-15.

n74 Id. at 415.

n75 Id. at 415-16. Of the fine, $ 250,000 was to be suspended upon restoration of a waterway. Id. at 415. However, the developer stated that he had no choice but to pay the entire fine because he would need to purchase land from third parties at a cost of more than $ 700,000 to complete the restoration. Id. at 415-16. The Court also ordered separate injunctive relief. Id. at 416.

n76 Id.

n77 Id. at 427.

n78 Id. at 417-25.

n79 Id. at 420. It concluded that the cause of action was analogous to both an action in debt, which required a jury trial at common law, and a public nuisance action, as the government contended. Id.

n80 Id. at 421 (citing Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970)).

n81 Id. at 422-25. The Court considered the nature of the remedy sought in Part IIB of its opinion. Id.

n82 Id. at 422.

n83 See id. at 422-23.

n84 Id. at 423, 425.

n85 Id. at 425-27.

n86 Id. at 426 (quoting Colgrove v. Battin, 413 U.S. 149, 156 n.11, 157 (1973)).

n87 Id.

n88 Id. The Court noted, "Congress' authority to fix the penalty by statute has not been questioned, and it was also the British practice." Id. (citation omitted).

n89 Id. at 426-27. Therefore, according to the Court, Congress can delegate the power to assess civil penalties to a trial judge without violating the Seventh Amendment. Id. at 427. Justice Scalia, joined by Justice Stevens, concurred with the Court for Parts I and II but dissented from Part III. Id. at 427-28. He found fault with the majority's logic in Part III, contending that it does not follow that Seventh Amendment rights cannot be invoked in cases where Congress has not fixed the amount of a civil fine. Id. at 427. Justice Scalia further stated that the majority created a form of adjudication he had never before encountered by providing for jury determination of liability and judicial assessment of civil fines. Id. at 428.

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To that end, he stated that "even punitive damages are assessed by the jury" after a jury determination of liability. Id. Justice Scalia acknowledged that it was tempting to analogize judicial assessment of civil fines to the judicial role in criminal sentencing. Id. However, noting that a heightened standard of proof is used to determine liability in criminal trials, Justice Scalia stated the government must "take the bitter with the sweet." Id. In other words, the government takes the benefit of proving a case by only a preponderance of the evidence along with the disadvantage of accepting an assessment of civil fines by a jury. See id.

n90 Id. at 427.

n91 Id. at 426 n.9.

n92 Id. For an argument that the framers in fact intended to extend the Seventh Amendment to the remedy phase, at least with regard to punitive damages, see Scheiner, supra note 6, at 145-60.

n93 Id. The Court reiterated its statement from Colgrove that the history of the Seventh Amendment shows that the amendment was adopted because of fear that the civil trial would be abolished. Id. (citing Colgrove v. Battin, 413 U.S. 149, 152 (1973)).

n94 The fact that the Court has not spoken to this issue has resulted in some confusion. For example, in Shamblin's Ready Mix, Inc. v. Eaton Corp., the Fourth Circuit concluded that judicial assessment of punitive damages is constitutional. 873 F.2d 736, 742 (4th Cir. 1989), overruled by Defender Indus. v. Northwestern Mut. Life Ins. Co., 938 F.2d 502 (4th Cir. 1991) (en banc). However, the court overruled itself in Defender, concluding that judicial assessment of punitive damages violates the Seventh Amendment. Defender, 938 F.2d at 507.

n95 For example, in Browning-Ferris Indus. v. Kelco Disposal, Inc., the Court addressed whether an award of punitive damages was excessive under the Eighth Amendment or federal common law. 492 U.S. 257 (1989). Additionally, in Pacific Mut. Life Ins. Co. v. Haslip, the Court addressed Due Process issues, concluding that the common law method of assessing punitive damages is not a per se violation of due process, 499 U.S. 1, 17-18 (1991), and that the amount of punitive damages assessed in that particular case did not violate due process, id. at 23-24. The Court has also issued TXO Prod. Corp. v. Alliance Resources Corp., in which it concluded that the punitive damages award in that case did not violate due process, 113 S. Ct. 2711, 2722-23 (1991), and that the procedure used to award punitive damages also did not violate due process, id. at 2723-24.

n96 The first case is Shamblin's, 873 F.2d at 740-42. However, the Fourth Circuit overruled this case in Defender, 938 F.2d at 507. Other circuits have addressed judicial assessment of punitive damages since the Tull decision was issued, but they have not examined judicial assessment of punitive damages in light of the Tull decision. See, e.g., Haluschak v. Dodge City of Wauwatosa, 909 F.2d 254, 256-57 (7th Cir. 1990) (finding that judicial assessment of punitive damages violates the Seventh Amendment); Morgan v. Woessner, 997 F.2d 1244, 1258-59 (9th Cir. 1993) (indicating that a judge should not assess punitive damages).

n97 The facts and reasoning of Shamblin's and Defender are discussed infra notes 102-28 & 129-52 and accompanying text, respectively.

n98 873 F.2d at 736.

n99 Id. at 740-42.

n100 938 F.2d 502 (4th Cir. 1991) (en banc).

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n101 Id. at 507.

n102 873 F.2d at 737-38.

n103 Id. at 737.

n104 Id.

n105 Id.

n106 Id. at 739. Specifically, a witness testified that the defendant had a policy of withholding equipment that was submitted for consideration of whether it was covered by a warranty until the defendant got payment for repair. Id. Cross-examination revealed, however, that the witness did not have personal knowledge of the defendant's policies. Id. Nevertheless, plaintiff's counsel stated to the jury in his closing argument:

What's scary about this case is not once did anyone get up here and tell you we've changed our corporate policies . . . . If your verdict is not large enough . . . what these people are going to do is they are going to laugh, they are going to say juries in West Virginia are going to condone our type of business practice, and they are going to continue to do it again and again until someone can stop it.

Id.

n107 Id. at 743.

n108 Id.

n109 Id. at 740-42.

n110 Id. at 740.

n111 Id. at 740-41.

n112 Id.

n113 Id. The cases mentioned by the court included Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 207 (1st Cir. 1987) ($ 3,000,000 award reduced to $ 300,000), Bell v. City of Milwaukee, 746 F.2d 1205, 1267, 1279 (7th Cir. 1984) ($ 350,000 award reduced to $ 50,000), and Guzman v. Western State Bank, 540 F.2d 948, 954 (8th Cir. 1976) ($ 25,000 award reduced to $ 10,000). Shamblin's, 873 F.2d at 740. In the fourth case the court cited, the original assessment of damages was reached by a judge in a bench trial. Id. at 740-41 (citing Shimman v. Frank, 625 F.2d 80, 102, 104 (6th Cir. 1980) ($ 75,000 award reduced to $ 20,000)).

n114 Shamblin's, 873 F.2d at 741.

n115 Id. at 740 n.2 (citing McKinnon v. City of Berwyn, 750 F.2d 1383, 1391-92 (7th Cir. 1984)).

n116 Id.

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n117 Id. at 741-42.

n118 Id. at 741 (discussing Kennon v. Gilmer, 131 U.S. 22 (1889)).

n119 Id. (citing Kennon, 131 U.S. at 28-30).

n120 Id.

n121 Id.

n122 Id. For a discussion of the purposes of punitive damages, see supra notes 29-36 and accompanying text.

n123 Shamblin's, 873 F.2d at 741-42. The facts and reasoning of Tull are discussed supra notes 71-93 and accompanying text.

n124 Tull, 481 U.S. at 426 n.9.

n125 Id. at 427.

n126 Shamblin's, 873 F.2d at 741.

n127 Id. (citing Tull, 481 U.S. at 422 n.7).

n128 Id. at 741-42. The court proceeded to conclude that eighteenth century cases did not require it to distinguish Tull. Id. at 742. The court noted that eighteenth century juries could not award damages for intangible harms, such as pain and suffering, but, in light of the present law of damages that permits the compensation of parties for intangible harm, the compensatory function of punitive damages is now "vestigial." Id. The court concluded that no principled distinction exists between civil penalties and punitive damages. Id.

n129 938 F.2d 502 (4th Cir. 1991) (en banc).

n130 Id. at 503-04. The plaintiff originally brought suit for breach of contract, breach of contract accompanied by a fraudulent act, fraud, constructive fraud and negligence arising from misrepresentations and fraudulent statements by the defendant's agents. Id. at 504. The district court granted the defendant's motion for a directed verdict on all of the claims except for fraud and constructive fraud. Id.

n131 Id. The jury awarded compensatory damages in the exact amount the plaintiff had paid in premiums to the defendant while the insurance policy was in effect. Id.

n132 Id. The district court ordered, however, that if its award was vacated on appeal, a new trial would be held to determine the amount of punitive damages. Id. at 503.

n133 Id. at 505.

n134 Id. (citing Shamblin's Ready Mix, Inc. v. Eaton Corp., 873 F.2d 736, 743 (4th Cir. 1989), overruled by Defender, 938 F.2d 502 (4th Cir. 1991) (en banc)).

n135 Id. at 505-06.

n136 Id.

n137 Id. at 506.

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n138 Id. at 506-07.

n139 Id.

n140 Id. at 506. As discussed above, the Fourth Circuit characterized Kennon differently in the Shamblin's opinion, concluding that the Kennon case spoke only to compensatory damages and was irrelevant to punitive damages. See supra notes 118-22 and accompanying text.

n141 Defender, 938 F.2d at 506-07.

n142 Id. (citing Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989)).

n143 Browning-Ferris, 492 U.S. at 278-79 (cited in Defender, 938 F.2d at 506-07).

n144 The Defender court quoted the following portion of the Browning-Ferris opinion:

It is not our role to review directly the award for excessiveness, or to substitute our judgment for that of the jury. Rather, our only inquiry is whether the Court of Appeals erred in finding that the District Court did not abuse its discretion in refusing to grant petitioners' motion, under Federal Rule of Civil Procedure 59, for a new trial or remittitur . . . .

. . . In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law . . . .

In reviewing an award of punitive damages, the role of the District Court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The Court of Appeals should then review the District Court's determination under an abuse-of-discretion standard.

Defender, 938 F.2d at 506 (quoting Browning-Ferris, 492 U.S. at 278-79).

n145 Id. at 507 (citing Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)).

n146 The Defender court quoted the following portion of the opinion:

Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

Id. (quoting Haslip, 499 U.S. at 15).

n147 Id. at 506.

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Most jurisdictions recognize that punitive damages serve both to punish defendants for past crimes and to deter the commission of future crimes. [29] Although courts often discuss punishment and deterrence in tandem, the two concepts provide differing rationales for the imposition of punitive damages. [30]

Once an actor has knowingly inflicted an injury, punishment serves to express society's shock and condemnation of such conduct. [31] Punishment is therefore retrospective and serves to penalize an actor. [32] Punitive damages also serve to deter a defendant and others from misconduct. [33] In contrast to the punishment rationale, the deterrence rationale of punitive damages is prospective and seeks to influence future conduct. [34]

Ideally, an award of punitive damages would simultaneously punish a defendant and deter the defendant and others. [35] Thus, the punishment and deterrence rationales of punitive damages are closely allied. **[*1094]** In fact, several commentators have maintained that these two purposes should be considered jointly because inflicting punishment for past actions also tends to deter future misconduct. [36]

C. Modifications of the Doctrine of Punitive Damages

Despite the recognized purposes of punitive damages, their use has been subject to great criticism in recent years. [37] The critics, who have included former Vice President Dan Quayle [38] and Justice Sandra Day O'Connor, [39] have contended that punitive damage awards are "skyrocketing" [40] and have been awarded in a "random and capricious manner." [41] In this atmosphere of criticism, proponents of tort reform have strived to change the manner for imposing punitive damages at both the federal and state level. [42]

On the federal level, Congress has considered adopting across-theboard limits on punitive damages. [43] On the state level, state legisla- **[*1095]** tures have adopted several methods of reform. For example, some states have set statutory caps on the total amount of punitive damages that can be awarded, [44] have required that a portion of punitive damages be paid to the state or a state-sponsored fund, [45] or have enacted general prohibitions of punitive damages in specific types of cases. [46] Finally, three states--Connecticut, Kansas, and Ohio--have required judicial assessment of punitive damages. [47] The Connecticut statute, which is limited to products liability cases, has not been subject to much dispute. [48] In contrast, the Ohio and Kansas measures are broader in scope, [49] and their constitutionality has been addressed by the highest courts of their respective states. [50]

III. CONSTITUTIONALITY OF JUDICIAL ASSESSMENT OF DAMAGES

An examination of the constitutionality of judicial assessment of punitive damages begins with the Seventh Amendment of the United States Constitution. [51] The Seventh Amendment is not directly binding upon the states, [52] but nearly all of the states, including Kansas and Ohio, have jury trial provisions that are analogous to the Seventh Amendment. [53] Thus, Seventh Amendment jurisprudence is persuasive **[*1096]** authority in state actions and is instructive in discussing the right to trial by jury under the constitutions of the states. [54] Seventh Amendment jurisprudence is also important in understanding the differing approaches of the Printup and Zoppo courts when analyzing the right to trial by jury under their state constitutions. [55]

A. Federal Right to Trial by Jury

1. Analysis of the United States Supreme Court for Ascertaining Right to Jury Trial

The Seventh Amendment provides, "In Suits at common law . . . the right of trial by jury shall be preserved . . . ." [56] In interpreting the Seventh Amendment, the United States

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n148 Id. at 507.

n149 Id. These cases were cited in Shamblin's; see supra note 113 and accompanying text.

n150 Defender, 938 F.2d at 507. Neither of the cases that the Fourth Circuit mentioned discusses the Tull opinion. See O'Gilvie v. International Playtex, Inc., 821 F.2d 1438, 1447-48 (10th Cir. 1987); McKinnon v. City of Berwyn, 750 F.2d 1383, 1391-92 (7th Cir. 1984). The McKinnon opinion was issued three years prior to Tull; in fact, the Shamblin's court distinguished it, viewing it as inconsistent with Tull. See supra notes 115-16 and accompanying text. The second opinion, O'Gilvie, was issued just two months after Tull, and it discusses the Seventh Amendment issue very briefly. The court stated that in the ordinary case "the plaintiff must be offered a choice between a new trial and accepting a remittitur to avoid a serious problem under the Seventh Amendment . . . . " O'Gilvie, 821 F.2d at 1447. However, the court concluded that it was not dealing with an ordinary remittitur case because the trial court was without power to order a remittitur under the unusual circumstances of the case. Id. at 1447-48.

n151 Defender, 938 F.2d at 507.

n152 Id.

n153 Tull v. United States, 481 U.S. 412, 426 (1987).

n154 Id. at 426-27.

n155 Id. at 426 n.9.

n156 See Shamblin's, 873 F.2d at 742; Defender, 938 F.2d at 507.

n157 See, e.g., Smith v. Printup, 866 P.2d 985 (Kan. 1993) (concluding that judicial assessment of punitive damages is not barred by the Kansas jury trial provision); Zoppo v. Homestead Ins. Co., 644 N.E.2d 397 (Ohio 1994) (concluding that judicial assessment of punitive damages is barred by the Ohio jury trial provision).

n158 See supra note 157.

n159 866 P.2d at 997-98.

n160 For a discussion of the conditions that states have required before punitive damages will be awarded, see supra notes 18-19 and accompanying text.

n161 For example, the Kansas Supreme Court stated in Schippel v. Norton, 16 P. 804, 807 (Kan. 1888): "Where no actual damage is suffered, surely no exemplary damages can by allowed. Exemplary damages can never constitute the basis of a cause of action." Printup, 866 P.2d at 992.

n162 See Folks v. Kansas Power & Light Co., 755 P.2d 1319, 1323 (Kan. 1988). The purposes of punitive damages are discussed supra notes 29-36 and accompanying text.

n163 See Nordstrom v. Miller, 605 P.2d 545, 549 (Kan. 1980).

n164 KAN. CONST. Bill of Rights section 5. An example of a case interpreting this provision is Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. 1988). In that case, the Kansas Supreme Court concluded that a $ 100,000 cap on total recovery in medical malpractice actions violated the jury trial guarantee. Id. at 258.

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n165 866 P.2d 985 (Kan. 1993).

n166 Id. at 990. In Printup, the driver of the van lost control and crossed the median of the Kansas Turnpike, crashing into the pickup truck. Id. The crash resulted in the deaths of the driver and passenger of the pickup truck. Id. The plaintiffs, including the administrator of the estate of the passenger in the pickup truck, brought suit against the driver of the moving van, his employer and the company that leased his services. Id.

n167 Id. The court awarded $ 20,000 against the driver and $ 100,000 against the company that leased his services. Id.

n168 Id. at 991. The constitutionality of the statute was one of the eleven issues the plaintiffs raised on appeal. Id. The statute provides:

In any civil action in which exemplary of punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted by the court to determine the amount of such damages to be awarded.

KAN. STAT. ANN. section 60-3701(a) (1994).

n169 Printup, 866 P.2d at 993.

n170 Id. at 992.

n171 Id.

n172 Id.

n173 Id.

n174 Id. The court stated: "The question we must resolve . . . is whether the fact that juries historically have determined the amount of punitive damages rises to the level of a right that existed at common law." Id.

n175 Id. at 993-94. The court stated that the right to a jury assessment of compensatory damages is guaranteed because it involves factual issues and because the presence of a claim for compensatory damages indicated a suit at law, which has traditionally been tried by a jury. Id.

n176 Id. at 994.

n177 Id.

n178 Id.

n179 Id.

n180 Id. The purposes of punitive damages are discussed supra notes 29-36 and accompanying text.

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n181 Printup, 866 P.2d at 994. The court cited Digital & Analog Design Corp. v. North Supply Co., 590 N.E.2d 737 (Ohio 1992). In that case, the Ohio Supreme Court indicated that punitive damages may be deemed equitable. See id. at 742. It should be noted, however, that the Ohio Supreme Court rejected some of the Digital decision's reasoning in Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 401-02 (Ohio 1994). See discussion of Zoppo infra notes 202-06 and accompanying text.

n182 Printup, 866 P.2d at 994. The court stated: "Given the character of a claim for punitive damages, the fact that juries historically determined punitive damages at common law does not establish that such determination was a right at common law." Id.

n183 Id.

n184 Id. Having raised the issue of the power of a legislature to alter the traditional doctrine of punitive damages, the court surveyed the practices in other jurisdictions regarding alterations of the traditional doctrine. Id. at 995-98. The court found, inter alia, that eight states required payment of a portion of punitive damages to the state or a state-sponsored fund. Id. at 995. Courts had addressed the constitutionality of four of the state statutes, finding two of the statutes unconstitutional and two constitutional. Id. at 995-96. The court stated, however, that none of these statutes or cases answered the relevant question, which was the extent to which the historical doctrine of punitive damages can be altered consistently with the Kansas Constitution. Id. at 996.

Additionally, the court discussed a case analogous to the present case, in which a dissenting judge made the argument that if the legislature has the power to abolish punitive damages, it must also have the power to modify the method of assessment of punitive damages. Id. at 997 (discussing Henderson v. Alabama Power Co., 627 So. 2d 878, 899 (Ala. 1993) (Maddox, J., concurring in part, dissenting in part)). Finding this argument persuasive, the court stated that nothing in the Kansas Constitution or in the common law prevents the legislature from requiring judicial assessment of damages. Id. at 996.

n185 Id.

n186 644 N.E.2d 397 (Ohio 1994).

n187 For a discussion of the traditional doctrine of punitive damages, see supra notes 12-40 and accompanying text.

n188 For a discussion of the traditional doctrine of punitive damages, see supra notes 12-40 and accompanying text; see, e.g., Zoppo, 644 N.E.2d at 404 (Wright, J., dissenting).

n189 See, e.g., Western Union Tel. Co. v. Smith, 59 N.E. 890, 892 (Ohio 1901) (noting the punitive damages are awarded to punish a guilty party for wrongful acts). It should be noted that most states recognize the dual purposes of punitive damages to punish and deter, see supra notes 32-40 and accompanying text, but Ohio case law has focused on their purpose of punishing a defendant. See Western Union, 59 N.E. at 892; Zoppo, 644 N.E.2d at 404 (Wright, J., dissenting).

n190 OHIO CONST. art. I, section 5. The provision states: "The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury." Id.

n191 Belding v. State ex rel. Heifner, 169 N.E. 301, 301 (Ohio 1929); Sorrell v. Thevenir, 633 N.E.2d 504, 510 (Ohio 1994).

n192 The courts addressed the constitutionality of OHIO REV. CODE section 2315.21(C)(2)

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(Anderson 1995), which required judicial assessment of punitive damages. The statute provided: "In a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court." Id.

n193 See Zoppo, No. 62926, 1993 WL 262641, at *7 (Ohio Ct. App. July 8, 1993). For a discussion of the test, see Tull v. United States, 481 U.S. 412, 426 (1987). The appellate court opinion discussed the constitutionality of the statute under the Tull fundamental elements test, but the court never mentioned that the test had previously been reserved for Seventh Amendment cases, and the Seventh Amendment has not been applied to the states. See Zoppo, 1993 WL at *7. The facts of the Zoppo case were set forth by the Ohio Supreme Court when the case reached the court on appeal. Zoppo, 644 N.E.2d at 398. The defendant, an insurance company, insured a building belonging to the plaintiff. Id. The building was a restaurant-bar, and it was destroyed in a fire started with kerosene. Id. After investigating the fire, the defendant denied coverage to the plaintiff, alleging that evidence showed the plaintiff participated in starting the fire and that the plaintiff made material misrepresentations about his whereabouts at the time of the fire. Id. The plaintiff then brought suit for breach of contract and bad faith refusal to settle. Id. At trial, the jury awarded $ 80,000 in compensatory damages for breach of contract and $ 187,800 for bad faith. Id. Additionally, the jury found the defendant liable for punitive damages. Id. After the jury crucial determination of liability, the court assessed $ 50,000 in punitive damages against the defendant. Id.

n194 Zoppo, 1993 WL at *7. Specifically, the court of appeals stated, "we hold that plaintiff has not demonstrated beyond a reasonable doubt that R.C. 2315.21(C)(2) is unconstitutional." Id.

n195 See Zoppo, 644 N.E.2d at 401-02.

n196 See id. Justices Douglas and Resnick concurred. Id. at 402. Justice A. William Sweeney concurred in the syllabus and judgment only. Id.

n197 Id. at 401 (citations omitted). In the opinion, the court stated that it "must first determine" whether there existed a common law right to jury assessment of punitive damages. Id. The second issue, the court explained, was whether there were sufficient facts to justify awarding punitive damages. Id. at 402. The court then determined that the award was justified. Id.

n198 Id. The court stated:

Prior to the 1987 enactment of R.C. 2315.21(C)(2) . . . , juries in this state had the integral role of determining not only when punitive damages were justified but also of assessing the amount of such damages. Clearly, the assessment of punitive damages by the jury stems from the common law and is encompassed within the right to trial by jury. However, the legislature, by enacting R.C. 2315.21(C)(2) and by permitting only the court to determine the amount of punitive damages, has in effect abrogated the common-law right of the jury to assess the amount of punitive damages.

Id. (citation omitted).

n199 Id.

n200 Id.

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n201 590 N.E.2d 737 (Ohio 1992).

n202 Zoppo, 644 N.E.2d at 401-02.

n203 Digital, 590 N.E.2d at 741-42.

n204 Id. at 742.

n205 Id.

n206 Zoppo, 644 N.E.2d at 401-02 (citing Digital, 590 N.E.2d at 742-43).

n207 Id. at 403 (Wright, J., dissenting).

n208 Id. (Wright, J., dissenting).

n209 Id. (Wright, J., dissenting).

n210 Id. (Wright, J., dissenting). The dissent stated,

Appropriate analysis in the case cannot, and should not, end with the broad conclusion that an individual has a jury-trial right with respect to tort actions. This case presents a much narrower question: whether a plaintiff has a right to have a jury decide the amount of the punitive damages award. That is the issue and the majority simply fails to come to grips with it.

Id. (Wright, J., dissenting).

n211 Id. (Wright, J., dissenting) (citing Tull v. United States, 481 U.S. 412 (1987); Colgrove v. Battin, 413 U.S. 149 (1973)).

n212 See id. at 403 n.2 (Wright, J., dissenting).

n213 Id. (Wright, J., dissenting).

n214 Id. at 403 (Wright, J., dissenting).

n215 Id. (Wright, J., dissenting).

n216 Id. (Wright, J., dissenting).

n217 Id. at 403-04 (Wright, J., dissenting).

n218 Id. at 404 (Wright, J., dissenting).

n219 Id. (Wright, J., dissenting) (citing Preston v. Murty, 512 N.E.2d 1174, 1176 (Ohio 1987)).

n220 Id. (Wright, J., dissenting). The dissent noted that the Printup court had also concluded that an assessment of punitive damages is not a fundamental element. Id. (Wright, J., dissenting) (citing Smith v. Printup, 866 P.2d 985, 994 (Kan. 1993)). The Printup opinion is discussed supra notes 165-85 and accompanying text.

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n221 Zoppo, 644 N.E.2d at 404 (Wright, J., dissenting).

n222 Id. (Wright, J., dissenting). The similarity between assessing punitive damages and criminal sentencing has been recognized by several commentators. See infra note 328 and accompanying text.

n223 Zoppo, 644 N.E.2d at 404 (Wright, J., dissenting).

n224 Id. (Wright, J., dissenting).

n225 Id. (Wright, J., dissenting).

n226 Id. (Wright J., dissenting) (citing Smith v. Printup, 966 P.2d 985, 994 (Kan. 1993)). The Printup case is discussed supra notes 165-85 and accompanying text.

n227 See Zoppo, 644 N.E.2d at 404 (Wright, J., dissenting).

n228 See 481 U.S. 412, 425-27 (1987).

n229 873 F.2d 736, 742 (4th Cir. 1989), overruled by Defender Indus. v. Northwestern Mut. Life Ins. Co., 938 F.2d 502 (4th Cir. 1991) (en banc).

n230 938 F.2d at 507.

n231 866 P.2d 985, 994, 998 (Kan. 1993).

n232 644 N.E.2d 397, 401 (Ohio 1994).

n233 866 P.2d 985, 994, 998 (Kan. 1993).

n234 644 N.E.2d 397, 401 (Ohio 1994).

n235 See Colgrove v. Battin, 413 U.S. 149, 152-57 (1973); Tull v. United States, 481 U.S. 412, 426 (1987).

n236 Colgrove, 413 U.S. at 157 (quoted in Tull, 481 U.S. at 426).

n237 See, e.g., Colgrove, 413 U.S. at 157; Tull, 481 U.S. at 425-27.

n238 Tull, 481 U.S. at 426 n.9. The Court's statements are quoted in the text accompanying note 92, supra.

n239 See Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 403-04 (Ohio 1994) (Wright, J., dissenting); Shamblin's Ready Mix, Inc. v. Eaton Corp., 873 F.2d 736, 742 (4th Cir. 1989) (concluding that an assessment of punitive damages is not a fundamental element), overruled by Defender Indus. v. Northwestern Mut. Life Ins. Co., 938 F.2d 502 (4th Cir. 1991) (en banc); see also Colleen P. Murphy, Integrating the Constitutional Authority of Civil and Criminal Juries, 61 GEO. WASH. L. REV. 723, 802-03 (1993) (noting that punitive damages are penal in nature, similar to civil penalties and criminal sentencing, and arguing that the Seventh Amendment does not bar judicial assessment of punitive damages); Jonathan Kagan, Comment, Toward a Uniform Application of Punishment: Using the Federal Sentencing Guidelines as a Model for Punitive Damage Reform, 40 UCLA L. REV. 753, 772 (1993) ("Efforts to restrict jury discretion in punitive damage determinations do not seem to run afoul of the Constitution."); Pritchard, supra note 5, at 1237-38 (stating that judicial assessment of punitive damages appears to be constitutional). But see Defender, 938 F.2d at

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507 (concluding that an assessment of punitive damages is a fundamental element of trial by jury); Scheiner, supra note 6, at 18497 (arguing that jury assessment of punitive damages is a fundamental element because the framers intended for the jury to protect the interests of common people and because the amount of damages awarded may determine whether a plaintiff chooses to vindicate his rights).

n240 Gertz v. Welch, 418 U.S. 323, 350 (1974).

n241 Id.

n242 See Tull, 481 U.S. at 425-27.

n243 Id. at 422 n.7.

n244 Id. at 425-27.

n245 For a discussion of the similarity between punitive damages and criminal sentencing, see infra note 328 and accompanying text.

n246 See Zoppo, 644 N.E.2d at 403-04 (Wright, J., dissenting) (applying the fundamental elements test and concluding that an assessment of punitive damages is not a fundamental element); Kagan, supra note 239, at 772; Murphy, supra note 239, at 802-03 ("The Constitution should not be deemed to guarantee jury calculation of punitive damages, just as it does not guarantee jury participation in either civil penalty assessment or in certain aspects of sentencing.").

n247 Zoppo, 644 N.E.2d at 403-04 (Wright, J., dissenting); see also Colgrove v. Battin, 413 U.S. 149, 157 (1973) (stating that a 12-member jury is not a fundamental element of trial by jury because it is not necessary for a fair and equitable resolution of factual issues); Tull, 481 U.S. at 426 n.9 (indicating that the Seventh Amendment may not extend to the remedy phase of a civil trial).

n248 Gertz v. Welch, 418 U.S. 323, 350 (1974). For a discussion of the purposes of punitive damages, see supra notes 29-36 and accompanying text.

n249 Murphy, supra note 239, at 802-03 ("The typical purpose of punitive damages is not compensation to the plaintiff, but furthering public policy goals such as retribution and deterrence. Thus, the Constitution should not be deemed to guarantee jury calculation of punitive damages . . . ."). (footnotes omitted); Zoppo, 644 N.E.2d at 403-04 (Wright, J., dissenting) (applying the fundamental elements test and concluding that an assessment of punitive damages falls outside the fundamental role of a jury).

n250 413 U.S. 149 (1973). For a discussion of the case, see supra notes 60-70 and accompanying text.

n251 Colgrove, 413 U.S. at 157.

n252 Colgrove could conceivably be construed broadly to require jury resolution of all factual issues. See id. at 157 (stating "the purpose of the jury trial . . . in civil cases is to assure a fair and equitable resolution of factual issues . . . "). However, such a broad reading of Colgrove would be inconsistent with Tull. In Tull, the Court found that an assessment of civil penalties is not a fundamental element of trial by jury. Tull, 481 U.S. at 425-27. Although factual issues may be raised regarding the amount of civil penalties necessary to punish a defendant, the Court found that these issues need not be resolved by a jury. See id. In fact, the Court indicated that the Seventh Amendment may not extend to the remedy phase of a civil trial. Id. at 426 n.9. Thus, Colgrove may be construed as protecting only a

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defendant's right to have liability and compensatory damages determined by a jury. See id. (indicating that the Seventh Amendment may not extend to the remedy phase of a civil trial); Zoppo, 644 N.E.2d at 403-04 (Wright, J., dissenting) (applying the fundamental elements test and concluding that punitive damages may be assessed by a judge); Shamblin's Ready Mix, Inc. v. Eaton Corp., 873 F.2d 736, 740-42 (4th Cir. 1989) (applying the fundamental elements test and concluding that punitive damages may be assessed by a judge), overruled by Defender Indus. v. Northwestern Mut. Life Ins. Co., 938 F.2d 502 (4th Cir. 1991) (en banc).

n253 See supra note 15 and accompanying text.

n254 481 U.S. 425-27 (1987). For a discussion of the case, see supra notes 71-93 and accompanying text.

n255 Tull, 481 U.S. at 425-27.

n256 See Shamblin's, 873 F.2d at 741-42; Murphy, supra note 239, at 802-03.

n257 One commentator has argued that punitive damages must be distinguished from civil penalties because punitive damages are awarded to a private plaintiff, rather than the government, and the risk of judicial bias in favor private wealth and power is therefore greater. Scheiner, supra note 6, at 209-12. However, the U.S. Supreme Court has explicitly recognized the similarity between civil penalties and punitive damages. Tull, 481 U.S. at 422 n.7 (noting that civil penalties are similar to punitive damages in that both exact punishment and are not fixed fines); see also Shamblin's, 783 F.2d at 741-42 (arguing that the Tull reasoning can be applied to punitive damages). Further, punitive damages and civil penalties should be likened because both are subject to discretion and serve the purposes of punishment and deterrence. Murphy, supra note 239, at 802-03 (concluding that the Seventh Amendment should not bar judicial assessment of punitive damages).

n258 See Zoppo, 644 N.E.2d at 403-04 (Wright, J., dissenting) (applying the fundamental elements test and concluding that judicial assessment of punitive damages is not a fundamental element); Shamblin's, 873 F.2d at 741-42; Murphy, supra note 347, at 802-03; see also Kagan, supra note 239, at 772 (stating that restrictions on jury discretion regarding punitive damages appear to be constitutional).

n259 The fact that this reasoning could extend to other areas was noted by one commentator, who stated: "There is nothing within Tull, however, that would limit its reasoning to civil penalties." Scheiner, supra note 6, at 208 (but arguing that Tull should be narrowly construed).

n260 See Tull, 481 U.S. at 425-27. For a discussion of the case, see supra notes 71-93 and accompanying text.

n261 Cf. Tull, 481 U.S. at 425-27.

n262 See Davis v. Omitowoju, 883 F.2d 1155, 1162 (3d Cir. 1989); Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1331 (D. Md. 1989). As one commentator explained:

The seventh amendment, however, could not bar damage caps. The amendment requires that actions and issues existing under the law be tried to a jury, not that certain actions and issues must be provided by law so that they can be tried to a jury. . . . When damages are capped, no legal issue exists concerning damages above that cap, and therefore there is no issue to be tried to a jury concerning damages above the cap.

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Scheiner, supra note 6, at 144 n.16 (citations omitted).

n263 See Tull, 481 U.S. at 426-27 ("Since Congress itself may fix the civil penalties, it may delegate that determination to trial judges.").

n264 Defender Indus. v. Northwestern Mut. Life Ins. Co., 938 F.2d 502, 507 (4th Cir. 1991) (en banc); O'Gilvie v. International Playtex, Inc., 821 F.2d 1438, 1447-48 (10th Cir. 1988); McKinnon v. City of Berwyn, 750 F.2d 1388, 1391-91 (7th Cir. 1984). However, several circuits have reduced punitive damages awards without remanding for a new trial, but they have not discussed the Seventh Amendment issue. See Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 207 (1st Cir. 1987); Bell v. City of Milwaukee, 746 F.2d 1205, 1267, 1279 (7th Cir. 1984); Guzman v. Western State Bank, 540 F.2d 948, 954 (8th Cir. 1976).

n265 Shamblin's, 873 F.2d at 740-43; Defender, 938 F.2d at 505-07.

n266 Shamblin's, 873 F.2d at 742.

n267 Defender, 938 F.2d at 507.

n268 See Zoppo v. Homestead Ins. Co., 644 N.E.2d at 403-04 (Wright, J., dissenting) (applying the fundamental elements test and concluding that assessment of punitive damages is not a fundamental element); see also Murphy, supra note 239, at 802-03 (concluding that judicial assessment of punitive damages should not be barred by the Seventh Amendment); Kagan, supra note 239, at 772 (finding that restrictions of jury discretion regarding punitive damages do not appear to violate the Seventh Amendment).

n269 See Shamblin's, 873 F.2d at 741 (citing Kennon v. Gilmer, 131 U.S. 22, 28-30 (1889)). It should be noted that the Fourth Circuit construed Kennon differently in Defender, contending the case stands for the proposition that tort damages must be assessed by a jury. Defender, 938 F.2d at 506. However, as the Shamblin's court argued, the case should not be deemed controlling regarding judicial assessment of punitive damages because the case did not address punitive damages. See Kennon, 131 U.S. at 28-30.

n270 See Shamblin's, 873 F.2d at 741-42. For a discussion of the applicability of the Tull fundamental elements test to punitive damages, see supra notes 235-49 and accompanying text.

n271 Shamblin's, 873 F.2d at 742. For a discussion of the similarities between civil penalties and punitive damages, see supra note 257 and accompanying text.

n272 Shamblin's, 873 F.2d at 742. For a discussion of the purpose and nature of punitive damages indicating that punitive damages are a fundamental element of trial by jury, see supra notes 235-49 and accompanying text.

n273 See Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 403-04 (Ohio 1994) (Wright, J., dissenting) (applying the fundamental elements test and concluding that assessment of punitive damages is not a fundamental element); Murphy, supra note 239, at 802-03 (concluding that the Seventh Amendment does not bar judicial assessment of punitive damages).

n274 938 F.2d 502, 507 (4th Cir. 1991).

n275 Id. at 506.

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n276 See id.

n277 See Zoppo, 644 N.E.2d at 403-04 (Wright, J., dissenting) (applying the fundamental elements test and concluding that assessment of punitive damages is not a fundamental element); Murphy, supra note 239, at 802-03 (concluding that the Seventh Amendment does not bar judicial assessment of punitive damages).

n278 See supra notes 235-49 and accompanying text.

n279 See Defender, 938 F.2d at 506-07. The quotations are provided supra notes 144 & 146.

n280 See Defender, 938 F.2d at 506-07.

n281 See id.

n282 For a list of courts that found judicial assessment of punitive damages unconstitutional, see supra note 264.

n283 See Zoppo, 644 N.E.2d at 403-04 (Wright, J., dissenting) (applying the fundamental elements test and concluding that assessment of punitive damages is not a fundamental element); Kagan, supra note 239, at 772 (arguing that restrictions on a jury's role in assessing punitive damages should be found constitutional); Pritchard, supra note 5, at 1239 ("Requiring the court to assess punitive damages after the jury finds liability appears to be constitutional."); Murphy, supra note 239, at 802-03 (concluding that the reasoning of Tull should be extended to permit judicial assessment of punitive damages).

n284 The Kansas jury trial guarantee provides: "The right of trial by jury shall be inviolate." KAN. CONST. Bill of Rights section 5.

n285 See Smith v. Printup, 866 P.2d 985, 993 (Kan. 1993) (stating that "the question that we must resolve, however, is whether the fact that juries historically have determined the amount of punitive damages rises to the level of a right that existed at common law").

n286 See Tull v. United States, 481 U.S. 412, 425-27 (1987). The approaches are similar in that both evaluate the element independent of other elements of the action. See id. at 426 (evaluating civil penalties without considering other elements of the plaintiff's suit); Printup, 866 P.2d at 993-94 (evaluating punitive damages without evaluating other elements of the plaintiff's suit). Further, under both approaches, courts evaluate the nature of the element. See Tull, 481 U.S. at 426-27 (considering whether the element at issue was fundamental); Printup, 866 P.2d at 994 (considering the character of the element at issue in determining whether it constituted a right).

n287 See Tull, 481 U.S. at 426.

n288 See Printup, 866 P.2d at 993.

n289 See id. at 994.

n290 See id. (observing that "punitive damages were not considered a remedy at common law, but merely incident to those causes of action in tort requesting compensatory damages"). For a discussion of this general rule, see supra note 19 and accompanying text.

n291 Printup, 866 P.2d at 994. For a discussion of the traditional doctrine and the recognized purpose of punitive damages, see supra notes 12-36 and accompanying text.

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Supreme Court has encountered two distinct issues: whether a particular cause of action requires a jury trial and whether a particular element of a cause of action mandates a jury trial. [57] In examining whether a cause of action requires a jury trial, the Court has considered both the historical analog of the action and whether the action was legal or equitable in nature. [58]

In examining an element of a cause of action, the Court has found that the right to trial by jury is invoked only if the element at issue is one of the "fundamental elements" of a jury trial. [59] Colgrove v. Battin [60] is an example of a case in which the Court considered whether an element of a jury trial was a fundamental element. The issue in Colgrove centered on whether a civil trial with a six-member jury complied with the mandates of the Seventh Amendment. [61] In considering **[*1097]** the issue, the Court discussed the language of the Seventh Amendment, noting that the language was intended to preserve the right to jury trial in suits at common law, but not to set in stone every characteristic of trial by jury. [62] The Court went on to examine the history of the Seventh Amendment, finding that the framers adopted the Seventh Amendment because they feared that the jury trial would be abolished, not because they sought to preserve every characteristic of the civil jury trial. [63]

The Court then set forth the standard for its analysis of the case before it. [64] Prior cases had held that the Seventh Amendment preserves " "the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure . . . .' " [65] In Colgrove, the Court reaffirmed this statement, noting that the Seventh Amendment does not bind federal courts to the exact procedure or details of the common-law right of trial by jury. [66]

Having set forth the standard for analysis, the Court examined whether the Seventh Amendment required a twelve-member jury to preserve the substance of the right to trial by jury. [67] The Court noted that the purpose of a jury in a civil suit is to ensure fair and equitable resolution of factual issues, [68] and it stated that the reliability of jury verdicts is not a function of jury size. [69] Thus, the Court concluded that a twelve-member jury is not a fundamental element of trial by jury. [70]

In a subsequent case, Tull v. United States, [71] the Court examined both a cause of action and an element of a cause of action, clarifying **[*1098]** how the two types of cases interact. In Tull, the United States government had sued the petitioner, a real estate developer, alleging that the developer had violated the Clean Water Act. [72] The government sought injunctive relief and civil penalties. [73] At trial, the district court denied the developer's demand for a jury trial. [74] The court then found that the developer had violated the act and imposed $ 325,000 in civil fines. [75] On appeal, the Fourth Circuit Court of Appeals affirmed, rejecting the developer's argument that he was entitled to a jury trial. [76] The Supreme Court reversed the Fourth Circuit, finding that the developer was entitled to a jury trial for a determination of liability, but was not entitled to a jury assessment of the civil penalty. [77]

The Court began by examining the developer's right to a jury trial for a determination of liability for the statutory cause of action. In resolving this issue, the Court first compared the action to the type of action that was tried by jury at common law and, second, evaluated the nature of the remedy sought. [78] Finding that the cause of action could be deemed analogous to either a legal or an equitable cause of action, [79] the Court stated, "We need not rest our conclusion on what has been called an "abstruse historical' search for the nearest 18th-century analog." [80] The Court therefore proceeded to examine the nature of the remedy sought, determining whether it was legal or equitable. [81] The Court noted that remedies aimed at punishing culpable individuals were historically issued by courts of law, where there was a right to a jury. [82] The Court further stated that the penalties issued under the Clean Water Act were punitive in nature. [83] Thus, the Court concluded **[*1099]** that the cause of action was legal, and the developer had a Seventh Amendment right to have liability determined by a jury. [84]

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n292 A difference of opinion exists regarding whether punitive damages should be deemed legal or equitable. Compare Scheiner, supra note 6, at 201-02 (arguing that punitive damages are a legal remedy) with Digital & Analog v. North Supply, 590 N.E.2d 737, 742-43 (Ohio 1992) (arguing that an award of attorney fees is a "punitive (and thus equitable) remedy") and Printup, 866 P.2d at 994 (stating that punitive damages may be an equitable remedy). The United States Supreme Court has indicated that damages that are punitive should be deemed legal. See Curtis v. Loether, 415 U.S. 189, 195-97 (1974); Tull v. United States, 481 U.S. 412, 422 (1987).

n293 Printup, 866 P.2d at 994. The court's analysis is similar to that of the dissent in Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 403-04 (Ohio 1994) (Wright, J., dissenting) (concluding that the nature and purpose of punitive damages indicate that punitive damages need not be assessed by a jury under the Ohio Constitution).

n294 Printup, 866 P.2d at 994.

n295 Id. The court stated:

Because a plaintiff does not have a right to punitive damages, the legislature could, without infringing upon a plaintiff's basic constitutional rights, abolish punitive damages. If the legislature may abolish punitive damages, then it also may, without impinging upon the right to trial by jury, accomplish anything short of that, such as requiring the court to determine the amount of punitive damages or capping the amount of the punitive damages.

Id.

n296 Tull v. United States, 481 U.S. 412, 426 (1987).

n297 Printup, 866 P.2d at 994.

n298 See id. at 997-98. The result the court reached is similar to that of the United States Supreme Court in Tull, 481 U.S. at 426, and to that of the dissenting justices of the Ohio Supreme Court in Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 403-04 (Wright, J., dissenting); see also Murphy, supra note 239, at 802-03 (arguing that judicial assessment of punitive damages should be deemed constitutional under the federal constitution); Kagan, supra note 239, at 772 (arguing that restrictions on jurors' discretion in assessing punitive damages do not appear unconstitutional under the federal constitution); Pritchard, supra note 5, at 1231, 123438 (stating that judicial assessment of punitive damages appears constitutional under the constitutions of Ohio and the United States).

n299 Zoppo, 644 N.E.2d at 403-04 (Wright, J., dissenting); see also Pritchard, supra note 5, at 1234-39 (stating that judicial assessment of punitive damages appears consistent with the Ohio Constitution). But see Koesel, supra note 6, at 78-81 (arguing that Ohio jury trial provision should be construed to bar judicial assessment of punitive damages).

n300 Zoppo, 644 N.E.2d at 404 (Wright, J., dissenting); Tull, 481 U.S. at 426 n.9 (indicating that the federal jury trial guarantee may not extend to the remedy phase of a civil trial).

n301 Ohio cases have focused on the punishment goal of punitive damages. See, e.g., Preston v. Murty, 512 N.E.2d 1174, 1176 (Ohio 1987); Zoppo, 644 N.E.2d at 404 (Wright, J.,

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dissenting). For a discussion of the purposes of punitive damages, see supra notes 29-36 and accompanying text.

n302 See Printup, 866 P.2d at 992-93; see also supra note 19 and accompanying text.

n303 Zoppo, 644 N.E.2d at 404. For a discussion of a judge's ability to achieve punishment and deterrence, see infra notes 340-57 and accompanying text.

n304 Zoppo, 644 N.E.2d at 403-04 (Wright, J., dissenting); see also Pritchard, supra note 5, at 1234-30 (stating that judicial assessment of punitive damages appears to be permissible under the Ohio jury trial guarantee); Murphy, supra note 239, at 802-03 (arguing that judicial assessment of punitive damages should be deemed constitutional under the federal constitution); Kagan, supra note 239, at 772 (arguing that restrictions on jurors' discretion in assessing punitive damages do not appear unconstitutional under the federal constitution).

It should be noted that the mandate of prior cases that the jury trial be preserved for a cause of action historically tried by jury will continue to be recognized; such a cause of action could continue to be tried by jury. For cases stating that such causes of action must be tried by jury, see Sorrell v. Thevenir, 633 N.E.2d 504, 510 (Ohio 1994), Belding v. State ex rel. Heifner, 169 N.E. 301, 301 (Ohio 1929). Only an element that does not constitute a right of trial by jury could be removed from the province of the jury. See Zoppo, 644 N.E.2d at 403-04 (Wright, J., dissenting); see also Tull, 481 U.S. at 426 (noting that a non-fundamental element is not within the protection of the Seventh Amendment); Printup, 866 P.2d at 994 (indicating that the Kansas jury trial guarantee protected an element only if it constituted a right at common law).

n305 See Zoppo, 644 N.E.2d at 403-04 (Wright, J., dissenting); see also Pritchard, supra note 5, at 1234-30 (finding that judicial assessment of punitive damages appears constitutional under the Ohio jury trial guarantee). But see Koesel, supra note 6, at 78-81 (arguing that the Ohio jury trial provision bars judicial assessment of punitive damages).

n306 See Zoppo, 644 N.E.2d at 401-02.

n307 See Koesel, supra note 6, at 70 ("Ohio courts have generally applied the historical test to ascertain whether a claim may be tried to a jury."). However, the court has not focused exclusively on history. As early as 1888, the court noted that the right to trial by jury depends on the nature of the relief sought. See Gunsaullus v. Pettit, 17 N.E. 231, 231 (1888); see also Digital & Analog Design Corp. v. North Supply Co., 590 N.E.2d 737, 741-42 (Ohio 1992) (focusing upon the historical treatment and nature of an award of attorney fees, as well as discussing persuasive authority from the United States Supreme Court, in determining whether the right to trial by jury under the Ohio Constitution extended to awarding attorney's fees).

n308 See Zoppo, 644 N.E.2d at 403-04 (Wright, J., dissenting); see also Pritchard, supra note 5, at 1234-39 (concluding that although an assessment of punitive damages historically was performed by a jury, the Ohio jury trial guarantee appeared to allow for judicial assessment of punitive damages); Colgrove v. Battin, 413 U.S 149, 156-57 (1973) (stating that the Seventh Amendment does not preserve every characteristic of trial by jury, but instead only the fundamental elements of trial by jury); Tull, 481 U.S. at 426 (noting that the federal constitution preserves only the fundamental elements of jury trial).

n309 See OHIO R. CIV. P. 38(B).

n310 See Colgrove, 413 U.S. at 157.

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n311 See OHIO CONST. art. I, section 5.

n312 See Tull, 481 U.S. at 426 n.9; Zoppo, 644 N.E.2d at 401-02.

n313 See Zoppo, 644 N.E.2d at 403-04 (Wright, J., dissenting) (examining whether an assessment of punitive damages was a fundamental element, thus constituting a right of trial by jury); see also Printup, 866 P.2d at 993-94 (examining whether an assessment of punitive damages was a right at common law); Tull, 481 U.S. at 426 (noting that the Seventh Amendment preserves only the fundamental elements of trial by jury).

n314 413 U.S. 149 (1973).

n315 481 U.S. 412 (1987).

n316 873 F.2d 736 (4th Cir. 1989), overruled by Defender Indus. v. Northwestern Mut. Life Ins. Co., 938 F.2d 502 (4th Cir. 1991) (en banc).

n317 Defender, 938 F.2d at 507.

n318 866 P.2d 985 (Kan. 1993).

n319 664 N.E.2d 397 (Ohio 1994).

n320 See, e.g., Mallor & Roberts, supra note 5, at 664-66.

n321 See M. PETERSON ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, PUNITIVE DAMAGES: EMPIRICAL FINDINGS 26-31 (1988). In the Rand Institute study, punitive damages were reduced in a significant number of cases for which post-verdict information was reported, with the likelihood of reduction having a relationship to the amount of the award. In cases with awards less than $ 50,000, damages were reduced 30 percent of the time. In contrast, in cases with awards greater than $ 50,000, damages were reduced 80 percent of the time. It should be noted that these numbers reflect both judicial reduction of damages when a case was appealed and settlements after a jury award, presumably because the parties expected damages would be reduced on appeal. See id.

n322 Studies show that juries assess higher damages awards against wealthy defendants. See, e.g., J. FLEMING, THE AMERICAN TORT PROCESS 111-12 (1988); James K. Hammitt et al., Tort Standards and Jury Decisions, 14 J. LEGAL STUD. 751, 753-56 (1985).

n323 See infra notes 364-79 and accompanying text.

n324 Compare Ellis, supra note 5, at 1008 ("The amount of punitive damages should be a decision for the judge, not the jury, as is the case with fines.") with Scheiner, supra note 6, at 187-89 (arguing that the decision should be made by a jury because it is the role of juries to engage in ad hoc norm elaboration).

n325 See Tull v. United States, 481 U.S. 412, 427 (1987); Mallor & Roberts, supra note 5, at 664.

n326 See, e.g., Mallor & Roberts, supra note 5, at 665.

n327 See, e.g., Owen, Public Good, supra note 5, at 120; Mallor & Roberts, supra note 5, at 664.

n328 The analogy between criminal sentencing and punitive damages has been noted by judges and commentators. E.g., Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 404 (Ohio

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1994) (Wright, J., dissenting); Mallor & Roberts, supra note 5, at 664-65; Reappraisal, supra note 5, at 1171. It should be noted that one commentator distinguished punitive damages from criminal sentencing because punitive damages are not sought by the government. See Scheiner, supra note 6, at 209-12. Additionally, he argued that judicial assessment of punitive damages is not constitutionally required, just as judicial sentencing is not constitutionally required. Id. However, those commentators who have compared punitive damages assessment with criminal sentencing are not arguing that the two are identical, nor that judicial assessment of punitive damages is constitutionally required; they argue only that a judge's role is similar in both contexts. See, e.g., Zoppo, 644 N.E.2d at 404 (Wright, J., dissenting); Mallor & Roberts, supra note 5, at 664-65.

n329 See Shamblin's Ready Mix v. Eaton Corp., 873 F.2d 736, 741-42 (4th Cir. 1989) (noting the comparison between civil penalties and punitive damages and citing Supreme Court cases recognizing the similarity). But see Scheiner, supra note 6, at 209-12 (distinguishing between civil penalties and punitive damages). For a discussion of the analogy between civil penalties and punitive damages, see supra note 257 and accompanying text.

n330 Punishment and deterrence are generally recognized as the primary goals of punitive damages. See supra notes 29-36 and accompanying text.

n331 See Mallor & Roberts, supra note 5, at 664; Owen, Public Good, supra note 5, at 120.

n332 See Scheiner, supra note 6, at 188-89.

n333 Id. However, at least one commentator has argued that the work of juries entails very few cases in which their knowledge of community standards is valuable. George L. Priest, Justifying the Civil Jury, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 103, 111-17 (Robert E. Litan ed., 1993). In fact, cases involving complex or conflicting social values or issues of governmental power comprised less than one-fourth of the cases heard by juries in a study of Cook County courts. Id. at 131. In contrast, juries spent the majority of their time resolving issues from routine accidents involving routine injuries. See id. at 111-17.

n334 See Scheiner, supra note 6, at 187-89.

n335 See id.

n336 See Ellis, supra note 5, at 1008.

n337 Gertz v. Welch, 418 U.S. 323, 350 (1974) (stating that punitive damages are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence").

n338 For a discussion of this analogy, see supra note 328.

n339 Ellis, supra note 5, at 1006-08.

n340 Compare Owen, Public Good, supra note 5, at 120 ("Judges have more familiarity than do juries with distinguishing "wrong' from "very wrong' behavior (and fixing the appropriate level of punishment therefor) upon a formal social scale . . . .") with Scheiner, supra note 6, at 170-79 (arguing that juries rival judges at achieving punishment and deterrence).

n341 Commentators have argued that judges are better than juries at making this determination because judges are more experienced and less susceptible to bias and confusion. See, e.g., Mallor & Roberts, supra note 5, at 664; Ellis, supra note 5, at 1006-08; DuBois, supra note 5, at 353.

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n342 Malcolm E. Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 VA. L. REV. 269, 302 (1983); Owen, Products Liability, supra note 5, at 132021; see also Mallor & Roberts, supra note 5, at 664 (arguing that judges are better at evaluating public policy concerns and economic factors).

n343 See Scheiner, supra note 6, at 170-79.

n344 See id. at 173. An example of a case in which judge and jury may differ is a breach of contract suit. Id. A judge may find that if the breach was an "efficient breach," or a breach resulting in a savings of money, large damages are not warranted to punish the conduct. Id. However, a jury may believe that it is morally wrong to break one's word, and it may assess damages to punish this moral wrong. Id. Because it cannot be proven that efficiency is more important than keeping commitments, it cannot be shown that the judge's conclusion is better than the jury's. Id.

n345 See id. at 171-73 & 188-89.

n346 Id. at 173-79.

n347 Id. at 173.

n348 Id. at 174 (footnotes omitted).

n349 Id. at 174-75.

n350 Id. at 175.

n351 Id. at 178 ("If optimal deterrence is the goal, jury assessment of the amount of the award makes little sense.").

n352 Id. at 178-79.

n353 Id. ("The jury serves its traditional function of norm elaboration.").

n354 Id.

n355 See id. at 170-79. With regard to meeting the goal of punishment, Scheiner stated: "Whether to inflict punishment is a purely moral judgement . . . . One cannot conclude that judges are right and juries are wrong." Id. at 173. With regard to achieving deterrence, he stated, "If optimal deterrence is the goal, jury assessment of the amount of the award makes little sense. . . . In contrast, jury assessment of punitive damages makes sense if the goal of total deterrence is adopted." Id. at 178. He then argued that a jury fulfills its traditional function of elaborating norms when it assesses punitive damages. Id. at 178-79. It should be noted, additionally, that Scheiner argued that greater uncertainty costs accompany jury assessment of punitive damages, and these uncertainty costs may result in increased deterrence. Id. at 179.

n356 See Mallor & Roberts, supra note 5, at 664.

n357 See id. at 664; Owen, Public Good, supra note 5, at 120.

n358 Scheiner, supra note 6, at 145-60.

n359 Id. The commentator discussed the views of the Anti-Federalists in arguing that the Tull case, discussed supra notes 71-93 and accompanying text, should not be extended to

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permit judicial assessment of punitive damages. Scheiner, supra note 6, at 145-60 & 204-12.

n360 Scheiner, supra note 6, at 145-60.

n361 Compare id. (arguing that the framers intended for punitive damages to be assessed by a jury) with Tull v. United States, 481 U.S. 412 (1987), which stated:

Although " 'we have almost no direct evidence concerning the intention of the seventh amendment itself,' the historical setting in which the Seventh Amendment was adopted highlighted a controversy that was generated . . . by fear that the civil jury itself would be abolished." We have been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial.

Id. at 426 n.9 (citations and footnote omitted).

n362 Tull, 481 U.S. at 426 n.9.

n363 Scheiner, supra note 6, at 145-60.

n364 See Mallor & Roberts, supra note 5, at 664 (arguing that judges "are less likely to be impressed by the histrionics of counsel and so to be inflamed by passion or prejudice"); Pritchard, supra note 5, at 1241 (stating that jurors "may be less likely than a trial judge to fully comprehend the true purpose of punitive damages awards").

n365 See Robert MacCoun, Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries, VERDICT: ASSESSING THE CIVIL JURY SYSTEM, supra note 333, at 137, 151 ("A growing body of studies indicates that some jurors may fail to comprehend as much as 50 percent of the judge's instructions regarding the law.") (citation omitted). See generally Walter W. Steele, Jr. & Elizabeth G. Thornburg, Jury Instructions: A Persistent Failure to Communicate, 67 N.C. L. REV. 77 (1988). But see Scheiner, supra note 6, at 164 n.120 (stating that claims that juries are typically irrational or ignorant "must be wrong in light of evidence that juries obey instructions and understand significance of expert testimony").

n366 See Pritchard, supra note 5, at 1241; Ellis, supra note 5, at 1006-07.

n367 DuBois, supra note 5, at 353; Mallor & Roberts, supra note 5, at 665. The reason for jurors' willingness to assess higher verdicts against wealthy corporate defendants has been subject to debate. See MacCoun, supra note 365, at 162-64.

n368 MacCoun, supra note 365, at 162 (noting several studies have concluded that juries awarded significantly higher awards against corporate or government defendants than individual defendants).

n369 For a discussion of the effect of the attractiveness of a plaintiff on a civil jury, see WALTER F. ABBOTT ET AL., JURY RESEARCH: A REVIEW AND BIBLIOGRAPHY section 5.19 (1993). The behavior of counsel may also improperly sway a jury. See Mallor & Roberts, supra note 5, at 664 (stating that judges are "less likely to be impressed by the histrionics of counsel").

n370 See Scheiner, supra note 6, at 159, 168-69.

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n371 Id. at 168 n.137.

n372 Id.

n373 Id. ("Jurors act free from any concern for the political ramifications of their decisions.").

n374 See Stephen A. Saltzburg, Improving the Quality of Jury Decisionmaking, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, supra note 333, at 162 ("A jury selected from a cross section of the community is likely to have members whose biases or prejudices cancel or neutralize each other, but nothing cancels or neutralizes those of a judge.").

n375 For example, a judge may intentionally award less in damages to benefit a wealthy defendant or the government, see Scheiner, supra note 6, at 159, while a jury may intentionally award greater damages against a wealthy defendant, see DuBois, supra note 5, at 353 (arguing that judicial assessment may remedy the "Robin Hood" philosophy of jurors).

n376 Mallor & Roberts, supra note 5, at 664; Pritchard, supra note 5, at 1240-41.

n377 Mallor & Roberts, supra note 5, at 664. As one commentator stated:

The judge very often perceives the stimulus that moves the jury, but does not yield to it. . . . The perennial amateur, layman jury cannot be so quickly domesticated to official role and tradition; it remains accessible to stimuli which the judge will exclude.

HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY, 497-98 (1966).

n378 Ellis, supra note 5, at 1006-07.

n379 See Mallor & Roberts, supra note 5, at 664; Pritchard, supra note 5, at 1240-41; Ellis, supra note 5, at 1006-07.

n380 See Pritchard, supra note 5, at 1240-41 ("The coupling of [the stimuli of passion and bias] and the fact that juries hear only one case create an environment of uncertainty and unpredictability that the trial judge can avoid."); Owen, Products Liability, supra note 5, at 1320; Peter H. Schuck, Mapping the Debate on Jury Reform, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, supra note 333, at 306, 312.

It should be noted that at least one commentator has argued that punitive damages awards would not be more predictable with judicial assessment. See Scheiner, supra note 6, at 180. Because of the vague instructions for the assessment of punitive damages and inconsistencies in the use of remittitur, the commentator argues that punitive damage awards would not be more predictable. Id. However, the commentator contends that punitive damage awards would be generally lower with judicial assessment of punitive damages. Id. It appears contradictory to argue that punitive damage awards would not be more predictable, and yet to argue that they would be generally lower; in other words, if punitive damages would be lower, that must mean that they would also be more predictable.

n381 See Mallor & Roberts, supra note 5, at 664.

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n382 Ellis, supra note 31, at 55-57. Commentators generally acknowledge that there is uncertainty regarding the amount of punitive damages that a jury will assess, and this uncertainty results in additional litigation costs. See, e.g., id. at 43-57; Scheiner, supra note 6, at 178-79. Many commentators have perceived these additional costs as a negative result of jury assessment of damages, see, e.g., Ellis, supra note 31, at 43-57, but one commentator has argued that the uncertainty costs may be perceived as a positive result because these costs may lead to greater deterrence of misconduct, see Scheiner, supra note 6, at 178-79.

n383 Ellis, supra note 31, at 56-57; George L. Priest, The Role of the Civil Jury in a System of Private Litigation, 1990 U. CHI. L. REV. 199.

n384 Ellis, supra note 31, at 56-57; Priest, supra note 383, at 199.

n385 See Priest, supra note 383, at 199. This may lead to greater trial delay. Id.

n386 See Scheiner, supra note 6, at 194-96.

n387 See id. at 195-96 (contending that jury assessment of damages is a form of democracy that should be preserved). However, at least one commentator has argued that the actual participatory and educational value of jury service is limited because of the small likelihood that citizens will be called for jury service. See Priest, supra note 333, at 120-24. In fact, a study of juries in Cook County indicated that jurors served, on average, once in every 260.2 years. Id. at 122.

n388 Scheiner, supra note 6, at 195-96.

n389 See id. at 194-96.

n390 See Koesel, supra note 6, at 79 ("Judges are thought to make more consistent, lower awards.").

n391 Scheiner, supra note 6, at 194-95 ("To both plaintiffs and defendants, the sum total of tort doctrine, jury preferences, judicial intervention and appellate decision is reflected in one variable--the expected verdict. . . . Thus, the allocation of discretionary power over damages determines who governs the civil litigation system. . . .") (footnote omitted).

n392 See id.

n393 See Ellis, supra note 5, at 1008 (arguing that judicial assessment would enhance fairness and predictability); Mallor & Roberts, supra note 5, at 664 (arguing that judicial assessment will increase the likelihood that punitive damages will be applied in a "principled manner").

n394 See KAN. STAT. ANN. section 60-3701(a) (1994) ("The trier of fact shall determine . . . whether punitive damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted by the court to determine the amount of such damages to be awarded."); CONN. GEN. STAT. ANN. section 52-240b (1991) ("If the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such damages . . . .").

n395 See KAN. STAT. ANN. section 60-3701; CONN. GEN. STAT. ANN. section 52-240b.

n396 See KAN. STAT. ANN. section 60-3701; CONN. GEN. STAT. ANN. section 52-240b. For a discussion of the purposes of punitive damages, see supra notes 32-40 and accompanying text.

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n397 See Fullilove v. Klutznick, 448 U.S. 448, 502 (1980) ("[Congress'] Constitutional role is . . . to make policy . . . .").

n398 For a discussion of different methods of tort reform, see supra notes 37-50 and accompanying text.

n399 For state statutes requiring judicial assessment of punitive damages, see supra note 4.

n400 See, e.g., Fullilove, 448 U.S. at 502 ("[Congress'] Constitutional role is . . . to make policy . . . ."); Kosak v. United States, 465 U.S. 848, 862 (1984) ("Petitioner and some commentators argue that [the statute at issue] should not be construed in a fashion that denies an effectual remedy to many persons. . . . That contention has force, but it is properly addressed to Congress, not to this Court.").

n401 Congress has, however, required judicial assessment of damages in certain areas. For federal statutes requiring judicial assessment of punitive damages, see, for example, Petroleum Marketing Practices Act, 15 U.S.C. section 2805(d)(2) (1988) (requiring judicial assessment of punitive damages); Patent Act, 35 U.S.C. section 284 (1988) (permitting judicial assessment of damages).

n402 As one commentator stated: "In the absence of legislation limiting the jury's participation in calculating punitive damages, federal courts perhaps should follow what Haslip called the "common-law method for assessing punitive awards': initial determination by the jury and judicial review for reasonableness." Murphy, supra note 239, at 803 (footnote omitted) (but adding that initial determination by a judge may be more sensible). The question of whether courts, in fact, have the constitutional power under the Seventh Amendment to assess punitive damages is discussed supra notes 235-83 and accompanying text.

n403 938 F.2d 502 (4th Cir. 1991) (en banc).

n404 Id. at 505. For a discussion of the facts of the case, see supra notes 129-32 and accompanying text.

n405 The standard on appeal for a punitive damages award has been abuse of discretion. See supra note 28 and accompanying text. The same standard of appeal would presumably apply to judicial assessment of punitive damages. See DuBois, supra note 5, at 353 (advocating judicial assessment and noting that "there remains the remedy of appellate review . . .").

n406 873 F.2d 736 (4th Cir. 1989), overruled by Defender, 938 F.2d 502.

n407 Shamblin's, 873 F.2d at 740.

n408 Id. at 742-43.

n409 See id. at 742 ("We conclude that remanding for yet a third trial would constitute an enormous waste of judicial as well as the parties' resources.")

n410 See KAN. STAT. ANN. section 60-3701(a) (1994); OHIO REV. CODE ANN. section 2315.21(C)(2) (Anderson 1995) (found unconstitutional by the Ohio Supreme Court).

n411 For an argument agreeing with the Kansas Supreme Court's decision in Printup that judicial assessment of punitive damages can be implemented consistently with the Kansas

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jury trial guarantee, see supra notes 284-98 and accompanying text. For an argument disagreeing with the Ohio Supreme Court's decision in Zoppo that judicial assessment of punitive damages cannot be implemented consistently with the Ohio jury trial guarantee, see supra notes 299-313 and accompanying text.

n412 For an evaluation of the policy arguments regarding judicial assessment of punitive damages, see supra notes 320-96 and accompanying text.

n413 Defender, 938 F.2d at 507; O'Gilvie v. International Playtex, Inc., 821 F.2d 1438, 1447-48 (10th Cir. 1988); McKinnon v. City of Berwyn, 750 F.2d 1388, 1391-91 (7th Cir. 1984). However, several circuits have reduced punitive damages awards without remanding for a new trial, but they have not discussed the Seventh Amendment issue. See Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 207 (1st Cir. 1987); Bell v. City of Milwaukee, 746 F.2d 1205, 1267, 1279 (7th Cir. 1984); Guzman v. Western State Bank, 540 F.2d 948, 954 (8th Cir. 1976). For a discussion of the consistency of judicial assessment of punitive damages with the Seventh Amendment, see supra notes 235-83 and accompanying text.

n414 See Zoppo v. Homestead Ins. Co., 664 N.E.2d at 403-04 (Ohio 1994) (Wright, J., dissenting) (applying the fundamental elements test and concluding that assessment of punitive damages is not a fundamental element); see also Murphy, supra note 239, at 802-03 (concluding that the reasoning of Tull should be extended to permit judicial assessment of punitive damages); Kagan, supra note 239, at 772 ("Efforts to restrict jury discretion in punitive damage determinations do not seem to run afoul of the Constitution."); Pritchard, supra note 5, at 1239 ("Requiring the court to assess punitive damages after the jury finds liability appears to be constitutional.").

n415 The Kansas Supreme Court interpreted the state's jury trial provision to permit judicial assessment of punitive damages. See Smith v. Printup, 866 P.2d 985 (Kan. 1993). For a discussion of the case, see supra notes 165-85 and accompanying text. In contrast, the Ohio Supreme Court interpreted the Ohio jury trial provision to bar judicial assessment of punitive damages. See Zoppo, 644 N.E.2d at 397. For a discussion of the case, see supra notes 192-206 and accompanying text.

n416 Owen, Public Good, supra note 5, at 120; Mallor & Roberts, supra note 5, at 664. For arguments that judges are better at achieving punishment and deterrence, see supra notes 340-42 and accompanying text.

n417 See Ellis, supra note 5, at 1008 ("The amount of punitive damage should be a decision for the judge. . . . These changes in procedure would render the process less unfair. They would also reduce the uncertainty associated with punitive damages claims and enhance predictability . . . ."). For arguments that judicial assessment of punitive damages will result in a reduction of uncertainty costs, see supra notes 380-85 and accompanying text.

n418 See Printup, 866 P.2d at 994; Zoppo, 644 N.E.2d at 403-04.

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The Court also considered whether the Seventh Amendment guarantees trial by jury for the assessment of civil penalties, an element of a cause of action. [85] The Court, quoting Colgrove, stated that the question was whether the element involved the " 'substance of the commonlaw right of trial by jury' " or a " 'fundamental' " element of trial by jury. [86] The Court noted that fundamental elements must be tried by a jury, [87] but it stated that Congress could choose to set a fixed amount for civil fines without reference to judge or jury. [88] Because the element of fixing civil fines need not be presented to a jury, the Court reasoned that the element of fixing civil penalties is not a fundamental element of trial by jury. [89] The Court also noted that an assessment of civil penalties entails discretionary calculations with multiple factors, and such calculations are usually performed by a judge. [90]

In a footnote, the Court further clarified the reach of Seventh Amendment protections with regard to the remedy phase of a civil trial. [91] To that end, the Court stated, "Nothing in the Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial, . . . and we have been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial." [92] Thus, in the Court's view, neither the **[*1100]** language of the Seventh Amendment nor historical evidence showed that the founding fathers intended to extend the right to trial by jury to the remedy phase of a trial. [93]

2. Applying the Court's Analysis to the Assessment of Punitive Damages

The Court has not spoken directly to the issue of whether a judge may assess punitive damages consistently with the Seventh Amendment. [94] Since Tull, the Court has issued several noteworthy decisions regarding punitive damages, but none has addressed the issue of judicial assessment. [95] However, some guidance is available from the federal circuit courts of appeal. The Fourth Circuit has twice examined the practice of judicial assessment of punitive damages in light of Tull. [96] These cases specifically addressed the issue of whether a judge can remit a jury verdict of punitive damages without granting the plaintiff the option of a new trial for a jury determination of punitive damages. [97] Initially, in Shamblin's Ready Mix, Inc. v. Eaton Corp., [98] **[*1101]** the Fourth Circuit concluded that the Seventh Amendment does not prohibit judicial assessment of damages. [99] However, in Defender Industries v. Northwestern Mutual Life Insurance Co., [100] the court overruled Shamblin's and concluded that the Seventh Amendment does prohibit judicial assessment of punitive damages. [101] This section examines the reasoning of both Shamblin's and Defender.

In Shamblin's, the plaintiff brought equipment to the defendant for repair and sued in conversion when the defendant failed to return the equipment. [102] At trial, a jury awarded $ 3,531 in compensatory damages and $ 600,000 in punitive damages. [103] The defendant appealed, and the Fourth Circuit affirmed the compensatory damages award, but set aside the punitive damages award, finding that the punitive damages award was tainted by the plaintiff's improper and prejudicial closing argument. [104] On remand to determine the amount of punitive damages, a jury awarded $ 650,000. [105] The defendant appealed, and the Fourth Circuit determined that the award was excessive, finding that it was based on improper, prejudicial evidence and a misleading closing argument by plaintiff's counsel. [106] The court, without remanding for a third jury determination of punitive damages, reduced the award to $ 60,000. [107] The court deemed this amount appropriate to punish the company because relatively low-ranking employees were responsible for the misconduct. [108]

In rendering its decision, the court discussed the constitutionality of judicial assessment of punitive damages. [109] Specifically, the court examined whether the Seventh Amendment prohibits a reduction of a **[*1102]** punitive damages award by a judge without remanding for a new trial. [110] The court began by examining the practices of other federal circuit courts of appeals. [111] It noted that four circuits--the first, sixth, seventh, and eighth--had reduced an award of punitive damages without remanding for a new trial. [112] In three of those cases, the courts reduced awards that were determined by juries, [113] but none of the courts

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discussed the Seventh Amendment. [114] In a footnote, the Shamblin's court mentioned that the Seventh Circuit, in a subsequent case, concluded that the Seventh Amendment prohibits judicial assessment of damages. [115] However, the Fourth Circuit deemed this case contrary to Tull and declined to follow it. [116]

Having discussed the opinions of the federal circuit courts, the court then examined relevant precedent from the United States Supreme Court. [117] First, it distinguished an 1889 case, Kennon v. Gilmer. [118] In that case, the Fourth Circuit explained, the United States Supreme Court found that the Seventh Amendment prohibits judicial assessment of compensatory damages, but the Court did not address the assessment of punitive damages. [119] The Fourth Circuit stated that Kennon was not controlling in Shamblin's because of the marked differences between compensatory damages and punitive damages. [120] Specifically, an award of compensatory damages is intended to make a plaintiff whole, and it involves findings of fact regarding the extent of harm to the plaintiff. [121] In contrast, punitive damages serve a public goal by punishing and deterring reprehensible conduct. [122]

After distinguishing Kennon, the Fourth Circuit discussed the Su- **[*1103]** preme Court's decision in Tull. [123] Reasoning that neither the language of the Seventh Amendment nor the historical evidence presented to the Court suggested that the Seventh Amendment extends to the remedy phase of a civil trial, [124] the Tull court found that the plaintiff was not entitled to an assessment of civil penalties by a jury. [125] The Fourth Circuit found this reasoning applicable to the assessment of punitive damages. [126] In support of its conclusion, the Fourth Circuit noted that the Supreme Court has recognized the similarity between civil penalties and punitive damages. [127] The court concluded that, like the assessment of civil penalties, the assessment of punitive damages is not a fundamental element of trial by jury. [128]

However, the Fourth Circuit reexamined its reasoning en banc in Defender Industries v. Northwestern Mutual Life Insurance Co. [129] In Defender, the plaintiff brought an action for, inter alia, fraud stemming from a contract with the defendant, an insurance company. [130] At the district court level, a jury awarded $ 106,513.74 in actual damages and $ 5,000,000 in punitive damages. [131] The district court, without remanding for a new trial, found the award of punitive damages excessive and reduced it to $ 10,000. [132]

On appeal, the Fourth Circuit noted that the district court failed to follow traditional procedure in assessing punitive damages when it did not offer the option of a new trial. [133] Instead, the district court had **[*1104]** exercised authority as permitted under the Shamblin's decision. [134] The Fourth Circuit then questioned the underlying basis for its Shamblin's decision. [135] The Fourth Circuit noted that the Shamblin's court based its decision in large part on Tull, but it stated that the Tull decision was narrower than the Shamblin's court had believed. [136] The Fourth Circuit conceded that Tull contained "some rather broad language," but it maintained that Tull should be construed as applying to civil penalties, and not extending to punitive damages. [137]

Having expressed its doubt about the Shamblin's reasoning, the Fourth Circuit then undertook a new examination of whether an assessment of punitive damages is a fundamental element of trial by jury. [138] Beginning its examination, the Fourth Circuit discussed decisions issued by the United States Supreme Court regarding punitive damages. [139] The Fourth Circuit stated that the Court's 1889 decision in Kennon, which it had discussed in Shamblin's, stood for the proposition that tort damages must be assessed by a jury. [140] The Fourth Circuit then discussed two decisions issued by the Supreme Court since Tull, though these cases did not speak directly to the Seventh Amendment issue. [141]

First, the Defender court discussed the opinion of the Supreme Court in Browning-Ferris Industries v. Kelco Disposal, Inc. [142] In Browning-Ferris, the Supreme Court addressed the application of the Eighth Amendment to the assessment of punitive damages, but it also discussed the procedure that has been followed in reviewing an award of punitive damages.

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[143] Specifically, the Court explained that the role of a district court is to determine whether a jury's verdict is within the confines of state law and to determine whether a new trial or remittitur should be ordered. The role of the appellate court, then, is to review lower court proceedings for an abuse of discretion. Finally, the traditional role of the United States Supreme Court is to determine whether the appellate court erred, but not to substitute its judgment for **[*1105]** that of a jury. [144]

Second, the Fourth Circuit also briefly referred to the United States Supreme Court's decision in Pacific Mutual Life Insurance Co. v. Haslip. [145] In Haslip, the Court explained that the traditional commonlaw approach entailed assessment of punitive damages by a jury, with appellate review ensuring reasonableness of the award. [146] The Fourth Circuit contended that the Court's statements in Browning-Ferris and Haslip indicated that jury assessment of punitive damages is a fundamental element of a civil trial. [147]

After discussing opinions issued by the United States Supreme Court, the Defender court examined the practice of other federal circuit courts with regard to judicial assessment of punitive damages. [148] The court noted that several circuits have reduced awards of punitive damages without remanding for a new trial and without discussing the Seventh Amendment issue. [149] However, the Fourth Circuit noted that only two circuits had considered the issue, and both concluded that the Seventh Amendment guarantees the right of jury assessment of punitive damages. [150] **[*1106]**

The Defender court, having discussed the decisions of the United States Supreme Court and federal circuit courts, concluded that the assessment of punitive damages by a jury is a fundamental element of trial by jury. [151] The court therefore overruled Shamblin's and held that the Seventh Amendment requires assessment of punitive damages by a jury. [152]

In summary, the United States Supreme Court in Tull concluded that, in determining whether an element of a civil trial must be tried by a jury under the Seventh Amendment, a court must consider whether the element is a fundamental element of trial by jury. [153] Further, the Court examined whether a specific remedy, a civil fine, was a fundamental element, [154] and the Court made general statements about the applicability of the Seventh Amendment to the remedy phase of a civil trial. [155] However, the Court has not spoken directly to the issue of the constitutionality of judicial assessment of punitive damages. The confusion that exists regarding this issue is evidenced by the strikingly divergent decisions of the Fourth Circuit in Shamblin's and Defender. [156]

B. Kansas Right to Trial by Jury

Like the federal courts, state courts have experienced confusion in their analyses of judicial assessment of punitive damages under their relevant jury trial provisions. [157] The highest courts of Kansas and Ohio have addressed the issue, reaching different results. [158] An examination of the Kansas analysis should include a discussion of the state's practice regarding punitive damages, the Kansas jury trial provision **[*1107]** and, finally, Smith v. Printup, the case in which the Kansas Supreme Court determined whether the Kansas jury trial provision barred judicial assessment of punitive damages. [159]

The Kansas practice regarding punitive damages is similar to approaches of other states. [160] Kansas courts have stated that a plaintiff has no general right to punitive damages; the right is generally dependent upon the receipt of at least nominal damages. [161] Additionally, Kansas courts, like a majority of other state courts, recognize that punitive damages serve to punish a defendant and to deter a defendant and others from future misconduct. [162] Thus, Kansas courts have stated that punitive damages are not compensatory in nature, but instead they are awarded by focusing on the character of a defendant's actions. [163]

The Kansas guarantee of trial by jury, section 5 of the Bill of Rights of the Kansas

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Constitution, provides, "The right of trial by jury shall be inviolate." [164] The Kansas Supreme Court interpreted this provision in addressing the constitutionality of judicial assessment of punitive damages in Smith v. Printup. [165] In that case, a jury determined that the driver of a moving van and the company leasing his services were liable for punitive damages after the driver lost control of the van and collided into a pickup truck, resulting in two deaths. [166] The court, pursuant to Kansas statute 60-3701, assessed punitive damages against the defendants. [167]

On appeal, the defendants alleged that Kansas statute 60-3701 vio- **[*1108]** lated the guarantee of trial by jury under the Kansas Constitution. [168] The court agreed with the defendants that punitive damages were available at common law, and they were assessed by a jury. [169] However, the court stated that punitive damages are not awarded as a matter of right, [170] but because the defendant deserves punishment. [171] Additionally, the court stated that a claim for punitive damages is not a cause of action; it is incident to and dependent upon an award for actual damages. [172]

The court then set forth the issue to be resolved. [173] The court stated that the issue was whether the historical assessment of punitive damages by a jury constitutes a right that existed at common law. [174] As a threshold issue, the court noted that compensatory damages must be assessed by a jury, but it stated that this fact does not indicate that punitive damages must be assessed by a jury. [175] Instead, the court found that it must examine the character of the claim to determine whether a right to trial by jury exists. [176]

With regard to the character of a punitive damages claim, the court noted that the amount of punitive damages may be regarded as a factual issue, but the court proceeded to set forth critical characteristics of punitive damages that distinguish them from actual damages. [177] The court stated that punitive damages were not considered a remedy at common law, but they were merely incident to a cause of action. [178] It added that punitive damages are not compensatory, and there is no **[*1109]** right to punitive damages. [179] Thus, the court noted, the purpose of awarding punitive damages is not to recognize any special merit in the plaintiff's case, but to punish a defendant and deter a defendant and others. [180] Further, it stated that punitive damages may be regarded as equitable in nature. [181] Thus, the Kansas Supreme Court concluded that, despite the fact that juries had historically assessed punitive damages, a claim for punitive damages was not a right at common law. [182]

The court then reasoned that because punitive damages do not constitute a right, the legislature could constitutionally abolish punitive damages. [183] Given this broad power to abolish punitive damages, the court concluded that the legislature must have the power to take less drastic steps, such as requiring judicial assessment of punitive damages or capping the amount of punitive damages. [184] The court therefore concluded that Kansas statute 60-3701, which permits judicial assessment of punitive damages, did not violate the state's guarantee of trial by jury. [185] **[*1110]**

C. Ohio Right to Trial by Jury

An examination of judicial assessment of punitive damages under the Ohio Constitution should include a discussion of the Ohio practice regarding punitive damages, the state's jury trial provision and, finally, a discussion of Zoppo v. Homestead Insurance Co., in which the Ohio Supreme Court addressed the consistency of judicial assessment of punitive damages with the Ohio jury trial guarantee. [186] Ohio's practice regarding punitive damages has been typical of that of other states. [187] Punitive damages have not been awarded as a matter of right for the plaintiff. [188] Instead, they are awarded to punish a defendant for misconduct. [189]

The Ohio guarantee of trial by jury, Section V of Article I of the Ohio Constitution, provides that the right to trial by jury "shall be inviolate. . . ." [190] The provision has been interpreted to guarantee trial by jury for those causes of action in which the right existed at common law

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at the time of the adoption of the Ohio Constitution, [191] and it was at issue in Zoppo, where courts considered its consistency with an Ohio statute requiring judicial assessment of punitive damages. [192] At the court of appeals level in Zoppo, the court employed the Tull fundamental elements test, which had not previously been used in interpreting the Ohio jury trial provision. [193] Applying the test, the appel- **[*1111]** late court found that assessment of punitive damages is not a fundamental element of trial by jury, and the court therefore held that the statute was constitutional. [194]

On appeal, the Ohio Supreme Court did not adopt the Tull fundamental elements test. [195] In an opinion written by Justice Francis E. Sweeney, the court focused on the historical treatment of the assessment of punitive damages. [196] To that end, the court set forth its perception of the issue to be resolved, stating, "The right [to trial by jury] extends to those causes of action where the right existed at common law. Thus, in analyzing the validity of R.C. 2315.21(C)(2), we must . . . determine whether there existed a common-law right for a jury to assess the amount of punitive damages." [197] Having set forth the issue, the court noted that juries assessed punitive damages historically [198] and that punitive damages are an important part of a civil trial. [199] Thus, the court concluded that the statute violated the right to a jury trial under the Ohio Constitution because the statute interfered **[*1112]** with this traditional role. [200]

The court was unpersuaded by arguments that its reasoning in a prior case, Digital & Analog Design Corp. v. North Supply Co. [201] compelled a different result. [202] In Digital, the Ohio Supreme Court considered whether the Ohio jury trial provision guaranteed assessment of attorney fees by a jury. [203] Because there was no action to recover punitive damages historically and because an examination of the nature of attorney fees revealed that an award of attorney fees is "a punitive (and thus equitable) remedy that flows from a jury finding of malice and the award of punitive damages," [204] the Digital court held that the Ohio Constitution does not guarantee assessment of attorney fees by a jury. [205] However, the Zoppo court stated that any language in Digital regarding punitive damages was merely dicta, and the court rejected the reasoning in Digital to the extent that it equated attorney fees with punitive damages. [206]

Justice Wright, joined by Chief Justice Moyer, dissented. The Zoppo dissent contended that the court was thwarting the Ohio legislature's efforts to reform the tort system. [207] The dissent acknowledged that a litigant has the right to a jury trial in a tort action, in accordance with historical practice. [208] However, it argued that the analysis in this case should not end with this broad conclusion. [209] Instead, the dissent contended that the relevant issue, with which the court failed to come to terms, is whether a plaintiff has the right to an assessment of punitive damages by a jury. [210]

The proper inquiry, the dissent argued, is whether an assessment of punitive damages is a fundamental element of trial by jury. [211] In a **[*1113]** footnote, the dissent acknowledged that the fundamental elements test has been used to interpret the Seventh Amendment, not the jury trial guarantee of the Ohio Constitution. [212] However, the dissent contended that the analysis in the Seventh Amendment cases is persuasive because of the similarity between the amendment and the Ohio jury trial guarantee. [213]

Beginning its examination, the dissent considered the role of a jury in a tort action. [214] The purpose of a tort action is to compensate a plaintiff, the dissent observed, and the role of a jury is to determine liability and the amount of damages necessary to compensate a plaintiff. [215] The dissent therefore acknowledged that the assessment of compensatory damages may be a fundamental element that must be performed by a jury. [216]

The dissent proceeded to examine whether an assessment of punitive damages is a fundamental element of trial by jury. [217] Specifically, the dissent discussed the nature of punitive damages, the purpose of punitive damages and whether a plaintiff has a right to

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ARTICLE: STATE CONSTITUTIONAL ANALYSIS OF PRETEXT STOPS: RACIAL PROFILING AND PUBLIC POLICY CONCERNS

The Honorable Phyllis W. Beck *, Patricia A. Daly, Esq. **

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SUMMARY:
... The primary concern with pretext stops is that they facilitate racial profiling, the process of singling out drivers based on their race. ... It is argued that most pretextual stops are race-based, and inherent in them is racial profiling. ... Finding this conduct unreasonable allows the court to exclude the evidence seized in the pretext stop and, according to logic, deter future stops based on racial profiling. ... It is argued that pretextual stops do not necessarily involve racial profiling. ... Scholarly support for the practice of racial profiling is predictably slim. ... The practice of racial profiling is widely reported - and criticized - in the media. ... Legislation aimed at preventing systemic racial profiling is being proposed on both federal and state levels. ... Even organizations beyond the police department are being accused of and investigated for engaging in racial profiling. ... Closer analysis of this proposition shows that a racial profiling claim under the Equal Protection Clause is difficult, if not impossible, to prove. ... While racial profiling may be confronted under the rubric of the Equal Protection Clause, it is not necessarily resolved. ...

TEXT:
[*597]

Introduction

A unanimous United States Supreme Court made itself quite clear in Whren v. United States: <=2> n1 motor vehicle stops based on pretext are not prohibited by the Fourth Amendment. <=3> n2 The primary concern with pretext stops is that they facilitate racial profiling, the process of singling out drivers based on their race. Although the Supreme Court was careful to point out that such a practice is unconstitutional, <=4> n3 the Court instructed that an attack on the practice must be made using the Equal Protection Clause, not

system.

Those supporting pretext stops argue that eliminating them is unwise, even though they are based on a fundamentally unfair factor like race. <=133> n132 Precluding the use of pretext altogether prevents police officers from using their knowledge of the street to interrupt criminal conduct even when their suspicions are not based on impermissible factors. <=134> n133 While the actual number of officers who operate on intuition without reliance on race would likely prompt an endless [*612] debate, <=135> n134 supporters of pretext stops urge that these police officers are invaluable assets to the communities they serve. <=136> n135 Preserving their ability to act for the greater public good is a desirable goal. The supporters assert that society can continue to permit officers of this type to root out crime by using pretext stops, since evils like racial profiling can be attacked under the Equal Protection Clause. Intuitive police officers can zealously conduct their business without fear that they are transgressing the Fourth Amendment.

Justice Scalia made it clear in his opinion in Whren that race-based stops are wrong and, indeed, unconstitutional. <=137> n136 According to the Justice and his colleagues, such stops do not offend the Fourth Amendment prohibition against unreasonable searches; instead, they are prohibited by the Equal Protection Clause, <=138> n137 an avenue of relief apparently not pursued by Michael Whren.

VI. Remedies: Getting the Proof and Making a Claim Under the Equal Protection Clause

While racial profiling is widely condemned, the supporters of pretext stops claim that the problem can be addressed via the Equal Protection Clause, while giving police greater latitude to operate legally within the Fourth Amendment. Closer analysis of this proposition shows that a racial profiling claim under the Equal Protection Clause is difficult, if not impossible, to prove. In assessing whether and to what extent the Equal Protection Clause is a viable avenue of relief, one must consider, in practical terms, what actions an accused would have to take to establish that her constitutional rights have been violated.

The Equal Protection Clause prohibits the discriminatory application of laws and precludes law enforcement agencies, exercising discretion, to go forward with a case based on "an unjustifiable standard such as race, religion or other arbitrary classification." <=139> n138 It is easy for an accused to allege that she was subjected to police interference based on race, but it is difficult to support the allegation.

In such cases, the accused will make a pre-trial attempt to prove that the officer in her case used race as a guide, thus violating the Equal Protection Clause, i.e., the officer stopped her because she was black and would not have stopped a white person under similar circumstances. It is safe to assume that there will be few admissions by police officers that a driver's race was the basis [*613] for a stop that ultimately yields contraband or evidence of criminal activity. <=140> n139 If the defendant is "fortunate" enough to have been stopped by someone like the two New Jersey state troopers who recently were indicted for falsifying their official paperwork, she might prevail. <=141> n140 In such a case, the officer's past transgressions based on race

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would be on the record. <=142> n141

The more likely scenario, however, is that the accused will request an enormous amount of documents from the prosecution, including a demand for the officer's prior arrest records and personnel records. She may also request documents from the law enforcement agency's files, items like department-wide arrest and investigation statistics, formal policies and procedures, and training manuals and techniques used by the agency.

Making the requests for these documents, however, is quite different from actually getting them. In the few cases deciding this issue, a rather stringent standard has developed. In general, discovery is permitted only when the accused has established that the "police agency has an officially sanctioned or "de facto' policy of selective enforcement against minorities." <=143> n142 Of course, even if the requests are granted, the documents may not provide the answers sought. The kind of information necessary for a pretext analysis simply has not been gathered on a regular basis. <=144> n143 While great strides have been made on both state and federal levels, it is only very recently that local governments and agencies have begun generating data regarding traffic stops and race. <=145> n144

[*614] When it comes to the breadth of a discovery request of this type, the scope of such an inquiry may be limitless. Is the accused entitled to look into the personal life of the officer? After all, there may be relevant and probative evidence from the officer's conduct outside of the police department from which one could conclude that she might target individuals of a certain race. If personal conduct is fair game, how far back can an accused go? Simply because an officer has not been involved in questionable conduct recently does not mean that she does not harbor racist tendencies. Are interviews of and subpoenas for the officer's friends, colleagues, neighbors, and supervisors off limits? Certainly, if an accused has a good faith basis to believe that testimony from these or other people will establish an officer's tendency to engage in racial profiling, how could a court preclude her from presenting it?

Of course, all of these inquiries make the pre-trial process more burdensome for all parties. Defense attorneys would have a much more complex task. Their burden will no longer be simply to establish that the reasonable officer would not have made the stop. Instead, they will be expected to probe any and all aspects of an officer's conduct, training, and habits, as well as those of his colleagues and supervisors. Failure to conduct a complete inquiry may give rise to an ineffective assistance of counsel claim.

The prosecution also will be burdened with additional tasks. Enormous discovery requests will mean not only more work culling documents, but also will likely prompt protracted litigation on the relevance and probative value of the items sought. Further, participation by the police department, state police, or other agency will be necessary, since much of the information requested will not be in the hands of the district attorney. Legal representation on behalf of those agencies or the officer himself may be appropriate, particularly if evidence of prior conduct in other cases is being sought or assessed. The introduction of additional parties and interests, of course, invites further delay.

These changes in turn burden the court system and hamper the judicial process. The sealing or sharing of evidence may become an issue. Proceedings may

be further delayed by the need for an extended briefing schedule, further discovery, or oral argument. The court will be forced to allot a significant amount of court time to pre-trial matters. It must decide what is and is not discoverable, what is and is not admissible, and ultimately, what effect all of the evidence has in the context of the case.

Throughout these lengthy proceedings, an accused's right to a speedy trial will invariably be put on hold. Admittedly, an in-depth analysis of a police [*615] officer's race-based conduct is the proper focus of a legislative committee hearing or a class action civil suit aimed at effecting a major change in a law enforcement agency's tactics and techniques. Making such an analysis part of any one criminal proceeding, however, is burdensome.

Further, even if an accused establishes that she was the victim of racial profiling and thereby proves that her constitutional rights under the Equal Protection Clause were violated, to what remedy is she entitled? While a violation of the Fourth Amendment has as its sanction the suppression of all evidence seized as a result of the violation, identical relief is not necessarily granted to the individual who has suffered a violation of her equal protection rights.

It seems fair to accord the victim of improper police conduct deemed a violation of the Equal Protection Clause the very same remedies accorded those who have sustained a Fourth Amendment violation via improper police conduct, namely, suppression of the evidence procured by unlawful means. There is no Supreme Court precedent, however, for such relief. <=146> n145 Instead, the Court has declined to state just what remedy, if any, a criminal defendant is entitled to if he establishes that he is the victim of racial profiling. <=147> n146

New Jersey courts have made compelling arguments that the purposes of the exclusionary rule in the Fourth Amendment context apply with equal force in a pretextual stop scenario, and in fact, have imposed such sanctions. <=148> n147 Both [*616] before and after Whren, those courts opined that improper police conduct must be met with the sanction of evidence exclusion "to deter future insolence... by those charged with enforcement of the law." <=149> n148 As one court explained, "the objective is to compel respect for the constitutional guaranty in the most effective way - by removing the incentive to disregard it." <=150> n149 Despite New Jersey's enlightened approach, which has now been joined by Washington, <=151> n150 other state courts simply are not bound to suppress the evidence seized in a pretext stop. <=152> n151

Alternative remedies are likewise uncertain. The dismissal of criminal charges is a possible, but not assured, remedy for a violation of this type. <=153> n152 In most selective prosecution claims brought under the Equal Protection Clause, the petitioner requests dismissal of the indictment against him based on the unconstitutional conduct of the prosecutor. <=154> n153 A pretext case, however, does not necessarily fit neatly within the selective prosecution model. <=155> n154

The bulk of selective enforcement claims is made against the prosecuting attorney's office. <=156> n155 The claims typically focus on the office's policy, not on the conduct of the individuals on staff. Racial profiling, on the other hand, often focuses on the conduct of a single officer who may or may not

have been encouraged by de facto or de jure policy of the police department. <=157> n156 An individual rogue officer, acting without departmental approval, may engage in racial profiling outside the knowledge of fellow officers or supervisors. The standards set forth in selective enforcement claim cases, which consider the [*617] policy of the prosecuting office, may be inadequate in dealing with racial profiling by a single officer. For instance, even though the New Jersey trial court has been willing to grant suppression as a sanction for selective enforcement, its appellate court continues to disregard the actions of single officers in the field and instead directs that only cases addressing agency-wide violations are actionable. <=158> n157 While statistical analyses of police department policy are indeed important evidence, such data cannot establish whether an individual officer conducting a pretext stop violated the driver's equal protection rights. Absent broad, new interpretations of the exclusionary rule, or specific sanctions for racial profiling on both an individual and agency-wide basis, there may be no direct consequence for the violation of equal protection rights in this context. <=159> n158

In sum, neither Pennsylvania nor any other state court can rely on the United States Supreme Court's equal protection safety net to rescue victims of racial profiling. Indeed, that net has a gaping hole. In the unlikely chance that documentary proof of racial profiling is acquired by the victim, admitted by the court, and accepted by a judge or jury, a forceful and effective remedy for the underlying constitutional violation simply is not in place.

The impracticalities of the equal protection alternative militate against adopting Whren in the state constitutional context. While racial profiling may be confronted under the rubric of the Equal Protection Clause, it is not necessarily resolved.

The fourth prong in Edmunds, consequently, appears to support divergence from the rule in Whren. <=160> n159 A bright-line rule finding pretext stops unreasonable and, therefore, unconstitutional, will no doubt impinge upon an officer's ability to detect crime through intuition and a keen sense of the street. That same rule, however, arguably serves the public interest in a significant manner in that it avoids extensive, protracted, and perhaps futile litigation, while reassuring a leery public that racial profiling is constitutionally intolerable. <=161> n160

Conclusion

Whether the impact of racial profiling is real or perceived, damaging or [*618] benign, underreported or overblown, it remains a public policy concern that must be confronted, both in the federal and state courts. A state constitutional evaluation of Whren is essential in responding to this very important social issue. Not only does racial profiling harm the individual, it also undermines the integrity of the state by making it a tool for discriminatory behavior against a group. This practice is unacceptable. In addressing Whren, state courts must recognize that resolution of the problem in the context of equal protection may only be theoretical. Furthermore, even if the matter can be addressed under the Equal Protection Clause, a resolution may be neither swift nor effective.

FOOTNOTES:

n1. *517 U.S. 806 (1996).*

n2. See *Whren, 517 U.S. at 819* (upholding stop where officers had probable cause to believe traffic code violated irrespective of officers' motivation).

n3. See *id. at 813* ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race.").

n4. Id.

n5. See infra notes 113-30 and accompanying text for a discussion of the public response to Whren.

n6. *453 U.S. 454 (1981).*

n7. *669 A.2d 896 (Pa. 1995).*

n8. See infra notes 42-67 and accompanying text for a discussion of the Pennsylvania Supreme Court state constitutional analysis in *Commonwealth v. White, 669 A.2d 896 (Pa. 1995)*, and *Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991).*

n9. See infra notes 91-100 and accompanying text for a discussion of Pennsylvania's willingness to diverge from federal standards.

n10. See *Commonwealth v. Edmunds, 586 A.2d 887, 896 (Pa. 1991)* (exploring unique history of article I, section 8 and noting prominence of Pennsylvania Declaration of Rights in state's original constitution of 1776). Article I, section 8 provides:

The people shall be secure in their persons, houses, papers, and possessions from unreasonable searches and seizures, and no warrant to search any place or seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pa. Const. art. I, 8.

n11. *New York v. Belton, 453 U.S. 454, 455 (1981).*

n12. *Id. at 456.*

n13. Id.

n14. *Id. at 459.*

n15. *395 U.S. 752 (1969).*

n16. *Belton, 453 U.S. at 457.* In Chimel, police officers entered the home of burglary suspect with a warrant for his arrest. *Chimel, 395 U.S. at 753.* The

suspect's wife permitted the officers to enter the home and wait for the suspect who was due to arrive from work shortly. Id. After the suspect returned home, the officers handed him the arrest warrant and proceeded to search the entire residence of the suspect's three-story home. *Id. at 754*. The Court found that the "search incident to arrest" principle does not include "searching any room other than that in which an arrest occurs." *Id. at 763*.

n17. *Belton, 453 U.S. at 458*.

n18. Id. (quoting *Dunaway v. New York, 442 U.S. 200 (1979)*).

n19. Id. at 457.

n20. See id. at 460 ("Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within "the area into which an arrestee might reach in order to grab a weapon or evidentiary item'.... We read Chimel's definition... in light of that generalization.") (quoting *Chimel, 395 U.S. at 763)* (emphasis added).

n21. The Court fashioned this definition despite its recognition that the rule in Chimel was based on "the need "to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape' and the need to prevent the concealment or destruction of evidence." *Belton, 453 U.S. at 457* (quoting *Chimel, 395 U.S. at 763)*.

n22. Id. at 462.

n23. Id. at 460 n.4.

n24. See id. ("Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk.").

n25. *Belton, 453 U.S. at 466* (Brennan, J., dissenting). Justice Marshall joined in the dissent. *Id. at 463*.

n26. *Id. at 468* (Brennan, J., dissenting).

n27. *Id. at 465* (Brennan, J., dissenting) (citations omitted).

n28. *Id. at 469* (Brennan, J., dissenting).

n29. *Id. at 471-72* (Brennan, J., dissenting) (citations and footnotes omitted). Justice White, joined by Justice Marshall, also filed a dissenting opinion. He characterized the majority's decision as "an extreme extension of Chimel" to which he could not subscribe. *Id. at 472* (White, J., dissenting).

n30. *Commonwealth v. White, 669 A.2d 896, 898 (Pa. 1995)*.

n31. Id.

n32. Id.

n33. Id.

n34. Id.

n35. *White, 669 A.2d at 898.*

n36. Id.

n37. Id.

n38. Id.
n39. Id.

n40. *White, 669 A.2d at 898.*

n41. Id.

n42. *Id. at 901.* The Pennsylvania Superior Court accepted this argument. Id. The other proffered bases for denying suppression were the automobile exception, a finding of exigency under the circumstances, and an inventory search. *Id. at 898-99.* All were rejected by the court. *Id. at 902-03.*

n43. *Id. at 902.*

n44. *Id. at 898.*

n45. See *White, 669 A.2d at 901-02* (discussing holding in *Commonwealth v. Timko, 417 A.2d 620 (Pa. 1980)*, that warrantless search of automobile incident to arrest is limited to individual's clothing and areas within his immediate reach).

n46. Id. at 902.

n47. Compare *Commonwealth v. White, 669 A.2d 896, 902 (Pa. 1995)* (suppressing evidence found in paper bag found between front seats of car), and *Commonwealth v. Timko, 417 A.2d 620, 623 (Pa. 1980)* (suppressing evidence found in zippered valise seized from automobile), with *New York v. Belton, 453 U.S. 454, 460 n.4 (1981)* (defining area within arrestee's immediate control to include glove compartments, consoles, luggage, boxes, bags, and all other receptacles found in passenger compartment).

n48. *White, 669 A.2d at 902.* The court found that the arrestee's privacy interests remained "intact" and the officer was permitted to search only for the limited purpose of preventing the arrestee from obtaining weapons or destroying evidence. Id.

n49. Id.

n50. *Id. at 903* (Montemuro, J., concurring).

n51. Id. (Montemuro, J., concurring). Justice Montemuro believed that dealing with the issue in summary fashion "weakened" the court's prior state constitutional decision in *Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991). White, 669 A.2d at 903* (Montemuro, J., concurring).

n52. *Id. at 903-04* (Montemuro, J., concurring).

n53. *White, 669 A.2d at 904* (Montemuro, J., concurring).

n54. *586 A.2d 887 (Pa. 1991)*.

n55. *Edmunds, 586 A.2d at 895*.

n56. In *Commonwealth v. Swinehart, 664 A.2d 957 (Pa. 1995)*, the court characterized the Edmunds factors as "helpful," but not mandatory. *Id. at 961 n.6*. The majority in White reiterated this characterization of Edmunds in response to the prosecution's claim that appellant waived his state constitutional claim by failing to set forth an Edmunds analysis. *White, 669 A.2d at 899*.

n57. *White, 669 A.2d at 904* (Montemuro, J., concurring). Justice Montemuro also suggested that the court engraft onto the Edmunds test the prerequisite finding of "important and substantial reasons" for departing from decisions of the United States Supreme Court. Id. (Montemuro, J., concurring).

n58. Id. (Montemuro, J., concurring).

n59. *Id. at 908* (Montemuro, J., concurring).

n60. *Id. at 904* (Montemuro, J., concurring).

n61. *Id. at 904-05* (Montemuro, J., concurring).

n62. *White, 669 A.2d at 905-07* (Montemuro, J., concurring).

n63. *Id. at 907-08* (Montemuro, J., concurring).

n64. *Id. at 908* (Montemuro, J., concurring).

n65. Id. (Montemuro, J., concurring).

n66. Id. (Montemuro, J., concurring). See *Chimel v. California, 395 U.S. 752, 768 (1969)* (holding unconstitutional warrantless search beyond suspect's person of area not within his immediate reach).

n67. *White, 669 A.2d at 908* (Montemuro, J., concurring).

n68. *Whren v. United States, 517 U.S. 806, 808 (1996)*.

n69. Id.

n70. Id.

n71. *Id. at 809*.

n72. Id.

n73. *Whren, 517 U.S. at 809*. Among the charges was one prohibiting distribution of drugs in a school zone or other protected area. Id. In such

circumstances, the statutory maximum punishment is doubled and there is a mandatory minimum one-year prison term. *21 U.S.C. 860*(a) (1994).

n74. *Whren, 517 U.S. at 810.*

n75. Id.

n76. Id. Whren argued that civil traffic regulations present a "unique context" that allows police to stop virtually anyone they wish. Id. Hence, Whren argued, the Fourth Amendment test in such circumstances should not be probable cause, "but rather, whether a police officer, acting reasonably, would have made the stop for the reason given." Id.

n77. Id.

n78. See, e.g., *United States v. Cannon, 29 F.3d 472, 476 (9th Cir. 1994)* (clarifying test as whether reasonable officer "would have" made stop regardless of other suspicions); *United States v. Smith, 799 F.2d 704, 708 (11th Cir. 1986)* (concluding proper inquiry to determine whether traffic stop was pretextual is whether reasonable officer would have made stop absent other motivation).

n79. The majority of circuits, including the one from which Whren came, followed the rule ultimately set forth in Whren, that is, any traffic stop based on an observed traffic violation is permissible. See, e.g., *United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995)* (en banc) (holding traffic stop does not violate Fourth Amendment where police officer had reasonable suspicion traffic violation occurred); *United States v. Ferguson, 8 F.3d 385, 392-93 (6th Cir. 1993)* (en banc) (finding traffic stop does not violate Fourth Amendment where officer had probable cause to believe traffic violation occurred). The Ninth and Eleventh Circuits, however, considered whether the traffic stop "would have" occurred absent the officers' unrelated suspicions. See, e.g., *Cannon, 29 F.3d at 476* (finding traffic stop constitutional if reasonable officer "would have" made stop regardless of suspicions of other criminal activity); *Smith, 799 F.2d at 708* (concluding proper inquiry to determine whether traffic stop was pretextual is whether reasonable officer would have made stop absent other motivation).

n80. See *Smith, 799 F.2d at 711* (excluding evidence obtained from traffic stop where evidence suggested that "reasonable officer would not have" stopped defendants absent illegitimate purpose). Whren wanted the United States Supreme Court to adopt the "would have" standard of *Cannon and Smith. Whren, 517 U.S. at 810.*

n81. *Whren, 517 U.S. at 814-16.* The Court reasoned that such an approach would be impermissibly "driven by subjective considerations." *Id. at 814.* The Fourth Amendment, instructed the Court, is concerned with reasonableness - a wholly objective principle that clearly is satisfied whenever there exists probable cause to believe a traffic law has been violated. Id.

n82. *Id. at 819.* The Court concluded that there was no "realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure." Id.

n83. *Id. at 810.*

n84. *Id. at 819.*

n85. *Id. at 818.*

n86. *Whren, 517 U.S. at 811.* The Whren Court distinguished *Florida v. Wells, 495 U.S. 1 (1990)* (involving inventory search), and *New York v. Burger, 482 U.S. 691 (1987)* (discussing administrative searches), as cases "addressing the validity of a search conducted in the absence of probable cause." Id.

n87. Id. at 813. Apparently, the only legal issue before the Court was suppression under the Fourth Amendment. See id. at 808 (framing issue as validity of temporary detention given Fourth Amendment prohibition against unreasonable seizures).

n88. See supra notes 53-55 and accompanying text for a discussion of *Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991).*

n89. See supra note 10 for the relevant text of the Pennsylvania Constitution.

n90. *Commonwealth v. White, 669 A.2d 896, 904 (Pa. 1995)* (Montemuro, J., concurring) (relying on *Commonwealth v. Edmunds, 586 A.2d 887, 895-96 (Pa. 1991)).*

n91. *Commonwealth v. Edmunds, 586 A.2d 887, 896 (Pa. 1991).*

n92. *Commonwealth v. Miller, 518 A.2d 1187, 1191-92 (Pa. 1986).*

n93. See *Commonwealth v. DeJohn, 403 A.2d 1283, 1291 (Pa. 1979)* (rejecting *United States v. Miller, 425 U.S. 435 (1976)).*

n94. Id. at 1289.

n95. See *Commonwealth v. Sell, 470 A.2d 457, 468 (Pa. 1983)* (rejecting *United States v. Salvucci, 448 U.S. 83 (1980)).*

n96. Id.

n97. See *Commonwealth v. Melilli, 555 A.2d 1254, 1260-61 (Pa. 1989)* (rejecting *Smith v. Maryland, 442 U.S. 735 (1979)).*

n98. See *Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991)* (rejecting *United States v. Leon, 468 U.S. 897 (1984)).*

n99. See, e.g., *Commonwealth v. Matos, 672 A.2d 769, 776 (Pa. 1996)* (departing from *California v. Hodari D., 499 U.S. 621 (1991)*, in holding police officers' pursuit of individual approached without reasonable suspicion or probable cause constitutes seizure under Pennsylvania Constitution); *Commonwealth v. Smith, 615 A.2d 321, 325 (Pa. 1992)* (diverging from *Oregon v. Kennedy, 456 U.S. 667 (1982)*, in finding Pennsylvania's double jeopardy clause prevents retrial of defendant where prosecutor intentionally sought to deny defendant fair trial).

n100. *Melilli, 555 A.2d at 1258.*

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the Fourth Amendment. <=5> n4

Scholars, journalists, and lawyers promptly and vociferously assailed the Whren decision as legally incorrect, technically flawed, and fundamentally unfair. <=6> n5 Forgotten in the resulting melee was an assessment of the practical application of Whren, that is, the degree of difficulty - throughout the entire criminal justice system - in addressing the issue of racial profiling via an equal protection analysis, rather than under the Fourth Amendment.

In order to examine the Pennsylvania Supreme Court's possible response to the principles established by the Whren Court, this Article reviews the Pennsylvania Supreme Court's past reliance on the state constitution to deviate from established Fourth Amendment jurisprudence. To illustrate the point, this Article explores the broad police power the United States Supreme Court endorsed in New York v. Belton, <=7> n6 as compared to the limits placed on that power by the Pennsylvania Supreme Court relying on the state constitution in [*598] Commonwealth v. White. <=8> n7 There is precedent for the Pennsylvania courts to rely on the state constitution in interpreting Whren-like cases. <=9> n8 In addition, as part of its public policy consideration, the court should take into account the positive practical consequences of diverging from the rule in Whren.

In analyzing Fourth Amendment cases, appellate courts are faced with complex fact patterns where only minute details serve to distinguish cases. This point is particularly true of auto search cases. The task is to decide whether or not those details are significant enough to warrant departure from what one party insists is binding precedent and what another party argues is clearly inapplicable.

In those matters when Fourth Amendment law, as dictated by the United States Supreme Court, is quite clear and an accused cannot prevail regardless of what factual differences exist, the generally greater protection afforded by the state constitution is the only remaining potential avenue of relief. In such cases, the accused must persuade the state court that deviating from the rationale of the United States Supreme Court is not only logical, but also mandatory under the state's most important and overriding body of law, its constitution.

In Pennsylvania, the state supreme court has not hesitated to depart from federal standards on the basis of its state constitution. <=10> n9 The reasons for so doing are based on heightened protections inherent in article I, section 8 of the Pennsylvania Constitution, the state's counterpart to the Fourth Amendment. <=11> n10 The Whren case is certain to provoke additional requests for deviation from Fourth Amendment law in Pennsylvania. If the state supreme court stays the course it has already charted, it will decide this issue under the state constitution, and perhaps provide greater protection than the federal norm.

I. The United States Supreme Court Broadens Police Power: New York v. Belton

In the spring of 1978, Roger Belton was a passenger in a car that was stopped by New York State police officers for speeding. <=12> n11 Upon discovering marijuana, the troopers ordered the occupants outside of the car, placed them [*599] under arrest, and conducted a warrantless automobile search. <=13> n12 They discovered Belton's jacket in the rear seat; inside the jacket's

n101. In one instance, the state court did not reach the state constitutional issue. In *Whitehead v. Maryland, 698 A.2d 1115 (Md. Ct. Spec. App. 1997)*, the Maryland appellate court found that where a police officer stops a vehicle and ultimately determines that no traffic laws have been violated, the officer's continued detention of the motorist cannot be rationalized as falling within Whren. *Id. at 1120.*

n102. See *State v. McBreairty, 697 A.2d 495, 496 (N.H. 1997)* (using federal and state case law to reject defendant's claim that stop was illegal).

n103. See *State v. Ladson, 979 P.2d 833, 842 (Wash. 1999)* (noting state court's prior rejection of precedents relied on by Whren).

n104. See *id. at 837* (quoting Wash. Const. art. 1, 7).

n105. *Id. at 839.*

n106. Id.

n107. See supra note 10 for the relevant text of the Pennsylvania Constitution.

n108. See infra notes 113-37 and accompanying text for additional discussion of the public policy response to pretext stops and racial profiling.

n109. See supra note 10 for the relevant text of the Pennsylvania Constitution.

n110. See, e.g., Jeffrey Goldberg, The Color of Suspicion, N.Y. Times Mag., June 20, 1999, at 51, 53 (describing traffic stop with hope of criminal interdiction).

n111. See Jackson Toby, "Racial Profiling' Doesn't Prove Cops Are Racist, Wall St. J., Mar. 11, 1999, at A22 (describing crackdown on minor offenses to prevent serious felonies as "one of the most important ideas in modern criminology").

n112. See supra note 87 and accompanying text for a discussion of the Supreme Court's suggestion in Whren that the basis for objecting to race-based state action is the Equal Protection Clause.

n113. Joseph Wambaugh, Trust Cops' Intuition, Wall St. J., May 19, 1998, at A22.

n114. Id.

n115. Id.

n116. Toby, supra note 111, A22.

n117. See, e.g., David A. Harris, Car Wars: The Fourth Amendment's Death on the Highway, *66 Geo. Wash. L. Rev. 556, 561 (1998)* (asserting Whren gives law enforcement carte blanche to engage in racial profiling); Patricia Leary & Stephanie Rae Williams, Toward a State Constitutional Check on Police Discretion

to Patrol the Fourth Amendment's Outer Frontier: A Subjective Test for Pretextual Seizures, 69 Temp. L. Rev. 1007, 1025 (1996) (describing Whren as "a rickety piece of judicial scholarship"); David O. Markus, Whren v. United States: A Pretext to Subvert the Fourth Amendment, 14 Harv. BlackLetter L.J. 91, 96-97 (1998) (arguing Whren encourages police officers to engage in arbitrary invasions of privacy).

n118. See infra notes 119-26 and accompanying text for examples of media coverage on the issue of racial profiling.

n119. See Tom Avril, et al., N.J. Admits that Race Played Role in Some Police Stops on Turnpike, Phila. Inquirer, Apr. 21, 1999, at A1 (reporting on news conference in which New Jersey governor and attorney general acknowledged racial profiling by state troopers). Governor Christine Todd Whitman reportedly said that "the broader problem is the result of well-intentioned troopers who simply thought they were engaging in good police work." Id. The report issued by the state attorney general's office revealed that 53 percent of persons searched during turnpike stops were black and 24 percent were Latino, despite the fact that "blacks make up about 14.5 percent of New Jersey's overall population, and... those "of Hispanic origin' make up 11.9 percent." Id.

n120. Actually, Governor Whitman requested that the superintendent of the state police tender his resignation prior to the release of the Attorney General's report on racial profiling. Diane Mastrull, et al., New Jersey's Top Trooper Is Forced Out, Phila. Inquirer, Mar. 1, 1999, at A1. Some thought Williams was asked to leave because the report was soon to be released and Williams had refused to admit his agency's racial profiling tactics; others believed his ouster was the direct result of public comments he made regarding the types of crimes committed and the types of people who commit them. Id. While insisting that racial profiling was something the state police would not tolerate, Williams also told reporters that the methamphetamine market was controlled by whites, while the heroin market was primarily controlled by Jamaicans. Id.

n121. See Howard Goodman, Gloucester County Turnpike Arrests in Doubt, Phila. Inquirer (South Jersey edition), Apr. 21, 1999, at B1 (describing class action suit and effect of state concession of racial profiling). In 1996, a Gloucester County judge suppressed evidence seized in the arrests of nineteen people on the New Jersey Turnpike when those individuals asserted that they were targeted for traffic stops on account of their race. Id. The Attorney General's Office promptly appealed the decision, but dropped the appeal after issuing its report on racial profiling practices within the state police force. Id.

n122. See id. It was expected that most, if not all, of the drug charges against the 19 African Americans stopped on the turnpike in Gloucester County would be withdrawn by the prosecution, since the suppression order would preclude it from offering evidence seized during the improper stop. Id. Cases in other New Jersey counties, wherein similar accusations against police were made, were put on hold. Id.

n123. See Robert Cohen, Racial Profiling Allegations Spur Lawmakers to Call for U.S. Study, Star-Ledger (Newark, N.J.), Apr. 14, 1999, at 7, available in *1999 WL 2970986* (reporting New Jersey State Police revelations prompted legislation on racial profiling); North Carolina Legislation Mandates Statistics

to Prove/Disprove Profiling, 1 Crim. Just. Wkly. 1, June 1, 1999, at 20 (noting North Carolina became first state to sign criminal statistics bill into law); Sonya Ross, Clinton Orders Officers to Collect Racial Data on Stops, Arrests, Phila. Inquirer, June 10, 1999, at A22 (reporting President ordered federal law enforcement agencies to collect race and gender data from all stops or arrests).

n124. See Tom Avril & Douglas A. Campbell, N.J. Troopers Indicted in Racial Profiling Probe, Phila. Inquirer, Apr. 20, 1999, at A1 (describing charges). The indictment alleges that the troopers falsified their stop and arrest records to make it appear that the minorities they stopped were instead white. Id. The two troopers, John Hogan and James Kenna, are the same officers involved in a 1998 incident on the New Jersey Turnpike. Id. Hogan and Kenna allegedly fired on four unarmed men, three black and one Hispanic, during a traffic stop. Id. See also Mastrull, et al., supra note 120, at A7 (describing shooting incident as bringing issue of racial profiling to forefront, eventually leading to resignation of superintendent of state police).

n125. See George Berkin, Black Cops Vow to Follow, Tape Troopers, Star-Ledger (Newark, N.J.), May 22, 1998, at 30, available in *1998 WL 3417389* (describing response to turnpike shooting). Three African-American police officer groups organized a 1998 Memorial Day weekend outing that involved off-duty police officers patrolling the New Jersey Turnpike and videotaping traffic stops. Id.

n126. See, e.g., Justice Department to Probe Accusations of "Racial Profiling,' Chi. Trib., Mar. 10, 1999, at 8 (reporting meeting between deputy attorney general and New Jersey black and hispanic leaders); John Kifner, N.J. Traffic Shootings Follow Racism Allegations Police "Targeting Blacks' on Turnpike, Ariz. Rep., May 10, 1998, at A20, available in *1998 WL 7770245* (describing shooting incident and racial profiling controversy).

n127. See David Harris, Driving While Black: Racial Profiling on Our Nation's Highways, An ACLU Special Report (visited June 2, 1999) <http://www.aclu.org/profiling/report> (stating practice of police looking for drug criminals by stopping drivers based on color is so common "that the minority community has given it the derisive term, "driving while black or brown' - a play on the real offense of "driving while intoxicated'"). See also David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, *87 J. Crim. L. & Criminology 544, 546 & n.10 (1997)* (relating "driving while black" was "standard way" black clients in Washington, D.C. area described "common experience of constant stops and harassment" by police).

n128. ACLU, Driver Profiling Complaint Form (visited June 2, 1999) <http://www.aclu.org/profiling/report<uscore>incident>.

n129. ACLU, ACLU "Bustcard': Pocket Guidelines on Encounters With the Police (visited June 2, 1999) <http://www.aclu.org/profiling/bustcard>. The "Bustcard" instructs users on what to do when stopped by police. In addition to warning drivers to be polite, respectful, and calm, the ACLU advises them to "write down everything you remember ASAP," "make [no]... statements regarding the incident," and "ask for a lawyer immediately upon your arrest." Id.

n130. See Al Frank, P.A. Looking into Claims of Profiling on the PATH, Star-Ledger (Newark, N.J.), Mar. 13, 1999, at 11, available in *1999 WL 2962478*

(reporting investigation of Port Authority PATH police alleged to have engaged in racial profiling); Howard Goodman, Profiling Allegations Expanded, Phila. Inquirer, Apr. 30, 1999, at B1 (reporting New Jersey Attorney General's Office investigation of state police program that trains hotel employees to spot possible drug dealers near turnpike).

n131. Wambaugh, supra note 113, at A22. The suspicions of the officers in Whren certainly were founded. See *Whren v. United States, 517 U.S. 806, 806-07 (1996)* (noting officers' "suspicions were aroused," causing them to pull over vehicle found to contain illegal drugs).

n132. See Wambaugh, supra note 113, at A22 (suggesting certain criminals, including white lawbreakers in black neighborhoods, would "cruise... unmolested" if police could not use profiling).

n133. See id. ("As police attempt to cull potential lawbreakers from honest citizens, sex, age, race, clothing and lots of subtleties go into the process.").

n134. While researching an article for the New York Times Magazine, author Jeffrey Goldberg rode with police officers from various cities, including Philadelphia. Some officers denied relying on race in deciding whom to stop; others admitted the practice. The officers alternatively decried and defended the practice. The wide use of racial profiling, however, was unmistakably clear throughout the fascinating piece. See generally Goldberg, supra note 110.

n135. See Toby, supra note 111, A22 (asserting stopping people who violate minor laws helps prevent major crimes such as drug trafficking).

n136. *Whren, 517 U.S. at 813.*

n137. The Whren Court agreed that race-based stops are wrong, but noted that it was necessary to present such claims under the Equal Protection Clause, not the Fourth Amendment. Id.

n138. *Oyler v. Boles, 368 U.S. 448, 456 (1962).*

n139. See generally Goldberg, supra note 110. Despite their description of conduct that arguably constitutes racial profiling, most of the officers in Goldberg's article denied that race was the sole factor in a stop. Id. Similarly, two New Jersey state troopers indicted for falsifying records, who also denied that race was the sole factor, have been characterized by their lawyers as conducting "good police work." Avril & Campbell, supra note 124, at A6.

n140. In this context, "prevail" is a strong word. Actually, a driver stopped by one of these officers may simply have a very strong case for a race-based traffic stop. Whether there exists a viable remedy for such a claim, however, is the central issue in this Article. See supra notes 138-39 and infra notes 141-60 and accompanying text for a discussion of the difficulty in fashioning a legal remedy for race-based traffic stops.

n141. Of course, the accused would still be faced with establishing that a race-based pretext occurred in her case.

n142. *State v. Smith, 703 A.2d 954, 958 (N.J. Super. Ct. App. Div. 1997)* (relying on *United States v. Armstrong, 517 U.S. 456 (1996)*). The use of a selective enforcement defense was approved by the United States Supreme Court in 1962, when in *Oyler v. Boles, 368 U.S. 448 (1962)*, the Court held that prosecution based on race, religion, or another arbitrary classification violates the Equal Protection Clause. *Id. at 456*. See infra note 145 and accompanying text for a discussion of selective enforcement claims.

n143. Even if compelling evidence were gathered, its positive effect in the courts is questionable. For years, opponents of the death penalty have offered statistical studies and analyses in an effort to prove that the harsh sentence is imposed in a discriminatory manner, but the death penalty remains a constitutional form of punishment. See, e.g., Developments in the Law: Race and the Criminal Process, Part VIII: Race and Capital Sentencing, *101 Harv. L. Rev. 1603, 1614-22 (1988)* (describing Supreme Court's rejection of death penalty as violative of Equal Protection Clause despite strong statistical evidence); Douglas W. Vick, Poorhouse Justice: Underfunded, Indigent Defense Services and Arbitrary Death Sentences, *43 Buff. L. Rev. 329, 332-36, 410-12 (1995)* (analyzing relation of race and socioeconomic status with imposition of death penalty).

n144. In Philadelphia, Police Commissioner John Timoney is not waiting for the enactment of mandatory legislation before confronting racial profiling among his staff. Instead, he has formed a ten member "Integrity Control Unit" that will conduct "random, unscheduled audits of all bureaus, divisions and units for any signs of trouble, including in the area of police compliance with departmental policies... such as racial profiling." Robert Moran, New Team to Monitor Police Conduct, Phila. Inquirer, June 11, 1999, at B2. Commissioner Timoney is also not naive about the daunting task he faces: "We cannot always detect, let alone change, the mindset or prejudices of certain people, but we can put systems in place to prevent those biases from affecting their performance as police officers." Telephone interview with the Offices of the Philadelphia Police Commissioner (June 30, 1999).

n145. Selective enforcement claims have been raised many times over the past several decades. See *Oyler v. Boles, 368 U.S. 448, 456 (1962)* (denying selective enforcement claim where no unjustifiable standard alleged); *United States v. Schoolcraft, 879 F.2d 64, 68-69 (3d Cir. 1989)* (rejecting equal protection claim where no evidence was offered supporting contended prosecution based on unjustifiable standard); *Commonwealth v. Wells, 657 A.2d 507, 510 (Pa. Super. Ct. 1995)* (denying alleged equal protection claim for selective prosecution where both prosecuted and non-prosecuted occupants of stopped vehicle were of same race). As the United States Supreme Court has explained:

A selective prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one.... A selective prosecution claim asks a court to exercise jurisdictional power over a "special province" of the Executive.

United States v. Armstrong, 517 U.S. 456, 463-64 (1996). However, as recently as 1996, in the same term the Court decided Whren, the Court explicitly stated in a footnote that it has "never determined whether dismissal... or some other sanction is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race." *Id. at 461 n.2*.

n146. Id. In Armstrong, the defendants sought discovery of police documents to establish their claim of selective enforcement and the district court entered an order granting the defendants' request. *Id. at 459*. The police challenged the defendants' right to the documents and refused to comply with the discovery order. *Id. at 461*. Armstrong involved racial profiling of a type, although not in the context of a traffic stop. Instead, the Armstrong defendants argued that they had been singled out for federal prosecution, in lieu of prosecution in the state court system, simply because they were black. *Id. at 458*.

n147. See, e.g., *State v. Kennedy, 588 A.2d 834, 838 (N.J. Super. Ct. App. Div. 1991)* (discussing racial profiling and propriety of suppression as sanction). In a landmark 1996 case in the New Jersey Superior Court, *State v. Soto, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996)*, Judge Robert Francis combined the suppression requests of nineteen criminal defendants, all of whom claimed that they were the victims of racial profiling by New Jersey troopers. *Id. at 359*. After hearing evidence of the agency's widespread racial profiling policy and practice, Judge Francis suppressed the evidence seized in the cases. *Id. at 361*. Thereafter, the Attorney General appealed the suppression order. Recently, in the wake of its admission that racial profiling indeed exists within the agency, the Attorney General's Office abandoned its appeal. Goodman, supra note 121, at B1.

n148. *Kennedy, 588 A.2d at 838*. See also Goodman, supra note 121, at B1 (reporting order of suppression in 19 consolidated cases asserting racial profiling on New Jersey Turnpike).

n149. *Kennedy, 588 A.2d at 838-39*.

n150. See supra notes 103-06 and accompanying text for a discussion of *State v. Ladson, 979 P.2d 833 (Wash. 1999)*, and that state's rejection of Whren.

n151. See *Armstrong, 517 U.S. at 461 n.2* (acknowledging that United States Supreme Court has not determined appropriate remedy for pretext stop).

n152. See id. (stressing Court has not determined whether dismissal is proper remedy). In Armstrong, the trial court dismissed the indictment not because it was bound to do so, but because the parties agreed that dismissal was the most efficient way to get the issue of discovery limitations before the appellate court. Id.

n153. See supra note 145 for a description of cases raising selective prosecution claims.

n154. See Sean Hecker, Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards, *28 Colum. Hum. Rts. L. Rev. 551, 587-89 (1997)* (examining difficulties of bringing Fourteenth Amendment claim for pretextual stop).

n155. See, e.g., *Commonwealth v. Mulholland, 702 A.2d 1027, 1034-35 (Pa. 1997)* (involving claim against prosecution and police officers' effort to bar their retrial where Commonwealth prosecuted only three of five officers involved in death of arrestee).

n156. See supra notes 119-24 and accompanying text for a discussion of racial profiling as an action of individual officers or department policy.

n157. See *State v. Smith, 703 A.2d 954, 957-58 (N.J. Super. Ct. App. Div. 1997)* ("At best, the evidence proffered relates... Trooper Long had a hidden agenda and profiled Afro-American citizens.... The alleged motives of an individual police officer are not enough.").

n158. This conclusion is true even in Pennsylvania where the state supreme court has interpreted the exclusionary rule broadly. See *Commonwealth v. Glass, 718 A.2d 804, 808-09 (Pa. Super. Ct. 1998)* (describing purpose behind Pennsylvania's exclusionary rule as not just deterrence of police misconduct, but also as fundamental safeguard of privacy), appeal granted in part, *726 A.2d 1041 (Pa. 1999)*.

n159. See supra notes 53-55 and accompanying text for a discussion of *Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991)*.

n160. Admittedly, analysis of pretext under search and seizure reasonableness principles would not eliminate pre-trial litigation altogether. Courts still would be required to sift through what a police officer "would have done" absent her legally insupportable suspicions. The reasonableness test, however, sharply limits the inquiry by making it a narrower one. The issue is simply whether the stop would have occurred on the basis of the proffered reason, i.e., the minor traff ic violation.

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zippered pocket, they found cocaine. <=14> n13 After Belton's conviction on drug charges, the United States Supreme Court framed the issue as the "proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants." <=15> n14 Recognizing that it already held, in Chimel v. California, <=16> n15 that a lawful arrest authorizes police to conduct warrantless searches of the person and "the immediately surrounding area," <=17> n16 the Belton Court nonetheless found this standard unworkable and "difficult to apply." <=18> n17 It highlighted the need for a "single, familiar standard... to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." <=19> n18

The Belton majority reasoned that the cure for the uncertainty faced by police, as to whether a warrant was necessary, was a straightforward rule defining the "immediately surrounding area" of the arrestee. <=20> n19 The Court defined the phrase in general terms. <=21> n20 It asked not what area the arrestee had control over at the time of the search, but rather, what area the arrestee controlled prior to his arrest and custody. <=22> n21 Because Belton's jacket was "located inside the passenger compartment of the car in which [he] had been a passenger just before he was arrested," the jacket was deemed to be in an area within his immediate control. <=23> n22 The term "immediate area of control," Belton held, includes the entire passenger compartment and all of its contents, including closed containers and zippered jacket pockets. <=24> n23 After Belton, only the trunk of [*600] the car remained off-limits. <=25> n24

The dissent in Belton, led by Justice William Brennan, soundly disagreed. It labeled a fiction the majority's conclusion that the interior of a car is "within the immediate control of an arrestee." <=26> n25 Justice Brennan considered the majority's holding an expansion of Chimel that was inconsistent with search incident to arrest jurisprudence. <=27> n26 Chimel, he asserted, properly placed "a temporal and a spatial limitation on searches incident to arrest, excusing compliance with the warrant requirement only when the search "is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest.'" <=28> n27

Justice Brennan also eschewed the majority's underlying rationale: the purported need for a ""bright-line rule' to guide the officer in the field." <=29> n28 Instead, he reasoned, Chimel set forth a clear and effective rule for determining the proper scope of a warrantless search incident to arrest:

Under Chimel, searches incident to arrest may be conducted without a warrant only if limited to the person of the arrestee or to the area within the arrestee's "immediate control." While it may be difficult in some cases to measure the exact scope of the arrestee's immediate control, relevant factors would surely include the relative number of police officers and arrestees, the manner of restraint placed on the arrestee, and the ability of the arrestee to gain access to a particular area or container. Certainly there will be some close cases, but when in doubt the police can always turn to the rationale underlying Chimel - the need to prevent the arrestee from reaching weapons or contraband - before exercising their judgment. <=30> n29

Despite Justice Brennan's analysis, the Belton majority's view was sustained and the issue consequently fell to the states for resolution on state constitutional grounds.

II. The Pennsylvania Supreme Court Confronts Belton: Commonwealth v. White

Over a dozen years later, the Pennsylvania Supreme Court was asked to consider Belton in light of the state constitution. In February of 1990, William White, who had been identified to the police as a drug dealer some months earlier, was the subject of an investigation that involved the use of a confidential informant ("CI"). <=31> n30 White unwittingly sold cocaine to the CI, who later [*601] informed the police that a significant drug deal between White, his partner, and others was scheduled to take place. <=32> n31 The CI gave the police the date and location of the deal. <=33> n32 He also informed them that a blue car would be involved in the drug transaction. <=34> n33

With all of the information they gathered, the police were able to secure search warrants for White's residence and the residence and automobile of White's partner. <=35> n34 The police, however, did not seek a warrant for White's car. <=36> n35 At the expected location on the expected date, White appeared in his blue car and was joined in the car by another, unidentified man. <=37> n36 White's partner, who was in a second car, drove by a number of times and left the scene. <=38> n37 At least six police officers then converged on White's car, ordered the men from the vehicle, and placed them under arrest. <=39> n38 The police thereafter searched the empty car and retrieved a brown paper bag between the seats. <=40> n39 Inside the bag, they discovered cocaine. <=41> n40 Prior to facing trial on drug charges, White argued that the cocaine was seized illegally. <=42> n41

One of the many bases upon which the Commonwealth sought to justify the search of the paper bag, and thereby avoid suppression of the cocaine as evidence at trial, was as a search incident to arrest under Belton. <=43> n42 Clearly, the rationale in Belton authorized admission of the drugs. The Pennsylvania Supreme Court, however, refused to adopt Belton and instead relied on the state constitution to find that suppression was proper. <=44> n43 In a relatively brief opinion, the state court justices characterized Belton as proof that "the United States Supreme Court has de-emphasized the privacy interests inherent in the Fourth Amendment." <=45> n44 Without much analysis other than citation to Pennsylvania case law decided prior to Belton, <=46> n45 the White court held that "there is no justifiable search incident to arrest under the Pennsylvania Constitution save for the search of the person and the immediate area which the person occupies during his [*602] custody...." <=47> n46 In Pennsylvania, the "immediate area" was more limited than its federal counterpart. <=48> n47 It meant only those areas that the arrestee could reach at the time of the search. <=49> n48 Where an arrestee was secured outside of his vehicle or in the back of a police car, a search of the automobile's interior compartment was beyond the scope of a search incident to arrest. <=50> n49

In a concurring opinion, Justice Montemuro agreed that the Pennsylvania Constitution gave its citizens additional protections against the Belton rule. <=51> n50 Justice Montemuro, however, faulted the majority's summary treatment of the issue. <=52> n51 He believed that an in-depth analysis was warranted whenever the court considered deviation from the federal norm. <=53> n52 He urged his colleagues to return to the Edmunds test, <=54>

n53 a legal analysis that the court created in Commonwealth v. Edmunds. <=55> n54 Edmunds set forth what was originally thought to be a mandatory four-prong briefing format that addressed, in detail, the following factors:

(1) the text of the relevant state constitutional provision; (2) the history of the provision; (3) related case law from other states; and (4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence. <=56> n55

Although the Pennsylvania Supreme Court had earlier made it clear that an Edmunds analysis was merely helpful, <=57> n56 Justice Montemuro called for reinstatement of Edmunds as a mandatory mode of analysis. <=58> n57 He suggested that Edmunds was "essential" to all state constitutional cases because it provided "a [*603] maximum amount of guidance to... lower courts and to litigants." <=59> n58

Justice Montemuro applied an Edmunds analysis to the facts in White and concluded that Belton was "seriously flawed and [had] no place in Pennsylvania jurisprudence." <=60> n59 Justice Montemuro began by analyzing the text of article I, section 8 of the state constitution, Pennsylvania's counterpart to the Fourth Amendment. <=61> n60 Justice Montemuro next examined the history of article I, section 8 and relevant Pennsylvania case law, concluding that Pennsylvania had been willing to depart from federal jurisprudence in the past. <=62> n61 In addressing the treatment of similar provisions in sister states, the third prong, Justice Montemuro compared the absence of sound state constitutional analysis from states that had adopted the Belton rule with the persuasive reasoning from those that had not. <=63> n62

The strength of Justice Montemuro's reasoning, however, was contained in his analysis of Edmunds's fourth prong, public policy. He carefully considered the current public view of Belton and the wide criticism it had received. <=64> n63 He weighed the risks and benefits of applying Belton's rule, balancing the privacy rights of Pennsylvania's citizens against the safety of its police officers. <=65> n64 He concluded that rejection of the Belton rule would not create "insurmountable law enforcement problems," while adoption of the rule would "dramatically curtail the privacy rights of motorists." <=66> n65 Contrary to the Belton majority's rationale, Justice Montemuro found no need for a bright-line rule in the wake of Chimel. <=67> n66 Instead, Justice Montemuro found that public policy interests commanded a state-based rejection of Belton. <=68> n67

III. The United States Supreme Court Further Broadens Police Power: Whren v. United States

On a summer evening in 1993, Michael Whren was a passenger in a sport utility vehicle on the streets of Washington, D.C. <=69> n68 A number of things prompted plainclothes vice-squad officers to be suspicious of Whren and the driver: the pair's youthful appearance, the truck's temporary license plate, and the fact that the vehicle remained at a stop sign in a "high drug area" for "an unusually long time" while the driver looked into the lap of his passenger. <=70> n69 [*604] When the officers made a U-turn in the direction of the truck, they observed the vehicle turn "suddenly to its right, without signaling,

and speed off at an "unreasonable' speed." <=71> n70 At a traffic light, they approached the vehicle, with the asserted intention of giving the driver a warning about the traffic violation he had just committed. <=72> n71 Once at the driver's side window, the officers saw that Whren was holding two large bags of crack cocaine. <=73> n72 Whren was arrested and ultimately charged with several violations of federal drug laws. <=74> n73

In seeking to suppress the drugs as evidence at trial, Whren argued that the officers' purpose for the traffic stop was pretextual, that is, they were suspicious of Whren and his companion solely because of the men's race. <=75> n74 Whren argued that the officers used the minor traffic violation as a way to stop and investigate the pair. <=76> n75 Whren urged the Court to evaluate the officers' conduct objectively to determine whether, without their legally unsubstantiated suspicions, they would have made a traffic stop for failure to use a turn signal. <=77> n76 If they would not have done so, Whren argued, suppression was proper since seizure of the drugs would have been based on pretext, contrary to the Fourth Amendment. <=78> n77

Prior to Whren, some circuit courts suggested that pretext stops were unreasonable and, thus, improper under the Fourth Amendment. <=79> n78 These courts typically analyzed an officer's motives in order to uncover pretext. <=80> n79 If an officer "would not have" conducted the stop absent her legally unsupportable reason, [*605] the stop was deemed pretextual and, therefore, illegal. <=81> n80

To the surprise of many, the Whren Court rejected completely any analysis of the officers' underlying motivations. <=82> n81 Instead, the Court reasoned, the only relevant inquiry was whether it appeared that a traffic infraction - even a minor one - had occurred. <=83> n82 The unanimous Whren Court affirmed the notion that where police officers observe a traffic violation, they may stop the vehicle - even if their actual reason for stopping the car was not the violation they observed. <=84> n83 Essentially, Whren holds that pretext stops do not violate the Fourth Amendment. <=85> n84

Ignoring those circuit courts that found pretext stops to be an unreasonable course of action by police, the Court reasoned that the Fourth Amendment can never be offended when a traffic stop is made in the face of probable cause to believe a motor vehicle violation has occurred. <=86> n85

In response to defense claims that pretext has long been considered improper, the Court stated that previous cases dealing with law enforcement personnel who harbored ulterior motives did not include the existence of probable cause, unlike the scenario in Whren. <=87> n86 On the primary argument that permitting pretext stops enables police to engage in selective enforcement of traffic laws based on consideration of race, the Court made little comment. It noted only that while such a practice was wrong, "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." <=88> n87

IV. The Pennsylvania Supreme Court's Approach to the Breadth of Police Power: A Response to Whren

While it has yet to happen, the rule in Whren certainly will face a state constitutional challenge in Pennsylvania. And, although the state's supreme

[*606] court no longer requires it, a full Edmunds analysis <=89> n88 may yield the very same result that it yielded in White, namely, a divergence from the established precedent of the United States Supreme Court based on the greater protections of the Pennsylvania Constitution. When the Pennsylvania Supreme Court is faced with a state constitutional challenge to Whren, it may find the Edmunds test a suitable mode of analysis from which to decide whether or not to diverge from federal law.

Edmunds's first prong, a textual analysis of the Fourth Amendment and its state counterpart, <=90> n89 militates neither in favor of nor against adherence to the Whren standard. In nearly every case in which the Pennsylvania Supreme Court has departed from the federal rule, it has recognized that article I, section 8 of the state constitution is "similar in language" to the Fourth Amendment but does not bind the courts to "interpret the two provisions as if they were mirror images" of one another. <=91> n90 Hence, prong one is not a barrier to divergence.

Edmunds's second prong, an analysis of the state constitutional provision and its history, results in a decided victory for departure from the federal norm. The protections afforded in article I, section 8 not only exceed, but precede, those set out in the Fourth Amendment. <=92> n91 The state provision has been interpreted as one "designed to protect [citizens]... from unwarranted and even vindictive incursions upon [their]... privacy," <=93> n92 a definition that aptly describes pretext stops.

Two decades ago, the state supreme court diverged from established federal law to rule that bank depositors have a legitimate expectation of privacy in their records held by the bank. <=94> n93 Characterizing the federal rule as "dangerous precedent," the court used the state constitution to afford state citizens greater privacy rights. <=95> n94

The court continued in this vein by rejecting the United States Supreme Court's reasoning and granting automatic standing to all criminal defendants accused of possessory offenses. <=96> n95 The state supreme court concluded that article I, section 8 "mandates greater recognition of the need for protection from illegal government conduct offensive to the right of privacy." <=97> n96

In yet other areas, Pennsylvania has refused to follow federal law, thereby granting an accused greater protection. Evidence gained from the use of a pen [*607] register was suppressed where the device was utilized without a prior court order. <=98> n97 The good faith exception to the exclusionary rule has been wholly rejected in the Commonwealth, based on state constitutional protections. <=99> n98 Other departures from Fourth Amendment jurisprudence have occurred, <=100> n99 establishing Pennsylvania as a state that "guards individual privacy rights more zealously than the federal government." <=101> n100 Clearly, the historical treatment of article I, section 8 militates in favor of divergence.

The third prong of analysis under Edmunds, consideration of related case law from other states, provides little direction to date. Due to the long road to appellate review, very few state courts have yet considered Whren. <=102> n101 Only New Hampshire has explicitly adopted Whren and held that its own state protections are equivalent to those granted by the federal constitution.

<=103> n102 Only Washington has explicitly rejected Whren on a state constitutional basis. <=104> n103 In doing so, the Supreme Court of Washington relied on a state constitutional provision that permitted an invasion of private affairs only under "authority of law." <=105> n104 That provision, reasoned the court, required one to look beyond the formal justification for a stop and to inquire into the actual reason. <=106> n105 Where the reason is pretextual, it is "inherently unreasonable" and violates the state constitution. <=107> n106 While the Washington case lends some support for rejecting Whren, the New Hampshire case does the contrary. Further, Pennsylvania's constitution does not contain a provision like the one relied on by the Washington court. <=108> n107

The final Edmunds prong, policy considerations, provides the most food for [*608] thought on this issue. <=109> n108 The primary public concern about constitutional validation of pretextual traffic stops is that the stops will be made disproportionately against an identifiable group, such as a racial minority. This practice of singling out a specific racial group for traffic stops, commonly known as racial profiling, causes persons of one race to be stopped repeatedly, while members of other racial groups avoid repeated police contact.

As always, there are two sides to the issue. Consider the balance of public policy interests. It is argued that most pretextual stops are race-based, and inherent in them is racial profiling. Where shown to be race-based, such stops are unreasonable, and therefore contrary to article I, section 8 of the Pennsylvania Constitution. <=110> n109 The unreasonableness of the stop stems from the fact that it is based on the officer's personal belief that people of certain races are more likely perpetrators of crime than are people of other races. The officer's beliefs are not based on anything the suspect has done. The officer's beliefs necessarily subject law-abiding citizens to unwarranted stops simply because of their race. Further, the officer does not seek to address and punish the minor traffic violation that serves as the legal basis for the stop, but is instead looking for other crimes, for which he has no legal basis. <=111> n110 Finding this conduct unreasonable allows the court to exclude the evidence seized in the pretext stop and, according to logic, deter future stops based on racial profiling.

On the other hand, characterizing pretextual stops as reasonable, and therefore not violative of article I, section 8, allows police officers to discover and apprehend criminals even when they do not commit significant crimes in the presence of police. This, according to logic, prevents more crime. <=112> n111 It is argued that pretextual stops do not necessarily involve racial profiling. To the extent that they do, the constitutional violation of such a race-based stop can be addressed effectively via alternative remedies, such as the Equal Protection Clause. <=113> n112 Whether that is true remains uncertain.

V. Public Policy Response: The State of Affairs in the Aftermath of Whren

Scholarly support for the practice of racial profiling is predictably slim. Few people find it acceptable, but one person who does is author and former police officer, Joseph Wambaugh. In an article addressing the public outcry that occurred after New Jersey state troopers fired on a van of minority youths [*609] stopped for a traffic violation on the turnpike, Wambaugh argued that a

police officer's consideration of race is not necessarily a bad thing. <=114> n113 Like the Supreme Court in Whren, Wambaugh concedes that race as the sole reason for a stop is improper. <=115> n114 He argues, however, that inclusion of race as part of the probable cause mix has always been and continues to be appropriate. <=116> n115

Another approach adopted by commentators unopposed to pretext stops is the claim that even if practiced, the conduct known as racial profiling is not as "evil" as perceived. A recent editorial in the Wall Street Journal urged readers to have "a little perspective" and consider whether statistical information on traffic stops was evidence of racism or, simply, "efficiency" in the "targeting [of] potential drug traffickers." <=117> n116

On the other hand, Whren has prompted a flood of law review articles, legal reports, and editorials condemning the opinion. Authors have criticized the reasoning and logic of the opinion on legal grounds, citing the Court's failure to follow applicable precedent and its error in applying case law that is inapposite. <=118> n117 Further, the debate taking place in our public forum, and the current events fueling that debate, offer additional opposition to Whren.

The practice of racial profiling is widely reported - and criticized - in the media. <=119> n118 Accusations and confirmations of the practice are everywhere. Recently, New Jersey's Office of the Attorney General released a report in which it admitted the existence of racial profiling in the state's law enforcement organizations. <=120> n119 This admission triggered the resignation of the state police chief, <=121> n120 a concession in a lawsuit successfully brought against the state by the [*610] American Civil Liberties Union, <=122> n121 and the probable release of nineteen criminal defendants whose cases originated with a traffic stop. <=123> n122 Legislation aimed at preventing systemic racial profiling is being proposed on both federal and state levels. <=124> n123 White police officers stand indicted for falsifying official records to cover up a practice of racial profiling, <=125> n124 while officers of African-American descent are rallying together to end the racist practices of their colleagues. <=126> n125 Print media nationwide report the news of those directly affected. <=127> n126

"DWB" or "Driving While Black" is no longer a novel term; instead, its [*611] definition is widely known - and used - in the public forum. <=128> n127 In an effort to combat racial profiling, the ACLU maintains a website that offers users the opportunity to file an electronic Driver Profiling Complaint Form. <=129> n128 Users also are invited to download the ACLU "Bustcard," a "pocket guideline on encounters with the police" that advises citizens on their rights when stopped by law enforcement personnel. <=130> n129 Even organizations beyond the police department are being accused of and investigated for engaging in racial profiling. <=131> n130

In weighing the public policy risks and benefits pursuant to an Edmunds analysis, one must consider the value pretext stops have in our society, as well as the dangers they present. As Mr. Wambaugh so aptly instructs, a police officer's instinct and intuition is often right on the mark. <=132> n131 Clearly, society benefits from the officer who is skilled enough to recognize criminal conduct even absent the standard indicators accepted in our legal

Brief
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*16 RACIAL PROFILING IN LAW ENFORCEMENT

The Defense Perspective on Civil Rights Litigation

Elizabeth A. Knight, William Kurnik [FNa1]

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*17 A claim of discriminatory law enforcement practices challenges the integrity of the law enforcement agency and its officers. The accusation of biased and prejudicial conduct by a police officer is easily charged, not readily proven, and difficult to defend.

Because the issue of racial profiling only recently became one of significant controversy and debate, many police agencies have little or no information on the race and/or national origin of the persons its officers have encountered, stopped, or arrested in the past. Many agencies have begun to gather statistics and data, but in the authors' opinion, until the data is analyzed and appropriate benchmarks established, it is too early to reach any conclusions with respect to the nature, context, and extent of actual discriminatory law enforcement practices. Until such information is available, law enforcement must respond proactively to the perceived problem, with the goal of eliminating discriminatory practices where they do exist and deterring any possibility for future prohibited practices.

Instances of racial profiling or targeting are both perceived and observed. It has been reported that 60 percent of the population, without regard to race, believes that racial profiling exists. [FN1] Among blacks, the figure is eighty percent. [FN2] It has been admitted that the state police of two states have engaged in the practice, and both are now operating under consent decree. [FN3] The Supreme Court has commented that the perception of the existence of the practice offers an explanation why innocent people may flee simply at the sight of the police. [FN4] Municipalities, upon hearing the rattling of sabers, enter into consent decrees. [FN5] So it comes as no surprise that motions to dismiss claims of racial profiling are regularly being denied, and class actions are being certified. [FN6]

Our purpose is to identify issues and problems encountered by the authors in defending allegations of racial profiling. Because there is no binding racial profiling precedent, we will contrast Fourth Amendment and equal protection jurisprudence, burden of proof, and evidentiary issues.

Defining the act

Historically, the term "profile" as it has been used in law enforcement practices, in a broad sense, refers to the specific reasonable inferences that a police officer is entitled to draw from the facts in light of his experience, as set forth in Terry v. Ohio. [FN7] Law enforcement officers rely upon and are trained to rely upon their own experiences in detection and prevention of crime. Similarly, law enforcement instruction trains officers to rely upon the profession's collective experience. [FN8]

In 1974, the Department of Justice Drug Enforcement Administration, in instituting training programs for narcotics officers, defined "profile" as the collective or distilled experience of narcotics officers concerningcharacteristics repeatedly seen in drug smugglers. [FN9] A police officer is entitled to assess the totality of the circumstances in light of his own training and experience, and instruction on a drug courier profile would be part of the officer's accumulated knowledge. [FN10]

For purposes of this article, we define a "profile" as a set of circumstances, events, or behavior that, when combined with the experience of an officer, may cause heightened suspicion that affects the officer's exercise of discretion in stop and/or arrest decisions.

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[FN4]. Id.

[FN5]. See, e.g., Ledford v. City of Highland Park, 2000 WL 1053967 (N.D. Ill. 2000).

[FN6]. Daniels v. City of New York, 198 F.R.D. 409 (S.D.N.Y. 2001).

[FN7]. 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889, 909 (1968).

[FN8]. United States v. Cortez, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).

[FN9]. Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229, 255 (1983) (Rehnquist dissenting, n. 6).

[FN10]. United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

[FN11]. United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 104 L. Ed. 2d 1, 12 (1989).

[FN12]. 221 F.3d 329, 337 (2nd Cir. 2000).

[FN13]. Id.

[FN14]. Whren v. United States, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89, 97 (1996).

[FN15]. Id.

[FN16]. Id.

[FN17]. United States v. Martinez-Fuerte, 328 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116, 1131 (1976).

[FN18]. United States v. Stone, 73 F.Supp.2d 441 (S.D. NY 1999).

[FN19]. 89 F. Supp. 2d 1131, 1140 (N.D. Cal. 2000).

[FN20]. Price v. Kramer, 200 F.3d 1237 (9th Cir. 2000).

[FN21]. United States v. Sokolow, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1, 12 (1989).

[FN22]. Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389, 403 n. 1 (1991).

[FN23]. Id. at 409 n. 4.

[FN24]. Whren v. United States, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89, 98 (1996).

[FN25]. 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889, 909 (1968).

[FN26]. 392 U.S. 1, 14-16, 88 S. Ct. 1868, 20 L. Ed. 2d 889, 901-03 (1968).

[FN27]. 137 F.3d 343, 353 (6th Cir. 1997)

[FN28]. Id. at 354.

[FN29]. Id. at 358.

[FN30]. Id. at 358.

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[FN31]. Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976).

[FN32]. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450, 468 (1977).

[FN33]. Ford v. Wilson, 90 F.3d 245, 248-49 (7th Cir. 1996).

[FN34]. Id. at 249.

[FN35]. Id. at 249.

[FN36]. 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687, 699 (1996).

[FN37]. Id.

[FN38]. Id.

[FN39]. 27 F. Supp. 2d 1053, 1066 (N.D. Ill. 1998).

[FN40]. Id.

[FN41]. Id. at 1067.

[FN42]. Id.

[FN43]. Id. at 1069.

[FN44]. Id. at 1070.

[FN45]. 89 F. Supp. 2d 1131 (N.D. Cal. 2000).

[FN46]. Id. at 1141.

[FN47]. 221 F.3d 329, 337 (2d. Cir. 2000).

[FN48]. 195 F.3d 111 (2d. Cir. 1999).

[FN49]. 75 F. Supp. 2d 154 (S.D. N.Y. 1999).

[FN50]. 191 F.R.D. 52 (S.D. N.Y. 1999).

[FN51]. United States v. Avery, 137 F.3d 343, 352 (6th Cir. 1997).

[FN52]. United States v. Brignoni-Ponce, 422 U.S. 873, 886-87 (1975).

[FN53]. 90 F.3d 22 (2nd Cir. 1996).

[FN54]. Id.

[FN55]. Id.

[FN56]. Snowden v. Hughes, 321 U.S. 1 (1944).

[FN57]. Id. at 11-12.

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[FN58]. Hameetman v. City of Chicago, 776 F.2d 636, 641 (7th Cir. 1985).

[FN59]. See, e.g., Farm Labor Organizing Comm. v. Ohio State Highway Patrol, 95 F. Supp. 2d 723 (N.D. Ohio 2000); Rodriguez v. California Highway Patrol, 89 F. Supp. 2d 1131 (N.D. Cal. 2000); Maryland State Conf. of NAACP Branches v. Maryland Dept. of State Police, 72 F. Supp. 2d 560 (D. Md. 1999).

[FN60]. 28 C.F.R. § 42.104(b).

[FN61]. Guardians Assn. v. Civil Serv. Comm. of New York City, 463 U.S. 582, 103 S. Ct. 3221 (1983).

[FN62]. Adams v. Ameritech Serv., Inc., 231 F.3d 414, 423 (7th Cir. 2000).

[FN63]. Gebser v. Lago Vista Ind. Sch. Dist., 424 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998).

[FN64]. City of St. Louis v. Prapotnik, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988).

[FN65]. Gebser v. Lago Vista Ind. Sch. Dist., 424 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998)

[FN66]. 64 USCAA 2511.

[FN67]. Cong. Rec., Fed. 7, 1964, pp. 2480-83.

[FN68]. Cong. Rec., Fed. 7, 1964, p. 2484.

[FN69]. Cong. Rec., July 2, 1964, p. 15896.

[FN70]. Davis v. Monroe Bd. of Ed., 526 U.S. 629, 639-40, 119 S. Ct. 1661, 1669-70, 143 L. Ed. 2d 839 (1989).

[FN71]. One district court, perhaps erroneously relying upon Armstrong, has held that statistical evidence cannot be used to establish intentional discrimination in a targeting case. Chavez v. Illinois State Police, 27 F. Supp. 2d 1053 (N.D. Ill. 1998), appeal pending.

[FN72]. Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 339, 97 S. Ct. 1843, 1856 (1977).

[FN73]. Castaneda v. Partida, 430 U.S. 482, 496 n. 17, 97 S. Ct. 1272, 1281, n. 17, 51 L. Ed. 2d 498 (1977) (prima facie case of underrepresentation of Mexican Americans on grand juries shown by 29 standard deviations).

[FN74]. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 310-12, 97 S. Ct. 2736, 2743-46, 53 L. Ed. 2d 768 (1977); REFERENCE MANUAL OF SCIENTIFIC EVIDENCE , FEDERAL JUDICIAL CENTER, 2000 (2d ed.),at 105.

[FN75]. In several questions posed by the judges during oral argument in Chavez, the judges seem to believe that the relevant benchmark was the racial breakdown of the operators of motor vehicles along the interstate highways where the alleged profiling occurred on the interstates. Dr. John Lamberth of Temple University gave a New Jersey Turnpike population census in connection with a motion to suppress where the defendant had alleged that he was targeted. David A. Harris, The Stories, The Statistics, and The Law: Why "Driving While Black" Matters, 84 MINN. L. REV. 265, 277-78 (1999).

[FN76]. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 310-12, 97 S. Ct. 2736, 2743-46 (1977). But it may no longer be a question of fact in this post-Daubert and -Kuhmo Tire era.

[FN77]. Always be cognizant that summaries may be misleading by choice of category. REFERENCE MANUAL OF SCIENTIFIC EVIDENCE , FEDERAL JUDICIAL CENTER, 2000 (2d ed.), at 106.

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Profiling has been recognized as a legitimate law enforcement tool in identifying suspicious and potentially criminal activity. The use of a profile has been held permissible for purposes of establishing the Fourth Amendment reasonable suspicion for an investigatory stop and detention. The U.S. Supreme Court has held that the fact that a drug courier profile was among the factors articulated for a Terry stop did not detract from its evidentiary significance as seen by a trained agent. [FN11]

In contrast, the term "racial profiling" appears to broadly connote discriminatory law enforcement practices. The courts have not yet developed a legal definition. The circumstances under which a law enforcement officer or official might exercise his or her judgmental discretion with discriminatory animus are varied. As the term "racial profiling" is legally applied to individual claims and circumstances, a more specific and concrete meaning of the term in a **constitutional** sense will evolve.

In the meantime, it is safe to assume that **racial profiling** generically references and seeks to encompass all prohibited discriminatory law enforcement practices and conduct. In this sense, **racial profiling** may be considered to include one or more of the practices listed in the sidebar below.

In constructing a definition of **racial profiling,** it is also important to include a requirement of self-initiation on the part of the officer. **Racial profiling *18** is, therefore, intended to encompass, by definition, the elective decision-making process, as opposed to the officer's response to a citizen call in which the officer takes national origin, ethnicity, or race into account in decision making with respect to enforcement of the law. The Second Circuit implicitly adopted this reasoning in Brown v. City of Oneonta, New York. [FN12] The court concluded that there was no violation of the Equal Protection Clause in a case where plaintiffs charged that they were questioned solely on the basis of their race, where the physical description of the suspect provided by the victim of the crime contained race among other factors. The policy of the department, which included obtaining a description of the assailant and seeking out persons matching that description, was found to be race-neutral on its face. [FN13] For this reason, we exclude non-self- initiated encounters from the definition of **racial profiling.**

Fourth Amendment considerations

The term **"racial profiling"** necessarily implies a requisite degree of mental intent or discriminatory purpose. The **constitutionality** of police stops, detentions, and arrests has historically been measured and scrutinized by the Fourth Amendment yardstick. The objective criteria that measure the officer's reasonableness in forming a suspicion or probable cause do not include discriminatory animus. Because the claims of racial profiling arise in the stop, detention, and arrest context, it is still important to analyze each case from a Fourth Amendment standpoint.

In the Fourth Amendment analysis, an officer's motive does not invalidate objectively justifiable behavior, and subjective intent does not make otherwise lawful conduct illegal or unconstitutional. [FN14] In Whren v. United States, [FN15] the suspects (African American) were stopped for traffic violations in a high drug area and were charged with possession of cocaine, which was discovered during the stop. The suspects urged that the stop was pretextual, and it was also contended that the police officers decided which motorists to stop based upon decidedly impermissible factors such as the race of the car's occupants. The Supreme Court held that an officer's motive did not invalidate objectively justified behavior under the Fourth Amendment. [FN16] The Fourth Amendment does not provide an open avenue for challenging racially motivated stops and arrests because of the objective standard set forth in Whren, which does not require an analysis of the officer's intent or motive. Even before Whren was decided, the U.S. Supreme Court perceived no Fourth Amendment violation in the practice of referring motorists to check point locations at the discretion of the border patrol, even if it was assumed that referrals were made largely on the basis of apparent Mexican ancestry. [FN17]

Another Fourth Amendment decision held that the fact that an officer's initial approach may have been racially motivated did not render a Terry stop unreasonable as a matter of law, even assuming that the defendant was singled out for a closer inspection on the basis of his race, where the court was otherwise satisfied that the officer complied with the Fourth Amendment. [FN18]

Not all claims of a racially motivated stop and arrest, however, escape analysis under the Fourth Amendment. In

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Rodriguez v. California Highway Patrol, [FN19] the court, in a civil action, allowed a Fourth Amendment claim to survive a motion to dismiss that was premised upon alleged racial profiling, concluding that even if the stops were lawful under Whren, the facts alleged might support liability for violation of the Fourth Amendment due to the intrusiveness and duration of the searches and detentions. Additionally, the Ninth Circuit Court of Appeals affirmed a verdict in favor of plaintiffs where it was alleged that officers with racial bias stopped the plaintiffs' vehicle without probable cause or reasonable suspicion, conducted an illegal search, and used degrading and excessive force on the plaintiffs. [FN20] Thus, it is possible that racial bias might be an evidentiary consideration in the Fourth Amendment context to establish the absence of reasonable suspicion or probable cause, but conduct under the Fourth Amendment is still judged by an objective standard.

Although the Fourth Amendment does not require inquiry into the subjective state of mind of the officer, the potential for racially biased law enforcement practices has been noted previously. Justice Thurgood Marshall was critical of the use of police profiles in a dissenting opinion, suggesting that reliance on a profile runs a greater risk of subjecting innocent individuals to unwarranted police harassment and detention. [FN21] Justice Marshall dissented in another case, criticizing police sweeps of buses as being conducted in dragnet style. [FN22] Justice Marshall concluded that insisting that police officers explain their decision to single out a particular passenger for questioning would help prevent their reliance on impermissible criteria such as race. [FN23] The foreshadowing of the problem of racial profiling articulated in Justice Marshall's dissents arose in a Fourth Amendment context, but identifies the complex issue presently challenging the courts.

From the defense perspective, Fourth Amendment criteria and objectivity should be addressed in a racial profiling claim. In the presence of a valid Fourth Amendment encounter, it is not clear that an arrest or prosecution will be invalidated criminally due to a claim of discrimination. Whren supplies a legal basis for the stop ***19** and/or arrest on objective criteria for Fourth Amendment purposes.

Equal Protection Clause bases

While subjective intentions play no role in the ordinary, probable-cause Fourth Amendment analysis, the Constitution prohibits selective enforcement of the law based on considerations such as race. The constitutional basis for objecting to intentional, discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. [FN24]

Although the Fourth Amendment is implicated in the stop, detention, and arrest setting, the most direct **constitutional** avenue of relief for a **racial profiling** claim is the Equal Protection Clause. Where an arrest otherwise passes scrutiny for Fourth Amendment purposes, it is unknown how racial profiling-equal protection challenges will affect criminal prosecution and conviction. If a stop or arrest passes constitutional Fourth Amendment scrutiny, will equal protection-racial bias claims on the part of the arresting officer or agency invalidate the arrest? Whren provides no indication for the solution of the problem and simply suggests it be resolved in an equal protection setting. The answer to the question may impact criminal cases with motions to suppress focusing upon allegations of bigotry on the part of the arresting officer instead of traditional search and seizure requirements. Similarly, a determination that discrimination in an otherwise proper Fourth Amendment context invalidates the arrest will broaden the definition of false arrest in a civil context. Terry v. Ohio [FN25] was decided in a Fourth Amendment setting, but the Court observed in passing that the wholesale harassment of minority groups by certain elements of the police community will not be stopped by the exclusion of any evidence in a criminal trial. [FN26]

More recently, the Sixth Circuit Court of Appeals in United States v. Avery [FN27] suggested that an equal protection violation may occur at the pre-contact stage of the criminal process where an officer initially targets someone solely because of the person's race, without additional factors, and because of the person's race, follows and investigates that individual. The court in Avery concluded that such targeting would be constitutionally impermissible and violative of the Equal Protection Clause because a person cannot become the target of a police investigation solely on the basis of race. [FN28] In Avery, Judge Boggs wrote a separate concurring opinion, critical of the majority, noting that the contours of a violation in a pre-contact stage of the criminal process are difficult to discern in the abstract. [FN29] Even if a hypothetical defendant in the criminal setting presented compelling evidence that officers noticed, targeted, pursued, or investigated a person solely because of his race, the concurring opinion in Avery raises the question whether the pre-contact activity, which could be described as leading to evidence of a crime, would warrant suppression.

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On the other hand, the contours of the violation are difficult to discern in the abstract. In a paradigmatic case, an officer on routine foot patrol walks east on First Street, behind two men, one black and one white. First Street dead-ends into Main, so at the corner of First and Main each man, and the officer must turn right or left. The black man turns one way; the white man turns the other. The officer chooses to turn the corner to follow one of the men and, when questioned later, candidly admits that he had no reason for deciding to go right rather than left save the race of the man who also turned that way. However, within a block of turning of the corner, the officer sees the man rob a store, and arrests the man. My intuition is that the evidence of that robbery could not be suppressed. However, that intuition was no less dicta than most of the discussion in Part II B of the court's opinion. [FN30]

It is not clear how the exclusionary rule will be applied to violations of the Equal Protection Clause in the criminal context. Regardless of the impact racial profiling-equal protection challenges are determined to have in the criminal arena, the claim of racial profiling is presently being advanced in civil claims.

Procedural and evidentiary uncertainties in a claim for equal protection- racial profiling exist because from a substantive standpoint, the law has not yet clarified the elements of the plaintiff's burden of proof. Purposeful intent to discriminate must be present before there is a violation of equal protection in a racial setting. [FN31] In an equal protection claim, the plaintiff carries the burden of proving that discriminatory purpose was a motivating factor in the defendant's decisions and action. [FN32] The combination of an arbitrary traffic stop with a racial difference between the person stopped and the police officer, however, has been held insufficient to establish a prima facie case of race discrimination. [FN33] Otherwise, the floodgates would be opened to federal court any time "a black arrested a white or a white arrested a black." [FN34]

There are fundamental problems with adopting a Title VII employment discrimination approach to the burden of proof in a racial profiling-equal protection claim that arises in a stop-and-arrest setting. The Seventh Circuit Court of Appeals rejected such an approach in Ford v. Wilson, [FN35] noting:

We do not think, by analogy to the McDonnell-Douglas framework for deciding motions for summary judgment in employment cases, that the combination of an arbitrary stop ... with a difference in race between the person stopped and the officer establishes a prima facie case of racial discrimination. Otherwise any time a black arrests a white, or a white arrests a black, the person could, by testifying that the arrest had been groundless, obtain a trial in federal court under 42 U.S.C. § 1983. We used the example of an arrest but the principle would apply equally to traffic stops--and again the specter of millions of new claims of constitutional infringement looms.

There is presently a conflict in the courts with respect to the critical question whether the plaintiff must be able to demonstrate that similarly situated individuals in a non-protected class were not stopped or arrested for equal protection-racial profiling claims.

In United States v. Armstrong, [FN36] the criminal defendants were charged with conspiracy to possess with intent to distribute cocaine and alleged that ***20** they were selected for federal prosecution based upon their race (African American). The defendants were able to demonstrate that all 24 crack cocaine cases closed in the previous year involved African-American defendants, and that 54 cases closed in the three previous years involved non-white defendants.

The requirements for a selective prosecution claim draw on ordinary equal protection standards, and the claimant must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by discriminatory purpose. [FN37] The court in Armstrong held that to establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted. [FN38] In Chavez v. Illinois State Police, [FN39] the district court applied Armstrong in a case that alleged that the Illinois State Police had engaged in the practice of stopping and detaining African-American and Hispanic motorists based upon their race without sufficient cause or justification.

Relying upon Armstrong the court in Chavez noted that the plaintiff must show that similarly situated individuals of a different race were not subjected to the challenged conduct. [FN40] The failure to establish the similarly situated requirement in Chavez was fatal to the plaintiffs' equal protection claims. The plaintiffs in Chavez were not able to identify similarly situated white motorists who were treated differently from the plaintiffs. In Chavez, the plaintiffs

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argued that Armstrong does not apply to a law enforcement racial profiling case because Armstrong involved a claim of selective prosecution. Armstrong was premised upon general equal protection principles. The plaintiffs in Chavez also attempted to avoid the application of Armstrong by distinguishing the case with the great deference afforded to a prosecutor's decision of whom to charge, which is not afforded to a police officer's decision of whom to stop. The district court rejected the argument in Chavez applying traditional equal protection principles that require a plaintiff demonstrate he or she was treated differently than a similarly situated person of a different race. The answer to the question was not in the deference given to the decision maker in the respective situations, but in whether the decision made resulted in impermissible treatment of similarly situated persons. [FN41]

The plaintiffs in Chavez alternatively argued that if the burden of proof in Armstrong applied to racial profiling in law enforcement, statistical data demonstrating that persons subjected to the alleged wrongful conduct were of a certain race would be sufficient to establish the similarly situated requirement. Applying Armstrong again, the district court in Chavez held that the study showing that all persons prosecuted were black did not meet the similarly situated requirement, and explained that the required threshold for equal protection claims is a credible showing of different treatment of similarly situated persons. [FN42]

The plaintiffs in Chavez also offered other non-statistical evidence in support of their claims of discriminatory treatment. The other claims included: 1) that the Illinois State Police permit consideration of race as a factor in deciding which motorists to stop; 2) that Illinois State Troopers admit they use race as one of the indicators in determining whether to search a vehicle; 3) that State Police training manuals emphasize alleged predominance of Hispanics as drug couriers; 4) that testimony of African-American motorists recounts allegedly discriminatory law enforcement by the Illinois State Police; and 5) that Illinois State Police refused to open a case when a citizen complained he was stopped because of race. [FN43]

Additionally, one of the plaintiffs in Chavez testified that an officer referred to "you people" when asking permission to search the plaintiff's vehicle. Because racial remarks alone may not give rise to an equal protection violation, the plaintiffs' claim in Chavez under the Equal Protection Clause was deemed insufficient because it had not been demonstrated that he was treated differently than someone else due to racial animus. Other evidence offered by the plaintiffs in Chavez was also found to be inadequate because the plaintiffs failed to point to a white motorist who was treated differently. [FN44]

In Chavez, the court refused to infer that a specific similarly situated white motorist would not have been stopped because the inference would require the court to collapse the two prongs of equal protection analysis and, in essence, eliminate the requirement of establishing the comparative element.

Faced with a similar issue of racial profiling, Rodriguez v. California Highway Patrol [FN45] rejected the application of Armstrong's similarly situated requirement in a law enforcement as opposed to a prosecutorial setting. The court in Rodriguez disagreed with the application of Armstrong in Chavez, noting that Armstrong is a case of critical importance in the criminal context but is less instructive in a civil case. In Rodriguez, the court also emphasized that the holding in Armstrong emphasized that the judiciary owes special deference to the prosecutorial office, concluding that such deference that is extended to a prosecutor's office is not extended to law enforcement officers. It is anticipated that the opinion of the Seventh Circuit Court of Appeals in Chavez will be significant in establishing the plaintiff's burden of proof in the civil context. If the plaintiff is held to be required to meet the similarly situated requirement of Armstrong, it will be difficult or, in some cases, impossible for the plaintiff to establish this element of the burden of proof. Unlike the records and data that would be available in a selective prosecution case, police agencies do not typically keep records of individuals who are not stopped or arrested. The court in Rodriguez expressed specific concern over the similarly situated requirement ***21** as it might be applied in the civil context because it would be impossible to meet. Normally, similarly situated persons for whom records might be maintained would be the relatively small subset of individuals who were stopped and questioned by the police but not arrested; and even for this group, it is difficult to conceive what data plaintiffs could obtain. [FN46]

In Brown v. City of Oneonta, New York, [FN47] the court held that it was not necessary to plead the existence of a similarly situated non-minority group when challenging a law or policy that contains an express, racial classification. Such classifications are subject to strict judicial scrutiny. This opinion in Brown superceded the court's prior opinion in

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Brown v. City of Oneonta, New York. [FN48] Further conflict and inconsistent results have been occurring in the district courts with respect to the burden of proof. The district court opinion in National Congress for Puerto Rican Rights v. City of New York [FN49] originally applied Armstrong requirements to the plaintiff's action challenging the constitutionality of stop-and-frisks conducted by the street crime unit in New York. In originally granting the motion to dismiss the equal protection claim, the district noted that the plaintiff failed to show that similarly situated individuals of a different race were not subjected to the challenged conduct. The court found the district court opinion in Chavez instructive but not controlling with respect to the application of Armstrong to law enforcement allegations of targeting and profiling. Two months later, on the plaintiff's motion for reconsideration, the district court in National Congress for Puerto Rican Rights v. City of New York [FN50] reversed the prior ruling and reinstated the equal protection claim based upon Brown holding that the plaintiff need not identify similarly situated non-minority individuals where discriminatory policy contains an express racial classification. The court concluded that a boilerplate Monell allegation in the complaint--alleging that the defendants implemented and enforced a policy, practice, or custom of stopping and frisking members of the plaintiff class based on race and national origin constituted an express racial classification--obviated the need for the plaintiff to address the comparative element of similarly situated persons emphasized in Chavez.

The Seventh Circuit Court of Appeals decision in Chavez should clarify and resolve some of the conflicting decisions with respect to the burden of proof. In addition to the unanswered questions surrounding the plaintiff's burden of proof, the law has not yet substantively defined the parameters of the Equal Protection Clause with respect to claims of racial profiling. It is clear that action taken solely because of an individual's race or national origin, regardless of the stage of the encounter with law enforcement, will violate the Equal Protection Clause. The definition of racial profiling previously provided herein includes activity more appropriately described as targeting. A person cannot become the target of a police investigation solely on the basis of race. [FN51] The extent to which race or national origin may be a factor or taken into account in law enforcement practices without causing a violation of the Equal Protection Clause is unknown. The airport and border cases involve distinguishable circumstances from a typical police encounter, including a qualitative Fourth Amendment difference. In addressing a border encounter, the United States Supreme Court refused to adopt, by analogy, the concept that "the likelihood that any given person of African ancestry is involved in drug trafficking is high enough to make African ancestry a relevant fact in investigating drug trafficking at the airport." [FN52]

To the extent that profiles are used as an investigatory law enforcement tool, the criteria should be based upon a pattern of conduct, repeated behavior and characteristics rather than membership in a particular class. In United States v. Al Jibori, [FN53] a post-Armstrong selective prosecution case, the assistant U.S. attorney admitted that the decision to prosecute included the defendant's place of origin as well as mode of entry since sufficient terrorist activity had originated in the Middle East. The defendant in Al Jibori was from Iraq, traveling with an altered Swedish passport. Ahmed Mohammed Ajaj was a Jordanian who traveled from Pakistan under his Swedish passport and was convicted in the World Trade Center bombing. The Second Circuit Court of Appeals characterized the similarities between the two fake passports as superficial and remanded the case for further inquiry to determine if there was commonality between the two defendants other than their national or regional origin. [FN54] In remanding, the court in Al Jibori suggested the lower court examine evidence that the defendant matched the alleged terrorist profile, as well as the government's newfound proactivity with regard to passport violations. If it could be demonstrated that this was not a one-time selective exercise or a showing that a substantial number of the prosecutions were of defendants from other areas of the world, it could be sufficient to pass **constitutional** scrutiny for selective prosecution. [FN55]

A definition of **racial profiling** in the context of the Equal Protection Clause will probably include the traditional equal protection concepts, in addition to reconciling claims of racial profiling with traditional principles regarding selective enforcement of the law. The unlawful administration by state officers of a state statute fair on its face--resulting in an unequal application to those who are entitled to be treated alike--is not a denial of equal protection unless there is an element of intentional or purposeful discrimination. [FN56] A construction of the Equal Protection Clause that would find a *22 violation of federal right in every departure by state officers from state law is not to be favored. [FN57]

The Constitution does not require states to enforce their laws (or cities their ordinances) with Prussian thoroughness at the price of being allowed to enforce them at all (citations omitted). Otherwise few speeders would have to pay traffic tickets. Selective, incomplete enforcement of the law is the norm in this country. [FN58]

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Although claims to enforce the Equal Protection Clause under 42 U.S.C. § 1983 first come to mind as the vehicle for remedying racial profiling or targeting, some district courts have sustained claims brought under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. [FN59] Recognizing actions under Title VI affects the level of culpability necessary to obtain relief, the scope of liability, and the admissibility of evidentiary issues.

42 U.S.C. § 2000d was passed pursuant to Congress' power under the spending clause. The section provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The Department of Justice promulgated regulations describing the prohibited discrimination. First, the regulations paraphrase the statutory authorization and then identify specific, discriminatory actions that are prohibited, including to "Deny an individual any disposition, service, financial aid or benefit provided under the program. ... subject an individual to segregation or separate treatment in any manner related to his receipt of any disposition, service, financial aid, or benefit under the program." [FN60]

Although claims brought under the Equal Protection Clause are limited to claims of intentional discrimination, actions under Title VI are broader in scope. Where monetary relief is not being sought, an action may be brought under Title VI to enforce the Justice Department's regulations on a disparate impact theory. [FN61] Although courts have observed that in disparate treatment or discriminatory pattern or practice cases, statistical evidence "will likely not be sufficient in itself" to establish the claim, [FN62] this is not so with a disparate impact claim.

Title VI operates like Title IX, and in construing both acts, because of their similarity, the same rules of construction apply in determining their scope and operation. [FN63] For liability to be imposed upon a public entity under Section 1983, the profiler must be a final policymaker, or notice of the existence of profiling must come to the attention of a final policymaker. [FN64] Not so under Title IX--and, therefore, not under Title VI. If notice of a violation of Title IX comes to the attention of a person with power to stop it, public entity liability is established. [FN65] A street sergeant or a shift commander should have the power to stop racial profiling, and notice to the supervisor may be sufficient to establish public entity liability. Absent delegation of final policy-making authority, only notice to the chief of police can establish liability under Section 1983. The evidentiary implications are obvious.

It seems that until the issue is foreclosed by binding precedent, the availability of Title VI as a vehicle for remedying racial profiling or targeting is an open question. Reviewing the congressional debates on Title VI indicates that the concern of Congress was that "citizens are denied the equal benefits from federal financial assistance programs because of their color." [FN66] Throughout the debates, Congress expressed its concern that funds were being used to perpetuate "segregation." [FN67] A comment was made: "Is not everyone entitled to his full share of benefits?" [FN68] Finally, on the date of the passage of the act by Congress, a sponsor of the House Bill commented that the bill addressed "programs administered on a segregated basis." [FN69] It seems that Congress wanted to ensure that everyone received a fair share of government largess. Nowhere in the debates on the title is there any mention made of any abuses in law enforcement activities or violence, as was the case for debates on Section 1983.

When Congress acts under its spending power, liability attaches "[o] nly where recipients of federal funding had adequate notice that they could be liable for the conduct at issue." [FN70] The focus of the Act is on persons being excluded from participation in a "program" or being denied the "benefits," of a program receiving federal aid. In a claim involving racial profiling and targeting, persons are not being denied a "benefit," nor are they being denied equal participation in a "program." The ultimate determination whether Title VI provides a remedy for racial profiling in the arrest context will probably turn upon this issue.

Statistical evidence

Not surprisingly, the use of statistics to establish intentional discrimination in racial profiling and targeting remains an open question. [FN71] In the employment context, the Supreme Court has held that statistics are, in general, admissible to prove the existence of a pattern or practice of discrimination. [FN72] Although no specific difference between the expected value and the observed number must be shown, two or three standard deviations may be sufficient to show

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discrimination. [FN73]

In any statistical analysis, one must look at the proper community or group when making a comparison. [FN74] In racial profiling and targeting cases, this provides the first means for attacking the statistics. Particularly in small communities bordering large metropolitan areas, the racial makeup of the drivers along the streets of the community may have no correlation to the population of the community. It is the racial makeup of the operators of motor vehicles in the particular community that provides the relevant benchmark. [FN75]

If traffic stops are being analyzed, the benchmark needs to be adjusted to determine driving-age population. The plaintiffs will no doubt seek to make adjustments to reduce the driving population of minorities by making further reductions for the percentage of families that do not own motor vehicles. The plaintiffs may seek to increase the driving population of whites by considering multiple-vehicle households. Whether or not these adjustments are warranted is problematic. Although this may seem to be the best method of attack, the Supreme ***23** Court has noted that the relevant market is a question of fact. [FN76]

Assuming that the department has not already begun data collection, the obvious sources of the data would be traffic citations, arrest reports, or logs of vehicle stops called in to the dispatcher. Depending upon the allegations, records of plates being run on vehicles that are not stopped would have to be reviewed. In connection with the compilation of the database from the sources, the consensus seems to be that the offenses must be quantified in light of the particular allegations. Non-discretionary offenses, for example, driving 10 miles per hour over the established speed limit or DUI, should be distinguished from discretionary violations, for example, improper lane change or obstructed vision. Again, depending upon the allegations, moving offenses and non-moving offenses can be distinguished and perhaps even further divided by observable versus non-observable offenses.

The next step in the statistical analysis is to analyze the data by categories to obtain a picture of exactly what is transpiring. [FN77] Comparisons may be based upon the overall numbers or broken down by gender, age group, and offense.

When faced with what may appear to be statistically significant discrimination, can it be explained by a "confounding variable?" [FN78] Is a particular type of vehicle being targeted--older versus newer, truck versus auto? Do day of the week, time of day, or commuting or work patterns tell us anything? Explanations to consider will vary in large part based upon the allegations of the complaint, as well as the size, location, and demographics of the community.

Aside from the evidentiary problems surrounding the use of statistics in a claim of this nature, it is important to identify the type of racial profiling alleged to be involved in a particular case, along with a preliminary determination as to the context in which the conduct arose. For example, an allegation that racial profiling was used in either a traffic stop at a particular location or place frequented by minorities or in a particular type of arrest such as domestic violence, may dictate different considerations from a preliminary investigative standpoint. Similarly, the proof required on an individual capacity claim against an officer will vary dramatically from a claim against the department for a municipal custom, policy, or practice brought pursuant to 42 U.S.C. § 1983. If statistical data is deemed sufficient to establish discriminatory purpose and intent or a Monell [FN79] custom, it is unlikely that such evidence can be properly admitted to prove the underlying constitutional deprivation on the part of the individual arresting officer. Similarly, in the absence of a certified class action, a statistical, pattern and practice analysis is not available to prove individual discrimination claims. [FN80]

The nature of an individual equal protection discrimination claim focuses on the evidence directed at the individual complainant and not at incidents of discrimination directed at others. The question of when statistics may be properly relied upon in a racial profiling-equal protection claim has not yet been resolved. The issue has been squarely addressed in Chavez, [FN81] which is pending before the Seventh Circuit Court of Appeals. Until the issue has been resolved, from a defense perspective, and in the absence of a certified class action, the use of statistics in the plaintiff's case should be challenged. Consideration should be given to the possibility of differentiating defendants sued in their individual capacities from claims filed against the police agency or municipality. Clarifying institutional claims of discrimination of racial profiling will avoid the obvious prejudicial effect the claimed departmental discrimination has on the individual defendant. If a plaintiff can successfully demonstrate a disproportionate number of minority police

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encounters in a particular agency, it does not logically follow that the individual defendant officer engaged in prohibited discriminatory practices in the course of a specific arrest.

As noted above, statistics alone may not be sufficient to prove a pattern or practice claim. Some smoking-gun evidence may be necessary. Racial slurs directed at the arrestees are obvious, but who made them? Are statements made by non-supervisors, for example, the patrol officer, admissible in a Title VI case? Statements made by non-policymakers should not be admissible in a case under Section 1983. Analogies will have to be drawn from the case law in the employment setting addressing stray remarks, remarks made outside the decision- making process, and remarks made by non-decisionmakers.

Where the officer's actions are justified, the Mt. Healthy "no harm--no foul" rule, a rule of causation which is applied in the mixed-motive, free speech context, should have equal application. [FN82] In other words, from a damage standpoint, if Section 1983 causation rules are applied, the defense may prevail when it can be shown that the plaintiff would have been stopped, detained, or arrested even in the absence of racial profiling on the part of the officer.

Fourth Amendment reasonable suspicion or probable cause may serve as the basis for structuring a Mt. Healthy defense in profiling claims. Unlike any other claim of discrimination, racial profiling will require balancing the competing considerations embodied in the Equal Protection Clause and the Fourth Amendment.

We have struggled with the legal issues and evidentiary issues outlined above for the last 18 months. Because of the nature of both the perception of racial profiling and racial discrimination in the law enforcement context, we expect the law of racial profiling in law enforcement to develop explosively and completely within the next year. In the meantime, a decision in Chavez will probably provide us with more guidance as well as a legal roadmap for claims involving racial profiling.

Addendum

Following the preparation of this article, the Seventh Circuit Court of Appeals handed down its decision in Chavez v. Illinois State Police [FN83] on May 23, 2001. The opinion of the district court is affirmed in a lengthy opinion that outlines the plaintiff's burden of proof in a racial profiling, equal protection claim and addresses the complex evidentiary consideration surrounding the use of statistics.

What Is Racial Profiling?

Racial profiling may include one or more of the following: The practice of focusing enforcement efforts on a particular ethnic or racial class (probably more properly defined as "targeting");

Exercising judgmental discretion in law enforcement decisions based upon the individual's membership in a particular ethnic or racial class (also more appropriately referred to as "targeting");

The practice of using racial and ethnic stereotypes as part of the circumstances for making an investigatory stop, detention or arrest; and

Using race or ethnicity as one factor among all the criteria of an established profile.

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[FN1]. GALLUP POLL RELEASE, Racial Profiling, December 9, 1999, p. 1.

[FN2]. Id.

[FN3]. Illinois v. Wardlow, 528 U.S. 119, 135 n. 10, 120 S. Ct. 674, 682 n. 10, 145 L. Ed. 2d 570 (2000).

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Federal Lawyer
November/December, 2001

***68** UN-AMERICAN ACTIVITIES

Racial Profiling and the Backlash after Sept. 11

Farah Brelvi [FNa1]

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***69** To all of my friends ...

I am writing this feeling so depressed and frustrated. I am sure you all know that I am Egyptian and of Muslim faith. I was also born and raised in America. Since September 11, my family and friends of the same background have been dealing with the feelings of fear and sadness like everyone else. But we've also been dealing with more ... you all know or have at least heard what has been happening to Muslims, Arabs, Pakistanis, or anyone who even looks like these ethnicities. I'm not going to go through all that. But I am going to tell you what just happened to me this past weekend on my way to and from Canada.

President Bush had come to Chicago and announced that everyone should fly again ... I was supposed to fly out to visit my friends in Toronto and Montreal the week of the tragedy, so I exchanged my ticket for this past weekend. I was nervous because of everything I was hearing about how Arabs and Muslims were being treated but I was not going to let that stop me and to be honest with you, I really didn't think that anything could happen to me because I do not cover my hair, or have an accent or look like any particular ethnicity (as you all know).

I got to O'Hare Airport and was going through the security. There was a group of people in front of me and behind me -- all pretty much white, conservative middle to upper-class looking. They all walked through, no problem. I walked through, they checked my bag, they frisked me and did another metal detector (hand-held), meanwhile, everyone else behind was going through, no problem. What happened to me next in Canada is more blatant and humiliating -- and, I must add, frightening. When I got to Toronto Pearson Airport, Canadian customs of course interrogated me as to why I was there and who I was visiting. When I told them I was visiting friends, the customs agent sarcastically said: "Oh, so you just became friends with these people like that and now you're coming to just visit?" ... When I finally told her I was visiting Esthero [author's note: Esthero is a well-known Canadian singer who has been compared to Billie Holliday and Bjork], she let me go.

From Toronto, I was traveling to visit a friend in Montreal. I go to check in and the ticket agent takes my AMERICAN passport and enters my name into the computer, hesitates, looks at me. ... I say, "Is there something wrong?", she says "No" and gives me my boarding pass. I go sit at the gate waiting with everyone else for my flight. I see four police officers appear. Minutes later, they all approach me and say that I need to come with them. "Why?" I ask. They say: "We'll tell you when you come with us." One officer said to me, "I'm sure you know what has happened in the U.S. We were given a terrorist suspect list from the FBI and were asked to pull you aside." I couldn't believe what I was hearing! I told him that I AM NOT A TERRORIST and that they know that my name is NOT on that list. One of the officers then said, "Well, your name is not on the list, but your name is similar to one on it:" So how can they treat me like a criminal, when I AM NOT? He said he needed to check my identity, et cetera. I showed him my passport and told him that what they are doing was wrong and racist and that I am insulted and humiliated. They let me go and five minutes later, the same police officer came up to me and said, "I just want you to know I was just doing my job. After you checked in, they called us and told us that we needed to pull you aside because of your last name. They are doing this to so many people and are pissing a lot of people off." He felt bad but all he could do was tell me this privately. I started to cry because the fact was that he knew the government was abusing this security situation but he couldn't do anything about it - and that was so scary to me.

I was one of the last people on the plane, and you could have cut the air with a knife. Everyone was quiet and either staring at me or trying not to stare at me in fear.

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When it was time for me to fly from Montreal back to Toronto, I was nervous so I asked my friend to come into the airport with me. I check in again. The counter ticket agent hesitates, calls someone on the phone and I say: "What's going on?" She says, "The computer is malfunctioning and you have to wait here until a technician comes to fix it because I cannot enter your info." I said to her: "I cannot miss this flight. I have to catch a connecting flight in Toronto to fly back home to Chicago and I have a job interview tomorrow." She said I wouldn't miss my flight in Toronto. The airline stopped checking everyone else in also. I see someone who looks like a sheriff standing about ten feet away and three police officers come walking up to me, AGAIN! I go through the same questioning and argue that, "This just happened to me two days earlier and obviously it was a mistake and I'm good" and "They let me on the plane so why are ***70** you doing this to me when I am not on this FBI list?" The sheriff was French Canadian and apparently didn't feel the need to speak with me in English. My friend told him that this was racism and he told her if she didn't shut up he was going to arrest her. This was all done in front of the entire airport. They made me miss my flight. Meanwhile they are all talking in French about me and I heard the word "terrorist." (I ended up having to stay in Toronto an extra night, which was a problem because I had no money left for a hotel and had to crash at a friend's friend's place.) The next flight I could take the next day from Toronto on United Airlines was not going to get me back home in time for my interview so I missed it. I didn't sleep the night before for fear of what was going to happen to me coming back home. At the Toronto Pearson airport, I checked in, got my seat assignment, which was in first class, and boarded the flight. The flight attendant was staring at me and when I asked her to help put my bag up in the overhead compartment because I have back problems, she said, "No." I looked at her in shock and she said, "Well, I'll help you but you have to lift it, too." Then the Captain walked up and down the aisle looking at people. Five minutes later, everyone is seated, and I hear a couple of flight attendants talking to each other. "I think we should move her." The other one answers "I don't know if that's a good idea ..." and the first one says, "Fine, I'll move her." The flight attendant comes up to me and says, "Is your name Sonia Hassan?" I said, "Yes, why?" "We need to move you. To coach. Seat number ___." "But why?" I said. "Dress code reasons." "But I was wearing jeans when the ticket agent saw me and gave me this seat so what's the problem?" She said, "You need to move," and walked away from me. At that point, I was so emotionally drained and sick, and all I wanted to do was just go home, so I moved.

Thanks so much for taking the time to read this. I hope that you all can try to understand where I am coming from because I am feeling very isolated. I felt like I've been in a horrible dream state since September 11 and I'm not waking up.

I'm wishing you all PEACE AND LOVE FOR YOURSELF AND EVERYONE ELSE AROUND YOU.

Love, Sonia Hassan. Your non-terrorist friend.

At the same time that 28-year-old Sonia Hassan, [FN1] (whose e-mail letter to her friends appears above) was traveling, Rep. John Cooksey of Louisiana announced that any airline passenger wearing "a diaper on his head" should be subjected to extra questioning by airport security. Cooksey later apologized for his statement. Then he issued a re-election ad pronouncing that "We know the faces of terrorists and where they're from. Terrorist profiling is essential for our nation's security." "An Ugly Appeal," Editorial, Wash. Post, Oct. 11, 2001, at A32.

If terrorist profiling indeed is essential for our nation's security, I would like to encourage a different way of thinking about profiling so that the context of the debate about its merits and demerits can be informed by factors about which we do not always think as lawyers. We must be aware not only of the legal standards of strict scrutiny and suspect classifications but also of considerations that do not always make it into the law books. We must ask what role -- if any -- racial prejudice plays in such national security concerns and question the meaning of singling out certain groups in a time of fear. We must ask: What becomes of our civil society without this discussion?

Before Sept. 11, judging by the national opprobrium toward New Jersey's highway stops ("DWB" -- "driving while black") and high-level congressional attention, **racial profiling** [FN2] was among the **constitutional** issues of the moment. Today, following the most vicious attacks on the United States since the attack on Pearl Harbor in 1941, and when it appears that every one of the terrorists was a Muslim man from the Middle East, racial profiling is being rehabilitated as one of the law enforcement techniques of choice. We hope that Cooksey and others like him -- who conflate racism with law enforcement -- are outliers. But we must be able to distinguish between a legitimate consideration of race, ethnicity, or religion in law enforcement and plain racial animus. We also must examine critically

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the "profiling" that is under way to identify and weed out the bad apple of racism that will spoil the whole barrel of law enforcement and civil rights. This is the challenge to which we have no choice but to rise.

Individual rights and due process are the cornerstones of our system of justice. Abandoning these principles for the expediency of national security is both wrong and -- despite the claims of defenders of profiling -- unproductive in the long run. "If we sacrifice our most basic principles of freedom in the name of saving our country, what have we saved, and who have we become?" David Cole, Commentary, "FBI Must Change: Guilt by Association Hinders Anti-Terrorism," Fulton County Daily Rep., 7 Sept. 19, 2001 (hereinafter "Cole, "FBI Must Change"). Those who would kick Sonia Hassan off three flights because her last name is "Hassan" must be reminded that "if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had ***71** been convicted of treason, the Constitution forbids its penalties to be visited upon [her]." Korematsu v. United States, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting).

Tragically, this is not the first time in our nation's history that fear has alienated us from our fundamental principles. The comparison of Sept. 11 to Dec. 7, 1941, is apt in more ways than just the obvious attack on American soil. After Pearl Harbor, in a nationwide application of guilt by association, Japanese-Americans were detained and imprisoned in internment camps. The Supreme Court upheld the internments in the culmination of a national refusal to view Japanese-Americans as individuals rather than as group members whose collective identity trumped any and all attempts at individuation.

The history behind Korematsu is worth repeating. In 1942, President Roosevelt issued Executive Order 9066, granting to the secretary of war the power to exclude all persons of Japanese ancestry from designated areas of special security concern, notably large areas of the Pacific coast. Approximately 120,000 people, including 70,000 U.S. citizens, were deported to 10 relocation camps scattered across the West. Korematsu upheld the constitutionality of a particular military order that excluded all Japanese and Japanese-Americans from San Leandro, Calif.

The Korematsu exclusion, the Supreme Court claimed, was premised upon "military imperative," not upon racial animus. 323 U.S. at 219. "[T]he need for action was great, and time was short." Id. at 223-224. To imply that racial prejudice was a factor

> merely confuses the issue. ... [T]he properly constituted military authorities ... felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily.

Id. at 223.

Notwithstanding the Court's protestations, even in 1945 there was evidence that the detentions were the product

> in good measure of an erroneous assumption of racial guilt rather than bona fide military necessity [as] evidenced by the Commanding General's ... reference to all individuals of Japanese descent as "subversive," as belonging to "an enemy race" whose "racial strains are undiluted," and as constituting "over 112,000 potential enemies at large today."

Korematsu at 236. (Murphy, J., dissenting). Forty years later, a congressional commission concluded that "substantial credible evidence from federal, civilian, and military agencies" contradicted the military necessity argument behind the exclusions and detentions. See Dean M. Hashimoto, "The Legacy of Korematsu v. United States: A Dangerous Narrative Retold," 4 Asian Pac. Am. L.J. 72, 73 (1996). The "commission found that there had not been military necessity [but that] the causes of the internment were racial prejudice, war hysteria, and a failure of political leadership." Id., citing George Miller, Commission on Wartime Relocation and Internment of Civilians, 102d Cong., 2d Sess., "Personal Justice Denied" (Comm. Print 1992).

In direct contravention of the rule that individuals be judged solely upon their own acts, the named plaintiff in Korematsu was literally and figuratively excluded, an anonymous member of a group that retained only its collective identity, to a detention center. The Korematsu majority did not refer to Fred Korematsu by name until the penultimate page of the decision; none of his particulars was ever considered. At the end of its opinion, when the Court finally identified the petitioner as "Korematsu," it had already conflated him with the threat to "our shores." 323 U.S. at 220. Thus, according to the majority, "Korematsu was not excluded from the Military Area [San Leandro, Calif.] because of

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hostility to him or his race. He was excluded because we are at war with the Japanese Empire." Id. at 223. No matter that "[n]o question was raised as to petitioner's loyalty to the United States." Id. at 216. See also Hashimoto, supra, at 82.

It is sobering to read Justice Murphy's Korematsu dissent in today's world:

The military necessity which is essential to the validity of the [interrogation or detention] order thus resolves itself into a few intimations that certain individuals actively aided the [terrorists], from which it is inferred that the entire group of [Muslims, or Arab Americans, or South Asians, or Middle Easterners] could not be trusted to be or remain loyal to the United States. No one denies, of course, that there were some disloyal persons of [Arab] descent [in the country] who did all in their power to aid [the terrorist cause]. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the [interrogation or detention] orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies, which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well- intentioned may have been the [security requirements], is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

323 U.S. 214, at 240.

It seems likely that today there is an intuitive understanding among the people of this country that the internment of an entire community -- including small children, older individuals, American citizens, and individuals who would otherwise be choosing to fight in the war -- was unwarranted***72** and inexcusable, the product of ignorance and fear. However, Korematsu teaches more than this literal lesson. Today, we speak about statistics, about the importance of allowing discretion among law enforcement, and about "slight trade-offs" between individual liberty and security. However, it is easy to lose sight of the fact that racial profiling -- while seemingly more subtle, more marginal, more diffuse, and more tailored than internment -- rests on the identical premise. The considerable difference between locking up an entire population and allowing race or ethnicity to be, ostensibly, only one of a series of factors in certain kinds of otherwise necessary decision-making (i.e., security and law enforcement) should not obscure an honest assessment of what profiling is. It is guilt by association; it is guilt by inheritance.

There should be no mistake about this climate of guilt by association. Says Mona Charen of the mainstream media:

There are thousands of Arabs in the United States at this moment on student and travel visas. They should all be asked, politely and without prejudice, to go home. This will work hardships in many cases, and that is regrettable ... and this would not apply to citizens of Middle Eastern origin - though they, too, should receive some scrutiny .... As for those missing hazardous materials drivers, the only answer is ethnic profiling. Every Middle-Eastern-looking truck driver should be pulled over and questioned wherever he may be in the United States.

Mona Charen, "Survival Instincts vs. Political Correctness," Washington Times, Oct. 18, 2001, at A18.

Most of the racial profiling now discussed theoretically deals with the more specific "profile" of a young, male, Muslim of Middle Eastern or South Asian descent, as opposed to, for example, older females from Lebanon, who could be Maronite Christian, or Egyptian children who are Coptic Christians, etc. However, it has already become clear that these theoretical guidelines do not really apply. Sonia Hassan, whose experiences with racial profiling caused her to miss her job interview, does not fit the profile -- or, rather, she fits part of it, as do Brad Pitt (a young male), Muhammad Ali (a Muslim), and M. Night Shaymalan (the South Asian film director of The Sixth Sense). However, terrorist profiling will not lead the police to Brad Pitt's door, and the reason we all understand that it will not is that profiling is about race and ethnicity.

The juxtaposition of who Hassan is with who she was profiled to be highlights the problems of using identity traits as a proxy for actual behavior. The gap is so large that, one must assume, but for profiling, competent law enforcement agents would have used their valuable time doing something else. David Cole, a constitutional law professor at Georgetown Law School, has written on this nation's history of suspending civil liberties, including during times of

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national trauma and war. He explains that guilt by association is unconstitutional and unwise -- and also that it is too easy. See Cole, "FBI Must Change," supra. It is easier for law enforcement to establish that an individual is a member of a suspect organization than to prove criminal conduct. Of course, it is even easier to establish that someone is Japanese or Muslim than to prove criminal conduct. Suspecting individuals based upon group characteristics is not likely to advance our anti-terrorism investigations.

In suspecting whole groups of people, one is likely to spend substantial resources investigating wholly innocent (and indeed constitutionally protected) activities, and thereby to miss the true threats. ... When law enforcement fails to draw careful lines and treats whole groups of people as presumptively suspect, those in the targeted groups are unlikely to cooperate with law enforcement, making it still more difficult to find the real criminals or terrorists.

Id.

Sonia Hassan's case is by no means isolated. By early October, one nongovernmental group had recorded over 25 instances of "Middle Eastern- looking" people being pulled off flights, but anecdotal evidence runs much higher. The business consultant brother of one Columbia Law School-educated lawyer I know was called by the FBI because he once stayed in the same hotel as someone with a name that was on the FBI's watch list -- and because his name is "Middle Eastern." When the FBI went to the northern California home of one prominent Muslim to question him, his wife informed them that he was at the White House meeting with the President. On Oct. 4, Mohamed Y.M. Mohamed, was pulled off a flight from Washington, D.C., to Atlanta because, a U.S. Customs official told him, he shared an initial and the last name "Mohamed" with someone on the watch list. When Mohamed was released and reboarded the flight, the captain announced, "Ladies and gentlemen, the young man you just saw walk down the aisle, well, he's from the Atlanta area, he's born and raised there. He had a name similar to someone on our watch list, but he's okay." Mohamed, a University of Georgia Law School graduate, is a Washington, D.C.-based attorney working for a federal agency, one that works to enforce constitutional and statutory protections.

Even if we assume that all of the real criminals and terrorists whom we are seeking fit a certain profile, the problem is that millions of people fit the profile as well. To target all members of the group is so inherently broad that it is akin to targeting none. To those who would use African-American to identify suspects because "so many" violent criminals are, for example, African-American, Ira Glasser of the ACLU responds: although most NBA players are African-American, if you were trying to put together a world-class basketball team, you would never randomly round up African-Americans off the street. Ira Glasser, "American Drug Laws: The New Jim Crow," Biennial Speech (June 1999).

Despite Mona Charen's hollow protestations that immediate expulsion of all Arabs will be "without prejudice," the fact is that to err on the side of overinclusiveness is not cost-free. Maybe, ex post facto, it will be true that all of the hijackers fit a certain profile. Ex ante, if we hold everyone ***73** in that group in suspicion, will it have been worth it? Would the risk of continued terrorist attacks decrease if all Muslims or Arabs were interned and our borders were closed to "these people"? Are we willing to pay that price? Doing so would "violate basic constitutional principles of political freedom and individual responsibility," those freedoms that distinguish the United States the most from almost every other country, and those freedoms that every patriot must want to protect. Cole, "FBI Must Change," supra.

Benjamin Franklin famously pronounced that those who would sacrifice liberty for temporary security deserve neither. Chief Justice Earl Warren wrote, in declaring unconstitutional a federal law that barred Communists from working in national defense facilities:

It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties -- the freedom of association -- which makes the defense of the Nation worthwhile.

U.S. v. Robel, 389 U.S. 258, 264 (1967), cited in David Cole, "Secrecy, Guilt by Association, and the Terrorist Profile," 15 J.L. & Religion 267, 288 (2001).

Unfortunately, troubling early indicators point to the very subversions of liberty that our founders feared. The New York Times recently spotlighted the case of Dr. Al-Badr Al-Hazmi. Deborah Sontag, "Who Is This Kafka That People Keep Mentioning?" N.Y. Times, Oct. 21, 2001, (Magazine) at 54-57. The 34-year- old doctor from San Antonio, Texas, was arrested at home on Sept. 12, held for 13 days and finally released in Brooklyn, N.Y. Dr. Al-Hazmi apparently was arrested because two of the passengers on the plane that was crashed into the Pentagon shared the last

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name of "Al-hazmi" and the FBI believed the doctor was a relative, notwithstanding the fact that "Al-Hazmi is common like the Smith name in Saudi Arabia." Id. While he was detained, however, Dr. Al-Hazmi was publicly identified as a material witness to the attacks and even as a key suspect. Id. According to a news report, when he was released, the Justice Department stated that "he's been cleared." The FBI has now suggested that it was Dr. Al-Hazmi's invocation of his civil rights that exacerbated his ordeal:

We backed off when he requested an attorney. ... As soon as he lawyered up, we couldn't ask him to clear up our questions, and then the system took over and he was off to New York.

Id. at 57.

Hundreds of men are being held in Manhattan's Metropolitan Correctional Center.

They have no contact with each other or their families and limited access to their lawyers. Their names appear on no federal jail log available to the public. No records can be found in any court docket in New York showing why they are detained, who represents them or the status of their cases.

Lois Romano and David S. Fallis, "Questions Swirl Around Men Held in Terror Probe," Wash. Post, Oct. 15, 2001, at Al. On Oct. 18, the ACLU cited "unprecedented government secrecy" and asked the Justice Department to release to the American public "additional information about the more than 700 people held in detention since Sept. 11." The ACLU acknowledges that some aspects of the investigation are justly confidential. Reports that detainees have not been allowed to contact lawyers, however, raise fundamental due process issues. The American public needs to know that "the government's investigation is both thorough and fair." Press Release, ACLU (Sept. 17, 2001), available at www.aclu.org (Oct. 18, 2001).

The Washington Post quotes a "senior federal law enforcement official involved in the investigation, speaking on the condition of anonymity," who claims that the detention of these "material witnesses" is "pushing the envelope" of civil liberties. "Some of these people have done nothing more than give someone a ride in their car," the official said. Romano and Fallis, supra at Al. Yazeed al-Salmi, a university student in San Diego, was detained for 17 days and released after he testified before a federal grand jury. He was questioned about his relationship with hijacker Nawab Alhazmi, who was his housemate for six weeks. "Al-Salmi said he hadn't seen Alhazmi for 10 months." His San Diego-based lawyer, who also represents two other young men from the area who are being held in New York, said that his clients "had asked time and again to call me and they were not allowed to do so. Law school doesn't prepare you for this." Id.

Legal profiling creates a climate of fear and suspicion. The price that our nation pays for tolerating these erosions of fundamental principles is not confined to our institutions of justice. An inevitable relationship exists between state action in derogation of due process and the subtle imprimatur it gives to private violence. Thus, a large number of Americans believe that the appropriate way to respond to the Sept. 11 attacks is to lash out at their neighbors. When law enforcement throws the broadest possible dragnet around Arab and Muslim immigrants, why should it be surprising that other citizens feel the same way? The vigilantism that has swept the United States -- violent attacks on Arabs, Sikhs, Muslims, South Asians and those who look like them -- is creating an isolated and fearful minority population. Those authority figures, law enforcement officials, and other vigilantes who have turned the daily lives of so many Asians, Muslims, and other immigrants into a miasma of fear are either directly ordered to do so, encouraged to do so, or think that they are doing the right thing. Vigilantism always arises out of someone's idea that he or she is upholding the law or that the law is insufficient.

One independent report cites 645 individual incidents of backlash against Americans of South Asian or Middle Eastern descent reported in the press in the seven days following Sept. 11. South Asian American Leaders of Tomorrow, Special Report, "American Backlash: Terrorists Bring War Home in More Ways Than One" (2001) at 3 (hereinafter "American Backlash"). As of Oct. 2, the Council on American-Islamic Relations had received reports of 785 anti-Muslim***74** incidents in the United States, more than one per hour. See Council on American Islamic Relations Web site at www.cair-net.org (Oct. 18, 2001).

The Department of Justice has a "Post September 11 Discriminatory Backlash" page on the Civil Rights Division Web site. As of Oct. 11, the DOJ, FBI, and the U.S. attorney's office were investigating

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over 150 acts involving force or threats of force committed against Arab Americans, Muslim Americans, and individuals perceived to be of Middle Eastern descent (such as Sikhs and South Asian Americans), in retaliation for the events of Sept. 11. The incidents have occurred in all regions of the country and the investigations are taking place in over 30 states and the District of Columbia.

See U.S. Dept. of Justice, Civil Rights Division Web site at www.usdoj.gov/crt/legalinfo/discrimupdate.htm (Oct. 17, 2001). The DOJ's "priority" investigations include: (1) three shootings of people working at a Dallas, Texas, convenience store and gas stations, in which a Pakistani was seriously injured and another Pakistani and an Indian were killed; (2) the murder of a Sikh gas station attendant in Mesa, Ariz.; (3) a machete attack on an Arab-American gas station attendant in Palos Heights, Ill.; (4) three Molotov cocktail and shooting attacks on mosques in Dallas; and (5) an automobile attack on a mosque in Parma, Ohio. Id.

The attacks, the backlash, happen so daily and are so mundane and so everywhere that they are difficult to process. Many Middle Eastern and South Asian immigrants and second-generation citizens are still afraid to leave their homes, go to work, attend school, or practice their religion for fear that they will be targets of discrimination or attacks. Muslim law students have asked whether it will be harder for them to get jobs in the legal field. A litigator friend and graduate of the University of Pennsylvania Law School gets the entire seat to herself on the New York City subway; people get up and move away when she sits down because she fits some aspect of the profile. A Sikh taxi driver reported that his son, who also drives a taxi, picked up a passenger, who reached through the open partition and tried to beat him with an umbrella, yelling, "I hate you, I hate you and your turban." American Backlash, supra, at 23. At another end of the spectrum, the co-president of the University of Iowa Association of Muslims in America said she has received anonymous e-mail threats, but she is not taking them seriously. "They said 'go back to your country,' which is stupid, because I am an American," she said. "Where am I supposed to go?" See id. at 28.

This last plea frames how I would like to end this article: with a discussion of community. In recent weeks, there has been a buzz about the sacrifice of individual liberties in the service of community. However sincerely most of us feel this, and however theoretically prepared to sacrifice we think ourselves to be, what we are often really saying is that we are willing to trade others' liberty for our security. I am not criticizing an honest debate about civic duty and the impact of exigencies on policy. I only point out that we should ask ourselves the tough questions: Whose liberty? Whose security? The trumpeting of individual rights and interests may seem out of step with the current national mood. It appears to many to smack of the selfishness and self- indulgence of the recent past.

The point that is perhaps getting lost is that racial profiling does not pit individuals (i.e., individual Muslims and people of Middle Eastern descent) against community; it pits our community -- this nation -- against one of its constituent parts and against its own best principles. Whatever seductive voice seems to say that, at least on some level, certain communities are more expendable than others, is telling us to give up much more than any terrorist could take away.

We should think about racial profiling not only from the point of view of what is best for an individual who is concerned about his or her own security but also from the point of view of a member of a national community whose members include those we would profile. We need to reach for a more meaningful understanding of community, one in which different people join to ensure that the vulnerable are not cut off.

The danger in a time of high emotion is that we attribute deeds of individuals to an entire ethnic group or religion, as has been done in the past. ... When black motorists are stopped unfairly or the INS treats Latino citizens unequally, we see the dangers of racial and ethnic stereotypes by public officials and private citizens. Let us remember that when American freedom is threatened the protection of that freedom is ultimately the responsibility of everyone.

Statement of the Civil Rights Project Concerning Discrimination Against Muslims and Arab Americans, Sept. 14, 2001, Harvard Law School Civil Rights Project, available at www.law.harvard.edu (Oct. 18, 2001).

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opinions expressed here are those of the authors.

[FN1]. One of her friends sent her e-mail to the National Association of Muslim Lawyers' listserv. I interviewed her on Oct. 16 for this article. The "letter" to her friends that appears is a shorter version of her original e- mail. It has been edited based upon our conversation.

[FN2]. It has been argued that racial profiling uses race as a proxy for criminal behavior or an indicator of criminal propensity. See generally Randall Kennedy, Suspect Policy, New Republic, Sept. 13 & 20, 1999, at 30, 30-35.

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COMMENT: RACIAL PROFILING AND INTERNATIONAL HUMAN RIGHTS LAW: ILLEGAL DISCRIMINATION IN THE UNITED STATES

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SUMMARY:
... As a result of an earlier lawsuit alleging racial profiling by the Maryland State Police, there were already statistics on the traffic stops and an awareness that racial profiling was inappropriate. ... Though the information about the race of drivers pulled over is limited, the information that has been collected strongly suggests that racial profiling, a form of racial discrimination, goes on in many police departments across the country. ... It goes on to analyze racial profiling in light of CERD's analysis, finding that the analysis suggests that CERD would find racial profiling to be impermissible racial discrimination. ... It applies the test to racial profiling in the form of pretextual traffic stops, and again finds that the practice is probably impermissible racial discrimination. ... Racial Profiling in Domestic Law: The United States ... Racial Profiling in International Law There is limited jurisprudence to assist in the determination of whether racial profiling constitutes impermissible racial discrimination under international law. ... A. Jurisprudence on racial profiling from CERD ... B. Racial profiling in light of Barbaro ... D. Racial Profiling under the ECHR Test ... Under this balancing test, racial profiling is not proportional and must be viewed as impermissible racial discrimination. ...

I obtained my driver's license in 1972 and I've been stopped by police every year since then... . As many as five times in one year and typically once or twice a year. <=2> n1

States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial

on race is discrimination. The definition also highlights the HRC's concern about effects of distinctions between members of different groups, rather than simply the purpose of such distinctions. Finally, the HRC's definition reinforces the notion that rights are to be protected and enjoyed equally by all.

The HRC has also explained that it "wishes to know if there remain any problems of discrimination in fact, which may be practised either by public authorities, by the community, or by private persons or bodies." <=61> n60 Thus, the HRC again focuses on the importance of what is actually [*224] happening to people in society, not just whether there are laws prohibiting discrimination. Similarly, the Committee explains that article 26 "prohibits discrimination in law or in fact in any field regulated and protected by public authorities." <=62> n61

C. Treaty Obligations

The obligations a state accepts in ratifying these two treaties are considerable. A state party to the ICCPR "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as race ... ." <=63> n62 This statement is misleading in its apparent simplicity. Not only is a state thus obligated to refrain from violating the rights of individuals within its borders, it also has an affirmative duty to ensure that those rights are not violated by others.

In addition to the general obligation to protect and respect human rights, a state must "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy ... develop the possibilities of judicial remedy[, and] ... ensure that the competent authorities shall enforce such remedies when granted." <=64> n63

Beyond substantive protection and enforcement of human rights, the ICCPR imposes reporting obligations on states. States parties are required to submit reports on the progress they are making in the protection of all the rights enumerated in the treaty. <=65> n64 The reports are to be submitted one year after the ratification of the treaty, and thereafter whenever the committee requests another report. <=66> n65 The [*225] reports should include information about laws, practices, customs, and efforts being made to eliminate violations of human rights. The HRC has explained the need for "information which would reveal discrimination in fact." <=67> n66 In one comment, the committee complained that

when reporting ... States Parties usually cite provisions of their constitution or equal opportunity laws with regard to the equality of persons. While such information is of course useful, the Committee wishes to know if there remain any problems of discrimination in fact ..." <=68> n67

The HRC's concern for information about de facto discrimination suggests that the obligation to report includes a derivative obligation to collect information, so that a state party will actually be capable of providing the information about the progress it is making.

Like the ICCPR, the Race Convention requires a state party to both refrain from and prevent discrimination. <=69> n68 However, the Race Convention goes into much greater detail about what these obligations actually entail. A state party "undertakes to engage in no act or practice of racial discrimination ... and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation." <=70> n69 The State is also obligated not to "sponsor, defend or support racial discrimination." <=71> n70 States are also required to "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or [*226] perpetuating racial discrimination." <=72> n71 Article 5 of the Race Convention obligates states parties to eliminate discrimination and to guarantee the right to equality before the law, highlighting certain areas in which this is particularly important. <=73> n72 Some of the areas of particular concern are:

.the right to equal treatment before the tribunals and all other organs administering justice; <=74> n73

.the right to security of person and protection by the State against violence or bodily harm; <=75> n74

.the right to freedom of movement ... within the border of the State; <=76> n75 and

.the right of access to any place or service intended for use by the general public, such as transport. <=77> n76

Besides being required to refrain from discriminating, states parties are also required to "ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation." <=78> n77 One of the key public institutions, in terms of ensuring equality before the law, is the police. Most encounters with the justice system begin with a police officer's decision to stop or arrest an individual. The police, like all officials of states parties, are bound not to discriminate. This is true both for individual officers and for police departments.

CERD recognized that the role of police raised important concerns. <=79> n78 Not only are police the entry point into the justice system, they are often in a position to exercise a [*227] great deal of discretion in deciding whom to stop or arrest. They also have discretion in determining how much force is appropriate to use in the process of stopping or arresting someone. Given the potential for abuse by police, CERD issued a General Recommendation on the training of law enforcement officials, a step it has taken for no other set of state officials. <=80> n79 In General Recommendation 13, CERD explained that a state's ability to fulfill its obligations under the Race Convention

very much depends upon national law enforcement officials who exercise police powers, especially the powers of detention or arrest, and upon whether they are properly informed about the obligations their State has entered into under the Convention. Law enforcement officials should receive intensive training to ensure that in the performance of their duties they respect as well as protect human dignity and maintain and uphold the human rights of all persons without distinction as to race, colour or national or ethnic origin... . The Committee calls upon States Parties to review and improve the training of law enforcement officials so that the standards of the Convention ... are fully implemented. <=81> n80

In the event that a person is the victim of discrimination, the Race Convention requires that states parties ensure that effective remedies are available to the person through courts and other institutions. <=82> n81

Finally, like the ICCPR, the Race Convention requires states parties to report on "legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of [the Race] [*228] Convention." <=83> n82 These reports are due one year after ratification and every two years thereafter. <=84> n83

D. American RUDs - U.S. Obligations

When the United States ratified the two treaties, it did so with numerous Reservations, Understandings and Declarations (RUDs). <=85> n84 The RUDs are controversial, in part because they call into question the genuineness of the U.S. commitment to the treaties and the rights contained within them. <=86> n85

1. The "Non-Self-Executing" Declaration

Common to both packets of RUDs was the provision that the treaties are not self-executing in the United States. <=87> n86 Therefore, the ratification of the treaties did not create any private right of action under municipal law. <=88> n87 However, the non-self-executing (NSE) clause is essentially an issue of domestic implementation and the American federal structure. <=89> n88 The federal government has explained to the Committee that it does not have the power to force state [*229] and local governments to comply with the provisions of the treaty, other than through constitutionally permissible legislation. Nonetheless, as the United States itself has acknowledged, the fact that treaties are not self-executing in the United States does not change the international obligations under the treaties. <=90> n89

Commentators have suggested that the NSE declaration is contrary to the object and purpose of human rights treaties. <=91> n90 The ICCPR expressly requires states parties to ensure the rights guaranteed in the treaty, to provide effective remedies in case of a violation of one of these rights, and to enact legislation if any of the rights are not already protected under municipal law. <=92> n91 The Race Convention requires states parties to examine governmental policies at all levels of government and fix any laws or regulations that violate the convention. <=93> n92 It also obligates states parties to "assure ... effective protection and remedies through the competent national tribunals and other State institutions... ." <=94> n93 The purpose of these two treaties is to protect individuals' rights against violations,

<=95> n94 therefore, denying individuals a remedy would defeat the purpose of the treaties.

The United States is a party to the Vienna Convention on the Law of Treaties, which prohibits states parties from defeating the object and purpose of a treaty in the period between signature and ratification. <=96> n95 It was during this period that the President and the Senate attached the RUDs to the treaties. <=97> n96 Thus, it must be assumed that the [*230] United States did not intend for the NSE provision to defeat the object and purpose of the treaties. Similarly, reading the Vienna Convention together with the two human rights treaties, the United States bound itself to perform its duties under the Race Convention and the ICCPR in good faith. <=98> n97 Additionally, the Vienna Convention specifically forbids states parties to "invoke the provisions of its internal law as justification for its failure to perform a treaty." <=99> n98 Thus, the United States cannot cite its federal system to justify its failure to perform its treaty obligations.

There is a simple way to avoid finding that the NSE declarations on the Race Convention and the ICCPR violate the Vienna Convention on the Law of Treaties. It is possible to interpret the NSE declarations to mean that the treaties do not create new rights of action in U.S. law because the right of action is already guaranteed for the rights protected in the treaties. <=100> n99 There is support for this interpretation, both in statements made by U.S. officials and in international law. During the ratification process for the Race Convention, a State Department Legal Advisor testified before the Senate Foreign Relations Committee, stating that "existing U.S. law provides extensive protection and remedies against racial discrimination sufficient to satisfy the requirements of the present Convention ... . There is thus no need for the establishment of additional causes of action to enforce the requirements of the Convention." <=101> n100 Similarly, the Bush Administration, during [*231] the ratification process for the ICCPR stated that the treaty provisions would not "by themselves create private rights enforceable in U.S. courts." <=102> n101 There was no assertion that these rights did not already exist.

These statements can be interpreted as meaning that the treaties do not provide new avenues for relief from violations of the rights guaranteed by the treaties, but rather allow those who have suffered rights violations, as defined by the treaties, to seek remedies for these violations through the avenues that are already available. <=103> n102 Thus, for example, courts could hear complaints of racial discrimination under currently existing civil rights law, but incorporate the meaning of racial discrimination under the ICCPR and the Race Convention. This would not require a new private cause of action, but it would fulfill the U.S. treaty obligations to provide effective remedies. Interpreting the NSE declaration in this way would show that the declaration was not contrary to the object and purpose of the treaties and that the United States was performing its duties under the treaties in good faith.

There is considerable support for this approach in international law. The Vienna Convention on the Law of Treaties includes a provision stating that a treaty is to be interpreted "in good faith in accordance with the ordinary meaning ... given to the terms of the treaty in their context and in the light of its object and purpose." <=104> n103 A member of the Human Rights Committee, in his comments on the first report of the United States to the Committee, noted that, when "interpreting domestic law ... the courts ... must

take into account international human rights instruments [*232] and make domestic law accord with international human rights standards." <=105> n104 The Inter-American Court on Human Rights <=106> n105 has dealt head on with the problem of interpreting a reservation to avoid finding that it is contrary to the object and purpose of a human rights treaty. <=107> n106 The court found that, where the American Convention on Human Rights expressly listed some rights as non-derogable rights, to make a reservation allowing for derogation from one of the non-derogable rights would be contrary to the object and purpose of the Convention. <=108> n107 Therefore, it interpreted the reservation in question as "merely [restricting] certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose." <=109> n108 Following this reasoning, the NSE declaration should be interpreted as restricting one aspect (the obligation to amend laws) of a non-derogable right (the right to an effective remedy), but not as a derogation of the obligation to provide an effective remedy.

Interpreting the NSE declaration to merely limit the obligation of the United States to create new private causes of action, but not to limit its obligation to provide effective remedies for violations of the rights guaranteed in the treaties is consistent with the United States' own statements and with international law. If the declaration is interpreted in this way, the United States can fulfill its international obligations under the treaties without passing new legislation if the courts incorporate the meaning of [*233] racial discrimination under international law into their assessments of complaints about civil rights violations.

2. The Understanding of Discrimination

Another of the RUDs dealt with the U.S. understanding of discrimination. <=110> n109 According to the ratification document, the United States understood distinctions on the basis of race and other factors as follows:

The Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in article 2, paragraph 1 and article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental interest. <=111> n110

Nonetheless, when the United States presented its first report to the Committee in 1994, it explained that distinctions based on race "can be justified only by a compelling governmental interest, a standard that is almost never met." <=112> n111

The U.S. Constitution only allows distinctions based on race if the distinctions are "justified by a compelling governmental interest and [are] necessary to the accomplishment of [a] legitimate purpose." <=113> n112 On its face, it appears that this statement of domestic law requires a greater showing of the necessity of discrimination than does the U.S. statement of its understanding of the meaning of [*234] discrimination in its ratification of the ICCPR and the Race Convention.

However, since the object and purpose of the treaties are to promote the rights guaranteed by them, <=114> n113 it would be contrary to the object and purpose of the treaties to read the understanding as lowering the bar for discrimination in municipal law. Additionally, the ICCPR explicitly states that the Treaty should not be read to imply that a state party may engage in any activity or act that is aimed at the destruction of any rights in the treaty. <=115> n114 To read the understanding as binding the United States to refrain from discriminating on the basis of race only if it was not "minimally rational" would mean that the ratification process, including the drafting of the understanding, diminished the rights of individuals in the United States not to be victims of discrimination.

Thus, the standard for determining when discrimination is permissible, both under U.S. domestic law and under its obligations stemming from the treaties, must remain the standard of a compelling government interest necessary to the accomplishment of a legitimate interest. Given that the understanding itself mentions the protections provided by the Constitution and domestic legislation, this is a reasonable way to read the understanding. <=116> n115

[*235] Besides the impossibility of using to treaties to lower U.S. standards for determining when discrimination is permissible, there is also reason to interpret the understanding simply to clarify that the United States would not provide additional protections for categorizations that are not protected from discrimination under American law, such as birth, property or social origin. <=117> n116 In responding to requests from the Human Rights Committee for clarification about the meaning of the understanding, U.S. representatives explained that the understanding

had been drafted with [the Committee's] general comment No. 18 [on the meaning of discrimination] in mind. It [is] difficult to conceive that a governmental objective could be legitimate under United States law if it contravened the fundamental civil and political rights which [are] protected by the Covenant... . Invidious discrimination based on status ... [is] never a legitimate governmental interest. <=118> n117

Thus it appears that the U.S. understanding was not an attempt to lower the level of justification necessary to below that of the HRC. Rather it seems that the understanding was simply an attempt to clarify that the United States did not understand itself to be bound to protect previously unprotected groups from discrimination.

[*236]

II. Racial Profiling in Domestic Law: The United States

Profiling by law enforcement officials is the process of describing the individuals likely to be engaged in certain types of criminal behavior, using a variety of indicators. The idea behind using profiles is that the profiles are a compilation of the experience and knowledge of many law enforcement officers, gleaned over years of law enforcement. <=119> n118 These profiles help determine who police or other law enforcement officers will stop, and may help

establish probable cause. <=120> n119 Unfortunately, profiles may be so broad and vague that they may provide justification for stopping any person. <=121> n120 Additionally, law enforcement agencies keep their profiles as secret as possible, so that people engaging in crimes do not change their behavior to avoid fitting the profile. <=122> n121 That means, however, that it is very difficult to challenge the validity of the reasoning behind a profile.

Racial profiling is profiling using race as one of the factors. For example, a DEA agent in Florida reported that his drug courier profile included "blacks and Colombians wearing "lots of gold.'" <=123> n122 Even if a profile is race-neutral, the discretion provided by the use of profiles makes it likely that law enforcement officers will apply them in a racially biased way. <=124> n123 From the data that is available, the percentage of drug arrests of minorities is grossly disproportionate to the percentage of drug users that are [*237] members of minority groups. <=125> n124 The reasons for this are plentiful, and not all based on race. <=126> n125 Whatever the reason, the disproportionately high rate of arrest of minorities reinforces a stereotype that minorities are disproportionately involved in the drug trade. When police have discretion to stop almost anyone because they fit a vague profile, it is likely that the stereotype that minorities are dealing drugs in higher numbers than whites will come into play.

In the cases in which race is the sole indicator of criminal behavior, American courts have uniformly held that racial profiling is unconstitutional. <=127> n126 However, the courts have been much less clear when a law enforcement officer or a departmental policy only alludes to race or uses race as one of multiple factors.

This Part examines one particular form of racial profiling in the context of America's War on Drugs. In recent years, many police departments have instituted the practice of stopping people, particularly people of color, for minor traffic violations, primarily for the purpose of searching their cars for narcotics, guns or cash. These stops are commonly referred to as pretextual traffic stops, as the actual reason for the stop - searching for drug traffickers - [*238] has little to do with the justification for the stop - the traffic violation.

A. Pretextual Traffic Stops

There is little data on pretextual traffic stops, because only in the last few years have law enforcement agencies admitted to engaging in the practice at all. However, the practice is probably more widespread now than in previous decades. One reason that the practice appears to be so prevalent now is the War on Drugs, which has put pressure on police to arrest large numbers of people. Pretextual traffic stops are thought by some to be a reasonably effective means of finding drug couriers. <=128> n127

A second reason for the prevalence of the practice is that in 1996 the Supreme Court held that such pretextual traffic stops are constitutional. <=129> n128 In Whren v. United States, the two defendants in a drug trafficking case sought to have evidence suppressed on the grounds that it was obtained unconstitutionally. <=130> n129 The two defendants, young African-American men, were stopped by police after stopping too long at a stop sign, an infraction of Washington, D.C. traffic laws. <=131> n130 The two defendants claimed that the law was enforced selectively, targeting them because

they were young black men in a new car. <=132> n131 The police acknowledged in court that they were not interested in enforcing the traffic laws, but were looking for drugs; they used the traffic violation as a pretext for stopping the two men they suspected of having drugs. <=133> n132 The Supreme Court held that as long as police witness a traffic violation, even if they do [*239] not intend to enforce the traffic laws, stopping the driver is constitutional. <=134> n133

There is even less data on the use of racial profiles in pretextual traffic stops than there is on the pretextual stops in general. There are two main reasons for this lack of information. First, law enforcement agencies do not generally keep statistics on the people they stop, the reasons for the stops, or the racial breakdown of drivers. <=135> n134 Instead, such statistics, when they are kept, reflect only those people who actually are arrested. <=136> n135 Second, when confronted with evidence of racial targeting in pretextual traffic stops, many police officers deny any knowledge of racial targeting or claim that they are simply engaged in effective police work and that any racial bias is in the numbers of stops or arrests is a reflection of reality. <=137> n136

However, as the practice of pretextual traffic stops has grown, so has media attention to the issue and litigation, resulting in more information being available. One of the first lawsuits to deal with the issue came out of Maryland. <=138> n137 This class action lawsuit was brought by Robert Wilkins, an African-American attorney, and three of his relatives, after police stopped them while they were returning from a family funeral. The police asked for consent to search the car for drugs and the driver refused. The police officer mused that if they had "nothing to hide, then what [was] the problem?" and then required the group to wait until another police officer arrived with drug-sniffing dogs. <=139> n138 Wilkins and his family were forced to stand in the rain [*240] while their car was searched for drugs, a search that turned up nothing. <=140> n139 Over the course of the ensuing litigation, a spokesperson for the police stated that the disproportionate number of African-Americans stopped was just "an unfortunate byproduct of sound police policies." <=141> n140 Additionally, a document, dated several days before the day Wilkins was stopped, turned up during discovery. The document informed police officers in the county where Wilkins was stopped that "dealers and couriers ... are predominantly black males and black females." <=142> n141

The eventual settlement agreement not only required the Maryland State Police to refrain from engaging in racial profiling, but also required them to keep computer records of all stops along one stretch of I-95 in which a driver consented to the search of her vehicle or a drug-detecting dog was used. <=143> n142 These records were to include, at a minimum, the date, time and location of the search, the name of the officer involved, the race of driver and any passengers, details about the car, and the reason for requesting consent to search the car or using a drug dog. <=144> n143

The information that emerged for the period of January 1995 through June 1996 was that "of the 732 citizens detained and searched by the Maryland State Police, 75% were African-Americans, and 5% were Hispanics." <=145> n144 Of the twelve police officers who carried out most of the stops and searches, two stopped only African Americans, one stopped just over 95% African-Americans, and six stopped more than 80% African-Americans. <=146> n145 An independent study

carried out in November 1996, counted drivers on the same stretch of highway over a 42 hour period and categorized [*241] them by race and whether they were speeding or violating other traffic laws. The researchers counted 5,741 cars and were able to identify the race of 96.8% of the drivers. <=147> n146 Of the total number of drivers, 16.9% were African-American and 75.6% were white. <=148> n147 More than 90% of all the drivers were violating traffic laws and therefore could have been stopped by police. <=149> n148 Of the drivers violating traffic laws, 17.5% were African-Americans and 74.7% were white. <=150> n149 Assuming that the numbers of drivers of both races remained steady, this means that while African-Americans were less than one-fifth of the drivers eligible to be pulled over for traffic violations, they represented three-quarters of those actually stopped and searched.

Another lawsuit, this one in Florida, challenged the practices of the Selective Enforcement Team, a "drug squad" making traffic stops for the purpose of looking for drugs or money. <=151> n150 In this case, the Special Enforcement Team had videos mounted to the dashboards of some of their cars during some periods. <=152> n151 A local newspaper was allowed to view the tapes, amounting to approximately 148 hours of tape, showing 1,084 stops. <=153> n152 Fewer than 1% of the individuals stopped for traffic violations were actually given tickets. <=154> n153 The newspaper reported that almost 70% of the drivers stopped were African-Americans or Hispanics, whereas "the vast majority of drivers on the interstate are white." <=155> n154 Additionally, the tapes showed that more than 80% of the individuals whose cars were searched were [*242] African-American or Hispanic. <=156> n155 The average length of time a white driver was detained was 5.1 minutes, whereas the average time of the detention of an African-American or Hispanic driver was 12.1 minutes. <=157> n156 Under the Florida law, police could confiscate money believed to be connected to the drug trade; 90% of the drivers from whom police confiscated money were African-American or Hispanic. <=158> n157 One African-American man captured on videotape complained that this was the seventh time he had been stopped by police. <=159> n158

Besides the racial disparity shown in the videotapes, there was also direct evidence of a policy of targeting minorities. The plaintiffs' attorneys produced a memo entitled "Common Characteristics of Drug Couriers," instructed deputies to watch for "ethnic groups associated with the drug trade," and several deputies testified that the memo was widely circulated throughout the department. <=160> n159 Two deputies testified that the Sheriff had explicitly instructed deputies to target African-Americans for traffic stops on the highway. <=161> n160 Unlike the suit in Maryland, this suit reached the courtroom. The judge dismissed it when, having refused to certify a class of plaintiffs, he found that there was insufficient evidence demonstrating that the police could identify the race of the drivers. <=162> n161

B. The Costs

At first blush, the harm in traffic stops does not obviously rise to the level of a human rights violation. However, the [*243] more one looks at the problem, the greater the costs, both to the individuals and to society as a whole.

1. Costs to the Individual

For individuals singled out for traffic stops, the costs run high. Besides the time involved, <=163> n162 there is the deprivation of basic human dignity. Police stop people on the suspicion of being criminals because of the combination of the color of their skin, the clothes they wear, the cars they drive, and the areas in which they drive. Members of minority groups are often forced to get out of their cars, sometimes they are handcuffed or frisked, while their children or friends look on and strangers drive by. <=164> n163 A man reported watching police take his car apart by the side of the road in their search for drugs; when they found nothing they handed him a screwdriver to put the car back together and went on their way. <=165> n164 When police treat individuals as criminals for no reason other than the way they look, including the color of their skin, they deny those individuals the equality before the law guaranteed in the Race Convention and the ICCPR, and deprive them of their dignity.

Freedom of movement and association are also threatened by the practice of stopping members of minority groups. One of the reasons police make traffic stops is that a person does not "belong" in an area. <=166> n165 In a case in the mid-1970s, the Third Circuit stated that "the presence of two black males cruising in a car in a predominantly white neighborhood is, by itself, insufficient cause for a belief that [*244] those persons have participated in a recent crime in the neighborhood." <=167> n166 However, under current Supreme Court jurisprudence, if those two black males commit a traffic violation, which they will if they are like most drivers, <=168> n167 they can be stopped. Once stopped, the police can request to search their car and may use drug-sniffing dogs to try to find probable cause to search the car. <=169> n168 African-Americans come under suspicion for being in predominantly white neighborhoods and whites come under suspicion for being in predominantly African-American neighborhoods. <=170> n169 If it is easy to find a pretextual reason for stopping these individuals who go where they are deemed not to belong, the police can deprive them of the right of freedom of movement within their own country and also of the right to associate with whomever they wish.

In extreme cases, traffic stops even lead to death. Police realize that traffic stops, while usually uneventful, carry an inherent risk of violence. <=171> n170 They are a forcible intrusion on an individual's life, and, at the very least, one party to the interaction is armed. In recognition of the inherent danger, police departments have rules requiring police to identify themselves, and limiting the ability of plainclothes police or police in unmarked cars to make traffic stops. <=172> n171 In one New Jersey case, police stopped a van for speeding. <=173> n172 The occupants of the van were three young African-American [*245] men and one Hispanic man, going to a basketball camp. As the police walked toward the van, "it moved into reverse. The troopers responded with several rounds of gunfire, striking the van and its occupants 11 times," badly wounding three of the four young men. <=174> n173

2. Costs to Society

There are other, less direct costs as well. One of these is that to the extent that African-Americans feel that they are being unjustly targeted by police, the police and the criminal justice system become less legitimate in the eyes of African-Americans. As a result, in some communities law enforcement becomes very difficult as people may refuse to cooperate with the police. <=175> n174

discrimination in all its forms. <=3> n2
TEXT:
[*207]

Imagine an elderly couple driving across the country with a van full of their possessions. <=4> n3 It's their fortieth wedding anniversary. As they drive down I-95, they see the lights of a police car flashing behind them and they pull over. The police officer walks up to their van and tells them they were swerving on the road. Then the police ask to search the car. They bring a drug-sniffing dog to go through all of the couple's belongings, taking the contents of the van out and placing them on the side of the highway - the refrigerator, the table, the freezer, the clothes. Their daughter's wedding dress blows onto the highway and gets run over. The drug-sniffing dog urinates on the couple's belongings. After a while, the woman asks if she can relieve herself, but [*208] the police say no and tell her to sit down or she will be handcuffed. The officers say that she cannot go relieve herself because they are afraid she will try to escape. The man pictures it, "two black seniors running down 95 [followed by] three white cops and a dog." After three and a half hours, the police allow to the couple to continue on their way. The police have found no drugs, nor have they written out a citation for the alleged traffic violation that provided the constitutionally required basis for stopping the couple.

In a way, these two senior citizens, Charles and Etta Carter, were lucky. They were stopped in Maryland. The elderly couple filed a lawsuit against the Maryland State Police. As a result of an earlier lawsuit alleging racial profiling by the Maryland State Police, there were already statistics on the traffic stops and an awareness that racial profiling was inappropriate. <=5> n4 The 1993 settlement from the earlier lawsuit, brought by Robert Wilkins, an African-American lawyer, required the Maryland State Police to keep records of the race of the drivers they stopped and of the drivers they searched. <=6> n5 The records showed that, while minorities made up 21.8% of the drivers who could have legally been stopped by police, <=7> n6 they were 60% of those stopped. <=8> n7 Minority drivers were the subjects of 80.3% of all the searches conducted. <=9> n8 During this period, while the state police were well aware that they were being watched for signs of racial profiling, it remained much more likely for a black or Hispanic driver to be stopped and searched than it was for a white driver. Faced with this detailed and [*209] damning information, the Maryland State Police rapidly settled with the Carters. <=10> n9

The Carters would probably have had a much more difficult fight for relief in most other states. Few states maintain statistics on the racial breakdown of traffic stops and there are no national statistics. <=11> n10 Instead there are anecdotes. <=12> n11 Unfortunately, anecdotes are not the solid evidence needed to show a widespread practice. The lack of hard evidence makes it extremely difficult to challenge the practice of singling out minority drivers to stop and search when they commit minor traffic infractions. <=13> n12

There are currently few avenues of relief available to minorities who suspect that they have been stopped by police as a result of their race. <=14> n13 This Comment explores a new route for pushing for redress of this problem, redress that could come either from Congress and the state legislatures or from the courts.

Another cost of racial profiling is that it enhances societal divisions by reinforcing the sense among minority communities that the society treats them unfairly. More than thirty years ago, the government recognized the potential cost of minority communities' resentment of the police, in terms of social unrest, violence and property damage. In the late 1960s, two separate Presidential Commissions found that urban violence and unrest were related to the resentment of the police and the resentment stemmed from perceived harassment and "aggressive patrol" policies. <=176> n175

Racial profiling also probably leads to greater social divisions by increasing stereotypes among whites. If police [*246] focus more attention on black and Hispanic suspects, they will almost certainly arrest more black and Hispanic individuals and the prisons will continue to be disproportionately filled with black and Hispanic prisoners. This in turn reinforces stereotypical views of blacks and Hispanics as criminals.

Finally, there is no way to know how many criminals the police miss because they are targeting one or two racial groups. Though racial profiling has led to a high number of arrests for drugs, there is no way of knowing whether it is actually an effective tactic compared to other tactics. As one commentator explained, "agents who lie in wait for black females do not arrest white males." <=177> n176

C. Remedies

When the Supreme Court rejected the claim of the two African-American men in Whren v. United States that they had been stopped and searched by police because of their race, the Court sent a message to police departments that it was acceptable to stop motorists for trivial traffic violations, based on profiles, racial or otherwise. Since that time, many police departments have set up projects specifically to make pretextual traffic stops, reinforcing the patterns of racial bias that were already apparent.

There have been, and continue to be, very few criminal cases in which the courts suppress evidence found in the course of a pretextual traffic stop. In one, Derricott v. Maryland, decided under Maryland state law, the court suppressed evidence of cocaine possession when the arresting police officer testified that he stopped Derricott on the basis of a drug courier profile he had received from the police department that included race as one factor. <=178> n177 In [*247] another case, a district court judge in Massachusetts departed from the mandatory sentence guidelines, noting that the African-American defendant faced a long sentence as a result of convictions stemming from traffic stops. <=179> n178 However, cases in which a defendant gets any sort of relief for this discriminatory practice are extremely rare, particularly since Whren.

In the civil context, the results have been more mixed. Lawsuits have been filed in several states. A class-action suit in Colorado resulted in a judgment that the Eagle County Sheriff's Department unconstitutionally stopped individuals based on race, among other factors. <=180> n179 While the sheriff's department's appeal was pending, the case settled for $ 800,000. <=181> n180 The settlement also required the sheriff's department not to stop or search a person "unless there is some objective reasonable suspicion that the person has done something wrong." <=182> n181 The Wilkins suit in Maryland

<=183> n182 settled, requiring state police to keep records of traffic stops, including the race of the driver. <=184> n183 From the information gathered after the settlement, it appears that, even when the state police know that they are not supposed to be engaged in profiling, both the drivers stopped, and those subsequently searched, are still overwhelmingly black and Hispanic. <=185> n184

As described above, a suit in Florida was dismissed after the court found that there was insufficient evidence that [*248] police could identify the race of the driver, despite direct and circumstantial evidence that police were targeting minorities. There are lawsuits pending in several other states.

Although in most of these cases the individuals whose rights have been violated do not receive any direct remedy, the collection of information is a critical first step toward providing an effective remedy and ultimately stopping this discriminatory practice.

D. Reporting on Police Stops

Most police departments are not required to keep any records on the racial breakdown of their stops or their searches. Many that do, do so only as a result of litigation. <=186> n185 Generally, police departments are resistant to keeping records on racial breakdown of the stops police officers make and the actual arrests. <=187> n186 The reasons given are generally that it will take too much time and will heighten everyone's awareness of race, leading only to continued tensions. <=188> n187 There is also the fear on the part of many police officers that they will be stereotyped as racists. <=189> n188 Interestingly, the National Organization of Black Law Enforcement Executives has endorsed legislation requiring police departments to keep such records. <=190> n189

[*249] The U.S. Congress has begun to look at the problem. In 1998, Representative John Conyers introduced a bill authorizing a study of traffic stops and searches, including information about the race of the drivers. <=191> n190 The bill passed unanimously in the House of Representatives only to be bogged down in a Senate committee. <=192> n191 The following year, the bill was introduced again in the House, and was also sponsored in the Senate by Senators Lautenberg and Feingold. <=193> n192 It again failed to pass. During the 2000 presidential campaign, Al Gore, the Democratic candidate for President, also spoke of the need for statistics, promising to issue Executive Orders requiring the collection of data and to lobby Congress to outlaw the practice of racial profiling by federal law enforcement agencies if he was elected. <=194> n193

E. A Comparison: Racial Profiling in the United Kingdom

One of the concerns about changing the practice of racial profiling is whether it is feasible, given the subjective nature of the practice and the importance of effective policing. <=195> n194 A recent British case, Hallam v. Avery, shows how the United Kingdom has dealt with racial profiling and suggests that it is possible to outlaw the practice, to hold people accountable, and to keep the prohibition from paralyzing the police. <=196> n195

In Hallam v. Avery, the court looked at whether concerns about maintaining

order justified actions based on [*250] assumptions about the Roma ethnic group. <=197> n196 The case involved a Roma woman who was engaged to be married. <=198> n197 She and her mother made a contract with the Cheltenham Borough Council to rent a hall for the reception. <=199> n198 In her application, she stated that she expected about 150 guests. <=200> n199

In the half year before the wedding, local police experienced some trouble with the Roma, and it appears from the court opinion that the judges felt that the police may have had an exaggerated view of the problems. <=201> n200 The police learned of the upcoming wedding and were under the impression that there would be 1,000 to 1,500 people present. <=202> n201 The police went to the Cheltenham Borough Council, explained their concerns and suggested ways of preventing "any public disorder." <=203> n202 The council tried to impose a number of new conditions on the contract with the bride and her mother, including requiring all guests to have tickets that would have to be issued two weeks in advance. <=204> n203

The trial court found that the council had breached its contract with the two women. <=205> n204 It also found that the treatment of the two Roma women, as compared to the treatment of the organizers of another event "known to pose serious risks of disorder," was unfair. <=206> n205 The court "inferred that the mother and daughter were treated differently to the way in which they would have been treated had they not been gypsies, and that the council was [*251] in breach of ... the [Race Relations] Act." <=207> n206 The women were awarded damages under the Act in addition to damages for breach of contract. <=208> n207

The court did not find that the police violated the Race Relations Act because they did not participate in the decision reached by the council nor had they assisted in its implementation. <=209> n208 By refraining from discriminating themselves, instead suggesting ways of dealing with security for a large event, the police avoided liability. Nonetheless, both the trial court and the appellate court chastised the police at length for their conduct. <=210> n209

This case demonstrates the way courts handle racial profiling in the United Kingdom. The court recognized that all of the actors were concerned about a real problem - public disorder in an historic building. However, the court rejected the idea that it was legal (in the case of the council) or appropriate (in the case of the police) to assess the risk of public disorder on the basis of the plaintiffs' ethnicity. One of the appellate judges noted that the Race Relations Act defines discrimination as treating a person less favorably than others on racial grounds. <=211> n210 She went on to note that the Act does not require any proof of the motive behind discrimination; rather a person violates the Act if he or she treats someone less favorably "substantially or effectively on racial grounds." <=212> n211

Thus, it appears that in the United Kingdom, unlike in the United States, racial profiling has been illegal at least since the passage of the Race Relations Act in 1976. Even in the context of protecting public security and safety, the law in the United Kingdom does not allow police or other state actors to expect criminality from one group of people [*252] on the basis of their ethnic background. In the United States, however, police may take race into account with little fear of repercussion.

The law in the United Kingdom has been able to prohibit racial profiling without hamstringing the police in their efforts to protect the public. As seen in Hallam v. Avery, the police can look at the potential for problems, whatever the race or ethnic group of the people involved. They can act in response to threats to public safety, such as a gathering of 1,500 people, as long as they take no discriminatory action. In the United States when police act on race-based assumptions, there is little chance that the victim of the discriminatory act will be able to convince a court to look beyond the justification given by the police to examine the patterns of action.

III. Racial Profiling in International Law

There is limited jurisprudence to assist in the determination of whether racial profiling constitutes impermissible racial discrimination under international law. Nonetheless, the jurisprudence that does exist suggests that it would be. The strongest evidence is a case submitted to CERD in 1995 under Article 14 of the Race Convention, which provides for the consideration of complaints from individuals if the state party accused of discrimination has consented to the competence of CERD. Additionally, the European Court of Human Rights' test for determining whether differential treatment is impermissible discrimination, when applied to the practice of racial profiling, suggests that the practice is discriminatory.

[*253]

A. Jurisprudence on racial profiling from CERD

Paul Barbaro was a man of Italian origin living in Australia. <=213> n212 He had a temporary position with the Liquor Licensing Commissioner (LLC), a state body charged with overseeing the compliance with governmental rules on the operation and functioning of casinos. <=214> n213 As part of the LLC's prior background check on Barbaro, it contacted the Commissioner of Police. <=215> n214 The Commissioner of Police sent the LLC a report stating that Barbaro was "a member of a broad family group which, in my opinion, can only be described as a major organized crime group ... . Eighteen members of this group have been convicted of major drug offences ... . All are of Italian extraction. All are related by marriage or direct blood lines." <=216> n215 Elsewhere, the persons convicted of drug offenses are referred to as members of Barbaro's extended family. <=217> n216 Apparently as a result of this report, the LLC ended Barbaro's employment. <=218> n217 After complaining to the Australian human rights oversight body, where the LLC was not found to have done anything wrong, Barbaro brought his complaint to CERD. <=219> n218 CERD found that Barbaro had made

specific allegations, notably in so far as they relate to the report of the Police commissioner ... to support his contention that his national and/or ethnic background influenced the decision of the LLC. In the Committee's opinion, the author has sufficiently substantiated, for [*254] purposes of admissibility, his claims under ... the Convention. <=220> n219

Though CERD essentially found that he had made out a prima facie case of

racial/ethnic discrimination, the case was never decided because CERD also found that Barbaro had not exhausted his domestic remedies. <=221> n220

B. Racial profiling in light of Barbaro

The comparison between Barbaro's case and the more general issue of racial profiling are illuminating. First, Australia argued that Barbaro's ethnicity was only one factor, "relevant only in so far as it assisted in defining this cluster of [family and offense] associations." <=222> n221 Racial profiling is exactly this practice; race is used in conjunction with other characteristics or behavior to assist police in identifying persons they believe likely to be engaged in criminal activity.

Second, distinctions about Barbaro, due to his ethnicity and family ties, came in the context of crime prevention, and more specifically, concern about narcotics. Racial profiling in the United States, to the degree it is acknowledged, is justified by its proponents as an effective tool of crime prevention, and more specifically, in the war on drugs. As is the case with racial profiling in the United States, the authorities claimed that they had a legitimate purpose in considering Barbaro's ethnic background.

[*255] Third, it should be noted that Barbaro case involved much more specificity in the associations he had with criminals. The people with whom he was associated were a limited group. They were members of his extended family, and they were specific individuals who had been convicted of a certain category of crimes. With racial profiling, individuals come under suspicion because of their race. The police associate people of color with other people of color, including vast numbers of people, most of whom do not know each other, and most of whom have never been convicted of any crime. The discrimination against Barbaro was based on a somewhat individualized assessment of his family, including a consideration of his ethnic origin. Racial profiling takes place on a much more generalized level.

The Barbaro complaint and CERD's assessment of it suggest that when the state uses racial or ethnic origin as one of several factors in deciding how to treat an individual, that is racial discrimination and is prohibited by the law. However, CERD did not actually determine whether there had been discrimination, and there have not, as yet, been any other similar complaints to the treaty body.

C. Permissible Different Treatment or Impermissible Discrimination?

The United States might also claim that racial profiling by police, to the extent that it happens, is a permissible difference in treatment under the treaties. Not all differences in the treatment of people, even differences based on race, amount to impermissible discrimination. One of the clearest examples of different treatment that is not impermissible is affirmative action, which the Race Convention specifically recognizes as a way of eliminating existing racial discrimination. <=223> n222 There are also [*256] some differences of treatment that are acceptable because the government's aim is legitimate. The HRC explained in its General Comment on Non-Discrimination that different treatment is not discrimination "if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant." <=224> n223 Similarly, CERD noted that

a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate ... . To determine whether an action has an effect contrary to the Convention, [the Committee] will look to see whether that action has an unjustified disparate impact upon a group distinguished by race. <=225> n224

The United States, in its package of RUDs to the ICCPR, stated that it understood the non-discrimination clause to allow the state to treat different persons differently when distinctions are "rationally related to a legitimate governmental objective." <=226> n225

Unfortunately, the treaty bodies have given little guidance as to what are legitimate aims or objectives, and what are reasonable means to try to achieve those aims. However, the European Court of Human Rights (ECHR) has struggled with the issue of determining what is permissible differentiation and what is not, and gives some guidance on how to make such determinations.

The ECHR is a court of law that hears cases arising under the European Convention for the Protection of [*257] Human Rights and Fundamental Freedoms. <=227> n226 This court, established in 1953, has a more developed jurisprudence than the treaty bodies and most, if not all, regional human rights bodies. <=228> n227 Like CERD, the ECHR has not heard any cases specifically dealing with racial profiling. However, it has decided cases in which the state party admitted to differentiating between individuals, but claimed that it had legitimate reasons for doing so. The ECHR has set out a test for distinctions that are permissible under the European Convention.

The European Convention purports to be an attempt to enforce the Universal Declaration of Human Rights. <=229> n228 Its non-discrimination provision is similar to that of the ICCPR. It reads:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. <=230> n229

The ECHR has developed a test for determining whether an action or policy is discriminatory. <=231> n230 First, it decides whether a state party has treated similarly situated individuals differently. If so, the court then goes on to decide whether the difference in treatment was "justified by a legitimate aim." <=232> n231 If the court finds the aim to be [*258] legitimate, it then decides whether the means employed are reasonably proportional to the aim.

Though the ECHR applies this test only to determine whether a state party has breached the European Convention, it would be reasonable to apply this test to determine whether there has been a violation of the non-discrimination clauses of other international human rights instruments. The purpose of the European

Convention, as noted above, was to try to enforce the ideals of the Universal Declaration of Human Rights. Additionally, the wording of the non-discrimination clause of the European Convention is substantially similar to the wording of the non-discrimination clause in the ICCPR. Both documents require states to ensure that people enjoy the rights guaranteed in the respective treaties without discrimination on the basis of race or certain other characteristics.

D. Racial Profiling under the ECHR Test

To the extent that racial profiling exists in the United States, it cannot be denied that this practice treats people in similar situations differently. In several of the examples described above, the pool of lawbreakers was around 15% African-American and 65-85% white, yet the majority, often the large majority, of the people stopped or arrested were African-Americans. <=233> n232 Thus, it appears that African-Americans who break traffic laws are treated differently than whites who break traffic laws.

The question, therefore, is whether the state officials who engage in racial profiling have a legitimate aim that is justified, reasonable, or rationally related to the practice of profiling. Applying the test of the ECHR, the question breaks down into two parts: (1) Does racial profiling serve a [*259] legitimate government aim, and (2) Is racial profiling reasonably proportional to that aim?

The first question is relatively easy. Profiling in general, including racial profiling, is intended to make law enforcement officers more effective and efficient in fighting crime and particularly the drug trade. Few would argue that this is not a legitimate government objective.

The second question - whether racial profiling is proportional to the aim - is more difficult. Weighed against the considerable interest in effective and efficient crime control are the important rights of individuals guaranteed in the ICCPR and the Race Convention.

Racial profiling is a form of judging people on the color of their skin. The two treaties both forbid States Party from discriminating against people based on race or color. <=234> n233 The importance of this prohibition is evident in the article of the ICCPR that allows states to suspend certain rights in case of public emergency, but emphasizes that such a suspension cannot involve discrimination based on race. <=235> n234

However, to say that racial profiling is discrimination is conclusory, essentially saying that it is impermissible because it is not justified. Nonetheless, even without addressing this as discrimination, any difference of treatment in traffic stops that is based on skin color probably violates the right to be treated with respect for the inherent dignity of the human person. <=236> n235 Judging a person's likelihood of criminal activity on the color of his or her skin devalues the individual worth of the person.

Racial profiling also implicates the right to equality before the law. It is law enforcement officers that engage in [*260] this practice. As part of the criminal justice system, they are bound by both treaties to treat everyone equally. <=237> n236

Additionally, both treaties guarantee to everyone the right to security of person. <=238> n237 As seen in the case in New Jersey, in which police fired on four high school boys, racial profiling can result in the denial of this right too. <=239> n238 Though it is rare for profiling to have such horrendous results, there is always the possibility of violence in any police stop. <=240> n239

The practice of stopping a driver with little reason, peering into the car and attempting to find a cause to search the car may well also violate the right to privacy. <=241> n240 In 1996 the U.N. Special Rapporteur on contemporary forms of racism issued a communication to the United States raising concerns from the minority communities that police unnecessarily invaded their privacy. <=242> n241

The rights of freedom of movement <=243> n242 and of access to public facilities, including public highways, <=244> n243 are also implicated. If African-Americans and Hispanics know that they are likely to be stopped in predominantly white areas (or if whites know that they are likely to be stopped in predominantly black or Hispanic neighborhoods), <=245> n244 they may feel the risk is not worth the trip and stop going to those areas. Similarly, they may stop using highways where they know they are likely to be stopped. One of the [*261] plaintiffs in the lawsuit in Colorado reported that she no longer travels as a result of police harassment on the roads. <=246> n245

Another aspect of the test for proportionality might be the number of people affected by the practice as compared to the number of arrests made. Statistically, African-Americans may be involved in criminal activity at higher rates than whites. <=247> n246 However this should never obscure the fact that the vast majority of every racial group is not involved in crime. As one commentator recently noted, "98 percent of blacks and 99.5 percent of whites are not arrested for any crime." <=248> n247 Even assuming that racial profiling may have been helpful in catching that 2% of blacks who are arrested, it is difficult to believe that the quotidian police harassment of the other 98% is a proportional means for finding and arresting that 2%.

Given the number of people whose rights are affected, and the importance and number of rights at issue in the practice of racial profiling and pretextual traffic stops, it is difficult to argue that racial profiling is proportional to the aim of fighting the drug trade. Therefore, the practice is impermissible racial discrimination under the ECHR test. This conclusion becomes even more certain when the societal costs of racial profiling are added into the equation, particularly the increased hostility between minority communities and law enforcement officers. Further weakening the argument that racial profiling is proportional to the aim of fighting the drug trade is the lack of evidence that racial profiling is actually an effective policing tool. Weighed against the aim of fighting the drug trade are the violation of rights of large numbers of individuals, the increased hostility between communities, the lessened cooperation of minorities with police and the [*262] missed opportunities to catch criminals that do not fit the profiles. Under this balancing test, racial profiling is not proportional and must be viewed as impermissible racial discrimination. As such, it is a violation of U.S. treaty obligations and therefore illegal.

IV. Meeting U.S. Treaty Obligations - Putting an End to Racial Profiling

If racial profiling is not discrimination, it does not implicate the Race Convention or the ICCPR at all. However, if it is impermissible discrimination, as suggested above, and it really is happening, not only is racial profiling a violation of the treaties in itself, it gives rise to other violations. A State has the obligation to refrain from discriminating and to ensure that it is not discriminating. It also has the obligation to provide remedies, amend discriminatory laws, eliminate discriminatory practices, and report on what is being done to fix problems. This section provides suggestions on how the United States can begin to fulfill its international obligations under the ICCPR and the Race Convention.

One of the ongoing debates is whether and to what degree law enforcement agencies engage in racial profiling. <=249> n248 For the U.S. government to ensure that state officials are not discriminating, it must find out if they are engaging in this discriminatory practice. This means that the government needs to collect data. This data should include the race of the drivers police stop, the reason(s) for the stop, whether the stop led to a release, ticket or arrest, the time involved in the stop, where the stop occurred, whether the police asked for consent to search, whether they used a drug-sniffing dog, and whether there was a search. <=250> n249 While this may appear to be a considerable amount of information for [*263] a police officer to record, this could be done quickly and easily with a form with boxes to check off. Additionally, compared to the very real possibility that the rights of a large section of the population is suffering from regular discrimination at the hands of state officials, the small amount of time involved in this type of data collection is trivial.

Though the federal government cannot force state governments to collect information, it can require federal law enforcement officers to do so, particularly Drug Enforcement Agency officers. <=251> n250 This would both begin to create solid data and would provide an example for the states to follow. The federal government could also provide incentives for the state governments to collect data. The obvious possibility would be to condition highway funds on gathering data about traffic stops, much as the government has in the past conditioned such funds on raising the drinking age. <=252> n251 With a clear nexus between the provision of highway funding and the desire to ensure that all people could enjoy them freely, there is little likelihood that such a condition would be found to be unconstitutional.

A second critical aspect of ensuring that individuals can enjoy their rights without distinction based on race is that the government must make it clear that racial profiling is a form of discrimination and that it is illegal. Currently, if a police officer stops someone for no reason other than his or her race, this would likely be unconstitutional under the Fourth Amendment. However, the law is much less clear when police officers stop someone due to a combination of a minor traffic violation and race, particularly if the officer is savvy enough not to say that race played a factor. In order [*264] to ensure that police do not discriminate, the government needs to outlaw this practice, either by changing laws or issuing regulations on how current laws should be interpreted.

The United States took on the obligation to amend its laws to the extent necessary to eliminate racial discrimination, <=253> n252 the NSE declaration notwithstanding. It should pass laws clearly prohibiting racial profiling by

federal law enforcement officers. In the specific context of pretextual traffic stops, the federal government is limited in what it can do, though again it can provide incentives to state governments.

The United States also has an obligation to provide remedies when a person's rights have been violated. Due to the decision in Whren, there is currently little hope for any judicial remedy. However, the Whren decision only looked at whether pretextual stops violated constitutional safeguards; the Court did not address whether the practice violates our treaty obligations. Courts should incorporate international standards of non-discrimination into their decisions and thereby find that the practice of pretextual traffic stops, when based on a racial profile, is illegal under the ICCPR and the Race Convention. Courts could do this without any change in the law.

These steps would go a long way toward meeting the obligations that the United States accepted when it ratified the ICCPR and the Race Convention.

Conclusion

The United States took on obligations not to discriminate and to ensure that state officials do not discriminate when it ratified the ICCPR and Race Convention. Despite claims by the U.S. government that it takes human rights [*265] seriously and therefore only ratifies what it intends to respect, there has been little movement toward fulfilling the obligations under the treaties.

One practice that raises serious human rights concerns in the United States is racial profiling by police. Under CERD's jurisprudence and the ECHR's test to determine whether differential treatment is impermissible discrimination, it appears that racial profiling in the context of pretextual traffic stops is discriminatory and unlawful. If indeed it is, the United States has an obligation to put a stop to the practice. While the federal government cannot single-handedly put an end to the practice, it can and should prevent its own law enforcement agencies from engaging in racial profiling and provide incentives for the states to end the practice. It should also collect information on traffic stops to find out how widespread the practice of targeting minorities is. Lastly, courts should incorporate international human rights standards of discrimination into their decisions when presented with a complaint that looks like racial profiling.

FOOTNOTES:

n1. Nightline: America in Black and White - Fitting the Profile: Racial Profiling Practiced by Police on Highways (ABC television broadcast, Mar. 31, 1998), available at *1998 WL 5373016* (statement of Christopher Darden, an African-American lawyer).

n2. International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly Dec. 21, 1965, entered into force Jan. 4, 1969, art. 2, 660 U.N.T.S. 195 (1966), [hereinafter Race Convention]. The Race Convention entered into force in the United States on Nov. 21, 1994. *33 I.L.M. 1615 (1994)*. See also Senate Comm. on Foreign Relations,

After delaying for decades, the United States ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992 <=15> n14 and the International Convention on the Elimination of all Forms of Racial Discrimination (Race Convention) in 1994. <=16> n15 The two treaties are central pieces of the United Nations' human rights regime. In ratifying these human rights treaties, the United States took on [*210] international obligations. These treaty obligations are violated by racial profiling by police departments, the failure of governmental bodies and police departments to maintain statistics on police behavior, and by recent Supreme Court decisions allowing for broad police discretion in making traffic stops.

Racial profiling - the practice of using race as a factor in deciding who is suspicious - is less dramatic than the abuses the phrase "human rights violation" usually calls to mind. Nonetheless, racial profiling is a form of discrimination and the effect it has on the lives of millions of Americans who are members of minority groups should not be understated. <=17> n16 From the information that is available, it appears that African-Americans and Hispanics are more likely than whites to be stopped by police when driving, taking public transportation or walking. <=18> n17 The police stops are likely to take longer when police stop African-Americans or Hispanics than when they stop whites, and the police are more likely to ask to search an African-American or Hispanic's car, bag or person for drugs. <=19> n18 The vast majority of all people of any race are not involved in the drug trade. Thus, when police stop members of minorities as a result of racial profiling, the majority of those stopped are completely innocent. These people are subjected to harassment by state officials; the police may humiliate people they stop, and the stops may result in actual violence. <=20> n19 The stop, in itself, is a denial of the individual's right to dignity, right not to have the state [*211] discriminate against him, and the right to be equal before the law. <=21> n20

Racial profiling by the police is particularly problematic at the point of entry into the criminal justice system. Police make decisions about whom to stop and whom to arrest with little accountability. On the roads, where nearly every driver is guilty of numerous offenses every time he or she takes the wheel, <=22> n21 police discretion in deciding whom to stop is almost absolute. <=23> n22 This situation invites police officers, and entire police departments, to use impermissible and illegitimate biases in decisions about making traffic stops. Though the information about the race of drivers pulled over is limited, the information that has been collected strongly suggests that racial profiling, a form of racial discrimination, goes on in many police departments across the country. <=24> n23 As state actors, these police officers and police departments are violating U.S. treaty obligations to not discriminate and to treat all persons as equals before the law. Treaties are binding law, thus, the police are acting illegally.

Part I of this Comment examines the obligations of states parties to the ICCPR and the Race Convention, with a particular emphasis on the definition of discrimination, both in the treaties and in the statements of the treaty bodies. This part also explores the limits of U.S. obligations under the treaties, limits stemming from the reservations, [*212] understandings and declarations registered by the United States at the time of ratification of the two treaties. In particular, this section looks at the meaning and effect of the declaration that the treaties are not self-executing and the understanding of

International Convention on the Elimination of All Forms of Racial Discrimination, S. Exec. Rep. No. 103-29 (1994) [hereinafter Race Convention Senate Report].

n3. Nightline, supra note 1 (statements of Charles Carter). See also American Civil Liberties Union, Driving While Black: Racial Profiling on our Nation's Highways 19 (1999) [hereinafter ACLU].

n4. ACLU, supra note 3, at 32-35.

n5. Id. at 32.

n6. Id.

n7. Scott Goldstein, Racial Profiling: Will Garden State Be Like Maryland?, N.J. Lawyer: the Weekly Newspaper, May 3, 1999, at 1.

n8. ACLU, supra note 3, at 32-33.

n9. Nightline, supra note 1.

n10. Id.

n11. See, e.g., Katheryn K. Russell, "Driving While Black": Corollary Phenomena and Collateral Consequences, *90 B.C. L. Rev. 717 (1999)*.

n12. See, e.g., Steve Berry, Bob Vogel Breezes Through Minorities' Legal Challenge, Orlando Sentinel, Jan. 15, 1995, at A1 (Florida judge refused to certify a class of minority drivers who had been stopped, later dismissing the complaint on finding that there was no evidence that the police officers could tell the race of the two plaintiffs).

n13. See infra, Part II.D.

n14. *31 I.L.M. 1596 (1992)*. See also Senate Comm. on Foreign Relations, International Covenant on Civil and Political Rights, S. Exec. Rep. No. 102-23 (1992) [hereinafter ICCPR Senate Report].

n15. Race Convention Senate Report, supra note 2.

n16. While there is some indication that Asian-Americans are subject to racial profiling, most of the information gathered to date documenting racial profiling has focused on the profiling of African-Americans and Hispanics. Accordingly, most of the information in this Comment refers to profiling of the latter two groups.

n17. ACLU, supra note 3, at 27-35. See also David Cole, No Equal Justice: Race and Class in the American Criminal Justice System 53 (1999); Russell, supra note 11, at 721-24.

n18. ACLU, supra note 3, at 34.

n19. See, e.g., Cole, supra note 17, at 34-35. See also Russell, supra note 11, at 719; and infra text accompanying notes 163-64.

n20. See International Covenant on Civil and Political Rights, adopted by the General Assembly Dec. 16, 1966, entered into force Mar. 23, 1976, preamble, arts. 2, 26, 999 U.N.T.S. 171 (1967) [hereinafter ICCPR]. The ICCPR entered into force in the United States on September 8, 1992. See ILM Reports: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, *31 I.L.M. 645, 646 (1992)*.

n21. See, e.g., ACLU, supra note 3, at 32 (survey data showing that 93.3% of drivers on I-95 in Maryland violated traffic laws).

n22. David Harris, "Driving While Black" and all Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, *87 J. Crim. L. & Criminology 544, 559 (1997)*.

n23. ACLU, supra note 3, at 14-26.

n24. U.N. Charter, art. 1, para. 3.

n25. Louis Henkin et al., Basic Documents Supplement to International Law: Cases and Materials 143 (3d ed. 1993).

n26. Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948), arts. 1, 2.

n27. See, e.g., id. art. 2; U.N. Charter, art. 1, para. 3.

n28. Henkin, supra note 25, at 146, 151.

n29. See U.N. Charter, art. 1, para. 3; International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly Dec. 16, 1966, entered into force Jan. 3, 1967, art. 2(1), 993 U.N.T.S. 3 (1967) [hereinafter ICESCR]; ICCPR, supra note 20, art. 2(1); Universal Declaration of Human Rights, supra note 26, art. 2.

n30. Henkin, supra note 25, at 165.

n31. Race Convention, supra note 2, art. 1; ICCPR, supra note 20, arts. 2(1), 26.

n32. The Race Convention explicitly allows for affirmative action to eliminate the vestiges of past discrimination. Race Convention, supra note 2, art. 1, para. 4. Thus, the word "disadvantage" here refers to a disadvantage from a position of equality and not from the status quo in any given country.

n33. See Race Convention, supra note 2, at preamble.

n34. Id. art. 2(1)(a).

n35. Id. arts. 2(1), 5 (referring to "racial discrimination in all its forms").

n36. Id. art. 2(1)(a) (emphasis added).

n37. Id. art. 2(1)(c) (emphasis added).

n38. Id. preamble (emphasis added).

n39. Id. art. 1(1). The Convention specifically allows affirmative action programs. Id. art. 1(4).

n40. ICCPR, supra note 20, art. 5(2) (emphasis added).

n41. Id. art. 2.

n42. Id. arts. 4, 5.

n43. Id. art. 5 (emphasis added).

n44. Id. art. 17(1).

n45. Id. art. 26.

n46. Race Convention, supra note 2, art. 9; ICCPR, supra note 20, art. 40.

n47. ICCPR, supra note 20, art. 40; Race Convention, supra note 2, art. 9.

n48. Race Convention, supra note 2, art. 11.

n49. ICCPR, supra note 20, art. 41.

n50. There is no significant distinction between recommendations and comments.

n51. General Recommendation XIV on the Definition of Discrimination, Comm. on the Elimination of Racial Discrimination, 48th Sess., Supp. No. 18, para. 1, U.N. Doc. A/48/18 (1996) [hereinafter General Recommendation XIV].

n52. Id.

n53. Id. at para. 2. See infra section III for discussion of whether racial profiling as practiced in the United States is justifiable.

n54. General Recommendation XX on Non-discriminatory implementation of rights and freedoms, Comm. on the Elimination of Racial Discrimination, 48th Sess., Supp. No. 18, para. 2, U.N. Doc. A/51/18 (1996).

n55. See, e.g., Report of the Committee on the Elimination of Racial Discrimination, CERD, 37th Sess., Supp. No. 18, para. 468, U.N. Doc. A/37/18 (1982).

n56. Report of the Committee on the Elimination of Racial Discrimination, CERD, 38th Sess., Supp. No. 18, para. 280, U.N. Doc. A/38/18 (1983).

n57. Consideration of Reports Submitted By States Parties Under Article 9 of the Convention: Madagascar, Comm. on the Elimination of Racial Discrimination,

48th Sess., para. 3, U.N. Doc. CERD/C/304/Add.6. (1996).

n58. General Comment 18 on Non-discrimination, Hum. Rts. Comm., 37th Sess., U.N. Doc. A/37/40 (1989) [hereinafter General Comment 18].

n59. Id. at para 7.

n60. Id. at para. 9.

n61. Id. at para 12.

n62. ICCPR, supra note 20, art. 2(1).

n63. Id. art. 2(3).

n64. Race Convention, supra note 2, art. 9; ICCPR, supra note 20, art. 40.

n65. Race Convention, supra note 2, art. 9; ICCPR, supra note 20, art. 40;.

n66. General Comment 18, supra note 58, at para. 9

n67. Id.

n68. Race Convention, supra note 2, art. 2.

n69. Id. art. 2(1)(a).

n70. Id. art. 2(1)(b).

n71. Id. art. 2(1)(c).

n72. Id. art. 5.

n73. Id. art. 5(a).

n74. Id. art. 5(b).

n75. Id. art. 5(d)(i).

n76. Id. art. 5(f).

n77. Id. art. 2(1)(a).

n78. General Recommendation XIII on the Training of Law Enforcement Officials in the Protection of Human Rights, CERD, 42nd Sess., U.N. Doc. A/42/18 (1993).

n79. Id.

n80. Id. at paras. 2, 3.

n81. Race Convention, supra note 2, art. 6.

n82. Id. art. 9(1).

n83. Id. art. 9(1)(a), (b). The United States has not yet submitted its first report, which was due in 1995.

n84. See Initial Reports of States Parties due in 1993: United States of America, Annex III, U.N. GAOR, Hum. Rts Comm., U.N. Doc. CCPR/C/81/Add.4. (1994) [hereinafter Initial American Report].

n85. See Jordan J. Paust, Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights, *42 DePaul L. Rev. 1257, 1258-59 (1993)*. See also David Sloss, The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties, *24 Yale J. Int'l L. 129, 133 (1999)* ("Virtually all of the commentators have criticized the [non-self-execution] declarations on policy grounds").

n86. See Race Convention Senate Report, supra note 2, at 11; ICCPR Senate Report, supra note 14, at 9.

n87. For a discussion of the effect and legality of the "Non-Self-Executing" declaration, see generally Paust, supra note 85.

n88. ICCPR Senate Report, supra note 14, at 14.

n89. See, e.g., Initial American Report, supra note 84, at para. 4.

n90. See Paust, supra note 85, at 1258-59.

n91. ICCPR, supra note 20, art. 2.

n92. Race Convention, supra note 2, art. 2(1)(c).

n93. Id. art. 6.

n94. Race Convention, supra note 2, at preamble; ICCPR, supra note 20,

preamble.

n95. Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, *8 I.L.M. 679, 686 (1969)*.

n96. See Sloss, supra note 85, at 132. President Carter was the first president to formally suggest attaching the Non-Self-Executing Declaration, suggesting it when he signed both the Race Convention and the ICCPR. President Bush supported its inclusion at ratification of the ICCPR and President Clinton supported it at ratification of the Race Convention. Race Convention Senate Report, supra note 2, at 2, 25-26; ICCPR Senate Report, supra note 14, at 6-9, 19.

n97. Vienna Convention on the Law of Treaties, supra note 95, art. 26.

n98. Id. art. 27.

n99. This Comment does not address the less general RUDs that apply to specific articles of the treaties, particularly the articles on freedom of speech and the death penalty.

n100. International Convention on the Elimination of All Forms of Racial Discrimination: Hearings Before the Senate Comm. on Foreign Relations, 103d Cong. (1994) (testimony of Conrad Harper, Legal Adviser, Department of State), quoted in Sloss, supra note 85, at 170.

n101. International Covenant on Civil and Political Rights: Hearings Before the Senate Comm. on Foreign Relations, 102d Cong. (1991) (statement of Richard Schifter) (emphasis added) quoted in Sloss, supra note 85, at 166.

n102. See Sloss, supra note 85, at 166-68.

n103. Vienna Convention on the Law of Treaties, supra note 95, art. 31 (emphases added).

n104. Summary record of the 1402d meeting: United States of America, Hum. Rts. Comm., 53d Sess., 1402d mtg. at 6, U.N. Doc. CCPR/C/SR.1402 (1995) (statement of Mr. Bhagwati).

n105. The Inter-American Court on Human Rights is a regional court established under the authority of the American Convention on Human Rights. The United States is not a State Party and cannot be brought before the court. Nonetheless, the approach of this well respected court provides a useful model for interpreting international human rights law.

n106. Advisory Opinion on Restrictions to the Death Penalty, Inter-Am. C.H.R., Adv. Op. No. OC-3 (1983) Ser. A, No. 3, *23 I.L.M. 320 (1984)*.

n107. *Id. at 341.*

n108. Id.

n109. ICCPR Senate Report, supra note 14, at 11-12.

n110. Id.

n111. Initial American Report, supra note 84, para. 821.

n112. *Palmore v. Sidoti, 466 U.S. 429, 432 (1984)*.

n113. ICCPR, supra 20, at preamble; Race Convention, supra note 2, at preamble. See also Nadine Strossen, Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis, *41 Hastings L.J. 805, 806 (1990)* ("International human rights precepts should be invoked only to expand, rather than to limit, protections of individual rights under domestic law.").

n114. ICCPR, supra note 20, art. 5(1).

the meaning of discrimination.

Part II describes the practice of racial profiling, focusing on the use of race in pretextual traffic stops. This section describes the practice, the harm caused by the practice, the remedies available to those injured, and the domestic reporting requirements that do exist. This part also looks at the way the United Kingdom has dealt with issues of racial profiling and compares the British response to racial profiling to the American response.

Part III looks at the analysis by the Committee on the Elimination of Racial Discrimination (CERD) of a case from Australia that was essentially an ethnic profiling complaint. It goes on to analyze racial profiling in light of CERD's analysis, finding that the analysis suggests that CERD would find racial profiling to be impermissible racial discrimination. Part III also lays out the test used by the European Court of Human Rights to determine whether actions taken by a state are discriminatory. It applies the test to racial profiling in the form of pretextual traffic stops, and again finds that the practice is probably impermissible racial discrimination.

Finally, Part IV of the Comment notes the ways in which allowing this practice to continue violates U.S. treaty obligations under the ICCPR and the Race Convention and makes a series of suggestions as to how the United States can work to meet those obligations.

I. Discrimination in International Human Rights Law

After World War II, the victorious powers established the United Nations, largely in response to the atrocities visited upon Europe before and during the war. Among the central [*213] goals of the United Nations, as established by the Charter of the United Nations, was the protection of human rights. <=25> n24 In 1948, the U.N. General Assembly adopted the Universal Declaration of Human Rights without a single vote cast against the declaration. <=26> n25 The declaration provided a list of universally recognized human rights. It was, however, not a binding treaty. Rather, it was something more akin to a statement of ideals. Leading up the list of rights were the statements that all people are equal in dignity and rights and are entitled to their rights without discrimination based on race. <=27> n26

It was not until the 1960s that the United Nations was able to draft and open for ratification binding human rights treaties codifying many of the rights set out in the Universal Declaration of Human Rights. One important aspect of these treaties was the establishment of oversight bodies that receive reports from states parties to the treaties, and provide guidance on how to interpret the treaties.

A. The Treaties

The entire international human rights regime is based on the principle of non-discrimination on any of numerous characteristics, including race, color, and national or ethnic origin. <=28> n27 In 1966, the General Assembly adopted two general human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). <=29> n28 Each of these treaties explicitly forbids state [*214] discrimination on the basis of race, color, or national or

n115. This does not render the Understanding meaningless. The Understanding allows for discrimination on other bases (sex, language, religion, political or other opinion, national or social origin, property, birth or any other status) that do not enjoy the same constitutional protections as race. These terms all appear together in the ICCPR. By saying that discrimination on any of these grounds must be "at minimum" rationally related to legitimate government interests, the Understanding should be read to mean that this is a floor below which government actions may not fall for any of these categorizations. That does not mean that every categorization is subject to the same test. Other categorizations, such as race and sex, may have higher tests. This reading is supported by the recognition in the Understanding that there are constitutional protections.

n116. ICCPR Senate Report, supra note 14, at 7. While the definitions of discrimination are worded somewhat differently in the two treaties, the Human Rights Committee has clarified that it defines discrimination in the same way as the Race Convention does. See supra text accompanying note 59.

n117. Summary record of the 1405th meeting: United States of America, Hum. Rts. Comm., 53d Sess., 1405th mtg., at 9-10, U.N. Doc. CCPR/C/SR.1405 (1995) (statements of Messrs.Harper and Patrick).

n118. Cole, supra note 17, at 47.

n119. Id.

n120. Id. at 47-8. Cole provides numerous examples of drug courier profiles that have been reported by federal agents. Taken together, the following three examples demonstrate the problem with such profiles:

.one of the first to deplane

.one of the last to deplane

.deplaned in the middle.

Id. at 48.

n121. Id. at 47.

n122. Id. at 49.

n123. Id. at 50.

n124. Human Rights Watch, Modern Capital of Human Rights? Abuses in the State of Georgia 70-71 (1996). The information available only counted whites and blacks. According to Human Rights Watch, in Georgia, from 1991 to 1994, blacks were between 13 and 17% of all drug users, whereas whites were 72 to 77%. During the same period, blacks were between 58 and 67% of drug arrests, while whites made up 32 to 42% of all drug arrests. Id. See also Cole, supra note 17. See generally ACLU, supra note 3.

n125. One of the primary reasons for the disparity between rates of use and rates of arrest is the difference in wealth between minority populations and whites, combined with the relative ease of arresting poorer people. In inner cities, where a great number of drug arrests take place, much of the drug trade goes on in public. It is easier to see the drug transactions taking place in such a situation than it is to locate a drug dealer and witness a transaction in a middle-class suburb. Human Rights Watch, supra note 124, at 75-77. Similarly, poorer people are more likely to take buses and buses and bus stations are prime areas for arrests for drugs. Cole, supra note 17, at 21.

n126. See, e.g., *United States v. Avery, 137 F. 3d 343, 353 (6th Cir. 1997)*.

n127. Kathleen M. O'Day, Pretextual Traffic Stops: Protecting Our Streets or Racist Policy, *23 U. Dayton L. Rev. 313, 316 (1998)*.

n128. *Whren v. United States, 517 U.S. 806 (1996)*.

n129. *Id. at 809*.

n130. *Id. at 810*.

n131. Id.

n132. *Id. at 812-13;* see also Cole, supra note 17, at 39.

n133. *Whren, 517 U.S. at 819.*

n134. David A. Harris, The Stories, the Statistics, and the Law: Why "Driving While Black" Matters, *84 Minn. L. Rev. 265, 275-76 (1999)* [hereinafter Harris, Stories].

n135. See, e.g., Andrew D. Leipold, Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law, *73 Chi.-Kent L. Rev. 559, 590 n.127 (1998).*

n136. ACLU, supra note 3, at 5.

n137. Wilkins v. Maryland State Police, Civil Action No. MJG-93-468 (D. Md. 1993), cited in Harris, supra note 22, at 565.

n138. Id. at 564.

n139. Id.

n140. Id. at 565.

n141. Id.

n142. Id. at 565.

n143. Id. at 566.

n144. Id.

n145. Id.

n146. ACLU, supra note 3, at 32.

n147. Id.

n148. Id.

n149. Id.

n150. Jeff Brazil & Steve Berry, Color of Driver is Key to Stops in I-95 Videos: Tapes Show that Most Stops and Searches by Volusia County's Drug Squad Involve Minorities, Orlando Sentinel, Aug. 8, 1992, at A1, A10.

n151. Id.

n152. Id.; Henry P. Curtis, Statistics Show Pattern of Discrimination, Orlando Sentinel, Aug. 23, 1992, at A11.

n153. Brazil, supra note 150, at A10.

n154. Id. at A1; Curtis, supra note 152.

n155. Brazil, supra note 150, at A10.

n156. Id.

n157. Id.

n158. Id. at A1.

n159. Steve Berry, Judge Throws Out Suit Against Vogel, Orlando Sentinel, Jan. 14, 1995, at A11.

n160. Id.

n161. *Washington v. Vogel, 880 F. Supp. 1542, 1544 (M.D. Fla. 1995)*.

n162. Salim Muwakkil, an African-American academic and journalist in Chicago, explained "I was getting stopped by police so much that I used to compute the time of my stop into my travel time." Michael A. Fletcher, Driven to Extremes: Black Men Take Steps to Avoid Police Stops, Wash. Post, Mar. 29, 1996, at A1.

n163. See, e.g., ACLU, supra note 3, at 9.

n164. Id. at 19.

n165. Sheri L. Johnson, Race and the Decision to Detain a Suspect, *93 Yale L. J. 214, 226 (1983)*.

n166. Johnson, supra note 165, at 228, citing *U.S. v. Richard, 535 F.2d. 246, 248 (3rd Cir. 1976)*.

n167. ACLU, supra note 3, at 32. See also Harris, supra note 22, at 559 (quoting from a 1967 book of statements by police, "You can always get a guy

legitimately on a traffic violation if you tail him for a while, and then a search can be made").

n168. Harris, supra note 22, at 573-75.

n169. Though this works in both directions, it should be noted that there is a disparate impact on minorities. Because there are many more predominantly white neighborhoods than predominantly African-American or Hispanic neighborhoods, whites have a greater area where they can circulate without arousing suspicions. See Johnson, supra note 165, at 244.

n170. See, e.g., *Maryland v. Wilson, 117 S.Ct. 882, 885 (1997)* (noting the high number of assaults on police officers and officer deaths arising out of traffic stops).

n171. Harris, supra note 22, at 549.

n172. Russell, supra note 11, at 719.

n173. Russell, supra note 11, at 719. On February 2, 2001, the New Jersey Attorney General announced that the young men settled their lawsuit against the New Jersey police for almost $ 13 million. On the same day, New Jersey also announced that it was dropping criminal charges against 128 individuals who alleged racial profiling. Tim O'Brien, Turnpike Shooting Settlement Is Turning P.I. Lawyers' Heads: $ 13 million payout dwarfs all other police injury awards, N.J.L.J., Feb. 12, 2001.

n174. Cole, supra note 17, at 169-71.

n175. Tracey Maclin, Race and the Fourth Amendment, *51 Vand. L. Rev. 333, 363 n.131-33 (1998)*.

n176. Johnson, supra note 165, at 240.

n177. *Derricott v. Maryland, 611 A.2d 592, 597-98 (1992).*

n178. *U.S. v. Leviner, 31 F. Supp.2d 23, 33-34 (D. Mass. 1998);* see also Russell, supra note 11, at 728.

n179. Patrick O'Driscoll, "Drug profile" lawsuit settled: Minority motorists stopped, Denv. Post, Nov. 10, 1995, at A1. There were 22 factors in the profile, including race. During a two year drug interdiction program on I-70, police stopped 402 people who fit the drug courier profile. The police did not ticket or arrest any of these people. ACLU, supra note 3, at 15.

n180. ACLU, supra note 3, at 15.

n181. Id. at 16.

n182. Wilkins v. Maryland State Police, Civil No. MJG-93-468 (D. Md. 1993). See supra text accompanying notes 137-43.

n183. ACLU, supra note 3, at 32.

n184. Id. at 33; see supra text accompanying notes 5-8.

n185. The police department of San Diego, CA announced in February 1999 that it would voluntarily collect data on traffic stops and the police department of San Jose, CA made a similar announcement several weeks later. ACLU, supra note 3, at 41.

n186. Russell, supra note 11, at 726-27. See also Harris, Stories, supra note 134, at 276. The National Association of Police Organizations, an umbrella organization of more than 4,000 police organizations, opposes congressional proposals to track traffic stops. Id.

n187. Id. See also Harris, supra note 22, at 581.

n188. David Crump, Evidence, Race, Intent, and Evil: The Paradox of Purposelessness in the Constitutional Racial Discrimination Cases, *27 Hofstra L. Rev. 285, 324 (1998)*; Harris, Stories, supra note 134, at 276.

n189. Russell, supra note 11, at 727.

n190. ACLU, supra note 3, at 38-39.

n191. Id. at 39.

n192. Id.

n193. Bob Davis, Bradley and Gore Attack Each Other On Issues of Race, Character, Liberalism, Wall St. J., Feb. 22, 2000, at B2.

n194. See Harris, supra note 22, at 580-81.

n195. *No. CCRTF 1999/0678/2, 1999 WL 1142590* (CA) (2000), 97(1) L.S.G. 23, 2-07-2000 Times 1142,590 (1999) [hereinafter Hallam]. This case is an appeal on the finding that the police did not violate the Race Relations Act of 1976. The findings about the Council related in this section of the Comment were not appealed.

n196. Hallam, supra note 195, at 1.

n197. Id.

n198. Id.

n199. Id.

n200. Id.

n201. Id.

n202. Id.

n203. Id.

n204. Id.

n205. Id.

n206. Hallam, supra note 195, at 1.

n207. Id.

n208. Id.

n209. Id. at 3.

n210. Id. at 8.

n211. Id.

n212. Decision of the Committee on the Elimination of Racial Discrimination Under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination, Communication No. 7/1995: Australia, Comm. on the

Elimination of Racial Discrimination, 51st Sess., Annex, para. 1, U.N. Doc. CERD/C/51/D/7/1995 [hereinafter Barbaro].

n213. Id. at para. 2(1).

n214. Id. at para. 2(2).

n215. Id. at para. 2(4).

n216. Id. at para. 2(5).

n217. Id. at para. 2(6).

n218. Id. at para. 4(3).

n219. Barbaro, at para. 10(2).

n220. Id. at para. 10(5). In November 2000, the CERD revisited this case, again finding that Barbaro had not exhausted domestic remedies. Decision of the Committee on the Elimination of Racial Discrimination under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination, Communication No. 12/1998: Australia, Comm. on the Elimination of Racial Discrimination, 57th Sess., paras. 15, 16, U.N. Doc. CERD/C/57/D/12/1998.

n221. Id. at para. 6(1).

n222. Race Convention, supra note 2, art. 4(d).

n223. General Comment 18, supra note 58, at para. 13.

ethnic origin, as do the U.N. Charter and the Universal Declaration of Human Rights. <=30> n29

Even as the United Nations drafted general human rights treaties, it recognized that there were certain problems that required more focused attention from the international community. The General Assembly drafted and adopted numerous treaties to address these human rights problems more specifically. One of these more specific treaties was the Race Convention, opened for ratification in 1966. <=31> n30

The Race Convention and ICCPR are two of the most important tools in the attempt of the international community to rid the world of discrimination, both in law and in practice. Both of these treaties expressly prohibit racial discrimination by the state. <=32> n31 The language of both treaties shows that the drafters were concerned not only with discrimination solely on the basis of one of the impermissible grounds, but also with any distinction that disadvantages individuals of protected groups. <=33> n32

1. The Race Convention

The general purpose of the International Convention on the Elimination of All Forms of Racial Discrimination is clear from its title. In a period of world-wide upheaval, from decolonization of Africa, the civil rights movement in the United States, and emerging international opposition to [*215] apartheid, the U.N. General Assembly adopted this treaty in an attempt to delegitimize and eliminate racism, at least state-sponsored racism. <=34> n33 This treaty explicitly obligates states parties not to engage in racially discriminatory acts or practices. <=35> n34 However, while this express prohibition of discriminatory acts clearly prohibits discrimination based solely on race, the question in the racial profiling context is whether the treaty prohibits differential laws or practices based on race as one of several factors. This question has two aspects. The first part is whether the treaty prohibits only facially discriminatory laws, or whether it prohibits less obvious forms of discrimination by the state as well, arising from the application of laws or from customs. The second question is whether differential treatment is considered racial discrimination when there is only a partial deprivation of a right based on race.

a. Laws and Customs

The language of the Race Convention makes it very clear that the drafters of the treaty were concerned not only with facially discriminatory laws, but also with laws or customs that have discriminatory effects. Besides the use of the expansive phrase "all forms of racial discrimination" in both the title and the body of the treaty, <=36> n35 there are several references to the need to eliminate discriminatory customs and practices. Article 2 requires the states parties "to engage in no act or practice of racial discrimination." <=37> n36 The same article obligates states parties to "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or [*216] perpetuating racial discrimination." <=38> n37 The preamble also describes the states parties' resolve to "prevent and combat racist doctrines and practices." <=39> n38 Given these references to acts, effects, and practices, it is clear that the drafters of the Race Convention intended that the treaty would have a

n224. General Recommendation XIV, supra note 51, at para. 2.

n225. ICCPR Senate Report, supra note 14, at 14. As explained above, the wording in the first report to the HRC was less permissive, stating that the United States only allowed differentiation in treatment when there was a compelling government interest, the standard strict scrutiny test.

n226. European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, arts. 38-56, 213 U.N.T.S. 221.

n227. Though there is an American Court of Human Rights, the United States has not accepted its jurisdiction.

n228. European Convention for the Protection of Human Rights and Fundamental Freedoms, preamble, supra note 226, at preamble.

n229. Id. art. 14.

n230. Hoffman v. Austria, No. 15/1992/360/434, Eur. Ct. H. R., para. 33 (1992).

n231. Id.

n232. See supra note 124 and text accompanying notes 144-49.

n233. Race Convention, supra note 2, art. 1; ICCPR, supra note 20, art. 2.

n234. ICCPR, supra note 20, art. 4(1).

n235. Id. art. 10(1).

n236. Race Convention, supra note 2, art. 5(a); ICCPR, supra note 20, art. 26.

n237. Race Convention, supra note 2, art. 5(b); ICCPR, supra note 20, art. 9(1).

n238. See, supra, text accompanying note 171-72.

n239. Harris, supra note 22, at 559.

n240. ICCPR, supra note 20, art. 17(1).

n241. Implementation of the Programme of Action for the Second Decade to Combat Racism and Racial Discrimination: Report by Mr. Maurice Glele-Ahanhanzo, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Comm'n on Hum. Rts., 53d Sess, para. 90, U.N. Doc. E/CN.4/1997/71 (1997).

n242. Race Convention, supra note 2, art. 5(d)(i); ICCPR, supra note 20, art. 12(1). See also Fletcher, supra note 162, at A1.

n243. Race Convention, supra note 2, art. 5(f).

n244. Johnson, supra note 165, at 226-27.

n245. O'Driscoll, supra note 179.

n246. Patricia J. Williams, Road Rage: Drug Smugglers Assumed to be Minorities, Nation, Mar. 22, 1999.

n247. Id.

n248. See generally Crump, supra note 188.

n249. See Harris, supra note 22, at 579.

n250. Much of the use of drug courier profiles, which often include race (either implicitly or explicitly), appears to have originated with the Drug Enforcement Agency in the late 1970s and 1980s. Johnson, supra note 165, at 233-34.

n251. See, e.g., *South Dakota v. Dole, 483 U.S. 203 (1987)* (holding that a statute conditioning receipt of highway funds on adoption of minimum drinking age is a valid use of congressional spending authority).

n252. Race Convention, supra note 2, art. 2(c).

broader application than just prohibiting facially discriminatory laws.

b. Partial Deprivation of Rights on the Basis of Race

A second question is whether the Race Convention outlaws laws or practices that restrict, rather than eliminate, the enjoyment of a right on the basis of race. Article 1 of the Race Convention defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of human rights and fundamental freedoms." <=40> n39 The choice of words in this definition is important. The word "exclusion" suggests a complete denial of a right. The words "distinction," "restriction," and "preference" are more comparative, showing that this definition sought to prohibit laws or practices that put people in different positions in terms of exercising their rights. Similarly, the word "impairing" shows that the rights do not have to be eliminated altogether for something to qualify as discrimination.

For example, if a government has a law that bans one racial group from travelling at night, this is discrimination under the Race Convention's definition. A member of the racial group could exercise her freedom of movement during [*217] the day, so she is not entirely excluded from exercising her freedom of movement. However, she is restricted from exercising this right on an equal footing with others, who can travel whenever they like. Also, she will not be arrested for no reason. She will only be arrested if she travels at night, as a member of her racial group. There are two factors in the decision to arrest her: race and travelling at night. The use of race as one of the factors places her in a disadvantaged position as compared to people not of her racial group.

Thus, the Race Convention prohibits laws that restrict rights on the basis of race, as well as those that eliminate rights completely. It does not matter if race is only one of several factors used to differentiate between people. If race is considered at all in the wording or application of a law, it creates a restriction or preference based on race. Therefore, if race is a factor and its use as a factor impairs the exercise or enjoyment of human rights by one racial group, the action is discriminatory.

2. The International Covenant on Civil and Political Rights

The ICCPR is less detailed about what constitutes discrimination than is the Race Convention. Nonetheless, it appears that the drafters of ICCPR were also concerned about discriminatory customs or practices, as well as discriminatory laws. Article 5 prohibits states parties from restricting the enjoyment of rights "pursuant to ... custom" on the pretext that the rights are not guaranteed by the treaty. <=41> n40

Also, like the Race Convention, the ICCPR seems to prohibit discriminatory actions that only impair the enjoyment of rights, as well as those that eliminate certain rights altogether. The ICCPR prohibits discrimination on [*218] numerous grounds, including race and color. <=42> n41 It also requires states parties to ensure the enjoyment of the rights protected and establishes the limits for derogation from these rights. <=43> n42 Article 5 reads:

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent. <=44> n43

Article 5 specifically recognizes the probability that a state might limit the enjoyment of certain rights, rather than denying the rights altogether, and prohibits this practice. Additionally, the use of language is telling. Article 5 uses the words "destruction ... or ... limitation" in the first paragraph and "restriction upon or derogation from" in the second. Of these four terms, only destruction implies a total denial of a right. The other three terms all suggest that a partial denial of rights was also considered and prohibited by the drafters.

There are also several other provisions in the ICCPR that indicate that the drafters were concerned about both total and partial denials of rights. Article 17 prohibits "arbitrary or unlawful interference with ... privacy, family, home or correspondence" and "unlawful attacks on ... honour and reputation." <=45> n44 The use of the word "interference," [*219] particularly in the context of these rights, suggests that the drafters were concerned about situations not rising to the level of a complete denial of privacy, home, family or correspondence. Interference suggests merely a hindrance or obstacle, that may or may not be overcome. Thus, the ICCPR prohibits acts that only impair the enjoyment of these rights, rather than limiting itself to prohibiting acts that eliminate their enjoyment altogether. Similarly, a person is protected from attacks on her honor or reputation, whether or not the attack actually destroys the individual's honor or reputation.

Finally, Article 26, states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race ... <=46> n45

The repetitive use of the phrase "any discrimination" shows the importance the drafters attached to eliminating even the smallest, most insignificant acts of discrimination from the administration of the law. Additionally, the use of the phrase "equal and effective protection from discrimination" would have been excessively wordy if all the drafters envisioned was that states would either protect people from discrimination or they would not. This phrase suggests that

the drafters considered the possibility that states might provide differing levels of protection to different groups and prohibited such a practice. Lastly, if it is assumed that all words in a law serve some purpose, the words "equal and effective protection" must have been an attempt to prevent states from providing unequal or ineffective protection.

[*220]

B. The Treaty Bodies

Both the ICCPR and the Race Convention have oversight bodies. The treaty bodies, the Human Rights Committee (HRC) and the Committee on the Elimination of Racial Discrimination (CERD), have several functions. They receive periodic reports from states parties on the implementation of the treaties. <=47> n46 They also question delegates of the states parties in those reports and issue comments and recommendations to the states parties. <=48> n47 The CERD has the power to consider complaints from states parties that other states parties are not living up to the obligations of the Race Convention. <=49> n48 The HRC has a similar authority, though states parties must accept the committee's authority to consider complaints, in addition to ratifying the ICCPR. <=50> n49

In order to assist states parties both with implementing the treaties and with reporting on their progress, both treaty bodies occasionally issue recommendations or comments, explaining their interpretations of the respective treaties. <=51> n50 While these interpretations are not binding on states parties, they are generally viewed as extremely persuasive authority as to the meaning of the various provisions.

The two committees have made it clear that they are concerned about practices that have either a discriminatory intent or a disparate impact on one group of individuals. Additionally, they have expressed the view that customs and practices that allow entrenched discrimination to continue must be eliminated, even if they are facially neutral.

[*221]

1. The Committee on the Elimination of Racial Discrimination

In its General Recommendation 14, CERD elaborated on the definition of discrimination laid out in Article 1 of the Race Convention. CERD explained that

a distinction is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms. This is confirmed by the obligation placed upon States Parties ... to nullify any law or practice which has the effect of creating or perpetuating racial discrimination." <=52> n51

CERD went on to explain that there are some limited situations in which different treatment based on race or one of the other factors might be permissible. If a state makes such distinctions, "the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention." <=53> n52 While there is no explanation of what legitimate means,

the reference to article 1, paragraph 4 gives some guidance, as this is the provision of the Race Convention that allows states to undertake affirmative action to reduce racial or ethnic discrimination and its effects. In any case, a state may not take actions contrary to the purposes of the convention and CERD would examine any different treatment to see if there was an "unjustifiable impact upon a group distinguished by race, colour, descent, or national or ethnic origin." <=54> n53

[*222] In a later recommendation, CERD again tried clarify what sorts of distinctions were prohibited under the Race Convention. General Recommendation 20 explained that

whenever a state imposes a restriction upon one of the rights [enumerated in] the Convention which applies ostensibly to all within its jurisdiction, it must ensure that neither in purpose nor in effect is the restriction incompatible with article 1 of the Convention... . To ascertain whether this is the case, the Committee is obliged to inquire further to make sure that any such restriction does not entail racial discrimination. <=55> n54

In these two recommendations, CERD reiterates the language of article 1, explaining that it is concerned about both laws and practices, and that it will look at their effects, as well as their purpose. It is also clear that CERD believes that it has the duty to look behind statutes and practices to examine their effects and evaluate the justification for actions that treat different groups in society differently.

Besides the general statements interpreting the Race Convention, the members of CERD have regularly stated their concerns about de facto equality, rather than merely de jure equality. <=56> n55 In particular, they have noted the problems of vestiges of discrimination remaining when neutral laws or practices are implemented. <=57> n56 They have also noted that impoverishment and dysfunctional social services can lead to racial or ethnic discrimination. <=58> n57

[*223]

2. The Human Rights Committee

The Human Rights Committee published a lengthy statement on non-discrimination, General Comment 18. <=59> n58 In this document, the HRC explains that the definition of discrimination of the ICCPR should be understood to be essentially the same as that of the Race Convention. The HRC explains that discrimination "implies any distinction, exclusion, restriction or preference which is based on [any of several grounds] and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms." <=60> n59 As explained above, the use of the words "restriction or preference," particularly when contrasted with "exclusion," is significant. It suggests that the HRC intends for the definition of discrimination to include acts or practices that create an advantage or a disadvantage for some individuals, rather than only those acts that entirely exclude members of one group from the enjoyment of a right. Similarly, the use of both nullify and impair suggests that the partial deprivation of rights based

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NOTE: CONSTITUTIONAL RISKS TO EQUAL PROTECTION IN THE CRIMINAL JUSTICE SYSTEM

SUMMARY:
... A constitutional risk perspective would not necessarily change any underlying values or normative goals of the legal system, but it would enhance the law's ability to recognize a set of harms hidden by the current paradigm of particularity. ... The existence of an unexplained racial disparity - a constitutional risk - suggests that the criminal justice system may be according government actors too much discretion. ... Guidelines and Record-keeping. - The above observation suggests a modification of equal protection doctrine in the context of constitutional risk: if a defendant demonstrates a racial disparity for which no legitimate explanation exists, a court could grant dismissal unless the government could show that it had adopted decisionmaking guidelines and, where possible, required decisionmaking records. ... This test, which combines statistical and structural elements, is reminiscent of the doctrine dealing with jury discrimination in Castaneda v. Partida, which held that, when a jury selection procedure is susceptible to abuse, a significant racial disparity is sufficient to establish an equal protection violation. ... This Note has examined the consequences of a shift in the equal protection context - a move from a traditional particularized harm perspective to a constitutional risk perspective focused on systemic harms. ... Additionally, because one need not confine the constitutional risk perspective to equal protection, it may usefully be extended to inform other constitutional doctrines, such as facial challenges and prophylactic rules. ...

TEXT:
[*2098]

Historically, the Supreme Court has required a showing of particularized harm to prove an equal protection violation. For example, in McCleskey v. Kemp, <=2> n1 the Supreme Court found no equal protection violation <=3> n2 despite statistical studies showing that defendants charged with killing white victims were four times more likely to be sentenced to death than those charged with killing black victims. <=4> n3 The Court reasoned that these statistics did not demonstrate that racial considerations had played a role in McCleskey's particular sentence. <=5> n4 Although the requirement of particularized harm is consistent with the traditional common law view of causation, it necessarily causes courts to neglect more subtle, systemic risks created by the operation of government. Often a criminal defendant cannot identify a specific wrongdoer, nor can he prove that racial discrimination more likely than not tainted his particular conviction. <=6> n5 Sometimes, as in McCleskey, all that a defendant can show is that, after multiple-regression analyses have accounted for plausible non-racial explanations, disparities still remain.

therefore be more amenable to granting proportional relief for claims of constitutional risk.

Despite the possible benefits of a proportional remedy, this alternative suffers from a number of significant difficulties, the most obvious of which is that it amounts to a race-based remedy. Only defendants of the race at risk would receive reduced sentences, a situation that raises grave political and equal protection concerns. <=104> n103 Another serious problem is that proportional remedies may undermine public acceptance of court decisions. <=105> n104 Observers could find the remedy strange and the message ambiguous: courts would recognize the existence of racial discrimination, but rather than develop doctrines to deter or stop equal protection violations, they would merely cut the baby in half.

B. Structural Injunctions

One might view the mismatch between dismissal and constitutional risk as the predictable result of applying old fixes to new contexts. The constitutional risk perspective addresses systemic, not particularized harm. So although a traditional remedy may be preferable to advocates of judicial restraint, a more systemic remedy may be necessary.

If the goal is systemic change, then structural injunctions seemingly provide a ready answer. If the system creates constitutional risk, then why not require changes in the system? Rather than take the circuitous route of granting windfalls to guilty defendants to deter government discrimination and to eliminate racial disparities, courts could simply mandate an end to inexplicable racial disparities. <=106> n105 For example, [*2116] an injunction could require the ratcheting up of arrests and prosecutions of whites until the disparities disappeared. <=107> n106

A structural remedy, however, faces substantial obstacles. First, injunctions cannot realistically address jury discrimination because juries are one-time actors and because direct interference with their deliberations would raise Sixth Amendment concerns. <=108> n107 Second, unlike injunctions in the prison or school context, injunctions forcing increased prosecutions provide no benefit, and therefore no incentive, to defendants. <=109> n108 Third, as a race-based remedy, a "ratchet-up" injunction would itself raise equal protection problems. In fact, it would be far worse than proportional remedies because government actors would explicitly use race to target individuals for prosecution. <=110> n109

C. Discretionary Guidelines

Remedies can be arranged along a spectrum of increasing judicial activism. At one end, sanctions, representing more passive remedies, use deterrence to influence other branches of government indirectly. At the other end, structural injunctions are far more active and impose judicially desired results directly. Both have significant drawbacks in combating constitutional risks, leading one to search for a middle-ground solution that would address structural defects with minimal intrusiveness. A possible compromise would have courts sanction the government not for imposing constitutional risks, but for failing to minimize them through structural safeguards.

[*2117] 1. Reining In Discretion. - Discretion is often at the root of discrimination. <=111> n110 Theoretically, given a facially race-neutral statute, no discrimination could occur if government actors had an obligation to arrest, prosecute, and sentence everyone in exactly the same way. Discretion, however, is inevitable in practice: rules have gaps; <=112> n111 discretion is often desirable in contexts such as sentencing that involve complex judgment calls; <=113> n112 and broad criminal statutes coupled with limited resources make the prosecution of all crimes impossible. <=114> n113 But the fact that discretion is inevitable does not mean that it must be unbridled. Courts and legislatures can restrain discretion with guidelines and record-keeping requirements that reduce the risk of discrimination. <=115> n114

The existence of an unexplained racial disparity - a constitutional risk - suggests that the criminal justice system may be according government actors too much discretion. If one accepts this assertion, then the racial disparities discussed in section I.C should come as little surprise. Law enforcement, prosecutorial, and sentencing decisions are generally governed by few guidelines <=116> n115 and are often accompanied by little or no record of their decisionmaking processes. Without records or standards, appellate courts lack the tools for meaningful review of discretion; such a scenario, in turn, opens the door to latent discrimination.

2. Guidelines and Record-keeping. - The above observation suggests a modification of equal protection doctrine in the context of constitutional [*2118] risk: if a defendant demonstrates a racial disparity for which no legitimate explanation exists, a court could grant dismissal unless the government could show that it had adopted decisionmaking guidelines <=117> n116 and, where possible, required decisionmaking records. <=118> n117 In effect, statistical disparities would create a presumption of discrimination, but to rebut the presumption, the government would need only demonstrate that it has adopted procedural safeguards that limit discretion and the concomitant risk of discrimination. <=119> n118 This test, which combines statistical and structural elements, is reminiscent of the doctrine dealing with jury discrimination in Castaneda v. Partida, <=120> n119 which held that, when a jury selection procedure is susceptible to abuse, a significant racial disparity is sufficient to establish an equal protection violation. <=121> n120 The Court has subsequently attempted to confine Castaneda to the jury context, <=122> n121 but there is no a priori reason not to extend it to constitutional risks. <=123> n122

From a doctrinal standpoint, any judicially created requirements of record-keeping and guidelines would be essentially prophylactic rules to minimize constitutional risks. <=124> n123 Courts might impose these requirements with varying degrees of specificity depending on the success of early interventions. The substantive details of the guidelines would likely be left to state legislatures because of their polycentric, policy-based nature. <=125> n124 If ultimately unsatisfied, however, courts could [*2119] offer certain procedures as safe harbors or even as constitutional requirements. <=126> n125

The requirements of guidelines and record-keeping accomplish four important goals. First, guidelines constrain discretion by providing a decisionmaking framework. Concededly, guidelines cannot eliminate all racism in the criminal process, but they can at least minimize it by reducing the range of discretion

available to government actors. <=127> n126 Second, record-keeping and guidelines create greater transparency, forcing government actors to make reasoned justifications and deterring them from using impermissible factors. <=128> n127 Third, decisionmaking standards and records provide appellate courts with the necessary tools for meaningful review. <=129> n128 Indeed, even if appellate courts are ill suited for reviewing executive discretion, <=130> n129 the mere threat of review has normative value and may alter behavior. <=131> n130 Finally, the implementation of guidelines benefits all defendants equally - unlike structural injunctions and proportional remedies, it is not a race-based remedy.

3. Potential Concerns. - Discretionary guidelines do, however, have some inherent drawbacks. Naturally, they limit prosecutorial discretion, which the Court has recognized as essential in a resource-constrained world. <=132> n131 Guidelines also limit the ability of all actors in the system - police, prosecutors, and judges - to dispense individualized justice. <=133> n132 The problem is that catering to the individual case [*2120] necessarily undermines the uniformity of legal rules. <=134> n133 Mercy may temper justice, but mercy requires discretion, and discretion allows discrimination. <=135> n134 Thus, the best one can hope to achieve is a balance, <=136> n135 and by retaining but narrowing discretion, discretionary guidelines reduce the risk of discrimination while preserving a modicum of individualized justice.

More fundamentally, critics may ask whether courts, as compared to legislatures, are the appropriate institutions to implement systemic changes. <=137> n136 Legislatures, however, have perverse incentives to draft overinclusive criminal statutes and to defer to prosecutors: broad criminalization maximizes politically popular "law and order" rhetoric, and extensive prosecutorial discretion minimizes legislatures' blame for perceived miscarriages of justice. <=138> n137 In addition, discretionary guidelines are not nearly as intrusive as the structural injunctions described in section II.B. A prophylactic rule requiring discretionary guidelines would mandate only that legislatures constrain discretion, either by legislating directly or by delegating the authority to develop guidelines to police, prosecutors, and trial courts. <=139> n138 A guidelines approach to constitutional risk would leave considerable leeway for local officials to develop their own systems to limit discretion. Only in the face of consistent failure would the judiciary need to increase its involvement. And even if courts shunned more intrusive measures as overly activist, the mere recognition of the problem might spur other branches to develop appropriate remedies. <=140> n139

[*2121]

III. Conclusion

This Note has examined the consequences of a shift in the equal protection context - a move from a traditional particularized harm perspective to a constitutional risk perspective focused on systemic harms. It has also acknowledged the significant remedial difficulties associated with constitutional risk, but by focusing on discretion as the source of most equal protection risks, this Note has proposed a moderate doctrinal change: discretionary safeguards.

To be sure, this Note leaves the project substantially incomplete.

Constitutional risk's focus on statistical evidence requires careful discussion of the pitfalls judges face in this area and of how they can develop expertise in response. Additionally, because one need not confine the constitutional risk perspective to equal protection, it may usefully be extended to inform other constitutional doctrines, such as facial challenges and prophylactic rules. <=141> n140 In extending constitutional risk, however, one should remember that shifting to a risk-based view of constitutional law represents a genuine policy decision. Never have laws protected every individual against every risk - to do so is neither practical nor possible. Therefore, one must determine which risks are substantial enough to warrant a remedy. Even more crucially, one must decide if constitutional risk is a transsubstantive doctrine, or whether only some constitutional harms are serious enough to require a more systemic and nuanced look. <=142> n141 All this remains for another day.

FOOTNOTES:

n1. *481 U.S. 279 (1987)*.

n2. *Id. at 299*.

n3. See id.

n4. See *id. at 294-95, 297*.

n5. See Alan David Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, *62 Minn. L. Rev. 1049, 1056 (1978)* (noting the "impossible burden of isolating the particular conditions of discrimination produced by and mechanically linked to the behavior of an identified blameworthy perpetrator"); cf. *Herskovits v. Group Health Coop. of Puget Sound, 664 P.2d 474, 475 (Wash. 1983)* (addressing the causation problems when a doctor's negligent diagnosis reduced a cancer patient's chance of survival); *Sindell v. Abbott Labs., 607 P.2d 924, 927-28 (Cal. 1980)* (addressing the claims of a plaintiff who was unable to identify precisely which pharmaceutical company manufactured a defective drug).

n6. Some commentators additionally, albeit controversially, suggest that racism can exist unconsciously, caused by a lack of empathy. See, e.g., Paul Brest, The Supreme Court, 1975 Term - Foreword: In Defense of the Antidiscrimination Principle, *90 Harv. L. Rev. 1, 14-15 (1976)* (describing the problem of "racially selective indifference"); Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, *39 Stan. L. Rev. 317, 328-44 (1987)*. But cf., e.g., *Md. Troopers Ass'n v. Evans, 993 F.2d 1072, 1077 (4th Cir. 1993)* (distinguishing "cronyism" from racism in a Title VII action because, although selecting one's friends may result in numerical

disparities, "it is not the same kind of iniquity as racial discrimination").

n7. See infra note 110.

n8. Cf. Laurence H. Tribe, The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics, *103 Harv. L. Rev. 1, 12 (1989)* (advocating a shift in state action doctrine from a Newtonian world view focused on "isolated forces acting on particular individuals" to a post-Newtonian, relativistic view focused on individuals' interactions with the entire fabric of a system).

n9. Cf. *Herskovits, 664 P.2d at 481* (Pearson, J., concurring) (suggesting that the "injury" caused by a doctor's negligent diagnosis could be defined as the decreased chance of surviving cancer).

n10. Randall L. Kennedy, McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court, *101 Harv. L. Rev. 1388, 1406 (1988)*.

n11. See, e.g., *Washington v. Davis, 426 U.S. 229, 238-42 (1976)*.

n12. See *McCleskey v. Kemp, 481 U.S. 279, 292 (1987)*; see also *Allen v. Wright, 468 U.S. 737, 751 (1984)* (holding that standing requires "personal injury fairly traceable to the [wrongdoer's] allegedly unlawful conduct"); David L. Faigman, Legal Alchemy: The Use and Misuse of Science in the Law 117 (1999) (criticizing the McCleskey Court for having introduced this new standard in discrimination cases).

n13. E.g., *Kennedy, supra* note 10, at 1405 (internal quotation marks omitted).

n14. See, e.g., *Castaneda v. Partida, 430 U.S. 482, 494 (1977)* (grand jury); *Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24-25 (1971)* (school desegregation); see also Daniel R. Ortiz, The Myth of Intent in Equal Protection, *41 Stan. L. Rev. 1105, 1119-34 (1989)* (arguing that in jury selection, voting, and education cases, the intent requirement is significantly attenuated).

n15. The Supreme Court typically accepts statistical evidence only when a law's application is so racially disparate that the numbers permit the inference of discriminatory intent. For example, in *Gomillion v. Lightfoot, 364 U.S. 339 (1960)*, the Court found unconstitutional a twenty-eight-sided voting district that redistricted all but four or five of 400 black voters, but no white voters. *Id. at 341;* see also *Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886)* (finding an equal protection violation when city supervisors denied permits to two hundred Chinese laundries while granting permits to eighty non-Chinese laundries).

n16. See H.L.A. Hart & Tony Honor<?extend ascii 233>, Causation in the Law 64-71 (2d ed. 1985); Morton J. Horwitz, The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy 52-57 (1992).

n17. Indeed, even if an act or occurrence can be shown to be more probable than not, under traditional causation principles such evidence, standing alone, is insufficient for recovery. See David Rosenberg, The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System, *97 Harv. L. Rev. 849, 857 (1984)*.

n18. See Tribe, supra note 8, at 5-7 (describing Newtonian mechanics).

n19. See Abram Chayes, The Role of the Judge in Public Law Litigation, *89 Harv. L. Rev. 1281, 1285 (1976)* (noting that intention and fault formed the foundation of the traditional private law system); Rosenberg, supra note 17, at 858.

n20. See Chayes, supra note 19, at 1282-83 (describing private law litigation as bipolar and as involving self-contained episodes confined to discrete parties).

n21. Cf. Freeman, supra note 5, at 1052-57 (describing this "perpetrator perspective" that causes courts to "view[] racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors").

n22. *McCleskey v. Kemp, 481 U.S. 279, 294 (1987)*.

n23. See *id. at 295 n.15*.

n24. See *id. at 291 n.7.*

n25. See Rosenberg, supra note 17, at 882-83.

n26. See Robert Nozick, Anarchy, State, and Utopia 76-77 (1974).

n27. These concerns probably underlie the well accepted tort doctrine that one cannot recover for "negligence in the air" (a negligent act that results in no injury). See, e.g., *Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99 (N.Y. 1928)* (Cardozo, C.J.). See generally Horwitz, supra note 16, at 56 (discussing the "negligence in the air" doctrine). Similarly, the infeasibility of awarding reversal for any de minimis trial mistake probably underlies the harmless error doctrine.

n28. See infra note 79. For a discussion of slippery slopes and the problem of line drawing, see Frederick Schauer, Slippery Slopes, *99 Harv. L. Rev. 361 (1985)*.

n29. The methods by which judges and juries handle statistical and probabilistic evidence would obviously be critical to the successful implementation of a constitutional risk perspective. A general discourse on these issues, however, is beyond the scope of this Note. For a discussion of the advantages of statistical data over experts' judgments, see William Meadow & Cass R. Sunstein, Statistics, Not Experts (Feb. 11, 2000) (unpublished manuscript, on file with the Harvard Law School Library).

n30. See *United States v. Armstrong, 517 U.S. 456, 469 (1996)* (implying that different racial groups commit crimes with varying degrees of frequency); cf. *City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989)* (rejecting the "assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population").

n31. See *McCleskey v. Kemp, 481 U.S. 279, 327 (1987)* (Brennan, J., dissenting) ("Multiple-regression analysis is particularly well suited to identify the influence of impermissible considerations in sentencing, since it is able to control for permissible factors that may explain an apparently arbitrary pattern.").

n32. See Richard H. McAdams, Race and Selective Prosecution: Discovering the Pitfalls of Armstrong, *73 Chi.-Kent L. Rev. 605, 627-33 (1998)* (discussing a method to account for correlations between non-racial factors and race and suggesting that collecting data on nonprosecutions is notoriously difficult).

n33. E.g., *Armstrong, 517 U.S. at 470* (citing a lack of evidence regarding "similarly situated persons" of other races); *McCleskey, 481 U.S. at 295 n.14* (distinguishing death penalty cases in which there is "no common standard by which to evaluate all defendants" from jury venire selection cases in which the number of factors is purportedly limited and, "to a great degree, objectively verifiable"); *Stephens v. State, 456 S.E.2d 560, 562 (Ga. 1995)* (finding statistical evidence insufficient and criticizing the potential omission of other race-neutral explanatory factors).

n34. *Bazemore v. Friday, 478 U.S. 385, 400 (1986)* (Brennan, J., concurring in part).

n35. See Joseph L. Gastwirth & Tapan K. Nayak, Statistical Aspects of Cases Concerning Racial Discrimination in Drug Sentencing: Stephens v. State and U.S. v. Armstrong, *87 J. Crim. L. & Criminology 583, 590-96 (1997)* (suggesting a statistical technique to make this determination). Professor McAdams has made the related suggestion that, when relevant data is unavailable, trial courts should fill in "data gaps" with reasonable assumptions. See McAdams, supra note 32, at 634-40. For example, although numerical data may not exist on the number of nonblack drivers who speed, it is reasonable to assume that at least some do. See id. at 632, 637.

n36. But see *United States v. Bell, 86 F.3d 820, 823 (8th Cir. 1996)* (rejecting the defendant's claim of discriminatory enforcement of a bicycle headlamp law because, even if the law was enforced solely against blacks, the defendant failed to show that whites rode bicycles in violation of the statute).

n37. See, e.g., *Md. Troopers Ass'n v. Evans, 993 F.2d 1072, 1077-78 (4th Cir. 1993)* (defining the class in a Title VII disparate impact action as the available pool of workers).

n38. Cf. *Garner v. Jones, 120 S. Ct. 1362, 1372 & n.1 (2000)* (Souter, J., dissenting) (arguing that, in the ex post facto context, a court must examine

the effect of a rule change on the class of defendants rather than on the particular defendant because the combination of rules and discretion involved in sentencing precludes ever proving harm in the individual case); James Gleick, Chaos: Making a New Science 44 (1987) (suggesting that, in the scientific context, looking analytically at individual pieces reveals little about global interactions or changes); Rosenberg, supra note 17, at 885 n.141 (suggesting that, in the tort context, case-by-case adjudication often overlooks aggregate or systemic problems).

n39. Cf. Abram Chayes, The Supreme Court, 1981 Term - Foreword: Public Law Litigation and the Burger Court, *96 Harv. L. Rev. 4, 39 (1982)* (noting that "statistics on employment decisions that by themselves appear neutral or nonprobative may take on a different meaning when seen in the context of the company's overall employment activities").

n40. *Kennedy, supra* note 10, at 1419.

n41. *Rose v. Mitchell, 443 U.S. 545, 559 (1979)*; id. ("But [the discrimination] is not less real or pernicious."); see *Kennedy, supra* note 10, at 1419 (discussing how the purposeful discrimination requirement "ignores the chameleonlike ability of prejudice to adapt unobtrusively to new surroundings").

n42. See, e.g., Laurence H. Tribe, American Constitutional Law 16-20, at 1509 (2d ed. 1988) (observing that finding a "bigoted decision-maker" can be difficult).

n43. See, e.g., James Vorenberg, Decent Restraint of Prosecutorial Power, *94 Harv. L. Rev. 1521, 1521-22 (1981)* (discussing how prosecutors have gained discretion while other actors such as magistrates, parole boards, and correctional officials have been constrained); infra note 115.

n44. *Wayte v. United States, 470 U.S. 598, 607 (1985)* (suggesting that prosecutorial discretion is necessary because of resource limitations and because of the "systemic costs" of judicial supervision, which include chilling law enforcement by scrutinizing prosecutorial motives and undermining prosecutorial effectiveness by "revealing the Government's enforcement policy").

n45. See infra note 110.

n46. See *Kennedy, supra* note 10, at 1416.

n47. Tribe, supra note 8, at 34; see id. at 33-34 (criticizing McCleskey on this ground); cf. id. at 30 (arguing that, in a school desegregation case, even if the Court "would have had no impact on judicial remedies, a judicial proclamation that inner city ghettoization was constitutionally infirm might have avoided legitimating this nationwide travesty").

n48. See id. at 38 (explaining that modernism teaches that "we can see more than we can do," but that "this does not mean that we should lie about what we see").

n49. Cf. *Allen v. Wright, 468 U.S. 737, 767 (1984)* (Brennan, J., dissenting) (accusing the Court of manipulating standing to disguise a decision on the merits); Dan M. Kahan, The Secret Ambition of Deterrence, *113 Harv. L. Rev. 413, 428-35 (1999)* (describing the use of deterrence-based arguments as a rhetorical strategy to pacify debates and to mask ideological preferences).

This observation does not mean that courts regularly use doctrinal manipulations to achieve desired substantive outcomes, but the threat that courts might do so nonetheless exists. For example, a skeptical observer of ex post facto doctrine could suggest that the Court has manipulated the required level of particularity to make relief more difficult to obtain: when particularized harm is easier to prove, the Court requires general systemic harm; when general systemic harm is easier to prove, the Court requires particularized harm. Compare *Seling v. Young, 121 S. Ct. 727, 734-35 (2001)* (requiring that "punitiveness" for ex post facto purposes be determined facially - that is, systemically - and finding that the defendant's particularized showing was insufficient), with *Garner v. Jones, 120 S. Ct. 1362, 1370 (2000)* (requiring a claimant to "show that as applied to his own sentence the law created a significant risk of increasing his punishment").

n50. See generally David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia, *83 Cornell L. Rev. 1638, 1658-62 (1998)* (citing U.S. Gen. Accounting Office, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities (1990), which surveyed twenty-eight statistical studies and found strong evidence of race-of-the-victim discrimination but equivocal evidence of race-of-the-defendant discrimination); *id. at 1676-1710* (discussing capital sentencing disparities in Philadelphia from 1983 to 1993).

The requirement of particularized harm is of special concern in equal protection cases today as social mores have largely driven racial animus underground, making discrimination far more likely to occur surreptitiously. <=7> n6 This problem is exacerbated in the criminal justice context, in which government actors often wield vast amounts of discretion - discretion that allows those who discriminate to mask their [*2099] impermissible motives. <=8> n7 Ironically, the harm that particularized inquiries are thus most likely to overlook is one that is especially damaging to the legitimacy of the law: systemic racial discrimination in the administration of criminal justice.

This Note examines the reasons for and the ramifications of a new equal protection perspective that would recognize not only traditional particularized harms, but also risks - uncertain, probabilistic representations of traditional harms. <=9> n8 Rather than ignoring risk as an unremediable possibility of harm, the new paradigm would view risk as a harm in itself. <=10> n9 A constitutional risk perspective would not necessarily change any underlying values or normative goals of the legal system, but it would enhance the law's ability to recognize a set of harms hidden by the current paradigm of particularity. It would allow a reassessment of "the legal significance of discrete, isolated decisions that are susceptible to a non-racial explanation when considered individually, but reveal a pattern clearly shaped by racial sentiment when considered en masse." <=11> n10

Part I summarizes the traditional requirement of particularity: its underlying reasons, its costs, and its effect on racial discrimination claims related to sentencing, prosecution, and policing. A brief examination reveals that the particularity requirement unnecessarily causes courts to ignore statistical data and to fail to remedy systemic discrimination. Part II conceptualizes a regime of constitutional risk and addresses the difficult problem of providing an appropriate remedy. In a regime that recognized risks as harms, defendants could make claims for less than certain, probabilistic harms, so delineating proper remedies would therefore be crucial to prevent a collapse of the system. Part II argues that guidelines for the exercise of discretion may create the right balance between security against discrimination and practical flexibility. Part III discusses the possibilities for a constitutional risk regime and suggests areas for further research.

[*2100]

I. The Particularity Requirement

Equal protection doctrine generally requires both a particularized actor and a particularized harm: a litigant must prove not only that a government actor was motivated by a discriminatory purpose, <=12> n11 but also that the discriminatory act affected the outcome of his case. <=13> n12 The Court has adhered rigidly to these particularity requirements, inducing some commentators to describe the doctrine as limiting equal protection violations only to cases in which a government official is "out to get" an individual based on impermissible grounds. <=14> n13 Except in a few select areas, <=15> n14 statistical evidence rarely furnishes a basis for a successful equal protection claim. <=16> n15

A. The Reasons for Particularity

n51. See *Kennedy, supra* note 10, at 1402 ("As far as reported cases disclose, no defendant in state or federal court has ever successfully challenged his punishment on grounds of racial discrimination in sentencing." (emphasis omitted)).

n52. *McCleskey v. Kemp, 481 U.S. 279, 291 n.7 (1987)*. The empirical validity of racial disparities in sentencing has been a matter of ongoing controversy, but suspicions of racial discrimination in capital sentencing are not new. In *Furman v. Georgia, 408 U.S. 238 (1972)*, several Justices, including the dissenting Chief Justice Burger, all expressed concerns about racial discrimination in capital cases. See *id. at 257* (Douglas, J., concurring) (blaming standardless statutes for the discriminatory imposition of the death penalty); *id. at 310* (Stewart, J., concurring) ("If any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race."); id. at 364 (Marshall, J., concurring) (stating that, "while the higher rate of execution among [blacks] is partially due to a higher rate of crime, there is evidence of discrimination"); id. at 389 n.12 (Burger, C.J., dissenting) (acknowledging disparities).

n53. *McCleskey, 481 U.S. at 297.*

n54. *426 U.S. 229 (1976)* (requiring discriminatory intent for equal protection claims).

n55. *McCleskey, 481 U.S. at 292* (emphasis added) (citations omitted) (quoting *Wayte v. United States, 470 U.S. 598, 608 (1985)*).

n56. Id. at 292-93.

n57. Lower courts' treatment of racial disparities in capital sentences for rape prior to *Coker v. Georgia, 433 U.S. 584 (1977)*, which abolished the death penalty for rape, further demonstrates the legal culture of particularity. See, e.g., *Maxwell v. Bishop, 398 F.2d 138, 146-47 (8th Cir. 1968)* (Blackmun, J.) (focusing on the aggravating factors in the particular case and downplaying statistical disparities); *State v. Mayo, 87 So. 2d 501, 503 (Fla. 1956)* (denying relief despite statistics showing that over a twenty-year period only one white man but twenty-three black men were sentenced to death for rape). See generally Marvin E. Wolfgang & Marc Riedel, Rape, Racial Discrimination and the Death Penalty, in Capital Punishment in the United States 99, 107-18 (Hugo Adam Bedau & Chester M. Pierce eds., 1976) (discussing empirical findings of racial

disparities in capital rape sentencing from 1945 to 1965).

Despite the culture of particularity, the disturbing ramifications of statistical studies became increasingly apparent to jurists in the early 1960s. See Arthur J. Goldberg, Memorandum to the Conference: Re: Capital Punishment, October Term 1963, *27 S. Tex. L. Rev. 493, 504 n.17 (1986)*; see also Michael Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment 28-29 (1973). In fact, although Coker was ultimately decided on Eighth Amendment grounds and did not address racial concerns, such considerations were clearly in the background. See *McCleskey, 481 U.S. at 332* (Brennan, J., dissenting) ("Although the [Coker] Court did not explicitly mention race, the decision had to have been informed by the specific observations on rape by both the Chief Justice and Justice Powell in Furman.").

n58. *McCleskey, 481 U.S. at 291 n.7.*

n59. See, e.g., *Stephens v. State, 456 S.E.2d 560, 562 (Ga. 1995)* (discounting racial disparities among prosecutorial requests for life sentences for repeat drug offenders due to the potential presence of other permissible explanatory factors). See generally Developments in the Law - Race and the Criminal Process, *101 Harv. L. Rev. 1472, 1630-35 (1987)* [hereinafter Developments] (tying disparities in noncapital sentencing to discriminatory parole board decisions). A well-known controversy about racial disparities in noncapital sentencing involves the Sentencing Guidelines' treatment of crack versus powder cocaine. David A. Sklansky, Cocaine, Race, and Equal Protection, *47 Stan. L. Rev. 1283 (1995)*. The crack/powder cocaine issue, however, is different from the one addressed in this Note. This Note addresses racial disparities that remain after regression accounts for possible race-neutral factors, while the other inquiry focuses on a disparate impact argument that disregards whether race may be merely correlated with a particular race-neutral trait (for example, crack cocaine use).

n60. See infra Part II.

n61. *McCleskey v. Kemp, 753 F.2d 877, 927 (11th Cir. 1985)* (en banc) (Clark, J., dissenting in part and concurring in part) ("The societal imperative of maintaining a criminal justice system ... would outweigh the mandate that race or other prejudice not infiltrate the legal process."). Judge Clark's dissent, however, distinguished capital sentencing, in which any racial discrimination was impermissible, from noncapital sentencing, which was subject to this pragmatic consideration. See id.

n62. See id.

n63. See Randall Kennedy, Race, Crime, and the Law 354 n. (1997) (arguing that no American court has ever found a prosecutor to have engaged in racially selective prosecution). Concededly, besides the one in Armstrong, statistical studies for discriminatory prosecution have thus far been relatively unsophisticated and episodic. See, e.g., *U.S. v. Figueroa-Rocha, No. CR-94-20103-JW, 1995 WL 253050, at 3* (N.D. Cal. April 27, 1995) (addressing raw numerical disparities in the enforcement of an immigration law); see also Angela J. Davis, Prosecution and Race: The Power and Privilege of Discretion, *67 Fordham L. Rev. 13, 55-56 (1998)* (implying that a rigorous statistical study would be necessary for credible evaluation of prosecutorial practices). Given the high cost of such studies and the Court's unwillingness to rely on them even in death penalty cases, such a result is unsurprising.

n64. See McAdams, supra note 32, at 616 n.55.

n65. See, e.g., *Butler v. Cooper, 554 F.2d 645, 647 (4th Cir. 1977)* (denying relief despite studies showing that eighty-four percent of persons arrested for violating liquor laws were black in a county with only a thirty-three percent black population). But cf. *State v. Kennedy, 588 A.2d 834, 840-41 (N.J. Super. Ct. App. Div. 1991)* (allowing statistical disparities to establish a colorable claim of discrimination and thus permitting discovery).

n66. *517 U.S. 456 (1996)*.

n67. *Id. at 458-59*.

n68. *Id. at 459-61*.

n69. *Id. at 465*.

n70. *Id. at 470*.

n71. Racial profiling remains a controversial issue, and a number of commentators deny its constitutionality. See Pamela S. Karlan, Race, Rights, and Remedies in Criminal Adjudication, *96 Mich. L. Rev. 2001, 2006-07 (1998)* (suggesting that the use by many police departments of statistical profiles in

which race is a factor is likely unconstitutional). The difficulty of determining the constitutionality of racial profiling is closely linked to the difficulty posed by disparate impact theories. See supra p. 2103. To the extent that certain minority groups may on average commit a greater percentage of certain crimes, profiling is strictly speaking "rational," but other societal values may make such stereotyping impermissible or undesirable. Cf. *Powers v. Ohio, 499 U.S. 400, 410 (1991)* (rejecting the use of race as a proxy for bias in the peremptory challenge context). See generally *Kennedy, supra* note 63, at 136-67 (discussing the rationality, but undesirability, of using race as a proxy).

n72. See David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, *87 J. Crim. L. & Criminology 544, 561-69 (1997)* (detailing studies in Florida, Maryland, Illinois, and Colorado).

n73. *517 U.S. 806 (1996)*.

n74. See *id. at 810, 813* (acknowledging the danger of racially discriminatory pretextual searches but holding that the applicable provision is the Equal Protection Clause, not the Fourth Amendment).

n75. *461 U.S. 95 (1983)*.

n76. *Id. at 105-06;* see also *id. at 111-12* (cautioning judicial restraint when interfering with state law enforcement in the absence of a substantial risk of irreparable injury). The Court has applied similar principles to discriminatory prosecution. See *O'shea v. Littleton, 414 U.S. 488, 495-99 (1974)*.

n77. See *Herskovits v. Group Health Coop. of Puget Sound, 664 P.2d 474, 481, 485-86 (Wash. 1983)* (Pearson, J., concurring); see also Nozick, supra note 26, at 75-77 (discussing various methods of compensating risk); cf. Joseph H. King, Jr., Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences, *90 Yale L.J. 1353, 1364 (1981)* (advocating "[a] more rational approach ... [that] would allow recovery for the loss of the chance of cure even though the chance was not better than even").

n78. See Rosenberg, supra note 17, at 884-87; cf. John Fabian Witt, Toward a New History of American Accident Law: Classical Tort Law and the Cooperative

First-Party Insurance Movement, *114 Harv. L. Rev. 690, 701-04 (2001)* (recounting the changes in the law of unintentional torts that resulted from statistically inevitable industrial accidents).

n79. By conceiving of risks as harms, the law must, as a practical matter, deal only with "substantial" risks to prevent an explosion of claims. See *Herskovits, 664 P.2d at 476* (suggesting that courts may need to limit recovery to "significant" risks). The line between "de minimis" risks and "substantial" risks is drawn as a matter of policy, just like the one delimiting "proximate" cause. See *Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928)* (Cardozo, C.J.); Nozick, supra note 26, at 76-77 & n..

n80. See Cass R. Sunstein, Standing and the Privatization of Public Law, *88 Colum. L. Rev. 1432, 1464-66 (1988)* (explaining why the question of standing rests substantially on the characterization of the relevant injury).

n81. On a theoretical level, the systemic and aggregative approach of a constitutional risk perspective may also be more consistent with equal protection than is the particularity approach. Although the battle against racism has perhaps traditionally had a more individualistic tone, emphasizing each person as an individual and not as a stereotype, the concept of equal protection itself invites comparisons on a systemwide basis. It invites comparisons among sentences, prosecutions, and traffic stops. It invites an examination of whether justice is equally distributed.

n82. Acknowledging constitutional risks will invariably require greater use and acceptance of statistics, and therefore courts may have to develop greater familiarity with and expertise in this area. As in other fields, however, the use of statistics and probability should be unremarkable. In the natural sciences, scientists often resort to statistics and probability to describe the physical world when a system becomes too complex to model using cause and effect relationships. Described by some as a "mathematical theory of ignorance," when one cannot follow the behavior of every particle or actor in a system, science settles for describing it holistically through the use of statistics. See Morris Kline, Mathematics in Western Culture 340-58 (1953).

n83. See *Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803)*.

n84. See Karlan, supra note 71, at 2029 (suggesting that the problems regarding equal protection and the criminal justice system are "as much about remedies as about rights").

n85. Reversal remedies, however, are inappropriate for constitutional risks because the harm involved is systemic and therefore will persist even in a retrial.

n86. See, e.g., *McCleskey v. Kemp, 481 U.S. 279, 348 (1987)* (Blackmun, J., dissenting). But see *United States v. Armstrong, 517 U.S. 456, 461 n.2 (1996)* (noting that the Court has not yet ruled on the appropriate remedy for discriminatory prosecution).

n87. See, e.g., Akhil Reed Amar, Sixth Amendment First Principles, *84 Geo. L.J. 641, 646 (1996)*.

n88. See Karlan, supra note 71, at 2005 (suggesting that concerns about the dismissal remedy led the Court to use the intent standard to eviscerate equal protection doctrine in the area of selective prosecution).

n89. For a general discussion on the usefulness of granting windfalls to private attorneys general to enforce constitutional provisions, see Daniel J. Meltzer, Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, *88 Colum. L. Rev. 247 (1988)*.

n90. Cf. *Rhodes v. Chapman, 452 U.S. 337, 367 n.15 (1981)* (Brennan, J., concurring) (acknowledging that if "less than 63 square feet of cell space per inmate were a per se violation of the Eighth Amendment, then approximately two-thirds of all federal, state and local inmates today would be unconstitutionally confined").

n91. See *McCleskey, 481 U.S. at 293* (expressing concern that McCleskey's claim "would extend to all capital cases in Georgia, at least where the victim was white and the defendant [was] black"); *id. at 314-15* (expressing concern that McCleskey's capital sentencing claim could easily be extended to all other types of penalty); see also *McCleskey v. Kemp, 753 F.2d 877, 927 (11th Cir. 1985)* (Clark, J., dissenting) (acknowledging that even if racial bias randomly arose in twenty percent of noncapital convictions, federal courts could not realistically strike down all prosecutions).

n92. In the aftermath of McCleskey, Congress considered allowing statistical

proof to establish such a presumption in capital sentencing cases, but the bill ultimately failed. See Racial Justice Act of 1989, S. 1696, 101st Cong. 2922(b)(1) (1989); cf. Ky. Rev. Stat. Ann. 532.300(3), (5) (Michie 1999) (allowing a defendant to use statistics to prove racial discrimination by clear and convincing evidence).

n93. E.g., *Batson v. Kentucky, 476 U.S. 79, 96-98 (1986)* (peremptory challenges); *Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971)* (previously segregated school district); see Sklansky, supra note 59, at 1318.

n94. This problem is one of the reasons that the rule against race-based peremptory challenges under Batson has essentially been eviscerated. See, e.g., *United States v. Lorenzo, 995 F.2d 1448, 1454-55 (9th Cir. 1993)* (permitting peremptory challenges to three potential jurors with Hawaiian surnames for race-neutral reasons such as lack of attentiveness, financial hardship, and having long hair and a beard); see also Karlan, supra note 71, at 2021 & nn.96-101 (reporting explanations such as weight, handwriting, clothing, and attitude).

n95. *Wayte v. United States, 470 U.S. 598, 624* (Marshall, J., dissenting).

n96. *United States v. Armstrong, 517 U.S. 456, 465 (1996)* (rejecting discovery for, inter alia, its possible chilling effect on law enforcement and its potential to reveal the government's enforcement policy).

n97. Cf. McAdams, supra note 32, at 658 (arguing that discovery is a useful sanction because it is costly to prosecutors and is an intermediate remedy); Anne Bowen Poulin, Prosecutorial Discretion and Selective Prosecution, *34 Am. Crim. L. Rev. 1071, 1090-98 (1997)* (arguing for discovery as a form of "soft enforcement"). However, although discovery may impose costs on government actors and deter unconstitutional conduct, it is not a "true" sanction. Unless a reasonable opportunity for ultimate dismissal accompanies discovery, defendants will lack the adequate incentives to bring claims.

n98. See supra note 15.

n99. Karlan, supra note 71, at 2028. Civil damages, the common law remedy for rights violations, seem unhelpful to defendants facing death or incarceration, and defendants also face barriers such as prosecutorial immunity, see *Imbler v. Pachtman, 424 U.S. 409, 431 (1976)*, and unsympathetic juries, see Karlan, supra

note 71, at 2012.

n100. Professor William J. Stuntz suggested this insight in private conversation. Cf. *Herskovits v. Group Health Coop. of Puget Sound, 664 P.2d 474, 487 (Wash. 1983)* (Pearson, J., concurring) (suggesting a discount of full compensatory damages to reflect the level of risk imposed by the wrongdoer); Rosenberg, supra note 17, at 867 (same). For a related discussion in the context of verdicts, see Michael Abramowicz, A Compromise Approach to Compromise Verdicts, *89 Cal. L. Rev. 231 (2001)*.

n101. Prosecutors could not overcharge minority defendants to compensate for the sentencing discount, because such overcharging would itself theoretically exacerbate racial disparities that would justify greater proportional compensation in the future.

n102. See Rosenberg, supra note 17, at 881-85.

n103. See *Md. Troopers Ass'n v. Evans, 993 F.2d 1072, 1076 (4th Cir. 1993)* (stating that courts should employ race-based remedies only as a "last-resort" because "the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome").

n104. Cf. Charles Nesson, The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts, *98 Harv. L. Rev. 1357, 1382-84 (1985)* (explaining how "proportionate awards" may undermine attempts to shape behavior).

n105. Cf. Chayes, supra note 19, at 1292-96 (noting the rise of injunctions and other equitable relief in public law litigation).

n106. Courts could also use a "ratchet-up" injunction to address race-of-the-victim discrimination. See *Kennedy, supra* note 10, at 1390-91.

n107. Cf. Carol S. Steiker & Jordan M. Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, *109 Harv. L. Rev. 355, 420 (1995)* (arguing that a "ratchet-up" is unavailable to enforce equality in capital sentencing because courts cannot compel decisionmakers to impose that penalty).

n108. Presumably, interest groups could take up the mantle, but only if they successfully overcame third-party standing obstacles.

n109. Structural injunctions also implicate concerns about judicial intrusiveness, which often explain the great reluctance of courts to impose them. See, e.g., Robert A. Burt, Disorder in the Court: The Death Penalty and the Constitution, *85 Mich. L. Rev. 1741, 1797-98 (1987)* (discussing the McCleskey Court's reluctance to undertake a "wholesale restructuring" of the system); see also Tribe, supra note 42, 16-20, at 1510 (suggesting that the Court's use of the discriminatory intent standard in equal protection cases stems from a "trepidation about embracing the highly intrusive structural remedies that may be required to root out the entrenched results of racial subjugation"). By interfering with prosecutorial decisions, the judiciary meddles in a traditionally exclusive province of the executive branch, see, e.g., *Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)*, and an area in which it is institutionally ill suited to make decisions, see, e.g., *Wayte v. United States, 470 U.S. 598, 607 (1985)*. Sentencing may be a more appropriate area for judicial intervention. See Sklansky, supra note 59, at 1316 (arguing that criminal sentencing is "close to the core" of the judiciary's competence). But even in the sentencing context it is unclear whether appellate courts are well suited to such fact-based inquiries.

n110. See Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 170 (Illini Books 1971) (1969) ("The power to be lenient is the power to discriminate." (emphasis omitted)). The concern over the link between discretion and discrimination is not new in criminal law. It was a motivating factor for regulating grand jury selection, see *Castaneda v. Partida, 430 U.S. 482, 496-97 & n.17 (1977)*, capital sentencing, see *Gregg v. Georgia, 428 U.S. 153, 188-91 (1976)*, and federal sentencing more generally, see U.S. Sentencing Guidelines Manual ch. 1, pt. A (2000). Vagueness doctrine arguably also aims at preventing excessive police discretion and its accompanying risk of impermissible classifications. See, e.g., *City of Chicago v. Morales, 527 U.S. 41, 71-72 (1999)* (Breyer, J., concurring in part and concurring in the judgment) (expressing constitutional concerns about unlimited police discretion).

n111. See generally H.L.A. Hart, The Concept of Law 124-36 (2d ed. 1994).

n112. See, e.g., *Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976)* (plurality opinion) (affirming the constitutional requirement of individualized sentencing in the death penalty context); see also Steiker & Steiker, supra note 107, at 381-83 (discussing the tension between discretion and nonarbitrariness in the death penalty context). In fact, a mandatory death penalty may actually exacerbate unbridled jury discretion because it may invite jury nullification. *Woodson, 428 U.S. at 302-03*.

n113. See, e.g., William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, *107 Yale L.J. 1, 7 (1997)*.

n114. See Vorenberg, supra note 43, at 1562-72.

n115. See *Davis, supra* note 63, at 35 n.106 (reporting that "Washington is the only state with [statutory prosecutorial] guidelines"). The Sentencing Guidelines constrain sentencing discretion at the federal level, but the same cannot be said for all state sentencing. See Michael Tonry, Twenty Years of Sentencing Reform: Steps Forward, Steps Backward, 78 Judicature 169, 170 (1995) (reporting that, as of 1995, more than twenty states had guidelines).

n116. Cf. *McCleskey v. Kemp, 481 U.S. 279, 365 (1987)* (Blackmun, J., dissenting) (advocating the use of "guidelines" for prosecutorial discretion in the death penalty context).

n117. Record-keeping may not be possible, for example, in the jury context, given strongly held traditions regarding the secrecy of deliberations.

n118. Cf. *Kolstad v. Am. Dental Ass'n, 119 S. Ct. 2118, 2129 (1999)* (allowing an employer to evade punitive damages for workplace sexual harassment if the employer has an antiharassment policy and a grievance mechanism in place).

n119. *430 U.S. 482 (1977)*.

n120. *Id. at 494-95*. Although the Castaneda elements create only a presumption of discrimination, id., in the context of multiple actors the presumption is very difficult to refute.

n121. Cf. Sklansky, supra note 59, at 1311 (implying that the Court has largely confined Castaneda to the jury context).

n122. See *Castaneda, 430 U.S. at 502* (Marshall, J., concurring) (suggesting

The reluctance of courts to grant relief based on statistical showings of inexplicable racial disparities is not without reasonable basis. The requirement of particularity is closely linked to traditional Enlightenment notions of moral responsibility and free will, and a rush to embrace statistical data could significantly compromise these widely held values. In addition, statistical analyses can be plagued with subtle technical flaws that are difficult to detect. When courts face these concerns as well as the problems of remedy discussed in Part II they are understandably hesitant.

1. Moral Responsibility and Free Will. - The requirement of particularity is not surprising in light of common law causation principles, [*2101] which are binary or mechanistic, <=17> n16 rather than probabilistic. <=18> n17 These principles arise from a Newtonian perspective - every action arises through the will of a free moral actor <=19> n18 - and accord with traditional notions of moral responsibility in the law <=20> n19 and the structure of private law litigation. <=21> n20 Thus, just as tort law requires a plaintiff to show that the defendant more likely than not caused his injury, constitutional law requires a party to show that a government actor's racial animus more likely than not changed the outcome of the case. This understanding of causation creates particularity requirements along two closely related veins: First, the law seeks to blame a specific actor, not societal conditions or the system in general. Second, the law requires that the actor have actually harmed the particular defendant.

The requirement of a particularized wrongdoer manifests itself in the equal protection requirement of purposeful discrimination and in the rejection of statistical proof of harm when a claimant cannot identify a specific wrongdoer. <=22> n21 For example, in McCleskey the Court cited jury uniqueness in denying McCleskey's claim. <=23> n22 Because the jury acted only once, no consistent pattern of racism could be imputed to it. <=24> n23 From the standpoint of individual responsibility, this conclusion makes logical sense - a single point, per se, cannot form a pattern. The systemic result, however, is that discriminatory decisionmakers go undetected, and structural safeguards that could prevent or impede racist decisionmaking are not considered.

The focus on actual harm to the particular defendant bars recovery when statistical studies can demonstrate only a risk of discrimination, not actual discrimination. <=25> n24 This doctrinal rule has normative and practical support. Normatively, denying recovery in the absence of actual [*2102] harm forgives transgressions in which no evil results <=26> n25 - "no harm, no foul." Practically, compensating every risk that government action imposes would involve enormous transaction costs and measurement difficulties and might well lead to an excessive level of rights enforcement and an overly cautious society. <=27> n26 Every government action theoretically harbors some risk of discrimination; to compensate for all such risks would be unmanageable, if not impossible. <=28> n27

The response to these arguments is two-fold. First, it is possible to distinguish between individual actors and the government. Forgiveness is less normatively appealing when applied to the government, especially because racial discrimination seriously undermines the legitimacy of the criminal justice system. Second, the practical difficulties of compensating all risks do not

that, at least as of 1977, a statistical disparity and discretionary selection procedures always established a prima facie case of discrimination); *Kennedy, supra* note 10, at 1427-29 (criticizing McCleskey's distinction of capital sentencing from grand jury selection as "unpersuasive"); see also Developments, supra note 59, at 1552-54 (suggesting a modified version of the scheme proposed in this Note).

n123. See generally David A. Strauss, The Ubiquity of Prophylactic Rules, *55 U. Chi. L. Rev. 190 (1988)* (observing that constitutional law is replete with prophylactic rules).

n124. See Lon L. Fuller, The Forms and Limits of Adjudication, *92 Harv. L. Rev. 353, 394-404 (1978)* (suggesting that legislatures are the institutions most competent to make decisions that carry multiple and complex repercussions involving many actors). This partnership between courts and state legislatures would parallel the Supreme Court's intervention in capital sentencing in the 1970s. See *Gregg v. Georgia, 428 U.S. 153, 188-95 (1976)* (plurality opinion).

n125. Compare *Miranda v. Arizona, 384 U.S. 436, 467-68 (1966)* (suggesting a safe-harbor procedure that would satisfy Fifth Amendment requirements but encouraging legislatures to develop their own solutions), with *Dickerson v. United States, 120 S. Ct. 2326, 2332-36 (2000)* (interpreting Miranda as announcing a constitutionally mandated prophylactic rule).

n126. But see Rory K. Little, The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role, *26 Fordham Urb. L.J. 347, 478-81 (1999)* (noting that despite the Department of Justice's elaborate death penalty review process, federal death sentencing exhibits even greater racial disparities than state death sentencing).

n127. If government actors remained undeterred, such records could be used for further litigation. See Harris, supra note 72, at 566 (reporting the statistical evidence of racial disparities that Maryland police generated after a settlement required greater record-keeping of certain traffic stops).

n128. See Strauss, supra note 123, at 196 (suggesting that "clear standards make it easier for a court reviewing the official's action to determine if it was influenced by an impermissible consideration"); cf. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 685-86 (1980)* (Rehnquist, J., concurring) (describing the need for intelligible principles to facilitate judicial review of administrative decisions).

n129. See *Wayte v. United States, 470 U.S. 598, 607 (1985)*.

n130. For example, the constitutional ban on race-based peremptory challenges established by *Batson v. Kentucky, 476 U.S. 79, 100 (1986)*, may be a paper tiger, see supra note 94, but its "shadow effects" arguably have tangible value. Cf. Cass R. Sunstein, Law and Administration After Chevron, *90 Colum. L. Rev. 2071, 2112 (1990)* (arguing that clear statement rules and the nondelegation doctrine operate as "second-best surrogates" in light of the "intrusiveness and unwieldiness" of large-scale judicial review).

n131. See, e.g., *Wayte, 470 U.S. at 608-09 (1985)*.

n132. Cf., e.g., *McCleskey v. Kemp, 481 U.S. 279, 314 n.37 (1987)* (declaring "discretion essential to a humane and fair system of criminal justice").

n133. See *Callins v. Collins, 510 U.S. 1141, 1144 (1994)* (Blackmun, J., dissenting from denial of certiorari) ("Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness - individualized sentencing." (citation omitted)).

n134. Cf. Steiker & Steiker, supra note 107, at 391 (explaining how standardless consideration of mitigating evidence makes discrimination possible in death penalty sentencing).

n135. See *McCleskey, 481 U.S. at 313 n.35* (discussing the essential need to balance uniformity and discretion).

n136. See *id. at 319* (maintaining that legislatures are the appropriate institutions).

n137. See William J. Stuntz, Substance, Process, and the Civil-Criminal Line, *7 J. Contemp. Legal Issues 1, 15-19 (1996)*.

n138. Cf. Strauss, supra note 123, at 200-01 (defending Miranda's prophylactic rule as less judicially imperialistic than rigid overbreadth doctrines in the First Amendment context because it allows for legislative alternatives).

n139. For example, instead of courts imposing prophylactic rules, Congress could legislate guidelines that were "congruent and proportional" to the harms involved. Cf. *City of Boerne v. Flores, 521 U.S. 507, 530-33 (1997)*; Tribe, supra note 42, 16-20, at 1514 n.97 (speculating that McCleskey left room for Congress to regulate, under Section 5 of the Fourteenth Amendment, state death penalty procedures that discriminate against racial minorities).

n140. A cursory examination reveals that the idea of constitutional risk may be latent in many areas of constitutional law. For example, one can view overbreadth doctrine and some facial challenges not as redressing actual harm (as in the case of an as-applied challenge), but as removing a risk of constitutional harm from the plaintiff's environment. The same is true for prophylactic rules, which address not constitutional harms ex post, but the risk of future constitutional harms ex ante. See Strauss, supra note 123, at 198-200 (suggesting that levels of constitutional scrutiny are in effect prophylactic rules).

n141. Cf. Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, *113 Harv. L. Rev. 1321, 1342-56 (2000)* (arguing that facial challenge doctrine is not transsubstantive but rather reflects specific doctrinal tests).

require courts to compensate no risks. By compensating some subset of "substantial" risks delineated as a matter of policy, the law can avoid the slippery slope. <=29> n28

2. Flawed Statistical Regressions. - From a practical standpoint, courts may be reluctant to open equal protection doctrine to statistical proof for technical reasons. <=30> n29 One of the most significant criticisms of statistical studies on discrimination is the inability of multiple regressions to account for all race-neutral explanations for racial disparities. Statistically, some crimes or behaviors may be more prevalent among members of certain minority groups; thus statistics showing disproportionate sentencing, prosecution, or policing may not reflect any discrimination at all. <=31> n30 Although regressions account for many race-neutral explanations and are thus more sophisticated than the raw numerical comparisons featured in disparate impact arguments, <=32> n31 regressions [*2103] can never be perfect, and some race-neutral factors may be omitted due to a lack of data. <=33> n32 Historically, courts have cited precisely this possible omission as a reason to disregard statistical showings of racial disparity. <=34> n33

This concern may be valid, but surely parties must do more than speculate about possible flaws to invalidate statistical evidence. The key question is whether the omission of potentially explanatory factors creates sufficient doubt in a study's accuracy to warrant the denial of all relief. Although the omission of variables may affect the probative value of a regression, it should not always render a study entirely inadmissible as evidence of discrimination. <=35> n34 As some statisticians suggest, courts need to consider just how significant a permissible "unknown" factor would have to be to account for the racial disparities observed. <=36> n35 For example, although there may be a five to one racial disparity in traffic stops, it is improbable that blacks are five times more likely to speed or to drive with a broken tail light than whites. <=37> n36

The other major problem with using statistical data in the equal protection context is the question of class definition: how one defines one's statistical sample can affect the results of a study. For example, there may be a racial disparity among murder sentences throughout a state, yet there may be no such disparity in a particular county. Courts do, however, face similar problems in mass-tort class actions as [*2104] well as in statutory discrimination actions, which suggests that this difficulty is manageable. <=38> n37

B. Costs

As already noted, the particularity requirement and its rejection of statistical evidence have substantial costs. The Court's cramped view of constitutional harm forces courts to examine only individual cases, which cannot reveal or redress patterns of racial discrimination. <=39> n38 Considered in isolation, nearly all decisions can be rationalized using permissible explanations; it is only when these decisions are considered in the aggregate that patterns may emerge that indicate the presence of impermissible discrimination. <=40> n39 As a result, the particularity requirement obscures the discriminatory decisions of government actors, making their already broad discretion effectively unreviewable.

It is true that overt discrimination is readily detectable under the

traditional particularized harm framework. If a judge overtly relies on race in sentencing defendants to death, or if police departments target motorists because of their race, the discrimination is plain. But the particularized framework, though perhaps effective in past "conquests" <=41> n40 of overt discrimination, is wholly inadequate in a contemporary society in which "discrimination takes a form more subtle than before." <=42> n41 Contemporary mores and legal pressures have altered the appearance of racism. Gone are facially discriminatory statutes and prosecution policies. In their place has arisen a racism cloaked in non-racial explanations. <=43> n42 Thus, despite a facially neutral statute and the absence of an overtly discriminatory enforcement policy, regression [*2105] analysis may still show that, even after accounting for all relevant non-racial factors, minorities are more likely to be arrested, convicted, or sentenced more harshly. The particularity requirement, however, renders courts incapable of recognizing such risk-based harm.

The broad discretion traditionally afforded government actors in investigating, prosecuting, convicting, and sentencing defendants exacerbates the cloaking phenomenon. <=44> n43 Although some discretion is inevitable because of the resource allocation and complex balancing questions involved, <=45> n44 broad discretion facilitates the masking of impermissible motives. Together with the judicial deference that usually accompanies it, such discretion fosters an environment acutely susceptible to discrimination. <=46> n45

Moreover, the failure to recognize statistical evidence and constitutional risks of discrimination legitimizes government structures and practices and thereby inhibits not only courts, but also legislatures from examining them. <=47> n46 By denying the existence of discrimination altogether, courts absolve other "governmental and nongovernmental actors of responsibility for solving these problems" through alternative avenues. <=48> n47 The inability to remedy a harm does not justify the refusal to acknowledge its existence. <=49> n48 Finally, because requiring particularized harm will almost always result in a finding of nondiscrimination, courts can theoretically manipulate the required level of particularity to mask ideological preferences for or against greater equal protection. <=50> n49

[*2106]

C. Effects

A brief survey of equal protection doctrine in sentencing, prosecution, and policing evinces the pervasive culture of particularity and its consequences. Courts have generally declined to award relief on the basis of statistical racial disparities, focusing instead on the particular facts of each case.

1. Sentencing. - Despite various studies showing racial disparities in sentencing, <=51> n50 the bottom line is simple: no court has ever found an equal protection violation on the basis of racial disparities. <=52> n51 Although the reasons for this stark result are complex, the principal decisions leave little doubt that the particularity requirement has played a critical role. For example, in McCleskey, although the Court assumed the validity of the statistical studies arguendo <=53> n52 - thus allowing the discussion to venture beyond surface-level empirical debates - it still denied relief,

focusing on the particulars of McCleskey's case. According to the Court, McCleskey could not claim discrimination because he was indeed guilty as charged - he had "committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty." <=54> n53 Furthermore, the Court emphasized that the corollary of the purposeful discrimination requirement of Washington [*2107] v. Davis <=55> n54 was that "a criminal defendant must prove that the purposeful discrimination "had a discriminatory effect' on him." <=56> n55 McCleskey had "offered no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence," <=57> n56 and thus was not entitled to relief.

The McCleskey Court thus manifested a legal consciousness narrowly focused on particular acts. The statistical studies showing racial disparities in sentencing were discarded as irrelevant to the individualized determination of justice. <=58> n57 Even more telling was the Court's revealing statement in a footnote that "even a sophisticated multiple-regression analysis ... can only demonstrate a risk that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision." <=59> n58 In other words, the risk of racial discrimination, in and of itself, was simply not enough.

Defendants claiming racial disparities in noncapital sentencing have fared no better. <=60> n59 After all, if the gravity of capital punishment [*2108] has not moved courts to consider statistical evidence, why would noncapital sentencing? Courts have predictably relied on the particularity requirement to deny discrimination claims, focusing especially on remedial difficulties. <=61> n60 As Judge Clark acknowledged in the lower court's consideration of McCleskey, even if racial bias randomly arose in twenty percent of all convictions, judges could not simply overturn them all. <=62> n61 Without a direct showing of discrimination in a specific case, little could be done. <=63> n62

2. Prosecution. - As in the sentencing context, defendants have rarely, if ever, brought successful claims for racially discriminatory prosecution. <=64> n63 Indeed, defendants have rarely succeeded in making any selective prosecution claim at all. <=65> n64 In denying relief, courts have focused less on a particular defendant's acts (as in the sentencing context) and more on the defendant's inability to show that prosecutors purposefully caused the racial disparities. <=66> n65 Only when the statistical disparities have been outrageous enough to make purposeful discrimination a virtual certainty have courts granted relief.

For example, in the only recent Supreme Court case dealing with alleged racially discriminatory prosecution, United States v. Armstrong, <=67> n66 the defendant argued that black crack-cocaine offenders were [*2109] disproportionately tried under harsher federal laws. <=68> n67 Statistics revealed that every one of the twenty-four federal crack cocaine cases tried by the local federal defenders office involved black defendants, and affidavits suggested that white offenders had been tried only in state court, in which penalties were considerably lighter. <=69> n68 Based on this evidence, the district court granted the defendant discovery of the prosecution's records. The Supreme Court reversed, holding that the evidence failed to show that "similarly situated individuals of a different race were not prosecuted," <=70> n69 and thus that the evidence was insufficient to warrant discovery. <=71> n70

3. Policing. - Even if explicit racial profiling were to be found unconstitutional, <=72> n71 similar doctrinal problems would hinder redress of discriminatory police practices. For example, studies report that a disproportionate number of minority motorists are pulled over while acting no differently than their white counterparts. <=73> n72 Despite the danger of facilitating this practice, the Court in Whren v. United States <=74> n73 nonetheless validated pretextual stops and searches of cars under the Fourth Amendment. <=75> n74 In addition, under City of Los Angeles v. Lyons, <=76> n75 to obtain an injunction against a discriminatory police practice, a plaintiff must show a high likelihood that he in particular will be injured again. <=77> n76 Thus, the particularity requirement once again presents a sizeable obstacle to relief for targeted groups.

[*2110]

II. Constitutional Risk and the Remedy Problem

The shortcomings of the traditional particularized harm requirement can be ameliorated by a greater focus on and acknowledgment of constitutional risks. Drawing from the mass tort context, this shift can be achieved in two ways: Rather than viewing risk as an irremediable possibility of harm, one can view risk as a remediable harm in itself. <=78> n77 Or, one may presume that, given a large enough population, what is traditionally "only" a risk is statistically certain to materialize into an "actual" harm: <=79> n78 yet because the actual manifestation of harm may be difficult to locate, one may prefer to empower third parties or private attorneys general for enforcement purposes.

These alternatives are essentially two sides of the same coin, but this Note pursues only the first. <=80> n79 Seeing risk as a remediable harm in itself fits well with the current individualistic conception of causation. In addition, by characterizing risk as injury in fact, one can address constitutional risks while avoiding doctrinal standing obstacles. <=81> n80

Conceptualizing constitutional risks as remediable harms would address the racial disparity concerns raised in section I.C. <=82> n81 Greater acceptance of statistical evidence would better enable courts to see potential patterns of discrimination and to assess whether certain aspects of the criminal process are structured appropriately to minimize discrimination. [*2111] At a minimum, a constitutional risk perspective would ensure that courts recognize the problem of discrimination in the criminal justice system. <=83> n82 Even if an effective court-imposed remedy were unavailable, acceptance of statistical evidence in the courts would impress the problem of discrimination on both government actors and the public at large.

Ideally, however, constitutional rights should be enforceable by adequate remedies. <=84> n83 Thus, the principal difficulty with achieving judicial acceptance of the constitutional risk perspective will be finding effective but appropriately cabined remedies. <=85> n84 As the remainder of this Part demonstrates, the traditional remedy for constitutional violations (reversal or dismissal) seems ill suited to address constitutional risks, as does the more activist remedy of a structural injunction. The solution rests instead with tweaking the equal protection right itself to create a requirement of procedural safeguards.

A. Sanctions

1. Dismissal. - Dismissal or reversal <=86> n85 has ordinarily been the remedy used to redress constitutional violations in the criminal process. <=87> n86 A substantial problem with dismissal remedies, however, is the oft-heard complaint that they are windfalls to defendants. <=88> n87 Defendants are freed not because they are innocent, but rather because of some problem in the criminal system itself. For this reason, although equal protection challenges in the criminal law context are perhaps more in need of redress for reasons of legitimacy and justice, they are more difficult to vindicate than those in other
contexts. Unlike in other contexts, in which claimants are at least occasionally sympathetic, in the criminal context the claimant is nearly always a convicted [*2112] defendant. Courts therefore unsurprisingly tend to narrow the circumstances under which a defendant can obtain a reversal. <=89> n88

Some might argue that the importance of vindicating equal protection rights in the criminal justice system justifies the social costs of releasing or retrying guilty defendants. Because defendants have the greatest incentive to monitor the system, they are needed as private attorneys general to deter state actors from unconstitutional behavior. <=90> n89 Nevertheless, the suitability of a private-attorney-general system in the constitutional risk context does not necessarily follow from its acceptance in the traditional context of proven, particularized discrimination. The right-remedy gap is even more pronounced when the harms suffered are constitutional risks - traditional harms discounted by probability. If dismissal for racially motivated prosecution of an otherwise guilty bank robber is already disproportionate, then dismissal when there was only a risk of racially motivated prosecution is even more problematic.

Constitutional risk presents an even more serious problem for dismissal remedies. Unlike the traditional particularized harm regime, a constitutional risk regime cannot limit dismissal to a small class of defendants. Because constitutional risk acknowledges a systemic problem, it would make dismissals available to all future defendants, calling into question the entire criminal justice system. <=91> n90 This kind of wide-ranging reductio argument weighed heavily in McCleskey. <=92> n91

2. Rebuttable Presumptions. - One solution to the dismissal problem would be to allow constitutional risks to create a rebuttable presumption of constitutional infirmity. <=93> n92 When a defendant demonstrates [*2113] an otherwise inexplicable racial disparity, a constitutional violation would be presumed unless the government could produce a neutral explanation for its behavior. Such presumptions have often been used in the jury selection and school segregation contexts. <=94> n93 Critics may argue, however, that such rebuttable presumptions create costly burdens on law enforcement and prosecutors given their limited resources, especially if the collection of statistical and other data justifying racial disparities is costly and difficult.

In addition, a rebuttable presumption still presupposes the existence of a particularized wrongdoer who can provide a race-neutral explanation. In the criminal justice system, such explanations are often unavailable. For example, jury deliberations are strictly confidential, making an allegation of racial discrimination impossible to rebut. In these instances, the rebuttable

presumption would be no different than dismissal.

On the flip side, small sample sizes make race-neutral explanations impossible to refute. Even if juries had open deliberations, they still convict and sentence only once, and individual prosecutors try few cases with similar factual situations. In such circumstances, these actors can easily rationalize potentially discriminatory conduct by giving race-neutral explanations. <=95> n94 Rebuttable presumptions would therefore fail to remedy the constitutional risk.

3. Discovery. - Another alternative would be to grant discovery requests by defendants who raise plausible statistical claims, but to leave the burden of proof on them. "Most of the relevant proof in selective prosecution cases will normally be in the Government's hands," <=96> n95 so discovery will provide additional data for defendants seeking to satisfy the traditional requirement of discriminatory purpose. Armstrong, of course, rejected precisely this discovery remedy, <=97> n96 but that decision arguably rested on the Court's particularized view of harm: because Armstrong had proven no harm in his particular case, [*2114] he was not entitled to discovery. Were the Court to recognize constitutional risk as an actual harm, one could imagine the Court being more inclined to grant a discovery "sanction." <=98> n97

Although granting discovery on the basis of constitutional risk would be an improvement over the present Armstrong doctrine, discovery too suffers from reliance on particularized wrongdoers. Discovery is only useful to defendants if the information discovered can prove intent, but short of finding the proverbial "smoking gun," discovery will likely provide only more statistical data, and little will be gained. And as precedent suggests, only in extreme cases will courts infer intent solely from statistical disparities. <=99> n98

4. Proportional Remedies. - Within the realm of compensatory remedies, constitutional risk faces a dilemma. On the one hand, it is unclear what remedy other than dismissal or a sentence reduction would provide sufficient incentive for a defendant "to ferret out racial discrimination." <=100> n99 On the other hand, dismissal is an overly generous remedy for constitutional risk. Constitutional risk varies by degrees - the harm inflicted depends on the magnitude of the risk. Dismissal, however, is a binary remedy - either a defendant escapes conviction or he does not. Dismissal is thus a windfall because it cannot be discounted to fit varying levels of harm.

This mismatch between harm and remedy exists at most stages of the criminal process: decisions to prosecute, convict, or sentence to death are all binary. But at some stages, such as noncapital sentencing, differences of degree do exist, theoretically allowing courts to discount for uncertainty. As in the tort context, courts could discount what would otherwise be full compensation by awarding proportional remedies. <=101> n100 More specifically, if a statistical study (having sufficiently accounted for all nonracial explanatory factors) were to demonstrate [*2115] that the average black defendant received a twenty-five percent greater prison sentence for a particular crime than did the average white defendant, then courts could simply reduce a black defendant's sentence by twenty-five percent. Because all black defendants could prove this risk, they would all receive the twenty-five percent reduction. No overdeterrence or windfall would result, <=102> n101 and the compensation would be directly proportional to the imposed risk. <=103> n102 Courts might

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SPEECH: THE PROFILING OF THREAT VERSUS THE THREAT OF PROFILING

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SUMMARY:
... Second, I would like to talk about the racial profiling that was used in this case. ... The nature of the problem is this: Racial profiling - that is the use of race by the government in its law enforcement - can be rational but wrong. ... So for those individuals who claim that they would like to follow the words of the late Reverend Martin Luther King, Jr. when he said that he had a dream that we not be judged by the color of our skin but by the content of our character, those individuals who profess their faith in those inspirational words cannot then turn around and say "But I make an exception and engage in rational discrimination when it suits me. ... If you look at the cases in which the plenary power doctrine is created, where the court approved of the Chinese Exclusion Act, the court is very forthright in cases that remain good law, that haven't been overruled in saying "Here we're dealing with an obnoxious race - one that does not assimilate." ... This sounds a lot like affirmative action opponents who are frustrated by a race conscious remedy being used to compensate for past racial discrimination. ...

TEXT:
[*135]

You know I suppose it's only because I'm a law professor that I take joy in coming back to this room where thirteen years ago as a first year law student I sat where you now sit in the afternoons for my course on Public Law. I'm glad to be back and I am very happy to be here to talk to you about some very important issues that I think affect all of us and affect our legal system, whether or not we're Asian American, whether or not we're racial minorities.

Law professors, as you know, always like to make three points when they talk. So I am going to make three points this afternoon in discussing the Wen Ho Lee case. First, I would like to give you a very brief summary of this spectacularly failed federal criminal prosecution. Second, I would like to talk about the racial profiling that was used in this case. Third, and finally, I would like to

What this means is that in year three this rational discriminator, the police chief, behaving rationally, might decide to allocate 90% of law enforcement resources to African Americans. Well, it doesn't take long for you to understand that the more extreme racial profiling is, the more it justifies itself. If you devote 100% of your law enforcement efforts targeted toward African Americans - unless people who are not African American bizarrely just decide to turn themselves in for committing a crime - you will have a pool of people who is arrested, prosecuted, and incarcerated that is or approaches 100% African American. In other words, if you have perfect racial profiling it will appear to have entirely justified itself.

Now, the reason I've walked you through this exercise using these numbers is to show you how easily this escalates; how easy it is to create the illusion that a policy is rational when it's applied to a racial minority group. That is what we have going on in the Wen Ho Lee case where you initially make the assumption that there is some greater likelihood that someone who is of Chinese background will commit espionage for China, so you investigate people of Chinese background.

Well, it doesn't take a rocket scientist to figure out that if the only people you investigate are Chinese American, if those are your only suspects, then the people you prosecute and ultimately find guilty are also likely to be Chinese American, regardless of whether or not they were actually guilty.

6. Racial Profiling Creates Negative Incentives

The sixth and final reason racial profiling is problematic is because of the incentives it creates for society as a whole. Racial profiling has a corrosive effect as Randall Kennedy has noted. <=26> n25 Let me make this as concrete as possible: let us say that we adopt the same mode of analysis that rational discrimination asks us to adopt. Let's say each of us behaves as the perfect rational actor, okay, and our morality is judged merely by cost benefit analysis, by what's utilitarian from our perspectives and we do what will result in the greatest benefit and the least cost to us. We maximize our own happiness, for that is what the rational discriminator does. [*148] He says, "Well, it's rational for me to discriminate, therefore I'm going to do so." It's a racial tragedy of the commons.

What happens now if everyone who is African American and male behaves rationally in this regime? If they face rational discrimination, what is rational behavior? Well, rational behavior for the African American male is to be a criminal. It's rational behavior because if they are not a criminal, of course they don't get any of the benefits of being a criminal. They don't get the loot that they might steal. They don't get the cachet that accompanies being bad. They don't get all the other good things that you get from a life of crime. Yet, what do they suffer? They suffer all the costs. They suffer the stigma associated with criminality. They suffer being picked up by police, not being able to apply for jobs, not having cabbies pick you up.

Not having a cabbie pick you up, well, that by itself doesn't seem like anything unless you understand that that's just one incident, one small sign of a larger pattern.

So, if you are African American and male and you face this prejudice, the smartest thing for you to do, if all you're doing is behaving rationally, is to

conform to the stereotype.

Likewise, in the Wen Ho Lee case, the most rational behavior for an Asian American who works for the federal government, who is believed to be engaged in espionage, is in fact to engage in espionage. After all, if you're going to be suspected of it and bear the burden why be innocent of it?

All right, I make this point which I hope is a little provocative to point out that mere rationality by itself is not a sufficient basis to provide a principle by which an individual can live, much less a principle by which a government would act.

So, for all of these reasons, the rational discrimination or racial profiling - call it what you will - that the government engaged in the Wen Ho Lee case is something we should condemn.

III. Asian American Activism

Now, let me turn to my third point - Asian Americans and activism in this case - because here too I think Asian Americans made a mistake. I say this as someone who is Asian American, who is an activist, who has worked with the individuals who are active on this case. The mistake they made is this: if you look at some of the quotes from Asian American leaders, or if you listen to the discussion within Asian American communities about the Wen Ho Lee case, especially within the Chinese American community, what you hear people saying is something like this: "Dr. Lee is not like drug dealers. He is not like people who are accused of those [*149] sorts of crimes." <=27> n26 I'm paraphrasing but that's roughly what one leader told the New York Times.

What's troubling about that is that it suggests that Dr. Lee is the good racial minority, not the bad racial minority. What's implicit in this is the notion that he was presumed guilty until proven innocent. What was wrong with the selective prosecution and the double standard here was its application against a respectable elderly Ph.D. holder who did research, who was Asian, and implicit in the comparison with drug dealers is the notion that he is not like African American males - young men, thugs, more dangerous felons. That's what's horrible about this, is the notion that he was treated the way that African Americans are treated on a daily basis. That's what's troubling about this activism; the failure to recognize that this is the same problem as driving while Black but with a different face put on it. Not only did Asian American activists not recognize but they actively sought to disassociate themselves from these other issues rather than build bridges and form coalitions so that groups together could condemn racial profiling.

Moreover, what else was interesting here is that as we talked about this case as a society, people made the following defense of the government: that none of the people involved were racist; they weren't bigots. It's not as if they were members of the KKK, although there were suspicions that one of the individuals who pursued Dr. Lee was someone who did have some problems with race based on a pattern of prior conduct. This person, who was White and male, had been involved in at least one lawsuit where an African American working with him as a colleague had sued, alleging that he had created a hostile work environment, and settled the case for several tens of thousands of dollars. There was some other evidence suggesting that this one individual may have had some racial animus toward Dr. Lee, that he had made some statements suggesting that no person of

Chinese descent could be trusted. <=28> n27

Nonetheless, for the most part, I think we can agree that the prosecutors who were involved - that the Department of Energy, that the Secretary of Energy, Bill Richardson, himself the highest ranking Hispanic in the federal government and someone who has spoken movingly about his own Hispanic background and having faced racial bias, and the U.S. attorney, who ultimately had responsibility for this case and who himself was Asian American - that these are people of good faith.

It's important to understand, though, that just as rationality doesn't excuse anything, neither does good faith. It is possible to engage in rational discrimination while sincerely believing that you are not a racist; while sincerely believing that all you're doing is relying on rational processes and [*150] facts. That's what's especially troubling about this form of racial bias: it's a form of racial bias that we don't recognize because we're prone to say "Well, it's true." We accept the defense of truth without asking why it is that something true of an abstract group should also be extended to cover individuals simply on the basis of race. We accept, all too easily, the notion that mere rationality is sufficient.

IV. Conclusion

So let me close then finally on this thought: that in order to understand the Wen Ho Lee case, in order to understand racial profiling, we must look at what we learned in constitutional law that every first year law student knows: the strict scrutiny test. Strict scrutiny means that it is not enough to accept only rationality, that we must, when race is involved, give strict scrutiny to the actions of the government. When we give the actions of the government strict scrutiny, if that standard is to mean anything at all, if it is to mean more than rationality review, than what it must mean is that rationality by itself does not suffice. There must be something more compelling as the ends. There must be narrow tailoring of the means. Strict scrutiny ensures that we will look closely and carefully and examine to make sure that our supposed rationality isn't just a mask and a cover for preexisting racial bias. Only when we learn how to do this, only when we reject merely utilitarian calculuses for a moral understanding of the obligation and guarantee of the Fourteenth Amendment, will we be able to prevent other examples of rational discrimination or racial profiling.

Thank you.

APPLAUSE

V. Audience Questions

FRANK WU: I'm happy to take questions. It's rare that you have the opportunity to ask a law professor questions and get a straight answer, as I'm sure you all know.

QUESTION: I have a question. You mentioned that racial profiling provides negative, but rational, incentives for persons being profiled. For instance, an African American being profiled as a criminal might as well receive the benefits of criminal behavior if they are going to be accused anyway. How does this

translate to Asian Americans that we often describe as "model minorities?"

FRANK WU: Sure, one of the images of Asian Americans is "Oh, you're so polite" you know, and that sounds like a compliment but all racial stereotypes, even the ones that are complimentary are, I think, suspect, because what is it to be polite? Well, to be polite is to be submissive, deferential, weak, not assertive. You know the last thing you want in your [*151] lawyer, for example, is someone who is polite. You know if you need to hire someone to sue someone, you don't want to hire the most polite person you can find. So sometimes even these positive images can have their negative component just as the images of, for example, African Americans as natural athletes sounds on its face like a compliment but you don't have to go too far beneath the surface to find images of bestiality. The notion that, well, it's just brute strength, it's not individual merit. Or that African Americans are good in certain positions in sports but not as the quarterback or as the coach because that requires much more intelligence.

So, some of these positive stereotypes have negative components. This particular stereotype of Asian Americans as being polite, I think, is also linked to the notion of Asian Americans as perpetual foreigners.

You know what's interesting about the Wen Ho Lee case? Think for a moment about this argument: China tries to recruit spies from among people of Chinese descent, therefore, the U.S. government is entitled to investigate Chinese Americans or people of Chinese descent, selectively. What does that really say? Well, structurally that says a foreign government, through its unilateral actions, can deprive U.S. citizens of their civil liberties. Well, that's absurd. Other than the Japanese American internment, there is no other example that I am aware of, where any court, where any decision maker, has accepted the notion that the actions of a foreign government, with which I have nothing to do, can deprive me, a U.S. citizen, of my constitutional rights.

Yet, with Asians that logic seems to apply because Asians are regarded as somehow foreign, not belonging, not assimilating. You can see this, for example, if you look at all sorts of cases, constitutional cases. If you look at the cases in which the plenary power doctrine is created, where the court approved of the Chinese Exclusion Act, the court is very forthright in cases that remain good law, that haven't been overruled in saying "Here we're dealing with an obnoxious race - one that does not assimilate." I think it's captured very well by a phrase that Asian Americans sometimes hear, especially if they aren't polite and do dissent and are activists. The comment, which is sort of the flip side of the "When are you going home?," is the "If you don't like it here you can go back to where you came from."

Well, I came from the Midwest. You know, well, I came from Cleveland, so I'm not quite sure what that is meant to say, but I think it's meant to say that you're disenfranchised. You don't have a right to articulate your disagreement and if you articulate your disagreement, if you are not willing to accept the terms that are given to you because you are, after all, a guest who is here enjoying privileges and benefits not rights, well then you can just get lost. I often, if I have the privilege to debate something in a more public form, whether it's on a college campus, a t.v. show or a radio show, get fan mail, or more properly hate mail, with that message. [*152] You know: "Go back to where you came from," or asking "Well, what do they do in China?" as if that has

anything to do with what I'm talking about.

QUESTION: You mentioned one commentator that tried to distinguish between an Asian American who had a doctorate and the average "driving while Black" victim. I want to be careful not to screw up and make that same separation because I think they're very linked. But as a practical matter as a movement against racial profiling, the "driving while Black" and other racial profiling of Blacks and Latinos seems to cover a wider variety of people on a daily basis, and I'm just wondering as a movement how that movement can include Asian Americans and African Americans.

FRANK WU: Sure, you know if anything, Asian Americans who are outraged at the Wen Ho Lee case are proving to some extent the government's case because their outrage is selective. Right? They're showing ethnic sympathies. And the last thing: one of the points I make to Asian American audiences is, you know, if you claim to be principled and claim to care about civil rights, where are you when there is a protest about "driving while Black?" You can't just suddenly discover the wonderful nature of due process and talk about all these different issues and how you're against police practices when it's someone who looks like you, because it's patently obvious to everyone that you only care, in this moment, for this particular case.And, I think you're right. If anything, it should be exactly the other way around. We should be much more concerned about the stereotyping of African Americans than Asian Americans, at least in this context, because law enforcement is only relatively, rarely targeted at Asian Americans and only when there is a national security issue or only when this image of foreignness comes into play. It's much more often targeted against African Americans, Hispanics, and other people of color. But the way to make people understand, the way to make them sympathetic, is not to attack them. I try not to do that. I try to say "Look, now that you're outraged about Wen Ho Lee, now that there's been a good result there, how about you come out to this rally next week about "driving while Black'? Because if you help other groups when the issue has their face on it, they will then help you. But if you're not going to help them, they're not going to help you and you're never going to be able to show that this is about anything other than raw self-interest."

In order to prevail, I think especially for racial minorities to prevail, the only way is through principle, not self interest. You can't just stand up and say "I care about Wen Ho Lee because of these lofty ideals" if you don't stand for those lofty ideals elsewhere. Because then people realize the real reason you care about Wen Ho Lee is because he is Asian like you and that's the worst message to send. That just confirms this view of racial minorities: sticking up for their own and only their own.

[*153] QUESTION: You mentioned that rational racial profiling and the idea of colorblindness are mutually exclusive. This sounds a lot like affirmative action opponents who are frustrated by a race conscious remedy being used to compensate for past racial discrimination. In the affirmative action context, how do you square this conflict between colorblindness and the need for race conscious pragmatism?

FRANK WU: Right. That is a very good point and that's a very difficult argument to make. Let me attempt to make the argument three different ways.

First, there's a difference between the original wrongdoing and the remedy to

the wrongdoing. That is to say, that affirmative action is not the equivalent of chattel slavery. It is not the equivalent of Jim Crow. But, if you believe people who make the argument you're trying to respond to, they would wipe out all distinctions. In fact, that's what the court did in Adarand. <=29> n28 It said that there is no such thing as invidious racial classifications or benign classifications. There are only racial classifications. So if you take that reasoning at face value, if you accept that as saying exactly what its authors say it says and what you intend it to say, then what you're really saying is slavery and affirmative action are the same. You can't distinguish between them.

I think that while that sounds appealing in the abstract, it's just empirically wrong and morally reprehensible - that of course you can distinguish. I don't mean to put words into people's mouths. Take a look at the white papers written by the Regan era Justice Department where they make explicitly this argument. <=30> n29 They argue you can't distinguish between affirmative action and apartheid, and they argue you can't distinguish between affirmative action in Nazi Germany laws that classify people on the basis of whether they are Jewish or not, and you can't distinguish between affirmative action and Jim Crow. <=31> n30 So, my first response is: of course you can. In the abstract you can't if all you ask is the question "Is race involved?" Then I concede to you. You are right. Race is involved in the one case. Race is involved in the other case, but that's abstracting it to such a level that of course it's impossible to distinguish. That's like saying that the master and the slave are in the same position because each is in a relationship where race is involved. So, in the abstract, logically, yes, it is indistinguishable but historically and factually, I think, you can distinguish between a wrong and a remedy. So that's the first argument.

The second argument is that there is a difference, it seems to me, between inferring a person's conduct over which they have some control, [*154] and as to which we should treat everyone as individuals, and a person's status which they occupy as a result, not of their own free will, but just as a result of societal features. I'll explain what I mean. In the Wen Ho Lee case, the inference the government is making is one about conduct. They're inferring that because he is of Chinese descent, therefore he's more likely to betray the United States to China. It is not an inference about what is his status. It's an inference about what his conduct is likely to be. What will he do if offered the opportunity to sell secrets to China?

With affirmative action, it is not an inference about the conduct of Whites or African Americans or anyone else, it is rather an inference about the relative status of these groups and that, if you care about Kantian or these loftier notions of when it's proper to impose consequences on people. The answer is in a Kantian view. You can pose consequences when people out of their own free will have made choices. Otherwise, you can't attach moral consequences to things that people don't have control over. So, I think that distinguishes, if you want to talk in the most abstract philosophical way about these things, distinguishes between affirmative action on the one hand and invidious racial profiling on the other hand.

The third argument is this - and let me be absolutely clear about this - I support affirmative action. I testified in the Law School case on behalf of the student interveners on the defense side for the school. <=32> n31 I have written in favor of affirmative action, testified in favor of it, and done all

sorts of things in favor of affirmative action. <=33> n32

I get called sometimes to debate affirmative action on television or go to a college campus to debate it. Whenever that call comes, I try to say no. I try to say no as a supporter of affirmative action. I would like to explain why I try to say no. I try to say no because to have a debate suggests that this is all figuratively black and white. That there is a pro and a con and that there are sound bites and slogans and it's an entertainment. You know you go and you watch and you see how clever and witty the one speaker is compared to the other speaker and you have a winner and a loser. And that seems to me entirely misguided. What we need is not a debate. We need dialogue and then, more importantly than that, we need action. This isn't the sort of thing that you just sit in a classroom and talk about. It's something where you roll up your sleeves and get out there and do something.

But more importantly than that, to debate affirmative action is to make a tremendous strategic mistake. The mistake is this: it is to start with the remedy. If you start with the remedy of course everyone can play on flaws to the remedy and then you're left talking about well, "Should we [*155] abolish this program? Should we amend that program?" The right place to start is with racial discrimination and to have a dialogue about racial discrimination. And then to take action about racial discrimination and to ask not "Should we abolish this program or that program?" but to ask instead "What will we do collectively and individually to address, not just statistical discrimination, not just historic discrimination, not just stuff you read about in books but contemporary day to day racial discrimination that we still see in the gross disparities in life expectancy or infant mortality or employment opportunities or educational outcomes?" How should we address disparities in every aspect of life that we still see in hate crimes such as those committed in L.A., Chicago, and Pittsburgh in the past two years in which gunmen have targeted people who are racial and ethnic minorities; shot at, wounded, and killed many of them for no reason other than the color of their skin? <=34> n33

The way to frame this, the way to talk about this, is to change the question, to have a new paradigm where we ask "What will we do?" And when we ask that, then it becomes apparent that affirmative action is just a means to an ends and affirmative action, I think that all supporters would agree, isn't perfect. It is not the best way to solve these problems. Ideally, there would be some other way to solve these problems. But it may be as the Bowen and Bok study showed of affirmative action with respect to colleges. <=35> n34 It may be the only way. If you don't take race into account, you just can't address racial problems. So that's what's different.

With affirmative action if you say, "Let's not take race into account" that's all affirmative action is: taking race into account in high stakes choices and decision making about who gets into this law school, for example. Then what you're doing is eliminating the very fact the problem is based on but not the problem itself. To do that would be like saying the way to cure cancer is we're just going to become cancer-blind. You know, that would be the equivalent of being color-blind; we're just going to deny that there is cancer and that will take care of the problem. Well, that, I think, is simply absurd and most people would agree. So there is a pragmatic argument.

So, I've given you a very concrete, factual one, an abstract theoretical one and now a pragmatic one that combines both of these which is, maybe, you're

right. Maybe it is hard to distinguish, maybe it's almost impossible to distinguish between these cases, but if you don't allow the use of race for affirmative action, you simply end up with, for example, with University of California, Boalt Hall Law School, where you have one [*156] African American in the entire entering class and that's someone who deferred from the year before. <=36> n35

QUESTION: In situations like the information leak here, can't the government always use national security as a compelling justification for racial profiling? With this is in mind, what has the Wen Ho Lee case really changed?

FRANK WU: Right, right. National security is the great magical wand that the federal government gets to wave. When it says "national security" the courts cower in fear and say "Oh well, if it's national security you get to do anything." You know, look at Chief Justice William Rehnquist's book All the Laws But One, <=37> n36 a book published just two years ago, where he argues basically that the internment of Japanese Americans was - he doesn't say it's right but he says that that's just the way that it would have to have been done, and that he doubts that it would be done any differently today. So, I think to some extent you're right, that maybe the government would do these things anyway. You know there's an irony of course to the Wen Ho Lee case, and that is if there was a Chinese spy no one has caught him. You know, they pursued the wrong man, they wasted all these resources, so they didn't even advance the interests of national security. If you look at what the government's case was - by the time it was filed and it had indicted Wen Ho Lee, its case had nothing to do with nuclear warheads with weapons, with design systems. <=38> n37 It only had to do with mishandling data, and government witnesses testified that their case had nothing to do, no connection whatsoever, with the original investigation that was undertaken. It's sort of like Whitewater. You know, transforming into something else completely. So Wen Ho Lee was pursued for something unrelated to what he was initially investigated for.

So, as far as national security goes, I'm in favor of national security just like everyone else. I'm a loyal American. I don't want to see the country overrun or China bombing the U.S. or Washington, D.C., but the problem here is national security is just invoked and no relationship is shown between national security - this wonderful goal that we all agree with - and prosecuting and pursuing this particular person on the other hand.

Let me just make a quick point about words and then I'll answer your question. There is something very interesting in the designation of Wen Ho Lee as the Chinese spy. You know that's an ambiguous phrase that was used in headlines all the time because Chinese spy doesn't make it clear: Is it someone who is spying for China or is it someone who is ethnically [*157] Chinese? <=39> n38 You know you could be a Chinese spy that is working for the Chinese government and not be of Chinese background at all. In fact, the recent revelations about the worst spy scandal in U.S. history that we've been reading about for the past couple of weeks involved someone, who, it's not clear what he was motivated by, but he wasn't motivated by ethnic ties. <=40> n39 You know it's not as if it was just ethnicity that drove him to spy and perhaps as that case unfolds we'll learn more about it.

Now to answer your question "What will this case do?" I think this case has done two things. First, it has at least galvanized Asian Americans. It has at

least made Asian Americans aware of these issues and second, it's made people realize they can win one sometimes. You know it's really remarkable. A year ago everyone figured Wen Ho Lee was this evil, terrible person, you know, who deserved, if not death, at least life in prison, and the only people speaking up on his behalf were cranks, lunatics - people like me. Or people who were thought of as, "Well of course their speaking up for him, they're also Asian like him." And what happened? The government case completely collapsed. A sitting federal judge admonished the Justice Department and said that the case shamed the nation. That rarely happens. So Wen Ho Lee's lawyers did a tremendous job and it shows that if you're persistent, if the facts are on your side, if you can prove a case the way that they were able to prove it, that you can win. And this is not just speculation, it's not just people sitting around and saying it looks like racial profiling. They got the director of counterintelligence who investigated Wen Ho Lee to come forward and say this was racial profiling. You know when that happens justice will be done.

So I think that we can be at least somewhat optimistic. It's a huge mistake for the case to have been brought but at least it resolved itself with an outcome that was right.

So with that I guess we're done and I'm happy to stay and chitchat.

APPLAUSE

FOOTNOTES:

n1. See, e.g., James Risen, Inquires Why Suspect At Atom Lab Kept Access, N.Y. Times, Apr. 23, 1999, at A7.

n2. See Matthew Purdy, The Making of a Suspect: The Case of Wen Ho Lee, N.Y. Times, Feb. 4, 2001, at A1; Matthew Purdy and James Sterngold, The Prosecution Unravels: The Case of Wen Ho Lee, Feb. 5, 2001, N.Y. Times, at A1.

n3. Id.

n4. Id.

n5. See, e.g., James Sterngold, U.S. to Reduce Case Against Scientist to a Single Charge, N.Y. Times, Sept. 11, 2000, at A1.

n6. See Robert Scheer, No Defense: How the New York Times Convicted Wen Ho Lee, Nation, Oct. 23, 2000, at 11, 12.

n7. See id.

n8. See id.; Purdy, supra note 2.

n9. Scheer, supra note 6, at 12.

n10. See, e.g., James Risen, Officials Disagree on How Lab Scientist Became Spy Suspect, N.Y. Times, Oct. 4, 2000, at A1, 24; Scheer, supra note 6, at 18.

n11. See Purdy, supra note 2.

n12. See id; Vernon Leob & Walter Pincus, Guilty Plea, Release Leave Unresolved Questions in Lee Case, Wash. Post, Sept. 17, 2000, at A12.

n13. See David A. Vise, Justice Study Faults FBI in Spy Case; Wen Ho Lee Probe too Slow and Sloppy, Report Says, Wash. Post, May 19, 2000, at A1.

n14. See, e.g., Deutch Faces New Security Inquiry, Documents Show, L.A. Times, Sept. 16, 2000, at A1.

n15. See id.; Deutch Seeks Plea Deal in Security Case, L.A. Times, Jan. 19, 2001, at A12; Secrets Weren't Compromised in Deutch Case, Pentagon Finds, L.A. Times, Feb. 2, 2001, at A20.

n16. See *18 U.S.C. 2381* (2001). The statute reads:

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $ 10,000; and shall be incapable of holding any office in the United States.

talk about the possibilities for Asian Americans and other racial minorities to engage in principled activism to overcome these unfortunate trends.
[*136]

I. The Wen Ho Lee Case

Let me begin though by summarizing a little bit of this case. You may recall that for more than a year there were spectacular allegations that Wen Ho Lee, a 60-year-old physicist, who had been forced to retire from the Los Alamos National Labs, where research and development work is conducted on our nuclear arsenal, was the so-called "Chinese spy." <=2> n1 This individual, working in the top secret Division X of the Los Alamos Labs, supposedly had downloaded hundreds of pages of top secret data, weapons design information and surreptitiously and illegally passed it on to the communist Chinese government. <=3> n2 For more than a year he sat in solitary confinement, allowed very few visitors, shackled at the hands and feet with a light bulb burning overhead at all hours, and under constant surveillance. He was said to have given away the "crown jewels" of our nuclear arsenal. <=4> n3

This was supposed to have been the worst breach of national security since the Rosenberg case some fifty years ago. <=5> n4 Yet, as quickly as the case against Wen Ho Lee had developed, it then evaporated. The federal government eventually agreed to a plea bargain where Wen Ho Lee was found to be guilty of one count that had nothing to do with espionage but that had to do merely with negligently mishandling data. He was sentenced to time already served. <=6> n5

Now this case was spectacular, not only because of its collapse, but also because of the reasons for its collapse. When the U.S. District Court Judge Parker, a Republican appointee, not a radical on matters of race, approved of the plea bargain, he said from the bench that this case, he thought, shamed the nation; <=7> n6 that the government's prosecutorial conduct here represented overreaching; <=8> n7 that it was overly zealous <=9> n8 and he raised questions about whether or not Wen Ho Lee had been the victim of selective prosecution and double standards. <=10> n9

[*137] Now if you look a little deeper at the case, if you look beyond the surface allegations, you find the sort of smoking gun evidence that you always wish for in trying to prove discrimination cases like this but which is hard to find. For example, Robert Vrooman, a former CIA agent who was the head of counter-intelligence at the Los Alamos Labs, said in public statements and in a sworn affidavit that there was no doubt in his mind that Wen Ho Lee was selected for investigation, in part because of his racial and ethnic background. <=11> n10 This statement, a brave statement to be made by a law enforcement official, is the equivalent of a sheriff or the head of some police department coming forward and admitting to racial profiling and stopping African American motorists on the highway. This was a statement that came from one of the people in charge of the investigation itself, who said that his colleagues, in pursuing this individual, targeted the individual, despite hundreds if not thousands of other leads that were not followed up despite numerous studies that showed that the Department of Energy in its labs had faulty security procedures. <=12> n11 Despite the fact that Wen Ho Lee's own wife worked as an FBI informant, they picked this single person to investigate because they feared that nuclear warhead plans had been lost to China; a claim which some have found not to be credible. <=13> n12

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Id.

n17. See Purdy, supra note 2; Scheer, supra note 6, at 20.

n18. See Gary S. Becker, The Economics of Discrimination (1971).

n19. See Richard A. Posner, Economic Analysis of Law 615-26 (1986).

n20. See Richard A. Epstein, Forbidden Grounds, 59-78 (1992).

n21. See Clint Bolick, The Affirmative Action Fraud: Can We Restore the American Civil Rights Vision? (1996).

n22. See Dinesh D'Souza, The End of Racism: Principles for a Multicultural Society 245-87, 297, 539 (1995).

n23. Talk Back Live: Wen Ho Lee: Did the Government Mishandle the Case? (CNN television broadcast, Sept. 27, 2000), transcript available at http://www.cnn.com/ TRANSCRIPTS/0009/27/tl.00.html; see also Stuart A. Harrington, Is Wen Ho Lee a Tarnished Martyr?, San Diego Union-Tribune, Oct. 6, 2000, at B7.

n24. See Lisa Lollock, The Foreign Born Population in the United States: March 2000, U.S. Census Bureau Current Population Rep. No. P20-534 (2000); U.S. Census Bureau, Profile of General Demographic Characteristics for the United States: 2000, Table DP-1 (2000).

n25. See Randall Kennedy, Race, Crime, and the Law (1997); Randall Kennedy, Racial Profiling Usually Isn't Racist. It Can Help Stop Crime. And it Should Be Abolished, New Republic, Sept. 13, 1999, at 30.

n26. See James Sterngold, Coalition Fears an Asian Bias in Nuclear Case, N.Y. Times, Dec. 13, 1999, at A1.

n27. See Sterngold, supra note 5.

n28. See *Adarand Contractors, Inc. v. Pena, 515 U.S. 200 (1995)*.

n29. See Office of Legal Policy, U.S. Dep't of Justice, Rep. to the Attorney General, Redefining Discrimination: Disparate Impact and the Institutionalization of Affirmative Action 16 (1987).

n30. Id.

n31. See *Grutter v. Bollinger, 137 F. Supp.2d 821 (E.D. Mich. 2001)*.

n32. See Gabriel Chin et al., Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action, *4 UCLA Asian Pac. Am. L.J. 129, 159 (1996)*.

n33. See, e.g., Lorraine Forte, Suit Alleges Hale Ordered Shootings, Chi. Sun-Times, Mar. 15, 2000, at 26; Cindi Lash & Gene Collier, Returning to the Scenes of the Crimes, Pittsburgh Post-Gazette, Apr. 30, 2000, at A19; Jeff Jacoby, Laws Send the Wrong Message, Boston Globe, June 22, 2000, at A25.

n34. See William G. Bowen & Derek Bok, The Shape of the River (1998).

n35. See Jerome Karabel, Commentary, Affirmative Action Had Real Merit; Education: Minority Students Accepted Under the Programs Did As Well As Their Regularly Admitted Counterparts, L.A. Times, July 10, 2000, at B7.

n36. William H. Rehnquist, All the Laws But One (1998).

n37. See, e.g., Purdy, supra note 2.

n38. See Marilyn Rauber, Feds Finally Slap Cuffs on China Nuke-Spy Suspect, N.Y. Post, Dec. 11, 1999, at 3; John Solomon, FBI Shifted China Spy Probe in "98, Pittsburgh Post-Gazette, Dec. 12, 1999, at A24; Chinese Spy Investigation Shifts to Defense, Associated Press State & Local. Wire, Oct. 19, 2000.

n39. See Philip Shenon, From Dour "Mortician' of F.B.I. To Suspected Russian Superspy, N.Y. Times, Feb. 21, 2001, at A1.

Independent studies, including one by a congressionally appointed oversight committee, chaired by former Senator Warren Rudman, concluded that the evidence was speculative at best and that there had not even been any breach of our nuclear weapons data and loss of that data. <=14> n13 Nonetheless, Vrooman's stepping forward to say that the target of investigation was targeted because of race is an extraordinary statement, for here you have an admission of selective prosecution by someone working for the prosecution team.

Not only that, there is a clear case of double standards in this case, which is so difficult to prove in most cases. At roughly the same time that Wen Ho Lee was incarcerated, was being deprived of his civil rights, the former Director of the CIA, John Deutch, admitted that he had committed similar transgressions - downloading highly sensitive data onto a laptop computer that was not secured, taking that computer home with him and accessing the World Wide Web and going to various websites, and signing on and downloading data and rendering the data on his laptop - jeopardizing the most highly, confidential, classified information [*138] that the government has, vulnerable to a breach of security. <=15> n14 The same problem with mishandling top-secret data is present as in the allegations against Wen Ho Lee. The difference: Deutch, who also was foreign-born, was not prosecuted. Instead, a cover-up was engaged in by some of his cronies at the CIA - something which was then later revealed, and at the very moment when he otherwise would have pled guilty also to a single count he was pardoned by President Clinton in the final round of pardons before Clinton left the White House. <=16> n15

What's interesting, then, about this case is that while a low level researcher who is a racial minority, who is the only person of Asian descent working in his division at Los Alamos Labs, faces the possibility not just of life imprisonment but of the death penalty, <=17> n16 a White male who is at the top of the establishment, who has committed the same breach, is let off with a slap on his wrist.

We also found out, through the testimony of various people involved with the prosecution of this case as the judge looked into these claims, that there had been this targeting on the basis of race, that the FBI in administering polygraph tests had lied not just to Wen Ho Lee but to the American public. They had said that this individual failed polygraph tests when in fact he had passed them. They had reminded him of the fate of the Rosenbergs, who were sent to their deaths, and tried to coerce out of him a confession, despite his efforts to help them before he realized that he was the target of their scrutiny. <=18> n17 So this was truly an unusual case and it offers a rare glimpse into the activities of law enforcement when it is investigating sensitive matters with racial overtones.

II. Racial Profiling

Let me now turn to the second part of my talk: racial profiling. I approach this topic as someone who believes quite strongly and fervently that Wen Ho Lee was done a wrong, a grievous wrong, by his own government, [*139] and that his lawyers worked a miracle in persuading the prosecution to accept the plea bargain and then the judge, that this wrong had been done. Let me say, though, this: That the responses in explaining what was wrong in the government's conduct have been seriously flawed. So while I agree that the government's

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conduct was wrong, I'd like to suggest that most of the discussion of this issue has entirely missed the point. That is, those individuals who have tried to criticize the government or defend Wen Ho Lee have misunderstood the nature of the problem.

The nature of the problem is this: Racial profiling - that is the use of race by the government in its law enforcement - can be rational but wrong. It's important to understand that distinction between whether an act is rational and whether it is wrong. How an action can be both rational yet at the same time wrong, illegal or unconstitutional.

In talking about racial profiling let me make three subpoints. The first subpoint is this: We all do it. The second subpoint is in some instances racial profiling is rational or at least plausible; it passes a common sense test. The third subpoint is rationality is no defense.

A. We All Do It

Let me first talk about all of us engaging in racial profiling. Let me give you some simple examples of the ways in which we engage in racial profiling. We do this, if, for example, we're at the airport and we need to find someone who speaks a foreign language. I'm often traveling and I'm often at airports where there are a large number of Asians. Not Asian Americans but Asian Asians, people not whose ancestors but who themselves are from Asia. Tourists, business people, traveling here in the United States with limited English proficiency and quite often, as is true with tourists or business people from anywhere else, they're lost. They need help. They need to know how to use the telephone or where the bathroom is or how to find their rental car or their friends. Not everyday and not every time I fly, but often enough - two, three, five times a year - some Asian stranger will pick me out of the crowd as I'm walking through an airport and come up to me and start talking to me in Chinese or Japanese or Korean or some other Asian language. They will pick me, in particular, ignoring all the other individuals who walk by who are White or African American.

This is a simple form of racial profiling. They believe that it is much more likely that I, as someone who looks Asian, will have some sort of linguistic understanding; will be able to speak the language or at least muddle through; that I am a better bet for them than someone who is Caucasian or African American, despite the fact that my Mandarin Chinese is that of about a five year old and there are plenty of people who are White or who are African American who can speak Asian languages fluently. Nonetheless, if you had to pick, if you looked at the people [*140] sitting in this audience and asked "Who is most likely to be able to speak Chinese or Japanese or Korean?"; if you had only one person you could pick to help you out, you would have to be willful or obstinate not to pick someone with an Asian face. I make this point because I think it's important to understand the ways in which it's easy to make inferences; the ways in which we rely on race. We rely on generalizations all the time and not all of those are invidious. They can be, but not all of them are.

The point is simply this: That now, in addition to the old fashioned form of racial discrimination, a form of bias which simply seeks to subjugate people, there is another form of so-called rational discrimination and there are people who actually argue in favor of this. You can read the work of Nobel laureate Gary Becker; <=19> n18 you can read Richard Posner's work; <=20> n19 you can

look at the work of Richard Epstein in Forbidden Grounds <=21> n20 or that of Clint Bolick, <=22> n21 an advocate against affirmative action, or that of Dinesh DeSouza, <=23> n22 all of who argue that irrational discrimination is wrong and should be avoided because it's inefficient. That is, when people make assumptions that turn out to be wrong for the most part, that's bad. But when people make assumptions that turn out to be right, for the most part, or right more often than not, then it's acceptable. Indeed, it's something we should praise and encourage and avoiding it would be inefficient behavior. We would cease to be rational actors.

This process of making assumptions based on race is the dilemma of the cabbie, who driving through a major city late at night looks at the fare standing at the street corner in the rain and sees that it's an African American male between eighteen and forty-five and passes that person up to pick up the White passenger a block further down the street. It's that sort of behavior which these writers not only condone, but encourage. Because this sort of behavior, they believe, is not intended to subjugate a people. Rather, it is using one trait, that of race, as a proxy for another trait, that of likely status as a felon or a criminal or likely conduct that is a propensity to engage in violent behavior. So they argue this is different than discriminating against a group without a "rational" reason.

B. Rationality of Racial Profiling

Now, in explaining why racial profiling is still wrong, I think it's important for us to understand that sometimes the pro-profiling arguments [*141] at least have a certain surface rationality. That takes me to my second subpoint: The rationality of racial discrimination in some instances. It is not easy to dismiss some of these arguments. For example, though I think that the internment of Japanese Americans during World War II was a tremendous wrong in violation of the Equal Protection Clause, I think it's also difficult to deny that at least it is plausible that Japanese Americans in the time of war might have some slightly greater propensity to be loyal to Japan than the United States, at least as compared to citizens of other racial backgrounds. Now don't misunderstand me here. I am strongly against the internment, against the prosecution of Wen Ho Lee, and against racial profiling of African American motorists as could possibly be - as I hope to explain and as I hope you'll see in a moment. But I'm against it not on the grounds of irrationality and I think that to argue this sort of conduct is irrational and utterly absurd and lacks any factual foundation is to make the wrong argument, because then what happens when you make that argument is you implicitly concede that when there is a rational basis the conduct is justified. You are then vulnerable whenever someone at least has a factual foundation, a plausible basis for a credible argument. They will have trapped you. You failed to have a fallback argument if all you say is this conduct is irrational. Because then you are attacking the very rationality of what someone has to say and engaged in what I would regard as an unwinnable argument about what the facts are rather than a legal argument or a moral argument or an argument over what the principles should be. That takes me to my third subpoint: What is wrong with the prosecution of Wen Ho Lee? What is wrong with racial profiling?

C. What Is Wrong With Racial Profiling?

I would like to give you six arguments as to what is wrong with racial

profiling.

1. Attack the Premises

First, there is the easy argument, which is the premises don't obtain - the premises aren't true. In other words, you could accept that where behavior is rational, you should engage in that behavior. But then argue these premises aren't true. It isn't factually true that Japanese Americans are more likely to be loyal to Japan than the United States. Or it isn't true that there is a greater likelihood of that among Japanese Americans than among Whites. Or you could argue there is no reason to suspect that Wen Ho Lee would be more disloyal to the United States as a naturalized citizen from Taiwan than someone similarly situated who is White and native born.

[*142] You could contest the premises and that is an important argument to have. You should have that argument. But sometimes that argument is vulnerable. The Wen Ho Lee prosecution is vulnerable because there is at least some evidence that the government of China targeted, in its recruitment of potential spies and potential informants and sources of information, people of Chinese ancestry. So that allows the government to say "Well we're merely being defensive. We don't want to stereotype. We don't want to be racially biased. We don't want to be prejudiced, but after all, if the Chinese government is doing this we're only playing defense. We're only responding to what someone else is doing." This is the argument that was made by a former army intelligence officer who I debated on CNN, for example. He argued that if the Chinese government does this it makes perfect sense for the U.S. government to respond in turn. <=24> n23 So sometimes you can't contest the premise as strongly or as strenuously as you would like because there is a factual problem for you there.

Nonetheless, there are five other reasons that I think are quite compelling for rejecting racial profiling even when it is rational. So understand that this is a more robust argument. It allows you to make a strategic concession. You can say "I admit that there is at least a plausible basis for you to suspect this person rather than that person." For example, you find sometimes the same argument is made with reference to African Americans and the overall statistics of people who are incarcerated. People look at the incarceration rates and argue that African American men are incarcerated at much higher rates than White men. Of course they disregard the causes, disregard possible prejudice within the criminal justice system. They say, nonetheless, "We at least know that there are higher rates of incarceration."

You see this same problem, for example, with respect to alienage. Asian Americans are often offended by the assumption that we're foreigners. It creates this notion of being a perpetual foreigner. When people ask "Where are you from?" they don't accept your answer ... . Sometimes when I say I was born in Cleveland and grew up near Ann Arbor, used to live in San Francisco and now live in Washington, D.C., people shake their heads and say "No, I mean where are you "really' from?" That addition of the word really, a question that they ask only of people who look to them foreign, is selective, but in some ways has a rational basis. For after all, two-thirds of all Asians in the United States are foreign born. <=25> n24 So [*143] it is not just that there are higher rates of foreign birth among the Asian Americans than among White Americans. An absolute majority of people who are Asian American are in fact foreign born.

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So, what then makes that question still offensive? What makes it offensive to say to me "How do you like it in our country?" or "When are you going home?" or "My, you speak English so well." What is it about those statements that despite their rationality troubles us? Let me suggest that there are a variety of things that properly do trouble us.

2. Racial Profiling is Not Objective

The second reason that racial profiling is wrong is that you have to accept on good faith that the person who is engaged in what they claim to be rational discrimination, in fact, is objective. You must assume that the person engaged in racial profiling has done an analysis and is using statistics or is using some real evidence rather than just acting out of prejudice. Unfortunately, all too often, you find out that their analysis of the facts turns out to coincide neatly with their prejudice. In other words, they went in with one view and came out with that same view. So sometimes though their sincerity may not be doubted, nonetheless, the good faith of their conclusions may be suspect.

3. Racial Profiling Frustrates the Value of Being Color-Blind

Third, racial profiling is emphatically not color-blind and does not treat us as individuals. Note that you cannot be at the same time a rational discriminator and a proponent of color-blindness. It is impossible. You must choose. So for those individuals who claim that they would like to follow the words of the late Reverend Martin Luther King, Jr. when he said that he had a dream that we not be judged by the color of our skin but by the content of our character, those individuals who profess their faith in those inspirational words cannot then turn around and say "But I make an exception and engage in rational discrimination when it suits me."

So, rational discrimination and color-blindness as an ideal are contradictory. For what rational discrimination does is it lumps us together and says we will treat individuals as members of groups and use aggregate statistics and deduce based on generalizations what is true about this person or that person. Not because we know anything about this person or that person, but rather because we know about their membership within a racial group.

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4. Racial Profiling is Often Based on Bad Information

Fourth, rational discrimination is wrong because it's often based on just bad estimates. All of us are bad with statistics. Social scientists who study this will tell you that people can't distinguish between the proposition most X are Y and most Y are X. So that when you tell them one, they easily confuse it with the other. They can't distinguish between the notion that one group has a greater propensity for a particular action than another group and the notion that an absolute majority of the former group has propensity to that action. We're just simply bad at making statistical inferences on a day to day basis. We tend to overestimate some risks and grossly underestimate other risks.

5. The Vicious Cycle of Racial Profiling

Fifth, rational discrimination or racial profiling creates a vicious cycle. It

is a self fulfilling prophecy. It proves itself to be true. Let me give you a simple demonstration using the numbers I have on this chalkboard.

[SEE TABLE IN ORIGINAL]

This is a demonstration, which if you know anything about statistics, should appall you and it is meant to appall you. It is meant to show a gross simplification and abuse of statistical analysis, but one that accords with our common sense. What I propose to do is demonstrate how if you, in good faith, as someone who is avowedly not a racist, decide to engage in rational discrimination for the purposes of controlling crime, how you will end up with a law enforcement policy which is hardly colorblind [*145] and certainly will have effects which cause the subjugation of a racial minority group.

Let us envision a regime in which we have a town and in this town there are ten thousand residents. Of these ten thousand residents a thousand are Black. Now, I'm just using arbitrary numbers. I'm using nice, neat numbers so you can see how this works. But this isn't too far off the mark. So I'm envisioning a town where 10% of the population is African American and we'll imagine that the rest, the remaining nine thousand, are White, although it really doesn't matter for our purposes whether they're White or whether it's more racially mixed. Just that nine thousand are non-Black.

Let's say you're the police chief in this town and let's say that you decide based on analysis, based on facts and figures, based on having looked at the Federal Bureau of Prisons statistics about who is incarcerated - not based on prejudice at all. Let's say you decide that you want to target your law enforcement in a manner that is appropriate to the problem and you say "Well, where is the problem?" And let's say by looking at the numbers you see that there are, in fact, more African American men who are incarcerated as a proportion of the prison population than there are as a proportion of the general population. The likelihood that an African American man has a criminal record is much higher than the likelihood of a similar White man, all other factors being equal. So let's say our hypothetical is based on these statistics, and these numbers that I'm giving you are true. I don't have the exact figures. But each of the statements that I have given you as a premise is actually true.

So let's say you decide to allocate your resources based on these numbers and let's say each percentage of your resource that you allocate results in the arrest of one person. Okay, now these are the sorts of assumptions that people make in this sort of statistical analysis all the time. So I'm not doing anything fancy and I'm not doing anything that would deviate from the way you would do this if you were a proponent of these methods.

All right, so you have 100% of your resources to allocate. Let's say that you decide to allocate 25% of your resources toward African Americans. That is, that you're going to allocate that many more patrol cars and officers on the beat to African American neighborhoods, to checking out African American bars, or places where you know larger numbers of African Americans congregate, etc. Twenty-five percent of your effort is going to be targeted at African Americans, 75% targeted at Whites. You're still going to target the majority at Whites, but you're going to overemphasize slightly African Americans.

What will happen at the end of the first year? What will happen at the end of

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the first year, if each percentage of this effort correlates to one arrest, is you will have arrested seventy-five Whites and twenty-five African Americans. Now what that means is the twenty-five African [*146] Americans out of the one thousand African Americans in the population constitute 2.5%; 97.5% of African Americans will still be good, decent, law abiding people. No arrest record whatsoever. Ninety-seven point five. That's the overwhelming majority.

Nonetheless, because African Americans are a minority in this community, because they're so significantly outnumbered and make up only 10% of the population, what will happen if you have 25% of your pool of people who have been arrested out of those one hundred people who were arrested, twenty-five are African American. Let's say this town was just founded and no one else has any arrest record previously, etc. Two point five times more of your pool of people with arrest records will be African American than of the general population. Two and a half times. Not only that, your typical African American, just your average African American, your random African American. If you just pick someone who is African American based just on their race, they are three times more likely to have an arrest record than someone who is White, who is randomly picked. Three times more likely, and that's if you just allocated 25% of your law enforcement efforts toward African Americans, and you can do all the numbers to double check my figures if you want.

So now let's say in year two. You look at these numbers that you get at the end of year one and you say "Wow, there really is more of a problem than I thought there was." Because look at this: African Americans are three times as likely as Whites to have criminal records. Three times as likely. You might then say, "Well, I'm going to adjust my law enforcement strategy accordingly. I'm going to focus three quarters of my law enforcement resources toward African Americans and one quarter toward Whites." Why? Because, after all, African Americans are three times more likely than Whites to have criminal records. Now again, this is an utter and total abuse of these numbers, but I will leave it to you as clever law students to figure out exactly why because this is doing what rational discrimination asks us to do. That is, to look at the numbers. You'll see exactly how pernicious the results turn out to be.

In year two, at the end of year two, you will have arrested a total of one hundred African Americans and one hundred Whites. You will have arrested those totals because you'll arrest another twenty-five Whites added to the original seventy-five year one arrests. Seventy-five African Americans added to your original twenty-five African Americans for one hundred from each group. (We'll ignore people who get picked up more than once, which is also the sort of thing that you can do for ease of use with an abstract model like this.)

What then happens is 90% of African Americans in this fictional town are still law abiding people. Still the overwhelming majority, 90%, okay, because one hundred have been arrested out of a thousand. Nine hundred have not been. Yet, despite that, African Americans are now overrepresented within this pool at five times their rate in the general [*147] population. The general population of African Americans is 10%. In this pool they are 50%; overrepresentation is by five fold. That's significant overrepresentation. Not only that, it is nine times more likely that any random African American who you pick up has a criminal record than it is of Whites. Nine times more likely. Almost an order of magnitude more likely.

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ARTICLE: LAW ENFORCEMENT BY STEREOTYPES AND SERENDIPITY: RACIAL PROFILING AND STOPS AND SEARCHES WITHOUT CAUSE

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SUMMARY:
... The "driving while black" phenomenon has been the subject of much scholarly and popular analysis, but for the most part these accounts of racial profiling have focused on highway stops and searches and have not addressed the role that race plays in pedestrian stop and frisk practices. ... The powerful combination of governmental investigations, judicial findings, anecdotal evidence, and statements by law enforcement officials leave little doubt about the existence of racial profiling and other stops without cause. ... In June, 1999, President Clinton condemned this practice as "morally indefensible" and requested record-keeping and studies to determine the extent of racial profiling in law enforcement. ... Racial Profiling: The Law Enforcement Justifications ... Since 1994, the DOJ has taken legal action against five law enforcement agencies: it has reached consent decrees with the City of Pittsburgh, Pennsylvania, the City of Steubenville, Ohio, and the State of New Jersey (with respect to the racial profiling on the New Jersey Turnpike). ...

TEXT:
[*296]

I. Introduction

On a summer evening in 1991, four young African-Americans were driving on I-95, returning to Delaware from a church service in Philadelphia. <=2> n1 Although the driver had committed no traffic violations, the car was stopped just south of the Philadelphia International Airport by police officers from Tinicum

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Empirical evidence gained from the review of car stops and searches supports this view. On the New Jersey Turnpike, seizures of contraband made incident to traffic stops were made at a rate of 10.5% from white drivers and 13.5% from black drivers. <=91> n90 In Maryland, searches on I-95 resulted in "find rates" that were roughly equal by race. <=92> n91 In both states, the large majority of seizures were of relatively [*312] small amounts of drugs, indicating possession for personal use. <=93> n92 In Illinois, searches of Hispanics yielded a lower percentage of narcotics than of whites. <=94> n93

Defenders of these practices have argued that the data does not disprove the assertion that the police are engaged in rational discrimination and efficient law enforcement practices in focusing on minority motorists. For example, a study of the Maryland I-95 searches concluded that the equal rates in the seizure of drug contraband from all African-American and white motorists who had been stopped and subjected to a search demonstrated that the "equilibrium" between these races was the product of police targeting of minority motorists who previously were transporting drugs at a significantly higher rate than whites. <=95> n94 The study is questionable on both methodological and legal grounds. First, as a statistical matter, the study assumes that the extremely small number of searches (compared to the motoring population and to the number of motorists actually stopped) was sufficient to deter African-American drivers from transporting drugs (there are no data to show the rate of transportation pre-racial profiling). <=96> n95 The study also assumes that the police are accurately reporting searches where nothing is recovered even though there is evidence to suggest the contrary. <=97> n96

Second, as a matter of constitutional law, the study proceeds on the theory that the police intentionally targeted African-American drivers for disproportionate stops and searches <=98> n97 (an assumption contradicted by the state police who have maintained that African-Americans have not been targeted). But even if there was solid evidence that African-Americans violated the drug laws on I-95 more often than whites, the state is prohibited from implementing formal sanctions that differentiate between the races. Thus, it would be unconstitutional for the state to enact criminal laws that provide for harsher prison terms for African-Americans convicted of the same drug offenses as whites, even in the face of an econometric model [*313] that would suggest that this differentiation would ultimately reduce the disproportionate drug violations by African-Americans as a class. <=99> n98 The same must be true for an official policy that targets African-Americans for a highly disproportionate rate of stops and searches based solely on their race and the alleged criminal propensities of very small numbers of African-Americans. <=100> n99

Moreover, given the fact that, on a relative scale, so few persons among the millions of drivers who use these transportation facilities each day are engaged in illegal drug activity - black or white - and so few stops or searches result in seizures of contraband, it is hard to justify the stops of large numbers of innocent blacks to enable the police to make the occasional seizure.

As Ira Glasser has stated:

Even if most of the drug dealers in the Northeast corridor or in any particular neighborhood or city are black or Latino, it does not follow that most blacks and Latinos are drug dealers ... . Think about it for a minute. Most players in the NBA are black. But if you were trying to get a team together, you wouldn't go out in the street and round up random African Americans.

... .

It's a very simple, logical fallacy. The fact that most drug dealers are X does not mean that most X are drug dealers. <=101> n100

[*314] Of course, while playing the numbers may be good strategy at the card tables at Atlantic City, several miles away on the New Jersey Turnpike the consequences of such a numbers game can be corrosive of legal and moral norms. As David A. Harris has stated:

Behind the race-neutral reasons police give lies a stark truth. When officers stop disproportionate members of African-Americans because this is "just good police work," they are using race as a proxy for the criminality or "general criminal propensity" of an entire racial group. Simply put, police are targeting all African-Americans because some are criminals. In essence, this thinking predicts that all blacks, as a group, share a general propensity to commit crimes. Therefore, having black skin becomes enough - perhaps along with a minimal number of other factors, perhaps alone - for law enforcement to stop and detain someone. <=102> n101

No one denies that the crime rates of young urban minorities are higher than those of elderly whites. But to jump from this obvious fact, to the use of race as a general proxy for crime, ignores the equally significant fact that very few minorities commit crimes (and thus an entire class is stigmatized and subjected to harsher treatment for the acts of a few). Further, such a racial proxy fails to consider the enormous damage (even to law enforcement interests) that is done by the resentment and anger that is stirred by this type of policing. Quality of life policing carries with it the strong potential for undermining the legitimacy of police operations, and when race becomes a factor in the exercise of police discretion, the potential is very likely to become manifest.

Finally, racial profiling must be considered in the context of this country's escalating incarceration rates. The statistics regarding race and incarceration rates are stark and deeply troubling. African-American men constitute approximately 7% of the population. <=103> n102 In 1930, they constituted 22% of all prison admissions; today they comprise 51% of admissions, a rate six times that of white men. <=104> n103 Nearly one in three black males aged 20-29 is under some form of criminal justice supervision on any given day. <=105> n104 A black male born in 1991 has a 29% chance of spending some time in prison during his lifetime. <=106> n105 [*315] The figure for whites is 4% and for Hispanics, 16%. <=107> n106

A major contributing factor in the escalating disparities in imprisonment is the War on Drugs. <=108> n107 Although African-Americans use and possess drugs in close approximation to their numbers in the overall population, they account for 37% of those arrested, 55% of those convicted and 74% of those incarcerated for drug offenses. <=109> n108 From 1985 to 1995, there was over a 100% increase in the number of drug offenders in state prison (38,900 to 224,900). <=110> n109 One in four inmates, as opposed to the 1980 rate of one in sixteen is a drug offender. <=111> n110 In the federal system, 59% of inmates are incarcerated on drug charges. <=112> n111 Overall, in 1995, of 1,700,000 inmates in state and federal prisons, 400,000 were held on drug charges. <=113> n112

Differentials in sentencing schemes and police practices contribute to the racial disparities. Mandatory federal sentencing statutes punish crack cocaine offense much more harshly than powder cocaine; 500 grams of powder cocaine will result in a five year mandatory sentence while only 5 grams of crack cocaine will trigger the same sentence. <=114> n113 Between 1989 to 1990, close to 90% of persons charged with crack cocaine offenses were African-American, but fewer than 35% of those was charged with federal powder cocaine offenses were African-Americans. <=115> n114

[*316] Race discrimination has also been documented in the critical decisions made by prosecutors and courts to transfer accused offenders from juvenile to adult court for trial. In a recent study in California, it was determined that minority juveniles were more than twice as likely to be transferred to adult court for case disposition than their white counterparts. <=116> n115 In Los Angeles, in 1996, of the 561 juvenile felony cases transferred to adult court, 5% were white, 6% were Asian, 30% were black and 59% were Hispanic. <=117> n116 The seriousness of the charges and criminal histories did not explain these disparities. <=118> n117 Further, once they entered the adult system, young African-Americans were 18.4, and Hispanics were 7.3 times more likely to be incarcerated than white offenders. <=119> n118 Finally, there is growing evidence of racially disproportionate disenfranchisement of African-Americans under state laws that suspend or forfeit the right to vote for persons convicted of crime. <=120> n119

There can be no doubting the fact that in policing - as in many areas of contemporary American life - race matters, and matters a [*317] lot. <=121> n120 The substantial racial disparities that have been documented in stop, frisk, and search practices cannot be fully explained or rationalized by crime patterns, police deployment, or policing tactics. Further, arguments of efficiency and rational discrimination flounder on empirical, constitutional, and moral principles. Yet, in the face of the growing evidence of arbitrary stops, frisks and searches, the courts have in many instances failed to order relief that is commensurate with the extraordinary deviation from legal norms. To understand this state of affairs, I turn to an examination of the legal standards that govern these police practices.

III. The Legal Framework: Racial Profiling and Stops and Searches Without Cause

Law enforcement's interest in maximizing the number of contacts, stops and searches of cars and pedestrians has prevailed over constitutionally-based claims of racial equality, privacy, and individual integrity. The Supreme Court

has been highly deferential to order-maintenance policing and has imposed substantial limitations on the federal court's powers to remedy constitutional violations. In this Part, I discuss the governing federal substantive standards for car and pedestrian stops and the application of this doctrine to racial profiling and random stop practices. In the next part, I address the remedial issues. <=122> n121

A. Automobile Stops

The constitutional story with respect to Fourth Amendment principles has been told - and told well - by others, <=123> n122 so I will trace only the most significant legal developments as they relate to traffic stops and racial profiling. The Supreme Court has permitted stops of cars based on cause to believe that a crime has been committed, including any traffic violation. <=124> n123 Further, once a car has been permissibly stopped, the driver and passengers can be ordered to stand outside of the vehicle (for the officer's protection), without any objective showing of harm or danger. <=125> n124 At any time during the encounter, and even [*318] after a ticket or warning may have been issued, the police can secure consent to search the persons or the car without any statement that no consent need be given, or that they are free to leave. <=126> n125 Any contraband that is observed in "plain view," including detection by use of a flashlight, can be immediately seized and used as probable cause to arrest. <=127> n126 During the stop, any person who appears to present a danger to the officer (and the car itself), may be frisked for the officer's protection. <=128> n127 If cause is established to arrest any of the occupants, a full-scale search of the car including suitcases and other private containers, and of all other passengers is permissible. <=129> n128

The police may question the driver or occupants of the car without providing Miranda warnings, <=130> n129 even if they are seeking information about drugs. <=131> n130 Of course, this questioning is often a prelude to a request to search ("I understand that you say you do not have drugs; do you mind if we search?"), without any warning to the driver of his right to refuse consent. Further the police may use a trained dog to detect narcotics without any suspicion, cause, or consent. <=132> n131

Since virtually every driver commits violations of the traffic laws on a regular basis, <=133> n132 the police have enormous discretion to effectuate stops of a very high number of cars, thus presenting the critical issue of pretextual stops and searches. For some time the lower federal courts divided on this Fourth Amendment question: in circumstances where a traffic violation has occurred, thereby creating probable cause for a stop, should a court consider the officer's subjective intentions or motivations in effectuating the stop, including possible [*319] racial profiling of the driver? <=134> n133

The Supreme Court decided this issue in Whren v. United States. <=135> n134 There, Washington, D.C. police officers had made a traffic stop and observed two bags of crack cocaine in the hands of a front-seat passenger. <=136> n135 The police testified that the stop was made because the driver had violated several traffic laws, including pausing at a stop sign for an "unusually long time," turning without signaling, and then proceeding at an "unreasonable speed." <=137> n136 The defendants claimed that the stop was pretextual: that the police were suspicious because they observed two black men in a Nissan

Pathfinder in Southeast Washington and, lacking any cause for a stop to investigate drugs, decided to stop on the basis of alleged traffic violations to place them in the position where they could conduct a drug investigation. <=138> n137 In fact, the officers involved, on a vice-detail, were prohibited by departmental regulation from making routine traffic stops. <=139> n138

The Supreme Court ruled that from a Fourth Amendment perspective the "constitutional reasonableness of traffic stops" does not depend "on the actual motivations of the individual officers." <=140> n139 According to the Court, the only relevant question was whether, looking at the circumstances from an objective viewpoint, the officer had legal cause for the stop. <=141> n140 The Court rejected the claim that the Fourth Amendment requires consideration of whether "the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given." <=142> n141

[*320] In response to the claim that pretextual stops could be racially motivated, the Court stated that the Equal Protection Clause of the Fourteenth Amendment would prohibit any intentional race discrimination in a car stop. <=143> n142 However, this perfunctory statement did not address the means by which an intentional race discrimination claim could be proven or what remedies might be available to either a criminal defendant or civil litigant. <=144> n143

Courts and commentators have correctly made the point that pretextual stops, and particularly those based on racial considerations, are inconsistent with the "reasonableness" requirements of the Fourth Amendment. <=145> n144 Assuming, however, that the Supreme Court continues to insist that subjective motivations, including racially motivated conduct, are not pertinent to the Fourth Amendment inquiry, <=146> n145 [*321] federal challenges to racial profiling must be mounted on grounds of racial discrimination under the Fourteenth Amendment or Title VI of the Civil Rights Act of 1964. Challenges could also be made under state law in jurisdictions that do not follow Whren or that provide an exclusionary remedy in criminal prosecutions for racially discriminatory stops or searches. <=147> n146

[*322]

1. Intentional Race Discrimination Under the Fourteenth Amendment

A claim of impermissible racial discrimination under the Equal Protection Clause of the Fourteenth Amendment involves two broad areas of inquiry: whether the practice or policy expressly or intentionally classifies persons on the basis of race and, if so, whether the race based classification withstands strict judicial scrutiny. <=148> n147 A practice or policy based on an explicit racial classification is "immediately suspect," triggering detailed examination and may be upheld only when shown to be narrowly tailored to serve a compelling government interest. <=149> n148

Intentional race discrimination may be shown by a law that "expressly classifies persons on the basis of race," <=150> n149 or by a practice or policy that treats one differently from members of other racial groups to whom he is similarly situated, if applied in an intentionally discriminatory manner. <=151> n150 Thus, in the racial profiling context, established policies or

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practices authorizing stops based on racial characteristics will enable a plaintiff to proceed under the first theory. <=152> n151 But, as is usually the case, where there is no direct proof of such a policy or practice, statistical evidence will be necessary to show that the police acted with the intent to discriminate. Disparate impact alone is not sufficient, as the "invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." <=153> n152

[*323] Use of statistical evidence to establish intentional race discrimination in criminal trial settings has met with mixed results. The Supreme Court has sustained attacks on racially discriminatory jury selection procedures and racially-based peremptory challenges upon statistical evidence that demonstrated that race played an impermissible role in these proceedings. <=154> n153 In these cases the Court established a base line for establishing a prima facie case of racial discrimination that could be satisfied by statistical evidence concerning the challenged practices. <=155> n154

In Hunter v. Underwood, <=156> n155 the Court sustained an equal protection claim by African-Americans who claimed that they were disenfranchised for convictions under an Alabama law that was adopted with the intent to discriminate on the basis of race, and which in fact had a racially discriminatory impact on African-Americans. <=157> n156 As proof of the impact, the Court noted that blacks were disenfranchised under this law at a rate 1.7 times more often than whites in certain counties, and up to 10 times more often in other areas of the state. <=158> n157 The Court did not require proof of the identity of white persons who were not disenfranchised because their convictions were for crimes not [*324] deemed to involve moral turpitude (the disenfranchising trigger). <=159> n158

However, in McCleskey v. Kemp, <=160> n159 the Court rejected, as insufficient under Eighth and Fourteenth Amendment standards, a statistical analysis concerning the application of the death penalty in Georgia. <=161> n160 Conducted by David C. Baldus, an expert in the area of statistics and criminal justice issues, the study used in McCleskey found that among all of the factors that might influence a jury to impose the death penalty, the race of the victim was the most consistent and central factor. <=162> n161 Without controlling for other factors, the defendant was eleven times more likely to receive the death penalty if the victim was white than if the victim was black. <=163> n162 Baldus's study, which considered 230 variables, including 39 non-racial variables, that could affect sentencing, demonstrated that the odds of a defendant receiving the death penalty where the victim was white was 4.3 times higher than for a black victim, a statistically significant number. <=164> n163

The Court distinguished McCleskey's claim from venire-selection and Title VII cases, where the courts have allowed statistics as proof of discriminatory intent. <=165> n164 In the Court's view, "the statistics related to fewer entities, and fewer variables [were] relevant to the challenged decisions." <=166> n165 Batson was different from McCleskey's situation because, "requiring a prosecutor to rebut a study that analyzes the past conduct of scores of prosecutors is quite different from requiring a prosecutor to rebut a contemporaneous challenge to his own acts." <=167> n166

The Court stated that the Baldus study showed only a "correlation" between

the race of the victim and the death penalty decision. <=168> n167 It is evident, however, that the study established far more that a "correlation" between race and sentence; it demonstrated a strong causative relationship. The Court was simply unwilling to recognize the degree to which race influenced jurors in capital cases, where such a finding would call into question a large number of death penalties.

[*325] The Court also questioned how far the logic of the argument would carry: the claim, Justice Powell stated, "throws into serious question the principles that underlie our entire criminal justice system." <=169> n168 Unexplained by the Court was the acceptance of such discrimination in the most serious decision made in the criminal courts, notwithstanding the Court's insistence that it had engaged in "unceasing efforts to eradicate racial prejudice from our criminal justice system." <=170> n169 Justice Brennan commented that the Court's concern with the implications of the statistics for other aspects of the criminal justice system displayed "a fear of too much justice." <=171> n170

The Court took a similar hands-off approach in United States v. Armstrong, <=172> n171 where it reversed a ruling that would have permitted discovery in support of a motion to dismiss federal crack cocaine prosecutions against black defendants on grounds of racially selective prosecution. <=173> n172 The defendants sought to prove discriminatory intent by showing a racially disparate pattern of federal crack cocaine prosecutions. <=174> n173 In a preliminary submission, the defendant showed that every one of the twenty-four crack cocaine cases closed by the public defender's office in 1991 involved a black defendant. <=175> n174

The government responded by setting forth race-neutral criteria such as the quantity of drugs, firearms violations, the evidence, and the criminal histories of the defendants. <=176> n175 The government also submitted part of a 1989 Drug Enforcement Administration report stating that "large scale, interstate trafficking networks controlled by Jamaicans, Haitians and Black street gangs dominate the manufacture and distribution of crack." <=177> n176 The defendants answered with affidavits asserting that there were an equal number of Caucasian and minority users and dealers and that "many nonblacks are prosecuted in state court for crack offenses." <=178> n177

The Court ruled that the defendants were not entitled to discovery because they "failed to satisfy the threshold showing ... that the Government declined to prosecute similarly situated suspects of other races." <=179> n178 In a selective prosecution case, the Equal Protection Clause requires a showing that similarly situated suspects of other races were not prosecuted and "some evidence" of this essential proof must be produced. <=180> n179 The Court stated that prosecutors were entitled to a [*326] presumption of the proper performance of their duties and relied upon arrest statistics to reject the argument that blacks and whites commit drugs offenses at rates that would not justify the highly disproportionate federal prosecution of black crack cocaine offenders. <=181> n180 As discussed above, these arrest data are suspect, but the Court, which had so seriously questioned the data in McCleskey, and which has condemned racial stereotyping in other contexts, <=182> n181 seemed untroubled in using these statistics to dismiss the claim of unfair racial disparities in prosecutions. Thus, despite what appeared to be a reasonable prima facie showing, even a limited request for discovery was unavailing.

<=183> n182

McCleskey and Armstrong are troubling, but are not dispositive of racial profiling claims. In McCleskey the Court stressed the unique discretion given to juries to decide between life and death in requiring proof beyond statistical patterns for the system as a whole to show that the judgment in an individual case was infected by intentional discrimination. <=184> n183 It may be that courts will not permit the discriminatory intent to be inferred from the judgment of disparate juries and different prosecutors acting independently from each other, but will find that statistical evidence that law enforcement officers repeatedly target racial minorities is sufficient to establish a Fourteenth [*327] Amendment claim. As the Court stated in McCleskey:

The nature of the capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the corresponding elements in the venire-selection or Title VII [employment discrimination] cases ... . Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense. <=185> n184

Armstrong's requirement that the defendant show that similarly situated white offenders were not subjected to federal prosecution, while questionable, should not bar selective policing claims. First, evidence that shows statistically significant disparities in the rates at which similarly situated black and white drivers are stopped and/or searched pursuant to alleged traffic violations establishes the factual predicate of similarly situated white drivers who have not been stopped and searched. <=186> n185

Second, Armstrong reaffirmed the rulings in Batson v. Kentucky <=187> n186 and Yick Wo v. Hopkins, <=188> n187 that statistical proof is sufficient where a challenged practice is characterized by a highly discretionary "selection procedure that is susceptible of abuse," <=189> n188 or where discrimination is sufficiently "clandestine and covert" that evidence other than naming white comparables is the "only available avenue of proof." <=190> n189 Several courts have sustained racial profiling equal protection claims based on this order of proof. <=191> n190 Where a racial profiling challenge is based on the theory that official policy contains an express racial classification, [*328] there should be no need to plead or prove the existence of a similarly situated non-minority group or person who was not subject to the complained of practices. <=192> n191 As the Second Circuit recently explained:

It is not necessary to plead the existence of a similarly situated non-minority group when challenging a law or policy that contains an express, racial classification. These classifications are subject to strict judicial scrutiny, see *Able v. United States, 155 F.3d 628, 631-32 (2d Cir. 1998)*, and strict scrutiny analysis in effect addresses the question of whether people of different races are similarly situated with regard to the law or policy at issue. <=194> n192

Third, Armstrong was a selective prosecution case challenging a prosecutor's discretion in deciding to charge particular defendants. <=195> n193 As the Court emphasized, prosecutors are accorded a strong presumption in favor of the "regularity" of their decisions, rebuttable only by "clear evidence to the contrary." <=196> n194 Because of separation of powers concerns, courts are "properly hesitant to examine the decision whether to prosecute." <=197> n195 There is no such presumption of correctness accorded to police officers charged with racial discrimination or other violations of constitutional norms in law enforcement duties. <=198> n196

Equal Protection doctrine does not absolutely prohibit consideration of race in enforcement or implementation of governmental policies and a "compelling governmental interest" can justify the practice. <=199> n197 Certainly police can consider race where a physical description is provided, but absent that factor, or other self-limiting factors, race cannot be considered in the decision to stop, detain, or search. <=200> n198 Tactical deployment, surveillance operations, and policing [*329] methods might well reflect responses to patterns of crime, and result in more intrusive operations in minority communities, but race should not warrant forcible stops or searches.

2. Title VI and Disparate Impact

Under Title VI of the Civil Rights Act of 1964, <=201> n199 regulations promulgated by the Department of Justice prohibit governmental action that have a disparate impact by reason of race:

A recipient [of federal funds] ... may not ... utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin. <=202> n200

[*330] Whether private parties may enforce this regulation through an implied right of action similar to that authorized by Cort v. Ash, <=203> n201 was recently addressed in Powell v. Ridge, <=204> n202 where the court set forth a three part test for determining whether Title VI regulations were enforceable by private parties: (1) whether a private cause of action exists under the enabling statute; (2) whether the agency rule is properly within the scope of the statute; and (3) whether implying a cause of action will further the purposes of the statute. <=205> n203 Title VI does permit private enforcement, <=206> n204 and the Department of Justice regulation appears to be well within the scope of the enabling statute. In Guardians Association v. Civil Service Commission, <=207> n205 regulations prohibiting discriminatory effects were approved by a majority of the Court. <=208> n206 And in Alexander v. Choate, <=209> n207 a unanimous Court confirmed that: "Title VI has delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts." <=210> n208

Since Guardians and Choate, federal courts of appeals have consistently found

that Title VI implementing regulations prohibiting practices that cause an unjustified disparate impact provide a basis for private plaintiffs to sue recipients of federal funds on a discriminatory effects theory, without a showing of discriminatory intent. <=211> n209

Private enforcement of such regulations will further the purposes of the statute. Title VI "sought to accomplish two related, but nevertheless [*331] somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." <=212> n210 In enacting the regulations, the Department of Justice determined that "disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts." <=213> n211

A plaintiff seeking to enforce the regulations must also establish standing given the particular state program and plaintiff's relationship to that program. Most state and local police agencies receive federal funds and the Civil Rights Restoration Act of 1987 defines "program or activity" to include all the operations of a governmental department or agency which receives federal funds. <=214> n212 Using this definition of "activity or program," traffic stops, searches, and arrests should be covered.

Whether a plaintiff has to demonstrate that she was a direct participant in or intended beneficiary of a covered "program or activity" in order to assert a claim under Title VI is not clear, but even if that were so, Title VI should still apply to traffic and pedestrian stops. The statute, as well as its implementing regulation, provides that "no person ... be subjected to discrimination under any program or activity receiving Federal financial assistance." <=215> n213 Were standing to be restricted only to direct beneficiaries or participants, claims asserted by persons "subjected to" discrimination by a federally funded entity who did not fall into either category would fail. The language of Title VI, however, prohibits any discriminatory conduct against an individual member of a protected class by a covered entity, including actions of a police officer. "The plain meaning of "activity' is a "natural or normal function or operation' ... . It is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context." <=216> n214

[*332] Finally, racial profiling plaintiffs come within the scope of prudential standing limits. The Supreme Court has recently reaffirmed the "zone of interests" test as a prudential limitation on standing in the context of an action brought under the Administrative Procedure Act. As the Court has articulated that test:

The proper inquiry is simply "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected ... by the statute." Hence, in applying the "zone of interests" test, we do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff. Instead, we first discern the interests "arguably ... to be protected" by the statutory provision at issue; we then

Township. <=3> n2 The officers ordered the occupants out of the vehicle and proceeded to subject them, and the vehicle, to an intrusive search that included the use of a narcotics trained-police dog. <=4> n3 They were detained for almost an hour until the police were convinced that they were not transporting drugs. <=5> n4 To justify the initial stop, an officer issued a "warning" regarding an alleged obstruction of the car's windshield (a thin piece of string hanging from the rear view mirror, which could not have been observed by the officer before the stop). <=6> n5 In response to a question from one of the occupants of the car as to why they had been stopped, the officer answered with surprising candor: "because you are young, black and in a high drug-trafficking area, driving a nice car." <=7> n6

[*297] On a summer afternoon in August 1998, U.S. Army Sergeant Rossano Gerald and his young son Gregory were driving across Oklahoma. <=8> n7 A career soldier and highly decorated veteran of Desert Storm, Gerald, a black man, was stopped twice within thirty minutes. <=9> n8 As a report on the incident noted, "during the second stop, which lasted two-and-half hours, the troopers terrorized [Sergeant] Gerald's 12-year-old son with a police dog, placed both father and son in a closed car with the air conditioning off and fans blowing hot air, and warned that the dog would attack if they attempted to escape." <=10> n9

As the district court described the allegations:

Over the course of the two hour detention the troopers repeatedly searched the car, turning up nothing. Despite this, Trooper Perry removed parts of the headliner, floorboards, carpet, and other areas, causing $ 1089.21 in damage to the car. Perry removed the passenger side floorboard, claiming the bolts looked funny, like military bolts. According to the body shop that repaired the car, the bolts were the factory-installed bolts. Throughout the search Perry and the second trooper accused Sergeant Gerald of running drugs and laundering money. Sergeant Gerald denied the allegations and informed the troopers that his vehicle had recently passed inspection and had received military clearance. He also informed the troopers that due to the nature of his assignment he is subject to random urinalysis and did not use drugs.

At approximately 3:45 p.m., the troopers ceased their detention and prepared to let Plaintiffs leave with nothing but a warning ticket. When Sergeant Gerald complained his car and luggage were a mess, Perry informed him "We ain't good at repacking." <=11> n10

On July 16, 1999, Alton Fitzgerald White, a leading African-American actor in the Broadway production of "Ragtime," was standing in the doorway of his apartment building in Manhattan, when police arrived. <=12> n11 He opened the door to allow them to enter. <=13> n12 He was immediately handcuffed and taken to the police district where he was strip searched and held in a cell - all without probable cause - until the police finally determined he had nothing to do with a call concerning "Hispanic men" selling drugs from the apartment house. <=14> n13 Rather than being on stage, he found himself crying in a police holding cell, a circumstance dictated in no small part by the color of his

inquire whether the plaintiff's interests affected by the agency action in question are among them. <=217> n215

Disparate impact theory avoids the difficult burden of proof of intentional discrimination. <=218> n216 Statistical evidence of the type assembled in New Jersey, Maryland, and Illinois would be sufficient to put the burden of justification for the use of racial characteristics on the law enforcement agency and would require substantial evidence as to the necessity and efficacy of racial profiling in the highway drug courier context. <=219> n217

B. Pedestrian Stops

The surge of attention to racial profiling on the highways has led to concern as well over similar police practices in stops of pedestrians and other travelers. Pedestrian stops, frisks and searches present some comparable legal issues. Thus, while the Fourteenth Amendment and Title VI standards discussed above will govern pedestrian stops as well, the policing interests and Fourth Amendment standards differ in significant respects from car stops and searches.

[*333]

1. Police Practices and Interests

Pedestrian stops are at the very core of policing. They are used to enforce narcotics and weapons laws, to identify fugitives or other persons for whom warrants may be outstanding, to investigate reported crimes and "suspicious" behavior, and to improve community "quality of life." They are also designed to secure intelligence information about criminal activities and to establish a police presence in, and physical control of, certain communities. The type of patrol sends a very strong message to the community, and stop and frisk practices are a key element of order-maintenance policing. As the New York Attorney General has reported:

Order maintenance theory encourages officers to intervene in instances of low-level disorder, whether observed or suspected, with approaches which fall short of arrest. A "stop" intervention provides an occasion for the police to have contact with persons presumably involved in low-level criminality - without having to effect a formal arrest, and under a lower constitutional standard (i.e., "reasonable suspicion"). Indeed, because low-level "quality of life" and misdemeanor offenses are more likely to be committed in the open, as a theoretical matter, the "reasonable suspicion" standard may be more readily satisfied as to those sorts of crimes. To the extent that "stop" encounters create points of contact between police and low-level offenders, such contacts can lead to the apprehension of persons already wanted for more serious crimes, or who might be prepared to commit them in the near future. <=220> n218

The pedestrian stop can be triggered by any number of diverse factors, although as a legal matter the police cannot forcibly stop or detain persons without reasonable suspicion to believe that criminal conduct may be afoot. <=221> n219 The complex and protean nature of street investigations, from both racial and crime control perspectives, makes legal and political judgments in this field highly controversial. The Supreme Court has addressed these issues in

numerous cases over the years and has developed a methodology for balancing law enforcement and privacy interests. <=222> n220 This article is not the occasion to analyze or critique this very large body of case law (which is the subject of extensive commentary); <=223> n221 rather, the focus will be on the relevance to [*334] Fourth Amendment doctrine of the empirical data that has been collected with respect to pedestrian stop practices.

Law enforcement officials maintain that there is a direct relationship between the degree of discretion they may exercise in stops, frisks, and questioning of individuals, and the effectiveness of their crime fighting and intelligence efforts. <=224> n222 Of course, the greater the police power, the greater is the potential for abuse. And it is precisely at this intersection of crime, race and, police stop and frisk practices that the underlying social and legal conflicts most often are manifested, and not infrequently in sharp and violent confrontations. On February 4, 1999, in New York City, one of these incidents exploded in controversy and generated a searching inquiry into the nature of these police street practices, with particular emphasis on their impact on people of color. On that date four plain-clothed officers from the elite Street Crimes Unit, observed Amadou Diallo in the vestibule of his apartment building and decided to investigate his nighttime appearance at that location. <=225> n223 As they approached, Diallo remained in the vestibule with a wallet in one hand and the police, claiming that they thought the wallet was a gun and that Diallo had been acting "suspiciously," started shooting; forty-one bullets were fired and nineteen penetrated Diallo's body. <=226> n224 The death of Diallo, an immigrant street peddler with no criminal record and carrying no weapons, brought to a head the long simmering controversy over aggressive New York policing practices and led to widespread demonstrations and protests of racially-biased policing. <=227> n225

In the public debate, comparisons were inevitably drawn between the Diallo killing and the sadistic torture by New York police officers of Abner Louima some nineteen months earlier. <=228> n226 But whatever similarities exist between the two incidents on reference points of race and police aggressiveness, no one contends that the type of brutality in the Louima affair was anything but criminal. The killing of Diallo, however, has evoked reactions ranging from criminal indictment to a defense that the incident, while tragic, was an aberrant by- [*335] product of an essential police practice. <=229> n227

Brutality, however effective in establishing police hegemony, cannot be defended in a democratic society. <=230> n228 By contrast, aggressive street patrol is defended as an essential element of urban policing and the inevitable abuses that occur in the course of this police work are presented as costs to be endured if crime is to be effectively controlled. The contours of this debate were captured well by Elizabeth Kolbert:

If you are a black resident of New York City, your chances of being murdered are at least five times as high as they are if you are white, and the odds that you've been arrested for murder are more than ten times as high. This disparity means that the police will see more behavior by blacks that they will legitimately identify as suspicious. At the same time, it means that they will, almost inevitably, come to see criminal behavior as a black phenomenon, which is not only profoundly unfair but also unlawful. The more aggressive policing

becomes - the more the cops try to anticipate crimes before they occur - the more such structural biases are brought out into the open.

Of course, the segregation of crime, by income, by neighborhood, and, especially, by race, is what makes such strategy politically practical in the first place. Crucial constituencies have little directly to lose from it. The cost of aggressive policing may be a collective erosion of civil rights, but only some groups feel the immediate impact.

...

[*336]

People sense, if only intuitively, the fundamental difference between the [Louima and Diallo] cases. Allegedly, as the cops beat Louima in their squad car on the way to the station and then tortured him inside it, they taunted him with racial epithets. The very explicitness of their racism was something to condemn, but also to take some comfort in: What those cops did to Louima, you could tell yourself, clearly had nothing to do with doing their job. It is much harder to say that about Diallo. <=231> n229

The constitutional seeds of this controversy were planted more than 30 years ago when the Supreme Court first decided how the Fourth Amendment would be applied to the street stop and frisk. Decided at a time of urban turmoil, bitter police/minority community relationships, and deep social conflict on a wide range of issues, the Court's opinion in Terry v. Ohio <=232> n230 established a doctrinal framework that has endured to this day. The Court ruled that a stop is "reasonable" under the Fourth Amendment if the facts and circumstances made known to the officer provide grounds for an objectively reasonable belief that criminal activity may be afoot. <=233> n231 Further, the Court decided that if the officer had a reasonable belief that the person stopped was "armed and dangerous," a pat-down frisk could be conducted, again on less than probable cause. <=234> n232 In some respects, this approach is the street equivalent to the Whren pretext doctrine for cars: just as the police use the traffic stop to place themselves in a position to search the vehicle and occupants, they use the stop of pedestrians to gain the opportunity to frisk.

The Court recognized the abuses that attend stop and frisk practices, including possible disproportionate impact on racial minorities, [*337] but thought that there was little that it could do to control these practices through the exclusionary rule. <=235> n233 After having ignored the racial factors in the case, <=236> n234 the Court addressed the role that aggressive stop and frisk practices have on racial tensions between the police and minority communities:

We have noted that the abusive practices which play a major, though by no means exclusive, role in creating this friction are not susceptible to control by means of the exclusionary rule, and cannot properly dictate our decision with

respect to the powers of the police in genuine investigative and preventive situations. However, the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices. <=237> n235

The Court's observations of the racial tensions that surround stop and frisk practices in minority communities were not unique. Governmental commissions, law enforcement officials, and community organizers were asserting similar views <=238> n236 and, while the Court soon cast a blind eye to this issue, thirty years after Terry the conflict between law enforcement and racial minorities continues to be raw and pronounced. <=239> n237 Over this period of time, the Court has significantly expanded police powers (in many cases in deference to the "War on Drugs") <=240> n238 and complaints concerning racial bias and random, arbitrary stop and frisks have continued to mount. <=241> n239

[*338] The Court recently addressed the justifications for a Terry stop in a case where the police sought to justify a stop and frisk primarily on the basis of flight of the suspect. <=242> n240 According to the police testimony, as a police caravan of four cars investigating drug trafficking in a "high crime" neighborhood passed, the defendant Wardlow looked in the direction of the officers and immediately fled, carrying an opaque bag. <=243> n241 A stop and frisk of the defendant disclosed a handgun. <=244> n242 The Supreme Court rejected the state's claim for a per se rule that flight would always justify a stop, but held that evidence of unprovoked flight was a factor that could be considered, among others, as to whether there is reasonable suspicion to believe that an individual was involved in criminal activity. <=245> n243

The Court recognized that flight may be perfectly innocent activity ("not necessarily indicative of wrongdoing"), but is "certainly suggestive [of wrongdoing]." <=246> n244 The Court conceded that there was no empirical evidence concerning the relationship of flight to criminal activity, but repeated its prior rulings that reasonable suspicion depends upon "commonsense judgments and inferences about human behavior." <=247> n245 Terry itself "accepts the risk that officers may stop innocent people," <=248> n246 but the burden of showing something more than an "inchoate and unparticularized suspicion or "hunch' of criminal activity" is all that is required by the Fourth Amendment. <=249> n247

The majority ignored arguments concerning possible racial bias in the consideration of ambiguous factors like flight and presence in a high crime area. <=250> n248 Further, the Court did not consider whether minorities might be more likely to flee upon the arrival of police. By contrast, the dissent specifically pointed to the belief, "particularly [among] minorities," that contact with the police could be dangerous even for innocent persons, <=251> n249 and cited to law enforcement investigations, including those of the Attorneys General of New Jersey and Massachusetts, regarding racial profiling and stops without cause. <=252> n250 Justice Stevens noted that news reports in New York demonstrated "that society as a whole is paying a significant cost in infringement of liberty by these virtually random stops." <=253> n251

[*339] The Wardlow opinions simply pass each other by on the crucial issues of race and the relevance of empirical data on the standards that should control Fourth Amendment stop and frisk adjudication. What weight, if any, the Court

would give to empirical evidence regarding the influence of race or the measurable relationship between alleged "suspicious" behavior and actual criminal conduct is not considered. <=254> n252

Scholarly commentary on the Court's stop and frisk jurisprudence has addressed the remarkable retreat from consideration of racial impact, but has often proceeded without attention to empirical data. A symposium entitled "Terry v. Ohio 30 Years Later," <=255> n253 presented analysis by 30 prominent judges, scholars and lawyers, of the legal and political impact of Terry and its progeny. These presentations reflected longstanding divisions over competing Fourth Amendment theory, <=256> n254 including the relevance of race in police street detentions. <=257> n255 But in the absence of empirical data, the articles did not address the racial impact or the Fourth Amendment compliance rate of Terry [*340] stops and frisks. Whether or not Terry represents "A Practically Perfect Doctrine," <=258> n256 cannot be answered on a purely theoretical level. Empirical evidence concerning the points of tension in Terry's balance of the needs of law enforcement, the privacy and autonomy rights of individuals, and the imperative of racial equality, is an essential element of the constitutional calculus.

Studies of pedestrian stops have been undertaken in New York City and Philadelphia. The Philadelphia study was made pursuant to a Settlement Agreement in a class action lawsuit against the Philadelphia Police Department that was filed in the wake of a federal criminal investigation that uncovered systemic corruption and misconduct in narcotics enforcement. The study considered stops of pedestrians and cars for selected periods and for selected police districts in Philadelphia in 1997. <=259> n257 For one-week periods in March and October, 1997, for four police districts in the City, every police-recorded stop of a car or a pedestrian was entered into a computer data base. <=260> n258 The data were then analyzed to determine whether there were racial patterns of enforcement and whether police were exercising their stop and frisk power with sufficient cause or suspicion. <=261> n259 The findings, though tentative in nature, raised serious questions concerning racial profiling and suspicionless stops and frisks. For example, in the Eighteenth District (West Philadelphia), where African-Americans constitute 70.3% of the population, for all pedestrian stops reported by the police for two different one-week periods in 1998, African-Americans were 93% of those stopped; whites constituted 4.7% of the stops. <=262> n260 Of the 214 stops of African-Americans pedestrians during these periods, 135 were conducted without a legally sufficient written explanation. <=263> n261

In the Eighth Police District, where the population was 91.2% white and 6.5% African-American, African-Americans constituted 26.8% of all those stopped. <=264> n262 Moreover, in this district, while a sufficient reason was provided by the police for approximately 40% of all whites stopped, only 15% of African-Americans were stopped with a [*341] stated legally sufficient reason. <=265> n263

While the statistical analysis did not control for crime rates and police deployment, the two factors that police officials and others have regularly cited as the primary reasons for any disparities in the gross numbers, <=266> n264 the study pointed to two sets of data that could be interpreted to show racial bias in street stops and frisks. First, the same patterns of highly disproportionate stops of minority drivers and pedestrians were observed.

<=267> n265 Second, in stops in which the police failed to provide any reason for their intervention, the racial disparity was greater than for stops made with a recorded reason. <=268> n266 Still, the Report recognized the need for further data collection and analysis. <=269> n267

On the issue of whether there were sufficient grounds under the Fourth Amendment and state constitutional principles for the stops and frisks, the data showed that over one-third of all stops either failed to state any reason for the police action or, if stated, the reasons were manifestly inadequate under governing constitutional standards. <=270> n268 In deference to the Police Department's response that many officers were simply not properly filling out the forms, as opposed to not having proper reasons for the stops, no conclusive findings were suggested. Commissioner Timoney has stated that the Department's review of stop data under the new police policies and practices shows a 50% reduction in the number of stops over comparable time periods. <=271> n269 This dramatic drop has occurred during a period of high numbers of arrests. <=272> n270 Significantly, the percentage reduction correlates with the large number of improper stops made under the "old regime." <=273> n271 A study of the stops and arrests made during a one-week period in July, 1999, after the reporting form and new training had been implemented, demonstrated continued evidence of racial [*342] bias in this area of police work. <=274> n272 In comparing the stops of African-Americans in largely black police districts to stops made in largely white districts, the statistical data showed hugely disproportionate stops by race in the white areas of the City, while stops in African-American areas were roughly proportionate to the population in those areas. <=275> n273 In some areas, there were more than ten times more stops of African-Americans as one would expect from the racial composition of the residential population. <=276> n274

In 1999, the Attorney General of New York State conducted a study of 175,000 stops made by New York City police over a fifteen-month period in 1998-1999. <=277> n275 This study was both broader in scope (analyzing every recorded stop made by the New York City Police Department for the 15 months), and statistically more sophisticated in its analysis of the data, including the use of regression analyses in its review of racial data, to ensure that the racial disparities reflected in the gross numbers were not explained by other factors, including differential crime rates among racial groups. <=278> n276 The results of this study parallel the findings made in Philadelphia and present compelling empirical data of racial profiling and large numbers of stops without legal justification. The Attorney General made the following findings:

During the covered period, minorities - and blacks in particular - were stopped at a higher rate than whites, relative to their respective percentages within the population of New York City. Specifically, the Attorney General found:

1.Blacks comprise 25.6% of the City's population, yet 50% of all persons "stopped" during the period were black. <=279> n277 Hispanics comprise 23.7% of the City's population, yet 33% of all "stops" were of Hispanics. <=280> n278 By contrast, whites are 43.4% of the City's population, but accounted for only 12.9% of all "stops." <=281> n279

2.This disparity in stop rates is particularly pronounced in precincts where the majority of the population is white. <=282> n280 In precincts in which

blacks and Hispanics each represent less than 10% of the total population, individuals identified as belonging to these racial groups nevertheless accounted for more than half of the total "stops" during the covered period. <=283> n281 Blacks accounted for 30% and Hispanics accounted [*343] for 23.4% of all persons "stopped" in these precincts. <=284> n282

3.Precincts where minorities constitute the majority of the overall population tended to see more stop and frisk activity. Of the ten precincts showing the highest rate of "stop and frisk" activity (measured by "stops" per 1,000 residents), in only one (the 10th Precinct) was the majority of the population white. <=285> n283

4.Significantly, the rate at which stops led to arrests during the covered period also differed by race. Overall, only one out of nine stops resulted in an arrest. This stop/arrest rate differed, however, based on the race of the person stopped. <=286> n284 During the covered period, the NYPD "stopped" 9.5 blacks for every one "stop" which resulted in the arrest of a black, 8.8 Hispanics for every one "stop" that resulted in the arrest of an Hispanic, and 7.9 whites for every one "stop" that resulted in the arrest of a white suspect. <=287> n285 These data are a strong indicator of racial discrimination as they are not affected by crime rates, police deployment, or other factors that might explain the racial disparities in the gross data regarding stops.

5.To test the hypothesis that higher crime rates in minority communities fully explain the higher rate at which minorities are stopped, various regression analyses were conducted. <=288> n286 They demonstrated that differing crime rates alone cannot fully explain the increased rate of stops of minorities. For example, the Attorney General compared stop/arrest ratios for blacks to stop/arrest ratios for whites, and the same ratios for Hispanics and whites after accounting for the effect of differing crime rates. <=289> n287 During the covered period, and after accounting for these factors, blacks were "stopped" 23% more often than whites, across all crime categories. <=290> n288 In addition, after accounting for the effect of differing crime rates, Hispanics were "stopped" 39% more often than whites across crime categories. <=291> n289

6.With respect to the issue of whether "reasonable suspicion" existed for the stops, the Attorney General found that citywide, 15.4% of all "stops" forms contained insufficient factual statements to justify a "stop." <=292> n290 Further, the Attorney General noted that, "roughly one-quarter of all ['stop'] forms (23.5%) did not appear to provide sufficient information to allow a reader (including a police supervisor [*344] checking a junior officer's work) to determine whether the facts articulated amount to "reasonable suspicion.'" <=293> n291

The Attorney General's Report provides much reason for concern. The racial disparities are simply too large to ignore and thousands of persons are being stopped and frisked without any legal justification. <=294> n292 There are sound reasons for courts and police departments to take these findings seriously. As the Supreme Court has stressed, the "touchstone" of Fourth Amendment jurisprudence is the "reasonableness" of the governmental conduct. <=295> n293 Surely, if it is clear that the factors which the courts have endorsed as providing grounds for a "reasonable suspicion" of criminal activity or for suspecting that an individual is "dangerous," are empirically without

foundation, the doctrinal calculus should be subject to modification.

The New York Attorney General's Report presents a significant challenge to the prevailing orthodoxy. First, by quantifying the arrest rates for persons stopped pursuant to investigative detentions and stop and frisk practices, we have a measure of the "success" rate for these police practices. Since reasonable suspicion is required to make these stops, there is now a statistical baseline from which we can judge whether the factors relied upon by the police sufficiently demonstrate this level of cause. Probable cause requires evidence that would lead a person of "reasonable prudence [to believe] that contraband or evidence of a crime will be found," <=296> n294 or to believe that there is a "fair probability" that the suspect has committed or is engaged in criminal activity. <=297> n295 Reasonable suspicion requires an objective and articulable belief that criminal activity is afoot, and a frisk requires a reasonable belief that the suspect is armed and dangerous. <=298> n296

[*345] The Court has not quantified these standards - other than to state that reasonable suspicion is "considerably less" than preponderance of the evidence <=299> n297 - but one would expect that where experienced police officers are engaging in practices that require a reasonable and articulable belief concerning possible criminal conduct, such conduct will be uncovered in more than a small percentage of the cases. If not, either the police are not being truthful in their assertions (a phenomenon that would not surprise those who have studied the criminal justice system), <=300> n298 or the standards for stops and frisks are not sufficiently demanding. There can be no precise delineation of a statistical standard for various police interventions (ranging from full scale searches and arrests to stops and frisks of persons engaged in "suspicious" conduct), but categorical estimates are possible. Thus, while the answer to this question will reflect a normative judgment, some attempts to quantify have been made. Professor Slobogin, for example, suggests that stops and frisks should result in a 20% to 30% rate of determination of criminal conduct. <=301> n299

In New York, only one in nine recorded stops resulted in an arrest <=302> n300 and there is good reason to believe that thousands of additional stops that disclosed no criminal conduct were not recorded. <=303> n301 Moreover, some of the arrests were for conduct that occurred during the stop [*346] and frisk. <=304> n302 The statistics with respect to the Street Crimes Unit are even more revealing. This Unit is composed of highly experienced officers, a characteristic that the courts repeatedly state requires substantial weight in determining whether the officer's actions were reasonable. <=305> n303 Not only was the success rate of this "experienced" unit poorer than the Department as a whole, but in the very category of policing in which they place their greatest emphasis - the removal of firearms from pedestrians - their record was the weakest. <=306> n304 In only 2.5 of every 100 stops in which the factual predicate was suspicion that a suspect was carrying a weapon did the police find a firearm. <=307> n305 There are two principle explanations for these troubling statistics. First, as discussed above, "reasonable suspicion" allows the police to effectuate stops and frisks on a relatively low quantum of evidence that permits broad "commonsense judgments" concerning human behavior. <=308> n306 Historically the Court has permitted stops in situations in which the conduct observed is likely to be innocent, or the source of the information on which the stop is based is highly questionable. <=309> n307 Thus, if the judgment is made that there are too many stops of innocent persons, a somewhat

different calibration of the standards for these stops may be necessary.

Second, the police may be making stops without the requisite reasonable suspicion, by reason of misapplication of legal standards or the deliberate decision to ignore limitations on their powers. It is difficult to avoid the conclusion that in departments that promote aggressive policing tactics without institutional safeguards sufficient to protect against abuses, a large number of the stops of innocent persons are the product of random, arbitrary stops, particularly of minorities. Remedying this problematic situation is far more difficult. It will require first and foremost a substantial change in policy and [*347] practice in police departments that have tolerated random and suspicionless searches and strict internal monitoring, and supervision and discipline of officers and supervisors who engage or acquiesce in this type of policing. <=310> n308 It will also require the courts to be far more skeptical of police testimony in both criminal and civil actions. And it will require a change in the application of legal doctrine, including substantive constitutional standards and remedial measures. <=311> n309

While the issues of race bias and cause for stops and frisks are often addressed as distinct constitutional matters, not infrequently police investigative detentions present concurrent consideration of both factors. For example, in Brown v. City of Oneonta, <=312> n310 a police manhunt followed the report of an assault of an elderly woman in the town of Oneonta, New York. <=313> n311 She informed the police that her attacker was a young black man and that he had cut himself on his hand during the incident. <=314> n312 Fewer than 300 blacks lived in this town, and at a nearby State University, approximately 2% of the students were black. <=315> n313 The police made a "sweep" of the town, stopping and questioning over 200 black men and inspecting their hands for cuts. <=316> n314

In a civil rights suit, the court ruled that a selection of all black men for investigation in a case in which they had a racial description and a relatively small number of possible suspects, even though there was no description of anything beyond race and age ("young" black man), did not constitute intentional race discrimination. <=317> n315 According to the court, the police had a racial description, and it was not intentional race discrimination to investigate all persons in that racial group. <=318> n316

Having isolated and rejected race as a constitutional problem, the court proceeded to analyze the Fourth Amendment claims to determine whether any of the plaintiffs were "seized" by the police in their respective encounters. <=319> n317 The Supreme Court has ruled that a seizure occurs (thus mandating application of Fourth Amendment "cause" standards) only where the "force or show of authority" is sufficient to lead a reasonable person to believe that she is not free to leave. <=320> n318 [*348] The circuit court recognized that the description of a young, black man was too vague to justify a stop, <=321> n319 and in assessing whether young, black men approached by the Oneonta police were subject to a "seizure," the court found such action where a police officer pointed a spotlight at the plaintiff, said, "what, are you stupid? Come here. I want to talk to you," <=322> n320 and instructed him to show his hands. <=323> n321

A second plaintiff was stopped and encircled by three police officers on the street, questioned as to whether he was a student and requested to produce his

identification. <=324> n322 As he started to leave an officer asked him to come back and to see his hands. <=325> n323 Again the court found a seizure. <=326> n324 One can only speculate what would have happened to these individuals if they had refused the police command to stop and show their hands. <=327> n325

Brown's equal protection analysis finesses the difficult issues. The fact that a description of a suspect includes a racial characteristic should be the start and not the end of the analysis. Race is surely an appropriate consideration in such an investigation, but where it becomes the "predominant" factor, strict scrutiny applies, <=328> n326 Under this approach, a court should consider what other descriptive characteristics are known, the size of the potential community of "suspects," and the intrusiveness of the police investigation. Thus, it may be that a court should distinguish between benign forms of investigation (for example, a simple written inquiry to speak with the police) and a physical confrontation or forcible stop. Regardless of where the line should be drawn, the racial discrimination issue cannot be decided on the simplistic notion that any racial description permits a sweeping, intrusive inquiry. The disquiet that Brown produces results from of the artificial doctrinal lines that the Supreme Court has drawn around the Fourth and Fourteenth Amendments.

[*349] Of course, beyond the substantive doctrinal issues, consideration must also be given to the remedial measures that may be available to persons subjected to unconstitutional police stop and frisk practices. Here, too, as I now explain, a web of doctrinal, procedural and practical barriers make vindication of protected rights far from a certainty.

IV. The Remedial Framework

The principle that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," <=329> n327 has never been a truism in our constitutional framework, and both legislative and judicially imposed limitations on remedial mechanisms can preclude the relief necessary to vindicate the substantive legal claim. <=330> n328 In this section, I explore potential remedies for racial profiling and random stops and frisks (suppression of evidence, civil damage actions, and equitable relief) to determine their availability and efficacy in these cases. <=331> n329

A. Suppression of Evidence

The exclusionary rule will provide a remedy for some victims of illegal stops, but it is not well suited to provide systemic relief from racial profiling and random stop and frisk practices. First, as a doctrinal matter, if probable cause otherwise exists, racially discriminatory stops are not subject to the Fourth Amendment exclusionary rule, <=332> n330 and the Supreme Court has yet to recognize a suppression remedy under the Fourteenth Amendment. Second, since most persons who are subjected to these practices are not arrested, the matter is never subject to criminal adjudication.

Third, where the police fail to comply with the substantive standards of the Fourth Amendment, limitations on the application of the exclusionary rule may still permit use of the evidence. Thus, the [*350] "standing" requirement,

[*298] skin. <=15> n14

In 1997, Janneral Denson, an African-American woman returning from Jamaica to Fort Lauderdale, Florida, was pulled out of the arrival line by a U.S. Customs agent, taken to a local hospital, handcuffed to a bed rail and forced to drink four cups of a laxative. <=16> n15 She protested that she was not carrying drugs and was seven months pregnant. <=17> n16 Over twenty-four hours after her detention, when her bowels showed no sign of drugs, she was released. <=18> n17 Eight days later, after severe diarrhea and bleeding, she underwent an emergency Caesarean. <=19> n18 Her son was born weighing three pounds, four ounces. <=20> n19 In a similar incident, Amanda Buritica was held for twenty-five hours, subjected to a full strip search, x-rays, and forced to swallow laxatives in what she termed was "the most degrading, humiliating thing I have been through." <=21> n20

In June of 1998, Curtis Rodriguez, a Latino attorney, was driving on Highway 152 near San Jose, California, and observed five traffic stops by state police, all of Latino drivers. <=22> n21 He stopped to take photographs of two of these stops and was then followed and stopped by the state highway officers. <=23> n22 When Rodriguez refused consent to search his car, the officer replied "I am in fear for my life," and proceeded to search the vehicle. <=24> n23 No contraband was found. <=25> n24

These incidents - stops, searches, and arrests without cause and of persons of color based on their race - are repeated thousands of times every year throughout the United States, and in too many instances reflect official police policy or practice. The "driving while black" phenomenon has been the subject of much scholarly and popular analysis, but for the most part these accounts of racial profiling have focused on highway stops and searches and have not addressed the role that race plays in pedestrian stop and frisk practices. <=26> n25 Moreover, while there is substantial commentary regarding [*299] the Fourth Amendment standards that govern stop and frisk practices, <=27> n26 almost no attention has been given to the question of stops and frisks conducted without legal justification, independent from racial profiling concerns. Even if we could eliminate racial bias in street level policing, the problem of arbitrary stops and searches would still be present. Empirical studies demonstrate that while there is substantial operational and doctrinal overlap, the dual problems of racial profiling and stops and searches without adequate cause deserve separate consideration. <=28> n27

Consider the following recent studies:

In New Jersey, litigation and governmental investigations concerning allegations of racial profiling on the New Jersey Turnpike provide comprehensive and compelling data demonstrating a long standing [*300] pattern of racial profiling. In criminal litigation arising from drug arrests on the Turnpike, a court found substantial evidence that stops and searches on the Turnpike were highly disproportionate based on race. <=29> n28 The court determined that approximately 15% of all drivers on the Turnpike were minorities, that virtually all drivers violated the traffic laws (and in particular for speeding), and that blacks and whites violated traffic laws at almost exactly the same rate, but that 42% of stops and 73.2% of arrests were of blacks motorists, resulting in respective disparities of 16.35 and 54.2 standard deviations. <=30> n29 Further, the court found that while radar stops were relatively consistent with

<=333> n331 the "good faith exception," <=334> n332 and narrow conceptions of an individual's expectation of privacy, <=335> n333 have significantly limited the potential remedial impact of the exclusionary rule.

Fourth, discovery in criminal cases is far more restricted than in civil litigation <=336> n334 and therefore the evidence necessary to demonstrate that racial profiling is a practice or policy (the data that can be collected from records of other stops by the police department) will not be available to individual defendants. Moreover, even if the criminal discovery rules mandated disclosure of the records in other stops and searches, most defendants will not have the resources, time, or expertise to retrieve and analyze the documents, or to make the requisite statistical showing in support of a constitutionally-based suppression of evidence claim.

Fifth, many suppression motions turn on credibility, and where such a determination against a police officer requires the suppression of critical evidence, courts frequently decide these cases in favor of the prosecution notwithstanding the not-infrequent occasions of police perjury. <=337> n335 The evidence that might persuade a court that an officer's version of the events is questionable or fabricated is normally not within the scope of the criminal discovery rules or within the investigative reach of a defense lawyer. For example, in litigation concerning car stops on I-95 in the Philadelphia area, civil discovery demonstrated that hundreds of cars were stopped without adequate cause; the police stopped cars at will and listed patently false reasons for the stop. <=338> n336 In many instances the police gave no adequate reason for a stop (where no contraband was recovered) or falsely asserted [*351] that a rear tail light was defective, a rear view mirror was obstructed by a hanging object, or that the driver was proceeding "recklessly." <=339> n337 Affidavits from persons who were stopped in these circumstances rebutted the asserted justifications for the stops and strongly suggested that the police were engaged in a widespread practice of racial profiling and random car stops without even the minimal basis for a stop required by Whren. <=340> n338 Further, police reports concerning alleged consent to search were seriously disputed by a large number of "innocent" subjects (and other witnesses) of these stops. <=341> n339 Had this information been available to defendants in criminal cases arising from the drug interdiction program, more persuasive arguments could have been made on the credibility issues. <=342> n340

A notable exception to the general ineffectiveness of the exclusionary rule as an antidote for pattern and practice violations is the litigation of suppression issues in State v. Soto, <=343> n341 the case that became the opening wedge in the New Jersey Turnpike racial profiling scandal. <=344> n342 Invoking New Jersey's comparatively liberal discovery procedures in cases alleging selective prosecution, <=345> n343 the defendants in a consolidated motion to suppress challenging stop and search practices on the southern end of the Turnpike presented evidence that African-Americans were being stopped at rates that far exceeded their use of the Turnpike and they were authorized by the trial court to discover a broad range of police documents relating to all stops and searches by state police for the relevant time period. <=346> n344 These documents, statistical studies of the data, and internal operating documents of the state police were sufficient to prove an extraordinary pattern of racial profiling and, under state law principles, the trial court suppressed the evidence in the cases. <=347> n345

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[*352] As the evidence concerning racial profiling continues to develop, some courts may be more receptive to pattern-and practice-type discovery and proof in the criminal suppression hearing. However, it is unlikely that the exclusionary rule will engender systemic change in police practices in these areas.

B. Civil Damage Actions

The federal civil rights act, *42 U.S.C. 1983*, provides for damages for harm caused by unconstitutional stops and searches conducted by state or local officials. <=349> n346 Claims against federal defendants (usually in the context of border, customs and airport searches) can be maintained directly under the Constitution as a Bivens action, <=350> n347 or under the Federal Tort Claims Act. <=351> n348 The case law and commentary on Section 1983 and Bivens actions is extensive and I will comment briefly only on the potential uses and limitations of damage actions as a means of providing redress to persons unlawfully stopped or searched, and as a means of effectuating systematic reforms.

Damage awards have some potential for triggering institutional reforms. Large verdicts in cases involving unconstitutional practices or customs may deter future misconduct. Proof of racial bias has led to significant damages in the police misconduct context. <=352> n349 Where unconstitutional [*353] practices affect large numbers of persons, as is the case with racial profiling and random stops and searches, the potential damages exposure is commensurately substantial, and governmental agencies may seek to avoid large judgments by a change in practices and policies. Thus, while most commentators have correctly asserted that civil damage actions are not an effective means of achieving systemic or institutional change, <=353> n350 in selected areas, the conventional wisdom may not control.

Other limitations of the damages remedy are well recognized. First, not every violation of a Fourth or Fourteenth Amendment right will establish an entitlement to a damages remedy. The doctrine of qualified immunity provides a broad scope of protection from individual liability from damages where the right asserted was not "clearly established," <=354> n351 or where a reasonably well-trained officer would not have known that his conduct would violate the Constitution. <=355> n352 In Hunter v. Bryant, <=356> n353 the Court ruled that immunity would protect an officer if it was reasonable to believe that probable cause existed, even if it did not. <=357> n354 Chief Judge Newman has criticized this conceptual formulation:

It is not readily apparent how a police officer could have an objectively reasonable belief that conduct was lawful when the unlawfulness of that conduct rests on a determination that an objectively reasonable police office would not have acted. And the situation is especially perplexing in a case like the pending one where, for purposes of removing the first issue from the jury, it has been determined, correctly in our view, that no reasonable juror could fail to find that the officer's conduct was unlawful.

Nevertheless, we have been authoritatively instructed that the objective reasonableness component of the inquiry as to lawfulness is not the same as the objective reasonableness component of the inquiry as to qualified immunity. <=358> n355

[*354] Eleventh Amendment immunity and the statutory limitations on municipal liability may preclude recovery from the only sources that can actually satisfy a judgment. The Eleventh Amendment prohibits suit against a state or state entity (e.g., the Division of State Police) for damages, <=359> n356 and under the Court's section 1983 jurisprudence, a municipal employer is liable only if the constitutional violation was caused by a municipal law, policy, practice, or custom. <=360> n357

As a practical matter, very few violations of the rights of motorists or pedestrians are likely to be filed as civil rights actions. Where contraband is discovered and a criminal prosecution initiated, any civil case must normally await the outcome of the criminal process, and may be precluded by findings and judgments made in the criminal litigation. <=361> n358 Even if there is no legal preclusive effect, the fact of the criminal conviction may undermine any civil suit. Moreover, even where the criminal case is disposed of favorably to the defendant, if the contraband can still be fairly attributed to him, juries are unlikely to provide compensation, even for clear constitutional violations.

In cases in which no contraband is found, and a strong legal claim for damages can be stated, the damages may be too modest to justify full-scale litigation. Absent particularly harsh or malicious conduct, the damages that flow from a relatively short stop and incidental frisk or search, may appear to be nominal to some juries. <=362> n359 As a result, such cases are not likely to attract competent counsel. <=363> n360 Moreover, many civil rights plaintiffs are burdened by racial and class characteristics that may prejudice juries against them. Jurors tend to dismiss their allegations, often awarding them less than a full measure of [*355] compensation. <=364> n361

The prospects change radically, however, if claims can be joined, and particularly if a class action can be maintained. By the very nature of drug interdiction and related car and pedestrian stop operations, thousands of persons may be subjected to unlawful practices. The case for liability becomes exponentially stronger with the supportive allegations and testimony of hundreds or thousands of "innocent" victims of governmental overreaching, and the damage claims become substantial enough to sustain federal litigation. Fear of damages could cause governmental units to reconsider their practices and policies, but are generally insufficient, standing alone, to effectuate institutional change. <=365> n362

C. Injunctive Relief

Federal injunctive relief against state or local officers upon a showing of a violation of federal constitutional or statutory rights is potentially the most effective and far-reaching remedial mechanism for preventing future violations of rights. The injunctive action is not encumbered by personal immunities and the Eleventh Amendment bar is avoided under the Ex Parte Young doctrine. <=366> n363 However, the federal court's equitable powers are circumscribed by federalism, comity, and standing doctrines. <=367> n364 To establish a claim for equitable relief, the plaintiff must meet the ordinary requirements

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for an injunction: that legal remedies are inadequate and that plaintiff is in danger of sustaining substantial and immediate injury if the injunction is not granted. <=368> n365

The requirement of a likelihood of future injury has been treated by the Supreme Court as a separate jurisdictional component: that the plaintiff must show a "credible threat" and not mere "conjectural" future injury. <=369> n366 In City of Los Angeles v. Lyons, <=370> n367 the plaintiff was stopped by Los Angeles police officers for a traffic violation. <=371> n368 After Lyons got out of his car, the officers drew their guns, ordered him to place his hands on top of his head and, without provocation, placed [*356] him in a chokehold causing damage to his larynx. <=372> n369 The Supreme Court ruled that Lyons had not proved a sufficient likelihood that he would again be subject to a police chokehold to make out a case or controversy on his request for an injunction. <=373> n370

The Court stated:

In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the City ordered or authorized police officers to act in such manner. <=374> n371

While the first condition appears draconian, the alternative ground for standing, that the conduct sought to be enjoined is officially authorized, may be more easily established in racial profiling cases, where a pattern and practice of illegal stops of large numbers of persons is proven. <=375> n372 Where the alleged unconstitutional conduct is the product of official policy or practice, there is a far greater likelihood that the conduct will be repeated and that a plaintiff who engages in activities that will bring him into the purview of those practices will suffer future injury. The existence of a policy that will directly affect the plaintiff or members of plaintiff class may be sufficient to establish standing. <=376> n373

[*357] The Supreme Court distinguished Lyons in Friends of the Earth v. Laidlaw Environmental Services, <=377> n374 in granting Article III standing to plaintiffs in an environmental lawsuit challenging the pollution of a river. <=378> n375 The plaintiffs alleged that they had suffered "injury in fact" as they were deterred from using the river for recreational purposes. <=379> n376 The Court ruled that there was "nothing "improbable' about the proposition that a company's continuous and pervasive discharge of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms." <=380> n377 The Court ruled that Lyons did not bar the action as the unlawful conduct was occurring at the time of the filing of the complaint, <=381> n378 a holding that confirms the significant difference between allegations of occasional unlawful conduct and practice and policy cases. Of course, a polluted river can affect everyone using that water source while racial profiling on highways randomly affects thousands out of a much larger class of drivers. Thus, the

question becomes whether once a policy of racial profiling is established, it would be "improbable" for minorities to avoid certain highways or for certain members of the minority group to be stopped on those roads. <=382> n379

Beyond the "official policy" argument, there are several grounds for distinguishing Lyons. First, the Court stressed that the past encounter would only repeat itself if Lyons would again violate the law, thus prompting a police stop, and the highly unusual improper application of a chokehold. <=383> n380 But as the courts have recognized, where for reasons beyond the control of the plaintiff, she is unable to avoid repeating the conduct that led to the original injury, there is a greater likelihood of future injury justifying injunctive relief. <=384> n381 In racial profiling cases where the claim is made that the stop is based on an immutable characteristic and that the plaintiff has not engaged in unlawful activity, this distinction may be sufficient to provide standing. <=385> n382

[*358] Moreover, the conduct adversely affects a class of persons by reason of the invidious characteristic of race. In Lyons, the Court may have been reluctant to make a definitive ruling on chokeholds (which are permissible in some circumstances) without the presence of a party who had a clear stake in the outcome. Racial bias in policing can never be justified and permitting a challenge to such practices by persons who might not otherwise have standing to challenge police policies would be consistent with the Court's willingness to grant broad standing to challenge racially discriminatory practices. <=386> n383

Second, Lyons was subjected to the chokehold on only one occasion and the record in the case demonstrated that this type of force, while serious and at times deadly, <=387> n384 was infrequently employed by the Department. <=388> n385 By contrast, racial profiling plaintiffs, either individually or as members of a class, may have been subjected to numerous stops. Thus, in cases where the plaintiffs alleged repeated stops and a pattern of unconstitutional stops and searches of others, the lower courts have found standing to invoke the court's equitable powers. <=389> n386 Where a class action is certified, standing should be determined by aggregating all of the factual claims of the class members. <=390> n387 Under current doctrine, however, a court may still view the likelihood of future injury as to any particular person to be remote (in profiling situations, given the large number of drivers even a policy of stopping racial minorities may not lead to repeated stops of a particular person), and for that reason rule that a practice that affects thousands of persons is insulated from judicial equitable review because most individuals are not likely to be the victim on more than one occasion. <=391> n388

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D. Federal Government Intervention

The Violent Crime Control and Law Enforcement Act of 1994 authorizes the United States, through the Attorney General, to bring civil actions for declaratory or equitable relief against police departments engaged in a pattern or practice of deprivation of constitutional or statutory rights. <=392> n389 The statute provides potentially broad grounds for intervention and relief, but until recently practical political realities muted the law's potential reach. <=393> n390 Since 1994, the DOJ has taken legal action against five law

enforcement agencies: it has reached consent decrees with the City of Pittsburgh, Pennsylvania, the City of Steubenville, Ohio, <=394> n391 and the State of New Jersey (with respect to the racial profiling on the New Jersey Turnpike). <=395> n392 It has reached a Settlement Agreement with Montgomery County, Maryland (racial profiling on I-95) <=396> n393 and has initiated litigation against the Columbus, Ohio Police Department. <=397> n394

[*360] The Department of Justice and private litigators have crafted consent decrees and other settlement agreements that mandate sweeping structural and institutional reforms. <=398> n395 These settlements and consent decrees require police departments to collect and maintain a wide range of information (in computerized form) that is critical to the effective internal management of departments and to external monitoring of abuse and corruption issues. Properly designed and implemented, these monitoring systems have the potential for remedying misconduct in the same way that COMPSTAT systems have helped police recognize patterns of criminal conduct. <=399> n396 In the area of racial profiling, the decrees mandate that race not be considered in a decision to stop or search (unless the police are acting on a specific description) and that in all stops, searches, and arrests, the department record and maintain information as to the race of the suspect and the reasons for the police action. <=400> n397 Further, departments are required to computerize their record-keeping operations in a manner that creates accessible fields of relevant information. <=401> n398

Police departments are also mandated to initiate early warning systems to alert Commanders and outside monitors of troublesome trends or performances before they become acutely dangerous to the public. <=402> n399 Officers who are involved in a disproportionate number of [*361] questionable stops or searches, use of force, or other discretionary conduct, or who are the subject of repeated civilian complaints, can be identified and counseled and re-trained even before disciplinary action may be warranted. The consent decrees require departments to ensure the integrity and fairness of internal affairs investigations into civilian complaints. <=403> n400

The New Jersey Turnpike Agreement prohibits troopers from considering the race, nationality, or ethnicity of motorists or passengers in determining which vehicles to stop or in "enforcement action or procedure" (e.g., searches), unless race or national or ethnic origin was part of a description of a suspect. <=404> n401 To effectuate this policy, the Consent Decree requires officers to record data on motor vehicle stops, including the gender and race or ethnicity of the driver and any passenger who was the subject of a "procedure," and the reason for the stop and any search resulting from the stop. <=405> n402 Further, supervisors must review troopers' reports on stops and may also review the corresponding audio/visual tapes. <=406> n403 When such review reveals a possible violation of the provisions of the decree or shortcomings in meeting the reporting or recording requirements, "nondisciplinary" action such as counseling or more training may be ordered. <=407> n404

New Jersey is also required to develop a "Management Awareness Program" that uses the data collected by troopers, the results of investigations, and other sources to "identify and modify potentially problematic behavior" by troopers. <=408> n405 Data analyses under the MAP must include:

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[A] comparison of racial/ethnic percentages of motor vehicle stops (by reason for the stop ...) and racial/ethnic percentages of enforcement actions and procedures taken in connection with or during the course of such stops, with a benchmark racial/ethnic percentage if available;

[A] comparison of racial/ethnic percentages for such stops with the racial/ethnic percentages for enforcement actions taken in connection with or during the course of such stops;

[*362]

[A] comparison of racial/ethnic percentages for consent searches of vehicles, and requests for consent to search vehicles, with "find" rates by race/ethnicity for motor vehicle consent searches;

[A] comparison of racial/ethnic percentages for non-consensual searches of motor vehicles with "find rates" by race/ethnicity for motor vehicle non-consensual searches. <=409> n406

The New Jersey Decree does not remedy all problems (for example, it does not prohibit pretextual stops), but if fully implemented it has the very strong potential of ending racial profiling on the New Jersey Turnpike. The combination of detailed data collection and analysis, limits on consent searches, and mandatory internal and external audits provide powerful tools for reform. <=410> n407

The Philadelphia Police Department Agreement covers a broader range of police practices. Among other provisions, it requires (1) computerization of standard police paperwork and all information relating to citizen complaints, use of force, firearms discharges, and other police activities that may disclose misconduct in a format that permits retrieval of information by officer, district, special squads, and category of police work, <=411> n408 (2) close reviews and audits of narcotics officers, including their applications for search warrants, "find" rates and use of force during searches, surveillance records, and use of informants, <=412> n409 (3) a substantial reform of the procedures of the Internal Affairs Division, <=413> n410 (4) accountability of supervisors for the preventable misconduct of police officials, <=414> n411 and (5) procedures and policies to counter racial bias in policing. <=415> n412 On this last issue, the Agreement provides:

A. Specific and detailed training with respect to equal treatment of citizens [and] promulgation of disciplinary regulations for racially biased police work.

B. A Deputy Commissioner [must] (1) monitor police records and complaints as

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they involve minorities and allegations of racial discrimination, (2) act as a liaison to representatives of minority communities and to officials in the Department dealing with race related issues, and (3) [*363] monitor programs with respect to hiring and promotion of minorities.

C. Pedestrian and vehicle stops [are to] be recorded ... even if the stop does not yield information, detention, evidence or an arrest. Each document must state the reason for the stop, for any police action taken (e.g., frisk, search, questioning), and the race of the person(s) stopped.

[A] review and audit, on a regular basis, [of] the patterns of these stops to determine whether impermissible racial factors are involved. Individuals identified on the police reports, but against whom no charges have been made, should be contacted on a random basis to determine if the police conduct was justified and to examine any possible racial patterns.

D. Individual officers' and supervisors' files (as computerized) should contain any allegations or findings of racial bias. In addition, the records of stops, searches, arrest and civilian complaints in the files should be periodically reviewed to determine whether racial bias or patterns are evident. <=416> n413

V. The Elements of Reform

Three developments have converged in the past few years with the distinct potential of altering the legal and political landscape of contemporary policing practices. First, there is almost universal condemnation of "racial profiling" and, while the debate as to the proper definition of this term will continue, there is growing support for the principle that race cannot be used to any degree to support a discretionary judgment by a police officer to stop, frisk, or search a suspect, except where a description of a suspect has been provided. Police departments will be pressed to adopt and implement policies prohibiting racial profiling and the courts are likely to intervene where patterns of racial profiling are proven.

Second, for the first time, reliable data are being collected and analyzed with respect to both racial disparities in stops and searches and whether adequate cause exists for the police intrusions. These data are essential to any serious effort to reconsider constitutional doctrine and to address the remedies necessary for racial profiling and other arbitrary police conduct.

Third, effective judicial remedial measures that reflect a more progressive police management philosophy have been adopted and, if properly implemented, hold the promise for significant amelioration of past abuses. Notwithstanding the serious obstacles that make federal injunctive relief far too problematical, strong pleadings and evidentiary showings have resulted in some preliminary adjudications sustaining complaints, certifying class actions, and permitting discovery of critical police department records. Further, the Department of

Justice has begun to exercise its powers to litigate pattern and practice [*364] cases of police misconduct and the Department as entered into a number of state of the art consent decrees.

These developments create the potential for bridging the enormous gap between the promises of the Constitution and the realities of street level policing. Ultimately, the abuses will be significantly reduced only where there are fundamental reforms in police policies and practices. The following are essential elements of a reform agenda.

A. Legislative and Administrative Measures

. Racial profiling should be prohibited. Race should not be a permissible factor in the discretionary decision to stop, search, or arrest, unless the police have specific descriptive racial information concerning a suspect.

. Law enforcement agencies should be mandated by law to collect, maintain, and report all relevant data concerning the race of persons stopped and searched, the legal cause for traffic and pedestrian stops and searches, and all relevant circumstances surrounding the stop (e.g., requests for consent, use of narcotics dogs, use of force). The provisions of the pending federal legislation on traffic stop statistics and the terms of the Consent Decrees entered into by the Department of Justice and State of New Jersey should provide models for legislatures and law enforcement agencies.

. Analysis of these data should include a comparison of all relevant categories of racial/ethnic percentages for car stops and searches and of all police investigatory methods used during these stops (with a benchmark racial/ethnic percentage if available).

. Analysis of data concerning pedestrian stops should include the same types of racial/ethnic comparisons for stops, frisks, and searches. Audits should be performed to determine whether stops are being made with adequate cause.

. Pretextual stops should be prohibited. Traffic stops should be made only for observed traffic violations or where adequate cause supports a criminal investigatory stop. The decision to stop should be made independent of race and should not be made on the mere suspicion of drug possession.

. In all circumstances in which consent to search is requested, the person should be informed of her right to refuse consent. All consent requests should be recorded, and all consents should be in writing and signed by the driver, passenger, or pedestrian who was stopped.

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B. Doctrinal Reform

. The Fourth Amendment should be construed to prohibit pretextual stops based on the race of the "suspect."

. Statistical evidence of significant racial disparities in stops and searches (controlled for relevant non-racial factors) should be sufficient to state a prima facie case of Fourteenth Amendment and Title VI claims of race

discrimination.

. Constitutional standing principles for raising constitutional claims of racial discrimination and for lack of cause of stops and searches should be adjusted to permit federal lawsuits where patterns or practices of unconstitutional conduct are alleged and where plaintiffs have been subjected to the complained-of practices.

. An evidentiary showing of significant numbers of stops without legal justification should provide grounds for class monetary and injunctive relief.

. Discovery rules in criminal procedure proceedings should be substantially broadened to require disclosure of pattern and practice evidence.

. Where categories of conduct that have been recognized as permissible grounds for an investigative stop are demonstrated by empirical evidence to result in extremely low rates of determined criminal conduct, the Court should reconsider the Fourth Amendment standards associated with this conduct.

C. Enforcement

. The Department of Justice should vigorously investigate and litigate pattern and practice police misconduct and should continue to draft and implement consent decrees that advance "best practices" and which effectively control unconstitutional practices.

. Police Departments should ensure that their Internal Affairs Unit conduct investigations of police misconduct with impartiality, integrity, and with the necessary resources. There should be "early warning systems" capable of detecting patterns of misconduct by individual officers or units within the Department. Supervisors should be held accountable for preventable misconduct of line officers.

. Civilian review should be established to ensure competent and vigorous external oversight of allegations of individual and institutional (pattern and practice) misconduct.

[*366] * * *

Policing by racial stereotypes and by serendipity has long been the norm in too many locations. The challenge to these long established practices must be multi-faceted and include political, administrative, and legal reform. The integrity of the constitutional framework hangs in the balance.

FOOTNOTES:

n1. *Wilson v. Tinicum Township, No. Civ. A. 92-6617, 1993 WL 280205, at 2* (E.D. Pa. July 20, 1993) (Opinion on Class Action Certification).

n2. Id.

the percentage of minority violators, discretionary stops (made by patrol officers involved in drug interdiction) resulted in double the number of stops of minorities. <=31> n30 Of all stops resulting in the issuance of a traffic citation, 88% involved cars with a minority driver or passenger and 63% involved a black male 30 years or younger. <=32> n31

A study conducted by the Attorney General of New Jersey confirmed and expanded upon these findings. The Attorney General determined that searches of cars on the Turnpike were even more racially disparate than the initial stops: 77.2% of all "consent" searches were of minorities and blacks. <=33> n32 The Attorney General concluded that the use of arrest statistics could not justify racially disparate stops and searches, as those arrests were the product of racially discriminatory law enforcement practices. <=34> n33

In Volusia County, Florida, where Sheriff's cars were fitted with video cameras that recorded routine traffic stops, 148 hours of videotape documenting over 1,000 stops of cars on a stretch of I-95 where 5% of the drivers were African-American or Latino, revealed that nearly 70% of the persons stopped by the police were minorities. <=35> n34

In Illinois, the state police initiated a drug interdiction program ("Operation Valkyrie") in which they used aggressive enforcement of traffic laws on interstates to stop motorists and then examine them and their cars for indicators of drug trafficking. <=36> n35 A statistical study of the racial impact of these stops on Hispanic drivers showed the following. <=37> n36

[*301] While Hispanics comprise less than 8% of the Illinois population, and take fewer than 3% of the personal vehicle trips in Illinois, they comprise approximately 30% of the motorists stopped by drug interdiction officers for discretionary offenses such as failure to signal a lane change or driving one to four miles over the speed limit. <=38> n37

Troopers assigned to Valkyrie teams stop Hispanic motorists for traffic violations two or three times more frequently than other troopers patrolling the same highways and charged with enforcing the same laws. <=39> n38 For example, in three counties in northern Illinois, where Hispanics comprise less than 3% of the local driving-age population, Hispanics make up 25% of the persons stopped by Valkyrie officers, while the rate for non-Valkyrie officers is 8%. <=40> n39

While Hispanics compromise 27% of the searches conducted by Valkyrie officers, troopers find contraband in a lower percentage of the vehicles of Hispanic motorists than in the vehicles of white motorists. <=41> n40

Statistical studies conducted of car and pedestrian stops in Philadelphia also demonstrate patterns of stops without cause and racial profiling. <=42> n41 For a one-week period in July, 1999, for car and pedestrian stops made in predominantly white police districts, the ratio of African-Americans who were stopped was up to ten times higher than one would expect from population data. <=43> n42 In predominantly minority police districts, stops were closely aligned to population data. <=44> n43 Further, one-third of all pedestrian stops were made without sufficient written explanation. <=45> n44

[*302] In Ohio, a study of the traffic ticketing of several police

n3. Id.

n4. Ann Stewart, Black Motorists Sue Police for Stopping Them on Highway, Gannett News Service, Nov. 19, 1992, available at *1992 WL 9397933*.

n5. See *Wilson 1993 WL 280205, at 2*.

n6. Id. As to the officer's statement, see *Wyoming v. Houghton, 526 U.S. 295, 298 (1999)* (suspect's admission made with "refreshing candor").

n7. Gerald v. Oklahoma Dep't of Pub. Safety, CIV-99-676-R, slip op. at 1 (W.D. Okla. Dec. 21, 1999); ACLU, Driving While Black: Racial Profiling on our Nation's Highways 3 (1999) [hereinafter ACLU Report]; Kevin Johnson, ACLU Campaign Yields Race Bias Suit, USA Today, May 19, 1999, at 4A.

n8. ACLU Report, supra note 7; *Johnson, supra* note 7.

n9. ACLU Report, supra note 7.

n10. Gerald, slip op. at 6.

n11. Bob Herbert, In America: Attention Must be Paid, N.Y. Times, Sept. 30, 1999, at A29; Dinitia Smith, Actor Resumes Role After Ordeal, N.Y. Times, July 22, 1999, at B3.

n12. *Smith, supra* note 11.

n13. Id.

n14. Id.

n15. Stephen Barr, Two Allege Racial Bias by Customs, Wash. Post, May 21, 1999, A29.

n16. Id.

n17. Id.

n18. Id.

n19. Id.

n20. Id.

n21. Gary Webb, DWB, Esquire, Apr. 1999, at 120; see also *Rodriguez v. California Highway Patrol, 89 F. Supp. 2d 1131 (N.D. Cal. 2000)* (addressing the litigation that resulted from these events).

n22. Webb, supra note 21, at 120.

n23. Id.

n24. Id.

n25. See, e.g., David Cole, No Equal Justice: Race and Class in the American Criminal Justice System 34-41 (1999) (discussing pretextual traffic stops of minority motorists); ACLU Report, supra note 7 (reporting on the problem of racial profiling during highway traffic stops); Angela J. Davis, Race, Cops, and Traffic Stops, *51 U. Miami L. Rev. 425 (1997)* (discussing the discretionary nature of pretextual traffic stops and their discriminatory effect on minority motorists); David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, *87 J. Crim. L. &*

Criminology 544 (1997) [hereinafter Harris, Driving While Black] (discussing the effects of Whren v. United States on pretextual traffic stops); David A. Harris, The Stories, the Statistics, and the Law: Why "Driving While Black" Matters, *84 Minn. L. Rev. 265 (1999)* [hereinafter Harris, The Stories] (discussing the experiences of African-American drivers who were stopped for pretextual traffic violations); Sheri Lynn Johnson, Race and the Decision to Detain a Suspect, *93 Yale L.J. 214 (1983)* (discussing the interplay between the determination of probable cause and race); Christo Lassiter, Eliminating Consent from the Lexicon of Traffic Stop Interrogations, *27 Cap. U. L. Rev. 79 (1998)* (discussing the validity of consent interrogations that occur after a traffic stop in the state of Ohio); Tracey Maclin, Race and the Fourth Amendment, *51 Vand. L. Rev. 333 (1998)* [hereafter Maclin, Race] (discussing the role of race during pretexual traffic stops); Reginald T. Shuford, Anyway You Slice It: Why Racial Profiling is Wrong, *18 St. Louis U. Pub. L. Rev. 371 (1999)*; David A. Sklansky, Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment, *1997 Sup. Ct. Rev. 271* (discussing the effect of traffic stops of minority motorists on Fourth Amendment jurisprudence); Anthony C. Thompson, Stopping the Usual Suspects: Race and the Fourth Amendment, *74 N.Y.U. L. Rev. 956 (1999)* (discussing the constitutional and policy implications of racially motivated searches and seizures); Jennifer A. Larrabee, Note, "DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice, 6 J.L. & Pol'y 291 (1997) (arguing that the Equal Protection Clause of the Fourteenth Amendment should bar the consideration of race when police decide who to detain for a traffic violation); Henry Louis Gates, Jr., Thirteen Ways of Looking at A Black Man, The New Yorker, Oct. 23, 1995, at 56, 58-59 (discussing "war stories" of famous African-American men stopped by police).

Courts have also addressed the issue. For example, the Ninth Circuit described a series of stops of African-American celebrities:

The police ... erroneously stopped businessman and former Los Angeles Laker star Jamaal Wilkes in his car and handcuffed him, and stopped 1984 Olympic medalist Al Joyner twice in the space of twenty minutes, and once forcing him out of his car, handcuffing him and making him to lie spread-eagled on the ground at gunpoint. Similarly, actor Wesley Snipes was taken from his car at gunpoint, handcuffed, and forced to lie on the ground while a policeman kneeled on his neck and held a gun to his head. Actor Blair Underwood was also stopped in his car and detained at gunpoint. We do not know exactly how often this happens to African-American men and women who are not celebrities and whose brushes with the police are not deemed newsworthy.

Washington v. Lambert, 98 F.3d 1181, 1182, n.2 (9th Cir. 1996) (citations omitted). See also, *Price v. Kramer 200 F.3d 1237, 1240 (9th Cir. 2000)* (sustaining award of $ 245,000 to two African-Americans stopped and abused by police).

n26. See infra notes 122-145 and accompanying text.

n27. I use the term racial profiling to mean any stop, search, or arrest of a person based in whole or in part on the race of the suspect, except where police are acting on a racial description of the perpetrator of a crime. Arbitrary stops, searches, or arrests refer to police investigatory practices without the requisite cause or suspicion required by the Fourth Amendment.

n28. *State v. Soto, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996)* (noting that the statistical disparities between African-American and white motorists stopped for traffic offenses were "stark").

n29. *Id. at 352-55;* Harris, The Stories, supra note 25, at 278-90.

n30. *Soto, 734 A.2d at 354.*

n31. *Id. at 356.*

n32. Peter Verniero, Attorney General of New Jersey, Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling 26-28 (Apr. 20, 1999), available at http://www.state.nj.us/lps/intm<uscore>419.pdf [hereinafter Interim Report of Attorney General of New Jersey].

n33. Id. at 67-68.

n34. Jeff Brazil & Steve Berry, Color of Drivers is Key to Stops on I-95 Videos, Orlando Sentinel, Aug. 23, 1992, at A-1; Harris, Driving While Black, supra note 25, at 561-62.

n35. ACLU Report, supra note 7, at 27.

n36. Id. The statistical evidence is set forth in *Plaintiffs' Experts' Reports, Chavez v. Illinois State Police, 27 F. Supp. 2d 1053, 1069 (N.D. Ill. 1998)* (No. 94 C 5307) (on file with author).

n37. ACLU Report, supra note 7, at 27.

n38. Id. at 28.

n39. Id.

n40. Id. at 27-28. In the highway drug interdiction field, a little known federal program, "Operation Pipeline," financed by the Drug Enforcement Agency (DEA) and administered by over 300 state and local law enforcement agencies, has had substantial influence on profiling practices. Gary Webb, DWB, Esquire, Apr. 1999, at 118. The DEA has trained thousands of officers in drug interdiction practices that rely heavily on pretextual traffic stops of "suspicious" vehicles. Id. at 123-24. This "volume" approach to law enforcement sweeps an overwhelming number of innocent drivers. In 1997, the California Highway Patrol stopped 34,000 cars and ultimately seized contraband in 2% of these stops. Id. at 122. As one California Highway Patrol sergeant explained, "it's sheer numbers ... . Our guys make a lot of stops. You've got to kiss a lot of frogs before you find a prince." Id.

n41. Plaintiffs' Fourth Monitoring Report, Pedestrian and Car Stop Audit, NAACP v. City of Philadelphia, C.A. No. 96-CV-6045 (E.D. Pa. July, 1998) [hereinafter Fourth Philadelphia Report]; Plaintiffs' Fifth Monitoring Report, Pedestrian and Car Stop Audit, NAACP v. City of Philadelphia, C.A. No. 96-CV-6045 (E.D. Pa. Dec. 7, 2000) [hereinafter Fifth Philadelphia Report].

n42. Fifth Philadelphia Report, supra note 41, at 9-10, 22-26.

n43. Id. at 20-25.

n44. Id. at 13-14.

n45. Harris, The Stories, supra note 25, at 281-88.

n46. Office of the Attorney General of New York State, Report on the New York City Police Department's "Stop & Frisk" Practices 88-89 (1999), available at http://www.oag.
state.ny.us/press/reports/stop<uscore>frisk/stop<uscore>frisk.html [hereinafter

Report of Attorney General of New York].

n47. Id. at 95.

n48. Id. at 105-06.

n49. Id. at 111.

n50. Id. at 121, 126.

n51. Id. at 160-62

n52. Id. at 162-64.

n53. Amadou Diallo was shot and killed on February 4, 1999 when four officers mistook a wallet he as holding for a gun and fired 41 shots at him. The officers were acquitted of criminal charges in February, 2000. See infra notes 223-225 and accompanying text.

n54. *Report of Attorney General of New York, supra* note 46, at 117 n.23.

n55. James M. Shannon, Attorney General of Massachusetts, Report of the Attorney General's Civil Rights Division on Boston Police Department Practices 60-61 (Dec. 18, 1990).

n56. U.S. General Accounting Office, U.S. Customs Service: Better Targeting of Airline Passengers for Personal Searches Could Produce Better Results 2, 40 (Mar., 2000). See also, Anderson v. Cornejo, No. 97 C 7556, *1999 U.S. Dist. LEXIS 519* (N.D. Ill. Jan. 11, 1999) (denying class certification of African-American women who claimed that they were improperly searched when going through customs at O'Hare International Airport).

n57. *United States General Accounting Office, supra* note 56, at 40.

n58. Id. at 2.

n59. E.g., Lassiter, supra note 25, at 115-19 (listing studies, newspaper articles, and reports). For additional data, see Tanya Albert, Chief Acknowledges Racial Profiling, Cincinnati Enquirer, Feb. 1, 2000, at 1; Barbara Whitaker, San Diego Police Found to Stop Black and Latino Drivers Most, N.Y. Times, Oct. 1, 2000, 1, at A31.

n60. Will Lester, Americans Think Racial Stops are Widespread, Phila. Inquirer, Dec. 11, 1999 at A14. In a survey of Philadelphia residents, the Pew Center for Civil Journalism found that 60% of whites, but only 39% of blacks believed that the police "treat everyone the same." Chris Brennan, Crime is a Local Concern, Phila. Daily News, Feb. 11, 2000, at 12.

n61. Lester, supra note 60.

n62. E.g., Jeffrey Goldberg, The Color of Suspicion, N.Y. Times, June 20, 1999, 6 (Magazine), at 51. On January 17, 2000, Democratic Presidential candidates Al Gore and Bill Bradley promised to end racial profiling if elected as President. Excerpts From Bradley-Gore Debate in Des Moines, N.Y. Times, Jan. 18, 2000, at A20.

n63. See infra notes 64 and 76 and accompanying text.

n64. For commentary on community policing, police discretion, and constitutional limits, see David Cole, Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship, *87 Geo. L.J. 1059 (1999)* (discussing legal scholarship supporting police discretion); Dan M. Kahan & Tracy L. Meares, The Coming Crisis of Criminal Procedure, *86 Geo. L.J. 1153 (1998)* (discussing the constitutional scrutiny used to evaluate community policing); Debra Livingston, Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing, *97 Colum. L. Rev. 551 (1997)* (critiquing police discretion in community policing); Tracey Maclin, What Can Fourth Amendment Doctrine Learn From Vagueness Doctrine?, *3 U. Pa. J. Const. L. 399 (2001)*; Dorothy E. Roberts, Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing, *89 J. Crim. L. & Criminology 775 (1999)* (arguing that order-maintenance policing can reinforce racist presumptions regarding the criminal behavior of minorities).

n65. E.g., Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics - 1997 (Kathleen Maguire & Ann L. Pastore eds., 1997). Moreover, with the increase of "hate-crime" legislation, law enforcement officials must analyze certain criminal conduct from the perspective of race and must keep records that reflect the race (and other statutorily covered characteristics) of victims and alleged offenders.

n66. See infra note 76 and accompanying text.

n67. For an interesting analysis of the ways in which the courts and other institutions have avoided confronting institutional patterns of misconduct by reducing evidence to anecdotes, see Susan Bandes, Patterns of Injustice: Police Brutality in the Courts, *47 Buff. L. Rev. 1275, 1307-09 (1999)*.

n68. See infra notes 359-361 and accompanying text.

n69. Kevin Johnson & Gary Fields, Police Chiefs Resist Race-Related Tallies, USA Today, Apr. 8, 1999, at 7A; Robert L. Jackson, Push Against Bias in Traffic Stops Arrested, L.A. Times, June 1, 1998, at A5.

n70. See ACLU Report, supra note 7, at 39-40; Harris, The Stories, supra note 25, at 321-22. Currently, Missouri, Connecticut, North Carolina, Washington, and Kansas require data collection. See supra note 70.

n71. H.R. 118, 105th Cong. 1 (1998). The Act provided that:

The Attorney General shall conduct a study of stops for routine traffic violations by law enforcement officers. Such study shall include collection and analysis of appropriate available data. The study shall include consideration of the following factors, among others:

(1) The number of individuals stopped for routine traffic violations.

(2) Identifying characteristics of the individual stopped, including the race and or ethnicity as well as the approximate age of that individual.

(3) The traffic infractions alleged to have been committed that led to the stop.

(4) Whether a search was instituted as a result of the stop.

(5) How the search was instituted.

(6) The rationale for the search.

(7) Whether any contraband was discovered in the course of the search.

(8) The nature of such contraband.

(9) Whether any warning or citation was issued as a result of the stop.

(10) Whether an arrest was made as a result of either the stop or the search.

(11) The benefit of traffic stops with regard to the interdiction of drugs and the proceeds of drug trafficking, including the approximate quantity of drugs and value of drug proceeds seized on an annual basis as a result of routine traffic stops.

n72. See supra note 69 and accompanying text. In 1999 the International Association of Chiefs of Police ("IACP") announced its opposition to "proactive traffic enforcement that is race or ethnic-based," but defined such activity as stops and searches made "simply because of race," and refused to endorse federal legislation requiring maintenance of data on these practices. IACP, Recommendations from the First IACP Forum on Professional Traffic Stops 2-8 (Apr. 6, 1999) (on file with author). The IACP recommended "voluntary" local efforts to collect data on traffic stops. Id. at 7-8. At a conference called by the Attorney General of the United States, "Strengthening Police-Community

Relationships," in June 1999, several police officials opposed data collection regarding racial characteristics of car stops, expressing concerns about cost, officer integrity in collecting the data, "legal questions" concerning asking drivers questions about race, and use of the data in performance and other officer evaluations. U.S. Dep't of Justice, Summary Report of Attorney General's Conference: Strengthening Police-Community Relationships 35 (June 1999) (on file with author).

The Department of Justice currently supports collection and maintenance of this data, but for many years declined the authority to do so. See Peter L. Davis, Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality when the Prosecutor Declines to Prosecute, *53 Md. L. Rev. 271, 274 n.4 (1994)* (noting that the Justice Department, while conducting a study of police brutality on its own, had previously opposed legislation requiring similar studies because of fears that such measures would hamper efforts to improve local police agencies).

n73. Harris, The Stories, supra, note 25, at 276; Alan Jenkins, See No Evil, The Nation, June 28, 1999, at 15. On March 1, 2000, the House Judiciary Committee approved an updated version of the racial profiling legislation. 146 Cong. Rec. H 930 (2000); H.R. 1443, 106th Cong. 1 (1999). See also, Hearing on S. 821, 106th Cong. 1 (1999), Subcommittee on Constitution, Federalism, and Property Rights, 146 Cong. Rec. D292 (2000).

n74. While most of the recent attention has focused on the "driving while black" phenomenon, racial bias in pedestrian stops, and the problem of random stops regardless of race present equally serious challenges. See infra Part III.

n75. See supra text accompanying note 62.

n76. The debates over "broken window" theories, zero tolerance of "quality of life" crimes, drug enforcement policies and aggressive patrol tactics reveal deep philosophical and operational divides. On the policing practices, see, for example William Bratton & Peter Knobler, Turnaround: How America's Top Cop Reversed the Crime Epidemic (1998) (discussing Bratton's role in reducing crime as New York City's Police Commissioner); Randall Kennedy, Race, Crime, and the Law, 138-63 (1998) (discussing police use of race as an indication of increased risk of criminality); Robert C. Ellickson, Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning, *105 Yale L.J. 1165, 1168-69 (1996)* (discussing the history and legal responses to chronic street nuisances); Judith A. Greene, Zero Tolerance: A Case Study of Police Policies and Practices in New York City, 45 Crime & Delinq. 171 (1999) (discussing the policing practices introduced in New York City by police commissioner William Bratton); Bernard E. Harcourt, Reflecting on the Subject: A

departments demonstrated that African-Americans were two to three times more likely to receive traffic tickets than their white counterparts. <=46> n45

The Attorney General of New York conducted a study of 175,000 pedestrian stops by the New York City Police Department and found a highly disproportionate rate of stops of minorities. <=47> n46 The Attorney General determined that (1) African-Americans were stopped six times more frequently than whites, <=48> n47 (2) in precincts with a white population of 80% or more and where African-Americans constitute 10% or less of the population, stops of African-Americans comprised 30% of all stops, more than ten times their percentage of the population, <=49> n48 (3) stops of African-Americans were less likely to result in arrests than stops of whites, <=50> n49 and (4) adjusting for crime rates by race, the differences in stops of minorities compared to stops of whites is statistically significant, with African-Americans stopped twice as often as whites. <=51> n50

The Attorney General also reported that where a full factual statement concerning the stop was provided by the police, 15.4% of the stops failed to comply with Fourth Amendment standards. <=52> n51 In addition, 23.5% of the stops failed to provide a sufficient factual basis, on their face, to determine whether the stop was constitutionally proper. <=53> n52 Stops by the elite "Street Crime Unit" (that was involved in the death of Amadou Diallo) <=54> n53 based on suspicion of possession of a weapon, yielded a weapon in only 2.5% of all stops. <=55> n54

The Massachusetts Attorney General investigated claims of racial bias and illegal stops in Boston and reported:

We conclude that Boston police officers engaged in improper, and unconstitutional, conduct in the 1989-90 period with respect to stops and searches of minority individuals ... . Although we cannot say with precision how widespread this illegal conduct was we believe that it was sufficiently common to justify changes in certain Department practices.

Perhaps the most disturbing evidence was that the scope of a number of Terry searches went far beyond anything authorized by that case and indeed, [*303] beyond anything that we believe would be acceptable under the federal and state constitutions even where probable cause existed to conduct a full search incident to an arrest. Forcing young men to lower their trousers, or otherwise searching inside their underwear, on public streets or in public hallways, is so demeaning and invasive of fundamental precepts of privacy that it can only be condemned in the strongest terms. The fact that not only the young men themselves, but independent witnesses complained of strip searches, should be deeply alarming to all members of this community. <=56> n55

Stops and searches by customs officials also disclose racial bias. In 1998, there were approximately 52,000 people selected for body searches (ranging from hand frisks to strip and cavity searches) by customs officials. <=57> n56 No contraband was found in 96% of these searches and almost half of all persons selected for search were African-American or Latino. <=58> n57 Further in

Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style, *97 Mich. L. Rev. 291 (1998)* (using empirical data to critique New York City's quality-of-life initiative); Symposium, Why is Crime Decreasing? *88 J. Crim. L. & Criminology 1173 (1998)*; Fox Butterfield, Rethinking the Strong Arm of the Law, N.Y. Times, Apr. 4, 1999, 4 (Week in Review), at 1 (promoting community policing as an alternative to the zero tolerance approach taken in New York City); Michael Massing, The Blue Revolution, New York Review of Books, Nov. 19, 1998, at 32 (reviewing several books discussing crime and the application of the broken windows theory); James Q. Wilson & George L. Kelling, Broken Windows: The Police and Neighborhood Safety, The Atlantic Monthly, Mar. 1982 (discussing police foot patrols and other efforts to improve community policing).

Claims that aggressive policing, including pretextual car stops, stop and frisks of pedestrians, and zero tolerance of low level criminal conduct have caused a reduction in crime are much disputed. For the proponents' view, see Bratton & Knobler, supra; Greene, supra. See also William J. Bratton, Why Lowering Crime Didn't Raise Trust, N.Y. Times, Feb. 25, 2000, at A19 (suggesting that the reduction in crime rates in New York City was the result of assertive policing strategies). Critics of this view dispute the effectiveness, necessity and legality of these practices. E.g., Harcourt, supra; Cole, supra note 25; Fox Butterfield, Cities Reduce Crime and Conflict Without New York-Style Hardball, N.Y. Times, Mar. 4, 2000, at A1 (comparing crime reduction rates by city and types of policing and reporting more reductions in "community oriented" policing in San Diego than in New York City); Roberts, supra note 64, at 811 ("In the same way that minor infractions of order ... can allegedly lead to serious crime, minor infringements of citizens' liberties can cause serious damage to the relationship between government and the governed ... ."). Indeed, if the broken windows theory is correct, it is fair to ask why police officials who advocate order-maintenance policing as the way to effectuate this theory are not equally vigilant in attempting to end low level abuses of citizens by police to prevent the more serious abuses that will surely follow under this theory of human behavior.

n77. Goldberg, supra note 62, at 51.

n78. See Thompson, supra note 25, at 999 (discussing the view in Dinesh D'Sousa, The End of Racism, Principles for a Multiracial Society 284 (1995), that using race as a proxy for suspicion may be a form of "rational discrimination"); *Kennedy, supra* note 76, at 145 (acknowledging higher crime rates among African-Americans, but strongly condemning use of race in determining suspicion). It is important to analyze the data concerning crime and arrest rates, by type of crime and reporting systems. Thus, while arrest records and victimization studies demonstrate that blacks commit more homicides and robberies than whites, see Bureau of Justice Statistics, supra note 65, at 338, drug arrest statistics are driven far more by law enforcement practices than actual use or distribution of drugs and, therefore, these statistics do not accurately measure the rate of "drug crimes." Human Rights Watch, Punishment and Prejudice: Racial Disparities in the War on Drugs (May, 2000), available at http://www.hrw.org/reports/2000/usa/.

n79. Race is an appropriate factor in stops where the police have been provided with a description of a criminal suspect. In the car stop context, however, descriptions are virtually never at play since almost all stops are made for alleged traffic violations. "Drug courier" profiles stops are made when there is no specific criminal information about any particular person. Pedestrian stops based on descriptions of alleged perpetrators were fewer than 30% of all stops in the *New York City study*. *Report of Attorney General of New York, supra* note 46, at 122 n.30.

n80. The Federal Substance Abuse and Mental Health Services Administration's 1997 National Household Survey on Drug Abuse found that the rate of illicit drug use for blacks was 7.5%, for whites, 6.4%, and for Hispanics, 5.9%. U.S. Dep't of Health and Human Servs., Substance Abuse and Mental Health Servs. Admin., National Household Survey on Drug Abuse - 1997 (1997). See also, Sam Vincent Meddis, Is the Drug War Racist?, USA Today, July 23, 1993, at A1 (noting that while black and white drug use are nearly the same, the war on drugs has been fought mainly against blacks). As the Human Rights Watch has reported:

According to the most recent NHSDA [National Household Survey on Drug Abuse] survey, in 1998 there were an estimated 9.9 million whites (72 percent of all users) and 2.0 million blacks (15 percent) who were current illicit drug users in 1998. There were almost five times as many current white marijuana users as black and four times as many white cocaine users. Almost three times as many whites had ever used crack as blacks. Among those who had used crack at least once in the past year, 462,000 were white and 324,000 were black. Only among current crack users did the number of blacks exceed the number of whites - and this was a change from previous years in which the number of current white crack users had exceeded the number of black users. SAMHSA [Substance Abuse and Mental Health Services Administration] also estimated that in 1998 there were 4,934,000 whites who used marijuana on 51 or more days in the past year, compared to 1,102,000 blacks, and 321,000 whites who had used cocaine on 51 or more days in the past year compared to 171,999 blacks. (citations omitted).

Human Rights Watch, supra note 78, at 20.

n81. Ron Harris, Blacks Feel Brunt of Drug War, L.A. Times, Apr. 22, 1990, at A1.

n82. Drew S. Days III, Race and the Criminal Justice System: A Look at the Issue of Selective Prosecution, *48 Me. L. Rev. 181, 186-87 (1996)*.

n83. Genaro C. Armas, War on Drugs Needs to Reach Small Towns, Rural Areas, Study Says, Phila. Inquirer, Jan. 27, 2000, at A9 (citing study released by the National Center on Addiction and Substance Abuse at Columbia University).

n84. U.S. Dep't of Commerce, Bureau of the Census, 1990 Census of Population (1990), available at http://www.census.gov/prod/3/98pubs/CP1-US.PDF.

n85. Armas, supra note 83 (citing study released by the National Center on Addiction and Substance Abuse at Columbia University). Among African-Americans, use of drugs has consistently run at lower levels than among whites. Human Rights Watch, supra note 78, at 19-20.

n86. E.g., Meddis, supra note 80.

n87. Id.

n88. Human Rights Watch, supra note 78, at 20-21.

n89. Interim Report of Attorney General of New Jersey, supra note 32, at 67-68. See also, Developments in the Law - Race and the Criminal Process, *101 Harv. L. Rev. 1473, 1508 (1988)* (asserting that use of arrest statistics to justify use of race creates self-fulfilling prophecy because it encourages the police to arrest minorities more frequently).

Empirical data regarding use of drug courier profiles at airports and other transportation hubs similarly expose the flaws in relying on factors unrelated to criminal conduct. See, e.g., *United States v. Hooper, 935 F.2d 484, 500 (2d Cir. 1991)* (Pratt, J., dissenting) (noting that in an operation at the Buffalo Airport, police were "correct" in their stops in fewer than two percent of their profile encounters). Similar results mark other profile based investigations. *United States v. Montoya de Hernandez, 473 U.S. 531, 557 (1985)* (Brennan, J., dissenting) ("The available evidence suggests that the number of highly intrusive border searches of suspicious-looking but ultimately innocent travelers may be very high."); *United States v. Montilla, 733 F. Supp 579, 580 (W.D.N.Y. 1990)* (agents of the U.S. Drug Enforcement Agency observing bus passengers in New York made eighty stops per month, which resulted in only three to four arrests). See also *Florida v. Bostick, 501 U.S. 429, 441-42 (1991)* (Marshall, J., dissenting) (noting that only a small number of the numerous police sweeps for drugs actually result in a successful interdiction of drugs); Morgan Cloud, Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas, *65 B.U. L. Rev. 843, 873-77 (1985)* (noting the flaws in the drug courier profile when compared to the aircraft

hijacker profile).

Professor David Cole has demonstrated how the drug courier profile can be manipulated to fit virtually any form of innocent activity of a person at an airport, including whether one is the first or the last to leave the plane, whether one appears nervous or calm, and whether one is dressed expensively or modestly. Cole, supra note 25, at 47-51. Further, his computer search of all federal cases involving drug courier profile stops over a four-year period showed that 80% of those stopped were minorities. Id. at 40.

In part, the approval of profile stops is a predictable consequence of the types of cases that actually reach the courts. For the most part, judges see only those cases in which drugs or other contraband are seized. In such cases, enormous pressure exists to ignore constitutional violations so as to avoid suppression of the evidence. In the thousands of cases where the individual stopped is innocent, even if that person was detained and searched illegally, it is unlikely that she will pursue legal remedies. See Tracey Maclin, The Central Meaning of the Fourth Amendment, *35 Wm. & Mary L. Rev. 197, 244-45 (1993)* (noting that individuals who have been searched illegally are unlikely to complain). Thus, the case law develops on a highly skewed notion of reality, subject to the distorting effect of discovery of contraband in the specific case. See, *Florida v. Riley, 488 U.S. 445, 463 (1989)* (Brennan, J., dissenting) ("It is difficult to avoid the conclusion that the plurality has allowed its analysis ... to be colored by its distaste for the activity in which [the defendant was involved].").

n90. Interim Report of Attorney General of New Jersey, supra note 32, at 26-28.

n91. *Expert Reports of John Lamberth, Maryland State Conference of NAACP Branches v. Maryland Department of State Police, 72 F. Supp. 2d 560 (D. Md. 1999)* (Civ. No. CCB-98-1098), available at http://www.aclu.org/court/lamberth.html (on file with author). See also Maclin, Race, supra, note 25, at 349-51 (1998) (noting that the percentage of traffic stops that resulted in the discovery of contraband was the same for black and white motorists).

n92. See supra note 91; Interim Report of Attorney General of New Jersey, supra note 32, at 36-37 (noting that "major" drug seizures on the New Jersey Turnpike were rare).

n93. See supra notes 35-40 and accompanying text.

n94. John Knowles, et al., Racial Bias in Motor Vehicle Searches: Theory and

Evidence 27 (Feb., 2000) (unpublished manuscript on file with author). The disparities in searches was profound: on a highway on which African-Americans constituted less than 20% of all drivers, of 1,590 searches, 1,007 African Americans were searched (63.4%) and 466 whites were searched (29.3%). Id. at 16. The remaining searches were of Hispanics (97 searches or 6.1% of all searches). Id.

n95. Id. at 1-3.

n96. Id. In New Jersey, two troopers have been indicted for deliberately falsifying records concerning the race of the drivers who were stopped and searched. They are alleged to have recorded "white" on the form where the driver was black. E.g., Mark Hosenball, "It is Not the Act of a Few Bad Apples," Newsweek, May 17, 1999, at 34.

n97. *John Knowles, et al., supra* note 94, at 1-3.

n98. See infra text accompanying notes 147-149.

n99. See infra text accompanying note 150. It is noteworthy that the Racial Bias study confirmed that similar results could be achieved without the kind of racial profiling that was practiced in *Maryland. John Knowles, et al., supra* note 94, at 23-26.

n100. Ira Glasser, ACLU Biennial Speech (June, 1999), available at http://www.aclu.org/ issues/racial/bispeech99.html (on file with author). In *Craig v. Boren, 429 U.S. 190 (1976)*, the Court found unconstitutional, under intermediate equal protection review, a gender classification that prohibited sale of 3.2% alcohol to men under 21 and to women under 18. The state attempted to justify the discrimination by studies that showed that of 18-20 year olds who were arrested for drunk driving, .18% of females and 2% of males in that age group had been arrested. *Id. at 201*. The Court did not deny the disparity in the statistics, but found that, "if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous "fit.'" *Id. at 201-02*. See also, *id. at 213-14* (Stevens, J., concurring) ("It does not seem to me that an insult to all of the young men of the state can be justified by visiting the sins of the 2% on the 98%.").

For an incisive discussion of police stereotyping, police discretion, and order maintenance, see M. Gottfredson & D. Gottfredson, Decision Making in Criminal Justice: Toward the Rational Exercise of Discretion (2d ed. 1988); Jerome H. Skolnick, Justice Without Trial: Law Enforcement in Democratic Society

80-81 (MacMillan 3d ed. 1994) (1966); Samuel Walker, Taming the System: The Control of Discretion in Criminal Justice, 1950-1990 (1993); Roberts, supra note 64, at 811 (discussing the potential for reinforcing racist norms in order-maintenance policing); Thompson, supra note 25, at 986-87 (discussing the role of stereotyping in police investigations); Wayne R. LaFave, Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication, *89 Mich. L. Rev. 442 (1990)* (discussing police rulemaking and judicial interpretations of police discretion). The role of subconscious racism has also been explored. See, e.g., Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, *39 Stan. L. Rev. 317 (1987)* (discussing unconscious racism and a new test for establishing race-based behavior); Sheri Lynn Johnson, Comment, Unconscious Racism and the Criminal Law, *73 Cornell L. Rev. 1016 (1988)* (discussing how the Supreme Court has ignored unconscious racism in its decisions).

n101. Harris, Driving While Black, supra note 25, at 572. For discussion of the legality of these practices, see discussion infra Part III. Randall Kennedy has likened racial profiling to "a type of racial tax for the war against drugs that whites and other groups escape," *Kennedy, supra* note 76, at 159. During the Jim Crow era, courts expressly permitted juries to consider race as evidence of criminal intent. Id. at 89-90; see *McQuirter v. State, 63 So. 2d 388, 390 (Ala. Ct. App. 1953)* (stating that a jury in determining whether black man intended to rape a white woman, "may consider social conditions and customs founded upon racial differences, such as that the prosecutrix was a white woman and defendant was a Negro man").

n102. National Crim. Just. Comm'n, The Real War on Crime, 102 (Steven R. Donzinger ed., 1996).

n103. Id. at 102-03.

n104. Marc Mauer, Race to Incarcerate, 124-25 (1999).

n105. Id. at 125.

n106. Id. While there is a disproportionate number of African-Americans in jail, much of this disproportionality can be explained by racial differences at arrest. Alfred Blumstein, Racial Disproportionality of U.S. Prison Populations Revisited, *64 U. Colo. L. Rev. 743, 750-54 (1993)* (noting at 76% of the disproportionality can be explained by racial differences at arrest).

n107. E.g., Human Rights Watch, supra note 78, at 13; Blumstein, supra note 106, at 756-59 (discussing the racial implications of the war on drugs).

n108. ACLU Report, supra note 7, at 11.

n109. Mauer, supra note 104, at 35.

n110. Human Rights Watch, supra note 78, at 13-16.

n111. Id. at 14.

n112. ACLU Report, supra note 7, at 10. In 1996, of all admissions to state prisons for drug offenses, blacks constituted 62.6%, while whites constituted 36.7%. Human Rights Watch, supra note 78, at 17.

n113. *21 U.S.C. 841* (1994).

n114. National Crim. Just. Comm'n, supra note 102, at 118-119. The argument that these statistics simply reflect prosecutions of high level crack dealers runs counter to data from the United States Sentencing Commission. In 1992, of all crack offenders, only 5.5% were classified as high level dealers. 63.7% were listed as street-level dealers or couriers and 30.8% as mid-level dealers. Marc Mauer, supra note 104, at 156. For commentary on the crack/powder cocaine dispute, see Cole, supra note 25, at 8, 141-44 (discussing the racially disparate effects of federal sentencing for crack cocaine); Days III, supra note 82, at 189-93 (discussing the Federal Sentencing Guidelines for cocaine and crack); David A. Sklansky, Cocaine, Race and Equal Protection, *47 Stan. L. Rev. 1283 (1995)* (discussing the mandatory federal sentences for trafficking crack cocaine and arguing that such sentences violate the Equal Protection Clause because the brunt of the sentences fall on African-Americans). To date, every court of appeals to consider the issue has determined that there is no equal protection violation presented by the application of these statutes. See, e.g., *United States v. Then, 56 F.3d 464, 466 (2d Cir. 1995)* (noting that the Second Circuit had joined six other circuits in holding that the Federal Sentencing Guidelines' 100 to 1 ratio of powder cocaine to crack cocaine in determining jail time has a rational basis and does not violate equal protection principles); *United States v. Williamson, 53 F.3d 1500, 1530 (10th Cir. 1995)* (rejecting claim that the section of the Federal Sentencing Guidelines that deal

with powder cocaine and crack cocaine violates the constitutional guarantee of equal protection, noting that a disparate racial impact does not necessarily imply intentional discrimination); *United States v. Singleterry, 29 F.3d 733, 741 (1st Cir. 1994)* (holding that there is insufficient evidence to find that the sections of the Federal Sentencing Guidelines that deal with powder and crack cocaine violate the Equal Protection Clause of the Fourteenth Amendment); Days III, supra note 82, at 189 (noting that each of the twelve circuit courts to examine the issue found that the Sentencing Guidelines that deal with crack cocaine and powder cocaine do not violate the Equal Protection Clause).

n115. Tamar Lewin, Discrepancy By Race Found In the Trying Of Youths, N.Y. Times, Feb. 3, 2000, at A21 [hereinafter Lewin, Discrepancy]. See also George S. Bridges & Sara Steen, Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms, 63 Am. Soc. Rev. 554 (1998) (noting the "pronounced differences in [police] officers' attributions about the causes of crime by white versus black youths"); Tamar Lewin, Study Finds Racial Bias in Public Schools, N.Y. Times, Mar. 1, 2000, at A14 (discussing report of Applied Research Center of Oakland which found that blacks are 3-5 times more likely to be expelled from high school than whites for similar offenses).

n116. Lewin, Discrepancy, supra note 115, at A21.

n117. Id.

n118. Id. This is not to suggest that the mere disparity in numbers is conclusive on the question of racial bias. For example, differential enforcement patterns can contribute to the disparities. Inner city drug dealing is more likely to occur on the street with the attendant hazards and crime associated with open market drug dealing, while drugs in the suburbs tend to be distributed and used behind closed doors. The inner city drug operations tend to be minority-run; suburban to be white. It is far easier to police the street markets and, because of the secondary criminal and quality of life impact street sales create, there is more demand for police intervention in these areas. William J. Stuntz, Race, Class and Drugs, *98 Colum. L. Rev. 1795 (1998); Kennedy, supra* note 75, at 378n.. Further, it has been argued that differences in usage and trafficking patterns explain the disparate racial arrest statistics. Days III, supra note 82, at 187-88.

Policing policies in minority communities have generated sharp disagreements. Compare *Kennedy, supra* note 76, at 138-63 (discussing policing policies in minority neighborhoods), with Paul Butler, (Color) Blind Faith: The Tragedy of Race, Crime, and the Law, *111 Harv. L. Rev. 1270 (1998)* (critically reviewing Randall Kennedy, Race, Crime, and the Law (1998)).

n119. George P. Fletcher, Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia, *46 UCLA L. Rev. 1895 (1999)*.

n120. See Cornel West, Race Matters (1993) (discussing the continuing issues of race and racism in the United States).

n121. State law may provide broader remedies than those available under federal law. David A. Harris, Addressing Racial Profiling in the States: A Case Study of the "New Federalism" in Constitutional Criminal Procedure, *3 U. Pa. J. Const. L. 368 (2001)*.

n122. E.g., Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment (3d ed. 1996); Maclin, Race, supra note 25 (discussing the competing concerns involved in Fourth Amendment analysis and application); Sklansky, supra note 25. For a recent comprehensive historical analysis of the Fourth Amendment, see Thomas Y. Davies, Recovering the Original Fourth Amendment, *98 Mich L. Rev. 547 (1999)*.

n123. *Whren v. United States, 517 U.S. 806, 816-19 (1996)*.

n124. *Maryland v. Wilson, 519 U.S. 408, 410 (1997); Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977)*

n125. *Ohio v. Robinette, 519 U.S. 33 (1996)* (holding that a lawfully seized defendant need not be advised that he is "free to go" before his consent to search will be recognized as voluntary).

n126. *Horton v. California, 496 U.S. 128, 133-37 (1990)* (reviewing the "plain view" doctrine); *United States v. Lee, 274 U.S. 559, 563 (1927)* (asserting that use of a searchlight to discover contraband does not violate the Fourth Amendment).

n127. *Michigan v. Long, 463 U.S. 1032, 1035 (1983)* (holding that a protective search of the passenger compartment of a motor vehicle during lawful investigatory stop of an occupant of the vehicle was reasonable).

n128. *Wyoming v. Houghton, 526 U.S. 295, 302-07 (1999)* (holding that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search); *California v. Acevedo, 500 U.S. 565, 574 (1991)* (holding that police may search container located within automobile without a search warrant); *New York v. Belton, 453 U.S. 454, 460 (1981)* (upholding the search of the passenger compartment of a vehicle and examination of the contents of any container found within the passenger compartment when the search is contemporaneous to a lawful arrest of an occupant).

n129. *Miranda v. Arizona, 384 U.S. 436 (1966)*.

n130. *Berkemer v. McCarty, 468 U.S. 420, 440-41 (1984)* (holding that roadside questioning is not custodial and therefore Miranda warnings are not required).

n131. *United States v. Place, 462 U.S. 696, 698 (1983)* (holding that a dog sniff of luggage located in a public place is not a search under the Fourth Amendment). In *City of Independence v. Edmond, 121 S. Ct. 447 (2000)*, the Supreme Court found unconstitutional the practice of using roadblocks to stop cars to allow for dog drug sniffs of the car.

n132. Harris, Driving While Black, supra note 25 at 545.

n133. See Sklansky, supra note 25, at 285-91 (discussing Justice Scalia's opinion in Whren and noting the split decisions in the lower and state courts regarding the subjective intent of the officer making the stop). Specifically, the lower courts had divided over whether a stop was justified where an officer could have made a proper traffic stop, see for example, *United States v. Botero-Ospina, 71 F.3d 783, 786-88 (10th Cir. 1995)* (rejecting the "would have" standard), or only where a reasonable officer would have done so, see for example, *United States v. Cannon, 29 F.3d 472, 474-76 (9th Cir. 1994)* (en banc) (accepting the "would have" standard after discussing the circuit split).

n134. *517 U.S. 806 (1996)*.

n135. *Id. at 808-09*.

1998, black women were nine times more likely than white women to be subjected to x-rays, yet they were less than half as likely to be found carrying contraband as their white counterparts. <=59> n58

The powerful combination of governmental investigations, judicial findings, anecdotal evidence, and statements by law enforcement officials leave little doubt about the existence of racial profiling and other stops without cause. <=60> n59 In December, 1999, a Gallup poll found that 56% of whites and 77% of blacks believe racial profiling to be widespread. <=61> n60 Almost three-quarters of all young black men polled believed that they had been stopped based on their race. <=62> n61 In June, 1999, President Clinton condemned this practice as "morally indefensible" and requested record-keeping and studies to determine the extent of racial profiling in law enforcement. <=63> n62

[*304] It may seem curious that the President would have to order federal law enforcement agencies to collect and analyze data on the racial characteristics of stops and searches. After all, law enforcement places heavy reliance on car and pedestrian stops as part of proactive, order - maintenance policing, <=64> n63 and the courts have vested broad discretion in the police in these areas. <=65> n64 Further, police and prosecutorial agencies maintain comprehensive data on reported crime, arrests and convictions, with specific documentation concerning race. <=66> n65

The failure of most law enforcement agencies to collect and analyze data concerning car and pedestrian stops, or to conduct comprehensive reviews of the legality of stops and searches - as to both racial profiling and stop and searches made without cause, regardless of race - has undermined efforts to make sound empirical judgments. Many police agencies have authorized or tolerated racial profiling and random, suspicionless stops and searches, as part of policing programs that operate on the theory that the more stops and searches that are conducted, whether in compliance with the Constitution or not, more drugs, weapons, and intelligence will be secured. <=67> n66 Law enforcement is well aware that it is far easier to discount anecdotal evidence of constitutional violations than it is to rebut statistical data that reflect entrenched patterns of unlawful practices. <=68> n67

Without hard data to prove that racial profiling and random stops are integral parts of street level policing, the police have every reason to be confident that if an improper stop is made there will likely not be any negative consequences. If contraband is recovered, it will be confiscated regardless of the legality of the stop or search. Moreover, factual assertions sufficient to justify the stop and search can be created [*305] to avoid the exclusionary rule or other sanctions. Even if nothing is found, the person stopped is highly unlikely to pursue any administrative or legal remedies. <=69> n68 To the degree that empirical evidence undermines these claims, law enforcement's broad discretionary powers and the practice of stopping as many cars and pedestrians as possible are placed in some jeopardy.

Police officials have fought legislative initiatives that would require record-keeping regarding the racial characteristics of police stops and searches. <=70> n69 Out of twenty states in which legislation has been drafted that would require data collection and analysis, only five have imposed these requirements. <=71> n70 On the federal level, the House of Representatives passed the Traffic Stops Statistics Study Act of 1998, authorizing the

n136. *Id. at 808.*

n137. *Id. at 808-09.*

n138. *Id. at 815.*

n139. *Id. at 813.*

n140. *Id. at 813-14.*

n141. *Id. at 814.* Justice Kennedy dissented from the Court's later decision in Maryland v. Wilson to permit police to order all occupants out of a stopped car, without suspicion:

The practical effect of our holding in Whren, of course, is to allow the police to stop vehicles in almost countless circumstances. When Whren is coupled with today's holding, the Court puts tens of millions of passengers at risk of arbitrary control by the police. If the command to exit were to become commonplace, the Constitution would be diminished in a most public way. As the standards suggested in dissent are adequate to protect the safety of the police, we ought not to suffer so great a loss.

Maryland v. Wilson, 519 U.S. 408, 423 (1997) (Kennedy, J., dissenting).

n142. *Whren, 517 U.S. at 813.*

n143. As Professor Paul Butler has noted, Justice Scalia authored both Whren and the dissent in *Morrison v. Olson, 487 U.S. 654, 728 (1988),* in which Justice Scalia quoted Justice Robert Jackson on the dangers of selective prosecution:

If the prosecutor is obligated to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone ... . It is in this realm - in which the

prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group.

Paul Butler, Starr is to Clinton as Regular Prosecutors Are to Blacks, *40 B.C. L. Rev. 705, 709-10 (1999)* (citing *Olson, 487 U.S. at 728)*.

n144. See, e.g., *State v. Ladson, 979 P.2d 833 (Wash. 1999)* (rejecting the use of pretextual traffic stops, holding that the provision of the state constitution prohibiting the invasion of private affairs or the home without authority of law forbids use of pretext as a justification for a warrantless search); Thompson, supra note 25, at 983-999 (pointing to the history behind the Fourth Amendment and social scientific research regarding racial stereotyping to show the conflict between racial profiling and the reasonableness standard of Fourth Amendment jurisprudence); Tracey Maclin, Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion, *72 St. John's L. Rev. 1271, 1285-86 (1998)* [hereinafter Maclin, Terry v. Ohio] (arguing that the Terry decision was flawed because it opened the door for the consideration of race as an element in the reasonableness of a search under the Fourth Amendment); Maclin, Race, supra note 25, at 362 (suggesting that pretextual traffic stops based on race don't meet the Fourth Amendment "reasonableness" standard); Harris, Driving While Black, supra note 25 at 549-550 (chastising the Whren Court for ignoring the fact that racially motivated pretexutal stops could be unreasonable); Sklansky, supra note 25, at 327 (stating that "there is nothing new in the suggestion that equality is the proper concern of more than one provision of the Constitution"). See also Akhil Reed Amar, Fourth Amendment First Principles, *107 Harv. L. Rev. 757, 808 (1994)* ("In a variety of search and seizure contexts, we must honestly address racially imbalanced effects and ask ourselves whether they are truly reasonable."); Sherry F. Colb, The Qualitative Dimension of Fourth Amendment "Reasonableness," *98 Colum. L. Rev. 1642 (1998)* (arguing that the qualitative basis for establishing probable cause is incomplete and requires both procedural and substantive safeguards); Pamela S. Karlan, Race, Rights, and Remedies in Criminal Adjudication, *96 Mich. L. Rev. 2001 (1998)* (discussing the problems of shifting racial profiling analysis from Fourth Amendment jurisprudence to jurisprudence based on the Equal Protection Clause of the Fourteenth Amendment).

n145. There are decided similarities between profile stops and the notorious "writs of assistance," the general warrants employed by British soldiers to enter colonial residences to search for violations of customs and duties provisions. Nelson B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1937); Morgan Cloud, Searching Through History, Searching for History; *63 U. Chi. L. Rev. 1707, 1737-39 (1996)* (reviewing William John Cuddihy, The Fourth Amendment: Origins and Original Meaning (1990) (unpublished Ph.D. dissertation available from UMI Dissertation Services, 300 N. Zeeb Road, Ann Arbor, Michigan 48106)); see also David Rudovsky, The Impact of the War on Drugs on Procedural Fairness and Racial Equality, *1994 U. Chi. Legal F. 237, 242-45 (1994)* (comparing the use of the

writs of assistance by the British during the colonial period to the present methods used in fighting the War on Drugs); Sklansky, supra note 25, at 286 (discussing the writs of assistance and comparing them to pretextual traffic stops). These writs were issued by the Crown without a showing of cause and the colonial reaction to the practice of searches without judicial authorization is widely regarded as a highly significant factor in the adoption of the Fourth Amendment. See, e.g., *Stanford v. Texas, 379 U.S. 476, 481-88 (1965)* (discussing the origins of the Fourth Amendment); see also M.H. Smith, The Writs of Assistance Case 5-6, 493-97 (1978). While the writs of assistance marked an invasive and harassing program against the colonists, they were not without a "profile" justification: there was a large conspiracy among the colonists to thwart the collection of duties and evidence of this conduct was regularly found in the searches conducted by British agents. Id. at 1-7.

In many respects, racial profiling and random stops are the contemporary equivalents of the writs of assistance. They are based on the same assumptions and proceed on the notion that even without specific reason to believe that any particular person is engaged in illegal activity, the "profile" limits the universe of suspects and will in some cases lead to evidence of criminal conduct. See *Commonwealth v. Rodriguez, 722 N.E.2d 429, 435 (Mass. 2000)* (stating that roadblocks used to search for evidence of drug trafficking was comparable to writs of assistance); *Commonwealth v. Lewis, 636 A.2d 619, 625 (Pa. 1994)* ("The facile reliance on drug courier profiles is reminiscent of ... the general warrants of the British."). See also Thompson, supra note 25, at 992-98 (discussing relationship of the writs of assistance during the colonial period, the purposes of the Fourth Amendment, and race discrimination); Maclin, Race, supra note 25, at 334-36 (noting the broad search authority of slave patrols during the colonial period and comparing mild colonial reaction to these patrols with fierce resistance to the writs of assistance).

n146. An argument could be made that a showing of intentional race discrimination under the Fourteenth Amendment should result in the exclusion of evidence derived from that misconduct. E.g., *United States v. Jennings, No. 91-5942, 1993 WL 5927, at 4* (6th Cir. Jan. 13, 1993) (affirming conviction based on consent search but suggesting that racial bias in stop is grounds for exclusion of evidence). Surely, this type of violation is at least as serious as the violation of Fourth Amendment rights and the need for deterrence would appear to be as strong. Karlan, supra note 144, at 2009-11 (arguing that suppression of evidence is one of the only remedies to deter police misconduct); see Andrew D. Leipold, Objective Tests And Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law, *73 Chi.-Kent L. Rev. 559, 571 (1998)* (noting the difficulty that a defendant faces in trying to exclude evidence obtained based on a racially motivated stop).

State courts have suppressed evidence as a result of findings of racial profiling. E.g., *Commonwealth v. Gonsalves, 711 N.E.2d 108, 115-16 (Mass. 1999)* (Ireland, J., concurring) (supporting the suppression of evidence gathered as a result of racial profiling by police); *State v. Donahue, 742 A.2d 775, 782 (Conn. 1999)* (suppressing evidence gathered during investigatory stop, noting that the case raises the "insidious specter of ""profiling'"); *State v. Soto, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996)*.

n147. See *Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)* (holding that racial classifications in affirmative action program must be analyzed under strict scrutiny).

n148. *Shaw v. Reno, 509 U.S. 630, 642-43 (1993)* (finding that North Carolina's redistricting legislation was so irregular that it could only be rationally viewed as an attempt to segregate races for voting purposes).

n149. *Hayden v. County of Nassau, 180 F.3d 42, 48 (2d Cir. 1999)* (citing *Adarand, 515 U.S. at 227-29*). See also *Rice v. Cayetano, 120 S. Ct. 1044 (2000)* (striking down a provision of Hawaii Constitution limiting by ancestry the right to vote for trustees of agency that administers programs for descendants of Polynesians who occupied island before 1778, finding that the provision violated the Fifteenth Amendment).

n150. E.g., *Yick Wo v. Hopkins, 118 U.S. 356 (1886)*.

n151. *Brown v. City of Oneonta, 221 F.3d 329 (2d Cir. 2000)* (holding that when criminal perpetrator is described as African American, no Fourteenth Amendment violation results from the stopping of all blacks in community because the expressed policy for the stops was racially neutral); *United States v. Avery, 128 F.3d 974, 985 (6th Cir. 1997)* (holding that a violation of the Equal Protection Clause results if law enforcement personnel "adopt[] a policy, employs a practice, or in a given situation takes steps to initiate an investigation ... based solely upon that citizen's race"); *Alexis v. McDonald's Restaurants, 67 F.3d 341, 353-54 (1st Cir. 1995)* (finding that use of excessive force to effect a forcible removal from the restaurant was motivated by a discriminatory animus).

n152. *Washington v. Davis, 426 U.S. 229, 240 (1976)*. See also, *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-68 (1977)* (holding that discriminatory intent can be shown by a combination of factors, including impact, historical context, substantive departures from norms, and administrative practices; plaintiff must show race was "a motivating factor," not the "sole" or "primary" reason). *Hunt v. Cromartie, 526 U.S. 541 (1999)* (noting that legislative motivation is a central question in determining claims of racial gerrymandering; circumstantial and statistical evidence may be used to prove racial motivation). The Supreme Court has also permitted a finding of discriminatory intent where the law or policy promotes racial stereotypes. *City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989); Batson v. Kentucky, 476 U.S. 79, 104 (1986)* (Marshall, J., concurring) (stating that "the Equal Protection Clause prohibits a State from taking any action based on crude,

inaccurate racial stereotypes"); *Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630-31 (1991)* (cautioning against "automatic invocation of race stereotypes" in determining that peremptory challenges excluding jurors based on race in private civil cases was unconstitutional). In *Rice v. Cayetano, 120 S. Ct. 1044 (2000)*, the Court found that ancestral voting restrictions were based on a "demeaning premise that citizens of a particular race are somehow more qualified to vote on certain matters," *id. at 1060*, and were "corruptive of the ... legal order," *id. at 1046*.

n153. *Batson v. Kentucky, 476 U.S. 79, 94-98 (1986)*. See also *Powers v. Ohio, 499 U.S. 400 (1991)* (holding that criminal defendant may object to race-based exclusion of jurors effected through peremptory challenges whether or not defendant and excluded jurors share same race); *Castaneda v. Partida, 430 U.S. 482 (1977)* (holding that a showing that the population of the county was 79.1% Mexican-American, but that over an 11-year period only 39% of the persons summoned for grand jury service were Mexican-American, established a prima facie case of discrimination against Mexican-Americans in grand jury selection); *Alexander v. Louisiana, 405 U.S. 625 (1972)* (holding that statistics may establish a prima facie case of invidious racial discrimination in the selection of the grand jury).

n154. As an example of how a plaintiff may prove an inference of discrimination, the Batson Court noted that a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination, and further stated:

In cases involving the venire, this Court has found a prima facie case on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing "the opportunity for discrimination." This combination of factors raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse.

476 U.S. at 95 (citations omitted).

n155. *471 U.S. 222 (1985)*.

n156. Id.

n157. *Id. at 227*.

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n158. *Id. at 232-33.*

n159. *481 U.S. 279 (1987).*

n160. Id.

n161. *Id. at 286-87.*

n162. See *id. at 286.*

n163. *Id. at 287.*

n164. *Id. at 294-95.*

n165. *Id. at 295.*

n166. *Id. at 296, n.17.* The Court further distinguished the venire selection and Title VII cases on the ground that:

The decisions of a jury commission or of an employer over time are fairly attributable to the commission or the employer. Therefore, an unexplained statistical discrepancy can be said to indicate a consistent policy of the decisionmaker. The Baldus study seeks to deduce a state "policy" by studying the combined effects of the decisions of hundreds of juries that are unique in their composition. It is incomparably more difficult to deduce a consistent policy by studying the decisions of these many unique entities.

Id. at 295, n.15.

n167. *Id. at 312.*

n168. *Id. at 314-15.*

n169. *Id. at 309* (citation omitted).

n170. *Id. at 339* (Brennan, J., dissenting).

n171. *517 U.S. 456 (1996).*

n172. *Id. at 458, 470-71.*

n173. *Id. at 459.*

n174. Id.

n175. *Id. at 460.*

n176. Id. (citation omitted).

n177. *Id. at 460-61.*

n178. *Id. at 458.*

n179. Id.

n180. *Id. at 464-69.* The Supreme Court cited statistics compiled by the Sentencing Commission:

The Court of Appeals reached its decision in part because it started "with the presumption that people of all races commit all types of crimes - not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group." *48 F.3d, at 1516-1517*. It cited no authority for this proposition, which seems contradicted by the most recent statistics of the United States Sentencing Commission. Those statistics show: More than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black, United States Sentencing Comm'n, 1994 Annual Report 107 (Table 45); 93.4% of convicted LSD dealers were white, ibid.; and 91% of those convicted for pornography or prostitution were white, id. at 41 (Table 13). Presumptions at war with presumably reliable statistics have no proper place in the analysis of this issue.

Id. at 469-70.

The Court's willingness to accept the proposition that rates of drug convictions by race and type of substance reflect actual rates of drug possession or trafficking is inconsistent with empirical data and Supreme Court pronouncements in related contexts. As the Attorneys General of New Jersey and New York have concluded, drug arrest statistics are highly misleading. See *Report of Attorney General of New York, supra* note 46; Interim Report of Attorney General of New Jersey, supra note 32. Further, as Professor Karlan has noted, in no other area of equal protection jurisprudence has the Court been willing to make this kind of judgment. Karlan, supra note 144, at 2024-25. Thus, the Court has rejected as demeaning the notion that black voters "think alike, share the same political interests, and will prefer the same candidates at the polls." *Miller v. Johnson, 515 U.S. 900, 911-12 (1995)* (quoting *Shaw v. Reno, 509 U.S. 630, 647 (1993)*). See also, *Rice v. Cayetano, 120 S. Ct. 1044, 1060 (2000)* ("Under the Fifteenth Amendment voters are treated not as members of a distinct race but as members of the whole citizenry.").

n181. See supra text accompanying notes 153-158.

n182. *Armstrong, 517 U.S. at 470-71*. For critical commentary on Armstrong, see Richard H. McAdams, Race and Selective Prosecution: Discovering the Pitfalls of Armstrong, *73 Chi.-Kent L. Rev. 605 (1998)*.

n183. *McCleskey v. Kemp, 481 U.S. 279, 293-94, 308-11 (1987)*.

n184. *Id. at 294*.

n185. See *Hunter v. Underwood, 471 U.S. 222 (1985)* (relying on statistics in finding that a facially neutral disenfranchisement statute violated the Equal Protection Clause of the Fourteenth Amendment).

n186. *476 U.S. 79 (1986).*

n187. *118 U.S. 356 (1886).*

n188. *Castaneda v. Partida, 430 U.S. 482, 494 (1977).*

n189. *International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977)* (citations omitted). As the Court stated:

Statistics showing racial or ethnic imbalance are probative ... because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

Id.

n190. See, e.g., *Rodriguez v. California Highway Patrol, 89 F. Supp. 2d 1131 (N.D. Cal. 2000)* (allowing equal protection claim based in part on statistical evidence); *Maryland State Conference of NAACP Branches v. Maryland Dep't of State Police, 72 F. Supp. 2d 560 (D. Md. 1999)* (noting that plaintiffs have standing based on continuing practice of racial profiling by police); *National Cong. for Puerto Rican Rights v. City of New York, 191 F.R.D. 52 (S.D.N.Y 1999)* (holding that allegation that police stopped and frisked black and Latino men based on their race and national origin was sufficient to state equal protection claim, notwithstanding that complaint failed to identify similarly situated non-minority individuals who were not stopped and frisked). But see *Chavez v. Illinois State Police, 27 F. Supp. 2d 1053, 1065 (N.D. Ill. 1998)* (statistical evidence alone was insufficient to satisfy "similarly situated" requirement applicable to equal protection claim).

n191. *Brown v. City of Oneonta, 221 F.3d 329, 337 (2d Cir. 2000); National Cong. for Puerto Rican Rights v. City of New York, 191 F.R.D. 52 (S.D.N.Y. 1999).*

n192. *Brown, 221 F.3d at 337.*

n193. *United States v. Armstrong, 517 U.S. 456 (1996).*

n194. *Id. at 464.*

n195. *Id. at 465.*

n196. See *City of Chicago v. Morales, 119 S. Ct. 1849 (1999)* (voiding as vague a city ordinance that prohibited "criminal street gang members" from loitering in public places); *Kolender v. Lawson, 461 U.S. 352, 358 (1983)* (finding loitering statute void, because it "vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest"); *Allee v. Medrano, 416 U.S. 802, 813 (1974)* (police prohibited from "using their authority as peace officers to arrest, stop, disperse, or imprison [labor organizers] ... without "adequate cause'").

n197. See *City of Richmond v. J.A. Croson Co., 488 U.S. 469, 485 (1989)* (citation omitted).

n198. E.g., *United States v. Alarcon-Gonzalez, 73 F.3d 289, 293 (10th Cir. 1996)* (to detain suspect for questioning, "police must be able to articulate something more than an inchoate and unparticularized suspicion or hunch."); *United States v. Ornelas-Ledesma, 16 F.3d 714, 717 (7th Cir. 1994)* ("The "suspicious' circumstances [relied upon by the police in stopping the defendants would mean] ... that a very large proportion of all Hispanic Americans would be vulnerable to being stopped on suspicion of drug trafficking."); *United States v. Anderson, 923 F.2d 450, 455 (6th Cir. 1991)* ("Suspicions based solely on race of person stopped cannot give rise to a reasonable suspicion justifying a Terry stop." (citation omitted)). In *United States v. Taylor, 956 F.2d 572, 581 (6th Cir. 1992)* (en banc) the dissent asserted:

The disproportionate number of African-Americans who are stopped indicates that a racial imbalance against African-Americans does exist and is implicitly sanctioned by the law enforcement agency. The assumption that seventy-five percent of those persons transporting drugs and other contraband through public modes of transportation are African-American is impermissible. It flies in the face of reason and legitimates a negative stereotype of African-Americans. Surely, this practice must "be subjected to the strictest scrutiny and [can be] justified only by the weightiest of considerations.'

collection and analysis of information relating to the age, race, and ethnicity of drivers stopped by the police. <=72> n71 Law enforcement agencies lobbied hard against this legislation, asserting that the data would be misused or misinterpreted and would adversely affect law enforcement. <=73> n72 The bill failed to gain Senate approval. <=74> n73

[*306] The systematic collection and analysis of data pertaining to police stops and searches, including the often ignored pedestrian stops, <=75> n74 is an essential component of any long term reforms of these practices. However, the fact that all police departments do not maintain this data cannot excuse law enforcement agencies or the courts from exercising their powers to remedy current unlawful or misinformed policies. Studies and litigation consistently demonstrate significant racial disparities and the failure to act cannot be rationalized on a "lack of data" theory. Unfortunately, while we might expect that "morally indefensible" <=76> n75 and "deeply corrosive" practices would be taken seriously by governmental agencies and the courts, experience to date does not meet that expectation.

To explore these issues, this article considers the legal and social ramifications of racial profiling and random police stops and searches. In Part II, I discuss the justifications provided for the continued disparate treatment of African-Americans and other racial minorities in drug, weapons, and quality of life law enforcement. In Part III, I review the relevant federal constitutional and statutory law, including Fourth and Fourteenth Amendment standards, as it applies to the different policing practices involved in car and pedestrian stops. Part IV presents an analysis of the remedial framework. In Part V, I recommend legislative, administrative, and judicial reforms.

II. Racial Profiling: The Law Enforcement Justifications

The debate over racial profiling has shifted ground. Virtually everyone agrees that it is impermissible to stop or search someone solely on the basis of race. However, the extent and pervasiveness of this practice is sharply disputed. While there has been a movement towards exclusion of race as a legitimate factor in any police stop or [*307] search, unless in response to a description of a suspect, many law enforcement officials and courts continue to assert that race is a legitimate factor in policing decisions, even where there is no specific racial description of a suspect. The racially disparate impact of police practices are defended on a number of grounds: (1) that minorities commit more crime than whites, which explains and justifies, at least in part, the racial disparities that appear in data concerning stops, searches, and arrests; (2) that enforcement of criminal laws that are violated by whites and minorities in roughly proportionate numbers is disproportionate as to minorities because the location and social impact of the same types of crimes justifies a more aggressive response in minority communities; and (3) that current practices work: aggressive policing and targeting of minority communities, with increased numbers of pedestrian and car stops and searches, has led to a significant number of seizures of contraband, weapons, and fugitives, and a reduction of crime. <=77> n76

[*308] As stated by one commentator, based on his interviews with and observations of police officers:

Id. at 581 (Keith, J., dissenting) (citation omitted).

In *United States v. Weaver, 966 F.2d 391, 392 (8th Cir. 1992)*, the court upheld a stop of a black drug courier suspect at the Kansas City Airport based on information that "a number of young roughly dressed black males from street gangs in Los Angeles frequently brought cocaine into the Kansas City area." *Id. at 392-93*. The court ruled that DEA agents can rely upon racial characteristics if objective crime trend analysis validates use of these characteristics as "risk factors' in predicting criminal activity. *Id. at 394*. In the same view Los Angeles Police Chief Bernard Parks has stated:

We have an issue of violent crime against jewelry salespeople ... . The predominant suspects are Colombians. We don't find Mexican-Americans, or blacks or other immigrants. It's a collection of several hundred Colombians who commit this crime. If you see six in a car in front of the Jewelry Mart, and they're waiting and watching people with briefcases, should we play the percentages and follow them? It's common sense.

Goldberg, supra note 62.

United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976), upheld stops of persons at fixed border checkpoints that were based in part on Mexican ancestry. However, in *United States v. Montero-Camargo, 208 F.3d 1122 (9th Cir. 2000)* (en banc), the court ruled that it is impermissible to take Hispanic origin into account in stops in Southern California. The court noted both significant "demographic changes" and "changes in the law restricting the use of race as a criterion in government decision-making." *Id. at 1134*.

n199. *42 U.S.C. 2000*(d) (1994) provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." See also, Omnibus Crime Control and Safe Streets Act of 1968, *42 U.S.C. 3789*(c) (repealed 1984) (prohibiting discrimination on basis of race, color, national origin, sex, or religion by law enforcement agencies that receive federal funding).

n200. 28 C.F.R. 42.104(b)(2) (1999). The regulations also require that "every application for Federal financial assistance ... shall, as a condition to its approval and the extension of any Federal financial assistance ... contain or be accompanied by an assurance that the program will be conducted ... in compliance with all requirements imposed by or pursuant to this subpart." 28 C.F.R. 42.105(a)(1) (1999).

n201. *422 U.S. 66, 74-77 (1975)* (discussing standards for determining whether a right of action should be implied under a federal statute).

n202. *189 F.3d 387 (3d Cir. 1999)*.

n203. *Id. at 397-98*.

n204. *Cannon v. University of Chicago, 441 U.S. 677, 710-16 (1979)*; Cf. *Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999)* (upholding private challenge under Title VI of the Civil Rights Act of 1964), cert. granted sub nom. *Alexander v. Sandoval, 121 S. Ct. 28 (2000)* (accepting petition of certiorari challenging Title VI ruling).

n205. *463 U.S. 582 (1983)*.

n206. See *463 U.S. at 584 n.2* (White, J.); *id. at 623 n.15* (Marshall, J., dissenting); *id. at 642-45* (Stevens, Brennan, Blackmun, JJ., dissenting).

n207. *469 U.S. 287 (1985)*.

n208. *Id. at 293-94*.

n209. See, e.g., *Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999)* (holding that regulations promulgated under Title VI prohibiting discriminatory effects in educational programs gave rise to an implied private right of action); *Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997)* (holding that a private right of action exists under Title VI regulations), cert. granted *524 U.S. 915*, vacated as moot, *524 U.S. 974 (1998)*; *Villanueva v. Carere, 85 F.3d 481, 486 (10th Cir. 1996)* (finding that while Hispanic parents had a private cause of action under Title VI to challenge decision of school district to close neighborhood elementary schools and a open new charter school, because parents failed to show a disparate impact, their claims were denied); *New York Urban League, Inc. v. State of New York, 71 F.3d 1031, 1036-37 (2d Cir. 1995)* (noting that riders of the New York City Transit Authority subway and bus system, the majority of whom are members of protected minority groups, had a private cause of action under Title VI).

n210. *Cannon v. University of Chicago, 441 U.S. 677, 704 (1979)*.

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n211. *Choate, 469 U.S. at 293-94.* There is substantial evidence of congressional intent to permit private plaintiffs to enforce the discriminatory effects standard set forth in Title VI regulations. Since Guardians and Choate were decided, Congress has amended Title VI to broaden the scope of the statute's coverage while acknowledging the existence of a privately enforceable discriminatory effects standard. Civil Rights Restoration Act of 1987, *42 U.S.C. 2000d-4a*(1) (1994).

n212. *42 U.S.C. 2000*(d)-4a (1994). See, *Cureton v. NCAA, 198 F.3d 107, 115 (3d Cir. 1999)* (finding that the Civil Rights Restoration Act of 1987 applies only to specific programs receiving federal aid).

n213. *42 U.S.C. 2000*(d) (emphasis added)

n214. *Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 44-45 (2d Cir. 1997)* (citations omitted). See also *Bryant v. New Jersey Dep't of Transp., 998 F. Supp. 438 (D.N.J. 1998)* (holding that African-American residents whose homes may be destroyed as a result of a federally funded highway project allegedly allocated in a discriminatory manner had standing under Title VI).

n215. *National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 492 (1998)* (citations omitted). See also, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 120 S. Ct. 693 (2000)* (holding that environmental plaintiffs adequately alleged injury in fact, for standing purposes, when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity).

n216. *Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)* (holding that intentional discrimination need not be shown under a Title VI claim).

n217. See *Rodriguez v. California Highway Patrol, 89 F. Supp. 2d 1131, 1140-42 (N.D. Cal. 2000)* (finding that statistical evidence could be used by plaintiffs in a racial profiling case to support claim based on an equal protection violation). Of course, the United States may invoke Title VI regulations directly to terminate federal funding of police departments that engage in practices that result in unjustified disparate impact on racial minorities. As I discuss below, in the past year the Department of Justice, pursuant to powers provided by Congress in 1994 to sue to enjoin unconstitutional patterns and practices by law enforcement agencies, has

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obtained consent decrees in New Jersey and Montgomery County, Maryland, that prohibit racial profiling on highways.

n218. *Report of Attorney General of New York, supra* note 46, at 57.

n219. *Terry v. Ohio, 392 U.S. 1 (1968).*

n220. The standards under the Fourth Amendment are far easier to state than to apply in specific factual contexts. In summary, consensual encounters between the police and civilians (defined as situations where a reasonable person would feel free to decline to answer questions or to leave the area) can be made without any showing of cause or suspicion, investigative stops (forced stops where an individual is not free to leave) may be effectuated upon "reasonable suspicion" of criminal conduct, a frisk (protective pat down for the officer's protection, but not as a search for contraband) is permissible incident to an investigative detention where the officer has articulable grounds for such action, and an arrest and full scale search are justified only upon a showing of probable cause. See generally, Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment (3d ed. 1996).

n221. E.g., Terry v. Ohio 30 Years Later: A Symposium on the Fourth Amendment, Law Enforcement and Police-Citizen Encounters, *72 St. John's L. Rev. 721 (1998).*

n222. See supra note 76 and accompanying text.

n223. See infra notes 225-227.

n224. Id.

n225. See, e.g., Dan Barry & Marjorie Connelly, Poll in New York Finds Many Think Police Are Biased, N.Y. Times, Mar. 16, 1999, at A1; Michael Cooper, Safir May Use Data on Frisks to Back Unit, N.Y. Times, Apr. 19, 1999, at B1 (reporting that the New York City Police Commissioner was attempting to deflect attacks that stops and frisks were racially biased); Robert. D. McFadden, Four Officers Indicted for Murder in Killing of Diallo, Lawyer Says, N.Y. Times, Mar. 26, 1999, at A1 (noting that the killing had led to a storm of protests against the police). On February 25, 2000 all four officers were acquitted on the criminal

charges. Jane Fritsch, 4 Officers in Diallo Shooting are Acquitted of All Charges, N.Y. Times, Feb. 26, 2000, at A1. See also, Kevin Flynn, Shooting Raises Scrutiny of Police Anti-Drug Tactics, N.Y. Times, Mar. 25, 2000, at A1 (reporting criticism of narcotics enforcement in the wake of shooting of Patrick Dorismond, an unarmed man).

n226. E.g., Elizabeth Kolbert, The Perils of Safety, The New Yorker, Mar. 22, 1999, at 50.

n227. E.g., Joyce Purnick, Central Issue is Left Unsaid in Diallo Case, N.Y. Times, Feb. 21, 2000, at B1 (suggesting that the aggressive tactics used by the Street Crime Unit of the New York Police Department was a major factor in the death of Diallo); Clyde Haberman, When Doing Wrong Isn't Wrongdoing, N.Y. Times, Feb. 27, 2000, 4 (Week in Review), at 3 (reporting the spectrum of public responses in the wake of the jury acquittal of the police officers charged in the killing of Diallo).

n228. Patterns of brutality, even torture, are not mere vestiges of the past. In recent years, evidence of brutal and sadistic conduct by officers and groups of officers in major police departments across the country have demonstrated how insidious are these practices. See, Bandes, supra note 67, at 1307-09 (analyzing ways in which the courts and other institutions have avoided confronting institutional patterns of police misconduct by reducing evidence to anecdotes); Todd S. Purdum, Los Angeles Police Officer Sets Off Corruption Scandal, N.Y. Times, Sept. 18, 1999, at A9 (reporting that a dozen police officers were suspended after an investigation uncovered cases in which the police had shot an unarmed and handcuffed gang member, and then framed him); see also, Report of the Independent Commission of the Los Angeles Police Department (1991) [hereinafter Christopher Commission] (reporting on the excessive use of force in the Los Angeles Police Department in the wake of the Rodney King beating); Report of the City of New York Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department (July 7, 1994) (Milton Mollen, Chair) [hereinafter Mollen Commission], reprinted in 6 New York City Police Corruption Investigation Commissions, 1894-1994 (Gabriel J. Chin ed., 1997) (investigating police corruption in the New York City police department). Police officials are almost always quick to deny allegations of brutality, and the code of silence and other entrenched practices in the police culture often make it difficult to prove these matters. Myriam E. Gilles, Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability, *80 B.U. L. Rev. 17 (2000)*.

n229. Kolbert, supra note 226, at 50, 56-57; see, Brent Staples, Editorial, How a Black Man's Wallet Becomes a "Gun," N.Y. Times, Mar. 12, 2000, 4 (Week in Review), at 14 ("The root of the problem is the tendency of white police officers - and white Americans generally - to associate blackness with criminality ... .").

n230. *392 U.S. 1 (1968).*

n231. *Id. at 30.*

n232. *Id. at 27.* See generally, 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 9.4(a), 137-43, 9.5(a), 246-70 (3d ed. 1996). Over the years, the Court has expanded the power to stop and frisk. See, e.g., *United States v. Sokolow, 490 U.S. 1 (1989)* (drug enforcement agents had reasonable suspicion to conduct investigative stop of suspected drug courier who flew from Honolulu and spent 48 hours in Miami, paid for two plane tickets with $ 2,100 from roll of $ 20 bills containing nearly twice that much; never checked his luggage, and agents had reasonable ground to believe that suspected courier was traveling under an alias); *United States v. Sharpe, 470 U.S. 675 (1985)* (holding that a twenty-minute detention of a criminal suspect is reasonable under the Fourth Amendment); *United States v. Cortez, 449 U.S. 411 (1981)* (holding that stop based on "inferences and deductions that might elude an untrained person" was justified on less than probable cause); *Adams v. Williams, 407 U.S. 143 (1972)* (holding that where an informant had advised a police officer that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist, that the officer acted justifiably in reaching in and removing a loaded gun from the occupant's waistband after the occupant had rolled down his window rather than complying with the officer's request to open the car door). But see, *Florida v. J.L., 120 S. Ct. 1375 (2000)* (anonymous tip of man with gun is an insufficient basis for stop and frisk).

n233. *392 U.S. at 13-15.*

n234. See, Thompson, supra note 25, at 966-68 (discussing testimony that established that two of the three men thought to be acting suspiciously were black, a fact that first led the officer to observe their conduct).

n235. *Terry, 392 U.S. at 17 n.14.*

n236. E.g., Report of the National Advisory Commission on Civil Disorders (1968) (Kerner Commission); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police (1967).

n237. The Court's refusal to consider racial bias in the development of Fourth Amendment doctrine is well documented. E.g., Maclin, Race, supra note 25, at 336-38; Thompson, supra, note 25, at 962-83; Sklansky, supra note 25, at 316-17. At the same time, the evidence of the corrosive impact of racial bias in street level policing has been similarly well documented. E.g., Christopher Commission supra note 228; Mollen Commission supra note 228; *Kennedy, supra* note 76.

n238. See, e.g., *Illinois v. Wardlow, 120 S. Ct 673, 676 (2000)* (holding that flight of individual from police is a strong factor to be considered in determining reasonableness of stop); *Alabama v. White, 496 U.S. 325 (1990)* (holding that anonymous telephone tip, corroborated by independent police work, provided reasonable suspicion to make investigatory stop of defendant's vehicle); *United States v. Sokolow, 490 U.S. 1 (1989)* (holding that stopping a suspect based on drug courier profile was reasonable under Fourth Amendment standard); *Schneckloth v. Bustamonte, 412 U.S. 218 (1973)* (holding that consent to a search can be voluntary even if suspect did not know that he could refuse search); *Adams v. Williams, 407 U.S. 143 (1972)* (holding that a police officer making a reasonable stop can conduct a limited protective search for weapons); David Rudovsky, The Impact of the War on Drugs on Procedural Fairness and Racial Equality, *1994 U. Chi. Legal F. 237 (1994)* (arguing that judicial deference to aggressive police tactics in the War on Drugs has had a negative impact on certain constitutional principles).

n239. E.g., Maclin, Race, supra note 25, at 336-38; Mollen Commission, supra note 228.

n240. *Illinois v. Wardlow, 120 S. Ct. 673 (2000).*

n241. *Id. at 674-75.* The officer could not recall whether the cars were marked. *Id. at 683* (Stevens, J., dissenting).

n242. *Id. at 675.*

n243. *Id. at 676-77.*

n244. *Id. at 676.*

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n245. Id.

n246. *Id. at 677.*

n247. *Terry v. Ohio, 392 U.S. 1, 27 (1968).*

n248. *Brief of Amici Curiae NAACP Legal Defense Fund at 4-5, 17-19, Illinois v. Wardlow, 120 S. Ct. 673 (2000)* (No. 98-1036).

n249. *120 S. Ct. at 680* (Stevens, J., dissenting).

n250. *Id. at 680-81, nn.8, 9 and 10* (Stevens, J., dissenting).

n251. *Id. at 680-81* (Stevens, J., dissenting). Justice Stevens' comment that African-Americans may tend to fear police more than whites, id., received very little attention. By contrast, Federal District Judge Harold Baer was vilified for suppressing evidence in a narcotics case in an opinion that discounted the flight of the suspect from police on the ground that residents of minority communities in New York City may believe the police to be "corrupt, abusive and violent." See *United States v. Bayless, 913 F. Supp. 232, 242 (S.D.N.Y. 1996).* After calls for his impeachment, e.g., Stephen B. Bright, Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?, *72 N.Y.U. L. Rev. 308, 310-11 (1997),* Judge Baer vacated his ruling. *United States v. Bayless, 921 F. Supp. 211 (S.D.N.Y. 1996),* aff'd., *201 F.3d 116 (2d Cir. 2000).*

n252. Judgments as to the relevancy and weight that should be assigned to particular human behavior are necessarily often subjective and imprecise. The Federal Rules of Evidence define as "relevant" any evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." Fed. R. Evid. 401. This extremely broad definition allows for the "common sense judgments" the Court approved of in Wardlow, but also for consideration of empirical and statistical data. See *Frost v. Symington, 197 F.3d 348, 356 (9th Cir. 1999)* ("Scientific studies can have a corrective effect by establishing an apparently implausible connection or refuting an apparently obvious one, but, subject to such corrections, conformity to commonsensical intuitive judgments is a standard element of both reasonableness and rationality." (citation omitted)); *Commonwealth v. Santoli, 680 N.E.2d 1116 (Mass. 1997)* (noting social science studies that show that there is no relationship between strength of the belief

of the accuracy of one's identification and the actual accuracy of the identification in holding that jury instructions could not include a statement that the strength of identification may be taken into consideration in determining accuracy).

n253. *72 St. John's L. Rev. 721 (1998)*.

n254. E.g., Maclin, Terry v. Ohio, supra note 144; Akhil Reed Amar, Terry and Fourth Amendment First Principles, *72 St. John's L. Rev. 1097 (1998)* (discussing the conflicting understandings of the Terry decision); Christopher Slobogin, Let's Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle, *72 St. John's L. Rev. 1053 (1998)* (promoting a conceptual framework for the Fourth Amendment based on the "proportionality principle").

n255. Several of the articles discussed the racial tensions surrounding the stop and frisk practices, e.g., Maclin, Terry v. Ohio, supra note 144; Jack B. Weinstein & Mae C. Quinn, Terry, Race and Judicial Integrity: The Court and Suppression During the War on Drugs, *72 St. John's L. Rev. 1323 (1998)*, and others addressed application of the doctrine in lower court adjudication, e.g., George C. Thomas, III, Terry v. Ohio in the Trenches: A Glimpse at How Courts Apply "Reasonable Suspicion," *72 St. John's L. Rev. 1025, 1026-27 (1998)*.

n256. Stephen A. Saltzburg, Terry v. Ohio: A Practically Perfect Doctrine, *72 St. John's L. Rev. 911 (1998)*.

n257. Fourth Philadelphia Report, supra note 41, at 1. It should be noted that there is even less reliable information made available by police departments concerning racial demographics and "cause" for pedestrian stops and frisks than for car stops and searches. Many departments require reports only when an arrest occurs and no department to my knowledge maintains a computer data base of this information. Indeed, in the two studies discussed in this Article, the information regarding pedestrian stops had to be individually transferred from handwritten police forms to computerized data fields.

n258. Id. at 1-4.

n259. Id.

n260. Id. at 21-22, 26-27.

n261. Id. at 26-27. The police reporting form (the "75-48") requires the officer to provide a reason for any stop, frisk or arrest. Id. at 1-7.

n262. Fourth Philadelphia Report, supra note 41, at 28.

n263. Id.

n264. See, e.g., New York City Police Commissioner Howard Safir, Statement to the New York City Council Public Safety Committee (Apr. 19, 1999).

n265. Fourth Philadelphia Report, supra note 41, at 18-28.

n266. Id.

n267. Id. at 31. The Report was issued at the time that a new Commissioner, John Timoney, was appointed to head the Police Department. Commissioner Timoney ordered that a revised form be developed for recording stops and frisks and that officers be specially trained with respect to their responsibilities in accurately recording all stops of cars and pedestrians. Fifth Philadelphia Report, supra note 41, at 4-10.

n268. Fourth Philadelphia Report, supra note 41, at 10. For the Narcotics Strike Force, 57% of the recorded stops were facially deficient under the Fourth Amendment. Id. at 13. As I discuss below, it is both ironic and disturbing that it is the officers often credited with the most "expertise" who most frequently make stops of innocent persons.

n269. Francis X. Clines, Philadelphia Police Chief Borrows from Bronx Beat, N.Y. Times, Jan. 16, 2000, 1, at 16.

n270. E.g., Mark Fazlollah, Arrests in Rapes Up 46% in 1999, Phila. Inquirer, Mar. 20, 2000, at A-1.

This is what a cop might tell you in a moment of reckless candor: in crime fighting, race matters. When asked, most cops will declare themselves color blind. But watch them on the job for several months, and get them talking about the way policing is really done, and the truth will emerge, the truth being that cops, white and black, profile ... . [They say] African-Americans commit a disproportionate percentage of the types of crimes that draw the attention of the police. Blacks make up 12 percent of the population, but accounted for 58 percent of all carjackers between 1992 and 1996. (Whites accounted for 19 percent.) Victim surveys - and most victims of black criminals are black - indicate that blacks commit almost 50 percent of all robberies. Blacks and Hispanics are widely believed to be the blue-collar backbone of the country's heroin - and cocaine - distribution networks. Black males between the ages of 14 and 24 make up 1.1 percent of the country's population, yet commit more than 28 percent of its homicides. Reason, not racism, cops say, directs their attention.

Cops, white and black, know one other thing: they're not the only ones who profile. Civilians profile all the time - when they buy a house, or pick a school district, or walk down the street. <=78> n77

These observations reflect widely held views - within and without law enforcement circles - that African-Americans and other minorities commit a disproportionate number of crimes and, therefore, they are justifiably targeted not only where race is part of a reported criminal incident, but also in situations where police have a wide range of possible targets (e.g., pretextual traffic stops) or where their suspicion of criminal activity would not otherwise justify a stop or search. <=79> n78

In the context of drug interdiction car stops, these defenses of racial profiling do not withstand empirical and legal scrutiny. <=80> n79 First, [*309] the empirical data does not support the notion of a minority-dominated drug trade. According to national drug abuse studies, minorities possess and use drugs just slightly more frequently than whites. <=81> n80 Former "Drug Czar" William J. Bennett has stated that "the typical cocaine user is white, male, a high school graduate employed full time and living in a small metropolitan area or suburb." <=82> n81 Drew S. Days, III, as Solicitor General, defended federal drug charging patterns, but has stated that "there appears to be a significant disparity" between drug usage by race and arrest rates. <=83> n82 A recent study found that the rate of drug abuse among adolescents was significantly higher in rural as opposed to urban areas. <=84> n83 Thus, eighth graders in rural areas, who are far more likely to be white, <=85> n84 are 104% more likely to use amphetamines, 50% more likely to use cocaine, 83% more likely to use crack cocaine, and 34% more likely to use marijuana than their urban counterparts. <=86> n85

In response, law enforcement officials assert that whatever the rates for use and possession, traffickers and couriers are disproportionately black or Hispanic and, therefore, profiling on the highways is justified. <=87> n86 But there is scant data on the racial composition of highway [*310] drug traffickers or couriers. The former Chief of DEA could not be any more specific than his assertion that it is "probably safe to say whites ... [constitute] the majority of traffickers." <=88> n87 Human Rights Watch has reported:

n271. Fourth Philadelphia Report, supra note 41, at 12-15.

n272. *Plaintiffs' Fifth Monitoring Report, supra* note 41, at 1-2, 9-10, 20-26.

n273. Id. at 20-25.

n274. Id. at 26-27.

n275. *Report of Attorney General of New York, supra* note 46, at 88.

n276. Id.

n277. Id. at 94.

n278. Id.

n279. Id. at 94-95.

n280. Id. at 106.

n281. Id.

n282. Id.

n283. Id. at 100-01. For a discussion of "neighborhood" and crime, see Margaret Raymond, Down on the Corner, Out in the Street: Considering the

Character of the Neighborhood in Evaluating Reasonable Suspicion, *60 Ohio St. L.J. 99 (1999)* (noting that the character of a neighborhood is often taken into consideration when establishing a reasonable suspicion that would justify a Terry stop).

n284. *Report of Attorney General of New York, supra* note 46, at 111.

n285. Id.

n286. Id. at 119-24, 130.

n287. Id. at 123.

n288. Id.

n289. Id.

n290. Id. at 160-62.

n291. Id. at 162.

n292. Notwithstanding the substantial evidence of arbitrary police investigatory stops and searches, there is no indication of a change in official policy or practice. David Barstow, View From New York Streets: No Retreat by Police, N.Y. Times, June 25, 2000, 1, at 1.

n293. *Ohio v. Robinette, 519 U.S. 33, 39 (1996)*. See also, *Illinois v. Wardlow, 120 S. Ct. 673, 675 (2000)* (reiterating Terry's holding that a police officer may stop a suspect upon a reasonable belief that criminal activity is afoot without violating the Fourth Amendment); *Skinner v. Ry. Labor Executives' Ass'n., 489 U.S. 602 (1989)* (holding that alcohol and drug tests established by the Federal Railroad Administration were reasonable and thus did not violate the Fourth Amendment); *United States v. Sokolow, 490 U.S. 1 (1989)* (upholding stop of suspect by police officer based on reasonable suspicion that criminal

activity was afoot). There has been a longstanding debate between a "probable cause/warrant preference" and a "reasonableness" interpretation of the Fourth Amendment. See, e.g., Amar, supra note 144, at 801 (suggesting that the core of the Fourth Amendment is reasonableness, not probable cause); Anthony G. Amsterdam, Perspectives on the Fourth Amendment, *58 Minn. L. Rev. 349 (1974)* (discussing in detail the development of Fourth Amendment jurisprudence); Scott E. Sunby, "Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, *94 Colum. L. Rev. 1751 (1994)* (criticizing the greater reliance on the reasonableness doctrine in Fourth Amendment jurisprudence).

n294. *Ornelas v. United States, 517 U.S. 690, 696 (1996).*

n295. *Illinois v. Gates, 462 U.S. 213, 238 (1983)* (defining probable cause required to secure a search warrant).

n296. E.g., *Terry v. Ohio, 392 U.S. 1, 30-31 (1968); United States v. Cortez, 449 U.S. 411, 417-18 (1981); Illinois v. Wardlow, 120 S. Ct. 673, 675 (2000).*

n297. *United States v. Sokolow 490 U.S. 1, 7 (1989).* The Court has insisted on information that distinguishes wrongdoers from the universe of innocent persons. *Reid v. Georgia, 448 U.S. 438, 441 (1980).*

n298. For a discussion of police perjury, particularly in the context of suppression hearings, see H. Richard Uviller, Tempered Zeal 115-16 (1988) (noting the temptations for police to commit perjury); Morgan Cloud, The Dirty Little Secret, *43 Emory L.J. 1311, 1311 (1994)* ("Police perjury is the dirty little secret of our criminal justice system."); Donald A. Dripps, Police, Plus Perjury, Equals Polygraphy, *86 J. Crim. L. & Criminology 693 (1996)* ("Criminal procedure scholars agree that police perjury is not exotic."); Maclin, Race, supra note 25, at 379-86 (arguing that police perjury is a legitimate concern in pretextual traffic stops based on race); Christopher Slobogin, Testilying: Police Perjury and What to do About it, *67 Colo. L. Rev. 1037 (1996)* (discussing police perjury and ways to reduce it); Scott Turow, Lying to Get the Bad Guys, N.Y. Times, Feb. 20, 2000, 4 (Week in Review), at 13; Irving Younger, The Perjury Routine, The Nation, May 8, 1967, at 596 (discussing police perjury during probable cause hearings). The "code of silence" may also place substantial obstacles in proving improper police conduct. E.g., Gabriel J. Chin & Scott C. Wells, The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury, *59 U. Pitt. L. Rev. 233 (1998);* Gilles, supra note 219; Jerome H. Skolnick, Code Blue, The American Prospect, March 27, 2000, at 49.

n299. Christopher Slobogin, Let's Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle, *72 St. John's L. Rev. 1053, 1082-84 (1998)*; see also, C.M.A. McCauliff, Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?, *35 Vand. L. Rev. 1293, 1328-32 (1982)* (survey of 164 federal judges disclosed a predominant range of 10%-50% level of certainty for establishing "reasonable suspicion," with an average of 29.59%). On the issues presented by probabilistic proof compare Michael J. Saks & Robert F. Kidd, Human Information Processing and Adjudication: Trial by Heuristics, 15 L. & Soc'y. Rev. 123 (1980-81) (arguing that mathematics has a role in the trial process), and Laurence H. Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, *84 Harv. L. Rev. 1329 (1971)* (discounting the use of mathematical techniques in the trial process).

n300. *Report of Attorney General of New York, supra* note 46, at 111.

n301. See id. at 66.

n302. Id. at 80-82.

n303. It is almost a mantra of Fourth Amendment jurisprudence that the "experience" of the officer is a significant factor. See, e.g., *Ornelas v. United States, 517 U.S. 690, 699 (1996)* (noting that "a reviewing court should take care ... to give due weight to inferences drawn from ... local law enforcement officers," when determining whether a stop based on probable cause is reasonable); *United States v. Cortez, 449 U.S. 411, 418 (1981)* ("[A] trained officer draws inferences and makes deductions - inferences and deductions that might well elude an untrained person."); *Brown v. Texas, 443 U.S. 47, 52 n.2 (1979)* (noting that the situation in the case should be, "distinguished from the observations of a trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer."); *Terry v. Ohio, 392 U.S. 1, 22-23 (1968)* ("It would have been poor police work indeed for an officer of 30 years' experience ... to have failed to investigate ... further.").

n304. *Report of Attorney General of New York, supra* note 46, at 117-18.

n305. Id. at 117 n.23.

n306. See *Illinois v. Wardlow, 120 S. Ct. 673, 676 (2000)*.

n307. See, e.g., *Illinois v. Wardlow, 120 S. Ct. 673 (2000)* (flight in itself can be a major factor for stop); *United States v. Sokolow, 490 U.S. 1, 3 (1989)* (upholding stop of airplane passenger based on drug courier profile factors); *Alabama v. White, 496 U.S. 352 (1990)* (upholding a stop based on information detailing normal daily activity from anonymous source).

n308. For a more detailed analysis of effective remedial measures, see infra Part IV.

n309. Id.

n310. *221 F.3d 329 (2d Cir. 2000)*.

n311. *Id. at 334*.

n312. Id.

n313. Id.

n314. Id.

n315. *Id. at 337-38*.

n316. Id.

n317. *Id. at 340*.

n318. *Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968); United States v. Mendenhall, 446 U.S. 544, 554 (1980)* (a person is "seized" within meaning of Fourth Amendment only when by means of physical force or show of authority his freedom

of movement is restrained and in view of all of the circumstances a reasonable person would have believed that he was not free to leave). In *Florida v. Bostick, 501 U.S. 429 (1991)*, the Court found no coercive conduct sufficient to establish a seizure of an interstate bus passenger who, at a scheduled stop, was surrounded in the bus by armed narcotics officers, and "consented" to a search of her luggage. The Court ruled that a "reasonable person" could have felt free, "to decline the officers' requests or otherwise terminate the encounter." *Id. at 436.*

n319. *Brown, 221 F.3d at 340.*

n320. *Id. at 340.*

n321. Id.

n322. Id.

n323. Id.

n324. Id.

n325. One commentator, incredulous that a federal court could uphold the stop of every black man in this town on the basis of the information in this case, described the affair as "Breathing While Black." Bob Herbert, Breathing While Black, N.Y. Times, Nov. 4, 1999, at A29. The court in Brown v. City of Oneonta did state that it recognized the "sense of frustration that was doubtlessly felt by those questioned," and cautioned that police should "always be cognizant of the impressions they leave on a community," but thought these concerns had nothing to do with equal protection analysis. *195 F.3d at 120.*

n326. See *Shaw v. Hunt, 517 U.S. 899, 905 (1996)* (determining that strict scrutiny applies when race is the "predominant" consideration in drawing congressional district lines); *City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)* (applying strict scrutiny in analyzing affirmative action programs that awarded city construction projects).

n327. *Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).*

n328. As Professor Burbank has stated, "substantive rights ... are worth no more than the procedural mechanisms available for their realization and protection." Stephen B. Burbank, The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power - A Case Study, *75 Notre Dame L. Rev. 1291, 1293 (2000).*

n329. This article does not address potential state causes of action or remedies for racial profiling and arbitrary stop and frisk practices. As has been well documented, however, state courts, interpreting state constitutions, have often provided greater protections from arrest and search practices than are required by the federal Constitution. See, e.g., David A. Harris, Addressing Racial Profiling in the States, *3 U. Pa. J. Const. L. 368 (2001).*

n330. *Whren v. United States, 517 U.S. 806 (1996)* (holding that police stops for traffic violations based upon probable cause do not violate the Fourth Amendment, even if the stops were pretextual). Some state courts have rejected Whren or otherwise held that racial bias in a stop or arrest is grounds for exclusion of evidence under search and seizure principles. E.g., *State v. Soto, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996).*

n331. See, e.g., *Rakas v. Illinois, 439 U.S. 128 (1978)* (standing to contest the legality of a search restricted to persons who had a legitimate expectation of privacy in the items or premises searched); *Rawlings v. Kentucky, 448 U.S. 98 (1980)* (possessory interest in items seized not enough to confer standing; defendant must have legitimate expectation of privacy with respect to someone else's purse and its contents).

n332. See, e.g., *United States v. Leon, 468 U.S. 897, 922-24 (1984)* (evidence of search not excluded where reasonable officer would believe search warrant stated probable cause, even though it did not).

n333. See, e.g., *California v. Greenwood, 486 U.S. 35 (1988)* (no reasonable expectation of privacy in trash); *Smith v. Maryland, 442 U.S. 735 (1979)* (no legitimate expectation of privacy in phone number dialed); *Oliver v. United States, 466 U.S. 170 (1984)* (open fields beyond the curtilage are not protected by the Fourth Amendment).

n334. *United States v. Armstrong, 517 U.S. 456 (1996)* (limiting discovery on

claim of selective prosecution based on race to instances where there is credible evidence that similarly situated defendants of other races had been treated differently); Andrew E. Taslitz, Slaves no More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings, *15 Ga. St. U. L. Rev. 709 (1999)* ("Pre-trial discovery in criminal cases is extraordinarily limited.").

n335. See supra note 298.

n336. See *Wilson v. Tinicum Township, No. Civ. A. 92-6617, 1993 WL 280205, at 2* (E.D. Pa. July 20, 1993) (noting police excuse used to establish a "legitimate" stop); Plaintiffs' Memorandum of Law in *Support of Their Motion for Class Certification at 7-9, Wilson v. Tinicum Township, No. Civ. A. 92-6617, 1993 WL 280205* (E.D. Pa. July 20, 1993) (No. 92-6617) (detailing incidents of illegal stops of cars and "routine" searches for drugs).

n337. Plaintiffs' Memorandum at 3-6, Tinicum Township (No. 92-6617).

n338. Exhibits to Plaintiffs' Memorandum, Tinicum Township (No. 92-6617).

n339. Id.

n340. Review of the files in which contraband was found disclosed that the courts rejected suppression motions in great majority of the cases. Occasionally, however, a trial judge found the police testimony simply too incredible. In one case, the court found a stop of a car with three black males made on the allegation that a small ornament from a rear view mirror "materially obstructed" the driver's view through the windshield to be insufficient to establish cause for the stop. Commonwealth v. Miller, No. 4627-91 (Pa. Ct. Com. Pl. of Del. County Crim. Div. Sept. 9, 1992).

n341. *734 A.2d 350 (N.J. Super. Ct. Law Div. 1996)*.

n342. See William H. Buckman & John Lamberth, Challenging Racial Profiles: Attacking Jim Crow on the Interstate, Champion, Sept.-Oct. 1999, at 14.

n343. See *State v. Kennedy, 588 A.2d 834 (N.J. Super. Ct. App. Div. 1991)* (statistical survey was sufficient to raise colorable claim of selective enforcement of traffic laws against minorities and to permit discovery of internal state police records).

n344. *Soto, 734 A.2d at 352.*

n345. *Id. at 352-58, 361.* The state filed a notice of appeal but subsequently withdrew its appeal at the time that the Attorney General of New Jersey issued the "Interim Report" on racial profiling on the Turnpike. See also *Commonwealth v. Gonsalves, 711 N.E.2d 108 (Mass. 1999)* (rejecting the doctrine of *Maryland v. Wilson, 519 U.S. 408 (1997)*, stating that the doctrine creates a police power providing, "a clear invitation to discriminatory enforcement"). Justice Ireland noted the widespread public concern with racial profiling and stated that the broad discretion provided by Wilson would contribute to this problem. Id. at 669-700 (Ireland, J., concurring).

n346. See generally, Michael Avery, Karen Blum & David Rudovsky, Police Misconduct: Law & Litigation (3d ed. 1999); Sheldon Nahmod, Civil Rights and Civil Liberties Litigation (4th ed. 1999).

n347. *Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)* (holding that plaintiffs can sue federal defendants in federal court for Fourth Amendment violations). See also, *Carlson v. Green, 446 U.S. 14 (1980)* (holding that a remedy was available directly under the Constitution even though allegations could also support a suit under the Federal Tort Claims Act); *Chappell v. Wallace, 462 U.S. 296 (1983)* (unique disciplinary structure of military establishment and Congress' activity in field constitute "special factors" which dictate that it would be inappropriate to provide enlisted military personnel a Bivens-type remedy against their superior officers).

n348. Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 842 (codified as amended in scattered sections of 28 U.S.C.).

n349. E.g., *Price v. Kramer, 200 F.3d 1237 (9th Cir. 1999)* (affirming award of $ 245,000 for racially-motivated arrest and use of excessive force); *Morgan v. Woessner, 997 F.2d 1244 (9th Cir. 1993)* (allowing $ 90,000 compensatory damages for unlawful arrest and excessive force, while award of $ 450,000 in punitive damages remanded for further consideration by the district court); *Hall v. Ochs, 817 F.2d 920 (1st Cir. 1987)* (where racially motivated conduct had a "profound and lasting effect" on plaintiff, court sustains award of $ 375,000 plus attorneys' fees). In the highway racial profiling cases, there have been

significant settlements (often joined with affirmative relief by way of consent decree) that have been effective in changing practices. See, e.g., Robert Jackson, Eagle County Must Pay for Stopping Motorists, Rocky Mountain News, Nov. 10, 1995, at A4 (reporting $ 800,000 settlement of racial profiling claim based on litigation, *Whitfield v. Board of County Comm'rs, 837 F. Supp. 338 (D. Colo. 1993))*; Settlement Agreement, Wilson v. Tinicum Township, No. 92-6617 (E.D. Pa. Jan. 19, 1995). By contrast, an initial settlement in the I-95 litigation in Maryland in Wilkins v. Maryland State Police, C.A. No. 93-468 (D. Md. 1996), failed to end racial profiling and new litigation has been initiated. See *Maryland State Conference of NAACP Branches v. Maryland Dep't of State Police, 72 F. Supp. 2d 560 (D. Md. 1999)*.

n350. E.g., Seth F. Kreimer, Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s, 5 Wm. & Mary Bill Rts. J. 427, 499-503 (1997).

n351. *Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)*.

n352. *Anderson v. Creighton, 483 U.S. 635 (1987)*.

n353. *502 U.S. 224 (1991)* (per curiam).

n354. *Id. at 227-28*.

n355. *Oliveira v. Mayer, 23 F.3d 642, 648 (2d Cir. 1994)*; see also *Karnes v. Skrutski, 62 F.3d 485, 491n.3 (3d Cir. 1995)* ("There is no conflict in saying a police officer who acted unreasonably nevertheless reasonably (but mistakenly) believed his conduct was reasonable.") By contrast, where a claim is based on intentional race discrimination, qualified immunity should not be a bar to recovery, since the prohibition against intentionally biased conduct has been so widely and emphatically established. E.g., *Wade v. Hegner, 804 F.2d 67 (7th Cir. 1986); Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984)*. On the Court's qualified immunity jurisprudence, see, Alan K. Chen, The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests, *81 Iowa L. Rev. 261 (1995)*; Kit Kinports, Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law, *33 Ariz. L. Rev. 115 (1991)*; David Rudovsky, The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights, *138 U. Pa. L. Rev. 23 (1989)*.

There are no comparable annual statistics on the estimated number and race of drug sellers nationwide. Nevertheless, such data as exists indicates whites constitute a far greater share of the drug selling population than of the population arrested for drug selling. For example, during the period 1991-1993, SAMHSA included questions about drug selling in the annual NHSDA surveys. Although the responses are best seen as a rough approximation of drug selling activity, they are nonetheless highly suggestive. On average over the three year period, blacks were 16 percent of admitted sellers and whites were 82 percent. According to research on patterns of drug purchase and use in selected major cities, drug users reported that their main drug sources were sellers of the same racial or ethnic background as they were. A large study conducted in the Miami, Florida metropolitan area of 699 cocaine users (power and crack) revealed that over 96 percent of the users in each ethnic/racial category were involved in street-level drug dealing, which again would suggest a racial profile of sellers that is comparable to that of users. General Barry McCaffrey has stated that drug transactions between youth are generally intra-racial, that is, youth tend to buy from sellers of the same race. ONDCP's [Office of National Drug Control Policy] former periodic report on drugs trends, Pulse Check, also indicated a high frequency of intra-racial drug transactions, that is, that whites tended to buy from white sellers and minorities from minority sellers. <=89> n88

Moreover, arrest statistics are notoriously misleading, particularly where profiling is practiced. The Attorney General of New Jersey directly addressed the assumption that minorities are disproportionately positioned among couriers, thus justifying highway racial profiling:

The evidence for this conclusion is, in reality, tautological and reflects as much as anything the initial stereotypes of those who rely upon these statistics. To a large extent, these statistics have been used to grease the wheels of a vicious cycle - a self-fulfilling prophecy where law enforcement agencies rely on arrest data that they themselves generated as a result of the discretionary allocation of resources and targeted drug enforcement efforts.

The most obvious problem is relying on arrest statistics, of course, is that these numbers refer only to persons who were found to be involved in criminal activity (putting aside for the moment the presumption of innocence). Arrest statistics, by definition, do not show the number of persons who were detained or investigated who, as it turned out, were not found to be trafficking drugs or carrying weapons. Consistent with our human nature, we in law enforcement proudly display seized drug shipments or "hits" as a kind of trophy, but pay scant attention to our far [*311] more frequent "misses," that is, those instances where stops and searches failed to discover contraband. (Recall that among the universe of stops, searches are quite rare, and searches that reveal evidence of crime are rarer still.) Logically, of course, one cannot hope to judge the overall effectiveness of any practice or program by looking solely at its successes, any more than by looking only at its failures. <=90> n89

n356. *Hans v. Louisiana, 134 U.S. 1 (1890)*. But see *Hafer v. Melo, 502 U.S. 21 (1991)* (holding that state officials, sued in their individual capacity, are not immune under the Eleventh Amendment).

n357. *Board of County Comm'rs v. Brown 520 U.S. 397 (1997); City of Canton v. Harris, 489 U.S. 378 (1989); Monell v. Department of Soc. Servs., 436 U.S. 658 (1978)*. Section 1983 has also been interpreted to bar civil rights actions by persons convicted of crimes whose convictions have not been reversed or vacated, if success of the civil rights claims, "would necessarily imply the invalidity of the [plaintiff's] conviction." *Heck v. Humphrey, 512 U.S. 477, 487 (1994)*. See also, *Spencer v. Kemna, 523 U.S. 1, 17 (1998)* (noting that section 1983 actions are not available where plaintiff's claim would imply the invalidity of his parole revocation). This doctrine may bar suits by persons who have been convicted based on events that transpired during the car or pedestrian stop, where the civil damage claim is based on alleged constitutional violations that occurred during the same incident. E.g., *Covington v. City of New York, 171 F.3d 117 (2d Cir. 1999)* (noting that plaintiff's complaint would be barred if it would suggest that plaintiff's criminal conviction was invalid); *Hudson v. Hughes, 98 F.3d 868 (5th Cir. 1996)* (affirming dismissal of section 1983 complaint based on false arrest and excessive force during an arrest where plaintiff had been convicted of possession of a firearm and battery of an officer based on the same event).

n358. See, e.g., *Heck, 512 U.S. at 487* (holding that plaintiff cannot bring a section 1983 claim that would challenge the plaintiff's underlying conviction).

n359. See David Rudovsky, Police Abuse: Can the Violence be Contained?, 27 Harv. C.R.-C.L. Rev. 465, 490-91 (1992).

n360. Id.

n361. Id. (citation omitted).

n362. It seems clear that many jurisdictions consider payments to victims of misconduct part of the "cost of policing." See Bandes, supra note 67, at 1337-38 (noting that New York City paid over $ 31 million dollars in settlements and judgments in 1998, but failed to take action against officers responsible for the misconduct).

n363. *Ex Parte Young, 209 U.S. 123 (1908); Hafer v. Melo, 502 U.S. 21, 30-31*

(1991).

n364. *Lewis v. Casey, 518 U.S. 343 (1996); City of Los Angeles v. Lyons, 461 U.S. 95 (1983); Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974).*

n365. *Lyons, 461 U.S. at 103; Allee v. Medrano, 416 U.S. 802, 814 (1974).*

n366. *Kolender v. Lawson, 461 U.S. 352, 355 n.3 (1983); O'Shea v. Littleton, 414 U.S. 488, 494-96 (1974).*

n367. *461 U.S. 95 (1983).*

n368. *Lyons, 461 U.S. at 97.*

n369. *Id. at 114-15* (Marshall, J., dissenting)

n370. *Id. at 110.*

n371. *Id. at 105-06.*

n372. See, *Lyons, 461 U.S. at 113-37 (1983)* (Marshall, J., dissenting); *Allee v. Medrano, 416 U.S. 802, 815 (1974)* (holding that where there is a pattern of police misconduct in suppressing organized labor activities, injunctive relief is appropriate); Richard H. Fallon, Jr., Of Justiciability, Remedies and Public Law Litigation: Notes on the Jurisprudence of Lyons, *59 N.Y.U. L. Rev. 1 (1984)* (noting that under the standing test set out in Lyons, a plaintiff must show present and continuing injuries).

n373. See, e.g, *Deshawn E. v. Safir, 156 F.3d 340 (2d Cir. 1998)* (noting that police interrogation practices subject to equitable relief, but court dismisses claim based on failure of proof); *Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486 (9th Cir. 1996)* (finding that the fourteen named plaintiffs have standing to obtain statewide injunctive relief against the state police where

illegal citation practices were the result of official practice and policy); *Thomas v. County of Los Angeles, 978 F.2d 504 (9th Cir. 1993)* (finding that plaintiffs had standing where "numerous instances of police misconduct have occurred in a small six by seven block area, [and] some minority residents of the area have been mistreated by deputies more than once"); *Rodriguez v. California Highway Patrol, 89 F. Supp. 2d 1131, 1135-36 (N.D. Cal. 2000)* (finding that NAACP and LULAC have standing in racial profiling suit). In *Maryland State Conference of NAACP Branches v. Maryland Department of State Police, 72 F. Supp. 2d 560, 565 (D. Md. 1999)*, the Court stated:

Here, the plaintiffs' likelihood of injury depends only on their status as a member of a minority group and their need to travel on I-95. An "illegal" action on their part associated with the future stop need be no more than a minor, perhaps unintentional, traffic infraction; indeed, according to their allegations, they may be stopped even if no traffic violation has been committed. The plaintiffs also have reason to expect they will continue to travel on I-95. This combination of alleged past injury, an earlier pattern and practice finding, and the plaintiffs' likely future travel is sufficient to confer standing. (emphasis added).

n374. *120 S. Ct. 693 (2000).*

n375. *Id. at 705-06.*

n376. *Id. at 704-06.*

n377. *Id. at 706;* see also *Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149, 156-61 (4th Cir. 2000)* (en banc) (following Laidlaw in determining that plaintiff had standing where plaintiff's use of a waterway was reduced by defendant's actions).

n378. *Laidlaw, 120 S. Ct. at 706.*

n379. In *City of Erie v. Pap's, A.M., 120 S. Ct. 1382 (2000)*, the Court, citing Laidlaw, found an appeal not moot even in the face of a party's declaration that it would not seek to engage in the challenged conduct in the future. The mere possibility of renewed conduct was deemed sufficient to permit adjudication. *Id. at 1390.*

n380. *City of Los Angles v. Lyons, 461 U.S. 95, 105-06 (1983).*

n381. *Honig v. Doe, 484 U.S. 305, 320 (1988)* (finding that emotionally handicapped individual cannot conform his conduct to socially acceptable norms; therefore, it is reasonable to expect that he will again engage in classroom misconduct); see also, *Church v. City of Huntsville, 30 F.3d 1332, 1337-78 (11th Cir. 1994)* (homeless persons had standing to seek injunction preventing city from implementing policy of isolating and/or removing homeless persons).

n382. E.g., Anderson v. Cornejo, No. 97 C 7556, *1999 U.S. Dist. LEXIS 519* (N.D. Ill. Jan. 11, 1999); *National Cong. for Puerto Rican Rights v. City of New York, 191 F.R.D. 52 (S.D.N.Y. 1999).*

n383. See, *Shaw v. Hunt, 517 U.S. 899, 904-05 (1996)* (noting that plaintiff who resides inside a district that was created through "a gerrymandered districting scheme" had standing); *Powers v. Ohio, 499 U.S. 400 (1991)* (holding that white defendant had standing to object to exclusion of black prospective jurors from his trial); *Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972)* (finding that tenants who sued owner for racial discrimination under the Civil Rights Act of 1964 had standing through the Court's "generous construction" of the Act).

n384. See *Lyons, 461 U.S. at 113-15* (Marshall, J., dissenting).

n385. *Id. at 110.*

n386. See *id. at 111-13* (noting that injunctive relief is available upon a showing that there is "a sufficient likelihood that [plaintiff] will again be wronged in a similar way"). By contrast, in *Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1044 (9th Cir. 1999)* (en banc) the court ruled that two individuals who had each been stopped once over a several-year period and who regularly drove in the area in which they claimed illegal "border" stops were being made, lacked standing to challenge the actions of the Border Patrol.

n387. See e.g., *Sosna v. Iowa, 419 U.S. 393, 397-403 (1975)* (upholding standing of class even where individual who brought the suit no longer met the class requirements); *Nicacio v. INS, 797 F.2d 700 (9th Cir. 1985)* (upholding class action lawsuit brought by minorities against the INS). However if the plaintiff lacks standing, the case may be dismissed prior to class

certification. *Hodgers-Durgin, 199 F.3d at 1042.*

n388. E.g., *Hodgers-Durgin, 199 F.3d at 1042; Chavez v. Illinois State Police, 27 F. Supp. 2d 1053 (N.D. Ill. 1998).* Another potential bar to injunctive relief is the decision in *Rizzo v. Goode, 423 U.S. 362, 380 (1976),* where the Court, relying heavily on principles of federalism, reversed an injunction requiring a police department to more effectively investigate and adjudicate civilian complaints of abuse. The Court was not persuaded that the evidence was sufficient to demonstrate a pattern and practice of misconduct within the police department and cautioned against intrusive federal court intervention in local government operations. Id. However, in *Monell v. Department of Social Services, 436 U.S. 658 (1978),* the Court ruled that an evidentiary showing that a municipality's policy, practice, or custom caused the constitutional violation is sufficient to warrant a judgment against the municipality. See also, *City of Canton v. Harris, 489 U.S. 378 (1989)* (municipal liability is established where city is deliberately indifferent in its training of police and lack of training causes a constitutional violation). Under this standard, it would appear that the municipality would be liable for damages and would be subject to equitable relief for a proven unconstitutional practice, policy, or custom.

As noted above, the barriers created by Lyons and Rizzo v. Goode have been overcome in some cases, and consent decrees and settlement agreements have provided effective remedial mechanisms. E.g, Settlement and Monitoring Agreement and Stipulations of the Parties, NAACP v. City of Philadelphia, C.A. No. 96-6045 (E.D. Pa. 1996) (on file with author); Julia C. Martinez, Settlement Reached in Tinicum Suit, Phila. Inquirer, Oct. 6, 1994, at B1; see, *Wilson v. Tinicum Township, No. Civ. A. 92-6617, 1993 WL 280205* (E.D. Pa. July 20, 1993) (granting motion for class certification based on racial profiling on highway stops). As I discuss in the following section, the United States has also entered into Consent Decrees requiring reform of police practices.

n389. *42 U.S.C. 14141* (1995). For a discussion of the implementation of the Act by the Department of Justice, see Myriam E. Gilles, Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights, *100 Colum. L. Rev. 1384 (2000);* Debra Livingston, Police Reform and the Department of Justice: An Essay on Accountability, *2 Buff. Crim. L. Rev. 815 (1999);* Marshall Miller, Note, Police Brutality, *17 Yale L. & Pol'y Rev. 149 (1998).*

n390. Livingston, supra note 389, at 841-850.

n391. Id. at 815-16.

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n392. See infra note 395 and accompanying text.

n393. Id.

n394. Livingston, supra note 389, at 815-16. The federal government (as well as local prosecutors) may bring criminal prosecutions against police officers who violate or conspire to violate civil rights. *18 U.S.C. 241*, 242 (1994). However, these criminal statutes require the government to prove a specific intent to deprive the victim of a constitutional right, *United States v. Guest, 383 U.S. 745, 760 (1966)*, a factor that the Department of Justice often cites in refusing to prosecute police officers. But even without this difficult burden of proof it is unlikely we would see many more prosecutions. Prosecutors do not embrace the prosecution of fellow law enforcement officers and even when they are motivated to act, the code of silence within most departments and jury sympathy for police officers may make the prosecution highly problematic. In the area of stops and searches, unless the incident escalates into the use of deadly force, the significance of any one case will be relatively minor, thus presenting an additional reason for federal officials to pass on criminal prosecution.

n395. E.g., Settlement and Monitoring Agreement and Stipulations of the Parties, NAACP v. City of Philadelphia, supra note 388; Consent Decree, United States v. City of Pittsburgh, C.A. No 97354 (W.D. Pa. 1997); Consent Decree, United States v. State of New Jersey, C.A. No. 99-5970 (D.N.J. 1999); Memorandum of Agreement Between United States Department of Justice and Montgomery County, Md., et al., Jan. 18, 2000. Much of the incentive for change resulted from unconscionable acts of brutality and corruption, including the Rodney King beating, the shooting of Amadou Diallo and the brutalization of Abner Louima in New York, the massive corruption and misconduct scandals in the New York, Los Angeles, Chicago, Philadelphia, and New Orleans Police Departments, and the growing sentiment and expressions of resentment and anger in minority communities over the day to day practices and policies of police agencies. And, as recent events powerfully demonstrate, pervasive corruption and misconduct continues in some departments. E.g., Christopher Commission, supra note 228; Mollen Commission, supra note 228; Settlement and Monitoring Agreement and Stipulations of the Parties, NAACP v. City of Philadelphia, supra note 395; Interim Report of Attorney General of New Jersey, supra note 32; *Report of Attorney General of New York, supra* note 46; Todd S. Purdum, Los Angeles Police Officer Sets off Corruption Scandal, N.Y. Times, Sept. 18, 1999 at A9 (describing largest corruption scandal in 60 years, involving framing of defendants); James Sterngold, Police Corruption Inquiry Expands in Los Angeles, N.Y. Times, Feb. 11, 2000, 1, at 16.

n396. See Bratton & Knobler, supra note 76, at 233-239.

n397. Consent Decree, United States v. New Jersey, supra note 395; Memorandum of Agreement Between the United States Department of Justice and Montgomery County, Md., United States v. Montgomery County, supra note 395.

n398. See supra note 395.

n399. Consent Decree, United States v. City of Pittsburgh, supra note 395, at 6-9.

n400. Id. 23-33

n401. *Consent Decree, United States v. State of New Jersey, supra* note 395.

n402. There are significant limitations on consent searches: state troopers may request consent to search a motor vehicle only where troopers can articulate a reasonable suspicion that a search would reveal evidence of a crime; every consent search of a vehicle must be based on written consent of the driver or other person authorized to give consent which precedes the search; the scope of the consent is limited to the scope of the consent that is given by the driver or other person authorized to give consent; the driver or other person authorized to give consent is advised of such right; that the driver or other person authorized to give consent who has granted written consent may orally withdraw that consent at any time during the search without giving a reason; and state troopers immediately must stop a consent search of a vehicle if and when consent is withdrawn. Id. These provisions are more restrictive than Fourth Amendment doctrine. See, e.g., *Ohio v. Robinette, 519 U.S. 33, 39 (1996)* (searches under Fourth Amendment must be reasonably based on the totality of the circumstances).

n403. *Consent Decree, United States v. State of New Jersey, supra* note 395, at 18-24.

n404. Id. at 23-33.

n405. *Consent Decree, United States v. State of New Jersey, supra* note 395, at 18-23.

n406. Id. at 21.

n407. Without a prohibition on pretextual stops, law enforcement agencies can continue to profile by race, and attempt to "even out" the statistics by stopping sufficient numbers of white drivers.

n408. Settlement Agreement, NAACP v. City of Philadelphia, supra note 395, at 2; City of Philadelphia's Response to Plaintiffs' Proposals for Reforms Within the Philadelphia Police Department, NAACP v. City of Philadelphia, C.A. No. 96-6045 (E.D. Pa. 1996), at 7-8 (on file with author).

n409. Settlement Agreement, NAACP v. City of Philadelphia, supra note 395, at 3-4; *City of Philadelphia's Response to Plaintiffs' Proposals, supra* note 408, at 16-20.

n410. Settlement Agreement, NAACP v. City of Philadelphia, supra note 395, at 2; *City of Philadelphia's Response to Plaintiffs' Proposals, supra* note 408, at 3-6.

n411. Settlement Agreement, NAACP v. City of Philadelphia, supra note 395, at 2; *City of Philadelphia's Response to Plaintiffs' Proposals, supra* note 408, at 3-6.

n412. Settlement Agreement, NAACP v. City of Philadelphia, supra note 395, at 2; *City of Philadelphia's Response to Plaintiffs' Proposals, supra* note 408, at 21-29.

n413. Fourth Philadelphia Report, supra note 41, at 3.

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LEVEL 1... 2

A History of Foreign Assistance

Summary

Historical Perspective

The 1961 Foreign Assistance Act

Post-1960s Efforts to "Reform" Foreign Assistance

Brief Chronology and Highlights of the History of U.S. Foreign Assistance Activities

Tuesday, 15-Jan-2002 10:52:00 EST

Summary

On September 4, 1961, the Congress passed the Foreign Assistance Act, which reorganized the U.S. foreign assistance programs including separating military and non-military aid. The Act mandated the creation of an agency to administer economic assistance programs, and on November 3, 1961, President John F. Kennedy established the U.S. Agency for International Development (USAID).

USAID became the first U.S. foreign assistance organization whose primary emphasis was on long-range economic and social development assistance efforts. Freed from political and military functions that plagued its predecessor organizations, USAID was able to offer direct support to the developing nations of the world.

The agency unified already existing U.S. aid efforts, combining the economic and technical assistance operations of the International Cooperation Agency, the loan activities of the Development Loan Fund, the local currency functions of the Export-Import Bank, and the agricultural surplus distribution activities of the Food for Peace program of the Department of Agriculture.

While some could argue that the creation of USAID simply represented a bureaucratic reshuffling, the agency, and the legislation creating it, represented a recommitment to the very purposes of overseas development. USAID was established to unify assistance efforts, to provide a new focus on the needs of a changing world, and to assist other countries in maintaining their independence and become self-supporting

Historical Perspective

The 1961 reorganization of America's foreign aid programs resulted from an increasing dissatisfaction with the foreign assistance structures that had evolved from the days of the Marshall Plan, to which USAID and U.S. foreign assistance policy traces its roots.

By the end of World War II, Europe had suffered substantial loses, physically and economically. Responding to Europe's calls for help, the international community established the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (the World Bank) on December 27, 1945. On April 2, 1948, through the enactment of the Economic Cooperation Act, the United States responded by creating the Marshall Plan. While the IMF and the World Bank were created as permanent institutions, the goal of the Marshall Plan was specific: To stabilize Europe, not as a permanent program for European recovery but as an emergency tool of assistance.

When the Marshall Plan ended on June 30, 1951, Congress was in the process of piecing together a new foreign aid proposal designed to unite military and economic programs with technical assistance. On October 31, 1951, this plan became a reality when Congress passed the first Mutual Security Act and created the Mutual Security Agency.

In 1953, the Foreign Operations Administration was established as an independent government

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agency outside the Department of State, to consolidate economic and technical assistance on a world-wide basis. Its responsibilities were merged into the International Cooperation Administration (ICA) one year later.

The ICA administered aid for economic, political and social development purposes. Although the ICA's functions were vast and far reaching, unlike USAID, ICA had many limitations placed upon it. As a part of the Department of State, ICA did not have the level of autonomy the USAID currently maintains. At the time, multilateral donors (such as those affiliated with the United Nations and the Organization of American States) were playing a greater role in foreign assistance.

The Mutual Security Act of 1954 introduced the concepts of development assistance, security assistance, a discretionary contingency fund, and guarantees for private investments. The Food for Peace program was implemented that year, introducing food aid.

Congressional approval of a revised Mutual Security Act in 1957 lead to the creation of the Development Loan Fund (DLF), which acted as the ICA's lending arm. The DLF's primary function was to extend loans of a kind that the Export-Import Bank and other donors were not interested in or prepared to underwrite - those repayable in local currencies. The DLF financed everything other than technical assistance but was most noteworthy for financing capital projects.

Neither the ICA nor the DLF addressed the need for a long-range foreign development program. That led to the creation of the U.S. Agency for International Development.

The 1961 Foreign Assistance Act

By 1960, the support from the American public and Congress for the existing foreign assistance programs had dwindled. The growing dissatisfaction with foreign assistance, highlighted by the book The Ugly American, prompted Congress and the Eisenhower Administration to focus U.S. aid to developing nations, which became an issue during the 1960 U.S. presidential campaign.

The new Kennedy Administration made reorganization of, and recommitment to, foreign assistance a top priority. It was thought that to renew support for foreign assistance at existing or higher levels, to address the widely-known shortcomings of the previous assistance structure, and to achieve a new mandate for assistance to developing countries, the entire program had to be "new."

In proposing a new United States foreign assistance program in 1961, President Kennedy provided a justification based on three premises: (1) then current foreign aid programs, "America's unprecedented response to world challenges", were largely unsatisfactory and ill suited for the needs of the United States and developing countries, (2) the economic collapse of developing countries "would be disastrous to our national security, harmful to our comparative prosperity, and offensive to our conscience", and (3) the 1960s presented an historic opportunity for industrialized nations to move less-developed nations into self-sustained economic growth.

Today, when foreign economic assistance programs are under scrutiny, it is worth quoting President Kennedy's remarks at length:

> "For no objective supporter of foreign aid can be satisfied with the existing program--actually a multiplicity of programs. Bureaucratically fragmented, awkward and slow, its administration is diffused over a haphazard and irrational structure covering at least four departments and several other agencies. The program is based on a series of legislative measures and administrative procedures conceived at different times and for different purposes, many of them now obsolete, inconsistent, and unduly rigid and thus unsuited for our present needs and purposes. Its weaknesses have begun to undermine confidence in our effort both here and abroad.
>
> "Although our aid programs have helped to avoid economic chaos and collapse, and assisted many nations to maintain their independence and freedom--nevertheless, it is a fact that many of the nations we are helping are not much nearer sustained economic growth than they were when our aid operation began. Money spent to

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> meet crisis situations or short-term political objectives while helping to maintain national integrity and independence has rarely moved the recipient nation toward greater economic stability."

Why, then, should the United States continue a foreign economic assistance program?

> "The answer is that there is no escaping our obligations: our moral obligations as a wise leader and good neighbor in the interdependent community of free nations--our economic obligations as the wealthiest people in a world of largely poor people, as a nation no longer dependent upon the loans from abroad that once helped us develop our own economy--and our political obligations as the single largest counter to the adversaries of freedom.
>
> "To fail to meet those obligations now would be disastrous; and, in the long run, more expensive. For widespread poverty and chaos lead to a collapse of existing political and social structures which would inevitably invite the advance of totalitarianism into every weak and unstable area. Thus our own security would be endangered and our prosperity imperiled. A program of assistance to the underdeveloped nations must continue because the Nation's interest and the cause of political freedom require it."

The Foreign Assistance Act of 1961 that was enacted as a result of the legislative process begun by President Kennedy was a relatively concise document that recognized the economic and political principles expressed in the President's transmittal message. Development assistance consisted primarily of two programs: (1) a Development Loan Fund whose primary purpose was to foster plans and programs to "develop economic resources and increase productive capacities" (i.e., a significant amount of capital infrastructure), and (2) a Development Grant Fund, to focus on "assisting the development of human resources through such means as programs of technical cooperation and development" in less developed countries.

Three other significant economic assistance programs were included in the new FAA: (1) a guaranty program (now the Overseas Private Investment Corporation) to provide protection assuring United States business against certain risks of doing business overseas, (2) a "supporting assistance" program (now the Economic Support Fund program) to support or promote economic or political stability, and (3) an appropriated contingency fund.

The new directions most emphatically stressed were a dedication to development as a long-term effort requiring country-by-country planning and a commitment of resources on a multi-year, programmed basis. The new focus of development was to achieve economic growth and democratic, political stability in the developing world to combat both the perceived spread of ideological threats such as communism and the threat of instability arising from poverty. The economic development theory of W.W. Rostow, which posited "stages of economic development," most notably a "takeoff into growth" stage, provided the premise for much of the development planning in the newly-formed U.S. Agency for International Development.

In the final analysis, the greatest achievement of USAID and the Foreign Assistance Act of 1961 was that they addressed the goals of setting up country-by-country planning and long-term development planning mechanisms through solving the organizational problems in the then-existing foreign assistance programs.

Fowler Hamilton, who was appointed as USAID's first administrator, assumed his primary goal was to establish an agency founded on good, strong organizational principles that would stand the test of time.

One of the first programs undertaken by the fledgling USAID was the Alliance for Progress. Conceptually set-up in the fall of 1960 by the Act of Bogota and confirmed by the Charter of Punta del Este (Uruguay) in early 1961, the Alliance was a hemisphere-wide commitment of funds and effort to develop the nations of the Americas. The Alliance became the basis for USAID's programs in Latin America throughout the 1960s. President Kennedy promoted the Alliance in trips to Colombia and Venezuela in 1961.

In Asia, USAID's first emphases were on countering the spread of communism, particularly the

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influence of the People's Republic of China. This quickly ballooned into a large program of assistance based on counter-insurgency and democratic and economic development in Vietnam, which lasted until the withdrawal of American troops in 1975. In Africa, USAID focused on such initiatives as the education of the leadership of the newly-independent countries and meeting other economic and social imperatives.

Post-1960s Efforts to "Reform" Foreign Assistance

The Foreign Assistant Act (FAA), as originally enacted in 1961, contained very few restrictions on how assistance may be provided, and contained only general prescriptions on the kinds of factors that were to be taken into account (e.g., the extent to which the recipient has taken effective self-help measures) prior to the provision of assistance.

In the early 1970s foreign aid fell on hard legislative times to the point that, in 1971, the Senate rejected a foreign assistance bill authorizing funds for fiscal years 1972 and 1973. The defeat of the 1971 bill represented the first time that either House had rejected a foreign aid authorization since the program was first initiated as the Marshall Plan after World War II. Several themes merged to cause the defeat of the bill: (1) opposition to the Vietnam War, (2) concern that aid was too concerned with short-term military considerations, and (3) concern that aid, particularly development aid, was a giveaway program producing few foreign policy results for the United States.

Attempts to reform the foreign assistance program -- particularly the economic assistance program -- were led by the House Committee on Foreign Affairs. Assistance for the poorest sectors of developing nations ("basic human needs") became the central thrust of the reform. To extend assistance directly to the recipient nation's population, Congress replaced the old categories of technical assistance grants and development loans with new functional categories aimed at specific problems such as agriculture, family planning, and education. The aim of bilateral development aid was to concentrate on sharing American technical expertise and commodities to meet development problems, rather than relying on large-scale transfers of money and capital goods, or financing of infrastructure. The structure of the FAA remains today pretty much the way it was following these 1973 amendments.

Attempting to address concerns similar to those raised in 1961 by President Kennedy, legislation drafted at the request of Senator Hubert Humphrey was introduced in 1978 to reorganize the foreign assistance management structure. In the Humphrey bill, an International Development Cooperation Agency was established to coordinate foreign assistance activities as they related to bilateral programs administered by USAID, multilateral programs of international lending institutions then under the purview of the Department of the Treasury, voluntary contributions to United Nations agencies then administered by the Department of State, food programs then administered by USAID, and the activities of OPIC. An International Development Institute would be established within IDCA to address, among other things, private and voluntary organizations and with one of the Institute's constituent parts being the Peace Corps.

The Humphrey bill was not enacted into law. Bureaucratic obstacles within the Executive branch and in Congress operated to limit the statutory impact of the bill to changes in the policy statements contained in the FAA and less sweeping administrative changes.

The IDCA, however, was established by Executive Order in September, 1979. Up until that time, all authority to administer FAA programs had been vested in the Secretary of State by delegation from the President. The establishment of IDCA changed this relationship. With the establishment of IDCA, FAA authorities were delegated in part to the Director of IDCA (those dealing with the provision of economic assistance), most of which were redelegated to the Administrator of USAID. Generally, those authorities dealing with security assistance were delegated to the Secretary of State. (The Economic Support Fund is the point at which the development and security programs "meet", so that the Secretary is empowered to determine what countries receive ESF assistance and the amounts, the USAID Administrator implements the ESF programs.) To give effect to some of these changes, the President submitted a reorganization plan (Reorganization Plan No. 2) which delegated certain economic assistance functions to the Director.

IDCA, to be charitable, was not the coordinating mechanism envisaged either by Senator Humphrey or, in all likelihood, President Carter. The only entity it coordinated was USAID and,

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since it was staffed with fewer than 75 people, could make only a marginal impact on overall bilateral and multilateral assistance policy. In the Reagan Administration no staff were provided to IDCA and, functionally, it faded quickly from the scene. The Executive Order creating IDCA remained intact, however, defining some of the lines of authority in the administration of foreign assistance. Some of the other coordinating functions that had been expected to be exercised by IDCA (but not contained in the Executive Order) were initially exercised instead by USAID, but over time the functions fell into disuse.

At the same time that IDCA was established, President Carter also attempted to give new life to the Development Coordination Committee (DCC). Organized into subgroups (e.g., multilateral assistance, food assistance), the DCC was an effort at inter-agency coordination on a consensus basis of all foreign assistance activities. This effort also failed. The DCC rarely met as a whole, and only two of its subcommittees ever functioned. Today, it exists only as an unimplemented provision in the FAA.

Beginning in late 1988, the House Committee on Foreign Affairs (HFAC) began an examination of the foreign assistance program generally and, in particular, the continued relevance of the Foreign Assistance Act. At the same time, numerous outside interest groups also began a similar review. The product of the HFAC review was a report (the so-called "Hamilton-Gilman report") which contains certain findings and recommendations. The findings restate many of the same themes that President Kennedy had raised almost thirty years earlier in his transmittal of the first Foreign Assistance Act:

- Foreign assistance is a valuable foreign policy tool in terms of promoting U.S. security interests and its economic interests.
- The interrelationship and interdependence of Nations means that the United States will continue to be affected--for good or bad--by economic and political events in other parts of the world and, increasingly, economic issues dominate the international agenda.
- Moreover, the world is changing to become more urbanized and with an increasing recognition of the value of market-oriented solutions to social and economic problems.
- But the program does not enjoy broad public support. ("U.S. public support for helping poor people remains strong, but the public does not view the aid program as doing this effectively. The public has very little concept of the aid program as an instrument of foreign policy, used to advance U.S. interests.")
- Foreign aid legislation and administration impede the effectiveness of the program thereby confirming the public's view of the value of these programs: there are too many objectives in the FAA, so numerous in fact that they "cannot provide meaningful direction or be effectively implemented"; too many earmarks, reporting requirements, and restrictions hamper the effectiveness of programs and forces the Executive branch to focus on "anticipating how assistance will be used, rather than on how effectively it has been used"; the economic assistance program is spread out over too many countries in too many projects; there is little coordination of U.S. economic, security, and development policies. The DCC seldom meets at a high level and then principally for ceremonial purposes, and IDCA "exists in name only"; non-governmental organizations have a lot to offer to the foreign assistance process, and their value is increasing over time.

The report's major recommendation was to repeal the FAA and start fresh with an act that was far more focused than current law. The legislation that was drafted (although not immediately introduced) by the Committee to address the report's findings, had as its major economic assistance themes economic growth, poverty alleviation, environmental sustainability, and promotion of political pluralism, which were designed to give focus to the economic assistance objectives of our foreign assistance programs. The bill also attempted to be more results-oriented in its approach by streamlining congressional notification procedures and encouraging a more active role for program evaluation. However, even as originally drafted the bill contained a considerable process or input-directed orientation. Authorities to enhance flexibility in program administration (an improvement over current law but, of course, not nearly as flexible as the FAA as originally enacted in 1961) were included in the draft bill, as was encouragement to better

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coordinate foreign assistance activities among the many agencies of the United States Government doing business overseas.

The draft legislation was vetted informally with the Executive branch which, although leery about the ultimate outcome, did not discourage the process from continuing. Unfortunately, Chairman Fascell and Hamilton were unable to sell the product to the rest of the Committee. The bill wound up as a hodgepodge of certification requirements, earmarks, and micromanagement, bearing little resemblance to the draft bill first reviewed informally with the committee and offering no inducement for the Administration to continue its support for the authorization process. This effort at a rewrite was unsuccessful, but the flame still flickered.

While efforts were made the next year, and failed, to rewrite the FAA, a more serious attempt was made in 1991. In April, 1991, the Bush Administration transmitted to the Congress its comprehensive rewrite of the Foreign Assistance Act. The bill attempted to return the legislative framework of the program, to a considerable extent, to the early years of the Foreign Assistance Act. Some elements in Congress, however, criticized the effort for providing the Executive branch with too much discretion, and it was not seriously considered.

However, the HFAC again renewed its quest for a new FAA by merging its earlier efforts with some of the initiatives proposed in the Administration's bill to yield a product that the Administration thought, from its perspective, would offer more in the way of flexibility than it took away. The Administration actively pursued the issue with the Senate Committee on Foreign Relations which produced a product with a far greater number of the "flexibility items" (e.g., greater authority to waive provisions of law and to transfer funds, reduction in the number of statutory limitations on the provision of assistance, etc.) than it had requested in its own bill.

The conference on the bill produced a product that the Administration threatened to veto due to provisions not central to the overall restructuring of the FAA (e.g., abortion-related provisions and provisions expanding merchant marine subsidies). It was hoped that the bill, once passed and vetoed, would be re-passed without the offending provisions and sent to the President for signature. The conference report, however, although passed in the Senate was defeated in the House. There were many reasons: a "free" vote against foreign aid given the President's outstanding veto threat and the economic circumstances in the United States at the time of the House vote were only two of these.

Subsequently, the Clinton administration took its hand to rewriting the FAA. In 1994, the Peace, Prosperity, and Democracy Act (PPDA) was introduced which would have repealed the FAA and substituted in its place a radical new account structure for foreign assistance programs. Based on program objectives, its authorizations would have merged previously separate programs into the same account. Thus, development assistance and those international organizations with a development focus would have been funded from the same account. Considerable flexibility was provided in the way in which assistance could be provided and legislative limitations overcome. The bill was never introduced in the Senate and never reported out of committee in the House.

No further efforts to rewrite the FAA wholesale have been attempted.

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Request for Leave or Approved Absence

1. Name *(Last, first, middle)*	2. Employee or Social Security Number

3. Organization

4. Type of Leave/Absence

Check appropriate box(es) and enter date and time below)	Date		Time		Total Hours
	From	To	From	To	
☐ **Accrued annual leave**					
☐ **Restored annual leave**					
☐ **Advance annual leave**					
☐ **Accrued sick leave**					
☐ **Advance sick leave**					

Purpose:
- ☐ Illness/injury/incapacitation of requesting employee
- ☐ Medical/dental/optical examination of requesting employee
- ☐ Care of family member, including medical/dental/optical examination of family member, or bereavement
- ☐ Care of family member with a serious health condition
- ☐ Other

☐ **Compensatory time off**					
☐ **Other paid absence** *(specify in remarks)*					
☐ **Leave without pay**					

5. Family and Medical Leave

If annual leave, sick leave, or leave without pay will be used under the Family and Medical Leave Act of 1993 (FMLA), please provide the following information:

☐ I hereby invoke my entitlement to family and medical leave for:

- ☐ Birth/Adoption/Foster care
- ☐ Serious health condition of spouse, son, daughter, or parent
- ☐ Serious health condition of self

Contact your supervisor and/or your personnel office to obtain additional information about your entitlements and responsibilities under the FMLA. Medical certification of a serious health condition may be required by your agency.

6. Remarks

7. **Certification:** I certify that the leave/absence requested above is for the purpose(s) indicated. I understand that I must comply with my employing agency's procedures for requesting leave/approved absence (and provide additional documentation, including medical certification, if required) and that falsification of information on this form may be grounds for disciplinary action, including removal.

7a. Employee signature	7b. Date signed

8a. Official action on request ☐ Approved ☐ Disapproved *(If disapproved, give reason. If annual leave, initiate action to reschedule.)*

8b. Reason for disapproval

8c. Signature	8d. Date signed

Privacy Act Statement

Section 6311 of title 5, United States Code, authorizes collection of this information. The primary use of this information is by management and your payroll office to approve and record your use of leave. Additional disclosures of the information may be: To the Department of Labor when processing a claim for compensation regarding a job connected injury or illness; to a State unemployment compensation office regarding a claim; to Federal Life Insurance or Health Benefits carriers regarding a claim; to a Federal, State, or local law enforcement agency when your agency becomes aware of a violation or possible violation of civil or criminal law; to a Federal agency when conducting an investigation for employment or security reasons; to the Office of Personnel Management or the General Accounting Office when the information is required for evaluation of leave administration; or the General Services Administration in connection with its responsibilities for records management.

Public Law 104-134 (April 26, 1996) requires that any person doing business with the Federal Government furnish a social security number or tax identification number. This is an amendment to title 31, Section 7701. Furnishing the social security number, as well as other data, is voluntary, but failure to do so may delay or prevent action on the application. If your agency uses the information furnished on this form for purposes other than those indicated above, it may provide you with an additional statement reflecting those purposes.

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Check appropriate box(es) and enter date and time below)	Date From	Date To	Time From	Time To	Total Hours
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☐ **Advance annual leave**					
☐ **Accrued sick leave**					
☐ **Advance sick leave**					
☐ **Compensatory time off**					
☐ **Other paid absence** *(specify in remarks)*					
☐ **Leave without pay**					

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☐ Advance annual leave					
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☐ Advance sick leave					
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☐ Other paid absence *(specify in remarks)*					
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- ☐ Serious health condition of spouse, son, daughter, or parent
- ☐ Serious health condition of self

Contact your supervisor and/or your personnel office to obtain additional information about your entitlements and responsibilities under the FMLA. Medical certification of a serious health condition may be required by your agency.

6. Remarks

7. **Certification:** I certify that the leave/absence requested above is for the purpose(s) indicated. I understand that I must comply with my employing agency's procedures for requesting leave/approved absence (and provide additional documentation, including medical certification, if required) and that falsification of information on this form may be grounds for disciplinary action, including removal.

7a. Employee signature	7b. Date signed

8a. Official action on request ☐ Approved ☐ Disapproved *(If disapproved, give reason. If annual leave, initiate action to reschedule.)*

8b. Reason for disapproval

8c. Signature	8d. Date signed

Privacy Act Statement

Section 6311 of title 5, United States Code, authorizes collection of this information. The primary use of this information is by management and your payroll office to approve and record your use of leave. Additional disclosures of the information may be: To the Department of Labor when processing a claim for compensation regarding a job connected injury or illness; to a State unemployment compensation office regarding a claim; to Federal Life Insurance or Health Benefits carriers regarding a claim; to a Federal, State, or local law enforcement agency when your agency becomes aware of a violation or possible violation of civil or criminal law; to a Federal agency when conducting an investigation for employment or security reasons; to the Office of Personnel Management or the General Accounting Office when the information is required for evaluation of leave administration; or the General Services Administration in connection with its responsibilities for records management.

Public Law 104-134 (April 26, 1996) requires that any person doing business with the Federal Government furnish a social security number or tax identification number. This is an amendment to title 31, Section 7701. Furnishing the social security number, as well as other data, is voluntary, but failure to do so may delay or prevent action on the application. If your agency uses the information furnished on this form for purposes other than those indicated above, it may provide you with an additional statement reflecting those purposes.

REV_00258807

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

Racial Profiling [Folder 2]

OA/NARA#: 1825/1743
9633

Box
Folder 50-12

REV_00258808

Binder - Randolph, Judge Arthur Raymond

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

OA/NARA#: 2173/2084
9793

Box
Folder 50-13

REV_00258809

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

Records - 1500 (Information Security Oversight Office) Position

OA/NARA#: 2180/2091
9800

Box
Folder 50-14

POSSIBLE QUESTIONS SUITABLE FOR ALL CANDIDATES

1. IN YOUR VIEW, WHAT PARTICULAR CHALLENGES AND OPPORTUNITIES, IF ANY, DO YOU FACE FOLLOWING A DIRECTOR WHO WAS IN THE POSITION FOR MORE THAN TWENTY YEARS? HOW DO YOU APPROACH THOSE CHALLENGES AND OPPORTUNITIES?

1. DESCRIBE HOW YOU APPROACH YOUR FIRST SEVERAL MONTHS IN THE POSITION OF ISOO DIRECTOR, HIGHLIGHTING HOW YOU INITIALLY INTERACT WITH THE VARIOUS CONSTITUENCIES WITHIN AND OUTSIDE GOVERNMENT WITH WHOM THE ISOO DIRECTOR ROUTINELY DEALS.

2. THROUGH THE POLICY COORDINATING COMMITTEE FOR RECORDS ACCESS AND INFORMATION SECURITY AND ITS CLASSIFICATION MANAGEMENT WORKING GROUP, THE ISOO IS CURRENTLY COORDINATING A REVIEW OF POSSIBLE AMENDMENTS TO EXECUTIVE ORDER 12958. DESCRIBE YOUR CONCEPTION OF THE ISOO DIRECTOR'S ROLE IN THIS PROCESS. IF YOU AS THE ISOO DIRECTOR PERCEIVE THAT THE REVIEW PROCESS IS HEADING IN THE WRONG DIRECTION, HOW DO YOU ATTEMPT TO CHANGE ITS DIRECTION TO ONE WITH WHICH YOU ARE IN AGREEMENT?

1. DO YOU HAVE ANY PARTICULAR VIEWS ON HOW E.O. 12958 SHOULD BE AMENDED? WHAT HAVE BEEN ITS STRENGTHS AND WEAKNESSES?

1. IF THE CURRENT ADMINISTRATION DIRECTED YOU TO SCRAP THE REVIEW OF E.O. 12958 AND PROCEED WITH THE DEVELOPMENT OF A NEW SECURITY CLASSIFICATION SYSTEM, HOW DO YOU PERCEIVE THE BASIC TENETS AND STRUCTURE OF SUCH A SYSTEM? SHOULD THE PRESIDENT CONTINUE TO CONSTRUCT THE SECURITY CLASSIFICATION SYSTEM THROUGH EXECUTIVE ORDER OR SHOULD HE INSTEAD PROPOSE LEGISLATION?

1. ISOO IS CURRENTLY IN THE PROCESS OF SEEING ITS SIZE DOUBLE, FROM APPROXIMATELY A DOZEN TO TWO DOZEN EMPLOYEES. HOW WOULD YOU FOCUS THESE ADDITIONAL RESOURCES AMONG ISOO'S VARIOUS FUNCTIONS? WHAT SORT OF MANAGEMENT STRUCTURE AND STYLE DO YOU ENVISION FOR THIS SOMEWHAT LARGER OFFICE?

1. E.O. 12958 RADICALLY CHANGED THE DECLASSIFICATION PROGRAM IN GOVERNMENT. WHAT, IN YOUR VIEW, HAVE BEEN THE SUCCESSES AND FAILURES OF THESE CHANGES? WHAT IS, IN YOUR VIEW, THE APPROPRIATE EMPHASIS OF THE DECLASSIFICATION PROGRAM WITHIN THE LARGER SECURITY CLASSIFICATION SYSTEM?

1. THE UNITED STATES PLAYS A LEADERSHIP ROLE AMONG NATIONS IN MANY ASPECTS OF SECURITY POLICY. HOW DOES THE SECURITY CLASSIFICATION SYSTEM PLAY INTO THAT ROLE? HOW SHOULD WE DEAL WITH FOREIGN GOVERNMENTS IN THE MANAGEMENT OF WHAT WE CALL "FOREIGN GOVERNMENT INFORMATION" THROUGHOUT THE COURSE OF ITS RETENTION IN OUR RECORDS SYSTEMS?

1. DURING THE PRIOR DIRECTOR'S LONG TENURE, THE ISOO DIRECTOR CLEARLY BECAME THE PUBLIC SPOKESPERSON OR HUMAN FACE OF THE SECURITY CLASSIFICATION AND DECLASSIFICATION PROGRAM. HOW DO YOU ENVISION THAT ASPECT OF THE ISOO DIRECTOR'S FUNCTIONS AND RESPONSIBILITIES? HOW HAS YOUR PREVIOUS EXPERIENCE PREPARED YOU TO MEET THOSE FUNCTIONS AND RESPONSIBILITIES?

- ISCAP = RV → Practice // AB/her //
- Auto → Yr info on

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Counsel's Office, White House

Kavanaugh, Brett

Subject Files

Records - Miscellaneous

OA/NARA#: 1824/1742
9632

Box

Folder 50 - 15

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF ADMINISTRATION
WASHINGTON, D.C. 20503

December 5, 2001

1/10 - Save written approval by e-mail

MEMORANDUM FOR BRETT M. KAVANAUGH
ASSOCIATE COUNSEL

BRADLEY A. BLAKEMAN
DEPUTY ASSISTANT FOR SCHEDULING

THROUGH: ERNA GILES BEVERLY
BRANCH CHIEF, SYSTEMS APPLICATION SUPPORT (SAS)

FROM: LEANNA F. TERRELL
ASSOCIATE DIRECTOR
INFORMATION SYSTEMS AND TECHNOLOGY DIVISION

SUBJECT: REQUEST FOR SAMPLE DATA FROM PRESIDENTIAL DIARY SYSTEM

In August of 2000, funding was approved for the upgrade and redesign of the current DOS based/Advanced Revelation software Presidential Diary Computer System, which was established during the Reagan Administration. A new system was originally planned for the beginning of the Bush Administration. The project was deferred for 176 days due the transition and higher priority projects. Currently, a project schedule has been created to outline the research and development process for the Presidential Diary System with completion estimated in mid-January 2002.

A representative sample of records from the existing Presidential Diary system (approximately 1,000 records of 7,000 records) is needed to test the functionality and design of a new Window-based system. In addition, the sample data will be used to facilitate final data conversion to the new system. Although the entries are not classified, it is highly sensitive information and will be tested on a secure EOP workstation with access restricted to select IS&T personnel.

Ellen McCathran, the Presidential Diarist, has agreed to this proposal but has requested a memoranda outlining our needs be submitted to the White House Counsel's office for written approval.

Thank you for your consideration of this matter, we look forward to your written approval.

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

[Records Management at the NSC]

OA/NARA#: 2162/2073
9692

Box
Folder 50-16

REV_00258814

THE WHITE HOUSE
WASHINGTON

2/21/01

Brett,

We would like to distribute this to the NSC staff but seek your concurrence/comments first. Attached is our memo from the last administration.

Thank you.

Jack Scharfen

6-9116
NSC-Legal

Document Originally
Attached to
Following Page

REV_00258815

NATIONAL SECURITY COUNCIL
WASHINGTON D C 20506

20352

1994
Memo

March 21, 1994

ACTION

MEMORANDUM FOR NSC STAFF

FROM: WILLIAM H. ITOH

SUBJECT: Electronic Communications Systems (Electronic Mail)

All National Security Council employees have ongoing responsibilities to create, maintain, and preserve records of their activities pursuant to the Federal Records Act (44 U.S.C., Chapters 29, 31, and 33) or the Presidential Records Act (44 U.S.C., sections 2201-2207), or both. Traditionally, the NSC has treated some of its records as federal and some as Presidential and filed them separately. The proper scope of that distinction (including definitions of relevant terms) is now in litigation. Until that question is resolved, we will retain copies of all record messages in a way that permits appropriate designation and filing of them at a later time by the staff of Records Management.

This memorandum provides guidance for fulfilling the NSC's legal obligations as they apply to records (either Presidential or federal) that are created on electronic communications systems. The guidance applies to the e-mail, word processing, and calendar functions of the VAX All-in-One and CC:Mail systems (which includes All-in-1 word processing documents sent via e-mail) and the calendar function of the PROFS (OfficeVision) system, as well as the e-mail, word processing, and calendar functions of the new e-mail system to be introduced later this year.

The staff of the NSC create records electronically, including by the use of electronic communications systems. The NSC preserves electronic mail messages that are records by filing them electronically and transferring them to magnetic tape in a software-independent format for long term preservation. The NSC also preserves essential transmission data for these records electronically, including the name of the sender and each addressee, plus the date and exact time of transmission, which are recorded with the text of each message. "Read receipts" that identify when a message is "opened" by each addressee also are preserved whenever requested.

Successful implementation of this policy requires each NSC employee to do five things: (1) determine the record/nonrecord status of any e-mail message at the time of creation (or, for word processing documents, at the time of transmission); (2) request read receipts whenever it is important to confirm the receipt of a message by a certain time; (3) for the time being, ensure that read receipts are preserved by printing them, attaching them to the originating message, and sending them to

REV_00258820

Records Management for filing; (4) print and file designated calendars and calendar authorization files monthly; and (5) print and file draft word processing documents that qualify as records. All other tasks associated with the proper maintenance and disposition of e-mail records will be performed by the staff of Records and Access Management and Systems and Technical Planning or WHCA.

DETERMINING RECORD STATUS

Electronic mail documents in the NSC (like all other documentary materials) fall into one of two categories: records or nonrecord materials (which includes personal materials). The only records management judgment that NSC staff must make when using e-mail is to determine whether a message is record or nonrecord in nature.

The Presidential Records Act defines Presidential records as:

> documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual in the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President. (44 U.S.C. 2201(2))

Under this definition, Presidential records are documentary materials that meet all three of the following tests. First, the materials must have been created or received by the President, his immediate staff, or a unit or individual in the EOP whose function it is to advise and assist the President. Second, the materials must be created or received by such a unit or individual in the course of conducting activities that relate to or have an effect upon the carrying out of the President's constitutional, statutory, or other official or ceremonial duties. Third, they must not be federal records, which are specifically excluded from coverage by the Presidential Records Act.

The Federal Records Act defines federal records as:

> All books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States under federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. (44 U.S.C. 3301)

Under this definition, electronically recorded data that satisfy two tests are federal records. First, the data must have been

created or received by agency personnel in connection with the transaction of public business. Second, they must be preserved or appropriate for preservation as evidence of the agency's activities or because they contain information of value. "Preserved" in the context of the NSC's e-mail systems means that the data are deliberately filed, stored, or otherwise systematically maintained for future use, including being stored in electronic files, folders, or logs.

Numeric, graphic, or text data that satisfy either of these two definitions are records, regardless of the medium on which they are recorded or the type of computer system on which the data are recorded or transmitted. Thus, electronic messages or documents that satisfy either definition (Presidential or federal) are records. This includes:

- messages or documents containing information developed in preparing position papers, reports and studies;
- messages or documents reflecting official actions taken in the course of conducting NSC business;
- messages or documents conveying information on NSC programs, policies, decisions, and essential transactions;
- messages or documents that convey statements of policy or the rationale for official decisions or actions;
- messages or documents memorializing oral exchanges, such as meetings or telephone conversations, during which policy was discussed or formulated or other activities of the NSC were planned, discussed, or transacted.

Preliminary drafts of final documents, rough notes, and similar materials must be maintained for purposes of adequate and proper documentation if (1) they contain unique information, such as annotations or comments, that help explain the formulation and execution of basic policies, decisions, actions, or responsibilities, and (2) they were circulated or made available to employees other than the creator for the purpose of approval, comment, action, or to keep staff informed about NSC business.

This guidance about determining the record status of preliminary drafts transmitted via e-mail also applies to word processing documents shared on a network. Because drafts of such shared documents may be records, their record status must be reevaluated as changes are made. Substantive updates to such drafts that constitute records must be preserved by printing and filing with the final paper copy while minor changes do not need to be preserved. Such substantive updates should identify the author, recipient(s), and date of the draft, as well as similar data documenting substantive updates.

REV_00258822

When the same information appears in two different documents, both documents may be records. Moreover, multiple copies of the same document may all be records if they are used for different purposes in the conduct of official business or filed in different files. More than one office may take action on, or otherwise use, copies of a document, and in such cases each copy of the document is a record.

Nonrecord or Personal Materials.

Certain types of documentary materials created within the NSC are considered "nonrecord" because they do not meet the conditions of record status as explained above or because they are excluded from the status of records by statute. This includes:

- reminders about meetings and appointments that contain no information of value about such events;
- telephone messages (unless the message contains information of value);
- invitations to unofficial social functions during office hours;
- preliminary drafts of correspondence, memoranda, reports, and studies that are not circulated to any other individual;
- preliminary drafts, work sheets, informal notes, and similar materials that contain the same information reflected in final documents and that do not document policy development or execution.
- notes about exclusively personal matters, such as private political or professional activities.

Monitoring Record Status Designations

To assist the NSC staff in making proper record status determinations, the staff of Records and Access Management will periodically examine a sample of all electronic mail messages and documents transmitted via e-mail, including those designated as nonrecord materials. The purpose of the examination is to identify any problems in interpreting this guidance for distinguishing between record and nonrecord materials. The selected messages and documents will be examined monthly in order to correct improper designations as promptly as possible.

Materials designated as nonrecord that are saved for the purpose of monitoring do not become federal records simply because they are retained for that purpose. However, if the Records and Access Management staff, in the course of the monitoring review, determine that the content of the materials show that the

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nonrecord designation of a particular message or document is incorrect, the staff shall redesignate it as a record. The staff of Records Management will report their findings to me at least once annually and recommend any needed changes in current guidance or procedures.

No copies of electronic mail documents (either electronic or paper) may be removed from the NSC unless they are determined to be exclusively personal materials. If a departing staff member wishes to retain such documents, the staff of Records and Access Management must review the documents before authorizing their removal.

PRESERVING ELECTRONIC MAIL MESSAGES

To facilitate the preservation of e-mail messages that are records, you are required to indicate whether the message is Record (R) or Nonrecord (N) each time you create a message or, for All-in-1 word processing documents, when you send the document. (For the NSC's new e-mail system you also will be required to make the same R/N determination whenever you respond to a nonrecord message.) You should make that determination by following the guidelines in this memorandum for identifying records, nonrecord materials, and personal materials (a personal message should be labeled nonrecord (N)). CC:Mail users should make the same determination for any message broadcast on the Bulletin Board function. When in doubt, designate a message as a record.

If you designate a message as a record, a copy automatically will be routed to Records Management for incorporation into the appropriate records system. Also, any response to a record message automatically will be labeled a record. All messages in individual e-mail accounts will be purged from the All-in-One and CC:Mail systems after one month, with the exception of extra copies placed in your "personal folder" because they need to be retained for more than one month for personal convenience.

Transmission and Receipt Data

All electronic mail messages contain certain "transmission data" regarding the sender, addressee(s), and transmission (date and exact time) of a document. The transmission information associated with an electronic mail message that is designated a record also must be preserved as a record. Consequently, all e-mail messages routed to Records Management as records will be filed electronically with the following transmission data included: the name of the sender and all recipients and the date and time of transmission.

Additionally, if you request a read receipt for an electronic mail record, the read receipt is also a record and must be preserved with the message. You should request read receipts

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whenever it is necessary to confirm that an addressee has read a message by a certain time, such as when you assign tasks with a deadline or need concurrence by a definite time. To the extent feasible, WHSSS will program the e-mail system to capture such read receipts electronically. However, until further notice, and as previously instructed in Will Itoh's 5/27/93 memorandum, you should print out read receipts whenever you request them, attach them to the originating message, and forward such materials to Records Management for filing.

PRESERVING CALENDARS

Calendars created on the NSC's electronic mail systems that contain information about government business may also be records. They are records if they are circulated to others or placed in files that allow others in the NSC to access and view the calendars in connection with official business. Calendars that are not circulated to others, and are not made accessible to others, do not need to be preserved, and they may be updated, changed, or deleted at the individual's discretion. The NSC manages calendars on these systems that are records as follows:

1. Electronic calendars relating to the activities of the APNSA, the DAPNSA, the Staff Director, the Executive Secretary, the Deputy Executive Secretary, and Senior Directors are meant to be shared with NSC employees other than the individual's secretary and, therefore, must be treated as records. They should be printed out monthly by an NSC staff member with designated responsibility for printing the calendar and forwarded to Records Management for permanent preservation. Entries in these calendars may not be deleted or destroyed prior to printing. When printing calendars for preservation, also print and file a list of the individuals who had authorized access to the calendar for the previous month.

2. Calendars of other employees that contain information about NSC activities will be retained on the computer system for two years. Entries in the calendars, and associated data regarding authorized access, may not be deleted or destroyed during those two years unless the calendar has been previously printed and forwarded to Records Management.

*****

This memorandum supersedes all previous guidance on electronic mail issued prior to January 6, 1993, as well as the instructions on Electronic Federal Records on page 6 of the May 8, 1993 memo on "Federal Records." I cannot emphasize too strongly the importance of staff compliance with this guidance in order to ensure that the NSC fulfills its legal obligations regarding the

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creation and preservation of federal and/or Presidential records. If you have any questions about this guidance, please contact the Office of Records and Access Management (53576) or the Office of the Legal Adviser (66538).

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Counsel's Office, White House

Kavanaugh, Brett

Subject Files

VHS - Remarks on Judiciary Confirmation, 10/30/2002

OA/NARA#: 2168/2079
9698

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Counsel's Office, White House

Kavanaugh, Brett

Subject Files

Research - Commerce Clause Cases

OA/NARA#: 2163/2074
9693

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Folder 50-18

Service: **LEXSEE®**
Citation: **73 Va. L. Rev. 1387**

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Virginia Law Review

NOVEMBER, 1987

73 Va. L. Rev. 1387

LENGTH: 34843 words

ARTICLE: THE PROPER SCOPE OF THE COMMERCE POWER.

Richard A. Epstein *

* James Parker Hall Professor of Law, University of Chicago. This Article was originally presented as a paper at a Conference on Economic Liberties and the Constitution held at the United States Department of Justice in June 1986. A revised version of the paper was presented at a Conference on the Constitution held at Bowling Green University in October 1987. I wish to give thanks to Professor Edmund Kitch of the University of Virginia School of Law and my colleague David Currie for their especially insightful comments on an earlier draft of this paper. I have also benefitted from discussions with Dennis Hutchinson and Michael McConnell.

SUMMARY:
... THE Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" -- such is the clause in the Constitution to which most federal power can be traced in today's general welfare state. ... Chief Justice Marshall decided, first, that navigation among the several states was interstate commerce, and second (in order to avoid the question of whether any dormant commerce power could be identified) that a 1793 federal statute that licensed ships in the "coasting trade" had preempted the New York statute. ... More to the point, *Gibbons'* limits on the extent of the commerce clause would have been important because they would have limited the degree to which Congress could have used its commerce power to cartelize the entire railroad industry, as it did by amending the ICA after World War I. ... But the transaction at issue in *E. C. Knight* was a merger that was quite impossible for Congress to reach by a plan to regulate the interstate sales of the combined sugar business (even if these preliminary merger agreements were regarded as in interstate commerce) without necessarily intruding into the regulation of manufacture, which *both* the majority and the dissent expressly regarded as outside the scope of the commerce clause. ...

TEXT:
[*1387] THE Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" [1] -- such is the clause in the Constitution to which most federal power can be traced in today's general welfare state. The labor statutes, the civil rights statutes, the farm and agricultural statutes, and countless others rest on the commerce power, or more accurately on a construction of the commerce

B. The Expansion of Commerce Clause Jurisdiction

There is a long road from *Gibbons* to modern doctrine of the broad reach of congressional power under the commerce clause. This section will trace the twists and turns in that road. In one sense *Gibbons,* for all its importance, is an odd place from which to begin the journey, because the case itself as much concerned the limitation of state power as it did the extent of congressional power under the coastal trading statute. Indeed, the negative, or dormant, commerce clause power that prohibits states from intruding on the federal authority over interstate commerce even absent any congressional legislation on the subject of the state action dates from *Gibbons* as well; Justice Johnson's concurring opinion argued that the commerce clause standing alone prohibited New York from passing the statute in question. [60] The primary purpose **[*1409]** of this Article is not, however, to trace the negative side of the clause, [61] which has proven quite stable in recent times. Rather, the purpose is to follow the expansion of the affirmative power of the clause. This development took place along three separate lines. [62] The first line took its cue from the narrow holding of *Gibbons* that navigation counted as commerce under the clause, and concerned the "instrumentalities of commerce." This Article follows the expansion of the clause, briefly in connection with navigable waterways, **[*1410]** and more extensively with the systematic and inexorable expansion of the federal power to regulate the railroads under the Interstate Commerce Act of 1887, as amended. [63]

The second line of cases involved the regulation of goods admittedly in interstate commerce (that is, goods in transit across state lines) in order to control the primary conduct of persons in either the sending or receiving state. This line of cases might be called the "indirect regulation" cases. The third line of cases, emanating from *E. C. Knight* itself, explored the distinction between manufacture and commerce among the several states.

Between 1870 and 1937 the scope of federal power under these three lines of case law continued to expand, but in ways that still left an extensive area of economic life outside the power of Congress. In particular, the distinction between manufacture and commerce laid down in *E. C. Knight* in 1895 retained its validity until it was at last overturned in 1937 by *NLRB v. Jones & Laughlin Steel Corp.* [64] In general the expansion of the first and second heads of the commerce power fall within the general scheme set out by Chief Justice Marshall in *Gibbons* in that they address both the power of Congress to regulate the means by which goods are shipped in interstate commerce, as well as the types of goods that can be shipped. In my judgment, the scope of the federal power under these two heads moved, prior to 1937, a step or two beyond where proper argument would take them. But although these difficult cases can be argued at the margin, nothing in the case law under these two heads undermined the essential validity of the line between commerce, on the one hand, and manufacture and agriculture on the other, clearly adumbrated in *Gibbons* and accepted in *E. C. Knight.* It is only when that last distinction is rejected that a system of enumerated powers is dismantled. Yet there is no conceptual necessity for saying that power to regulate commerce among the several states must reach everything if it is to reach anything. The modern generation of negative commerce clause cases is instructive because it proves that it is possible, and sensible, to articulate an enduring conception of interstate commerce -- just as Chief Justice Marshall had insisted.

[*1411] *1. The Instrumentalities of Commerce*

Gibbons itself laid down the distinction between the "internal commerce" or "interior traffic" of a state and commerce among the states. [65] Although Chief Justice Marshall articulated the distinction with confident assurance, its limits were not really tested until 1870, when the Court in *The Daniel Ball* [66] considered an 1852 inspection statute for steam passenger vessels operating on the navigable waters of the United States. The appellant questioned whether Congress had the power to inspect a ship that remained solely within a single state, even

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though it carried goods that had been shipped from other states, or were eventually destined for shipment into other states. [67] As framed, the case offered an instructive counterpoint to *Gibbons,* which had decided that the federal commerce power reached a single, continuous journey that started in one state and ended in another. The Court in *The Daniel Ball* asked what happened when that same journey involved two ships instead of one. If Chief Justice Marshall's view of the commerce clause was as expansive as the received wisdom has it -- if "plenary" had meant "wholly unbounded" -- then it is unintelligible why the Supreme Court should have paused a second to decide *The Daniel Ball.* It is only because *Gibbons* extended the scope of the commerce power to "intercourse," and kept it there, that there was any occasion to deliberate on the loose ends left open by *Gibbons.*

Relative to the understandings of its time, *The Daniel Ball* gave *Gibbons* a modestly expansive interpretation. The opinion by Justice Field -- no friend of big government -- upheld the 1852 inspection statute because of the Court's explicit fear that any other interpretation of the commerce clause would strip the federal government of its fundamental powers. "Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State, and leaving it at the boundary line at the other end," he wrote, "the Federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter." [68]

[*1412] Justice Field's conclusion has assumed the status of a necessary truth. Nonetheless, there is reason to ask whether the decision is as impregnable as it seems. It appears that the commerce clause could well apply to *goods* destined for sale in another state as part of a continuous transaction, even if they are shipped by boats that operate solely within the territorial waters of one state. Where the transfer of goods from boat to boat is part of a comprehensive plan -- as when the various carriers have coordinated travel schedules -- then Congress should have jurisdiction. But it is far from self-evident that because the goods are in the interstate market the ships which carry them on parts of the journey are in interstate commerce as well. The states could regulate the safety of the boats on which the goods are carried, while the federal government could (as it has never seen fit to do) pass a statute dealing with the rights and duties of common carriers and their customers, as well as maintain jurisdiction over any ship that did cross a state line. There need be no gap in the system of regulation. And as long as ships remain within a single state, shipowners hardly need the federal power to protect them from inconsistent regulation. If state regulation became overly onerous, a shipowner could escape it by explicitly organizing his business to specialize in interstate transport, or by moving to another state. Deciding *The Daniel Ball* the other way would have promoted competition between state governments. Such an outcome would hardly have made the commerce clause a dead letter, as Justice Field insisted, even if it would have stopped the further expansion of federal power.

There is a danger in this alternative analysis of *The Daniel Ball* that federal jurisdiction will be less comprehensive than is needed to perform a particular regulatory task. The Court in *The Daniel Ball* and subsequent decisions reacted to this danger by weighing the risk of underinclusion within the federal power more heavily than the reverse danger of overinclusion. With the vantage of hindsight, *The Daniel Ball* originated the "protective principle" which, when pushed to its limit, finds that the use of federal power in a doubtful case is *always* "necessary," perhaps in the sense of the "necessary and proper" clause. [69] But there are some risks to the strategy, that although not evident here, must be kept in mind. Unless the countervailing principle of enumerated powers is **[*1413]** brought to the fore, then the basic structure may be lost in a series of small accretions, each one palatable on its own, even though the whole structure is not.

It is precisely that form of incrementalism that characterized the later cases involving the use of railroads in interstate commerce. The impetus for national regulation clearly came from the famous decision in *Wabash, St. Louis & Pacific Railway v. Illinois.* [70] That case prevented state governments from regulating railroad fares from points within a state to points outside

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it. [71] There was a functional reason for the decision, given the risk that separate states could impose inconsistent obligations upon carriers. Congress attempted to solve this problem by passing the Interstate Commerce Act (ICA) [72] in 1887.

Sensible economic concerns led to the passage of the first ICA, which was designed to prevent discrimination against short-haul carriers. The problem arose because of the structure of the railroad lines. Different carriers went by different routes from one population center to another. Thus there was competition on the long-haul routes (such as San Francisco to Chicago) because shippers had many choices. But, once out in the plains, any given line had a local monopoly that it could exploit against farmers and others. When it exacted monopoly profit, its short-haul rates could easily exceed its long-haul rates, even if the actual cost of long-haul shipment was greater. But simply preventing the price per segment from exceeding the price for the whole trip would have gone a long **[*1414]** way toward eliminating monopoly profit without getting the government involved in the ratemaking that characterized the Interstate Commerce Commission (ICC) after the "reforms" of this century, including the Transportation Act of 1920. [73]

One question was whether the ICC's authority reached trips that began and ended within a single state. In essence this was the land-based version of the question raised, and answered in the affirmative, in *The Daniel Ball.* Nonetheless, as a matter of first principle, one could forcefully insist that the proper answer should have been no. The obvious response to this assertion is that unprincipled exploitation of short-haul users would have continued on a limited scale even after the passage of the ICA. But that need not have been the case. The states could have had exclusive jurisdiction over these short-haul runs, and their local laws could have replicated the key substantive provision of the ICA, thereby protecting purely intrastate shippers: the railroad could not charge more for the intrastate run than it charged for any longer interstate run of which the intrastate segment was a part. The danger of radical state restrictions on the power of carriers to cover their costs for internal runs could have been avoided by constitutional protections against confiscation, such as those invoked during this period in *Smyth v. Ames.* [74] The jurisdictional balance between federal and state governments could have been quite stable if left where *Gibbons* had placed it. More to the point, *Gibbons'* limits on the extent of the commerce clause would have been important because they would have limited the degree to which Congress could have used its commerce power to cartelize the entire railroad industry, as it did by amending the ICA after World War I. [75]

Historically, however, the dividing line between interstate and intrastate journeys did not endure. It is instructive to trace the expansion of the commerce clause in the railroad cases. At each point the Supreme Court seemed aware that there must be some **[*1415]** limit to the commerce power, but on virtually every occasion it found the federal legislation at issue not to exceed the limit. The Court failed to understand that too much federal jurisdiction was as dangerous as too little. In this regard, *Houston, East & West Texas Railway v. United States (The Shreveport Rate Case),* [76] decided in 1914, marked an especially instructive watershed. This case has been read as an important step forward (the bias is implicit) for the commerce power. The facts were complicated, and the details have unfortunately been forgotten in modern times. Nonetheless they deserve close attention today.

Various points in East Texas were served by interstate carriers operating out of Shreveport, Louisiana on one end, and Dallas and Houston, Texas on the other. [77] Before the intercession of the ICC, the prices charged by these railroad lines were far higher for shipping goods from Shreveport to Texas than were the rates for shipping goods within Texas, where rates were set by a state body, the Texas Railroad Commission. [78] The ICC ordered adjustments to railroad rate structures that "unjustly discriminated in favor of traffic within the State of Texas and against similar traffic between Louisiana and Texas." [79]

The ICC proposed a compound remedy to alleviate the perceived ills. The first part of the ICC

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order imposed specific maximum rates that the carriers could charge on their interstate, i.e., Louisiana-Texas, routes. [80] The second part was a general nondiscrimination provision which held that the rates in interstate traffic could not be higher than those in intrastate traffic. [81] The order, however, left it to the railroads to decide whether they raised intrastate rates, lowered interstate ones, or did a little of both. All that was required was equalization of rates within the ceilings set by the first part of the ICC order. Given the structure of the order, it was possible for the railroads to comply in full with the ICC order **[*1416]** without changing their intrastate rates: the railroads simply had to reduce their interstate rates until they equalled the rates charged on the intrastate runs. Accordingly, the decision upholding the ICC order could be read not to involve a conflict between the rates established by the ICC for interstate traffic and those set by the Texas Railroad Commission for intrastate traffic, and as such the decision does not appear to have extended the scope of the commerce clause very far.

This narrow reading of the case, however, is belied in at least two respects. First, the *Shreveport Rate Case* protected the railroads if they chose to raise their intrastate rates in defiance of the rates set by the Texas Railroad Commission. Although there was no necessary regulation of intrastate rates, the remedy envisioned made the state powerless to set any intrastate maximum below the ICC maximum if the railroads chose to raise their local rates to the ICC levels. The unmistakable thrust of the opinion was to make the congressional power paramount over state authority:

Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. [82]

Second, the *Shreveport Rate Case* relied upon and extended earlier decisions that had sustained the power of Congress to regulate railroad safety, even when there was a "commingling of duties relating to interstate and intrastate operations." [83] *Southern Railway v. United States,* [84] had sustained the Safety Appliance Act [85] with respect to cars in interstate travel even though it necessarily embraced cars that were used in intrastate travel as well. In the *Second Employers' Liability Cases,* [86] the Court had sustained Congress' authority to allocate liability for accidents caused to employees in interstate commerce, even when they were caused by employees engaged in intrastate commerce. These cases arguably **[*1417]** could be justified under some protective principle as a response to the same hard choice faced by the Court in *The Daniel Ball:* if Congress were confined to matters that were purely in interstate commerce, then it could never legislate to the limit of its jurisdiction. [87] Yet for Congress to reach the full limits of its jurisdiction it must on some occasions go beyond it. The choice is necessarily either over- or underinclusion. It is hard to gainsay a judicial decision that opts for the former over the latter, at least in cases where interstate and intrastate commerce are inextricable, such as different railroad cars on the same train. A necessary and proper clause argument has evident force here. [88]

Justice Hughes (the same Justice Hughes who later as Chief Justice wrote *NLRB v. Jones & Laughlin Steel Corp.*) [89] made it appear in the *Shreveport Rate Case* that there was a seamless web encompassing both the safety cases and the rate regulation cases. But the rate regulation case marked an expansion of the commerce power, although perhaps an inadvertent one, beyond the safety cases that preceded it. The commerce clause was at issue in the safety cases because railroad cars were used for both interstate and intrastate runs at different times, and were often mixed on the same train. There was thus a "commingling of duties relating to interstate and intrastate operations." [90] Yet no such commingling existed with respect to the rate structures, as it was surely possible to regulate interstate fares without regulating intrastate fares. The various rate schedules were distinct; it was possible

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for the ICC to set rates on the interstate runs without having to set them on intrastate activities. Indeed, it appears that this was Congress' intention in passing the original statute. [91] In order to uphold the expanded **[*1418]** jurisdiction sought by the ICC, the "commingled" approach of the safety cases had to yield to a broader formulation whereby Congress could extend "its control over the interstate carrier in all matters having . . . a close and substantial relation to interstate commerce." [92] At this point the Justices should have considered whether the risks of overextension of federal power were worth running. But, lacking an underlying theory of the risks of regulation, the Court acted as though any exercise of the congressional jurisdiction were benign. The path of broad construction and social virtue again coincided, in the Court's view.

For all their nimble footwork, the authors of the *Shreveport Rate Case* did not necessarily commit the Court to an all-inclusive view of the commerce clause. The regulations in question were imposed upon the intrastate business of interstate carriers. Congress' commerce power did not yet necessarily reach intrastate carriers that did not engage in any interstate business. In addition, the *Shreveport Rate Case* tied federal regulation of local business to proof of discrimination against interstate commerce. The ICC could not have comprehensively regulated the entire railway business under its authority alone, for some local rates at least were not set in conjunction with discriminatory interstate rates. Yet this barrier too was quickly overrun by the Court in *Wisconsin Railroad Commission v. Chicago, Burlington & Quincy Railroad,* [93] which upheld the constitutionality of one of the worst pieces of modern economic legislation, the Transportation Act of 1920. [94] The Act replaced specific control of long-haul/short-haul problems with comprehensive regulation of the railroad industry, and helped cartelize an entire industry by imposing comprehensive rate of return regulation. [95] Yet, under the rationale of the *Shreveport Rate* **[*1419]** *Case,* the statute could *not* have been sustained in its entirety under the commerce clause because it reached local railroad runs that by no stretch of the imagination competed with interstate runs. [96] On these local routes a showing of nondiscrimination, so critical to the *Shreveport Rate Case,* could not be made. But the Court again took a benevolent view of an expansive statute, [97] finding that Congress could ensure that the costs of running railroads were properly distributed between interstate and intrastate carriers. [98]

The connection between federal jurisdiction, interest group politics, and substantive entitlements is clear. The Court adopted a benevolent, public interest interpretation of the 1920 statute, and hence saw no risk in extending federal power farther than prior law had taken it. But too much regulation is always at least as risky as too little. [99] Furthermore, the Court's extension of the commerce clause in the *Shreveport Rate Case* dictated the likely structure of future regulation, to which the Court also was to acquiesce. It was **[*1420]** not possible, or at least it was less possible, to have comprehensive rate-of-return regulation, complete with control over entry, if Congress could not touch the local portions of the railroad business. If the emphasis had remained on the long-haul/short-haul problem, then a system of federal and state regulation that limited congressional control to wholly interstate trips would have been adequate to the task. The original ICA thus was clearly superior to its 1920 version. It was only the judicial expansion of the commerce clause that made it possible for Congress to adopt its own unfortunate substantive provisions.

The game has still not run its course, for even the decisions of the Court in rate cases after the *Shreveport Rate Case* do not mandate the conclusion that the commerce clause is all-embracing. To see the remaining distinctions, consider the fate of one critical passage from the *Shreveport Rate Case:*

Congress is empowered to regulate, -- that is, to provide the law for the government of interstate commerce; to enact 'all appropriate legislation' for its 'protection and advancement;' to adopt measures 'to promote its growth and insure its safety;' 'to foster, protect, control and restrain.' Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their

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operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. [100]

This passage appears to say that the commerce clause supports congressional power over the *instruments of commerce,* that is, the railroads and the highways, because of the impossibility of disentangling the various threads of interstate and intrastate business, but extends no further. Federal jurisdiction over commerce would end at the railroad station, with the already bloated ICC of the 1920 Act. This judgment implies no preference for regulated over-competitive industries. The railroads have serious long-haul/short-haul problems that make the competitive solution difficult. In any event, the conflict is not between federal regulation and market competition. Instead it is a conflict between state and federal regulation, **[*1421]** and there is no reason to think a priori that one will be superior, by whatever measure, to the other.

One could therefore find a stable stopping point to the commerce power by limiting its reach to transportation by rail, river, road, and today, by air. Congressional power would be limited to commerce as traditionally understood, even though it would reach intrastate as well as interstate commerce with respect to those transportation facilities that were devoted to both.

It is possible, however, to unhinge the last fragment of the previous passage from the whole so as to make it appear that any competition, from whatever source, justifies federal regulation. Just that step was taken during the New Deal. But before we turn to this ultimate transformation of the *Shreveport Rate Case* line of cases, [101] it will be instructive to examine the other two lines of commerce clause cases.

2. What Goods May Be Shipped in Interstate Commerce?

The pre-New Deal expansion of the commerce clause did not stem solely from the federal regulation of the instrumentalities of interstate commerce. It was also intimately connected to the types of goods that could be shipped in interstate commerce at all. These cases, it seems clear, did not necessarily involve only commerce among the several states, although the regulated goods were in transit from one state to another. But the relevant questions were, and remain, intractable because both the motive and effect of congressional regulation concerned matters that were themselves not within the "stream of commerce," at least as the phrase was understood before 1937. The true goal of these regulations was to govern -- "influence" is not a strong enough word -- the behavior of individuals and firms before their goods entered commerce or after they left it. In evaluating the statutes, the Court was required to consider the interaction between the commerce clause and the rest of the constitutional structure, in particular the principle that Congress possessed only the limited and enumerated powers conferred upon it by article I -- powers that did not allow it to intrude upon the reserved powers of the states. The drawing of the relevant lines is by no means an easy task. But there is on balance **[*1422]** good reason to believe that here too the Court, even before the 1937 revolution, construed the commerce clause in ways that extended the power of Congress beyond its proper scope.

The first case in the line was *Champion v. Ames* [102] in 1903. The question before the Court was whether Congress under the commerce clause could prohibit the transportation of lottery tickets across state lines. [103] The first Justice Harlan's opinion upheld the statute as a proper application of the commerce power. [104] But Justice Harlan's defense of federal power in *Champion* is problematic. Although the statute in question operated on articles of interstate commerce, its purpose surely was not to protect or to facilitate interstate commerce. Quite the opposite -- its purpose was designed to influence the primary conduct of individuals, either before the goods entered interstate commerce or before it left them. One tell-tale sign of the new aggressiveness to which the commerce power was turned was that Congress

sought to *prohibit,* not to regulate, the transfer of lottery tickets in interstate commerce. In and of itself, this fact hardly seems dispositive, for it is doubtful that the commerce clause could be read so that "regulation" occupies a domain so narrow that all types of prohibition fall outside the power of Congress. Hamilton himself spoke of "prohibitory regulations" when addressing in The Federalist No. 11 the need to regulate commerce with foreign nations. [105] If these prohibitions are (regrettably) proper in the foreign context, then they cannot be wholly banished in the domestic one.

Analytically, too, it seems that regulations comprehend prohibitions. To be sure, regulation and prohibition do not mean the same thing, and the Constitution itself uses the two terms in clear opposition to each other. [106] It would be very odd indeed to say that **[*1423]** Congress had the power "to prohibit all commerce with foreign nations, among the states, or with the Indian tribes," for the total elimination of all trade seems hard to reconcile with the original vision of vibrant national markets unimpeded by petty local regulations. [107] But it is difficult to have the extreme case determine the principle, given the massive overlap between regulations and prohibitions in ordinary speech. The class of conditional prohibitions -- of the sort which say that no goods may travel in interstate commerce unless evidenced by a bill of lading -- is so extensive, and benign, that it is difficult to see how any jurisdictional limitation on congressional power could be erected on the strength of the verbal distinction alone.

The source of the uneasiness with *Champion* does not, however, disappear even if we acknowledge, however uneasily, that all prohibitions are regulations within the meaning of the commerce clause. Instead, the common concern with both regulations and prohibitions of the sort found in *Champion* and its progeny is that Congress will use its powers of regulation to upset the doctrine of enumerated powers. Stated otherwise, *Champion* is perhaps the first case in which Congress had consciously sought to exploit the outer reaches of the commerce clause in ways that might trench upon the power of the states. In one sense, the Congress stayed within the commerce clause because Chief Justice Marshall told us that the commerce power is "plenary" over everything that comes within its specified limits. But in another sense Congress used its plenary power to arrogate to itself matters reserved to the states. The uneasiness that one thus feels with *Champion* is quite similar to that which is provoked by the troublesome doctrine of unconstitutional **[*1424]** conditions, which no one quite understands, but which no one will nonetheless ignore. [108] One way to read unconstitutional conditions is an effort by the state to expand its power over the private activities of individuals by conditioning their access to public facilities, most typically roads: thus the doctrine has been invoked to hold that the state cannot allow a private carrier to use the public highways unless it first agrees (without compensation) to be regulated as a public carrier. [109] The clear function of the doctrine is to curb the state desire to use its power of public instrumentalities to control private behavior, even though it is allowed to exclude vehicles of certain classes from the highways altogether.

The *Champion* line of cases shows the same type of tensions at work, as the Court struggled to find the line that allowed the power of Congress to remain plenary, without undermining the reserved powers of the state. Some forms of regulations, and indeed prohibitions, seem not to threaten the delicate balance of the federal system. As the dissent in *Champion* suggested, for example, a clear instance of an acceptable prohibition is one preventing the shipment in interstate commerce of goods that are themselves a peril to interstate commerce:

The power to prohibit the transportation of diseased animals and infected goods over railroads or on steamboats is an entirely different thing, for they would be in themselves injurious to the transaction of interstate commerce, and, moreover, are essentially commercial in their nature. And the exclusion of diseased persons rests on different ground, for nobody would pretend that persons could be kept off the trains because they were going from one State to another to engage in the lottery business." [110]

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Here there is no concern that Congress by the use of a single enumerated power is trying to dominate the states in the exercise of **[*1425]** their reserved powers.

Similarly, a somewhat broader but wholly defensible line could stress the harmony between federal and state regulation. Suppose that the statute at issue in *Champion* prohibited the shipment of lottery tickets from any state in which their production was illegal or into any state in which their possession was illegal. Here the congressional statute would be *in aid of* valid legislation at the state level. It would reinforce, rather than contradict, state law. In *Champion,* however, the tie between state and federal regulation was nonexistent, or even negative. The shipment of lottery tickets was forbidden in interstate commerce although their use may have been wholly legal in the states from which and to which they were sent. To be sure, if congressional power under the commerce clause had been clearly established, the supremacy clause would have resolved the conflict between state and federal laws in Congress' favor. [111] But the supremacy clause is of no help until the proper scope of the commerce clause has been first determined, in light of the concerns raised by the doctrine of unconstitutional conditions. The narrower tests previously discussed would not seem to allow the *Champion* prohibition. These two tests -- "in aid of" state legislation, and the "noxious use" test -- would not make the commerce clause a dead letter, but they also respect the independent power of the states.

There was yet a third line of argument that could have prevailed in *Champion.* The case could have rested on a peculiar amalgam of the police power and the commerce clause, showing yet again the affinity between jurisdictional and substantive concerns. Lottery tickets were an issue toward which states had long taken a quite schizophrenic attitude. Sometimes the states prohibited lotteries; sometimes they allowed private firms to run them under state charter; sometimes they ran the lotteries themselves. [112] Generally speaking, gambling fell within the class of dubious private activities subject to police power regulation, along with, for example, prostitution. One possible stopping point under the commerce clause would provide that Congress could prohibit the transmission in interstate commerce of those goods which a state *could* ban **[*1426]** under its police power, as it was then understood, even if the state had not actually prohibited their use. Justice Harlan, who wrote the majority opinion in *Champion,* always gave an expansive, [113] and occasionally maddeningly extravagant, [114] scope to the police power whenever supposed issues of health and morals arose, though otherwise he was a tiger in defense of individual liberty and freedom of contract. [115] Justice Harlan's opinion in *Champion* emphasized the police power, stressing the iniquitous nature of lotteries and asking, "why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another?" [116] Harlan rejected the idea that the commerce clause "countenances the suggestion that one may, of right, carry or cause to be carried from one State to another that which will harm the public morals." [117]

The question then arises: Could the argument equating prohibition under the police power with prohibition under the commerce clause survive? Why not? It is an argument that could permit the federal government to regulate the transport of prostitutes across state lines, [118] whether or not prostitution was legal in the state to which they were sent, or to prohibit the sale of adulterated foods and drugs. [119] Note that each of these examples would be far more secure if the sale of the ultimate product or service were illegal in the state to which the goods were shipped, as was typically the **[*1427]** case. This somewhat broader conception, although perhaps less preferable than the more limited versions of the commerce clause discussed above, would still have left its scope less than comprehensive.

It was just this conception of the relationship between the commerce clause and the police power that held the line against federal power in *Hammer v. Dagenhart.* [120] In *Hammer,* federal legislation forbade the shipment in interstate commerce of any goods manufactured in any plant that used child labor in ways prohibited by the statute within a thirty-day period

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prior to the shipment. [121] There was no requirement that the actual goods shipped in interstate commerce had to have been made by child labor -- only that some goods made at the plant had been made with the use of child labor. The validity of the statute was hardly compelled by *Champion,* for the sale of ordinary clothing could not be prohibited as an illicit item of commerce under even the most extravagant version of the police power. Indeed, the Court understood the statute for what it was; it was not an effort to control the goods themselves, but to prescribe the internal rules governing their manufacture within the state. [122] The delicacy of this legislation was manifest in an age when direct federal regulation of manufacture had been precluded by the Supreme Court in *United States v. E. C. Knight.* [123] In *Hammer* the Supreme Court stuck to its guns, and by a narrow five-four decision refused to extend *Champion* beyond the noxious or dangerous products to which it applied.

On balance, *Hammer* was correctly decided, assuming that the commerce clause must be understood within the larger structural context of the Constitution. Thus, if the child labor statute in *Hammer* had been good law, one can envision the following cycle of evasion and response: A firm using child labor now divides its business into two halves, subject to common stock ownership. One half makes goods for intrastate commerce using child labor, while the other half makes goods for interstate commerce without using **[*1428]** child labor. Congress then passes a new statute which says that no firm whose shareholders have a dominant interest in a second firm that uses child labor may send its goods into interstate commerce. The firm decides to go out of the interstate business altogether. Congress next passes a statute which says that no firm that acquires part of its supplies from any firm that uses child labor may ship its goods in interstate commerce, whether or not the goods made with child labor are incorporated into its own goods shipped interstate.

Why stop here? If the political will exists, Congress can pass a law which states that no firm in any state may ship its goods in interstate commerce unless every other firm within that state forswears the use of child labor. In each case the statute technically regulates only goods within the stream of interstate commerce. If prohibitions are simply forms of regulation, then Congress can raise the price of state independence so high that even the fool-hardy must capitulate. Congress can make any use of child labor a federal issue by redefining the keys that unlock the gates to interstate commerce. If child labor can be reached by Congress, then so can everything else reserved to the states. A "Congressional Marriage Act" could provide that "no manufacturer can ship its goods in interstate commerce unless its state legislature passes a statute under which all local marriages conform to the federal requirements." These concerns were indeed raised by Justice Day, who wrote the majority opinion in *Hammer.* [124] Justice Day correctly noted that prior cases were limited to cases in which the "use of interstate transportation was necessary to the accomplishment of harmful results," [125] and held that only the limited version of the commerce clause was consistent with the tenth amendment. [126] He noted that competition within the federal system was essential to the original constitutional design. [127]

[*1429] Justice Holmes in dissent wrote a spirited and perceptive defense of the congressional power:

The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. [128]

Holmes surely overstated his point. No one doubted that Congress had the power to override any state effort to block the shipment of goods in interstate commerce. But the justification of one use of that power hardly demanded acceptance of any use of it. The child labor statute in *Hammer* was invalid because Congress had used its admitted powers over interstate

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commerce to eliminate a state's "internal affairs" completely. Holmes never addressed this limit to his principles, nor identified the expansive statutes that his views necessarily tolerated -- even though he had previously warned against interpreting the commerce clause so as to allow Congress to reach every productive endeavor of human life. [129] His observation that no statute should be upset because it has "indirect effects" upon the domestic affairs of the state [130] simply failed to address the structural threats that the child labor statutes posed to the distribution of state and federal power.

Justice Day's majority opinion in *Hammer* was strong on the jurisdictional side, but apologetic on the substantive side. [131] The issue of child labor laws had long been an emotional one, and there was a powerful consensus in the Progressive movement that these statutes were absolutely necessary to counteract the evils of an unrestrained laissez-faire economic system which tolerated, and indeed encouraged, child labor. The Solicitor General, John W. Davis (who later represented the southern states in *Brown v. Board of Education* [132]), insisted that, although the need was pressing, individual **[*1430]** states were reluctant to enact their own child labor statutes because they feared that their manufacturers would be harmed by competition from industries in states still employing child labor:

The shipment of child-made goods outside of one State directly induces similar employment of children in competing States. It is not enough to answer that each State theoretically may regulate conditions of manufacturing within its own borders. As Congress saw the situation, the States were not entirely free agents. For salutary statutes had been repealed, legislative action on their part had been defeated and postponed time and again, solely by reason of the argument (valid or not) that interstate competition could not be withstood. [133]

The quoted passage was something of an overstatement, as every state in the Union, including North Carolina (the state at issue in *Hammer*), had some statute regulating child labor on its books. [134] The real question was whether the weaker North Carolina statute, which forbade child labor below the age of twelve, was preferable to the federal minimum of fourteen. [135]

Justice Day made no substantive attack on the child labor laws -- rather, he sympathized with them. [136] Justice Day was in the awkward position of having to defend jurisdictional limitations that worked against what he thought to be highly desirable social regulation.

The case takes on a different complexion, however, if one looks with even modest suspicion on child labor statutes, as I do, and thinks that as a general rule the only proper grounds for government intervention in family relations are abuse or neglect. Any reader of Laura Ingalls Wilder's *Farmer Boy* knows that child labor was not a creature of the industrial revolution. [137] Arduous labor, day and night, without any employer to regulate or to sue has always been the lot of farm children. The children in the factories were certainly not as well off as we would like, but they were probably **[*1431]** better off than they would have been back on the farm, or than if they had been left in the city without any opportunity to sell their labor. Their families had voted to leave the farm or the old country with their feet, as a matter of life and death. [138] Under this view, the substantive reforms may well have been misguided initiatives that inflicted harm upon the very persons they were ostensibly intended to benefit. Child labor changes in its character and intensity as changes occur in the means of production, the income level of parents, and the returns to children from more education. Restrictions on child labor may be proposed as ways to prevent child neglect and abuse, but the case for them is far from self-evident. Even if the police power is thought to be extensive enough to "protect" children from their parents as a constitutional matter, as it surely was by 1918, [139] there is a clear risk that the proper limits of the police power will be exceeded when legislation is used by interest groups that do not rely upon child labor to undercut rivals who do. Stated otherwise, child labor legislation could well be misguided paternalism or interest-group politics.

clause that grants the federal government jurisdiction so long as it can show (as it always can) that the regulated activity burdens, obstructs, or affects interstate commerce, however indirectly. Is this underlying interpretation of the commerce clause correct? [2]

The entire inquiry may be idle theoretical speculation, or it may have profound practical importance. I cannot say which, although at present I should guess the former; too much water has passed over the dam for there to be a candid judicial reexamination of the commerce clause that looks only to first principles. Still, in an age **[*1388]** in which the theory of government is again subject to general theoretical discussion, it is instructive to ask, as a matter both of first principle and of Supreme Court precedent: What is the proper construction of the grant of congressional power contained within article I, section 8, clause 3?

In Part I of this Article, I introduce the question of the scope of the commerce power by discussing its intended role in limiting government power and its relation to the individual rights protections of the Constitution. In Parts II and III, I analyze the text of the commerce clause and look at the place of the commerce clause in the overall constitutional structure. Finally, in Parts IV and V, I analyze the clause in light of the cases that have construed and extended its scope during our entire constitutional history. My analysis places special emphasis on the fifty-year period of the rise of the administrative state, from the onset of the Interstate Commerce Commission in 1887 to the height of the New Deal. My conclusion is clear enough. I think that the expansive construction of the clause accepted by the New Deal Supreme Court is wrong, and clearly so, and that a host of other interpretations are more consistent with both the text and the structure of our constitutional government.

I. THE PROBLEM: STRUCTURE AND INDIVIDUAL RIGHTS

The commerce power is not a comprehensive grant of federal power. It does not convert the Constitution from a system of government with enumerated federal powers into one in which the only subject matter limitations placed on Congress are those which it chooses to impose upon itself. Nor does the "necessary and proper" clause work to change this basic design; although it seeks to insure that the federal power may be exercised upon its appropriate targets, it is not designed to run roughshod over the entire scheme of enumerated powers that precedes it in the Constitution. [3] If forced to summarize what the commerce clause means, I would **[*1389]** say that it refers more to "commerce" as that term has been developed in connection with the "negative" or "dormant" commerce clause cases, which concern the instrumentalities of interstate commerce and the goods that are shipped into it. Stated otherwise, the term commerce has a stable usage in various other contexts. Zoning for "commercial" uses, for example, is often used in opposition to zoning for "manufacturing" uses. The Uniform Commercial Code does not cover the law of manufacturers. More generally, the idea of commerce seems closer to the idea of "trade" than to other economic activities. It is in just this sense that the term was used in ordinary discourse at the time of the founding. Hume's essay *Of Commerce,* for example, explicitly places the idea of commerce in opposition to that of manufacturing. [4] The same usage, restrictive by modern standards, was adopted by Hamilton, who for example in the Federalist No. 11 uses commerce as a synonym for trade and navigation, and links his discussion of the commerce power with the need to have an American navy to police and protect the seas. [5] But whatever the uncertainties, commerce does not comprise the sum of all productive activities in which individuals may engage. There is at least a slight irony here, for the Uniform Commercial Code is enacted under state law, whereas everything from manufacturing to welfare is regulated comprehensively at the federal level.

Finding the proper interpretation is of course no easy task. One great problem has to do with the function of the commerce clause itself. The Constitution contains two general types of provisions; **[*1390]** the first class is structural and was designed to divide powers between state and federal government, and, at the federal level, between the different branches of

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This skeptical view of the substantive issues in *Hammer* should caution one against reading more into the commerce clause than its language, or its place in the overall constitutional structure, allows. There is no obvious reason to approach the jurisdiction question with the assumption that child labor laws are intrinsically good, if only we knew how to enact them. Their strength, far from being a given, should be tested in competition between states. Such competition would show the true importance of child labor laws to the state: Will a state impose the restriction even when local firms may be hampered in interstate competition? The legislative question surely is not an all-or-nothing one. Indeed, the difference between North Carolina's twelve-year limit and Congress' fourteen is surely only a question of degree, and it is far from self-evident **[*1432]** which minimum is better, assuming there should be child labor laws at all.

The relatively clean line in *Hammer* prevented Congress from using its power over the movement of goods in interstate commerce to regulate the terms and conditions of their production. The line of cases regarding what types of goods could be shipped in interstate commerce thus imposed real limitations on the power of Congress. To be sure, the ICC cases afforded Congress powerful jurisdiction over the instrumentalities of interstate commerce. [140] But even when broadly construed these still stopped with the railroads and navigable waters (and by obvious extension interstate highways and interstate airplane transportation). The line between state police power and the commerce clause had shifted, and there is reason to think that some of the shifts had already placed too many matters on the federal side of the line. But the case law was still a long way from giving Congress comprehensive powers to regulate all productive activities.

3. Manufacturing and Commerce

I now turn to the last line of cases necessary to complete the overall picture -- those that drew the sharp and structural line between commerce on one hand and manufacture (or production and agriculture) on the other. This line of cases began with *United States v. E.C. Knight Co.* [141] in 1895, and retained its overall validity until the 1937 term. What follows is an account of how that line of cases developed, and retained, its distinct position from the two groups of cases just considered.

E. C. Knight was the first constitutional challenge to the Sherman Act. [142] At issue was the acquisition by the American Sugar Refining Company, a New Jersey corporation, of four Pennsylvania corporations that manufactured refined sugar. The United States challenged the merger under the Sherman Act as "a combination or contract in restraint of trade or commerce among the several states." [143] The Court held that the merger could not be reached by the Sherman Act because it was not part of interstate commerce **[*1433]** and had no "direct" effect upon it. [144] Chief Justice Fuller made a conscious effort to delineate the respective spheres of the state police power and the commerce clause in his majority opinion in ways that harken back to *Gibbons v. Ogden:*

Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce.

It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by

resort to expedients of even doubtful constitutionality.

Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce. [145]

Chief Justice Fuller tried to raise a barrier between manufacture, on the one hand, and sale or shipment of goods in interstate commerce, on the other. But the barrier was not as well-defined as Chief Justice Fuller made it out to be. Justice Harlan forcefully made this point in his dissent, noting that this merger was designed to regulate not only the manufacturing of refined sugar **[*1434]** but also "selling sugar in different parts of the country." [146] The transaction in *E. C. Knight* had two purposes: manufacture, over which there could be a local monopoly that Congress could not reach, and a plan for restrictive interstate sale, designed to raise prices in interstate markets. The status of the sales plan element of the merger was the subject of dispute between the Justices. Chief Justice Fuller's majority opinion allowed federal regulation of the contracts by which the sugar was bought and sold. [147] Yet it reads as though it would not have allowed the regulation of a structural agreement made prior to actual sales, by which the parties agreed to sell only certain amounts in interstate commerce at certain prices. According to his view, this master agreement would fall outside of the scope of the commerce clause. Justice Harlan's dissent, on the other hand, did *not* attack Chief Justice Fuller's position that "commerce succeeds manufacture." Instead he argued that manufacture became commerce when the sugar was sold to be transported, not subsequently, when it actually was placed in interstate transport:

It is said that manufacture precedes commerce and is not a part of it. But it is equally true that when manufacture ends, that which has been manufactured becomes a subject of commerce; that buying and selling succeed manufacture, come into existence after the process of manufacture is completed, precede transportation and are as much commercial intercourse, where articles are bought *to be* carried from one State to another, as is the manual transportation of such articles after they have been so purchased. [148]

Justice Harlan never quite closed in on the essential issue in the case. The government did not attack the individual contracts for sale of sugar in interstate commerce, but only the prior structural arrangements that influenced the terms on which the interstate sales were made. In most antitrust cases the contracts for the division of markets or the maintenance of prices are separate and distinct from any contract arrangements for the manufacture or sale of goods. But the transaction at issue in *E. C. Knight* was a merger that was quite impossible for Congress to reach by a plan to regulate the interstate sales of the combined sugar business (even if **[*1435]** these preliminary merger agreements were regarded as in interstate commerce) without necessarily intruding into the regulation of manufacture, which *both* the majority and the dissent expressly regarded as outside the scope of the commerce clause. [149] *E. C. Knight* was thus an early version of the *Shreveport Rate Case* problem, in which the Court recognized that the regulation of interstate commerce was necessarily either over- or underinclusive. [150] The difference between the majority and dissenting opinions in *E. C. Knight* is best explained as a response to the issue of whether too much or too little regulation was desired. Justice Harlan in dissent thought that the regulation was appropriate, for the peril of national monopolies was too great to be ignored. [151] To Chief Justice Fuller, on the other hand, the decisive consideration was that the expansion of the commerce power to meet the danger of monopoly ran the far greater risk of upsetting the grand constitutional balance between the federal and the state governments. [152] That is why he was so eager to strike down any statute of "even doubtful constitutionality." [153]

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Unfortunately, these genuine substantive concerns were not incorporated into a careful analysis of the error costs of alternative jurisdictional rules. Instead the debate focused on the question whether the regulation had an impact on interstate commerce that was "direct or immediate" or "remote or indirect." [154] These abstract, largely nondescriptive terms simply could not carry the vast institutional weight placed upon them in future years. The *E. C. Knight* opinions, in retrospect, seem in large part to be simple word games or metaphysical abstractions rather than debates about important principles.

[*1436] The difference between the two sides, moreover, was not as great as might be supposed. The substantial common ground between Chief Justice Fuller and Justice Harlan is clearly borne out by looking at the next important case in the line, *Addyston Pipe & Steel Co. v. United States,* [155] written for a unanimous Supreme Court by Justice Peckham, who is today largely remembered for his opinion in *Lochner v. New York* striking down New York's ten-hour maximum daily labor law for bakers. [156] *Addyston Pipe* upheld a federal attack on an explicit contract by cast-iron pipe producers to divide the territorial market for their product among themselves in order to create a set of local monopolies. [157] At one level the case appears indistinguishable from *E. C. Knight,* from which it differed solely by the method chosen by the parties to obtain their monopoly prices. A merger of manufacturing businesses was the method of choice in *E. C. Knight,* while an explicit cartelization was chosen in *Addyston Pipe.* If the sole question was whether there was a "direct" or "indirect" effect upon commerce, whether by the price or volume of goods shipped, the two cases could hardly be distinguished. If a merger designed to raise prices has only an "indirect" effect upon commerce, then so too does a cartel arrangement with that same purpose and effect.

[*1437] Yet if the distinction between the two cases is viewed in light of the underlying substantive concerns motivating the Court, then it makes perfect sense. *E. C. Knight* raised two questions: first, whether a preliminary step (be it merger or cartel) toward a proposed sale of goods in interstate commerce was itself part of interstate commerce; and second, even if a preliminary step was part of interstate commerce, could Congress reach it by regulating manufacture, which everyone conceded was not part of interstate commerce? Chief Justice Fuller found *E. C. Knight* an easy case because he was prepared to answer the second question in the negative, given his doubts about the first. Yet in *Addyston Pipe* the second question vanished, because the cartel arrangement reached only planned interstate sales and had no influence at all upon manufacturing. Only the first question had to be addressed. The difficult choice between necessary over- and necessary under-inclusion did not arise in *Addyston.* To apply the Sherman Act, it needed only to be said that preliminary agreements, designed by the parties to regulate their private sales in interstate commerce, were themselves part of interstate commerce. [158] It did not take a very inventive reading of *Gibbons* to say that these outward-looking contracts were not part of the purely internal commerce of the state. This refinement of *E. C. Knight* therefore did not challenge the view that manufacture and commerce were distinct spheres. Despite giving Congress its head in *Addyston Pipe,* the Court did not intrude upon the basic principle that the power to regulate commerce among the several states was only one of a list of enumerated powers. *Addyston Pipe* therefore hardly broke with the past. The Court reached a unanimous decision (with Fuller still Chief Justice) because the risk of excessive congressional power was not present.

The same can be said about the two other major early antitrust decisions that invoked the commerce clause. The issue in *Northern Securities Co. v. United States* [159] was whether Congress could reach a stock merger of two railroad lines. Congressional power was sustained by a five-four vote, with Justice Harlan writing for the Court and with Chief Justice Fuller and Justice Peckham (joined by Justices Holmes and White) in dissent. The latent disagreement **[*1438]** that divided the Court in *E. C. Knight* again came to the fore, albeit in somewhat different form. Justice Harlan's basic posture was unchanged. If a merger of gigantic manufacturing concerns was of federal concern because of its direct influence on prices, he had no reason to pause simply because the antitrust laws were applied to a transaction in shares of stock that was local in origin and governed by state law. [160] Indeed,

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the fact that the underlying assets were two interstate railroads could have only strengthened Justice Harlan's view that the transaction had to be reached by the antitrust laws. It was no longer necessary, after all, to tiptoe along the narrow line between manufacture and commerce, for the merger did not involve any regulation of manufacturing. If Congress could regulate the rates on interstate lines, then why should it not be able to stop the merger?

The four dissenting Justices took a very different position. To them, the appropriate balance between state and federal power was as primary an issue as it had been to Chief Justice Fuller in *E. C. Knight,* given that the regulation of state corporate ownership, a local matter, was inseparable from the regulation of interstate transport. [161] A passage from Justice Holmes' dissent shows the interplay between two dominant motifs of the early decisions:

The point decided in *[E. C. Knight]* was that "the fact that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree." Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce. If the act before us is to be carried out according to what seems to me the logic of the argument for the Government, which I do not believe that it will be, I can see no part of the conduct of life with which on similar principles Congress might not interfere. [162]

In a single passage, Justice Holmes was able to merge and confuse two distinct ideas: first, that Congress could not regulate absent direct effects on interstate commerce; and second, that the federal-state balance of power under the founders' plan required that the commerce clause be given some effective limits, lest the independent powers of the states be undermined. In a sense the five-four **[*1439]** vote in *Northern Securities* is explained in that the case was a more powerful one for congressional action under the commerce power than was *E. C. Knight.* But the differences between the majority and dissent on the question of principle were minor, and at best *Northern Securities* identified the tipping point at which the interstate elements start to dominate the overall transaction.

In *Swift & Co. v. United States* [163] decided a year later, the consensus of *Addyston Pipe* reasserted itself. In *Swift,* the government brought an antitrust case against fresh food dealers who sought to organize bidding in livestock markets across the United States. [164] The distinction between this cartel and the one in *Addyston Pipe* was not worth pursuing, so Justice Holmes came out of his dissent in *Northern Securities* and wrote for a unanimous Court condemning this cartel for its effect on interstate commerce:

[I]t is a direct object, it is that for the sake of which the several specific acts and courses of conduct are done and adopted. Therefore the case is not like *[E. C. Knight],* where the subject matter of the combination was manufacture and the direct object monopoly of manufacture within a State. However likely monopoly of commerce among the States in the article manufactured was to follow from the agreement it was not a necessary consequence nor a primary end. Here the subject matter is sales and the very point of the combination is to restrain and monopolize commerce among the States in respect of such sales. [165]

Holmes's distinction between direct and indirect consequences is unpersuasive. To use a tort analogy, it was an effort to smuggle all the limitations on liability into the rules on remoteness of damages, without recognizing the independent status of the standard excuses and justifications in tort law. Imagine, to push the analogy, what tort law would look like without the defenses of consent, self-defense, contributory negligence, or assumption of risk. In tort, the consequence of this approach is to place incredible stress upon the idea of causation, with a consequent loss of analytical clarity. In constitutional law too the burden upon the idea of direct consequences was too great. What was needed was an explicit acknowledgment that the doctrine of enumerated powers played, in constitutional **[*1440]** discourse, a role parallel to the one that affirmative defenses play under tort law.

Whatever the weaknesses in basic theory, *Swift* and its predecessors articulated a set of

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boundary lines that was reasonably easy to apply. The Court read *Swift* as the decisive precedent in favor of federal power in both *Stafford v. Wallace* [166] and *Chicago Board of Trade v. Olsen.* [167] In neither case was the line between manufacture and commerce tested, let alone overthrown.

In *Stafford,* the court upheld the constitutionality of the Packers and Stockyards Act of 1921, [168] which regulated the middlemen who arranged the sale and shipment of cattle from the West to purchasers in the Chicago stockyards. [169] The Act gave to the Secretary of Agriculture the power to set maximum and minimum prices and to prohibit discriminatory and deceptive trade practices. [170] The Court relied heavily on an analogy to the "instrumentalities of interstate commerce":

The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one State to another. [171]

Olsen upheld the Grain Futures Act, [172] which regulated the sale of grain for future delivery on boards of trade under the rationale that manipulation of futures prices had burdened and obstructed interstate commerce. [173] Chief Justice Taft again emphasized the **[*1441]** link between trade in goods and the railroads. [174]

These two decisions, by involving matters ancillary to the actual shipment of goods by the railroads, clearly expanded the scope of the commerce power. General concern about fraud and manipulation (both of which are wrongs under state law) is not an obvious reason to allow federal regulation. It is possible therefore to argue that the statutes themselves were unconstitutional, despite the unanimous decisions of the Supreme Court. For the purposes of this Article, however, it is sufficient to note that *nothing* in either case challenged *E. C. Knight*'s distinction between manufacture or production on the one hand, and interstate commerce on the other. As late as 1935 in *Schechter Poultry Corp. v. United States,* [175] Chief Justice Hughes wrote, in limiting the jurisdiction of Congress under the commerce clause, "The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act," and then used the distinction to strike down the National Industrial Recovery Act. [176] The next year, in *Carter v. Carter Coal Co.,* [177] a majority of the Supreme Court struck down various provisions of the Bituminous Coal Conservation Act of 1935 [178] on the ground that the commerce clause did not allow the federal government to regulate the terms of employment within the mines. [179] The *Carter* Court correctly distinguished *Stafford* as a "flow of commerce" case, in which Congress had regulated the "throat" of interstate commerce, and nothing more. [180] Elsewhere **[*1442]** in his majority opinion, Justice Sutherland wrote categorically that "[t]he relation of employer and employee is a local relation." [181]

E. C. Knight's basic distinction between manufacture and commerce thus held firm as late as *Carter* in 1936. The emerging pattern said, for example, that the Ford Motor Company did not manufacture goods in interstate commerce, but the Northern Pacific Railroad shipped them in interstate commerce. As constitutional principles go, this line was relatively clear. It is just the line that is observed today in the dormant commerce clause cases, [182] and it is as intelligible with the affirmative power cases as with the dormant power cases.

This third line of cases under the commerce clause added to congressional power, but it surely did not lead to the conclusion that Congress should have the comprehensive power to regulate the entire business of life. The Court had expanded the reach of earlier cases involving the "instrumentalities of interstate commerce." This broadened scope to the

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commerce power allowed Congress to regulate matters actually outside the scope of commerce in order to regulate what fell within its admitted power. But the over-breadth doctrine was applied only in cases that did not involve common carriers. And Congress' power to prohibit the shipment of certain kinds of goods in commerce was sharply, but correctly, limited by *Hammer v. Dagenhart* to those things noxious in themselves. [183] The totality of commerce clause jurisprudence as it emerged before the New Deal may not have been perfect; indeed it probably yielded a bit too much to federal power, at least under the power to regulate instrumentalities of commerce and the power to regulate the type of goods shipped in interstate commerce. But the set of rules was surely workable. This state of affairs was to change in the 1930's. The final Part of this Article will trace the rapid decline of the old distinctions, and will briefly note the regrettable social consequences that followed in the wake of departures from sound constitutional principle.

[*1443] V. THE NEW DEAL TRANSFORMATION OF THE COMMERCE CLAUSE

The New Deal cases systematically removed each of the previous limitations on the scope of the commerce clause. This expansion of federal power was not driven by any textual necessity. Instead, it is better understood, but hardly justified, as a response to two separate but related forces. First, the 1936 Roosevelt mandate and the prospect of court packing could hardly have been lost on the Court. [184] Second, a narrow majority of the Court was in sympathy with the dominant intellectual belief of the time that national problems required national responses. The New Deal cases worked a revolution in constitutional theory as well as in textual interpretation. The original theory of the Constitution was based on the belief that government was not an unrequited good, but was at best a necessary evil. The system of enumerated powers allowed state governments to compete among themselves, thus limiting the risks of governmental abuse even absent explicit, substantive limitations on the laws that states could pass. The various limitations upon the federal power helped achieve this end. The New Deal conception, on the other hand, saw no virtue in competition, whether between states or between firms. The old barriers were stripped away; in their place has emerged the vast and unwarranted concentration of power in Congress that remains the hallmark of the modern regulatory state.

The first major case to test the traditional analysis of the commerce clause was *NLRB v. Jones & Laughlin Steel Corp.,* [185] which involved a challenge to the National Labor Relations Act (Wagner Act). [186] The Wagner Act in essence removed employers' power to hire and fire at will, instead requiring extensive collective bargaining in good faith between employers and unions if the union is approved by a majority of employees. [187] The unions were selected by a majority of workers, but had the power to bind workers who dissented. [188] Individual contracts inconsistent with the master agreement **[*1444]** were unenforceable, lest the union's power be undermined by dissatisfied workers. [189]

The Wagner Act was based squarely upon the commerce clause. The draftsmen sought to meet the fundamental challenge of jurisdiction by providing that federal jurisdiction extended not only to cases of "commerce" but also to cases "affecting commerce": "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." [190]

This extended definition proves that Congress used a legal fiction to expand federal jurisdiction beyond its original grant. The commerce clause does not say "Congress shall have the power to regulate commerce, and all matters affecting commerce with foreign nations, among the several states, and with the Indian tribes." The statutory text, moreover, invited a favorable outcome on the jurisdictional question by smuggling into its expanded definition of commerce the desirable effects that the labor statute was intended to achieve. Yet there was no real evidence that local regulation of employment markets was incapable of achieving desired economic goals. It was only the distinct New Deal bias for worker monopolies

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protected by explicit barriers to entry (here, against rival workers who would work for less) that could have led to the conclusion that the Wagner Act would improve the free flow of commerce. How cartelization of labor markets would remove barriers or obstructions to interstate commerce has never been explained. Labor cartelization generally raises the level of wages and reduces the quantity of goods produced. When a cartel is legally protected against new entrants into its market, the new entrants are no longer able to take advantage of the price "umbrella" that an unregulated cartel necessarily creates for enterprising rivals. The Wagner Act surely had an effect on commerce, and that effect was negative.

A system of limited government keeps local governments in competition with each other. This sensible institutional arrangement was wholly undermined by Congress' decision, in the teeth of the commerce clause, to subject all employment markets to nationally **[*1445]** uniform regulation. As in the case of child labor laws, the power of states to impose collective bargaining requirements on firms is effectively limited by the ability of old firms to leave the state and of new ones not to enter it. Also, since domestic firms can escape whatever misguided tariff barriers may be thrown up against international suppliers of goods and services, the level of state regulation is effectively curtailed, and the volume of goods and services in commerce increases.

The transformation in legislative and judicial thinking about the commerce clause is revealed by the reversal in substantive outcomes. *Gibbons v. Ogden* ensured free trade by overturning a state-granted legal monopoly. [191] The Sherman Act cases were also directed against private monopolies -- a lesser peril -- which were seen improperly as "regulating" interstate commerce. [192] Both *Gibbons* and the Sherman Act cases were attempts to facilitate free trade in open markets -- one at the constitutional, the other at the statutory, level. With the later expansion of congressional jurisdiction by such laws as the Transportation Act of 1920, however, the commerce clause became an instrument to suppress competition, rather than one to further it. [193] It is only if one thinks that government can neutrally determine when there is too much competition as well as when there is too little that the broader interpretation of the commerce power becomes plausible. And it is clear that the New Deal thinkers thought they understood the vices of competition. [194]

It is always, however, a precarious venture for judges to make independent normative judgments about the desirability of certain social arrangements when passing on the constitutionality of certain acts. In a sense, the task of interpretation should depend, as Chief Justice Marshall did in *Gibbons v. Ogden,* on the natural and ordinary sense of the word. [195] The approach also leads, however, to **[*1446]** the conclusion that the Wagner Act goes beyond the scope of the commerce clause under the authority of *E. C. Knight* and, most notably, *Carter.* [196] The three decisions of the United States Courts of Appeals that passed upon the Wagner Act declared it unconstitutional by applying the precedents mechanically. [197] Recall that the hard question in *E. C. Knight* was whether prospective restraints of trade in interstate markets could justify an intrusion into manufacture, an area normally regulated by the states. *Jones & Laughlin,* of course, involved no effort to monopolize an interstate market. Quite the opposite; the contracts at issue concerned only matters of local employment which, as the Court's opinion in *Carter* had confirmed, had never been thought a federal matter under any prior conception of the commerce clause. [198]

To respond to this difficulty, the Court in *Jones & Laughlin* resurrected the losing argument of *Carter* -- that anything which had a substantial effect upon interstate commerce could be regulated regardless of its source. [199] In so doing, the Court in effect borrowed the language of those cases concerned with the instrumentalities of interstate commerce [200] and applied it generally, as if the original subject-matter restriction had not been integral to the earlier decisions. Manufacture was no longer distinguishable from commerce, because the manufacturing process involved "a great movement of iron ore, coal and limestone along well-defined paths to the steel mills, thence through them, and thence in the form of steel

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products into the consuming centers of the country -- a definite and well-understood course of business." [201]

To be sure, Chief Justice Hughes acknowledged in *Jones & Laughlin* that some "internal concerns" of the state remained **[*1447]** outside the power of Congress to regulate. [202] But it was all lip service; the companion cases to *Jones & Laughlin* showed that the "internal concerns of a state" had become an empty vessel. *NLRB v. Fruehauf Co.* applied the Wagner Act to a manufacturer of commercial trailers that obtained more than fifty percent of its material out of state and sold eighty percent of its output to out-of-state customers. [203] *NLRB v. Friedman-Harry Marks Clothing Co.* used the same logic, applying the statute to a clothing manufacturer that purchased most of its raw cloth out of state, and sold a majority of its finished garments there as well. [204] The commerce clause was thus hardly limited to the integrated multistate firms like Jones & Laughlin. And beneath the legal analysis lay the ultimate policy reason for the decisions: Congress and the NLRB believed that industry-wide unionizations could not succeed without federal assistance, and the Court accepted this belief, and the desirability of the substantive conclusion, at face value. [205]

The cases that followed *Jones & Laughlin* continued to sustain the power of the federal government to regulate interstate commerce expansively, on the ground that any competition among states necessarily restricted the scope of government action. The government's argument in *United States v. Darby* [206] in defense of the Fair Labor Standards Act (FLSA), [207] for example, was essentially identical to that made unsucessfully a generation before in **[*1448]** *Hammer v. Dagenhart:*

No State, acting alone, could require labor standards substantially higher than those obtaining in other States whose producers and manufacturers competed in the interstate market. Employers with lower labor standards possess an unfair advantage in interstate competition, and only the national government can deal with the problem. [208]

The Court's unanimous decision upholding the FLSA accepted the substantive case for the statute at face value, and regarded the FLSA as essentially public interest rather than interest-group legislation. [209] Arguments in favor of *Hammer*'s limits on federal power were curtly dismissed: "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control." [210]

There remained only the question whether federal power extended to those goods of local manufacture which were not shipped in interstate commerce. In this regard Justice Stone cited the *Shreveport Rate Case* to support the proposition that a "familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled." [211] Justice Stone omitted any reference to the desire to fight local discrimination against interstate commerce that was so critical to the earlier decision, or to any recognition that the *Shreveport Rate Case* did not apply to all "intrastate transactions" but only to the "instrumentalities" of interstate commerce -- in particular to interstate railroad operations. [212] Nor did Justice Stone acknowledge that the *Shreveport Rate Case* never challenged the distinction between commerce and manufacture defended in *E. C. Knight.* Justice Holmes in his *Hammer* dissent defending federal authority still recognized that some manufacture **[*1449]** was part of the purely internal commerce of the state. [213] Yet such was the strength of the federal tide that Justice Stone abandoned that vestige of state autonomy in *Darby.* [214] The question of state autonomy, so critical to *E. C. Knight,* also received back-of-the-hand treatment in *Darby;* the Court brushed aside the tenth amendment, and the principle of enumerated powers that it articulated, as "but a truism that all is retained which has not been surrendered." [215]

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Justice Stone's cavalier treatment of jurisdictional objections to the FLSA resulted from his powerful belief in the soundness of the basic social legislation involved. [216] To him, the suppression of "unfair" competition from exploited labor was the dominant "evil" the FLSA attacked. [217] The possibility that the minimum wage law could be a barrier to the entry of unskilled labor into the labor market, and hence the very evil to be avoided, was never assessed. What failed in *Darby* was not the language of the Constitution, but the willingness of the Justices to accept the theory of limited government upon which it rested.

The same failure was repeated in cases that sustained the powerful system of agricultural price supports and acreage restrictions that was introduced by the New Deal. The question in *United States v. Wrightwood Dairy* [218] was whether Congress could authorize the Secretary of Agriculture to set minimum prices for milk that was produced and consumed within a single state. The usual language which spoke of a transaction "which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof," was duly set out in the statutory language. [219] Ironically, the anticompetitive effect of federal interstate milk regulation became the justification for a further expansion of federal power:

As the court below recognized, and as seems not to be disputed, the marketing of intrastate milk which competes with that shipped **[*1450]** interstate would tend seriously to break down price regulation of the latter. Under the conditions prevailing in the milk industry, as the record shows, the unregulated sale of the intrastate milk tends to reduce the sales price received by handlers and the amount which they in turn pay to producers." [220]

Even after *Wrightwood* plugged the loophole of intrastate sales, another obstacle remained to comprehensive federal agricultural regulation. Farmers could still influence the price of agricultural products in interstate commerce simply by keeping and using them on their own farms. The scope of agricultural regulation expanded to meet this challenge. *Wickard v. Filburn* [221] upheld the statutory authority of the Secretary of Agriculture to limit the consumption of wheat on the very farms that grew it. Here there was no sale transaction at all, but this did not matter to the Court. The government's ability to maintain artificially high regulated prices for goods shipped across interstate lines would surely have been compromised if local consumption had been allowed to expand supply to meet demand. The economic interdependence of the various activities was held to preclude any watertight division between production and commerce. [222] The Court regarded the distinction between direct and indirect effects on interstate commerce as quite beside the point (as indeed it was), and the entire issue of enumerated powers and state autonomy disappeared from view. [223] Once the Court decided to ignore the limitations of the *Shreveport Rate Case,* [224] it saw *Wickard* as a natural extention of the *Shreveport Rate Case* doctrine. This is just the approach that Justice Jackson took:

The opinion of Mr. Justice Hughes found federal intervention constitutionally authorized because of "matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. [225]

[*1451] Carefully excised from the quotation was the beginning of Justice Hughes's sentence: "[Congress'] authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters . . . ." [226] This excision, doubtless deliberate, completed the transformation of the commerce clause.

The question then arises as to how is it possible to stand a clause of the Constitution upon its head. I do not think that the explanation comes from any vagueness in the language of the commerce clause. [227] If a Court innocent of political theory or of any predeliction on the

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merits of the underlying legislation approached a commerce case, it could not possibly parse the words of the clause so as to reach the extravagant interpretations of federal power accepted in *Jones & Laughlin, Darby, Wrightwood,* and *Wickard.* Could anyone say with a straight face that the consumption of home-grown wheat is "commerce among the several states?" A powerful principle must have led to so fanciful a conclusion. That principle has to go to the idea of what kind of government and social organization is thought to be just and proper for society at large.

I have no doubt that the Justices of the Supreme Court who forged so powerful a doctrine had such a conception in mind. At one level they rejected the idea of limited federal government and decentralized power. That idea only made sense if there was a risk that governments could misbehave. If it was thought that they always acted in the public interest, then any effort to deny them substantive power would have hobbled the forces of virtue and enhanced those of wickedness. It is noticeable that all the key New Deal commerce clause opinions took the substantive findings of Congress at face value. None was prepared to identify the powerful interest group politics that were so evident in both the labor and agricultural cases -- the very policy areas in which the commerce clause reached its present scope. Once government is thought to be the source of risk, however, then competition between governments makes sense, and there is good reason to uphold the ideas of limited **[*1452]** government and enumerated federal powers that were part of the original design. The New Deal's change in attitude toward the commerce clause thus depended upon a radical reorientation of judicial views toward the role of government that in the end overwhelmed the relatively clean lines of the commerce clause.

In addition, the key federal laws of the New Deal cartelized either labor or product markets that would otherwise have been highly competitive absent government regulation. [228] Indeed, there were substantive challenges to each of these laws, usually under the due process clause. [229] These developments were not unrelated, for jurisdictional limitations upon the power of Congress only made sense if there was reason to think that use of the power would have been harmful. Yet once the idea that markets performed useful functions was cast aside, the jurisdictional limitations ceased to make any sense. The war cry became a call for Congress to act because, in an age of economic interdependence, national problems demanded national solutions. [230]

Yet the point about economic interdependence mistakes the disease for the cure. It is precisely because markets are interdependent that there is reason to fear comprehensive federal regulation. [231] Competitive markets are the best way to allocate scarce **[*1453]** goods and services. They promise to bring price into line with the marginal cost of production, and they hold out some hope that all the possible gains from trade will be achieved by voluntary transactions. Markets are not just a good in themselves. They are powerful instruments for human happiness and well-being.

Legal monopolies have precisely the opposite effect. They raise price above marginal cost and they prevent many voluntary transactions from taking place, so that the total social output is reduced by the deadweight loss that they cause. Worse still, the ability to obtain legal protection against competition invites individuals and groups to spend valuable resources in order to obtain (or resist obtaining) economic rents. [232] Even though no market is an ideal competitive market, there is absolutely no reason to impose economic regulations, such as minimum price laws or cartelization of labor markets, whose only effect is to drive quantity and price further from the competitive equilibrium. When viewed from this perspective, the Wagner Act, the Fair Labor Standards Act, and the Agricultural Marketing Acts appear to be long-standing social disasters that could not long have survived with their present vigor solely at the state level.

There is a dangerous tendency to assume that competitive injury and physical injury form part of a seamless web, so that the power to regulate the one necessarily confers the

government. The second class was designed to protect individual rights against wrongdoing by government. The two types of provisions are in some sense parts of an integral strategy to ensure that the government, state or federal, does not become the enemy of the very people whom it is organized to protect. But the provisions work in very different ways, and their proper construction proceeds along rather different paths.

In considering guaranties of individual rights, we address the highest ends of government and civilization. Generally it is possible to look to the common law, to a rich political theory, and to a long political tradition in order to gather hints about what these provisions mean and how they should function. The framers understood the protection of speech, contract, and property as ends good in themselves, as rights so "natural" and ends so clear that they did not receive the intellectual justification they so desperately needed -- and still need. In reading these provisions, we can draw upon a large body of materials to guide our interpretation: Hobbes, Locke, Hume, Montesquieu, and a host of lesser, but still able, writers. [6] The differences that emerge in dealing with these questions are often attributable to the richness and the centrality of their subject, not to the want of speculation about them.

Provisions that go to the question of jurisdiction are no less important to sound governance than those that govern individual rights. Yet jurisdictional principles have a very different intellectual pedigree. Jurisdiction is not part of ordinary moral discourse, or of our common understanding of right and wrong. Instead, jurisdiction is always regarded as a means towards an end rather than as an end in itself. Hamilton treated jurisdiction as a more effective guarantor of individual rights than a bill of rights, because he believed that it provided clear and powerful lines to keep government from straying beyond its appointed limits. [7] Hamilton's judgment **[*1391]** was, I think, wrong to the extent that it relied on jurisdictional provisions as the sole limit to government power. [8] But it contained a fair measure of good sense in using jurisdictional limitations as an important, indeed indispensable, limitation upon government power.

The difficulty lies in construing jurisdictional provisions to achieve this political end. Here there is no comparable tradition of political philosophy upon which to draw. The classical writers who extolled the virtues of liberty and property did not have the practical experience of the founders in forming governments. The great debates over the social contract always asked the question of how individuals in a state of nature could enter into a social contract for their mutual advantage. They never considered the possibility that in practice social contract theory would be tested in a world in which it was hardly clear whether Sovereign States or ordinary persons were the contracting parties. It is hardly surprising therefore that the classical writers never addressed federalism, enumerated **[*1392]** powers, and jurisdiction, even though these form fundamental features of our constitutional system. [9]

We must, therefore, examine this question in an artificial world devoid of theories of natural rights. We must take our cue from more immediate, technical considerations. Or so it seems. Appearances are deceiving, however, and I shall argue throughout this Article that the reasons for the expansion of the commerce clause were strongly substantive. The rationale for limited government became obscure in an age when the Progressive tradition of good government came to dominate American intellectual life. [10] Judges who were persuaded that national solutions were needed for national problems could hardly be expected to invoke the commerce clause as a barrier to federal action when they believed in the importance of popular democracy, the soundness of the underlying legislation, the need for national uniformity, or all three. A judge's view of the commerce clause might be very different, however, if the perils of collective choice and the wisdom of the underlying substantive legislation were called into question. A court which shared the framers' view of government as a necessary evil could, if it so chose, put more teeth into the commerce clause than has existing case law.

Cases from both the Progressive Era and the New Deal showed a close fusion between issues

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authority to regulate the other. It is as though the power to protect interstate commerce against robbers and thieves [233] is sufficient warrant for the far more extensive social controls that treat competitive activities undertaken within different states, when the social consequences of violence and competition are so radically different. [234] The ability to conceive of competitive injury as a justification for the exercise of federal power lies at the root of all the modern commerce clause **[*1454]** decisions. The ability to perceive the essential difference between violence and competition is *all* that is needed to respect the limitation on federal power that is implicit in the commerce clause.

VI. CONCLUSION

I thus return to my original theme: Although questions of jurisdiction and substantive rights appear to be distinct, the unfortunate history of decisionmaking under the commerce clause shows how unbreakable is the link between them. The very distinction between violence and competitive harm that is necessary for organizing the private and public substantive law is critical to an understanding of the proper principles of federal jurisdiction. Hamilton may not have had it all correct when he said that sound limitations on government jurisdiction obviated the need for a bill of rights. [235] But he was surely correct when he said that the maintenance of those jurisdictional limitations is one essential bulwark to sound constitutional government. [236]

The problem of sovereignty remains: How do the people compel the holders of governmental monopoly power to act as though they could only obtain a competitive return for their services? [237] Federalism facilitates a solution by allowing easy exit, as well as by allowing voice. National regulation prevents unhealthy types of competition among jurisdictions, such as were present in *Gibbons.* Under this view, the old construction of the commerce clause makes sense; it facilitates national markets by preventing state balkanization. This was the achievement of *Gibbons.* The great peril of national regulation is that it may be taken too far, to impose national uniformity which frustrates, rather than facilitates markets. This was the New Deal. I cannot help thinking that a sound view of the commerce clause is one that returns to *Gibbons.* The affirmative scope of the commerce power should be limited to those matters that today are governed by the dormant commerce clause: interstate transportation, navigation and sales, and the activities closely incident to them. All else should be left to the states.

I realize that this conclusion seems radical because of the way **[*1455]** the clock has turned. One is hesitant to require dismantling of large portions of the modern federal government, given the enormous reliance interests that have been created. And I do not have, nor do I know of anyone who has, a good theory that explains when it is appropriate to correct past errors that have become embedded in the legal system. It is far easier to keep power from the hands of government officials than it is to wrest it back from them once it has been conferred. We had our chance with the commerce clause, and we have lost it.

Still, the argument from principle seems clear enough, even if one is left at a loss as to what should be done about it. And in a sense that is just the point. Congress and the courts can proceed merrily on their way if they are convinced that the basis for an extensive federal commerce power is rooted firmly in the original constitutional text or structure. But uneasiness necessarily creeps into the legislative picture if, as I have argued, the commerce clause is far narrower in scope than modern courts have held. There is a powerful tension between the legacy of the past fifty years and the original constitutional understanding. It is a tension that we must face, even if we cannot resolve it.

FOOTNOTES:

n1 U.S. Const. art. I, § 8.

n2 More accurately, the inquiry might be stated: How should the grant to Congress be

understood when the commerce clause is construed in light of the necessary and proper clause? See infra notes 22-28 and accompanying text.

n3 This theme of limited and enumerated powers was central to the distinction between a federal and national government. It is evident on the face of article I, which begins with the words "All legislative powers herein granted" (without specifying who the grantor was), and it was reiterated in all the ratification debates. See, e.g., 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 435-36, 454, 540 (J. Elliot 2d ed. 1836) (dialogue of Wilson and McKean); 3 id. at 95, 246, 444, 553 (dialogue of Madison, Nicholas, and Marshall); 4 id. at 147-49, 259-60 (dialogue of Iredell and Pinckney).

n4 See, D. Hume, Of Commerce (1752), *reprinted in* Essays: Moral, Political, and Literary 252, 263-64 (Liberty Classics ed. 1985). Hume's basic theory was that nations that tolerate foreign commerce are able to realize gains from trade that permit them to accumulate greater wealth, and to achieve greater prosperity and political stability, than those that rely upon domestic manufacture and agriculture alone. Hume's essay mixes historical example with analytical propositions in a style that anticipates the Federalist.

n5 The Federalist No. 11 (A. Hamilton) ("Concerning Commerce and a Navy"). The opposition between commerce on the one hand, and agriculture and manufacture on the other, seems clear enough. Thus in speaking of the control over foreign commerce, Hamilton wrote:

By prohibitory regulations, extending, at the same Time throughout the States, we may oblige foreign countries to bid against each other, for the privileges of our markets. This assertion will not appear chimerical to those who are able to appreciate the importance of the markets of three millions of people -- increasing in rapid progression, for the most part exclusively addicted to agriculture, and likely from local circumstances to remain so -- to any manufacturing nation.
Id. at 63 (Modern Library College ed. 1937).

n6 See, e.g, T. Hobbes, Leviathan (Everyman's Library ed. 1950) (1651); D. Hume, supra note 4; J. Locke, An Essay Concerning Human Understanding (R. Wilburn ed. 1947) (1689); Montesquieu, The Spirit of Laws (T. Nugent trans. 1949) (1748).

n7 The Federalist No. 84 (A. Hamilton). Hamilton continued:

I go further, and affirm that bills of rights . . . are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?
Id. at 559 (Modern Library College ed. 1937). Hamilton's argument presupposes that the doctrine of enumerated powers places substantial limitations upon all grants of power to the federal government, including those under the commerce power.

n8 Thus Hamilton thought that the principle of freedom of speech could not protect the press from arbitrary taxation:

It cannot certainly be pretended that any degree of duties, however low, would be an abridgment of the liberty of the press. . . . And if duties of any kind may be laid without a violation of that liberty, it is evident that the extent must depend on legislative discretion, regulated by public opinion; so that, after all, general declarations respecting the liberty of the press, will give it no greater security than it will have without them.
Id. at 560 n.

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Hamilton was clearly wrong on this issue. It may not be possible to use the first amendment to insist that the press be free of all general taxes, but it is possible to limit the nature of the taxes that are imposed, so that special taxes placed upon the press, but not other industries, are prohibited, or that special taxes placed on some portions of the press, but not others, are prohibited. Courts have intervened to prevent disproportionate taxation when public opinion has failed to do so. See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Grosjean v. American Press Co., 297 U.S. 233 (1936). *Grosjean* has had little development because its holding was clear enough to stop most forms of abusive taxes in their tracks.

n9 Some sense of the twist of history is found in Patrick Henry's speech in opposition to the ratification of the Constitution in the Virginia debates:

[W]hat right had they to say, We, the People? My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, who authorized them to speak the language of, We, the People instead of We, the States? States are the characterisitics, and the soul of a confederation. If the states be not the agents of this compact, it must be one great consolidated National Government of the people of all the States.

H. Storing, What the Antifederalists Were For 12 (1981) (quoting Henry). Henry was a better prophet than even his supporters would have allowed at the time. Storing rightly notes that the Anti-Federalists were on their strongest ground when they used a principle of ratification that put the Constitution into effect, at least as between the parties, when nine states ratified it. Under the Articles of the Confederation, each state had a blocking position against the changes, and Rhode Island had not bothered to send a delegate to the Philadelphia Convention.

n10 See A. Ekirch, Progressivism in America: A Study of the Era from Theodore Roosevelt to Woodrow Wilson (1974).

n11 It is no coincidence, for example, that West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding minimum wage law for women), was decided in the same term as NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), discussed infra notes 185-202 and accompanying text.

n12 See, e.g., Cohen, The Inevitable Constitutional Revolution of 1937 (speech to the AALS Constitutional Law Meeting, Washington, D.C., Oct. 8, 1987), written in response to my short paper, R. Epstein, Why the Revolution of 1937 Was a Mistake. Cohen places heavy reliance upon the Roosevelt landslide of 1936 as justification for the expanded construction of the commerce clause.

n13 U.S. Const. art. I, § 8.

n14 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824). Chief Justice Marshall continued:

Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive of a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.
Id. at 189-90. Chief Justice Marshall may well have borrowed the term "intercourse" from Hamilton, who in speaking of "The importance of the Union, in a commercial light," also spoke of "our intercourse with foreign countries as well as with each other." The Federalist No. 11, at 62 (A. Hamilton) (Modern Library College ed. 1937). Note too that in The Federalist No. 11, Hamilton repeatedly stressed that navigation was comprehended in

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commerce, the very point that Chief Justice Marshall had emphasized in his decision.

n15 This point was stressed by Hamilton in The Federalist No. 11, as in the sentence quoted supra note 5. For those of us who believe in free trade, the powers given Congress seem far too broad, as the debates over the current protectionist trade bills reveal. See also Kitch, Regulation and the American Common Market, *in* Regulation, Federalism, and Interstate Commerce 16, 51 (A. Tarlock ed. 1981).

n16 U.S. Const. art. I, § 9.

n17 Id. preamble.

n18 See id. art. VII.

n19 317 U.S. 111 (1942). For further elaboration, see infra notes 221-26 and accompanying text.

n20 See S. Morrison, H. Commager & W. Leutchenburg, A Concise History of the American Republic 188-91 (1977).

n21 See, for one illustration of this escape, a superb new casebook:

The Civil War and its aftermath inaugurated an era in which Congress began to act more vigorously. The very success of the national economy created problems. The economy became obviously interconnected; problems were no longer localized, so that it became difficult to imagine a purely internal commerce that affected no other states.

G. Stone, L. Seidman, C. Sunstein & M. Tushnet, Constitutional Law 138 (1986).

n22 U.S. Const. art. I, § 8.

n23 See infra notes 83-88 and accompanying text.

n24 See The Federalist No. 33, in which Hamilton gives a relatively narrow reading of the necessary and proper clause, when he tries to allay the fear that the necessary and proper clause will allow the national government to run roughshod over the states:

But SUSPICION may ask, Why then was it introduced? The answer is, that it could only have been done for greater caution, and to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union. The Federalist No. 33, at 200 (A. Hamilton) (Modern Library College ed. 1937). In the subsequent dispute over the clause in connection with the creation of a national bank, Hamilton gave a broader interpretation, similar to that put forward by Chief Justice Marshall. See D. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789-1888, at 160-69.

n25 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

n26 Id. at 406.

n27 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 187 (1824). Note too that Chief Justice Marshall addressed the necessary and proper clause in order to show that it does not *require* a rule of strict construction.

n28 Thus Professor Tribe gives but one brief connection between the two clauses, where they are discussed in connection with the so-called protective principle, which allows Congress to reach matters outside the scope of the commerce clause in order to govern those

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matters that fall within it. See L. Tribe, American Constitutional Law § 5-7, at 240 (1978). The threat this principle poses to the doctrine of enumerated powers is ignored by Professor Tribe, but is discussed herein. See infra notes 69-73 and accompanying text.

n29 See, e.g., L. Tribe, supra note 28, § 5-4, at 232-35.

n30 See id.

n31 156 U.S. 1 (1895).

n32 L. Tribe, supra note 28, § 5-4, at 234-35. He continued: "But with its watershed decision in NLRB v. Jones & Laughlin Steel Corp. [301 U.S. 1 (1937)], the Court acceded to political pressure and to its own sense of its doctrine's irrelevance and manipulability, abandoning the formally analytical approach to the commerce clause, and returning to Chief Justice Marshall's original empiricism." Id. at 235. Professor Tribe was not the first to develop this line of thought. It was documented in great detail in Stern, The Commerce Clause and the National Economy 1933-1946, 59 Harv. L. Rev. 645 (1946), a highly readable and happily partisan defense of the New Deal decisions written by a member of the Solicitor General's office, who had participated actively on the government's side.

n33 22 U.S. (9 Wheat.) 1 (1824).

n34 See Chief Justice Marshall's discussion in *McCulloch,* where his famous phrase, "we must never forget, that it is *a constitution* we are expounding," was designed to show only the opposition between a document which spoke in great outlines and the detailed positions of, say, a commercial code. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819). See also his dissent in Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827) (Marshall, C.J., dissenting), where his argument for the *prospective* application of the contract clause rested in part on his vision that individuals preserve in civil society the rights to contract that they have in the state of nature. Id. at 345-49. Chief Justice Marshall also wrote:

In framing an instrument, which was intended to be perpetual, the presumption is strong, that every important principle introduced into it is intended to be perpetual also; that a principle expressed in terms to operate in all future time, is intended so to operate. But if the construction for which the plaintiff's counsel contend be the true one [i.e. retroactive legislation only], the constitution will have imposed a restriction in language indicating perpetuity, which every State in the Union may elude at pleasure. The obligation of contracts in force, at any given time, is but of short duration; and, if the inhibition be of retroactive laws only, a very short lapse of time will remove every subject on which the act is forbidden to operate, and make this provision of the constitution so far useless.
Id. at 355.

It is at least a little ironic that Chief Justice Hughes refers to the Chief Justice Marshall of *McCulloch* in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442-43 (1934), while ignoring the Chief Justice Marshall of *Ogden.*

I have given a modified defense of Chief Justice Marshall's position in Epstein, Toward a Revitalization of the Commerce Clause, 51 U. Chi. L. Rev. 703, 723-30 (1984). For criticism, see Kmiec & McGinnis, The Contract Clause: A Return to the Original Understanding, 14 Hastings Const. L.Q. 525, 557-59 (1987).

n35 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 1-2 (1824). Ogden was the assignee of the original franchisees, Robert Livingston and Robert Fulton.

n36 Id. at 4-5 (argument of Daniel Webster for appellant).

n37 Also at issue was whether the exclusive franchise was an impairment of contract by the

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state of New York. The conclusion that it was would seem quite plausible if the contracts clause was given the prospective interpretation that Chief Justice Marshall urged three years after *Gibbons.* See Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 354-56 (1827) (Marshall, C.J., dissenting). But Chief Justice Marshall was in dissent in *Saunders* and the interpretation was lost. One might also note that *Gibbons* involved the conversion of public property (to which access is open and equal) to private property. It was a taking, albeit of public and not private property. The public trust issue surfaced in Livingston v. Van Ingen, 9 Johns. 507, 572-573 (N.Y. 1812), in which New York Chief Justice Kent brushed aside the argument there was an impropriety in the grant under state law doctrine. On the vexing use of the public trust doctrine, see Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892); Rose, The Comedy of the Commons: Custom, Commerce and Inherently Public Property, 53 U. Chi. L. Rev. 711 (1986); Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970). For my views, see Epstein, The Public Trust Doctrine, 7 Cato J. (forthcoming 1987).

n38 *Gibbons,* 22 U.S. (9 Wheat.) at 190-91, 213-17.

n39 L. Tribe, supra note 28, § 5-4, at 232 (footnotes omitted).

n40 *Gibbons,* 22 U.S. (9 Wheat.) at 195 (emphasis added).

n41 Id. Stern used the same selective powers of quotation, stating that "the Commerce Clause comprehended 'that commerce which concerns more states than one.'" Stern, supra note 32, at 648 (quoting *Gibbons,* 22 U.S. at 194-95). He then dropped the rest of the material quoted above and continued with the remainder of the passage, beginning "[t]he genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally." Id. The passage reads more broadly without the omitted language.

n42 Marshall emphasized this point elsewhere in *Gibbons:*

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right.
Gibbons, 22 U.S. at 195. Note that Marshall assigned to commerce a uniform meaning with regard both to commerce with foreign nations and to that among the several states.

n43 *Gibbons,* 22 U.S. (9 Wheat.) at 196.

n44 Id. at 197.

n45 Chief Justice Marshall wrote:

What do gentlemen mean, by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded.

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Id. at 188.

n46 Farnsworth writes: "An especially common rule of construction is that if language supplied by one party is reasonably susceptible to two interpretations, one of which favors each party, the one that is less favorable to the party who supplied the language is preferred." E. Farnsworth, Contracts § 7.11, at 499 (1982). The rule is widely used with standard form contracts, and even beyond them. Its major cost is that it biases the way in which the original documents are drafted, rendering them more complicated and less clear than they would under a rule of ordinary and natural meaning, without the presumption.

n47 *Gibbons,* 22 U.S. (9 Wheat.) at 187; see supra notes 22-28 for a discussion of the clause.

n48 *Gibbons,* 22 U.S. (9 Wheat.) at 194.

n49 9 Johns. 506 (N.Y. 1812).

n50 New York Chief Justice Kent wrote:

Our turnpike roads, our toll-bridges, the exclusive grant to run stage-wagons, our laws relating to paupers from other states, our *Sunday* laws, our rights of ferriage over navigable rivers and lakes, our auction licenses, our licences to retail spiritous liquors, the laws to restrain hawkers and pedlars; what are all these provisions but regulations of internal commerce, affecting as well the intercourse between the citizens of this and other states, as between our own citizens.
Id. at 579.

n51 See *Gibbons,* 22 U.S. (9 Wheat.) at 203.

n52 Id.

n53 United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895).

n54 One new casebook states: "Under the *formal* approach, the Court examines the statute and the regulated activity to determine whether certain objective criteria are satisfied. . . . In contrast, the *realist* approach attempts to determine the actual economic impact of the regulation or the actual motivation of Congress." G. Stone, L. Seidman, C. Sunstein & M. Tushnet, supra note 21, at 139.

n55 Robert Addie & Sons (Collieries), Ltd. v. Dumbreck, 1929 App. Cas. 358, 371 (H.L.). The passage continues:

When you come to the facts it may well be that there is great difficulty -- such difficulty as may give rise to difference of judicial opinion -- in deciding into which category a particular case falls, but a judge must decide and, having decided, then the law of that category will rule and there must be no looking to the law of the adjoining category. I cannot help thinking that the use of epithets, "bare licensees," "pure trespassers" and so on, has much to answer for in obscuring what I think is a vital proposition; that, in deciding cases of the class we are considering, the first duty of the tribunal is to fix once and for all into which of the three classes the person in question falls.
Id. at 371-72.

n56 The key case is still Rowland v. Christian, 69 Cal.2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). *Rowland* was in a sense wholly gratuitous, as recovery could have been awarded under the traditional view holding hosts responsible for latent defects causing harm under ordinary usage. See id. at 115, 443 P.2d at 566, 70 Cal. Rptr. at 102. For a criticism of the modern tendency of balancing in the tort area, see Epstein, The Risks of Risk/Utility, 47 Ohio

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St. L.J. (forthcoming 1987).

n57 312 U.S. 100 (1941); see discussion infra notes 206-17 and accompanying text. Note too that *Darby*'s view of the clause makes hash of the reserved powers clause of the tenth amendment. If jurisdiction under the commerce clause is both plenary and unlimited, then there is nothing left to reserve. The tenth amendment thus really becomes a truism. Yet the amendment sharply confirms that the federal government has only delegated powers: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Why bother with the amendment if *Darby* is correct? By contrast, the tenth amendment makes good sense if Chief Justice Marshall's view in *Gibbons* is followed.

n58 317 U.S. 111 (1942); see discussion infra notes 221-27 and accompanying text.

n59 Id. at 120. Justice Jackson went on to note that Chief Justice Marshall in *Gibbons* warned that "effective restraints on its exercise must proceed from political rather than from judicial processes." Id. The passage in *Gibbons* reads in full:

The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New-York, and act upon the very waters to which the prohibition now under consideration applies.
Gibbons, 22 U.S. (9 Wheat.) at 197. Justice Jackson thus confused two points. First, the need for political decisions for matters properly within the scope of the commerce powers, and, second, the scope of the clause itself. The latter was only held to "comprehend navigation" in New York waters, not all productive activities within the state.

n60 Justice Johnson wrote:

The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom, necessarily implies the power to determine what shall remain unrestrained, it follows, that the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.

It is impossible, with the views which I entertain of the principle on which the commercial privileges of the people of the United States, among themselves, rests, to concur in the view which this Court takes of the effect of the coasting license in this cause. I do not regard it as the foundation of the right set up in behalf of the appellant. . . . And I cannot overcome the conviction, that if the licensing act was repealed to-morrow, the rights of the appellant to a reversal of the decision complained of, would be as strong as it is under this license.
Gibbons, 22 U.S. at 227-32 (Johnson, J., concurring).

n61 It is strange to think of how little the commerce power moved in the decades that followed *Gibbons.* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), stood for the principle that the federal jurisdiction under the commerce clause comes in two parts. For those matters, such as pilotage in local waters, that fall within interstate commerce but that are of great local concern as well, the federal and state jurisdictions are concurrent. Id. at 319-20. For those matters for which there should be a uniform rule, the power of Congress is

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exclusive. Id. at 319. This delicate compromise is somewhat tricky to reconcile with the constitutional text, even if greater feats of legerdemain have been done in the name of constitutional construction. The power granted by the commerce clause seems to be unitary for all objects that fall within it; how then can federal jurisdiction be exclusive for some areas and concurrent for others?

Nonetheless the *Cooley* solution does have a structural sense that makes it more durable than might appear at first blush. Local conditions easily could demand separate treatments, which do not threaten interstate commerce in the same way as did the New York statute at issue in *Gibbons.* Local practices shown to discriminate against outsiders could be addressed by the privileges and immunities clause of the Constitution, and arguably by other substantive provisions as well. U.S. Const. art. IV, § 2, cl. 1

n62 In analyzing this division, I do not discuss in depth United States v. Coombs, 37 U.S. (13 Pet.) 71 (1838), which upheld the constitutionality of a statute that imposed criminal penalties against "any person who shall plunder, steal or destroy any money, goods," etc. from a ship under the admirality jurisdiction of the United States. Justice Story sustained the constitutionality of that statute, writing that the commerce clause "extends to such acts, done on land, which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce and navigation with foreign nations and among the states." Id. at 78. Note that there are actions outside of interstate commerce that have evident effects upon interstate commerce. Yet the decision does little to threaten the system of enumuerated powers found in the constitution, because the train of physical effects is quite limited, and do not involve the federal government in the operations of the local economies. *Coombs* is another case for which the necessary and proper clause could sensibly make the difference. But, given its limited extent, it is not surprising that *Coombs* was not invoked in the subsequent expansionary period of the commerce clause.

n63 Ch. 104, 24 Stat. 379 (1887) (current version at 49 U.S.C.A. §§ 10101-11917 (Supp. 1987)).

n64 301 U.S. 1 (1937).

n65 *Gibbons,* 22 U.S. (9 Wheat.) at 194-95.

n66 77 U.S. (10 Wall.) 557 (1870).

n67 Id. at 562 (argument of appellant).

n68 Id. at 566.

n69 See infra notes 22-28; L. Tribe, supra note 28, § 5-6, at 238-39.

n70 118 U.S. 557 (1886).

n71 Id. at 577.

n72 Ch. 104, 24 Stat. 379 (1887) (current version at 49 U.S.C.A. §§ 10101-11917 (Supp. 1987)). Section 4 of the statute provided:

That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance.

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Id. § 4, 24 Stat. at 380.

A proviso to the section then gave the ICC the power to relieve carriers from this obligation "in special cases," but did not set out any standards which indicated when this general obligation should be suspended, and none are apparent as a general matter. Section 3 of the Act contained a prohibition against undue preferences, and § 5 prevented certain kinds of pooling of freight.

n73 Transportation Act of 1920, ch. 91, 41 Stat. 456 (current version at scattered sections of 49 U.S.C.A. (Supp. 1987)); see infra notes 93-101 and accompanying text. For a general account of the early changes in the Interstate Commerce Act, see Aitchison, The Evolution of the Interstate Commerce Act: 1887-1937, 5 Geo. Wash. L. Rev. 289 (1937).

n74 169 U.S. 466 (1898) (holding state railroad regulations to be violations of the 14th amendment).

n75 See Transportation Act of 1920, ch. 91, 41 Stat. 456 (current version at scattered sections of 49 U.S.C.A. (Supp. 1987)).

n76 234 U.S. 342 (1914). I am most indebted to Professor Edmund Kitch for pointing out to me the genuine complexities that this case raises, and for insisting that I deal more fully with the matter.

n77 Id. at 346.

n78 Id.

n79 Id. at 345. One example of the discrimination was that "a rate of 60 cents carried first class traffic a distance of 160 miles to the eastward from Dallas, while the same rate would carry the same class of traffic only 55 miles into Texas from Shreveport." Id. at 346.

n80 Id. at 346-47.

n81 Id. at 347.

n82 Id. at 351-52.

n83 Id. at 352.

n84 222 U.S. 20 (1911).

n85 Ch. 196, 27 Stat. 531 (1893) (current version at 45 U.S.C. §§ 1-7 (1982)).

n86 223 U.S. 1 (1912).

n87 See supra notes 65-69 and accompanying text.

n88 See supra notes 22-28 and accompanying text.

n89 301 U.S. 1 (1937); see infra notes 185-205 and accompanying text.

n90 *The Shreveport Rate Case,* 234 U.S. at 352.

n91 The actual language of the Interstate Commerce Act appears to have precluded the regulations that were sustained in the case. Section 3, which prevented "undue or unreasonable preference or advantage" to one person over another, was subject to a proviso that read:

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of substantive rights and questions of federal jurisdiction. The very attitudes that led to the demise of substantive due process protection of economic liberties lay behind **[*1393]** judicial interpretation of the commerce clause. [11] To trace this history, it is necessary to discard the aura of inevitability that modern courts and writers have placed around the commerce clause. [12] At each stage in the historical analysis, the right question to ask is: Was this extension of federal power justified by the text and structure of the Constitution? There are no shortcuts in the journey. Let us start with the text.

II. THE TEXT

The first place to look to find the meaning of the commerce clause is the text of the clause itself. Here one notices that the word "commerce" governs three separate sets of relations -- those with foreign nations, among the states, and with Indian tribes. [13] One should assume that the word commerce applies with equal force to all three cases, and bears the same meaning with respect to each of its objects. One cannot, for example, assign a meaning to "commerce" which is intelligible only with respect to foreign nations. The asserted construction must make equally good sense for commerce among the states and for commerce with the Indian tribes.

Similarly, one does not want a meaning of the term commerce which renders any one of these three heads of the commerce power redundant or unnecessary. The modern view which says that commerce among the several states includes all manufacture and other productive activity within each and every state, because of the effect that such manufacture has upon commerce, violates this constraint. If commerce includes all that precedes trade with foreign nations, among the states, and with Indian tribes, then the three heads of jurisdiction cover the same ground; that is, each by itself covers manufacturing or agriculture within each of the states. The **[*1394]** scope of the clause would thus be plenary even if it said only that Congress shall have power to regulate commerce with foreign nations, or even with the Indian tribes, and remained silent about commerce among the several states. The level of industrial production within each state, after all, influences the amount, type, and price of goods available for the export trade or for the Indian trade. Granting Congress the power over commerce among the states thus accomplishes nothing that has not been already provided for elsewhere in the document. What possible sense does it make as a matter of ordinary English to say that Congress can regulate "manufacturing with foreign nations, or with Indian tribes," or for that matter "manufacturing among the several states," when the particular fabrication or production takes place in one state, even with goods purchased from another?

Taking the alternative position, that commerce means trade, or as Chief Justice Marshall said, "intercourse," [14] with or among the parties named, changes the situation dramatically. By Chief Justice Marshall's account, "intercourse" covered both shipping and navigation, and the contracts regulating buying and selling. Using that two-part definition it becomes clear that trade with foreign nations is not trade among the several states or with the Indian tribes. Each part of the clause attributes the same meaning to the term commerce, and each of the objects of the clause -- foreign nations, the states, and Indian tribes -- becomes an indispensable part of the constitutional structure. The power to regulate commerce with foreign nations, for example, is needed to ensure that trade negotiations with foreign nations are not conducted by each of the **[*1395]** several states in its own individual capacity. [15]

It is worth noting that this view of commerce as trade is consistent with the other prominent mention of the word commerce in the Constitution. Article I also states that "[n]o preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another . . . ." [16] The term "commerce" is used in opposition to the term "revenue," and seems clearly to refer to shipping and its incidental activities; this much seems evident from the use of the term "port." The clause itself would sound odd if it referred, for example, to preferences "given by any Regulation of Commerce, Manufacture or Revenue to the ports

Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country or to any State or Territory as aforesaid.
The Shreveport Rate Case, 234 U.S. at 356-57 (quoting the Interstate Commerce Act).

Yet this remnant of Chief Justice Marshall's "internal commerce" of the several states did not long survive. The Court concluded that the proviso did not apply "when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act." Id. at 358. Certainly there was no reference to unjust discrimination in the proviso, which would have been wholly redundant if it reached only those cases in which no discrimination was present, for these were precisely the cases lacking conduct which the ICC could find unlawful.

n92 Id. at 355.

n93 257 U.S. 563 (1922).

n94 Transportation Act of 1920, ch. 91, 41 Stat. 456 (current version at scattered sections of 49 U.S.C.A. (Supp. 1987)).

n95 "The . . . most novel and most important feature of the act, requires the Commission so to prescribe rates as to enable the carriers as a whole, or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation." *Wisconsin R.R. Comm'n,* 257 U.S. at 584. This is merely a nice way to describe cartelization of the railroad industry.

n96 See id. at 579-80.

n97 See id. at 583. Typically, expanded government authority during the First World War set the stage for expanded government authority after peace had returned.

n98 The Court wrote:

Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The States are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear.
Id. at 589-90.

n99 "Capture," whether by railroads wishing to cartelize their industry, or by shippers wishing to ship their goods below cost, is an inherent risk of all forms of regulation. The basic insight here is that regulation of all forms constitutes an implicit transfer of wealth among private individuals. The difficult question is to determine which interest group or groups will be able to take over, or capture the process. See McChesney, Rent Extraction and Rent Creation in the Economic Theory of Regulation, 16 J. Legal Stud. 101 (1987); Peltzman, Toward a More General Theory of Regulation, 19 J. Law & Econ. 211 (1976); Posner, Taxation by Regulation, 2 Bell J. Econ. & Mgmt. Sci. 22 (1971); Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971).

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of one State." The term commerce in this commerce provision does not carry with it the extensive baggage placed upon it by the better-known New Deal cases concerning the commerce clause.

III. THE STRUCTURE

One obtains the same interpretation of the commerce clause when considering the clause in light of the overall constitutional structure. Article I, section 8, contains an extensive list of separate, discrete, and enumerated powers granted to Congress, whereas article I, section 9, contains a comparable list of powers specifically denied to it. The lists of inclusion and exclusion suggest that the provisions contained in any one section should be read to recognize the existence and necessity of other specific powers and limitations contained elsewhere in article I, as well as the certainty that some matters are wholly beyond the power of Congress.

This view certainly appears to agree with the original theory of the Constitution. The federal government received delegated powers from the states and the individuals within the states. The exact source of the granting power might be somewhat unclear; after all, the preamble begins with "We the People," [17] yet ratification was by nine of the thirteen sovereign states. [18] Yet whatever the pedigree **[*1396]** of the Constitution, there was clearly no sense that either grantor conferred upon the Congress the plenary power to act as a roving commission, in order to do whatever it thought best for the common good. The looseness of vague grants of power would have given rise to the possibility of massive abuse, a possibility the framers seemed determined to control. The federal government was to have supremacy in the areas under its control, but the quid pro quo was that these areas were to be limited by specific jurisdictional grants. A system which says that the commerce clause essentially allows the government to regulate anything that even indirectly burdens or affects commerce does away with the key understanding that the federal government has received only enumerated powers. The doctrine of "internal relations" is not only a philosophical creed that says every event is related to every other separate event; it is also something of an economic truth in a world in which the price of any given commodity depends upon the costs of its inputs and upon the alternatives available to potential buyers. To say that Congress may regulate *X* because of its price effects upon any goods in interstate commerce, or because of its effects upon the quantity of goods so shipped, is to say that Congress can regulate whatever it pleases, a theory that cases such as *Wickard v. Filburn* [19] have so eagerly inferred.

On this score, moreover, there is no reason to distinguish the commerce of the eighteenth and nineteenth centuries from that of the twentieth. Business in one state has always had profound economic effects upon the fortunes of other states. The pre-Civil War battles between North and South over the tariff show just how much the fate of each state has always depended upon national economic policies. [20] There was no economic revolution during the Progressive Era or the New Deal that justifies the convenient escape of saying that it is only the nature of business and trade that has changed, not the appropriate construction of the commerce clause. [21] The intimate interdependence between trade and national **[*1397]** economic conditions was as clear to the Phoenicians and the Romans as it is to ourselves. There has been no basic transformation of the economy that requires, or allows, a parallel transformation in the scope of the commerce clause. International trade is driven by the principle of comparative advantage and the costs of reaching distant markets. It did not begin with either the steamship or the railroad.

If the constitutional limitations on federal powers were designed to act as a substitute Bill of Rights, then the expansive interpretation of the commerce clause has done away with this protection completely. The necessary effect is that greater burdens are placed upon the substantive limitations, such as the Bill of Rights, found elsewhere in the Constitution. These limitations have met with varying fates themselves; one need only contrast the takings clause of the fifth amendment with the first amendment protection of the freedom of speech.

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In some cases, the second barrier against expanded government has held. In other cases, chiefly those concerning economic liberties, it has crumbled, leaving liberty at the mercy of the "good faith" of the Congress whose mischief the barrier was designed to constrain.

Nor is any of this understanding upset by the "necessary and proper" clause of the Constitution, which may expand the power of Congress, but does not provide for an unlimited grant of federal power. The necessary and proper clause provides that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." [22] As drafted the clause does nothing to upset the balance of power between the federal and the state governments, nor to contravene the principle of enumerated powers on which the structure of article I, section 8 rests. What the necessary and proper clause does is to ensure that the Congress shall have all means at its disposal to reach the heads of power that admittedly fall within its grasp. **[*1398]** Such is the import of the phrase "for carrying into Execution": Congress shall not fail because it lacks the means of implementation. The clause does not, however, authorize the creation of new and independent heads of power, such as over local manufacture or agriculture, that obliterate the distinction between a federal and a national government. The necessary and proper clause thus permits the regulation of local affairs that are in a sense inseparable from national ones, as happens when local and interstate cars, for example, move along the same line. [23] But it is hardly "necessary" to regulate every form of local activity in order to regulate the three heads of commerce over which Congress has power. And it is surely not "proper" to do so. [24]

This reading of the necessary and proper clause may appear somewhat narrower than that given by Chief Justice Marshall in *McCulloch v. Maryland:* "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." [25] Yet as stated, Chief Justice Marshall's broad reading of the clause does take into account the risks of overinclusion, by reference to matters which "consist with the letter and spirit of the constitution," which surely includes respect for the principle of enumerated powers, which Chief Justice Marshall acknowledged as being preserved in the tenth amendment. [26] More to the point, Chief Justice Marshall adopted just this limited interpretation of "necessary and proper" in *Gibbons v. Ogden* when he wrote: "In the last of the enumerated powers, that which **[*1399]** grants, expressly, the means for carrying all others into execution, Congress is authorized 'to make laws which shall be necessary and proper' for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred." [27] In essence he treats the clause as a *limitation* upon means only, and surely not as an extension of *permitted* ends. So understood, the necessary and proper clause places a small but important weight upon the jurisdictional scales. But it is far from an automatic trump that overrides other jurisdictional limitations. Its historical role in the explication of the commerce clause is relatively small, and deservedly so. [28]

IV. THE CASE LAW BEFORE THE NEW DEAL: 1824-1936

The elaborate case law under the commerce clause can be profitably interpreted in light of the above understandings. Thus it is often said today that the New Deal does not represent violent revolution but prudent reformation [29] (one thinks of Martin Luther and that other reformation). More precisely, the newer cases are said only to have returned to the wisdom of Chief Justice Marshall, who understood the importance of an expansive interpretation of the commerce clause to the maintenance of the Union. [30] In between, in such cases as *United States v. E.C. Knight Co.,* [31] the courts are said to have strayed from the original understanding to a view that effectively hampered the power of Congress to impose much-needed social and economic regulation. This set of insights has even been dressed up in

plausible philosophical garb. Professor Tribe's treatise, *American Constitutional Law,* tells us that the Supreme Court between 1887 and 1937 substituted a "formal classification" **[*1400]** of economic activities for the "empiricism" [32] that characterized Chief Justice Marshall's great judgment in the pivotal case of *Gibbons v. Ogden.* [33]

The New Deal was not a reformation, but a sharp departure from previous case law, and one that moved federal power far beyond anything Chief Justice Marshall had in mind. *Gibbons* is often regarded as an expansive interpretation, and for its time so it was. Yet when the critical passages of the opinion are read as a whole, it seems quite clear that the case strongly adumbrated the subsequent holding in *E. C. Knight,* with which it is said to contrast so clearly. It is worth a minute to describe Chief Justice Marshall's logic, for the key to understanding his view is to understand that he found in the rigid and formal structures of the Constitution the materials that enabled it to be the foundation on which a perpetual Union could rest. His vision of the Constitution was not that of a living and changing organism, but of a great temple of government that, properly understood, could endure for the ages. [34]

[*1401] *A.* Gibbons v. Ogden

At issue in *Gibbons v. Ogden* was whether New York could grant an exclusive franchise that permitted steamships to ply between New Jersey and New York only with the franchisees' permission. [35] New Jersey had passed a retaliatory law; citizens of New Jersey sued in New York for violating New York law could recoup treble damages against the New Yorker in a New Jersey court. [36] The New York statute threatened massive commercial balkanization. [37] Chief Justice Marshall decided, first, that navigation among the several states was interstate commerce, and second (in order to avoid the question of whether any dormant commerce power could be identified) that a 1793 federal statute that licensed ships in the "coasting trade" had preempted the New York statute. [38]

Professor Tribe has summarized his view of the broad scope of *Gibbons* as follows:

[I]n an elaborate preliminary discussion, [Chief Justice] Marshall indicated that, in his view, congressional power to regulate "commercial **[*1402]** intercourse" extended to all activity having any interstate impact -- however indirect. Acting under the commerce clause, Congress could legislate with respect to all "commerce which concerns more states than one." This power would be plenary: absolute within its sphere, subject only to the Constitution's affirmative prohibitions on the exercise of federal authority. [39]

This passage suggests that Chief Justice Marshall in *Gibbons* gave a very extensive reading to the reach of the commerce clause. But that is only because of the redactor's power of selection. Consider the fuller context of the quotation from *Gibbons:*

Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and

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that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. [40]

The passage gives a quite different sense of the commerce clause's scope than the one that Tribe suggests. It is hard to find in the phrase "commerce which concerns more States than one" a total jurisdiction over all commercial activity, especially when the phrase is preceded by the word "restricted." [41] Quite the opposite; **[*1403]** it looks as though Chief Justice Marshall wanted only to refute the argument (see his first sentence quoted) that interstate commerce can only take place on the narrow boundary between the two states. [42] Such a position, if carried into law, would have rendered the commerce clause a dead letter. Commerce between two states, or among many, must take place physically within the confines of one or both of them. It is therefore the nature of a transaction, rather than its location, that stamps it as part of interstate commerce. Navigation between states takes place at one instant in one state, and at another instant in another. Both portions of the journey are covered by the commerce clause, even if purely intrastate navigation is excluded. The power may be plenary, but it is surely limited as to its objects. Matters outside its scope are fully reserved to the states. Chief Justice Marshall did write, as Tribe suggests, of the "plenary" nature of the commerce power. But again his words must be set in context. Chief Justice Marshall thus wrote: "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution." [43] But he continued:

If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. [44]

It follows therefore that "plenary" powers were understood by **[*1404]** Chief Justice Marshall to be wholly consistent with powers "limited to specified objects."

This view is, moreover, reinforced when we take into account Chief Justice Marshall's own principles of construction, which should give caution to advocates of both judicial restraint and judicial activism. His attitude was essentially that the Constitution should be construed in its "natural sense." He was rightly suspicious of any effort to impose principles of "strict construction," but by the same token did not wish to give words an extravagant meaning given their function and purpose within the framework of the constitution. [45] He followed a middle course on the issue of construction, that of ordinary meaning, no different from that which a good contracts judge follows when he attaches ordinary meaning to contractual provisions. [46] Even with an explicit reference to the necessary and proper clause, [47] Chief Justice Marshall acknowledged that the commerce clause was itself directed toward specific ends, as was captured by the distinction between "internal" and "external" commerce, where internal commerce was that trade "between man and man in a State, or between different parts of the same State." [48] By that definition internal commerce is as commonplace in our own time as it was in Marshall's: every purchase **[*1405]** at a supermarket is internal commerce, even if the market itself acquired its own goods from a supplier out of state.

Nor is this balance between internal and external commerce undone because Chief Justice Marshall used the word "affects" to round out the scope of Congress' power. Those references to activities that "affect" interstate commerce cannot be read in isolation from the rest of the text, as an effort to nullify the basic doctrine of enumerated powers. Instead, his purpose was to counter prior contentions about the scope of internal commerce that had been stated by the New York court in *Livingston v. Van Ingen.* [49] There, New York Chief Justice Kent gave the commerce clause its narrowest possible construction, and thus treated as part of internal commerce any portion of an interstate journey that was undertaken wholly within local

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waters. [50] When Chief Justice Marshall spoke of local regulations that "affect" interstate commerce, he did so to reject the argument that New York could insist that all rival carriers be required to use sails in New York waters, even if they used steam elsewhere. So long as this local restriction "affected" the journey as a whole, the regulation reached commerce among the several states, notwithstanding that its "direct" impact was on New York waters alone. There is not the slightest hint that Chief Justice Marshall meant to have the "affects" qualification expand the specific objects to which the "plenary" commerce clause applies, beyond the control of interstate commercial transactions and the instrumentalities of interstate commerce.

Further elaboration of Chief Justice Marshall's meaning appeared elsewhere in his opinion. At one point he addressed whether the states could pass inspection laws, or whether these laws fell solely within the domain of the congressional commerce power. [51] He finessed that question by giving a very narrow definition of what interstate commerce included:

[*1406] That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. [52]

It is instructive to compare this passage with the most famous sentence of *E. C. Knight,* which has been cited as a sign of its narrow and indefensible rigidity: "Commerce succeeds to manufacture, and is not a part of it." [53] Chief Justice Marshall himself could have written that sentence, citing *Gibbons* as authority. His style was anything but "empirical," if that term is used to identify the necessary economic connection between intrastate and interstate commerce. Indeed the passage just quoted is wholly inconsistent with the indirect burden on interstate commerce approach taken in the modern law. Chief Justice Marshall's greatness rests upon his appreciation of the boundaries which should dominate the constitutional playing field. Individual cases may fall close to the boundary lines, and must be placed on one side or the other. Yet the position of the boundary lines must remain fixed if the power to adjudicate is to remain. Things cannot be partly in and partly out of interstate commerce. As long as one government or the other must regulate, the boundaries must be sharp -- such as the foul lines in baseball -- and not fuzzy. It has been said that modern constitutional law represents the triumph of "formalism" over "realism." [54] If this is true, then Chief Justice Marshall was the great formalist, not the precursor of the modern realists.

There is a good deal to be said for Marshall's categorical approach. If pressed to give a common law analogy to Marshall's way of thinking, I would offer the common law trilogy of the liabilities **[*1407]** of a landowner to the trespasser, the licensee, and the invitee. No judge ever thought that these categories were crystal clear, nor that individual cases would not give rise to honest disagreements of opinion. But it was thought that the categories were fixed and limited as a matter of principle: "There is no half-way house, no noman's land between adjacent territories. When I say rigid, I mean rigid in law." [55] And the modern disintegration of the categories has done little to produce any coherent law of occupiers' liability. [56] So it is with interstate commerce. The principle that the power of Congress *did not* extend to the internal commerce of the state was as important to the overall scheme as the recognition that the power of Congress extended to interstate commerce. Marshall well understood the fact that local events affected interstate commerce, but he *rejected* it as a basis for extension of congressional power over internal matters. *Gibbons* thus stands in sharp opposition to the very assertion of federal power that characterizes such cases as *United States v. Darby* [57] and *Wickard v. Filburn.* [58] In *Wickard,* **[*1408]** Justice Jackson captured the transformation of *Gibbons* when he wrote: "At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded." [59] No way.

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*529 U.S. 848, *; 120 S. Ct. 1904, **;*
*2000 U.S. LEXIS 3426, ***; 146 L. Ed. 2d 902*

DEWEY J. **JONES** v. **UNITED STATES**

No. 99-5739

SUPREME COURT OF THE **UNITED STATES**

529 U.S. 848; 120 S. Ct. 1904; 2000 U.S. LEXIS 3426; 146 L. Ed. 2d 902; 68 U.S.L.W. 4422; 2000 Cal. Daily Op. Service 3961; 2000 Daily Journal DAR 5293; 2000 Colo. J. C.A.R. 2791; 13 Fla. L. Weekly Fed. S 356

March 21, 2000, Argued
May 22, 2000, Decided

NOTICE: [*1]**

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE **UNITED STATES** COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

DISPOSITION: 178 F.3d 479, reversed and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner sought review of the decision of the Court of Appeals for the Seventh Circuit affirming the judgment of the district court which convicted him of arson in violation of 18 U.S.C.S. § 844(i) (Supp. IV 1994).

OVERVIEW: Petitioner criminal defendant tossed a Molotov cocktail through a window into a home owned and occupied by his cousin. Petitioner was convicted of arson, in violation of 18 U.S.C.S. § 844(i) (Supp. IV 1994) and related crimes. The Court of Appeals for the Seventh Circuit affirmed the judgment. On appeal, petitioner argued the statute did not apply to buildings not used for commercial purposes, and challenged the constitutionality of such an application. Respondent argued the residence was "used" in the "activity" of receiving natural gas, a mortgage, and an insurance policy. The court avoided the constitutional question that would have arose if the statute were read to render the traditionally local criminal conduct a matter for federal enforcement. The court held that the provision covered only property currently used in commerce or in an activity affecting commerce and an owner-occupied residence not used for any commercial purpose did not qualify.

OUTCOME: Judgment reversed because the federal arson statute did not cover the arson of an owner-occupied dwelling not used for any commercial purpose; petitioner's conviction under the federal arson statute vacated; case remanded for further proceedings.

CORE TERMS: commerce, arson, owner-occupied, interstate, explosive, interstate commerce, foreign commerce, homeowner, destroy, natural gas, dwelling, damaged, cousin,

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CONCUR: JUSTICE STEVENS, with whom JUSTICE THOMAS joins, concurring.

Part II of the Court's opinion convincingly explains why its construction of 18 U.S.C. § 844(i) better fits the text and context of the provision than the Government's expansive reading. It also seems appropriate, however, to emphasize the kinship between our well-established presumption against federal pre-emption of state law, see *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157, 55 L. Ed. 2d 179, 98 S. Ct. 988 (1978), and our reluctance to "believe Congress intended to authorize federal intervention in local law enforcement in a marginal case such as this." ***United States*** v. *Altobella*, 442 F.2d 310, 316 (CA7 1971). The fact that petitioner received a sentence of 35 years in prison when the maximum penalty for the comparable state offense was only 10 years, Ind. Code **[***23]** §§ 35-43-1-1, 35-50-2-5 (1993), illustrates how a criminal law like this may effectively displace a policy choice made by the State. Even when Congress has undoubted power to pre-empt local law, **[*860]** we have wisely decided that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." ***United States*** v. *Bass*, 404 U.S. 336, 349, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971). For this reason, I reiterate my firm belief that we should interpret narrowly federal criminal laws that overlap with state authority unless **[**1913]** congressional intention to assert its jurisdiction is plain. *

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* See *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 700, n. 2, 85 L. Ed. 2d 692, 105 S. Ct. 2297 (1985) (STEVENS, J., dissenting); *Bennett* v. *New Jersey*, 470 U.S. 632, 654-655, n. 16, 84 L. Ed. 2d 572, 105 S. Ct. 1555 (1985) (STEVENS, J., dissenting); *Garcia* v. ***United States***, 469 U.S. 70, 89-90, 83 L. Ed. 2d 472, 105 S. Ct. 479 (1984) (STEVENS, J., dissenting); *Bell* v. ***United States***, 462 U.S. 356, 363, 76 L. Ed. 2d 638, 103 S. Ct. 2398 (1983) (STEVENS, J., dissenting); *McElroy* v. ***United States***, 455 U.S. 642, 675, 71 L. Ed. 2d 522, 102 S. Ct. 1332 (1982) (STEVENS, J., dissenting).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[***24]**

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring.

In joining the Court's opinion, I express no view on the question whether the federal arson statute, 18 U.S.C. § 844(i) (1994 ed., Supp. IV), as there construed, is constitutional in its application to all buildings used for commercial activities.

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commerce-affecting, interpretive, expansive, everyday, mortgage, occupied, doubtful, rental, dwelling place, real estate, federal-state, destruction, reinforced, destroyed, convicted, cocktail, firearm

CORE CONCEPTS - ◆ Hide Concepts

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Arson
See 18 U.S.C.S. § 844(i) (Supp. IV 1994).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Arson
In determining a violation of 18 U.S.C.S. § 844(i) (Supp. IV 1994), the proper inquiry is into the function of the building itself, and then a determination of whether that function affects interstate commerce.

Governments : Legislation : Construction & Interpretation
The word "use," in legislation as in conversation, ordinarily signifies active employment.

Governments : Legislation : Construction & Interpretation
When terms used in a statute are undefined, the court gives them their ordinary meaning.

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Arson
By its terms, 18 U.S.C.S. § 844(i) (Supp. IV 1994) applies only to property that is "used" in an "activity" that affects commerce.

Governments : Legislation : Construction & Interpretation
Judges should hesitate to treat statutory terms in any setting as surplusage, and resistance should be heightened when the words describe an element of a criminal offense.

Governments : Legislation : Construction & Interpretation
Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, the court's duty is to adopt the latter.

Governments : Legislation : Construction & Interpretation
Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.

Governments : Legislation : Construction & Interpretation
When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before the court chooses the harsher alternative, to require that Congress should have spoken in language that is clear and definite.

Governments : Legislation : Construction & Interpretation
Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes.

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Arson
18 U.S.C.S. § 844(i) (Supp. IV 1994) covers only property currently used in commerce or in an activity affecting commerce. The statute does not cover the arson of an owner-occupied dwelling used for everyday family living.

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SYLLABUS: Petitioner **Jones** tossed a Molotov cocktail into a home owned and occupied by his cousin as a dwelling place for everyday family living. The ensuing fire severely damaged the home. **Jones** was convicted in the District Court of violating, *inter alia*, 18 U.S.C. § 844 (i), which makes it a federal crime to "maliciously damage or destroy, . . . by means of fire or an explosive, any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." The Seventh Circuit affirmed, rejecting **Jones's** contention that § 844(i), when applied to the arson of a **[***2]** private residence, exceeds the authority vested in Congress under the Commerce Clause.

Held: Because an owner-occupied residence not used for any commercial purpose does not qualify as property "used in" commerce or commerce-affecting activity, arson of such a dwelling is not subject to federal prosecution under § 844(i). Pp. 3-10.

(a) In support of its argument that § 844(i) reaches the arson of an owner-occupied private residence, the Government relies principally on the breadth of the statutory term "affecting . . . commerce," words that, when unqualified, signal Congress' intent to invoke its full Commerce Clause authority. But § 844(i) contains the qualifying words "used in" a commerce-affecting activity. The key word is "used." Congress did not define the crime as the explosion of a building whose damage or destruction might affect interstate commerce, but required that the damaged or destroyed property itself have been used in commerce or in an activity affecting commerce. The proper inquiry, therefore, is into the function of the building itself, and then into whether that function affects interstate commerce. The Court rejects the Government's argument that **[***3]** the Indiana residence involved in this case was constantly "used" in at least three "activities affecting commerce": (1) it was "used" as collateral to obtain and secure a mortgage from an Oklahoma lender, who, in turn, "used" it as security for the loan; (2) it was "used" to obtain from a Wisconsin insurer a casualty insurance policy, which safeguarded the interests of the homeowner and the mortgagee; and (3) it was "used" to receive natural gas from sources outside Indiana. Section 844(i)'s use-in-commerce requirement is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce. See, *e.g.*, *Bailey* v. ***United States,*** 516 U.S. 137, 143, 145, 133 L. Ed. 2d 472, 116 S. Ct. 501. It surely is not the common perception that a private, owner-occupied residence is "used" in the "activity" of receiving natural gas, a mortgage, or an insurance policy. Cf. *id.*, at 145. The Government does not allege that the residence here served as a home office or the locus of any commercial undertaking. The home's only "active employment," so far as the record reveals, was for the everyday living of **Jones's** cousin and his family. **[***4]** *Russell* v. ***United States,*** 471 U.S. 858, 862, 85 L. Ed. 2d 829, 105 S. Ct. 2455 -- in which the Court held that particular property was being used in an "activity affecting commerce" under § 844 (i) because its owner was renting it to tenants at the time he attempted to destroy it by fire -- does not warrant a less "use"-centered reading of § 844(i) in this case. The Court there observed that "by its terms," § 844(i) applies only to "property that is 'used' in an 'activity' that affects commerce," and ruled that "the rental of real estate" fits that description, *ibid.* Here, the homeowner did not use his residence in any trade or business. Were the Court to adopt the Government's expansive interpretation, hardly a building in the land would fall outside § 844(i)'s domain, and the statute's limiting language, "used in," would have no office. Judges should hesitate to treat statutory terms in any setting as surplusage, particularly when the words describe an element of a crime. *E.g.*, *Ratzlaf* v. ***United States,*** 510 U.S. 135, 140-141. Pp. 3-8, 126 L. Ed. 2d 615, 114 S. Ct. 655.

(b) The foregoing reading is in harmony with the guiding principle that where a statute is susceptible of two constructions, by **[***5]** one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, the Court's duty is to adopt the latter. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392. In holding that a

statute making it a federal crime to possess a firearm within 1,000 feet of a school exceeded Congress' power to regulate commerce, this Court, in ***United States*** v. ***Lopez***, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624, stressed that the area was one of traditional state concern, see, *e.g., id.*, at 561, n. 3, and that the legislation aimed at activity in which neither the actors nor their conduct had a commercial character, *e.g.*, 514 U.S. at 560-562. Given the concerns brought to the fore in ***Lopez***, it is appropriate to avoid the constitutional question that would arise were the Court to read § 844(i) to render the traditionally local criminal conduct in which **Jones** engaged a matter for federal enforcement. ***United States*** v. *Bass*, 404 U.S. 336, 350, 30 L. Ed. 2d 488, 92 S. Ct. 515. The Court's comprehension of § 844(i) is additionally reinforced by other interpretive guides. **[***6]** Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, *Rewis* v. ***United States***, 401 U.S. 808, 812, 28 L. Ed. 2d 493, 91 S. Ct. 1056, and when choice must be made between two readings of what conduct Congress has made a crime, it is appropriate, before choosing the harsher alternative, to require that Congress should have spoken in language that is clear and definite, ***United States*** v. *Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221-222, 97 L. Ed. 260, 73 S. Ct. 227. Moreover, unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes. *Bass*, 404 U.S. at 349. To read § 844(i) as encompassing the arson of an owner-occupied private home would effect such a change, for arson is a paradigmatic common-law state crime. Pp. 8-9.

178 F.3d 479, reversed and remanded.

COUNSEL: Donald M. Falk argued the cause for petitioner.

Michael R. Dreeben argued the cause for respondent.

JUDGES: GINSBURG, J., delivered the opinion for a unanimous Court. STEVENS, J., filed a concurring opinion, in which THOMAS, J., joined. THOMAS, J., filed a concurring opinion, in which SCALIA, J., joined.

OPINIONBY: GINSBURG

OPINION: [*850] [1907]**

JUSTICE GINSBURG delivered the opinion of the Court.

[1A]
It is a federal **[***7]** crime under 18 U.S.C. § 844(i) (1994 ed., Supp. IV) to damage or destroy, "by means of fire or an explosive, any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." **[**1908]** This case presents the question whether arson of an owner-occupied private residence falls within § 844(i)'s compass. Construing the statute's text, we hold that an owner-occupied residence not used for any commercial purpose does not qualify as property "used in" commerce or **[*851]** commerce-affecting activity; arson of such a dwelling, therefore, is not subject to federal prosecution under § 844(i). Our construction of § 844(i) is reinforced by the Court's opinion in ***United States*** v. ***Lopez***, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided where possible, see *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988).

I

[2A]
On February 23, 1998, petitioner Dewey **Jones** tossed a Molotov cocktail through a window into a home in Fort Wayne, Indiana, owned and occupied by his cousin. No one was **[***8]** injured in the ensuing fire, but the blaze severely damaged the home. A federal grand jury

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returned a three-count indictment charging **Jones** with arson, 18 U.S.C. § 844(i) (1994 ed., Supp. IV); using a destructive device during and in relation to a crime of violence (the arson), 18 U.S.C. § 924(c); and making an illegal destructive device, 26 U.S.C. § 5861(f). **Jones** was tried under that indictment in the Northern District of Indiana and convicted by a jury on all three counts. n1 The District Court sentenced him, pursuant to the Sentencing Reform Act of 1984, to a total prison term of 35 years, to be followed by five years of supervised release. The court also ordered **Jones** to pay $ 77,396.87 to the insurer of the damaged home as restitution for its loss. **Jones** appealed, and the Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court. 178 F.3d 479 (1999).

[2B]

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n1 The question on which we granted review refers solely to **Jones's** § 844(i) conviction. See *infra*, at 3. We therefore do not address his § 924(c) and § 5861(f) convictions.

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[1B]
Jones unsuccessfully urged, both before the District Court and on appeal to the Seventh Circuit, that § 844(i), when applied to the arson of a private residence, exceeds the authority vested in Congress under the Commerce Clause of the **[*852]** Constitution, Art. I, § 8, cl. 3. Courts of Appeals have divided both on the question whether § 844(i) applies to buildings not used for commercial purposes, n2 and on the constitutionality of such an application. n3 We granted certiorari, 528 U.S. 1002 (1999), and framed as the question presented:
[*10]**

"Whether, in light of ***United States*** v. ***Lopez,*** 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided, see *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988), 18 U.S.C. § 844(i) applies to the arson of a private residence; **[**1909]** and if so, whether its application to the private residence in the present case is constitutional."

Satisfied that § 844(i) does not reach an owner-occupied residence that is not used for any commercial purpose, we reverse the Court of Appeals' judgment.

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n2 Compare ***United States*** v. *Gaydos,* 108 F.3d 505 (CA3 1997) (vacant, uninhabitable house formerly rented not covered by statute), ***United States*** v. *Denalli,* 73 F.3d 328 (CA11) (owner-occupied residence not covered), modified on other grounds, 90 F.3d 444 (1996) *(per curiam)*, ***United States*** v. *Mennuti,* 639 F.2d 107 (CA2 1981) (same), with ***United States*** v. *Ryan,* 41 F.3d 361 (CA8 1994) (en banc) (vacant former commercial property covered), cert. denied, 514 U.S. 1082, 131 L. Ed. 2d 721, 115 S. Ct. 1793 (1995), ***United States*** v. *Ramey,* 24 F.3d 602 (CA4 1994) (owner-occupied residence covered), cert. denied, 514 U.S. 1103, 131 L. Ed. 2d 757, 115 S. Ct. 1838 (1995), and ***United States*** v. *Stillwell,* 900 F.2d 1104 (CA7) (same), cert. denied, 498 U.S. 838, 112 L. Ed. 2d 81, 111 S. Ct. 111 (1990).

n3 Compare ***United States*** v. *Pappadopoulos,* 64 F.3d 522 (CA9 1995) (application to owner-occupied residence unconstitutional), with 178 F.3d 479 (CA7 1999) (decision below), and *Ramey,* 24 F.3d at 602 (application constitutional).

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II

Congress enacted 18 U.S.C. § 844(i) as part of Title XI of the Organized Crime Control Act of 1970, Pub. L. 91-452, § 1102, 84 Stat. 952, "because **[***11]** of the need 'to curb the use, transportation, and possession of explosives.'" *Russell* v. **[*853]** ***United States,*** 471 U.S. 858, 860, n. 5, 85 L. Ed. 2d 829, 105 S. Ct. 2455 (1985) (citation omitted). The word "fire," which did not appear in § 844(i) as originally composed, was introduced by statutory amendment in 1982. n4 As now worded, § 844(i) (1994 ed., Supp. IV) reads in relevant part:

"Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire **[***12]** or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both . . . ."

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n4 See Pub. L. 97-298, § 2(c), 96 Stat. 1319 (amending § 844(i) to insert the words "fire or" before the words "an explosive"). The House Report accompanying the 1982 legislation explained that the original measure, which was confined to damage caused by "an explosive," had resulted in problems of practical application. H. R. Rep. No. 678, 97th Cong., 2d Sess., 2 (1982). In particular, the Report noted a Circuit conflict on the question whether the measure covered use of gasoline or other flammable liquids to ignite a fire. *Id.*, at 2, and nn. 5-6.

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We previously construed § 844(i) in *Russell* v. ***United States,*** 471 U.S. 858, 85 L. Ed. 2d 829, 105 S. Ct. 2455 (1985), and there held that § 844(i) applies to a building "used as rental property," *ibid.* The petitioner-defendant in *Russell* had unsuccessfully attempted to set fire to a two-unit apartment building he owned. He earned rental income from the property and "treated it as business property for tax purposes." *Id.*, at 859. Our decision stated as the dispositive fact: "Petitioner was renting his apartment building to tenants at the time he attempted to destroy it by fire." *Id.*, at 862. It followed from that fact, the *Russell* opinion concluded, that "the property was . . . being used in an activity affecting commerce within the meaning of § 844(i)." *Ibid.* n5

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n5 We noted in *Russell* that the original version of the bill that became § 844(i) applied to destruction, by means of explosives, of property used "for business purposes." *Russell*, 471 U.S. at 860, n. 5. After some House members indicated that they thought the provision should apply to the bombings of schools, police stations, and places of worship, the words "for business purposes" were omitted. 471 U.S. at 860-861. The House Report accompanying the final bill, we further noted in *Russell*, described § 844(i) as "a very broad provision covering substantially all business property." *Id.*, at 861, and n. 8 (citing H. R. Rep. No. 91-1549, pp. 69-70 (1970)).

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We now confront a question that was not before the Court in *Russell*: Does § 844(i) cover property occupied and used by its owner not for any commercial venture, but as a private residence. Is such a dwelling place, in the words of § 844(i), "used in . . . any activity affecting . . . commerce"?

[1C]
[3]

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[4A]
[5]
In support of its argument that § 844(i) reaches the arson of an owner-occupied private residence, the Government relies principally on the breadth of the statutory term "affecting . . . commerce," see Brief for **United States** 10, 16-17, words that, when unqualified, signal Congress' intent to invoke its full authority under the Commerce Clause. But § 844(i) contains the qualifying words "used in" a commerce-affecting activity. The key word is "used." "Congress did not define the crime described in § 844(i) as the explosion **[**1910]** of a building whose damage or destruction might affect interstate commerce . . . ." ***United States*** v. *Mennuti*, 639 F.2d 107, 110 (CA2 1981) (Friendly, J.). n6 Congress "required that the damaged or destroyed property must itself have been used in commerce or in an activity affecting commerce." *Ibid.* The proper inquiry, we agree, "is into **[***14]** the function of the building itself, and then a determination of whether that function affects interstate commerce." **[*855]** ***United States*** v. *Ryan*, 9 F.3d 660, 675 (CA8 1993) (Arnold, C. J., concurring in part and dissenting in part). n7

[4B]

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n6 The defendants in *Mennuti* destroyed two buildings. One was the residence of the owner and her family, the other was a rental property. See 639 F.2d at 108-109, n. 1. The Second Circuit affirmed the District Court's dismissal of the entire indictment. Our decision in *Russell* v. ***United States***, 471 U.S. 858, 85 L. Ed. 2d 829, 105 S. Ct. 2455 (1985), supersedes *Mennuti* with respect to the building held for rental. Regarding the family residence, we find *Mennuti*'s reasoning persuasive.

n7 In *Ryan*, Chief Judge Arnold dissented from a panel decision holding that the arson of a permanently closed fitness center fell within § 844(i)'s prohibition. The panel majority considered adequate either of two interstate commerce connections: the building was owned and leased by out-of-state parties, and received natural gas from across state borders. The panel added, however, that it would not extend the decision "to property which is purely private in nature, such as a privately owned home, used solely for residential purposes." 9 F.3d at 666-667. Sitting en banc, the Eighth Circuit affirmed the panel's judgment. See ***United States*** v. *Ryan*, 41 F.3d 361 (1994), cert. denied, 514 U.S. 1082, 131 L. Ed. 2d 721, 115 S. Ct. 1793 (1995).

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The Government urges that the Fort Wayne, Indiana residence into which **Jones** tossed a Molotov cocktail was constantly "used" in at least three "activities affecting commerce." First, the homeowner "used" the dwelling as collateral to obtain and secure a mortgage from an Oklahoma lender; the lender, in turn, "used" the property as security for the home loan. Second, the homeowner "used" the residence to obtain a casualty insurance policy from a Wisconsin insurer. That policy, the Government points out, safeguarded the interests of the homeowner and the mortgagee. Third, the homeowner "used" the dwelling to receive natural gas from sources outside Indiana. See Brief for **United States** 19-23.

[1D]
[6]
The Government correctly observes that § 844(i) excludes no particular type of building (it covers "any building"); the provision does, however, require that the building be "used" in an activity affecting commerce. That qualification is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce. Although "variously defined," the word "use," in legislation as in conversation, ordinarily signifies "active employment." **[***16]** *Bailey* v. ***United States,***

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516 U.S. 137, 143, 145, 133 L. Ed. 2d 472, 116 S. Ct. 501 (1995); see also *Asgrow Seed Co. v. Winterboer,* 513 U.S. 179, 187, 130 L. Ed. 2d 682, 115 S. Ct. 788 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning."). **[*856]**

[1E]
It surely is not the common perception that a private, owner-occupied residence is "used" in the "activity" of receiving natural gas, a mortgage, or an insurance policy. Cf. *Bailey,* 516 U.S. at 145 (interpreting the word "use," as it appears in 18 U.S.C. § 924(c)(1), to mean active employment of a firearm and rejecting the Government's argument that a gun is "used" whenever its presence "protects drugs" or "emboldens" a drug dealer). The Government does not allege that the Indiana residence involved in this case served as a home office or the locus of any commercial undertaking. The home's only "active employment," so far as the record reveals, was for the everyday living of **Jones's** cousin and his family. **[**1911]**

Our decision in *Russell* does not warrant a less "use"-centered reading of § 844(i). In that case, which involved the arson of property rented out by its owner, see *supra*, at 4, the Court **[***17]** referred to the recognized distinction between legislation limited to activities "in commerce" and legislation invoking Congress' full power over activity substantially "affecting . . . commerce." 471 U.S. at 859-860 and n. 4. The *Russell* opinion went on to observe, however, that "by its terms," § 844(i) applies only to "property that is 'used' in an 'activity' that affects commerce." 471 U.S. at 862. "The rental of real estate," the Court then stated, "is unquestionably such an activity." *Ibid. n8* Here, as earlier emphasized, the owner used the property as his home, the center of his family life. He did not use the residence in any trade or business.

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n8 Notably, the Court in *Russell* did not rest its holding on the expansive interpretation advanced by the Government both in *Russell* and in this case. Compare Brief for **United States** in *Russell* v. ***United States***, O.T. 1984, No. 435, p. 15 ("Petitioner used his building on South Union Street in an activity affecting interstate commerce by heating it with gas that moved interstate."), with *Russell,* 471 U.S. at 862 (focusing instead on fact that "the rental of real estate is unquestionably . . . an activity" affecting commerce).

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Were we to adopt the Government's expansive interpretation of § 844(i), hardly a building in the land would fall outside the federal statute's domain. Practically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce. See, *e.g.*, *FERC* v. *Mississippi,* 456 U.S. 742, 757, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982) (observing that electric energy is consumed "in virtually every home" and that "no State relies solely on its own resources" to meet its inhabitants' demand for the product). If such connections sufficed to trigger § 844(i), the statute's limiting language, "used in" any commerce-affecting activity, would have no office. See ***United States*** v. *Monholland,* 607 F.2d 1311, 1316 (CA10 1979) (finding in § 844(i) no indication that Congress intended to include "everybody and everything"). "Judges should hesitate . . . to treat statutory terms in any setting [as surplusage], and resistance should be heightened when the words describe **[***19]** an element of a criminal offense." *Ratzlaf* v. ***United States,*** 510 U.S. 135, 140-141, 126 L. Ed. 2d 615, 114 S. Ct. 655 (1994); accord, *Bailey,* 516 U.S. at 145.

III

[1F]
Our reading of § 844(i) is in harmony with the guiding principle that "where a statute is

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susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." ***United States*** *ex rel. Attorney General* v. *Delaware & Hudson Co.,* 213 U.S. 366, 408, 53 L. Ed. 836, 29 S. Ct. 527 (1909), quoted in ***Jones*** v. ***United States,*** 526 U.S. 227, 239, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999); see also *DeBartolo,* 485 U.S. at 575; *Ashwander* v. *TVA,* 297 U.S. 288, 348, 80 L. Ed. 688, 56 S. Ct. 466 (1936) (Brandeis, J., concurring). In ***Lopez,*** this Court invalidated the Gun-Free School Zones Act, former 18 U.S.C. § 922(q) (1988 ed., Supp. V), which made it a federal crime to possess a firearm within **[*858]** 1,000 feet of a school. The defendant in that case, a 12th-grade student, had been convicted for knowingly possessing a concealed handgun and bullets at his San Antonio, Texas, high school, in violation of the federal **[***20]** Act. Holding that the Act exceeded Congress' power to regulate commerce, the Court stressed that the area was one of traditional state concern, see 514 U.S. at 561, n. 3, 567; *id.* at 577 (KENNEDY, J., concurring), and that the legislation aimed at activity in which "neither the **[**1912]** actors nor their conduct has a commercial character," *id.* at 580 (KENNEDY, J., concurring); *id.* at 560-562 (opinion of the Court).

Given the concerns brought to the fore in ***Lopez***, it is appropriate to avoid the constitutional question that would arise were we to read § 844(i) to render the "traditionally local criminal conduct" in which petitioner **Jones** engaged "a matter for federal enforcement." ***United States*** v. *Bass,* 404 U.S. 336, 350, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971). Our comprehension of § 844(i) is additionally reinforced by other interpretive guides. We have instructed that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *Rewis* v. ***United States,*** 401 U.S. 808, 812, 28 L. Ed. 2d 493, 91 S. Ct. 1056 (1971), and that "when choice has to be made between two readings of what conduct Congress has made a crime, **[***21]** it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite," ***United States*** v. *Universal C. I. T. Credit Corp.,* 344 U.S. 218, 221-222, 97 L. Ed. 260, 73 S. Ct. 227 (1952). We have cautioned, as well, that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance" in the prosecution of crimes. *Bass,* 404 U.S. at 349. To read § 844(i) as encompassing the arson of an owner-occupied private home would effect such a change, for arson is a paradigmatic common-law state crime. See generally Poulos, The Metamorphosis of the Law of Arson, 51 Mo. L. Rev. 295 (1986). **[*859]**

IV

[1G]
[7A]
We conclude that § 844(i) is not soundly read to make virtually every arson in the country a federal offense. We hold that the provision covers only property currently used in commerce or in an activity affecting commerce. The home owned and occupied by petitioner **Jones's** cousin was not so used -- it was a dwelling place used for everyday family living. As we read § 844(i), Congress left cases of this genre to the law enforcement authorities of the States. **[***22]**

[7B]
Our holding that § 844(i) does not cover the arson of an owner-occupied dwelling means that **Jones's** § 844(i) conviction must be vacated. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CONCURBY: STEVENS; THOMAS

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Service: **LEXSEE®**
Citation: **2000 U.S. LEXIS 3422**

*529 U.S. 598, *; 120 S. Ct. 1740, **;*
*2000 U.S. LEXIS 3422, ***; 146 L. Ed. 2d 658*

UNITED STATES v. ANTONIO J. MORRISON, ET AL.; AND CHRISTY BRZONKALA v. ANTONIO J. MORRISON, ET AL.

Nos. 99-5 and 99-29

SUPREME COURT OF THE UNITED STATES

529 U.S. 598; 120 S. Ct. 1740; 2000 U.S. LEXIS 3422; 146 L. Ed. 2d 658; 68 U.S.L.W. 4351; 82 Fair Empl. Prac. Cas. (BNA) 1313; 77 Empl. Prac. Dec. (CCH) P46,376; 2000 Cal. Daily Op. Service 3788; 2000 Daily Journal DAR 5061; 2000 Colo. J. C.A.R. 2583; 13 Fla. L. Weekly Fed. S 287

January 11, 2000, Argued
May 15, 2000, * Decided

* Together with No. 99-29, Brzonkala v. Morrison et al., also on certiorari to the same court.

NOTICE: [*1]**

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

DISPOSITION: **169 F.3d 820,** affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner victim appealed the judgment of the United States Court of Appeals for the Fourth Circuit declaring unconstitutional 42 U.S.C.S. § 13981, which provided a civil remedy for the victims of gender-motivated violence, on the ground that Congress lacked the authority to enact the statue under either the Commerce Clause or U.S. Const. amend. XIV, § 5.

OVERVIEW: Petitioner victim brought an action against respondent offender under 42 U.S.C.S. § 13981, which provided a federal civil remedy for the victims of gender-motivated violence. The lower court struck down § 13981 and concluded that Congress lacked constitutional authority to enact the statute under either the Commerce Clause or U.S. Const. amend. XIV, § 5. The court rejected petitioners' argument that § 13981 was a regulation of activity that substantially affected interstate commerce. The court affirmed the decision of the lower court and held that gender-motivated crimes of violence were not considered economic activity, and therefore, the Commerce Clause did not vest Congress with the authority to enact a statute regulating such. Moreover, the court affirmed that the civil remedy contained in § 13981 should be struck down as it was outside Congress's remedial power under U.S. Const. amend. XIV, § 5. The civil remedy was not found to be corrective in its character nor adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers. Instead, the subject statute redressed private discrimination and was outside Congress' power to enact.

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broadly one might define those terms." 514 U.S. at 561. Reviewing our case law, we noted that "we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce." 514 U.S. at 559. Although we cited only a few examples, including *Wickard* v. *Filburn*, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942); *Hodel*, *supra*; *Perez*, *supra*; *Katzenbach* v. *McClung*, 379 U.S. 294, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964); and *Heart of Atlanta Motel, supra*, we stated that the pattern of analysis is clear. *Lopez*, 514 U.S. at 559-560. "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." 514 U.S. at 560.

[5B]
Both petitioners and JUSTICE SOUTER's dissent downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis. But a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case. See, **[***22]** *e.g.*, *id.*, at 551 ("The Act [does not] "regulate a commercial activity"), 560 ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not"), 561 ("Section 922(q) is not an essential part of a larger regulation of economic activity"), 566 ("Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty'"), 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition **[*611]** elsewhere, substantially affect any sort of interstate commerce"); see also *id.*, at 573-574 (KENNEDY, J., concurring) (stating that *Lopez* did not alter our "practical conception of commercial regulation" and that Congress **[***23]** may "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy"), 577 ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur"), 580 ("Unlike the earlier cases to come before the Court here neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far" (citation omitted)). *Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic **[***24]** endeavor. See *id.*, at 559-560. n4

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n4 JUSTICE SOUTER's dissent does not reconcile its analysis with our holding in *Lopez* because it apparently would cast that decision aside. See *post*, at 10-16. However, the dissent cannot persuasively contradict *Lopez*'s conclusion that, in every case where we have sustained federal regulation under *Wickard*'s aggregation principle, the regulated activity was of an apparent commercial character. See, *e.g.*, *Lopez*, 514 U.S. at 559-560, 580.

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[6B]
The second consideration that we found important in analyzing § 922(q) was that **[**1751]** the statute contained "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have **[*612]** an explicit

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connection with or effect on interstate commerce." *Id.*, at 562. Such a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce.

[6C]

[7]
Third, we noted that neither § 922(q) "'nor **[***25]** its legislative history contains express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.'" *Ibid.* (quoting Brief for United States, O.T. 1994, No. 93-1260, pp. 5-6). While "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," 514 U.S. at 562 (citing *McClung*, 379 U.S. at 304; *Perez*, 402 U.S. at 156), the existence of such findings may "enable us to evaluate the legislative judgment that the activity in question substantially affects interstate commerce, even though no such substantial effect [is] visible to the naked eye." 514 U.S. at 563.

[6D]
Finally, our decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated. *Id.*, at 563-567. The United States argued that the possession of guns may lead to violent crime, and that violent crime "can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the **[***26]** mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe." *Id.*, at 563-564 (citation omitted). The Government also argued that the presence of guns at schools poses a threat to the educational process, which in turn threatens to produce a less efficient and productive workforce, which will negatively affect national productivity and thus interstate commerce. *Ibid.*

We rejected these "costs of crime" and "national productivity" arguments because they would permit Congress **[*613]** to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.*, at 564. We noted that, under this but-for reasoning:

> "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under these theories . . . , it is difficult to perceive any limitation on federal power, even in areas such as criminal law **[***27]** enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Ibid.*

[5C]
[8]
With these principles underlying our Commerce Clause jurisprudence as reference points, the proper resolution of the present cases is clear. Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature. See, *e.g.*, *id.*, at 559-560, and the cases cited therein.

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[6E]
[9]
Like the Gun-Free School Zones Act at issue in *Lopez*, § 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce. Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that § 13981 **[**1752]** is sufficiently tied to **[***28]** interstate commerce, Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime. n5

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n5 Title 42 U.S.C. § 13981 is not the sole provision of the Violence Against Women Act of 1994 to provide a federal remedy for gender-motivated crime. Section 40221(a) of the Act creates a federal criminal remedy to punish "interstate crimes of abuse including crimes committed against spouses or intimate partners during interstate travel and crimes committed by spouses or intimate partners who cross State lines to continue the abuse." S. Rep. No. 103-138, p. 43 (1993). That criminal provision has been codified at 18 U.S.C. § 2261(a)(1), which states:

"A person who travels across a State line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided in subsection (b)."

The Courts of Appeals have uniformly upheld this criminal sanction as an appropriate exercise of Congress' Commerce Clause authority, reasoning that the provision properly falls within the first of *Lopez*'s categories as it regulates the use of channels of interstate commerce -- i.e., the use of the interstate transportation routes through which persons and goods move." *United States* v. *Lankford*, 196 F.3d 563, 571-572 (CA5 1999) (collecting cases) (internal quotation marks omitted).

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[6F]
[10]
In contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 *is* supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. See, *e.g.*, H. R. Conf. Rep. No. 103-711, p. 385 (1994); S. Rep. No. 103- 138, p. 40 (1993); S. Rep. No. 101-545, p. 33 (1990). But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, "'Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'" 514 U.S. at 557, n. 2 (quoting *Hodel*, 452 U.S. at 311 (REHNQUIST, J., concurring in judgment)). Rather, "'whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.'" 514 U.S. at 557, n. 2 (quoting *Heart of Atlanta Motel*, 379 U.S. at 273 (Black, J., concurring)). **[*615]**

In these cases, Congress' **[***30]** findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. Congress found that gender-motivated violence affects interstate commerce

"by deterring potential victims from traveling interstate, from engaging in

> employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." H. R. Conf. Rep. No. 103-711, at 385.

Accord, S. Rep. No. 103-138, at 54. Given these findings and petitioners' arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. See *Lopez, supra,* at 564. The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' **[***31]** police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial **[**1753]** effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

[11A]
[12A]
Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of **[*616]** marriage, divorce, and childrearing on the national econ omy is undoubtedly significant. Congress may have recognized this specter when it expressly precluded § 13981 from being used in the family law context. n6 See 42 U.S.C. § 13981(e)(4). Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace. n7 **[***32]** See *Lopez, supra,* at 575-579 (KENNEDY, J., concurring); *Marbury,* 1 Cranch at 176-178.

[11B]
[12B]

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n6 We are not the first to recognize that the but-for causal chain must have its limits in the Commerce Clause area. In *Lopez,* 514 U.S. at 567, we quoted Justice Cardozo's concurring opinion in *A. L. A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 79 L. Ed. 1570, 55 S. Ct. 837 (1935):

"There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.'" *Id.,* at 554 (quoting *United States v. A. L. A. Schechter Poultry Corp.,* 76 F.2d 617, 624 (CA2 1935) (L. Hand, J., concurring)).

n7 JUSTICE SOUTER's dissent theory that *Gibbons v. Ogden,* 22 U.S. 1, 9 Wheat. 1, 6 L. Ed. 23 (1824), *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985), and the Seventeenth Amendment provide the answer to these cases, see *post,* at 19-26, is remarkable because it undermines this central principle of our constitutional system. As we have repeatedly noted, the Framers crafted the federal system of government so that the people's rights would be secured by the division of power. See, *e.g., Arizona v. Evans,* 514 U.S. 1, 30, 131 L. Ed. 2d 34, 115 S. Ct. 1185 (1995) (GINSBURG,

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J., dissenting); *Gregory* v. *Ashcroft*, 501 U.S. 452, 458-459, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991) (cataloging the benefits of the federal design); *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985) ("The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties'") (quoting *Garcia, supra*, at 572 (Powell, J., dissenting)). Departing from their parliamentary past, the Framers adopted a written Constitution that further divided authority at the federal level so that the Constitution's provisions would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the legislature's self-restraint. See, *e.g.*, *Marbury* v. *Madison*, 5 U.S. 137, 1 Cranch 137, 176, 2 L. Ed. 60 (1803) (Marshall, C. J.) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written"). It is thus a "'permanent and indispensable feature of our constitutional system'" that "'the federal judiciary is supreme in the exposition of the law of the Constitution.'" *Miller* v. *Johnson*, 515 U.S. 900, 922-923, 132 L. Ed. 2d 762, 115 S. Ct. 2475 (1995) (quoting *Cooper* v. *Aaron*, 358 U.S. 1, 18, 3 L. Ed. 2d 5, 78 S. Ct. 1401 (1958)).

No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text. As we emphasized in *United States* v. *Nixon*, 418 U.S. 683, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974), "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others . . . . Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury* . . . that 'it is emphatically the province and duty of the judicial department to say what the law is.'" *Id.*, at 703 (citation omitted).

Contrary to JUSTICE SOUTER's suggestion, see *post*, at 19-21, and n. 14, *Gibbons* did not exempt the commerce power from this cardinal rule of constitutional law. His assertion that, from *Gibbons* on, public opinion has been the only restraint on the congressional exercise of the commerce power is true only insofar as it contends that political accountability is and has been the only limit on Congress' exercise of the commerce power *within that power's outer bounds*. As the language surrounding that relied upon by JUSTICE SOUTER makes clear, *Gibbons* did not remove from this Court the authority to define that boundary. See *Gibbons, supra,* at 194-195 ("It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States . . . . Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State").

----------End Footnotes---------- **[*617]** **[***33]** **[**1754]**

[13A]
[14A]
We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is **[*618]** truly national and what is truly local. *Lopez*, 514 U.S. at 568 (citing *Jones & Laughlin Steel*, 301 U.S. at 30). In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the

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province of the States. See, *e.g.*, *Cohens* v. *Virginia*, 19 U.S. 264, 6 Wheat. 264, 426, 428, 5 L. Ed. 257 (1821) (Marshall, C. J.) (stating that Congress "has no general right to punish murder committed within any of the States," and that it is "clear . . . that congress cannot punish felonies generally"). Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims. n8 See, *e.g.*, **[***34]** *Lopez*, 514 U.S. at 566 ("The Constitution . . . withholds from Congress a plenary police power"); *id.*, at 584-585 (THOMAS, J., concurring) ("We *always* have rejected readings **[*619]** of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power"), 596-597, and n. 6 (noting that the first Congresses did not enact nationwide punishments for criminal conduct under the Commerce Clause).

[14B]

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n8 JUSTICE SOUTER disputes our assertion that the Constitution reserves the general police power to the States, noting that the Founders failed to adopt several proposals for additional guarantees against federal encroachment on state authority. See *post*, at 19-22, and n. 14. This argument is belied by the entire structure of the Constitution. With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate. See, *e.g.*, *New York* v. *United States*, 505 U.S. 144, 156-157, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992). And, as discussed above, the Constitution's separation of federal power and the creation of the Judicial Branch indicate that disputes regarding the extent of congressional power are largely subject to judicial review. See n. 7, *supra*. Moreover, the principle that "'the Constitution created a Federal Government of limited powers,'" while reserving a generalized police power to the States is deeply ingrained in our constitutional history. *New York*, *supra*, at 155 (quoting *Gregory* v. *Ashcroft*, *supra*, *at* 457; see also *Lopez*, 514 U.S. at 584-599 (THOMAS, J., concurring) (discussing the history of the debates surrounding the adoption of the Commerce Clause and our subsequent interpretation of the Clause); *Maryland* v. *Wirtz*, 392 U.S. 183, 196, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968).

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III

[1B]
[13B]
Because we conclude that the Commerce Clause does not provide Congress **[**1755]** with authority to enact § 13981, we address petitioners' alternative argument that the section's civil remedy should be upheld as an exercise of Congress' remedial power under § 5 of the Fourteenth Amendment. As noted above, Congress expressly invoked the Fourteenth Amendment as a source of authority to enact § 13981.

[15]
The principles governing an analysis of congressional legislation under § 5 are well settled. Section 5 states that Congress may "'enforce,' by 'appropriate legislation' the constitutional guarantee that no State shall deprive any person of 'life, liberty or property, without due process of law,' nor deny any person 'equal protection of the laws.'" *City of Boerne* v. *Flores*, 521 U.S. 507, 517, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997). Section 5 is "a positive grant of legislative power," *Katzenbach* v. *Morgan*, 384 U.S. 641, 651, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966), that includes authority to "prohibit conduct which is not itself unconstitutional and [to] intrude into 'legislative spheres of autonomy previously reserved to the States.'" *Flores*, *supra*, at 518 (quoting *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455, 49 L. Ed. 2d 614, 96

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S. Ct. 2666 (1976)); **[***36]** see also *Kimel* v. *Florida Bd. of Regents*, 528 U.S. , (2000) (slip op., at 16). However, as broad as the congressional enforcement power is, it is not unlimited." *Oregon* v. *Mitchell*, 400 U.S. 112, 128, 27 L. Ed. 2d 272, 91 S. Ct. 260 (1970); see also *Kimel*, *supra*, at - (slip op., at 16-17). In fact, as we discuss in detail below, several limitations inherent in § 5's text and constitutional context have been recognized since the Fourteenth Amendment was adopted.

Petitioners' § 5 argument is founded on an assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence. This assertion **[*620]** is supported by a voluminous congressional record. Specifically, Congress received evidence that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions. Congress concluded that these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence. See **[***37]** H. R. Conf. Rep. No. 103-711, at 385-386; S. Rep. No. 103-138, at 38, 41-55; S. Rep. No. 102-197, at 33-35, 41, 43-47. Petitioners contend that this bias denies victims of gender-motivated violence the equal protection of the laws and that Congress therefore acted appropriately in enacting a private civil remedy against the perpetrators of gender-motivated violence to both remedy the States' bias and deter future instances of discrimination in the state courts.

[16]
As our cases have established, ↑state-sponsored gender discrimination violates equal protection unless it "'serves "important governmental objectives and . . . the discriminatory means employed" are "substantially related to the achievement of those objectives."' " *United States* v. *Virginia*, 518 U.S. 515, 533, 135 L. Ed. 2d 735, 116 S. Ct. 2264 (1996) (quoting *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982), in turn quoting *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U.S. 142, 150, 64 L. Ed. 2d 107, 100 S. Ct. 1540 (1980)). See also *Craig* v. *Boren*, 429 U.S. 190, 198-199, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976). However, the language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack **[***38]** discriminatory conduct. These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government. See *Flores*, 521 U.S. at 520-524 (reviewing the history of the Fourteenth Amendment's enactment and discussing the contemporary belief **[**1756]** that the Amendment "does **[*621]** not concentrate power in the general government for any purpose of police government within the States") (quoting T. Cooley, Constitutional Limitations 294, n. 1 (2d ed. 1871)). Foremost among these limitations is the time-honored principle that ↑the Fourteenth Amendment, by its very terms, prohibits only state action. The principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley* v. *Kraemer*, 334 U.S. 1, 13, 92 L. Ed. 1161, 68 S. Ct. 836, and n. 12 (1948).

Shortly after the Fourteenth Amendment was adopted, we decided two cases interpreting the Amendment's provisions, **[***39]** *United States* v. *Harris*, 106 U.S. 629, 27 L. Ed. 290, 1 S. Ct. 601 (1883), and the *Civil Rights Cases*, 109 U.S. 3, 27 L. Ed. 835, 3 S. Ct. 18 (1883). In *Harris*, the Court considered a challenge to § 2 of the Civil Rights Act of 1871. That section sought to punish "private persons" for "conspiring to deprive any one of the equal protection of the laws enacted by the State." 106 U.S. at 639. We concluded that this law exceeded Congress' § 5 power because the law was "directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers." 106 U.S. at 640. In so doing, we reemphasized our statement from *Virginia* v. *Rives*, 100 U.S. 313, 318, 25 L. Ed. 667 (1880), that "'these provisions of the fourteenth amendment have reference to State action exclusively, and not to any action of private individuals.'"

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Harris, *supra,* at 639 (misquotation in *Harris*).

We reached a similar conclusion in the *Civil Rights Cases*. In those consolidated cases, we held that the public accommodation provisions of the Civil Rights Act of 1875, which applied to purely private conduct, were beyond the scope **[***40]** of the § 5 enforcement power. 109 U.S. at 11 ("Individual invasion of individual rights is not the subject-matter of the [Fourteenth] Amendment. See also, *e.g.*, *Romer* v. **[*622]** *Evans*, 517 U.S. 620, 628, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996) (It was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations"); *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982) ("Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power"); *Blum* v. *Yaretsky*, 457 U.S. 991, 1002, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 172, 32 L. Ed. 2d 627, 92 S. Ct. 1965 (1972); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970); *United States* v. *Cruikshank*, 92 U.S. 542, 554, 23 L. Ed. 588 (1876) ("The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the **[***41]** States upon the fundamental rights which belong to every citizen as a member of society").

The force of the doctrine of *stare decisis* behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur -- and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.

Petitioners contend that two more recent decisions have in effect overruled this longstanding limitation on Congress' § 5 authority. They rely on *United States* v. **[**1757]** *Guest*, 383 U.S. 745, 16 L. Ed. 2d 239, 86 S. Ct. 1170 (1966), for the proposition that the rule laid down in the *Civil Rights Cases* is no longer good law. In *Guest*, the Court reversed the construction of an indictment under 18 U.S.C. § 241, saying in the course of its opinion that "we deal here with issues of statutory construction, not with issues of constitutional power." 383 U.S. at 749. Three Members of the Court, in a separate opinion **[***42]** by Justice Brennan, expressed the view that the *Civil Rights Cases* **[*623]** were wrongly decided, and that Congress could under § 5 prohibit actions by private individuals. 383 U.S. at 774 (opinion concurring in part and dissenting in part). Three other Members of the Court, who joined the opinion of the Court, joined a separate opinion by Justice Clark which in two or three sentences stated the conclusion that Congress could punish all conspiracies -- with or without state action -- that interfere with Fourteenth Amendment rights." *Id.* at 762 (concurring opinion). Justice Harlan, in another separate opinion, commented with respect to the statement by these Justices:

> "The action of three of the Justices who joined the Court's opinion in nonetheless cursorily pronouncing themselves on the far-reaching constitutional questions deliberately not reached in Part II seems to me, to say the very least, extraordinary." *Id.*, at 762, n. 1 (opinion concurring in part and dissenting in part).

Though these three Justices saw fit to opine on matters not before the Court in *Guest*, the Court had no occasion to revisit the *Civil Rights* **[***43]** *Cases* and *Harris*, having determined "the indictment [charging private individuals with conspiring to deprive blacks of equal access to state facilities] in fact contained an express allegation of state involvement." 383 U.S. at 756. The Court concluded that the implicit allegation of "active connivance by

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agents of the State" eliminated any need to decide "the threshold level that state action must attain in order to create rights under the Equal Protection Clause." *Ibid.* All of this Justice Clark explicitly acknowledged. See *id.*, at 762 (concurring opinion) ("The Court's interpretation of the indictment clearly avoids the question whether Congress, by appropriate legislation, has the power to punish private conspiracies that interfere with Fourteenth Amendment rights, such as the right to utilize public facilities"). **[*624]**

To accept petitioners' argument, moreover, one must add to the three Justices joining Justice Brennan's reasoned explanation for his belief that the *Civil Rights Cases* were wrongly decided, the three Justices joining Justice Clark's opinion who gave no explanation whatever for their similar view. This is simply not the way **[***44]** that reasoned constitutional adjudication proceeds. We accordingly have no hesitation in saying that it would take more than the naked dicta contained in Justice Clark's opinion, when added to Justice Brennan's opinion, to cast any doubt upon the enduring vitality of the *Civil Rights Cases* and *Harris*.

Petitioners also rely on *District of Columbia* v. *Carter*, 409 U.S. 418, 34 L. Ed. 2d 613, 93 S. Ct. 602 (1973). *Carter* was a case addressing the question whether the District of Columbia was a "State" within the meaning of Rev. Stat. § 1979, 42 U.S.C. § 1983 -- a section which by its terms requires state action before it may be employed. A footnote in that opinion recites the same litany respecting *Guest* that petitioners rely on. This litany is of course entirely dicta, and in any event cannot rise above its source. We believe that the description of the § 5 power contained in the *Civil Rights Cases* is correct:

> "But where a subject has not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular state legislation or state action in reference **[***45]** to that subject, the power given is limited **[**1758]** by its object, any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers." 109 U.S. at 18.

Petitioners alternatively argue that, unlike the situation in the *Civil Rights Cases*, here there has been gender-based disparate treatment by state authorities, whereas in those cases there was no indication of such state action. There is **[*625]** abundant evidence, however, to show that the Congresses that enacted the Civil Rights Acts of 1871 and 1875 had a purpose similar to that of Congress in enacting § 13981: There were state laws on the books bespeaking equality of treatment, but in the administration of these laws there was discrimination against newly freed slaves. The statement of Representative Garfield in the House and that of Senator Sumner in the Senate are representative:

> The chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to **[***46]** enforce their provisions, a portion of the people are denied equal protection under them." Cong. Globe, 42d Cong., 1st Sess., App. 153 (1871) (statement of Rep. Garfield).

> "The Legislature of South Carolina has passed a law giving precisely the rights contained in your 'supplementary civil rights bill.' But such a law remains a dead letter on her statute-books, because the State courts, comprised largely of those whom the Senator wishes to obtain amnesty for, refuse to enforce it." Cong. Globe, 42d Cong., 2d Sess., 430 (1872) (statement of Sen. Sumner).

See also, *e.g.,* Cong. Globe, 42d Cong., 1st Sess., at 653 (statement of Sen. Osborn); *id.,* at 457 (statement of Rep. Coburn); *id.,* at App. 78 (statement of Rep. Perry); 2 Cong. Rec. 457 (1874) (statement of Rep. Butler); 3 Cong. Rec. 945 (1875) (statement of Rep. Lynch).

[17]
But even if that distinction were valid, we do not believe it would save § 13981's civil remedy. For the remedy is simply not "corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers." *Civil Rights Cases,* 109 U.S. at 18. Or, as we have phrased **[***47]** it in more recent cases, prophylactic legislation under § 5 must have a "'congruence **[*626]** and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank,* 527 U.S. 627, 639, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999); *Flores,* 521 U.S. at 526. Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.

In the present cases, for example, § 13981 visits no consequence whatever on any Virginia public official involved in investigating or prosecuting Brzonkala's assault. The section is, therefore, unlike any of the § 5 remedies that we have previously upheld. For example, in *Katzenbach* v. *Morgan,* 384 U.S. 641, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966), Congress prohibited New York from imposing literacy tests as a prerequisite for voting because it found that such a requirement disenfranchised thousands of Puerto Rican immigrants who had been educated in the Spanish language of their home territory. That **[***48]** law, which we upheld, was directed at New York officials who administered the State's election law and prohibited them from using a provision of that law. In *South Carolina* v. *Katzenbach,* 383 U.S. 301, 15 L. Ed. 2d 769, 86 S. Ct. 803 (1966), Congress imposed voting rights requirements on States that, Congress found, had a history of discriminating against blacks in voting. **[**1759]** The remedy was also directed at state officials in those States. Similarly, in *Ex parte Virginia,* 100 U.S. 339, 25 L. Ed. 676 (1880), Congress criminally punished state officials who intentionally discriminated in jury selection; again, the remedy was directed to the culpable state official.

Section 13981 is also different from these previously upheld remedies in that it applies uniformly throughout the Nation. Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States. By contrast, the § 5 remedy upheld in *Katzenbach* v. *Morgan, supra,* **[*627]** was directed only to the State where the evil found by Congress existed, and in *South Carolina* v. *Katzenbach, supra,* the remedy was directed **[***49]** only to those States in which Congress found that there had been discrimination.

[1C]
For these reasons, we conclude that Congress' power under § 5 does not extend to the enactment of § 13981.

IV

[1D]
Petitioner Brzonkala's complaint alleges that she was the victim of a brutal assault. But Congress' effort in § 13981 to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under § 5 of the Fourteenth Amendment. If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States. The judgment of the Court of Appeals is

Affirmed.

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OUTCOME: The court affirmed and held that Congress lacked the authority to enact the subject statute under the Commerce Clause because the statute did not involve economic activity or interstate commerce. The court also affirmed that Congress lacked authority to enact said statute under U.S. Const. amend. XIV since the statute governed the conduct of private individuals instead of harm caused by the state.

CORE TERMS: interstate commerce, violence, commerce, commerce power, Fourteenth Amendment, gender-motivated, gender, regulation, interstate, rape, violent crime, federalism, intrastate, noneconomic, categorical, enact, domestic violence, framers, aggregate, gender bias, consumption, regulating, state regulation, federalist, plenary, gun, economic activity, national economy, state action, regulated

CORE CONCEPTS - ♦ Hide Concepts

Constitutional Law : Substantive Due Process : Equal Protection : Sex
See 42 U.S.C.S. § 13981(b)-(e).

Constitutional Law : Congressional Powers & Duties
Every law enacted by Congress must be based on one or more of its powers enumerated in the U.S. Constitution.

Constitutional Law : The Judiciary : Case or Controversy : Constitutionality of Legislation
Due respect for the decisions of a coordinate branch of Government demands that the Court invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.

Constitutional Law : Congressional Powers & Duties : Commerce Clause
Even modern-era precedents which have expanded congressional power under the Commerce Clause confirm that Congress' regulatory authority is subject to outer limits. The scope of the interstate commerce power must be considered in the light of the dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

Constitutional Law : Congressional Powers & Duties : Commerce Clause
Modern Commerce Clause jurisprudence has identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, namely, those activities that substantially affect interstate commerce.

Constitutional Law : Congressional Powers & Duties : Commerce Clause
Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

Constitutional Law : Congressional Powers & Duties : Commerce Clause

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CONCURBY: THOMAS

CONCUR: *JUSTICE THOMAS*, concurring.

The majority opinion correctly applies our decision in *United States* v. *Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), and I join it in full. I write separately only to express my view that the very notion of a "substantial effects" test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases. By **[***50]** continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.

DISSENTBY: SOUTER; BREYER

DISSENT: [*628]

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The Court says both that it leaves Commerce Clause precedent undisturbed and that the Civil Rights Remedy of the Violence Against Women Act of 1994, 42 U.S.C. § 13981, exceeds Congress's power under that Clause. I find the claims irreconcilable and respectfully dissent. n1

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n1 Finding the law a valid exercise of Commerce Clause power, I have no occasion to reach the question whether it might also be sustained as an exercise of Congress's power to enforce the Fourteenth Amendment.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[***51]**

I

Our cases, which remain at least nominally undisturbed, stand for the following propositions. Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. See *Wickard* v. *Filburn*, 317 U.S. 111, 124-128, 87 L. Ed. 122, 63 S. Ct. 82 (1942); *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 277, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981). The fact of such a substantial effect is not an issue for the courts in the first instance, *ibid.*, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds **[**1760]** ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact. See *ibid.* Any explicit findings that Congress chooses to make, though not dispositive of the question of rationality, may advance judicial review by identifying factual authority on which Congress relied. Applying those propositions in these cases can lead **[***52]** to only one conclusion.

One obvious difference from *United States* v. *Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), is the mountain of data assembled by Congress, **[*629]** here showing the effects of violence against women on interstate commerce. n2 Passage of the Act in 1994 was preceded by four years of hearings, n3 which included testimony from physicians and law

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professors; n4 from survivors **[*630]** of rape and domestic violence; n5 and from representatives of state law enforcement and private business. n6 The record includes reports on gender bias from task forces in 21 States, n7 and we have the benefit of specific factual findings **[*631]** in **[**1761]** the eight separate Reports issued by Congress and its committees over the long course leading to enactment. n8 Compare *Hodel*, 452 U.S. at 278-279 (noting "extended hearings," "vast amounts of testimony and documentary evidence," and "years of the most thorough legislative consideration"). **[***53] **[***54] **[***55]

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 It is true that these data relate to the effects of violence against women generally, while the civil rights remedy limits its scope to "crimes of violence motivated by gender" -- presumably a somewhat narrower subset of acts. See 42 U.S.C. § 13981(b). But the meaning of "motivated by gender" has not been elucidated by lower courts, much less by this one, so the degree to which the findings rely on acts not redressable by the civil rights remedy is unclear. As will appear, however, much of the data seems to indicate behavior with just such motivation. In any event, adopting a cramped reading of the statutory text, and thereby increasing the constitutional difficulties, would directly contradict one of the most basic canons of statutory interpretation. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30, 81 L. Ed. 893, 57 S. Ct. 615 (1937). Having identified the problem of violence against women, Congress may address what it sees as the most threatening manifestation; "reform may take one step at a time." *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U.S. 483, 489, 99 L. Ed. 563, 75 S. Ct. 461 (1955).

n3 See, *e.g.*, Domestic Violence: Terrorism in the Home, Hearing before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 101st Cong., 2d Sess. (1990) (S. Hearing 101-897); Women and Violence, Hearing before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. (1990); Violence Against Women: Victims of the System, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess. (1991) (S. Hearing 102-369); Violence Against Women, Hearing before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, 102d Cong., 2d Sess. (1992); Hearing on Domestic Violence, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (S. Hearing 103-596); Violent Crimes Against Women, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (S. Hearing 103-726); Violence Against Women: Fighting the Fear, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (S. Hearing 103-878); Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess. (1993); Domestic Violence: Not Just a Family Matter, Hearing before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, 103d Cong., 2d Sess. (1994).

n4 See, *e.g.*, S. Hearing 103-596, at 1-4 (testimony of Northeastern Univ. Law School Professor Clare Dalton); S. Hearing 102-369, at 103-105 (testimony of Univ. of Chicago Professor Cass Sunstein); S. Hearing 103-878, at 7-11 (testimony of American Medical Assn. president-elect Robert McAfee).

n5 See, *e.g.*, *id.*, at 13-17 (testimony of Lisa); *id.* at 40-42 (testimony of Jennifer Tescher).

n6 See, *e.g.*, S. Hearing 102-369, at 24-36, 71-87 (testimony of attorneys general of Iowa and Illinois); *id.*, at 235-245 (testimony of National Federation of Business and Professional Women); S. Hearing No. 103-596, at 15-17 (statement of James Hardeman, Manager, Counseling Dept., Polaroid Corp.).

n7 See Judicial Council of California Advisory Committee on Gender Bias in the Courts, Achieving Equal Justice for Women and Men in the California Courts (July 1996) (edited

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version of 1990 report); Colorado Supreme Court Task Force on Gender Bias in the Courts, Gender and Justice in the Colorado Courts (1990); Connecticut Task Force on Gender, Justice and the Courts, Report to the Chief Justice (Sept. 1991); Report of the Florida Supreme Court Gender Bias Study Commission (Mar. 1990); Supreme Court of Georgia, Commission on Gender Bias in the Judicial System, Gender and Justice in the Courts (1991), reprinted in 8 Ga. St. U. L. Rev. 539 (1992); Report of the Illinois Task Force on Gender Bias in the Courts (1990); Equality in the Courts Task Force, State of Iowa, Final Report (Feb. 1993); Kentucky Task Force on Gender Fairness in the Courts, Equal Justice for Women and Men (Jan. 1992); Louisiana Task Force on Women in the Courts, Final Report (1992); Maryland Special Joint Comm., Gender Bias in the Courts (May 1989); Massachusetts Supreme Judicial Court, Gender Bias Study of the Court System in Massachusetts (1989); Michigan Supreme Court Task Force on Gender Issues in the Courts, Final Report (Dec. 1989); Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report (1989), reprinted in 15 Wm. Mitchell L. Rev. 825 (1989); Nevada Supreme Court Gender Bias Task Force, Justice For Women (1988); New Jersey Supreme Court Task Force on Women in the Courts, Report of the First Year (June 1984); Report of the New York Task Force on Women in the Courts (Mar. 1986); Final Report of the Rhode Island Supreme Court Committee on Women in the Courts (June 1987); Utah Task Force on Gender and Justice, Report to the Utah Judicial Council (Mar. 1990); Vermont Supreme Court and Vermont Bar Assn., Gender and Justice: Report of the Vermont Task Force on Gender Bias in the Legal System (Jan. 1991); Washington State Task Force on Gender and Justice in the Courts, Final Report (1989); Wisconsin Equal Justice Task Force, Final Report (Jan. 1991).

n8 See S. Rep. No. 101-545 (1990); Majority Staff of Senate Committee on the Judiciary, Violence Against Women: The Increase of Rape in America, 102d Cong., 1st Sess. (Comm. Print 1991); S. Rep. No. 102-197 (1991); Majority Staff of Senate Committee on the Judiciary, Violence Against Women: A Week in the Life of America, 102d Cong., 2d Sess. (Comm. Print 1992); S. Rep. No. 103-138 (1993); Majority Staff of Senate Committee on the Judiciary, The Response to Rape: Detours on the Road to Equal Justice, 103d Cong., 1st Sess. (Comm. Print 1993); H. R. Rep. No. 103-395 (1993); H. R. Conf. Rep. No. 103-711 (1994).

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

With respect to domestic violence, Congress received evidence for the following findings:

> "Three out of four American women will be victims of violent crimes sometime during their life." H. R. Rep. No. 103-395 p. 25 (1993) (citing U.S. Dept. of Justice, Report to the Nation on Crime and Justice 29 (2d ed. 1988)).
>
> "Violence is the leading cause of injuries to women ages 15 to 44 . . . ." S. Rep. No. 103-138, p. 38 (1993) (citing Surgeon General Antonia Novello, From the Surgeon General, **[***56]** U.S. Public Health Services, 267 JAMA 3132 (1992)).
>
> "As many as 50 percent of homeless women and children are fleeing domestic violence." S. Rep. No. 101-545, p. 37 (1990) (citing E. Schneider, Legal Reform Efforts for Battered Women: Past, Present, and Future (July 1990)).
>
> "Since 1974, the assault rate against women has outstripped the rate for men by at least twice for some age groups and far more for others." S. Rep. No. 101-545, **[*632]** at 30 (citing Bureau of Justice Statistics, Criminal Victimization in the United States (1974) (Table 5)).
>
> "Battering 'is the single largest cause of injury to women in the United States.'"

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S. Rep. No. 101-545, at 37 (quoting Van Hightower & McManus, Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies, 49 Pub. Admin. Rev. 269 (May/June 1989).

"An estimated 4 million American women are battered each year by their **[**1762]** husbands or partners." H. R. Rep. No. 103-395, at 26 (citing Council on Scientific Affairs, American Medical Assn., Violence Against Women: Relevance for Medical Practitioners, 267 JAMA 3184, 3185 (1992).

"Over 1 million women in the United States seek medical assistance **[***57]** each year for injuries sustained [from] their husbands or other partners." S. Rep. No. 101-545, at 37 (citing Stark & Flitcraft, Medical Therapy as Repression: The Case of the Battered Woman, Health & Medicine (Summer/Fall 1982).

"Between 2,000 and 4,000 women die every year from [domestic] abuse." S. Rep. No. 101-545, at 36 (citing Schneider, *supra*).

"Arrest rates may be as low as 1 for every 100 domestic assaults." S. Rep. No. 101-545, at 38 (citing Dutton, Profiling of Wife Assaulters: Preliminary Evidence for Trimodal Analysis, 3 Violence and Victims 5-30 (1988)).

"Partial estimates show that violent crime against women costs this country at least 3 billion -- not million, but billion -- dollars a year." S. Rep. No. 101-545, at 33 (citing Schneider, *supra,* at 4).

"Estimates suggest that we spend $ 5 to $ 10 billion a year on health care, criminal justice, and other social costs of domestic violence." S. Rep. No. 103-138, at **[*633]** 41 (citing Biden, Domestic Violence: A Crime, Not a Quarrel, Trial 56 (June 1993)).

The evidence as to rape was similarly extensive, supporting these conclusions:

"[The incidence of] rape rose four times as fast as the total national **[***58]** crime rate over the past 10 years." S. Rep. No. 101-545, at 30 (citing Federal Bureau of Investigation Uniform Crime Reports (1988)).

"According to one study, close to half a million girls now in high school will be raped before they graduate." S. Rep. No. 101-545, at 31 (citing R. Warshaw, I Never Called it Rape 117 (1988)).

"[One hundred twenty-five thousand] college women can expect to be raped during this -- or any -- year." S. Rep. No. 101-545, at 43 (citing testimony of Dr. Mary Koss before the Senate Judiciary Committee, Aug. 29, 1990).

"Three-quarters of women never go to the movies alone after dark because of the fear of rape and nearly 50 percent do not use public transit alone after dark for the same reason." S. Rep. No. 102-197, p. 38 (1991) (citing M. Gordon & S. Riger, The Female Fear 15 (1989)).

"[Forty-one] percent of judges surveyed believed that juries give sexual assault victims less credibility than other crime victims." S. Rep. No. 102-197, at 47 (citing Colorado Supreme Court Task Force on Gender Bias in the Courts, Gender Justice in the Colorado Courts 91 (1990)).

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> "Less than 1 percent of all [rape] victims have collected damages." S. Rep. No. 102-197, at **[***59]** 44 (citing report by Jury Verdict Research, Inc.).
>
> "'An individual who commits rape has only about 4 chances in 100 of being arrested, prosecuted, and found guilty of any offense.'" S. Rep. No. 101-545, at 33, n. 30 **[*634]** (quoting H. Feild & L. Bienen, Jurors and Rape: A Study in Psychology and Law 95 (1980)).
>
> "Almost one-quarter of convicted rapists never go to prison and another quarter received sentences in local jails where the average sentence is 11 months." S. Rep. No. 103-138, at 38 (citing Majority Staff Report of Senate Committee on the Judiciary, The Response to Rape: Detours on the Road to Equal Justice, 103d Cong., 1st Sess., 2 (Comm. Print 1993)).
>
> "Almost 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity." S. Rep. No. 102-197, at 53 (citing Ellis, Atkeson, & Calhoun, An Assessment of Long-Term Reaction to Rape, 90 J. Abnormal Psych., No. 3, p. 264 (1981). **[**1763]**

Based on the data thus partially summarized, Congress found that

> "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate **[***60]** business, and from transacting with business, and in places involved, in interstate commerce . . . [,] by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products . . . ." H. R. Conf. Rep. No. 103-711, p. 385 (1994).

Congress thereby explicitly stated the predicate for the exercise of its Commerce Clause power. Is its conclusion irrational in view of the data amassed? True, the methodology of particular studies may be challenged, and some of the figures arrived at may be disputed. But the sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned. Cf. *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180, 199, 137 L. Ed. 2d 369, 117 S. Ct. 1174 (1997) **[*635]** ("The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process").

Indeed, the legislative record here is far more voluminous than the record compiled by Congress and found sufficient in two prior cases upholding Title II of the Civil Rights Act of 1964 against Commerce Clause challenges. In *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964), **[***61]** and *Katzenbach* v. *McClung*, 379 U.S. 294, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964), the Court referred to evidence showing the consequences of racial discrimination by motels and restaurants on interstate commerce. Congress had relied on compelling anecdotal reports that individual instances of segregation cost thousands to millions of dollars. See Civil Rights -- Public Accommodations, Hearings on S. 1732 before the Senate Committee on Commerce, 88th Cong., 1st Sess., App. V, pp. 1383-1387 (1963). Congress also had evidence that the average black family spent substantially less than the average white family in the same income range on public accommodations, and that discrimination accounted for much of the difference. H. R. Rep. No. 88-914, pt. 2, pp. 9-10, and Table II (1963) (Additional Views on H. R. 7152 of Hon. William M. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McC. Mathias, Hon. James E. Bromwell).

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While Congress did not, to my knowledge, calculate aggregate dollar values for the nationwide effects of racial discrimination in 1964, in 1994 it did rely on evidence of the harms caused by domestic violence and sexual **[***62]** assault, citing annual costs of $ 3 billion in 1990, see S. Rep. 101-545, and $ 5 to $ 10 billion in 1993, see S. Rep. No. 103-138, at 41. n9 Equally important, though, gender-based violence in the 1990's was shown to operate in a manner similar to racial **[*636]** discrimination in the 1960's in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce. Like racial discrimination, gender-based violence bars its most likely targets -- women -- from full participation in the national economy." *Id.,* at 54.

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n9 In other cases, we have accepted dramatically smaller figures. See, *e.g., Hodel* v. *Indiana,* 452 U.S. 314, 325, n. 11, 69 L. Ed. 2d 40, 101 S. Ct. 2376 (1981) (stating that corn production with a value of $ 5.16 million "surely is not an insignificant amount of commerce").

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If the analogy to the Civil Rights Act of 1964 is not plain enough, one can always look back a bit further. In *Wickard,* we upheld the application of the Agricultural Adjustment Act to the planting and **[***63]** consumption of homegrown wheat. The effect on interstate commerce in that case followed from the possibility that wheat **[**1764]** grown at home for personal consumption could either be drawn into the market by rising prices, or relieve its grower of any need to purchase wheat in the market. See 317 U.S. at 127-129. The Commerce Clause predicate was simply the effect of the production of wheat for home consumption on supply and demand in interstate commerce. Supply and demand for goods in interstate commerce will also be affected by the deaths of 2,000 to 4,000 women annually at the hands of domestic abusers, see S. Rep. No. 101-545, at 36, and by the reduction in the work force by the 100,000 or more rape victims who lose their jobs each year or are forced to quit, see *id.,* at 56, H. R. Rep. No. 103-395, at 25-26. Violence against women may be found to affect interstate commerce and affect it substantially. n10

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n10 It should go without saying that my view of the limit of the congressional commerce power carries no implication about the wisdom of exercising it to the limit. I and other Members of this Court appearing before Congress have repeatedly argued against the federalization of traditional state crimes and the extension of federal remedies to problems for which the States have historically taken responsibility and may deal with today if they have the will to do so. See Hearings before a Subcommittee of the House Committee on Appropriations, 104th Cong., 1st Sess., pt. 7, pp. 13-14 (1995) (testimony of JUSTICE KENNEDY); Hearings on H. R. 4603 before a Subcommittee of the Senate Committee on Appropriations, 103d Cong., 2d Sess., 100-107 (1994) (testimony of JUSTICES KENNEDY and SOUTER). The Judicial Conference of the United States originally opposed the Act, though after the original bill was amended to include the gender-based animus requirement, the objection was withdrawn for reasons that are not apparent. See Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., 70-71 (1993).

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II

The Act would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995, a period in which the law enjoyed a stable understanding that congressional power under the

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Commerce Clause, complemented by the authority of the Necessary and Proper Clause, Art. I. § 8 cl. 18, extended to all activity that, when aggregated, has a substantial effect on interstate commerce. As already noted, this understanding was secure even against the turmoil at the passage of the Civil Rights Act of 1964, in the aftermath of which the Court not only reaffirmed the cumulative effects and rational basis features of the substantial effects test, see *Heart of Atlanta, supra,* at 258; *McClung, supra,* at 301-305, but declined to limit the commerce power through a formal distinction between legislation focused on "commerce" and statutes addressing "moral and social wrongs," *Heart of Atlanta, supra,* at 257.

The fact that the Act does not pass muster before the Court today is therefore proof, to a degree that *Lopez* was not, that the Court's nominal adherence to the substantial effects test is merely that. Although a new jurisprudence **[***65]** has not emerged with any distinctness, it is clear that some congressional conclusions about obviously substantial, cumulative effects on commerce are being assigned lesser values than the once-stable doctrine would assign them. These devaluations are accomplished not by any express repudiation of the substantial effects test or its application through the aggregation of individual conduct, but by supplanting rational basis scrutiny with a new criterion of review. **[*638]**

Thus the elusive heart of the majority's analysis in these cases is its statement that Congress's findings of fact are "weakened" by the presence of a disfavored "method of reasoning." *Ante,* at 14. This seems to suggest that the "substantial effects" analysis is not a factual enquiry, for Congress in the first instance with subsequent judicial review looking only to the rationality of the congressional conclusion, but one of a rather different sort, dependent upon a uniquely judicial competence. **[**1765]**

This new characterization of substantial effects has no support in our cases (the self-fulfilling prophecies of *Lopez* aside), least of all those the majority cites. Perhaps this explains why the majority is not content to **[***66]** rest on its cited precedent but claims a textual justification for moving toward its new system of congressional deference subject to selective discounts. Thus it purports to rely on the sensible and traditional understanding that the listing in the Constitution of some powers implies the exclusion of others unmentioned. See *Gibbons* v. *Ogden,* 22 U.S. 1, 9 Wheat. 1, 195, 6 L. Ed. 23 (1824); *ante,* at 10; The Federalist No. 45, p. 313 (J. Cooke ed. 1961) (J. Madison). n11 The majority stresses that Art. I, § 8, enumerates **[*639]** the powers of Congress, including the commerce power, an enumeration implying the exclusion of powers not enumerated. It follows, for the majority, not only that there must be some limits to "commerce," but that some particular subjects arguably within the commerce power can be identified in advance as excluded, on the basis of characteristics other than their commercial effects. Such exclusions come into sight when the activity regulated is not itself commercial or when the States have traditionally addressed it in the exercise of the general police power, conferred under the state constitutions but never extended to Congress under the Constitution of the Nation, **[***67]** see *Lopez,* 514 U.S. at 566. *Ante,* at 16.

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n11 The claim that powers not granted were withheld was the chief Federalist argument against the necessity of a bill of rights. Bills of rights, Hamilton claimed, "have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations." The Federalist No. 84, at 578. James Wilson went further in the Pennsylvania ratifying convention, asserting that an enumeration of rights was positively dangerous because it suggested, conversely, that every right not reserved was surrendered. See 2 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 436-437 (2d ed. 1863) (hereinafter Elliot's Debates). The Federalists did not, of course, prevail on this point; most States voted for the Constitution only after proposing amendments and the First Congress speedily

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adopted a Bill of Rights. See *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 569, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985) (Powell, J., dissenting). While that document protected a range of specific individual rights against federal infringement, it did not, with the possible exception of the Second Amendment, offer any similarly specific protections to areas of state sovereignty.

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The premise that the enumeration of powers implies that other powers are withheld is sound; the conclusion that some particular categories of subject matter are therefore presumptively beyond the reach of the commerce power is, however, a non sequitur. From the fact that Art. I, § 8, cl. 3 grants an authority limited to regulating commerce, it follows only that Congress may claim no authority under that section to address any subject that does not affect commerce. It does not at all follow that an activity affecting commerce nonetheless falls outside the commerce power, depending on the specific character of the activity, or the authority of a State to regulate it along with Congress. n12 My disagreement **[*640]** with the majority is not, however, confined to logic, for history has **[**1766]** shown that categorical exclusions have proven as unworkable in practice as they are unsupportable in theory.

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n12 To the contrary, we have always recognized that while the federal commerce power may overlap the reserved state police power, in such cases federal authority is supreme. See, *e.g.,* *Lake Shore & Michigan Southern R. Co.* v. *Ohio,* 173 U.S. 285, 297-298, 43 L. Ed. 702, 19 S. Ct. 465 (1899) ("When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the General Government"); *United States* v. *California,* 297 U.S. 175, 185, 80 L. Ed. 567, 56 S. Ct. 421 (1936) ("We look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce").

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A

Obviously, it would not be inconsistent with the text of the Commerce Clause itself to declare "noncommercial" primary activity beyond or presumptively beyond the scope of the commerce power. That variant of categorical approach is not, however, the sole textually permissible way of defining the scope of the Commerce Clause, and any such neat limitation would at least be suspect in the light of the final sentence of Article I, § 8, authorizing Congress to make "all Laws . . . necessary and proper" to give effect to its enumerated powers such as commerce. See *United States* v. *Darby,* 312 U.S. 100, 118, 85 L. Ed. 609, 61 S. Ct. 451 (1941) ("The power of Congress . . . extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce"). Accordingly, for significant periods of our history, the Court has defined the commerce power as plenary, unsusceptible to categorical exclusions, and this was the view expressed throughout the latter part of the 20th century in the substantial **[***70]** effects test. These two conceptions of the commerce power, plenary and categorically limited, are in fact old rivals, and today's revival of their competition summons up familiar history, a brief reprise of which may be helpful in posing what I take to be the key question going to the legitimacy of the majority's decision to breathe new life into the approach of categorical limitation. **[*641]**

Chief Justice Marshall's seminal opinion in *Gibbons* v. *Ogden, supra,* at 193-194, construed

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the commerce power from the start with "a breadth never yet exceeded," *Wickard* v. *Filburn,* 317 U.S. at 120. In particular, it is worth noting, the Court in *Wickard* did not regard its holding as exceeding the scope of Chief Justice Marshall's view of interstate commerce; *Wickard* applied an aggregate effects test to ostensibly domestic, noncommercial farming consistently with Chief Justice Marshall's indication that the commerce power may be understood by its exclusion of subjects, among others, "which do not affect other States," *Gibbons,* 9 Wheat. at 195. This plenary view of the power has either prevailed or been acknowledged by this Court at every stage **[***71]** of our jurisprudence. See, *e.g., id.,* at 197; *Nashville, C. & St. L. R. Co.* v. *Alabama,* 128 U.S. 96, 99-100, 32 L. Ed. 352, 9 S. Ct. 28 (1888); *Lottery Case,* 188 U.S. 321, 353, 47 L. Ed. 492, 23 S. Ct. 321 (1903); *Minnesota Rate Cases,* 230 U.S. 352, 398, 57 L. Ed. 1511, 33 S. Ct. 729 (1913); *United States* v. *California,* 297 U.S. 175, 185, 80 L. Ed. 567, 56 S. Ct. 421 (1936); *United States* v. *Darby,* 312 U.S. 100, 115, 85 L. Ed. 609, 61 S. Ct. 451 (1941); *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. at 255; *Hodel* v. *Indiana,* 452 U.S. at 324. And it was this understanding, free of categorical qualifications, that prevailed in the period after 1937 through *Lopez,* as summed up by Justice Harlan: "'Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.'" *Maryland* v. *Wirtz,* 392 U.S. 183, 190, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968) (quoting *Katzenbach* v. *McClung,* 379 U.S. at 303-304). **[***72]**

Justice Harlan spoke with the benefit of hindsight, for he had seen the result of rejecting the plenary view, and today's attempt to distinguish between primary activities affecting commerce in terms of the relatively commercial or noncommercial character of the primary conduct proscribed **[**1767]** comes with the pedigree of near-tragedy that I outlined in **[*642]** *United States* v. *Lopez, supra,* at 603 (dissenting opinion). In the half century following the modern activation of the commerce power with passage of the Interstate Commerce Act in 1887, this Court from time to time created categorical enclaves beyond congressional reach by declaring such activities as "mining," "production," "manufacturing," and union membership to be outside the definition of "commerce" and by limiting application of the effects test to "direct" rather than "indirect" commercial consequences. See, *e.g., United States* v. *E. C. Knight Co.,* 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249 (1895) (narrowly construing the Sherman Antitrust Act in light of the distinction between "commerce" and "manufacture"); *In re Heff,* 197 U.S. 488, 505-506, 49 L. Ed. 848, 25 S. Ct. 506 (1905) (stating that Congress could not regulate the intrastate **[***73]** sale of liquor); *The Employers' Liability Cases,* 207 U.S. 463, 495-496, 52 L. Ed. 297, 28 S. Ct. 141 (1908) (invalidating law governing tort liability for common carriers operating in interstate commerce because the effects on commerce were indirect); *Adair* v. *United States,* 208 U.S. 161, 52 L. Ed. 436, 28 S. Ct. 277 (1908) (holding that labor union membership fell outside "commerce"); *Hammer* v. *Dagenhart,* 247 U.S. 251, 62 L. Ed. 1101, 38 S. Ct. 529 (1918) (invalidating law prohibiting interstate shipment of goods manufactured with child labor as a regulation of "manufacture"); *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 545-548, 79 L. Ed. 1570, 55 S. Ct. 837 (1935) (invalidating regulation of activities that only "indirectly" affected commerce); *Railroad Retirement Bd.* v. *Alton R. Co.,* 295 U.S. 330, 368-369, 79 L. Ed. 1468, 55 S. Ct. 758 (1935) (invalidating pension law for railroad workers on the grounds that conditions of employment were only indirectly linked to commerce); *Carter* v. *Carter Coal Co.,* 298 U.S. 238, 303-304, 80 L. Ed. 1160, 56 S. Ct. 855 (1936) (holding that regulation of unfair labor practices in mining regulated "production," not "commerce").

Since adherence to these formalistically contrived confines **[***74]** of commerce power in large measure provoked the judicial crisis of 1937, one might reasonably have doubted that Members of this Court would ever again toy with a return to the days before *NLRB* v. *Jones & Laughlin Steel Corp.,* **[*643]** 301 U.S. 1, 81 L. Ed. 893, 57 S. Ct. 615 (1937), which brought the earlier and nearly disastrous experiment to an end. And yet today's decision can only be seen as a step toward recapturing the prior mistakes. Its revival of a distinction between commercial and noncommercial conduct is at odds with *Wickard*, which repudiated

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that analysis, and the enquiry into commercial purpose, first intimated by the *Lopez* concurrence, see *Lopez, supra,* at 580 (opinion of KENNEDY, J.), is cousin to the intent-based analysis employed in *Hammer, supra*, at 271-272 but rejected for Commerce Clause purposes in *Heart of Atlanta, supra,* at 257 and *Darby, supra,* at 115.

Why is the majority tempted to reject the lesson so painfully learned in 1937? An answer emerges from contrasting *Wickard* with one of the predecessor cases it superseded. It was obvious in *Wickard* that growing wheat for consumption right on the farm was **[***75]** not "commerce" in the common vocabulary, n13 but that did not **[**1768]** matter constitutionally so long as the aggregated activity of domestic wheat growing affected commerce substantially. Just a few years before **[*644]** *Wickard*, however, it had certainly been no less obvious that "mining" practices could substantially affect commerce, even though *Carter Coal Co., supra,* had held mining regulation beyond the national commerce power. When we try to fathom the difference between the two cases, it is clear that they did not go in different directions because the *Carter Coal* Court could not understand a causal connection that the *Wickard* Court could grasp; the difference, rather, turned on the fact that the Court in *Carter Coal* had a reason for trying to maintain its categorical, formalistic distinction, while that reason had been abandoned by the time *Wickard* was decided. The reason was laissez-faire economics, the point of which was to keep government interference to a minimum. See *Lopez, supra,* at 605-606 (SOUTER, J., dissenting). The Court in *Carter Coal* was still trying to create a laissez-faire world out of the 20th-century economy, and formalistic **[***76]** commercial distinctions were thought to be useful instruments in achieving that object. The Court in *Wickard* knew it could not do any such thing and in the aftermath of the New Deal had long since stopped attempting the impossible. Without the animating economic theory, there was no point in contriving formalisms in a war with Chief Justice Marshall's conception of the commerce power.

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n13 Contrary to the Court's suggestion, *ante,* at 11, n. 4, *Wickard* applied the substantial effects test to domestic agricultural production for domestic consumption, an activity that cannot fairly be described as commercial, despite its commercial consequences in affecting or being affected by the demand for agricultural products in the commercial market. The *Wickard* Court admitted that Filburn's activity "may not be regarded as commerce" but insisted that "it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ." 317 U.S. at 125. The characterization of home wheat production as "commerce" or not is, however, ultimately beside the point. For if substantial effects on commerce are proper subjects of concern under the Commerce Clause, what difference should it make whether the causes of those effects are themselves commercial? Cf., *e.g.*, *National Organization for Women, Inc.* v. *Scheidler,* 510 U.S. 249, 258, 127 L. Ed. 2d 99, 114 S. Ct. 798 (1994) ("An enterprise surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives"). The Court's answer is that it makes a difference to federalism, and the legitimacy of the Court's new judicially derived federalism is the crux of our disagreement. See *infra*, at 18-19.

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If we now ask why the formalistic economic/noneconomic distinction might matter today, after its rejection in *Wickard*, the answer is not that the majority fails to see causal connections in an integrated economic world. The answer is that in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual **[*645]** States see fit. The legitimacy of the Court's current emphasis on the noncommercial nature of regulated activity,

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Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce, but the existence of such findings may enable the Court to evaluate the legislative judgment that the activity in question substantially affects interstate commerce, even though no such substantial effect is visible to the naked eye.

Constitutional Law : Congressional Powers & Duties : Commerce Clause
Constitutional Law : Substantive Due Process : Equal Protection : Sex
Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.

Constitutional Law : Congressional Powers & Duties : Commerce Clause
Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so. Rather, whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by the Court.

Constitutional Law : Congressional Powers & Duties : Commerce Clause
Congress may not regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The U.S. Constitution requires a distinction between what is truly national and what is truly local. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce is the province of the states.

Constitutional Law : Substantive Due Process : Equal Protection : Scope of Protection
See U.S. Const. amend. XIV, § 5.

Constitutional Law : Substantive Due Process : Equal Protection : Sex
State-sponsored gender discrimination violates equal protection unless it serves important governmental objectives and the discriminatory means employed are substantially related to the achievement of those objectives.

Constitutional Law : Substantive Due Process : Equal Protection : Scope of Protection
U.S. Const. amend. XIV, by its very terms, prohibits only state action. U.S. Const. amend. XIV erects no shield against merely private conduct, however discriminatory or wrongful.

Constitutional Law : Congressional Powers & Duties
Where a subject has not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular state legislation or state action in reference to that subject, the power given is limited by its object, any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers.

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SYLLABUS:

Petitioner Brzonkala filed suit, alleging, *inter alia,* that she was raped by respondents while the three were students at the Virginia Polytechnic Institute, and that this attack violated 42 U.S.C. § 13981, which provides a federal civil remedy for the victims of gender-motivated violence. Respondents moved to dismiss on the grounds that the complaint failed to state a

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then, does not turn on any logic serving the text of the Commerce Clause or on the realism of the majority's view of the national economy. The essential issue is rather the strength of the majority's claim to have a constitutional warrant for its current conception of a federal relationship enforceable by this Court through limits on otherwise plenary commerce power. This **[***78]** conception is the subject of the majority's second categorical discount applied today to the facts bearing on the substantial effects test.

B

The Court finds it relevant that the statute addresses conduct traditionally subject to state prohibition under domestic criminal law, a fact said to have some heightened significance when the violent conduct in question is not itself aimed directly at interstate commerce or its instrumentalities. *Ante,* at 9. Again, history seems to be recycling, for the theory of traditional state concern as grounding a limiting principle has been rejected previously, and more than once. It was disapproved in *Darby,* 312 U.S. at 123-124, and held insufficient standing alone to limit **[**1769]** the commerce power in *Hodel,* 452 U.S. at 276-277. In the particular context of the Fair Labor Standards Act it was rejected in *Maryland* v. *Wirtz,* 392 U.S. 183, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968), with the recognition that there is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other." *Id.,* at 195 **[***79]** (internal quotation marks omitted). The Court held it to be "clear that the Federal Government, when acting within delegated power, may override countervailing state interests, whether these be described as 'governmental' or 'proprietary' in character." *Ibid.* While *Wirtz* was later overruled by *National League of Cities* v. *Usery,* 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 **[*646]** (1976), that case was itself repudiated in *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985), which held that the concept of "traditional governmental function" (as an element of the immunity doctrine under *Hodel*) was incoherent, there being no explanation that would make sense of the multifarious decisions placing some functions on one side of the line, some on the other. 469 U.S. at 546-547. The effort to carve out inviolable state spheres within the spectrum of activities substantially affecting commerce was, of course, just as irreconcilable with *Gibbons*'s explanation of the national commerce power as being as "absolute as it would be in a single government," 9 Wheat. at 197. n14

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n14 The Constitution of 1787 did, in fact, forbid some exercises of the commerce power. Article I, § 9, cl. 6, barred Congress from giving preference to the ports of one State over those of another. More strikingly, the Framers protected the slave trade from federal interference, see Art. I, § 9, cl. 1, and confirmed the power of a State to guarantee the chattel status of slaves who fled to another State, see Art. IV, § 2, cl. 3. These reservations demonstrate the plenary nature of the federal power; the exceptions prove the rule. Apart from them, proposals to carve islands of state authority out of the stream of commerce power were entirely unsuccessful. Roger Sherman's proposed definition of federal legislative power as excluding "matters of internal police" met Gouverneur Morris's response that "the internal police . . . ought to be infringed in many cases" and was voted down eight to two. 2 Records of the Federal Convention of 1787, pp. 25-26 (M. Farrand ed. 1911) (hereinafter Farrand). The Convention similarly rejected Sherman's attempt to include in Article V a proviso that "no state shall . . . be affected in its internal police." 5 Elliot's Debates 551-552. Finally, Rufus King suggested an explicit bill of rights for the States, a device that might indeed have set aside the areas the Court now declares off-limits. 1 Farrand 493 ("As the fundamental rights of individuals are secured by express provisions in the State Constitutions; why may not a like security be provided for the Rights of States in the National Constitution"). That proposal, too, came to naught. In short, to suppose that enumerated powers must have limits is sensible; to maintain that there exist judicially identifiable areas of state regulation immune to the plenary congressional commerce power even though falling within the limits defined by

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the substantial effects test is to deny our constitutional history.

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The objection to reviving traditional state spheres of action as a consideration in commerce analysis, however, not only rests on the portent of incoherence, but is compounded by a further defect just as fundamental. The defect, in essence, is the majority's rejection of the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy. n15 **[**1770]** Whereas today's majority takes a leaf from the book of the old judicial economists in saying that the Court should somehow draw the line to keep the federal relationship in a proper balance, Madison, Wilson, and Marshall understood the Constitution very differently.

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n15 That the national economy and the national legislative power expand in tandem is not a recent discovery. This Court accepted the prospect well over 100 years ago, noting that the commerce powers "are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances." *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U.S. 1, 9, 24 L. Ed. 708 (1878). See also, *e.g.*, *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U.S. 204, 211-212, 74 L. Ed. 371, 50 S. Ct. 98 (1930) ("Primitive conditions have passed; business is now transacted on a national scale").

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Although Madison had emphasized the conception of a National Government of discrete powers (a conception that a number of the ratifying conventions thought was too indeterminate to protect civil liberties), n16 Madison himself must have sensed the potential scope of some of the powers granted (such as the authority to regulate commerce), for he **[*648]** took care in The Federalist No. 46 to hedge his argument for limited power by explaining the importance of national politics in protecting the States' interests. The National Government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." The Federalist No. 46, at 319. James Wilson likewise noted that "it was a favorite object in the Convention" to secure the sovereignty of the States, and that it had been achieved through the structure of the Federal Government. 2 Elliot's Debates 438-439. n17 The Framers of the Bill of Rights, in turn, may well have sensed that Madison and Wilson were right about politics as the determinant of the federal balance within the broad limits of a power like commerce, for they formulated the Tenth **[***82]** Amendment without any provision comparable to the specific guarantees proposed for individual liberties. n18 In any case, this Court recognized the political component of federalism in the seminal *Gibbons* opinion. After declaring the plenary character of congressional power within the sphere of activity affecting commerce, the Chief Justice spoke for the Court in explaining that there was only one restraint on its valid exercise:

[*649]

> "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

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Gibbons, supra, at 197.

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n16 As mentioned n. 11, *supra,* many state conventions voted in favor of the Constitution only after proposing amendments. See 1 Elliot's Debates 322-323 (Massachusetts), 325 (South Carolina), 325-327 (New Hampshire), 327 (Virginia), 327-331 (New York), 331-332 (North Carolina), 334-337 (Rhode Island).

n17 Statements to similar effect pervade the ratification debates. See, *e.g.,* 2 *id.,* at 166-170 (Massachusetts, remarks of Samuel Stillman); *id.,* at 251-253 (New York, remarks of Alexander Hamilton); 4 *id.,* at 95-98 (North Carolina, remarks of James Iredell).

n18 The majority's special solicitude for "areas of traditional state regulation," *ante,* at 15, is thus founded not on the text of the Constitution but on what has been termed the "*spirit* of the Tenth Amendment," *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U.S. at 585 (O'CONNOR, J., dissenting) (emphasis in original). Susceptibility to what Justice Holmes more bluntly called "some invisible radiation from the general terms of the Tenth Amendment," *Missouri* v. *Holland,* 252 U.S. 416, 434, 64 L. Ed. 641, 40 S. Ct. 382 (1920), has increased in recent years, in disregard of his admonition that "we must consider what this country has become in deciding what that Amendment has reserved." *Ibid.*

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Politics as the moderator of the congressional employment of the commerce power was the theme **[***84]** many years later in *Wickard,* for after the Court acknowledged the breadth of the *Gibbons* formulation it invoked Chief Justice Marshall yet again in adding that "he made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than judicial processes." *Wickard,* **[**1771]** 317 U.S. at 120 (citation omitted). Hence, "conflicts of economic interest . . . are wisely left under our system to resolution by Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do." *Id.,* at 129 (footnote omitted).

As with "conflicts of economic interest," so with supposed conflicts of sovereign political interests implicated by the Commerce Clause: the Constitution remits them to politics. The point can be put no more clearly than the Court put it the last time it repudiated the notion that some state activities categorically defied the commerce power as understood in accordance with generally accepted concepts. After **[***85]** confirming Madison's and Wilson's views with a recitation of the sources of state influence in the structure of the National Constitution, *Garcia,* 469 U.S. at 550-552, the Court disposed of the possibility of identifying "principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely **[*650]** by relying on *a priori* definitions of state sovereignty," *id.,* at 548. It concluded that

> "the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.,* at 552.

REV_00258911

The *Garcia* Court's rejection of "judicially created limitations" in favor of the intended reliance on national politics was all the more powerful owing to the Court's explicit recognition that in the centuries since the framing the relative powers of **[***86]** the two sovereign systems have markedly changed. Nationwide economic integration is the norm, the national political power has been augmented by its vast revenues, and the power of the States has been drawn down by the Seventeenth Amendment, eliminating selection of senators by state legislature in favor of direct election.

The *Garcia* majority recognized that economic growth and the burgeoning of federal revenue have not amended the Constitution, which contains no circuit breaker to preclude the political consequences of these developments. Nor is there any justification for attempts to nullify the natural political impact of the particular amendment that was adopted. The significance for state political power of ending state legislative selection of senators was no secret in 1913, and the amendment was approved despite public comment on that very issue. Representative Franklin Bartlett, after quoting Madison's Federalist No. 62, as well as remarks by George Mason and John Dickinson during the Constitutional Convention, concluded, "It follows, therefore, that the **[*651]** framers of the Constitution, were they present in this House to-day, would inevitably regard this resolution as a most **[***87]** direct blow at the doctrine of State's rights and at the integrity of the State sovereignties; for if you once deprive a State as a collective organism of all share in the General Government, you annihilate its federative importance." 26 Cong. Rec. 7774 (1894). Massachusetts Senator George Hoar likewise defended indirect election of the Senate as "a great security for the rights of the States." S. Doc. No. 232, 59th Cong., 1st Sess., 21 (1906). And Elihu Root warned that if the selection of senators should be taken from state legislatures, "the tide that now sets toward the Federal Government will swell in volume and power." 46 Cong. Rec. 2243 (1911). "The time will come," he continued, "when the Government of the United States will be driven to the exercise of more arbitrary and unconsidered **[**1772]** power, will be driven to greater concentration, will be driven to extend its functions into the internal affairs of the States." *Ibid.* These warnings did not kill the proposal; the Amendment was ratified, and today it is only the ratification, not the predictions, which this Court can legitimately heed. n19

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n19 The majority tries to deflect the objection that it blocks an intended political process by explaining that the Framers intended politics to set the federal balance only within the sphere of permissible commerce legislation, whereas we are looking to politics to define that sphere (in derogation even of *Marbury* v. *Madison,* 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803)), *ante,* at 16-17. But we all accept the view that politics is the arbiter of state interests only within the realm of legitimate congressional action under the commerce power. Neither Madison nor Wilson nor Marshall, nor the *Jones* & *Laughlin*, *Darby, Wickard,* or *Garcia* Courts, suggested that politics defines the commerce power. Nor do we, even though we recognize that the conditions of the contemporary world result in a vastly greater sphere of influence for politics than the Framers would have envisioned. Politics has legitimate authority, for all of us on both sides of the disagreement, only within the legitimate compass of the commerce power. The majority claims merely to be engaging in the judicial task of patrolling the outer boundaries of that congressional authority. See *ante,* at 16, n. 7. That assertion cannot be reconciled with our statements of the substantial effects test, which have not drawn the categorical distinctions the majority favors. See, *e.g., Wickard,* 317 U.S. at 125; *Darby,* 312 U.S. at 118-119. The majority's attempt to circumscribe the commerce power by defining it in terms of categorical exceptions can only be seen as a revival of similar efforts that led to near tragedy for the Court and incoherence for the law. If history's lessons are accepted as guides for Commerce Clause interpretation today, as we do accept them, then the subject matter of the Act falls within the commerce power and the choice to legislate nationally on that subject, or to except it from national legislation because the States have traditionally

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dealt with it, should be a political choice and only a political choice.

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Amendments that alter the balance of power between the National and State Governments, like the Fourteenth, or that change the way the States are represented within the Federal Government, like the Seventeenth, are not rips in the fabric of the Framers' Constitution, inviting judicial repairs. The Seventeenth Amendment may indeed have lessened the enthusiasm of the Senate to represent the States as discrete sovereignties, but the Amendment did not convert the judiciary into an alternate shield against the commerce power.

C

The Court's choice to invoke considerations of traditional state regulation in these cases is especially odd in light of a distinction recognized in the now-repudiated opinion for the Court in *Usery*. In explaining that there was no inconsistency between declaring the States immune to the commerce power exercised in the Fair Labor Standards Act, but subject to it under the Economic Stabilization Act of 1970, as decided in *Fry* v. *United States*, 421 U.S. 542, 44 L. Ed. 2d 363, 95 S. Ct. 1792 (1975), the Court spoke of the latter statute as dealing with a serious threat affecting all the political components of the federal **[*653]** system, "which only collective action by the National **[***89]** Government might forestall." *Usery*, 426 U.S. at 853. Today's majority, however, finds no significance whatever in the state support for the Act based upon the States' acknowledged failure to deal adequately with gender-based violence in state courts, and the belief of their own law enforcement agencies that national action is essential. n20

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n20 See n. 7, *supra*. The point here is not that I take the position that the States are incapable of dealing adequately with domestic violence if their political leaders have the will to do so; it is simply that the Congress had evidence from which it could find a national statute necessary, so that its passage obviously survives Commerce Clause scrutiny.

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The National Association of Attorneys General supported the Act unanimously, see Violence Against Women: Victims of the System, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess., 37-38 (1991), and Attorneys **[**1773]** General from 38 States urged Congress to enact the Civil Rights **[***90]** Remedy, representing that "the current system for dealing with violence against women is inadequate," see Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., 34-36 (1993). It was against this record of failure at the state level that the Act was passed to provide the choice of a federal forum in place of the state-court systems found inadequate to stop gender-biased violence. See Women and Violence, Hearing before the Senate Committee on the Judiciary, 101st Cong., 2d Sess., 2 (1990) (statement of Sen. Biden) (noting importance of federal forum). n21 The Act accordingly offers a federal civil rights remedy aimed exactly **[*654]** at violence against women, as an alternative to the generic state tort causes of action found to be poor tools of action by the state task forces. See S. Rep. No. 101-545, at 45 (noting difficulty of fitting gender-motivated crimes into common-law categories). As the 1993 Senate Report put it, "The Violence Against Women Act is intended to respond both to the underlying attitude that this violence is somehow less serious than other crime and to the **[***91]** resulting failure of our criminal justice system to address such violence. Its goals are both symbolic and practical . . . ." S. Rep. No. 103-138, at 38.

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n21 The majority's concerns about accountability strike me as entirely misplaced. Individuals, such as the defendants in this action, haled into federal court and sued under the United States Code, are quite aware of which of our dual sovereignties is attempting to regulate their behavior. Had Congress chosen, in the exercise of its powers under § 5 of the Fourteenth Amendment, to proceed instead by regulating the States, rather than private individuals, this accountability would be far less plain.

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The collective opinion of state officials that the Act was needed continues virtually unchanged, and when the Civil Rights Remedy was challenged in court, the States came to its defense. Thirty-six of them and the Commonwealth of Puerto Rico have filed an *amicus* brief in support of petitioners in these cases, and only one State has taken respondents' side. It **[***92]** is, then, not the least irony of these cases that the States will be forced to enjoy the new federalism whether they want it or not. For with the Court's decision today, Antonio Morrison, like *Carter Coal*'s James Carter before him, has "won the states' rights plea against the states themselves." R. Jackson, The Struggle for Judicial Supremacy 160 (1941).

III

All of this convinces me that today's ebb of the commerce power rests on error, and at the same time leads me to doubt that the majority's view will prove to be enduring law. There is yet one more reason for doubt. Although we sense the presence of *Carter Coal, Schechter,* and *Usery* once again, the majority embraces them only at arm's-length. Where such decisions once stood for rules, today's opinion points to considerations by which substantial effects are discounted. Cases standing for the sufficiency of substantial effects are not overruled; cases overruled since 1937 are not quite revived. The Court's thinking betokens less clearly **[*655]** a return to the conceptual straitjackets of *Schechter* and *Carter Coal* and *Usery* than to something like the unsteady state of obscenity law between *Redrup* v. *New York,* 386 U.S. 767, 18 L. Ed. 2d 515, 87 S. Ct. 1414 (1967) **[***93]** *(per curiam),* and *Miller* v. *California,* 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973), a period in which the failure to provide a workable definition left this Court to review each case ad hoc. See *id.,* at 22, n. 3; *Interstate Circuit, Inc.* v. *Dallas,* 390 U.S. 676, 706-708, 20 L. Ed. 2d 225, 88 S. Ct. 1298 (1968) (Harlan, J., dissenting). As our predecessors learned then, the practice of such ad hoc review cannot preserve the distinction between the judicial and the legislative, and this Court, in any event, lacks the institutional **[**1774]** capacity to maintain such a regime for very long. This one will end when the majority realizes that the conception of the commerce power for which it entertains hopes would inevitably fail the test expressed in Justice Holmes's statement that "the first call of a theory of law is that it should fit the facts." O. Holmes, The Common Law 167 (Howe ed. 1963). The facts that cannot be ignored today are the facts of integrated national commerce and a political relationship between States and Nation much affected by their respective treasuries and constitutional modifications adopted by the people. The federalism of some earlier time is no more adequate to account **[***94]** for those facts today than the theory of laissez-faire was able to govern the national economy 70 years ago.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, and with whom JUSTICE SOUTER and JUSTICE GINSBURG join as to Part I-A, dissenting.

No one denies the importance of the Constitution's federalist principles. Its state/federal division of authority protects liberty -- both by restricting the burdens that government can impose from a distance and by facilitating citizen participation in government that is closer to home. The question is how the judiciary can best implement that **[*656]** original federalist understanding where the Commerce Clause is at issue.

I

REV_00258914

The majority holds that the federal commerce power does not extend to such "noneconomic" activities as "noneconomic, violent criminal conduct" that significantly affects interstate commerce only if we "aggregate" the interstate "effects" of individual instances. *Ante*, at 17-18. JUSTICE SOUTER explains why history, precedent, and legal logic militate against the majority's approach. I agree and join his opinion. I add that the majority's holding illustrates the difficulty of finding a workable judicial Commerce Clause touchstone **[***95]** -- a set of comprehensible interpretive rules that courts might use to impose some meaningful limit, but not too great a limit, upon the scope of the legislative authority that the Commerce Clause delegates to Congress.

A

Consider the problems. The "economic/noneconomic" distinction is not easy to apply. Does the local street corner mugger engage in "economic" activity or "noneconomic" activity when he mugs for money? See *Perez* v. *United States*, 402 U.S. 146, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971) (aggregating local "loan sharking" instances); *United States* v. *Lopez*, 514 U.S. 549, 559, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995) (loan sharking is economic because it consists of "intrastate extortionate credit transactions"); *ante*, at 9. Would evidence that desire for economic domination underlies many brutal crimes against women save the present statute? See United States General Accounting Office, Health, Education, and Human Services Division, Domestic Violence: Prevalence and Implications for Employment Among Welfare Recipients 7-8 (Nov. 1998); Brief for Equal Rights Advocates, *et al.* as *Amicus Curiae* 10-12.

The line becomes yet harder to draw given the need for exceptions. The Court itself would **[***96]** permit Congress to aggregate, hence regulate, "noneconomic" activity taking place **[*657]** at economic establishments. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964) (upholding civil rights laws forbidding discrimination at local motels); *Katzenbach* v. *McClung*, 379 U.S. 294, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964) (same for restaurants); *Lopez, supra*, at 559 (recognizing congressional power to aggregate, hence forbid, noneconomically motivated discrimination at public accommodations); *ante*, at 9-10 (same). And it would permit Congress to regulate where that regulation is **[**1775]** "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez, supra*, at 561; cf. Controlled Substances Act, 21 U.S.C. § 801 *et seq.* (regulating drugs produced for home consumption). Given the former exception, can Congress simply rewrite the present law and limit its application to restaurants, hotels, perhaps universities, and other places of public accommodation? Given the latter exception, can Congress save the present law **[***97]** by including it, or much of it, in a broader "Safe Transport" or "Workplace Safety" act?

More important, why should we give critical constitutional importance to the economic, or noneconomic, nature of an interstate-commerce-affecting *cause*? If chemical emanations through indirect environmental change cause identical, severe commercial harm outside a State, why should it matter whether local factories or home fireplaces release them? The Constitution itself refers only to Congress' power to "regulate Commerce . . . among the several States," and to make laws "necessary and proper" to implement that power. Art. I, § 8, cls. 3, 18. The language says nothing about either the local nature, or the economic nature, of an interstate-commerce-affecting cause.

This Court has long held that only the interstate commercial effects, not the local nature of the cause, are constitutionally relevant. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 38-39, 81 L. Ed. 893, 57 S. Ct. 615 (1937) (focusing upon interstate effects); *Wickard* v. *Filburn*, 317 U.S. 111, 125, 87 L. Ed. 122, 63 S. Ct. 82 (1942) (aggregating **[*658]** interstate effects of wheat grown for home consumption); *Heart of Atlanta Motel, supra*, at 258 **[***98]** ("If it is interstate commerce that feels the pinch, it does not matter how

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local the operation which applies the squeeze'" (quoting *United States* v. *Women's Sportswear Mfrs. Assn.*, 336 U.S. 460, 464, 93 L. Ed. 805, 69 S. Ct. 714 (1949))). Nothing in the Constitution's language, or that of earlier cases prior to *Lopez*, explains why the Court should ignore one highly relevant characteristic of an interstate-commerce-affecting cause (how "local" it is), while placing critical constitutional weight upon a different, less obviously relevant, feature (how "economic" it is).

Most important, the Court's complex rules seem unlikely to help secure the very object that they seek, namely, the protection of "areas of traditional state regulation" from federal intrusion. *Ante*, at 15. The Court's rules, even if broadly interpreted, are underinclusive. The local pickpocket is no less a traditional subject of state regulation than is the local gender-motivated assault. Regardless, the Court reaffirms, as it should, Congress' well-established and frequently exercised power to enact laws that satisfy a commerce-related jurisdictional prerequisite -- for example, that some item relevant to the federally **[***99]** regulated activity has at some time crossed a state line. *Ante*, at 8-9, 11, 13, and n. 5; *Lopez, supra,* at 558; *Heart of Atlanta Motel, supra,* at 256 ("'The authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question'" (quoting *Caminetti* v. *United States,* 242 U.S. 470, 491, 61 L. Ed. 442, 37 S. Ct. 192 (1917))); see also *United States* v. *Bass,* 404 U.S. 336, 347-350, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971) (saving ambiguous felon-in-possession statute by requiring gun to have crossed state line); *Scarborough* v. *United States,* 431 U.S. 563, 575, 52 L. Ed. 2d 582, 97 S. Ct. 1963 (1977) (interpreting same statute to require only that gun passed "in interstate commerce" "at some time," without questioning constitutionality); cf., *e.g.*, 18 U.S.C. § 2261(a)(1) (making it a federal crime for a person to cross state lines to commit **[*659]** a crime of violence against a spouse or intimate partner); § 1951(a) (federal crime to commit **[**1776]** robbery, extortion, physical violence or threat thereof, where "article or commodity in commerce" is affected, obstructed or delayed); **[***100]** § 2315 (making unlawful the knowing receipt or possession of certain stolen items that have "crossed a State . . . boundary"); § 922(g)(1) (prohibiting felons from shipping, transporting, receiving, or possessing firearms "in interstate . . . commerce").

And in a world where most everyday products or their component parts cross interstate boundaries, Congress will frequently find it possible to redraft a statute using language that ties the regulation to the interstate movement of some relevant object, thereby regulating local criminal activity or, for that matter, family affairs. See, *e.g.*, Child Support Recovery Act of 1992, 18 U.S.C. § 228. Although this possibility does not give the Federal Government the power to regulate everything, it means that any substantive limitation will apply randomly in terms of the interests the majority seeks to protect. How much would be gained, for example, were Congress to reenact the present law in the form of "An Act Forbidding Violence Against Women Perpetrated at Public Accommodations or by Those Who Have Moved in, or through the Use of Items that Have Moved in, Interstate Commerce"? Complex Commerce Clause rules **[***101]** creating fine distinctions that achieve only random results do little to further the important federalist interests that called them into being. That is why modern (pre-*Lopez*) case law rejected them. See *Wickard, supra,* at 120; *United States* v. *Darby,* 312 U.S. 100, 116-117, 85 L. Ed. 609, 61 S. Ct. 451 (1941); *Jones & Laughlin Steel Corp., supra,* at 37.

The majority, aware of these difficulties, is nonetheless concerned with what it sees as an important contrary consideration. To determine the lawfulness of statutes simply by asking whether Congress could reasonably have found that *aggregated* local instances significantly affect interstate commerce will allow Congress to regulate almost anything. **[*660]** Virtually all local activity, when instances are aggregated, can have "substantial effects on employment, production, transit, or consumption." Hence Congress could "regulate any crime," and perhaps "marriage, divorce, and childrearing" as well, obliterating the "Constitution's distinction between national and local authority." *Ante*, at 15; *Lopez,* 514 U.S. at 558; cf. *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 548, 79 L. Ed. 1570, 55 S. Ct. 837 (1935) **[***102]** (need for distinction between "direct" and "indirect"

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effects lest there "be virtually no limit to the federal power"); *Hammer* v. *Dagenhart*, 247 U.S. 251, 276, 62 L. Ed. 1101, 38 S. Ct. 529 (1918) (similar observation).

This consideration, however, while serious, does not reflect a jurisprudential defect, so much as it reflects a practical reality. We live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change. Those changes, taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State -- at least when considered in the aggregate. *Heart of Atlanta Motel*, 379 U.S. at 251. And that fact makes it close to impossible for courts to develop meaningful subject-matter categories that would exclude some kinds of local activities from ordinary Commerce Clause "aggregation" rules without, at the same time, depriving Congress of the power to regulate activities that have a genuine and important effect upon interstate commerce.

Since judges cannot change the world, the "defect" means that, within the bounds of the rational, Congress, not the courts, **[***103]** must remain primarily responsible for striking the appropriate state/federal balance. *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985); *ante*, at 19-24 (SOUTER, J., dissenting); **[**1777]** *Kimel* v. *Florida Bd. of Regents*, 528 U.S. , (2000) (slip op., at 2) (STEVENS, J., dissenting) (Framers designed important structural safeguards to ensure that, when Congress legislates, "the normal operation of the legislative process itself would adequately defend **[*661]** state interests from undue infringement"); see also Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215 (2000) (focusing on role of political process and political parties in protecting state interests). Congress is institutionally motivated to do so. Its Members represent state and local district interests. They consider the views of state and local officials when they legislate, and they have even developed formal procedures to ensure that such consideration takes place. See, *e.g.*, Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.). Moreover, Congress often can **[***104]** better reflect state concerns for autonomy in the details of sophisticated statutory schemes than can the judiciary, which cannot easily gather the relevant facts and which must apply more general legal rules and categories. See, *e.g.*, 42 U.S.C. § 7543(b) (Clean Air Act); 33 U.S.C. § 1251 *et seq.* (Clean Water Act); see also *New York* v. *United States*, 505 U.S. 144, 167-168, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992) (collecting other examples of "cooperative federalism"). Not surprisingly, the bulk of American law is still state law, and overwhelmingly so.

B

I would also note that Congress, when it enacted the statute, followed procedures that help to protect the federalism values at stake. It provided adequate notice to the States of its intent to legislate in an "area of traditional state regulation." *Ante*, at 15. And in response, attorneys general in the overwhelming majority of States (38) supported congressional legislation, telling Congress that "our experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds." **[***105]** *Id.*, at 34-36; see also Violence Against Women: Victims of **[*662]** the System, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess., 37-38 (1991) (unanimous resolution of the National Association of Attorneys General); but cf. Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., 77-84 (1993) (Conference of Chief Justices opposing legislation).

Moreover, as JUSTICE SOUTER has pointed out, Congress compiled a "mountain of data" explicitly documenting the interstate commercial effects of gender-motivated crimes of violence. *Ante*, at 2-8, 27-28 (dissenting opinion). After considering alternatives, it focused the federal law upon documented deficiencies in state legal systems. And it tailored the law to prevent its use in certain areas of traditional state concern, such as divorce, alimony, or

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child custody. 42 U.S.C. § 13981(e)(4). Consequently, the law before us seems to represent an instance, not of state/federal conflict, but of state/federal efforts to cooperate in order to help solve a mutually acknowledged **[***106]** national problem. Cf. §§ 300w-10, 3796gg, 3796hh, 10409, 13931 (providing federal moneys to encourage state and local initiatives to combat gender-motivated violence).

I call attention to the legislative process leading up to enactment of this statute because, as the majority recognizes, *ante*, at 14, it far surpasses that which led to the enactment of the statute we considered in *Lopez*. And even were I to accept *Lopez* as an accurate statement of the law, which I do not, that distinction provides a possible basis for upholding the law here. This Court on occasion has pointed to the importance of procedural limitations in **[**1778]** keeping the power of Congress in check. See *Garcia*, 469 U.S. at 554 ("Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy'" (quoting *EEOC* v. *Wyoming*, 460 U.S. 226, 236, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983))); see **[*663]** also *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-461, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991) (insisting upon **[***107]** a "plain statement" of congressional intent when Congress legislates "in areas traditionally regulated by the States"); cf. *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 103-105, 114-117, 48 L. Ed. 2d 495, 96 S. Ct. 1895 (1976); *Fullilove* v. *Klutznick*, 448 U.S. 448, 548-554, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) (STEVENS, J., dissenting).

Commentators also have suggested that the thoroughness of legislative procedures -- *e.g.*, whether Congress took a "hard look" -- might sometimes make a determinative difference in a Commerce Clause case, say when Congress legislates in an area of traditional state regulation. See, *e.g.*, Jackson, Federalism and the Uses and Limits of Law: *Printz* and Principle?, 111 Harv. L. Rev. 2180, 2231-2245 (1998); Gardbaum, Rethinking Constitutional Federalism, 74 Texas L. Rev. 795, 812-828, 830-832 (1996); Lessig, Translating Federalism: *United States* v. *Lopez*, 1995 S. Ct. Rev. 125, 194-214 (1995); see also Treaty Establishing the European Community Art. 5; Bermann, Taking Subsidiarity Seriously: Federalism in the European Community and the United States, 94 Colum. L. Rev. 331, 378-403 (1994) (arguing for similar limitation **[***108]** in respect to somewhat analogous principle of subsidiarity for European Community); Gardbaum, *supra*, at 833-837 (applying subsidiarity principles to American federalism). Of course, any judicial insistence that Congress follow particular procedures might itself intrude upon congressional prerogatives and embody difficult definitional problems. But the intrusion, problems, and consequences all would seem less serious than those embodied in the majority's approach. See *supra*, at 2-7.

I continue to agree with JUSTICE SOUTER that the Court's traditional "rational basis" approach is sufficient. *Ante*, at 1-2 (dissenting opinion); see also *Lopez*, 514 U.S. at 603-615 (SOUTER, J., dissenting); *id.*, at 615-631 (BREYER, J., dissenting). But I recognize that the law in this area is unstable and that time and experience may demonstrate both the unworkability of the majority's rules and the superiority **[*664]** of Congress' own procedural approach -- in which case the law may evolve towards a rule that, in certain difficult Commerce Clause cases, takes account of the thoroughness with which Congress has considered the federalism issue.

For these reasons, as **[***109]** well as those set forth by JUSTICE SOUTER, this statute falls well within Congress's Commerce Clause authority, and I dissent from the Court's contrary conclusion.

II

Given my conclusion on the Commerce Clause question, I need not consider Congress' authority under § 5 of the Fourteenth Amendment. Nonetheless, I doubt the Court's reasoning rejecting that source of authority. The Court points out that in *United States* v.

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claim and that § 13981's civil remedy is unconstitutional. Petitioner United States intervened to defend the section's constitutionality. In dismissing the complaint, the District Court held that it stated a claim against respondents, **[***2]** but that Congress lacked authority to enact § 13981 under either § 8 of the Commerce Clause or § 5 of the Fourteenth Amendment, which Congress had explicitly identified as the sources of federal authority for § 13981. The en banc Fourth Circuit affirmed.

Held: Section 13981 cannot be sustained under the Commerce Clause or § 5 of the Fourteenth Amendment. Pp. 7-28.

(a) The Commerce Clause does not provide Congress with authority to enact § 13981's federal civil remedy. A congressional enactment will be invalidated only upon a plain showing that Congress has exceeded its constitutional bounds. See *United States* v. *Lopez*, 514 U.S. 549, 568, 577-578, 131 L. Ed. 2d 626, 115 S. Ct. 1624. Petitioners assert that § 13981 can be sustained under Congress' commerce power as a regulation of activity that substantially affects interstate commerce. The proper framework for analyzing such a claim is provided by the principles the Court set out in *Lopez*. First, in *Lopez,* the noneconomic, criminal nature of possessing a firearm in a school zone was central to the Court's conclusion that Congress lacks authority to regulate such possession. Similarly, gender-motivated crimes of violence **[***3]** are not, in any sense, economic activity. Second, like the statute at issue in *Lopez*, § 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' regulation of interstate commerce. Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that § 13981 is sufficiently tied to interstate commerce to come within Congress' authority, Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime. Third, although § 13981, unlike the *Lopez* statute, *is* supported by numerous findings regarding the serious impact of gender-motivated violence on victims and their families, these findings are substantially weakened by the fact that they rely on reasoning that this Court has rejected, namely a but-for causal chain from the initial occurrence of violent crime to every attenuated effect upon interstate commerce. If accepted, this reasoning would allow Congress to regulate any crime whose nationwide, aggregated impact has substantial effects on employment, production, transit, or consumption. Moreover, such reasoning will not limit Congress **[***4]** to regulating violence, but may be applied equally as well to family law and other areas of state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. The Constitution requires a distinction between what is truly national and what is truly local, and there is no better example of the police power, which the Founders undeniably left reposed in the States and denied the central government, than the suppression of violent crime and vindication of its victims. Congress therefore may not regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce. Pp. 7-19.

(b) Section 5 of the Fourteenth Amendment, which permits Congress to enforce by appropriate legislation the constitutional guarantee that no State shall deprive any person of life, liberty, or property, without due process or deny any person equal protection of the laws, *City of Boerne* v. *Flores*, 521 U.S. 507, 517, 138 L. Ed. 2d 624, 117 S. Ct. 2157, also does not give Congress the authority to enact § 13981. Petitioners' assertion that there is pervasive bias in various state justice systems against victims of **[***5]** gender-motivated violence is supported by a voluminous congressional record. However, the Fourteenth Amendment places limitations on the manner in which Congress may attack discriminatory conduct. Foremost among them is the principle that the Amendment prohibits only state action, not private conduct. This was the conclusion reached in *United States* v. *Harris*, 106 U.S. 629, 27 L. Ed. 290, 1 S. Ct. 601, and the *Civil Rights Cases*, 109 U.S. 3, 27 L. Ed. 835, 3 S. Ct. 18, which were both decided shortly after the Amendment's adoption. The force of the doctrine of *stare decisis* behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time, who all had intimate knowledge and familiarity with the events surrounding the Amendment's adoption. Neither *United States* v. *Guest*, 383 U.S. 745, 16 L. Ed. 2d 239, 86

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Harris, 106 U.S. 629, 27 L. Ed. 290, 1 S. Ct. 601 (1883), and the *Civil Rights Cases*, 109 U.S. 3, 27 L. Ed. 835, 3 S. Ct. 18 (1883), the Court held that § 5 does not authorize Congress to use the Fourteenth Amendment as a source of power to remedy the conduct of *private persons*. *Ante*, at 21-23. That is certainly so. The Federal Government's argument, however, is that Congress used § 5 to remedy the actions of *state actors*, namely, those States which, through discriminatory design or the discriminatory conduct of their officials, failed to provide **[**1779]** adequate (or any) state remedies for women injured by gender-motivated violence -- a failure that the States, and Congress, documented in depth. See *ante*, at 3-4, n. 7, 27-28 (SOUTER, J., dissenting) (collecting sources). **[***110]**

Neither *Harris* nor the *Civil Rights Cases* considered this kind of claim. The Court in *Harris* specifically said that it treated the federal laws in question as "directed *exclusively* against the action of private persons, without reference to the laws of the State, or their administration by her officers." 106 U.S. at 640 (emphasis added); see also *Civil Rights Cases*, 109 U.S. at 14 (observing that the statute did "not profess to be corrective of any constitutional wrong committed by the States" and that it established "rules for the conduct **[*665]** of individuals in society towards each other, . . . without referring in any manner to any supposed action of the State or its authorities").

The Court responds directly to the relevant "state actor" claim by finding that the present law lacks "'congruence and proportionality'" to the state discrimination that it purports to remedy. *Ante*, at 26; see *City of Boerne* v. *Flores*, 521 U.S. 507, 526, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997). That is because the law, unlike federal laws prohibiting literacy tests for voting, imposing voting rights requirements, or punishing state officials who intentionally discriminated **[***111]** in jury selection, *Katzenbach* v. *Morgan*, 384 U.S. 641, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 15 L. Ed. 2d 769, 86 S. Ct. 803 (1966); *Ex parte Virginia*, 100 U.S. 339, 25 L. Ed. 676 (1880), is not "directed . . . at any State or state actor." *Ante*, at 26.

But why can Congress not provide a remedy against private actors? Those private actors, of course, did not themselves violate the Constitution. But this Court has held that Congress at least sometimes can enact remedial "legislation . . . [that] prohibits conduct which is not itself unconstitutional." *Flores*, 521 U.S. at 518; see also *Katzenbach* v. *Morgan*, *supra*, at 651; *South Carolina* v. *Katzenbach*, *supra*, at 308. The statutory remedy does not in any sense purport to "determine what constitutes a constitutional violation." *Flores*, *supra*, at 519. It intrudes little upon either States or private parties. It may lead state actors to improve their own remedial systems, primarily through example. It restricts private actors only by imposing liability for private conduct that is, in the main, already forbidden by state law. Why **[***112]** is the remedy "disproportionate"? And given the relation between remedy and violation -- the creation of a federal remedy to substitute for constitutionally inadequate state remedies -- where is the lack of "congruence"?

The majority adds that Congress found that the problem of inadequacy of state remedies "does not exist in all States, **[*666]** or even most States." *Ante*, at 27. But Congress had before it the task force reports of at least 21 States documenting constitutional violations. And it made its own findings about pervasive gender-based stereotypes hampering many state legal systems, sometimes unconstitutionally so. See, *e.g.*, S. Rep. No. 103-138, pp. 38, 41-42, 44-47 (1993); S. Rep. No. 102-197, pp. 39, 44-49 (1991); H. R. Conf. Rep. No. 103-711, p. 385 (1994). The record nowhere reveals a congressional finding that the problem "does not exist" elsewhere. Why can Congress not take the evidence before it as evidence of a national problem? This Court has not previously held that Congress must document the existence of a problem in every State prior to proposing a national solution. And the deference this Court gives to Congress' chosen remedy under § 5, *Flores*, *supra*, at 536, **[***113]** suggests that any such requirement would be inappropriate.

Despite my doubts about the majority's § 5 reasoning, I need not, and do not, **[**1780]** answer the § 5 question, which I would leave for more thorough analysis if necessary on

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another occasion. Rather, in my view, the Commerce Clause provides an adequate basis for the statute before us. And I would uphold its constitutionality as the "necessary and proper" exercise of legislative power granted to Congress by that Clause.

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S. Ct. 1170, nor *District of Columbia* v. *Carter,* 409 U.S. 418, 34 L. Ed. 2d 613, 93 S. Ct. 602, casts any doubt on the enduring vitality of the *Civil Rights Cases* and *Harris.* Assuming that there has been gender-based disparate treatment by state authorities in this case, it would not be enough to save § 13981's **[***6]** civil remedy, which is directed not at a State or state actor but at individuals who have committed criminal acts motivated by gender bias. Section 13981 visits no consequence on any Virginia public official involved in investigating or prosecuting Brzonkala's assault, and it is thus unlike any of the § 5 remedies this Court has previously upheld. See *e.g., South Carolina* v. *Katzenbach,* 383 U.S. 301, 15 L. Ed. 2d 769, 86 S. Ct. 803. Section 13981 is also different from previously upheld remedies in that it applies uniformly throughout the Nation, even though Congress' findings indicate that the problem addressed does not exist in all, or even most, States. In contrast, the § 5 remedy in *Katzenbach* was directed only to those States in which Congress found that there had been discrimination. Pp. 19-27.

169 F.3d 820, affirmed.

COUNSEL: Julie Goldscheid argued the cause for petitioner in No. 99-29.

Seth P. Waxman argued the cause for the United States in No. 99-5.

Michael E. Rosman argued the cause for respondents.

JUDGES: REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. THOMAS, J., filed a concurring opinion. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, J., joined, and in which SOUTER and GINSBURG, **[***7]** JJ., joined as to Part I-A.

OPINIONBY: REHNQUIST

OPINION: [*601] [1745]**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[1A]
In these cases we consider the constitutionality of 42 U.S.C. § 13981, which provides a federal civil remedy for the **[*602]** victims of gender-motivated violence. The United States Court of Appeals for the Fourth Circuit, sitting en banc, struck down § 13981 because it concluded that Congress lacked constitutional authority to enact the section's civil remedy. Believing that these cases are controlled by our decisions in *United States* v. *Lopez,* 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), *United States* v. *Harris,* 106 U.S. 629, 27 L. Ed. 290, 1 S. Ct. 601 (1883), and the *Civil Rights Cases,* 109 U.S. 3, 27 L. Ed. 835, 3 S. Ct. 18 (1883), we affirm.

I

Petitioner Christy Brzonkala enrolled at Virginia Polytechnic Institute (Virginia Tech) in the fall of 1994. In September of that year, Brzonkala met respondents Antonio Morrison and James Crawford, who **[**1746]** were both students at Virginia Tech and members of its varsity football team. Brzonkala alleges that, within 30 minutes of meeting Morrison and Crawford, they assaulted and repeatedly raped her. After the attack, Morrison allegedly **[***8]** told Brzonkala, "You better not have any . . . diseases." Complaint P22. In the months following the rape, Morrison also allegedly announced in the dormitory's dining room that he "liked" to get girls drunk and . . . ." *Id.,* P31. The omitted portions, quoted verbatim in the briefs on file with this Court, consist of boasting, debased remarks about what Morrison would do to women, vulgar remarks that cannot fail to shock and offend.

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Brzonkala alleges that this attack caused her to become severely emotionally disturbed and depressed. She sought assistance from a university psychiatrist, who prescribed **[*603]** antidepressant medication. Shortly after the rape Brzonkala stopped attending classes and withdrew from the university.

In early 1995, Brzonkala filed a complaint against respondents under Virginia Tech's Sexual Assault Policy. During the school-conducted hearing on her complaint, Morrison admitted having sexual contact with her despite the fact that she had twice told him "no." After the hearing, Virginia Tech's Judicial Committee found insufficient evidence to punish Crawford, but found Morrison guilty of sexual assault and sentenced him to immediate suspension for **[***9]** two semesters.

Virginia Tech's dean of students upheld the judicial committee's sentence. However, in July 1995, Virginia Tech informed Brzonkala that Morrison intended to initiate a court challenge to his conviction under the Sexual Assault Policy. University officials told her that a second hearing would be necessary to remedy the school's error in prosecuting her complaint under that policy, which had not been widely circulated to students. The university therefore conducted a second hearing under its Abusive Conduct Policy, which was in force prior to the dissemination of the Sexual Assault Policy. Following this second hearing the Judicial Committee again found Morrison guilty and sentenced him to an identical 2-semester suspension. This time, however, the description of Morrison's offense was, without explanation, changed from "sexual assault" to "using abusive language."

Morrison appealed his second conviction through the university's administrative system. On August 21, 1995, Virginia Tech's senior vice president and provost set aside Morrison's punishment. She concluded that it was "'excessive when compared with other cases where there has been a finding of violation of **[***10]** the Abusive Conduct Policy,'" 132 F.3d 949, 955 (CA4 1997). Virginia Tech did not inform Brzonkala of this decision. After learning from a **[*604]** newspaper that Morrison would be returning to Virginia Tech for the fall 1995 semester, she dropped out of the university.

In December 1995, Brzonkala sued Morrison, Crawford, and Virginia Tech in the United States District Court for the Western District of Virginia. Her complaint alleged that Morrison's and Crawford's attack violated § 13981 and that Virginia Tech's handling of her complaint violated Title IX of the Education Amendments of 1972, 86 Stat. 373-375, 20 U.S.C. §§ 1681-1688. Morrison and Crawford moved to dismiss this complaint on the grounds that it failed to state a claim and that § 13981's civil remedy is unconstitutional. The United States, petitioner in No. 99-5, intervened to defend § 13981's constitutionality.

The District Court dismissed Brzonkala's Title IX claims against Virginia Tech for failure to state a claim upon which relief can be granted. See *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 772 (WD Va. 1996). It then held that Brzonkala's **[***11]** complaint stated a claim against Morrison and Crawford under § 13981, but dismissed the complaint because **[**1747]** it concluded that Congress lacked authority to enact the section under either the Commerce Clause or § 5 of the Fourteenth Amendment. *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 779 (WD Va. 1996).

A divided panel of the Court of Appeals reversed the District Court, reinstating Brzonkala's § 13981 claim and her Title IX hostile environment claim. n1 *Brzonkala v. Virginia Polytechnic and State Univ.*, 132 F.3d 949 (CA4 1997). The full Court of Appeals vacated the panel's opinion and reheard the case en banc. The en banc court then issued an opinion affirming the District Court's conclusion that Brzonkala stated a claim under § 13981 because her complaint alleged a crime of violence and the allegations of Morrison's crude and derogatory statements regarding his **[*605]** treatment of women sufficiently indicated that his crime was motivated by gender animus. n2 Nevertheless, the court by a divided vote affirmed the District Court's conclusion that Congress lacked constitutional authority to enact § 13981's civil remedy. ***Brzonkala v. Virginia Polytechnic and State Univ.*, 169 F.3d 820 (CA4**

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1999). [*12]** Because the Court of Appeals invalidated a federal statute on constitutional grounds, we granted certiorari. 527 U.S. 1068 (1999).

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 The panel affirmed the dismissal of Brzonkala's Title IX disparate treatment claim. See 132 F.3d at 961-962.

n2 The en banc Court of Appeals affirmed the District Court's conclusion that Brzonkala failed to state a claim alleging disparate treatment under Title IX, but vacated the District Court's dismissal of her hostile environment claim and remanded with instructions for the District Court to hold the claim in abeyance pending this Court's decision in *Davis* v. *Monroe County Bd. of Ed.*, 526 U.S. 629, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999). ***Brzonkala* v. *Virginia Polytechnic and State Univ.*, 169 F.3d 820, 827, n. 2 (CA4 1999).** Our grant of certiorari did not encompass Brzonkala's Title IX claims, and we thus do not consider them in this opinion.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Section 13981 was part of the Violence Against Women Act of 1994, § 40302, 108 Stat. 1941-1942. **[***13]** It states that "persons within the United States shall have the right to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b). To enforce that right, subsection (c) declares:

> "A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate."

Section 13981 defines a "crime" of violence motivated by "gender" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an **[*606]** animus based on the victim's gender." § 13981(d)(1). It also provides that the term "crime of violence" includes any

> "(A) . . . act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that **[***14]** would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and
>
> "(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken." § 13981(d)(2). **[**1748]**

Further clarifying the broad scope of § 13981's civil remedy, subsection (e)(2) states that

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"nothing" in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c) of this section." And subsection (e)(3) provides a § 13981 litigant with a choice of forums: Federal and state courts "shall have concurrent jurisdiction" over complaints brought under the section.

Although the foregoing language of § 13981 covers a wide swath of criminal conduct, Congress placed some limitations on the section's federal civil remedy. Subsection (e)(1) states **[***15]** that "nothing" in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender." Subsection (e)(4) further states that § 13981 shall not be construed "to confer on the courts of the United States jurisdiction over any State law claim seeking **[*607]** the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree."

[2A]
Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. "The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written." *Marbury* v. *Madison*, 5 U.S. 137, 1 Cranch 137, 176, 2 L. Ed. 60 (1803) (Marshall, C. J.). Congress explicitly identified the sources of federal authority on which it relied in enacting § 13981. It said that a "federal civil rights cause of action" is established "pursuant" to the affirmative power of Congress . . . under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of **[***16]** the Constitution." 42 U.S.C. § 13981(a). We address Congress' authority to enact this remedy under each of these constitutional provisions in turn.

II

[2B]
Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds. See *United States* v. *Lopez*, 514 U.S. at 568, 577-578 (KENNEDY, J., concurring); *United States* v. *Harris*, 106 U.S. at 635. With this presumption of constitutionality in mind, we turn to the question whether § 13981 falls within Congress' power under Article I, § 8, of the Constitution. Brzonkala and the United States rely upon the third clause of the Article, which gives Congress power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[3]
As we discussed at length in *Lopez*, our interpretation of the Commerce Clause has changed as our Nation has developed. See *Lopez*, 514 U.S. at 552-557; *id.*, at 568-574 (KENNEDY, J., concurring); *id.*, at 584, 593-599 (THOMAS, J., **[***17]** concurring). We need not repeat that detailed review of **[*608]** the Commerce Clause's history here; it suffices to say that, in the years since *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 81 L. Ed. 893, 57 S. Ct. 615 (1937), Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted. See *Lopez*, 514 U.S. at 555-556; *id.*, at 573-574 (KENNEDY, J., concurring).

Lopez emphasized, however, that even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds.

> *Id.*, at 557.
> "Even [our] modern-era precedents which have expanded congressional power **[**1749]** under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate

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commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between **[***18]** what is national and what is local and create a completely centralized government.'" *Id.*, at 556-557 (quoting *Jones & Laughlin Steel*, *supra*, at 37). n3

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n3 JUSTICE SOUTER's dissent takes us to task for allegedly abandoning *Jones & Laughlin Steel* in favor of an inadequate "federalism of some earlier time." *Post,* at 15-17, 29. As the foregoing language from *Jones & Laughlin Steel* makes clear however, this Court has always recognized a limit on the commerce power inherent in "our dual system of government." 301 U.S. at 37. It is the dissent's remarkable theory that the commerce power is without judicially enforceable boundaries that disregards the Court's caution in *Jones & Laughlin Steel* against allowing that power to "effectually obliterate the distinction between what is national and what is local." *Ibid.*

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[4]
As we observed in *Lopez*, modern Commerce Clause jurisprudence has "identified three broad categories of activity that Congress may regulate **[***19]** under its commerce power." **[*609]** 514 U.S. at 558 (citing *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-277, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981); *Perez* v. *United States*, 402 U.S. 146, 150, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971)). "First, Congress may regulate the use of the channels of interstate commerce." 514 U.S. at 558 (citing *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964); *United States* v. *Darby*, 312 U.S. 100, 114, 85 L. Ed. 609, 61 S. Ct. 451 (1941)). "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." 514 U.S. at 558 (citing *Shreveport Rate Cases*, 234 U.S. 342 (1914); *Southern R. Co.* v. *United States*, 222 U.S. 20, 32 S. Ct. 2, 56 L. Ed. 72 (1911); *Perez*, *supra*, at 150). "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce." 514 U.S. at 558-559 **[***20]** (citing *Jones & Laughlin Steel*, *supra*, at 37).

Petitioners do not contend that these cases fall within either of the first two of these categories of Commerce Clause regulation. They seek to sustain § 13981 as a regulation of activity that substantially affects interstate commerce. Given § 13981's focus on gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce), we agree that this is the proper inquiry.

[5A]
[6A]
Since *Lopez* most recently canvassed and clarified our case law governing this third category of Commerce Clause regulation, it provides the proper framework for conducting the required analysis of § 13981. In *Lopez*, we held that the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), which made it a federal crime to knowingly possess a firearm in a school zone, exceeded Congress' authority under the Commerce Clause. See 514 U.S. at 551. Several significant considerations contributed to our decision. **[*610]**

First, we observed that § 922(q) was "a criminal statute that by its terms has nothing **[***21]** to do with 'commerce' or any sort of economic enterprise, however **[**1750]**

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Citation: **514 U.S. 549,AT 551**

*514 U.S. 549, *; 115 S. Ct. 1624, **;*
*1995 U.S. LEXIS 3039, ***; 131 L. Ed. 2d 626*

UNITED STATES, PETITIONER v. ALFONSO LOPEZ, JR.

No. 93-1260

SUPREME COURT OF THE UNITED STATES

514 U.S. 549; 115 S. Ct. 1624; 1995 U.S. LEXIS 3039; 131 L. Ed. 2d 626; 63 U.S.L.W. 4343; 95 Cal. Daily Op. Service 3074; 8 Fla. L. Weekly Fed. S 752

November 8, 1994, Argued
April 26, 1995, Decided

PRIOR HISTORY: [*1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

DISPOSITION: 2 F.3d 1342, affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant sought review of reversal by the Court of Appeals for the Fifth Circuit of respondent's conviction under the Gun-Free School Zones Act of 1990 (GFSZA), 18 U.S.C.S. § 922(q)(1)(A) (1988).

OVERVIEW: Respondent was convicted of violating the Gun-Free School Zones Act of 1990 (GFSZA), 18 U.S.C.S. § 922(q)(1)(A) (1988) after carrying a concealed handgun and bullets to school. Respondent's conviction was reversed on appeal. In upholding the reversal, the court held the GFSZA was invalid as it was beyond the power of congress under the commerce clause, U.S. Const. art. I, § 8, cl. 3. The GFSZA had nothing to do with commerce or any economic activity, and therefore could not be sustained as a regulation of activity arising out of or connected with a commercial transaction, which viewed in the aggregate, substantially affected interstate commerce.

OUTCOME: Reversal of respondent's conviction upheld because GFSZA was invalid; it was not a regulation of activity arising out of or connected with a commercial transaction which substantially affected interstate commerce, and was thus beyond the power of congress under the commerce clause.

CORE TERMS: commerce, interstate commerce, commerce clause, gun, commerce power, regulation, federal government, interstate, firearm, intrastate, regulated, manufacturing, agriculture, wheat, violence, zone, manufacture, substantially affect, skills, power to regulate, rational basis, enumerated, learning, enact, indirect, classroom, violent crime, productivity, regulating, federalism

CORE CONCEPTS - ✦ Hide Concepts

Constitutional Law : Congressional Powers & Duties : Commerce Clause
See U.S. Const. art. I, § 8, cl. 3.

Constitutional Law : Congressional Powers & Duties : Commerce Clause

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sense competes with wheat in commerce." 317 U.S. at 128.

[1C]
[3A]
Section 922(q) is a criminal statute that by its terms has nothing to do with **[**1631]** "commerce" or any sort of economic enterprise, however broadly one might define those terms. n3 Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

[3B]

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n3 Under our federal system, the "'States possess primary authority for defining and enforcing the criminal law.'" *Brecht* v. *Abrahamson*, 507 U.S. 619, 635, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993) (quoting *Engle* v. *Isaac*, 456 U.S. 107, 128, 71 L. Ed. 2d 783, 102 S. Ct. 1558 (1982)); see also *Screws* v. *United States*, 325 U.S. 91, 109, 89 L. Ed. 1495, 65 S. Ct. 1031 (1945) (plurality opinion) ("Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States"). When Congress criminalizes conduct already denounced as criminal by the States, it effects a "'change in the sensitive relation between federal and state criminal jurisdiction.'" *United States* v. *Enmons*, 410 U.S. 396, 411-412, 35 L. Ed. 2d 379, 93 S. Ct. 1007 (1973) (quoting *United States* v. *Bass*, 404 U.S. 336, 349, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971)). The Government acknowledges that § 922(q) "displace[s] state policy choices in . . . that its prohibitions apply even in States that have chosen not to outlaw the conduct in question." Brief for United States 29, n. 18; see also Statement of President George Bush on Signing the Crime Control Act of 1990, 26 Weekly Comp. of Pres. Doc. 1944, 1945 (Nov. 29, 1990) ("Most egregiously, section [922(q)] inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed upon the States by the Congress").

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[*23]**

[1D]
Second, § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. For example, in *United States* v. *Bass*, 404 U.S. 336, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971), the Court interpreted former 18 U.S.C. § 1202(a), which made it **[*562]** a crime for a felon to "receive, posses[s], or transport in commerce or affecting commerce . . . any firearm." 404 U.S. at 337. The Court interpreted the possession component of § 1202(a) to require an additional nexus to interstate commerce both because the statute was ambiguous and because "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Id.*, at 349. The *Bass* Court set aside the conviction because although the Government had demonstrated that Bass had possessed a firearm, it had failed "to show the requisite nexus with interstate commerce." *Id.*, at 347. The Court thus interpreted the statute to reserve the constitutional question whether Congress

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could **[***24]** regulate, without more, the "mere possession" of firearms. See *id.*, at 339, n. 4; see also *United States* v. *Five Gambling Devices*, 346 U.S. 441, 448, 98 L. Ed. 179, 74 S. Ct. 190 (1953) (plurality opinion) ("The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative"). Unlike the statute in *Bass*, § 922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.

Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce, see, *e. g.*, *Preseault* v. *ICC*, 494 U.S. at 17, the Government concedes that "neither the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of **[***25]** gun possession in a school zone." Brief for United States 5-6. We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. See *McClung*, 379 U.S. at 304; **[*563]** see also *Perez*, 402 U.S. at 156 ("Congress need [not] make particularized findings in order to legislate"). But to the **[**1632]** extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here. n4

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n4 We note that on September 13, 1994, President Clinton signed into law the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796. Section 320904 of that Act, *id.*, at 2125, amends § 922(q) to include congressional findings regarding the effects of firearm possession in and around schools upon interstate and foreign commerce. The Government does not rely upon these subsequent findings as a substitute for the absence of findings in the first instance. Tr. of Oral Arg. 25 ("We're not relying on them in the strict sense of the word, but we think that at a very minimum they indicate that reasons can be identified for why Congress wanted to regulate this particular activity").

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[*26]**

[4]
The Government argues that Congress has accumulated institutional expertise regarding the regulation of firearms through previous enactments. Cf. *Fullilove* v. *Klutznick*, 448 U.S. 448, 503, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) (Powell, J., concurring). We agree, however, with the Fifth Circuit that importation of previous findings to justify § 922(q) is especially inappropriate here because the "prior federal enactments or Congressional findings [do not] speak to the subject matter of section 922(q) or its relationship to interstate commerce. Indeed, section 922(q) plows thoroughly new ground and represents a sharp break with the long-standing pattern of federal firearms legislation." 2 F.3d at 1366.

The Government's essential contention, *in fine*, is that we may determine here that § 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. Brief for United States 17. The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs **[***27]** of violent **[*564]** crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. See *United States* v. *Evans*, 928 F.2d 858, 862 (CA9 1991). Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. Cf. *Heart of Atlanta Motel*, 379 U.S. at 253. The

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Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.

We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. See **[***28]** Tr. of Oral Arg. 8-9. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Although JUSTICE BREYER argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not. JUSTICE BREYER posits that there might be some limitations on Congress' **[*565]** commerce power, such as family law or certain aspects of education. *Post*, at 624. These suggested limitations, when viewed in light of the dissent's expansive analysis, are devoid of substance.

JUSTICE BREYER focuses, for the **[***29]** most part, on the threat that firearm possession in **[**1633]** and near schools poses to the educational process and the potential economic consequences flowing from that threat. *Post*, at 619-624. Specifically, the dissent reasons that (1) gun-related violence is a serious problem; (2) that problem, in turn, has an adverse effect on classroom learning; and (3) that adverse effect on classroom learning, in turn, represents a substantial threat to trade and commerce. *Post*, at 623. This analysis would be equally applicable, if not more so, to subjects such as family law and direct regulation of education.

For instance, if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, *a fortiori*, it also can regulate the educational process directly. Congress could determine that a school's curriculum has a "significant" effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant "effect on classroom learning," cf. *ibid.*, and that, in turn, has a substantial effect on interstate **[***30]** commerce.

[5]
JUSTICE BREYER rejects our reading of precedent and argues that "Congress . . . could rationally conclude that schools fall on the commercial side of the line." *Post*, at 629. Again, JUSTICE BREYER's rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial. Under the dissent's rationale, Congress could just as easily look at child rearing as "falling on the commercial side of the line" because it provides a "valuable service -- namely, to equip [children] with the skills they need to survive in life and, more specifically, in the workplace." *Ibid.* We do not doubt that Congress **[*566]** has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools.

[6]

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Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those **[***31]** enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender "legal uncertainty." *Post*, at 630. As Chief Justice Marshall stated in

> *McCulloch* v. *Maryland*, 17 U.S. 316, 4 Wheat. 316, 4 L. Ed. 579 (1819): "The [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist." *Id.*, at 405.

See also *Gibbons* v. *Ogden*, 9 Wheat., at 195 ("The enumeration presupposes something not enumerated"). The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation. See Art. I, § 8. Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the Judiciary's duty "to say what the law is." *Marbury* v. *Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803) **[***32]** (Marshall, C. J.). Any possible benefit from eliminating this "legal uncertainty" would be at the expense of the Constitution's system of enumerated powers.

In *Jones & Laughlin Steel*, 301 U.S. at 37, we held that the question of congressional power under the Commerce Clause "is necessarily one of degree." To the same effect **[*567]** is the concurring opinion of Justice Cardozo in *Schechter Poultry:*

> "There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.'" 295 U.S. at 554 **[**1634]** (quoting *United States* v. *A. L. A. Schechter Poultry Corp.*, 76 F.2d 617, 624 (CA2 1935) (L. Hand, J., concurring)).

[1E]
These are not precise formulations, and in the nature of things they cannot be. But we think they point the way to a correct decision of this case. The possession of a gun in a local school **[***33]** zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. See *supra*, at 556-558. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, cf. *Gibbons* v. *Ogden*, *supra*, at 195, and that there

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never will be a distinction between what is **[*568]** truly national and what is truly local, **[***34]** cf. *Jones & Laughlin Steel, supra,* at 30. This we are unwilling to do.

For the foregoing reasons the judgment of the Court of Appeals is

Affirmed.

CONCURBY: KENNEDY; THOMAS

CONCUR: JUSTICE KENNEDY, with whom JUSTICE O'CONNOR joins, concurring.

The history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the Founders knew to the single, national market still emergent in our own era counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power. That history gives me some pause about today's decision, but I join the Court's opinion with these observations on what I conceive to be its necessary though limited holding.

Chief Justice Marshall announced that the national authority reaches "that commerce which concerns more States than one" and that the commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons* v. *Ogden,* 22 U.S. 1, 9 Wheat. 1, 194, 196, 6 L. Ed. 23 (1824). His statements can be understood now as an early and authoritative recognition that the **[***35]** Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise. The progression of our Commerce Clause cases from *Gibbons* to the present was not marked, however, by a coherent or consistent course of interpretation; for neither the course of technological advance nor the foundational principles for the jurisprudence itself were self-evident to the courts that sought to resolve contemporary disputes by enduring principles.

Furthermore, for almost a century after the adoption of the Constitution, the Court's Commerce Clause decisions did not concern the authority of Congress to legislate. Rather, **[*569]** the Court faced the related but quite distinct question of the authority of the States to regulate matters that would be within the commerce power had Congress chosen to act. The simple fact was that in the early years of the Republic, Congress seldom perceived the necessity to exercise its power in circumstances where its authority would be called into question. The Court's initial task, therefore, was to elaborate the theories that would permit the States to act where Congress had not done so. Not the least part of the problem was the unresolved **[***36]** question whether the congressional power was exclusive, a question reserved by Chief Justice Marshall in *Gibbons* v. *Ogden, supra,* at 209-210.

At the midpoint of the 19th century, the Court embraced the principle that the States and the National Government both have authority to regulate certain matters absent the **[**1635]** congressional determination to displace local law or the necessity for the Court to invalidate local law because of the dormant national power. *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots,* 53 U.S. 299, 12 HOW 299, 318-321, 13 L. Ed. 996 (1852). But the utility of that solution was not at once apparent, see generally F. Frankfurter, The Commerce Clause under Marshall, Taney and Waite (1937) (hereinafter Frankfurter), and difficulties of application persisted, see *Leisy* v. *Hardin,* 135 U.S. 100, 122-125, 34 L. Ed. 128, 10 S. Ct. 681 (1890).

One approach the Court used to inquire into the lawfulness of state authority was to draw content-based or subject-matter distinctions, thus defining by semantic or formalistic categories those activities that were commerce and those that were not. For instance, in deciding that a State could prohibit the in-state **[***37]** manufacture of liquor intended for out-of-state shipment, it distinguished between manufacture and commerce. "No distinction is more popular to the common mind, or more clearly expressed in economic and political

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literature, than that between manufacture and commerce. Manufacture is transformation -- the fashioning of raw materials **[*570]** into a change of form for use. The functions of commerce are different." *Kidd* v. *Pearson*, 128 U.S. 1, 20, 32 L. Ed. 346, 9 S. Ct. 6 (1888). Though that approach likely would not have survived even if confined to the question of a State's authority to enact legislation, it was not at all propitious when applied to the quite different question of what subjects were within the reach of the national power when Congress chose to exercise it.

This became evident when the Court began to confront federal economic regulation enacted in response to the rapid industrial development in the late 19th century. Thus, it relied upon the manufacture-commerce dichotomy in *United States* v. *E. C. Knight Co.*, 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249 (1895), where a manufacturers' combination controlling some 98% of the Nation's domestic sugar refining capacity was **[***38]** held to be outside the reach of the Sherman Act. Conspiracies to control manufacture, agriculture, mining, production, wages, or prices, the Court explained, had too "indirect" an effect on interstate commerce. *Id.*, at 16. And in *Adair* v. *United States*, 208 U.S. 161, 52 L. Ed. 436, 28 S. Ct. 277 (1908), the Court rejected the view that the commerce power might extend to activities that, although local in the sense of having originated within a single State, nevertheless had a practical effect on interstate commercial activity. The Court concluded that there was not a "legal or logical connection . . . between an employe's membership in a labor organization and the carrying on of interstate commerce," *id.*, at 178, and struck down a federal statute forbidding the discharge of an employee because of his membership in a labor organization. See also *The Employers' Liability Cases*, 207 U.S. 463, 497, 52 L. Ed. 297, 28 S. Ct. 141 (1908) (invalidating statute creating negligence action against common carriers for personal injuries of employees sustained in the course of employment, because the statute "regulates the persons **[***39]** because they engage in interstate commerce and does not alone regulate the business of interstate commerce").

[*571] Even before the Court committed itself to sustaining federal legislation on broad principles of economic practicality, it found it necessary to depart from these decisions. The Court disavowed *E. C. Knight*'s reliance on the manufacturing-commerce distinction in *Standard Oil Co. of N. J.* v. *United States*, 221 U.S. 1, 68-69, 55 L. Ed. 619, 31 S. Ct. 502 (1911), declaring that approach "unsound." The Court likewise rejected the rationale of *Adair* when it decided, in *Texas & New Orleans R. Co.* v. *Railway Clerks*, 281 U.S. 548, 570-571, 50 S. Ct. 427, 74 L. Ed. 1034 (1930), that Congress had the power to regulate matters pertaining to the organization of railroad workers.

In another line of cases, the Court addressed Congress' efforts to impede local activities it considered undesirable by prohibiting the interstate movement of some essential element. In the *Lottery Case*, 188 U.S. 321, 47 L. Ed. 492, 23 S. Ct. 321 (1903), the Court rejected the argument that Congress lacked power to prohibit the interstate movement of lottery tickets because it had power only **[***40]** to regulate, not to prohibit. See also **[**1636]** *Hipolite Egg Co.* v. *United States*, 220 U.S. 45, 55 L. Ed. 364, 31 S. Ct. 364 (1911); *Hoke* v. *United States*, 227 U.S. 308, 57 L. Ed. 523, 33 S. Ct. 281 (1913). In *Hammer* v. *Dagenhart*, 247 U.S. 251, 62 L. Ed. 1101, 38 S. Ct. 529 (1918), however, the Court insisted that the power to regulate commerce "is directly the contrary of the assumed right to forbid commerce from moving," *id.*, at 269-270, and struck down a prohibition on the interstate transportation of goods manufactured in violation of child labor laws.

Even while it was experiencing difficulties in finding satisfactory principles in these cases, the Court was pursuing a more sustainable and practical approach in other lines of decisions, particularly those involving the regulation of railroad rates. In the *Minnesota Rate Cases*, 230 U.S. 352, 57 L. Ed. 1511, 33 S. Ct. 729 (1913), the Court upheld a state rate order, but observed that Congress might be empowered to regulate in this area if "by reason of the interblending of the interstate and intrastate operations of interstate carriers" the regulation of interstate rates could not be maintained **[***41]** without restrictions on "intrastate **[*572]** rates which substantially affect the former." *Id.*, at 432-433. And in the *Shreveport*

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Rate Cases, 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914), the Court upheld an Interstate Commerce Commission order fixing railroad rates with the explanation that congressional authority, "extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." *Id.*, at 351.

Even the most confined interpretation of "commerce" would embrace transportation between the States, so the rate cases posed much less difficulty for the Court than cases involving manufacture or production. Nevertheless, the Court's recognition of the importance of a practical conception of the commerce power was not altogether confined to the rate **[***42]** cases. In *Swift & Co.* v. *United States*, 196 U.S. 375, 49 L. Ed. 518, 25 S. Ct. 276 (1905), the Court upheld the application of federal antitrust law to a combination of meat dealers that occurred in one State but that restrained trade in cattle "sent for sale from a place in one State, with the expectation that they will end their transit . . . in another." *Id.*, at 398. The Court explained that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Ibid.* Chief Justice Taft followed the same approach in upholding federal regulation of stockyards in *Stafford* v. *Wallace*, 258 U.S. 495, 66 L. Ed. 735, 42 S. Ct. 397 (1922). Speaking for the Court, he rejected a "nice and technical inquiry," *id.*, at 519, when the local transactions at issue could not "be separated from the movement to which they contribute," *id.*, at 516.

Reluctance of the Court to adopt that approach in all of its cases caused inconsistencies in doctrine to persist, however. In addressing New Deal legislation the Court **[***43]** resuscitated **[*573]** the abandoned abstract distinction between direct and indirect effects on interstate commerce. See *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 309, 80 L. Ed. 1160, 56 S. Ct. 855 (1936) (Act regulating price of coal and wages and hours for miners held to have only "secondary and indirect" effect on interstate commerce); *Railroad Retirement Bd.* v. *Alton R. Co.*, 295 U.S. 330, 368, 79 L. Ed. 1468, 55 S. Ct. 758 (1935) (compulsory retirement and pension plan for railroad carrier employees too "remote from any regulation of commerce as such"); *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 548, 79 L. Ed. 1570, 55 S. Ct. 837 (1935) (wage and hour law provision of National Industrial Recovery Act had "no direct relation to interstate commerce").

The case that seems to mark the Court's definitive commitment to the practical conception of the commerce power is *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 81 L. Ed. 893, 57 S. Ct. 615 (1937), where the Court sustained labor laws that applied to **[**1637]** manufacturing facilities, making no real attempt to distinguish *Carter, supra*, and *Schechter, supra*. 301 U.S. at 40-41. **[***44]** The deference given to Congress has since been confirmed. *United States* v. *Darby*, 312 U.S. 100, 116-117, 85 L. Ed. 609, 61 S. Ct. 451 (1941), overruled *Hammer* v. *Dagenhart, supra*. And in *Wickard* v. *Filburn*, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942), the Court disapproved *E. C. Knight* and the entire line of direct-indirect and manufacture-production cases, explaining that "broader interpretations of the Commerce Clause [were] destined to supersede the earlier ones," 317 U.S. at 122, and "whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution," *id.*, at 123, n. 24. Later examples of the exercise of federal power where commercial transactions were the subject of regulation include *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964), *Katzenbach* v. *McClung*, 379 U.S. 294, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964), and *Perez* v. *United States*, 402 U.S. 146, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971). **[***45]** These and like authorities are within the fair ambit **[*574]** of the Court's practical conception of commercial regulation and are not called in question by our decision today.

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The history of our Commerce Clause decisions contains at least two lessons of relevance to this case. The first, as stated at the outset, is the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause. The second, related to the first but of even greater consequence, is that the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. *Stare decisis* operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature. That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy, dependent then upon production and trading practices that had changed but little over the preceding centuries; it also mandates against returning to the time when congressional authority **[***46]** to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system. Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.

In referring to the whole subject of the federal and state balance, we said this just three Terms ago:

> "This framework has been sufficiently flexible over the past two centuries to allow for enormous changes in the nature of government. The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses: first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such **[*575]** responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role." *New York* v. *United States*, 505 U.S. 144, 157, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992) (emphasis deleted).

It does **[***47]** not follow, however, that in every instance the Court lacks the authority and responsibility to review congressional attempts to alter the federal balance. This case requires us to consider our place in the design of the Government and to appreciate the significance of federalism in the whole structure of the Constitution.

Of the various structural elements in the Constitution, separation of powers, checks and balances, judicial review, and federalism, only concerning the last does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role **[**1638]** in maintaining the design contemplated by the Framers. Although the resolution of specific cases has proved difficult, we have derived from the Constitution workable standards to assist in preserving separation of powers and checks and balances. See, *e. g.*, *Prize Cases*, 67 U.S. 635, 2 Black 635, 17 L. Ed. 459 (1863); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863 (1952); *United States* v. *Nixon*, 418 U.S. 683, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974); *Buckley* v. *Valeo*, 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976); **[***48]** *INS* v. *Chadha*, 462 U.S. 919, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983); *Bowsher* v. *Synar*, 478 U.S. 714, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986); *Plaut* v. *Spendthrift Farm, Inc.*, *ante*, p. 211. These standards are by now well accepted. Judicial review is also established beyond question, *Marbury* v. *Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803), and though we may differ when applying its principles, see, *e. g.*, *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992), its legitimacy is undoubted. Our role in preserving the federal balance seems more tenuous.

There is irony in this, because of the four structural elements in the Constitution just

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mentioned, federalism was the unique contribution of the Framers to political science and political theory. See Friendly, Federalism: A Foreword, 86 **[*576]** Yale L. J. 1019 (1977); G. Wood, The Creation of the American Republic, 1776-1787, pp. 524-532, 564 (1969). Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. "In the compound republic of America, the power **[***49]** surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, p. 323 (C. Rossiter ed. 1961) (J. Madison). See also *Gregory* v. *Ashcroft*, 501 U.S. 452, 458-459, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty"); *New York* v. *United States, supra*, at 181 ("The Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive **[***50]** from the diffusion of sovereign power'") (quoting *Coleman* v. *Thompson*, 501 U.S. 722, 759, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) (Blackmun, J., dissenting)).

The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If, as Madison expected, the Federal and State Governments are to control each other, see The Federalist No. 51, and hold each other in check by competing for the affections of the people, see The Federalist No. 46, those citizens must have some means of knowing which of **[*577]** the two governments to hold accountable for the failure to perform a given function. "Federalism serves to assign political responsibility, not to obscure it." *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 636, 119 L. Ed. 2d 410, 112 S. Ct. 2169 (1992). Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political **[***51]** responsibility would become illusory. Cf. *New York* v. *United States, supra*, at 155-169; *FERC* v. *Mississippi*, 456 U.S. 742, 787, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982) (O'CONNOR, J., concurring in judgment in part and dissenting in part). The resultant inability to hold either branch of the government answerable **[**1639]** to the citizens is more dangerous even than devolving too much authority to the remote central power.

To be sure, one conclusion that could be drawn from The Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process. Madison's observation that "the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due," The Federalist No. 46, p. 295 (C. Rossiter ed. 1961), can be interpreted to say that the essence of responsibility for a shift in power from the State to the Federal Government rests upon a political judgment, though he added assurance that "the State governments could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered, **[***52]** " *ibid.* Whatever the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance.

For these reasons, it would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. In the Webster-Hayne Debates, see The Great Speeches and **[*578]** Orations of Daniel Webster 227-272 (E. Whipple ed. 1879), and the debates over the Civil Rights Acts, see Hearings on S. 1732 before the Senate Committee on Commerce, 88th Cong., 1st Sess., pts. 1-3 (1963), some Congresses have accepted responsibility to confront the great questions of the proper federal balance in terms

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of lasting consequences for the constitutional design. The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.

At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete **[***53]** renunciation of the judicial role. Although it is the obligation of all officers of the Government to respect the constitutional design, see *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 466, 105 L. Ed. 2d 377, 109 S. Ct. 2558 (1989); *Rostker* v. *Goldberg*, 453 U.S. 57, 64, 69 L. Ed. 2d 478, 101 S. Ct. 2646 (1981), the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.

In the past this Court has participated in maintaining the federal balance through judicial exposition of doctrines such as abstention, see, *e. g.*, *Younger* v. *Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971); *Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941); *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943), the rules for determining the primacy of state law, see, *e. g.*, *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), the doctrine of adequate and independent state grounds, see, *e. g.*, *Murdock* v. *Memphis*, 87 U.S. 590, 20 Wall. 590, 22 L. Ed. 429 (1875); **[***54]** *Michigan* v. *Long*, 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983), the whole jurisprudence of pre-emption, see, *e. g.*, *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992), and many of the rules governing our habeas jurisprudence, see, *e. g.*, *Coleman* v. *Thompson*, 501 U.S. 722, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991); *McCleskey* **[*579]** v. *Zant*, 499 U.S. 467, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991); *Teague* v. *Lane*, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989); *Rose* v. *Lundy*, 455 U.S. 509, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (1982); *Wainwright* v. *Sykes*, 433 U.S. 72, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977).

Our ability to preserve this principle under the Commerce Clause has presented a much greater challenge. See *supra*, at 568-574. "This clause has throughout the Court's history been the chief source of its adjudications regarding federalism," and "no other body of opinions affords a fairer or more revealing test of judicial qualities." Frankfurter 66-67. But as the branch whose distinctive duty it is to declare "what the law is," *Marbury* v. **[**1640]** *Madison*, 1 Cranch, at 177, **[***55]** we are often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines. The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights even though clear and bright lines are often absent in the latter class of disputes. See *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 630, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989) (O'CONNOR, J., concurring in part and concurring in judgment) ("We cannot avoid the obligation to draw lines, often close and difficult lines" in adjudicating constitutional rights). But our cases do not teach that we have no role at all in determining the meaning of the Commerce Clause.

Our position in enforcing the dormant Commerce Clause is instructive. The Court's doctrinal approach in that area has likewise "taken some turns." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, *ante*, at 180. Yet in contrast to the prevailing skepticism that surrounds our ability to give meaning to the **[***56]** explicit text of the Commerce Clause, there is widespread acceptance of our authority to enforce the dormant Commerce Clause, which we have but inferred from the constitutional structure as a limitation on the power of the States. One element of our dormant Commerce Clause jurisprudence has been the principle that the States may not **[*580]** impose regulations that place an undue burden on interstate commerce, even where those regulations do not discriminate between in-state and out-of-state businesses. See *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476

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The commerce power, U.S. Const. art. I, § 8, cl. 3, is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.

Constitutional Law : Congressional Powers & Duties : Commerce Clause

Where the interstate and intrastate aspects of commerce are so mingled together that full regulation of interstate commerce requires incidental regulation of intrastate commerce, the commerce clause, U.S. Const. art. I, § 8, cl. 3, authorizes such regulation.

Constitutional Law : Congressional Powers & Duties : Commerce Clause

The power of congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of congress to regulate interstate commerce.

Constitutional Law : Congressional Powers & Duties : Commerce Clause

Even if an activity is local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as direct or indirect.

Constitutional Law : Congressional Powers & Duties : Commerce Clause

The scope of the interstate commerce power, U.S. Const. art. I, § 8, cl. 3, must be considered in the light of the dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. Congress may regulate intrastate activity that has a "substantial effect" on interstate commerce and activity that exerts a substantial economic effect on interstate commerce. The court decides whether a rational basis exists for concluding that a regulated activity sufficiently affects interstate commerce.

Constitutional Law : Congressional Powers & Duties : Commerce Clause

There are three broad categories of activity that congress may regulate under its commerce power, U.S. Const. art. I, § 8, cl. 3. First, congress may regulate the use of the channels of interstate commerce. Second, congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.

Constitutional Law : Congressional Powers & Duties : Commerce Clause

The proper test of whether an activity substantially affects interstate commerce requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

Constitutional Law : Congressional Powers & Duties : Commerce Clause
Criminal Law & Procedure : Criminal Offenses : Weapons Offenses : Possession Offenses

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U.S. 573, 579, 90 L. Ed. 2d 552, 106 S. Ct. 2080 (1986) (citing *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970)). Distinguishing between regulations that do place an undue burden on interstate commerce and regulations that do not depends upon delicate judgments. True, if we invalidate a state law, Congress can in effect overturn our judgment, whereas in a case announcing that Congress has transgressed its authority, the decision is more consequential, for it stands unless Congress can revise its law to demonstrate its commercial character. This difference no doubt informs the circumspection **[***57]** with which we invalidate an Act of Congress, but it does not mitigate our duty to recognize meaningful limits on the commerce power of Congress.

The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required. As THE CHIEF JUSTICE explains, unlike the earlier cases to come before the Court here neither the actors nor their conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus. See *ante*, at 559-561. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far. If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.

An interference of these dimensions occurs here, for it is well established that education is a traditional concern of the States. *Milliken* v. *Bradley*, 418 U.S. 717, 741-742, 41 L. Ed. 2d 1069, 94 S. Ct. 3112 (1974); **[*581]** **[***58]** *Epperson* v. *Arkansas*, 393 U.S. 97, 104, 21 L. Ed. 2d 228, 89 S. Ct. 266 (1968). The proximity to schools, including of course schools owned and operated by the States or their subdivisions, is the very premise for making the conduct criminal. In these circumstances, we have a particular duty to ensure that the federal-state balance is not destroyed. Cf. *Rice, supra*, at 230 ("We start with the assumption that the historic police powers of the States" are not displaced by a federal statute "unless that was the clear and manifest purpose of Congress"); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 146, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963).

[1641]** While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear. See *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 49-50, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973); **[***59]** *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311, 76 L. Ed. 747, 52 S. Ct. 371 (1932) (Brandeis, J., dissenting).

If a State or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are sufficient to enact those measures. Indeed, over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds. See, *e. g.*, Alaska Stat. Ann. §§ 11.61.195(a)(2)(A), 11.61.220(a)(4)(A) (Supp. 1994); Cal. Penal Code Ann. § 626.9 (West Supp. 1994); Mass. Gen. Laws § 269:10(j) (1992); N. J. Stat. Ann. § 2C:39-5(e) (West Supp. 1994); Va. Code Ann. § 18.2-308.1 (1988); Wis. Stat. § 948.605 (1991-1992).

Other, more practicable means to rid the schools of guns may be thought by the citizens of some States to be preferable for the safety and welfare of the schools those States are **[*582]** charged with maintaining. See Brief for National Conference of State Legislatures et al. as *Amici Curiae* 26-30 (injection of federal officials into local problems causes friction and diminishes political accountability of state and local governments). These might include **[***60]** inducements to inform on violators where the information leads to arrests or confiscation of the guns, see Lima, Schools May Launch Weapons Hot Line, Los Angeles Times, Ventura Cty. East ed., Jan. 13, 1995, p. B1, col. 5; Reward for Tips on Guns in Tucson

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Schools, The Arizona Republic, Jan. 7, 1995, p. B2; programs to encourage the voluntary surrender of guns with some provision for amnesty, see Zaidan, Akron Rallies to Save Youths, The Plain Dealer, Mar. 2, 1995, p. 1B; Swift, Legislators Consider Plan to Get Guns Off Streets, Hartford Courant, Apr. 29, 1992, p. A4; penalties imposed on parents or guardians for failure to supervise the child, see, *e. g.*, Okla. Stat., Tit. 21, § 858 (Supp. 1995) (fining parents who allow students to possess firearm at school); Tenn. Code Ann. § 39-17-1312 (Supp. 1992) (misdemeanor for parents to allow student to possess firearm at school); Straight Shooter: Gov. Casey's Reasonable Plan to Control Assault Weapons, Pittsburgh Post-Gazette, Mar. 14, 1994, p. B2 (proposed bill); Bailey, Anti-Crime Measures Top Legislators' Agenda, Los Angeles Times, Orange Cty. ed., Mar. 7, 1994, p. B1, col. 2 (same); Krupa, New Gun-Control Plans Could Tighten Local Law, The Boston Globe, **[***61]** June 20, 1993, p. 29; laws providing for suspension or expulsion of gun-toting students, see, *e. g.*, Ala. Code § 16-1-24.1 (Supp. 1994); Ind. Code § 20-8.1-5-4(b)(1)(D) (1993); Ky. Rev. Stat. Ann. § 158.150(1)(a) (Michie 1992); Wash. Rev. Code § 9.41.280 (1994), or programs for expulsion with assignment to special facilities, see Martin, Legislators Poised to Take Harsher Stand on Guns in Schools, The Seattle Times, Feb. 1, 1995, p. B1 (automatic year-long expulsion for students with guns and intense semester-long reentry program).

[*583] The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term. The tendency of this statute to displace state regulation in areas of traditional state concern is evident from its territorial operation. There are over 100,000 elementary and secondary schools in the United States. See U.S. Dept. of Education, National Center for Education Statistics, Digest of Education Statistics 73, 104 (NCES 94-115, 1994) (Tables 63, 94). Each **[***62]** of these now has an invisible federal zone extending 1,000 feet beyond the (often irregular) boundaries of the school property. In some communities no doubt it would be difficult to navigate without infringing on those zones. Yet throughout these areas, school officials would find their own programs for the prohibition **[**1642]** of guns in danger of displacement by the federal authority unless the State chooses to enact a parallel rule.

This is not a case where the etiquette of federalism has been violated by a formal command from the National Government directing the State to enact a certain policy, cf. *New York* v. *United States*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992), or to organize its governmental functions in a certain way, cf. *FERC* v. *Mississippi*, 456 U.S. at 781 (O'CONNOR, J., concurring in judgment in part and dissenting in part). While the intrusion on state sovereignty may not be as severe in this instance as in some of our recent Tenth Amendment cases, the intrusion is nonetheless significant. Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance **[***63]** the Framers designed and that this Court is obliged to enforce.

For these reasons, I join in the opinion and judgment of the Court.

[*584] JUSTICE THOMAS, concurring.

The Court today properly concludes that the Commerce Clause does not grant Congress the authority to prohibit gun possession within 1,000 feet of a school, as it attempted to do in the Gun-Free School Zones Act of 1990, Pub. L. 101-647, 104 Stat. 4844. Although I join the majority, I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.

We have said that Congress may regulate not only "Commerce . . . among the several States," U.S. Const., Art. I, § 8, cl. 3, but also anything that has a "substantial effect" on

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such commerce. This test, if taken to its logical extreme, would give Congress a "police power" over all aspects of American life. Unfortunately, we have never come to grips with this implication of our substantial effects formula. Although we have supposedly **[***64]** applied the substantial effects test for the past 60 years, we *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power. See *New York* v. *United States*, 505 U.S. 144, 155, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992) ("No one disputes the proposition that 'the Constitution created a Federal Government of limited powers'") (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 457, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991); *Maryland* v. *Wirtz*, 392 U.S. 183, 196, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 81 L. Ed. 893, 57 S. Ct. 615 (1937). Cf. *Chisholm* v. *Georgia*, 2 U.S. 419, 2 Dall. 419, 435, 1 L. Ed. 440 (1793) (Iredell, J.) ("Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them") (emphasis deleted). Indeed, on this crucial point, the majority and JUSTICE BREYER agree in principle: The Federal **[*585]** Government has nothing approaching a police power. Compare *ante*, **[***65]** at 556-558, with *post*, at 624.

While the principal dissent concedes that there are limits to federal power, the sweeping nature of our current test enables the dissent to argue that Congress can regulate gun possession. But it seems to me that the power to regulate "commerce" can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States. Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities' effects on interstate commerce. Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination.

In an appropriate case, I believe that we must further reconsider our "substantial effects" test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting **[**1643]** our more recent Commerce Clause jurisprudence.

Today, however, I merely support the Court's conclusion with a discussion of the text, structure, and history of the Commerce Clause and an analysis of our early case law. My goal is **[***66]** simply to show how far we have departed from the original understanding and to demonstrate that the result we reach today is by no means "radical," see *post*, at 602 (STEVENS, J., dissenting). I also want to point out the necessity of refashioning a coherent test that does not tend to "obliterate the distinction between what is national and what is local and create a completely centralized government." *Jones & Laughlin Steel Corp., supra*, at 37.

I

At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes. See 1 S. Johnson, A Dictionary **[*586]** of the English Language 361 (4th ed. 1773) (defining commerce as "Intercour[s]e; exchange of one thing for another; interchange of any thing; trade; traffick"); N. Bailey, An Universal Etymological English Dictionary (26th ed. 1789) ("trade or traffic"); T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) ("Exchange of one thing for another; trade, traffick"). This understanding finds support in the etymology of the word, which literally means "with merchandise." See 3 Oxford English Dictionary 552 (2d ed. 1989) (com -- "with"; merci -- "merchandise **[***67]** "). In fact, when Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably. See The Federalist No. 4, p. 22 (J. Jay) (asserting that countries will cultivate our friendship when our "trade" is prudently regulated by Federal Government); n1 *id.*, No. 7, at 39-40 (A. Hamilton) (discussing "competitions of commerce" between States resulting from state "regulations of

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trade"); *id.*, No. 40, at 262 (J. Madison) (asserting that it was an "acknowledged object of the Convention . . . that the regulation of trade should be submitted to the general government"); Lee, Letters of a Federal Farmer No. 5, in Pamphlets on the Constitution of the United States 319 (P. Ford ed. 1888); Smith, An Address to the People of the State of New-York, in *id.*, at 107.

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n1 All references to The Federalist are to the Jacob E. Cooke 1961 edition.

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As one would expect, the term "commerce" was used in contradistinction to productive **[***68]** activities such as manufacturing and agriculture. Alexander Hamilton, for example, repeatedly treated commerce, agriculture, and manufacturing as three separate endeavors. See, *e. g.*, The Federalist No. 36, at 224 (referring to "agriculture, commerce, manufactures"); *id.*, No. 21, at 133 (distinguishing commerce, arts, and industry); *id.*, No. 12, at 74 (asserting that commerce and agriculture have shared interests). The same distinctions **[*587]** were made in the state ratification conventions. See, *e. g.*, 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 57 (J. Elliot ed. 1836) (hereinafter Debates) (T. Dawes at Massachusetts convention); *id.*, at 336 (M. Smith at New York convention).

Moreover, interjecting a modern sense of commerce into the Constitution generates significant textual and structural problems. For example, one cannot replace "commerce" with a different type of enterprise, such as manufacturing. When a manufacturer produces a car, assembly cannot take place "with a foreign nation" or "with the Indian Tribes." Parts may come from different States or other nations and hence may have been in the flow of commerce at one time, **[***69]** but manufacturing takes place at a discrete site. Agriculture and manufacturing involve the production of goods; commerce encompasses traffic in such articles.

The Port Preference Clause also suggests that the term "commerce" denoted sale and/or transport rather than business generally. According to that Clause, "no Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." U.S. Const., Art. I, § 9, cl. 6. Although it is possible to **[**1644]** conceive of regulations of manufacturing or farming that prefer one port over another, the more natural reading is that the Clause prohibits Congress from using its commerce power to channel commerce through certain favored ports.

The Constitution not only uses the word "commerce" in a narrower sense than our case law might suggest, it also does not support the proposition that Congress has authority over all activities that "substantially affect" interstate commerce. The Commerce Clause n2 does not state that Congress may **[*588]** "regulate matters that substantially affect commerce with foreign Nations, and among the several States, and with the Indian Tribes." In contrast, the Constitution itself temporarily **[***70]** prohibited amendments that would "affect" Congress' lack of authority to prohibit or restrict the slave trade or to enact unproportioned direct taxation. Art. V. Clearly, the Framers could have drafted a Constitution that contained a "substantially affects interstate commerce" Clause had that been their objective.

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n2 Even to speak of "the Commerce Clause" perhaps obscures the actual scope of that Clause. As an original matter, Congress did not have authority to regulate all commerce; Congress could only "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3. Although the precise line between interstate/foreign commerce and purely intrastate commerce was hard to draw, the Court

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attempted to adhere to such a line for the first 150 years of our Nation. See *infra*, at 593-599.

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In addition to its powers under the Commerce Clause, Congress has the authority to enact such laws as are "necessary and proper" to carry into execution its power **[***71]** to regulate commerce among the several States. U.S. Const., Art. I, § 8, cl. 18. But on this Court's understanding of congressional power under these two Clauses, many of Congress' other enumerated powers under Art. I, § 8, are wholly superfluous. After all, if Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may enact bankruptcy laws, cl. 4, or coin money and fix the standard of weights and measures, cl. 5, or punish counterfeiters of United States coin and securities, cl. 6. Likewise, Congress would not need the separate authority to establish post offices and post roads, cl. 7, or to grant patents and copyrights, cl. 8, or to "punish Piracies and Felonies committed on the high Seas," cl. 10. It might not even need the power to raise and support an Army and Navy, cls. 12 and 13, for fewer people would engage in commercial shipping if they thought that a foreign power could expropriate their property with ease. Indeed, if Congress could regulate matters that substantially affect interstate commerce, there would have been no need to specify **[*589]** that Congress can regulate international trade and commerce **[***72]** with the Indians. As the Framers surely understood, these other branches of trade substantially affect interstate commerce.

Put simply, much if not all of Art. I, § 8 (including portions of the Commerce Clause itself), would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct. Yet this Court's Commerce Clause jurisprudence has endorsed just such an interpretation: The power we have accorded Congress has swallowed Art. I, § 8. n3

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n3 There are other powers granted to Congress outside of Art. I, § 8, that may become wholly superfluous as well due to our distortion of the Commerce Clause. For instance, Congress has plenary power over the District of Columbia and the territories. See U.S. Const., Art. I, § 8, cl. 17, and Art. IV, § 3, cl. 2. The grant of comprehensive legislative power over certain areas of the Nation, when read in conjunction with the rest of the Constitution, further confirms that Congress was not ceded plenary authority over the *whole* Nation.

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[*73]** Indeed, if a "substantial effects" test can be appended to the Commerce Clause, why not to every other power of the Federal Government? There is no reason for singling out the Commerce Clause for special treatment. Accordingly, Congress could regulate all matters that "substantially affect" the Army and Navy, bankruptcies, tax collection, expenditures, and so on. In that case, the Clauses of § 8 all mutually overlap, something we can assume the Founding Fathers never intended.

[1645]** Our construction of the scope of congressional authority has the additional problem of coming close to turning the Tenth Amendment on its head. Our case law could be read to reserve to the United States all powers not expressly *prohibited* by the Constitution. Taken together, these fundamental textual problems should, at the very least, convince us that the "substantial effects" test should be reexamined.

[*590] II

The exchanges during the ratification campaign reveal the relatively limited reach of the Commerce Clause and of federal power generally. The Founding Fathers confirmed that most

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areas of life (even many matters that would have substantial effects on commerce) would remain outside the reach of the Federal **[***74]** Government. Such affairs would continue to be under the exclusive control of the States.

Early Americans understood that commerce, manufacturing, and agriculture, while distinct activities, were intimately related and dependent on each other -- that each "substantially affected" the others. After all, items produced by farmers and manufacturers were the primary articles of commerce at the time. If commerce was more robust as a result of federal superintendence, farmers and manufacturers could benefit. Thus, Oliver Ellsworth of Connecticut attempted to convince farmers of the benefits of regulating commerce. "Your property and riches depend on a ready demand and generous price for the produce you can annually spare," he wrote, and these conditions exist "where trade flourishes and when the merchant can freely export the produce of the country" to nations that will pay the highest price. A Landholder No. 1, Connecticut Courant, Nov. 5, 1787, in 3 Documentary History of the Ratification of the Constitution 399 (M. Jensen ed. 1978) (hereinafter Documentary History). See also The Federalist No. 35, at 219 (A. Hamilton) ("Discerning citizens are well aware that the mechanic and manufacturing **[***75]** arts furnish the materials of mercantile enterprise and industry. Many of them indeed are immediately connected with the operations of commerce. They know that the merchant is their natural patron and friend"); *id.*, at 221 ("Will not the merchant . . . be disposed to cultivate . . . the interests of the mechanic and manufacturing arts to which his commerce is so nearly allied?"); A Jerseyman: To the Citizens of New Jersey, Trenton Mercury, Nov. 6, 1787, in 3 Documentary History 147 (noting that agriculture will serve as **[*591]** a "source of commerce"); Marcus, The New Jersey Journal, Nov. 14, 1787, *id.*, at 152 (both the mechanic and the farmer benefit from the prosperity of commerce). William Davie, a delegate to the North Carolina Convention, illustrated the close link best: "Commerce, sir, is the nurse of [agriculture and manufacturing]. The merchant furnishes the planter with such articles as he cannot manufacture himself, and finds him a market for his produce. Agriculture cannot flourish if commerce languishes; they are mutually dependent on each other." 4 Debates 20.

Yet, despite being well aware that agriculture, manufacturing, and other matters substantially affected commerce, **[***76]** the founding generation did not cede authority over all these activities to Congress. Hamilton, for instance, acknowledged that the Federal Government could not regulate agriculture and like concerns:

> "The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction." The Federalist No. 17, at 106.

In the unlikely event that the Federal Government would attempt to exercise authority over such matters, its effort "would be as troublesome as it would be nugatory." *Ibid.* n4

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n4 Cf. 3 Debates 40 (E. Pendleton at the Virginia convention) (The proposed Federal Government "does not intermeddle with the local, particular affairs of the states. Can Congress legislate for the state of Virginia? Can [it] make a law altering the form of transferring property, or the rule of descents, in Virginia?"); *id.*, at 553 (J. Marshall at the Virginia convention) (denying that Congress could make "laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same state"); The Federalist No. 33, at 206 (A. Hamilton) (denying that Congress could change laws of descent or could pre-empt a land tax); A Native of Virginia: Observations upon the Proposed Plan of Federal Government, Apr. 2, 1788, in 9 Documentary History 692 (States have sole authority

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over "rules of property").

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[*592] [*77] [**1646]** The comments of Hamilton and others about federal power reflected the well-known truth that the new Government would have only the limited and enumerated powers found in the Constitution. See, *e. g.*, 2 Debates 267-268 (A. Hamilton at New York convention) (noting that there would be just cause for rejecting the Constitution if it would enable the Federal Government to "alter, or abrogate . . . [a State's] civil and criminal institutions [or] penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals"); The Federalist No. 45, at 313 (J. Madison); 3 Debates 259 (J. Madison) (Virginia convention); R. Sherman & O. Ellsworth, Letter to Governor Huntington, Sept. 26, 1787, in 3 Documentary History 352; J. Wilson, Speech in the State House Yard, Oct. 6, 1787, in 2 *id.*, at 167-168. Agriculture and manufacture, since they were not surrendered to the Federal Government, were state concerns. See The Federalist No. 34, at 212-213 (A. Hamilton) (observing that the " internal encouragement of agriculture and manufactures" was an object of *state* expenditure). Even before the passage of the Tenth Amendment, it was apparent that Congress would **[***78]** possess only those powers "herein granted" by the rest of the Constitution. Art. I, § 1.

Where the Constitution was meant to grant federal authority over an activity substantially affecting interstate commerce, the Constitution contains an enumerated power over that particular activity. Indeed, the Framers knew that many of the other enumerated powers in § 8 dealt with matters that substantially affected interstate commerce. Madison, for instance, spoke of the bankruptcy power as being "intimately connected with the regulation of commerce." The Federalist No. 42, at 287. Likewise, Hamilton urged that "if we mean to be a commercial people or even to be secure on our Atlantic side, we must endeavour as soon as possible to have a navy." *Id.*, No. 24, at 157.

In short, the Founding Fathers were well aware of what the principal dissent calls "'economic . . . realities.'" See **[*593]** *post*, at 625 (BREYER, J.) (quoting North American Co. v. SEC, 327 U.S. 686, 705, 90 L. Ed. 945, 66 S. Ct. 785 (1946)). Even though the boundary between commerce and other matters may ignore "economic reality" and thus seem arbitrary or artificial to some, we must nevertheless **[***79]** respect a constitutional line that does not grant Congress power over all that substantially affects interstate commerce.

III

If the principal dissent's understanding of our early case law were correct, there might be some reason to doubt this view of the original understanding of the Constitution. According to that dissent, Chief Justice Marshall's opinion in Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 6 L. Ed. 23 (1824), established that Congress may control all local activities that "significantly affect interstate commerce," *post*, at 615. And, "with the exception of one wrong turn subsequently corrected," this has been the "traditional" method of interpreting the Commerce Clause. *Post*, at 631 (citing *Gibbons* and United States v. Darby, 312 U.S. 100, 116-117, 85 L. Ed. 609, 61 S. Ct. 451 (1941)).

In my view, the dissent is wrong about the holding and reasoning of *Gibbons*. Because this error leads the dissent to characterize the first 150 years of this Court's case law as a "wrong turn," I feel compelled to put the last 50 years in proper perspective.

A

In *Gibbons*, the Court examined whether a federal law that licensed ships to engage in the "coasting **[***80]** trade" pre-empted a New York law granting a 30-year monopoly to Robert Livingston and Robert Fulton to navigate the State's waterways by steamship. In

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concluding that it did, the Court noted that Congress could regulate "navigation" because "all America . . . has uniformly understood, the **[**1647]** word 'commerce,' to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed." 9 Wheat., at 190. The Court also observed **[*594]** that federal power over commerce "among the several States" meant that Congress could regulate commerce conducted partly within a State. Because a portion of interstate commerce and foreign commerce would almost always take place within one or more States, federal power over interstate and foreign commerce necessarily would extend into the States. *Id.*, at 194-196.

At the same time, the Court took great pains to make clear that Congress could *not* regulate commerce "which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Id.*, at 194. **[***81]** Moreover, while suggesting that the Constitution might not permit States to regulate interstate or foreign commerce, the Court observed that "inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State" were but a small part "of that immense mass of legislation . . . not surrendered to a general government." *Id.*, at 203. From an early moment, the Court rejected the notion that Congress can regulate everything that affects interstate commerce. That the internal commerce of the States and the numerous state inspection, quarantine, and health laws had substantial effects on interstate commerce cannot be doubted. Nevertheless, they were not "surrendered to the general government."

Of course, the principal dissent is not the first to misconstrue *Gibbons*. For instance, the Court has stated that *Gibbons* "described the federal commerce power with a breadth never yet exceeded." *Wickard* v. *Filburn*, 317 U.S. 111, 120, 87 L. Ed. 122, 63 S. Ct. 82 (1942). See also *Perez* v. *United States*, 402 U.S. 146, 151, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971) (claiming that with *Darby* and **[***82]** *Wickard*, "the broader view of the Commerce Clause announced by Chief Justice Marshall had been restored"). I believe that this misreading stems from two statements in *Gibbons*.

First, the Court made the uncontroversial claim that federal power does not encompass "*commerce*" that "does **[*595]** not extend to or affect other States." 9 Wheat., at 194 (emphasis added). From this statement, the principal dissent infers that whenever an activity affects interstate commerce, it necessarily follows that Congress can regulate such activities. Of course, Chief Justice Marshall said no such thing and the inference the dissent makes cannot be drawn.

There is a much better interpretation of the "affect[s]" language: Because the Court had earlier noted that the commerce power did not extend to wholly intrastate commerce, the Court was acknowledging that although the line between intrastate and interstate/foreign commerce would be difficult to draw, federal authority could not be construed to cover purely intrastate commerce. Commerce that did not affect another State could *never* be said to be commerce "among the several States."

But even if one were to adopt the dissent's **[***83]** reading, the "affect[s]" language, at most, permits Congress to regulate only intrastate *commerce* that substantially affects interstate and foreign commerce. There is no reason to believe that Chief Justice Marshall was asserting that Congress could regulate *all* activities that affect interstate commerce. See *ibid.*

The second source of confusion stems from the Court's praise for the Constitution's division of power between the States and the Federal Government:

> "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal

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> concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." *Id.*, at 195.

[*596] In this passage, the Court merely was making the well understood point that the Constitution commits matters of "national" concern to Congress and leaves "local" matters **[**1648]** to the States. The Court was *not* saying that whatever Congress believes **[***84]** is a national matter becomes an object of federal control. The matters of national concern are enumerated in the Constitution: war, taxes, patents, and copyrights, uniform rules of naturalization and bankruptcy, types of commerce, and so on. See generally Art. I, § 8. *Gibbons'* emphatic statements that Congress could not regulate many matters that affect commerce confirm that the Court did not read the Commerce Clause as granting Congress control over matters that "affect the States generally." n5 *Gibbons* simply cannot be construed as the principal dissent would have it.

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n5 None of the other Commerce Clause opinions during Chief Justice Marshall's tenure, which concerned the "dormant" Commerce Clause, even suggested that Congress had authority over all matters substantially affecting commerce. See *Brown* v. *Maryland*, 25 U.S. 419, 12 Wheat. 419, 6 L. Ed. 678 (1827); *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245 (1829).

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B

I am aware of no cases prior to **[***85]** the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test. My review of the case law indicates that the substantial effects test is but an innovation of the 20th century.

Even before *Gibbons*, Chief Justice Marshall, writing for the Court in *Cohens* v. *Virginia*, 19 U.S. 264, 6 Wheat. 264, 5 L. Ed. 257 (1821), noted that Congress had "no general right to punish murder committed within any of the States," *id.*, at 426, and that it was "clear that congress cannot punish felonies generally," *id.*, at 428. The Court's only qualification was that Congress could enact such laws for places where it enjoyed plenary powers -- for instance, over the District of Columbia. *Id.*, at 426. Thus, whatever effect ordinary murders, or robbery, or gun possession might have on interstate commerce (or on any **[*597]** other subject of federal concern) was irrelevant to the question of congressional power. n6

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n6 It is worth noting that Congress, in the first federal criminal Act, did not establish nationwide prohibitions against murder and the like. See Act of Apr. 30, 1790, ch. 9, 1 Stat. 112. To be sure, Congress outlawed murder, manslaughter, maiming, and larceny, but only when those acts were either committed on United States territory not part of a State or on the high seas. *Ibid.* See U.S. Const., Art. I, § 8, cl. 10 (authorizing Congress to outlaw piracy and felonies on high seas); Art. IV, § 3, cl. 2 (plenary authority over United States territory and property). When Congress did enact nationwide criminal laws, it acted pursuant to direct grants of authority found in the Constitution. Compare Act of Apr. 30, 1790, *supra*, §§ 1 and 14 (prohibitions against treason and the counterfeiting of U.S. securities), with U.S. Const., Art. I, § 8, cl. 6 (counterfeiting); Art. III, § 3, cl. 2 (treason). Notwithstanding any substantial effects that murder, kidnaping, or gun possession might have had on interstate commerce, Congress understood that it could not establish nationwide prohibitions.

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Likewise, there were no laws in the early Congresses that regulated manufacturing and agriculture. Nor was there *any* statute that purported to regulate activities with "substantial effects" on interstate commerce.

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[*86]** *United States* v. *Dewitt*, 76 U.S. 41, 9 Wall. 41, 19 L. Ed. 593 (1870), marked the first time the Court struck down a federal law as exceeding the power conveyed by the Commerce Clause. In a two-page opinion, the Court invalidated a nationwide law prohibiting all sales of naphtha and illuminating oils. In so doing, the Court remarked that the Commerce Clause "has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States." *Id.*, at 44. The law in question was "plainly a regulation of police," which could have constitutional application only where Congress had exclusive authority, such as the territories. *Id.*, at 44-45. See also *License Tax Cases*, 72 U.S. 462, 5 Wall. 462, 470-471, 18 L. Ed. 497 (1867) (Congress cannot interfere with the internal commerce and business of a State); *Trade-Mark Cases*, 100 U.S. 82, 25 L. Ed. 550 (1879) (Congress **[*598]** cannot regulate internal commerce and thus may not establish national trademark registration).

In *United States* v. *E. C. Knight Co.*, 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249 (1895), **[***87]** this Court held that mere attempts to monopolize the manufacture of sugar could not be regulated pursuant to the Commerce Clause. **[**1649]** Raising echoes of the discussions of the Framers regarding the intimate relationship between commerce and manufacturing, the Court declared that "commerce succeeds to manufacture, and is not a part of it." *Id.*, at 12. The Court also approvingly quoted from

> *Kidd* v. *Pearson*, 128 U.S. 1, 20, 32 L. Ed. 346, 9 S. Ct. 6 (1888):
> "'No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce . . . . If it be held that the term [commerce] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested . . . with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining -- in short, every branch of human industry.'" *E. C. Knight, supra*, at 14.

[*88]** If federal power extended to these types of production "comparatively little of business operations and affairs would be left for state control." *Id.*, at 16. See also *Newberry* v. *United States*, 256 U.S. 232, 257, 65 L. Ed. 913, 41 S. Ct. 469 (1921) ("It is settled . . . that the power to regulate interstate and foreign commerce does not reach whatever is essential thereto. Without agriculture, manufacturing, mining, etc., commerce could not exist, but this fact does not suffice to subject them to the control of Congress "). Whether or not manufacturing, agriculture, or other matters substantially affected interstate commerce was irrelevant.

[*599] As recently as 1936, the Court continued to insist that the Commerce Clause did not reach the wholly internal business of the States. See *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 308, 80 L. Ed. 1160, 56 S. Ct. 855 (1936) (Congress may not regulate mine labor because "the relation of employer and employee is a local relation"); see also *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 543-550, 79 L. Ed. 1570, 55 S. Ct. 837 (1935) (holding that Congress may not regulate intrastate sales **[***89]** of sick chickens or the labor of employees involved in intrastate poultry sales). The Federal Government simply could not reach such subjects regardless of their effects on interstate

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The Gun-Free School Zones Act of 1990 (GFSZA), 18 U.S.C.S. § 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. The GFSZA is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained as a regulation of activity that arises out of or is connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Constitutional Law : Congressional Powers & Duties : Commerce Clause

The Gun-Free School Zones Act of 1990, 18 U.S.C.S. § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.

Constitutional Law : Congressional Powers & Duties : Commerce Clause

Governments : Legislation : Construction & Interpretation

As part of the court's independent evaluation of constitutionality under the commerce clause, U.S. Const. amend. I, § 8, cl. 3, the court considers legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce.

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SYLLABUS:

After respondent, then a 12th-grade student, carried a concealed handgun into his high school, he was charged with violating the Gun-Free School Zones Act of 1990, which forbids "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone," 18 U.S.C. § 922(q)(1)(A). The District Court denied his motion to dismiss the indictment, concluding that § 922(q) is a constitutional exercise of Congress' power to regulate activities in and affecting commerce. In reversing, the Court of Appeals held that, in light of what it characterized as insufficient congressional findings and legislative history, § 922(q) is invalid as beyond Congress' power under the Commerce Clause.

Held: The Act exceeds Congress' Commerce Clause authority. First, although this Court has upheld a wide variety **[***2]** of congressional Acts regulating intrastate economic activity that substantially affected interstate commerce, the possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, have such a substantial effect on interstate commerce. Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly those terms are defined. Nor is it an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under the Court's cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which, viewed in the aggregate, substantially affects interstate commerce. Second, § 922(q) contains no jurisdictional element that would ensure, through case-by-case inquiry, that the firearms possession in question has the requisite nexus with interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement **[***3]** that his possession of the firearm have any concrete tie to interstate commerce. To uphold the Government's contention that § 922(q) is justified because firearms possession in a local school zone does indeed substantially affect interstate commerce would require this Court to pile inference upon inference in a manner that would bid fair to convert congressional Commerce Clause authority to a general police power of the sort held only by the States. Pp. 552-568.

COUNSEL: Solicitor General Days argued the cause for the United States. With him on the

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commerce.

These cases all establish a simple point: From the time of the ratification of the Constitution to the mid-1930's, it was widely understood that the Constitution granted Congress only limited powers, notwithstanding the Commerce Clause. n7 Moreover, there was no question that activities wholly separated from business, such as gun possession, were beyond the reach of the commerce power. If anything, the "wrong turn" was the Court's dramatic departure in the 1930's from a century and a half of precedent.

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n7 To be sure, congressional power pursuant to the Commerce Clause was alternatively described less narrowly or more narrowly during this 150-year period. Compare *United States* v. *Coombs*, 12 Pet. 72, 78 (1838) (commerce power "extends to such acts, done on land, which interfere with, obstruct, or prevent the due exercise of the power to regulate [interstate and international] commerce" such as stealing goods from a beached ship), with *United States* v. *E. C. Knight Co.*, 156 U.S. 1, 13, 39 L. Ed. 325, 15 S. Ct. 249 (1895) ("Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities . . . may be regulated, but this is because they form part of interstate trade or commerce"). During this period, however, this Court never held that Congress could regulate everything that substantially affects commerce.

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[*90]** IV

Apart from its recent vintage and its corresponding lack of any grounding in the original understanding of the Constitution, the substantial effects test suffers from the further **[*600]** flaw that it appears to grant Congress a police power over the Nation. When asked at oral argument if there were *any* limits to the Commerce Clause, the Government was at a loss for words. Tr. of Oral Arg. 5. Likewise, the principal dissent insists that there are limits, but it cannot muster even one example. *Post*, at 624. Indeed, the dissent implicitly concedes that its reading has no limits when it criticizes the Court for "threatening legal uncertainty in **[**1650]** an area of law that . . . seemed reasonably well settled." *Post*, at 630. The one advantage of the dissent's standard is certainty: It is certain that under its analysis everything may be regulated under the guise of the Commerce Clause.

The substantial effects test suffers from this flaw, in part, because of its "aggregation principle." Under so-called "class of activities" statutes, Congress can regulate whole categories of activities that are not themselves either "interstate" or "commerce." In applying the effects test, we ask whether **[***91]** the class of activities *as a whole* substantially affects interstate commerce, not whether any specific activity within the class has such effects when considered in isolation. See *Maryland* v. *Wirtz*, 392 U.S. at 192-193 (if class of activities is "'within the reach of federal power,'" courts may not excise individual applications as trivial) (quoting *Darby*, 312 U.S. at 120-121).

The aggregation principle is clever, but has no stopping point. Suppose all would agree that gun possession within 1,000 feet of a school does not substantially affect commerce, but that possession of weapons generally (knives, brass knuckles, nunchakus, etc.) does. Under our substantial effects doctrine, even though Congress cannot single out gun possession, it can prohibit weapon possession generally. But one *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce. Under our jurisprudence, if Congress passed an omnibus "substantially affects interstate commerce" statute, purporting to regulate every aspect of human existence, the Act apparently **[***92]** would be constitutional. **[*601]** Even though particular sections may govern only trivial activities, the statute in the aggregate regulates matters that substantially affect commerce.

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V

This extended discussion of the original understanding and our first century and a half of case law does not necessarily require a wholesale abandonment of our more recent opinions. n8 It simply reveals that our substantial effects test is far removed from both the Constitution and from our early case law and that the Court's opinion should not be viewed as "radical" or another "wrong turn" that must be corrected in the future. n9 The analysis also suggests that we ought to temper our Commerce Clause jurisprudence.

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n8 Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean.

n9 Nor can the majority's opinion fairly be compared to *Lochner* v. *New York*, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 (1905). See *post*, at 604-609 (SOUTER, J., dissenting). Unlike *Lochner* and our more recent "substantive due process" cases, to-day's decision enforces only the Constitution and not "judicial policy judgments." See *post*, at 607. Notwithstanding JUSTICE SOUTER's discussion, "'commercial' character" is not only a natural but an inevitable "ground of *Commerce* Clause distinction." See *post*, at 608 (emphasis added). Our invalidation of the Gun-Free School Zones Act therefore falls comfortably within our proper role in reviewing federal legislation to determine if it exceeds congressional authority as defined by the Constitution itself. As John Marshall put it: "If [Congress] were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard . . . . They would declare it void." 3 Debates 553 (before the Virginia ratifying convention); see also The Federalist No. 44, at 305 (J. Madison) (asserting that if Congress exercises powers "not warranted by [the Constitution's] true meaning" the judiciary will defend the Constitution); *id.*, No. 78, at 526 (A. Hamilton) (asserting that the "courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments"). Where, as here, there is a case or controversy, there can be no "misstep," *post*, at 614, in enforcing the Constitution.

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[*602] **[***93]** Unless the dissenting Justices are willing to repudiate our long-held understanding of the limited nature of federal power, I would think that they, too, must be willing to reconsider the substantial effects test in a future case. If we wish to be true to a Constitution that does not cede a police power to the Federal Government, our Commerce Clause's boundaries simply cannot be "defined" as being "'commensurate with the national needs'" or self-consciously intended **[**1651]** to let the Federal Government "'defend itself against economic forces that Congress decrees inimical or destructive of the national economy.'" See *post*, at 625 (BREYER, J., dissenting) (quoting *North American Co.* v. *SEC*, 327 U.S. at 705). Such a formulation of federal power is no test at all: It is a blank check.

At an appropriate juncture, I think we must modify our Commerce Clause jurisprudence. Today, it is easy enough to say that the Clause certainly does not empower Congress to ban gun possession within 1,000 feet of a school.

DISSENTBY: STEVENS; SOUTER; BREYER

DISSENT: JUSTICE STEVENS, dissenting.

The welfare of our future "Commerce with foreign Nations, and among the several States, **[***94]** " U.S. Const., Art. I, § 8, cl. 3, is vitally dependent on the character of the

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education of our children. I therefore agree entirely with JUSTICE BREYER's explanation of why Congress has ample power to prohibit the possession of firearms in or near schools -- just as it may protect the school environment from harms posed by controlled substances such as asbestos or alcohol. I also agree with JUSTICE SOUTER's exposition of the radical character of the Court's holding and its kinship with the discredited, pre-Depression version of substantive due process. Cf. *Dolan* v. *City of Tigard*, 512 U.S. 374, 405-411, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994) (STEVENS, J., dissenting). I believe, however, that the Court's extraordinary decision merits this additional comment.

Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, **[*603]** either directly or indirectly, of commercial activity. In my judgment, Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use; it necessarily follows that Congress may also prohibit their possession in particular markets. The **[***95]** market for the possession of handguns by school-age children is, distressingly, substantial. * Whether or not the national interest in eliminating that market would have justified federal legislation in 1789, it surely does today.

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* Indeed, there is evidence that firearm manufacturers -- aided by a federal grant -- are specifically targeting schoolchildren as consumers by distributing, at schools, hunting-related videos styled "educational materials for grades four through 12," Herbert, Reading, Writing, Reloading, N. Y. Times, Dec. 14, 1994, p. A23, col. 1.

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JUSTICE SOUTER, dissenting.

In reviewing congressional legislation under the Commerce Clause, we defer to what is often a merely implicit congressional judgment that its regulation addresses a subject substantially affecting interstate commerce "if there is any rational basis for such a finding." *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981); *Preseault* v. *ICC*, 494 U.S. 1, 17, 108 L. Ed. 2d 1, 110 S. Ct. 914 (1990); **[***96]** see *Maryland* v. *Wirtz*, 392 U.S. 183, 190, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968), quoting *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964). If that congressional determination is within the realm of reason, "the only remaining question for judicial inquiry is whether 'the means chosen by Congress [are] reasonably adapted to the end permitted by the Constitution.'" *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc., supra*, at 276, quoting *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 262, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964); see also *Preseault* v. *ICC, supra*, at 17. n1

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n1 In this case, no question has been raised about means and ends; the only issue is about the effect of school zone guns on commerce.

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[*604] The practice of deferring to rationally based legislative judgments "is a paradigm of judicial restraint." *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 314, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993). In judicial review under the Commerce Clause, it reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes **[**1652]** from Congress's political accountability in dealing with matters open to a wide range of possible choices. **[***97]** See *id.*, at 313-316; *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*,

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supra, at 276; *United States* v. *Carolene Products Co.*, 304 U.S. 144, 147, 151-154, 82 L. Ed. 1234, 58 S. Ct. 778 (1938); cf. *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U.S. 483, 488, 99 L. Ed. 563, 75 S. Ct. 461 (1955).

It was not ever thus, however, as even a brief overview of Commerce Clause history during the past century reminds us. The modern respect for the competence and primacy of Congress in matters affecting commerce developed only after one of this Court's most chastening experiences, when it perforce repudiated an earlier and untenably expansive conception of judicial review in derogation of congressional commerce power. A look at history's sequence will serve to show how today's **[***98]** decision tugs the Court off course, leading it to suggest opportunities for further developments that would be at odds with the rule of restraint to which the Court still wisely states adherence.

I

Notwithstanding the Court's recognition of a broad commerce power in *Gibbons* v. *Ogden*, 22 U.S. 1, 9 Wheat. 1, 196-197, 6 L. Ed. 23 (1824) (Marshall, C. J.), Congress saw few occasions to exercise that power prior to Reconstruction, see generally 2 C. Warren, The Supreme Court in United States History 729-739 (rev. ed. 1935), and it was really the passage of the Interstate Commerce Act of 1887 that opened a new age of congressional reliance on the Commerce Clause for authority to exercise general police powers at the national level, see *id.*, at **[*605]** 729-730. Although the Court upheld a fair amount of the ensuing legislation as being within the commerce power, see, *e. g.*, *Stafford* v. *Wallace*, 258 U.S. 495, 66 L. Ed. 735, 42 S. Ct. 397 (1922) (upholding an Act regulating trade practices in the meat packing industry); *Shreveport Rate Cases*, 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914) (upholding Interstate Commerce Commission order to equalize interstate and intrastate rail rates); see generally **[***99]** Warren, *supra*, at 729-739, the period from the turn of the century to 1937 is better noted for a series of cases applying highly formalistic notions of "commerce" to invalidate federal social and economic legislation, see, *e. g.*, *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 303-304, 80 L. Ed. 1160, 56 S. Ct. 855 (1936) (striking Act prohibiting unfair labor practices in coal industry as regulation of "mining" and "production," not "commerce"); *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 545-548, 79 L. Ed. 1570, 55 S. Ct. 837 (1935) (striking congressional regulation of activities affecting interstate commerce only "indirectly"); *Hammer* v. *Dagenhart*, 247 U.S. 251, 62 L. Ed. 1101, 38 S. Ct. 529 (1918) (striking Act prohibiting shipment in interstate commerce of goods manufactured at factories using child labor because the Act regulated "manufacturing," not "commerce"); *Adair* v. *United States*, 208 U.S. 161, 52 L. Ed. 436, 28 S. Ct. 277 (1908) (striking protection of labor union membership as outside "commerce").

These restrictive views of commerce subject to congressional power complemented the Court's activism in limiting the enforceable scope **[***100]** of state economic regulation. It is most familiar history that during this same period the Court routinely invalidated state social and economic legislation under an expansive conception of Fourteenth Amendment substantive due process. See, *e. g.*, *Louis K. Liggett Co.* v. *Baldridge*, 278 U.S. 105, 73 L. Ed. 204, 49 S. Ct. 57 (1928) (striking state law requiring pharmacy owners to be licensed as pharmacists); *Coppage* v. *Kansas*, 236 U.S. 1, 59 L. Ed. 441, 35 S. Ct. 240 (1915) (striking state law prohibiting employers from requiring their employees to agree not to join labor organizations); *Lochner* v. *New York*, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 (1905) (striking state law establishing maximum working hours for bakers). See generally L. Tribe, American Constitutional **[*606]** Law 568-574 (2d ed. 1988). The fulcrums of judicial review in these cases were the notions of liberty and property characteristic of laissez-faire economics, whereas the Commerce Clause cases turned on what was ostensibly a structural limit of federal power, but under each conception of judicial review the Court's character for the **[**1653]** first third of the century showed itself in exacting judicial scrutiny **[***101]** of a legislature's choice of economic ends and of the legislative means selected to reach them.

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It was not merely coincidental, then, that sea changes in the Court's conceptions of its authority under the Due Process and Commerce Clauses occurred virtually together, in 1937, with *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578, and *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 81 L. Ed. 893, 57 S. Ct. 615. See Stern, The Commerce Clause and the National Economy, 1933-1946, 59 Harv. L. Rev. 645, 674-682 (1946). In *West Coast Hotel*, the Court's rejection of a due process challenge to a state law fixing minimum wages for women and children marked the abandonment of its expansive protection of contractual freedom. Two weeks later, *Jones & Laughlin* affirmed congressional commerce power to authorize NLRB injunctions against unfair labor practices. The Court's finding that the regulated activity had a direct enough effect on commerce has since been seen as beginning the abandonment, for practical purposes, of the formalistic distinction between direct and indirect effects.

In the years following these decisions, **[***102]** deference to legislative policy judgments on commercial regulation became the powerful theme under both the Due Process and Commerce Clauses, see *United States* v. *Carolene Products Co.*, 304 U.S. at 147-148, 152; *United States* v. *Darby*, 312 U.S. 100, 119-121, 85 L. Ed. 609, 61 S. Ct. 451 (1941); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 118-119, 86 L. Ed. 726, 62 S. Ct. 523 (1942), and in due course that deference became articulate in the standard of rationality review. In due process litigation, the Court's statement of a rational **[*607]** basis test came quickly. See *United States* v. *Carolene Products Co., supra*, at 152; see also *Williamson* v. *Lee Optical Co., supra*, at 489-490. The parallel formulation of the Commerce Clause test came later, only because complete elimination of the direct/indirect effects dichotomy and acceptance of the cumulative effects doctrine, *Wickard* v. *Filburn*, 317 U.S. 111, 125, 127-129, 87 L. Ed. 122, 63 S. Ct. 82 (1942); *United States* v. *Wrightwood Dairy Co., supra*, at 124-126, so far **[***103]** settled the pressing issues of congressional power over commerce as to leave the Court for years without any need to phrase a test explicitly deferring to rational legislative judgments. The moment came, however, with the challenge to congressional Commerce Clause authority to prohibit racial discrimination in places of public accommodation, when the Court simply made explicit what the earlier cases had implied: "where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." *Katzenbach* v. *McClung*, 379 U.S. at 303-304, discussing *United States* v. *Darby, supra;* see *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. at 258-259. Thus, under commerce, as under due process, adoption of rational basis review expressed the recognition that the Court had no sustainable basis for subjecting economic regulation as such to judicial policy judgments, and for the past half century the Court has no more turned back **[***104]** in the direction of formalistic Commerce Clause review (as in deciding whether regulation of commerce was sufficiently direct) than it has inclined toward reasserting the substantive authority of *Lochner* due process (as in the inflated protection of contractual autonomy). See, *e. g.*, *Maryland* v. *Wirtz*, 392 U.S. at 190, 198; *Perez* v. *United States*, 402 U.S. 146, 151-157, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971); *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. at 276, 277.

[*608] II

There is today, however, a backward glance at both the old pitfalls, as the Court treats deference under the rationality rule as subject to gradation according to the commercial or noncommercial nature of the immediate subject of the challenged regulation. **[**1654]** See *ante*, at 558-561. The distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly. And the act of calibrating the level of deference by drawing a line between what is patently commercial and what is less purely so will probably resemble the **[***105]** process of deciding how much interference with contractual freedom was fatal. Thus, it seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago. The answer is not reassuring. To be sure, the occasion for today's decision

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reflects the century's end, not its beginning. But if it seems anomalous that the Congress of the United States has taken to regulating school yards, the Act in question is still probably no more remarkable than state regulation of bake shops 90 years ago. In any event, there is no reason to hope that the Court's qualification of rational basis review will be any more successful than the efforts at substantive economic review made by our predecessors as the century began. Taking the Court's opinion on its own terms, JUSTICE BREYER has explained both the hopeless porosity of "commercial" character as a ground of Commerce Clause distinction in America's highly connected economy, and the inconsistency of this categorization with our rational basis precedents from the last 50 years.

Further glosses on rationality review, moreover, may be in the **[***106]** offing. Although this case turns on commercial character, the Court gestures toward two other considerations that it might sometime entertain in applying rational basis **[*609]** scrutiny (apart from a statutory obligation to supply independent proof of a jurisdictional element): does the congressional statute deal with subjects of traditional state regulation, and does the statute contain explicit factual findings supporting the otherwise implicit determination that the regulated activity substantially affects interstate commerce? Once again, any appeal these considerations may have depends on ignoring the painful lesson learned in 1937, for neither of the Court's suggestions would square with rational basis scrutiny.

A

The Court observes that the Gun-Free School Zones Act operates in two areas traditionally subject to legislation by the States, education and enforcement of criminal law. The suggestion is either that a connection between commerce and these subjects is remote, or that the commerce power is simply weaker when it touches subjects on which the States have historically been the primary legislators. Neither suggestion is tenable. As for remoteness, it may or may not be wise for **[***107]** the National Government to deal with education, but JUSTICE BREYER has surely demonstrated that the commercial prospects of an illiterate State or Nation are not rosy, and no argument should be needed to show that hijacking interstate shipments of cigarettes can affect commerce substantially, even though the States have traditionally prosecuted robbery. And as for the notion that the commerce power diminishes the closer it gets to customary state concerns, that idea has been flatly rejected, and not long ago. The commerce power, we have often observed, is plenary. *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc., supra,* at 276; *United States* v. *Darby,* 312 U.S. at 114; see *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 549-550, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985); *Gibbons* v. *Ogden,* 9 Wheat., at 196-197. Justice Harlan put it this way in speaking for the Court in *Maryland* v. *Wirtz:*

> **[*610]** "There is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as **[***108]** not to interfere with the free and full exercise of the powers of the other. . . . It is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests . . . . As long ago as [1925], the Court put to rest the contention that state concerns might constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce." **[**1655]** 392 U.S. at 195-196 (citations and internal quotation marks omitted).

See also *United States* v. *Darby, supra,* at 114; *Gregory* v. *Ashcroft,* 501 U.S. 452, 460, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991); *United States* v. *Carolene Products Co.,* 304 U.S. at 147.

Nor is there any contrary authority in the reasoning of our cases imposing clear statement

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rules in some instances of legislation that would significantly alter the state-national balance. In the absence of a clear statement of congressional design, for example, we have refused to interpret ambiguous federal statutes to limit fundamental state legislative prerogatives, *Gregory* v. *Ashcroft, supra,* at 460-464, **[***109]** our understanding being that such prerogatives, through which "a State defines itself as a sovereign," are "powers with which Congress does not readily interfere," 501 U.S. at 460, 461. Likewise, when faced with two plausible interpretations of a federal criminal statute, we generally will take the alternative that does not force us to impute an intention to Congress to use its full commerce power to regulate conduct traditionally and ably regulated by the States. See *United States* v. *Enmons,* 410 U.S. 396, 411-412, 35 L. Ed. 2d 379, 93 S. Ct. 1007 (1973); *United States* v. *Bass,* 404 U.S. 336, 349-350, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971); *Rewis* v. *United States,* 401 U.S. 808, 812, 28 L. Ed. 2d 493, 91 S. Ct. 1056 (1971).

These clear statement rules, however, are merely rules of statutory interpretation, to be relied upon only when the **[*611]** terms of a statute allow, *United States* v. *Culbert,* 435 U.S. 371, 379-380, 55 L. Ed. 2d 349, 98 S. Ct. 1112 (1978); see *Gregory* v. *Ashcroft, supra,* at 470; *United States* v. *Bass, supra,* at 346-347, and in cases implicating Congress's historical **[***110]** reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States, *Gregory* v. *Ashcroft, supra,* at 461; *United States* v. *Bass, supra,* at 349; see *Rewis* v. *United States, supra,* at 811-812. They are rules for determining intent when legislation leaves intent subject to question. But our hesitance to presume that Congress has acted to alter the state-federal status quo (when presented with a plausible alternative) has no relevance whatever to the enquiry whether it has the commerce power to do so or to the standard of judicial review when Congress has definitely meant to exercise that power. Indeed, to allow our hesitance to affect the standard of review would inevitably degenerate into the sort of substantive policy review that the Court found indefensible 60 years ago. The Court does not assert (and could not plausibly maintain) that the commerce power is wholly devoid of congressional authority to speak on any subject of traditional state concern; but if congressional action is not forbidden absolutely when it touches such a **[***111]** subject, it will stand or fall depending on the Court's view of the strength of the legislation's commercial justification. And here once again history raises its objections that the Court's previous essays in overriding congressional policy choices under the Commerce Clause were ultimately seen to suffer two fatal weaknesses: when dealing with Acts of Congress (as distinct from state legislation subject to review under the theory of dormant commerce power) nothing in the Clause compelled the judicial activism, and nothing about the judiciary as an institution made it a superior source of policy on the subject Congress dealt with. There is no reason to expect the lesson would be different another time.

[*612] B

There remain questions about legislative findings. The Court of Appeals expressed the view, 2 F.3d 1342, 1363-1368 (CA5 1993), that the result in this case might well have been different if Congress had made explicit findings that guns in schools have a substantial effect on interstate commerce, and the Court today does not repudiate that position, see *ante,* at 562-563. Might a court aided by such findings have subjected this legislation to less exacting scrutiny **[***112]** (or, put another **[**1656]** way, should a court have deferred to such findings if Congress had made them)? n2 The answer to either question must be no, although as a general matter findings are important and to be hoped for in the difficult cases.

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n2 Unlike the Court, (perhaps), I would see no reason not to consider Congress's findings, insofar as they might be helpful in reviewing the challenge to this statute, even though adopted in later legislation. See the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 320904, 108 Stat. 2125 ("The occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country; . . . this decline . . . has an adverse impact on interstate commerce and the foreign commerce of the United States; . .

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. Congress has power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection"). The findings, however, go no further than expressing what is obviously implicit in the substantive legislation, at such a conclusory level of generality as to add virtually nothing to the record. The Solicitor General certainly exercised sound judgment in placing no significant reliance on these particular afterthoughts. Tr. of Oral Arg. 24-25.

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[*113]** It is only natural to look for help with a hard job, and reviewing a claim that Congress has exceeded the commerce power is much harder in some cases than in others. A challenge to congressional regulation of interstate garbage hauling would be easy to resolve; review of congressional regulation of gun possession in school yards is more difficult, both because the link to interstate commerce is less obvious and because of our initial ignorance of the relevant facts. In a **[*613]** case comparable to this one, we may have to dig hard to make a responsible judgment about what Congress could reasonably find, because the case may be close, and because judges tend not to be familiar with the facts that may or may not make it close. But while the ease of review may vary from case to case, it does not follow that the standard of review should vary, much less that explicit findings of fact would even directly address the standard.

The question for the courts, as all agree, is not whether as a predicate to legislation Congress in fact found that a particular activity substantially affects interstate commerce. The legislation implies such a finding, and there is no reason to entertain claims that Congress **[***114]** acted ultra vires intentionally. Nor is the question whether Congress was correct in so finding. The only question is whether the legislative judgment is within the realm of reason. See *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. at 276-277; *Katzenbach* v. *McClung*, 379 U.S. at 303-304; *Railroad Retirement Bd.* v. *Alton R. Co.*, 295 U.S. 330, 391-392, 79 L. Ed. 1468, 55 S. Ct. 758 (1935) (Hughes, C. J., dissenting); cf. *FCC* v. *Beach Communications, Inc.*, 508 U.S. at 315 (in the equal protection context, "those attacking the rationality of the legislative classification have the burden to negate every conceivable basis which might support it[;] . . . it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature") (citations and internal quotation marks omitted); *Ferguson* v. *Skrupa*, 372 U.S. 726, 731-733, 10 L. Ed. 2d 93, 83 S. Ct. 1028 (1963); *Williamson* v. *Lee Optical Co.*, 348 U.S. at 487. Congressional findings do not, however, directly address **[***115]** the question of reasonableness; they tell us what Congress actually has found, not what it could rationally find. If, indeed, the Court were to make the existence of explicit congressional findings dispositive in some close or difficult cases something other than rationality review would be afoot. The resulting congressional obligation to justify its policy choices on the merits would imply **[*614]** either a judicial authority to review the justification (and, hence, the wisdom) of those choices, or authority to require Congress to act with some high degree of deliberateness, of which express findings would be evidence. But review for congressional wisdom would just be the old judicial pretension discredited and abandoned in 1937, and review for deliberateness would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court. Such a legislative process requirement would function merely as an excuse for covert review of the merits of legislation under standards never expressed **[**1657]** and more or less arbitrarily applied. Under such a regime, in any case, the rationality standard of review would be a thing of the past.

On the other hand, to say that courts applying **[***116]** the rationality standard may not defer to findings is not, of course, to say that findings are pointless. They may, in fact, have great value in telling courts what to look for, in establishing at least one frame of reference for review, and in citing to factual authority. The research underlying JUSTICE BREYER's dissent was necessarily a major undertaking; help is welcome, and it not incidentally shrinks the risk that judicial research will miss material scattered across the public domain or buried under pounds of legislative record. Congressional findings on a more particular plane than

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this record illustrates would accordingly have earned judicial thanks. But thanks do not carry the day as long as rational possibility is the touchstone, and I would not allow for the possibility, as the Court's opinion may, *ante*, at 563, that the addition of congressional findings could in principle have affected the fate of the statute here.

III

Because JUSTICE BREYER's opinion demonstrates beyond any doubt that the Act in question passes the rationality review that the Court continues to espouse, today's decision may be seen as only a misstep, its reasoning and its suggestions **[*615]** not quite in **[***117]** gear with the prevailing standard, but hardly an epochal case. I would not argue otherwise, but I would raise a caveat. Not every epochal case has come in epochal trappings. *Jones & Laughlin* did not reject the direct-indirect standard in so many words; it just said the relation of the regulated subject matter to commerce was direct enough. 301 U.S. at 41-43. But we know what happened.

I respectfully dissent.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

The issue in this case is whether the Commerce Clause authorizes Congress to enact a statute that makes it a crime to possess a gun in, or near, a school. 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V). In my view, the statute falls well within the scope of the commerce power as this Court has understood that power over the last half century.

I

In reaching this conclusion, I apply three basic principles of Commerce Clause interpretation. First, the power to "regulate Commerce . . . among the several States," U.S. Const., Art. I, § 8, cl. 3, encompasses the power to regulate local activities insofar as they significantly **[***118]** affect interstate commerce. See, *e. g.*, *Gibbons* v. *Ogden*, 22 U.S. 1, 9 Wheat. 1, 194-195, 6 L. Ed. 23 (1824) (Marshall, C. J.); *Wickard* v. *Filburn*, 317 U.S. 111, 125, 87 L. Ed. 122, 63 S. Ct. 82 (1942). As the majority points out, *ante*, at 559, the Court, in describing how much of an effect the Clause requires, sometimes has used the word "substantial" and sometimes has not. Compare, *e. g.*, *Wickard, supra*, at 125 ("substantial economic effect"), with *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981) ("affects interstate commerce"); see also *Maryland* v. *Wirtz*, 392 U.S. 183, 196, n. 27, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968) (cumulative effect must not be "trivial"); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 81 L. Ed. 893, 57 S. Ct. 615 (1937) **[*616]** (speaking of "close and substantial *relation*" between activity and commerce, not of "substantial effect") (emphasis added); *Gibbons, supra*, at 194 (words of Commerce Clause do not "comprehend . . . commerce, which is completely internal . . . and which does not . . . affect other States"). And, as the majority **[***119]** also recognizes in quoting Justice Cardozo, the question of degree (how *much* effect) requires an estimate of the "size" of the effect that no verbal formulation can capture with precision. See *ante*, at 567. I use the word "significant" because the word "substantial" implies a somewhat narrower power than recent precedent suggests. See, *e. g.*, *Perez* v. *United States*, 402 **[**1658]** U.S. 146, 154, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971); *Daniel* v. *Paul*, 395 U.S. 298, 308, 23 L. Ed. 2d 318, 89 S. Ct. 1697 (1969). But to speak of "substantial effect" rather than "significant effect" would make no difference in this case.

Second, in determining whether a local activity will likely have a significant effect upon interstate commerce, a court must consider, not the effect of an individual act (a single instance of gun possession), but rather the cumulative effect of all similar instances (*i. e.*, the effect of all guns possessed in or near schools). See, *e. g.*, *Wickard, supra*, at 127-128. As

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this Court put the matter almost 50 years ago:

> "It is enough that the individual activity when multiplied into a general practice . . . contains a threat to the interstate economy that **[***120]** requires preventative regulation." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236, 92 L. Ed. 1328, 68 S. Ct. 996 (1948) (citations omitted).

Third, the Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce -- both because the Constitution delegates the commerce power directly to Congress and because the **[*617]** determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words "rational basis" capture this leeway. See *Hodel, supra*, at 276-277. Thus, the specific question before us, as the Court recognizes, is not whether the "regulated activity sufficiently affected interstate commerce," but, rather, whether Congress could have had "*a rational basis*" for so concluding. *Ante*, at 557 (emphasis added).

I recognize that we must judge this matter independently. "Simply because Congress may conclude **[***121]** that a particular activity substantially affects interstate commerce does not necessarily make it so." *Hodel, supra*, at 311 (REHNQUIST, J., concurring in judgment). And, I also recognize that Congress did not write specific "interstate commerce" findings into the law under which Lopez was convicted. Nonetheless, as I have already noted, the matter that we review independently (*i. e.*, whether there is a "rational basis") already has considerable leeway built into it. And, the absence of findings, at most, deprives a statute of the benefit of some *extra* leeway. This extra deference, in principle, might change the result in a close case, though, in practice, it has not made a critical legal difference. See, *e. g.*, *Katzenbach* v. *McClung*, 379 U.S. 294, 299, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964) (noting that "no formal findings were made, which of course are not necessary"); *Perez, supra*, at 156-157; cf. *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 666, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994) (opinion of KENNEDY, J.) ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate **[***122]** judicial review"); *Fullilove* v. *Klutznick*, 448 U.S. 448, 503, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) (Powell, J., concurring) ("After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate . . ."). It would seem particularly unfortunate to make the validity of **[*618]** the statute at hand turn on the presence or absence of findings. Because Congress did make findings (though not until after Lopez was prosecuted), doing so would appear to elevate form over substance. See Pub. L. 103-322, §§ 320904 (2) (F), (G), 108 Stat. 2125, 18 U.S.C. §§ 922(q)(1)(F), (G).

In addition, despite the Court of Appeals' suggestion to the contrary, see 2 F.3d 1342, 1365 (CA5 1993), there is no special need here for a clear indication of Congress' rationale. The statute does not interfere with the exercise of state or local authority. Cf., *e. g.*, *Dellmuth* v. *Muth*, 491 U.S. 223, 227-228, 105 L. Ed. 2d 181, 109 S. Ct. 2397 (1989) (requiring clear statement for abrogation of Eleventh Amendment immunity). Moreover, any clear **[***123]** statement rule would **[**1659]** apply only to determine Congress' intended result, *not* to clarify the source of its authority or measure the level of consideration that went into its decision, and here there is no doubt as to which activities Congress intended to regulate. See *ibid.*; *id.*, at 233 (SCALIA, J., concurring) (to subject States to suits for money damages, Congress need only make that intent clear, and need not refer explicitly to the Eleventh Amendment); *EEOC* v. *Wyoming*, 460 U.S. 226, 243, n. 18, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983) (Congress need not recite the constitutional provision that authorizes its action).

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briefs were Assistant Attorney General Harris, Deputy Solicitor General Wallace, Malcolm L. Stewart, and John F. De Pue.

John R. Carter argued the cause for respondent. With him on the brief were Lucien B. Campbell, Henry J. Bemporad, Carter G. Phillips, and Adam D. Hirsh. *

* Briefs of amici curiae urging reversal were filed for 16 Members of the United States Senate et al. by Debra A. Valentine, Brady C. Williamson, and Jeffrey J. Kassel; for the State of Ohio et al. by Lee Fisher, Attorney General of Ohio, John P. Ware, Assistant Attorney General, Richard A. Cordray, State Solicitor, Simon B. Karas, G. Oliver Koppell, Attorney General of New York, and Vanessa Ruiz; for the Center to Prevent Handgun Violence et al. by Erwin N. Griswold, Dennis A. Henigan, and Gail A. Robinson; for Children NOW et al. by William F. Abrams; for the Clarendon Foundation by Ronald D. Maines; for the Coalition to Stop Gun Violence et al. by Brian J. Benner; and for the National School Safety Center et al. by James A. Rapp.

Briefs of amici curiae urging affirmance were filed for the National Conference of State Legislatures et al. by Richard Ruda and Barry Friedman; and for the Pacific Legal Foundation by Ronald A. Zumbrun and Anthony T. Caso.

Briefs of amici curiae were filed for Academics for the Second Amendment et al. by Patrick J. Basial, Don B. Kates, Robert Carter, Henry Mark Holzer, Nicholas J. Johnson, Joseph E. Olson, Daniel Polsby, Charles E. Rice, Wallace Rudolph, Justin Smith, Robert B. Smith, George Strickler, Richard Warner, and Robert Weisberg; and for the Texas Justice Foundation by Clayton Trotter.

JUDGES: REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., filed a concurring opinion, in which O'CONNOR, J., joined, post, p. 568. THOMAS, J., filed a concurring opinion, post, p. 584. STEVENS, J., post, p. 602, and SOUTER, J., post, p. 603, filed dissenting opinions. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, post, p. 615.

OPINIONBY: REHNQUIST

OPINION: [*551] [1626]** CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[1A]
In the Gun-Free School Zones Act of 1990, Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922 **[***4]** (q)(1)(A) (1988 ed., Supp. V). The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "to regulate Commerce . . . among the several States . . . ." U.S. Const., Art. I, § 8, cl. 3.

On March 10, 1992, respondent, who was then a 12th-grade student, arrived at Edison High School in San Antonio, Texas, carrying a concealed .38 caliber handgun and five bullets. Acting upon an anonymous tip, school authorities confronted respondent, who admitted that he was carrying the weapon. He was arrested and charged under Texas law with firearm possession on school premises. See Tex. Penal Code Ann. § 46.03(a)(1) (Supp. 1994). The next day, the state charges were dismissed after federal agents charged respondent by complaint with violating the Gun-Free School Zones Act of 1990. 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V). n1

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II

Applying these principles to the case at hand, we must ask whether Congress could have had a *rational basis* for finding a significant (or substantial) connection between gun-related school violence and interstate commerce. Or, to put the question in the language of the *explicit* finding that Congress made when it amended this law in 1994: Could Congress rationally have found that "violent crime in school zones," through its effect on the "quality of education," significantly (or substantially) affects "interstate" or "foreign **[***124]** commerce"? 18 U.S.C. §§ 922(q)(1)(F), (G). As long as one views the commerce connection, not as a "technical legal conception," but as "a practical one," *Swift & Co. v. United States,* 196 U.S. 375, 398, 49 L. Ed. 518, 25 S. Ct. 276 **[*619]** (1905) (Holmes, J.), the answer to this question must be yes. Numerous reports and studies -- generated both inside and outside government -- make clear that Congress could reasonably have found the empirical connection that its law, implicitly or explicitly, asserts. (See Appendix, *infra*, at 631, for a sample of the documentation, as well as for complete citations to the sources referenced below.)

For one thing, reports, hearings, and other readily available literature make clear that the problem of guns in and around schools is widespread and extremely serious. These materials report, for example, that four percent of American high school students (and six percent of inner-city high school students) carry a gun to school at least occasionally, Centers for Disease Control 2342; Sheley, McGee, & Wright 679; that 12 percent of urban high school students have had guns fired at them, *ibid.;* that **[***125]** 20 percent of those students have been threatened with guns, *ibid.;* and that, in any 6-month period, several hundred thousand schoolchildren are victims of violent crimes in or near their schools, U.S. Dept. of Justice 1 (1989); House Select Committee Hearing 15 (1989). And, they report that this widespread violence in schools throughout the Nation significantly interferes with the quality of education in those schools. See, *e. g.*, House Judiciary Committee Hearing 44 (1990) (linking school violence to dropout rate); U.S. Dept. of Health 118-119 (1978) (school-violence victims suffer academically); compare U.S. Dept. of Justice 1 (1991) (gun violence worst in inner-city schools), with National Center 47 (dropout rates highest in inner cities). Based on reports such as these, Congress obviously could have thought that guns and learning are mutually exclusive. Senate Labor and Human Resources Committee Hearing 39 (1993); U.S. Dept. of Health 118, 123-124 (1978). Congress could therefore have found a substantial educational problem -- teachers unable to teach, students unable to learn -- and concluded that guns near schools contribute substantially to the size and scope of that **[***126]** problem.

[*620] Having found that guns in schools significantly undermine the quality of education in our Nation's classrooms, Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun-related violence in and around schools is a commercial, as well as a human, problem. Education, although far more than a matter of economics, has long been inextricably intertwined with the Nation's economy. When this Nation began, most workers received their education in the workplace, typically (like Benjamin Franklin) as apprentices. See generally Seybolt; Rorabaugh; U.S. Dept. of Labor (1950). As late as the 1920's, many workers still received general education directly from their employers -- from large corporations, such as General Electric, Ford, and Goodyear, which created schools **[**1660]** within their firms to help both the worker and the firm. See Bolino 15-25. (Throughout most of the 19th century fewer than one percent of all Americans received secondary education through attending a high school. See *id.*, at 11.) As public school enrollment grew in the early 20th century, see Becker 218 (1993), the need for industry to teach basic educational skills diminished. **[***127]** But, the direct economic link between basic education and industrial productivity remained. Scholars estimate that nearly a quarter of America's economic growth in the early years of this century is traceable directly to increased schooling, see Denison 243; that investment in "human capital" (through spending on education) exceeded investment in "physical capital" by a ratio of almost two to one, see Schultz 26 (1961); and that the economic returns to this

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investment in education exceeded the returns to conventional capital investment, see, *e. g.*, Davis & Morrall 48-49.

In recent years the link between secondary education and business has strengthened, becoming both more direct and more important. Scholars on the subject report that technological changes and innovations in management techniques have altered the nature of the workplace so that more jobs now demand greater educational skills. See, *e. g.*, MIT 32 **[*621]** (only about one-third of handtool company's 1,000 workers were qualified to work with a new process that requires high-school-level reading and mathematical skills); Cyert & Mowery 68 (gap between wages of high school dropouts and better trained workers increasing); U.S. **[***128]** Dept. of Labor 41 (1981) (job openings for dropouts declining over time). There is evidence that "service, manufacturing or construction jobs are being displaced by technology that requires a better-educated worker or, more likely, are being exported overseas," Gordon, Ponticell, & Morgan 26; that "workers with truly few skills by the year 2000 will find that only one job out of ten will remain," *ibid.;* and that

> "over the long haul the best way to encourage the growth of high-wage jobs is to upgrade the skills of the work force. . . . Better-trained workers become more productive workers, enabling a company to become more competitive and expand." Henkoff 60.

Increasing global competition also has made primary and secondary education economically more important. The portion of the American economy attributable to international trade nearly tripled between 1950 and 1980, and more than 70 percent of American-made goods now compete with imports. Marshall 205; Marshall & Tucker 33. Yet, lagging worker productivity has contributed to negative trade balances and to real hourly compensation that has fallen below wages in 10 other industrialized nations. See National Center 57; Handbook **[***129]** of Labor Statistics 561, 576 (1989); Neef & Kask 28, 31. At least some significant part of this serious productivity problem is attributable to students who emerge from classrooms without the reading or mathematical skills necessary to compete with their European or Asian counterparts, see, *e. g.*, MIT 28, and, presumably, to high school dropout rates of 20 to 25 percent (up to 50 percent in inner cities), see, *e. g.*, National Center 47; Chubb & Hanushek 215. Indeed, Congress has said, when writing other statutes, that **[*622]** "functionally or technologically illiterate" Americans in the work force "erode" our economic "standing in the international marketplace," Pub. L. 100-418, § 6002(a)(3), 102 Stat. 1469, and that "our Nation is . . . paying the price of scientific and technological illiteracy, with our productivity declining, our industrial base ailing, and our global competitiveness dwindling," H. R. Rep. No. 98-6, pt. 1, p. 19 (1983).

Finally, there is evidence that, today more than ever, many firms base their location decisions upon the presence, or absence, of a work force with a basic education. See MacCormack, Newman, & Rosenfield 73; Coffee 296. Scholars on the subject report, **[***130]** for example, that today, "high speed communication and transportation make it possible to produce most products and services anywhere in the world," National Center 38; that "modern machinery and production methods can therefore be combined with low wage workers to drive costs down," *ibid.;* that managers can perform "'back office functions anywhere in the world now,'" and say that if they "'can't get enough skilled **[**1661]** workers here'" they will "'move the skilled jobs out of the country,'" *id.*, at 41; with the consequence that "rich countries need better education and retraining, to reduce the supply of unskilled workers and to equip them with the skills they require for tomorrow's jobs," Survey of Global Economy 37. In light of this increased importance of education to individual firms, it is no surprise that half of the Nation's manufacturers have become involved with setting standards and shaping curricula for local schools, Maturi 65-68, that 88 percent think this kind of involvement is important, *id.*, at 68, that more than 20 States have recently passed educational reforms to attract new business, Overman 61-62, and that business

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magazines have begun to rank cities according **[***131]** to the quality of their schools, see Boyle 24.

The economic links I have just sketched seem fairly obvious. Why then is it not equally obvious, in light of those links, that a widespread, serious, and substantial physical **[*623]** threat to teaching and learning *also* substantially threatens the commerce to which that teaching and learning is inextricably tied? That is to say, guns in the hands of six percent of inner-city high school students and gun-related violence throughout a city's schools must threaten the trade and commerce that those schools support. The only question, then, is whether the latter threat is (to use the majority's terminology) "substantial." The evidence of (1) the *extent* of the gun-related violence problem, see *supra*, at 619, (2) the *extent* of the resulting negative effect on classroom learning, see *ibid.*, and (3) the *extent* of the consequent negative commercial effects, see *supra*, at 620-622, when taken together, indicate a threat to trade and commerce that is "substantial." At the very least, Congress could rationally have concluded that the links are "substantial."

Specifically, Congress could have found that gun-related violence **[***132]** near the classroom poses a serious economic threat (1) to consequently inadequately educated workers who must endure low paying jobs, see, *e. g.*, National Center 29, and (2) to communities and businesses that might (in today's "information society") otherwise gain, from a well-educated work force, an important commercial advantage, see, *e. g.*, Becker 10 (1992), of a kind that location near a railhead or harbor provided in the past. Congress might also have found these threats to be no different in kind from other threats that this Court has found within the commerce power, such as the threat that loan sharking poses to the "funds" of "numerous localities," *Perez* v. *United States*, 402 U.S. at 157, and that unfair labor practices pose to instrumentalities of commerce, see *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 221-222, 83 L. Ed. 126, 59 S. Ct. 206 (1938). As I have pointed out, *supra*, at 618, Congress has written that "the occurrence of violent crime in school zones" has brought about a "decline in the quality of education" that "has an adverse impact on interstate commerce and the foreign commerce of the United States." 18 U.S.C. §§ 922 **[***133]** (q)(1)(F), (G). The violence-related facts, the educational **[*624]** facts, and the economic facts, taken together, make this conclusion rational. And, because under our case law, see *supra*, at 615-617; *infra*, at 627-628, the sufficiency of the constitutionally necessary Commerce Clause link between a crime of violence and interstate commerce turns simply upon size or degree, those same facts make the statute constitutional.

To hold this statute constitutional is not to "obliterate" the "distinction between what is national and what is local," *ante*, at 567 (citation omitted; internal quotation marks omitted); nor is it to hold that the Commerce Clause permits the Federal Government to "regulate any activity that it found was related to the economic productivity of individual citizens," to regulate "marriage, divorce, and child custody," or to regulate any and all aspects of education. *Ante*, at 564. First, this statute is aimed at curbing a particularly acute threat to the educational process -- the possession (and use) of life-threatening firearms in, or near, the classroom. The empirical evidence that I have discussed above unmistakably documents the special way **[***134]** in which guns and education are incompatible. See *supra*, at 619. This Court has previously recognized the singularly disruptive potential **[**1662]** on interstate commerce that acts of violence may have. See *Perez, supra*, at 156-157. Second, the immediacy of the connection between education and the national economic well-being is documented by scholars and accepted by society at large in a way and to a degree that may not hold true for other social institutions. It must surely be the rare case, then, that a statute strikes at conduct that (when considered in the abstract) seems so removed from commerce, but which (practically speaking) has so significant an impact upon commerce.

In sum, a holding that the particular statute before us falls within the commerce power would not expand the scope of that Clause. Rather, it simply would apply pre-existing law to changing economic circumstances. See *Heart of Atlanta* **[*625]** *Motel, Inc.* v. *United States*, 379 U.S. 241, 251, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964). It would recognize that,

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in today's economic world, gun-related violence near the classroom makes a significant difference to our economic, as **[***135]** well as our social, well-being. In accordance with well-accepted precedent, such a holding would permit Congress "to act in terms of economic . . . realities," would interpret the commerce power as "an affirmative power commensurate with the national needs," and would acknowledge that the "commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy." *North American Co. v. SEC*, 327 U.S. 686, 705, 90 L. Ed. 945, 66 S. Ct. 785 (1946) (citing *Swift & Co. v. United States*, 196 U.S. at 398 (Holmes, J.)).

III

The majority's holding -- that § 922 falls outside the scope of the Commerce Clause -- creates three serious legal problems. First, the majority's holding runs contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence. In *Perez v. United States, supra*, the Court held that the Commerce Clause authorized a federal statute that makes it a crime to engage in loan **[***136]** sharking ("extortionate credit transactions") at a local level. The Court said that Congress may judge that such transactions, "though purely *intra*state, . . . affect *inter*state commerce." 402 U.S. at 154 (emphasis added). Presumably, Congress reasoned that threatening or using force, say with a gun on a street corner, to collect a debt occurs sufficiently often so that the activity (by helping organized crime) affects commerce among the States. But, why then cannot Congress also reason that the threat or use of force -- the frequent consequence of possessing a gun -- in or near a school occurs sufficiently often so that such activity (by inhibiting basic education) affects **[*626]** commerce among the States? The negative impact upon the national economy of an inability to teach basic skills seems no smaller (nor less significant) than that of organized crime.

In *Katzenbach v. McClung*, 379 U.S. 294, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964), this Court upheld, as within the commerce power, a statute prohibiting racial discrimination at local restaurants, in part because that discrimination discouraged travel by African Americans and in part because that discrimination **[***137]** affected purchases of food and restaurant supplies from other States. See *id.*, at 300; *Heart of Atlanta Motel, supra*, at 274 (Black, J., concurring in *McClung* and in *Heart of Atlanta*). In *Daniel v. Paul*, 395 U.S. 298, 23 L. Ed. 2d 318, 89 S. Ct. 1697 (1969), this Court found an effect on commerce caused by an amusement park located several miles down a country road in the middle of Alabama -- because some customers (the Court assumed), some food, 15 paddleboats, and a juke box had come from out of state. See *id.*, at 304-305, 308. In both of these cases, the Court understood that the specific instance of discrimination (at a local place of accommodation) was part of a general practice that, considered as a whole, caused not only the most serious human and social harm, but had nationally significant economic dimensions as well. See *McClung, supra*, at 301; **[**1663]** *Daniel, supra*, at 307, n. 10. It is difficult to distinguish the case before us, for the same critical elements are present. Businesses are less likely to locate in communities where violence plagues the classroom. **[***138]** Families will hesitate to move to neighborhoods where students carry guns instead of books. (Congress expressly found in 1994 that "parents may decline to send their children to school" in certain areas "due to concern about violent crime and gun violence." 18 U.S.C. § 922(q)(1)(E).) And (to look at the matter in the most narrowly commercial manner), interstate publishers therefore will sell fewer books and other firms will sell fewer school supplies where the threat of violence disrupts learning. Most importantly, like the local racial discrimination at issue in *McClung* and *Daniel*, the local instances here, taken **[*627]** together and considered as a whole, create a problem that causes serious human and social harm, but also has nationally significant economic dimensions.

In *Wickard v. Filburn*, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942), this Court sustained the application of the Agricultural Adjustment Act of 1938 to wheat that Filburn grew and

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consumed on his own local farm because, considered in its totality, (1) homegrown wheat may be "induced by rising prices" to "flow into the market and check price increases, **[***139]** " and (2) even if it never actually enters the market, homegrown wheat nonetheless "supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market" and, in that sense, "competes with wheat in commerce." *Id.*, at 128. To find both of these effects on commerce significant in amount, the Court had to give Congress the benefit of the doubt. Why would the Court, to find a significant (or "substantial") effect here, have to give Congress any greater leeway? See also *United States v. Women's Sportswear Mfrs. Assn.*, 336 U.S. 460, 464, 93 L. Ed. 805, 69 S. Ct. 714 (1949) ("If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze"); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. at 236 ("It is enough that the individual activity when multiplied into a general practice . . . contains a threat to the interstate economy that requires preventive regulation").

The second legal problem the Court creates comes from its apparent belief that it can reconcile its holding with earlier cases by making **[***140]** a critical distinction between "commercial" and noncommercial "transaction[s]." *Ante*, at 561. That is to say, the Court believes the Constitution would distinguish between two local activities, each of which has an identical effect upon interstate commerce, if one, but not the other, is "commercial" in nature. As a general matter, this approach fails to heed this Court's earlier warning not to turn "questions of the power of Congress" upon "formula[s]" that would give

> **[*628]** "controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce." *Wickard, supra*, at 120.

See also *United States v. Darby*, 312 U.S. 100, 116-117, 85 L. Ed. 609, 61 S. Ct. 451 (1941) (overturning the Court's distinction between "production" and "commerce" in the child labor case, *Hammer v. Dagenhart*, 247 U.S. 251, 271-272, 62 L. Ed. 1101, 38 S. Ct. 529 (1918)); *Swift & Co. v. United States*, 196 U.S. at 398 (Holmes, J.) ("Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business"). Moreover, **[***141]** the majority's test is not consistent with what the Court saw as the point of the cases that the majority now characterizes. Although the majority today attempts to categorize *Perez*, *McClung*, and *Wickard* as involving intrastate "economic activity," *ante*, at 559, the Courts that decided each of those cases did *not* focus upon the economic nature of the activity regulated. Rather, they focused upon whether that activity *affected* interstate or foreign commerce. In fact, the *Wickard* Court expressly held that Filburn's consumption of homegrown wheat, "*though it may not be regarded* **[**1664]** *as commerce*," could nevertheless be regulated -- "*whatever its nature*" -- so long as "it exerts a substantial economic effect on interstate commerce." *Wickard, supra*, at 125 (emphasis added).

More importantly, if a distinction between commercial and noncommercial activities is to be made, this is not the case in which to make it. The majority clearly cannot intend such a distinction to focus narrowly on an act of gun possession standing by itself, for such a reading could not be reconciled with either the civil rights cases (*McClung* and *Daniel*) or *Perez* -- in **[***142]** each of those cases the specific transaction (the race-based exclusion, the use of force) was not itself "commercial." And, if the majority instead means to distinguish generally among broad categories of activities, differentiating what is educational from what is commercial, then, as a **[*629]** practical matter, the line becomes almost impossible to draw. Schools that teach reading, writing, mathematics, and related basic skills serve *both* social and commercial purposes, and one cannot easily separate the one from the other. American industry itself has been, and is again, involved in teaching. See *supra*, at 620, 622. When, and to what extent, does its involvement make education commercial? Does the

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number of vocational classes that train students directly for jobs make a difference? Does it matter if the school is public or private, nonprofit or profit seeking? Does it matter if a city or State adopts a voucher plan that pays private firms to run a school? Even if one were to ignore these practical questions, why should there be a theoretical distinction between education, when it significantly benefits commerce, and environmental pollution, when it causes economic harm? See *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981).

[*143]** Regardless, if there is a principled distinction that could work both here and in future cases, Congress (even in the absence of vocational classes, industry involvement, and private management) could rationally conclude that schools fall on the commercial side of the line. In 1990, the year Congress enacted the statute before us, primary and secondary schools spent $ 230 billion -- that is, nearly a quarter of a trillion dollars -- which accounts for a significant portion of our $ 5.5 trillion gross domestic product for that year. See Statistical Abstract 147, 442 (1993). The business of schooling requires expenditure of these funds on student transportation, food and custodial services, books, and teachers' salaries. See U.S. Dept. of Education 4, 7 (1993). These expenditures enable schools to provide a valuable service -- namely, to equip students with the skills they need to survive in life and, more specifically, in the workplace. Certainly, Congress has often analyzed school expenditure as if it were a commercial investment, closely analyzing whether schools are efficient, whether they justify the significant resources **[*630]** they spend, and whether they can be restructured to achieve **[***144]** greater returns. See, *e. g.*, S. Rep. No. 100-222, p. 2 (1987) (federal school assistance is "a prudent investment"); Senate Appropriations Committee Hearing (1994) (private sector management of public schools); cf. Chubb & Moe 185-229 (school choice); Hanushek 85-122 (performance based incentives for educators); Gibbs (decision in Hartford, Conn., to contract out public school system). Why could Congress, for Commerce Clause purposes, not consider schools as roughly analogous to commercial investments from which the Nation derives the benefit of an educated work force?

The third legal problem created by the Court's holding is that it threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled. Congress has enacted many statutes (more than 100 sections of the United States Code), including criminal statutes (at least 25 sections), that use the words "affecting commerce" to define their scope, see, *e. g.*, 18 U.S.C. § 844(i) (destruction of buildings used in activity affecting interstate commerce), and other statutes that contain no jurisdictional language at all, see, *e. g.*, 18 U.S.C. § 922 **[***145]** (*o*)(1) (possession of machineguns). Do these, or similar, statutes regulate noncommercial activities? If so, would that alter the meaning of "affecting commerce" in a jurisdictional element? Cf. *United States* v. *Staszcuk*, 517 F.2d 53, 57-58 (CA7 1975) (en **[**1665]** banc) (Stevens, J.) (evaluation of Congress' intent "requires more than a consideration of the consequences of the particular transaction"). More importantly, in the absence of a jurisdictional element, are the courts nevertheless to take *Wickard*, 317 U.S. at 127-128, (and later similar cases) as inapplicable, and to judge the effect of a single noncommercial activity on interstate commerce without considering similar instances of the forbidden conduct? However these questions are eventually resolved, the legal uncertainty now created will restrict Congress' ability to enact criminal laws aimed at criminal behavior that, considered problem by problem rather **[*631]** than instance by instance, seriously threatens the economic, as well as social, well-being of Americans.

IV

In sum, to find this legislation within the scope of the Commerce Clause would permit "Congress . . . **[***146]** to act in terms of economic . . . realities." *North American Co.* v. *SEC*, 327 U.S. at 705 (citing *Swift & Co.* v. *United States*, 196 U.S. at 398 (Holmes, J.)). It would interpret the Clause as this Court has traditionally interpreted it, with the exception of one wrong turn subsequently corrected. See *Gibbons* v. *Ogden*, 9 Wheat., at 195 (holding that the commerce power extends "to all the external concerns of the nation, and to those

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internal concerns which affect the States generally "); *United States* v. *Darby*, 312 U.S. at 116-117 ("The conclusion is inescapable that *Hammer* v. *Dagenhart* [the child labor case] was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision . . . . It should be and now is overruled"). Upholding this legislation would do no more than simply recognize that Congress had a "rational basis" for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce **[***147]** they threaten. For these reasons, I would reverse the judgment of the Court of Appeals. Respectfully, I dissent.

APPENDIX TO OPINION OF BREYER, J.

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- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*5]** A federal grand jury indicted respondent on one count of knowing possession of a firearm at a school zone, in violation of § 922(q). Respondent moved to dismiss his federal indictment on the ground that § 922(q) "is unconstitutional as it is beyond the power of Congress to legislate control over our public schools." The District Court denied the motion, concluding that § 922(q) "is a constitutional exercise of Congress' well-defined power to regulate activities in and affecting **[*552]** commerce, and the 'business' of elementary, middle and high schools . . . affects interstate commerce." App. to Pet. for Cert. 55a. Respondent waived his right to a jury trial. The District Court conducted a bench trial, found him guilty of violating § 922(q), and sentenced him to six months' imprisonment and two years' supervised release.

On appeal, respondent challenged his conviction based on his claim that § 922(q) exceeded Congress' power to legislate under the Commerce Clause. The Court of Appeals for the Fifth Circuit agreed and reversed respondent's conviction. It held that, in light of what it characterized as insufficient congressional findings and legislative history, "section 922(q), in the full **[***6]** reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause." 2 F.3d 1342, 1367-1368 (1993). Because of the importance of the issue, we granted certiorari, 511 U.S. 1029 (1994), and we now affirm.

We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote, "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991) (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." **[***7]** *Ibid.*

The Constitution delegates to Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, **[*553]** cl. 3. The Court, through Chief Justice Marshall, first defined the nature of Congress' **[**1627]** commerce power in

> *Gibbons* v. *Ogden*, 22 U.S. 1, 9 Wheat. 1, 189-190, 6 L. Ed. 23 (1824):
> "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

The commerce power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.*, at 196. The *Gibbons* Court, however, acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause.

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> "It is not intended to say that these words comprehend that commerce, which is completely internal, **[***8]** which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.
>
> "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State." *Id.*, at 194-195.

For nearly a century thereafter, the Court's Commerce Clause decisions dealt but rarely with the extent of Congress' power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce. See, *e. g.*, *Veazie* v. *Moor*, 55 U.S. 568, 14 How. 568, 573-575, 14 L. Ed. 545 (1853) (upholding a state-created steamboat monopoly **[*554]** because it involved regulation of wholly internal commerce); *Kidd* v. *Pearson*, 128 U.S. 1, 17, 20-22, 32 L. Ed. 346, 9 S. Ct. 6 (1888) (upholding a state prohibition on the manufacture of intoxicating liquor because the commerce power "does not comprehend the purely internal domestic **[***9]** commerce of a State which is carried on between man and man within a State or between different parts of the same State"); see also L. Tribe, American Constitutional Law 306 (2d ed. 1988). Under this line of precedent, the Court held that certain categories of activity such as "production," "manufacturing," and "mining" were within the province of state governments, and thus were beyond the power of Congress under the Commerce Clause. See *Wickard* v. *Filburn*, 317 U.S. 111, 121, 87 L. Ed. 122, 63 S. Ct. 82 (1942) (describing development of Commerce Clause jurisprudence).

In 1887, Congress enacted the Interstate Commerce Act, 24 Stat. 379, and in 1890, Congress enacted the Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C. § 1 *et seq.* These laws ushered in a new era of federal regulation under the commerce power. When cases involving these laws first reached this Court, we imported from our negative Commerce Clause cases the approach that Congress could not regulate activities such as "production," "manufacturing," and "mining." See, *e. g.*, *United States* v. *E. C. Knight Co.*, 156 U.S. 1, 12, 39 L. Ed. 325, 15 S. Ct. 249 (1895) ("Commerce **[***10]** succeeds to manufacture, and is not part of it"); *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 304, 80 L. Ed. 1160, 56 S. Ct. 855 (1936) ("Mining brings the subject matter of commerce into existence. Commerce disposes of it"). Simultaneously, however, the Court held that, where the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation. See, *e. g.*, *Shreveport Rate Cases*, 234 U.S. 342, 58 L. Ed. 1341, 34 S. Ct. 833 (1914).

In *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 550, 79 L. Ed. 1570, 55 S. Ct. 837 (1935), the Court struck down regulations that **[*555]** fixed the hours and wages of individuals employed by an intrastate business because the activity being regulated related to interstate commerce only indirectly. In doing so, the Court characterized the distinction between **[**1628]** direct and indirect effects of intrastate transactions upon interstate commerce as "a fundamental one, essential to the maintenance of our constitutional system." *Id.*, at 548. **[***11]** Activities that affected interstate commerce directly were within Congress' power; activities that affected interstate commerce indirectly were beyond Congress' reach. *Id.*, at 546. The justification for this formal distinction was rooted in the fear that otherwise "there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government." *Id.*, at 548.

Two years later, in the watershed case of *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1,

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81 L. Ed. 893, 57 S. Ct. 615 (1937), the Court upheld the National Labor Relations Act against a Commerce Clause challenge, and in the process, departed from the distinction between "direct" and "indirect" effects on interstate commerce. *Id.*, at 36-38 ("The question [of the scope of Congress' power] is necessarily one of degree"). The Court held that intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" are within Congress' power to regulate. *Id.*, at 37.

[*12]** In *United States* v. *Darby*, 312 U.S. 100, 85 L. Ed. 609, 61 S. Ct. 451 (1941), the Court upheld the Fair Labor Standards Act, stating:

> "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Id.*, at 118.

[*556] See also *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119, 86 L. Ed. 726, 62 S. Ct. 523 (1942) (the commerce power "extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power").

In *Wickard* v. *Filburn*, the Court upheld the application of amendments to the Agricultural Adjustment Act of 1938 to the production and consumption of homegrown wheat. 317 U.S. at 128-129. The *Wickard* Court explicitly rejected earlier distinctions between direct and indirect effects on interstate commerce, **[***13]** stating:

> "Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Id.*, at 125.

The *Wickard* Court emphasized that although Filburn's own contribution to the demand for wheat may have been trivial by itself, that was not "enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.*, at 127-128.

Jones & Laughlin Steel, Darby, and *Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change **[***14]** also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.

But even these modern-era precedents which have expanded congressional power under the Commerce Clause **[*557]** confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that **[**1629]** to embrace them, in view of our complex society, would effectually obliterate the distinction

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between what is national and what is local and create a completely centralized government." 301 U.S. at 37; see also *Darby, supra,* at 119-120 (Congress may regulate intrastate activity that has a "substantial effect" on interstate commerce); *Wickard, supra,* at 125 (Congress may regulate activity that "exerts a substantial economic effect on interstate commerce"). Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a **[***15]** regulated activity sufficiently affected interstate commerce. See, *e. g.,* *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 276-280, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981); *Perez* v. *United States,* 402 U.S. 146, 155-156, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971); *Katzenbach* v. *McClung,* 379 U.S. 294, 299-301, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964); *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, 252-253, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964). n2

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n2 See also *Hodel,* 452 U.S. at 311 ("Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so") (REHNQUIST, J., concurring in judgment); *Heart of Atlanta Motel,* 379 U.S. at 273 ("Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court") (Black, J., concurring).

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[*16]** Similarly, in *Maryland* v. *Wirtz,* 392 U.S. 183, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968), the Court reaffirmed that "the power to regulate commerce, though broad indeed, has limits" that "the Court has ample power" to enforce. *Id.,* at 196, overruled on other grounds, *National League of Cities* v. *Usery,* 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976), overruled by *Garcia* v. *San Antonio Metropolitan Transit* **[*558]** *Authority,* 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985). In response to the dissent's warnings that the Court was powerless to enforce the limitations on Congress' commerce powers because "all activities affecting commerce, even in the minutest degree, *[Wickard]*, may be regulated and controlled by Congress," 392 U.S. at 204 (Douglas, J., dissenting), the *Wirtz* Court replied that the dissent had misread precedent as "neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities," *id.,* at 197, n. 27. Rather, "the Court has said only that where **[***17]** *a general regulatory statute bears a substantial relation to commerce,* the *de minimis* character of individual instances arising under that statute is of no consequence." *Ibid.* (first emphasis added).

[2A]
Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. *Perez, supra,* at 150; see also *Hodel, supra,* at 276-277. First, Congress may regulate the use of the channels of interstate commerce. See, *e. g.,* *Darby,* 312 U.S. at 114; *Heart of Atlanta Motel, supra,* at 256 ("'The authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question'" (quoting *Caminetti* v. *United States,* 242 U.S. 470, 491, 61 L. Ed. 442, 37 S. Ct. 192 (1917))). Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only **[***18]** from intrastate activities. See, *e. g.,* *Shreveport Rate Cases,* 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914); *Southern R. Co.* v. *United States,* 222 U.S. 20, 56 L. Ed. 72, 32 S. Ct. 2 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); *Perez, supra,* at 150 ("For example, the destruction of an aircraft (18 U.S.C. § 32), or . . . thefts from interstate shipments (18 U.S.C. § 659)"). Finally, Congress' commerce authority includes the power to regulate those activities **[*559]** having a substantial **[**1630]** relation to interstate commerce, *Jones & Laughlin Steel,* 301 U.S. at 37, *i. e.,* those activities that substantially affect interstate commerce,

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Wirtz, supra, at 196, n. 27.

Within this final category, admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. Compare *Preseault* v. *ICC*, 494 U.S. 1, 17, 108 L. Ed. 2d 1, 110 S. Ct. 914 (1990), with *Wirtz, supra*, at 196, **[***19]** n. 27 (the Court has never declared that "Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities"). We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

[1B]
We now turn to consider the power of Congress, in the light of this framework, to enact § 922 (q). The first two categories of authority may be quickly disposed of: § 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if § 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

[2B]
First, we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate **[***20]** commerce. Examples include the regulation of intrastate coal mining; *Hodel, supra*, intrastate extortionate credit transactions, *Perez, supra*, restaurants utilizing substantial interstate supplies, *McClung, supra*, inns and hotels catering to interstate guests, *Heart of Atlanta Motel, supra*, and production **[*560]** and consumption of homegrown wheat, *Wickard* v. *Filburn*, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942). These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not. Roscoe Filburn operated a small farm in Ohio, on which, in the year involved, he raised 23 acres of wheat. It was his practice to sow winter wheat in the fall, and after harvesting it in July to sell a portion of the crop, to feed part of it to poultry and livestock on the farm, to use some in making flour for home consumption, and to keep the **[***21]** remainder for seeding future crops. The Secretary of Agriculture assessed a penalty against him under the Agricultural Adjustment Act of 1938 because he harvested about 12 acres more wheat than his allotment under the Act permitted. The Act was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices, which had previously obtained. The Court said, in an opinion sustaining the application of the Act to Filburn's activity:

> "One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. **[*561]** **[***22]** Home-grown wheat in this

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*2001 U.S. Dist. LEXIS 3256, **

BARBARA GRUTTER, Plaintiff, vs. LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, REGENTS OF THE UNIVERSITY OF MICHIGAN, and THE UNIVERSITY OF MICHIGAN LAW SCHOOL, Defendants.

Civil Action No. 97-CV-75928-DT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2001 U.S. Dist. LEXIS 3256

March 27, 2001, Decided

DISPOSITION: [*1] Plaintiffs' request for declaratory relief granted. Plaintiffs' request for injunctive relief granted. Parties' various motions for summary judgment denied, except that motion of individual defendants for summary judgment on grounds of qualified immunity granted.

CASE SUMMARY

PROCEDURAL POSTURE: The matter came on for trial on plaintiff's complaint alleging defendants' law school admissions policy discriminated against her on the basis of race in violation of equal protection under U.S. Const. amend. XIV, and that defendants violated 42 U.S.C.S. § 2000d. The individual defendants moved for summary judgment based on qualified immunity and defendant board of regents moved for summary judgment on the basis of U.S. Const. amend. XI immunity.

OVERVIEW: Plaintiff, a Caucasian, applied for admission to defendant law school, a state educational institution receiving federal funds. Plaintiff sued alleging her application was rejected because defendants, the law school, its dean and director of admissions, the university president and the university regents, used race as a predominant factor in determining law school admissions, giving minority applicants a significantly greater chance of admission than students with similar credentials from disfavored racial groups. Following a bench trial the court found that: defendants placed a heavy emphasis on race in deciding whether to accept or reject an applicant; under the Bakke analysis a state educational institution's desire to assemble a racially diverse student body was not a compelling state interest; achievement of racial diversity in defendant law school's admissions was not a compelling state interest because it was not a remedy for past discrimination; and, even if it was, it had not been narrowly tailored to serve that interest. With respect to intervenors' case the court held that remedying past or present societal discrimination was not a compelling state interest.

OUTCOME: The court granted plaintiff declaratory and injunctive relief, holding that defendant law school's race conscious admissions policy violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. The court enjoined further use of race as an admissions factor, denied defendant regents Eleventh Amendment immunity, but granted individual defendants summary judgement on the basis of qualified immunity.

CORE TERMS: law school, score, underrepresented, diversity, undergraduate, odds, dean, critical mass, gap, ethnic, median, intervenors, grid, diverse, educational, grades, affirmative

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file [sic] are also important. I also like to see people who have been challenged in one way or the other and have faced up to that challenge in a positive way."

The law school's admissions policy is also succinctly described in the University of Michigan Law School Bulletin. The bulletin for the 1996-1997 academic year, which was admitted as Trial Exhibit 6, states at page 81: n7

> All applications are read in their entirety, and all of the information elicited by the application is factored into the admission decision. All admissions are made with the goal of forming a class with an exciting and productive mix of students who will enhance the educational experience for each other and for the School. Law School Admission Test (LSAT) scores and undergraduate course work **[*19]** and performance are relied on heavily, as are comparative studies of the past performance of similar students at the Law School. Serious regard is also given to an applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic -- e.g., an unusual intellectual achievement, employment experience, nonacademic performance, or personal background. The guiding purpose for selection among applicants is to make the School a better a livelier place in which to learn and to improve its service to the profession and the public.
>
> In addition to its own interest in forming a class which is strengthened by the talents and diversity of its members, Michigan recognizes the public interest in increasing the number of lawyers from groups which the faculty identifies as significantly underrepresented in the legal profession. In particular, we strongly encourage prospective students who are African American, Mexican American, Native American, or Puerto Rican and raised on the U.S. mainland to apply. Such applicants are invited to contact the Admissions Office for further information about the School's affirmative efforts to increase enrollment **[*20]** from among these groups. Similarly, the Law School welcomes applications from all persons without regard to their sex, religious affiliation, national origin or ancestry, age, marital status, sexual orientation, or handicap. Every Law School matriculant must be a graduate of an accredited college or university.

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n7 The identical statement appears at page 81 of the law school bulletin for 1995-1997. See Trial Exhibit 7.

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In the 1997-1999 law school bulletin (Exhibit 8, p. 85), the first paragraph of this passage is repeated, but the second paragraph was rewritten as follows:

> Based on its years of teaching experience, the Michigan faculty has determined that the quality of classroom analysis and discussion is enhanced by the multiplicity of perspectives and experiences that students bring with them. Each year, the Law School enrolls a talented and diverse class of students, and the admissions office considers the ways in which a potential student will contribute to the diversity of the Law School as **[*21]** one of the factors in its admissions decisions. The Law School welcomes applications from all persons without regard to their sex, religious affiliation, national origin or ancestry, age, marital status, sexual orientation, or handicap. Every Law School matriculant must be a graduate of an accredited college or university.

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2.

At trial, a number of witnesses testified as to the admissions procedures prior to the adoption of the 1992 policy; the reasons why, and the process by which, the 1992 policy was adopted; and the manner in which the 1992 policy has been administered. This testimony assisted the court in understanding the genesis of the 1992 policy and how it works in practice.

Allan Stillwagon was the law school's Director of Admissions from 1979 to 1990. He testified that during his tenure admissions decisions were made in accordance with the policy described at pp. 85-86 of the 1988-89 Law School Announcement (Exhibit 55), which states:

> One half of the entering class is selected primarily on the basis of a prediction of their academic success in law study. The prediction is calculated on the basis of Law School Admission Test scores, undergraduate records, and studies **[*22]** of the past performance of previous students at the Law School. . . .
>
> The other half of the class will be chosen from a group of several hundred applicants whose grades and test scores qualify them for further consideration. The grades and scores necessary to gain admission to this pool vary from year to year, but the academic credentials of all who are included are invariably strong.
>
> Selections among applicants in the pool are made for the purpose of making the School a livelier place to learn and for improving its service to the profession and the public. Specifically, the School seeks those students who are more likely to contribute affirmatively to the learning of others by reason of their unusual intellectual attainments, significant employment experience or outstanding non-academic achievements, demonstration of emotional maturity and self-discipline, unusual social background, or exceptional capacity to benefit from a particular phase of the School's program. . . .
>
> In administering its admissions policy, the Law School recognizes the racial imbalance now existing in the legal profession and the public interest in increasing the number of lawyers from the ethnic and cultural **[*23]** minorities significantly underrepresented in the profession. Minorities are strongly encouraged to apply and to call upon Assistant Dean Stillwagon for information and assistance. Black, Chicano, Native American, and many Puerto Rican applicants are automatically considered for a special admissions program designed to encourage and increase the enrollment of minorities.

Mr. Stillwagon testified that under this system, which was in effect throughout his tenure, applicants were selected from one of three groups. The first group consisted of applicants who were chosen based on "the numbers," that is, their LSAT scores and UGPA. The second consisted of a "pool" of candidates who had lower numbers but other interesting qualities. The third, known as "special admissions," was for minority candidates who did not fall within the other two groups. According to Mr. Stillwagon, approximately one-half of the minority applicants who were admitted came from the first two groups, and the other half came from the third. The "special admissions" program was adopted in order to increase minority enrollment at the law school. n8 Mr. Stillwagon indicated that the law school had a "goal" or "target" **[*24]** whereby 10-12% of the students of each entering class should be Black, Chicano, Native American, and mainland Puerto Rican. The law school faculty increased this percentage in the 1970s from 10% to 10-12% because they believed it necessary to increase the representation of minorities in the legal profession. Mr. Stillwagon testified that he had no discretion to disregard this policy, and that the policy was considered flexible only to the extent that the number of minority admittees could deviate by three or four students on

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either side of the target range. Mr. Stillwagon also testified that the 10-12% target could be achieved only through the special admissions program due to the "considerable differences" in academic credentials between the minority and non-minority applicants.

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n8 Trial Exhibit 53 is a document entitled "The History of Special Admissions at the University of Michigan Law School, 1966-1981." This document traces the history of the law school's efforts to enroll a certain percentage of students from particular, identified minority groups during this time period. Beginning in 1966, the law school faculty became concerned about the low numbers of black students. For the first time, "those who are Negroes or from disadvantaged backgrounds" who were on the waiting list for admission were given preference. Id. at 5. In 1970, the dean of admissions indicated he would seek to admit black and Mexican-American students "who fall below the admission standards regularly applied" in sufficient numbers to constitute 10% of the entering class. Id. at 16. Exhibit 53 shows that from the late 1960s to the early 1980s the law school faculty frequently debated the issue of special admissions -- the reasons for the policy, how it should be administered, the minority groups to which it was directed, and the "target" percentage the law school should aim to achieve. Over the years, the law school faculty apparently reached a consensus that black and Hispanic students should constitute between 10% and 12.5% of the entering class. See id. at 16, 19, 22, 27, 31, 34, 45, 48-50, 57. In 1975 the law school faculty formally adopted a special admissions policy that identified "Blacks, Chicanos, American Indians, and Puerto Rican Americans" as the groups which "have been substantially underrepresented in the student body and the legal profession" and directed that members from these groups constitute 10-12% of the entering class. See id. at 48-49. The dean of the law school, Terrance Sandalow, reaffirmed the 10-12% goal in a memorandum to the faulty in 1978. See id. at 53-55.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[*25]**

Mr. Stillwagon testified that Exhibits 112 and 113 show admissions statistics for 1988-1989 and 1989-1990, respectively. These reports to the law school Committee of Visitors show significant differences in the numerical qualifications between "regular" admissions (i.e., students admitted based on LSAT and UGPA and those admitted from the "pool") and "special" admissions. In 1988, the regular admissions had a median LSAT score of 43 and a median UGPA of 3.58, whereas the special admissions had a median LSAT score of 34 and a median UGPA of 3.05. This gap in the numbers was essentially the same in 1989 and 1990. n9 On cross-examination, Mr. Stillwagon testified that explicit consideration of race was necessary since otherwise very few minority students would have been admitted.

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n9 In 1989, regular admissions had a median LSAT score of 43 and a median UGPA of 3.60, while special admissions had a median LSAT score of 35 and a median UGPA of 3.06. In 1990, regular admissions had a median LSAT score of 45 and a median UGPA of 3.60, while special admissions had a median LSAT score of 38 and a median UGPA of 3.16.

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Dennis Shields succeeded Allan Stillwagon as the director of the law school's admissions office in 1991 and he held this position until 1998. Mr. Shields testified that his memo entitled "The Gospel According to Dennis" was intended to give newcomers to his staff some guidance in reading application files. Mr. Shields did not mention race in this memo because this is not a "primary consideration" in making admissions decisions. Mr. Shields indicated that he did not tell his staff to strive to admit a particular percentage of minority students, but that an applicant's race was considered along with all other factors. Mr. Shields said that he never spoke with the law school dean about the number or percentage of minority

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students who should be admitted, although the dean did tell him that approximately one-third of the class should consist of Michigan residents because the law school is a state institution. Mr. Shields also testified that the minority and non-minority admittees were all well qualified for admission.

On cross-examination, Mr. Shields was asked about the manner in which he would use the so-called "daily reports," an example of which was admitted as Exhibit 10. These **[*27]** reports provide an overview, as of the day the report is generated, of the number of applications and their current status. That is, one can see at a glance the number of applications received to date, the number offered admission, the number rejected, the number on the waiting list, and so on. While the first page of the report provides an overview for the total applicant pool, each of the next seven pages breaks down the information by the following racial categories: Native American, Black/African American, Caucasian/White, Mexican American, Other Hispanic, Asian American, and Puerto Rican American. Page 9 is devoted to "Other/Non-Citizen" and page 10 is "unknown." The last four pages break down the applicants by gender and by their status as either Michigan or Non-Michigan residents. Mr. Shields testified that as an admissions season progressed, he would consult the daily reports more and more frequently in order to keep track of the racial and ethnic composition of the class. This was done in order to ensure that a "critical mass" of minority students were enrolled so as to realize the educational benefits of a diverse student body. Mr. Shields could not say what percentage was **[*28]** needed in order to achieve this goal. He doubted if five percent would be enough but thought that 10% might suffice. While Mr. Shields testified that he did not seek to admit a particular number or percentage of underrepresented minority students, he acknowledged that during his tenure at least 11% of each entering class consisted of African American, Hispanic and Native American students.

Mr. Shields' attention was drawn to Exhibit 15, which is the law school's admissions grids for the class entering in 1995. Like the law school's daily reports, the admissions grids are broken down by racial groups. In each cell of each grid, one can see the number of applicants who applied, the number who were accepted, and the number who enrolled for any given combination of LSAT score and undergraduate GPA. When asked why most white applicants are rejected and most black applicants are accepted in the mid-ranges of LSAT scores and UGPA, Mr. Shields acknowledged that race does account for some of the difference. n10

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n10 Mr. Shields also acknowledged that, at his deposition, he testified that race "generally" explains the difference in admissions rates between minority and non-minority groups. The comparison during Mr. Shields' cross-examination was the difference in admission rates between white and black applicants with LSAT scores between 154 and 169 and with UGPA's between 3.25 and 4.00. In these cells nearly all of the African American applicants (48 of 52) were accepted, whereas a much smaller percentage of the Caucasian applicants (379 of 1437) were accepted. In the same cluster of cells, 30 of 40 Mexican American applicants were accepted; 7 of 14 Native American applicants were accepted; and 3 of 5 Puerto Rican applicants were accepted.

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Erica Munzel replaced Dennis Shields as the director of the law school's admissions office in 1998. She testified that she feels bound by the law school's 1992 admissions policy, including the provision that calls for the enrollment of a "critical mass of minority students." See Exhibit 4, p. 12. Ms. Munzel testified that a "critical mass" means "meaningful numbers" or "meaningful representation," which she understands to mean a number that is sufficient so that the minority students can contribute to classroom dialog and not feel isolated. When pressed to express this concept in numerical terms, Ms. Munzel stated that there is no number or percentage, or range of numbers or percentages, which constitute critical mass. However, she stated that there must be more than a "token" number of minority students,

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since small numbers of students cannot contribute in the manner foreseen by the law school's diversity policy.

Ms. Munzel also indicated that she must consider the race of the applicants because a critical mass of minority students could not be enrolled if admissions decisions were based primarily on LSAT scores and UGPA's. This is apparent from Exhibit 14, which Ms. Munzel **[*30]** acknowledged shows the median LSAT scores and UGPA's for the students enrolled in 1994 and 1995. These figures show the same gap in the numbers between minority and non-minority admittees as is shown in similar exhibits for previous years. n11 Ms. Munzel testified that only ten minority students per entering class would be admitted if admissions decisions were driven by the numbers.

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n11 See, e.g., Exhibit 112 (1988-1989), Exhibit 113 (1989-1990), Exhibit 114 (1990-1991), Exhibit 115 (1992), Exhibit 116 (1993). Exhibit 14 shows that in the 1994 entering class, white students had a median LSAT score of 168 and a median UGPA of 3.57, while the corresponding figures were 157 and 2.97 for African American students, and 162 and 3.26 for Mexican American students. In the 1995 entering class, white students had a median LSAT score of 167 and a median UGPA of 3.59, while the corresponding figures were 155 and 3.18 for African American students, and 159 and 3.35 for Mexican American students.

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In deciding whether to **[*31]** admit an applicant, Ms. Munzel stated that she reviews the entire file. In addition to grades and test scores, she also considers the strength of the undergraduate curriculum, the college attended, the personal statements, letters of recommendation, and the applicant's background and experiences. The student's race is considered because it is relevant to achieving diversity in the entering class. Ms. Munzel stated that she was never told by the dean or by the faculty to admit a particular number or percentage of minority students, but she does consult the daily reports (such as Exhibits 11 and 12) to make sure that admissions goals, including those regarding the admission of a critical mass of minority students, are being achieved.

The court also heard testimony from Lee Bollinger and Jeffrey Lehman as to the reasons why race is considered in the admissions process. Mr. Bollinger was the dean of the law school from 1987 to 1994, and he has been the president of the University of Michigan since 1997. Mr. Lehman succeeded Mr. Bollinger as the dean of the law school in 1994, and he continues to hold this position. President Bollinger testified that in the fall of 1991 he convened a faculty **[*32]** committee to review the law school's admissions policy. n12 President Bollinger sought to ensure that the policy complied with the Supreme Court's ruling in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978). He believes that it is appropriate for an applicant's race to be considered because the law school seeks a student body with diverse backgrounds and perspectives.

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n12 It was this committee's report and recommendation that became the law school's official admissions policy when it was adopted, unanimously, by the law faculty in April 1992. See Exhibit 4 (cover sheet).

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Dean Lehman testified that racial diversity in the student body is an important part of one's education at the law school because exposure to students of various races and perspectives helps students to understand and be sympathetic to differing points of view. He described racial diversity as "part of the general commitment to diversity." Dean Lehman agreed with

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the testimony offered by other witnesses to the effect **[*33]** that the law school seeks to admit a critical mass of underrepresented minority students, particularly those from groups which have been discriminated against historically. He was unable to quantify "critical mass" in terms of numbers or percentages, or ranges of numbers or percentages, but indicated that critical mass means "meaningful numbers," that is, numbers such that the minority students do not feel isolated or like spokespersons for their race, and feel comfortable discussing issues freely based on their personal experiences. He doubted whether critical mass would be present if only five percent of a class consisted of minority students, and he acknowledged that minority students have constituted at least 11% of every entering class since 1992.

When asked about the extent to which race is considered in admissions, Dean Lehman testified that this varies from one application file to another. In some files the applicant's race may play no role, while in others it may be a "determinative" factor. n13 Dean Lehman indicated that race is taken into consideration to the extent necessary to achieve a critical mass, although he could not quantify this in terms of numbers or percentages. **[*34]** While Dean Lehman reviews the daily admissions reports with the admissions director, he said he has not given any direction as to a number or percentage of minority students who should be admitted. Dean Lehman also stated that a critical mass of minority candidates cannot be admitted unless race is explicitly considered, due to the gap in LSAT scores and UGPA's between minority and non-minority students. He fears that minority enrollment would drop to "token levels" if race could not be considered, and in this context he pointed to the experience of the University of California at Berkeley, where minority enrollment dropped sharply after passage of Proposition 209.

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n13 Dean Lehman conceded that the different admission rates for different racial groups is "partly indicative" of the extent to which race is considered. Referring to Ex. 15 (the law school's 1995 grids), Dean Lehman acknowledged that all African American applicants with an LSAT score of 159-160 and a UGPA of 3.00 and above were admitted, whereas only one of 54 Asian applicants and four of 190 Caucasian applicants with these qualifications were admitted.

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The court also heard extensive testimony from Professor Richard Lempert, the law school professor who chaired the faculty admissions committee that drafted the 1992 admissions policy. n14 Professor Lempert testified that the admissions committee was charged with examining the law school's admissions policy and ensuring that it complied with the Supreme Court's ruling in Bakke. The 1992 written policy, which was conceived in a "very deliberative process," was debated and then adopted unanimously by the full faculty. It remains in effect today.

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n14 The other members of the committee were Don Herzog, Jeffrey Lehman, Don Regan, Ted **Shaw** and Dennis Shields. See Exhibit 4, p. 14.

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Professor Lempert emphasized that the law school seeks to admit an interesting and dynamic class, which has a certain "synergy" that is greater than the sum of its parts. That is, the law school seeks students with a diversity of interests and backgrounds in order to enhance classroom discussion and the educational experience of students **[*36]** and faculty, both in and outside the classroom. In Professor Lempert's view, racial diversity is an important part of "perspective" or "experiential" diversity. A critical mass is needed so that minority students do not feel that they must be spokespersons for their race.

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When asked about the policy's "commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against," see Exhibit 4, p. 12, Professor Lempert stated that this was not intended as a remedy for past discrimination, but as a means of including students who may bring to the law school a perspective different from that of members of groups which have not been the victims of such discrimination. n15 Professor Lempert indicated that race is one element in the admissions decision-making process, but that some minority applicants would be admitted even if their race were not considered. He believes that race is considered only to the extent necessary to achieve critical mass.

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n15 Professor Lempert indicated that other groups, such as Asians and Jews, have also been discriminated against, but they were not mentioned in the law school's admissions policy because members of these groups are already being admitted to the law school in significant numbers.

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Exhibit 34 is a draft of the admissions policy, which contains several provisions omitted from the final version. One such provision, on page 13 of the draft, states:

> Our goal is to have substantial and meaningful racial and ethnic diversity, but we do not wish to exhaust the positions that are open to non-grid diversity admittees in promoting racial and ethnic diversity. Nor are we insensitive to the competition among all students for admissions to this law school. Thus while we set no floors or ceilings on the numbers or proportion of students who are to be admitted as minority diversity candidates, in making judgments about admitting such candidates the Admissions Officer and Admissions Committee should be sensitive to such factors as the proportion of minority students who would be attending Michigan without a diversity admissions program and the strength of the credentials that various minority candidates bring. Also it is important to note that in the past we seem to have achieved the kinds of benefits that we associate with racial and ethnic diversity from classes in which the proportion of African American, Hispanic and Native American members has been between about 11% **[*38]** and 17% of total enrollees.

Professor Lempert testified that the "11% to 17%" figure, which is the range he believes constitutes critical mass, was omitted from the final version of the admissions policy because percentages were too rigid and could be misconstrued as a quota. Another provision omitted for the same reason stated on page 12 of the draft that "non-grid admittees admitted for diversity purposes shall not exceed 20% of the expected matriculants in a class." One faculty member, Don Regan, argued for retaining the "numbers on the 'target range' . . . for a variety of reasons, including candor." See Exhibit 32, p. 1.

The final witness who testified about the law school's policy, and the reasons for the inclusion of race as a factor in admissions decisions, was Kent Syverud. He was a professor at the law school when the 1992 admissions policy was adopted, and he is now the dean of Vanderbilt Law School. He has also submitted expert reports on the educational benefits of diversity. See Exhibits 153, 154, 155. Like the other witnesses who testified on this subject, Dean Syverud believes that racial diversity is part of the diversity of perspectives needed to **[*39]** enhance the "classroom dynamic." Also like the other witnesses, he indicated that critical mass cannot be quantified, but that a professor knows when it is present because minority students feel free to express their views, rather than to state "expected views" or

"politically correct views." Dean Syverud also indicated that when a critical mass of minority students are present, racial stereotypes are dismantled because non-minority students see that there is no "minority viewpoint"; they see, in other words, that there is a diversity of viewpoints among minority students.

3.

While defendants concede that race is a factor in the admissions process, they have consistently argued that race is simply one of many factors and not a "trump card." Plaintiffs, on the other hand, have argued that race is a "super factor" in the admissions process. In an attempt to quantify the extent to which race actually has been considered during the years in question, the parties presented expert testimony, and expert reports, from two statisticians. Plaintiffs presented Dr. Kinley Larntz, a professor emeritus in the Department of Applied Statistics at the University of Minnesota. n16 Defendants presented **[*40]** Dr. Stephen Raudenbush, a professor of education at the University of Michigan. n17 Both were qualified as experts in statistics and both testified at great length.

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n16 Dr. Larntz' expert reports were admitted as Exhibits 137-142. Exhibit 143 consists of the tables and charts of Dr. Larntz' "powerpoint presentation."

n17 Dr. Raudenbush's expert reports were admitted as Exhibits 145-150.

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Dr. Larntz analyzed admissions data provided by the law school. This data consists of the "admissions grids" for each of the years in question (1995-2000). As noted previously, these grids show the number of applicants and the number of admittees for all combinations of undergraduate GPA and LSAT score. n18 The UGPA is presented along the vertical axis in quarter-point increments (as well as "below 2.00" and "No GPA"); the LSAT score is presented along the vertical axis in two- or three-point increments (as well as "170-Above," "120-145" and "No LSAT"). The ten UGPA rows and twelve LSAT columns in these grids produce 120 **[*41]** "cells" with admissions data. For each of the years in question, the law school compiled one admissions grid for all applicants, as well as separate grids for various racial groups. n19

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n18 The law school grids also indicate the "yield," that is, the number of admittees who enrolled.

n19 For example, separate grids are compiled for Native Americans, African Americans, Caucasian Americans, Mexican Americans, Hispanic Americans, Asian/Pacific Island Americans, Puerto Rican Applicants, and for other groups as well.

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Dr. Larntz used this extensive numerical data, compiled by the law school, to make "cell-by-cell" comparisons between applicants of different races to determine by logistic regression analysis whether a statistically significant relationship exists between race and admission rates. Because the grids show the number of applicants and the number of admittees in each cell, and because different grids have been prepared for various racial groups, it is possible to make cross-racial comparisons of applicants **[*42]** with closely similar "academic credentials" or "numbers." To make this comparison, Dr. Larntz calculated the odds of admission for Caucasian applicants and compared them with the odds of admission for applicants of other races in order to calculate the "relative odds of acceptance" for each racial

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group. Caucasians were the "comparison group" -- that is, each group's odds of acceptance were calculated relative to those of Caucasians. Relative odds, or an "odds ratio," greater than 1.0 would indicate that a member of the racial group in question has a greater chance of admission than does a Caucasian applicant. Relative odds less than 1.0 would indicate the opposite. "For perspective, attaining a relative odds of 2 or 3 for cure of a disease is often the goal of a medical study. That is, a drug that doubled or tripled the odds of cure would be of great value. Double and triple digit relative odds are simply enormous!" Exhibit 137, p. 8.

Dr. Larntz calculated the relative odds of acceptance for various racial groups for each of the years in question. The results of these calculations, and the grids themselves, are presented in his expert reports. See Exhibits 137 and 138 (1995-98), **[*43]** 139 (1999), 141 (2000). For each of the years in question, the relative odds of acceptance for Native American, African American, Mexican American and Puerto Rican applicants were many times greater than for Caucasian applicants. n20 Dr. Larntz characterized these relative odds as "extremely large." He concluded that in 1995-2000,

> membership in certain ethnic groups is an extremely strong factor in the decision for acceptance. Native American, African American, Mexican American, and Puerto Rican applicants in the same LSAT x GPA grid cell as a Caucasian American applicant have odds of acceptance that is many, many (tens to hundreds) times that of a similarly situated Caucasian American applicant.

Exhibit 137, p. 9; Exhibit 139, p. 7; Exhibit 141, p. 7. This conclusion remained the same even when Dr. Larntz controlled for other factors, such as Michigan residency status, gender, and whether the applicant received an application fee waiver. See Exhibit 137, p. 11; Exhibit 139, p. 8; Exhibit 141, p. 10. At trial Dr. Larntz characterized his relative odds figures as "enormous" and as showing that a "tremendous advantage" was given to applicants from these minority groups **[*44]** in each of the years in question.

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n20 In 1995, the relative odds of acceptance were 61.37 for Native Americans, 257.93 for African Americans, 81.90 for Mexican Americans, and 37.86 for Puerto Ricans. In 1996, the relative odds were 29.81 for Native Americans, 313.59 for African Americans, 81.46 for Mexican Americans, and 45.40 for Puerto Ricans. In 1997, the relative odds were 37.37 for Native Americans, 53.49 for African Americans, 17.55 for Mexican Americans, and 32.78 for Puerto Ricans. In 1998, the relative odds were 23.98 for Native Americans, 132.16 for African Americans, 23.53 for Mexican Americans, and 17.84 for Puerto Ricans. See Exhibit 137, pp. 23-26. In 1999, the relative odds were 32.05 for Native Americans, 206.45 for African Americans, 43.77 for Mexican Americans, and 41.71 for Puerto Ricans. See Exhibit 139, p. 21. And in 2000, the relative odds were 24.61 for Native Americans, 443.26 for African Americans, 16.99 for Mexican Americans, and 28.63 for Puerto Ricans.

Dr. Larntz cautioned that the relative odds do not express the "number of times greater" a minority applicant's chances of admission are as compared to those of a Caucasian applicant. For the 1995 relative odds, for example, if a Caucasian applicant has a 6-7% chance of being admitted, an African American with a similar index score would have a 93% chance of being admitted. If a Caucasian applicant has a 10% chance of being admitted, a Mexican American applicant with a similar index score would have a 90% chance of being admitted.

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In addition to calculating relative odds of acceptance, Dr. Larntz also prepared graphs which plotted the probability of acceptance against the selection index. The selection index, or

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simply "index," is a combination of an applicant's undergraduate GPA and LSAT score. As noted above, the law school's admissions policy states that "bluntly, the higher one's index score, the greater should be one's chances of being admitted. The lower the score, the greater the risk the candidate poses." Exhibit 4, p. 4. Each of Dr. Larntz' graphs plots the relationship between the selection index and the probability of acceptance for Caucasian applicants and for applicants from one minority group for comparison. As one would expect, these graphs show that for all races the higher one's index score, the greater one's chances of being admitted. However, each graph shows a significant gap between the lines plotted for the Caucasian and certain minority applicants. n21 Dr. Larntz concluded that "all the graphs comparing Native American, African American, Mexican American, and Puerto Rican applicants to Caucasian American applicants show wide separation indicating a much higher probability of acceptance **[*46]** for the particular ethnic group at a given selection index value." Exhibit 137, p. 14; Exhibit 139, pp. 9-10; Exhibit 141. pp. 9-10. Based on all of his analysis, Dr. Larntz concluded that membership in these racial groups "is an extremely strong factor in the decision for acceptance." Exhibit 137, p. 14, and that applicants from these minority groups "are given an extremely large allowance for admission" as compared to Caucasian applicants. Exhibit 139, p. 13; Exhibit 141, p. 13. Dr. Larntz found this to be the case for each of the years in question (1995-2000).

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n21 See Exhibit 137, Figures 9, 10, 11, 14, 17, 18, 19, 22, 25, 26, 27, 30, 33, 34, 35, 38; Exhibit 139, Figures 3, 4, 5, 8; Exhibit 141, Figures 3, 4, 5, 8.

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At trial Dr. Larntz made certain cell-by-cell comparisons to highlight the difference in acceptance rates for Caucasian and minority applicants. For example, in 1995 African American and Caucasian applicants with LSAT scores of 161-163 were accepted in clearly disparate proportions at every **[*47]** UGPA level. Two of the three African American applicants with a UGPA of 2.5-2.74 were accepted, whereas none of the seven Caucasian applicants were accepted. All of the four African American applicants with a UGPA of 2.75-2.99 were accepted, whereas none of the 14 Caucasian applicants were accepted. Seven of the eight African American applicants with a UGPA of 3.00-3.24 were accepted, whereas two of the 42 Caucasian applicants were accepted. All of the four African American applicants with a UGPA of 3.25-3.49 were accepted, whereas five of the 126 Caucasian applicants were accepted. Five of the six African American applicants with a UGPA of 3.50-3.74 were accepted, whereas 14 of the 161 Caucasian applicants were accepted. All of the three African American applicants with a UGPA of 3.75 and above were accepted, whereas eight of the 93 Caucasian applicants were accepted. See Exhibit 143, slide 27.

Dr. Larntz highlighted similarly disparate rates of admission between African American and Caucasian applicants by holding the UGPA constant and showing the admissions figures for applicants with various LSAT scores. Dr. Larntz' Exhibit 143, slide 28, compares applicants in 1995 from these **[*48]** two racial groups with UGPA's of 3.25-3.49. In this UGPA range, of six African American applicants with an LSAT score of 148-150, two were admitted; of 16 Caucasian applicants, none was admitted. Of seven African American applicants with an LSAT score of 151-153, three were admitted; of 24 Caucasian applicants, none was admitted. Of five African American applicants with an LSAT score of 154-155, four were admitted; of 51 Caucasian applicants, one was admitted. Of ten African American applicants with an LSAT score of 156-158, all were admitted; of 51 Caucasian applicants, one was admitted. Of three African American applicants with an LSAT score of 159-160, all were admitted; of 61 Caucasian applicants, one was admitted. Of four African American applicants with an LSAT score of 161-163, all were admitted; of 126 Caucasian applicants, five were admitted.

Dr. Larntz showed similar discrepancies in the admissions rates between Caucasians and members of other minority groups in each of the years in question. See, e.g., Exhibit 143,

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action, non-minority, racially, classification, student body, faculty, cell, admit, University of Michigan Law School, enrollment, classroom, viewpoint, candidate, dropped

CORE CONCEPTS - ◆ Hide Concepts

Constitutional Law : Substantive Due Process : Equal Protection : Scope of Protection
See U.S. Const. amend. XIV, § 1.

Constitutional Law : Civil Rights Enforcement : Discrimination in Education
See 42 U.S.C.S. § 2000d.

Constitutional Law : Substantive Due Process : Equal Protection : Level of Review
Constitutional Law : Substantive Due Process : Equal Protection : Race
All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

Constitutional Law : Substantive Due Process : Equal Protection : Race
The legal analysis of a claim of discrimination on the basis of race under both the Fourteenth Amendment, U.S. Const. amend. XIV, and 42 U.S.C.S. § 2000d, is the same under both claims.

Governments : Courts : Judicial Precedents
The Marks framework cannot be applied to a case where the various Justices' reasons for concurring in the judgment are not merely different by degree, but are so fundamentally different as to not be comparable in terms of "narrowness."

Constitutional Law : Substantive Due Process : Equal Protection : Level of Review
Strict scrutiny applies to all racial classifications, regardless of the level of government using the classification.

Constitutional Law : Substantive Due Process : Equal Protection : Race
Racial classifications are unconstitutional unless they are intended to remedy carefully documented effects of past discrimination.

Constitutional Law : Substantive Due Process : Equal Protection : Race
Racial classifications which are not strictly limited in duration are highly suspect.

Constitutional Law : Substantive Due Process : Equal Protection : Race
Constitutional Law : Substantive Due Process : Equal Protection : Scope of Protection
A straight quota system is not narrowly tailored under any interpretation of the Equal Protection Clause, U.S. Const. amend. XIV, § 1.

Constitutional Law : Substantive Due Process : Equal Protection : Level of Review
A "close fit" is required between the means and the ends that the U.S. Constitution demands in order for a racial classification to pass muster under strict scrutiny analysis.

Constitutional Law : Substantive Due Process : Equal Protection : Level of Review
The term "narrowly tailored" maybe used to require consideration of whether lawful alternative and less restrictive means could have been used. The classification at issue must 'fit' with greater precision than any alternative means.

slides 47-51. He concluded that the law school gives an "incredibly large allowance" to Native American, African American, Mexican American and Puerto Rican **[*49]** applicants, as compared to Caucasian applicants with similar undergraduate GPA's, LSAT scores, and residency status.

Dr. Raudenbush testified as defendants' statistician. He suggested that Dr. Larntz' analysis of the admissions data is flawed because it did not consider the effect of "unquantifiable" factors such as applicants' letters of recommendation and essays, or the reputation of the applicants' undergraduate institutions. In addition, Dr. Raudenbush criticized Dr. Larntz' odds ratio analysis because it disregarded cells in which all applicants were accepted, or all were rejected, and this resulted in the loss of information. n22 He also suggested that because the odds ratios vary from one cell to another, an overall or "composite" odds ratio is not informative. In addition, Dr. Raudenbush was suspicious of the odds ratios because they vary widely from one year to another, whereas the actual percentage of applicants admitted (at least for African Americans and Caucasians) has remained relatively stable. See Exhibit 194.

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n22 Dr. Larntz testified that he disregarded these cells because they do not contain "comparative information." That is, if all applicants in a particular cell are accepted, or if all are rejected, then there is no basis for calculating the odds ratio.

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Aside from criticizing Dr. Larntz' analysis, the primary focus of Dr. Raudenbush's own analysis and testimony was on the predicted effect of eliminating race as a factor in the law school's admissions process. In Dr. Raudenbush's view, a "race-blind" admissions system would have a "very dramatic," negative effect on minority admissions but only a slight effect on non-minority admissions, due to the vastly greater number of non-minority applicants. In the year 2000, 35% of underrepresented minority applicants and 40% of non-minority applicants were admitted. See Exhibit 187. Dr. Raudenbush predicted that if race were not considered, then only 10% of underrepresented minority applicants and 44% of non-minority applicants would be admitted. If correct, this would mean that in the year 2000 only 46 underrepresented minority applicants would have been admitted (instead of 170 who actually were admitted), of whom only 16 would enroll (instead of 58 who actually enrolled). Under this scenario, underrepresented minority students would have constituted 4% of the entering class in 2000, instead of 14.5% as actually occurred. See Exhibit 189.

B. Findings of Fact and Conclusions of **[*51]** Law

From this testimony and documentary evidence, the court makes the following findings and conclusions.

1.

The law school clearly considers an applicant's race in making admissions decisions. While the reasons for doing so have changed somewhat over time, the law school has given some degree of preference to members of particular racial groups for more than 30 years. n23 In the early years of affirmative action, the law school extended this preference only to African American applicants. In the years since then, the preference has been broadened to include Native Americans, Mexican Americans and mainland Puerto Ricans. It does not appear that any preference is given to members of any other racial groups.

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n23 Professor Lempert has written that the law school has considered applicants' race since 1966. See Exhibit 166, p. 2.

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The current stated reason for granting a preference to members of these groups is that certain educational benefits flow from a racially diverse student body, and members of underrepresented **[*52]** minorities would not be admitted in significant numbers unless race is explicitly considered. n24 This is due to the fact that members of these groups, on average, have lower LSAT scores and lower undergraduate GPA's as compared to other applicants (i.e., Caucasians and Asians), so that comparatively few would be admitted in a system where admissions decisions were based on "the numbers."

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n24 This is the reason stated in the policy itself, and it is the reason given by defendants' witnesses and counsel. However, the court notes that as recently as 1996-1997 the law school's bulletin indicated that one reason for the affirmative action policy has been to further "the public interest in increasing the number of lawyers from groups which the faculty identifies as significantly underrepresented in the legal profession." Exhibit 6, p. 81.

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A major bone of contention in this case has been the extent to which race is considered in the admissions process. The evidence shows that race is not, as defendants have argued, **[*53]** merely one factor which is considered among many others in the admissions process. Rather, the evidence indisputably demonstrates that the law school places a very heavy emphasis on an applicant's race in deciding whether to accept or reject.

This emphasis on race is apparent from the admissions policy itself, which explicitly states the law school's "commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, . . ." Exhibit 4, Admissions Policy, p. 12. The admissions policy is equally explicit about the extent of this commitment: race is considered at least to the extent necessary to enroll a "critical mass" of students from these groups. While "critical mass" has proved to be a concept that has eluded precise quantification, over the years it has meant in practice that the law school attempts to enroll an entering class 10% to 17% of which consists of underrepresented minority students. The 10% figure, as a target, has historical roots going back to the late 1960s. Beginning in the 1970s, law school documents begin referring to **[*54]** 10-12% as the desired percentage. Professor Lempert testified that critical mass lies in the range of 11-17%. Indeed, this percentage range appeared in a draft of the 1992 admissions policy, and it was omitted from the final version despite Professor Regan's suggestion that it remain for the sake of "candor."

The actual admissions and graduation statistics confirm the law school's commitment to enroll African American, Native American and Hispanic students in the 10-17% range. For example, Exhibit 97 shows the number of students graduating (total as well as by various racial groups) for each year from 1950 to 1999. From 1973 to 1985, underrepresented minority students constituted approximately 9-10% of the graduating class, n25 and from 1986 to 1999 students from these groups constituted approximately 12-13% of the graduating class. n26 These percentages conclusively demonstrate that the law school considers race in the admissions process because applicants from the underrepresented minority groups have, on average, considerably lower undergraduate GPA's and LSAT scores as compared to Caucasian applicants and yet, nonetheless, the percentage of applicants from these minority groups **[*55]** who are admitted is roughly equal to the percentage they constitute of the total applicant pool.

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n25 The percentages range from a low of 5.8% in 1974 to a high of 12.5% in 1977, but the mean percentage of underrepresented minority students from 1973 to 1985 was 9.7%.

n26 The percentages range from a low of 5.4% in 1998 to a high of 19.2% in 1994, but the mean percentage of underrepresented minority students from 1986 to 1999 was 12.6%.

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In 1995, for example, Native Americans constituted 1.1% of the total applicant pool and 1.2% of the admitted students; African Americans constituted 9.3% of the total applicant pool and 9.2% of the admitted students; Mexican Americans constituted 2.3% of the total applicant pool and 3.5% of the admitted students; Puerto Ricans constituted 0.5% of the total applicant pool and 0.4% of the admitted students; and Caucasians constituted 56.3% of the total applicant pool and 59.7% of the admitted students. See Exhibit 146, Table 1. That is, the representation of each group in **[*56]** the applicant pool roughly approximates its representation among the total admitted. Yet the median undergraduate GPA and LSAT score are generally lower -- even considerably lower -- for underrepresented minority applicants than for Caucasian applicants. See Exhibit 137, pp. 18-19 (Tables 2 and 3). The same pattern can be seen in 1996 and 1997. See Exhibit 146 (Tables 2 and 3) and Exhibit 137, pp. 18-19 (Tables 2 and 3). If race were not considered in the admissions process, one would expect to see underrepresented minority applicants admitted in much lower proportions than has been the case.

Plaintiffs' and defendants' statisticians analyzed the admissions data and both provided testimony and expert reports which assisted the court in understanding the extent to which race is considered in the law school's admissions process. Dr. Larntz' cell-by-cell analysis provided mathematically irrefutable proof that race is indeed an enormously important factor. In each year at issue in this case, Native American, African American, Mexican American and Puerto Rican applicants have been admitted in significantly greater proportions than Caucasian applicants with the same or similar undergraduate **[*57]** GPA's and LSAT scores. As Dr. Larntz noted, this fact is apparent on the face of the law school's admissions grids. One does not need to undergo sophisticated statistical analysis in order to see it; the statistical analysis simply confirms empirically what the grids suggest intuitively. The court specifically adopts Dr. Larntz' analysis and his conclusion that "membership in certain ethnic groups is an extremely strong factor in the decision for acceptance."

The court rejects Dr. Raudenbush's criticism of Dr. Larntz' cell-by-cell analysis. While it is true that Dr. Larntz' analysis did not include cells in which all applicants were either accepted or rejected, the court was persuaded by Dr. Larntz' explanation that these cells do not contain any comparative data. The issue in this case is whether similarly situated applicants are treated differently because of their race, and this question can be answered by examining cells in which some applicants are accepted and others rejected so that the differences in the admissions rates can be calculated. Moreover, Dr. Larntz testified that the cells he included in his analysis are the ones containing more than 95% of all admittees. Thus, **[*58]** the court believes that Dr. Larntz omitted very little data from his analysis and none that is relevant.

The court also rejects Dr. Raudenbush's other criticisms of Dr. Larntz' methodology. For example, Dr. Raudenbush argued that the admissions process is complex and cannot be reduced to a comparison of acceptance odds based on "the numbers" and membership in various racial groups. The court agrees, and specifically finds, that the law school examines each application file individually and considers not only grades and test scores but also letters of recommendation, the applicant's personal statements, extracurricular activities, work experience, residency status, relationship to university alumni, rigor of undergraduate curriculum, trend in undergraduate grades, and reputation of undergraduate institution. Nonetheless, the court does not believe that the complexity of the admissions process undermines the validity of Dr. Larntz' analysis. When cell by cell, and year by year, underrepresented minority applicants are admitted in significantly greater proportions than

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their non-minority competitors with similar UGPA and LSAT scores, it is clear that the law school accords the race of **[*59]** the applicants a great deal of weight.

Even the testimony and reports of the law school's statistician, Dr. Raudenbush, support this conclusion. As noted above, Dr. Raudenbush testified that the number of underrepresented minority admittees would drop "sharply and dramatically" if race were not considered in the admissions process. By his calculations, the percentage of underrepresented minority applicants who are admitted would have dropped from 26% to 4% in 1995, and from 31% to 8% in 1996, under a race-blind admissions system. See Exhibit 146, Table 8. In 1997 the percentage admitted would have dropped from 33% to 8%; in 1998 the percentage admitted would have dropped from 34% to 9%; in 1999 the percentage admitted would have dropped from 37% to 8%; and in 2000 the percentage admitted would have dropped from 35% to 10%. See Exhibit 149, Table 1; and Exhibit 149, Tables 1-3. These figures, which the court has no reason to doubt, may explain even more plainly than Dr. Larntz' odds ratios and graphs the extent to which race is considered in the law school's admissions process.

Finally, the testimony of the witnesses who are familiar with the inner workings of the law school's **[*60]** admissions office confirmed that race is considered and that it makes a difference in admissions decisions. The current and former dean, as well as the current and former admissions directors, all testified that race is considered to the extent necessary to enroll a critical mass of underrepresented minority students. While none of these witnesses acknowledged that they have a particular number or percentage in mind as the admissions season progresses, the written and unwritten policy at the law school charges the admissions office with assembling entering classes which consist of between 10% and 17% African American, Native American, and Hispanic students. Over the years this target has been achieved, and even exceeded, n27 despite the underrepresented minority students' generally lower LSAT scores and undergraduate GPA's. The court also finds it significant that the dean and the admissions director monitor the law school's "daily admissions reports," which classify applicants by race. These reports inform the reader how many students from various racial groups have applied, how many have been accepted, how many have been placed on the waiting list, and how many have paid a deposit. **[*61]** There would be no need for this information to be categorized by race unless it were being used to ensure that the target percentage is achieved.

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n27 From the graduation years 1986 to 1999, underrepresented minorities constituted at least 9.8% (1999) and as much as 19.2% (1994) of the class, except in 1998 when the percentage dipped to 5.4%. See Exhibit 97.

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In conclusion, the court finds that the law school explicitly considers the race of applicants in order to enroll a critical mass of underrepresented minority students -- that is, the law school wants 10% to 17% of each entering class to consist of African American, Native American, and Hispanic students.

2.

The court must now turn to the central issue in this case: whether the Constitution permits the consideration of race in order to achieve racial diversity. In current constitutional parlance, the question is Whether the achievement of racial diversity is a compelling state interest and, if so, whether the law school's admissions policy is narrowly **[*62]** tailored to serve that interest. n28 See **Adarand** Constructors, Inc. v. Pena, 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995) ("all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly

tailored measures that further compelling governmental interests").

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n28 While plaintiffs claim that the law school's policy violates both the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, the legal analysis under the two claims is the same. See Bakke, 438 U.S. at 287; Johnson v. Board of Regents, 106 F. Supp. 2d 1362, 1366 (S.D. Ga. 2000).

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In answering this question, the starting point is the Supreme Court's landmark decision in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978), the only case in which the high court has ever addressed the "diversity **[*63]** rationale" as a justification for considering race in reviewing an application for admission to a university.

In Bakke, the plaintiff was a white male who applied in 1973 and 1974 to the University of California at Davis Medical School ("U.C. Davis"), a state institution. In both years, U.C. Davis rejected Bakke's application. After the second rejection Bakke sued the Regents of the University of California, claiming that U.C. Davis' special admissions program, which reserved 16 places in the class of 100 for members of certain minority groups, violated the California state constitution, Title VI, and the Fourteenth Amendment's Equal Protection Clause. The trial court held that U.C. Davis could not consider race in making admissions decisions. The California Supreme Court affirmed and enjoined any consideration of race in the admissions process.

On appeal, a sharply divided Supreme Court affirmed in part and reversed in part. Justice Stevens wrote an opinion in which Chief Justice Burger and Justices Stewart and Rehnquist joined. The Stevens group concluded that Title VI prohibited U.C. Davis, as a state educational institution receiving federal funding, from considering an applicant's **[*64]** race in making admissions decisions. Bakke, 438 U.S. at 412. Justices Brennan, White, Marshall, and Blackmun authored a joint opinion in which they concluded that both Title VI and the Constitution permit a state educational institution to "take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area." Id. at 325.

In a separate, tie-breaking opinion, Justice Powell expressed the view that a state educational institution has a compelling interest in admitting a diverse student body, and that "ethnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." Id. at 311, 314. Because the Brennan group joined in the short portion of Justice Powell's opinion (Part V-C) which reversed the California Supreme Court's holding that an applicant's race may never be considered, a total of five Justices agreed that "the State has a substantial interest that **[*65]** legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." Bakke, 438 U.S. at 320. However, Justice Powell also found that U.C. Davis' special admissions program, which implemented a strict quota system along race lines, was not narrowly tailored to serve the interest of admitting a diverse class of students. Thus, Justice Powell joined the Stevens group, albeit on different grounds, to make a five-Justice majority holding that U.C. Davis' special admissions program was unlawful. n29

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n29 Justice Powell found U.C. Davis' special admissions program invalid under the Fourteenth Amendment, see Bakke, 438 U.S. at 320; while the Stevens group avoided the constitutional issue and found that the program violated Title VI, see id. at 421.

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This court is faced with the task of piecing together the above opinions to determine Bakke's holding. n30 Specifically, the court must determine whether Bakke held **[*66]** that a state institution's desire to assemble a racially diverse student body is a compelling government interest. The parties sharply disagree on this issue. In short, plaintiffs argue that although Justice Powell's opinion announced the Court's judgment, his opinion contained statements and conclusions in which no other Justice or group of Justices joined and are therefore not part of the Court's holding. Plaintiffs argue that Justice Powell's discussion of the "diversity rationale" in Part IV-D of his opinion is one such matter. Defendants argue that the Brennan group concurred with Justice Powell's conclusions regarding diversity by joining in Part V-C of his opinion, and that under Marks n31 Justice Powell's conclusions regarding diversity are part of the Court's holding. For the reasons stated below, the court is persuaded that Bakke did not hold that a state educational institution's desire to assemble a racially diverse student body is a compelling government interest.

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n30 The difficulty of this task was perhaps best summarized by the Fifth Circuit in United States v. City of Miami, 614 F.2d 1322, 1337 (5th Cir. 1980), which stated: "We frankly admit that we are not entirely sure what to make of the various Bakke opinions. In over one hundred and fifty pages of United States Reports, the Justices have told us mainly that they have agreed to disagree." **[*67]**

n31 See Marks v. United States, 430 U.S. 188, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977).

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Of the six separate opinions issued by the Supreme Court in Bakke, Justice Powell's was the only one that considered whether a state educational institution may have a compelling interest in admitting a racially diverse class of students. While rejecting the other justifications offered for the special admissions program, n32 Justice Powell found in Part IV-D of his opinion that "the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education." 438 U.S. at 311-12. He cited Justice Frankfurter's statement in Sweezy v. New Hampshire, 354 U.S. 234, 263, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957), that universities must have the freedom to decide which students to admit, as this is relevant to providing an "atmosphere which is most conducive to speculation, experiment and creation." Justice Powell also indicated his belief that "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of **[*68]** many peoples." 438 U.S. at 313. He quoted approvingly from an article by the president of Princeton University, who wrote:

> [A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world.

Id. at 313, quoting Bowen, "Admissions and the Relevance of Race," Princeton Alumni Weekly 7, 9 (September 26, 1977). Justice Powell emphasized that "ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a

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heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded." Id. at 314.

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n32 U.C. Davis argued that its special admissions program served four purposes: "(i) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body." Bakke, 438 U.S. at 306.

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Having recognized the compelling nature of a university's interest in diversity, including ethnic diversity, Justice Powell went on in Parts V-A and V-B of his opinion to find that U.C. Davis' quota system was not narrowly tailored to serve this interest. He stated:

> It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed. In a most fundamental sense the argument misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation, of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important **[*70]** element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.

438 U.S. at 315. While rejecting a quota system, Justice Powell endorsed an admissions program such as the one adopted by Harvard College, which states that

> race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough **[*71]** to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.

438 U.S. at 317-18.

In Part V-C of his opinion, Justice Powell concluded that

> In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

438 U.S. at 320.

The clearest indication that the Brennan group did not concur with Justice Powell's conclusions regarding the diversity rationale is that, although they joined in other portions of Justice Powell's opinion, they did not join in Part IV-D, the only portion of any of the Bakke opinions that specifically addressed the diversity issue. n33 Moreover, the Brennan group apparently **[*72]** did not believe that the diversity rationale was before the Court, as those Justices stated that the "issue presented" in the case was "whether government may use race-conscious programs to redress the continuing effects of past discrimination." Id. at 324. The Brennan group also stated that in their view the "central meaning of today's opinions [is that] Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area." Id. at 325. The Brennan group did not so much as mention the diversity rationale in their opinion, and they specifically declined to join in the portion of Justice Powell's opinion that addressed this issue. At the same time, Justice Powell specifically and vigorously disagreed with the Brennan group's conclusion that the special admissions program at U.C. Davis could be justified on the grounds that it sought to remedy general, societal discrimination. See 438 U.S. at 294-97 & nn. 34, 36. **[*73]** In short, while the Brennan group and Justice Powell agreed that race may be considered in admissions (hence the joinder of the Brennan group in Part V-C of Justice Powell's opinion), they disagreed entirely as to the reasons why (hence their failure to join in Part IV-D). Thus, there is no force at all to defendants' contention that the Brennan group's joinder in Part V-C of Justice Powell's opinion may be taken as an endorsement of Justice Powell's discussion of the diversity rationale.

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n33 The Brennan group stated that it "joined Parts I and V-C of our Brother POWELL's opinion and three of us agree with his conclusion in Part II that this case does not require us to resolve the question whether there is a private right of action under Title VI." 438 U.S. at 328.

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The defendants next argue that under Marks, Justice Powell's opinion is controlling because it is the narrowest grounds which support the judgment. The court must reject this argument because a Marks analysis does not assist in **[*74]** interpreting Bakke.

In Marks v. United States, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977), the Court held that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" In Marks this rule was applied to determine the holding of Memoirs v. Massachusetts, 383 U.S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975 (1966), a pornography case in

which the Supreme Court reversed a state court judgment finding a book obscene. In Memoirs, three Justices reversed on the grounds that the book had not been shown to be "utterly without redeeming social value"; two others reversed on the grounds that the First Amendment prohibits any action by government to suppress obscenity; and one Justice reversed on the grounds that the book was not "hard core pornography." In Marks the Court stated that the "governing standards" of Memoirs were those announced by the three-Justice plurality because the other Justices who concurred in the judgment did so "on broader grounds." 430 U.S. at 193.

The Court **[*75]** in Marks did not clearly explain what it meant by "narrow" and "broad" grounds. But in that particular case, the plurality's opinion was the "narrowest" in the sense that it was the most conservative reason for reversing the finding of obscenity *and* it was a reason that was subsumed within the grounds articulated by the other justices who concurred in the judgment.

The Marks framework cannot be applied to a case like Bakke, where the various Justices' reasons for concurring in the judgment are not merely different by *degree*, as they were in Memoirs, but are so fundamentally different as to not be comparable in terms of "narrowness." In Memoirs, the six Justices concurring in the judgment expressed three viewpoints which could be placed on a continuum from narrow to broad. The narrowest would permit a finding of obscenity if the book in question is "utterly without redeeming social value." A somewhat broader view would permit a finding of obscenity if the book is "hard cord pornography." An even broader view would not permit any book to be found obscene. On this continuum, the first view is clearly the narrowest and, therefore, articulates the binding legal **[*76]** standard constituting the Court's holding.

In Bakke, however, it is nonsensical to ask which opinion -- Justice Powell's or the Brennan group's -- offers the "narrowest grounds" in support of the judgment reversing the finding that race may never be considered in university admissions. The diversity rationale articulated by Justice Powell is neither narrower nor broader than the remedial rationale articulated by the Brennan group. They are completely different rationales, neither one of which is subsumed within the other. There is simply no overlap between the two rationales; in fact, as noted above, the two opinions are very much at odds with one another. Thus, the Marks framework is inapplicable because the varying positions cannot be compared for "narrowness."

For these reasons, the court concludes that Justice Powell's discussion of the diversity rationale is not among the governing standards to be gleaned from Bakke. No other member of the Court joined in his view that the attainment of a diverse student class is a compelling state interest which can justify the consideration of race in university admissions. Nor can Justice Powell's discussion of this issue be understood **[*77]** as part of the Court's holding on the grounds that, under Marks, it is the narrowest grounds for the judgment in which he and the Brennan group joined. Therefore, this court concludes that Bakke does not stand for the proposition that a university's desire to assemble a racially diverse student body is a compelling state interest. n34

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n34 The court acknowledges that the status of Justice Powell's opinion has been the subject of much debate and disagreement. Some courts have concluded that the diversity rationale is part of Bakke's holding. See, e.g., Smith v. University of Wash. Law Sch., 233 F.3d 1188, 1200-1201 (9th Cir. 2000); Gratz v. Bollinger, 122 F. Supp. 2d 811, 819-21 (E.D. Mich. 2000). Others have reached the opposite conclusion. See, e.g., Hopwood v. State of Texas, 78 F.3d 932, 944-45 (5th Cir. 1996); Johnson v. Board of Regents of the Univ. Sys. of Georgia, 106 F. Supp. 2d 1362, 1368-69 (S.D. Ga. 2000). Other courts have avoided deciding the issue. See, e.g., Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 130 (4th Cir. 1999) ("whether diversity is a compelling governmental interest remains

unresolved, and in this case, we also choose to leave it unresolved"); Wessmann v. Gittens, 160 F.3d 790, 796 (1st Cir. 1998) ("we need not definitively resolve this conundrum today").

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Further, in post-Bakke decisions the Supreme Court has indicated quite clearly that it looks upon racial classifications with even more suspicion than was the case at the time Bakke was decided. In Metro Broadcasting, Inc. v. Federal Communications Comm'n, 497 U.S. 547, 111 L. Ed. 2d 445, 110 S. Ct. 2997 (1990), the Court upheld FCC regulations which gave a preference to various racial minority groups in the awarding of broadcast licenses. Applying intermediate scrutiny, the Court upheld the regulations because "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective . . . ." Id. at 567. Five years later, however, in **Adarand** Constructors, Inc. v. Pena, 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995), the Court stated "that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. To the extent that Metro Broadcasting is inconsistent with that holding, it is overruled." **Adarand** clarified that strict scrutiny applies to all racial classifications, regardless of the level of government using the classification. Here it should be noted that **[*79]** the Brennan group in Bakke used the less demanding standard of intermediate scrutiny in their review of U.C. Davis' admissions program. See Bakke, 438 U.S. at 359 ("racial classifications designed to further remedial purposes "'must serve important governmental objectives and must be substantially related to achievement of those objectives'"). Moreover, the Court in City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989), made the following significant statement: "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." n35 When read together, **Adarand** and Croson clearly indicate that racial classifications are unconstitutional unless they are intended to remedy carefully documented effects of past discrimination. n36 The Supreme Court has rejected various "benign" justifications for racial classifications. See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986) (finding race-conscious layoff policy unconstitutional, and rejecting "minority role model" **[*80]** and "societal discrimination" justifications).

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n35 This statement appears in Part III-A of Justice O'Connor's opinion, in which Justices Rehnquist, White and Kennedy joined. Justice Scalia, in a concurring opinion, wrote that "at least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception to the principle embodied in the Fourteenth Amendment that 'our Constitution is color-blind, and neither knows nor tolerates classes among citizens.'" 488 U.S. at 521 (citations omitted). Thus, four members of the Court expressed the view that racial classifications are permissible only to remedy past discrimination, and a fifth expressed the view that they are permissible only in cases of social emergency.

n36 For example, race-based hiring or promotion programs have been upheld where necessary to correct a racial imbalance caused by documented race discrimination by a particular agency or employer. See, e.g., United States v. Paradise, 480 U.S. 149, 94 L. Ed. 2d 203, 107 S. Ct. 1053 (1987); Franks v. Bowman Transp. Co., 424 U.S. 747, 47 L. Ed. 2d 444, 96 S. Ct. 1251 (1976). Race-based student assignments have been upheld where necessary to correct a racial imbalance, or a misallocation of school resources, caused by de jure racial segregation. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971).

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Constitutional Law : Civil Rights Enforcement : Official Immunities

Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Constitutional Law : State Autonomy

Congress has abrogated Eleventh Amendment, U.S. Const. amend. XI, immunity by conditioning the receipt of federal funds upon the duty to comply with various anti-discrimination laws.

Constitutional Law : State Autonomy

See 42 U.S.C.S. § 2000d-7(a).

Constitutional Law : Civil Rights Enforcement : Discrimination Claims

Under 42 U.S.C.S. § 2000d, liability for damages attaches upon a showing of intentional discrimination. The right at issue need not have been "clearly established"; it suffices for a state to have violated a plaintiff's rights by intentional action. A violation of § 2000d requires proof of discriminatory intent, and, when intentional discrimination is proven, damages are among the remedies which may be awarded.

Constitutional Law : Civil Rights Enforcement : Discrimination Claims

In the context of the duty to comply with anti-discrimination laws conditioned upon the receipt of federal funds, "intentional discrimination," as used in 42 U.S.C.S. § 2000d means that a plaintiff must prove that the governmental actor, in adopting or employing the challenged practices or undertaking the challenged action, intended to treat similarly situated persons differently on the basis of race.

Constitutional Law : Substantive Due Process : Equal Protection : Race

The effects of general, societal discrimination cannot constitutionally be remedied by race-conscious decision-making.

Constitutional Law : Substantive Due Process : Equal Protection : Race

Societal discrimination alone is insufficient to justify a racial classification. Rather, there must be some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.

Constitutional Law : Substantive Due Process : Equal Protection : Level of Review

Constitutional Law : Substantive Due Process : Equal Protection : Race

A governmental agency's interest in remedying "societal" discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny.

Constitutional Law : Substantive Due Process : Equal Protection : Race

The Fourteenth Amendment, U.S. Const. amend. XIV, does not permit government to make racial classifications in order to remedy societal discrimination.

Constitutional Law : Substantive Due Process : Equal Protection : Race

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The court concludes that the Supreme Court in Bakke did not recognize the achievement of racial diversity in university admissions as a compelling state interest. The court further concludes that under the Supreme Court's post-Bakke decisions, the achievement of such diversity is not a compelling state interest because it is not a remedy for past discrimination.

3.

This is not to say that diversity does not have important educational benefits. The evidence defendants submitted on this issue, both at trial and in their summary judgment briefs, demonstrated that the educational atmosphere at the law school is improved by the presence of students who represent the greatest possible variety of backgrounds and viewpoints. Several law professors testified that classroom discussion is livelier, more spirited, and simply more enlightening and interesting when students from varying walks of life, and representing varying world views, participate. As Professor Syverud has written, "in the best classrooms, every voice is heard, and the quality of the education received is largely a function of the diversity of viewpoints and experiences among the students in the class." Report of Kent **[*82]** Syverud, p. 3. n37

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n37 Professor Syverud's report is among those contained in volume 3 of the appendix filed by defendants in support of their renewed motion for summary judgment on grounds of qualified immunity.

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However, a distinction should be drawn between viewpoint diversity and racial diversity. While the educational benefits of the former are clear, those of the latter are less so. The defendants' witnesses emphasized repeatedly that it is a diversity of viewpoints, experiences, interests, perspectives, and backgrounds which creates an atmosphere most conducive to learning. As Dean Lehman testified, it is primarily a "diversity of views" that the law school seeks.

The connection between race and viewpoint is tenuous, at best. The defendants walk a fine line in simultaneously arguing that one's viewpoints are not determined by one's race but that certain viewpoints might not be voiced if students of particular races are not admitted in significant numbers. Some of defendants' witnesses testified that classroom **[*83]** discussion is improved when the class is racially diverse, and some gave examples of viewpoints expressed in class by underrepresented minority students. However, these witnesses generally conceded that these viewpoints might equally have been expressed by non-minority students. n38

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n38 Professor Terrance Sandalow, former dean of the law school and long-time law professor, has written in this connection:

> Students learn from one another in different ways. In the course of discussion, whether in the classroom or in dormitory 'bull sessions,' participants are likely to be exposed to unfamiliar ideas. My own experience and that of colleagues with whom I have discussed the question, experience that concededly is limited to the classroom setting, is that racial diversity is not responsible for generating ideas unfamiliar to some members of the class. Students do, of course, quite frequently express and develop ideas that others in the class have not previously encountered, but even though the subjects I teach deal extensively with racial issues, I cannot recall an instance in which, for example, ideas were expressed by

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> a black student that have not also been expressed by white students. Black students do, at times, call attention to the racial implications of issues that are not facially concerned with race, but white and Asian-American students are in my experience no less likely to do so.

Terrance Sandalow, "Identity and Equality, Minority Preferences Reconsidered," 97 Mich. L. Rev. 1874, 1906-1907 (1999).

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Another asserted benefit of racial diversity is, essentially, that it promotes socialization. That is, cross-racial understanding is advanced, and racial stereotypes break down, in a multi-racial setting. This, it is argued, enhances all students' legal education because it enables them to better understand persons of different races and better equips them to serve as lawyers in an increasingly diverse society and an increasingly competitive world economy. See, e.g., Report of Derek Bok, pp. 3, 11, 13, 17; Report of Robert Webster, pp. 2-5; Amicus Curiae Brief of General Motors Corp., pp. 8-25. Defendants have also submitted a lengthy report by Patricia Gurin, a professor of psychology and women's studies at the University of Michigan, whose research suggests that "students learn better in a [racially and ethnically] diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic society once they leave such a setting." Report of Patricia Gurin, p. 3.

The court does not doubt that racial diversity in the law school population may provide these educational and societal benefits. Nor are these benefits disputed by the **[*85]** plaintiffs in this case. Clearly the benefits are important and laudable. Nonetheless, the fact remains that the attainment of a racially diverse class is not a compelling state interest because it was not recognized as such by Bakke and it is not a remedy for past discrimination.

4.

Even if racial diversity were a compelling state interest, defendants' use of race as an admissions factor would be constitutional only if "narrowly tailored" to serve that interest. See **Adarand**, 515 U.S. at 227. For the following reasons, the court finds that defendants' use of race has not been so narrowly tailored at any time under consideration in this case.

First, defendants have indicated that they use race in admissions to the extent necessary to achieve a "critical mass" of underrepresented minority students. None of the witnesses was able to clearly define critical mass in terms of numbers or percentages. While Professor Lempert indicated that critical mass lies somewhere between 11% and 17% of the entire class, Professor Syverud stated that even one to three minority students in a particular classroom might suffice. The current director of admissions, Erica Munzel, testified **[*86]** that she does not know what number or percentage of the entering class would constitute critical mass, and that she relies on faculty members to keep her informed as to whether she is achieving it. "Critical mass" has proved to be an amorphous concept. Apparently defendants know it when they see it, but it cannot be quantified. Narrow tailoring is difficult, if not impossible, to achieve when the contours of the interest being served are so ill-defined.

Second, there is no time limit on defendants' use of race in the admissions process. The Supreme Court has been highly critical of racial classifications which are not strictly limited in duration. See, e.g., Croson, 488 U.S. at 510 ("Proper findings . . . defining both the scope of the injury and the extent of the remedy . . . serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself"); Wygant, 476 U.S. at 275 ("The

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role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial **[*87]** purpose"). The defendants have indicated that they will continue to use race as a factor in admissions for as long as necessary to admit a critical mass of underrepresented minority students, and no one can predict how long that might be. Such indefiniteness weighs heavily against a finding of narrow tailoring.

Third, by using race to ensure the enrollment of a certain minimum percentage of underrepresented minority students, the law school has made the current admissions policy practically indistinguishable from a quota system. As noted above, the law school has an unwritten policy of constituting each entering class so that at least 10-12% are students from underrepresented minority groups. This percentage has fluctuated somewhat from one year to another, but 10-12% is the approximate percentage that has been established as the minimum level needed to achieve a "critical mass" of students from these groups. While the law school has not set aside a fixed number of seats for underrepresented minority students, as did the medical school in Bakke, there is no principled difference between a fixed number of seats and an essentially fixed minimum percentage figure. Under either system, **[*88]** students of all races are not competing against one another for each seat, with race being simply one factor among many which may "tip the balance" in particular cases. The reservation of some seats for applicants of particular races, and the attendant lack of competition for those seats, was the principle reason Justice Powell found U.C. Davis' quota system unconstitutional. See Bakke, 438 U.S. at 315-19. While defendants contend that the law school's admissions policy differs from U.C. Davis' in that all applicants compete against one another, the fact of the matter is that approximately 10% of each entering class is effectively reserved for members of particular races, and those seats are insulated from competition. The practical effect of the law school's policy is indistinguishable from a straight quota system, and such a system is not narrowly tailored under any interpretation of the Equal Protection Clause. See, e.g., Bakke, 438 U.S. at 307 ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake"). It appears that the law school is engaging in simple racial balancing by focusing **[*89]** so carefully on admitting and enrolling a particular percentage of students from particular racial groups.

Fourth, there is no logical basis for the law school to have chosen the particular racial groups which receive special attention under the current admissions policy. The 1992 admissions policy, at page 12, identifies "African Americans, Hispanics and Native Americans" as "groups which have been historically discriminated against n39 [and] who without this commitment might not be represented in our student body in meaningful numbers." During some of the years at issue in this lawsuit, the law school bulletin indicated that special attention has been given to "students who are African American, Mexican American, Native American, or Puerto Rican and raised on the U.S. mainland." n40 The law school has failed to offer a principled explanation as to why it has singled out these particular groups for special attention. Certainly, other groups have also been subjected to discrimination, such as Arabs and southern and eastern Europeans to name but a few, yet the court heard nothing to suggest that the law school has concerned itself as to whether members of these groups are represented **[*90]** "in meaningful numbers." No satisfactory explanation was offered for distinguishing between Puerto Ricans who were raised on the U.S. mainland from Puerto Ricans who were raised in Puerto Rico or elsewhere. No satisfactory explanation was offered for singling out Mexican Americans but, by implication, excluding from special consideration Hispanics who originate from countries other than Mexico. A special "commitment" is made to African Americans, but apparently none is made to blacks from other parts of the world. This haphazard selection of certain races is a far cry from the "close fit" between the means and the ends that the Constitution demands in order for a racial classification to pass muster under strict scrutiny analysis. n41 If the law school may single out these racial groups for a special commitment today, there is nothing to prevent it from enlarging, reducing, or shifting its list of preferred groups tomorrow without any reasoned basis or logical stopping point.

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n39 In this connection it is worth noting that the law school, like U.C. Davis, "does not purport to have made, and is in no position to make such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality." Bakke, 438 U.S. at 309. **[*91]**

n40 See the University of Michigan Law School Bulletin, 1996-1997 (Exhibit 6), p. 81; the University of Michigan Law School Bulletin, 1995-1997 (Exhibit 7), p. 81. No such statement appears in the University of Michigan Law School Bulletin, 1997-1999 (Exhibit 8), p. 85.

n41 A close fit is lacking for another reason -- namely, that there is no basis for believing that a particular member of any underrepresented minority group is "particularly likely to have experiences and perspectives of special importance to our mission." Exhibit 4, 1992 Admissions Policy, p. 12. One cannot assume, for example, that a particular African American applicant has been the victim of race discrimination or that a particular Mexican American applicant has grown up in an economically depressed neighborhood.

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A fifth and final factor the court must note in this connection is the law school's apparent failure to investigate alternative means for increasing minority enrollment. See Croson, 488 U.S. at 507 (finding that narrow tailoring was absent because, among other reasons, the city failed to **[*92]** consider "the use of race-neutral means to increase minority business participation in city contracting"); Wygant, 476 U.S. at 280 n.6 ("The term 'narrowly tailored' . . . maybe used to require consideration of whether lawful alternative and less restrictive means could have been used. . . . The classification at issue must 'fit' with greater precision than any alternative means"). The court did hear some testimony from witnesses who indicated that underrepresented minority students cannot be enrolled in significant numbers unless their race is explicitly considered in the admissions process. However, the court heard very little testimony from the authors of the 1992 admissions policy, or from those who have been involved in administering it, as to whether the deans or the faculty at the law school itself have ever given serious consideration to race-neutral alternatives. Such efforts might have included increasing recruiting efforts, decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores, using a lottery system for all qualified applicants, or a system whereby a certain number or percentage of the top graduates from various colleges and universities **[*93]** are admitted. Even if these alternatives would not be as effective in enrolling significant numbers of underrepresented minority students, the law school's failure to consider them, and perhaps experiment with them, prior to implementing an explicitly race-conscious system militates against a finding of narrow tailoring.

For all of these reasons, the court believes that the attainment of a racially diverse student body is not a compelling state interest. Even if it were, the law school's admissions policy is not narrowly tailored to serve that interest. Accordingly, the court concludes that the law school's 1992 admissions policy violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act.

5.

Nonetheless, having listened to extensive testimony and having reviewed all of the relevant documents, the court also concludes that the individual defendants are qualifiedly immune from damages. Under Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982), "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory **[*94]** or constitutional rights of which a reasonable person would have known." In Anderson v. Creighton, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct.

3034 (1987), the Supreme Court indicated that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent."

While the court is convinced that the law school's admissions policy is unconstitutional, the court is equally convinced that the individual defendants (Lee Bollinger, Jeffrey Lehman, and Dennis Shields) did not participate in the adoption or administration of a policy they either knew or had reason to believe was unconstitutional. The state of the law in this area is murky, to say the least. No Supreme Court decision since Bakke has addressed the constitutionality of affirmative action in university admissions, and Bakke itself, to borrow a phrase, "is a riddle wrapped in a mystery inside an enigma." n42 Lower courts have struggled **[*95]** for years, with little success, to divine the legal principles to be gleaned from Bakke, and to understand how, if at all, the teachings of other affirmative action cases may apply to the higher education context. Under these circumstances, university officials understandably had difficulty formulating admissions policies that conformed with Bakke.

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n42 Winston Churchill, in a radio broadcast in October 1939. J. Bartlett, Familiar Quotations 620 (1968).

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Moreover, it is clear from the defendants' testimony that they were concerned about the constitutionality of the law school's admissions policy and that they attempted to comply with Bakke, as they interpreted the decision, while still striving to fulfill their admissions goals. President Bollinger testified that he formed the faculty Admissions Committee in the fall of 1991 because he wanted to ensure that the law school was in compliance with the law. He deliberately selected committee members who were knowledgeable about Bakke and constitutional **[*96]** law. Dean Lehman, who served on that committee, testified that the committee members wanted the law school's admissions policy to be lawful, especially in light of Bakke. Dennis Shields, the director of admissions from 1991 to 1998, also served on that committee. Nothing in his testimony, or in any other evidence admitted in this case, suggests that he knew or should have known that it was unconstitutional for the law school to consider race as part of its admissions policy.

In short, the "contours" of the legal standards governing affirmative action in university admissions have not been so clearly defined as to permit reasonable law school officials to know whether it was constitutional to use race in the admissions process in order to assemble a racially diverse student body. The court finds that the individual defendants in this case acted reasonably and in good faith in adopting and administering the policy in question. Accordingly, the court shall grant the motion of these defendants for summary judgment on grounds of qualified immunity.

6.

Plaintiffs also seek, as part of their Title VI claim, money damages from the board of regents. The board argues that this damages **[*97]** claim is barred by the Eleventh Amendment, which generally prevents individuals from obtaining damages from a state or a state institution in federal court. See, e.g., Alabama v. Pugh, 438 U.S. 781, 782, 57 L. Ed. 2d 1114, 98 S. Ct. 3057 (1978); Edelman v. Jordan, 415 U.S. 651, 662-63, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974).

However, the board acknowledges that in this context Congress has abrogated Eleventh Amendment immunity by conditioning the receipt of federal funds upon the duty to comply

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with various anti-discrimination laws. Title 42 U.S.C. § 2000d-7(a) states:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the **[*98]** same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

Nonetheless, the board argues that it may be held liable in damages only if it is found to have violated "clearly established legal principles." Defendants' Memorandum of Law in Support of Renewed Motion for Summary Judgment, p. 45. Plaintiffs argue that it is inappropriate to graft a qualified immunity standard onto Title VI, and that the board is liable so long as intentional discrimination has been proven. See Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 33.

The court has reviewed the cases cited by both sides and is convinced that, under Title VI, liability for damages attaches upon a showing of intentional discrimination. The right at issue need not have been "clearly established"; it suffices for a state to have violated a plaintiff's rights by intentional action. In Guardians Ass'n v. Civil Serv. Comm'n of the City of New York, 463 U.S. 582, 608 n.1, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983), a majority of the Court agreed "that a violation of [Title VI] requires proof of discriminatory intent." When intentional **[*99]** discrimination is proven, damages are among the remedies which may be awarded. See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75-76, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992). In Franklin, the Court held that damages could be awarded under Title IX to a student who allegedly had been sexually harassed by a teacher, even though the law in this area was not clearly established. See id. at 75 (citing a Title VII sexual harassment case as sufficient authority for the proposition that sexual harassment of a student by a teacher is an "intentional action[]" proscribed by Title IX). The court agrees with the Fifth Circuit's view on this issue:

> "Intentional discrimination," as used in this context means that a plaintiff must prove "that the governmental actor, in adopting or employing the challenged practices or undertaking the challenged action, intended to treat similarly situated persons differently on the basis of race." While we agree with the district court's conclusion that the various defendants acted in good faith, there is no question that they intended to treat the plaintiffs differently on account of their race.

Hopwood, 78 F.3d at 957 **[*100]** (citations omitted). Accord, Gratz, 122 F. Supp. 2d at 834-36; Smith v. University of Wash. Law Sch., 2 F. Supp. 2d 1324, 1331 (W.D. Wash. 1998). See also Pederson v. Louisiana State Univ., 201 F.3d 388, 410-12 (5th Cir. 2000) (defendants liable for damages under Title IX for "intentional discrimination" where university sports program treated women differently because of their sex, although defendants were ignorant of their legal obligations. Court noted the defendants "need not have intended to violate Title IX, but need only have intended to treat women differently").

In the present case, there is no doubt that the law school's official admissions policy

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intentionally treats applicants differently because of their race. While the constitutionality of this policy may be debatable, the board of regents is nonetheless subject to liability in damages under Title VI insofar as it intentionally endorsed, or acquiesced in, an admissions policy that treats applicants differently because of their race. The unlawfulness of the policy need not have been clearly established for liability to attach. n43 Accordingly, the court must deny the board's **[*101]** motion for summary judgment.

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n43 Of course, whether plaintiffs actually should be awarded any damages is a question to be resolved in the next phase of the trial. Now that defendants' liability has been established, defendants may still defeat plaintiffs' claim for compensatory damages by showing that plaintiffs would not have been admitted under a race-blind admissions policy. See Hopwood, 78 F.3d at 955-57 (discussing burden of proof under Mt. Healthy).

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III. Remedying Societal Discrimination as a Rationale for Using Race as a Factor in University Admissions: The Intervenors' Case

A. Evidence

The intervenors presented many witnesses who testified about the history and current status of racial discrimination in this country; the causes of the "achievement gap" between underrepresented minority and non-minority students; the alleged cultural bias in standardized tests such as the SAT and the LSAT; and the recent experiences of some African American and Mexican American students **[*102]** at high schools, colleges and universities. Some of these witnesses are preeminent experts in their respective fields of history, sociology, psychology and education. Others testified about their personal experiences of the deplorable conditions at a Detroit high school, and of isolation and discrimination at predominantly white universities. The court listened intently to nearly 30 hours of testimony from the intervenors' witnesses. The court shall summarize briefly the highlights of each witness's testimony.

Four students testified. Erica Dowdell is an African American student in her junior year at the University of Michigan. She was elected to the university's student assembly on the Defendant Affirmative Action Party ticket. Ms. Dowdell grew up in Detroit and attended public schools, where all or nearly all of the students were African American. She testified to the generally shoddy conditions at her elementary, middle and high schools. Her high school, Lewis Cass Technical High School, is one of the best in Detroit, yet the building is poorly maintained and books and other resources are often lacking. Ms. Dowdell testified that in her senior year she attended a band festival **[*103]** at Livonia Churchill High School in the suburbs, where most of the students are white, and she was hurt and shocked at the differences in such things as the sports facilities and the quality of the students' musical instruments. As an undergraduate student at the University of Michigan, Ms. Dowdell testified that she feels isolated because African Americans are in the minority. She also testified that she experiences racism on a daily basis, and she gave examples of insensitive remarks by other students and instructors. While Ms. Dowdell is doing well academically, she feels that racism negatively affects her performance because it is discouraging and distracting.

Concepcion Escobar is a Mexican American and Native American student at the University of Michigan Law School. She testified primarily about her experiences at a predominantly black public high school in Chicago and then at Amherst College, where most of the students are white and from privileged backgrounds. In her high school there were very few college counselors, and Ms. Escobar was not given any information about scholarships for which she may have been eligible. At Amherst, she abandoned her plans to pursue a pre-med **[*104]** curriculum because her high school had not adequately prepared her for college-level math

and science classes. Ms. Escobar indicated that she did not often speak in class at Amherst because the student population was predominantly white and she did not want to play the role of representing her race. She also testified about some of the difficulties she and her classmates had in understanding one another, as they came from such completely different backgrounds.

Crystal James is an African American student in her second year of law school at the University of California at Los Angeles. Ms. James entered UCLA in 1999, three years after the passage of Proposition 209, which banned state-sponsored affirmative action and racial preferences in California. She testified that she was shocked to discover that she was one of only two African American law students in her entering class of 300. Ms. James feels isolated and believes that students and teachers expect her to represent the "black viewpoint" when racial issues are discussed. She also has experienced a loss of self-confidence and optimism, and a decline in her academic performance, which she attributes to her racial isolation and to **[*105]** subtle forms of racism on campus. The latter phenomenon has taken the form of students making anti-affirmative action comments, teachers failing to direct classroom discussion of racial issues in a positive manner, and teachers neglecting to call on her in class because, she believes, they assume she would not be able to respond. In sum, Ms. James testified that the loss of affirmative action in California has resulted in far fewer underrepresented minority students being admitted to prestigious state universities such as UCLA and Berkeley, and that those who are admitted feel isolated and defeated.

The last student to testify was Tania Kappner, an African American graduate of the master's of education program at the University of California at Berkeley. Like Ms. James, Ms. Kappner testified about her feelings of isolation, since the number of black students in her program dropped significantly following the passage of Proposition 209. Ms. Kappner teaches English at a high school near Berkeley, and she testified that the abolishment of affirmative action has had a demoralizing effect on her minority students.

The court also heard testimony from several university professors who, **[*106]** as noted above, are highly respected scholars in their various fields of endeavor. Gary Orfield is a professor of education and social policy at Harvard University. He testified extensively about racial segregation and affirmative action. His expert report, which is a collection of articles he has published on these issues, was admitted as Exhibit 167.

Professor Orfield testified that racial segregation in American public schools is particularly pronounced in the northeast and midwest sections of the country, and that Michigan is among the four most highly segregated states. n44 Of all the states, Michigan has the highest percentage (64%) of black students who attend schools whose student populations are 90-100% minority. See Exhibit 196. Detroit has the most highly segregated schools of any major metropolitan area in the country. Over 90% of the children enrolled in Detroit public schools are African American. Professor Orfield testified that racial segregation in the schools is related to segregation in housing, and he characterized housing in Detroit as "hyper-segregated." Further, Professor Orfield indicated that segregation in schools is associated with high levels of poverty **[*107]** which, in turn, are associated with poor resources and decreased educational opportunities. And as a rule, the poorest schools are the ones with the highest minority population. See Exhibit 197. Two-thirds of African American and 70% of Hispanic schoolchildren attend segregated schools. Professor Orfield testified that, as a result, most minority students do not receive a public education that prepares them for college. He noted, for example, that the University of Chicago has routinely rejected applicants who are Chicago valedictorians, even those from magnet schools, because city schools do not compare with schools in the suburbs. Professor Orfield has written that "college admissions officers have long known that class rank is hardly comparable from one high school to the next. The top students in many high-poverty schools are woefully unprepared for college." Exhibit 167 D, G. Orfield and E. Miller, Chilling Admissions 10 (1998).

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n44 In this connection Professor Orfield meant racial separation, not de jure segregation.

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Professor Orfield was also asked several questions about the effects of Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996), which banned the consideration of applicants' race in university admissions in the Fifth Circuit; and of Proposition 209, which in 1996 eliminated all racial preferences, including in university admissions, in California. Professor Orfield noted that following Hopwood and Proposition 209, enrollment of underrepresented minority students dropped sharply in Texas and California. For example, at the University of Texas School of Law at Austin, whose admissions system was challenged in Hopwood, the percentage of the entering class that is African American dropped from 5.8% (29 students) in 1996 to 0.9% (4 students) in 1997. n45 Native American enrollment at that law school dropped from 1.2% (six students) in 1996 to 0.2% (one student) in 1997. n46 Hispanic enrollment dropped from 9.2% (46 students) in 1996 to 6.7% (31 students) in 1997. n47 See Exhibit 131.

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n45 The percentage of African American students increased to 1.8% (nine students) in 1998 but fell slightly to 1.7% (nine students) in 1999. **[*109]**

n46 The percentage of Native American students increased to 1.0% (five students) in 1998 but fell to 0.4% (two students) in 1999.

n47 The percentage of Hispanic students increased to 7.6% (37 students) in 1998 and to 8.1% (42 students) in 1999.

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Professor Orfield also cited statistics showing that similar declines in law school enrollments occurred in California following the passage of Proposition 209. In 1996, for example, 89 Hispanics, 43 African Americans and 10 Native Americans were enrolled as first year students at the top three public California law schools. n48 In 1997, these numbers fell to 59, 16, and 4, respectively. At Berkeley, only one African American enrolled in the freshman law class in 1997, whereas 20 had been enrolled in the freshman class the year before. See Exhibit 132.

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n48 By this Professor Orfield was referring to the University of California at Berkeley, the University of California at Davis, and the University of California at Los Angeles.

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Part of the reason for the drop in the number of underrepresented minorities in law schools, following the elimination of affirmative action, can be seen in Exhibits 199 and 200. These exhibits are graphs showing the distribution of LSAT scores by race in 1997-1998. Exhibit 199 shows that the test scores of each racial group formed a similar bell-shaped curve, but that the curve for whites is located to the right of those of all underrepresented minority groups. This confirms the data from other exhibits, which reveal that the median LSAT score of white test-takers is significantly higher than the median underrepresented minority score. See Exhibit 137, p. 19; Exhibit 139, p. 20; Exhibit 141, p. 17. Exhibit 200 shows the distribution of LSAT scores by race, but indicates the absolute numbers of tests taken. The curve of the white test-takers absolutely dwarfs the curves of the minority test-takers; this graph dramatically illustrates the fact that the vast majority of test-takers are white and that

the vast majority of high LSAT scores are obtained by white test-takers. In Professor Orfield's words, "hardly any" minority test-takers receive scores in the 169-180 range from which **[*111]** the best law schools expect their applicants to come.

Professor Orfield concluded that affirmative action is needed in order to achieve racial diversity at law schools because the academic averages between underrepresented minority and non-minority groups is such that a "very segregated outcome" would result if race were not considered in the admissions process. He believes there is no double standard in doing so, since most minority children are so disadvantaged in their public school education.

Professor Orfield also testified that the elimination of affirmative action in university admissions leads to a phenomenon known as "cascading," whereby minority students no longer gain admittance to the most prestigious institutions and are instead relegated to less selective ones. In his view, this is undesirable because the more prestigious universities are "leadership training institutions." n49

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n49 Professor Orfield has written:

> The reversal of affirmative admissions in higher education can drastically reduce black, Latino, and American Indian enrollment on highly selective campuses. The increased use of tests and grades as entrance standards will tend to exacerbate the existing inequities in U.S. society. If affirmative action is outlawed nationally, as it has been in Texas, the impact on access to leading public and private universities would be enormous. Many of our most able students would find themselves on campuses overwhelmingly dominated by white and Asian students. The severe isolation characteristic of our more affluent suburbs would become the rule in the institutions that train the leaders of our society and our professions. This threatens critical educational functions of universities and their ability to fully serve their communities.

Exhibit 167D, G. Orfield and E. Miller, Chilling Admissions 14 (1998).

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The court also heard extensive testimony from another distinguished sociologist, Dr. Walter Allen, a professor of sociology at the University of California at Los Angeles. His expert reports were admitted as Exhibits 156-158.

Professor Allen testified that affirmative action in the law school admissions process is needed in order to counterbalance the negative effects of racism on the academic performance of underrepresented minority students in college. Professor Allen believes that underrepresented minorities suffer systematic deprivations in both housing and educational opportunities, which account for much of the "GPA gap" that exists between minority and non-minority college students. Professor Allen indicated that underrepresented minority students at predominantly white undergraduate institutions often experience a racially hostile environment, which depresses their confidence and desire to succeed academically. He stated that African American students perform better at historically black colleges and universities (HBCU's) than at predominantly white institutions because they feel validated and encouraged to succeed in the friendlier and more supportive atmosphere at HBCU's. **[*113]** In contrast, at predominantly white institutions, African Americans and other underrepresented minority students often feel isolated, disliked and marginalized.

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A constitutional challenge to a voluntarily adopted racial classification may not be defeated by the argument that elimination of the classification will or may have undesirable consequences, be they political, social, economic or otherwise.

Constitutional Law : Substantive Due Process : Equal Protection : Level of Review
Constitutional Law : Substantive Due Process : Equal Protection : Race
All racial distinctions are inherently suspect and presumptively invalid. This presumption may be overcome only upon a showing that the distinction in question serves a compelling state interest, and that the use of race is narrowly tailored to the achievement of that interest. It does not suffice for the interest in question merely to be important, beneficial, or laudable; the interest must be compelling.

Constitutional Law : Substantive Due Process : Equal Protection : Race
The remedying of societal discrimination, either past or present, has is not recognized as a compelling state interest.

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For OHIO, STATE OF, movant: Edward B. Foley, PENDING APP, Ohio **[*2]** Department of Attorney General, Columbus, OH.

For ASSOCIATION OF AMERICAN LAW SCHOOLS, NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND GRANT COLLEGES, COMMITTEE ON INSTITUTIONAL COOPERATION, WAYNE STATE UNIVERSITY, movants: Richard A. Wilhelm, Dickinson, Wright, Bloomfield Hills, MI.

JUDGES: BERNARD A. FRIEDMAN, UNITED STATES DISTRICT JUDGE.

OPINIONBY: BERNARD A. FRIEDMAN

OPINION: FINDINGS OF FACT AND CONCLUSIONS OF LAW

On December 22, 2000, the court heard oral argument in this case on the parties' cross motions for summary judgment. The court took the motions under advisement and identified the issues for trial. Over a period of 15 days in January and February 2001, the court conducted a bench trial. In this opinion, the court shall rule on the motions and make findings of fact and conclusions of law.

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Professor Allen studied the racial climate at four of the undergraduate institutions which supply a portion of the students who apply to the University of Michigan Law School. The "feeder schools" selected for this research were the University of Michigan, Michigan State University, the University of California at Berkeley, and Harvard University. Professor Allen also studied the racial climate at the law school itself. His research was conducted at these campuses principally by studying the responses of minority and non-minority students in focus groups and surveys.

Professor Allen concluded that the students at the four feeder campuses "described the overall racial climate of their campuses as a place where they feel their presence is questioned and belittled." Exhibit 157, p. 11. The underrepresented minority focus group participants described various items which contributed to this climate, including insensitive or racist remarks by faculty and students, a feeling of isolation due to the low number of fellow students **[*114]** of the same race, avoidance of racial issues in classroom discussions, the lack of minority role models such as faculty members, exclusion from white study groups, and unequal treatment by campus police. Some of the focus group participants also indicated that the negative racial climate caused them to feel alienated and discouraged and that this harmed their academic performance.

Professor Allen also surveyed 200 students at the feeder institutions. Thirty-five percent felt discriminated against at their campus because of their race, and 47% felt they had been unfairly graded. See Exhibit 157, p. 51. However, 75% felt they had made the right choice in attending their undergraduate institution, and 84% "would definitely recommend their university to other students who want to attend college." Id. pp. 51, 55.

The court also heard testimony from Professor John Hope Franklin, a renowned historian with special expertise in the history of race relations in the United States. n50 His expert report was admitted as Exhibit 163. Professor Franklin described his personal experiences as the victim of racial discrimination as an undergraduate student in Nashville, as a graduate student **[*115]** doing research in North Carolina, and as a young history professor seeking housing in Brooklyn. Professor Franklin testified that even now, as a distinguished educator and historian, he experiences racism. For example, in recent years he has been approached more than once by a white person in a hotel lobby or private club who asked him to fetch her coat or car. Professor Franklin believes that great strides have been made in improving race relations, but that much more remains to be done. Professor Franklin believes that active effort is needed to eliminate the race problem, and that the abolishment of affirmative action at universities is a step toward resegregation. However, he also expressed the belief that academic standards should not be lowered for minority students, and that all people should be judged on their individual merits.

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n50 Additional testimony about this history of racial discrimination in the United States was provided by Dr. Eric Foner, a professor of American history at Columbia University.

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Three witnesses testified on the subject of bias in standardized testing. This was important testimony, given the significance of such tests in undergraduate and graduate admissions. The first such witness was Jay Rosner, the executive director of the San Francisco office of the Princeton Review Foundation (PRF). The PRF is affiliated with the Princeton Review, an organization that provides LSAT preparation courses to approximately 10,000 students each year. The PRF focuses on providing such courses to underrepresented minority students.

Mr. Rosner's expert reports were admitted as Exhibits 168 and 169. He testified that the LSAT is developed and administered by the Law School Admission Council (LSAC), which claims that the LSAT score helps predict students' first year grades in law school. However,

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according to Mr. Rosner, the actual correlation is only 16-20%, which is to say that 80-84% of first year law school grades are not predicted by the LSAT. Mr. Rosner stated that test preparation courses like those offered by the Princeton Review, or by its competitor Kaplan, Inc., generally improve one's LSAT score by approximately seven points.

Mr. Rosner testified that the PRF engages **[*117]** in "targeted outreach" to offer its test preparation services to African American and other minority students. In his experience, white students are aware of the benefits of taking such a course, but minority students do not share this awareness. For example, at Howard University, a predominantly African American institution, Mr. Rosner once had difficulty filling the 15 seats in an LSAT preparation course, despite the fact that the customary $ 1,000 fee was reduced to $ 200. He also testified that despite PRF's outreach efforts, the vast majority of the students who take an LSAT preparation course are white, and that this fact accounts for some of the test-score gap between minority and non-minority test-takers.

Martin Shapiro, a professor of psychology at Emory University, testified on the issue of bias in standardized testing. He also submitted an expert report, which was admitted as Exhibit 170. Professor Shapiro testified that standardized admission tests, by the manner in which new test questions are "pretested," tend to perpetuate bias against groups which have performed poorly on the tests in the past. He also noted the large difference between the average LSAT score for whites **[*118]** and blacks, and the weak correlation, of about 27%, between performance on the LSAT and first year law school grades.

On the issue of bias in standardized testing, the court also heard testimony from David White, director of Testing for the Public, a group which offers test preparation courses for women and minority students. His expert report was accepted as Exhibit 173. White provided information similar to that provided by Dr. Larntz regarding the gaps in LSAT scores and UGPA's between whites and underrepresented minorities. Exhibit 219 shows that while 46% of white law school applicants in 1996-1997 scored at or above 155 on the LSAT, only 8% of black applicants did so. While 46% of white applicants had a UGPA of 3.25 or above, only 17% of black applicants had a UGPA in this range. And while 27% of white applicants had both qualifications, only 3% of black applicants had both. Whites on average score higher on the LSAT than any other racial group at all socioeconomic levels. See Exhibits 220, 221. Even among applicants who attend the same undergraduate institution and have the same undergraduate GPA, the LSAT gap as compared to white applicants is 4.0 points for Native Americans, **[*119]** 6.8 points for Hispanics, and 9.2 points for African Americans. See Exhibit 223.

The court also heard testimony from Dr. Eugene Garcia, the Dean of the School of Education at the University of California at Berkeley. His expert report was admitted as Exhibit 164. Dr. Garcia testified about the effects of Proposition 209 on student admissions at the eight campuses of the University of California system. n51 From 1995 to 2000, underrepresented minority admissions dropped by 1% overall. See Exhibit 213. Underrepresented minority admissions at the most selective campuses, Los Angeles and Berkeley, have dropped by 45% and 42%, respectively, whereas the admission rates at Santa Cruz and Riverside, which are less selective, have increased by 27% and 87%, respectively. n52 Dr. Garcia attributed these changes to the fact that underrepresented minority applicants generally have lower GPA's and test scores. Their lower average GPA is due in large part to the generally poorer quality of the schools attended by underresented minority students. And their lower average test scores are to some extent due to the fact that standardized tests, like the SAT and LSAT, are "heavily loaded with **[*120]** academic English." This disadvantages many Hispanics because English is their second language. African Americans are also disadvantaged because many -- 60% by his estimate -- speak "Black English." Dr. Garcia indicated that test preparation courses do improve test scores, but that these courses are expensive, which adds to the disadvantage against poorer groups. Dr. Garcia characterized the loss of underrepresented minority students at Los Angeles and Berkeley, and the corresponding gain of underrepresented minority students at Santa Cruz and Riverside, as a "redistribution" within the University of

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California system. This is the phenomenon which Professor Orfield called "cascading."

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n51 The University of California has campuses at Los Angeles, Berkeley, San Diego, Irvine, Davis, Santa Barbara, Santa Cruz, and Riverside.

n52 Exhibit 214 shows applications, admissions, admissions rates, and enrollment figures for the years 1995 to 2000 at all of the University of California campuses by the race of the applicants. It appears that the most significant declines in admission rates occurred among African Americans, Native Americans, Chicanos and Latinos at Berkeley, Los Angeles and San Diego. The court notes that admission rates of whites and Asian Americans also dropped at most of the campuses over the same time period, albeit less dramatically. At San Diego, for example, the admission rate for Asian Americans fell from 62.8% in 1995 to 46.1% in 2000. At Santa Barbara, the admission rate for whites fell from 85.3% in 1995 to 48.9% in 2000.

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Dr. Garcia testified that the University of California has been unable to admit underrepresented minority students in significant numbers by any means other than by explicitly considering race in admissions. He favors race-conscious admissions policies because they enable universities to consider historical discrimination against particular racial groups. Dr. Garcia testified that a decrease in racial diversity at universities decreases the quality of the educational experience for all students. He also expressed the belief that institutions of higher education prepare students to take leadership roles later in life, and that part of this preparation should include exposure to people of other races, particularly in light of the fact that American society is itself becoming increasingly diverse.

On cross-examination, Dr. Garcia acknowledged that at the school of education of which he is the dean, 28% of this year's class consists of underrepresented minority students. Dr. Garcia indicated that the school of education was able to achieve this level of diversity by decreasing reliance on the Graduate Record Examination (GRE), and by expending greater effort in recruiting new students. **[*122]**

The court also heard testimony from Faith Smith, the president of Native American Educational Services (NAES) College; and Frank Wu, an associate professor of law at Howard University. Ms. Smith testified about the educational difficulties which face Native Americans, and the importance of increasing the number of Native American lawyers. Her expert report was admitted as Exhibit 171. Professor Wu testified about the historical and present societal discrimination against Asian Americans, particularly in the areas of employment and housing. His expert report was admitted as Exhibit 175.

Finally, the intervenors called Professor Richard Lempert. As noted above, Professor Lempert has served for many years on the faculty of the law school as well as in the sociology department at the University of Michigan. While the defendants called him to testify about the genesis of the law school's admissions policy, the intervenors called him to testify about a survey study he and others performed which examined the career success of underrepresented minority graduates of the law school. Professor Lempert's study, and a condensed version thereof, were admitted as Exhibits 165 and 166.

While Professor **[*123]** Lempert's report is quite lengthy, he summarized the main conclusions as follows:

> The results reveal that almost all of Michigan Law School's minority graduates pass a bar exam and go on to have careers that appear successful by

> conventional measures. In particular, the survey indicates that minority graduates (defined so as to include graduates with African American, Latino, and Native American backgrounds) are no less successful than white graduates, whether success is measured by the log of current income, self-reported satisfaction, or an index of service contributions. Also, although an admissions index that combines LSAT scores and undergraduate grade-point average is a significant predictor of law school grades, it does not predict career success on any of our three outcome measures. n53

Exhibit 166, p. 1. Professor Lempert also wrote:

> What we find is a strong, statistically significant relationship between LSAT and UGPA, on the one hand, and grades at the end of three years of law school on the other. But we find no significant relationship between the LSAT or UGPA and what matters more -- the achievement of students after graduation. Drawing on work **[*124]** done in connection with the affirmative action lawsuit against the University of Michigan Law School, we can also say that had the LSAT and the UGPA been the only criteria for admissions at Michigan, few of Michigan's minority graduates would have been admitted to the school, even though their career success since law school is similar to the career success of Michigan's white graduates and consistent with the aspirations Michigan has for all students it admits.

Id. at 33-34. In his testimony, Professor Lempert also indicated that the law school's race-conscious admissions policy has helped to integrate the legal profession. He testified that if affirmative action in admissions did not exist, the number of underrepresented minorities admitted to any law school in the country would be reduced by 75%. Not only would underrepresented minority applicants "cascade down" to less selective law schools, but they probably would, if admitted, simply displace other minority applicants. Professor Lempert believes that the LSAT is a valid predictor of academic success in law school (though not of later success in the profession), and he does not believe there are any "hard data" showing **[*125]** any racial bias against minorities in terms of the LSAT's predictive capacity. See also Exhibit 166, p. 34 ("LSAT scores and an index based on LSAT scores and UGPAs are significantly correlated with both first-year and final law school grade-point averages").

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n53 Professor Lempert found that the law school's "admissions index" (combination of LSAT score and UGPA) was an equally poor predictor of career success for both minority and white alumni. See Exhibit 166, pp. 94-99 (Tables 29A, 29B, 29C, 30A, 30B, 30C).

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B. Findings of Fact and Conclusions of Law

From this extensive body of evidence, the court makes the following findings and conclusions.

1.

First, there is no question about the long and tragic history of race discrimination in this country. At different times in history, Native Americans have been deprived of land and forced onto reservations; African Americans have been held in slavery; and Asian Americans

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have been detained in internment camps. Many ethnic and racial groups -- including, **[*126]** but not limited to, the underrepresented minority groups identified by the law school's admissions policy -- have been victims of discrimination in housing, employment, education, public accommodations, and elsewhere.

While American public policy has sought to eradicate race discrimination, its lingering effects are apparent. As Professor Wu has written, "For many people of color, racism has decreased the amount and value of economic, social, and cultural capital inherited from our ancestors. Not only did we receive less material wealth, we also received less 'insider knowledge' and fewer social contacts so instrumental to one's educational and professional advancement in America." Exhibit 175, p. 131. The lingering effects can be seen, for example, in lower education rates and higher poverty rates among some minority groups as compared to whites. n54

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n54 While not introduced at trial, defendants did submit a report from Dr. Thomas Sugrue, a professor of history and sociology at the University of Pennsylvania, in support of their motion for summary judgment on grounds of qualified immunity. Professor Sugrue cites census data showing the significant disparities along racial lines in educational attainment, unemployment rates, income levels, poverty rates, and household net worth. See Sugrue Report, pp. 50, 53-57.

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2.

The evidence presented at trial also made clear that underrepresented minority groups have, on average, lower undergraduate grade-point averages than whites. Among applicants accepted by the University of Michigan law school from 1995 through 2000, the median UGPA of every underrepresented minority group has been lower than the median UGPA of Caucasians by approximately one-tenth to three-tenths of a point. n55 A greater gap exists in LSAT scores. From 1995 to 2000, the median LSAT score of the underrepresented minority groups has been lower than the median LSAT score of Caucasians by approximately seven to nine points. n56

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n55 The median undergraduate GPA for accepted applicants, by race, is shown in Exhibit 137, p. 21; Exhibit 139, p. 19; and Exhibit 141, p. 16. The smallest difference between the Caucasian UGPA and an underrepresented minority group UGPA was .05 (Caucasian vs. Puerto Rican in 1996, and Caucasian vs. Native American in 1998). The largest difference was .41 (Caucasian vs. African American in 2000). Averaging the figures over the six years, one sees that the gap between the Caucasian UGPA was .21 for Native Americans, .32 for African Americans, .14 for Mexican Americans, and .22 for Puerto Ricans. **[*128]**

n56 The median LSAT scores for accepted applicants, by race, is shown in Exhibit 137, p.22; Exhibit 139, p. 20; and Exhibit 141, p. 17. The smallest difference between the Caucasian LSAT score and an underrepresented minority group LSAT score was three points (Caucasian vs. Native American in 2000). The largest different was 12 points (Caucasian vs. African American in 2000). Averaging the figures over the six years, one sees that the point gap between the Caucasian LSAT score was 6.8 for Native Americans, 9.6 for African Americans, 7 for Mexican Americans, and 7.6 for Puerto Ricans.

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The reasons for the "GPA gap" and the "LSAT gap" are complex. While one must be cautious

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in making generalizations, the evidence at trial clearly indicates that much of the GPA gap is due to the fact that disproportionate numbers of Native Americans, African Americans, and Hispanics live and go to school in impoverished areas of the country. It should not surprise anyone that students who attend schools where books are lacking, where classrooms are overcrowded, and where Advanced Placement or other higher level courses **[*129]** are not offered are at a competitive disadvantage as compared with students whose schools do not suffer from such shortcomings. An educational deficit in the K-12 years will, for most students, have a negative ripple effect on academic performance in college. Ms. Escobar, for example, had to drop out of the pre-med program in college because her high school, a large public school in Chicago, failed to provide her with the necessary mathematics and science background. Of course, students of any race will have difficulty "catching up" in college if they have had a poor K-12 education.

The intervenors have also argued that the GPA gap is due in part to the racially hostile environment at college and university campuses. The court does not doubt that many underrepresented minority students find the racial climate hostile at the law school's "feeder" institutions. Nor does the court doubt that such a climate can have a negative effect on these students' academic performance. Nonetheless, the court is unable to give any weight to Professor Allen's study of this issue, due to the small number of students who participated in the focus groups and surveys and due to the manner in which the **[*130]** students were selected.

Regarding the small numbers, the court notes that a total of 65 students participated in Professor Allen's focus groups. Of these, 18 were white and Asian students; only 47 were members of the underrepresented minority groups at issue in this case. n57 Of these 47 students, 20 participated in four focus groups at the University of Michigan; 15 participated in three focus groups at Berkeley; eleven participated in two focus groups at Harvard; and one participated in one focus group at Michigan State University. See Exhibit 157, Figure 2. n58 Similarly small numbers of underrepresented minority students participated in the surveys. Of the 200 total respondents, 140 were African Americans, Hispanics or Native Americans, 47 of whom were participants in the focus groups. See Exhibit 157(2), Tables 3, 6, 9 and 12. At trial, Professor Allen acknowledged that it is difficult to make generalizations based on results from such small sample sizes. The court seriously doubts whether any reliable generalizations can be made about the racial climate at the feeder institutions, whose total student population well exceeds 125,000, based on the information gathered **[*131]** from 47 focus group participants and 140 survey respondents.

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n57 All 47 of these students were African American or Hispanic. No Native Americans participated in the focus groups. See Exhibit 157, Figure 2.

n58 At trial Professor Allen indicated that focus groups 1, 2, 5, 8, 9 and 11 were conducted at The University of Michigan; focus groups 4, 6 and 10 were conducted at Berkeley; focus groups 3 and 7 were conducted at Harvard; and focus group 12 was conducted at Michigan State University.

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The reliability of Professor Allen's conclusions is further undermined by the manner in which students were solicited for inclusion in the research project. While Professor Allen supervised the focus groups and the composition of the survey, he relied on student volunteers to recruit the study's participants. Several of these solicitations, in the form of electronic mail and facsimile transmissions, were co-authored by United for Equality and Affirmative Action, which is one of the intervenors in this case. These solicitations **[*132]** called upon students "to contribute to a legal case that will impact the educational opportunities of minority students for generations to come. It is our 'Brown v. Board of Education' and we must do

everything we can to ensure a victory." Exhibit 176. Other solicitations began with the heading, "URGENT - PLEASE PARTICIPATE IN A STUDY FOR THE U OF M AFFIRMATIVE ACTION CASES." Exhibit 177. These solicitations also indicated that "the student intervenors in the watershed University of Michigan affirmative action cases are seeking students . . . ." Id. Professor Allen acknowledged that the wording of these solicitations "possibly" could have biased the selection process. The court believes not only that such bias may have occurred, but that it surely did occur, because the solicitations clearly communicated a desire to attract research participants who shared a particular viewpoint.

The court has three other difficulties with Professor Allen's research results. The first is that they fail to quantify the degree to which the academic performance of underrepresented minority students is reduced by the racially hostile environment at the feeder institutions. Nor did the evidence show **[*133]** that the academic performance of all underrepresented minority students is reduced to the same extent, or whether the effect varies from one individual to another. Thus, even if it were constitutionally permissible for the law school to consider the race of underrepresented minority applicants in order to compensate for the reduction in their grades and test scores attributable to a racially hostile environment in college, the court has no means of knowing the permissible extent of such compensation, either for particular individuals or for all underrepresented minority law school applicants.

Second, even if the effect of a racially hostile environment on academic performance could be quantified, no testimony was offered as to the percentage or numbers of underrepresented minority students at the University of Michigan Law School who come from the four "feeder" institutions. n59 Nor was any testimony or other evidence offered to show whether the racial climate at other undergraduate institutions from which underrepresented minority law students have graduated is hostile to the same degree as at the four feeder schools. Thus, it is impossible to know whether Professor Allen's findings **[*134]** apply to most or only some of the underrepresented minority law school applicants.

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n59 The magnitude of this flaw is suggested by Exhibit 18, which identifies all of the undergraduate schools which graduated students who entered the law school's 1995 class. Of the 337 students in that class, only 85 (25%) came from the four "feeder" institutions studied by Professor Allen. The remaining 252 students (75%) came from 106 other colleges and universities which were not included in the study.

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Third, Professor Allen's research failed to inquire into the effects of racial hostility on the academic performance of minority groups other than African Americans, Latinos, Asian Americans and Native Americans. It seems quite likely that Arab students, or those from eastern or southern Europe, or adherents of a religious minority, may also to one degree or another be subjected to a hostile undergraduate environment. Given the narrow focus of Professor Allen's research project, the court and the law school admissions office **[*135]** can only guess as to precisely which applicants are entitled to a "boost."

3.

The gap in LSAT scores between underrepresented minorities and Caucasians is even more difficult to explain than the gap in undergraduate GPA's. The intervenors contend that this gap is due to various factors, including cultural bias in the LSAT and a psychological phenomenon experienced by underrepresented minority test-takers known as "stereotype threat." The court is unable to find that anything in the content or design of the LSAT biases the test for or against any racial group. If such a bias exists, it was not proved at trial. Jay Rosner gave some testimony about "white preference" and "black preference" questions on the SAT (not the LSAT). Three of these questions appeared in newspaper articles in 1997 and

1999, while Mr. Rosner found others in unspecified "'88-'89 ETS data." See Exhibits 202-210. The court is unable to give any weight to this testimony, as Mr. Rosner is not an expert in test design. Nor did he claim to have studied, or to have the expertise to study, the issue of bias in standardized tests. Professor Shapiro testified generally as to how pre-testing procedures can be used to **[*136]** perpetuate a test-score gap, but he did not testify that such procedures are used in connection with the LSAT. Professor Shapiro and David White testified about the existence of the LSAT gap, but they did not demonstrate to the court's satisfaction that the gap is due to the selection of the test questions or the design of the test.

The intervenors have also suggested that underrepresented minority students do less well than Caucasians on the LSAT, and on other standardized tests, because of a psychological phenomenon known as "stereotype threat." No witnesses testified directly on this subject. However, defendants did file a report by Dr. Claude Steele, a psychology professor at Stanford University who has done some research in this area. See Appendix in support of defendants' motion for summary judgment on grounds of qualified immunity, volume 3. Professor Steele writes that stereotype threat

> refers to the experience of being in a situation where one recognizes that a negative stereotype about one's group is applicable to oneself. When this happens, one knows that one could be judged or treated in terms of that stereotype, or that one could inadvertently do something **[*137]** that would confirm it. In situations where one cares very much about one's performance or related outcomes -- as in the case of serious students taking the SAT -- this threat of being negatively stereotyped can be upsetting and distracting. Our research confirms that when this threat occurs in the midst of taking a high stakes standardized test, it directly interferes with performance.

Steele Report, p. 7. Professor Steele indicates that he once conducted an experiment where black and white Stanford University sophomores were given a difficult verbal test, using questions from the advanced Graduate Record Examination in literature. When the students were told that their ability was being tested, the black students performed "dramatically worse" than did the white students. But when the students were told that the test was a "problem-solving task," not a measure of ability, black and white performance was the same. Id. at 8. Professor Steele indicates that he has performed other research which "shows stereotype threat to be a very general effect, one that is undoubtedly capable of undermining the standardized test performance of any group negatively stereotyped in the area **[*138]** of achievement tested by the test." Id. at 9.

Due to the sparseness of the evidence on this issue, the court is unable to determine whether stereotype threat explains any part of the gap between Caucasian and underrepresented minority LSAT scores. Professor Steele's report describes his research only in the most general terms. He reports the results of only one experiment he performed using the GRE, and he does not indicate when the experiment was done, how many students participated, whether the results were tested for statistical significance, or whether the results were published and subjected to peer review. Nor has Professor Steele provided any evidence, by way of survey data for example, to show that the members of any particular racial group perceive themselves as being the object of a stereotype that expects underachievement. Professor Steele does not quantify the effect of stereotype threat; nor, at least according to this report, has he performed any research on the LSAT. If there is evidence showing that stereotype threat accounts for some of the LSAT gap, it was not produced in this case.

The intervenors' witnesses offered two explanations for the LSAT gap which the **[*139]** court does find plausible. The first is that the LSAT, and other standardized tests, are written

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in what Dr. Garcia characterized as "academic English." Evidence at trial indicated that this causes a problem for underrepresented minority students, many of whom do not speak English, or do not speak standard English, as their first language. The second is that underrepresented minority students are less likely to take an LSAT preparation course, which could increase one's score. Mr. Rosner testified that underrepresented minority students enroll in such courses only in "token numbers." This may well be due to the cost of taking a test preparation course, although Mr. Rosner testified that in his experience underrepresented minority students are simply less aware than are Caucasian students about the benefits such a course can provide.

4.

The intervenors have argued strenuously that the law school's race-conscious admissions policy does not apply lower academic standards to underrepresented minority applicants than are applied to non-minority applicants. In this view, there is no "double standard" in the admissions process because the UGPA gap and the LSAT gap are attributable to past **[*140]** and present discrimination against underrepresented minorities in the form of segregation in housing and schools, a racially hostile environment at undergraduate institutions, cultural bias in standardized tests, and stereotype threat. That is to say, underrepresented minority applicants are actually performing at a higher academic level than is suggested by their undergraduate grade-point averages and LSAT scores because of the more difficult conditions under which they were obtained. Therefore, the intervenors argue, the law school's race-conscious admissions policy simply "levels the playing field," or compensates for the differing levels of adversity, by giving some degree of preference to underrepresented minority applicants.

The court has made its findings on the factual issues relevant to this inquiry and, as noted above, the court concludes that the comparatively lower grades and test scores of underrepresented minorities is attributable, at least in part, to general, societal racial discrimination against these groups. While the court may agree with some of the factual underpinnings of the intervenors' argument, the legal conclusion they draw therefrom is flawed both as a **[*141]** matter of logic and as a matter of constitutional law.

The logical flaw in the argument is that it assumes all members of the underrepresented minority groups have suffered adversity entitling them to some degree of upward adjustment in their UGPA and LSAT scores. Conversely, the intervenors' argument assumes that no members of non-minority groups have suffered any such adversity which would entitle them to a similar adjustment in their grades and scores. Of course, neither assumption is correct. Every law school applicant is an individual whose personal history is unique. Some applicants, regardless of their race, may have been the victims of racial discrimination or have attended a substandard school or have grown up in poverty, while others will have been more fortunate. There is no basis in logic or in the evidence for assuming that all members of some racial groups are victims of adverse circumstances or, conversely, that all members of other racial groups are beneficiaries of privilege.

The legal flaw in the intervenors' conclusion is even more daunting, and it is this: the Supreme Court has held that the effects of general, societal discrimination cannot constitutionally be **[*142]** remedied by race-conscious decision-making. For example, in Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986), the Supreme Court stated that it "never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." n60 See also id. at 276 ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.") n61 In the present case there has been no evidence, or even an allegation, that the law school or the University of Michigan has engaged in racial discrimination. All of the evidence submitted by the intervenors relates to discrimination on the part of society at large

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or by entities other than the law school or the University of Michigan. As a matter of federal constitutional law, the law school is not permitted to "level the playing field" in the manner urged by the intervenors. That is, the law school may not consider the race of applicants in order to compensate for **[*143]** the effects of discrimination by others or by society generally.

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n60 This statement is from Part I of Justice Powell's opinion, which was joined by Justices Burger and Rehnquist. Justice O'Connor filed a concurring opinion in which she specifically joined Part I of Justice Powell's opinion, see 476 U.S. at 294, and "agreed with the plurality that a governmental agency's interest in remedying 'societal' discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny." 476 U.S. at 288. Justice White also concurred in the judgment and wrote that "none of the interests asserted by the Board, singly or together, justify this racially discriminatory layoff policy and save it from the strictures of the Equal Protection Clause." 476 U.S. at 295. Thus, five members of the court indicated that the Fourteenth Amendment does not permit government to make racial classifications in order to remedy societal discrimination.

n61 This statement is from Part III-A of Justice Powell's opinion, in which Justices Burger, Rehnquist and O'Connor joined. Justice White, in a concurring opinion, tacitly agreed with the statement by indicating that "none of the interests asserted by the Board, singly or together, justify this racially discriminatory layoff policy and save it from the structures of the Equal Protection Clause." 476 U.S. at 295.

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5.

The intervenors' other argument in support of the law school's race-conscious admissions policy is that it is necessary in order to prevent "resegregation." The intervenors fear that if the law school is prohibited from considering race in admissions, then the number of underrepresented minority students will fall dramatically, perhaps to mere "token" levels. They point to the law schools at Austin and Berkeley, where underrepresented minority enrollment fell sharply following the elimination of affirmative action, as examples of what may occur here.

The court agrees that it would be unfortunate if the number of students from any racial group would decline at the University of Michigan Law School. It is the court's sincere hope that such consequences can be avoided, and some evidence adduced at trial suggested that they can be. Dr. Garcia testified that Berkeley's school of education has succeeded in constituting a class that is 28% minority by increasing its recruiting efforts and decreasing its reliance on standardized test scores. At the most selective law schools in the University of California system, the underrepresented minority population increased from 9.3% of the entering **[*145]** class in 1999 to 10.5% in 2000. See Exhibit 132. Throughout the University of California system, underrepresented minority admissions decreased just one percent from 1995 to 2000, although one must recognize the significant shift of the underrepresented minority student population from the more to the less selective campuses during this time period. See Exhibit 213.

Regardless of one's analysis of the admissions data in California and Texas, the constitutionality of the current admissions system at the University of Michigan Law School does not turn on the predicted consequences of instituting a race-blind admissions system. The current system is either constitutional or it is not. The court is unaware of any precedent for the proposition that a constitutional challenge to a voluntarily adopted racial classification may be defeated by the argument that elimination of the classification will or

I. Introduction

Plaintiff Barbara Grutter commenced this action in December 1997. Ms. Grutter alleges that in 1996 she applied for admission to the University of Michigan Law School (hereinafter "the law school"). At first plaintiff was placed on a waiting list, but in June 1997 her application was rejected. Plaintiff, who is Caucasian, alleges that her application was **[*3]** rejected because the law school uses race as a "predominant" factor, giving minority n1 applicants "a significantly greater chance of admission than students with similar credentials from disfavored racial groups." Complaint PP 20, 23. In their answer to the complaint, defendants "state that they do have a current intention to continue using race as a factor in admissions, as part of a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Answer PP 9, 23.

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n1 Unless indicated otherwise, the court uses the terms "minorities," "minority groups," and "underrepresented minorities" interchangeably in this opinion to refer to African American, Native American, Mexican American and mainland Puerto Rican students, as these are identified in University of Michigan Law School documents as the groups which receive special attention in the admissions process.

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Plaintiff asserts two claims. First, she claims that defendants discriminated against her on **[*4]** the basis of her race, thereby violating her rights to equal protection under the Fourteenth Amendment. n2 This claim is brought under 42 U.S.C. §§ 1981 and 1983. Second, plaintiff claims that defendants violated Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, which prohibits recipients of federal funds from discriminating on the basis of race. n3 For relief, plaintiff seeks a declaratory judgment to the effect that her rights were violated; an injunction prohibiting racial discrimination in admissions; compensatory and punitive damages; an order requiring defendants to admit her to the law school; and attorney fees and costs. The defendants are Lee Bollinger, the dean of the law school from 1987 to 1994 and president of the University of Michigan from 1997 to the present; Jeffrey Lehman, the dean of the law school from 1994 to the present; Dennis Shields, the director of admissions at the law school from 1991 to 1998; the regents of the University of Michigan; and the University of Michigan Law School.

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n2 Section 1 of the Fourteenth Amendment to the Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. **[*5]**

n3 42 U.S.C. § 2000d states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

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may have undesirable consequences, be they political, social, economic or otherwise. n62 If undesirable consequences are likely or even certain to occur, the answer is not to retain the unconstitutional racial classification but to search for lawful solutions, ones that treat all people **[*146]** equally and do not use race as a factor.

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n62 This is not a case where a challenge to a desegregation order is opposed on the grounds that the order must be kept in place lest the school district revert to a racially segregated state. See, e.g., Belk v. Charlotte-Mecklenburg Bd. of Educ., 233 F.3d 232 (4th Cir. 2000) (opinion vacated). Nor, with all due respect to the intervenors' counsel, can the present admissions policy be defended on the grounds that its elimination would result in the creation of an all-white campus. In this connection the intervenors have raised the specter of Sweatt v. Painter, 339 U.S. 629, 94 L. Ed. 1114, 70 S. Ct. 848 (1950), in which the Supreme Court struck down the de jure exclusion of blacks from the University of Texas Law School and the creation of a separate law school for black students. There is simply no comparison between the de jure segregation at issue in Sweatt and a race-blind admissions policy which may admit fewer underrepresented minority students than are admitted by a race-conscious policy.

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One such solution may be to relax, or even eliminate, reliance on the LSAT. The evidence presented at trial indicated that the LSAT predicts law school grades rather poorly (with a correlation of only 10-20%) and that it does not predict success in the legal profession at all. If, as its admissions policy states, the law school seeks students who "have substantial promise for success in law school" and "a strong likelihood of succeeding in the practice of law," one must wonder why the law school concerns itself at all with an applicant's LSAT score. Defense counsel, and counsel for the intervenors, asserted at trial that the American Bar Association (ABA) and the Association of American Law Schools (AALS) will not accredit law schools which do not require applicants to submit an LSAT score. This is not entirely accurate. Standard 503 of the ABA's Standards for the Approval of Law Schools states:

> A law school shall require all applicants to take an acceptable test for the purpose of assessing the applicants' capability of satisfactorily completing its education program. A law school that is not using the Law School Admission Test sponsored by the Law School Admission Council **[*148]** shall establish that it is using an acceptable test.

Section 6-2 of the AALS bylaws, which covers law school admissions, states:

> a. A member school shall admit only those applicants who appear to have the capacity to meet its academic standards.
>
> b. In order that appropriate intellectual rigor may be maintained, a member school shall admit to its first professional degree program only those applicants who have the level of intellectual maturity and accomplishment normally demonstrated by the award of an undergraduate degree.
>
> c. A member school shall deal fairly with applicants for admission.

Exhibit 31. Thus, neither accrediting organization requires law schools to require applicants to

take the LSAT. While the ABA does require law schools to "require all applicants to take an acceptable test," such as the LSAT, it does not require that law schools give the test results any particular weight. n63

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n63 The court did not hear any testimony as to whether the University of Michigan Law School has considered reducing its reliance on the LSAT or whether it has considered challenging the ABA's requirement that applicants take "an acceptable test."

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Another solution may be for the law school to relax its reliance on undergraduate GPA. The law school's admissions policy acknowledges that, even in combination, the LSAT score and undergraduate GPA are "far from perfect" predictors of success in law school. In fact, the policy asserts that the correlation between the index score and first-year law school grades is merely 27%. See Exhibit 4, Admissions Policy, p. 3. The policy also notes the obvious fact that high undergraduate grades may overstate an applicant's academic achievements or promise, and that low grades may understate them. To determine the significance of an applicant's undergraduate GPA, the law school's admissions officers say they consider such factors as the difficulty of the course work and the reputation of the undergraduate institution. The law school may be able to counterbalance some of the negative effect of the UGPA gap by also determining whether *individual applicants* have had to overcome any particularly challenging or difficult obstacles. So long as the law school acknowledges that such obstacles may confront an applicant of any race, consideration might be given to such things as growing up in **[*150]** difficult family circumstances, attending underfunded public schools, or learning English as a second language.

Another solution may be for the law school to reduce or eliminate the preference now given to the sons and daughters of University of Michigan alumni. The current admissions director testified that applicants with a family connection to alumni are given "careful consideration," although this factor adds nothing in terms of diversity. Common sense would suggest that a preference of this nature perpetuates past imbalances and has no connection to any measure of "merit."

In this regard, the court would make the obvious observation that, ultimately, the law school student population naturally will become racially diverse under a race-blind admissions system when the gaps in LSAT scores, undergraduate GPA's, and other measures of academic performance are eliminated by investing greater educational resources in currently under-performing primary and secondary school systems. Dr. Garcia testified to some of the efforts being made in this regard in California. This is a social and political matter, which calls for social and political solutions. The solution is not for the law **[*151]** school, or any other state institution, to prefer some applicants over others because of race.

Whatever solution the law school elects to pursue, it must be race neutral. The focus must be upon the merit of *individual applicants*, not upon assumed characteristics of racial groups. An admissions policy that treats any applicants differently from others on account of their race is unfair and unconstitutional. As a matter of constitutional law, such a system cannot be justified on the grounds that certain races are at a greater competitive disadvantage than others because of discrimination or other societal conditions which may have created an "uneven playing field." Nor can a race-conscious system be upheld based on the predicted consequences of moving to a race-blind system. In sum, the court must reject the arguments raised by the intervenors in defense of the law school's current admissions policy.

IV. Conclusion

The Supreme Court has often stated that "distinctions between citizens solely because of

their ancestry [are] odious to a free people whose institutions are founded upon the doctrine of equality." Wygant, 476 U.S. at 273, quoting Hirabayashi v. United States, 320 U.S. 81, 100, 87 L. Ed. 1774, 63 S. Ct. 1375 (1943). **[*152]** In our history, such distinctions generally have been used for improper purposes. Even when used for "benign" purposes, they always have the potential for causing great divisiveness. For these reasons, all racial distinctions are inherently suspect and presumptively invalid. This presumption may be overcome only upon a showing that the distinction in question serves a compelling state interest, and that the use of race is narrowly tailored to the achievement of that interest. It does not suffice for the interest in question merely to be important, beneficial, or laudable; the interest must be *compelling*.

For the reasons stated in this opinion, the court concludes that the University of Michigan Law School's use of race as a factor in its admissions decisions is unconstitutional and a violation of Title VI of the 1964 Civil Rights Act. The law school's justification for using race -- to assemble a racially diverse student population -- is not a compelling state interest. Even if it were, the law school has not narrowly tailored its use of race to achieve that interest. Nor may the law school's use of race be justified on the alternative grounds urged by the intervenors -- to "level **[*153]** the playing field" between applicants of minority and non-minority races -- because the remedying of societal discrimination, either past or present, has not been recognized as a compelling state interest. n64 Accordingly,

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n64 The court notes again that no party in this case has alleged, or offered any evidence to suggest, that the law school or the University of Michigan has committed any acts of discrimination against any minority group which might warrant a race-based remedy.

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IT IS ORDERED that plaintiffs' request for declaratory relief is granted. The court finds and declares that the University of Michigan Law School's use of race in its admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.

IT IS FURTHER ORDERED that plaintiffs' request for injunctive relief is granted. The University of Michigan Law School is hereby enjoined from using applicants' race as a factor in its admissions decisions.

IT IS FURTHER ORDERED that the parties' **[*154]** various motions for summary judgment are denied, except that the motion of the individual defendants for summary judgment on grounds of qualified immunity is granted.

IT IS FURTHER ORDERED that the clerk schedule the damages phase of the trial.

Dated: March 27, 2001

Detroit, Michigan

/s/

BERNARD A. FRIEDMAN

UNITED STATES DISTRICT JUDGE

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In an opinion and order dated January 7, 1999, the court granted plaintiff's motion for class certification and for bifurcation of the trial into liability and damages phases. The class was defined as consisting of "all persons who (A) applied for and were not granted admission to the University of Michigan Law School for the academic years since (and including) 1995 until the time that judgment is entered herein; and (B) were members of those racial or ethnic groups, including Caucasian, that Defendants treated less favorably in considering their applications for admission to the Law School."

In March 1998, 41 individuals and three pro-affirmative action student groups n4 sought to intervene in the case as defendants. The individual intervenors include 21 undergraduate students of various **[*6]** races who currently attend the University of Michigan, Wayne State University, the University of California at Berkeley, or Diablo Valley Community College in Pleasant Hill, California, all of whom plan to apply to the law school for admission; five black students who currently attend Cass Technical High School or Northwestern High School in Detroit and who plan to apply to the law school for admission; twelve students of various races who currently attend the law school; a paralegal and a Latino graduate student at the University of Texas at Austin who intend to apply to the law school for admission; and a black graduate student at the University of Michigan who is a member of the Defend Affirmative Action Party. Motion to Intevene PP 1-41. The court initially denied the motion to intervene, but in August 1999 the court of appeals reversed and directed that the intervention be permitted.

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n4 These groups are United For Equality and Affirmative Action (UEAA), the Coalition to Defend Affirmative Action By Any Means Necessary (BAMN), and Law Students for Affirmative Action (LSAA).

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On December 22, 2000, the court heard oral argument on the parties' cross motions for summary judgment. The court took those motions under advisement. The court indicated that the trial would focus on the following three issues: (1) the extent to which race is a factor in the law school's admissions decisions; (2) whether the law school's consideration of race in making admissions decisions constitutes a double standard in which minority and non-minority students are treated differently; and (3) whether the law school may take race into account to "level the playing field" between minority and non-minority applicants.

II. Diversity as a Rationale for Using Race as a Factor in University Admissions

A. Evidence

1.

The starting point in this case is the written admissions policy of the University of Michigan Law School, which was admitted at trial as Exhibit 4. This policy, which was adopted by the law school faculty in April 1992, was the subject of many hours of testimony during trial as well as extensive discovery. Due to the central role the policy has played in this case, the court shall summarize the policy and highlight certain provisions.

The policy expresses **[*8]** the law school's desire "to admit a group of students who individually and collectively are among the most capable students applying to American law schools in a given year. . . . Collectively, we seek a mix of students with varying backgrounds and experiences who will respect and learn from each other." Exhibit 4, Admissions Policy, p. 1. The policy notes that "no applicant should be admitted unless we expect that applicant to

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do well enough to graduate with no serious academic problems." Id. at 2. In identifying applicants who can be expected to succeed academically, the law school's "most general measure . . . is a composite of an applicant's [Law School Admission Test] score and undergraduate gradepoint average (UGPA) (which we shall call the 'index')." Id. at 3.

Under this admissions policy, the law school pays close attention to LSAT scores and UGPA's in reviewing applications. The significance of these numbers is visually apparent from the "grid" of law school applicants, an example of which is attached to the law school's admissions policy. n5 LSAT scores are shown along the horizontal axis in three- or four-point increments; UGPA's are shown along the vertical axis **[*9]** in quarter-point increments. Every combination of LSAT and UGPA is shown in a "cell" on this grid. In each cell, the law school reports the number of applicants with that particular combination of numerical qualifications, as well as the number of offers of admission made to the applicants in that cell. n6 Constructed in this manner, the highest combinations of LSAT scores and UPGA's are found in the upper right-hand corner of the grid. Even a cursory review of the numbers contained in this grid reveals that one's chances of being admitted increase dramatically as one moves into the upper right corner. Of the 966 offers of admission made in 1991, 843 (87%) were made to applicants who fell within the nine cells closest to this corner. In short, the numbers reflect the law school's stated policy: "Bluntly, the higher one's index score, the greater should be one's chances of being admitted. The lower the score, the greater the risk the candidate poses. . . . So we expect the vast majority of those students we admit to have high index scores." Id. at 4. See also id. at 6-7 ("The further applicants are from the upper right corner the less likely they are to be offered admission. **[*10]** Thus we may think of the upper right portion of the grid as indicating the combinations of LSAT and UGPA that characterize the overwhelming bulk of students admitted.")

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n5 For easy reference a copy of this grid, which shows admissions information for 1991, is attached to this opinion as Exhibit A.

n6 For example, in 1991 there were 499 applicants with an LSAT score between 38 and 41 and a UGPA between 3.50 and 3.74; and of these, 36 were offered admission. In later years, the LSAT was scored on a scale between 120 and 180 points. The grids for the years at issue in this case (1995 to the present) still show UGPA in quarter-point increments on the vertical axis, as was done in earlier years. But the LSAT scores, which are still shown along the horizontal axis, are presented in the following increments: no LSAT, 120-145, 146-147, 148-150, 151-153, 154-155, 156-158, 159-160, 161-163, 164-166, 167-169, and 170-above.

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The policy also notes, however, that admissions decisions should not be made strictly based **[*11]** on the index scores. A high index score may not necessarily identify an applicant who is likely to succeed in law school, and a low index score may not necessarily identify one who is likely to fail. See id. at 4-5. The policy states:

> When the differences in index scores are small, we believe it is important to weigh as best we can not just the index but also such file characteristics as the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection. These "soft" variables not only bear on the applicant's likely graded performance but also have the additional benefit that they may tell us something about the applicant's likely contributions to the intellectual and social life of the institution. Thus an applicant who has performed well in advanced courses in a demanding subject may have more to offer both faculty and students than an applicant with a similarly high average achieved without ever pursuing in

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> depth any area of learning. Other information in an applicant's file may add nothing about the applicant's likely LGPA [law school grade-point average] beyond **[*12]** what may be discerned from the index, but it may suggest that that applicant has a perspective or experiences that will contribute to the diverse student body that we hope to assemble. The applicant may for example be a member of a minority group whose experiences are likely to be different from those of most students, may be likely to make a unique contribution to the bar, or may have had a successful career as a concert pianist or may speak five languages.

Id. at 5-6.

Thus, while the policy indicates that most offers for admission should be made to applicants with high "index" scores, the policy also states that "considerable discretion is exercised in the admissions process . . ., for many qualities not captured in grades and test scores figure in the evaluation of an application." Id. at 7. The reasons behind the exercise of this discretion are an important part of the admissions policy, and they also lie at the heart of the dispute between the parties in this case. The policy articulates two reasons why an offer of admission may be made to applicants with grades and test scores "that place them relatively far from the upper right corner of the grid." Id. at **[*13]** 8. The first reason is that "there are students for whom we have good reason to be skeptical of an index score based prediction." Id. As an example, the policy describes an applicant who received a poor SAT score but nonetheless went on to perform well academically in college. This applicant received an unimpressive LSAT score, which pulled down his index, but he was admitted on the strength of his undergraduate record "with the expectation that this record would be a better predictor of [his] performance at Michigan than his LSAT score." Id. at 9.

The second reason for admitting applicants with comparatively lower index scores is that they "may help achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts. In particular we seek to admit students with distinctive perspectives and experiences as well as students who are particularly likely to assume the kinds of leadership roles in the bar and make the kinds of contributions to society discussed in the introduction to this report." Id. at 9-10. The policy identifies these as "diversity admissions," id. at 10, and provides three **[*14]** examples of applicants who were admitted in 1991 under this rubric. One was born in Bangladesh, graduated from Harvard, received "outstanding references" from his professors, and had a "truly exceptional record of extracurricular activity." Id. Another was a single mother from Argentina who worked successfully in business for several years, graduated from college summa cum laude, received "glowing references," and was fluent in four languages. Id. at 10-11. The third had excellent grades and a good LSAT score; "diversity considerations" further strengthened her application because her parents were Greek immigrants, she was "immersed in a significantly ethnic home life," she had studied and traveled in Europe and was fluent in three languages. Id. at 11.

In addition to the type of diversity that may come, for example, from an applicant's interesting or unusual employment experiences, extracurricular activities, travel experiences, athletic accomplishments, volunteer work, or foreign language fluency, the admissions policy also describes the importance of an applicant's race as a qualification which may make him a more attractive candidate for admission:

> There is, however, **[*15]** a commitment to one particular type of diversity that the school has long had and which should continue. This is a commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might

> not be represented in our student body in meaningful numbers. These students are particularly likely to have experiences and perspectives of special importance to our mission.
>
> Over the past two decades, the law school has made special efforts to increase the numbers of such students in the school. We believe that the racial and ethnic diversity that has resulted has made the University of Michigan Law School a better law school than it could possibly have been otherwise. By enrolling a "critical mass" of minority students, we have ensured their ability to make unique contributions to the character of the Law School; the policies embodied in this document should ensure that those contributions continue in the future.

Id. at 12.

The law school's admissions policy is further described in an October 13, 1992, memorandum **[*16]** from defendant Dennis Shields, who was the Director of Admissions at the law school from 1991 to 1998. This memorandum (Trial Exhibit 5), entitled "The Gospel According to Dennis," was addressed to "File Readers 1992-93," and was intended to provide guidance to his staff who assisted him in reviewing application files. Mr. Shields explained his philosophy as follows:

> As one of my colleagues so elegantly stated recently "our mission is to pick winners". . . . To make those selections requires more than a mere review of the numbers (LSAT and GPA), credentials. This is because many of the numbers will be so close to the same as to make the candidates indistinguishable from one another on that basis. Rather we must begin with the numbers and go forward from there to scrutinize the essays and letters of recommendation (as well as considering extracurricular and work experience) to look for candidates that show intellectual talent, leadership ability, and academic acumen which augers for a lively intellectual community and important contributions to the profession.
>
> * * *
>
> Of the 5,000 or more applications we will receive this year, we will offer admission to about 1,000 of the candidates. **[*17]** Of that thousand offers, fully 500 of the decisions are pretty easy, another 300 or are [sic] a bit tougher, and the last 200 very difficult because the numbers will be so close that in these cases we will clearly be making the most subjective of judgements.

Mr. Shields went on to explain that in reviewing an application file he looked first at an applicant's grades and LSAT score. "My view is we will ultimately be swayed in any case by the strength of the numbers so it makes sense to know what they are before one proceeds to judge the rest of the file." "The numbers" referred to the LSAT score, the cumulative GPA, the undergraduate institution, the trend in grades, and the rank at the undergraduate institution. In addition, Mr. Shields indicated that in reviewing transcripts he looked to see if applicants chose a rigorous major, whether they pursued a liberal education, and whether they took difficult courses. After reviewing "the numbers," Mr. Shields proceeded to the essays and the letters of recommendation. The essays reveal an applicant's writing and intellectual abilities and interests, and "what the candidate might offer the academic enterprise which is legal education **[*18]** at Michigan." The letters of recommendation are useful because they provide information about the applicant's academic abilities, particularly "growth and improvement or other trends" and "the general rigor of the curriculum pursued by the student." Finally, Mr. Shields noted that "there is a preference for those who have demonstrated academic and/or intellectual strength. Hard work and discipline evidenced in

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*228 F.3d 1147, *; 2000 U.S. App. LEXIS 23725, **;*
79 Empl. Prac. Dec. (CCH) P40,237; 2000 Colo. J. C.A.R. 5574

ADARAND CONSTRUCTORS, INC., a Colorado corporation, Plaintiff-Appellee, v. RODNEY E. SLATER, Secretary of the Department of Transportation; KENNETH R. WYKLE, Administrator of the Federal Highway Administration; VINCENT F. SCHIMMOLLER, Administrator of Region VIII of the Federal Highway Administration; LARRY C. SMITH, Engineer of the Central Federal Lands Highway Division, Defendants-Appellants, PACIFIC LEGAL FOUNDATION; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.; EMPLOYMENT LAW CENTER; MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC., Amici Curiae.

No. 97-1304

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

228 F.3d 1147; 2000 U.S. App. LEXIS 23725; 79 Empl. Prac. Dec. (CCH) P40,237; 2000 Colo. J. C.A.R. 5574

September 25, 2000, Filed

PRIOR HISTORY: [1]** Appeal from the United States District Court for the District of Colorado. (D.C. No. 90-K-1413). D.C. Judge John L. Kane Jr.

DISPOSITION: REVERSED and Remanded for further proceedings consistent with this opinion.

CASE SUMMARY

PROCEDURAL POSTURE: Defendants appealed from a judgment of the United States District Court for the District of Colorado, granting summary judgment to plaintiff and finding the Subcontractor Compensation Clause program unconstitutional.

OVERVIEW: The district court found the Subcontractor Compensation Clause program, which employed race-conscious presumptions designed to favor minority and disadvantaged business enterprises, to be unconstitutional. Specifically, the district court found the program insufficiently narrowly tailored to further a compelling interest because the program was both over- and under-inclusive, including minority individuals who were not in fact disadvantaged and excluding non-minority individuals who were disadvantaged. In so finding, the district court granted summary judgment to plaintiff. Defendants appealed. The court found the government had met its initial burden of presenting a "strong basis in evidence" sufficient to support its articulated, constitutionally valid, compelling interest. Next, the court held that plaintiff utterly failed to meet the "ultimate burden" of introducing credible, particularized evidence to rebut the government's showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market.

OUTCOME: Judgment reversed; government had met its initial burden of presenting a "strong basis in evidence" sufficient to support its articulated, constitutionally valid, compelling interest. Also, the relevant programs now met the requirements of narrow tailoring.

16 F.3d at 1543. This conclusion was left undisturbed by the Supreme Court, see **Adarand** III, 515 U.S. at 210-12, and remains law of the case, and we discern no clear error in that prior decision or manifest injustice sufficient to warrant overriding the law of the case doctrine, see Agostini v. Felton, 521 U.S. 203, 236, 138 L. Ed. 2d 391, 117 S. Ct. 1997 **[*1160]** (1997); McIlravy, 204 F.3d at 1034-35. Furthermore, our decision in **Adarand** II, as well as the Supreme Court's remand in **Adarand** III, was limited to the question of the constitutionality of the use of a race-conscious presumption in the SCC program. See **Adarand** III, 515 U.S. at 237-38. This case does not involve, nor has **Adarand** ever demonstrated standing to bring, a generalized challenge to the policy of maximizing contracting opportunities for small disadvantaged businesses set forth in 15 U.S.C. §§ 637 and 644(g), or to the various goals for fostering the participation of small minority-owned businesses **[**18]** promulgated pursuant to 15 U.S.C. § 644(g), also discussed below. Nor are we presented with any indication that **Adarand** has standing to challenge paragraphs (4)-(6) of 15 U.S.C. § 637(d). Finally, we agree with the government that throughout the course of this litigation, **Adarand's** challenge has been to the use of the SCC in direct federal highway procurement contracts entered into by the CFLHD with funds appropriated under STURAA, ISTEA, and TEA-21. In the discussion that follows, we therefore address the constitutionality of the relevant statutory provisions as applied in the SCC program, as well as their facial constitutionality. To the extent the district court's judgment can be construed as having reached statutes, programs, and issues beyond the scope of **Adarand's** standing and the Supreme Court's remand in **Adarand** III, we reverse that judgment.

C. Overview of the Statutory Framework and the SCC

We are now in a position to offer a brief overview of the statutory framework and the SCC underlying this litigation.

> The [SBA] . . . declares it to be "the policy of the United States that small business concerns, **[**19]** [and] small business concerns owned and controlled by socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." § 8(d)(1), 15 U.S.C. § 637(d)(1). The [SBA] defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," § 8(a)(5), 15 U.S.C. § 637(a)(5), and it defines "economically disadvantaged individuals" as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." § 8(a)(6)(A), 15 U.S.C. § 637(a)(6)(A).
>
> In furtherance of the policy stated in § 8(d)(1), the Act establishes "the Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals" at "not less than 5 **[**20]** percent of the total value of all prime contract and subcontract awards for each fiscal year." 15 U.S.C. § 644(g)(1). It also requires the head of each federal agency to set agency-specific goals for participation by businesses controlled by socially and economically disadvantaged individuals. Id.

Adarand III, 515 U.S. at 206. These goals must "realistically reflect the potential" of small disadvantaged businesses to perform subcontracts. See 15 U.S.C. § 644(g)(2), (h)(1). Under both § 8(a) and § 8(d), subcontractors can be certified as DBEs, qualifying them for the SCC program at issue in this litigation.

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STURAA, ISTEA, and TEA-21, the transportation appropriations statutes at issue in this case, incorporate the presumption of disadvantage from SBA § 8(d). See STURAA § 106(c)(2)(B), ISTEA § 1003(b)(2)(B); TEA-21 § 1101(b)(2)(B) (providing that the term "socially and economically disadvantaged individuals" has the meaning of such term under SBA § 8(d) "and relevant subcontracting **[*1161]** regulations promulgated pursuant thereto."). STURAA, ISTEA, and TEA-21 all set forth aspirational goals of 10% DBE **[**21]** participation in federal subcontracting. See STURAA § 106(c)(1); ISTEA § 1003(b)(1); TEA-21 § 1101(b)(1). n5

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n5 The relevant statutes have remained unchanged in all respects material to this litigation from 1992 to the present, except as noted in the Appendix to this opinion.

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The SCC is a means of implementing the various statutory goals and directives at issue in this litigation. This clause provides a financial bonus of up to 10% of an approved subcontract (no more than 1.5% or 2% of the original contract, depending on how many DBEs are employed) to a prime contractor for employing a DBE. (See Appellants' App. at 55-56.) Subcontractors must be certified as DBEs by "the SBA, a state highway agency, or some other certifying authority acceptable to the contracting officer" pursuant to the "[§] 8(a) or [§] 8(d) program, or certification by a State under the DOT regulations." **Adarand** III, 515 U.S. at 209-10. In November of 1997, the SCC at issue in **Adarand** IV was revised, **[**22]** leaving the basic framework in place. At present, the government maintains, and **Adarand** does not dispute, that SCCs are no longer in use. (See Appellants' Supp. Br. Attach. 1.)

A discussion of the complex, cumbersome, and changing regulations promulgated pursuant to the foregoing statutes, as well as a more thorough summary both of the statutory framework itself and of the SCC, is incorporated as an Appendix to this opinion. Otherwise, changes in the relevant portions of the regulations and SCC are discussed in our application of the strict scrutiny standard that follows.

III

In reviewing the district court's grant of summary judgment to **Adarand,** we employ our customary standard of review:

> We review a grant of a motion for summary judgment de novo, applying the same legal standard used by the district court. See Byers v. City of Albuquerque, 150 F.3d 1271, 1274 (10th Cir. 1998). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter **[**23]** of law." Fed. R. Civ. P. 56(c). We view the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the nonmoving party. See Byers, 150 F.3d at 1274.

McGarry v. Board of County Comm'rs, 175 F.3d 1193, 1198 (10th Cir. 1999). At the very outset, before immersing ourselves in the intricacies of the issues before us, we emphasize our substantial agreement with much of the district court's judgment as it pertains to the versions of the statutes and regulations in place in 1996. Insofar as the court's judgment does not exceed the proper scope of its review and with the significant caveat that we

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disagree both with the court's conclusion regarding the fatality in fact of strict scrutiny and with its ultimate result in light of the current version of the relevant regulations, we take the district court's view of the matter. And we share wholeheartedly its sentiment that the time has come for this litigation to come to an end. See **Adarand** IV, 965 F. Supp. at 1558.

A. Evolution of Strict Scrutiny Standards

The Supreme Court's declarations in the affirmative action area are characterized by plurality **[**24]** and split opinions and by the overruling of precedent. This fractured prism complicates the task of lower courts in both identifying and applying an appropriate form of equal protection review. We therefore begin our analysis with a brief review of what we understand to be the current state of the law in this area.

Twenty years ago, the Supreme Court addressed a direct precursor of the statutes **[*1162]** at issue today in Fullilove, 448 U.S. at 448. Although Fullilove failed to produce a majority opinion, six Justices voted to affirm the program at issue--the "minority business enterprise" ("MBE") provision of the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, § 103(f)(2). See Fullilove, 448 U.S. at 453. The MBE provision required that, subject to waiver by the Secretary of Commerce, "no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary [of Commerce] that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." Id. at 454 (quoting 42 U.S.C. § 6705(f)(2) (1976 **[**25]** ed., Supp. II)). For purposes of the MBE set-aside, MBEs were defined as businesses owned and controlled by individuals who could be classified as "Negroes, Spanish-speaking, Oriental, Indians, Eskimos, and Aleuts." Id. (quoting 42 U.S.C. § 6705(f)(2)). The MBE program was a mandatory set-aside; under the relevant regulations, a request for waiver could be granted, among other circumstances, if a minority business enterprise quoted an "unreasonable" price. Id. at 470-71 (internal quotation and citation omitted).

Chief Justice Burger, joined by Justices White and Powell, applied what appears to be a more deferential standard than what the Court often terms "strict scrutiny":

> A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment.

Id. at 472 (quoting **[**26]** U.S. Const., art. I, § 8, cl. 1); see also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 487, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989) (Op. of O'Connor, J.) ("The principal opinion in Fullilove, written by Chief Justice Burger, did not employ 'strict scrutiny' or any other traditional standard of equal protection review.").

Adarand III, 515 U.S. at 235, cast doubt on Fullilove. "To the extent (if any) that Fullilove held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling. But we need not decide today whether the program upheld in Fullilove would survive strict scrutiny as our more recent cases have defined it." Id. We interpret that statement in **Adarand** III as precluding reliance on Fullilove for either the standard of review or the result in this case. Otherwise, the programs at issue here would almost certainly pass muster under the Fullilove standard because, in furtherance of substantially similar goals, the programs before us impose a significantly more flexible and less intrusive remedy--a voluntary subsidy as opposed to a fixed set-aside subject to waiver. **[**27]** n6

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n6 We note that the **Adarand** III Court's qualified repudiation of Fullilove would appear to leave in place other aspects of that case, most notably its factual determinations regarding congressional findings and the legislative history of the SBA discussed in the Chief Justice's opinion and further elaborated upon in the concurring opinion of Justice Powell. See Croson, 488 U.S. at 488 (Op. of O'Connor, J.) ("In reviewing the legislative history behind the Act, the principal opinion focused on the evidence before Congress that a nationwide history of past discrimination had reduced minority participation in federal construction grants." (citing Fullilove, 448 U.S. at 458-67 (Op. of Burger, C.J.)); id. at 489 (citing the concurring opinion of Powell, J., in Fullilove). Thus, where Fullilove's factual findings bear on the factual underpinnings of this case, we so note in the discussion that follows. The separate question of whether those findings are adequately supported by evidence, pursuant to **Adarand** III's application of Croson to federal race-conscious programs, is one we consider at length in Subsection B below.

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[*1163] In 1989 the Court produced a majority for a portion of an affirmative action opinion. See Croson, 488 U.S. at 469. In Croson, the Court struck down under strict scrutiny a municipal plan requiring "prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more [MBEs]." Id. at 477. In so doing, Justice O'Connor, joined by Chief Justice Rehnquist and Justice White, rejected the competing arguments that a state's power to remedy racial discrimination is equal to that of Congress under § 5 of the Fourteenth Amendment and that the Fourteenth Amendment effectively preempts state action in matters of race. See id. at 489-93 (Op. of O'Connor, J.). n7 A plurality of the Court then proceeded to reject the proposition that the level of scrutiny varies in cases of "benign" and invidious racial classifications, noting that black Americans constituted a controlling political majority in the city of Richmond, a fact militating against the application of a more deferential standard of review. Id. at 495-96 (Op. of O'Connor, J.).

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n7 Despite overruling Metro Broadcasting and casting doubt on Fullilove, the majority opinion in **Adarand** III firmly rejected the suggestion "that any Member of this Court has repudiated in this case his or her previously expressed views on the subject" of Congress's powers under § 5 of the Fourteenth Amendment. **Adarand** III, 515 U.S. at 231.

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What did produce a clear majority in Croson was the proposition that "the factual predicate offered in support of the Richmond Plan suffers from the two defects identified as fatal in Wygant [v. Jackson Board of Education, 476 U.S. 267, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986)]," Croson, 488 U.S. at 498, namely, failure to make findings specific to the market to be addressed by the remedy and to provide limits to the scope of that remedy due to only generalized findings of discrimination. n8 The Court stated that "while there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia." Id. at 499. In particular, the majority noted it was "sheer speculation" to simply guess how many firms there would be absent past discrimination and "the 30% quota cannot in any realistic sense be tied to any injury suffered by anyone." Id.

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n8 Croson cannot be read, as **Adarand** would have it, as standing for the proposition that

findings of "the present effects of past discrimination in the construction industry," 488 U.S. at 498 (citation omitted), are automatically insufficient to justify remedial action. This characterization of Croson overlooks a very significant difference between the Richmond Plan at issue in Croson and the congressional enactments at issue in the instant case. The City of Richmond had no authority to remedy the present effects of past discrimination in the entire construction industry nationally, and the City was not permitted to simply infer that congressional findings as to the entire industry applied equally to the particular market within its jurisdiction. See id. at 504-05. The remediation of nation-wide problems, however, is particularly within the purview of Congress, and findings of industry-wide discrimination are precisely what is relevant to a federal decision to undertake remedial action. See id. at 490, 504.

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After noting the City of Richmond's failure to link its remedial program to specifically identified past discrimination, the Croson majority made two additional observations explaining why the City's program was not narrowly tailored. See id. at 507. First, the Court noted "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting." Id. (citing United States v. Paradise, 480 U.S. 149, 171, 94 L. Ed. 2d 203, 107 S. Ct. 1053 (1987)). The Court suggested that race-neutral programs of municipal financing for small firms might increase minority participation without the use of a direct racial preference. See id.

[*1164] Second, the Court declared "the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." Id. (quoting Sheet Metal Workers' v. EEOC, 478 U.S. 421, 494, 92 L. Ed. 2d 344, 106 S. Ct. 3019 (1986) (O'Connor, J., **[**31]** concurring in part and dissenting in part)).

Adarand III, 515 U.S. at 235 (citing Fullilove, 448 U.S. at 496 (Powell, J., concurring)), followed and held that "federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest." Now, informed by the Supreme Court's directives pertaining to remand, and its multifaceted jurisprudence on affirmative action programs, we turn to the task of assessing the application of racial presumptions in the SCC program under a strict scrutiny standard.

B. Compelling Interest

We "decide the question [of] whether the interests served by the use of [SCCs] are properly described as 'compelling.'" **Adarand** III, 515 U.S. at 237. In so doing, our inquiry necessarily consists of four parts: First, we must determine whether the government's articulated goal in enacting the race-based measures at issue in this case is appropriately considered a "compelling interest" under the governing case law; if so, we must then set forth the standards under which to evaluate the government's evidence of compelling interest; **[**32]** third, we must decide whether the evidence presented by the government is sufficiently strong to meet its initial burden of demonstrating the compelling interest it has articulated; and finally, we must examine wether the challenging party has met its ultimate burden of rebutting the government's evidence such that the granting of summary judgment to either party is proper. We begin, as we must, with an inquiry into the meaning of "compelling interest."

1. "Compelling Interest" in Race-Conscious Measures Defined

We know from **Adarand** III that, as a general proposition, there may be a compelling interest that supports the enactment of race-conscious measures. Justice O'Connor explicitly states: "The unhappy persistence of both the practice and the lingering effects of racial

discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." **Adarand** III, 515 U.S. at 237; see also Shaw v. Hunt, 517 U.S. 899, 909, 135 L. Ed. 2d 207, 116 S. Ct. 1894 (1996) (stating that "remedying the effects of past or present racial discrimination may in the proper case justify a government's **[**33]** use of racial distinctions" (citing Croson, 488 U.S. at 498-506)). Interpreting Croson, we have recognized that "the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a '"passive participant" in a system of racial exclusion practiced by elements of the local construction industry' by allowing tax dollars 'to finance the evil of private prejudice.'" Concrete Works of Colo., Inc. v. City & County of Denver, 36 F.3d 1513, 1519 (10th Cir. 1994) (quoting Croson, 488 U.S. at 492).

The government identifies the compelling interest at stake in the use of racial presumptions in the SCC program as "remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups." (Appellants' Br. at 21.) The district court in **Adarand** IV, 965 F. Supp. at 1572, held this interest is properly described as compelling, reasoning that "it appears that Justice O'Connor's assertion in Croson, that Congress has the ability under Section **[**34]** 5 [of the Fourteenth Amendment] to recognize and address racial discrimination, has been left **[*1165]** undisturbed." Although we decline to address the precise relationship between § 5 of the Fourteenth Amendment and the power of Congress, acting through the Executive branch, to address racial discrimination by the states, we readily conclude that the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. See Croson, 488 U.S. at 492 (Op. of O'Connor, J.) ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." (citing Norwood v. Harrison, 413 U.S. 455, 465, 37 L. Ed. 2d 723, 93 S. Ct. 2804 (1973))); Norwood, 413 U.S. at 463 ("That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for **[**35]** such discrimination.").

In its brief, **Adarand** cites general language from **Adarand** III in an attempt to limit the permissible scope of Congress's power to redress the effects of racial discrimination, ignoring the substantial differences between the scope of problems to be addressed by Congress and those to be addressed by a city council such as that in Croson. The fact that Congress's enactments must serve a compelling interest does not necessitate the conclusion that the scope of that interest must be as geographically limited as that of a local government. See Croson, 488 U.S. at 489 (Op. of O'Connor, J.). n9 Although there is not a clear majority on the Court for the proposition that § 5 of the Fourteenth Amendment grants Congress broad remedial powers in the area of discrimination, in Section II of Justice O'Connor's opinion in Croson, Justice O'Connor and Chief Justice Rehnquist endorsed that proposition. See Croson, 488 U.S. at 490 ("That Congress may identify and redress the effects of society-wide discrimination does not mean that, a fortiori, the States and their political subdivisions are free to decide that such remedies **[**36]** are appropriate."). The geographic scope of Congress's reach in this regard is "society-wide" and therefore nationwide. See id. n10

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n9 Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia, 6 F.3d 990 (3d Cir. 1993), cited by appellee, is distinguishable both in that it involved a city-based rather than a nationwide program, and in that the program at issue was based on far scantier evidence than that available in the instant case.

n10 The parties and their respective amici curiae differ sharply as to the relevant

geographical scope to be considered in assessing the government's basis in evidence for concluding that race-conscious remedial action is necessary. **Adarand** and its amici argue based on Croson for the necessity of findings regarding both discrimination and the availability of qualified DBEs in a particular local market as a necessary prerequisite to any government action. We disagree, concluding that the absence of such findings is more properly addressed in this case under the rubric of narrow tailoring. Quite apart from the question of Congress's power under § 5 of the Fourteenth Amendment left unresolved by the **Adarand** III majority, see **Adarand** III, 515 U.S. at 230-31, the compelling interests to be addressed by Congress, whether under the Commerce Clause, Spending Clause, or Fourteenth Amendment, are necessarily different in geographic scope than those properly addressed by a city. See, e.g., Croson, 488 U.S. at 505 (focusing on lack of "identified discrimination in the Richmond construction industry"); Concrete Works, 36 F.3d at 1520 (identifying "the six-county Denver Metropolitan Statistical Area" as one acceptable geographical region for inquiry into an affirmative action measure by the City and County of Denver). That said, **Adarand's** concern with the availability of DBEs in a particular market is certainly an important one, see Croson, 488 U.S. at 502, and, as discussed below, the lack of evidence provided by the government regarding local availability and the government's concomitant failure to tailor contracting regulations accordingly constitute one of the chief barriers to finding the previous statutory and regulatory scheme narrowly tailored.

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[*1166] 2. Evidence Required to Show Compelling Interest

While the government's articulated interest is compelling as a theoretical matter, we must yet determine whether the actual evidence proffered by the government supports the existence of past and present discrimination in the publicly-funded highway construction subcontracting market. Generally,

> absent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining what classifications are . . . in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant the use of a highly suspect tool.

Id. at 493 (Op. of O'Connor, J.); see also Shaw v. Reno, 509 U.S. 630, 643-44, 125 L. Ed. 2d 511, 113 S. Ct. 2816 (1993) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." (quoting Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 272, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979)) **[**38]** (further citations omitted)).

Our "benchmark for judging the adequacy of the government's factual predicate for affirmative action legislation is whether there exists a 'strong basis in evidence for [the government's] conclusion that remedial action was necessary.'" Concrete Works, 36 F.3d at 1521 (quoting Croson, 488 U.S. at 500 (quoting Wygant, 476 U.S. at 277 (plurality))) (emphasis in Concrete Works). Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not. See

> Concrete Works, 36 F.3d at 1520-21.
> Although Croson places the burden of production on the [government] to demonstrate a "strong basis in evidence" that its race- and gender-conscious contract program aims to remedy specifically identified past or present discrimination, the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before [the government] may take

affirmative steps to eradicate discrimination.

Id. at 1522 (citing Wygant, 476 U.S. at 292 (O'Connor, J., **[**39]** concurring)). After the government's initial showing, the burden shifts to **Adarand** to rebut that showing: "Notwithstanding the burden of initial production that rests" with the government, "the ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." Id. (quoting Wygant, 476 U.S. at 277-78 (plurality)). "The nonminority [challengers] . . . continue to bear the ultimate burden of persuading the court that [the government entity's] evidence did not support an inference of prior discrimination and thus a remedial purpose." Id. 36 F.3d at 1522-23 (quoting Wygant, 476 U.S. at 293 (O'Connor, J., concurring)).

In addressing the question of what evidence of discrimination supports a compelling interest in providing a remedy, we consider both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. See Concrete Works, 36 F.3d at 1521, 1529 n.23 (considering post-enactment evidence). n11 Furthermore, we may consider public and private discrimination not only **[**40]** in the specific area of government procurement contracts but also in the construction **[*1167]** industry generally; thus, any findings Congress has made as to the entire construction industry are relevant. See id. at 1523, 1529; see also Croson, 488 U.S. at 492 (Op. of O'Connor, J.).

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n11 Post-enactment evidence is particularly relevant when, as here, it was gathered specifically to respond to the Supreme Court's **Adarand** III decision, which applied a new compelling interest standard to the federal government's affirmative action programs. See Appendix--The Compelling Interest for Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,050 (1996) (noting purpose of responding to **Adarand** III).

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It is with the foregoing principles in mind that we turn to an examination of the evidentiary basis on which Congress relied to support its finding of discrimination and continuing effects of past discrimination against minorities in the publicly-funded and private construction **[**41]** industry.

3. Evidence in the Present Case

There can be no doubt that Congress repeatedly has considered the issue of discrimination in government construction procurement contracts, finding that racial discrimination and its continuing effects have distorted the market for public contracts--especially construction contracts--necessitating a race-conscious remedy. See, e.g., Appendix--The Compelling Interest for Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,050, 26,051-52 & nn.12-21 (1996) ("The Compelling Interest") (citing approximately thirty congressional hearings since 1980 concerning minority-owned businesses). But the question is not merely whether the government has considered evidence, but rather the nature and extent of the evidence it has considered.

Of course, statements made with regard to discrimination in the subcontracting industry by congressional reports and by members of Congress are insufficient in themselves to support a finding of compelling interest. We must probe more deeply into the legislative history of the enactments at issue. We cannot merely recite statements made by members of Congress alleging a finding **[**42]** of discriminatory effects and the need to address those effects, such as the following:

> Where there are no DBE programs, women and minority-owned small businesses are shut out of the highway construction. The Federal DBE program serves to redress the inequality and redress the unfortunate fact that all across the country women and minorities would not otherwise have access to construction contracts.

144 Cong. Rec. S1421 (March 5, 1998) (statement of Sen. Moseley-Braun). Such findings are not enough to satisfy strict scrutiny standards. See Croson, 488 U.S. at 500 ("When a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals." (citing McLaughlin v. Florida, 379 U.S. 184, 190-92, 13 L. Ed. 2d 222, 85 S. Ct. 283 (1964))). The question that Croson requires us to ask is whether there is a strong basis in evidence to support the legislature's conclusion.

In Concrete Works, we noted that

> Neither Croson nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, **[**43]** provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program. A plurality in Croson simply suggested that remedial measures could be justified upon a municipality's showing that "it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry." Croson, 488 U.S. at 492. Although we do not read Croson as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program.

Concrete Works, 36 F.3d at 1529. Unlike Concrete Works, the evidence presented by the government in the present case demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds **[*1168]** due to private discrimination. The first discriminatory barriers are to the **[**44]** formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presents further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs. Discussion of each of those bodies of evidence follows. n12

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n12 In the discussion that follows, we take judicial notice of the content of hearings and testimony before the congressional committees and subcommittees cited by the government. Furthermore, we note in passing that there is an even more substantial body of legislative history supporting the compelling interest in the present case than that cited by the government. See, e.g., Barriers to Full Minority Participation in Federally Funded Highway Contracts: Hearing Before a Subcomm. of the House Comm. on Gov't Operations, 100th Cong. (April 1, 1998); Problems Facing Minority and Women-Owned Small Businesses in Procuring U.S. Government Contracts: Hearing Before the Commerce, Consumer, & Monetary

Affairs Subcomm. of the House Comm. on Gov't Operations, 103d Cong. (July 12, 1993).

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a. Barriers to Minority Business Formation in Construction Subcontracting

As to the first kind of barrier, the government's evidence consists of numerous congressional investigations and hearings as well as outside studies of statistical and anecdotal evidence--cited and discussed in The Compelling Interest, 61 Fed. Reg. 26,054-58--and demonstrates that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide.

The evidence demonstrates that prime contractors in the construction industry often refuse to employ minority subcontractors due to "old boy" networks--based on a familial history of participation in the subcontracting market--from which minority firms have traditionally been excluded. See H.R. Rep. 103-870 15 n.36 (1994) ("The construction industry is . . . family dominated. Many firms are in their second or third generation operating structures. Minorities and women, unless they are part of construction families, have been and will continue to be excluded whenever possible."); The Meaning and Significance for Minority Business of the **[**46]** Supreme Court Decision in the City of Richmond v. J.A. Croson: Hearing Before the Legislative & Nat'l Sec. Subcomm. of the House Comm. on Gov't Operations, 100th Cong. 111 (1990) ("The Significance of Croson") (statement of Manuel Rodriguez, President, R&D Development, Inc., specializing in mechanical construction, and past president and founder of the National Hispanic Association of Construction Enterprises) ("Few [minorities] today have families from whom they can inherit a construction business."); see also Minority Business Development Program Reform Act of 1987: Hearings on S. 1993 & H.R. 1807 Before the Senate Comm. on Small Bus., 100th Cong. 127 (1988) (statement of Parren Mitchell, Chairman, Minority Business Enterprise Legal Defense and Education Fund) (noting the "harsh reality" of the "old-boy network" that prevents minority-owned firms from breaking into the private sector); H.R. Rep. No. 103-870 15 & n.36 (1994) (discussing evidence of the discriminatory exclusion of minority firms from business networks); The Compelling Interest, 61 Fed. Reg. at 26,057 & nn.82-83 (citing studies explaining minorities' exclusion from the construction trades **[**47]** as a result of the lack of familial connections).

Furthermore, subcontractors' unions place before minority firms a plethora of barriers to membership, thereby effectively blocking them from participation in a **[*1169]** subcontracting market in which union membership is an important condition for success. See Minority Business Participation in Department of Transportation Project: Hearing Before a Subcomm. of the House Comm. on Gov't Operations, 99th Cong. 203 (1985) (testimony of James Haughton, President, Fight Back) (minority contractors continue to "suffer[] very heavily because they have been victims to that discrimination as practiced by the unions"); The Significance of Croson at 117-19 (statement of Manuel Rodriguez) (describing the way in which union discrimination prevents access to skills and experience needed to form a business); The Compelling Interest, 61 Fed. Reg. at 26,055-56 & nn.53 & 62 (citing studies of statistical and anecdotal evidence finding racism by construction trade unions in several cities and states and concluding that racism is a major cause of the lack of minority business formation in the construction industry).

The government's evidence **[**48]** is particularly striking in the area of the race- based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied. See, e.g., Availability of Credit to Minority-Owned Small Businesses: Hearing Before the Subcomm. on Fin. Insts. Supervision, Regulation & Deposit Ins. of the House Comm. on Banking, Fin. & Urb. Affs., 103d Cong. 19-20 (1994) (statement of Toni Hawkins, Executive Director, National Black Business Counsel) (noting the existence and examples of discrimination in business lending); id. at 27 (statement of Wayne Smith, Chairperson, Black Urban Alliance: African American Chamber of Commerce of Newark, NJ) (stating that while perhaps more subtle than discrimination in mortgage lending, discrimination in business

CORE TERMS: regulation, disadvantaged, disadvantage, compelling interest, certification, socially, subcontracting, contractor, disparity, strict scrutiny, race-conscious, recipient, prime, economically, narrowly tailored, contracting, subcontractor, bonding, racial discrimination, construction industry, classification, race-neutral, small business, subcontract, bid, tailoring, minority-owned, discriminatory, aspirational, minority business

CORE CONCEPTS - ✦ Hide Concepts

Governments : Legislation : Effect & Operation : Prospective & Retrospective Operation
Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute affects the propriety of prospective relief, application of the new provision is not retroactive.

Governments : Legislation : Effect & Operation : Prospective & Retrospective Operation
Generally an appellate court must apply the law in effect at the time it renders its decision where a change in law occurs while a case is on direct appeal, although there may well be an exception to this rule to prevent manifest injustice.

Governments : Legislation : Effect & Operation : Prospective & Retrospective Operation
Where a rule of law was changed after the decision in the trial court but before the decision in the appellate court, the decision in the appellate court must be according to the new law.

Civil Procedure : Jurisdiction : Subject Matter Jurisdiction
A defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.

Public Contracts Law : Business Aids & Assistance : Small Businesses
See 15 U.S.C.S. § 637(d)(1).

Public Contracts Law : Business Aids & Assistance : Small Businesses
See 15 U.S.C.S. § 637(a)(5).

Public Contracts Law : Business Aids & Assistance : Small Businesses
See 15 U.S.C.S. § 637(a)(6)(A).

Public Contracts Law : Business Aids & Assistance : Small Businesses
See 15 U.S.C.S. § 644(g)(1).

Public Contracts Law : Business Aids & Assistance : Small Businesses
The Small Business Act of 1958 requires the head of each federal agency to set agency-specific goals for participation by businesses controlled by socially and economically disadvantaged individuals.

Civil Procedure : Summary Judgment : Summary Judgment Standard
A court reviews a grant of a motion for summary judgment de novo, applying the same legal standard used by the district court. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c). Courts view the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the nonmoving party.

lending exists); id. at 209 (statement of M. Harrison Boyd, President/CEO, HBA Management Services Group, Inc.) (White bank employees "have been, and are continually, programmed to perceive minority business loans as bad business, and/or at a minimum, risky and less desirable."); H.R. Rep. No. 103-870 7 (1994) ("There is a widespread reluctance on the part of the commercial banking, venture capital, . . **[**49]** . and capital markets to take the same risk with a [minority] entrepreneur that they would readily do with a white one." (quoting testimony of Sherman Copelin, President of the National Business League)); Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearing Before the Subcomm. on Procurement, Innovation, and Minority Enter. Dev. of the House Comm. on Small Bus., 100th Cong. 26 (1988) (statement of Joann Payne, President, PSM Consultants) ("Because of the ethnic and sex discrimination practiced by lending institutions, it was very difficult for minorities and women to secure bank loans. . . ."); The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act: Hearing Before **[*1170]** the Subcomm. on Transp. of the Senate Comm. on Env't & Pub. Works, 99th Cong. 363 (1985) (statement of James K. Laducer, Director, North Dakota Minority Business Enterprise Programs, United Tribes Educational Technical Center) (North Dakota banks "refuse to lend monies to minority businesses from nearby Indian communities."); Fiscal Economic & Social Crises Confronting American Cities: Hearings Before the Senate Comm. on Banking, Housing, & Urb. Affs., 102d **[**50]** Cong. 431 (1992) (statement of Anthony Robinson, President, Minority Business Enterprise Legal Defense and Education Fund) ("The legitimate capital needs of the minority business community are ignored or held to such a higher underwriting standard and systematically denied venture capital."); Federal Minority Business Programs: Hearing Before the House Comm. on Small Bus., 102d Cong. 89 (1991) (statement of Joshua I. Smith, Chairman, U.S. Commission on Minority Business Development) (attaching Interim Report 1990 of the United States Commission of Minority Business Development, which states minority business owners' "access to credit has been historically limited"); Minority Construction Contracting: Hearing Before the Subcomm. on SBA, the Gen. Econ. & Minority Enter. Dev. of the House Comm. on Small Bus., 101 Cong. 26 (1989) (statement of Cleveland M. Chapman, President, Midwest Contractors For Progress) (citing statistics demonstrating discrimination in lending in Chicago). For example, "the average loan to a black-owned construction firm is $ 49,000 less than the average loan to an equally matched nonminority construction firm." The Compelling Interest, 61 Fed. Reg. at 26,058 & n.91 **[**51]** (citing Grown & Bates, Commercial Bank Lending Practices & the Development of Black-Owned Construction Companies., 14 J. Urb. Aff. at 34 (1992)). "All other factors being equal, a black business owner is approximately 15 percent less likely to receive a business loan than a white owner." Id. at 26,058 & n.90 (citing Faith Ando, Capital Issues and the Minority-Owned Business, 16 Rev. Black Pol. Econ. at 97 (1988)). Another study

> surveyed 407 business owners in the Denver area. It found that African Americans were 3 times more likely to be rejected for business loans than whites. The denial rate for Hispanic owners was 1.5 times as high as white owners. Disparities in the denial rate remained significant even after controlling for other factors that may affect the lending rate, such as the size and net worth of the business. The study concluded that "despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample (Black, Hispanic and Anglo) were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial."

Id. at 26,058 **[**52]** (footnotes omitted) (citing The Colorado Center for Community Development, University of Colorado at Denver, Survey of Small Business Lending in Denver v (1996)). Such findings strongly support an initial showing of discrimination in lending; and we take judicial notice of the obvious causal connection between access to capital and ability to implement public works construction projects. n13

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n13 Lending discrimination alone of course does not justify action in the construction market. See Croson, 488 U.S. at 510 (Op. of O'Connor, J.) (noting a municipality's alternative remedy of taking direct action against discrimination in the provision of credit). However, the persistence of such discrimination, which is already unlawful under federal law, supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded.

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b. Barriers to Competition by Existing Minority Enterprises

With regard to barriers faced by existing minority enterprises, **[**53]** the government presents evidence tending to show that discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies fosters a decidedly uneven playing field for minority subcontracting enterprises seeking to compete in the area of federal construction subcontracts.

The government presents powerful evidence that

> all too often, contracting remains a closed network, with prime contractors maintaining long-standing relationships with subcontractors with whom they prefer to work. Because minority owned firms are new entrants to most markets, the existence and proliferation of these relationships locks them out of subcontracting opportunities. As a result, minority-owned firms are seldom or never invited to bid for subcontracts on projects that do not contain affirmative action requirements.

The Compelling Interest, 61 Fed. Reg. 26,058 & nn.98-99 (footnotes omitted) (citing studies of statistical and anecdotal evidence of minority business participation in state and local construction industries). The government has also presented sobering evidence that

> when minority firms are permitted to bid **[**54]** on subcontracts, prime contractors often resist working with them. This **[*1171]** sort of exclusion is often achieved by white firms refusing to accept low minority bids or by sharing low minority bids with another subcontractor in order to allow that business to beat the bid (a practice known as "bid shopping").

Id. at 26,058-59 (citing studies of statistical and anecdotal evidence detailing bid shopping in several localities).

It is clear to us that Congress has devoted considerable energy to investigating and considering this systematic exclusion of existing minority enterprises from opportunities to bid on construction projects resulting from the insularity and sometimes outright racism of the non-minority firms in the construction industry. See, e.g., How State and Local Governments Will Meet the Croson Standard (Minority Set-Asides): Hearing Before the Subcomm. on Civ. & Const. Rights of the House Comm. on the Judiciary, 100th Cong. 53-54 (1989) (statement of Marc Bendick, Bendick & Egan Economic Consultants, Inc.) ("We must not for a moment underestimate the role of continuing pervasive blunt discrimination by the private market. . . . The same prime **[**55]** contractor who will use a minority subcontractor on a city contract and will be terribly satisfied with the firm's performance, will

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simply not use that minority subcontractor on a private contract where the prime contractor is not forced to use a minority firm."); The Significance of Croson at 121-22 (statement of Manuel Rodriguez); id. at 104-06 (statement of E.R. Mitchell, Jr., President of E.R. Mitchell Construction Company and President of the Atlanta Chapter of the National Association of Minority Contractors) (identifying racially discriminatory actions by federal and state government agencies in the bidding process on construction contracts).

The government's evidence strongly supports the thesis that informal, racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms. See, e.g., The Significance of Croson at 107 (statement of E.R. Mitchell, Jr.) ("Qualified black firms are outside the business network of established white firms. By virtue of being outsiders to their communications loop, it is impossible to successfully bid because we remain forever strangers to white owners and developers. **[**56]** "); The Compelling Interest, 61 Fed. Reg. at 26,059-60 & nn.107, 109-110 (citing studies and articles on statistical and anecdotal evidence demonstrating discriminatory treatment in the bidding process).

Minority subcontracting enterprises in the construction industry find themselves unable to compete with non-minority firms on an equal playing field due to racial discrimination by bonding companies, without whom those minority enterprises cannot obtain subcontracting opportunities. The government presents evidence both that bonding is an essential requirement of participation in federal subcontracting procurement, see The Compelling Interest, 61 Fed. Reg. at 26,060 (citing 40 U.S.C. §§ 270a-270e), and a "vicious circle" whereby minority subcontractors cannot obtain bonding due to lack of experience, and "since they cannot get bonding, they cannot get experience," The Compelling Interest, 61 Fed. Reg. at 26,060 (footnote omitted). Minority Business Participation in Department of Transportation Project: Hearing Before a Subcomm. of the House Comm. on Gov't Operations, 99th Cong., 1st Sess. 159 (1985) (statement **[**57]** of Sherman Brown, President, MCAP, Inc.) ("Virtually everyone connected with the minority contracting industry . . . apparently agrees that surety bonding is one of the biggest obstacles in the development of minority firms."). The government additionally presents evidence of an insular "old-boy" network in bonding that excludes minority firms. See, e.g., H.R. Rep. No. 103-870 at 15 & n.36. There is also strong evidence of overt racial discrimination in the bonding market. See, e.g., Discrimination in Surety Bonding: Hearing Before the Subcomm. on Minority Enter., Fin. & Urb. Dev. of the House Comm. on Small Bus., 103d Cong. 2 (1993) (statement of John B. Cruz, III, President, John B. Cruz Construction Co.) (describing racial **[*1172]** discrimination his company suffered in its efforts to obtain bonding); City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urb. & Minority-Owned Bus. Dev. of the Senate Comm. on Small Bus., 101st Cong. 40-41, 43 (1990) (statement of Andrew Brimmer, President, Brimmer and Company, Inc., Economic and Financial Consultants) (presenting the results of a study showing discrimination in bonding faced by African-American, **[**58]** Hispanic, and Pacific-Islander-owned firms in the Atlanta area); id. at 165-66 (statement of Edward W. Bowen, Project Administrator, Prentiss Properties, Ltd.) (noting that unclear bonding standards permit denials of bonding that are arbitrary and capricious and racially-biased); Disadvantaged Business Set-Asides in Transportation Construction Projects, supra, at 107 (statement of Marjorie L. Herter, National President, Women Construction Owners & Executives, USA; President, Vee See Construction Co.) ("Discrimination against women and minorities in the bonding market is quite prevalent."); The Compelling Interest, 61 Fed. Reg. at 26060 & n.118 (citing studies of statistical and anecdotal evidence of widespread racial discrimination in bonding). For example, the government cites a Louisiana study according to which "minority firms were nearly twice as likely to be rejected for bonding, three times more likely to be rejected for bonding for over $ 1 million, and on average were charged higher rates for the same bonding policies than white firms with the same experience level," The Compelling Interest, 61 Fed. Reg. at 26,060 & n.119 (citing **[**59]** D.J. Miller & Associates, 2 State of Louisiana Disparity Study at 35-57 (1991)), while an Atlanta study found similarly glaring disparities in the ability of minority versus non-minority construction firms to obtain bonding generally and "unlimited bonding" in particular, Andrew F. Brimmer & Ray Marshall,

Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia at 19-20 (1990) (cited in City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urb. & Minority-owned Bus. Dev. of the Sen. Comm. on Small Bus., 101st Cong. 193-94 (1990)).

Finally, the government presents evidence of discrimination by suppliers, the result of which is that nonminority subcontractors receive special prices and discounts from suppliers not available to minority subcontractors, driving up "anticipated costs, and therefore the bid, for minority-owned businesses." Id. at 26,061; see also id. at n.123 (citing studies detailing discrimination by suppliers); The Significance of Croson at 106 (statement of E.R. Mitchell, Jr.) ("Common suppliers working on projects routinely give white subs better prices **[**60]** for materials than they do black subs.").

Contrary to **Adarand's** contentions, on the basis of the foregoing survey of evidence regarding minority business formation and competition in the subcontracting industry, the government's evidence as to the kinds of obstacles minority subcontracting businesses face constitutes a strong basis for the conclusion that those obstacles are not "the same problems faced by any new business, regardless of the race of the owners." (Appellee's Br. at 28.)

c. Local Disparity Studies

Following the Supreme Court's decision in Croson, numerous state and local governments have undertaken statistical studies to assess the disparity, if any, between availability and utilization of minority-owned businesses in government contracting. See The Compelling Interest, 61 Fed. Reg. at 26,061-62 (presenting the Urban Institute's analysis of thirty-nine disparity studies); see also 144 Cong. Rec. S5413-14 (May 22, 1998) (statement of Senator Chafee) (discussing a disparity study conducted for CDOT that found "a disproportionately small number of . . . minority-owned contractors participating in Colorado's transportation construction industry **[**61]** . . . . Hispanic firms received less than one-half of one percent (.26%). . . . The vast majority of contracts--more than 99 percent-- **[*1173]** went to firms owned by white men."). The government's review of those studies reveals that although such disparity was least glaring in the category of construction subcontracting, even in that area "minority firms still receive only 87 cents for every dollar they would be expected to receive" based on their availability. The Compelling Interest, 61 Fed. Reg. at 26,062. In that regard, the Croson majority stated that "where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [government] or the [government's] prime contractors, an inference of discriminatory exclusion could arise." 488 U.S. at 509 (Op. of O'Connor, J.) (citations omitted). We are certainly mindful that "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular **[**62]** task." Id. at 501-02. But here, we are unaware of such "special qualifications" aside from the general qualifications necessary to operate a construction subcontracting business. At a minimum, the disparity indicates that there has been under-utilization of the existing pool of minority subcontractors; and there is no evidence either in the record on appeal or in the legislative history before us that those minority subcontractors who have been utilized have performed inadequately or otherwise demonstrated a lack of necessary qualifications.

The disparity between minority DBE availability and market utilization in the subcontracting industry raises an inference that the various discriminatory factors the government cites have created that disparity. In Concrete Works, we stated that "we agree with the other circuits which have interpreted Croson impliedly to permit a municipality to rely . . . on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger's summary judgment motion," and we do not see **Adarand** III as requiring any different standard in the case of an analogous suit against the federal government. **[**63]** 36 F.3d at 1528. n14 Although **[*1174]** the government's aggregate figure of a 13% disparity

between minority enterprise availability and utilization is not overwhelming evidence, it is significant. It is made more significant yet by the evidence showing that discriminatory factors discourage both enterprise formation of minority businesses and utilization of existing minority enterprises in public contracting. Of course, it would be "sheer speculation" to even attempt to attach a particular figure to the hypothetical number of minority enterprises that would exist without discriminatory barriers to minority DBE formation. Croson, 488 U.S. at 499. However, the existence of evidence indicating that the number of minority DBEs would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion. n15

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n14 We reject the decidedly vague urgings of **Adarand's** amici curiae to reject disparity studies generally as biased and/or insufficiently reliable. Certainly, the conclusions of virtually all social scientific studies may be cast into question by criticism of their choice of assumptions and methodologies. The very need to make assumptions and to select data sets and relevant variables precludes perfection in empirical social science. However, general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and neither compels us to discount the disparity evidence presented in the government's appendix nor does it create "a legitimate factual dispute about the accuracy of [the government's] data." Concrete Works, 36 F.3d at 1528 (refusing to grant summary judgment because of a legitimate factual dispute about the accuracy of disparity study data). Moreover, a generalized assertion that disparity studies lack reliability is in conflict with Croson, which suggests that disparity studies are entirely relevant to an assessment of whether sufficiently strong evidence exists to support a compelling interest in a race-conscious remedy. See 488 U.S. at 501; Concrete Works, 36 F.3d at 1528 ("Once credible information about the size or capacity of the firms is introduced in the record, it becomes a factor that the court should consider.").

Adarand and its amici curiae misinterpret the case law they cite for the proposition that disparity studies are invalid. For example, with regard to Coral Construction Co. v. King City, 941 F.2d 910, 921 (9th Cir. 1991), we agree with the Ninth Circuit that the challengers of a DBE program should have the opportunity to rebut statistical evidence. In the present case, **Adarand** has had such an opportunity both in the district court below, see **Adarand** IV, 965 F. Supp. at 1573-77, and before this Court on appeal, but has failed to present a rebuttal other than an unfocused attack on disparity studies generally. Relying on Coral Construction Co., **Adarand's** amici further argue the disparity studies were not introduced into evidence and not rebutted; however, the amici do not, and presumably cannot, cite the portion of the record where **Adarand** objected on that ground to the introduction of the studies via The Compelling Interest, 61 Fed. Reg. 26,050, and their objection has been waived. See Lopez v. Behles (In re Am. Ready Mix, Inc.), 14 F.3d 1497, 1502 (10th Cir. 1994) (holding that where the appellant did not show, and the court of appeals could not find, where the issue was raised in the trial court below, the issue was not properly before the court of appeals and would not be considered); Walker v. Mather (In re Walker), 959 F.2d 894, 896 (10th Cir. 1992) (holding that as a general rule, the court of appeals will not consider an issue that was not raised below). As for Associated General Contractors of California, Inc. v. Coalition for Economic Equity, 950 F.2d 1401, 1416 (9th Cir. 1991), the court in that case held the statistical evidence presented was sufficient on the facts to establish compelling interest. Contractors Association of Eastern Pennsylvania, 6 F.3d at 1005, stated that "disparity indices are highly probative evidence of discrimination." On further appeal in that case, the Third Circuit stated that whether disparity studies provided the requisite strong basis in evidence for upholding the race-conscious program at issue was a "close call" but did not decide the question. Contractors Ass'n of E. Penn, Inc. v. City of Philadelphia, 91 F.3d 586, 605 (3d Cir. 1996). Finally, Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895, 903-05, 924 (11th Cir. 1997), can be distinguished on the

grounds that the court of appeals affirmed the district court's factual findings which rejected evidence from disparity studies under the deferential "clear error" standard of review. Here the district court committed no clear error in its finding of compelling interest based on the statistical evidence before it. To the extent the foregoing cases may be otherwise interpreted, we reject their holdings. **[**64]**

n15 Based on a comprehensive review of 1987 census data showing disproportionately low minority business ownership and receipts for minority-owned business, the U.S. Commission on Minority Business Development concluded that "minorities are not underrepresented in business because of choice or chance. Discrimination and benign neglect is the reason why our economy has been denied access to this vital resource." United States Commission on Minority Business Development, Final Report 60 (1992).

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d. Results of Removing Affirmative Action Programs

We take notice of an additional source of evidence of the link between compelling interest and remedy. There is ample evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears. See, e.g., 144 Cong. Rec. S1421 (March 5, 1998) (statement of Sen. Moseley-Braun) (citing statistics); The Compelling Interest, 61 Fed. Reg. 26,062 & nn.130-134 (citing studies). Although that evidence standing alone is not dispositive, **[**65]** it strongly supports the government's claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination. "Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." Croson, 488 U.S. at 509 (Op. of O'Connor, J.) (citations omitted).

In sum, on the basis of the foregoing body of evidence, we conclude that the government has met its initial burden of presenting a "strong basis in evidence" **[*1175]** sufficient to support its articulated, constitutionally valid, compelling interest. Croson, 488 U.S. at 500 (quoting Wygant, 476 U.S. at 277).

4. **Adarand's** Rebuttal

Adarand and the amici curiae supporting it have utterly failed to meet their "ultimate burden" of introducing credible, particularized evidence to rebut the government's initial showing of the existence of a compelling interest in remedying the nationwide **[**66]** effects of past and present discrimination in the federal construction procurement subcontracting market. n16 Concrete Works, 36 F.3d at 1522 (quoting Wygant, 476 U.S. at 277). Its assertions as to the general impermissibility of a race-conscious remedy regardless of the compelling interest identified by Congress are not in accordance with equal protection jurisprudence. It is simply an untenable interpretation of Equal Protection Doctrine to insist that the Constitution requires Congress to acquiesce in the workings of an ostensibly free market that would direct the profits to be gleaned from disbursements of public funds to non-minorities alone. See Concrete Works, 36 F.3d at 1519 ("The Fourteenth Amendment permits race-conscious programs that seek . . . to prevent the public entity from acting as a '"passive participant" in a system of racial exclusion . . .' by allowing tax dollars 'to finance the evil of private prejudice.'" (quoting Croson, 488 U.S. at 492)); see also **Adarand** III, 515 U.S. at 237 ("The unhappy persistence of both the practice and the lingering effects of racial discrimination **[**67]** against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.").

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n16 We disagree with **Adarand's** contention that the government's "Appendix I" to its motion for summary judgment (Appellants' App. at 44-53) is insufficient evidence of Congress's findings. The Appendix references and discusses the long and comprehensive legislative history and findings on discrimination in the nationwide construction contracting market. **Adarand's** challenge to that history is too conclusory to meet its burden under Concrete Works.

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We reject **Adarand's** characterization of various congressional reports and findings as conclusory and its highly general criticism of the methodology of numerous "disparity studies" cited by the government and its amici curiae as supplemental evidence of discrimination. n17 The evidence cited by the government and its amici curiae and examined in this opinion only reinforces the conclusion that "racial discrimination and its effects **[**68]** continue to impair the ability of minority-owned businesses to compete in the nation's contracting markets." The Compelling Interest, 62 Fed. Reg. at 26,062. In Concrete Works, 36 F.3d at 1530-31, the plaintiff "specifically identified" and "put forth evidence" showing "flaws" in the data justifying the City of Denver's affirmative action program, thus precluding summary judgment on the issue of compelling interest. Here, by contrast, the government's evidence permits a finding that as a matter of law Congress has the requisite strong basis in evidence to take action to remedy racial discrimination and its lingering effects in the construction industry. This evidence demonstrates that both the race-based barriers to entry and the ongoing **[*1176]** race-based impediments to success faced by minority subcontracting enterprises--both discussed above--are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. Furthermore, Congress is not limited to simply proscribing federal discrimination against minority contractors, as it has obviously already done. The Constitution does not obligate Congress to stand **[**69]** by idly and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice. n18

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n17 **Adarand** III called into question Fullilove's standard of review and possibly its result. However, as far as we can ascertain, nothing in **Adarand** III undermines the conclusion of the lead Fullilove opinion that "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." Fullilove, 448 U.S. at 477-78 (Op. of Burger, C.J.); see also Croson, 488 U.S. at 504 ("[In the Fullilove case,] Congress was exercising its powers under § 5 of the Fourteenth Amendment in making a finding that past discrimination would cause federal funds to be distributed in a manner which reinforced prior patterns of discrimination . . . . Congress has made national findings that there has been societal discrimination in a host of fields."). **[**70]**

n18 We likewise reject **Adarand's** contention that Congress must make specific findings regarding discrimination against every single sub-category of individuals within the broad racial and ethnic categories designated by statute and addressed by the relevant legislative findings. If Congress has valid evidence, for example that Asian-American individuals are subject to discrimination because of their status as Asian-Americans, it makes no sense to require sub-findings that subcategories of that class experience particularized discrimination because of their status as, for example, Americans from Bhutan. "Race" is often a classification of dubious validity--scientifically, legally, and morally. We need not impart excess legitimacy to racial classifications by taking notice of the harsh fact that racial discrimination commonly occurs along the lines of the broad categories identified: "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other

minorities." 15 U.S.C. § 637(d)(3)(C).

The evidence at issue is not, as **Adarand** would have it, merely evidence of generalized societal discrimination. See Wygant, 476 U.S. at 276 (Op. of Powell, J.) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."). Rather, it is evidence of specific barriers to market entry and fair competition facing actual and potential minority participants in the market for public construction contracts. In short, the construction contracting market is overwhelmingly composed of non-minorities due to the effects of racial discrimination.

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We do not intend to suggest that the evidence cited by the government is unrebuttable. We merely point out that under our precedent it is for **Adarand** to rebut that evidence, and it has not done so to the extent required to raise a genuine issue of material fact as to whether the government has met its evidentiary burden. We reiterate that "the ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." Id. 36 F.3d at 1522 (quoting Wygant, 476 U.S. at 277-78 (plurality)). "The nonminority [challengers] . . . continue to bear the ultimate burden of persuading the court that [the government entity's] evidence did not support an inference of prior discrimination and thus a remedial purpose." Id. (quoting Wygant, 476 U.S. at 293 (O'Connor, J., concurring)). Because **Adarand** has failed utterly to meet its burden, the government's initial showing stands.

In sum, guided by Concrete Works, we conclude that the evidence cited by the government and its amici, particularly that contained in The Compelling Interest, 61 Fed. Reg. 26,050, more than satisfies **[**72]** the government's burden of production regarding the compelling interest for a race-conscious remedy. Congress has a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies. We therefore affirm the district court's finding of a compelling interest.

C. Narrow Tailoring

We turn now to the question of narrow tailoring. Here, again, we must first define "narrow tailoring" for purposes of strict scrutiny and then determine whether the SCC program in the present case falls within that definition.

1. "Narrow Tailoring" in Race-conscious Programs Defined

We are guided in our inquiry by the handful of Supreme Court cases that have applied the narrow-tailoring analysis to government affirmative action programs. **[*1177]** In applying strict scrutiny to a court-ordered program remedying the failure to promote black police officers, a plurality of the Court stated that

> in determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability **[**73]** of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Paradise, 480 U.S. at 171 (1986) (plurality op. of Brennan, J.) (citations omitted). Regarding flexibility, "the availability of waiver" is of particular importance. Id. As for numerical

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proportionality, Croson admonishes us to beware of the "completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." 488 U.S. at 507 (quoting Sheet Metal Workers, 478 U.S. at 494 (O'Connor, J., concurring in part and dissenting in part)). In that context, a "rigid numerical quota" particularly disserves the cause of narrow tailoring. Id. at 508. n19 Finally, as for burdens imposed on third parties, a plurality of the Court in Wygant stated:

> As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. "When effectuating a limited and properly tailored remedy to cure the effects **[**74]** of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible."

476 U.S. at 280-81 (Op. of Powell, J.) (quoting Fullilove, 448 U.S. at 484 (plurality)) (further quotations and footnote omitted). We are guided by that benchmark.

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n19 While Paradise only assumed without deciding that strict scrutiny is the appropriate standard, see 480 U.S. at 166-67 (plurality), it nevertheless applied strict scrutiny to affirm a race-conscious relief measure, see id. at 185-86. Although the Paradise factors require some modification in order to be used for evaluating the nationwide legislative enactment and its implementing regulations and programs at issue here (as opposed to a judicial order aimed at a particular police department), they provide some general guidance on questions the Court considers relevant to the narrow tailoring inquiry. See also **Adarand** III, 515 U.S. at 237 (citing the opinions of Justices Brennan, Stevens, and O'Connor in Paradise "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact'" (quoting Fullilove, 448 U.S. at 519 (Marshall, J., concurring))).

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Justice O'Connor's majority opinion in Croson adds a further factor to our analysis: under- or over-inclusiveness of the DBE classification. In Croson, the Supreme Court struck down an affirmative action program as insufficiently narrowly tailored in part because "there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination . . . . The interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered from the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification." Croson, 488 U.S. at 508 (citation omitted). Thus, we must be especially careful to inquire into whether there has been an effort to identify worthy participants in DBE programs or whether the programs in question paint with too broad--or too narrow--a brush.

More specific guidance is found in **Adarand** III. In remanding for strict scrutiny, the Court identified two questions apparently of particular importance in the instant case: (1) "consideration of the use of race-neutral means;" and (2) "whether the program [is] **[**76]** appropriately limited [so as] not to last longer than the discriminatory effects it is designed to eliminate." **Adarand** III, 515 U.S. at 237-38 (internal quotations and citations omitted). We thus direct our attention to an analysis of the program in light of **[*1178]** **Adarand** III's specific questions on remand, and the foregoing narrow-tailoring factors, in the following order: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the SCC and DBE certification programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness.

2. Race-neutral Alternative Remedies

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The first factor to be considered is that of the availability of alternative remedies to the race-conscious measures at issue. The district court in **Adarand** IV found, and **Adarand** does not challenge its finding, that Congress over a period of decades attempted to correct by race-neutral means the problem of too few minority subcontractors for government construction contracts, and only after it continued to find discriminatory effects did it first implement a race-conscious remedy. See **Adarand** IV, 965 F. Supp. at 1582-83; **[**77]** see also Croson, 488 U.S. at 507 (noting the finding in Fullilove that "Congress . . . carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside"). n20 That finding is law of the case and is not clearly erroneous. See Agostini, 521 U.S. at 236; McIlravy, 204 F.3d at 1034-35. The long history of discrimination in, and affecting, the public construction procurement market--despite the efforts dating back at least to the enactment in 1958 of the SBA to employ race-neutral measures--places a formidable burden on both existing and would-be minority participants and thus justifies race-conscious action to address a decidedly racial disparity.

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n20 Although the standard of review and result of Fullilove have been called into question by **Adarand** III, the district court noted, in our view correctly, that a square majority of the Court in Croson cited with approval the principal opinion in Fullilove for this factual finding. We fail to see how this factual aspect of Fullilove has been impaired; **Adarand** offers no authority to refute the finding that three decades of race-neutral measures failed to have any appreciable effect on the exclusion of minorities from the receipt of government highway largesse. **Adarand** offers no evidence to rebut the district court's conclusion that Congress entertained and indeed attempted years of race-neutral measures without success before resorting to the programs at issue in this lawsuit.

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A separate question, however, is whether the FLHP considered other more narrowly tailored measures before deciding to implement 15 U.S.C. § 644(g) by means of the SCC, with its race-based presumptions of disadvantage. The government's argument focuses on Congress's consideration of race-neutral measures prior to enacting its policy of maximizing opportunity for minority-owned and controlled businesses and setting aspirational goals for the participation of such businesses in federal contracting. Although Congress considered the futility of race-neutral measures prior to incorporating the aspirational goals into the SBA and the relevant appropriations measures, the government fails to address whether the FLHP considered either measures short of a race-conscious subsidy to prime contractors or a more refined means of assessing subcontractors' eligibility for race-conscious programs prior to promulgating the regulations implementing the SCC. The record persuades us that under the high degree of solicitude for individual rather than race-based consideration mandated by the Court's strict scrutiny standard, the government has not shown that the FLHP adequately **[**79]** considered such alternative measures in the 1996 SCC program.

Again, the situation has since changed dramatically. n21 A comparison of that previous SCC program with the new federal regulations under TEA-21 is particularly instructive. The current, revised regulations instruct recipients that "you must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation," 49 C.F.R. § 26.51(a) (2000); see also 49 C.F.R. **[*1179]** § 26.51(f) (2000) (if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures), and enumerate a list of race-neutral measures, see 49 C.F.R. § 26.51(b) (2000). The current regulations also outline several race-neutral means available to program recipients including helping overcome bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. See 49 C.F.R. § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as

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Constitutional Law : Substantive Due Process : Equal Protection : Scope of Protection

A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet courts are bound to approach the task with appropriate deference to the Congress, a co-equal branch charged by the United States Constitution with the power to provide for the general welfare of the United States and to enforce, by appropriate legislation, the equal protection guarantees of the U.S. Const. amend. XIV.

Constitutional Law : Substantive Due Process : Scope of Protection

When deciding the question of whether the interests served by the use of subcontractor compensation clauses are properly described as "compelling," a courts inquiry necessarily consists of four parts: First, it must determine whether the government's articulated goal in enacting the race-based measures at issue is appropriately considered a "compelling interest" under the governing case law; if so, it must then set forth the standards under which to evaluate the government's evidence of compelling interest; third, it must decide whether the evidence presented by the government is sufficiently strong to meet its initial burden of demonstrating the compelling interest it has articulated; and finally, it must examine whether the challenging party has met its ultimate burden of rebutting the government's evidence such that the granting of summary judgment to either party is proper.

Constitutional Law : Substantive Due Process : Equal Protection : Race

U.S. Const. amend. XIV permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry by allowing tax dollars to finance the evil of private prejudice.

Constitutional Law : Substantive Due Process : Scope of Protection

The fact that Congress's enactments must serve a compelling interest does not necessitate the conclusion that the scope of that interest must be as geographically limited as that of a local government.

Constitutional Law : Substantive Due Process : Equal Protection : Race

Generally, absent searching judicial inquiry into the justification for race-based measures, there is simply no way of determining what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to smoke out illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant the use of a highly suspect tool.

Constitutional Law : Substantive Due Process : Equal Protection : Race

A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.

Labor & Employment Law : Affirmative Action

Constitutional Law : Substantive Due Process : Equal Protection : Scope of Protection

A court's benchmark for judging the adequacy of the government's factual predicate for affirmative action legislation is whether there exists a strong basis in evidence for the government's conclusion that remedial action was necessary. Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not.

Constitutional Law : Substantive Due Process : Scope of Protection

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the need for race-conscious remedies is recognized. **[**80]** The record before us does not indicate whether or not FLHP considered race-neutral measures prior to resorting to the SCC. This absence weighs strongly against any finding of narrow tailoring. See **Adarand** III, 515 U.S. at 237-38; Croson, 488 U.S. at 507. The district court was therefore correct, given the information before it at the time, that the SCC program was not narrowly tailored, and should the government reinstitute the revised program without considering race-neutral measures similar to those outlined in 49 C.F.R. § 25.51(a) and (b) (2000), that program too would be insufficiently narrowly tailored.

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n21 The regulatory changes discussed below resulted from several years of study and consideration of Croson and **Adarand** III. See 64 Fed. Reg. 5096, 5101-03 (1999) (discussing how regulatory changes address the requirements of narrow tailoring).

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3. Appropriate Limit on Duration

A second important factor in any narrow-tailoring analysis is a limit **[**81]** on the duration of the race-conscious measures at issue. The district court declined to address this aspect of the Supreme Court's inquiry on remand because of the court's finding that the 1996 SCC program was not narrowly tailored for other reasons. See **Adarand** IV, 965 F. Supp. at 1584. Although we agree for different reasons that the 1996 program the district court considered was insufficiently narrowly tailored to pass constitutional muster, the factor of limited duration is mentioned in **Adarand** III, 515 U.S. at 238, and we accept the Court's invitation to consider this factor now.

The duration of a particular company's DBE status is limited by statute and regulation to approximately ten-and-one-half years under the § 8(a) certification program. See 15 U.S.C. §§ 634(b)(6), 636(j)(10)(C)(i), 637(a), (d); 13 C.F.R. § 124.110 (1996); 13 C.F.R. § 124.2 (2000). Moreover, each participant in the § 8(a) program is required to annually submit financial and other information, on the basis of which the SBA reevaluates and may "graduate" a small disadvantaged business from the program as no longer qualified (e.g., because the **[**82]** criteria of economic disadvantage are no longer met). See 15 U.S.C. §§ 636(j)(10)(G), 637(a)(6)(B), (C). The § 8(a) program's inherent time limit and graduation provisions ensure that it, like the program upheld in Paradise, is carefully designed to "endure[] only until . . . the discriminatory impact" has been eliminated; once a DBE loses its economic disadvantage, it loses its certification. Paradise, 480 U.S. at 178. As far as we can ascertain from the regulations previously in effect, the § 8(d) program did not have an analogous individual time limit. Therefore, insofar as the 1996 SCC program relied on § 8(a) criteria, those criteria increased the narrow tailoring of the program. However, insofar as the program relied on § 8(d) criteria, through state certifications, n22 we discern no evidence that the specific criteria of DBE eligibility provide a temporal limit to the program. Thus, insofar as the district court suggested that an SCC program based on § 8(a) criteria would be insufficiently narrowly tailored, we disagree; the court's skepticism about the fatality in fact of strict scrutiny in the narrow-tailoring context is **[**83]** contrary to the Supreme Court's own pronouncements in both **Adarand** III, **[*1180]** 515 U.S. at 237, and Croson, 488 U.S. at 509.

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n22 Notably, Gonzalez was certified through such a state program in the present case, belying the government's argument that there was no evidence of unconstitutional state certifications under the version of § 8(d) in place at the time this litigation commenced.

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In this respect, too, we note that the government has modified its unconstitutional practices. The current § 8(d) program regulations specifically incorporate the certification requirements from the Small Business Administration regulations implementing the § 8(a) program. See 48 C.F.R. § 19.001 (2000) (incorporating certification requirements of 13 C.F.R. pt. 124, subpt. B); 13 C.F.R. § 124.1002(a) (2000) (incorporating § 8(a) criteria from 13 C.F.R. pt. 124, subpt. A). The regulations incorporated into the § 8(d) program provide for a certification of a business as socially and economically **[**84]** disadvantaged for three years after either the initial certification or other administrative determination. See 13 C.F.R. § 124.1014 (2000). If a business wishes to remain certified for longer than three years, it must "submit a new application and receive a new certification." Id. § 124.1014(c). n23 Therefore, with regard to appropriate limitations on duration, the current DBE certification programs are narrowly tailored.

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n23 Although the § 8(a) program provides for annual rather than tri-annual review of DBE certification, for purposes of the "duration" prong of the narrow-tailoring inquiry, that difference is not so glaring as to require striking down the § 8(d) program; rather, it is the periodic reevaluation of disadvantaged status that renders this aspect of the program narrowly tailored because in that way, the program will not last longer than the situation it seeks to correct.

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Finally, we note that Congress extensively debated whether to renew the DBE program prior to passing TEA-21 in 1998. **[**85]** See, e.g., 144 Cong. Rec. S1481-06, S1481-96 (March 6, 1998); id. S1395-01, S1395-434 (March 5, 1998); id. H1885-04, H2000-11 (Apr. 1, 1998). These debates, in addition to the limited duration of the DBE program in accordance with the limited duration of TEA-21 and other highway appropriations statutes like it, indicate that the race-conscious programs at issue are "appropriately limited" to last no longer than "the discriminatory effects [they are] designed to eliminate." **Adarand** III, 515 U.S. at 238 (quotation omitted).

4. Additional Narrow-Tailoring Factors

Although they were not emphasized by the **Adarand** III Court, we deem the other factors discussed in Paradise, 480 U.S. at 171, and Croson, 488 U.S. at 507-08, to be of value in the narrow tailoring analysis, and we turn to them now.

a. Flexibility

The 1996 SCC program, providing a subsidy for the use of DBEs, is certainly more flexible than the set-asides considered in either Fullilove or Croson because the program is not mandatory. It does not require the use of DBEs in subcontracting against the will of the prime contractor. See **Adarand** IV, 965 F. Supp. at 1583 **[**86]** (finding that the prime contractor's choice to avail itself of the SCC is "more flexible than the 'rigid racial quota' struck down in Croson, 488 U.S. at 499, and the 10 percent set aside upheld in Fullilove, 448 U.S. at 513-14"). n24 Moreover, the 1996 SCC program **[*1181]** incorporates an additional element of flexibility--"the availability of waiver," Paradise, 480 U.S. at 171--because any prime contractor is free not to take advantage of the clause and will never be required to make a "gratuitous" choice of subcontractors, id. at 178. With regard to flexibility, the 1996 program passes muster under a narrow-tailoring analysis.

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n24 None of the parties in this case contend that SBA § 8(d)(4), 15 U.S.C. § 637(d)(4),

pertains to the SCC. However, even if § 8(d)(4) were relevant here, that would not change our conclusion that the SCC is not mandatory in nature. Section 8(d)(4)(E) informs government agencies letting contracts that they are "authorized to provide such incentives as such Federal agency may deem appropriate in order to encourage such subcontracting opportunities as may be commensurate with the efficient and economical performance of the contract." 15 U.S.C. § 637(d)(4)(E) (emphasis added). This language demonstrates that § 8 (d)(4) merely authorizes, but does not require, the use of incentives (of whatever type) to further the aspirational goals of increased participation in government contracts by socially and economically disadvantaged individuals. The fact that the FLHP has discontinued use of the SCC further demonstrates that § 8(d)(4) in no way requires an incentive clause in federal highway transportation contracts.

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Nothing has changed in this regard from 1996 until the present that would militate the contrary conclusion. On the contrary, the present version of the regulations have increased the flexibility of the government's DBE programs: An express waiver provision has been added to the current regulations. See 49 C.F.R. § 26.15 (2000) (allowing recipients of federal highway construction funds to seek waivers and exemptions, despite the already non-mandatory nature of DBE programs).

b. Numerical Proportionality

The essential question arising out of the numerical proportionality factor of Paradise is whether the aspirational goals of 5% in the SBA and 10% participation contained in STURAA, ISTEA, and TEA-21 are proportionate only if they correspond to an actual finding as to the number of existing minority-owned businesses. Despite involving a rigid quota rather than flexible and periodically adjusted aspirational goals, Croson may be read to suggest as much. See Croson, 488 U.S. at 507 (characterizing as "completely unrealistic" the "assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population" **[**88]** (citing Sheet Metal Workers', 478 U.S. 421 at 494, 92 L. Ed. 2d 344, 106 S. Ct. 3019 (O'Connor, J., concurring in part and dissenting in part))). However, because Congress has evidence that the effects of past discrimination have excluded minorities from the construction industry and that the number of available minority subcontractors reflects that discrimination, the existing percentage of minority-owned businesses is not necessarily an absolute cap on the percentage that a remedial program might legitimately seek to achieve. Absolute proportionality to overall demographics is an unreasonable goal. However, Croson does not prohibit setting an aspirational goal above the current percentage of minority-owned businesses that is substantially below the percentage of minority persons in the population as a whole. This aspirational goal is reasonably construed as narrowly tailored to remedy past discrimination that has resulted in homogenous ownership within the industry. It is reasonable to conclude that allocating more than 95% of all federal contracts to enterprises owned by non-minority persons, or more than 90% of federal transportation contracts to enterprises **[**89]** owned by non-minority males, is in and of itself a form of passive participation in discrimination that Congress is entitled to seek to avoid. See Croson, 488 U.S. at 492 (Op. of O'Connor, J.).

Apart from the reasonableness of the goals, the record before us supports the government's contention that the 5% and 10% goals incorporated in the statutes at issue here, unlike the set-asides in both Fullilove and Croson, are merely aspirational and not mandatory. Cf. Croson, 488 U.S. at 508 (finding no need "for a rigid numerical quota"). Therefore, while the goal may well be relevant to the numerical proportionality aspect of the Paradise strict scrutiny inquiry, we disagree with the district court that the goal itself is facially unconstitutional. Moreover, there is simply no showing that **Adarand** lost or will lose contracts due to the STURAA/ISTEA/TEA-21 10% goals for DBE participation, but rather only due to the over- or under-inclusive race-based presumptions involved in certification for 1996 SCC eligibility. Therefore, we conclude both that **Adarand** is without standing to mount any

independent challenge to the 5% and 10% figures **[**90]** and that such a challenge is outside the scope of the Supreme Court's **Adarand** III remand. See **[*1182]** **Adarand** IV, 965 F. Supp. at 1566 n.11 (noting that "Defendants maintain, and **Adarand** does not dispute, that the challenge in this action is based only on the use of the SCC to meet the various goals" established by the SBA, STURAA, and ISTEA).

We also conclude the government failed to carry its evidentiary burden in the district court insofar as the use of the 1996 SCC was based on an ill-defined 12-15% goal apparently adopted by the Federal Highway Administration ("FHA"). (See Appellants' App. at 187.) Unlike the congressionally-mandated goals that are supported by legislative history and supplemental evidence, we can find no explanation in the record before us of the basis in evidence on which the FHA relied in adopting this 12-15% goal (if in fact there is one). That congressional findings support the 5% and 10% aspirational goals in the SBA and transportation appropriation statutes, respectively, as well as the delegation of responsibility for setting individual goals to various agencies, does not vitiate the constitutional duty of those agencies to assure that **[**91]** the goals are supported by evidence that meets the requirements of Croson and Concrete Works. The complete absence of an explanation for the 12-15% goal in the record would have required granting summary judgment in favor of **Adarand** on the question of whether use of the 1996 SCC is narrowly tailored to meet the compelling interest determined by Congress.

Once again, however, comparison of the 1996 SCC to the current TEA-21 regulations is instructive and leads us to the conclusion that the recent regulatory changes preclude ruling in favor of **Adarand** at the present time for reasons beyond the abandonment of use of the SCC in federal highway construction contracting. The process by which recipients of federal transportation funding set aspirational goals is now much more rigorous. The current regulation instructs each recipient that its "overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on [the recipient's] DOT-assisted contracts" and must make "reference to the relative availability of DBEs in [the recipient's] market." ↑ 49 C.F.R. § 26.45 (b) (2000). In **[**92]** addition, goal setting must involve "examining all evidence available in [the recipient's] jurisdiction." Id. § 26.45(c). Such evidence may include census data and valid disparity studies. See id. § 26.45(c)(1)-(3). After examining this evidence, the recipient must adjust its DBE participation goal by examining the capacity of DBEs to perform needed work, disparity studies, and other evidence. See id. § 26.45(d). When submitting a goal, the recipient must include a description of the methodology and evidence used. See id. § 26.45 (f)(3). Significantly, the rigidity of even those realistic goals is negligible. Once the goals have been set, there is no requirement that the recipient actually meet them, merely that it make a good faith effort to do so: So long as good faith efforts were made, failure to meet a goal will not subject a recipient to penalties or to being held in noncompliance. See id. § 26.47(a). These new requirements that federal agencies rigorously examine, in a verifiable manner, the reasonableness of DBE programs given particular local conditions further ensure that government agencies will heed Croson's mandate to avoid rigid application **[**93]** of DBE percentages in government contracting. See 488 U.S. at 507.

In sum, in conformity with the aspirational nature of the percentage goals of the relevant statutes, the current regulations emphasize that the 10% figure is nothing more than "an aspirational goal at the national level," 49 C.F.R. § 26.41(b) (2000), which "does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level," id. § 26.41(c). Thus, in practice there are significant requirements currently in place that must be met by any recipient of federal highway construction funds before setting even an aspirational goal for **[*1183]** DBE participation. There is little danger of arbitrariness in the setting of such goals, as was the case in Croson, 488 U.S. at 507.

c. Burden on Third Parties

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As for the third Paradise factor, the burden on third parties is obviously significant enough to grant standing to **Adarand.** See **Adarand** III, 515 U.S. at 211-12. While there appears to be no serious burden on prime contractors, who are obviously compensated for any additional burden occasioned by the employment of **[**94]** DBE subcontractors, at the margin, some non-DBE subcontractors such as **Adarand** will be deprived of business opportunities. See Wygant, 476 U.S. at 280-81 (Op. of Powell, J.) ("When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, . . . a 'sharing of the burden' by innocent parties is not impermissible." (quoting Fullilove, 448 U.S. at 484 (plurality)) (further quotations and footnote omitted)). Insofar as the 1996 and current SCC programs are "limited in scope and duration, [they] only postpone[]" the hiring of non-DBEs, "imposing a diffuse burden . . . foreclosing only one of several opportunities." Paradise, 480 U.S. at 183 (quoting Wygant, 476 U.S. at 283).

These further limitations have been incorporated: (1) Compensation under the SCC above 1.5-2% of the total contract is prohibited (see Appellants' App. at 56); (2) under the revised SCC, there is also a monetary limit to compensation under the program of $ 50,000-$ 100,000 (see Appellants' Supp. Br. Attach. 2 at 3). Thus, the subsidy is capped in such a way as to circumscribe the financial incentive **[**95]** to hire DBEs; after a fairly low threshold, the incentive for the prime contractor to hire further DBEs disappears.

Moreover, the current regulations are designed to increase the participation of non-minority DBEs. As to those not falling into one of the categories to which a presumption of social disadvantage applies, the current regulations retain procedures for non-minorities to participate in the DBE program. Consistent with the changes in SBA regulations, proof of social disadvantage by those not so presumed may be shown by a preponderance of the evidence, rather than by the former "clear and convincing" standard. Compare 49 C.F.R. §§ 26.61(d), 26.67(d) (2000) and 13 C.F.R. § 124.105(c)(1) (2000) with 13 C.F.R. § 124.105(c)(1) (1996). The current regulations also require recipients to ensure that DBEs are not "so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate." 49 C.F.R. § 26.33(a) (2000).

While at the margin, some DBEs may be hired under the program in lieu of non-DBEs, the possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion **[**96]** that the program is not narrowly tailored. To invalidate the 1996 and revised SCC and other government DBE programs on that basis would be to render strict scrutiny effectively fatal, in contravention of Justice O'Connor's clear statements to the contrary. See **Adarand** III, 515 U.S. at 237.

d. Over- or Under-Inclusiveness

The last factor we must consider in applying strict scrutiny in this case is that of the over- or under-inclusiveness of the programs at issue. One factor in the Croson Court's rejection of the Richmond Plan was the lack of "inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination." Croson, 488 U.S. at 508.

Even if a race-conscious means of achieving the goal of increasing minority participation is necessary, in promulgating the SCC in use at the time of the district court's decision in **Adarand** IV, defendants-appellants have not demonstrated that they considered the effectiveness of at least one other, less sweeping approach to **[*1184]** implementing a race-conscious SCC program: disaggregating the presumptions of social and economic disadvantage, as is the **[**97]** case under the SBA § 8(a) program, to require a separate determination of social disadvantage and economic disadvantage. See 48 C.F.R. § 52.219-8 (1996). Requiring a separate showing as to each type of disadvantage would help address the Court's concern in Croson that a government entity undertake the necessary administrative effort "to tailor remedial relief to those who truly have suffered from the effects of prior discrimination." 488 U.S. at 508. The record does not disclose any evidence

that defendants undertook, and found to be unsuccessful, a program incorporating, as under § 8(a), a more individualized inquiry as to economic disadvantage prior to implementing the particular SCC program at issue in this litigation.

If the § 8(d) program in place prior to 1999 is interpreted, as we conclude it must be, to accord a presumption of economic as well as social disadvantage to minority individuals under § 8(d), while not doing so under § 8(a), that fact suggests that another more carefully tailored approach is available, i.e., the § 8(a) approach of individualized inquiry into economic disadvantage. The final section of **Adarand** III, 515 U.S. at 238-39, **[**98]** suggests the distinction is relevant. If individualized inquiry into economic disadvantage is sufficient to serve the purpose, why then dispense with such inquiry under § 8(d)? Indeed, if one can qualify under § 8(d), what is the significance of permitting qualification under § 8(a), aside from the practical matter of already including those DBEs enjoying § 8(a) benefits?

At the time **Adarand** IV originally was appealed in 1997, the government argued that the more lenient approach of § 8(d) is acceptable because of the differing purposes of § 8(a) and § 8(d).

> The [§] 8(a) program is targeted towards a smaller number of firms and provides direct assistance and protection from open competition over a period of years to help such firms become viable as prime contractors. By contrast, the [§] 8(d) program is focused on opening up federal subcontracting opportunities to a much larger number of small disadvantaged firms, and thus imposes less restrictive qualifications.

(Appellants' Br. at 34 (citing 13 C.F.R. § 124.06(b) (1997)).) That distinction, however, fails to identify why an individualized inquiry into economic disadvantage, which is admittedly **[**99]** practicable for § 8(a) purposes, was unnecessary for the particular purposes of § 8 (d) prior to 1999. To put it simply, presuming economic disadvantage based on membership in certain racial groups does make § 8(d) "less restrictive," but it is not thereby narrowly tailored. The government fails to explain why it could not have used a non-race-based means of making § 8(d) "less restrictive." Therefore, we must conclude, under Croson, that the § 8 (d) method of certification reviewed by the district court in **Adarand** IV is not narrowly tailored insofar as it obviates an individualized inquiry into economic disadvantage. See Croson, 488 U.S. at 508 (rejecting an affirmative action program in part because "there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination . . .[, and] the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered from the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification" (citation omitted)).

Requiring state certification standards to incorporate **[**100]** an individualized inquiry into economic disadvantage would certainly increase the burden on enterprises seeking DBE certification, as the government argues, and therefore would presumably reduce the pool of eligible enterprises. That increased burden, however, is slight when compared with the constitutional imperative **[*1185]** to avoid over- or under-inclusive racial classifications--the "Sultan of Brunei" scenario that troubled the district court, **Adarand** IV, 965 F. Supp. at 1581 n.17--, and the § 8(d) certification process thus fails to satisfy the narrow tailoring prong of the strict scrutiny inquiry. Cf. Croson, 488 U.S. at 508. When faced with the readily available alternative approach under § 8(a) of requiring would-be DBEs to provide a narrative statement of the economic disadvantage they have faced, combined with the various other more narrowly tailored alternatives discussed above, we fail to see how the SCC approach to certification in use at the time of **Adarand** IV satisfies the rigorous narrow tailoring requirement of the strict scrutiny calculus. In short, by inquiring into economic disadvantage

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on an individual basis, the program could avoid **[**101]** improperly increasing the contracting opportunities of those minority entrepreneurs whose access to credit, suppliers, and industry networks is already sufficient to obviate the effects of discrimination, past and present.

Yet again, the government has eliminated its offending 1996 practices. In particular, it has eliminated the discrepancy between the individualized determination of economic disadvantage characterizing the § 8(a) program and the non-individualized presumption of economic disadvantage characterizing the § 8(d) program. See 48 C.F.R. § 19.001 (2000) (providing that the § 8(d) program regulations expressly incorporate the definitions of "small disadvantaged business concern" contained in 13 C.F.R. pt 124, subpt. B); 13 C.F.R. § 124.1002(a) (2000) (incorporating § 8(a) criteria from 13 C.F.R. pt. 124, subpt. A); see also 48 C.F.R. § 19.703 (2000) (eliminating the race-based presumption of economic disadvantage of the former regulation); id. § 52.219-8. The current regulations also impose a new requirement on applicants with regard to an individualized showing: They must submit a narrative statement describing the circumstances of that purported economic **[**102]** disadvantage. See 13 C.F.R. § 124.104(b)(1) (2000); see also 49 C.F.R. § 26.67(b)(1) (2000) (providing a net worth limit for DBEs under ISTEA and TEA-21); id. § 26.65(b) (stating that businesses exceeding a certain amount of gross receipts are ineligible for the DBE program). With the individualized determination of § 8(a) extended to economic disadvantage under § 8(d), the main obstacle to a finding of narrow tailoring has disappeared.

Thus, one of **Adarand** III's "unresolved questions" has been answered, namely, whether the § 8(d) DBE certification program requires an individualized showing of economic disadvantage or whether the presumption applies to both social and economic disadvantage. **Adarand** III, 515 U.S. at 238. The 1996 § 8(d) certification program did not require an individualized showing of economic disadvantage, whereas the current § 8(d) certification program does require such an individualized showing.

There remains a further question of over- and under-inclusiveness that we must consider. The district court, **Adarand** IV, 965 F. Supp. at 1580, found that the 1996 SCC program was not narrowly tailored in part due **[**103]** to a failure to inquire into discrimination against each particular minority racial or ethnic group. The district court's opinion cites **Adarand's** arguments that "there is no evidence that Aleuts, Samoans or Bhutans [sic] have been discriminated against in the Colorado construction industry." Id. Insofar as the district court held that the scope of the inquiry into the statutes generally was the Colorado construction industry alone, this is at odds with our holdings regarding compelling interest and Congress's power to enact nationwide legislation. Furthermore, as discussed below, because of the unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications, extrapolating findings of discrimination against Native Americans, Asian-Pacific Americans, and Asian-Americans to include Aleuts, Samoans, and **[*1186]** Bhutanese, respectively, is more a question of nomenclature than of narrow tailoring. The Constitution does not erect a barrier to the government's effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications. **[**104]** While the concept of classifying human beings by race is distasteful, the fact remains that discrimination occurs based on such classifications, and engaging the classifications in order to eradicate such discrimination is a necessary evil which constitutes a compelling government interest.

We agree in principle that the 1996 SCC program would be more narrowly tailored had the CFLHD conducted an inquiry into the scope of discrimination within the region it administers as the current regulations mandate. n25 However, the district court's ensuing conclusion appears to stem from a premise that a classification, to be narrowly tailored, must not only include minority individuals who have themselves suffered discrimination, but must also automatically include all non-minority individuals who have suffered disadvantage as well. Cf. Fullilove, 448 U.S. at 486 ("There has been no showing in this case that Congress has

inadvertently effected an invidious discrimination by excluding from coverage an identifiable minority group that has been the victim of a degree of disadvantage and discrimination equal to or greater than that suffered by the groups encompassed by the MBE program. **[**105]** "). Requiring that degree of precise fit would again render strict scrutiny "fatal in fact." Id. at 507 (Powell, J., concurring). We hold that such fatality is inconsistent with **Adarand** III, which re-affirmed Paradise, in its declaration that strict scrutiny was not fatal in fact. See **Adarand** III, 515 U.S. at 237. There can be a permissible middle ground in appropriate circumstances between the entirely individualized inquiry of a Title VII lawsuit, for example, and an unconstitutionally sweeping, race-based generalization. Indeed, the police officers receiving the benefit of the promotion policy in Paradise were not required to prove that they themselves individually were victims of past discrimination. n26

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n25 Nonetheless, the geographic scope of the remedial powers of a local government, as in Croson, and that of Congress's remedial powers under § 5 of the Fourteenth Amendment differ. See Croson, 488 U.S. at 488 (Op. of O'Connor, J.). In Croson, the City ignored the fact

> that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.

Id. at 490 (Op. of O'Connor, J.) (citations omitted). **[**106]**

n26 Although the viability of Fullilove is uncertain, the Fullilove majority rejected a very similar overinclusiveness challenge to the 1977 10% MBE set-aside:

> It is also contended that the MBE program is overinclusive--that it bestows a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination. It is conceivable that a particular application of the program may have this effect; however, the peculiarities of specific applications are not before us in this case.

Fullilove, 448 U.S. at 486.

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Although we disagree with the district court's effectively fatal standard of scrutiny, we again note that comparison with the current SBA § 8(d) and TEA-21 regulations illustrates how the more careful tailoring now in place avoids some of the problems identified by the district court--again, the court's conclusion that the "Sultan of Brunei," should he have the temerity to apply, could qualify for DBE status. **Adarand** IV, 965 F. Supp. at 1581 n.17. **[**107]** See 13 C.F.R. § 124.104(c)(2) (2000); 48 C.F.R. § 19.001 (2000); 49 C.F.R. §§ 26.65, 26.67 (b) (2000) (providing for an individual net worth limit for DBE certification). The current regulations more **[*1187]** precisely identify the proper minority recipients of DBE certification by periodically re-screening for economic disadvantage all candidates for such certification. See 48 C.F.R. § 19.1014 (2000).

Mindful of the Supreme Court's mandate to exercise particular care in examining governmental racial classifications, we conclude that the 1996 SCC was insufficiently

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narrowly tailored as applied in this case and is thus unconstitutional under **Adarand** III's strict standard of scrutiny. Nonetheless, after examining the current SCC and DBE certification programs, we conclude that the 1996 defects have been remedied, and the relevant programs now meet the requirements of narrow tailoring.

D. "Unresolved Question"

As a final matter, inasmuch as **Adarand** III suggests that an additional "unresolved question []" concerning one of "the details of the complex regulatory regimes," 515 U.S. at 238, bears on the constitutionality of the SCC program, we address that **[**108]** question now: namely, whether there are differing definitions of economic disadvantage under § 8(a) and § 8(d). The 1996 regulations establish that § 8(a) certification requires, for determination of economic disadvantage, comparison with "others in the same or similar line of business who are not socially disadvantaged." 13 C.F.R. § 124.106(a) (1996). Subsection 8(d) certification, however, apparently requires comparison with "others in the same or similar line of business" generally, presumably with all others, socially disadvantaged or not. 13 C.F.R. § 124.106(b) (1996). Because under 1996 programs based on § 8(d) economic disadvantage is to be presumed for minorities, the § 8(d) comparative analysis would appear to arise only in the event of either a challenge to the presumption in the case of a particular minority DBE, or application for DBE status by a socially-disadvantaged non-minority subcontractor (the classic example being the white subcontractor from rural Appalachia). We are unable to discern the constitutional relevance of these two slightly different methods of comparison. n27 Moreover, the distinction between the two has disappeared in the current version of **[**109]** the regulations. The current regulation retains the more precise definition previously applicable to the § 8(a) program, requiring a comparison of the applicant to those who are not socially disadvantaged. See 13 C.F.R. § 124.104(a) (2000); see also 48 C.F.R. § 19.001 (2000) (incorporating the definitions of "small disadvantaged business concern" contained in 13 C.F.R. pt. 124, subpt. B); 13 C.F.R. § 124.1002(a) (2000) (incorporating 13 C.F.R. pt. 124, subpt. A, in determining social and economic disadvantage).

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n27 We reject the contention that two slightly different definitions of economic disadvantage for purposes of two different certification methods create uncertainty as to who is a DBE, thus necessarily precluding any finding of narrow tailoring.

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IV

As a final matter, the government argues that we should remand this case in light of a pending, potentially related lawsuit originally filed under the name **Adarand** Constructors, Inc. v. Romer, No. CIV. A. 97-K-1351 (D. Colo.) (filed June 26, 1997). **[**110]** n28 Romer involves a challenge by plaintiff in the instant case to use of race-conscious policies in highway construction projects by CDOT. **Adarand** has conceded that its challenge in the instant case is to "the federal program, implemented by federal officials," and not to the letting of federally-funded construction contracts by state agencies. (Appellee's Br. at 24 n.23.) **[*1188]** We do not have before us a sufficient record to enable us to evaluate the separate question of CDOT's implementation of race-conscious policies. The propriety of potential consolidation of the instant action and Romer following our remand is a question to be considered by the district court in the first instance, should that question arise.

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n28 Decisions arising out of the Romer litigation include: **Adarand** Constructors, Inc. v. Romer, 174 F.R.D. 100 (D. Colo. 1997) (denying the federal government's motion to intervene); **Adarand** Constructors, Inc. v. Romer, 194 F.3d 1320, 1999 U.S. App. LEXIS

23725, 1999 WL 770176 (10th Cir. 1999) (unpublished) (permitting intervention by the federal government); and **Adarand** Constructors, Inc. v. Owens, 2000 U.S. Dist. LEXIS 5478, No. CIV. A. 97- K-1351, 2000 WL 490690 (D. Colo. Apr. 24, 2000) (unpublished) (dismissing the governor of Colorado as a defendant).

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V

The judgment of the district court is **REVERSED**. This matter is remanded for further proceedings consistent with this opinion.

APPENDIX

As noted, several statutes are implicated in this case, notably the Small Business Act of 1958 ("SBA"), Pub. L. No. 85-536, 72 Stat. 384, as amended, 15 U.S.C. §§ 631 et seq., § 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"), Pub. L. No. 100-17, 101 Stat. 132, and § 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), Pub. L. No. 102-240, 105 Stat. 1914, the Transportation Equity Act for the 21st Century of 1998 ("TEA 21"), Pub. L. No. 105-178, 112 Stat. 107, 113, as well as their accompanying administrative regulations. In the discussion that follows, we outline the statutory and regulatory scheme as it was at the time of the first and second district court decisions. n29 Then we discuss the relevant changes in that scheme after 1997.

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n29 The relevant language in the statutes and regulations did not change in any material way between **Adarand** I and **Adarand** IV, and therefore references to regulations are to 1991 regulations unless otherwise indicated.

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A. SBA

Subsection 8(d)(1) of the SBA states "it is the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." 15 U.S.C. § 637(d)(1). n30 "Socially disadvantaged individuals" are defined as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5). The SBA further defines "economically disadvantaged individuals" as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. § 637(a)(6)(A). n31

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n30 The SCC defines Disadvantaged Business Enterprises ("DBEs") as those concerns owned and operated by socially and economically disadvantaged individuals. **[**113]**

n31 It appears that the 1996 regulations implementing the § 8(d) certification program provide that the showing of disadvantage requires a general comparison "to others in the same or similar line of business." 13 C.F.R. § 124.106(b)(1) (1996). Justice O'Connor suggests that this distinction may have constitutional significance. See **Adarand** III, 515 U.S. at 238.

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In addressing the question of what evidence of discrimination supports a compelling interest in providing a remedy, courts consider both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. Furthermore, courts may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus, any findings Congress has made as to the entire construction industry are relevant.

Constitutional Law : Substantive Due Process : Scope of Protection

When a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals.

Evidence : Writings & Real Evidence

The challengers of a disadvantaged business enterprises program should have the opportunity to rebut statistical evidence.

Constitutional Law : Substantive Due Process : Scope of Protection

U.S. Const. amend. XIV permits race-conscious programs that seek to prevent the public entity from acting as a passive participant in a system of racial exclusion by allowing tax dollars to finance the evil of private prejudice.

Evidence : Procedural Considerations : Burdens of Proof, Presumptions & Inferences

Constitutional Law : Substantive Due Process : Scope of Protection

The ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of an affirmative-action program. The nonminority challengers continue to bear the ultimate burden of persuading the court that the government entity's evidence did not support an inference of prior discrimination and thus a remedial purpose.

Constitutional Law : Substantive Due Process : Scope of Protection

In determining whether race-conscious remedies are appropriate, courts look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Constitutional Law : Substantive Due Process : Scope of Protection

As part of the United States' dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a sharing of the burden by innocent parties is not impermissible.

Constitutional Law : Substantive Due Process : Scope of Protection

If a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures.

Public Contracts Law : Business Aids & Assistance : Minority, Women-Owned & Disadvantaged Businesses

See 49 C.F.R. § 26.45(b) (2000).

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15 U.S.C. § 637(d)(2) requires that all federal contracts, with certain exceptions not relevant here, contain a clause stating it is the government's policy for small disadvantaged businesses to have "the maximum practicable opportunity to participate" as contractors or subcontractors. See 15 U.S.C. § 637(d)(3). The required clause includes the following language: "The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business **[**114]** Act [15 U.S.C. 637 (a)]." 15 U.S.C. § 637(d)(3)(C). n32

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n32 15 U.S.C. § 637(d)(4) provides for certain additional requirements for contracts to be awarded "pursuant to the negotiated method of procurement" and exceeding certain dollar amounts. These requirements include an approved plan providing maximum opportunity for small business concerns, see id. § 637(d)(4)(D), and provision for agencies to offer incentives to encourage subcontracting opportunities for small business concerns owned and controlled by socially and economically disadvantaged individuals, see id. § 637(d)(4)(E). The parties have not addressed paragraph (4) of § 8(d) at all, and, because there is no indication from the parties that **Adarand** has or will bid for contracts governed by that paragraph's requirement, we do not address it in great detail.

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15 U.S.C. § 644(g)(1) provides for a government-wide goal of 5% minimum minority business participation **[**115]** calculated on the basis of "the total value of all prime **[*1189]** contract and subcontract awards for each fiscal year." n33 The Federal Highway Administration appears to have adopted, pursuant to 15 U.S.C. § 644(g)(2), goals of 12-15% participation for the period of time pertinent to this litigation. (Appellants' App. at 187.) These goals are aspirational rather than mandatory and must "realistically reflect the potential" of small disadvantaged businesses to perform subcontracts. See 15 U.S.C. § 644 (g)(2), (h)(1). Section 644(h) further mandates annual reports to the Administration and Congress on the results of government agency efforts to increase contracting participation by small businesses, including those owned and controlled by socially and economically disadvantaged individuals.

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n33 Section 644(g)(1) provides in relevant part that

> the President shall annually establish Government-wide goals for procurement contracts awarded to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals . . . . The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year. . . . Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity . . . for small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency.

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1. Subsection 8(a)

The § 8(a) program provides numerous benefits to disadvantaged businesses aside from eligibility for the SCC program. n34 Eligibility requires "small" size and 51% ownership by individuals socially and economically disadvantaged. See 13 C.F.R. § 124.103. Subsection 8 (a) regulations incorporate a presumption that enumerated minorities are socially disadvantaged, see 13 C.F.R. § 124.105(b)(1), and others can prove social disadvantage by clear and convincing evidence, see id. § 124.105(c). The presumption of disadvantage is in theory rebuttable by a third party. See 49 C.F.R. § 23.69. All businesses must separately prove economic disadvantage. See id. § 124.106(a). Eligibility for the § 8(a) program confers an automatic presumption of disadvantage under § 8(d). See 15 U.S.C. § 637(d)(3)(C).

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n34 Although **Adarand** lacks standing to challenge the constitutionality of the § 8(a) program per se, we consider its provisions insofar as they are relevant to the use of racially-conscious presumptions in determining certification of DBEs for the SCC program challenged here.

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2. Subsection 8(d)

The relevant portions of § 8(d) in themselves require only the inclusion of a provision in federal contracts stating the government's policy of maximizing contracting opportunities for small businesses, including those owned and controlled by socially and economically disadvantaged individuals. See 15 U.S.C. § 637(d)(1)-(3). n35 Subsection (d) is relevant to this litigation, however, insofar as the definition set forth therein serves as a basis for certifying small businesses as disadvantaged for purposes **[*1190]** of compensating prime contractors under the SCC. See 49 C.F.R. § 23.53. n36 Like § 8(a), § 8(d) includes language instructing contractors to afford a presumption of social disadvantage based on race. See id. The Court stated that certain regulations based on § 8(d) "appear[] to require an individualized, although 'less restrictive,' showing of economic disadvantage." **Adarand** III, 515 U.S. at 207 (quoting 13 C.F.R. § 124.106(b)). However, other regulations provide for presumptions of both social and economic disadvantage. See **Adarand** III, 515 U.S. at 207-08 (citing 48 C.F.R. §§ 19.011, **[**118]** 19.703(a)(2)). The Court was thus "left with some uncertainty as to whether participation in the [§] 8(d) subcontracting program requires an individualized showing of economic disadvantage." **Adarand** III, 515 U.S. at 208. n37 Both presumptions of disadvantage are theoretically rebuttable by a third party. (See Appellants' App. at 131.)

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n35 There is no indication from any of the parties in their briefs or elsewhere that the particular requirements of paragraphs (4)-(6) of § 8(d) are at issue in the instant lawsuit or that **Adarand** has and will continue to bid for contracts or subcontracts covered by those paragraphs. See 15 U.S.C. § 637(d)(4)-(6).

n36 The relevant state DBE program at the time of the contract at issue, under which **Adarand's** competitor was certified as a DBE, provided that "persons who are members of [specified racial/ethnic minorities] are 'rebuttably presumed' to be socially and economically disadvantaged." (Appellants' App. at 131.) Pursuant to **Adarand** VI, because Colorado's

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revised program may be inconsistent with federal requirements, we direct our inquiry to the possibility of reinstatement of the prior state DBE certification requirements, as informed by federal law and regulation. **[**119]**

n37 As noted, those portions of § 8(d) at issue here perhaps may be more properly characterized as a requirement that a clause be included in contracts than as a discrete program. However, the Supreme Court has characterized the requirements as a discrete program, and we note that they are certainly relevant to the SCC program at issue because they inform the criteria for certification of DBE participants by state agencies.

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B. STURAA and ISTEA provisions

STURAA and ISTEA are relevant insofar as they incorporate the presumption of disadvantage from SBA § 8(d). See STURAA § 106(c)(2)(B), ISTEA § 1003(b)(2)(B) (providing that the term "socially and economically disadvantaged individual" has the meaning of such term under SBA § 8(d) "and relevant subcontracting regulations promulgated pursuant thereto."). Both measures set forth aspirational goals of 10% DBE participation in federal subcontracting. See ISTEA § 1003(b)(1).

C. Subcontracting Compensation Clause

The particular means of implementation of the various statutory goals and directives at issue in this litigation **[**120]** is the SCC. This clause provides a financial bonus of up to 10% of an approved subcontract (no more than 1.5% or 2% of the original contract, depending on how many DBEs are employed) to a prime contractor in return for employing a DBE. (See Appellants' App. at 55-56.) n38 Subcontractors **[*1191]** must be certified as DBEs by "the SBA, a state highway agency, or some other certifying authority acceptable to the contracting officer" pursuant to the "[§] 8(a) or [§] 8(d) program, or certification by a State under the DOT regulations." **Adarand** III, 515 U.S. at 209-10.

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n38 The Supreme Court in **Adarand** III stated that "federal law requires that a subcontracting clause similar to the one used here must appear in most federal agency contracts, and it also requires the clause to state that 'the contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act.'" 515 U.S. at 205 (quoting 15 U.S.C. §§ 637(d)(2), (3)). However, examination of the statute reveals that 15 U.S.C. § 637, while providing for inclusion in most federal agency contracts of a clause stating that "it is the policy of the United States that . . . small business concerns owned and controlled by socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency," 15 U.S.C. § 637(d)(3)(A), the relevant provisions of § 8(d) do not require the particular contract provision at issue here: "monetary compensation . . . for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals," **Adarand** III, 515 U.S. at 209 (citation omitted). Cf. 15 U.S.C. § 637(d)(4)(E). Rather, that clause, the SCC, was established administratively by the Federal Lands Highway Program ("FLHP") of the Department of Transportation ("DOT") pursuant to the FLHP's obligations under 15 U.S.C. § 644(g). (See Appellants' App. at 33.) In **Adarand** II, 16 F.3d at 1545-56, ("**Adarand** II"), we concluded that the FLHP was acting within its delegated power under § 644(g) in promulgating the SCC. The Supreme Court, in altering the equal protection standard of scrutiny applicable to federal action in **Adarand** III, did not disturb this statutory conclusion. Therefore it remains law of the case that the SCC constitutes an exercise of the

FLHP's delegated authority under § 644(g), and we discern no clear error in that prior decision or manifest injustice sufficient to warrant overriding the law of the case doctrine. See Agostini, 521 U.S. at 236; McIlravy, 204 F.3d at 1034-35.

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D. Post-1996 Changes

1. SBA

There have been no significant changes to § 637(a) or (d) relevant to the **Adarand** litigation after 1996. Virtually the only changes to these statutory sections were additions of language including other groups in the SBA's affirmative action program: 1995 (women); 1998 ("HUBZone small business concerns"); and 2000 (veterans). Likewise, the key language in § 644(g)(1)--"The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year"--has not changed. However, § 644(g)(1) has been amended at various times during the litigation to include government-wide contracting goals for other groups, such as women, service-disabled veterans, and HUBZone small business concerns.

Of the regulations implementing § 8(a) of the SBA, 13 C.F.R. §§ 124.1 et seq., n39 two regulations--those defining social and economic disadvantage--are relevant to this litigation and differ significantly from their 1996 counterparts. The most extensive changes **[**122]** were made in 1998 and are present in the current regulations.

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n39 The § 8(d) program regulations are located at 48 C.F.R. pt. 19, but they specifically incorporate the definitions of "small disadvantaged business concern" contained in 13 C.F.R. pt. 124, subpt. B. See 48 C.F.R. § 19.001 (2000); 13 C.F.R. § 124.1002(a) (2000) (incorporating 13 C.F.R. pt. 124, subpt. A).

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The regulation defining social disadvantage are presently located at 13 C.F.R. § 124.103, and its language, preceding the list of presumptively socially disadvantaged groups, has changed. The current regulation states: "There is a rebuttable presumption that the following individuals are socially disadvantaged . . . ." 13 C.F.R. § 124.103(b)(1) (2000); see also id. § 124.103(b)(3) ("The presumption of social disadvantage may be overcome with credible evidence to the contrary."). This change reemphasizes that the presumption of social disadvantage based on group membership is not absolute.

In addition, the burden on members of unlisted **[**123]** groups to show they are socially disadvantaged has been reduced. Currently, social disadvantage may be established by a "preponderance of the evidence," rather than by the former "clear and convincing" evidentiary standard. Compare 13 C.F.R. § 124.103(c)(1) (2000) with 13 C.F.R. § 124.105(c)(1) (1997). The Small Business Administration explains that this change was meant to more narrowly tailor the § 8(a) program in light of **Adarand** III. See 8(a) Business Development/Small Disadvantaged Business Status Determinations, 63 Fed. Reg. 35,726, 35,728 **[*1192]** (1998) ("In response to the Supreme Court's decision in **Adarand** [III] . . .,the Department of Justice recommended the 'preponderance of the evidence' standard for government-wide disadvantaged business programs. [The Small Business Administration] . . . continues to believe that the use of this standard strengthens the defense of the [§] 8(a) Business Development program.").

The relevant regulations regarding economic disadvantage are presently located at 13 C.F.R.

§ 124.104. The **Adarand** III majority expressed concern about the "apparent discrepancy between the definitions of which socially **[**124]** disadvantaged individuals qualify as economically disadvantaged for the [§] 8(a) and [§] 8(d) programs." **Adarand** III, 515 U.S. at 238-39. The new regulations rectify that discrepancy, retaining the more precise definition previously applicable to the § 8(a) program, which requires comparing the applicant to those who are not socially disadvantaged. See 13 C.F.R. § 124.104(a) (2000). The current regulations also impose a new requirement on applicants: They must submit a narrative statement describing their economic disadvantage. See id. § 124.104(b)(1) (2000).

As to duration of DBE certification, the current § 8(d) certification program regulations provide for certification of a business as socially disadvantaged for three years after either the initial certification or other administrative determination. See 13 C.F.R. § 124.1014 (2000). If a DBE wishes to retain its certification for longer than three years, it must "submit a new application and receive a new certification." Id. § 124.1014(c).

2. STURAA, ISTEA, and TEA-21

The language in STURAA, ISTEA, and TEA-21 concerning the DBE program is similar. Notably, the requirement that **[**125]** "not less than 10 percent of the amounts" authorized under those Acts "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals" remains unchanged in all three statutes. TEA-21 § 1101(b)(1), 112 Stat. at 113; ISTEA § 1003(b)(1), 105 Stat. 1919; STURAA § 106(c)(1), 101 Stat. 132.

The only significant change in the transportation appropriations statutes is the addition in both § 1003(b) of ISTEA, 105 Stat. 1920-22, and § 1101(b)(6) of TEA-21, 112 Stat. 114-15, of a requirement that the Comptroller General conduct a study and report to Congress regarding several aspects of the DBE program.

In ISTEA § 1003(b)(5), 105 Stat. 1920-22, the Comptroller General is given twelve months to study and prepare a report discussing: graduation from the program; the extent of out-of-state contracting with disadvantaged businesses by prime contractors; whether adjustments could be made "with respect to Federal and State participation in training programs and with respect to meeting capital needs and bonding requirements" to increase the success of disadvantaged business enterprises; possible "revisions and additions to criteria **[**126]** used to determine the performance and financial capabilities of" DBEs; the costs and benefits of meeting the goal of 10% participation by DBEs; the effect of the program on the construction industry; the certification process; and the implementation of the program by states.

In TEA-21 § 1101(b)(6), 112 Stat. 114-15, the Comptroller General is given three years to study and prepare a report discussing: the number, participation in prime contracts and subcontracts, gross receipts, and net worth of DBEs; the overall costs of the DBE program, "including administrative costs, certification costs, additional construction costs, and litigation costs"; discrimination against DBEs in various markets including transportation contracting, financial, insurance, credit and bonding; the costs of any court order striking down the DBE program; and the impact of the program on competition and the creation of jobs.

[*1193] The regulations implementing affirmative action programs of STURAA, ISTEA, and TEA-21 have undergone the most change of any of the relevant regulations at issue over the course of the instant litigation. According to the federal Department of Transportation, the changes were made "primarily **[**127]** in response to the 'narrow tailoring' requirements of **Adarand** [III]," and the final rule "complies with the requirements that the courts have established for a narrowly tailored affirmative action program." Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 64 Fed. Reg. 5096 (1999); see also id. at 5101-03 (discussing the requirements of narrow tailoring and

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the ways in which the new regulations attempt to meet those requirements). The current regulations, which apply to any federal highway funds authorized under ISTEA or TEA-21, see 49 C.F.R. § 26.3(a) (2000), are located at 49 C.F.R. pt. 26.

The current regulations specify that the presumption of economic disadvantage automatically is rebutted for any individual whose net worth is above $ 750,000, without a requirement of further proceedings. See id. § 26.67(b)(1) (2000). This conforms with SBA regulations concerning re-certification of economic disadvantage. See 13 C.F.R. § 124.104 (2000). The current regulations also retain the requirement that businesses not exceed a certain amount of gross receipts in order to be eligible **[**128]** for the DBE program. See 49 C.F.R. § 26.65(b) (2000).

Regarding the allocation of subcontracts to DBEs, the current regulations explicitly prohibit the use of quotas. See id. § 26.43(a). Similarly, the current regulations prohibit use of set-asides except in "limited and extreme circumstances . . . when no other method could be reasonably expected to redress egregious instances of discrimination." Id. § 26.43(b). Although acknowledging that ISTEA and TEA-21 set a goal of 10% DBE participation in government contracts, the current regulations term this "an aspirational goal at the national level," id. § 26.41(b), which "does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level," id. § 26.41(c). n40

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n40 The term "recipient" is defined by the regulations as "any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the . . . FHWA." 46 C.F.R. § 26.5 (2000). The FLHP is such a program and therefore is a "recipient" for purposes of the relevant regulations. See 23 C.F.R. § 645.105(f) (2000).

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Extensive regulatory requirements must be met before goals may be set for DBE participation in a particular market. See id. § 26.45. Goals must be based on "demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate" and must make "reference to the relative availability of DBEs in [the recipient's local] market." Id. § 26.45(b). In addition, goal setting must involve "examining all evidence available in [the recipient's] jurisdiction." Id. § 26.45(c). Such evidence may include census data and valid disparity studies. See id. § 26.45(c)(1)-(3). After examining this evidence, the recipient must adjust its DBE participation goals by examining the capacity of DBEs to perform needed work, disparity studies, and other evidence. See id. § 26.45(d). When submitting these goals, the recipient must include a description of the methodology and evidence used in setting them. See id. § 26.45(f)(3). Finally, there is no requirement that the recipient actually meet its goals, merely that it make a good faith effort to do so; failure to meet goals will not subject a recipient to penalties **[**130]** or to being held in noncompliance as long as good faith efforts were made. See id. § 26.47(a).

Wherever possible, the current regulations require recipients to use race-neutral means to "meet the maximum feasible portion" **[*1194]** of their overall DBE participation goals. Id. § 26.51(a); see also id. § 26.51(f) (if a recipient can meet its overall goals through race-neutral means, it must implement its program without the use of contract goals). The current regulations also outline several race-neutral means available to program recipients including helping overcome bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. See id. § 26.51(b).

For those not falling into one of the categories to which a presumption of social disadvantage applies, the current regulations retain procedures for non-minorities to participate in the DBE program. Consistent with the changes in SBA regulations, proof of social and economic

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disadvantage by those not so presumed may be shown by a preponderance of the evidence. See id. §§ 26.61(d), 26.67(d). Additionally, the current regulations require recipients to make **[**131]** sure DBEs are not "so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate." Id. § 26.33(a).

Finally, as to any part of the foregoing DBE statutory and regulatory framework, the current regulations allow recipients to seek waivers and exemptions, despite the already non-mandatory nature of the DBE programs. See id. § 26.15. In this way, the statutory and regulatory scheme provides yet another means of ensuring that the program is not applied more broadly than warranted.

3. SCC

The government maintains, and **Adarand** does not dispute, that the SCC, which spawned this litigation in 1989, is no longer in use. (See Appellants' Supp. Br. Attach. 1 (memorandum from Arthur E. Hamilton, Federal Lands Program Manager to Federal Lands Highway Division Engineers stating that "the SCC will not be placed in any future invitations for bids" and "shall be removed by amendment from any invitations for bids where the bid opening has not taken place").)

In November 1997, before the discontinuation of its use, the SCC was revised by the addition of a new section n41 which creates further conditions of eligibility for the program. **[**132]** (See id. Attach. 2 (new section of the SCC).) To begin with, subject to modification based on DBE availability, at least 10% of the prime contract must go to DBEs for SCC eligibility. If a DBE subcontractor is hired, that DBE may only contract out to non-DBEs "for onsite work . . . incidental to, and necessary for the accomplishment of," the subcontract, in an amount not to exceed 50 percent of the value of the DBE's subcontract. (Id. at 2.) In addition to the 1.5-2% cap on the total amount of the prime contract that may be awarded pursuant to the SCC, the new section adds a further cap of $ 50,000 if subcontracting to one DBE and $ 100,000 if subcontracting to more than one DBE.

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n41 It is unclear from the record whether the 1997 revision to the SCC entailed the addition of a new section or the replacement of the previous one. The revision instructs those using the SCC to "add the following [revision]," (Appellants' Supp. Br. Attach. 2 at 1), rather than replace the existing SCC, and we thus assume the 1997 revision is an addition to the SCC. However, in either case, our analysis in this opinion remains the same.

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The revised SCC retains the provision furnishing prime contractors with "compensation . . . to locate train, utilize, assist, and develop DBEs to become fully qualified contractors in the transportation facilities construction field," but adds the explanation that this compensation is provided "to offset costs and anticipated risks associated with awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals (DBE)." (Id. at 1.)

Finally, the new section provides an alternative route to certification, "ad hoc certification" based on "self certification" accompanied by the requisite documents to demonstrate qualification for the program, **[*1195]** as well as "documentation showing the disposition of any previous application for certification the subcontractor has made to any Federal, State or local Government agency." (Id.) If a would-be self-certified DBE has already been rejected by a government agency, ad hoc certification will not be granted "unless the reasons for [the previous] denial have been resolved." (Id.)

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Source: All Sources : Federal Legal - U.S. : Circuit Court Cases - By Circuit : **US Court of Appeals Cases - 10th Circuit**
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Robin L. Rivett, Sharon L. Browne, and Stephen R. McCutcheon, Jr., for Pacific Legal Foundation, **[**2]** Sacramento, California, filed an amicus curiae brief.

Julian A. Gross and William C. McNeill III, Legal Aid Society of San Francisco, for the Employment Law Center, San Francisco, California, and Franklin M. Lee and Tracie Anita Watkins for the Minority Business Enterprise Legal Defense and Education Fund, Inc., Washington, D.C., filed an amicus curiae brief.

Michael E. Kennedy, General Counsel for Associated General Contractors of America, Inc., and John G. Roberts, Jr., David G. Leitch, and H. Christopher Bartolomucci of Hogan & Hartson, L.L.P., Washington, D.C., filed an amicus curiae brief for Associated General Contractors of America, Inc.

JUDGES: Before LUCERO, Circuit Judge, McKAY, Senior Circuit Judge, and MURPHY, Circuit Judge.

OPINIONBY: LUCERO

OPINION: [*1155] OPINION ON REMAND

LUCERO, Circuit Judge.

Following the Supreme Court's vacation of our dismissal on mootness grounds, we address the merits of this appeal, namely, the federal government's challenge to the district court's grant of summary judgment to plaintiff-appellee **Adarand** Constructors, Inc. In so doing, we must resolve the constitutionality of the use in federal subcontracting procurement of the Subcontractor **[**3]** Compensation Clause ("SCC"), which employs race-conscious presumptions designed to favor minority enterprises and other "disadvantaged business enterprises" ("DBEs"). Our evaluation of the SCC program utilizes the "strict scrutiny" standard of constitutional review enunciated by the Supreme Court in an earlier decision in this case, **Adarand** Constructors, Inc. v. Pena, 515 U.S. 200, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995) ("**Adarand** III").

In his concurring opinion in **Adarand** III, Justice Scalia succinctly articulated this Nation's guiding aspiration: "In the eyes of government, we are just one race here. It is American." Id. at 239 (Scalia, J., concurring in part and concurring in the judgment). Until that future day when national aspiration and national reality converge, the Court has made clear that under certain circumstances the federal government may use race-conscious means to remedy the effects of historical and present-day racial discrimination. Inherently, we resolve whether the two branches of the government--the Legislative and the Executive--that have chosen to hasten that future day have met the constitutional standards enunciated **[**4]** by the third branch. Since the district court last considered this case, and after lengthy congressional hearings in response to the **Adarand** III decision, the federal government has significantly changed the way in which it implements the challenged race-conscious programs in highway construction contracting. It is ultimately our considered judgment that the SCC program and the DBE certification programs as currently structured, though not as they were structured in 1997 when the district court last rendered judgment, pass constitutional

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muster: They are narrowly tailored to serve a compelling governmental interest. Thus, exercising jurisdiction pursuant to 28 U.S.C. § 1291, we reverse the judgment of the district court below.

I

The Supreme Court has characterized the facts of this case as "fairly straightforward," **[*1156]** **Adarand** III, 515 U.S. at 206, summarizing the relevant facts as follows:

> In 1989, the Central Federal Lands Highway Division (CFLHD), which is part of the United States Department of Transportation (DOT), awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction **[**5]** Company. Mountain Gravel then solicited bids from subcontractors for the guardrail portion of the contract. **Adarand,** a Colorado-based highway construction company specializing in guardrail work, submitted the low bid. Gonzales Construction Company also submitted a bid.

Id. at 205. At the time, Gonzales was certified as a small business owned and controlled by socially and economically disadvantaged individuals, while **Adarand** was not. See id. This litigation centers around the SCC, a clause which was included in CFLHD's prime contract with Mountain Gravel. The SCC provided "that Mountain Gravel would receive additional compensation if it hired subcontractors certified as small businesses controlled by 'socially and economically disadvantaged individuals.'" Id. (citation omitted).

Adarand submitted an affidavit stating that but for the additional compensation Mountain Gravel obtained by hiring Gonzales, a certified business, it would have hired **Adarand** for the guardrail work. See id. **Adarand** sued, arguing that the use of a race-conscious presumption in determining who is a socially and economically disadvantaged individual for purposes of the SCC **[**6]** violated its Fifth Amendment equal protection rights. See id. at 205-06.

In **Adarand** Constructors, Inc. v. Skinner, 790 F. Supp. 240 (D. Colo. 1992) ("**Adarand** I"), the district court addressed **Adarand's** challenge to "the DBE program as administered by the CFLHD within Colorado." Id. at 241 (footnote omitted). Without focusing specifically on the SCC and its operation, the court in **Adarand** I upheld as constitutional, under intermediate scrutiny, statutory provisions defining DBEs and setting goals for DBE participation in government contracting. See id. at 241, 244-45 (relying on Fullilove v. Klutznick, 448 U.S. 448, 480, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 598-601, 111 L. Ed. 2d 445, 110 S. Ct. 2997 (1990)).

In **Adarand** Constructors, Inc. v. Pena, 16 F.3d 1537, 1539 (10th Cir. 1994) ("**Adarand** II"), this Court affirmed the district court's judgment on different grounds. We concluded that **Adarand** had standing to challenge the SCC program as it pertains to minority business enterprises but not women-owned **[**7]** business enterprises and addressed our inquiry to the SCC as a program implemented pursuant to § 502 of the Small Business Act of 1958 ("SBA"), Pub. L. No. 85-536, 72 Stat. 384 (codified as amended, 15 U.S.C. § 631 et seq.). See **Adarand** II, 16 F.3d at 1543 (citing 15 U.S.C. § 644(g)). Like the district court, we relied on Metro Broadcasting, 497 U.S. at 565, applying intermediate scrutiny to the SCC and holding "the SCC program . . . constitutional because it is narrowly tailored to achieve its significant governmental purpose of providing subcontracting opportunities for small [DBEs], as required under section 502 of the [SBA]." **Adarand** II, 16 F.3d at 1547.

The Supreme Court reversed. It overruled Metro Broadcasting and cast doubt on Fullilove insofar as that case might be read to apply less than strict scrutiny to federal programs involving racial classifications. See **Adarand** III, 515 U.S. at 227, 235. n1

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n1 The principal focus of **Adarand** III was not an analysis of the particular statutes and regulations before the Court under its newly-announced standard, but the far more abstract question of whether "benign" race-conscious programs are subject to the "strict scrutiny" doctrine, a question which the majority answered in the affirmative. See **Adarand** III, 515 U.S. at 225-27. In its enunciation of the strict scrutiny standard and its overruling of Metro Broadcasting, the Court accorded very little attention to the application of the strict scrutiny test to the particular programs at issue in this case.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[**8]**

[*1157] On remand, the district court held the SCC program unconstitutional, finding it insufficiently narrowly tailored to further a compelling interest because the program was both over- and under-inclusive, including minority individuals who were not in fact disadvantaged and excluding non-minority individuals who were disadvantaged. See **Adarand** Constructors, Inc. v. Pena, 965 F. Supp. 1556 (D. Colo. 1997) ("**Adarand** IV"). With regard to the Court's pronouncement in **Adarand** III that strict scrutiny is not "fatal in fact," the district court found it "difficult to envisage a race-based classification" that would ever be narrowly tailored, thereby effectively pronouncing strict scrutiny fatal in fact. Id. at 1580. The district court granted summary judgment to **Adarand.**

Following **Adarand** IV, we considered the government's contention that subsequent events had rendered the case moot. See **Adarand** Constructors, Inc. v. Slater, 169 F.3d 1292 (10th Cir. 1999) ("**Adarand** V"). Specifically, because **Adarand** applied for and was granted DBE certification by the Colorado Department of Transportation ("CDOT"), we concluded that **Adarand [**9]** could no longer demonstrate an injury stemming from the SCC sufficient to confer standing. See id. at 1296-97. Hence, the case was moot. See id.

The Supreme Court disagreed. See **Adarand** Constructors, Inc. v. Slater, 528 U.S. 216, 120 S. Ct. 722, 145 L. Ed. 2d 650 (2000) ("**Adarand** VI"). Relying on its decision in Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000), handed down on the same day as its **Adarand** VI remand, the Court stated it had "recently noted" that a possibility of a defendant "engaging in (or resuming) harmful conduct" might be too speculative to confer standing but not too speculative to overcome mootness. **Adarand** VI, 120 S. Ct. at 726 (quoting Friends of the Earth, 120 S. Ct. 693 at 699). The Court held it was "far from clear" that DOT would not initiate proceedings to revoke **Adarand's** status and because "it is impossible to conclude that respondents have borne their burden of establishing that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur, **[**10]** ' petitioner's cause of action remains alive." Id. 120 S. Ct. at 726-27 (quoting Friends of the Earth, Inc., 120 S. Ct. 693 at 708). With the reversal of our judgment in **Adarand** V, this appeal was remanded to us for consideration on the merits. See id. 120 S. Ct. at 726-27.

In the discussion that follows, we first dispose of three threshold concerns: (1) a determination of the appropriate versions of the statutes and regulations at issue in this case; (2) the scope of our review of the SCC program; and (3) a brief overview of the relevant statutory framework and of the SCC program. Then, in Part III we subject the SCC program to strict scrutiny, examining the compelling interest underlying the program as well as its narrow tailoring, and addressing specific issues that the Supreme Court in **Adarand** III directed that we consider. Finally, in Part IV, we briefly discuss the government's request that we consolidate with the instant action a pending, potentially related case, originally filed under the name **Adarand** Constructors, Inc. v. Romer, No. CIV. A. 97-K-1351 (D. Colo. June 26, 1997).

II

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We begin by addressing the scope of our inquiry in this appeal. It is essential **[**11]** that we decide which versions of the statutes and regulations at issue are properly before us, as well as which portions of those statutes and regulations are relevant to this appeal.

[*1158] Several statutes are implicated in this case, notably §§ 8(a), 8(d) and 502 of the SBA (codified as amended at 15 U.S.C. §§ 637(a), (d), and 644(g)), § 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"), Pub. L. No. 100-17, 101 Stat. 132, 145 (1987), § 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), Pub. L. No. 102-240, 105 Stat. 1914, 1919-21 (1991), § 1101(b) of the Transportation Equity Act for the 21st Century of 1998 ("TEA-21"), Pub. L. No. 105-178, 112 Stat. 107, 113-15 (1998), as well as their accompanying administrative regulations.

A. The Versions To Be Considered

With regard to the foregoing statutes, regulations, and SCC, the parties disagree as to whether we may properly consider intervening changes in the law between 1992 when **Adarand** I was handed down and the present. n2 Our resolution of that dispute is ultimately compelled by the logic of the well-settled precedent of both **[**12]** the Supreme Court and this Circuit. **Adarand** seeks only prospective declaratory and injunctive relief. See **Adarand** III, 515 U.S. at 210. n3 Application of the intervening statutory and regulatory changes to this type of claim does not implicate any presumption against the retroactive application of statutes. See Landgraf v. USI Film Prods., 511 U.S. 244, 273, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994) ("Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute . . . affects the propriety of prospective relief, application of the new provision is not retroactive."); Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1149 (10th Cir. 1999) (applying Landgraf), cert. denied sub nom. Palaganas-Suarez v. Greene, 529 U.S. 1041, 146 L. Ed. 2d 352, 120 S. Ct. 1539 (2000); see also Jones v. Hess, 681 F.2d 688, 695 n.9 (10th Cir. 1982) ("Generally an appellate court must apply the law in effect at the time it renders its decision where a change in law occurs while a case is on direct appeal, although there may **[**13]** well be an exception to this rule to prevent manifest injustice." (citations omitted)); McMahan v. Hunter, 179 F.2d 661, 663 (10th Cir. 1950) ("Where a rule of law was changed after the decision in the trial court but before the decision in the Appellate Court, the decision in the Appellate Court must be according to the new law."); 13A Charles Alan Wright et al., Federal Practice & Procedure, Jurisdiction 2d § 3533.6 (1984) ("Ordinarily, courts . . . apply[] the law in force at the time of decision, unless a good reason appears for ignoring the change."); cf. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 836-37, 108 L. Ed. 2d 842, 110 S. Ct. 1570 (1990). To ignore intervening changes in the statutory and regulatory framework underlying this litigation would be to shirk our responsibility to strictly scrutinize the real-world legal regime against which **Adarand** seeks prospective relief. The changes in the law are squarely before us today, and we discern no reason to leave their scrutiny to future litigation, in effect prolonging the instant litigation and fostering "both a wasteful expenditure of resources by courts and litigating **[**14]** parties and the gradual undermining of public confidence in the judiciary--in short, Dickens's Jarndyce v. Jarndyce syndrome." McIlravy v. Kerr-McGee Coal Corp., 204 F.3d 1031, 1035 (10th Cir. 2000).

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n2 We have therefore requested and received supplementary briefing from the parties on intervening changes in the statutory and regulatory scheme at issue in the instant action.

n3 Although **Adarand** also seeks "such other and further relief as to the Court seems just and equitable," this highly general language does not constitute a prayer for retrospective relief under the circumstances of this case. (Appellants' App. at 10.) Moreover, on appeal **Adarand** seeks to uphold the district court's grant of summary judgment and declaratory and injunctive relief and has not filed a cross-appeal seeking damages or another form of

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retrospective relief.

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[*1159] However, considering that we are reviewing a decision of the district court below that relied on older versions of the statutes, regulations, and SCC, **[**15]** and because we are mindful that future statutory and regulatory changes may cause the government to "engage in (or resume) [the] harmful conduct" in question earlier in this litigation so as to militate against a finding of mootness, **Adarand** VI, 120 S. Ct. at 726 (quoting Friends of the Earth, 120 S. Ct. at 699), we consider the statutory and regulatory framework in its prior stages as well. n4 See also Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 662, 124 L. Ed. 2d 586, 113 S. Ct. 2297 (1993) ("[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." (quoting City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289, 71 L. Ed. 2d 152, 102 S. Ct. 1070 (1982))). It is not fanciful to suggest that the government may retreat to prior practice, but if the government did so, this opinion expressly holds that such an action would be unconstitutional for the reasons discussed below.

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n4 Thus, we refuse the government's invitation to ignore the SCC program by virtue of its citation to a March 29, 2000 memorandum from the Manager of the Federal Lands Program indicating that the SCC is no longer in use in federal highway construction procurement contracts. We likewise reject the government's argument, relying on Lawrence v. Chater, 516 U.S. 163, 165-66, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996), that we must remand this case to the district court for consideration of intervening statutory and regulatory changes. The government's reliance on Lawrence is misplaced: That case involved the Supreme Court's exercise of its power to "grant certiorari, vacate the judgment below, and remand the case" to a "lower federal court" in light of intervening regulatory changes, and not the power of a lower federal court to decide a case on remand from the Supreme Court. Id. (emphasis added). In the present case, the parties have briefed intervening changes in the law, there are no disputed factual issues, and we see no reason to delay this already protracted litigation by remanding to the district court, especially considering the district court's statement that it would be "difficult to envisage a race-based classification" that would ever be narrowly tailored, thereby effectively pronouncing strict scrutiny fatal in fact, **Adarand** IV 965 F. Supp. at 1580, a view which we reject in the discussion that follows.

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B. The Scope of the SCC Program Under Scrutiny

We next clarify the scope of the SCC program under review. In that regard, we are bound by the Supreme Court's ruling on **Adarand's** standing in **Adarand** III as law of the case. Based on its conclusion that "CFLHD is likely to let contracts involving guardrail work that contain an [SCC] at least once per year in Colorado, that **Adarand** is very likely to bid on each such contract, and that **Adarand** often must compete for such contracts against small disadvantaged businesses," the Court held **Adarand** has standing to challenge "the race-based rebuttable presumption used in some certifications under the Subcontracting Compensation Clause." **Adarand** III, 515 U.S. at 212-13 (citation omitted).

We recognize, however, that there are programs that the Supreme Court did not hold **Adarand** has standing to challenge. First is the § 8(a) program, discussed below. See 15 U.S.C. § 637(a). Subsection 8(a) does not involve the use of SCCs, nor has **Adarand** made any showing that it has been injured by non-inclusion in the § 8(a) program. Second, we specifically held in **Adarand** II that **Adarand** has **[**17]** not shown standing to challenge "the provisions of the SCC program pertaining to women-owned business enterprises (WBE)."

REV_00259038

Source: All Sources : Federal Legal - U.S. : District Court Cases - By Circuit : **US District Court Cases - 6th Circuit**
Terms: **bakke and hopwood** (Edit Search)

*122 F. Supp. 2d 811, *; 2000 U.S. Dist. LEXIS 18099, **

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated, Plaintiffs, v. LEE BOLLINGER, JAMES J. DUDERSTADT, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, Defendants, and EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS, KATRINA GIPSON, CANDICE B.N. REYNOLDS, by and through their parents or guardians, DENISE PATTERSON, MOISE MARTINEZ, LARRY CRENSHAW, HARRY J. WILLIAMS, PATRICIA SWAN-BROWN, KAREN A. MCDONALD, LINDA A. HARRIS, DEANNA A. SMITH, ALICE BRENNAN, IVY RENE CHARMICHAEL, SARAH L. DUBOSE, INGER DAVIS, BARBARA DAWSON, ROY D. HARLIN, WYATT G. HARRIS, GEORGE C. GIPSON, SHAWN R. REYNOLDS, AND CITIZENS FOR AFFIRMATIVE ACTION'S PRESERVATION, Defendant-Intervenors.

CASE NO.: 97-CV-75231-DT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

122 F. Supp. 2d 811; 2000 U.S. Dist. LEXIS 18099

December 13, 2000, Decided

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiffs brought class action for violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d, and U.S. Const. amend. XI, by considering race as a factor in admissions decisions. Defendants cross-moved for summary judgment with respect to the liability phase only. Defendants sued in their individual capacities under 42 U.S.C.S. § 1983, moved for summary judgment on grounds of qualified immunity.

OVERVIEW: Plaintiffs, Caucasian applicants denied admission, brought suit alleging that defendant university's admissions policies favoring minorities violated equal protection rights. The court agreed with defendants that a racially and ethnically diverse student body produced significant educational benefits such that diversity, in the context of higher education, constituted a compelling governmental interest under strict scrutiny. Defendants' current admissions program was a permissible use of race because it did not utilize rigid quotas or seek to admit a predetermined number of minority students. The court was satisfied that the admissions program, under which certain minority applicants received a plus on account of their race but were not insulated from all competition with other applicants, was constitutional. However the prior system used represented an impermissible use of race because the system operated as the functional equivalent of a quota. Because it was not unreasonable for an official in the position of defendants sued in their individual capacity to conclude that the admissions policies were constitutional, they had qualified immunity.

OUTCOME: Plaintiffs' motion for summary judgment was granted with respect to the admissions programs in existence from 1995 through 1998, and the admissions programs for such years were declared unconstitutional, but denied as to the programs for 1999 and 2000. Plaintiffs' request for injunctive relief was denied. The individual defendants' motion was granted on grounds of qualified immunity.

REV_00259077

'reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,' (ii) countering the effects of societal discrimination, (iii) increasing **[**16]** the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body." *Id.* 438 U.S. at 306, 98 S. Ct. at 2756-57.

The Supreme Court of California sustained the applicant's challenge, holding that the university's admission program violated the California Constitution, Title VI, and the Equal Protection Clause of the Fourteenth Amendment. On appeal, the United States Supreme Court, through a majority formed by Justices Powell, Stevens, Burger, Stewart and Rehnquist, affirmed the California Supreme Court's finding that the university's special admissions system was invalid, as was its order directing the university to admit the respondent to the Medical School. The Supreme Court also, through a different majority formed by Justices Powell, Brennan, White, Marshall, and Blackmun, reversed the California Supreme Court's order enjoining the university from ever considering race in making admissions decisions. An examination of the separate opinions in ***Bakke***, however, clearly illustrates that there were no clear grounds upon which a **[*818]** majority of the Court agreed in reaching **[**17]** their respective decisions.

Justice Powell's Opinion

Justice Powell, writing solely for himself, supplied the pivotal vote in both affirming the California Supreme Court's finding that the university's admission program was unlawful, and reversing the California Supreme Court's order "enjoining [the university] from according any consideration to race in its admission process." *Id.* 438 U.S. at 272, 98 S. Ct. at 2738.

Applying strict scrutiny, Justice Powell found that to the extent that the university's purpose was to "assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected, not as insubstantial, but as facially invalid." *Id.* 438 U.S. at 307, 98 S. Ct. at 2757. Justice Powell also rejected the university's proferred interests in countering the effects of societal discrimination and improving the delivery of healthcare to disadvantaged communities. *Id.* 438 U.S. at 307-10, 98 S. Ct. at 2757-59.

However, Justice Powell found that the university's fourth goal, "the attainment of a diverse student body," was "clearly" a "constitutionally permissible **[**18]** goal for an institution of higher education." *Id.* 438 U.S. at 311-12, 98 S. Ct. at 2759. Relying upon the "four essential freedoms" that constitute "academic freedom," *i.e.* "'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study,'" Justice Powell concluded that "the freedom of a university to make its own judgments as to education includes the selection of its student body." *Id.* at 312, 98 S. Ct. at 2759 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 77 S. Ct. 1203, 1218, 1 L. Ed. 2d 1311 (1957) (Frankfurter, J., concurring)). According to Justice Powell, "the atmosphere of 'speculation, experiment and creation'--so essential to the quality of higher education--is widely believed to be promoted by a diverse student body." *Id.* at 312, 98 S. Ct. at 2760. Furthermore, "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 313, 98 S. Ct. at 2760.

According to Justice Powell, a university's "interest in diversity is compelling **[**19]** in the context of a university's admissions program," in which "ethnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogenous student body." *Id.* at 314, 98 S. Ct. at 2760-61.

Justice Brennan's Opinion

Applying intermediate scrutiny, Justice Brennan, joined by Justices White, Marshall, and

Blackmun, found that the university's articulated purpose of remedying the effects of past societal discrimination was "sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities." n6 *Id.* at 362, 98 S. Ct. at 2784.

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n6 As noted *supra*, the Supreme Court has since clarified that all racial classifications are subject to strict scrutiny review. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

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Justice Stevens's Opinion

Based upon the fact that ***Bakke*** was not a class action, but rather a "controversy between two specific litigants," Justice Stevens, joined by Chief Justice Burger, Justice Stewart, and Justice Rehnquist, viewed "the question of whether race can ever be used as a factor in an admissions decision" as an issue not before the Court. *Id.* at 408 & 411, 98 S. Ct. at 2808 & 2809. Justice Stevens also declined to address the issue on constitutional grounds, relying solely upon Title VI's prohibition instead, which Justice Stevens viewed as "crystal clear: Race cannot be the basis of excluding **[*819]** anyone from participation in a federally funded program." *Id.* at 418, 98 S. Ct. at 2813.

2. Diversity as a Matter of Law

In support of their motion for summary judgment, the University Defendants contend that under Justice Powell's reasoning in ***Bakke***, the University has, as a matter of law, a compelling governmental interest in the educational benefits that flow from a racially and ethnically diverse student body. n7 According to the University Defendants, Justice Powell's opinion in ***Bakke*** stands as the narrowest grounds offered in support of **[**21]** the judgment in that case and is therefore also binding precedent on this Court.

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n7 Defendant-Intervenors join in the University Defendants' assertion that racial diversity is a compelling governmental interest in the context of higher education. (Def.-Intervenors' 8/11/00 Resp. to Defs.' Mot. at 3-5).

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"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15, 96 S. Ct. 2909, 2923 n.15, 49 L. Ed. 2d 859 (1976)). As explained by the Sixth Circuit, "where a Justice or Justices concurring in the judgment in such a case articulates a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that **[**22]** case would agree, that standard is the law of the land." *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994).

It is clear that a majority of the Justices in ***Bakke*** expressly agreed that the California Supreme Court erred in enjoining the university from ever considering race in its admissions programs. Therefore, to the extent that the University Defendants assert ***Bakke***'s holding to be that "'a properly devised admissions program involving the competitive consideration of

race and ethnic origin'" is constitutional, this Court agrees. *See* ***Bakke***, 438 U.S. at 320, 98 S. Ct. at 2763; *see also Minnick v. California Dep't of Corr.*, 452 U.S. 105, 115 & n.17, 101 S. Ct. 2211, 2217 & n.17, 68 L. Ed. 2d 706 (1981) (recognizing that the opinions of Justices Brennan, White, Marshall, Blackmun, and Powell "unequivocally stated that race may be used as a factor in the admissions process in some circumstances"); *Oliver v. Kalamazoo Bd. of Educ.*, 706 F.2d 757, 763 (6th Cir. 1983) (citing ***Bakke*** for proposition that "affirmative action admission programs of educational institutions may take race into **[**23]** account"). What is less clear, however, is whether five Justices implicitly agreed that diversity can be a compelling interest in the context of higher education, *i.e.*, whether universities have a compelling interest in the educational benefits that flow from a racially and ethnically diverse student body.

It is clear that no five Justices in ***Bakke*** expressly held that diversity was a compelling interest under the Equal Protection Clause. The most that can be garnered from ***Bakke's*** splintered decision is that five Justices reached the same conclusion, *i.e.* that universities may take race into account in admissions when done so properly, for separate, unrelated reasons.

The University Defendants, relying upon *Smith v. University of Washington*, 2000 U.S. App. LEXIS 31160, Nos. 99-35209, 99-35347, 99-35348, 2000 WL 1770045 (9th Cir. Dec. 4, 2000), contend that Justice Powell's opinion is the "narrowest opinion" of the Court and therefore, diversity is a compelling governmental interest as a matter of law. n8

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n8 In their briefs, the University Defendants rely on the district court's opinion in *Smith*, No. C97-3352 (W.D. Wash. Feb. 12, 1999). On December 4, 2000, however, the Ninth Circuit affirmed the district court's decision.

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While this Court does not necessarily agree with the Ninth Circuit's conclusion that Justice Powell's "analysis is the narrowest footing upon which a race-conscious decision making process could stand," *Smith*, 2000 U.S. App. LEXIS 31160, at *31, 2000 WL 1770045 at *10, this Court reaches the same ultimate conclusion as the Ninth Circuit, *i.e.*, that under ***Bakke***, diversity constitutes a compelling governmental interest in the context of higher education justifying the use of race as one factor in the admissions process, albeit through somewhat different reasoning. n9

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n9 Recognizing that neither the Supreme Court nor the Sixth Circuit have definitively held that diversity can never be a compelling interest under strict scrutiny, this Court is satisfied that the University's argument remains viable.

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Plaintiffs, relying on the Fifth Circuit's decision in ***Hopwood*** *v. State of Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033, 116 S. Ct. 2581, 135 L. Ed. 2d 1095 (1996), and more **[**25]** recently, the United States District Court for the Southern District of Georgia's decision in *Johnson v. Board of Regents of University System of Georgia*, 106 F. Supp. 2d 1362, 1375 (S.D. Ga. 2000), contend that, as a matter of law, "diversity" and "academic freedom" are not compelling governmental interests that can ever justify the use of race in the admission process. This Court disagrees.

In ***Hopwood***, two of the three judges on the Fifth Circuit panel held "that any consideration of race or ethnicity. . . for the purpose of achieving a diverse student body is not a compelling

interest under the Fourteenth Amendment." ***Hopwood***, 78 F.3d at 944. The Fifth Circuit reasoned that by explicitly agreeing with a portion of Justice Powell's opinion, but remaining silent in regard to Justice Powell's diversity rationale, the Justices who joined Justice Brennan's opinion in ***Bakke*** "implicitly rejected" Justice Powell's position regarding diversity. *Id.* This Court, however, believes that the panel in ***Hopwood*** reads too much into the other Justices' silence regarding Justice Powell's diversity rationale. It is just as likely that the other Justices **[**26]** felt no need to address the issue of diversity based upon their finding that under intermediate scrutiny, the program at issue was justified as a means to remedy past discrimination.

For example, Justice Brennan's silence regarding diversity could just as easily be interpreted as "implicit approval" that, in an appropriate case, diversity may constitute a compelling governmental interest. In fact, in *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 568, 110 S. Ct. 2997, 3010, 111 L. Ed. 2d 445 (1990), *rev'd on other grounds, Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995), Justice Brennan specifically described the Supreme Court's decision in ***Bakke*** as recognizing that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated." In this Court's opinion, Justice Brennan's statement in *Metro Broadcasting* further supports a conclusion that his silence regarding the diversity interest in ***Bakke*** was not an implicit rejection of such an interest, but rather, an implicit approval **[**27]** of such an interest. As the Ninth Circuit recognized in *Smith*:

> True it is that Justice Brennan did not specifically say that "race" could be used to achieve student body diversity in the absence of any societal discrimination, but, then, there was no need for him to do so in light of his view about past societal discrimination. Yet, we can hardly doubt that he would have embraced that somewhat narrower principle if need be, for he thought that it was simply an allotrope of the principle he was propounding.

Smith, 2000 U.S. App. LEXIS 31160, at *32, 2000 WL 1770045 at *10.

Although this Court agrees that since ***Bakke***, no Supreme Court decision has explicitly accepted the diversity rationale under strict scrutiny, this Court does not **[*821]** agree that under recent Supreme Court precedent, the diversity interest can never constitute a compelling state interest, especially in the context of higher education. In fact, none of the cases relied upon by the Fifth Circuit involved the issue of whether the educational benefits that flow from a racially and ethnically diverse student body can ever constitute a compelling governmental interest in the context of higher education, most likely because **[**28]** the Supreme Court has not been faced with this precise issue since ***Bakke.*** *See* ***Hopwood***, 78 F.3d at 944-45; *Johnson*, 106 F. Supp. 2d at 1367-70.

In ***Hopwood***, the Fifth Circuit relied upon the Supreme Court's decision in *City of Richmond v. J.A. Croson*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989), in reaching its conclusion that diversity can never justify the use of racial classifications. *Croson*, however, involved a minority set-aside program in the context of government construction contracts. This Court agrees with Judge Wiener's concurring opinion in ***Hopwood*** that the public graduate or professional school context is distinguishable from the employment, minority business set-aside, and re-districting contexts in that, unlike the other cited contexts, the higher education context implicates "the uneasy marriage of the First and Fourteenth Amendments." n10 ***Hopwood***, 78 F.3d at 965 n.21 (Wiener, J., concurring).

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n10 As the First Circuit recognized in

> *Wessmann v. Gittens*, 160 F.3d 790, 795-96 (1st Cir. 1998):
> In the education context, ***Hopwood*** is the only appellate court to have rejected diversity as a compelling interest, and it did so only in the face of vigorous dissent from a substantial minority of the active judges in the Fifth Circuit. *See* ***Hopwood*** *v. State of Texas*, 84 F.3d 720, 721 (5th Cir. 1996) (Politz, C.J., with whom King, Wiener, Benavides, Stewart, Parker, and Dennis, JJ., joined, dissenting from denial of rehearing en banc). The question that divided the Fifth Circuit centered on the precedential value of Justice Powell's controlling opinion in ***Bakke***. The panel in ***Hopwood*** pronounced that opinion dead. The dissenting judges countered that the reports of ***Bakke's*** demise were premature.

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As Justice Powell recognized in ***Bakke***, "academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." ***Bakke***, 438 U.S. at 312, 98 S. Ct. at 2759. This "freedom" has always been viewed as including "the freedom of the university to make its own judgments as to education," including "the selection of its student body." *Id.* (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 77 S. Ct. 1203, 1218, 1 L. Ed. 2d 1311 (1957) (Frankfurter, J., concurring); *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S. Ct. 675, 683, 17 L. Ed. 2d 629 (1967)).

Moreover, that section of Justice O'Connor's opinion in *Croson* that is most often cited for the proposition that race-based classifications must be "strictly reserved for remedial settings" did not enjoy a majority of the Court. *Croson*, 488 U.S. at 493, 109 S. Ct. at 722. In his concurring opinion, Justice Stevens specifically disagreed with the premise that seemed to underlie Justice O'Connor's opinion, *i.e.*, "that a governmental decision that rests on a racial classification is **[**30]** never permissible except as a remedy for a past wrong." *Id.* at 511, 109 S. Ct. at 731. In Justice Stevens's opinion, Justice O'Connor's approach "overlooked the potential value of race-based determinations that may serve other valid purposes." *Id.* at 511 n.1, 109 S. Ct. at 731 n.1.

In short, this Court is not convinced that recent Supreme Court precedent has established, as a matter of law, that the consideration of race in an attempt to attain the educational benefits that flow from a racially and ethnically diverse student body in the context of higher education can never constitute a compelling interest under strict scrutiny. To that end, this Court agrees with Judge Wiener's concurring opinion in ***Hopwood*** that applicable Supreme Court precedent has never held **[*822]** "squarely and unequivocally either that remedying the effects of past discrimination is the only compelling state interest that can ever justify racial classification, or conversely that achieving diversity in the student body of a public graduate or professional school can never be a compelling governmental interest." ***Hopwood***, 78 F.3d at 964 (Wiener, J., concurring); **[**31]** *see also Smith*, 2000 U.S. App. LEXIS 31160, at *34, 2000 WL 1770045 at *11 ("For now, therefore, it ineluctably follows that the Fourteenth Amendment permits University admissions programs which consider race for other than remedial purposes, and educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures."); *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 130 (4th Cir. 1999) (noting that issue of whether diversity constitutes a compelling interest remains unresolved); *Boston's Children First v. City of Boston*, 62 F. Supp. 2d 247, 258 (D. Mass. 1999) (rejecting plaintiff's contention on motion for preliminary injunction that diversity can never be compelling governmental interest); *Hunter v. Regents of Univ. of Cal.*, 971 F. Supp. 1316, 1324-27 (C.D. Cal. 1997) (rejecting plaintiff's contention that remedying past discrimination is only compelling state interest). Accordingly, this Court is satisfied that, if presented with

sufficient evidence regarding the educational benefits that flow from a diverse student body, there is nothing barring the Court from determining that such **[**32]** benefits are compelling under strict scrutiny analysis.

The University Defendants have presented this Court with solid evidence regarding the educational benefits that flow from a racially and ethnically diverse student body. According to Patricia Y. Gurin, Professor of Psychology at the University of Michigan and Interim Dean of the LSA, "students learn better in a diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic society once they leave such a setting." (Gurin Rep. at 3; *see also* U.S. Br. at 20-24; Association of American Law Schools ("ALS") n11 Br. at 6-10). Diversity in higher education also serves to break "patterns of racial segregation and separation historically rooted in our national life." (*Id.*).

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n11 The Association of American Laws Schools, National Association of State Universities and Land Grant Colleges, Committee on Institutional Cooperation (an academic consortium including Indiana University, Michigan State University, Northwestern University, The Ohio State University, Pennsylvania State University, Purdue University, the University of Chicago, the University of Illinois, the University of Iowa, the University of Michigan, the University of Minnesota, and the University of Wisconsin-Madison), and Wayne State University have joined in one amicus brief in support of the University, together representing over 360 institutional members of the professional higher education community.

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Gurin reports that "multi-institutional national data, the results of an extensive survey of students at the University of Michigan, and data drawn from a specific classroom program at the University of Michigan" show that "students who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills." (*Id.* at 5). Such students were also "better able to understand and consider multiple perspectives, deal with the conflicts that different perspectives sometimes create, and appreciate the common values and integrative forces that harness differences in pursuit of common ground." (*Id.* at 5-6; *see also* ALS Br. at 11-13; American Council on Education ("ACE") n12 Br. at 9-11).

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n12 The American Council on Education is joined by twenty-four other associations, councils, and other groups representing the higher education community throughout the United States.

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Members of heterogeneous working groups also offer more creative solutions to problems than do homogeneous groups, and show a greater potential for critical thinking because heterogeneity "eliminates a problem termed 'group think,' an organizational situation in which group members mindlessly conform." (*Id.* at 17) (internal citation omitted). Students who had experienced the most diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills. (*Id.* at 35-36 & Tables C1, C2, M1, M2, I1). Gurin also concludes that on average, students who attend more diverse institutions exhibit a greater "intellectual engagement and motivation index" and a greater "citizenship engagement index." (*Id.*, Figs. 3 & 4).

A number of amici have filed briefs concurring with the University that diversity results in a

richer educational experience for students. n13 In support of its position, the United States cites a study by Alexander Astin, Director of the Higher Education Research Institute at the University of California, in which **[**35]** Astin associates diversity with increased satisfaction in most areas of the college experience and an increased commitment to promoting racial understanding and participation in cultural activities, leadership, and citizenship. (U.S. Br. at 20-21; *see also* ALS Br. at 6; ACE Br. at 15).

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n13 Along with the ALS and ACE, the following have filed amicus briefs in support of the University's position: the United States, the State of Ohio, the Michigan Attorney General, General Motors Corporation, Steelcase, Inc., joined by nineteen other global corporations, and the National Association of Social Workers, joined by the Council on Social Work Education, the Association of Baccalaureate Social Work Program Directors, Inc., and the Group for the Advancement of Doctoral Education in Social Work.

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The over 360 institutions represented by the Association of American Law Schools assert that they have learned through their extensive experience in the educational realm that the quality of education for all students is greatly **[**36]** enhanced when student bodies include persons of diverse backgrounds, interests, and experiences, including racial and ethnic makeups. (ALS Br. at v). According to these institutions, a decision adverse to the University Defendants would significantly undermine their ability to provide the highest quality of academic experience and to prepare their students to effectively contribute to society after graduation. (*Id.* at vi).

Plaintiffs have presented no argument or evidence rebutting the University Defendants' assertion that a racially and ethnically diverse student body gives rise to educational benefits for both minority and non-minority students. In fact, during oral argument, counsel for Plaintiffs indicated his willingness to assume, for purposes of these motions, that diversity in institutions of higher education is "good, important, and valuable." Counsel for Plaintiffs, however, contends that "good, important, and valuable" is not enough, and that the diversity rationale is too amorphous and ill-defined, and "too limitless, timeless, and scopeless," to rise to the level of a compelling interest. According to counsel for Plaintiffs, the University's diversity rationale has **[**37]** "no logical stopping point" but rather is a "permanent regime" in direct conflict with the strict scrutiny standard.

This Court, however, is not convinced that what may be too amorphous and ill-defined in other contexts, *i.e.* the construction industry context, is also necessarily too amorphous or ill-defined in the context of higher education. In this Court's opinion, the fact that the University cannot articulate a set number or percentage of minority students that would constitute the requisite level of diversity does not, by itself, eliminate diversity as a potentially compelling interest.

Furthermore, unlike the remedial setting, diversity in higher education, by its **[*824]** very nature, is a permanent and ongoing interest. As previously noted, diversity is not a "remedy." Therefore, unlike the remedial setting, where the need for remedial action terminates once the effects of past discrimination have been eradicated, the need for diversity lives on perpetually. This does not mean, however, that Universities are unrestrained in their use of race in the admissions process, as any use of race must be narrowly tailored. Hopefully, there may come a day when universities are able to achieve **[**38]** the desired diversity without resort to racial preferences. Such an occurrence, however, would have no affect on the compelling nature of the diversity interest. Rather, such an occurrence would affect only the issue of whether a university's race-conscious admissions program remained narrowly tailored. In this Court's opinion, the permanency of such an interest does not remove it from the realm of "compelling interests," but rather, only emphasizes the importance of ensuring

that any race-conscious admissions policy that is justified as a means to achieve diversity is narrowly tailored to such interest.

The only argument rebutting the University Defendants' assertions regarding the educational benefits of a diverse student body comes from the National Association of Scholars ("NAS"), which has filed a brief as amicus curiae in support of Plaintiffs. Contrary to the amici in support of the University Defendants, the NAS contends that "*intellectual* diversity bears no obvious or necessary relationship to *racial* diversity." (NAS Br. at 3). NAS specifically takes issue with the studies relied upon by the ALS, contending that such studies really report that "outcomes are generally **[**39]** not affected" by racial diversity on campus. (*Id.* at 6-7).

NAS also asserts that none of the variables Gurin uses in her studies as proxies for racial diversity on college campuses actually requires the presence of other-race students on campus. (*Id.* at 8). For example, NAS asserts that Gurin relies on a student's attendance at an ethnic studies course coupled with either participation in a racial/cultural awareness workshop or a discussion regarding racial issues. (*Id.*). As NAS points out, neither of these necessarily requires the presence of other-race students.

NAS also attacks Gurin's study as providing no indication of the number of minority students that are needed to achieve the effects reported. (*Id.* at 9). According to NAS, "it is possible that the positive outcomes that Gurin catalogues do not require any more racial diversity than that which would occur without racial preferences." (*Id.*). This argument, however, does not go to the core issue of whether the educational benefits that flow from a diverse student body constitute a compelling governmental interest, but rather, whether the means employed to achieve that interest are narrowly tailored.

This **[**40]** Court is persuaded, based upon the record before it, that a racially and ethnically diverse student body produces significant educational benefits such that diversity, in the context of higher education, constitutes a compelling governmental interest under strict scrutiny.

3. Narrowly Tailored Analysis

Having determined that the educational benefits flowing from a racially and ethnically diverse student body are a sufficiently compelling interest to survive strict scrutiny, the Court must now determine whether the LSA's admissions policies for the years at issue (1995-present) were narrowly tailored to achieving that interest.

Although Justice Powell found diversity to be a compelling interest in the context of a university's admissions program, Justice Powell ultimately found that the particular admissions program at issue in ***Bakke*** was not a narrowly tailored means of achieving such interest and accordingly, the program was nonetheless unconstitutional. According to Justice Powell, the **[*825]** fatal flaw in the University of California's program was that:

> It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage **[**41]** of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.

Bakke, 438 U.S. at 318, 98 S. Ct. at 2763. However, "in enjoining [the university] from ever considering the race of any applicant," the California Supreme Court had "failed to recognize

that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* For that reason, Justice Powell concluded that so much of the California court's judgment that enjoined the university from any consideration of an applicant's race had to be reversed. n14

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n14 In contrast, Justice Brennan found that there was "no sensible, and certainly no constitutional, distinction between, for example, adding a set number of points to the admissions rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants." ***Bakke***, 438 U.S. at 378, 98 S. Ct. at 2793.

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In contrast to the University of California's special admissions system, Justice Powell cited Harvard's admissions program as an example of how race could properly be taken into account in an effort to achieve diversity. *Id.* 438 U.S. at 316, 98 S. Ct. at 2762. As Justice Powell described Harvard's admissions program:

> In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way **[**43]** is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

Id. 438 U.S. at 317-18, 98 S. Ct. at 2762.

According to Justice Powell, such a program was appropriate because it "treated each applicant as an individual in the admissions process." *Id.* 438 U.S. at 318, 98 S. Ct. at 2762. "The applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant." *Id.* An applicant whose qualifications had been weighed "fairly and competitively" had no basis to complain of **[*826]** unequal treatment under the **[**44]** Fourteenth Amendment. *Id.*

Although the Harvard plan spoken of approvingly by Justice Powell did not set target-quotas for the number of minorities to be admitted in a given year, the plan clearly used race as a

factor in admissions. *Id.* 438 U.S. at 316, 98 S. Ct. at 2761-62. Therefore, to the extent that Plaintiffs contend that race can never be used as a factor during admissions decisions, their argument must be rejected.

It is also clear that under the Harvard plan, "race may tip the balance in [an applicant's] favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases." *Id.* 438 U.S. at 316, 98 S. Ct. at 2761. Therefore, in some cases, an applicant may constitutionally be granted admission over another applicant solely on account of his race.

Furthermore, a university may "pay[] some attention to distribution among many types and categories of students," as more than a "token number of blacks" is necessary to fully achieve the educational benefits that flow from a racially and ethnically diverse student body. *Id.* 438 U.S. at 316-17, 98 S. Ct. at 2762. As Harvard explained in regard to its admission program:

> In Harvard College admissions **[**45]** the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that if Harvard College is to provide a truly heterogeneous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States.

Id. 438 U.S. at 323, 98 S. Ct. at 2765.

As is clear from Justice Powell's opinion in ***Bakke***, a university's interest in achieving the educational benefits that flow from a diverse student body does not justify an admissions program designed to admit a predetermined number or proportion of minority students. Instead, a university must carefully design its system to fall between these two competing ends of the spectrum, *i.e.*, between a system that completely fails to achieve a meaningful degree **[**46]** of diversity, under which the benefits associated with a diverse student body will never be realized, and a rigid quota system, which is clearly unconstitutional under Justice Powell's opinion in ***Bakke***.

In striving to achieve such a system, "race or ethnic background may be deemed a 'plus' in a particular applicant's file," as long as this plus "does not insulate the individual from comparison with all other candidates for the available seats." *Id.* 438 U.S. at 317, 98 S. Ct. at 2762. As Justice Powell explained with reference to the Harvard plan, an admissions program that takes race into consideration must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Id.* 438 U.S. at 317, 98 S. Ct. at 2761. It is exactly because race need not necessarily be accorded the same weight as other objective factors that, in some instances, "race may tip the balance in an applicant's favor." *Id.* 438 U.S. at 316, 98 S. Ct. at 2761.

The instant action involves the LSA's admissions programs from 1995 through the present. In **[**47]** 1995 and 1996, admission decisions were based primarily on a set of guideline tables referred to as grids, with GPA 2 ranges represented on the vertical axis, and ACT/SAT scores represented on the horizontal axis. n15 In 1995, four grids **[*827]** were used: (1) in-state non-minority applicants, (2) out-of-state non-minority applicants, (3) in-state minority applicants, and (4) out-of-state minority applicants. In 1996 only two grids were

CORE TERMS: diversity, student body, diverse, educational, summary judgment, seat, under-represented, higher education, compelling interest, qualified immunity, immunity, grid, non-minority, Eleventh Amendment, compelling governmental interest, strict scrutiny, ethnically, racially, pool, counselor, score, narrowly tailored, Fourteenth Amendment, ethnic, joined, classification, abrogated, achieving, matter of law, candidate

CORE CONCEPTS - ♦ Hide Concepts

Civil Procedure : Summary Judgment : Summary Judgment Standard

Summary judgment is proper only if there is no genuine issue as to any material fact, thereby entitling the moving party to judgment as a matter of law. Fed. R. Civ. P. 56 (c). There is no genuine issue of material fact for trial unless, by viewing the evidence in a light most favorable to the nonmoving party, a reasonable jury could return a verdict for that party.

Civil Procedure : Summary Judgment : Burdens of Production & Proof

On a motion for summary judgment, the moving party bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record that establish the absence of a material issue of fact.

Civil Procedure : Summary Judgment : Burdens of Production & Proof

Once the moving party on a summary judgment motion has met its burden, the nonmoving party must go beyond the pleadings and come forward with specific facts to show that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The nonmoving party must do more than show that there is some metaphysical doubt as to the material facts. The nonmoving party must present significant probative evidence in support of its opposition to the motion for summary judgment. If, after adequate time for discovery, the party bearing the burden of proof fails to make a showing sufficient to establish an essential element of his claim, summary judgment is appropriate.

Constitutional Law : Substantive Due Process : Equal Protection : Scope of Protection

See U.S. Const. amend. XIV § 1.

Constitutional Law : Substantive Due Process : Equal Protection : Race

The "central mandate" of U.S. Const. amend. XIV is racial neutrality in governmental decisionmaking. The basic principle is straightforward: racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. Accordingly, the United States Supreme Court has explicitly clarified that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

Governments : Courts : Judicial Precedents

When a fragmented United States Supreme Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds. As explained by the United States Court of Appeals for the Sixth Circuit, where a Justice or Justices concurring in the judgment in such a case articulates a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree, that standard is the law of the land.

Constitutional Law : Substantive Due Process : Equal Protection : Race

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used- (1) in-state and legacy applicants and (2) out-of-state applicants - with non-minority applicant action codes listed in the top row of the grid's cells, and minority action codes listed in the bottom row. In 1997, the same grids as in 1996 were used. However, in 1997, the LSA also added .5 to under-represented minority applicants' GPA 2 scores.

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n15 An applicant's GPA 2 was calculated by adjusting the applicant's high school GPA based upon several factors, including the quality of the applicant's high school, the strength of the applicant's high school curriculum, any unusual circumstances, the applicant's geographical residence, and the applicant's alumni relations, if any.

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From 1998 through the present, the LSA has used a 150 point system, under which admission decisions were generally determined by the applicant's rank on the 150 point scale. Under-represented minority applicants automatically receive 20 points based upon their membership in one of the identified under-represented minority categories. In 1999 and 2000, the LSA also added a system whereby certain applicants, including under-represented minority applicants, could be "flagged," thereby keeping such applicants in the review pool for further consideration.

Beyond the fact that rigid quotas are impermissible, Justice Powell's opinion in ***Bakke*** fails to set forth any bright line regarding what constitutes a permissible consideration of race in admissions decisions. Furthermore, in situations such as this, it is often a thin line that divides the permissible from the impermissible. Applying the principles set forth by Justice Powell in ***Bakke***, this Court is satisfied that when examined in its entirety, the LSA's current admissions program (1999-present) represents a permissible use of race. At the same time, however, the Court is satisfied that although the LSA views its current system **[**49]** as "changing only the mechanics, not the substance" of its prior systems, its prior systems, when examined in their entirety, cross that thin line from the permissible to the impermissible. n16

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n16 It is understandable that the LSA does not contend that there is any "substantive" difference between its current and prior admissions programs. To acknowledge a substantive difference in such programs would give some support to Plaintiffs' claims that the admissions programs in effect from 1995 through 1998 were not "narrowly tailored." Furthermore, the University Defendants' contention that "only the current system can form the basis for [injunctive relief]," and their arguments in support of this contention, (Defs.' 8/11/ 00 Br. at 92), suggest that there are some significant differences between the LSA's current admissions programs and those used from 1995 through 1998.

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A. The LSA's Current System (1999-Present)

Foremost in the Court's decision that the LSA's current admissions program is constitutional **[**50]** is the fact that the LSA's current program does not utilize rigid quotas or seek to admit a predetermined number of minority students. Therefore, the LSA's current program does not contain the fatal flaw identified by Justice Powell in ***Bakke***. Instead, race is taken into account in two ways under the LSA's current program. First, admissions counselors may assign each under-represented minority applicant twenty points in calculating their selection index score on account of their race. Second, under the LSA's current program, counselors may "flag" applicants that possess certain qualities or characteristics the LSA deems important to the composition of its freshman class, one of which is "under-represented race,"

thereby keeping an applicant who may not necessarily pass the LSA's initial admit threshold in the review pool for further consideration. n17 Such uses of race, however, **[*828]** operate as nothing more than the "plus" spoken of with approval by Justice Powell in ***Bakke***.

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n17 Other qualities or characteristics include high school class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and geography.

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In response, Plaintiffs contend that the LSA's practice of adding twenty points to under-represented minority applicants' selection index scores really operates as the functional equivalent of a quota. Justice Powell, however, rejected essentially the same argument in ***Bakke*** explaining:

> It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated--but no less effective--means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element--to be weighed fairly against other elements--in the selection process. "A boundary line," as Mr. Justice Frankfurter remarked in another connection, "is none the worse for being narrow." *McLeod v. Dilworth*, 322 U.S. 327, 329, 64 S. Ct. 1023, 1025, 88 L. Ed. 1304 (1944). And a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent **[**52]** of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases. *See e. g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976); *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965).

Id. 438 U.S. at 318-19, 98 S. Ct. at 2762-63.

Minority applicants are not insulated from review by virtue of these twenty points any more than other applicants are insulated from review by virtue of the six points awarded for geographic factors, four points awarded for alumni relationship, three points awarded for an outstanding essay, five points awarded for leadership and service skills, twenty points awarded for socioeconomic status, or twenty points awarded for athletes. In fact, the Court notes that in certain circumstances, these points may be combined for a total of up to forty. The fact that these points may "tip the balance" in favor of a particular applicant, however, does not necessarily lead to a conclusion that such **[**53]** applicants have been insulated from competition in the sense that Justice Powell spoke of in ***Bakke***.

The Court agrees that in certain situations, a pre-existing commitment to a fixed preference may translate into an exact proportion of the favored group being selected. This is most clearly illustrated by programs in which a preference is only available for one factor, for example race. However, under the LSA's admissions program, there are many factors that may entitle an applicant to a preference, thereby making the results of any one factor less predictable.

Plaintiffs also contend that the LSA's program, under which twenty points may be added to

the selection index score of under-represented minority applicants, operates as the same type of "dual" or "two-track" system prohibited by Justice Powell in ***Bakke***. (Pls.' 8/11/ 00 Br. at 15). The "two-track" system Justice Powell spoke of in ***Bakke***, however, was not a two-track system that employed lower thresholds for minority applicants *vis a vis* majority applicants. Such a conclusion is evident from the fact that not once in his narrowly tailored analysis did Justice Powell ever discuss the fact that under **[**54]** the University of California's admissions program, majority students were subject to a 2.5 minimum GPA requirement, whereas there was no minimum GPA requirement for minority students. *See id.* 438 U.S. 274-75, 98 S. Ct. at 2739-40. **[*829]**

Instead, the "two-track" system of which Justice Powell spoke was the university's system under which one group of students, *i.e.* minority students, competed for one set of seats, and another group of students, *i.e.* majority students, competed for another set of seats, thereby in effect creating two separate admissions systems. Justice Powell's statement that the university's interest in genuine diversity would not be served by "expanding [the university's] two-track system into a multitrack program with a prescribed number of seats set aside for each identifiable category of applicants" further confirms that the two-track system Justice Powell spoke of related to the university's practice of setting seats aside for minority applicants, not the university's practice of employing different GPA requirements for minority *vis a vis* majority applicants. *Id.* at 314, 98 S. Ct. 2761.

Furthermore, unlike the University of California, the LSA does not **[**55]** utilize a separate admissions review committee for under-represented minority applications. Instead, admission counselors are assigned to specific geographic areas. Each counselor reviews all applications from his or her territory, under-represented minority and non-minority alike. There is no separate review or assignment of under-represented minority applicants as there was in ***Bakke***. (Spencer Dep. at 273; Gauss Dep. at 31, Vanhecke Dep. at 99).

Moreover, whenever a point-based system such as the LSA's is used in making admissions decisions, any factor that may result in points being added to an applicant's total score will necessarily have the effect of lowering that applicant's admission threshold. For example, any time an applicant receives three points for an outstanding essay, it can just as easily be said that the threshold for admission for that applicant has now been reduced by three points. The same is true for each of the other factors used during the admissions process, *e.g.*, geographic location, alumni relationship, socioeconomic status, etc. Such a result is the natural byproduct of using such a point system.

What Plaintiffs really appear to contest is the fact **[**56]** that race is accorded twenty points, while other factors that may more consistently favor non-minority students are not typically accorded the same weight. However, as Justice Powell recognized in ***Bakke***, universities may accord an applicant's race some weight in the admissions process and, in doing so, universities are not required to accord the same weight to race as they do other factors. ***Bakke***, 438 U.S. at 317-18, 98 S. Ct. at 2762. As long as the admissions program does not work to isolate the applicants from review, it withstands constitutional muster, despite the fact that it may provide individuals with a "plus" on account of their race.

Plaintiffs also attack the LSA's "flagging" system. According to Plaintiffs, the files of under-represented minorities remain "protected" insofar as the LSA's flagging procedure ensures that the files of such students remain in the "review pool" because of their race.

Under the LSA's current admissions system, a counselor may "flag" an applicant if (1) in the counselor's estimation, the applicant is academically prepared for the University, (2) has a selection index score of at least 80 for residents, or 75 for non-residents, **[**57]** and (3) possesses a quality or characteristic the LSA deems important to the composition of its incoming class, including under-represented minority status. Counselors, however, are not required to flag every under-represented minority applicant. Furthermore, applicants other than under-represented minority applicants may also be flagged. For example, other factors a

counselor may consider in flagging applications include whether the applicant was in the top of his class, resided in a preferred county of Michigan, exhibited any "unique life experiences, challenges, circumstances, interests or talents," exhibited a disadvantaged background, had an important connection **[*830]** to the University community, or was a recruited athlete. (Defs.' Exs., Ex. Z at 3-4). Given that any number of applicants, including applicants other than under-represented minority applicants, may be "flagged" under the LSA's current system, the Court rejects Plaintiffs' contention that under-represented minorities remain "protected" by virtue of such system.

Plaintiffs also contend that the University Defendants have failed to sustain their burden of showing that it considered race-neutral alternatives to its current **[**58]** program. For example, according to Plaintiffs, one obvious race-neutral mechanism would be to randomly select all or a portion of the class from the entire pool of 'qualified' applicants, regardless of race. Plaintiffs, however, fail to explain how randomly selecting all or a portion of the class from the entire pool of applicants would produce a sufficiently diverse student body. As discussed *supra*, to achieve the educational benefits associated with a racially and ethnically diverse student body, more than a token number of under-represented minority students is required. Given the small size of the applicant pool, it is highly unlikely that a random selection process would result in a sufficiently diverse student body.

Furthermore, the University Defendants have presented evidence that a race-neutral admission program would substantially reduce the number of under-represented minority students in the LSA's incoming student body. (*See* Raudenbush 2/24/00 Supp. Rep. at 4-5; Raudenbush 3/3/99 Supp. Rep. at 9-11). If race were not taken into account, the probability of acceptance for minority applicants would be cut dramatically, while non-minority students would see only a **[**59]** very small positive effect on their probability of admission, due largely in part to the size of their respective applicant pools. (*See* Raudenbush 3/3/00 Supp. Rep. at 11).

The University Defendants have also presented evidence that a system that relied entirely on test scores would also lead to the rejection of a number of qualified minority applicants. (Bowen Rep. at 10). This is due to the fact that nationally, minorities are very under-represented at the higher level of standardized test scores, and over-represented at the lower level. (*Id.* at 10).

The University Defendants have also presented the expert opinion of William G. Bowen that the race-neutral admissions program currently used by the University of Texas, under which all students who finish in the top ten percent of their high school class are guaranteed admission, and any system based purely on an applicant's income level, would not be as effective in enrolling "an academically well prepared and diverse student body." (Bowen Rep. at 12). According to Bowen, the Texas approach would have the effect of "admitting some students from weaker high schools while turning down better-prepared applicants who happen not **[**60]** to finish in the top tenth of their class in academically stronger schools." (*Id.*). Bowen further hypothesizes that "so long as high schools differ so substantially in the academic abilities of their students and the level of difficulty of their courses, treating all applicants alike if they finished above a given high school class rank provides a spurious form of equality that is likely to damage the academic profile of the overall class of students admitted to selective institutions." (*Id.*).

According to Bowen, income-based strategies are just as ineffective as there "are simply too few blacks and Latinos from poor families who have strong enough academic records to qualify for admission to highly selective institutions." (*Id.* at 13). Bowen also reports that if universities were totally eliminated from considering race during the admissions process, "over half of the black students in selective colleges today would have been rejected." (*Id.*).

Furthermore, the University has attempted to enlarge its pool of under-represented **[*831]** minority applicants through vigorous minority recruitment programs, which have all proved

to be unavailing. For example, the University's efforts **[**61]** have included personal contact with minority students at symposia, attendance at recruiting fairs, direct mailings, campus visits, and offices in Detroit. (Vanhecke Dep. at 11-12; Spencer Dep. at 29, 196-97). Nevertheless, according to the University, its pool of qualified minority applicants for the LSA has remained small, most of whom are also highly recruited by other selective institutions and universities. (Defs.' 7/17/ 00 Br. at 27).

The Court also rejects Plaintiffs' contention that the LSA's current system amounts to nothing more than racial balancing. Unlike the cases relied upon by Plaintiffs, the LSA does not seek to achieve a certain proportion of minority students, let alone a proportion that represents the community. To that end, the Court agrees with the Fourth Circuit in *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 707 (4th Cir. 1999), that an educational institution's goal of achieving the educational benefits associated with a diverse student body "does not require racial balancing." However, the University's interest does require a sufficiently diverse student body and therefore, requires that some attention be given to the composition **[**62]** of the student body. Although fixed racial quotas and racial balancing are not necessary to achieving that goal, the consideration of an applicant's race during the admissions process necessarily is.

In summary, the Court is satisfied that the LSA's current admissions program, under which certain minority applicants receive a "plus" on account of their race but are not insulated from all competition with other applicants, meets the requirements set forth by Justice Powell in ***Bakke*** and is therefore constitutional. Accordingly, the University Defendants' motion for summary judgment shall be granted with respect to the LSA's current admissions program, and Plaintiffs' motion for injunctive relief shall be denied.

B. The LSA's Prior Programs (1995-1998)

Although the Court finds the LSA's current admissions program to be permissible under the principles set forth by Justice Powell in ***Bakke***, the Court is similarly satisfied that the LSA's prior admissions programs, when examined in their entirety, represent an impermissible use of race. One of the most significant factors that transforms the permissible into the impermissible in this case is the LSA's prior practice of "protecting" **[**63]** or "reserving" seats for under-represented minority applicants. As explained by the LSA itself:

> Because the class is selected on a rolling basis, rather than at one point in time, a certain number of seats is designated during the admissions cycle for in-state students and for certain other groups of students, including, for example, athletes, foreign applicants, *underrepresented minority candidates*, and ROTC candidates (sometimes referred to as "protected" space). This space is "protected" to enable OUA to achieve the enrollment targets of the University and of the individual units while using a rolling admissions system. If this space is not filled by qualified candidates from the designated groups toward the end of the season, it used to admit students from the postponed pool or the extended waiting list, applicants to other units, etc.

(Defs.' Answer Interrog. No. 1) (emphasis added); (*See also* Pls.' 4/9/99 Exs., Vol. I, Exs. P, Q, & R) (showing number of protected seats for particular academic years). The LSA has also explained this practice in the following manner:

> LSA admissions occur on a "rolling" basis: rather than waiting for one date in late **[**64]** winter to notify all applicants of the disposition of their applications, LSA admits applicants throughout the admissions season. Under such a process,

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> **[*832]** offers of admissions must be carefully monitored and managed to ensure that sufficient spaces are reserved, or protected, for attractive applicants who apply later in the cycle. The number of protected spaces is determined by the expected pool size of various groups of applications. *As applicants from a particular group are admitted over the course of the admissions season, the protected spaces reserved for that group are used.* If the pool of qualified applicants never reaches the number of protected spaces, those slots are filled with qualified applicants off the wait list.

(Pls.' 4/9/ 99 Br. at 7 n.4) (quoting Defendants' Motion for Reassignment or Designating Actions as Companion Cases in *Grutter v. Bollinger*, 16 F. Supp. 2d 797, 97-CV-5928-DT).

Other memoranda refer to these "protected" seats as being "reserved" for particular groups of applicants. (*See* Pls.' 4/9/99 Exs., Vol. I, Ex. M). In fact, one memorandum specifically states that the number of "protected groups" for Fall 1997 would be decreased, thereby "opening **[**65]** up slots for non-protected applicants." (*Id.*, Ex. O). This evidence clearly indicates that these slots were not merely protected from the admissions process itself, but from competition by non-protected applicants. It is clear that the LSA's system operated as the functional equivalent of a quota and therefore, ran afoul of Justice Powell's opinion in ***Bakke***.

In this Court's opinion, there is no significant difference between the LSA's prior practice of "protecting" or "reserving" seats and the University of California's quota system. The fact that non-minority applicants may have had a chance at any "leftover" spots at the end of the admissions cycle does not change this conclusion. Under both systems, preferred minority applicants were insulated from competition from non-preferred applicants for a given number of seats. The fact that this number may have changed from year to year, or even during any one particular admissions cycle, does not change this fact. It can hardly be said that those non-preferred applicants who, by pure chance, may have had an opportunity to compete for one of the leftover seats, were allowed to compete on equal footing for every seat in the class. **[**66]**

Furthermore, it is undisputed that from 1995 through 1997, the LSA used facially different grids and action codes based solely upon an applicant's race. Under these differing grids, a certain group of non-preferred applicants were automatically excluded from competing for a seat in the class without any type of individualized counselor review solely on account of their race, n18 whereas, preferred minority applicants were never automatically rejected, regardless of their grades and test scores. Rather, all minority applicants received some type of individualized counselor review. (McKinney Dep. at 41, Spencer Dep. at 105). This practice of "automatic exclusion" continued into the 1998 academic year despite the LSA's switch to the selection index system. (McKinney Dep. at 97-98, 150-52).

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n18 The Court notes that the LSA's practice of automatically rejecting applicants also ended with the 1999 academic year.

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The Court agrees with the University Defendants' assertion that all who are ultimately admitted to the **[**67]** LSA are "qualified" academically, and neither Plaintiffs nor this Court seek to imply that those minorities who are admitted under the lower admissions standards are not academically qualified for admission. It cannot be seriously disputed, however, that the effect of the LSA's differing standards was to systematically exclude a certain group of non-minority applicants from participating in the admissions process based

solely on account of their race.

For example, in 1995 and 1996, the LSA **[*833]** used two grids for instate applicants, n19 one for "non-minority" applicants and another for "minority" applicants. The non-minority grid indicated that an applicant with a GPA 2 of 3.2-3.3 and ACT of 18-20/SAT of 400-500 would be automatically rejected, whereas a minority applicant with the same grade/score would have most likely been admitted. n20

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n19 The Court notes that another set of grids was used for out-of-state applicants, for a total of four grids.

n20 The minority grid also contained the option of delaying such a minority applicant "for senior year SAT's or ACT's."

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In so doing, the LSA's policies foreclosed each of the automatically rejected applicants from further consideration for a seat simply because they were not of a favored race or ethnicity. These applicants were never accorded any further individualized review as envisioned by Justice Powell in ***Bakke***. In this Court's opinion, the LSA's different treatment of preferred minority applicants *vis a vis* non-preferred applicants at this stage of the admissions process further adds to the infirmity of the LSA's prior programs.

Moreover, the only distinguishing factor between the grids used by the LSA during these years was the applicant's race. Therefore, to the extent admissions counselors used such grids in making admissions decisions, it is clear from the face of the grids themselves that in some cases, the only defining factor was race.

Although the LSA's use of facially different grids/action codes based upon an applicants' race, in and of itself, may not have been constitutionally impermissible, when combined with the other components previously discussed by the Court, *i.e.* the LSA's use of protected seats and the LSA's system of automatic rejection, the Court is convinced **[**69]** that the LSA's prior programs, when examined in their entirety, fall within the impermissible under the principles enunciated by Justice Powell in ***Bakke***. Accordingly, Plaintiffs' motion for summary judgment shall be granted with respect to the LSA's admissions programs employed from 1995 through 1998.

Qualified Immunity

Defendants Bollinger and Duderstadt, who have been sued in their individual capacities under 42 U.S.C. § 1983, have moved for summary judgment on grounds of qualified immunity. Under the qualified immunity doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). "The question of whether qualified immunity attaches to an official's actions is a purely legal question for the trial judge to determine prior to trial." *Garvie v. Jackson*, 845 F.2d 647, 649 (6th Cir. 1988).

In order to determine whether an **[**70]** official is entitled to qualified immunity, a court must first consider, "whether, based on the applicable law, a constitutional violation occurred." *Dickerson v. McClellan*, 101 F.3d 1151, 1157 (6th Cir. 1996) (citing *Centanni v. Eight Unknown Officers*, 15 F.3d 587, 589 (6th Cir. 1994)). As discussed *supra*, the Court is satisfied that although diversity is a sufficiently compelling interest to survive strict scrutiny, the LSA's prior admissions programs (1995-1998) were nonetheless impermissible under the

principles enunciated by Justice Powell in ***Bakke***. Therefore, the Court is satisfied that a constitutional violation has occurred.

Next, the Court must determine whether the constitutional violation involved "'clearly established constitutional rights of which a reasonable person would have known.'" *Id.* 101 F.3d at 1158 (quoting *Christophel v. Kukulinsky*, 61 F.3d 479, 485 (6th Cir. 1995)). "In determining whether a constitutional right is clearly established, a district **[*834]** court must find binding precedent by the Supreme Court, its court of appeals, or itself." *Sheets v. Moore*, 97 F.3d 164, 166 (6th Cir. 1996) (citing **[**71]** *Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988)). Neither party disputes the fact that under the Fourteenth Amendment, every individual is entitled to equal protection of the laws. To date, however, there has been only one Supreme Court decision addressing the extent to which a university may take race into consideration during the admissions decision, *i.e.*, the Supreme Court's decision in ***Bakke***. As is illustrated by the foregoing discussion, the binding effect of Justice Powell's opinion in ***Bakke*** has been the subject of much debate in recent years.

Furthermore, to defeat a claim of qualified immunity, Plaintiffs must show that Defendants "knew or reasonably should have known" that their actions were unconstitutional. *Harlow*, 457 U.S. at 816, 102 S. Ct. 2727; *see also Dickerson*, 101 F.3d at 1151 (quoting *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992)). "'The unlawfulness must be apparent.'" *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987)).

In finding the University of California's **[**72]** admission program unconstitutional, Justice Powell relied exclusively upon the fact that the university employed a rigid quota. In light of the principles enunciated by Justice Powell in ***Bakke***, the Court does not believe that it would necessarily have been unreasonable for an official in Defendants' position to conclude that the LSA's admissions policies were constitutional. It is clear that the University did not employ the same type of rigid quota renounced by Justice Powell in ***Bakke***. Moreover, the mere fact that this Court has disagreed with Defendants as to whether the LSA's programs were constitutional does not automatically defeat qualified immunity. As the Supreme Court has explained, "the qualified immunity standard gives ample room for mistaken judgment by protecting all but the plainly incompetent or those who knowingly violate the law. This accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued." *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S. Ct. 534, 537, 116 L. Ed. 2d 589 (1991).

Applying the defense of qualified immunity in this case is, in this Court's opinion, consistent **[**73]** with the qualified immunity standard. Courts themselves have been struggling for well over two decades to fully understand what constitutes a properly devised admissions program under ***Bakke***. This Court cannot say that a reasonable official in Defendants' position should have known that the LSA's prior admissions programs were unconstitutional. Accordingly, Defendants' motion for summary judgment based upon the doctrine of qualified immunity shall be granted.

Eleventh Amendment Immunity

The Board of Regents ("the Board") also seeks summary judgment with respect to Plaintiffs' Title VI claims on grounds of Eleventh Amendment Immunity. In general, Eleventh Amendment immunity bars plaintiffs from bringing claims for damages against a state or its officials acting in their official capacities unless the state has waived its immunity, or Congress has exercised its power to override that immunity. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). With respect to Title VI, Congress has enacted a specific provision abrogating the states' Eleventh Amendment immunity. *See* 42 U.S.C. § 2000d-7 **[**74]** (a)(1). n21

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n21 42 U.S.C. § 2000d-7(a)(1) specifically provides:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[*835]**

In fact, the Board specifically recognizes that Congress has abrogated its Eleventh Amendment immunity with respect to claims under Title VI, and that by accepting federal funds, it has consented to being sued for damages in federal court. (Defs.' 5/3/ 99 Br. at 68). **[**75]** In support of its motion for summary judgment, however, the Board contends that the *scope* of that agreement does not encompass Plaintiffs' claims because the Board was not on "notice" that its conduct in this case would subject it to liability. (*Id.* at 68-69). According to the Board, its actions must violate "*Clearly established* legal principles" for its Eleventh Amendment immunity to be abrogated. (*Id.*) (emphasis in original).

None of the cases relied upon by the Board, however, support its claim that its Eleventh Amendment immunity cannot be abrogated unless it had notice that its conduct was unconstitutional. In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998), the Supreme Court faced the issue of whether a plaintiff could maintain a cause of action for sexual harassment against a school under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, based upon a theory of *respondeat superior* or constructive notice. Because the express remedial scheme of Title IX was based upon notice to an appropriate person and an opportunity to rectify the **[**76]** discriminatory behavior, the Supreme Court held that a plaintiff could not maintain a cause of action under Title IX based upon a theory of *respondeat superior* or constructive notice. *Id.* 524 U.S. at 290-93, 118 S. Ct. at 1999-2000.

Similarly, in *Guardians Association v. Civil Service Commission of City of N.Y.*, 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983), the Supreme Court faced the issue of whether a plaintiff could maintain a cause of action under Title VI without showing intentional discrimination on behalf of the defendant. In *Guardians*, the Supreme Court ultimately held that intent was not an essential element of a Title VI violation, but "a plaintiff should recover only injunctive, noncompensatory relief for a defendant's unintentional violations of Title VI." *Id.* 463 U.S. at 607, 103 S. Ct. at 3235. Each of these cases addressed the requisite showing a plaintiff must make to sustain a claim under the respective federal statute, not whether a state's Eleventh Amendment immunity could be abrogated where the state has not been put on "notice" that the specific conduct alleged to be a violation of federal law was illegal. **[**77]**

The Supreme Court has referred to § 2000d as an "unequivocal waiver" of the states' Eleventh Amendment immunity. *See Lane v. Pena*, 518 U.S. 187, 198, 116 S. Ct. 2092, 2099, 135 L. Ed. 2d 486 (1996). Furthermore, a number of courts have recognized that with respect to Title VI, Congress has validly abrogated the states' Eleventh Amendment immunity. *See, e.g., Fuller v. Rayburn*, 161 F.3d 516, 518 (8th Cir. 1998) ("We nevertheless agree with Mr. Fuller that by enacting section 2000d-7, 'Congress abrogated the States' Eleventh Amendment immunity under . . . Title VI.'"); *DeKalb County Sch. Dist. v. Schrenko*, 109 F.3d 680, 688 (11th Cir. 1997) ("On the other hand, the parties agree that Congress has

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abolished the states' immunity for causes of action grounded in Title VI."); *United States v. Yonkers Bd. of Educ.*, 893 F.2d 498, 503 (2d Cir. 1990) ("With respect to Title VI, which prohibits, inter alia, racial discrimination in federally assisted programs, Congress has expressly abrogated the states' Eleventh Amendment immunity . . . .").

Moreover, to the extent that the Board seeks to extend the doctrine of qualified **[**78]** immunity to cover its actions, the Board's arguments must be rejected, as "qualified **[*836]** immunity is not a defense available to governmental entities, but only to government employees sued in their individual capacity." *Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 535 (8th Cir. 1999); *see also Rodriguez v. City of New York*, 72 F.3d 1051, 1065 (2d Cir. 1995) ("The defense of qualified immunity protects only individual defendants sued in their individual capacity, not governmental entities."); *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1185 (11th Cir. 1994) ("Governmental entities are not entitled to qualified immunity regarding section 1983 claims.").

By enacting § 2000d, Congress validly abrogated the states' Eleventh Amendment immunity with respect to Title VI claim. Therefore, although the Board remains free to assert that Plaintiffs have failed to set forth a proper case under Title VI, the Eleventh Amendment does not bar Plaintiffs' claims for damages. Accordingly, the Board's motion for summary judgment with respect to Plaintiffs' Title VI claim shall be denied.

Conclusion

For the reasons stated above, Plaintiffs' **[**79]** motion for summary judgment is granted with respect to the LSA's admissions programs in existence from 1995 through 1998, and the admissions programs for such years are declared unconstitutional. However, the University Defendants' motion for summary judgment is granted with respect to the LSA's admissions programs for 1999 and 2000. Furthermore, Plaintiffs' request for injunctive relief is denied. Defendants Duderstadt and Bollinger's motion for summary judgment on grounds of qualified immunity is granted. The Board of Regent's motion for summary judgment on grounds of Eleventh Amendment immunity, however, is denied.

An Order consistent with this Opinion shall issue.

PATRICK J. DUGGAN

UNITED STATES DISTRICT JUDGE

Date: December 13, 2000

Source: All Sources : Federal Legal - U.S. : District Court Cases - By Circuit : **US District Court Cases - 6th Circuit**
Terms: **bakke and hopwood** (Edit Search)
View: Full
Date/Time: Wednesday, March 28, 2001 - 9:19 AM EST

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Governments : Local Governments : Education

Since **Bakke,** no United State Supreme Court decision has explicitly accepted the diversity rationale under strict scrutiny, however, that is not to say that under recent Supreme Court precedent, the diversity interest can never constitute a compelling state interest, especially in the context of higher education.

Constitutional Law : Fundamental Freedoms

Governments : Local Governments : Education

Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the U.S. Const. amend. I. This "freedom" has always been viewed as including the freedom of the university to make its own judgments as to education, including the selection of its student body.

Constitutional Law : Substantive Due Process : Equal Protection : Race

Applicable United States Supreme Court precedent has never held squarely and unequivocally either that remedying the effects of past discrimination is the only compelling state interest that can ever justify racial classification, or conversely that achieving diversity in the student body of a public graduate or professional school can never be a compelling governmental interest.

Constitutional Law : Substantive Due Process : Equal Protection : Race

If presented with sufficient evidence regarding the educational benefits that flow from a diverse student body, there is nothing barring the court from determining that such benefits are compelling under strict scrutiny analysis.

Constitutional Law : Substantive Due Process : Equal Protection : Race

Governments : Local Governments : Education

Unlike the remedial setting, diversity in higher education, by its very nature, is a permanent and ongoing interest. Diversity is not a remedy.

Constitutional Law : Substantive Due Process : Equal Protection : Race

Governments : Local Governments : Education

A university's interest in achieving the educational benefits that flow from a diverse student body does not justify an admissions program designed to admit a predetermined number or proportion of minority students. Instead, a university must carefully design its system to fall between these two competing ends of the spectrum, i.e., between a system that completely fails to achieve a meaningful degree of diversity, under which the benefits associated with a diverse student body will never be realized, and a rigid quota system, which is clearly unconstitutional.

Governments : Local Governments : Education

In striving to achieve a diverse student body, race or ethnic background may be deemed a plus in a particular applicant's file, as long as this plus does not insulate the individual from comparison with all other candidates for the available seats.

Constitutional Law : Substantive Due Process : Equal Protection : Race

Governments : State & Territorial Governments : Education

Universities are not required to accord the same weight to race as they do other factors. As long as the admissions program does not work to isolate the applicants from review, it withstands constitutional muster, despite the fact that it may provide individuals with a "plus" on account of their race.

Constitutional Law : Civil Rights Enforcement : Official Immunities

Under the qualified immunity doctrine, government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The question of whether qualified immunity attaches to an official's actions is a purely legal question for the trial judge to determine prior to trial.

Constitutional Law : Civil Rights Enforcement : Official Immunities

In order to determine whether an official is entitled to qualified immunity, a court must first consider, whether, based on the applicable law, a constitutional violation occurred.

Constitutional Law : Civil Rights Enforcement : Official Immunities

In a determination of qualified immunity, the court must determine whether the constitutional violation involved clearly established constitutional rights of which a reasonable person would have known. In determining whether a constitutional right is clearly established, a district court must find binding precedent by the United States Supreme Court, its court of appeals, or itself.

Constitutional Law : Civil Rights Enforcement : Official Immunities

To defeat a claim of qualified immunity, a plaintiff must show that defendant knew or reasonably should have known that their actions were unconstitutional. The unlawfulness must be apparent.

Constitutional Law : Civil Rights Enforcement : Official Immunities

The qualified immunity standard gives ample room for mistaken judgment by protecting all but the plainly incompetent or those who knowingly violate the law.

Constitutional Law : State Autonomy

U.S. Const. amend. XI immunity bars plaintiffs from bringing claims for damages against a state or its officials acting in their official capacities unless the state has waived its immunity, or Congress has exercised its power to override that immunity. With respect to Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d, Congress has enacted a specific provision abrogating the states' U.S. Const. amend. XI immunity. 42 U.S.C.S. § 2000d-7 (a)(1).

Constitutional Law : State Autonomy

The United States Supreme Court has referred to Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d as an "unequivocal waiver" of the states' U.S. Const. amend. XI immunity. Furthermore, a number of courts have recognized that with respect to Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d, Congress has validly abrogated the states' U.S. Const. amend. XI immunity.

Constitutional Law : Civil Rights Enforcement : Official Immunities

Qualified immunity is not a defense available to governmental entities, but only to government employees sued in their individual capacity.

Constitutional Law : State Autonomy

By enacting Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d, Congress validly abrogated the states' U.S. Const. amend. XI immunity with respect to Title VI claims.

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For 3M, ABBOTT LABORATORIES, BANK ONE CORPORATION, E.I. DUPONT DE NEMOURS COMPANY, DOW CHEMICAL COMPANY, EASTMAN KODAK COMPANY, ELI LILLY AND COMPANY, GENERAL MILLS, INCORPORATED, INTEL CORPORATION, JOHNSON AND JOHNSON, KELLOGG COMPANY, KPMG INTERNATIONAL, LUCENT TECHNOLOGIES, INCORPORATED, MICROSOFT CORPORATION, PPG INDUSTRIES, INCORPORATED, PROCTER AND GAMBLE COMPANY, SARA LEE CORPORATION, TEXACO, INCORPORATED, TRW, INCORPORATED, movants: Jeffrey S. Silver, Jenner & Block, Chicago, IL.

JUDGES: PATRICK J. DUGGAN, UNITED STATES DISTRICT JUDGE.

OPINIONBY: PATRICK J. DUGGAN

OPINION: [*813]

HON. PATRICK J. DUGGAN

[3] OPINION**

On October 14, 1997, Plaintiffs filed a class action against the University of **[*814]** Michigan and various university officials asserting that the University's College of Literature, Science, and the Arts ("LSA") had violated Title VI of the Civil Rights Act, as well as the Equal Protection Clause of the Fourteenth Amendment, by considering race as a factor in admissions decisions. Plaintiffs seek injunctive, declaratory, and monetary relief.

On December 23, 1998, this Court issued an Order bifurcating the action into a "liability" and "damages" phase. This matter is currently before the Court on cross-motions for summary

judgment with respect to the "liability" phase only, which has been previously defined as "whether Defendants' use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution," n1 and has been specifically limited to Plaintiffs' request for injunctive and declaratory relief. n2 Oral argument was heard on November 16, 2000.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 Because Title VI "proscribe[s] only those racial classifications that would violate the Equal Protection Clause," it is not necessary for the Court to engage in a separate analysis regarding Plaintiffs' claims under Title VI. *Regents of Univ. of Cal. v.* ***Bakke***, 438 U.S. 265, 287, 98 S. Ct. 2733, 2746, 57 L. Ed. 2d 750 (1978). **[**4]**

n2 In the same Order, this Court certified a class consisting of:

> Those individuals who applied for and were not granted admission to the College of Literature, Science & the Arts of the University of Michigan for all academic years from 1995 forward and who are members of those racial or ethnic groups, including Caucasian, that defendants treated less favorably on the basis of race in considering their application for admission.

(12/23/98 Op. at 15).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

For the reasons set forth herein:

> Plaintiffs' motion for summary judgment shall be granted with respect to the LSA's admissions programs in existence from 1995 through 1998, and the admissions programs for such years shall be declared unconstitutional;
>
> The University Defendants' motion for summary judgment shall be granted with respect to the LSA's admissions programs for 1999 and 2000;
>
> Plaintiffs' request for injunctive relief shall be denied;
>
> Defendants Duderstadt and Bollinger's motion for summary judgment on grounds of qualified immunity shall be granted; and
>
> The Board of Regent's motion for summary **[**5]** judgment on grounds of Eleventh Amendment immunity shall be denied. n3

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 This Opinion and its corresponding order shall address only the University Defendants' arguments regarding diversity. The Intervenor-Defendants' arguments regarding remedial measures shall be addressed in a supplemental opinion and order.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Background

The University of Michigan ("University") is a public institution of higher education located in Ann Arbor, Michigan. According to Defendants, admission to the University is selective, meaning that many more students apply each year than can be admitted. The University received some 13,500 applications for admission to the LSA in 1997, from which it elected to enroll 3,958 freshmen. Among its stated admissions objectives, the University strives to compose a class of students from diverse races, ethnicities, cultures, and socioeconomic backgrounds. The University views diversity as an integral component of its mission. According to the University, diversity "increase[s] the **[**6]** intellectual vitality of [its] education, scholarship, service, and communal life." (Jt. Summ. Facts at 1). n4 To facilitate the University's goal of diversity, it is undisputed that the LSA employs race as a factor in its admissions decisions.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 The parties have provided the Court with a Joint Summary of Undisputed Facts Regarding Admissions Process, which was filed on December 13, 2000.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Plaintiffs Jennifer Gratz and Patrick Hamacher are Caucasion residents of the State of Michigan, both of whom applied for admission into the 1995 and 1997 classes of the LSA, respectively. On January 19, 1995, Plaintiff Gratz was notified that a final decision regarding her admission had been delayed until early to mid **[*815]** April 1995, as she was considered by the LSA as "well qualified, but less competitive than the students who had been admitted on first review." (*Id.*). On April 24, 1995, Plaintiff Gratz was notified that the LSA was unable to offer her admission. Thereafter, Plaintiff Gratz enrolled in the University of **[**7]** Michigan at Dearborn, from which she graduated in the spring of 1999.

Similarly, Plaintiff Hamacher was notified on November 19, 1996, that a decision regarding his admission was "postponed" until mid-April of 1997. According to the LSA's letter, a decision regarding Plaintiff Hamacher had been postponed because, "although [his] academic credentials [were] in the qualified range, they [were] not at the level needed for first review admission." (*Id.* at 2). On April 8, 1997, Plaintiff Hamacher's admissions application was rejected. Thereafter, Plaintiff Hamacher enrolled at Michigan State University.

The Defendant-Intervenors are seventeen African American and Latino students who have applied for, or intend to apply for, admission to the University, joined by the Citizens for Affirmative Action's Preservation, a nonprofit organization whose stated mission is to preserve opportunities in higher education for African American and Latino students in Michigan. According to Defendant-Intervenors, the resolution of this case directly threatens African American and Latino students' access to higher education.

Plaintiffs have filed a motion for summary judgment asserting that the **[**8]** LSA's use of race as a factor in admissions decisions violates Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the Equal Protection Clause of the United States Constitution. The University Defendants have filed a cross-motion for summary judgment asserting that the LSA's use of race as a factor in admissions decisions is, as a matter of law, constitutional. Defendant-Intervenors have filed responses to both motions, supporting the University Defendants' assertion that the LSA's admissions policies are constitutional.

Standard of Review

Summary judgment is proper only if there is no genuine issue as to any material fact, thereby entitling the moving party to judgment as a matter of law. *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 709 (6th Cir. 2000); *see also* FED. R. CIV. P. 56(c). There is no genuine issue of material fact for trial unless, by viewing the evidence in a light most favorable to the

nonmoving party, a reasonable jury could "return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). On a motion for summary judgment, **[**9]** the moving party bears the initial responsibility of informing the Court of the basis for its motion and identifying those portions of the record that establish the absence of a material issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Once the moving party has met its burden, the nonmoving party must go beyond the pleadings and come forward with specific facts to show that there is a genuine issue for trial. FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 322-24, 106 S. Ct. at 2552-53. The nonmoving party must do more than show that there is some metaphysical doubt as to the material facts. *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 800 (6th Cir. 1994). The nonmoving party must present significant probative evidence in support of its opposition to the motion for summary judgment. *Moore v. Philip Morris Co., Inc.*, 8 F.3d 335, 339-40 (6th Cir. 1993). If, after adequate time for discovery, the party bearing the burden of proof fails to make a showing sufficient to establish an essential element of his claim, summary judgment is appropriate. *Celotex*, 477 U.S. at 322-24, 106 S. Ct. at 2552-53. **[**10]**

Discussion

As previously mentioned, this phase of the litigation has been explicitly limited to **[*816]** the issue of "liability," defined as "whether Defendants' use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution," as well as Plaintiffs' request for injunctive and declaratory relief. (12/23/98 Op. at 15; 5/1/00 Op. & Order at 4). Specifically, Plaintiffs seek a declaratory judgment that the LSA's admission policies and practices for the academic years 1995 through the present violate Plaintiffs' rights under the Constitution and 42 U.S.C. §§ 1981, 1983, and 2000d. Without such a declaration, Plaintiffs' claims for monetary relief fail. Plaintiffs further seek an order permanently enjoining the LSA from engaging in illegal, racially discriminatory admissions practices in the future.

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. XIV, § 1. The "central mandate" of the Fourteenth Amendment "is racial neutrality in governmental decisionmaking. **[**11]** " *Miller v. Johnson*, 515 U.S. 900, 904, 115 S. Ct. 2475, 2482, 132 L. Ed. 2d 762 (1995) (citing *Loving v. Virginia*, 388 U.S. 1, 11, 87 S. Ct. 1817, 1823, 18 L. Ed. 2d 1010 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 191-92, 85 S. Ct. 283, 287-88, 13 L. Ed. 2d 222 (1964)). "The basic principle is straightforward: 'Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.'" *Id.* (quoting *Regents of Univ. of Cal. v.* ***Bakke***, 438 U.S. 265, 291, 98 S. Ct. 2733, 2748, 57 L. Ed. 2d 750 (1978) (Powell, J.)). Accordingly, the Supreme Court has explicitly clarified that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S. Ct. 2097, 2113, 132 L. Ed. 2d 158 (1995).

Two interests have been asserted in support of the LSA's race conscious **[**12]** admissions policies. The University Defendants assert that the LSA has a compelling interest in the educational benefits that result from having a diverse student body, whereas the Defendant-Intervenors assert that the LSA has a compelling interest in remedying the University's past and current discrimination against minorities. n5 Therefore, the two issues this Court must decide in resolving the parties' motions for summary judgment are: (1) whether Defendants have asserted a compelling governmental interest in support of the LSA's use of race and (2) whether the measures by which the LSA has used race as a factor in admissions decisions were narrowly tailored to serve such interest.

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- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n5 Only the Defendant-Intervenors have asserted that the LSA's admissions policies serve a remedial purpose. The University Defendants have never justified the LSA's race-conscious admissions policies on remedial grounds.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Both the Plaintiffs and the University Defendants have agreed to the material facts relating to the mechanics **[**13]** of the LSA's admission policies, and that the Court has, in the record currently before it, all the evidence they wish to present. Therefore, both Plaintiffs and the University Defendants agree there is no need for a trial with respect to the issue of whether diversity constitutes a compelling interest under strict scrutiny, and whether the LSA's admissions programs were narrowly tailored to achieving that interest, and that, based upon the record before the Court, such issues may be resolved by summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The Diversity Rationale

Both parties assert that with respect to the University Defendants' "diversity" rationale, the Supreme Court's decision in *Regents of the University of California v.* **[*817]** ***Bakke***, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978), governs this dispute. In support of their motion for summary judgment, the University Defendants, supported by Defendant-Intervenors and a number of amici, contend that under Justice Powell's decision in ***Bakke***, the University has a compelling governmental interest in the educational benefits that flow from a racially and ethnically diverse **[**14]** student body. The University Defendants also contend that under ***Bakke***, the LSA's admissions policies were properly tailored to achieve the University's stated interest in diversity.

Plaintiffs, however, contend that Justice Powell's decision in ***Bakke*** has never garnered a majority of support from the Justices and that subsequent Supreme Court cases have confirmed that "diversity" and "academic freedom" are not compelling governmental interests that can ever justify the use of race in the admissions process. In the alternative, Plaintiffs contend that even if this Court were to find "diversity" to be a sufficiently compelling interest, they are nonetheless entitled to summary judgment because the manner in which the LSA used race in admissions decisions for the years at issue in this case, 1995 through the present, is inconsistent with that specifically endorsed by Justice Powell in ***Bakke***.

1. The "***Bakke***" Decision

In ***Bakke***, a rejected applicant challenged the University of California at Davis Medical School's admissions program, which consisted of two systems: a regular admissions system for non-minority applicants, and a special admissions system strictly **[**15]** for minorities. ***Bakke***, 438 U.S. at 273-75, 98 S. Ct. at 2739-40. In contrast to the regular admissions system, the special minority admissions system operated with a separate committee, a majority of whom were members of minority groups. Special applicants were rated by the special committee in a manner similar to the regular admissions system, except that the special applicants did not have to meet the 2.5 minimum GPA applied to non-minority applicants.

Under the university's special admissions system, the special applicants were never compared against the non-minority applicants. The special admissions committee would continue to recommend special applicants for admission until a specific number of minority applicants were admitted, which was predetermined by faculty vote. For example, in 1973 and 1974, sixteen out of the one hundred available seats were reserved for special applicants.

According to the university, its special admissions system served the purposes of: "(i)

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Counsel's Office, White House

Kavanaugn, Brett

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*483 U.S. 203, *; 107 S. Ct. 2793, **;*
*1987 U.S. LEXIS 2871, ***; 97 L. Ed. 2d 171*

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SOUTH DAKOTA v. **DOLE,** SECRETARY OF TRANSPORTATION

No. 86-260

SUPREME COURT OF THE UNITED STATES

483 U.S. 203; 107 S. Ct. 2793; 1987 U.S. LEXIS 2871; 97 L. Ed. 2d 171; 55 U.S.L.W. 4971

April 28, 1987, Argued
June 23, 1987, Decided

PRIOR HISTORY: [*1]**

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

DISPOSITION: 791 F.2d 628, affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: On certiorari from the United States Court of Appeals, Eighth Circuit, petitioner challenged ruling that 23 U.S.C.S. § 158, which reduced federal highway funding to states with minimum drinking age below twenty-one, did not violate U.S. Const. amend. XXI, or Congress' spending power, U.S. Const. art. I, § 8, cl. 1.

OVERVIEW: Petitioner permitted persons nineteen years of age or older to purchase beer pursuant to S.D. Codified Laws § 35-6-27. However, 23 U.S.C.S. § 158 permitted the reduction of federal highway funds otherwise allocable to a state if the state had a minimum drinking age below twenty-one. Petitioner sought a declaratory judgment that § 158 violated Congress' spending power, U.S. Const. art. I, § 8, cl. 1, and that it violated U.S. Const. amend. XXI. The trial court rejected petitioner's claims, and the Court of Appeals for the Eighth Circuit affirmed. On certiorari, the Court affirmed, holding that: (1) the statute's indirect imposition of a minimum drinking age was a valid exercise of Congress' spending power, reasonably calculated to advance the general welfare and national concern of safe interstate travel; (2) the Twenty-first amendment was not violated as the statute did not induced petitioner to engage in unconstitutional activities.

OUTCOME: Affirmed; the statute's indirect imposition of a minimum drinking age was a valid exercise of Congress' spending power, reasonably calculated to advance the general welfare and national concern of safe interstate travel. The Twenty-first amendment was not violated as the statute did not induce petitioner to engage in unconstitutional activities.

CORE TERMS: spending, Twenty-first Amendment, highway, federal funds, regulation, drinking, general welfare, expenditure, liquor, minimum drinking age, expended, drinking age, interstate, conditional, federal interest, unrelated, commerce power, indirect, safe, condition imposed, regulatory power, sale of liquor, germaneness, conditioned, coercion, withhold, reserved, alcohol, drink, drive

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a State's social, political, or economic life on the theory that use of the interstate transportation system **[***24]** is somehow enhanced. If, for example, the United States were to condition highway moneys upon moving the state capital, I suppose it might argue that interstate transportation is facilitated by locating local governments in places easily accessible to interstate highways -- or, conversely, that highways might become overburdened if they had to carry traffic to and from the state capital. In my mind, such a relationship is hardly more attenuated than the one which the Court finds supports § 158. Cf. Tr. of Oral Arg. 39 (counsel for the United States conceding that to condition a grant upon adoption of a unicameral legislature would violate the "germaneness" requirement).

There is a clear place at which the Court can draw the line between permissible and impermissible conditions on federal grants. It is the line identified in the Brief for the **[**2801]** National Conference of State Legislatures et al. as *Amici Curiae*:

[*216] "Congress has the power to *spend* for the general welfare, it has the power to *legislate* only for delegated purposes. . . .

"The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether **[***25]** it is regulation. The difference turns on whether the requirement specifies in some way how the money should be spent, so that Congress' intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers." *Id.*, at 19-20.

This approach harks back to *United States* v. *Butler*, 297 U.S. 1 (1936), the last case in which this Court struck down an Act of Congress as beyond the authority granted by the Spending Clause. There the Court wrote that "there is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced." *Id.*, at 73. The *Butler* Court saw the Agricultural Adjustment Act for what it was -- an exercise of regulatory, not spending, power. The error in *Butler* was not the **[***26]** Court's conclusion that the Act was essentially regulatory, but rather its crabbed view of the extent of Congress' regulatory power under the Commerce Clause. The Agricultural Adjustment Act was regulatory but it was regulation that today would likely be considered within Congress' commerce power. See, *e. g.*, *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

While *Butler*'s authority is questionable insofar as it assumes that Congress has no regulatory power over farm production, **[*217]** its discussion of the spending power and its description of both the power's breadth and its limitations remain sound. The Court's decision in *Butler* also properly recognizes the gravity of the task of appropriately limiting the spending power. If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions **[***27]** save such as are self-imposed." *United States* v. *Butler, supra*, at 78. This, of course, as *Butler* held, was not the Framers' plan and it is not the meaning of the Spending Clause.

Our later cases are consistent with the notion that, under the spending power, the Congress may only condition grants in ways that can fairly be said to be related to the expenditure of federal funds. For example, in *Oklahoma* v. *CSC*, 330 U.S. 127 (1947), the Court upheld application of the Hatch Act to a member of the Oklahoma State Highway Commission who

was employed in connection with an activity financed in part by loans and grants from a federal agency. This condition is appropriately viewed as a condition relating to how federal moneys were to be expended. Other conditions that have been upheld by the Court may be viewed as independently justified under some regulatory power of the Congress. Thus, in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), the Court upheld a condition on federal grants that 10% of the money be "set aside" for contracts with minority business enterprises. But the Court found that the condition could **[***28]** be justified as a valid regulation **[**2802]** under the commerce power and § 5 of the Fourteenth Amendment. *Id.*, at 476, 478. See also *Lau* v. *Nichols*, 414 U.S. 563 (1974) (upholding nondiscrimination provisions applied to local schools receiving federal funds).

[*218] This case, however, falls into neither class. As discussed above, a condition that a State will raise its drinking age to 21 cannot fairly be said to be reasonably related to the expenditure of funds for highway construction. The only possible connection, highway safety, has nothing to do with how the funds Congress has appropriated are expended. Rather than a condition determining how federal highway money shall be expended, it is a regulation determining who shall be able to drink liquor. As such it is not justified by the spending power.

Of the other possible sources of congressional authority for regulating the sale of liquor only the commerce power comes to mind. But in my view, the regulation of the age of the purchasers of liquor, just as the regulation of the price at which liquor may be sold, falls squarely within the scope of those powers reserved to the **[***29]** States by the Twenty-first Amendment. *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 716 (1984). As I emphasized in *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 356 (1987) (dissenting opinion):

"The history of the Amendment strongly supports Justice Black's view that the Twenty-first Amendment was intended to return absolute control of the liquor trade to the States, and that the Federal Government could not use its Commerce Clause powers to interfere in any manner with the States' exercise of the power conferred by the Amendment."

Accordingly, Congress simply lacks power under the Commerce Clause to displace state regulation of this kind. *Ibid.*

The immense size and power of the Government of the United States ought not obscure its fundamental character. It remains a Government of enumerated powers. *McCulloch* v. *Maryland*, 4 Wheat. 316, 405 (1819). Because 23 U. S. C. § 158 (1982 ed., Supp. III) cannot be justified as an exercise of any power delegated to the Congress, it is not authorized by the Constitution. The Court errs in holding it to be the law of the land, and I respectfully dissent.

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CORE CONCEPTS - ◆ Hide Concepts

Constitutional Law : Congressional Powers & Duties : Spending & Taxation
See U.S. Const. art. I, § 8, cl. 1.

Constitutional Law : Congressional Powers & Duties : Spending & Taxation
Incident to its power under U.S. Const. art. I, § 8, cl. 1, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.

Constitutional Law : Congressional Powers & Duties : Spending & Taxation
The power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution. Thus, objectives not thought to be within U.S. Const. art I's enumerated legislative fields, may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

Constitutional Law : Congressional Powers & Duties : Spending & Taxation
The spending power granted to Congress under U.S. Const. art. I, § 8, cl. 1 is of course not unlimited, but is instead subject to several general restrictions. The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of the general welfare.

Constitutional Law : Congressional Powers & Duties : Spending & Taxation
In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress.

Constitutional Law : Congressional Powers & Duties : Spending & Taxation
If Congress desires to condition the States' receipt of federal funds, it must do so unambiguously enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Constitutional Law : Congressional Powers & Duties : Spending & Taxation
Conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs.

Constitutional Law : Congressional Powers & Duties : Spending & Taxation
Besides the limitations of Congress' spending power imposed by U.S. Const. art. I, § 8, cl. 1, other constitutional provisions may provide an independent bar to the conditional grant of federal funds.

Constitutional Law : Congressional Powers & Duties : Spending & Taxation
The constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly.

Constitutional Law : Congressional Powers & Duties : Spending & Taxation
Constitutional Law : Relations Among Governments
The "independent constitutional bar" limitation on the spending power is not a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, the power may not be used to induce the States to engage in activities that would themselves be unconstitutional.

Constitutional Law : Congressional Powers & Duties : Spending & Taxation

Even if Congress might lack the power to impose a national minimum drinking age directly, that encouragement to state action found in 23 U.S.C.S. § 158 is a valid use of the Congress' spending power under U.S. Const. art. I, § 8, cl. 1.

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SYLLABUS: Title 23 U. S. C. § 158 (1982 ed., Supp. III) directs the Secretary of Transportation to withhold a percentage of otherwise allocable federal highway funds from States "in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful." **South Dakota,** which permits persons 19 years old or older to purchase beer containing up to 3.2% alcohol, sued in Federal District Court for a declaratory judgment that § 158 violates the constitutional limitations on congressional exercise of the spending power under Art. I, § 8, cl. 1, of the Constitution and violates the Twenty-first Amendment. The District Court rejected the State's claims, and the Court of Appeals affirmed.

Held: Even if Congress, in view of the Twenty-first Amendment, might lack the power to impose directly a national minimum drinking age (a question not decided here), § 158's indirect encouragement of state action to obtain uniformity in the States' drinking ages is a valid use of the spending power. Pp. 206-212.

(a) Incident to the spending **[***2]** power, Congress may attach conditions on the receipt of federal funds. However, exercise of the power is subject to certain restrictions, including that it must be in pursuit of "the general welfare." Section 158 is consistent with such restriction, since the means chosen by Congress to address a dangerous situation -- the interstate problem resulting from the incentive, created by differing state drinking ages, for young persons to combine drinking and driving -- were reasonably calculated to advance the general welfare. Section 158 also is consistent with the spending power restrictions that, if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation; and that conditions on federal grants must be related to a national concern (safe interstate travel here). Pp. 206-209.

(b) Nor is § 158 invalidated by the spending power limitation that the conditional grant of federal funds must not be independently barred by other constitutional provisions (the Twenty-first Amendment here). Such limitation is not a prohibition on the indirect **[***3]** achievement of objectives which Congress is not empowered to achieve directly, but, instead, means that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Here, if **South Dakota** were to succumb to Congress' blandishments and raise its drinking age to 21, its action would not violate anyone's constitutional rights. Moreover, the relatively small financial inducement offered by Congress here -- resulting from the State's loss of only 5% of federal funds otherwise obtainable under certain highway grant programs -- is not so coercive as to pass the point at which pressure turns into compulsion. Pp. 209-212.

COUNSEL: Roger A. Tellinghuisen, Attorney General of **South Dakota,** argued the cause for petitioner. With him on the briefs was Craig M. Eichstadt, Assistant Attorney General.

Deputy Solicitor General Cohen argued the cause for respondent. With him on the brief were Solicitor General Fried, Assistant Attorney General Willard, Andrew J. Pincus, Leonard Schaitman, and Robert V. Zener. *

* Briefs of amici curiae urging reversal were filed for the State of Colorado et al. by Anthony J. Celebrezze, Jr., Attorney General of Ohio, William Damsel and Shawn H. Nau, Assistant

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Attorneys General, Joel S. Taylor, and Nancy J. Miller, joined by the Attorneys General for their respective States as follows: Duane Woodard of Colorado, Warren Price III of Hawaii, Robert T. Stephan of Kansas, William J. Guste, Jr., of Louisiana, Mike Greely of Montana, T. Travis Medlock of South Carolina, W. J. Michael Cody of Tennessee, Jeffrey L. Amestoy of Vermont, and Joseph B. Meyer of Wyoming; for the Mountain States Legal Foundation et al. by Hal Stratton, Attorney General of New Mexico, Constance E. Brooks, and Casey Shpall; for the National Conference of State Legislatures et al. by Benna Ruth Solomon, Beate Bloch, and Larry L. Simms; for the National Beer Wholesalers' Association et al. by E. Barrett Prettyman, Jr., John G. Roberts, Jr., and John F. Stasiowski; and for Phillip J. MacDonnell et al. by Morton Siegel, Michael A. Moses, Richard G. Schoenstadt, and James L. Webster.

Briefs of amici curiae urging affirmance were filed for the Insurance Institute for Highway Safety et al. by Andrew R. Hricko, Michele McDowell Fields, and Ronald G. Precup; for the National Council on Alcoholism et al. by Charles R. Walker III; for the National Safety Council by Harry N. Rosenfield; and for United States Senator Frank R. Lautenberg et al. by Thomas F. Campion and Michael J. Faigen. **[***4]**

JUDGES: Rehnquist, C. J., delivered the opinion of the Court, in which White, Marshall, Blackmun, Powell, Stevens, and Scalia, JJ., joined. Brennan, J., post, p. 212, and O'Connor, J., post, p. 212, filed dissenting opinions.

OPINIONBY: REHNQUIST

OPINION: [*205] [2795]** CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[1A]
[2A]
Petitioner **South Dakota** permits persons 19 years of age or older to purchase beer containing up to 3.2% alcohol. S. D. Codified Laws § 35-6-27 (1986). In 1984 Congress enacted 23 U. S. C. § 158 (1982 ed., Supp. III), which directs the Secretary of Transportation to withhold a percentage of federal highway funds otherwise allocable from States "in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful." The State sued in United States District Court seeking a declaratory judgment that § 158 violates the constitutional limitations on congressional exercise of the spending power and violates the Twenty-first Amendment to the United States Constitution. The District Court rejected the State's claims, and the Court of Appeals for the Eighth Circuit affirmed. 791 F.2d 628 (1986). **[***5]**

In this Court, the parties direct most of their efforts to defining the proper scope of the Twenty-first Amendment. Relying on our statement in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980), that the "Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system," **South Dakota** asserts that the setting of minimum drinking ages is clearly within the "core powers" reserved to the States under § 2 of the Amendment. n1 Brief for Petitioner 43-44. Section 158, petitioner claims, usurps **[*206]** that core power. The Secretary in response asserts that the Twenty-first Amendment is simply not implicated by § 158; the plain language of § 2 confirms the States' broad power to impose restrictions on the sale and distribution of alcoholic beverages but does not confer on them any power to *permit* sales that Congress seeks to *prohibit*. Brief for Respondent 25-26. That Amendment, under this reasoning, would not prevent Congress from affirmatively enacting a national minimum drinking age more restrictive than **[***6]** that provided by the various state laws; and it would follow *a fortiori* that the indirect inducement involved here is compatible with the Twenty-first Amendment.

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n1 Section 2 of the Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

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[1B]
[3]
These arguments present questions of the meaning of the Twenty-first Amendment, the bounds of which have escaped precise definition. *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 274-276 (1984); *Craig* v. *Boren*, 429 U.S. 190, 206 (1976). Despite the extended treatment of the question by the parties, however, we need not decide in this case whether that Amendment would prohibit an attempt by Congress to legislate directly a national minimum drinking age. Here, Congress has acted indirectly under its spending power to encourage uniformity in the States' **[***7]** drinking ages. As we explain below, we find this legislative effort within constitutional bounds even if Congress may not regulate drinking ages directly.

[4]
The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1. Incident to this power, Congress may attach conditions on the receipt of **[**2796]** federal funds, and has repeatedly employed the power "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Fullilove* v. *Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C. J.). See *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974); *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma* **[*207]** v. *Civil Service Comm'n*, 330 U.S. 127, 143-144 (1947); *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). The breadth of this power was made clear in *United States* v. *Butler*, 297 U.S. 1, 66 (1936), **[***8]** where the Court, resolving a longstanding debate over the scope of the Spending Clause, determined that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." Thus, objectives not thought to be within Article I's "enumerated legislative fields," *id.*, at 65, may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

[5]
[6]
The spending power is of course not unlimited, *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 17, and n. 13 (1981), but is instead subject to several general restrictions articulated in our cases. The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of "the general welfare." See *Helvering* v. *Davis*, 301 U.S. 619, 640-641 (1937); *United States* v. *Butler*, *supra*, at 65. In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of **[***9]** Congress. *Helvering* v. *Davis*, *supra*, at 640, 645. n2 Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State School and Hospital* v. *Halderman*, *supra*, at 17. Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." *Massachusetts* v. *United States*, 435 U.S. 444, 461 **[*208]** (1978) (plurality opinion). See also *Ivanhoe Irrigation Dist.* v. *McCracken*, *supra*, at 295, ("The Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof"). Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds. *Lawrence County* v. *Lead-Deadwood School Dist.*,

469 U.S. 256, 269-270 (1985); **[***10]** *Buckley* v. *Valeo*, 424 U.S. 1, 91 (1976) *(per curiam)*; *King* v. *Smith*, 392 U.S. 309, 333, n. 34 (1968).

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 The level of deference to the congressional decision is such that the Court has more recently questioned whether "general welfare" is a judicially enforceable restriction at all. See *Buckley* v. *Valeo*, 424 U.S. 1, 90-91 (1976) *(per curiam)*.

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[1C]
[7A]
South Dakota does not seriously claim that § 158 is inconsistent with any of the first three restrictions mentioned above. We can readily conclude that the provision is designed to serve the general welfare, especially in light of the fact that "the concept of welfare or the opposite is shaped by Congress . . . ." *Helvering* v. *Davis, supra*, at 645. Congress found that the differing drinking **[**2797]** ages in the States created particular incentives for young persons to combine their desire to drink with their ability to drive, and that this interstate problem required a national **[***11]** solution. The means it chose to address this dangerous situation were reasonably calculated to advance the general welfare. The conditions upon which States receive the funds, moreover, could not be more clearly stated by Congress. See 23 U. S. C. § 158 (1982 ed., Supp. III). And the State itself, rather than challenging the germaneness of the condition to federal purposes, admits that it "has never contended that the congressional action was . . . unrelated to a national concern in the absence of the Twenty-first Amendment." Brief for Petitioner 52. Indeed, the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended -- safe interstate travel. See 23 U. S. C. § 101(b). n3 **[*209]** This goal of the interstate highway system had been frustrated by varying drinking ages among the States. A Presidential commission appointed to study alcohol-related accidents and fatalities on the Nation's highways concluded that the lack of uniformity in the States' drinking ages created "an incentive to drink and drive" because "young persons commut[e] to border States where the drinking age is lower." Presidential Commission on Drunk **[***12]** Driving, Final Report 11 (1983). By enacting § 158, Congress conditioned the receipt of federal funds in a way reasonably calculated to address this particular impediment to a purpose for which the funds are expended.

[7B]

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - n3 Our cases have not required that we define the outer bounds of the "germaneness" or "relatedness" limitation on the imposition of conditions under the spending power. *Amici* urge that we take this occasion to establish that a condition on federal funds is legitimate only if it relates directly to the purpose of the expenditure to which it is attached. See Brief for National Conference of State Legislatures et al. as *Amici Curiae* 10. Because petitioner has not sought such a restriction, see Tr. of Oral Arg. 19-21, and because we find any such limitation on conditional federal grants satisfied in this case in any event, we do not address whether conditions less directly related to the particular purpose of the expenditure might be outside the bounds of the spending power.



- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[2B]
The remaining question **[***13]** about the validity of § 158 -- and the basic point of disagreement between the parties -- is whether the Twenty-first Amendment constitutes an "independent constitutional bar" to the conditional grant of federal funds. *Lawrence County* v.

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Lead-Deadwood School Dist., supra, at 269-270. Petitioner, relying on its view that the Twenty-first Amendment prohibits *direct* regulation of drinking ages by Congress, asserts that "Congress may not use the spending power to regulate that which it is prohibited from regulating directly under the Twenty-first Amendment." Brief for Petitioner 52-53. But our cases show that this "independent constitutional bar" limitation on the spending power is not of the kind petitioner suggests. *United States* v. *Butler, supra,* at 66, for example, established that the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly.

[*210] We have also held that a perceived Tenth Amendment limitation on congressional regulation of state affairs did not comitantly limit the range of conditions legitimately placed on federal **[***14]** grants. In *Oklahoma* v. *Civil Service Comm'n,* 330 U.S. 127 (1947), the Court considered the validity of the Hatch Act insofar as it was applied to political activities of state officials whose employment was financed in whole or in part with federal funds. The State contended that an order under this provision to withhold certain federal funds unless a state official was removed invaded its sovereignty in violation of the Tenth Amendment. Though finding that "the United States is not concerned with, and has no power to regulate, local political activities as such of state officials," the Court nevertheless held that the Federal Government "does have power to fix the terms upon **[**2798]** which its money allotments to states shall be disbursed." *Id.,* at 143. The Court found no violation of the State's sovereignty because the State could, and did, adopt "the 'simple expedient' of not yielding to what she urges is federal coercion. The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual." *Id.,* at 143-144 (citation **[***15]** omitted). See also *Steward Machine Co.* v. *Davis,* 301 U.S., at 595 ("There is only a condition which the state is free at pleasure to disregard or to fulfill"); *Massachusetts* v. *Mellon,* 262 U.S. 447, 482 (1923).

[2C]
[8]
These cases establish that the "independent constitutional bar" limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' **[*211]** broad spending power. But no such claim can be or is made here. Were **South Dakota** to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone.

[*16]**

[2D]
Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion." *Steward Machine Co.* v. *Davis, supra,* at 590. Here, however, Congress has directed only that a State desiring to establish a minimum drinking age lower than 21 lose a relatively small percentage of certain federal highway funds. Petitioner contends that the coercive nature of this program is evident from the degree of success it has achieved. We cannot conclude, however, that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective.

When we consider, for a moment, that all **South Dakota** would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact. As we said a half century ago in *Steward Machine Co.* v. *Davis*:

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"Every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold **[***17]** that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems." 301 U.S., at 589-590.

[1D]
[2E]
Here Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory **[*212]** but in fact. Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in § 158 is a valid use of the spending power. Accordingly, the judgment of the Court of Appeals is

Affirmed.

DISSENTBY: BRENNAN; O'CONNOR

DISSENT: JUSTICE BRENNAN, dissenting.

I agree with JUSTICE O'CONNOR that regulation of the minimum age of purchasers of liquor falls squarely within the ambit **[**2799]** of those powers reserved to the States by the Twenty-first Amendment. See *post*, at 218. Since **[***18]** States possess this constitutional power, Congress cannot condition a federal grant in a manner that abridges this right. The Amendment, itself, strikes the proper balance between federal and state authority. I therefore dissent.

JUSTICE O'CONNOR, dissenting.

The Court today upholds the National Minimum Drinking Age Amendment, 23 U. S. C. § 158 (1982 ed., Supp. III), as a valid exercise of the spending power conferred by Article I, § 8. But § 158 is not a condition on spending reasonably related to the expenditure of federal funds and cannot be justified on that ground. Rather, it is an attempt to regulate the sale of liquor, an attempt that lies outside Congress' power to regulate commerce because it falls within the ambit of § 2 of the Twenty-first Amendment.

My disagreement with the Court is relatively narrow on the spending power issue: it is a disagreement about the application of a principle rather than a disagreement on the principle itself. I agree with the Court that Congress may attach conditions on the receipt of federal funds to further "the federal interest in particular national projects or programs." *Massachusetts* v. *United States*, 435 U.S. 444, 461 (1978); **[***19]** see *Oklahoma* v. *Civil Service Comm'n*, 330 U.S. 127, 143-144 (1947); *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). I also subscribe to the established proposition **[*213]** that the reach of the spending power "is not limited by the direct grants of legislative power found in the Constitution." *United States* v. *Butler*, 297 U.S. 1, 66 (1936). Finally, I agree that there are four separate types of limitations on the spending power: the expenditure must be for the general welfare, *Helvering* v. *Davis*, 301 U.S. 619, 640-641 (1937), the conditions imposed must be unambiguous, *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981), they must be reasonably related to the purpose of the expenditure, *Massachusetts* v. *United States, supra*, at 461, and the legislation may not violate any independent constitutional prohibition, *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U.S. 256, 269-270 (1985). *Ante*, at 207-208. Insofar as two of those limitations are concerned, the

Court is clearly correct **[***20]** that § 158 is wholly unobjectionable. Establishment of a national minimum drinking age certainly fits within the broad concept of the general welfare and the statute is entirely unambiguous. I am also willing to assume, *arguendo*, that the Twenty-first Amendment does not constitute an "independent constitutional bar" to a spending condition. See *ante*, at 209-211.

But the Court's application of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended is cursory and unconvincing. We have repeatedly said that Congress may condition grants under the spending power only in ways reasonably related to the purpose of the federal program. *Massachusetts* v. *United States, supra,* at 461; *Ivanhoe Irrigation Dist.* v. *McCracken,* 357 U.S. 275, 295 (1958) (the United States may impose "reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof"); *Steward Machine Co.* v. *Davis, supra,* at 590 ("We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape **[***21]** its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power"). In my view, establishment of a minimum drinking **[*214]** age of 21 is not sufficiently related to interstate highway construction to justify **[**2800]** so conditioning funds appropriated for that purpose.

In support of its contrary conclusion, the Court relies on a supposed concession by counsel for **South Dakota** that the State "has never contended that the congressional action was . . . unrelated to a national concern in the absence of the Twenty-first Amendment." Brief for Petitioner 52. In the absence of the Twenty-first Amendment, however, there is a strong argument that the Congress might regulate the conditions under which liquor is sold under the commerce power, just as it regulates the sale of many other commodities that are in or affect interstate commerce. The fact that the Twenty-first Amendment is crucial to the State's argument does not, therefore, amount to a concession that the condition imposed by § 158 is reasonably related to highway construction. The Court also relies on a portion of the argument transcript **[***22]** in support of its claim that **South Dakota** conceded the reasonable relationship point. *Ante*, at 208-209, n. 3, citing Tr. of Oral Arg. 19-21. But counsel's statements there are at best ambiguous. Counsel essentially said no more than that he was not prepared to argue the reasonable relationship question discussed at length in the Brief for the National Conference of State Legislatures et al. as *Amici Curiae*.

Aside from these "concessions" by counsel, the Court asserts the reasonableness of the relationship between the supposed purpose of the expenditure -- "safe interstate travel" -- and the drinking age condition. *Ante*, at 208. The Court reasons that Congress wishes that the roads it builds may be used safely, that drunken drivers threaten highway safety, and that young people are more likely to drive while under the influence of alcohol under existing law than would be the case if there were a uniform national drinking age of 21. It hardly needs saying, however, that if the purpose of § 158 is to deter drunken driving, it is far too over- and under-inclusive. It is over-inclusive because it stops teenagers from drinking even when they are not about to drive on **[***23]** interstate **[*215]** highways. It is under-inclusive because teenagers pose only a small part of the drunken driving problem in this Nation. See, *e. g.*, 130 Cong. Rec. 18648 (1984) (remarks of Sen. Humphrey) ("Eighty-four percent of all highway fatalities involving alcohol occur among those whose ages exceed 21"); *id.*, at 18651 (remarks of Sen. McClure) ("Certainly, statistically, if you use that one set of statistics, then the mandatory drinking age ought to be raised at least to 30"); *ibid.* (remarks of Sen. Symms) ("Most of the studies point out that the drivers of age 21-24 are the worst offenders").

When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of

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*297 U.S. 1, *; 56 S. Ct. 312, **;*
*1936 U.S. LEXIS 946, ***; 80 L. Ed. 477*

UNITED STATES *v.* BUTLER ET AL., RECEIVERS OF HOOSAC MILLS CORP.

No. 401

SUPREME COURT OF THE UNITED STATES

297 U.S. 1; 56 S. Ct. 312; 1936 U.S. LEXIS 946; 80 L. Ed. 477; 36-1 U.S. Tax Cas. (CCH) P9039; 16 A.F.T.R. (P-H) 1289; 1936-1 C.B. 421; 4 Ohio Op. 401; 102 A.L.R. 914

Argued December 9, 10, 1935
January 6, 1936

PRIOR HISTORY: [*1]**

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

CORE TERMS: farmer, expenditure, general welfare, commodity, regulation, agricultural, appropriation, exaction, Agricultural Adjustment Act, power to tax, cotton, spend, processing, federal government, processor, processing tax, acreage, duty, taxing power, agriculture, reserved, declare, levy, expended, spending, rental, excise, carrier, farm, delegated

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

STATUTES, §32
who may question validity -- right of taxpayer to question purpose to which proceeds of tax are appropriated. --

Headnote: [1]
One called upon to pay a tax levied, not to obtain revenue for the support of government generally, but for a specific purpose, may question the validity of the intended use and consequently of the exaction which is an incident of the scheme.

TAXES, §3
nature. --

Headnote: [2]
A tax, in the general understanding of the term and as used in the Federal Constitution, signifies an exaction for the support of the government; and the term cannot properly be applied to the expropriation of money from one group for the benefit of another.

TAXES, §12
purpose for which imposable -- incidental benefit to individuals. --

It is true that by the very Act which imposed the tax and provided for its collection, the proceeds were appropriated to other purposes. But § 12 shows that if not a dollar had been collected in the way of processing taxes, the Government, nevertheless, made provision for the payment of rental and benefit contracts out of the hundred million dollars which Congress directly appropriated and out of the authority which they gave to the Secretary of the Treasury to furnish funds for carrying on this activity of the Government. As a matter of fact, something less than a billion dollars has already been collected in these taxes.

The question of the validity of the Agricultural Adjustment Act as a tax or revenue statute alone is dependent upon a consideration of the cases which this Court has decided, namely, the *Child Labor Tax* case, 259 U.S. 20, and the case of *Hill* v. *Wallace,* 259 U.S. 44, upon the one side, and *United States* v. *Doremus,* 249 U.S. 86, *Veazie Bank* v. *Fenno,* 8 Wall. 533, and *Magnano Company* **[***16]** v. *Hamilton,* 292 U.S. 40, upon the other.

We distinguish the *Child Labor Tax* case. That case involved a tax of ten per cent. upon the profits which might be earned by a manufacturer who employed child labor, to be imposed immediately upon a violation of the law. It was not a tax in the sense that it was levied upon an operation by the manufacturer, but was held by this Court to be a penalty which affected the income from the operation of a manufacturer who employed children, and that penalty applied at the very instant when he employed the first child contrary to that Act, and employed that child knowingly. The doctrine of scienter entered into that case. In *Hill* v. *Wallace* the tax was upon the selling of futures upon the Grain Exchange, and was levied at a rate of 20 cents a bushel, when the commission of the broker was only a fraction of a cent a bushel, so that it was prohibitive.

This Court said in the case of *Veazie Bank* v. *Fenno* that "the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility **[***17]** of the legislature is not to the courts but to the people, by whom its members are elected."

The case of *Hampton & Company* v. *United States,* 276 U.S. 394, involved an Act which declared in its very title that it was for the protection of inustries and for the raising of revenue.

In the present case there is a plain statement in the Act that the tax is to be used for something other than the general support of the Government. The contract which the Secretary of Agriculture makes with the individual producer is to be for the purpose of inducing the producer to reduce his production.

In *United States* v. *Doremus,* which involved licenses and taxes to control the dealing in drugs, there was a tax, in the earlier acts, of only one dollar a year, and a license for the purpose of handling; and upon that tax Congress built an entire system for information in regard to dealing in morphine and other narcotics. That was upheld. . . .

In the case of *McCray* v. *United States,* 195 U.S. 27, there was a clear intention on the part of Congress, which was not, however, expressed in the Act itself, to use the power of taxation for purposes other than the raising of revenue. **[***18]**

I think it may be said that the *Doremus* case and the *McCray* case on one side, and the case of *Hill* v. *Wallace* and the *Child Labor* case on the other, lead to the conclusion that the motives of Congress in levying a tax are not to be considered by this Court. Even if the Act shows that the motive is ulterior to the tax in the mind of Congress, that is immaterial to the validity of the tax, so long as it is based upon an authority which occurs in the Constitution.

In both the *Child Labor Tax* case and in the case of *Hill* v. *Wallace,* you had clear evidence of prohibitions against constitutional rights which people had and exercised. In the *Child Labor*

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Tax case there had been, up to that time, and of course now is, the right to use child labor in manufacture if there was no State prohibition; and of course the brokers who deal upon the Exchange at Chicago, on the Grain Exchanges wherever they may be, have the right to deal upon those exchanges. So you had a tax which in effect prohibited the exercise of a right by the taxpayer. You had, in the *Child Labor* case, in addition to the excessive tax, an imposition of that tax for a violation of **[***19]** a rule laid down. That, we think, distinguishes those cases from this one. Here is a tax which is to be used, let us say, in rental and benefit payments, together with other things, but there is nothing in the use for a rental or benefit payment which deprives the person who contracts with the Government of any constitutional right which he had at that time. He may be induced to give up a right which he had, which of course every employee of the Government gives up when he gives up his liberty to do other things and agrees to do certain things for the Government.

In so far as the excise is concerned, our briefs, I think, cover that thoroughly. We have the question of uniformity, we have the question of floor-stocks, and I pass to the problem of delegation.

[Here followed an interesting discussion (interrupted by many questions from the Bench) of the method of fixing the tax and of the question whether the functions sought to be delegated to the Secretary of Agriculture in that regard were constitutionally delegated, with proper legislative standards. The speaker also contended that, in any event, the acts of the Secretary in fixing the taxes were ratified by § 21 (b) of the **[***20]** Amendatory Act of August 24, 1935.]

As to whether or not this is a violation of the Fifth Amendment, we contend that there is no power in the taxpayer to question the expenditures that are made. Citing *Massachusetts* v. *Mellon,* 262 U.S. 447. . . .

If the Court should think it proper to go beyond the tax itself, and consider the purpose for which this money is expended, then we contend that the general welfare clause gave Congress power to expend it for rental and benefit payments.

We distinguish, of course, between the use of Federal money to coerce some action by an individual, and the inducement to the individual. We say that the general welfare clause is a clause that is construed not as a general power, but as a special power in Congress to expend this money, and we rely particularly upon the case of *United States* v. *Realty Company,* 163 U.S. 427, where it was held that Congress had authority to appropriate for the payment of a claim for sugar bounty which was a moral claim upon the Government, even if the earlier act granting the bounty were unconstitutional. . . .

We also take up a discussion of the purpose of this money -- as to whether this tax has been **[***21]** levied for a public purpose. We do not think that that can be approached except from the standpoint of the general rules in regard to the use of tax money. We know how hesitant the Court is to interfere with the appropriation by Congress of money for purposes deemed by Congress to be within the public welfare.

We accept the decision in the case of *Loan Association* v. *Topeka,* 20 Wall. 655, where this Court held that a State act was not for a public purpose, where it had authorized the payment to a local manufacturer of funds to operate his business. Upon the other side, the theory of public purpose upon which we rely is that enunciated in the case of *Noble State Bank* v. *Haskell,* 219 U.S. 104. In that case money was taken from the various banks that were operating in the State of Oklahoma and paid into a fund which was to be used to make whole the depositors in banks that failed. That is an illustration of the use of public money for a public purpose. It seems to us similar to the use that is made here of a tax levied on processors in the form of an excise passed on to the general consuming public, the purpose of which is to raise money to be used by the Government **[***22]** in contracts with farmers, for the reduction of surplus production that was pressing on the price and pressing

on the supply in the hands of the American handlers of commodities. . . .

Extracts from the printed argument for the Government, signed by *Attorney General Cummings, Solicitor General Reed, Assistant Attorney General Wideman, Assistant Attorney General Morris,* and *Messrs. Sewall Key, Andrew D. Sharpe, Robert N. Anderson, Alger Hiss, Mastin G. White,* and *Prew Savoy.*

The sole purpose of the processing and floor-stock taxes is to raise revenue.

The processing and floor-stock taxes are excises; not direct taxes.

The floor-stocks adjustment may be separately justified as a necessary adjunct to the processing taxes.

Powers were not unlawfully delegated.

If in the original Act Congress exceeded its power to delegate, that is now immaterial because Congress has expressly ratified the assessment and collection of the taxes. Agricultural Adjustment Act, as amended Aug. 24, 1935, § 30, subsec. 21 (b); *Rafferty* v. *Smith, Bell & Co.,* 257 U.S. 226; *The Peggy,* 1 Cranch 103, 110; *Dinsmore* v. *Southern Express Co.,* 183 U.S. 115; *Dorchy* v. **[***23]** *Kansas,* 264 U.S. 286; *Steamship Co.* v. *Joliffe,* 2 Wall. 450.

This Court has recognized that Congress may ratify taxes, illegal when assessed but assessed under claim and color of authority, if it could have imposed such taxes in the first instance and if its power to do so remained unimpaired to the date of ratification. *United States* v. *Heinszen & Co.,* 206 U.S. 370; *Rafferty* v. *Smith, Bell & Co.,* 257 U.S. 226. See also *Mascot Oil Co.* v. *United States,* 282 U.S. 434; *Charlotte Harbor Ry.* v. *Welles,* 260 U.S. 8, 10, 11; *Seattle* v. *Kelleher,* 195 U.S. 351, 359-360; *Hamilton* v. *Dillin,* 21 Wall. 73; *Hodges* v. *Snyder,* 261 U.S. 600, 602-603; *Stockdale* v. *Insurance Companies,* 20 Wall. 323, 332; *Wagner* v. *Baltimore,* 239 U.S. 207, 216, 217; *Mattingly* v. *District of Columbia,* 97 U.S. 687; *Kansas City Ry. Co.* v. *Road District,* 266 U.S. 379; *Tiaco* v. *Forbes,* 228 U.S. 549. Cf. *Matter of People (Title & Mortgage Guaranty Co.),* 264 N.Y. 69; *Fisk* v. *Kenosha,* 26 Wis. 23; *Miller* v. *Dunn,* 72 Cal. 462.

A tax is not necessarily invalid because retroactively **[***24]** applied. Taxing acts having retroactive features have been upheld in view of the particular circumstances disclosed.

The processing and floor-stocks taxes do not contravene the Fifth Amendment. *Helvering* v. *City Bank Farmers Trust Co.,* 296 U.S. 85; *Nebbia* v. *New York,* 291 U.S. 502, 525; *Railroad Retirement Board* v. *Alton R. Co.,* 295 U.S. 330, 347 (footnote 5); *Magnano Co.* v. *Hamilton,* 292 U.S. 40, 44; *McCray* v. *United States,* 195 U.S. 27; *Nicol* v. *Ames,* 173 U.S. 509, 521; *Flint* v. *Stone Tracy Co.,* 220 U.S. 107.

The contention that these taxes are not for a public purpose is simply another way of challenging their character as revenue measures. The money collected goes into the Treasury of the United States. One must presume that it will be used for a purpose within the powers of Congress. If so used, no objection could be made on the ground that the taxes are not levied for a public purpose. *Mountain Timber Co.* v. *Washington,* 243 U.S. 219; *Noble State Bank* v. *Haskell,* 219 U.S. 104; *Veazie Bank* v. *Fenno,* 8 Wall. 533.

Respondents should not be allowed to question the appropriation as **[***25]** a defense to the payment of their taxes. *Massachusetts* v. *Mellon,* 262 U.S. 447, 487.Cf. *Knights* v. *Jackson,* 260 U.S. 12, 15; *Patton* v. *Brady,* 184 U.S. 608, 620; *United States* v. *Realty Co.,* 163 U.S. 427.

Public policy requires that taxpayers shall not avoid payment of otherwise valid taxes by

questioning the purpose of the levy or of an appropriation contained in the taxing statute. The appropriateness of such a rule is particularly apparent where, as here, it is not possible to ascertain the exact use to which the taxpayers' money will be put. It is true that the Act in its original form contained in itself an appropriation. § 12 (b). But this fact would not have made the money, if collected at that time, any the less a part of the public funds. See *Knights v. Jackson,* 260 U.S. 12. Furthermore, money collected under the Act could be used to defray any of the Government's expenses should Congress see fit to change the appropriation before the money was actually transferred from the general fund of the Treasury as a set-off against advances made out of that fund. Cf. *Head Money Cases,* 112 U.S. 580.

In the case of respondents' **[***26]** taxes, the use is made even more uncertain by the terms of the appropriation provisions found in the Act.

Under the Act of August 24, 1935, the appropriation is out of the general funds of the Treasury in an amount equivalent to the taxes collected under the original Act. Also, under the appropriation the Secretary of Agriculture may now use any part of the money for additional kinds of payments and for the acquisition of agricultural commodities pledged as security for certain loans made by federal agencies. Thus, additional objects of expenditure and additional elements of uncertainty have been introduced.

The general welfare clause should be construed broadly to include anything conducive to the national welfare; it is not limited by the subsequently enumerated powers. Congress may tax (and appropriate) in order to promote the national welfare by means which may not be within the scope of the other Congressional powers. That this, commonly known as the Hamiltonian theory, is correct, is shown by the plain language of the clause; by the circumstances surrounding its adoption; by the opinion of most of those who participated in the early execution of the Constitution; by the opinion **[***27]** of later authorities; and by long-continued practical construction.

The question was elaborately discussed in the briefs filed in *Field* v. *Clark,* 143 U.S. 649; *United States* v. *Realty Co.,* 163 U.S. 427; *Smith* v. *Kansas City Title Co.,* 255 U.S. 180; and *Massachusetts* v. *Mellon,* 262 U.S. 447.

The Madisonian theory, rejecting the natural meaning, and treating the clause as an introduction to the subsequent enumeration of Congressional powers (1 Richardson's Messages, etc., 585), violates the basic principle of constitutional construction. *Holmes* v. *Jennison,* 14 Pet. 540, 570-571. See Story, Const., §§ 912-913. This would transform a great independent power into a mere incident of other powers.

The circumstances surrounding the adoption of the clause and the opinions of most of those who participated in the adoption and early execution of the Constitution support the Hamiltonian view. Arts. of Confed. § 8; 9 Writings of James Madison (Hunt ed.), pp. 411-424, 370-375; 4 Madison, Letters and Writings, 126; Elliott's Debates.

The clause was adopted along with that relating to payment of the debts, after a prolonged discussion, not **[***28]** only of the Revolutionary debts, but also of the power of Congress, as against that of the States, in regard to matters of general interest. See Elliott's Debates, V, I; cf. 4 Madison, Letters and Writings, pp. 121 *et seq.*

Discussion in the ratifying conventions indicates clearly an almost unanimous view that the clause was not limited by the enumerated powers. Elliott's Debates; Hamilton's Rep. on Manufactures, 3 Hamilton's Works, pp. 192, 250; President Monroe, 2 Richardson's Messages, etc., pp. 165, 173.

There would seem no doubt that President Washington agreed with Hamilton and Monroe (Story, Const., § 978, note). And it is clear that John Quincy Adams was of the same opinion (Letter to Stevenson, July 11, 1832, reprinted in Cong. Rec., 49th Cong., 1st Sess., vol. 17,

Part 8, Appendix, pp. 226 to 229). as was likewise Calhoun (30 Annals of Congress, 14th Cong., 2d Sess., p. 855). Henry St. George Tucker, of Virginia, representing a special committee of the House of Representatives in 1817, expressed the same opinion (II American State Papers (Misc.), 443, 446, 447), as did also Daniel Webster (Webster's Great Speeches, 243). Apparently, Jefferson likewise shared this **[***29]** view, although his opinion on the Bank of the United States has been quoted both as supporting the Hamiltonian and the Madisonian view. IV Elliott's Debates, 2d ed., 610. See Story, Const., § 926 (note); 1 Hare, American Const. Law, 244; and see President Jackson's statements in his veto of the Maysville Road Bill. [An Appendix to the Government's brief in this case contains a valuable collection of the opinions on this question delivered before the ratifying conventions, and other examples of contemporaneous exposition. See also 36 Harv. L. Rev. 548; 23 Georgetown L.J. 155; 22 *id.* 207; 8 Va. L. Rev. 167-180; 42 Yale L.J. 878.] Madison himself in later years recognized that his view had not been followed in practice. 4 Madison's Letters and Writings, 146.

Not only was the Hamiltonian theory adopted by the "weight of contemporaneous exposition" (See *Martin* v. *Hunter,* 1 Wheat. 304, 350); it has been accepted by most of the later great commentators on the Constitution. See Story, *ubi supra;* Pomeroy, the Const. (3d ed., 1883), pp. 174-175; Willoughby, Const., pp. 582-593; 1 Hare, Am. Const. L., pp. 241 *et seq.;* Mr. Justice Miller's "Lectures on the Constitution," **[***30]** pp. 229-231, 235; Burdick, Const., § 77. Of even more importance is the practical construction by the earlier Congresses. 30 Annals of Congress, 14th Cong., 2d Sess., p. 855; II American State Papers (Misc.), 443, 446, 447; Story, *op. cit.,* § 991.

The Hamiltonian view has been so continuously and so extensively followed by Congress that many of our most familiar and significant governmental policies and activities are dependent upon its validity. [Under this head the brief cites a large number of instances of appropriations for various objects, including: relief of distress due to catastrophes; health; education; science; social welfare; industry; agriculture.]

The relevant judicial authorities support the Hamiltonian theory. *United States* v. *Realty Co.,* 163 U.S. 427; *Missouri Utilities Co.* v. *California City,* 8 F. Supp. 454, 462; *United States* v. *Gettysburg Electric Ry.,* 160 U.S. 668, 681; *Head Money Cases,* 112 U.S. 580, 595; *Gibbons* v. *Ogden,* 9 Wheat. 1, 197; *Flint* v. *Stone Tracy Co.,* 220 U.S. 107, 153.

The literal reading of the general welfare clause has been adopted by most of the lower federal courts. *Langer* **[***31]** v. *United States,* 76 F. (2d) 817; *Kansas Gas & Electric Co.* v. *Independence,* 79 F. (2d) 32, supplemental opinion on rehearing, 79 F. (2d) 638; *Missouri Utilities Co.* v. *California City,* 8 F. Supp. 454; *Vogt & Sons* v. *Rothensies,* 11 F. Supp. 225. Cf. *Miles Planting Co.* v. *Carlisle,* 5 App. D.C. 138; *Washington Water Power Co.* v. *Coeur D'Alene,* 9 F. Supp. 263.

It is not suggested that the public money may be expended by Congress for any other than national purposes, or for any other uses than those of the Nation. But the question of what is a national purpose, of what is a national use, is, in the first instance, purely a question of governmental policy, of which Congress is to judge.

The procedure provided by the Constitution for the consideration by Congress of fiscal measures, and the accountability to the electorate, were the only checks on congressional appropriations. *McCulloch* v. *Maryland,* 4 Wheat. 316, 428; *Pacific Insurance Co.* v. *Soule,* 7 Wall. 433, 443.

The entire range of discussion in the Convention was directed to *locating* the power and little or no attention was given its *extent,* which **[***32]** everyone seemed to concede must, in the nature of things, be discretionary. The same is, in general, true of the ratifying conventions. In the early years following the adoption of the Constitution, the view was generally expressed that Congress' determination of what was for the general welfare was not

subject to judicial review. Madison, Veto Message of March 4, 1817; Hamilton, Opinion on the National Bank, 3 Hamilton's Works (Lodge ed.), p. 485. See also Hamilton's Report on Manufactures, III Hamilton's Works (Hamilton ed.), p. 250; Monroe, Veto of the Road Bill, II Richardson, 142, 165, 166; Pomeroy, Const. L. (10the ed.), § 275; 1 Hare, American Const. L., 249; Cooley, Taxation (2d ed.), 109; Story, Const., §§ 924, 944, 991, 1348.

In *United States* v. *Realty Co.*, 163 U.S. 427, it was said that the determination of what debts or claimed debts should be paid "depends solely upon Congress" (p. 441); and that the decision of Congress recognizing a claim founded upon principles of right and justice "can rarely, if ever, be the subject of review by the judicial branch of the government" (p. 444). If this be true of the word "debt" -- so familiar to our courts -- Congressional **[***33]** application of the term "general welfare" cannot be more readily subject to judicial review.

The expenditures authorized by the Agricultural Adjustment Act were soundly designed to promote the general welfare. [Here followed an elaborate explanation of the agricultural situation and the application of the statute].

The tax was laid and the proceeds appropriated for a public purpose.

Rules applicable to municipal taxation are not relevant to the great power of Congress to raise revenues. 1 Cooley, Taxation, 4th ed., pp. 388-390.

While in local taxation the courts may, in extreme cases, review the legislative determination that a particular object is for a public purpose, in federal taxation Congress should be the final arbiter of what constitutes a federal public purpose. That which is for the "general welfare" as those words are used in the Constitution, must of necessity also be for a public purpose.

Yet even viewed by the more narrow and critical rules applicable to state taxation, the purpose here was clearly public. Citing and discussing many authorities, including *Loan Association* v. *Topeka*, 20 Wall. 655, 665; *Green* v. *Frazier*, 253 U.S. 233, 240-242; **[***34]** *Fallbrook Irrigation District* v. *Bradley*, 164 U.S. 112; *Parkersburg* v. *Brown*, 106 U.S. 487; *Cole* v. *LaGrange*, 113 U.S. 1.

It is no objection to the tariff acts that they benefit manufacturers as well as the country generally. *Field* v. *Clark*, 143 U.S. 649, 696; *Hampton & Co.* v. *United States*, 276 U.S. 394, 411.

The appropriations contemplated by the Act are a valid exercise of the fiscal powers of Congress. To stabilize and preserve the credit structure of the Nation, to protect the banks and other credit agencies which it had already established or sponsored, and to protect the credit of the Government itself.

It was inevitable that the sudden and tremendous decrease in farm incomes should have caused a serious strain on the farm-credit agencies which had already been weakened by the long price decline and general liquidation which had characterized agriculture since 1920. Only by increasing the purchasing power of the farmer could the stability of the financial system be restored and the large investments which the Federal Government had made in this field ever be liquidated.

Power of control over or regulation of agriculture **[***35]** has not been asserted, but, to the contrary, the steps authorized by this Act and taken under it do not go beyond the appropriation and spending of the money.

The contracts are a matter of negotiation and voluntary agreement and on the part of the United States amount to no more than a method by which the Secretary of Agriculture sees that the money appropriated goes to persons in the class specified by Congress. It is, indeed,

probable that the Secretary would be held to have the right to enter into contracts of this sort even though he had not been specifically authorized by Congress to do so. See *United States v. Fidelity & Deposit Co.*, 80 F. (2d) 24. Similar contracts are entered into by administrative officials in almost every case where money is expended for such familiar matters as the construction of buildings and the delivery of supplies.

It would be most unusual to suppose that a contract of this nature, entered into freely by both parties, is an exercise of sovereign regulation and control over one of the parties or over the subject matter with which the contract deals. "The United States, when they contract with their citizens, are controlled by the same **[***36]** laws that govern the citizen in that behalf." *United States v. Bostwick*, 94 U.S. 53, 66; See also *Cooke v. United States*, 91 U.S. 389, 398; *Smoot's Case*, 15 Wall. 36. No method of enforcement of these contracts has been provided by Congress. Under them the rights of the United States are no greater than would be the rights of a private citizen under similar contracts, and enforcement must be by ordinary judicial process according to the law of the forum. The contracts are not derogatory of any sovereign rights of the States; they are carried out pursuant to and under the protection of the laws of the States.

In this Act the Government goes no further than offering benefits to those who comply with certain conditions. If power over the matters to which those conditions relate is vested in the States, they remain free to pass laws rendering it impossible for any of their inhabitants to comply with such conditions. In so doing the States would not be clashing with any enactment of Congress, even though the result were to terminate completely the administration of the agricultural provisions of the Act in those States. There is no attempt to require the States **[***37]** to take or refrain from action with respect to agricultural land within their borders, a power which this Court in *Kansas v. Colorado*, 206 U.S. 46, has declared does not reside in the Federal Government.

The distinction between an application of the lawmaking power to enforce compliance, and the use of the spending power to persuade, was pointed out in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529, and illustrated by the case of *Federal Compress Co. v. McLean*, 291 U.S. 17.

The effect which the Act of Congress will have in a State is dependent entirely upon the voluntary action of that State and its inhabitants. The situation is much like that in *Massachusetts v. Mellon*, 262 U.S. 447.

Furthermore, if the expenditure results in regulation of matters normally within state control, that result cannot deprive Congress of the right of taxation for the general welfare given it by the Constitution. *McCray v. United States*, 195 U.S. 27.

Similarly, considering this Act as an exercise of the fiscal powers of Congress, it is not invalid even if it invades state fields. *First National Bank v. Fellows*, 244 U.S. 416; **[***38]** *Legal Tender Cases*, 12 Wall. 457, 539.

Oral argument of *Mr. George Wharton Pepper*, for respondents.

May it please your Honors, this record gives rise, as I see it, to two entirely distinct questions. One question is whether the portions of the Agricultural Adjustment Act which are under discussion would be constitutional in respect of the taxes levied under their authority, if Congress had itself levied them and settled every detail in connection with them. The second is the entirely distinct question (assuming that Congress might itself have done all that the Secretary of Agriculture has here done) whether the delegation to him of the authority in virtue of which he had undertaken to act was such a valid delegation that the acts done by him have the quality of taxation.

Mr. Hale, my colleague, who represents the receivers, respondents in this case, has invited

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me to address myself to the first of these questions, namely, whether or not this processing tax is a valid exaction, irrespective of the question of delegation; and he, with your Honors' permission, will address himself to the question of delegation, a great and important question in the case, but quite distinct, **[***39]** as it seems to me, from the one which I am going to discuss.

I have no disposition to raise an issue with the Solicitor General respecting the seriousness of the situation with which Congress undertook to deal; but when I come to consider whether or not the attempted remedy for the economic evils is or is not within the limits of the power of Congress, I cannot escape the conclusion that in his argument, able as it was, he has indulged somewhat in oversimplification. The case presents to him no difficulty. Congress, in the familiar course of legislation, has done two things, both of which, as he sees it, are well within its power. First it has laid a tax. Second it has made an appropriation. The tax feature is an ordinary exercise of the taxing power; and, as to the appropriation, even if it is for any reason questionable, nobody has a standing to question it. Apart from the question of delegation, he thus readily convicts the court below of error and asks confidently for a reversal.

I, on the other hand, find in this record some constitutional questions of great difficulty and of vast importance. It seems to me that a reversal of the judgment appealed from would justify **[***40]** the conclusion that Congress, originating as a federal legislature with limited powers, has somehow been transformed into a national parliament subject to no restraint except self-restraint.

I venture to hope that the judicial power of the United States does not extend to working any such transformation and that, to bring it about, we the people of the United States must deliberately resort to the process of constitutional amendment.

One of the difficulties necessarily involved in the argument of this case is to identify the relevant portions of the statute and to isolate the essential facts, and then make a statement of them that is full enough to be fair but compact enough to be manageable. Although the Solicitor General has done this to the extent required by his argument, I hope the Court will be patient with me if I attempt a brief restatement.

In what I am about to say I am referring to the unamended act, inasmuch as the taxes sought to be recovered by the Government in the instant case had accrued before the amendment. The significance of the amendment will be discussed at the proper point in the argument in connection with what we hold to be an ineffective attempt **[***41]** to ratify taxes theretofore invalid.

Any such statement must, as its first point, make a reference to the declared policy of the AAA, which is found in § 2 of Title I. That policy is by an elaborate mechanism to re-create for the farmer the favorable financial conditions which, under the operation of economic law, he for a short time enjoyed about a quarter of a century ago. More specifically, the policy is to raise the price which the farmer receives for a unit of what he produces until the sale of that unit shall enable him to buy as much and as many needed commodities as a unit sale would have enabled him to buy during the base period. The base period selected as the golden age of agriculture is, in the case of all commodities except tobacco and potatoes, the pre-war period from 1909 to 1914. In the case of tobacco and potatoes it is the post-war decade from 1919 to 1929. The golden age value to be secured for the unit is called its "fair exchange value." Obviously its determination requires first the ascertainment (at any given moment) of the actual current market price of the unit; second the actual current market price of commodities needed by the farmer; third the number **[***42]** of dollars that a unit fetched in the base period; and, fourth, the quantity of needed commodities for which a unit was then exchangeable. When the Secretary of Agriculture has ascertained these factors he has the material for a formula which will determine the gap or "spread" between the actual price and the ideal, or parity, price. This gap it is the laudable purpose of the act to close.

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Accordingly, the Secretary undertook, in the early part of 1933, to determine what had been, in the base period, the farm price per pound of cotton, and he found that it was 12.40 cents. He then ascertained that the price index of the commodities which farmers buy pointed to a figure higher than their price in the base period by 3 per cent, so that the figure was 103 per cent as of the time of his determination compared with the situation in the base period.

Applying his 103 per cent to his 12.40, he got 12.77. He then ascertained that the farm price current for a pound of cotton was 8.7 cents. Subtracting the 8.7 cents from 12.77, he got 4.07. Then he made an adjustment, which is explained by the fact that the farm prices have to do with the lint cotton, in bales, and the price to the **[***43]** farmer is based upon the unbaled weight, so he finally determined the gap to be 4.2 per pound.

It is perfectly true, as the Solicitor General has said, that we do not dispute that the Secretary of Agriculture did the best job he could do with the figures at his disposal. He gathered a lot of statistics from all over the country, and he weighted them and he did all the things which have been suggested from the bench as the common practice in the departments; and there did result this figure of 4.2, and there is no dispute between us respecting the fidelity with which the Secretary acted in an attempt to find the figures upon which to base the tax.

Adjustment of production to consumption by closing the gap in order to increase the purchasing power of agricultural commodities thus being the ultimate objective, the second important point is that the adjustment is to be accomplished by a reduction in acreage, or reduction in the production for market, or both, of any basic agricultural commodity. This reduction of production is relied upon to cause a corresponding diminution of marketable units and a consequent approximation of their actual market price to the golden age price. **[***44]**

I pause to note that the phrase "adjustment of production to consumption" is really not an accurate statement of the objective. The natural meaning of that phrase is that you are merely reducing production to the extent of equalizing it to a consumption which is to remain undisturbed. It is evident, however, that what is really proposed is such a reduced production as will secure for the farmer his parity price, irrespective of the effect produced upon the consumer.

The third point is that the closing of the gap through reduction of production is to be accomplished principally through agreements with producers containing provisions for rental or benefit payments in such amounts as the Secretary of Agriculture deems fair and reasonable; the producer in consideration of the payment agreeing to act in conformity with the federal policy.

The fourth point is that, in order to raise the money with which to purchase the promise of the farmer to limit his production and otherwise submit to regulation, a processing tax is levied upon processors in respect of the first conversion of raw material into a manufactured product; and the proceeds of this tax, while paid into the Treasury, are **[***45]** appropriated in advance to the Secretary of Agriculture for the specific purposes which I shall presently state. The rate of tax, per unit processed, is by the act declared to be the difference between the current average farm price for the commodity and the fair exchange value thereof. In other words, the rate of tax corresponds to the gap or spread between the actual and the ideal. Thus the rise and fall of the so-called tax is dependent upon factors wholly unrelated to the business of the processor. From his point of view the tax might as well have been levied at a figure per unit processed dependent upon the rise or fall of the mercury in the Fahrenheit thermometer.

The next point to be noted is that the proceeds of the tax when received by the Secretary of Agriculture are to be available for specific purposes, to wit, disbursements which include not merely rental and benefit payments to farmers but what is euphemistically described as

"expansion of markets" and "removal of surplus agricultural products." "Expansion of markets" I understand to include those open market operations which, when conducted in financial centers, are described as "rigging the market." "The removal **[***46]** of surplus agricultural products" means in the case of hogs (for example) the purchase of quantities of animals at high prices and their incineration with a view to limitation of supply. My friend the Solicitor General is quite right when he says that there was appropriated a hundred million dollars initially out of the Treasury, before the scheme got to work, which was available for the time being for rental and benefit payments; but I am sure that the provision of the Act has not escaped him which is to the effect that as the proceeds of the tax come in, the amounts advanced by the Treasury are to be repaid; so that the whole financing of the scheme which I am outlining is accomplished by a tax paid by the processors in accordance with a measure or yardstick which has no relation under heaven to their activity or the business they are to do.

Finally, it may be observed that the original list of agricultural commodities as contained in § 11 of the act, has been increased by the subsequent inclusion of many others, the most recent being potatoes. Naturally it is impossible to make a definate statement respecting the scope of that provision of the act which authorizes the imposition **[***47]** of compensating taxes on articles found to be in competition with basic commodities. These competing commodities are to be identified only by the Secretary and might include a vast area of production in addition to the area specified in the act.

In making the foregoing statement I have carefully refrained from stating such features of the act as give rise to the question of delegated power. It seems to me to conduce to clearness to reserve a reference to those features until the argument on delegation is made. I merely remark in passing that the whole scheme of the act necessarily calls for so many determinations, adjustments and decisions on points of policy that it might fairly be described as a scheme for the government of agriculture with the Secretary of Agriculture as Governor General.

That is my basic statement of the significant parts of the Act and of the facts which it seems to me it is important to bear in mind in approaching the constitutional questions, which, as I have said, seem to me to be two. I affirm, first, that the processing exaction is not in its nature the exercise of the taxing power of the United States, but is wholly regulatory in character, and **[***48]** is part of a nation-wide scheme for the Federal regulation of local agricultural production; and, second, that if that scheme as a whole is unconstitutional as an invasion of the reserved powers of the States, then the whole scheme falls and the processing tax falls with it. . . .

When the Court rose yesterday I had completed an introductory statement upon the basis of which I desire to present two propositions for the consideration of this Court.

First: That the exactions called processing taxes are not exercises of the taxing power as such but are integral parts of a regulatory scheme and are themselves regulatory in character.

Second: That this regulatory scheme is an invasion of the field reserved by the Tenth Amendment to the States and to the people and that therefore the scheme must fall and carry the processing taxes with it.

If I can sustain these propositions, then without regard to the question of delegation, the judgment appealed from must be affirmed. I confidently assert, without arguing the point, that if my propositions are sound, nothing in the amendment of August 24, 1935, in any way affects them. I do not understand it to be seriously contended that the **[***49]** amendment has changed the nature of the regulatory scheme. If the original act was invalid for lack of power the amendment is in no better case.

The outline of the scheme which I have already made makes it clear that control of

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Headnote: [3]
An excise may constitutionally be levied on one group for the benefit of another when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation.

EVIDENCE, §2
judicial notice -- matters generally understood. --

Headnote: [4]
The court may not shut its eyes to what all others can see and understand.

STATUTES, §32
who may question validity of Agricultural Adjustment Act processing tax. --

Headnote: [5]
The processing tax authorized by the Agricultural Adjustment Act of May 12, 1933, is a mere incident of the regulation of agricultural production for which such act provides, the validity of which may accordingly be challenged by those against whom the tax is levied.

STATUTES, §12
validity -- conformity to Constitution as essential. --

Headnote: [6]
The Federal Constitution is the supreme law of the land, ordained and established by the people, and all legislation must conform to the principles it lays down.

COURTS, §96
extent of power to review legislation. --

Headnote: [7]
The function of the courts when an act of Congress is appropriately challenged as not conforming to the constitutional mandate is merely to ascertain and declare whether the legislation is in accordance with or in contravention of the provisions of the Constitution, and not to approve or condemn its policy.

UNITED STATES, §57
powers of Federal government -- extent. --

Headnote: [8]
The Federal government is one of delegated powers; and has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted.

UNITED STATES, §14
powers of Congress -- scope of welfare clause. --

production is the objective of Congress. I now wish to show that the processing tax is merely a cog, though an essential cog, in the regulatory machine. That this is its true character appears from the following considerations:

There is no tax until the Secretary of Agriculture determines that rental or benefit payments are to be made. See § 9 (a). In other words, the making of rental or benefit payments is the sole occasion for the tax.

The declared objective being to close the gap between the farmer's financial condition today and his condition in a pre-war period, the rate of the tax is declared to be the extent of such gap. § 9 (b). In other words, (as already explained) there is no relation whatever between the rate of tax and the activity of the processor, except that the extent of the gap in the farmer's income is translated into such-and-such a sum per pound of raw material processed. Congress in so many words has said "We exact from the **[***50]** processor a sum equal to our estimate of what the farmer should be receiving in addition to his present income."

The sum so exacted is to be paid into the treasury but is by the act itself so appropriated as to be available to the Secretary of Agriculture for rental and benefit payments and other features of the reduction program. § 12 (b). In other words, the tax and its use are so related that, except for the specified use, there would be no tax, and except for the tax, the scheme could never go into effect.

The tax terminates at the end of the marketing year current at the time the Secretary determines to discontinue rental and benefit payments. § 9(a). In other words, just as the proposed exercise of control is the occasion of the tax so a determination to abandon control marks the end of the tax. The provision on that subject is the reciprocal of the first that I mentioned. The tax goes into effect when the Secretary declares that rental and benefit payments are to be made. The tax ceases to exist at the end of the market year when he declares that the rental and benefit payments are to terminate; and, as I have explained, in the interval the tax, in theory at least, **[***51]** is modified upward or downward by fluctuations in the fortunes of the farmer. I say "in theory at least," because (referring to the brief filed on behalf of the processors of hogs) you will find that while in the case of cotton it so happens, as so clearly explained by the Solicitor-General yesterday, that the tax has been maintained and still exists at the same figure at which it was originally placed -- namely, 4.2 cents per pound, that being the precise mathematical outcome of the formula in the act, with some administrative adjustments -- in the case of hogs the authority given to the Secretary to approach compliance with the formula gradually has been exercised so liberally that while the tax which the formula would have yielded at the time the tax was imposed was something over four dollars and a half per hundred-weight of hogs, the Secretary imposed a tax first of fifty cents, then of a dollar, then of a dollar and a half, and subsequently, as of March, 1934, a tax of $ 2.25 the hundred-weight, which has continued in effect and is in effect at the present time, although at the outset that was only about half the figure yielded by the formula; and the gap has in fact so far **[***52]** closed, owing to the successful operation of the scheme, that there was, I think, one time when the gap disappeared entirely; and there are judicial findings in a number of cases to the effect that the gap had shrunk to 81 cents at the time of the findings in question, although the tax was still maintained at $ 2.25.

I mention this to show that the tax is regulatory in character, and does not really follow even the fluctuations as required by the formula, but that resort must be had to that provision of the Act which authorizes the Secretary not merely to fix the rate at the outset in accordance with the formula or a gradual approach to it, but authorizes him to maintain the tax after it has been laid, so that if the tax equals the formula or is less than the formula at the time it is laid, and subsequently the gap closes, even approaching the vanishing point, the power to maintain is invoked for the purpose of keeping the tax at a figure in excess of the formula, provided in the opinion of the constituted authority it is necessary to do that thing in order to regulate local production.

Since the object of the scheme of federal control is to enable the farmers to get higher prices **[***53]** for their products, and so close the gap, it must follow that if (for example) the processors of hogs had voluntarily paid to their several vendors such prices as would close the gap there never would have been any tax whatever.

While the formula for the tax rate is specified in the act, the Secretary of Agriculture is given discretion to lower it, § 9(b); he is, by § 15(a), given authority to exempt the processing of any commodity from all tax whatever, and even to refund what has been paid; and he is empowered by § 15(d) to impose compensating taxes of unspecified amounts upon commodities competing with basic commodities.

In view of the foregoing I submit that what Congress has done is not to exercise its taxing power except as part of and solely in aid of a regulatory scheme, the administration of which it has confided to an executive official.

If I am right in my analysis, it is about as clear a case of an exaction masquerading as a tax, but really regulatory in its character, as I think has ever come before this Court. . . .

Now, may it please your Honors, if I am right in my contention that this so-called processing tax is merely a regulatory exaction, and not an exercise **[***54]** of the taxing power as such, it remains for me to satisfy your Honors that it is such an exaction as should fall if the scheme itself is beyond the power of Congress.

On this point I contend that this Court has decided that wherever it appears upon the face of the statute that levies are being imposed not to replenish the public treasury but to control the conduct of the private citizen, the validity of the levy depends upon whether the exercise of control is within the powers granted by the people to Congress.

At this point the Solicitor General advances the objection that there is a difference between this case and the decisions to which I refer. He is right: there *is* a difference but it is not a significant difference. It is true that in the *Child Labor Case* and others the tax was laid upon A in order to control A's conduct. In the instant case the money is exacted from A in order to be used for the control of the conduct of B. If, however, the fact be that *control of conduct* is the legislative objective and if such control cannot be accomplished without resort to a tax, then it must be immaterial whether the control, if achieved, results from A's desire to **[***55]** escape the tax or from B's readiness to exchange his freedom for a share of A's money. . . .

But the objection is then advanced in another form. It is said that in the instant case it is optional with the farmer whether he will accept the benefit payment and that, if he subjects himself to control, he does so voluntarily. This, it seems to me, is a factual distinction without a legal difference. The employer of child labor was not coerced except by economic pressure. The farmer is not coerced except by economic pressure. Whether the pressure takes the form of threatened exaction or of promised bounty, the Court is faced by the same fundamental proposition, namely that Congress is using the device of a tax as a means to the exertion of effective pressure upon the citizen in order to make him conform to congressional policy. If the control thus sought is within some granted power, well and good. If not, the whole scheme fails.

The Court will note that I am not contending that a federal loan or a federal bounty to farmers is, *per se,* invalid. I recognize that for a hundred years there have been all sorts of unchallenged congressional appropriations to promote agriculture. **[***56]** But these measures merely offered advice or instruction or extended financial aid to farmers. In no case, as far as I know, was there an attempt by Congress through the use of money to regulate local production. The type of regulation here attempted is the limitation of local agricultural production. Suppose it were the policy of a given State to stimulate such

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production through bounties or by more positive coercion. I find it hard to believe that the Constitution of the United States would sanction a public auction in which the farmer is placed on the auction block, the federal government bidding in order to purchase his promise to limit production and the State bidding in order to retain his loyalty to the local law. That is not at all an extravagant illustration, because, if, when your Honors come to look at Mr. Donald's able brief [referring to one of the briefs filed by *amici curiae*] you will glance at page 42, you will find the most interesting collection of constitutional and statutory declarations in the several States that seem to me to be at war with this Federal policy; and if it is going to be possible for the Federal Government to offer pecuniary reward to the **[***57]** farmer under conditions such that he cannot very well afford to decline, you get a situation in which he sells his freedom for this mess of pottage, and disavows his allegiance to that State which, under the Tenth Amendment, is entitled to control his production, and subjects himself to what is, in that sense, an alien scheme. I always distrust my capacity to put a perfect dilemma; but I suggest that in this case one of two things is true -- either that control acquired by purchase is, if lawful, the supreme law of the land or that a scheme of local regulation which it is within the power of the State to nullify is a scheme which Congress lacks the power to set up.

If you look at the case realistically, it is not a voluntary matter with the farmer whether he does or does not accept the regime. It is no more voluntary than it was in the case of the manufacturer of goods made with child labor to continue to pay the tax and still remain in the business of which Congress disapproved. It is not possible for the farmer in any neighborhood who refuses to accept the regime to compete successfully with his next door neighbor who has accepted it. If you think realistically, it is not **[***58]** a voluntary scheme at all; and if you will glance at pages 32 to 36 in Mr. Donald's brief and note the intensive sales effort that was put out to capture the allegiance of the farmers, you will think that I am not extravagant in saying that that was a method of compulsion that is a good deal more effective than allotting quotas and threatening criminal penalties for their violation. It is a good deal more effective to purchase control with the use of liberal sums of money than it is to enforce obedience to a complicated scheme by means of criminal sanctions.

In connection with the emphasis laid by the Government upon the alleged voluntary character of the farmer's consent to be regulated, I think it significant to note that there is nothing voluntary in the consequences of his action as they affect the processor and the consumer. These people may well be neighbors of the farmer and citizens of the same State. The necessary result of the farmer's agreement with the federal government to limit production is threefold: first, it subjects the processor to a tax; second, it raises the price which the processor must pay to the farmer for his raw material; and, third, even if the processor **[***59]** absorbs the tax, he must reflect the rise in raw material costs in his price to the retailer -- who, in turn, exacts an increased price from the ultimate consumer. There is, I repeat, nothing voluntary in this scheme as respects the effect upon processor and public. I mention this merely by the way; because I am contending that the criterion of validity or invalidity is the control sought by Congress and not the nature of the economic pressure exerted to secure it.

I have now attempted to establish that these processing exactions are an integral part of a scheme to regulate local production and to affect the price of agricultural commodities and so must be declared invalid if the scheme as a whole is invalid. Before passing to my second proposition -- namely, that the scheme *is* invalid -- I wish to notice a final objection made by the Government against treating the scheme of the act as a unity.

It is said that while A may resist payment of an exaction intended to control his own conduct, he has no standing to resist it if the proceeds are to go into the Treasury and there become subject to uncontrollable spending power. There is in this objection what seems to me an obvious **[***60]** fallacy. The precedent relied upon by the Government -- *Massachusetts* v. *Mellon* -- is merely authority for the proposition that neither a State nor an individual taxpayer has a sufficiently direct pecuniary interest to give him a standing to question the

validity of an appropriation of money which is lawfully in the Treasury and subject to appropriation. The question presented by this record is wholly different. Here the citizen is resisting an attempt of the Federal Government to take money out of his own pocket and is basing his resistance upon the invalidity of the scheme of which both the threatened collection and proposed disbursement are necessary parts.

I do not overlook the announcement recently carried by the press that if this act is declared unconstitutional the next move of Congress will be to levy an excise in one Act and then appropriate money for benefit payments by another. If such a course is followed it will be time enough to discuss the constitutional questions to which it may give rise. I venture the suggestion, however, that if the spending power is ever thus deliberately invoked to enlarge the area of Congressional control, it might not be impertinent **[***61]** to ask this Court to consider whether, in a democracy, the individual citizen has not a standing to call the legislature to account, not because of his pecuniary stake but because of his responsible share in government.

I come now to my second proposition -- which is that a scheme to regulate farm production and fix farm prices is an invasion of the field reserved by the Tenth Amendment.

I do not see how there can be much controversy over the purpose of this Act. The draftsman with commendable frankness has, as we have seen, explicitly stated it. Whether you call it realistically the philosophy of scarcity or euphemistically the adjustment of production to consumption, the plain fact is that the reduction of local production of crops must at all hazards be achieved or else the desired increase in farm prices is unattainable. It seems to me, therefore, that we have, as to agriculture, the same type of regulation unsuccessfully attempted by NRA in the case of industry. If the Court will compare the declarations of emergency in the two Acts it will be seen that obstruction of the normal currents of commerce figures largely in what Congress evidently hoped would be accepted by **[***62]** the Court as jurisdictional facts. In the case of both Acts the draftsman had a rosy vision of nationwide economic recovery achieved through increased commodity prices and he mistakenly assumed that this end could be lawfully accomplished through regimentation by a central authority -- in one case the President, in the other the Secretary of Agriculture.

When NRA was submitted for judicial examination an effort was made to salvage it by seeking authority for the codes in the power to regulate interstate commerce. Now, however, when AAA is before the Court, there is a significant silence on the part of the Government as to the commerce clause. It seems to be conceded, as indeed it would have to be in the light of the *Schechter* decision, that the federal regulation of production is wholly beyond the scope of the commerce clause. The whole reliance of the Government is accordingly placed upon the proposition that we have nothing to consider but an unimpeachable tax and an uncontrollable appropriation.

To support the tax argument, the Government invokes the general welfare clause. This seems to me to afford the coldest kind of cold comfort.

As I understand it, when Congress **[***63]** merely imposes a tax (whether it be a uniform indirect tax or an apportioned direct tax) no question of *purpose* is involved. There are plenty of legitimate governmental needs for money, and Congress, presumably, is merely undertaking to meet them. Accordingly no problem arises unless and until, in the very act of imposing the tax, Congress (as here) specifies the purpose for which the money is sought to be raised. The purpose so specified might be one clearly within some recognized congressional power. In such case no difficulty would be presented. But suppose (as here) that the only specific power that might plausibly be invoked (to wit, the commerce power) falls far short of what is required. It is then, and then only, that recourse is had to the proposition that it is within the exclusive power of Congress to determine that a particular measure will promote the general welfare and that accordingly a tax to be applied for the purposes of that measure is a valid tax. This proposition, as far as I can see, means this: that

Congress may determine that a certain nation-wide policy is necessary to the welfare of the nation; ergo that legislation to effectuate such policy must **[***64]** be within the power of Congress, and that, if you cannot find an applicable specific power which covers the case, you invoke the general welfare clause. The practical result of this argument is the same as that which would flow from the doctrine of "inherent national power" upon which this Court put a quietus in *Kansas* v. *Colorado* . Whether Congress invokes "inherent power" or wallows in the welfare clause -- in either event the powers reserved by the Tenth Amendment disappear and that against which I solemnly protest ensues -- namely the conversion of a federal legislature into a national parliament -- with the consequent destruction of the right of local self-government.

As I understand it, there are three possible views of the general welfare clause. It seems to me to be patient of two interpretations and can be tortured into a third. It is patient of the Madisonian view; it is patient of the Hamiltonian view; and it can be tortured, possibly, although I hope not, to answer the needs of the Solicitor General in the present case.

I understand Madison's view to have been that the welfare for which Congress may appropriate is the welfare which may be achieved in the **[***65]** exercise of the granted powers. I understand the Hamiltonian view to have been that, irrespective of the existence of power in virtue of specific grants or implications, the power to tax may be used to raise revenue for the general welfare, and that appropriations may be made out of that fund for such purposes as Congress may think fit. But I did not know, until this statute proposed it, of any interpretation which begins where Hamilton stops, and asserts that because you may appropriate for anything which congress thinks is consonant with the public welfare, you may, through that appropriation, control the local conduct of the producer in a particular reserved to the States under the Tenth Amendment. That, it seems to me, is the general welfare clause gone mad. It seems to me it is impossible to sustain any such view without throwing overboard once and for all the idea that Congress is a federal legislature with limited powers. It carries you all the way to the other extreme, which is that of the national parliament subject to no restraint but self-restraint. . . .

The commerce clause failing to serve his purpose -- and the general welfare clause being unsafe ground on which **[***66]** to build, four subsidiary arguments are advanced by the Solicitor General to which I wish to refer briefly.

The first is based upon the historical fact that spending is an executive function. No student of English constitutional history will dispute the proposition and no contemporary observer can doubt that even in the United States the same function is effectively exercised by the Executive. But the conclusion sought to be drawn is a non-sequitur. Because the Executive may spend as he pleases, it is argued that when he pleases to make a certain expenditure his decision puts into operation a tax to raise the money for him to spend. Whether you call this a delegation to him of the taxing power or whether he is attempting to delegate to Cogress his executive discretion is largely a matter of words. The practical result would be to give to the President and to Congress an unlimited power to tax for any purpose which could be attained by inflating the general welfare clause to the utmost. . . .

Next it is said that Congress may organize banks and other agencies with power to lend money to farmers on mortgage. This may be conceded. But the conclusion is remarkable -- namely, **[***67]** that *therefore* Congress may take over the control of production in order to increase the farmer's ability to repay the loan. If this argument had been advanced a year ago it might have saved the NRA; because, since Congress has authorized the formation of National Banks with power to lend money to industrialists, it would seem to follow that Congress may take control of any and all industries to make it more likely that the notes will be paid. Here again the trouble with the argument is that it proves too much. It frees the legislature from all constitutional restraint.

The third subsidiary argument is based upon the proposition that power to pay the debts of

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the United States includes power to discharge a moral obligation. This may be conceded. Thus, if a farmer had performed his part of a contract with the Secretary and the latter were to refuse to pay the consideration on the ground that the contract was void, and if Congress were then to appropriate for the relief of the farmer, nobody could enjoin the appropriation. But to argue that Congress may therefore authorize an unconstitutional scheme in order to create an honorary duty, and may then tax the processor to raise **[***68]** the money to perform it, seems to me to be juggling with words. If the United States is unjustly enriched by accepting a farmer's performance, let Congress appropriate funds in the treasury not otherwise appropriated. If the honor of all the people is at stake, let all the people vindicate it. But for goodness sake do not permit the United States to purge itself of unjust enrichment by unjustly impoverishing the processor. The United States would not be entitled to a thrill of moral satisfaction merely because it had robbed Processor Peter in order to pay Producer Paul.

A fourth subsidiary argument is built around the contention that the farmer needs a tariff -- and that therefore he should have it in the exercise of the same power that justifies the international tariff. The argument overlooks the fact that the international tariff is primarily an exercise of the express power to regulate commerce with foreign nations. It was so decided in *Board of Trustees of State University* v. *United States* in 289 U.S. Being free to forbid admission of goods from abroad, Congress may regulate their admission and use the taxing power in aid of regulation. There is no corresponding **[***69]** power to regulate agricultural production -- and the argument loses its force. It has then no other basis than the exploded doctrine of "inherent national power" -- to which reference has already been made.

There is one aspect of this case which requires a reference to the Fifth Amendment.

The Solicitor General indeed stoutly maintains that the Amendment has nothing to do with this case. I agree that if this processing exaction is merely part of a regulatory scheme that is beyond the power of Congress, then the reason for the invalidity of the tax is, not the Fifth Amendment, but the lack of power to control local production.

On the other hand, if I am wrong in my main contention and if Congress may lawfully regulate such production -- on the general welfare theory or some other equally vague -- it by no means follows that the entire cost of the regulatory process may be taken out of the pockets of the processors. As the Fifth Amendment applies to the exercise of all the powers of government it must apply to the regulatory power of Congress no matter whence derived. I concede that an excise tax on all processors to help raise money for the federal treasury could not be resisted **[***70]** merely because it was too heavy. If (contrary to my earnest contention) it were assumed that regulation of production by benefit payments and other uses of money is within some power of Congress, I should also have to concede that money in the treasury raised by general taxation is available for such use. I suggest, however, that there is something essentially unjust in compelling the first handler of an agricultural commodity to contribute whatever is necessary to make up deficiencies in the income of the man who produces that commodity. It is all very well to think of the promotion of the agricultural industry as a public purpose; but to integrate the industry for purposes of regulation by treating the handler and producer as having interlocking interests and then to compel the stronger group to extend financial aid to the weaker comes perilously close to taking A's property and giving it to B. Something like this was attempted by Congress in the Railroad Retirement Act, where strong roads were expected to make up the deficiencies of the weak. This exaction from the processor might be justified if there were any ascertainable relation between the rate of tax and the activity **[***71]** in respect of which the excise is levied. But when it appears that the tax rate is determined by the width of the gap between what the farmer's income is and what Congress thinks it ought to be, it begins to look as if the processor were brought upon the scene merely in order to have his pocket picked for the benefit of the farmer. It would be hard enough on the processor to have to submit to assessment merely to increase the producer's income; but when we reflect that the increase

is accomplished by using the proceeds of the tax to raise the price which the processor has to pay for his raw material, the question arises whether this is the due process which the Fifth Amendment guarantees. It seems clear to me that it is not due process to measure an excise on processing by a deficiency in producer's income.

It is not possible for me to extract from the due process decisions of this Court a formula for determining what does and what does not come within the condemnation of the Fifth Amendment. Probably the Court has deliberately avoided the formulation of a rule for the same reason that chancellors refuse to specify the limits of fraud. Each case must be determined in the light **[***72]** of its own facts. I suggest, however, that the processing exaction is a far more marked departure from what is usually regarded as permissible in taxation than was the case in *Nichols* v. *Coolidge,* 274 U.S. 531 (1927), in *Hoeper* v. *Tax Commission of Wisconsin,* 284 U.S. 206 (1931) or in *Heiner* v. *Donnan,* 285 U.S. 312 (1932).

. . .

My time is fleeting and I must not pause to sum up the argument I have made. I have come to the point at which a consideration of delegation is the next logical step, and that is to be dealt with effectively by my colleague, Mr. Hale. But I do want to say just one final and somewhat personal word.

I have tried very hard to argue this case calmly and dispassionately, and without vehement attack upon things which I cannot approve, and I have done it thus because it seems to me that this is the best way in which an advocate can discharge his duty to this Court.

But I do not want your Honors to think that my feelings are not involved, and that my emotions are not deeply stirred. Indeed, may it please your Honors, I believe I am standing here today to plead the cause of the America I have loved; and I pray Almighty God that **[***73]** not in my time may "the land of the regimented" be accepted as a worthy substitute for "the land of the free."

Messrs. Edward R. Hale and *Bennett Sanderson* closed the argument for respondents.

Following are excerpts from the respondents' brief, on which were the two gentlemen last named, together with *Messrs. George Wharton Pepper, Humbert B. Powell, James A. Montgomery, Jr., J. Willison Smith, Jr.,* and *Edmund M. Toland:*

Notwithstanding the reservation of the Tenth Amendment, this Act, by purchased control, forces upon agricultural communities within state lines a reduction of production of agricultural commodities without regard to the needs, desires or policies of the State affected. It disregards even the policies against restraints on trade announced by many of the States in formal enactment.

Indeed, there is a substantial question of the power of the States themselves either to control agricultural activities and internal prices, or *a fortiori,* of their ability to grant any such power to the Federal Government. The ordinary legitimate pursuits and transactions of citizens are, except in extraordinary circumstances, traditionally free from control **[***74]** even of the States. *New State Ice Co.* v. *Liebmann,* 285 U.S. 262; *Tyson Bros.* v. *Banton,* 273 U.S. 418; *Fairmont Creamery* v. *Minnesota,* 274 U.S. 1; *Williams* v. *Standard Oil Co.,* 278 U.S. 235; *Van Winkle* v. *Fred Meyer, Inc.,* 151 Ore. 455; 49 P. (2d) 1140. If power to regulate the operation of farms and prices of farm products is reserved to the people, as distinguished from the States, it follows that such power may not be delegated to the Federal Government

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except by an act of the people, expressed in a constitutional amendment. *Kansas* v. *Colorado,* 206 U.S. 46, 90.

It is argued that there is something voluntary about the crop reduction program which removes it from the limitations upon the Federal Government. As a matter of law we are unable to see any valid distinction arising from the fact that in this Act the regulation of individual activities within the States is accomplished by purchase instead of penalty.

While economic compulsion is invoked in the original Act to secure compliance from the producer, Congress has not hesitated to employ legal compulsion where less drastic methods were too slow. Legal compulsion has **[***75]** thus been resorted to in the case of cotton (the commodity involved in the instant case), tobacco and potatoes. The Bankhead Cotton Act of 1934, 48 Stat. 598; The Kerr Tobacco Act, 48 Stat. 1275; The Potato Act of 1935 (being Title II of "An Act to Amend the Agricultural Adjustment Act, and for other Purposes," approved August 24, 1935, Public No. 320, 74th Congress). Similar power to exert legal compulsion upon the processor or handler is granted in § 8 (3) of the Agricultural Adjustment Act as originally enacted. Such power has been extended by the amendments of August 24, 1935. These related Acts and provisions leave no doubt that the original and continuing Congressional intention in the Agricultural Adjustment Act is to impose the federal will upon production of agricultural commodities. In the light of such intentions and acts, the argument that control is voluntary becomes mere casuistry.

The regulatory measures of which the tax is an integral part cannot be justified as a regulation of interstate commerce.

Neither the production of commodities by farmers nor the manufacture of articles is subject to the control of Congress. *Chassaniol* v. *Greenwood,* 291 U.S. **[***76]** 584; *Utah Power & Light Co.* v. *Pfost,* 286 U.S. 165; *Heisler* v. *Thomas Colliery Co.,* 260 U.S. 245; *Oliver Iron Mining Co.* v. *Lord,* 262 U.S. 172; *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U.S. 129; *Kidd* v. *Pearson,* 128 U.S. 1.

Interstate commerce begins only when articles are delvered to a carrier to be transported. It comes to an end when articles are delivered. *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495; *Federal Compress Co.* v. *McLean,* 291 U.S. 17; *United Leather Workers* v. *Herkert & Co,* 265 U.S. 457.

Neither agriculture nor manufacturing "affects" or "burdens" interstate commerce. In order to come within the interstate commerce power, the effect or burden of activities not commerce must be direct and immediate. *Schechter Poultry Corp.* v. *United States, supra; Railroad Retirement Board* v. *Alton R. Co.,* 295 U.S. 330; *Levering & Garrigues* v. *Morrin,* 289 U.S. 103; *United Leather Workers* v. *Herkert & Co.,* 265 U.S. 457; *United Mine Workers* v. *Coronado Coal Co.,* 259 U.S. 344; *Hammer* v. *Dagenhart,* 247 U.S. 251.

The processing and floor stocks taxes **[***77]** are levied in violation of the Fifth Amendment. The Act takes from one class without compensation, and gives to members of another. *Railroad Retirement Board* v. *Alton R. Co.,* 295 U.S. 330; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U.S. 555.

The taxing power is limited to taxes raised for public as distinguished from private purposes. *Loan Association* v. *Topeka,* 20 Wall. 655; *Cole* v. *LaGrange,* 113 U.S. 1; *Parkersburg* v. *Brown,* 106 U.S. 487; *Lowell* v. *Boston,* 111 Mass. 454.

The taxes are arbitrary and unreasonable. The Fifth Amendment requires that a law (including a tax law) shall not be unreasonable, arbitrary or capricious. Of tax laws it requires a reasonable classification of objects of taxation, a rate determined upon a reasonable basis, not arbitrary or confiscatory, and reasonableness in the time when the tax becomes effective. The Fifth Amendment also requires that the means selected to carry out one of the granted

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powers shall have a real and substantial relation to the object sought to be attained. *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330, 347, note 5; *Louisville Joint Stock* **[***78]** *Land Bank* v. *Radford*, 295 U.S. 555, 589, note 19. See also *Nebbia* v. *New York*, 291 U.S. 502, 525; *Heiner* v. *Donnan*, 285 U.S. 312; *Nichols* v. *Coolidge*, 274 U.S. 531; *Hoeper* v. *Tax Commission*, 284 U.S. 206.

Congress may not, under the guise of the taxing power, assert a power not delegated to it by the Constitution. Ulterior purposes may be accomplished under this power only when they are truly incidental and necessary to a real revenue measure. Cf. *Railroad Retirement Board* v. *Alton R. Co., supra; Hill* v. *Wallace*, 259 U.S. 44; *Child Labor Tax Case*, 259 U.S. 20. *United States* v. *Doremus*, 249 U.S. 86 and *McCray* v. *United States*, 195 U.S. 27, distinguished.

The taxpayer may contest the tax and question the purpose thereof. *Massachusetts* v. *Mellon*, 262 U.S. 447, distinguished.

The floor stocks taxes are direct taxes and are void because not apportioned.

The Act is invalid in that it delegates legislative power to the Secretary of Agriculture. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388; *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495; *Field* v. *Clark*, 143 **[***79]** U.S. 649; *United States* v. *Grimaud*, 220 U.S. 506; *Hampton & Co.* v. *United States*, 276 U.S. 394. *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. 551; *Blair* v. *Oesterlein Machine Co.*, 275 U.S. 220; *Heiner* v. *Diamond Alkali Co.*, 288 U.S. 502, and *United States* v. *Grimaud*, 220 U.S. 506, distinguished.

Section 21 (b) of the amendments is ineffective to validate taxes assessed prior to its passage. *United States* v. *Heinszen*, 206 U.S. 370; *Rafferty* v. *Smith, Bell & Co.*, 257 U.S. 226; *Tiaco* v. *Forbes*, 228 U.S. 549; *Charlotte Harbor & N. Ry. Co.* v. *Welles*, 260 U.S. 8; *Graham & Foster* v. *Goodcell*, 282 U.S. 409; *Nichols* v. *Coolidge*, 274 U.S. 531; *Blodgett* v. *Holden*, 275 U.S. 142; *Untermyer* v. *Anderson*, 276 U.S. 440.

Solicitor General Reed closed the argument:

May it please the Court, in the brief time remaining to me to close the argument for the Government I should like particularly to call to your Honors' attention the problem of the welfare clause, the Tenth Amendment, and whether or not this tax is for a public purpose.

I do not know whether counsel **[***80]** for the respondents mean to take the position that the welfare clause does give a power of appropriation and a power to tax that can be utilized for the purposes of relief and that can be utilized for the purposes of making loans to agriculture through the Farm Loan Corporation, and making loans to homeowners through the Home Owners Loan Corporation, or can be used for making loans to agriculture, railroads, industry, and banks, through the Reconstruction Finance Corporation; or whether they take the position that the welfare clause as such does not give a right to the Government to make loans. If we can make a loan, can we also make a grant, or if we can make a grant, can we make a contract? The vital point of assault and defense upon the Agricultural Adjustment Act seems to me not to be in the Tenth Amendment, nor in whether this is for a public purpose, but as to whether the Government has the power to appropriate money which it raises by taxation for the benefit of individuals in the States, or to carry out contracts which the Government makes with those individuals.

The scope of the welfare clause has never been finally decided by this Court. The Government's position is **[***81]** not that it may take any action it pleases under the welfare clause. Our contention is that the welfare clause gives the right to tax and the right to appropriate, so long as the appropriations are limited to the general welfare.

This interpretation of the welfare clause has met the approval of those who participated in the ratifying conventions. It met the approval of George Washington when he sent his

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message to Congress that agriculture should be supported and benefited by Congressional appropriations. It met the approval of the early Congresses when they used the power of giving bounties to the cod fisheries of Massachusetts. . . .

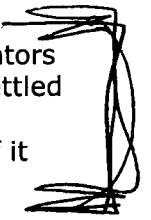

That is the interpretation of the welfare clause which has met the approval of commentators from Story to Justice Miller. With but one exception that I recall, they have been fully settled in the view that the appropriating power of Congress gave it the right to give money for relief, to aid those who were in distress, to lend where money was needed. And surely if it can take those steps, it can also contract to help, where it is also for the public welfare.

Is this present Act for the public welfare? I heard the manifestation of deep emotion **[***82]** with which counsel spoke of his interest in the preservation of the welfare of this Government, and I respect his motives and the earnestness with which he presents them to this Court. But there is another side to the argument, as to what is the duty of the Government of the United States. Over and over again counsel have used the words "control" and "regiment." There is no control or regimentation in this Act. An emergency existed, not of sudden creation, but grown up over the years; lack of balance between different sections of this country, not geographical sections, but different interests of the people of the United States.

This very corporation is an excellent example of benefits that have been secured from the taxing powers of this Government -- a textile mill which, with its competitors, for more than a hundred years has received the bounties which come and the benefits which flow from the protective tariff system. Surely they should be the last to object to a readjustment of the balance between agriculture and industry.

The farmers of the United States comprise 30 per cent of the population, men, women and children, bringing out of the ground the natural resources **[***83]** which sustain the entire American commonwealth, and bringing from the ground the very resource which this corporation uses in its manufacture of textiles. There is no reason to begrudge it the bounties it has received from the Government, but on the other hand there is no reason why the Government of the United States, in the exercise of its power under the general welfare clause, should not seek to equalize the interests of agriculture and industry.

The Government sought to do that in the Act under consideration. The tax which is criticized has relation to the farmer and relation to the consumer. It was sought to equalize the benefits to the farmer, to give him better prices, and not impose a tax so high that the consumer would pay more than the normal amount the farmer was to receive. Therefore it is written that the tax shall not exceed the difference between the selling price of the commodity at the time the tax is placed upon it and the normal purchasing power of that commodity in what has been taken as a normal period.

Is there any reason why this country should be denied a right to help its citizens engaged in agriculture, which is open to every other country? Of course, **[***84]** it is said that we must act within the Constitution. Certainly we must. But the interpretation that is to be given to the Constitution must be viewed in the light of what is reasonable in the exercise of the power of Congress under the general welfare clause. Every nation, from the British Isles to Bechuanaland -- we have cited the reports from them in the appendix to our brief -- has taken steps to protect its agriculture.

We do not mean to say that that gives us a right so to legislate in this country if it is contrary to the Constitution, but we do say that it is evidence of the reasonable exercise of the power, if we have the power to provide for the general welfare, and the power of appropriation under that provision of the Constitution.

No one could be more firmly convinced of the necessity of keeping inviolate the separation of powers between the National Government and the States than counsel for the Government

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Headnote: [9]
Power to provide for the general welfare independently of the taxing power is not conferred by the provision of Article 1, 8, clause 1, of the Federal Constitution empowering Congress "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States," but the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare.

PUBLIC MONEY, §1
power to appropriate under welfare clause. --

Headnote: [10]
Power to appropriate public funds for the general welfare of the United States is as broad as the power to lay taxes for such purpose.

CONSTITUTIONAL LAW, §13
construction -- giving effect to every word. --

Headnote: [11]
Words employed in the Federal Constitution cannot be regarded as meaningless.

UNITED STATES, §17
powers of Congress -- scope of power to lay tax for general welfare. --

Headnote: [12]
The power conferred by Article 1, 8, clause 1, of the Federal Constitution to lay and spend taxes to provide for the general welfare of the United States, is not restricted to the enumerated legislative fields committed to Congress by the other provisions of the article, but confers a substantive power to tax and appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States.

EVIDENCE, §99
presumption of constitutionality of acts of Congress. --

Headnote: [13]
Every presumption is to be indulged in favor of faithful compliance by Congress with the mandates of the Constitution.

COURTS, §97
declaring unconstitutionality of statute -- effect of doubt as to invalidity. --

Headnote: [14]
To establish the unconstitutionality of an act of Congress requires a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.

who appear here before this Court. This Court, however, has laid down the rules by which we are to judge as to whether we are interfering with the rights of a State.

The case of *Massachusetts* v. *Mellon* has been repeatedly called to your Honors' attention. **[***85]** We have used it as an argument that the respondent cannot object in this case to the way in which the money is spent. But that is not the most important part of the case of *Massachusetts* v. *Mellon* at this moment. In that case the Court said not only that the citizen of a State could not object, but it said that "Probably, it would be sufficient to point out that the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject."

It was also said, in the case of *Ellis* v. *United States,* 206 U.S. 246, that the United States had the right even to control, by criminal provision, the actions of employers who employed people contrary to the laws of the United States when there was a contract between the employer and the United States.

We do not need to go so far in this case but we do say that the right to contract is free from limitation, that we have no more interfered with the rights of the States in this case than we would have interfered with the rights of the State in the case of *Massachusetts* v. *Mellon* if that State had accepted the money which was offered.

With **[***86]** those views, we submit that the Agricultural Adjustment Act, as it has been enacted and amended, is fully within the authority of the Constitution.

By leave of Court, briefs of *amici curiae* were filed as follows:

Mr. Vernon A. Vooman, on behalf of the League for Economic Equality; *Messrs. Frederic P. Lee* and *Donald Kirkpatrick,* on behalf of the American Farm Bureau Federation; *Mr. Clay R. Apple,* on behalf of the National Beet Growers Assn., and the Mountain States Beet Growers Marketing Assn.; *Mr. O. O. Haga,* on behalf of the Farmers National Grain Corp.; and *Mr. Dan Moody,* on behalf of the Texas Agricultural Assn.; -- supporting the validity of the Act.

Messrs. Nathan L. Miller, John W. Davis, and *William R. Perkins,* on behalf of Hygrade Food Products Corp., P. Lorillard Co., and National Biscuit Co.; *Messrs. Malcolm Donald* and *Edward E. Elder,* on behalf of the National Association of Cotton Manufacturers; *Messrs. Kingman Brewster, James S. Y. Ivins, Percy W. Phillips, O. R. Folsom-Jones, Richard B. Barker,* and *John W. Cutler; Mr. John E. Hughes,* on behalf of American Nut Co., Inc., et al.; *Messrs. Leo P. Harlow* and *Al.* **[***87]** *Philip Kane,* on behalf of Farmers' Independence Council of America; *Mr. Wm. B. Bodine,* on behalf of Berks Packing Co., Inc., et al.; and *Messrs. Charles B. Rugg, Frank J. Morley, Thomas Nelson Perkins,* and *Warren F. Farr,* on behalf of General Mills, Inc., et al.; -- challenging the validity of the Act.

JUDGES: Hughes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Stone, Roberts, Cardozo

OPINIONBY: ROBERTS

OPINION: [*53] [314]** MR. JUSTICE ROBERTS delivered the opinion of the Court.

In this case we must determine whether certain provisions of the Agricultural Adjustment Act, 1933, n1 conflict with the Federal Constitution.

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n1 May 12, 1933, c. 25, 48 Stat. 31.

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Title I of the statute is captioned "Agricultural Adjustment." Section 1 recites that an economic emergency has arisen, due to disparity between the prices of agricultural and other commodities, with consequent destruction of farmers' purchasing power and breakdown in orderly exchange, which, in turn, have affected transactions in agricultural commodities with a national **[***88]** public interest and burdened and obstructed the normal currents of commerce, calling for the enactment of legislation.

[*54] Section 2 declares it to be the policy of Congress:

"To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities n2 a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period."

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n2 Section 11 denominates wheat, cotton, field corn, hogs, rice, tobacco, and milk and its products, "basic agricultural commodities," to which the act is to apply. Others have been added by later legislation.

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The base period, in the case of cotton, and all other commodities except tobacco, is designated as that between August, 1909, and July, 1914.

The further policies announced are an approach to the desired equality by gradual correction of present inequalities **[***89]** "at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets," and the protection of consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities or products derived therefrom, which is returned to the farmer, above the percentage returned to him in the base period.

Section 8 provides, amongst other things, that "In order to effectuate the declared policy," the Secretary of Agriculture shall have power

"(1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to **[*55]** be paid out of any moneys available for such payments. . . ."

"(2) To enter into marketing agreements with processors, associations of producers, and others engaged in the handling, **[***90]** in the current of interstate or foreign commerce of any agricultural commodity or product thereof, after due notice and opportunity for hearing to interested parties. . . ."

"(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof."

It will be observed that the Secretary is not required, but is permitted, if, in his uncontrolled

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judgment, the policy of the act will so be promoted, to make agreements with individual farmers for a reduction of acreage or production upon such terms as he may think fair and reasonable.

Section 9 (a) enacts:

"To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing **[***91]** year therefor next following the date of such **[**315]** proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. . .

The Secretary may from time to time, if he finds it necessary for the effectuation of the policy of the act, readjust the amount of the exaction to meet the requirements **[*56]** of subsection (b). The tax is to terminate at the end of any marketing year if the rental or benefit payments are discontinued by the Secretary with the expiration of that year.

Section 9 (b) fixes the tax "at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value," with power in the Secretary, after investigation, notice, and hearing, to readjust the tax so as to prevent the accumulation of surplus stocks and depression of farm prices.

Section 9 (c) directs that the fair exchange value of a commodity shall be such a price as will give that commodity the same purchasing power with respect to articles farmers buy as it had during the base period and that the fair exchange value and **[***92]** the current average farm price of a commodity shall be ascertained by the Secretary from available statistics in his department.

Section 12 (a) appropriates $ 100,000,000 "to be available to the Secretary of Agriculture for administrative expenses under this title and for rental and benefit payments. . ."; and § 12 (b) appropriates the proceeds derived from all taxes imposed under the act "to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products. . . administrative expenses, rental and benefit payments, and refunds on taxes."

Section 15 (d) permits the Secretary, upon certain conditions, to impose compensating taxes on commodities in competition with those subject to the processing tax.

By § 16 a floor tax is imposed upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied in amount equivalent to that of the processing tax which would be payable with respect to the commodity from which the article is processed if the processing had occurred on the date when the processing tax becomes effective.

[*57] On July 14, **[***93]** 1933, the Secretary of Agriculture, with the approval of the President, proclaimed that he had determined rental and benefit payments should be made with respect to cotton; that the marketing year for that commodity was to begin August 1, 1933; and calculated and fixed the rates of processing and floor taxes on cotton in accordance with the terms of the act.

The United States presented a claim to the respondents as receivers of the Hoosac Mills Corporation for processing and floor taxes on cotton levied under §§ 9 and 16 of the act. The receivers recommended that the claim be disallowed. The District Court found the taxes valid and ordered them paid. n3 Upon appeal the Circuit Court of Appeals reversed the order. n4

The judgment under review was entered prior to the adoption of the amending act of August 24, 1935, n5 and we are therefore concerned only with the original act.

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n3 *Franklin Process Co.* v. *Hoosac Mills Corp.,* 8 F. Supp. 552.

n4 *Butler* v. *United States,* 78 F. (2d) 1.

n5 49 Stat. 750, c. 641.

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[1]
First. At the outset the United States contends that the respondents have no standing to question the validity of the tax. The position is that the act is merely a revenue measure levying an excise upon the activity of processing cotton, -- a proper subject for the imposition of such a tax, -- the proceeds of which go into the federal treasury and thus become available for appropriation for any purpose. It is said that what the respondents are endeavoring to do is to challenge the intended use of the money pursuant to Congressional appropriation when, by confession, that money will have become the property of the Government and the taxpayer will no longer have any interest in it. *Massachusetts* v. *Mellon,* 262 U.S. 447, is claimed to foreclose litigation by the respondents or other taxpayers, as such, looking to restraint of the expenditure of government funds. That case might be an authority **[*58]** in the petitioners' favor if we were here concerned merely with a suit by a taxpayer to restrain the **[**316]** expenditure of the public moneys. It was there held that a taxpayer of the United States may not question expenditures from its treasury on the ground that the alleged **[***95]** unlawful diversion will deplete the public funds and thus increase the burden of future taxation. Obviously the asserted interest of a taxpayer in the federal government's funds and the supposed increase of the future burden of taxation is minute and indeterminable. But here the respondents who are called upon to pay moneys as taxes, resist the exaction as a step in an unauthorized plan. This circumstance clearly distinguishes the case. The Government in substance and effect asks us to separate the Agricultural Adjustment Act into two statutes, the one levying an excise on processors of certain commodities, the other appropriating the public moneys independently of the first. Passing the novel suggestion that two statutes enacted as parts of a single scheme should be tested as if they were distinct and unrelated, we think the legislation now before us is not susceptible of such separation and treatment.

The tax can only be sustained by ignoring the avowed purpose and operation of the act, and holding it a measure merely laying an excise upon processors to raise revenue for the support of government. Beyond cavil the sole object of the legislation is to restore the purchasing **[***96]** power of agricultural products to a parity with that prevailing in an earlier day; to take money from the processor and bestow it upon farmers n6 who will reduce their acreage for **[*59]** the accomplishment of the proposed end, and, meanwhile to aid these farmers during the period required to bring the prices of their crops to the desired level.

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n6 U.S. Department of Agriculture, Achieving A Balanced Agriculture, p. 38: "Farmers should not forget that all the processing tax money ends up in their own pockets. Even in those cases where they pay part of the tax, they get it all back. Every dollar collected in processing taxes goes to the farmer in benefit payments."

U.S. Dept. of Agriculture, The Processing Tax, p. 1: "Proceeds of processing taxes are passed to farmers as benefit payments."

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The tax plays an indispensable part in the plan of regulation. As stated by the Agricultural Adjustment Administrator, it is "the heart of the law"; a means of "accomplishing one or both of two things intended to help farmers **[***97]** attain parity prices and purchasing power." n7 A tax automatically goes into effect for a commodity when the Secretary of Agriculture determines that rental or benefit payments are to be made for reduction of production of that commodity. The tax is to cease when rental or benefit payments cease. The rate is fixed with the purpose of bringing about crop-reduction and price-raising. It is to equal the difference between the "current average farm price" and "fair exchange value." It may be altered to such amount as will prevent accumulation of surplus stocks. If the Secretary finds the policy of the act will not be promoted by the levy of the tax for a given commodity, he may exempt it. (§ 11.) The whole revenue from the levy is appropriated in aid of crop control; none of it is made available for general governmental use. The entire agricultural adjustment program embodied in Title I of the act is to become inoperative when, in the judgment of the President, the national economic emergency ends; and as to any commodity he may terminate the provisions of the law, if he finds them no longer requisite to carrying out the declared policy with respect to such commodity. (§ 13.)

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n7 U.S. Department of Agriculture, Agricultural Adjustment, p. 9.

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The statute not only avows an aim foreign to the procurement of revenue for the support of government, but by its operation shows the exaction laid upon processors to be the necessary means for the intended control of agricultural production.

[*60] In these aspects the tax, so-called, closely resembles that laid by the Act of August 3, 1882, entitled "An Act to Regulate Immigration," which came before this court in the *Head Money Cases,* 112 U.S. 580. The statute directed that there should be levied, collected and paid a duty of fifty cents for each alien passenger who should come by vessel from a foreign port to one in the United States. Payment was to be made to the collector of the port by the master, owner, consignee or agent of the ship; the money was to be paid into the Treasury, was to be called the immigrant fund, and to be used by the Secretary of the **[**317]** Treasury to defray the expense of regulating immigration, for the care of immigrants and relieving those in distress, and for the expenses of effectuating the act.

Various objections to the act were presented. In answering them the court said (p. 595):

"But the true answer to all these objections is that the power **[***99]** exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce -- of that branch of foreign commerce which is involved in immigration. . . ."

"It is true not much is said about protecting the ship owner. But he is the man who reaps the profit from the transaction,. . . The sum demanded of him is not, therefore, strictly speaking, a tax or duty within the meaning of the Constitution. The money thus raised, though paid into the Treasury, is appropriated in advance to the uses of the statute, and does not go to the general support of the government."

While there the exaction was sustained as an appropriate element in a plan within the power of Congress "to regulate commerce with foreign nations," no question was made of the standing of the shipowner to raise the question **[*61]** of the validity of the scheme and consequently of the exaction which was an incident of it.

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[2]
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[4]
It is inaccurate and misleading to speak of the exaction from processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term, **[***100]** and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation. But manifestly no justification for it can be found unless as an integral part of such regulation. The exaction cannot be wrested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end. To do this would be to shut our eyes to what all others than we can see and understand. *Child Labor Tax Case*, 259 U.S. 20, 37.

[5]
We conclude that the act is one regulating agricultural production; that the tax is a mere incident of such regulation and that the respondents have standing to challenge the legality of the exaction.

It does not follow that as the act is not an exertion of the taxing power and the exaction not a true tax, the statute is void or the exaction **[***101]** uncollectible. For, to paraphrase what was said in the *Head Money Cases* (supra), p. 596, if this is an expedient regulation by Congress, of a subject within one of its granted powers, "and the end to be attained is one falling within that power, the act is not void, because, within a loose and more extended sense than was used in the Constitution," the exaction is called a tax.

[*62] *Second.* The Government asserts that even if the respondents may question the propriety of the appropriation embodied in the statute their attack must fail because Article I, § 8 of the Constitution authorizes the contemplated expenditure of the funds raised by the tax. This contention presents the great and the controlling question in the case. n8 We approach its decision with a sense of our grave responsibility **[**318]** to render judgment in accordance with the principles established for the governance of all three branches of the Government.

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n8 Other questions were presented and argued by counsel, but we do not consider or decide them. The respondents insist that the act in numerous respects delegates legislative power to the executive contrary to the principles announced in *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, and *Schechter Corp.* v. *United States*, 295 U.S. 495; that this unlawful delegation is not cured by the amending act of August 24, 1935; that the exaction is in violation of the due process clause of the Fifth Amendment since the legislation takes their property for a private use; that the floor tax is a direct tax and therefore void for lack of apportionment amongst the states, as required by Article I, § 9; and that the processing tax is wanting in uniformity and so violates Article I, § 8, clause one, of the Constitution.

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[7]
There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not

conforming to the constitutional mandate the judicial branch of the Government has only one duty, -- to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. **[*63]** The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends. n9

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n9 Compare *Adkins* v. *Children's Hospital*, 261 U.S. 52, 544; *Massachusetts* v. *Mellon*, 262 U.S. 447, 488.

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[8]
The question is not what power the Federal Government ought to have but what powers in fact have been given by the people. It hardly seems necessary to reiterate that ours is a dual form of government; that in every state there are two governments, -- the state and the United States. Each State has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the States, or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. In this respect we differ radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body subject to no restrictions except the discretion of its members.

Article I, § 8, of the Constitution vests sundry powers in the Congress. But two of its clauses have any bearing upon the validity of the statute under review.

The third clause endows the Congress with power "to regulate Commerce. . . among the several States," Despite a reference in its first section to a burden upon, and an obstruction **[***104]** of the normal currents of commerce, the act under review does not purport to regulate transactions in interstate or foreign n10 commerce. Its stated purpose **[*64]** is the control of agricultural production, a purely local activity, in an effort to raise the prices paid the farmer. Indeed, the Government does not attempt to uphold the validity of the act on the basis of the commerce clause, which, for the purpose of the present case, may be put aside as irrelevant.

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n10 The enactment of protective tariff laws has its basis in the power to regulate foreign commerce. See *Board of Trustees of the University of Illinois* v. *United States*, 289 U.S. 48, 58.

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[9]
The clause thought to authorize the legislation, -- the first, -- confers upon the Congress power "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . ." It is not contended that this provision grants power to regulate agricultural production upon the theory **[***105]** that such legislation would promote the general welfare. The Government concedes that the phrase "to provide for the general welfare" qualifies the power "to lay and collect taxes." The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. Mr. Justice Story

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points out that if it were adopted "it is obvious that under color of the generality of the words, to 'provide for the common defence and general welfare,' the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers." n11 The true construction undoubtedly is that the only thing granted **[**319]** is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare.

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n11 Story, Commentaries on the Constitution of the United States, 5th ed., ol. I, § 907.

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Nevertheless the Government asserts that warrant is found in this **[***106]** clause for the adoption of the Agricultural Adjustment Act. The argument is that Congress may appropriate and authorize the spending of moneys for the "general welfare"; that the phrase should be liberally **[*65]** construed to cover anything conducive to national welfare; that decision as to what will promote such welfare rests with Congress alone, and the courts may not review its determination; and finally that the appropriation under attack was in fact for the general welfare of the United States.

[10]
[11]
The Congress is expressly empowered to lay taxes to provide for the general welfare. Funds in the Treasury as a result of taxation may be expended only through appropriation. (Art. I, § 9, cl. 7.) They can never accomplish the objects for which they were collected unless the power to appropriate is as broad as the power to tax. The necessary implication from the terms of the grant is that the public funds may be appropriated "to provide for the general welfare of the United States." These words cannot be meaningless, else they would not have been used. The conclusion must be that they were intended to limit and define the granted power to raise and to expend money. How shall they **[***107]** be construed to effectuate the intent of the instrument?

[12]
Since the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, **[*66]** limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Each contention has had the support of those whose views are entitled to weight. This court has noticed the question, **[***108]** but has never found it necessary to decide which is the true construction. Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position. n12 We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.

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n12 *Loc. cit.* Chapter XIV, *passim.*

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But the adoption of the broader construction leaves the power to spend subject to limitations.

As Story says:

"The Constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated **[***109]** powers, and not of general and unlimited powers." n13

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n13 *Loc. cit.* § 909.

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Again he says:

"A power to lay taxes for the common defence and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them." n14

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n14 *Loc. cit.* § 922.

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That the qualifying phrase must be given effect all advocates of broad construction admit. Hamilton, in his **[*67]** well known Report on Manufactures, states that the purpose must be "general, and not local." n15 Monroe, an advocate of Hamilton's doctrine, wrote: "Have Congress a right to raise and appropriate the money to any and to every purpose according to their will and pleasure? They certainly **[**320]** have not." n16 Story says that if the tax be not proposed for the common defence or general welfare, but for other objects wholly extraneous, it would be wholly indefensible upon constitutional principles. **[***110]** n17 And he makes it clear that the powers of taxation and appropriation extend only to matters of national, as distinguished from local welfare.

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n15 Works, Vol. III, p. 250.

n16 Richardson, Messages and Papers of the Presidents, Vol. II, p. 167.

n17 *Loc. cit.* p. 673.

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[13]
[14]
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As elsewhere throughout the Constitution the section in question lays down principles which control the use of the power, and does not attempt meticulous or detailed directions. Every

presumption is to be indulged in favor of faithful compliance by Congress with the mandates of the fundamental law. Courts are reluctant to adjudge any statute in contravention of them. But, under our frame of government, no other place is provided where the citizen may be heard to urge that the law fails to conform to the limits set upon the use of a granted power. When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress. How great is the extent of that range, when the subject is the promotion **[***111]** of the general welfare of the United States, we hardly need remark. But, despite the breadth of the legislative discretion, our duty to hear and to render judgment remains. If the statute plainly violates the stated principle of the Constitution we must so declare.

[*68]

[16]
We are not now required to ascertain the scope of the phrase "general welfare of the United States" or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end.

From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall **[***112]** any suggestion to the contrary, the Tenth Amendment was adopted. n18 The same proposition, otherwise stated, is that powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.

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n18 The Tenth Amendment declares: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

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[17]
It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted.

"Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision **[*69]** come before it, to say that such an act was not the **[***113]** law of the land." *McCulloch* v. *Maryland,* 4 Wheat. 316, 423.

"Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced." *Linder* v. *United States,* 268 U.S. 5, 17.

These principles are as applicable to the power to lay taxes as to any other federal power.

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COURTS, §95
duty to declare unconstitutionality of statute. --

Headnote: [15]
If a statute plainly violates the Constitution, it is the duty of the court so to declare.

STATES, §31
reserved powers -- encroachment upon by Federal Agricultural Adjustment Act. --

Headnote: [16]
The Federal Agricultural Adjustment Act of May 12, 1933, in setting up a plan to regulate and control agricultural production, unconstitutionally invades the reserved rights of the states.

UNITED STATES, §14
powers of Congress -- attainment of prohibited end by indirection. --

Headnote: [17]
The attainment by Congress of a prohibited end may not be accomplished under the pretext of the assertion of powers which are granted.

TAXES, §5
validity of tax imposed for ulterior purpose. --

Headnote: [18]
While the power of taxation may be adopted as the means to carry into operation another power also expressly granted, resort to the taxing power to effectuate an end which is not within the scope of the Constitution is inadmissible.

INTERNAL REVENUE, §4
exercise of taxing power to purchase compliance with regulation beyond power of Congress. --

Headnote: [19]
The taxing power may not be employed to raise money to purchase or to enforce by economic pressure a compliance with a congressional regulation of a matter with respect to which Congress has no authority.

PUBLIC MONEY, §2
contract to compensate agriculturalists for reduction of acreage as justifying appropriation. --

Headnote: [20]
Contracts with agriculturalists for the reduction of acreage and the control of production, being outside the range of Federal power, cannot justify appropriations and expenditures for such purpose.

Said the court, in *McCulloch* v. *Maryland, supra,* 421:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and **[**321]** spirit of the constitution, are constitutional."

[18]
The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing **[***114]** power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible.

"Congress is not empowered to tax for those purposes which are within the exclusive province of the States." *Gibbons* v. *Ogden,* 9 Wheat. 1, 199.

"There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the [taxing] power if so exercised as to impair the separate existence and independent self-government of the States or if exercised for ends **[*70]** inconsistent with the limited grants of power in the Constitution." *Veazie Bank* v. *Fenno,* 8 Wall. 533, 541.

In the *Child Labor Tax Case,* 259 U.S. 20, and in *Hill* v. *Wallace,* 259 U.S. 44, this court had before it statutes which purported to be taxing measures. But their purpose was found to be to regulate the conduct of manufacturing and trading, not in interstate commerce, but in the states, -- matters not within any power conferred upon Congress by the Constitution -- and the levy of the tax a means to force compliance. The court held this was not a constitutional use, but an unconstitutional abuse **[***115]** of the power to tax. In *Linder* v. *United States,* supra, we held that the power to tax could not justify the regulation of the practice of a profession, under the pretext of raising revenue. In *United States* v. *Constantine,* 296 U.S. 287, we declared that Congress could not, in the guise of a tax, impose sanctions for violation of state law respecting the local sale of liquor. These decisions demonstrate that Congress could not, under the pretext of raising revenue, lay a tax on processors who refuse to pay a certain price for cotton, and exempt those who agree so to do, with the purpose of benefiting producers.

[19]
Third. If the taxing power may not be used as the instrument to enforce a regulation of matters of state concern with respect to which the Congress has no authority to interfere, may it, as in the present case, be employed to raise the money necessary to purchase a compliance which the Congress is powerless to command? The Government asserts that whatever might be said against the validity of the plan if compulsory, it is constitutionally sound because the end is accomplished by voluntary co-operation. There are two sufficient answers to the contention. **[***116]** The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to **[*71]** agree to the proposed regulation. n19 The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; hose who receive payments will be able to undersell him. The result may well be financial ruin. The coercive purpose and intent of the statute is not obscured by the fact that it has not been perfectly successful. It is pointed out that, because there still remained a minority whom the rental and benefit payments were insufficient to induce to surrender their independence of action, the Congress has gone further and, in the Bankhead Cotton Act, used the taxing power in a more directly minatory fashion to compel submission. This progression only serves more fully to expose the coercive purpose of the so-called tax imposed by the present act. It **[**322]** is clear that the Department of Agriculture has properly described the plan as one to keep a non-cooperating **[***117]** minority in line. This is coercion by economic pressure. The asserted power of choice is illusory.

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n19 U.S. Dept. of Agriculture, Agricultural Adjustment, p. 9. "Experience of cooperative associations and other groups has shown that without such Government support, the efforts of the farmers to band together to control the amount of their product sent to market are nearly always brought to nothing. Almost always, under such circumstances, there has been a noncooperating minority, which, refusing to go along with the rest, has stayed on the outside and tried to benefit from the sacrifices the majority has made. . . . It is to keep this noncooperating minority in line, or at least prevent it from doing harm to the majority, that the power of the Government has been marshaled behind the adjustment programs."

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In *Frost Trucking Co. v. Railroad Comm'n,* 271 U.S. 583, a state act was considered which provided for supervision and regulation of transportation for hire by automobile on the public highways. Certificates **[***118]** of convenience and necessity were to be obtained by persons desiring to use the highways for this purpose. The regulatory **[*72]** commission required that a private contract carrier should secure such a certificate as a condition of its operation. The effect of the commission's action was to transmute the private carrier into a public carrier. In other words, the privilege of using the highways as a private carrier for compensation was conditioned upon his dedicating his property to the quasi-public use of public transportation. While holding that the private carrier was not obliged to submit himself to the condition, the commission denied him the privilege of using the highways if he did not do so. The argument was, as here, that the carrier had a free choice. This court said, in holding the act as construed unconstitutional:

"If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, **[***119]** which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool, -- an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." (p. 593.)

But if the plan were one for purely voluntary co-operation it would stand no better so far as federal power is concerned. At best it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states.

[20]
It is said that Congress has the undoubted right to appropriate money to executive officers for expenditure under contracts between the government and individuals; that much of the total expenditures is so made. But appropriations and expenditures under contracts for proper **[*73]** governmental purposes cannot justify contracts which are not within federal power. And contracts for the reduction of acreage and the control of production are outside the range of that power. An appropriation to be expended by the United States under contracts calling for violation of a state law clearly would **[***120]** offend the Constitution. Is a statute less objectionable which authorizes expenditure of federal moneys to induce action in a field in which the United States has no power to intermeddle? The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action.

We are referred to numerous types of federal appropriation which have been made in the past, and it is asserted no question has been raised as to their validity. We need not stop to examine or consider them. As was said in *Massachusetts v. Mellon, supra* (p. 487):

". . . as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect."

As the opinion points out, such expenditures have not been challenged because no remedy was open for testing their constitutionality in the courts.

We are not here concerned with a conditional appropriation of money, nor with a provision that if certain conditions are not complied with the appropriation shall no longer be available. By the Agricultural Adjustment Act the amount of the tax is appropriated **[***121]** to be expended only in payment under contracts whereby the parties bind themselves to regulation by the Federal Government. There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced. Many examples pointing the distinction might be cited. We are **[**323]** referred to appropriations in aid **[*74]** of education, and it is said that no one has doubted the power of Congress to stipulate the sort of education for which money shall be expended. But an appropriation to an educational institution which by its terms is to become available only if the beneficiary enters into a contract to teach doctrines subversive of the Constitution is clearly bad. An affirmance of the authority of Congress so to condition the expenditure of an appropriation would tend to nullify all constitutional limitations upon legislative power.

But it is said that there is a wide difference in another respect, between compulsory regulation of the local affairs of a state's citizens and the mere making of a contract relating to their conduct; **[***122]** that, if any state objects, it may declare the contract void and thus prevent those under the state's jurisdiction from complying with its terms. The argument is plainly fallacious. The United States can make the contract only if the federal power to tax and to appropriate reaches the subject matter of the contract. If this does reach the subject matter, its exertion cannot be displaced by state action. To say otherwise is to deny the supremacy of the laws of the United States; to make them subordinate to those of a State. This would reverse the cardinal principle embodied in the Constitution and substitute one which declares that Congress may only effectively legislate as to matters within federal competence when the States do not dissent.

[21]
Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance. The Constitution and the entire plan of our government negative any such use of the power to tax and to spend as the act undertakes to authorize. It does not help to declare that local conditions throughout the nation **[***123]** have created a situation of national concern; for this **[*75]** is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore constitutional limitations upon its own powers and usurp those reserved to the states. If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of § 8 of Article I would become the instrument for total subversion of the governmental powers reserved to the individual states.

If the act before us is a proper exercise of the federal taxing power, evidently the regulation of all industry throughout the United States may be accomplished by similar exercises of the same power. It would be possible to exact money from one branch of an industry and pay it to another branch in every field of activity which lies within the province of the states. The mere threat of such a procedure might well induce the surrender of rights and the compliance with federal regulation as the price of continuance in business. A few instances will illustrate the thought.

Let us suppose **[***124]** Congress should determine that the farmer, the miner or some

other producer of raw materials is receiving too much for his products, with consequent depression of the processing industry and idleness of its employes. Though, by confession, there is no power vested in Congress to compel by statute a lowering of the prices of the raw material, the same result might be accomplished, if the questioned act be valid, by taxing the producer upon his output and appropriating the proceeds to the processors, either with or without conditions imposed as the consideration for payment of the subsidy.

We have held in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, that Congress has no power to regulate wages and hours of labor in a local business. If the petitioner is right, this very end may be accomplished by **[*76]** appropriating money to be paid to employers from the federal treasury under contracts whereby they agree to comply with certain standards fixed by federal law or by contract.

Should Congress ascertain that sugar refiners are not receiving a fair profit, and that this is detrimental to the entire industry, and in turn has its repercussions in trade and commerce **[***125]** generally, it might, in analogy to the present law, impose an excise of two cents a pound on every sale of the commodity and pass the funds collected to such refiners, and such only, as will agree to maintain a certain price.

[324]** Assume that too many shoes are being manufactured throughout the nation; that the market is saturated, the price depressed, the factories running half-time, the employes suffering. Upon the principle of the statute in question Congress might authorize the Secretary of Commerce to enter into contracts with shoe manufacturers providing that each shall reduce his output and that the United States will pay him a fixed sum proportioned to such reduction, the money to make the payments to be raised by a tax on all retail shoe dealers or their customers.

Suppose that there are too many garment workers in the large cities; that this results in dislocation of the economic balance. Upon the principle contended for an excise might be laid on the manufacture of all garments manufactured and the proceeds paid to those manufacturers who agree to remove their plants to cities having not more than a hundred thousand population. Thus, through the asserted power of taxation, **[***126]** the federal government, against the will of individual states, might completely redistribute the industrial population.

A possible result of sustaining the claimed federal power would be that every business group which thought itself under-privileged might demand that a tax be laid on its vendors or vendees, the proceeds to be appropriated to the redress of its deficiency of income.

[*77] These illustrations are given, not to suggest that any of the purposes mentioned are unworthy, but to demonstrate the scope of the principle for which the Government contends; to test the principle by its applications; to point out that, by the exercise of the asserted power, Congress would, in effect, under the pretext of exercising the taxing power, in reality accomplish prohibited ends. It cannot be said that they envisage improbable legislation. The supposed cases are no more improbable than would the present act have been deemed a few years ago.

Until recently no suggestion of the existence of any such power in the Federal Government has been advanced. The expressions of the framers of the Constitution, the decisions of this court interpreting that instrument, and the writings of **[***127]** great commentators will be searched in vain for any suggestion that there exists in the clause under discussion or elsewhere in the Constitution, the authority whereby every provision and every fair implication from that instrument may be subverted, the independence of the individual states obliterated, and the United States converted into a central government exercising uncontrolled police power in every state of the Union, superseding all local control or regulation of the affairs or concerns of the states.

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Hamilton himself, the leading advocate of broad interpretation of the power to tax and to appropriate for the general welfare, never suggested that any power granted by the Constitution could be used for the destruction of local self-government in the states. Story countenances no such doctrine. It seems never to have occurred to them, or to those who have agreed with them, that the general welfare of the United States, (which has aptly been termed "an indestructible Union, composed of indestructible States,") might be served by obliterating the constituent members of the Union. But to this fatal conclusion **[*78]** the doctrine contended for would inevitably lead. And its **[***128]** sole premise is that, though the makers of the Constitution, in erecting the federal government, intended sedulously to limit and define its powers, so as to reserve to the states and the people sovereign power, to be wielded by the states and their citizens and not to be invaded by the United States, they nevertheless by a single clause gave power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed. The argument when seen in its true character and in the light of its inevitable results must be rejected.

[22]
Since, as we have pointed out, there was no power in the Congress to impose the contested exaction, it could not lawfully ratify or confirm what an executive officer had done in that regard. Consequently the Act of 1935 does not affect the rights of the parties.

The judgment is

Affirmed.

DISSENTBY: ~~STONE~~

DISSENT: MR. JUSTICE STONE, dissenting.

I think the ~~judgment should~~ be reversed.

[325]** The present stress of widely held and strongly expressed differences of opinion of the wisdom of the Agricultural Adjustment Act makes it important, in the interest of clear thinking **[***129]** and sound result, to emphasize at the outset certain propositions which should have controlling influence in determining the validity of the Act. They are:

1. The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power **[*79]** by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government.

2. The constitutional power of Congress to levy an excise tax upon the processing of agricultural products is not questioned. The present levy is held invalid, not for any want of power in Congress to lay such a tax to defray public expenditures, including those for the general welfare, but because the use to which its proceeds are put is disapproved.

3. As the present **[***130]** depressed state of agriculture is nation wide in its extent and effects, there is no basis for saying that the expenditure of public money in aid of farmers is not within the specifically granted power of Congress to levy taxes to "provide for the . . . general welfare." The opinion of the Court does not declare otherwise.

4. No question of a variable tax fixed from time to time by fiat of the Secretary of Agriculture, or of unauthorized delegation of legislative power, is now presented. The schedule of rates

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imposed by the Secretary in accordance with the original command of Congress has since been specifically adopted and confirmed by Act of Congress, which has declared that it shall be the lawful tax. Act of August 24, 1935, 49 Stat. 750. That is the tax which the government now seeks to collect. Any defects there may have been in the manner of laying the tax by the Secretary have now been removed by the exercise of the power of Congress to pass a curative statute validating an intended, though defective, tax. *United States* v. *Heinszen & Co.*, 206 U.S. 370; *Graham & Foster* v. *Goodcell*, 282 U.S. 409; cf. *Milliken* v. *United States*, 283 U.S. 15. The **[***131]** Agricultural Adjustment Act as thus amended declares **[*80]** that none of its provisions shall fail because others are pronounced invalid.

It is with these preliminary and hardly controverted matters in mind that we should direct our attention to the pivot on which the decision of the Court is made to turn. It is that a levy unquestionably within the taxing power of Congress may be treated as invalid because it is a step in a plan to regulate agricultural production and is thus a forbidden infringement of state power. The levy is not any the less an exercise of taxing power because it is intended to defray an expenditure for the general welfare rather than for some other support of government. Nor is the levy and collection of the tax pointed to as effecting the regulation. While all federal taxes inevitably have some influence on the internal economy of the states, it is not contended that the levy of a processing tax upon manufacturers using agricultural products as raw material has any perceptible regulatory effect upon either their production or manufacture. The tax is unlike the penalties which were held invalid in the *Child Labor Tax Case*, 259 U.S. 20, in *Hill* **[***132]** v. *Wallace*, 259 U.S. 44, in *Linder* v. *United States*, 268 U.S. 5, 17, and in *United States* v. *Constantine*, 296 U.S. 287, because they were themselves the instruments of regulation by virtue of their coercive effect on matters left to the control of the states. Here regulation, if any there be, is accomplished not by the tax but by the method by which its proceeds are expended, and would equally be accomplished by any like use of public funds, regardless of their source.

The method may be simply stated. Out of the available fund payments are made to such farmers as are willing to curtail their productive acreage, who in fact do so and who in advance have filed their written undertaking to do so with the Secretary of Agriculture. In saying that this **[**326]** method of spending public moneys is an invasion of the reserved powers of the states, the Court does not assert **[*81]** that the expenditure of public funds to promote the general welfare is not a substantive power specifically delegated to the national government, as Hamilton and Story pronounced it to be. It does not deny that the expenditure of funds for the benefit of farmers and in aid of a program of curtailment **[***133]** of production of agricultural products, and thus of a supposedly better ordered national economy, is within the specifically granted power. But it is declared that state power is nevertheless infringed by the expenditure of the proceeds of the tax to compensate farmers for the curtailment of their cotton acreage. Although the farmer is placed under no legal compulsion to reduce acreage, it is said that the mere offer of compensation for so doing is a species of economic coercion which operates with the same legal force and effect as though the curtailment were made mandatory by Act of Congress. In any event it is insisted that even though not coercive the expenditure of public funds to induce the recipients to curtail production is itself an infringement of state power, since the federal government cannot invade the domain of the states by the "purchase" of performance of acts which it has no power to compel.

Of the assertion that the payments to farmers are coercive, it is enough to say that no such contention is pressed by the taxpayer, and no such consequences were to be anticipated or appear to have resulted from the administration of the Act. The suggestion of coercion **[***134]** finds no support in the record or in any data showing the actual operation of the Act. Threat of loss, not hope of gain, is the essence of economic coercion. Members of a long depressed industry have undoubtedly been tempted to curtail acreage by the hope of resulting better prices and by the proffered opportunity to obtain needed ready money. But there is nothing to indicate that those who accepted benefits were impelled by fear of lower prices if they did not accept, or that at any stage in the operation **[*82]** of the plan a

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farmer could say whether, apart from the certainty of cash payments at specified times, the advantage would lie with curtailment of production plus compensation, rather than with the same or increased acreage plus the expected rise in prices which actually occurred. Although the Agricultural Adjustment Act was put into operation in June, 1933, the official reports of the Department of Agriculture show that 6,343,000 acres of productive cotton land, 14% of the total, did not participate in the plan in 1934, and 2,790,000 acres, 6% of the total, did not participate in 1935. Of the total number of farms growing cotton, estimated at 1,500,000, 33% in 1934 **[***135]** and 13% in 1935 did not participate.

It is significant that in the congressional hearings on the bill that became the Bankhead Act, 48 Stat. 598, as amended by Act of June 20, 1934, 48 Stat. 1184, which imposes a tax of 50% on all cotton produced in excess of limits prescribed by the Secretary of Agriculture, there was abundant testimony that the restriction of cotton production attempted by the Agricultural Adjustment Act could not be secured without the coercive provisions of the Bankhead Act. See Hearing before Committee on Agriculture, U.S. Senate, on S. 1974, 73rd Cong., 2nd Sess:, Hearing before Committee on Agriculture, U.S. House of Representatives, on H.R. 8402, 73rd Cong., 2nd Sess. The Senate and House Committees so reported, Senate Report No. 283, 73rd Cong., 2nd Sess., p. 3; House Report No. 867, 73rd Cong., 2nd Sess., p. 3. The Report of the Department of Agriculture on the administration of the Agricultural Adjustment Act (February 15, 1934 to December 31, 1934), p. 50, points out that the Bankhead Act was passed in response to a strong sentiment in favor of mandatory production control "that would prevent noncooperating farmers from increasing their own plantings **[***136]** in order to capitalize upon the price advances that had resulted from the reductions made by contract **[*83]** signers." n1 The presumption of constitutionality of a statute is not to be overturned by an assertion of its coercive effect which rests on nothing more substantial than groundless speculation.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 Whether coercion was the sole or the dominant purpose of the Bankhead Act, or whether the act was designed also for revenue or other legitimate ends, there is no occasion to consider now.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

It is upon the contention that state power **[**327]** is infringed by purchased regulation of agricultural production that chief reliance is placed. It is insisted that, while the Constitution gives to Congress, in specific and unambiguous terms, the power to tax and spend, the power is subject to limitations which do not find their origin in any express provision of the Constitution and to which other expressly delegated powers are not subject.

The Constitution requires that public funds shall be spent for a defined purpose, the promotion **[***137]** of the general welfare. Their expenditure usually involves payment on terms which will insure use by the selected recipients within the limits of the constitutional purpose. Expenditures would fail of their purpose and thus lose their constitutional sanction if the terms of payment were not such that by their influence on the action of the recipients the permitted end would be attained. The power of Congress to spend is inseparable from persuasion to action over which Congress has no legislative control. Congress may not command that the science of agriculture be taught in state universities. But if it would aid the teaching of that science by grants to state institutions, it is appropriate, if not necessary, that the grant be on the condition, incorporated in the Morrill Act, 12 Stat. 503, 26 Stat. 417, that it be used for the intended purpose. Similarly it would seem to be compliance with the Constitution, not violation of it, for the government to take and the university to give a contract that the grant would be so used. It makes no difference **[*84]** that there is a promise to do an act which the condition is calculated to induce. Condition and promise are alike valid **[***138]** since both are in furtherance of the national purpose for which the money is appropriated.

These effects upon individual action, which are but incidents of the authorized expenditure of government money, are pronounced to be themselves a limitation upon the granted power, and so the time-honored principle of constitutional interpretation that the granted power includes all those which are incident to it is reversed. "Let the end be legitimate," said the great Chief Justice, "let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *McCulloch* v. *Maryland,* 4 Wheat. 316, 421. This cardinal guide to constitutional exposition must now be re-phrased so far as the spending power of the federal government is concerned. Let the expenditure be to promote the general welfare, still, if it is needful in order to insure its use for the intended purpose to influence any action which Congress cannot command because within the sphere of state government, the expenditure is unconstitutional. And taxes otherwise lawfully **[***139]** levied are likewise unconstitutional if they are appropriated to the expenditure whose incident is condemned.

Congress through the Interstate Commerce Commission has set aside intrastate railroad rates. It has made and destroyed intrastate industries by raising or lowering tariffs. These results are said to be permissible because they are incidents of the commerce power and the power to levy duties on imports. See *Minnesota Rate Cases,* 230 U.S. 352; *Shreveport Case,* 234 U.S. 342; *Board of Trustees of the University of Illinois* v. *United States,* 289 U.S. 48. The only conclusion to be drawn is that results **[*85]** become lawful when they are incidents of those powers but unlawful when incident to the similarly granted power to tax and spend.

Such a limitation is contradictory and destructive of the power to appropriate for the public welfare, and is incapable of practical application. The spending power of Congress is in addition to the legislative power and not subordinate to it. This independent grant of the power of the purse, and its very nature, involving in its exercise the duty to insure expenditure within the granted power, presuppose freedom of selection **[***140]** among divers ends and aims, and the capacity to impose such conditions as will render the choice effective. It is a contradiction in terms to say that there is power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to the **[**328]** attainment of the end which alone would justify the expenditure.

The limitation now sanctioned must lead to absurd consequences. The government may give seeds to farmers, but may not condition the gift upon their being planted in places where they are most needed or even planted at all. The government may give money to the unemployed, but may not ask that those who get it shall give labor in return, or even use it to support their families. It may give money to sufferers from earthquake, fire, tornado, pestilence or flood, but may not impose conditions -- health precautions designed to prevent the spread of disease, or induce the movement of population to safer or more sanitary areas. All that, because it is purchased regulation infringing state powers, must be left for the states, who are unable or unwilling to supply the necessary relief. The government may spend its money for vocational rehabilitation, **[***141]** 48 Stat. 389, but it may not, with the consent of all concerned, supervise the process which it undertakes to aid. It may spend its money for the suppression of the boll weevil, but may **[*86]** not compensate the farmers for suspending the growth of cotton in the infected areas. It may aid state reforestation and forest fire prevention agencies, 43 Stat. 653, but may not be permitted to supervise their conduct. It may support rural schools, 39 Stat. 929, 45 Stat. 1151, 48 Stat. 792, but may not condition its grant by the requirement that certain standards be maintained. It may appropriate moneys to be expended by the Reconstruction Finance Corporation "to aid in financing agriculture, commerce and industry," and to facilitate "the exportation of agricultural and other products." Do all its activities collapse because, in order to effect the permissible purpose, in myriad ways the money is paid out upon terms and conditions which influence action of the recipients within the states, which Congress cannot command? The answer would seem plain. If the expenditure is for a national public purpose,

that purpose will not be thwarted because payment is on condition which will advance **[***142]** that purpose. The action which Congress induces by payments of money to promote the general welfare, but which it does not command or coerce, is but an incident to a specifically granted power, but a permissible means to a legitimate end. If appropriation in aid of a program of curtailment of agricultural production is constitutional, and it is not denied that it is, payment to farmers on condition that they reduce their crop acreage is constitutional. It is not any the less so because the farmer at his own option promises to fulfill the condition.

That the governmental power of the purse is a great one is not now for the first time announced. Every student of the history of government and economics is aware of its magnitude and of its existence in every civilized government. Both were well understood by the framers of the Constitution when they sanctioned the grant of the spending power to the federal government, and both were recognized by Hamilton and Story, whose views of the **[*87]** spending power as standing on a parity with the other powers specifically granted, have hitherto been generally accepted.

The suggestion that it must now be curtailed by judicial fiat because **[***143]** it may be abused by unwise use hardly rises to the dignity of argument. So may judicial power be abused. "The power to tax is the power to destroy," but we do not, for that reason, doubt its existence, or hold that its efficacy is to be restricted by its incidental or collateral effects upon the states. See *Veazie Bank* v. *Fenno,* 8 Wall. 533; *McCray* v. *United States,* 195 U.S. 27; compare *Magnano Co.* v. *Hamilton,* 292 U.S. 40. The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national. Another is that it may not be used to coerce action left to state control. Another is the conscience and patriotism of Congress and the Executive. "It must be remembered that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." Justice Holmes, in *Missouri, Kansas & Texas Ry. Co.* v. *May,* 194 U.S. 267, 270.

A tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless congressional **[**329]** spending which might occur if courts could not prevent -- expenditures which, even if they could **[***144]** be thought to effect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility. Such suppositions are addressed to the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action. Courts are not the only agency of government that must be assumed to have capacity to govern. Congress and the courts both unhappily may falter or be mistaken in the performance of their constitutional duty. But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive **[*88]** concern of any one of the three branches of government, or that it alone can save them from destruction is far more likely, in the long run, "to obliterate the constituent members" of "an indestructible union of indestructible states" than the frank recognition that language, even of a constitution, may mean what it says: that the power to tax and spend includes the power to relieve a nationwide economic maladjustment by conditional gifts of money.

MR. JUSTICE BRANDEIS and MR. JUSTICE CARDOZO join in **[***145]** this opinion.

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STATES, §16
reserved powers -- widespread similarity of conditions cannot justify Federal encroachment upon reserved powers of states. --

Headnote: [21]
A widespread similarity of local conditions cannot confer upon Congress powers reserved to the states by the Federal Constitution.

UNITED STATES, §14
powers of Congress -- ratification of acts of executive officer. --

Headnote: [22]
Where there is no power in Congress to impose an exaction, it cannot lawfully ratify or confirm the imposition of such exaction by an executive officer.

SYLLABUS: 1. Processors of farm products have a standing to question the constitutionality of the "processing and floor-stock taxes" sought to be laid upon them by the Agricultural Adjustment Act of May 12, 1933, 48 Stat. 31. *Massachusetts* v. *Mellon*, 262 U.S. 447, distinguished. P. 57.

2. A tax, in the general understanding and in the strict constitutional sense, is an exaction for the support of Government; the term does not connote the expropriation of money from one group to be expended for another, as a necessary means in a plan of regulation, such as the plan for regulating agricultural production set up in the Agricultural Adjustment Act. P. 61.

3. In testing the validity of the "processing tax," it is impossible to wrest it from its setting and treat it apart as a mere excise for raising revenue. P. 58.

4. From the conclusion that the exaction is not a true tax it does not necessarily follow that the statute is void and the exaction uncollectible, if the regulation, of which the exaction is a part, is within any of the powers granted to Congress. P. 61.

5. The Constitution is the supreme law of **[***2]** the land, ordained and established by the people, and all legislation must conform to the principles it lays down. P. 62.

6. It is a misconception to say that, in declaring an Act of Congress unconstitutional, the Court assumes a power to overrule or control the action of the people's representatives. P. 62.

7. When an Act of Congress is appropriately challenged in a court, it is the duty of the court to compare it with the article of the Constitution which is invoked and decide whether it conforms to that article. P. 62.

8. All that the court does or can do in such cases is to announce its considered judgment upon the question; it can neither approve nor condemn any legislative policy; it can merely ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution. P. 62.

9. The question in such cases is not what powers the Federal Government ought to have, but what powers have in fact been given it by the people. P. 63.

10. Ours is a dual form of government; in every State there are two Governments -- the

State and the United States; each State has all governmental powers, save such as the people, **[***3]** by the Constitution, have conferred upon the United States, denied to the States, or reserved to themselves. P. 63.

11. The Government of the United States is a Government of delegated powers; it has only such powers as are expressly conferred upon it by the Constitution and such as are reasonably to be implied from those expressly granted. P. 63.

12. The Agricultural Adjustment Act does not purport to regulate transactions in interstate or foreign commerce; and the Government in this case does not attempt to sustain it under the commerce clause of the Constitution. P. 63.

13. In Article I, § 8, cl. 1 of the Constitution, which provides that Congress shall have power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States," the phrase "to provide for the general welfare" is not an independent provision empowering Congress generally to provide for the general welfare, but is a qualification defining and limiting the power "to lay and collect taxes," etc. P. 64.

14. The power to appropriate money from the Treasury (Constitution, Art. I, § 9, cl. 7) is as broad as the power to **[***4]** tax; and the power to lay taxes to provide for the general welfare of the United States implies the power to appropriate public funds for that purpose. P. 65.

15. The power to tax and spend is a separate and distinct power; its exercise is not confined to the fields committed to Congress by the other enumerated grants of power; but it is limited by the requirement that it shall be exercised to provide for the general welfare of the United States. P. 65.

16. The Court is not required in this case to ascertain the scope of the phrase "general welfare of the United States," or to determine whether an appropriation in aid of agriculture falls within it. P. 68.

17. The plan of the Agricultural Adjustment Act is to increase the prices of certain farm products for the farmer by decreasing the quantities produced; the decrease is to be attained by making payments of money to farmers who, under agreements with the Secretary of Agriculture, reduce their acreage and crops; and the money for this purpose is exacted, as a tax, from those who first process the commodities. *Held:*

(1) The Act invades the reserved powers of the States. P. 68.

(2) Regulation and control of agricultural **[***5]** production are beyond the powers delegated to the Federal Government. P. 68.

(3) The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan -- the means to an unconstitutional end. P. 68.

(4) The power of taxation, which is expressly granted to Congress, may be adopted as a means to carry into operation another power also expressly granted; but not to effectuate an end which is not within the scope of the Constitution. P. 69.

(5) The regulation of the farmer's activities under the statute, though in form subject to his own will, is in fact coercion through economic pressure; his right of choice is illusory. P. 70.

(6) Even if the farmer's consent were purely voluntary, the Act would stand no better. At best it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the States. P. 72.

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(7) The right to appropriate and spend money under contracts for proper governmental purposes cannot justify contracts that are not within federal power. P. 72.

(8) Congress cannot invade state jurisdiction by purchasing the action of individuals any more than by compelling it. **[***6]** P. 73.

(9) There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon the assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced. P. 73.

(10) Owing to the supremacy of the United States, if the contracts with farmers contemplated by the Agricultural Adjustment Act were within the federal power to make, the States could not declare them void or prevent compliance with their terms. P. 74.

(11) Existence of a situation of national concern resulting from similar and widespread local conditions cannot enable Congress to ignore the constitutional limitations upon its own powers and usurp those reserved to the States. P. 74.

(12) If the novel view of the General Welfare Clause now advanced in support of the tax were accepted, that clause would not only enable Congress to supplant the States in the regulation of agriculture and of all other industries as well, but would furnish the means whereby all of the other provisions of the Constitution, sedulously framed to define and limit the powers of the United States and preserve the powers of the States, could **[***7]** be broken down, the independence of the individual States obliterated, and the United States converted into a central government exercising uncontrolled police power throughout the Union superseding all local control over local concerns. P. 75.

(13) Congress, being without power to impose the contested exaction, could not lawfully ratify the acts of an executive officer in assessing it. P. 78.

78 F. (2d) 1, affirmed.

CERTIORARI, 296 U.S. 561, to review a decree which reversed an order of the District Court (*Franklin Process Co.* v. *Hoosac Mills Corp.*, 8 F. Supp. 552), directing the receivers of Hoosac Mills, a cotton milling corporation, to pay claims of the United States for processing and floor taxes on cotton, levied under §§ 9 and 16 of the Agricultural Adjustment Act of May 12, 1933. The opinion of this Court begins on p. 53, *post;* the dissenting opinion on p. 78.

COUNSEL: *Solicitor General Reed,* orally, after stating the case:

The conditions to which power is addressed are always to be considered when the exercise of power is challenged, -- extraordinary conditions may call for extraordinary remedies; but, as the Court has said, "the argument necessarily stops **[***8]** short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power." *Home Building & Loan Assn.* v. *Blaisdell,* 290 U.S. 398; *Schechter Case,* 295 U.S. 495.

In the effort to meet the emergencies arising during this depression, we have proceeded under that view of the law; and we do not now contend that the extraordinary conditions give rise to anything more than an opportunity to use extraordinary remedies; but, of course, such remedies as flow from the language of the Constitution as it has been interpreted by this Court.

The Government, in legislating in regard to the depression, was quick to ratify actions that had been taken without clear, specific Congressional authority. The Court will recall that the

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first ratification by the Congress was as to the closing of the banks, which had been done under a statute conferring that authority, but in terms making ratification advisable. Further, there was an abrogation of the gold clause. There were Acts directed to the relief of distress. Others authorized lending to the home-owner, through the Home Owners Loan Corporation; **[***9]** to the farmer, through the Farm Credit Corporation; and to banks and industry, through the Reconstruction Finance Corporation.

As a part of this concerted effort to bring about recovery, the Agricultural Adjustment Act was passed. It should not, however, be approached as an emergency measure, nor as a measure that came into consideration because of the present emergency. Rather should we bear in mind that since the 68th Congress at least, the House and the Senate and the Executive have been giving careful attention to the problem of agricultural surpluses.

Eight times have acts been reported by the Agricultural Committee of the House, and ten times by the Committee on Agriculture and Forestry of the Senate. The House has rejected two and passed five. The Senate has rejected two and passed four. It is recalled, of course, that the McNary-Haugen Act was twice vetoed by President Coolidge, that the Federal Farm Board Act was approved by President Hoover, and the Agricultural Adjustment Act by President Roosevelt.

We have a long history of Legislative and Executive consideration of the problem of agricultural surplus. There were innumerable acts that dealt with other agricultural **[***10]** difficulties, rather than the surplus as such. But it was the mounting supply of the great staple, nonperishable, agricultural commodities that demanded the attention of the Legislature and of the Executive, and that has received the attention of the courts throughout those years.

I need refer only to the Cooperative Marketing Acts passed by States, complemented by acts of Congress, which had for an end not only an orderly marketing of commodities but an endeavor to bring about an adjustment of supply and demand and a hoped-for diminution of a burdensome surplus. They did not achieve that result.

The Federal Farm Board Act, 46 Stat. 11, 12 U.S.C. § 1141, while providing for loans to cooperatives that complied with the Capper-Volstead Act, 42 Stat. 388, 7 U.S.C. §§ 291, 292, also contemplated a control of production of cotton and wheat through stabilization corporations. I mean the handling of the surplus, as distinct from a control of the actual growth of the commodity. . . .

The present Act is comprehensive. The title probably gives as accurate a reflection of its purposes as any statement of mine could do.

I might say parenthetically that this act in separate titles dealt **[***11]** with the Farm Credit Administration and the establishment of the Farm Loan Bank Corporation, through which two billion dollars was loaned to agriculture.

The Act opens with a declaration of emergency, and passes on to a declaration of policy. A cursory reading will show that this declaration of policy, while it follows in form and in location in the Act declarations of policy that this Court considered in *Panama Rfg. Co.* v. *Ryan,* 293 U.S. 388, and in *Schechter* v. *United States,* is entirely distinct. It is a great deal more than a hope of what may happen, and will become important as an actual standard of what Congress sought from the passage of this legislation, and of what discretion it gave to its chosen instruments for carrying that out.

The essence of the declaration is that Congress hopes to re-establish prices to farmers at a level that will give agricultural commodities a purchasing power, with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. For the purpose of this commodity and of all others, I believe, except tobacco, the

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base period was fixed as August, 1909, to July, 1914. **[***12]** . . .

After this declaration of policy, the Act points out what is to be done to effectuate it. Part 2 relates to the authority of the Secretary of Agriculture to achieve this standard which Congress has laid down. Section 8 gives to the Secretary of Agriculture the power to provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith. . . .

This case involves the floor-stock tax, together with the processing tax. The processing tax is covered by § 9 of the Act. Section 9(a) provides the action that puts the tax into effect, and § 9(b) declares what that tax shall be:

"The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity,". . .

The current farm price for the commodity is a figure determined by the Department of Agriculture. The determination involves many different commodities, but includes all of those which are basic agricultural commodities under this Act. Prices **[***13]** of farm commodities have been determined and published by the Secretary of Agriculture for at least twenty years.

The exchange value of the commodity is defined in § 9 (c) of the Act, and is -- "the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such comodity had during the base period specified in § 2."

That means that the value or farm price would need to be increased according to the rising scale of prices for articles that farmers bought. Both of those factors had been used by the Department of Agriculture for many years. . . .

The collection of the tax is left to the Collector of Internal Revenue in the usual form, and an appropriation is made to carry out the purposes of the Act. The appropriation, I am sure, will be found important because it clearly answers the contention that this tax was wholly for the purpose of rental and benefit payments.

By § 12 one hundred million dollars are appropriated "For administrative expenses under this title and for rental and benefit payments made with respect to reduction in acreage." It also appropriated "The proceeds derived from all taxes imposed under this title. **[***14]** . . to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the following purposes under Part 2 of this title: Administrative expenses, rental and benefit payments, and refunds on taxes."

There has been no adjustment of the tax rates in respect to cotton. No question is here as to refunds of the tax, nor of amendments to the Agricultural Adjustment Act. We do not conceive that the amendments (passed in August, 1935, 49 Stat. 750) have any effect upon the present case, unless the Court should determine that the old Act, the first Act, does not properly delegate to the officers of the Government discretion to handle the duties imposed upon them, and in that case there has been a ratification of the action of the officers, so that the tax is now authorized not only by the discretion of the administrative officers, but by the amendatory legislation.

The license taxes are in and of themselves a revenue measure; they are levied as an excise on the processing of the commodity, and for that reason are to be collected without regard to the purposes for which they are to be spent, inasmuch as they go into the Treasury of **[***15]** the United States, together with other funds that were appropriated by the same section, and become there a part of the revenue of the Government.

n100 *The Shreveport Rate Case,* 234 U.S. at 351 (citation omitted).

n101 See infra notes 185-234 and accompanying text.

n102 188 U.S. 321 (1903). The appellants attempted as an initial maneuver to keep the case outside the commerce clause altogether, by arguing that lottery tickets were not articles of commerce at all, but were instead "mere evidences of contract made wholly within the boundaries of a State, which contracts are valid or invalid according to the municipal law of the State where made or attempted to be enforced." Id. at 327. This argument seems weak. If the writing has a tangible form, and if the ticket can be bought or sold, then something, rather than nothing, is working its way through the channels of interstate commerce.

n103 Id. at 327.

n104 See id. at 353-54.

n105 See supra note 14.

n106 See U.S. Const. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."). Clearly any regulation that made it impossible to import slaves (note the euphemism in the text) into the United States was prohibited as well. For the vexed relationship of this clause to the commerce power, see Berns, The Constitution and the Migration of Slaves, 78 Yale L.J. 198 (1968). Note, however, that although the commerce clause might have given Congress the power to regulate (or even prohibit) the slave trade, it did not give it the power to regulate the position of the slaves located within the state, much less to prohibit slavery.

n107 This argument was well made by the appellant's counsel in oral argument. *Champion,* 188 U.S. at 329-30 (argument of appellant). There the point was limited to the transfer of "promissory notes, of deed, of bonds, of contracts for personal services, etc." Id. In principle, however, it could extend to the underlying goods shipped in interstate commerce as well.

n108 The principle states that "a state is without power to impose an unconstitutional requirement as a condition for granting a privilege." Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 598 (1926). The most exhaustive treatment of the subject is found in Kreimer, Allocation Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293 (1984). I have addressed the use of the doctrine of unconstitutional conditions in the context of eminent domain in Epstein, Takings: Descent and Resurrection, 1986 Sup. Ct. Rev. (forthcoming).

n109 This connection between the commerce clause and the fifth amendment was noted by counsel for appellees in Hammer v. Dagenhart, 247 U.S. 251 (1917), who insisted that there was a higher level of judicial review under the commerce clause. See id. at 267.

n110 *Champion,* 188 U.S. at 374 (Fuller, C.J., dissenting).

n111 See U.S. Const. art. VI.

n112 For a checkered history of lotteries passing in and out of favor in one state, see Stone v. Mississippi, 101 U.S. 814 (1881).

n113 See, e.g., Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding compulsory vaccination); Mugler v. Kansas, 123 U.S. 623, 674 (1887) (upholding prohibition of alcoholic beverages); Lochner v. New York, 198 U.S. 45, 65 (1905) (Harlan, J., dissenting from holding that New York could not limit bakers' working hours).

n114 See Powell v. Pennsylvania, 127 U.S. 678, 683-87 (1888) (upholding prohibition of manufacture or sale of margarine).

n115 See, e.g., Adair v. United States, 208 U.S. 161 (1908) (upholding freedom of contract between employer and employee); Smyth v. Ames, 169 U.S. 466 (1898) (holding confiscatory state railroad rate regulations to be violations of the 14th amendment); Berea College v. Kentucky, 211 U.S. 45, 58-70 (1908) (Harlan, J., dissenting) (criticizing racial segregation).

n116 *Champion,* 188 U.S. at 356.

n117 Id.

n118 See Caminetti v. United States, 242 U.S. 470 (1917); Hoke v. United States, 227 U.S. 308, 322 (1913) (noting the link between the police power and the commerce clause).

n119 See Hipolite Egg Co. v. United States, 220 U.S. 45 (1911). *Hipolite* was confined to "illicit articles -- articles which the law seeks to keep out of commerce because, they are debased by adulteration," id. at 57, and which were "at their point of destination in the original, unbroken packages," id. at 58.

n120 247 U.S. 251 (1918).

n121 Act of Sept. 1, 1916, ch. 432, 39 Stat. 675. This act prohibited all labor by children under 14, and allowed children between the ages of 14 and 16 to work only eight-hour days, six days per week.

n122 *Hammer,* 247 U.S. at 272.

n123 156 U.S. 1 (1895); see infra notes 141-58 and accompanying text.

n124 *Hammer,* 247 U.S. at 271.

n125 Id.

n126 Id. at 273-74.

n127 Justice Day wrote:

There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition. Many causes may cooperate to give one State, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions.
Id. at 273.

n128 Id. at 281 (Holmes, J., dissenting).

n129 See Northern Secs. Co. v. United States, 193 U.S. 197, 402-03 (1904) (Holmes, J., dissenting).

n130 *Hammer,* 247 U.S. at 277.

n131 See id. at 276-77.

n132 347 U.S. 483 (1954).

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n133 *Hammer,* 247 U.S. at 256-57 (argument of appellant).

n134 Id. at 275 ("That such employment [e.g., child labor] is generally deemed to require regulation is shown by the fact that the brief of counsel states that every State in the Union has a law upon the subject, limiting the right to thus employ children.").

n135 *Hammer,* 247 U.S. at 268-69 n.1.

n136 "That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit." Id. at 275.

n137 See L. Wilder, Farmer Boy (1933).

n138 See I. Howe, The World of Our Fathers (1976). Howe's book is notable for its discussion of the unintended harmful consequences of turn-of-the-century social legislation on the very people it was supposed to protect. Howe himself is a social democrat who supports such legislation, but his accounts reveal his obvious sense of puzzlement about the issue, although he was not moved to change his substantive positions. See, e.g., id. at 150-53 (discussing the mixed results of housing legislation in New York, including the 1901 statute that forbade further construction of the so-called "dumbbell" tenements).

n139 See, e.g., the account of the police power given in New York Cent. R.R. v. White, 243 U.S. 188, 207 (1917).

n140 See supra notes 74-101 and accompanying text.

n141 156 U.S. 1 (1895).

n142 Ch. 647, 26 Stat. 209 (1980) (current version at 15 U.S.C. §§ 1-8 (1982)).

n143 *E. C. Knight,* 156 U.S. at 9.

n144 Id. at 16-17.

n145 Id. at 12-13.

n146 Id. at 18 (Harlan, J., dissenting).

n147 See id. at 12-13.

n148 Id. at 35-36 (Harlan, J., dissenting).

n149 See id. at 12, 36-37 (Harlan, J., dissenting).

n150 See supra note 87 and accompanying text.

n151 Justice Harlan wrote:

> If this combination, so far as its operations necessarily or directly affect interstate commerce, cannot be restrained or suppressed under some power granted to Congress, it will be cause for regret that the patriotic statesmen who framed the Constitution did not foresee the necessity of investing the national government with power to deal with gigantic monopolies holding in their grasp, and injuriously controlling in their own interest, the entire trade *among the States* in food products that are essential to the comfort of every household in the land.
> *E. C. Knight,* 156 U.S. at 19 (Harlan, J., dissenting).

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n152 Id. at 13.

n153 Id.

n154 Id. at 15-16.

n155 175 U.S. 211 (1899).

n156 198 U.S. 45 (1905). Yet Justice Peckham did not simply use "freedom of contract" as a phrase to conceal all understanding of regulatory issues. In *Addyston Pipe,* for example, he was explicit about the limits of freedom of contract in its constitutional guise:

It has been held that the word "liberty," as used in the Constitution, was not to be confined to the mere liberty of person, but included, among others, a right to enter into certain classes of contracts for the purpose of enabling the citizen to carry on his business. But it has never been, and in our opinion ought not to be, held that the word included the right of an individual to enter into private contracts upon all subjects, no matter what their nature and wholly irrespective (among other things) of the fact that they would, if performed, result in the regulation of interstate commerce and in the violation of an act of Congress upon that subject.
Addyston Pipe, 175 U.S. at 228-29 (citation omitted).

The passage is odd in the sense that it treats private contracts as the equivalent of public regulation, and because it inverts the relationship between constitutional principle and legislative action. But otherwise stated, the principle of freedom of contract does not protect contracts in restraint of trade. The explanation for the distinction lies in the external effects of two kinds of contracts. Contracts in restraint of trade may well have negative, systematic, economic effects; ordinary commercial contracts have positive systematic effects. The issue could be understood, although it was not by Justice Peckham, in terms of the just compensation requirements associated with limitation of both contract and property rights. See R. Epstein, Takings: Private Property and the Power of Eminent Domain 202-03 (1985).

n157 See *Addyston Pipe,* 175 U.S. at 248.

n158 Id. at 226-27.

n159 193 U.S. 197 (1904).

n160 See id. at 327-28.

n161 Id. at 402 (Holmes, J., dissenting).

n162 Id. at 402-03 (Holmes, J., dissenting) (citation omitted).

n163 196 U.S. 375 (1905).

n164 Id. at 388.

n165 Id. at 397.

n166 258 U.S. 495, 517 (1922) ("The judgment in *[Swift]* gives a clear and comprehensive exposition which leaves to us in this case little but the obvious application of the principles there declared.").

n167 262 U.S. 1, 35 (1923) ("*[Swift]* merely fitted the commerce clause to the real and practical essence of modern business growth. It applies to the case before us just as it did in *[Stafford].").*

n168 Ch. 64, 42 Stat. 159 (current version at 7 U.S.C. §§ 181-231 (1982)).

n169 *Stafford,* 258 U.S. at 514.

n170 Id. at 513-14.

n171 Id. at 515-16.

n172 Ch. 369, 42 Stat. 998 (1922) (current version codified as part of the Commodity Exchange Act, 7 U.S.C. §§ 1-24 (1982 & Supp. III 1985)).

n173 *Olsen,* 262 U.S. at 32.

n174 Chief Justice Taft wrote:

The railroads of the country accommodate themselves to the interstate function of the Chicago market by giving shippers from western States bills of lading through Chicago . . . for temporary purposes of storing, inspecting, weighing, grading, or mixing, and changing the ownership, consignee or destination and then to continue the shipment under the same contract and at a through rate. . . . The fact that the grain shipped from the west and taken from the cars may have been stored in warehouses and mixed with other grain, so that the owner receives other grain when presenting his receipt for continuing the shipment, does not take away from the interstate character of the through shipment . . . .
Id. at 33-34.

n175 295 U.S. 495 (1935).

n176 Id. at 521, 547, 551 (citing the National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933)).

n177 298 U.S. 238 (1936).

n178 Ch. 824, 49 Stat. 991 (1935).

n179 *Carter,* 298 U.S. at 239.

n180 Id. at 305.

n181 Id. at 308.

n182 See supra notes 60-61 and accompanying text.

n183 Hammer v. Dagenhart, 247 U.S. 25, 271 (1918); see supra notes 120-40.

n184 See G. Gunther, Constitutional Law 128-30 (11th ed. 1985).

n185 301 U.S. 1 (1937). Companion cases to *Jones & Laughlin* were NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937), and NLRB v. Fruehauf Trailer Co., 301 U.S. 49 (1937).

n186 Ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1982 & Supp. III 1985)).

n187 See id. § 8(a)(5), 29 U.S.C. § 158 (a)(5).

n188 See id. § 9(a), 29 U.S.C. § 159 (a).

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n189 See J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

n190 Id. at 450.

n191 See supra notes 35-59 and accompanying text.

n192 See supra notes 141-83 and accompanying text.

n193 See supra notes 93-101 and accompanying text.

n194 "There would appear to be no difference in the constitutional power to protect interstate commerce against unduly high prices, as in the Sherman Act, and excessively low prices, as in the New Deal legislation." Stern, supra note 32, at 651. The economic error is to think that prices, rather than economic structure, are the source of any misallocation of resources.

n195 See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1824).

n196 See Carter v. Carter Coal Co., 298 U.S. 238 (1936); E.C. Knight Co. v. United States, 156 U.S. 1 (1895).

n197 See NLRB v. Fruehauf Trailer Co., 85 F.2d 391 (6th Cir. 1936), rev'd, 301 U.S. 49 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 85 F.2d 1 (2d Cir. 1936), rev'd, 301 U.S. 58 (1937); NLRB v. Jones & Laughlin Steel Corp., 83 F.2d 998 (5th Cir. 1936), rev'd, 301 U.S. 1 (1937). The circuit opinions were reprinted in full in Justice McReynolds' dissent to all three of these cases. See Labor Board Cases, 301 U.S. 76, 79-84 (1937) (McReynolds, J., dissenting).

n198 *Carter*, 298 U.S. at 308-09.

n199 *Jones & Laughlin*, 301 U.S. at 37; see *Carter*, 298 U.S. at 317 (Cardozo, J., dissenting).

n200 See *Jones & Laughlin*, 301 U.S. at 36-37 (quoting Second Employers' Liability Cases, 223 U.S. 1, 47 (1911); The Daniel Ball, 77 U.S. (10 Wall.) 557, 564 (1870)).

n201 *Jones & Laughlin*, 301 U.S. at 34-35 (quoting the government's argument).

n202 Chief Justice Hughes wrote:

The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.
Id. at 30.

n203 NLRB v. Fruehauf Co., 301 U.S. 49, 50 (1937).

n204 NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 73 (1937).

n205 The Court in *Friedman-Harry Marks* wrote:

With effective competition between the industry's enterprises an accepted fact regardless of location, and bearing in mind the purpose and effect of the migration of enterprises, it seems unavoidable that the members of the Amalgamated Clothing Workers should, as they do,

regard the industry as one whose economic organization is not based on the interests of each individual enterprise, but is one in which union conditions, to be maintained at all, must prevail generally.
Id. at 59.

n206 312 U.S. 100 (1941).

n207 Ch. 676, 52 Stat. 1060 (1938) (current version at 29 U.S.C. §§ 201-209 (1982 & Supp. III 1985)).

n208 *Darby,* 312 U.S. at 102 (the government's argument).

n209 Id. at 115.

n210 Id.

n211 Id. at 121.

n212 Id. at 109 n.1. Justice Stone's version of The Shreveport Rate Case, 234 U.S. 342 (1914), was adopted by Justice Jackson in Wickard v. Filburn, 317 U.S. 111, 123-34 (1942). See infra notes 221-26 and accompanying text.

n213 Hammer v. Dagenhart, 247 U.S. 251, 281 (1918) (Holmes, J., dissenting).

n214 See *Darby,* 312 U.S. at 115.

n215 Id. at 124.

n216 See id. at 122.

n217 Id.

n218 315 U.S. 110 (1942).

n219 See id. at 116 (quoting the Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246 (current version at scattered sections of 7 U.S.C. (1982 & Supp. III 1985))).

n220 Id. at 120.

n221 317 U.S. 111 (1942).

n222 See id. at 120.

n223 See id.

n224 The Shreveport Rate Case, 234 U.S. 342 (1914).

n225 *Wickard,* 317 U.S. at 123 (quoting *The Shreveport Rate Case,* 234 U.S. at 351).

n226 *The Shreveport Rate Case,* 234 U.S. at 351. Professor Tribe's rendition of the *The Shreveport Rate Case*'s sentence suppresses this first clause as well, with the exception of keeping the word "control" and dropping the words "their operations in." Tribe, supra note 28, § 5-4, at 235 (quoting *The Shreveport Rate Case,* 234 U.S. at 351).

n227 See supra notes 13-16 and accompanying text.

n228 Descriptively, one reason why there is little federal regulation of land use, for

example, is that the markets for land tend to be more local than national. For these markets federal regulation is of little assistance, so regulation is apt to take place at the local level. But where the economics change, as with strip-mining, the regulation becomes federal. For my views on how the eminent domain clause of the fifth amendment, as applied to both federal and state governments, should function, see R. Epstein, supra note 156; Epstein, supra note 34.

n229 See, e.g., *Wickard,* 317 U.S. at 129-33; *Darby,* 312 U.S. at 125; *Jones & Laughlin,* 301 U.S. at 43-49. *Wrightwood Dairy,* 315 U.S. at 110, is an apparent exception, but only because the question whether the state could control the price of milk had already been resolved in favor of the state. See Nebbia v. New York, 291 U.S. 502 (1934).

n230 Professor Tribe has written that

Hammer v. Dagenhart highlights the tension that existed between the Supreme Court's taxonomic approach to the commerce clause in the early 20th century -- an approach grounded in the theory of dual sovereignty and sustained by a faith in the market as the proper mechanism for distributing wealth -- and the increasingly undeniable consequences of economic interdependence.
Tribe, supra note 28, § 5-7, at 238 n.1. The word "creating" should be inserted in place of "distributing" to understand the economic case.

n231 Moreover, there is reason to fear local regulation that is designed to preclude external competition, as in *Gibbons.* Indeed, the great achievement of the commerce clause has been its negative side, which has precluded state regulation even when the federal government has not acted. Perhaps the ideal form of the commerce clause should have been negative:

"No state shall have any power to pass legislation that interferes with the freedom of commerce among the several states." There are of course difficulties to this proposal. For example, it makes any sensible response to the long-haul/short-haul problem difficult. The mischief of excessive federal action, however, is far greater.

n232 See Tullock, The Welfare Costs of Tariffs, Monopolies, and Theft, 5 W. Econ. J. 224, 232 (1967), for the first demonstration of the point. I have addressed some of these problems in Epstein, supra note 34.

n233 See supra note 62.

n234 For the modern analogue, see Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), dealing with the ability of the federal government to regulate the states themselves under the commerce clause.

n235 See The Federalist No. 84 (A. Hamilton); supra notes 5-8 and accompanying text.

n236 See id.

n237 See R. Epstein, supra note 156, ch. 2.

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Subject Files

[Restatement of the Law, Second, Torts, section 908]

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Restatement of the Law, Second, Torts, § 908

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Rules and Principles

Division 13 - Remedies

Chapter 47 - Damages

Topic 1 - General Statements

Restat 2d of Torts, § 908

§ 908 Punitive Damages

(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.
(2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

COMMENTS & ILLUSTRATIONS: Comment:

a. Purpose. The purposes of awarding punitive damages, or "exemplary" damages as they are frequently called, are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future. Although the purposes are the same, the effect of a civil judgment for punitive damages is not the same at that of a fine imposed after a conviction of a crime, since the successful plaintiff and not the state is entitled to the money required to be paid by the defendant. The awarding of punitive damages is not prevented by a prior criminal conviction for the same act, which is relevant only to the amount of the award; nor does the granting of punitive damages prevent a subsequent criminal conviction.

Punitive damages are not awarded against the representatives of a deceased tortfeasor nor, ordinarily, in an action under a death statute. (See §§ 900 and 925).

In many states statutes have been enacted with reference to certain types of conduct, such as intentional trespass to land under the terms of which double or treble damages or designated amounts can be recovered. Punitive damages are to be distinguished from *qui tam* awards and civil penalties or forfeitures.

b. Character of defendant's conduct. Since the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence, these

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damages can be awarded only for conduct for which this remedy is appropriate -- which is to say, conduct involving some element of outrage similar to that usually found in crime. The conduct must be outrageous, either because the defendant's acts are done with an evil motive or because they are done with reckless indifference to the rights of others. Although a defendant has inflicted no harm, punitive damages may be awarded because of, and measured by, his wrongful purpose or intent, as when he unsuccessfully makes a murderous assault upon the plaintiff, who suffers only a momentary apprehension. In all these cases, however, a cause of action for the particular tort must exist, at least for nominal damages. Reckless indifference to the rights of others and conscious action in deliberate disregard of them (see § 500) may provide the necessary state of mind to justify punitive damages.

Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence. And they are not permitted merely for a breach of contract. When, however, the plaintiff has a right in the alternative to sue for a breach of contract or for a tort, the fact that his act or omission amounts to a breach of contract does not preclude the award of punitive damages if the action is brought for the tort and the tort is one for which punitive damages are proper.

c. Extent and nature of harm. In the earliest cases in which punitive damages were allowed, the plaintiffs suffered no substantial harm, or at least no physical or financial harm appeared. These were cases in which public officials were guilty of outrageously oppressive conduct. Punitive damages are today awarded when there is substantial harm and when there is none. Although as stated in Comment *e*, the extent of the harm may be considered in determining their amount, it is not essential to the recovery of punitive damages that the plaintiff should have suffered any harm, either pecuniary or physical.

Thus an award of nominal damages (see § 907) is enough to support a further award of punitive damages, when a tort, such as a trespass to land, is committed for an outrageous purpose, but no significant harm has resulted.

Compensatory damages in a trifling amount and substantial punitive damages in the same verdict are not necessarily inconsistent. It is essential, however, that facts be established that, apart from punitive damages, are sufficient to maintain a cause of action. Thus a nonharmful unauthorized dealing with another's chattel, if not amounting to a dispossession, does not give rise to a cause of action and the fact that it was done with a bad motive is immaterial. On the other hand, in torts like malicious prosecution that require a particular antisocial state of mind, the improper motive of the tortfeasor is both a necessary element in the cause of action and a reason for awarding punitive damages.

In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.

d. Function of jury. Whether to award punitive damages and the determination of the amount are within the sound discretion of the trier of fact, whether judge or jury. It is error, however, for the trier of fact to award punitive damages if there has been no bad motive or wanton indifference. An instruction that the jury can award punitive damages in such a case followed by a verdict that indicates from its size that punitive damages have been awarded is ground for a new trial. On the other hand, the trier of fact is not required to award punitive damages in a case in which they are permissible, and it is error for a trial judge to instruct the jury that punitive damages must be given. The excessiveness of punitive damages in a case in which they are allowable may be ground for reversal, for a new trial, or for a remittitur under the usual rules by which the court controls the jury's award of compensatory damages.

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e. Amount of damages. In determining the amount of punitive damages, as well as in deciding whether they should be given at all, the trier of fact can properly consider not merely the act itself but all the circumstances including the motives of the wrongdoer, the relations between the parties and the provocation or want of provocation for the act. (See § 921). In addition, the extent of harm to the injured person can be considered by analogy to the doctrine of the criminal law by which the seriousness of a crime may depend upon the harm done, as when a battery with intent to kill results in mayhem or murder. Included in the harm to the plaintiff may be considered the fact that the plaintiff has been put to trouble and expense in the protection of his interests, as by legal proceedings in this or in other suits. (See § 914). The wealth of the defendant is also relevant, since the purposes of exemplary damages are to punish for a past event and to prevent future offenses, and the degree of punishment or deterrence resulting from a judgment is to some extent in proportion to the means of the guilty person.

Another factor that may affect the amount of punitive damages is the existence of multiple claims by numerous persons affected by the wrongdoer's conduct. It seems appropriate to take into consideration both thepunitive damages that have been awarded in prior suits and those that may be granted in the future, with greater weight being given to the prior awards. In a class action involving all claims, full assessment of the punitive damages can be made.

f. Criticisms and restrictions. The entire concept of punitive damages has been subjected to attack from some sources. Some states decline to award these damages in the absence of a statutory provision. Others insist that there must be significant compensatory damages in order to warrant their award and still others hold that they must be proportioned to compensatory damages in some appropriate ratio. In many states there has been a tightening of control by the appellate courts over discretion of the trier of fact.

Restrictive rules of substantive law have also developed in some states. Thus punitive damages are sometimes disallowed unless the defendant's conduct was "aimed at the public generally," and certain types of defendants, such as a governmental unit, may not be subject to them. Sometimes they are limited to the amount of counsel fees. Sometimes procedural techniques are utilized to prevent abuse of a claim for punitive damages when it becomes apparent that they are not warranted and the claim was made for the purpose of introducing prejudicial evidence that would otherwise not be admissible.

REPORTERS NOTES: This Section has been changed by adding the last clause in Subsection (1) and the first sentence in Subsection (2).

Comment a: Purpose. See generally, Johnson v. Husky Industries, 536 F.2d 645 (6th Cir. 1976); Ellis v. Zuck, 546 F.2d 643 (5th Cir. 1977); Knipper v. Ford Motor Co., 546 F.2d 993 (D.C.Cir. 1976); Northern v. McGraw-Edison Co., 542 F.2d 1336 (8th Cir. 1976), cert. denied, 429 U.S. 1097, 97 S.Ct. 1115, 51 L.Ed.2d 544 (1977), reh'g denied, 430 U.S. 960, 97 S.Ct. 1612, 51 L.Ed.2d 812 (1977); Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979), mod'f, 615 P.2d 621 (1980); Anglo-American General Agents v. Jackson Nat'l Life Ins. Co., 83 F.R.D. 41 (N.D.Cal.1979); Hutchison v. Pyburn, 567 S.W.2d 762 (Tenn.App.1978).

Comment b: Character of defendant's conduct. See Johnson v. Husky Indus. Inc., 536 F.2d 645 (6th Cir. 1976); Birmingham Waterworks Co. v. Brooks, 16 Ala.App. 209, 76 So. 515 (1917), cert. denied, 200 Ala. 697, 76 So. 995 (1917); Eshelman v. Rawalt, 298 Ill. 192, 131 N.E. 675 (1921); Hintz v. Roberts, 98 N.J.L. 768, 121 A. 711 (1923); Cobb v. Atlantic Coast Line R. Co., 175 N.C. 130, 95 S.E. 92 (1918); Gamble v. Keyes, 39 S.D. 592, 166 N.W. 134 (1917); Prince v. State Mut. Life Ins. Co., 77 S.C. 187, 57 S.E. 766 (1907) (fraudulent purpose).

On wilful or wanton conduct, see Dunn v. Koehring Co., 546 F.2d 1193 (5th Cir. 1977), mod'f on other grounds, 551 F.2d 73 (1977); Harris Lumber Co. v. Morris, 80 Ark. 260, 96 S.W.

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1067 (1906); Sistrunk & Co. v. Meisenheimer, 205 Ky. 254, 265 S.W. 467 (1924); Buford v. Hopewell, 140 Ky. 666, 131 S.W. 502 (1912); Illinois Cent. R. Co. v. Owens, 95 So. 833 (Miss.1923); Reel v. Consolidated Inv. Co., 236 S.W. 43 (Mo.1921). A good opinion on this is Sebastian v. Wood, 246 Iowa 94, 66 N.W.2d 841 (1954); see also Allman v. Bird, 186 Kan. 802, 353 P.2d 216 (1960).

Gross negligence, in the sense merely of an extreme departure from ordinary care, is not enough. Moore v. Wilson, 180 Ark. 41, 20 S.W.2d 310 (1929). Cf. Rugg v. Tolman, 39 Utah 295, 117 P. 54 (1911).

Comment c: Extent and nature of harm. Many courts say that there must be compensatory damages to support an award of punitive damages. Aubertin v. Board of City Comm'rs, 588 F.2d 781 (10th Cir. 1978); Weider v. Hoffman, 238 F.Supp. 437 (M.D. Pa.1965); Stoner v. Houston, 265 Ark. 928, 582 S.W.2d 28 (1979); Brewer v. Second Baptist Church, 32 Cal.2d 791, 197 P.2d 713 (1948); Vice v. Automobile Club, 241 Cal.App.2d 759, 50 Cal.Rptr. 837 (1966); Miami Nat. Bank v. Sobel, 198 So.2d 841 (Fla.App. 1967); Syester v. Banta, 257 Iowa 613, 133 N.W.2d 666 (1965); Reeder v. Guaranteed Foods, Inc., 194 Kan. 386, 399 P. 2d 822 (1965); Stacy v. Portland Pub. Co., 68 Me. 279 (1878); Mississippi Power Co. v. Jones, 369 So.2d 1381 (Miss.1979); Scheid v. Pickham, 395 S.W.2d 166 (Mo.1965); Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 70 S.W.2d 397 (1934); cf. Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3rd Cir. 1979).

Some courts, insisting that there is a cause of action when there is actual injury but only nominal damages have been awarded, allow recovery of the punitive damages. Kelite Products, Inc. v. Binzel, 224 F.2d 131 (5th Cir. 1955); Wilson v. Vaughn, 23 F. 229 (10th Cir. 1885); Alabama G. S. R. Co. v. Sellers, 93 Ala. 9, 9 So. 375 (1890); Muller v. Reagh, 150 Cal.App.2d 99, 309 P.2d 826 (1957); Sterling Drug Co. v. Benatar, 99 Cal.App.2d 393, 221 P.2d 965 (1950); Werschkull v. United California Bank, 85 Cal. App.3d 981, 149 Cal.Rptr. 829 (1978); Copeland v. Dunehoo, 36 Ga.App. 817, 138 S.E. 267 (1927); Crystal Dome Oil & Gas Co. v. Savic, 51 Idaho 409, 6 P.2d 155 (1931); Pringle Tax Service, Inc. v. Knoblauch, 282 N.W.2d 151 (Iowa 1979); State ex rel. St. Joseph Belt R. Co. v. Shain, 341 Mo. 733, 108 S.W.2d 351 (1937); Crawford v. Taylor, 58 N.M. 340, 270 P.2d 978 (1954); Underwriter's Laboratories, Inc. v. Smith, 41 Misc.2d 756, 246 N. Y.S.2d 436 (1964); Snyder v. Fatherly, 158 Va. 335, 163 S.E. 358 (1931).

Comment d: Function of jury. See Kelite Products, Inc. v. Binzel, 224 F.2d 131 (5 Cir. 1965); Collins v. Brown, 268 F.Supp. 198 (D.D.C.1967); Alabama Power Co. v. Rembert, 282 Ala. 5, 208 So.2d 205 (1968); Lindgren Plumbing Co. v. Doral Country Club, Inc., 196 So.2d 242 (Fla. App.1967); National Ass'n for A. C. P. v. Overstreet, 221 Ga. 16, 142 S.E.2d 816 (1965); Sebastian v. Wood, 246 Iowa 94, 66 N. W.2d 841 (1954); State ex rel. St. Joseph Belt R. Co. v. Shain, 341 Mo. 733, 108 S.W.2d 351 (1937).

On review of jury award, see Butcher v. Petranek, Mont. , 593 P.2d 743 (1979); Kraus v. Alamo Nat'l Bank of San Antonio, 586 S.W.2d 202 (Tex.Civ. App.1979); Malco v. Midwest Aluminum Sales, 14 Wis.2d 57, 109 N.W.2d 516 (1961).

On elements to be taken into consideration by the trier of fact in determining the measure of punitive damages, see Michael v. Cole, 122 Ariz. 450, 595 P.2d 995 (1979); Walker v. Signal Companies, Inc., 84 Cal.App.3d 982, 149 Cal.Rptr. 119 (1978); Arnold v. Sharpe, 37 N.C.App. 506, 246 S. E.2d 556 (1978) rev'd, 296 N.C. 533, 251 S.E.2d 452 (1979); Cooper v. Moscillo, 39 Or.App. 443, 592 P.2d 1034 (effect of previous criminal punishment); Kraus v. Alamo Nat'l Bank of San Antonio, 586 S.W.2d 202 (Tex.Civ.App.1979).

Comment e: Amount of damage. See Will v. Hughes, 172 Kan. 45, 238 P.2d 478 (1951); Edquest v. Tripp & Dragstedt Co., 93 Mont. 446, 19 P.2d 637 (1933); Beggs v. Universal C.I. T. Credit Corp., 409 S.W.2d 719 (Mo.1966); Gerharter v. Mitchellill, 157 S.W.2d 577

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(Mo.App. 1941); Hughes v. Babcock, 349 Pa. 475, 37 A.2d 551 (1944); Cain v. Fontana, 423 S.W.2d 134 (Tex.Civ.App.1967); Ostertag v. La Mont, 9 Utah 2d 130, 339 P.2d 1022 (1959); Wilson v. Oldroyd, 1 Utah 2d 362, 267 P.2d 759 (1954).

On punitive damages and multiple claims, see Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838-40 (2 Cir.1967); Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979), mod'f, 615 P.2d 621 (1980); People v. Superior Court, 9 Cal.3d 283, 107 Cal.Rptr. 192, 507 P.2d 1400 (1973).

Comment f: Criticisms and restrictions. Punitive damages are not allowed in some states in the absence of statutory provision. See, e. g., Killebrew v. Abbott Labs., 359 So.2d 1275 (La.App. 1978); Boott Mills v. Boston & M.R.R. Co., 218 Mass. 582, 106 N. E. 680 (1914).

On appellate control of the amount, see Jones v. Fisher, 42 Wis.2d 209, 166 N.W.2d 175 (1969).

Punitive damages not allowed unless defendant's conduct aimed at the public generally. James v. Powell, 19 N.Y.2d 249, 279 N.Y. S.2d 10, 225 N.E.2d 714 (1967).

State not liable for punitive damages. McCandless v. State, 6 Misc.2d 391, 166 N.Y.S.2d 272 (1956), modified on other grounds, 3 A.D.2d 600, 162 N.Y. S.2d 570, aff'd, 4 N.Y.2d 797, 173 N.Y.S.2d 30, 149 N.E.2d 530 (1958). On liability of municipal corporation, see Eifert v. Bush, 27 A.D.2d 950, 279 N.Y.S.2d 368 (1967), aff'd, 22 N.Y.2d 681, 291 N.Y.S.2d 372, 238 N.E.2d 759 (1968).

Law reviews: See K. Redden, Punitive Damages (1980); Hodgin & Veitch, Punitive Damages Reassessed, 21 Int. & Comp.L.Q. 119 (1972); Mallor & Roberts, Punitive Damages: Toward a Principled Approach, 31 Hastings L.J. 639 (1980); Morris, Punitive Damages in Tort Cases, 44 Harv.L.Rev. 1173 (1931); Owen, Punitive Damages in Products Liability Litigation, 74 Mich.L. Rev. 1257 (1976); Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U.Chi.L. Rev. 1 (1982); Notes, 70 Harv. L.Rev. 517 (1957), 55 N.Y.U.L. Rev. 303 (1980).

CROSS REFERENCES: ALR Annotations:

Assault: Criminal liability as barring or mitigating recovery of punitive damages. 98 A.L.R.3d 870.
Defendant's state of mind necessary or sufficient to warrant award of punitive damages in action for malicious prosecution. 94 A.L.R.3d 791.
Defendant's state of mind necessary to warrant award of punitive damages in action for false arrest or imprisonment. 93 A.L.R.3d 1109.
Recovery of damages as remedy for wrongful discrimination under state or local civil rights provisions. 85 A.L.R.3d 351.
Admissibility on defendant's behalf, as matter in mitigation of punitive damages, or evidence as to his lack of financial resources. 79 A.L.R.3d 1138.
What constitutes malice sufficient to justify an award of punitive damages in action for wrongful attachment or garnishment. 61 A.L.R.3d 984.
Recovery of damages for emotional distress resulting from discrimination because of sex or marital status. 61 A.L.R.3d 944.
Requirement of full faith and credit to foreign judgment for punitive damages. 44 A.L.R.3d 960.
Punitive damages in actions based on nuisance. 31 A.L.R.3d 1346.
Spouse's or parent's right to recover punitive damages in connection with recovery of damages for medical expenses or loss of services or consortium arising from personal injury to other spouse or to child. 25 A.L.R.3d 1416.
Apportionment of punitive or exemplary damages as between joint tortfeasors. 20 A.L.R.3d

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666.
Financial worth of one or more of several joint defendants as proper matter for consideration in fixing punitive damages. 9 A.L.R.3d 692.
Action or claim for punitive damages as surviving death of person wronged. 63 A.L.R.2d 1327.
Punitive or exemplary damages for conversion of personalty by one other than chattel mortgagee or conditional seller. 54 A.L.R.2d 1361.
Punitive or exemplary damages in action by spouse for alienation of affections or criminal conversation. 31 A.L.R.2d 713.
Recovery of exemplary or punitive damages from municipal corporation. 19 A.L.R.2d 903.
Actual damages as a necessary predicate of punitive or exemplary damages. 17 A.L.R.2d 527.
Punitive damages for wrongful ejection or rejection of guest from hotel or restaurant. 14 A.L.R.2d 715.
Punitive damages in actions for violations of Title VII of Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.). 43 A.L.R.Fed. 208.

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C.J.S. Damages §§ 117-124.
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Subject Files

[Review of the President's Foreign Intelligence Advisory Board Records]

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NATIONAL RECONNAISSANCE OFFICE

18 December 2002

MEMORANDUM FOR EXECUTIVE DIRECTOR PRESIDENT'S FOREIGN INTELLIGENCE ADVISORY BOARD

SUBJECT: Review of the President's Foreign Intelligence Advisory Board Records in Accordance with Files Series Exemption (U)

REFERENCE: Memorandum of Understanding, Dated July 2000, Between the President's Foreign Intelligence Advisory Board and the National Reconnaissance Office re Archived Records Declassification Review (U)

(U) This is to inform you that the declassification review of the President's Foreign Intelligence Advisory Board (PFIAB) Historical Files, as specified in the Statement of Work (SOW) attached to referenced Memorandum of Understanding (MOU), has been completed. This review was conducted in strict accordance with the directions set forth in your memoranda of 30 and 31 October 2001, same subject.

(U) The following is a summary of our activity:

a. (U) The actual review took place at the National Archives/Office of Presidential Libraries classified holdings area in the National Archives Building in Washington, D.C. Two National Reconnaissance Office contractor personnel conducted the review under the supervision of the Chief, Information Declassification Review Center. The project began on 16 April 2002 and ended on 8 August 2002.

b. (U) All PFIAB specified files in the 31 identified boxes were reviewed in accordance with the provisions of Executive Order (E.O.)12958. The reviewed files were categorized as follows: PFIAB Classified documents; PFIAB unclassified documents; Other Government Agency (OGA)-originated classified documents; and OGA-originated unclassified documents.

This memorandum is unclassified when separated from attachment.

CL BY: 538471
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SUBJECT: Review of the President's Foreign Intelligence Advisory Board Records in Accordance with Files Series Exemption (U)

c. (U) A total of 2,521 documents, 23,274 pages, are contained in the specified files. We identified 898 PFIAB classified documents; 580 PFIAB unclassified documents; 572 OGA classified documents; and 471 OGA unclassified documents.

d. (U) A loose-leaf binder listing all files reviewed, sorted as above, is attached with this memorandum.

(U) Since PFIAB classified documents are exempt from the provisions of E.O. 12958, no further action is required for those documents. PFIAB and OGA unclassified documents are not subject to provisions of E.O. 12958, therefore, no further action is required on that category of documents. However, OGA classified documents are subject to E.O. 12958 provisions. Further action regarding the referral process is pending the decision of PFIAB. Finally, an optional task identified in our SOW, preserving reviewed files, is also pending your decision whether to proceed.

(U) Three pieces of electronic equipment were purchased with PFIAB funds to aid in the performance of this task: a DELL laptop computer, a printer, and a ZIP drive. This equipment is being held in the Presidential Libraries classified holding area of the National Archives Building along with a ZIP disk which contains files formatted identically to those found in the attached notebook. This equipment is the property of PFIAB and can be picked up through arrangements with personnel from the Presidential Materials Staff of the National Archives and Records Administration.

Kenneth C. Piontek

Kenneth C. Piontek, Chief,
Information Declassification Review Center

Attachment:
Loose-leaf Binder Listing All Files Reviewed [redacted]

[redacted]

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

Rewards - Authorities

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To: Brett M. Kavanaugh/WHO/EOP@EOP

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Subject: more relevant reward provision

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18 USC sect. 3071 authorizes the AG to reward any individual who furnishes information leading to arrest or conviction in any country of any individual for an act of terrorism against the U.S.

section 3072 provides that a reward under the section may not exceed $500,000 and a reward of $100,000 or more may not be made without approval of the AG or President personally. "A dtermination made by the AG or the President shall be final and conclusive and no court shall have power or jurisdiction to review it."

Section 3077 defines "act of terrrorism."

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART II--CRIMINAL PROCEDURE
CHAPTER 204--REWARDS FOR INFORMATION CONCERNING TERRORIST ACTS AND ESPIONAGE

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Current through P.L. 107-11, approved 5-28-01

§ 3071. Information for which rewards authorized

(a) With respect to acts of terrorism primarily within the territorial jurisdiction of the United States, the Attorney General may reward any individual who furnishes information--

(1) leading to the arrest or conviction, in any country, of any individual or individuals for the commission of an act of terrorism against a United States person or United States property; or

(2) leading to the arrest or conviction, in any country, of any individual or individuals for conspiring or attempting to commit an act of terrorism against a United States person or property; or

(3) leading to the prevention, frustration, or favorable resolution of an act of terrorism against a United States person or property.

(b) With respect to acts of espionage involving or directed at the United States, the Attorney General may reward any individual who furnishes information--

(1) leading to the arrest or conviction, in any country, of any individual or individuals for commission of an act of espionage against the United States;

(2) leading to the arrest or conviction, in any country, of any individual or individuals for conspiring or attempting to commit an act of espionage against the United States; or

(3) leading to the prevention or frustration of an act of espionage against the United States.

CREDIT(S)

2000 Main Volume

(Added Pub.L. 98-533, Title I, § 101(a), Oct. 19, 1984, 98 Stat. 2706, and amended Pub.L. 103-359, Title VIII, § 803(a), Oct. 14, 1994, 108 Stat. 3438.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1994 Acts. House Report No. 103-541 and House Conference Report No. 103-753, see 1994 U.S. Code Cong. and Adm. News, p. 2703.

Amendments

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1994 Amendments. Subsec. (a). Pub.L. 103-359, § 803(a)(1), designated existing provisions as subsec. (a).

Subsec. (b). Pub.L. 103-359, § 803(a)(2), added subsec. (b).

Short Title

Section 1 of Pub.L. 98-533 provided that: "This Act [enacting this chapter and section 2708 of Title 22, Foreign Relations and Intercourse, amending sections 2669, 2678 and 2704 of Title 22, Foreign Relations and Intercourse, enacting provisions set out as a note under section 5928 of Title 5, Government Organizations and Employees and amending provisions set out as a note preceding section 2651 of Title 22, Foreign Relations and Intercourse] may be cited as the '1984 Act to Combat International Terrorism'."

LIBRARY REFERENCES

American Digest System

Rewards ⚷4.

Key Number System Topic No. 340.

Encyclopedias

Rewards and Bounties, see C.J.S. §§ 9, 10.

18 U.S.C.A. § 3071

18 USCA § 3071

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UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART II--CRIMINAL PROCEDURE
CHAPTER 204--REWARDS FOR INFORMATION CONCERNING TERRORIST ACTS AND ESPIONAGE

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Current through P.L. 107-11, approved 5-28-01

§ 3072. Determination of entitlement; maximum amount; Presidential approval; conclusiveness

The Attorney General shall determine whether an individual furnishing information described in section 3071 is entitled to a reward and the amount to be paid. A reward under this section may be in an amount not to exceed $500,000. A reward of $100,000 or more may not be made without the approval of the President or the Attorney General personally. A determination made by the Attorney General or the President under this chapter shall be final and conclusive, and no court shall have power or jurisdiction to review it.

CREDIT(S)

2000 Main Volume

(Added Pub.L. 98-533, Title I, § 101(a), Oct. 19, 1984, 98 Stat. 2707.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Spending Limitations Lifted

Any funds made available to the Attorney General before or after July 27, 1995, as not subject to the spending limitations contained in this section and section 3059 of this title, but with a proviso that any reward of $100,000 or more, up to a maximum of $2,000,000, not to be made without the personal approval of the President or the Attorney General, with such approval not to be delegated, see section 3001 of Pub.L. 104-19, set out as a note under section 3059 of this title.

LIBRARY REFERENCES

American Digest System

Rewards ⚿4.

Key Number System Topic No. 340.

Encyclopedias

Rewards and Bounties, see C.J.S. §§ 9, 10.

18 U.S.C.A. § 3072

18 USCA § 3072

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UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART II--CRIMINAL PROCEDURE
CHAPTER 204--REWARDS FOR INFORMATION CONCERNING TERRORIST ACTS AND ESPIONAGE

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Current through P.L. 107-11, approved 5-28-01

§ 3073. Protection of identity

Any reward granted under this chapter shall be certified for payment by the Attorney General. If it is determined that the identity of the recipient of a reward or of the members of the recipient's immediate family must be protected, the Attorney General may take such measures in connection with the payment of the reward as deemed necessary to effect such protection.

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2000 Main Volume

(Added Pub.L. 98-533, Title I, § 101(a), Oct. 19, 1984, 98 Stat. 2707.)

<General Materials (GM) - References, Annotations, or Tables>

LIBRARY REFERENCES

American Digest System

Rewards ⚿13.

Key Number System Topic No. 340.

Encyclopedias

Rewards and Bounties, see C.J.S. §§ 35-37.

18 U.S.C.A. § 3073

18 USCA § 3073

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Current through P.L. 107-11, approved 5-28-01

§ 3075. Authorization for appropriations

There are authorized to be appropriated, without fiscal year limitation, $5,000,000 for the purpose of this chapter.

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2000 Main Volume

(Added Pub.L. 98-533, Title I, § 101(a), Oct. 19, 1984, 98 Stat. 2707.)

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18 U.S.C.A. § 3075

18 USCA § 3075

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Current through P.L. 107-11, approved 5-28-01

§ 3076. Eligibility for witness security program

Any individual (and the immediate family of such individual) who furnishes information which would justify a reward by the Attorney General under this chapter or by the Secretary of State under section 36 of the State Department Basic Authorities Act of 1956 may, in the discretion of the Attorney General, participate in the Attorney General's witness security program authorized under chapter 224 of this title.

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2000 Main Volume

(Added Pub.L. 98-533, Title I, § 101(a), Oct. 19, 1984, 98 Stat. 2707, and amended Pub.L. 99-646, § 45, Nov. 10, 1986, 100 Stat. 3601.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1986 Acts. House Report No. 99-797, see 1986 U.S. Code Cong. and Adm. News, p. 6138.

References in Text

Section 36 of the State Department Basic Authorities Act of 1956, referred to in text, is classified to section 2708 of Title 22, Foreign Relations and Intercourse.

Amendments

1986 Amendments. Pub.L. 99-646 substituted "chapter 224 of this title" for "title V of the Organized Crime Control Act of 1970".

LIBRARY REFERENCES

American Digest System

Criminal Law ⚷1222.1.

Key Number System Topic No. 110.

Encyclopedias

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Criminal Law, see C.J.S. §§ 1724, 1729-1731.

18 U.S.C.A. § 3076

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UNITED STATES CODE ANNOTATED
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§ 3077. Definitions

As used in this chapter, the term--

(1) "act of terrorism" means an activity that--

(A) involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; and

(B) appears to be intended--

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by assassination or kidnapping;

(2) "United States person" means--

(A) a national of the United States as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(B) an alien lawfully admitted for permanent residence in the United States as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20));

(C) any person within the United States;

(D) any employee or contractor of the United States Government, regardless of nationality, who is the victim or intended victim of an act of terrorism by virtue of that employment;

(E) a sole proprietorship, partnership, company, or association composed principally of nationals or permanent resident aliens of the United States; and

(F) a corporation organized under the laws of the United States, any State, the District of Columbia, or any territory or possession of the United States, and a foreign subsidiary of such corporation;

(3) "United States property" means any real or personal property which is within the United States or, if outside the United States, the actual or beneficial ownership of which rests in a United States person or any Federal or State governmental entity of the United States;

(4) "United States", when used in a geographical sense, includes Puerto Rico and all territories and possessions

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of the United States;

(5) "State" includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any other possession or territory of the United States;

(6) "government entity" includes the Government of the United States, any State or political subdivision thereof, any foreign country, and any state, provincial, municipal, or other political subdivision of a foreign country;

(7) "Attorney General" means the Attorney General of the United States or that official designated by the Attorney General to perform the Attorney General's responsibilities under this chapter; and

(8) "act of espionage" means an activity that is a violation of--

(A) section 793, 794, or 798 of this title; or

(B) section 4 of the Subversive Activities Control Act of 1950.

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2000 Main Volume

(Added Pub.L. 98-533, Title I, § 101(a), Oct. 19, 1984, 98 Stat. 2707, and amended Pub.L. 100-690, Title VII, § 7051, Nov. 18, 1988, 102 Stat. 4401; Pub.L. 101-647, Title XXXV, § 3572, Nov. 29, 1990, 104 Stat. 4929; Pub.L. 103- 322, Title XXXIII, § 330021(1), Sept. 13, 1994, 108 Stat. 2150; Pub.L. 103- 359, Title VIII, § 803(b), Oct. 14, 1994, 108 Stat. 3439; Pub.L. 104-294, Title VI, § 605(g), Oct. 11, 1996, 110 Stat. 3510.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1988 Acts. For Related Reports, see 1988 U.S. Code Cong. and Adm. News, p. 5937.

1990 Acts. House Report Nos. 101-681(Parts I and II) and 101-736, Senate Report No. 101-460, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 6472.

1994 Acts. House Report Nos. 103-324 and 103-489, and House Conference Report No. 103-711, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

House Report No. 103-541 and House Conference Report No. 103-753, see 1994 U.S. Code Cong. and Adm. News, p. 2703.

1996 Acts. House Report No. 104-788, see 1996 U.S. Code Cong. and Adm. News, p. 4021.

References in Text

The Immigration and Nationality Act, referred to in pars. (2)(A) and (B) is Act June 27, 1952, c. 477, 66 Stat. 163, as amended, which is classified principally to chapter 12 (section 1101 et seq.) of Title 8, Aliens and Nationality. Section 101(a)(20) and (22) of the Immigration and Nationality Act is classified to section 1101(a)(20) and (22), respectively of Title 8. For complete classification of this Act to the Code, see Short Title note set out under section 1101 of Title 8 and Tables.

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The Subversive Activities Control Act of 1950, referred to in par. (8)(B), is Act Sept. 23, 1950, c. 1024, Title I, 64 Stat. 987, as amended, which is classified principally to subchapter I (section 781 et seq.) of chapter 23 of Title 50, War and National Defense. Section 4 of such Act is classified to section 783 of Title 50. For complete classification of this Act to the Code, see Short Title note set out under section 781 of Title 50 and Tables.

Amendments

1996 Amendments. Par. (8)(A). Pub.L. 104-294, § 605(g), substituted "this title" for "title 18, United States Code".

1994 Amendments. Par. (1)(B)(iii). Pub.L. 103-322, § 330021(1), substituted "kidnapping" for "kidnaping".

Par. (8). Pub.L. 103-359, § 803(b), added par. (8).

1990 Amendments. Pub.L. 101-647, § 3572(1)-(3), substituted in par. (4) " 'United States'," for " 'United States,' "; substituted in pars. (1)-(3) and (5) at the end a semicolon for the period; and substituted in par. (6) "; and" for the period.

1988 Amendments. Par. (4). Pub.L. 100-690, § 7051, substituted "United " 'United States,' when" for " 'United States'--(A) when", and struck out subpar. (B) which provided that United States be defined in context of section 3073 with meaning given in Immigration and Nationality Act (8 U.S.C. 1101 et seq.).

LIBRARY REFERENCES

Law Review and Journal Commentaries

Money laundering and lawyers. Eugene R. Gaetke and Sarah N. Welling, 43 Syracuse L.Rev. 1165 (1992).

18 U.S.C.A. § 3077

18 USCA § 3077

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VICKI LEWIS, ET VIR., ETC., Petitioners, v. BRUNSWICK CORPORATION, Respondent.

No. 97-288

1997 U.S. Briefs 288

October Term, 1997

January 28, 1998

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

BRIEF OF AMICUS CURIAE GENERAL MOTORS CORPORATION IN SUPPORT OF RESPONDENT

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Attorneys for Amicus Curiae General Motors Corporation

QUESTION PRESENTED

Whether the Federal Boat Safety Act of 1971 preempts a state common law requirement that recreational boats be equipped with propeller guards, where the United States Coast Guard, after extensive administrative proceedings, determined that such a requirement would be contrary to the interests of boat safety?

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INTEREST OF AMICUS CURIAE

General Motors Corporation ("General Motors") is the world's largest manufacturer of automobiles. n1

n1 Petitioners and respondent have consented to the filing of this brief, in letters on file in the Clerk's office. The undersigned counsel for General Motors Corporation alone have authored this brief, and no other person or entity has made a monetary contribution to its preparation or submission.

The National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718

that state juries, just like state administrative and legislative officials, set "standard[s]" and "requirement[s]" that may therefore be preempted by federal regulatory action. Cf. New York Times v. Sullivan, 376 U.S. 254, 265 (1964) (the "test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised").

Indeed, petitioners' argument on this point is so plainly wrong that, if accepted here, its logic would partially overrule Erie R.R. v. Tompkins, 304 U.S. 64 (1938). The very same argument that petitioners and their amici put forward with respect to the text of section 4306 would apply equally well to the term "laws" in the Rules of Decision Act, 28 U.S.C. § 1652. The Rules of Decision Act requires a federal court to apply "the laws of the several states" as the rules of decisions in civil actions not arising under federal law. Applying the logic of petitioners' argument, because the Supremacy Clause refers also to "the Laws of the United States," U.S. Const. art. VI, cl. 2 (emphasis added), and because there is no general common law of the United States, then the phrase "the laws of the several states" should be limited to the positive law of the several states, thereby excluding state common law as the governing rules of decision in federal courts. Adoption of petitioners' argument thus would have the pernicious consequence of upsetting the entire interpretive basis for the longstanding and important Erie doctrine.

It is therefore not surprising that, in Cipollone, the Court rejected the parallel argument that the phrase "State law" included only state statutes and regulations, but not state common law. See 505 U.S. at 522-23; see also id. at 549 (Scalia, J., concurring and dissenting in part) (agreeing that the phrase "State law" used in the 1969 Act "embraces state common law"). The Court recognized that this argument was flatly irreconcilable with its longstanding construction of the same basic language in the Rules of Decision Act. See Erie, 304 U.S. at 77-78. Indeed, the Court indicated no desire to revisit the controversial battles fought over many decades that led up to the Court's historic decision in Erie to overrule the contrary interpretation of the Rules of Decision Act that had been adopted in Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). Instead, the Court simply noted that "we have recognized the phrase 'state law' to include common law as well as statutes and regulations." Cipollone, 505 U.S. at 522. For all the same reasons, the efforts made by petitioners and the Solicitor General to limit the terms "requirement[s]" and "standard[s]" to state positive law must fail.

III. SECTION 4311(g) SIMPLY CONCERNS THE EFFECT OF COMPLIANCE WITH FEDERAL LAW, AND DOES NOT LIMIT THE SCOPE OF THE PREEMPTION CLAUSE.

The Boat Safety Act contains what some have called a "savings" clause, which states that "compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). Petitioners and the Solicitor General contend that this provision establishes that the common law is beyond the reach of the preemption clause. See Petrs. Br. 28-31; U.S. Br. 21-24. But that does not square with the relation between the preemption clause and this provision, with the text of this provision, or with the clear purpose of this provision, as explained by Congress.

Section 4311(g) does not serve the purpose of "saving" state law or state common law from preemption at all. Indeed, the preemption clause contains its own savings provisions, which are explicitly designed to specify when state law is preserved in the face of the broader general language of the preemption clause. Those provisions operate to save state law from preemption in three distinct circumstances.

First, the States may apply their own law where it is "identical to a regulation prescribed" under federal law. 46 U.S.C. § 4306. This provision is similar to one at issue in Medtronic, where the Court unanimously held that the preemption clause permitted state laws and state requirements to be enforced where they are identical to federal law. See 116 S. Ct. at 2255; id. at 2264 (O'Connor, J., concurring and dissenting in part).

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Second, the States may apply to the Secretary for permission to apply their own law even where it differs from federal law. See 46 U.S.C. § 4306. This provision establishes an avenue for each State to seek approval, on a state-by-state basis, for exemption from the statutory prohibition on enforcing inconsistent state laws if a particular matter is thought to warrant an exemption.

Third, the States are explicitly permitted to apply their own law to "regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State," unless the Secretary specifically disapproves of their doing so. 46 U.S.C. § 4306. This one narrow area of explicit state authority is clearly circumscribed, thus reinforcing the otherwise restrictive impact of the broad preemption clause.

Moreover, section 4311(g) says nothing about the kinds of state laws that are preempted or saved from preemption. Rather, it simply disclaims any possibility that a manufacturer will be able to assert a federal immunity from liability at state law based on its mere compliance with the requirements imposed by federal law. This provision thus works in tandem with the preemption clause by ensuring that the boundaries of federal preemption are not improperly expanded by a broad "government standards" defense, which might be asserted to impede the enforcement of otherwise valid state law. Thus, it would be much more appropriate to refer to this provision as an "anti-affirmative-defense" clause, which operates to preserve state authority on how to treat the issue of a manufacturer's compliance with pertinent federal standards and requirements. For example, where state common law addresses "uniquely hazardous" local conditions, as expressly permitted by the statute, this clause would ensure that federal law is understood to place no limits on how state courts treat the issue of compliance with any federal requirements.

Section 4311(g) thus should not be misread as an "anti-preemption" clause. To the contrary, Congress declared in this provision that where a state-law cause of action is not preempted by federal law, it is impermissible for a party or a court to accomplish the same end by citing the party's compliance with all pertinent federal requirements as the basis for an affirmative defense or immunity asserted to defeat the same state-law cause of action. In this manner, Congress specified that unless state common law is actually preempted, it cannot be circumscribed by legal inferences that might otherwise be drawn about a party's conduct in exercising due care by complying with the federal regulatory scheme. See, e.g., Restatement (Third) of Torts: Products Liability § 4, cmt. e (proposed final draft Apr. 1, 1997) (explaining the "important distinction" between "the matter of federal preemption of state products liability law" and "the question of whether and to what extent, as a matter of state tort law, compliance with product safety statutes or administrative regulations affects liability for product defectiveness").

The Senate Report accompanying the Act confirms this interpretation. Congress intended, with respect to section 4311(g), that "mere compliance ... with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary use." S. Rep. No. 92-248, at 32 (1971), reprinted in 1971 U.S.C.C.A.N. 1352. The references to "not ... a complete defense" and "evidentiary value" further establish that this provision simply ensures that the States will have the flexibility to determine whether a party's compliance with pertinent federal requirements can serve as the basis for an affirmative defense or immunity asserted to defeat an otherwise permissible state-law cause of action. In practice, the States differ in their views of such an affirmative defense, and on the admissibility of evidence of compliance with federal standards on the issues of defectiveness and due care. n9

n9 Each State thus remains free to determine for itself whether compliance with pertinent federal requirements (the "government standards" defense) is a relevant factor or an affirmative defense under state law in adjudicating an otherwise permissible state-law cause of action. There are diverse views on this issue under state law. Some States recognize a

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rebuttable presumption that a product which complies with federal standards is not defective. E.g., Mich. Comp. L. Ann. § 600.2946(4) (West 1997); Kan. Stat. Ann. § 60-3304(a) (1996). Others hold compliance with federal standards is relevant to whether there is a defect, but not conclusive or presumptive evidence. E.g., Wagner v. Clark Equip. Co., 700 A.2d 38, 49-50 (Conn. 1997); Brooks v. Beech Aircraft Corp., 902 P.2d 54, 63 (N.M. 1995). A few States may hold that compliance conclusively negates any defect, see, e.g., Beatty v. Trailmaster Prods., 625 A.2d 1005, 1013-14 (Md. 1993), while others may treat compliance as irrelevant and inadmissible, see, e.g., Sheehan v. Cincinnati Shaper Co., 555 A.2d 1352, 1355 (Pa. Super. 1989).

The contrary reading of this provision proposed by petitioners would, in addition, flout Congress' intention that "the need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level" and that "manufacture for the domestic trade will not involve compliance with widely varying local requirements." S. Rep. No. 92-248, at 14, 20 (emphases added).

The erroneous construction of section 4311(g) urged upon the Court by petitioners and the Solicitor General is further underscored by their failure to come to grips with the actual language of the clause, which states that "compliance with ... this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g) (emphasis added). Although they make much of the fact that Congress used the term "common law" in this provision, they completely ignore the fact that Congress also referred to all of "state law" in the same passage. If petitioners' reading of this provision were to be adopted, then it would become a complete "anti-preemption" clause, and all state law -- whether statutory, administrative, or judge-made -- would remain in effect as a basis for imposing liability, thus completely nullifying the plain import of the preemption clause. Thus, petitioners' strained attempt to find deeper meaning in the omission of the term "common law" from the preemption clause and its inclusion in the so-called "savings" clause, see Petrs. Br. 30, rests on a clear distortion of the statutory text.

In addition, as Justice Breyer explained in Medtronic, the position urged by petitioners and their amici "would have anomalous consequences." 116 S. Ct. at 2259 (Breyer, J., concurring). It would permit "the liability-creating premises of the plaintiffs' state law tort suit" to operate in direct conflict with federal law, whereas state agency regulations could not. Id. at 2261. Yet the practical "effects of the state agency regulation and the state tort suit are identical." Id. at 2259; see also supra Section II.

Finally, the Court's prior cases have consistently held that the general language of a so-called "savings" clause cannot negate the terms of an explicit preemption clause. The Court has frequently been faced with potentially competing preemption and general savings clauses, and has given the latter provisions limited effect in the context of the statutory scheme as a whole. For example, in Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992), the Court held that a "general 'remedies' saving clause cannot be allowed to supersede the specific substantive preemption provision." Id. at 385. Indeed, the Solicitor General had urged this reading upon the Court:

> [The savings clause] is properly construed only to preserve those remedies not inconsistent with other provisions of the statute, including [the] express preemption provision. That is the interpretation that this Court has long placed on a comparable savings clause in the Interstate Commerce Act. Pennsylvania R.R. v. Puritan Coal Mining Co., 237 U.S. 121, 129-30 (1915).

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Brief for the United States as Amicus Curiae Supporting Respondents, Morales (No. 90-1604), at 16.

More generally, the Court has routinely given so-called "savings" clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole. See, e.g., American Airlines v. Wolens, 513 U.S. 219, 222 (1995) (state fraud suit expressly preempted notwithstanding savings clause providing that statute does not "abridge or alter the remedies now existing at common law or by statute"); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51-52 (1987) (savings clause given narrow reading after the Court looked "to the provisions of the whole law, and to its object and policy"). Indeed, just two days ago, the Court held again "'it is a commonplace of statutory construction that the specific'" language concerning such matters as preemption "'governs the general' terms of the saving clause." South Dakota v. Yankton Sioux Tribe, No. 96-1581, slip op. at 17 (U.S. Jan. 26, 1998) (quoting Morales, 504 U.S. at 384)). n10

n10 The Solicitor General's suggestion that the federal safety standards should be understood as mere "minimum" standards, see U.S. Br. 20-21, proves too much, for it would exempt all state law from the reach of the preemption clause. Indeed, the only limit that the Solicitor General appears to place on this approach is supposedly premised on the language of section 4311(g), though once again he fails to recognize that the phrase "at common law" is followed by the phrase "or under State law." See id. at 21; see also Ray v. Atlantic Richfield Co., 435 U.S. 151, 168 n.19 (1978) (rejecting argument that because statute referred to "minimum standards," it "requires recognition of state authority to impose higher standards").

Therefore, section 4311(g) of the Boat Safety Act cannot properly be read to nullify or abridge the explicit terms of the preemption clause.

IV. PETITIONERS' CLAIMS ALSO ARE SUBJECT TO IMPLIED-CONFLICT PREEMPTION ANALYSIS AND ARE IMPLIEDLY PREEMPTED.

Even if not expressly preempted, petitioners' claims would fail under an implied-conflict preemption analysis.

Petitioners briefly assert that the Court should not conduct any implied preemption analysis in this case because the Boat Safety Act contains a preemption clause. See Petrs. Br. 31-32. Notably, the Solicitor General appears to disagree with this assertion, for his brief devotes considerable space to the customary inquiry into implied-conflict preemption in an effort to explain its view that petitioners' claims are not impliedly preempted in this case. See U.S. Br. 25-30.

In fact, this Court's precedents have already established that the judicial inquiry into implied-conflict preemption, which is dictated by the Supremacy Clause, is proper when courts are applying the federal regulatory safety laws. At one time, a passage from the plurality opinion in Cipollone, see 505 U.S. at 517, had been misinterpreted so as to create confusion on this point. The Court seemed to settle the issue in CSX, when it conducted an implied-conflict preemption analysis even though the federal railway safety statutes included a preemption clause. See 507 U.S. at 673 n.12.

Nevertheless, some lower courts continued to dispute the issue. When the Court granted review in Myrick, therefore, the parties addressed it and the Court squarely resolved it:

> According to respondents and the Court of Appeals, Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992), held that implied pre-emption cannot exist when Congress has chosen to include an express preemption clause in a statute. This argument is without merit.

514 U.S. at 287 (emphasis added). The Court specifically noted that it had in fact "engaged in a conflict pre-emption analysis" in Cipollone itself, id. at 289, and had done so again in CSX, notwithstanding the existence of a preemption clause in the statutes at issue in both of those cases, see id. After thus conclusively deciding the issue, the Court went on to conduct an implied-conflict preemption inquiry under the motor vehicle safety statutes, which include both a preemption clause and a clause addressing the effect of compliance with federal standards and requirements. See id. at 287-88.

Finally, in Medtronic, the posture of the case decided by the Court was such that it concerned only an issue of express preemption, without any briefing on the issue of implied preemption. See, e.g., 116 S. Ct. at 2251 (plurality opinion). Nonetheless, even the four Justices who gave the preemption clause its narrowest reading pointed out that in considering further questions about express preemption under that statute in the future, "the issue may not need to be resolved if the claim would also be pre-empted under conflict pre-emption analysis." Id. at 2259 (citing Myrick, 514 U.S. at 289). The statute at issue in Medtronic, once again, contained both a preemption clause and a clause addressing the effect of federal compliance.

The Court's repeated endorsements of implied-conflict preemption analysis in the context of federal safety statutes that contain a preemption clause, and often a general savings clause, defeats the argument that such analysis is foreclosed in this case. This approach also accords with the natural effect of the Supremacy Clause. Federal law is unequivocally stated to be "the supreme Law of the Land," U.S. Const. art. VI, cl. 2, and thus any state law which conflicts with federal law is "pre-empted by direct operation of the Supremacy Clause." Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union, 468 U.S. 491, 501 (1984). The mere inclusion of a preemption clause in a statute cannot uproot the necessary constitutional inquiry. n11

n11 Petitioners refer to a supposed "presumption against preemption." Petrs. Br. 24. Where state and federal law collide, the Supremacy Clause settles the matter and there is no place for presumptions, no matter how much the matter may traditionally be in the state domain: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." Free v. Bland, 369 U.S. 663, 666 (1962); see also Cipollone, 505 U.S. at 516 ("state law that conflicts with federal law is without effect"); id. at 544 (Scalia, J., concurring and dissenting in part) (same).

Moreover, the mere inclusion of a general savings clause in a federal statute cannot nullify the traditional judicial inquiry into implied-conflict preemption. n12 For almost a century, the Court has made clear that even when an Act has no preemption clause at all, a savings clause cannot be read to permit claims that actually conflict with the Act. The principle was first stated in Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907). There, a federal act contained a broad savings clause that purported to save "the remedies now existing at common law or by statute." Id. at 446. In spite of that savings clause, the Court held that an existing but conflicting common law claim was preempted because a savings clause "cannot in reason be construed as continuing ... a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." Id.; see also International Paper Co. v. Ouellette, 479 U.S. 481, 485-505 (1987) (state common law claims were impliedly preempted because they conflicted with the method chosen by federal law to implement the statutory goals, despite broad savings clause); Chicago & Northwest Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 328-31 (1981) (same). Whatever else may be the effect of section 4311(g), it most assuredly cannot, consistent with the Court's decisions, be interpreted to bar implied-conflict preemption.

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n12 The Solicitor General also appears to accept this proposition, for he states that "under our reading of the savings clause," a common law claim would be preempted by a pertinent federal regulation if it "propounded a standard of conduct directly contrary to the federal rule." U.S. Br. 28.

For purposes of the merits of the inquiry into implied-conflict preemption in this case, amicus curiae General Motors accepts the position taken by the Court of Appeals, see Pet. App. A15-A21, and presented in more detail by respondents here -- that in the circumstances of this case the Coast Guard made a considered decision not to mandate propeller guards on recreational vessels, because it determined that to do so would disserve the core safety objectives of the Boat Safety Act. n13 On this record, the agency's decision "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." Ray v. Atlantic Richfield Co., 435 U.S. 151, 178 (1978). n14

n13 The Solicitor General similarly frames the issue as whether the "Coast Guard's decision not to regulate propeller guards" results in implied preemption, U.S. Br. 25 (emphasis added), though his explanation of the underlying basis for the agency's decision is somewhat different.

n14 The Solicitor General's efforts to distinguish Ray, see U.S. Br. 28-29 & n.19, are unpersuasive. First,it cannot matter whether the federal agency is required to act or permitted to act; what matters is simply whether it is authorized to act. Second, the regulations imposed under the Boat Safety Act are quite comprehensive. See, e.g., 33 C.F.R. Pts. 175, 177, 181, 183.

As a practical matter, moreover, it would be unfair and unworkable to hold manufacturers liable for any penalties, fines, or compensatory or punitive damages imposed under state law for conforming the design of their vessels to the governing federal agency's explicit determination that requiring them to be equipped with propeller guards would undermine the public safety. The conflicting signals of state and federal policy pose an obvious potential to whipsaw citizens who wish only to abide by the law and policies of their respective governments. There can be little doubt that if any manufacturer had ignored these safety concerns and installed propeller guards, these considerations would have featured prominently in any lawsuit arising from a blunt trauma injury or fatality of the sort described by the agency as the basis for its determination not to mandate propeller guards on recreational vessels.

In sum, the Coast Guard's decision not to require propeller guards because to do so would disserve the core safety objectives of the Boat Safety Act necessarily leads to the conclusion that such a standard or requirement imposed by state positive law or common law is impliedly preempted. See, e.g., Ray, 435 U.S. at 178.

CONCLUSION

For the foregoing reasons, as well as those set forth in respondent's brief, the decision below should be affirmed.

Respectfully submitted,

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(1966), 49 U.S.C. §§ 30101-30169 (1994) (the "Motor Vehicle Safety Act") is similar in certain respects to the Federal Boat Safety Act of 1971 ("the Boat Safety Act"), under review here. The Motor Vehicle Safety Act contains a preemption clause, which states that when a federal standard is in effect, no State may "establish, or continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 49 U.S.C. § 30103(b)(1). Moreover, like the Boat Safety Act, the Motor Vehicle Safety Act states: "Compliance with any [federal standard] does not exempt a person from liability under common law." 49 U.S.C. § 30103(e).

For that reason, the resolution of certain issues under the Boat Safety Act is potentially relevant to issues that arise under the Motor Vehicle Safety Act. General Motors thus has an interest in the Court's disposition of this case.

INTRODUCTION

The Boat Safety Act, 46 U.S.C. §§ 4301-4311 (1994), contains two provisions relevant to the preemption issues presented in this case.

Section 4306, entitled "Federal preemption," provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.



Section 4311, entitled "Penalties and injunctions," provides in subsection (g):

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.



The preemption issues presented in this case require the Court to reach a sensible and harmonious construction of these two provisions. Amicus curiae General Motors respectfully submits that the positions taken by petitioners and the Solicitor General fail in this task. This brief is being submitted to respond to the points discussed not only in petitioners' brief, but also in the Solicitor General's brief.

SUMMARY OF ARGUMENT

1. The Boat Safety Act delegates implementing authority to regulate the design and performance of boats and associated equipment, which the Coast Guard exercised by adopting extensive and detailed regulations. As the Solicitor General notes, section 4306 of the statute expressly preempts the field of state laws and regulations imposing standards or requirements with respect to the design and performance of boats and associated equipment, with only three exceptions: the States may enforce laws that are identical to federal regulations; they may apply for authorization to enforce differing laws; and they may

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regulate the carrying or use of marine safety articles to meet uniquely hazardous local conditions, unless this authority is specifically disapproved.

If none of these exceptions applies, the Boat Safety Act explicitly preempts state law governing boat design and performance -- regardless of whether a federal regulation governs that same aspect of boat design or performance. Here, the Coast Guard has not required propeller guards on outboard motors. The State of Georgia has not obtained authorization to require propeller guards and does not claim that they would address any uniquely hazardous local conditions. Therefore, petitioners' tort claim based on respondent's failure to install propeller guards is expressly preempted.

2. Petitioners and the Solicitor General counter that state common law damages actions enjoy a blanket immunity from this straightforward preemption analysis because state common law is not a state "law or regulation" and does not impose any legal "standard" or "requirement" within the meaning of this clause. That is wrong. The Court has rejected their argument at least thrice, by holding that broad terms in a preemption clause such as "standard[s]" and "requirement[s]" encompass state common law. See, e.g., Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2259-60 (1996) (Breyer, J., concurring in part and concurring in judgment); id. at 2262 (O'Connor, J., concurring and dissenting in part); CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); id. at 548-49 (Scalia, J., concurring and dissenting in part). Petitioners and the Solicitor General offer no justification for the Court to overrule this line of decisions, which forecloses their position.

Even putting aside this controlling precedent, the position taken by petitioners and the Solicitor General ignores the fact that state common law is an integral part of the corpus of state law, and it sets "standards" and "requirements" that govern private conduct quite as much as state positive law does. Their argument also rests on the bizarre assumption that Congress intended a single state jury -- an ad hoc collection of citizens assembled to hear one case -- to have more power to regulate private conduct in a manner different from the federal government than do their duly elected and appointed state officials. Finally, their suggested misreading of the statutory language, if accepted, would undermine the settled holding of cases as basic as Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

3. Petitioners and the Solicitor General further contend that the so-called "savings" clause in the Boat Safety Act negates its explicit preemption of common law tort suits. That, too, is incorrect. The preemption clause contains its own savings provisions, which operate to save state law from preemption where it is identical to federal law, where authority is granted to enforce differing state laws, and in limited circumstances to address uniquely hazardous local conditions. What petitioners and the Solicitor General call a "savings" clause -- section 4311 (g) -- is more appropriately viewed as an "anti-affirmative-defense" clause. It says nothing about the kinds of state laws that are preempted. Instead, it simply disclaims any federal immunity from liability at state law, which thus frees each State to determine for itself whether compliance with pertinent federal requirements (the "government standards" defense) will be recognized as an affirmative defense in an otherwise permissible state-law cause of action. The claim that this provision should be read instead as a broad "anti-preemption" clause is untenable and cannot be squared with the plain language of the statute.

In any event, the Court has repeatedly held that the general language of a so-called "savings" clause cannot negate the plain terms of an explicit preemption clause. See, e.g., Morales v. Trans World Airlines, Inc., 504 U.S. 374, 385 (1992). More generally, the Court has routinely given these general clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole. See, e.g., Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51-52 (1987).

4. Moreover, petitioners' claims also fail under an implied-conflict preemption analysis. As the

Court has consistently held in several recent decisions, the mere existence of a clause directed at preemption in the Boat Safety Act does not eliminate the need for such analysis. See Medtronic, 116 S. Ct. at 2259 (plurality opinion) (implied-conflict preemption inquiry is proper); Freightliner Corp. v. Myrick, 514 U.S. 280, 287-88 (1995) (conducting such an inquiry); CSX, 507 U.S. at 673 n.12 (same). In addition, the so-called "savings" clause does not preclude implied-conflict preemption analysis, as the Court has long held. See, e.g., International Paper Co. v. Ouellette, 479 U.S. 481, 493-94 (1987); Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907). Unlike petitioners, the Solicitor General accepts this established approach, and there is no reason for the Court to strike out in a different direction in this case.

Here, accepting the Court of Appeals' view that the Coast Guard made a considered decision not to regulate propeller guards on recreational vessels, in furtherance of its mission to promote boat safety, the necessary result is that any such requirement imposed by state law is impliedly preempted. See Ray v. Atlantic Richfield Co., 435 U.S. 151, 178 (1978). Indeed, as a practical matter it would be unfair and unworkable to hold manufacturers liable for any penalties, fines, or compensatory or punitive damages imposed under state law for conforming the design of their vessels to the federal agency's explicit determination that requiring them to be equipped with propeller guards would undermine the public safety.

ARGUMENT

I. THE BOAT SAFETY ACT PREEMPTS THE FIELD OF STATE LAW GOVERNING THE DESIGN AND PERFORMANCE OF RECREATIONAL VESSELS AND ASSOCIATED EQUIPMENT.

The Solicitor General points out that the plain language of the Boat Safety Act, its legislative history, and its subsequent administrative history all support the view that the statute is intended to preempt the field of state laws regulating the design and performance of recreational vessels and their associated equipment, subject only to certain exceptions that are specified in the statute itself. Strangely, however, the Solicitor General does not draw the conclusion that the Boat Safety Act actually has this effect, for reasons that will be discussed in more detail in Sections II and III, infra.

As the Solicitor General explains, the text of the Boat Safety Act appears expressly to preempt the field of state laws regulating the design and performance of recreational vessels and their associated equipment, subject only to three exceptions that are set forth in the preemption clause itself. See U.S. Br. 14; 46 U.S.C. § 4306. First, Congress has authorized the States to enforce laws that are "identical" to regulations adopted by the Secretary. Second, the States may apply to the Secretary for authorization to enforce differing laws. Third, the States may regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State, unless the Secretary specifically disapproves. See id.

If none of these exceptions applies, the Boat Safety Act, by its terms, preempts state law governing the design and performance of recreational vessels and their associated equipment -- regardless of whether a federal regulation governs that same aspect of boat design or performance. It thus differs from the Motor Vehicle Safety Act at issue in Freightliner Corp. v. Myrick, 514 U.S. 280, 287-88 (1995), which preempts state law only where a federal regulation concerning the same aspect of performance is in effect. Myrick is thus irrelevant to the express preemption issue raised in this case.

As the Solicitor General further notes, this reading of the broad preemption clause contained in the Act is confirmed by its legislative history. See U.S. Br. 14. The Senate Report on the proposed legislation stated that it was intended to have broad preemptive effect, explaining the preemption clause as follows:

> This section provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements. . . . The section does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern.

S. Rep. No. 92-248, at 20 (1971), reprinted in 1971 U.S.C.C.A.N. 1341. The Report emphasized that the "need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level." Id. at 14 (emphasis added). While the language of the Act phrased the Secretary's obligation to issue regulations in permissive rather than mandatory terms, "the Committee expected that initial standards will be promulgated as soon as practicable." Id. at 17. "It was precisely to take advantage of the expertise and flexibility available in the administrative process in these regards, and the possibility for continuous review and updating of the standards, that the Committee opted for a system of administrative rather than statutory standards." Id.

The Solicitor General also explains that this construction of the preemption clause accords with the administrative history implementing the Boat Safety Act. See U.S. Br. 14-15. The day after the Act was signed into law, the Secretary issued a statement exempting all existing state "laws and regulations" from preemption under the express language of the new statute. 36 Fed. Reg. 15,764-65 (Aug. 11, 1971). The Secretary noted that he was acting under the authority conferred by Congress, which provided that the Secretary "may, if he considers that boat safety will not be adversely affected, issue exemptions from any provision of this Act or regulations and standards established thereunder, on terms and conditions as he considers appropriate." Id. (quoting 46 U.S.C. § 4305). Because "boating safety will not be adversely affected by continuing in effect those existing laws and regulations," the Secretary exempted each State from the operation of the express preemption clause, which "prohibit[s] any of those jurisdictions from continuing in effect or enforcing any provision of law or regulation that is not identical to a Federal regulation." 36 Fed. Reg. at 15,765. The exemption was to remain in effect "until expressly superseded, revoked, or otherwise terminated." Id.

About a year later, the Coast Guard exercised the authority delegated by the Secretary to issue voluminous regulations governing boat safety pursuant to 46 U.S.C. § 4302. See 37 Fed. Reg. 15,777-85 (Aug. 4, 1972). These regulations cover a broad spectrum of safety matters, such as design standards for horsepower, electrical, fuel, ventilation, and start-in-gear systems, requirements for safety equipment to be carried on boats, and measures to correct especially hazardous conditions. See, e.g., 33 C.F.R. Pts. 175, 177, 181, 183 (1997). Thereafter, the Coast Guard proposed to replace the previous blanket exemption from preemption with a more limited provision, noting that "the issuance of these regulations removes the necessity for an exemption to the prohibitions of [the Act's preemption clause] concerning performance or other safety standards for boats." See 38 Fed. Reg. 71 (Dec. 27, 1972). The blanket exemption from preemption for state laws concerning boat performance or safety standards was eventually eliminated. See 38 Fed. Reg. 6914-15 (Mar. 8, 1973).

Both the legislative history and subsequent administrative history implementing the Boat Safety Act thus reinforce the plain language of the preemption clause. That provision operates to preempt all state laws that are not "identical" to federal regulations, unless they concern certain uniquely hazardous local conditions or unless the Secretary specifically

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confers additional authority to act. n2

n2 Contrary to the assertions made by the Solicitor General, see U.S. Br. 14-15, nothing in the administrative history implementing the Act suggests that the exemptions to preemption granted first by the Secretary and later by the Coast Guard do not apply to state common law. Indeed, the Coast Guard explained its later, more limited, exemption by noting that it "will principally [but not solely] affect State statutes and regulations." 38 Fed. Reg. at 6914 (emphasis and bracketed material added). See also infra Sections II & III.

Here, the Court's application of the statute's preemption analysis is relatively uncomplicated. The Coast Guard has not required manufacturers to install propeller guards on outboard motors. The State of Georgia has not obtained authorization from the Secretary to require manufacturers to install propeller guards, and no claim has been made that they would address any uniquely hazardous local conditions. Petitioners' tort claim based on respondent's failure to install propeller guards thus is expressly preempted by the Boat Safety Act.

The Solicitor General tries to avoid this straightforward conclusion by arguing that: (1) the preemption clause contained in section 4306 of the Boat Safety Act does not encompass "standards" and "requirements" imposed by state common law; and (2) in any event, section 4311(g) of the Boat Safety Act should be read to override the preemption clause and to preserve all state common law. See U.S. Br. 13-25. These arguments are incorrect, as shown in Sections II and III, infra.

II. THE PREEMPTION CLAUSE APPLIES TO REQUIREMENTS IMPOSED BY STATE COMMON LAW AS WELL AS THOSE IMPOSED BY STATE STATUTE OR RULE.

The preemption clause in the Boat Safety Act states that no State may "establish, continue in effect, or enforce a law or regulation" establishing a "performance or other safety standard" or imposing such a "requirement" for recreational vessels and their associated equipment, which is "not identical to" a regulation prescribed by the Coast Guard under the Act. 46 U.S.C. § 4306. Petitioners and the Solicitor General contend that this provision encompasses only "state legislative and administrative enactments," but not common law. Petrs. Br. 13; U.S. Br. 11-12. They thus argue that all common law damages actions -- regardless of whether they set requirements or standards that differ from a federal requirement that is directly applicable -- are immune from a claim-by-claim determination of whether they are preempted under the Act. This extreme position is wrong, for a number of reasons.

First, the Court has rejected this very argument in three cases, holding that the use of terms such as "law," "standard," and "requirement" in a preemption provision plainly covers standards and requirements set by common law damages actions. See Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2259-60 (1996) (Breyer, J., concurring); id. at 2262 (O'Connor, J., concurring and dissenting in part); CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); id. at 548-49 (Scalia, J., concurring and dissenting in part). The sound reasons for the Court's repeated holding on this interpretive point compel adherence to stare decisis as the Court addresses it once again in this case. n3

n3 The Solicitor General directly disagrees with the holdings of these cases, see U.S. Br. 17-18 & n.9, yet never offers any plausible basis for overruling them. For their part, petitioners essentially ignore the Court's holdings in Medtronic, CSX, and Cipollone when discussing this point. See Petrs. Br. 24-28.

In Cipollone, the Court was obliged to construe the express preemption provisions contained in two successive federal statutes -- the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), and the Public Health Cigarette Smoking Act of 1969, 84 Stat. 87. The Court determined that in the preemption clause in the 1965 Act, "Congress spoke precisely and narrowly: 'No statement relating to smoking and health shall be required in the

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advertising of [properly labeled] cigarettes.'" Cipollone, 505 U.S. at 518 (quoting section 5(b) of the 1965 Act). The Court noted that this language was consistent with "the continued vitality of state common law damage actions," and was "best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels." Id. at 518-19.

The Court held, however, that Congress changed the situation dramatically by enacting the "much broader" preemption clause contained in the 1969 Act. 505 U.S. at 520. That provision introduced new constraints upon all manner of requirements, duties, and standards imposed under state law by stating that "no requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes" that are labeled as required under federal law. 15 U.S.C. § 1334(b). Based on this language -- particularly the reference to "requirement[s] or prohibition[s] ... imposed under State law" -- the Court held that common law actions were within the coverage of the preemption clause in the 1969 Act. 505 U.S. at 520-24. n4

n4 The plurality opinion on this point actually speaks for the majority, for it is reinforced by the express agreement of Justices Scalia and Thomas. See 505 U.S. at 548-49 (Scalia, J., concurring and dissenting in part).

In Cipollone, therefore, the Court specifically rejected the linguistic argument urged by petitioners here in an attempt to limit the scope of terms such as "standard" and "requirement" to exclude the effects of damage actions brought under state common law. The Court explicitly found this argument to be "at odds both with the plain words of the 1969 Act and with the general understanding of common law damages actions." 505 U.S. at 521. In a key passage that squarely resolves this issue, the Court stated: "The phrase 'no requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." Id. Even though there was some evidence in the legislative history suggesting that Congress "was primarily concerned with positive enactments by States and localities," the Court was emphatic that "the language of the Act plainly reaches beyond such enactments." Id. (emphasis added). n5

n5 Justice Scalia's separate opinion, joined by Justice Thomas, expressly agreed that the broader language of the 1969 Act "plainly reaches beyond [positive] enactments," and "general tort-law duties" can impose requirements or prohibitions within the meaning of the 1969 Act. See 505 U.S. at 548-49 (Scalia, J., concurring and dissenting in part) (brackets in original).

The Court dispatched the same argument more briefly in the CSX case, where it considered the preemptive effect of the Federal Railroad Safety Act of 1970, 84 Stat. 971. The preemption clause contained in that statute provided that applicable federal regulations would preempt any state "law, rule, regulation, order, or standard relating to railroad safety." 45 U.S.C. § 434. n6 In a single sentence, the Court treated the issue as settled, flatly stating that "legal duties imposed on railroads by the common law fall within the scope of these broad phrases." 507 U.S. at 664 (citing Cipollone plurality and concurrence). No member of the Court dissented from this proposition.

n6 The Railroad Safety Act's preemption clause provided that "[a] State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement," but included an exception for "an additional or more stringent [state] law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard," when "not incompatible" with Federal law. 45 U.S.C. § 434; see 507 U.S. at 662 n.2.

In Medtronic, the Court addressed the Medical Device Amendments of 1976, 90 Stat. 539,

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which contained a preemption clause barring any State from " establishing or continuing in effect" any "requirement" relating to the safety or effectiveness of a medical device that differed from any applicable Federal requirement. 21 U.S.C. § 360k(a). Plaintiffs argued that "common-law duties are never 'requirements'" within the meaning of the statute, and that the statute "therefore never pre-empts common-law actions." 116 S. Ct. at 2258 (Stevens, J., plurality opinion).

A majority of the Court directly rejected this argument. Justice Breyer, in a separate concurrence, stated that "one can reasonably read the word 'requirement' as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law." 116 S. Ct. at 2259 (Breyer, J., concurring). After setting forth the Court's holdings to the same effect in Cipollone and CSX, Justice Breyer observed that the same rationale "would seem applicable to the quite similar circumstances at issue here." Id. at 2259. He also agreed on this point with Justice O'Connor's separate opinion for four Justices, which held that state common law actions impose "requirements" because they "operate to require manufacturers to comply with common-law duties." Id. at 2262 (O'Connor, J., concurring and dissenting in part) (citing Cipollone). The other Justices found it unnecessary to address the issue,since none of plaintiffs' claims was preempted in any event. Id. at 2259 (Stevens, J., plurality opinion). The conclusion reached by the five Justices who addressed the question thus constitutes yet another holding that common law claims impose state law "requirements" within the meaning of such an explicit preemption clause. See generally Marks v. United States, 430 U.S. 188, 193-94 (1977) (majority of Justices reaching conclusion by way of "fragmented" opinions state "the holding of the Court"). n7

n7 In addition, the Court has frequently held that the term "standards" refers to state common law as well as state positive law. See, e.g., Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 114-15 (1987) (referring to "safety standards" set by California products liability law); United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392, 400 (1965) (referring to "common law standards"); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630-31 (1959) (referring to "standard of care" imposed by common law).

It bears mention that the Government's position in this case is flatly inconsistent with the position in Medtronic, where the Solicitor General stated: "We do not agree with respondents' broad submission that the act's preemption provision does not speak at all to common law tort claims. In our view, the word 'requirement' in section 521(a) of the act encompasses duties imposed by State common law, as well as duties imposed by State statutory or regulatory law." Transcript of Oral Argument, Medtronic (No. 95-754), at 45. There the Solicitor General added that "Cipollone and the use of the requirement there, and just the nature of State law ... would also encompass duties imposed by the ... law from whatever source." Id. at 46. The Government offers no explanation for this abrupt about-face from its position in Medtronic.

Second, even if petitioners' argument were not squarely foreclosed by these prior decisions, it is still plainly wrong because it ignores the ordinary interrelations between the substantive principles of the common law and statutory law in regulating the health, safety, and welfare of citizens in each state. Again, the Court discussed this point in Cipollone, and pointed out that "common law damages actions of the sort raised by petitioner are premised on the existence of a legal duty and it is difficult to say that such actions do not impose 'requirements or prohibitions,'" for "it is the essence of the common law to enforce duties that are either affirmative requirements or negative prohibitions." 505 U.S. at 522; see also Medtronic, 116 S. Ct. at 2262 (O'Connor, J., concurring and dissenting in part) (state common law actions constitute "requirements" where they "operate to require manufacturers to comply with common-law duties").

In this regard, it simply does not matter whether the remedy used to enforce the substantive component of the state law is the payment of damages to private parties rather than the payment of fines to the government or some other enforcement mechanism. "Such regulation

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can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236, 247 (1959). The Court recently reaffirmed this position. See BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1598 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.").

The intricate relationship between state common law and state statutory and administrative law in regulating private conduct, and the extent to which they are inherently interwoven, is widely understood and readily demonstrated. Earlier in this century, the courts typically led the way on health and safety issues by applying and developing common law principles to regulate the private sector. The requirements, obligations, and standards imposed in accordance with these principles, in turn, were eventually codified and at times modified by state legislatures when they took the initiative to address particular concerns. On occasion, legislatures have enacted regulatory statutes conferring administrative authority on government agencies to regulate private conduct directly, while still retaining the common law to fill the remaining gaps between these positive enactments. The further interaction of state legislation and state common law adjudication often is even more complex, as legislative or regulatory enactments may be used to supply the duty of care underlying private damage actions. See generally Melvin Eisenberg, The Nature of the Common Law, (1988); Guido Calabresi, A Common Law for the Age of Statutes (1982). n8

n8 The Solicitor General offers a strained construction of the statutory phrase "State or political subdivision" that would appear to read the courts entirely out of the framework of state governments. See U.S. Br. 18-19. This approach overlooks the fact that the statute in Medtronic contained the same phrase ("State or a political subdivision"), and a majority of the Court held that its preemption clause reached common law claims. In the same passage, the Solicitor General suggests that if state courts wished to apply state common law standards or requirements to the design or manufacture of recreational vessels and associated equipment, it would be absurd to expect state judges to apply for federal authorization to do so. Id. We agree that the suggestion is absurd; it also is irrelevant. As with the state legislatures, the state courts have authority to act only where state law is not preempted; any application for an exemption from preemption to the governing federal agency -- here, the Coast Guard -- would be made by state executive officials. Neither state legislators nor state judges would be expected to make this application.

At the state level, therefore, it is undeniable that the common law forms an integral part of the law's comprehensive regulation of private conduct. Taken in combination with statutory and regulatory enactments, the common law imposes a continual procession of legal "requirements," obligations, prohibitions, and "standards" that are designed to influence and regulate the actions of businesses and individual citizens. See, e.g., Medtronic, 116 S. Ct. at 2262 (O'Connor, J., concurring and dissenting in part) ("state common-law damages actions operate to require manufacturers to comply with common-law duties"). Any reading of these terms that would pose a putative distinction between common law and positive law in this respect would be fundamentally misguided. See id. at 2259 (Breyer, J., concurring) ("The effects of the state agency regulation and the state tort suit are identical.").

Third, the argument presented by petitioners and their amici rests on the odd assumption that Congress intended an ad hoc collection of state citizens assembled to hear one civil case -- a jury -- to have greater power to set standards that differ from Federal law than do sovereign state officials acting through the careful, deliberative processes established in the legislative and administrative spheres. Such a result would be a perverse undermining of the democratic process, and the Court should not assume that Congress intended "this anomalous result" unless it clearly so provided. See Medtronic, 116 S. Ct. at 2260 (Breyer, J., concurring). Certainly nothing in the language of the Boat Safety Act requires this upside-down worldview. Indeed, for the reasons stated above, section 4306 plainly contemplates

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Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court Of The United States

Rex R. Sprietsma, Adm'r of the Estate of
Jeanne Sprietsma, Deceased,

Petitioner,

v.

Mercury Marine, a Division
of Brunswick Corporation,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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B. The Proceedings Below

This case arose out of a boating accident in Tennessee state waters in which the petitioner's decedent, Jeanne Sprietsma, fell from a motor boat and was struck by the motor's propeller blades. App. 1. As a result, she suffered serious injuries and later died. App. 1. The boat was equipped with a 115-horsepower outboard motor that did not contain a propeller guard. The motor was designed, manufactured, and sold by respondent Mercury Marine, a division of Brunswick Corporation. App. 1, 23.

Petitioner Rex Sprietsma is the administrator of the estate of his deceased wife. App. 1. He filed a wrongful death action against Mercury Marine in the Circuit Court of Cook County, Illinois seeking to recover damages for his wife's pain and suffering, along with the financial losses suffered by him and his son. App. 1. The complaint alleged that the boat engine was defectively designed because it was not equipped with a propeller guard. App. 24.

Respondent moved to dismiss on the ground that Mr. Sprietsma's claims are preempted by the Boat Safety Act and by the Coast Guard's decision not to regulate propeller guards. The trial court granted the motion to dismiss, finding the claims to be preempted. App. 39. The appellate court affirmed, holding that the claims are expressly preempted by the Boat Safety Act. App. 34.

On appeal, the Illinois Supreme Court rejected the appellate court's express preemption ruling, but nonetheless held that petitioner's claims are impliedly preempted by federal law. App. 16. At the outset, the court held that the case is not subject to the strong presumption against federal preemption

that ordinarily applies to health and safety issues – "matters which have traditionally come within the jurisdiction of the state through its police powers." App. 5 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 474 (1996)). Relying on this Court's recent decision in *United States v. Locke*, 529 U.S. 89 (2000), which held that the presumption against preemption does not apply to cases involving international maritime commerce, the Illinois Supreme Court declined to apply any presumption against preemption in this recreational boating case on the theory that, "[a]lthough Sprietsma's claims bear upon state and federal concerns, we believe the federal concerns predominate in this case." App. 6.

The lower court then considered the questions of express and implied preemption under the Boat Safety Act. Regarding the former, the court concluded that the Act's broadly-worded savings clause, which provides that "compliance with this chapter . . . does not relieve a person from liability at common law or under state law," precludes any finding of express preemption of common law claims. App. 9-10. The Illinois Supreme Court went on to hold, however, that petitioner's claims are impliedly preempted by federal law because a jury verdict finding Mercury Marine liable for not installing a propeller guard would "frustrate" federal purposes. App. 16. Despite its acknowledgment that the Coast Guard has never issued any regulations governing propeller guards (yet retains the authority to do so if it so chooses), the court found that the agency's regulatory *in*action amounted to an affirmative decision to preclude any common law claims seeking to hold a manufacturer liable for failing to install propeller guards. In the court's view, "[a] damage award would, in effect, create a propeller guard requirement, thus frustrating the objectives of Congress in promulgating the [Boat Safety Act]." App. 16 (citations omitted).

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In so ruling, the lower court chose to disregard the United States' only articulated view on the matter: the anti-preemption position set forth in the Solicitor General's *amicus curiae* brief in *Lewis*, which argued that "[t]he Coast Guard's conclusion in 1990 that the available data did not justify the issuance of regulations concerning propeller guards *is not a basis for implied conflict preemption of petitioners' common law tort claims*." Brief for the United States as *Amicus Curiae* Supporting Petitioners at 26, *Lewis v. Brunswick Corp.*, 522 U.S. 978 (1997) (No. 97-288) (emphasis added). The *Lewis* brief emphasized that "[t]he Coast Guard has never formally determined that a requirement [of propeller guards] would be contrary to the interests of boat safety." *Id.* The United States further noted that,

> [i]f it had reached that conclusion, the Coast Guard may well have prohibited propeller guards. The Coast Guard stated only that the "available propeller guard accident data do not support imposition of a regulation requiring propeller guards."

Id. Given this fact, and the absence of any federal regulation governing propeller guards, the United States concluded that the petitioners' claims did not in any way conflict with the federal regulatory scheme. *Id.* at 25-30.

In the face of these arguments, the Illinois Supreme Court ultimately held that the United States' no-preemption position in *Lewis* was not persuasive because, among other things, "[t]he Solicitor General has not presented his argument concerning the *Lewis* case or the Sprietsma claim to this court." App. 18. This petition followed.

REASONS FOR GRANTING THE WRIT

I. This Case Presents the Same Federal Preemption Issue that this Court Considered in *Lewis*, But Could Not Resolve Because *Lewis* Settled After Oral Argument.

This case presents the same issue of federal preemption that was before the Court in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998): whether state common law tort claims that a boat was defectively designed because it lacked a propeller guard are preempted by federal law. In *Lewis*, the United States submitted an *amicus curiae* brief arguing that, because the Coast Guard never issued any regulations relating to propeller guards, common law no-propeller-guard claims do not conflict with or undermine any federal regulatory purpose. *Lewis* settled after oral argument, so no opinion was ever rendered in the case. The lower courts remain split on the issue, with one state supreme court (Texas) holding that no-propeller-guard claims are not preempted and a host of federal courts and the Illinois Supreme Court holding just the opposite (*see infra* at II).

The decision below is the first meaningful opportunity for this Court to review the propeller-guard issue in the wake of *Lewis*. The same question was presented in *Lady v. Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000), *cert. denied sub nom. Lady v. Outboard Marine Corp.*, 121 S. Ct. 1402 (2001), but the respondent declared bankruptcy shortly after the petition was filed and the writ was denied. The Illinois Supreme Court's ruling in this case is the first decision on the propeller-guard question rendered by a state high court or federal court of appeals since the denial of review in *Lady*.

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Thus, this case presents the first opportunity since *Lewis* for this Court to resolve this important issue of federal law.[2]

II. There is a Direct Split of Authority as to Whether No-Propeller-Guard Claims are Preempted by the Boat Safety Act.

Review is also warranted because there is a direct split between the Supreme Court of Texas and the Illinois Supreme Court (along with three federal circuit courts) as to whether a common law claim that a manufacturer is liable for failing to equip its boats with propeller guards is preempted by the Boat Safety Act.

In *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994), the Texas Supreme Court held that the Boat Safety Act neither expressly nor impliedly preempts no-propeller-guard claims. The court emphasized the strong presumption against federal preemption of state common law claims – a presumption that "particularly obtains when, as in this case, state regulation of health and safety matters is involved." *Id.* at 249 (citing *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 715 (1985)). In light of this strong presumption against preemption, *Moore* rejected the boat manufacturer's claim that the reference to "law or regulation" in the Boat Safety Act's preemption provision encompasses – and expressly preempts – common law claims. 889 S.W.2d at 250.

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[2] In fact, in opposing review in *Lady*, the bankrupt defendant urged this Court to await review of the decision in *this* case, arguing that Mr. Sprietsma's claims against a non-bankrupt boat manufacturer would present a more suitable vehicle for review. *See* Respondent's Brief in Opposition at 24, *Lady v. Outboard Marine Corp.*, No. 00-1031.

The Texas Supreme Court also rejected the boat manufacturers' argument that the plaintiff's no-propeller-guard claims were impliedly preempted under the Act. *Id.* at 251. On this point, the defendants argued that "a jury award in this case will conflict with and undermine the goals of the Act by creating a standard requiring propeller guards, in the face of the Coast Guard's determination that guards should not be mandated." *Id.* The Texas Supreme Court disagreed, stating, first, that the Coast Guard's decision not to commence rulemaking did not "reflect an intention to foreclose state tort liability." *Id.*

As to the boat manufacturers' claim that preemption must be implied because permitting no-propeller-guard claims would undermine Congress' goal of creating uniform safety regulations, the Texas Supreme Court stated: "the [Act's] savings clause reflects that Congress was willing to tolerate some tension between the concept that uniform safety regulations should be established at the federal level and the concept that a state may nevertheless award tort damages for unsafe products." *Id.* at 252. This approach makes sense, in the Texas Supreme Court's view, because "the regulatory effect of damage awards is not equivalent to that of positive enactments: a manufacturer who incurs tort liability for failing to install propeller guards has a choice not available to the regulated manufacturer – installing guards on future boats or taking no action and bearing the liability as a cost of doing business." *Id.* at 251 (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988)). *Moore* concluded that, although "[w]e recognize the potential for conflict, [we] do not think it justifies a holding of preemption." *Id.* at 251-52.

The decision below is squarely in conflict with *Moore*. Although the two courts agree that there is no express

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preemption of common law claims under the Boat Safety Act (in light of the Act's savings clause), the Illinois Supreme Court split with *Moore* in holding that no-propeller-guard claims are impliedly preempted by the Coast Guard's regulatory inaction. To reach this conclusion, the lower court began by abandoning a core proposition of law embraced in *Moore*: that such claims are subject to a strong presumption against federal preemption. *See* App. 6. Having jettisoned the presumption against preemption, the lower court went on to conclude – again directly contrary to the holding in *Moore* – that "[a] damage award would, in effect, create a propeller guard requirement, thus frustrating the objectives of Congress in promulgating the [Boat Safety Act]." App. 16. Such an outcome, the court held, "would present an obstacle to the accomplishment and execution of the purposes and objectives Congress sought in enacting the [Boat Safety Act]." App. 16.

Thus, the decision below is manifestly at odds with the Texas Supreme Court's decision in *Moore*. In addition, as the lower court recognized, this split is reflected in numerous other court decisions regarding the scope of preemption under the Boat Safety Act, including *Carstensen v. Brunswick Corp.*, 49 F.3d 430 (8th Cir.), *cert. denied*, 516 U.S. 866 (1995), *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), *cert. dismissed*, 523 U.S. 1113 (1998), and *Lady v. Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000), *cert. denied sub nom. Lady v. Outboard Marine Corp.*, 121 S. Ct. 1402 (2001). *See* App.16 (collecting cases). Review is warranted here to finish the job started in *Lewis*: to resolve this split, prevent further confusion among the lower courts, and ensure that state

common law claims that Congress intended to preserve are not preempted.[3]

III. The Decision Below Conflicts with Relevant Decisions of this Court.

Review is also warranted because the lower court's ruling conflicts with decisions of this Court in at least three ways: first, it improperly affords preemptive effect to federal regulatory inaction; second, it improperly abandons the long-standing presumption against preemption; and, third, it fails to give any – let alone sufficient – weight to the federal government's own interpretation of the preemptive effect of the Coast Guard's decision not to regulate propeller guards.

A. The Lower Court Erroneously Afforded Preemptive Effect to the Federal Government's Regulatory Inaction.

To begin with, the Illinois Supreme Court's holding that the Coast Guard's decision *not* to commence rulemaking with respect to propeller guards has preemptive force directly conflicts with *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), which made clear that the mere absence of federal regulation with respect to a particular product has no preemptive effect. In *Myrick*, this Court considered whether a claim that a manufacturer was negligent for failing to install antilock brakes in tractor-trailer trucks was preempted by the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (1982), and by a federal motor vehicle

[3] Unless this split is resolved, the viability of no-propeller-guard claims in Texas will depend entirely on whether a case proceeds in state or federal court.

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safety regulation governing airbrake systems in buses, trucks, and trailers. 49 C.F.R. § 571.121 (S3) (1993) ("Standard 121").

As originally promulgated in 1974, Standard 121 required that all truck manufacturers install antilock brakes. This requirement was invalidated by the Ninth Circuit's decision in *Paccar, Inc. v. NHTSA*, 573 F.2d 632, 640 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978), which held that, although the braking performance of some trucks was improved by antilock brakes, "critical problems began with mass production of vehicles designed to meet the Standard." *Id.* at 641. Due to the unforeseen manufacturing difficulties encountered during mass production of antilock systems, the Ninth Circuit ordered the federal regulatory agency to suspend the antilock requirements of Standard 121. *Id.* at 643. In response, the agency added language to the regulation stating that the antilock brake provisions invalidated by the *Paccar* ruling "are not applicable to trucks and trailers." 49 C.F.R. § 571.121(S3).

In *Myrick*, the truck manufacturers argued that Standard 121 preempted common law claims that their trucks were defective because they lacked antilock brakes. This Court disagreed, holding that there could be no express preemption because there was no federal standard in place regarding antilock brakes in trucks. *See* 514 U.S. at 286. In so holding, *Myrick* explicitly rejected the truck manufacturers' claim "that the absence of regulation itself constitutes regulation," especially where "there is no evidence that [the federal agency] decided that [the product] should be free from all state regulation . . .." *Id.* Regarding implied preemption, the Court ruled, first, that "it is not impossible for petitioners to comply with both federal and state law because there is simply no federal standard for a private party to comply with." *Id.* at 289. Frustration of federal objectives was also not an issue, in the Court's view, because

the federal regulation "currently has nothing to say concerning [antilock brake] devices one way or another, and [the federal agency] has not ordered truck manufacturers to refrain from using [such] devices. A finding of liability against petitioners would undermine no federal objectives or purposes with respect to [antilock brake] devices, since none exist." *Id.* at 289-90.

The decision below is squarely at odds with *Myrick*. In finding federal preemption of petitioner's no-propeller-guard claim, the Illinois Supreme Court embraced the very proposition that was rejected in *Myrick*: that an agency's decision not to regulate has the same preemptive force as a decision to regulate. This ruling has the perverse effect of transforming a federal decision *not* to commence rulemaking regarding propeller guards on motor boats into an affirmative decision to *ban* any common law claim seeking to require a manufacturer to pay damages for failing to include a specific propeller guard on a specific boat. Not only is this conclusion contrary to *Myrick*, but it flies in the face of numerous prior decisions of this Court holding that mere federal regulatory inaction, without more, does not imply an authoritative federal determination that the area is best left unregulated. *See, e.g., Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 496, 503-04 (1988) (federal inaction alone does not have preemptive effect); *Arkansas Elec. Co-Op v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (regulatory inaction only has preemptive force where Congress has made clear that its intention is "to fill a regulatory gap, not to perpetuate one.") (footnote omitted).

The lower court also ignored the fact that, as in *Myrick*, "there is no evidence that [the federal agency] decided that [the product at issue] should be free from all state regulation . . .." 514 U.S. at 286. As explained above, the Coast Guard's

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decision not to commence rulemaking regarding propeller guards stemmed from its "many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation." App. 40. Due to the lack of a "universally acceptable" solution, and the high statutory threshold of having to demonstrate that federal regulation would "avoid a substantial risk of personal injury to the public," 46 U.S.C. § 4302(c)(2), the Coast Guard declined to commence rulemaking to consider a nationwide standard for propeller guards. *Id.* The agency never stated, however, that there was *no* technology appropriate for use in *any* mode of boat operation; rather, the Coast Guard found that there was no technology appropriate for a national, *across-the-board* regulation applicable to *all* types of boats. App. 40. Contrary to the Illinois Supreme Court's apparent reasoning, this determination would be entirely consistent with a state's decision to allow some boat manufacturers to be held liable for failing to install a certain type of propeller guard on specific boats or on boats used for a particular purpose.

There is also no evidence that the Coast Guard intended to restrict the ability of victims of propeller accidents to seek compensation through the common law tort system. To the contrary, as *Moore* recognized, the Propeller Subcommittee report that was the basis for the Coast Guard's decision not to regulate propeller guards "mentions that manufacturers have been sued for not installing propeller guards, and recognizes that a federal requirement of propeller guards would establish a prima facie case of manufacturer liability in some states." 889 S.W.2d at 252. Despite this recognition of on-going litigation regarding propeller guards, the agency never suggested that it intended to preempt such actions in the future. *See* App. 40-41. "Thus even if the Coast Guard made a policy determination, carrying preemptive weight, that propeller

guards should not be regulated, its preemptive effect would not necessarily include common law." 889 S.W.2d at 252.

The absence of any preemptive intent on the part of the Coast Guard is dramatically underscored by the manner in which its decision was rendered. Under the Boat Safety Act, the Coast Guard is directed to "*prescribe regulations* . . . establishing minimum safety standards . . .." 46 U.S.C. § 4302(a)(1) (emphasis added). In keeping with this directive, Congress clearly intended that only properly promulgated regulations would exert preemptive force under the Act. In this case, however, there was no rulemaking proceeding of any sort, let alone a federal regulation proclaiming the Coast Guard's intention to ban state regulation of propeller guards. Instead, the agency's decision not to commence rulemaking was the product of internal deliberations by an advisory subcommitee (as opposed to the notice-and-comment rulemaking procedures mandated by the Administrative Procedure Act, *see* 5 U.S.C. § 553 (1994)), and was embodied in an informal letter to the Chairperson of the Advisory Council setting forth the agency's decision not to regulate propeller guards. App. 40-44. This is hardly the type of "clear and manifest" expression of preemptive purpose that must be evident before preemption may be found based on regulatory inaction. *Isla Petroleum*, 485 U.S. at 503.

At bottom, the Coast Guard's decision not to commence rulemaking with regard to propeller guards is markedly similar to the fate of antilock brake regulation described in *Myrick*. In both cases, the absence of regulation was due to a determination that the current state of technology did not warrant a universal regulatory solution to a safety problem. In *Myrick*, that decision was made by the Ninth Circuit and then memorialized in the amendment to Standard 121 eliminating the antilock brake

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requirement for trucks and trailers; in this case, the decision not to commence rulemaking was made by the agency in the first instance. But the result in both instances was the same: an absence of any federal regulation mandating *or* prohibiting the use of the technology in question. *Myrick* makes clear that federal preemption does not exist under these circumstances.

The Illinois Supreme Court's decision, moreover, has implications far beyond the narrow issue of preemption under the Boat Safety Act. If the decision below is permitted to stand, it could massively broaden the scope of federal preemption far beyond what Congress ever intended. Under the lower court's reasoning, *any* federal decision not to regulate could be deemed to have preemptive force, regardless of the reason for federal inaction and regardless of the extent to which Congress made clear its intent *not* to intrude on States' regulatory power and/or strip individuals of their common law remedies. Not only would this constitute a grievous blow against the traditional rights of victims to seek redress for injuries caused by dangerous products, but it would strip the States of their historic power to protect the health and welfare of their citizens. Review is warranted to prevent this deep encroachment on the rights of the States to protect their citizens and of citizens to use the common law to protect themselves – rights that neither Congress nor the Coast Guard ever expressed any intention to restrict.

B. The Lower Court Erroneously Disregarded the Presumption Against Preemption.

Review is also warranted to correct the lower court's decision to abandon any presumption against preemption of common law claims in all cases in the "maritime" context – even those involving a small recreational boat in state waters.

See App. 6. This approach does violence to the rights of the States to provide compensation for their citizens and flies in the face of long-standing decisions of this Court recognizing a strong presumption against federal preemption in health and safety matters. *See generally Medtronic*, 518 U.S. at 485.

The lower court's error stemmed in part from a misreading of this Court's recent decision in *Locke*, 529 U.S. 89 (2000), which involved state regulations of the operation and design of ocean-going oil tankers used in international commerce. *Locke* merely held that, in a case where "[t]he state laws in question bear upon national and international *maritime commerce*, . . . there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Id.* at 108 (emphasis added). A presumption against preemption is inappropriate in such cases, this Court reasoned, given Congress' longstanding authority "to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations." *Id.* at 98. The Court also expressed concern that regulations governing international ocean-going oil tankers implicated "the substantial foreign affairs interests of the Federal Government." *Id.* at 97.

These concerns have no bearing here. First, this case is entirely unrelated to "interstate navigation," as the accident that harmed petitioner occurred on Tennessee waters. Second, this case has nothing to do with "maritime commerce," international or otherwise, as the Boat Safety Act merely involves federal regulation of *recreational* vessels, such as the boat that struck petitioner's wife. *See* 46 U.S.C. § 4301. Finally, the United States' "foreign affairs interests" – so paramount in *Locke* that "the governments of 13 ocean-going nations expressed their concerns [about conflicting state regulations] through a

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diplomatic note" (429 U.S. at 97) – are clearly not implicated here. The United States has no greater interest in maintaining presumptively exclusive authority over safety features on small recreational boats than it has regulating medical devices, cigarettes, and myriad other products over which the federal government has authority and yet the presumption against preemption has been applied by this Court with full force. *See, e.g., Medtronic*, 518 U.S. at 485 (medical devices); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (cigarettes).

At the same time, *Locke* reaffirmed that the "beginning assumption" against preemption continues to apply in cases involving the "historic police powers of the States." 429 U.S. at 107 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Numerous prior decisions of this Court have made clear that such powers may be exercised concurrently with the federal government's jurisdiction over maritime matters, *see, e.g., Askew v. American Waterways Operators*, 411 U.S. 325 (1973); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Kelly v. State of Washington*, 302 U.S. 1 (1937), and that, absent express Congressional intent to preempt the entire field of state law, preemption only lies where the conflict between state and federal law is "so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" *Kelly*, 302 U.S. at 10 (citations omitted). *See also Askew*, 411 U.S. at 341; *Huron*, 362 U.S. at 444. Nothing in *Locke* suggests that these cases are no longer good law, or that the presumption against preemption no longer applies in cases – such as this one – that involve the historic police powers of the states to compensate accident victims through the tort system. *See, e.g., Medtronic*, 518 U.S. at 488. Review is warranted to correct the Illinois Supreme Court's unwarranted holding to the contrary.

C. The Lower Court Erroneously Disregarded the United States' Own Interpretation of the Preemptive Effect of the Coast Guard's Regulatory Inaction.

Finally, review is warranted because the lower court improperly disregarded this Court's repeated teachings that the views of the federal government are entitled to deference when determining the preemptive effect of an agency's regulatory decisions. As this Court held in *Medtronic*, the United States' interpretation of the scope of preemption is entitled to "substantial weight." 518 U.S. at 496 (majority opinion); *id.* at 505-07 (Breyer, J., concurring). *See also Geier v. Honda*, 529 U.S. 861, 885 (1999) (federal government's interpretation of preemptive scope of agency regulations is entitled to "special weight"); *Hillsborough County*, 471 U.S. at 714-15 ("[t]he [federal government's] statement is dispositive on the question of implicit intent to pre-empt unless either the agency's position is inconsistent with clearly expressed congressional intent, . . . or subsequent developments reveal a change in that position") (citations omitted). Deference to the federal government's understanding of the Boat Safety Act is particularly appropriate where, as here, the United States is *ceding* authority to the states, not trying to claim power for itself. The concern behind the preemption doctrine – protection of federal interests from inconsistent state or local activity – is not implicated where the United States itself does not object to – and indeed welcomes – state participation. *See Hillsborough County*, 471 U.S. at 714-15.

The lower court paid lip service to these principles, but then substituted its judgment for that of the United States in holding that petitioner's common law claims are impliedly preempted by federal law. Such an approach was warranted, in the lower court's view, because the United States had not entered an

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appearance before it – even though the federal government's brief in *Lewis* was made part of the record in this proceeding. This reasoning simply makes no sense: an *amicus curiae* brief filed by the Solicitor General's office represents the United States' official position on an issue whether or not the United States has entered a formal appearance in a case.

The lower court also held that the *Lewis* brief is not entitled to deference because "arguments made in the *Lewis* brief have been rejected by the Supreme Court in *Geier*." App. 18. This argument is simply wrong. With reference to implied conflict preemption (which is the issue before this Court), the United States in *Lewis* argued that the absence of any federal regulation of propeller guards, coupled with the absence of any federal determination that a requirement of propeller guards would be contrary to boat safety, meant that a common law damage claim such as petitioner's "would not in any way conflict with the federal regulatory scheme." Brief for United States as *Amicus Curiae* Supporting Petitioners at 26, *Lewis v. Brunswick Corp.*, 522 U.S. 978 (1997) (No. 97-288).

This argument is entirely consistent with, and not in any way undercut by, this Court's recent decision in *Geier*. Regarding implied conflict preemption, *Geier* held that a common law claim that an automobile was defective because it lacked an airbag conflicted with a complex federal regulation that was carefully designed to "bring about a mix of different [passive restraint] devices introduced gradually over time." *See* 529 U.S. at 874. On this latter point, this Court's holding was narrowly confined to the particular regulation at issue, and has no bearing on whether a no-propeller-guard claim like petitioner's would conflict with the U.S. Coast Guard's regulatory *in*action regarding propeller guards.

At the same time, in one key respect that went unmentioned by the lower court, *Geier* confirms that the Texas Supreme Court got it exactly right. In *Geier*, the United States had filed an *amicus curiae* brief arguing that no-airbag claims would conflict with federal regulatory purposes. This Court ultimately deferred to that position, holding that the United States' interpretation of the preemptive effect of agency action is entitled to "special weight." *Geier*, 529 U.S. at 875. Thus, if anything, *Geier* provides further reason to grant review and accord the United States' authoritative position on the preemptive effect of the Coast Guard's regulatory inaction the deference it deserves.

CONCLUSION

This petition for a writ of *certiorari* should be granted.

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QUESTION PRESENTED

This case involves the same issue raised by *Lewis v. Brunswick Corp.*, No. 97-288 (October Term, 1997), *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998): whether common law tort claims that a boat was defectively designed because it lacked a propeller guard are preempted by federal law. In *Lewis*, the United States submitted an *amicus curiae* brief stating the federal government's view that such claims are not preempted. *Lewis*, however, settled after oral argument, before any decision was rendered. This case presents the first meaningful opportunity for the Court to consider this preemption issue since *Lewis*. The question presented is:

Whether the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (1988 & Supp. 1993), preempts state common law claims that a recreational motor boat was defectively designed because it lacked a propeller guard when: (1) the Act expressly provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law" (46 U.S.C. § 4311(g)); (2) the U.S. Coast Guard has never adopted any standard or regulation with respect to propeller guards; and (3) the United States has taken the position that common law no-propeller-guard claims do not conflict with or otherwise frustrate any federal statutory or regulatory purpose?

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PARTIES TO THE PROCEEDING

The parties to the proceedings below were petitioner Rex R. Sprietsma, Administrator of the Estate of Jeanne Sprietsma (as appellant) and respondent Mercury Marine, a Division of Brunswick Corporation (as appellee).

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OPINIONS BELOW

The opinion of the Illinois Supreme Court (App. 1-22) is reported at 197 Ill.2d 112 (2001). The opinion of the appellate court (App. 23-38) is reported at 729 N.E.2d 45 (2000). The unreported order of the trial court (App. 39) was entered on November 20, 1998.

JURISDICTION

The decision of the Illinois Supreme Court was filed on August 16, 2001. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The express "preemption clause" of the Federal Boat Safety Act of 1971, 46 U.S.C. § 4306 (1988), reads as follows:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

The express "savings clause" of the Federal Boat Safety Act of 1971, 46 U.S.C. § 4311(g) (1988), reads as follows:

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> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

The Coast Guard has not issued any regulations governing propeller guards on recreational vessels. The agency considered developing a regulation requiring propeller guards on all recreational boats, but it decided not to do so. The Coast Guard's decision not to take any regulatory action with respect to such devices was not the subject of any formal rulemaking.

STATEMENT OF THE CASE

This case presents the question of whether a state common law claim that a boat engine was defectively designed because it lacks a propeller guard is preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (1988 & Supp. 1993) ("Boat Safety Act" or "Act"), and by a decision of the United States Coast Guard not to begin developing a regulation that would have required the use of propeller guards on all recreational motor boats. The Illinois Supreme Court held that such claims are impliedly preempted by federal law, even though the Coast Guard has never regulated propeller guards and even though the United States, in an *amicus curiae* brief filed with this Court in a case that was settled after oral argument, took the position that no-propeller-guard claims like petitioner's are not preempted by federal law. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Lewis v. Brunswick Corp.*, 522 U.S. 978 (1997) (No. 97-288). In so doing, the lower court disregarded repeated teachings of this Court that the federal government's own view of the preemptive effect of agency regulations is entitled to "susbstantial weight." *E.g.*, *Medtronic v. Lohr, Inc.*, 518 U.S. 470, 496 (1996) (majority opinion); *id.* at 505-07 (Breyer, J., concurring). The Illinois Supreme Court's decision, which is in direct conflict with the Texas Supreme Court's holding in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994), is the subject of this petition.

A. The Federal Statutory and Regulatory Framework.

1. The Boat Safety Act.

The Boat Safety Act was enacted to "improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating – presently the Secretary of Transportation." S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1333. The Act provides that the Secretary of Transportation "may prescribe regulations establishing minimum safety standards for recreational vessels and associated equipment . . .." 46 U.S.C. § 4302(a)(1). This rulemaking authority has been transferred to the Commandant of the United States Coast Guard. *See* App. 2. The National Boating Safety Advisory Council (the "Advisory Council") is charged with assisting the Coast Guard in evaluating the need for safety regulations. 46 U.S.C. § 4302(c)(4).

Under the Act, the Coast Guard's authority to issue minimum safety standards is permissive, not mandatory. *Id.* *See also* S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1338. In addition, the Coast Guard is prohibited from establishing regulations that would compel substantial alterations of existing boats unless compliance with

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those regulations would "avoid a substantial risk of personal injury to the public." 46 U.S.C. § 4302(c)(2). The Act sets forth the procedures that the Coast Guard must follow to prescribe such regulations, including the actual publishing of a proposed safety standard and the express provision of a future effective date after its initial publication. *See* 46 U.S.C. § 4302(b). Thus the Act

> requires certain actions by the [Coast Guard] in the development of safety standards . . . In addition to the specific procedural requirements outlined in the [Act], the [Coast Guard], in promulgating standards, is required to comply with the formal rulemaking procedures in the Administrative Procedure Act (5 U.S.C. 553).

S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1340. Under this scheme, any party adversely affected by a standard prescribed under the Act is entitled to seek judicial review of the standard in accordance with the Administrative Procedure Act. *Id.*

The Boat Safety Act also contains two provisions addressing the effect of Coast Guard regulations on state law. First, Congress included in the legislation an express preemption clause providing, in pertinent part, that:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated

> equipment . . . that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306. Second, Congress included an anti-preemption provision, or savings clause, that expressly preserves all common law claims. It provides:

> [c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

46 U.S.C. § 4311(g).

Together, the preemption provision and the savings clause govern the preemptive effect of federal regulations issued pursuant to the Boat Safety Act.

2. The Coast Guard's Decision Not to Regulate Propeller Guards.

In 1988, in response to increasing controversy over – and litigation with respect to – the dangers of unguarded boat propellers, the Coast Guard formed a subcommittee of the Advisory Council that included members of the boating industry and the general public (the "Subcommittee"). The Subcommittee was charged with investigating the feasibility of requiring guards to prevent underwater propeller accidents and opining whether "the Coast Guard should move toward a federal propeller guard requirement." App. 3. In November 1989, based in part on its conclusion that propeller guards "could create other safety concerns" (App. 3), the Subcommittee recommended that the Coast Guard should take no regulatory action to require propeller guards." App. 3. This

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recommendation was then adopted by the Advisory Council and forwarded to the Coast Guard for its consideration. App. 3.

On February 1, 1990, the agency adopted the Advisory Council's recommendation that "the Coast Guard should take no regulatory action to require propeller guards." App. 3. In a letter setting forth the rationale underlying the agency's decision not to begin the formal regulatory process, Rear Admiral Robert T. Nelson explained the Coast Guard's position on propeller guards as follows:

> The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

App. 40. Rear Admiral Nelson added, however, that the agency would "continue to collect and analyze accident data for changes and trends . . . [and] review and retain any information made available regarding development and testing of new propeller guarding devices . . ." App. 40-41.

At no point did Rear Admiral Nelson's letter – or anything else issued by the Coast Guard – indicate that the agency had concluded that propeller guards are dangerous. In addition, although the agency was well aware of ongoing lawsuits filed by a number of propeller-strike victims, *see* Report of the Propeller Guard Subcommittee of the National Boating Safety

Advisory Council, November 7, 1989, at 4, Rear Admiral Nelson's letter contains no indication that the agency ever intended to preempt common law claims relating to a manufacturer's failure to install propeller guards in its boats.

The Coast Guard's 1990 decision not to begin the process of developing a regulation to require propeller guards was not the product of any formal rulemaking proceeding and did not result in any regulatory action. Thus, there was no attempt to conform to the notice-and-comment rulemaking requirements of the Administrative Procedure Act. *See* 5 U.S.C. § 553 (1994). To date, there is still no federal regulation with respect to propeller guards, and their use is neither mandated nor prohibited by federal law.[1]

---

[1] The Coast Guard has, however, continued to study various policy proposals to prevent propeller-related injuries. In 1995, for example, the Coast Guard issued an Advance Notice of Proposed Rulemaking ("ANPRM") requesting comment on "the public's present feelings about the use of propeller guards on these vessels," a request occasioned by a serious accident involving a houseboat. *See* 60 Fed. Reg. 25,191 (1995). In 1996, the Coast Guard issued another ANPRM "to gather current, specific, and accurate information about the injuries involving propeller strikes and rented boats." 61 Fed. Reg. 12,123 (1996). And, in 1997, the Coast Guard sought "comments on the effectiveness and interventions which have been suggested for reducing the number of recreational boating accidents involving rented power boats in which individuals are injured by the propeller." 62 Fed. Reg. 22,991 (1997). Because it received few responses to that request, the Coast Guard extended the period for comments. *See* 62 Fed. Reg. 44,507 (1997). To date, the rulemaking is still open, and the Coast Guard is still considering what action, if any, to take with regard to propeller guards. *See* 64 Fed. Reg. 21,566 (1999).



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Record Type: Record

To: Lauren J. Vestewig/OPD/EOP@EOP

cc:
Subject: Important Preemption Information for Your Review

Hello Lauren,

Can you please pass this message on to Mr. Lefkowitz, from John? Have a great weekend. - Vanessa

Jay:

Please give me a call about this if you have a chance, it's quite important -- as you can see from the attachment. I've already spoken to Tim Flanigan about it. <<Boat Safety-Preemption.pdf>>

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Supreme Court, U.S.
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No. 01-706

In the Supreme Court of the United States

REX R. SPRIETSMA, ADMINISTRATOR OF THE ESTATE OF JEANNE SPRIETSMA, DECEASED, PETITIONER

v.

MERCURY MARINE, A DIVISION OF BRUNSWICK CORPORATION, RESPONDENT.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

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capability of boats equipped with such motors. *Id.* § 183.53 (boats must be "capable of completing a 90° turn without the driver losing control of the boat or reducing the throttle setting" at "maximum throttle"). The Coast Guard also has authority to notify manufacturers of product defects, and manufacturers must certify that their products comply with all federal design standards. *Id.* §§ 179.11, 181.7, 181.15.

1. The Coast Guard's study of propeller guards

In 1988, the Coast Guard considered whether to require manufacturers to install propeller guards on their boat motors. As required by 46 U.S.C. § 4302(c)(4), the Coast Guard consulted with the NBSAC and directed it to:

- "Review the available data on the prevention of propeller-strike accidents and the Coast Guard study of various methods of shrouding propellers to prevent contact with a person in the water."
- "Assess the arguments for and against some form of mechanical guard to protect against propeller strikes reflecting the positions of state boating law administrators, the recreational boating industry, and the boating public."

NBSAC, *Report of the Propeller Guard Subcommittee* (Nov. 7, 1989) ("Report"), Appendix A (Ill. App. A29). The NBSAC in turn appointed a subcommittee to "review and assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers" and the "[f]easibility of some form of mechanical guard or other action to prevent such contact." *Id.* at A2.

2. The Subcommittee's makeup and methodology

The Subcommittee comprised representatives of every interested constituency—state boat safety officials, industry representatives, members of recreational boating groups, and members of the general public. Ill. App. A55. Throughout its

study, it invited oral and written participation from others by publishing notices of its proceedings in the Federal Register.[2]

Over an 18-month period, the Subcommittee heard from a wide range of interested parties—designers of propeller guards, accident victims and their attorneys, marine engineers, naval architects, academics, industry representatives, and medical doctors. It conducted a "comprehensive" review of the "documentation, materials and information" about propeller-related injuries, including videos, journal articles, patents, on-water test data, and statistics pertaining to the causes of boating accidents. It held public meetings across the country, and it conducted its own on-water tests, where members were given opportunity to drive boats both equipped and unequipped with propeller guards. Ill. App. A2-A5, A34-A39, A41-A43.

3. The Subcommittee's study of propeller guards

The Subcommittee carefully studied each of the "three basic configurations of 'propeller guards'": (1) ring-type guards, (2) screen- or cage-type guards, and (3) nozzle-type guards. Ill. App. A13-A14. Observing that a propeller guard requirement "would necessarily be predicated on the feasibility of guards and establish prima facie manufacturer liability in having failed to provide them," it stated that "[f]easibility" was an "important questio[n] before the Subcommittee." *Id.* at A6.

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[2] See, *e.g.*, 53 Fed. Reg. 33210 (Aug. 30, 1988) (public notice of Propeller Guard Subcommittee meeting on Sept. 22-23, 1988, stating that the meeting "is open to the public" and inviting "oral" or "written statement[s]"); *id.* at 43070 (Oct. 25, 1988) (same for Subcommittee meeting on Nov. 14, 1988); *id.* at 43069 (same for NBSAC meeting on Nov. 15-16, 1988); 54 Fed. Reg. 15068 (Apr. 14, 1989) (same for Subcommittee meeting on May 13, 1989 to "[d]iscuss the pros and cons of Propeller Guards"); *id.* at 15066 (same for NBSAC meeting on May 11-12, 1989); *id.* at 42138 (Oct. 13, 1989) (same for Subcommittee meeting on Nov. 4, 1989); *ibid.* (same for NBSAC meeting on Nov. 6-7, 1989).

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Ring-type guards consist of a circular band surrounding the motor's propeller to prevent contact from the propeller's side. Ill. App. A15. However, the Subcommittee found that "the ring-type guard creates severe steering and trim effects which cause serious safety and control problems." *Id.* at A17. In on-water tests, for example, "the boat could not be brought out of a turn at high speed unless power was quickly reduced. In the hands of an inexperienced or negligent operator, a serious accident could result." *Ibid.* Moreover, ring-type guards create "a new hazard"—"an arm, leg, etc., may be caught by the bars or ring and held against the rotating propeller." *Id.* at A21-A22.

Cage- or mask-type guards consist of "a screen surrounding the propeller like a fan cage or catcher's mask, constructed of wire mesh, bars or wires." Ill. App. A14. The Subcommittee, however, found that such guards are only feasible for use on slow-moving "rescue boats" or "amusement park bumper boats, which operate at very slow speeds (approximately 2 miles an hour or less) where problems of drag, engine efficiency, structural integrity and boat handling are negligible," and where "a blow to a person in the water" has "minimal effects." "No evidence indicated that this solution had any validity for normal use of pleasure boats at normal planing speeds." *Id.* at A16.

Nozzle-type guards surround the propeller with "a tunnel or tube" and are designed "to increase its efficiency by producing greater power at low speeds, such as for tug boats and large ships." But "[n]o example of any nozzle device suitable for recreational boat use at normal operating speeds was brought to the attention of the Subcommittee." Ill. App. A14, A16.

4. The Subcommittee's conclusions

Based on the available data, the Subcommittee conducted a cost-benefit analysis of propeller guards, explaining that any "technologically feasible safety featur[e]" must "minimize the consequences of inexperienced or negligent operation, without at the same time (a) creating some other hazard, (b) materially

interfering with normal operations, or (c) being at economic costs disproportionate to the particular risk." Ill. App. A21. The Subcommittee flatly rejected the "assert[ion] that propeller guard technology and/or availability meets the foregoing criteria." *Ibid.* Rather, it found "that propeller guards could create other safety concerns, including: (1) adversely affecting boat operations at speeds greater than 10 miles per hour; (2) increasing the chance of blunt force contact to a person in the water; and (3) creating a new hazard in that an arm or leg could be caught between the guard and the propeller blades." Pet. App. 3.

The Subcommittee thus concluded that "propeller guarding at best could have only a negligible impact on improving boating safety," and that "[o]perators of a 'guard-equipped' boat can be expected to have a false sense of security when approaching persons in the water at slow speeds, with a very real risk of impacting and/or entrapping a body appendage." Ill. App. A22, A24. As stated in the Report's conclusions:

> The development and use of devices such as "propeller guards" can * * * be counter-productive and can create new hazards of equal or greater consequence. * * * [T]here are no indications that there is a generic or universal solution currently available or foreseeable in the future. The boating public must not be misled into thinking there is a "safe" device which would eliminate or significantly reduce such injuries or fatalities.

Id. at A24-A25. The Subcommittee accordingly recommended that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards," but rather should focus on efforts such as "awareness campaigns" regarding "hazards associated with careless or negligent boat operation." *Id.* at A25. There were no "minority or dissenting statements." *Id.* at A2.

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5. The Coast Guard's adoption of the Subcommittee's Report and Recommendations

The 21-member NBSAC and the Coast Guard *unanimously* adopted all of the Subcommittee's recommendations. Ill. App. A74; *id.* at A274 ("All of the report's recommendations are accepted" and "will be implemented"). In conformity with the Council's recommendation that the "U.S. Coast Guard should take no regulatory action to require propeller guards," the Coast Guard expressly determined that "[a]vailable propeller guard accident data *do not support imposition of a regulation requiring propeller guards.*" *Id.* at A25, A274 (emphasis added). In addition to the accident data, the Coast Guard cited "economic" and "feasib[ility]" concerns as grounds for rejecting a propeller guard requirement. *Ibid.*

The Coast Guard noted that it would continue to "review and retain any information * * * regarding development and testing of new propeller guarding devices." Ill. App. A274. However, despite several instances in which the Coast Guard has invited the public to submit information regarding the feasibility of fitting *other* types of boats with propeller guards (*e.g.*, houseboats), it has never altered its conclusions regarding high-speed recreational boats.[3] Nor has it issued any regulation requiring any boat to be equipped with such a guard or permitting the States to adopt such a requirement. To the contrary, in one recent notice of proposed rulemaking, it reiterated that "[u]nder

[3] In 1995, the Coast Guard issued a Notice and Request for Comments on "the public's present feelings about the use of propeller guards" on "houseboats." 60 Fed. Reg. 25191 (May 11, 1995). In 1996, it issued an Advance Notice of Proposed Rulemaking "to gather current, specific, and accurate information about the injuries involving propeller strikes and rented boats." 61 Fed. Reg. 13123 (Mar. 26, 1996); see also 62 Fed. Reg. 22991 (Apr. 28, 1997) (soliciting comments on the effectiveness of specific devices that have been suggested for reducing the number of accidents involving propellers of rented boats). The Coast Guard has received "very general" comments in response to its 1995 notice. 65 Fed. Reg. 23144, 23148 (Apr. 24, 2000).

current Federal statutes (46 U.S.C. 4306), the States *do not have the authority to establish carriage requirements for associated equipment, such as a mechanical means for preventing propeller strikes, on vessels operated on waters where both the Coast Guard and the State have jurisdiction.*" 61 Fed. Reg. 13123, 13125 (Mar. 26, 1996) (emphasis added). The Coast Guard has held this view since the Act's adoption. See 36 *id.* 15764 (Aug. 18, 1971); 38 *id.* 6914 (Mar. 14, 1973).

D. The Proceedings Below

The complaint alleges that on July 10, 1995, while boating in Tennessee, Jeanne Sprietsma "was caused to fall from the boat" in which she was riding as a passenger. Ill. App. A278. Ms. Sprietsma, a 41-year-old woman, allegedly was struck by the boat motor's propeller and sustained injuries resulting in death. The engine was a 115-horsepower outboard motor manufactured by Mercury Marine in 1988, equipped with a traditional propeller. *Id.* at A289-A290.

The accident occurred in the Mitchell Creek portion of Dale Hollow Lake, a major interstate body of water that spans the Kentucky-Tennessee border. Ill. App. A278. The lake was created by a federal dam built by the U.S. Army Corps of Engineers pursuant to the Flood Control Act of 1938 and the Rivers and Harbors Act of 1946. It covers some 935 square miles and has more than 600 miles of shoreline, as well as seven federal recreation areas, 14 commercial marinas, and dozens of lodges, motels, and campgrounds. See generally http://www.lrn.usace.army.mil/op/DAL/rec/ (visited Dec. 4, 2001).

Rex Sprietsma later filed this suit against Mercury Marine and Ebbtide Corporation, the boat's manufacturer. Asserting theories of strict liability and negligence, he alleged that the boat's motor was defectively designed because it lacked a "propeller guard" that would have prevented Ms. Sprietsma's death. Ill. App. A277-A285. He also alleged that the boat, a 1988 Ebbtide ski boat, was defective because it "[a]llowed for

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open bow seating to the very front edge of the bow," lacked "sufficient back support in the seating" or "any substantial form of rail or guard to obstruct a fall out of the boat," and failed to warn of these risks. *Id.* at A286.

Mercury Marine moved to dismiss the complaint, contending that the claims against it were preempted by the BSA. The Cook County Circuit Court granted the motion. Noting that the Coast Guard's "consideration of the propeller guard regulation or the lack thereof was substantial and within the guidelines set forth by [the BSA]," it held that the Coast Guard's decision not to require propeller guards impliedly preempted tort claims that would impose such a requirement. Ill. App. A292-A293, A295. The Appellate Court unanimously affirmed, observing that "every federal court to have considered the issue" has held that the BSA preempts propeller guard claims. Pet. App. 38.

In a detailed opinion that carefully canvassed governing Supreme Court precedents, the Illinois Supreme Court affirmed the lower courts' decisions. The court began by noting that the BSA, which applies to recreational boats operated "on waters subject to the jurisdiction of the United States" (46 U.S.C. § 4301(a)), is predicated on the "federal maritime jurisdiction." Pet. App. 5-6. Because propeller guard claims "bear upon an area historically regulated by the federal government," the court stated, "'an assumption of nonpre-emption is not triggered.'" *Ibid.* (quoting *Locke*, 529 U.S. at 108).

The court went on to hold that petitioner's claims were impliedly preempted under a long line of this Court's decisions, including *Geier*, *Locke*, and *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978). Pet. App. 12-17. Quoting this Court's holding in numerous cases that "'a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate,'" the court concluded (Pet. App. 13, 15-16):

> [T]he Coast Guard's failure to promulgate a propeller guard requirement here equates to a ruling that no such regulation is appropriate pursuant to the policy of the FBSA. The Coast Guard made an informed decision that no regulatory action should be taken to require propeller guards after studying the findings and recommendations of the Advisory Council and the Propeller Guard Subcommittee. A damage award would, in effect, create a propeller guard requirement, thus frustrating the objectives of Congress in promulgating the FBSA.

The court was also persuaded by the reasoning of *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598, 615 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001), which held that "'where the Coast Guard has been presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a requirement, that decision takes on the character of a regulation and the FBSA's objective of national uniformity mandates that state law not provide a result different than the Coast Guard's.'" Pet. App. 18-19.[4]

REASONS FOR DENYING THE PETITION

The petition satisfies none of this Court's criteria for a grant of certiorari. Its central theme is that this Court should take its "first meaningful opportunity" (Pet. 11) to address the question presented in *Lewis* v. *Brunswick Corp.*, No. 97-288, which settled before decision. But the issues raised in *Lewis* (and in this case) have been resolved by intervening decisions of this Court, including *Geier* and *Locke*. The court below carefully applied those precedents in concluding that the Coast Guard's considered decision regarding propeller guards has preemptive force, and nine other federal courts—including the only other post-*Geier* case—have unanimously reached the same result.

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[4] The court further held that petitioner had waived his various arguments concerning the date of manufacture of the motor in question and accordingly did not address them. Pet. App. 19.

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See *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001). Thus, the petition presents nothing more than a disagreement over the application of this Court's recent decisions to the facts of this particular case, which is not worthy of a grant of certiorari. See Rule 10. There will be other opportunities to review the issue should a conflict arise in the future.

Moreover, several other prudential considerations warrant a denial of certiorari. The decision below is of no practical importance because petitioner could not recover under Illinois law even if his tort claim were allowed to go forward. In addition, this case arose in state court and part of the proceeding—petitioner's claim against Ebbtide Corporation, the boat's manufacturer—is still pending. It thus appears that the decision below is not final as to all parties. Finally, the decision below is fully consistent with this Court's preemption rulings, with the federal interest in uniform design requirements for boats in interstate commerce, and with the public interest in boat safety. There is no ground for further review.

I. THE PETITION FAILS TO SATISFY ANY OF THE CRITERIA FOR A GRANT OF CERTIORARI.

A. This Court's Recent Decisions Have Resolved The Legal Issues Left Undecided In *Lewis* v. *Brunswick Corporation*.

Petitioner's principal argument for certiorari is the claim that "[t]his case involves the same issue raised by *Lewis* v. *Brunswick Corp.*, No. 97-288," which settled before a decision on the merits. Pet. i. Because this Court granted review in *Lewis*, the argument goes, it should grant review here as well.

Lewis presented two related questions: first, whether "it is constitutionally permissible to imply the federal pre-emption of state common law claims" when a statute contains both express preemption and savings clauses; and second, whether "torts of

omission [can be] impliedly preempted" under a statute that contains a savings clause. Pet. i in No. 97-288.

This Court answered both of these questions in *Geier*. As to whether implied preemption principles apply to laws containing both express preemption and savings clauses, *Geier* expressly held that such provisions "do[] *not* bar the ordinary working of conflict pre-emption principles." 529 U.S. at 869. And as to whether a "tort of omission" can be impliedly pre-empted in the face of a savings clause, *Geier* itself involved such a tort—a "failure to install" claim—yet the Court held that allowing a jury to require auto makers to install airbags would frustrate the purpose of a federal decision *not* to impose such a requirement. *Id.* at 881. That a case involves a "failure to install" claim does not alter this Court's analysis: the inquiry remains whether the claim "actually conflicts" with the federal regulatory scheme, either by making it "'impossible' for private parties to comply with both state and federal law," or by "frustrat[ing] the accomplishment of a federal objective." *Id.* at 873.

Petitioner attempts to discount *Geier* as "narrowly confined to the particular regulation at issue." Pet. 24. In the court below, however, he argued vehemently that the statutory provisions at issue in *Geier* and those at issue here were "nearly identical." Pet. 5 in Ill. No. 89492. Moreover, he sought review in the Illinois Supreme Court on the basis of this Court's pending decision in *Geier* (*id.* at 4-5, 17), and most of his merits brief below was devoted to arguments concerning *Geier*.

The court below faithfully applied *Geier* in holding that a jury verdict imposing a duty to install propeller guards would "present an obstacle to the accomplishment and execution of the purposes and objectives Congress sought in enacting the FBSA." Pet. App. 16. Petitioner's disagreement with the lower court's application of these "ordinary pre-emption principles, grounded in longstanding precedent" (*Geier*, 529 U.S. at 874), does not warrant a grant of certiorari.

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Any remaining issue presented in *Lewis* was disposed of in *Locke*, which addressed the preemptive effect of Coast Guard decisions concerning the design and construction of maritime vessels. Specifically, petitioner complains that the court below entered uncharted waters in holding that a federal decision not to regulate can have preemptive effect in the "absence of any federal regulation." Pet. 20. But *Locke* unanimously reaffirmed that there are "instances in which state regulation of maritime commerce is inappropriate even absent the exercise of federal authority," citing this Court's repeated holdings that "'where failure of * * * federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such a regulation." 529 U.S. at 99, 110 (citations omitted). As the Court in *Locke* stated in reference to the Coast Guard: "The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment." *Id.* at 111.

As with *Geier*, the court below carefully analyzed *Locke* in rendering its opinion. It explained that "'the relevant inquiry for * * * pre-emption'" is "'whether the Coast Guard has promulgated its own requirement on the subject or has decided that no such requirement should be imposed at all'" and concluded that the Coast Guard's "informed decision that no regulatory action should be taken to require propeller guards" "equates to a ruling that no such regulation is appropriate pursuant to the policy of the FBSA." Pet. App. 15-16 (quoting *Locke*, 529 U.S. at 110). Here again, petitioner dislikes this application of settled precedent, but there is no reason to review an application of principles that this Court laid down just two Terms ago—especially under a statutory scheme that petitioner concedes is "nearly identical" to that in *Geier*. If a conflict arises in the future, this Court can address the issue at that time.

B. The Lower Courts Are Not Divided Over The Issue Of BSA Preemption Of Propeller Guard Claims.

Petitioner next argues that review is necessary to resolve a "direct conflict" among the lower courts. Pet. 3. He concedes (at 11) that "a host" of courts have held that the BSA preempts propeller guard claims—indeed, the decision below accords with that of *every* federal court and several state courts to address the issue[5]—but asserts that the decision below conflicts with one 1994 state court decision, *Moore* v. *Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994).

Contrary to petitioner's claim, there is no genuine conflict. To begin with, the court in *Moore*, like the lower court here, rejected the contention that the BSA expressly preempts propeller guard claims, 889 S.W.2d at 249-251, and petitioner himself notes that the decisions are in agreement on that score. Pet. 13-14.

As for implied preemption, the reasoning of *Moore* has been overtaken by that of *Geier* and this Court's other recent preemption rulings. *Moore* held that the presence of an express preemption clause precluded a finding of implied preemption. 889 S.W.2d at 251 n.10. But that view was decisively rejected in *Geier*, which found conflict preemption in the face of a similar provision. 529 U.S. at 869 (an express preemption provision "does *not* bar the ordinary working of conflict preemption principles"); see also *Freightliner Corp.* v. *Myrick*,

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[5] See *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000); *Lewis* v. *Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997); *Carstensen* v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir. 1995); *Moss* v. *Outboard Marine Corp.*, 915 F. Supp. 183 (E.D. Cal. 1996); *Davis* v. *Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993); *Shield* v. *Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991); *Parker* v. *Outboard Marine Corp.*, No. J90-0011(L) slip. op. at 2 (S.D. Miss. Feb. 28, 1991); *Mowery* v. *Mercury Marine*, 773 F. Supp. 1012 (N.D. Ohio 1991); *Ryan* v. *Brunswick Corp.*, 557 N.W.2d 541 (Mich. 1997); *Farner* v. *Brunswick Corp.*, 607 N.E.2d 562 (Ill. App. 1992).

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514 U.S. 280, 287 (1995) (rejecting the Eleventh Circuit's view "that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute").[6]

Similarly, the *Moore* court was of the view that the BSA's savings clause indicated Congress's intent to preserve even common law claims that were in "tension" with federal policy. 889 S.W.2d at 252. But *Geier* rejected the view that a savings clause may be interpreted "to 'save' all state-law tort actions, regardless of their potential threat to the objectives of federal safety standards promulgated under that Act." 529 U.S. at 870.

Likewise, *Moore* reasoned that "damage awards" are "not equivalent to * * * positive enactments," since "a manufacturer who incurs tort liability for failing to install propeller guards has a choice not available to the regulated manufacturer—installing guards on future boats or taking no action and bearing the liability as a cost of doing business." 889 S.W.2d at 251. *Geier*, by contrast, held that "rules of law that judges and juries create or apply" in tort suits may remove a manufacturing choice that federal regulators intended to preserve. 529 U.S. at 871.

Finally, *Moore* applied a presumption against preemption, reasoning that the lawsuit implicated the safety of boats "on [Texas's] waterways." 889 S.W.2d at 251. *Locke*, however, made clear that no such presumption applies to the regulation of "maritime commerce" (529 U.S. at 108); the accident here occurred on an interstate body of navigable water (see *supra* p.11); and Congress relied upon its "historic maritime jurisdiction" in enacting the BSA. S. Rep. at 17; see *id.* at 20 (citing "the long history of preemption in maritime safety matters" and "the need for uniformity applicable to vessels moving in

[6] Indeed, the *Moore* court cited the Eleventh Circuit's decision in *Myrick* for the proposition that the presence of an express preemption clause foreclosed any implied preemption analysis. See 889 S.W.2d at 251 n.10. As shown in the text, however, this Court expressly repudiated that aspect of the Eleventh Circuit's reasoning when the case came before it on certiorari.

interstate commerce"); see also *Geier*, 529 U.S. at 873 (declining to apply an "unusual, 'special burden' against pre-emption").

In sum, at every point in its reasoning, *Moore* adopted legal conclusions that have since been rejected by this Court's decisions. There is no reason to believe that the Texas Supreme Court would reach the same result today—especially when three justices dissented in *Moore* for reasons that this Court validated in *Geier* and *Locke*. See 889 S.W.2d at 252-257; *Worthy* v. *Collagen Corp.*, 967 S.W.2d 360, 367 (Tex. 1998) ("We are also bound to follow the decisions of the United States Supreme Court, the final authority on federal preemption issues"). Thus, *Moore* does not give rise to any conflict with the decision below.

Apart from the decision below, the only other post-*Geier* case to address BSA preemption of propeller guard claims is *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000). Applying *Geier* and *Locke*, the court there held that allowing such claims to proceed "would present an obstacle to and frustrate the flexible approach towards propeller guards adopted by the Coast Guard." *Id.* at 614.

Like the court below, the Fifth Circuit in *Lady* rejected the argument that claims implicating "maritime commerce" are entitled to a "presumption against preemption." 228 F.3d at 607. Like the court below, it rejected the view that the BSA "expressly preempts" propeller guard claims. *Id* at 611. Like the court below, it rejected the argument of the Solicitor General in *Lewis*. *Id.* at 615 n.23. And like the court below, it rejected the contention that propeller guard claims are not preempted "as long as the Coast Guard has not promulgated a regulation that conflicts with the common-law requirement." *Id.* at 611-612. "Rather," the court held, "where the Coast Guard has been presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a requirement, that decision takes on the character of a regulation

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and the FBSA's objective of national uniformity mandates that state law not provide a result different than the Coast Guard's." *Id.* at 615. *Lady* is thus on all fours with the decision below.

Without dissent, this Court denied the petition for certiorari in *Lady*—which was an *almost verbatim* copy of the petition filed here, raising identical arguments. 121 S. Ct. 1402 (2001). The petitioner's counsel there (also counsel here) argued that there was a conflict between the Fifth Circuit's decision and *Moore*, and that review was needed "to finish the job started in *Lewis*." Pet. 15 in No. 00-1031. OMC responded that *Geier* resolved the question presented in *Lewis*, and that the Solicitor General's arguments in *Lewis* and the reasoning of *Moore* have been rejected by recent decisions. The only development since *Lady* is the decision below. Thus, every post-*Geier* decision has held that the BSA impliedly preempts propeller guard claims.[7]

C. The Decision Below Is Fully Consistent With The Decisions Of This Court.

Faced with the absence of any genuine conflict among the lower courts, petitioner resorts to the assertion that the decision below conflicts with this Court's precedents. Pet. 15-25. He

[7] Petitioner tries to divert attention from the denial of certiorari in *Lady* by noting that OMC filed a Chapter 11 bankruptcy petition shortly after Lady sought certiorari. Pet. 11-12. In his reply brief in support of certiorari (at 7-9), however, Lady (represented by petitioner's counsel here) vigorously argued that "OMC's bankruptcy is not a reason to deny the writ," since he could obtain relief from the stay and potentially recover a substantial amount on remand if he prevailed. That assertion was plainly correct. The fact that OMC was in reorganization proceedings does not mean that Lady would have been unable to pursue his tort claim. Bankruptcy courts routinely lift the automatic stay to permit a determination of the validity of a claim in other litigation, particularly where necessary to avoid loss of the entire claim. See 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][a] (15th ed. rev. 2001); *Foust* v. *Munson S.S. Lines*, 299 U.S. 77 (1936) (district court abused its discretion in staying wrongful death suit against company involved in reorganization proceeding). A bankruptcy court would undoubtedly lift the stay to permit briefing and argument of a case in which this Court granted certiorari.

makes three such claims—that the decision is inconsistent with *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995); that it misapplied *Locke* in declining to apply a "presumption against preemption"; and that it failed to give sufficient weight to the Solicitor General's brief in *Lewis*. None of these arguments has merit.

Myrick involved a federal safety standard prescribing short stopping distances for semitrailers. The Ninth Circuit invalidated the standard on the ground that the National Highway Traffic Safety Administration ("NHTSA") had not considered the failure rate of anti-lock brake systems ("ABS"), which were needed to comply with the standard. 514 U.S. at 284-285. NHTSA thereafter amended the standard so that the distance and lock-up requirements no longer applied to semitrailers. *Id.* at 285.

The plaintiffs in *Myrick*, who were injured in accidents with trucks lacking ABS, claimed that "the absence of ABS was a negligent design that rendered the vehicles defective." 514 U.S. at 283. The defendants replied that the absence of any federal standard governing truck stopping distances evidenced an intent to leave the issue unregulated, thus impliedly preempting the plaintiffs' claims. This Court rejected that argument, however, explaining that "the lack of federal regulation *did not result from an affirmative decision of agency officials to refrain from regulating air brakes*." *Id.* at 286 (emphasis added).

In contrast to *Myrick*, this *is* a case where the absence of a federal regulation resulted from the agency's "affirmative decision to refrain" from regulating. As both the court below and the Fifth Circuit held: "'the lack of a regulation mandating propeller guards on recreational boats came after the Coast Guard studied the matter and affirmatively determined that requiring propeller guards was substantively inappropriate.'" Pet. App. 12 (quoting *Lady*, 228 F.3d at 612).

Moreover, the plaintiffs in *Myrick* merely sought to impose a state-law duty that was effectively identical to the short-lived

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federal regulation. NHTSA wanted to regulate truck stopping distances; it had specifically endorsed ABS; and it had imposed a rule that would have required trucks to install ABS, only to have a court declare it invalid. Here, by contrast, the Coast Guard affirmatively determined that propeller guards should *not* be required, and petitioner advocates a duty directly contrary to this judgment. Thus, *Myrick* is wholly inapposite—as the lower courts have consistently recognized. Pet. App. 11-12; *Lady*, 228 F.3d at 612; *Lewis*, 107 F.3d at 1503-1504.

Petitioner next argues that the court below, in not applying a presumption against preemption, "misrea[d] this Court's recent decision in *Locke*." Pet. 21. He claims that *Locke* is irrelevant because this case involves "*recreational* vessels" and "has nothing to do with maritime commerce," because the accident here took place in "state waters," and because *Locke* involved "international" issues and "ocean-going oil tankers." *Id.* at 20-21. These arguments are without foundation.

First, the fact that this case involves *recreational* boats does not mean it does not implicate *interstate commerce* and *federal waterways*. Pleasure boating is a multi-billion-dollar industry, manufacturers make pleasure boats for national markets, and such boats routinely cross state lines (as petitioner's boat did here). As Congress explained in adopting the Act at issue: federal preemption in this context "conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce." S. Rep. at 20; accord *id.* at 14 (citing "[t]he need for uniformity in standards if interstate commerce is not to be unduly impeded"). Thus, Congress fully understood that manufacturing standards for recreational boats directly affect interstate commerce. See also *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 675 (1982) ("[a] collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce").

Nor did this case arise in "state waters." As explained above (at 11), the accident here occurred in the Dale Hollow chain of lakes—a navigable and interstate body of water that crosses the Tennessee-Kentucky border and that was created by federal authorities acting under federal legislation. The "jurisdictional applicability" of the BSA extends to every recreational vessel "within the historic federal maritime jurisdiction—the navigable waters of the United States, [and] certain internal waters which are in the exclusive or concurrent jurisdiction of the United States." S. Rep. at 17. In sum, petitioner cannot plausibly claim that this accident occurred on state waters that are not "subject to the jurisdiction of the United States." 46 U.S.C. § 4301(a).

It makes no difference that *Locke* involved "international" concerns and "ocean-going oil tankers." Congress understood the BSA to be as closely related to maritime commerce as the Act at issue in *Locke*; the BSA applies as fully to boats on land-locked lakes as to those "on the high seas" (§ 4301(a)); and the federal government's paramount authority over maritime commerce does not depend on its being foreign or international in scope. *Foremost*, 457 U.S. at 674-677. As the Fifth Circuit explained in *Lady*: "any distinction between recreational vessels and tankers is of little significance, as the national interest in vessels operating on navigable waters of the United States encompasses both." 228 F.3d at 607.[8]

Moreover, even if petitioner's arguments regarding *Myrick* and *Locke* were correct (and they are not), they would represent nothing more than a quarrel over the Illinois Supreme Court's application of this Court's recent decisions to the particular

[8] It is well settled that "'[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *Fidelity Fed. Sav. & Loan* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)).

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facts of this case. Petitioner does not deny that a federal decision not to regulate can have preemptive force when it is based on an affirmative determination that the area is best left unregulated; he simply disagrees that this is such a case. Nor does he dispute that a "presumption against preemption" does not apply to regulation of maritime commerce; he simply disagrees that this case involves such commerce. These disagreements do not justify this Court's review. See Rule 10 ("misapplication of a properly stated rule of law" is an insufficient basis for certiorari).

Finally, petitioner says that the decision below disregarded precedent in not deferring to the Solicitor General's brief in *Lewis*, which argued that the BSA does not preempt propeller guard claims. Pet. 23-25. But as the court below explained:

> [A]rguments made in the *Lewis* brief have been rejected by the Supreme Court in *Geier*. For example, the Solicitor General in the *Lewis* brief argued that the existence of the savings clause (section 4311(g)) "makes clear Congress's explicit intent to preserve tort liability." But the *Geier* Court found implied preemption in the presence of the savings clause and rejected the argument that this clause "bar[red] the ordinary working of conflict pre-emption principles."

Pet. App. 18; see *Lady*, 228 F.3d at 615 & n.23 (the Solicitor General's views in *Lewis* were not "sufficient to overcome the reasons supporting the application of implied preemption").

This is but one of the Solicitor General's arguments in *Lewis* that was rejected in *Geier*. For example, the *Lewis* brief states (at 27) that "a common law claim would be permitted even if a regulation were in existence unless that claim propounded a standard of conduct directly contrary to the federal rule." But *Geier* explained that the "full purposes" of federal law could be frustrated even absent such a direct conflict. 529 U.S. at 873.

Similarly, the brief (at 22) made much of the fact that the BSA's preemption provision did not reference common law claims, stating that "[t]he regulatory effect of a common law judgment is not as direct as that of positive enactments or prescriptions." But as *Geier* observed in analyzing a similar provision: "rules of law that judges and juries create or apply in [state tort] suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts." 529 U.S. at 871.

And the brief in *Lewis* argued (at 28) that "the absence of a federal regulation does not create a preemptive effect on state common law claims when the federal scheme is not intended to occupy the complete field of motorboat safety." But while the Court in *Geier* made no finding that the Act there "preempted the field," it readily concluded that the government's refusal to require airbags was a considered decision with preemptive force. See 529 U.S. at 874-883.

Furthermore, the Coast Guard did not sign the Solicitor General's brief in *Lewis*—in contrast to its practice in other preemption cases involving its jurisdiction. *E.g.*, U.S. Br. in *Locke* (No. 98-1701). And that brief acknowledged the Coast Guard's "longstanding interpretation" that the Act preempts state safety requirements "regardless of whether a federal standard is in existence." *Lewis* Br. 15-17. See 61 Fed. Reg. 13123, 13125 (Mar. 26, 1996) ("the States do not have the authority to establish carriage requirements for associated equipment, such as a mechanical means for preventing propeller strikes, on vessels operated on waters where both the Coast Guard and the State have jurisdiction"); 36 *id.* 15764 (Aug. 18, 1971); 38 *id.* 6914 (Mar. 14, 1973). Thus, it is not the case that the views set forth in the *Lewis* brief are "the United States' only articulated view on the matter." Pet. 10. But in any event, those views have been rejected by subsequent decisions of this Court.

The holding below is consistent not only with *Myrick*, *Locke*, and *Geier*, but also with a long line of this Court's precedents.

QUESTION PRESENTED

Whether the Illinois Supreme Court correctly applied this Court's preemption precedents, including *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), and *United States v. Locke*, 11S. 89 (2000), in holding that the Federal Boat Safety Act preempts common law claims asserting that recreational boat motors must be equipped with "propeller guards," where the Coast Guard expressly rejected such a requirement after extensive administrative proceedings.

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As the court below recognized (Pet. App. 13-15), it is well settled that a federal decision not to regulate has preemptive force where based on a considered study of the regulatory question. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978); *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947); *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983); *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 151-152 (1989); *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). As the Court stated in the leading case in this area—involving the Coast Guard's authority—the "relevant inquiry" is "whether the Secretary has either promulgated his own [requirement] * * * or has decided that no such requirement should be imposed at all." *Ray*, 435 U.S. at 171-172. Accord *Locke*, 529 U.S. at 104, 107 (reaffirming *Ray*'s "essential framework," "analytic structure," and "holding"). There is no reason to review the Illinois Supreme Court's ruling that this is such a case.

It is hard to imagine a more compelling case for application of the principle recognized in these decisions. Pursuant to statutorily prescribed procedures, the Coast Guard conducted a painstaking, 18-month study of propeller guards. Its decision not to require them reflected not indifference, but a thorough analysis of the regulatory issues and a conclusion that they were technologically infeasible, economically unjustified, and likely to *increase* safety hazards. Ill. App. A24. As in *Geier*, the Coast Guard focused on a single item of equipment and made a "policy judgment that safety would best be promoted" if that item is *not* required. 529 U.S. at 881. And as in *Geier*, to allow "different juries in different States [to] reach different decisions" "would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives" and override federal safety policies that were "deliberately imposed." *Id.* at 869, 871, 872. See also *id.* at 884 (rejecting the argument that "a formal agency statement of pre-emptive intent [i]s a prerequisite to concluding that a conflict

exists"); *Ray*, 435 U.S. at 178 (holding that the Coast Guard's "failure to promulgate a ban" on large oil tankers took on "the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute").

II. THIS CASE IS NOT A PROPER VEHICLE TO RESOLVE THE QUESTION PRESENTED.

Quite apart from the petition's failure to satisfy the criteria of Rule 10, review is also unwarranted for various prudential reasons. To begin with, a decision here would be of no practical importance because petitioner could not recover under Illinois tort law even if his claim were allowed to proceed. In Illinois, a party alleging a design defect must satisfy § 402A of the RESTATEMENT (SECOND) OF TORTS (1965), which imposes strict liability on makers of "unreasonably dangerous" products. See *Lamkin* v. *Towner*, 563 N.E.2d 449 (Ill. 1990). Time and again, Illinois courts have held that a product is not "unreasonably dangerous" if its risks "derive merely from those inherent properties * * * which are obvious to all who come in contact with [it]." *Hunt* v. *Blasius*, 384 N.E.2d 368, 372 (Ill. 1978).[9]

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[9] See *Miller* v. *Dvornik*, 501 N.E.2d 160, 164 (Ill. App. 1986) (holding that a motorcycle is not defective for lack of crash bars and stating that "[i]t is well settled that injuries are not compensable if they are caused by inherent propensities of a product which are obvious to all who come into contact with them"); *Scoby* v. *Vulcan-Hart Corp.*, 569 N.E.2d 1147, 1151 (Ill. App. 1991) (holding that a deep fat fryer is not defective for lack of a protective cover and stating that "[c]onsidering not only the obvious nature of any danger here but, also, the simple nature of the mechanism involved, * * * summary judgment for the defendant was clearly proper"); *Jarke* v. *Jackson Products*, 631 N.E.2d 233, 238 (Ill. App. 1994) (holding that a welding mask was not unreasonably dangerous for failure to include an ear guard and stating that "the only pertinent inquiry is whether the product is unreasonably dangerous in the state in which it is used"); *Todd* v. *Societe BIC, S.A.*, 21 F.3d 1402, 1407 (7th Cir. 1994) (en banc) (holding that a cigarette lighter was not unreasonably dangerous for lack of a child-restraint device; stating that "[i]njuries are not compensable in products liability if they derive merely from those inherent properties of a product which are obvious to all who come in contact with the product").

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These holdings fully apply to a boat motor's propeller, the dangers of which are readily apparent to the ordinary consumer. Much as a chef must appreciate the dangers of a sharp knife, or a lumberjack the dangers of a saw's spinning chain, members of the boating public must appreciate the danger of an outboard motor's high-speed propeller blades—as numerous courts have held. *E.g.*, *Elliott* v. *Brunswick Corp.*, 903 F.2d 1505, 1507 (11th Cir. 1990) (reversing a verdict finding that a propeller was defective for lack of a guard on the basis that "products whose inherent danger is patent and obvious, do not, as a matter of law, involve defects of a sort that a jury should resolve," and explaining that "the ordinary consumer clearly understands that a revolving propeller involves danger").[10]

[10] In addition to *Elliott*, see *Fitzpatrick* v. *Madonna*, 623 A.2d 322, 324-325 (Pa. Super. Ct. 1993) (reversing a jury verdict for the plaintiff because "[a] competent person knows that he or she must stay clear of the churning blades of an outboard motor in the same way as a person avoids airplane propellers, chain saw teeth, and lawn mower blades," and because "it cannot be said with any degree of certainty that the risk of injury will be reduced by a safety guard"); *Pree* v. *Brunswick Corp.*, 983 F.2d 863, 867-868 (8th Cir. 1993) (unguarded propellers "[are] not dangerous beyond the expectations of the ordinary consumer" and "do not, as a matter of law, involve defects of a sort that a jury should resolve"); *Allen* v. *Minnstar, Inc.*, 8 F.3d 1470, 1481 (10th Cir. 1993) (entering judgment for the manufacturer and citing the "absence of evidence that there was a feasible, safer alternative design for a propeller guard"); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579, 1583 (M.D. Ga. 1991) ("a pleasure boat's unguarded propellers are not dangerous beyond the expectations of the ordinary consumer"; "the consensus of experts that the industry's adaption of propeller guards at this point would not only be infeasible, but unwise, unsafe and unfortunate"); *Beech* v. *Outboard Marine Corp.*, 584 So. 2d 447, 449-450 (Ala. 1991) (finding no "jury issue" because "a propeller guard that arguably creates other dangers is not a safer design"); *Veal* v. *Teleflex, Inc.*, 586 So. 2d 188, 191 (Ala. 1991) (holding that "the trial court should not have submitted the [defective design] charge to the jury" and rejecting the claim "that because there were several patents available for propeller guards, Mercury Marine was negligent or wanton in failing to utilize them on its boats").

In light of this overwhelming body of authority, there is no substantial ground to doubt that Illinois courts would reject petitioner's claim as a matter of substantive tort law. It would thus be a waste of private and judicial resources to debate the preemption issue in this context.

Moreover, it is questionable whether this Court has jurisdiction in this matter. Under 28 U.S.C. § 1257(a), the Court may review federal issues arising from "[f]inal judgments or decrees rendered by the highest court of a State." In order to satisfy the finality requirement, the judgment from which review is sought must be final as to all parties and issues. See *Flynt* v. *Ohio*, 451 U.S. 619, 620 (1981) (per curiam) ("the final-judgment rule has been interpreted 'to preclude reviewability where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State'"); *Collins* v. *Miller*, 252 U.S. 364, 370 (1920) (the judgment "should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action"); *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 68 (1948).

Petitioner, however, sued not only respondent, but Ebbtide Corporation, alleging that its boat was defectively designed because it lacked adequate handrails and failed to warn passengers of inadequate back support in the boat's seating. See *supra* p. 12. The Circuit Court granted respondent's motion to dismiss, and that decision was affirmed on appeal. Petitioner's claim against Ebbtide, however, is still pending.[11] A trial below may result in full relief (rendering the issue here moot), or it may raise other issues of federal law (*e.g.*, relating to punitive damages or other federal regulatory standards). In any event, the decision below did not resolve petitioner's claims against

[11] After the decision of the Illinois Supreme Court, the Circuit Court of Cook County reinstated petitioner's remaining claim against Ebbtide on its trial docket. See Order (Cook County Circuit Ct. No. 01L14400) (Dec. 4, 2001).

all parties, and the federal question presented here is not conclusive of the remaining proceedings below.

Finally, it merits emphasis that the decision below is fully consistent with the public interest in safe boating. After careful study, the Coast Guard determined not only that propeller guards were infeasible for any recreational speedboat, but also that they would give boaters a false sense of security and increase the occurrence of serious accidents. Numerous courts have held that speedboats are not defective for lack of propeller guards, citing "the consensus of experts that the industry's adaption of propeller guards at this point would not only be infeasible, but unwise, unsafe and unfortunate." *E.g.*, *Elliott*, 903 F.2d at 1509. Thus, the decision below accords with the public interest in ensuring that boats be as safe as possible.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

[12] At the present time, boating accidents involving propellers are very rare. As the Subcommittee found, the "risk of fatality" from recreational power-boating is small in comparison to that of other activities, including other types of boating: estimated fatalities per each million activity hours were "1.26 for inflatables, 0.62 for canoes/kayaks, and 0.59 for rowboats, in each case with no engine being involved, compared to a risk of 0.14 from all causes for open motorboats (*within which the risk of propeller strike itself is a very small fraction*)." Ill. App. A11 (emphasis added).

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Supreme Court, U.S.
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No. 01-706

IN THE

Supreme Court of the United States

Rex R. Sprietsma, Adm'r of the Estate of
Jeanne Sprietsma, Deceased,

Petitioner,

v.

Mercury Marine, a Division
of Brunswick Corporation,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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ARGUMENT

As explained in our petition for *certiorari*, this case presents the identical question that was before this Court in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir., *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998): whether a state common-law claim that a boat engine was defectively designed because it lacks a propeller guard is preempted by a decision of the United States Coast Guard not to begin developing a regulation that would require the use of propeller guards on recreational motor boats. *Lewis* settled after oral argument, before any decision was rendered in the case. This is the first meaningful opportunity for this Court to revisit this important question of federal law in the wake of *Lewis*.

Mercury Marine's main theme in opposition is that review should not be granted because decisions of this Court since *Lewis* was argued – particularly *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), and *United States v. Locke*, 529 U.S. 89 (2000) – have "definitively resolved" the core questions presented in this case and discredited the conflicting decision of the Texas Supreme Court in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994). As we now explain, these arguments are meritless.

1. Neither *Geier* nor *Locke* Resolved the Federal Preemption Question Presented in *Lewis* and this Case.

A. *Geier*'s Implied Preemption Holding Has No Bearing Here.

Mercury Marine's principal claim is that *Geier* repudiated the Texas Supreme Court's decision in *Moore*,

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thereby effectively eradicating the split of authority that gave rise to the grant of *certiorari* in *Lewis*. In so arguing, Mercury Marine mischaracterizes *Geier* as holding that "allowing a jury to require auto makers to install airbags would frustrate the purpose of a federal decision *not* to install an airbag requirement." Opp. at 15 (citing *Geier*, 529 U.S. at 881; emphasis in original). Based on this mischaracterization of *Geier*, Mercury Marine claims that the U.S. Coast Guard's decision "*not* to impose [a propeller guard] requirement" must be accorded similar preemptive effect. *Id.*

The main flaw in this analogy is that, unlike the decision at issue here (a decision by the federal government to take *no* regulatory action at all), *Geier* involved a highly complex federal safety standard that did, in fact, regulate the use of airbags. In *Geier*, this Court confronted the 1984 version of a federal motor vehicle safety standard promulgated by the National Highway Traffic and Motor Vehicle Safety Administration ("NHTSA") – Standard 208 – that required auto manufacturers gradually to "phase-in" the use of passive restraint devices in passenger automobiles. Unlike the typical minimum safety standards promulgated by NHTSA, Standard 208 "deliberately sought variety . . . by setting a performance requirement for passive restraint devices and allowing manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technologies to satisfy that requirement." 529 U.S. at 878. The Court emphasized that NHTSA sought a "mix of devices" because of safety concerns associated with airbags. *Id.* at 878-79. *Geier* further stressed that, in NHTSA's view, a "mix of devices would help develop data on comparative effectiveness, would allow the industry time to overcome the safety problems and the high production costs associated with

airbags, and could facilitate the development of alternative, cheaper, and safer passive restraint systems." *Id.* at 879.

Against this backdrop, *Geier* held that a common-law damages action holding a manufacturer liable for its failure to install an airbag would conflict with NHTSA's goal of encouraging a mixture of passive restraint devices. *Id.* at 880. The Court wrote that "a rule of state tort law imposing [liability for failure to install airbags] . . . would have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* In so ruling, *Geier* gave "special weight" to an *amicus curiae* brief filed by the United States, in which the agency strenuously argued that no-airbag claims would conflict with and substantially undermine NHTSA's regulatory goals. *See id.* at 886.

The facts here could not be farther from those in *Geier*. Unlike the complex set of regulatory obligations imposed by Standard 208, which affirmatively encouraged a mixture of passive restraint devices, *there is no federal regulation whatsoever governing propeller guards.* As previously explained, the only action taken by the Coast Guard with regard to these devices was to task a subcommittee of its Advisory Council (which included, among others, industry representatives and members of the public) with investigating whether the federal government should begin to develop a regulation requiring propeller guards on passenger boats. *See* Pet. at 5. The Coast Guard ultimately decided not to regulate these devices in any way, in part because there was no universally applicable technology appropriate for use on all boats. *Id.* at 6. To date, there is no federal safety standard governing (or even addressing) the use of propeller guards. Thus, unlike in *Geier*, there is no federal regulatory framework

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with which petitioner's common-law claims could possibly conflict.

This conclusion is underscored by the fact that, in *Lewis*, the United States filed an *amicus curiae* brief confirming that no-propeller-guard claims exactly like petitioner's do not in any way conflict with federal regulatory purposes. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners, Lewis v. Brunswick Corp., 522 U.S. 978 (1997) (No. 97-288) ("*Lewis* Brief"). This position stands in stark contrast to the United States' *amicus curiae* brief in *Geier*, which vigorously asserted that no-airbag claims would frustrate and undermine the goals of Standard 208. *See* 529 U.S. at 880. And *Geier* itself confirms that the Solicitor General's views on the preemptive effect of an agency's regulatory decisions are entitled to some deference. *Id.* at 882, 886. *See also Medtronic v. Lohr, Inc.*, 518 U.S. 470, 496, 505-07 (1996) (majority and concurring opinions). Thus, if anything, *Geier* provides further reason to grant review and accord the United States' authoritative position the deference it deserves.[1]

[1] Mercury Marine attempts to avoid the United States' anti-preemption position in *Lewis* by arguing that the Solicitor General's reasoning, like that of the Texas Supreme Court in *Moore*, has been discredited by *Geier*. *See* Opp. at 24-25. This argument is meritless. First, the *Lewis* Brief's suggestion (at 21) that the Boat Safety Act's savings clause "makes clear Congress's explicit intent to preserve tort liability" is, contrary to respondent's claim, in no way contrary to *Geier* and ultimately irrelevant to the United States' rejection of preemption, which hinged on the fact that there is clearly no conflict between no-propeller-guard claims and the Coast Guard's regulatory purposes. *Id.* at 25-27. Second, the *Lewis* Brief's recognition (at 22) that the "regulatory effect of a common law judgment is not as direct as that of positive enactments or prescriptions" is, in fact, supported by ample authority and is wholly consistent with *Geier*. (As explained *infra* at 7-8, *Geier* explicitly acknowledged, and did not purport to overrule, numerous prior decisions of this Court making precisely this point.) Third, the *Lewis* Brief's argument (at 28) that, absent a statute that affirmatively preempts the entire field of state action, regulatory inaction lacks preemptive effect, is fully consistent with *Geier*, given that *Geier* did not involve a "field preemption" statute and did not involve regulatory inaction. In short, *Geier* did not undermine the validity of any of the arguments set forth in the Lewis Brief, and Mercury Marine's arguments to the contrary are simply wrong.

B. *Locke*'s Preemption Holding is Equally Inapplicable to this Case.

Mercury Marine also argues that "any remaining issue presented in *Lewis* was disposed of in *Locke*," which stated that there are "instances in which state regulation of maritime commerce is inappropriate even absent the exercise of federal authority." Opp. at 16. *Locke*, however, did little more than reaffirm this Court's previous holding in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), that Title II of the Ports and Waterways Safety Act of 1972 ("PWSA") expressly preempts the entire field of state laws and regulations governing ocean-going oil tankers used in international commerce.[2] Within the context of a field preemption statute like the PWSA, it made sense for this Court to "reaffirm" that regulatory inaction may exert a preemptive effect on state law. This holding has virtually nothing to do with this case, however, given that the

[2] As the Supreme Court explained in *Ray* (and reiterated in *Locke*), Title II of the PWSA *requires* the Coast Guard to issue "such rules and regulations as may be necessary with respect to the design, construction, and operation of the covered vessels." *Ray*, 435 U.S. at 168; *Locke*, 529 U.S. at 110. *Ray* and *Locke* both reasoned that, given Title II's mandatory directive that the Coast Guard impose national regulations governing the general seaworthiness of tankers and their crews, "Congress has left no room for state regulation of these matters." *Locke*, 529 U.S. at 110.

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Boat Safety Act, unlike the PWSA, does *not* preempt the field of boat safety.

As explained by the United States in *Lewis*, the Boat Safety Act "is quite distinctive from the [PWSA]" insofar as it "does not require the [Coast Guard] to issue regulations, but rather merely permits [the agency] to do so." *Lewis* Brief at 29. *See also* 46 U.S.C. § 4302(a). As the United States concluded, this grant of permissive regulatory authority reveals that Congress never intended the Act to preempt the entire field of boat safety regulation, given that the Coast Guard has the option of doing *nothing* under the Act (and, in fact, has not issued any regulations governing propeller guards). Because the Boat Safety Act does not preempt the regulated field, *Locke*'s language regarding the preemptive effect of regulatory inaction has no bearing here: unlike the PWSA, the Boat Safety Act only preempts state positive law in areas where the Coast Guard has issued regulations governing the subject matter at issue – and it is undisputed that no such action has been taken with respect to propeller guards. Thus, Mercury Marine's suggestion that *Locke* resolves the preemption question presented here has no merit.[3]

[3] Assuming, however, that the Boat Safety Act (like Title II of the PWSA) preempts the field of state positive law even where the Coast Guard has taken no regulatory action, *Locke*'s holding would still have no bearing here given that common-law claims are expressly preserved by the Act's broadly worded savings clause. *See* 46 U.S.C. § 4311(g). In this respect, this case is very different from both *Ray* and *Locke*, which involved state regulations rather than common-law claims. As the United States explained in *Lewis*, "[t]hat distinction is equally important here, because the [Act] contains a savings clause, but the PWSA, at issue in *Ray*, did not." *Lewis* Brief at 29.

2. *Moore* is Still Good Law, and Directly Conflicts with the Decision Below.

Equally without merit is Mercury Marine's claim that "there is no genuine conflict" between the decision below and the Texas Supreme Court's decision in *Moore*. *See* Opp. at 17. Mercury Marine argues, first, that *Moore* is no longer good law because its holding that "the presence of an express preemption clause precluded a finding of implied preemption" was rejected by *Geier*. *Id.* *Moore*'s holding on this point is irrelevant, however, because the Texas Supreme Court went on to reach the same implied conflict preemption question presented here: whether "a jury award in this case will conflict with and undermine the goals of the Act by creating a standard requiring propeller guards, in the face of the Coast Guard's policy determination that guards should not be mandated." *Id.* at 251.

Mercury Marine is also wrong in claiming that *Moore*'s holding that "damage awards" are "not equivalent to . . positive enactments" conflicts with this Court's prior teachings and was definitively rejected by *Geier*. Opp. at 18. In reality, *Moore*'s holding on this point is squarely in accord with numerous prior decisions of this Court recognizing that "the effects of direct regulation . . . are significantly more intrusive than the incidental regulatory effects of [damage awards]." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988). *See also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) ("there is no general, inherent conflict between [express] federal pre-emption of state [regulatory] warning requirements and the continued vitality of state common law [damages] actions") (plurality); *id.* at 533-34 (Blackmun, J., concurring); *English v. General Electric Corp.*, 496 U.S. 72, 85 (1990) (common-law claims "neither direct nor substantial enough" to be within the preempted field"); *Silkwood v. Kerr-McGee Corp.*, 464 U.S.

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RULES 29.6 AND 14.1 STATEMENT

Respondent is Mercury Marine, an unincorporated division of Brunswick Corporation. Brunswick Corporation has no parent company, and no publicly held company owns 10% or more of Brunswick's stock.

Petitioner is Rex R. Sprietsma, administrator of the estate of Jeanne Sprietsma, deceased.

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238, 256 (1984) ("Congress intended . . . to tolerate whatever tension there was between [federal regulation and state common-law claims, and] [w]e can do no less.").

Notably, *all* of these cases were cited in *Geier*, which explicitly acknowledged this Court's oft-repeated teachings that the effects of "tort law may be somewhat different" than those of positive law for purposes of determining the extent of federal preemption. *See* 529 U.S. at 882. And *Geier*'s particular holding that the "rules of law that judges or juries create or apply in [tort] suits" may remove a choice that federal regulators intended to preserve has no bearing here, given that the Coast Guard has made crystal clear that it never intended even to address any aspect of manufacturers' decision making with respect to propeller guards. In short, *Moore* remains good law after *Geier*, and is squarely in conflict with the decision below.[4]

[4] Mercury Marine also claims that *Moore* was wrong because it applied a presumption against preemption that was subsequently rejected in *Locke*. *See* Opp. at 18. As explained in our petition, however, there are myriad reasons why *Locke*'s rejection of the presumption against preemption – a holding directed to state regulation of ocean-going oil tankers involved in international maritime commerce – should not apply to a case involving a small recreational vessel on local waters. *See* Pet. at 21-23. Even assuming that the Texas Supreme Court erred in this regard, however, its preemption ruling was still correct, given that the Coast Guard has never regulated propeller guards and the United States itself has taken the position that no-propeller-guard claims do not undermine or frustrate any federal policy.

3. This Case is a Proper Vehicle for Review.

Finally, there is no merit to Mercury Marine's argument that this case is not a proper vehicle for review on the grounds that (1) "petitioner could not recover under state tort law even if his claim were allowed to proceed"; and (2) this Court's jurisdiction is "questionable" due to the pendency of remaining claims against the boat's manufacturer. *See* Opp. at 29. Regarding the former, suffice it to say that the alleged weaknesses of petitioner's claims on the merits (which is a subject of hot dispute and belied by the fact that other injury victims in similar cases have obtained significant recoveries) is hardly a valid reason to decline review. Regarding the jurisdictional argument, the Illinois Supreme Court affirmed judgments dismissing petitioner's claims on the ground that they are preempted by federal law. Mercury Marine neither disputes that this is a final judgment between the parties to this appeal nor produces any authority for the argument that petitioner's claims against other defendants not party to this appeal render the Illinois Supreme Court's dismissal ruling unreviewable under 28 U.S.C. § 1257. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975), this Court recognized its jurisdiction to review a state court decision where "the federal issue, finally decided by the highest court in the state, will survive and require decision regardless of the outcome of future state-court proceedings." *See also Brady v. Maryland*, 373 U.S. 83 (1963) (reviewing federal question arising out of criminal conviction before sentencing because sentence would not moot issue). This well-recognized exception to any requirement of technical finality that Section 1257 otherwise might impose plainly applies here, especially given that Mercury Marine will not even be a party to the only remaining state court proceedings it identifies. Respondent's preemption

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defense is thus guaranteed to survive these proceedings as a live issue in this case, and the case is properly presented for review.

CONCLUSION

This petition for a writ of *certiorari* should be granted.

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Illinois Supreme Court (Pet. App. 1-22) is reported at 757 N.E.2d 75 (Ill. 2001). The opinion of the Illinois Appellate Court (Pet. App. 23-38) is reported at 729 N.E.2d 45 (Ill. App. 2000). The order of the Circuit Court of Cook County (Nov. 20, 1998) (Pet. App. 39) is unreported.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257. As explained below, however, there is a question about the Court's jurisdiction in this case. See *infra* pp. 29-30.

STATEMENT OF THE CASE

The petition rests almost entirely on the claim that this Court should resolve the question presented in *Lewis* v. *Brunswick Corp.*, No. 97-288, which was dismissed before a decision on the merits. 523 U.S. 1113 (1998). But the principal legal issues raised here were definitively resolved two Terms ago in *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000)—which involved a law that petitioner has acknowledged is "nearly identical" to the law at issue here, and which the court below carefully applied in reaching its decision.

No post-*Geier* decision conflicts with the ruling below. The nine federal courts to address the issue (both before and after *Geier*) have unanimously held that "propeller guard" claims are preempted by the Boat Safety Act. The only contrary decision —a 1994 state court ruling—rests on reasoning that has been repudiated by several recent decisions of this Court, including *Geier* and *United States* v. *Locke*, 529 U.S. 89 (2000). Thus, the petition is nothing more than a quarrel with the application of settled law to this particular case. There is no genuine conflict among the lower courts, and it will be time enough to address the issue if and when a conflict arises.

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This Court's denial of certiorari only six months ago in *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001), a case presenting the same issue in a nearly identical petition submitted by the same counsel, confirms that this is not a certworthy case. There is no justification for a different disposition here.

A. The Federal Boat Safety Act

Congress enacted the Federal Boat Safety Act ("BSA"), 46 U.S.C. §§ 4301-4311, to "improve boating safety and to foster greater development, use, and enjoyment of all the waters of the United States." Pub. L. No. 92-75, § 2, 85 Stat. 213, 214 (1971). Congress sought to achieve those goals by "authorizing the establishment of national construction and performance standards for boats and associated equipment." *Ibid.*

Prior to the BSA, the federal laws governing boat safety did "not meet current requirements of safe boating." H.R. Rep. No. 92-324, at 9 (1971) ("H.R. Rep."). The Motorboat Act of 1940 imposed limited safety requirements "such as life preservers [and] fire extinguishers." S. Rep. No. 92-248, at 13 (1971) ("S. Rep."). The Boating Act of 1958 was narrower—"primarily a boat numbering statute." H.R. Rep. at 9. Congress thus established a more comprehensive and "coordinated national boating safety program"—the BSA. S. Rep. at 1, 13.

The BSA has three principal components. First, it establishes "a standard numbering system for vessels" that is administered by the Coast Guard. Pub. L. No. 92-75, §§ 17-24, 85 Stat. at 220-222; *Recreational Boat Safety: Hearings on H.R. 15041, 15140 Before a Subcomm. of the House Comm. on Merchant Marine & Fisheries*, 91st Cong., 2d Sess. 57 (1970) ("H. Hearings") (statement of Rear Admiral Joseph J. McClelland, U.S. Coast Guard).[1]

[1] The statute vests implementing authority in the Secretary of Transportation, who has delegated his functions to the Coast Guard. 49 C.F.R. § 1.46(n)(1).

Second, "to encourage greater State participation and consistency in boating safety efforts, and particularly greater safety patrol and enforcement activities," the BSA establishes "State boating safety programs" under the auspices of the Coast Guard. Pub. L. No. 92-75, §§ 25-33, 85 Stat. at 222-226.

Third, and most important, the Act mandates comprehensive federal design standards for boats and associated equipment (including motors). The Act directs the Coast Guard to prescribe regulations (46 U.S.C. § 4302(a)):

> (1) establishing minimum safety standards for recreational vessels and associated equipment, and establishing procedures and tests required to measure conformance with those standards, with each standard—
>
> (A) meeting the need for recreational vessel safety; and
>
> (B) being stated, insofar as practicable, in terms of performance * * *.

In considering whether to adopt a manufacturing standard, the Coast Guard must "consult with" the National Boating Safety Advisory Council ("NBSAC" or "Council"). 46 U.S.C. §§ 4302(c)(4), 13110. The Council's 21 members, all of whom are appointed by the Secretary of Transportation, must have expertise in recreational boating safety and must represent three different constituencies: (a) seven state officials responsible for state boat safety programs; (b) seven representatives of boat manufacturers; and (c) seven representatives of national boating organizations and the general public. *Id.* § 13110(a), (b)(1).

B. Preemption Under The Federal Boat Safety Act

The BSA grants the Coast Guard plenary authority to require that manufacturers comply with its "national construction and performance standards for boats and associated equipment." S. Rep. at 15. Because of their effect on interstate and maritime commerce, Congress was particularly concerned that any such manufacturing requirements be nationally uniform: "The need

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for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level." *Id.* at 14. Accord H.R. Rep. at 29; see H. Hearings at 61 ("several States are developing requirements of their own in law[s] which are varied and it is quite important both for the convenience of the boatmen and for the manufacturer, too, to insure that these standards are uniform throughout the country") (statement of Rear Admiral McClelland). As Representative Monagan explained: "A proliferation of dissimilar standards would give the manufacturer * * * an impossible task. Federal preemption over any law or regulation which establishes boat or associated equipment safety standards is imperative now." *National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 101 (1971) ("S. Hearing").

Congress also recognized that maritime safety traditionally has been an area where federal regulation predominates. As the Senate Report states: "federal preemption in the issuance of boat and equipment safety standards * * * conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce." S. Rep. at 20.

These considerations led Congress to draft the BSA's preemption clause in broad and inclusive terms:

> Unless permitted by the [Coast Guard] under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the [Coast Guard's] disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions

> or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306. The Act thus insures that boat manufacturers are not subject to "compliance with widely varying local requirements." S. Rep. at 20. By mandating that any state laws, regulations, or requirements be "identical" to some regulation issued by the Coast Guard, the preemption clause "preempts the field on boating standards or regulations." H.R. Rep. at 11.

C. The Federal Boat Safety Act's "Savings Provision"

Late in the course of Congress's consideration of the BSA, the Senate Commerce Committee added a "Savings Provision" to the bill. See S. Rep. at 31. "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter," this provision states, "does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g).

The only recorded discussion of this provision in the House was a brief colloquy on the floor, in which Representative Grover described it as a "technical amendmen[t] put in on the Senate side in which we of the minority of the Committee on Merchant Marine and Fisheries have concurred." 117 Cong. Rec. 28036 (1971). The Senate's "technical" amendment "was concurred in" by the House, and the Act was adopted. *Ibid.*

D. The Coast Guard's Considered Determination That Propeller Guards Should Not Be Required

The Coast Guard has promulgated a host of federal boat and motor design standards. See 33 C.F.R. Chap. I, Subchap. S. In particular, it has adopted numerous "Equipment Requirements," including design standards for boat motors, flotation materials, electrical and fuel systems, personal flotation devices, distress signals, and ventilation systems. See *id.* Parts 175 (Subparts B-D), 183 (Subparts D-L). For example, the Coast Guard regulates the "safe powering" and "maximum horsepower capacity" of boats, the "placement" of outboard motors, and the "quick turn"

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*529 U.S. 861, *; 120 S. Ct. 1913, **;*
*146 L. Ed. 2d 914, ***; 2000 U.S. LEXIS 3425*

ALEXIS GEIER, ET AL. v. AMERICAN HONDA MOTOR COMPANY, INC., ET AL.

No. 98-1811

SUPREME COURT OF THE UNITED STATES

529 U.S. 861; 120 S. Ct. 1913; 146 L. Ed. 2d 914; 2000 U.S. LEXIS 3425; 68 U.S.L.W. 4425; CCH Prod. Liab. Rep. P15,795; 2000 Cal. Daily Op. Service 5277; 2000 Daily Journal DAR 5277; 2000 Colo. J. C.A.R. 2826; 13 Fla. L. Weekly Fed. S 344

December 7, 1999, Argued
May 22, 2000, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

DISPOSITION: 166 F.3d 1236, affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, petitioners appealed from the judgment of the appellate court, affirming the dismissal of their "no airbag" tort suit, finding that those claims conflicted with Federal Motor Vehicle Safety Standard 208, and that the National Traffic and Motor Vehicle Safety Act of 1966, former 15 U.S.C.S. § 1381 et seq., consequently pre-empted the suit.

OVERVIEW: Petitioner driver collided with a tree and was seriously injured. Petitioners, the driver and her parents, sued respondent car manufacturer, claiming that respondent had designed its car negligently and defectively because it lacked a driver's side airbag. The district court dismissed the suit, and the court of appeals affirmed. The court granted certiorari and affirmed the dismissal. The court found that the National Traffic and Motor Vehicle Safety Act of 1966, former 15 U.S.C.S. § 1381 et seq., express preemption provision did not preempt the common-law "no airbag" action because the language permitted a narrow reading that excluded common-law actions. However, the court found that petitioners' suit conflicted with Federal Motor Vehicle Safety Standard (FMVSS) 208. FMVSS 208 sought a gradually developing mix of alternative passive restraint devices for safety-related reasons. The rule of state tort law for which petitioners argued would have stood as an obstacle to the accomplishment of that objective, and the statute foresaw the application of ordinary principles of preemption in cases of actual conflict. Hence, petitioners' action was pre-empted.

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suggests Congress wanted to complicate ordinary experience-proved principles of conflict pre-emption with an added, "special burden." Indeed, the dissent's willingness to impose a "special burden" here stems ultimately from its view that "frustration-of-purpose" conflict pre-emption is a freewheeling, "inadequately considered" doctrine that might well be "eliminated." *Post*, at 24, and n. 22. In a word, ordinary pre-emption principles, grounded in longstanding precedent, *Hines, supra,* at 67, apply. We would not further complicate the law with complex new doctrine.

IV

[*HR1D]** [1D]
The basic question, then, is whether a common-law "no airbag" action like the one before us actually conflicts with FMVSS 208. We hold that it does.

In petitioners' and the dissent's view, FMVSS 208 sets a minimum airbag standard. As far as FMVSS 208 is concerned, the more airbags, and the sooner, the better. But that was not the Secretary's view. DOT's **[*875]** comments, which accompanied the promulgation of FMVSS 208, make clear that the standard deliberately provided the manufacturer with a range of choices among different passive restraint devices. Those choices **[***928]** would bring about a mix of different devices introduced gradually over time; and FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance -- all of which would promote FMVSS 208's safety objectives. See generally 49 Fed. Reg. 28962 (1984).

A

The history of FMVSS 208 helps explain why and how DOT sought these objectives. See generally *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 34-38, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983). In 1967, DOT, understanding that seatbelts would save many lives, required manufacturers to install manual seat belts in all automobiles. 32 Fed. Reg. 2408, 2415. It became apparent, however, that most occupants simply would not buckle up their belts. See 34 Fed. Reg. 11148 (1969). DOT then began to investigate the feasibility of requiring "passive restraints," such as airbags and automatic seatbelts. *Ibid.* In 1970, it amended FMVSS 208 to include some passive protection requirements, 35 Fed. Reg. 16927, while making clear that airbags were one of several "equally acceptable" devices and that it neither "'favored' nor expected the introduction of airbag systems." *Ibid.* In 1971, it added an express provision permitting compliance through the use of nondetachable passive belts, 36 Fed. Reg. 12858, 12859, and in 1972, it mandated full passive protection for all front seat occupants for vehicles manufactured after August 15, 1975, 37 Fed. Reg. 3911. Although the agency's focus was originally on airbags, 34 Fed. Reg. 11148 (1969) (notice of proposed rulemaking); *State Farm*, 463 U.S. at 35, n. 4; see also *id.*, at 46, n. 11 (noting view of commentators that, as of 1970, FMVSS **[*876]** 208 was "'a de facto airbag mandate'" because of the state of passive restraint technology), at no point did FMVSS 208 formally require the use of airbags. From the start, as in 1984, it permitted passive restraint options.

DOT gave manufacturers a further choice for new vehicles manufactured between 1972 and August 1975. Manufacturers could either install a passive restraint device such as automatic seatbelts or airbags or retain manual belts and add an "ignition interlock" device that in effect forced occupants to buckle up by preventing the ignition otherwise from turning on. 37 Fed. Reg. 3911 (1972). The interlock soon became popular with manufacturers. And in 1974, when the agency approved the use of detachable automatic seatbelts, it conditioned that approval by providing **[**1923]** that such systems must include an interlock system *and* a continuous warning buzzer to encourage reattachment of the belt. 39 Fed. Reg. 14593. But the interlock and buzzer devices were most unpopular with the public. And Congress, responding to public pressure, passed a law that forbade DOT from requiring, or permitting compliance by means of, such devices. Motor Vehicle and Schoolbus Safety Amendments of

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1974, § 109, 88 Stat. 1482 (previously codified at 15 U.S.C. § 1410b(b) (1988 ed.)).

That experience influenced DOT's subsequent passive restraint initiatives. In 1976, DOT Secretary William **[***929]** Coleman, fearing continued public resistance, suspended the passive restraint requirements. He sought to win public acceptance for a variety of passive restraint devices through a demonstration project that would involve about half a million new automobiles. *State Farm, supra,* at 37. But his successor, Brock Adams, canceled the project, instead amending FMVSS 208 to require passive restraints, principally either airbags or passive seat belts. 42 Fed. Reg. 34289 (1977).

Andrew Lewis, a new DOT Secretary in a new administration, rescinded the Adams requirements, primarily because DOT learned that the industry planned to satisfy those **[*877]** requirements almost exclusively through the installation of detachable automatic seatbelts. 46 Fed. Reg. 53419-53420 (1981). This Court held the rescission unlawful. *State Farm, supra,* at 34, 46. And the stage was set for then-DOT Secretary, Elizabeth Dole, to amend FMVSS 208 once again, promulgating the version that is now before us. 49 Fed. Reg. 28962 (1984).

B

Read in light of this history, DOT's own contemporaneous explanation of FMVSS 208 makes clear that the 1984 version of FMVSS 208 reflected the following significant considerations. First, buckled up seatbelts are a vital ingredient of automobile safety. *Id.,* at 29003; *State Farm, supra,* at 52 ("We start with the accepted ground that if used, seatbelts unquestionably would save many thousands of lives and would prevent tens of thousands of crippling injuries"). Second, despite the enormous and unnecessary risks that a passenger runs by not buckling up manual lap and shoulder belts, more than 80% of front seat passengers would leave their manual seatbelts unbuckled. 49 Fed. Reg. 28983 (1984) (estimating that only 12.5% of front seat passengers buckled up manual belts). Third, airbags could make up for the dangers caused by unbuckled manual belts, but they could not make up for them entirely. *Id.,* at 28986 (concluding that, although an airbag plus a lap and shoulder belt was the most "effective" system, airbags alone were *less* effective than buckled up manual lap and shoulder belts).

Fourth, passive restraint systems had their own disadvantages, for example, the dangers associated with, intrusiveness of, and corresponding public dislike for, nondetachable automatic belts. *Id.,* at 28992-28993. Fifth, airbags brought with them their own special risks to safety, such as the risk of danger to out-of-position occupants (usually children) in small cars. *Id.,* at 28992, 29001; see also 65 Fed. Reg. 30680, 30681-30682 (2000) (finding 158 confirmed airbag-induced fatalities as of April 2000, and amending rule **[*878]** to add new requirements, test procedures, and injury criteria to ensure that "future air bags be designed to create less risk of serious airbag-induced injuries than current air bags, particularly for small women and young children"); U.S. Dept. of Transportation, National Highway Traffic Safety Administration, National Accident Sampling System Crashworthiness Data System 1991-1993, p. viii (Aug. 1995) (finding that airbags caused approximately 54,000 injuries between 1991 and 1993). **[**1924]** **[***930]**

Sixth, airbags were expected to be significantly more expensive than other passive restraint devices, raising the average cost of a vehicle price $ 320 for full frontal airbags over the cost of a car with manual lap and shoulder seatbelts (and potentially much more if production volumes were low). 49 Fed. Reg. 28990 (1984). And the agency worried that the high replacement cost -- estimated to be $ 800 -- could lead car owners to refuse to replace them after deployment. *Id.,* at 28990, 29000-29001; see also *id.,* at 28990 (estimating total investment costs for mandatory airbag requirement at $ 1.3 billion compared to $ 500 million for automatic seatbelts). Seventh, the public, for reasons of cost, fear, or physical intrusiveness, might resist installation or use of any of the then-available passive restraint devices, *id.,* at 28987-28989 -- a particular concern with respect to airbags, *id.,* at 29001

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(noting that "airbags engendered the largest quantity of, and most vociferously worded, comments").

FMVSS 208 reflected these considerations in several ways. Most importantly, that standard deliberately sought variety -- a mix of several different passive restraint systems. It did so by setting a performance requirement for passive restraint devices and allowing manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technologies to satisfy that requirement. *Id.,* at 28996. And DOT explained why FMVSS 208 sought the mix of devices that it expected its performance standard to produce. *Id.* at **[*879]** 28997. DOT wrote that it had *rejected* a proposed FMVSS 208 "all airbag" standard because of safety concerns (perceived or real) associated with airbags, which concerns threatened a "backlash" more easily overcome "if airbags" were "not the only way of complying." *Id.,* at 29001. It added that a mix of devices would help develop data on comparative effectiveness, would allow the industry time to overcome the safety problems and the high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems. *Id.,* at 29001-29002. And it would thereby build public confidence, *id.,* at 29001-29002, necessary to avoid another interlock-type fiasco.

The 1984 FMVSS 208 standard also deliberately sought a *gradual* phase-in of passive restraints. *Id.,* at 28999-29000. It required the manufacturers to equip only 10% of their car fleet manufactured after September 1, 1986, with passive restraints. *Id.,* at 28999. It then increased the percentage in three annual stages, up to 100% of the new car fleet for cars manufactured after September 1, 1989. *Ibid.* And it explained that the phased-in requirement would allow more time for manufacturers to develop airbags or other, better, safer passive restraint systems. It would help develop information about the comparative effectiveness of different systems, would lead to a mix in which airbags and other nonseatbelt passive restraint systems played a more prominent role than would otherwise result, and would promote public acceptance. *Id.,* at 29000-29001.

Of course, as the dissent points out, *post,* at 19-20, FMVSS 208 did not guarantee the mix by setting a ceiling for each different passive restraint **[***931]** device. In fact, it provided a form of extra credit for airbag installation (and other nonbelt passive restraint devices) under which each airbag-installed vehicle counted as 1.5 vehicles for purposes of meeting FMVSS 208's passive restraint requirement. 49 CFR § 571.208, S4.1.3.4(a)(1) (1999); 49 Fed. Reg. 29000 (1984). **[*880]** But why should DOT have bothered to impose an airbag ceiling when the practical threat to the mix it desired arose from the likelihood that manufacturers would install, not too many airbags too quickly, but too few or none at all? After all, only a few years earlier, Secretary Dole's predecessor had discovered that manufacturers intended to meet **[**1925]** the then-current passive restraint requirement almost entirely (more than 99%) through the installation of more affordable automatic belt systems. 46 Fed. Reg. 53421 (1981); *State Farm,* 463 U.S. at 38. The extra credit, as DOT explained, was designed to "encourage manufacturers to equip *at least some* of their cars with airbags." 49 Fed. Reg. 29001 (1984) (emphasis added) (responding to comment that failure to mandate airbags might mean the "end of . . . airbag technology"); see also *id.,* at 29000 (explaining that the extra credit for airbags "should promote the development of what may be better alternatives to automatic belts *than would otherwise be developed*" (emphasis added)). The credit provision *reinforces* the point that FMVSS 208 sought a gradually developing mix of passive restraint devices; it does not show the contrary.

Finally FMVSS 208's passive restraint requirement was conditional. DOT believed that ordinary manual lap and shoulder belts would produce about the same amount of safety as passive restraints, and at significantly lower costs -- *if only auto occupants would buckle up.* See *id.,* at 28997-28998. Thus, FMVSS 208 provided for rescission of its passive restraint requirement if, by September 1, 1989, two-thirds of the States had laws in place that, like those of many other nations, required auto occupants to buckle up (and which met other requirements specified in the standard). *Id.,* at 28963, 28993-28994, 28997-28999. The

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Secretary wrote that "coverage of a large percentage of the American people by seatbelt laws that are enforced would largely negate the incremental increase in safety to be expected from an automatic protection requirement." *Id.,* at 28997. **[*881]** In the end, two-thirds of the States did not enact mandatory buckle-up laws, and the passive restraint requirement remained in effect.

In sum, as DOT now tells us through the Solicitor General, the 1984 version of FMVSS 208 "embodies the Secretary's policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." Brief for United States as *Amicus Curiae* 25; see 49 Fed. Reg. 28997 (1984). Petitioners' tort suit claims that the manufacturers of the 1987 Honda Accord "had a duty to design, manufacture, distribute and sell a motor vehicle with an effective and safe passive restraint system, including, but not limited to, airbags." App. 3 (Complaint, P 11).

In effect, petitioners' tort action depends upon its claim that manufacturers had a duty to install an airbag when they manufactured the **[***932]** 1987 Honda Accord. Such a state law -- *i.e.*, a rule of state tort law imposing such a duty -- by its terms would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems, such as automatic belts or passive interiors. It thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought. It would have required all manufacturers to have installed airbags in respect to the entire District-of-Columbia-related portion of their 1987 new car fleet, even though FMVSS 208 at that time required only that 10% of a manufacturer's nationwide fleet be equipped with any passive restraint device at all. It thereby also would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed. In addition, it could have made less likely the adoption of a state mandatory buckle-up law. Because the rule of law for which petitioners contend would have stood "as an obstacle to the accomplishment and execution of " the important means-related federal objectives that we have just discussed, it is pre-empted. *Hines,* 312 U.S. at **[*882]** 67; see also *Ouellette,* 479 U.S. at 493; *De la Cuesta,* 458 U.S. at 156 (finding conflict and pre-emption where state law limited the availability of an option **[**1926]** that the federal agency considered essential to ensure its ultimate objectives).

Petitioners ask this Court to calculate the precise size of the "obstacle," with the aim of minimizing it, by considering the risk of tort liability and a successful tort action's incentive-related or timing-related compliance effects. See Brief for Petitioners 45-50. The dissent agrees. *Post,* at 17-20. But this Court's pre-emption cases do not ordinarily turn on such compliance-related considerations as whether a private party in practice would ignore state legal obligations -- paying, say, a fine instead -- or how likely it is that state law actually would be enforced. Rather, this Court's pre-emption cases ordinarily *assume* compliance with the state law duty in question. The Court has on occasion suggested that tort law may be somewhat different, and that related considerations -- for example, the ability to pay damages instead of modifying one's behavior -- may be relevant for pre-emption purposes. See *Goodyear Atomic Corp.* v. *Miller,* 486 U.S. 174, 185, 100 L. Ed. 2d 158, 108 S. Ct. 1704 (1988); *Cipollone,* 505 U.S. at 536-539 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part); see also *English,* 496 U.S. at 86; *Silkwood* v. *Kerr-McGee Corp.,* 464 U.S. 238, 256, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984). In other cases, the Court has found tort law to conflict with federal law without engaging in that kind of an analysis. See, *e.g., Ouellette,* 479 U.S. at 494-497; *Kalo Brick,* 450 U.S. at 324-332. We need not try to resolve these differences here, however, for the incentive or compliance considerations upon which the dissent relies cannot, by themselves, change the legal result. Some of those considerations rest on speculation, see, *e.g., post,* at 17 (predicting risk of "no airbag" liability and manufacturers' **[***933]** likely response to such liability); some rest in critical part upon the dissenters' own view of FMVSS 208's basic purposes -- a view **[*883]** which we reject, see, *e.g., post,* at 17-20 (suggesting that pre-existing risk of "no airbag" liability would have made FMVSS 208 unnecessary); and others, if we understand them

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correctly, seem less than persuasive, see, *e.g.*, *post*, at 18 (suggesting that manufacturers could have complied with a mandatory state airbag duty by installing a *different* kind of passive restraint device). And in so concluding, we do not "put the burden" of proving pre-emption on petitioners. *Post*, at 23. We simply find unpersuasive their arguments attempting to undermine the Government's demonstration of actual conflict.

One final point: We place some weight upon DOT's interpretation of FMVSS 208's objectives and its conclusion, as set forth in the Government's brief, that a tort suit such as this one would "'stand as an obstacle to the accomplishment and execution'" of those objectives. Brief for United States as *Amicus Curiae* 25-26 (quoting *Hines*, 312 U.S. at 67). Congress has delegated to DOT authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is "uniquely qualified" to comprehend the likely impact of state requirements. *Medtronic*, 518 U.S. at 496; see *id.* at 506 (BREYER, J,. concurring in part and concurring in judgment). And DOT has explained FMVSS 208's objectives, and the interference that "no airbag" suits pose thereto, consistently over time. Brief for United States as *Amicus Curiae* in *Freightliner Corp.* v. *Myrick*, O. T. 1994, No. 94-286, pp. 28-29; Brief for United States as *Amicus Curiae* in *Wood* v. *General Motors Corp.*, O. T. 1989, No. 89-46, pp. 7, 11-16. In these circumstances, the agency's own views should make a difference. See *City of New York* v. *FCC*, 486 U.S. 57, 64, 100 L. Ed. 2d 48, 108 S. Ct. 1637 (1988); *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714, 721, 85 L. Ed. 2d 714, **[**1927]** 105 S. Ct. 2371 (1985); *De la Cuesta, supra*, at 158; *Blum* v. *Bacon*, 457 U.S. 132, 141, 72 L. Ed. 2d 728, 102 S. Ct. 2355 (1982); *Kalo Brick, supra*, at 321. **[*884]**

We have no reason to suspect that the Solicitor General's representation of DOT's views reflects anything other than "the agency's fair and considered judgment on the matter." *Auer* v. *Robbins*, 519 U.S. 452, 461-462, 137 L. Ed. 2d 79, 117 S. Ct. 905 (1997); cf. *Hillsborough County, supra*, at 721 (expressing reluctance, in the absence of strong evidence, to find an actual conflict between state law and federal regulation where agency that promulgated the regulation had not, at the time the regulation was promulgated *or subsequently*, concluded that such a conflict existed). The failure of the Federal Register to address pre-emption explicitly is thus not determinative.

[*HR1E]** [1E]
[*HR7B]** [7B]
[*HR9]** [9]
The dissent would require a formal agency statement of **[***934]** pre-emptive intent as a prerequisite to concluding that a conflict exists. It relies on cases, or portions thereof, that did not involve conflict pre-emption. See *post*, at 25; *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 583, 94 L. Ed. 2d 577, 107 S. Ct. 1419 (1987); *Hillsborough, supra*, at 718. And conflict pre-emption is different in that it turns on the identification of "actual conflict," and not on an express statement of pre-emptive intent. *English*, 496 U.S. at 78-79; see *Hillsborough*, 471 U.S. at 720-721; *Jones*, 430 U.S. at 540-543. While "pre-emption fundamentally is a question of congressional intent," *English, supra*, at 78, this Court traditionally distinguishes between "express" and "implied" pre-emptive intent, and treats "conflict" pre-emption as an instance of the latter. See, *e.g.*, *Freightliner*, 514 U.S. at 287; *English*, 496 U.S. at 78-79; see also *Cipollone*, 505 U.S. at 545, 547-548 (SCALIA, J., concurring in judgment in part and dissenting in part). And though the Court has looked for a specific statement of pre-emptive intent where it is claimed that the mere "volume and complexity" of agency regulations demonstrate an implicit intent to displace *all* state law in a particular area, *Hillsborough, supra*, at 717; see *post*, at 25, n. 23 -- so-called "field pre-emption" -- the Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists. **[*885]** Indeed, one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict. While we certainly accept the dissent's basic position that a court should not find pre-emption too readily in the absence of clear evidence of a conflict, *English, supra*,

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at 90, for the reasons set out above we find such evidence here. To insist on a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking, would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended. The dissent, as we have said, apparently welcomes that result, at least where "frustration-of-purpose" pre-emption by agency regulation is at issue. *Post*, at 24, and n. 22. We do not.

Nor do we agree with the dissent that the agency's views, as presented here, lack coherence. *Post*, at 21-22. The dissent points, *ibid.*, to language in the Government's brief stating that

"a claim that a manufacturer should have chosen to install airbags rather than another type of passive restraint in a certain model of car *because of other design features particular to that car* . . . would not necessarily frustrate Standard 208's purposes." Brief for United States as *Amicus Curiae* 26, n. 23 (emphasis added).

And the dissent says that these words amount to a concession that there is no conflict in this very case. *Post*, at 21. But that is not what the words say. Rather, **[**1928]** as the italicized phrase emphasizes, **[***935]** they simply leave open the question whether FMVSS 208 would pre-empt a different kind of tort case -- one *not* at issue here. It is possible that some special design-related circumstance concerning a particular kind of car might require airbags, rather than automatic belts, and that a suit seeking to impose that requirement could escape pre-emption -- say, because it would affect so few cars that its rule of law would not create a legal "obstacle" to 208's mixed-fleet, gradual objective. But that is not what petitioners **[*886]** claimed. They have argued generally that, to be safe, a car must have an airbag. See App. 4.

[*HR1F]** [1F]
Regardless, the language of FMVSS 208 and the contemporaneous 1984 DOT explanation is clear enough -- even without giving DOT's own view special weight. FMVSS 208 sought a gradually developing mix of alternative passive restraint devices for safety-related reasons. The rule of state tort law for which petitioners argue would stand as an "obstacle" to the accomplishment of that objective. And the statute foresees the application of ordinary principles of pre-emption in cases of actual conflict. Hence, the tort action is pre-empted.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

DISSENTBY: STEVENS

DISSENT: JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE THOMAS, and JUSTICE GINSBURG join, dissenting.

Airbag technology has been available to automobile manufacturers for over 30 years. There is now general agreement on the proposition "that, to be safe, a car must have an airbag." *Ante*, at 23. Indeed, current federal law imposes that requirement on all automobile manufacturers. See 49 U.S.C. § 30127; 49 CFR § 571.208, S4.1.5.3 (1998). The question raised by petitioner's common-law tort action is whether that proposition was sufficiently obvious when Honda's 1987 Accord was manufactured to make the failure to install such a safety feature actionable under theories of negligence or defective design. The Court holds that an interim regulation motivated by the Secretary of Transportation's desire to foster gradual development of a variety of passive restraint devices deprives state courts of jurisdiction to answer that question. I respectfully dissent from that holding, and especially from the Court's unprecedented extension of the doctrine of pre-emption. As a preface to an explanation of my understanding of the statute and the regulation, these preliminary observations seem appropriate. **[*887]**

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"This is a case about federalism," *Coleman* v. *Thompson*, 501 U.S. 722, 726, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991), that is, about respect for "the constitutional role of the States as sovereign entities." *Alden* v. *Maine*, 527 U.S. 706, 713, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999). It raises important questions concerning the way in which the Federal Government may exercise its undoubted power to oust state courts of their traditional jurisdiction over common-law tort actions. The rule the Court enforces today was not enacted by Congress and is not to be found in the text of any Executive Order or regulation. It has a unique origin: it is the product **[***936]** of the Court's interpretation of the final commentary accompanying an interim administrative regulation and the history of airbag regulation generally. Like many other judge-made rules, its contours are not precisely defined. I believe, however, that it is fair to state that if it had been expressly adopted by the Secretary of Transportation, it would have read as follows:

"No state court shall entertain a common-law tort action based on a claim that an automobile was negligently or defectively designed because it was not equipped with an airbag;

"Provided, however, that this rule shall not apply to cars manufactured before September 1, 1986, or after such time as **[**1929]** the Secretary may require the installation of airbags in all new cars; and

"Provided further, that this rule shall not preclude a claim by a driver who was not wearing her seatbelt that an automobile was negligently or defectively designed because it was not equipped with any passive restraint whatsoever, or a claim that an automobile with particular design features was negligently or defectively designed because it was equipped with one type of passive restraint instead of another."

Perhaps such a rule would be a wise component of a legislative reform of our tort system. I express no opinion about **[*888]** that possibility. It is, however, quite clear to me that Congress neither enacted any such rule itself nor authorized the Secretary of Transportation to do so. It is equally clear to me that the objectives that the Secretary intended to achieve through the adoption of Federal Motor Vehicle Safety Standard 208 would not be frustrated one whit by allowing state courts to determine whether in 1987 the life-saving advantages of airbags had become sufficiently obvious that their omission might constitute a design defect in some new cars. Finally, I submit that the Court is quite wrong to characterize its rejection of the presumption against pre-emption, and its reliance on history and regulatory commentary rather than either statutory or regulatory text, as "ordinary experience-proved principles of conflict pre-emption." *Ante*, at 11.

I

The question presented is whether either the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act or Act), 80 Stat. 718, 15 U.S.C. § 1381 *et seq.* (1988 ed.), n1 or the version of Standard 208 promulgated by the Secretary of Transportation in 1984, 49 CFR §§ 571.208, S4.1.3-S4.1.4 (1998), pre-empts common-law tort claims that an automobile manufactured in 1987 was negligently and defectively designed because it lacked "an effective and safe passive restraint system, including, but not limited to, airbags." App. 3. In *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 34-38, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983), we **[***937]** reviewed the first chapters of the "complex and convoluted history" of Standard 208. It was the "unacceptably high" rate of deaths and injuries caused by automobile accidents that led to the enactment of the Safety Act in 1966. *Id.*, at 33. The purpose of the Act, as stated by Congress, **[*889]** was "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. The Act directed the Secretary of Transportation or his delegate to issue motor vehicle safety standards that "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." § 1392(a). The Act defines the term "safety standard" as a "minimum standard for motor vehicle performance, or motor vehicle equipment performance." § 1391(2).

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n1 In 1994, the Safety Act was recodified at 49 U.S.C. § 30101 *et seq*. Because the changes made to the Act as part of the recodification process were not intended to be substantive, throughout this opinion I shall refer to the pre-1994 version of the statute, as did the Court of Appeals.

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Standard 208 covers "occupant crash protection." Its purpose "is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements . . . [and] equipment requirements for active and passive restraint systems." 49 CFR § 571.208, S2 (1998). The first version of that standard, issued in 1967, simply required the installation of manual seatbelts in all automobiles. Two years later the Secretary formally proposed a revision that would require the installation of "passive occupant restraint systems," that is to say, devices that do not depend for their effectiveness on any action by the vehicle **[**1930]** occupant. The airbag is one such system. n2 The Secretary's proposal led to a series of amendments to Standard 208 that imposed various passive restraint requirements, culminating in a 1977 regulation that mandated such restraints in all cars by the model year 1984. The two commercially available restraints that could satisfy this mandate **[*890]** were airbags and automatic seatbelts; the regulation allowed each vehicle manufacturer to choose which restraint to install. In 1981, however, following a change of administration, the new Secretary first extended the deadline for compliance and then rescinded the passive restraint requirement altogether. In *Motor Vehicle Mfrs. Assn.*, we affirmed a decision by the Court of Appeals holding that this rescission was arbitrary. On remand, Secretary Elizabeth Dole promulgated the version of Standard 208 that is at issue in this case.

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n2 "The airbag is an inflatable device concealed in the dashboard and steering column. It automatically inflates when a sensor indicates that deceleration forces from an accident have exceeded a preset minimum, then rapidly deflates to dissipate those forces. The lifesaving potential of these devices was immediately recognized, and in 1977, after substantial on-the-road experience with both devices, it was estimated by [the National Highway Traffic Safety Administration (NHTSA)] that passive restraints could prevent approximately 12,000 deaths and over 100,000 serious injuries annually. 42 Fed. Reg. 34298." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 35, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983).

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The 1984 standard provided for a phase-in of passive restraint requirements beginning with the 1987 model year. In that year, vehicle manufacturers were required to equip a minimum of 10% of their new passenger cars with such restraints. While the 1987 Honda Accord driven by Ms. Geier was not so equipped, it is undisputed that Honda complied with the 10% minimum by installing passive restraints **[***938]** in certain other 1987 models. This minimum passive restraint requirement increased to 25% of 1988 models and 40% of 1989 models; the standard also mandated that "after September 1, 1989, all new cars must have automatic occupant crash protection." 49 Fed. Reg. 28999 (1984); see 49 CFR §§ 571.208, S4.1.3-S4.1.4 (1998). In response to a 1991 amendment to the Safety Act, the Secretary amended the standard to require that, beginning in the 1998 model year, all new cars have an airbag at both the driver's and right front passenger's positions. n3

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n3 See 49 U.S.C. § 30127; 49 CFR § 571.208, S4.1.5.3 (1998). Congress stated that it did not intend its amendment or the Secretary's consequent alteration of Standard 208 to affect the potential liability of vehicle manufacturers under applicable law related to vehicles with or without airbags. 49 U.S.C. § 30127(f)(2).

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Given that Secretary Dole promulgated the 1984 standard in response to our opinion invalidating her predecessor's rescission of the 1977 passive restraint requirement, she provided a full explanation for her decision not to require airbags **[*891]** in all cars and to phase in the new requirements. The initial 3-year delay was designed to give vehicle manufacturers adequate time for compliance. The decision to give manufacturers a choice between airbags and a different form of passive restraint, such as an automatic seatbelt, was motivated in part by safety concerns and in part by a desire not to retard the development of more effective systems. 49 Fed. Reg. 29000-29001 (1984). An important safety concern was the fear of a "public backlash" to an airbag mandate that consumers might not fully understand. The Secretary believed, however, that the use of airbags would avoid possible public objections to automatic seatbelts and that many of the public concerns regarding airbags were unfounded. *Id.,* at 28991.

Although the standard did not require airbags in all cars, it is clear that the Secretary did intend to encourage wider use of airbags. One of her basic conclusions was that "automatic occupant protection **[**1931]** systems that do not totally rely upon belts, such as airbags . . . , offer significant additional potential for preventing fatalities and injuries, at least in part because the American public is likely to find them less intrusive; their development and availability should be encouraged through appropriate incentives." *Id.,* at 28963; see also *id.,* at 28966, 28986 (noting conclusion of both Secretary and manufacturers that airbags used in conjunction with manual lap and shoulder belts would be "the most effective system of all" for preventing fatalities and injuries). The Secretary therefore included a phase-in period in order to encourage manufacturers to comply with the standard by installing airbags and other (perhaps more effective) nonbelt technologies that they might develop, rather than by installing less expensive automatic seatbelts. n4 As a further incentive **[*892]** for the use of such technologies, the standard provided that a vehicle equipped with an airbag or other nonbelt system would count as 1.5 vehicles for the purpose **[***939]** of determining compliance with the required 10, 25, or 40% minimum passive restraint requirement during the phase-in period. 49 CFR § 571.208, S4.1.3.4(a)(1) (1998). With one oblique exception, n5 there is no mention, either in the text of the final standard or in the accompanying comments, of the possibility that the risk of potential tort liability would provide an incentive for manufacturers to install airbags. Nor is there any other specific evidence of an intent to preclude common-law tort actions.

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n4 "If the Department had required full compliance by September 1, 1987, it is very likely all of the manufacturers would have had to comply through the use of automatic belts. Thus, by phasing-in the requirement, the Department makes it easier for manufacturers to use other, perhaps better, systems such as airbags and passive interiors." 49 Fed. Reg. 29000 (1984).

n5 In response to a comment that the manufacturers were likely to use the cheapest system to comply with the new standard, the Secretary stated that she believed "that competition, potential liability for any deficient systems[,] and pride in one's product would prevent this." *Ibid.*

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II

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Before discussing the pre-emption issue, it is appropriate to note that there is a vast difference between a rejection of Honda's threshold arguments in favor of federal pre-emption and a conclusion that petitioners ultimately would prevail on their common-law tort claims. I express no opinion on the possible merit, or lack of merit, of those claims. I do observe, however, that even though good-faith compliance with the minimum requirements of Standard 208 would not provide Honda with a complete defense on the merits, n6 I assume **[*893]** that such compliance would be admissible evidence tending to negate charges of negligent and defective design. n7 In addition, **[**1932]** if Honda were ultimately found liable, such compliance would presumably weigh against an award of punitive damages. *Silkwood* v. *Kerr-McGee Corp.*, 485 F. Supp. 566, 583-584 (WD Okla. 1979) (concluding that substantial compliance with regulatory scheme did not bar award of punitive damages, but noting that "good faith belief in, and efforts to comply with, all government regulations would be evidence of conduct inconsistent with the mental state requisite for punitive damages" under state law). n8

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n6 *Wood* v. *General Motors Corp.*, 865 F.2d 395, 417 (CA1 1988) (collecting cases). The result would be different, of course, if petitioners had brought common-law tort claims challenging Honda's compliance with a mandatory minimum federal standard -- *e.g.*, claims that a 1999 Honda was negligently and defectively designed *because* it was equipped with airbags as required by the current version of Standard 208. Restatement (Third) of Torts: General Principles § 14(b), and Comment *g* (Discussion Draft, Apr. 5, 1999) ("If the actor's adoption [or rejection] of a precaution would require the actor to violate a statute, the actor cannot be found negligent for failing to adopt [or reject] that precaution"); cf. *ante*, at 8-9 (discussing problem of basing state tort liability upon compliance with mandatory federal regulatory requirement as question of pre-emption rather than of liability on the merits); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal [regulations and state tort law] is a physical impossibility . . . ").

n7 Restatement (Third) of Torts: Products Liability § 4(b), and Comment *e* (1997); *Contini* v. *Hyundai Motor Co.*, 840 F. Supp. 22, 23-24 (SDNY 1993). See also Restatement (Second) of Torts § 288C, and Comment *a* (1964) (negligence); *McNeil Pharmaceutical* v. *Hawkins*, 686 A.2d 567, 577-579 (D. C. 1996) (strict liability).

n8 The subsequent history of *Silkwood* does not cast doubt on this premise. See *Silkwood* v. *Kerr-McGee Corp.*, 667 F.2d 908, 921-923 (CA10 1981) (reversing on ground that federal law pre-empts award of punitive damages), rev'd and remanded, 464 U.S. 238 (1984), on remand, 769 F.2d 1451, 1457-1458 (CA10 1985).

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The parties have not called our attention to any appellate court opinions **[***940]** discussing the merits of similar no-airbag claims despite the fact that airbag technology was available for many years before the promulgation of the 1984 standard -- a standard that is not applicable to any automobiles manufactured before September 1, 1986. Given that an arguable basis for a pre-emption defense did not exist until that standard was promulgated, it is reasonable to infer that the manufacturers' assessment of their potential liability for compensatory and punitive damages on such claims -- even **[*894]** without any pre-emption defense -- did not provide them with a sufficient incentive to engage in widespread installation of airbags.

Turning to the subject of pre-emption, Honda contends that the Safety Act's pre-emption provision, 15 U.S.C. § 1392(d), expressly pre-empts petitioners' common-law no-airbag claims. It also argues that the claims are in any event impliedly pre-empted because the

OUTCOME: Judgment affirmed; petitioners' action was preempted, since the rule of state tort law for which they argued would have stood as an obstacle to the accomplishment of a Federal Motor Vehicle Safety Standard, which sought a developing mix of alternative passive restraint devices.

CORE TERMS: pre-emption, airbag, passive restraint, manufacturer, common-law, regulation, pre-empt, state law, safety standard, saving clause, pre-emptive, passive, seatbelt, belt, automatic, federal law, install, obstacle, pre-empted, saving, manual, Safety Act, occupant, duty, mix, motor vehicle, state tort, installation, promulgated, lawsuit

CORE CONCEPTS - ◆ Hide Concepts

Torts : Procedure : Preemption

A "no airbag" tort suit conflicts with the objectives of Federal Motor Vehicle Safety Standard 208, a standard authorized by the National Traffic and Motor Vehicle Safety Act of 1966, former 15 U.S.C.S. § 1381 et seq., and is therefore pre-empted by the Act.

Constitutional Law : Supremacy Clause

Transportation Law : Private Motor Vehicles : Maintenance & Safety

See former 15 U.S.C.S. § 1392(d).

Torts : Procedure : Preemption

Compliance with a federal safety standard does not exempt any person from any liability under common law, former 15 U.S.C.S. § 1397(k).

Torts : Procedure : Preemption

The savings clause in the Motor Vehicle Safety Act of 1966, former 15 U.S.C.S. § 1381 et seq., (like the express preemption provision) does not bar the ordinary working of conflict preemption principles.

Torts : Procedure : Preemption

The court has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.

Constitutional Law : Supremacy Clause

The saving clause in the Motor Vehicle Safety Act of 1966, former 15 U.S.C.S. § 1381 et seq., foresees -- it does not foreclose -- the possibility that a federal safety standard will pre-empt a state common-law tort action with which it conflicts.

Constitutional Law : Supremacy Clause

The court has not previously driven a legal wedge, only a terminological one, between conflicts that prevent or frustrate the accomplishment of a federal objective and conflicts that make it impossible for private parties to comply with both state and federal law. Rather, it has said that both forms of conflicting state law are nullified by the Supremacy Clause of the United States Constitution.

Constitutional Law : Supremacy Clause

Torts : Procedure : Preemption

The court has refused to read general saving provisions to tolerate actual conflict both in cases involving impossibility, and in frustration-of-purpose cases.

Torts : Procedure : Preemption

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imposition of liability in cases such as this would frustrate the purposes of Standard 208. I discuss these alternative arguments in turn.

III

When a state statute, administrative rule, or common-law cause of action conflicts with a federal statute, it is axiomatic that the state law is without effect. U.S. Const., Art. VI, cl. 2; *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992). On the other hand, it is equally clear that the Supremacy Clause does not give unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States. n9 Because of the role of States as separate sovereigns in our federal system, we have long presumed that state laws -- particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the States' historic police powers -- are not to be pre-empted by a federal statute unless it is the clear and manifest purpose of Congress to do so. *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996); *Gade* v. *National Solid Wastes Management Assn.*, 505 U.S. 88, 116-117, 120 L. Ed. 2d 73, 112 S. Ct. 2374 (1992) (SOUTER, J., dissenting) ("If the [federal] statute's terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred").

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n9 Regrettably, the Court has not always honored the latter proposition as scrupulously as the former. See, *e.g.*, *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 101 L. Ed. 2d 442, 108 S. Ct. 2510 (1988).

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When a federal statute contains an express pre-emption provision, "the task of statutory construction must in the first instance focus on the plain wording of [that provision], which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664, 123 L. Ed. 2d 387, 113 S. Ct. 1732 (1993). The Safety Act contains both an express pre-emption provision, 15 U.S.C. § 1392(d), and a saving **[**1933]** clause that expressly preserves common-law claims, § 1397(k). The relevant part of the former provides:

"Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, **[***941]** no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." n10

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n10 This provision is now codified at 49 U.S.C. § 30103(b)(1). Because both federal and state opinions construing this provision have consistently referred to it as " § 1392(d)," I shall follow that practice. Section 1392(d) contains these additional sentences: "Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard."

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The latter states:

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"Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." n11

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n11 This provision is now codified at 49 U.S.C. § 30103(e). See nn. 1 and 10, *supra*.

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Relying on § 1392(d) and legislative history discussing Congress' desire for uniform national safety standards, n12 Honda argues that petitioners' common-law no-airbag claims are expressly pre-empted because success on those claims would necessarily establish a state "safety standard" not identical to Standard 208. It is perfectly clear, however, that the term "safety standard" as used in these two sections refers to an objective rule prescribed by a legislature or an administrative agency and does not encompass case-specific decisions by judges and juries that resolve common-law claims. That term is used three times in these sections; presumably it is used consistently. *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570, 131 L. Ed. 2d 1, 115 S. Ct. 1061 (1995). The two references to a federal safety standard are necessarily describing an objective administrative rule. 15 U.S.C. § 1392(a). When the pre-emption provision refers to a safety standard established by a "State or political subdivision of a State," therefore, it is most naturally read to convey a similar meaning. In addition, when the two sections are read together, they provide compelling evidence of an intent to distinguish between legislative and administrative rulemaking, on the one hand, and common-law liability, on the other. This distinction was certainly a rational one for Congress to draw in the Safety Act given that common-law liability -- unlike most legislative or administrative rulemaking -- necessarily performs an important remedial role in compensating accident victims. Cf. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 251, 256, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984).

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n12 S. Rep. No. 1301, 89th Cong., 2d Sess., 2 (1966); H. R. Rep. No. 1776, 89th Cong., 2d Sess., 17 (1966).

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It is true that in three recent cases we concluded that broadly phrased pre-emptive commands encompassed common-law claims. In *Cipollone* v. *Liggett Group, Inc.*, while we thought it clear that the pre-emption provision **[***942]** in the 1965 Federal Cigarette Labeling and Advertising Act applied only to "rulemaking bodies," 505 U.S. at 518, we concluded that the broad command in the subsequent 1969 **[*897]** amendment that "no requirement or prohibition . . . shall be imposed under State law" did include certain common-law claims. 505 U.S. at 548-549 (SCALIA, J., concurring in judgment in part and dissenting in part). n13 In *CSX* **[**1934]** *Transp., Inc.* v. *Easterwood*, where the pre-emption clause of the Federal Railroad Safety Act of 1970 expressly provided that federal railroad safety regulations would pre-empt any incompatible state "'law, rule, regulation, order, or standard relating to railroad safety,'" n14 we held that a federal regulation governing maximum train speed pre-empted a negligence claim that a speed under the federal maximum was excessive. And in *Medtronic, Inc.* v. *Lohr*, we recognized that the statutory reference to "any requirement" imposed by a State or its political subdivisions may include common-law duties. 518 U.S. at 502-503 (plurality opinion); 518 U.S. at 503-505 (BREYER, J., concurring in part and concurring in judgment); 518 U.S. at 509-512 (O'CONNOR, J., concurring in part and dissenting in part).

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n13 The full text of the 1969 provision read: "'No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.'" 505 U.S. at 515 (quoting Public Health Cigarette Smoking Act of 1969, 84 Stat. 88).

n14 507 U.S. at 664 (quoting § 205, 84 Stat. 972, as amended, 45 U.S.C. § 434 (1988 ed. and Supp. II)).

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The statutes construed in those cases differed from the Safety Act in two significant respects. First, the language in each of those pre-emption provisions was significantly broader than the text of § 1392(d). Unlike the broader language of those provisions, the ordinary meaning of the term "safety standard" includes positive enactments, but does not include judicial decisions in common-law tort cases.

Second, the statutes at issue in *Cipollone*, *CSX*, and *Medtronic* did not contain a saving clause expressly preserving common-law remedies. The saving clause in the Safety Act **[*898]** unambiguously expresses a decision by Congress that compliance with a federal safety standard does not exempt a manufacturer from *any* common-law liability. In light of this reference to common-law liability in the saving clause, Congress surely would have included a similar reference in § 1392(d) if it had intended to pre-empt such liability. *Chicago* v. *Environmental Defense Fund*, 511 U.S. 328, 338, 114 S. Ct. 1588, 128 L. Ed. 2d 302 (1994) (noting presumption that Congress acts intentionally when it includes particular language in one section of a statute but omits it in another).

The Court does not disagree with this interpretation of the term "safety standard" in § 1392 (d). Because the meaning of that term as used by Congress in this statute is clear, the text of § 1392(d) is itself sufficient to establish that the Safety Act does not expressly pre-empt common-law claims. In order to avoid the conclusion that the saving clause is superfluous, **[***943]** therefore, it must follow that it has a different purpose: to limit, or possibly to foreclose entirely, the possible pre-emptive effect of safety standards promulgated by the Secretary. The Court's approach to the case has the practical effect of reading the saving clause out of the statute altogether. n15

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n15 The Court surely cannot believe that Congress included that clause in the statute just to avoid the danger that we would otherwise fail to give the term "safety standard" its ordinary meaning.

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Given the cumulative force of the fact that § 1392(d) does not expressly pre-empt common-law claims and the fact that § 1397(k) was obviously intended to limit the pre-emptive effect of the Secretary's safety standards, it is quite wrong for the Court to assume that a possible implicit conflict with the purposes to be achieved by such a standard should have the same pre-emptive effect "'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Ante*, at 10. Properly construed, the Safety Act imposes a special burden on a party relying on an arguable implicit conflict **[**1935]** with a temporary regulatory policy -- **[*899]** rather than a conflict with congressional policy or with the text of any regulation -- to demonstrate that a common-law claim has been pre-empted.

IV

Even though the Safety Act does not expressly pre-empt common-law claims, Honda contends that Standard 208 -- of its own force -- implicitly pre-empts the claims in this case.

"We have recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, *English* v. *General Elec. Co.*, 496 U.S. 72, 78-79, 110 L. Ed. 2d 65, 110 S. Ct. 2270 (1990), or when state law is in actual conflict with federal law. We have found implied conflict pre-emption where it is 'impossible for a private party to comply with both state and federal requirements,' *id.*, at 79, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941)." *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287, 131 L. Ed. 2d 385, 115 S. Ct. 1483 (1995).

In addition, we have concluded that regulations "intended to pre-empt state law" that are promulgated by an agency acting non-arbitrarily and within its congressionally delegated authority may also have pre-emptive force. *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U.S. 141, 153-154, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982). In this case, Honda relies on the last of the implied pre-emption principles stated in *Freightliner*, arguing that the imposition of common-law liability for failure to install an airbag would frustrate the purposes and objectives of Standard 208.

Both the text of the statute and the text of the standard provide persuasive reasons for rejecting this argument. The saving clause of the Safety Act arguably denies the Secretary the authority to promulgate standards that would **[*900]** pre-empt **[***944]** common-law remedies. n16 Moreover, the text of Standard 208 says nothing about pre-emption, and I am not persuaded that Honda has overcome our traditional presumption that it lacks any implicit pre-emptive effect.

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n16 The Court contends, in essence, that a saving clause cannot foreclose *implied* conflict pre-emption. *Ante*, at 11. The cases it cites to support that point, however, merely interpreted the language of the particular saving clauses at issue and concluded that those clauses did not foreclose implied pre-emption; they do not establish that a saving clause in a given statute cannot foreclose implied pre-emption based on frustration of that statute's purposes, or even (more importantly for our present purposes) that a saving clause in a given statute cannot deprive a *regulation* issued pursuant to that statute of any implicit pre-emptive effect. See *United States* v. *Locke*, 529 U.S. , (2000) (slip op., at 12-15); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 493, 93 L. Ed. 2d 883, 107 S. Ct. 805 (1987) ("Given that the Act itself does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact pre-empts an action"); *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 328, 331, 67 L. Ed. 2d 258, 101 S. Ct. 1124 (1981). As stated in the text, I believe the language of this particular saving clause unquestionably limits, and possibly forecloses entirely, the pre-emptive effect that safety standards promulgated by the Secretary have on common-law remedies. See *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374, 90 L. Ed. 2d 369, 106 S. Ct. 1890 (1986). Under that interpretation, there is by definition no frustration of federal purposes -- that is, no "tolerat[ion of] actual conflict," *ante*, at 11 -- when tort suits are allowed to go forward. Thus, because there is a textual basis for concluding that Congress intended to preserve the state law at issue, I think it entirely appropriate for the party favoring pre-emption to bear a special burden in attempting to show that valid federal purposes would be frustrated if that state law were not pre-empted.

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Honda argues, and the Court now agrees, that the risk of liability presented by common-law claims that vehicles without **[**1936]** airbags are negligently and defectively designed

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would frustrate the policy decision that the Secretary made in promulgating Standard 208. This decision, in their view, was that safety -- including a desire to encourage "public acceptance of the airbag technology and experimentation with better passive restraint systems," n17 -- would best be promoted **[*901]** through gradual implementation of a passive restraint requirement making airbags only one of a variety of systems that a manufacturer could install in order to comply, rather than through a requirement mandating the use of one particular system in every vehicle. In its brief supporting Honda, the United States agreed with this submission. It argued that if the manufacturers had known in 1984 that they might later be held liable for failure to install airbags, that risk "would likely have led them to install airbags in all cars," thereby frustrating the Secretary's safety goals and interfering with the methods designed to achieve them. Brief for United States as *Amicus Curiae* 25.

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n17 166 F.3d 1236, 1243 (CADC 1999).

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There are at least three flaws in this argument that provide sufficient grounds for rejecting it. First, the entire argument is based on an unrealistic factual predicate. Whatever the risk of liability on a no-airbag claim may have been prior to the promulgation of the 1984 version of Standard 208, that risk did not lead any manufacturer to install airbags in even a substantial portion of its cars. If there had been a realistic likelihood that the risk of tort liability would have that consequence, there would have been no need for Standard 208. The promulgation of **[***945]** that standard certainly did not *increase* the pre-existing risk of liability. Even if the standard did not create a previously unavailable pre-emption defense, it likely *reduced* the manufacturers' risk of liability by enabling them to point to the regulation and their compliance therewith as evidence tending to negate charges of negligent and defective design. See Part II, *supra*. Given that the pre-1984 risk of liability did not lead to widespread airbag installation, this reduced risk of liability was hardly likely to compel manufacturers to install airbags in all cars -- or even to compel them to comply with Standard 208 during the phase-in period by installing airbags exclusively.

Second, even if the manufacturers' assessment of their risk of liability ultimately proved to be wrong, the purposes of Standard 208 would not be frustrated. In light of the inevitable **[*902]** time interval between the eventual filing of a tort action alleging that the failure to install an airbag is a design defect and the possible resolution of such a claim against a manufacturer, as well as the additional interval between such a resolution (if any) and manufacturers' "compliance with the state law duty in question," *ante*, at 19, by modifying their designs to avoid such liability in the future, it is obvious that the phase-in period would have ended long before its purposes could have been frustrated by the specter of tort liability. Thus, even without pre-emption, the public would have been given the time that the Secretary deemed necessary to gradually adjust to the increasing use of airbag technology and allay their unfounded concerns about it. Moreover, even if any no-airbag suits were ultimately resolved against manufacturers, the resulting incentive to modify their designs would have been quite different from a decision by the Secretary to mandate the use of airbags in every vehicle. For example, if the extra credit provided for the use of nonbelt passive restraint technologies during the phase-in period had (as the Secretary hoped) ultimately encouraged manufacturers to develop a nonbelt system more effective than the airbag, manufacturers held liable for failing to install passive restraints would have been free to respond by modifying their designs to include **[**1937]** such a system *instead of* an airbag. n18 It seems clear, therefore, that any **[*903]** **[***946]** potential tort liability would not frustrate the Secretary's desire to encourage both experimentation with better passive restraint systems and public acceptance of airbags.

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n18 The Court's failure to "understand [this point] correctly," *ante*, at 20, is directly attributable to its fundamental misconception of the nature of duties imposed by tort law. A general verdict of liability in a case seeking damages for negligent and defective design of a vehicle that (like Ms. Geier's) lacked any passive restraints does not amount to an immutable, mandatory "rule of state tort law imposing . . . a duty [to install an airbag]." *Ante*, at 18; see also *ante*, at 8 (referring to verdict in common-law tort suit as a "jury-imposed safety standard"). Rather, that verdict merely reflects the jury's judgment that the manufacturer of a vehicle without any passive restraint system breached its duty of due care by designing a product that was not reasonably safe because a reasonable alternative design -- "including, but not limited to, airbags," App. 3 -- could have reduced the foreseeable risks of harm posed by the product. See Restatement (Third) of Torts: Products Liability § 2(b), and Comment *d* (1997); *id.*, § 1, Comment *a* (noting that § 2(b) is rooted in concepts of both negligence and strict liability). Such a verdict obviously does not foreclose the possibility that more than one alternative design exists the use of which would render the vehicle reasonably safe and satisfy the manufacturer's duty of due care. Thus, the Court is quite wrong to suggest that, as a consequence of such a verdict, only the installation of airbags would enable manufacturers to avoid liability in the future.

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Third, despite its acknowledgement that the saving clause "preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor," *ante*, at 7, the Court completely ignores the important fact that by definition all of the standards established under the Safety Act -- like the British regulations that governed the number and capacity of lifeboats aboard the *Titanic n19* -- impose minimum, rather than fixed or maximum, requirements. 15 U.S.C. § 1391(2); see *Norfolk Southern R. Co.* v. *Shanklin*, 529 U.S. , (2000) (BREYER, J., concurring) (slip op., at 1) ("federal *minimum* safety standards should not pre-empt a state tort action"); *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 721, 85 L. Ed. 2d 714, 105 S. Ct. 2371 (1985). The phase-in program authorized by Standard 208 thus set minimum percentage requirements for the installation of passive restraints, increasing in annual stages of 10, 25, 40, and 100%. Those requirements were not ceilings, and it is obvious that the Secretary favored a more rapid increase. The possibility that exposure to potential tort liability **[*904]** might accelerate the rate of increase would actually further the only goal explicitly mentioned in the standard itself: reducing the number of deaths and severity of injuries of vehicle occupants. Had gradualism been independently important as a method of achieving the Secretary's safety goals, presumably the Secretary would have put a ceiling as well as a floor on each annual increase in the required percentage of new passive restraint installations. For similar reasons, it is evident that variety was not a matter of independent importance to the Secretary. Although the standard allowed manufacturers to comply with the minimum percentage requirements by installing passive restraint systems other than airbags (such as automatic seatbelts), it encouraged them to install airbags and other nonbelt systems that might be developed in the future. The Secretary did not act to ensure the use of a variety of passive restraints by placing ceilings on the number of airbags that could be used in complying **[**1938]** with the minimum requirements. n20 Moreover, even if variety and gradualism had been independently important to the Secretary, there is nothing in the Standard, the accompanying commentary, or the history of airbag regulation to support the notion that the Secretary intended to advance those purposes at all costs, without regard to the detrimental consequences that pre-emption of tort liability could have for the achievement of her avowed purpose of reducing vehicular injuries. See *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. at 257.

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n19 Statutory Rules and Orders 1018-1021, 1033 (1908). See Nader & Page, Automobile-Design Liability and Compliance with Federal Standards, 64 Geo. Wash. L. Rev. 415, 459

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(1996) (noting that the *Titanic* "complied with British governmental regulations setting minimum requirements for lifeboats when it left port on its final, fateful voyage with boats capable of carrying only about [half] of the people on board"); W. Wade, The *Titanic*: End of a Dream 68 (1986).

n20 Of course, allowing a suit like petitioners' to proceed against a manufacturer that had installed no passive restraint system in a particular vehicle would not even arguably pose an "obstacle" to the auto manufacturers' freedom to choose among several different passive restraint device options. Cf. *ante*, at 16, 18-19.

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My disagreement with Honda and the Government runs deeper than these flaws, however. In its brief, the Government concedes that "[a] claim that a manufacturer should have chosen to install airbags rather than another type of **[*905]** passive restraint in a certain model of car because of other design features particular to that car . . . would not necessarily frustrate Standard 208's purposes." Brief for United States as *Amicus Curiae* 26, n. 23. n21 Petitioners' claims here are quite similar to the claim described by the Government: their complaint **[***947]** discusses other design features particular to the 1987 Accord (such as the driver's seat) that allegedly rendered it unreasonably dangerous to operate without an airbag. App. 4-5. The only distinction is that in this case, the particular 1987 Accord driven by Ms. Geier included no passive restraint of any kind because Honda chose to comply with Standard 208's 10% minimum requirement by installing passive restraints in other 1987 models. I fail to see how this distinction makes a difference to the purposes of Standard 208, however. If anything, the type of claim favored by the Government -- *e.g.*, that a particular model of car should have contained an airbag instead of an automatic seatbelt -- would seem to trench even more severely upon the purposes that the Government and Honda contend were behind the promulgation of Standard 208: that having a variety of passive restraints, rather than only airbags, was necessary to promote safety. Thus, I conclude that the Government, on the Secretary's behalf, has failed to articulate a coherent view of the policies behind Standard 208 that would be frustrated by the petitioners' claims.

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n21 Compare *ante*, at 18-19 (disagreeing with Government's view by concluding that tort-law duty "requiring manufacturers of all similar cars to install airbags rather than other passive restraint systems . . . would [present] an obstacle to the variety and mix of devices that the federal regulation sought"), with *ante*, at 21, 23 (noting that "the agency's own views should make a difference," but contending that the above-quoted Government view is "*not* at issue here").

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V

For these reasons, it is evident that Honda has not crossed the high threshold established by our decisions regarding **[*906]** pre-emption of state laws that allegedly frustrate federal purposes: it has not demonstrated that allowing a common-law no-airbag claim to go forward would impose an obligation on manufacturers that directly and irreconcilably contradicts any primary objective that the Secretary set forth with clarity in Standard 208. *Gade v. National Solid Wastes Management Assn.*, 505 U.S. at 110 (KENNEDY, J., concurring in part and concurring in judgment); 505 U.S. at 111 ("A freewheeling judicial inquiry into whether [state law] is in tension with federal objectives would undercut the principle that it is Congress [and federal agencies,] rather than the courts[,] that pre-empt state law"). Furthermore, it is important to note that the text of Standard 208 (which the Court does not even bother **[**1939]** to quote in its opinion), unlike the regulation we reviewed in *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. at 158, does not contain any expression of

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an intent to displace state law. Given our repeated emphasis on the importance of the presumption against pre-emption, see, *e.g.*, *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. at 663-664; *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947), this silence lends additional support to the conclusion that the continuation of whatever common-law liability may exist in a case like this poses no danger of frustrating any of the Secretary's primary purposes in promulgating Standard 208. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. at 721; *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. at 251 ("It is difficult to believe that [the Secretary] would, without comment, **[***948]** remove all means of judicial recourse for those injured by illegal conduct.").

The Court apparently views the question of pre-emption in this case as a close one. *Ante*, at 20-21 (relying on Secretary's interpretation of Standard 208's objectives to bolster its finding of pre-emption). Under "ordinary experience-proved principles of conflict pre-emption," *ante*, at 11, therefore, the presumption against pre-emption should control. Instead, the Court simply ignores the presumption, **[*907]** preferring instead to put the burden on petitioners to show that their tort claim would not frustrate the Secretary's purposes. *Ante*, at 19-20 (noting that petitioners' arguments "cannot, by themselves, change the legal result"). In view of the important principles upon which the presumption is founded, however, rejecting it in this manner is profoundly unwise.

Our presumption against pre-emption is rooted in the concept of federalism. It recognizes that when Congress legislates "in a field which the States have traditionally occupied . . . [,] we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. at 230; see *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977). The signal virtues of this presumption are its placement of the power of pre-emption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance (particularly in areas of traditional state regulation), and its requirement that Congress speak clearly when exercising that power. In this way, the structural safeguards inherent in the normal operation of the legislative process operate to defend state interests from undue infringement. *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985); see *United States* v. *Morrison*, 529 U.S. , (2000) (BREYER, J., dissenting) (slip op., at 6-9); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. , (2000) (STEVENS, J., dissenting) (slip op., at 2); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 292-293, 130 L. Ed. 2d 753, 115 S. Ct. 834 (1995) (THOMAS, J., dissenting); *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-464, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991). In addition, the presumption serves as a limiting principle that prevents federal judges from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purposes -- *i.e.*, that state law is pre-empted if it "stands as an obstacle to the accomplishment and execution **[*908]** of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. at 67. n22

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n22 Recently, one commentator has argued that our doctrine of frustration-of-purposes (or "obstacle") pre-emption is not supported by the text or history of the Supremacy Clause, and has suggested that we attempt to bring a measure of rationality to our pre-emption jurisprudence by eliminating it. Nelson, Preemption, 86 Va. L. Rev. 225, 231-232 (2000) ("Under the Supremacy Clause, preemption occurs if and only if state law contradicts a valid rule established by federal law, and the mere fact that the federal law serves certain purposes does not automatically mean that it contradicts everything that might get in the way of those purposes"). Obviously, if we were to do so, there would be much less need for the presumption against pre-emption (which the commentator also criticizes). As matters now stand, however, the presumption reduces the risk that federal judges will draw too deeply on malleable and politically unaccountable sources such as regulatory history in

finding pre-emption based on frustration of purposes.

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While the presumption is important in assessing the pre-emptive reach of federal statutes, it becomes crucial when the pre-emptive effect of an administrative regulation is at issue. Unlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law. We have addressed the heightened federalism and nondelegation concerns that agency pre-emption raises by using the presumption to build a procedural bridge across the political accountability gap between States and administrative agencies. Thus, even in cases where implied regulatory pre-emption is at issue, we generally "expect an administrative regulation to declare any intention to pre-empt state law with some specificity." n23 *California Coastal* **[*909]** *Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 583, 94 L. Ed. 2d 577, 107 S. Ct. 1419 (1987); see *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. at 717-718 (noting that too easily implying pre-emption "would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence," and stating that "because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive"); *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U.S. at 154 (noting that pre-emption inquiry is initiated "when the administrator promulgates regulations intended to pre-empt state law"). This expectation, which is shared by the Executive Branch, n24 serves to ensure **[**1941]** that States will be able to have a dialog **[*910]** with agencies **[***950]** regarding pre-emption decisions *ex ante* through the normal notice-and-comment procedures of the Administrative Procedure Act (APA), 5 U.S.C. § 553.

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n23 The Court brushes aside our specificity requirement on the ground that the cases in which we relied upon it were not cases of implied conflict pre-emption. *Ante*, at 21-22. The Court is quite correct that *Hillsborough* and *California Coastal* are cases in which field pre-emption, rather than conflict pre-emption, was at issue. This distinction, however, does not take the Court as far as it would like. Our cases firmly establish that conflict and field pre-emption are alike in that both are instances of implied pre-emption that by definition do "not [turn] on an express statement of pre-emptive intent." *Ibid.*; see, *e.g.*, *Freightliner Corp.* v. *Myrick*, 514 U.S. at 287 (quoted on page 15, *supra*); *English* v. *General Elec. Co.*, 496 U.S. 72, 79-80, 110 L. Ed. 2d 65, 110 S. Ct. 2270, and n. 5 (1990) (noting that field pre-emption rests on an inference of congressional intent to exclude state regulation and that it "may be understood as a species of conflict pre-emption"); *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U.S. 141, 153, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982). Given that our specificity requirement was adopted in cases involving implied pre-emption, the Court cannot persuasively claim that the requirement is incompatible with our implied pre-emption jurisprudence in the federal regulatory context.

n24 See Exec. Order No. 12612, § 4(e), 3 CFR 252, 255 (1988) ("When an Executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department or agency shall provide all affected States notice and an opportunity for appropriate participation in the proceedings."); Exec. Order No. 13132, § 4(e), 64 Fed. Reg. 43255, 43257 (1999) (same); cf. *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 496, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996) (discussing 21 CFR § 808.5 (1995), an FDA regulation allowing a State to request an advisory opinion regarding whether a particular state-law requirement is pre-empted, or exempt from pre-emption, under the Medical Device Amendments of 1976).

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When the presumption and its underpinnings are properly understood, it is plain that Honda has not overcome the presumption in this case. Neither Standard 208 nor its accompanying commentary includes the slightest specific indication of an intent to pre-empt common-law no-airbag suits. Indeed, the only mention of such suits in the commentary tends to suggest that they would not be pre-empted. See n. 5, *supra*. In the Court's view, however, "the failure of the Federal Register to address pre-emption explicitly is . . . not determinative," *ante*, at 21, because the Secretary's consistent litigating position since 1989, the history of airbag regulation, and the commentary accompanying the final version of Standard 208 reveal purposes and objectives of the Secretary that would be frustrated by no-airbag suits. Pre-empting on these three bases blatantly contradicts the presumption against pre-emption. When the 1984 version of Standard 208 was under consideration, the States obviously were not afforded any notice that purposes might someday be discerned in the history of airbag regulation that would support pre-emption. Nor does the Court claim that the notice of proposed rulemaking that led to Standard 208 provided the States with notice either that the final version of the standard might contain an express pre-emption provision or that the commentary accompanying it might contain a statement of purposes with arguable pre-emptive effect. Finally, the States plainly had no opportunity to comment upon either the commentary accompanying the final version of the standard or the Secretary's *ex post* litigating position that the standard had implicit pre-emptive effect.

Furthermore, the Court identifies no case in which we have upheld a regulatory claim of frustration-of-purposes implied conflict pre-emption based on nothing more than an *ex post* administrative litigating position and inferences from **[*911]** regulatory history and final commentary. The latter two sources are even more malleable than legislative history. Thus, when snippets from them are combined with the Court's broad conception of a doctrine of frustration-of-purposes pre-emption untempered by the presumption, a vast, undefined area of state law becomes vulnerable to pre-emption by any related federal law or regulation. In my view, however, "preemption analysis is, or at least should be, a matter of precise statutory [or regulatory] construction rather than an exercise in free-form judicial policymaking." 1 L. Tribe, American Constitutional Law § 6-28, p. 1177 (3d ed. 2000).

As to the Secretary's litigating position, it is clear that "an interpretation contained in a [legal brief], not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking[,] . . . does not warrant *Chevron*-style deference." *Christensen* v. *Harris County*, 529 U.S. , (2000) (slip op., at 10). Moreover, our **[***951]** pre-emption precedents and the APA establish that even if the Secretary's litigating position were coherent, the lesser deference paid to it by the Court today would be inappropriate. Given the Secretary's contention that he has the authority to promulgate safety standards that pre-empt state law and the fact that he could promulgate a standard such as the one quoted *supra*, at 2, with relative ease, we should be quite reluctant to find pre-emption based only on the Secretary's informal effort to recast the 1984 version of Standard 208 into a pre-emptive mold. n25 See **[**1942]** *Hillsborough County* v. *Automated Medical* **[*912]** *Laboratories, Inc.*, 471 U.S. at 721; cf. *Medtronic, Inc.* v. *Lohr*, 518 U.S. at 512 (O'CONNOR, J., concurring in part and dissenting in part) ("It is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference"); *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U.S. 735, 743-744, 135 L. Ed. 2d 25, 116 S. Ct. 1730 (1996). Requiring the Secretary to put his pre-emptive position through formal notice-and-comment rulemaking -- whether contemporaneously with the promulgation of the allegedly pre-emptive regulation or at any later time that the need for pre-emption becomes apparent n26 -- respects both the federalism and nondelegation principles that underlie the presumption against pre-emption in the regulatory context and the APA's requirement of new rulemaking when an agency substantially modifies its interpretation of a regulation. 5 U.S.C. § 551(5); *Paralyzed Veterans of America* v. *D. C. Arena L. P.*, 326 U.S. App. D.C. 25, 117 F.3d 579, 586 (CADC 1997); *National Family Planning & Reproductive Health Assn.* v. *Sullivan*, 298 U.S. App. D.C. 288, 979 F.2d 227, 240 (CADC 1992).

- When the rule of law for which petitioners contend would stand as an obstacle to the accomplishment and execution of the important means-related federal objectives, it is pre-empted.

Constitutional Law : Supremacy Clause

- Conflict pre-emption turns on the identification of "actual conflict," and not on an express statement of pre-emptive intent.

Constitutional Law : Supremacy Clause

- While pre-emption fundamentally is a question of congressional intent, the court traditionally distinguishes between express and implied pre-emptive intent, and treats conflict pre-emption as an instance of the latter. And though the court has looked for a specific statement of pre-emptive intent where it is claimed that the mere volume and complexity of agency regulations demonstrate an implicit intent to displace all state law in a particular area, so-called field pre-emption, the court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists.

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SYLLABUS: Pursuant to its authority under the National Traffic and Motor Vehicle Safety Act of 1966, the Department of Transportation promulgated Federal Motor Vehicle Safety Standard (FMVSS) 208, which required auto manufacturers to equip some but not all of their 1987 vehicles with passive restraints. Petitioner Alexis Geier was injured in an accident while driving a 1987 Honda Accord that did not have such restraints. She and her parents, also petitioners, sought damages under District of Columbia tort law, claiming, *inter alia,* that respondents (hereinafter American Honda) were negligent in not equipping the Accord with a driver's side airbag. Ruling that their claims were expressly pre-empted by the Act, the District Court granted American Honda summary judgment. In affirming, the Court of Appeals concluded that, because petitioners' state tort claims posed an obstacle to the accomplishment of the objectives of FMVSS 208, those claims conflicted with that standard and that, under ordinary pre-emption principles, the Act consequently pre-empted the lawsuit.

Held: Petitioners'"no airbag" lawsuit conflicts with the objectives of FMVSS 208 and is therefore pre-empted by the Act. Pp. 3-23.

(a) The Act's pre-emption provision, 15 U.S.C. § 1392(d), does not expressly pre-empt this lawsuit. The presence of a saving clause, which says that "compliance with" a federal safety standard "does not exempt any person from any liability under common law," § 1397(k), requires that the pre-emption provision be read narrowly to pre-empt only state statutes and regulations. The saving clause assumes that there are a significant number of common-law liability cases to save. And reading the express pre-emption provision to exclude common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate where, for example, federal law creates only a minimum safety standard. Pp. 3-5.

(b) However, the saving clause does *not* bar the ordinary working of conflict pre-emption principles. Nothing in that clause suggests an intent to save state tort actions that conflict with federal regulations. The words "compliance" and "does not exempt" sound as if they simply bar a defense that compliance with a federal standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute, or a minimum, requirement. This interpretation does not conflict with the purpose of the saving provision, for it preserves actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor. Moreover, this

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n25 The cases cited by the Court, *ante*, at 21, are not to the contrary. In *City of New York* v. *FCC*, 486 U.S. 57, 100 L. Ed. 2d 48, 108 S. Ct. 1637 (1988), for example, we were faced with FCC regulations that explicitly "reaffirmed the Commission's established policy of pre-empting local regulation of technical signal quality standards for cable television." *Id.*, at 62, 65. It was only in determining whether the issuance of such regulations was a proper exercise of the authority delegated to the agency by Congress that we afforded a measure of deference to the agency's interpretation of that authority, as *formally* expressed through its explicitly pre-emptive regulations. *Id.*, at 64; see also *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700-705, 81 L. Ed. 2d 580, 104 S. Ct. 2694 (1984) (regulation); *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U.S. at 158-159 (regulation); *Blum* v. *Bacon*, 457 U.S. 132, 141-142, 72 L. Ed. 2d 728, 102 S. Ct. 2355 (1982) (Action Transmittal by Social Security Administration); *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. at 327 (order of Interstate Commerce Commission); *United States* v. *Shimer*, 367 U.S. 374, 377, 6 L. Ed. 2d 908, 81 S. Ct. 1554 (1961) (regulation). I express no opinion on whether any deference would be appropriate in any of these situations, but merely observe that such situations are not presented here.

n26 *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. at 721 (noting that agency "can be expected to monitor, on a continuing basis, the effects on the federal program of local requirements" and to promulgate regulations pre-empting local law that imperils the goals of that program).

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Because neither the text of the statute nor the text of the regulation contains any indication of an intent to pre-empt **[*913]** petitioners' cause of action, and because I cannot agree **[***952]** with the Court's unprecedented use of inferences from regulatory history and commentary as a basis for implied pre-emption, I am convinced that Honda has not overcome the presumption against pre-emption in this case. I therefore respectfully dissent.

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Court has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law, a concern applicable here. The pre-emption provision and the saving provision, read together, reflect a neutral policy, not a specially favorable or unfavorable one, towards the application of ordinary conflict pre-emption. The pre-emption provision itself favors pre-emption of state tort suits, while the saving clause disfavors pre-emption at least some of the time. However, there is nothing in any natural reading of the two provisions that would favor one policy over the other where a jury-imposed safety standard actually conflicts with a federal safety standard. Pp. 5-11.

(c) This lawsuit actually conflicts with FMVSS 208 and the Act itself. DOT saw FMVSS 208 not as a minimum standard, but as a way to provide a manufacturer with a range of choices among different passive restraint systems that would be gradually introduced, thereby lowering costs, overcoming technical safety problems, encouraging technological development, and winning widespread consumer acceptance -- all of which would promote FMVSS 208's safety objectives. The standard's history helps explain why and how DOT sought these objectives. DOT began instituting passive restraint requirements in 1970, but it always permitted passive restraint options. Public resistance to an ignition interlock device that in effect forced occupants to buckle up their manual belts influenced DOT's subsequent initiatives. The 1984 version of FMVSS 208 reflected several significant considerations regarding the effectiveness of manual seatbelts and the likelihood that passengers would leave their manual seatbelts unbuckled, the advantages and disadvantages of passive restraints, and the public's resistance to the installation or use of then-available passive restraint devices. Most importantly, it deliberately sought variety, rejecting an "all airbag" standard because perceived or real safety concerns threatened a backlash more easily overcome with a mix of several different devices. A mix would also help develop data on comparative effectiveness, allow the industry time to overcome safety problems and high production costs associated with airbags, and facilitate the development of alternative, cheaper, and safer passive restraint systems, thereby building public confidence necessary to avoid an interlock-type fiasco. The 1984 standard also deliberately sought to gradually phase-in passive restraints, starting with a 10% requirement in 1987 vehicles. The requirement was also conditional and would stay in effect only if two-thirds of the States did not adopt mandatory buckle-up laws. A rule of state tort law imposing a duty to install airbags in cars such as petitioners' would have presented an obstacle to the variety and mix of devices that the federal regulation sought and to the phase-in that the federal regulation deliberately imposed. It would also have made adoption of state mandatory seatbelt laws less likely. This Court's pre-emption cases assume compliance with the state law duty in question, and do not turn on such compliance-related considerations as whether a private party would ignore state legal obligations or how likely it is that state law actually would be enforced. Finally, some weight is placed upon DOT's interpretation of FMVSS 208's objectives and its conclusion that a tort suit such as this one would stand as an obstacle to the accomplishment and execution of those objectives. DOT is likely to have a thorough understanding of its own regulation and its objectives and is uniquely qualified to comprehend the likely impact of state requirements. Because there is no reason to suspect that the Solicitor General's representation of these views reflects anything other than the agency's fair and considered judgment on the matter, DOT's failure in promulgating FMVSS 208 to address pre-emption explicitly is not determinative. Nor do the agency's views, as presented here, lack coherence. Pp. 11-23.

166 F.3d 1236, affirmed.

COUNSEL: Arthur H. Bryant argued the cause for petitioners.

Lawrence G. Wallace argued the cause for the United States, as amicus curiae, by special leave of court.

Malcolm E. Wheeler argued the cause for respondents.

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JUDGES: BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, THOMAS, and GINSBURG, JJ., joined.

OPINIONBY: BREYER

OPINION: [*864] [*921] [**1916]**

JUSTICE BREYER delivered the opinion of the Court.

[*HR1A]** [1A]
This case focuses on the 1984 version of a Federal Motor Vehicle Safety Standard promulgated by the Department of Transportation under the authority of the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, 15 U.S.C. § 1381 *et seq.* (1988 ed.). The standard, FMVSS 208, required auto manufacturers to equip some but not all of their **[*865]** 1987 vehicles with passive restraints. We ask whether the Act pre-empts a state common-law tort action in which the plaintiff claims that the defendant auto manufacturer, who was in compliance with the standard, should nonetheless **[**1917]** have equipped a 1987 automobile with airbags. We conclude that the Act, taken together with FMVSS 208, pre-empts the lawsuit.

I

In 1992, petitioner Alexis Geier, driving a 1987 Honda Accord, collided with a tree and was seriously injured. The car was equipped with manual shoulder and lap belts which Geier had buckled up at the time. The car was not equipped with airbags or other passive restraint devices.

Geier and her parents, also petitioners, sued the car's manufacturer, American Honda Motor Company, Inc., and its affiliates (hereinafter American Honda), under District of Columbia tort law. They claimed, among other things, that American Honda had designed its car negligently and defectively because it lacked a driver's side airbag. App. 3. The District Court dismissed the lawsuit. The court noted that FMVSS 208 gave car manufacturers a choice as to whether to install airbags. And the court concluded that petitioners' lawsuit, because it sought to establish a different safety standard -- *i.e.*, an airbag requirement -- was expressly pre-empted by a provision of the Act which pre-empts "any safety standard" that is not identical to a federal safety standard applicable to the same aspect of performance, 15 U.S.C. § 1392(d) (1988 ed.); Civ. No. 95-CV-0064 (D. D.C., Dec. 9, 1997), App. 17. (We, like the courts below and the parties, refer to the pre-1994 version of the statute throughout the opinion; it has been recodified at 49 U.S.C. § 30101 *et seq.*). **[***922]**

The Court of Appeals agreed with the District Court's conclusion but on somewhat different reasoning. It had doubts, given the existence of the Act's "saving" clause, 15 U.S.C. § 1397 (k) (1988 ed.), that petitioners' lawsuit involved the potential **[*866]** creation of the kind of "safety standard" to which the Safety Act's express pre-emption provision refers. But it declined to resolve that question because it found that petitioners' state-law tort claims posed an obstacle to the accomplishment of FMVSS 208's objectives. For that reason, it found that those claims conflicted with FMVSS 208, and that, under ordinary pre-emption principles, the Act consequently pre-empted the lawsuit. The Court of Appeals thus affirmed the District Court's dismissal. 166 F.3d 1236, 1238-1243 (CADC 1999).

[*HR1B]** [1B]
Several state courts have held to the contrary, namely, that neither the Act's express pre-emption nor FMVSS 208 pre-empts a "no airbag" tort suit. See, *e.g.*, *Drattel* v. *Toyota Motor Corp.*, 92 N.Y.2d 35, 43-53, 699 N.E.2d 376, 379-386, 677 N.Y.S.2d 17 (1998); *Minton* v. *Honda of America Mfg., Inc.*, 80 Ohio St. 3d 62, 70-79, 684 N.E.2d 648, 655-661 (1997); *Munroe* v. *Galati*, 189 Ariz. 113, 115-119, 938 P.2d 1114, 1116-1120 (1997); *Wilson* v.

Pleasant, 660 N.E.2d 327, 330-339 (Ind. 1995); *Tebbetts* v. *Ford Motor Co.*, 140 N.H. 203, 206-207, 665 A.2d 345, 347-348 (1995). All of the Federal Circuit Courts that have considered the question, however, have found pre-emption. One rested its conclusion on the Act's express pre-emption provision. See, *e.g.*, *Harris* v. *Ford Motor Co.*, 110 F.3d 1410, 1413-1415 (CA9 1997). Others, such as the Court of Appeals below, have instead found pre-emption under ordinary pre-emption principles by virtue of the conflict such suits pose to FMVSS 208's objectives, and thus to the Act itself. See, *e.g.*, *Montag* v. *Honda Motor Co.*, 75 F.3d 1414, 1417 (CA10 1996); *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116, 1121-1125 (CA3 1990); *Taylor* v. *General Motors Corp.*, 875 F.2d 816, 825-827 (CA11 1989); *Wood* v. *General Motors Corp.*, 865 F.2d 395, 412-414 (CA1 1988). We granted certiorari to resolve these differences. We now hold that this kind of "no airbag" lawsuit conflicts with the objectives of FMVSS 208, a standard authorized by the Act, and is therefore pre-empted by the Act. **[*867]**

[*HR1C]** [1C]
[*HR2A]** [2A]
[*HR3A]** [3A]
In reaching our conclusion, we consider three subsidiary questions. First, does the Act's express pre-emption provision **[**1918]** pre-empt this lawsuit? We think not. Second, do ordinary pre-emption principles nonetheless apply? We hold that they do. Third, does this lawsuit actually conflict with FMVSS 208, hence with the Act itself? We hold that it does.

II

We first ask whether the Safety Act's express pre-emption provision pre-empts this tort action. The provision reads as follows:

"Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment [,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." **[***923]** 15 U.S.C. § 1392 (d) (1988 ed.).

American Honda points out that a majority of this Court has said that a somewhat similar statutory provision in a different federal statute -- a provision that uses the word "requirements" -- may well expressly pre-empt similar tort actions. See, *e.g.*, *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 502-504, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996) (plurality opinion); 518 U.S. at 503-505 (BREYER, J., concurring in part and concurring in judgment); 518 U.S. at 509-512 (O'CONNOR, J., concurring in part and dissenting in part). Petitioners reply that this statute speaks of pre-empting a state-law "safety *standard*," not a "requirement," and that a tort action does not involve a safety *standard*. Hence, they conclude, the express pre-emption provision does not apply.

[*HR2B]** [2B]
We need not determine the precise significance of the use of the word "standard," rather than "requirement," however, for the Act contains another provision, which resolves the **[*868]** disagreement. That provision, a "saving" clause, says that "compliance with" a federal safety standard "does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k) (1988 ed.). The saving clause assumes that there are some significant number of common-law liability cases to save. And a reading of the express pre-emption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate -- for example, where federal law creates only a floor, *i.e.*, a minimum safety standard. See, *e.g.*, Brief for United States as *Amicus Curiae* 21 (explaining that common-law claim that a vehicle is defectively designed because it lacks antilock brakes would not be pre-empted by 49 CFR § 571.105 (1999), a safety standard establishing minimum requirements for brake

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performance). Without the saving clause, a broad reading of the express pre-emption provision arguably might pre-empt those actions, for, as we have just mentioned, it is possible to read the pre-emption provision, standing alone, as applying to standards imposed in common-law tort actions, as well as standards contained in state legislation or regulations. And if so, it would pre-empt all nonidentical state standards established in tort actions covering the same aspect of performance as an applicable federal standard, even if the federal standard merely established a minimum standard. On that broad reading of the pre-emption clause little, if any, potential "liability at common law" would remain. And few, if any, state tort actions would remain for the saving clause to save. We have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions, in such circumstances. Hence the broad reading cannot be correct. The language of the pre-emption provision permits a narrow reading that excludes common-law actions. Given the presence of the saving clause, we conclude that the pre-emption clause must be so read. **[*869]** **[**1919]**



III

We have just said that the saving clause *at least* removes tort actions from the scope of the express pre-emption clause. Does it do more? In **[***924]** particular, does it foreclose or limit the operation of ordinary pre-emption principles insofar as those principles instruct us to read statutes as pre-empting state laws (including common-law rules) that "actually conflict" with the statute or federal standards promulgated thereunder? *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta,* 458 U.S. 141, 153, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982). Petitioners concede, as they must in light of *Freightliner Corp.* v. *Myrick,* 514 U.S. 280, 131 L. Ed. 2d 385, 115 S. Ct. 1483 (1995), that the pre-emption provision, by itself, does not foreclose (through negative implication) "any possibility of implied [conflict] pre-emption," *id.,* at 288 (discussing *Cipollone* v. *Liggett Group, Inc.,* 505 U.S. 504, 517-518, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992)). But they argue that the saving clause has that very effect.

[*HR3B]** [3B]
We recognize that, when this Court previously considered the pre-emptive effect of the statute's language, it appeared to leave open the question of how, or the extent to which, the saving clause saves state-law tort actions that conflict with federal regulations promulgated under the Act. See *Freightliner, supra,* at 287, n. 3 (declining to address whether the saving clause prevents a manufacturer from "using a federal safety standard to immunize itself from state common-law liability"). We now conclude that the saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles.

[*HR2C]** [2C]
[*HR3C]** [3C]
Nothing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations. The words "compliance" and "does not exempt," 15 U.S.C. § 1397(k) (1988 ed.), sound as if they simply bar a special kind of defense, namely, a defense that compliance with a federal standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute requirement or only a minimum one. See Restatement (Third) of Torts: Products **[*870]** Liability § 4(b), Comment *e* (1997) (distinguishing between state-law compliance defense and a federal claim of pre-emption). It is difficult to understand why Congress would have insisted on a compliance-with-federal-regulation precondition to the provision's applicability had it wished the Act to "save" all state-law tort actions, regardless of their potential threat to the objectives of federal safety standards promulgated under that Act. Nor does our interpretation conflict with the purpose of the saving provision, say by rendering it ineffectual. As we have previously explained, the saving provision still makes clear that the express pre-emption provision does not of its own force pre-empt common-law tort actions. And it thereby preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor. See *supra*, at 4-5.

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[*HR4]** [4]
Moreover, this Court has repeatedly "declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *United States* v. *Locke*, 529 U.S. ,(2000) (slip op., at 14); see *American Telephone & Telegraph Co.* v. *Central Office Telephone,* **[***925]** *Inc.*, 524 U.S. 214, 227-228, 141 L. Ed. 2d 222, 118 S. Ct. 1956 (1998) *(AT&T)*; *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446, 51 L. Ed. 553, 27 S. Ct. 350 (1907). We find this concern applicable in the present case. And we conclude that the saving clause foresees -- it does not foreclose -- the possibility that a federal safety standard will pre-empt a state common-law tort action with which it conflicts. We do not understand the dissent to disagree, for it acknowledges **[**1920]** that ordinary pre-emption principles apply, at least sometimes. *Post*, at 14-16 (opinion of STEVENS, J.).

[*HR5A]** [5A]
Neither do we believe that the pre-emption provision, the saving provision, or both together, create some kind of "special burden" beyond that inherent in ordinary pre-emption principles -- which "special burden" would specially disfavor pre-emption here. Cf. *post,* at 14. The two provisions, read together, reflect a neutral policy, not a specially **[*871]** favorable or unfavorable policy, towards the application of ordinary conflict pre-emption principles. On the one hand, the pre-emption provision itself reflects a desire to subject the industry to a single, uniform set of federal safety standards. Its pre-emption of *all* state standards, even those that might stand in harmony with federal law, suggests an intent to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standard cooks might otherwise create. See H. R. Rep. No. 1776, 89th Cong., 2d Sess., 17 (1966) ("Basically, this preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards"); S. Rep. No. 1301, 89th Cong., 2d Sess., 12 (1966). This policy by itself favors pre-emption of state tort suits, for the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts.

On the other hand, the saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims. That policy by itself disfavors pre-emption, at least some of the time. But we can find nothing in any natural reading of the two provisions that would favor one set of policies over the other where a jury-imposed safety standard actually conflicts with a federal safety standard.

[*HR6]** [6]
Why, in any event, would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake? Some such principle is needed. In its absence, state law could impose legal duties that would conflict directly with federal regulatory mandates, say, by premising liability upon the presence of the very windshield retention requirements that federal law requires. **[*872]** See, *e.g.*, 49 CFR § 571.212 (1999). Insofar as petitioners' argument would permit common-law actions that "actually conflict" with federal regulations, it would take from those who would enforce a federal law the very ability to achieve the law's congressionally **[***926]** mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect. To the extent that such an interpretation of the saving provision reads into a particular federal law toleration of a conflict that those principles would otherwise forbid, it permits that law to defeat its own objectives, or potentially, as the Court has put it before, to "'destroy itself.'" *AT&T, supra,* at 228 (quoting *Abilene Cotton,* 524 U.S. at 446). We do not claim that Congress lacks the constitutional power to write a statute that mandates such a complex type of state/federal relationship. Cf. *post*, at 15, n. 16. But there is no reason to believe Congress has done so here.

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[*HR5B]** [5B]
The dissent, as we have said, contends nonetheless that the express pre-emption and saving provisions here, taken together, create a "special burden," which a court must impose "on a party" who claims conflict pre-emption under those principles. *Post*, at 14. But nothing in the Safety Act's language refers to any "special burden." Nor can one find the basis for a "special burden" in this Court's precedents. **[**1921]** It is true that, in *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 131 L. Ed. 2d 385, 115 S. Ct. 1483 (1995), the Court said, in the context of interpreting the Safety Act, that "[*a*]*t best*" there is an "inference that an express pre-emption clause forecloses implied pre-emption." *Id.*, at 289 (emphasis added). But the Court made this statement in the course of *rejecting* the more absolute argument that the presence of the express pre-emption provision entirely foreclosed the possibility of conflict pre-emption. *Id.*, at 288. The statement, headed with the qualifier "at best," and made in a case where, without any need for inferences or "special burdens," state law obviously would survive, see 514 U.S. at 289-290, simply preserves a legal possibility. This **[*873]** Court did not hold that the Safety Act *does* create a "special burden," or still less that such a burden necessarily arises from the limits of an express pre-emption provision. And considerations of language, purpose, and administrative workability, together with the principles underlying this Court's pre-emption doctrine discussed above, make clear that the express pre-emption provision imposes no unusual, "special burden" against pre-emption. For similar reasons, we do not see the basis for interpreting the saving clause to impose any such burden.

[*HR3D]** [3D]
[*HR5C]** [5C]
[*HR7A]** [7A]
[*HR8]** [8]
A "special burden" would also promise practical difficulty by further complicating well-established pre-emption principles that already are difficult to apply. The dissent does not contend that this "special burden" would apply in a case in which state law penalizes what federal law requires -- *i.e.*, a case of impossibility. See *post*, at 8, n. 6, 15-16, n. 16. But if it would not apply in such a case, then how, or when, would it apply? This Court, when describing conflict pre-emption, has spoken of pre-empting state law that "under the circumstances of the particular case . . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" -- whether that "obstacle" goes **[***927]** by the name of "conflicting; contrary to; . . . repugnance; difference; irreconcilability; inconsistency; violation; curtailment; . . . interference," or the like. *Hines* v. *Davidowitz*, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941); see *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977). The Court has not previously driven a legal wedge -- only a terminological one -- between "conflicts" that prevent or frustrate the accomplishment of a federal objective and "conflicts" that make it "impossible" for private parties to comply with both state and federal law. Rather, it has said that both forms of conflicting state law are "nullified" by the Supremacy Clause, *De la Cuesta*, 458 U.S. at 152-153; see *Locke*, 529 U.S., at (slip op., at 17); *English* v. *General Elec. Co.*, 496 U.S. 72, 78-79, 110 L. Ed. 2d 65, 110 S. Ct. 2270 (1990), and it has assumed that Congress would not want either kind of conflict. The Court **[*874]** has thus refused to read general "saving" provisions to tolerate actual conflict *both* in cases involving impossibility, see, *e.g.*, *AT&T*, 524 U.S. at 228, *and* in "frustration-of-purpose" cases, see, *e.g.*, *Locke*, *supra*, at (slip op., at 11-20); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 493-494, 93 L. Ed. 2d 883, 107 S. Ct. 805 (1987); see also *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 328-331, 67 L. Ed. 2d 258, 101 S. Ct. 1124 (1981). We see no grounds, then, for attempting to distinguish among types of federal-state conflict for purposes of analyzing whether such a conflict warrants pre-emption in a particular case. That kind of analysis, moreover, would engender legal uncertainty with its inevitable systemwide costs (*e.g.*, conflicts, delay, and expense) as courts tried sensibly to distinguish among varieties of "conflict" (which often shade, one into the other) when applying this complicated rule to the many federal statutes that contain **[**1922]** some form of an express pre-emption provision, a saving provision, or as here, both. Nothing in the statute

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*1998 U.S. TRANS LEXIS 21, **

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VICKY LEWIS, ET UX., INDIVIDUALLY, AS PARENTS, AS NEXT FRIENDS AND AS ADMINISTRATORS OF THE ESTATE OF KATHRYN C. LEWIS, DECEASED Petitioners v. BRUNSWICK CORPORATION

No. 97-288

SUPREME COURT OF THE UNITED STATES

1998 U.S. TRANS LEXIS 21

March 2, 1998, Monday, Washington, D.C.

[*1] The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:35 a.m.

APPEARANCES:

DAVID E. HUDSON, ESQ., Augusta, Georgia; on behalf of the Petitioners.

DAVID C. FREDERICK, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the petitioners.

KENNETH S. GELLER, ESQ., Washington, D.C.; on behalf of the Respondent.

OPINION: PROCEEDINGS

11:35 a.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 97-288, Vicky Lewis v. Brunswick Corporation.

Mr. Hudson, you may proceed whenever you're ready.

ORAL ARGUMENT OF DAVID E. HUDSON ON BEHALF OF THE PETITIONERS

MR. HUDSON: Thank you, Mr. Chief Justice, may it please the Court:

Plaintiffs' claims that Brunswick negligently failed to protect against propeller guard injuries in the circumstances of this case should not be preempted for three reasons. First of all, the claims we are bringing in this case do not conflict with any Federal regulation. Under Freightliner, there's no **preemption.**

Secondly, the text of the **preemption** clause, section 4306 of the act, does not, much less clearly and unambiguously, reach **[*2]** the body of State law of general application, common law damage claims. Our position there is consistent, we think, with all of the **preemption** cases of this Court.

Thirdly, in this case the reading that we submit for the **preemption** clause is confirmed by a

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The first is that the savings clause was intended to make clear that there was to be no affirmative defense. In our view, that is incorrect, because it was black letter law in 1971. It was in the Second Restatement of Torts in section 288(c), which was published by the American Law Institute in 1965.

The compliance with a legislative enactment or a regulation would not relieve someone of liability if a reasonable person acting under the same or similar circumstances would do otherwise.

So that theory for the savings clause really doesn't make much sense. There would have been no need for Congress to have added a specific savings provision.

The second theory that they have is that the savings clause was intended to save against breach of warranty or manufacturing defect claims. Well, that theory in our view doesn't make any sense because you can't read 4306 to preempt those things, so--

QUESTION: Do you think the American Law Institute always represents what is the view in almost all of the States? That hasn't been **[*22]** my experience.

MR. FREDERICK: Well, I think--

QUESTION: I mean, I think there would be real reason to put that in just in case a number of States were following it.

MR. FREDERICK: Justice Scalia, even if you were to say that what Congress was intending to do was to put the ALI's view right into law, the words that Congress used made very clear that general provisions of common law liability are to be preserved, because it didn't say liability under common law, especially breach of warranty or product defect claims. It didn't create the kind of textual limitation that the respondents would read into the savings clause.

So I think that if you look at the way that respondent's theory spells, you know, out what the savings clause was intended to do, there really wouldn't be that much of a reason to do it, and--

QUESTION: What do you do--

QUESTION: What do you do with--oh.

MR. FREDERICK: Thank you.

QUESTION: Thank you, Mr. Frederick.

When we return at 1:00, Mr. Geller, we'll hear from you.

(Whereupon, at 12:01 p.m., the Court recessed.)

AFTERNOON SESSION

1:00 p.m.

CHIEF JUSTICE REHNQUIST: Mr. Geller, we'll hear from you.

ORAL ARGUMENT OF KENNETH S. GELLER ON BEHALF OF THE RESPONDENT

MR. **[*23]** GELLER: Thank you, Mr. Chief Justice, and may it please the Court:

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We heard 25 minutes of argument this morning from the plaintiffs and the Solicitor General explaining why it's perfectly permissible for the State of Georgia through its common law to impose a requirement that boats be equipped with propeller guards, but if Georgia can do this, then presumably South Carolina could through its common law impose a requirement that boats not be equipped with propeller guards for the reasons that, as the Coast Guard found, they make boats less safe.

Now--

QUESTION: Well, excuse me. I didn't know that the Coast Guard had found that at all. The Solicitor General's brief sets out a portion of the Coast Guard's letter stating the reason that it was going to take no actions. This is on page 7 of the SG's brief. At least in the excerpt there the Coast Guard didn't make any such finding. Is there more material?

MR. GELLER: No, there's no--I should say the Coast Guard was relying, I believe, on unanimous recommendations from the--from its Subcommittee on Propeller Guards and from the National Boating Safety Advisory Council, each of whom had found that the use of propeller guards would demonstrably **[*24]** make boating less safe, and the Coast Guard--

QUESTION: Well, that's right, but the Coast Guard--

MR. GELLER: The Coast Guard--

QUESTION: --gave its reasons. I mean, it said there was a deficiency of accident data, the difficulty of coming up with a single model, and so on. It didn't, as I understand it, adopt any finding that in fact it would be more dangerous in some cases--

MR. GELLER: That's--

QUESTION: --so I don't think we can attribute that to the Coast Guard.

MR. GELLER: That's true, Justice Souter, although it did find--it did agree with the recommendations of the underlying committees that it shouldn't impose a prop guard requirement.

But my point is simply that the accident in this case occurred on a body of water that forms part of the border between South Carolina and Georgia, and the plaintiffs and the Solicitor General don't bother to explain how a manufacturer could possibly build a boat that could operate on that body of water and still comply with these divergent State law.

QUESTION: What if there had been no Federal statute at all? A boat manufacturer would still have a difficult time complying with both--

MR. GELLER: Yes.

QUESTION: --South Carolina and Georgia **[*25]** law were they different.

MR. GELLER: But it was the very purpose of this statute, Mr. Chief Justice, the very purpose of this statute to avoid that sort of a problem. In fact, the Senate report specifically says in this case it assures that manufacturers for the domestic trade will not--will not involve--will not have to worry about compliance with widely varying local requirements. That's our precise point. It was the purpose of this statute to avoid a situation--

QUESTION: Well, yes, but the Coast Guard did not, in fact, adopt a regulation on this specific device, and I don't know that South Carolina have a different rule. Does South Carolina have common law principles that say you must have a propeller guard?

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MR. GELLER: No, it doesn't, and no, I think that would be preempted if it did as well. My point is simply to explain why there's a need for a national uniform rule here, which Congress recognized in passing this statute. It's so you have one single rule that manufacturers can follow throughout the United States.

QUESTION: Yes, but it clearly envisions that the Coast Guard might not take action with regard to the whole universe of possible actions it could take, and we have **[*26]** a situation here where it didn't take action.

MR. GELLER: But the language--

QUESTION: And that may leave open some room for application of State law.

MR. GELLER: I think that the language of the **preemption** provision, Justice O'Connor, specifically addresses the situation and provides, as the Solicitor General acknowledges, the Coast Guard has always interpreted the provision according to its plain--the Coast Guard has always interpreted the provision according to its plain language to preempt State law involving design and equipment requirements even in the absence of a Coast Guard regulation because of this congressional desire to have uniform national requirements.

In fact, this act was passed in 1971. The day after the act was passed--the day after--the Coast Guard issued a regulation under section 4305 exempting all existing State requirements from **preemption,** because--

QUESTION: Well, of course, that included, as I understand it, State regulatory requirements in the narrow sense, so that it did not necessarily imply that the Coast Guard thought that it was necessary to do that to preserve any State common law.

MR. GELLER: There was no--it simply exempted all existing State requirements. **[*27]** There was no specific discussion of statutes, regulations, common law. The point is--

QUESTION: Right, and that's--I mean, my only point is, I don't think you can infer from that that the Coast Guard ever took the position that a common law requirement was, in fact, preempted.

MR. GELLER: No. I'm taking from that the understanding, which has been in existence since the beginning of the statute, that even in the absence of a regulation section 4306 would provide for **preemption** from State law. That was the point that I think comes through clearly.

QUESTION: Mr. Geller, doesn't it--it's a little unrealistic to talk about a requirement imposed by State law anyway.

It's not as though--I mean, even within the State of South Carolina a manufacturer wouldn't know whether to put on or off the propeller guard, because one jury, the first jury may find it was negligent not to have it, and that--certainly that finding that it was negligent not to have a propeller guard does not prevent a subsequent South Carolina juror, jury from finding that it was negligent to have a propeller guard, isn't that right?

MR. GELLER: That's true. That's why it seems completely irrational for Congress to have prohibited **[*28]** State legislatures or State boating commissioners from entering this area, because it was concerned about the need for national uniform regulation, one rule that every manufacturer could follow throughout the United States, and to create an exception for common law rules, which is I think the point that Justice Breyer made last year in his separate opinion in Medtronic, but--

QUESTION: But isn't the argument for exception oddly enough supported by the advisory

committee's report here, and that is that the designs of boats vary so enormously that it would be difficult, if not impossible, to have a uniform rule in the sense of saying, all boats should have propeller guards, or all boats should have this kind of propeller guard.

The kind of multifarious context here suggests exactly what common law adjudication is intended to serve, and that is quite fact-specific adjudications when no uniform rule really could sensibly be written to cover it.

MR. GELLER: Two requirements, Justice--two responses, Justice Souter. The first is I think that misstates what the advisory committee, commission did here. It tested every type of propeller guard in existence, and it concluded that there was no **[*29]** feasible workable propeller guard that could be used on any type of motor boat, so I don't think it's fair to say that it simply said there wasn't one that could be used on every boat. It tested every single--

QUESTION: Well, I thought they--and you know this better than I do. I thought they said that in some cases the guard would in fact make it much more dangerous than it was.

MR. GELLER: Exactly.

QUESTION: But not in all cases.

MR. GELLER: In every case in which a motor boat was going more than 10 miles an hour. In other words, they didn't find any application in which it would be safe to require that a motor boat be equipped with a propeller guard.

But the second answer to your question, Justice Souter, frankly is that this is an argument that I think--and Justice Scalia said this this morning--the Court has heard many previous times when faced with statutes of this type and has never drawn an exception between statutory requirements and common law requirements.

QUESTION: But we have emphasized the language in the particular statutes.

MR. GELLER: Yes, and the language in this statute I think is indistinguishable, Justice Stevens, from--

QUESTION: Does it have the word requirement **[*30]** in it?

MR. GELLER: Yes. The list--this statute does. In fact, it might be useful to focus on the specific language at issue here, because I think it answers a lot of questions. The section--

QUESTION: Mr. Geller, as you do that--

MR. GELLER: Yes.

QUESTION: --can you tell me if there's another statute that uses the word, minimum safety standards, because I thought that gave some kind of a tone to it.

MR. GELLER: Yes. The statute, for example, that was at issue in Ray v. Atlantic-Richfield, which this Court considered 20 years ago, had that very language in there, and the Court said that didn't mean there was no **preemption.** It simply meant the manufacturers--

QUESTION: No, everyone agrees that there's a **preemption** pro tanto. That is, to the extent the Coast Guard has a standard, the State can't have a different one.

MR. GELLER: Yes.

QUESTION: But the word minimum suggests to me that there could be other things, that

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every--

MR. GELLER: What the Court--

QUESTION: That those standards must be followed, but there could be additional standards.

MR. GELLER: That's not the argument--the Court rejected that very argument in Ray v. Atlantic-Richfield, Your Honor. They're minimum in the sense **[*31]** that manufacturers could add to that. They're not minimum in the sense that States could add to that. That would make--there would be no reason for **preemption** if they were--if that reading of minimum standards were correct. There would be no reason to have a **preemption** clause in there.

QUESTION: The reason could be that these standards are in place, but we're not saying that that's the universe, that there can't be liability apart from these standards.

Let me ask you something just as a matter of updating. As I understood the propeller guard, it wasn't dead, that there's still current consideration in the Coast Guard?

MR. GELLER: Yes. Yes, absolutely.

QUESTION: Where--what is the status of that now?

MR. GELLER: As recently as last August, Justice Ginsburg, the Coast Guard again asked for comments from people as to whether there would be a workable type of propeller guard that the Coast Guard could consider.

QUESTION: And that's just--

MR. GELLER: They haven't yet issued any regulation presumably because they haven't yet been satisfied that they can meet the standards of 4302, which is to say that the requirement that the propeller guard would actually advance the interest of **boat [*32] safety.**

QUESTION: All we know is that they asked again.

MR. GELLER: Yes.

QUESTION: And we don't know anything about the answers.

MR. GELLER: No. I don't believe anything has happened since August of 1997.

Let me just focus if I could the Court on the language of 4306. It's reprinted in a number of different places, including page 6 of the red brief, and it's helpful to focus on the language. This language, Justice Stevens, is I think identical in respect to the language that the Court had before it in Medtronic and in Cipollone.

Section 4306 has a broad requirement that--broad **preemptions** that the State may not establish or enforce a law imposing a requirement for associated equipment, which is--no one disputes that a propeller guard here is associated equipment, and the Court has held in Cipollone, in Easterwood, in Norfolk and Western Railway, in Medtronic, that the word requirement in those very similar statutes includes common law claims.

In fact, I don't know of any case in this Court that has ever construed the word requirement to include only positive law, and the Court on a number of occasions has rejected that very argument. The Court--

QUESTION: Well, you take--

QUESTION: **[*33]** A law or regulation establishing--

MR. GELLER: Law or--

QUESTION: A law or regulation establishing--

MR. GELLER: Yes. I think the--

QUESTION: --the requirement?

MR. GELLER: I think the language in Medtronic was very, very similar. The law here is the common law, which establishes a requirement for associated equipment.

QUESTION: Well, you take the position, Mr. Geller, that regardless of whether--what we think of the action or inaction of the Coast Guard on this propeller guard business that any common law requirement for a propeller guard by a State is preempted, no matter what the Coast Guard has done--

MR. GELLER: That's right.

QUESTION: --or hasn't done.

MR. GELLER: Because I think that section 43--section 4306 enacts a general **preemption** rule that says no State can impose a requirement for associated equipment. Now, there are--

QUESTION: So if the Coast Guard had never even studied the problem, nothing had been done--

MR. GELLER: Absolutely. For the purposes of--

QUESTION: --you take the position it's still preempted.

MR. GELLER: Yes, for purposes of our express **preemption.**

Now, here we have a very powerful implied **preemption** argument as well, which I'll get to in a minute, Justice **[*34]** O'Connor, because the Coast Guard did do a thorough study, but that's right, and this is, of course, the way the Coast Guard has interpreted this statute over the years.

QUESTION: What sense would that make? I mean, you bring me along a lot when you say, unless we read the word requirement to include tort action--

MR. GELLER: Yes.

QUESTION: --then you would have a Coast Guard explicit rule and a State could have a tort case that would force the opposite. That would make no sense. I accept that--

MR. GELLER: That would make no sense.

QUESTION: --at least for argument. But doesn't it also make no sense to say, if the Coast Guard doesn't do anything, does nothing whatsoever, that then you couldn't have any State tort law in the area?

MR. GELLER: You couldn't have any--

QUESTION: I mean, I can understand why Congress might have said, if the Coast Guard does

nothing at all, still the States aren't supposed to sit there and write rules out on a piece of paper, but I just can't understand why Congress would have said, if the Congress does nothing at all, all of State tort law goes up in smoke.

MR. GELLER: Not all of State tort--I think the breadth of this argument has been grossly overstated, **[*35]** Justice Breyer. The States have a large role to play under the **Boat Safety** Act, but in terms of boat safe use and operation, boater education, boat numbering, tort law can apply in case of manufacturing defects involving boats, and--

QUESTION: No, no, but why would Congress have wanted to--

MR. GELLER: Yes, and--

QUESTION: --say that no State tort law for the basic hornbook classic negligence--

MR. GELLER: Of design. Design.

QUESTION: --of design, any of that stuff when the Coast Guard does nothing.

MR. GELLER: Because, as Congress said--as Congress said, there has to be a uniform national rule for design requirements. You can't build a boat, one boat for South Carolina and another boat for Georgia, and that's precisely--

QUESTION: Well, I take it--I take it that an additional answer to Justice Breyer--maybe you don't want--is that this didn't prempt all State tort law automatically because the Coast Guard could and, in fact, did leave much of it in place, and in the States.

MR. GELLER: Absolutely. In fact, I want to turn--

QUESTION: Under 430--05.

MR. GELLER: 4305. 4305, Justice Kennedy. That's exactly right. I think if you look at section 4306, which I keep wanting to bring the **[*36]** Court back to because that's the issue in this case, is how to interpret that provision, there are a number of exceptions that Congress has written into the **preemption** provision.

There's a general **preemption** provision of State design requirements for the reasons I gave, that there has to be uniformity in design requirements. You can't have--you have to have a single national rule, which is precisely what the Senate report says. It assures that manufacturers will not have to worry about compliance with widely varying local requirements.

And then there are three exceptions to narrow it in section 4306. First of all, as Justice Kennedy said, the Coast Guard can draft an exemption to allow States to have a rule involving design of boats.

Second, even when the Coast Guard hasn't granted an exemption--

QUESTION: Are we talking about 4306 or 4305?

MR. GELLER: Yes, 4306. 4305 allows the Coast Guard to grant the exemption, but it's--4306 says that there's a general **preemption** of State requirements involving the design and equipment of boats, but the Coast Guard can grant an exemption to the States.

Secondly, the States can operate--their State law can operate to meet some uniquely hazardous **[*37]** local condition, and third, the States are allowed to enforce their law about the design of boats to the extent that it is identical to a regulation promulgated by the

Coast Guard, and the scheme of this is obvious.

The Coast Guard is supposed to promulgate the rules that tell manufacturers what they have to do in order to build a boat, a recreational boat in interstate commerce, and the States can enforce--if the State law is identical to it, the States can participate in the enforcement. So if a boat is built out of compliance with Federal design requirements, there can be a State law remedy, but the States can't add to the requirement.

So that they--so that here, for example, you know, you could have a State requirement that has--that it requires that boats be built with propeller guards. That would be a requirement only for one State. It would dictate the national rule and, if a State had a contrary rule, you couldn't sell a boat in interstate commerce, because one State could say you had to have one type of requirement, another State could say you have to have another.

The idea of this was to have a uniform national rule, and as--the Court actually confronted a case almost precisely **[*38]** like this 20 years ago, Ray v. Atlantic Richfield. That was a case in which Congress passed a statute that promulgated--that authorized the Coast Guard to promulgate design requirements for tankers, and the Coast Guard in fact did.

It promulgated a long list of design requirements for tankers, and then the State of Washington came in and passed a statute that said, if you want to operate in Puget Sound, you also have to follow the following three additional design requirements. You have to have double hulls, you have to have two radar, working radar, and this Court held that that statute was preempted. It was preempted actually in the absence of an express **preemption** provision.

But the reason the Court gave is--applies here like a glove. The Court said, enforcement of these State requirements would frustrate what seems to us to be the evident congressional intent to establish a uniform Federal regime controlling the design of oil tankers. This is 435 U.S. at page 151.

It's precisely the same thing here. In fact, here there's even more evidence that that's what Congress wanted to do, because there's an express **preemption** provision that says that that's what **[*39]** they're trying to do.

QUESTION: Well, but you also have the savings clause, 4311, and--

MR. GELLER: Yes. Let's talk about the savings clause.

QUESTION: --its reference to common law and State law cuts the other way, I--

MR. GELLER: I don't think a fair reading of the savings clause cuts the other way, Justice O'Connor, but let's look at that as well. This is on page 2 of the red brief.

What it literally says--what it literally says is that compliance with a Federal regulation or order does not relieve a person from liability at common law or under State law, and the legislative history uses almost the exact same language to describe what Congress was trying to do here.

What Congress was trying to do here, quite specifically, and it says it literally, is that in those areas where State law still has a role to play, areas that are not preempted, it is not a defense to that State law claim that you've complied with the Federal regulation.

That's precisely what this says, and that's all that this says. It says nothing about **preemption,** and if it were truly a savings clause intended to create a gaping hole in section 4306, you'd think it would have been put in section 4306.

QUESTION: What **[*40]** does it apply to? Give me a few examples.

MR. GELLER: One example might be, Justice Scalia, if a State had a design requirement that was not preempted because it was intended to deal with uniquely hazardous local conditions. That's not preempted under section 4306. Or the State may have a design--

QUESTION: Yes, but by the same token you don't need a savings clause.

MR. GELLER: You need a savings clause, Justice Souter, for fear that the--that it might be perceived under State law that it's a complete defense that you've complied with the Federal regulation.

QUESTION: Yes, but that would be a bizarre reading of the **preemption** clause.

QUESTION: I don't think you really need it for that. Do you have any other examples?

MR. GELLER: Yes. Well, I think actually, Justice Scalia, that's precisely what the legislative history again says this was trying to do, because when it discusses the savings clause, which I should say was added at the last minute--

QUESTION: You're talking to me?

(Laughter.)

MR. GELLER: I'm talking to the Court.

But it does explain what this--what 4311(g) is intended to do. It says, of course, in describing 4311(g) and the reason they put it in, of course, depending **[*41]** on the rules of evidence of the particular judicial forum, such compliance--in other words, compliance with Federal regulations--may or may not be admissible for its evidentiary value.

In other words, they couldn't possibly have been talking about Federal **preemption** here. They were talking about State rules, and contrary--

QUESTION: What would happen in a case that--let's assume that there is fairly clear **preemption.** The Coast Guard says, no propeller guards, and this boat has no propeller guards, and the accident happened. Could the plaintiff sue for failure to warn?

MR. GELLER: I think that that claim would--the failure to warn about the absence of propeller guards?

QUESTION: About the absence, yes.

MR. GELLER: I think--I think that would probably be preempted as well because of the effect it would have on manufacturers to build their boats to--in other words, the failure to warn would have to warn about some dangerous, perhaps defective condition that--

QUESTION: I looked at the complaint briefly. I didn't see a failure to warn--

MR. GELLER: There isn't a failure to warn claim in this case--

QUESTION: --allegation here.

MR. GELLER: --and it's an interesting question. I'm not sure **[*42]** that I know the right answer, but I think the argument would be that if you allowed failure to warn claims in that situation it would impose pressure on manufacturers to put on the device that would eliminate the need to make the warning, and that would be a--

QUESTION: Oh, no. It would just--it would make them warn. It would make them put labels on.

MR. GELLER: There are warning requirements in the act as well, Federal warning requirements, and it may be that those would preempt a State warning requirement, but that's not what we have here. This is a pure design requirement.

They're saying this boat is defective because it didn't have a propeller guard, and what I'm saying is that section 4306 addresses that question precisely and says that the--what equipment a boat operating in interstate commerce should have is a question reserved to the Coast Guard.

QUESTION: Well, Mr. Geller, it's--you say that a propeller is regarded as associated equipment for the board--

MR. GELLER: Yes.

QUESTION: --for the boat?

MR. GELLER: Yes.

QUESTION: It's not a part of the boat itself.

MR. GELLER: It's defined in Coast Guard regulations as associated equipment.

QUESTION: So there's a little bit different **[*43]** language about associated equipment than there is for the vessel itself, isn't there? One says, imposing a requirement for associated equipment, and for the boat it says, enforce a law or regulation establishing performance or other safety standard.

MR. GELLER: Right, and we are relying--this case involves the section of 4306 that talks about imposing a equipment for associated--

QUESTION: A requirement.

MR. GELLER: A requirement for associated equipment, that's right.

QUESTION: Mr. Geller, can I come back and ask you for another example of how the savings clause would apply State law, other than a State law that had been exempted under 4305?

MR. GELLER: There are many types--first of all, I'm not sure that Congress necessarily had in mind a specific situation. They were told--

QUESTION: I don't need many. Just give me a couple.

MR. GELLER: Yes. Any case in which State law has a role to play. There could be a tort claim that the boat was defectively manufactured because something was done in a particular way and the--

QUESTION: But--

MR. GELLER: --suggestion is that you shouldn't allow the **preemption** provision to be broadened beyond Congress' intent by allowing the defense to argue **[*44]** that mere compliance--mere compliance with the Federal regulations is a defense under State law.

QUESTION: But unless the defective manufacture claim dealt with the manufacture of the

particular savings clause, where Congress specifically and without qualification provided that compliance with the **Boat Safety** Act regulation is no defense to common law claims.

In this **preemption** case, as in every case of statutory interpretation, surely the starting point is the text of the act itself. We submit in this case it is also the ending point. Starting with a statement of purpose in the policy declaration--

QUESTION: Mr. Hudson, we have a good amplifying system. I think we could hear you even if you didn't speak quite as loud.

MR. HUDSON: I will tone it down--

QUESTION: Okay.

MR. HUDSON: --Chief Justice.

Starting with the policy declaration in section 2 of the act, Congress spoke of reciprocity and comity, signal words that State law has a role to play. It spoke of developing and enforcing Federal and State laws, again signalling that State laws would have a role to play.

And then throughout the act Congress over and **[*3]** over again speaks of the enactment of positive regulations both by the Federal Government and by the State, never any reference to common law claims.

QUESTION: Well, but we've certainly held in Medtronic and in that Cipollone case that State common law actions can constitute requirements subject to **preemption.**

MR. HUDSON: Yes, Your Honor, there has a been a holding that the common law can lead to a requirement. I don't think that--

QUESTION: Can lead to? It is. I mean, they are requirements, and I don't see why we should necessarily create--treat this statute differently in that regard.

MR. HUDSON: Well, for a couple of reasons. The language used in this statute is different than the language used in both Cipollone and in Medtronic. In this statute, Congress says that there may not be a State law or regulation. In both Cipollone and Medtronic it was a requirement which arose under State law and this Court has, in a number of cases, not only in Cipollone but following that in Medtronic, English v. GE, Goodyear v. Miller, Silkwood, has explained that common law is a traditional State area.

If we were to obtain a judgment in this case, Brunswick would not be required to put a propeller **[*4]** guard on any of its boats in any State, or in any jurisdiction. It would have the discretion as a manufact--

QUESTION: Well, I--isn't the whole purpose of your punitive damage claim to require the manufacturer to change his behavior?

MR. HUDSON: Even then--

QUESTION: Isn't that what you're going to argue to the jury?

MR. HUDSON: Even then, Your Honor, it may not be necessary that they actually install a propeller guard. It may be enough that a warning be issued putting consumers on notice that if you are thrown or fall out of this boat there's a danger of this type of injury.

We assert in our complaint that they had this knowledge, and they had--

propeller--

MR. GELLER: Yes. I mean, it could have. It could have. I mean, in other words--

QUESTION: It seems to me it would be preempted anyway. I just don't see any realistic situation in which the savings clause would apply, other than when there's been an exemption, which I don't find--

MR. GELLER: Well--

QUESTION: --terribly persuasive.

MR. GELLER: That's one example, but you have to remember, Justice Scalia, this was added at the last minute. This was not part of the original bill. It was stuck in at the Senate committee level at the last minute because someone suggested there might be a problem here, let's put this in, but--

QUESTION: Mr.--finish your answer. I'm sorry.

MR. GELLER: But the other key point--I mean, I think the Achille's heel of the plaintiffs' and any attempt to rely on section 4311(g) is that it doesn't distinguish at all between common law and State law.

I think the Court would have to commit an unnatural act with that language to draw a distinction between the common law and **[*45]** State law for purposes of **preemption,** and if--and if it saved all State law, which is the only logical reading of it, if it saves common law claims, if it saves State law claims there's no **preemption** at all. It eliminates completely section 4306.

QUESTION: I want to be sure--I thought you made an acknowledgement of a point I didn't think you would make. You suggested in answer to Justice Scalia that there could be a State law defective manufacture claim even if the Coast Guard had promulgated elaborate regulations about how boats had to be manufactured and the boat complied with every one of those regulations.

MR. GELLER: Yes. Yes.

QUESTION: There could still be a State law claim?

MR. GELLER: There could be a claim--there could well be a State law claim because we would not be within State 4306, that the boat was not manufactured according to its design requirements.

QUESTION: No, I'm assuming it complied with the--because it only talks about when they comply with all the Federal requirements. You think there still could be a--

MR. GELLER: Yes, but there aren't manufacturing requirements.

QUESTION: No, but I'm assuming they--of course, they could have a problem here, of course.

MR. **[*46]** GELLER: Yes. In other words, if, for example, the Coast Guard had a propeller--had a propeller guard requirement--

QUESTION: Right.

MR. GELLER: --and you complied fully with--you put the propeller guard on your boat, so you

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satisfied the design requirements, but you didn't fasten it properly. It should have been fastened with four bolts and you only put two on, and it fell off in the water, there would be, I think, a plausible--

QUESTION: Even if--

MR. GELLER: --failure to manufacture--

QUESTION: Assuming that the Coast Guard regulation didn't tell you how many bolts to put on.

MR. GELLER: Right.

QUESTION: Is that right?

MR. GELLER: Right. But you see, the--Justice Stevens, the precise difference between that hypothetical--

QUESTION: It seems to me there's a bigger gap in this case than the one you--

MR. GELLER: A failure to manufacture claim only requires the manufacturer to comply with his own or the Coast Guard's design requirements. It doesn't add any design requirements.

The problem with allowing the States to impose design requirements--

QUESTION: But if that's true in regard to a minor matter like nuts and bolts, why isn't it true with regard to the total omission of any requirement **[*47]** for propeller guards?

MR. GELLER: Because how the boat is to be designed and what equipment the boat is to have on it is a question reserved to the Coast Guard or else you can't have a uniform national rule.

QUESTION: Well, but that's the same--true with the four bolts instead of two.

MR. GELLER: No. No, I don't think so, Your Honor, because there would be a uniform national rule. You have to build your boat consistent with the design requirements.

Now, if in a particular case you don't--

QUESTION: No, but the omission is, there's no requirement on the number of bolts. In this case, there's no requirement on propeller guards.

MR. GELLER: No, but in one case you're simply being asked to comply with your own design requirements. If your own design requirement says it should have four bolts, you have to have four bolts. If you only put two in, it's a manufacturing defect. That's a clear claim that can be brought under State law.

We have a completely different type of claim in this case. They're claiming it should have been designed differently.

QUESTION: The statute says performance standard. It doesn't talk about design.

MR. GELLER: Right.

QUESTION: So therefore, if the failure to have--it's **[*48]** the same question. If the failure to have a performance standard permits, in your view, a tort suit in respect to the defective manufacture, why doesn't the failure to have a propeller guard standard permit a tort suit in

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respect to the failure to have the propeller guard? I think that's what Justice Stevens'--

MR. GELLER: I thought Justice Stevens was referring to a manufacturing defect, a failure to comply with your own design requirements or the Coast Guard's design requirements. There's a single set of design requirements. You have to comply with it, and if you don't, you're liable as a manufacturer for having a manufacturing defect.

That doesn't prevent you from manufacturing one type of boat throughout the United States. When you're dealing with a design requirement where each State can impose its own design requirement, it is impossible to build a single boat that operates throughout the United States, and that's precisely what the legislative history said Congress had in mind and wanted uniform national design and equipment requirements.

Manufacturing requirements are of a totally different order. You simply screwed up with one particular boat. It doesn't tell you anything **[*49]** at all about how you have to build the generality of your boats.

Now, I just want to turn for a minute to implied **preemption,** which provides a separate and totally independent basis for **preemption** here. The--even if the--even if 4306 didn't cover this situation, it's clear that it would--the State law claim here would be impliedly preempted, because it plainly frustrates what Congress and the Coast Guard were trying to do in this area.

I don't know of any piece of equipment that's been more thoroughly studied by the Coast Guard than prop guards, and the advisory committee and the Subcommittee on Prop Guards took 18 months, they looked at all the available data, they took a boat out onto Boston Harbor and operated it both with and without prop guards, they held hearings across the country--

QUESTION: Mr. Geller, do we give any credence to the fact that the Coast Guard itself doesn't think that this is contrary to what it's intending to do. In fact, it thinks it's consistent with the act.

MR. GELLER: Well, I don't know, Justice Ginsburg. That's the position of the Solicitor General. The Coast--I find it interesting, the Department of Transportation did not sign this brief, which is **[*50]** not typical of its practice. It's signed other briefs in this Court in cases like Myrick in recent years, so I don't know what the position of the Coast Guard is.

The Coast Guard has clearly held that even in the absence of a Federal regulation there is **preemption** of State law.

QUESTION: The Coast Guard isn't in charge of **preemption** anyway. The Coast Guard doesn't administer **preemption.** I mean, we give the Coast Guard deference on those matters that are within its bailiwick.

MR. GELLER: Yes. My point, Justice Scalia--

QUESTION: Whether the State is preempted or not is not within the Coast Guard's bailiwick.

MR. GELLER: All I'm saying, Justice Scalia, the answer to Justice Ginsburg's question is, I don't know of any pronouncement by the Coast Guard, ever, that has ever drawn a distinction between--

QUESTION: Well, maybe we should just leave the Coast Guard out of it.

MR. GELLER: Well, the fact of the matter is that the Coast Guard has never--

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(Laughter.)

MR. GELLER: And I think it's an important point. The Coast Guard has never, ever drawn a distinction between State, regulatory, statutory, or common law requirements, ever, and I think it would be inconsistent for the Coast Guard to **[*51]** do that, given the fact that common law requirements can frustrate what they're trying to do, as this case shows every bit as much as a State statutory or regulatory--

QUESTION: And I suppose some inquiry into that subject is within their purview, because they can pronounce regulations exempting--

MR. GELLER: Right.

QUESTION: --certain State laws.

MR. GELLER: Right, and I don't know of any instance in which they have ever said, contrary, for example, to in Medtronic, where the FDA had a regulation that--

QUESTION: Thank you, Mr. Geller.

Mr. Hudson, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF DAVID E. HUDSON ON BEHALF OF THE PETITIONERS

MR. HUDSON: In regard to the position of the Coast Guard, I think in footnote 2 of the blue brief the statement of the Commandant at the time the legislation was enacted is pretty compelling.

Without any qualification, without any cramp reading, the Commandant understood that the usual tort law concerning negligence and warranties would survive the enactment of this law. It's consistent with the statement quoted on page 6 of the blue brief by the executive director of the Boatowners Association, who suggested a need for a provision in the law **[*52]** to make it clear that common law claims would survive.

QUESTION: This is the statement of the Commandant before this legislation was on the books?

MR. HUDSON: Yes, during the Senate committee hearings in response to a question from the committee.

QUESTION: You consider that to be a position of the agency as to the meaning of the law?

MR. HUDSON: Further evidence of the agency's position I think, Justice Scalia, is found in those 1971 and 1973 Federal Register provisions that are cited in all of the briefs where the Coast Guard specifically left in place all laws enacted by the States prior to 1971.

It was talking about statutory enactments, even felt no need to even speak to the common law. If they're going to allow the State law enactments to stay in place, surely the common law survives as well and, in fact, I don't know that there's any recision of those 1971 exemptions from **preemption.**

The claims we're making here, the Georgia wrongful death statute is over 100 years old, the negligence standard has existed for as long as the State of Georgia has existed, so the common law has never been a focus of the Coast Guard restriction, or any need to exempt from **preemption** common law claims. **[*53]**

In regard to the case of Ray v. Atlantic Richfield, it does not fit this case. That was a situation

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where the Coast Guard was directed--the statute said it shall issue the regulations governing the size of tankers and other activities on the coast. The Coast Guard in fact enacted regulations.

And if the State of Washington was able to put a limit on tanker sizes, contrary to what the Coast Guard had done, it would be the hypothetical Justice Breyer presented this morning. You would have a conflict, and under the Supremacy Clause, the State may not act contrary to any established regulation of the Coast Guard and in this case we don't have an established regulation.

Finally, I would submit--

QUESTION: You wouldn't necessarily have a conflict if they added something that the regulations didn't have, like a propeller guard. It wouldn't necessarily conflict any more than it does.

MR. HUDSON: I agree there would be no conflict, Justice Scalia. If we are able to prevail on a damage claim there would be no conflict.

It seems to me, Your Honors, that for Brunswick to prevail and for **preemption** to exist in this case five very high hurdles have to be overcome. They must overcome the presumption **[*54]** against the displacement of State law. They must overcome the requirement that **preemption** be manifest and clear purpose of Congress. They must overcome the lack of any statutory or legislative history showing an intent to restrict the common law. They must overcome the common understanding of the words used in section 4306.

Justice Stevens, in Cipollone you made a distinction between a **preemption** of requirements and in the Senate draft in the tobacco legislation they talked about a statute or regulation. That was changed to a requirement, and you pointed out one would be preempted and the other would not.

And finally, they would have to overcome the express mention of the common law in the savings provision in this case.

On the other hand, this is a **preemption** case, after all. The Federal agency with the authority to regulate agrees that common law claims should not be barred, or, indeed, there is no conflict between anything claimed in our lawsuit and any existing regulation of the Coast Guard and, if our claims are successful, we will only enhance the ultimate goal of the **Boat Safety** Act, which was to improve safety for people using boats.

Thank you, Your Honors.

CHIEF JUSTICE REHNQUIST: **[*55]** Thank you, Mr. Hudson.

The case is submitted.

(Whereupon, at 1:34 p.m., the case in the above-entitled matter was submitted.)

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QUESTION: Well, I take it that the main thrust of your argument below is that the propeller guard should have been installed. You're going to change the behavior of the manufacturer. That's the whole justification, at least for your punitive damage award, punitive damage claim.

MR. HUDSON: To award compensation to the injured victim is the first purpose. The punitive damage claim is a heightened incentive to do the steps that are necessary to protect persons who use the boats. It would have that impact.

But as this Court acknowledged in Silkwood, **[*5]** punitive damage is a customary part of the State common law damage scheme and just because it's a punitive damage claim married with a claim for general damages does not create any heightened point of reference to preempt a State law claim.

QUESTION: On that very point, if--imagine that the Coast Guard here had said what it didn't say, but suppose it said we think that the guards on these propellers are actually a greater danger than an unguarded propeller because somebody can get hit on the head, and that's a bigger chance of harm than the other, so suppose because of that they'd said very clearly, we don't want guards.

Now, on your view of the statute a jury would be perfectly free to award punitive damages against the manufacturer because he did the very thing that the Coast Guard told him to do. Now, what sense would that make of the statute?

MR. HUDSON: Under that reading it wouldn't make sense, Justice Breyer, and I'd like to--

QUESTION: So how do you prevent--how do you read it your way, which is to say, it preserves common law claims, and yet avoid what you've just said is a ridiculous result?

MR. HUDSON: May I assume in your question that you are referring to the Coast Guard **[*6]** adopting a regulation saying thou shalt not have propeller guards, and then not as a matter of **preemption,** but I think as a matter of the Supremacy Clause and cases like American Airlines v. Wollands and the case that was cited from 1907. If the State attempts to do something it is in conflict with the regulation by Supremacy Clause analysis--

QUESTION: What happens to your savings clause here? You said that the savings clause preserves all common law remedies and so why hasn't Congress, on your view of it--I mean, what then does the savings clause mean? You started off pointing to that savings clause which refers to common law and State law--

MR. HUDSON: Well--

QUESTION: --and--yes. So you see my question.

MR. HUDSON: It's--I think you have to go one word further. Back in the savings clause it refers to liability under common law or State law, is what is preserved, and--

QUESTION: Well--

QUESTION: You mean, it reads punitive damages out?

MR. HUDSON: No. I think it is--that is a liability claim under State law, but you asked what is the purpose of the savings clause if you cannot bring a claim that is diametrically opposed to a Federal regulation, which is not our case.

I concede **[*7]** that if--

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QUESTION: I'm trying to get your view on it. I thought your view was that the common law was simply preserved. Now I take it your view is that the common law is simply preserved in the absence of a specific determination by the Coast Guard. Is that your view? That's a different view.

MR. HUDSON: No, sir, I think that is our view, Your Honor.

QUESTION: So in other words your view is that the savings clause does nothing if the Coast Guard--it--the savings clause is necessary, I guess, in your view. It's just that this prempt--a straight rule of the Coast Guard preempts the tort remedy, but other than a straight rule it doesn't, is that the view?

MR. HUDSON: Well, it depends on whether or not there's a conflict, because if they say thou shalt not have a propeller guard, then our claim would be barred.

QUESTION: Suppose it simply--

QUESTION: Well, but you told me that State common law couldn't be a requirement and could never have any preemptive effect, so you can't have it both ways.

MR. HUDSON: Well--

QUESTION: Now, I take it you're backing off that position and you're saying, well, if it really is in direct conflict, then maybe common law rules can in fact be requirements **[*8]** or regulations under--

MR. HUDSON: Fortunately, that's not our case, but I do--

QUESTION: No, but even if--

MR. HUDSON: I do concede--

QUESTION: Even if we think that, that doesn't end the case for you because you have another theory here, right?

MR. HUDSON: Well, our theory is that there is no conflict.

QUESTION: No, but before you get to--I thought that your position was that the savings clause requires us to read the statute in such a way that the reference to regulations or standards does not necessarily encompass every common law rule. Do you go any further than that?

MR. HUDSON: No, we don't, Justice Souter.

QUESTION: Okay. Okay.

MR. HUDSON: That is statutory evidence, along with some pretty extensive legislative history, that all concerned thought that common law claims would survive even after the adoption of this act. It is additional authority for the proposition that what was preempted in section 4306 were positive enactments under a State legislative law on affirmative regulation.

QUESTION: And what do you do with the phrase, or under State law? I didn't understand your--

MR. HUDSON: Justice Scalia, you backed up in that statute.

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QUESTION: You just say you have to read **[*9]** it with the word--

MR. HUDSON: Liability.

QUESTION: --liability. I don't--that doesn't make any sense to me. I don't--

MR. HUDSON: For example, Justice Scalia, in our case we are bringing a negligence--we have a negligence count. We have a wrongful death count. The wrongful death count is a statutory claim in Georgia. It's been in existence for over 100 years, so that is a liability claim--that's certainly not common law. I don't think wrongful death was recognized at the common law.

QUESTION: Well, you could call it a State law--it's positive State enactment rather than common law--couldn't you?

MR. HUDSON: The difference, I think, Chief Justice, is it is not a law aimed specifically at boating requirements. What Congress was addressing in 4306 was acts and regulations enacted by a State and particularly applied to **boat safety.** These are laws of general application, much as has been said you might have a zoning law or a general safety law. These are different from what Congress preempted in the section under question.

QUESTION: Of course, that reference to State law might be an indication that the only--that the general **preemption** clause should be read to mean that there is no **preemption [*10]** unless there is a positive enactment of Federal law. That might be one indication of--and that's not the way the Coast Guard read it right after the act, after the passage of act, but it could mean that too, couldn't it?

MR. HUDSON: I think that is the most logical reading, because when you read 4306 in conjunction with 4305, what you are permitted to obtain exemption from if you apply to the Coast Guard is from existing rules and regulations of the Coast Guard.

Furthermore, if you read the statute where it says at the conclusion, unless identical to a regulation comprised under section 4302, that's surplus. If what Congress intended to do was to say the only regulation we're going to have are positive enactments of the Coast Guard, then you don't need that language in the statue that says, unless identical to the regulations prescribed under this section.

QUESTION: Well, you could read it either way. I mean, there's an ambiguity there.

I suppose you could read it as saying, all State law goes unless the Coast Guard has adopted a regulation and State law is identical to that regulation, or you could read it as saying, all State law stays unless there is a Coast Guard regulation and **[*11]** in that case the only State law that stays is that which is identical. You could read it either way, I suppose, textually.

The reference to State law in the savings clause as distinct from common law might be an indication of which of those two possible readings you should take, i.e. that the State law is preserved in the absence of a positive enactment with conflict.

MR. HUDSON: To that I would respond, Justice Souter, that the former reading, why do you need State laws that simply parrot an existing Federal regulation that has been enacted by the Coast Guard.

QUESTION: Mm-hmm.

MR. HUDSON: The conduct is being regulated.

I would further say, if you have a statue that can be read both ways under the clear and

unambiguous standard that this Court cites in every one of its **preemption** cases, that in itself proves that at the very least this would be an ambiguous statute.

QUESTION: If that's what we mean.

QUESTION: You don't--we don't have to resolve that question, I take it, to decide in your favor, because the Government is taking the position, I assume, that the Coast Guard is right when the Coast Guard says, we're the only ones in the standard-setting business, so to reach your common **[*12]** law claim we don't have to decide--

MR. HUDSON: That is correct, because from the time of the enactment of the act and through the present time the Coast Guard has never taken the position that common law claims of general application of State laws are preempted.

QUESTION: May I ask you about the--whether the Georgia--the question of Georgia law of--to introduce to this jury the fact that the Coast Guard did not make a regulation requiring propeller guards would be relevant, wouldn't it?

MR. HUDSON: At least the underlying facts that caused the Coast Guard not to do anything, and the Coast Guard decided not to do anything because they couldn't come up with a common solution and it might expensive and the data was incomplete.

Now, the study committee said some other things, but the Coast Guard letter was general in that nature.

Yes, I think the underlying facts about whether propeller guards are safe or not safe do come into evidence.

QUESTION: And the fact that the Coast Guard that has set other standards didn't set this one.

MR. HUDSON: Yes, I think that could, because it will be a very limited application, even when it comes in, because the Coast Guard's action was very narrow in **[*13]** scope, the letter that adopted the position of the subcommittee that studied propeller guards.

QUESTION: Mr. Hudson--

QUESTION: Are you responding to Justice Ginsburg's question by saying what you think is desirable, or what you feel you know about the Georgia law of evidence?

MR. HUDSON: Well, I think I do know that much, Your Honor. In product liability cases in Georgia there's a recent supreme court decision we cite in our brief, and it allows all of these factors to come into evidence, whether they are other designs, whether they are Federal regulations, or Federal authorities. The whole mix goes into the jury's determination of whether or not this was too dangerous for use under this application.

QUESTION: Mr. Hudson, 4305 is discussed in all the briefs. I can't find it set forth anywhere. Is it set forth in any of your submissions?

It's very annoying to have a lot of discussion going on about a particular statutory provision and you look in the materials in front of you and it's just not there.

Is it in the red brief?

MR. HUDSON: Your Honor, I can't--we'll look in the blue brief. I think 4305 is the statute that allows the regulations to be established. Other than the fact that-- **[*14]**

REV_00259303

QUESTION: It's the one that permits the State to apply--

MR. HUDSON: For an exemption.

QUESTION: For an exemption.

MR. HUDSON: Okay. That's right.

QUESTION: Right.

MR. HUDSON: It's--if we haven't set it forth, Your Honor, that's an oversight, but it simply says the Coast Guard can grant an exemption from an existing act or a regulation that the Coast Guard has adopted, not an exemption from the wiping-of-the-slate clean notion that Brunswick submits in this case.

QUESTION: Well, I'm still looking for it.

MR. HUDSON: I'd like to reserve the balance of my time.

QUESTION: Very well, Mr. Hudson.

Mr. Frederick, we'll hear from you.

ORAL ARGUMENT OF DAVID C. FREDERICK ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

MR. FREDERICK: Thank you, Mr. Chief Justice, and may it please the Court:

Justice Scalia, it's at page 2 of the red brief. Actually, sorry, page 1 of the red brief, 4305.

We agree with petitioners that common law claims are not expressly preempted or impliedly preempted by Coast Guard regulations that don't exist in this case. Congress had two very good reasons to differentiate between positive law enactments and common law remedies that might be **[*15]** available.

The first is that common law remedies give manufacturers a choice as to whether or not they would change their product design or to install some particular equipment. They could make a cost-benefit analysis of whether assuming the risk that their product might cause a danger and thereby incur liability is worth the cost of redesigning the equipment or putting on some type of propeller guard, and that--

QUESTION: What about punitives?

QUESTION: We've heard that argument before. We heard it in Cipollone. We hear it in every case where the issue is whether common law remedies are precluded, and we have not found it persuasive.

MR. FREDERICK: Well, Justice Scalia--

QUESTION: I mean, it's true, you can roll the dice if you like. I suppose you can say the same thing about an explicit regulatory prohibition and there's especially very little difference when you have punitive damages.

I mean, I could ignore a regulation, too, can't I, and say it's a cost of business. A cost of doing business is now and then I'll get picked up for violating the regulation. It's worth it. I can say that about a regulation just as well as about a common law liability.

MR. FREDERICK: Justice Scalia, **[*16]** I'm trying to set forth the reasons why in 1971, when Congress enacted this statute, it may have differentiated it. The second is that it legislated against a backdrop, the historical traditions of the country that if people were injured they would have the ability to bring a tort claim, and so the words that it used in setting out in sections 4302, 4306, and 4311(g) used words that suggest positive law enactments would be preempted in 4306 and that common law liability would be saved--

QUESTION: Is that true even if the Coast Guard has a particular rule? I mean, suppose the Coast Guard said, look, this is obviously a tough question whether you should have propeller guards or not. People are killed both ways, and if the--you don't want to make a mistake. So the Coast Guard says, we don't want it. We think more people are killed with the propeller guards than without.

Are you saying under those circumstances in your view a State is perfectly free to award $ 50, $ 60, $ 100 million in punitive damages for doing the very thing the Coast Guard said not to do?

MR. FREDERICK: No. We think implied conflict **preemption**--

QUESTION: Ah.

MR. FREDERICK: --principles would be applicable.

QUESTION: **[*17]** So in other words it's just the fact they don't have a particular reg here that this turns on, in your opinion.

MR. FREDERICK: Well, the savings clause should not be read to eviscerate the power that Congress gave the Coast Guard to promulgate affirmative regulations, so that if in exercising that power that Congress gave the Coast Guard the Coast Guard promulgates a regulation that prohibits propeller guards, it would be anomalous to read the savings clause to bring it into conflict with that.

QUESTION: So if they have a reg--suppose they do have a reg.

MR. FREDERICK: Yes.

QUESTION: In your view, should we look to see whether that reg, there's a direct conflict with the State law or common law State--you know, the tort judgment, whether it--the State tort judgment would defeat an object of the reg, or whether the state judgment would be in an area that the reg clearly intends to reserve to the Coast Guard--that's your view of it?

MR. FREDERICK: That's correct. All of the--

QUESTION: Okay. If that's your view of it, why doesn't that apply--and I think maybe that is a perfectly good view. Why doesn't that just as much apply to a State positive regulation as it would to a tort action? **[*18]**

MR. FREDERICK: Because in 4306 the words that Congress used, it started out by saying, unless permitted by the Secretary, and everything else follows. It uses terms that parallel the terms that were used in 4302 which allow the Secretary to prom--to establish a safety standard.

If you then look at 4306 you see the parallel reference to, a State shall not be allowed to do a law or regulation that establishes a standard or in 4302(a)(2) it says, or impose a requirement or require a--an associated equipment device.

You then look at 4306. After the or, it says, or impose a requirement for associated

REV_00259305

equipment.

In our view, the language the Congress used in 4302 was to say, these are the things that the Secretary is authorized to issue regulations about, and then in 4306 it says, unless the Secretary permits, a State can't do those things which the Secretary is empowered to do in 4302, and--

QUESTION: The trouble I find with this analysis, that you rely just on implied **preemption** for common law, is that would be very peculiar in a statute which in 4306 insists that the State law be identical, that the State regulation, at least, be identical to the Federal law.

I mean, it's really saying, **[*19]** we don't want any State regulation unless it's the very same one.

MR. FREDERICK: Well, to the contrary, Justice Scalia.

If a regulation that a State promulgates is written in words that are going to be easily compared with a Federal standard it would be very easy to determine whether it was identical or not identical.

And the fact that Congress used the phrase, liability under common law in the savings provisions 4311(g), but did not use the phrase, common law to show that which was to be preempted in 4306 is further textual support for our view that those things which were to be preempted in 4306 were positive enactments of State law that would be done by State executive officers because, in fact, they will have to apply to the Secretary for the exemption from a **preemption,** and they are the ones who have to seek that authority in order to keep that in place, so it is true that--

QUESTION: Why would a State want to have a regulation that was identical with the Federal regulation?

MR. FREDERICK: Mr. Chief Justice, the history of it is that the Coast Guard recognized that it lacked the resources in order to enforce all of these provisions with the tens of millions of boats that were **[*20]** out there, so in fact when the Commandant of the Coast Guard testified he urged Congress to provide a scheme that would allow States to promulgate parallel--an identical regulation so that State enforcement officers could go and help with the enforcement of the safety standards.

QUESTION: The States couldn't help enforce the Coast Guard regulation?

MR. FREDERICK: It wasn't clear at the time whether in the absence of that explicit authority and provision that State officers would have the incentive or necessarily the power to do that, so when the Commandant of the Coast Guard testified before the Senate committee he made very clear that what the concern that the Coast Guard had was the positive enactments that would be conflicting with State law.

And he also made clear in response to a written question that was given to him in advance of his testimony so he had additional time to think about it that private remedies would be available to people if they were injured as a result of an unsafe device that was put on a boat.

So we think the legislative history, the structure and the text make very clear that what Congress was intending to do in 4306 was to deal with State positive law enactments.
[*21]

I would like to address, briefly address the respondent's theory of the savings clause, because in our view it doesn't really make that much sense. They have two theories.

REV_00259306

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

Rich, Marc Pardon

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REV_00259323

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

Draft March 27, 2001

The Honorable Dan Burton
Chairman
Committee on Government Reform
U.S. House of Representatives
Washington, DC 20515

Department of Justice

Dear Mr. Chairman:

This responds to your letter, dated March 14, 2001, which requested documents relating to certain recent presidential pardons. Your letter requested four categories of documents.

The first category consists of records relating to the consideration of clemency for 18 named individuals. Consistent with the approach that the ~~executive branch~~ took in response to similar document requests made by congressional committees in 1999 with regard to grants of clemency for certain Puerto Rican Nationalists, we are prepared to provide the Committee with documents submitted to the Department from outside the executive branch and certain law enforcement records, such as pre-sentencing reports, but ~~we are~~ not ~~prepared to provide~~ internal executive branch documents concerning the deliberations regarding possible grants of clemency. Documents concerning the grant to Carlos Vignali fall within an exception to this limitation, because the privilege protections have previously been lifted with respect to that matter (as was the case with respect to the pardons of Marc Rich and Pincus Green). We are searching for documents within this category that we are prepared to provide, and will inform you when they are assembled.

The second and third categories consist of records relating to any criminal investigations concerning individuals and matters identified in your letter. Our longstanding policy regarding the confidentiality of ongoing criminal investigations precludes us from providing records in response to this request. Although we can neither confirm nor deny that we are investigating any of the specific matters referred to in your letter, the United States Attorney's Office for the Southern District of New York has informed us that your request does have some relationship to its ongoing investigations.

Finally, your fourth category consists of records relating to clemency requests for which the White House requested priority review. White House requests to the Department concerning clemency deliberations, such as requests that we prioritize certain matters, fall within the category of deliberative information that we are protecting, consistent with the ~~executive branch~~ position on the Puerto Rican Nationalist matter. Accordingly, we are not prepared to identify which matters the White House asked

us to prioritize and therefore are not providing documents in response to this request.

Please do not hesitate to contact me if you would like additional assistance regarding this or any other matter.

Sincerely,

Sheryl L. Walter
Acting Assistant Attorney General

cc: The Honorable Henry Waxman
Ranking Minority Member

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

Draft March 27, 2001

The Honorable Richard C. Shelby
Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This responds to your letter of March 12, 2001, which requested "an outline of the role, formal or informal, of officials of the Department of Justice in the consideration and granting" of pardons to John Deutch and Samuel Morison. We are sending an identical letter to Vice Chairman Graham.

Under the Constitution, the pardon power is exercised by the President alone, although the Department has traditionally played an extensive advisory role with respect to most pardons and commutations. Mr. Deutch's pardon was an exception to that general rule. The President made his decision in this matter without consultation with or advice from the Department of Justice. To our knowledge, the Pardon Attorney is the only Department official who was advised that Mr. Deutch was going to receive a pardon. At about 9:30 or 9:45 A.M. on the morning of January 20, 2001, the Pardon Attorney was informed in a telephone call from an Associate White House Counsel that President Clinton had decided to grant a pardon to Mr. Deutch. The Associate Counsel requested technical advice in drafting the language of the pardon warrant and the Pardon Attorney attempted to provide such advice, although his only knowledge of the Deutch matter was the information provided by the Associate Counsel. Prior to this occurrence, neither he nor anyone on his staff was aware that Mr. Deutch was being considered for a pardon, and the pardon warrant was drafted by members of the White House Counsel's Office, rather than by attorneys at the Department of Justice.

By contrast, Mr. Morison submitted a petition for pardon to the Office of the Pardon Attorney, and it was processed routinely. The process typically includes obtaining the presentence report, requesting an FBI background investigation, and seeking recommendations from the United States Attorney whose office prosecuted the case and from the sentencing judge. After completing its investigation of Mr. Morison's case, the Pardon Attorney's Office prepared a report and recommendation for the Deputy Attorney General's signature. The report was signed by the Deputy Attorney General and sent to the White House Counsel. Subsequently, President Clinton made the decision to grant Mr. Morison a pardon. I would emphasize that the role of the Department of Justice in this case, as in all clemency cases in which the applicant applies through the Pardon Attorney, was to

conduct an appropriate investigation and provide advice and a recommendation to the President. The President, however, is always free to accept or ignore the Department's recommendation in a particular case.

I hope that this information is helpful. Please do not hesitate to contact me if you would like assistance regarding any other matter.

Sincerely,

Sheryl L. Walter
Acting Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

Draft March 20, 2001

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This is to provide information responsive to Senator Feinstein's questions at the Committee's hearing on February 14, 2001 regarding clemency granted by President Clinton on January 20, 2001. We request that this information, which pertains to the role of victims in the clemency review process, be included in the hearing record.

The impact on victims of the crime for which the applicant seeks executive clemency has long been a significant factor for the Office of the Pardon Attorney in its investigation of clemency petitions and in its preparation of the Department's advice to the President concerning whether a pardon or commutation should be granted. Since 1997, the portion of the United States Attorneys Manual that deals with the role of the United States Attorney in clemency matters (Section 1-2.111, USAM) has expressly noted the importance of providing information to the Pardon Attorney regarding victim impact in clemency cases. The practice of victim consultation in clemency cases has now been standardized by a regulation (28 CFR § 1.6(b)) which applies to clemency petitions filed on or after September 28, 2000, but this reflects more of a continuation of past practice than the commencement of a new procedure.

In response to Senator Feinstein's request, we examined pardons and commutations granted between December 1, 1999, and December 31, 2000. Of the ten commutations granted in this period, none involved an individual victim who suffered either physical or financial harm.
Of the 147 pardons granted during this period, only two involved physical harm to persons or property. The victims were not consulted in these two cases. In both instances, the defendant/pardon applicant had been charged with a regulatory type offense, not an assault or property destruction offense. In one case, restitution had been fully paid many years ago, and the defendant had taken great pains not to hurt any persons and to do only damage to the personal property of an individual with whom he was having a personal feud. The other case involved merely bad judgment that resulted in an accident, and neither drugs nor alcohol were involved.

I hope that this information is helpful. Please do not hesitate to contact me if you would like additional assistance regarding this matter.

Sincerely,

Sheryl L. Walter
Acting Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

REV_00259329

To: Stuart B.
6-1647

THE WHITE HOUSE
WASHINGTON

OFFICE OF THE COUNSEL TO THE PRESIDENT

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He meets w/ Cauthell + Murray on Th. @ 10:45 am (w/ Stuart).

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ONE HUNDRED SEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

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BERNARD SANDERS, VERMONT,
INDEPENDENT

March 14, 2001

The Honorable John Ashcroft
Attorney General
United States Department of Justice
Tenth Street & Constitution Avenue, N.W.
Washington, D.C. 20530

Re: Request for Documents

Dear General Ashcroft:

Pursuant to its authority under Rules X and XI of the Rules of the House of Representatives, the Committee on Government Reform is conducting an investigation of certain pardons and commutations granted by President Clinton. The Committee hereby requests certain records.

Please provide the Committee with the following records:

1. All records relating to the consideration of Executive Grants of Clemency for the following individuals:

(1) deliberative
(2) FALN line →

a. Benjamin Berger;
b. Almon Glenn Braswell;
c. Jacob Elbaum;
d. Robert Clinton Fain;
e. David Goldstein;
f. Edgar Allen Gregory;
g. Vonna Jo Gregory;
h. Garland Lincecum;
i. Eugene Lum;
j. Nora Lum;
k. James Lowell Manning;
l. Joe McKernan;
m. Kalmen Stem;
n. Carlos Vignali;
o. Thomas Waddell III;

REV_00259332

p. Harvey Weinig;
q. Mitchell Couey Wood;
r. Phillip Young;

2. All records relating to any criminal investigation of Roger Clinton's involvement in the pardon request of Phillip Young;

3. All records relating to any criminal investigation relating to the relationship between Roger Clinton, Arkansas lawyer Larry Wallace, and Birmingham, Alabama, businessman John Katopodis; and

4. All records from October 2000 through January 20, 2001, relating to any requests for grants of clemency for which the White House requested priority review by the Justice Department.

Please provide the requested records by March 21, 2001. If you have any questions about this matter, please have your staff contact the Committee's Chief Counsel, James C. Wilson, at (202) 225-5074. Thank you for your cooperation with this request.

Sincerely,

Dan Burton
Chairman

cc: The Honorable Henry A. Waxman, Ranking Minority Member

REV_00259333

DAN BURTON, INDIANA,
CHAIRMAN
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ONE HUNDRED SEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

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WM. LACY CLAY, MISSOURI

BERNARD SANDERS, VERMONT,
INDEPENDENT

March 14, 2001

The Honorable John Ashcroft
Attorney General
United States Department of Justice
Tenth Street & Constitution Avenue, N.W.
Washington, D.C. 20530

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   h. Garland Lincecum;
   i. Eugene Lum;
   j. Nora Lum;
   k. James Lowell Manning;
   l. Joe McKernan;
   m. Kalmen Stern;
   n. Carlos Vignali;
   o. Thomas Waddell III;

REV_00259334

p. Harvey Weinig;
q. Mitchell Couey Wood;
r. Phillip Young;

2. All records relating to any criminal investigation of Roger Clinton's involvement in the pardon request of Phillip Young;

3. All records relating to any criminal investigation relating to the relationship between Roger Clinton, Arkansas lawyer Larry Wallace, and Birmingham, Alabama, businessman John Katopodis; and

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Sincerely,

Dan Burton
Chairman

cc: The Honorable Henry A. Waxman, Ranking Minority Member

REV_00259335

THE WHITE HOUSE ID#

CORRESPONDENCE TRACKING WORKSHEET PAGE 1

DATE RECEIVED: 3/15/01

NAME OF CORRESPONDENT: Paul Colborn

SUBJECT: Request for Documents from the House Cmte. on Govt. Reform

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	DISPOSITION CD	DISPOSITION COMPLETED YY/MM/DD
CUGONZ		A	3/15/01		A	3/15/01
	ACTION COMMENTS:					
CUATOS		A	3/15/01			/ /
	ACTION COMMENTS:					
			/ /			/ /
	ACTION COMMENTS:					
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	ACTION COMMENTS:					

COMMENTS

ADDITIONAL CORRESPONDENTS: MEDIA:

ACTION CODES:
A - APPROPRIATE ACTION
C - COMMENT/RECOMMENDATION
D - DRAFT RESPONSE
F - FURNISH FACT SHEET
I - INFO COPY/NO ACT NECESSARY
R - DIRECT REPLY W/ COPY
S - FOR SIGNATURE

DISPOSITION CODES:
A - ANSWERED
B - NON-SEPC-REFERRAL
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S - SUSPENDED

OUTGOING CORRESPONDENCE:
TYPE RESP = INITIALS OF SIGNER
CODE = A
COMPLETED = DATE OF OUTGOING

REFER QUESTIONS AND ROUTING UPDATES TO RECORDS MANAGEMENT (ROOM 72, OEOB) EXT 6-2590.
KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS MANAGEMENT.

Fax Transmission

Faxed Over

Paul P. Colborn
Special Counsel
United States Department of Justice
Office of Legal Counsel
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Phone: 202-514-2048
Fax: 202-305-8524

To: Brett Kavanaugh Date: 3-15-01

Office # ( ) Pages: 3 (including cover sheet)

Fax#: ( ) 456-6279

Subject: Oversight on Pardons

Comments: Please call me to discuss the DOJ response to the attached



Good morning, Mr. Chairman and Members of the Committee:

I am here today at the Committee's request to provide information about how my office, the Office of the Pardon Attorney, normally handles clemency petitions, and to describe the procedures we followed with regard to President Clinton's grants of pardon to individuals, including Marc Rich and Pincus Green, on January 20, 2001.

Executive clemency petitions most commonly request relief in the form of pardon or commutation of sentence. The Department of Justice processes requests for executive clemency in accordance with regulations promulgated by the President and set forth at 28 C.F.R. §§ 1.1 to 1.11. These regulations provide internal guidance for Department of Justice personnel who advise and assist the President in carrying out the pardon function, but they create no enforceable rights in persons applying for executive clemency and do not restrict in any way the plenary clemency authority granted to the President under Article II, Section 2 of the Constitution. While the regulations thus govern the process for clemency requests submitted to the Department, they do not govern requests submitted directly to the President.

A presidential pardon serves as an official statement of forgiveness for the commission of a federal crime and restores basic civil rights. It does not connote innocence. Under the provisions of 28 C.F.R. § 1.2, a person does not become eligible to file a pardon request with the Department until the expiration of a five-year waiting period that commences upon the date of the individual's release from confinement (including home or community confinement) for his most recent conviction or, if no condition of confinement was imposed as part of that sentence, the date of conviction. Typically, the waiting period is triggered by the sentence imposed for the offense for which the pardon is sought, but any subsequent conviction begins the waiting period anew. Moreover, the same regulation stipulates that no petition for pardon should be filed by an individual who is then on probation, parole, or supervised release. As the foregoing indicates, a person who has not yet been convicted or has not fully served the sentence for the federal crime for which pardon is sought is ineligible for pardon under the regulations that guide the

President Clinton intended to pardon, and drafted the individual warrant accordingly. We obtained information as to dates of conviction and exact offenses for which these persons were convicted from the Internet web sites of several Independent Counsels, and in some cases obtained court documents such as the judgment orders, which give the date of conviction and the United States Code citation for the offense of conviction.

In non-Independent Counsel cases in which we have received either no documents at all or very sketchy information from the White House Counsel in the last hours before the pardons were granted, we have determined in all but one case that the person has only one federal conviction. We are therefore confident that it was this single conviction that President Clinton intended to pardon, and so drafted the individual warrants accordingly. We obtained information as to the date of conviction and the exact charges by contacting United States Attorney's Offices and United States Probation Offices and requesting the judgment orders in each case. We intend to prepare in this fashion the remaining nine individual warrants that have not been completed as of today. The delay in the processing of these warrants is occasioned by the need of the U.S. Attorneys and Probation Officers to request the official records from archived files stored at distant locations, and is not due to any doubt as to the scope of the pardon intended by President Clinton. We expect to complete this task shortly. In one case (that of Adolph Schwimmer), the conviction of which we have knowledge is more than 50 years old. The age of that conviction and Mr. Schwimmer's own advanced age may prolong for awhile the process of confirming that this is only conviction. In any event, we have no knowledge or belief that President Clinton intended to pardon anyone for conduct for which he or she was not at least charged and, in most cases, convicted. Moreover, my office has had no contact of any sort with President Clinton or any of his assistants since the master pardon warrant was signed on January 20th.

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Department of Justice's processing of pardon requests. However, these rules do not bind the President. The President retains the authority under the Constitution to consider a pardon request from an individual who is ineligible to apply under the regulations or who has not applied at all, and to grant clemency to such a person if he believes such action to be appropriate.

A pardon request is typically processed in the following manner. The pardon applicant files his clemency petition, addressed to the President, with the Office of the Pardon Attorney. He is free to utilize the services of an attorney or to act on his own behalf in seeking pardon. The standard form utilized for this process requests information about the offense, the petitioner's other criminal record, his employment and residence history since the conviction and other biographical information, and his reasons for seeking pardon. The application must be signed and notarized, and the applicant must also submit three notarized affidavits from character references who are unrelated to him, know of his conviction, and support his pardon request. When my office receives a pardon petition, it is screened to ensure that the applicant is in fact eligible to seek a pardon (*i.e.*, that the crime for which pardon is sought is a federal offense and that the waiting period has been satisfied), to determine whether any necessary information has been omitted from the application or whether the applicant's responses to the questions require further elaboration, and to ascertain whether the petitioner has described his efforts at rehabilitation. If the petitioner is ineligible to apply for pardon under the regulations, he is so informed. If the application is incomplete, further information is sought from the petitioner.

As an initial investigative step in a pardon case, the Office of the Pardon Attorney contacts the United States Probation Office for the federal district in which the petitioner was prosecuted to obtain copies of the presentence report and the judgment of conviction, as well as information regarding the petitioner's compliance with court supervision, and to ascertain the Probation Office's views regarding the merits of the pardon request. If review of the pardon petition and the data obtained from the Probation Office reveals information that clearly excludes the case from further favorable consideration, my office prepares a report to the President for the

signature of the Deputy Attorney General recommending that pardon be denied. Alternatively, if the initial review indicates that the case may have some merit, it is referred to the FBI so that a background investigation can be conducted.

The FBI does not make a recommendation to support or deny a pardon request. Rather, the Bureau provides the Office of the Pardon Attorney with factual information about the petitioner including such matters as his criminal history, records concerning the offense for which pardon is sought, his employment and residence history, and his reputation in the community. The FBI report is reviewed by my staff to ascertain whether favorable consideration of the case may be warranted. If the investigation reveals derogatory information of a type that would render pardon inappropriate and warrant denial of the request, my office prepares a report to the President through the Deputy Attorney General recommending such a result.

If the FBI report suggests that favorable treatment may be warranted, or in cases which are of particular importance or in which significant factual questions exist, the Office of the Pardon Attorney requests input from the prosecuting authority (*e.g.*, a United States Attorney, a Division of the Department of Justice, or in some cases, an Independent Counsel) and the sentencing judge concerning the merits of the pardon request. If the individual case warrants, other government agencies, such as the Internal Revenue Service or the Immigration and Naturalization Service, may be contacted as well. In appropriate cases in which the offense involved a victim, the prosecuting authority is asked to notify the victim of the pendency of the clemency petition and advise him that he may submit comments concerning the pardon request. Upon receipt of the responses to these inquiries, my office prepares a report and a proposed recommendation for action upon the case. The report is drafted for the signature of the Deputy Attorney General and is submitted for his review. If the Deputy Attorney General concurs with my office's assessment, he signs the recommendation and returns the report to my office for transmittal to the Counsel to the President. If the Deputy Attorney General disagrees with the disposition proposed by the Office of the Pardon Attorney, he may direct the Pardon Attorney to

modify the Department's recommendation. After the recommendation is signed by the Deputy Attorney General, the report is transmitted to the Counsel to the President for the President's action on the pardon request whenever he deems it appropriate.

Similarly, a federal inmate seeking a presidential commutation (reduction) of his sentence files a petition for such relief with the Office of the Pardon Attorney. In contrast to a pardon, a commutation is not an act of forgiveness, but rather simply remits some portion of the punishment being served. An inmate is eligible to apply for commutation so long as he has reported to prison to begin serving his sentence and is not concurrently challenging his conviction through an appeal or other court proceeding. The petitioner is free to append to the commutation application - or to submit separately at a later date - any additional documentation he believes will provide support for his request. In completing the petition, the inmate - or his attorney, if he is represented by counsel - explains the circumstances underlying his conviction; provides information regarding his sentence, his criminal record, and any appeals or other court challenges he has filed regarding the conviction for which he seeks commutation; and states the grounds upon which he bases his request for relief.

When my office receives a commutation petition, we review it to ensure that the applicant is eligible to apply for clemency, and we commence an investigation of the merits of the request. The initial investigative step involves contacting the warden of the petitioner's correctional institution to obtain copies of the presentence report and judgment of conviction for the petitioner's offense, as well as the most recent prison progress report that has been prepared detailing his adjustment to incarceration, including his participation in work, educational, vocational, counseling, and financial responsibility programs; his medical status; and his disciplinary history. We also check automated legal databases for any court opinions relating to the petitioner's conviction. In most cases, this information is sufficient to enable my office to prepare a report to the President through the Deputy Attorney General recommending that commutation be denied.

In a minority of cases, however, if our review of this information raises questions of material fact or suggests that the commutation application may have some merit, or because the case presents significant issues, my office contacts the United States Attorney for the federal district of conviction or the prosecuting section of the Department of Justice for comments and recommendations regarding the commutation request. We also contact the sentencing judge, either through the United States Attorney or directly, to solicit the judge's views and recommendation on the clemency application. As with pardon requests, if the individual case warrants, other government agencies may be contacted as well. In appropriate cases in which the offense involved a victim, the prosecuting authority is asked to notify the victim of the pendency of the commutation petition and advise him that he may submit comments concerning the clemency request.

Following an evaluation of all of the material gathered in the course of the investigation, the Pardon Attorney's Office drafts a report and recommendation for action on the merits of the commutation request which is transmitted to the Deputy Attorney General. Following his review, the Deputy Attorney General may either sign the report and recommendation or return it to my office for revision. Once the Deputy Attorney General determines that the report and recommendation satisfactorily reflects his views on the merits of the clemency request, he signs the document, which is then forwarded to the Counsel to the President for consideration by the President. Thereafter, when he deems it appropriate, the President acts on the commutation petition and grants or denies clemency, as he sees fit.

When the President decides to grant clemency, whether in the form of pardon or commutation of sentence, the Counsel to the President informs the Office of the Pardon Attorney to prepare the appropriate clemency warrant. Typically, if the President intends to pardon a number of applicants, a master warrant of pardon will be prepared for his signature. The signed warrant bears the seal of the Department of Justice, lists the names of all of the individuals to whom the President grants pardon, and directs the Pardon Attorney to prepare and sign individual

warrants of pardon reflecting President's action to be delivered to each pardon recipient. The individual warrant signed by the Pardon Attorney likewise bears the seal of the Department of Justice and reflects that it has been prepared at the direction of the President. When the individual pardon warrant has been prepared, it is sent to the applicant, or his attorney if he is represented by counsel, along with an acknowledgment form that the pardon recipient completes and returns to the Pardon Attorney's Office to reflect receipt of the warrant.

If the President decides to commute a prisoner's sentence, the Pardon Attorney's Office likewise prepares the warrant of commutation for the President's signature. Depending upon how many sentences are to be commuted, either a master warrant detailing all of the commuted sentences or individual commutation warrants may be prepared. After the President has signed the commutation warrant, which bears the seal of the Department of Justice, the Pardon Attorney's Office transmits a certified copy of the document to the Bureau of Prisons to effect the inmate's release. A copy of the warrant is also sent to the petitioner's attorney if he is represented by counsel. Whenever the President grants a pardon or commutation, the Pardon Attorney's Office notifies the prosecuting authority (United States Attorney or Division of the Justice Department), the sentencing judge, the relevant United States Probation Office, the FBI, and any other government agencies whose views were solicited, of the final decision in the matter.

When the President denies clemency, the Counsel to the President typically notifies the Deputy Attorney General and the Pardon Attorney's Office by memorandum that the affected cases have been decided adversely. The Pardon Attorney's office then notifies the pardon or commutation applicant, or his attorney, of the decision. In addition, the Pardon Attorney's Office notifies the prosecuting authority, the sentencing judge, other government agencies whose views were solicited, and, in the case of a commutation, the Federal Bureau of Prisons, of the outcome of the request. No reasons for the President's action are given in the notice of denial.

With respect to the pardon of Marc Rich and Pincus Green, none of the regular

procedures were followed. The first time I learned that the White House was considering these two persons for pardon was shortly after midnight on the morning of Saturday, January 20, 2001. At that time, I received a telephone call from the Office of the White House Counsel advising me that they were faxing me a list of additional persons to whom the President was considering granting pardons. When the facsimile arrived, among the several names listed were Pincus Green and Marc Rich. Since the fax included no other information about these persons, I telephoned the White House Counsel's Office to advise that I would need additional identifying data in order to request that the FBI conduct criminal records checks on the named individuals. (I had been contacting the FBI for the past several days with names of persons for whom the White House wanted checks of criminal records and outstanding warrants.)

I was told by White House Counsel staff that the only two people on the list for whom I needed to obtain records checks were Marc Rich and Pincus Green, and that it was expected there would be little information about the two men because they had been "living abroad" for several years. I obtained the dates of birth and Social Security numbers for Rich and Green from Counsel's Office and then passed this information along to the FBI by telephone so that the records checks could be completed. Shortly thereafter, White House Counsel's Office personnel faxed to my office a few pages that appeared to have come from a clemency petition that had been submitted to the White House on behalf of Rich and Green by Jack Quinn, Esq. and other attorneys. The information contained in these documents revealed that the pardon request sought clemency for pending charges that had been brought by indictment in the Southern District of New York some 17 years earlier, and that Rich and Green had resided outside the United States ever since and were considered to be fugitives. At that point, a member of my staff began to conduct a quick Internet search for information about the two men.

While that search was ongoing, I received a facsimile transmission from the FBI of records which confirmed that Rich and Green were wanted fugitives whom law enforcement authorities were willing to extradite for a variety of felony charges, including mail and wire

fraud, arms trading, and tax evasion. Because I was concerned that the FBI transmission would not be readable if it were itself faxed to the White House Counsel's Office, I wrote a quick summary of the information regarding the outstanding charges against Rich and Green and their fugitive status and faxed that to Counsel's Office shortly before 1:00 a.m. on January 20th. Because of what we had learned about Rich and Green, I also immediately contacted Deputy Attorney General Eric Holder at home through the Justice Department Command Center to alert him that the President was considering granting pardons to the two men. Mr. Holder indicated to me at that time that he was aware of the pending clemency requests by Rich and Green. After receiving my short summary of the FBI's information about Rich and Green, personnel from the White House Counsel's Office called to ask that I fax them a copy of the FBI record itself. I did so shortly after 1:00 a.m., and also included the limited information about Rich's fugitive status and the charges against him that my staff had been able to obtain from the Internet.

The only other time the names of Marc Rich and Pincus Green had come to my attention was on the morning of January 19, 2001, when I first saw a copy of a letter dated January 10, 2001, that their attorney, Jack Quinn, had sent to Deputy Attorney General Holder seeking his support for pardons for the two men. The Justice Department transmittal sheet attached to the letter indicated that on January 17th, the Department's Executive Secretariat had assigned the Quinn letter to my office for response and had sent a copy to the Deputy Attorney General's Office for information. My office received its copy on the afternoon of January 18th, and on the morning of the 19th, I saw it in our mail. The due date for response indicated by the Executive Secretariat was January 31st. Because neither Rich nor Green had filed a clemency application with my office and because the White House Counsel's Office had never indicated to me that pardons for these two persons were under consideration, I simply drafted a short response on the morning of the 19th, to be held until the following Monday, advising Mr. Quinn that neither man had submitted a pardon petition to my office and that if they wished to request pardons, the application forms were available upon request.

Mr. Chairman, I understand that the Committee is also interested in hearing how the Department of Justice determined the scope of the individual pardon grants made on January 20, 2001. A majority of the persons named on the master pardon warrant had submitted petitions for pardon to the Department of Justice. Their applications specified the offenses for which they had been convicted and for which they sought pardon. In many cases, we had sufficient time to fully process their cases and submit reports and recommendations to the White House in which we discussed those offenses. In these cases, it is clear that President Clinton intended to grant pardons for the offenses so noted and discussed.

Other persons named on the master warrant also submitted petitions to the Department, but they arrived too late for us to submit a report and recommendation. Many of these persons had also submitted their petitions directly to the White House, and in some cases the White House asked the Office of the Pardon Attorney for copies of their petitions. In these cases as well, we are confident that President Clinton intended to grant pardons for the offenses cited in their petitions.

Some of the persons whose names were on the master pardon warrant never submitted petitions to the Department. We have determined the scope of the pardons for these persons in a variety of ways. In some cases, including those of Marc Rich and Pincus Green, the White House Counsel's office sent us, just prior to the granting of the pardons, copies of or excerpts from the pardon requests that these persons or their counsels had submitted to the White House. We therefore drafted the individual pardon warrants to reflect the offenses for which the pardon recipients were convicted (or, in the case of Rich and Green, indicted) as described in these submissions made directly to the White House.

In several other cases in which the Department received nothing from the pardoned person, we were able to determine that the person had been prosecuted by an Independent Counsel. In these instances, we determined that the Independent Counsel conviction is the person's only federal conviction. We therefore are confident that it was this conviction that

litigation files

Robert Wollner
5540 W. Glendale Ave., Suite 204
Glendale, Arizona 85301
Telephone 623 939-7745

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Robert Wollner,

Plaintiff,

- VS. -

Defendants,

George H. Bush
Jeb Bush
George W. Bush
Dick Cheney
Colin Powel
Donald Rumsfelt

SUMMONS IN A CIVIL CASE

Case Number

CIV '01 0602 PHX EHC

TO:

George H. Bush
10000 Memorial Dr.
Houston, TX 77024-3422

Jeb Bush
State of Florida, The Capitol
Tallahassee, Florida 32399-0001

George W. Bush
1600 Pennsylvania Ave., N.W.
Washington, D.C. 20500

Dick Cheney
1600 Pennsylvania Ave., N.W.
Washington, D.C. 20500

Colin Powel
2201 C Street N.W.
Washington D.C. 20520

Donald Rumsfeld
The Pentagon
Washington D.C. 20301-1155

YOU ARE HEREBY SUMMONED and required to serve upon THE PLAINTIFF

Robert Wollner, 5540 W. Glendale Ave., Suite 204, Glendale, Arizona 85301

An answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default

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will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

United States Courthouse
230 North First Avenue, Room 1400
Phoenix, AZ 85025

RICHARD H. WEARE
CLERK

(BY) DEPUTY CLERK

APR 04 2001
DATE

Robert Wollner
5540 W. Glendale Ave., Suite 204
Glendale, Arizona 85301
Telephone 623 939-7745

FILED ✓ LODGED
RECEIVED ✓ COPY
APR 04 2001
CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Robert Wollner,

Plaintiff,

- VS. -

Defendants,

George H. Bush
Jeb Bush
George W. Bush
Dick Cheney
Colin Powel
Donald Rumsfelt

George H. Bush
10000 Memorial Dr.
Houston, TX 77024-3422

Jeb Bush
State of Florida, The Capitol
Tallahassee, Florida 32399-0001

George W. Bush
1600 Pennsylvania Ave., N.W.
Washington, D.C. 20500

Dick Cheney
1600 Pennsylvania Ave., N.W.
Washington, D.C. 20500

Colin Powel
2201 C Street N.W.
Washington D.C. 20520

Donald Rumsfeld
The Pentagon
Washington D.C. 20301-1155

COMPLAINT

Case Number

CIV '01 0602 PHX EHC

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JURISDICTION

The United States District Court, District Of Arizona, is the proper jurisdiction for litigating this matter. The court has jurisdiction and the claim needs no new grounds of jurisdiction to support it.

Being Sued As Individuals

The Defendants, each singular litigant, are being sued as individuals, and any past or present public service office which they may have held, or may now hold, is not relevant to this litigation.

COMPLAINT

The Plaintiff in this action, Mr. Robert Wollner, will NOW introduce the pertinent facts and issues that have risen in order to provoke this lawsuit. The Plaintiff comes forth with dispatch, to present the relevant circumstances pertaining to his complaint.

The Plaintiff, Robert Wollner, is the author\inventor of a new concept in economics named Negative Economics. The new concept has been designated as *"Negative"* Economics, because of the consequences that such a concept would produce on the human race. The destructive capabilities of Negative Economics to damage the human race is profound. The evolution forecast of mankind would be altered, because the incentive to implement Negative Economics is rooted in the basic evil characteristics of man. The human desire that produces the hunger for greed and wickedness is the motivation that justifies the logic to employ Negative Economics pursuits. If the concept of Negative Economics were to reach the sovereign nations of the world, the planet Earth would be transformed into a different world. A world of warring nations would emerge. Aggressive nations would wage war for the ownership

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of other nations, with the intent being, to impose Negative Economics upon them in order to steal their national income and their nation's wealth. Negative Economics is a concept that has been designed to enrich governments. Governments acquire wealth by imposing Negative Economics upon their own citizens. And by overthrowing other nations and imposing Negative Economics upon them. The more nations they overthrow, and impose Negative Economics upon, the wealthier they become. Stealing the wealth and financial assets of nations is the undertaking of Negative Economics. The primary objective of the concept of Negative Economics is to establish Negative Economics "Empires", that consist of large numbers of nations that produce income and wealth, on a ongoing basis, for the nation, or group of nations, that implement Negative Economics as a means of acquiring wealth. It is even conceivable that the holders of larger Negative Economics "Empires" would overthrow the holder, or holders, of smaller Negative Economics "Empires" and, in doing so, benefit from the wealth that can be acquired. The appetite for wealth and the yearning for power makes Negative Economics an irresistible compulsion to nations who are willing to consider beginning and controlling a Negative Economics empire.

The inability of the Defendants to recognize the threat that Negative Economics imposes upon the world of sovereign nations, and the freedom that can be lost, should the practice of implementing Negative Economics become a reality, is an issue for this court to judge. Their unconcern is undermining the safety and well-being of the human race. The Defendants have made no effort to prevent Negative Economics from reaching the sovereign nations of the world. Their attitude is one of complete disregard. They send no messages or signals that indicate their concern for the captured nations of the world who would become economic slaves to the more powerful nations, who would force Negative Economics upon them. The Defendants possess the experience and the knowledge for evaluating the detrimental

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consequences that a Negative Economics world would produce, yet their belief and conviction that sovereign nations would not be corrupted by the powerful influence that Negative Economics represents, is without foundation. Greed and the appetite for wealth are the characteristics that fuel Negative Economics. Such greed is demonstrated in the United States. In our economic system, only one percent of the population owns all the wealth of the system. Greed and the desire for wealth has flourished in capitalism. Negative Economics offers a larger path for greed to spread and expand its evil wrongdoing. The wealth of a legion of nations, and the potential for "world domination", now lies at the feet of those bold nations who would extract wealth on a gigantic scale, from captured nations who must submit to Negative Economics. Since the Defendants are unwilling to chose a destiny for Negative Economics to take, this court will decide the outcome. The significance and purpose of this litigation is to prevent our planet from becoming a doomed world that consists of Negative Economics empires.

The Plaintiff had requested that the Defendants provide him with a small government grant for developing his inventions. The Defendants, most of whom, hold positions that grant them the authority to provide government grants. The Defendants have ignored the Plaintiff's request. In exchange for the government grant, the Plaintiff expressed his willingness to forgo his anticipated project of mailing Negative Economics to all the nations of the world. And in doing so, suffer the loss of billions of dollars paid by rouge nations and impoverished nations who would welcome the opportunity to acquire great wealth and power from the implementation of Negative Economics. Negative Economics has a value in excess of ten billion dollars. The Plaintiff feels that his request was not unreasonable. The willingness of the Defendants to prevent Negative Economics from reaching the sovereign nations of the world has not been demonstrated. Thus, the Plaintiff is demanding compensation and

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relief from the Defendants for his loss for not providing Negative Economics to the nations of the world.
Attached to this lawsuit is a complete and concise description of Negative Economics. It describes in detail, the methods, the procedures, and the system of Negative Economics, that bold nations could use for stealing the wealth of other nations. The description also explains the precise methods for establishing Negative Economics Empires. The material is marked ("Exhibit A" Negative Economics).

THE VALUE OF NEGATIVE ECONOMICS

In order to determine the approximate loss of the Plaintiff for not providing Negative Economics to the sovereign nations of the world, the following is given.
Negative Economics is compared in monetary value to some of the major corporations in America. For example. If Time\Warner Corporation has a monetary value of 110 billion dollars, as was stated on the television news, then Negative Economics must have a far greater monetary value. Negative Economics has the capability of abstracting the wealth of entire nations, and moving that wealth into the government revenues bank accounts of the nation who controls Negative Economics. Negative Economics is very efficient at abstracting the wealth of a nation. Undeniably, such a concept has a far greater monetary value then any one corporation. Thus, 10 billion dollars is a very small amount in compensation, for the Plaintiff's loss for not marketing Negative Economics to the world. One rouge nation would gladly pay that amount to purchase such a concept.

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THE MONETARY VALUE OF SOME OF AMERICA'S CORPORATIONS, COMPARED TO THE VALUE OF COMPENSATION BEING ASKED FOR NEGATIVE ECONOMICS

NAME OF COMPANY	***MARKET VALUE***
Negative Economics	**- 10 billion dollars**
Merrill Lynch	- 37 billion dollars
Dimler\Chrysler	- 54 billion dollars
General Motors	- 57 billion dollars
Ford Motor Co.	- 59 billion dollars
Philip Morris Cos.	- 60 billion dollars
Chase Manhattan Bank	- 61 billion dollars
Wells Fargo	- 73 billion dollars
Nestle	- 73 billion dollars
Dean Witter & Cos.	- 81 billion dollars
Bell Atlantic	- 81 billion dollars
Procter & Gamble	- 88 billion dollars
Bank of America	- 91 billion dollars
Howlett-Packard	- 119 billion dollars
AT & T	- 130 billion dollars
Toyota Motor	- 170 billion dollars
IBM	- 190 billion dollars
Wal-Mart Stores	- 258 billion dollars
Exxon\Mobil	- 290 billion dollars
Microsoft	- 329 billion dollars
General Electric	- 405 billion dollars
Citigroup	- 716 billion dollars

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SUMMATION

The Plaintiff, Mr. Robert Wollner, is the author\inventor of a new concept in economics called, Negative Economics. This new economic concept can produce a world where nations prey upon other nations for the purpose of abstracting their wealth. Negative Economics can withdraw a nation's riches and transfer them to the government revenues bank accounts of the nation who controls Negative Economics. Imagine a world where prosperity is a disadvantage. A world where prosperous nations fall victim to other nations who desire to harvest their wealth. Military power becomes the implement for robbing affluent nations of their riches. The objective of Negative Economics is to establish Negative Economics "empires". Negative Economics "empires" begin and expand. Consuming more and more nations. Bigger, more powerful nations take and control the Negative Economics empires of smaller nations. The world becomes a planet of Negative Economics empires.

The Plaintiff mailed descriptions of Negative Economics to all of the Defendants, and informed the Defendants about the harmful effects that Negative Economics can produce in the world of sovereign nations. The Plaintiff was willing to accept a small government grant for abandoning his project of selling and marketing Negative Economics to all the countries of the world. Once mailed, Negative Economics cannot be retrieved. The nations of the world would not return it. They would use it. A state of panic would arise amongst the peaceful nations of the world, who would fear that they could become the victims of Negative Economics. Their concern that other nations would be expecting to overthrow them, and to steal their wealth, could be realized. The world would be change indefinitely. The system of Negative Economics would continue on into the future, constantly making the world an unsafe place for prosperous nations. Negative Economics is a threat to prosperous nations. Poor nations have no

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value in the Negative Economics formula. They have no wealth to steal.

The Defendants were unwilling to recognize the threat that Negative Economics imposed upon a peaceful world. They ignored the Plaintiff's pleas to compensate him with a small sum for not corrupting the world with Negative Economics. Weary of pleading with the Defendants, the Plaintiff has initiated this litigation in order to be compensated. The Plaintiff is asking for compensation from the Defendants who have disregarded the safety and well-being of humanity. This lawsuit is well-founded.

DEMAND

Plaintiff is praying for a judgment, for the following compensation and relief:

$10,000,000,000.00 (Ten Billion Dollars)

Compensation is being sought for the plaintiff's loss for not selling and marketing Negative Economics to the sovereign nations of the world. This is satisfactory compensation for denying an economic concept to rouge nations and impoverished countries who would implement such a concept to enrich themselves.

The judgment prayed for is to be divided up as follows:

George H. Bush	**- 4 billion dollars.**	**($4,000,000,000.00)**
Jeb Bush	**- 1 billion dollars.**	**($1,000,000,000.00)**
George W. Bush	**- 2 billion dollars.**	**($2,000,000,000.00)**
Dick Cheney	**- 1 billion dollars.**	**($1,000,000,000.00)**
Colin Powel	**- 1 billion dollars.**	**($1,000,000,000.00)**
Donald Rumsfelt	**- 1 billion dollars.**	**($1,000,000,000.00)**

Plaintiff has indicated that George H. Bush should bear the biggest obligation should judgment be granted. George H. Bush is the most qualified of the Defendants and has the most experience in foreign affairs. His qualifications include: Director of the CIA, 8 years as Vice President of the United States, and 4 years

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as President of the United States. The Plaintiff first began his ordeal with Negative Economics by contacting George H. Bush. The Defendant, George H. Bush, has continually ignored the threat that Negative Economics represents to the world. He made no effort to stop Negative Economics from reaching sovereign nations who would implement it with malicious intent.

Dated this 4th day of April, 2001.

Robert Wollner, Plaintiff

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EXHIBIT A

Negative Economics

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government could impose a tax on business incomes as high as 50% or 65% of each business's income. This would boost government revenues.

Other Resources That Can Be Utilized To Increase Spending In Spending Programs

Negative Economics is a system that was designed for government revenues production. The greater the amount of Dated Money that can be pumped through the economy, the more profoundly the government benefits. By adding more methods to increase Dated Money spending during spending programs, adds to government revenues intake. Some methods for consideration could be:

Match The Dated Money, Program

Profitable businesses, factories and corporations could be required to "Match" the amount of Dated Money that employees receive in their pay envelope. Or even "Double" the amount. This would increase the amount of Dated Money being spent in the spending program.

Example. Mr. Smith, a production supervisor, normally earns $630.00 a week after tax deductions. This week's pay envelope contained a pay check for $210.00 (1\3rd of his normal pay check) and $420.00 in Dated Money. (2\3rds of his pay check mandated by the government for the spending program). A second envelope contained another $420.00 in Dated Money, with a statement from his employer showing that they had met their obligation under the government mandate to match the Dated Money amount employees receive for the spending program. Mr. Smith now has a total of $840.00 in Dated Money to spend before the spending program expires. The Dated Money may be spent at any business in the country, unless certain types of businesses have been excluded from the spending program. $294.00 will end up in government revenues accounts (35%). $546.00 (65%), the country's businesses will benefit from.

Money Stored In Bank Accounts

Depending on the government. And the country. Banks would provide lists of bank balances over the "Target Balance" amounts. Businesses and individuals who have bigger bank account balances might be relied upon for boosting Dated Money spending in spending programs. They may be required to contribute to the spending program by spending more Dated Money. The strategy is to free up

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money stored in bank accounts and pump it into the economy so that the economy and the government revenues bank accounts will benefit.
Example. Mr. Smith, the production supervisor, has $840.00 in Dated Money to spend in the spending program. $420.00 came from his own pay check. An additional $420.00 came from his employer. Because his bank account balance is over the government targeted amount, he will receive from his bank a government mandated, "Dated Money Voucher" that will be good for $150.00 in Dated Money. The $150.00 has already been withdrawn from his bank account and was used to purchase the voucher from the government. The Voucher can be cashed in for Dated Money at any location that has Dated Money available. He now has $990.00 in Dated Money available that him and his family will spend in the spending program. $346.50 will end up in government revenues bank accounts (35%). $643.50 (65%), the country's businesses will benefit from.

Credit Card Indebtedness Program

Other targeted moneys for spending programs could be reviewed as well. Depending on which government is implementing the programs. Credit Cards are another source for generating Dated Money spending in spending programs. Citizens would be required to spend money during spending programs that is taxed onto their credit card and is designated as Dated Money. An amount would be determined for each credit card account. That amount of money would be defined as Dated Money to be used for that spending program. The amount determined would have to be spent with that credit card during the spending program. If not spent by the time the spending program ended, the money is forfeited. The date printed on Dated Money being used for each spending program, is the date the program expires. Any part of the money that remains on the credit card when the spending program expires is credited to the government revenue accounts. The credit card holder is notified that on the date the spending program begins $200 (for example) will be credited to their credit card. When the spending program begins they have until the end of the program to spend the $200. This may be in addition to any other Dated Money they may have received through their employer, or bank if they are self-employed. The $200 will appear on their credit card statement when they receive it. They can make monthly payments on the $200 as they normally do other charges on their credit card.
Example. Mr. Smith, the production supervisor, now has $990.00 in Dated Money to spend in the spending program. $420.00 came from his own pay check. An

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additional $420.00 came from his employer. $150.00 was mandated by the government from his savings account. Mr. Smith's credit card account has been selected by the government for increasing Dated Money spending in the spending program. He has received notification by Certified Mail that $350.00 in Dated Money credits are available on his credit card for spending during the spending program. That the $350.00 must be spent in its entirety before the spending program expires. Any portion that is remaining on the credit card will be forfeited. Mr. Smith now has $1,340.00 in Dated Money for him and his family to spend during the spending program. $469.00 will end up in government revenues accounts (35%). $871.00 (65%) the country's businesses will benefit from. The Certified Mail letter that Mr. Smith received, also informed him that certain items will not be available for Dated Money spending in this spending program. Food items at the supermarkets and other stores, new or used cars, professional services such as Dentists, Doctors, Hospitals and other medical services, new or used home purchases, and other items are listed that are excluded from the spending program.

Consumers Assistance Program

The government prints extra Dated Money and sells it to consumers during spending programs. The incentive to purchase the Dated Money is to increase their spending power which helps consumers with inflation.
See chart below.

PURCHASE DATED MONEY FROM THE GOVERNMENT AND INCREASE YOUR SPENDING POWER

AMOUNT PAID IN CASH	DATED MONEY AMOUNT YOU RECEIVE
$10.00	$12.00
$15.00	$18.00
$20.00	$25.00
$40.00	$54.00
$60.00	$78.00
$100.00	$135.00

Example. Mr. Smith, the production supervisor, and his family, decide to purchase $300.00 in Dated Money from the government. This gives them $405.00

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additional in Dated Money to spend. They now have $1,745.00 in Dated Money to spend in the spending program. Mr. Smith supports a wife and three children who are overjoyed about the spending they will do during the spending program. The $420.00 in Dated Money that Mr. Smith received from his employer, through the government mandated program will help them out considerably.

Who Benefits From All The Spending

The government benefits with increased revenues. The nation's businesses benefit from increased sales and income. The economy benefits from increased employment and business activity.

MAKING CHANGE

Making change for purchases made with Dated Money at businesses during the Spending Programs. When consumers receive their Dated Money, businesses would not have change to give for purchases made with Dated Money. The government does not provide businesses with Dated Money for the purpose of making change. That would require to much Dated Money to be printed for the Spending Program. As cash registers in businesses fill up with Dated Money from purchases, that money would be used for giving change.
Example. SHOWN IN U.S. DOLLARS

No Dated Money In Cash Register Yet
A $3.00 purchase is made. $5.00 is given to the cashier in Dated Money. Change given back is $2.00 in cash.

With Dated Money In Cash Register
A $3.00 purchase is made. $5.00 is given to the cashier in Dated Money. Change given back is $2.00 in Dated Money.

No coins such as nickels, dimes, quarters, are made for Consumer Spending Programs. If the change is $3.75, the customer gets $3.00 in Dated Money and 75¢ in normal change.

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A MARRIED COUPLE GET A SURPRISE

It's Friday night and workers everywhere are opening their pay envelops. OH, NO. Say the married couple. It's mostly all Dated Money. We didn't plan on going out this weekend, they say. The couple now has to decide if they want to forfeit their Dated Money. Or head out to the businesses and shopping areas and spend. Spend it or lose it, is their motto. Might as well spend, they say. 35% of what is being spent goes into the government's revenues bank accounts. Besides spending Dated Money during the program, many people will run out of Dated Money and keep on spending when they find things they need. This helps to increase economic productivity.

Negative Economics Can Be Expanded To Other Countries (optional) (May be used by some countries)

One of the benefits that Negative Economics offers is that it can be expanded to other countries.
The first consideration is to decide which nations are the best candidates for expanding Negative Economics to.

Evaluating A Country's Potential For Negative Economics

In considering which countries are good candidates for expanding Negative Economics to, the economic productivity of nations is appraised. The chart on the next page gives information for Gross Domestic Product and Income Per Capita figures for ten simulated countries. They are being used for an example and are not the figures of any country.

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Country	Gross Domestic Product	Income Per Capita
Country A	$4.15 Trillion	$3,260 a year
Country B	$674 Billion	$5,700 a year
Country C	$4.08 Trillion	$22,000 a year
Country D	$302 Billion	$5,200 a year
Country E	$690.2 Billion	$16,700 a year
Country F	$20.4 Billion	$900 a year
Country G	$6.031 Trillion	$32,600 a year
Country H	$264 Billion	$2,200 a year
Country I	$4.6 Billion	$3,200 a year
Country J	$50 Billion	$3,000 a year

On the chart shown above, the Gross Domestic Product figures can be used for determining a nation's economic productivity. The Gross Domestic Product figures can be used to help estimate the income that Negative Economics might provide if expanded to that nation.

Gross Domestic Product Figures

Country A $4.15 Trillion
Country B $674 Billion
Country C $4.08 Trillion
Country D $302 Billion
Country E $690.2 Billion
Country F $20.4 Billion
Country G $6.031 Trillion
Country H $264 Billion
Country I $4.6 Billion
Country J $50 Billion

In reviewing the Gross Domestic Product figures above we can make some comparisons.

Country C has a large Gross Domestic Product. $4.08 trillion a year. This indicates that it is a good candidate for expanding Negative Economics to.
Country C $4.08 Trillion

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Country E generates twice as much wealth as Country D. Country E is the better choice for expanding Negative Economics to.

Country D $302 Billion

Country E $631.2 Billion

Between Countries H, I and J. Country H is the best choice for expanding Negative Economics to. It has a Gross Domestic Product of $264 billion. Country I is hardly worth bothering with. It only has a Gross Domestic Product figure of $4.6 billion.

Country H $264 Billion

Country I $4.6 Billion

Country J $50 Billion

In comparing Country E and Country F. Country F has such a small Gross Domestic Product that it is a poor choice for expanding Negative Economics to.

Country E $631.2 Billion

Country F $20.4 Billion

Another comparison is that of Country B and Country E. Both countries have about the same Gross Domestic Product figures. Country B is a country with only 45 million people. Country E has 200 million people. The country with the smaller population is the better choice for Negative Economics. It generates more wealth with fewer people.

Country B $674 Billion 45 million people

Country E $690.2 Billion 200 million people

Country G has by far the highest Gross Domestic Product figure.
It is the best choice for expanding Negatives Economics to.

Country G $6.031 Trillion

The Gross Domestic Product a nation produces tells how much wealth it generates. For example, compare Example A, with a Gross Domestic Product of 7.9 billion, to Example B, with a Gross Domestic Product of 4.03 Trillion. If your income from Negative Economics consists of 25% of each business's income, (or whatever percentage amount is decided), in an entire country, which country will have businesses that earn higher incomes, Example A or Example B. Example

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B's Gross Domestic Product is so small that it hardly pays to bother with it. By selecting countries with higher Gross Domestic Product amounts means more wealth can be obtained.

The next consideration is Income Per Capita. This discloses the average income that people earn in a country. These figures are important because Consumer Spending Programs pump money into an economy that ends up in government revenues bank accounts. The higher the incomes that people earn in a country, the more money that can be pumped into the economy on a regular basis.

Income Per Capita Figures (The amount of money people earn per year on a national average)

Country A	$3,260 a year	– Low
Country B	$5,700 a year	– Low
Country C	$22,000 a year	– Very High
Country D	$5,200 a year	– Low
Country E	$16,700 a year	– High
Country F	$900 a year	– Lowest
Country G	$32,600 a year	– Very High
Country H	$2,200 a year	– Low
Country I	$3,200 a year	– Low
Country J	$3,000 a year	– Low

The Income Per Capita figures shown above designate which countries are the more promising choices for expanding Negative Economics to. The more money people earn in a country, the greater the amount that can be pumped into the economy during Dated Money spending programs. A percentage of the money is channeled to government revenues bank accounts. Example: People in Country F earn only $900 a year. People in Country C earn $22,000 a year.

Income from Negative Economics is generated by implementing Consumer Spending Programs in countries that Negative Economics has been expanded to. Dated Money is used as a tool for creating intense consumer spending. Intense consumer spending results in increased business incomes. The Negative Economics income during Dated Money spending programs is a 35% tax (or whatever amount is decided upon) of each business's income. Each business will deposit 35% of their income earned from the spending program into their

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government Treasure Chest account at their bank. The money goes directly into government revenues bank accounts. The higher the incomes that people earn in a country, the more money that can be pumped into the economy. Much of which will end up in government revenues accounts. The money is collected by banks in each country. Banks receive deposits from local businesses which is deposited into their government Treasure Chest account. The money is then transferred by "electronic bank money transfers" to banks in the country that controls Negative Economics. The Internet can be used to keep track of business incomes in countries where Negative Economics is present. Accounting technicians would sit in front of computers and analyze business incomes from Negative Economics governed nations. The Government Treasure Chest checking account that each business entity maintains is the tool for collecting money from businesses. Banks make regular electronic money transfers so that the cash keeps flowing out of the country and into the governing country's bank accounts. When the Income Per Capita figures are low for a country, less Negative Economics income is possible from Consumer Spending Programs. How much money can be pumped into an economy when people only earn $2000 or $3000 a year. Very little.

How To Begin And Expand A Negative Economics Empire

The first requirement is to purchase the rights to use Negative Economics from the owner, Robert Wollner. The second step is to decide which countries are worth expanding Negative Economics to. Perhaps neighboring countries are more convenient because they are closer and easier to access.

In order to impose Negative Economics upon a country, it is necessary to capture the country through military engagement. Military conflicts are common in the world today. Selecting weaker, yet economically healthy nations is beneficial. Once captured, the nation will continue to produce income for your government indefinitely. While capturing a nation is not such a pleasant act, the wealth that can be obtained makes it a potential consideration. The more nations that are captured, the greater the wealth that is obtained. After a nation has been captured, then Negative Economics begins. All the businesses, factories, corporations and so forth, in the captured country are informed that they are now

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required to open, and make regular bank deposits into, a second checking account at the bank where they do business. This is the ruling government's Treasure Chest account. The Treasure Chest, as it is called, is the channel through which revenues pass to reach the ruling government's bank accounts. At first the amounts businesses must deposit into their Treasure Chest account is small. So small that few businesses complain. This gets them acquainted with the process of depositing moneys into the Treasure Chest account. As the amounts increase, businesses are informed that, while their business income is shared with the Treasure Chest bank account, the ruling government will be implementing consumer spending programs on a regular basis that will generate increased spending in the economy. The result will be increased business activity. Business incomes will rise nationally. As the spending programs are implemented, the tax mandated for the government Treasure Chest program increases to reach 50% of the income of each business, factory, corporation and so forth in the entire country. This money passes through the Treasure Chest bank accounts and is transferred via bank money transfers into the government bank accounts in the ruling country. This money keeps piling up. The ruling country's government then informs the businesses in the captured nation that there are costs involved in running the spending programs. And that each business, factory, corporation etc. will help to shoulder the cost by paying their fair share. Before long the ruling government is getting 60% of the spending during spending programs, as well as 50% of business incomes during normal times. Other programs are implemented, such as targeting larger bank accounts of individuals and businesses, mandating employers to double and triple the Dated Money amounts that employees receive, charging up people's credit card accounts, and so forth. Before long the national income and the wealth of the captured nation is moved over to the ruling government's bank accounts. Such wealth supports an ever increasing military force that captures more nations to impose Negative Economics upon them, and for military forces that are maintained in captured nations. As the empire grows larger, the inventor of the concept, Robert Wollner, claims more riches for himself. Everyone benefits except the captured nations who work and toil with few rewards because the wealth of their nation keeps disappearing.

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NEGATIVE ECONOMICS

A New System of Economics Designed for Government Revenues Enrichment.

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Negative Economics Coalitions And Alliances

By combining forces with other nations, Negative Economics coalitions can achieve greater wealth. Many nations working together can establish large empires by working together as partners in Negative Economics.

Expanding The Vast Network Of Wealth

New nations can be added to the Negative Economics empire regularly when coalitions and alliances combine their military forces. Vast wealth can be achieved rapidly and easily.

The Basic Rules Of Negative Economics

Negative Economics is a concept that was designed for channeling money into government revenues bank accounts. A nation's businesses are essential for abstracting money that a nation possess. Business incomes are easy to tax and funnel into government revenues bank accounts. A checking account concept referred to as the Treasure Chest account is used to collect the money. If businesses had to be relied upon to mail the money, the system would be less reliable. During normal times each business is required to deposit a percentage of their weekly income into their government Treasure Chest account. This provides the government with constant revenues. When the government needs to acquire additional revenues consumer spending programs are implemented. Dated Money is used to generate consumer spending. Consumer spending programs boost business incomes. Money flows into government revenues bank accounts when consumer spending programs are implemented. A percentage of the income businesses earn during spending programs is deposited into their government Treasure Chest bank account. This goes directly to the government. Other resources a nation has can be utilized for boosting Dated Money spending during spending programs. Employee wages, business monetary assets, funds in bank accounts, and credit card accounts are some examples. The more Dated Money that is spent in spending programs, the greater the government benefits. By consuming other nations and forcing Negative Economics upon them, adds to the wealth that a nation can achieve. As more and more nations are consumed,

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through military superiority, those nations become contributors to the abundant riches that a nation who controls Negative Economics can attain. Imposing Negative Economics on other nations, affords the dominating nation the opportunity to abstract the wealth of their nation on an ongoing basis. The businesses in those countries are required to deposit a percentage of their weekly income into the Treasure Chest checking account at their bank. Implementing consumer spending programs boosts business incomes which channels greater amounts of money through the Treasure Chest accounts to the ruling nation's banks. Such vast wealth acquired continuously and relentlessly, contributes to an ever increasing military force that dominates nations for the productive endeavor of utilizing Negative Economics as a tool for achieving great and abounding wealth. Negative Economics does not impose enslavement or tyranny upon a nation, it simply abstracts its wealth. While it is difficult to capture a nation, once captured it continues to provide revenues. Looking for weaknesses in leadership, a reduction in military capabilities, economic distress, loss of friendship with other nations, etc. pays off in acquiring nations for Negative Economics.

Dated Money Programs In Captured Countries.

Low Incomes In A Country Reduces Dated Money Spending During Spending Programs.

When the Income Per Capita of a country is low, additional methods are needed in order to increase the amount of money that will be pumped into the economy. If the bulk of the money being spent in the consumer spending program consists of employee's wages, and the weekly income of employees in a country is small, the government revenues yield from the spending program will be reduced. In order to increase the Dated Money amounts that will be spent in the spending program, additional sources can be utilized to boost spending during the program. Other financial resources a nation owns can be pumped into the economy so that increased revenues are gained for government revenues accounts. No assets are exempt in the Negative Economics formula. Worker's wages, business and personal checking and savings accounts, business financial assets, credit card accounts, are just some of the many sources the government can regard as obtainable resources in Negative Economics. Some examples are given:

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Match The Dated Money Program

Businesses, factories, corporations, etc., will match the amount of Dated Money that employees receive in their pay envelope. Or even "Double" the amount. This will increase the amount of money being spent in the program.

Money Stored In Bank Accounts

Business bank accounts and personal bank accounts are considered for examination. Banks will provide lists of bank balances over the "Target Balance" amounts. Businesses and individuals who have bigger bank account balances may be relied upon for boosting Dated Money amounts in spending programs. The objective is to move the wealth of the nation into government revenues accounts. This is the purpose of Negative Economics. The wealth of the government is more significant then the wealth of its citizens. The idea is to free up money stored in bank accounts and pump it through the economy so that government revenues accounts will benefit.

Credit Card Indebtedness Program

Credit Cards are another source for boosting Dated Money spending. Citizens would be required to spend money during spending programs that is charged on their credit card and designated as Dated Money. This has already been explained on page 8.

Dated Money Giveaway Program

The government intentionally executes an overprinting of Dated Money with the intention of giving it to special government employees and government officials and their families as a reward for their faithful service to the government. The overprint of Dated Money is spent during the spending program and much of it ends up in government revenues accounts.

Government Credits Program

The program is designed to extend loans to people who need to buy things they can't afford. The loan is given to them in Dated Money when consumer spending programs occur. The money is paid back to the government by low weekly payments removed from their pay check by their employer and mailed to the government.

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Employee Bonus Program

The program encourages businesses to give bonuses to their employees in Dated Money. The Dated Money is spent in the economy and is good for the nation's businesses. And adds to the government revenues stockpile of wealth.

Bank Loans Program

This program encourages banks to loan money to people that is paid to them in Dated Money that can be spent in consumer spending programs.

Printing Billions In Dated Money And Sell It To The Public

This program is a method for turning printed money into cash. The public is encouraged to increase their spending power by purchasing Dated Money. In ruled countries this is effective for turning printed paper into cash. The ruling government prints the Dated Money themselves. This gives them control over its use.

PURCHASE DATED MONEY FROM THE GOVERNMENT AND INCREASE YOUR SPENDING POWER

AMOUNT PAID IN CASH	DATED MONEY AMOUNT YOU RECEIVE
$10.00	$12.00
$15.00	$18.00
$20.00	$25.00
$40.00	$54.00
$60.00	$78.00
$100.00	$135.00

Buying Merchandise With Dated Money, Program

Dated Money that the ruling government prints is used by their "Team Buyers" to purchase tons of merchandise in the captive country. The merchandise is warehoused, and then sold back to the merchants for the next spending program, at a 100% profit.

These and other ideas, no matter how trivial they might sound, could boost government revenues accounts. All the ideas that can be invented add up to more Dated Money being spent in spending programs.

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How Negative Economics Develops From Peaceful Beginnings

The country of Russia is being used for this example model. The Russian government and its embassies around the world receive a description of Negative Economics. In the earliest review of Negative Economics the Russian government rejects the concept. More copies of Negative Economics reach the Russian government and its embassies as the months go by. As winter approaches the Kremlin decides that the concept of Negative Economics contains definite parts of the plan that could contribute to an improved Russian economy. Russia's winters are long, and extremely cold climate is the explanation for a slowed down economy. Russian consumers are not active during the colder months and business activity is reduced. Reduced business activity during the long Russian winters is devastating to the economy. Government revenues are reduced and national business profits suffer. The concept of Negative Economics offers a consumer spending plan that utilizes Dated Money to generate consumer spending. Consumers are compelled to shop and spend money because of Dated Money that expires. If not spent, the Dated Money expires and becomes worthless. The Russian government decides that Dated Money spending programs could increase consumer spending during the long winter season. Another part of the Negative Economics plan the Russian government finds desirable is the "Match the Dated Money" program. In this concept Russian businesses would be required to match the Dated Money that workers receive in their pay envelope. This would force businesses in Russia to put back into the economy some of the money they withdraw from the economy and store in their bank accounts. For the free enterprise system to work, money must constantly flow through the system. Worker's wages are often not sufficient to produce an ample flow of money through the system. The Match the Dated Money program in Russia would provide enhanced spending capabilities for consumers who contribute to the economic well-being of the system. Economists worldwide have concluded that consumer spending is 70% of the free market system.

The Russian Foreign Minister makes arrangements with the inventor of Negative Economics to meet at the Russian Embassy in Washington D.C.. The deal is consummated and Russia begins their new winter economic improvement program. Russian businesses are overjoyed about the increased consumer spending in the Russian economy. The economy benefits from the spending and

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the economy grows. Economic expansion, increased employment, and the beginning of new industries in Russia is the result of the increase in consumer spending. The Kremlin decides that the Dated Money spending programs are costly to the government and are becoming a burden on the government. Dated Money has to be constantly printed and the programs have to be administered. They decide to charge a tax to businesses in Russia who benefit from the spending programs. They mandate that all businesses in Russia will open a second checking account at their bank for depositing taxes into that are related to the Dated Money spending programs. Money deposited into these accounts will go directly into Russian government revenues bank accounts. At first the amounts businesses are required to deposit are low. As the tax is increased each business in Russia is required to deposit 25% of their business income into the government's bank account. The second bank account businesses maintain might be called the "Dated Money Spending Program" tax account. Even thought businesses are required to make deposits on a weekly bases weather spending programs are implemented that week, or not. The government then increases the tax that businesses must pay to 45% of their business income during the Dated Money spending programs. The Kremlin discovers that new wealth is reaching their revenues bank accounts. Instead of burdening the Russian businesses with additional increased taxes, the Kremlin decides to add more businesses to the formula that will contribute to the Russian government revenues accounts. In order to increase the number of businesses that contribute to the Russian government's wealth, other countries are considered for the Dated Money spending programs agenda. The Kremlin informs the countries of Ukraine, Kazakhstan, Belarus, Estonia, Lithuania, Moluova, Romania and Bulgaria about the remarkable Dated Money spending programs that have produced such incredible results in Russia's economy. That Russia wants to assist them with their economy so that they also will benefit from this remarkable new economic wonder. Eager to improve their economy, they agree to a trial period. The Kremlin's plan works. The businesses in these countries are soon paying 25% of their business income during normal times, and 45% of their business income during Dated Money spending programs. This money is deposited into the second bank account that businesses must maintain at their bank. The money is transferred to Russian government revenues bank accounts in Russia, via electronic money transfers by the many banks in those countries that collect the money. Russia's greed is now beyond hope. More nations must be added the

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Kremlin says. The Russian president, Mr. Putin, meets with the president of China and North Korea and informs them that easy money is to be made with Negative Economics. And that prosperous nations have wealth to plunder. Japan, Great Britain, France, Germany, the United States, Canada and others are looked upon as potential revenue providers for the Russia\China\North Korea Coalition.
But then, the Federal Judge who is adjudicating this case is to responsible to permit Negative Economics to reach these countries. He points his finger at the Defendants and says: Judgment For Plaintiff, for the amount stated in the complaint. END OF STORY

Contact the inventor of Negative Economics to purchase exclusive rights to use Negative Economics in your country. Or begin Negative Economics empires. International copyright laws protect this material from unauthorized use.

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THE END

To purchase the rights to use Negative Economics in your country, or to begin Negative Economics empires that generate enormous wealth, contact the owner\inventor of Negative Economics below.

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REV_00259398

WHAT IS NEGATIVE ECONOMICS

Negative Economics is a new system that has been designed for government revenues enrichment. Negative Economics is designed to produce income at the government level. A prosperous government is the goal of Negative Economics. Because Negative Economics can be extended to other countries, additional revenues can be acquired by countries that implement Negative Economics. Negative Economics is a comprehensive blueprint for systematic approaches to broadening government wealth by utilizing techniques that are at the forefront of economic ingenuity. New principles in economics elevate government wealth by manipulating economic factors in an economy that control economic functions. Wealth and revenues are produced at the government level.

THE SYSTEM OF NEGATIVE ECONOMICS

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The Needed Elements That Are Essential For Negative Economics To Work Are As Follows:

1. Businesses That Earn A Profit.

2. Consumers That Spend Money.

3. An Economic Pump That Pumps Money Through An Economy.

Businesses That Earn A Profit

A country's businesses are an essential element in the Negative Economics system. For Negative Economics to function, a system is needed for withdrawing from an economy, money that will contribute to government revenues enrichment. A country's businesses are the instrument that serve the purpose of withdrawing revenues from an economy. Each business in a country that utilizes Negative Economics, supports a "Government Treasure Chest". The enrichment of government revenues is the goal that Negative Economics was designed to achieve.

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The Government Treasure Chest Program

In countries that utilize Negative Economics for the purpose of government revenues enrichment, all the businesses are required by law to participate in the Government Treasure Chest program. The program requires that every business enterprise well have two checking accounts for their business. One checking account is for their regular business checking. The other checking account is for the Government Treasure Chest program. Example below.

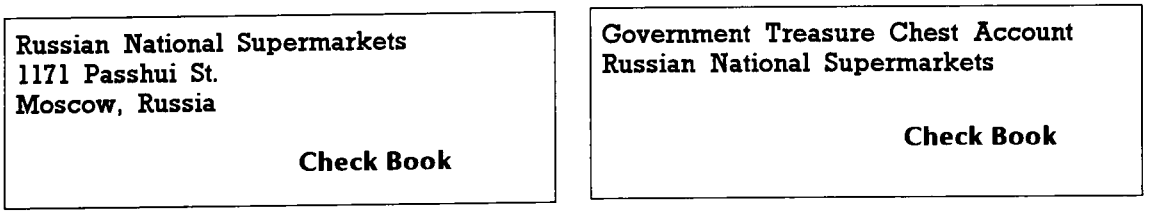

The business checking account is for regular business deposits. The Government Treasure Chest account is for deposits mandated by the government for the Treasure Chest program. The monies deposited into the Government Treasure Chest account goes directly into the government revenues accounts. The checking account concept is used because the money goes immediately into government bank accounts. If businesses have to be relied upon to mail the money, the system becomes less reliable.

An Economic Pump

An economic pump has been designed for pumping money through a country's economy. A portion of the money will be channeled into government revenues bank accounts.

The Economic Pump In Action --- It Works Good

This "Consumer Spending Program" model is being used to demonstrate how money can be pumped through a country's economy and can be channeled into government revenues bank accounts.

REV_00259377

How The Program Works

The government has decided that the economic pump will be utilized to pump money into the economy.

The money will come from various sources. The objective of the program is to create increased consumer spending and heightened business activity. Increased economic activity will boost business incomes. As previously stated, a country's businesses are the instrument that serve the purpose of withdrawing revenues from an economy. The Government Treasure Chest program is utilized for channeling revenues into government revenues bank accounts. It will now be demonstrated how this works.

EMPLOYEE WAGES

One of the sources for pumping money into an economy is employee wages. In this consumer spending program model the government has mandated that 2\3rds of each employee's pay check that they receive for one week will be pumped into the economy. All employees in the country will participate in the program.

On Friday night when working people get their pay checks there will be two (2) different items in their pay check envelope. One item will be their pay check for 1\3 of the normal amount they receive. The other 2\3rds of their pay check will consist of Dated Money. Example. An employee earns $300.00 a week. $200.00 will be Dated Money. $100.00 will be a company pay check. Dated Money is currency that has been printed by the government for the spending program. The Dated Money looks like regular currency printed in a different color. A large DATE is printed on the money in a large colorful box that is quite visible. The color of the Dated Money can be changed each time there is a Spending Program. The workers\employees inspect their Dated Money to see when the date expires. The date printed on the Dated Money is the following Monday. This indicates that the Dated Money will expire on Sunday at midnight. The country's citizens will have Friday night, Saturday and Sunday until midnight to spend the Dated Money. Monday morning the Dated Money is worthless. Might as well throw it in the trash. Any Dated Money that is not spent is lost. The government could determine any period of time to spend the Dated Money. A weekend, a week, 2 weeks, or whatever is decided.

REV_00259378

People who are self-employed, own a business, are retired, and so forth, will pick up their Dated Money at their bank. Or arrangements can be made for their bank to mail it to them. Everyone in the country, if it is a national spending program, will have Dated Money to spend. The government will decide how far-reaching the program will be. The program could embody the entire country, a section of the country, a city or cities, or whatever they decide. The government will decide how much Dated Money people will be required to spend. The amount could be based on their income, their total wealth, their job, occupation or profession, or whatever method they decide. The government might charge a fee for the Dated Money which would be paid either by the employee or by the employer. This is to cover the cost of printing and distributing the Dated Money. If the employee pays the fee, there would be less Dated Money in the pay envelope. Example. Instead of receiving $200.00 in Dated Money, the Dated Money amount would be $192.00.

The Program Starts

Some citizens will begin spending their Dated Money as quickly as possible because they know that those who shop later will find that store merchandise stocks can become depleted from massive consumer spending. The early shoppers will have the better choices before stocks begin to deplete. The country's manufactures, distributors and retailers have prepared for the program by overstocking stores with merchandise for the crowds of shoppers who will be looking for things to buy with their Dated Money. The police, fire department and volunteers will be available to assist with the traffic problem that will exist when consumers take to the streets in pursuit of their spending spree.

The Government Treasure Chest Program

Negative Economics is a system that has been designed to promote government revenues enrichment. A nation's businesses are an essential part of the system because they deposit money into government revenues accounts, designated as the Government Treasure Chest bank account.

REV_00259379

In the consumer spending program model example that is being demonstrated here, the government mandated tax that businesses will pay for the Government Treasure Chest program is: 25% of their business income during normal times. 35% of their business income during Date Money spending programs. During normal times each business, factory, corporation, etc. in the country will deposit 25% of their income on a weekly basis, into their Government Treasure Chest account at their bank. When spending programs occur, because there are costs related to the programs, such as the printing of Dated Money, administering the program, etc., each business will deposit 35% of their business income into their Government Treasure Chest account at their bank. At the conclusion of each spending program these deposits are made. Money will be pumped into the economy, and will be spent at the nation's businesses. 35% of the money will reach the government's revenues accounts. Since the government decides how much Dated Money people will be required to spend, and what percentage of their income businesses will be required to deposit into their Government Treasure Chest account at their bank, the government can regulate its revenues growth.

Inflation During The Spending Programs

The 35% Government Treasure Chest tax mandated to businesses during spending programs could be reflected in an increase in prices that consumers pay. Because of inflation during spending programs (businesses increasing prices to cover the 35% tax) the buying power of consumers could be reduced. Dated Money doesn't buy much in these spending programs", consumers might complain. Prices are just to high, they might say. Inflated prices on consumer goods and services during the spending programs drives up business incomes, which means more money for the government. These spending programs generate consumer spending in an economy. Increased spending in the economy is good for businesses who profit from such spending programs. While 25% or 35% of a business's income, (the Government Treasure Chest program) is a lot of taxation, usually such taxes are passed on to consumers who pay higher prices. Higher prices (inflation) can result in reduced consumer spending in an economy. Economies that operate with inflation are flawed and can result in a slowed down economy. Factories produce less, retailers sell less, consumers buy less, because of inflation. Consumer

REV_00259380

spending can be increased in an economy by utilizing these spending programs which will defeat inflation by creating volume sales. The programs result in consumers who must go out to spend, because of Dated Money that will expire. The money is forfeited if not spent.

How effective was the Consumer Spending Program.

It is Monday morning and the spending program has ended. The country's banks are getting all the expired Dated Money ready to be returned to the government. The country's businesses are making their bank deposits. The banks are ensuring that bank deposits are being made in both of the checking accounts that businesses must maintain. The business's regular checking account and the Government Treasure Chest account. Both deposits are made at the same time. 65% of the total deposit is deposited into the business account. 35% is deposited into the Government's Treasure Chest account. All of the country's businesses will make these 65% - 35% bank deposits at the conclusion of each spending program. Banks and government employees may be verifying each business's cash register receipts which show a record of business sales and income during the spending program. The effect of the program is being analyzed by the program administrators. They are deciding if the consumer spending program had the effect on the government revenues accounts that they had hoped for. And that the government received ample financial resources from the spending program that contributed to the government's stockpile of wealth. The government can regulate their revenues income, by governing the amounts that employees spend in Dated Money, and by controlling the tax that businesses pay into their Treasure Chest checking account. The purpose of the spending programs is to pump money through the economy that ends up in government revenues accounts. Normally 25% of each business's income is deposited into the Government Treasure Chest account at their bank on a weekly basis. (used as an example for this spending program model). During spending programs the amount is increased to 35% of a business's income. Because the government decides how much Dated Money citizens must spend, and the amount of tax businesses will pay during the spending program, the government can pump as much money into the economy as they desire, and regulate how much of the money will end up in their revenues bank accounts. During certain selected Dated Money spending programs, the

REV_00259381

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

DATE RECEIVED: 5/14/01

NAME OF CORRESPONDENT: Robert Wollner

SUBJECT: vs. POTUS

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	ACTION DATE M/D/YR	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED M/D/YR
	CUGONZ	A	5/14/01		C	
	Brett	A				

ACTION COMMENTS:

ACTION COMMENTS:

ACTION COMMENTS:

ACTION COMMENTS:

COMMENTS:

ADDITIONAL CORRESPONDENTS: MEDIA:

14
Counsel

Defendant,

George W. Bush

Robert Wollner
5540 W. Glendale Ave., Suite 204
Glendale, Arizona 85301
Telephone 623 939-7745

FILED LODGED
RECEIVED COPY
APR 3 0 2001
CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Robert Wollner,

Plaintiff,

- VS. -

Defendants,

George H. Bush
Jeb Bush
George W. Bush
Dick Cheney
Colin Powel
Donald Rumsfeld

George H. Bush
10000 Memorial Dr., Suite 900
Houston, TX 77024-3422

Jeb Bush
State of Florida, The Capitol
Tallahassee, Florida 32399-0001

George W. Bush
1600 Pennsylvania Ave., N.W.
Washington, D.C. 20500

Dick Cheney
1600 Pennsylvania Ave., N.W.
Washington, D.C. 20500

Colin Powel
2201 C Street N.W.
Washington D.C. 20520

Donald Rumsfeld
The Pentagon
Washington D.C. 20301-1155

Case Number

CIV '01 0602PHX EHC

MOTION

REQUEST FOR DEFAULT JUDGMENT

FEDERAL RULES OF CIVIL PROCEDURE
RULE 55. DEFAULT

REV_00259401

REQUEST FOR DEFAULT JUDGMENT

The Plaintiff in this action does herewith inform the court that the defendants have willfully and deliberately defaulted. The Defendants have failed to plead, answer or otherwise defend the claim against them. Proof of service has been effected in accordance with F.R.C.P. Rule 4. No answer or effort to respond to the Complaint is evident. The Defendants have declined to acknowledge the Plaintiff's declaration in asserting his claim for relief. And in doing so, Defendants have compromised the invitation to defend this action. Plaintiff believes that Defendants have no intention of acknowledging this civil action. Their defiance to this lawsuit is basis for a default judgment. The Plaintiff believes that the Defendants deem themselves exempt from such a proceeding. That they will pursue no Defense other then to insist that they be excused because of their standing in public office. That they be granted the privilege to adjourn this case and suspend court procedures predicated upon their conviction that public office affords one the right to exemption from public regulations and that government administrations are not subject to judicial civil processes. The foundation for this lawsuit is seated in the premise that public officials have ignored a concept that is detrimental to the prosperous nations of the world. That their inappropriate behavior has endangered the continued freedom of the United States, and other countries could undergo a loss of freedom because of their actions. Exhibit A, Negative Economics has recently been rewritten and upgraded and is now more potent and more deadly then before. Negative Economics is a threat to the world. This can be proven in court through testimony from competent professionals who possess knowledge of the ruthlessness of sovereign nations who would stop at no end to implement Negative Economics in order to acquire great wealth. The Defendants have sanctioned such a ruthless course of action by disregarding all possibilities that

any nation would undertake a concept such as Negative Economics. This is an issue that is of importance to the courts, the American people and the Congress. While this lawsuit is an annoyance to the Defendants it is in the public's interest.

The Plaintiff appeals to the court to enter judgment against Defendants who are in default under federal statutes. The Defendants will not defend this lawsuit and legal remedy should be undertaken.

All of the Defendants received a Summons which states that an answer to the Complaint must be served upon the Plaintiff and the court within the stated time period or judgment by default will be taken against Defendants for the relief demanded in the Complaint. The time has expired and no answer has been dispatched. Plaintiff believes that Defendants have contempt for this lawsuit and deem themselves exempt from this proceeding. Plaintiff has mailed a copy of this Motion and Request for Default Judgment to all of the Defendants. At the court's discretion please enter Default Judgment when appropriate.

Dated this 30th day of April, 2001.

Robert Wollner, Plaintiff

Robert Wollner
5540 W. Glendale Ave., Suite 204
Glendale, Arizona 85301
Telephone 623 939-7745

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

DATE RECEIVED: 7/25/01

NAME OF CORRESPONDENT: Roger L. Shoffstall

SUBJECT: **Shoffstall v. POTUS**

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	ACTION DATE M/D/YR	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED M/D/YR
	CUGONZ	A	7/25/01		C	
	ACTION COMMENTS:					
	Brett	A				__/__/__
	ACTION COMMENTS:					
			__/__/__			__/__/__
	ACTION COMMENTS:					
			__/__/__			__/__/__
	ACTION COMMENTS:					

COMMENTS: file in litigation file
Brett Kavanaugh

ADDITIONAL CORRESPONDENTS: MEDIA:

REV_00259404

12-R Counsel's Office

JUN 20 2001

134620

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

ROGER L. SHOFFSTALL,

Petitioner / Plaintiff,

vs.

The presiding PRESIDENT of the UNITED STATES, George Bush,

Respondent / Defendant.

CASE NO. 4FA-91-378 CI

MOTION FOR EX PARTE ORDER GRANTING

"EX PARTE SUMMARY JUDGMENT"

COMES NOW the Petitioner / Plaintiff, ROGER L. SHOFFSTALL, by and through himself, appearing In propria persona, and hereby moves, COMMANDS and ORDERS this Court to issue Ex Parte Order that grants Ex Parte Summary Judgment to the Petitioner / Plaintiff, Roger L. Shoffstall, in this matter.

WHEREFOR, the PREPONDERANCE of the EVIDENCE which is substantial proves BEYOND A REASONABLE DOUBT that Petitioner / Plaintiff is entitled to enjoy the issuance of this Motion.

RESPECTFULLY Submitted at Fairbanks, Alaska this 14th day of June, 2001.

ROGER L. SHOFFSTALL

Roger L. Shoffstall
P.O. Box 70689
Fairbanks, Alaska 99707
In propria persona

REV_00259405

I certify that on 6/14/2001
the original copy of this
Motion was sent to:

Presiding Judge of the
Superior Court of Alaska
Fourth Judicial District
604 Barnette Street
Fairbanks, Alaska 99701;

And that true and full copies
of the above Motion were sent
to:

William Rehnquist
Chief Justice
U.S. Supreme Court
One First Street, NE
Washington, D.C. 20543;

George Bush
The presiding President of the United States
1600 Pennsylvania Avenue
Washington, D.C. 20500;

as shown by affidavit;

By: _____
ROGER L. SHOFFSTALL.

REV_00259406

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

ROGER L. SHOFFSTALL,

Petitioner / Plaintiff,

vs.

The presiding PRESIDENT of the UNITED STATES, George Bush,

Respondent / Defendant.

CASE NO. 4FA-91-378 CI

EX PARTE ORDER GRANTING

EX PARTE SUMMARY JUDGMENT

GOOD CAUSE APPEARING and the Petitioner / Plaintiff having made proper Motion and the Court being advised in the Premises:

IT IS HEREBY ORDERED, COMMANDED, ADJUDICATED, AND DECREED that the U.S. Supreme Court shall immediately issue and execute "EX PARTE SUMMARY JUDGMENT" under this matter - in favor of and on behalf of Petitioner / Plaintiff, Roger L. Shoffstall.

IT IS HEREBY FURTHER ORDERED, COMMANDED, ADJUDICATED, AND DECREED that the U.S. Supreme Court shall immediately issue and execute "EX PARTE SUMMARY JUDGMENT (Supplement 1)" under this matter - in favor of and on behalf of Petitioner / Plaintiff, Roger L. Shoffstall.

IT IS HEREBY FURTHER ORDERED, COMMANDED, ADJUDICATED, AND DECREED that the U.S. Supreme shall immediately issue DECLARATORY JUDGMENT and its FINDINGS under this matter.

IT IS HEREBY FURTHER ORDERED, COMMANDED, ADJUDICATED, AND DECREED that the U.S. Supreme Court shall immediately convey to Petitioner / Plaintiff ANY AND ALL REDRESS AND RESTORATION that is legitimately due Petitioner / Plaintiff under this matter.

REV_00259407

IT IS HEREBY FURTHER ORDERED, COMMANDED, ADJUDICATED, AND DECREED that the U.S. Supreme Court shall proceed forthwith to grant Petitioner / Plaintiff, Roger L. Shoffstall, Relief and Redress via EXPEDITED CONSIDERATION under this matter in a Summary Manner.

DONE IN OPEN COURT this _____ day of _____, 2001.

_____
JUDGE OF THE SUPERIOR COURT

RLS 6/14/2001

REV_00259408

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

ROGER L. SHOFFSTALL,

Petitioner / Plaintiff,

vs.

The presiding PRESIDENT of the UNITED STATES, George Bush,

Respondent / Defendant.

CASE NO. 4FA-91-378 CI

"MOTION FOR EX PARTE ORDER GRANTING LEAVE TO EXECUTE EX PARTE SUMMARY JUDGMENT"

COMES NOW The Petitioner / Plaintiff, Roger L. Shoffstall, by and through himself, and hereby moves and COMMANDS this Court to issue EX PARTE ORDER that invokes an immediate and indefinite STAY of these proceedings when and where this Court shall fully and fairly Execute Ex Parte Summary Judgment for the Petitioner / Plaintiff, Roger L. Shoffstall, and against the Respondent / Defendant, the presiding President of the United States, George Bush.

WHEREFOR, the PREPONDERANCE of the EVIDENCE which is substantial shows BEYOND A REASONABLE DOUBT that Petitioner / Plaintiff is entitled to the issuance of this Motion.

RESPECTFULLY Submitted at Fairbanks, Alaska this 14th day of June, 2001.

ROGER L. SHOFFSTALL

Roger L. Shoffstall
P.O. Box 70689
Fairbanks, Alaska 99707
In propria persona

REV_00259409

I certify that on 6/14/2001
the original copy of this
Motion was sent to:

Presiding Judge of the
Superior Court of Alaska
Fourth Judicial District
604 Barnette Street
Fairbanks, Alaska 99701;

And that true and full copies
of the above Motion were sent
to:

William Rehnquist
Chief Justice
U.S. Supreme Court
One First Street, NE
Washington, D.C. 20543;

George Bush
The presiding President of the United States
1600 Pennsylvania Avenue
Washington, D.C. 20500;

as shown by affidavit;

By: _____
ROGER L. SHOFFSTALL.

REV_00259410

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

ROGER L. SHOFFSTALL,)
)
Petitioner / Plaintiff,)
vs.)
)
The presiding PRESIDENT of the UNITED STATES,)
George Bush,)
)
Respondent / Defendant.)
)

CASE NO. 4FA-91-378 CI

EX PARTE ORDER GRANTING LEAVE

TO EXECUTE EX PARTE SUMMARY JUDGMENT

GOOD CAUSE APPEARING and Petitioner / Plaintiff having made proper Motion and the Court being advised in the premises:

IT IS ORDERED, COMMANDED, ADJUDICATED AND DECREED that an immediate Stay is hereby invoked on these proceedings when and where this Court shall fully and fairly Execute Summary Judgment in favor of and on behalf of the Petitioner / Plaintiff, ROGER L. SHOFFSTALL.

IT IS FURTHER ORDERED, COMMANDED, ADJUDICATED AND DECREED that from this day forward this Court shall not hear and/or consider any communications inclusive of ex parte communications from the Respondent / Defendant, the presiding President of the United States, George Bush, or from any party on his behalf.

IT IS FURTHER ORDERED, COMMANDED, ADJUDICATED AND DECREED that this Court shall immediately suspend above said Stay of Proceedings when service of Motion to Suspend Stay of Proceedings is made by Petitioner / Plaintiff, Roger L. Shoffstall.

IT IS FURTHER ORDERED, COMMANDED, ADJUDICATED AND DECREED that this Court and all other courts shall immediately proceed with execution of above said Ex Parte Summary Judgment until Motion is made by Petitioner / Plaintiff, Roger L. Shoffstall, to Stay said execution.

REV_00259411

IT IS FURTHER ORDERED, COMMANDED, ADJUDICATED AND DECREED that this Court shall CONVENE a Fair and Impartial EX PARTE HEARING to Hear Petitioner's / Plaintiff's "MOTION FOR EX PARTE ORDER GRANTING LEAVE TO EXECUTE SUMMARY JUDGMENT" in a speedy manner giving expedited consideration to the Execution of all aspects of this matter.

IT IS FURTHER ORDERED, COMMANDED, ADJUDICATED AND DECREED that this Court shall RENDER Fair and Impartial ADJUDICATION on Petitioner's "Motion For Ex Parte Order Granting Leave To Execute Summary Judgment" in a speedy manner.

IT IS FURTHER ORDERED, COMMANDED, ADJUDICATED AND DECREED that that the United States inclusive of this Court shall give sufficient and adequate NOTICE to Petitioner / Plaintiff regarding all aspects of this proceeding.

DONE IN OPEN COURT this _____ day of _____, 2001.

_____
JUDGE OF THE SUPERIOR COURT

RLS 6/14/2001

REV_00259412

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

ROGER L. SHOFFSTALL,)
)
Petitioner / Plaintiff,)
)
vs.)
)
The presiding PRESIDENT of the UNITED STATES,)
George Bush,)
)
Respondent / Defendant.)
)

CASE NO. 4FA-91-378 CI

"MOTION FOR EX PARTE ORDER ISSUING WRIT OF EXECUTION"

COMES NOW The Petitioner, Roger L. Shoffstall, by and through himself, and hereby moves and COMMANDS this Court to issue EX PARTE ORDER where this Court immediately renders, RELINQUISHES and RELEASES WRIT OF EXECUTION in this matter.

WHEREFOR, the PREPONDERANCE of the EVIDENCE which is substantial shows BEYOND A REASONABLE DOUBT that Petitioner / Plaintiff is entitled to the issuance of this Motion.

RESPECTFULLY Submitted at Fairbanks, Alaska this 14th day of June, 2001.

ROGER L. SHOFFSTALL

Roger L. Shoffstall
P.O. Box 70689
Fairbanks, Alaska 99707
In propria persona

REV_00259413

I certify that on 6/14/2001
the original copy of this
Motion was sent to:

Presiding Judge of the
Superior Court of Alaska
Fourth Judicial District
604 Barnette Street
Fairbanks, Alaska 99701;

And that true and full copies
of the above Motion were sent
to:

William Rehnquist
Chief Justice
U.S. Supreme Court
One First Street, NE
Washington, D.C. 20543;

George Bush
presiding President of the United States
1600 Pennsylvania Avenue
Washington, D.C. 20500;

as shown by affidavit;

By: _____
ROGER L. SHOFFSTALL.

REV_00259414

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

ROGER L. SHOFFSTALL,

Petitioner / Plaintiff,

vs.

The presiding PRESIDENT of the UNITED STATES, George Bush,

Respondent / Defendant.

CASE NO. 4FA-91-378 CI

EX PARTE ORDER ISSUING WRIT OF EXECUTION

GOOD CAUSE APPEARING and Petitioner having made proper Motion and the Court being advised in the premises:

IT IS ORDERED, COMMANDED, ADJUDICATED AND DECREED that this Court shall immediately render, RELINGUISH, RELEASE AND execute Writ of Execution served by the Petitioner / Plaintiff, ROGER L. SHOFFSTALL.

IT IS FURTHER ORDERED, COMMANDED, ADJUDICATED AND DECREED that the United States Government inclusive of this Court shall give sufficient and adequate NOTICE to Petitioner / Plaintiff regarding all aspects of this proceeding.

IT IS FURTHER ORDERED, COMMANDED, ADJUDICATED AND DECREED that this Court shall immediately CONVENE a Fair and Impartial EX PARTE HEARING to Hear Petitioner's / Plaintiff's "MOTION FOR EX PARTE ORDER ISSUING WRIT OF EXECUTION".

IT IS FURTHER ORDERED, COMMANDED, ADJUDICATED AND DECREED that this Court shall immediately RENDER ADJUDICATION on Petitioner's / Plaintiff's "Motion For Ex Parte Order Issuing Writ Of Execution".

DONE IN OPEN COURT this _____ day of _____, 2001.

JUDGE OF THE SUPERIOR COURT

RLS 6/14/2001

REV_00259415

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

ROGER L. SHOFFSTALL,

Petitioner / Plaintiff,

vs.

The presiding PRESIDENT of the UNITED STATES, George Bush,

Respondent / Defendant.

CASE NO. 4FA-91-378 CI

WRIT OF EXECUTION

To: U.S. Marshal or Any Other Officer Serving Process:

ROGER L. SHOFFSTALL [judgement creditor] recovered a judgement against the presiding PRESIDENT of the UNITED STATES, George Bush, the Government of the United States [judgement debtor] in this court on or about the 24th day of May, 2001, consisting of immediate relief in the form of Declaratory Judgement via Ex Parte Summary Judgment.

A certified true and full copy of said Ex Parte Summary Judgment is enclosed with this Writ.

You are hereby ordered and commanded to fully execute said Ex Parte Summary Judgment against the Respondent / Defendant, and for the Petitioner / Plaintiff continuing through to a point when and where all of Petitioner's / Plaintiff's Due Process Rights have been fully and fairly restored and redressed, and all due relief has been fully and fairly conveyed and delivered to Petitioner / Plaintiff directly and/or to his children [Jamie Lynne Shoffstall D.O.B. 2/17/79, Sean Gilbert Shoffstall D.O.B. 10/1/75, and William Charles Shoffstall D.O.B. 9/26/93].

REV_00259416

CLERK OF COURT

Date:_____

By Deputy Clerk: _____

Return to: 604 Barnette Street
Fairbanks, Alaska
99701

6/14/2001 RLS

REV_00259417

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

ROGER L. SHOFFSTALL,)
)
Petitioner / Plaintiff,)
vs.)
)
The PRESIDENT of the UNITED STATES,)
George Bush,)
)
Respondent / Defendant.)
)

CASE NO. 4FA-91-378 CI

STATE OF ALASKA)
)ss
FOURTH JUDICIAL DISTRICT)

AFFIDAVIT OF SERVICE OF PROCESS

I, ROGER L. SHOFFSTALL, The undersigned, appearing in propria persona, being first duly sworn upon oath, depose and state as follows:

1. I am over 18 years of age, I am a Citizen of the United States and resident of the State of Alaska.

I am the Petitioner / Plaintiff in this Writ of Habeas Corpus action.

I am entitled to have Ex Parte Summary Judgment adjudicated on my behalf.

I have personal knowledge of the facts contained herein.

To the best of my knowledge and belief the legality of my restraint has not been adjudicated on a prior Writ of Habeas Corpus.

The preponderance of the evidence which is substantial clearly shows that Petitioner/Plaintiff is entitled to immediate conveyance of the relief via Ex Parte Summary Judgment.

2. On or about June 14, 2001, I served the original copy of this "Affidavit Of Service Of Process" along with the

REV_00259418

original copy of the following listed documents:

A. MOTION FOR EX PARTE ORDER GRANTING "EX PARTE SUMMARY JUDGMENT";

B. EX PARTE ORDER GRANTING EX PARTE SUMMARY JUDGMENT;

C. "MOTION FOR EX PARTE ORDER GRANTING LEAVE TO EXECUTE EX PARTE SUMMARY JUDGMENT";

D. EX PARTE ORDER GRANTING LEAVE TO EXECUTE SUMMARY JUDGMENT;

E. "MOTION FOR EX PARTE ORDER ISSUING WRIT OF EXECUTION";

F. EX PARTE ORDER ISSUING WRIT OF EXECUTION;

G. WRIT OF EXECUTION;

to the following address:

Presiding Judge
Superior Court of Alaska
4th Judicial District
604 Barnette Street
Fairbanks, Alaska 99701
via US Certified Mail
7000 1530 0005 2219 8751,
return receipt requested.

3. On or about June 14, 2001, I served true and full copies of this Affidavit and the above listed documents to the following addresses:

William Rehnquist
Chief Justice
U.S. Supreme Court
One First Street, NE
Washington, D.C. 20543
via U.S. Certified Mail
7000 1670 0011 1576 6231,
return receipt requested;

George Bush
U.S. President
White House Office
1600 Pennsylvania Avenue
Washington, D.C. 20500
via U.S. Certified Mail

REV_00259419

7000 1530 0005 2219 8768,
return receipt requested.

4. I personally placed the above listed documents in the U.S. Mail at Fairbanks, Alaska on or about the above shown dates.

DATED AT Fairbanks, Alaska this 14th day of June in the year 2001.

ROGER L. SHOFFSTALL

Roger L. Shoffstall
P.O. Box 70689
Fairbanks, Alaska 99707
In propria persona

CERTIFICATE OF COUNSEL/Return of Service

I, Roger L. Shoffstall, the undersigned hereby certify that the originals and true & full copy(ies) of the foregoing "AFFIDAVIT OF FACT AND OF SERVICE OF PROCESS", and the above listed documents were sent via U.S. Certified Mail to the addresses shown herein this 14th day of June, 2001, as is shown by the above Affidavit of Service of Process.

6/14/2001
RETURN DATE

ROGER L. SHOFFSTALL
In propria persona
P.O. Box 70689
Fairbanks, Alaska 99707
In Propria Persona

SUBSCRIBED AND SWORN to before me this 14 day of June, 2001.

Rebecah McBr
Notary Public in and for Alaska

My commission expires: 8-17-04

REV_00259420

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

DATE RECEIVED: 6/5/01

NAME OF CORRESPONDENT: Roger L. Shoffstall

SUBJECT: Roger L. Shoffstall v. POTUS

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	ACTION DATE M/D/YR	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED M/D/YR
	CUGONZ	A	6/5/01		C	
	Brett	A				

ACTION COMMENTS:

ACTION COMMENTS:

ACTION COMMENTS:

ACTION COMMENTS:

COMMENTS:

ADDITIONAL CORRESPONDENTS: **MEDIA:**

REV_00259421

2102392

12 - R
Counsel's Office JUN 1

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

ROGER L. SHOFFSTALL,)
)
Petitioner / Plaintiff,)
vs.)
)
The PRESIDENT of the UNITED STATES,)
George Bush,)
)
Respondent / Defendant.)
)

CASE NO. 4FA-91-378 CI

STATE OF ALASKA)
)ss
FOURTH JUDICIAL DISTRICT)

AFFIDAVIT OF FACT AND OF SERVICE OF PROCESS

I, ROGER L. SHOFFSTALL, The undersigned, appearing in propria persona, being first duly sworn upon oath, depose and state as follows:

1. I am over 18 years of age, I am a Citizen of the United States and resident of the State of Alaska.

I am the Petitioner / Plaintiff in this Writ of Habeas Corpus action.

I am entitled to have Ex Parte Summary Judgment adjudicated on my behalf.

I have personal knowledge of the facts contained herein.

To the best of my knowledge and belief the legality of my restraint has not been adjudicated on a prior Writ of Habeas Corpus.

The preponderance of the evidence which is substantial clearly shows that Petitioner/Plaintiff is entitled to immediate conveyance of the relief contained within below listed Ex Parte Summary Judgment.

REV_00259422

2. On or about May 25, 2001, I served the original copy of this "Affidavit Of Fact And Of Service Of Process" along with the original copy of "EX PARTE SUMMARY JUDGMENT" (initialed and dated 5/24/2001, by myself) - to the following address:

Presiding Judge
Superior Court of Alaska
4th Judicial District
604 Barnette Street
Fairbanks, Alaska 99701
via US Certified Mail
7000 1530 0005 2219 8706,
return receipt requested.

3. On or about May 25, 2001, I served true and full copies of this Affidavit and the above listed "Ex Parte Summary Judgment" to the following addresses:

William Rehnquist
Chief Justice
U.S. Supreme Court
One First Street, NE
Washington, D.C. 20543
via U.S. Certified Mail
7000 1530 0005 2219 8713,
return receipt requested;

George Bush
U.S. President
White House Office
1600 Pennsylvania Avenue
Washington, D.C. 20500
via U.S. Certified Mail
7000 1530 0005 2219 8720,
return receipt requested.

4. I personally placed the above listed documents in the U.S. Mail at Fairbanks, Alaska on or about the above shown dates.

DATED AT Fairbanks, Alaska this 24th day of May in the year 2001.

ROGER L. SHOFFSTALL

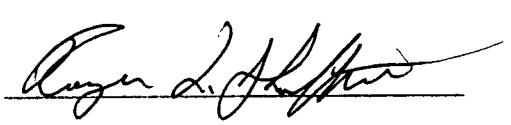

REV_00259423

Roger L. Shoffstall
P.O. Box 70689
Fairbanks, Alaska 99707
In propria persona

CERTIFICATE OF COUNSEL/Return of Service

I, Roger L. Shoffstall, the undersigned hereby certify that the originals and true & full copy(ies) of the foregoing "AFFIDAVIT OF FACT AND OF SERVICE OF PROCESS", and the above listed "EX PARTE SUMMARY JUDGMENT" were sent via U.S. Certified Mail to the addresses shown herein this 25th day of May, 2001, as is shown by the above Affidavit of Service of Process.

5/25/2001
RETURN DATE

ROGER L. SHOFFSTALL
In propria persona
P.O. Box 70689
Fairbanks, Alaska 99707
In Propria Persona

SUBSCRIBED AND SWORN to before me this 25th day of MAY, 2001.

Notary Public in and for Alaska

My commission expires: 01-16-02

JEAN TORKEL NOTARY PUBLIC STATE OF ALASKA

REV_00259424

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

ROGER L. SHOFFSTALL,)
)
Petitioner / Plaintiff,)
)
vs.)
)
5/24/01 The ~~Ex~~PRESIDENT of the UNITED STATES,)
RL ~~William Jefferson Clinton,~~ RL
George Bush,)
Respondent / Defendant.)
)

CASE NO. 4FA-91-378 CI

RL Ex Parte SUMMARY JUDGMENT

GOOD CAUSE APPEARING and the Petitioner / Plaintiff having made proper Motion and the Court being advised in the Premises:

IT IS ORDERED, COMMANDED, ADJUDICATED AND DECREED that an immediate and perpetual moratorium is hereby placed on any and all action under the United States Government RL ~~like those~~ made under the Department of the Treasury / Internal Revenue Service RL ~~(see Exhibit #2)~~ and/or RL the State of Alaska Department of Revenue 5/24/01 ~~(see Exhibit #1)~~ where said agencies have levied Direct RL ~~personal~~ tax RL against Petitioner / Plaintiff, Roger L. Shoffstall. ~~when it is not laid in Proportion to the Census or Enumeration as is established by and through the principles of taxation under the ratified body of the United States Constitution.~~

IT IS FURTHER ORDERED, COMMANDED, ADJUDICATED AND DECREED that the Supreme Court of the United States shall fully and fairly render Declaratory Judgment in this matter, ~~for the~~ therein, RL RL ~~purpose of~~ making a full and fair determination of damages and other relief that are Due Petitioner / Plaintiff.

IT IS FURTHER ORDERED, COMMANDED, ADJUDICATED AND DECREED that prior to issuing above said Declaratory Judgment said Court shall visit the record of this matter and that of all associated RL cases and ~~in order to~~ then make a full and fair consideration RL of this matter.

IT IS FURTHER ORDERED, COMMANDED, ADJUDICATED, AND DECREED that ~~the Ex~~President of the United States, RL ~~William~~ George RL Bush ~~Jefferson Clinton~~, is hereby ~~CONVICTED of Treason, Bribery, and other high crimes and Misdemeanors.~~ RL removed from the Office of the President. RL

REV_00259425

It Is Further Ordered, Commanded, Adjudicated, AND DECREED that Petitioner / Plaintiff, Roger L. Shoffstall, is hereby installed in the Office of the U.S. President. 5/24/01 5/24/01

IT IS FURTHER ORDERED, COMMANDED, ADJUDICATED, AND DECREED that this Court and the administration of United States shall act immediately and perpetually to REDRESS and FULLY RESTORE any and all violations of Petitioner's / Plaintiff's substantive DUE PROCESS RIGHTS, and all other Things, rights, privileges, principles etc. that Petitioner / Plaintiff is due and entitled to enjoy under the U.S. Const. and other places.

IT IS FURTHER ORDERED, COMMANDED ADJUDICATED AND DECREED that the UNITED STATES Government shall fully and fairly execute, convey and deliver all Relief and damages that is due Petitioner / Plaintiff throughout this matter.

IT IS FURTHER ORDERED, COMMANDED, ADJUDICATED AND DECREED that this Court shall fully and fairly EXECUTE Summary Judgment in a summary manner in this matter.

DONE IN OPEN COURT this _____ day of _____, 2001.

_____
JUDGE OF THE SUPERIOR COURT

~~RLS 4 / 19 / 2001~~
RLS 5 24 2001

REV_00259426

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

DATE RECEIVED: 7/16/01

NAME OF CORRESPONDENT: Roger L. Shoffstall

SUBJECT: Shoffstall v. POTUS

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	ACTION DATE M/D/YR	DISPOSITION TYPE RESP	C D	COMPLETED M/D/YR
	CUGONZ	A	7/16/01		C	
ACTION COMMENTS:						
	Brett	A				
ACTION COMMENTS:						
ACTION COMMENTS:						
ACTION COMMENTS:						

COMMENTS: file in litigation file - give to Brent

Brett Kavanaugh
7/17/01

ADDITIONAL CORRESPONDENTS: **MEDIA:**

145008

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

ROGER L. SHOFFSTALL,

Petitioner/Plaintiff,

vs.

PRESIDENT of the UNITED STATES,

George Bush,

Respondent/Defendant.

CASE NO. 4FA-91-378 CI

CLOSING AURGUMENT

The Haves take from the Have-nots!!!!!!! The Haves do so in an illicit manner under the guise of legitimacy!!!!!! The Haves have always taken from the Have-nots throughout recorded history!!! After thousands of years of this the Have-nots established the Supreme Law of the Land under the United States Constitution!!!

Now as is normal – the Haves are illicitly usurping the Rights and other Things belonging to the Have-nots!!!

It is this Court's manifest duty and obligation to prohibit the Haves from usurping the Rights and other Things belonging to the Have-nots!!!

President Bush is a Have!!!

To President Bush the Constitution is nothing more than window dressing!!! Good cover for his "Big Oil" to work under!!!

His solemn oath is just another lie told for his personal gain and that of his supporters!!!

His intent is to enrich himself at my expense!

In the world I grew up in - a man's word was his solemn oath that you could rely on him to satisfy his obligation to you!!! I can't rely on President George W. Bush to satisfy his sworn oath any more than I could rely on his Daddy to or President Clinton to!!!

In February of 1988, the then President Bush (the current President's father) kept and concealed my children from me by and through the State of Arizona, at Maricopa County, in substantial violation of my Due Process Rights!!! He filed a malicious prosecution (Dependency Petition) that directed the State kidnapping of my then minor children!!! He failed to give Full Faith And Credit to a standing Alaska Decree of Divorce And Child Custody that had previously granted me permanent Shared Custody of my then minor children!!! He arbitrarily and capriciously suspended my Petition For Order To Show Cause without consideration for or in disregard of my rights and other Things established by and through the U.S. Constitution.

His intent was to enrich himself at my expense too!!!

President Clinton took over from there and continued the substantial violations of my Due Process Rights!!! Substantial evidence shows that he to used the powers of the Office of the President to arbitrarily and capriciously inflicted irreparable harm on my children and me!!!

His intent was to enrich himself at my expense too!!!

And here we are today with the presiding President Bush conducting the State of Alaska, IRS, NASA, AT&T, GCI and others under his continuing illicit cause to inflict further irreparable injury on me, the Petitioner / Plaintiff!!! President Bush uses them and others to harass me from day to day with intent to make my life difficult if not unbearable!!! President Bush uses NASA and AT&T to routinely cause problems on FTS 2000 circuits carried by my company and then frames me to make it appear like the problem was in my company!!! The State of Alaska continues to takes my income while they build their own private telecommunications network that they use to bypass mine!!!!! Of course the rules of competition that they apply to me don't apply to them!!!!!!!

The 1st time the President began to operate outside of our Constitution we were doomed!

I cannot stand by and permit my rights to be taken by ~~while~~ the President while he lords over me and enslaves me!!!

Rather than administer the Constitution the President has built a massive wall of illicit bureaucracy between the Constitution and myself, thereby, insuring that I will not enjoy its protection!!! He has made them elite and treats them better than Citizens like myself!!! With his jack booted IRS Agents, those of the Department of Revenue for Alaska and other like officials he steals my life, liberty, income, and other Things!!!

Substantial evidence shows that he has intentionally obstructed my attempts to enjoy my Due Process Rights and other Things that I am entitled to enjoy!!!

I have as much right to be here as he does!!!

Just because he is willing to do anything in order to conceal and continue his substantial violation of my Due Process Rights - doesn't mean it is right!!!!!

What it does mean is that he is a criminal!!! I'm a law-abiding citizen entrapped in his snare because – to my detriment I relied and depended on him to do what he swore to do when he took the Office of the President!!!

There is no place in the Constitution that says it is okay to administer our Republic as a Democracy but he is doing it!!!

I have tried to correct these Things by and through every means that is available to me as a common citizen of this country – to no avail!!!

The U.S. Supreme Court should compel the President to administer Equal Protection of the Laws to me and all Citizens, not to just the select super minority that controls this country where I and others have been arbitrarily and capriciously excluded.

It appears that in order to change Things from what they are – I will have to occupy the Office of the President!!!!!!

This Court should have installed me in the Office of the President before the current Bush administration's entry but it omitted doing so then!!!

There is and has been a standing order before this Court to install Petitioner / Plaintiff into the Office of the President since before President Clinton was removed from the Office!!!

Now, therefor - it is time to summarily remove presiding President George Bush from the Office of the President and install Petitioner / Plaintiff!!!!!!!

WHEREFOR, – IT IS TIME TO AMEND this Court's above act of omission - thereby installing the Petitioner / Plaintiff in the Office of the President!!!

RESPECTFULLY SUBMITTED At or near Fairbanks, Alaska this the 17th day of June in the year of 2001.

Roger L. Shoffstall

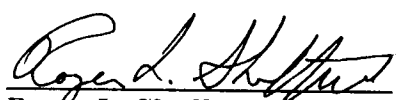

Roger L. Shoffstall
In propria persona
P.O. Box 70689
Fairbanks, Alaska 99707

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

ROGER L. SHOFFSTALL,)
)
Petitioner / Plaintiff,)
vs.)
)
The PRESIDENT of the UNITED STATES,)
George Bush,)
)
Respondent / Defendant.)
)

CASE NO. 4FA-91-378 CI

STATE OF ALASKA)
)ss
FOURTH JUDICIAL DISTRICT)

AFFIDAVIT OF SERVICE OF PROCESS

I, ROGER L. SHOFFSTALL, The undersigned, appearing in propria persona, being first duly sworn upon oath, depose and state as follows:

1. I am over 18 years of age, I am a Citizen of the United States and resident of the State of Alaska.

I am the Petitioner / Plaintiff in this Writ of Habeas Corpus action.

I am entitled to have Ex Parte Summary Judgment adjudicated on my behalf.

I have personal knowledge of the facts contained herein.

To the best of my knowledge and belief the legality of my restraint has not been adjudicated on a prior Writ of Habeas Corpus.

The Preponderance of Evidence clearly shows that Petitioner / Plaintiff is entitled to immediate conveyance of the relief via Ex Parte Summary Judgment.

The preponderance of evidence shows that Respondant / Defendant is NOT entitled to legitimate relief in this matter under the "Soldiers' and Sailors' Civil Relief Act".

REV_00259431

The Preponderance of Evidence shows that Public Safety does not require the suspension of Petitoner's / Plaintiff's privilege of the Writ of Habeas Corpus. This country is not under invasion and we are not suffering under rebellion.

The preponderance of evidence shows that NO TRIABLE ISSUE OF FACTS exist in this matter.

The preponderance of evidence shows that NO GENUINE ISSUE OF MATERIAL FACT exist in this matter.

There is only a question of law left for determination in this matter.

Questions of law can be determined by the Chief Justice of the U.S. Supreme Court, William Rehnquist.

Wherefor, Chief Justice of the U.S. Supreme Court, William Rehnquist, should proceed in a summary manner to convey all legitimate due relief to Petitioner / Plaintiff.

2. On or about June 18, 2001, I served the original copy of this "Affidavit Of Service Of Process" along with the original copy of the enclosed "CLOSING ARGUMENT".

to the following address:

Presiding Judge
Superior Court of Alaska
4th Judicial District
604 Barnette Street
Fairbanks, Alaska 99701
via US Certified Mail
7000 1670 0011 1576 6224,
return receipt requested.

3. On or about June 18, 2001, I served true and full copies of this Affidavit and the above listed "CLOSING ARGUMENT" to the following addresses:

REV_00259432

William Rehnquist
Chief Justice
U.S. Supreme Court
One First Street, NE
Washington, D.C. 20543
via U.S. Certified Mail
7000 1670 0011 1576 6217,
return receipt requested;

George Bush
U.S. President
White House Office
1600 Pennsylvania Avenue
Washington, D.C. 20500
via U.S. Certified Mail
7000 1670 0011 1576 6200,
return receipt requested.

4. I personally placed the above listed documents in the U.S. Mail at Fairbanks, Alaska on or about the above shown dates.

DATED AT Fairbanks, Alaska this 18th day of June in the year 2001.

ROGER L. SHOFFSTALL



Roger L. Shoffstall
P.O. Box 70689
Fairbanks, Alaska 99707
In propria persona

REV_00259433

CERTIFICATE OF COUNSEL/Return of Service

I, Roger L. Shoffstall, the undersigned hereby certify that the originals and true & full copy(ies) of the foregoing "AFFIDAVIT OF FACT AND OF SERVICE OF PROCESS", and the above listed document(s) were sent via U.S. Certified Mail to the addresses shown herein this 18th day of June, 2001, as is shown by the above Affidavit of Service of Process.

6/18/2001
RETURN DATE

ROGER L. SHOFFSTALL
In propria persona
P.O. Box 70689
Fairbanks, Alaska 99707
In Propria Persona

SUBSCRIBED AND SWORN to before me this 18 day of June, 2001.

Notary Public in and for Alaska

My commission expires: 8.17.04

REV_00259434

HSBA
Hawaii State Bar Association

February 27, 2002

Honorable Patrick J. Leahy
Chair, Committee on the Judiciary
United States Senate
224 Dirkson Senate Office Building
Washington, D.C. 20510- 6275

OFFICERS
Michael W. Gibson, President
Douglas A. Crosier, President-Elect
Lionel T. Nishioka, Secretary
Jeffrey H.K. Sia, Treasurer

DIRECTORS
Steven J.T. Chow
John P. Gillmor
Paul K. Hamano (East Hawaii)
Hugh R. Jones
David M. Jorgensen (Maui)
Ronette M. Kawakami
Faye M. Koyanagi
Carol Mon Lee
Carol K. Muranaka
Christiane L. Nakea (Kauai)
Wayne D. Parsons
Trudy Burns Stone
Elizabeth A. Strance (West Hawaii)
Suzanne T. Tarada
Andrew S. Winer

YLD PRESIDENT
Jodi L. Kimura

HSBA/ABA DELEGATE
James A. Kawachika

EXECUTIVE DIRECTOR
Coralie Chun Matayoshi

Re: Nomination of Frederick W. Rohlfing III to U.S. District Court in Hawaii

Dear Senator Leahy:

The Board of Directors of the Hawaii State Bar Association (HSBA) has found Frederick W. Rohlfing III to be highly qualified for the position of U.S. District Court Judge in Hawaii, and he therefore meets our very highest level of standards for recommendation to the Bench.

As part of the HSBA Board's procedures for taking a position on judicial appointments, the candidate is requested to submit a resume and/or respond to a questionnaire and to appear before the Board, which Mr. Rohlfing has done. The HSBA Board utilizes a modified version of the American Bar Association Guidelines for Reviewing Qualifications of Candidates for State Judicial Office. These Guidelines include the following criteria for judicial positions: integrity, legal knowledge and ability, professional experience, judicial temperament, diligence, financial responsibility, public service, collegiality, and writing ability.

The HSBA Board's rating system includes the categories of "highly qualified," "qualified," or "not qualified."

The qualifications of Mr. Rohlfing for the position of U.S. District Court Judge in Hawaii were reviewed in this manner and the HSBA Board determined that he is highly qualified.

Please contact me if you have any questions about our position on this matter.

Sincerely,

Michael W. Gibson, President
Hawaii State Bar Association

cc: HSBA Board of Directors
Coralie Chun Matayoshi, HSBA Executive Director

1132 Bishop Street, Suite 906 • Honolulu, HI 96813 • Phone: (808) 537-1868 • Fax: (808) 521-7936 • Http://HSBA.org

c

U.S. Department of Justice

Office of Legal Policy

Frederick W. Rohlfing

Biography

Frederick W. Rohlfing III is a founding partner in the Honolulu law firm of Rohlfing & Stone. Born in what was then the Territory of Hawaii, he graduated from Punahou School in 1974, received his B.A. magna cum laude, with high honors in economics, from Dartmouth College in 1978, and his J.D. from the University of Chicago in 1983. In Chicago, Mr. Rohlfing was active in the Mandel Legal Aid Clinic, representing Social Security Disability claimants.

Since returning to Honolulu in 1983, Mr. Rohlfing has concentrated his practice primarily in business, real estate, and personal injury civil litigation. He has vigorously advocated on behalf of injured traffic accident victims, including before the Hawaii Supreme Court. Mr. Rohlfing is a member of the Association of Trial Lawyers of America.

An opening brief co-authored by Mr. Rohlfing in the case of *Swire Properties (Hawaii), Ltd. v. Zoning Board of Appeals* was selected by the Hawaii Supreme Court as the best example of appellate writing from the State of Hawaii for submission to the first annual Scribe's Brief Writing Competition sponsored by the American Society of Writers on Legal Subjects.

In federal court, Mr. Rohlfing has participated in a variety of cases involving First Amendment constitutional law, the Americans with Disabilities Act, the Clean Water Act, the Lanham Act, the Petroleum Marketing Practices Act, the Securities Act, and the Sherman Antitrust Act. Mr. Rohlfing has also been a faculty speaker in several continuing legal education seminars in Hawaii.

In addition to his legal practice, Mr. Rohlfing is active in the community. He served from 1991-1993 as an elected member of the Manoa Neighborhood Board of the City and County of Honolulu. He was the president of Manoa Paniolo (Youth) Football from 1999-2001, and presently serves as a member of the Mission Houses Museum board.

REV_00259436

FOIA | Privacy and Security Notice

REV_00259437

c

U.S. Department of Justice

Office of Legal Policy

Frederick W. Rohlfing III

Resumé

Birth:	July 21, 1956	Honolulu, Hawaii
Legal Residence:	Hawaii	
Education:	1974 - 1978	Dartmouth College B.A. degree, *magna cum laude*
	1980 - 1983	University of Chicago Law School J.D. degree
Bar Admittance:	1983	Hawaii
Experience:	1983 - 1984	Torkildson Katz Jossem & Loden Associate
	1985	House of Representatives, State of Hawaii Chief Minority Attorney
	1985 - 1990	Law Offices of James M. Sattler Associate
	1990 - 1995	Stubenberg & Durrett Associate 1990 - 1993 Partner 1993 - 1995
	1995	Senate, State of Hawaii Chief Minority Attorney
	1995 - 1996	Law Office of Frederick

	W. Rohlfing, III Sole Proprietor
1997 - present	Rohlfing & Stone Partner

FOIA | Privacy and Security Notice

REV_00259439

c

U.S. Department of Justice
Office of Legal Policy

Frederick W. ("Fritz") Rohlfing III
Support

Lowell K.Y. Chun-Hoon, Esq. of King, Nakamura & Chun-Hoon, Honolulu, Hawaii:

- "I have worked together with him extensively representing a mutual client in an unusually complicated personal injury-legal malpractice-workers' compensation claim... I was impressed by his rapid assimilation of this arcane body of law, his graceful and lucid prose, and his tenacious representation of the injured worker. . . . I hope the fact that he is endorsed by a lifelong union lawyer like myself suggests something of his ability to transcend traditional labels and affiliations through the force of his character and intellect." *Excerpt from February 20, 2002 letter to Michael Gibson, President, Hawaii State Bar Association.*

Cynthia A. Farias, Esq., Honolulu, Hawaii:

- "In my opinion, Mr. Rohlfing is highly intelligent, completely honest and extremely hard-working. He is reasonable and even-tempered, and has been a pleasure to work with. Mr. Rohlfing is also a problem-solver who will work diligently towards resolution of an issue. He has the legal skills, experience and work ethic to be an excellent judge." *Excerpt from February 20, 2002 letter to Michael Gibson, President, Hawaii State Bar Association.*

Thomas E. Crowley, Esq., of the Law Offices of Thomas E. Crowley, Honolulu, Hawaii:

- "Mr. Rohlfing is an excellent lawyer and litigator. He brings two critical skills to each case which are fundamental to a district court judgeship: the ability to correctly analyze complicated issues, and the ability to communicate that analysis in a clear and concise way. He is extremely well-organized, prompt, careful, and efficient. Of special note is the superior quality of Mr. Rohlfing's legal writing."

REV_00259440

- "Mr. Rohlfing is more than an excellent litigator. He has private as well as public integrity, which means he is honest in both his personal and professional dealings. As a judge, Mr. Rohlfing would have the courage to displease, which means he will rule the right way, even in the face of public and private pressure." *Excerpt from March 12, 2002 letter to Senator Patrick Leahy.*

The Honorable Boyd P. Mossman, State of Hawaii Circuit Court Judge for the Second Circuit, Retired

- "Fritz's legal education and his experience with business as well as the law provide him with an intellectual capacity and confidence; however, his sense of community and sense of humor generating from his local roots are an even better gauge of his genuinenesss and dedication to Hawaii and the United States." *Excerpt from February 5, 2002 letter to Michael Gibson, President, Hawaii State Bar Association.*

Sharon R. Himeno, Esq. of Price Okamoto Himeno & Lum, Honolulu, Hawaii:

- "I am pleased to endorse Fritz Rohlfing's nomination to the U.S. District Court. I have known Fritz for over 25 years, and he has always been a person of the highest integrity and intellect. His credentials are outstanding, he has extensive experience as a litigator in both federal and state court, and he would be a great addition to our federal bench." *Excerpt from February 20, 2002 letter to the Michael Gibson, President, Hawaii State Bar Association.*

Charles Robert Ching, Esq. of Honolulu, Hawaii:

- "In working with Fritz, I found both his legal analysis and his written work product to be consistently excellent. In discussing legal issues and theories, Fritz demonstrates a keen legal mind and an abiding respect for the law. I am particularly impressed by Fritz's ability to recall and explore alternate legal theories and his willingness to entertain and analyze such theories on their own merits. In this regard, Fritz has always displayed an intellectual curiosity, integrity, and judgement that would be especially well suited to the bench. Fritz is also a tireless legal researcher with a thirst for substantive legal knowledge and a seemingly infinite capacity to digest case law." *Excerpt from February 11, 2002 letter to the Michael Gibson, President, Hawaii State Bar Association.*

Russell Blair, former Democratic state senator and District Judge:

REV_00259441

- "We've had discussions over the years about matters political and legal and he's always struck me as being intelligent and forthright. He's coming from the right place: good heart and good head." *The Honolulu Advertiser, Thursday, January 24, 2002.*

For further information please contact Barbara Comstock in the Office of Public Affairs at (202) 514-2007.

FOIA | Privacy and Security Notice

REV_00259442

HSBA
Hawaii State Bar Association

February 27, 2002

Honorable Patrick J. Leahy
Chair, Committee on the Judiciary
United States Senate
224 Dirkson Senate Office Building
Washington, D.C. 20510- 6275

OFFICERS
Michael W. Gibson, President
Douglas A. Cresler, President-Elect
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Jeffrey H.K. Sia, Treasurer

DIRECTORS
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Paul K. Hamano (East Hawaii)
Hugh R. Jones
David M. Jorgensen (Maui)
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Carol Mon Lee
Carol K. Muranaka
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Suzanne T. Tarada
Andrew S. Winer

YLD PRESIDENT
Jodi L. Kimura

HSBA/ABA DELEGATE
James A. Kawachika

EXECUTIVE DIRECTOR
Coralie Chun Matayoshi

Re: Nomination of Frederick W. Rohlfing III to U.S. District Court in Hawaii

Dear Senator Leahy:

The Board of Directors of the Hawaii State Bar Association (HSBA) has found Frederick W. Rohlfing III to be highly qualified for the position of U.S. District Court Judge in Hawaii, and he therefore meets our very highest level of standards for recommendation to the Bench.

As part of the HSBA Board's procedures for taking a position on judicial appointments, the candidate is requested to submit a resume and/or respond to a questionnaire and to appear before the Board, which Mr. Rohlfing has done. The HSBA Board utilizes a modified version of the American Bar Association Guidelines for Reviewing Qualifications of Candidates for State Judicial Office. These Guidelines include the following criteria for judicial positions: integrity, legal knowledge and ability, professional experience, judicial temperament, diligence, financial responsibility, public service, collegiality, and writing ability.

The HSBA Board's rating system includes the categories of "highly qualified," "qualified," or "not qualified."

The qualifications of Mr. Rohlfing for the position of U.S. District Court Judge in Hawaii were reviewed in this manner and the HSBA Board determined that he is highly qualified.

Please contact me if you have any questions about our position on this matter.

Sincerely,

Michael W. Gibson, President
Hawaii State Bar Association

cc: HSBA Board of Directors
Coralie Chun Matayoshi, HSBA Executive Director

1132 Bishop Street, Suite 906 • Honolulu, HI 96813 • Phone: (808) 537-1868 • Fax: (808) 521-7936 • Http://HSBA.org

c

U.S. Department of Justice
Office of Legal Policy

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Last Updated: 3/25/02

Frederick W. Rohlfing
Biography

Frederick W. Rohlfing III is a founding partner in the Honolulu law firm of Rohlfing & Stone. Born in what was then the Territory of Hawaii, he graduated from Punahou School in 1974, received his B.A. magna cum laude, with high honors in economics, from Dartmouth College in 1978, and his J.D. from the University of Chicago in 1983. In Chicago, Mr. Rohlfing was active in the Mandel Legal Aid Clinic, representing Social Security Disability claimants.

Since returning to Honolulu in 1983, Mr. Rohlfing has concentrated his practice primarily in business, real estate, and personal injury civil litigation. He has vigorously advocated on behalf of injured traffic accident victims, including before the Hawaii Supreme Court. Mr. Rohlfing is a member of the Association of Trial Lawyers of America.

An opening brief co-authored by Mr. Rohlfing in the case of *Swire Properties (Hawaii), Ltd. v. Zoning Board of Appeals* was selected by the Hawaii Supreme Court as the best example of appellate writing from the State of Hawaii for submission to the first annual Scribe's Brief Writing Competition sponsored by the American Society of Writers on Legal Subjects.

In federal court, Mr. Rohlfing has participated in a variety of cases involving First Amendment constitutional law, the Americans with Disabilities Act, the Clean Water Act, the Lanham Act, the Petroleum Marketing Practices Act, the Securities Act, and the Sherman Antitrust Act. Mr. Rohlfing has also been a faculty speaker in several continuing legal education seminars in Hawaii.

In addition to his legal practice, Mr. Rohlfing is active in the community. He served from 1991-1993 as an elected member of the Manoa Neighborhood Board of the City and County of Honolulu. He was the president of Manoa Paniolo (Youth) Football from 1999-2001, and presently serves as a member of the Mission Houses Museum board.

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Frederick W. Rohlfing III

Resumé

Birth:	July 21, 1956	Honolulu, Hawaii
Legal Residence:	Hawaii	
Education:	1974 - 1978	Dartmouth College B.A. degree, *magna cum laude*
	1980 - 1983	University of Chicago Law School J.D. degree
Bar Admittance:	1983	Hawaii
Experience:	1983 - 1984	Torkildson Katz Jossem & Loden Associate
	1985	House of Representatives, State of Hawaii Chief Minority Attorney
	1985 - 1990	Law Offices of James M. Sattler Associate
	1990 - 1995	Stubenberg & Durrett Associate 1990 - 1993 Partner 1993 - 1995
	1995	Senate, State of Hawaii Chief Minority Attorney
	1995 - 1996	Law Office of Frederick

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	W. Rohlfing, III Sole Proprietor
1997 - present	Rohlfing & Stone Partner

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Frederick W. ("Fritz") Rohlfing III
Support

Lowell K.Y. Chun-Hoon, Esq. of King, Nakamura & Chun-Hoon, Honolulu, Hawaii:

- "I have worked together with him extensively representing a mutual client in an unusually complicated personal injury-legal malpractice-workers' compensation claim... I was impressed by his rapid assimilation of this arcane body of law, his graceful and lucid prose, and his tenacious representation of the injured worker. . . . I hope the fact that he is endorsed by a lifelong union lawyer like myself suggests something of his ability to transcend traditional labels and affiliations through the force of his character and intellect." *Excerpt from February 20, 2002 letter to Michael Gibson, President, Hawaii State Bar Association.*

Cynthia A. Farias, Esq., Honolulu, Hawaii:

- "In my opinion, Mr. Rohlfing is highly intelligent, completely honest and extremely hard-working. He is reasonable and even-tempered, and has been a pleasure to work with. Mr. Rohlfing is also a problem-solver who will work diligently towards resolution of an issue. He has the legal skills, experience and work ethic to be an excellent judge." *Excerpt from February 20, 2002 letter to Michael Gibson, President, Hawaii State Bar Association.*

Thomas E. Crowley, Esq., of the Law Offices of Thomas E. Crowley, Honolulu, Hawaii:

- "Mr. Rohlfing is an excellent lawyer and litigator. He brings two critical skills to each case which are fundamental to a district court judgeship: the ability to correctly analyze complicated issues, and the ability to communicate that analysis in a clear and concise way. He is extremely well-organized, prompt, careful, and efficient. Of special note is the superior quality of Mr. Rohlfing's legal writing."

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- "Mr. Rohlfing is more than an excellent litigator. He has private as well as public integrity, which means he is honest in both his personal and professional dealings. As a judge, Mr. Rohlfing would have the courage to displease, which means he will rule the right way, even in the face of public and private pressure." *Excerpt from March 12, 2002 letter to Senator Patrick Leahy.*

The Honorable Boyd P. Mossman, State of Hawaii Circuit Court Judge for the Second Circuit, Retired

- "Fritz's legal education and his experience with business as well as the law provide him with an intellectual capacity and confidence; however, his sense of community and sense of humor generating from his local roots are an even better gauge of his genuinenesss and dedication to Hawaii and the United States." *Excerpt from February 5, 2002 letter to Michael Gibson, President, Hawaii State Bar Association.*

Sharon R. Himeno, Esq. of Price Okamoto Himeno & Lum, Honolulu, Hawaii:

- "I am pleased to endorse Fritz Rohlfing's nomination to the U.S. District Court. I have known Fritz for over 25 years, and he has always been a person of the highest integrity and intellect. His credentials are outstanding, he has extensive experience as a litigator in both federal and state court, and he would be a great addition to our federal bench." *Excerpt from February 20, 2002 letter to the Michael Gibson, President, Hawaii State Bar Association.*

Charles Robert Ching, Esq. of Honolulu, Hawaii:

- "In working with Fritz, I found both his legal analysis and his written work product to be consistently excellent. In discussing legal issues and theories, Fritz demonstrates a keen legal mind and an abiding respect for the law. I am particularly impressed by Fritz's ability to recall and explore alternate legal theories and his willingness to entertain and analyze such theories on their own merits. In this regard, Fritz has always displayed an intellectual curiosity, integrity, and judgement that would be especially well suited to the bench. Fritz is also a tireless legal researcher with a thirst for substantive legal knowledge and a seemingly infinite capacity to digest case law." *Excerpt from February 11, 2002 letter to the Michael Gibson, President, Hawaii State Bar Association.*

Russell Blair, former Democratic state senator and District Judge:

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- "We've had discussions over the years about matters political and legal and he's always struck me as being intelligent and forthright. He's coming from the right place: good heart and good head." *The Honolulu Advertiser, Thursday, January 24, 2002.*

For further information please contact Barbara Comstock in the Office of Public Affairs at (202) 514-2007.

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TODAY'S DATE 06/18/03

TO: Brett Kavanaugh AGENCY: WH Counsel's Office

OFFICE# ( ) 456-7984 FAX# ( ) 456 1647

FROM:

[~~4~~] **Raymond Sheehan**
Director

[ ] **Dave Spradlin**
Sr. Ethics Specialist

[ ] **Pat Tippett**
Sr. Ethics Specialist

[ ] **Mike Edwards**
Sr. Ethics Specialist

[ ] **Lolita Roberson**
Ethics Specialist

[ ] **Dwaine Grove**
Intern

~ COMMENTS ~

Brett: How's it going?
Dale Moore wants to send out the May 30 memos from Andy Card and Judge Gonzales under this cover letter and wants your 'OK' on whether it's sufficient. Thanks
Ray

MEMORANDUM TO THE SUBCABINET

FROM: Dale Moore, Chief of Staff

SUBJECT: Rules Governing Partisan Political Activity

Please find attached a memorandum from the Chief of Staff to the President and an accompanying memorandum from the Counsel to the President reiterating the restrictions and ground rules that must be followed by all officers and employees in regards to political campaigns at any level of government. While the general election isn't until November 3, 2004, both major political parties have commenced fundraising and organizational activities. The President is adamant that no member of his Administration breach or even appear to push the envelope of the Hatch Act restrictions or such other procedures as the White House and employing agencies may establish for their officers and employees.

There are different restrictions and allowances regarding political activity depending upon where one falls within three classes of officer or employee: 1) Senate Confirmed Appointees, 2) Career Senior Executives, and 3) all others – including non-career Senior Executives, Schedule C appointees, and career staff below the Senior Executive level. We need to make sure that everyone at USDA knows and abides by the rules.

Classroom instruction will soon be afforded at the Subcabinet Meeting and the Schedule C meetings conducted by the White House Liaison. In addition, Office of Ethics and the Chief Financial Officer have developed the following training tools and procedures specific to political activity:

- Financial Procedures under which the costs of mixed travel (political and official) by Senate Confirmed Appointees are to be allocated and the political portion billed to the benefited political committee(s). These procedures are attached and must be provided to your travel coordinators.
- Laminated vest-pocket / purse-sized cards that summarize the basic "dos and don'ts" of political activity according to the type of officer or employee. Samples of all three cards are attached and sufficient quantities are available to distribute to your staffs. Every person engaged in partisan political activity should carry the card pertinent to him or her at all times.
- The ethics website (www.usda.gov/ethics) has a thorough online training module on political activity as well as the full text of the pertinent Federal Regulations (5 CFR 734 Subparts A through F). Field staff unable to attend classroom instruction should be directed to this site and complete the automated certification upon completion of the training module.

I ask each of you to take all steps necessary to make sure that your employees are well versed in, and fully compliant with, these rules and procedures.

Attachments / as stated

Source: All Sources > Secondary Legal > **Law Reviews, Combined**
Terms: **(engagement) and necessity and war and self-defense and date(aft 1995)** (Edit Search)

*42 A.F. L. Rev. 245, **

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42 A.F. L. Rev. 245

LENGTH: 6553 words

ARTICLE: The JCS Standing Rules of **Engagement:** A Judge Advocate's Primer

Professor Richard J. Grunawalt *

* Professor Grunawalt (B.A., J.D., University of Michigan) is Director, Oceans Law and Policy Department, United States Naval **War** College.

SUMMARY:
... The Standing Rules of **Engagement** (SROE) promulgated by Chairman of the Joint Chiefs of Staff Instruction 3121.01 provides policy guidance and procedures governing **self-defense** and mission accomplishment for US commanders during all military operations and contingencies. ... The SROE consist of the basic Chairman's Instruction and four enclosures which set forth "Standing Rules of **Engagement** for U.S. Forces" (Enclosure A), "Supplemental Measures" (Enclosure B), "Compendium and Combatant Commander's Special ROE" (Enclosure C), and "References" (Enclosure D). ... The commander and the mission will not be well served, however, if unwarranted deference is made to the special ROE expertise that we expect of the operational lawyer. ... Enclosure C contains a "Compendium" of other ROE-related guidance as well as the "Combatant Commander's Special ROE." ... Determining the existence of a hostile act or demonstration of hostile intent is a function of the professional military judgment of the on-scene commander. ... Clearly, an F-16 pilot engaged in that mission will comply with that supplemental measure, e.g., he or she will not engage intruding aircraft absent specific authority from the designated air defense commander to do so. ...

TEXT:
[*245] I. INTRODUCTION

The Standing Rules of **Engagement** (SROE) [1] promulgated by Chairman of the Joint Chiefs of Staff Instruction 3121.01 provides policy guidance and procedures governing **self-defense** and mission accomplishment for US commanders during all military operations and contingencies. Judge advocates contemplating assignment to operational law billets must be fully conversant with these SROE. This article is designed to assist in that process.

The Armed Forces of the United States constitute without question the most powerful, technologically sophisticated and professionally respected military organization in the world. Some 1.5 million strong, the men and women of the United States Army, Navy, Air Force, Marine Corps and Coast Guard are either "on-station" around the globe or are prepared to deploy whenever and wherever they are directed to do so by the National Command Authorities (NCA). [2] Rules of **engagement** delineate the circumstance when those forces are authorized to initiate or continue armed **engagement** with foreign forces or terrorist units wherever they may be encountered. [3]

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were always more versatile than the word "Peacetime" in the title might suggest. Replacement of "Peacetime" with the term "Standing", results in a far more descriptive title to the current rules. Memorandum from Secretary of the Joint Staff for Unified and Specified Combatant Commanders and Commander U.S. Element, NORAD, Peacetime Rules of **Engagement** for U.S. Forces (Oct. 28 1988) (on file with author).

n9 *See* CJCSI 3121.02, *supra* note 1.

n10 CJCSI 3121.02, *supra* note 1, at 2.

n11 The term "Military Operations Other Than **War,**" "encompasses the use of military capabilities across the range of military operations short of **war.** These military actions can be applied to complement any combination of the other instruments of national power and occur before, during, and after **war.** Also called MOOTW." Joint Pub. 3-07, Joint Doctrine for Military Operations Other Than **War** p. GL-3 (1995).

n12 CJCSI 3121.02, *supra* note 1, at app. A.

n13 *Id.* at app. B.

n14 *Id.* at app. C.

n15 *Id.* at app. D.

n16 The five geographic CINCs are Commander in Chief U.S. Atlantic Command (USCINCACOM), Commander in Chief U.S. European Command (USCINCEUR), Commander in Chief U.S. Pacific Command (USCINCPAC), Commander in Chief U.S. Central Command (USCINCCENT), and Commander in Chief U.S. Southern Command, (USCINCSOUTH). The four functional CINCs are Commander in Chief U.S. Strategic Command, (USCINCSTRAT), Commander in Chief U.S. Transportation Command (USCINCTRANS), Commander in Chief U.S. Special Operations Command (USCINCSOC), and Commander in Chief U.S. Space Command (USCINCSPACE). CJCSI 3121.02, *supra* note 1, at B-1, C-1.

n17 To date, only USCINCENT, USCINCPAC and USCINCSOUTH have promulgated NCA-approved Combatant Commander's Special ROE. (Annexes B, D and F, respectively).

n18 Article 51 of the Charter of the United Nations provides, in pertinent part, that. "nothing in the present Charter shall impair the inherent right of individual or collective **self-defense** if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. . . ." U.N. Charter art. 51. For a discussion of the inherent right of **self-defense** generally, *see* James Brierly, The Law of Nations: An Introduction to the International Law of Peace 416-21 (6th ed., 1963): Stone, Legal Controls of International Conflict 244 (1954); von Glahn, Law Among Nations 129-33 (6th ed., 1992); Bruce Harlow, *The Legal Use of Force . . . Short of **War***, U.S. Naval Inst. Proc., Nov. 1966, at 89; and Yoram Dinstein, **War,** Aggression and **Self-Defense** 187-191 (2d ed., 1994).

n19 *See* L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 122 (1993).

n20 *Id.* at 330-332.

n21 CJCSI 3121.02, *supra* note 1, at A-3.

n22 The glossary of the SROE provides the following amplifying guidance on the concept of individual **self-defense:**

> . . . It is critical that individuals are aware of and train to the principle that they have the authority to use all available means and to take all appropriate action to defend themselves and other U.S. personnel in their vicinity. In the implementation of these SROE and other ROE, commanders have the obligation to ensure that the individuals within that commander's unit understand when and how they may use force in **self-defense.** While individuals assigned to a unit respond to a hostile act or hostile intent in the exercise of their inherent right of **self-defense,** their use of force must remain consistent with lawful orders of superiors, the rules contained in this document, and other applicable rules of **engagement** promulgated for the mission or AOR.

Id. at GL-10.

n23 Admiral Frank Kelso, Commander in Chief, U.S. Atlantic Command, Address at the Norfolk Naval Base Rules of **Engagement** Symposium (Nov. 18 1987).

n24 CJCSI 3121.02, *supra* note 1, at A-4.

n25 *Id.* at A-6.

n26 *Id.* at B-1.

n27 *Id.*

Source: All Sources > Secondary Legal > **Law Reviews, Combined**
Terms: **(engagement) and necessity and war and self-defense and date(aft 1995)** (Edit Search)
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Carl von Clausewitz, the renowned military strategist of the last century, wrote that:

> **War** is not merely an act of policy but a true political instrument, a continuation of political inter-course, carried on with other means . . . the political object is the goal, **war** is the means of reaching it, and means can never be considered in isolation from the purpose. [4]

[*246] Von Clausewitz' premise reminds us that application of the military instrument, at whatever level of intensity, is always pursuant to an overarching national political purpose. Article II of the Constitution vests the executive power of the United States, and responsibility for the development and execution of the foreign policy of our nation, in the President. [5] Article II further provides that the President is the Commander in Chief of the armed forces. [6] Under this fundamental constitutional construct, the military forces of the United States are at all times and for all purposes under the control of, and responsive to, civilian leadership. In a Clausewitzian sense, rules of **engagement** serve the most fundamental of political purposes -- they ensure that the military instrument of the United States is indeed employed pursuant to the overarching national political purposes of our nation.

Rules of **engagement** shape the application of military force to national political objectives by:

(a) providing standing guidance on the use of force during time of peace;
(b) controlling the application of force during transition from peace to **war;**
(c) controlling combat operations during time of **war;** and
(d) controlling the application of force during transition from **war** back to peace. [7]

At all times, our rules of **engagement** are designed to provide for the safety and survival of U.S. military forces that come into harm's way and to ensure successful accomplishment of any mission that those forces may be tasked to undertake. Our rules of **engagement** are also the principal mechanism of **[*247]** ensuring that U.S. military forces are at all times in full compliance with our obligations under domestic as well as international law.

U.S. rules of **engagement** are, therefore, based upon three pillars - national policy, operational requirements and law. To be truly effective, the rules of **engagement** that govern the military forces of the United States must be fully consistent with the political objectives of our national policy, the dictates of the law, and the safety and survival of our forces during the prompt and effective accomplishment of their mission.

In October 1994, the NCA approved the Standing Rules of **Engagement** for US Forces. Issued by the Chairman of the Joint Chiefs of Staff in the form of a Chairman's Instruction (CJCSI 3121.01), they replace the JCS Peacetime Rules of **Engagement** which had been last promulgated in 1988. [8] The SROE consist of the basic Chairman's Instruction and four enclosures which set forth "Standing Rules of **Engagement** for U.S. Forces" (Enclosure A), "Supplemental Measures" (Enclosure B), "Compendium and Combatant Commander's Special ROE" (Enclosure C), and "References" (Enclosure D). A Glossary of abbreviations, acronyms, terms and definitions is also included. [9]

A. The Chairman's Instruction

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The basic Chairman Instruction (CJCSI 3121.01) is just two pages in length. The *purpose* paragraph of the instruction establishes that the SROE serve two distinct purposes: implementing the inherent right of **self-defense** and providing guidance for the application of force for mission accomplishment. At the outset of this discussion of the SROE, it is imperative to keep in mind these two purposes, **self-defense** and mission accomplishment, as a clear understanding of the differences between the two is critical to the proper understanding and implementation of the SROE.

The Chairman's Instruction provides that the SROE apply to U.S. forces during all military operations and contingencies and the policies and procedures established by the SROE remain in effect until rescinded. **[*248]** Moreover, they may be augmented by supplemental ROE for specific operations or mission.

As a general rule, the SROE apply to all U.S. forces at all places at all times. As the title to the document underscores, these are *standing* ROE. They are not limited to peacetime application, but are designed to remain effective in prolonged conflict as well. There are no "wartime" ROE awaiting implementation at the first outbreak of hostilities. The SROE, augmented as necessary by supplemental rules, are the bedrock of U.S. military **engagement** throughout the spectrum of conflict.

The basic Chairman's Instruction notes that the NCA approves ROE for U.S. forces and that the Joint Operations Division (J-3) of the Joint Staff is responsible for their maintenance. This later observation is worthy of elaboration. The development, maintenance and implementation of ROE are the province of the operational directorate -- not the staff judge advocate, not the intelligence officer, not the planner, and not the logistician. All of the latter have important roles to play in this process, but it is imperative that both the operational commander and the judge advocate (or other staff specialists) understand that ROE are properly within the responsibility of the operations directorate. Judge advocates in operational law positions must be well versed in ROE and must be prepared to support the commander and the operations directorate as fully and effectively as possible in their development and interpretation. The commander and the mission will not be well served, however, if unwarranted deference is made to the special ROE expertise that we expect of the operational lawyer.

The Chairman's Instruction notes that "Enclosure A [the first 8 pages of Enclosure A] is unclassified and intended to be used as a coordination tool with U.S. allies for the development of combined or multinational ROE that are consistent with these SROE." [10] Promulgation of the underlying principles and policies of the SROE in an unclassified format is a major improvement over past practice. Heretofore, our ROE were classified SECRET-NOFORN (no foreign nationals) in their entirety. Given the reality of coalition warfare and the day-to-day occurrence of combined operations in the MOOTW [11] arena, the utility of fostering commonality in basic ROE precepts with allied forces is obvious. Moreover, the promulgation of basic ROE principles in an unclassified format facilitates a broader understanding of the policies and procedures of the SROE among U.S. forces.

[*249] B. Structure of the SROE

Any meaningful effort to become conversant with the SROE should begin with an examination of the Table of Contents of that document. Consisting of four Enclosures and the Glossary, the SROE must be seen as an integral whole; a sophisticated *system* rather than a litany of disparate rules. Proper implementation of the SROE, whether in regard to **self-defense** or mission accomplishment, requires that commanders -- at whatever echelon of command -- and the operational lawyers providing guidance and assistance to them, comprehend the SROE as a *system*. That comprehension begins with a familiarity of the Table of Contents.

Enclosure A, entitled "Standing Rules" sets forth the purpose, scope and policy of the SROE. As noted above, the first eight pages of Enclosure A are unclassified. It is here that one finds

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the fundamental expression of U.S. policy regarding rules of **engagement.** The unclassified provisions are supported by four classified Appendices which, in turn, contain a number of Annexes, which are also classified. Appendix A -- General Standing Rules -- builds upon the general provisions of the unclassified text by, *inter alia*, delineating where the authority to declare forces hostile is fixed, and by providing guidance on operational security (OPSEC), tactical military deception, and security operations at U.S. diplomatic and consular facilities abroad. The three Annexes thereunder address "Command and Control and Information Warfare" (Annex A), "Counterdrug Support Operations" (Annex B) and "Noncombatant Evacuation Operations" (Annex C). [12]

Appendix B of Enclosure A is entitled "US Seaborne Forces" and provides more definitive guidance for U.S. forces engaged in or supporting seaborne operations. Note that the guidance applies to all seaborne operations and is not limited to Navy, Marine Corps or Coast Guard activities. Air Force units providing Civil Air Patrol (CAP), refueling, reconnaissance, strike, etc., support for seaborne operations are embraced by this Appendix, as are Army units operating from or in support of seaborne platforms. Two annexes support Appendix B - "Defense of US Citizens and Their Property at Sea" (Annex A) and "Recovery of US Government Property at Sea" (Annex B). [13]

Appendix C, entitled "Air Operations" provides guidance for all air operations other than those in support of seaborne operations. Naval aviation, when "feet-dry" or otherwise in support of other than seaborne operations, falls under Appendix C. These are not "U.S. Air Force" rules, they are U.S. *air forces* rules. [14]

[*250] Appendix D, "Land Operations," similarly embraces all U.S. ground forces irrespective of Service affiliation. Thus, they govern, e.g., the use of force by U.S. Air Force security police engaged in air base defense. [15]

Enclosure B, "Supplemental Measures," provides the means to tailor mission accomplishment rules to the particular circumstances at hand. Supplemental measures provide tactically realistic guidance to operational commanders regarding the employment of force in mission accomplishment. Consisting of a numbered series of authorizations and restrictions, supplemental measures, applied through a formatted message system, are designed to ensure that mission accomplishment rules reflect the dynamic realities of the mission setting. To make them more "user friendly" the supplemental measures are set out in four Annexes - "General Supplemental Measures List" (Annex A), "Supplemental Measures List for Maritime Operations" (Annex B), "Supplemental Measures List for Air Operations" (Annex C), and "Supplemental Measures List for Land Operations" (Annex D). A fifth Annex describes the formatted message system (Annex E).

Enclosure C contains a "Compendium" of other ROE-related guidance as well as the "Combatant Commander's Special ROE." Each of the Unified Combatant Commanders (CINC's) (currently 9 in number - 5 geographic and 4 functional [16]) as well as the Commander, U.S. Element, North American Defense Command (NORAD) is provided an opportunity to include theater-specific or function-specific ROE in the SROE. Those CINC specific rules, which of course require prior approval by the NCA, are set forth in Annexes A through J. [17]

Enclosure D, entitled *References*, lists a series of DOD Directives, Joint publications and other doctrinal authority pertaining to military operations and capabilities.

Lastly, is the *Glossary* of abbreviations, acronyms, terms and definitions. It is important to note here that the Glossary, like each of the Enclosures, is an **[*251]** integral and essential part of the SROE structure. Amplifying policy guidance, in the form of definitional expressions, is often found in the Glossary.

II. SELF-DEFENSE

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The inherent right of **self-defense,** as articulated in customary international law and reflected in the Charter of the United Nations, [18] is the basis of the **self-defense** provisions of the SROE. Under international law, the predicate for actions taken in **self-defense** consists of two elements -- **necessity** and proportionality. **Necessity** is defined in the law as the presence of an imminent danger of an armed attack. [19] In military parlance, and in the SROE, **necessity** is expressed as the occurrence of a hostile act or demonstration of hostile intent, e.g., someone is shooting at you or is about to do so.

The proportionality element of the **self-defense** equation establishes the nature and magnitude of the response that is permitted when the **necessity** element is present. Proportionality, an often misunderstood concept, is not a body-count equation. Proportionality does not mean that if they killed six of our people, we kill six of theirs. Nor does it mean if they fired at us with a 166 millimeter howitzer, we are allowed to respond in kind. As defined in international law -- and in the SROE -- proportionality is the degree of force, that is reasonable in terms of intensity, duration and magnitude, required to decisively counter the hostile act or demonstration of hostile intent that constitutes the **necessity** part of the equation - but no more than that. [20]

Under the SROE, **self-defense** is addressed at two levels, the unit level (or unit **self-defense)** and the national level (or national **self-defense.**) To fully comprehend the concept of **self-defense** in the SROE, it is important to understand the nature of these two levels.

[*252] A. Unit Self-defense

Unit **self-defense** is the authority and obligation of commanders to defend their units from hostile acts and demonstrations of hostile intent. Determining the existence of a hostile act or demonstration of hostile intent is a function of the professional military judgment of the on-scene commander. The fundamental policy within the SROE pertaining to unit **self-defense** is expressed as follows: "These rules do not limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate action in **self-defense** of the commander's unit and other U.S. forces in the vicinity. [21]

This policy pronouncement is the only guidance in the SROE that is presented in all capital letters and all bold print. Its importance is also reflected in the fact that it is repeated, verbatim, ten times throughout the document. A close analysis of this policy statement is therefore in order.

The words "*These rules do not limit*" highlight that notwithstanding other guidance contained in the SROE, this expression of policy is paramount and immutable. "*A Commander's inherent authority and obligation*" establishes the fundamental premise that all commanders at every echelon of command are both authorized and obligated to defend the forces entrusted to their command. It is not a matter of discretion. The commander *will* defend his forces as an inherent function of command. "*To use all necessary means available*" instructs that in exercising this authority and obligation, the commander may employ the military capability, e.g., forces, weapons, tactics at hand (other than those weapons that are specifically controlled at all times by the NCA), as the commander determines is necessary. "*And to take all appropriate action in **self-defense***" refers to the proportionality part of the **self-defense** equation. The responsive action must be reasonable in intensity, duration and magnitude based upon all of the facts known to that commander at that time. "*Of the commander's unit*" refers to the aircraft, squadron, ship, tank, squad, platoon, division, etc. that constitutes the "unit" of that particular "commander." "*And other U.S. forces in the vicinity*" imposes on the commander the authority and obligation of **self-defense** of any other US forces entity that may be present. Consequently, an Air Force or Navy aircraft commander has the obligation to come to the defense of an Army or Marine unit on the ground that is confronted with a hostile act or demonstration of hostile intent. This authority and obligation of unit **self-defense** does not extend to the defense of other U.S. citizens and property or to foreign forces. The

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SROE provide separate guidance for such contingencies. Individual **self-defense,** that is, the authority and obligation of **self-defense** of individual military members within a unit, is a **[*253]** subset of unit **self-defense.** That means that the individual soldier or marine on patrol in the streets of Mogadishu has the authority and obligation to defend himself and other U.S. force members. [22]

As noted previously, determination by an on-scene commander that the "unit" is being subjected to a hostile act or a demonstration of hostile intent is necessarily a matter of professional military judgment. While a hostile act is ordinarily self-evident - you generally know when you are being shot at - the existence of a demonstration of hostile intent is necessarily a most difficult determination to make. Admiral Frank Kelso, USN, while addressing commanders participating in a ROE symposium some years ago, remarked, "The determination of hostile intent is the single most difficult decision that a commander has to make during peacetime." [23]

The rationale behind this observation is compelling. It is difficult to define the intention of another party under the best of circumstances. When that judgment must be made in a dynamic operational context on the basis of incomplete and often conflicting information, and when the on-scene commander may not have the luxury of 90 seconds to make a decision, the complexity of the equation is several orders of magnitude greater. Moreover, the commander must always bear in mind the terrible consequences of being wrong. To be overly cautious may result in the destruction of the unit. Conversely, to be too fast to respond may risk death or injury to persons innocent of hostile intention. Therefore, the guidance in the SROE recognizes that the determination of hostile intent is necessarily a matter of sound military judgment; judgment that must take into consideration the military evidence of the situation, i.e., the capabilities and physical actions of the person or platform presenting a threat. The on-scene commander must also consider the intelligence information that has been provided, e.g., indications and warnings, as well as the political backdrop against which these events are unfolding.

[*254] B. National Self-defense

National **self-defense** involves actions to defend "the United States, US forces, and in certain circumstances, US citizens and their property, US command assets, and other designated non-US forces, foreign nationals and their property" from hostile acts and demonstrations of hostile intent. [24] The exercise of national **self-defense** ordinarily involves the act of declaring a foreign force or terrorist unit hostile. Once such an entity has been declared hostile by appropriate authority, the on-scene commander no longer need observe a hostile act or demonstration of hostile intent before engaging that force or unit. For obvious reasons, the authority to declare a force hostile is very carefully circumscribed.

The SROE provide that the authority to defend non-U.S. forces, "collective **self-defense,**" is a subset of national **self-defense** that only the NCA may authorize.

C. Action in Self-defense

Amplifying "all necessary means available" and "all appropriate action", the SROE establish the following guidelines for use of force in **self-defense:**

a. Use of force is ordinarily a measure of last resort. When the situation permits, a potentially hostile force should be warned and given an opportunity to withdraw.

b. When force is in fact required, it must be proportional. This means that the amount of force to use must not exceed that which is required to decisively counter the hostile act or demonstration of hostile intent.

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c. Once the hostile act or demonstration of hostile intent has been successfully countered, or the threat is otherwise no longer imminent, the authority to continue the **engagement** ceases. [25]

The SROE generally contemplate that the on-scene commander will make every effort to contact superiors in the chain of command, report the circumstances as they unfold, and obtain any additional guidance that may pertain. However, the SROE also recognize that there may very well be no opportunity to do so. In any case, the authority and obligation of the on-scene commander to defend his or her unit remains undiminished.

[*255] III. MISSION ACCOMPLISHMENT

The second basic purpose of the SROE is to provide guidance for mission accomplishment. This purpose is distinct from that of **self-defense.** Mission accomplishment is a function of how U.S. forces are to be employed in the execution of their assigned tasks. This includes the what, the when, the where, and the how of the mission. Mission accomplishment guidance under the SROE will take the form of supplemental measures promulgated by appropriate authority. Enclosure B to the SROE sets forth this system of supplemental measures. At the outset, Enclosure B states that such measures define limits or grant authority for mission accomplishment, not **self-defense.** To emphasize this point, the following policy pronouncement is set out in that Enclosure: "Supplemental measures do not limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate action in **self-defense** of the commander's unit and other U.S. forces in the vicinity." [26]

A hypothetical example may be useful to illustrate this precept - that supplemental measures do not bear on **self-defense.** Assume that an operational commander has been tasked to enforce a "no-fly zone" to prevent intrusion into a defined airspace by military aircraft of a particular nation. Assume further that supplementary measures under the SROE have been promulgated providing guidance for the accomplishment of that mission. One such measure provides that intruding aircraft are not to be so engaged without the express authority of the designated area air defense commander. Clearly, an F-16 pilot engaged in that mission will comply with that supplemental measure, e.g., he or she will not engage intruding aircraft absent specific authority from the designated air defense commander to do so. However, let us now assume that our F-16 pilot, while on patrol of the "no-fly zone", encounters an aircraft that he or she determines is demonstrating hostile intent and time does not permit contacting the air defense commander. Is that pilot authorized to engage the threatening aircraft notwithstanding the supplemental measure necessitating authorization from the air defense commander? Of course. The supplemental measure here under consideration, like any and all supplemental measures, has nothing whatsoever to do with **self-defense.** In this instance, the F-16 pilot is authorized (and obliged!) ". . . to use all necessary means available and to take all appropriate action in **self-defense** . . ." [27] If that pilot determines that **engagement** of the intruding aircraft is necessary and appropriate in order to decisively counter the imminent threat that it poses, he or she would be fully justified in doing so.

[*256] It is also important to bear in mind that supplemental measures are designed to facilitate command and control of the force. Any measure listed in Enclosure B of the SROE may be *requested* by any echelon of command. The level of authority necessary to *approve* a particular measure depends upon the nature of the measure under consideration. This approval authority is set out in the SROE. It is also important to understand that if there is no listed supplemental measure that "fits" the contemplated need, the requesting or approving commander is free to draft a measure that does "fit". Indeed, the listings of supplemental measures in Enclosure B contain numerous "spare" numbers just for that purpose.

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IV. LESSONS LEARNED

A primer on rules of **engagement** would not be complete without a brief discussion of the principal "lessons learned" that caused the SROE to evolve as it has. Lessons learned are more often than not the product of something that has gone wrong -- often tragically wrong. A comprehensive assessment of ROE lessons learned over the past two decades is obviously beyond the scope of this paper. However, the following examples should prove insightful;

A. ROE are Dynamic

To be effective, ROE must reflect operational reality. As the mission evolves, as it inevitably will, so too must the ROE. This is particularly true with respect to the threat, which is a function of both capabilities and intentions - ours as well as that of potential adversaries. ROE that are adequately "robust" in one setting may be decidedly less so in another.

B. ROE Are Not Written in Stone

It is important to appreciate the difference between the Ten Commandments, which are depicted as chiseled in stone for all eternity, and ROE. By their very nature, ROE are designed to be questioned, and when necessary, changed. Indeed, commanders at every echelon of command have the obligation to always question the ROE provided to them. If the authority provided is considered to be inadequate, excessive or unclear, that concern must be voiced. The system of the SROE is designed with that purpose in mind.

C. Mind-set

How ROE are actually implemented by the operational commander on the scene may very well be a function of the "mind-set" of that particular individual. In the compressed time equation of a hostile act or demonstration **[*257]** of hostile intent encounter, when a potentially fateful decision may have to be taken on literally a moment's notice, the mind-set that the commander awoke with that morning may be decisive. If that mind-set is one of safety over security, of "try not to hurt anyone", that commander's response may be quite different than that of the commander with a mind-set of "don't take the first hit." The point here is that there is more to this business of ROE than promulgating written guidance. It is also important to understand how that guidance is being inculcated in the thought processes of the commander - the mind-set.

D. Common Understanding

All too often ROE take on one meaning at one echelon of command and quite another at a higher or lower echelon. It was with this problem in mind during the Iran-Iraq "Tanker **War"** in the Persian Gulf (1987-88) that the Chairman of the Joint Chiefs of Staff met privately with the Commander, Middle East Command to discuss application of the applicable ROE in a variety of possible settings. Their purpose of course, was to ensure that the Chairman and the onscene commander had a common understanding of the ROE.

E. Tailored to the User

The document described in this article, the SROE provides the policies and procedures that govern all U.S. forces commanders - from CINC's to sergeants. Necessarily, the SROE are broad based, detailed and, in a word, complex. Consequently, the guidance of the SROE must be tailored to the circumstance of its application. This may take the form of supplemental ROE for specific operations or missions. It may also take the form of basic rules reproduced on plasticised cards pinned to the flak-jacket of individual troopers or inserted into the combat mission folder (CMF) of aircrew members. Whatever the mechanism, the need to tailor the SROE to the user's requirements cannot be overstated.

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V. CONCLUSION

This "primer" on the SROE is just that -- a primer. It is a place to begin what, for the operational lawyer, must become a career-long pursuit. There are no "ultimate experts" in the business of rules of **engagement.** The subject is far too important to be taken lightly and far too complex to be studied cavalierly. Premised upon national policy, international and domestic law, and operational **necessity,** the SROE ensure that U.S. military forces are at all times responsive to the direction of the constitutionally established civilian leadership of our **[*258]** nation. The SROE implement the inherent right of **self-defense** for those forces and provide to them guidance for the application of force for mission accomplishment across the spectrum of military operations and contingencies. No small accomplishment.

FOOTNOTES:

n1 Chairman Joint Chiefs of Staff Instruction 3121.02, Standing Rules of **Engagement** for United States Forces (1994) [hereinafter CJCSI 3121.02].

n2 The "National Command Authorities", a plural term, is defined as "The President and the Secretary of Defense or their duly deputized alternates or successors. Commonly referred to as NCA." Joint Pub. 1-02, Dictionary of Military and Associated Terms (1994) at 253.

n3 The SROE defines rules of **engagement** as "Directives issued by competent military authority which delineate the circumstances and limitations under which U.S. forces will initiate and/or continue combat **engagement** with other forces encountered." CJCSI 3121.02, *supra* note 1, at A-5. This definition has been specifically held to include terrorist units. *Id.*

n4 CARL VON CLAUSEWITZ, ON **WAR** 87 (Michael Howard & Peter Paret eds., 1984).

n5 U.S. CONST. art. II. Article II, § 1 provides, "The executive Power shall be vested in a President of the United States of America . . . ." *Id.*

n6 *Id.* Article II, § 2, also provides that "the President shall be Commander in Chief of the Army and Navy of the United States." *Id.* Of course, the Congress also has a role under the Constitution in the governance of the armed forces. Article I, § 8 provides, *inter alia*, that:

> The Congress shall have Power to lay and collect Taxes . . . and provide for the common Defense and general Welfare of the United States;
>
> . . . .
> To raise and support Armies . . .;
> To provide and maintain a Navy;
> To make Rules for the Government and Regulation of the land and naval forces . . . .

U.S. Const. art I, § 8.

n7 United States Naval **War** College, Rules of **Engagement** Lecture Materials, Oceans Law and Policy Department (on file with author).

n8 The 1988 Peacetime Rules of **Engagement** for U.S. Forces were promulgated to the Unified and Specified Combatant Commanders and Commander U.S. Element, NORAD, by Memorandum of the Secretary of the Joint Staff, Oct. 28, 1988. Paragraph 1 of the memorandum stated: "The Secretary of Defense has approved the attached 'Peacetime Rules of **Engagement** for U.S. Forces,' which is forwarded for your compliance." The 1988 rules

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ARTICLE: OPERATIONAL LAW -- A CONCEPT MATURES

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SUMMARY:
... This article describes the context of contemporary military operations and suggests an operational focus for the Army Judge Advocate General's Corps. ... From running the "weapons for cash" turn-in program in Grenada to investigating **war** crimes in Kuwait, from trying courts-martial in Saudi Arabia to advising detainee interrogators in Haiti, from participating in targeting cells in Somalia to sitting on joint military commissions in Bosnia, judge advocates constantly expand the scope of the practice of operational law. ... Beyond the content of the mission statement, ascertaining the proper scope of a mission is at times complicated by the inherent vagaries of the term "MOOTW." ... In Haiti, in a heavily publicized incident occurring two days into the operation, the United States military was criticized for not intervening to prevent the beating death of a civilian coconut vendor. ... Law of armed conflict training at the soldier-level should center on performanceoriented training on the "Soldier's Rules," nine minimum principles which every soldier must know and obey. ... Perhaps the most accurate forecast of the future of operational law -- and thus of the Corps -- was provided not by a judge advocate, but by a commander:

...

Commanders should be counseled chiefly by persons of known talent; by those who have

legal, document.

A recommended approach to the ROE staff process is to form a ROE working group. (The group could be termed an "ROE Board" or exist as part of, or adjunct to, an extant targeting board.) The G3, G2 (Intelligence), and SJA (or their representatives) constitute the group. The G3 brings knowledge of the mission, operations details, and Commander's Intent; the G2 contributes information concerning the threat (intent, capabilities, and systems); and the SJA adds insight concerning language and meaning, enforceability, and the law of armed conflict. Collectively, the group considers the ROE in the context of the mission statement and the Commander's Intent, both from their own and higher headquarters. The working group is not a committee. Their conclusions and proposals are briefed to, and approved by, the commander (ROE are the commander's rules for the use of force).

If time permits, proposed ROE are distributed for comment to subordinate commanders (brigade and battalion, for example) and senior noncommissioned officers. Recognition of reality is as significant in drafting ROE as situation awareness is in implementing them. A 10th Mountain Division soldier's comment suggests the complex dynamic associated with ROE: "The ROE vignettes are a lot like football plays. We practice the vignettes, but in the real game, they let the fans on the field." [90]

Just as the JCS SROE is guidance from the NCA to the CINCs, ROE in contingency operations are primarily guidance from the CINCs to subordinate commanders. These ROE are typically tailored to the particular mission and scenario and may reflect control measures (for example, no incendiaries, no riot control agents **[*55]** (RCA), [91] nor unobserved fires) which result from political or practical considerations. These control measures seldom impact on the firing of small arms by individual soldiers. For most individual soldiers, the term "ROE" is a misnomer. Particularly in MOOTW, and in any scenario without a declared "hostile force," [92] ROE for the individual soldier might be more appropriately termed "RUF" ("rules for the use of force") or "OFOF" ("orders for opening fire"). [93] In such circumstances, the trigger for the use of force is the conduct, not the status, of the threat.

More fundamentally, with the JCS SROE establishing standing policies and rules concerning the right and obligation of unit **self-defense,** commanders and judge advocates should consider what standing principles they have given their soldiers which enable them to exercise the right and obligation of **self-defense.** Simple, memorable "default rules" can serve as the basis both for repetitive generalized training and for additional rules in a specific operation. [94] The standing, or "default," principles can be stated as **[*56]** acronyms for ease of recollection in training and implementation. [95]

Standing rules, by whatever name, may be supplemented or modified in -- and often during -- an actual operation. Soldiers must be alert and responsive to, and trained to anticipate, changes in ROE. Changes in the *application* of the ROE may occur because of changes in mission or threat. In Somalia, for example, the overall ROE remained fairly constant throughout the operation. What changed, predominately due to changes in the threat to United States forces, was the way in which the ROE were applied to, for example, Somali Technicals, light trucks carrying crew-served weapons. In the early stages of the operation, Technicals were permissible targets only if they posed a threat to United States forces by demonstrating hostile intent or committing a hostile act. As the operation progressed, and Technicals repeatedly fired on United States forces, they were simply deemed a threat to United States forces and could be targeted at any time. [96]

Operations in Macedonia [97] and Haiti illustrate the effect of context, threat, and mission on ROE. These operations also high-light the disciplined flexibility required of United States military personnel who must implement ROE in subtle operations. In Macedonia, United States forces operate under Chapter VI of the UN Charter as part of a UN "peacekeeping force" [98] tasked to observe and report Serbian military movements near the Serbian-Macedonian border. In Haiti, United States forces operated under Chapter VII of the UN

Charter as part of a multinational force tasked to restore the Aristide government to power. In Macedonia, the threat to UN forces is low, but fairly certain; in Haiti, the threat was low, but, at least in the early stages of the operation, the threat was uncertain.

[*57] As of the writing of this article, in Macedonia, Serbian soldiers have pointed small arms at United States patrols and, on at least two occasions, detained United States soldiers for a period of hours. [99] United States soldiers have neither fired at Serb forces nor physically resisted detention. By contrast, in Haiti, a United States Marine platoon preemptively fired on a group of Haitian policemen, killing ten of them, after the Haitian officer in charge of the group raised the muzzle of his submachine gun. [100] The acts of both the soldiers in Macedonia and the Marines in Haiti were appropriate based on their respective missions, threats, and contexts.

Rules of **engagement** in MOOTW typically stress two concepts: **self-defense** and restraint, but neither principle is within the exclusive domain of MOOTW. United States forces may use force in **self-defense** in any context; United States forces frequently practice restraint in **war.** What makes the principles so significant in MOOTW is the means by which they are regulated. For example, the use of warning shots, a practice conceived with good intentions and fraught with practical difficulties, has crept into ROE as a means of tempering **self-defense** with restraint. The proper use of warning shots requires rigorous training; in most cases, warning shots may create, not prevent, incidents suggesting lack of discipline. [101]

Conversely, ROE in MOOTW should address the use of force to defend military property, and the circumstances under which force may be used to defend civilians. In addressing these and other appropriate issues, judge advocates and commanders must guard against the temptation to cram ROE with guidance, procedures, or admonitions unrelated to the use of force. Rules of **engagement** and ROE extracts are diluted when they contain restatements of the law of armed conflict, reporting requirements, or weapons safety instructions.

D. Prisoners and Detainees

Operation Desert Storm presented a relatively uncomplicated context within which to address prisoner of **war** issues. [102] The **war** was unquestionably an international armed conflict, and southern **[*58]** Iraq was a territory under partial occupation, within the meaning of Article 2 of the Geneva Convention Relative to the Treatment of Prisoners of **War** of 12 August 1949 [103] (GPW). Persons who met the criteria of Article 4 of the GPW (members of the Iraqi Army, for example) were accordingly "the right kind of people in the right kind of place" and entitled to the status of prisoners of **war** as a matter of law.

Military operations other than **war** frequently present scenarios in which United States forces encounter persons who do not qualify for legal status as prisoners of **war.** In Panama, Somalia, and Haiti, for example, persons captured after having committed hostile acts against United States forces were not entitled to legal status as prisoners of **war.** None of the persons were in an international armed conflict or in occupied territory. [104] In Somalia, for example, United States forces were confronted by armed civilians who fought with impunity as unlawful combatants. The challenge in such operations is to ensure that soldiers act with discipline and humanity and that they act in accordance with the rules on which they have been trained.

In this regard, the humanitarian provisions of the GPW are of particular value in nuanced operations. They establish a baseline or foundation of understood rules of humanity. They provide a common point of reference and minimum standards of humanitarian treatment from which particular problems may be resolved either by application or analogy.

In Panama, Somalia, and Haiti, captured persons -- termed "detainees" -- were treated as prisoners of **war** during their capture and initial period of detention. [105] Although not qualifying for prisoner of **war** status, detainees were treated with dignity and humanity.

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Detainees in Panama, most of whom met the criteria for members of the regular armed force under Article 4 of the GPW, were treated as prisoners of **war** throughout their brief period of captivity. [106] **[*59]** In Somalia and Haiti, detainees were treated in accordance with the humanitarian, but not administrative or technical, standards of the GPW.

In both Somalia and Haiti, United States forces detained persons who fell within two deliberately narrow categories: those who posed a threat to the force and those who had committed a serious criminal act. Judge advocates prepared the list of humanitarian standards for detainees by using the humanitarian provisions of the GPW, among other authorities, [107] as a general foundation. They then tailored additional standards to the nuances of each operation.

In Somalia, for example, detainees were originally held in anticipation of release to the custody of an emerging Somali government. As the political situation in Somalia failed to improve, detainees were held not only for a longer time than anticipated, but toward an uncertain disposition. The United States refrained from trying any of the detainees (many of whom were unlawful combatants or common criminals) by military commission or general court-martial as it could have under Articles 18 and 21 of the UCMJ and under the law of armed conflict. [108] Some of the detainees, held for less serious infractions, were simply released over time. More serious offenders were transferred to the custody of the UN. [109]

Although human rights groups generally found the conditions of detention to be acceptable, the uncertain circumstances and duration of the detention provoked some criticism. Some detainees objected to being held without arraignment or trial. Some claimed that they did not know why they were being held or that they were mistreated in the course of interrogation. Several detainees expressed concern that they were afforded no forum in which to communicate with military authorities and "tell their side of the story" concerning the incident occasioning their detention. [110]

[*60] In Haiti, judge advocates helped develop an innovative approach to address the criticisms and concerns which had arisen in Somalia. [111] A judge advocate was assigned to the Joint Interrogation Center and to the Joint Detention Center. Military Intelligence interrogators questioning the detainees were instructed to use the same rules, and restrict themselves to the same interrogation techniques, as would apply to prisoners of **war.** Detainees were allowed visitation hours four days per week. Visitors could include family members, physicians, or attorneys. The Detention Center Commander provided a daily list of detainees to the ICRC. [112]

Each detainee was visited by a "detainee judge advocate" within seventy-two hours of his detention. [113] Through an interpreter, the detainee judge advocate explained to the detainee the basis for his detention and afforded the detainee the opportunity to communicate, through the detainee judge advocate, to the general officer commanding the multinational force. The communication of the detainee, which generally requested immediate release, was reduced to writing, then forwarded through the SJA to the commanding general. The SJA, and the force's J-2 (intelligence section) and provost marshal, would collectively review detainees' requests for release.

Almost all of the detainees in Haiti requested release through this procedure; about one-fourth of them were released by order of the commanding general. Most were released within two weeks of their detention after investigation established that they were not a threat to the multinational force. The remaining detainees, most of whom had been detained for commission of serious criminal acts, were transferred to the custody of the Haitian government. [114]

The utility of the GPW in establishing minimum treatment standards for detainees is exemplified by the provisions of the Convention on the Safety of United Nations and Associated Personnel. [115] Applying by its terms only in those operations which **[*61]** the

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GPW does not apply as a matter of law, the Convention requires that captors treat captured or detained UN and associated personnel in accordance with "the principles and spirit of the Geneva Conventions of 1949." This approach -- demanding treatment, but not status, in accordance with the GPW -- was used by the United States in its communications with Mohammed Aideed concerning Chief Warrant Officer Two Michael Durant, the Army helicopter pilot detained in Somalia in October 1993. [116]

E. Indigenous Civilians

Humanitarian protections afforded to civilians cannot only affect, but define, the conduct of military operations. In both Grenada and Panama, the safety of United States civilians present in those nations was an articulated basis for United States intervention under Article 51 of the UN Charter. The suffering of indigenous civilians was at the very heart of military operations in Somalia and Rwanda. In Haiti, the poor human rights record of the de facto government of General Cedras was cited as moral, if not legal, persuasion for United States intervention.

The problem for commanders and judge advocates in such operations is how to translate lofty humanitarian goals into practical action. When given mission statements which include such general directives as "restore order" or "create a stable environment," how should judge advocates assist commanders discharge their humanitarian obligations toward civilians? What minimum humanitarian rules apply to civilians? [117]

In occupied territory, the entire range of protections, responsibilities, and rights enumerated in the Geneva Convention for the Protection of Civilians in Time of **War** [118] (GC) apply to civilians who are "protected persons" within the scope of the Convention. "Occupation," a term of legal precision and significance, is a question of fact. [119] Occupation may be partial or total and follows hostile **[*62]** invasion, whether resisted or unresisted. An example of partial occupation was the United States occupation of southern Iraq after the Gulf **War;** an example of total occupation was Iraq's occupation of Kuwait after the 1990 invasion.

Most recent military operations were not conducted in occupied territory. The United States was not an occupier in Grenada, Panama, or Rwanda because it was present at the invitation or acquiescence of the governments of those countries. The United States was not an occupier in Somalia because there was no hostile invasion nor was there a supplantation of governmental authority within former *enemy* territory. Similarly, in Haiti, the United States was not an occupier because there was no hostile invasion; however, this point is much less clear in Haiti than in Somalia. United States forces were present in Haiti at the invitation of the de jure Aristide government, at the acquiescence of the de facto Cedras government, and at the behest of the UN (through Security Council Resolution 940).

Nevertheless, the duress attendant to the acquiescence of the Cedras government -- and the substitution of United States military authority for the authority of the Cedras government -- allow a reasoned argument that United States forces occupied Haiti subsequent to an unresisted invasion. Much like the initial debate over whether the United States was an occupier in southern Iraq, the debate over the legal context of United States forces' presence in Haiti is practically superfluous. The United States routinely assumes the minimum humanitarian responsibilities of an occupier as a matter of policy in the areas under the control of United States Armed Forces. Since World **War** II, however, the United States has not issued an occupation proclamation or otherwise exercised the rights of an occupier.

In territory which is not occupied, but in which United States forces are present as participants in an international armed conflict, the general human rights protections of the GC apply to civilians. In combat, the goal of United States forces is to minimize civilian casualties and minimize civilian interference with military operations. Insofar as practicable, United States forces should observe the humanitarian principles of the law of occupation on the battlefield and in the areas transited by United States troops.

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In unoccupied territory where United States forces are not present as participants in an international armed conflict, the GC applies only as a matter of policy. It serves mainly as a point of reference and a basis for analogy. For example, in Somalia, United States forces protected civilians from serious criminal acts of other civilians only to the extent that they were in areas under United **[*63]** States forces' control. A similar approach was utilized in Haiti with the ROE allowing United States forces to detain and using deadly force, if necessary, "persons observed committing serious criminal acts." [120]

The locational limitations present in both Somalia (areas under United States control) and Haiti (criminal acts under observation) were deliberate and designed to restrict the law enforcement activities of United States forces to those mandated by the limited mission statement in each operation. On at least one occasion in Somalia, United States forces properly refused to send soldiers to detain a Somali civilian alleged to have murdered a relief worker. The murder occurred, and the accused Somali civilian resided, outside the area of United States forces' control. [121] The United States military was not the national police force for Somalia.

In Haiti, in a heavily publicized incident occurring two days into the operation, the United States military was criticized for not intervening to prevent the beating death of a civilian coconut vendor. The civilian was beaten with clubs wielded by Haitian police in view of United States soldiers. [122] Despite initial press reports to the contrary, the extant ROE would have allowed the soldiers to stop the beating and detain the attackers. [123] However, United States forces were not legally obligated to act. At the time of the incident, United States forces were consolidating their positions and testing the terms of the Carter-Cedras "power sharing" agreement. They were rightfully concerned about their primary mission at the time: protecting the force. The United States military was not a guarantor for the safety of all civilians in Haiti.

F. Discipline

Discipline is a fundamental aspect of Army operations. [124] In contemporary military operations, where restraint and legitimacy are often important to mission success, and where misconduct can have immediate world-wide impact, disciplined conduct is essential. Discipline is a central component of military effectiveness: **[*64]** "Untrained and undisciplined troops take heavy casualties; trained and disciplined ones inflict them." [125]

Disciplined operations are not premised on fear of prosecution under the UCMJ. Adherence to the rule of law is instilled by training and based on our national and military values:

> A nation state that disregards the human rights of individuals makes warfare unnecessarily harsh, increases the resolve of its enemy, and changes the nature of the conflict. How the Army fights is a mark of what it is and what it stands for. Laws of **war** are only effective in reducing casualties and enhancing fair treatment of combatants and noncombatants alike so long as trained leaders ensure that those laws are obeyed. The commander ensures the proper treatment of prisoners, noncombatants, and civilians by building good training programs that reinforce the practice of respecting those laws. [126]

Former Chief of Staff of the Army, General Gordon Sullivan, once told the following story: On the first day of the Haiti operation, a young soldier from the Army's 10th Mountain Division disembarked from a Blackhawk helicopter and took up a prone firing position -- right in front of a network camera crew. A reporter walked over to the soldier, and asked him why he had

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taken up a defensive firing position when the only apparent threat was from the horde of overzealous reporters. The young soldier responded quickly and surely, "Because that is what I was trained to do." [127]

Judge advocates can assist in the development of good training programs. [128] They can help make units more capable and versatile. Wherever possible, trainers should combine tactical, law of armed conflict, and ROE training. Training should be realistic, evaluated, and tied to the unit's mission-essential task list. [129] Law of armed conflict training at the soldier-level should center on performanceoriented training on the "Soldier's Rules," nine minimum principles **[*65]** which every soldier must know and obey. [130] Leader-level training may be more advanced, involving discussions and problem-solving exercises. Particularly when preparing for actual operational application, classes on ROE and on the law of armed conflict should be standardized throughout the unit. [131]

When breaches of discipline occur, commanders and judge advocates must process military justice actions fairly and efficiently in accordance with law and regulation. Military justice is the codal mission of the JAGC [132] and it must be accomplished flawlessly. In operations, this includes making arrangements for defense counsel and military judge support and correctly establishing courts-martial convening authorities in the field and at the home station. The Army must retain its capability to enforce discipline in the field, whether in a combat or noncombat environment. The enforcement of discipline includes trying courts-martial in combat zones. [133] All judge advocates must know how to try courts-martial; as the number of cases diminishes, the importance of correctly handling cases, both from the prosecutorial and defense perspective, increases.

[*66] Judge advocates must have a clear understanding of how to create provisional units and transfer jurisdiction; how to establish courts-martial convening authorities; [134] and how to administer "joint justice" in a Joint Task Force (JTF). [135] Although the legal authority already exists, [136] and joint doctrine and implementing regulations are maturing, [137] practical experience in "joint justice" is limited. The growing role of the joint force commander [138] will reduce the role of the component commander. As a result, the impact of component regulations and policies will diminish, and divergence among the regulations and policies will become increasingly vestigial. Absent compelling reason to the contrary, joint force commanders should have clear disciplinary authority over their subordinates. Their judge advocates must push to make it happen.

As the military draws down and increasingly relies on civilian employees and contractors to perform operational and tactical logistical functions, judge advocates will face questions concerning discipline of, and jurisdiction over, civilians accompanying the force in the field. [139] While sporadic effort has been made to expand courtsmartial jurisdiction to include civilians accompanying the force in **[*67]** circumstances short of **war,** [140] no civilian is subject to the UCMJ unless either serving with or accompanying the force in a declared **war** or accused of a **war** crime. [141]

Nevertheless, current United States policy allows the arming of civilians for personal defense; authorizes the training of civilians in the law of armed conflict, UCMJ, and use of weapons and equipment; permits the provision of weapons, protective equipment, and uniforms; and requires the issuance of Geneva Convention identification cards. [142] If captured by the enemy in a conflict to which the GPW applies, civilians accompanying the force in the field shall be accorded status as prisoners of **war.** [143] Arming civilians raises three of the many potential questions associated with the current law and policy pertaining to civilians accompanying the force. One is whether civilian employees and contractors are sufficiently trained to safely and effectively handle weapons. The second is whether persons over whom there is no real disciplinary authority should be armed. Finally, while there is little doubt that civilians accompanying the force are lawful targets for the enemy, [144] what precisely are the limitations on their use of force and how does this affect their status under the law of armed conflict? [145]

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[*68] Since Operation Desert Storm, a punitive order regulating conduct, often referred to as "General Order Number 1," has become common in operations. [146] Very much like ROE, a General Order Number 1 addresses the commander's concerns and lays out the commander's rules. Like ROE, the order should be tailored to each operation. Absolute prohibitions on **war** trophies [147] and alcohol, while appropriate in most operations, may be unduly restrictive in other scenarios. [148] As always, the commander must strike the balance among morale and discipline and reality and risk. [149]

In combat, a similar balance must be struck between control and latitude, and safety and audacity. Accidents, including fratricide, within the force are unfortunate consequences of operations. While they are not individually inevitable, they are collectively **[*69]** foreseeable. [150] Mishaps will occur. While accidents should not compromise a mission or halt an operation, they require investigation for myriad reasons, the most important is to ascertain facts to prevent their recurrence. [151] Judge advocates must stand ready to participate in administrative investigations, commander's inquiries, and related activities, including summary courts, line of duty investigations, and casualty notification and survivor assistance duty. Judge advocates must anticipate untoward events and subsequent scrutiny. In more serious cases, or to ease the burden on other officers, judge advocates will serve as investigating officers. In most cases, judge advocates will advise investigating officers and the command. In either event, the command legal section, including its legal noncommissioned officers, has a vital role in completing an accurate, thorough, and legally sufficient report of investigation.

VI. The Future

The challenges of the future are many -- the world is becoming a more dangerous place. [152] Despite good intentions, [153] **war** will not disappear; it will just become more confusing. The nature of future conflicts will involve competitions of diverse technologies as well as clashes of diverse interests: unregulated weapons of mass destruction versus strictly controlled precision munitions, sticks and clubs versus directed energy weapons, and blunt force versus information warfare.

Not all challenges are external. Changes in force size, structure, and systems afford both opportunity and risk. [154] Nevertheless, change, like the Army's journey into the Twenty-First Century, is inevitable. [155]

[*70] As the Army marches toward Force XXI, the operational law role of the judge advocate becomes even more critical. Smaller, more lethal forces require capable staff officers who are able to process and exploit information. [156] Judge advocates can serve as multifunctional staff officers. They possess the education and experience, judgment and maturity, and mental acuity and flexibility to cope with the complexities and pace of tomorrow's operations. Their greatest asset is the mind, [157] and they require extraordinarily little equipment or support to be fully operational. [158] Judge advocates are force multipliers, particularly within smaller deployed headquarters elements.

The Judge Advocate General's Corps of the future will be:

* joint and interagency compatible;

* multifunctional;

* integrated in doctrine;

* a success multiplier; and

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* a nonlethal element of military power.

The Corps will be joint and interagency compatible, with judge advocates and legal noncommissioned officers trained and ready to deploy in any command or operational environment. Deployed legal elements will likely be joint, built on or with existing headquarters, **[*71]** and staffed with modules of judge advocates and legal noncommissioned officers. [159] Joint commands in general, and the unified commands in particular, will continue to gain in importance -- and so will their legal advisors. [160] The Corps must develop judge advocates for increasingly key joint assignments. [161] Reserve Component judge advocates and the Corps' civilian attorneys, with their critical legal skills and interagency experience, are an integral part of the Corps of the future.

Judge advocates will increasingly serve as multifunctional staff officers, particularly in civil-military and postconflict operations. Judge advocates have a traditional role in civil affairs. [162] Tomorrow's Army should strongly consider giving the Judge Advocate General's Corps staff responsibility for the civil affairs/civil-military operations mission. [163]

The role of the judge advocate will be increasingly integrated into Army and joint doctrine. The revitalization of the Center for **[*72]** Law and Military Operations, [164] which has involved judge advocates more fully in the Army's Combat Training Centers, [165] is a major investment by the Corps in the Army of the future. Not only must the Corps continue to refine its doctrine, it must ensure that developing Army and joint doctrine reflects the role of the judge advocate. [166] Judge advocates are key players in operations; their continued presence in deployed units must be enshrined in doctrine, not dependent on the force of personality.

Judge advocates will continue to act as success multipliers. Proactive operational law advice and legal support and services in the field will facilitate mission accomplishment by unburdening commanders, reducing distractions, enforcing discipline, and promoting effectiveness. Prompt and astute advice, and effective training contributions, can set the conditions for future success. Planning and executing the conflict termination [167] and postconflict phases of future operations will increasingly involve judge advocates; they will become key advisors in mission analyses, particularly in helping define success criteria and end states. Judge advocates will assist commanders in executing disciplined operations in compliance with an evolving law of armed conflict, and provide more sophisticated advice in the areas of intelligence law, special operations, and information warfare. They will continue to assist all soldiers and families through legal assistance and family support activities.

The Corps of the future, even more than today, will be a nonlethal element of military power. Its judge advocates are instruments of both **engagement** and disengagement [168] and merit an expanding **[*73]** role in international military education and training. They will have a central role in stability and support operations and in building or rehabilitating systems of governance. [169] They will likely become increasingly involved in international criminal tribunals such as those established by the UN for the Former Yugoslavia and Rwanda, and in international conferences and conventions on the evolving law of armed conflict in a changing world. By their very existence, judge advocates represent the rule of law, and their continued presence in the field demonstrates the commitment of the nation -- and the Army -- to discipline and humanity in battle.

VII. Conclusion

The great challenges of the future are important opportunities for the Army Judge Advocate General's Corps. Its officers are members of two great professions and, as soldier-lawyers, they have unbridled potential for future service to the nation. They are, like the commanders and soldiers they serve, the best in the business. As operational law matures, it will increasingly define and expand the role of the Corps. Perhaps the most accurate forecast of the future of operational law -- and thus of the Corps -- was provided not by a judge

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advocate, but by a commander:

> Operational law is going to become as significant to the commander as maneuver, as fire support, and as logistics. It will be a principal battlefield activity. The senior SJAs may be as close to the commander as his operations officer or his chief of staff . . . . Operational law and international law are the future. We need an SJA who is a man or a woman for all seasons. SJAs will find themselves more and more part of the operational aspects of the business. They will be the right hand of the commander, and he will come to them for advice. [170]

FOOTNOTES:

n1 Whether this is really a new phenomenon is debatable. The United States military has long conducted wide-ranging operations at home and abroad. Consider, for example, Operation Bluebat, the 1958 United States intervention in Lebanon (*see* ROGER J. SPILLER, COMBAT STUDIES INSTITUTE, LEAVENWORTH PAPER NO. 3, NOT **WAR** BUT LIKE **WAR:** THE AMERICAN INTERVENTION IN LEBANON (1981)) or Operation Power Pack, the 1965 intervention in the Dominican Republic (*see* LAWRENCE A. YATES, COMBAT STUDIES INSTITUTE, LEAVENWORTH PAPER NO. 15, POWER PACK: UNITED STATES INTERVENTION IN THE DOMINICAN REPUBLIC, 1965-1966 (1988)). What is novel, and the result of the end of the Cold **War,** is the recent United States participation in repetitive overseas operations authorized or directed by the United Nations (UN).

n2 10 U.S.C. § 3062 (1988). *See* DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS iv (14 June 1993) [hereinafter FM 100-5, OPERATIONS]; DEP'T OF ARMY WHITE PAPER, DECISIVE VICTORY -- AMERICA'S POWER PROJECTION ARMY 2 (Oct. 1994).

n3 General Maxwell R. Thurman frequently said, "All military operations are political-military operations."

n4 *See, e.g.*, General Gordon R. Sullivan & Lieutenant Colonel Andrew B. Twomey, *The Challenges of Peace*, PARAMETERS, Autumn 1994, at 4 (discussing "nuanced operations").

n5 "MOOTW encompass the use of military capabilities across the range of military operations short of **war.**" *See* JOINT CHIEFS OF STAFF PUBLICATION 3-07, JOINT DOCTRINE FOR MILITARY OPERATIONS OTHER THAN **WAR** (16 June 1995) [hereinafter JOINT PUB 3-07, MOOTW]; JOINT CHIEFS OF STAFF PUBLICATION 3-0, DOCTRINE FOR JOINT OPERATIONS (9 Sept. 1993); FM 100-5, OPERATIONS, *supra* note 2, ch. 13.

n6 The operational diversity within MOOTW has caused the Army to revisit the issue of whether there should be any overarching reference to operations other than **war** (OOTW). *See* Message, Headquarters, US Army Training and Doctrine Command, DTG 272016Z Oct 95, subject: Commander TRADOC's Philosophy on the Term "Operations Other Than **War"** (OOTW). What to call OOTW is a tempest in a teapot -- the military has always been involved in operations other than **war.** Suggestions on the successor to the term "OOTW" range from "small **wars"** to "operations short of **war,**" and from "low intensity conflict" to, facetiously, "operations formerly known as operations other than **war"** to "stability and support operations." *See, e.g.*, Dep't of Army, Field Manual 100-20, Stability and Support Operations (1996) (Final Draft). A new *FM 100-5, Operations*, which must confront the issue, will likely not be published until 1997 or 1998. For analyses of the doctrinal and practical issues associated with overarching terminology, see Colonel Ann E. Story & Major Aryea Gottlieb, *Beyond the Range of Military Operations*, JOINT TASK FORCE QUARTERLY, Autumn 1995, at 99; Robert J. Bunker, *Rethinking OOTW*, MIL. REV., Nov.-Dec. 1995, at 34.

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n7 However, *JOINT PUB 3-07, MOOTW*, identifies "areas requiring legal expertise." These include refugees, displaced and detained civilians, fiscal law, rules of **engagement** (ROE), psychological operations, civil affairs, medical support, local culture and government, international law and agreements, military and political liaison, claims, and contingency contracting. JOINT PUB 3-07, MOOTW, *supra* note 5, fig. IV-2.

n8 Lawyers advise and commanders command. Nevertheless, as Sir Francis Bacon wrote: "The greatest trust between man and man is the trust of giving counsel" (*quoted in* GREGG HERKEN, COUNSELS OF **WAR** (1985)).

n9 Lieutenant Colonel David E. Graham, *Operational Law (OPLAW) -- A Concept Comes of Age*, ARMY LAW., Jul. 1987, at 9.

n10 *Id.*

n11 DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL OPERATIONS 5, 6 (Sept. 1991) [hereinafter FM 27-100, LEGAL OPERATIONS]. The term "legal operations" is a confusing misnomer. A more accurate title for the manual is "*Operational Law*."

n12 THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, JA 422, OPERATIONAL LAW HANDBOOK 1-1 (1996) [hereinafter OPERATIONAL LAW HANDBOOK]. The *Operational Law Handbook* is published each June and is available on the JAGC Electronic Bulletin Board Service and on the Joint Electronics Library (JEL) CDROM on Peace Operations (Joint Warfighting Center, Fort Monroe, Virginia, Dec. 1995).

n13 Judge advocates were involved in military operations long before Grenada. *See, e.g.*, DEP'T OF ARMY, THE ARMY LAWYER: A HISTORY OF THE JAGC, 1775-1975 (1975); MAJOR GENERAL GEORGE S. PRUGH, DEP'T OF ARMY, VIETNAM STUDIES, LAW AT **WAR:** VIETNAM 1964-1973 (1975) [hereinafter PRUGH, LAW AT **WAR]**; Colonel Ted B. Borek, *Legal Services During **War***, 120 MIL. L. REV. 19 (1988).

n14 Major Peter Zolper & Captain Mike Isaaco, *The Joint Military Commission -- A Potential Decisive Point*, CENTER FOR ARMY LESSONS LEARNED (CALL) NEWSLETTER, Jan.-Feb. 1996, at 8. Joint military commissions are specified under Article VIII of Annex 1A, Military Aspects of the Peace Settlement, of the Agreement on General Framework Agreement for Peace in Bosnia and Herzegovina (Implementing the Dayton Peace Accords), 15 December 1995, Republic of Bosnia and Herzegovina, Republic of Croatia, Federal Republic of Yugoslavia [hereinafter the Dayton Agreement], *printed in* THE JUDGE ADVOCATE GENERAL'S SCHOOL, MATERIALS ON OPERATIONAL LAW 107, 116 (1996) [hereinafter MATERIALS ON OPERATIONAL LAW].

n15 *Cf.* Major Richard W. Thelin, *Specialization: The Time is Now for Judge Advocates*, MARINE CORPS GAZETTE, Feb. 1996, at 29.

n16 If every judge advocate is an operational lawyer, what is the role of the Chief, Operational Law, at corps and divisions? The chief, operational law, is the link between the Staff Judge Advocate (SJA) and other staff elements, primarily operations and intelligence, involved in the planning and execution of operations. The SJA is always the chief operational lawyer. The chief, operational law, is the SJA's representative. In the field, the chief, operational law, is collocated with the G3 operations section, typically in the plans element. In garrison, the chief, operational law, frequently works in the G3 section several days per week. Properly discharged, the duties of the chief, operational law, constitute more than a full-time job.

n17 Military schooling, staff rides, officer professional development sessions, and professional reading programs are key components of training. For military reading program

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*made the art of **war** their particular study, and whose knowledge is derived from experience; from those who are present at the scene of action, who see the country, who see the enemy; who see the advantages that occasions offer, and who, like people embarked on the same ship, are sharers of the danger. If, therefore, anyone thinks himself qualified to give advice respecting the **war** which I am to conduct, which may prove advantageous to the public, let him not refuse his assistance to the state, but let him come with me into Macedonia. He shall be furnished with a ship, a horse, a tent; even his traveling charge shall be defrayed. But if he thinks this is too much trouble, and prefers the repose of the city life to the toils of **war,** let him not, on land, assume the office of a pilot. The city, in itself, furnishes abundance of topics for conversation; let it confine its passion for talking within its own precincts, and rest assured that we shall pay no attention to any councils but such as shall be framed within our camp.*

-- Lucius Paulus

Roman Consul

We are soldiers who happen to be lawyers.

-- Major General Michael J. Nardotti

The Judge Advocate General, U.S. Army

TEXT:

[*34] I. Introduction

This article describes the context of contemporary military operations and suggests an operational focus for the Army Judge Advocate General's Corps. It endorses a broad definition of the maturing concept of operational law and examines selected legal issues in recent operations. Finally, it posits a vision for the Army Judge Advocate General's Corps of the future -- a Corps based on operational law.

II. The Operational Context

The United States military routinely conducts extraordinary missions. [1] While existing fundamentally to fight and win the nation's **wars,** [2] the United States military's recent utility has been in diverse political-military operations, [3] which blur the distinction between combat and noncombat and between **war** and peace. [4] From Somalia to Macedonia, Northern Iraq to Haiti, and Bosnia to Liberia, these operations present issues of enormous political, military, and legal complexity. For better or for worse, the United States military is inexorably involved in what the United States military community jointly calls "military operations other than **war,**" or MOOTW, a term first coined by the Army that made its official Department of Defense appearance in 1993 in *Joint Chiefs of Staff* **[*35]** *Publication 3-0, Doctrine for Joint Operations*. [5] While doctrine and doctrinal terms for joint operations are in flux, changing in response to threats, technology, and objectives, throughout this article I use the current official Department of Defense term MOOTW to collectively describe the many and complex United States *joint* military efforts short of **war.**

Military operations other than **war** present numerous and diverse legal issues. Just as types of missions vary widely within MOOTW, so do the legal issues which pertain to them. [6] There is no "law of MOOTW." [7] There are, however, numerous laws and policies that impact -- and frequently define -- MOOTW.

As the Army faces new and sophisticated challenges, its leadership requires advisors who focus on concomitant political, military, and legal issues. To face these challenges, the Army

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suggestions, *see* COMBAT STUDIES INSTITUTE, BOOKS FOR THE MILITARY PROFESSIONAL (1995).

n18 *See* Colonel James W. Swanson & Colonel Charles J. Dunlap, Jr., *Staff Judge Advocate for the Joint Task Force: Are You Ready?*, 22:1 REPORTER 1. At a minimum, officers and noncommissioned officers should be aware of the concept of joint staffs and have access to the publications on the Joint Electronic Library (JEL) CD ROMs available from the Joint Warfighting Center, Fort Monroe, Virginia. A good primer on joint staffs is the Department of Defense's 1993 *Armed Forces Staff College Publication 1, The Joint Staff Officer's Guide*.

n19 Judge advocate sections also must establish internal standard operating procedures. Deployment checklists, smart books, job books, continuity books, and published reporting requirements are important; once deployed, a log or other record is essential. Deployment preparation and execution is addressed in the OPERATIONAL LAW HANDBOOK, *supra* note 12, ch. 14.

n20 This attribute suggests flexibility, initiative, agility, and versatility, and is incorporated in Army doctrine. *See* FM 100-5, OPERATIONS, *supra* note 2, at 2-9.

n21 Recognition of contracting and fiscal law issues and solutions is an attribute of the operational lawyer. Recent experience in limited **war** and MOOTW suggests that such issues will arise almost contemporaneously with the commencement of an operation. *See, e.g.*, CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995, LESSONS LEARNED FOR JUDGE ADVOCATES 118 (11 Dec. 1995) [hereinafter HAITI LESSONS]. For a primer on contingency contracting, *see* Major Rafael Lara, Jr., *A Practical Guide to Contingency Contracting*, ARMY LAW., Aug. 1995, at 16; on fiscal law, *see* Contract Law Note, *Funding Issues in Operational Settings*, ARMY LAW., Oct. 1993, at 38.

n22 FM 27-100, LEGAL OPERATIONS, *supra* note 11, at 1; the reference in the manual to "battlefield" can be read as "area of operations." The manual, premised on the Airland Battle Doctrine, predates the doctrinal concept of MOOTW.

n23 Advice on the law of armed conflict is a solemn responsibility of judge advocates, involving issues of law, regulation, policy, discipline, humanity, politics, and treaty obligations on the part of the United States. In no small measure, judge advocates in the field are an affirmation of the nation's intent to follow and enforce the law of armed conflict. Although the United States is not yet a party to Protocol I Additional to the Geneva Conventions of 1949, judge advocates provide a more comprehensive -- and immediate -- resource than contemplated by Article 82 of the Protocol (mandating legal advisors for commanders). See The 1977 Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex 16 I.L.M. 1391, 1125 U.N.T.S. 3 [hereinafter Protocol I]. For an examination of the role of the legal advisor in this context, *see* William H. Parks, *The Law of **War** Adviser*, 31 JAG. J. 1 (1980); Matthew E. Winter, "*Finding the Law" -- The Values, Identity, and Function of the International Law Adviser*, 128 MIL. L. REV. 1 (1990); Lieutenant Colonel Walter G. Sharp, Jr., *The Warfighting Role of the Marine Judge Advocate*, MARINE CORPS GAZETTE, Feb. 1996, at 18.

n24 DEP'T OF ARMY, FIELD MANUAL 71-100, DIVISION OPERATIONS 3-2 to 3-8 (16 JUNE 1993); DEP'T OF ARMY, FIELD MANUAL 71-100, DIVISION OPERATIONS 3-30 (approved final draft, 27 Oct. 1995) [hereinafter FM 71-100, DIVISION OPERATIONS]; DEP'T OF ARMY, FIELD MANUAL 71-100-2, INFANTRY DIVISION OPERATIONS TACTICS, TECHNIQUES, AND PROCEDURES 2-42, 2-61 to 2-84 (31 Aug. 1993) [hereinafter INFANTRY DIVISION TTP]. "Included in the personnel requirements for the G3 operations element is an SJA officer to inform the commander on legal ramifications of operations and COAs [courses of actions]. . . . The SJA element is a critical element in the assault CP [command post] in the early stages of the deployment." *Id.* at 2-83. *See also* OPERATIONAL LAW HANDBOOK, *supra* note 12, ch.

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n25 INFANTRY DIVISION TTP, *supra* note 24, at 6-7.

n26 *See, e.g.*, DEP'T OF ARMY, FIELD MANUAL 100-16, SUPPORT OPERATIONS: ECHELONS ABOVE CORPS 7-11, 7-12 (16 Apr. 1985). "[Judge Advocate General's Corps] officers, legal clerks, and court reporters will be attached to each of the brigade-sized units . . . . All legal services, except legal assistance, are required by statute notwithstanding the type of combat, the intensity of the combat environment, and the time phase of combat. Legal assistance is required by regulation. . . . Legal support, however, must remain organic and dedicated to the command at all times." *Id.*

n27 The presence of judge advocates near the actual fighting provoked comment dating back to the First World **War:**

> It would be well to disabuse the public mind of any superstition to the effect that the applicants under the legal branch of the army are looking for a 'snap' or for a 'silk stocking' position far in the rear of the actual fighting. The officers acting on the staff of The Judge Advocate General will be members of the actual fighting force, and, in the pursuit of duty, will be brought into the danger zone just as often as other specialized commissioned men, medical officers, for instance.

11 AM. J. INT'L L. 651 (1917).

n28 DEP'T OF ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS 2-3 to 2-9, 3-31, 3-32 (25 May 1984). Judge advocates often perform nonlegal duties during operations; *Army Regulation 27-1* cautions only that they should "as much as possible . . . perform only professional legal duties" and should not "perform any nonlegal duties . . . that would interfere with their primary assigned legal duties." DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICE, para. 3-2c (3 Feb. 1995).

n29 The Combined Joint Task Force 180/XVIII Airborne Corps Staff Judge Advocate was Colonel, now Brigadier General, John D. Altenburg. The commander was Lieutenant General, now General, Henry H. Shelton.

n30 The acts of the judge advocate must always remain within the bounds of the law and conform to standards of professional ethics and responsibility. There is no combat or operational exclusion to professional responsibility; unless expressly authorized, the judge advocate's client remains the Army or, in the case of a joint or other executive agency assignment, the organization of assignment, not the commander or the unit. *See* DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) (Rules 1.13 and 1.7, and comments thereto); OPERATIONAL LAW HANDBOOK, *supra* note 12, app. G, "Professional Responsibility."

n31 General Matthew B. Ridgway, *Leadership, reprinted in* MILITARY LEADERSHIP: IN PURSUIT OF EXCELLENCE 43, 51 (Robert L. Taylor & William E. Rosenbach, eds., 2d ed. 1992).

n32 Contemporary operations present numerous legal issues which could be grouped in many ways. One means of grouping legal issues is "FAST J," found in the *Operational Law Handbook, see* OPERATIONAL LAW HANDBOOK, *supra* note 12, ch. 6. Designed as a shorthand method of operation plan and order review addressing major operations legal issues, the acronym stands for "Force" (ROE), "Authority" (to perform missions and tasks), "Status" (of the force and other persons encountered by the force), "Things" (buying,

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breaking, and blowing up), and "Justice."

n33 Interview with General Maxwell R. Thurman at National Defense University Joint Operations Symposium, Washington, D.C. (12 July 1994).

n34 The mission is "the primary task assigned to an individual, unit, or force. It usually contains the elements of who, what, when, where, and the reason therefor, but seldom specifies how." DEP'T OF ARMY, FIELD MANUAL 101-5-1, OPERATIONAL TERMS AND SYMBOLS 1-47 (21 Oct. 1985). *See also* FM 100-5, OPERATIONS, *supra* note 2, at 6-6: "The mission is the commander's expression of what the unit must accomplish and for what purpose."

n35 UNITED STATES MARINE CORPS, SMALL **WARS** MANUAL 9 (1940). The *Small* ***Wars*** *Manual*, now out of official print but available from Sunflower University Press, Manhattan, Kansas, is a must-read for operational lawyers. It is proof of Hamilton's assertion that, "All who have gone before us are not fools." In addition to traditional military topics like tactics and logistics, it discusses psychological warfare, the relationship with the State Department, methods of pacification, recruiting and training native troops and police, detaining and disarming civilians, establishing military government, supervising elections, applying legal principles to situations short of **war,** and withdrawal.

n36 It may be possible to refine a proposed mission statement to give the command the clear capability to accomplish the intended mission. A task specified or implied from a mission statement is both proper for the force to accomplish and a proper, easily justified expenditure of Operation and Maintenance (O&M) Appropriations. Conversely, some latitude in the mission statement is essential to afford the commander operational flexibility. There is no cookie cutter solution; the SJA must participate in the mission analysis, conduct a legal estimate of the situation, and assist the commander as part of a synchronized staff. *See generally* DEP'T OF ARMY, COMMAND AND GENERAL STAFF COLLEGE, STUDENT TEXT 101-5, COMMAND AND STAFF DECISION PROCESSES (20 Feb. 1995).

n37 This is an area in which judge advocates must step forward to protect their command and the Army. "Force protection" is not a subterfuge for actions that should be funded by other means, such as the Economic Support Fund (Foreign Assistance Act §§ 531-535d, 22 U.S.C. §§ 2346-2346d), specifically, or the Foreign Assistance Act programs, generally. A key indicator that O&M funds may be improper for a contemplated project is that the idea for the project arose not in command or operations channels but with the Ambassador or United States Agency for International Development (USAID) director or in the civil-military operations element. Judge advocates also should consider whether the contemplated expenditure is long term or if the result is permanent. If in doubt about the contemplated project, the judge advocate should raise the issue, forward an inquiry, and document the response.

n38 "Mission creep" is a phenomenon where parties, in furtherance of their political agendas, attempt to expand the limits of a commander's mission without approval of the National Command Authority (NCA). *See* DEP'T OF ARMY, FIELD MANUAL 100-23-1, MULTISERVICE PROCEDURES FOR HUMANITARIAN ASSISTANCE OPERATIONS 3-1, 3-2 (31 Oct. 1994) [hereinafter FM 100-23-1, HUMANITARIAN ASSISTANCE].

n39 *See generally* John T. Fishel, *The Murky World of Conflict Termination: Planning and Executing the 1989-90 Restoration of Panama and The Middle East,* ***War's*** *End: A Strategic Concept for Post-Conflict Operations, reprinted in* DEP'T OF ARMY, COMMAND AND GENERAL STAFF COLLEGE, THEATER OPERATIONS (Jan. 1996), suggesting that postconflict operations, including the discharge of legal obligations toward indigenous civilians and rehabilitation of legal and governmental structures, were not integrated into the respective campaign plans for Panama and the Gulf **War.**

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n40 *See supra* notes 6, 7, and related text.

n41 In 1994, Operation Support Hope in Rwanda, for example, was crafted with specific success criteria and measures of effectiveness, a clear end state, purely defensive ROE, and a limited, explicitly stated mission. It was a pristine "humanitarian assistance operation."

n42 The word "dominated" is used deliberately. Operations may involve combat and noncombat activity. Under this model, Somalia was a noncombat operation in that it was "dominated" by noncombat activity and "dominated" by nonlethal elements of power. Nevertheless, combat was certainly an integral part of the United States military experience in Somalia. Similarly, UN and NATO missions in Bosnia are noncombat operations, but combat activity (NATO airstrikes) set the conditions for the Dayton Agreement and subsequent NATO IFOR mission.

n43 These areas include, for example, the law of armed conflict and the Uniform Code of Military Justice (UCMJ), various implementing directives and regulations, and FM 27-100, LEGAL OPERATIONS, *supra* note 11.

n44 Weapons confiscation, control, and buyback policies can be extremely complicated. In Grenada, judge advocates actually ran the weapons and explosives turn in and buyback operation. Weapons buyback in Panama led to an investigation concerning funding for, and disposition of, weapons. Judge advocates must distinguish weapons "buyback" or "incentive" programs from confiscation. In contemplating any such policies, judge advocates should consider the realistic threat to the force, the threat to law-abiding citizens if they are disarmed, the law and culture of the society regarding weapons, the possibility of creating a weapons black market, and the likelihood of success. *See, e.g.*, Colonel F.M. Lorenz, *Law and Anarchy in Somalia*, PARAMETERS, Winter 1993-94, at 27, 30.

n45 The means to accomplish a mission range from the inherent authority of United States forces to more specific action such as that taken in Operation Urgent Fury in Grenada. After the combat phase of that operation, the emerging Grenadian government was faced with limited police capability and rampant lawlessness. Among other problems, with the breakdown of authority during and after the combat phase, inmates escaped from the island's prison and helped themselves to the ample supply of weapons strewn about the island. The Governor-General declared a state of emergency and, pursuant to his emergency powers, issued a "Preventative Detention Ordinance" which authorized "United States Forces officers and Military Police" to enforce Grenadian law.

n46 Police training is an issue associated with virtually every operation. From 1981 to 1996, the United States military was prohibited by law from expending Foreign Assistance Act (FAA) funds to train or advise nonexempted foreign police in law enforcement functions (Foreign Assistance Act § 660(a), 22 U.S.C. § 2420(a)), but a broader prohibition existed by policy and tradition. In Somalia, United States forces assisted the UN in training local police only after a presidential authorization effectively exempted the training from the FAA. Absent such authority, only limited inter-operability and compatibility training and liaison and joint patrol activity could be appropriately accomplished for force protection and mission objective reasons in stability-type operations. However, in 1996 the National Defense Authorization Act amended FAA § 660 to, among other things, expressly permit the United States military to provide assistance to reconstitute civilian police authority and capability in the postconflict restoration of host nation infrastructure and to provide professional public safety training, including training in human rights, the rule of law, anticorruption, and the promotion of civilian police roles that support democracy. More detailed training on law enforcement and criminal investigation subjects are within the purview of the Department of Justice's International Criminal Investigation and Training Assistance Program (ICITAP). Judge advocates have long had a role in assisting governments reestablish or improve judicial, penal, justice, and police institutions.

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n47 As a general starting point, judge advocates should be familiar with the content of the current National Security Strategy and the National Military Strategy, salient extracts of which are located in the OPERATIONAL LAW HANDBOOK, *supra* note 12, ch. 2.

n48 For general information on the bases of intervention, *see* RICHARD HAASS, INTERVENTION: THE USE OF AMERICAN MILITARY FORCE IN THE POST-COLD **WAR** WORLD (1994).

n49 50 U.S.C. §§ 1541-48 (1988 & Supp.).

n50 The White House and the National Security Council, Presidential Decision Directive/NSC 25, subject: Reforming Multilateral Peace Operations (May 1994).

n51 The country team is the means by which the Chief of Mission (Ambassador) ensures interdepartmental coordination among key members of the United States diplomatic mission. Its membership varies but frequently includes the Political Counselor (often third in command of the mission after the Deputy Chief of Mission and Ambassador); the Defense, Commercial, Agricultural, and Treasury Attaches; Directors of the USAID, USIS, and Peace Corps; and the chief of the Security Assistance Office. The United States forces commander is not a member of the diplomatic mission or country team but is typically welcome at country team meetings. *See* 22 U.S.C. § 3927; *see* DEP'T OF DEFENSE, JOINT PUBLICATION 3-07.1, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR FOREIGN INTERNAL DEFENSE, ch. 2 (20 Dec. 1993); DEP'T OF ARMY, FIELD MANUAL 41-10, CIVIL AFFAIRS OPERATIONS, ch. 14 (11 Jan. 1993); United States Foreign Service Institute, *The Team: The Ambassador Sets the Pace* 1 (undated 3 page information paper widely distributed to individuals receiving foreign service training).

n52

> Political objectives drive military decisions at every level from the strategic to the tactical. All commanders and staff officers must understand these political objectives and the impact of military operations on them. They must adopt courses of action which legally support those objectives even if the courses of action appear to be unorthodox or outside what traditional doctrine had contemplated.

DEP'T OF ARMY, FIELD MANUAL 100-20, MILITARY OPERATIONS IN LOW-INTENSITY CONFLICT 1-5 (5 Dec. 1990).

n53 *See generally* DEP'T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS (30 Dec. 1994) [hereinafter FM 100-23, PEACE OPERATIONS]. The manual is a "big picture, broad brush" reference which contains a chapter on legal considerations discussing ROE, terms of reference, and status of forces issues.

n54 Judge advocates deploying on a peacekeeping mission should review the materials on the JEL Peace Operations CD-ROM, *supra* note 12, paying particular heed to the *Joint Task Force Commander's Handbook for Peace Operations and Joint Publication 3-07.3, Joint Tactics, Techniques, and Procedures for Peacekeeping Operations*. If embarking on a mission as or with UN peacekeepers, *see also* INTERNATIONAL PEACE ACADEMY, PEACEKEEPER'S HANDBOOK (1984) [hereinafter PEACEKEEPER'S HANDBOOK].

n55 *See* FM 100-23, PEACE OPERATIONS, *supra* note 53, at 6.

n56 The United States Agency for International Development (USAID) Office of Foreign Disaster Assistance (OFDA) Disaster Assessment and Response Team (DART) is a United

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States GO likely to be present in an operation. The DART *Field Operations Guide* is a superb pocket-size reference for judge advocates deploying on a humanitarian assistance (or any other) operation. *See* FIELD OPERATIONS GUIDE (OFDA, 1994) The UN High Commissioner for Refugees (UNHCR) and the International Committee of the Red Cross (ICRC) are examples of IOs.

n57 Nongovernmental organizations are "predominantly European national or international, nonprofit citizen's voluntary organizations." Private volunteer organizations are "private US based, nonprofit organizations involved in humanitarian efforts." FM 100-23-1, HUMANITARIAN ASSISTANCE, *supra* note 38, at 1-1, 1-2. Lists of the most active NGOs and PVOs are published in *FM 100-23-1, Humanitarian Assistance*, and *FM 100-23, Peace Operations. Supra* note 53; and the OPERATIONAL LAW HANDBOOK, *supra* note 12. Many of the organizations register with the USAID, which publishes a yearly report and list entitled "Volunteer Foreign Aid Programs."

n58 For guidance, look to the mission statement and list of specified tasks and implied tasks. *See generally* DEP'T OF ARMY, PAMPHLET 700-15, LOGISTICAL SUPPORT OF UN PEACEKEEPING FORCES (1 May 1986); DEP'T OF ARMY, REG. 700-131, LOAN AND LEASE OF ARMY MATERIEL (15 Feb. 1985) (C1, 4 Sept. 1987); DEP'T OF ARMY, UNIT SUPPLY UPDATE, 2-14 (23 Feb. 1994).

n59 For information on the CMOC (now often termed the Civil-Military Cooperation Center), and on the closely related Humanitarian Operations Center (HOC), *see* FM 100-23-1, HUMANITARIAN ASSISTANCE, *supra* note 38, chs. 3, 4.

n60 Of course, UN operations present a host of legal issues. *See generally* LIEUTENANT COLONEL WALTER G. SHARP, JR., UNITED NATIONS PEACE OPERATIONS (1996).

n61 A sample mandate is in FM 100-23, PEACE OPERATIONS, *supra* note 53, annex B.

n62 A sample TOR document is located in *FM 100-23, Peace Operations. Supra* note 53, annex A.

n63 The CAO is the principal administrative and budget advisor to the UN Head of Mission.

n64 *See* DEP'T OF ARMY, PAMPHLET 700-31, HANDBOOK FOR PEACE OPERATIONS (A LOGISTICS PERSPECTIVE) (1 July 1994), which discusses logistics organization, structure, and procedures. Chapter VI, UN Cost Reimbursements and associated annexes are of particular importance to judge advocates as they cover in and out surveys, write off of equipment, and funds calculations.

n65 *Although Treaties in Force (T.I.F.), United States Treaties (U.S.T.)*, and *Treaties and Other International Acts Series (T.I.A.S.)* are excellent academic references; the best source of information is the unified command having geographic responsibility for the country at issue and, if United States forces are already in country, the legal advisor for that force. Reference texts are often outdated, do not contain classified agreements, and cannot relate the ground truth concerning the actual implementation of an agreement by a country or its political subdivisions.

n66 In Somalia, for example, there was no legitimate national government with which to conclude any agreement concerning the status of the force; there was instead only a political vacuum.

n67 The "Law of the Flag," which traces its lineage in American jurisprudence back to *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812), and *Coleman v. Tennessee*, 97 U.S. 509 (1878), has two components of relevance to judge advocates. The first is that a force can bring its own law into foreign territory (the concept of extraterritoriality, which is

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inherent in the UCMJ); the second is that the force and its personnel are, in certain circumstances, immune from the exercise of jurisdiction by the foreign sovereign. The thrust of case law and commentators since the 1950s has been to limit the circumstances of immunity. *See generally* DEP'T OF ARMY, PAMPHLET 27-161-1, LAW OF PEACE 11-1 (1 Sept. 1979).

n68 While academics conclude that the Law of the Flag is a discredited or obsolete concept in international law, it is alive and well in fact and practice. Although it is true in modern law that consensual entry does not guarantee legal immunity, there are plainly situations in which the United States will not allow its forces to be amenable to local law but subject only to the extraterritorial application of the UCMJ and international law. In addition to combat and occupation, and operations conducted in a political vacuum, the Law of the Flag also may apply as a "default" in MOOTW which are "near-combat" or "near-occupation" operations. Two examples are Operations Provide Comfort (northern Iraq) and Uphold Democracy (Haiti). In both operations, the United States obtained a "waiver of jurisdiction" from the "receiving state;" however, the waivers were superfluous concessions to a foregone conclusion.

n69 *See* DEP'T OF DEFENSE, DIRECTIVE 5530.3, INTERNATIONAL AGREEMENTS (11 June 1987) (C1, 18 Feb. 1991); DEP'T OF ARMY, REG. 550-51, AUTHORITY AND RESPONSIBILITY FOR NEGOTIATING, CONCLUDING, FORWARDING, AND DEPOSITING OF INTERNATIONAL AGREEMENTS (1 May 1995); *see generally* OPERATIONAL LAW HANDBOOK, *supra* note 12, ch. 3.

n70 "Extrapolated," as used in this context, is a term coined in the Operational and International Law Department of The Judge Advocate General's School, United States Army, Charlottesville, Virginia, which has found its way into scholarly literature. *See, e.g.*, Major Brian H. Brady, *The Agreement Relating to a United States Military Training Mission in Saudi Arabia: Extrapolated to Deployed Forces?*, ARMY LAW., Jan. 1995, at 14.

n71 Administrative and Technical Staff Privileges and Immunities flow from Article 37 of the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 22 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95. Often termed "Admin. & Tech. P. & I.," the status affords immunity from receiving state criminal jurisdiction and civil immunity for acts performed within the scope of duty. Typically, members of the Force do not enjoy "Admin. & Tech. P. & I." because they are not on the mission staff; rather, they enjoy an analogous status under a specific agreement.

n72 *See* OPERATIONAL LAW HANDBOOK, *supra* note 12, ch. 3.

n73 The "UN Model SOFA" is reprinted in *id.*, ch. 3. It is useful in two respects. It is an accepted model for concluding a SOFA in a particular operation, and it may be used as the basis for the behavior of the parties in the absence of an express agreement.

n74 Feb. 13, 1946, 21 U.S.T. 1419, T.I.A.S. 6900. The status granted by the Convention is often termed "Expert on Mission" status. *See also* PEACEKEEPER'S HANDBOOK, *supra* note 54, at 361.

n75 Such was the case during UN Protection Force (UNPROFOR) operations in Bosnia, where political subdivisions routinely ignored express or implied agreements.

n76 In Haiti, the Aristide government not only insisted on a tailored SOFA (not being content with simple SOFAs utilized in similar prior operations), but on three specific and diverse SOFAs with the various visiting forces in the country. Accordingly, the first SOFA, applicable to the Multinational Force (MNF), was not concluded until 10 December 1995, and two separate status agreements were required to respectively govern the UN Mission in Haiti (UNMIH) and United States forces not part of the MNF or UNMIH. *See* HAITI LESSONS, *supra* note 21, appendices O, P, Q.

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n77 In Bosnia, United States Brigadier General Patrick O'Neal pragmatically demonstrated his understanding of the freedom of ingress and movement granted to IFOR under the Dayton Agreement when he was confronted at the border by a Bosnian militiaman demanding his passport. As he walked past the militiaman and into Bosnia, he pointed at his soldiers' rifles and said, "That's our passport." Thomas K. Ricks, *U.S. Brings to Bosnia Tactics That Tamed Wild West*, WALL STREET J., Dec. 27, 1995, at 7.

n78 Requisition, seizure, and confiscation are terms of legal significance and acts typically reserved for the battlefield or "enemy or former territory." *See* DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 148-56 (18 July 1956) (C1, 15 July 1976) [hereinafter FM 27-10, THE LAW OF LAND WARFARE]. Nevertheless, even in MOOTW dominated by noncombat activities (particularly where authorized under Chapter VII of the UN Charter), reason and practice suggest that weapons may be confiscated or seized for force protection purposes, and public property may be seized at least at the beginning of an operation in order to receive and consolidate, and establish lodgements for the force. Concerning practical and legal aspects of seizure (and other "combat acquisition practices") *see* OPERATIONAL LAW HANDBOOK, *supra* note 12, ch. 9.

n79 10 U.S.C. § 2734 (1988 & Supp.); DEP'T OF ARMY, REG. 27-20, CLAIMS, ch. 10 (15 Feb. 1989).

n80 In Grenada, claims for combat damage were not paid under the initial Army claims program. A later and separate program, funded by USAID and executed by Army judge advocates pursuant to a Participating Agency Servicing Agreement (PASA), paid certain combat damage claims which had been originally denied by Army Foreign Claims Commissions.

n81 Discipline is a characteristic of Army operations. FM 100-5, OPERATIONS, *supra* note 2, at 2-3.

n82 Restraint and legitimacy are tenets of operations other than **war** (FM 100-5, OPERATIONS, *supra* note 2, at 13-4) but are not restricted to OOTW. The United States showed great restraint in furtherance of political objectives in Operation Desert Storm, despite being operationally unimpeded by the enemy. For an example of an ill-conceived and needless use of restraint in the Vietnam **War,** *see* William H. Parks, *Rolling Thunder and the Law of **War***, AIR U. REV., Jan.-Feb. 1982, at 4.

n83 JOINT CHIEFS OF STAFF PUBLICATION 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (23 Mar. 1994) defines ROE as: "Directives issued by competent military authority which delineate the circumstances and limitations under which United States Forces will initiate and/or continue combat **engagement** with other forces encountered." Interestingly, the definitions of ROE contained in other doctrinal publications (many Army field manuals, for example) do not track the Department of Defense definition.

n84 CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01, STANDING RULES OF **ENGAGEMENT** FOR US FORCES (1 Oct. 1994).

n85 For an excellent, succinct primer on the JCS SROE, *see* Colonel F.M. Lorenz, *Standing Rules of **Engagement:** Rules to Live By*, MARINE CORPS GAZETTE, Feb. 1996, at 20.

n86 For insight into multinational ROE, *see* Colonel F.M. Lorenz, *Forging Rules of **Engagement:** Lessons Learned in Operation United Shield*, MIL. REV., Nov.-Dec. 1995, at 17. The Lorenz article raises an important issue: even with almost identical ROE, units from different countries may lack the common training and will to identically apply the ROE. *See also* Lieutenant Colonel Stephen M. Womack, *Rules of **Engagement** in Multinational Operations*, MARINE CORPS GAZETTE, Feb. 1996, at 22.

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n87 See International Law Note, *"Land Forces" Rules of **Engagement** Symposium: The CLAMO Revises the Peacetime Rules of **Engagement***, ARMY LAW., Dec. 1993, at 14.

n88 Pocket cards are no panacea. They are predominately training tools for MOOTW. While they tend to make everyone feel better, they are not a **necessity** for every unit in every operation. Special mission units do not require ROE pocket cards. Combat operations against a declared hostile force only require pocket cards to the extent that they may reflect either the imposition or removal of control measures or constraints.

n89 "JAGC personnel . . . review ROE" and "provide required training on the law of **war** and ROEs." FM 27-100, LEGAL OPERATIONS, *supra* note 11, at 17. Judge advocates "assist in the preparation of and review ROE." *Id.* at 13. "The SJA receives the JTF or Corps ROE from the G3. He recommends changes to the division commander and G3. The SJA works with the division staff and subordinate commanders to ensure that ROE support the operation." FM 71-100, DIVISION OPERATIONS, *supra* note 24, at 8-14.

n90 JOINT WARFIGHTING CENTER, JOINT TASK FORCE COMMANDER'S HANDBOOK FOR PEACE OPERATIONS 76 (28 Feb. 1995). This superb handbook, contained in the JEL Peace Operations CD-ROM, *supra* note 12, should be in every deployment library.

n91 Riot control agents (RCAs) are now a matter of particular concern in ROE. Ironically, the United States has recently imposed restrictions on the use of RCA in operations just as it has become involved in operations in which they are useful. In 1993, the United States signed the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800 [hereinafter the CWC]. Although the Senate still has not given its advice and consent to the CWC, the President has taken the position that the CWC prohibits the use of RCA as a "method of warfare," and the formerly permissible use of RCA in the rescue of downed aircrews and dispersal of civilians being used as human shields is now prohibited. This position conflicts with Exec. Order No. 11,850 (3 C.F.R. 980 (1971-1975)), *reprinted in* FM 27-10, THE LAW OF LAND WARFARE, *supra* note 78, at 18, C1, 2), which has not been superseded. (*See* CHAIRMAN, JOINT CHIEFS OF STAFF INSTRUCTION 3110.07, NUCLEAR, BIOLOGICAL, AND CHEMICAL DEFENSE; RIOT CONTROL AGENTS; AND NON-LETHAL WEAPONS (3 July 1995).) Accordingly, judge advocates should anticipate confusion concerning RCA, ensure that any use of RCA is coordinated with the responsible unified command, and plan on the likelihood that NCA approval will be required to employ RCA in virtually any non-law enforcement circumstance.

n92 Distinguish conduct (committing a hostile act or exhibiting hostile intent) from status (membership in a hostile force). In most MOOTW, ROE are based on conduct, not status -- typically, there is no declared "hostile force."

n93 For example, the NATO IFOR "ROE Card," dated 10 January 1996, is styled "Commander's Guidance on Use of Force."

n94 The rules are typically a starting, not ending, point. As stated in FIELD MANUAL 100-5, OPERATIONS, *supra* note 2, at 2-4, and numerous other references, ROE are tailored, dynamic, and change over time. Nevertheless, most aspects of default rules will not change at the soldiers' level and serve as a valid training base. Further, there are standing unit ROE which, given their proponent, content and audience, are likely consistent with future operational ROE (or extracts thereof) and require no modification for actual combat operations. For an example, *see* "Ranger Regiment Combat ROE" pocket card (Headquarters, 75th Ranger Regiment) *reprinted in* OPERATIONAL LAW HANDBOOK, *supra* note 12, ch. 8.

n95 *See* Major Mark S. Martins, *Rules of **Engagement** for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1 (1994); HAITI LESSONS, *supra* note 21, at 40-42; CENTER FOR ARMY LESSONS LEARNED, ROE TRAINING: AN ALTERNATIVE APPROACH

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(May 1996). Like pocket cards, mnemonics are not a panacea; they are training tools that can help soldiers develop judgment, not a substitute for judgment itself. *See* Martins, *supra*, at 86-89, 105.

n96 *Compare* pertinent extracts of Unified Task Force (UNITAF) ROE ("You have the right to use force to defend yourself against attack or threat of attack") and the subsequent UN Operation in Somalia (UNOSOM) II ROE ("Crew-served weapons are considered a threat to UNOSOM Forces and the relief effort whether or not the crew demonstrates hostile intent").

n97 Macedonia is often termed the "Former Yugoslav Republic of Macedonia" or "FYROM." For purposes of this article, it is referred to as Macedonia.

n98 Under the United States doctrinal definition, the force is engaged in a "preventive diplomacy" deployment, not peacekeeping, because it is present to deter violence at a zone of potential conflict where tension exists among several parties. FM 100-23, PEACE OPERATIONS, *supra* note 53, at 2.

n99 Interview with Task Force Legal Advisors, Garmisch, Germany (December 1994). See also Captain David G. Bolgiano, *Firearms Training System: A Proposal for Future Rules of* ***Engagement*** *Training*, ARMY LAW., Dec. 1995, at 79.

n100 *See* Tom Rhodes & Ian Brodie, *Americans Admit They Fired First*, THE TIMES, Sept. 26, 1994, at 1.

n101 *See, e.g.*, the discussion and analysis of *United States v. Mowris*, a case arising from the use of warning shots in Somalia, in MARTINS, *supra* note 95, at 3, 17.

n102 *See, e.g.*, Captain Vaughn A. Ary, *Accounting for Prisoners of* ***War:*** *A Legal Review of the United States Armed Forces Identification and Reporting Procedures*, ARMY LAW., Aug. 1994, at 16.

n103 Geneva Convention Relative to the Treatment of Prisoners of **War,** *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter GPW].

n104 Some scholars would disagree and assert that Operation Just Cause was an international armed conflict thus triggering prisoner of **war** status for the Panamanian Defense Forces. *See, e.g.*, Major John Embry Parkerson, Jr., *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31 (1991).

n105 This broad practical application of the humanitarian provisions of the GPW was used by the United States with regard to the Viet Cong (PRUGH, LAW AT **WAR,** *supra* note 13, at 61-78) and makes good sense today. United States forces train on how to handle prisoners of **war,** and field soldiers should not be burdened with legalistic distinctions between "prisoner of **war**" and "detainee." Judge advocates and senior commanders, however, should know that the difference between the two terms is not merely semantic; similarly, the distinction between "treatment" and "status" as a prisoner of **war** can be legally, practically, and politically profound.

n106 Panamanian soldiers were not prisoners of **war** as a matter of law because the intervention was not an international armed conflict. United States forces were present at the invitation of the lawfully elected government of President Endara. *Cf.* United States v. Noriega, 808 F. Supp. 791 (S.D. Fla. 1992) (the court, finding the GPW to be self-executing, held that Manuel Noriega was a "prisoner of **war**"). The ruling was irrelevant to the defense, however, since Noriega was charged with precapture criminal offenses unrelated to any claim of privileged warlike act.

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merits a cadre of advisors who are competent in military and legal skills, participants in operations, and mindful of the depth -- and limitation -- of their roles. [8] The focus of the advisors is to lawfully facilitate mission accomplishment, thereby enhancing the versatility of already capable units to meet diverse mission requirements. That cadre is the Army Judge Advocate General's Corps. Their focus is operational law.

[*36] III. Operational Law

In his seminal article on operational law, Colonel David Graham identified the discipline as "that body of law, both domestic and international, impacting upon legal issues associated with the planning for and deployment of US Forces overseas in both peace-time and combat environments." [9] Colonel Graham noted that operational law "transcends normally defined legal disciplines" and constitutes a "comprehensive, yet structured approach toward resolving legal issues evolving from the overseas deployment of US military forces." [10] Colonel Graham's definition, with slight modification, is repeated in the field manual on legal operations: "Operational law is the application of domestic, international, and foreign law to the planning for, training for, deployment of, and employment of United States military forces." [11]

The *Operational Law Handbook*, published by The Judge Advocate General's School, offers a more contemporary and comprehensive working definition of the discipline: "Operational law is that body of foreign, domestic, and international law which impacts specifically upon the activities of US Forces in **war** and operations other than **war.**" [12] The School's definition of operational law is remarkably broad -- and deliberately so. The role of the judge advocate in military operations since Operation Urgent Fury in 1983 (the crucible for the definition and practice of operational law) establishes the interdisciplinary and interprofessional depth and breadth of operational law. [13] From running the "weapons for cash" turn-in program in Grenada to investigating **war** crimes in Kuwait, from trying courts-martial in Saudi Arabia to advising detainee interrogators in Haiti, from participating in targeting cells in Somalia to sitting on **[*37]** joint military commissions in Bosnia, [14] judge advocates constantly expand the scope of the practice of operational law.

If the essence of the Army is its operations in the field, then operational law is the essence of the military legal practice. Operational law exists to provide legal support and services to commanders and soldiers in the field. It is not a specialty, [15] nor is it a discrete area of substantive law. It is a discipline, a collection of all of the traditional areas of the military legal practice focused on military operations. Practicing operational law involves military justice, administrative law, claims, contract law, fiscal law, legal assistance, international law, and the law of armed conflict. Operational law also includes proficiency in military skills. It is the *raison d'etre* of the uniformed judge advocate. Every judge advocate must be an operational lawyer. [16]

This broad view of operational law is inclusionary, not exclusionary, and evolutionary, not revolutionary. It requires more of a thematic than a structural revision of the Corps. Our central focus must be to facilitate operations. Staff judge advocates, regional defense counsel, and other leaders must stress the legal and military roles of their judge advocates [17] and train their subordinates as soldier-lawyers in a joint, combined, and interagency environment. [18] **[*38]** Operations training should include legal noncommissioned officers and stress joint headquarters tactics, techniques, and procedures. [19]

Operational lawyers must be decathletes, not boxers. [20] They must be consummate generalists, well schooled in all aspects of this discipline. Substantive specialization, although necessary in some areas (for example, acquisition law), should continue to be the exception rather than the rule in the Corps. [21]

Versatility of the Corps' personnel enhances the versatility afforded by the Corps to the Army. As operations are increasingly executed by joint and interagency task forces and, in

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n107 Preeminent among the other authorities was the Universal Declaration of Human Rights, G.A. Res. 217 A(III), Dec. 10, 1948, U.N. Doc. A/810 (1948).

n108 *See generally* Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509 (1994).

n109 This transfer would have been prohibited by law had the detainees been prisoners of law. The UN is neither a signatory nor a party to the GPW.

n110 *See, e.g.*, JOINT COMMITTEE PRINT, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993, at 258-60 (Feb. 1994).

n111 The approach developed by judge advocates in Haiti made good political, practical, and legal sense in that particular operation. The approach incorporated aspects of the Haitian Constitution and international law, but was *not required* by either law. Although praised by humanitarian organizations and commentators, the approach does not establish a new standard or requirement of detainee law or policy.

n112 The SJA served as the command's liaison to the ICRC, a role of the judge advocate in all United States combat operations since at least the Vietnam **War.** The judge advocate's ICRC liaison role is doctrinal (*see* FM 71-100-2, INFANTRY DIVISION TTP, *supra* note 24, at 6-28).

n113 The "detainee judge advocate" did not establish an attorney-client relationship with the detainee. Another judge advocate reviewed the written basis of the detention within 72 hours of the detention.

n114 The number of detainees reached a high of about 200 during the first month of the intervention, but was down to 24 by January 1995. HAITI LESSONS, *supra* note 21, at 60.

n115 G.A. Res. 49/59, Feb. 17, 1995, U.N. DOC. A/Res./49/59 (1995), 34 I.L.M. 482 (1995).

n116 In contrast, Chief Warrant Officer Two (CW2) Bobby Hall, captured in December 1994 when his helicopter crashed in North Korea, was a prisoner of **war.** The Korean **War** was not terminated by peace treaty; military operations have merely been suspended by armistice. Accordingly, CW2 Hall was "captured" in an international armed conflict, but released under GPW Article 118.

n117 In an effort to answer this question in today's complex political-military environment, the International and Operational Law Department of The Army Judge Advocate General's School, United States Army, developed a new category of law: "Civilian Protection Law" (CPL). Civilian Protection Law is a logical and dynamic extension of the law of occupation. An entire chapter is devoted to CPL in the OPERATIONAL LAW HANDBOOK, *supra* note 12.

n118 Geneva Convention Relative to the Protection of Civilian Persons in Time of **War,** *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

n119 FM 27-10, THE LAW OF LAND WARFARE, *supra* note 78, at 139.

n120 Headquarters, CJTF 180 PROE, "Civil-Military Operations in Haiti," para. 7 (23 Sept. 1994).

n121 *See Law and Anarchy, supra* note 44, at 27, 35.

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n122 *See* Kenneth Freed, *Haitian Police Attack Crowds as American Troops Look On*, L.A. TIMES, Sept. 21, 1994, at A1.

n123 In response to concerns raised by judge advocates, the ROE already had been changed to expressly allow action by United States forces in cases of Haitian civilian violence, but new ROE cards reflecting the change had not been issued to soldiers. Soldiers were still operating under a generic permissive-entry ROE card dated 6 September 1994. *See* HAITI LESSONS, *supra* note 21, at 32-34.

n124 FM 100-5, OPERATIONS, *supra* note 2, at 2-3.

n125 Brigadier General Jack Rogers, *quoted in* DEP'T OF DEFENSE, UNITED STATES SPECIAL OPERATIONS COMMAND PUBLICATION 1, SPECIAL OPERATIONS IN PEACE AND **WAR** C-1 (25 Jan. 1996).

n126 FM 100-5, OPERATIONS, *supra* note 2, at 2-3, 2-4.

n127 General Gordon R. Sullivan, speech at the Army Judge Advocate General's Corps Worldwide Continuing Legal Education Conference, The Judge Advocate General's School, Charlottesville, Virginia (Oct. 1994).

n128 *See, e.g.*, William H. Parks, *Teaching the Law of **War***, ARMY LAW., June 1987, at 3; H. Wayne Elliott, *Theory and Practice: Some Suggestions for the Law of **War** Trainer*, ARMY LAW., July 1983, at 1.

n129 Judge advocates should have some familiarity with the Army's training doctrine -- it works. *See* DEP'T OF ARMY, FIELD MANUAL 25-100, TRAINING THE FORCE (15 Nov. 1988); DEP'T OF ARMY, FIELD MANUAL 25-101, BATTLE FOCUSED TRAINING (30 Sept. 1990).

n130 The nine rules, listed in DEP'T OF ARMY, REG. 350-41, TRAINING IN UNITS, ch. 14 (19 Mar. 1993), are as follows:

> (1) Soldiers fight only enemy combatants.
> (2) Soldiers do not harm enemies who surrender. Disarm them and turn them over to your superiors.
> (3) Soldiers do not kill or torture enemy prisoners of **war.**
> (4) Soldiers collect and care for the wounded, whether friend or foe.
> (5) Soldiers do not attack medical personnel, facilities, or equipment.
> (6) Soldiers destroy no more than the mission requires.
> (7) Soldiers treat all civilians humanely.
> (8) Soldiers do not steal. Soldiers respect private property and possessions.
> (9) Soldiers should do their best to prevent violations of the law of **war.** Soldiers report all violations of the law of **war** to their superiors.

n131 A superb example of standardized training is the package developed by the SJA section, 1st Armored Division/Task Force Eagle in preparation for the NATO IFOR mission. The package, styled "Pre-Deployment Legal Briefing," covers ROE, law of armed conflict, Code of Conduct, and Treaty issues. MATERIALS ON OPERATIONAL LAW, *supra* note 14, at 50, contains the briefing slides.

n132 10 U.S.C. § 801 (1988 & Supp.) (UCMJ art. 1); 10 U.S.C. § 806 (1988) (UCMJ art. 6); 10 U.S.C. § 3064 (1988 & Supp.); 10 U.S.C. § 3072 (1988) (creating the Corps and

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authorizing The Judge Advocate General).

n133 Matters likely considered for resolution by courts-martial in a combat zone include "wartime offenses," offenses inimical to the maintenance of good order and discipline in the field, and offenses violating the law of armed conflict (although not charged as such as a matter of policy). For a discussion of "wartime" and "combat offenses," *see* OPERATIONAL LAW HANDBOOK, *supra* note 12, ch. 17. Whether to try cases in a combat zone also depends on a number of factors other than the offense, including the intensity and duration of the conflict and the availability of panel members and witnesses. The decision should never hinge on the availability of counsel, military judges, or court reporters.

n134 Notwithstanding the statement of command relationships found in plans and orders, judge advocates must look to law and regulation to determine whether commanders are in fact courts-martial convening authorities. Judge advocates should read UCMJ Articles 22 through 24, and study MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.), R.C.M. 201(e), "Reciprocal Jurisdiction," and the analysis thereto [hereinafter MCM]. While it is widely known that the commander of a "unified and specified combatant command" may convene courts-martial (*id.* R.C.M. 201(e)(2)(A)), it is less known that the Secretary of Defense may empower "any commanding officer of a joint command or joint task force [to] convene general courts-martial for the trial of members of any of the armed forces" (*id.* R.C.M. (e)(2)(B)).

n135 DEP'T OF DEFENSE, JOINT PUBLICATION 0-2, UNIFIED ACTION ARMED FORCES ch. IV (10 Jan. 1995) [hereinafter UNIFIED ACTION] discusses the exercise of disciplinary authority in unified command, subordinate unified command, and JTF organizations. The publication, either in hard copy or on the JEL CD-ROM, *supra* note 18, is a must for a deployment library in that it addresses the law, policy, and practice of jurisdiction, nonjudicial punishment, courts-martial trial and punishment, and rules and regulations in a joint environment.

n136 *See* UCMJ art. 22 and MCM, *supra* note 134, R.C.M. 201(e); R.C.M. 503 (authorizing the detailing of military judges and counsel from one armed force to serve in courts-martial in a different armed force).

n137 *See, e.g.*, DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, para. 8-6e (8 Aug. 1994) (C1, 16 Dec. 1994), which addresses judicial cross-servicing, and, in change 1, addresses imposition of, and procedures concerning, nonjudicial punishment by multiservice commanders and officers in charge. *See also* DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 2-12b (24 Apr. 1988).

n138 The joint force commander can be a geographic commander in chief (CINC) or a JTF commander.

n139 *See, e.g.*, Major Susan S. Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114 (1995); Major Brian H. Brady, *Notice Provisions for United States Citizen Contractor Employees Serving with the Armed Forces of the United States in the Field: Time to Reflect Their Assimilated Status in Government Contracts?*, 147 MIL. L. REV. 1 (1995).

n140 A proposed amendment to the UCMJ, now under study, would give courtsmartial jurisdiction over civilians accompanying the force in "time of armed conflict," a broader period than "time of **war,**" but still limited in that many contemporary operations are conducted in neither **war** nor armed conflict. The amendment was introduced in the House as H.R. 1530, 104th Cong., 1st Sess. (1995) and in the Senate as S. 1026, 104th Cong., 1st Sess. (1995).

n141 In *United States v. Averette*, 41 C.M.R. 363 (C.M.A. 1970), the United States Court of Military Appeals (now the United States Court of Appeals for the Armed Forces) held that UCMJ Article 2(a)(10) jurisdiction over civilians serving with or accompanying an armed force

in the field "in time of **war"** applied only in a declared **war.** Notwithstanding the holding in Averette, UCMJ Article 18 grants to general courts-martial the jurisdiction to try "*any* person who by the law of **war** is subject to trial by a military tribunal" (emphasis added).

n142 *See* DEP'T OF DEFENSE, DIRECTIVE 1404.10, EMERGENCY-ESSENTIAL (E-E) DOD US CITIZEN CIVILIAN EMPLOYEES (10 Apr. 1992); UNITED STATES ARMY MATERIEL COMMAND, AMC CIVILIAN DEPLOYMENT GUIDE (Mar. 1994).

n143 GPW, *supra* note 103, art. 4(A)(4).

n144 *See, e.g.*, THE DESERT STORM ASSESSMENT TEAM, REPORT TO THE JUDGE ADVOCATE GENERAL OF THE ARMY, III.F., Labor and Employment Law (22 Apr. 1992). "Civilian employee[s] accompanying the force are, of course, legitimate targets of enemy attack." *Id. See also* William H. Parks, *Air **War** and the Law of **War***, 32 A.F. L. REV. 1, 131 (1990).

n145 While the thrust of developing international law suggests that civilians accompanying the force in the field are combatants (*see* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 515 (Sandoz et al. eds., 1987) [hereinafter PROTOCOL COMMENTARY]), United States policy reflects the position that at least contractors are noncombatants. *See* DEP'T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM, para. 3-2d (16 Dec. 1985) ("[Contractors] may not be used in any role that would jeopardize their role as noncombatants."). Although the distinction between combatant and noncombatant *within the armed forces* may no longer be critical under international law (PROTOCOL COMMENTARY, *supra*, at 506), it is significant in determining numerous disciplinary, employment, and veterans' status issues under United States domestic law. A cogent examination of these issues is found in Brady, *supra* note 139.

n146 Sample General Orders, including the JTF 190 Order used in Haiti, are in the OPERATIONAL LAW HANDBOOK, *supra* note 12, ch. 17.

n147 Regarding **war** trophies, *see* 10 U.S.C. § 2579 (1996), a product of the 1994 National Defense Authorization Act. The legislation mandates standards not yet published in implementing directives and regulations. The Department of Defense should publish a governing directive; the Army regulation on **war** trophies is decades old. *See* DEP'T OF ARMY, REG. 608-4, CONTROL AND REQUISITION OF **WAR** TROPHIES AND **WAR** TROPHY FIREARMS (28 Aug. 1969) (C1, 27 Aug. 1975). One of the purposes of a **war** trophy or minimum vehicle number convoy policy is to reduce needless risk to soldiers. In Panama, the Gulf, and Bosnia, soldiers were killed or maimed by exploding ordnance or mines when they acted in contravention of orders and policy. Consider prohibitions on unauthorized bunkering, souvenir hunting, and "climbing on or in enemy vehicles and equipment." (A good maxim in areas where unexploded ordnance and booby traps are a problem: "If you didn't drop it, don't pick it up.")

n148 In a multinational operation, for example, commanders contemplating a complete ban on alcohol should consider that other national contingents may have liberal alcohol policies. While considering the adverse impact that this may have on morale, commanders also should consider the undeniable positive impact of an alcohol ban on discipline and efficiency in the field.

n149 When drafting the order, consider the "6 C Principle:"

1. COMMON SENSE: Does the order make sense?
2. CLARITY: Is the order understandable at the lowest level?
3. COMMAND INFORMATION (CI): Is the order publicized through all CI means

available?
4. CONSISTENCY: Is the order applicable, enforceable, and enforced throughout all levels and layers of command? (An order promulgated for an entire corps is better than diverse orders within its subordinate divisions; a policy promulgated by a unified command and applicable to all of its component commands is better still.)
5. CUSTOMS: Are amnesty and leaders' inspection procedures in place prior to redeployment customs inspections?
6. CAUTION: Does the order reflect the commander's risk assessment?

n150 *See generally* Lieutenant Colonel Charles R. Shrader, *Friendly Fire: The Inevitable Price*, PARAMETERS, Autumn 1992, at 29.

n151 *See, e.g.*, DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, para. 1-5 (11 May 1988) ("The primary function of any investigation . . . is to gather facts and report them to the appointing authority.").

n152 *See, e.g.*, Major Ralph Peters, *After the Revolution*, PARAMETERS, Summer 1995, at 7; Robert D. Kaplan, *The Coming Anarchy*, ATLANTIC MONTHLY, Feb. 1994, at 44; ALVIN & HEIDI TOFFLER, **WAR** AND ANTI-**WAR:** SURVIVAL AT THE DAWN OF THE 21ST CENTURY (1993); Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFF., Summer 1993, at 22.

n153 *See* MICHAEL HOWARD, **WAR** AND THE LIBERAL CONSCIENCE (1978).

n154 *See, e.g.*, Steven Metz & Lieutenant Colonel James Kievit, *The Siren Song of Technology and Conflict Short of **War***, SPECIAL WARFARE, Jan. 1996, at 2.

n155 All who will lead the Army into the next century should consider Brigadier R. G. S. Bidwell's "five fallacies: "the fallacy of miniaturism (a small good army cannot defeat a big good army); the fallacy of the magic weapon (there is no such thing); the fallacy of **war** as chess (**wars** are not won by maneuver alone); the fallacy of the bloodless operation (such is self-deception); and the fallacy of the passive enemy (possible, but neither likely nor completely predictable). Brigadier R. G. S. Bidwell, *The Five Fallacies: Some Thoughts on British Military Thinking*, THE ROYAL UNITED SERVICE INSTITUTION JOURNAL, Feb. 1967, at 53.

n156 A Force XXI objective is to "win the information **war.**" *See, e.g.*, DEP'T OF ARMY, OFFICE OF THE CHIEF OF STAFF, FORCE XXI AMERICA'S ARMY OF THE 21ST CENTURY, 15 Jan. 1995, at 22.

n157 "The military staff must be adequately composed: it must contain the best brains in the fields of land, air, and sea warfare, propaganda **war,** technology, economics, politics, and also those who know the peoples' life." GENERAL ERICH VON LUDENDORFF, TOTAL **WAR** (1935), *quoted in* UNIFIED ACTION, *supra* note 135, at IV-11.

n158 Many judge advocates have remarked that they are ready to practice with "a pen, a green memo pad, the *Operational Law Handbook*, and the MCM." CD-ROM technology, a 486 or Pentium computer with preloaded form sets, software compatible with the deployed headquarters, the LAAWS program, and a communications link greatly enhance the capability of the deployed judge advocate (deploying judge advocates should have not only the JEL CD-ROMs, *supra* notes 12 and 18, but other available CD-ROMs such as the ICRC's CD-ROM on "International Humanitarian Law"). United States Army Special Forces command judge advocates have fielded the "Deployable Law Office," which includes, within a briefcase, a

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notebook computer with CD-ROM, printer, telephone, optical scanner, and camera; the system is powered by batteries and a solar panel. More recently, the Developments, Doctrine, and Literature Department at The Judge Advocate General's School and the Office of the Staff Judge Advocate, United States Army Forces Command, have developed a "Rucksack Deployable Law Office and Library (RDL)," a set of similar capabilities that can serve as the basis for training, equipping, and task organizing legal support elements. The latter organization has purchased more than 80 RDLs for Division and Corps staff judge advocate sections, and the RDL has become for judge advocates the TRADOC-approved "workaround" to the Army Battle Command System (ABCS). *See generally* DEP'T OF ARMY, FIELD MANUAL 24-7, ARMY BATTLE COMMAND SYSTEM (ABCS): SYSTEMS MANAGEMENT TECHNIQUES (1996). Legal support tactics, techniques, and procedures are fast incorporating these promising new information and digital technologies.

n159 The concept of "modularity," much discussed in the context of division redesign, is nothing new for the Corps. With the exception of some divisions in Operations Desert Shield and Storm, units or unit composites typically choose to deploy tailored legal cells or elements, not the entire SJA section. Requirements for legal support and services continue at home station. Furthermore, United States Army Reserve judge advocate offices already are modular.

n160 "Jointness" is a profound phenomenon which has only marginally impacted the military legal community. The day likely will come when unified command legal offices are large organizations and the CINCs' legal advisors are brigadier generals. The relative rank and significance of the services' Judge Advocates General and the Chairman's legal advisor will, along with pressure for civilianization and service consolidation, be a major organizational issue facing the Corps of the early Twenty-First Century.

n161 Aside from joint duty assignments, a means for judge advocates to become more proficient is to allow them to complete Phase II of their Professional Joint Education (PJE) at the Armed Forces Staff College. Graduation from the Command and General Staff Officer Course constitutes completion of Phase I of the PJE. Whether judge advocates should become joint specialty officers (JSOs) is a question worthy of careful study. On the developing process of joint education, *see* JOINT CHIEFS OF STAFF PUBLICATION, A STRATEGIC VISION FOR THE PROFESSIONAL MILITARY EDUCATION OF OFFICERS IN THE TWENTY-FIRST CENTURY (1995).

n162 Judge advocates were involved in the emerging stages of Army civil affairs. In 1941, The Judge Advocate General (and later Provost Marshall General), Major General Allen W. Gullion, suggested the need for advanced military government training. General Gullion supervised the production of *Field Manual 27-5, Military Government*. The Corps was offered the military government mission but demurred. HARRY L. COLES & ALBERT K. WEINBERG, US ARMY IN WORLD **WAR** II SPECIAL STUDIES, CIVIL AFFAIRS: SOLDIERS BECOME GOVERNORS 8-29 (1964). Ironically, the Army's School of Military Government opened at the University of Virginia, later "the home of the Army lawyer," while The Judge Advocate General's School held classes at the University of Michigan.

n163 In Exercise Prairie Warrior 1996, the capstone exercise for the Army Command and General Staff College and part of the Army Advanced Warfighting Experiment, judge advocates served as the G5 of the Corps and as the G5 of one of two divisions participating in the exercise.

n164 *See* Major Mark S. Martins, *Responding to the Challenge of an Enhanced OPLAW Mission: CLAMO Moves Forward with a Full-Time Staff*, ARMY LAW., Aug. 1995, at 3.

n165 A judge advocate has served as an observer-controller (OC) at the Combat Maneuver Training Center (CMTC), Hohenfels, Germany since 1993. A judge advocate OC was assigned to the Joint Readiness Training Center (JRTC), Fort Polk, Louisiana, in 1995, *see id.*, and two

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more judge advocates and a legal NCO will be assigned to the JRTC in 1996. A judge advocate was assigned to the Battle Command Training Program (BCTP), Fort Leavenworth, Kansas, in June of 1996.

n166 This process is already underway. Several joint and service publications contain chapters or appendices on "legal responsibilities" or "legal considerations." *See* OPERATIONAL LAW HANDBOOK, *supra* note 12, ch. 1, for a list of selected doctrinal publications. The JEL Peace Operations CD-ROM, *supra* note 12, includes the 1995 edition of the *Operational Law Handbook*. The process must be continuous and monitored with vigilance, particularly as the Army downsizes and increasingly relies on technology. Simulations are not conducive to the presentment of legal issues, and the contributions of the SJA are often not quantified. Accordingly, the Corps must continue to aggressively state its case about the role, location, and organization of judge advocates in the Force XXI Army.

n167 *See, e.g.*, Major Vaughn A. Ary, *Concluding Hostilities: Humanitarian Provisions in Cease-Fire Agreements*, 148 MIL. L. REV. 186 (1995).

n168 With regard to **engagement** (and enlargement), judge advocates are involved in Expanded International Military Education and Training (*see* Martins, *supra* note 164) and "Human Rights" Training (*see* Major Jeffrey F. Addicott & Major Andrew M. Warner, *JAG Corps Poised for New Defense Missions: Human Rights Training in Peru*, ARMY LAW., Feb. 1991, at 78), and have the potential for increased participation in programs as diverse as the Marshall Center in Garmisch, Germany, and the ICRC's International Institute for Humanitarian Law in San Remo, Italy. As instruments of disengagement, judge advocates are significant members of training teams preparing UN, multinational, or other national headquarters to successfully accept responsibility from the United States for an ongoing mission (for example, judge advocates participated in BCTP training of the UN mission in Haiti military staff). Judge advocates also can help ensure the success of follow-on headquarters: two judge advocates have served as legal advisors to the Commander, UNMIH.

n169 "Governance," or "relative good government," is a more realistic aspiration than "democracy." *See generally* Kishore Mahbubani, *The West and the Rest*, NATIONAL INTEREST, Summer 1993.

n170 Lieutenant General Anthony C. Zinni, Commanding General, I MEF, *The SJA in Future Operations*, MARINE CORPS GAZETTE, Feb. 1996, at 15, 17.

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combined environments, judge advocates are likely to deploy as part of a composite legal support section. Because of the composite, complex nature of modern operations, judge advocates supporting combat support or combat service support units may be as likely to deploy as those assigned to combat units. Such was the case in Haiti, Somalia, and Rwanda. Soldier-lawyers must be physically fit and mentally prepared to deploy whether they are assigned to the Pentagon or to a division.

Army doctrine mandates the assignment of judge advocates to combat units and provides some constants concerning their location and mission. First, judge advocates will deploy as far forward as possible. The mission of the Judge Advocate General's Corps is "to support the commander on the battlefield by providing professional legal services as far forward as possible at all echelons of command throughout the operational continuum." [22] Within the discipline of operational law, judge advocates advise commanders on the law of armed conflict, and on other international and domestic law and **[*39]** policy which impact upon the activities of United States forces in **war** and MOOTW. [23]

Second, judge advocates will deploy with the lead elements of combat units. The field manuals governing the operations of the infantry division in the field provide a description of the SJA section in the rear, main, and assault command posts of the division. [24] The SJA of the 82d Airborne Division airlanded in Grenada with the division's assault command post in Operation Urgent Fury in 1983. The SJA parachuted into Panama with the division's assault command post in Operation Just Cause in 1989. Judge advocates are a key component of the advance party and main body in MOOTW. [25] A judge advocate deployed with the first rotation of soldiers in Operation Able Sentry in Macedonia in 1993. Presently, many judge advocates serve with the NATO Implementation Force (IFOR) in Bosnia.

Third, judge advocates will deploy with maneuver brigades and larger units. [26] Judge advocates participated in combat with brigades, regiments, and divisions in Operation Desert Storm and in **[*40]** Panama and Grenada. [27] Judge advocates were on the ground and offshore in Somalia and Haiti. In what may have been a first, at least for an Army judge advocate, an attorney was aloft in the airborne command post for the Haiti operation.

The role of the deployed judge advocate has changed. No longer solely an advisor on discrete areas of law, the SJA increasingly serves in a broader capacity analogous to that of corporate general counsel. Subordinate judge advocates serve as operational law advisors to their commanders. All judge advocates provide legal and policy advice and serve as multifunctional personal and special staff officers. [28] In Haiti, for example, on the first morning of the operation, the SJA advising the United States forces commander participated in the first meeting between the United States commander and General Cedras. [29]

Within the command, judge advocates frequently serve as the "honest broker" or "sounding board" in matters other than those involving law and regulations. Particularly in deployed headquarters, judge advocates cannot wait for others to identify and staff legal issues; they must anticipate, identify, and resolve issues which arise in the course of operations outside the normal staffing process. Judge advocates should be as comfortable in the tactical operations center as they are in a courtroom and as versed in operational legal issues as they are in case law. A deployed, effective judge advocate both unburdens and empowers the commander, relieving the commander from unnecessary tasks and providing advice which enhances the capability of the unit. [30] Today's judge advocate is not **[*41]** "just the lawyer" but a key leader within the unit. In this regard:

> The qualities of a leader are not limited to commanders. The requirements for leadership are just as essential in the staff officer, and in some respects more exacting, since he does not have that ultimate authority which can be used when necessary and must rely even more than his commander on his own strength of

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character, his tact, and persuasion in carrying out his duties. [31]

IV. Selected Legal Issues

Recent experience suggests that legal issues concerning the mission and status of the force, rules of **engagement** (ROE), prisoners and detainees, indigenous civilians, and military discipline are particularly critical in MOOTW outside the continental United States involving United States forces equipped for combat. [32] Identification and orderly resolution of these and other legal issues can help enhance effectiveness, focus effort, and accomplish the mission. Judge advocates assist commanders by providing legally and militarily sound analysis: "The SJA must be on the commander's squad from the very beginning of any operation." [33]

Solving the legal issues in operations requires analytical versatility and flexible thinking. Seldom are the issues rote or the solutions readily apparent. The "practice of law by analogy" is common-place in operations outside the traditional ambits -- and resultant legal structure -- of "**war,**" "international armed conflict," "internal armed conflict," or "occupation." Nontraditional operational and **[*42]** legal parameters create issues arising from the most basic of military concepts: the mission. [34]

A. The Mission

To paraphrase the Marine Corps *Small **Wars** Manual*, military operations other than **war** "are conceived in uncertainty, are conducted often with precarious responsibility and doubtful authority, under indeterminate orders lacking specific instructions." [35] Commanders often require assistance in defining the permissible scope of their mission. Coordinated and approved restated mission statements provide the most direct guidance to commanders. Similarly, approved and nested intent statements help ensure that all levels of command "stay within their lane" legally, fiscally, and tactically.

When concerned about whether contemplated tasks or actions are within the scope of the unit's mission, commanders and judge advocates should collectively review their mission statement. [36] If the action is not expressly authorized by the statement, they must consider whether it is inherently authorized. Reasonable action to protect the force is always authorized. In Somalia, United States forces permissibly improved roads under the inherent authority to protect the force -- convoys and patrols that would have been placed at greater risk on dangerous, worn roads. More problematic are actions undertaken by implication. In Haiti, for example, United States forces were directed to "enhance security and restore civil order." This mission statement served as the implied basis for **[*43]** Operation Light Switch, wherein operational and maintenance funds were used to make minor, short-term repairs to the Port-au-Prince municipal power plant. [37] The restoration of electricity in a city clearly enhances security and promotes order. Similarly, the authority to detain civilians for security and order is fairly implied from mission statements which contain commands such as "restore order" or "create a secure environment."

Missions can change. Although judge advocates should assist their commanders in avoiding "mission creep," [38] whether a mission "crept" or changed may be a matter of intent, result, and perspective. Changes in mission can be deliberate, as in phases, or contingent, as in branches and sequels. Missions and orders are dynamic; they will likely be modified by fragmentary orders (FRAGOs). Judge advocates can make a valuable contribution in their commands by assisting in the planning for sequels involving postcombat stability and support and civil-military operations. [39]

Beyond the content of the mission statement, ascertaining the proper scope of a mission is at times complicated by the inherent vagaries of the term "MOOTW." What constitutes a

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"MOOTW mission?" What is a "MOOTW environment?" What is a "MOOTW trained and ready force?" Judge advocates may be tempted to look for "the law of MOOTW." [40] They must ignore that temptation. While there may be some constants, tenets, or principles associated with MOOTW, they are, like the principles of **war** or tenets of Army operations, only generalities. Conversely, the "laundry list" of MOOTW **[*44]** can present a trap for the unwary, suggesting that missions can be readily categorized; while this is possible, it is unusual. [41] More likely, operations will be a combination of MOOTW, occurring either concurrently or consecutively. Operations may even be a combination of MOOTW and **war.** When faced with a particular mission, however characterized, judge advocates should instead ask, "Is the mission primarily dominated by combat or noncombat operations?" Put another way, the question could be phrased, "Is the operation dominated by lethal or nonlethal elements of combat power?" [42]

In operations primarily dominated by combat operations, the role of the judge advocate is significant, but traditional, and involves support in the areas governed by existing law, regulation, and doctrine. [43] In operations either dominated by, or evolving into, noncombat operations, the role of the judge advocate expands. Conflict termination activity, stability and support operations, and postconflict missions in general are expanding areas for judge advocates. Repetitive issues in these contexts are indigenous weapons control and confiscation policies, [44] methods by which United States forces restore order, [45] the status of United States forces, and the reemergence **[*45]** and training of local police and governmental structures. [46]

Judge advocates must appreciate the political-legal context of operations. [47] At a minimum, they must understand the articulated legal basis for an operation. [48] Questions concerning the applicability and effect of the **War** Powers Resolution [49] are rote, but inevitable. The content and meaning of applicable UN Security Council resolutions and the impact of Presidential Decision Directive 25 [50] are key issues in establishing the context of peace operations authorized or directed by the UN. On the ground, political-legal factors are no less important. Judge advocates must understand the role of the country team. [51] The senior judge advocate on a contingency operation should **[*46]** attend country team meetings with, or for, the commander whenever practicable. All judge advocates should appreciate that the Departments of State and Defense do not necessarily have identical (or even parallel) agendas in a particular operation, and that domestic, international, and "host nation" politics are important considerations, particularly in MOOTW. [52]

Much has been written about peace operations [53] and the distinctions between "peacekeeping" [54] and "peace enforcement." [55] While the distinctions are critical to the international lawyer or politician, the terminology differences among missions are not as important to the soldier on the ground. The soldier -- and his commander -- are more properly concerned about the following questions:

. Who is in charge?

. What is the mission?

. Where is my sector, position, or zone?

. When do we use force (what are the ROE)?

. Why are we here? How do we know when we are done (what is the objective and end state)?

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Peace and humanitarian assistance operations present particular challenges to commanders and judge advocates. In addition to the issues associated with all military operations, peace operations often produce complex questions concerning mission and legal context; ROE; status, authority, and protection of the force; and logistics. In both peace and humanitarian assistance operations, the presence of international organizations (IOs) and governmental **[*47]** organizations (GOs), [56] and nongovernmental organizations (NGOs) and private volunteer organizations (PVOs), [57] can establish, complicate, or hinder the mission of the deployed force. In any event, the judge advocate will provide advice concerning the command's support to, and authority over, IOs, GOs, NGOs, and PVOs. [58] The judge advocate, possessing legal, cultural, and negotiating skills, has a key role in supporting the civil-military operations center (CMOC). [59]

In UN operations, regardless of their mission characterization, judge advocates must understand the international and domestic governing authority, the mandate, and the terms of reference (TOR). [60] Simply stated, governing authority is granted by applicable UN Security Council Resolutions (UNSCRs) and the domestic law of the nations contributing forces to the operation. The mandate is expressed by UNSCR and states the broad mission, political objective, and desired end state. [61] The TOR is effectively the contract between the UN and countries contributing forces to an operation. [62] The TOR are extremely important; the document states the mission, structure, organization, command and logistical relationships, support requirements, and funding of the force. Judge advocates must appreciate the roles of UN civilians, particularly the Special Representative to the Secretary General (SRSG), who is to UN **[*48]** forces what the United States Ambassador is to United States forces overseas and to the Chief Administrative Officer (CAO). [63] Attention to logistical support, resource management, and property account-ability details are important in a UN operation. [64]

B. Status of the Force

Any overseas mission requires determining the legal status, rights, and privileges of the force and its members. In some instances, this determination is simple and certain; in others, it is difficult and ambiguous. Judge advocates addressing the issue should first ascertain whether any existing agreement applies to the operation. [65] If no agreement applies, then judge advocates should consider whether one is necessary. No agreement is necessary if United States forces are engaging in combat against, or occupying, what would otherwise be the "receiving state;" similarly, no agreement is necessary without a "receiving state." [66] In these instances, "the Law of the Flag" [67] applies, and the United States retains exclusive jurisdiction over its forces. [68]

[*49] Two situations are more problematic. The first occurs when United States forces are present with the consent or acquiescence of the receiving state, without benefit of any status of forces agreement. The second occurs in postconflict situations when the United States is not an occupier and local governmental structures, particularly police and judicial institutions, are beginning to function. Both situations require some determination of the status of the force. Both require coordination with the geographically-responsible unified command and the United States Chief of Mission (Ambassador). Those negotiating status (and other international) agreements must act with requisite legal, procedural, and substantive authority. [69]

Judge advocates have been deeply involved in determining the status of United States forces in recent operations. Typically, United States forces are granted the status "extrapolated" [70] from an already existing agreement (which, by its terms, does not apply to the size, composition, or size of the force at issue), or the United States forces are granted privileges and immunities analogous to those conferred on the administrative and technical staff of missions (embassies). [71] The result under either approach is to give United States forces full immunity from receiving state criminal laws and limited immunity from civil jurisdiction. In Grenada, as combat ended and government functions reemerged, United States forces were granted such immunity through an exchange of notes. [72] In Kuwait, United States forces were

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initially and unilaterally granted complete immunity. During Operation Desert Storm, Saudi Arabia extrapolated an earlier limited agreement to apply to arriving United States forces. In the NATO IFOR mission, the Dayton Agreement addresses the status of the force in Bosnia. The new Partnership for Peace (PFP) status of forces agreement governs the status of the force in Hungary, which is the site of the intermediate staging base.

[*50] Status of forces issues can be complicated in UN operations. On the one hand, forces committed to a traditional peacekeeping mission directed by the UN generally can rely on the consent of the receiving state as well as express or implied agreement about the privileges and immunities of the peacekeeping force. An express agreement may be concluded between the UN mission and the receiving state, often following the terms of "the UN Model Status of Mission/Status of Forces Agreement." [73] An implied understanding can flow from the terms of Articles 104 and 105 of the UN Charter and, by analogy, from the Convention on the Privileges and Immunities of the UN. [74] In any event, the nature of a true peace-keeping mission portends little real difficulty concerning the status of the peacekeeping force.

On the other hand, in a mission which does not fit within traditional peacekeeping, or where the receiving state is not fully committed to the success of the mission, reliance on agreements by implication is folly. Not only must judge advocates strive to obtain explicit agreements which address both legal and military issues, they must anticipate variance between "legal truth and ground truth." They must recognize the reality that a receiving state may be unable or unwilling to enforce compliance with agreements among its political subdivisions; [75] conversely, the receiving state may insist on strict interpretation of the parties and content of an agreement. [76] The negotiation and application of status of forces, and other international agreements, in modern operations requires sagacity born of political, military, and legal experience. [77]

[*51] Claims play a significant role in operational law. Prompt and efficient processing of deployed soldiers' claims can have a positive impact on morale. Payment of indigenous citizens' claims enhances civilian support of the force. Military operations other than **war** can present an unusual context for claims because of the blurred distinction between combat and noncombat operations, with resultant uncertainty over compensation for the use, taking, or damage of civilian property. [78] Further, claims processing in MOOTW may be complicated by other UN, multilateral, and host nation claims authorities.

Judge advocates should be mindful that, despite frequent political and economic arguments to the contrary, the United States does not pay claims for combat damage under the Foreign Claims Act. [79] Absent express authority and funding, the United States Armed Forces claims program is not an instrument of economic recovery. [80] Similarly, the program is not a contracting substitute. It is, however, a powerful tool to maintain the goodwill of the civilian populace; accordingly, United States forces should be cautious about relying on the often ponderous and cumbersome claims programs of the UN or other authorities. Notwithstanding assertions that other programs are in place, United States forces should always maintain the capability to adjudicate claims in the field.

*C. Rules of **Engagement***

Rules of **engagement** are a critical component of disciplined operations, [81] particularly in MOOTW where political considerations **[*52]** require the restrained and judicious use of force. [82] For the judge advocate, ROE may be the most important information pertaining to an operation. Judge advocates are increasingly involved in the drafting, distillation, and dissemination of ROE.

While much has been written on ROE at the theoretical and strategic levels, little doctrinal literature for land forces exists at the practical, operational, and tactical levels. Even the doctrinal definition of ROE, published by the Joint Chiefs of Staff (JCS), has little specific meaning to the soldier on the ground. [83] A better definition for the soldier is that ROE are the

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commander's standards for the use of force.

The JCS Standing ROE (SROE), which replaced the JCS Peacetime ROE (PROE) in 1994, provide standing rules and policy guidance from the National Command Authority to the unified command commanders-in-chief (CINCs). [84] The JCS SROE base document is unclassified, but the SROE include classified supplemental measures. Unclassified definitions of critical terms, such as "national **self-defense,**" "unit **self-defense,**" "collective **self-defense,**" "hostile act," and "hostile intent," also are contained in the SROE.

The JCS SROE contain numerous improvements over the JCS PROE. [85] First, the SROE provide standing rules and policy that apply, unless superseded, in peacetime, transition to **war,** and wartime. Second, the SROE are permissive and realistic, not restrictive or prophylactic. Third, they govern the use of force not only in **self-defense,** but in mission accomplishment. Fourth, the SROE include, as additional standing ROE for specific areas of operational responsibility (AORs), ROE proposed by CINCs and approved by the JCS. Fifth, the SROE contain more robust supplemental measures, particularly for the ground forces, which may be activated either by **[*53]** order of the JCS or on the request of any level of command and approval by the JCS. Significantly, commanders need not limit their requests to listed supplemental measures but may draft their own proposed ROE for approval by higher headquarters. Supplemental measures, whether or not invoked, never limit a commander's right and obligation to use force for unit **self-defense.** Sixth, the SROE provide guidance concerning ROE in combined (multinational) operations: ROE should be "common" but need not be identical among multinational partners. [86]

Judge advocates participated in the drafting and staffing process leading to the new SROE, [87] and play a continuing role in the implementation of ROE at the operational and tactical levels. Judge advocates assist commanders in several major respects relative to ROE:

> (1) They provide advice to commanders concerning the effect and propriety of applicable or putative Supplemental Measures, frequently drafting proposed Supplemental Measures.
>
> (2) They "distill" complex ROE provided by higher head-quarters into simplified ROE, and into ROE extracts on pocket cards, for their units. [88] The "distillation" must be consistent with the ROE provided by the higher headquarters.
>
> (3) They draft, in concert with the operations and intelligence staffs, complete ROE for a contingency operation. The ROE is then sent to higher headquarters for approval.
>
> (4) They provide advice to commanders concerning the meaning, effect, implementation, and enforceability of ROE.
>
> (5) They provide training assistance in preparing realistic scenarios and vignettes for commanders and soldiers to learn the ROE, and enhance the ability of commanders and soldiers to apply the ROE under stress.

[*54] Doctrine does not define a standard staff approach and procedure for ROE development. The role of judge advocates in the ROE process is mentioned only generally or obliquely in military publications. [89] In some commands, staff primacy in ROE matters resides with the SJA; in others, with the G3 (Operations). Primary staff responsibility for ROE should lie with the G3. The SJA may "draft" the ROE (or ROE supplemental measure, distillation, or extract), but the ROE at the operational and tactical level should remain an operational, not a

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COMMENT: PROTECTING CIVILIANS DURING OPERATION ALLIED FORCE: THE ENDURING IMPORTANCE OF THE PROPORTIONAL RESPONSE AND NATO'S USE OF ARMED FORCE IN KOSOVO

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SUMMARY:
... An example of an internationally recognized limitation governing the use of force is the doctrine of proportionality. ... This doctrine accepts wartime civilian casualties as inevitable, but the doctrine of proportionality requires that civilian casualties inflicted by military strikes not be excessive in relation to the anticipated military advantage gained by the strike. ... Although the U.N. Charter does not expressly discuss a proportional limitation on the use of force, it is widely accepted that the doctrine of proportionality governs any use of force, including the use of force in **self-defense.** ... When balanced against the anticipated military advantage of a strike, such caution is indicative of the doctrine of proportionality. ... Kosovo: The Continuing Crisis in the Balkans ... A. Kosovo: The Anatomy of a Conflict ... In Kosovo, ninety percent of the civilian population is Albanian and the remaining ten percent is Serbian. ... As applied in Kosovo, this strategy combined the case-by-case analysis with the cumulative analysis and, at times, sacrificed the protective umbrella created by the doctrine of proportionality. ... As evidenced by the conflict in Kosovo, one of the most important continues to be the doctrine of proportionality. ...

"[The l]aws are silent in time of **war.**"

- Cicero [1]

"To introduce into the philosophy of **War** ... a principle of moderation would be an absurdity ... . Let us not hear of Generals who conquer without bloodshed. If a bloody slaughter is a horrible sight, then that is a ground for paying more respect to **War.**"

- Carl von Clausewitz [2]

"There has always been a sentiment among mankind to mitigate the horrors of **war,** as far as the nature of the thing permits."

- William C. Sherman [3]

Operation Allied Force demonstrated the modern application of the doctrine of proportionality. Examples of NATO attacks, namely those against the Socialist Party Headquarters building in Belgrade and Serbian infrastructure targets, show that NATO planners had intended to avoid excessive civilian casualties. [199]

[*531] In addition, political leaders of NATO member nations took active roles in target selection. [200] Current information does not indicate any intentional or indiscriminate bombings of civilian populations, which the doctrine of proportionality strictly prohibits. [201] NATO planners reviewed the range of possible civilian collateral damage for each target, gathered intelligence, and used weapons that would minimize civilian casualties. [202] Finally, NATO postponed a ground invasion of Kosovo and an attack upon Serbian computer systems, both of which would have negatively impacted Serbian civilian life. [203]

B. Operation Allied Force: NATO's Proportional Failures

An analysis of Operation Allied Force's individual attacks, particularly **[*532]** the attacks that disrupted the water supply, reveals NATO's failure to protect civilians. [204] Attacks on electrical power grids and bridges also raise questions as to whether the anticipated military advantage truly outweighed civilian concerns. [205] Further, accidental strikes occurred and led to civilian casualties. [206]

Operation Allied Force shows that nations use a combination of the cumulative and case-by-case approaches when determining anticipated military advantage. [207] When the case-by-case analysis does not justify a particular attack, nations may apply the cumulative analysis of the anticipated military advantage, which provides a lower standard of protection for civilians during wartime. [208] The strategic goals of Operation Allied Force included expelling Serbian forces from Kosovo, ending the humanitarian disaster, and preventing further instability in the Balkan region. [209] NATO's use of force was not intended to punish Serbian civilians, but rather to apply only that amount of force necessary to achieve these strategic goals. [210]

NATO planners frequently balanced civilian concerns when they **[*533]** planned individual attacks, as evidenced in the attack upon the Socialist Headquarters building and the refusal to bomb the "Rock-n-Roll" bridge. [211] They planned for a minimum amount of potential civilian casualties, acted upon intelligence to minimize such casualties, and discussed possible strategies that would decrease unwanted casualties. [212]

At times, however, NATO planners measured the anticipated military advantage through a cumulative analysis, determining whether a specific attack would help achieve the overall strategic goals. [213] NATO understood that attacking Serbian military targets in Kosovo and Serbia would not be enough to make the Serbian government capitulate. [214] The Serbian government would have acquiesced only after NATO targeted more sensitive and civilian-related objects, including electricity grids, ministry buildings, and bridges. [215] NATO, therefore, attacked targets that affected Serbia's military capability, as well as its ability to gain Serbian-civilian support for its military action in Kosovo. [216]

[*534] As applied in Kosovo, this strategy combined the case-by-case analysis with the cumulative analysis and, at times, sacrificed the protective umbrella created by the doctrine of proportionality. [217] Continuing this predominant aspect of warfare, which focuses military force on an enemy's civilian population and government in order to compel an enemy to accept certain terms, fails to provide the full protection found in the express language of the Protocol. [218]

Operation Allied Force illustrates the continuing influence of the jus ad bellum of a military operation upon the jus in bello. [219] Theoretically, the two maxims are distinct, but frequently, the means of an operation are considered just if the cause is considered just. [220] Increased acceptance of proportionality, a development marked most notably by its codification in the

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Protocol, may be expected to dull the jus ad bellum influence; however, the tactics of the Gulf **War** and Operation Allied Force show the strong belief that achieving an end, when deemed just, permits a wide range of means. [221]

[*535]

C. Operation Allied Force: A Criminal Law Application?

As required by the Protocol, an operation is not analyzed as a whole to determine whether it constituted a proportional response, but the proportionality of each attack within an operation is assessed individually. [222] Proportionality, within the context of the Protocol, stresses the jus in bello of warfare, speaking to the anticipated military advantage of a specific attack rather than the overall political or humanitarian advantages of an operation. [223]

Proportionality in the criminal law context, which mandates that the punishment fit the crime, provides another analytical tool for the jus ad bellum of a military operation. [224] Considering whether NATO's operation, taken as a whole, was a proportional response to the humanitarian crisis created in Kosovo, the appropriate question asks whether the operation, inclusive of both civilian and combatant injuries, properly fits the crimes committed by Serbia against the citizens of Kosovo. [225] The answer to this question will differ according to individual moral, political, legal, and ethical views. [226]

D. The Direction of the Doctrine of Proportionality in the 21st Century

As the hearts and minds of the world soar and embrace the new opportunities of the 21st century, they sink when remembering the carnage of **wars** fought in the 20th century, including the current trend of violence in the Balkans. [227] Is it possible to regulate **war** and maintain rules intended **[*536]** to protect civilians? [228] Although nations once chose to settle conflicts by engaging large armies on battlefields, airstrikes are now popular military tools. [229] Governments prefer surgical airstrikes, which maintain the false promises of decreasing combatant and civilian casualties. [230] Despite the best efforts and intentions of any military planner to apply the doctrine of proportionality, civilian casualties in wartime are inevitable. [231] Because **[*537]** of this truth of **war,** some suggest that General Robert E. Lee surmised correctly that "it is well that **war** is so terrible[; otherwise] we would grow too fond of it." [232]

V. Conclusion

The doctrine of proportionality, most recently codified in the Protocol, continues to be a workable tool and the best solution in the effort to prevent excessive civilian casualties. Its purpose and importance find support in international charters and treaties, ICJ decisions, and in state practice. Proportionality now claims further support from NATO's Operation Allied Force against Serbia. For proportionality to be most effective, however, nations must focus on a case-by-case analysis of military advantage. The current trend of accepting a cumulative analysis of military advantage, within a broader combination of both cumulative and case-by-case analyses, fails to meet the standards set forth by the Protocol. This combination deprives civilians of the most protection during wartime. As modern warfare continues to exact tolls on civilians, it is imperative that nations continue to look to the doctrine for guidance and explore ways for which it can be improved. Contrary to Cicero's belief, there are laws in time of **war.** As evidenced by the conflict in Kosovo, one of the most important continues to be the doctrine of proportionality.

FOOTNOTES:

n1. The Oxford Dictionary of Quotations 204 (Angela Partington ed., 4th ed. 1992).

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n2. Gerald J. Adler, Targets in **War:** Legal Considerations, 8 Hous. L. Rev. 1, 7 & n.28 (1970) (quoting Carl von Clausewitz, On **War** 3, 288 (Graham trans., 1966)).

n3. The Laws of **War:** Constraints on Warfare in the Western World 159 (Michael Howard et al., eds., 1994).

n4. See John Prevas, Hannibal Crosses the Alps at xv (1998) (providing a time line of the major events in Hannibal's life including the Battle of Zama); see also Donald Kagan, On the Origins of **War** and the Preservation of Peace 232-80 (1995) (detailing the causes and battles of the Second Punic **War)**; Serge Lancel, Hannibal 172-85 (1998) (restating the facts of the Battle of Zama); B.H. Liddell Hart, Scipio Africanus: Greater Than Napoleon 164-90 (1926) (assessing the Battle of Zama).

n5. See Prevas, supra note 4, at 7 (intimating that Scipio also spared Carthage due to his respect for Hannibal).

n6. See id. (clarifying how Carthage quickly prospered due to international trade and repaid its debt to Rome after the Second Punic **War** ahead of schedule).

n7. See id. (noting Carthage's eventual demise due to Rome's three-year siege of the city). The story states that:

Legend has it that the Roman fear and hatred of Carthage had become so great ... that a curse was placed over the ruins and salt plowed into the ground so nothing could ever live there again. So complete was the Roman destruction that little trace of the Carthaginian culture remains today.

Id.

n8. See id. at 1. The story continues:

The city burned for seventeen days, and even after it no longer contained life the Romans weren't finished. Once the fires had cooled, soldiers worked amidst the rubble and the thousands of incinerated human remains to obliterate any physical trace of what had once been known as "the jewel of the Mediterranean."

Id.

n9. See id.

n10. See id.

n11. Id.; cf. Kagan, supra note 4, at 289-90 (providing a comparison of the peace treaty that concluded the First World **War** to a "Carthaginian Peace"). John Maynard Keyes, the noted economist, called the Treaty of Versailles "immoral and unworkable." Id. at 290. Referring to both the reparations and economic aspects imposed by the treaty and the total destruction of Carthage by Rome after the Third Punic **War,** Keyes argued that the proposed peace treaty "would bring economic ruin and **war** to Europe unless it was repudiated." Id.

n12. See John Temple Swing, Foreword to Louis Henkin et al., Right v. Might: International Law and the Use of Force at vii (1989) (admitting that humankind has a long history of attempts to limit the "scourge of **war**"). Swing describes this process as a "struggle to impose "rationality on reality.'" Id. Swing postulates that this "central contest between reason and force" continues today. Id.; see generally John Keegan, A History of Warfare 3-60 (1993) (summarizing the role **war** has played in the development of humankind).

n13. See Swing, supra note 12, at vii (postulating that limitations on the use of force, culminating with the U.N. Charter, are as old as warfare itself); see also Lieutenant Colonel William J. Fenrick, The Rule of Proportionality and Protocol I in Conventional Warfare, 98 Mil. L. Rev. 91, 92 (1982) ("The law of **war** or of armed conflict is concerned in part with the protection of basic human rights, particularly the elemental right to life."); Guy B. Roberts, The New Rules for Waging **War:** The Case Against Ratification of Additional Protocol I, 26 Va. J. Int'l L. 109, 110-11 (1985) (providing a brief description of the history of warfare regulation); Stefaan Smis & Kim Van der Borght, The Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 27 Ga. J. Int'l & Comp. L. 345, 376-77 (1999) (stating that the customary rules that limit the use of force in the conduct of **war** existed in India, China, Ancient Rome, and the European Middle Ages).

n14. See Commander Charles A. Allen, Implementing Limitations on the Use of Force: The Doctrine of Proportionality and **Necessity,** 86 Am. Soc'y Int'l Proc. 39, 46 (1992) (defining proportionality as a concept of distinction, requiring that parties to a conflict "distinguish between civilian populations and combatants and between civilian objects and military objectives"); Fenrick, supra note 13, at 92; Judith Gail Gardam, Proportionality and Force in International Law, 87 Am. J. Int'l L. 391, 391 (1993) (introducing the doctrine of proportionality as it applied in the Gulf **War)**; Bernard L. Brown, Note, The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification, 10 Cornell Int'l L.J. 134, 134 (1976) (providing examples of attempts to codify and strengthen the international recognition of limitations on warfare); see also Crimes of **War:** What the Public Should Know 294 (Roy Guthman & David Rieff, eds., 1999) [hereinafter Crimes of **War]** (stating that the principle of proportionality is "embedded in almost every national legal system and underlies the international legal order"). Proportionality is used to determine "the lawfulness in jus ad bellum of the strategic goals ... [and] the lawfulness in jus in bello of any armed attack that causes civilian casualties." Id. Proportionality is involved in any situation where military action causes collateral civilian damage. See id.

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n15. See Gardam, supra note 14, at 391 & n.3 (expressing the importance of a proportional military response); Michael N. Schmitt, Clipped Wings: Effective and Legal No-fly Zone Rules of **Engagement,** 20 Loy. L.A. Int'l & Comp. L.J. 727, 765 (1998) (defining proportionality, within the context of legal rules of **engagement** for no-fly zones, as allowing "no more force than necessary to counter the hostile act or demonstration of hostile intent"). The fundamental principle of proportionality states that belligerents are not entitled to utilize unlimited means to achieve particular military objectives at the expense of civilian casualties. See Gardam, supra note 14, at 391; see also Brown, supra note 14, at 134 & n.2 (noting the failure of recent codifications such as the Geneva Convention to address proportionality and to provide adequate civilian protection).

n16. See Brown, supra note 14, at 134.

n17. See Gardam, supra note 14, at 395-96; see also Crimes of **War,** supra note 14, at 223 ("Jus ad bellum is the title given to the branch of law that defines the legitimate reasons a state may engage in **war** and focuses on certain criteria that render a **war** just."). The modern principle of jus ad bellum derives from the U.N. Charter, which sets forth the only acceptable instances that permit the use force. See id.

n18. See Gardam, supra note 14, at 391, 395; see also Crimes of **War,** supra note 14, at 223 (providing that the jus in bello is the "set of laws that come into effect once a **war** has begun" and noting that these rules depend upon international customary law); Fenrick, supra note 13, at 94 (setting forth the concepts underlying the rule of proportionality). The traditional approach toward armed conflict involves three concepts. See id. at 93. First, military **necessity** mandates that force can only be used to achieve a particular military objective, which is usually the "partial or complete submission of the enemy at the earliest possible moment with the least possible expenditure of lives, resources, and money." Id. Second, humanity prohibits the infliction of unnecessary suffering upon combatants or noncombatants. See id. Third, chivalry recognizes the deference to certain formalities and courtesies in warfare. See id. at 94. The doctrine of proportionality balances these three concepts. See id.

n19. See North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. NATO was established as a U.S.-European alliance, "reaffirming their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments." Id. at 2242. Frequently viewed solely as a defensive alliance against the Soviet Union, the Treaty granted NATO nations the ability to settle international disputes, including the use of force, under the auspices and direction of the U.N. See id.

n20. See generally NATO's Role in Relation to the Conflict in Kosovo (visited June 17, 2000) <http://www.nato.int/kosovo/history.htm> [hereinafter NATO's Role] (providing background information on the Kosovo conflict and an overview of NATO's goals and methods).

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n21. See Michael J. Kelly, Traveling the Road to Rambouillet: Is the Imposition of Federalism in Kosovo Pragmatic Foreign Policy or Unwise Meddling?, 40 S. Tex. L. Rev. 789, 798-99 (1999) (considering various questions raised by NATO's action in Kosovo, such as whether mass genocide justifies the use of armed force by a nation-state); Aaron Schwabach, The Legality of the NATO Bombing Operation in the Federal Republic of Yugoslavia, 11 Pace Int'l L. Rev. 405, 407-08, 418 (1999) (suggesting sources of international law that would provide a legal basis for NATO's bombing of Kosovo and Serbia); Kofi Annan, Two Concepts of Sovereignty, The Economist, Sept. 18, 1999, at 49-50 (advancing both the importance of national sovereignty and the risks presented to international peace and stability by the use of force by regional arrangements without the previous and explicit approval of the U.N. Security Council); Other People's **Wars,** The Economist, July 31, 1999, at 13-14 (evaluating the opinions of legal scholars who argue that force for humanitarian intervention is wrong because it prolongs violence and unrest by prohibiting the same from running their natural courses to cessation and postulating that intervention does not produce lasting peace).

n22. Black's Law Dictionary 1219 (6th ed. 1990); see also Webster's New World Dictionary 1139-40 (2d ed. 1980) (defining proportionate as "in proper proportion" or "to make proportionate" and defining proportion as "the comparative relation between parts, things or elements with respect to size, amount or degree").

n23. See, e.g., Lewis v. Vogelstein, 699 A.2d 327, 336-38 (1997) (introducing the concept of proportionality into Delaware corporate law).

n24. See, e.g., Solem v. Helm, 463 U.S. 277, 303 (1983) (reaffirming proportionality in criminal sentencing); Weems v. United States, 217 U.S. 349, 367 (1910) ("It is a precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.").

n25. See Barry E. Carter & Phillip R. Trimble, International Law 1287-88, 1293 (2d ed. 1995) (discussing the concept of proportionality as it relates to the state of **war** among nations).

n26. See Gardam, supra note 14, at 394-95 (contending that proportionality "required an assessment as to whether the overall evil a **war** would cause was balanced by the good that would be achieved"). But see M. Shaw, International Law 539-41 (1986), reprinted in Carter & Trimble, supra note 25, at 1282-83 (insisting that later legal theorists began to include with the requirements of just **war** the "immunity of innocent persons from direct attack and the proportionate use of force to overcome the opposition").

n27. See Gardam, supra note 14, at 395 (conceding that no independent jus in bello doctrine existed during the early stages of the proportionality doctrine); see also Crimes of **War,** supra note 14, at 224 (reporting that the theory of just **war** originated from Roman Law). In the seventeenth century, the Dutch philosopher Hugo Grotius first espoused the seven criteria that formed the foundation for a just **war:**

The criteria for engaging in a just **war** ... consists of seven elements: (1) that there be a just cause; (2) that there is a right authority (legitimate sovereign) to initiate the **war;** (3) a right intention on the part of the parties using force; (4) that the resort to force be proportional; (5) that force be a last resort; (6) that **war** is undertaken with peace as its goal (not for its own sake); (7) and that there be a reasonable hope of success.

Id. at 224.

n28. See Gardam, supra note 14, at 397 (illuminating the early developmental stage of proportionality). The modern law of armed conflict developed during:

The period from the emergence of the modern nation state until the adoption of the Geneva Conventions of 1949 saw the development of the modern law of armed conflict; much of the law of the means and methods of warfare was codified between the middle of the nineteenth century and the Hague Conferences of 1899 and 1907. The foundation of the modern doctrine of proportionality in the law of armed conflict, that belligerents do not have an unlimited choice of means to inflict damage on the enemy, emerged during this period.

Id.

n29. See id.

n30. See id. at 397, 399-401; see also David G. Burwell, Note, Civilian Protection in Modern Warfare: A Critical Analysis of the Geneva Civilian Convention of 1949, 14 Va. J. Int'l L. 123, 126 (1973) (elaborating that "the atrocities of the Second World **War** ... pointed out the need to extend protection to civilians, not only as against the acts of opposing belligerent powers, but also as against persecution by their own incumbent governments"); David MacIsaac, Voices from the Central Blue: The Air Power Theorists, in Makers of Modern Strategy from Machiavelli to the Nuclear Age 624, 630 (Peter Paret et al. eds., 1986) (detailing the argument that air warfare should avoid making distinctions between combatants and noncombatants because massive aerial bombing raids should be conducted against enemy centers of population, government, and industry).

n31. See Gardam, supra note 14, at 400. But see id. (arguing that governments expressed concern regarding a strict adherence to proportionality because the doctrine may nullify the effectiveness of military strikes). In addition to the desire to maximize military effectiveness, a pessimism continued from the First World **War** into the Second over the ability to maintain proportional armed force. See id. As methods of warfare became more sophisticated and the practice of aerial bombardment became more accepted, distinguishing between military and nonmilitary targets and combatants and civilians became increasingly difficult. See id.

n32. See id. at 402.

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n33. See Allen, supra note 14, at 39 (concluding that a determination of whether force is necessary and proportional "arouses strong emotions and affects political attitudes" and citing as examples the Second World **War,** the Panamanian Invasion by the United States, and the Korean, Vietnam, and Gulf **Wars)**; see also Roberts, supra note 13, at 118 (noting the difficulty of applying proportionality). Roberts argues that:

Balancing the potential loss of innocent civilian lives against the attainment of an important military objective requires a commander to undertake an impossible ethical calculus. Nevertheless, the principle remains an integral part of the law of **war,** serving as a method whereby judgments can be made as to the appropriateness of the use of force in a given situation.

Id.

n34. U.N. Charter art. 2, para. 4. The Charter states that: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Id.

n35. U.N. Charter art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken ... to maintain or restore international peace and security."); U.N. Charter art. 42 ("Should the Security Council consider that measures ... [are] inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.").

n36. U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective **self-defense** if an armed attack occurs against a Member of the United Nations ... . "); see also Major Dawn R. Eflein, A Case Study of Rules of **Engagement** in Joint Operations: The Air Force Shootdown of Army Helicopters in Operation Provide Comfort, 44 A.F. L. Rev. 33, 40 (1998) (reiterating that **necessity** and proportionality are prerequisites for the legitimate use of force in **self-defense)**.

n37. See Gardam, supra note 14, at 403; Louis Henkin, Use of Force: Law and U.S. Policy, in Right v. Might: International Law and the Use of Force 37, 45 (1989) (discussing proportionality as a limitation on the use of force for **self-defense** under the U.N. Charter); see also Mark B. Baker, Terrorism and the Inherent Right of **Self-Defense** (A Call to Amend Article 51 of the United Nations Charter), 10 Hous. J. Int'l L. 25, 46-47 (1987) (citing the importance of proportionality when responding in **self-defense** to a terrorist attack). The methods used must be limited to removing the danger; once the danger is removed under Article 51 of the U.N. Charter, all force must cease pending Security Council action. See id.

n38. See Fenrick, supra note 13, at 95 (detailing attempts at codifying proportionality prior to Protocol I); see also id. at 96 (adding that the 1938 Resolution of the League of Nations Assembly Concerning Protection of Civilian Population Against Bombing From the Air in Case of **War** was another milestone in the development of proportionality). The Resolution made the intentional bombing of civilian populations illegal, mandated that targets of aerial attacks must be legitimate, identifiable military targets, and insisted that caution be used in the execution of attacks in order to prevent the negligent bombing of civilian areas. See id.

n39. See N.J. Rengger, Treaties and Alliances of the World 163-64 (1990) (providing pertinent aspects of the 1899 Hague Convention including the prohibitions on the use of asphyxiating gases and expanding bullets).

n40. See Brown, supra note 14, at 136; Burwell, supra note 30, at 125-26 (stressing how the parties to the 1907 Hague Convention "remained under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience"). But see Rengger, supra note 39, at 164 (finding that the previous prohibitions on the use of asphyxiating gases and expanding bullets were not renewed in 1907).

n41. See Hague Convention, July 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter 1899 Hague Convention]; Hague Convention Respecting the Laws and Customs of **War** on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter 1907 Hague Convention]; Brown, supra note 14, at 136; see also Allen, supra note 14, at 41-42 (detailing provisions of the Hague Conventions that limited the means of combat, such as Article 23(g) that protected enemy property and Article 27 that protected certain buildings from attack). This protection required combatants to limit the use of force only as much as practically possible, accepting the possibility of civilian casualties. See id. Identifying a limitation of the Hague Convention, the author recognized the difficulty in determining whether a target is a military **necessity.** See id. This determination is an important aspect of justifying a military strike against a target. See id.

n42. See Rengger, supra note 39, at 162-63.

n43. See Geneva Convention Relative to the Protection of Civilian Persons in the Time of **War,** Aug. 12, 1949, 6 U.S.T. 3516, 3528, 3530, 3552, 4 Bevans 853 [hereinafter the Geneva Convention]. The Geneva Convention also extends protection to expectant mothers, provides strict rules governing the application of the death penalty to protected persons, guarantees the right of protected persons to appeal convictions, and mandates that internees are provided with adequate food and clothing. See id. at 3528, 3560, 3564, 3574.

n44. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 16 I.L.M. 1391 [hereinafter Protocol I]; Fenrick, supra note 13, at 95. Article 15 of the Lieber Instructions, which was distributed to the Union forces engaged in the U.S. Civil **War** in 1863, stated that military **necessity** required the destruction of enemy forces. See id. The Rules of Air Warfare,

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drafted by Hague jurists in 1922-1923, prohibited indiscriminate aerial bombings of civilian populations. See id. Compare George H. Aldrich, Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions, 85 Am. J. Int'l L. 1, 20 (1991) (arguing that ratification of Protocol I is in the best interests of the United States as it would improve protections for civilians caught in armed conflicts), with Roberts, supra note 13, at 170 (arguing against the ratification of Protocol I calling it "neither a codification of the laws of **war** nor a reliable coherent expression of humanitarian principles").

n45. See generally Protocol I, supra note 44; see also Rengger, supra note 39, at 163 (describing the contents of Protocols I and II). Protocol I includes, in its definition of **war** crimes, "attacks on the civilian population by target area (or "carpet") bombing, the destruction of nuclear power stations, dams, food supplies and water installations indispensable to the survival of civilians." Id. at 163. In pertinent part, Protocol I includes struggles against colonial domination or racist regimes and an occupation by a foreign power in the definition of "armed international conflict" under Article 42 of the U.N. Charter. Id. In addition, Protocol II seeks to safeguard civilian populations during an internal conflict providing protections for the sick, wounded, medical personnel, and children, as well as providing a general prohibition on the intentional starvation of a civilian population as a tool of **war.** See id.; Fenrick, supra note 13, at 92 (introducing the two Protocols adopted in 1977 including Protocol I and Protocol II). International armed conflicts involve "regular armed forces engaging the regular armed forces of a foreign state or entering the territory of a foreign state without permission" and those conflicts against a racist regime in the name of self-determination. Id. at 98.

n46. See Gardam, supra note 14, at 406; see also Allen, supra note 14, at 47 (stating that the conventional rule of proportionality as codified in Protocol I requires more than simple intent not to harm civilians, but an active consideration of the likelihood of civilian casualties). Sixteen of the nineteen NATO member nations including: Belgium, Canada, the Czech Republic, Denmark, Germany, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Great Britain, and the United States, signed the Protocol. See Protocol Original Agreement (visited Nov. 20, 1999) <http://www.un.org/depts/ treaty>. France, Greece, and Turkey did not sign the Protocol. See id. In addition to these NATO member nations, China recently acceded to the terms and conditions of the Protocol. See China's National Defense in 2000 (visited Oct. 18, 2000) <http://www.chinadaily.com.cn/cndydb/2000/10/d1-6re1.a17.html>. The terms of the Protocol bind NATO members because Article 18 of the Vienna Convention on the Law of Treaties requires a nation not to do anything to defeat the purpose of the treaty once the nation has signed it or once it has "expressed its consent to be bound by the treaty." Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679.

n47. See Protocol I, supra note 44, art. 48 (requiring that all parties to a conflict shall attack only military objectives after distinguishing between military and civilian objectives and civilian populations and combatants); see also Allen, supra note 14, at 50 (citing sources of international customary law that accept Article 52(2) including the United States Army's Field Manual and the Annotated Supplement to the Commander's Handbook on the Law of Naval Operations).

n48. See Protocol I, supra note 44, art. 51; see also Fenrick, supra note 13, at 99-100.

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TEXT:
[*501] In 202 B.C., the Roman general Scipio Africanus achieved a decisive victory over Hannibal, the great Carthaginian general, at the Battle of Zama, thus ending the Second Punic **War.** [4] Scipio, moved by the splendor and beauty of Carthage, decided to spare the city from total destruction. [5] Carthage again prospered in the years following Rome's victory. [6]
[*502] Fearing Carthage's new-found prosperity, Rome launched the Third Punic **War,** this time showing Carthage no mercy. [7] The Romans set Carthage ablaze, took the city apart stone by stone, and either killed or enslaved its citizens. [8] The Romans destroyed official Carthaginian records and threw salt over the area where Carthage once stood in order to prevent life from ever growing there again. [9] In time, Rome destroyed all traces of Carthage and its great civilization. [10] Rome devised the "Carthaginian solution," which refers to the total destruction and annihilation of one's enemy with equal disregard for combatants and civilians. [11]

Throughout history, humankind has continually resorted to the use of force to resolve conflicts. [12] Because international law developed limitations on the use of force in an attempt to minimize the horror of **war,** acts such as the "Carthaginian solution" became the exception rather than the norm. [13] An example of an internationally recognized limitation governing
[*503] the use of force is the doctrine of proportionality. [14]

The doctrine of proportionality requires a response of force to be proportional to the aggression that precipitated such force. [15] This doctrine accepts wartime civilian casualties as inevitable, but the doctrine of proportionality requires that civilian casualties inflicted by military strikes not be excessive in relation to the anticipated military advantage gained by the strike. [16] The doctrine initially applied to the jus ad bellum of warfare, the branch of law that defines the legitimate reasons a nation may conduct a military operation. [17] The modern application of proportionality, **[*504]** however, also covers the jus in bello, the actual means used in the conduct of the military operation, balancing the anticipated military advantage gained against expected civilian casualties. [18]

On March 23, 1999, the North Atlantic Treaty Organization (NATO) [19] commenced Operation Allied Force against targets in Kosovo and Serbia. [20] Despite the Operation's short duration, ability to keep NATO casualties low, and use of high-tech weapons, Operation Allied Force sparked debate over the international use of force. [21]

This Comment explores both the legal foundation for the doctrine of proportionality and NATO's application of the doctrine during Operation **[*505]** Allied Force. This Comment examines Operation Allied Force's impact on the acceptance of proportionality as a workable tool in the endeavor to protect civilians during wartime. First, this Comment explores the foundation of the legal doctrine by considering the general principle of proportionality, existing international treaties and charters, International Court of Justice (ICJ) decisions that speak to proportionality, and examples of the use of force in state practice. Second, this Comment details the history of the conflict in Kosovo and provides a summary of Operation Allied Force. Third, this Comment considers specific Operation Allied Force attacks and analyzes them under the requirements of proportionality. Finally, this Comment argues that proportionality continues to be a workable tool in the effort to protect civilians during wartime. This Comment further argues that NATO intended to respond proportionally to the Serbian offensive within Kosovo's borders. To this end, NATO succeeded in many of its attempts to protect civilians. Operation Allied Force shows, however, that in order to provide civilians with maximum protection, nations must apply proportionality consistantly when using armed force.

I. The Doctrine of Proportionality: A Historical and Legal Foundation

A. Proportionality and the Use of Force: The Historical Development

n49. See Protocol I, supra note 44, art. 57; see also Fenrick, supra note 13, at 100-01 (detailing Article 57); Protocol I, supra note 44, art. 58 (mandating that nations remove civilians from the vicinity of military objectives and take other precautions required to protect the civilian population).

n50. See Protocol I, supra note 44, art. 85 (calling the deliberate planning and execution of indiscriminate attacks as grave breaches of the Protocol). In sum, Article 85 states that when conducted willfully, grave breaches of Protocol I include: (1) making civilian populations or individual civilians the object of attacks; (2) launching indiscriminate attacks with the knowledge that such an attack will cause excessive injuries or death to civilians; (3) and knowingly launching attacks on works or installations that contain dangerous forces that might result in excessive injury or death to civilians. See id.; see also Fenrick, supra note 13, at 110. The violator of this provision may be subject to "universal jurisdiction" if the breach causes death or injury. See id. Further, it is the commander who orders, and not the subordinate who executes the attack, who will be punished for the grave breach. Id.

n51. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, opened for signature Apr. 10, 1980, 19 I.L.M. 1523 (1980). This Convention prohibits the indiscriminate use of such weapons when not directed toward a military object or when excessive injury or loss of civilian life could occur in relation to the military gain. Id. art. 3, para. 3. Finally, this Convention requires parties to record the locations of any pre-planned mine fields or areas with large numbers of booby-traps or mines. Id. art. 7, paras. 1 & 2.

n52. Protocols to the 1980 Conventional Weapons Convention, amended May 3, 1996, 35 I.L.M. 1207 (1996). The 1980 Conventional Weapons Convention proposed three protocols: (1) an Amended Prohibitions or Restrictions on the Use of Mines, Booby-traps, and Other Devices, which expanded the protections of civilians during internal conflicts; (2) the Protocol or Restrictions on the Use of Incendiary Weapons, which prohibits the use of incendiary weapons against targets in cities, towns, or villages; and (3) the Protocol on Blinding Laser Weapons, which prohibits the use of such weapons against opposing soldiers and civilians. Id.

n53. United States Convention on the Law of the Sea, Nov. 1, 1982, 21 I.L.M. 1261, 1274-75 (stating that nations are entitled to take "necessary steps" to prevent prejudicial passage of a foreign ship); see also Dale G. Stephens, The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations, 29 Cal. W. Int'l L.J. 283, 311 (1999) (concluding that taking such "necessary steps" in response to prejudicial passage must be necessary and proportionate though the Convention fails to expressly address the use of force in this context).

n54. But see Carter & Trimble, supra note 25, at 14 (concluding that only a "few issues of substantial significance to international order" get to the ICJ because nations prefer the "flexibility of diplomacy" to the slow and expensive methods of the international court).

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n55. The Corfu Channel (U.K.-N. Ir. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

n56. Id. at 36 (articulating the findings of the ICJ including the rejection of the Albanian claim that Operation Retail violated its sovereignty).

n57. See id. at 35. After previously sweeping the Corfu Channel for mines in 1945 and declaring it a safe passageway, two British warships hit mines on October 22, 1946 and suffered severe damage. See id. at 12-13. Despite Albania's sovereignty protests, the British Navy swept the Corfu Channel again for mines under Operation Retail on November 13, 1946. See id. at 13. As part of that operation, and in preparation for any offensive Albanian action, the British Navy sent a covering force of warships to accompany the minesweepers, including an aircraft carrier, cruisers, and other **war** vessels. See id. at 14. The ICJ deemed this covering force to be proportional to the perceived threat of Albanian offensive action and possible existing mines in the area. See id. at 35. The court further held Albania responsible for deaths and injuries caused by the detonations. See id. at 36.

n58. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4 (June 27).

n59. Id. at 146 (providing the court's conclusions).

n60. Id. at 103.

n61. See id. at 176 (separate opinion of Judge Ruda).

n62. See id. at 367-68 (dissenting opinion of Judge Schwebel) (asserting the importance of a flexible application of proportionality). But see id. (dissenting opinion of Judge Schwebel) (noting that **self-defense** must be proportional to the precipitating use of force, but asserting that the use of force in **self-defense** will sometimes fail to be "commensurate with the attack"). The dissent considered Judge Ago's opinion, which stated that the defensive act may sometimes be disproportionate to the initial act of aggression. See id. (dissenting opinion of Judge Schwebel). According to Judge Ago, the important point to consider was the result to be achieved by the defensive act, not the forms, substance, and strength of the defensive act. See id.

n63. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (Jul. 8).

n64. Id. at 259-63, 266 (exposing the court's inability to decide the legality of the threat or

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use of nuclear weapons under international law even if a nation uses nuclear weapons within the guidelines of humanitarian law).

n65. See id.; see also Smis & Van der Borght, supra note 13, at 386 (summarizing the ICJ's conclusion that it had "established customary rules of humanitarian law applicable to any present and future weapon").

n66. See Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. at 257.

n67. See, e.g., Fenrick, supra note 13, at 117-19 (citing the 1856 bombardment of Canton by Royal Navy ships, pre-D-Day bombing of French territory in 1944, and the battle to recapture Manila in 1945 as examples of proportionality in state practice).

n68. See id. at 122-23 (introducing two studies of proportionality's impact on the effectiveness of the 1965 to 1968 and 1972 to 1973 bombing campaigns).

n69. See id. (citing studies attributing the failure of Operation Rolling Thunder and other bombing campaigns in North Vietnam to the Johnson Administration's over-extensive demand that the bombing campaign minimize civilian casualties rather than merely lessen collateral civilian casualties). The 1972 to 1973 campaign, however, was effective despite proportionality's rigorous application. See id. at 123.

n70. See id.

n71. See id.

n72. See Tom J. Farer, Panama: Beyond the Charter Paradigm, 84 Am. J. Int'l L. 503, 513 (1990) (questioning the proportionality of Operation Just Cause); Ved P. Nanda, The Validity of United States Intervention in Panama Under International Law, 84 Am. J. Int'l L. 494, 497 (1990) (criticizing "Operation Just Cause" because no imminent threat to U.S. interests or U.S. citizens existed). But see Anthony D'Amato, The Invasion of Panama Was a Lawful Response to Tyranny, 84 Am. J. Int'l L. 516, 524 (1990) (arguing that the U.S. invasion of Panama appropriately and legally protected civil liberties and fundamental freedoms).

n73. See Gardam, supra note 14, at 404-05. The massive bombardment of the Iraqi infrastructure was troubling; moreover, it "appeared that more was done than was proportionate to [expel] Iraq from Kuwait." Id. at 405.

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n74. See Michael P. Roch, Military Intervention in Bosnia-Hercegovina: Will World Politics Prevail Over the Rule of International Law?, 24 Denv. J. Int'l L. & Pol'y 461, 468-72 (1996) (describing the events leading to NATO's airstrikes). Fighting erupted when various ethnic factions of the country, including the Bosnian Croats, Muslims, and Serbs, declared independence. See id. at 468-69. After these declarations, a civil **war** erupted, which resulted in NATO's use of armed force for the first time in its history. See id. at 487.

n75. See Sean D. Murphy, Contemporary Practice of the United States Relating to International Law, 93 Am. J. Int'l L. 161, 161-64 (1999). The United States attacked targets in response to the bombings of the U.S. embassies in Kenya and Tanzania. See id. at 161. The United States believed that the first set of targets, paramilitary camps in Afghanistan, were training grounds for the terrorist organization that perpetrated the embassy bombings. See id. The U.S. identified the second target, a Sudanese pharmaceutical plant, as a chemical weapons facility, the products of which were to be used in future attacks against U.S. targets. See id.

n76. See id. at 163 & n.6 (quoting a letter dated August 20, 1998 from the Permanent Representative of the United States to the United Nations, which was addressed to the President of the Security Council). But see Jules Lobel, The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan, 24 Yale J. Int'l L. 537, 539-40, 557 (1999) (postulating that the airstrikes against Sudan and Afghanistan failed to meet the requirements of proportionality because of factual insufficiencies and a disregard for the U.N. Charter and international law); Leah M. Campbell, Comment, Defending Against Terrorism: A Legal Analysis of the Decision To Strike Sudan and Afghanistan, 74 Tul. L. Rev. 1067, 1096 (2000) (arguing that the U.S. missile strikes failed to meet the requirements of **necessity** and proportionality because international law did not condone the use of force to retaliate against terrorists).

n77. See Richard C. Paddock, Russia Takes Page from NATO Playbook, L.A. Times, Sept. 29, 1999, at A1 (describing the Russian air offensive in Chechnya as identical to NATO's air operation in Kosovo). Russian airstrikes targeted the Chechen economy in an attempt to devastate it just as NATO attacked Serbia's infrastructure and industry to bring Milosevic's government to the negotiating table. See id. Russian warplanes attacked bridges, oil and communications facilities, and economic and military installations. See id.; Daniel Williams, Russian Aircraft Batter Chechnya, Wash. Post, Sept. 28, 1999, at A1 [hereinafter Williams, Better Chechnya] (assessing the initial phases of the Russian air campaign over Chechnya and adding Russian views that the Russian bombings of Chechnya are identical to NATO's bombings of Serbia).

n78. See David Hoffman, Yeltsin Aides Guiding **War** in Chechnya, Wash. Post, Oct. 7, 1999, at A1 (stating that thousands of Chechen civilians fled from the **war** zone to northern Chechnya). Admitting that civilians were among the victims of the Russian air campaign, Russian generals justified strikes against civilian targets by accusing Chechen civilians of being a vital part of both the guerrillas' efforts to wage **war** in Dagestan and to conduct bombing campaigns in Russian cities. See Williams, Better Chechnya, supra note 77, at A1; Daniel Williams, Rockets Hit Chechen Capital, Wash. Post, Oct. 22, 1999, at A1 (describing a Russian attack on an alleged arms bazaar, which was really a Chechen marketplace, that resulted in civilian casualties). Russia's then-President Boris Yeltsin defended the military

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campaign against allegations that it was creating a humanitarian disaster. Yeltsin: West Has "No Right' To Criticize Chechen Campaign (visited Aug. 3, 2000) <http://www.cnn.com/WORLD/europe/9911/18/osce.summit>. Yeltsin declared that Russian forces would follow all U.N. conventions, but urged OSCE members not to interfere ""in the internal affairs of sovereign states.'" Id. Yeltsin claimed to have learned from NATO's use of force in Kosovo and stated that the world already knew ""what disproportionate consequences such interference can cause'" in nations. Id. But See Human Rights Watch, Russia/Chechnya: Civilian Killings in Staropromyslovski District of Grozny (visited Sept. 2, 2000) <http://www.hrw.org/reports/2000/russia<uscore>chechnya/> (detailing abuses by Russian soldiers in Chechnya, including the execution of 38 Chechen civilians and the looting and destruction of Chechen personal property).

n79. See Barak, 2 Ministers Empowered To Strike Lebanese Civilian Targets (visited June 11, 2000) <http://www.cnn.com/2000/WORLD/meast/02/16/lebanon.israel.02>.

n80. Id.

n81. See Barton Gellman, U.S., Allies Order Attack on Serbia, Wash. Post, Mar. 24, 1999, at A1; see also NATO's Role, supra note 20, at 1; Bruce W. Nelan, Into the Fire (visited June 11, 2000) <http://www.time.com/timemagazine/articles/0,3266,22211,00.html> [hereinafter Into the Fire] (describing the initial phases of Operation Allied Force).

n82. See Text: NATO Sec-Gen Solana Statement on NATO Airstrikes (visited Aug. 24, 1999) <http://www.usia.gov/kosovo/texts/99032504.htm>. Regarding this matter, President Clinton stated that:

We act to protect thousands of innocent people in Kosovo from a mounting military offensive. We act to prevent a wider **war;** to diffuse a powder keg at the heart of Europe that has exploded twice before in this century with catastrophic results ... ending this tragedy is a moral imperative.

United States Information Agency (visited Aug. 24, 1999) <http://www.usia.gov/kosovo/texts/990324wh.htm> (statement by President Clinton, Mar. 24, 1999); see also Guardian Unlimited (visited Feb. 28, 2001) <http://www.guardian.co.uk/Archive/Article/0,4273,3854203,00.html> (statement by British Prime Minister Tony Blair, Apr. 13, 1999). Additional goals included ending Serbian violence, establishing the withdrawal of all Serbian forces, providing a safe return of all refugees, and guaranteeing access to humanitarian aid organizations. See id. Further objectives included an end to all military action and the immediate suspension of violence and suppression, the withdrawal of military forces from Kosovo, the stationing of U.N. peacekeepers in Kosovo, the safe and unconditional return of all refugees, and the establishment of a more secure political framework for Kosovo. See NATO's Role, supra note 20, at 1; see generally U.S. and NATO Objectives and Interests in Kosovo (visited Aug. 24, 1999) <http://www.state.gov/www/regions/eur> [hereinafter U.S. and NATO Objectives] (detailing three strong interests for the mission in Kosovo: stopping the humanitarian crisis caused by the Serbian military, preventing a wider Balkan **war,** and securing NATO's credibility).

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n83. See Dana Priest, A Decisive Battle That Never Was, Wash. Post, Sept. 19, 1999, at A1 (addressing the use of air power as the main vehicle of Operation Allied Force and describing the initial planning for a ground invasion of Kosovo and Serbia by NATO troops if the airstrike phase of Operation Allied Force failed to achieve its objectives).

n84. See id.; Gen. Wesley K. Clark, Supreme Allied Commander, Europe, & Brig. Gen. John Corley, Press Conference on the Kosovo Strike Assessment (visited June 11, 2000) <http://www.nato.int/kosovo/press/p990916a.htm> [hereinafter Kosovo Strike Assessment].

n85. Military Technical Agreement Between the International Security Force ("KFOR") and the Government of the Federal Republic of Yugoslavia and the Republic of Serbia, June 9, 1999, KFOR-Yugo.-Serb. (visited June 11, 2000) <http://www.nato.int/kosovo/docu/a990609a.htm>; see also U.N. SCOR Res. No. 1244, 4011 mtg. at 1 (1999) (visited Aug. 24, 1999) <http://www.nato.int/kosovo/docu/u99061a.htm> (authorizing the creation and implementation of a peacekeeping force in Kosovo). The main effect of Resolution 1244 was to approve the creation of an international peacekeeping force within Kosovo to monitor the status of the peace agreement established under the Military Technical Agreement. See id.

n86. Noel Malcolm, Kosovo: A Short History xxvii (1999).

n87. Id. at 1; see also David Fromkin, Kosovo Crossing: American Ideals Meet Reality on the Balkan Battlefields 158 (1999) (describing the geography of the Kosovo region).

n88. See Fromkin, supra note 87, at 84 (addressing the effects of the mountainous terrain on the development of the Balkan people); see also Malcolm, supra note 86, at 1-2 (attributing the name of the "Accursed Mountains" to "their fierce impenetrability: rivers have sliced through their dry limestone like wires through cheese, creating a network of vertiginous gorges"). The mountains have internally divided the Balkan region, thereby decreasing unity among the people. See Fromkin, supra note 87, at 84. For example, the "inhabitants ... have retained their own religions, ... languages, ... style of dress, ... architecture, ... and their own calendars." Id.

n89. See Malcolm, supra note 86, at 2.

n90. Why Kosovo? Why NATO? Why Now? (visited June 10, 2000) <http://www.policy.com/issuewk/1999/0420<uscore>69/detail428.html> [hereinafter Why Kosovo?].

n91. See id. The origin of this conflict is commonly attributed to the Ottoman Turks' defeat

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of Serbia during the Battle of Kosovo Polje in 1389. See id. Since then, relations between the Serbs, who are predominantly Eastern Orthodox Christian, and Kosovo Albanians, who are predominantly Islamic due to Ottoman rule, have suffered. See id.

n92. See Malcolm, supra note 86, at 264-65 (noting that the Yugoslav state came into existence on December 1, 1918, after the First World **War** ended). The state officially took the name Yugoslavia in 1929. See id.; Fromkin, supra note 87, at 135 (contending that the victors of the First World **War** divided the Austrian-Hungarian Empire into three states: Poland, Czechoslovakia, and the Kingdom of the Serbs, which included the Croats and Slovenes and would later be called Yugoslavia). Following the Second World **War,** Yugoslavia was divided into the six republics of Slovenia, Croatia, Bosnia-Herzegovina, Serbia, Montenegro, and Macedonia. See id. at 146. Belgrade, the capital of Serbia, became the capital of this new federal system and retained the bulk of federal power. See id.; see also Why Kosovo?, supra note 90 (describing the modern history of Kosovo, including the effect of Yugoslavia's internal ethnic conflict on the region).

n93. See Why Kosovo?, supra note 90, at 1; see also Michael P. Roch, supra note 74, at 468-72 (explaining the conditions in the Balkans that led to the conflict in Bosnia and Kosovo's declaration of independence); Kelly A. Childers, United Nations Peacekeeping Forces in the Balkan **Wars** and the Changing Role of Peacekeeping Forces in the Post-Cold **War** World, Comment, 8 Temp. Int'l & Comp. L.J. 117, 123-24 (1994) (detailing Bosnia's application for recognition as an independent state); Yoshiko Inoue, United Nations' Peace-Keeping Role in the Post-Cold **War** Era: The Conflict in Bosnia-Herzegovina, Comment, 16 Loy. L.A. Int'l & Comp. L.J. 245, 250-53 (1993) (describing the Bosnian conflict as a classic example of a fight for self-determination).

n94. See Why Kosovo?, supra note 90; see generally Ved P. Nanda et al., Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia - Revisiting the Validity of Humanitarian Intervention Under International Law - Part II, 26 Denv. J. Int'l L. & Pol'y 827, 837-42 (1998). In June 1991, two Yugoslav republics, Slovenia and Croatia, declared independence. See id. A Croatian civil **war** erupted as Croat Serbs, with military support from Serbia, resisted the independence movement. See id. Although the Croatia situation seemed relatively secure by July 1992, a civil **war** had erupted in Bosnia-Herzegovina between the Bosnian Serbs, Croats, and Muslims. See id.

n95. See Why Kosovo?, supra note 90 (describing the escalation of violence between KLA and Serbian forces during the mid-1990s). The KLA consequently took control of almost a third of Kosovo before Serbian forces became more involved in the fighting. See id.

n96. See NATO's Role, supra note 20, at 6.

n97. See U.S. and NATO Objectives, supra note 82.

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n98. See SCOR Res. No. 1160, 3868th mtg., at 1 (1998) (visited Aug. 24, 1999) <http://www.nato.int/kosovo/docu/u980331a.htm>. The resolution "call[ed] upon the Federal Republic of Yugoslavia immediately to take the further necessary steps to achieve a political solution to the issue of Kosovo through dialogue ... . " Id. The resolution demanded that both sides cease hostilities and prohibited the sale of military equipment to the Federal Republic of Yugoslavia. See id.

n99. See Why Kosovo?, supra note 90, at 1; NATO's Role, supra note 20, at 3. The Contact Group met on January 29, 1992 to convene "urgent negotiations between the parties to the conflict, under international mediation." Id. at 2.

n100. See NATO's Role, supra note 20, at 2.

n101. See id. During a subsequent meeting held on June 12, 1998, the North Atlantic Council considered further measures, including various military measures. See id.

n102. SCOR Res. No. 1199, 3930th mtg. at 1 (1998) (visited Aug. 24, 1999) <http://nato.int.kosovo/docu/u980923a.htm>.

n103. See NATO's Role, supra note 20, at 2 (describing NATO's authorization of airstrikes as "designed to support diplomatic efforts to make the Milosevic regime withdraw forces from Kosovo, bring an end to the violence, and facilitate the return of refugees to their homes").

n104. See id. Milosevic agreed only after intense negotiations and diplomatic initiatives, including visits from NATO Secretary General Solana, United States Envoys Holbrooke and Hill, and General Clark, the Supreme Allied Commander in Europe. See id.

n105. See What Is the OSCE? (visited Aug. 7, 2000) <http://www.osce.org/publications/factsheets/osce<uscore>e.pdf7>. OSCE is a "pan-European security organization [with fifty-five] participating States [that] span the geographic area from Vancouver to Vladivostok." Id. OSCE deals with different security issues including arms control, diplomacy, human rights, and the environment. See id.

n106. SCOR Res. No. 1203, 3937th mtg. at 1 (1998) (visited Aug. 24, 1999) <http://www.nato.int/kosovo/docu/u981024a.htm> (authorizing the OSCE to establish a ground-based verification mission and NATO to create an air verification mission over Kosovo for surveillance purposes).

n107. See NATO's Role, supra note 20, at 3 (describing the resumption of attacks between

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the KLA and Serbian military and police forces). Despite international mediation efforts, both the KLA and the Serbian government initiated attacks in early 1999. See id. By mid-January 1999, Serbia initiated an offensive against Kosovar Albanians. See id.; see also Report to Congress: Kosovo/Operation Allied Force After-Action Report (Jan. 31, 2000) (visited Feb. 5, 2000) <http//www.defenselink.mil/pubs/index.html#Reports> (statement of Chairman of the Joint Chiefs of Staff Henry H. Shelton) [hereinafter Report to Congress] (offering that initial agreements allowed unarmed international observations from the OSCE and a NATO air verification mission into Kosovo).

n108. See NATO's Role, supra note 20, at 3.

n109. See id. The first round took place February 6-23, 1999, and the second round took place March 15-18, 1999. See id.

n110. See id.

n111. See id.; Gellman, supra note 81, at A1 (reporting that during last-minute meetings, Milosevic was "adamant in rejecting any deployment of NATO peacekeepers").

n112. See NATO's Role, supra note 20, at 3.

n113. See id.

n114. See id. (stating that airstrikes began only after Ambassador Holbrooke failed in his last attempt at mediation after flying to Belgrade and meeting with President Milosevic).

n115. See id.; Kosovo Strike Assessment, supra note 84.

n116. See Kosovo Strike Assessment, supra note 84.

n117. See id. (stating that at the beginning of the campaign, the second line of strikes against Serbian military targets within Kosovo would be the critical focus of NATO's efforts because these were the Serbian elements conducting the attacks against Kosovar civilians and KLA units).

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n118. See Report to Congress, supra note 107, at 7.

n119. See id.

n120. See id.

n121. See id.

n122. Id. at 8.

n123. See id.

n124. See Kosovo Strike Assessment, supra note 84, at 3, 7.

n125. See id.

n126. Operation Allied Force Update (visited June 10, 2000) <http://www.nato.int/kosovo/all-frce.htm> (providing a daily update of the missions flown and the targets attacked during Operation Allied Force). Additional targets included: military barracks, petroleum storage sites, military radio relay sites, communications centers, border posts, and a Serbian presidential retreat and leadership command center. See id.

n127. See Mark Thompson, Warfighting 101, Time, June 14, 1999 (visited Jan. 19, 2001) <http://www.time.com/time/magazine/printout/0,8816,26475,00. html> (adding that NATO claimed a 99.6% success rate in hitting its intended targets).

n128. See Dana Priest, Bombing by Committee: France Balked at NATO Targets, Wash. Post, Sept. 20, 1999, at A10 [hereinafter Priest, Bombing by Committee] (providing lower estimates of 500 to 1,000 for the number of civilian casualties caused by Operation Allied Force).

n129. See Gardam, supra note 14, at 391 & n.1 (discussing the difference between the jus ad bellum and the jus in bello); see also supra notes 15-18 and accompanying text (discussing both doctrines).

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"Proportionate" means to be "adjusted to something else according to [a] certain rate of comparative relation." [22] The concept of proportionality is used in various legal fields such as corporate, [23] criminal, [24] and international law. [25] Within the international legal arena, proportionality developed as a response to the Christian theory of just **war,** which permitted any means of fighting a **war** if the cause of the **war** proved **[*506]** just. [26] In order to achieve a just end, any means used were considered just even if those means adversely impacted civilians. [27]

The proportionality doctrine experienced growing acceptance during the Nineteenth century. [28] The doctrine initially centered on combatants, as warfare mainly involved armies of professional soldiers fighting far from civilian populations. [29] The doctrine of proportionality in armed conflict became more applicable to civilians with the development of modern weapons, such as fighterplanes and bombers, which increasingly victimized civilian populations. [30] This use of modern weapons prompted **[*507]** nations to find a method that would limit excessive civilian casualties; the doctrine of proportionality accordingly evolved. [31]

Legal limitations on armed force seemed obsolete with the creation of the United Nations (U.N.) and the prohibition against the use of international force under the U.N. Charter. [32] Despite the U.N. founders' good intentions, nations continued to use force and the doctrine of proportionality maintained a vital role in international law. [33]

B. Proportionality and the Use of Force: International Treaties and Charters

Article 2(4) of the U.N. Charter forbids one nation from using force against another. [34] The U.N. Charter, however, provides exceptions and permits armed force in two situations: maintaining international peace and security as authorized by the U.N. Security Council, [35] and acting in **self-defense.** [36] Although the U.N. Charter does not expressly discuss a **[*508]** proportional limitation on the use of force, it is widely accepted that the doctrine of proportionality governs any use of force, including the use of force in **self-defense.** [37]

Prior to the U.N. Charter, nations entrusted the 1899 and 1907 Hague Conventions, which were important stages in the development of proportionality, to limit the means and methods of international warfare. [38] Because governments sought to limit the way soldiers fought **wars,** the Hague Convention of 1899 prohibited the use of balloon-released projectiles, asphyxiating gases, and expanding bullets. [39] The 1907 Hague Convention provided broader rules for the conduct of warfare by requiring all signatory nations to follow the principles of warfare observed by civilized nations. [40] Both Hague Conventions protected enemy property from unneeded seizure and prohibited the destruction of buildings dedicated to nonmilitary purposes including religious, artistic, scientific, charitable, historic, and health purposes. [41]

[*509] Following the Second World **War,** nations adopted the Geneva Convention on the Protection of Civilians in Wartime, which not only limited the methods of armed force, but also sought protection for civilian populations. [42] The Geneva Convention created safe neutral zones where belligerents could station injured and sick combatants and noncombatants, protected civilian hospitals organized to give care to the sick and wounded, and directed an occupying power to provide food and medical supplies to civilian populations under its control. [43]

In 1977, Protocol I to the 1949 Geneva Convention (the Protocol) provided the first real attempt to codify the doctrine of proportionality. [44] The Protocol drafters included new protections for civilians caught in the middle of armed conflict. [45] The adoption of the Protocol allowed proportionality **[*510]** to develop into an international conventional rule. [46] Among other requirements, the Protocol limits military attacks to military objectives, [47] prohibits indiscriminate attacks upon civilians, [48] requires military planners to use caution in an order to avoid excessive civilian casualties, [49] and outlaws indiscriminate attacks of civilian populations. [50]

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n130. See Gardam, supra note 14, at 411 (rationalizing the theoretical independence of the jus ad bellum from the jus in bello); cf. Protocol I, supra note 44, art. 49, para. 1 (defining both offensive and defensive military attacks as "acts of violence against the adversary").

n131. See Brown, supra note 14, at 140; Gardam, supra note 14, at 407.

n132. See Brown, supra note 14, at 140. If the decision is made in "hindsight," the effectiveness of proportionality is nullified. Id.

n133. See id. at 140-47; Gardam, supra note 14, at 407. In addition to these factors, the party planning the military attack must determine whether the object identified for attack is a civilian or a legitimate military object. See Brown, supra note 14, at 139.

n134. See Gardam, supra note 14, at 407; see also Brown, supra note 14, at 145-46. Although the importance of military intelligence and increased technology is recognized, this analysis greatly enhances the ability to plan and to execute a proportional military attack. See Brown, supra note 14, at 145-46. The failure to plan may lead to indiscriminate attacks on insignificant military targets in large civilian population centers. See id. at 147. This is not to suggest, however, that the doctrine of proportionality is free from error. See id. at 146.

n135. See Brown, supra note 14, at 146.

n136. See id. Nuclear reactors, which could cause additional civilian casualties if struck, are examples of potentially dangerous forces. See id.

n137. See id.

n138. See id.

n139. See Gardam, supra note 14, at 407; Brown, supra note 14, at 146-47.

n140. See Brown, supra note 14, at 142; Gardam, supra note 14, at 407 (noting that the use of aerial bombardment may be indiscriminate and therefore disproportional).

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n141. See Brown, supra note 14, at 142.

n142. See id. at 143.

n143. See id. (noting that nuclear weapons cause crop destruction and defoliation and citing A. Thomas & A.J. Thomas, Jr., Legal Limits on the Use of Chemical and Biological Weapons, 210 (1970)).

n144. See Gardam, supra note 14, at 407.

n145. See Allen, supra note 14, at 48.

n146. See id. (discussing variables beyond the control of military planners). No "rational planner assumes either human or mechanical infallibility." Id. But see NATO Bombed Chinese Deliberately (visited Jul. 31, 2000) <http://www.guardianunlimited.co.uk/Archive/Article/0,24273,39,3246,00.html> (stating that NATO intentionally bombed the Chinese Embassy in Belgrade because the embassy transmitted Serbian military communications for the Serbian government and monitored U.S. cruise missile strikes in order to develop effective countermeasures against the United States).

n147. See Allen, supra note 14, at 48. One example includes a British bomber attack on a bridge located in the Iraqi town of Falluja during the Persian Gulf **War** that missed its target, hit a marketplace, and caused many civilian casualties. See id.; see also Priest, Bombing by Committee, supra note 128, at A10 (listing mistakes during NATO bombing missions). This list of mistakes includes the killing of 17 civilians in the mining town of Aleksinac, the accidental bombing of a passenger train, the killing of dozens of refugees in a convoy heading for the Macedonian border, the deaths of more than 20 civilians due to a laser-guided bomb in Surdulica, and the killing of 47 civilians when a bus was attacked on a bridge. See id. Most notably, 15 people were killed when bombs accidentally struck a marketplace and a hospital in Nis on May 7, 1999. See id. In addition, three Chinese citizens were killed when NATO forces accidentally attacked the Chinese Embassy in Belgrade. See id.

n148. See supra notes 44-52 and accompanying text.

n149. See supra notes 44-55 and accompanying text (articulating specific articles of Protocol I that apply to proportionality).

n150. Protocol I, supra note 44, art. 57, para. 3.

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n151. Protocol I, supra note 44, art. 53. Protocol I states that:

It is prohibited (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (b) to use such objects in support of the military effort; [and] (c) to make such objects the object of reprisals.

Id.

n152. Protocol I, supra note 44, art. 54, para. 2 ("Objects indispensable to the survival to the civilian population [include] foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population ... .").

n153. Brown, supra note 14, at 141-42 (introducing the "cumulative" and "case-by-case" analyses).

n154. Id.

n155. See id. at 141.

n156. Cf. id. (providing a discussion of a cumulative analysis and justification for military strikes in Japan, the Second World **War,** and Vietnam). One example is the use of nuclear weapons in Hiroshima and Nagasaki in 1945 to cripple and destroy the Japanese **war** industry. See id. The United States justified the use of atomic weapons by arguing that they brought a quick Japanese surrender, which saved countless lives on both sides, including those that may have been lost in a ground invasion. See id. In Shimoda v. State, however, a Japanese court deemed the use of nuclear weapons illegal because they could not discriminate between military and non-military objects. Shimoda v. State, 32 I.L.R. 626, 627 (Dist. Ct. of Tokyo, Japan 1963); see also Brown, supra note 14, at 141-42. The Vietnam Conflict provides another example of the cumulative approach, as the United States destroyed large areas of the Vietnamese countryside in which enemy guerillas reportedly operated. See Brown, supra note 14, at 141-42. The United States justified this tactic "on the grounds that their cumulative effect was to keep the enemy forces constantly on the move and to separate the guerillas from their base of support." Id. at 142. These attacks received wide criticism because of the belief that Vietnamese civilian casualties outnumbered Vietcong guerilla casualties. See id.

n157. See Brown, supra note 14, at 142.

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n158. See id. (identifying this weakness of the cumulative approach and stating that the language of the Articles support the "case-by-case" approach); see also Protocol I, supra note 44, art. 51, para. 5(b); Gardam, supra note 14, at 407 (interpreting the Protocol's "concrete and direct" language to mean that military advantage is assessed "in relation to each individual attack, rather than on a cumulative basis"). The individual assessment of the "case-by-case" approach provides more protection for civilians. Gardam, supra note 14, at 407. Consequently, this approach is preferred over the cumulative approach.

n159. Brown, supra note 14, at 141.

n160. Id. at 140-41 (stressing that a case-by-case analysis refers to the specific tactical objective of a military strike); cf. Gardam, supra note 14, at 407 (postulating that the case-by-case language creates a subjective test that is often difficult to satisfy consistently). This "lack of precision" benefits military operations rather than civilian protection. Id.

n161. See Priest, Bombing by Committee, supra note 128, at A10 (discussing briefly the initial intended targets of Operation Allied Force); see also Dana Priest, Tension Grew with Divide Over Strategy, Wash. Post, Sept. 21, 1999, at A1 [hereinafter Priest, Divide Over Strategy] (stating that Allied warplanes destroyed or damaged 93 tanks, 153 armored personnel carriers, 339 military vehicles, and 389 artillery pieces and mortars).

n162. See Priest, A Decisive Battle, supra note 83, at A30 (detailing a bombing raid upon two battalions of Serbian troops stationed on Mount Pastrik).

n163. See U.S. and NATO Objectives, supra note 82, at 1 (stating that one of NATO's objectives included stopping the humanitarian disaster in Kosovo and in the surrounding areas). The KLA began an offensive against Serbian positions, but the tide soon turned as the KLA forces were pinned down on Mount Pastrik. See Priest, A Decisive Battle, supra note 83, at A30. On June 7, 1999, two B-52 bombers bombed the Serbian positions to relieve the KLA forces. See id. At the time, it was believed the Serbian forces sustained heavy casualties, but this has yet to be confirmed. See id.

n164. See Priest, Divide Over Strategy, supra note 161, at A16; cf. Adler, supra note 2, at 24-25 (discussing some of the difficulties that arise when a target has probable military value as opposed to possible military value).

n165. See Thompson, supra note 127, at 1 (estimating that NATO dropped 20,000 bombs).

n166. See Priest, Bombing by Committee, supra note 128, at A10 (discussing briefly the

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repair and salvage efforts after the Socialist Headquarters building was destroyed).

n167. See id. Unconfirmed Serbian reports estimated that ten civilians perished because of this attack. See id. No official casualty figure exists, but reports indicate that these ten casualties resulted from two attacks: the attack on the Socialist Party Headquarters on April 21, 1999, and an attack on the Yugoslav state television and radio building on April 23, 1999. See id.

n168. See id. at A1 (providing a copy of the intelligence report used in planning the attack on the Headquarters building). The intelligence report stated that NATO planners were highly confident that the strike would cause no more than 350 casualties. See id. Planners based this estimate upon the expectation that there would be casualties of 50-100 government employees in the building at the time of the attack and 250 civilians who lived in nearby apartment buildings. See id.

n169. See Priest, Divide Over Strategy, supra note 161, at A16 (reiterating NATO's ability to use weapons that would make a building fall in on itself, thereby reducing the amount of expelled fragments that would cause civilian casualties).

n170. See id. (exploring how technology aided target selection). The article continues:

The general gave ... a detailed lesson in targeting. He explained the blast radius of various weapons. He talked about picking "aim points" - crossbeams, keystones or baseboards that could be struck to make a building collapse inward, upon itself. NATO planners ... could calculate how far shattered glass would fly and whether it would simply graze or penetrate a person's skin. If they changed the warhead or angle of impact, they could determine whether concrete would be blown one block away or three.

Id.

n171. Cf. generally Lessons Learned from Military Operations and Relief Efforts in Kosovo: Hearing of the Senate Committee on Armed Services, Oct. 21, 1999 (statements of General Wesley Clark, USA, Admiral James O. Ellis, Jr., USN, and Lieutenant General Michael C. Short, USAF) available at <http://www.fednews.com.> (insisting that precision guided munitions were effective because they provided highly accurate strikes while "minimizing collateral damage and civilian casualties").

n172. Protocol I, supra note 44, art. 57 (demanding verification that targets are military in nature rather than civilian in nature).

n173. See id. (characterizing advanced cruise missiles as one of NATO's specific means and

methods).

n174. Protocol I, supra note 44, art. 51(b).

n175. See Gardam, supra note 14, at 412.

n176. Protocol I, supra note 44, art. 48.

n177. Id. art. 52(2).

n178. See id. (requiring a military strike to be conducted only against a military target).

n179. See Priest, Bombing by Committee, supra note 128, at A10.

n180. See Adler, supra note 2, at 39-42 (arguing that attacks against governmental buildings are permissible). Destruction of government buildings produce strong emotional and psychological effects upon the enemy; as such, an attack against these buildings affects the morale of the enemy, which may benefit the attacker. See id. at 40. Compare Protocol I, supra note 44, art. 52, para. 2 (clarifying that military attacks are permitted against military objectives), with id. art. 51, para. 7 (commanding belligerents not to use civilians as shields for military targets in order to render military targets immune from attack).

n181. See Priest, Bombing by Committee, supra note 128, at A10 (detailing Allied efforts to strike Serbia's electrical system); cf. Allen, supra note 14, at 50-51 (describing Allied attacks during the Gulf **War** against electrical power generating stations). Because attacks on power stations normally do not incur high civilian casualties, they do not raise a proportionality concern, except for the issue of whether electrical grids are military objects. See id. But see Protocol I, supra note 44, art. 54 (protecting objects that are indispensable to the survival of the civilian population).

n182. See Priest, Bombing by Committee, supra note 128, at A1.

n183. See id. (describing the CBU-94 as a then top-secret United States weapon invented to disable electrical grids). To further alleviate French concerns, General Henry Shelton, Chairman of the United States' Joint Chiefs of Staff, provided information about backup electricity that hospitals could use. See id.

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n184. See id. The article continues:

And in the post-midnight darkness ... dispensers the size of a can of tennis balls dropped from the sky, each with its own parachute. As they reached ... power grids and transformer yards, spools of specially treated carbon-graphite thread unraveled into a web causing instant short circuits. The rubber duckies, as the military dubbed the weapon, knocked out power to 70 percent of Yugoslavia. Most of it was back on within a day.

Id.

n185. See id.

n186. See id.; Michael Mandelb

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Since the creation of the Protocol, subsequent international treaties **[*511]** have provided support for the doctrine of proportionality. The 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons limited the use of mines, booby-traps, and other related devices aimed at civilian populations. [51] The Protocols to the 1980 Convention [52] and the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations also consider proportionality a method of limiting the use of force in armed conflict. [53]

C. Proportionality and the Use of Force: The ICJ's Recognition of Proportionality's Role in International Law

In addition to treaties and charters, International Court of Justice (ICJ) decisions refer to the doctrine of proportionality. [54] In Corfu Channel, [55] the ICJ held that Great Britain's Operation Retail, a minesweeping operation of the Corfu Channel that began after two British warships suffered damage from striking mines, did not violate Albania's sovereignty. [56] The ICJ held that the number of ships used in the operation was a proportional response to the existing threat of both possible Albanian **[*512]** offensive action and mines in the area. [57]

In Nicaragua v. United States, [58] the ICJ rejected the claim of the United States that its actions in Nicaragua constituted collective **self-defense** under the U.N. Charter. [59] While discussing the various factors that justify **self-defense,** the court recognized proportionality as "well-established in customary international law." [60] The court further suggested that acts of national **self-defense** must be proportional to the initial armed attack. [61] The dissent noted that state practice supports the application of proportionality to acts of **self-defense;** in addition, proportionality must have a flexible application to meet the specific circumstances of a certain situation. [62]

In Legality of the Threat or Use of Nuclear Weapons, [63] the ICJ recognized the limitations placed on a military planner's ability to meet the requirements of proportionality and other laws of **war** if nuclear weapons were used in battle. [64] The court declared that the use of nuclear weapons would violate the principles of humanitarian law because such weapons could not be used in a manner that would discriminate between combatants and civlians. [65] Even though the court failed to conclude whether the **[*513]** use of nuclear weapons would be unlawful, it stressed that nations can not deliberately target civilians during military operations and should not use weapons that would help in such an effort. [66]

D. Proportionality in State Practice

A full review of the application of the doctrine of proportionality in state practice, which defines the manner in which a nation conducts itself, is extensive and beyond the scope of this Comment. [67] A few examples, however, are illustrative.

The United States strictly adhered to the principle of minimizing civilian casualties during its bombing campaigns over North Vietnam from 1965 to 1968 and 1972 to 1973. [68] Even though the effectiveness of the 1965 to 1968 campaigns was limited due to targeting constraints, the bombing campaigns of 1972 to 1973 were deemed militarily effective and in compliance with the laws of **war.** [69] These later bombing campaigns avoided intentional attacks on civilian populations and the subsequent collateral casualties that would have resulted. [70] When balanced against the anticipated military advantage of a strike, such caution is indicative of the doctrine of proportionality. [71]

After conducting Operation Just Cause, the 1989 full-scale invasion of Panama, the United States was criticized for responding disproportionately to the threats of Panamanian dictator Manuel Noreiga. [72] It also has **[*514]** been argued that the United States' response to Iraq's armed invasion of Kuwait during the 1991 Persian Gulf **War** failed to meet the requirements of proportionality. [73] In 1995, NATO ordered airstrikes of select targets in

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Bosnia-Herzegovina to end a humanitarian crisis caused by conflict in that country. [74] In 1998, the United States claimed **self-defense** after conducting missile strikes against targets in Sudan and Afghanistan in order to prevent future attacks by a terrorist group led by Osama bin Laden. [75] The United States chose these targets in an effort to limit possible collateral damage to civilians and to comply with the rules of **necessity** and proportionality. [76]

Two more recent examples of the use of armed force in **self-defense** present questions of whether nations strictly adhere to proportionality. Russia invaded neighboring Chechnya in 1999 because it allegedly housed terrorists who had attacked Russian cities. [77] In launching these **[*515]** cross-border attacks, the Russian government was accused of failing to take necessary precautions to promote the safety of Chechen civilians. [78] In early 2000, Israeli military forces conducted retaliatory airstrikes against Hezbollah guerrilla targets in southern Lebanon. [79] The Israeli Government permitted military strikes against targets even if located in predominately civilian areas. [80]

II. Kosovo: The Continuing Crisis in the Balkans

On March 23, 1999, NATO ordered its warships and aircraft to initiate Operation Allied Force and to begin bombing selected targets in Kosovo and Serbia. [81] NATO's main objectives included halting further humanitarian catastrophe caused by a Serbian military offensive against Kosovar civilians and preventing further destabilization of the Balkan region, produced by the thousands of refugees fleeing into neighboring countries such as Macedonia and Albania. [82] NATO's operation, which only consisted **[*516]** of airstrikes [83] and lasted seventy-eight days, [84] ended with the signing of the mutual Military Technical Agreement. [85]

A. Kosovo: The Anatomy of a Conflict

""The Yugoslav crisis began in Kosovo, and it will end in Kosovo.'" [86]

Kosovo, a small region located in the southwest corner of Serbia, has been called the "lost heart of the Balkans." [87] Geographically, the region **[*517]** is isolated because its southern border is formed by the Sar Mountain Range extending eastward from northern Albania, its western border is formed by the "Accursed Mountains," [88] its northern border consists of the Kopaonik Range, and its southeastern border is formed by a range of hills known as the Skopska Crna Gora. [89] In Kosovo, ninety percent of the civilian population is Albanian and the remaining ten percent is Serbian. [90] This region has been the site of constant ethnic, religious, and political conflicts for over 600 years. [91]

The cycle of violence that led to NATO's military operation can be traced to the fall of the Soviet-dominated communist system and the eventual dissolution of Yugoslavia. [92] In September 1991, Kosovar Albanian separatists declared Kosovo an independent republic. [93] Serbia, the **[*518]** largest Yugoslavian state, paid little attention to this declaration because it was embroiled in conflict, first with Croatia, and then with Bosnia. [94] By 1996, Kosovar separatists, who would later become the Kosovo Liberation Army (KLA), had increased their attacks on Serbia's military forces and its Interior Ministry. [95] Due largely to Serbian military attacks against KLA forces, NATO asserts that approximately 1.5 million Kosovars had been displaced from their homes by March 1999, [96] while more than 250,000 Kosovars had fled to neighboring countries such as Macedonia and Montenegro, over 225,000 Kosovar men were missing, and 5,000 Kosovars had been executed. [97]

B. The International Community's Response

Spurred by the escalation of fighting in Kosovo, the U.N. Security Council adopted Resolution 1160 on March 31, 1998, which called upon all parties involved to enter into meaningful dialogue in order to reach a political solution. [98] In April 1998, the members of "the Contact Group" for Yugoslavia, which consisted of the United States, Great Britain, France, Germany,

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and Italy, sanctioned Serbia for its role in worsening the situation in Kosovo. [99]

On May 28, 1998, the North Atlantic Council of NATO issued two major objectives regarding the conflict in Kosovo. [100] The first objective **[*519]** attempted to help achieve a peaceful solution to the conflict, while the second promoted stability and security in the Balkan region. [101] On September 23, 1998, the U.N. Security Council adopted Resolution 1199, which renewed its demand for all parties to cease hostilities, evaluated measures that may have been helpful in achieving international peace and security, and expressed concern over the excessive and indiscriminate force used by both Serbian government and KLA forces. [102]

On October 13, 1998, the North Atlantic Council acted again by authorizing activation orders for airstrikes against Serbian targets. [103] In response to these threatened airstrikes and growing international pressure, Serbian President Slobodan Milosevic agreed to a cease-fire. [104] To assist in maintaining the cease-fire, the U.N. Security Council authorized NATO and the Organization for Security and Cooperation in Europe (OSCE) [105] to establish surveillance missions in Kosovo. [106]

Despite the cease-fire and the verification missions, violence among the Serbian military, police forces, and the KLA reignited in Kosovo. [107] This resumption of violence prompted the Contact Group to convene in **[*520]** January 1999 and to engage in negotiations in Rambouillet, France. [108] The Rambouillet talks involved two rounds of negotiations. [109] By the end of the second round, the KLA representatives agreed to the proposed peace agreement. [110] The Serbian government, on the other hand, did not agree, in part because of its refusal to permit U.N. peacekeeping troops in Kosovo. [111] Serbian forces then increased their attacks upon Kosovar civilians and the KLA. [112]

On March 20, 1999, the OSCE withdrew the Verification Mission from Kosovo because of the looming prospect of NATO military intervention. [113] Because Serbia refused to stop attacking Kosovar civilians and KLA units, NATO authorized Operation Allied Force on March 23, 1999, and commenced airstrikes against Serbian targets. [114]

C. NATO's Response to Serbian Aggression: Operation Allied Force

Operation Allied Force, NATO's response to Serbia's refusal to sign the Rambouillet Accords and maintain peace in the Kosovo region, proceeded along two lines of attack. [115] The first line included a strategic attack against Serbian targets such as its integrated air defense, command and control centers, military supply routes, and infrastructure. [116] The second line identified, isolated, and interdicted Serbian targets strictly in the Kosovo region, including troops, weapons, and other military supplies. [117]

These two lines of attack proceeded in five phases. [118] First, NATO deployed air assets to the European theater to prepare for the operation. [119] **[*521]** Second, NATO established air superiority over Kosovo and degraded Yugoslavia's command and control and integrated air-defense system. [120] Third, NATO attacked Serbian targets in Kosovo and Yugoslavia, south of its capital Belgrade, which provided support for Serbia's **war** effort. [121] Fourth, NATO expanded its air operations to include "high-value military and security force targets" throughout the Kosovo region and Serbia. [122] Fifth, NATO redeployed forces as required. [123]

NATO selected a variety of targets throughout Serbia during its operation. [124] Examples of such targets included: tanks, armored fighting vehicles, artillery, mortars, aircraft, airfields, ordinance repair facilities, and ammunition storage sites. [125] Further, NATO targeted the Serbian Ministry of Defense and Army General Staff buildings in Belgrade, electrical power transformer yards and power generation facilities, television and radio transmitters, and highway and railroad bridges. [126] Subsequent estimates concluded that NATO pilots flew 35,000 sorties and dropped over 20,000 bombs on targets. [127] Despite some estimates of high accuracy in NATO bombing, approximately five thousand Yugoslavian citizens were killed during Operation Allied Force. [128]

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III. Proportionality and Operation Allied Force

A. The Importance of Assessing the Individual Attack

The modern doctrine of proportionality addresses the jus ad bellum, the reasons given for the military operation, as well as the jus in bello, the **[*522]** means used to conduct the operation. [129] Historically, the means of an attack were justified if the cause was just, but proportionality now requires that the means of an attack be assessed by balancing the anticipated military advantage against expected civilian casualties. [130] This reasoning requires an assessment of proportionality for each individual attack of a military operation at its planning stage, [131] which must be completed prior to approving a military strike. [132]

B. Making the Assessment: The Important Factors of Proportionality

The factors used to assess the proportionality of a military attack include: target selection, the means and methods chosen for the military strike, the lack of negligence in the execution of the military strike, and the determination of what constitutes the military advantage of a particular military strike. [133]

1. Target Selection

Selecting a target is extremely important, especially when targets are near civilian populations. [134] Proper assessment of a target requires knowledge of the precise location of the target, [135] a determination of whether the target contains any potentially dangerous forces, [136] an estimate of the importance of the military objective to an opponent's military **[*523]** capabilities, [137] and an assessment of the vulnerability of the target to destruction by the military attack. [138]

2. Means and Methods and Lack of Negligence

The means and methods of a military strike, as well as negligent execution of the strike, are critical when determining the proportionality of a particular strike. [139] Controllability is a particularly important factor to consider when choosing which weapon or technique to use in a military strike. [140] Controllability connotes the ability to limit the strike's damage to the military objective while avoiding civilian casualties and damage to civilian areas. [141] A military planner must ascertain a weapon or technique's controllability by considering the immediate damage and the long-term effects that may result from the use of the weapon or technique. [142] Such effects will include not only physical damage to the intended target, but also a long-term impact on the environment surrounding it. [143]

In addition to controllability, military planners must strive to avoid negligence in the execution of the military strike that may result in unnecessary civilian casualties. [144] A cunning strategy and good intentions do not guarantee an error-free and perfect execution of a military operation. [145] Accidents occur and result in the loss of human life despite a military planner's preparation and best efforts. [146] Planners must account for variables over which they have little control, including pilot error, weapon malfunction, enemy defenses, and sudden changes in weather. [147]

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3. The Guidance of Protocol I

Protocol I provides guidance regarding what constitutes a proportional response. [148] In addition to the relevant articles of Protocol I discussed above, [149] Article 57 requires a military planner, when presented with several military targets of equal military advantage, to select the target expected to cause the fewest civilian casualties. [150] In particular, Article 53

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prohibits attacks against cultural objects or places of worship. [151] Similarly, Article 54 prohibits attacks against objects that are indispensable for the survival of the civilian population. [152]

4. The Interpretation of Military Advantage

The final factor in analyzing the proportionality of a military strike involves deciding which of two "military advantage" approaches to use. [153] The first approach, the "cumulative" approach, balances expected civilian casualties against the contribution of an anticipated military advantage to a party's overall strategic goals. [154] In the Operation Allied Force context, this approach would have required NATO to determine the **[*525]** overall strategic goals of its operation in Kosovo. [155] The anticipated military advantage of any specific attack would have been measured by determining whether that advantage would help achieve those strategic goals. [156] Cumulative analysis has been interpreted to condone civilian casualties that result from military strikes because these casualties will prevent future civilian casualties. [157] This interpretation, however, deprives civilians of meaningful protection and creates a vague standard of review because it is difficult to predict accurately the consequences of military strikes. [158]

The second approach, the "case-by-case" approach, requires the anticipated military advantage of any strike to be measured by the specific tactical advantage gained. [159] This approach defines the term "military advantage" as the "specific tactical objective of a particular action." [160]

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C. Final Assessment and Execution: What did the Planners of Operation Allied Force Decide?

The initial phase of Operation Allied Force concentrated firepower upon Serbian military targets including tanks, artillery, bunkers, barracks, ammunition depots, [161] and enemy troops. [162] It is difficult to question the proportionality of these strikes because they were carried out in areas far from civilian population; moreover, the anticipated military advantage outweighed civilian concerns because the Serbian military forces were judged to be responsible for most of the humanitarian disaster. [163] As the operation entered the later phases, however, NATO increasingly began to focus on targets that were not only closer to civilian areas, but those that arguably had military and civilian purposes. [164]

Operation Allied Force involved thousands of individual attacks, many of which affected civilians. [165] Specific attacks, such as the bombing of Serbian infrastructure targets and the Socialist Party Headquarters in Belgrade, illustrate the use of the doctrine of proportionality in the planning and execution of NATO's operation. [166]

1. The Socialist Party Headquarters in Belgrade

In the early morning hours of April 21, 1999, four cruise missiles struck the Socialist Party Headquarters in downtown Belgrade. [167] Before **[*527]** launching this attack, operation planners used a picture of the building and an intelligence report to determine the possible consequences, including the number of civilians (e.g., employees) that might be killed. [168] The availability of modern weapons, which could implode a building, provided military planners with some confidence that civilian casualties would be minimized. [169] For example, modern weapons allowed NATO military planners to predict the path and distance of propelled concrete and shattered glass, which provided an additional method of protecting civilians. [170]

NATO appears to have applied the doctrine of proportionality properly during the planning and execution stages of its bombing of the Socialist Party Headquarters. [171] Accordingly, NATO satisfied Article 57 of the Protocol, which requires planners to do everything within

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their ability to verify that an object is truly military in nature. [172] NATO chose means and methods to ensure maximum damage with minimum collateral damage and does not appear to have acted negligently. [173]

Article 51(5)(b) of the Protocol requires a balancing of the anticipated **[*528]** military advantage gained and the expected civilian casualties caused by a specific military strike. [174] This balancing is important because proportionality will only achieve its goal of lessening civilian casualties if those expected casualties do not exceed the anticipated military advantage. [175] Article 48 of the Protocol mandates that the target is a true military objective, [176] and Article 52(2) specifically limits all attacks to military objectives. [177] Therefore, NATO could only justify the attack on the Socialist Party Headquarters building by establishing, during the planning stage, that the building served military purposes. [178] NATO planners described the Socialist Party Headquarters as an alternative headquarters for the Milosevic government. [179] By establishing that the Serbian government converted an otherwise civilian-oriented building into a government building, NATO acquired and attacked a target of true military advantage. [180]

2. The Serbian Infrastructure: Electricity, Water, and Bridges

Some operation planners, particularly the members of the United States' Armed Forces wanted to strike Serbia's power grid. [181] The French Government, however, opposed this plan. [182] In order to allay French concerns, the Allies turned to a top-secret weapon that would disrupt the electricity for only a few hours. [183] Once France agreed to this **[*529]** plan, NATO commenced the attack. [184] In subsequent weeks, the Allies conducted additional attacks on Yugoslavia's electrical system that disabled power for days. [185] These tactics not only disabled electrical power, but disrupted the Serbian water supply. [186]

In addition to the disruption of Serbia's electrical power and water supplies, airstrikes destroyed twenty-four bridges. [187] NATO planners spared one bridge, known as the "Rock-n-Roll" bridge, from Allied attack. [188] The Allies refrained from bombing this bridge because they wanted to avoid excessive civilian casualties. [189] That Serbian volunteers stood on the bridge to prevent its destruction also contributed to the decision not to bomb the "Rock-n-Roll" bridge. [190] In sum, NATO planners refused to attack the "Rock-n-Roll" bridge because the anticipated civilian casualties outweighed any expected military advantage. [191]

The bombings of the electrical system and bridges, and the disruption of the water supply, raise questions under Article 54 of the Protocol, which prohibits attacks against targets that are indispensable to the survival of the civilian population. [192] The fundamental question asks whether these objects are strictly civilian in nature. Article 54(2) expressly **[*530]** protects water supplies, which are solely for civilian use. [193] This language does not, however, define electrical grids or bridges as indispensable for civilian survival. [194] When considering the evidence beyond the language of the Protocol, however, facts suggest that the directors of Operation Allied Force wanted to control the amount of damage these attacks caused, as evidenced by the choice of weapons. [195]

The question was whether any anticipated military advantage could be gained by attacking elements of the Serbian infrastructure when balanced against expected civilian casualties. [196] Military advantage may be gained only through the attack of military objects because Protocol I prohibits attacks against civilian targets. [197] It is arguable that electrical grids and bridges satisfy the Article 52(2) definition of military objects because they may be used for military and domestic purposes; the water supply, on the other hand, is expressly protected by the Protocol because the supply supported the civilian population and not the military. [198]

IV. Operation Allied Force: A Proportional Response?

A. NATO's Intention: A Proportional Effort To Maintain Balkan Stability

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ARTICLE: Contemporary Practice of the United States Relating to International Law

Edited by Sean D. Murphy *

* George Washington University Law School. Professor Murphy wishes to acknowledge the superb research assistance provided by Cameron Alford, Perri Al-Raheim, and Uta Melzer in preparing the four submissions of this section for volume 93.

SUMMARY:
... *Kosovo: Deployment of Peacekeeping Force* ... The international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees. ... The Court entered final judgment in the Prudential worldwide settlement class action on July 17, 1992. ... Swiss banks will pay the valid claims and will deduct those amounts from the amount that they will pay in settlement of the New York class action. ... *U.S.-Taiwan-China Relations* ... The European Union failed to lift the import restrictions by that date, so Canada and the United States requested the WTO Dispute Settlement Body to authorize suspension of the application to the European Union and its member states of Canadian and U.S. tariff concessions and related obligations, in an amount of $ 202 million for the United States and $ 51 million for Canada. ... *Status of the U.S.-USSR Anti-Ballistic Missile System Treaty*One of the most important nuclear arms control agreements concluded during the Cold **War** was the 1972 anti-ballistic missile treaty (ABM Treaty). ...

TEXT:
[*879] LEGAL REGULATION OF THE USE OF FORCE

Kosovo: Deployment of Peacekeeping Force

After seventy-two days of NATO's air campaign against the Federal Republic of Yugoslavia (Serbia-Montenegro) (FRY), [1] FRY President Slobodan Milosevic on June 3, 1999 accepted an international peace proposal to end the conflict concerning Kosovo. [2] The proposal was developed in Bonn after lengthy discussions between U.S. Deputy Secretary of State Strobe Talbott, EU envoy (and Finnish President) Martti Ahtisaari, and Russian envoy Viktor Chernomyrdin, and then presented to President Milosevic by President Ahtisaari and Mr. Chernomyrdin. Although it contained several elements previously unacceptable to the FRY, Mr. Milosevic accepted the proposal due to a relentless bombing campaign against FRY tanks, artillery, and ground forces in Kosovo, as well as the destruction of oil refineries, bridges, and power stations elsewhere in Serbia; a resurgence of the Kosovo Liberation Army (KLA) as a ground force; and the decision of Russia to find common ground with NATO prior to a regular meeting in early June of the seven leading industrial countries (Group of Seven or "G-7") and

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702, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979) ("Nothing in Rule 23 . . . limits the geographical scope of a class action that is brought in conformity with that Rule."). Accordingly, United States courts have not hesitated to certify international classes, and to enter judgments with effects resounding worldwide. For example, in *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980), the court certified an international class of soldiers who were exposed to Agent Orange in Vietnam. Despite defendants' arguments that the laws of the 50 states and foreign nations diverged and clashed, making class certification inappropriate, the court found that defendants' course of conduct in the devastating overseas deployment of Agent Orange gave rise to common issues amenable to class treatment.

Similarly, by order dated July 17, 1992, the Honorable Milton Pollack approved the inclusion of *Prudential Life Insurance Co. v. Milken*, 92 Civ. 1151 (S.D.N.Y.), a world-wide securities class action, in the "Milken Global Settlement" relating to over 180 federal and state court actions against Michael Milken and numerous former associates of The Drexel Burnham Lambert Group, Inc. *See In re Michael Milken & Assocs. Sec. Litig. (In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.)*, 150 F.R.D. 57, 59 & n.1 (S.D.N.Y. 1993). The Court entered final judgment in the Prudential worldwide settlement class action on July 17, 1992. *See Presidential Life Ins. Co. v. Milken*, 946 F. Supp. 267, 269 (S.D.N.Y. 1996) (denying motions to intervene and for relief from judgment). When Judge Pollack signed the final closing papers in *Prudential* in September of 1993, thereby releasing settlement funds to the class, *see In re Michael R. Milken & Assocs. Sec. Litig. (Presidential Life Ins. Co. v. Milken)*, 1993 U.S. Dist. LEXIS 14242 (S.D.N.Y. 1993), he was lauded for his "imagination to come up with creative methods of handling this huge mass of litigation across the country, including a worldwide class . . . it was a phenomenal step in the advancement of creative class litigation, and that itself will be a landmark in jurisprudence." *Id.* at * 16.

Likewise, the consequences of international distribution and use of the Dalkon Shield intrauterine device required certification of a class comprised of Dalkon Shield **[*890]** users in the United States and approximately 100 foreign countries. *In re A.H. Robins Co. (Breland v. Aetna Casualty & Surety Co.)*, 85 B.R. 373, 376-78 (E.D. Va. 1988) (certifying plaintiff class in part because the Dalkon Shield had been distributed not only in the United States, but in approximately 100 foreign countries, making joinder impracticable); 88 B.R. 755 (E.D. Va. 1988) (approving class settlement), *aff'd* 880 F.2d 709 (4th Cir.), cert. denied sub nom, *Anderson v. Aetna Casualty & Surety Co.*, 493 U.S. 959 (1989). In connection with its approval of a global settlement, the court ordered implementation of a sophisticated world-wide notice program, including press releases, press conferences, public service announcements, and letters to foreign health and medical associates. The district court's notice implementation order was upheld, and the adequacy of the foreign notice program was described in detail and expressly approved, in *Vancouver Women's Health Collective Soc. v. A.H. Robins Co.*, 820 F.2d 1359 (4th Cir. 1987).

In *In re Silicone Gel Breast Implant Products Liability Litigation* (MDL 926), Master File No CV 92-P 10000-S (*Lindsey v. Dow Corning Corp.*, Civil Action No. CV 94-P-11558-S), the court approved a $ 4.2-plus billion worldwide class action settlement on behalf of an international settlement class.

Finally, in *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460 (D. Haw. 1995), aff'd sub nom., *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1996), as discussed above, the court certified a class of approximately 10,000 victims of torture, summary execution and disappearance during the roughly 14-year period (1972-86) when President Marcos had declared martial law. The

> Ninth Circuit affirmed the 3-phase class-wide trial of liability, punitive damages, and compensatory damages, conducted under international law. [27]

The District Court preliminarily approved the settlement agreement on April 2, 1999. [28] As a means of alerting potential claimants to the settlement, an extensive, worldwide advertising campaign commenced in June 1999.

Although a lawsuit had been filed against the Swiss National Bank, that bank refused to contribute to the settlement, arguing that, as a government bank, doing so "would lend this an official character, which is not in the interests of the country as a whole." [29] The settlement expressly provides that the lawsuit against the Swiss National Bank will be dismissed.

As part of their efforts to demonstrate good faith in dealing with dormant bank accounts, Swiss banks in 1996 entered into an agreement with the World Jewish Restitution Organization and the World Jewish Congress, which set up an "Independent Committee of Eminent Persons" (ICEP) headed by Paul A. Volcker, former Chairman of the U.S. Federal Reserve Bank. ICEP searched the banks' archives and assessed the number and value of bank accounts opened before the Second World **War** and since then dormant. In 1997, lists of the names of account holders were published worldwide, with an invitation to persons believing that they have a claim on an account to file the claim with an international accounting firm. A group of arbitrators comprising the Claims Resolution Tribunal, financed by the Swiss Federal Banking Commission and acting under the auspices of an Independent Claims Resolution Foundation, was established under Swiss law to decide the **[*891]** validity of the claims. [30] Swiss banks will pay the valid claims and will deduct those amounts from the amount that they will pay in settlement of the New York class action.

When the New York class action settlement was announced in August 1998, the Swiss Government stated that it provided a closure of all the financial claims raised against Switzerland. Both President Clinton and Under Secretary of State Eizenstat issued statements lauding the agreement and complimenting the parties' "understanding, flexibility, and determination." [31] On January 30, 1999, Vice President Al Gore declared that the disputes over Nazi gold, as well as the treatment of Holocaust survivors by Swiss banks, were finally settled, but he sought assurances from the Swiss Government that it remained committed to the creation of a $ 4.7 billion humanitarian fund, to be financed by selling some of the nation's gold reserves. The creation of such a fund most likely would require a Swiss national referendum, and has been criticized heavily in Switzerland. [32]

A similar class action suit filed on behalf of Holocaust victims and their families in New York against Bank Austria led to a $ 40 million settlement on May 19, 1999. [33]

Confiscated Art. On August 30, 1998, Under Secretary of State Eizenstat commended the New York class action settlement agreement, as well as the evolving cooperation in the area of insurance disputes, but looked to expand the "search for truth" to other areas, especially works of art stolen during the **war.** [34]

To deal with issues of stolen art (as well as insurance, education, communal property, and archives), the U.S. Department of State and the U.S. Holocaust Memorial Museum cohosted a Washington Conference on Holocaust-Era Assets in late 1998. [35] Forty-four countries and thirteen nongovernmental organizations participated and reached consensus on certain principles, which, according to Under Secretary of State Eizenstat, "while not legally binding represent a moral commitment among nations which all in the art world will have to take into account." [36] The Washington Conference Principles on Nazi Confiscated Art provide:

> In developing a consensus on non-binding principles to assist in resolving issues

relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.

I. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.

II. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.

III. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.

IV. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.

[*892] V. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-**War** owners or their heirs.

VI. Efforts should be made to establish a central registry of such information.

VII. Pre-**War** owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.

VIII. If the pre-**War** owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.

IX. If the pre-**War** owners of art that is found to have been confiscated by the Nazis, or their heirs, can not be identified, steps should be taken expeditiously to achieve a just and fair solution.

X. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.

XI. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues. [37]

In his concluding statement at the Conference, Under Secretary of State Eizenstat acknowledged ongoing efforts to address the issue of stolen art by various countries and expressed hope that others would join in these efforts:

I am pleased to note that several countries have already taken courageous steps to address these issues. For example, Austria, Switzerland, and the Netherlands are researching the provenance of works in their national collections; the French Government has established a web site to display a portion of the some 2,000

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> pieces of art restituted after the **war** still unclaimed; and Austria has passed a law to allow restitution notwithstanding such legal obstacles as the statute of limitations. In addition, we are particularly pleased by the announcement of the Russian delegation that they will actively cooperate in resolving outstanding issues related to Holocaust-era art. The actions of these nations could provide useful models for other countries. [38]

U.S. Abduction of Mexican National As Violation of International Law

In 1990, individuals, acting on behalf of the U.S. Government, abducted Dr. Humberto Alvarez-Machain in Mexico, detained him for twenty-four hours, and brought him to the United States to face trial on various counts of conspiracy, kidnapping and murder of a U.S. Drug Enforcement Agency (DEA) agent, Enrique Camarena, in Mexico in 1985. [1] As a result of the abduction, Mexico lodged several diplomatic protests against the United States.

U.S. law does not impair the power of a court to try a person for a crime merely on the basis that that person was brought within the court's jurisdiction by reason of a "forcible abduction." [2] However, courts have denied such jurisdiction when the abduction was undertaken in violation of an extradition treaty. [3] Dr. Alvarez-Machain moved to dismiss his indictment, in part on grounds that his apprehension violated the U.S.-Mexico extradition **[*893]** treaty. [4] In 1992, the U.S. Supreme Court rejected the motion, finding that the treaty, by its terms, did not preclude the United States from obtaining custody over persons in Mexico through resort to means other than as provided by the extradition treaty. [5] The Court did not determine whether the abduction violated international law generally but stated that "it may be in violation of general international law principles." [6]

On remand, the case proceeded to trial, but the U.S. District Court granted Dr. Alvarez-Machain's motion for an acquittal based on a lack of evidence. On July 9, 1993, Dr. Alvarez-Machain brought a civil suit against the U.S. Government and numerous individual defendants charging, among other things, kidnapping, assault and battery, false imprisonment, negligent and intentional infliction of emotional distress, and cruel, inhuman, and degrading treatment. On March 18, 1999, in the course of deciding several motions by the parties, the U.S. District Court made certain important findings.

First, the Court rejected most of Dr. Alvarez-Machain's claims against the U.S. Government under the Federal Tort Claims Act [7] for acts occurring in California and Texas. The Court found that the applicable state laws did not regard most of the alleged acts as torts or as otherwise actionable in a civil action. Particularly with respect to California, the Court asserted:

> While Plaintiff correctly observes that California courts have applied international law to certain discrete situations, such as determining California's territorial jurisdiction, Plaintiff does not cite a single instance in the history of California case law, nor did the court find an example, in which a California court has incorporated a violation of international law into its domestic law as a tort. In fact, the cases which Plaintiff cites as examples of situations in which American courts have recognized a prohibition on kidnapping or cruel treatment rely on the Alien Tort Claims Act, . . . which explicitly contemplates the use of such law. [8]

Despite these findings regarding California law, the Court refused to dismiss Dr. Alvarez-Machain's charges against the U.S. Government for the alleged actions that occurred once Dr. Alvarez-Machain arrived in El Paso because Texas law allows a civil action for intentional

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infliction of emotional distress. [9]

Second, the Court considered the application of the Alien Tort Claims Act (ATCA), [10] a statute increasingly used as a tool for judicial redress of human rights violations [11] but that generally has been limited to suits against individuals acting under color of state authority, [12] since it generally is assumed that only states can violate international law. [13] In this case, Dr. Alvarez-Machain used the ATCA to sue an individual, Francisco Sosa, who the United States had hired as an independent contractor, not an employee, to arrange the abduction. The Court reasoned that, if the U.S. Government had employed Mr. Sosa, in the sense that it directly controlled and supervised his performance or provided the tools or instrumentalities **[*894]** for the abduction, then Dr. Alvarez-Machain would not be able to sue Mr. Sosa in his personal capacity, pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988. [14] However, for this abduction, the U.S. Government only instructed Mr. Sosa on who should be abducted and how he should be treated once in custody, leaving to Mr. Sosa's discretion the time and manner for conducting the abduction. As such, the Court found that Mr. Sosa was an independent contractor who could be sued in his individual capacity under the ATCA. [15]

Third, for an ATCA claim, three elements must exist: the claim must be filed by an alien (*i.e.*, a non-citizen and non-national of the United States); the claim must be for a tort; and the action in controversy must have violated international law. With respect to the third element, the Court affirmed certain positions taken by earlier courts, noting that the violated international norm must be "specific, universal, and obligatory," that it need not rise to the level of *jus cogens*, and that it be assessed as it exists today rather than as it existed in 1789, when the ATCA was enacted as part of the First Judiciary Act of 1789. [16] With respect to this case, the Court held that state-sponsored transnational border abductions violate international law, [17] a conclusion never before reached by a U.S. court, but one that accords with the practice of states, the courts of other countries, resolutions of international organizations and the views of many commentators. [18] Likewise, the Court found that arbitrary arrest and detention violated international law. [19] However, the Court also found that while international law prohibited cruel, inhuman, and degrading treatment, as of 1990 -- when the events in this case took place -- there was no "universal" consensus as to the content of such a tort. [20] Moreover, violation of any such norm related to whether the plaintiff had been deprived of his constitutional due process rights, which the Ninth Circuit, on a previous appeal, found had not occurred.

U.S.-Taiwan-China Relations

Although in 1979 the United States ended normal diplomatic relations with Taiwan (which officially refers to itself as The Republic of China), the United States nevertheless unofficially has maintained extensive political, economic, cultural and military relations with Taiwan. Rather than promote Taiwan as an independent state, the United States has sought to maintain relations with both Taiwan and the People's Republic of China (P.R.C.) through a "one-China" policy, which -- in declaring that there was only one state of "China" -- allowed both governments to maintain the fiction that each was the legitimate ruler of the other and that reunification might someday occur.

U.S.-P.R.C. relations since 1979 have been normal diplomatic relations. U.S.-Taiwan relations are grounded in the Taiwan Relations Act (TRA) [1] which, among other things, provides that the absence of diplomatic relations after 1979 does not affect the application of U.S. laws to Taiwan, that the United States will support Taiwan's **self-defense** capability, **[*895]** that all treaties and international agreements entered into prior to 1979 between the United States and Taiwan continue in force, [2] and that relations of the U.S. Government with Taiwan after 1979 shall be conducted through the American Institute in Taiwan (AIT), a nonprofit corporation organized under the laws of the District of Columbia. AIT conducts relations with a nongovernmental counterpart organized under Taiwanese law, the Taipei Economic and Cultural Representative Office (TECRO), formerly known as the Coordination Council for North

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American Affairs (CCNAA).

On April 14, 1999, Susan L. Shirk, U.S. Deputy Assistant Secretary for East Asian and Pacific Affairs, testified before the House International Relations Committee's Subcommittee on Asia and the Pacific regarding the twentieth anniversary of the TRA. She stated:

> One measure of the TRA's success is the remarkable democratic transformation and economic prosperity achieved by Taiwan. Twenty years ago, Taiwan was under martial law, and human rights violations occurred with regularity. Today, Taiwan has a vibrant democracy characterized by free elections, a free press, and dynamic political campaigns. Taiwan's economic development on free market principles has been no less impressive, as seen in its ranking as the 14th largest trading economy in the world and in its success in weathering the Asian Financial Crisis. Taiwan's experience is a powerful example in the region and beyond.
>
> Of course, Taiwan's people deserve the full credit for their achievements. But the TRA helped both to ensure that the unofficial status of our relations did not harm Taiwan's interests and to create a stable environment favorable to Taiwan's transformation.
>
> Consistency of U.S. Commitment
>
> One way the U.S. Government has fostered this stable environment is by upholding the security provisions of the TRA. In close consultation with Congress, successive administrations have implemented our obligation under the TRA to provide articles and services necessary to Taiwan to maintain a sufficient **self-defense** capability. We have provided Taiwan with F-16s, Knox class frigates, helicopters, and tanks as well as a variety of air-to-air, surface-to-air, and anti-ship defensive missiles. We continually reevaluate Taiwan's posture to ensure we provide Taiwan with sufficient **self-defense** capability while complying with the terms of the 1982 U.S.-P.R.C. Communique.
>
> The Department of Defense's recent assessment of the security situation in the Taiwan Strait concludes that, except in a few areas, despite improvements in the military forces of both sides, the dynamic equilibrium of those forces in the Taiwan Strait has not changed dramatically over the last two decades. This assessment reflects the effectiveness of the TRA.

Ms. Shirk noted the growth of the U.S.-Taiwan relationship in trade, aviation, science and technology, public health and other fields. She characterized U.S. policy toward Taiwan and the P.R.C. as not being a "zero sum game":

> The U.S. policy framework, of which the TRA is part, allows us to retain substantive, but unofficial relations with Taiwan, while pursuing improved ties with the P.R.C. Six U.S. administrations of both parties have engaged Beijing in order to promote U.S. interests and to encourage a responsible P.R.C. role in the world. The U.S.-P.R.C. relationship that followed the normalization decision -- for all of its ups and downs -- has contributed enormously to stability and peace in Asia -- an environment which is very much in Taiwan's interest.
>
> . . . .
>
> **[*896]** U.S. relations with the P.R.C. and the people on Taiwan are likely to be one of our most complex and important foreign policy challenges for many years to come. This Administration, like the five Republican and Democratic Administrations before it, firmly believes that the future of cross-Strait relations

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is a matter for Beijing and Taipei to resolve peacefully.

. . . .

Our role should not be as a mediator but instead as a contributor to an environment in which the two sides can take good ideas and build on them. This role has three elements: having sound relationships with Taiwan and the P.R.C.; maintaining stable, consistent, and predictable policies in the region so that both Taiwan and the P.R.C. focus energies on engaging one another directly rather [than] trying to pull us over to their side; and adhering to the overall China policy framework that has served our interests well. [3]

In an interview on German radio on July 10, 1999 (subsequently clarified by Taiwanese officials), Taiwan President Lee Teng-hui announced that Taiwan was ending its "one China" policy and would henceforth treat contacts between Taiwan and the P.R.C. as "state-to-state relations." [4] The P.R.C. reacted by threatening Taiwan that it might use force if Taiwan sought independence or to interfere otherwise with reunification. [5] Asked the view of the U.S. Government, the Department of State spokesman said: "We do not support Taiwan independence; we do not support Taiwanese membership in organizations where statehood is required; we do not support a two-China policy or a one-China/one-Taiwan policy." [6]

International Convention to Eliminate the "Worst Forms of Child Labor"

On June 17, 1999, the International Labor Organization (ILO) unanimously adopted a Convention to eliminate the "worst forms of child labor." The Convention states in part:

Article 1. Each member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.

Article 2. For the purposes of this Convention, the term "child" shall apply to all persons under the age of 18.

Article 3. For the purposes of this Convention, the term "the worst forms of child labour" comprises:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

[*897] (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

. . . .

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Article 7. 1. Each Member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions.

2. Each Member shall, taking into account the importance of education in eliminating child labour, take effective and time-bound measures to:

(a) prevent the **engagement** of children in the worst forms of labour;

(b) provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration;

(c) ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour;

(d) identify and reach out to children at special risk; and

(e) take account of the special situation of girls. [1]

The Convention will enter into force twelve months after ratification by two states and, thereafter, shall come into force for any state that ratifies it twelve months after that state's ratification.

The language in Article 1(a) of the treaty regarding the use of children in armed conflict permits the voluntary enlistment of children under age 18 to serve in a state's armed services. Since both the United Kingdom and the United States permit enlistment of volunteers under the age of 18, they insisted that the Convention permit such practice. [2]

In the first speech of a U.S. President before the ILO in Geneva, President Clinton addressed the conference on June 16, 1999. He stated that the United States endorsed the Convention and that he would seek advice and consent from the Senate for its ratification. Among other things, he said that the United States would not tolerate children being used in pornography, prostitution, slavery or bondage, being forcibly recruited to serve in armed conflicts, or risking their health in hazardous and dangerous working conditions. President Clinton noted, however, that adopting the Convention alone would not solve the problem. Rather, states must work aggressively both to enforce the Convention and to address the root causes of the problem ("the tangled pathology of poverty and hopelessness that leads to abusive child labor") by providing access to education for students and to jobs for their parents. [3]

Separately, President Clinton signed an executive order on June 12, 1999, setting forth the policy of U.S. executive branch agencies to take appropriate actions to enforce U.S. laws prohibiting the manufacture or importation of goods produced by forced child labor. To **[*898]** that end, the Department of Labor will publish a list of products, identified by their country of origin, which are believed to have been produced by forced child labor. Whenever U.S. executive branch agencies at home or abroad contract to procure products which appear on the list, they must obtain a certification from the supplying contractor that forced child labor was not used. The executive order contains further provisions for investigation of such certifications and sanctions if they are provided falsely. [4]

Unconstitutionality of Massachusetts Law Targeting Business with Myanmar

In 1996, the Commonwealth of Massachusetts enacted "An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)". [1] The law prohibited the Commonwealth, its government agencies and authorities, from purchasing goods or services from individuals or companies that engage in business with or in Myanmar, except in certain limited situations. The purpose of the law was both to express disapproval of the human rights abuses of the non-democratic, military Government of Myanmar, and to inhibit companies wishing to do business with the Commonwealth of Massachusetts from also doing business with or in Myanmar, thereby placing economic pressure on the Government of Myanmar to reform. Massachusetts purchases approximately $ 2 billion in goods and services annually. [2]

After hundreds of U.S. and non-U.S. companies were placed by Massachusetts on a "restricted purchase list," the National Foreign Trade Council (NFTC) [3] on April 30, 1998, filed a suit in the U.S. District Court for the District of Massachusetts charging that the law was unconstitutional. The NFTC contended that the law interfered with the federal foreign relations power, violated the foreign commerce clause, [4] and violated the supremacy clause, [5] given the existence of federal laws that impose sanctions on Myanmar. [6]

Because of the scope of the Massachusetts law, the existence of similar laws in other U.S. states and localities (*i.e.*, laws that target foreign states, such as China, Cuba and Nigeria, for social and political injustices), and concerns about the role of U.S. states in foreign affairs, [7] the Massachusetts case attracted considerable interest in the United States and abroad, within both the business and academic communities. [8] Several entities, including representatives from other states, the U.S. Congress, and the European Union, (but not the U.S. executive branch) appeared as amici curiae.

[*899] On November 4, 1998, the District Court found that the U.S. Constitution grants the federal government exclusive authority over foreign affairs and that the Massachusetts law impermissibly burdened U.S. foreign relations. As such, the law was unconstitutional. The Court found that NFTC had not shown that federal law preempted the Massachusetts law; it did not reach the issue relating to the foreign commerce clause. [9]

On June 22, 1999, the First Circuit Court of Appeals affirmed the District Court's finding that the Massachusetts law unconstitutionally infringed on the foreign affairs power of the federal government. After noting that the "Constitution's foreign affairs provisions have been long understood to stand for the principle that power over foreign affairs is vested exclusively in the federal government," [10] the Court carefully analyzed the Supreme Court's holding in *Zschernig v. Miller* [11] to assess the boundaries for permissible state activity in the foreign affairs context. The Court found that the Massachusetts law had more than an "incidental or indirect effect in foreign countries" (evidenced by the intent of the law, by Massachusetts' purchasing power, by protests from foreign countries, and by the law's divergence from federal law which creates the potential for federal embarrassment) and therefore is impermissible even if it advances a strong state interest. [12]

Further, the Court found the Massachusetts law unconstitutional as a violation of the foreign commerce clause. The Court doubted that the "market participant exception," which is part of the U.S. constitutional doctrine concerning the "dormant" domestic commerce clause, [13] extended as well to the foreign commerce clause. Even if this exception did extend to foreign commerce, the Court found that, in passing its law, Massachusetts did not act as a market participant but, rather, as a market regulator. The Massachusetts law violated the foreign commerce clause because it facially discriminated against foreign commerce without a legitimate local justification and because it attempted to regulate conduct beyond its borders. [14]

Unlike the District Court, the Court of Appeals also found the Massachusetts law

unconstitutional under the supremacy clause, given the federal sanctions against Myanmar. The Court found that Congress had not implicitly approved of or permitted the Massachusetts law and that the law tried to regulate conduct (trade with Myanmar) already addressed by federal law, yet through different means in scope and kind. [15] The Court concluded:

> The passage of the Massachusetts Burma Law has resulted in significant attention being brought to the Burmese government's human rights record. Indeed, it may be that the Massachusetts law was a catalyst for federal sanctions. Massachusetts also played a role, through its representatives in the House and the Senate, in Congress's decision to impose sanctions on Burma. Nonetheless, the conduct of this nation's foreign affairs cannot be effectively managed on behalf of all of the nation's citizens if each of the many state and local governments pursues its own foreign policy. Absent express congressional authorization, Massachusetts cannot set the nation's foreign policy. [16]

[*900] INTERNATIONAL ECONOMIC LAW

Unilateral U.S. Actions Against Steel Imports

In part because of the sharp reduction in demand for steel in Asia brought about by the Asian financial crisis, steel imports to the United States surged in 1998, leading U.S. steel producers and some in Congress to charge that foreign producers were selling steel products at prices below production costs or below their home-market prices (an illegal practice referred to as "dumping"). On September 30, 1998, U.S. steel producers and workers filed petitions with the International Trade Administration (ITA) of the U.S. Department of Commerce and with the International Trade Commission (ITC) alleging that Brazil, Japan, and Russia were dumping "hot-rolled" carbon steel flat products on the U.S. market. [1]

In response to a request from Congress, the Clinton Administration prepared a report in January 1999 setting forth an array of diplomatic and unilateral steps to deal with the increase in steel imports. Those steps included (1) bilateral efforts -- primarily with Japan, Korea and Russia -- to counter unfair trade practices and subsidization; (2) the enforcement of U.S. trade laws against unfair trade practices, effectuated in part through new regulations, [2] expedited investigations, and preliminary rulings by the U.S. Department of Commerce of "critical circumstances," which allow for the retroactive assessment of dumping duties; (3) "safeguards" actions, [3] which provide an important and WTO-consistent mechanism for addressing import surges; (4) the development of an early warning system to monitor import trends and guidelines for the release of preliminary import statistics to the U.S. steel industry; (5) the restoration of growth and demand in emerging markets, generating the conditions necessary for stronger, more stable currencies in our trading partners, and strengthening market-based reform in economies affected by the financial crisis so as to reduce the steel import pressure on the U.S. market; (6) tax relief for the steel industry; and (7) adjustment assistance for steelworkers and their communities. [4]

Dissatisfied with the Administration's approach, the U.S. House of Representatives on March 17, 1999 passed by a vote of 289 to 141 (one vote shy of a veto-proof majority) a bill directing the Administration to limit steel imports to the monthly average of the amount of steel imported during the 36-month period preceding July 1997. [5] The Clinton Administration urged the Senate not to pass the bill and, if passed, threatened to veto it, arguing that it would require broad restrictions on steel imports and therefore contravene U.S. obligations under WTO agreements. [6] The Senate killed the bill 57 to 42. [7]

In response to U.S. concerns over steel imports, both Brazil and Russia entered into agreements that suspended U.S. investigations concerning the dumping of hot-rolled steel

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Russia. [3]

The peace proposal provided as follows:

> Agreement should be reached on the following principles to move towards a resolution of the Kosovo crisis:
>
> 1. An immediate and verifiable end of violence and repression in Kosovo.
>
> 2. Verifiable withdrawal from Kosovo of all military police and paramilitary forces according to a rapid timetable.
>
> 3. Deployment in Kosovo under United Nations auspices of effective international civil and security presences, acting as may be decided under Chapter VII of the Charter, capable of guaranteeing the achievement of common objectives.
>
> 4. The international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees.
>
> **[*880]** 5. Establishment of an interim administration for Kosovo as a part of the international civil presence under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, to be decided by the Security Council of the United Nations. The interim administration to provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo.
>
> 6. After withdrawal, an agreed number of Yugoslav and Serbian personnel will be permitted to return to perform the following functions:
>
> -- Liaison with the international civil mission and the international security presence;
>
> -- Marking/clearing minefields;
>
> -- Maintaining a presence at Serb patrimonial sites;
>
> -- Maintaining a presence at key border crossings.
>
> 7. Safe and free return of all refugees and displaced persons under the supervision of the Office of the United Nations High Commissioner for Refugees and unimpeded access to Kosovo by humanitarian aid organizations.
>
> 8. A political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the [KLA]. Negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions.
>
> 9. A comprehensive approach to the economic development and stabilization of the crisis region. This will include the implementation of a stability pact for

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[*901] products. The suspension agreement with Brazil, concluded on July 7, 1999, precludes Brazil from selling hot-rolled steel at a price below $ 327 per metric ton. A separate agreement, designed to address Brazil's subsidization of its steel exporters, cut Brazil's exports to the United States of hot-rolled steel by approximately 28 percent, and limited exports to 295,000 metric tons per twelve-month period, beginning in October 1999. [8]

The United States and Russia concluded a suspension agreement regarding hot-rolled steel products on July 12, 1999. The agreement prohibits the shipment of certain types of Russian steel to the United States during most of 1999 and establishes quotas for the subsequent four years. The agreement also sets minimum prices, which range from $ 255 to $ 280 per metric ton of steel. Moreover, the United States and Russia reached a separate agreement, which restricted exports to the United States of Russian steel products not covered by the suspension agreement, including cold-rolled steel, semi-finished steel, wire rod, and galvanized sheet, pipe, and tube. This separate agreement was intended not only to provide further relief for U.S. industry, but also to help prevent circumvention of the suspension agreement. [9]

The United States did not, however, reach a suspension agreement concerning steel imports from Japan. On April 29, 1999, the ITA determined that illegal dumping was occurring for hot-rolled carbon steel imports from Japan. [10] In June 1999, the ITC determined that the dumping of such products had materially injured U.S. industry, [11] which led the U.S. Customs Service to impose duties on Japanese steel. [12] Japan protested the ITC's findings and announced that it would challenge these actions at, among other places, the WTO. [13]

U.S. Reaction to EU Failure to Abide by WTO Decision on Banana Imports

As part of its preferential trade scheme for former European colonies in Africa, the Caribbean, and the Pacific (ACP), [1] the European Union since 1993 has provided ACP countries with preferential treatment for the imports of ACP bananas. Further, the European Union concluded in 1994 a Banana Framework Agreement with Colombia, Costa Rica, Nicaragua, and Venezuela to provide special quota allocations for banana imports from those countries. Both schemes operate at the expense of banana producers in other Latin American states, including producers owned by U.S. corporations. [2]

In 1996, the United States, along with Ecuador, Guatemala, Honduras, and Mexico (later joined by Panama), filed a complaint with the World Trade Organization charging that these schemes violated various provisions of the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS). On May 22, 1997, a **[*902]** WTO dispute panel agreed, finding that the European Union's allocation of tariff quota shares was inconsistent with the requirements of GATT article XIII, and that the European Union's import licensing procedures were inconsistent with several provisions of GATT and GATS. [3] On September 9, 1997, the Appellate Body upheld the panel's decision with minor changes; [4] the Appellate Body's decision, in turn, was adopted by the WTO Dispute Settlement Body on September 25, 1997. [5]

Subsequent consultations between the complaining parties and the European Union failed to reach agreement on the deadline for EU compliance with its WTO obligations. Consequently, the parties submitted the matter to binding arbitration, in accordance with Article 21.3(c) of the WTO Dispute Settlement Understanding (DSU). [6] When the parties could not agree on an arbitrator, the WTO Director-General appointed one for them. The arbitrator, Said El-Nagger, found on January 7, 1998, that the European Union must comply by January 1, 1999. [7] As of that date, the European Union had proposed a modified preference scheme that would retain separate tariff rate quotas for the ACP and non-ACP countries, which the United States found unacceptable. Consequently, on January 14, 1999, the United States requested, pursuant to DSU article 22.6, that the WTO Dispute Settlement Body authorize suspension of the application to the European Union and its member states of U.S. tariff concessions and related obligations in an amount of $ 520 million. The European Union objected to the

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requested amount and the matter was referred to arbitration by the members of the original panel.

On April, 9, 1999, the WTO arbitrators determined that the level of impairment suffered by the United States was $ 191.4 million per year and, therefore, permitted the United States to suspend the application to the European Union and its member states of tariff concessions and related obligations in that amount. In determining a value lower than that requested by the United States, the arbitrators did not include in their assessment of harm to the United States losses incurred in trade between the United States and non-EU countries. The arbitrators stated in part:

> 6.12. We are of the view that the benchmark for the calculation of nullification or impairment of US trade flows should be losses in US exports of goods to the European Communities and losses by US service suppliers in services supply in or to the European Communities. However, we are of the opinion that losses of US exports in goods or services *between the US and third countries* do not constitute nullification or impairment of even *indirect* benefits accruing to the United States under the GATT or the GATS for which the European Communities could face suspension of concessions. To the extent the US assessment of nullification or impairment includes *lost US exports* defined as *US content incorporated in Latin American bananas* (e.g. US fertilizer, pesticides and machinery shipped to Latin America and US capital or management services used in banana cultivation), we do not consider such lost US exports for calculating nullification or impairment in the present arbitration proceeding between the European Communities and the United States.
>
> . . . .
>
> **[*903]** 6.14. It would be wrong to assume that there is no further recourse within the framework of the WTO dispute settlement system to claim compensation or to request authorization to suspend concessions equivalent to the level of the nullification or impairment caused with respect to bananas of Latin American origin, including incorporated inputs of whatever kind or origin. A right to seek redress for that amount of nullification or impairment does exist under the DSU for the WTO Members which are the countries of origin for these bananas, but not for the United States. In fact, a number of these WTO Members have been in the recent past, or are currently, in the process of exercising their rights under the DSU. Moreover, our concern with the protection of rights of other WTO Members is in conformity with public international law principles of sovereign equality of states and the non-interference with the rights of other states . . . .
>
> 6.15. Moreover, if *overlapping* claims by different WTO Members as to nullification or impairment suffered because of the same lost trade in goods (and goods and service inputs used in their production or incorporated therein) or the same lost trade in services were permissible under the DSU, the problem of "*double-counting*" of nullification or impairment would arise. Due to the difference in origin of goods or services used as *inputs* in the banana production, on the one hand, and the origin of the bananas as *end-products*, on the other, *cumulative* requests for compensation or suspension of concessions could be made for the *same* amount of nullification or impairment caused by a Member. [8]

In light of this decision, the United States applied one hundred percent duties on various European products (that are unrelated to bananas) retroactively effective until March 3,

1999, [9] the deadline for the arbitral panel decision under WTO dispute settlement rules. This case represents the first time that the WTO has authorized retaliatory measures for failure of a member state to comply with a WTO ruling within the required time. [10]

The European Union did not appeal the arbitrators' April 1999 ruling. While the European Commission outlined new options for modifying its regime, the Commission expressed uncertainty as to whether those options would meet the European Union's obligations under the WTO agreements. [11] In a message to the European Council of Ministers on June 1, 1999, the Commission stated:

> It is clear that there is no solution which is guaranteed to solve the dispute which does not involve major difficulties in relation to the Community's own interests, budget resources and obligations. It is also clear that the Community will have to put forward its solution if it wants to avoid an indefinite continuation of the US sanctions, possibly followed by more retaliation by Ecuador. The Commission would find a continuation of the sanctions inappropriate in view of the damage they do to European industry but also because of the wider implications this would have on our WTO obligations. [12]

U.S. Reaction to EU Failure to Abide by WTO Decision on Hormone Treated Beef Imports

On April 29, 1996, the European Union decided to maintain a ban first enacted in the 1980s on the import of meat derived from cattle treated with certain growth-promoting **[*904]** hormones. [1] Canada and the United States challenged the import ban as a violation of the European Union's obligations as a member of the WTO. [2] On August 18, 1997, a WTO dispute panel found that the ban violated provisions of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") and therefore should be lifted. [3] On January 16, 1998, the WTO Appellate Body affirmed these findings, concluding that the risk assessments that had been performed did not support the ban on imports. [4]

The parties entered into consultations regarding the deadline for EU compliance, but they failed to reach an agreement. An EU proposal to compensate the United States by doubling the European Union's import quota for hormone free beef was considered inadequate, since U.S. exports only fulfill about half of the existing hormone free beef quota. [5] A second proposal, which would allow imports of hormone-treated beef but make them subject to labeling, foundered due to disagreements over the label's language. In any event, the European Union indicated that it would not lift its import ban until risk studies were completed sometime in 2000. [6] On April 28, 1999, the European Union released preliminary results from one of the seventeen studies it had underway, which demonstrated that residues from one hormone fed to cattle may cause cancer. [7] The United States challenged the validity of those findings.

Since the parties could not agree on a deadline for EU compliance, the appointed arbitrator decided that the European Union must comply by May 13, 1999. [8] The European Union failed to lift the import restrictions by that date, so Canada and the United States requested the WTO Dispute Settlement Body to authorize suspension of the application to the European Union and its member states of Canadian and U.S. tariff concessions and related obligations, in an amount of $ 202 million for the United States and $ 51 million for Canada. [9] The European Union contested the amount of the U.S. request, forcing the matter into another arbitration by the original dispute resolution panel, which issued a decision on July 12, 1999. The panel found that the EU's beef hormone ban resulted in annual U.S. beef export losses of $ 116.8 million, and that the United States and Canada were entitled to $ 125 million in sanctions against the European Union. [10] Therefore, **[*905]** effective July 29, 1999, the United States imposed one hundred percent tariffs on a range of foodstuffs from the

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European Union. [11]

U.S. Reaction to Canadian Failure to Abide by WTO Decision on "Split-Run" Magazines

Up until 1965, several U.S. magazine publishers had "split-runs" for the U.S. and Canadian markets, meaning that they published in Canada a Canadian version of the U.S. magazine. The Canadian version of the split-run typically contained advertisements purchased by Canadian advertisers at what Canada alleged to be significantly reduced rates, since most of the production costs of the magazine were already covered through sales of the U.S. magazine in the U.S. market. Canada claimed that selling such advertising at low rates began drawing advertisers away from Canadian-produced magazines, which the Government of Canada feared would drive Canadian magazines out of business and diminish Canadian culture. Consequently, in 1965, Canada enacted a ban on imports of any periodical that either (a) contains an advertisement that primarily targets the Canadian market and that does not appear identically in all editions of that issue of the periodical that were distributed in the periodical's country of origin, or (b) has more than five percent of its advertising content directed to the Canadian market. Further, in 1994, Canada imposed an 80 percent excise tax on split-runs, as well as postal rate measures designed to protect Canadian periodicals from split-run competition.

On May 24, 1996, the United States requested the formation of a WTO dispute panel to review these measures for compliance with WTO agreements. On March 14, 1997, the dispute panel found that most of the measures were inconsistent with Canada's obligations under the GATT, a decision that the WTO Appellate Body largely upheld. [1] Effective October 30, 1998, Canada responded to the WTO ruling by terminating its import ban and eliminating or modifying its other measures. At the same time, however, the Canadian Heritage Minister introduced legislation before the Canadian Parliament -- the Foreign Publishers Advertising Services Act -- that would have prohibited foreign magazines from selling advertising aimed at Canadians, thus accomplishing the same effect as the earlier measures. [2] In response, the United States threatened in early 1999 to take action under NAFTA to impose retaliatory tariffs of $ 650 million against Canadian steel, clothing, wood and plastics. The threat prompted Canada to enter into meaningful negotiations, [3] which lead in May 1999 to a bilateral resolution of the matter.

Canada agreed to amend its proposed legislation to exempt foreign-owned magazines either produced in or imported to Canada so long as no more than twelve percent of their advertisements primarily target the Canadian market (with the percentage increasing to eighteen percent after three years). Furthermore, Canada agreed to certain tax and investment measures favorable to foreign publishers of periodicals selling in the Canadian market. [4]

[*906] ENVIRONMENTAL, SCIENCE, AND HEALTH AFFAIRS

Amendment of U.S.-Canada 1985 Pacific Salmon Treaty

The United States and Canada have attempted for decades to reach a sensible arrangement for the harvesting of salmon that migrate from one State's waters to the other's in the North Pacific Ocean. In 1985, after fifteen years of negotiations, the two States concluded a Pacific Salmon Treaty [1] designed to establish a framework for long-term bilateral cooperation in salmon management, research, and "enhancement," meaning efforts to increase salmon stocks. Unfortunately, the regime established under the 1985 treaty, based on a fixed quota system, proved inadequate for resolving disputes between the two States and began to break down in 1992. [2]

Consequently, the two States sought to amend the 1985 treaty through further negotiations, which successfully concluded on June 30, 1999. [3] According to the U.S. State Department, the key features of the amendments are:

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The agreement establishes abundance-based regimes for the major salmon intercepting fisheries in the US and Canada. These regimes, which allow catches in fisheries to vary from year-to-year, are designed to implement the conservation and harvest sharing principles of the Pacific Salmon Treaty. Larger catches will be allowed when abundance is higher, and importantly, catches will be significantly constrained in years when abundance is down. This type of regime will be more responsive to the conservation requirements of salmon than the fixed ceilings that existed under the original Treaty arrangements.

Two bilaterally-managed regional funds would be established. The funds would be used to improve fisheries management and aid the country's efforts to recover weakened salmon stocks. Subject to the availability of appropriated funds, the US will contribute $ 75 million and $ 65 million dollars [sic] ($ US) to a northern and a southern fund, respectively, over a four-year period.

The agreement includes provisions to enhance bilateral cooperation, improve the scientific basis for salmon management, and apply institutional changes to the Pacific Salmon Commission. [4]

Most of the elements of the amendments are contained in new chapters to Annex IV of the 1985 treaty, which address management of salmon in several transboundary rivers (chapter 1), management of sockeye and pink salmon fisheries in southeastern Alaska and northern British Columbia (chapter 2), management of chinook salmon in marine and certain freshwater fisheries in Alaska, Canada, and the States of Washington and Oregon (chapter 3), management of sockeye and pink salmon in the Fraser River (chapter 4), and management **[*907]** of coho salmon and chum salmon in southern British Columbia and the State of Washington (chapters 5 and 6). All of these chapters will remain in force for at least ten years.

Retention of the Smallpox Virus

In 1980, after years of an intense, global vaccination program, the World Health Organization (WHO) declared that smallpox -- a virus with a thirty percent mortality rate believed to have killed 500 million people in this century alone -- had been eradicated as a disease. [1] Beginning in 1990, the WHO's Ad Hoc Committee on Orthopoxvirus Infections recommended destroying the remaining known stocks of smallpox virus, held in laboratories in Russia and the United States. That recommendation was endorsed by the WHO's governing body, the World Health Assembly (WHA), in 1996, subject to further confirmation by the WHA in 1999. [2] The three-year delay was intended to provide an opportunity to achieve a broad consensus in favor of destruction and permitted time for the WHO to conduct an inquiry into the attitudes of states. As of 1998, 74 of the 191 WHO members responded to the WHO's inquiry that they favored destruction of the virus, while four (including the United States) said they were undecided, and one (Russia) said it was opposed. In January, 1999, the WHO's Ad Hoc Committee again recommended destruction by June 30, 1999. [3]

On March 15, 1999, the U.S. Institute Of Medicine (IOM) issued a report stating that important scientific and medical opportunities would be lost if the smallpox virus were destroyed. In particular, the IOM report noted the value of having the live virus so as to develop antiviral agents to protect persons against a future outbreak of smallpox, which might occur as part of a terrorist attack against the United States using biological weapons. [4]

On April 22, 1999, President Clinton decided that the United States would not destroy its smallpox virus stock. [5] The President reportedly based his decision on the March 1999 IOM

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report and on intelligence reports that some states may secretly hold stocks of the smallpox virus for military use. [6]

Although the WHA can adopt regulations concerning prevention of the international spread of disease, such regulations do not enter into force with respect to any member state that notifies the WHO of its rejection. [7] Consequently, the WHA operates largely by consensus. In the face of Russian and U.S. resistence to complete destruction of known smallpox virus stocks, on May 24, 1999, the WHA adopted by consensus a resolution authorizing "temporary retention" by Russia and the United States of the known smallpox stocks "up to not later than 2002 and subject to annual review" by the WHA "for the purpose of further international research into antiviral agents and improved vaccines, and to permit high-priority investigations of the genetic structure and pathogenesis of smallpox." [8]

[*908] PEACEFUL SETTLEMENT OF DISPUTES

Surrender of Libyan Nationals for Lockerbie *Bombing Trial in the Netherlands*

On April 5, 1999, Libya surrendered two Libyan nationals accused of committing the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland for trial by a Scottish court in the Netherlands. [1] Libya surrendered the two nationals after receiving private clarifications from the UN Secretary-General, Kofi Annan, [2] concerning a U.S.-UK proposal for the trial. [3] President Clinton expressed his gratitude for the surrender, noting that the "road to justice has begun." [4] As anticipated by Security Council Resolution 1192, [5] the Secretary-General reported to the Security Council that the surrender had occurred, and the economic sanctions previously imposed on Libya in 1992 immediately were suspended. [6]

The two men were handed over in Tripoli to the UN Legal Counsel, Hans Corell, and then flown on an Italian air force plane to the Netherlands, where the Dutch took them into custody. After the two suspects informed Dutch authorities that they consented to their immediate extradition to UK custody, Dutch authorities took them to a Dutch military base outside Utrecht and handed them over to Scottish authorities. Pursuant to an agreement between the United Kingdom and the Netherlands, Scottish authorities had established a Scottish detention center at the base, where the two men will be tried before a Scottish court. On April 6, the two men were formally charged by Scottish police with conspiracy, murder, and contravention of the UK Aviation Security Act of 1982. [7]

A request by defense lawyers for additional time to prepare their case has delayed commencement of the trial until February 2000. In the meantime, in a meeting with the Secretary-General, U.S. and Libyan Government representatives discussed the United States' position on a final lifting of UN economic sanctions. The United States informed Libya that it would not support a final lifting of sanctions until Libya satisfied the requirements of the relevant Security Council resolutions, namely that it stop support for international terrorism, cooperate fully in the trial, acknowledge its responsibility for the acts of its officials, and pay compensation to the families of the victims of Pan Am Flight 103. [8]

ARMS CONTROL

North Korean Nuclear Proliferation

Throughout the 1990s, the United States has sought to reduce the threat of nuclear and missile proliferation, as well as the prospect of **war,** on the Korean Peninsula. On October 21, 1994, representatives of the United States and the Democratic People's Republic of Korea (DPRK or North Korea), signed an unusual Agreed Framework, in which the DPRK, **[*909]** among other things, agreed to freeze its existing nuclear reactor and related facilities program and to refrain from further development of a nuclear program; in exchange, the United States would provide a light-water reactor power plant. [1] To that end, in March 1995, the United States, the Democratic Republic of Korea (ROK or South Korea), and Japan

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founded the Korean Peninsula Energy Development Organization (KEDO), based in New York, as an international consortium to finance and supply to the DPRK two proliferation-resistant light water reactors, as well as shipments of heavy fuel oil as an interim energy source.

As of 1997, KEDO had grown to include eleven member states, had received monetary contributions from twenty-one nations, and included the European Union as the fourth member of the executive board, alongside the three founding members. [2] By 1998, KEDO had negotiated a supply agreement with the ROK for the light water reactor and a number of other side protocols and agreements. The ROK pledged to pay for seventy percent of the $ 4.6 billion light water reactor project, Japan pledged $ 1 billion to the project, and the United States undertook to provide 500,000 metric tons per year of heavy fuel oil. [3]

Due to various delays, including those related to obtaining sufficient financing, construction of the reactors moved slowly and generated concern in the U.S. Congress regarding the commitment of sufficient resources by other states. [4] Furthermore, in 1998 the United States began to suspect that the DPRK was not abiding by its obligation to refrain from developing a nuclear program, and to consider with particular concern the construction at an underground site at Kumchang-ni. In May 1999, after months of bilateral negotiations, a team of U.S. inspectors toured the site at Kumchang-ni only to find a reportedly empty tunnel. [5]

At a hearing of the House International Relations Committee on March 24, 1999, Chairman Benjamin A. Gilman outlined steps for a new U.S. policy for North Korea. He asserted that the United States needed: (1) to more aptly be able to verify North Korea's compliance with the Agreed Framework; (2) to address the North Korean missile program; (3) to monitor food aid to North Korea -- possibly by means of unscheduled, unsupervised visits by U.S. Korean-speaking monitors -- in order to prevent diversion to the military and to the ruling party cadre; (4) to pay greater attention to North Korea's involvement in international narcotics trafficking and other criminal activity; (5) to pursue full implementation of the 1991 Joint Declaration on the Denuclearization of the Korean Peninsula; and (6) to develop a theater missile defense that will serve to insulate the United States and its allies from nuclear and missile "blackmail" by North Korea. [6] Representative Gilman threatened to introduce legislation that would restrict the ability of the President to lift sanctions against North Korea, or provide aid to it, unless such concessions were made.

In an effort to place the process back on track, President Clinton named Dr. William Perry, a former U.S. Secretary of Defense, as the Administration's North Korea Policy **[*910]** Coordinator. [7] In May 1999, Dr. Perry headed the highest-ranking U.S. delegation to visit North Korea since the 1950-53 Korean **war,** with a proposal for lifting U.S. economic sanctions on North Korea, as well as expanding economic and diplomatic ties, in exchange for North Korean commitments to abide by the Framework Agreement and to stop testing missiles and selling missile technology. While the DPRK pledged its commitment to the Agreed Framework, it did not otherwise immediately respond to the U.S. initiative. [8]

Status of the U.S.-USSR Anti-Ballistic Missile System Treaty

One of the most important nuclear arms control agreements concluded during the Cold **War** was the 1972 anti-ballistic missile treaty (ABM Treaty). [1] The parties to the ABM Treaty envisioned a blanket prohibition on the development of anti-ballistic missile systems, except for very limited land-based systems, on a theory that neither the United States nor the Soviet Union would initiate a nuclear attack if it were unable to defend itself against the retaliation that almost certainly would ensue. A 1985 Reagan Administration interpretation of the Treaty as permitting the development and testing of a space-based system, known as the Strategic Defense Initiative (SDI), sparked controversy both within the United States and with the Soviet Union. [2] While funding of SDI went forward, the United States could not sufficiently perfect its technology in order to deploy such a system.

On September 26, 1997, the U.S. Department of State issued the following statement

addressing the effect of the Soviet Union's dissolution upon the ABM Treaty and certain memoranda [3] negotiated with the newly formed states of the former Soviet Union.

> The Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems of May 26, 1972, commonly known as the ABM Treaty, was a bilateral agreement between the two states. When the USSR dissolved at the end of 1991, and its constituent republics became independent States, the only operationally-deployed ABM system was at Moscow, while a number of its early warning radars and an ABM test range were located outside of the Russian Federation. Although the ABM Treaty continues in force, it nevertheless has become necessary to reach agreement as to which New Independent States (NIS) would collectively assume the rights and obligations of the USSR under the Treaty.
>
> The Memorandum of Understanding on Succession (MOUS) establishes that the Parties to the ABM Treaty shall be the United States, Belarus, Kazakhstan, the Russian Federation, and Ukraine. For the purposes of the MOUS and the ABM Treaty, the latter four states are considered to be the USSR Successor States. Pursuant to the MOUS provisions, the USSR Successor States collectively assume the rights and obligations of the USSR. This means that only a single ABM deployment area is permitted among the four Successor States; in addition, only 15 ABM launchers at ABM test ranges are collectively permitted. Russia will be able to continue to operate any existing early **[*911]** warning radars, as well as the ABM test range, located within other states with the permission of those governments.
>
> States that become bound by the MOUS also are bound to observe the provisions of both the First and Second Agreed Statements, which deal with lower-velocity and higher-velocity theater ballistic missile defense systems, respectively. These agreements will now be subject to ratification or approval by the signatory states in accordance with the appropriate constitutional procedures of each state, and will enter into force on the date when the governments of all five signatory states have deposited instruments of ratification or approval of the Memorandum of Understanding on Succession. The MOUS will remain in force as long as the ABM Treaty remains in force. The ABM Treaty is of unlimited duration. [4]

In the aftermath of the Cold **War,** concerns about the ballistic missile threat of Russia and other former Soviet states have diminished. However, due to concern about the ballistic missile capabilities of "rogue" states, such as North Korea and Iran, U.S. Secretary of Defense William S. Cohen announced on January 20, 1999, a six-year, $ 6.6 billion plan for the development of a land-based National Missile Defense (NMD) system, which he stated would be deployed if technologically feasible. Since deployment of such a system might be construed as a violation of the ABM Treaty, Secretary Cohen noted:

> While our NMD program is being conducted consistent with the terms of the ABM Treaty to date, our deployment might require modifications to the treaty and the Administration is working to determine the nature and scope of these modifications.
>
> We will seek to amend the treaty if necessary, and we will work in good faith to do so. We have amended the treaty before and see no reason why it cannot be amended again.

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> The ABM Treaty also provides, of course, for right of withdrawal with six months notice if a party concludes it's in its supreme national interests.
>
> The limited NMD capability we're developing is focused primarily on countering rogue nation threats and will not be capable of countering Russia's nuclear deterrent. We've already begun environmental site surveys for potential basing sites in both Alaska and North Dakota, and we have briefed Russian officials on these activities and on our NMD program in general, and on today's announcement. [5]

After Secretary Cohen's announcement, the United States proposed to Russia that the ABM Treaty be amended; Russia initially refused and threatened not to ratify the START II (strategic arms limitation treaty) if Washington went forward with its NMD. [6] Conservatives within the United States began urging the Administration to abandon the ABM Treaty as inhibiting the United States' ability to protect itself against growing missile threats.

On May 25, 1999, David B. Rivkin, Jr. and Lee A. Casey, summarized for the Senate Foreign Relations Committee an analysis of this issue undertaken by their law firm, Hunton & Williams, at the request of the Heritage Foundation, a conservative research organization based in Washington, D.C. They argued that the ABM Treaty was a bilateral agreement between the United States and the Soviet Union whose key terms could be performed only by those two states. When the Soviet Union disappeared, so did the ability to execute the Treaty in accordance with its original terms, and thus the Treaty expired. Further, in **[*912]** considering whether any of the new states of the former Soviet Union could be viewed as parties to the Treaty, Messrs. Rivkin and Carey argued that, either under a continuity rule or under a "clean slate" analysis, the ABM Treaty did not survive the Soviet Union. Finally, they argued that the President must obtain the advice and consent of the Senate before reviving the ABM Treaty and adding new parties. [7]

In May 1999, Congress voted overwhelmingly in favor of proceeding with an anti-missile defense system, which was then signed into law by President Clinton on July 22. The National Missile Defense Act of 1999 provides:

> It is the policy of the United States to deploy as soon as is technologically possible an effective National Missile Defense system capable of defending the territory of the United States against limited ballistic missile attack (whether accidental, unauthorized, or deliberate) with funding subject to the annual authorization of appropriations and the annual appropriation of funds for National Missile Defense. [8]

After meetings between U.S. and Russian officials in Cologne, Germany, in June 1999, the two governments issued a joint statement providing, in part:

> Proceeding from the fundamental significance of the ABM Treaty for further reductions in strategic offensive arms, and from the need to maintain the strategic balance between the United States of America and the Russian Federation, the Parties reaffirm their commitment to that Treaty, which is a cornerstone of strategic stability, and to continuing efforts to strengthen the Treaty, to enhance its viability and effectiveness in the future. [9]

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Further, the two governments affirmed their existing obligations under the ABM Treaty to consider "possible changes in the strategic situation that have a bearing on the ABM Treaty and, as appropriate, possible proposals for further increasing the viability of this Treaty." The two governments also called for early entry into force of the 1997 memoranda of understanding and the implementation of measures previously agreed upon for the exchange of data on missile launches and on early warning. [10]

FOOTNOTES:

n1 *See* Sean D. Murphy, Contemporary Practice, 93 AJIL 167 & 627 (1999).

n2 Steven Erlanger, *Milosevic Yields on NATO's Key Terms; 50,000 Allied Troops to Police Kosovo*, N.Y. TIMES, June 4, 1999, at A1.

n3 William Drozdiak & Anne Swardson, *Diplomatic, Military Offenses Forced Belgrade's Hand*, WASH. POST, June 4, 1999, at A1; William Drozdiak, *The Kosovo Peace Deal: How It Happened*, WASH. POST, June 6, 1999, at A1.

n4 Letter Dated 7 June 1999 from the Permanent Representative of Germany to the United Nations Addressed to the President of the Security Council, UN Doc. S/1999/649, annex (1999). For the FRY's acceptance as communicated to the United Nations, see Letter Dated 7 June 1999 from the Charge D'Affaires A.I. of the Permanent Mission of Yugoslavia to the United Nations Addressed to the Security Council, UN Doc. S/1999/655 (1999).

n5 R. W. Apple Jr., *Moscow and West Agree on Kosovo; Plan Given to U.N.*, N.Y. TIMES, June 9, 1999, at A1.

n6 Military Technical Agreement between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia (June 9, 1999), *reprinted in* Letter Dated 15 June 1999 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/1999/682, annex (1999), *available in* <http://www.nato.int/kosovo/docu/a990609a.htm>; *see* Steven Lee Myers, *Serb Military Accepts Accord, Clearing Way to Halt Bombing*, N.Y. TIMES, June 10, 1999, at A1.

n7 SC Res. 1244 (June 10, 1999). For the Security Council's debate, see UN SCOR, 54th Sess., 4011th mtg., UN Doc. S/PV.4011 (1999).

n8 For NATO's communication to the United Nations that the air campaign was suspended, see Letter Dated 10 June 1999 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/1999/663, annex (1999); *see also* Letter Dated 21 June 1999 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/1999/702, annex (1999) (transmitting NATO's communication to the Secretary-General that the air campaign was terminated); Craig R. Whitney, *Bombing Ends as Serbs Begin Pullout*, N.Y. TIMES, June 11, 1999, at A1.

n9 The Secretary-General's plan for the UN Interim Administration Mission in Kosovo (UNMIK) was approved by the Security Council. Report of the Secretary-General Pursuant to Paragraph 10 of Security Council Resolution 1244 (1999), UN Doc. S/1999/672 (1999); Letter Dated 17 June 1999 from the President of the Security Council to the Secretary-General, UN Doc. S/1999/689 (1999). The Secretary-General then issued a report setting forth the framework for the operation of UNMIK. Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/1999/779 (1999). For the FRY's reaction to that report, see Letter Dated 19 July 1999 from the Charge d'Affaires A.I. of the Permanent Mission of Yugoslavia to the United Nations Addressed to the Secretary-General, UN Doc. S/1999/800 (1999).

n10 For the initial report of NATO to the United Nations on the KFOR deployment, see Letter Dated 17 June 1999 from the Secretary-General Addressed to the President of the Security

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South-Eastern Europe with broad international participation in order to further promotion of democracy, economic prosperity, stability and regional cooperation.

10. Suspension of military activity will require acceptance of the principles set forth above in addition to agreement to other, previously identified, required elements . . . . A military-technical agreement will then be rapidly concluded that would, among other things, specify additional modalities, including the roles and functions of Yugoslav/Serb personnel in Kosovo . . . . [4]

Within days of President Milosevic's acceptance of this peace proposal, G-7 leaders and Russia meeting in Cologne reached agreement on the draft of a UN Security Council resolution to authorize deployment of peacekeeping forces to Kosovo, [5] as well as on funding for the "stability pact" for aid to rebuild Kosovo. FRY military authorities and NATO authorities, meeting just across the border from Kosovo in Macedonia, then concluded the military-technical agreement covering, among other things, the timetable and movement for the withdrawal of FRY forces from Kosovo. [6] On June 10, the Security Council adopted **[*881]** Resolution 1244 by a vote of 14-0 (with China abstaining), [7] FRY military and police forces began withdrawing from Kosovo, and NATO suspended its bombing campaign. [8]

Resolution 1244 authorized the Secretary-General to establish an "interim administration" for Kosovo, guaranteeing "substantial autonomy" and providing for free elections. [9] The resolution also authorized the deployment of a NATO-led international peacekeeping force for an initial period of 12 months, although the force -- known as KFOR (Kosovo Force) -- can continue to operate thereafter "unless the Security Council decides otherwise." Charged by the Resolution with "deterring renewed hostilities," "demilitarizing the Kosovo Liberation Army," and establishing a "secure environment" for the return of refugees, KFOR troops entered Kosovo on June 12, and established themselves in five sectors run by French, German, Italian, U.K. and U.S. forces, [10] all under the command of U.K. Lieutenant General Michael Jackson.

Prior to the entry of NATO forces, a small contingent of Russian peacekeeping troops, which already was deployed in Bosnia, crossed into Serbia and traveled to Kosovo's captial, Pristina, where they took up position at Pristina's airport. This unexpected move unnerved Western leaders and led to extensive negotiations between U.S. and Russian diplomats concerning Russia's role in Kosovo. [11] Ultimately, on June 18, the two countries signed a military agreement that integrated Russian forces into KFOR, dividing most of the expected 3,600 Russian troops among three of the sectors. While it was agreed that the Russian troops would be under the political control of Russia and under the tactical command of KFOR, disputes nevertheless arose, both over the Russian troops' exact relationship to NATO and over the appropriate posts at which to station them. [12]

UN administrators and NATO peacekeepers also had to provide for the thousands of Kosovar Albanian refugees eager to return home. As of July 8, more than 650,000 refugees **[*882]** had returned to Kosovo. [13] Their return coincided with the departure of an estimated 50,000 Serbs from Kosovo to elsewhere in Serbia, fearful for their safety now that FRY forces had departed. [14] Low-level violence broke out by Kosvar Albanians against Serbs and gypsies, [15] and between Serbs and NATO peacekeepers. Concern over KLA hostilities toward the Serbs prompted NATO peacekeepers to move quickly to disarm the KLA. At the same time, NATO pledged in a formal agreement in June on "demilitarization and transformation" of the KLA to consider the formation from the KLA of an "Army in Kosovo on the lines of the US National Guard in due course as part of a political process designed to determine Kosovo's future status, taking into account the Rambouillet Accord." [16] In September, agreement was reached on the formation of such a force. [17]

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Council, UN Doc. S/1999/692 (1999); *see also* Letter Dated 8 July 1999 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/1999/767 (1999) (Secretary-General's initial report on KFOR operations); John Kifner & Steven Lee Myers, *Russians Enter Kosovo Early But Moscow Calls It a Mistake; British Lead NATO's Vanguard: A Short Pause, Then the Allies Start Moving In*, N.Y. TIMES, June 12, 1999, at A1.

n11 Western intelligence analysts later concluded that the Russian deployment was part of a scheme to stake out a Russian zone in the northwest sector of Kosovo. The United States thwarted the Russian scheme by prevailing on Bulgaria, Hungary, and Romania to deny Russian requests to use the airspace of those states to fly more Russians into Kosovo. Robert G. Kaiser & David Hoffman, *Russia Had Bigger Plan in Kosovo*, WASH. POST, June 25, 1999, at A1.

n12 Agreed Points on Russian Participation in KFOR (June 18, 1999), *available in* <http://www.nato.int/kosovo/docu/a990618a.htm>; *see* Celestine Bohlen, *Accord is Reached on Integrating Russian Troops in Kosovo Force*, N.Y. TIMES, June 19, 1999, at A1; Craig R. Whitney, *NATO and Moscow Still Differ Over Where Russian Forces Will Be Stationed*, N.Y. TIMES, July 1, 1999, at A10; Eric Schmitt, *NATO Bars Russia From Reinforcing Troops in Kosovo*, N.Y. TIMES, July 3, 1999, at A1; Carlotta Gall, *Russians Fly Into Kosovo After Impasse Is Resolved*, N.Y. TIMES, July 7, 1999, at A8. For the "G-8" statement on Kosovo of June 20, see Note Verbale Dated 24 June 1999 from the Permanent Mission of Germany to the United Nations Addressed to the Secretary-General, UN Doc. S/1999/711, annex (1999).

n13 Report of the Secretary-General, UN Doc. S/1999/779, *supra* note 9, at para. 9.

n14 *See, e.g.*, John Ward Anderson & Molly Moore, *Kosovo's Albanians Returning in Droves*, WASH. POST, June 18, 1999, at A1.

n15 *See, e.g.*, Letter Dated 24 July 1999 from the Charge d'Affaires A.I. of the Permanent Mission of Yugoslavia to the United Nations Addressed to the Secretary-General, UN Doc. S/1999/818 (1999); Chris Hedges, *Slaying of Serbs Sets Back Efforts for Kosovo Peace*, N.Y. TIMES, July 25, 1999, at 1; John Kifner, *Kosovo Rebels Move Into Towns; Violence is Reported*, N.Y. TIMES, June 19, 1999, at A1.

n16 Undertaking of Demilitarization and Transformation by the UCK, para. 25 (June 20, 1999), *available in* <http://www.nato.int/kosovo/docu/a990620a.htm>; *see* Steven Lee Myers, *NATO To Consider Letting Kosovars Set Up New Army*, N.Y. TIMES, June 22, 1999, at A1; Molly Moore, *NATO Hastens Disarming of KLA as Serb Fears Rise*, WASH. POST, June 20, 1999, at A19. For the FRY's attitude regarding UN and NATO implementation of Security Council Resolution 1244, see Letter Dated 28 July 1999 from the Charge d'Affaires A.I. of the Permanent Mission of Yugoslavia to the United Nations Addressed to the Secretary-General, UN Doc. S/1999/828 (1999).

n17 *See* R. Jeffrey Smith, *NATO, Kosovo Rebel Group Agree on Civil Corps*, WASH. POST, Sept. 21, 1999, at A1.

n18 Steven Lee Myers, *Last Serbian Troops Pull Out of Kosovo*, N.Y. TIMES, June 21, 1999, at A1.

n19 John Kifner with Ian Fisher, *Kosovo Landscape Lays Bare Serbs' Brutal Campaign*, N.Y. TIMES, June 16, 1999, at A1.

n20 *See, e.g.*, John Kifner, *Bodies Torn From a Grave Leave a Trail of Evidence*, N.Y. TIMES, June 29, 1999, at A8; John Kifner, *F.B.I. Team Looks for Evidence of Massacres*, N.Y. TIMES, June 25, 1999, at A13.

n21 John Kifner, *Inquiry Estimates Serb Drive Killed 10,000 in Kosovo*, N.Y. TIMES, July 18,

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1999, at 1.

n22 *Excerpts From the President's Remarks on Kosovo and National Issues*, N.Y. TIMES, June 26, 1999, at A11; *see also* Address to the Nation on the Military Technical Agreement on Kosovo, 35 WEEKLY COMP. PRES. DOC. 1074 (June 14, 1999).

n1 In addition, in 1952, Germany concluded an agreement at Luxembourg whereby it agreed to pay 3.5 billion Deutschmarks to Israel and 500 million Deutschmarks to the Conference on Jewish Material Claims Against Germany, a federation of 52 Jewish organizations in Western countries formed in 1951 to act as the overall representative of Jews living outside of Israel and having reparation claims against Germany. For a brief description of the compensation programs established through the Conference, see Wolf v. Federal Republic of Germany, 95 F.3d 536, 539-40 (7th Cir. 1996). For an overall discussion of post-**war** efforts to obtain compensation for Holocaust claims, see CHRISTIAN PROSS, PAYING FOR THE PAST: THE STRUGGLE OVER REPARATIONS FOR SURVIVING VICTIMS OF THE NAZI TERROR (Belinda Cooper trans., 1998).

The U.S. Government's release of two reports coordinated by Under Secretary of State Stuart E. Eizenstat have aided recent efforts to recover assets lost during the Holocaust. U.S. Dep't of State, Preliminary Study on U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World **War** II (May 1997); U.S. Dep't of State, U.S. and Allied Wartime and Postwar Relations and Negotiations with Argentina, Portugal, Spain, Sweden and Turkey on Looted Gold and German External Assets and U.S. Concerns About the Fate of Wartime Ustasha Treasury (June 1998). The reports, and other information on State Department activities relating to Holocaust claims, may be found at <http://www.state.gov/www/regions/eur/holocausthp.html>.

n2 For instance, claims for forced or slave labor were ultimately rejected by German courts on the grounds that the 1952 London Debt Conference (at which the amount and method of payment of the total debt of the former Third Reich to the allied powers was negotiated) had decided that such claims should be deferred until "final settlement of the problem of reparation," which never occurred due to the partition of Germany. *See* Agreement on German External Debts, Feb. 27, 1953, Art. 5(2), 4 UST 443, 333 UNTS 3; *see also* BENJAMIN B. FERENCZ, LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION (1979).

Efforts during the era of the Cold **War** to bring suits in U.S. courts to advance wide-ranging Holocaust claims were unsuccessful. *See, e.g.*, Kelberine v. Societe Internationale, Etc., 363 F.2d 989 (D.C. Cir. 1966) (unsuccessful effort to enjoin the U.S. Government from paying $ 120 million to a Swiss corporation which allegedly conspired with a German corporation in Nazi actions against some 200,000 persons between 1933 and 1945); Handel v. Artukovic, 601 F. Supp. 1421 (C.D. Cal. 1985) (class action against defendant for alleged involvement in deprivations of life and property suffered by Jews in Yugoslavia during Second World **War** dismissed on various grounds, including the age of the claim).

n3 Princz v. Federal Republic of Germany, 813 F.Supp. 22, 29 (D.D.C. 1992); *see also* Princz v. Federal Republic of Germany, Civ. A. No. 92-0644, 1993 WL 121501 (D.D.C. Apr. 7, 1993) (denying German Government's motion for a stay pending appeal).

n4 Princz v. Federal Republic of Germany, 26 F.3d 1166, 1168 (D.C. Cir. 1994). Thereafter, the U.S. District Court dismissed the German Government from the lawsuit. Princz v. Federal Republic of Germany, 871 F.Supp. 18 (D.D.C. 1994).

n5 141 CONG. REC. E681-02, *available in* 1995 WL 128869.

n6 35 ILM 193 (1996).

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n7 For a discussion of the related case of *Miller v. Albright*, see Sean D. Murphy, Contemporary Practice, 93 AJIL 663 (1999).

n8 22 U.S.C.A. § 1644 note (West Supp. 1999).

n9 Exchange of Letters between Hans-Friedrich von Ploetz, German Foreign Office State Secretary, and John C. Kornblum, U.S. Ambassador to Germany (Jan. 25, 1999) (on file at GWU). The agreement reportedly covers some 230-40 further U.S. nationals. Philip Shenon, *Germany to Pay Compensation To U.S. Survivors of Nazi Camps*, N.Y. TIMES, Jan. 16, 1999, at A6; *Germany to Pay Reparations for Americans*, WASH. POST, Jan. 16, 1999, at A18. The United States and Germany, however, agreed that the numbers of claimants and the bases for determining the amount would remain confidential.

n10 *See, e.g.*, Iwanova v. Ford Motor Co., 57 F.Supp. 2d 41 (D.N.J. 1999); Burger-Fisher v. Siemens AG, 1999 WL 717260 (D.N.J. 1999); Fishel v. BASF Group, 175 F.R.D. 525 (S.D. Iowa 1997); Edmund L. Andrews, *53 Years Later, Lawsuit Is Filed on Behalf of Hitler's Slave Labor*, N.Y. TIMES, Sept. 1, 1998, at A9.

n11 *See* Joint Statement on the Establishment of a "Foundation Initiative of German Enterprises: Remembrance, Responsibility and Future" (Feb. 16, 1999), *available in* <http://www.germany-info.org/govern/ state_02_16_99.htm>; Roger Cohen, *German Companies Adopt Fund For Slave Laborers Under Nazis*, N.Y. TIMES, Feb. 17, 1999, at A1; William Drozdiak, *German Banks Make Redress*, WASH. POST, Feb. 17, 1999, at A11.

n12 Stuart E. Eizenstat, Under Secretary of State, U.S. Dep't of State Press Release on Third Plenary Meeting of the Steering Group to Prepare the Foundation Initiative of German Enterprises (July 15, 1999), *available in* <http://secretary.state.gov/www/briefings/statements/1999/ps990715e.html>.

n13 In California, the state court has held that it has the authority to hear the case, which was brought by a family of five Holocaust survivors. Stern v. Assicurazioni Generali, No. BC 185376, 1999 WL 167546 (Cal. Super. Jan. 25, 1999); *see* Henry Weinstein, *Holocaust Survivors' Claims Get Boost*, L.A. TIMES, Jan. 26, 1999, at A3, *available in* 1999 WL 2124106. The family alleges that Generali wrongfully withheld life insurance benefits from the family of Moshe Stern, who was killed at Auschwitz. *See* Alan Abrahamson, *Heirs of Holocaust Victims Sue Insurer*, L.A. TIMES, Feb. 5, 1998, at B3, *available in* 1998 WL 2395560. *See generally* <http://www.insurance.ca.gov/holocaust/department/legalactions.htm>. For class action litigation in New York, see Leslie Scism, *State Insurance Regulators Join Holocaust-Survivor Claims Probe*, WALL ST. J., Dec. 12, 1997, at B2.

n14 Abrahamson, *supra* note 13.

n15 John M. Goshko, *Italian Insurer Reaches Pact on Holocaust Claims; Tentative Settlement Includes $ 100 Million Payment*, WASH. POST, Aug. 20, 1998, at A3.

n16 Stuart E. Eizenstat, Under Secretary of State, U.S. Dep't of State Press Release on Announcement of Agreement Between Generali, Holocaust Survivor Organizations and U.S. Insurance Commissioners (Aug. 19, 1998), *available in* <http://secretary.state.gov/www/briefings/statements/1998/ps980819b.html>.

n17 For information on the Commission and the text of the Memorandum of Understanding, see <http://www.icheic.org>; *see also* Stuart E. Eizenstat, Under Secretary of State, Statement to the U.S. Executive Monitoring Committee at 5-6 (Apr. 15, 1999) (on file at GWU).

n18 *Italy's Generali Says Settlement of Claims On Holocaust Fails*, WALL ST. J., Sept. 21,

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1998, at A14, *available in* 1998 WL-WSJ 18984933.

n19 International Commission on Holocaust Era Insurance Claims Press Release on Statement of Lawrence S. Eagleburger Following the Meeting of the International Commission on Holocaust Era Insurance Claims (May 6, 1999), *available in* <http://www.icheic.org/press_releases/May1999.html>; *see* Alan Cowell, *Insurers Agree to Pay on Victims' Pre-Holocaust Policies*, N.Y. TIMES, May 7, 1999, at A3.

n20 The banks initially were Credit Suisse, Swiss Bank Corporation, and the Union Bank of Switzerland, but the latter two merged during the course of the lawsuit to form UBS AG.

n21 *In re* Holocaust Victims Assets Litigation, No. CV 96-4849, CV 96-5161, CV 97-0461 (E.D.N.Y. filed Oct. 3, 1996). The additional, related cases were filed in California state courts, but were then stayed pending resolution of the New York cases.

n22 The actions were consolidated under *In re* Holocaust Victims Assets Litigation, No. CV 96-4849 (E.D.N.Y.).

n23 John M. Goshko, *Sanctions on Swiss Banks to Proceed*, WASH. POST, July 2, 1998, at A3.

n24 Devon Spurgeon, *New York Threatens Swiss Bank Sanctions; State Department Criticizes Move*, WASH. POST, July 3, 1998, at A3.

n25 James P. Rubin, Assistant Secretary of State and Spokesman, U.S. Dep't of State Daily Press Briefing, at 8 (July 6, 1998), *available in* <http://secretary.state.gov/www/briefings/9807/980706db.html>.

n26 John M. Goshko, *Swiss Banks Agree to Holocaust Pact; $ 1.25 Billion Settlement for Victims, Heirs*, WASH. POST, Aug. 13, 1998, at A1. For the text of the settlement, see <http://www.giussani.com/holocaust-assets/documents/settlement.html>.

n27 Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Preliminary Approval of Proposed Class Action Settlement and Provisional Certification of Settlement Classes at 46-48, *In re* Holocaust Victim Assets Litigation, No. CV 96-4849 (E.D.N.Y. Mar. 22, 1999) (footnote omitted).

n28 Order Preliminarily Approving Material Terms of the Proposed Class Settlement Agreement and Provisionally Certifying the Proposed Settlement Classes, *In re* Holocaust Victim Assets Litigation, No. CV 96-4849 (E.D.N.Y. Mar. 30, 1999). At the same time, the District Court issued an order referring the settlement to a special master for development of a plan to allocate and distribute the settlement proceeds.

n29 *Swiss Bank Won't Pay Holocaust Victim Fund*, WASH. POST, Aug. 22, 1998, at A12. The Swiss National Bank, however, has made a $ 75 million contribution to a charitable fund for Holocaust survivors. David E. Sanger, *Gold Dispute With the Swiss Declared to Be At an End*, N.Y. TIMES, Jan. 31, 1999, at 9.

n30 Hans Michael Riemer et al., *The Claims Resolution Tribunal For Dormant Accounts In Switzerland: An Overview*, 14 MEALEY'S INT'L ARB. REP., Feb. 1999, at 19, 20.

n31 Statement on the Settlement of Holocaust Assets Lawsuits, 34 WEEKLY COMP. PRES. DOC. 1624 (Aug. 17, 1998); Stuart E. Eizenstat, Under Secretary of State, U.S. Dep't of State Press Release on Settlement of Class Action Suits (Aug. 12, 1998), *available in* <http://secretary.state.gov/www/briefings/statements/1998/ps980812c.html>.

n32 Sanger, *supra* note 29.

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n33 John M. Goshko, *$ 40 Million Holocaust Settlement From Bank*, WASH. POST, May 20, 1999, at A2.

n34 Stuart E. Eizenstat, *Justice After The Holocaust*, WASH. POST, Aug. 30, 1998, at C7.

n35 Thomas W. Lippman, *44 Nations Pledge to Act On Art Looted by Nazis*, WASH. POST, Dec. 4, 1998, at A2.

n36 Stuart E. Eizenstat, Under Secretary of State, Concluding Statement at Washington Conference on Holocaust-Era Assets (Dec. 3, 1998), *available in* <http://www.state.gov/www/policy_remarks/1998/981203_eizenstat_heac_conc.html>.

n37 Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), *available in* <http://www.state.gov/www/regions/eur/981203_heac_art_princ.html>.

n38 Eizenstat, *supra* note 36.

n1 Jacques Semmelman, International Decisions, 86 AJIL 811 (1992); Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151, 167-70 (1991).

n2 Ker v. Illinois, 119 U.S. 436, 444 (1886); Frisbie v. Collins, 342 U.S. 519, 522 (1952).

n3 *See, e.g.*, United States v. Verdugo-Urquidez, 939 F.2d 1341, 1343 (9th Cir. 1991), *vacated*, 505 U.S. 1201 (1992).

n4 Extradition Treaty, May 4, 1978, U.S.-Mex., 31 UST 5059, TIAS No. 9656.

n5 United States v. Alvarez-Machain, 504 U.S. 655, 668-69 (1992).

n6 *Id.* at 669.

n7 28 U.S.C. §§ 1346(b), 2401(b), 2671-2680 (1994). The Court also rejected certain constitutional claims against named U.S. Government employees involved in arranging for the abduction.

n8 Alvarez-Machain v. United States, No. CV 93-4072, mem. op. at 18 (C.D. Cal. Mar. 18, 1999). Similarly, the Court found that Texas law does not contain a cause of action for negligent infliction of emotional distress.

n9 *Id.* at 36-37.

n10 The ATCA states that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1994).

n11 For a discussion of prominent cases since 1980, see Donald J. Kochan, Note, *Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 CORNELL INT'L L.J. 153, 162-68 (1998).

n12 Suits against governments present difficulties under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1441(d), 1602-11 (1994). *See generally* Justin Lu, Note, *Jurisdiction over Non-State Activity under the Alien Tort Claims Act*, 35 COLUM. J. TRANSNAT'L L. 531 (1997).

n13 Sung Teak Kim, Note, *Adjudicating Violations of International Law: Defining the Scope*

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of Jurisdiction Under the Alien Tort Statute -- Trajano v. Marcos, 27 CORNELL INT'L L.J. 387, 411 (1994).

n14 28 U.S.C. § 2679 (1994).

n15 Alvarez-Machain, *supra* note 8, at 11.

n16 *Id.* at 38-39, 44.

n17 *Id.* at 44.

n18 *See, e.g.*, Michael J. Glennon, *Agora: International Kidnapping: State Sponsored Abduction: A Comment On United States v. Alvarez-Machain*, 86 AJIL 746 (1992); Malvina Halberstam, *Agora: International Kidnapping: In Defense Of The Supreme Court Decision In Alvarez-Machain*, 86 AJIL 736 (1992).

n19 Alvarez-Machain, *supra* note 8, at 47-49.

n20 *Id.* at 46-47.

n1 22 U.S.C. §§ 3301-3316 (1994); *see also* Exec. Order No. 12,143, 44 Fed. Reg. 37,191 (1979), *superceded by* Exec. Order No. 13,014, 61 Fed. Reg. 42,963 (1996). On the status of Taiwan generally, see JOHN F. COPPER, TAIWAN: NATION-STATE OR PROVINCE? (2d ed. 1996); THE INTERNATIONAL STATUS OF TAIWAN IN THE NEW WORLD ORDER: LEGAL AND POLITICAL CONSIDERATIONS (Jean-Marie Henchaerts ed., 1996); PENG MING-MIN & NG YUZIN CHIAUTONG, TAIWAN NO HOTEKI CHII [THE LEGAL STATUS OF TAIWAN] (1983).

n2 Pre-1979 agreements remaining in force between the United States and Taiwan appear in the U.S. Department of State's annual publication TREATIES IN FORCE at the end of the bilateral treaties section, under "China (Taiwan)." Agreements between the United States and Taiwan concluded between 1979 and 1993 may be found at Agreements Between the American Institute in Taiwan and the Coordination Council for North American Affairs, 58 Fed. Reg. 32,355 (1993).

n3 *The Taiwan Relations Act at Twenty, Hearings Before the Subcomm. on Asia and the Pacific of the House Int'l Relations Comm.*, 96th Cong. (Apr. 14, 1999) (testimony of Susan L. Shirk, U.S. Deputy Assistant Secretary of State for East Asian and Pacific Affairs), *available in* <http://www.state.gov/www/policy_remarks/1999/990414_shirk_taiwan 2. html>.

n4 Michael Laris, *Taiwan Jettisons 'One China' Formula*, WASH. POST, July 13, 1999, at A14; Seth Faison, *Taiwan President Implies His Island Is Sovereign State*, N.Y. TIMES, July 13, 1999, at A1.

n5 Michael Laris, *Sparks Fly Across Taiwan Strait*, WASH. POST, July 14, 1999, at A17; John Pomfret, *Beijing Warns Taiwan Again*, WASH. POST, July 19, 1999, at A13.

n6 James P. Rubin, Assistant Secretary of State and Spokesman, U.S. Dep't of State Daily Press Briefing at 4 (July 13, 1999), *available in* <http://secretary.state.gov/www/briefings /9907/990713db.html>; *see also* Jane Perlez, *China and U.S. Are Reported to Trade Threats on Taiwan*, N.Y. TIMES, Aug. 13, 1999, at A1; *China Says It Will Not Use Nuclear Weapons Against Taiwan*, N.Y. TIMES, Sept. 3, 1999, at A3. Similar support for maintenance of the "one China" policy was expressed in a communique of the foreign ministers of the Association of Southeast Asian Nations on July 24. *Asian Group Lends Support to Beijing Over Taiwan*, N.Y. TIMES, July 25, 1999, at 8.

n1 Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *adopted* June 17, 1999, ILO No. C182. Documents of the ILO

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may be found at <http://www.ilo.org/public/ english>. *See* 93 AJIL 943 (1999); Elizabeth Olsen, *World Panel Adopts Treaty to Restrict Child Labor*, N.Y. TIMES, June 18, 1999, at A12.

n2 Jane Perlez, *Clinton Pushes for Treaty to Ban The Worst Child Labor Practices*, N.Y. TIMES, June 17, 1999, at A17.

n3 Remarks to the International Labor Organization Conference in Geneva, Switzerland, 35 WEEKLY COMP. PRES. DOC. 1117, 1120-21 (June 21, 1999).

n4 Exec. Order No. 13,126, 64 Fed. Reg. 32,383 (1999)

n1 MASS. ANN. LAWS ch. 7, §§ 22G-22M, 40F 1/2 (Law. Co-op. 1998).

n2 *Voiding Of Burma Boycott Upheld: Mass. Overstepped Authority, Court Says*, WASH. POST, June 24, 1999, at A16.

n3 The NFTC is a nonprofit corporation founded in 1914 that advocates, on behalf of its member companies, in favor of open international trade and investment.

n4 U.S. CONST. Art. I, § 8, cl.3.

n5 U.S. CONST. Art. VI, cl. 2.

n6 The federal government imposed certain foreign assistance sanctions and other measures on Myanmar three months after the Massachusetts law was enacted. Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997, § 570, 110 Stat. 3009-166 to 3009-167, as contained in the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 101(c), 110 Stat. 3009-121 to 3009-181 (1996). In addition, in May 1997, President Clinton imposed certain trade sanctions on Myanmar. Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (1997); for implementing regulations, see 31 C.F.R. pt. 537 (1998).

n7 *Compare* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997) (favoring involvement of U.S. states in foreign affairs) *with* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (taking the opposite view).

n8 *Compare* Daniel M. Price & John P. Hannah, *The Constitutionality of United States State and Local Sanctions*, 39 HARV. INT'L L.J. 443 (1998) *and* David Schmahmann & James Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar)*, 30 VAND. J. TRANSNAT'L L. 175 (1997) (finding such laws unconstitutional) *with* Lynn Loschin & Jennifer Anderson, *Massachusetts Challenges the Burmese Dictators: The Constitutionality of Selective Purchasing Laws*, 39 SANTA CLARA L. REV. 373 (1999) *and* Jay A. Christofferson, Comment, *The Constitutionality of State Laws Prohibiting Contractual Relations with Burma: Upholding Federalism's Purpose*, 29 McGEORGE L. REV. 351 (1998) (finding such laws constitutional).

n9 National Foreign Trade Council v. Baker, 26 F.Supp. 2d 287, 293 (D. Mass. 1998), *aff'd sub nom.* National Foreign Trade Council v. Natsios, No. 98-2304, 1999 U.S. App. LEXIS 13735 (1st Cir. June 22, 1999). For an analysis of the decision, see Recent Case, 112 HARV. L. REV. 2013 (1999).

n10 National Foreign Trade Council v. Natsios, No. 98-2304, 1999 U.S. App. LEXIS 13735 at * 20 (1st Cir. June 22, 1999).

n11 389 U.S. 429 (1968).

n12 Natsios, 1999 U.S. App. LEXIS 13735 at * 31-33 (quoting Clark v. Allen, 331 U.S. 503, 517 (1947)). Further, the court rejected Massachusetts' effort to extend to the foreign affairs power the "market participant" exception to the dormant domestic commerce clause and found that neither the first nor tenth amendments protected the Massachusetts law.

n13 *See, e.g.*, White v. Massachusetts Council of Construction Employers, 460 U.S. 204 (1983) (when the state is acting as a market participant, rather than as a market regulator, the dormant domestic commerce clause places no limitation on its activities).

n14 Natsios, 1999 U.S. App. LEXIS 13735 at *57-87.

n15 *Id.* at * 88-107.

n16 *Id.* at * 107-08.

n1 The petitions were filed as confidential, although basic information is recorded as part of the ITC's public docket. *See* <http://info.usitc.gov/sec/dockets.nsf>; *see also Three Nations Are Accused of Dumping Steel*, N.Y. TIMES, Oct. 1, 1998, at C4. To obtain relief from dumping or unfairly subsidized imports, the Commerce Department must issue a finding of dumping or subsidization and the ITC must find that the dumped or subsidized imports are injuring a U.S. industry. *See* 19 U.S.C. §§ 1671-77n (1994). All told, imports of hot-rolled steel products surged seventy-four percent in 1998 over 1997 imports. Remarks of William M. Daley, U.S. Secretary of Commerce, on Steel Quota Legislation and the Administration's Response to the 1998 Surge of Steel Imports (June 21, 1999), *available in* <http://www.ita.doc.gov/media/0621STEELWMD.htm>.

n2 19 C.F.R. pt. 351 (1999).

n3 Trade Act of 1974, Title II, § 201, 19 U.S.C. § 2251 (1994).

n4 White House, Report to Congress on a Comprehensive Plan for Responding to the Increase in Steel Imports (Jan. 7, 1999), *available in* <http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi//oma.eop.gov.us/1999/1/8/4.text.1>.

n5 H.R. 975, 96th Cong. (1999); Alison Mitchell, *By A Wide Margin, The House Votes Steel Import Curb*, N.Y. TIMES, Mar. 18, 1999, at A1.

n6 David E. Sanger, *White House Tries To Fend Off Push For Steel Quotas*, N.Y. TIMES, June 22, 1999, at A1.

n7 Paul Blustein, *Bill to Restrict Steel Imports Fails to Clear Hurdle in Senate*, WASH. POST, June 23, 1999, at A6; David E. Sanger, *Senate Kills Effort to Impose Tight Limits on Steel Imports*, N.Y. TIMES, June 23, 1999, at A1.

n8 Dep't of Commerce Press Release, Commerce Secretary William M. Daley Announces Agreements Substantially Reducing Imports of Brazilian Steel (July 7, 1999). Press releases and fact sheets of the Department of Commerce may be found at <http://www.doc.gov>.

n9 Dep't of Commerce Press Release, Commerce Secretary William M. Daley Announces Agreements Sharply Reducing Imports of Russian Steel (July 13, 1999).

n10 U.S. Dep't of Commerce Fact Sheet on Anti-dumping Investigation: Hot-Rolled Steel Products from Japan (Apr. 29, 1999); *see* Rossella Brevetti, *Commerce Finds Japan Is Dumping Hot-Rolled Steel*, 16 Int'l Trade Rep. (BNA) 779 (May 5, 1999).

n11 Certain Hot-Rolled Steel Products from Japan, 64 Fed. Reg. 33,514 (1999); *see Punitive Tariffs Are Approved On Imports of Japanese Steel*, N.Y. TIMES, June 12, 1999, at

C3.

n12 Antidumping Duty Order: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan, 64 Fed. Reg. 34,778 (1999).

n13 Toshio Aritake, *Japanese Steel Mills Preparing Complaints to WTO over ITC Decisions*, 16 Int'l Trade Rep. (BNA) 1017 (June 16, 1999).

n1 This trade scheme operates under the Fourth ACP-EEC Convention of Lome, Dec. 15, 1989, 29 ILM 783 (1990).

n2 For background to the U.S.-EU dispute over EU banana imports, see Raj Bhala, *The Bananas **War***, 31 McGEORGE L. REV. (forthcoming 2000).

n3 European Communities -- Regime for the Importation, Sale and Distribution of Bananas, WTO Doc. WT/DS27/R/USA (May 22, 1997), *available in* 1997 GATTPD LEXIS 34. WTO Reports are generally available at <http://www.wto.org/wto/dispute/distab.htm>.

n4 European Communities -- Regime for the Importation, Sale and Distribution of Bananas, WTO Doc. WT/DS27/AB/R (Sept. 9, 1997), *available in* 1997 GATTPD LEXIS 25.

n5 European Communities -- Regime for the Importation, Sale and Distribution of Bananas, WTO Doc. WT/DS27/15 (Jan. 7, 1998), para. 1.

n6 Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 ILM 1144, 1226 (1994).

n7 European Communities -- Regime for the Importation, Sale and Distribution of Bananas, WTO Doc. WT/DS27/15 (Jan. 7, 1998), paras. 3, 20.

n8 European Communities -- Regime for the Importation, Sale and Distribution of Bananas -- Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WTO Doc. WT/DS27/ARB (Apr. 9, 1999) (emphasis in original).

n9 David E. Sanger, *Ruling Allows Tariffs by U.S. Over Bananas*, N.Y. TIMES, Apr. 7, 1999, at C1.

n10 Daniel Pruzin, *WTO Backs U.S. Banana Sanction Request; Wrangling Continues Over Retroactive Duties*, 16 Int'l Trade Rep. (BNA) 660 (Apr. 21, 1999).

n11 *European Commission Outlines Options For Resolving Banana Dispute With U.S.*, 16 Int'l Trade Rep. (BNA) 944 (June 2, 1999).

n12 European Commission, Communication From the Commission to the Council on Bananas, EC Doc. SEC/99/0799 at 8 (June 1, 1999), *available in* <http://europa.eu.int/comm/dg01/2605bana.pdf>.

n1 Council Directive 96/22/EC of 29 April 1996 Concerning the Prohibition on the Use in Stockfarming of Certain Substances Having a Hormonal or Thyrostatic Action and of Beta-Antagoists, and Repealing Directives 81/602/EEC, 88/146/EEC and 88/299EEC, 1996 O.J. (L 125) 3. For background on this dispute, see Implementation of WTO Recommendations Concerning EC -- Measures Concerning Meat and Meat Products (Hormones), 64 Fed. Reg. 14,486 (1999).

n2 Sixty-three percent of all cattle and ninety percent of feed cattle in the United States are treated with growth hormones. Elizabeth Olsen, *$ 253 Million Sanctions Sought in Beef Fight*

With Europe, N.Y. TIMES, June 4, 1999, at C4.

n3 EC Measures Concerning Meat and Meat Products (Hormones), WTO Docs. WT/DS26/R/USA & WT/DS/48/R/CAN (Aug. 18, 1997) at para. 9.1

n4 EC Measures Concerning Meat and Meat Products (Hormones) (AB-1997-4), WTO Docs. WT/DS26/AB/R & WT/DS48/AB/R (Jan. 16, 1998); *see* David A. Wirth, International Decisions, 92 AJIL 755 (1998); Dale E. McNiel, *The First Case Under the WTO's Sanitary and Phytosanitary Agreement: The European Union's Hormone Ban*, 39 VA. J. INT'L L. 89 (1998).

n5 Gary G. Yerkey, *U.S., Europe Make Little Progress In New Discussions on Beef, Aides Say*, 16 Int'l Trade Rep. (BNA) 710 (Apr. 28, 1999).

n6 Daniel Pruzin, *U.S., Canada Request WTO Approval To Retaliate Against EU Hormone Ban*, 16 Int'l Trade Rep. (BNA) 974 (June 9, 1999).

n7 Daniel Pruzin & Joe Kirwin, *U.S., EU Fail to Resolve Hormone Dispute, But U.S. Will Study Recent Scientific Data*, 16 Int'l Trade Rep. (BNA) 888 (May 26, 1999).

n8 EC Measures Concerning Meat and Meat Products (Hormones) -- Arbitration Under 21.3 (c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Docs. WT/DS26/15 & WT/DS48/13 (May 29, 1998) at para. 48.

n9 Olsen, *supra* note 2.

n10 European Communities -- Measures Concerning Meat and Meat Products (Hormones)-Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, WTO Docs. WT/DS26/ARB & WT/DS48/ARB (July 12, 1999); *see* Elizabeth Olsen, *U.S. and Canada Get $ 125 Million Ruling on Europe Beef Ban*, N.Y. TIMES, July 13, 1999, at C4.

n11 Paul Blustein, *Europe Hit By Tariffs In Battle Over Beef*, WASH. POST, July 20, 1999, at E1.

n1 Canada -- Certain Measures Concerning Periodicals, WTO Doc. WT/DS31/R (Mar. 14, 1997), *available in* 1997 GATTPD LEXIS 20; Canada-Certain Measures Concerning Periodicals, WTO Doc. WT/DS31/AB/R (June 30, 1997), *available in* 1997 GATTPD LEXIS 18. For background, see USTR Press Release on United States and Canada Resolve "Periodical" Differences, No. 99-46 (May 26, 1999), *available in* <http://www.ustr.gov/releases/1999/05/99-46.html>.

n2 *Canadian Magazine Law Opponents Ask Senate to Delay Passage of Bill*, 16 Int'l Trade Rep. (BNA) 822 (May 12, 1999).

n3 Chad Bowman & Peter Menyasz, *Canada Magazine Dispute Cools Off After 'Amicable, Cooperative' Talks*, 16 Int'l Trade Rep. (BNA) 449 (Mar. 17, 1999); *Canada, U.S. Exchange Proposals in Start Of Talks Over Magazine Advertising Dispute*, 16 Int'l Trade Rep. (BNA) 208 (Feb. 3, 1999).

n4 The agreement consists of an exchange of letters between Raymond Chretien, Ambassador of Canada to the United States, and Charlene Barshefsky, United States Trade Representative (June 3, 1999), *available in* <http://www.usembassycanada.gov/mags.htm>.

n1 Treaty Concerning Pacific Salmon, Jan. 28, 1985, U.S.-Can., TIAS 11091, 1469 UNTS 357. For background, see Marian Nash Leich, Contemporary Practice, 79 AJIL 432 (1985); Joy A. Yanagida, *The Pacific Salmon Treaty*, 81 AJIL 577 (1987).

Serbian forces completed their withdrawal on June 20, prompting NATO formally to end its air campaign. [18] The Serb forces left in their wake "a landscape of grave sites, burned homes, toppled mosque minarets and smashed shops." [19] Investigators from the International Criminal Tribunal for the former Yugoslavia (ICTY) entered Kosovo to gather evidence of atrocities, and were supported by investigators from the United States. [20] Information uncovered by the ICTY, as well as by NATO peacekeepers and aid agencies, suggested that at least 10,000 Albanian Kosovars were killed during the three-month FRY Government campaign. [21]

Asked at a news conference on June 25 to reflect on Kosovo, President Clinton replied in part:

> I think that when you look at this conflict and you seek to understand, "Well, why did President Clinton do this, why did Tony Blair do this, why did Jacques Chirac go along, why did the Germans get in there with both feet so early, given their history and all this?" I think you have to see this through the lens of Bosnia.
>
> . . . In Bosnia we had the U.N. in there first in a peacekeeping mission, and we tried for four years, you know, 50 different diplomatic solutions, all those different maps, all that different argument, and in the end of it all, from 1991 to 1995, we still had Srebrenica.
>
> . . . When it was all said and done, we had a quarter of a million people dead and two and a half million refugees. And I think what you have to understand is that we saw this through the lens of Bosnia. And we said we are not going to wait a day, not a day if we can stop it . . . . Once we knew there was a military plan, they had all those soldiers **[*883]** deployed, they had all those tanks deployed, you know, we knew what was coming and we decided to move. [22]

NON-STATE ENTITIES IN INTERNATIONAL LAW

U.S. Involvement in Claims by Victims of the German Holocaust or Their Heirs

In the aftermath of the Second World **War,** the major powers that occupied Germany enacted laws in their respective zones to restore property confiscated by the Nazis to the original owners. These laws did not address non-property loss, such as physical suffering or unjust deprivation of freedom, since the Allies contemplated that a new German Government would assume such responsibility. In the 1950s, and through various amendments thereafter, the Federal Republic of Germany enacted legislation to provide restitution for persons persecuted by the Nazi regime because of political opposition or for racial, religious or ideological reasons. [1] While these complex restitution laws permitted recovery by many persons who were German nationals or stateless persons during the **war,** or who were refugees within the meaning of the 1949 Geneva Conventions, the laws excluded many others. [2] In the years thereafter, Germany concluded bilateral agreements with several countries to compensate persons not eligible under the German restitution laws. After German reunification in 1989, Germany expanded its program to include persons to whom the German Democratic Republic had denied relief.

Since German reunification, U.S. victims of the German Holocaust or their heirs have pursued various avenues to obtain compensation for both personal and property losses against the German and Swiss Governments, and against private entities in those and other states, often with the support of the U.S. Government. These initiatives may be grouped into the following categories: (1) claims against the Government of Germany for persecution; (2) claims against German industry and German banks; (3) claims against insurance **[*884]**

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n2 For background on the breakdown of the 1985 treaty, see Thomas Healy, Comment, *Where Artificial Constraints Kill: The Dispute Between Canada and the United States Over Pacific Salmon*, 12 ARIZ. J. INT'L & COMP. L. 303 (1995); Michael F. Keiver, *The Pacific Salmon* ***War:*** *The Defense of* ***Necessity*** *Revisited*, 21 DALHOUSIE L.J. 408 (1998); Ted L. McDorman, *The West Coast Salmon Dispute: A Canadian View of the Breakdown of the 1985 Treaty and the Transit License Measure*, 17 LOY. L.A. INT'L & COMP. L.J. 477, 491-497 (1995); Robert J. Schmidt, Jr., *International Negotiations Paralyzed by Domestic Politics: Two-Level Game Theory and the Problem of the Pacific Salmon Commission*, 26 ENVT'L L. 95 (1996).

n3 The agreement consists of an exchange of diplomatic notes between Thomas Pickering, U.S. Acting Secretary of State, and Raymond Chretien, Ambassador of Canada to the United States (June 30, 1999), *available in* <http://www.state.gov/www/global/oes/oceans/990630_salmon_index.html>. *See* Tom Kenworthy & Steven Pearlstein, *U.S., Canada Reach Landmark Pact on Pacific Salmon Fishing*, WASH. POST, June 4, 1999, at A17; Sam Howe Verhovek, *U.S. and Canada Agree on a Plan to Restrict Catches of Endangered Salmon*, N.Y. TIMES, June 4, 1999, at A19.

n4 U.S. Dep't of State Fact Sheet on the Pacific Salmon Agreement (June 3, 1999), *available in* <http://www.state.gov/www/global/oes/oceans/fs_990603_salmon.html>.

n1 Lawrence K. Altman et al., *Smallpox: The Once and Future Scourge?*, N.Y. TIMES, June 15, 1999, at D1.

n2 WHA Res. 49.10 (1996). For background, see Report by the WHO Secretariat, Smallpox Eradication: Destruction of Variola Virus Stocks, WHO Doc. A52/5 (Apr. 15, 1999). WHO documents generally are available at <http://www.who.int>.

n3 Department of Communicable Disease Surveillance and Response, World Health Organization, Report of the Meeting of the Ad Hoc Committee on Orthopoxvirus Infections. Geneva, Switzerland, WHO Doc. WHO/CDS/CSR/99.1 at 2, 4 (Jan. 14-15, 1999).

n4 Institute Of Medicine, Assessment of Future Scientific Needs for Live Variola Virus (1999), *available in* <http://books.nap.edu/books/0309064414/html/7-14.html>.

n5 Statement by the White House Press Secretary (Apr. 22, 1999), *available in* <http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi//oma.eop.gov.us/1999/4/23/5.text.1>; *see* Susan Okie, *U.S. to Oppose Destroying Smallpox Stocks*, WASH. POST, Apr. 23, 1999, at A2.

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n4 Statement on the Delivery of the Suspects Accused of the 1988 Bombing of Pan Am Flight 103, 35 WEEKLY COMP. PRES. DOC. 587 (Apr. 12, 1999).

n5 SC Res. 1192, para. 8 (1998).

n6 Report of the Secretary-General Submitted Pursuant to Paragraph 8 of Resolution 1192 (1998), UN Doc. S/1999/378 (1999).

n7 Marlise Simons, *2 Libyans Formally Charged In 1988 Pan Am Bombing*, N.Y. TIMES, Apr. 7, 1999, at A6.

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n1 *See* Marian Nash (Leich), Contemporary Practice, 89 AJIL 119 & 372 (1995). When fully implemented, the Agreed Framework will terminate the DPRK's nuclear program.

n2 *Hearings Before the Subcomm. on Asian and Pacific Affairs of the House Int'l Relations Comm.*, 105th Cong. (Feb. 26, 1997) (testimony of Charles Kartman, Acting Assistant Secretary of State for East Asian and Pacific Affairs, U.S. Dep't of State).

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n5 Philip Shenon, *Suspected North Korean Atom Site Is Empty, U.S. Finds*, N.Y. TIMES, May 28, 1999, at A3.

n6 *Hearings Before the House Int'l Relations Comm.*, 106th Cong. (Mar. 24, 1999) (opening statement of Chairman Benjamin A. Gilman).

n7 James P. Rubin, Assistant Secretary of State and Spokesman, U.S. Dep't of State Press Release on Dr. William Perry Named North Korean Policy Coordinator (Nov. 12, 1998), *available in* <http://secretary.state.gov/www/briefings/statements/1998/ps981112.html>.

n8 *Hearings Before the Subcomm. on E. Asian and Pacific Affairs of the Senate Foreign Relations Comm.*, 105th Cong. (Oct. 12, 1999) (testimony of William Perry, U.S. North Korea Policy Coordinator); Nicholas D. Kristof, *North Korea Unresponsive In U.S. Talks, Envoy Reports*, N.Y. TIMES, May 30, 1999, at 4; Kevin Sullivan, *N. Korea Promises No Nuclear Weapons*, WASH. POST, May 30, 1999, at A19. For the unclassified version of Dr. Perry's

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review of U.S. policy toward North Korea, see <http://www.state.gov/www/regions/eap/991012_northkorea_rpt.html>.

n1 Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-USSR, 23 UST 3435.

n2 *Compare* Abram Chayes & Antonia Handler Chayes, *Testing and Development of "Exotic" Systems Under the ABM Treaty: The Great Reinterpretation Caper*, 99 HARV. L. REV. 1956 (1986), *with* Abraham Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1972 (1986).

n3 These memoranda have not yet been submitted to the Senate for advice and consent. *See* Thomas W. Lippman, *Helms Faces Off With White House on Missed ABM Treaty Deadline*, WASH. POST, June 21, 1999, at A5. The amendments would also define the difference between strategic or intercontinental missiles (prohibited under the treaty) and "theater" missiles (not prohibited).

n4 U.S. Dep't of State Fact Sheet on Memorandum of Understanding on Succession (Sept. 26, 1997), *available in* <http://www.state.gov/www/global/arms/fs-abm_succ__mou_970926.html>.

n5 William S. Cohen, Secretary of Defense, U.S. Dep't of Defense Press Briefing at 2-3 (Jan. 20, 1999), *available in* <http://www.defenselink.mil/news/Jan 1999/t01201999_t0120md.html>.

n6 *See* David Hoffman, *Russia Says START II Is Imperiled*, WASH. POST, Jan. 22, 1999, at A16; Walter Pincus, *Pentagon Debates Arms Treaty Changes*, WASH. POST, Jan. 22, 1999, at A16; Daniel Williams, *Russia Rejects Changes to ABM Treaty*, WASH. POST, Jan. 23, 1999, at A18. In June 1999, Russia agreed to meet to hear the U.S. proposals, but continued to assert that it opposed amending the ABM Treaty. David Hoffman, *Clinton, Yeltsin Plan New Talks on Nuclear Arms*, WASH. POST, June 22, 1999, at A10.

n7 *The Legal Status of the ABM Treaty: Hearings Before the Senate Foreign Relations Comm.*, 106th Cong. (May 25, 1999) (prepared statement of David B. Rivkin and Lee A. Casey), *available in* <http://www.senate.gov/[approximately]foreign/riv.htm>.

n8 Pub. L. No. 106-38, 113 Stat. 205 (1999); *see also* Statement on Signing the National Missile Defense Act of 1999, 35 WEEKLY COMP. PRES. DOC. 1471 (Aug. 2, 1999) (the statement was made July 22, but released on July 23).

n9 White House Press Office, Joint Statement Between the United States and the Russian Federation Concerning the Strategic Offensive and Defensive Arms and Further Strengthening of Stability (June 20, 1999).

n10 *See* Sean D. Murphy, Contemporary Practice, 93 AJIL 192 (1999).

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companies; (4) claims against Swiss banks; and (5) claims for confiscated art. Each is discussed in turn.

Persecution Claims. Hugo Princz, a U.S. national of Jewish faith, was living with his family in what is now Slovakia at the outbreak of the Second World **War.** The Slovak police arrested Mr. Princz and his family as enemy aliens; normal international practice would dictate that they intern in civilian camps or be exchanged for U.S.-held German nationals. Since the Princz family was Jewish, however, it was handed over to the German SS, which sent it to concentration and slave labor camps. Mr. Princz survived; his parents and three siblings did not. Although Mr. Princz filed a claim under Germany's post-**war** restitution program, the claim was denied because Mr. Princz was neither a German national nor a refugee. Mr. Princz may have been eligible when Germany expanded its program in 1965, but he did not reapply until after the period for filing claims had expired in 1969.

In November of 1992, Mr. Princz sued the Federal Republic of Germany in a U.S. federal court for false imprisonment, assault and battery, emotional distress, and recovery quantum meruit for the value of his labor under the Nazi regime. The District Court denied Germany's motion to dismiss the case for lack of jurisdiction under the Foreign Sovereign Immunities Act. [3] That decision, however, was reversed in July 1994 by the Court of Appeals, which stated:

> Assuming that the Foreign Sovereign Immunities Act [FSIA] of 1976 . . . applies retroactively to events occurring in 1942-1945, no exception to the general grant of sovereign immunity in that statute applies in this case. If the FSIA does not apply retroactively, then there is no federal subject matter jurisdiction over Mr. Princz's claims, which sound in tort and quasi contract. [4]

The U.S. Congress reacted strongly to the decision. In March of 1995, Representative Charles E. Schumer of New York summarized its efforts as follows:

> During the 103d Congress, the House and Senate [passed] unanimous resolutions supporting Mr. Princz and took numerous other steps on his behalf, including unanimous passage last October in the House, and near passage in the Senate, of legislation I authored which would have permitted the lawsuit he filed against Germany in 1992 to proceed . . . . My colleagues and I are prepared to reintroduce that bill in this Congress should the latest diplomatic efforts to resolve the case founder. [5]

On September 19, 1995, Germany and the United States signed an Agreement Concerning Final Benefits to Certain United States Nationals Who Were Victims of National Socialist Measures of Persecution. [6] The Agreement was designed to compensate persons who were U.S. nationals persecuted by the Nazi regime, but who had not previously been compensated. The Agreement provided for a lump-sum transfer of three million Deutschmarks (about U.S.$ 2.1 million) to the U.S. Government; the U.S. Department of State then distributed the sum to Mr. Princz and several other known victims. Individuals subjected to forced labor in prison camps other than concentration camps were excluded from the agreement. [7]

Since Germany and the United States anticipated that there could be other victims with claims comparable to those of Mr. Princz who had not come to the attention of the U.S. **[*885]** Government as of September 1995, Article 2(2) of the Agreement provided for the possibility of future payments to other victims. It states:

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> For any possible further cases not known at the present moment, both Governments intend to negotiate two years after the entry into force of this Agreement, an additional lump sum payment based on the same criteria as set forth in Article 1 and derived on the same basis as the amount under paragraph 1.

The United States enacted legislation enabling the Foreign Claims Settlement Commission (FCSC) of the U.S. Department of Justice to receive and determine the validity and amount of claims by U.S. nationals against Germany for persecution within the scope of the 1995 Agreement. [8] The FCSC conducted its Holocaust Survivors Claims Program to locate eligible individuals and to assess their claims. The FCSC extended its initial filing deadline of September 1996 numerous times, setting the final deadline at September 1997, two years after the 1995 Agreement entered into force. In March 1998, the FCSC completed its adjudications under the Program and certified to the Secretary of State the validity and amounts of the awards.

On January 25, 1999, the United States and Germany reached agreement on a lump sum payment by the German Government of 34.5 million Deutschmarks for those claimants. [9] In June 1999, Germany transferred the funds to the United States, totaling U.S.$ 18,183,559.24.

Claims against German industry and German banks. In 1998, lawsuits were filed in U.S. courts against certain German companies and banks. [10] On February 16, 1999, in part as a response to such suits, the German Government announced the creation of a "Foundation Initiative of German Enterprises: Remembrance, Responsibility, and Future" ("Stiftungsinitiative deutscher Unternehmen: Erinnerung, Verantwortung und Zukunft"), a fund to which initially twelve of Germany's largest banks and companies accused of benefitting from slave labor during the Second World **War** will contribute. The Foundation is expected to address claims of former forced and slave laborers, as well as claims against German banks stemming from "aryanization activities," dormant accounts, and looted gold.

The joint statement of Germany's Government and private companies issued by the German Government reads:

> The companies Allianz AG, BASF AG, Bayer AG, BMW AG, DaimlerChrysler AG, Deutsche Bank AG, Degussa-Huls AG, Dresdner Bank AG, Friedr. Krupp AG Hoesch-Krupp, Hoechst AG, Siemens AG and Volkswagen AG today proposed to the Federal Chancellor the establishment of a "Foundation Initiative of German Enterprises: Remembrance, Responsibility and Future". The Federal Chancellor welcomes and commends this Initiative and pledges the Federal Government's support.
>
> The companies wish, from a sense of solidarity, justice and self-respect, to send a conclusive material signal as the century draws to a close. This Initiative is a direct way for civil society to contribute to and complement the efforts of the state in the field of restitution policy. Since restitution payments by the state have been funded from public tax revenues, German business has also hitherto consistently contributed indirectly to these payments. In addition, German companies have over the past decades made direct payments of their own to Nazi victims.
>
> **[*886]** The fact that the German Bundestag intends to speedily establish a Federal foundation for humanitarian payments, especially to victims of Nazi forced labor, is welcomed. It is important to find an appropriate way of linking this legislative initiative with the Foundation Initiative of German Enterprises.

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This Foundation Initiative has three goals:

> -- To meet the moral responsibilities of German companies arising from the use of forced labor, aryanization and other grave injustices committed under the Nazi dictatorship,
>
> -- Based on this understanding of the Nazi past, to support humanitarian and forward-looking projects, and
>
> -- Thereby to lay the groundwork for countering lawsuits, particularly class actions in the USA, and remove the rationale for any campaigns against the reputation of our country and its business community.

The Foundation Initiative is to comprise two parts of equal importance:

> -- A humanitarian fund for the benefit of victims of forced labor and other groups who suffered at the hands of the Nazis, and
>
> -- A future foundation to support appropriate projects linked in some way to the reasons for which the fund is to be set up.

The Governments of the USA and Israel welcome this Initiative as a positive and courageous response by the German companies to meet their moral responsibilities. The Initiative is contingent on the participating German companies receiving a satisfactory degree of legal certainty on the basis of appropriate intergovernmental agreements.

The paramount goal of the fund is to provide cooperative, fair, unbureaucratic and above all prompt assistance to Nazi victims. Given the advanced age of those concerned, the prime humanitarian objective must be to put the Initiative in place quickly, and if possible by September 1, 1999.

The participating German companies thank the Federal Government for the progress made in the discussions to date toward the creation of the fund and toward achieving legal certainty . . . . It is the express goal of the participating German companies that humanitarian payments to those concerned be made without regard to their religion or nationality. Other German companies that are involved but have not yet participated in this Initiative are called upon to join in the efforts now under way. [11]

The statement did not specify the amount of money provided for the fund as that amount ultimately will depend on the number of German companies that join in the initiative. As of July 1999, a steering group of governmental and nongovernmental representatives formed to develop the initiative focused on a plan to create two categories of former forced laborers, distinguished on the basis of whether they were imprisoned in a concentration camp (category A claimants) or detained for other forms of forced labor (category B claimants, who would receive a lesser amount). The steering group also anticipated payments to the claimants at a fixed amount (not based on need or living standards), which would be offset by any amount that private enterprises previously have paid to the individuals. [12] However, the steering group proved unable to reach agreement by the **[*887]** September 1, 1999, deadline on exactly who would qualify as "forced laborers" and how much compensation they

should receive. On October 7, the German companies and German Government offered $ 3.3 billion in compensation, but it was immediately rejected by lawyers of the claimants as insufficient.

Claims Against Insurance Companies. Various European insurance companies accused of denying life insurance payments to heirs of insurance holders who died in the Holocaust have faced criticism and lawsuits, and many have attempted to resolve the issue. For instance, in 1997-98, suits were filed in California state and New York federal courts by Holocaust survivors and their heirs against the Italian insurance company Assicurazioni Generali. [13] Assicurazioni Generali announced that it would establish a $ 12 million philanthropic fund in honor of policyholders who died in the Holocaust. [14] This initiative, however, did not resolve the lawsuits, forcing Assicurazioni Generali to settle the New York class action lawsuit for $ 100 million, to be paid both to individual claimants and to a humanitarian fund established to benefit Holocaust survivors more generally. [15]

State insurance regulators also pursued this issue, although not in the form of class action suits. In April 1998, the U.S. National Association of Insurance Commissioners (NAIC) formed a task force to investigate the issue of Holocaust-era insurance policies. NAIC held extensive hearings on this subject and threatened sanctions against European insurers that did not cooperate in addressing the matter. In August 1998, Under Secretary of State Eizenstat urged the targeted insurance companies to create an international commission to deal with this matter. He stated:

> Earlier this summer, I met with Generali executives and representatives and encouraged their cooperation in resolving Holocaust insurance issues. I have convened similar meetings with other European insurers, and I have also personally raised Holocaust insurance issues with governments in Central and Eastern Europe.
>
> We support the establishment of an international process to deal with all Holocaust insurance issues and claims. We believe such issues and claims are best handled through international cooperation among insurance regulators, insurance companies, and organizations representing Holocaust survivors. We support in this regard the efforts led by the National Association of Insurance Commissioners, Holocaust survivor organizations, and major insurance companies. These entities are working on a Memorandum of Understanding calling for the formation of an international commission to address Holocaust-era insurance issues. [16]

On September 9, 1998, NAIC and the major European insurance companies (including Assicurazioni Generali) concluded a Memorandum of Understanding establishing the International Commission on Holocaust-Era Insurance Claims. The Commission includes representatives from Holocaust survivor organizations, U.S. and European insurance regulators, major European insurance companies, the State of Israel and (in an observer status) the U.S. Department of State. The purpose of the Commission, which is chaired by **[*888]** former Secretary of State Lawrence Eagleburger and funded by the insurance companies, is to foster a fact-based, equitable effort to resolve Holocaust insurance claims within two years, without resorting to lengthy litigation. The program entails a claims process whereby, after advertisement, persons will file claims that then will be adjudicated through relaxed standards of proof. [17]

Assicurazioni Generali backed out of the previously agreed settlement of the class action lawsuit, since the Commission process did not cap at $ 100 million the amount that Assicurazioni Generali would be expected to contribute to the process. [18] On May 6, 1999, the

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Commission reached agreement for payment by the European insurance companies on prewar policies of Holocaust victims under a formula that reflects present day values (thus taking into account inflation, interest payments, and currency depreciation). The total amount ultimately paid is expected to be in the billions of dollars. [19]

Swiss Bank Claims. In late 1996 and early 1997, class action lawsuits on behalf of an estimated 18,000 Holocaust survivors and their heirs (both U.S. nationals and non-U.S. nationals) were filed against major Swiss banks [20] in U.S. federal court. [21] The complaints were eventually consolidated into a single case, in which the plaintiffs alleged that the Swiss banks collaborated with the Nazis in violation of international humanitarian law by knowingly retaining and concealing the assets of Holocaust victims, accepting and laundering illegally obtained Nazi loot, and transacting in the profits of slave labor. The plaintiffs also claimed that the banks breached fiduciary and other duties, breached contracts, converted the plaintiffs' property, enriched themselves unjustly, acted negligently, violated Swiss banking law and the Swiss commercial code of obligations, engaged in fraud and conspiracy, and concealed relevant facts from the plaintiffs in an effort to frustrate their claims. The plaintiffs sought compensatory and punitive damages, as well as declaratory and other relief. [22]

Although the banks offered to settle the case for $ 600 million, many Jewish groups regarded the amount offered as "insulting." [23] New York state and city financial officers announced that they planned to impose sanctions against the banks, and several other U.S. states announced that they were considering similar action. The Swiss Government strongly protested the threatened sanctions, deeming them "unjustified and illegal." [24] Although the U.S. Government favored resolving this matter, it did not favor imposition of economic sanctions by state and local authorities. On July 6, 1998, U.S. State Department spokesman James P. Rubin commented as follows:

> Our position on sanctions against Switzerland remains firm. We continue to believe that sanctions are unwarranted and counterproductive. They may lead to less rather than more flexibility on the part of Swiss institutions. They will prevent our nation from **[*889]** speaking with one voice on matters of foreign policy. They may call into question the openness of American financial markets, and we're calling on state and local governments considering punitive measures to refrain from taking actions which can further heighten tensions and delay further progress on a settlement that can do justice to the victims of the Holocaust. In the light of recent findings, we encourage the Swiss government to reflect on what [it] can do, what ways [it] can develop to accelerate the movement towards closure on these issues. [25]

The defendant banks moved to dismiss the New York class action, but before the court ruled on the motion Credit Suisse and UBS agreed in principle, on August 12, 1998, to settle the lawsuit for $ 1.25 billion. [26] After months of further negotiations, the parties signed a final settlement agreement on February 10, 1999. The key terms of the settlement provide that: (1) the defendants will pay a total of $ 1.25 billion in four installments over the course of three years; (2) the court will appoint a special master who will develop a plan for allocation and distribution of the funds to the class members; (3) the plaintiffs relinquish their claims against all Swiss companies and institutions; (4) the plaintiffs will develop a plan for notifying all class members; and (5) all class members have a right not to participate in the settlement, but any class member that affirmatively fails to opt out remains within the class and is bound by the settlement. In arguing to the court the appropriateness of accepting a settlement agreement covering a world-wide class, the plaintiffs argued:

> Federal Rule of Civil Procedure 23 imposes no geographic limitations on the size or scope of a certifiable classes. *See, e.g.*, *Califano v. Yamasaki*, 442 U.S. 682,

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USCS Fed Rules Civ Proc R 4

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*** CURRENT THROUGH CHANGES RECEIVED APRIL, 2001 ***

FEDERAL RULES OF CIVIL PROCEDURE
II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

USCS Fed Rules Civ Proc R 4 (2001)

- Review expert commentary from The National Institute for Trial Advocacy
- Review Court Orders which may amend this Rule.

Rule 4. Summons

(a) Form.The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.

(b) Issuance.Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.

(c) Service with Complaint; by Whom Made.
(1) A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint.
(2) Service may be effected by any person who is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for the purpose. Such an appointment must be made when the plaintiff is authorized to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 or is authorized to proceed as a seaman under 28 U.S.C. § 1916.

(d) Waiver of Service; Duty to Save Costs of Service; Request to Waive.
(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.
(2) An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request.
(A) shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment

or law to receive service of process) of a defendant subject to service under subdivision (h);

(B) shall be dispatched through first-class mail or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request;

(E) shall set forth the date on which request is sent;

(F) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and

(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.

(3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proofs of service shall be required.

(5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

(e) Service Upon Individuals Within a Judicial District of the United States.Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:

(1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(f) Service Upon Individuals in a Foreign Country.Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the law of the foreign country, by

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(i) delivery to the individual personally of a copy of the summons and the complaint; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) by other means not prohibited by international agreement as may be directed by the court.

(g) Service Upon Infants and Incompetent Person.Service upon an infant or an incompetent person in a judicial district of the United States shall be effected in the manner prescribed by the law of the state in which the service is made for the service of summons or like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. Service upon an infant or an incompetent person in a place not within any judicial district of the United States shall be effected in the manner prescribed by paragraph (2)(A) or (2)(B) of subdivision (f) or by such means as the court may direct.

(h) Service Upon Corporations and Associations.Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or

(2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

(i) Serving the United States, Its Agencies, Corporations, Officers, or Employees.

(1) Service upon the United States shall be effected

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency.

(2) (A) Service on an agency or corporation of the United States, or an officer or employee of the United States sued only in an official capacity, is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by also sending a copy of the summons and complaint by registered or certified mail to the officer, employee, agency, or corporation.

(B) Service on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States--whether or not the officer or employee is sued also in an official capacity--is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by serving the officer or employee in the manner prescribed by Rule 4 (e), (f), or (g).

(3) The court shall allow a reasonable time to serve process under Rule 4(i) for the purpose of curing the failure to serve:

(A) all persons required to be served in an action governed by Rule 4(i)(2)(A), if the plaintiff has served either the United States attorney or the Attorney General of the United States, or

(B) the United States in an action governed by Rule 4(i)(2)(B), if the plaintiff has served

an officer or employee of the United States sued in an individual capacity.

(j) Service Upon Foreign, State, or Local Governments.
(1) Service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U.S.C. § 1608.
(2) Service upon a state, municipal corporation, or other governmental organization subject to suit, shall be effected by delivering a copy of the summons and of the complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

(k) Territorial Limits of Effective Service.
(1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant
(A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or
(B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or
(C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335, or
(D) when authorized by a statute of the United States.
(2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

(l) Proof of Service.If service is not waived, the person effecting service shall make proof thereof to the court. If service is made by a person other than a United States marshal or deputy United States marshal, the person shall make affidavit thereof. Proof of service in a place not within any judicial district of the United States shall, if effected under paragraph (1) of subdivision (f), be made pursuant to the applicable treaty or convention, and shall, if effected under paragraph (2) or (3) thereof, include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court. Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

(m) Time Limit for Service.If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

(n) Seizure of Property; Service of Summons Not Feasible.
(1) If a statute of the United States so provides, the court may assert jurisdiction over property. Notice to claimants of the property shall than be sent in the manner provided by the statute or by service of a summons under this rule.
(2) Upon a showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by service of summons in any manner authorized by this rule, the court may assert jurisdiction over any of the defendant's assets found within the district by seizing the assets under the circumstances and in the manner provided by the law of the state in which the district court is located.

HISTORY:
(Amended July 1, 1963; July 1, 1966; Aug. 1, 1980; Jan. 12, 1983, P.L. 97-462, § 2, 96 Stat. 2527; Aug. 1, 1987; Dec. 1, 1993.)

(As amended Dec. 1, 2000.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee. Note to Subdivision (a). With the provision permitting additional summons upon request of the plaintiff compare former Equity Rule 14 (Alias Subpoena) and the last sentence of former Equity Rule 12 (Issue of Subpoena--Time for Answer).

Note to Subdivision (b). This rule prescribes a form of summons which follows substantially the requirements stated in former Equity Rules 12 (Issue of Subpoena--Time for Answer) and 7 (Process, Mense and Final).

U.S.C., Title 28, former § 721 (now § 1691) (Sealing and testing of writs) is substantially continued insofar as it applies to a summons, but its requirements as to teste of process are superseded. U.S.C., Title 28, former § 722 (Teste of process, day of), is superseded.

See Rule 12(a) for a statement of the time within which the defendant is required to appear and defend.

Note to Subdivision (c). This rule does not affect U.S.C., Title 28, former § 503 (now § 547), as amended June 15, 1935 (Marshals; duties) and such statutes as the following insofar as they provide for service of process by a marshal, but modifies them insofar as they may imply service by a marshal only:

U.S.C., Title 15:

§ 5 (Bringing in additional parties) (Sherman Act)

§ 10 (Bringing in additional parties)

§ 25(Restraining violations; procedure)

U.S.C., Title 28, former:

§ 45 (Practice and procedure in certain cases under the interstate commerce laws)

Compare former Equity Rule 15 (Process, by Whom Served).

Note to Subdivision (d). Under this rule the complaint must always be served with the summons.

Paragraph (1). For an example of a statute providing for service upon an agent of an individual see U.S.C., Title 28, former § 109 (now §§ 1400, 1694) (Patent cases).

Paragraph (3). This enumerates the officers and agents of a corporation or of a partnership or other unincorporated association upon whom service of process may be made, and permits service of process only upon the officers, managing or general agents, or agents authorized by appointment or by law, of the corporation, partnership or unincorporated association against which the action is brought. See Christian v. International Ass'n of Machinists, 7 F.2d 481 (D.C. Ky. 1925) and Singleton v. Order of Railway Conductors of America, 9 F. Supp. 417 (D.C. Ill. 1935). Compare Operative Plasterers' and Cement Finishers' International Ass'n of the United States and Canada v. Case, 93 F.2d 56 (D.C. Cir. 1937).

For a statute authorizing service upon a specified agent and requiring mailing to the defendant, see U.S.C., Title 6, § 7 (Surety companies as sureties; appointment of agents; service of process).

Paragraphs (4) and (5) provide a uniform and comprehensive method of service for all actions against the United States or an officer or agency thereof. For statutes providing for such service, see U.S.C., Title 7, §§ 217 (Proceedings for suspension of orders), 499k (Injunctions; application of injunction laws governing orders of Interstate Commerce Commission), 608c(15)(B) (Court review of ruling of Secretary of Agriculture), and 855 (making § 608c(15)(B) applicable to orders of the Secretary of Agriculture as to handlers of anti-hog-cholera serum and hog-cholera virus); U.S.C., Title 26, § 3679 (Bill in chancery to clear title to realty on which the United States has a lien for taxes); U.S.C., Title 28, former § 45 (District courts; practice and procedure in certain cases under the interstate commerce laws), former § 763 (Petition in suit against the United States; service; appearance by district attorney), former § 766 (now § 2409) (Partition suits where United States is tenant in common or joint tenant), former § 902 (now § 2410) (Foreclosure of mortgages or other liens on property in which the United States has an interest). These and similar statutes are modified insofar as they prescribe a different method of service or dispense with the service

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To authorize an additional permanent judgeship in the district of Idaho, and for other purposes. (Referred to House Committee after being Received from Senate)

S 878 RFH

108th CONGRESS

1st Session

S. 878

IN THE HOUSE OF REPRESENTATIVES

June 2, 2003

Referred to the Committee on the Judiciary

AN ACT

To authorize an additional permanent judgeship in the district of Idaho, and for other purposes.

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

SECTION 1. DISTRICT JUDGESHIP FOR THE NORTHERN DISTRICT OF ALABAMA.

(a) ADDITIONAL PERMANENT DISTRICT JUDGESHIP- The President shall appoint, by and with the advice and consent of the Senate, 1 additional district judge for the northern district of Alabama.

(b) TECHNICAL AND CONFORMING AMENDMENT- The table under section 133(a) of title 28, United States Code, is amended by striking the item relating to Alabama and inserting the

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following:

8

3

3.'.

SEC. 2. DISTRICT JUDGESHIPS FOR THE DISTRICT OF ARIZONA.

(a) ADDITIONAL PERMANENT DISTRICT JUDGESHIPS- The President shall appoint, by and with the advice and consent of the Senate, 2 additional district judges for the district of Arizona.

(b) TECHNICAL AND CONFORMING AMENDMENT- The table under section 133(a) of title 28, United States Code, is amended by striking the item relating to Arizona and inserting the following:

14.'.

SEC. 3. DISTRICT JUDGESHIPS FOR THE EASTERN AND SOUTHERN DISTRICTS OF CALIFORNIA.

(a) ADDITIONAL PERMANENT DISTRICT JUDGESHIPS- The President shall appoint, by and with the advice and consent of the Senate--

(1) 3 additional district judges for the eastern district of California; and

(2) 1 additional district judge for the southern district of California.

(b) CONVERSION OF TEMPORARY JUDGESHIP TO PERMANENT JUDGESHIP- The existing judgeship for the eastern district of California authorized by section 203(c) of the Judicial Improvements Act of 1990 (28 U.S.C. 133 note; Public Law 101-650) shall, as of the date of enactment of this Act, be authorized under section 133 of title 28, United States Code, and the incumbent in that office shall hold the office under section 133 of title 28, United States Code (as amended by this Act).

(c) TECHNICAL AND CONFORMING AMENDMENT-

(1) IN GENERAL- The table under section 133(a) of title 28, United States Code, is amended by striking the item relating to California and inserting the following:

14

10

27

14.'.

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(2) EFFECTIVE DATE- This subsection shall take effect on the later of--

(A) the date of enactment of this Act; or

(B) July 16, 2003.

SEC. 4. DISTRICT JUDGESHIP FOR THE DISTRICT OF IDAHO.

(a) ADDITIONAL PERMANENT DISTRICT JUDGESHIP- The President shall appoint, by and with the advice and consent of the Senate, 1 additional district judge for the district of Idaho.

(b) TECHNICAL AND CONFORMING AMENDMENT- The table under section 133(a) of title 28, United States Code, is amended by striking the item relating to Idaho and inserting the following:

'Idaho

3.'.

SEC. 5. TEMPORARY JUDGESHIP FOR THE NORTHERN DISTRICT OF IOWA.

(a) IN GENERAL- The President shall appoint, by and with the advice and consent of the Senate, 1 additional judge for the northern district of Iowa.

(b) VACANCY NOT FILLED- The first vacancy in the office of district judge in the northern district of Iowa occurring 10 years or more after the confirmation date of the judge named to fill the temporary district judgeship created by this subsection, shall not be filled.

SEC. 6. CONVERSION OF TEMPORARY JUDGESHIP TO PERMANENT JUDGESHIP FOR THE DISTRICT OF NEBRASKA.

(a) IN GENERAL- The existing judgeship for the district of Nebraska authorized by section 203 (c) of the Judicial Improvements Act of 1990 (28 U.S.C. 133 note; Public Law 101-650) shall, as of the date of enactment of this Act, be authorized under section 133 of title 28, United States Code, and the incumbent in that office shall hold the office under section 133 of title 28, United States Code (as amended by this Act).

(b) TECHNICAL AND CONFORMING AMENDMENTS- The table under section 133(a) of title 28, United States Code, is amended by striking the item relating to Nebraska and inserting the following:

4.'.

SEC. 7. DISTRICT JUDGESHIPS FOR THE EASTERN DISTRICT OF NEW YORK.

(a) ADDITIONAL PERMANENT DISTRICT JUDGESHIPS- The President shall appoint, by and with the advice and consent of the Senate, 2 additional district judges for the eastern district of New York.

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(b) TECHNICAL AND CONFORMING AMENDMENT-

(1) IN GENERAL- The table under section 133(a) of title 28, United States Code, is amended by striking the item relating to New York and inserting the following:

5

28

17

4.'.

(2) EFFECTIVE DATE- This subsection shall take effect on the later of--

(A) the date of enactment of this Act; or

(B) July 16, 2003.

SEC. 8. TEMPORARY JUDGESHIP FOR THE EASTERN DISTRICT OF NEW YORK.

(a) IN GENERAL- The President shall appoint, by and with the advice and consent of the Senate 1 additional judge for the eastern district of New York.

(b) VACANCY NOT FILLED- The first vacancy in the office of district judge in the eastern district of New York occurring 10 years or more after the confirmation date of the judge named to fill the temporary district judgeship created by this subsection, shall not be filled.

SEC. 9. DISTRICT JUDGESHIP FOR THE DISTRICT OF SOUTH CAROLINA.

(a) ADDITIONAL PERMANENT DISTRICT JUDGESHIP- The President shall appoint, by and with the advice and consent of the Senate, 1 additional district judge for the district of South Carolina.

(b) TECHNICAL AND CONFORMING AMENDMENT- The table under section 133(a) of title 28, United States Code, is amended by striking the item relating to South Carolina and inserting the following:

11.'.

SEC. 10. DISTRICT JUDGESHIP FOR THE DISTRICT OF UTAH.

(a) ADDITIONAL PERMANENT DISTRICT JUDGESHIP FOR THE DISTRICT OF UTAH- The President shall appoint, by and with the advice and consent of the Senate, 1 additional district judge for the district of Utah.

(b) TECHNICAL AND CONFORMING AMENDMENTS- The table under section 133(a) of title 28, United States Code, is amended by striking the item relating to Utah and inserting the

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following:

6.'.

SEC. 11. BANKRUPTCY JUDGESHIPS.

(a) SHORT TITLE- This section may be cited as the `Bankruptcy Judgeship Act of 2003'.

(b) AUTHORIZATION FOR ADDITIONAL BANKRUPTCY JUDGESHIPS- The following judgeship positions shall be filled in the manner prescribed in section 152(a)(1) of title 28, United States Code, for the appointment of bankruptcy judges provided for in section 152(a)(2) of such title:

(1) Two additional bankruptcy judgeships for the southern district of New York.

(2) Four additional bankruptcy judgeships for the district of Delaware.

(3) One additional bankruptcy judgeship for the district of New Jersey.

(4) One additional bankruptcy judgeship for the eastern district of Pennsylvania.

(5) Three additional bankruptcy judgeships for the district of Maryland.

(6) One additional bankruptcy judgeship for the eastern district of North Carolina.

(7) One additional bankruptcy judgeship for the district of South Carolina.

(8) One additional bankruptcy judgeship for the eastern district of Virginia.

(9) Two additional bankruptcy judgeships for the eastern district of Michigan.

(10) Two additional bankruptcy judgeships for the western district of Tennessee.

(11) One additional bankruptcy judgeship for the eastern and western districts of Arkansas.

(12) Two additional bankruptcy judgeships for the district of Nevada.

(13) One additional bankruptcy judgeship for the district of Utah.

(14) Two additional bankruptcy judgeships for the middle district of Florida.

(15) Two additional bankruptcy judgeships for the southern district of Florida.

(16) Two additional bankruptcy judgeships for the northern district of Georgia.

(17) One additional bankruptcy judgeship for the southern district of Georgia.

(c) TEMPORARY BANKRUPTCY JUDGESHIPS-

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(1) AUTHORIZATION FOR ADDITIONAL TEMPORARY BANKRUPTCY JUDGESHIPS- The following judgeship positions shall be filled in the manner prescribed in section 152(a)(1) of title 28, United States Code, for the appointment of bankruptcy judges provided for in section 152(a)(2) of such title:

(A) One additional bankruptcy judgeship for the district of Puerto Rico.

(B) One additional bankruptcy judgeship for the northern district of New York.

(C) One additional bankruptcy judgeship for the middle district of Pennsylvania.

(D) One additional bankruptcy judgeship for the district of Maryland.

(E) One additional bankruptcy judgeship for the northern district of Mississippi.

(F) One additional bankruptcy judgeship for the southern district of Mississippi.

(G) One additional bankruptcy judgeship for the southern district of Georgia.

(2) VACANCIES-

(A) IN GENERAL- The first vacancy occurring in the office of bankruptcy judge in each of the judicial districts set forth in paragraph (1)--

(i) occurring 5 years or more after the appointment date of the bankruptcy judge appointed under paragraph (1) to such office; and

(ii) resulting from the death, retirement, resignation, or removal of a bankruptcy judge;

shall not be filled.

(B) TERM EXPIRATION- In the case of a vacancy resulting from the expiration of the term of a bankruptcy judge not described in subparagraph (A), that judge shall be eligible for reappointment as a bankruptcy judge in that district.

(3) EXTENSION OF EXISTING TEMPORARY BANKRUPTCY JUDGESHIPS-

(A) IN GENERAL- The temporary bankruptcy judgeships authorized for the northern district of Alabama and the eastern district of Tennessee under paragraphs (1) and (9) of section 3(a) of the Bankruptcy Judgeship Act of 1992 (28 U.S.C. 152 note) are extended until the first vacancy occurring in the office of a bankruptcy judge in the applicable district resulting from the death, retirement, resignation, or removal of a bankruptcy judge and occurring 5 years or more after the date of enactment of this Act.

(B) APPLICABILITY OF OTHER PROVISIONS- All other provisions of section 3 of the Bankruptcy Judgeship Act of 1992 (28 U.S.C. 152 note) remain applicable to the temporary bankruptcy judgeships referred to in this subsection.

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(d) TRANSFER OF BANKRUPTCY JUDGESHIP SHARED BY THE MIDDLE DISTRICT OF GEORGIA AND THE SOUTHERN DISTRICT OF GEORGIA- The bankruptcy judgeship presently shared by the southern district of Georgia and the middle district of Georgia shall be converted to a bankruptcy judgeship for the middle district of Georgia.

(e) CONVERSION OF EXISTING TEMPORARY BANKRUPTCY JUDGESHIPS-

(1) DISTRICT OF DELAWARE- The temporary bankruptcy judgeship authorized for the district of Delaware pursuant to section 3 of the Bankruptcy Judgeship Act of 1992 (28 U.S.C. 152 note), shall be converted to a permanent bankruptcy judgeship.

(2) DISTRICT OF PUERTO RICO- The temporary bankruptcy judgeship authorized for the district of Puerto Rico pursuant to section 3 of the Bankruptcy Judgeship Act of 1992 (28 U.S.C. 152 note), shall be converted to a permanent bankruptcy judgeship.

(f) TECHNICAL AMENDMENTS- Section 152(a)(2) of title 28, United States Code, is amended--

(1) in the item relating to the eastern and western districts of Arkansas, by striking `3' and inserting `4';

(2) in the item relating to the district of Delaware, by striking `1' and inserting `6';

(3) in the item relating to the middle district of Florida, by striking `8' and inserting `10';

(4) in the item relating to the southern district of Florida, by striking `5' and inserting `7';

(5) in the item relating to the northern district of Georgia, by striking `8' and inserting `10';

(6) in the item relating to the middle district of Georgia, by striking `2' and inserting `3';

(7) in the item relating to the southern district of Georgia, by striking `2' and inserting `3';

(8) in the collective item relating to the middle and southern districts of Georgia, by striking `Middle and Southern . . . . . 1';

(9) in the item relating to the district of Maryland, by striking `4' and inserting `7';

(10) in the item relating to the eastern district of Michigan, by striking `4' and inserting `6';

(11) in the item relating to the district of Nevada, by striking `3' and inserting `5';

(12) in the item relating to the district of New Jersey, by striking `8' and inserting `9';

(13) in the item relating to the southern district of New York, by striking `9' and inserting `11';

(14) in the item relating to the eastern district of North Carolina, by striking `2' and inserting `3';

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(15) in the item relating to the eastern district of Pennsylvania, by striking `5' and inserting `6';

(16) in the item relating to the district of Puerto Rico, by striking `2 and inserting `3';

(17) in the item relating to the district of South Carolina, by striking `2' and inserting `3';

(18) in the item relating to the western district of Tennessee, by striking `4' and inserting `6';

(19) in the item relating to the district of Utah, by striking `3' and inserting `4'; and

(20) in the item relating to the eastern district of Virginia, by striking `5' and inserting `6'.

Passed the Senate May 22, 2003.

Attest:

EMILY J. REYNOLDS,

Secretary.

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A PRAYER FOR CALIFORNIA
36th Annual California Prayer Breakfast
Thunderbird Ballroom, Red Lion Hotel
Thursday, March 6, 1997

By: Justice Janice R. Brown

Please join me in a prayer for California.

Dear God,

We join in prayer to celebrate this great State and surrender its destiny to you. When we find you in the sacred silence of the redwoods; when we contemplate the perfect beauty of Shasta's peak; when you lay fields of golden poppies and purple irises like a gift at our feet; when sunset spreads its colors over the Pacific like a benediction; when we see all the wondrous things your hands have made, we stand in awe of you. And we know you love us. And we thank you.

[We thank you for the cleansing breath of the Santa Ana's and the howling winds of winter's storms. For the night sky teeming with stars and for the burning sun that warms our fertile valleys. We thank you for giving us minds to seek distant universes and hearts filled with the longing to know. We thank you for making us weak enough to love beauty and strong enough to endure whatever comes. When the earth moves beneath our feet and the waters overwhelm our efforts to control the flood, you are yet with us. Do not let us forget that it is the earth and the water that sustain our lives. And it is through the work of rebuilding that we glimpse immortality.]*

We give thanks today for everything that makes California a place of exhilaration and enchantment. We thank you for the good and the bad. We accept

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the good with gratitude and the bad knowing we can make it better. What needs to be changed will be changed when we are changed. Help us to change. Heal our cynicism, Father. Cure us of the disease of indifference. Take this plague of violence from our midst.

Forgive us for our many failures, our lapses, our lack of faith. We know you keep ***all*** your promises and love everything that you have made. We pray today for a new spirit. Grant us, dear God, a total transformation. Send us a miracle. Send us two or three. Whatever it takes to convince us that we can make a world defined by our highest aspirations and not our lowest appetites.

Break our chains so the truth ***can*** set us free. Remove the walls that separate us. Remove the anger and the rage. Remove from our hearts the illusion that we are separate. Let us all, people of every color and every language and every religion, understand that we are members of a single tribe and through you, our common Father, redeemer of broken dreams, we share one heart and one destiny. Remove from our minds the tendency to blame. Instill in each of us a personal and powerful passion for justice.

We ask your blessings for those who lead us. Make them great enough to be the conduits of your power; humble enough to serve faithfully, diligently seeking the common good; wise enough to see the innocence and the brotherhood of those who oppose them; and brave enough to speak the truth and thus lead us into a new freedom, a new politics, a new hope.

Reanimate in us the spirit of integrity so that the beauty and greatness of this state will flower once again in the hearts of its people. Help us not to be afraid of malice and not to be dismayed by fools. Remind us of the eternal truths and the permanent things so that we will not confuse self-indulgence with self-discipline so that we will know the difference between hype and hope, so that we will stop

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* This language was omitted from the prayer presentation on March 6 due to time constraints.

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pretending that license and liberty are the same. Help us to realize the dreams of those who came before us, that we might live in honesty and charity and excellence with our neighbors and so that we might pass on a legacy to our children and their children worthy of free people.

Dear God,

Fill our hearts with love.

Our minds with humility.

Our spirits with soaring light.

Reignite the flame in us so we, as living fire, may yet become a beacon of hope and goodness and peace and freedom.

Renew us.

Repair us.

Revive us again.

Dear God, please, bless California.

Amen.

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How Open Do We Have To Be?
San Diego Chamber of Commerce
National Business Women's Forum
Thursday, March 27, 1997
7:30 A.M.
Emerald Wyndham Hotel
San Diego, CA

By Justice Janice R. Brown

Thank you. I want to thank Midge Costanza for extending the invitation to join you and all of the people who have gone to so much trouble to make my stay so enjoyable. It is always a pleasure to come to San Diego. I keep trying to convince my colleagues to agree that -- since we are violating our authorizing statute by having the court headquartered in San Francisco, we might as well go all the way and move the court to San Diego. The weather is better; the people are nicer; and you don't have nearly as many bridges. So far I've only gotten one vote for that proposition -- my own.

Recently I had the good fortune to stumble upon a book by Rabbi Harold Kushner called "How Good Do We Have to Be?" It is one of those small delightful books filled with practical wisdom and good sense. Rabbi Kushner points out how much grief and anguish is added to individual human lives by our determination to be perfectly good and by our self-disgust -- the coals of fire we heap upon our own heads when we fail to achieve this mythical perfection. And, of course, we fail over and over again because we are only human. The rabbi's point is not that we should not strive. Striving is what makes us human. But he suggests we should accept the fact that failure is part of the process. That what is required is not perfection, but rather integrity. What he calls wholeness. [Expand this definition]

He illustrates his point with an adult fable by Shel Silverstein. It is the story of a circle that has a piece missing. He goes on a journey rolling through the world

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recognizing, as in the parable with which I began this discussion, that we will always be flawed. That's okay. Imperfection is part of the human condition. In fact, Revel says it "is a mistake to fault liberal society for lacking an ideal." On the contrary, "this is what renders it noble." The whole evolution of the West, in his view, has been "to make an individual who is free and even obliged to be the author of his own destiny and capable of doing this."

> "The tragedy is that until our own times, so many individuals have shirked before this prospect, fearing mediocrity, anguish, loneliness. So they invented collective madness to avoid their own responsibilities, on the threshold of free and liberal civilization. Totalitarianism is a deadly substitute for man's self-improvement."

Second, I recommend to you a document drafted as part of the bicentennial celebration called the Williamsburg Charter. It offers four guidelines for conducting civil public debate.

"First, *those who claim the right to dissent should assume the responsibility to debate.* This combination implies that 'the characteristic American formula of individual liberty complemented by respect for the opinions of others [will] permit differences to be asserted, yet a broad, active community of understanding to be sustained.'

"Second, *those who claim the right to criticize should assume the responsibility to comprehend.* This suggests a critical difference between a 'genuine tolerance' and a 'debased tolerance.' As the charter puts its, 'Genuine tolerance considers contrary views fairly and judges them on merit. Debased tolerance so refrains from making any judgment that it refuses to listen at all. Genuine tolerance honestly weighs honest differences and promotes both impartiality and pluralism. Debased tolerance results in indifference to the differences that vitalize a pluralistic democracy.'

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"Third, *those who claim the right to influence should accept the responsibility not to inflame.* When ultimate principles are at stake in public life, it is both natural and very easy for each side to incite the other to defensiveness and hostility. After all, what one side of the cultural divide views as a desacralization, the other views as a constitutional right, and vice versa. A commitment to both the social and moral bonds of democratic civility would seem to require a caution and respect (based in common citizenship) in the manner in which ideas and agendas are put forward.

"Fourth, *those who claim the right to participate should accept the responsibility to persuade.* Among other things, this means that arguments for public policy 'should be more than private convictions shouted out loud. For persuasion to be principled, private convictions would be translated into publicly accessible claims. Such claims should be made publicly accessible for two reasons: first, because they must engage those who do not share the same private convictions; and second, because they should be directed toward the common good.' "

Third, we should redefine the public debate to give it a more human scale. As De Tocqueville noted in his travels through America, democracy flourishes in small scale (decentralized or local) settings. This may be as good a reason as any to argue in favor of smaller government and stronger communities.

Finally, I will close with the final thoughts from Revel's book:

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"Democracy depends, to function well, on citizens being autonomous individuals. This means that culture is understood to provide a capacity to sustain oneself, escaping from the emptiness and the loneliness by the resources of one's own mind. Education is ever more important as societies grow more democratic. The purpose of education is not to prepare for a job; it is, far more, a preparation for understanding and giving meaning to civilization in which one lives. Only the cultural maturity of the majority will allow democracy to last. Otherwise fanaticism and violence will motivate people. They will be their only way of filling the spiritual void of their existence, by replacing individual liberty with collective exultation.

"Democracy allows free men to be born, but free men enable democracy to last."

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looking for his missing piece. He finds lots of pieces along the way: some are too big; some are too small; some too narrow. None of them fit just right. But because he has a piece missing, he is not able to roll smoothly. He rolls very slowly. And because of his missing piece he has time to notice the colors and the light. He has a chance to appreciate the flowers beside the path. And then one day, he finds his missing piece. It fits perfectly. And once he has it in place, he rolls along at an incredible speed. But he realizes that he is no longer seeing the colors and the seasons and the flowers. So he takes out the missing piece and leaves it by the side of the road and then goes on his way, looking for his missing piece. I think this may be more of a fable for our times than may at first appear. The rabbi's point, of course, is that a person may have integrity (be whole) without being perfect.

It occurred to me that it might be profitable to apply this idea to our consideration of government. In fact, De Tocqueville, who seems to have thought of everything sooner and more clearly than everybody else, says something similar in his book, *Democracy in America.* He says candidly, that compared to the French government of that era, American government is woefully inefficient. But he argues that is one of its strengths. Every project is so thoroughly discussed and debated that everyone feels they have a hand in its solution. Of course, that emphasis on local government and community life has almost disappeared in the modern political realm, but the positive qualities of imperfection might be something we should consider reviving.

This morning, I will attempt to explore (very briefly) the logical limits of a commitment to openness. "How Open Do We Have to Be?" A number of different words could be substituted here. We might ask how pure or how perfect does democratic capitalism have to be? Like Rabbi Kushner, my thesis is a simple one. I believe we can be seduced by this dream of perfection in a way that will ultimately kill the very thing we seek to perfect. My grandmother might approach

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this with an affirmation rather than a question. She would say: "It's a fine thing to have an open mind. But your mind shouldn't be so open everything in it falls out."

I realize that even to question openness as the primary virtue of American democracy is to be guilty of heresy. But as Alan Bloom points out openness may be in the eye of the beholder.

> "Openness used to be the virtue that permitted us to seek the good by using reason. It now means accepting everything and denying reason's power."

In his book, *The Closing of the American Mind*, Bloom theorizes that our perspective on rational thought and knowledge itself has changed. We have accepted doctrines of openness and relativism to such an extent that we have abandoned reason for fear it may lead to intolerance. The true effect of such blind allegiance to openness is that we now refuse to seek any truth at all. In a word, our minds have become closed to the reality of truth. "The unrestrained and thoughtless pursuit of openness, without recognizing the inherent political, social, or cultural problems of openness as the goal of nature, has rendered openness meaningless." He concludes:

> "The United States is one of the highest and most extreme achievements of the rational quest for the good life according to nature. What makes its political structure possible is the use of the rational principles of natural right to found a people . . . . Or, to put it otherwise, the regime established here promised untrammelled freedom to reason--not to everything indiscriminately, but to reason, the essential freedom that justifies other freedoms. . . . An openness that denies the special claim of reason bursts the mainspring keeping this regime in motion."

Bloom says in fact that the goals of education have changed from the education of the democratic person to the education of the democratic personality. The old view was that by accepting a notion of universal rights, people found a basis of

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unity and sameness in the light of which differences in class, race, religion, and national origin tended to recede. The recent education in openness abandons all that. The only virtue is openness. But, he asks, "when there is no shared goals or vision of the public good, is the social contract any longer possible?"

Francis Fukuyama, in his book, *The End of History and the Last Man*, puts this even more bluntly.

> "Democratic societies tend to promote a belief in the equality of all lifestyles and values. They do not tell their citizens how they should live, or what will make them happy, virtuous, or great. Instead, they cultivate the virtue of toleration, which becomes the chief virtue in democratic societies."

Of course, no one is in favor of intolerance. Openness seems to be one of those things like truth, justice, and the American way (motherhood and apple pie); who can be against it. Nevertheless, as in other aspects of our lives, too much of a good thing can have its dark side.

As Fukuyama notes: "It becomes particularly difficult for people in democratic societies to take questions with real moral content seriously in public life. Morality involves a distinction between better and worse, good and bad, which seems to violate the democratic principle of tolerance." It is for this reason, he says, that the last man becomes obsessed with his own personal health and safety. "In America today, we feel entitled to criticize another person's smoking habits but not his or her religious beliefs or moral behavior."

Query whether we could have fought a civil war on the question of slavery in an era of openness in which all views are equally valid? In a society so transformed that we now believe there is no right or wrong, we are left with a single gauge by which to judge all actions and all outcomes: Our feelings. We need no greater justification for any position we care to take. We can say: "This is how I feel. My feelings are valid." End of conversation. On this scale, there is no

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difference between the feelings of Mother Teresa and the militiaman who feels he is justified in blowing up a preschool full of toddlers.

It may seem that relying on feeling doesn't matter very much. What's the big deal? There are two ways in which it matters very much. First, we greatly increase the chances of being led into error in our political decisions. In his book, *Democracy Against Itself*, Jean Francois Revel says unself-consciously that the "whole world needs democracy in order to survive or to be reborn." But he notes: "the more democratic societies become, the more complex become the issues and the more difficult the choices among desired but incompatible solutions." In this confusion, conducive to demagoguery, "tricks must not become the ultimate element in the arsenal of campaigns -- a grotesque dance of mutual alienation between the voter and the candidate, wherein the latter grow more manipulative and at the same time enslaved by public opinion, which they themselves deform." It is not enough to say democracy is a good regime because the people cannot be wrong. The people are often wrong and are even more often led into error. It is, Revel says, "despite this sorry reality," that democracy is the least bad regime.

Noting that politicians no longer win elections by telling the truth (indeed they scarcely try to find out what it is), Revel suggests the successful campaign nowadays is "one that severs the link between the voters' common sense and reality."

He concludes that an additional cause of the disappearance of democracy where it should be strongest is "the improvement of the means of persuasion, obsession with public relations, the appeal to feelings instead of critical reflection, the supremacy of affirmative rather than demonstrative statements, all of the tricks of communication which is the art whereby a leader gets himself judged on the basis of the impression he puts across rather than his record or his proposed programs -- lead voters to forget the facts, to lose sight of the real issues and their

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contexts. Voters have a growing difficulty in expressing through their ballots a choice based on real results or real reflection on the future.

Secondly, sentiment is simply not a basis for substantive democracy. As James Hunter says: "When the truth claims at the heart of culture are hollowed out, when their substance cannot be defended or criticized, there is little left besides feelings." But sentiment constitutes very shaky ground for sustaining democratic ideals. Shallow democracy is only capable of producing a shallow self-defense.

Thus, a handful of advocates and activists are able to wield enormous power. We literally cede the power of government to the Sony soundbite. Hamlet said, "To be or not to be was the question." He was wrong. "How do you feel?" is the question. A handful of people with picket signs become more powerful than thousands of people peacefully participating. There is little entertainment value in constructive dialogue. The media wants conflict, pathos, ethos, and if possible bathos. The more maudlin the better.

A recent example. A report on NPR about the threatened federal crackdown on Indian gaming. The report began by saying the United States Attorney had asked tribes operating slot machines to sign a voluntary agreement to cease using the machines which violate California law. Although most tribes had agreed, several in Southern California vowed to resist the order. The rest of the report had interviews with tribal leaders talking about what an economic boom the casinos had been to tribes formerly dependent on welfare; the report noted the casinos were major employers in the area and featured an interview with one of the casino workers who was asked -- you guessed it -- "How do you feel." Her response. "Just devastated. It's terrible. I don't feel the casino is doing anything wrong." The segment ended with Steven Seagal, apparently as a spokesman for the Indians, reciting the many broken promises between the Indians and the federal government.

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Without expressing any view about the merits of this, I can tell you exactly who won the Sony soundbite contest.

In this, I suppose we must accept being both sinned against and sinning. Our democratic education has taught us to remain in the shallow end of the pool. Even so, we are remarkably ill informed. Legal illiteracy and misinformation are the rule, not the exception. As Hunter describes it: "Americans have strong opinions, but they seem to venture on the seas of various controversies without much ballast of knowledge." They are incapable of articulating much beyond their feelings. They have remarkably few resources on which to draw.

The key institutions which should mediate these controversies are often engaged in the dispute as superficially and tendentiously as the partisans. Professional associations, political parties and religious institutions often become de facto special interest groups themselves and end up carrying out the political agendas of one side or the other. What we end up with is power politics with a vengeance. Brute force. Not only power politics but negative politics in which the object is to delegitimize and discredit the opposition. What one author characterizes as "a soft imperialism" where words are weapons and debates are occasions to intimidate if not verbally bludgeon one's opponent. In the world of power politics there is no percentage in trying to be reasonable.

What information citizens can obtain comes from the media and will be superficial by design. Newspapers, radio, and television are dramatic media. They need the interplay of antagonists and protagonists, heroes and villains, victims and victimizers. The voices that do not fit neatly into the grid of inflamed rhetoric -- the thoughtfully ambivalent and scholarly -- are simply ignored. Public discourse thus becomes much more polarized than the nation is. The other aspect of this -- and perhaps the most significant is the tendency to reduce every controversy to the struggle for power. Every issue is framed in terms of who has power and who does not.

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To quote from Barbara Brotman of the Chicago Tribune: "We've gotten bogged down in reporting the political ups and downs of the sides, like we're covering sports and we've gotten away from reporting the issues." To put it another way, "when the cultural, moral, and aesthetic dimensions of a controversy are ignored, public expectations cannot help but be framed by the zero-sum logic of winners and losers."

A recent column by William Raspberry, entitled "Discovered: A New Definition of Ethics," brought this to light for me. Raspberry begins by lamenting that his small class at Duke seemed incapable of working up any more outrage about the latest campaign fundraising scandal. Thinking they simply did not understand what was normal in the buying and selling of political access, Raspberry offered several hypothetical examples of selling his column in the newspaper. To his dismay, the vast majority of his students saw nothing wrong with taking money to advocate some organization's side of a controversy even if he did not believe in the righteousness of their cause. He muses that maybe we are not seeing cynicism or indifference to unethical behavior, but a new definition of "ethics that allows for the buying and selling of virtually anything." He says:

> "Maybe they have come to see the media's hot-breadth pursuit of political scandal the way they view professional boxing -- as a game that is sometimes boring, sometimes entertaining but irrelevant to their lives. What are the Lincoln Bedroom story, the Newt Gingrich affair or Whitewater about? One may as well ask what the fight between Evander Holyfield and Mike Tyson was about."

He ends by saying: "It has been remarked of late that the media, driven by their own economic survival, are becoming more tabloid every day." Wouldn't it be something if they also became the last surviving arbiter of public virtue? Now there's a scary thought.

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The question, of course, is what then shall we do. We have shifted the paradigm. From our vantage point at the end of history, we exude a world weary cynicism. It is hard for us to believe in anything. The irony is we must believe in something or be destroyed. Democratic capitalism may be the last regime left standing. But its triumph at this stage owes more to the weakness and wickedness of totalitarian regimes than to its own agility.

Fukuyama offers this chilling assessment.

> "Relativism--the doctrine that maintains that all values are merely relative and which attacks 'privileged perspectives--must ultimately end up undermining democratic and tolerant values as well.' Relativism is not a weapon that can be aimed selectively at the enemies one chooses. It fires indiscriminately shooting out the legs of not only the 'absolutisms,' dogmas, and certainties of western tradition, but the tradition's emphasis on tolerance, diversity, and freedom of thought as well. If nothing can be true absolutely, if all values are culturally determined, then cherished principles like human equality have to go by the wayside as well."

This is true even though liberal democracy may constitute the best solution to the human problem. As Revel puts it: "Men are able to conceive and build political institutions that are more rational than they are, and to freely place themselves under their rule. However, it is unlikely that we will ever be capable of building a world that is qualitatively better than we ourselves are. There is within us an unchanged impulse which prefers failure to success, misfortune to happiness, might over right, violence over justice."

There are many ways in which we might begin to recapture the ideal we hold in our minds. There are a few things we could try. First, I think we must give up this idea of the silver bullet, the dream of perfection, the universal solution. Our hopes ought to be altogether more modest. Part of this modesty is

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It's Not That Easy Being Green
(A Philosophical Perspective From Kermit the Frog)
UCLA Law School Alumni Association Luncheon
The City Club
April 30, 1997

By Justice Janice R. Brown

Good afternoon. Thank you. I want to thank Dean Prager for extending the invitation and all of you for such a warm welcome. I am truly happy to be here. This has been the most difficult month I have spent on the court. When Ron George, the new Chief, was appointed, he changed the schedule for the compilation of court statistics from the calendar year to a true court-term calendar which runs from September to September. He did this to avoid what had come to be known as "December Dementia" — three weeks in December when a large portion of the court's yearly workload would have to be completed. The change to a true term means the June calendar represents the last opportunity to get cases completed before September. Thus, December Dementia has now been replaced with "April Angst."

Since I had never experienced this phenomenon, and foolishly thought this would be a slow time for the court, I followed up a packed two-day calendar in Los Angeles with participation in a moot court program at the Southwestern University School of Law; the annual judges dinner in Hanford the following week; a panel discussion at the Appellate Court Institute in Palm Springs the week after that; and finally this luncheon. Those were my spare-time activities. During regular working hours, I had to review, comment upon, or take exception to, no less than 25 circulating calendars and half a dozen opinions being prepared for release. We did not rid ourselves of the bulge in the court's workload, we just shifted it to another season. And tax season at that. Looking on the bright side, I suppose it's better to be feeling evil in April than December.

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When I say I am delighted to be here, I am completely sincere. I am thrilled to be still standing. If I can last another two days, I will celebrate (May 2) my first full year as a member of the California Supreme Court. It seems longer doesn't it? June 19 is the 20-year anniversary of my graduation from the UCLA School of Law. And that seems much shorter. Okay, I'm going to talk a little bit about the adventure I am having because this is a family discussion and UCLA played a critical role (even if largely off-screen). I suppose this segment could be called First Impressions.

What is it like being the junior member of a state supreme court in a state so large and populous it seems to be another country? Is it different? Well, I have to tell you the truth. In the words of a froggy philosopher of my acquaintance, "It's not that easy being green." I have always liked Kermit's whimsical signature song because it suggests not only the ordinary ways in which we use the idea of greenness — to be new, fresh, untested — but also acknowledges the special and positive dimensions of being different.

So I will limit myself to sharing a few of the things I think I have learned — some more startling than others. First, I have been forcibly reminded of the wisdom of the ages: There really is no free lunch. In the old days, when someone said they wanted to "honor" me they just meant I should stop by, enjoy a complimentary lunch or dinner, be introduced, and have a good time. These days I'm expected to make a few remarks. The bad news is that this is a speech. The good news is it's a teeny one.

> Sudden Revelation No. 1. Supreme Court justices are expected to earn their calories. And this is a good thing. It is how we maintain that lean and hungry look that keeps appellate lawyers awake at night.

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Second, one of the things I loved about the Court of Appeal was its air of anonymity. Most people did not know what it was and certainly not where it was or who was part of it. And, except for a handful of appellate specialists, nobody cared. I remember thinking I had finally found my niche and launched myself into complete obscurity.

The Supreme Court has a much higher profile. Many more people know my face. I don't have fans or groupies, but I am recognized — often in unlikely places, like dripping with sweat on the stairmaster at the athletic club or buying shoes in Macy's. Meeting the public has not been so bad. Most of them have actually been quite nice and have offered words of encouragement. What is even more disconcerting, every word written or spoken is likely to be minutely scrutinized. Of course, this has always been true and the dissemination of opinions is a large part of the reason for the court's existence. But information has now become an industry — perhaps the premier industry in America — and the competition for the new angle, the odd spin, the hint of controversy has altered the nature of our interest.

Writing 20 years ago, Bayless Manning diagnosed the United States as having hyperlexis — a malady he described as a pathological condition caused by an overactive lawmaking gland. He paints a graphic word picture of this activity:

> "Law has always been one of the garrulous professions, and modern communications gadgetry makes it all too easy to record, reproduce, and distribute legal words. As in the wake of a great ship, mewing seagulls follow so legal commentators pursue the societies law making machines, squabbling over the newly emitted material."

Whether one agrees with Manning's rather uncharitable characterization or not, the sheer volume of commentary is daunting and the immediacy with which legal pronouncements are turned into political issues seems likely to alter forever the

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stately, evolutionary progress of the common law tradition. In the past 20 years, the trends Manning chronicled have only intensified. As more and more new organizations come into being, the news cycles faster and faster. A story that used to last two or three days now lasts two or three hours. Consequently, the media no longer wait for news, they create it.

Newspapers often report what the court will do before it does it. And judges get credit or blame for things they did not do and could not have done. So far, I have seen at least four reports in which I am identified as one of the judges responsible for the *Romero* decision. This kind of haphazard reporting could have a positive side. I have been compiling a list of other things I would like to get credit for which I did not do. Maybe I could take credit for *Marbury v. Madison* or the dissent in *Plessy v. Ferguson* which celebrated its 100th anniversary last year. I certainly would have dissented if I had been there.

> Revelation No. 2. In a world dominated by soundbites, perception becomes reality. There is a great irony. Those who are in the business of producing opinions are discouraged from having any of their own.

Third, the differences between this court and the Court of Appeal are obvious, but profound. I did not think so when I was on the Court of Appeal. The work of the Court of Appeal is to write opinions. The task on the Supreme Court is the same. But there the similarity ends. On the Court of Appeal, you spend almost all of your time writing opinions. On this court, you spend a lot of time deciding to decide. This seems like the simplest thing in the world, but it is actually quite complex. H. W. Perry in his book Deciding to Decide — a discussion of United States Supreme Court certiorari procedures — begins his discussion of jurisdiction with this gem:

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> "The State Supreme Court refused to deny a lower court ruling to quash an appeal to rehear an appeal by the Circuit Court to regain jurisdiction in a previous case. In the majority opinion, Justice Memphis Cumbrun wrote, 'In the opinion of this court . . . we don't know what the heck is going on here.' "

The complaint is often made that the court does not take enough of particular kinds of cases. From the court's point of view, the perspective is different. We are often desperately looking for the right vehicle. Many cases are rejected simply because they are so procedurally intricate or so factually convoluted we fear we can never fight our way through the thicket to decide the merits. The right case, at the right time, with the right facts, in just the right procedural posture, is a thing of beauty and it is extremely rare.

Moreover, because the court is trying to carefully select cases which present new, novel issues or questions on which reasonable minds and reasonable courts of appeal can differ, a large percentage of the cases selected are quite difficult. In contrast, since litigants have virtually free access to the courts of appeal, a large percentage of the cases are, once examined, easily resolved. Perhaps 80 percent of court of appeal cases fall into this category. So judges can spend a lot of time on the 20 percent of cases that present tough issues. On the supreme court, 70 percent of the cases are difficult. Moreover, the authoring judge needs three votes instead of one. As might be expected, consensus is much harder to achieve. Every judge on the court must consider every case in light of the court's precedents and their own inclinations.

> Revelation No. 3. To achieve unanimity, the authoring judge must overcome the objections of every other judge or get them to come over, AND IT AIN'T EASY.

Which brings me to my final comment and back to Kermit. About the positive dimensions of being different. In 1977, the year I graduated from law

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school, the first African American, Wiley Manuel, was appointed to the California Supreme Court. The first woman, Rose Bird, was confirmed a few days later. We have come to accept (and indeed to expect) that the high court will reflect differences of gender, ethnicity, culture, and religious conviction. We did not achieve this easily, but we did achieve it. I think we have come to understand that our similarities as human beings are more important than our differences of gender or skin color or language. And as wide as the divide has been between us on these issues, it has always been easier for us to accommodate our cultural diversity than our differences of opinion.

De Tocqueville, writing in 1835 said: "I know of no country in which there is so little independence of mind and real freedom of discussion as in America." Contrasting the tyranny of the majority with the authority of the king, he noted: "The authority of a king is physical, and controls the actions of men without subduing their will. But the majority possesses a power which is physical and moral at the same time, which acts upon the will as much as upon the actions, and represses not only all contest, but all controversy." As a result, he concluded, "freedom of opinion does not exist in America."

Judge Learned Hand recognized this tendency was amplified by the increasingly homogenized mass society that characterized American society in the Twentieth Century. In many of his speeches, he questioned how democracy might survive amid the pressure toward conformity. Writing in 1920 to his friend Walter Lippmann, he lamented that never before had there been so many people "who felt alike, thought alike, ate alike, slept alike, hated alike . . . loved alike, wore the same clothes, used the same furniture in the same houses, went to the same games, saw the same plays, approved the same sentiments . . . ."

If you've been reading the legal newspapers or the advance sheets, the members of this court, however, are in no danger of suffering a crushing conformity. The court represents, as it should, a broad range of life experiences,

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perspectives, and philosophies. And though it is our task to produce symphonies and not solos, that does not mean the separate instruments are not heard. But, it is in melding our voices that the work is done. The beauty and utility of the work of a collegial court is this accommodation of differences to create a stronger, richer context for understanding.

I do not mean to suggest that accommodation is easy, painless, or graceful. Usually, it is not. The paradigm of collegiality to which we aspire — fully informed and intelligent participation of every judge in every case — is not for wimps. Disagreements may be sharp; criticisms breathtakingly frank. Revising, restructuring, rethinking is a time-consuming process. In fact, as Chief Justice Traynor once noted, trying to craft a judicial opinion, to see if an analysis "will write" is the hardest kind of thinking. The result, though, is an improved judicial product no single judge could have created.

That is the final insight which has been evolving over the last two years and which comes into clear focus in the work of this court. The tough discipline of the appellate court is not only to capture thoughts and give them structure and coherence within the pattern of the law but to be able to defend both articulation and result.

Like Kermit said, "It's not that easy being green." It is difficult to be different. But it has its rewards. It occurs to me that if we imposed the same discipline on politicians, public officials, and bureaucrats, it might have some interesting results. Suppose that before you could run for office, or emcee a talk show, or be an advocate for some interest group, you had to put your opinions in written form, write them persuasively enough to convince three other thoughtful, conscientious people who have different views before you could make any public statement. Undoubtedly, the airwaves would be quieter. Civic discourse would be immeasurably improved. And we might all be the better for it.

Kermit ends his song this way:

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BUT IF BEING GREEN IS ALL THERE IS TO BE
IT CAN MAKE YOU WONDER
BUT WHY WONDER WHY WONDER WHY
I'M GREEN. AND IT'S BEAUTIFUL
AND IT'S WHAT I WANT TO BE.

I could end here too because — somewhat to my surprise — I am where I want to be. The California Supreme Court was never my ambition. It was not in my plans. As a youngster and even into my college years, I was a semi-serious poet. In my senior year, I was asked to participate in a poetry reading and told to write my own introduction — what I thought would be important to tell the audience. I said: "The critical question at this time in my life is whether the heart of a Black woman, the mind of an economist, and the soul of a poet can continue to peacefully coexist or will they have to go their separate ways."

After I was appointed to the Third District Court of Appeal, I remember walking into the Library and Courts Building and seeing the words carved into the pediment: "Into the highlands of the mind." I realized UCLA was the first giant step on this journey.

The judge exists because of the UCLA School of Law. I know some of my professors are cringing, thinking, "I hope people don't hold me responsible for this." I hasten to absolve the faculty of any personal responsibility. But, UCLA, a state institution, was the only sort of professional school I could afford. I was a parent, I could work only part-time, and I had no family resources to finance my education. Moreover, because I was able to manage with a modest amount of loans, after law school I could afford to forego the search for a huge salary and was able to follow my inclination to work in the public sector. And that has a lot to do with my becoming a judge.

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I know concern is often expressed about the level of the subsidy provided to students in state-sponsored professional schools. But I hope some consideration will be given in the equation to unexpected returns. The rule of reciprocity. When you put more in; you get more out.

When I arrived at the Third District Court of Appeal, my chambers contained a bare desk, a chair, a telephone. But the work was waiting, briefs and records lined up on my book bench like little soldiers. I picked up the first set of briefs and a pad. I was immediately absorbed. The world went away. I finished my first opinion before I paused to add any personal touches to the office. When I finished it, I had the most poignant, most powerful sense of homecoming I have ever experienced. I knew the answer to that old question, knew the answer was yes. All those different parts of myself survive, indeed they thrive, in the judge.

Thank you.

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CJER RESEARCH ATTORNEYS INSTITUTE
September 26, 1997, Noon
Hyatt Alicante Hotel, Anaheim

RESISTANCE IS FUTILE

When I received this invitation, I was faced with the most difficult problem givers of speeches have to confront. I thought it was very nice of you to extend the invitation. I was flattered. I was honored. But I asked myself what can I possibly say. I could talk about the transition from the Court of Appeal to the Supreme Court, but I would have to label that speech "Paradise Lost" and that says about all there is to say on that subject. I could tell you about the glamorous life of an Associate Justice of the Supreme Court, but most of you would know that's a lie. The most exciting thing that has happened to me at Marathon Plaza was a particularly nasty encounter with our state-of-the-art security system which left me (at 9:00 p.m.) locked in an elevator that would not move, would not open, and which after about 90 seconds went completely dark. But, I probably found that a great deal more exciting than you would.

Finally, I hit upon the perfect topic. I could talk about you. Or rather about what you do. Actually, the relationship of judges and research attorneys is a rather mysterious subject — though not as mysterious as it used to be before Professor Barnett started accusing us of selling our judicial soul for the comforts of bureaucracy, the California Lawyer started publishing articles called "The Shadow Court," and newspaper reporters started asking impertinent questions like: "How much of this stuff do you actually write?" Barnett's article is simply taking a page from a much more thoughtful discussion of this subject by Judge Richard Posner. (Judge Posner is focusing on the federal courts.)

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discussion, the attorney admitted the decision to leave the court was hastened by continued exposure to a PR process that seemed to thrive on destruction for the sheer joy of destruction. I have no doubt the PR process was intended to be wholly positive, to enhance the quality of the court's work. Sometimes it works that way. But all too often, a process designed to be constructive, to point out mistakes, flaws in reasoning, and inaccuracies degenerates into some sort of demolition derby. My own staff expressed this sentiment a bit more humorously. They awarded me the Chambers Medal of Valor (designed especially for the occasion) for, in the words of the citation, "conspicuous bravery in submitting unflinchingly to the calendar memorandum vetting process." I treasure the medal. I plan to have it framed.

We often make light of the savaging to which majority calendars are subjected and shrug it off as part of the process; and while I am less and less certain such rigorous thought control is necessary, I am more and more convinced that it is inevitable. Indeed, Posner may be right but for the wrong reason. He criticizes current judicial opinions for exhibiting a "standard style" which "draws a veil over reality, making it harder to see exactly what the judge is doing." These opinions, he notes, "do everything they can to conceal novelty and to disguise imagination as deduction." Professor Vining criticizes the bureaucratic writing style for producing opinions which seem "written by no one at all."

> "They are too much things of patchwork, things which seem, on their face, to express more the institutional process of their making than the . . . reasoning of the author and those persuaded with him."

In his view, judicial opinions "exert their authority over us and command our respect and serious attention because and to the extent that we hear a person

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speaking through them. Their authority rests upon the sense of mind behind them."

If these perceptions are correct, the problem goes beyond the simple complaint of over-delegation. Posner, and others, think the bureaucratic style reflects timidity on the part of staff. It may be instead that the institutional dynamic is more akin to mob rule. Thus, the pressure on judges as well as staff is in the direction of relentless conformity. The desire is to make the target small; to write opinions that are innocuous, uncontroversial, in every way unobjectionable. In other words, the bureaucratic style is not an unintended consequence of the process; it is the purpose for the process.

The sense of style Posner praises, the sense of mind Vining seeks becomes not just unusual, it is deemed inappropriate. Nevertheless, I believe the decline in the quality of judicial writing — if it has declined — cannot be blamed solely on different institutional arrangements.

It is true the tug of institutional arrangements works on us at some subterranean level and it is precisely at that level that the judges best work is done or undone. As Llewellyn says, it is the conscious struggle to take a new look which "may bring something better into focus."

> "The queer subconscious may this time be ready to give up an out which has been cooking down in there since the last time the court walked through these legal sandbars. In this effort to take a [fresh] look each time, the appellate court's job, their duty [is to] freshen up consciously . . . . It *must not* be what all habit, all routine, all weariness cry out that it is and has to be: just another of the shopworn same."

Of course, not every opinion requires a divine spark. There are subjects which will maintain their pedestrian character even in the hands of

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the master jurist. Judges have more to do than ever before. This year our court filed 99 majority opinions, authored 104 separate opinions, reviewed more than 7,000 petitions for review (that works out to about 135 per week); participated in oral arguments and performed countless other tasks, both administrative and judicial. The judicial system ain't what it used to be. I can only look with admiration and envy upon Hand's famous admonition to his law clerks: "I write, you listen." I would like to emulate his singular devotion to his judicial duty. I wonder, though, if we would produce as many "great" judges even if the judges sitting today wrote every word of every opinion. Were those flashes of inspiration and insight so prized by Posner glimpsed in majority opinions or only in separate opinions later adopted by the majority of the court. It occurs to me that greatness is not a goal of the appellate project. The need to woo three other judges to your point of view is a strong incentive to remove all flair, to erase marks of individuality. People often criticize the majority opinions of the Supreme Court as sounding like something written by a committee. But that, of course, is exactly what it is.

It is also true that the weight of institutional arrangements tends to flatten us out, to create a sort of mass culture in which our differences are homogenized. But, again, I suspect that judges come to the bench flatter than they once were. In her book, Rights Talk, Mary Ann Glendon theorizes that American political discourse has become thinner and thinner because its leaders have become ever narrower. She notes "[f]ew American statesmen today are — as Abraham Lincoln was — equally at home with the Bible and Blackstone." Our language which has become increasingly legalistic draws on fewer cultural, intellectual, or philosophical resources. Judges are probably no different in this respect. We may find ourselves at century's end much like the last men Nietzche's Zarathrusta speaks of with such contempt

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— "without belief or superstition. . . [we stick] out our chests — but alas they are hollow."

I agree that writing an opinion and editing one can never be the same thing. An act of creation is transforming in a way an act of adoption can never be. You give some part of yourself to that which you create; and you are always changed by the act of creation.

Workload pressures have altered forever the way we work. Must it inevitably cast its shadow over the work itself and cripple the imagination of those whose work it purports to be. The debate may be most notable for what it overlooks. In a scene from *Young Frankenstein*, Gene Wilder who plays the young doctor, says to a horribly and obviously deformed Igor: "Perhaps I could do something about your hump." Marty Feldman, as Igor, replies, "What hump?"

The current debate focuses on how others will perceive judges and their work product. Maybe we would do better to focus on the mirror we hold up to them. What is it that we prize in judges? Intellect? Experience? Genius? Humanity? Character? Or only the illusion of the emotionless and neutral arbiter. What is it that society thinks it wants judges to be? Is that different from what it will allow them to be. Our fate may be decided by the terms of the debate. Is resistance futile and assimilation inevitable?

Letting The Music Come

My husband is a musician — a bass player. When he and I were still courting (that's an old fashioned term — you will have to ask your grandparents what it means!) he did something I found rather curious. He would get a far-away, abstracted look on his face and usually the fingers of one hand would be moving, tapping out a rhythm. I would ask: "What are you doing?" His usual answer was "nothing." But when I persisted, he finally told me "I am letting the music come." Well, I am tone deaf and have

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no musical talent whatsoever, but I do have great curiosity. So I asked: "When you hear this music, is it the sound of a musical instrument — a piano, a saxophone, a flute." He said, "No, no, it's nothing like that. It isn't the sound of any instrument. Sometimes it is the way a flag moves in the breeze, the quality of the light, the way a sign flashes on and off. It has music." And then, having explained it beautifully, he would look at me helplessly and say: "I can't explain." Another time he told me, "There is no music without silence." For a bass player, it's the beat between beats, the beat of silence, that makes the music.

Musically challenged as I am, I did understand in my own way. Sometimes he wakes up in the morning and finds me, propped on my elbow, staring out the window. He says: "What are you doing?" I say: "I am writing." He says, "Oh, sure!" But the answer is accurate. In those quiet moments, the words pour in a torrent through my head — sometimes hot and liquid like molten steel, sometimes cool and supple as clay on a potter's wheel. In these moments I feel free to let the music come.

When I finally write it down, it will never be as clear or pure as that chorus in my head. The melody will never be as right; the bass line never quite as compelling. But, in those quiet, staring-out-the-window and into-my-head moments, I can glimpse what it should be. Words are the way the music comes for me. It is language that I love; writing that is my passion.

CONCLUSION

Lest anyone should misunderstand, I hasten to say that I am devoted to my research attorneys. They are smart, funny, hardworking, intensely loyal. The task of modern day appellate judges would be impossible without them. I am not suggesting that we turn back the clock. Caseloads are not likely to decrease substantially in the foreseeable future. Courts and judges will have to continue to press for productivity gains. My point is a modest one. It is

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the hope that judges and staff and institutional demands can be tuned to accommodate the broader reaches of the judicial process so that we can continue to do the work efficiently and well, to be even-handed and to think straight, and still . . . let the music come.

Thank you.

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I know the mere mention of Barnett gives some folks hives. But, as my grandmother is fond of saying, even the devil tells the truth sometimes. It seems to me that the role of research attorneys and the interaction of judges with them is a largely unexamined aspect of our work. And while I was musing on this subject, I was fortuitously reminded of the perfect analogy for exploring this relationship. I have to confess, I am a science fiction fan. In fact, I am a Trekkie. And, thus, I am well acquainted with all the generations of those who have explored the final frontier and pretty familiar with the etiology of most alien species they have encountered. As luck would have it, while I was struggling with the ideas for this speech, I heard a preview for Star Trek Voyager. The voiceover caught my attention with this phrase. "We are Borg. Resistance is Futile."

For those of you not conversant with the Star Trek cosmology, the Borg is a technological race, half humanoid, half robot, which conquers by assimilating its victims into the collective. In other words, the Borg emulates the organization of the hive: a single consciousness, focused on relentless assimilation of all other life forms. The monolithic consciousness knows all the conquered species knew. The conquered forget all that they were. They are assimilated. They become Borg. Resistance is futile. In applying this analogy to the interaction between research attorneys and judges, the most interesting question, of course, is who is assimilating whom and for what purpose?

I think the assumption would be that attorneys are submerged into the consciousness of judges. In fact, when I have participated in interviews with lawyers seeking work with the court, one of the routine questions is: "How will you feel about having to defer to the judge's wishes even (especially) when you disagree?" What Posner highlights and it may be worth considering is the impact of the attorney presence on the decisionmaking

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process itself. In other words, maybe the question is not whether attorneys ultimately defer to the judge's decision, the question may be whether the result is already being shaped in subtle and intangible ways before the judge reaches any decision. Are we talking about judicial alter egos or para-judges?

And Then There Were Law Clerks

The exploration of that question requires us to return to the beginning. Judges have not always had law clerks or attorneys to assist them. I was surprised to find that — in America — a particular judge is credited with creating the judicial clerkship. Judge Horace Gray became Chief Justice of the Massachusetts Supreme Judicial Court of Errors in 1873. In the summer of 1875, the increased workload led Gray to employ a law assistant — a recently graduated and highly ranked law school student. Gray was fortunate to be able to get referrals from half-brother, John Chipman Gray, a Harvard professor. When Chief Justice Gray was appointed to the Supreme Court in 1882, he brought his personal assistant to Washington with him. And the rest is history. Judge Gray apparently paid for his assistants out of his own resources, as there was no budget for them.

By 1886 the Attorney General was recommending that each justice be provided "with a secretary or law clerk, to be a stenographer, to be paid an annual salary to assist in such clerical work as might be assigned to him." On August 4, 1886, Congress provided for a stenographic clerk for each justice of the Supreme Court at the munificent salary of $1,600 a year. By 1888, all nine justices were using the allotted stenographic clerks. They were never used purely as scribes, however. The law clerk, as invented by Judge Gray, reviewed newly filed cases and the opinions proposed by the judge's colleagues. They were sometimes asked to draft opinions, but the opinions served we are told only as a source of discussion. The real work of the law clerk was to engage in vigorous colloquy with the judge.

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That paradigm of the law clerk function has persisted. By the 1930s the institution of law clerking was firmly entrenched and clerks were introduced to the lower federal courts. As caseloads continued to rise so did the number of clerks, reaching a peak with the caseload explosion of the 1960s. Supreme Court justices have four authorized clerks, district courts have two. Circuit court judges also have four if the court's central staff attorneys are included.

The California Supreme Court, as usual a little ahead of the curve, hired its first research attorney in 1925. William I. Sullivan, who graduated from law school in 1924, served the court as a research attorney for 21 years, the last seven as chief research attorney until he was appointed Clerk of the Supreme Court and ex officio Secretary of the Judicial Council in 1946.[1]

California created a somewhat unique hybrid, utilizing both a central staff, to handle the courtwide work, like petitions, and permanent attorney staff, instead of temporary law clerks, to assist judges in chambers. The justification for all of these changes was the same: burgeoning caseloads. Courts needed to be more efficient while at the same time keeping the complement of judicial officers relatively small.

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[1] Sullivan was joined by a second law clerk (research attorney) in 1930 and the two men had facing desks in a little office of the fourth floor of the old State Building. This second clerk returned to the court in 1959 as an associate justice. In the interim, he served as Presiding Justice of the First District Court of Appeal. His name was Raymond E. Peters. (Not a bad career path.) The two research attorneys performed the functions similar to our current central staff.

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Too Much Of A Good Thing?

As the use of law clerks and attorneys has expanded, it has spawned a surprisingly contentious — even if relatively low-key debate. While the complaints vary with the age, experience, and permanency of the staff, the underlying concern is for the quality and legitimacy of the judicial product. Everyone acknowledges that courts may have no alternative, but some question whether there is a darker side to our quest for greater efficiency. Kester, in his article, "*The Law Clerk Explosion*," laments that these "disquieting changes" are being accepted with "virtually no analysis and no protest."

One concern is consistently voiced. Critics of the over-reliance on staff complain that legal assistants have "become an uncontrollable force that has transformed the judicial process into an essentially bureaucratic arm of government, with judges functioning as staff managers and opinion editors rather than in the traditional judicial role." Whether the courts have increased their reliance on young, inexperienced law school graduates or career attorneys, the complaints are remarkably similar. The critics claim the delegation of judicial tasks has gone too far. As one commentator sees it: "law clerks have usurped the decision-making function in toto from the judges. . . . Once an institution that supplied mentors to instruct bright graduates, the clerkship has grown into a corps of post-adolescent mandarins, Judges for a Year after the fashion of 'Queen for a Day.' " But where a court relies on career attorneys, the attorneys are criticized because their longevity gives them excessive clout. Professor Barnett points to a forum of ex-justices held in 1994, which he claims became "a chorus bemoaning of staff presumption," with Justices Panelli and Kaufman commiserating that "[s]ome people who have been there a long time feel they are the judge" or "tend to lose sight of their role."

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Even more surprising was Barnett's repetition of some advice former members of the court had offered after my nomination to "dispel" any doubts about my competence. They, according to a newspaper article, advised me to "first of all hire a good staff . . . and be prepared to delegate work to them and, most important of all, to avoid the mistake of trying to do things my own way." Barnett ends this section with his own editorial comment: "If the power of staff is such that a new justice to survive had better hire some of them, it may follow that the justice had better not offend the ones hired — as by editing their drafts too aggressively."

The Chief Justice has authored a rebuttal to Professor Barnett's specific criticisms of the Supreme Court and we need not rework that ground. What is more interesting is the subtle and coded subtext of these exchanges. Whether people feel alarm or complacency about institutional changes in the courts depends on how they define the essential judicial function. And this definition has proved very elusive.

Critics of the new order, like Judge Posner and Professor Joseph Vining, believe that if there is any essential quality to justice, it is the engaged, personal creative effort of the judge as author. As Posner explains: "The structure, the ideas, even the style of the opinion may be the judge's even though much of the actual drafting is the law clerk's. *But it is generally true that whoever does the basic drafting of a document — a judicial opinion or anything else — will have a big impact on the final product.*" Posner argues that opinions drafted by law clerks will differ in substantial ways from opinions written by judges and these differences include style, length, candor, credibility, and what Posner characterizes as greatness:

> "It is a curious feature of the American legal system that a handful of famous judges should have made a contribution to the law so greatly disproportionate to

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their number. But it is true; and it would be sad to think that there will never be another great American judge . . . . The sense of style that is inseparable from the idea of a great judge in our tradition is unlikely to develop in a judge who does not do his own writing. People are not born great writers; they become great writers by hard work — as writers not editors. And the struggle to compose a coherent opinion provides a more searching test of the soundness of one's ideas than performing an editorial function does. It is all too easy to glide over the smoothly written product of an able assistant without searching out the stresses and weak joints."

To others, the essential judicial function is merely the judge's involvement in the ultimate outcome of the system or process. Thus, Judge Harry Edwards, a spirited defender of the "new" judicial institution, argues vehemently that drafting opinions is not the same thing as deciding appeals.

"[A]ll careful judges will confer at length with their clerks and give them fairly specific instructions concerning the content of opinions. And, more important, careful judges will not allow an opinion to issue in their name until the words constituting the opinion precisely reflect their views on the proper disposition of the case. . . . [¶] [¶] . . . In the opinions of a careful judge, as in other fields, '[s]entences, forms of expression, even ideas that are not originally the author's own become his by adoption because he actually, and I emphasize actually, considers them, sentence by sentence, phrase by phrase, thought by

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thought, comma by comma, and makes them his own after deliberation.' "

Judge Mahoney of the Second Circuit strongly seconds this view:

> "Personally, I feel that so long as the judge reads all the briefs (and key portions of the record), listens to oral argument and engages in face-to-face dialogue with counsel, participates in the conferences with her colleagues, and controls the formation and expression of ideas . . . that go into her opinion, she has done the job."

Of course, Posner's response is that "adoption is not creation." But, these are issues on which reasonable minds can differ. Indeed, it is not clear that the combatants are fighting about the same thing. Nostalgia tends to add a rosy glow to things when we look back. It is true that opinions were shorter. However, as I have had occasion to note recently, those one-page opinions were often lacking in analysis and some of them were patently wrong.

Moreover, we live in a much more complicated world. The complications are real even if courts themselves have been responsible for their great increase in business and for the difficulties in resolving the ever-expanding universe of questions on which courts now have the final word.

My experience suggests there is some validity to both viewpoints, but this discussion includes elements claimed by neither camp. In one of the first discussions I had with my research attorneys, I explained that I wanted to be able to write. For me, the writing is the most attractive part of the job. I must say my staff has done everything possible to accommodate my idiosyncrasy. In the writing of separate opinions, I have had the opportunity to shape the opinion very precisely.

Crafting majority opinions is a different matter. As you probably know, the Supreme Court's opinion process is somewhat different from the Courts of

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Appeal. We begin with a calendar memo (what in other courts is called a proposed opinion). The authoring judge sends out the calendar and all the other chambers prepare formal written comments — a Preliminary Response (PR in the court's shorthand). Usually, the initials of the staff attorney responsible for the calendar appear at the bottom of the calendar. On the summary document which tallies the votes, the initials of the staff attorney who is "tracking the calendar" appears next to the name of each judge. This way, the staff can have detailed discussions about the calendar before the judge even weighs in. Thus, the staff discussion can (and usually does) bypass the judge. The schedule includes time for the circulation of separate opinions. It is up to the individual judges to determine how they will participate in the review process.

When I sent out the first majority calendar drafted entirely by my own hand, there was a great deal of discussion concerning the advisability of circulating the opinion with my own initials or hiding behind the initials of one of my attorneys and letting them take the heat. My staff encouraged me — perhaps in their own self-interest — to circulate the opinion under my own initials. The next morning I encountered a senior attorney from another chambers in the elevator. He asked if those were actually my initials on a calendar he had just seen. When I confirmed it, he asked: "Are you really going to submit yourself to this nest of vipers?" That is a fascinating comment on the way some members of the staff view the process in which they participate. My own experience is consistent.

I have talked to attorneys who have made the transition from the Court of Appeal to the Supreme Court, and they tell me they feel so intimidated by the virulence of the Supreme Court PR process that they are reluctant to send out any work at all. A similar observation was voiced by a former court staffer I encountered at a conference recently. In the course of a casual

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Los Angeles Federalist Society
California Lincoln Club
Libertarian Law Council
California Club — Justice of the Year Award
December 11, 1997, 11:30 a.m.

Thank you. I am honored to accept this award and gratified to know you are cautious enough only to honor one judge this year and discerning enough not to give out an award every year. I am touched and frankly . . . surprised. Since I have been making a career out of being the lone dissenter, I really didn't think anyone reads this stuff. It's nice to know a few people occasionally do. The Reporter of Decisions has a nice tradition. When an appellate judge leaves the bench, the Reporter collects all of the judge's opinions and places them in a bound volume (or volumes) and presents it to the judge as a keepsake. I console myself that these exercises in futility (a.k.a. my dissents) are essays for my bound volume. For reasons which I will explain, however, I think it is probably too soon for me to receive any recognition as a judge. I still don't know what I will be when I grow up.

America is, and always has been, an impatient country. I suppose nothing else could be expected in a place that invented minute rice, instant oatmeal, and quick grits. We delight in jumping to the wrong conclusion and do not hesitate to express our opinions on issues about which we know nothing. As P.J. O'Rourke[1] puts it: "The American electorate isn't willing to learn facts, let alone face them." I recognize that it goes against the grain to say that judges have to be aged to perfection.

Last year when I had been on the Supreme Court a mere five months, I wrote a speech entitled "It's Not Easy Being Green" and talked about my first impressions of the court — about the qualities associated with being green: newness, freshness, being untried and untested. I confessed that I have always liked Kermit's whimsical signature song because it suggests not only these ordinary themes, but also acknowledges the positive dimensions of being different.

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process and simultaneously frustrate the society's capacity to make policy decisions."[23] However unpopular it may be to say so, America's lawmaking machinery is overheated. We must continue to protect the rights of the individual, but must also consider law's impact on the community and our communal lives. As Keyes puts it: "No matter how much good we may wish to achieve, we do not have the right to achieve that good at the expense of others' freedom."[24] Or, to quote Manning: "In a legal system that tries to offer everybody a remedy for everything, no one will have a remedy for anything."[25]

I started out by saying that you would have to wait to see who I was when I grew up. I know who I would like to be. In 1930, Learned Hand spoke at the presentation to Harvard Law School of a portrait of Holmes. He explained what he and Holmes called "Jobbism." According to Holmes, one of the best ways to find purpose in life "is just to do one's task with one's might." In his speech in 1930, Hand explained what it meant to be a "Jobbist": He asked: "Are you a member of the Society of Jobbist, or do you know the guild? If not let me tell you of it. All may join, though few can qualify. . . . It is an honest craft, which gives good measure for its wages and undertakes only those jobs which the members can do in proper workman-like fashion. Which of course means that they must like them . . . It demands right quality, better than the market will pass, and perhaps it is not quite as insistent as it should be on standards of living, but the working hours are strictly controlled."[26] Like Holmes, I believe "every detail has the mystery of the universe behind it" and that the only pride appropriate to a judge is the pride one takes in mastery of one's craft and in the tradition of which one feels a part.

I had the privilege this summer of meeting Raoul Berger in his 96th year. He is a remarkable man and I think he gave me some very good advice. He said he has great sympathy for judges because the task they have to do is so difficult, but he told me to remember that a judge builds her house one brick at a time and I should just concentrate on making good bricks. That is what I will try to do and maybe when I grow up I will be accepted as a member in good standing of that Society of Jobbist to which I aspire.

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Thank you.

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1 O'Rourke, Parliament of Whores (1991).

2 DeTocqueville, Democracy in America (1835) Part I, *The Unlimited Power of the Majority,* p. 263.

3 *Ibid.*

4 *Id.* at p. 265

5 Scalia, A Matter of Interpretation (1997) pp. 95, 114.

6 The Philosophy of Edmund Burke (Bredvod & Ross edit. 1970) pp. 73-74.

7 Golembiewski & Wildavsky, *Bare Bones: Putting Flesh on the Skeleton of American Federalism* (1984) The Cost of Federalism, p. 70.

8 Howard,

9 Hamilton, Madison, Jay (Rossider ed. 1961) No. 51: Madison, p. 322.

10 *Op. cit. supra,* No. 51: Madison, p. 324.

11 Keyes, *The Preservation of Liberty* (1992) Cornell L.Rev. 969 (hereafter *Keyes*)

12 Berger, *A Lawyer Lectures A Judge* (1995) 18 Harv. J.L. & Pub. Pol'y, p. 864, quoting H. Jefferson Powell, *The Original Understanding of Original Intent (1985) 98 Harv. L.Rev.* (1985) p. 892

13 Hamilton, Madison, Jay, *op. cit. supra,* No. 78: Hamilton, p. 465

14 Hamilton, Madison, Jay, *op. cit. supra,* No. 78: Hamilton, p. 466

15 Glendon, A Nation Under Lawyers (1994) (hereafter Glendon)

16 Glendon, *supra,* at p. 118.

17 Glendon, *supra,* at p. 152.

18 Glendon, *supra,* at pp. 124-126

19 The Spirit of Liberty: Papers and Addresses of Learned Hand (Dilliard ed. 1959) p. xx.

20 *Ibid.*

21 Stewart, *A Life on the Court,* A.B.A. Journal (Feb. 1993) p. 62

22 Manning, *Hyperlexis: Our National Disease* (1977) Northwestern U.L.Rev. 767, 772 (hereafter *Manning).*

23 Manning, *op. cit. supra,* at p. 780.

24 Keyes, *op. cit. supra,* at p. 970.

25 Manning, *op. cit. supra,* at p. 781.

26 Glendon, *op. cit. supra,* at p. 93

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I pointed out that the year I graduated from law school, the First African American, Wiley Manuel, was appointed to the California Supreme Court. The first woman, Rose Bird, was confirmed a few days later. We have come to accept (and indeed to expect) that the high court will reflect differences of gender, ethnicity, culture, and religion. We did not achieve this easily, but we did achieve it. I think we have come to understand that our similarities as human beings are more important than our differences of gender or skin color or language. But as wide as the divide has been between us on these issues, it has always been easier to accommodate our cultural diversity than our differences of opinion.

DeTocqueville, writing in 1835, said: "I know of no country in which there is so little independence of mind and real freedom on discussion as in America."[2] Contrasting the tyranny of majority with the authority of the king, he noted: "The authority of a king is physical, and controls the actions of men without subduing their will. *But the majority possesses a power which is physical and moral at the same time, which acts upon the will as much as upon the actions, and represses not only all contest, but all controversy.*"[3] As a result, he concluded, "freedom of opinion does not exist in America."[4]

Judge Learned Hand recognized this tendency was amplified by the increasingly homogenized mass society that characterizes America in the Twentieth Century. In many of his speeches, he questioned how democracy might survive amid the relentless pressure to conformity. (Of course, our court does not suffer this crushing conformity!) Judge Hand believed it was important to the kind of democracy we want to have and the kind of people we want to be to preserve a spirited public dialogue — to make sure the marketplace of ideas remains open.

Today, having passed my third anniversary as a member of the bench and a year and a half on the Supreme Court, I thought I might preview the sequel. I could call it: "It's Not Easy Being Green, but It's Really Tough Being Gray." One of the corollaries to our hostility to different points of view may be the way in which the familiar becomes more and more invisible.

I am reminded of a conversation I had with my son many years ago. He was 10 or 12 years old. I was cleaning house one Saturday afternoon. He was watching one of those mindless, low-budget movies that provided staple early afternoon fare. Usually they featured pretty young girls on the beach. This particular one featured pretty girls in ski sweaters – very original. Anyway, I heard some familiar music and said to him as I was passing by: "That sounds like James Brown." He looked at me in great surprise and said, "That's who it is. James Brown and the Famous Flames. How did you know?" "Oh," I replied airily, "James Brown was the man when I was in my teen's. He had the most popular group around." My son looked at me wide-eyed. "Really," he said. "They were around when you were a kid. Are they dead?"

I remembered that story when I began thinking about this topic because it reminds me how difficult it is to have a true sense of perspective about things — like parents — with which we feel a sense of utter familiarity. I suppose that is why we can all use the same words, we can talk about freedom, justice, and equality, and yet mean something so different we could be speaking a foreign language. Courts have certainly not escaped the contagion. And the whole field of constitutional interpretation is a subject of lively debate with a cast of thousands – originalists, strict constructionists, intentionalists, evolutionists, and even a deconstructive group of neo-intentionalists. In the whorl of abstract and theoretical discussions, the familiar becomes invisible to us and words, chameleon-like, change their meaning with the environment.

In her comment to Justice Scalia's essay on interpretation, Mary Ann Glendon recalls the scene from Young Frankenstein in which Gene Wilder as the doctor looks at the visibly and hideously deformed Igor, played by Marty Feldman, and says, "Perhaps I could do something about your hump" – and Igor replies "What hump?" She ends her comment with this statement:

> "Tyranny, as Tocqueville warned, need not announce itself with guns and trumpets. It may come softly — so softly that we will barely notice when we become one of those countries where there are no citizens but only subjects. So

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softly that if a well-meaning foreigner should suggest, 'Perhaps you could do something about your oppression,' we might look up, puzzled, and ask, 'What oppression?' "[5]

The genius of the American Constitution was in its attempt to combine stable government with liberty. Liberty was what the American experiment was all about, but liberty to the founders was not a synonym for license. The political philosophers in Publius's reading list were always careful to modify that word liberty. They talked of ordered liberty, rational liberty, or moral liberty. But, they always made a connection between civic freedom and civic responsibility.

There is a wonderful quote from Edmund Burke which beautifully articulates the task confronting the founders:

> "To make a government requires no great prudence. Settle the seat of power, teach obedience, and the work is done. To give freedom is still more easy. It is not necessary to guide; it only requires to let go the rein. But to form a *free government*, that is, to temper together these opposite elements of liberty and restraint in one consistent work, requires much thought, deep reflection, a sagacious, powerful, and combining mind."[6]

For a long period of our history, it seemed the founders had succeeded. As late as 1944, Judge Learned Hand could talk of the spirit of liberty in a way that suggested the opposite elements of liberty and restraint had been able to peacefully coexist.

The United States Constitution inspired reverence not just because it was a clever experiment in political science, but because it was an attempt to construct a polity consistent with both the baser passions and the higher aspirations of its citizens. But there is now a sense that things are more than slightly askew. Despite the founder's notion that liberty requires law-free spaces, Americans are probably the most law-ridden people on the face of the earth. Every aspect, every corner, every moment of our lives is subject to government regulation and control. And while everybody demands the right to everything without restraint, there is a gnawing sense of impotence. As Aaron Wildavsky has noted:

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". . . [P]rocedures for making public policy — from nominating Presidential candidates to holding open meetings — appear to be more and more democratic. Equality, majority rule, due process, representation of practically everyone, all appear to have increased."[7]

Why then, he asks, are outcomes increasingly unsatisfactory? Despite a constitutional blueprint designed to emphasize deliberation rather than allowing the passion or power of a particular cause to take hold, we have become in recent years what Philip K. Howard[8] calls "A Nation of Enemies." We seem every day less like a nation and more like a collection of warring tribes.

In short, we have more freedom than the founders would ever have imagined possible and less liberty than they would ever have tolerated. We have been described, accurately I think, as the most law-ridden society on the face of the earth. We are heirs to a mind-numbing bureaucracy; subject to a level of legalization that cannot avoid being arbitrary, capricious, and discriminatory. What other outcome is possible in a society in which no adult can wake up, go about their business, and return to their homes without breaking several laws? There are of course many reasons for our present difficulties, but some of our troubles can be laid at the feet of that most innocuous branch – the judiciary.

In Federalist No. 51, Madison tried to explain how we might preserve liberty by constraining government. He said the great security against a gradual concentration of power in one department was to give each the constitutional means and personal motives to resist encroachments of the others:

"Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[9]

Madison says something else in that passage that is very rarely quoted and that seems to me equally significant. He says:

> "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." [10]

In the modern era, we have come to see justice in terms that undermine the notion of liberty. We see justice not as the personal responsibility of each individual, but as an institutional obligation. We talk of social justice and propose redistributive means to achieve those ends. As our view of justice has changed so has the way we view the judiciary and, more fundamentally, the way in which judges view themselves.

Alan Keyes makes a cogent observation about the relationship between justice and liberty. He says this passage summarizes the "challenge our society faces when confronted with questions involving principles of right and justice." Justice has "substantive relevance to any regime," but the real goal of this society's existence is "the preservation of liberty." [11]

Concern about the untrammeled power of judges was an issue during the drafting and ratification of the Constitution. As summarized in an article by Raoul Berger, the colonists expressed the fear that judges would " 'undermine the legislative prerogatives of the people's representatives by engaging in the corruptive process of interpreting legislative texts;' " they feared the advantages of " 'a known and written [constitution] would be lost if the law's meaning could be twisted by judicial construction,' " [12] and they opposed the judges' imposition of their personal views.

Hamilton sought to allay the concerns of the ratifiers of the Constitution about possible usurpation by the judicial branch by assuring them that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution, because it will be least in a capacity to annoy or injure them." [13] As we know, of course, the courts overcame these alleged limitations on their powers with ridiculous ease. How?

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By constitutionalizing everything possible, finding constitutional rights which are nowhere mentioned in the Constitution. By taking a few words which are in the Constitution like "due process" and "equal protection" and imbuing them with elaborate and highly implausible etymologies; and by enunciating standards of constitutional review which are not standards at all but rather policy vetoes, i.e., strict scrutiny and the compelling state interest standard. As one commentator candidly admits: The "compelling interest" test imposes such a severe burden of justification on the state as to be "a statement of conclusion rather than a measure of constitutionality."

Hamilton acknowledges that "individual oppression may now and then proceed from the courts of justice," but he says "the general liberty of the people can never be endangered from that quarter." [14] I think Hamilton's faith that the judiciary could never endanger liberty was based on an assumption — not about the nature of the judiciary — but about the nature of judges. And for a long time that classical ideal of how judges behaved was powerfully predictive and accurate. But things have changed.

Most court observers see *Brown* v. *The Board of Education* as the pivotal decision which ushered in the new era. According to one commentator: What has been changing in the years since *Brown* is the way judges and the legal community in general think about judicial excellence and about the role of the judiciary in American society. Two sets of ideals are vying for the soul of the American judiciary. For most of our history, we admired and venerated what Glendon calls the classical virtues: impartiality, prudence, practical reason, mastery of craft, persuasiveness, a sense of the legal system as a whole, the ability to preserve principled continuity while adopting the law to changed social and economic conditions — and above all self-restraint. She discerns three distinct concepts of self-control. [15]

> "[S]tructural restraint (respecting the limits on judicial power imposed by federalism, the separation of powers and a court's position in the judicial hierarchy); interpretive restraint (observing the bounds imposed on judicial discretion by precedent, statute, or

constitutional text, design, and tradition); and personal restraint (avoiding distortion of the decision making process by one's own opinion of the parties or the issues)."[16]

In marked contrast, the new paradigm celebrates adventurousness and hubris. From the 1960's onward, we have witnessed the rise of the judge militant. The classical conception of the judicial role was viewed as too confining, boring, and above all insufficiently responsive to social problems. The classical ideal is being rapidly supplanted by the "image of the good judge as bold, creative, compassionate, result-oriented, and liberated from legal technicalities."[17]

For judges like John Marshall, Holmes, Hand and Frankfurter, the most important quality was humility. Frankfurter described it this way:

> "What is essential. . . is that you get [judges] who bring to their task first and foremost, humility and an understanding of the range of the problems and of their own inadequacy in dealing with them, disinterestedness, and allegiance to nothing except the effort, amid tangled words and limited insights to find the path through precedent, through policy, through history, to the best judgment that fallible creatures can reach in that most difficult of all tasks: the achievement of justice . . . through reason called law." [18]

As is probably apparent these are the judges to whom I can relate. I freely confess that this is the most difficult job I have ever tried to do; the most daunting. There are moments of exhilaration and satisfaction. But, there are also moments (lots of them) of terror and black despair.

And that is why I find it so hard to understand the chronic conceit of judges who claim infallibility, shrug off the Constitution like a shopworn suit, and never let text or tradition stand in the way of a desired result.

Apparently when Learned Hand was asked about his judicial philosophy, he liked to say that it was summed up in Oliver Cromwell's admonition to the Kirk of Scotland: " 'I beseech ye in the bowles of Christ, think that ye may be mistaken.' " [19] Those words, said Hand, "should be inscribed on the portals of every courthouse in the nation . . . ."[20]

Justice Brennan, on the other hand, was not given to such doubt and self-questioning. Shortly after his retirement, the justice reminisced with journalist David O. Stewart about his long judicial career. Stewart reminded Brennan of retired Justice Lewis Powell's admission that with hindsight he regretted voting to uphold Georgia's sodomy law. Had Justice Powell's second thoughts prompted Justice Brennan to think of any cases over his 33 years on the Supreme Court where he wished now that he had voted differently?, Stewart asked. "Hell no," Brennan replied, "I never thought I was wrong."[21]

We cannot lay all the blame on the courts. Americans have always turned to the courts for the resolution of difficult problems. As Manning notes, "The special role of the Supreme Court as ultimate arbiter of constitutionality enhances that impulse, but the people's faith and reliance in its judges runs both wider and deeper than that. Whether in matters of civil rights, town planning, the economics of the market place, or labor-management relations, . . . the judiciary will play, a key and often determining, role. . . . The inevitable result is that we are the most litigious people in the world. We go to great lengths to find ways to cast any and every problem into the familiar pattern of a two-party adversary trial and take it to court."[22]

If we really want to understand what has gone wrong with the political process, we should look in the mirror. In the immortal words of Pogo, "We have met the enemy and he is us." We the People are We the Government. If we believe nothing really matters, nothing will. If we refuse to look beyond the immediacy of our own desires, politics will never be more than the arithmetical and (paralytic) sum of appetites. And it should be more. Much more.

As Manning recognized way back in 1977, "Our legislatures, courts and agencies must eventually recognize, and the public must come to see, that the legal system simply cannot operate if it tries to provide for every citizen and institution a lawsuit against every other citizen and institution to resolve every difference of view or interest, to redress every perceived invasion of privilege, and to recompense every risk of living. The ultimate result of that approach will be to halt the legal

Hearts Touched With Fire
Upon Receiving Honorary Doctor of Law Degree
Pepperdine University Commencement
May 22, 1998, 2:00 p.m.

I thank the Chief Justice for his kind introduction. To the President, the Dean, Members of the Faculty, Baron Six, Graduates and all our Honored Guests. I greatly value the distinction you confer upon me by awarding me the honorary degree and allowing me to share, if only by reflection, this university's great record of excellence and achievement. I take special pride in receiving a mark of recognition from the Pepperdine University School of Law because of this university's strong affirmation that faith and moral principle are a necessary part of a personal commitment to justice.

A commencement is a ceremony which celebrates both endings and beginnings and invites us to reflect. About the past and about the future. Last summer, my law school class celebrated its 20-year reunion and a classmate reminded me of something I had forgotten. He said that he looked up my picture in the year book and under the heading "future plans" it said: "looking for work as a gardener." He said he was relieved to know at least one other person in the class had not yet achieved their aspiration. I doubt that any of you aspire to be gardeners — but I can now give you some advice from the perspective of a grizzled old veteran. It is more important to think about the kind of person you want to become than to worry about what you will do.

Grant Gilmore ends his book, The Ages of American Law, with a passage he identifies as a paraphrase of Holmes. "Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the

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lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell, there will be nothing but law, and due process will be meticulously observed."[1]

I believe this catechism is correct. But that does not mean law and lawyers are insignificant. In America, there has always been a potent reciprocity between the attitudes of lawyers and the expectations of popular culture. In a country like our own, a society so culturally diverse in which we share neither language nor culture nor history, law has become the carrier of our few common understandings. As Maryann Glendon notes: [It is now] the terrain on which Americans are struggling to define what kind of people they are, and what kind of society they wish to bring into being."[2]

That will be the challenge for the next generation of lawyers. My generation viewed the task as largely external, and in our arrogance, we believed pure intellect would provide the universal key. We were going to change the world. Through law, our society would be reformed, purified, saved. Our hubris was understandable if not wholly justified. After all, this country was founded by men who believed they were to political science what Sir Isaac Newton was to physics.

We did change the world, but not always for the better. We have overcome cold-eye sheriffs, fire hoses, and cattle prods. We have faced up to discrimination, racism, and bigotry, and struggled to make our dreams and our principles one. We have come close to the mountain top, but we have also descended to the rubble of Oklahoma City. We earnestly celebrate diversity, but we also mourn the loss of common ground. Freedom is the word on all our lips, but every day we drive the stake deeper into the heart of the spirit of liberty. In many ways, civil society now seems shattered. Every attempt to move forward founders on new and greater obstacles. Our

hyphens overtake us. The rights we sow so abundantly spring up overnight, like dragon's teeth, and destroy the bridges to tomorrow. Further investigation revealed that Newton did not get the physics exactly right and neither did we.

The legal profession's task is no longer changing the world. It is the more difficult, useful, and ultimately more rewarding job of changing ourselves.

We must once again seek and respect the "ideal of character." We must restore reverence for the lawyer as peacemaker and healer, the advocate Dean Kronman describes as "devoted to the public good but keenly aware of the limitations of human beings and their political arrangements."[3] The desirable traits – integrity, exceptional wisdom, good judgment, extraordinary deliberative power, prudence, sympathy for opposing views, and a keen sense of honor – are a catalogue of virtues. And the pursuit of virtue, like hope, is an activity of the spirit.

De Chardin has said that one day after mastering the physical universe, "We shall finally harness for God the energies of love. And on that day, for the second time in the history of the world, we will have discovered fire." We must restore that spirit of virtue and one more thing: We must once again come to an understanding of what it means to have, in Holmes's words, "hearts touched with fire."

I like that phrase because it distinguishes the "heart" of which I speak from the maudlin sentimentality which pervades the national consciousness, from the flood of easy talk show tears, available on cue.

When I speak of heart, I mean to use the term in what I think is a truer sense. I mean great-hearted. The heart of the warrior, filled with courage and purpose, but not cruelty. The heart that glories in the richness of the human connection. The heart that feels shame. The heart that recognizes

and is humbled by the nuanced, complex, many-patterned reality of the human condition. The heart that perseveres, accepting adversity as the other face of triumph.

Between 1899 and 1902 – just at the turn of the last century – Rene Rilke, a young German poet, composed one of his best-known works, "The Book of Hours." In this book, subtitled "Love Poems to God," Rilke pens not only a ravishingly poetic vision but a prophetic one. In one poem, written after a visit to Italy, Rilke admits his envy of his southern brethren whose religious Renaissance art portrayed God as "an ardent flame" and laments: "When I lean over the chasm of myself – it seems my God is dark and like a web: a hundred roots silently drinking."[4]

Like all good poetry, Rilke's vision works on many levels. He seems to see or foresee exactly what is taking place in his world. He is writing at a time which marks the end of the Age of Enlightenment and the inauguration of this present darkness – a nonjudgmental, indifferent age, the era of moral relativity. On another level, though, when Rilke talks about leaning over the chasm of himself he also suggests that what we see, all we can see, is what we have made of ourselves. What we have become. If our God is dark, we alone are responsible for reigniting that ardent flame.

So I will close, as I began, with the words of Holmes:

> "Through our great good fortune, in our youth our hearts were touched with fire. It was given to us to learn at the outset that life is a profound and passionate thing. While we are permitted to scorn nothing but indifference, and do not pretend to undervalue the worldly rewards of ambition, we have seen with our own eyes, beyond and above the gold fields, the snowy heights of honor, and it is for us to bear the report to those who come after us. But, above all, we have

learned that whether [we] accept from Fortune her spade, and will look downward and dig, or from Aspiration her axe and cord, and will scale the ice, the one and only success which it is [ours] to command is to bring to [our] work a mighty heart."[5]

This school has taken seriously its responsibility to engender mighty hearts. The university can only give us the spark. We, ourselves, must nurture the flame. I will work on mine if you will work on yours, and, together, we can bring honor to our calling.

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1 Gilmore, The Ages of American Law (1977) pp. 110-111.
2 Glendon, Rights Talk (1991) p. 3
3 Kronman, The Lost Lawyer (1993) p. __
4 Rilke's Book of Hours, Love Poems to God (Barrows et al. ed. 1996) p. 49.
5 The Mind and Faith of Justice Holmes (Max Lerner ed. 1943) p. 33.

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Remarks
Retirement Dinner of
Justice Robert K. Puglia
February 18, 1999

Close Encounters Of The First Kind

Good evening. I suppose I am on the program because I have a slightly different perspective. I came to know Justice Puglia later in his illustrious career and so represent that generation of lawyers who got to know him from the other side of the bench when he was (in my mind at least) already a great gray eminence and I also had the privilege of serving as a member of the Third District Court of Appeal and working with him.

In 1979 when I joined the Attorney General's office, he was the Presiding Justice of the Third and people were already beginning to speak of him in reverent tones. The first thing I did that caused much wincing and frowning among the assignment assistants at the AG's office was to ask: "Who is this guy . . . PUG-lia? It's Pul-ya, Pul-ya, they chanted in unison. The 'G' is silent!"

I vividly remember my first encounter with Justice Puglia. I had never been in the Third DCA's courtroom before. They sent along another deputy attorney general to make sure I could actually find the courtroom and would know which chair to sit in. It was my companion's job to show me the ropes. And he dutifully pointed out the beautiful features of the courtroom — the marvelously luminous gumwood, the specially designed light fixtures, the frosted glass lightwells, and the magnificent coffered ceiling. He told me how the artisan who created that ceiling had left out one of the gold medallions because he thought only God should create perfection. I peered at the ceiling trying to find that empty space. And the whole time I could hear this annoying tap, tappity, tap, tap. I thought what a shame that this beautiful old

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courtroom had problems with the sound system. I wondered if this noise would continue during the argument. And I worried about being totally distracted. I kept leaning this way and that trying to detect the source of that dry, rhythmic clicking.

This was a simple case. What would later be known as a routine disposition appeal. So I had brought along a notebook of carefully outlined arguments, the briefs, and parts of the record just in case. All of this material was resting on my lap. And I happened to notice the movement of the pile of papers resting on my lap was precisely synchronized to that annoying noise — and realized — to my complete horror — that clicking sound was from my knees knocking together. Just at that moment, the gavel banged; the panel of judges strode into the courtroom. I rose shakily to my feet as they marched past those gold-topped Corinthian columns and royal purple draperies. They sat in chairs covered in the same material. But Justice Puglia sat in a chair a foot taller than all the rest with a carved diadem above his head. It looked like a throne.

I represented the respondent. When appellant finished I rose and neatly arranged my pages of prepared argument and launched into it. About 90 seconds into my oration, however, Justice Puglia's chair tilted back almost to the wall, he cast his eyes upward to that magnificent ceiling and kept them there. Somehow, I did not think Justice Puglia was looking for that missing medallion. I stammered: "Uh, unless the court has questions . . . ." Before I finished the thought, Puglia's chair came upright with a thump. He nodded regally. I had been dismissed. Lesson No. 1. If you have nothing to say that will enlighten, enliven, or enlarge the dialogue, shut up. I subsided feeling a bit downcast. But, just for a moment, I had the most disconcerting feeling his eyes were twinkling — like a relieved parent with a slow child.

Nah. I thought as I trudged back to the office: " I might be new at this, but one thing I knew for certain: great gray eminencies do not twinkle."

Gamesmanship And All That Jazz

By December 1982, I was an old hand. Puglia, P.J., published *Cronk* v. *Municipal Court*. The case involved a defendant's attempt to hurriedly enter a plea before the information could be amended to allege more serious charges. The opinion said a magistrate has "the inherent power to prevent injustice." It was short, it was clear, it was correct. And it contained this footnote: "The dubious tactic referred to in the concluding sentence of the trial court's opinion is more colorfully characterized in the Attorney General's brief as "Gamesmanship and All that Jazz." I was that lowly AG. And I was thrilled that something I had written would actually be quoted in the official reports. Great gray eminencies might twinkle . . . occasionally.

Somewhere during this time, the thought may first have come to me that if ever I were a judge — a possibility I deemed extremely remote — I would be a judge like Puglia. I liked his opinions — and not just because he quoted me. They were intelligent, wise, and witty, but most important, they were clear, assessable, understandable. I began to discern that the opinions which resonated, the ones I remembered long after I read them, had at their heart a passionate kernel of truth. They were not the product of "a judicial process"; and even though they sometimes reflected the opinion of a court, the best of them exuded that "sense of style" that Richard Posner tells us is "inseparable from the idea of a great judge in our tradition."

Rules To Live By

Because truth really is stranger than fiction, in time I was actually appointed to the Third and became a colleague of Justice Puglia.

There are many benefits to being a judge on the Third District Court of Appeal. For one thing, you are automatically on the distribution list for

Puglia's Rules to Live By. Unfortunately, I was on the court such a short time, I only received Rules No. 11 and 12. No. 11 warned us not to be guilty of turgid writing lest our readers conclude "we do not know precisely what we are talking about." No. 12 admonished us to be "all [we] could be" but at least be better than the Iowa or Texas appellate courts, and use "pleaded," the correct past tense, and not "pled" — a weak form of the verb when we discussed pleas. I got that part, but since my subscription to the rules was abruptly terminated at that point, I was left in a quandary about other crucial questions. Should I say the victim bled or that he bleeded. Or should led be leaded.

I learned other important stuff too. Justice Puglia is a walking musical encyclopedia. I am one of the very few appellate judges in the country who knows all the words to the Chiquita Banana Song.

Warrior Virtues

Several years ago, Justice Puglia returned to Korea. He had fought in Korea as a member of the Third Infantry Division — part of the group that finally broke the stranglehold of the North Korean Army in the winter of 1952-53. On his return trip — 40 years later, he had an opportunity to visit a monument commemorating the landing at Inchon. The memorial is set in the midst of a broad, grassy area. Nearby a group of neatly dressed, elderly men sat in the sunshine, laughing and talking. But when the guide explained to them that his guest (Justice Puglia) was one of the soldiers who had fought during the last phase of the Korean War, the men approached him and each in turn bowed and kissed his hand. It was their way of showing respect to someone they regarded as a liberator of their country.

We all thought that was a very touching story until we realized Bob intended to implement a similar ritual in the Third District to show respect for the P.J.

Winning Is The Only Thing

If you know Justice Puglia at all, you know he is a fierce competitor. So it is not surprising that he joined with two of his colleagues — Fred Morrison and Arthur Scotland — to form a triathlon team to compete in the appellate division of regional events. Bob was the biker. The group, aptly named Team Jurisimprudence, first took to the field in the Monterey Bay Triathlon, held in Aptos on July 14 (Bastille Day), 1996, and took first place in the Appellate Judiciary Division. Next was the Sentinel Triathlon in Santa Cruz on October 6, 1996, and another first place! In 1997, the TEAM rested on its laurels. I tried to tell them that if they were resting on their laurels they were probably wearing them in the wrong place. But you know when three appellate judges agree on something, you can't tell them anything.

In 1998 the TEAM was resurrected to defend its honor at the Donner Lake Triathlon, the national championship. Once again, they were victorious, now becoming — unknown to the race directors — national champions in their division. Bob had, by far, the most difficult task in this struggle: he rode up and down the Donner Summit Road. And I certainly don't think the significance of this string of victories should be one whit diminished by the trifling circumstance that they were in each case the *only* team in their division.

With A Song In His Heart

Bob has another little known distinction. You know when entertainers are starting out, they often get their first break as an opening act. That means they go on first, warm up the audience and get them in the mood for the main attraction. When an entertainer has made it to the top in the profession, he or she is the headliner. The part of the show everyone pays to see. But when you get beyond headliner status, you can be the closing act. That's the act that takes over when you want everybody to leave.

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Here again, Bob is a standout. At the ABOTA dinner in January 1999, Justice Puglia distinguished himself by taking over the mike from the band's singer and treating the audience to songs from his favorite era — the late 20's — and sure enough, everybody went home. When the last guest left, even Ingrid, Bob was still singing. This is a man who loves his work. Even when its only his avocation.

Not PC

Justice Puglia comes from a time when men could be gentlemen, scholars, and warriors. And these are the virtues he brought to the work at the Third District. Bob Puglia has never been politically correct. He is something much better than that. A decent, honorable man, who never sees people as abstractions or symbols. He takes them as he finds them; expects the best of them; and demands no more from them than he demands of himself. I think it was precisely this leadership by example that over the past quarter century has made the Third such an extraordinary court. With Justice Puglia expressing his absolute faith that we would be all we could be and that we could be much more than we imagined, it would have been downright churlish to let him down.

The Third is a productive, collegial, remarkably lighthearted place where everyone — at every level — works with a will. It reminds me of that mythical Guild of Judges which Learned Hand called the Society of Jobbists — judges for whom exquisite craftsmanship, attention to detail, and principled continuity — is both motivation and reward. If the society existed, Robert K. Puglia would be its California Chairman.

My personal pantheon of admirable judges does not contain a cast of thousands. It is a select company, but I certainly include Justice Puglia among them.

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To me he exemplifies the classical judicial virtues: impartiality, prudence, mastery of a craft, persuasiveness, and candor. He has a sense of the legal system as a whole, an awareness of the ebb and flow of history, and of the need for consistent jurisprudence, and above all self-restraint.

I have this framed quotation on my desk. "Angels can fly because they take themselves lightly. I think it was Justice Puglia's seemingly contradictory qualities that gained him the respect and affection of so many people. He was serious about the work of the court; and he took seriously his role as the keeper of its history and traditions — even going so far as to undertake a lightning commando raid on a museum in South Carolina to retrieve some of our lost artwork. He took the job seriously, but he took himself lightly.

His approach to decisionmaking was painfully democratic. I had a great deal of sympathy for lawyers who sought to work at the Third and bopped into the job interview only to be confronted with all 10 judges. Even arguing before the U. S. Supreme Court you only have to deal with nine! It takes 15 minutes just to shake hands with everybody.

Since he retired, Bob and I have shared adjacent workspaces on the fifth floor. He began with his small space crammed with boxes — the accumulation of more than a quarter century at the court. Recently, I stopped to see how the work was progressing. He had only a few boxes left. He said he had calculated that in his time on the court he had authored more than 3,000 opinions. "Are they going to provide you with bound volumes of all your published opinions?," I asked. His response: "Heck, No." I'm pretty sure he said "heck." "I can always find them on the library shelf if I want to read them." And after a little pause, he said: "Any way, all my best stuff is in California Reporter." For the non-lawyers among us, California Reporter is where good opinions go to die when the California Supreme Court depublishes them.

We talked a few minutes more. Reflecting on all the differences the last few years have wrought. We complained about the general fecklessness of American society in its current manifestation and were, frankly, nostalgic for the days when more people had "feck." Finally, he said with a rueful laugh, "I guess I am a dinosaur." I don't think so. Not a dinosaur. More of an ancient artifact. Like the Rosetta Stone. A text from which we can decipher the best of our past and — if we are lucky — find our way back to the future.

I am sure the Third will continue to be a good court. But, a part of it will always belong to Puglia, P.J. The court will go on, but it will never be quite the same without him. And those of us who in our misspent youth wanted to be Puglia when we grew up now know in our heart of hearts that there will only ever be one. That is as it should be.

Justice Puglia, we will miss you. It will be strange to see future pictures of the court without you in that middle chair. We are, all of us, glad to have been part of the California court system on your watch. Thank you for teaching us what it means to be a good judge. For demonstrating that character counts and integrity is personal. For showing us what dreams may come when we believe in ourselves. Thank you.

Vaya con Dios.

Frederick Douglass Moot Court Competition
Introductory Remarks by Justice Janice R. Brown
Hyatt Hotel, Fisherman's Wharf
San Francisco, California
February 25, 1999
6:15 P.M.

Thank you. I would like to thank the Mayor for his gracious introduction. I am especially grateful because I understand the Mayor had an adventure on his way to the hotel this evening that might have unsettled a less self-possessed individual. He was running late when his limousine unaccountably screeched to a halt in the middle of the block. When he asked the driver what was happening, the driver explained that a frog was hopping across the street and the driver, being a compassionate soul, did not want to squash him. Unfortunately, the frog had stopped and showed no signs of moving on. Well, the Mayor had had enough of this nonsense. He got out of the limo, walked up to the front of the car and sure enough a rather large frog was sitting there. He was startled when the frog thanked him for being so courteous and asked for a ride. Mayor Brown obliged. He put the frog on the seat beside him and the limo continued on its way. Before they had traveled two blocks, the frog said: "Kiss me, I will become a beautiful princess and reward you for your kindness." The Mayor said nothing. The entreaty was repeated several times and got no response. Finally, the frog asked plaintively, "Why won't you kiss me?" And the Mayor replied: "I would rather have a talking frog." You see like most lawyers, he loves words. The law is a wordy profession.

Frederick Douglass was also someone who loved words; who believed in the power of words and the ideas they can convey to enlighten, inspire and persuade, as well as chastise and degrade. He made a career of talking.

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that they would take care of the philosophy and that his role should be limited to telling facts.

His determination to go his way and think his own thoughts, eventually becoming publisher and editor of his own newspaper, led to a rift between Douglass and his benefactors that was not healed for decades. Nevertheless, he chose to be free. Even when that was painful. He understood that there were choices to be made and that those choices would have consequences. At the end of his biography he says:

> "[I] have written in part for the encouragement of a class whose aspirations need the stimulus of success. I have aimed to assure them that knowledge can be obtained under difficulties; that poverty may give place to competency; that obscurity is not an absolute bar to distinction, and that a way is open to welfare and happiness to all who will resolutely and wisely pursue that way; that neither slavery, stripes, imprisonment or proscription need extinguish self-respect, crush manly ambition, or paralyze effort; that no power outside of himself can prevent a man from sustaining an honorable character and a useful relation to his day and generation."

After the war, on August 1, 1880, speaking at a rally celebrating the abolition of slavery in the West Indies, he gave an update of conditions in America.

> "Taking all the circumstances into consideration, the colored people have no reason to despair. We still live, and while there is life there is hope. The fact that we have endured wrongs and hardships, which would have destroyed any other race, and have increased in numbers and public consideration, ought to strengthen our faith in ourselves and the future. . . . I

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will not listen, myself, and I would not have you listen to the nonsense, that no people can succeed in a life among people by whom they have been despised and oppressed. [¶] The statement is erroneous and contradicted by the whole history of human progress. A few centuries ago, all Europe was cursed with serfdom or slavery. . . . [¶] Greatness does not come to any people on flowery beds of ease. We must fight to win the prize . . . . The hardships and dangers involved in the struggle give strength and toughness to the character, and enable it to stand firm in storm as well as in sunshine. [¶] One thought more before I leave this subject, and it is a thought I wish you all to lay to heart. Practice it yourselves and teach it to your children. It is this. Neither we nor any other people, will ever be respected until we respect ourselves, and we will never respect ourselves till we have the means to live respectably. An exceptionally poor and dependent people will be despised by the opulent and despise themselves."

Like Douglass I do not think freedom is an entitlement. Freedom is a responsibility. Nor do I believe it is the job of government to take care of us. That idea is the antithesis of freedom. Burke got it right 300 years ago and it is still true. "The people maintain the government, and not the government the people." If the government takes care of the people, they will be subjects not citizens, a passive and dependent population, ~~suffering~~ a different, perhaps more comfortable slavery. To quote Alan Keyes: "Empowerment does not mean just the capacity to do for oneself; rather it means the motive and the will to take the responsibility for one's own destiny. This is the essence of self-government."

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Frederick Douglass understood something I hope we may soon come to realize. Chains on your body are easier to endure than chains on your mind. When your body is imprisoned, your mind can set you free. But when your mind is imprisoned, there can be no hope. These ideas are not new. They have been echoed by sources as diverse as Frederick Douglas, Booker T. Washington, W.E.B. Du Bois, Marcus Garvey and Malcolm X. Without claiming to be heir apparent to any, we might profitably consider the remarkable convergence of their views on the need for intellectual achievement, economic self-sufficiency, and good character.

There is a song from the soundtrack of Space Jam that I used to hear constantly last year. R. Kelly. I Believe I Can Fly. "I believe I can fly. I believe I can touch the sky. I believe I can soar. See me running through that open door." I hope you believe you can fly. I know you can. But our job on the eve of the new millennium is to create an America in which every child will have that same confidence. For black children, this means retrieving the positive portion of our legacy; creating an ethic of pride, progress, and achievement. A legacy of resilience, courage, morality, responsibility, and collective commitment.

Well, I started with a talking frog. I will end with wild geese. When I was a little girl, living in the country, one of the things that fascinated me was the seasonal migration of flocks of geese. I would see them flying overhead. Always in formation. Sometimes a V; sometimes a W. And I learned there is a reason for this characteristic shape. It is aerodynamic. The biggest and strongest birds are always at the front or nearest to the point of the V. They take the brunt of the headwinds and the shape of the formation forces the winds outward and away from the rest of the flock. The young, the old, the sick and weak fly near the tail end of the formation. That way they are not

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only protected from the fiercest winds, the updraft of the leaders' wings lifts them aloft and pulls them along.

You have an obligation to go as far and as high as you can. You cannot change the past, but you have it in your power to invent the future. Have a care for the rest of us who will be swept along and held aloft by the updraft of your wings.

Please. Please. Please. Choose to be free.

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He was a natural orator. The editor and publisher of a newspaper. And a nonfiction writer of some renown.

It was his role in history to be a beacon and a symbol for black Americans in a time of change and great peril. And it occurs to me that here — on the eve of the millennium — his words may once again help us to see the future more clearly. I apologize for what I am going to say next, but it has become somewhat of a cliché to say black folks in America are imperiled. But sometimes even a cliché may be true.

In the words of Pastor Leonidas Young, former Mayor of Richmond, Virginia: "The crisis now facing Black America is more devastating than the combined impact of slavery, racial discrimination, and drugs. For now, the enemy is within." We are suffering death by a thousand cuts, and many of the wounds are self-inflicted. It is a crisis of the spirit. Robert Woodson laments that "the lifeline has been severed between today's generation and the rich heritage of self-determination and the will to achieve that once provided a foundation for black progress, even against the greatest odds."

I experienced this firsthand when I was still in law school. The Black Law Student's Association at UCLA started a community outreach program. Each law student adopted a neighborhood school and taught a series of classes about issues we thought would be of interest: legal history, famous black jurists, the legal basis of the civil rights struggle, and questions related to juvenile law.

I was assigned to teach at Inglewood High School. Twenty-five years ago, I would not have described Inglewood as a ghetto school. It was located in a neighborhood of single family homes with well-kept lawns. The school itself was the typical, sprawling California construction, with buildings grouped around a landscaped quad. There was a student parking lot filled with decent looking cars.

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I thought these discussions were going pretty well. The students were attentive though not talkative. On the last day, a young man raised his hand. He said: "Why are you coming here? Why are you talking about this stuff? Everybody knows if you're black and you're poor, you don't have a chance." I was astonished. In all my life I had never heard this defeatist manifesto. Quite the opposite. I started out poor; I will die black, and all my life I had been offered a world of limitless possibilities. I am a great fan of Condoleza Rice, a black woman, a world-class scholar and now Provost at Stanford University. She is from Birmingham, Alabama; I grew up in the tiny town of Luverne. During one speech I attended, she said her parents had her absolutely convinced that she could grow up to be president — even if she couldn't eat a sandwich at Woolworth's. My experience was much the same. I imagine Mayor Brown could recite much the same story.

I was baffled. A law student in my 20s, I was less than 10 years older than this high school student — much less than a generation — and yet it was as if we stood on opposite sides of a great divide. I could not conceive of anyone having the opportunities this young man had who did not think he could conquer the world.

At that moment, I knew I felt something terribly wrong. My certainty has deepened in every decade since. Simple and silly as it sounds, I began to have an inkling even then that words might be the root of the problem. And when it happened — quite by accident — that I became reacquainted with the writings of Frederick Douglass, I was sure of it.

Like you, I heard part of Frederick Douglass's story when I was in grade school. There are several copies of biographies — by and about him — on my bookshelves. But I feel I really made his acquaintance in November 1994. November 4th to be exact.

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[I had been appointed to the Third District Court of Appeal and November 4 was the date set for my confirmation hearing. Ordinarily, the hearing would have been scheduled close to my home, but in order to accommodate the schedule of the members of the Commission on Judicial Appointments, the hearing was scheduled in Los Angeles. I traveled to Los Angeles with my husband and a couple of friends. Not knowing how long the process would take, we scheduled our return flight for late afternoon. As it turned out, the hearing was a breeze and we found ourselves with a whole afternoon of leisure. So, of course, we sent shopping. At least, we went looking. On Rodeo Drive. And we happened upon a shop called Profiles in History. They had fascinating memorabilia. Letters and speeches and photographs from past presidents, supreme court justices, movie stars. Autographed pictures and fragments of letters. We had a wonderful time browsing and reading. Finally, the men growing impatient, we headed for the door. As I walked out, I had the sudden sensation of someone looking at me. Turning my head, I encountered a pair of intent eyes. A fierce gaze. From eyes that could stare an eagle blind.

Stopped in my tracks, I did an about face, walked back into the store and into the corner where I could get a better look. It was a photograph of Frederick Douglass — the young Frederick — mounted above his signature, taken from a letter written in his own hand. I was astonished. I had been in the shop more than an hour and had not seen this photo. It was tucked away in the darkest corner behind the door. But, the fact that I did see it; could not leave the shop without my attention being drawn to it; and that I found it (or it found me) on this day — the day I was first sworn in as a judge — must have some special meaning.

They removed Frederick from the wall, wrapped him carefully, and he went with me on the plane back to Sacramento.] His autographed picture

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was the first thing I placed on the walls of my chambers at the Third District Court of Appeal. And it went with me when I was appointed to the Supreme Court. If you come into my office right now, you will see Frederick still watching from the wall right in front of my desk. Whenever I look up from my work, he is looking back at me. And that is why when I received your invitation, I knew it was an offer I could not refuse.

Of course, I had heard stories of Frederick Douglas since childhood. The saga of a man born into slavery who managed to win his freedom; to overcome illiteracy and become one of the most powerful advocates of the abolitionist cause. His life has been an inspiration to generations of black people. And Frederick Douglass reentered my life as a story and a symbol at about the time the sense of unease and bafflement I felt that morning in Inglewood blossomed into full-fledged dismay and a sense of impending doom.

It was not that black Americans made no progress in that quarter century. Those decades saw explosive growth in the numbers of black households moving firmly into the middle class. There were more black high school graduates; more college diplomas; and more advanced degrees than ever before. A corps of dedicated black professionals won praise and recognition for their accomplishments in science, medicine, and law. And there are thousands of black-elected officials throughout the country.

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It is important to say that this history is part of an unbroken march of progress by black Americans that begins before the Civil War. We have a proud heritage left to us by people who did more than sing "We Shall Overcome." They founded businesses and banks, established flourishing centers of trade and commerce, and supported a host of mutual aid societies. But it is becoming increasingly difficult to feel that legacy is authentic. It seems sometimes like a dream only half remembered.

Day after day, week after week, month after month. We hear, like the incessant thrum of talking drums, this roll call of failure. Drugs, poverty, violence. An illegitimacy rate above 80 percent for black children; a third of young black males enmeshed in the criminal justice system; the highest murder rate in the civilized world. More than 350 young black men are killed each year in our nation's capital. A few years ago the Los Angeles Times ran a week long series on all the child victims of gang warfare in Watts and East Los Angeles. Pages and pages of photographs and tiny biographies. Infants. Toddlers. Ten- and twelve-year-olds. And these scenes are being repeated in cities across America. I sit in my office every day reading of senseless slaughter and young men sentenced to two and three consecutive life terms.

I believe that what is happening on these streets would have been unthinkable 45 years ago when Rosa Parks refused to give up her seat on that Montgomery bus; inconceivable in 1963 when thousands stood before the Washington Monument and heard Martin Luther King speak the truth to power, extolling the dream of freedom.

But sometime between then and now, the dream came undone.

There was a day when we were a community and the things that are now happening to our children would not have been permitted. Now, we

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are only a hapless aggregation and we feel powerless to prevent it. The difference is just a word, but the difference is profound.

In the words of Robert Woodson, "[a]ccepting an identity as 'victims' has done more damage than years of outright discrimination could accomplish, because it has caused destruction from within. We have fallen prey to an epidemic of an entitlement mentality." We are not alone. As Tony Brown notes in his book, Black Lies, White Lies, "we have become a nation on the dole, a people constantly foraging for government handouts. Americans, rich, poor, and in the middle, have come to feel they are entitled to tap into the public till."

Nor did black people invent the game of grievance-based political action, but — as with everything we put our hearts into — we raised it to a high art form. We did it so well, in fact, that everyone else has learned to play. Julian Bond offers this wry observation: "Today the protected classes extend to a majority of all Americans, including white men over 40, short people, the chemically addicted, the left-handed, the obese, members of all religions. Surely there is a scholar somewhere who can tell us how we came to this state of affairs and how the road to civil rights became so crowded . . . ."

By relying on grievance as the basis of political power and our claims to entitlement, we have been twice victimized: first by the oppression which gave rise to our claim, but finally by the unintended consequences of that agenda.

The unintended consequences have been devastating. The sociological equivalent of a reversal of polarity. "[T]he champions of the black community are those who whine the loudest, whose complaints are the most persistent, and whose claims are the most outrageous — those who 'rattle their [beggar's] cups the loudest.' " In order to support this culture of

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victimization we have excised from the portrait of black America "the remarkable models of self-help — accomplishments of black entrepreneurs and mutual aid societies" that succeeded even during the eras of the most brutal racial repression and slavery.

> "The selective history that is transmitted to our young people is, simply put, that blacks came into this country on slave ships; from there they went to the plantations and slavery, from the plantations to the ghetto, and finally, to welfare.
>
> "A complete black history would reveal that, even in the face of the most bitter oppression and bondage, many courageous blacks persevered and accomplished, undaunted by the obstacles they faced."

I grew up surrounded by these stories, these images, words of encouragement and support. It was in the air. Like the scent of flowers on the breeze. We breathed it in, absorbed it, internalized, and lived by it. Words like Challenge. Struggle. Self-reliance. Responsibility. Self-improvement. Achievement. Success. Self-respect. They came not just from my parents and grandparents. From in-laws, cousins, teachers, preachers, and passersby on the street. Any adult could and would reprimand me if I behaved badly; but they were just as likely to pat me on the shoulder and say "we're all so proud of you; keep up the good work!"

These days, it seems just the opposite. Parents struggle in vain to inoculate their children against a culture that celebrates mediocrity and worse; that sees incompetence and academic failure as signs of "true" blackness; that says, without apology, that SAT testing is unfair to black students because they do not have the "genetic hereditary background" to achieve high scores; a culture that proclaims in every way that being black is a handicap, a cross to bear, and a deficit we cannot be expected to

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overcome. These words like poison in the air. Defeat. Despair. Failure. How high I wonder do the bodies of our children have to be piled before we acknowledge the need for a new vision. Or an old one, retooled for the next millennium.

The current civil rights agenda apparently assumes history began in the 1960's and ended there too. It is past time to hit the eject button and get out of this time warp.

It's always a revelation to go back to the stories you loved as a child and read them with the eyes of an adult. When I read about Frederick Douglass as a little girl, it was his bondage and his suffering that stayed in my mind. He complained of being hungry, ill-clothed and often cold. I could feel his terrible desolation at being a "slave, a slave for life." His vivid descriptions of the horror and oppression of slavery sparked my compassion.

When I returned to his story as an adult, I still had sympathy for his suffering, but what kindled my admiration was his determination — man and boy — to be free, free on every level. And his willingness to accept the burdens as well as the benefits of his freedom. The Massachusetts Anti-Slavery Society launched Douglass's career by signing him on as a paid lecturer. In later years, when asked where he got his education, Douglass replied: "From Massachusetts Abolition University, Mr. Garrison, president." But as much as he admired the abolitionists and credited them with his success, Douglass chafed at the limits they tried to impose on him. White abolitionists welcomed blacks to recount their suffering, to become prize exhibits of the evils of slavery. They did not invite their input on policy or their vision for the future. When Douglas said he wanted to go beyond a recitation of the wrongs he endured to discuss his hopes for the future, Garrison advised that he just stick to his storytelling. Others told Douglass

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California Supreme Court
Sesquicentennial Celebration
B.F. Hastings Building
Old Sacramento
February 8, 2000
9:00 a.m.

By: Justice Janice R. Brown

Thank you Chief.

I am honored to be able to speak on behalf of the court at its 150th birthday party and delighted that all of you are here to share the occasion with us. This has been an extraordinary program.

Shakespeare said, "[The] past is prologue." H.J. Mueller muses that history is poetry and the poetry of history consists in its truth. "It is the fact about the past that is poetic." The playwright and the historian are both right.

I want to thank the participants in this morning's program who have evoked this court's rich history with passion, poetry, and truth. We have certainly had our share of colorful characters and moments of high drama, and our speakers today have made our story live. And those stories about perseverance, independence and courage — and even eccentricity — are the touchstones from which we shape our visions of the future. Holmes said that knowing our history is not a duty; it is only a necessity.

Sometimes, though, history seems oddly familiar. Or, as the French say, the more things change, the more they remain the same. Consider this brief survey of the press coverage of the court's first hundred years.

On April 6, 1855, the same year the court moved into the B.F. Hastings Building, the daily Alta California published an editorial entitled "Contempt of Court." The paper gleefully congratulated the Legislature for passing a law overturning the court's recent decision in *Johnson v. Gordon* (1854) 4 Cal. 368, in which the court held the United States Constitution gave no authority to the Supreme Court of the United States to exercise appellate jurisdiction over the state

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courts. According to the Alta's editorial page: "The doctrines laid down in this opinion were so novel and so startling, that in some they caused surprise, in others alarm, in all contempt." The newspaper applauded the Legislature for pulling off "the coolest contempt of court ever committed." Of course, given the way things have turned out, the Legislature might want to reconsider.

Curiously, eight years later the same paper lamented that the $8,000 annual salary proposed for justices of the Supreme Court was inadequate. Said the paper's editorial writer on March 8, 1863: "This upon reflection must be regarded as very poor economy. First class talent cannot be procured for this stipend. The office of a judge in this state is no sinecure. . . . One of the greatest elements of prosperity is an able, upright, and brilliant judiciary. We can have such only by paying for it." But here we are. Able, upright and brilliant jurists, and still underpaid.

And in a surprisingly sympathetic tone, the Sacramento Union reported, on December 4, 1869, on the first case to be heard in the Supreme Court courtroom at the capitol. The day before, Judge Sanderson had heard the habeas corpus case of Nellie Smith and Anna Keating — a case brought to test the validity of the city ordinance providing that women shall not exhibit themselves in a drinking saloon after midnight. The women argued the ordinance conflicted with the equal protection clause of the Fourteenth Amendment of the United States Constitution. But the city attorney argued that the ordinance, "like all other laws, merely placed restrictions on one for the benefit of many." That was not so uplifting a cause as the one led by Clara Shortridge Foltz, but still a claim for the rights of women.

In 1886, when an unpopular decision concerning riparian rights (*Lux v. Haggin* (1886) 69 Cal. 255) led to vociferous calls for the resignation of the justices, the San Francisco Call came stoutly to the court's defense in an editorial published on June 18 of that year. Chastising the "infamous plan of dragging the Supreme Court into politics," which the Call said was being advocated by papers like the Chronicle, Examiner, and Alta, the Call ridiculed "these journalistic

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wiseacres" who with "their usual pretensions to a universality of knowledge, sum up the law of the case in a line and abuse the majority of the Supreme Court in a paragraph" and "stigmatize as ignorant and stupid" the judges who had devoted months "of weary labor to a patient study of the law."

And then there is the long-running and apparently endless debate about where the Supreme Court should have its headquarters. One editorial, appearing in the Alta California on January 20, 1865, takes a somewhat jaundiced view of the reason for the opposition of the City of Sacramento to the court's removal to San Francisco. According to the Alta California, the Sacramento Union opposed the removal of the Supreme Court because it feared "there may be less demand for drinks, and fewer boots to black." (Parenthetically, I should say I do not think the writer was accusing the justices of being heavy drinkers. He seems to have been referring to the lawyers who would come to town to appear before the court.) On the other hand, the Marysville Express had complained that "the removal of the court would necessitate the removal of the State Library," which the Express said was needed as much for the benefit of the Legislature as the court. The Alta conceded that point was "good in theory," but noted: "The Library would be a great assistance to our legislators, provided these gentlemen made a practice of seeking wisdom among its shelves. But when have they done so? [¶] Books in certain cases, it cannot be denied would be of great service in framing of enactments, but the trouble about them is, they can neither buzz nor buttonhole. The 'lobby' has an advantage over them which cannot be overcome. Champagne can make more converts to a given opinion, any day, than Blackstone."

The court did move to San Francisco, but the controversy was still very much alive in 1957 when the Sacramento Bee reported Governor Goodwin J. Knight's favorable reaction to "the growing movement to return the state supreme court from San Francisco to Sacramento." The article noted that no new law would be needed since the Constitution specifies the court shall be located in Sacramento, and cited in support reports in recent weeks that Chief Justice Phil

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Gibson favored returning the court to Sacramento to "do away with the expensive and exhausting practice of holding court periodically in Los Angeles and Sacramento as well as in San Francisco." (Sacramento Bee (Feb. 22, 1957) p. 1, col. 4.) Apparently, that was only a rumor. Almost 50 years later, the court remains in San Francisco.

After 150 years, we may perhaps be entitled to feel some confidence that — despite our ups and downs — the court's existence is secure. In 2050, we hope the court will be able to return to the B.F. Hastings Building to celebrate its 200th anniversary. You are all invited. I am reminding you now to save the date. Mark your calendars because Justice Mosk will be very disappointed if you are not here.

Finally, on behalf of all the members of the court and the court's staff, I want to thank the people of Sacramento for being generous and gracious to the Supreme Court of California during the whole of its 150-year history. And I do not think it was only because you thought we would give a boost to the local economy.

~~I promise.~~ If I ever get three more votes, we'll be back!

Thank you.

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"Holding Everything Up"
Address to the Black Women Lawyers
Claremont Resort
Berkeley, California
Sunday, May 21, 2000
11:00 A.M.

Thank you. And Good Morning. I want to thank your President, Jill Jasper, for inviting me to join you today at this lovely hotel and for going out of her way to accommodate my schedule. My task this morning is to deliver an address. What that means is that Congresswoman Lee has to do the real work, and I still get to have lunch. That's important because the first thing you learn as a member of the Supreme Court is that there is no free lunch. You are always expected to earn it. But, the more generous groups, like the Black Women Lawyers, sometimes give you a discount: you do an address instead of a speech.

So I thought I would just share with you some personal reflections about life, law and music. I know this may seem to be an oddly disjointed collection of topics, but as I grow older I see fiercer connections between seemingly unrelated ideas and events. This may be the beginning of wisdom. On the other hand, it may signal the onslaught of Alzheimer's. Only time will tell!

In his book, The Mind of God, physicist Paul Davies recounts an anecdote about a student who interrupts a lecture on the origins of the universe to proclaim that she knows better. The world she declares is really a flat plate resting on the back of a giant turtle. When asked by the lecturer what the turtle rests on, she replies: "It's turtles all the way down."[1] This story, Davies says, symbolizes the essential problem of those who search for ultimate answers to the mystery of existence. Where he asks can such a

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chain of reasoning end? We are either faced with an infinite regress or a superturtle that stands at the base of the tower unsupported. Davies goes on to speculate that the symmetry and precision and intelligibility of the universe weighs strongly in favor of a creative intelligence. That being the case, I propose to offer a new theory about what holds everything up. I am casting a vote for the Left Hand of God. I realize this is an idea which may require a bit more explanation. So, by way of explanation, I offer a biography and some reflections about thinking differently and how a structural conception (or the absence of it) changes everything.

The Biography

You see it occurs to me that the world may not have started with a bang. Maybe it was a jazz riff. An unmistakable boogie-woogie bass line. This is how my theory evolved. Not long ago I heard a program on NPR called Jazz Profiles. They devoted the entire segment to Mary Lou Williams, a jazz pianist and composer, described as the first internationally famous jazz artist who was not a vocalist. I had never heard her name. I doubt if you have either — unless you are a true jazz aficionado. She has become more famous in the 20 years since her death than she was during her lifetime. Yet, Mary Lou Williams began her performing career in 1916 at the age of six, began gigging with early Swing groups as a teenager, and is credited by many with being the bridge from boogie-woogie to be-bop. Her playing influenced performers as diverse as Art Tatum, Count Basie, and Nat "King" Cole. "Indeed, critics have called her the history of Jazz".[2] She was "the only major Jazz artist who lived and played through all the eras in the history and development of Jazz: The Spirituals, the Blues, . . . Kansas City Swing, Boogie-Woogie, Bop or Modern, [sacred music], and . . . even . . . Avante Garde."[3]

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Between 1929 and 1942, she was the musical director and piano player for Andy Kirk and the Clouds of Joy, one of the premier Kansas City bands of Kansas City's golden era. She got her start as an arranger and composer during the great days of the so-called "stride" piano players -- people like James P. Johnson, Fats Waller, and Jelly Roll Morton. In fact, the boogie-woogie player, Jack Howard, was one of her earliest influences. While she was still in kindergarten, Howard taught her the importance of a strong and loud left hand. This was the main characteristic of the stride piano. In those days when many bands did not have a drummer and the bass was unamplified, it was the piano that provided both tempo and bass. Thus, it was said that the piano was "holding everything up." Jazz musicians sometimes refer to this as bottom. It is their way of describing the foundation, the structure or framework on which everything else rests. Without that driving relentless beat, without the fullness supplied by those crashing lefthanded chords, the rest of the band lacks both tempo and contrast.

The front men had fame; the soloist got the glory, but it was the powerful left hand of the stride pianist that made the music happen. And as I was listening to some of the early compositions of Mary Lou Williams, I could feel the strength of her hand. Relentless as a locomotive. Steady as a heartbeat. Providing that steadiness required discipline, self-restraint, self-control and humility.

Listening to the powerful, beautiful, mysterious chords of Mary Lou Williams on a Sunday afternoon, I had this sudden insight: That the structure of music is the structure of everything. It is not, as the modern world seems to think, chaos that is creative. Bringing order out of chaos is the creative act. But only, and this is important, if the order does no more than anchor the soaring solos and make the song intelligible.

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Life, Law & The Universe

Does this lesson in musicology have anything to do with life and law? I think it does. The profile of Williams included excerpts of interviews of Williams, commentaries from other musicians about her accomplishments, and many examples of Williams's compositions being played by the lady herself. Thinking about, and hearing and feeling, this music, an odd but satisfying analogy came to mind. Perhaps because we think of new things in terms that are familiar, I found myself thinking this is exactly what good judges do. And, in a sense, it's exactly how they do it.

For much of our history we admired and venerated judges who exhibited what Mary Ann Glendon calls the classical virtues: impartiality, prudence, practical reason, mastery of a craft, and a sense of the legal system as a whole. The ability to preserve principled continuity while adopting the law to changed social and economic conditions was greatly prized; and the highest virtue was self-restraint. These judges of the old school were kindred spirits to the old stride piano players. They could lay down the beat and hold it steady. They could improvise and innovate without ever disconnecting from the solid foundation. Ms. Williams said she "changed her style with each period."[4] She was "always experimenting."[5] She changed her emphasis, but she never abandoned her roots. "The left hand gave you strength and a great beat in your head. You didn't have to stride after the [mid-thirties]. You could play rhythmic things on top because the beat was embedded in your head."[6]

For judges of the old school, like John Marshall, Holmes, Hand, and Frankfurter, the most important quality was humility. Frankfurter described it this way:

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> "What is essential . . . is that you get [judges] who bring to their task first and foremost, humility and an understanding of the range of the problems and of their own inadequacy in dealing with them, disinterestedness, and allegiance to nothing except the effort, amid tangled words and limited insights to find the path through precedent, through policy, through history, to the best judgment that fallible creatures can reach in that most difficult of all tasks: the achievement of justice . . . through reason called law."[7]

It was all about knowing the limits of the role, the limits of the law, and the limits of human beings. In marked contrast, the new paradigm celebrates adventuresomeness and hubris. The classical conception of the judicial role is viewed as too confining, boring, and above all insufficiently responsive to social problems. The classical ideal is being rapidly supplanted by the "image of the good judge as bold, creative, compassionate, result-oriented, and liberated from legal technicalities."[8]

The ideal of the good judge succumbs more and more to the cult of celebrity. Judges are no longer content with providing the steady and stable foundation. They want acclaim, adulation, stardom. And these may seem innocuous ambitions in a culture where every opportunity for notoriety is eagerly grasped and no indignity is too great if it will guarantee 15 minutes of fame and the paycheck that comes with it. Who wouldn't want to be Learned Hand; but more famous, Harlan Stone, winning every instant poll even if his colleagues won't sign his opinion; Justice Jackson as the guest host on Larry King Live. But judges cast in the role of entertainers or court jesters may not be the best thing for a democratic regime such as ours.

Morton Horwitz[9] says the early evolution of American law can be explained as a continuing struggle to provide assurance that law transcends politics. To separate law and politics has been a central theme of much of our legal and political thought. In the old world, American jurists sought to

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enshrine the rule of law — the conviction that a structure of impartial and self-executing norms existed, untainted by politics. "Law carried an unusual burden in this conception. It was hoped that it could provide a non-political cushion or buffer between state and society. Unless law could be rendered non-political, how could it avoid becoming simply an instrument of democratic politics?"[10]

In the new world, the judicial allegiance to principle, prudence, and moderation became the first casualty in the war waged by the theorists and the ideologues. "Safeguards against arbitrary power, resistance to total power, assurance of stable government which is responsive and capable of generating long term consent"[11] — these were all anathema to the architects of perfection. Law became not only an instrument of politics, it became the instrument of politically imposed perfection.

America's Constitution provided an 18th Century answer to the question of what to do about the status of the individual and the mode of government. Though the founders set out to establish good government "from reflection and choice,"[12] they also acknowledged the "limits of reason as applied to constitutional design,"[13] and wisely did not seek to invent the world anew on the basis of abstract principle; instead, they chose to rely on habits, customs, and principles derived from human experience and authenticated by tradition. They sought to limit government and thus to limit the villainous potential of self-interest amplified by the public sphere.

In the 1930's things began to change. Traditional morality lost ground to moral relativism. And the ideal of limited government gave way to the ideology of collectivism. Collectivism sought to answer a different question: how to achieve cosmic justice – sometimes referred to as social justice – a world of social and economic equality. Such an ambitious

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proposal sees no limit to man's capacity to reason. It presupposes a community can consciously design not only improved political, economic, and social systems but new and improved human beings as well. The pursuit of these goals required a new view of government and a new sort of judge — a decisionmaker convinced of the infallibility of human reason and the absolute sovereignty not of the rule of law but of the rule of judges. These judges viewed their paramount obligation as "doing the right thing." It is difficult to think that "doing the right thing" could ever be wrong. But the choice is not between doing right and doing wrong. The choice is between judges imposing their own view of what is right (and waiting for the applause) or judges committed resolutely to the much less glamorous task of holding everything up. What holds everything up can be invisible; unnoticed by the uninitiated; but deeply necessary.

As we cease to remember the music of our youth, the rhythm of our past becomes little more than a fading and erratic echo. If that indeed was what was holding everything up, we are in danger of losing more than the same old song.

I know this sounds impossibly far-fetched. But why should the conception of God as a jazz musician be less compelling than God as a mathematician or God as a computer programmer. Maybe his strong left hand has been sending a rollicking rhythm through the cosmos for eons, and when he lifts his fingers from the keys the song of the universe will collapse. You ought not to reject the idea out of hand. There could be a lot worse things than a God who likes to jam!

Thank you.

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[1] Davies, The Mind of God (1992) p. 223.

[2] http://www.New Jazz Archives (1997-1999) Eyeneer Music Archives.

[3] *Ibid.*

[4] O'Neil, Swinger With A Mission, Books & Arts (Dec. 7, 1979) pp. 30-31.

[5] Maroon, Mary Lou Williams Biography (1931-1942).

[6] *Ibid.*

[7] *Id.* at pp. 124-126.

[8] Glendon, A Nation Under Lawyers (1994) p. 152

[9] Horwitz, The Transformation of American Law 1870-1960 (1992).

[10] *Ibid.*

[11] Bickel, The Morality of Consent (1975) p.18.

[12] Hamilton, The Federalist Papers No. 1 (Rossiter ed. 1961) p. 33.

[13] Michael W. Spicer, *Public Administration and the Constitution: A Conflict in World Views* (Mar. 1, 1994) 24 American R. of Public Admin. 85 [1994 WL 2806423 at *10].

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Fifty Ways to Lose Your Freedom*
The Institute for Justice
Washington, D.C.
August 12, 2000
6:30 P.M.

Thank you. This has been a wonderful evening and I congratulate all of the participants. I would like to thank William ("Chip") Mellor and Clint Bolick for inviting me to join you — even though it is August. Just knowing that such a conference exists is a refreshment to my spirit. It is not often that I am in the company of so many people who speak my language. I appreciate Mr. Bolick's kind introduction and I applaud the Institute for laboring to keep alive an authentic conversation about the core principles of our regime. It is not an easy task in a world where all the words have lost their meaning.

A few preliminaries. First, I should warn you that today's discussion will be a mile wide, but only an inch deep. That's about all you can do in a speech. Second, the title of this meditation is Fifty Ways to Lose Your Freedom, which is a paraphrase of a Paul Simon tune. If you don't know who Paul Simon is, ask an old person. It will be a good way to get acquainted. The song tells the tale of a young man trying — though not too hard — to resist temptation and remain true to his first love while being advised by the source of temptation that . . . there must be 50 ways to leave your lover. When I began writing this speech, that phrase kept revolving in my mind.

In the last 100 years – and particularly in the last 30 – the Constitution, once the fixed chart of our aspirations, has been demoted to the status of a bad chain novel. Government has been transformed from a necessary evil to a nanny – benign, compassionate, and wise. Sometimes transformation is a good thing. Sometimes, though, it heralds not higher ground but rather, to

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all foundations for prudence and practical reason."[xvi] Thus, "the fatal error" of the Enlightenment is "the emancipation of the will from reason."[xvii] Similarly, the fatal error of those who repudiated the idea of natural law is the attempt to separate law from morality. "Law is rooted in a series of objective value judgments about morality or 'justice' or it is about nothing."[xviii]

Lord Hailsham adds: "Law is concerned with the compulsion of human beings by other human beings. To try and divorce such compulsion from conceptions of what is right and wrong is ultimately to justify tyranny in its most naked form."[xix]

While politics is the art of the possible and law must often be expedient, "the attempt to divorce law or legislation from an objective set of moral or spiritual values connected with right and wrong, just and unjust, good and bad, virtue and vice, however starry-eyed the proponents or advocates of such an attempt may be, is the precise heresy which has led to the major cruelties and disasters of the twentieth century."[xx]

All political ideologies involve the assertion of values and all values are derived from what we call the Natural Law, Traditional Morality, or the First Principles of Practical Reasoning. "There never has been and never will be, a radically new judgment of value in the history of the world. What purport to be new systems or [as they now call them] new 'ideologies,' all consist of fragments from [the natural law] arbitrarily wrenched from their context in the whole and then swollen to madness in their isolation, yet still owing to [natural law] alone such validity as they possess."[xxi] To put it another way, these so-called new values resemble natural law "as Satan resembles God. These bloodthirsty idols are proving to be far more exacting than the old gods of truth and justice."[xxii] The result, I believe, is an America the Constitution never contemplated.

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Aaron Wildavsky notes that the Madisonian world has now gone "topsy turvy" as factions, defined as groups "activated by some common interest adverse to the rights of other citizens or to the permanent and aggregate interests of the community,"[xxiii] have been transformed into sectors of public policy. "Indeed," says Wildavsky, "government now pays citizens to organize, lawyers to sue, and politicians to run for office. Soon enough, if current trends continue, government will become self-contained, generating (apparently spontaneously) the forces to which it responds."[xxiv]

Is this the fulfillment of the Founders' plan? Not exactly. Clearly, the American Revolution, like the French Revolution, is part of a rationalist tradition. But rationalism is an ambiguous term, subtle in its infinite manifestations. For present purposes it is sufficient to identify the critical differences. The American tradition accepted the limits of reason; the European tradition did not.

America's Constitution provided an 18th Century answer to the question of what to do about the status of the individual and the mode of government. Though the Founders set out to establish good government "from reflection and choice,"[xxv] they also acknowledged the "limits of reason as applied to constitutional design,"[xxvi] and wisely did not seek to invent the world anew on the basis of abstract principle; instead, they chose to rely on habits, customs, and principles derived from human experience and authenticated by tradition.

> "The Framers understood that the self-interest which in the private sphere contributes to the welfare of society — both in the sense of material well-being and in the social unity engendered by commerce — makes man a knave in the public sphere, the sphere of politics and group action. It is self-interest that leads individuals to form factions to try to expropriate the wealth of

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others through government and that constantly threatens social harmony."[xxvii]

There is nothing new, of course, in the idea that the Framers did not buy into the notion of human perfectibility. The political theory upon which our Constitution was organized reflected not an antirationalist conception of human capacity — but a narrower and, in my view, more realistic one. It could be characterized as a conception of man *after the fall.*

It was a quite opposite notion of humanity, of its fundamental nature and capacities, that animated the great concurrent event in the West in 1789 – the revolution in France. Out of that revolutionary holocaust – intellectually an improbable melding of Rousseau with Descartes – the powerful notion of abstract human rights was born. At the risk of being skewered by historians of ideas, I want to suggest that the belief in and the impulse toward human perfection, at least in the political life of a nation, is an idea whose arc can be traced from the Enlightenment, through the Terror, to Marx and Engels, to the Revolutions of 1917 and 1937. The latter date marks the triumph of our own socialist revolution.

Collectivism provided the 20th century answer to a question very different from the one our Constitution resolved. The new question was how to achieve cosmic justice – sometimes referred to as social justice – a world of perfect social and economic equality. Such an ambitious proposal sees no limit to man's capacity to reason. It presupposes a community can consciously design not only improved political, economic, and social systems, but new and improved human beings as well.

The great innovation of this millennium was equality before the law. The greatest fiasco — the attempt to guarantee equal outcomes for all people. Tom Bethell notes that the security of property — a security our Constitution

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sought to ensure — had to be devalued in order for collectivism to come of age. The ambitious project of socialism was nothing less than the "reformation of human nature. Intellectuals visualized a planned life without private property, mediated by the New Man."[xxviii] He never arrived. As John McGinnis persuasively argues: "There is simply a mismatch between collectivism on any large and enduring scale and our evolved nature. As Edward O. Wilson, the world's foremost expert on ants, remarked about Marxism, 'Wonderful theory. Wrong species.' "[xxix]

We continue to chip away at the foundations of our success. We dismissed natural law and morality because its unverifiable judgments were deemed inferior to reason. But, then, we drove reason itself from the camp because the most significant of life's questions defy empiricism. Kant compared a "purely empirical theory of law" to "the wooden head in Phaedrus' fable, which may be beautiful, but alas! has no brain."[xxx] Now we have nothing left but our passion.

This is a dilemma for any judge, but one especially acute for a supreme court judge. A court of last resort is supposed to do more than resolve individual disputes. Such courts ought to be building for the future, providing guidance, structure, stability — instilling confidence in the primacy of the rule of law. But, alas, the decisions of such courts, including my own, seem ever more ad hoc and expedient, perilously adrift on the roiling seas of feckless photo-op compassion and political correctness. And we are, by and large, captives of an intellectual world view that is completely antithetical to the kind of substantive limits an authentic historical interpretation of our constitutional traditions would impose. We are committed to doing the right thing. But with only our feelings to guide us, most of the time we cannot figure out what the right thing is.[xxxi]

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I know the idea that there is an extra constitutional dimension to constitutional law is heresy. And given our recent history, it is a very scary thought. But I am slowly coming to agree with Charles Fried's assessment: it is the hubris, carelessness, and lack of candor of judges that should concern us — not the label active or passive. If judges tell us honestly what they are doing, we do know something about the world view that animated the American Revolution and formed the basis of our constitutional documents. The Founders were committed to individual liberty. Liberty not license. And not openness. Certainly not an openness so extreme it bursts the mainspring of the regime. That mainspring is reason. An idea of reason that is both modest and practical. The Founders did not demand perfection of human beings or civil society. They seemed to understand the essentially totalitarian heart of all dreams of utopia. One man's perfection is another's holocaust. Their ideas — expressed with precision and detail — will allow us to gauge the bona fides of judges audacious enough to invoke higher law.

On those rare occasions, we will have to face the countermajoritarian difficulty squarely. It must be part of the design. Individual liberty cannot be preserved if the majority's will must always triumph.

My view is admittedly a bit skewed. My heritage includes not only the middle passage but the trail of tears; not only the rhythms of midnight trains but the terrors of midnight riders; Jim Crow and Jim Dandy; whited sepulchres and colored fountains.

Anyone with that kind of history will tell you quite emphatically that the positive law is not enough. Never enough. When I was growing up the positive law declared that some people were more equal than others. But that law, judged by a higher law, was wrong.

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And the civil rights movement that firmly established that proposition was deeply rooted in the natural law, natural rights tradition. By demanding the natural and political rights which belonged to them as human beings, Black Americans in the early civil rights movement firmly allied themselves with the natural law foundations of the Constitution. Only natural law offers an alternative to might makes right and accounts for man's "unrelenting quest to rise above the 'letter of the law' to the realm of the spirit."[xxxii]

I know it is fashionable these days to dismiss the Founders as *stale, pale, and male*; to speak harshly and cynically of America's corrupt constitutional tradition. But, this is a cheap shot. One which does not do justice to the principles embodied in our founding documents. These men deserve our admiration and respect. They were human. They were flawed. Gertrude Himmelfarb says hypocrisy is the homage vice pays to virtue. But, whether the result of glorious accident, inspired mistake, Machiavellian machination or well-considered master plan, the Founders built better than perhaps they knew. They built on the right foundation and founded a regime which created the potential for moral freedom, material prosperity, and social generosity. "[W]hat the American revolution instituted was a rule of law, a preference for restraint, a refuge from the rampaging presumptions" of those Sowell refers to derisively as the "morally anointed."[xxxiii]

Lincoln long ago foresaw that America's achievement might be jeopardized from within by those anxious to "strike a blow" against free government. Men of ambition would continue to seek to gratify their "ruling passion." Such ambition, Lincoln warned, "thirsts and burns for distinction; and, if possible, it will have it, whether at the expense of emancipating slaves, or enslaving free men."[xxxiv] Both Lincoln and Tocqueville apparently did anticipate that we might cheerfully place the shackles around our own necks.

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As Lincoln noted: "If destruction be our lot, we must ourselves be its author and finisher. As a nation of freemen, we must live through all time, or die by suicide."[xxxv]

We have had to decide before: whether to be slaves or free.

Freedom never has been easy. Not to obtain. Not to sustain. In the last 100 years we have let the government buy our birthright with our own tax money. Freedom requires us to have courage; to live with our own convictions; to question and struggle and strive. And to fail. And Fail. Recently, I saw a quote attributed to Samuel Beckett. He asks: "Ever tried? Ever failed?" Well, no matter. He says, "Try again. Fail better." Trying to live as free people is always going to be a struggle. But we should commit ourselves to trying and failing, and trying again. To failing better until we really do become like that city on the hill, which offered the world salvation.

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* I am, of course, indebted to an old Paul Simon song for this felicitous phrase.

i Woodrow Wilson, Democracy and Efficiency, Atlantic Monthly (1901).

ii F. A. Hayek, The Road to Serfdom (U. of Chicago Press 1994).

iii Tom Bethell, *Property Rights, Prosperity and 1,000 Years of Lessons,* Wall Street J. (Dec. 27, 1999) p. A19 (Bethell); and see James W. Ely, The Guardian of Every Other Right (Oxford U. Press 1992) p. 26.

iv *Ibid.*

v *Ibid.*

vi Ayn Rand, Capitalism the Unkown Ideal (New Am. Lib. 1966) pp. 4-5.

vii Harold McKinnon, The Higher Law, address to Ninth Circuit judges (1946) p. 1 (McKinnon).

viii *Id.* at p. 16.

ix Clint Bolick, Unfinished Business (Pacific Research Inst. 1990) p. 2.

x Lord Hailsham, Modern Reflections on the Natural Law, address to the Canon Law Trust Society (1978) (Hailsham).

xi d'Entreves, Natural Law: An Introduction to Legal Philosophy (Hutchinson U. Lib. 1951) p. 7 (d'Entreves).

xii *Id.* at p. 86, quoting Thomas Aquinas, Summa Theologica

xiii *Id.* at p. 95.

xiv *Id.* at p. 105.

xv *Id.* at p. 75.

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[xvi] Stanley Rosen, Rethinking the Enlightenment, 7 Common Knowledge (Winter 1998) 104, 106.

[xvii] *Id.* at p. 114.

[xviii] Hailsham, op cit. *supra*, at p. 3.

[xix] *Ibid.*

[xx] *Ibid.*

[xxi] C.S. Lewis, The Abolition of Man (First Touchstone ed. 1996) pp. 55-56.

[xxii] d'Entreves, op cit. *supra*, at p. 17.

[xxiii] Golembiewski & Wildavsky, The Cost of Federalism, Bare Bones: Putting Flesh on the Skeleton of American Federalism (1984) 67, 73.

[xxiv] *Ibid.*

[xxv] Hamilton, The Federalist Papers No. 1 (Rossiter ed. 1961) p. 33.

[xxvi] Michael W. Spicer, *Public Administration and the Constitution: A Conflict in World Views* (Mar. 1, 1994) 24 American R. of Public Admin. 85 [1994 WL 2806423 at *10].

[xxvii] John O. McGinnis, *The Original Constitution and Our Origins* (1996) 19 Harv. J.L. & Pub. Policy 251, 253, fn. omitted (McGinnis).

[xxviii] Bethell, *supra*, at p. A19.

[xxix] McGinnis, op. cit. *supra*, at p. 258, quoting Josh Getlin, Natural Wonder: At Heart, Edward Wilson's an Ant Man, L.A. Times (Oct. 21, 1994) p. E1.

[xxx] d'Entreves, Natural Law, *supra*, at p. 115.

[xxxi] See Jean Francois Revel, The Flight From Truth (Random House N.Y. 1991) p. xvi.

[xxxii] d'Entreves, Natural Law, *supra*, at p. 121.

[xxxiii] Tom Sowell, The Quest for Cosmic Justice (The Free Press 1999) p. 146.

[xxxiv] Abraham Lincoln, address to the Young Men's Lyceum of Springfield, Illinois, January 27, 1838.

[xxxv] *Ibid.*

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put a different gloss on Pat Moynihan's memorable phrase, defining democracy down.

My grandparents' generation thought being on the government dole was disgraceful, a blight on the family's honor. Today's senior citizens blithely cannibalize their grandchildren because they have a right to get as much "free" stuff as the political system will permit them to extract. What happened to the old time glory of constitutional democracy, which Woodrow Wilson praised for "the emphasis it puts on character; for its tendency to exalt the purposes of the average man to some high level of endeavor; for its just principles of common assent in matters in which all are concerned; for its ideals of duty and its sense of brotherhood"?[i]

I have bad news. Not only was the revolution not televised; most of us did not hear the radio broadcast; we missed it entirely.

Writing 50 years ago, F.A. Hayek warned us that a centrally planned economy is "The Road to Serfdom."[ii] He was right, of course; but the intervening years have shown us that there are many roads to serfdom. In fact, it now appears that human nature is so constituted that, as in the days of empire all roads led to Rome; in the heyday of liberal democracy, all roads lead to slavery. If Hayek was writing today he would have to call his book "50 Ways to Lose Your Freedom." Consider these lyrics: "Climb on somebody's back, Jack; just believe every lie, Sly; plan the perfect man, Stan; If you crave slavery, go to the back of the bus, Gus. You don't have to discuss much; tell the powers that be, Lee; they can throw away the key, you don't want to be free!" Well . . . Paul Simon probably has nothing to worry about. I'm just trying to make a point. Most of us no longer find slavery abhorrent. We embrace it. We demand more. Big government is not just the opiate of the masses. It is the opiate. The drug of choice for multinational

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corporations and single moms, for regulated industries and rugged Midwestern farmers, and militant senior citizens.

The prevalence and permanence of this newly fledged feudal consciousness is a puzzle that led me — by a very circuitous path — to a new understanding of (or at least a new way of thinking about) the judicial role. As a conservative judge, I initially accepted the conventional wisdom that substantive due process was a myth invented by judicial activists who were up to no good. You all know the drill. Substantive due process is an oxymoron and Lochnerism is the strongest pejorative known to American law.

There are at least two problems with dismissing the idea of substance in the due process clause. First, substantive due process is still around, cleverly disguised as fundamental rights jurisprudence. Second, even conservative judges who take the rule of law seriously are appalled by legislative actions which violate the whole spirit, if not quite the letter, of provisions clearly designed to limit government. And most significantly, if we can invoke no ultimate limits on the power of government, a democracy is inevitably transformed into a Kleptocracy — a license to steal, a warrant for oppression.

Much to my surprise, when I actually began to investigate the question, I found a small but credible body of scholarship suggesting that, in our early history, the due process clause was viewed as a restraint on government, fashioned, in part, to protect the rights of property owners. Apparently, the colonists saw in the due process clause a guarantee which had a wide, varied, and indefinite content. The concept of due process like the words "the law of the land" in the Magna Carta put some liberties and some property interests beyond the power of government. Moreover, the language of the

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Constitution suggests the drafters clearly distinguished between the limited framework of that document and the whole law.

This revelation was what's known in the precise, technical language of the judge's trade as an "uh-oh."

It slowly dawned on me that the problem may not be judicial activism. The problem may be the world view — amounting to an altered political and cultural consciousness — out of which judges now fashion their decisions.

At its founding and throughout its early history, this regime revered private property. The American philosophy of the Rights of Man relied heavily on the indissoluble connection between rationality, property, freedom, and justice. The Founders viewed the right of property as "the guardian of every other right" and reasoned that "to deprive a people of this right is in fact to deprive them of their liberty."[iii] The idea of constitutional government is deceptively simple: the government cannot legitimately infringe upon our rights even if the majority votes to do so.

But, by 1890, attitudes had changed radically enough for Alfred Marshall, the teacher of John Maynard Keynes, to make "the astounding claim that the need for private property 'reaches no deeper than the qualities of human nature.' "[iv] A hundred years later came Milton Friedman's laconic reply: " 'I would say that goes pretty deep.' "[v] Marshall's statement, however, signaled a seachange: a political and cultural shift from the American vision of humans as free and creative beings entitled to enjoy the fruits of individual effort back to the tribal view of man which continues to dominate European political philosophy. "Europe's predominant idea of emancipation consisted of changing the concept of man as a slave to the absolute state embodied by the king, to the concept of man as a slave to the absolute state as embodied by 'the people' — i.e., switching from slavery to a

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tribal chieftain into slavery to the tribe."[vi] America sought to make government subservient to the people; the collectivist impulse which gained preeminence in Europe sought to keep people subservient to the government.

It is, I believe, this shift in world view which causes conservatives to dread judicial activism. In short, we have been fixated on the structure's gingerbread trim when we should have been focusing on its foundations.

Speaking to a conference of Ninth Circuit judges in San Francisco in 1946, Harold McKinnon identified a central problem with the socialist mystique. He understood the threat of the essentially antidemocratic and totalitarian political and legal philosophies gaining ground in American universities. Such teachings, McKinnon believed, denied the essential elements of a regime devoted to the preservation of natural rights.

> "[This teaching] denies that there is a moral law which is inherent in human nature and which is therefore immutable and to which all man-made laws to be valid must conform. It denies that by virtue of this law man possesses certain rights which are inherent and inalienable and therefore superior to the authority of the state. It denies that the purpose of government is to secure these inherent inalienable rights."[vii]

I take issue with one part of McKinnon's catechism. He says the teachings are undemocratic. While it is true that natural law was a necessary precursor to the good constitutional republic; democracy need not be a good regime — as we are proving every day. Freedom and democracy are not synonymous. Indeed, one of the grave errors of American foreign policy is the assumption that merely installing the forms of a regime like ours — without its foundation — will automatically lead to freedom, stability, and prosperity.

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McKinnon correctly concluded that adherence to natural law is the essential element of the American birthright.

> "For if there is no higher law, there is no basis for saying that any man-made law is unjust . . . and, in such case, the ultimate reason for things, as Justice Holmes himself conceded, is force. If there is no natural law, there are no natural rights; and if there are no natural rights, the Bill of Rights is a delusion, and everything which a man possesses — his life, his liberty and his property — are held by sufferance of government, and in that case it is inevitable that government will some day find it expedient to take away what is held by such a title as that. And if there are no eternal truths, if everything changes, everything, then we may not complain when the standard of citizenship changes from freedom to servility and when democracy relapses into tyranny."[viii]

Today these words sound strange to our ears. McKinnon could make such a forceful statement because he and his audience shared a common understanding. They accepted the necessary connection between natural law and natural rights and the centrality of natural law to any effective scheme of limited government. In short, McKinnon and his audience of judges shared a common devotion to a set of *first principles* — what Clint Bolick describes as that immutable body of law derived from the nature of people as rational human beings — "the law of nature that has from the beginning of human beings nurtured their progress and development."[ix]

In the context of law or morality, "natural" means "something which can be apprehended by natural man, by the use of faculties with which he is naturally endowed, including reason and the moral sense, and which does not require for its authentication more than reflection, thought, and the diligent pursuit of truth by practice, self-discipline, and attention to detail."[x]

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Let me give you an example from an unlikely source: a comedy routine of Chris Rock's. He is talking about taxes and government services. He says: "The messed up thing about taxes is you don't 'pay' taxes. The government TAKES them. You get your check and money is GONE! It was not an option! That ain't a payment, that's a JACK! I been TAX JACKED! . . . [The] worst part about it, we pay taxes for [stuff] we don't even use . . . . Why are black people paying Social Security? I won't get the money till I'm 65 . . . . Meanwhile, the average black man dies at 54. Hypertension, high blood pressure, police. . . . I used to work at McDonald's making minimum wage. . . . I would get $200 a week and they would take out $50 in taxes. That's a lot of money if you only making $200. . . . What do you get with that $50? All the free street light in the world. As far as I am concerned, give everybody a candle. Just give me back my $50."

As far as I know, Chris Rock is not a lawyer; he is not a legal philosopher; and I doubt that he is a conservative. But he is using his experience, his observations, and his rational faculties to make a judgment about fairness and justice.

Natural law seems to come naturally to human beings. We almost invariably describe events as fair or unfair, sporting or not sporting, just or unjust. If memory serves, "it's not fair" is the first phrase our children learn after they master the word "no." If anything, we may make such value judgments too casually and with too little appreciation of the deep metaphysical implications of our language.

Nevertheless, for thousands of years, the idea of natural law played a dominant role in both philosophy and history. "It was conceived as the ultimate measure of right and wrong, as the pattern of the good life. . . . It

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provided a potent incentive to reflection, the touchstone of existing institutions, the justification of conservatism as well as revolution."[xi]

Cicero's eloquent expression of this idea should be committed to memory by every law student:

> "True law is Reason, right and natural, commanding people to fulfill their obligations and prohibiting and deterring them from doing wrong. Its validity is universal; it is immutable and eternal. Its commands and prohibitions apply effectively to good men, and those uninfluenced by them are bad. Any attempt to supersede this law, to repeal any part of it, is sinful; to cancel it entirely is impossible. Neither the Senate nor the Assembly can exempt us from its demands; we need no interpreter or expounder of it but ourselves. There will not be one law at Rome, one at Athens, or one now and one later, but all nations will be subject all the time to this one changeless and everlasting law." (De Re Publica, III, 33.)

I suspect it is the use of words, like unchanging, everlasting, immutable, that was (and is) also natural law's greatest vulnerability. The claim to fame of modern jurisprudence is precisely that it does not purport to have a monopoly on truth. Medieval scholars devoted much energy to demonstrating the demarcation between law and morals because they did not want morals reduced to narrow legal categories. They did not deny the close connection between law and morals (they would have argued that life in society is a moral duty and that there is no aspect of life to which we can be morally indifferent), but argued morality is (and should remain) broader than legal duty. "[T]he laws of men do not primarily aim at promoting virtue, but only at securing peaceful living together; they do not forbid all that is evil, but only that which imperils society; they do not command all that is good, but only that which pertains to the general welfare."[xii]

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"Natural law is the outcome of man's quest for an absolute standard of justice."[xiii] The breach between law and morals, the assertion that one has nothing to do with the other, is the essential feature of modern jurisprudence. Positivism is perhaps the inevitable result of the rationalist view that exalts the lawgiver. For the positivists, law is defined by the will of the lawmakers and the truth of legal propositions is proven by the fact the provision has been duly enacted by the appropriate authority. Positivism, in turn, paved the way for a slew of other adventures in legal criticism: legal realism, historical, feminist, critical legal studies, and even law and economics.

To the extent the Enlightenment sought to substitute the paradigm of reason for faith, custom or tradition, it failed to provide a rational explanation of the significance of human life. It thus led, in a sort of ultimate irony, to the repudiation of reason.[xiv] Rationalism pushed to its limits consigns all that is not objectively verifiable, i.e., all that is not mathematical or scientific, to the realm of rhetoric. Thus, it reduces truth to a matter of perspective; and makes all perspectives equal. And since our choices can only be justified rhetorically — that is by reference to compassion or philanthropy or utility — even equality is debased, reduced to the equal right of all desires to be satisfied. In this brave new world, the assertion of a perspective becomes its justification. The claim is that a particular perspective serves the general welfare. What is really served is the will to power. "There can be little room left for old-fashioned discussions about the nature of justice and the essence of law when human will is made the supreme arbiter of all human values."[xv]

I am glossing over a complicated evolution, but the important point here is that positivism exalts the lawgiver because from the positivist's point of view it is the only rational thing to do. However, "[t]he repudiation of metaphysics, religion, and tradition . . . leads inevitably to the destruction of

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Brett

Fifty Ways to Lose Your Freedom*
The Institute for Justice
Washington, D.C.
August 12, 2000
6:30 P.M.

Thank you. This has been a wonderful evening and I congratulate all of the participants. I would like to thank William ("Chip") Mellor and Clint Bolick for inviting me to join you — even though it is August. Just knowing that such a conference exists is a refreshment to my spirit. It is not often that I am in the company of so many people who speak my language. I appreciate Mr. Bolick's kind introduction and I applaud the Institute for laboring to keep alive an authentic conversation about the core principles of our regime. It is not an easy task in a world where all the words have lost their meaning.

A few preliminaries. First, I should warn you that today's discussion will be a mile wide, but only an inch deep. That's about all you can do in a speech. Second, the title of this meditation is Fifty Ways to Lose Your Freedom, which is a paraphrase of a Paul Simon tune. If you don't know who Paul Simon is, ask an old person. It will be a good way to get acquainted. The song tells the tale of a young man trying — though not too hard — to resist temptation and remain true to his first love while being advised by the source of temptation that . . . there must be 50 ways to leave your lover. When I began writing this speech, that phrase kept revolving in my mind.

In the last 100 years – and particularly in the last 30 – the Constitution, once the fixed chart of our aspirations, has been demoted to the status of a bad chain novel. Government has been transformed from a necessary evil to a nanny – benign, compassionate, and wise. Sometimes transformation is a good thing. Sometimes, though, it heralds not higher ground but rather, to

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all foundations for prudence and practical reason."[xvi] Thus, "the fatal error" of the Enlightenment is "the emancipation of the will from reason."[xvii] Similarly, the fatal error of those who repudiated the idea of natural law is the attempt to separate law from morality. "Law is rooted in a series of objective value judgments about morality or 'justice' or it is about nothing."[xviii]

Lord Hailsham adds: "Law is concerned with the compulsion of human beings by other human beings. To try and divorce such compulsion from conceptions of what is right and wrong is ultimately to justify tyranny in its most naked form."[xix]

While politics is the art of the possible and law must often be expedient, "the attempt to divorce law or legislation from an objective set of moral or spiritual values connected with right and wrong, just and unjust, good and bad, virtue and vice, however starry-eyed the proponents or advocates of such an attempt may be, is the precise heresy which has led to the major cruelties and disasters of the twentieth century."[xx]

All political ideologies involve the assertion of values and all values are derived from what we call the Natural Law, Traditional Morality, or the First Principles of Practical Reasoning. "There never has been and never will be, a radically new judgment of value in the history of the world. What purport to be new systems or [as they now call them] new 'ideologies,' all consist of fragments from [the natural law] arbitrarily wrenched from their context in the whole and then swollen to madness in their isolation, yet still owing to [natural law] alone such validity as they possess."[xxi] To put it another way, these so-called new values resemble natural law "as Satan resembles God. These bloodthirsty idols are proving to be far more exacting than the old gods of truth and justice."[xxii] The result, I believe, is an America the Constitution never contemplated.

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Aaron Wildavsky notes that the Madisonian world has now gone "topsy turvy" as factions, defined as groups "activated by some common interest adverse to the rights of other citizens or to the permanent and aggregate interests of the community,"[xxiii] have been transformed into sectors of public policy. "Indeed," says Wildavsky, "government now pays citizens to organize, lawyers to sue, and politicians to run for office. Soon enough, if current trends continue, government will become self-contained, generating (apparently spontaneously) the forces to which it responds."[xxiv]

Is this the fulfillment of the Founders' plan? Not exactly. Clearly, the American Revolution, like the French Revolution, is part of a rationalist tradition. But rationalism is an ambiguous term, subtle in its infinite manifestations. For present purposes it is sufficient to identify the critical differences. The American tradition accepted the limits of reason; the European tradition did not.

America's Constitution provided an 18th Century answer to the question of what to do about the status of the individual and the mode of government. Though the Founders set out to establish good government "from reflection and choice,"[xxv] they also acknowledged the "limits of reason as applied to constitutional design,"[xxvi] and wisely did not seek to invent the world anew on the basis of abstract principle; instead, they chose to rely on habits, customs, and principles derived from human experience and authenticated by tradition.

> "The Framers understood that the self-interest which in the private sphere contributes to the welfare of society — both in the sense of material well-being and in the social unity engendered by commerce — makes man a knave in the public sphere, the sphere of politics and group action. It is self-interest that leads individuals to form factions to try to expropriate the

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wealth of others through government and that constantly threatens social harmony."[xxvii]

There is nothing new, of course, in the idea that the Framers did not buy into the notion of human perfectibility. The political theory upon which our Constitution was organized reflected not an antirationalist conception of human capacity — but a narrower and, in my view, more realistic one. It could be characterized as a conception of man *after the fall.*

It was a quite opposite notion of humanity, of its fundamental nature and capacities, that animated the great concurrent event in the West in 1789 – the revolution in France. Out of that revolutionary holocaust – intellectually an improbable melding of Rousseau with Descartes – the powerful notion of abstract human rights was born. At the risk of being skewered by historians of ideas, I want to suggest that the belief in and the impulse toward human perfection, at least in the political life of a nation, is an idea whose arc can be traced from the Enlightenment, through the Terror, to Marx and Engels, to the Revolutions of 1917 and 1937. The latter date marks the triumph of our own socialist revolution.

Collectivism provided the 20th century answer to a question very different from the one our Constitution resolved. The new question was how to achieve cosmic justice – sometimes referred to as social justice – a world of perfect social and economic equality. Such an ambitious proposal sees no limit to man's capacity to reason. It presupposes a community can consciously design not only improved political, economic, and social systems, but new and improved human beings as well.

The great innovation of this millennium was equality before the law. The greatest fiasco — the attempt to guarantee equal outcomes for all people. Tom Bethell notes that the security of property — a security our Constitution

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sought to ensure — had to be devalued in order for collectivism to come of age. The ambitious project of socialism was nothing less than the "reformation of human nature. Intellectuals visualized a planned life without private property, mediated by the New Man."[xxviii] He never arrived. As John McGinnis persuasively argues: "There is simply a mismatch between collectivism on any large and enduring scale and our evolved nature. As Edward O. Wilson, the world's foremost expert on ants, remarked about Marxism, 'Wonderful theory. Wrong species.' "[xxix]

We continue to chip away at the foundations of our success. We dismissed natural law and morality because its unverifiable judgments were deemed inferior to reason. But, then, we drove reason itself from the camp because the most significant of life's questions defy empiricism. Kant compared a "purely empirical theory of law" to "the wooden head in Phaedrus' fable, which may be beautiful, but alas! has no brain."[xxx] Now we have nothing left but our passion.

This is a dilemma for any judge, but one especially acute for a supreme court judge. A court of last resort is supposed to do more than resolve individual disputes. Such courts ought to be building for the future, providing guidance, structure, stability — instilling confidence in the primacy of the rule of law. But, alas, the decisions of such courts, including my own, seem ever more ad hoc and expedient, perilously adrift on the roiling seas of feckless photo-op compassion and political correctness. And we are, by and large, captives of an intellectual world view that is completely antithetical to the kind of substantive limits an authentic historical interpretation of our constitutional traditions would impose. We are committed to doing the right thing. But with only our feelings to guide us, most of the time we cannot figure out what the right thing is.[xxxi]

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I know the idea that there is an extra constitutional dimension to constitutional law is heresy. And given our recent history, it is a very scary thought. But I am slowly coming to agree with Charles Fried's assessment: it is the hubris, carelessness, and lack of candor of judges that should concern us — not the label active or passive. If judges tell us honestly what they are doing, we do know something about the world view that animated the American Revolution and formed the basis of our constitutional documents. The Founders were committed to individual liberty. Liberty not license. And not openness. Certainly not an openness so extreme it bursts the mainspring of the regime. That mainspring is reason. An idea of reason that is both modest and practical. The Founders did not demand perfection of human beings or civil society. They seemed to understand the essentially totalitarian heart of all dreams of utopia. One man's perfection is another's holocaust. Their ideas — expressed with precision and detail — will allow us to gauge the bona fides of judges audacious enough to invoke higher law.

On those rare occasions, we will have to face the countermajoritarian difficulty squarely. It must be part of the design. Individual liberty cannot be preserved if the majority's will must always triumph.

My view is admittedly a bit skewed. My heritage includes not only the middle passage but the trail of tears; not only the rhythms of midnight trains but the terrors of midnight riders; Jim Crow and Jim Dandy; whited sepulchres and colored fountains.

Anyone with that kind of history will tell you quite emphatically that the positive law is not enough. Never enough. When I was growing up the positive law declared that some people were more equal than others. But that law, judged by a higher law, was wrong.

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And the civil rights movement that firmly established that proposition was deeply rooted in the natural law, natural rights tradition. By demanding the natural and political rights which belonged to them as human beings, Black Americans in the early civil rights movement firmly allied themselves with the natural law foundations of the Constitution. Only natural law offers an alternative to might makes right and accounts for man's "unrelenting quest to rise above the 'letter of the law' to the realm of the spirit."[xxxii]

I know it is fashionable these days to dismiss the Founders as *stale, pale, and male*; to speak harshly and cynically of America's corrupt constitutional tradition. But, this is a cheap shot. One which does not do justice to the principles embodied in our founding documents. These men deserve our admiration and respect. They were human. They were flawed. Gertrude Himmelfarb says hypocrisy is the homage vice pays to virtue. But, whether the result of glorious accident, inspired mistake, Machiavellian machination or well-considered master plan, the Founders built better than perhaps they knew. They built on the right foundation and founded a regime which created the potential for moral freedom, material prosperity, and social generosity. "[W]hat the American revolution instituted was a rule of law, a preference for restraint, a refuge from the rampaging presumptions" of those Sowell refers to derisively as the "morally anointed."[xxxiii]

Lincoln long ago foresaw that America's achievement might be jeopardized from within by those anxious to "strike a blow" against free government. Men of ambition would continue to seek to gratify their "ruling passion." Such ambition, Lincoln warned, "thirsts and burns for distinction; and, if possible, it will have it, whether at the expense of emancipating slaves, or enslaving free men."[xxxiv] Both Lincoln and Tocqueville apparently did anticipate that we might cheerfully place the shackles around our own necks.

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As Lincoln noted: "If destruction be our lot, we must ourselves be its author and finisher. As a nation of freemen, we must live through all time, or die by suicide."[xxxv]

We have had to decide before: whether to be slaves or free.

Freedom never has been easy. Not to obtain. Not to sustain. In the last 100 years we have let the government buy our birthright with our own tax money. Freedom requires us to have courage; to live with our own convictions; to question and struggle and strive. And to fail. And Fail. Recently, I saw a quote attributed to Samuel Beckett. He asks: "Ever tried? Ever failed?" Well, no matter. He says, "Try again. Fail better." Trying to live as free people is always going to be a struggle. But we should commit ourselves to trying and failing, and trying again. To failing better until we really do become like that city on the hill, which offered the world salvation.

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* I am, of course, indebted to an old Paul Simon song for this felicitous phrase.

i Woodrow Wilson, Democracy and Efficiency, Atlantic Monthly (1901).

ii F. A. Hayek, The Road to Serfdom (U. of Chicago Press 1994).

iii Tom Bethell, *Property Rights, Prosperity and 1,000 Years of Lessons,* Wall Street J. (Dec. 27, 1999) p. A19 (Bethell); and see James W. Ely, The Guardian of Every Other Right (Oxford U. Press 1992) p. 26.

iv *Ibid.*

v *Ibid.*

vi Ayn Rand, Capitalism the Unkown Ideal (New Am. Lib. 1966) pp. 4-5.

vii Harold McKinnon, The Higher Law, address to Ninth Circuit judges (1946) p. 1 (McKinnon).

viii *Id.* at p. 16.

ix Clint Bolick, Unfinished Business (Pacific Research Inst. 1990) p. 2.

x Lord Hailsham, Modern Reflections on the Natural Law, address to the Canon Law Trust Society (1978) (Hailsham).

xi d'Entreves, Natural Law: An Introduction to Legal Philosophy (Hutchinson U. Lib. 1951) p. 7 (d'Entreves).

xii *Id.* at p. 86, quoting Thomas Aquinas, Summa Theologica

xiii *Id.* at p. 95.

xiv *Id.* at p. 105.

xv *Id.* at p. 75.

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[xvi] Stanley Rosen, Rethinking the Enlightenment, 7 Common Knowledge (Winter 1998) 104, 106.

[xvii] *Id.* at p. 114.

[xviii] Hailsham, op cit. *supra*, at p. 3.

[xix] *Ibid.*

[xx] *Ibid.*

[xxi] C.S. Lewis, The Abolition of Man (First Touchstone ed. 1996) pp. 55-56.

[xxii] d'Entreves, op cit. *supra*, at p. 17.

[xxiii] Golembiewski & Wildavsky, The Cost of Federalism, Bare Bones: Putting Flesh on the Skeleton of American Federalism (1984) 67, 73.

[xxiv] *Ibid.*

[xxv] Hamilton, The Federalist Papers No. 1 (Rossiter ed. 1961) p. 33.

[xxvi] Michael W. Spicer, *Public Administration and the Constitution: A Conflict in World Views* (Mar. 1, 1994) 24 American R. of Public Admin. 85 [1994 WL 2806423 at *10].

[xxvii] John O. McGinnis, *The Original Constitution and Our Origins* (1996) 19 Harv. J.L. & Pub. Policy 251, 253, fn. omitted (McGinnis).

[xxviii] Bethell, *supra*, at p. A19.

[xxix] McGinnis, op. cit. *supra*, at p. 258, quoting Josh Getlin, Natural Wonder: At Heart, Edward Wilson's an Ant Man, L.A. Times (Oct. 21, 1994) p. E1.

[xxx] d'Entreves, Natural Law, *supra*, at p. 115.

[xxxi] See Jean Francois Revel, The Flight From Truth (Random House N.Y. 1991) p. xvi.

[xxxii] d'Entreves, Natural Law, *supra*, at p. 121.

[xxxiii] Tom Sowell, The Quest for Cosmic Justice (The Free Press 1999) p. 146.

[xxxiv] Abraham Lincoln, address to the Young Men's Lyceum of Springfield, Illinois, January 27, 1838.

[xxxv] *Ibid.*

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put a different gloss on Pat Moynihan's memorable phrase, defining democracy down.

My grandparents' generation thought being on the government dole was disgraceful, a blight on the family's honor. Today's senior citizens blithely cannibalize their grandchildren because they have a right to get as much "free" stuff as the political system will permit them to extract. What happened to the old time glory of constitutional democracy, which Woodrow Wilson praised for "the emphasis it puts on character; for its tendency to exalt the purposes of the average man to some high level of endeavor; for its just principles of common assent in matters in which all are concerned; for its ideals of duty and its sense of brotherhood"?[i]

I have bad news. Not only was the revolution not televised; most of us did not hear the radio broadcast; we missed it entirely.

Writing 50 years ago, F.A. Hayek warned us that a centrally planned economy is "The Road to Serfdom."[ii] He was right, of course; but the intervening years have shown us that there are many roads to serfdom. In fact, it now appears that human nature is so constituted that, as in the days of empire all roads led to Rome; in the heyday of liberal democracy, all roads lead to slavery. If Hayek was writing today he would have to call his book "50 Ways to Lose Your Freedom." Consider these lyrics: "Climb on somebody's back, Jack; just believe every lie, Sly; plan the perfect man, Stan; If you crave slavery, go to the back of the bus, Gus. You don't have to discuss much; tell the powers that be, Lee; they can throw away the key, you don't want to be free!" Well . . . Paul Simon probably has nothing to worry about. I'm just trying to make a point. Most of us no longer find slavery abhorrent. We embrace it. We demand more. Big government is not just the opiate of the masses. It is the opiate. The drug of choice for multinational

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corporations and single moms, for regulated industries and rugged Midwestern farmers, and militant senior citizens.

The prevalence and permanence of this newly fledged feudal consciousness is a puzzle that led me — by a very circuitous path — to a new understanding of (or at least a new way of thinking about) the judicial role. As a conservative judge, I initially accepted the conventional wisdom that substantive due process was a myth invented by judicial activists who were up to no good. You all know the drill. Substantive due process is an oxymoron and Lochnerism is the strongest pejorative known to American law.

There are at least two problems with dismissing the idea of substance in the due process clause. First, substantive due process is still around, cleverly disguised as fundamental rights jurisprudence. Second, even conservative judges who take the rule of law seriously are appalled by legislative actions which violate the whole spirit, if not quite the letter, of provisions clearly designed to limit government. And most significantly, if we can invoke no ultimate limits on the power of government, a democracy is inevitably transformed into a Kleptocracy — a license to steal, a warrant for oppression.

Much to my surprise, when I actually began to investigate the question, I found a small but credible body of scholarship suggesting that, in our early history, the due process clause was viewed as a restraint on government, fashioned, in part, to protect the rights of property owners. Apparently, the colonists saw in the due process clause a guarantee which had a wide, varied, and indefinite content. The concept of due process like the words "the law of the land" in the Magna Carta put some liberties and some property interests beyond the power of government. Moreover, the language

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of the Constitution suggests the drafters clearly distinguished between the limited framework of that document and the whole law.

This revelation was what's known in the precise, technical language of the judge's trade as an "uh-oh."

It slowly dawned on me that the problem may not be judicial activism. The problem may be the world view — amounting to an altered political and cultural consciousness — out of which judges now fashion their decisions.

At its founding and throughout its early history, this regime revered private property. The American philosophy of the Rights of Man relied heavily on the indissoluble connection between rationality, property, freedom, and justice. The Founders viewed the right of property as "the guardian of every other right" and reasoned that "to deprive a people of this right is in fact to deprive them of their liberty."[iii] The idea of constitutional government is deceptively simple: the government cannot legitimately infringe upon our rights even if the majority votes to do so.

But, by 1890, attitudes had changed radically enough for Alfred Marshall, the teacher of John Maynard Keynes, to make "the astounding claim that the need for private property 'reaches no deeper than the qualities of human nature.' "[iv] A hundred years later came Milton Friedman's laconic reply: " 'I would say that goes pretty deep.' "[v] Marshall's statement, however, signaled a seachange: a political and cultural shift from the American vision of humans as free and creative beings entitled to enjoy the fruits of individual effort back to the tribal view of man which continues to dominate European political philosophy. "Europe's predominant idea of emancipation consisted of changing the concept of man as a slave to the absolute state embodied by the king, to the concept of man as a slave to the absolute state as embodied by 'the people' — i.e., switching from slavery to a

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tribal chieftain into slavery to the tribe."[vi] America sought to make government subservient to the people; the collectivist impulse which gained preeminence in Europe sought to keep people subservient to the government.

It is, I believe, this shift in world view which causes conservatives to dread judicial activism. In short, we have been fixated on the structure's gingerbread trim when we should have been focusing on its foundations.

Speaking to a conference of Ninth Circuit judges in San Francisco in 1946, Harold McKinnon identified a central problem with the socialist mystique. He understood the threat of the essentially antidemocratic and totalitarian political and legal philosophies gaining ground in American universities. Such teachings, McKinnon believed, denied the essential elements of a regime devoted to the preservation of natural rights.

> "[This teaching] denies that there is a moral law which is inherent in human nature and which is therefore immutable and to which all man-made laws to be valid must conform. It denies that by virtue of this law man possesses certain rights which are inherent and inalienable and therefore superior to the authority of the state. It denies that the purpose of government is to secure these inherent inalienable rights."[vii]

I take issue with one part of McKinnon's catechism. He says the teachings are undemocratic. While it is true that natural law was a necessary precursor to the good constitutional republic; democracy need not be a good regime — as we are proving every day. Freedom and democracy are not synonymous. Indeed, one of the grave errors of American foreign policy is the assumption that merely installing the forms of a regime like ours — without its foundation — will automatically lead to freedom, stability, and prosperity.

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McKinnon correctly concluded that adherence to natural law is the essential element of the American birthright.

> "For if there is no higher law, there is no basis for saying that any man-made law is unjust . . . and, in such case, the ultimate reason for things, as Justice Holmes himself conceded, is force. If there is no natural law, there are no natural rights; and if there are no natural rights, the Bill of Rights is a delusion, and everything which a man possesses — his life, his liberty and his property — are held by sufferance of government, and in that case it is inevitable that government will some day find it expedient to take away what is held by such a title as that. And if there are no eternal truths, if everything changes, everything, then we may not complain when the standard of citizenship changes from freedom to servility and when democracy relapses into tyranny."[viii]

Today these words sound strange to our ears. McKinnon could make such a forceful statement because he and his audience shared a common understanding. They accepted the necessary connection between natural law and natural rights and the centrality of natural law to any effective scheme of limited government. In short, McKinnon and his audience of judges shared a common devotion to a set of *first principles* — what Clint Bolick describes as that immutable body of law derived from the nature of people as rational human beings — "the law of nature that has from the beginning of human beings nurtured their progress and development."[ix]

In the context of law or morality, "natural" means "something which can be apprehended by natural man, by the use of faculties with which he is naturally endowed, including reason and the moral sense, and which does not require for its authentication more than reflection, thought, and the diligent pursuit of truth by practice, self-discipline, and attention to detail."[x]

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Let me give you an example from an unlikely source: a comedy routine of Chris Rock's. He is talking about taxes and government services. He says: "The messed up thing about taxes is you don't 'pay' taxes. The government TAKES them. You get your check and money is GONE! It was not an option! That ain't a payment, that's a JACK! I been TAX JACKED! . . . [The] worst part about it, we pay taxes for [stuff] we don't even use . . . . Why are black people paying Social Security? I won't get the money till I'm 65 . . . . Meanwhile, the average black man dies at 54. Hypertension, high blood pressure, police. . . . I used to work at McDonald's making minimum wage. . . . I would get $200 a week and they would take out $50 in taxes. That's a lot of money if you only making $200. . . . What do you get with that $50? All the free street light in the world. As far as I am concerned, give everybody a candle. Just give me back my $50."

As far as I know, Chris Rock is not a lawyer; he is not a legal philosopher; and I doubt that he is a conservative. But he is using his experience, his observations, and his rational faculties to make a judgment about fairness and justice.

Natural law seems to come naturally to human beings. We almost invariably describe events as fair or unfair, sporting or not sporting, just or unjust. If memory serves, "it's not fair" is the first phrase our children learn after they master the word "no." If anything, we may make such value judgments too casually and with too little appreciation of the deep metaphysical implications of our language.

Nevertheless, for thousands of years, the idea of natural law played a dominant role in both philosophy and history. "It was conceived as the ultimate measure of right and wrong, as the pattern of the good life. . . . It

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provided a potent incentive to reflection, the touchstone of existing institutions, the justification of conservatism as well as revolution."[xi]

Cicero's eloquent expression of this idea should be committed to memory by every law student:

> "True law is Reason, right and natural, commanding people to fulfill their obligations and prohibiting and deterring them from doing wrong. Its validity is universal; it is immutable and eternal. Its commands and prohibitions apply effectively to good men, and those uninfluenced by them are bad. Any attempt to supersede this law, to repeal any part of it, is sinful; to cancel it entirely is impossible. Neither the Senate nor the Assembly can exempt us from its demands; we need no interpreter or expounder of it but ourselves. There will not be one law at Rome, one at Athens, or one now and one later, but all nations will be subject all the time to this one changeless and everlasting law." (De Re Publica, III, 33.)

I suspect it is the use of words, like unchanging, everlasting, immutable, that was (and is) also natural law's greatest vulnerability. The claim to fame of modern jurisprudence is precisely that it does not purport to have a monopoly on truth. Medieval scholars devoted much energy to demonstrating the demarcation between law and morals because they did not want morals reduced to narrow legal categories. They did not deny the close connection between law and morals (they would have argued that life in society is a moral duty and that there is no aspect of life to which we can be morally indifferent), but argued morality is (and should remain) broader than legal duty. "[T]he laws of men do not primarily aim at promoting virtue, but only at securing peaceful living together; they do not forbid all that is evil, but only that which imperils society; they do not command all that is good, but only that which pertains to the general welfare."[xii]

REV_00259868

"Natural law is the outcome of man's quest for an absolute standard of justice."[xiii] The breach between law and morals, the assertion that one has nothing to do with the other, is the essential feature of modern jurisprudence. Positivism is perhaps the inevitable result of the rationalist view that exalts the lawgiver. For the positivists, law is defined by the will of the lawmakers and the truth of legal propositions is proven by the fact the provision has been duly enacted by the appropriate authority. Positivism, in turn, paved the way for a slew of other adventures in legal criticism: legal realism, historical, feminist, critical legal studies, and even law and economics.

To the extent the Enlightenment sought to substitute the paradigm of reason for faith, custom or tradition, it failed to provide a rational explanation of the significance of human life. It thus led, in a sort of ultimate irony, to the repudiation of reason.[xiv] Rationalism pushed to its limits consigns all that is not objectively verifiable, i.e., all that is not mathematical or scientific, to the realm of rhetoric. Thus, it reduces truth to a matter of perspective; and makes all perspectives equal. And since our choices can only be justified rhetorically — that is by reference to compassion or philanthropy or utility — even equality is debased, reduced to the equal right of all desires to be satisfied. In this brave new world, the assertion of a perspective becomes its justification. The claim is that a particular perspective serves the general welfare. What is really served is the will to power. "There can be little room left for old-fashioned discussions about the nature of justice and the essence of law when human will is made the supreme arbiter of all human values."[xv]

I am glossing over a complicated evolution, but the important point here is that positivism exalts the lawgiver because from the positivist's point of view it is the only rational thing to do. However, "[t]he repudiation of metaphysics, religion, and tradition . . . leads inevitably to the destruction of

REV_00259869

Counsel's Office, White House

Kavanaugh, Brett

Saudi Arabia 09/11/2001 Suit

Subject Files

OA/NARA#: 2175/2026
9795

Box 52
Folder 2

REV_00259878

U.S. DEPARTMENT OF STATE
Office of the Assistant Legal Adviser
for Diplomatic Law and Litigation
2201 C Street, N.W.
Washington, D.C. 20520-6310

FAX COVER SHEET

DATE:	June 18, 2003		
TO:	**CHAD BOUDREAUX**	**PHONE:**	
		FAX:	(202) 514-8071
FROM:	Andrew Keller L/DL, Room 5420	**PHONE:** **FAX:**	202-647-1074 202-736-7541

Subject: Saudi letter to Sec. Powell

Cover plus 3 page(s)

→ send to State
David Stewart
Will Taft

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Email	Powell Letter - To: Brett M. Kavanaugh - From: Chad Boudreaux	1	06/18/2003	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
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SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
Saudi Arabia 09/11/2001 Suit

FRC ID:
9795

OA Num.:
2175

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2086

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Letter	[Letter] - To: Your Highness - From: Colin Powell	1	06/18/2003	P1/b1;

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Letter	[Letter] - To: Colin Powell - From: Saud Al-Faisal	3	06/18/2003	P1/b1;

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Kavanaugh, Brett - Subject Files

FOLDER TITLE:
Saudi Arabia 09/11/2001 Suit

FRC ID:
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OA Num.:
2175

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2017-0345-F

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Counsel's Office, White House
Kavanaugh, Brett

Subject Files

EP2, P6/b6] - DOL (Department of Labor)
Nomination

OA/NARA#: 1824/1742
9632

Box 52
Folder 3

REV_00259883

U.S. Department of Labor
Office of the Chief of Staff

Fax

To: Brett Kavanaugh From: Gene Scalia

Fax: Date:

Phone : Page: (Total) 2

Re: CC:

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

•Subject:

•Comments:

If you have questions or problems regarding this fax, please call (202) 693-6007.

12/18/01 TUE 15:52 FAX

Two Scalias in our government are two too many



MARIANNE MEANS
Hearst News Service

WASHINGTON — When President Bush nominated the son of conservative Supreme Court Justice Antonin Scalia to the third-highest post in the Labor Department, the terrorist attacks had not occurred and Bush was not yet in a political unity mode.

This week, however, Eugene Scalia's nomination to be the department's solicitor — its top lawyer — was before the Senate Judiciary Committee threatening to blow up the fragile aura of bipartisanship the president is currently trying to foster. During his hearing, Scalia was sternly grilled by Democratic members and lavishly praised by the Republicans.

Giving Scalia power to interpret the administration's policies toward organized labor, which worked hard to defeat Bush in the 2000 election, was a deliberately vengeful move. Looming over the selection is the dark shadow of his cranky father, the architect of the court's rightward drift on civil rights and the mastermind of the court's convoluted ruling that handed the presidency to Bush. Eugene Scalia's nomination inescapably looks like a gigantic political payback, meant to reaffirm Bush's authority by slapping the Democrats in the face.

In April when he picked Scalia, Bush had embarked on a crusade to drive the country to the right, rolling over the Democratic congressional minority and his own party's moderates. In those days, he had no interest in bipartisanship.

His first choice as Labor Secretary, the conservative anti-labor commentator Linda Chavez, proved to be too controversial and was forced to withdraw her name. She was replaced by Elaine Chao, whose attitude is less ideological than Chavez's and is therefore less objectionable to the major unions. Scalia, 37, seems to have been selected to give Chao the backbone to be tough on the labor movement whenever possible.

During his career as a labor lawyer, Scalia campaigned vigorously to repeal Clinton-era federal ergonomics rules designed to reduce repetitive-motion injuries and lower back problems. He said he doubted the "very existence" of the problem, which union officials take very seriously, and mocked ergonomics as "junk science." The Clinton rule was killed by the Republican-controlled Congress earlier this year, and Chao is currently reviewing proposals for revised ergonomics rules.

Senate Health, Education, Labor and Pensions Committee ChairmanEdward Kennedy, D-Mass., is unequivocal in his opposition to Scalia. The senator says his writings and his record "clearly suggest that his views are outside the mainstream on many issues of vital importance to the nation's workers and their families."

The committee is divided along party lines, with all 10 Democrats opposed to Scalia and all 10 Republicans supporting him. When the committee votes next week, the tie will be broken by former Republican-turned-independent James Jeffords of Vermont. Recently Jeffords said awkwardly, "I think I'll probably support him ... reluctantly."

That means the nomination will go to the Senate floor, where Kennedy vowed "there will be a battle." Business groups have lined up behind Scalia, and the AFL-CIO is campaigning against him, making the outcome uncertain.

The floor vote is likely to break down along party lines, marking the first serious tear in the bipartisan fabric Bush is trying to weave.

He visited the Labor Department Thursday and warned, "This is not a time to worry about partisan politics."

He should have thought of that before he picked such a partisan nominee. Scalia, a choice left over from the pre-unity era, is a flagrant example of the partisan excesses of that period before the terrorist attacks. It is impossible for the Democrats to embrace Scalia, and Bush knew it when he chose him. It would be disingenuous of the president to claim now to be shocked that the nomination has provoked a partisan confrontation.

If Bush is really serious about working in a bipartisan fashion, he should withdraw the nomination. There are other qualified Republican labor lawyers who would not raise so many hackles and cost the president so much in good will.

Marianne Means can be reached at the e-mail address means@hearstdc.com.

002

REV_00259885

Counsel's Office, White House

Kavanaugh, Brett

Subject File

[P2, P6/b6] Recommendation Letters

OA/NARA #: 2174/2085
9794

Box 52
Folder 4

REV_00259886

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

OA/NARA#: 2179/2090
9799

Schumer, Charles / Patrick Leahy Letters

Box 52
Folder 5

REV_00259891

United States Senate

WASHINGTON, DC 20510

March 16, 2001

President George W. Bush
The White House
Washington, DC 20500

Dear President Bush:

We are writing to you as Ranking Member of the Senate Judiciary Committee and Ranking Member of the Courts Subcommittee to express our serious concern that your Administration is considering terminating the policy of soliciting comment from the American Bar Association on prospective nominees for the federal courts. The policy of obtaining ABA review – half a century old and uniformly followed by Republican and Democratic Presidents alike – has served our nation well, and ending it would imperil the process of selecting and confirming federal judges.

Since 1952, the ABA has reviewed the professional qualifications of potential nominees to the federal bench before the person under consideration is formally nominated and submitted to the Senate. The ABA considers only the integrity, professional competence and temperament of persons identified as potential nominees – not their philosophy or ideology.

To ensure complete insulation from politics, members of the ABA committee that evaluates potential nominees refrain from participating in or contributing to political campaigns, or taking part in political activity of any kind. The ABA's views remain confidential until after a judicial candidate is formally nominated.

We firmly believe that ending the long established practice of ABA review would dilute the quality of the federal bench. The process of judicial selection needs *more* information about the competence and integrity of potential nominees, not less. If ABA evaluation did not provide unique, unbiased and essential information, presidents of both parties would not have so heavily relied on it for almost 50 years.

ABA evaluation has been the gold standard by which judicial candidates are judged, which is why presidents have rarely elected to proceed with a nomination after the ABA found the candidate unqualified in the confidential pre-nomination stage. Indeed, for every candidate the ABA finds unqualified, there are undoubtedly scores of others never submitted for ABA review because it is known they cannot meet that body's rightfully exacting scrutiny. Without having to clear the bar of ABA review, nominees will inevitably be of lower quality.

Eliminating ABA review will also further polarize a process that, by now, all Senators agree cries out for less partisanship. The void of information about a candidate's merits that will result from elimination of ABA review will inevitably be filled with politics. And if the Administration chooses not to consult the ABA, we and others of our committee will. Far from saving time, that will delay Senate consideration of nominees, end the Administration's ability to withdraw a nomination in a confidential manner because of a poor ABA rating (which will also publicly embarrass nominees), and drive Senators apart over ideology rather than bring them together.

In sum, we urge you to continue the nearly 50 year old tradition of independent, apolitical ABA evaluation of potential nominees for federal judgeships. Our system of justice can only benefit as a result.

Sincerely,

Charles E. Schumer
UNITED STATES SENATOR

Patrick J. Leahy
UNITED STATES SENATOR

PATRICK J. LEAHY, VERMONT, CHAIRMAN
EDWARD M. KENNEDY, MASSACHUSETTS
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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

EXEC. OFC. PRESIDENT
COUNSEL TO THE PRESIDENT
2002 JUN 25 AM 5:42

June 24, 2002

The Honorable George W. Bush
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20501

Dear Mr. President:

The Senate Judiciary Committee has been working diligently and consistently to consider your judicial nominations during the past 11 months. During that time, the Senate Judiciary Committee has held 20 hearings for 75 of your nominees for lifetime appointment to the federal bench and we are planning another hearing for this week. We have given hearings to more of your judicial nominees in less than one year than were granted to the judicial nominees of other presidents in 20 of the last 22 years.

It was unfortunate to see the Senate's bipartisan cooperation on judicial confirmations distorted in the weeks leading up to May 9th of this year. It was disappointing to see White House officials asserting that the Senate's pace of confirmation of judges was the "worst pace set in recent history" when, in fact, in less than one year since the reorganization of the Senate Judiciary Committee, the Democratic-led Senate had already confirmed 57 judges as of May 9, 2002. This constitutes more judicial nominees confirmed under Democratic leadership than were confirmed in four of the last six full years of Republican control.

Rather than acknowledge the better pace at which your nominees have been considered than those of the last President, members of your staff and political party have chosen to make fund-raising speeches to conservative activists focusing on the few nominees who have not yet had a hearing. The Committee is working hard to evaluate all of your judicial nominees, as part of the Senate's role under the Constitution of preserving the independence of the federal courts. A number of your nominations have not been without controversy, and the difficult ones have taken more time.

Senator Hatch himself acknowledged, when he was Chair, that the Committee can set its own pace depending on the difficulty of the nominees, stating: "If nominees were only considered in the order there were nominated, the process would grind to a halt as more qualified nominees would back up behind questionable nominees." In attempting to address responsibly the 110 vacancies we inherited last summer, the Committee has endeavored to move as quickly as possible on the less controversial of the nominees, in order to provide some much needed relief to the federal courts. Confirming 57 judicial nominees in fewer than 11 months demonstrates our willingness to act fairly, expeditiously and in a bipartisan way.

With all of those appointments, the current number of vacancies in the 862-member federal judiciary is 89. The additional 42 judicial vacancies which have arisen since last summer contribute to that number. Of course, had Senate Republicans not blocked more than 50 of your predecessor's judicial nominees, the current vacancy level would be closer to a total of 40.

At the beginning of this year I offered some suggestions on how we could proceed more cooperatively. Unfortunately, the White House has uniformly rejected them. Most importantly, there has been no significant improvement in the consultation with home-state Senators of which I am aware. Fully a dozen of your current judicial nominees do not have the required support of home-state Senators to be considered by the Committee. As you know, the Committee's long-standing policy in this regard remains unchanged. At the risk of another wasted effort, I again urge increased and improved consultation.

I reiterate my request that you allow the American Bar Association (ABA) peer review process to occur simultaneously with the FBI investigation of judicial nominees. That would allow more nominees to be ready for hearings more quickly. I think that your staff would have to concede that the ABA process has been quite fair to your nominees and that it has not posed the kinds of difficulties that perhaps you had anticipated. I can recall only one of your nominees who received a not qualified rating, and the Committee and Senate nonetheless proceeded to confirm even that nominee.

I again urge your staff to abandon their practice of hoarding nominations and grouping them for simultaneous transmission to the Senate. Larger groupings of nominees may make for a fine press release but create bottlenecks in the review process for the Committee.

Today almost half of the open seats on the federal courts, 44 of 89, are without nominees. While we are moving to consider your judicial nominees, we obviously cannot confirm those who have not yet been nominated. The lack of nominations is particularly acute in the district courts. In fact, we are almost out of district court nominees whose paperwork is complete and are ready to be given hearings. As it is now late June -- and because you have declined to allow the ABA to conduct its independent evaluation concurrent with the FBI investigation prior to nomination, as was the practice of Republican and Democratic presidents dating back to President Eisenhower -- anyone that you nominate in the next month will likely not have an opportunity to receive an ABA rating and be eligible for a hearing prior to the August recess. Accordingly, we likely will have only September and a very few days in October to hold additional hearings.

It was also disheartening to hear members of your Administration admit that they are making no efforts to work out differences on judicial nominations and that your Administration has made the political decision to wait to see what happens in the upcoming elections. This kind of approach is counter-productive.

The Constitution contemplates both the Executive and Legislative Branches working together with respect to lifetime appointments to the Judicial Branch. The nomination and confirmation process can be improved through more cooperation, not less. We could accomplish more and help fill more vacancies more quickly with greater consultation and cooperation. I look forward to working with you more closely on the important work of identifying judicial nominees who will follow precedent, be fair and impartial to all people, respect the independence of the federal judiciary, and protect the rights of all Americans.

Sincerely,

PATRICK LEAHY
Chairman

CHARLES E. SCHUMER
NEW YORK

516476

COMMITTEES:
BANKING
JUDICIARY
RULES

United States Senate

WASHINGTON, DC 20510

May 14, 2002 5/14/02

The Honorable George W. Bush
The White House
Washington, DC 20500

Dear Mr. President:

I am writing today about the nation's federal appellate courts in the hope we can create a more constructive, fair, and balanced approach to filling the vacancies on the federal bench.

As you know, the judges sitting on the circuit courts of appeals have tremendous power. In an era when the Supreme Court hears fewer than 100 cases a year, the federal appellate courts have nearly unchecked authority. Their rulings have a massive impact on national policy, especially when it comes to areas I care most about such as the environment, workers' rights, women's rights, and the right to vote.

We agree on at least one thing when it comes to judicial nominations: ideology matters. You have made no bones about your desire to nominate conservatives. I respect and appreciate your candor. It creates an atmosphere in which we can engage in honest dialogue about what is happening to the courts instead of being forced to play "gotcha" politics, searching for minor personal peccadillos when ideology is really what the dispute is all about.

That said, I must tell you that with all due respect that your strategy is troubling in the opinion of many members of the Senate. Trying to tilt the bench too far to either side is dangerous for the courts, the country, and the average, everyday Americans for whom these judges have the last word on some of the most important issues in their lives.

Your mission to stock the courts with judges in the mold of Justices Scalia and Thomas, without offering balance on the other side, endangers the legitimacy of our vaunted independent judiciary. Personally, I have no objection to one or two Scalias or Thomases when there is balance on the other side. But a bench full of them will throw the courts out of the mainstream for decades to come.

The Constitution gives the Senate the power of both advice and consent when it comes to federal judicial nominations. Therefore, I am writing to offer some suggestions to improve the process and to expedite the confirmation of judges.

Last week, I chaired a hearing at which four of President Clinton's nominees to the federal bench testified. Judge Jorge Rangel and Enrique Moreno from Texas, former Iowa Attorney General Bonnie Campbell, and Professor Kent Markus from Ohio, have a lot in common. All four are eminently qualified to be federal judges. They are an impressive, accomplished, moderate, and

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diverse group of men and women. And they share one other thing in common. Not one of them received a vote in the Senate Judiciary Committee under Republican control.

Vacancies exist on all three circuits from which they hail: the 5th, 6th, and 8th. Were you to renominate these four compelling and ideological moderates, it would go a long way toward convincing us that you share our goal of maintaining balance on our nation's courts. While these four compelling people would be extraordinary jurists, they are by no means the only candidates for renomination. I would be pleased to provide you with a more thorough list candidates who are legally excellent, ideological moderate, and diverse.

At a minimum, I encourage you to consider seeking advice from the Senate, especially when it comes to these circuit court nominations that have such far-reaching impact. We would much rather work together to ensure the federal judiciary remains the thoughtful, balanced system envied by the world, instead of becoming so politically charged that it loses the respect and reverence it has enjoyed since the founding of our country.

You and I have worked together successfully in a bipartisan manner on any number of matters. For one reason or another, we have been unable to reach agreement with the Administration on how to fill open judgeships. It is precisely because I have so much respect for you and because I have such a strong desire to end the partisan wrangling over who will serve in our third branch of government that I write to propose this first step toward a solution.

I look forward to discussing this matter with you in the near future.

Sincerely,

Charles E. Schumer
United States Senator

REV_00259898

May 19, 2002

Dear Chuck:

This is to acknowledge the receipt of your letter to the President regarding the Nation's federal appellate courts and offering some suggestions on how to improve the process and expedite the confirmation of judges.

I have shared your letter with the President's advisors and the appropriate agencies who have been formulating policy recommendations in this area. Your letter is receiving their close and careful attention. You will be receiving a more detailed response in the near future.

Thank you for your comments.

Sincerely,

Nicholas E. Calio
Assistant to the President and
Director of Legislative Affairs

The Honorable Charles Schumer
United States Senate
Washington, DC 20510

Bcc w/ copy for appropriate action: Counsel
For Information:

020531

REV_00259899

Seattle Hebrew Academy

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

OA/NARA#: 1652/1520
9603

Box 52
Folder 6

REV_00259900

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WASHINGTON, D.C.

December 21, 2001

VIA FACSIMILE AND U.S. MAIL

Ms. Donna Voss
Washington State Public Assistance Officer
Washington State Disaster Field Office
625 Black Lake Blvd., Suite 3200
Olympia, WA 98502

Re: Seattle Hebrew Academy

Dear Ms. Voss:

This is an appeal from the decision of Region X of the Federal Emergency Management Agency (Bothell, Washington office) ("Region X"), which your office forwarded to Ms. Rebecca Almo, President of Seattle Hebrew Academy ("SHA") on October 27, 2001 that SHA is not an eligible PNP under 44 C.F.R. 206.221(e)(1).

Pursuant to 44 C.F.R. 206.206, SHA has sixty (60) days from receipt of the determination to appeal Region X's decision. This letter appeals Region X's decision that SHA does not meet the eligibility requirements of 44 C.F.R. 206.221(e)(1). SHA requests that this determination be reversed, and that SHA be classified eligible for FEMA assistance under the aforementioned Regulation.

I Summary

This is SHA's second appeal under 44 C.F.R. § 206.206. Region X denied SHA's application for disaster relief, determining that SHA is not "open to the general public" (44 C.F.R. 206.221(e)(1)) and therefore not eligible to receive disaster relief. SHA submits that this determination is both legally nonapplicable and factually inappropriate. From a legal perspective, the requirement of "open to the general public" does not apply to a nonprofit educational facility; 42 U.S.C.A. §5122(9), 44 C.F.R. §206.221(e)(1) so that, even if SHA were deemed not "open to the general public" it would be eligible for public assistance. Moreover, reliance by Region X exclusively on SHA's old bylaws and articles of incorporation gives an incomplete factual picture of the nature of SHA's student body.

In addition, the Stafford act's nondiscrimination provisions mandate that FEMA provide SHA with public assistance. Finally, Region X has conceded that SHA's building is not "used primarily for religious purposes," 44 C.F.R. § 206.221(e)(1), and is therefore not ineligible on these grounds. Regardless, granting relief to SHA neither constitutes the promotion of religion, nor excessive government entanglement with a religious institution.

statutory provisions are intended as binding directives with regard to the government agencies applying them; any form of discrimination constitutes a violation.

Furthermore, FEMA's Director's Policy No. 1-97 of May 12, 1997 (as updated on December 4, 1998) and Director's Policy No. 2-01 of July 17, 2001 (as updated on August 1, 2001) provide the following:

> 1. It is the policy of the Federal Emergency Management Agency (FEMA) to ensure that the Civil Rights of all persons receiving services or benefits from agency programs and activities are protected. **No person shall, on the grounds of race, color, national origin, sex, religion, age, disability, or economic status, be denied the benefits of, be deprived of participation in, or be discriminated against in any program or activity receiving financial assistance from FEMA.** In particular, all personnel carrying out Federal major disaster or emergency assistance functions, including the distribution of supplies, the processing of the applications, and other relief and assistance activities, shall perform their work in an equitable and impartial manner without discrimination. It is Agency policy to prohibit such discrimination in any programmatic guidelines, procedures, or other directives. (...)
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> 5. As an Agency, our goals are to protect lives and prevent the loss of property; to reduce human suffering and enhance the recovery of communities after disaster strikes; and to ensure that FEMA is a high-performance organization serving the public in a timely and cost-efficient manner. **We will not truly fulfill these goals unless we also protect precious rights and prevent discrimination.** I expect support from every employee of FEMA in carrying out our Civil Rights mandates.
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> (See Exhibits 6-A and 6-B) (Emphasis supplied.)

Discrimination, however, does not only occur when a statute itself (on its face) provides for disparate treatment on the basis of religion. As such, the language of 44 C.F.R. 206.221(e)(1), which excludes facilities "primarily used for religious instruction" from eligibility, is inherently suspect; *see McDaniel v. Paty* (1978) 435 U.S. 618 and *Larson v. Valente* (1982) 456 U.S. 228, 244-246. Discrimination can also occur if such disparate treatment takes place in the application of an otherwise neutral statute to a given case. Further, discrimination does not only involve giving preference to one religion over another (*McDaniel,* 435 U.S. 618 and *Larson,* 456 U.S. at 244-246); it also involves the unequal treatment of religious groups and organizations on the one hand and secular groups and organizations on the other hand. The Stafford Act, FEMA Regulation 206.11(b) (mandating non-discrimination) and FEMA's written policies prohibit any and all such practices. It is a well-established principle that the government must not impose any special disabilities on the basis of religious views or status (*McDaniel,* 435 U.S. 618, and *Larson,* 456 U.S. at 245).

Even indirect coercion is subject to constitutional scrutiny. In particular, governmental benefits may not be withheld based on an individual's choice to follow the laws of his religion. *See Everson v. Board of Education* (1947) 330 U.S. 1, 16 and *Sherbert v. Verner* (1963) 374 U.S. 398, 404 (analogizing the denial of benefits to the imposition of a fine); accord, *Thomas v. Review Board* (1981) 450 U.S. 707, 716-718. Similarly, the religion-based exclusion

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from a public forum is subject to strict constitutional scrutiny and requires the government to advance a compelling interest and show that its course of action is narrowly tailored to realize that interest. *Widmar v. Vincent* (1981) 454 U.S. 263, 270. Only where the *incidental* effect of a governmental program is to make it more difficult to practice certain religions, without any tendency to coerce members of that religion to act contrary to their beliefs, does government not have to provide a compelling justification for its course of action. *Lyng v. Northwest Indian Cemetery Protective Ass'n* (1988) 485 U.S. 439, 450. Here, however, the denial of FEMA aid on the basis of SHA's old bylaws is of such a coercive nature, because it penalizes SHA based on the strict interpretation of Judaic principles embedded in the school's old bylaws.

As stated above, both the Stafford Act in section 5151(a) and 44 C.F.R. 206.11(b) unequivocally prohibit discrimination, in whichever form it may occur; and so do FEMA's written policies. Significantly, by including the word "accomplished," the Act and the Regulations emphasize that discrimination is also prohibited in their application. This, too, is underscored in FEMA's written policies. Yet, in arguing – erroneously, see part III.B and C of this appeal – that SHA is not eligible for public assistance because under SHA's old bylaws admission to the school could be restricted on religious grounds, Region X draws a distinction which not only misinterprets the applicable statutes but moreover, runs afoul of the prohibition of discrimination codified in 42 U.S.C.A. 5151(a), 44 C.F.R and FEMA's written policies. Further, in not expressly relying on First Amendment grounds, Region X does not even undertake to set forth a compelling governmental interest that would justify its denial of aid to SHA (nor does it advance a legitimate governmental interest forming a rational basis for the denial, which would be required even if strict scrutiny did not apply here). Region X merely purports to interpret the applicable statutes, and it does so in an erroneous manner.

E. Region X Does Not Argue that the SHA Building is Not "Used Primarily for Religious Purposes."

Because Region X has conceded this argument, we do not need to point out that, under the definition given in the Public Assistance Guide, FEMA Publication Manual 322 p. 15, SHA's building is not "used primarily for religious purposes."[5]

F. Granting Relief To SHA Neither Constitutes The Promotion Of Religion Nor Excessive Government Entanglement With A Religious Institution.

While FEMA has not expressly denied assistance to SHA based on First Amendment grounds, the language of 44 C.F.R. 206.221(e)(1) ("primarily used for religious instruction"), and the definition of eligible facilities under this section in the Public Assistance Guide, FEMA Publication Manual 322 p. 15 ("used over 50 percent of the time for eligible activities, or 50 percent of its space is used for eligible activities") suggests that FEMA is concerned that assistance given to institutions *inter alia* engaged in religious instruction might constitute excessive government entanglement with a religious institution or the promotion of

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[5] Rather, the facility is used, in accordance with the Public Assistance Guide, "over 50 percent of the time for eligible activities, or 50 percent of its space is used for eligible activities;". *see* Exhibit 2-B.

religion, as defined in the Establishment Clause of the First Amendment to the U.S. Constitution and the U.S. Supreme Court's case law. In the present case, however, this is not true.

The criteria traditionally considered to govern the permissibility of government aid to educational institutions were first articulated in the Supreme Court's decision in *Lemon v. Kurtzman* (1971) 403 U.S. 602. The tripartite so-called "Lemon test" requires an analysis (1) whether the government program serves a purely secular purpose, (2) whether it has the effect of advancing religion, and (3) whether it creates excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-613. In a number of cases, however, the Supreme Court has reevaluated and elaborated on these criteria, and SHA submits that granting FEMA assistance to SHA would not run afoul of the standards established in the Supreme Court's case law.

1. SHA Is Eligible To Receive FEMA Aid Because Such Assistance Neither Has The Purpose Nor The Effect Of Promoting Religion.

Even if government aid is given directly to religious institutions, it is not necessarily invalid. The mere identity of the recipient of the aid is not dispositive. Pursuant to *Agostini v. Felton* (1997) 521 U.S. 203, 225-228, *Witters v. Washington Dept. of Services for the Blind* (1986) 474 U.S. 481, 486-489 and *Mueller v. Allen* (1983) 463 U.S. 388, 396-399 government grants that are made available "generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited" are permissible even if they are given to recipients who ultimately use them to engage in or obtain religious education, and even if the government agency administering the grants is aware of this use. *Agostini*, 521 U.S. at 225, *quoting Witters*, 474 U.S. at 488; *see also Zobrest v. Catalina Foothills School District* (1993) 509 U.S. 1, 10 and *Walker v. San Francisco Unified School District* (9th Cir. 1995) 46 F.3d 1449, 1458, 1462 and 1464-1467. The key element, according to these cases, is not what kind of institution is the ultimate recipient of the funds but rather, whether the funds are made available pursuant to neutral criteria, and to religious and non-religious beneficiaries alike. Where aid is provided on such neutral, secular criteria, and made available to various kinds of beneficiaries regardless of their religious or other orientation, it neither creates an incentive to undertake religious indoctrination, nor can any religious indoctrination occurring in an educational institution reasonably be attributed to the government aid granted. This type of aid, therefore, is permissible, regardless whether granted in the context of a religious institution or otherwise. *Agostini*, 521 U.S. at 226 and 230-231, *Witters*, 474 U.S. at 488 and *Mueller*, 463 U.S. at 398-399; *accord, Mitchell v. Helms* (2000) 530 U.S. 793, 809-814 and 822 ["Where the aid would be suitable for use in a public school, it is also suitable for use in any private school."]

FEMA aid fits these neutral criteria: Its purpose is to provide disaster relief, not to advance or promote religion (42 U.S.C.A. § 5121 and 44 C.F.R. § 206.3). Further, while 44 C.F.R. 206.221(e)(1) places certain restrictions on assistance to "primarily" religious institutions, the Regulations do not, in any event, provide for *preferential* treatment of religious institutions.[6]

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[6] Under the Supreme Court case law requirement that public assistance must neither further *nor hinder* religion, and that the religious character of an institution may not be inquired into (*infra*), it is debatable whether 44 C.F.R. 206.221(e)(1), insofar as it expressly *excludes* aid to primarily religious institutions, is in compliance with the Supreme Court's interpretation of the First

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In fact, pursuant to 42 U.S.C.A. 5151(a), the Regulations "shall include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, *without discrimination on the grounds of ... religion ...*" (emphasis supplied). 44 C.F.R. § 206.11(b)-(d) implement this requirement with regard to disaster relief, providing (again) that all personnel carrying out disaster relief or assistance functions shall perform their work "in an equitable and impartial]manner, without discrimination on the basis of [*inter alia*] religion," that as a condition of participation in Stafford Act programs, government bodies and other organizations shall provide written assurances of their intent to comply with regulations relating to nondiscrimination, and that information regarding these provisions shall be made available to applicants and other interested parties. Neither the Act nor the Regulations therefore *foster* religion; to the contrary, 42 U.S.C.A. § 5151(a) and 44 C.F.R. § 206.11(b)-(d) expressly mandate neutral and non-discriminatory disbursement criteria and procedures.

The Regulations further set forth an elaborate scheme defining the procedures according to which FEMA disaster relief is granted, and detailing a review process designed to make sure aid is only granted and used in accordance with the purpose stated in 42 U.S.C.A. § 5121 and 44 C.F.R. § 206.3. An analysis of these criteria shows that FEMA aid is not only secular in its purpose but, likewise, in its effect.

Pursuant to 44 C.F.R. § 206.48(a), the factors considered by FEMA in reviewing a Governor's request for a major disaster declaration (44 C.F.R. § 206.36) with regard to FEMA's public assistance program – which is applicable to grants to private nonprofit educational institutions such as SHA (44 C.F.R. §§ 206.200 *et seq.* and 206.220 *et seq.*) – are the estimated costs of the assistance, the localized impacts of the disaster, any insurance coverage in force, hazard mitigation measures in place in the state, the state's recent disaster history and the applicability of other federal aid programs. Upon issuing of the Presidential declaration of a major disaster or emergency and notification of the Governor (44 C.F.R. §§ 206.38 and 206.39), the Associate Director determines and designates the areas eligible to receive assistance, as well as the types of assistance to be made available, based on findings as to the magnitude and effects of the disaster, the response capabilities of the State, local governments and other potential recipients of FEMA assistance (44 C.F.R. § 206.40). More detailed determinations as to the types of relief to be granted, and as to the coordination between federal and state governments are made by the Federal and State Coordinating officers (44 C.F.R. §§ 206.41, 206.42). The mutual understandings, commitments and conditions under which FEMA assistance is provided, as well as the period for which aid is made available and the type and extent of aid, are laid down, in a form binding and legally enforceable upon all parties, governments and private nonprofit organizations, in a FEMA-state agreement, the so-called Memorandum of Understanding (44 C.F.R. § 206.44). None of the factors and criteria considered in any of the aforementioned determinations and agreements is applicable to religious institutions in a way different from the treatment of secular institutions.

Likewise, the types of assistance granted in the context of FEMA's public assistance program are the same with regard to all classes of beneficiaries, namely, cost-sharing (subject to the limitations set by the FEMA-State Agreement and the Stafford Act), and project-

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Amendment Establishment Clause, and whether it is likewise in compliance with the Stafford Act's non-discrimination provision (42 U.S.C.A. 5151(a)). *Infra.*

funding, in degrees varying with the size of the project (44 C.F.R. § 206.203) and according to specific deadlines and payment procedures (44 C.F.R. §§ 206.204 and 206.205), but not in any particular consideration of the religious or non-religious affiliation of the ultimate recipient of the funds.

Detailed program standards, reporting systems, and procedures for further review and studies are established by the Associate Director and the Regional Director pursuant to § 206.13; in addition, the Associate Director and the Regional Director conduct audits and investigations to assure compliance with the Stafford Act (44 C.F.R. § 206.16; *see also* 42 U.S.C.A. § 5161). The State, likewise, develops an administrative plan setting forth procedures for the notice, hearing, and processing of the applications of potential beneficiaries, cooperation with FEMA, and auditing and review requirements (44 C.F.R. § 206.207). Again, none of these procedures and standards affect religious institutions in a way different from their effect on non-religious institutions.

Lastly, an analysis of the types of applicants eligible under 44 C.F.R. §§ 206.221 and 206.222 shows that the Regulations' only focus is on the support and maintenance of essential services to the public in the wake of a disaster. In addition to educational institutions, pursuant to 44 C.F.R. § 206.221(e),[7] eligible applicants include facilities such as water, sewer, irrigation, energy, communication and similar utilities, ambulance, rescue, fire and other emergency service providers, medical, rehabilitation and custodial care facilities, homeless shelters, and cultural institutions such as museums, libraries and zoos. A number of the aforementioned types of facilities, particularly those maintained by ambulance, rescue and other emergency service providers, medical, rehabilitation and custodial care facilities and homeless shelters, but also certain cultural institutions such as museums, are often operated by religious organizations and, in varying degrees depending on the "mission" of the organization in question, utilized for the purpose of religious indoctrination. Yet, their eligibility is neither curtailed nor enhanced by their potential religious affiliation. This shows that regardless of any non-secular side effect which the assistance may have in the context of these institutions, religion is not a consideration in granting or denying assistance. The only effect of FEMA aid given importance by the creators of the Regulations is the maintenance of the essential public services provided by these and all other eligible institutions in the wake of a disaster. This effect is purely secular and does not change with the kind of institution providing the services.

In this context, the exclusion of facilities "primarily used" for religious education from the catalog of eligible institutions in 44 C.F.R. § 206.221(e)(1) can only be understood as a reflection of earlier Supreme Court decisions, now expressly abandoned in *Mitchell v. Helms* (2000) 530 U.S. 793, 827-828, which considered aid to "pervasively sectarian" organizations and institutions a potential violation of the First Amendment. In the context of 44 C.F.R. 206.221 and the Stafford Act and Regulations as a whole, it is an anomaly as it is the only instance where religion is declared a determinative factor. Even this, however, shows the concern of the creators of the Regulations with the non-religious effect of FEMA aid. See section C.2 of this appeal, *infra*.

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[7] As amended by Interim Final Rule RIN3067-AD20, 66 Fed. Reg. 87, pp. 22443-22445.

The focus on the use of FEMA aid for disaster relief only is further reinforced by provisions according to which the knowing misapplication of funds or other benefits granted pursuant to the Stafford Act and Regulations is fined at a rate of 1 ½ times the misappropriated funds, and the Attorney General may initiate both criminal prosecutions and civil actions against suspected violators (42 U.S.C.A. § 5157; 44 C.F.R. § 206.14).

Lastly, it must not be forgotten that FEMA aid is not provided directly to any particular beneficiary but rather distributed to the respective State's disaster relief agencies (here: the Washington State Disaster Field Offices) which then in turn dispense the funds pursuant to the Memorandum of Understanding reached with FEMA and pursuant to the Regulations. This, too, can be a factor indicating that the funds are not used to foster or otherwise establish a religion. *Agostini*, 521 U.S. at 228-229.

2. Neither The Divertibility Of Funds Nor The Allegedly "Pervasively Sectarian" Character Of The Beneficiary Nor The Size Of A Particular Class Of Recipients Are Legitimate Considerations.

So long as government aid is available pursuant to neutral criteria and therefore does not create an incentive for religious indoctrination, it is irrelevant whether it is divertible in the sense that it frees the institution to spend its own resources on religious ends. *Mitchell*, 530 U.S. at 824-825 [rejecting "divertibility" as an unworkable and overbroad criterion]; *see also Committee for Public Education and Religious Liberty v. Regan* (1980) 444 U.S. 646, 658. If SHA receives FEMA assistance, it is irrelevant to what extent the school is consequently able to use funds for educational purposes which, to the extent that it would not have received financial support, it would have had to spend on the restoration of its facility. *Every* type of public funding incidentally has this effect, and none of the agencies involved in the instant proceedings have even suggested that SHA is applying for disaster relief with the intention to divert these funds to religious indoctrination (which, indeed, it of course does *not* intend. *See* declaration of Marc Maislen, attached hereto as Exhibit 1). In addition, such intentional diversion is penalized in 42 U.S.C.A. § 5157 and 44 C.F.R. § 206.14.

Moreover, the Supreme Court has expressly given up reliance on the "pervasively sectarian" character of a recipient as a factor that must be considered: regardless whether the institution in question provides primary or secondary school education, its potentially pervasive sectarian character is irrelevant. *Mitchell*, 530 U.S. at 827-828 [pointing out that to receive aid granted pursuant to otherwise neutral criteria does not constitute a "special favor," and that a court's focus on the pervasively sectarian nature of a school is "not only unnecessary but also offensive," because "[i]t is well established ... that courts should refrain from trolling through a person's or institution's religious beliefs," and because the application of this factor "collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity."] Under *Mitchell*, FEMA aid would have to be granted to SHA even if it were to devote more than 50% of its time and other resources to Judaic instruction (which it does not; *supra*), because FEMA aid has a religiously neutral purpose and effect and is appropriately granted to public and non-religious private schools, and because in consideration of these factors, the government is not allowed to pry into SHA's (or its students') religious beliefs.

Similarly, the constitutionality of a particular type of otherwise neutrally granted assistance does not depend on the number of sectarian or religiously oriented recipients who are

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among its beneficiaries. *Agostini*, 521 U.S. at 229; *Mueller*, 463 U.S. at 401 [stating that the Court would be "loath to adopt a rule grounding the constitutionality of a facially neutral law" on reports on such facts]. Even if *only* schools operated by religious organizations would apply for FEMA aid in the State of Washington with regard to this particular earthquake, those schools would still be entitled to assistance as long as the aid is granted pursuant to facially neutral criteria and would also be available to secular schools if they applied.

3. FEMA Aid Does Not Create An "Excessive Entanglement" Between SHA And The Government.

Insofar as "excessive entanglement" of government and religion is still a factor to be considered separately, it is likewise analyzed in the context of a statute's effect. Not all entanglements have the effect of advancing religion, and some level of involvement between church and state has always been tolerated. *Agostini*, 521 U.S. at 233. Aid that is granted to religious and secular institutions alike, pursuant to the same neutral criteria, does not embody excessive entanglement; at least not if, like here, no permanent relationship or "symbolic link" between SHA and the government is created by granting government assistance. *Regan*, 444 U.S. at 659-661 and *Walker*, 46 F.3d at 1458-1459; *see also Committee for Public Education and Religious Liberty v. Secretary, U.S. Dept. of Education* (E.D.N.Y. 1996) 942 F. Supp. 842, 866 ["In order for such a [symbolic link] to be found, the activity must give the appearance of public endorsement or support for a religion or a religious tenet"] and *id.* at 868-869 [neither administrative contacts nor political divisiveness created by a government program alone have the effect of unconstitutional entanglement]; *see also, Nat'l Coalition for Public Education and Religious Liberty v. Harris* (S.D.N.Y. 1980) 489 F.Supp. 1248, 1268-1270 [same]. SHA neither receives special benefits if it is granted FEMA aid nor does this create the need for onerous, intrusive, day-to-day oversight. Any furtherance of SHA's religious orientation would be merely incidental and thus, permissible. *Zobrest*, 509 U.S. at 8; *Walker*, 46 F.3d at 1461 and 1469.

4. The Government Is Prohibited From Taking An Adversary Position Towards Religion.

Lastly, it must not be overlooked that the First Amendment requires the state to be *neutral* in its relations with religious believers and nonbelievers, not *adversarial*. Benefits may not be denied to a particular recipient based on his/her or its religion alone. *Everson*, 330 U.S. at 16-17 [pointing out that "state power is no more to be used so as to handicap religions than it is to favor them;" *id.* at 17]; *accord, Mitchell*, 530 U.S. at 827-828 ["[i]t is most bizarre" if, in the case of a facially neutral program, "the Court would ... reserve special hostility for those who take their religion seriously," and "profoundly troubling" if the Court were "discriminating in the distribution of public benefits based upon religious status or sincerity"]; *see also* 42 U.S.C.A. 5151(a) [the Regulations "shall include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, *without discrimination on the grounds of ...religion* ..."](emphasis supplied)].

Yet, the government has taken an adversarial position to religion in general, and to SHA in particular (based on its religious orientation) in two instances here: *first*, generally, in singling out all "primarily religious institutions" as the only institutions otherwise defined as providing essential government services excluded from access to FEMA disaster relief in 44 C.F.R. 206.221(e)(1); and *second*, specifically, in denying SHA's application based on their old

bylaws alone without performing a complete analysis of the underlying facts of SHA's application. This position is irreconcilable with the First Amendment's requirement that the government take a neutral stance towards religion.

IV Conclusion

For all the aforementioned reasons, this appeal should be granted and SHA should be awarded the assistance it has applied for.

Truly yours,

Ulrike I. Boehm
of LATHAM & WATKINS

II Statement of Facts

SHA is a private nonprofit organization devoted to educational purposes (*see* Bylaws of the Seattle Hebrew Academy as amended and adopted on May 1, 2001, attached hereto as Exhibit 1-A; hereinafter: "Bylaws").[1] It is incorporated as a Washington nonprofit corporation pursuant to the state's March 31, 1895 Act regarding the incorporation of educational, charitable and religious associations (see Articles of Incorporation of June 10, 1920, Certificate of Reinstatement of July 16, 1993, and Certificate of Amendment of November 15, 1996 reflecting the school's name change to Seattle Hebrew Academy, all attached hereto as Exhibits 1B through 1-D). The facility enjoys tax-exempt status under section 501(c)(3) of the Internal Revenue Code (*see* June 1, 1971 confirmation letter from the District Director of the Internal Revenue Service, attached hereto as Exhibit 1-E), is a candidate for membership with the Pacific Northwest Association of Independent Schools ("PNAIS"), which only accepts schools that adhere to a non-discrimination policy as members (*see* May 23, 2001 letter from PNAIS and attachments, attached hereto as Exhibit 1-F), and is a recipient of various forms of state and federal funding. SHA offers a full range of academic courses of study to students in grades Kindergarten through eight. Its graduates have been successful in high schools throughout the Seattle area, and in many colleges and universities around the country (see declaration of Marc Maislen, attached hereto as Exhibit 1).

SHA's site consists of a four-story building and over 15 classrooms, offices, a library, a full sized school kitchen which serves a hot lunch, a large auditorium, a large gym, a three-room preschool facility, and a small outdoor field and play area. The main building dates from 1909 and qualifies as historic building (see Seattle City Ordinance No. 102229, attached hereto as Exhibit 1-G).

SHA's facility sustained severe damage as a result of the magnitude 6.8 Nisqually Earthquake on February 28, 2001, which was centered near Olympia, WA, and caused destruction throughout the Puget Sound area. The President immediately declared the quake zone a National Disaster Area. Because of the damages the facility sustained, it is currently unoccupied, in accordance with recommendations by SHA's architects. In addition to widespread damage to the interior architectural finish work, such as cracked and fallen plaster, the facility also sustained extensive structural damage, and according to the architects' professional estimate, areas showing certain forms of non-structural damage are likely to have underlying structural damage as well.

In the basement/foundation of the building, the exterior concrete walls at the basement floor contain several diagonal and vertical cracks, spreading from the corners, sills, or headers of window and door openings (in some cases, these cracks are extensions of pre-existing cracks, widened due to the building motion). Cracks in several locations begin in the concrete

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[1] At the time of the earthquake, SHA had initiated procedures to amend its Bylaws to more accurately reflect the educational practices and the policies which at that time had already been followed for a considerable amount of time. The earthquake interrupted this process to amend the bylaws; it was, however, promptly resumed after the school had taken the steps necessary to deal with the immediate effects of the disaster. *See* declaration of Marc Maislen and copy of the revised Bylaws, attached hereto as Exhibits 1 and 1-A.

wall and extend upward into the brick walls above. There is also a large vertical crack at the interior wall of the boiler room in the building's central wing.

Further, the exterior balcony on the third floor at the east end of the central wing, which is located directly above the building's east entrance, has pulled away from the building. There is a visible separation at the railing between the building and the balcony, which continues down to the columns below. Also on the third floor, the east exterior wall of the north wing has pulled away from the floor and ceiling, the north-south corridor at the intersection of the north wing has a large crack a the walls and ceiling, and the north and east exterior walls in the vicinity of the north stair have pulled away slightly from the stair framing, with cracks at the intersection of the floor and walls. Similar structural damage as on the third floor also exists on the fourth floor, and even appears to be slightly worse.

On the roof, the east exterior wall of the north wing has separated from the roof framing, tearing the roofing material above in the process. The north exterior wall at the dormer roof at the top of the stairwell has separated slightly from the roof framing. The east exterior wall of the central wing has pulled away from the roof framing. All of the parapets, which exist at all three wings and at the dormer roofs of the building, were damaged, in degrees ranging from cracking and misalignment to fallen brick. While none of the parapets failed completely, several bricks were dislodged and fell on the roofs and surrounding area below.

Based on the existing structural damage, SHA's architects also expect certain areas of apparent non-structural damage to have similar underlying structural damage. At locations where the perpendicular floor framing is parallel to the walls, inadequate connection between the floor and the walls allowed for separation; and damage requiring repair also exists at the stairwell, where the floor framing changes and inadequate connection of the floor and roof's diaphragm exists. For example, plaster cracking exists at the wall corners and floor of the north and south wing at the east walls and the stairwells of the second floor, and structural damage in the form of mild separation of the walls from the floor are expected by SHA's architects at the east and west walls of the north and south wing, as well as the exterior walls of the stairwells of both wings. On the third and fourth floor, there is plaster cracking at the east wall and stairwell of the south wing, and structural damage in the form of a slight separation of the walls from the floor is expected at the east and west walls of the south wing and at the south wall of the stairwell. On the roof, where the framing of the pitched roof areas of the dormer roof system and the end walls of the north, central and south wings runs parallel to the exterior wall and forms a ridge member at the roof peak, there is no adequate connection between the roof diaphragm and the walls. Similar conditions exist at the east and west ends of the north and south wings, and the east end of the central wing.

Even the initial repairs, which would not yet bring the building into compliance with current building codes or seismic safety provisions but will enable it to retain the level of seismic safety present prior to the earthquake and allow it to be re-occupied, are quite extensive. Repair work will have to include the mending of the cracks in the facility's foundation/basement; either by injection with a structural epoxy (in the case of large cracks), or by sealing with elastomeric paint. The second, third and fourth floor diaphragms will need to have ties installed to connect the floor to the masonry walls at locations where the framing runs perpendicular to the wall. Likewise, the roof diaphragm will have to have ties with the top of the masonry walls at all dormer roofs and peak configurations installed. Finally, the parapets at all sides of the building will need to be repaired or reconstructed, and external bracing will have to be installed

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from the parapets to the roof framing. The review of the damage and the design of a cost-effective repair scheme has not yet been completed by SHA's architects. Current estimates for the damage and necessary repair work described herein are between two and four million dollars (with regard to the extent of the damage and necessary minimal repairs, *see* declaration of Marc Maislen, attached hereto as Exhibit 1, and Report of Coughlin Porter Lundeen, SHA's architects, attached hereto as Exhibit 1-H).

SHA applied for disaster assistance with the U.S. Small Business Administration ("SBA") and with FEMA, in accordance with the Stafford Act, as amended on October 30, 2000, and in accordance with the Regulations and Interim Final Rule RIN3067-AD20. However, both SHA's application with the SBA and with FEMA were denied; its application with the SBA by letter dated April 4, 2001 and its application with FEMA by fax dated March 29, 2001 (*see* April 4, 2001 letter and March 29, 2001 fax, attached hereto as Exhibits 1-K and 1-L). In addition, SHA's first appeal of the denial of its application for FEMA assistance was also denied (*see* October 27, 2001 letter from Donna J. Voss, attached hereto as Exhibit 1-M).

This is SHA's second appeal of the denial of its application for FEMA assistance, filed in accordance with 44 C.F.R. § 206.206. SHA submits that the denial of its application with FEMA is unjustified. Contrary to the conclusion reached by Region X, the requirement of being "open to the general public" is not applicable to a private nonprofit educational facility, either by statute or regulation. Furthermore, reliance by Region X exclusively on SHA's old bylaws and articles of incorporation gives an incomplete factual picture of the nature of SHA's student body. Finally, as Region X has conceded, SHA is not an institution "primarily used" for religious instruction. Further, granting assistance to SHA is not contrary to the Establishment Clause of the First Amendment to the U.S. Constitution.

III Analysis

A. The Regulatory Framework Of The Stafford Act And Regulations

Pursuant to 42 U.S.C.A. § 5121 and 44 C.F.R. § 206.3, the purpose of FEMA assistance is to provide disaster relief in cases of major disasters, which surpass an individual state's or local government's financial ability to cope with the effects of the disaster. 42 U.S.C.A. 5151(a) and 44 C.F.R. § 206.11(b) mandate that FEMA's distribution of supplies, the processing of applications, and other relief and assistance activities "shall be accomplished in an equitable and impartial manner, *without discrimination on the grounds of ...religion ...*" (emphasis supplied).

The eligibility requirements for FEMA disaster assistance are set forth in 44 C.F.R. § 206.221(e) and (f). Pursuant to 44 C.F.R. § 206.221(f), a private nonprofit organization is eligible if it has been declared tax-exempt under § 501(c)-(e) of the Internal Revenue Code or if it is organized or doing business as a nonprofit entity under state law. Pursuant to in 44 C.F.R. § 206.221(e), private nonprofit institutions providing educational services are eligible for FEMA disaster assistance, except if they are "primarily used" for religious instruction. According to the definition given in the Public Assistance Guide, FEMA Publication Manual 322 p. 15, a facility is "not primarily used" for religious instruction if it is used "over 50 percent of the time for eligible activities, or 50 percent of its space is used for eligible activities." Lastly, according to 44 C.F.R. 206.206, a party whose application has been denied has sixty (60) days from receipt of the determination to appeal FEMA's decision.

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B. SHA is not Required by Statute or Regulation to be "Open to the General Public" in order to be Eligible for Public Assistance.

As already explained, SHA is a private nonprofit organization devoted to educational purposes, incorporated as a Washington nonprofit corporation pursuant to the state's March 31, 1895 Act regarding the incorporation of educational, charitable and religious associations. The facility enjoys tax-exempt status under section 501(c)(3) of the Internal Revenue Code, is a candidate member of PNAIS, and is a recipient of state and federal funding.

Region X posits that, because SHA is not "open to the general public," it is ineligible for public assistance under the Stafford Act and regulations promulgated thereunder. This is a fundamental misreading of the Stafford Act. 42 USC §5122(9) defines "private nonprofit facility" as any one of the following:

> private nonprofit educational, utility, emergency medical, rehabilitation, and temporary or permanent custodial care facilities (including those for the aged and disabled), other private nonprofit facilities which provide essential services of a governmental nature to the general public, and facilities on Indian reservations as defined by the President.

The key phrase within this definition is "which provide essential services of a governmental nature to the general public." Region X maintains that this phrase modifies not only "other private nonprofit facilities," but also the first list of facilities, namely "educational, utility, emergency medical . . . facilities." Region X also points to the regulations set forth at 42 CFR §206.221(e), which contain language almost identical to the statute.

A proper understanding of the definition of "private nonprofit facility" (above) begins with the recognition that it includes three separate categories; two of these were included as eligible facilities in disaster relief law prior to adoption of the Stafford Act: (1) "private nonprofit educational, utility, emergency medical, rehabilitation, and temporary or permanent custodial care facilities (including those for the aged and disabled)," and (2) "facilities on Indian reservations as defined by the President." The third category, which the Stafford Act placed in between these two, is other private nonprofit facilities which provide essential services of a governmental nature to the general public."

The Disaster Mitigation Act of 1974, P.L. 93-288 (the "1974 Act") was the first statute to provide for public assistance to private nonprofit facilities (an earlier law had provided this only in the case of one specific hurricane, not as a general rule). Section 402(b) of the 1974 Act provides as follows:

> The President is also authorized to make grants to help repair, restore, reconstruct or replace private nonprofit educational, utility, emergency, medical and custodial care facilities, including those for the aged or disabled, and facilities on Indian reservations as defined by the President, which were damaged or destroyed by a major disaster.

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The Legislative History calls this section a "significant amendment" to the law and describes it as "authorizing 100% grants for repairing or reconstructing . . . private, nonprofit medical and educational facilities and utilities damaged by major disasters." 1994 USCCAN 3071. The Legislative History also provides: "This bill . . . includes private non-profit educational, emergency, medical, custodial care and utility facilities. . ." 1994 USCCAN 3074. You will note that the words "provide essential services of a governmental nature to the general public" do not appear in the 1974 Act, and are not mentioned in the legislative history. The category of private, nonprofit educational facility is not qualified.

In 1988, the Stafford Act, P.L. 100-707, amended the Disaster Mitigation Act of 1974 to include the current language of 42 U.S.C. §5122(9) as set forth above. Prior to adoption of the Stafford Act, there was not a separate definition of "private nonprofit facility" in the statute; rather, the list of these types of facilities was included within Section 402(b) of the 1974 Act, as set forth above. The Legislative History accompanying the Stafford Act explains how the definition of "private nonprofit facility" (42 U.S.C. §5122(9)) entered the definitions section of the statute:

> Subsection (e) [of Section 104 of the Stafford Act] places the definition of public facility and private non-profit facility as those terms are used throughout the Act into the definition section. The definition of public facility is amended to include those facilities used for cultural purposes, such as museums. The definition of private non-profit facility is also **broadened** [i.e., the middle category was inserted] to include facilities which provide to the general public services of a governmental nature. Examples of eligible facilities include museums, zoos, community centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, and shelter workshops (emphasis supplied).

1988 USCCAN 6088. Thus, this new section of the Stafford Act is the first time that these words, "provide essential services of a governmental nature to the general public," appear in disaster relief law. It is clear from both the Stafford Act's amendment to the language of the Disaster Mitigation Act of 1974 and from the accompanying Legislative History that the entire phrase, "other private nonprofit facilities which provide essential services of a governmental nature to the general public," was inserted right into the middle of the prior language, not intending to change the meaning of either the category before it or after it, but only intending to broaden the definition of "private nonprofit facility." There is no reference in either the Stafford Act or the accompanying Legislative History to any attempt to narrow the definition of "educational facility," or to modify it in any way. Region X's reading of the Stafford Act, on

the other hand, would have its amendments narrowing the category of eligible educational facilities, a reading clearly rebutted by the legislative history, and one which should be reversed.[2]

This understanding of the Stafford Act definition of "private nonprofit facility" is further buttressed by FEMA's own regulations. In 42 CFR §206.221(e), after repeating the statutory definition of "private nonprofit facility," the regulation states:

> Further definition is as follows:
>
> (1) Educational facilities means classrooms plus related supplies, equipment, machinery, and utilities of an educational institution necessary or appropriate for instructional, administrative, and support purposes, but does not include buildings, structures and related items used primarily for religious purposes or instruction[3].
> (2) Utility means buildings, structures, or systems of energy, communication, water supply, sewage collection and treatment, or other similar public service facilities.
> (3) Emergency facility means those buildings, structures, equipment, or systems used to provide emergency services, such as fire protection, ambulance, or rescue, to the general public, including the administrative and support facilities essential to the operation of such emergency facilities even if not contiguous.
> (4) Medical facility means and hospital, outpatient facility, rehabilitation facility, or facility for long term care as such terms are defined in section 645 of the Public Health Service Act (42 U.S.C. 2910) and any similar facility offering diagnosis or treatment of mental or physical injury or disease, including the administrative and support facilities essential to the operation of such medical facilities even if not contiguous.
> (5) Custodial care facility means those buildings, structures, or systems including those for essential administration and support, which are used to provide institutional care for persons who require close supervision and some physical constrains on their daily activities for their self-protection, but do not require day-to-day medical care.

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[2] Region X asserts that the requirement that any PNP be "open to the general public" is included in the statute in order to implement the statute's nondiscrimination provisions, 42 U.S.C. §5151(a). There is not statutory basis, or basis in the Stafford Act's legislative history, to support this assertion in any way.

[3] Region X has conceded that, because the SHA building is used a majority of the time for secular instruction, it is not a "structure . . . used primarily for religious purposes or instruction." See Section III.E.

> (6) Other essential governmental service facility means museums, zoos, community centers, libraries, homeless shelters, senior citizen centers, rehabilitation facilities, shelter workshops and facilities which provide health and safety services of a governmental nature. All such facilities must be open to the general public.

Most important about this list is that Paragraph (1) contains no reference to "the general public." Other paragraphs include this reference, and Paragraph (6), which incorporates the language of the Legislative History quoted above to further define the new language placed within the definition by the Stafford Act, states explicitly that, as to those facilities, "[a]ll such facilities must be open to the general public." Region X is reading the introductory paragraph of 44 C.F.R. §206.221(e) in a way which is inconsistent with the further definitions which follow.

C. Even if Region X's Understanding of the Stafford Act Definition of "Private Nonprofit Facility" is Correct, SHA Should be Eligible for Public Assistance.

Even if the requirement of being "open to the general public" is applicable to a private nonprofit educational facility, SHA should be eligible for public assistance. Region X's exclusive reliance on the wording of old bylaws (which were in the process of being rewritten, *see* Exhibit 4), to the exclusion of SHA's actual admissions policy which was in effect at the time, is misplaced. Under the guidelines of FEMA's Public Assistance Guide, SHA is a qualified PNP and is eligible for public assistance.

SHA is in compliance with the requirements of Title VI of the Civil Rights Act of 1964, section 2000d, which states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

SHA is also a candidate member of Pacific Northwest Association of Independent Schools ("PNAIS") (*see* Exhibit 1-F). One of the key philosophies of PNAIS is:

> Member schools do not discriminate on the basis of race, color, religion, gender, disability , national or ethnic origin, or other legally protected status in admission of otherwise qualified students or in providing access t o the rights, privileges, programs, or activities generally available to all students or their families, including educational polices, scholarship and other financial aid programs, or athletic, extra-curricular, and other school-administered programs and activities.

In addition, SHA has consistently participated in PNAIS advertisement of non-discriminatory practices; *see* Exhibits 1-F, 2-A and 3. For the 2000-2001 school year, SHA's student body included two African Americans, three Asian Americans, and four Hispanic students. Student nationalities included Russian, Bulgarian, Australian, and French.

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SHA's bylaws in effect on February 28, 2001 were old, and were not being followed at the time of the earthquake; *see* Exhibit 4. In fact, the bylaws were being rewritten as mentioned in the February 6, 2001 SHA board minutes (Exhibit 5). The bylaws have been revised to state in Article I: "The purpose of this corporation shall be to own, maintain and operate a school or schools for the education of children." *See* Exhibit 1-A.

SHA had disregarded the old bylaws, in that students who, under the old bylaws definition, were not eligible for admission, were admitted. *See* Exhibit 4. Such students have been those whose non-Jewish families are seriously studying and practicing Jewish law and culture in their home, under the supervision and instruction of a rabbi. Under Paragraph 7.E.2 of RR Policy Number 9521.3 (April 25, 2000)[4], if such a qualification is deemed a restriction, then SHA is nonetheless eligible for public assistance because it meets the Public Assistance Guide requirement that its restriction to users has at least one open ended parameter. Specifically, attendance is open to children of any race, color, or national original. Since SHA is a Jewish school, and a significant portion of the curriculum taught to students is Jewish, SHA's selection criteria (set forth above) should be considered a use restriction, clearly related to the nature of the facility and allowable under Paragraph 7.E.2.

Region X's exclusive reliance on the language of the old bylaws and articles of incorporation is misplaced. These bylaws were in the process of being rewritten prior to the earthquake. Moreover, SHA's admissions practices prior to the earthquake did not adhere to the requirements of the bylaws. Even if "open to the general public" is a requirement applicable to SHA, SHA is eligible for public assistance from FEMA.

D. It Constitutes a Violation of the Stafford Act's, the FEMA Regulations' and FEMA's Written Policies' Nondiscrimination Mandate not to Provide Public Assistance Relying on SHA's Religious Orientation.

42 U.S.C.A. 5151(a) and 44 C.F.R. § 206.11(b) mandate that FEMA's distribution of supplies, the processing of applications, and other relief and assistance activities "*shall* be accomplished in an equitable and impartial manner, *without discrimination on the grounds of ...religion* ..." (emphasis supplied). The use of the word "shall" indicates that these

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[4] This paragraph provides:

. . . an organization likely meets the "open to the general public" requirement if:

a. It is open to the general public,

b. Membership fees, if any, are nominal,

c. Membership fees, if any, can be waived in instances I which someone can show inability to pay the fee, and

d. Use restrictions, if any are clearly related to the nature of the facility. (Facilities for senior citizens, child day-care, children with cancer and other disabilities, or abused spouses could be restricted to that group and might still be eligible.

Secret Service Personnel Matters

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

OA/NARA#: 341/237
9122

Box 52
Folder 7

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THE WHITE HOUSE

WASHINGTON

May 14, 2001

Elroy Sailor
House Republican Conference
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Sailor:

I write in response to your letter to Judge Gonzales regarding the Department of Treasury and a Secret Service personnel complaint. As this matter is currently in litigation, we will not comment further about it at this time, but we thank you for your letter and the information you have provided.

Sincerely yours,

Brett M. Kavanaugh

Brett M. Kavanaugh
Associate Counsel

Brett is Treasury

GOP.gov
HOUSE REPUBLICAN CONFERENCE

J.C. WATTS, JR.
CHAIRMAN
4th District, Oklahoma

Reforming Washington
Securing America's Future

Fax Cover Sheet

To: Alberto Gonzales
Office: White House Legal Counsel
Phone: 202-456-2632
Fax: 202-456-6279
Date: 4/5/01
No. of pages (including cover sheet) 19

From:
- ☐ Downey, Kyle
- ☐ Dhar, Shawn
- ☐ Henderson, Shelley
- ☐ Hofer, Tom
- ☐ Horner, Jack
- ☐ Iverson, Christine
- ☐ Jones, Jocelyn
- ☐ LaMora, Leigh
- ☐ Leahy, Pat
- ☐ Manning, Tom
- ☐ Mascott, Jeff
- ☐ Perrin, Chris
- ☐ Pryor, Pam
- ☐ Radewagen, Amata
- ☒ Sailor, Elroy
- ☐ Schweers, Kevin
- ☐ Smith, James
- ☐ VandenHeuvel, Jon
- ☐ Wolfe, Kenneth
- ☐ Other _____

Phone: 202 225-5107 Fax: 202 225-0809

Note:
The originals of this fax are being mailed to you today, along with an executive summary booklet. I just wanted you to get this as soon as possible. Thank you.

REV_00259920

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REGINALD G. MOORE, et al. Plaintiffs, vs. LAWRENCE H. SUMMERS, Secretary, U.S. Department Of The Treasury Defendant.	Civil Action No. 00-00953 (RWR) CLASS ACTION

DECLARATION OF JAMES C. SHARF, PH.D.

1. I am over eighteen years of age, and have personal knowledge of and am competent to testify as to the matters stated herein.

2. From 1974 until 1978, I was the Chief Psychologist at the United States Equal Employment Opportunity Commission ("EEOC"). In that position, I assisted the EEOC's

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General Counsel in drafting the 1978 Uniform Guidelines on Employee Selection Procedures ("Uniform Guidelines"). I was responsible for critiquing validation studies and served as the EEOC's testing expert on "job-relatedness" matters. I also assisted EEOC attorneys in making prima facie case determinations of adverse impact by reviewing statistical evidence related to employment practices.

3. From 1991 to 1993, I served as the Special Assistant to the Chairman of the EEOC. In that capacity, I advised the Chairman on the Uniform Guidelines on Employee Selection Procedures and on generally accepted principles and practices involving employee selection and job performance appraisal systems. During my service with the Chairman, I assisted him in drafting the language for the "race norming" prohibition section (codified as Section 106) of the 1991 Civil Rights Act.

4. From 1978 to 1984, I was Vice President of Richardson, Bellows, Henry & Co., Inc. where I designed and conducted multi-employer validation studies. I also provided expert testimony in Title VII litigation for private-sector employers and for the Civil Rights Division of the U.S. Department of Justice.

5. From 1985 to 1991, I was a Personnel Research Psychologist in the United States Office of Personnel Management ("OPM"). In this position, I developed job-related selection procedures that are currently used by the Federal civil service Agencies to select professional and career employees nationwide. I also represented OPM on the National Academy of Science study of validity generalization for the U.S. Employment Service's General Aptitude Test Battery.

6. From 1994 to 1998, I was employed as Vice President, Human Resources Consulting Group for Aon Consulting, in Washington, D.C. In this position I was in charge of

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EEO compliance, risk management, and litigation support services within the Human Resources Consulting Group.

7. I have also worked as an Assistant and Adjunct Professor at The American University and as a Professorial Lecturer in two graduate departments at The George Washington University. In 1978, I served as Team Leader in the President's Reorganization Project in the Executive Office of President Carter.

8. I obtained my B.S. in Chemistry from Dickinson College in 1965 and my Ph.D. in Organizational Psychology from the University of Tennessee in 1970. I have authored over 50 professional articles and have served on the editorial boards of Personnel Psychology and The Industrial/Organizational Psychologist. I am a Fellow of the Society for Industrial and Organizational Psychology and a Fellow of the American Psychological Association.

9. I am currently employed as President of SHARF & Associates, Employment Risk Advisors in Alexandria, Virginia. SHARF & Associates is a consulting firm that specializes in employment risk management by advising Human Resources professionals, employment attorneys and industrial psychologists on developing, implementing, and defending selection and job performance appraisal systems. I also serve as an expert witness on these issues where appropriate to do so. I have been President of SHARF & Associates since its inception in 1999.

10. In July 2000, I was retained by Plaintiffs in this matter to give my opinion on whether the Secret Service's Merit Promotion Plan for GS/GM 1811s ("MPP") performance appraisals and promotion selections were consistent with the EEOC's 1978 Uniform Guidelines on Employee Selection Procedures and/or the generally accepted principles and practices of industrial psychology described in the Society for Industrial and Organizational Psychology,

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Inc.'s 1987 Principles for the Validation and Use of Personnel Selection Procedures (3rd ed.). I reviewed the following documents and materials in arriving at my opinion:

1. United States Secret Service, Merit Promotion Plan for GS/GM-1811 Positions, 7/8/97, 52p. (Saliunas Deposition, Exhibit 4).

2. United States Secret Service, Amendment to PER-08 (02), 12/23/98, 3p. (Saliunas Deposition, Exhibit 4).

3. United States Secret Service, Amendment to GS/GM-1811 Promotion Process, 5/14/98, 2p. (Saliunas Deposition, Exhibit 4).

4. United States Secret Service, Language Prerequisite and Supervisory Experience for Overseas Assignments, 8/4/95, 2p. (Saliunas Deposition, Exhibit 4).

5. United States Secret Service, Special Agent Career Track Program. 09/06/94, 10 p. (Saliunas Deposition, Exhibit 16).

6. United States Secret Service, GS-1811 Job Opportunities, 05/12/00, 3p. (Saliunas Deposition, Exhibit 8).

7. United States Secret Service, Amendment to GS-1811 Job Opportunities, 05/19/00, 2p. (Saliunas Deposition, Exhibit 8).

8. Declaration of Special Agent Reginald G. Moore, May 30, 2000, 10p. (Saliunas Deposition, Exhibit 9).

9. Declaration of Donna Burgess, Supervisory Personnel Management Specialist, United States Secret Service, June 8, 2000, 8p. (Saliunas Deposition, Exhibit 7).

10. Notice of Filing of Corrected Copy of Memorandum of Points and Authorities in Support of Plaintiffs' Application for Preliminary Injunction, June 1, 2000, 45p.

11. Defendant's Opposition to Plaintiffs' Application for a Preliminary Injunction, June 14, 2000, 32p.

12. Plaintiffs' Reply to Defendant's Opposition to Plaintiffs' Application for a Preliminary Injunction, June 30, 2000, 34p.

13. Deposition transcript of Secret Service Designee Deputy Chief of Personnel Barbara Saliunas, July 27, 28 and 31, August 1, 7 and 8, 2000., 987p.

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11. It is my opinion that appraisal decisions and promotion selections made under the Secret Service's MPP are not "job-related" as that term is understood either under the EEOC's 1978 Uniform Guidelines on Employee Selection Procedures and/or the generally accepted principles and practices of industrial psychology. My reasoning is based on the following facts as described in the MPP, (PER-08(02) and its subsequent amendments) and the deposition testimony of Secret Service Designee Barbara Saliunas.

12. The MPP for GS/GM-1811 Position in the United States Secret Service described in Directive System, PER-08 (02), Amendment to PER-08 (02) states that the Promotion Evaluation process is comprised of three components: the First-level supervisors evaluation which counts 50%, a Peer Panel evaluation counting 20% and a Second Level Panel evaluation counting 30% (p.2).

13. MPP scores are used to rank candidates to develop a best qualified group. The best qualified group is the top 30 candidates who apply for the position or the top 25%, which ever is greater (Saliunas Deposition Transcript, 137:4-19, 137:20-138:3). The Assistant Director with authority over the position in question makes a recommendation to the Advisory Board from the best qualified group. The Advisory Board is comprised of the Assistant Directors, the Chief Counsel, and the Deputy Director. The Chief Personnel Division serves as a recording secretary (144:2-7). The Advisory Board discusses it and after coming to a consensus, makes a recommendation to the Director (144:3-20). The Director has ultimate authority to select all GS-14s and above (201:17-19).

14. There is no mandated uniform method on how the Assistant Directors arrive at their recommendations to the Advisory Board (145:20-146:11). Each Assistant Director is free to develop his or her own procedures and can make recommendations from the best qualified list

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without specific criteria. (145:20-146:11) (151:17-22). One Assistant Director's practice is to ask the Special Agent in Charge ("SAIC") where the position is located for three recommendations (650:5-17). This process is not in the MPP and other Assistant Directors could have different practices (650:18-651:3) (651:4-7). The Secret Service does not know if there are any guidelines in place as to how each Assistant Director should decide who to recommend to the Advisory Board for promotion (146:16-20).

15. The Secret Service claims it follows the Uniform Guidelines for Employee Selection Procedures in validating its selection procedures (165:13-16) (169:12-16). Yet, the Secret Service does not know if the MPP was validated pursuant to the Uniform Guidelines (169:8-11). The Secret Service does not know if the MPP score is used for any other purpose than as a cutoff score for the best qualified list (140:18-22). The Secret Service does not know if MPP cutoff score procedures have been validated pursuant to the Uniform Guidelines (189:2-7). The Secret Service does not know if the Advisory Board considers relative differences in scores in promotion considerations (184:14-17).

16. The Secret Service alleges that it promotes people in accordance with the MPP (589:1-2). The MPP indicates that race and gender are two factors that should not be considered in making promotion decisions (939:12-940:4) (MPP, p. 4). Nonetheless, there were two promotion selections discussed during the Saliunas deposition in which contrary to the MPP, race and gender were a consideration (638:2-12) (633:2-634:3).

17. Under the MPP, management will take into account the Career Track Program when making selections (MPP, p. 4). The Secret Service does not know if the Special Agent Career Track Program is taken into account in making promotion recommendations (775:11-19). None of the Assistant Directors indicated that the Special Agent Career Track Program was a

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factor in any of the promotion recommendations discussed during the Saliunas deposition (775:1-7) (657:6-11)

18. The Advisory Board is not routinely provided with the candidate's Special Agent Qualification Statements which describes their experience and ratings (206:12-207:4). Some Assistant Directors indicated that they make promotion recommendations without considering the candidate's Special Agent Qualification Statements (230:8-12).

19. Other than the two promotion selections discussed during the Saliunas deposition in which race and gender were a consideration in determining promotion recommendations, the various different practices used by different AD's did not violate Secret Service policy (939:12-940:12).

20. There is a discretionary policy, for example, that allows for a Special Agent to get promoted outside the MPP (668:15-22). The exception is "an action taken for failure to receive proper consideration in a competitive action" (MPP, p5.). The Secret Service does not know under what circumstances that exception would apply (672:17-673:2). The Secret Service does not know if this exception is initiated by the Director or Assistant Directors (673:3-5).

21. The Secret Service does not have a policy called "informal disciplinary action" (246:20-247:1). There is nothing in the MPP that indicates that such a factor is to be used in the promotion process. (MPP). The Secret Service does not know if it has a policy to consider incidents that occur off-duty for which no discipline was incurred in connection with promotion selections (248:5-9). One Assistant Director indicated that in deciding not to recommend a candidate, he considered the fact that the candidate had been involved in a domestic incident and had not received discipline (248:21-249:2).

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22. The Director has established an unwritten "practice" of preferring GS-14 lateral candidates for open GS-14 positions over GS-13s (131:2-8) (951:12-22). This preference is not in writing and is not in the MPP (154:20-22) (131:9-11). The Secret Service does not know if the Director has articulated a business justification for establishing that preference or what weight it should be given (132:16-20) (132:3-15). The Secret Services does not know if the SAICs have been informed of this "practice" (948:4-6). The Secret Service does not know if all of the Assistant Directors have been informed of this "practice" (948:4-6). However, Assistant Director Bauer, Assistant Director Spriggs and Assistant Director Riggs follow this "practice" (952:18-22) (953:1-4) (955:8-11). The Secret Service does not know if Assistant Director Cockell follows this "practice" (955:4-7).

23. The Director has asked all Assistant Directors and the Deputy Director to consider the cost of a government move in making promotion recommendations to the Advisory Board (155:13-156:3). This "practice" is not in writing and no specific weight is attached to this consideration (156:17-21) (156:7-12). The Secret Service does not know if this factor has been part of a job posting (156:17-21). The cost of a government move is not in the MPP (157:11-16) (946:20-947:8). The Secret Service does not know whether the SAICs are aware of the "practice" of considering government moves, in promotion decisions (945:14-19). The Secret Service does not know whether it has been communicated to Agents in the field that the cost of a government sponsored move may be a factor in determining whether or not they may be promoted to a specific position. (157:2-10).

24. In my opinion, two of the three components of the MPP performance appraisals are subjectively flawed for the following reasons. Raters serving on Peer Panels are selected by lottery (PER-08 (02), 12/23/98, p.15) without regard as to whether each panel member, or any

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panel member, has first-hand knowledge of the candidate for promotion's job performance. Raters serving on the Second Level Panel are tasked to assess "an employee's ability to perform successfully at the next higher grade" and "rate(s) each candidate on managerial competencies based on the information provided on the candidate's qualification statement" again without regard as to whether each panel member, or any panel member, has first-hand knowledge of the candidate for promotion's job performance. Rather panel members will "consist of a representative from each Assistant Director's office" (p.17). Additionally, the Second Level Panel is encouraged to compound their subjectivity by basing their deliberations on "Peer Panel results...(which) may be considered..."(p.16).

25. In contrast, the MPP's first-level evaluation explicitly requires that the person preparing the evaluation "to consult with lower-level supervisors whenever he/she is not the immediate supervisor of the employee being evaluated" and the lower-level supervisor is required to sign the completed form to attest to his/her participation. Also, the rating official is to consider the comments of others who have supervised the employee for significant periods of time during the rating official (MPP, p.12)

26. The generally accepted principles and practices of industrial psychology recognize that people other than an employee's immediate first-level supervisor may have relevant information about an employee's job performance. In addition to self-assessments, appraisals may be solicited from co-workers, from subordinates and even from customers. The use of multiple sources of appraisal ratings enhances the opportunity for observing an employee's job-relevant behaviors. What makes these appraisal practices generally accepted professionally is that each source of job-relevant information depends on the rater having directly observed the employee's job performance. As attested in sections of the Secret

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Service's Merit Promotion Plan (see ¶ 24 above), the MPP falls short of generally accepted professional practices by asking randomly selected and/or administratively appointed raters without regard to whether there is first-hand information based on having observed the specific candidate's job performance.

27. One generally accepted professional performance appraisal practice frequently includes a higher-level review of the immediate supervisor's rating of a subordinate's job performance. What distinguishes such professionally acceptable practices from the instant case is that the higher-level reviewer does not make the appraisal decision. Rather the second-level reviewer is responsible for assuring that the immediate supervisor's appraisal decision has been sufficiently documented with examples of either effective or ineffective job performance. The Secret Service's MPP falls short in this regard because Peer Panel and Second Level panel members are making appraisal decisions without the benefit of first-hand observation of job performance.

28. It is my professional opinion that the appraisal decisions made by Secret Service Peer Panels and by Second Level Panels are not "job related" as understood either under generally accepted principles and practices of industrial psychology and/or the EEOC's 1978 Uniform Guidelines on Employee Selection Procedures because decisions are made without first-hand observation of actual on-the-job performance.

29. It is also my professional opinion that the promotion recommendations made by Assistant Director or Deputy Director to the Advisory Board are not "job-related" as that term is understood under the Uniform Guidelines on Employee Selection Procedures and/or generally accepted principles and practices of industrial psychology because different decision-makers invoke different considerations in making promotion recommendations that are nowhere defined

REV_00259938

CHAIRMAN
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4TH DISTRICT, OKLAHOMA

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BARBARA CUBIN
WYOMING—AT LARGE

ROOM 1010
LONGWORTH HOUSE OFFICE BUILDING
202-225-5107

House Republican Conference
U.S. House of Representatives
Washington, DC 20515

April 2, 2001

Alberto R. Gonzales
Counsel to the President
Office of the Counsel to the President
White House
Washington, DC 20502

Dear Mr. Gonzales,

Per my meeting with Ronald A. Schmidt, an attorney with the law office of Thelen Reid & Priest LLP, I would like to bring to your attention an issue regarding the Department of Treasury and a Secret Service personnel complaint. Our office would appreciate your review of this matter. While I am aware that a myriad of issues are on your desk, we would appreciate your assistance.

For additional information regarding this issue, please see the attached correspondence.

Thank you for your time and consideration.

Sincerely,

Elroy Sailor
Director of Policy

cc: Angela Sailor
White House Public Affair's Office

PRINTED ON RECYCLED PAPER

in official Secret Service policy directives. The various decision-making considerations fall short because there is no consistent, reliable application of valid job-related criteria. For example, many of the promoting officials make their recommendation without having reviewed the candidate's Special Agent Qualification Statements.

30. From my review of the evidence, it is clear that the Secret Service's MPP promotion system lacks job-related standards and the various practices that are followed are inherently subjective. Even where policies do exist, such as the MPP requirement that managers consider the Career Track Program in their selection decision-making , they are not consistently followed. In addition, it is troubling that many of the Secret Service's employment practices have not been directed to the SAICs or the Agents in the field as official policy.

31. In sum, the Secret Service's MPP promotion appraisal and selection system falls far short of meeting either generally accepted principles and practices of industrial psychology or the EEOC's 1978 Uniform Guidelines on Employee Selection Procedures.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief. Executed this 9th day of August, 2000.

James C. Sharf, Ph.D.

REV_00259939

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February 26, 2001

Elroy P. Sailor
Director of Policy
House Republican Conference
U.S. House of Representatives
1010 Longworth Building
Washington, DC 20515

Re: Flawed Secret Service Personnel System

Dear Mr. Sailor:

In our meeting last Thursday, you mentioned that it would be helpful if we could present you with evidence that non-African-American Special Agents shared our view that there are serious problems with the Secret Service personnel system.

Enclosed is a message sent recently over the Hispanic Agents e-mail router at the Secret Service. Special Agent PRA 6 calls the Secret Service promotion system "a sham." He suggests that promotion ranking results are manipulated by management to promote unqualified people. Diaz also raises serious questions about the equal employment opportunity atmosphere at the Secret Service. For example, non-Hispanic Agents refer to Hispanic Agents as "laca laca" Agents. PRA 6 and the other Hispanic Agents are considering their own suit against the Department of Treasury. Many of the issues they raise are the same ones that we identified in *Moore v. Summers*, Civ. Action No. 00-00953 (RWR).

In addition, there are white Special Agents who will confirm the problems with the Secret Service promotion system. PRA 6 is contacting them to see if they would be willing to speak to you and/or Chairman Watts. I am told these Agents are very concerned about retaliation by the Secret Service and may not be willing to speak if their identities would have to be revealed.

As a final matter, I am enclosing to you a copy of our expert's evaluation of the Secret Service promotion system. Dr. Sharf was the Chief Industrial/Organizational Psychologist at the Equal Employment Opportunity Commission ("EEOC") from 1974 through 1978 and helped draft the EEOC's 1978 Uniform Guidelines on Employee Selection Procedures. Based upon his review of the relevant materials, Dr. Sharf determined that the Secret Service's MPP promotion system lacked job-related standards and that the various practices were inherently subjective.

REV_00259922

Even where policies do exist, Dr. Sharf found that the Secret Service does not follow them consistently.

For example, the MPP requirement that managers consider the Career Track Program in promotion selections is frequently ignored. Still more troubling is that many of the Secret Service's employment practices have not been directed to the Special Agent in Charge ("SAICs") or the Agents in the field as official policy. In sum, Dr. Sharf found that the Secret Service's MPP promotion appraisal and selection system is a ready vehicle for discrimination that falls short of generally accepted principles and practices of industrial psychology or the EEOC's 1978 Uniform Guidelines on Employee Selection Procedures.

Thank you for your assistance in this matter. If you require any additional information, please do not hesitate to call me at the above number.

Yours truly,

Ronald A. Schmidt

RAS/dam
Enclosures

REV_00259923

To: Elroy Sailor

From: Daniel Beck

Date: 3-6-01

RE: Possible Policies for Secret Service

When I spoke with Secret Service agen PRA 6 and his lawyer both of them would like to see a policy that more objective, less subjective and arbitrary implemented. They want agents to be promoted based on merit not on their race or whom they know. PRA 6 and his lawyer are advocating that agents be promoted based upon their test scores and their performance field. When discrimination does occur both agent PRA 6 and his lawyer would like to see punishment administered to agents who discriminate against African American agents. The policy that they would they would like to see implemented would be similar to that of the A.T.F.'s, that is objective.

The A.T.F.'s policies for combating discrimination are very logical and straightforward. In the Diversity and Career Impact Program Coordinators section page 19, the policy states that every field division office will have one special agent designated as the diversity and career impact program coordinator, which would be a part time position while hiring is going on. One of their main jobs is to collect data on the racial diversity of the applicants. Another policy under in this section is that the associate director can hire no special agents unless they have prior approval of head quarters.

Pg 20 states that a qualified individual, though it does not state the qualifications of a qualified person, will write a work statement for promotions so there will be minimal negative impacts on African American agents. The qualified individual shall outline the

promotion assessment system and selection process. Page 22. A technical evaluation panel would be set up to evaluate all promotional proposals. The designated qualified individual as well as representatives of the plaintiffs would represent the panel.

Pg 25 b. If an African American is selected for promotion, the process shall be complete and the agent should be promoted.

Pg 26 c. If a non-African American is chosen for promotion, the Secret Service will at minimum designate an Associate assistant director to review the promotion. The director will be known as the Competitive Promotion Consultant (CPC).

Pg 26 d. If the African American candidate is not recommended than the non-African American shall receive the promotion.

Pg 26 f. If an African American is recommended by the CPC but officials reject it, the case shall be reviewed by the director and his designee.

Pg 26 g. If the director rejects the promotion of the African American, the director must submit an explanation in writing with in 45 days of why the promotion is rejected.

Performance Appraisals

Pg 27 a. Performance appraisal will be evaluated with uniformed guidelines and other professional standards enforced by the proper individuals to help minimize discrimination.

Pg 28 d. Agents will have two options for performance appraisals. Either taking the most recent test or the three most recent test's which will be averaged together.

Transfers

Pg 30. Transfers will be governed by the new promotion assessment system by Career Development.

Discipline

Pg32 c. In cases of discrimination in the Secret Service, the Secret Service shall determine whether discriminatory actions have taken place against African American agents. Upon the agencies review they determine whether a change of procedure is necessary to reduce disparity.

Pg 32 d. If discrimination is found, the agency should conduct an investigation against the alleged agent. If discipline is not needed a letter is to be written and submitted to the deputy associate director on why discipline is not needed.

Assignment To Special Teams

Pg 32 a. The agency will develop objective criteria for assignments to special teams.

To: Elroy Sailor

From: Daniel Beck

Re: Secret Service Article

Date: 2-22-01

The Washington Post Magazine article titled, *The Secret Service, In Black and White*, concerns racism and the lack of promotion of African Americans in the Secret Service. PRA 6 PRA 6 who had served in the Secret Service for 16 years, guarded nearly five Presidents and was highly respected by others, was passed over for promotions numerous times for under qualified agents who were white. He was passed over for about 70 promotions in 1999 alone.

After much thought about what he should do about the unfair situation he decided to hire PRA 6 to place a class-action race discrimination suit against the Secret Service that will go as far back as1974. The lawsuits is seeking $300,000 in damages and back pay for each of the eligible and current black agents. Once PRA 6 had filed the suit he began to hold meetings to rally support for his case and at the first meeting he and PRA 6 were surprised that 50 agents showed up to discuss the matter. They were only expecting 15. Each agent felt as though they were being passed over for white and under qualified agents as well. Going public with their grievances went against Secret Service tradition of keeping everything private because they always thought of themselves as family.

As the investigation continued agent after agent told their stories of how they had received verbal insults and were passed over for job hiring, job placement and promotion because of race and/gender. Former agent PRA 6 tell of being verbally assaulted for his race and treated as a second class agents from his fellow colleagues. Fellow agents PRA 6 PRA 6 and many other agents all confirmed that they received the same unfair treatment.

During the investigation the Secret Service denied that they show preferential treatment to white agents. They claimed that the agents needed a few more months in training then about 30 or more agents would be promoted. They went on to state that two of the seven assistant directors are African-American.

Section 2954 - Henry Waxman

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

OA/NARA#: 21616/2077
96,96

Box 52
Folder 8

REV_00259960

D R A F T

Honorable Henry S. Reuss
House of Representatives
Washington, D. C. 20515

Dear Mr. Reuss:

This is in response to the letter of May 25, 1970, signed by you and six other members of the House Committee on Government Operations which, making reference to section 2954, title 5, United States Code, requests a copy of a report on the SST prepared in 1969 by a committee headed by Dr. Richard L. Garwin. I understand that Presidential Assistant Ehrlichman advised you on May 20, 1970, that the report constitutes an internal governmental memorandum of a confidential nature which cannot be released.

The language of the statutory provision on which your request is based unquestionably is rather broad. The legislative history of section 2 of the act of May 29, 1928, 45 Stat. 996, from which that provision is derived, however, indicates that its legislative purpose is narrow and that it does not support your request. See in this connection Kramer & Marcuse, Executive Privilege--A Study of the Period 1953-1960, Part II, 29 George Washington Law Review 827, 881-983.

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The purpose of the 1928 act was to discontinue the submission to Congress of a large number of obsolete and useless reports, and to enable Congress to obtain the information contained in the discontinued reports if this should become necessary. See S. Rept. 1320, 70th Cong., 1st Sess., p. 4, and H. Rept. 1757, 70th Cong., 1st Sess., p. 6. 5 U.S.C. 2954 is thus designed to serve as a means for obtaining information theretofore embodied in annual routine reports to Congress submitted by the several agencies, rather than to compel the release of internal executive branch information such as the Corwin report.

I therefore regret that I cannot comply with your request.

Sincerely,

REV_00259962

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Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HENRY A. WAXMAN, et al.,

Plaintiffs,

v.

DONALD L. EVANS, Secretary of Commerce,

Defendant.

No. 01-04530-LGB (AJWx)

SECRETARY'S MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

Date: March 4, 2002
Time: 10:00 a.m.
Courtroom: No. 780
Location: Los Angeles-Roybal

REV_00259963

violated? If they do not, their claim must be dismissed under Fed.R.Civ.P. 12(b).[5]

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immunity for suits seeking nonmonetary relief. See Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518, 524-26 (9th Cir. 1989) (construing second sentence 5 U.S.C. § 702 as waiving sovereign immunity for all claims for nonmonetary relief against the United States, its agencies or officials). The question for the Court is whether plaintiffs can point to any federal statute that creates an express or implied cause of action in their favor, an "analytically distinct" inquiry than that posed by sovereign immunity which goes to "whether the source of substantive law upon which the claimant relies provides an avenue of relief." FDIC v. Meyer, 510 U.S. 471, 484 (1994) (reversing decision of the Ninth Circuit because it "conflate[d] the two analytically distinct inquiries of sovereign immunity and cause of action), *citing* United States v. Mitchell, 463 U.S. 206, 218 (1983). See, e.g., Dewakuku v. Martinez, 271 F.3d 1031, 1037 (Fed. Cir. 2001) (waiver of sovereign immunity in Housing Act of 1937 did not obviate the need for plaintiff suing the Department of Housing and Urban Development to establish an express or implied cause of action under that Act); United States of Shawnee Indians v. United States, 253 F.3d 543, 550 (10th Cir. 2001) (waiver of sovereign immunity in 5 U.S.C. § 702 does not obviate the need for plaintiff suing the United States to establish an express or implied cause of action).

That the Court has subject matter jurisdiction over plaintiffs' claim under 28 U.S.C. § 1361 – which states that district courts have original jurisdiction of any action "in the nature of mandamus" – does not eliminate the need for plaintiffs to establish an express or implied cause of action under either § 2954 or the APA. While the Ninth Circuit has recently declined to take a position on the question, see Barron v. Reich, 13 F.3d 1370, 1375 (9th Cir. 1994), the weight of authority holds that a plaintiff who lacks a private right of action, under the statute alleged to give rise to a duty, is not entitled to mandamus relief under 28 U.S.C. § 1361. Id. at 1374-75, *citing* District Lodge No. 166, Int'l Ass'n of Machinists v. TWA Servs., Inc., 731 F.2d 711, 717 (11th Cir. 1984); Aguirre v. Meese, 930 F.2d 1292, 1293 (7th Cir. 1991); Gonzalez v. INS, 867 F.2d 1108, 1110 (8th Cir. 1989). See also Mead Corp. v. United States, 490 F. Supp. 405, 407 (D.D.C. 1980) (28 U.S.C. § 1361 does not in itself create substantive rights or causes of action but only confers jurisdiction on district court to hear certain kinds of cases); International Fed'n of Prof'l & Technical Engineers v. Williams, 389 F. Supp. 287, 290 (E.D. Va. 1974), *aff'd without opinion*, 510 F.2d 966 (4th Cir. 1974) (28 U.S.C. § 1361 "broadened the venue" where mandamus-type actions could be brought and did not create any new causes of action). But see Hernandez-Avalos, 50 F.3d 842, 845 (10th Cir. 1995) (holding that a plaintiff who has alleged a cause of action under the Mandamus Act "need not rely upon an implied right of action under any other statute"). In short, if a failure to comply with § 2954 is not otherwise subject to judicial review under another statute, the jurisdictional grant set forth in 28 U.S.C. § 1361 does not create an independent right to a judicial relief. (If the Court disagrees and concludes that 28 U.S.C. § 1361 does give rise to an independent cause of action for individual members of Congress to sue the Executive Branch to enforce a statutory duty, that provision is unconstitutional for the reasons stated in Section II *supra*.)

In issuing its ruling of January 22, the Court apparently assumed that 5 U.S.C. § 2954 or the APA created such a right and, indeed, indicated its belief that judicial enforcement of that provision was necessary to give effect to "congressional intent to empower Plaintiffs here to obtain the census data sought without having to invoke the authority of the full committee through a subpoena or convincing a chamber majority of the need for the information." Order at 14.

This assumption, however, is directly at odds with the Supreme Court's admonition that a court should not infer an intent by Congress to create a judicially enforceable right of action absent a clear indication from the statutory text or legislative history that Congress intended to create not just a right but also a judicial remedy. Alexander v. Sandoval, 532 U.S. 275, ___ (2001) (emphasis added).[6] As the Court recently explained in Sandoval, "like substantive federal law itself, private rights of action to enforce federal law, must be created by Congress." Sandoval, 532 U.S. at ___ , 121 S.Ct. at 1519. See also Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979) (remedies available are those "that Congress enacted into law"). Thus, the role of the judiciary is to interpret the statute Congress has passed to determine whether it "displays an intent to create not just a private right *but also a private remedy*." Sandoval, 532 U.S. at ___, 121 S.Ct. at 1519 (emphasis added), *citing* Transamerica Mortgage Advisors, 444 U.S. 11, 15 (1979). See also Walls v. Wells Fargo Bank, 276 F.3d 502, ___, 2002 WL 15687, * 4 (quoting Sandoval and adhering to this principle).

"Statutory intent on this latter point is determinative." Sandoval, 532 U.S. at ___, 121 S.Ct. at 1519, *citing* Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083,1102 (1991); Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 812, n. 9 (1986) (and cases cited therein). See also Davis v. Passman, 442 U.S. 228, 241 (1979) ("Statutory rights and obligations are

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[6] See also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365 (1991) ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.") (Scalia, J., concurring in part and concurring in judgment), *quoted in* Sandoval, 532 U.S. at ___, 121 S.Ct. at 1520).

established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine, in addition, who may enforce them and in what manner . . . In each case, . . . the question is the nature of the legislative intent informing a specific statute . . . ."). See also Walls v. Wells Fargo Bank, 276 F.3d at ___, 2002 WL 15687, * 4 ("the critical inquiry is whether Congress intended to create a private right of action").

Without the requisite legislative intent, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." Alexander, 532 U.S. at ___, 121 S.Ct. at 1520, *citing* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 145, 148 (1985); Transamerica Mortgage Advisors, 444 U.S. at 23; Touche Ross, 442 U.S. at 575-576. See also Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO, 451 U.S. 77, 94 (1981) ("[U]nless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predication for implication of a private remedy does not exist.") [7]

Under the rule of Sandoval, plaintiffs' claim for judicial relief fails here. An examination of both statutes which plaintiffs claim have been violated – 5 U.S.C. § 2954 and the APA – demonstrates that Congress did not intend to create judicially enforceable rights to the information requested by plaintiffs.

5 U.S.C. § 2954

Plaintiffs' claim for direct judicial relief under 5 U.S.C. § 2954 fails as a result of the utter lack of any indication that Congress intended to create a private remedy to enforce this provision.

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[7] The Supreme Court stressed in its recent decision in Sandoval, *supra*, that it long ago abandoned the understanding of private causes of action that held sway 40 years ago, as captured by the Court's statement in J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964), that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" expressed by a statute. See Sandoval, 532 U.S. at ___, 121 S.Ct. at 1520. Thus, in addressing the issue at hand, the Court can disregard similar statements made in the past to the effect that courts will "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, expects the courts to grant relief when an executive agency violates such a command." Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 (1986).

Section 2954 was enacted in 1928, nearly two decades before passage of the APA. Even at that time, congressional practice with regard to compelling disclosure of information by the Executive Branch was well-established. Then, as now, resort to the courts to compel disclosure was only done with the assent of at least a majority of a House of Congress, generally through an action to enforce a subpoena.

The process for gaining judicial enforcement of subpoenas exists today as it existed at the time § 2954 was enacted in 1928. See 2 U.S.C. § 194 (enacted in 1857). It requires that, following non-compliance with a subpoena, a contempt citation must be approved by the subcommittee, the full committee, *and* the full House or Senate, or by the presiding officer if Congress is not in session, before certification to the appropriate United States Attorney for prosecution. Id. That process accords with the relevant interest, which is not the interest of individual members, but the interest of Congress as an institution. And it ensures that the courts' powers are only invoked when a majority believes that disclosure of information is in the public interest and when there is political accountability for its determination. Indeed, no House or committee rules have ever authorized ranking minority members or individual members on their own, without an authorizing Resolution, to seek judicial enforcement of a subpoena.

Nothing in the language of the statute or its history remotely suggests that Congress believed it was, for the first time, creating in individual members a judicially enforceable right to compel disclosure of a virtually unlimited category of information from the Executive Branch. Indeed, at the time of enactment, the Supreme Court had ruled that, for purposes of 5 U.S.C. § 1345,[8] individual legislators had no right to invoke the power of the courts to compel the production of requested documents absent a specific and express grant of that power by their respective Chamber. See Reed v. County Commissioners of Delaware County, Pa., 277 U.S. 376 (1928) (upholding dismissal of suit brought by a number of Senators to compel the production of

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[8] 5 U.S.C. § 1345 gives district courts original jurisdiction over "all civil actions, suits, or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

ballots and other evidence where suit was not expressly authorized by the full Senate). Given that this was the state of the law at the time § 2954 was enacted, there is no basis for inferring that Congress intended to create a right for individual legislators to invoke the power of the courts to enforce its provisions.

What the legislative history cited by this Court suggests is that Congress was creating a means of allowing more specific requests for information to the Executive Branch to overcome the deficiencies in reports that were not directed to members' concerns. In providing a mechanism for streamlining information requests, Congress gave no sign that it was shifting judicially enforceable rights to small minorities so that they would be capable of overriding the collective judgment of both Houses and the Executive Branch.

If Congress had intended to create such rights, it would have done so explicitly, just as it has in other contexts in which it intended for compliance with requests for Executive Branch documents to be judicially enforced. For example, in the Freedom of Information Act, Congress expressly created a judicially enforceable right to government information, establishing a carefully calibrated scheme that balances a variety of common law and statutory privileges against a requester's right to information. While Congress might have adopted a different set of protections in a statute dealing only with requests by legislators, it surely would not have created an unfettered right in individual legislators to invoke the powers of the courts to gain access to a broad spectrum of Executive Branch information subject only to such privileges as a court might choose to recognize.

Given that Congress has expressly authorized suit to compel disclosure of Executive Branch information in other instances, the lack of express authorization for individual members of Congress to file suit to enforce 5 U.S.C. § 2954, in itself, is a strong indication that Congress did not intend for disputes between Congress and the Executive Branch arising under this

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[9] [Discuss resolutions authorizing suits here]

provision to be resolved in court.[9] See Walls v. Wells Fargo Bank, 276 F.3d at ___, 2002 WL 15687, * 5 ("Had Congress meant to create a remedy for violations of [a provision of the Bankruptcy Code], it could easily have done so; that it did not is a strong indication that it did not intend any such remedy.").

The need for a clear statement of congressional intent is particularly important where, as here, the legislator plaintiffs are suing in their official capacities as *individual* legislators and not on behalf of Congress or a congressional committee. Such a dispute is inherently political and raises fundamental questions as to the power of an individual legislator to inquire into the conduct of the Executive. A court thus should be wary of assuming that, in directing the Executive Branch to comply with requests for information by individual members, Congress intends to confer on those members the right to take the Executive Branch to court.[10]

Finally, any suggestion that a private right of action in plaintiffs' favor should be inferred because they are members of "the class for whose *especial* benefit the statute was enacted," Cort v. Ash, 422 U.S. 66, 78 (1975) (emphasis in original), would be meritless. First, as the Secretary stated earlier, § 2954 was clearly enacted for the purpose of seeking information for the benefit of Congress as whole, not for congressmen as private individuals.[11] Second, even assuming for the sake of argument that § 2954 was enacted to benefit individual members, that alone would not justify the inference that Congress intended to create right for individual members to invoke the powers of the courts to compel compliance with their requests. "[T]he mere fact that [a] statute was designed to protect [certain individuals] does not require the implication of a private cause of action . . . on their behalf . . . . The dispositive question remains whether Congress

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[9] [Discuss resolutions authorizing suits here]

[10] When a House of Congress determines to seek judicial enforcement of a subpoena – the traditional means of compelling the Executive Branch to comply with a demand for information – it makes a collective, considered determination for which that House is politically accountable. A suit by individual members, in contrast, does not carry the same degree of political accountability and may seek to compel disclosure of information that the vast majority of Congress believes should not be disclosed.

[11] It is for this reason that plaintiffs lack standing. See discussion *supra*.

intended to create any such remedy." Transamerica Mortgage Advisors, 444 U.S. at 24. See also Walls v. Wells Fargo Bank, 276 F.3d at ___, 2002 WL 15687, * 4. In this instance, taking into account all the circumstances surrounding enactment of § 2954, it is clear that Congress did not so intend and that is where the inquiry must end.[12]

"Final Agency Action"

Plaintiffs erroneously assert that the APA gives them a right to seek judicial enforcement of 5 U.S.C. § 2954. See Pls Mem. (filed Aug. __, 2001), at 18. In determining whether review is available under the APA, as in determining the existence of an implied cause of action, it is necessary to examine the language and nature of that Act. By its express terms, the APA provides for judicial review only of "[a]gency action made reviewable by statute" and "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.[13] See, generally, Western Radio Services Co., Inc. v. Glickman, 123 F.3d 1189, 1196 (9th Cir. 1997). Because there is no express or implied right of action under 5 U.S.C. § 2954 itself, as explained above, the failure to comply with that provision is not "made reviewable" by that statute. Thus, plaintiffs' claim is viable under the APA only if a failure to submit information pursuant to a statutory mandate constitutes "final agency action" within the meaning of the APA.

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[12] Supreme Court decisions since Cort v. Ash, 422 U.S. 66 (1975), make clear that the so-called Cort factors are merely guides in the central task of ascertaining legislative intent, see Transamerica Mortgage Advisors, 444 U.S. at 15; Touche Ross, 442 U.S. at 575-76 (1979), that they are not of equal weight, Transamerica Mortgage Advisors , 444 U.S. at 15, and that in deciding an implied-right-of-action case, courts need not "mechanically trudge through all four of the factors when the disposition question of legislative intent has been resolved." California v. Sierra Club, 451 U.S. 287, 301 1981) (Rehnquist, concurring), *citing* Transamerica Mortgage Advisors, 444 U.S. at 24; Touche Ross, 442 U.S. at 24; Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 148-49 (1980).

[13] 5 U.S.C. § 704 specifies the types of actions that are judicially reviewable under the APA, thereby clarifying the scope of the judicial review to which a person is entitled under that statute. See 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

"Agency action" is defined in the APA to mean "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. 551(13). "Final agency action" has been construed by the courts to mean agency action "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" Bennett v. Spear, 520 U.S. 154, 177 (1997). See also Western Radio Services Co., Inc. v. Glickman, 123 F.3d at 1196-97.

The courts have consistently held that the submission of information to Congress does not constitute "agency action" within the meaning of the APA. See, e.g., Guerrero v. Clinton,157 F.3d 1190, 1195-96 (9th Cir. 1998) (a report to Congress "not agency action of the sort that is typically subject to judicial review" because "it triggers no legal consequences and determines no rights or obligations"); Chemical Weapons Group, Inc. v. United States Dep't of the Army, 111 F.3d 1485, 1495 (10th Cir. 1997) (a certification to Congress not reviewable agency action). Cf. American Trucking Assoc. v. United States, 755 F.2d 1292, 1297 (7th Cir. 1985) (report that is "educational undertaking" and does not "impose an obligation, determine a right or liability or fix a legal relationship" is not reviewable agency action).

The reasons for this are best explained by the D.C. Circuit's opinion in Natural Resources Defense Council, Inc. v. Hodel, 865 F.2d 288 (D.C. Cir. 1988), which bears quoting at length here:

> We think the presumption [of reviewability for agency action] is inapplicable here. First, and most importantly, the nature of the "agency action" at issue is quite distinct from the prototypical exercise of agency power. In the run-of-the-mill case, the agency whose action is challenged has exercised authority delegated (at least arguably) to it by Congress. The agency in such circumstances is exercising legislative functions (via formal or informal rulemaking) or adjudicatory functins that have been specifically ordained by Congress. As a basic element of our system of checks and balances, Congress has seen fit to provide broadly for judicial review of those actions, affecting as they do the lives and liberties of the American people. This is fully in keeping with

> fundamental notions in our policy that the exercise of governmental power, as a general matter, should not go unchecked. . . Executive responses to congressional reporting requirements [requiring that certain reports be made to Congress] represent, we believe, an entirely different sort of action. Under the reporting requirement before us, the designated Executive Branch officer is simply reporting back to the source of its delegated power in accordance with the Article I branch's instructions. Lacking a provision for judicial review, the measure before us embodies a requirement that by its nature seems singularly committed to congressional discretion in measuring the fidelity of the Executive Branch actor to legislatively mandated requirements . . . It scarcely bears more than a passing mention that the most representative branch is not powerless to vindicate its interests or ensure Executive fidelity to Legislative directives. In short, in the absence of a congressional directive for judicial review . . ., this issue seems to us quintessentially within the province of the political branches to resolve as part of their ongoing relationships.

Id. at 318-19, *quoted favorably in* Guerrero v. Clinton,157 F.3d at 1195-96.[14]

If the submission of information to Congress is not "agency action," it follows that the failure to submit information ~~also~~ does not fall within the definition of "agency action" either. Like a submission of information, a failure to submit information to Congress cannot be said to be agency action "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" Bennett v. Spear, 520 U.S. at 177. To the contrary, a failure to comply with a congressional reporting requirement is "an entirely different sort of action" that is "quintessentially within the province of the political branches to resolve as part of their ongoing

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[14] While the plaintiffs in Hodel were private parties rather than legislators, and the case turned in part on a lack of meaningful standards to judge compliance with the reporting requirement in question, the D.C. Circuit's observations are equally applicable here.

[15] Even if a failure to comply with a reporting requirement might qualify as "final agency action" in some instances, the Court should be wary of concluding that a failure to comply with 5

relationships," Hodel, 865 F.2d at 318-19, and outside the scope of the APA.[15]

* * *

In sum, the historical means by which Congress has compelled the disclosure of information from the Executive Branch reflect the interests and accountability of Congress as a whole, and there is simply no indication whatsoever that Congress intended to deviate from those means when it enacted either § 2954 or the APA.

Should the Court have any doubt in this regard, it should resolve those doubts in favor of finding no right of action for plaintiffs in order to avoid reaching the serious constitutional question that would arise if § 2954 or the APA (or any other statute) were construed to allow suits by individual members of Congress to compel Executive Branch compliance with a congressional request for information. See Crowell v. Benson, 285 U.S. 22, 62 (1932) (in choosing between competing versions of statutory construction, a court must choose that which avoids a constitutional question); Public Citizen v. United States Department of Justice, 491 U.S. 440, 466 (1989) (reluctance to confront or decide constitutional issues "is especially great where . . . they concern the relative powers of coordinate branches of government"). As the Secretary demonstrates next, any attempt by Congress to create such a right would exceed its powers under Article I of the Constitution.

III. CONGRESS MAY NOT CONSTITUTIONALLY DELEGATE ITS INVESTIGATORY POWERS TO A FEW MEMBERS OF CONGRESS TO THE EXTENT OF ALLOWING THEM TO SUE THE EXECUTIVE BRANCH TO COMPEL COMPLIANCE WITH A REQUEST FOR INFORMATION.

If the Court construes a statute enacted by Congress – be it 5 U.S.C. § 2954 or the APA – to encompass a right of individual members of Congress to sue the Executive Branch for failure to comply with an investigatory request, without the express consent of their respective Chamber, that statute would be unconstitutional. Congress simply may not constitutionally delegate its investigatory powers to a few individual members in a manner that has coercive effects outside of Congress.

Article I of the Constitution provides that "All legislative Powers herein granted shall be

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U.S.C. § 2954 falls within the compass of the APA given the nature and purpose of that provision and the context in which it was enacted, discussed *supra*.

GROUNDS FOR RECONSIDERATION

The Secretary seeks reconsideration of the Court's January 22 ruling in order to address a crucial but unexamined premise that lies at the heart of that ruling – namely, that plaintiffs were entitled to invoke the powers of the Court under the statutes on which they rely. This motion, then, does not seek to reargue points already considered by the Court, but addresses additional ~~case~~ authority that compels dismissal of plaintiffs' claim. As this memorandum goes to the very authority of this Court to resolve a dispute between the two political branches of government, the Secretary respectfully urges the Court to reconsider its ruling in light of it.

As the Secretary demonstrates below, plaintiffs' requested relief suffers from two principal flaws not fully considered in this Court's January 22 ruling. First, plaintiffs lack Article III standing to sue for the release of the documents subject to their request. Under the Supreme Court rule of Raines v. Byrd, 521 U.S. 811 (1997), legislators lack standing where, as here, they sue to remedy an institutional injury suffered by them in their official capacity as legislators. Here, despite asserting that they are seeking information in their personal capacities, plaintiffs would have no claim whatsoever to the information if they were not members of Congress. See id at 821. Plaintiffs do not cure the standing deficiency by arguing 5 U.S.C. § 2954 provides the basis for standing because, as the Court made clear in Raines, "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." Id. at 820 n.3 (citations omitted).

Second, even if the Court's interpretation of the scope of 5 U.S.C. § 2954 is correct, plaintiffs do not have a judicially enforceable right of action, express or implied, under either 5 U.S.C. § 2954 or the Administrative Procedure Act. Absent a clear statutory right on plaintiffs' part to invoke the power of the courts to enforce 5 U.S.C. § 2954, it is axiomatic – and not a matter of judicial discretion – that their claim must be dismissed under Fed.R.Civ.P 12(b)(6). To the extent the Court construes either the APA or § 2954, or any other statutory provision, to create a right of action for individual Members of Congress to sue the Executive Branch over document disputes without the express consent of a majority of either the House of Representatives or the Senate, the Secretary explains why the creation of such a right would be

vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const., Art. I, § 1. Included in Congress' "legislative Powers," of course, is the power to conduct investigations "in the aid of a legislative function." Kilbourn v. Thompson, 103 U.S. 168, 204 (1880).[16] But that power is constitutionally assigned to Congress, as a whole, and not to any individual Member of Congress. Given that fundamental fact, it would be unconstitutional for Congress to allow a few members of a Senate or House committee to exercise Congress's investigatory powers to the extent of suing the Executive Branch without the express authorization or approval of a majority in either the Senate or the House. Giving due respect to the separation of powers fundamental to our Constitution, the power to create a dispute of such moment, involving all three branches of the government and invoking the coercive powers of a court to compel Executive Branch action, can be exercised only upon the deliberate decision of a House as a whole.

The Secretary has no quarrel with the Senate or House, as a matter of their internal rules, delegating to committees or individual members the power to make a request for documents or testimony, or to issue subpoenas to demand compliance with such a request. See McGrain v. Daugherty, 272 U.S. 135, 158 (1927) ("The committee was acting for the Senate and under its authorization and therefore the subpoenas which the committee issued . . . are to be treated as if issued by the Senate"). The power to invoke the powers of the courts to compel compliance with such a demand or to enforce a subpoena, however, is an altogether different matter, and can only be exercised pursuant to a collective determination by the respective Chamber that such a step is truly "in the aid of a legislative function," Kilbourn v. Thompson, 103 U.S. at 204, and necessary to achieve its investigatory goals. Whatever Congress may choose to administratively delegate within its four walls, when it acts externally – whether by legislation or through its

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[16] See also McGrain v. Daugherty, 272 U.S. 135 (1927); Watkins v. United States, 354 U.S. 178 (1957); Barenblatt v. United States, 360 U.S. 109 (1950); Eastland v. United States Servicemen's Fund, 421 US. 491 (1975); Nixon v. Administrator of General Services, 433 U.S. 425 (1977).

coercive investigatory powers – Article I requires that this be done only at the will of the majority.[17]

IV. SECTION 2954 HAS BEEN SUPERSEDED BY HOUSE RULES.

[this argument up for discussion]

Insofar as § 2954 purports to delegate the power of the House of Representatives to "any seven members" of the House "Committee on Government Operations," § 2954 had, by the time of the request at issue, been superseded by subsequent House rules and was therefore no longer effective.

Article I , § 5, cl. 2 authorizes "[e]ach House [to] determine the Rules of its Proceedings." This rule-making power has been construed broadly by the courts. The Supreme Court long ago described its breadth in this way:

> All matters of method are open to the determination of the house. . . The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and [unless exercised so as to ignore constitutional restraints or irrationally], absolute and beyond the challenge of any other body or tribunal.

United States v. Ballin, 144 U.S. 1, 5 (1892). See also INS v. Chadha, 462 U.S. 919, 956 n.20 (1983) ("Each House has the power to act alone in determining specified internal matters.").

Each House has the constitutional power to establish, and to revise, its own rules. This

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[17] While this issue appears to be one of first impression, the judicial precedent that does exist indicates that the courts have been reluctant to use their coercive power at the behest of less than a majority of a House. For example, in Wilson v. United States, 369 F.2d 198 (D.C. Cir. 1966), the D.C. Circuit read the contempt-of-Congress statute, contrary to its literal terms, to require a vote of the full House before a witness could be found in contempt by a court. Although the court stressed Congress's apparent desire that committees be subject to external checks, the court also appeared concerned that committees might manipulate their processes in order to "insulate their actions on contempt matters from any further consideration within the legislative branch."

power is by its very nature non-delegable: the House of Representatives cannot delegate to the Senate, to the President, or to any private individual the ability to establish its rules. Nor may either House bind its successors. Indeed, the House of Representatives is not a continuous body -- it is reconstituted each Congress -- and it adopts its own rules of proceedings at the outset of each Congress.

The question who may exercise each House's authority to request information on its behalf is a "matter[ ] of method" related directly to the investigatory powers of the Senate and House and thus must be "open to the determination of each House." Ballin, 144 U.S. at 5. Section 2954 therefore addresses a matter within the rule-making power of the Senate and the House under Article I, § 5, cl. 2.

Plaintiffs' reading of § 2954 would effect an unconstitutional delegation of the House's power to make its own rules. Under plaintiffs' reading, the House of Representatives is forever barred from repealing the seven-member rule contained in § 2954 unless it obtains the consent of the Senate and of the President. In short, under this view, the House has delegated to the Senate and the President the power to block the House from revising its own rules.

We do not dispute the ability of each House, if it so chooses, to embody rules in statute if it thereafter incorporates that statute by reference into its internal rules. The House of Representatives has not done this. Specifically, the House rules in effect at the time of plaintiffs' request do not incorporate § 2954 (nor do they even establish a "Committee on Government Operations"). Therefore, the House rules have, as a constitutional matter, superseded § 2954.

CONCLUSION

For the foregoing reasons, the Court should reconsider its Order granting Plaintiffs' Motion for Summary Judgment, vacate that order, and then dismiss plaintiffs' claim for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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Dated: February 5, 2002

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2002, I caused a true copy of the Secretary's Memorandum in Support of Motion for Reconsideration to be served by first class mail, postage prepaid, upon:

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an unconstitutional exercise of Congress's Article I powers.

While recognizing that motions for reconsideration are disfavored by the Court, the Secretary urges the Court to exercise its considerable discretion in light of the extraordinary nature of the remedy afforded by the Court in its January 22 Order. The Court's ruling is likely to have a dramatic impact on relations between the Congress and the Executive Branch and on the courts. Much more is at stake here than access to the specific data sought by plaintiffs. The Court has, in effect, given a small number of members of the two investigative committees of Congress the ability to circumvent the congressional subpoena process and the will of the majority and bring routine political disputes over document production directly to the courts for resolution – disputes that have been resolved through non-judicial means, with few exceptions, since the ratification of our Constitution.

Moreover, the implications of the Court's ruling extend well beyond requests for information pursuant to § 2954. If every statute providing that the Executive Branch "shall" produce information to Congress (or one of its components or members) is enforceable in the courts, as the Court appears to suggest, the "veritable cornucopia of federal reporting requirements, involving basic interrelationships between the Article I and Article II branches" would be "appropriate grist for the judicial rule." Natural Resources Defense Council, Inc. v. Hodel, 865 F.2d 288, 317 & n.3 (D.C. Cir. 1988) (counting over 150 provisions in the U.S. Code imposing congressional reporting requirements). The Court's ruling is thus "rife with danger of flooding the courts with failure-to-file cases," id. at 319, and inserting the judiciary into everyday disputes between the Executive Branch and Congress over access to Executive Branch information to a far greater extent than has ever been allowed before.

Before the Court allows a ruling with such profound and far-reaching implications to take effect, it should be absolutely certain that plaintiffs have constitutionally valid statutory authority to invoke the powers of the judiciary to resolve this dispute. The authority discussed *infra* establishes that such authority is lacking and that plaintiffs' claim is therefore not legally viable, no matter how "plain" the statutory duty in question

may appear to the Court.[1]

ARGUMENT

I. PLAINTIFFS LACK STANDING TO MAINTAIN THIS ACTION.

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Raines v. Byrd, 521 U.S. 811, 818, *quoting* Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 37 (1976). See also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982) (case-or-controversy requirement is a "bedrock requirement.").

One element of the case-or-controversy requirement is that a plaintiff must establish that he has standing to sue. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (plaintiff bears burden of establishing standing). To meet the standing requirements of Article III, "[a] plaintiff must allege *personal* injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751 (1984) (emphasis added). Thus, a plaintiff's complaint must establish that he has a "personal stake" in the alleged dispute, and that the alleged injury suffered is particularized as to him. See, e.g., Lujan, 504 U.S. at 560-561 & n. 1 (to have standing, the plaintiff must have suffered a "particularized" injury, which means that "the injury must affect the plaintiff in a personal and individual way"); Bender v. Williamsport Area School Dist., 475 U.S. 534, 543-544 (1986) (school board member who "has no personal stake in the outcome of the litigation" has no standing); Simon, 426 U.S. at 39 ("The necessity that the plaintiff who seeks to invoke judicial

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[1] The Secretary has also discovered additional evidence of legislative intent that supports his position as to the proper scope of § 2954 that he wishes to add to the record. This new evidence – the Senate floor debate– is along the same lines of the legislative statements the Secretary relied on before. See ___ Cong. Rec. S10613-14 (daily ed. May 29, 1928) (copy attached hereto) (statement of Sen. Sackett, characterizing the provision later codified as § 2954 as a provision "under which the committee could reinstate any report [previously required] that was found to be needed."). [need full cite]

power stand to profit in some personal interest remains an Art. III requirement").

The Supreme Court has also stressed that the alleged injury must be "legally and judicially cognizable." Raines v. Byrd, 521 U.S. at 819. This requires, among other things, that the plaintiff have suffered "an invasion of a legally protected interest which is ... concrete and particularized," Lujan, 504 U.S. at 560, and that the dispute is "traditionally thought to be capable of resolution through the judicial process." Flast v. Cohen, 392 U.S. 83, 97 (1968). See also Allen, 468 U.S. at 752 ("Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable?").

The Supreme Court has always insisted on "strict compliance" with this jurisdictional standing requirement. See Raines v. Byrd, 521 U.S. at 819, *citing* Allen, 468 U.S. at 752 (under Article III, "federal courts may exercise power only 'in the last resort, and as a necessity' ") (quoting Chicago & Grand Trunk R. Co. v. Wellman, 143 U.S. 339, 345, 12 S.Ct. 400, 402, 36 L.Ed. 176 (1892)); Muskrat v. United States, 219 U.S. 346, 356, 31 S.Ct. 250, 253, 55 L.Ed. 246 (1911) ("[F]rom its earliest history this [C]ourt has consistently declined to exercise any powers other than those which are strictly judicial in their nature"). And the standing inquiry is to be "especially rigorous" when reaching the merits of the dispute would force the court to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional. See Raines v. Byrd, 521 U.S. at 819, *citing* Bender, 475 U.S. at 542; Valley Forge, 454 U.S. at 473-474. As the Supreme Court said in Allen, 468 U.S. at 752, "the law of Art. III standing is built on a single basic idea--the idea of separation of powers."

In the light of this "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere," this court must "put aside the natural urge to proceed directly to the merits of [an] important dispute and to 'settle' it for the sake of convenience and efficiency." Raines v. Byrd, 521 U.S. at 820. Instead, it must carefully inquire as to whether plaintiffs have met their burden of establishing that their claimed injury is "personal, particularized, concrete, and otherwise judicially cognizable." Id.

* * *

In a recent decision, the Supreme Court has revisited the application of these fundamental

principles to the question of legislative standing. Its decision in Raines v. Byrd, *supra*, leaves no doubt that the legislator-plaintiffs in the instant suit have no standing to bring suit.

In Raines v. Byrd, the Supreme Court addressed the standing of a small number of legislators to challenge the constitutionality of the Line Item Veto Act. In finding standing lacking, the Court disagreed with a line of cases from the Court of Appeals for the District of Columbia Circuit, which applied special standing rules to permit "legislative standing" for Members of Congress asserting injury to their institutional interests as legislators. The Supreme Court made clear that congressional plaintiffs hold no privileged status for purposes of the standing inquiry and that "strict compliance" with the fundamental principles of standing discussed above is required.

Applying these principles, the Raines Court held that congressional plaintiffs alleging a "diminution of [their] legislative power" lacked a "personal stake" in the outcome of the case and failed to allege a sufficiently concrete injury to establish Article III standing. Id. at___. In making this determination, the Court first noted that plaintiffs claimed only a type of "institutional injury," which was based on a loss of political power and which would affect all members of Congress equally, rather than an injury to a " private" right to which they were personally entitled.[2] Id. at 829. Next, the Court considered the nature of the institutional injury, and held that the claimed loss of legislative power was itself "wholly abstract and widely dispersed." Id. at 2322.

Only once in its history has the Supreme Court upheld standing for legislators claiming an institutional — as opposed to a personal — injury. Id. at ___. In that case,

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[2] The Raines court distinguished Powell v. McCormack, 395 U.S. 486 (1969), a case in which a Member of Congress was found to have standing to challenge his exclusion from the House of Representatives. In Powell, plaintiff alleged both that he was "singled out for specially unfavorable treatment" compared to other Members, and he alleged a loss of something to which he was personally entitled, i.e., his salary and his seat as a Member of Congress after his constituents had elected him. Raines, 117 S. Ct. at 2318. The Court explained that Powell's loss of a private right, rather than an institutional one, made his injury "more concrete," id., and conferred standing.

Coleman v. Miller, 307 U.S. 433 (1939), the Court affirmed a Kansas Supreme Court decision to grant standing to 20 state legislators challenging Kansas' ratification of a constitutional amendment. The plaintiffs had voted against ratification, deadlocking the legislature in a 20-20 tie and, plaintiffs claimed, properly dooming the amendment to defeat. However, after the State's Lieutenant Governor cast a deciding vote in favor of the amendment, it was deemed ratified. The 20 legislators had standing to sue, the Supreme Court held, because their "votes against ratification [were] overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification." Id. at 438.

The Raines Court refused to extend the holding in Coleman to support standing for a minority of legislators alleging that the Line Item Veto Act reduced their political power. Raines, 117 S. Ct. at 2320. "[O]ur holding in Coleman stands (at most) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." Id. at ____.[3] The Raines plaintiffs, in contrast, did not allege "that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated," id., nor that the Line Item Veto Act nullified their votes in such a way that there was no alternative political remedy. Id. at ___. Because the Raines Court found that "there is a vast difference between the level of vote nullification at issue in Coleman and the abstract dilution of institutional legislative power" alleged in Raines, the Court dismissed plaintiffs' claims for lack of standing. Id.

The rationale of the Raines decision is fatal to plaintiffs' standing claims in this

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[3] Further, the Court noted that Coleman may not even stand for that narrow proposition, as it declined to decide whether the fact that Coleman was brought by state legislators — and therefore did not raise separation of powers concerns — made it entirely distinguishable from any case in which plaintiffs are federal legislators. Id. at 824 n.8.

case. First, this is plainly not a case where the private or personal rights of the legislators are at issue. Rather, plaintiffs have claimed "serious, irreparable" harm from being deprived of "important information to which they are entitled by law" and which is needed in order to "engage in meaningful oversight . . . [and] develop legislation." Complaint at ¶ 19. Like the injuries alleged in Raines, there can be no doubt that these are quintessential "institutional injuries" that "damage[ ] all members of Congress and both Houses of Congress equally," and that are claimed only on the basis of plaintiffs' official capacities as legislators. Raines, 521 U.S. at ___.

Second, these plaintiffs share none of the exceptional characteristics that may be sufficient to confer standing on legislators seeking redress for institutional injuries.[4] Unlike the plaintiffs in Coleman, these plaintiffs represent a minority of the House Committee on Government Reform. As a small minority of one House committee, they do not themselves maintain the right to enact legislation pertaining to redistricting or to amend the Census Act. Nor do they have standing to allege institutional injuries on behalf of a majority of their colleagues whose votes would be sufficient to enact legislation on such matters – colleagues who have not joined plaintiffs in this suit or authorized them to bring it on their behalf. See Raines v. Byrd, 521 U.S. at ___ (holding that Coleman exception to general rule against legislative standing is limited to cases where plaintiffs include legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act, and further attaching "some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress").]

* * *

Plaintiffs' suggestion (see Pls. Mem. at 19-20) that they have standing,"[b]ecause at its

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[4] In fact, it is not clear after the Court's decision in Raines whether any institutional injury alleged by congressional plaintiffs will be sufficient to confer standing, unless the injury exactly mimics the injury claimed in Coleman. See generally Separation of Powers — Congressional Standing, 111 Harv. L. Rev. 217 (1997).

core this is a case to enforce a statutory right," is unavailing. In the next section, the Secretary shows that plaintiffs do not have a statutory right to go to court to enforce 28 U.S.C. § 2954. But even if the Court concludes otherwise, this would not give plaintiffs Article III. standing. As the Supreme Court reaffirmed in Raines, "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." Raines v. Byrd, 521 U.S. at 820 n.3, *citing* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979). See also Lujan, 504 U.S. at 578 ("in suits against the government, at least, the concrete injury requirement must remain" and is not subject to congressional override). [confirm quote]

Plaintiffs' assertion that they have suffered a "particularized harm" from the Secretary's failure to comply with 5 U.S.C. § 2954 is also without merit. Although there is no question that § 2954 was enacted to make it clear that the Executive Branch was expected to comply with requests for information by a certain number of individual members acting without the assent of their committee, that provision was clearly enacted for the purpose of seeking information for the benefit of Congress as whole, not for congressmen as private individuals. Plaintiffs' injury, then, is properly deemed an "institutional injury" that "damages all members of Congress and both Houses of Congress equally," Raines, 521 U.S. at 829, and thus insufficient to confer Article III standing.

II. PLAINTIFFS LACK A STATUTORY RIGHT OF ACTION, EXPRESS OR IMPLIED, TO ENFORCE SECTION 2954.

This Court's January 22 opinion overlooks a fundamental issue underlying this dispute: do plaintiffs have a right of action, either express or implied, under the statute they are seeking to enforce or the Administrative Procedure Act, the only other statute they allege to have been

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[5] It is fundamental that a plaintiff suing the United States or one of its officials must demonstrate subject-matter jurisdiction of the court where suit is brought, a waiver of sovereign immunity, and an express or implied cause of action in its favor. In this action, 28 U.S.C. §§ 1331 and 1361 provide the basis for the Court's exercise of subject matter jurisdiction and 5 U.S.C. § 702, as construed by the Ninth Circuit, provides a general waiver of sovereign

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United States Senate

WASHINGTON, DC 20510

April 30, 2003

Dear Senators Frist and Daschle,

As the ten newest members of the United States Senate, we write to express our concerns about the state of the federal judicial nomination and confirmation process. The apparent breakdown in this process reflects poorly on the ability of the Senate and the Administration to work together in the best interests of our country. The breakdown also disserves the qualified nominees to the federal bench whose confirmations have been delayed or blocked, and the American people who rely on our federal courts for justice.

We, the ten freshmen of the United States Senate for the 108th Congress, are a diverse group. Among our ranks are former federal executive branch officials, members of the U.S. House of Representatives, and state attorneys general. We include state and local officials, and a former trial and appellate judge. We have different viewpoints on a variety of important issues currently facing our country. But we are united in our commitment to maintaining and preserving a fair and effective justice system for all Americans. And we are united in our concern that the judicial confirmation process is broken and needs to be fixed.

In some instances, when a well qualified nominee for the federal bench is denied a vote, the obstruction is justified on the ground of how prior nominees – typically, the nominees of a previous President – were treated. All of these recriminations, made by members on both sides of the aisle, relate to circumstances which occurred before any of us arrived in the United States Senate. None of us were parties to any of the reported past offenses, whether real or perceived. None of us believe that the ill will of the past should dictate the terms and direction of the future.

Each of us firmly believes that the United States Senate needs a fresh start. And each of us believes strongly that we were elected to this body in order to do a job for the citizens of our respective states – to enact legislation to stimulate our economy, protect national security, and promote the national welfare, and to provide advice and consent, and to vote on the President's nominations to important positions in the executive branch and on our nation's courts.

Accordingly, the ten freshmen of the United States Senate for the 108th Congress urge you to work toward improving the Senate's use of the current process or establishing a better process for the Senate's consideration of judicial nominations. We acknowledge that the White House should be included in repairing this process.

All of us were elected to do a job. Unfortunately, the current state of our judicial confirmation process prevents us from doing an important part of that job. We seek a bipartisan solution that will protect the integrity and independence of our nation's courts, ensure fairness for judicial nominees, and leave the bitterness of the past behind us.

Yours truly,

John Cornyn

Mark Pryor

Lisa Murkowski

Elizabeth Dole

Norm Coleman

Lamar Alexander

[Separation of Powers] [1]

Counsel's Office, White House

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(Preliminary Print)

Office of Legal Counsel
U.S. Department of Justice

I. THE CONSTITUTIONAL SEPARATION OF POWERS BETWEEN THE PRESIDENT AND CONGRESS

May 7, 1996

This memorandum provides an overview of the constitutional issues that periodically arise concerning the relationship between the executive and legislative branches of the federal government. Although that relationship is shaped in part by the policy and political concerns of the President and Congress of the day, the political interaction between the President and Congress takes place within an enduring constitutional framework that confers powers and responsibilities on both elected branches. In this memorandum we discuss the general principles underlying separation of powers analysis, and we address certain specific questions that have arisen in the past. Any set of examples is necessarily illustrative rather than exhaustive, however, and the Office of Legal Counsel is always available to assist in reviewing legislation or other congressional action for potential separation of powers issues. [FN1]

MEMORANDUM FOR THE GENERAL COUNSELS
OF THE FEDERAL GOVERNMENT

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I was unconstitutional. "[O]nce a function has been delegated to the executive branch, it must be performed there, and cannot be subjected to continuing congressional control except through the constitutional process of enacting new legislation." Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President, 4A Op. O.L.C. 21, 27 (1980) (opinion of the Attorney General).

Similarly, while Congress has near-plenary authority in deciding to grant, limit or withhold appropriations, the Department of Justice has long contended that the appropriations power may not be used to circumvent the restrictions the Constitution places on the modes of legislative action. See, e.g., Authority of Congressional Committees to Disapprove Action of Executive Branch, 41 Op. Att'y Gen. 230 (1955) (opining that legislation authorizing congressional committees to disapprove Defense Department contracts is unconstitutional). Several years before Chadha, for example, this Office advised that Congress could not validly provide for the indirect implementation of a legislative "veto" by an appropriations rider that would prospectively deny funding for the implementation of any regulation disapproved in the future by such a "veto." See Appropriations Limitation for Rules Vetoed by Congress, 4B Op. O.L.C. 731 (1980). Our reasoning in that opinion is equally applicable to appropriations provisions that attempt to cut off funding that would otherwise be available on the basis of any future expression of disapproval by Congress that does not take the form of new legislation. The same analysis would apply, as well, to a provision prohibiting the expenditure of funds for some purpose, but allowing a future expression of approval by committee action to remove the prohibition.

In carrying out its legitimate legislative functions, Congress "enjoys ample channels to advise, coordinate, and even directly influence an executive agency [including by] direct communication with the [agency]." FEC v. NRA Political Victory Fund, 6 F.3d 821, 827 (D.C. Cir. 1993), cert. dismissed, 115 S. Ct. 537 (1994). As a practical matter, therefore, congressional committees and individual members of Congress often are able to sway the decisions of the executive officials with whom they deal. In addition, congressional committees can exercise limited but legally coercive authority over persons outside the legislative branch through the power to issue subpoenas to compel testimony. [FN44] In light of the capacity of Congress to extend its influence beyond the legislative sphere by informal means that are sometimes troubling although not unlawful, it is imperative that the executive branch consistently assert the rule of constitutional law that formal control of executive decision making and administration is subject to the requirements of Article I, and especially to the constitutional authority of the President to participate in the legislative process through the presentment mechanism. The executive branch has a constitutional obligation not to accede to legislative action that does not conform to Article I. Advising the Secretary of Education that she could validly implement departmental regulations despite a legislative "veto," Attorney General Civiletti wrote that "recognition of these concurrent resolutions as legally binding would constitute an abdication of the responsibility of the executive branch, as an equal and coordinate branch of government with the legislative branch, to preserve the integrity of its functions against constitutional encroachment." Congress' Disapproval of Agency Regulations, 4A

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Op. O.L.C. at 29.

B. Appointment Clause and Related Questions

The Appointments Clause provides that

[The President,] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2. [FN45] In Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), the Supreme Court held that the terms of the Appointments Clause set out the only means by which Congress may provide for the appointment of "Officers of the United States." [FN46] Id. at 124-37. Principal officers must be appointed by the President with the advice and consent of the Senate; inferior officers will be appointed in the same manner unless Congress by statute provides for their appointment by the President, the "Head[] of [a] Department[]," or the courts. Id. at 132; [FN47] see also Freytag v. Commissioner, 501 U.S. 868, 878 (1991) ("the Constitution limits congressional discretion to vest power to appoint 'inferior Officers' to three sources"). Despite the apparent clarity of its language, however, the Appointments Clause has provided the occasion for many opinions of the Attorneys General and of this Office. [FN48]

1. Who is Required to Be an "Officer of the United States"? Not everyone who performs duties for the federal government is an "officer" within the meaning of the Appointments Clause. From the early days of the Republic, this term has been understood to embrace the ideas of "tenure, duration, emolument, and duties." United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868). Because Hartwell has long been taken as the leading statement of the constitutional meaning of "officer," [FN49] that statement is worth repeating in full:

An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.

The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe. A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.

Id. at 393.

Hartwell and the cases following it specify a number of criteria for identifying constitutional officers, and in some cases it is not entirely clear which criteria the court considered essential to its decision. Nevertheless, we

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believe that from the earliest reported decisions onward, the constitutional definition of officer has involved at least three necessary conditions.

a. Employment by the Government: The Distinction between Appointees and Independent Contractors. An officer's duties are permanent, continuing, and based upon responsibilities created through a chain of command rather than by contract. Underlying an officer is an "office," to which the officer must be appointed. As Chief Justice Marshall, sitting as circuit justice, wrote: "Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer." United States v. Maurice, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747). Chief Justice Marshall speaks here of being "employed under a contract"; in modern terminology the type of non-officer status he is describing is usually referred to as that of independent contractor. In Hartwell, this distinction shows up in the opinion's attention to the characteristics of the defendant's employment being "continuing and permanent, not occasional or temporary," as well as to the suggestion that with respect to an officer, a superior can fix and then change the specific set of duties, rather than having those duties fixed by a contract. 73 U.S. at 393.

The distinction between employees and persons whose relationship to the government takes some other form also appears in later decisions. [FN50] The question in United States v. Germaine, 99 U.S. 508 (1879), concerned whether a surgeon appointed by the Commissioner of Pensions "to examine applicants for pension, where [the Commissioner] shall deem an examination . . . necessary," id. at 508 (quoting Rev. Stat. § 4777), was an officer within the meaning of the Appointments Clause. The surgeon in question was "only to act when called on by the Commissioner of Pensions in some special case"; furthermore, his only compensation from the government was a fee for each examination that he did in fact perform. Id. at 512. The Court stated that the Appointments Clause applies to "all persons who can be said to hold an office under the government" and, applying Hartwell, concluded that "the [surgeon's] duties are not continuing and permanent and they are occasional and intermittent." Id. (emphasis in original). The surgeon, therefore, was not an officer of the United States. Id. [FN51]

The Court employed the same reasoning in Auffmordt v. Hedden, 137 U.S. 310 (1890). Pursuant to statute, an importer dissatisfied with the government's valuation of dutiable goods was entitled to demand a reappraisement jointly conducted by a general appraiser (a government employee) and a "merchant appraiser" appointed by the collector of customs for the specific case. Despite the fact that the reappraisement decision was final and binding on both the government and the importer, id. at 329, the Court rejected the argument that the merchant appraiser was an "inferior Officer" whose appointment did not accord with the requirements of the Appointments Clause.

> He is an expert, selected as such. . . . He is selected for the special case. He has no general functions, nor any employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case. . . . He has no claim or right to be designated, or to act except as he may be designated. . . . His position is without tenure, duration, continuing emolument, or continuous duties . . . . Therefore, he is not an

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'officer,' within the meaning of the clause.
Id. at 326-27.
We believe that under its best reading, Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), reflects and endorses this distinction, and that suggestions to the contrary misread the opinion. First, Buckley cites both Germaine and Auffmordt approvingly. See id. at 125-26 & n.162. Second, in several of its statements of the definition of "officers," Buckley, sometimes citing Germaine explicitly, says that the term applies to appointees or appointed officials who exercise significant authority under federal law, thus recognizing the possibility that non-appointees might sometimes exercise authority under federal law. See, e.g., 424 U.S. at 131 ("Officers" are "all appointed officials exercising responsibility under the public laws"). It is true that at other points in its opinion, the Buckley Court used language that, taken in isolation, might suggest that the Appointments Clause applies to persons who, although they do not hold positions in the public service of the United States, exercise significant authority pursuant to federal law. See id. at 141. However, we think such a reading of Buckley is unwarranted. So understood, Buckley must be taken to have overruled, sub silentio, Germaine and Auffmordt -- cases upon which it expressly relies in its analysis, see id. at 125-26 & n.162 -- and its repeated quotation of the Germaine definition of "officer" as "all persons who can be said to hold an office under the government" would make no sense. The apparently unlimited language of some passages has a simpler explanation: there was no question that the officials at issue in Buckley held "employment[s]," Maurice, 26 F. Cas. at 1214, under the federal government, and thus the question of the inapplicability of the Appointments Clause to persons not employed by the federal government was not before the Court. [FN52] The Supreme Court's decision in Buckley, we conclude, did not modify the long-settled principle that a person who is not an officer under Hartwell need not be appointed pursuant to the Appointments Clause. [FN53]
b. The Exercise of Significant Authority. Chief Justice Marshall's observation that "[a]lthough an office is 'an employment,' it does not follow that every employment is an office," United States v. Maurice, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) (Marshall, Circuit Justice), points to a second distinction as well -- although not one that was at issue in Maurice itself. An officer is distinguished from other full-time employees of the federal government by the extent of authority he or she can properly exercise. As the Court expressed this in Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam):

> We think that the term "Officers of the United States" as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in United States v. Germaine, [means] that any appointee exercising significant authority pursuant to the laws of the United States . . . must . . . be appointed in the manner prescribed by [the Appointments Clause].

Id. at 125-26 (emphasis added). [FN54] In contrast, "[e]mployees are lesser functionaries subordinate to officers of the United States." Id. at 126 n.162.
The distinction between constitutional officers and other employees is a long-standing one. See, e.g., Burnap v. United States, 252 U.S. 512, 516-19 (1920) (landscape architect in the Office of Public Buildings and Grounds was an employee, not an officer); Second Deputy Comptroller of the Currency --

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Appointment, 26 Op. Att'y Gen. 627, 628 (1908) (Deputy Comptroller of the Currency was "manifestly an officer of the United States" rather than an employee). At an early point, the Court noted the importance of this distinction for Appointments Clause analysis. See Germaine, 99 U.S. at 509. [FN55]

The Supreme Court relied on the officer/employee distinction in its recent decision in Freytag v. Commissioner, 501 U.S. 868 (1991). In Freytag, the Court rejected the argument that special trial judges of the Tax Court are employees rather than officers because "they lack authority to enter a final decision" and thus arguably are mere subordinates of the regular Tax Court judges. [FN56] Id. at 881. The Court put some weight on the fact that the position of special trial judge, as well as its duties, salary, and mode of appointment, are specifically established by statute; [FN57] the Court also emphasized that special trial judges "exercise significant discretion" in carrying out various important functions relating to litigation in the Tax Court. Id. at 881-82.

Applying the same understanding of the distinction between officers and employees, this Office has concluded that the members of a commission that has purely advisory functions "need not be officers of the United States" because they "possess no enforcement authority or power to bind the Government." Proposed Commission on Deregulation of International Ocean Shipping, 7 Op. O.L.C. 202, 202-03 (1983). For that reason, the creation by Congress of presidential advisory committees composed, in whole or in part, of congressional nominees or even of members of Congress does not raise Appointments Clause concerns.

Since employees do not wield independent discretion and act only at the direction of officers, they do not in their own right "exercis[e] responsibility under the public laws of the Nation," Buckley, 424 U.S. at 131. [FN58] As a constitutional matter, therefore, an employee may be selected in whatever manner Congress directs. Conversely, "any appointee" in federal service who "exercis[es] significant authority pursuant to the laws of the United States" must be an officer in the constitutional sense and must be appointed in a manner consistent with the Appointments Clause. [FN59] 424 U.S. at 126. Congress and the President may not avoid the strictures of the Clause by vesting federal employees with the independent or discretionary responsibility to perform any "significant governmental duty." Id. at 141. [FN60]

c. Appointment to a Position of Employment within the Federal Government.

Finally, United States v. Hartwell, 73 U.S. (6 Wall.) 385 (1868), and the other major decisions defining "Officers of the United States" all reflect the historical understanding that a constitutional officer is an individual who is appointed to his or her office by the federal government. The Appointments Clause simply is not implicated when significant authority is devolved upon non-federal actors. [FN61] In Hartwell the Court stated, "[a]n office is a public station, or employment, conferred by the appointment of government. . . . The employment of the defendant was in the public service of the United States." Id. at 393; see also United States v. Germaine, 99 U.S. 508, 510 (1879) (founders intended appointment pursuant to the Appointments Clause only for "persons who can be said to hold an office under the government about to be established under the Constitution"). It is a conceptual confusion to argue that federal laws delegating authority to state officials create federal "offices," which are then

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filled by (improperly appointed) state officials. Rather, the "public station, or employment" has been created by state law; the federal statute simply adds federal authority to a pre-existing state office. Accordingly, the substantiality of the delegated authority is immaterial to the Appointments Clause conclusion. [FN62] An analogous point applies to delegations made to private individuals: the simple assignment of some duties under federal law, even significant ones, does not by itself pose an Appointments Clause problem. [FN63]

In our view, therefore, the lower federal courts have been correct in rejecting Appointments Clause challenges to the exercise of federally derived authority by state officials, [FN64] the District of Columbia City Council, [FN65] qui tam relators under the False Claims Act, [FN66] and plaintiffs under the citizen suit provisions of the Clean Water Act. [FN67] The same conclusion should apply to the members of multinational or international entities who are not appointed to represent the United States. [FN68] We believe that the Appointments Clause doubts sometimes voiced about legislation requiring the concurrence of state or local officials, Indian tribes, or private persons as a condition precedent to federal action are equally without merit. [FN69]

Determining whether an individual occupies a position of private employment or federal employment can pose difficult questions. The Supreme Court recently set forth rules for making this determination in Lebron v. National Railroad Passenger Corp., 115 S. Ct. 961 (1995). There, the Court found itself faced with the question of whether Amtrak is a private corporation or an agency of the government. Amtrak is chartered by Congress and incorporated under the District of Columbia Business Corporation Act. Id. at 967. The organic statute expressly provides that Amtrak "shall be operated and managed as a for-profit corporation, and is not a department, agency, or instrumentality of the United States Government." 49 U.S.C. § 24301(a)(2)-(3). The Court ruled that this provision "is assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress' control . . . . But it is not for Congress to make the final determination of Amtrak's status as a government entity for purposes of determining the constitutional rights of citizens affected by its actions." 115 S. Ct. at 971.

However, the Court held that an entity is "what the Constitution regards as the Government," if the entity is government-created and government- controlled. Id. at 971. Because Amtrak was created "by special law for the furtherance of governmental objectives," it is government-created. [FN70] Id. at 974. Because federally appointed members of Amtrak's governing board hold "voting control" and there is no provision for this government control to sunset, Amtrak is government-controlled. The Court contrasted Conrail, which it determined is not what the Constitution regards as the government. By statute the federal government appoints a voting majority of Conrail's board of directors. Nevertheless, the Court held that Conrail is not part of the government, because the government's voting control will shift to the private shareholders if Conrail's debt to the federal government falls below half of its total indebtedness and because "'[t]he responsibilities of the federal directors are not different from those of the other directors -- to operate Conrail at a profit for the benefit of its shareholders' -- which contrasts with the public-

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interest 'goals' set forth in Amtrak's charter." Id. (quoting Regional Rail Reorganization Act Cases, 419 U.S. 102, 152 (1974)). [FN71]

d. Summary. An appointee (1) to a position of employment (2) within the federal government (3) that carries significant authority pursuant to the laws of the United States is required to be an "Officer of the United States." Each of these three conditions is independent, and all three must be met in order for the position to be subject to the requirements of the Appointments Clause.

We recently applied this principle in determining whether the Appointments Clause represents a blanket proscription against participation by the federal government in binding arbitration. Typically, arbitrators are private individuals chosen by the parties to the dispute. In a binding arbitration, the decision of the arbitrators is mandatory upon the parties, subject only to limited judicial review. The view that the Appointments Clause prohibits federal government participation in binding arbitration proceeds from the misinterpretation of Buckley discussed above. We reasoned that although it is "beyond dispute that arbitrators exercise significant authority, at least in the context of binding arbitration involving the federal government," [FN72] the standard binding arbitration mechanism does not implicate the Appointments Clause. Arbitrators

> are manifestly private actors who are, at most, independent contractors to, rather than employees of, the federal government. Arbitrators are retained for a single matter, their service expires at the resolution of that matter, and they fix their own compensation. Hence, their service does not bear the hallmarks of a constitutional office -- tenure, duration, emoluments, and continuing duties. Consequently, arbitrators do not occupy a position of employment within the federal government, and it cannot be said that they are officers of the United States. Because arbitrators are not officers, the Appointments Clause does not place any requirements or restrictions on the manner in which they are chosen.

Memorandum for John Schmidt, Associate Attorney General, from Walter Dellinger, Assistant Attorney General, re: Constitutional Limitations on Federal Government Participation in Binding Arbitration, at 10 (Sept. 7, 1995). [FN73] The only case that to our knowledge addresses this question agreed with our analysis and conclusion, and held that the Appointments Clause does not prohibit the federal government from entering into binding arbitration. See Tenaska Washington Partners v. United States, 34 F. Cl. 434, 440 (1995) ("the OLC Memorandum is a thorough and persuasive analysis").

2. Who May Be an Inferior Officer? Since all officers of the United States may be appointed by the President with the advice and consent of the Senate, the only Appointments Clause significance to the distinction between principal and inferior officers lies in Congress's ability to provide for the appointment of inferior officers by one of the alternative means listed in the Clause. The Supreme Court has observed that "[t]he line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn." Morrison v. Olson, 487 U.S. 654, 671 (1988). Unfortunately, the Court's own decisions provide only modest additional guidance. In Morrison, the Court declined to "attempt . . . to decide exactly where the line falls" because it found that the independent counsel "clearly falls on the 'inferior officer' side of that line." Id. at 671. The Court

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advanced several factors that pointed to that conclusion: (1) The counsel was removable by the Attorney General, thus making her "to some degree 'inferior' in rank and authority." Id. (2) The counsel's duties were limited, particularly with respect to policy making and administration. (3) The counsel's tenure was limited to the particular "mission that she was appointed for." Id. at 672. [FN74] The Court's other recent Appointments Clause decisions shed little additional light on the subject. [FN75]

We agree with the court of appeals in Silver v. United States Postal Service, 951 F.2d 1033 (9th Cir. 1991), that the particular factors Morrison discussed do not constitute an exhaustive or exclusive list. See id. at 1040 ("The nature of each government position must be assessed on its own merits."). The Silver court noted that the official at issue in that case, the Postmaster General, "performs many tasks and has many responsibilities," but determined the office to be an inferior one because the Postmaster General "does not have 'control"' and "serv[es] at the pleasure of the" Board of Governors of the Postal Service. Id. This approach is consistent with the one we have taken in the past. For example, in concluding that United States Attorneys are inferior officers whose appointment could be vested in the Attorney General, we rejected the argument that the constitutional term "inferior" means "'petty or unimportant"'; instead, we concluded that the term connotes amenability to supervision by the superior "in whom the power of appointment is vested." United States Attorneys -- Suggested Appointment Power of the Attorney General -- Constitutional Law (Article 2, § 2, cl. 2), 2 Op. O.L.C. 58, 58-59 (1978) (quoting Collins v. United States, 14 Ct. Cl. 568, 574 (1878)); see also Department of Housing and Urban Development -- Delegations of Authority -- 42 U.S.C. § 3533, 3535, 2 Op. O.L.C. 87, 89 (1978) (deputy assistant secretary, who is subject to direction by an assistant secretary, is "unquestionably" an inferior officer). In determining whether an officer may properly be characterized as inferior, we believe that the most important issues are the extent of the officer's discretion to make autonomous policy choices and the location of the powers to supervise and to remove the officer. While an officer responsible only to the President for the exercise of significant discretion in decision making is probably a principal officer, an officer who is subject to control and removal by an officer other than the President should be deemed presumptively inferior.

3. Who May Appoint Inferior Officers? The Appointments Clause does not define "Heads of Departments" or "Courts of Law," and questions have arisen about which entities are included by these terms within the "possible repositories for the appointment power." Freytag v. Commissioner, 501 U.S. 868, 884 (1991). Earlier Attorneys General have accorded these terms a broad construction. See, e.g., Authority of Civil Service Commission to Appoint a Chief Examiner, 37 Op. Att'y Gen. 227 (1933). The same is true of the courts, [FN76] which have held that the Tax Court, [FN77] a special division of a court of appeals created primarily for the purpose of appointing independent counsels, [FN78] and the Governors of the Postal Service (as a collective head of department), [FN79] can be vested with appointments power. The interpretive difficulties lie in determining exactly how broadly the term "Department" should be read.

We think that the "Departments" to which the Appointments Clause refers are not limited to those major divisions of the executive branch that are headed by

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members of the President's cabinet. [FN80] In 1933, Acting Attorney General Biggs opined that Congress could authorize the Civil Service Commission to appoint an inferior officer. Authority of Civil Service Commission to Appoint a Chief Examiner, 37 Op. Att'y Gen. 227 (1933). His opinion noted that the Commission "ha[d] certain independent executive duties to perform," was "responsible only to the Chief Executive," id. at 229, and was "not a subordinate Commission attached to one of the so-called executive departments," id. at 231. As "an independent division of the Executive Branch," he concluded, the Commission was a "Department" for Appointments Clause purposes and its three commissioners, collectively, "the 'head of a Department' in the constitutional sense." Id. The fact that the commissioners were not members of the Cabinet was not controlling, the Acting Attorney General concluded, because the Cabinet itself is not a creation of the Constitution. Id. [FN81] We find this opinion persuasive and note that the Court's opinion in Freytag ultimately reserved the question of whether the heads of entities other than cabinet-level departments can be vested with the power to appoint inferior officers. See Freytag, 501 U.S. at 887 n.4. [FN82] Cf. United States v. Germaine, 99 U.S. 508 (1879) (Commissioner of Pensions, as head of a bureau within the Interior Department, was not a "Head of Department"). [FN83]

We would apply the reasoning of the 1933 opinion in concluding that it is constitutional for Congress to vest the power to appoint inferior officers in the heads of the so-called independent agencies -- those agencies whose heads are not subject to removal at will by the President and that conventionally are understood to be substantially free of policy direction by the President. Except for the attenuated nature of the President's supervisory authority, most of the independent agencies are clearly analogous to major executive agencies. They exercise governmental authority without being subordinated to any broader unit within the executive branch, and Congress has implicitly characterized them as "Departments" for Appointments Clause purposes by permitting their heads to appoint officials who plainly are inferior officers. [FN84] Nothing in the original history of the Clause suggests any intention to exclude from the scope of the Clause separate establishments that are not subject to plenary presidential control. [FN85] Finally, in reserving the question of appointments by "the head of one of the principal agencies," the Freytag Court itself included as examples of those agencies the "independent" FTC and the SEC as well as the clearly executive CIA, which suggests that the Court did not perceive a difference between the two types of agencies, at least in the Appointments Clause context. 501 U.S. at 887 n.4. We see no reason to exclude the independent regulatory agencies from the class of entities that are "Departments" for Appointments Clause purposes.

We note that, even accepting the reasoning of the 1933 Justice Department opinion, some entities may exercise governmental authority in so limited a manner that they need not be viewed as "Departments" even though their heads are responsible only to the President. For example, the Committee for Purchase from People Who Are Blind or Severely Disabled, the members of which are appointed by the President alone, 41 U.S.C. § 46(a), appears to exercise significant authority but is subordinate to no larger executive agency. Id. §§ 46-48c. Given the narrow scope of the Committee's powers, however, we do not think that the

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Committee necessarily should be analyzed as a collective head of a department for Appointments Clause purposes.

4. Legislation Lengthening the Tenure of an Officer. As the Court held in Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam), the Appointments Clause by its terms and its structure prohibits Congress from itself exercising the power to appoint "Officers of the United States." The text and structure of the Clause reflect a deliberate constitutional choice to deny to the legislature the power to select the individuals who exercise significant governing authority as non-legislative officers of the federal government. See id. at 129-31 (reviewing the debates in the Philadelphia convention). [FN86] This choice to exclude Congress as such from the appointments process can be set at naught by means other than legislation overtly vesting in Congress the power of appointment. Accordingly, the executive branch has traditionally viewed statutes that constitute an effective exercise by Congress of the power to appoint as violations of the Appointments Clause.

This issue sometimes arises in connection with statutes that attempt to extend the tenure of an officer with a set term, thus potentially denying the President the power he or she would otherwise have to reappoint the officer or select someone else. In 1951, for example, the President requested the Justice Department's views on the validity of a statute extending the terms of the members of a commission. See Displaced Persons Commission -- Terms of Members, 41 Op. Att'y Gen. 88 (1951). According to the original legislation creating the commission, the terms were to expire in June 1951, but prior to that date Congress amended the legislation to extend the commissioners' tenure to August 1952. Acting Attorney General Perlman advised the President that, while he did not think "there can be any question as to the power of the Congress to extend the terms of offices which it has created," this legislative power is subject "to the President's constitutional power of appointment and removal." Id. at 90. However, because the legislation did not attempt to restrict the President's authority to remove the commissioners at will, it was constitutionally harmless: the President remained free to exercise his appointment power simply by removing the incumbents from office at any time. See id. ("As so construed, the [extension legislation] presents no constitutional difficulties."); see also Pension Agents and Agencies, 14 Op. Att'y Gen. 147, 148-49 (1872) (discussing President's power to remove officer serving a term extended by statute). [FN87]

We think that the Department's 1951 opinion adopted the correct approach to this issue: while the power to lengthen the tenure of an incumbent officer is incident to Congress's general power to create, determine the duties of, and abolish offices, [FN88] that power cannot legitimately be employed to produce a result that is, practically speaking, a congressional reappointment to office. On this reasoning, the extension of tenure of officers serving at will raises no Appointments Clause problem, but lengthening the term of an officer who may be removed only for cause would be constitutionally questionable. [FN89] However, this conclusion, which we think sound in principle, has been rejected by the courts in at least one context. The Bankruptcy Amendments and Federal Judgeship Act of 1984 extended the tenure of bankruptcy judges, who can be removed only for cause, and that provision has been sustained repeatedly against constitutional challenge. The leading case, In re Benny, 812 F.2d 1133 (9th Cir.

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The Constitution reflects a fundamental conviction that governmental "power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it." The Federalist No. 48, at 332 (James Madison) (Jacob E. Cooke ed., 1961), quoted in Metropolitan Washington Airports Auth. ("MWAA") v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 273 (1991). The founders, not content to rely on paper definitions of the rights secured to the people, "viewed the principle of separation of powers as a vital check against tyranny." Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam). In order to safeguard liberty, therefore, the Constitution creates three distinct branches of government -- Congress, the President, and the federal judiciary -- and assigns to them differing roles in the exercise of the government's powers. The resulting division of governmental authority is not a mere set of housekeeping rules indicating which branch presumptively performs which functions; it is, rather, a fundamental means by which the Constitution attempts to ensure free, responsible, and democratic government. See MWAA, 501 U.S. at 272 ("The ultimate purpose of this separation of powers is to protect the liberty and security of the governed."). The constitutional separation of powers advances this central purpose by "assur[ing] full, vigorous, and open debate on the great issues affecting the people"; [FN2] by "placing both substantive and procedural limitations on each [branch]"; [FN3] and by maintaining a "system of . . . checks and balances" among the three branches. [FN4]

Although the structure of the Constitution is designed to obviate the danger to liberty posed by each of the branches, [FN5] the founders were particularly concerned with the Congress's potential for improvident or overreaching action: "the tendency of republican governments is to an aggrandizement of the legislat[ure] at the expense of the other departments." The Federalist No. 49, at 315-16 (James Madison) (Clinton Rossiter ed., 1961), cited in United States v. Brown, 381 U.S. 437, 444 n.17 (1965). Many specific aspects of the Constitution's separation of governmental powers embody the founders' "profound

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1987), held that a statutory extension of tenure "becomes similar to an appointment" only "when it extends the office for a very long time." Id. at 1141; see also In re Investment Bankers, Inc., 4 F.3d 1556, 1562 (10th Cir. 1993) (agreeing with Benny and noting that the contrary Appointment Clause argument "has been rejected by every court that has considered it"), cert. denied, 114 S. Ct. 1061 (1994). We do not find especially persuasive the reasoning of Benny, [FN90] and it is possible that the doctrine of Benny is limited to its factual context. [FN91] However, the reasoning set forth in Benny and the cases that follow it is susceptible to general application, and it is unclear that the courts could repudiate Benny's conclusion with respect to other officers without undercutting the legitimacy of those cases.

The relevant precedents contemplate a continuum. At the one end is constitutionally harmless legislation that extends the term of an officer who is subject to removal at will. At the other end is legislation, constitutionally objectionable even under Benny, that enacts a lengthy extension to a term of office from which the incumbent may be removed only for cause. Legislation along this continuum must be addressed with a functional analysis. Such legislation does not represent a formal appointment by Congress and, absent a usurpation of the President's appointing authority, such legislation falls within Congress's acknowledged authority -- incidental to its power to create, define, and abolish offices -- to extend the term of an office. As indicated, constitutional harm follows only from legislation that has the practical effect of frustrating the President's appointing authority or amounts to a congressional appointment.

Our recent opinion on legislation extending the terms of members of the United States Sentencing Commission is illustrative of this functional approach. After the Sentencing Commission had been appointed, Congress enacted legislation "to provide [that] a member of the United States Sentencing Commission may continue to serve until a successor is appointed or until the expiration of the next session of Congress." Pub. L. No. 102-349, 106 Stat. 933 (1992). Commissioners may be removed only for cause. 28 U.S.C. § 991(a). We concluded that the statute did not function to violate the President's appointment power. See Whether Members of the Sentencing Commission Who Were Appointed Prior to the Enactment of a Holdover Statute May Exercise Holdover Rights Pursuant to the Statute (Apr. 5, 1994) (publication forthcoming in 18 Op. O.L.C. (1994)). The statute left the President free to "nominate whomever he want[ed] at precisely the same time as he could before [the statute was enacted]." Id. at 10. We noted that the effect of the legislation could actually be to augment the President's power by giving him "the option of retaining the holdover officer until he chooses to nominate a successor." Id.

We acknowledged the argument that the statute might give Congress the opportunity to appoint, in effect, an incumbent to a new term because the President's removal authority is statutorily restricted and the Senate might refuse to confirm any presidential nominee in order to retain a congressionally favored incumbent. Id. But this argument was unavailing for two reasons. First, the argument is unduly speculative insofar as it hypothesizes contumacious conduct on the part of the Congress, and whatever danger such a possibility might entail was mitigated by the limitation on the period for which a holdover may continue to serve. Second, we noted that the holdover provision is

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unarguably valid as applied to Sentencing Commissioners who took office after the statute's enactment. We concluded that "[i]t is simply not persuasive to argue that the President's appointment power is effectively frustrated when incumbent commissioners hold over but not when subsequent commissioners hold over." Id.

We also found it significant that the holdover statute was neutral in its application. We reserved the question of whether a holdover statute "might amount to a prohibited congressional designation, even if the holdover period is for a short time," if the statute "would create or repeal holdover provisions for selective members of the same commission or for classes of members on the same commission, e.g., those appointed on a certain date or those from a particular political party." Id. at 14 n.8.

5. Legislation Imposing Additional Duties on an Officer. The executive branch has consistently maintained that a statute creating a new office and conferring it and its duties on the incumbent of an existing office would be unconstitutional under the Appointments Clause. [FN92] Congress's recognized authority to alter the duties and powers of existing offices could be employed to achieve substantially the same result if the legislature were unconstrained in the duties it could add to an office. [FN93] The Supreme Court accordingly has interpreted the Constitution to limit the legislature's discretion. The leading case, Shoemaker v. United States, 147 U.S. 282 (1893), concerned a statute that created a commission to select the land for Rock Creek Park in the District of Columbia. Three of the five members were to be appointed by the President and confirmed by the Senate; the persons holding two existing federal offices, the chief of engineers of the Army and the engineer commissioner of the District, were declared members ex officio. The Court rejected an Appointments Clause challenge to the assignment of the two engineers to the new commission:

> [W]e do not think that, because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.

Id. at 301. The legislation at issue was valid, the Court concluded, because the new duties assigned to the engineers "cannot fairly be said to have been dissimilar to, or outside of the sphere of," the engineers' existing responsibilities. Id.

The Shoemaker rule ensures "that Congress [is] not circumventing the Appointments Clause by unilaterally appointing an incumbent to a new and distinct office." Weiss v. United States, 114 S. Ct. 752, 759 (1994). For the imposition of new duties on an officer to be valid under Shoemaker, two requirements must be met. First, as in Shoemaker itself, the legislation must confer new duties on "offices, . . . [not] on any particular officer." Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision, 732 F. Supp. 1183, 1192 (D.D.C.) (emphasis in original), appeal dismissed as moot, 903 F.2d 837 (D.C. Cir. 1990). "Had the Chief of Engineers of the United States Army or the Engineer Commissioner of the District of Columbia resigned from office after the commission was established, he would no longer have served on the commission

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-- the new Chief of Engineers or Engineer Commissioner would have taken over those duties." Id. at 1192-93 (discussing facts in Shoemaker). The statute at issue in Olympic Federal, in contrast, abolished certain offices (the three-person Federal Home Loan Bank Board) while simultaneously defining the duties of a new office (the Director of OTS) and designating as the first Director the holder of one of the abolished offices (the chair of the Federal Home Loan Bank Board). See id. at 1186. The Olympic Federal court correctly determined that by doing so the statute in effect appointed the particular individual who was chair of the old board to a new position. Id. at 1193. [FN94]

The second facet of the Shoemaker rule is the requirement that the new duties be "germane to the offices already held by" the affected officers. 147 U.S. at 301. This inquiry is necessarily case-specific. In Weiss, the Court examined closely the specific duties of military judges and the general responsibilities of military and naval officers and concluded that they are so intertwined that the selection by the Judges Advocate General of certain military and naval officers to serve for a time as military judges is consistent with the germaneness requirement. 114 S. Ct. at 759-60. In giving advice on this issue, we also have looked at the reasonableness of assigning the new duties "in terms of efficiency and institutional continuity," and we have asked whether "it could be said that [the officers'] functions . . . [with the additional duties] were within the contemplation of those who were in the first place responsible for their appointment and confirmation." Legislation Authorizing the Transfer of Federal Judges from One District to Another, 4B Op. O.L.C. 538, 541 (1980).

The Weiss decision may have weakened judicial enforcement of Shoemaker's germaneness requirement by suggesting that some legislation that adds new duties is valid regardless of whether it satisfies the requirement. The opinion of the Court stressed the fact that "[i]n Shoemaker, Congress assigned new duties to two existing offices, each of which was held by a single officer. This no doubt prompted the [Shoemaker] Court's description of the argument as being that 'while Congress may create an office, it cannot appoint the officer.' . . . But here the statute authorized an indefinite number of military judges, who could be designated from among hundreds or perhaps thousands of qualified commissioned officers." 114 S. Ct. at 759. For that reason, the Court concluded, there was "no ground for suspicion here that Congress was trying to both create an office and also select a particular individual to fill the office." Id. The Court nevertheless went on to consider the germaneness issue and concluded that the duties of military judges are adequately related to the duties of the commissioned officers from whom the judges are selected. Id. at 760.

In a separate opinion, Justice Scalia argued that "'germaneness' is relevant whenever Congress gives power to confer new duties to anyone other than the few potential recipients of the appointment power specified in the Appointments Clause," because "taking on . . . nongermane duties . . . would amount to assuming a new 'Offic[e]' within the meaning of Article II, and the appointment to that office would have to comply with the strictures of Article II." Id. at 770 (Scalia, J., concurring in part and concurring in the judgment). We find Justice Scalia's reasoning persuasive and believe that in an appropriate setting the executive branch should urge the Court expressly to accept it. In light of the Weiss Court's detailed examination of the germaneness issue, this may not

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require the Court in fact to modify the doctrine of that case because it is unclear to us that the Court actually intended to hold germaneness constitutionally irrelevant in Weiss-type circumstances. The Court may instead simply have been emphasizing the fact that assignment of new and nongermane duties to a few specific officers not only violates the Appointments Clause per se, but also fails under the more general anti-aggrandizement principle of its decisions. We believe that it is appropriate, therefore, to review proposed new-duties legislation for germaneness even where the new duties are assigned to large or indefinite groups.

6. The Ineligibility and Incompatibility Clauses. The Constitution places two important restrictions on the universe of persons who may be appointed to serve as officers of the United States. U.S. Const. art. I, § 6, cl. 2. [FN95] The Ineligibility Clause states that "[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time." Id. The Clause "restricts the President's power to appoint Members of Congress," and "[i]t has long been settled within the executive branch that the President, in exercising his powers of appointment under Article II, § 2, cl. 2, will not make an appointment in violation of the . . . clause." Members of Congress Holding Reserve Commissions, 1 Op. O.L.C. 242, 244 (1977). The most common problem under the Ineligibility Clause arises from legislation that creates a commission or other entity and simultaneously requires that certain of its members be Representatives or Senators, either ex officio or by selection or nomination by the congressional leadership. Unless the congressional members participate only in advisory or ceremonial roles, or the commission itself is advisory or ceremonial, the appointment of members of Congress to the commission would violate the Ineligibility Clause. [FN96]

The Incompatibility Clause provides that "no Person holding any Office under the United States, shall be a Member of either House during his continuance in Office." U.S. Const. art. I, § 6, cl. 2. The Clause is primarily a restriction on Congress and its members: the Incompatibility Clause "disqualifies individuals who have already been appointed from assuming or retaining seats in Congress." Reserve Commissions, 1 Op. O.L.C. at 244; cf. Members of Congress Serving in the Armed Forces, 40 Op. Att'y Gen. 301 (1943). [FN97] However, the President's duty to take care that the law of the Incompatibility Clause is observed requires him or her to ensure that appointments [FN98] and legislation creating governmental positions are consistent with the Clause. See, e.g., Case of the Collectorship of New Orleans, 12 Op. Att'y Gen. 449, 451 (1868) ("in view of the" Incompatibility Clause, an executive officer's acceptance of a seat in Congress "must be considered as having the legal character of a resignation of the office"); Appointments to the Commission on the Bicentennial of the Constitution, 8 Op. O.L.C. 200, 207-08 (1984) (providing advice about "various structural arrangements within the Commission that might be designed to respect the Incompatibility Clause"). [FN99]

7. The Recess Appointments Clause. With respect to officers of the United States, the Constitution vests the President with the "Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting

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Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3. "A long line of opinions of the Attorneys General, going back to 1823 . . . and which have been judicially approved . . . has firmly established that . . . [t]he President's power to make recess appointments . . . extends to all vacancies existing during the recess regardless of the time when they arose." Recess Appointments -- Compensation, 3 Op. O.L.C. 314, 314 (1979) (citations omitted); accord Executive Authority to Fill Vacancies, 1 Op. Att'y Gen. 631 (1823). [FN100] Although there was some early uncertainty about the President's power to make appointments under the Recess Appointments Clause during intrasession recesses, that question was settled within the executive branch by an often-cited opinion of Attorney General Daugherty concluding that the President is so authorized. Executive Power -- Recess Appointments, 33 Op. Att'y Gen. 20 (1921). The most difficult problem of interpretation under the Clause today is determining how substantial an intrasession recess must be to give rise to the President's power. [FN101] Attorney General Daugherty concluded that a twenty-eight-day recess was sufficient, but cautioned that "the term 'recess' must be given a practical construction." Id. at 24-25. We agree with his view that the President has discretion to make a good-faith determination of whether a given recess is adequate to bring the Clause into play. [FN102] Giving advice on how the President may properly exercise that discretion has proven a difficult task. See Recess Appointments During the Recess of the Senate Beginning January 3, 1992, 16 Op. O.L.C. 15 (1992) (preliminary print) (eighteen-day recess a sufficient period, particularly in light of fact that except for a brief formal session on January 3 the Senate would actually be absent for fifty-four days); Recess Appointments, 3 Op. O.L.C. at 316 (President may make recess appointments "during a summer recess of the Senate of a month's duration").

8. Acting and Interim Appointments. Early Attorneys General repeatedly opined that the President enjoyed a constitutional power of appointment empowering the President to make temporary or ad interim appointments to offices in cases of need without conforming to the requirements of the Appointments or Recess Appointments Clause. [FN103] Their initial reaction to congressional legislation on the subject of vacancies was therefore to view it as having neither the purpose nor the effect of supplanting the President's preexisting constitutional authority. See Office and Duties of Attorney General, 6 Op. Att'y Gen. 326, 352 (1854) ("Perhaps the truer view of the question is to consider the . . . statutes as declaratory only, and to assume that the power to make such temporary appointment is a constitutional one."). After the enactment of the Vacancies Act of 1868, 15 Stat. 168, however, the Attorneys General treated the Act as providing the exclusive means of making temporary appointments to those offices covered by the statute. See, e.g., Appointments Ad Interim, 17 Op. Att'y Gen. 530 (1883); Appointments Ad Interim, 16 Op. Att'y Gen. 596, 596-97 (1880) (authority to fill vacancy in the office of Navy Secretary is "a statutory power," and when the power is exhausted, "the President is remitted to his constitutional power of appointment"). A 1904 opinion attempted to synthesize the older and the more recent views, treating as reasonable and legitimate Congress's wish to cabin presidential discretion to make interim appointments while the Senate is in session, but describing as a "fundamental right as Chief

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Executive" the President's authority "to make such a temporary appointment, designation, or assignment of one officer to perform the duties of another whenever the administration of the Government requires it." Temporary Recess Appointments, 25 Op. Att'y Gen. 258, 261 (1904); see also Promotion of Marine Officer, 41 Op. Att'y Gen. 291, 294 (1956) (President has constitutional authority to appoint "key military personnel to positions of high responsibility" without following statutory procedures).

There is little modern caselaw on the President's power to make temporary appointments to offices requiring Senate confirmation. [FN104] The "leading" judicial decision is a brief per curiam court of appeals opinion denying a motion for a stay of the district court's mandate pending appeal, Williams v. Phillips, 482 F.2d 669 (D.C. Cir. 1973) (per curiam). [FN105] Because of its procedural posture, Williams did not actually resolve the constitutional issue, but it suggested somewhat obliquely that what non- statutory power the President possesses to make interim appointments to offices requiring Senate confirmation can be employed only for a "reasonable time required by the President to select persons for nomination." Id. at 671. Looking to the thirty-day period that was, at the time, permitted temporary appointments under the Vacancies Act for an indication of what a reasonable period would be, Williams concluded that even if the implied power existed, a four-and-a-half-month period without any nomination was unreasonable. Id. at 670-71. [FN106] Since Williams was decided, the Vacancies Act has been amended to provide for an initial appointment period of 120 days. Up to two extensions, each lasting 120 days, may be made depending on the specific circumstances of the vacancy. Moreover, the Vacancies Act also tolls the running of these periods when particular conditions obtain. See 5 U.S.C. § 3348. Thus, the Vacancies Act allows temporary appointments, in appropriate circumstances, of durations well in excess of even one year. Accordingly, we would not currently view a four-and-a-half-month temporary appointment as necessarily exceeding a reasonable duration, provided that a nomination is submitted to the Senate.

On the assumption that Williams can be read to indicate that "[t]o keep the Government running calls for the designation of acting officials to fill vacancies in the absence of express statutory authority," Department of Energy -- Vacancies, 2 Op. O.L.C. 113, 117 (1978) (citing Williams), we have argued that the reasonableness of a given interim appointment should be measured not by a per se rule but by a variety of pragmatic factors. Those factors include "the difficulty of finding suitable candidates," id. at 118, "the specific functions being performed by the [interim officer]; the manner in which the vacancy was created (death, long-planned resignation) . . . and particular factors affecting the President's choice [such as] a desire to appraise the work of [the interim officer] or the President's ability to devote attention to the matter." Status of the Acting Director, Office of Management and Budget, 1 Op. O.L.C. 287, 290 (1977). However, given the ambiguity of the Williams opinion, we have urged caution, even when the relevant department head has statutory authority to designate another official to serve in an acting capacity. See Acting Officers, 6 Op. O.L.C. 119, 121-22 (1982).

We recently revisited the vacancies question in relation to the United States Commission on Civil Rights. The Commission is headed by an eight-member

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committee that works on a part-time basis, while its day-to-day functioning is administered by a staff director. The statute creating the position of staff director vests the authority to appoint the staff director in the President, subject to the concurrence of a majority of the members of the Commission. In keeping with the Department of Justice's long-standing position, we concluded that, when confronted with a vacancy in the position of staff director, the President has constitutional authority to appoint an acting staff director, unless Congress had statutorily limited this authority. We stated:

The President's take care authority to make temporary appointments rests in the twilight area where the President may act so long as Congress is silent, but may not act in the face of congressional prohibition. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Thus, the Vacancies Act, 5 U.S.C. §§ 3345-3348, constitutes a restriction on the President's authority, as opposed to a source of power. If it applies to a given position, the Vacancies Act constitutes the sole means by which a temporary appointment to that position may be made.

Appointment of an Acting Staff Director of the United States Commission on Civil Rights, at 3 (Jan. 13, 1994) (publication forthcoming in 18 Op. O.L.C. (1994)).

We concluded that Congress had not limited the President's constitutional authority with respect to the appointment of an acting staff director of the Civil Rights Commission. The Vacancies Act does not apply to the position of staff director. [FN107] In addition, the statute creating the position is silent on the subject of temporarily filling a vacancy in that position. Consequently, we concluded that the President was free to exercise his constitutional authority to appoint an acting staff director. [FN108]

9. Other Issues of Combined, Collective, and Interbranch Authority and the Appointments Clause. The Appointments Clause prohibits Congress or the President from obscuring the lines of authority and responsibility within the federal government: the political branches cannot vest the power to perform "a significant governmental duty" of an executive, administrative, or adjudicative nature in any federal official who is not appointed in a manner consistent with the Clause. Buckley v. Valeo, 424 U.S. 1, 141 (1976) (per curiam). The Clause, however, does not prohibit creative combinations of officers and authorities as long as a person or body with legitimate appointing authority under the Clause has appointed -- and therefore is accountable for -- all federal officials with such power. Cf. Weiss v. United States, 114 S. Ct. 752, 768 (1994) (Souter, J., concurring); Silver v. United States Postal Serv., 951 F.2d 1033, 1040-41 (9th Cir. 1991).

The Appointments Clause therefore does not forbid the exercise of authority by a decision-making body with a collective head that consists of principal officers and an inferior officer removable by them. See Silver, 951 F.2d at 1040-41. Nor is the Clause offended by the delegation of concurrent authority to a Senate-confirmed officer and her deputy when the latter is appointed by a head of department. See Department of Housing and Urban Development -- Delegations of Authority, 2 Op. O.L.C. 87, 89-91 (1978). In both cases all of the officials performing significant governmental duties are validly appointed officers.

The exercise of authority by a group of principal officers, some of whom serve

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at the President's pleasure while others are removable by the President only for cause, presents no Appointments Clause issue: once again, the Clause's procedures for appointing federal officials so that they may wield "significant authority" have been met. The Clause's strictures are likewise satisfied by arrangements in which a head of department, pursuant to a statute, designates a subordinate to sit in his or her stead on a commission or board: if the designation by the head were authorized by statute, then it would itself be an appointment in conformity with the Clause, and even if it were not, the designee would be acting for or on behalf of the head of department, whose actions, for constitutional purposes, are the head's.

Finally, the Appointments Clause does not invalidate commissions composed of members or appointees from more than one branch of the government. Mistretta v. United States, 488 U.S. 361, 412 (1989), upheld the constitutionality of the Sentencing Commission, which includes at least three federal judges and the Attorney General as an ex officio non-voting member, while Buckley concluded that a commission consisting of a mixture of presidential appointees and members of Congress selected by the Speaker and President pro tempore can validly exercise "powers . . . essentially of an investigative and informative nature," 424 U.S. at 137. Interbranch entities are subject to constitutional review on other grounds, including the anti- aggrandizement and general separation of powers principles, but their interbranch nature does not in itself raise any Appointments Clause question.

C. Removal Power Issues

1. The Executive's Removal Power. The first great constitutional debate in the First Congress concerned the power to remove officers of the United States. A wide range of views was expressed over the respective roles -- or lack thereof -- of the President and Congress in removal matters, [FN109] but ultimately, as the Supreme Court has interpreted the "Decision of 1789," Congress rejected a legislative role in removal in favor of recognizing plenary presidential power over officers appointed by the President with the advice and consent of the Senate. See Bowsher v. Synar, 478 U.S. 714, 723-24 (1986); see also Myers v. United States, 272 U.S. 52, 111-44 (1926) (discussing debates and subsequent acquiescence in the legislative decision).

The nineteenth-century Justices interpreted the First Congress's actions as illustrative of a more general principle that "the power of removal [is] incident to the power of appointment." Ex parte Hennen, 38 U.S. (13 Pet.) 230, 259 (1839). Thus, it was determined that inferior officers appointed by a department head were not removable by the President (absent statutory authorization to do so) but by the secretary who appointed them and that a new appointment by the proper officer amounted to a removal of the previous incumbent by operation of law. Id. at 260-61; accord The President and Accounting Offices, 1 Op. Att'y Gen. 624 (1823). In United States v. Perkins, 116 U.S. 483 (1886), the Court held that, "when Congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest." Id. at 485. Although the Court did not address any questions about presidential removal

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powers, its reasoning about Congress's authority to limit department heads' removal power could logically be applied to the President with respect to inferior officers whose appointment is vested by statute in the President alone. [FN110] The power to suspend an officer, finally, was held to be "an incident of the power of removal." Burnap v. United States, 252 U.S. 512, 515 (1920) (relying primarily on nineteenth-century precedents). The Court's conclusions in Hennen, Perkins, and Burnap remain good law. [FN111]

The seminal twentieth-century cases on removal, Myers and Humphrey's Executor v. United States, 295 U.S. 602 (1935), both addressed the power to remove officers appointed by the President with the advice and consent of the Senate. Myers held unconstitutional a statute requiring Senate approval of the President's decision to remove certain postmasters. The Court based its holding in part on its interpretation of the "Decision of 1789" and on its understanding of the President's constitutional role. "Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal. . . . Each head of a department is and must be the President's alter ego in the matters of that department where the President is required by law to exercise authority." 272 U.S. at 132-33. An illimitable removal power, Myers concluded, is a necessary incident to the President's power and responsibility to take care that the laws are faithfully executed. Id. at 163-64. [FN112]

Any suggestion in Myers that the Supreme Court would invalidate all limitations on the President's power to remove officers appointed with the advice and consent of the Senate was firmly repudiated less than a decade later by Humphrey's Executor. The case concerned the President's power to remove a member of the Federal Trade Commission on the grounds of policy differences, despite the existence of a for-cause removal provision in the statute establishing the Commission. [FN113] The Court dismissed Myers as inapposite because a postmaster is "an executive officer restricted to the performance of executive functions," and "the necessary reach of the decision" only "goes far enough to include all purely executive officers [and] no farther." 295 U.S. at 627-28. [FN114] By contrast, the Court examined the functions of the FTC and concluded that it was "an administrative body" exercising "quasi-legislative or quasi-judicial powers," rather than an agency of the executive branch. Id. at 628. The Court reasoned that Congress possesses the authority in creating such a body "to require [it] to act in discharge of [its] duties independently of executive control." Id. at 629. [FN115] In Wiener v. United States, 357 U.S. 349 (1958), the Court extended the scope of Humphrey's Executor by inferring the existence of a for-cause limitation on the President's power to remove an officer with quasi-adjudicatory functions, even in the absence of an express statutory removal restriction. [FN116]

The rationale in Humphrey's Executor for upholding Congress's power "to forbid [the commissioners'] removal except for cause" was in fact identical to that for recognizing the President's plenary removal power over "purely executive officers." "[I]t is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." 295 U.S. at 629. The constitutionality

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of congressional limitations on presidential removal authority thus depended under Humphrey's Executor on the legitimacy of a legislative decision to reduce or eliminate the President's control over a particular agency or officer, and that in turn depended on the nature of the functions performed by the agency or officer. [FN117]

In Morrison v. Olson, 487 U.S. 654 (1988), the Supreme Court upheld a provision of the Ethics in Government Act that forbids the removal of an independent counsel appointed under the Act except for cause. The Court explained that under "[t]he analysis contained in our removal cases," the constitutional question is whether Congress has "interfere[d] with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed."' Id. at 689-90. Morrison reasoned that the Attorney General retained adequate control over the independent counsel to safeguard "the President's ability to perform his constitutional duty." Id. at 691.

Morrison's broader significance is defined by the office in question. The removal restriction upheld in Morrison concerned an inferior officer with a sharply limited and highly unusual function, the investigation of particular allegations about the conduct of high-ranking executive branch officials. In that context, although it declined to decide "exactly what is encompassed within the term 'good cause,"' the Court held that "because the independent counsel may be terminated for 'good cause,' the Executive . . . retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act." 487 U.S. at 692. The Morrison Court thus had no occasion to consider the validity of removal restrictions affecting principal officers, officers with broad statutory responsibilities, or officers involved in executive branch policy formulation. [FN118]

The Supreme Court's removal cases establish a spectrum of potential conclusions about specific removal limitations. At one end of the spectrum, restrictions on the President's power to remove officers with broad policy responsibilities in areas Congress does not or cannot shelter from presidential policy control clearly should be deemed unconstitutional. We think, for example, that a statute that attempts to limit the President's authority to discharge the Secretary of Defense would be plainly unconstitutional and that the courts would so hold. [FN119] As the Court stated in Morrison, Myers "was undoubtedly correct . . . in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role." 487 U.S. at 690. [FN120] At the other end of the spectrum, we believe that for cause and fixed term limitations on the power to remove officers with adjudicatory duties affecting the rights of private individuals will continue to meet with consistent judicial approval: the contention that the essential role of the executive branch would be imperiled by giving a measure of independence to such officials is untenable under both precedent and principle.

Between these two extremes, the arguments are less clear, and it is imperative that the executive branch carefully examine removal limitations in pending legislation for their impact on the President's ability to exercise his or her

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conviction . . . that the powers conferred on Congress were the powers to be most carefully circumscribed" and the founders' recognition of the particular "'propensity"' of the legislative branch "'to invade the rights of the Executive."' INS v. Chadha, 462 U.S. 919, 947 (1983) (quoting The Federalist No. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). Executive branch lawyers thus have a constitutional obligation, one grounded not in parochial institutional interests but in our fundamental duty to safeguard the liberty of the people, to assert and maintain the legitimate powers and privileges of the President against inadvertent or intentional congressional intrusion. As Attorney General William Mitchell put it long ago:

> Since the organization of the Government, Presidents have felt bound to insist upon the maintenance of the Executive functions unimpa[i]red by legislative encroachment, just as the legislative branch has felt bound to resist interferences with its power by the Executive. To acquiesce in legislation having a tendency to encroach upon the executive authority results in establishing dangerous precedents.

Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 64 (1933). [FN6]

The Constitution, however, "by no means contemplates total separation of each of these three essential branches of Government." Buckley, 424 U.S. at 121. Instead, "'[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."' Mistretta v. United States, 488 U.S. 361, 381 (1989) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). The Constitution thus guards against "the accumulation of excessive authority in a single Branch" not by providing mutually exclusive lists of executive, legislative, and judicial powers, but by imposing on each of the three branches "a degree of overlapping responsibility, a duty of interdependence as well as independence." Id. at 381. [FN7] The constitutional boundaries between the powers of the branches must be determined "according to common sense and the inherent necessities of the governmental co-ordination." J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928).

Some general observations on the sources and methodology we employ in analyzing separation of powers questions are appropriate. We believe that the constitutional structure obligates the executive branch to adhere to settled judicial doctrine that limits executive and legislative power. While the Supreme Court's decisions interpreting the Constitution cannot simply be equated with the Constitution, we are mindful of the special role of the courts in the interpretation of the law of the Constitution. "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

The Supreme Court's decisions interpreting the constitutional separation of powers among Congress, the President, and the courts recognize the founders' basic concern over the "encroaching nature" of power, as well as their specific belief that Congress is potentially the most dangerous branch. "It is this concern of encroachment and aggrandizement that has animated our separation-of-

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constitutional powers and carry out his or her duties. In situations in which Congress does not enact express removal limitations, we believe that the executive branch should resist any further application of the Wiener rationale, under which a court may infer the existence of a for-cause limit on presidential removal, except with respect to officers whose only functions are adjudicatory. [FN121] In reviewing pending legislation, furthermore, we should be aware that legislative silence about the President's removal power over administrative agency officers invites judicial policy choices that may be contrary to those the President or Congress intended.

2. Congressional Removal Power. Unless it limits its own discretion by statute, Congress enjoys plenary authority to remove its own officers, as do the individual houses of Congress. [FN122] In addition, Congress has the general authority to legislate in ways that in fact terminate an executive branch officer or employee's tenure by defunding a position, for example, or by legislating mandatory retirement rules that apply to incumbents. [FN123] The executive branch, however, has long maintained that the Constitution does not permit this legislative authority to be deployed abusively as a de facto removal power. See Civil Service Retirement Act -- Postmasters -- Automatic Separation from the Service, 35 Op. Att'y Gen. 309, 312-15 (1927) (deeming mandatory retirement statute constitutional because it could not fairly be viewed as an encroachment on the President's removal power). The Supreme Court's decisions confirm the executive position. In Myers v. United States, 272 U.S. 52 (1926), the Court at one point portrayed the issue before it in terms of congressional aggrandizement, id. at 161, and modern decisions have redescribed the enduring rationale of Myers in anti-aggrandizement terms. See Morrison v. Olson, 487 U.S. 654, 686 (1988) ("the essence of the decision in Myers was the judgment that the Constitution prevents Congress from 'draw[ing] to itself . . . the power to remove"'); Bowsher v. Synar, 478 U.S. 714, 724-26 (1986). Legislation that can properly be described as exercising the power of removal is unconstitutional, therefore, because it amounts to an attempt on Congress's part "to gain a role in the removal of executive officials other than its established powers of impeachment and conviction." Morrison, 487 U.S. at 686. [FN124] We think, for example, that "ripper" legislation that ostensibly abolished an office while simultaneously proceeding to recreate it would be a transparent, and unconstitutional, attempt to remove the officer in question and therefore would violate the anti-aggrandizement principle. See Constitutionality of Proposed Legislation Requiring Renomination and Reconfirmation of Executive Branch Officers Upon the Expiration of a Presidential Term, 11 Op. O.L.C. 25, 26 (1987).

The executive branch also has resisted attempts by the Senate to "reconsider" the nomination of an officer to whose appointment that body has already given its advice and consent once the President has taken steps to complete the appointment. In 1931, for example, President Hoover declined to return to the Senate resolutions notifying him that it had confirmed three nominees to the Federal Power Commission. The President explained that "the return of the documents by me and reconsideration by the Senate would be ineffective to disturb the appointees in their offices. I cannot admit the power in the Senate to encroach upon Executive functions by removal of a duly appointed executive

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officer under the guise of reconsideration of his nomination." Message to Senate, January 10, 1931, quoted in United States v. Smith, 286 U.S. 6, 28 n.3 (1932); see also United States v. Smith, 286 U.S. 6, 37-48 (1932) (discussing historical practice). Such senatorial action is both an unconstitutional attempt to remove the officer and a violation of the anti-aggrandizement principle, in that it is a legislative attempt to exercise power after the constitutionally prescribed role of the legislative body has been completed. [FN125]

D. Issues Involving the Boundaries of the Legislative Sphere

The Supreme Court decisions articulating the Court's anti- aggrandizement principle make it plain that Congress's formal authority is limited to the enactment of legislation and activities in aid of the legislative process such as investigation and oversight. The Gramm-Rudman Act's vesting in a congressional agent of the power to exercise policy-making control over the post-enactment decisions of executive officials is the paradigmatic example of congressional action in violation of this limitation. See Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating the relevant provision of the Act). Respect for Congress's legitimate and broad authority to legislate is consistent with our duty as officials of the executive branch to identify instances in which Congress transgresses the boundaries of its constitutional sphere of operations.

1. The Paradox of the Congressional Agencies. From reading the bare text of the Constitution, one might not expect there to exist any formally separate entities within the legislative branch other than the two houses themselves. From an early date, however, Congress has created distinct agencies, under its special supervision, for various purposes. Some of these agencies, or the officers who head them, exercise authority that seems incompatible or at least difficult to reconcile with the Supreme Court's anti-aggrandizement decisions. Of special interest are the Smithsonian Institution (and its subordinate bureaus, such as the John F. Kennedy Center for the Performing Arts ("J.F.K. Center")), the Library of Congress, the General Accounting Office ("GAO") (headed by the Comptroller General), the Government Printing Office ("GPO"), and the Office of the Architect of the Capitol. [FN126] The head of each of these agencies exercises authority with respect to executive officials or private persons that could be seen as problematic under Bowsher v. Synar, 478 U.S. 714 (1986), which held unconstitutional the Comptroller General's exercise of controlling authority over executive branch budgeting.

We believe that many of the powers currently exercised by the presently existing congressional agencies may be deemed constitutionally harmless. Most of the functions undertaken by the Library of Congress, the basic accounting tasks of the GAO, and all of the duties of the Architect of the Capitol can comfortably be described as in aid of the legislative process. See Springer v. Government of the Philippine Islands, 277 U.S. 189, 202 (1928). The activities undertaken by the Smithsonian and its bureaus also seem to fit under a broad construction of that concept, a construction that is supported by historical practice stretching far back into the antebellum Republic. Cf. Springer, 277 U.S. at 211 (Holmes, J., dissenting) ("Congress long ago established the Smithsonian Institution, to question which would be to lay hands on the Ark of

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the Covenant"). The GPO's involvement in executive branch printing is also supported by a substantial historical pedigree, see Joint Res. No. 25, 36th Cong., 1st Sess., 12 Stat. 117 (1860), but in the twentieth century the executive branch has repeatedly been compelled to resist congressional attempts to empower the GPO to exercise genuine discretion over executive decisions. [FN127] The review authority of the Librarian of Congress over the Copyright Arbitration Royalty Panel, see 17 U.S.C. §§ 801-803, is permissible because the Librarian's tenure is not protected by an explicit for-cause removal limitation, and we therefore infer that the President has at least the formal power to remove the Librarian at will. [FN128] We note that the historical lineage of, and long-standing acquiescence of the Presidents in, these legislative agencies and most of their activities are important to our conclusion that those activities are constitutionally permissible: we think it highly doubtful that Congress constitutionally could create new legislative agencies with operational powers, or afford existing agencies novel powers, with respect to executive officials or private persons.

Our conclusion about the limits on Congress's authority to create legislative branch agencies with powers reaching beyond the legislative branch is consistent with the decision in Hechinger v. Metropolitan Washington Airports Authority, 36 F.3d 97 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 934 (1995), where the court of appeals held unconstitutional Congress's response to the Supreme Court's decision in Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991). After MWAA struck down a congressionally constituted board with the power to review and reverse the decisions of the Airports Authority, Congress created a similar, congressionally controlled board of review with the power to delay, but not to control, the Authority's implementation of decisions. The court rejected the argument that the new board's powers were constitutional because of this distinction: the very purpose of this board was to bring congressional policy views to bear on the decisions of the Authority by enabling congressional agents to participate directly in the Authority's decision-making processes. Under the Supreme Court's rigorous understanding of the anti- aggrandizement principle, any such extension of legislative power beyond the legislative sphere is invalid. We therefore believe that Hechinger was correctly decided.

2. Reporting Requirements. Many statutes empower executive branch agencies to take certain actions only after a specified period following the provision of notice or of a report to Congress. The Department of Justice has long acknowledged the constitutionality of such report-and-wait provisions, see, e.g., Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 63 (1933) ("[n]o one would question the power of Congress to provide for delay in the execution of . . . an administrative order"), and the Supreme Court in INS v. Chadha, 462 U.S. 919 (1983), "specifically recognized" report-and-wait requirements "as a constitutionally acceptable alternative to the legislative veto." Implementation of the Bid Protest Provisions of the Competition in Contracting Act, 8 Op. O.L.C. 236, 246 (1984); see Chadha, 462 U.S. at 935 n.9, 955 n.19. While individual instances of congressional investigation and oversight may be objectionable on policy grounds, and in certain situations may involve information with respect to which the President

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is constitutionally entitled to assert executive privilege, the conduct of investigation into, and oversight concerning, executive actions is generally well within the power of Congress. See Buckley v. Valeo, 424 U.S. 1, 137-38 (1976) (per curiam). [FN129] Report-and-wait provisions generally are constitutional means of assisting Congress in carrying out these legitimate activities. [FN130]

Simple reporting requirements, which again are sometimes objectionable on policy grounds, are clearly constitutional as a general matter. "Congress may at all times call on [the heads of executive departments] for information or explanation in matters of official duty." Office and Duties of Attorney General, 6 Op. Att'y Gen. 326, 344 (1854); see Chadha, 462 U.S. at 955 n.19; see also Duties of the Attorney General, 1 Op. Att'y Gen. 335, 336 (1820) (Congress could by legislation require Attorney General to prepare report on claims against the United States). In the past, this Office has made constitutional objections to so-called "concurrent" reporting provisions that require an executive agency to submit a given report simultaneously to the President and Congress. See Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress, 6 Op. O.L.C. 632 (1982); Inspector General Legislation, 1 Op. O.L.C. 16, 17 (1977). The argument is that such provisions interrupt the lines of responsibility within the executive branch and interfere with a presidential prerogative to control the presentation of the executive branch's views to Congress. On the other hand, advocates of such provisions might argue that a concurrent reporting provision does not, as a formal matter, enlarge congressional powers at the expense of the executive, because the power to require information is well within Congress's legitimate legislative authority.

We think that concurrent reporting requirements are best analyzed under the general separation of powers principle. That principle first requires an inquiry into "the extent to which" a given reporting provision "prevents the Executive Branch from accomplishing its constitutionally assigned functions." Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) (citation omitted). Many conceivable concurrent reporting requirements, particularly ones touching on the President's responsibility for the conduct of foreign affairs and for national defense, would have a serious negative impact on the President's performance of his "constitutionally assigned functions." A statutory requirement that the Secretary of State report simultaneously to the President and Congress on the status of United States relations with a given foreign power, for instance, would fall within that description. [FN131] Similarly, legislation that attempted to impose concurrent reporting requirements across a broad spectrum of executive branch activities might well constitute so serious an interference with the President's fulfillment of his obligations under the Take Care Clause, U.S. Const. art. II, § 3, that it should be deemed invalid. The courts, however, might uphold the validity of a concurrent reporting requirement imposed for a legitimate congressional purpose on a specific agency with limited, domestic, and purely statutory duties.

As a practical political matter, concurrent reporting requirements clearly weaken the President's control over the executive branch and by doing so increase congressional leverage on the President and other officials of the executive branch. By doing so they impair the Constitution's "'great principle

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of unity and responsibility in the Executive department."' Myers v. United States, 272 U.S. 52, 131 (1926) (quoting James Madison). For this reason, we think the presumption should be that the executive branch will object to any concurrent reporting provision in proposed legislation.

3. Congressional Agents in Non-Legislative Contexts. The Supreme Court's decisions make it clear that legislation placing members or agents of Congress on a board or commission that is outside the legislative branch is immediately suspect. The constitutional "location" of a given entity is not a matter of congressional fiat; Congress cannot define away an anti-aggrandizement problem simply by declaring that a given entity is within or without the legislative branch. [FN132] The question is, we think, a matter of the relationship between the entity's functions and the formal powers Congress can assert over and through it. In Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991), for example, the board at issue was the board of review of an entity, the Airports Authority, created by a compact between Virginia and the District of Columbia, and the review board members were appointed by the Authority. However, by federal legislative mandate, the Authority was compelled to appoint a review board made up exclusively of members of Congress selected from a pool determined by Congress. See id. at 268-69. Congress's agents on the board thus were able to exercise ultimate control over important operational decisions of the Authority, in violation of the Constitution's constraints on the exercise of congressional power. Id. at 275-77.

The Court of Appeals for the D.C. Circuit recently came to a similar conclusion in FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), cert. dismissed, 115 S. Ct. 537 (1994), in striking down part of a section of the Federal Election Campaign Act, 2 U.S.C. § 437c(a)(1). That section provides that the Secretary of the Senate and Clerk of the House or their designees are to be members of the Federal Election Commission "ex officio and without the right to vote." The Secretary and the Clerk are self-evidently agents of Congress, but the Commission argued that their presence was constitutionally harmless because their only formal role was informational and advisory. The court rejected the argument, reasoning that the very point of placing the Secretary and Clerk on the Commission was to influence the Commission's actions and that

> Congress must limit the exercise of its influence, whether in the form of advice or not, to its legislative role. . . . What the Constitution prohibits Congress from doing, and what Congress does in this case, is to place its agents "beyond the legislative sphere" by naming them to membership on an entity with executive powers.

6 F.3d at 827 (citation omitted). We believe that NRA Political Victory Fund was correctly decided: however modest the ability of Congress's agents to influence the Commission's actions may have been formally, the statute placed the agents intended to communicate that influence within the very heart of an agency charged with enforcing federal law. The anti-aggrandizement principle properly can be interpreted to forbid even modest attempts by Congress to intervene in the enforcement of the laws once "its participation [in the passage of legislation] ends." Bowsher v. Synar, 478 U.S. 714, 733 (1986). E. The

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General Separation of Powers Principle

The proper application of the general separation of powers principle is highly specific to context, and thus few generalizations are possible. For example, in the past we have expressed concern that legislation delegating federal authority to state or local officials or private persons could undermine the executive branch's ability to carry out its functions and thereby violate the principle. See, e.g., Constitutional Limitations on "Contracting Out" Department of Justice Functions under OMB Circular A-76, 14 Op. O.L.C. 106, 114-15 (1990) (preliminary print). [FN133] We continue to believe that such delegations can raise questions with respect to the constitutional separation of powers, [FN134] and that in certain circumstances, a congressional delegation of authority to non-federal officials or to private parties might have a significant impact on the executive branch's ability to fulfill its constitutional functions. If so, the delegation might be invalid under the general separation of powers principle. [FN135]

F. Statutory Construction

Issues involving the constitutional separation of powers between the President and Congress most often arise in the context of a statute that raises or proposed legislation that would raise questions under one of the three headings we have identified. For this reason, it is worth recalling the "cardinal principle" of statutory interpretation that statutes be construed to avoid raising serious constitutional questions, where such a construction is reasonably available. See, e.g., Crowell v. Benson, 285 U.S. 22 (1932).

An important subset of these questions relate to statutes that do not plainly state that they apply to the President. The Supreme Court and this office have adhered to a plain statement rule: statutes that do not expressly apply to the President must be construed as not applying to the President, where applying the statute to the President would pose a significant question regarding the President's constitutional prerogatives. See, e.g., Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992); Memorandum for Jack Quinn, Counsel to the President, from Walter Dellinger, Assistant Attorney General, re: Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges (Dec. 18, 1995). This principle has two sources in the constitutional context within which the Congress drafts statutes. The first is the interpretive canon of avoiding serious constitutional questions. See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

The second source is the constitutional principle of separation of powers. The purpose of the constitutional separation of powers is to prevent an excessive accumulation of authority in any of the three branches of the federal government. The plain statement safeguards "the 'usual constitutional balance"' of power. Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)); see Franklin, 505 U.S. at 800-01. Given the central position that the separation of powers doctrine occupies in the Constitution's design, this rule also serves to "assure[] that the legislature has in fact faced, and intended to bring into issue, the critical matters" of the balance of power between the three branches of the federal government. See United States v. Bass, 404 U.S. 336, 349 (1971).

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This plain statement rule has been applied frequently by the Supreme Court as well as this office with respect to statutes that might otherwise be susceptible of an application that would affect the President's constitutional prerogatives, were one to ignore the constitutional context. For instance, in Franklin the Court was called upon to determine whether the Administrative Procedure Act, 5 U.S.C § 701, authorized "abuse of discretion" review of final actions by the President. The APA authorizes review of final actions by an "agency," which it defines as "each authority of the Government of the United States." 5 U.S.C. § 701(b)(1). From this definition, the APA expressly exempts Congress, the courts, the territories, and the DC government.

Even though the statute defined agency in a way that could include the President and did not list the President among the express exceptions to the APA, Justice O'Connor wrote for the Court,

> [t]he President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.

505 U.S. at 800-01 (emphasis added). To amplify, she continued, "[a]s the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements." Id. at 801. Numerous other Supreme Court decisions employ this approach. See, e.g., Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989) (holding that the Federal Advisory Committee Act does not apply to committees that advise the President on the discharge of his exclusive constitutional functions because doing so would raise serious separation of powers questions); Sale v. Haitian Centers Council, Inc., 113 S. Ct. 2549 (1993) (refusing to give the Refugee Act extraterritorial application because doing so could conflict with the President's constitutionally committed authority); Nixon v. Fitzgerald, 457 U.S. 731 (1982) (President was immune from suit because Congress had failed to create a cause of action expressly against the President of the United States).

In addition to the Supreme Court precedents, this office has frequently applied the plain statement rule in the context of the separation of powers between the executive and legislative branches. For example, we were asked whether the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, prohibits the President from considering the age of judicial candidates when determining whom to nominate for federal judgeships. See Judges -- Appointment -- Age Factor, 3 Op. O.L.C. 388 (1979). We concluded that the ADEA should not be read to apply to the presidential appointment of federal judges:

> The power to appoint Federal judges, who hold office on good behavior, is by tradition and design one of the most significant powers given by the Constitution to the President. It provides one of the few administrative mechanisms through which the President can exert a long-term influence over the development and administration of law in the courts. The President's present power to exert that influence to the fullest by preferring candidates for appointment who are likely to have long, rather than short, careers on the bench

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is therefore a matter of constitutional significance. Whether Congress could deny the President that power by requiring him to disregard utterly the age of candidates for appointment has never been considered by the courts, but because of the gravity of the constitutional questions it raises, we would be most reluctant to construe any statute as an attempt to regulate the President's choice in that way, absent a very clear indication in the [statute].
Id. at 389. [FN136]

III. Constitutional Requirements and Policy Concerns

The conclusion that a particular provision of proposed legislation probably would not be held unconstitutional by the courts is not equivalent to a determination that the legislation is constitutional per se. The judiciary is limited, properly, in its ability to enforce the Constitution, both by Article III's requirements of jurisdiction and justiciability and by the obligation to defer to the political branches in cases of doubt or where Congress or the President has special constitutional responsibility. [FN137] In such situations, the executive branch's regular obligation to ensure, to the full extent of its ability, that constitutional requirements are respected is heightened by the absence or reduced presence of the courts' ordinary guardianship of the Constitution's requirements. Furthermore, even where on any view the letter of the Constitution is satisfied, the Constitution's intention to separate the federal government's powers can appropriately be invoked as a sound reason for objecting to legislation that undermines or imperils that separation. The constitutional separation of powers, to make the point in a different way, is a political as well as a legal principle. [FN138]

The Constitution demands of the executive and legislative branches alike an "ethic of institutional responsibility" in defending their respective roles in the overall constitutional structure. [FN139] For example, legislation that attempts to structure the very details of executive decision making, or that imposes onerous and repetitive reporting requirements on executive agencies, is troubling from a separation of powers standpoint even if the individual statutes could not easily be described in themselves as unconstitutional. The overall effects of such micromanagement for the constitutional separation of powers obviously can be tremendous, and yet it is unlikely that judicial intervention can or would preserve the constitutional balance. The executive branch thus has the primary responsibility for presenting, in as forceful and principled a way as possible, the separation of powers problems with all legislation that has such effects. In carrying out this Office's various roles in the executive's review of existing and proposed legislation, we intend to bear this obligation in mind, and we are pleased to be of assistance to other components of the executive branch in their efforts to analyze, from a policy standpoint as well as from a strictly legal basis, the impact of legislation on the constitutional separation of congressional and presidential powers.

Walter Dellinger
Assistant Attorney General

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FN1 This memorandum supersedes a 1989 memorandum that the Office of Legal Counsel provided to the General Counsels' Consultative Group. See Common Legislative Encroachments on Executive Branch Constitutional Authority, 13 Op. O.L.C. 299 (1989) (preliminary print). While we agree with many of the conclusions of that document, we have determined that subsequent decisions by the Supreme Court and certain differences in approach to the issues make it appropriate to revisit and update the Office's general advice on separation of powers issues.

FN2 Bowsher v. Synar, 478 U.S. 714, 722 (1986).

FN3 MWAA, 501 U.S. at 272.

FN4 Morrison v. Olson, 487 U.S. 654, 693 (1988). James Madison described the "policy" lying behind "distributions of power" -- "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other." The Federalist No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961), quoted in Buckley, 424 U.S. at 122-23.

FN5 See INS v. Chadha, 462 U.S. 919, 951 (1983) (the Constitution's separation of powers is designed to counteract the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power").

FN6 The Attorney General noted that "[t]he first presidential defense of the integrity of the powers of the Executive under the Constitution was made by Washington himself" and that "[f]rom that day to this the Presidents, with very few exceptions, have felt the necessity for refusing to overlook encroachments upon the executive power." 37 Op. Att'y Gen. at 64.

FN7 The Supreme Court repeatedly has rejected the "'archaic view of the separation of powers as requiring three airtight departments of government."' Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) (citation omitted). In doing so, the Court has noted that such a view is "inconsistent with the origins of th[e] doctrine" as well as with "the contemporary realities of our political system." Id. at 441; see also id. at 442 & n.5 (noting that James Madison in The Federalist No. 47 and Justice Joseph Story in his famous treatise on the Constitution rejected the claim that the Constitution requires an absolute separation).

FN8 We shall refer to this theme in the Supreme Court's separation of powers jurisprudence as "the anti-aggrandizement principle."

FN9 We refer to this line of reasoning as "the general separation of powers principle."

FN10 Indeed, Article II specifically requires the President to take an oath or affirmation "to preserve, protect and defend the Constitution." U.S. Const. art. II, § 1, cl. 8.

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powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power."' Mistretta, 488 U.S. at 382 (citation omitted). The Court's decisions have employed three distinct principles in resolving separation of powers disputes. First, where "[e]xplicit and unambiguous provisions of the Constitution prescribe and define . . . just how [governmental] powers are to be exercised," Chadha, 462 U.S. at 945, the constitutional procedures must be followed with precision. Second, where the effect of legislation is to vest Congress itself, its members, or its agents with "'either executive power or judicial power,"' the statute is unconstitutional. MWAA, 501 U.S. at 274 (citation omitted). [FN8] Finally, legislation that affects the functioning of one of the other branches may be unconstitutional if it prevents the affected branch "from accomplishing its constitutionally assigned functions." Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) (legislation affecting the executive branch); accord CFTC v. Schor, 478 U.S. 833, 851, 856-57 (1986) (legislation affecting the judiciary). [FN9]

Our analyses are guided and, where there is a decision of the Court on point, governed by the Supreme Court's decisions on separation of powers. At the same time, the executive branch has an independent constitutional obligation to interpret and apply the Constitution. [FN10] That obligation is of particular importance in the area of separation of powers, where the issues often do not give rise to cases or controversies that can be resolved by the courts. This is due in part to the limits of jurisdiction and justiciability that Article III places on the courts. In addition there may be legislation that violates one of the three principles outlined above and yet is unlikely to reach the courts in a form or context in which the judiciary will be able to identify or remedy the constitutional problem. [FN11] The Attorneys General and this Office have a long tradition of carrying out this constitutional responsibility, one that dates back to Attorney General Edmund Randolph's 1791 opinions on the constitutionality of a national bank. See The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinions (publication forthcoming in 18 Op. O.L.C. (1994)) (reprinting, with commentary, the bank opinions). [FN12] We believe therefore that it is important in addressing separation of powers matters to give careful consideration to the views of our predecessors and to what seems to us to be the import of the Constitution's text, history, and structure. [FN13]

To be sure, respect for the legislative branch of the government requires a degree of deference to legislative judgments. [FN14] However, it is also the President's "duty to pass the executive authority on to his successor, unimpaired by the adoption of dangerous precedents." Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. at 65. [FN15] Our constitutional analyses are informed by both of these concerns. [FN16]

A. Express Procedures: The Bicameralism and Presentment Requirements and the Appointments Clause

While the expression "separation of powers" does not appear in the

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Constitution, the Constitution does require both separation and interdependence on some matters by specifying, expressly and precisely, the procedures that must be followed. Where the constitutional text is unequivocal as to the manner in which the branches are to relate, any attempt to vary from the text's prescriptions is invalid. [FN17] The Court has identified two such express procedures relating to the separation of executive and legislative powers: the bicameralism and presentment requirements for legislation, and the Appointments Clause.

Congress's broad authority to take action that has "the purpose and effect of altering the legal rights, duties, and relations of persons . . . . outside the Legislative Branch," INS v. Chadha, 462 U.S. 919, 952 (1983), is limited by the procedural requirements of Article I. With a few express exceptions found or rooted in the constitutional text, Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 276 n.21 (1991), [FN18] Article I requires that Congress take such action "in accord with a single, finely wrought and exhaustively considered, procedure" -- bicameral passage and presentation to the President followed by presidential signature or bicameral repassage by a two-thirds majority. Chadha, 462 U.S. at 951; see U.S. Const. art. I, §§ 1, 7. The classic and often-repeated violation of this express textual requirement is the "legislative veto" mechanism invalidated in Chadha. [FN19]

The Supreme Court has applied a similar analysis to the Appointments Clause of Article II, Section 2. In Buckley v. Valeo, 424 U.S. 1, 138-39 (1976) (per curiam), the Court concluded that "Congress' power under [the Necessary and Proper] Clause is inevitably bounded by the express language of Art. II, § 2, cl. 2," and that consequently Congress cannot provide for the appointment of "'Officers of the United States,"' except through a procedure that "comports with" the Appointments Clause. [FN20] Pursuant to the language of the Clause, principal officers must be appointed by the President with the advice and consent of the Senate, while Congress is limited in providing alternative means for the appointment of inferior officers to the "possible repositories for the appointment power." Freytag v. Commissioner, 501 U.S. 868, 884 (1991). (Those repositories are "the President alone, . . . the Courts of Law, or . . . the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.)

The rules of law derived from the requirements of bicameralism/presentment and the Appointments Clause have the clear and powerful effect of invalidating any inconsistent congressional action. Congress may not employ any mode of exercising legislative power other than through bicameralism and presentment. The Appointments Clause's list of those who may appoint officers is exclusive, and Congress cannot authorize anyone else to appoint officers of the United States. The major difficulty in applying the bicameralism/presentment and Appointments Clause requirements lies in determining whether a particular action falls within the scope of the prescribed procedures. In section II of this memorandum, we discuss questions that have arisen concerning the scope of both requirements.

B. The Anti-Aggrandizement Principle

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Although the founders were concerned about the concentration of governmental power in any of the three branches, their primary fears were directed toward congressional self-aggrandizement, [FN21] and the Supreme Court's decisions call for careful scrutiny of legislation that has the purpose or effect of extending Congress's authority beyond the legislative process. Just as the textual requirement of bicameralism and presentment limits the means by which Congress may legislate, so the anti-aggrandizement principle limits the means by which Congress may influence the execution (or adjudication) of the laws. [FN22] The Constitution affords Congress great latitude in making policy choices through the process of bicameral passage and presentment. However, "once Congress makes its choice in enacting legislation, its participation ends," and "Congress can thereafter control the execution of its enactment only indirectly -- by passing new legislation." Bowsher v. Synar, 478 U.S. 714, 733- 34 (1986). While Congress may inform itself of how legislation is being implemented through the ordinary means of legislative oversight and investigation, the anti-aggrandizement principle forbids Congress, directly or through an agent subject to removal by Congress, [FN23] from intervening in the decision making necessary to execute the law. See id. at 733-34; FEC v. NRA Political Victory Fund, 6 F.3d 821, 827 (D.C. Cir. 1993), cert. dismissed, 115 S. Ct. 537 (1994). [FN24]

In Bowsher, the Court held that a provision of the Gramm-Rudman Deficit Reduction Act was unconstitutional because it vested in the Comptroller General (an official "removable only at the initiative of Congress," 478 U.S. at 728) the power to make post-enactment decisions about how the executive branch should implement budget reduction legislation. The Court rejected the argument that self-aggrandizing legislation can be upheld when it is as a practical matter harmless or de minimis and dismissed as beside the point Justice White's vigorous argument that "[r]ealistic consideration of the nature of the Comptroller General's relation to Congress . . . reveals that the threat to separation of powers . . . is wholly chimerical." 478 U.S. at 774 (White, J., dissenting); see also Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 269 n.15 (1991) ("the likelihood that Congress" actually would exercise its authority to remove the members of the review board under consideration in MWAA was "irrelevant for separation-of-powers purposes"). In contrast, the Court upheld the validity of the laws challenged in Morrison v. Olson, 487 U.S. 654 (1988) (independent counsel provisions of Ethics in Government Act of 1978), and CFTC v. Schor, 478 U.S. 833 (1986) (regulations implementing section of the Commodity Exchange Act), in part because the Court saw no reason to view those laws as examples of legislative aggrandizement. [FN25]

Like the express requirements of the bicameralism/presentment process and the Appointments Clause, the anti-aggrandizement principle puts a powerful constraint on congressional power: legislative action that falls within the scope of the principle is unconstitutional. [FN26] The complementary limit on the principle is that, as the Court understands it, the principle applies only to congressional action that amounts to formal or direct self-aggrandizement -- for example, the placement of congressional agents on a body with prosecutorial or law enforcement powers -- no matter how limited the power thereby seized by Congress. See NRA Political Victory Fund, 6 F.3d at 826-27. The Court reviews

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legislation that arguably increases Congress's power indirectly by weakening the executive politically under the less stringent general separation of powers principle. See Morrison, 487 U.S. at 694. A significant difficulty in applying the anti-aggrandizement principle arises from the uncertain line between minor (but unconstitutional) aggrandizements and (constitutional) exercises of Congress's broad investigative and oversight powers. [FN27] In section II, we discuss some of the questions that have arisen.

C. The General Separation of Powers Principle

Legislation that affects the constitutional separation of powers but is consistent with the requirements of bicameralism/presentment, the Appointments Clause, and the anti-aggrandizement principle is subject to less searching scrutiny. [FN28] While some older judicial opinions used language suggesting that any overlap between the powers wielded by the different branches is illegitimate, [FN29] the modern Supreme Court interprets the general principle of separation of powers in light of Madison's assertion that the separation necessary to free government is violated only "'where the whole power of one department is exercised by the same hands which possess the whole power of another department."' Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 442 n.5 (1977) (quoting The Federalist No. 47, at 325-26 (James Madison) (Jacob E. Cooke ed., 1961) (emphasis in original)). [FN30] Therefore, "in determining whether [an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." Id. at 443. Cf. CFTC v. Schor, 478 U.S. 833, 856-57 (1986) ("the separation of powers question presented in this litigation is whether Congress impermissibly undermined . . . the role of the Judicial Branch"). An affirmative answer to the question of whether Congress has prevented the executive or judiciary from accomplishing its functions, furthermore, would not lead inexorably to the judicial invalidation of the statute: in that case, the Court has stated, it would proceed to "determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." Administrator of Gen. Servs., 433 U.S. at 443. [FN31]

The Court's current understanding of the general principle of separation of powers is illustrated by Morrison v. Olson, 487 U.S. 654 (1988). [FN32] In Morrison, the Court concluded that the restrictions in the independent counsel statute on the executive's supervisory and removal powers did not violate the principle. While the Court acknowledged that the statute rendered the independent counsel "free from Executive supervision to a greater extent than other federal prosecutors," it was unpersuaded that the limitations placed on that supervision meant that the President would not be able "to perform his constitutionally assigned duties." Id. at 696. [FN33] In light of the narrow range of the independent counsel's jurisdiction, her essential insulation from any significant policy-making role, and the well-established principle that Congress can limit the removal authority of a head of department when granting that officer the power to appoint subordinates, the Court concluded that the independent counsel statute did not fundamentally undermine the executive's

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constitutional authority.

The Supreme Court's basic formulation of the general principle of separation of powers is consistent with the approach taken by most Attorneys General in the past, and it accords with what we find to be the most persuasive scholarship on the original understanding and early practice of the separation of powers under the United States Constitution. [FN34] However, given the very emphasis the general principle places on evaluating constitutional questions in light of the overall structure and functioning of the federal government, the principle's application to specific questions is unavoidably difficult, and the answers we or the courts reach ordinarily should be viewed as quite specific to context. [FN35] Furthermore, although the general principle marks the boundary of the law of separation of powers, it is inappropriate for the executive to regard this as defining the outer limit of proper separation of powers policy objections to legislation. [FN36] The Constitution's very structure suggests the importance of maintaining the hallmarks of "executive administration essential to effective action" [FN37] as well as the accountability to the public that stems from vesting ultimate authority in a single, politically responsible officer. [FN38] Several quite common types of legislation threaten the structural values protected by the general separation of powers principle even if the courts are unlikely to invalidate them. Examples of such legislation may include burdensome reporting requirements, attempts to dictate the processes of executive deliberation, and legislation that has the purpose or would have the effect of "micromanaging" executive action. Executive branch agencies should be careful to object to any legislation that unduly reduces the accountability of officials or agencies to the President, or that unnecessarily interferes with the flexibility and efficiency of executive decision making and action. Such legislation undercuts the constitutional purpose of creating an energetic and responsible executive branch.

II. Common Separation of Powers Issues

A. Bicameralism/Presentment Questions

The Supreme Court's holding in INS v. Chadha, 462 U.S. 919 (1983), was emphatic: Congress can exercise "the legislative power of the Federal Government" only "in accord with a single, finely wrought and exhaustively considered, procedure" -- passage by both houses and presentment to the President. [FN39] Id. at 951. Applying that rule, the Court struck down a statutory mechanism in the Immigration and Nationality Act by which a single house of Congress could override decisions of the Attorney General. The effect of the Court's decision was to invalidate the similar "legislative veto" provisions found in many other statutes. [FN40] In addition to the classic legislative veto mechanism invalidated by Chadha, we think that the requirement of bicameralism and presentment is infringed whenever a single house, committee, or agent of Congress attempts to direct the execution of the laws, to determine the "final disposition of the rights of persons outside the legislative branch" or to promulgate rules or standards intended to bind the actions of executive or administrative officials that have not been approved by both houses and

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presented to the President. See, e.g., Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1108 (9th Cir. 1988), modified as to attorney fees, 893 F.2d 205 (1989) (en banc); [FN41] cf. Mistretta v. United States, 488 U.S. 361, 396 (1989) (distinguishing Sentencing Guidelines from political policy making on the grounds that "they do not bind or regulate the primary conduct of the public").

For many decades, the congressional Joint Committee on Printing ("JCP") has attempted to exercise the legislative authority to promulgate rules and procedures binding on the executive branch's activities relating to printing, publication, and (more recently) data storage. In 1920, President Wilson vetoed an appropriations bill because it purported to confer on the JCP the power to promulgate regulations governing printing by executive officials or agencies: Congress has no power, he explained, to "endo[w] a committee of either House or a joint committee of both Houses with power to prescribe 'regulations' under which executive departments may operate." Veto Message on Legislative, Executive and Judicial Appropriation Bill, H.R. No. 764, 66th Cong., 2d Sess. 2 (1920), reprinted in 59 Cong. Rec. 7,026 (1920); see Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 62-63, 65 (1933) (quoting and endorsing President Wilson's reasoning). In 1984, we concluded that legislation granting the JCP authority to promulgate regulations that "would require executive departments to submit annual plans outlining their intended activities and to seek advance approval of all projected goals, policies, strategies, purchases, publications, and means of distribution" with respect to printing, word processing, and data storage and retrieval was unconstitutional. Constitutionality of Proposed Regulations of Joint Committee on Printing, 8 Op. O.L.C. 42, 42 (1984). The proposed regulations would have established general rules binding the conduct of executive officials without those rules being approved by both houses of Congress and presented to the President, in plain violation of Article I's procedural requirements. [FN42] We have also advised that the statutory provision authorizing the JCP "unilaterally to create exceptions to the [statutory] rule that all printing must be accomplished through the GPO [Government Printing Office]" has no lawful force under Chadha. Id. at 51 & n.14; see also Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. at 58-60 (bill subjecting Treasury Department decisions on tax refunds to review and disallowance by congressional joint committee would be unconstitutional).

The requirement of bicameralism and presentment also can be violated in more convoluted ways. Section 431 of the General Education Provisions Act, for example, subjected final regulations of the Department of Education to a forty-five day report-and-wait provision [FN43] and provided that the final regulation would not become effective if Congress "by concurrent resolution, find[s] that the final regulation is inconsistent with the Act . . . and disapprove[s] such final regulation." 20 U.S.C. § 1232(d) (Supp. IV 1980). Concurrent resolutions are not legislation within the meaning of the Constitution, see U.S. Const. art. I, § 7, cl. 3, because they are not presented to the President. Accordingly, Attorney General Civiletti advised the Secretary of Education that the subjection of the Education Department's delegated lawmaking authority to congressional control and revision by means other than those required by Article

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affirmation "to preserve, protect and defend the Constitution." U.S. Const. art. II, § 1, cl. 8.

FN11 An example of such legislation would be an enactment that does not, when viewed in isolation, violate the constitutional principles we have identified, but as to which constitutional difficulties arise when the statute is examined in conjunction with other similar enactments. Because, absent a refusal by the executive to enforce any of these cumulative enactments, the courts may not have an opportunity to review the statute in its full context, it is incumbent upon the executive to object to such legislation before it becomes law. Burdensome reporting requirements may illustrate this problem. Even if no single reporting requirement violates the general separation of powers principle, see Administrator of Gen. Servs., 433 U.S. at 443, the cumulative effect of many such requirements might prevent the executive from acting with the dispatch and efficiency that the Constitution intends and that, indeed, Congress expects.

FN12 Persuaded by Secretary of the Treasury Hamilton's opinion defending the validity of the legislation, President Washington declined to accept the Attorney General's arguments that the bank bill was unconstitutional and signed it into law. The Supreme Court upheld the President's conclusion that Congress could charter a national bank in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

FN13 For an example of an opinion that is, in our view, an exemplary model of the approach this Office should take in interpreting the Constitution, see Article II, Section 2, Clause 3 -- Recess Appointments -- Compensation (5 U.S.C. § 5503), 3 Op. O.L.C. 314 (1979).

FN14 From the beginning of the Republic, the executive branch has interpreted the Constitution with a due regard for the constitutional views of Congress. See, e.g., Thomas Jefferson, The Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791) (Opinion of the Secretary of State), in 5 Writings of Thomas Jefferson 284, 289 (Paul L. Ford ed., 1895) (arguing that the President should not veto a bill on constitutional grounds, "if the pro and the con hang so even as to balance his judgment," out of "a just respect for the wisdom of the legislature"). Respect for Congress also demands that the executive, like the judiciary, construe statutes so as to avoid constitutional problems. See, e.g., Appropriations Limitation for Rules Vetoed by Congress, 4B Op. O.L.C. 731, 732 n.3 (1980) ("It is our practice to interpret statutes in ways that avoid constitutional infirmities, whenever possible.").

FN15 Thus, for example, in declining to comply with a request from the House of Representatives that he deemed an intrusion on the treaty power, President Washington explained that "as it is essential to the due administration of the government, that the boundaries fixed by the [C]onstitution between the different departments should be preserved: A just regard to the Constitution and to the duty of my Office . . . forbids a compl[i]ance with your request." Message to the House of Representatives (Mar. 30, 1796), reprinted in 35

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FN54 See Appointments in the Department of Commerce and Labor, 29 Op. Att'y Gen. 116, 118-19, 122-23 (1911) (official authorized to perform all the duties of the Commissioner of Fisheries, who was appointed by the President and confirmed by the Senate, was an officer; scientists, technicians, and superintendent of mechanical plant in the Bureau of Standards were employees rather than officers); Second Deputy Comptroller of the Currency -- Appointment, 26 Op. Att'y Gen. 627, 628 (1908) ("The officer is distinguished from the employee in the greater importance, dignity, and independence of his position"; official authorized to exercise powers of the Comptroller of the Currency in the absence of the Comptroller was clearly an officer).

FN55 The status of certain officials traditionally appointed in modes identical to those designated by the Appointments Clause is somewhat anomalous. For instance, low-grade military officers have always been appointed by the President and confirmed by the Senate and understood to be "Officers of the United States" in the constitutional sense; in Weiss v. United States, 114 S. Ct. 752, 757 (1994), the Supreme Court recently indicated its agreement with that understanding. It is at least arguable, however, that the authority exercised by second lieutenants and ensigns is so limited and subordinate that their analogues in the civil sphere clearly would be employees. There are at least three possible explanations. (1) Congress may make anyone in public service an officer simply by requiring appointment in one of the modes designated by the Appointments Clause. The Clause, on this view, mandates officer status for officials with significant governmental authority but does not restrict the status to such officials. This apparently was the nineteenth-century view, see, e.g., United States v. Perkins, 116 U.S. 483, 484 (1886) (cadet engineer at the Naval Academy was an officer because "Congress has by express enactment vested the appointment of cadet-engineers in the Secretary of the Navy and when thus appointed they become officers and not employees"). While recognizing that Congress may make anyone in the public service an officer, Attorney General Kennedy rejected the argument that Congress evinces and effectuates such an intention merely by providing for the public servant to be appointed by a method that coincidentally conforms with the Appointments Clause. See Communications Satellite Corporation, 42 Op. Att'y Gen. 165, 167 (1962) ("it does not follow" from the Constitution that "every appointment authorized by law which is preceded by nomination and confirmation necessarily renders the appointee an officer"). (2) Certain officials are constitutional officers because in the early Republic their positions were of greater relative significance in the federal government than they are today. Cf. Buckley, 424 U.S. at 126 (postmasters first class and clerks of district courts are officers). (3) Even the lowest ranking military or naval officer is a potential commander of United States armed forces in combat -- and, indeed, is in theory a commander of large military or naval units by presidential direction or in the event of catastrophic casualties among his or her superiors.

FN56 In fact, as the Court pointed out, the chief judge of the Tax Court can assign special trial judges to render final decisions in certain types of cases, a power that the government conceded rendered them, in those circumstances,

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"inferior officers who exercise independent authority." The Court rejected the argument that special trial judges could be deemed inferior officers for some purposes and employees for others. 501 U.S. at 882.

FN57 The text of the Appointments Clause implies that offices in the sense of the Clause must be established in the Constitution or by statute. See U.S. Const. art. II, § 2, cl. 2 (specifying certain officers and then referring to "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law").

FN58 That an employee may not exercise independent discretion does not, of course, mean that his or her duties may not encompass responsibilities requiring the exercise of judgment and discretion under the ultimate control and supervision of an officer. In Steele v. United States (No. 2), 267 U.S. 505, 508 (1925), the Supreme Court noted that a "deputy marshal is not in the constitutional sense an officer of the United States," yet "is called upon to exercise great responsibility and discretion" in "the enforcement of the peace of the United States, as that is embraced in the enforcement of federal law." But deputy marshals act at the direction of "the United States marshal under whom they serve," id., who is an officer in the constitutional sense.

FN59 See Appointment and Removal of Inspectors of Customs, 4 Op. Att'y Gen. 162, 164 (1843) (Congress may not provide for the appointment of "any employe [e], coming fairly within the definition of an inferior officer of the government," except by a mode consistent with the Appointments Clause).

FN60 Buckley illustrates this last point. The FEC commissioners appointed by congressional officials were undoubtedly employees of the federal government but they could not constitutionally exercise the enforcement powers the statute attempted to grant them because their mode of appointment precluded them from being officers. 424 U.S. at 137-41.

FN61 The delegation to private persons or non-federal government officials of federal-law authority, sometimes incorrectly analyzed as raising Appointments Clause questions, can raise genuine questions under other constitutional doctrines, such as the non-delegation doctrine and the general separation of powers principle. Compare Confederated Tribes of Siletz Indians v. United States, 841 F. Supp. 1479, 1486-89 (D. Or. 1994) (confusing Appointments Clause with separation of powers analysis in holding invalid a delegation to a state governor) with United States v. Ferry County, 511 F. Supp. 546, 552 (E.D. Wash. 1981) (correctly dismissing Appointments Clause argument and analyzing delegation to county commissioners under non-delegation doctrine).

FN62 See Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power & Conservation Planning Council, 786 F.2d 1359, 1365 (9th Cir. 1986) ("because the Council members do not serve pursuant to federal law," it is "immaterial whether they exercise some significant executive or administrative authority over federal activity"), cert. denied, 479 U.S. 1059 (1987).

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FN63 One might also view delegations to private individuals as raising the same considerations as suggested by the distinction drawn earlier between appointee and independent contractor -- so long as the statute does not create such tenure, duration, emoluments and duties as would be associated with a public office, the individual is not the occupant of a constitutional office but is, rather, a private party who has assumed or been delegated some federal responsibilities.

FN64 See, e.g., Seattle Master Builders, 786 F.2d at 1364-66. The particular state officials at issue were serving on an entity created by an interstate compact established with the consent of Congress, but that fact is not significant for Appointments Clause purposes. The crucial point was that "[t]he appointment, salaries and direction" of the officials were "state-derived": "the states ultimately empower the [officials] to carry out their duties." Id. at 1365. The Supreme Court's recent decision in New York v. United States, 112 S. Ct. 2408 (1992), which held that Congress cannot "commandeer" state officials to serve federal regulatory purposes, reenforces this conclusion. Where state officials do exercise significant authority under or with respect to federal law, they do so as state officials, by the decision and under the ultimate authority of the state.

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991), does not suggest a different conclusion. The constitutional issue in that case was the validity of a statutory provision subjecting the Airports Authority "to the veto power of" a Board of Review composed of members of Congress purportedly "acting 'in their individual capacities."' Id. at 270. The Supreme Court held that the Board in fact acted as an agent of Congress and that the Board's veto power therefore represented an unconstitutional enlargement of congressional authority. Nothing in the Court's opinion suggests that there would have been any constitutional problem if Congress had delegated the same power to the Authority subject to review by the executive branch.

FN65 See Techworld Dev. Corp. v. D.C. Preservation League, 648 F. Supp. 106, 115-17 (D.D.C. 1986).

FN66 We believe that United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 757-59 (9th Cir. 1993) (rejecting Appointments Clause challenge to False Claims Act), cert. denied, 114 S. Ct. 1125 (1994), reached the correct result but through an incorrect line of analysis. See id. at 758 (Clause not violated because of the relative modesty of the authority exercised by the relator). The better analysis, in our view, is that of the court in United States ex rel. Burch v. Piqua Engineering, Inc., 803 F. Supp. 115 (S.D. Ohio 1992), which held that "because qui tam plaintiffs are not officers of the United States, the FCA does not violate the Appointments Clause." Id. at 120. We now disapprove the Appointments Clause analysis and conclusion of an earlier opinion of this Office, Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. O.L.C. 249 (1989) (preliminary print) (arguing that the qui tam provisions violate the Clause).

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FN67 Here the Court phrased its analysis in terms of separation of powers, but the challenge to the statute was, at its core, based on the Appointments Clause. See Chesapeake Bay Found. v. Bethlehem Steel Corp., 652 F. Supp. 620, 624 (D. Md. 1987) (Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), "does not stand for the proposition . . . that private persons may not enforce any federal laws simply because they are not Officers of the United States appointed in accordance with Article II of the Constitution").

FN68 At least where these entities are created on an ad hoc or temporary basis, there is a long historical pedigree for the argument that even the United States representatives need not be appointed in accordance with Article II. See, e.g., Alexander Hamilton, The Defence No. 37 (Jan. 6, 1796), reprinted in 20 The Papers of Alexander Hamilton 13, 20 (Harold C. Syrett ed., 1974):
As to what respects the Commissioners agreed to be appointed [under the Jay Treaty with Great Britain], they are not in a strict sense OFFICERS. They are arbitrators between the two Countries. Though in the Constitutions, both of the U[nited] States and of most of the Individual states, a particular mode of appointing officers is designated, yet in practice it has not been deemed a violation of the provision to appoint Commissioners or special Agents for special purposes in a different mode. The traditional view of the Attorneys General has been that the members of international commissions hold "an office or employment emanating from the general treaty-making power, and created by it and" the foreign nation(s) involved and that members are not constitutional officers. Office -- Compensation, 22 Op. Att'y Gen. 184, 186 (1898).

FN69 Some of our prior opinions express such concerns. Because that view, we now conclude, cannot be reconciled with Appointments Clause principles or caselaw, we expressly disavow it.

FN70 The Court also referred to this as a "policy-implementing" role. Id. at 973. This is to distinguish government agencies and instrumentalities, such as Amtrak, from truly private corporations that, though created pursuant to statutory authority, do not implement any government policy, but instead pursue profit and the policies of their shareholders.

FN71 In some passages, the Court spoke in terms of the First Amendment and individual rights, for instance:
We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment. Id. We do not, however, believe that the Court meant to imply that it is within Congress's power to exempt federal instrumentalities from the Constitution's structural requirements, such as the Appointments Clause and the separation of powers doctrine, that apply to all other federal agencies. We believe instead that the references to individual rights are explained by two considerations. First, the issue in the case was whether Amtrak had violated the petitioner's First Amendment rights, and so did not raise any structural issues. Second, the

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Constitution imposes certain obligations on all government entities, state as well as federal. In other words, not all government entities, within Lebron's definition, are part of the federal government; many are part of a state or local government or of an interstate compact. See id. at 973 (citing Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957) (per curiam)). These latter entities are not subject to the separation of powers doctrine or the Appointments Clause. Because the Court was concerned with all entities that the Constitution regards as within the government, not just the federal government, it naturally phrased its opinion in terms of the obligations that apply to all organs of government, not just the organs of the federal government. Ultimately, we can conceive of no principled basis for distinguishing between the status of a federal entity vis-a-vis constitutional obligations relating to individual rights and vis-a-vis the structural obligations that the Constitution imposes on federal entities. See Brief of Appellant United States, Wilkinson v. United States, Nos. 95-5144, 91-5174 (D.C. Cir. Nov. 22, 1995). It therefore is not surprising that the Court did not consistently limit its language to individual rights. See, e.g., Lebron, 115 S. Ct. at 973 ("It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form."). Thus, we do not believe that Congress may evade the "solemn obligations" of the doctrine of separation of powers by resorting to the corporate form any more than it may evade the obligations of the Bill of Rights through this artifice.

FN72 Memorandum for John Schmidt, Associate Attorney General, from Walter Dellinger, Assistant Attorney General, re: Constitutional Limitations on Federal Government Participation in Binding Arbitration, at 10 (Sept. 7, 1995).

FN73 We nevertheless noted that it is possible for a theoretical binding arbitration mechanism to run afoul of the Appointments Clause. As indicated, arbitrators whose sole or collective decisions are binding on the government exercise significant authority. If any such arbitrator were to occupy a position of employment within the federal government, that arbitrator would be required to be appointed in conformity with the Appointments Clause. See Freytag v. Commissioner, 501 U.S. 868, 881 (1991). Thus, if a federal agency were to conduct binding arbitrations and to employ arbitrators with whom it provided all relevant attributes of an office, all such arbitrators would be required to be appointed in conformity with the Appointments Clause. See Federal Government Participation in Binding Arbitration, at 13.

FN74 The Court also compared the independent counsel's status to that of other officials who had been considered inferior officers in earlier decisions. See 487 U.S. at 672-73 (discussing cases dealing with vice-consuls, election supervisors, and United States commissioners). The Court also took note of its "reference in United States v. Nixon, 418 U.S. 683, 694, 696 (1974), to the Office of Watergate Special Prosecutor -- whose authority was similar to that of [the independent counsel] -- as a 'subordinate officer"' and concluded that this characterization was "consistent" with its conclusion that independent counsels

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are inferior officers. See 487 U.S. at 673.

FN75 Buckley simply asserted that the members of the FEC were "at the very least" inferior officers. Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam). In Freytag, no one claimed that the special trial judges at issue were principal, as opposed to inferior, officers; instead, the case involved the distinction between inferior officers and employees. Freytag v. Commissioner, 501 U.S. 868, 880-82 (1991). The military judges under review in Weiss, like all commissioned officers in the armed forces, were appointed with the advice and consent of the Senate. Weiss v. United States, 114 S. Ct. 752, 757 (1994). Justice Souter concurred in the Court's opinion on the understanding that the military judges at issue there are inferior officers. Id. at 763. He reasoned that there were substantial points to be made on either side of the question whether they were principal or inferior officers and concluded that the Court should defer "to the political Branches' [implicit] judgment" that the military judges were inferior officers. Id. at 769. Although Justice Souter's admonition that "it is ultimately hard to say with any certainty on which side of the line" between principal and inferior status a given officer may fall, id., is indubitably correct, the executive branch cannot invoke the principle of judicial deference he properly used to decide the issue in Weiss.

FN76 The exception to this broad reading of the Clause was Buckley's unsurprising conclusion that "neither Congress nor its officers [are] included within the language 'Heads of Departments."' Buckley v. Valeo, 424 U.S. 1, 127 (1976) (per curiam).

FN77 Freytag, 501 U.S. at 892. The Court in Freytag concluded that it is constitutional for the chief judge of the Tax Court to appoint special trial judges because the Tax Court, though an Article I legislative court, "exercise[s] judicial power and perform[s] exclusively judicial functions" and thus is a "Court[] of Law" within the meaning of the Clause. Id. Justice Scalia argued in a concurring opinion that the Tax Court should be treated as a "Department" and the chief judge as its "Head." Id. at 914-22 (Scalia, J., concurring in part and concurring in the judgment). Justice Souter recently has suggested that the opinion of the Court in Freytag did not actually resolve the question of whether the judges of the Tax Court, including the chief judge, are principal officers. Weiss v. United States, 114 S. Ct. 752, 768 (1994) (Souter, J., concurring).

FN78 Morrison v. Olson, 487 U.S. 654 (1988). In Morrison, the Court indicated that there is some "constitutional limitation on 'incongruous' interbranch appointments," id. at 677, despite the broad language the Appointments Clause uses in describing Congress's discretion on the subject. A statute vesting in a court the power to appoint officers acting in areas in which judges "have no special knowledge or expertise," id. at 676 n.13, for example, might create tension between the court's normal functions and "the performance of [its] duty to appoint." Id. at 676. We think that this limitation is probably of little practical significance with respect to presidential appointments in light of the fact that it is difficult to conceive a plausible argument that vesting the

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power in the President to appoint any officer (other, perhaps, than some legislative officers) could ever be constitutionally "incongruous."

FN79 Silver v. United States Postal Serv., 951 F.2d 1033, 1038 (9th Cir. 1991).

FN80 The Appointments Clause thus differs from Section 4 of the Twenty-fifth Amendment, the language and history of which confirm that the "principal officers of the executive departments" it mentions are the members of the Cabinet. U.S. Const. amend. XXV, § 4; see Freytag, 501 U.S. at 886-87; id. at 917 (Scalia, J., concurring in part and concurring in the judgment).

FN81 "The Cabinet, as such, was not provided for by the Constitution and it follows therefore that the interpretation of the Constitution cannot depend upon such consideration." 37 Op. Att'y Gen. at 231; accord Freytag, 501 U.S. at 916-17 (Scalia, J., concurring in part and concurring in the judgment).

FN82 While the opinion of the Court in Freytag rejected the argument that "every part of the Executive Branch is a department," 501 U.S. at 885, we do not think that the Court's reasoning is inconsistent with the 1933 Justice Department opinion. The Court's chief concern was that part of the Appointments Clause's purpose is to prevent "the dangers posed by an excessively diffuse appointment power." Id. The Court observed that "[g]iven the inexorable presence of the administrative state, a holding that every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint." Id. We do not think that our view that entities other than cabinet-level agencies can be "Departments" for the purposes of the Appointments Clause leads to this constitutionally troublesome result. We assume the continuing validity of United States v. Germaine, 99 U.S. 508 (1879), which held that the head of a bureau within an executive branch department was not the head of a department. Most of the discrete units of the executive branch in fact are subordinate to some larger executive agency, and therefore are not departments under Germaine. The Federal Bureau of Investigation, for example, wields far-reaching law enforcement authority, but as a component of the Justice Department it is not itself a "Department" for purposes of the Appointments Clause. Legislation authorizing the appointment of inferior officers by a subordinate officer within a department with the approval of the head of the department, see United States v. Hartwell, 73 U.S. (6 Wall.) 385, 392-94 (1868); see also Germaine, 99 U.S. at 511 (explaining Hartwell), does not transgress this principle because for constitutional purposes the appointment should be deemed to be made by the department head. We also note that the four concurring Justices in Freytag expressly adopted the reading of the Appointments Clause set forth in the 1933 Attorney General's opinion: that "the term 'Departments' means all independent executive establishments." 501 U.S. at 919 (Scalia, O'Connor, Kennedy, & Souter, JJ., concurring in part and concurring in the judgment).

FN83 The court of appeals in Silver found no constitutional problem with a statute vesting the power to appoint an inferior officer, the Deputy Postmaster General, in an entity consisting of the Governors of the Postal Service

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(principal officers who are collectively the "head of a Department") and the Postmaster General (an inferior officer appointed by the Governors). See 951 F.2d at 1036-41. This conclusion might be justified on either of two rationales. (1) As Justice Souter recently noted, it remains unresolved whether "the Appointments Clause envisions appointment of some inferior officers by other inferior officers," Weiss v. United States, 114 S. Ct. 752, 768 (1994) (Souter, J., concurring), and it may be that there is no constitutional objection to designating one or more inferior officers to be the head of a department with the power to make appointments. (2) It might be argued that although as a general matter the head of a department must be a principal officer and a collective head of department must consist of exclusively principal officers, the association of an inferior officer with a collective head of department in making a specific appointment is constitutionally harmless.

FN84 See Freytag, 501 U.S. at 918 (Scalia, J., concurring in part and concurring in the judgment) (noting that most inferior officers in independent agencies are appointed by neither the President nor a Cabinet official).

FN85 In late-eighteenth century English, the term "department" had no specialized governmental or organizational meaning. For example, Dr. Johnson defined "department" as "[s]eparate allotment; province or business assigned to a particular person," 1 Samuel Johnson, A Dictionary of the English Language (1755), to which Webster added the gloss "in which a class of duties are allotted to a particular person." 1 Noah Webster, American Dictionary 58 (1828), quoted in Freytag, 501 U.S. at 920 (Scalia, J., concurring in part and concurring in the judgment) (founders chose "Department" to connote "separate organization"). In its foundational legislation, the First Congress used the word both for the Departments of Foreign Affairs (later, State) and War and for the Department of the Treasury, even though it pointedly did not term Treasury an "executive department" as it did State and War. Compare Act of July 27, 1789, ch. 4, 1 Stat. 28-29 (establishing the Department of Foreign Affairs) and Act of Aug. 7, 1789, ch. 7, 1 Stat. 49-50 (establishing the Department of War) with Act of Sept. 2, 1789, ch. 12, 1 Stat. 65-67 (establishing the Department of the Treasury). A substantial body of scholarship views this terminological choice as reflecting an intention to make Treasury at least partially independent of the President, although by means other than limiting the latter's removal power. See Lawrence Lessig & Cass R. Sunstein, supra note 33, at 27-29; Gerhard Casper, supra note 33, at 240-42; Peter M. Shane, supra note 33, at 615-16.

FN86 Buckley noted that the Constitution expressly authorizes the selection of the Speaker of the House and the President pro tempore of the Senate from among the membership of those bodies, see U.S. Const. art. I, § 2, cl. 5; id. art. I, § 3, cl. 5, and held that nothing in the Constitution forbids Congress from appointing non-members as legislative branch officials to "perform duties . . . in aid of those functions that Congress may carry out by itself." 424 U.S. at 127-28, 139.

FN87 In this circumstance, Congress's action in lengthening an officer's term

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does not have the effect of usurping the power of appointment the Constitution vests in the President rather than in Congress. Cf. In re Benny, 812 F.2d 1133, 1142-43 (9th Cir. 1987) (Norris, J., concurring in the judgment):

> [T]he Appointments Clause precludes Congress from extending the terms of incumbent officeholders. I am simply unable to see any principled distinction between congressional extensions of the terms of the incumbents and more traditional forms of congressional appointments. Both implicate the identical constitutional evil -- congressional selection of the individuals filling nonlegislative offices.

FN88 See Crenshaw v. United States, 134 U.S. 99 (1890); Civil Service Retirement Act -- Postmasters -- Automatic Separation from the Service, 35 Op. Att'y Gen. 309, 314 (1927) ("If, as stated in [Embry v. United States, 100 U.S. 680, 685 (1879),] Congress may at any time add to or take from compensation fixed, it may also, it would seem, by analogy, at any time shorten or lengthen a term of office.").

FN89 In 1987, this Office issued an opinion that may be read to hold that legislation extending the term of any officer, even one serving at the pleasure of the President, is unconstitutional. See Reappointment of United States Parole Commissioners, 11 Op. O.L.C. 135 (1987). At the time it was issued, that opinion was directly contrary to long-standing executive branch precedent. See, e.g., Displaced Persons Commission -- Terms of Members, 41 Op. Att'y Gen. at 90-91. We recently revisited the question presented in the 1987 opinion and concluded that it was in error. See Legislation Extending the Terms of Office of United States Parole Commissioners (July 15, 1994) (publication forthcoming in 18 Op. O.L.C. (1994)). We therefore reaffirmed the traditional view that legislation extending the term of an officer subject to removal at will does not violate the Appointments Clause and disavowed our 1987 suggestion to the contrary.

FN90 Benny asserted that Wiener v. United States, 357 U.S. 349 (1958), implicitly rejected any Appointments Clause argument against term-extension legislation. 812 F.2d at 1141. We think that this overstates Wiener. Wiener dealt only with the President's removal power and did not consider any issue regarding the Appointments Clause. The date on which the President removed the plaintiff in Wiener from office was in fact within the term of office for which the plaintiff was originally appointed, although part of the backpay the plaintiff ultimately recovered was for a period after his original term would have expired. See 357 U.S. at 350-51 (term should have expired on March 1, 1954 as the law stood at the time plaintiff was appointed; President removed plaintiff on December 10, 1953; plaintiff recovered backpay for four months after March 1, 1954, because commission's authorization was extended after his appointment). The additional Supreme Court cases that Benny and other opinions have cited are distinguishable. See, e.g., Benny, 812 F.2d at 1141 (citing Shoemaker v. United States, 147 U.S. 282 (1893), which upheld legislation imposing additional duties on an officer); In re Tom Carter Enters., 44 B.R. 605, 607 (C.D. Cal. 1984) (citing Shoemaker and cases dealing with issues under the Contracts Clause and the Philippine Organic Act). Benny also pointed out

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that the First Congress twice extended the tenure of the first Postmaster General. 812 F.2d at 1142. While we agree that this fact supports the argument that Congress generally possesses the power to extend terms, the original Postmaster General served at the pleasure of the President, and thus the First Congress's actions placed no practical limitation on the appointments power.

FN91 The result reached in the Benny line of cases was as a practical matter much less troublesome than its reverse, which would have put in question an enormous number of decisions within the bankruptcy system. It is therefore possible to characterize these decisions as a sensible resolution of a legal quandary, which may have compromised constitutional logic but did so at no real cost to the ultimate purposes of the Constitution. However, while this view of the cases may be quite sensible from a political-science perspective, it leaves the constitutional law on the subject in some disarray.

FN92 See, e.g., President Buchanan's signing statement dated June 25, 1860, relating to the Civil Appropriations Act for fiscal year 1861, in 5 Messages and Papers of the Presidents, 1789-1897, at 597-98 (1897) (construing Act to avoid the constitutional problem).

FN93 The same possibility is not presented by Congress's power to reduce or limit the duties of an officer. Except with respect to (certain) constitutional officers, Congress has plenary authority to eliminate offices altogether, subject to the general separation of powers principle. The lesser-included power to take away part of an officer's authority does not in itself enable Congress to choose which individual will exercise authority and thus does not implicate the Appointments Clause. See United States v. San Jacinto Tin Co., 125 U.S. 273, 284 (1888) (Congress, as "the legislative body which created the office" of Attorney General, has the authority to put "restrictions . . . upon the exercise of [the Attorney General's] authority").

In Crenshaw v. United States, 134 U.S. 99 (1890), the Supreme Court upheld a statute that affected undergraduates ("cadet midshipmen") at the Naval Academy by redesignating them as "naval cadets" and restricting the circumstances in which they would be commissioned upon graduation. The Court concluded that "Congress did not thereby undertake to name the incumbent of any office. It simply changed the name, and modified the scope of the duties." Id. at 109.

FN94 The Olympic Federal court thought the legislation would have been valid if Congress had created a three-person directorate for the OTS and designated the members of the former board as the directors. (The court reasoned that the germaneness requirement of Shoemaker would be satisfied because OTS was absorbing the duties of the old board as well as acquiring other, related ones.) 732 F. Supp. at 1193. We reached a similar conclusion in 1980 in opining that Congress could merge the Court of Claims and the Court of Customs and Patent Appeals and designate the members of those courts to serve as members of the merged court. See Legislation Authorizing the Transfer of Federal Judges from One District to Another, 4B Op. O.L.C. 538, 541 (1980). The "merger situation . . . involves the end of one institution and the continuance of its major

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Writings of George Washington 5 (John C. Fitzpatrick ed., 1940).

FN16 The correct resolution of separation of powers questions demands that due respect be given to two distinct constitutional axioms. The first axiom is that the Constitution's creation of a vigorous executive and an independent judiciary must not be undermined by legislative encroachment. The second axiom is that the Constitution delegates to Congress broad power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [of Congress], and all other Powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." U.S. Const. art. I, § 8, cl. 18 (emphasis added). The Necessary and Proper Clause thereby authorizes Congress not only to choose any appropriate means of exercising the legislative powers it has been delegated, but also "to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government" as a whole, M'Culloch v. Maryland, 17 U.S. at 420, including the powers vested in the President. In our analyses, we fully acknowledge the broad sweep of Congress's powers while insisting, as we must, that those powers cannot be legitimately employed so as to undermine the constitutional authority of the executive branch.

FN17 In such circumstances "the balance" between the branches "already has been struck by the Constitution itself" in the text. Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 486 (1989) (Kennedy, J., concurring).

FN18 The House of Representatives has the power to impeach any civil officer of the United States, see U.S. Const. art. I, § 2, cl. 5; id. art. II, § 4, and the Senate to try and, if convinced that the officer is guilty of "high Crimes and Misdemeanors," to remove him or her from office, id. art. I, § 3, cls. 5, 6; id. art. II, § 4. The Senate also acts on its own in exercising its advice and consent powers with respect to treaties and the appointment of officers. Congress and congressional committees, furthermore, may take certain actions in aid of Congress's legislative tasks that have legal consequences for specific persons outside the legislative branch; a congressional committee, for example, may issue a subpoena to a witness. See Lear Siegler, Inc. Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1108 (9th Cir. 1988), modified as to attorney fees, 893 F.2d 205 (1989) (en banc). We disagree with the Lear Siegler court's application of this principle to the question before it.

FN19 The statute at issue in Chadha provided for a one-house "veto" of certain decisions by the Attorney General. A two-house "veto" satisfies bicameralism but is inconsistent with the requirement of presentment, and soon after Chadha the Court summarily invalidated a statute employing this mechanism. See United States Senate v. FTC, 463 U.S. 1216 (1983) (mem.). These Supreme Court decisions vindicated the executive branch's long-held objections to any form of legislative "veto." See Memorandum for the Attorney General from President Franklin D. Roosevelt (Apr. 7, 1941), reprinted in Robert H. Jackson, A Presidential Legal Opinion, 66 Harv. L. Rev. 1353, 1357-58 (1953) (concurrent resolution); Constitutionality of Proposed Legislation Affecting Tax Refunds, 37

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functions in another," and it was reasonable for Congress "to provide in this context for the relocation of experienced and capable judicial personnel, and for their continuing to perform the functions of the office to which they were originally appointed." Id.

FN95 One possible restriction is notable for its absence from the Constitution: although Articles I and II and the Twelfth Amendment establish citizenship and age requirements for serving as a member of Congress, the President, or the Vice President (and also set varying minimum age requirements), see U.S. Const. art. I, § 2, cl. 2 (Representatives); id. art. I, § 3, cl. 3 (Senators); id. art. II, § 1, cl. 4 (the President); id. amend. XII (Vice President), the Constitution places no such limitations on anyone who becomes an officer through one of the processes prescribed by the Appointments Clause.

FN96 After FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), cert. dismissed, 115 S. Ct. 537 (1994), it appears that designating a member of Congress to serve on a commission with any executive functions, even in what was expressly labeled a ceremonial or advisory role, may render the delegation of significant governmental authority to the commission unconstitutional as a violation of the anti-aggrandizement principle. See id. at 826-27.

FN97 The Incompatibility Clause does not prohibit members of Congress from serving in positions that are not offices in the constitutional sense. See, e.g., Proposed Commission on Deregulation of International Ocean Shipping, 7 Op. O.L.C. 202, 202-03 (1983) (members of Congress may serve as members of a "purely advisory" commission because the members need not be officers).

FN98 Cf. Special Deputization of Members of Congress, at 1 n.1 (May 25, 1994) (publication forthcoming in 18 Op. O.L.C. (1994)) (recognizing Incompatibility Clause requirement but finding it unnecessary to reach that issue).

FN99 The suggestion in this Office's 1977 opinion on the Clause that "exclusive responsibility for interpreting and enforcing the Incompatibility Clause rests with Congress," Reserve Commissions, 1 Op. O.L.C. at 242, thus was an overstatement.

FN100 The most thorough judicial treatment of the issue, which quotes extensively from Attorney General Wirt's 1823 opinion, is United States v. Allocco, 200 F. Supp. 868 (S.D.N.Y. 1961), aff'd, 305 F.2d 704 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963).

FN101 There must be a vacancy in order for the President to exercise the authority granted by the Recess Appointments Clause. See Recess Appointments, 3 Op. O.L.C. at 317 (the power to make a "recess appointment presupposes the existence of a vacancy," and an appointment cannot in itself remove an incumbent so as to create a vacancy). In many situations, whether a vacancy exists will depend on the correct interpretation of a holdover provision in the statute creating the office. The scanty caselaw on this issue -- which is a matter of

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statutory construction rather than of constitutional law -- is not easily reconciled. Compare Staebler v. Carter, 464 F. Supp. 585 (D.D.C. 1979) with Mackie v. Clinton, 827 F. Supp. 56 (D.D.C. 1993), vacated as moot, Nos. 93-5287 & 93-5289, 1994 WL 163761 (D.C. Cir. Mar. 9, 1994).

FN102 "In this connection I think the President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate. . . . But there is a point, necessarily hard of definition, where palpable abuse of discretion might subject his appointment to review." 33 Op. Att'y Gen. at 25.

FN103 See, e.g., Appointment of Acting Purser, 6 Op. Att'y Gen. 357, 365 (1854) (executive power of "filling up a vacancy by an appointment of one to act ad interim, and for a particular exigency, in a distant service" could be exercised to make temporary appointment of acting purser despite statutory prohibition on anyone acting as purser prior to Senate confirmation); Executive Power of Appointment, 4 Op. Att'y Gen. 248, 248 (1843) (appointment power is derived from President's Take Care Clause duty, "an obligation imposed by the constitution, and from the authority of which no mere act of legislation can operate a dispensation," although President could not pay interim appointees without an appropriation).

FN104 Indeed, at least one court has indicated a judicial willingness to defer to the views of the Attorney General on the President's authority to make temporary appointments. See Olympic Federal Sav. & Loan Ass'n v. Director, Office of Thrift Supervision, 732 F. Supp. 1183, 1197-98 (D.D.C.) ("The Attorney General is charged with responsibility for ensuring that only lawfully appointed officials act on behalf of the United States, and consequently his interpretation of law on this subject is entitled to great deference."), appeal dismissed as moot, 903 F.2d 837 (D.C. Cir. 1990).

FN105 Williams was a challenge to the legality of actions taken by the acting director of the Office of Economic Opportunity on the grounds that the President lacked authority to appoint an acting director of that office and to continue the interim appointment for over four months without submitting to the Senate any nomination to the position of director. The district court declared the President's action unlawful. The court of appeals refused to grant a stay of the district court's order because in its judgment the acting director had failed to show the requisite likelihood of success on the merits. The brief discussion in Williams of the merits emphasized that Article II "unequivocally requires an officer of the United States to be confirmed by the Senate unless different provision is made." The court nevertheless observed that "[i]t could be argued" that the President has "an implied power, in the absence of limiting legislation . . . to appoint an acting director for a reasonable period of time before submitting the nomination of a new director to the Senate" 482 F.2d at 670.

FN106 Our opinions have struggled with the meaning of Williams. See, e.g., Power

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of the President to Designate Acting Member of the Federal Home Loan Bank Board, 1 Op. O.L.C. 150, 151-52 (1977) (court of appeals' opinion in Williams "can perhaps be read as disagreeing with" the argument that the President has no non-statutory authority or "as perhaps agreeing" that he does have such authority, "in the absence of a limiting statute," subject, of course, to the condition that he must submit a nomination within a reasonable time).

FN107 The Vacancies Act only applies to temporary appointments "[w]hen an office[]" is vacant. 5 U.S.C. § 3346 (emphasis added). Because the staff director for the Commission on Civil Rights is not a constitutional officer, the Vacancies Act does not apply. See Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision, 732 F. Supp. 1183, 1195 (D.D.C.) (finding that "officer" as used in the Vacancies Act, 5 U.S.C. § 3346, means "constitutional officer"), appeal dismissed as moot, 903 F.2d 837 (D.C. Cir. 1990). Indeed, since the Commission is an exclusively investigatory and advisory body, see Hannah v. Larche, 363 U.S. 420, 441 (1960), none of the positions at the Commission are constitutional offices. See Statement on Signing the United States Commission on Civil Rights Act of 1983, 2 Pub. Papers 1634, 1635 (Nov. 30, 1983) (Statement by the Department of Justice). Accordingly, the Vacancies Act does not apply to the Commission at all.

FN108 A federal district court ruled to the contrary, but its decision has been vacated. See George v. Ishimaru, 849 F. Supp. 68 (D.D.C. 1994), vacated as moot, No. 94-5111 1994 WL 517746 (D.C. Cir. Aug. 25, 1994).

FN109 Professor Gerhard Casper has identified seven "major positions [in the First Congress] on the question of the location of the removal power," ranging from the view that the President has illimitable authority to remove any non-judicial officer to the argument that Congress has plenary discretion over removal issues under the Necessary and Proper Clause. See Gerhard Casper, supra note 33, at 234-35.

FN110 "The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed. The head of a Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto." Perkins, 116 U.S. at 485. The President similarly "has no constitutional prerogative" to make appointments without senatorial advice and consent "independently" of congressional authorization -- that is, the President may make appointments without the advice and consent of the Senate only if Congress authorizes the President to do so. See Myers, 272 U.S. at 161- 62 (noting without deciding the question).

FN111 We do not read Morrison v. Olson, 487 U.S. 654 (1988), to cast any doubt on the continuing vitality of these decisions. See id. at 689 n.27, 690 n.29 (implicitly reaffirming Perkins).

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FN112 The Court dismissed the argument that the rationale for giving the President plenary removal authority over heads of department and other great officers of state simply did not apply to postmasters with the observation that Congress could extend civil service tenure protection to the latter simply by vesting their appointment "in the head[] of department[] to which they belong." 272 U.S. at 174.

FN113 The statute establishing the FTC included a provision stating that a commissioner "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office," which the Court construed as intended "to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here." Humphrey's Ex'r, 295 U.S. at 623, 626.

FN114 Humphrey's Executor expressly repudiated the language in Myers suggesting that the President's general executive powers and Take Care Clause responsibilities rendered it unconstitutional for Congress to reduce or eliminate presidential control over the administration of federal law. "In the course of the opinion [in Myers], expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of stare decisis. In so far as they are out of harmony with the views here set forth, these expressions are disapproved." Humphrey's Ex'r, 295 U.S. at 626.

FN115 See also id. at 628:
The FTC was created by Congress to "carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other special duties as a legislative or judicial aid. . . . Its duties are to be performed without executive leave and, in the contemplation of the statute, must be free from executive control."

FN116 The rationale of Wiener, which is essentially that Congress must have implied a for-cause removal restriction when the Court believes that the functions of the agency demand such tenure protection, 357 U.S. at 353-56, seems questionable. There would be nothing illogical in a legislative decision, for example, to protect against review or revision of the decisions of the agency, see id. 354-55, while placing the agency's decision makers within the control of the President. Congress has made such decisions from the beginning of the Republic. To the extent that Wiener assumes that control is and ought to be a binary matter -- either plenary or non-existent -- its reasoning is difficult to reconcile with more recent separation of powers decisions that reject such an either/or approach to presidential control. See, e.g., Morrison v. Olson, 487 U.S. 654 (1988). Despite these possible flaws in its logic, however, Wiener's holding continues to be followed. See FEC v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993) (concluding that the members of the Federal Election Commission probably are removable only for cause despite the absence of an explicit statutory restriction on removal), cert. dismissed, 115 S. Ct. 537 (1994).

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FN117 Congress's decision was considered legitimate in Humphrey's Executor because the Court viewed the FTC as "a body of experts" "charged with the enforcement of no policy except the policy of the law" and concluded that "[s]uch a body cannot in any proper sense be characterized as an arm or an eye of the executive". 295 U.S. at 624, 628. We do not find the Court's reasoning in Humphrey's Executor completely persuasive. The Court's assertion about the FTC's "enforcement of no policy except the policy of the law," id. at 624, does not differentiate the FTC, except perhaps as a matter of degree, from the many undoubtedly executive agencies upon which Congress imposes mandatory duties. The Court also stated that an FTC member is "an officer who occupies no place in the executive department," but the Court may only have meant that the FTC is "an agency of the legislative or judicial departments of the government," id. at 628, in which case questions would arise under current constitutional doctrine as to the legitimacy of an Article I entity exercising law-making authority without following bicameralism and presentment, see INS v. Chadha, 462 U.S. 919 (1983), or of an Article III non-judicial entity "bind[ing] or regulat[ing] the primary conduct of the public," Mistretta v. United States, 488 U.S. 361, 396 (1989). We do not think that the "independent" regulatory agencies could be viewed today as within the legislative or judicial branches. See id. at 386 n.14 (SEC is "not located in the Judicial Branch").

FN118 A much older decision, Shurtleff v. United States, 189 U.S. 311 (1903), had held that a for-cause provision did not oust the President's power, derived from the power of appointment, to remove an officer at will, but after Humphrey's Executor, Shurtleff appeared confined to its factual setting (where the official's tenure had no fixed termination). See Kalaris v. Donovan, 697 F.2d 376, 395 & n.76 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983). Bowsher, however, cited Shurtleff in connection with a more general suggestion that "the enumeration of certain specified causes of removal" may not "exclud[e] the possibility of removal for other causes." 478 U.S. at 729. Bowsher and Morrison together suggest that a generous reading of the President's (or a department head's) power to remove an inferior officer for cause may be essential to the constitutionality of removal restrictions concerning even those officers whose functions are narrow.

FN119 The Tenure of Office Act of 1867, ch. 154, 14 Stat. 430 (1867), expressly provided the Secretaries of War and the Navy, among others, with terms longer than that of the President who appointed them, subject only to presidential removal with the consent of the Senate. President Andrew Johnson's attempt to remove the Secretary of War was the legal basis for his impeachment and near-removal from office. (The Act had been passed over President Johnson's constitutionally based veto.) GR

FN120 With respect to an officer serving at the President's pleasure, the President may remove the incumbent by direct order or by appointing his or her successor after receiving the advice and consent of the Senate. See, e.g., Quackenbush v. United States, 177 U.S. 20, 25 (1900); Presidential Appointees -- Resignation Subject to the Appointment and Qualification of a Successor, 3 Op.

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O.L.C. 152 (1979).

FN121 On the basis of precedent, and in light of the understandable tendency of Article III judges to value tenure protection positively, it is safe to assume that courts will continue to apply Wiener with respect to officials whose primary duties involve the adjudication of disputes involving private persons.

FN122 The two houses of Congress also have complementary roles in the congressional power to impeach and remove any civil officer of the United States. See U.S. Const. art. I, § 2, cl. 5; id. art. I, § 3, cl. 6.

FN123 Congress's authority in this regard is bounded, to be sure, by independent constitutional limitations such as the Bill of Attainder Clause, U.S. Const. art. I, § 9, cl. 3. See United States v. Lovett, 328 U.S. 303 (1946) (provision in appropriations statute prohibiting the payment of compensation to three specified executive branch employees because of their political beliefs was an unconstitutional bill of attainder).

FN124 One could also describe the reasoning directly in terms of the impeachment and removal powers. See U.S. Const. art. I, § 2, cl. 5 (House has "sole Power of Impeachment"); id. art. I, § 3, cl. 6 (Senate has "sole Power to try all Impeachments"); id. art. II, § 4 ("President, Vice President and all civil Officers" are subject to impeachment and removal). These powers stem from "[e]xplicit and unambiguous provisions of the Constitution [that] prescribe and define" the only means by which Congress may remove officers. INS v. Chadha, 462 U.S. 919, 945 (1983).

FN125 In Smith the Supreme Court rejected a challenge to the right of one of President Hoover's appointees to sit on the Federal Power Commission, but based its holding on its construction of the Senate's rule permitting reconsideration. The Court thus did not reach the executive's constitutional arguments. See 286 U.S. at 34 ("we have, therefore, no occasion to consider the constitutional objection").

FN126 The composition of the Smithsonian's Board of Regents and of the Board of Trustees of the J.F.K. Center presents a separate problem under Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), because members of Congress serve on these boards through appointment by the Speaker and the President pro tempore. See 20 U.S.C. § 42 (Regents of Smithsonian); Id. § 76h(a) (Trustees of J.F.K. Center).

FN127 Under the modern understanding of the separation of powers, we do not think that Congress validly can empower the GPO to play any role that is not purely ministerial with respect to the executive branch.

FN128 Formal removal authority is sufficient to render the Librarian subject to the President's control for constitutional purposes. See Bowsher v. Synar, 478 U.S. 714, 726-27 (1986). We think that under Bowsher the fact that a President

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is highly unlikely to remove a Librarian is legally irrelevant. Id. at 727 n.5.

FN129 The Constitution presupposes that all executive branch action is taken under the legal authority of officers of the United States and that it is those officers (and not their subordinates) who are constitutionally responsible for those actions. See U.S. Const. art. II, § 4 (civil officers may be impeached). It is our view, therefore, that the executive branch is generally entitled to resist congressional demands that employees be questioned about their actions and that as a matter of constitutional comity Congress ordinarily is obligated to respect an executive decision to send a superior officer to present testimony and answer questions about the actions of a subordinate officer. (The last statement does not apply to congressional investigations connected with impeachment or with other legitimate investigations into the actions of specific officers.) Although the details of executive responses to congressional demands for information have changed somewhat, the general principle that Congress ought not employ its powers of investigation to disrupt the lines of responsibility and authority within the executive branch is very old. See Thomas Jefferson, Opinion of the Cabinet (Apr. 2, 1792), in I The Writings of Thomas Jefferson 304 (Andrew A. Lipscomb ed., 1903) (advising President Washington "that neither the committee nor [the] House [of Representatives] had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President").

FN130 This is not to say that an unconstitutional report-and-wait provision cannot be imagined. A provision that imposed so lengthy a delay as to in effect nullify the executive's power to take action substantively authorized by the Constitution or a statute might be invalid as a violation of the anti-aggrandizement or general separation of powers principle.

FN131 Moreover, such a provision ought to fail the courts' final test under general separation of powers analysis -- whether the statute's impact on the executive "is justified by an overriding need to promote objectives within the constitutional authority of Congress." Administrator of General Services, 433 U.S. at 443. The hypothesized reporting requirement could seriously impair the President's ability to formulate foreign policy and conduct negotiations and addresses an area in which Congress's constitutional authority is limited.

FN132 The result in Bowsher v. Synar, 478 U.S. 714 (1986), for example, would not be changed by a statute providing that the General Accounting Office is an executive branch agency. Through the Comptroller General, an official removable by Congress, the legislature would still be exercising ultimate authority over executive decisions. In fact, the Comptroller General does have obligations to the executive branch as well as to Congress. See Bowsher, 478 U.S. at 746 (Stevens, J., concurring in the judgment).

FN133 The delegation question actually at issue in our 1990 opinion concerned OMB requirements to contract out governmental work. Executive branch delegations

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1488. Therefore, the court concluded, the provision requiring the governor's concurrence violated the Appointments Clause and the general separation of powers principle. Id. at 1489. We think that the district court went wrong in its description of the legislation it was reviewing: the only final determination the Secretary is "legislatively charged with making" under 25 U.S.C. § 2719(b)(1)(A) is a determination that the statutory conditions -- inter alia, that the relevant governor concurs in the Secretary's findings that granting the waiver will be beneficial to the tribe and harmless to its neighbors -- have been satisfied. The governor's concurrence, from the Secretary's perspective, is as much a fact about the world as the predicted effects of the casino (or the concurrence of the supermajority of farmers at issue in Currin) -- it is one more condition that must be met before the Secretary can exercise the waiver power Congress has provided, albeit a condition that the Secretary may be able to satisfy using different methods (persuasion, for example) than those employed in satisfying other conditions (economic forecasts of the impact of a casino, for example).

For somewhat similar reasons, there is no separation of powers problem with legislation that defines a federal rule of law by reference to state or foreign law. The Supreme Court held in United States v. Sharpnack, 355 U.S. 286 (1958), that the Constitution permits Congress to provide for the application, as bases for federal prosecution, of subsequently enacted state criminal laws in federal enclaves. The Court concluded that such a prospective congressional adoption of "future state legislative action in connection with the exercise of federal legislative power" does not involve "a delegation by Congress of its legislative authority to the States" at all. Id. at 294. On the basis of Sharpnack's reasoning, we think that no special separation of powers issues are raised by the role of the states under such legislation. The courts of appeals have applied the rationale of Sharpnack to a variety of federal statutes that require consideration of state or foreign laws in determining the application of federal law. See, e.g., United States v. Rioseco, 845 F.2d 299, 302 (11th Cir. 1988) ("Congress has delegated no power, but has itself set out its policies and has implemented them").

FN136 See also Memorandum for Jack Quinn, Counsel to the President, from Walter Dellinger, Assistant Attorney General, re: Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges (Dec. 18, 1995); Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts, 13 Op. O.L.C. 361, 366-68 (1989) (preliminary print); Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101 (1984); Memorandum for Richard T. Burress, Office of the President, from Laurence H. Silberman, Deputy Attorney General, re: Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution, at 2, 5 (Aug. 28, 1974); Memorandum for Egil Krogh, Staff Assistant to the Counsel to the President, from William H. Rehnquist, Assistant Attorney General, re: Closing of Government Offices in Memory of Former President Eisenhower (Apr. 1, 1969).

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FN137 This last point is true not only with respect to true "political questions," i.e., constitutional issues the resolution of which is committed by the Constitution to (one of) the political branches, but also as to areas which, although not absolutely insulated from judicial review, demand extraordinary judicial respect for the decisions of a coordinate branch. See, e.g., United States v. Butenko, 494 F.2d 593, 603, 605 (3d Cir. 1974) (en banc) (broad presidential power to order covert surveillance for foreign affairs and national security purposes does not "justify completely removing" judicial enforcement of the Fourth Amendment; however, the "strong public interest" in "the efficient operation of the Executive's foreign policy-making apparatus" should make a court "wary of interfering").

FN138 Justice Robert Jackson once wrote that "[i]t is hard to conceive a task more fundamentally political than to maintain amidst changing conditions the balance between the executive and legislative branches of our federal system." Robert H. Jackson, The Supreme Court in the American System of Government 62 (1955).

FN139 See Richard A. Champagne, Jr., The Separation of Powers, Institutional Responsibility, and the Problem of Representation, 75 Marq. L. Rev. 839, 844 (1992).
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Op. Att'y Gen. 56, 60-62 (1933) (joint congressional committee); Constitutional Issues Raised by Inter-American Convention on International Commercial Arbitration, 4B Op. O.L.C. 509, 512-13 (1980) (one-house veto of "private" action).

FN20 Buckley vindicated the long-standing constitutional view of the executive branch. See, e.g., Constitutionality of Resolution Establishing United States New York World's Fair Commission, 39 Op. Att'y Gen. 61 (1937).

FN21 See Mistretta v. United States, 488 U.S. 361, 411 n.35 (1989) (distinguishing Bowsher v. Synar, 478 U.S. 714 (1986), as resting on "the special danger recognized by the Founders of congressional usurpation of Executive Branch functions").

FN22 The fact that the anti-aggrandizement principle does not rest on a particular provision of the Constitution does not make it any less important and legitimate a feature of the law of separation of powers than those features such as bicameralism and presentment that do have specific textual loci.
The Framers regarded the checks and balances they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other. . . . This Court has not hesitated to enforce the principle of separation embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it. Buckley v. Valeo, 424 U.S. 1, 122- 23 (1976) (per curiam).

FN23 "The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." Bowsher, 478 U.S. at 726. An officer subject to removal by Congress is subordinate to Congress as a matter of constitutional law and must be viewed as an agent of Congress for separation of powers purposes. Id. at 730. The Constitution expressly prescribes the only means by which the houses of Congress may participate in the removal from an ongoing office of a non-legislative official -- impeachment by the House and trial by the Senate. Id. at 723.

FN24 Bowsher upheld the view of the Constitution long maintained by the executive branch. See, e.g., Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 56 (1933) (unconstitutional for Congress to give a joint committee of Congress authority "to approve or disapprove executive acts").

FN25 Morrison, 487 U.S. at 694 ("We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch."); Schor, 478 U.S. at 856 ("Unlike Bowsher, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch.").

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FN26 The bicameralism/presentment and anti-aggrandizement requirements converge when Congress attempts to vest in itself or its agents the power to take action with legal effects outside the legislative branch by some means other than the textually prescribed procedure of bicameral passage of a bill and presentation to the President. Such an attempt is unconstitutional regardless of whether one views the attempt as a violation of the bicameralism/presentment requirement for legislation or as a self-aggrandizing intrusion into the sphere of activity of another branch. See MWAA, 501 U.S. at 274-77. However, the two requirements do not always work in tandem. A statute providing that the President can exercise additional authority over some issue with the approval of a single house of Congress would not amount to congressional self-aggrandizement but would violate the bicameralism requirement. Similarly, it is difficult to view the designation by statute of agents of Congress to be non-voting members of an extra-legislative decision-making body as leading to the exercise of legislative authority in violation of Chadha, but such designation may well run afoul of the anti-aggrandizement principle. See, e.g., NRA Political Victory Fund, 6 F.3d at 826-27.

FN27 Compare NRA Political Victory Fund, 6 F.3d at 826-27 (unconstitutional for Congress to place agents within an entity exercising final decision-making authority) with McGrain v. Daugherty, 273 U.S. 135 (1927) (constitutional for Congress to issue subpoenas).

FN28 Legislation impinging on the President's responsibilities in the areas of foreign affairs and national defense poses unique issues in the application of the general principle of separation of powers, requiring a more searching examination of the validity of congressional action.

FN29 See, e.g., Springer v. Philippine Islands, 277 U.S. 189, 201 (1928) (discussing the "exclusive character of the powers conferred upon each of the three departments"). On the present Court, Justice Scalia adheres to a version of this view. See, e.g., Morrison v. Olson, 487 U.S. 654, 703-04 (1988) (Scalia, J., dissenting) (criticizing the Court for focusing on "such relatively technical details as the Appointments Clause and the removal power" rather than on "the principle of separation of powers").

FN30 Madison's language about "the whole power of [a] department" should not be construed in a woodenly literalistic manner. As the Supreme Court's decisions indicate, the point is that the principle of separation of powers safeguards the overall constitutional role and function of the affected branch. Indeed, this would seem to have been Madison's view as well: during the great debate in the First Congress over the President's authority to remove executive branch officers, Madison argued against congressional power to limit the President's authority on the ground that such limitations would distort the constitutionally ordained role of the executive. See Myers v. United States, 272 U.S. 52, 131 (1926) (quoting Madison).

FN31 Although most of the Court's decisions applying the general separation of

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powers principle have concerned legislation arguably interfering with the executive or judiciary, the Court's approach is applicable in other circumstances as well. For example, United States v. Nixon, 418 U.S. 683 (1974), addressed the argument that a subpoena duces tecum addressed to the President in the course of a criminal proceeding was a judicial encroachment on the executive's autonomy. The Court rejected the argument, holding in the circumstances of the case that the President's "generalized interest in confidentiality" was outweighed by "the demonstrated, specific need [of the courts and the accused] for evidence in a pending criminal trial." Id. at 713. The threat to the President's constitutionally based interest posed by compelled disclosure in such (presumably rare) circumstances was slight, the Court concluded, while "the allowance of the privilege to withhold evidence . . . would . . . gravely impair the basic function of the courts." Id. at 712. The Court built on its reasoning in United States v. Nixon in formulating the test set out a few years later in Administrator of General Services, under which it examined the impact of an adverse decision on the constitutional functions of the executive and judicial branches.

FN32 See also Mistretta v. United States, 488 U.S. 361 (1989). Mistretta upheld the validity of Congress's decision to create the Sentencing Commission as an independent entity within the judicial branch composed, in part, of Article III judges against the claim that the Commission violated the general separation of powers principle. Id. at 383. As in Morrison, the Court looked to the impact of the challenged legislation on the ability of the affected branch to fulfill its duties and concluded that the legislation posed no real threat to the integrity or authority of the judiciary. Id. at 384.

FN33 The Court also addressed the statute's imposition of a for-cause requirement on the Attorney General's power to remove an independent counsel, arguably a violation of the rule of Myers v. United States, 272 U.S. 52 (1926) (holding unconstitutional a statute requiring Senate advice and consent to the presidential removal of certain postmasters). Morrison distinguished Myers as based on what we have called the anti-aggrandizement principle, 487 U.S. at 686 (like Bowsher v. Synar, 478 U.S. 714 (1986), Myers involved "Congress' attempt to involve itself in the removal of an executive official"), and rejected the argument that the constitutionality of a for-cause removal requirement depends on whether an official is classified as "purely executive," id. at 689. The proper inquiry, the Court concluded, was the compatibility of the restriction on the executive's removal power with the general separation of powers principle that Congress cannot legislate in such a way that the President cannot carry out his constitutional functions. Ultimately, the Court was "simply [unable to] see how the President's need to control the [counsel's] exercise of . . . discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." Id. at 691-92.

FN34 While we do not rest any conclusions on the potentially shifting ground of scholarly consensus, we note the existence of a number of impressive studies

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arguing that the principle of separation was originally understood to be flexible, open-ended, and consistent with a variety of actual institutional relationships among the three branches. Furthermore, it seems undeniable that early practice under the Constitution reflected a loose rather than strict understanding of the required separation. See, e.g., Susan Low Bloch, The Early Role of the Attorney General in our Constitutional Scheme: In the Beginning There was Pragmatism, 1989 Duke L.J. 561; Gerhard Casper, An Essay in Separation of Powers: Some Early Versions and Practices, 30 Wm. & Mary L. Rev. 211 (1989); William B. Gwyn, The Indeterminacy of the Separation of Powers and the Federal Courts, 57 Geo. Wash. L. Rev. 474 (1989); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 93 Colum. L. Rev. 1 (1994); Peter M. Shane, Independent Policymaking and Presidential Power: A Constitutional Analysis, 57 Geo. Wash. L. Rev. 596 (1989).

FN35 Once again, we note that the areas of foreign relations and national defense present unique considerations, in light of the President's much greater constitutional authority to act in those areas.

FN36 In analyzing the validity of congressional action, we are mindful of the respect it is appropriate for the executive branch to pay to an equal and coordinate branch of the government. However, the executive branch is not bound by precisely the same rules of deference that guide the courts in exercising their power of judicial review. Judicial deference to the legislative choices embodied in statutes is one of the means by which the courts themselves avoid interfering improperly with the constitutional powers of the politically responsible branches. (In the case of most statutes, judicial review involves scrutinizing the legal and policy judgments of the President who signed the legislation into law as well as those of the Congress that enacted it.) The courts, it should be remembered, are also deferential to purely executive branch decisions, and for the same basic reason: the constitutional structure makes the President, like Congress, politically responsible. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984) ("[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices").

FN37 Myers, 272 U.S. at 134.

FN38 Rejecting the argument that it was unsafe to delegate the executive power to a single official, Alexander Hamilton wrote that "one of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults, and destroy responsibility." The Federalist No. 70, at 476 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), cited in In re Sealed Case, 838 F.2d at 527 n.27 (Ginsburg, R.B., J., dissenting). Then-Judge Ginsburg explained that "[t]he unity of the executive branch was intended to serve the ends of responsibility and accountability." Id.

FN39 As a matter of practical reality, much of the federal government's

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legislative activity is undertaken by officers and agencies outside the legislative branch (in the form of regulations), but as a rule such entities act under statutory delegation from Congress. The delegating legislation is, for Chadha purposes, the congressional exercise of legislative power. See Chadha, 462 U.S. at 953 n.16.

FN40 A statutory provision conditioning the executive's ability to take action on approval by one or both houses of Congress or by a congressional committee is as invalid as a provision enabling one of these bodies to "veto" executive action, and for the same reason: it is a legislative attempt to exercise authority beyond the legislative sphere in a mode not conforming to the requirements of bicameralism and presentment. See, e.g., American Fed'n of Gov't Employees v. Pierce, 697 F.2d 303, 306 (D.C. Cir. 1982).

FN41 We agree with the court of appeals in Lear Siegler that many separation of powers issues can properly be analyzed under either the Chadha rule (forbidding Congress to exercise legislative power except by bicameralism and presentment) or the anti-aggrandizement principle (forbidding Congress to exercise executive power). Attempts to resolve constitutional issues by categorizing an exercise of authority as "in its essence, 'legislative' or 'executive'," can be confusing and, in any event, miss the point that under either analysis, "the critical issue is whether Congress or its agent seeks to control . . . the execution of its enactments without respect to the Article I legislative process." 842 F.2d at 1108 (emphasis in original). In Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 276 (1991), the Supreme Court concluded that it was unnecessary to resolve the categorization issue because the exercise of authority was unconstitutional however it was viewed.

FN42 We also determined that the proposed regulations were not authorized by any of the statutes concerning the JCP. 8 Op. O.L.C. at 43-46. That point was not relevant to the constitutional analysis, however, since Congress cannot circumvent the bicameralism and presentment requirement by delegating legislative authority to a part or agent of itself even by means of a statute itself duly passed and presented.

FN43 In themselves report-and-wait mechanisms usually are valid, as we discuss more fully later in this memorandum.

FN44 The Supreme Court has reasoned that the "congressional power of inquiry" is necessary to "'enable [Congress] efficiently to exercise [the] legislative function[s] belonging to it under the Constitution."' Barenblatt v. United States, 360 U.S. 109, 111 (1959) (quoting McGrain v. Daugherty, 273 U.S. 135, 160 (1927)). Like Congress's substantive powers to legislate -- which it exists only to serve -- the power of inquiry is "subject to the limitations placed by the Constitution on governmental action," id. at 112, including the anti-aggrandizement and general separation of powers principles.

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FN45 As the language of the Appointments Clause suggests, offices in the constitutional sense "are only those established or recognized by the Constitution or by act of Congress." Inventions International Exposition, 18 Op. Att'y Gen. 171, 171 (1885); see also id. ("the President cannot create an office").

FN46 The officers at issue in Buckley were the six voting members of the Federal Election Commission, four of whom were appointed by congressional officials and two by the President, subject to the approval of the Senate and the House of Representatives. The statutory scheme thus violated the Appointments Clause in two distinct ways, by vesting appointment power in officials not listed in the Clause and by subjecting presidential nominees to confirmation by the House. 424 U.S. at 126-27.

FN47 See Appointment of Assistant Secretary of State, 6 Op. Att'y Gen. 1, 1 (1853) ("without there be[ing] express enactment to the contrary . . . the appointment of any officer of the United States belongs to the President, by and with the advice and consent of the Senate").

FN48 We do not state anything novel in observing that the Appointments Clause sometimes presents difficult questions of interpretation. Attorney General Legare remarked in an 1843 opinion that "[n]o points of our fundamental law are more difficult than those involved in this whole subject of appointments." Appointment and Removal of Inspectors of Customs, 4 Op. Att'y Gen. 162, 164 (1843).

FN49 In an opinion discussing an Appointments Clause issue, Attorney General Kennedy referred to Hartwell as providing the "classical definition pertaining to an officer." Communications Satellite Corporation, 42 Op. Att'y Gen. 165, 169 (1962). Hartwell itself cited several earlier opinions, including United States v. Maurice, 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15,747) (Marshall, Circuit Justice), see 73 U.S. at 393 n.<<dagger>>, and in turn has been cited by numerous subsequent Supreme Court decisions, including United States v. Germaine, 99 U.S. 508, 511-12 (1879), and Auffmordt v. Hedden, 137 U.S. 310, 327 (1890). These latter two decisions were cited with approval by the Court in Buckley v. Valeo, 424 U.S. 1, 125-26 & n.162 (1976) (per curiam).

FN50 In this memorandum, the term "officer" will be used to refer exclusively to "Officers of the United States" in the constitutional sense; other full-time government servants will be called "employees."

FN51 Germaine clearly was discussing the concept of "officer" in the constitutional, and not simply a generic, sense: the alternative basis for the holding was that the surgeon was not an officer because he was appointed by the Commissioner who, as the head of a bureau within the Interior Department, could not be a "Head of Department" with the authority to appoint officers. Id. at 510-11.

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FN52 The post-Buckley Supreme Court has often assessed the validity of statutes that would starkly pose Appointments Clause issues if, in fact, the Court had adopted the position that wielding significant authority pursuant to the laws of the United States, without more, requires appointment in conformity with that Clause. In none of these cases has the Court even hinted at the existence of an Appointments Clause issue. See, e.g., Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985) (upholding statutory requirement that registrants under a federal regulatory scheme submit to binding arbitration conducted by a panel of arbitrators who are private individuals not appointed by one of the methods specified in the Appointments Clause and are subject only to limited judicial review); FERC v. Mississippi, 456 U.S. 742 (1982) (upholding requirement that states enforce federal regulatory scheme relating to utilities); Lake Carriers' Ass'n v. Kelley, 456 U.S. 985 (1982) (mem.), aff'g 527 F. Supp. 1114 (E.D. Mich. 1981) (three-judge panel) (upholding statute that granted states authority to ban sewage emissions from all vessels); Train v. National Resources Defense Council, Inc., 421 U.S. 60 (1975) (construing provision of Clean Air Act that gave states authority to devise and enforce plans for achieving congressionally defined, national air quality standards).

FN53 Some recent opinions of this Office have read Buckley more broadly as repudiating the historical understanding of the Appointments Clause and endorsing the proposition we reject here -- that is, that all persons exercising significant federal authority, by virtue of that fact alone, must be appointed pursuant to the Appointments Clause. We are aware of four opinions in which our disagreement with this understanding of Buckley would cause us to reach a different conclusion on the Appointments Clause question presented. See Constitutionality of Subsection 4117(b) of Enrolled Bill H.R. 5835, the "Omnibus Budget Reconciliation Act of 1990," 14 Op. O.L.C. 170, 171 (1990) (preliminary print) (statutory scheme under which congressional delegations and physicians' organizations of certain states exercise "significant authority" violates Appointments Clause); Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. O.L.C. 249, 264-65 (1989) (preliminary print) (provisions of False Claims Act authorizing qui tam suits by private parties violate Appointments Clause because qui tam relators exercise "significant governmental power"); Representation of the United States Sentencing Commission in Litigation, 12 Op. O.L.C. 21, 31-33 (1988) (preliminary print) (private party acting as counsel for United States agency must be appointed pursuant to Appointments Clause); Proposed Legislation to Establish the National Indian Gaming Commission, 11 Op. O.L.C. 73, 74 (1987) (Appointments Clause problems raised where state and local officials given authority to waive federal statute). Our conclusion that the more limited historical understanding of the Appointments Clause is correct requires us to disavow the Appointments Clause holdings of those opinions. To the extent that our current reading of Buckley is inconsistent with the Appointments Clause reasoning of other opinions of this office, that reasoning is superseded. See Common Legislative Encroachments on Executive Branch Constitutional Authority, 13 Op. O.L.C. 299, 300 (1989) (preliminary print).

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SYMPOSIUM: A Response to Professor Johnsen

Mark J. Rozell *

* Ph.D. 1987, University of Virginia. Associate Professor of Politics, The Catholic University of America.

SUMMARY:
... I will nonetheless break precedent here to briefly object to Dawn Johnsen's essay. ... Then she says that I criticize the executive branch "when it reaches an accommodation with **Congress.**" ... Either be serious about using **executive privilege** or don't use it at all. ... Professor Johnsen says in a footnote that I am wrong to suggest that the practice of keeping OLC legal opinions secret originated with the Bush presidency. ... She implies that I am in error to say that the Bush administration created a secret opinions policy to deny **Congress** access to a Justice Department memorandum. ... That Judge Norma Halloway Johnson reaffirmed the legitimacy of **executive privilege** was not exactly some kind of stirring victory for the White House. ... She also claims that there is a need to devote much attention to defining the proper scope and limits of **executive privilege** and to base decisions in this area on principles. Ultimately it is unclear in her essay whether disputes over **executive privilege** are in the neat theoretical world in which principles are the guide or in the land of give and take. ... Professor Johnsen's overriding argument is that my approach to **executive privilege** is "fundamentally misguided." ...

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I generally do not believe that it is either necessary or fruitful to respond to responses. I will nonetheless break precedent here to briefly object to Dawn Johnsen's essay. In trying to pick apart my research she repeatedly both misrepresents the facts and my positions. Apparently only she sees the truth whereas others are guilty of mischaracterizations. In the end, she squanders a nice opportunity to contribute something valuable to the debate over **executive privilege.** Sai Prakash shows the way and though I disagree with his interpretation, clearly Professor Johnsen can learn much from him about good scholarship and argumentative tone.

In light of Professor Johnsen's previous position in the Office of Legal Counsel for the Clinton administration she might feel a bit defensive about the President's actions on **executive privilege.** It was her job to represent the President's interests in these matters and that surely must have been a tall order. But she destroys her credibility as an academic discussant by presenting a heavy-handed and overly defensive justification for presidential actions with which no credible scholar to my knowledge would agree.

Perhaps she makes a good point here and there in the essay, as many of these more recent events are open to interpretation and all of us are struggling to work with an incomplete record of information on issues of **executive privilege.** I might, for example, concede that the President's stand on the Freeh memorandum had some merit and I certainly agree that the Burton committee did not always engage in good faith negotiations during that controversy. But in her zeal to attack my presentation of the events she misses the key points that I make: (1) that it weakens **executive privilege** for a president to assert that power as some kind of opening bid in a negotiating process and then to back down; and (2) that the congressional **[*1192]** power of investigation must override **executive privilege** unless the president's claim meets the proper standards for asserting that power.

Neither time nor space allows a full response to Professor Johnsen's many misrepresentations of my article. I would nonetheless like to point out some egregious examples. She claims that I am "harshly critical" of presidents and that I don't convey a "pattern" of criticism. Yet elsewhere she discerns a pattern and then objects to the pattern that I developed (of modern presidents inventing other bases for **executive privilege** to hide embarrassments and then frequently capitulating, doing further damage to this power). She wrongly conveys the impression that I am dogmatically opposed to presidents using **executive privilege** and that I am somehow concerned with adding up wins and losses in presidential-congressional battles over access to information. [1] She completely misstates my view in suggesting that I do not properly respect the needs of candid advice within the White House. She claims that I misstate the applicable test of whether **Congress's** request for information overrides a claim of **executive privilege** when in fact I am merely presenting my own normative assessments and not describing the controlling case law. Just because I disagree with a judicial interpretation on the proper use of **executive privilege** that does not mean, as Professor Johnsen claims, that I misstate some facts or ignore some piece of evidence. [2]

Elsewhere Professor Johnsen discusses the issue of political accommodation as though I am completely oblivious to its role in resolving inter-branch disputes. Then she says that I criticize the executive branch "when it reaches an accommodation with **Congress.**" Not only a contradiction, that statement is just flat-out wrong. I criticize presidents who say that they **[*1193]** are taking a principled stand and then back down because it is politically expedient to do so in the short-term. Either be serious about using **executive privilege** or don't use it at all. That power should be rarely used and only for the most compelling reasons and is not to be exercised as something in a lawyer's arsenal of tactics to bid with against adversaries.

Professor Johnsen says in a footnote that I am wrong to suggest that the practice of keeping OLC legal opinions secret originated with the Bush presidency. I never said that. She implies that I am in error to say that the Bush administration created a secret opinions policy to deny **Congress** access to a Justice Department memorandum. But that is exactly what happened in one case. [3]

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Cannot she acknowledge that the Clinton White House made at least some mistakes in refusing to release documents or in the efforts to prevent certain individuals from testifying before **[*1194]** the grand jury? By defending Clinton's every action Professor Johnsen surely raises doubts about her own objectivity.

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FOOTNOTES:

n1. This criticism is truly ironic. I wrote my book on **executive privilege** directly as a challenge to Raoul Berger's dogmatically anti-**executive privilege** tone. I recognize the legitimacy of **executive privilege,** when properly invoked. If there is any sense that the current article conveys an anti-presidential tone, it is only because of the particular actions of presidents in the post-Watergate period - the focus of this work.

n2. Furthermore, just because the President's Attorney General sides with the President in a dispute with **Congress** doesn't mean that the President was right and **Congress** wrong. In the particular controversy to which Professor Johnsen refers, Attorney General Reno indeed cited the controlling case law but in so doing rendered an incorrect interpretation as I explain in the essay.

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General — *Washington, D.C. 20530*

June 21, 2000

The Honorable Henry J. Hyde
Chairman
Committee on Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letter, dated February 29, 2000, which questioned the Department's decision to decline to answer certain questions posed in your letter of November 8, 1999, regarding Leonard Peltier's clemency petition.

The Department's position is that clemency is within the exclusive authority of the President under the Constitution, and our responses to the House Judiciary Committee and other congressional committees are consistent with that constitutional mandate. Our willingness to provide information to Congress last year relating to the President's grant of clemency to certain Puerto Rican Nationalists is consistent with our discussions with you and your staff on the Peltier matter. In the Puerto Rican Nationalist matter, the congressional oversight requests were made after the President had already granted clemency and were closely related to a congressional oversight interest in an after-the-fact assessment of the impact of the President's clemency decision on future law enforcement efforts against terrorism. Congress' oversight interest does not extend to the clemency review and deliberative process that led to that presidential decision. In advising the President that he was legally entitled to invoke executive privilege in response to a congressional subpoena seeking information about his clemency grant, the Attorney General stated that "[a] compelling case can be made . . . that Congress has no authority whatsoever to review a President's clemency decision," and that it therefore "appears that Congress' oversight authority does not extend to the process employed in connection with a particular clemency decision, to the materials generated or the discussions that took place as part of that decision, or to the advice or views the President received in connection with a clemency decision." Letter of Attorney General Janet Reno to the President, Sept. 16, 1999, at 2-3.

Your outstanding questions concern precisely such matters. They all are directed at the Department's activities with respect to the pending Peltier clemency request, and seek detailed information concerning the work the Department has undertaken in connection with that request and any communications the Department has had with the White House concerning the request. These questions concern only the clemency review process leading up to a possible presidential decision. It is our position that questions about the conduct and substance of any particular

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clemency review - regardless of whether the clemency request is pending or closed - are beyond Congress' oversight authority.

The Department advised the Senate Judiciary Committee earlier this year that legislation designed to regulate aspects of the Department's collection and provision of information and advice to the President on clemency matters is unconstitutional because the President's pardon power is an exclusive presidential prerogative that is not subject to congressional encroachment. Since Congress' oversight power is only derivative of its legislative power, it naturally follows that because Congress cannot legislate regarding the process by which the Department assists the President on clemency matters, Congress' oversight authority does not extend to that process. See Barenblatt v. United States, 360 U.S. 109, 111-12 (1959) ("Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government."); United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871) ("To the executive alone is intrusted the power of pardon"); see also Public Citizen v. Department of Justice, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring) (reaffirming that pardon power is "commit[ted] . . . to the exclusive control of the President").

Mr. Chairman, we have the highest regard for your Committee and its responsible performance of its oversight and other important functions. However, in light of the constitutional limitations under which we must operate in this matter, we are respectfully responding that your inquiries go toward an exclusive Executive function, and it is our view that we are compelled to respond as we have above.

Sincerely,

Robert Raben
Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

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Duties of their respective Offices." U.S. Const. art. 2, § 2. That clause is evidence that the Framers viewed the President's ability to obtain advice from his principal officers as an essential component of executive power. *See Harlow v. Fitzgerald*, 457 U.S. 800, 810 & n.13 (1982) (principal officers' "essential roles are acknowledged by the Constitution") (citing the Opinions Clause); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 918 (1991) (Scalia, J., concurring in part and concurring in the judgment) (the purpose of the Opinions Clause "was to assure the President's ability to get a written opinion on important matters"); *see also Myers*, 272 U.S. at 117 ("[T]he President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates."). We are concerned that the bill may unconstitutionally condition the President's power to obtain opinions from his principal officers by requiring that the Attorney General undertake a detailed investigation to gather and make available to the President specific information each time he seeks her advice in his exercise of his exclusive pardon authority.

Thank you for the opportunity to present our views on this important matter. If we may be of additional assistance, we trust that you will not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

Robert Raben
Assistant Attorney General

IDENTICAL LETTER TO BE SENT TO THE RANKING MINORITY MEMBER, COMMITTEE ON THE JUDICIARY

FEB-01-2001 17:16 DOJ/OFC OF LEGAL COUNSEL 202 305 8524 P.01/13
REV_00260084

THE WHITE HOUSE

WASHINGTON

June 16, 1992

Dear Mr. Chairman:

I am writing in response to your letter of June 11 to the President regarding your June 23 scheduled hearing. In that letter, you invited the Administration to send appropriate Administration officials to testify. We would propose to send Mr. Robert Mueller, Assistant Attorney General, Criminal Division, Department of Justice, and Mr. Laurence Urgenson, Acting Deputy Assistant Attorney General, Criminal Division, Department of Justice. In addition, I would note that the Administration has previously testified in great detail regarding pre-Desert Storm Iraq policy, the administration of the relevant programs and related investigations. I attach a copy of this testimony and ask that it be made available to all Committee Members before the hearing.

Your letter also requested the appearance of Mr. Nicholas Rostov, Special Assistant to the President and Senior Director for Legal Affairs, National Security Council; and Mr. C. Boyden Gray, Counsel to the President. As I advised the Chairman of the Committee on Banking, Finance and Urban Affairs in response to a similar request, it is the longstanding practice of the Executive Branch to decline requests for testimony by members of the President's personal staff. For that reason, I must decline your request for personal testimony by Messrs. Gray and Rostov. In light of the unusual circumstances presented here, however, the Administration is prepared to work with you to develop an alternative, mutually acceptable mechanism for making available to Members of the Committee the White House officials whose testimony you have sought.

Finally, attached to your letter was a request for documents from the Department of Agriculture, the State Department, the Department of Justice, the White House, the Department of the Treasury/U.S. Customs Service, and the Department of Commerce. In order to expedite a response to that request, we have forwarded it to the listed Departments outside the White House, and have directed them to respond directly to the Committee. In light of the large number of documents requested, it is unlikely that they or the White House will be able to meet the June 18

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response date, but we have requested that they respond as quickly as possible.

Sincerely,

Nicholas E. Calio
Assistant to the President for
Legislative Affairs

Chairman Jack Brooks
Committee on the Judiciary
House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6218

cc: The Honorable Hamilton Fish, Jr.

attachments

FEB-01-2001 17:17 DOJ/OFC OF LEGAL COUNSEL 202 305 0524 P.03/13

REV_00260086

O'MELVENY & MYERS
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WRITER'S DIRECT DIAL NUMBER
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OUR FILE NUMBER
600,000-013

June
11th
1 9 9 2

The Honorable C. Boyden Gray
Counsel to the President of the
United States
The White House
Washington, D.C. 20500

Dear Boyden:

Thank you for the clarification today. As I understand it, Senator Howard Baker, Frank Carlucci and similarly situated senior advisors to President Reagan are authorized to meet informally with Members and staff of the Senate Select Committee on POW/MIA Affairs to discuss conversations they may have had with Mr. Perot and other non-White House personnel about events in 1986 or 1987, but that such discussions shall not disclose conversations with the President, the Vice President or other White House officials.

In addition, consistent with longstanding White House policy, Senator Baker, Frank Carlucci and other former White House officials are not authorized to provide formal testimony to the Committee about matters occurring during their White House service.

We understand your office is continuing to study this matter and that we may receive additional guidance.

I would appreciate receiving written confirmation of the foregoing. Thank you very much.

Sincerely,

Arthur B. Culvahouse, Jr.

cc: The Honorable Howard H. Baker, Jr.

THE WHITE HOUSE

WASHINGTON

June 17, 1992

Dear A.B.:

Thank you for your letter. We do not object to Senator Baker and other similarly situated former advisors to the President meeting informally with Members and staff of the Senate Select Committee on POW/MIA Affairs to discuss conversations they may have had with Mr. H. Ross Perot and other non-Executive branch officials. We are not prepared, however, to make a general waiver of Executive privilege with respect to their conversations with the President, the Vice President or other Executive branch officials, including those outside the White House.

In addition, it is long-standing White House policy not to assent to formal testimony to Congressional committees by former White House officials about matters occurring during their White House service.

Finally, we are reserving the option to assert Executive privilege on a specific matter to protect the Presidency. However, as you know, such decisions are not made in the abstract without a specific matter in dispute.

I hope this clarifies our policy. If you have any questions, please call me.

Sincerely,

C. Boyden Gray
Counsel to the President

Mr. Arthur B. Culvahouse
O'Melveny & Myers
555 13th Street, N.W.
Washington, D.C. 20004-1109

REV_00260088

U.S. Department of Justice
Office of the Deputy Attorney General

OLC

The Deputy Attorney General

Washington, D.C. 20530

April 19, 1983

Senator Orrin G. Hatch
Chairman
United States Senate
Committee on Labor
and Human Resources
Washington, D. C. 20510

Senator Edward M. Kennedy
Ranking Minority Member
United States Senate
Committee on Labor and
Human Resources
Washington, D. C. 20510

Dear Chairman Hatch and Senator Kennedy:

This is in response to your letter of March 23, 1983 reiterating your desire to obtain testimony from the Counsel to the President, Fred F. Fielding, with respect to your ongoing investigation of the process, in January and February of 1981, surrounding the confirmation by the United States Senate, of Secretary of Labor Raymond J. Donovan.

Before responding directly to your request for sworn testimony from the Counsel to the President, I believe that it is appropriate to note that, as I am sure you will agree, the Administration has made every effort to cooperate with your Committee's lengthy investigation of this matter. The Department of Justice, including the Federal Bureau of Investigation, has provided vast quantities of information to your Committee, including in many instances, access to raw data in the Bureau's possession. The Bureau has also answered numerous written questions, provided you with summaries and other data relative to its internal investigations and has made two of its officials available to your Committee at hearings for lengthy sworn testimony regarding this matter. In addition, the White House has provided your Committee with copies of documents in its possession and has prepared and supplied you with a detailed chronology of relevant events. We are not aware of any previous occasion when so much information has been provided by the Executive Branch to a Senate Committee relative to an appointee's confirmation in either the pre- or post-confirmation period.

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In addition to the information which the Administration has supplied to you directly, we understand that you have been given access to the fruits of the investigation of Special Prosecutor Leon Silverman, an exhaustive investigation into all allegations regarding Mr. Donovan that consumed months of the time of numerous investigators, involved the assistance of a grand jury, and cost hundreds of thousands of dollars.

In short, we believe that the Administration has been most cooperative with your investigation and that your Committee has been provided an extraordinary and unprecedented quantity of information regarding Mr. Donovan and his confirmation. We, of course, remain willing to assist you and your Committee in any reasonable way.

As you know, our concern regarding your desire for the sworn testimony of Mr. Fielding is based upon important principles relative to the powers, duties and prerogatives of the Presidency. We share with previous Presidents and their advisers serious reservations regarding the implications for established constitutional doctrines arising from the separation of powers of a Congressional demand for the sworn testimony of close presidential advisers on the White House staff.

Presidents have historically resisted efforts to obtain sworn testimony from their closest and most immediate advisers on the White House Staff. Congress has customarily honored the President's wishes relative to such matters as a matter of comity toward a respected co-equal branch of government. As you know, these principles do not spring from partisan considerations or any other transitory concerns. The position to which we adhere has been taken consistently by Presidents of either party and has been respected by Congress irrespective of the party in control or the subject matter of the inquiry.

The Counsel to the President serves the President solely and exclusively. He is available for and provides legal advice to the President. His professional responsibility is directly to the President. The President must be able to count on the constant availability of his Counsel, and on the total confidentiality of his services. As an institutional matter, the President cannot permit his Counsel to provide sworn testimony to the Legislative Branch regarding the performance of his duties.

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The Administration wishes to continue to cooperate with your Committee's inquiry and we support your effort to bring this inquiry to a close. To accomplish this, if you feel that you need information beyond that already supplied to you relating to the White House's actions during the confirmation process, we have suggested that Mr. Fielding, consistent with the foregoing principles, would be willing to provide written responses to a reasonable number of relevant written inquiries which you may wish to pose in concluding your inquiry. If this alternative is agreeable to you, I urge that you articulate such a set of questions in a letter and I will undertake to arrange for you to receive written responses to those questions.

Sincerely,

Edward C. Schmults
Deputy Attorney General

FEB-01-2001 17:18 DOJ/OFC OF LEGAL COUNSEL 202 305 8524 P.10/13

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TOTAL P.15

The New York Times

DATE: 2-1-01
PAGE: A23

Essay

WILLIAM SAFIRE

Isn't It Rich?

Clinton sent in the clowns.

WASHINGTON

Mark Rich, the billionaire on the lam for 17 years for helping Iranian kidnappers and South African white supremacists evade U.S. sanctions, was unable to buy off Presidents Reagan or Bush.

But then he hired Jack ("Tell 'em nuthin' ") Quinn, the former White House counsel privy to Bill Clinton's darkest secrets, for what Quinn says is a mere "low six figures." Rich's former wife contributed over $1 million to Democratic campaigns, while Rich's direction of some ill-gotten gains to charities induced Israel's Ehud Barak to use up his one big pardon favor with Clinton, dooming the unrich Jonathan Pollard to a life in jail.

Result: the most flagrant abuse of the presidential pardon power in U.S. history. Even Clinton stalwarts are openly disgusted at their man's departing display of shamelessness. But Rich's hired guns in public relations and the law will soon claim that "every president did it" or that "Rich was persecuted by evil prosecutors."

How can Clinton's final presidential wrong be righted? A constitutional amendment to restrict the undemocratic kingly power is far off, and this unpardonable pardon can never be undone. But though justice in this case is denied, truth can be served, and the truth can hurt Rich and the perpetrators of his pardon.

Congressional hearings will begin next week to determine how the end run was made around all normal procedures. To display nonpartisanship, Dan Burton's Government Reform Committee should call a predecessor chairman, John Conyers, who held hearings a decade ago into Republican failures to bring Rich to trial.

A threshold question: *Why did Clinton decide the case on a one-sided presentation by Rich's lawyer, Quinn, with no analysis from Justice's pardon attorney, Roger Adams?* Why was Rich's prosecutor in the Southern District of New York, Mary Jo White, kept in the dark rather than asked for her rebuttal?

Quinn says, "I notified the deputy attorney general two months before the pardon was granted." That would be Eric Holder, who is now stonewalling. If Holder was informed, did he then promptly notify the pardon attorney and prosecutor — or did he presume Clinton did not want to see the case against Rich?

Quinn, who slipped past Clinton's revolving-door ethics rule on a clause written by the unpardoned Web Hubbell, told NBC's Tim Russert that "the comments of the Justice Department, when asked about this by the White House ... contributed to its being granted." But who at Justice advised what person at the White House that Rich should be pardoned, and how were "those comments," if such existed, transmitted to Clinton?

I asked Quinn for specifics yesterday. He replied: "Mr. Holder told me, after the fact, he had said to the White House he was 'neutral, leaning positive' on the pardon. The president himself confirmed to me that was the case, and said that had they not had that view from Justice, the pardon would not have been granted."

So, according to Quinn, "the president himself" chose Holder to be the fall guy. When did Quinn, who apparently wants company in leading Clinton into this mess, notify White House Counsel Beth Nolan that Holder was on board? Quinn insists he told counsels Nolan and Bruce Lindsey twice — in mid-December and mid-January — to seek Holder's views: "Contrary to what you hear, this was no surprise. They were working with me."

Congress will want to know if the former Mrs. Rich, a major Clinton contributor who begged Clinton for Rich's pardon, was used as a conduit for the pardonee's funds. And were the C.I.A. and National Security Agency asked if Rich's companies were taped doing business recently with Saddam Hussein, Muammar el-Qaddafi or other previous associates?

If Rich attempts to enter the U.S., House and Senate committees will subpoena him to testify under oath about his pardon campaign. Rich cannot plead the Fifth Amendment because Clinton's pardon gives him immunity. Quinn will advise him to cooperate, "including appearances," but not wishing to risk fresh perjury charges if caught lying about this deal, the unrepentant billionaire may refuse to testify. Chairman Burton could then ask a federal court to jail him for contempt of Congress.

Money doesn't buy pardons from prospective crimes. Send in that clown. □

21

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Fax Transmission

Paul P. Colborn
Special Counsel
United States Department of Justice
Office of Legal Counsel
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Phone: 202-514-2048
Fax: 202-305-8524

To: Brett Kavanaugh Date: 4-3-01

Office # ( ) Pages: 21 (including cover sheet)

Fax#: ( ) 456-6279

Subject: Revising Cutler/Rivers memo

Comments: Here are the materials I mentioned. You'll notice I previously sent them to Chris B. in February.

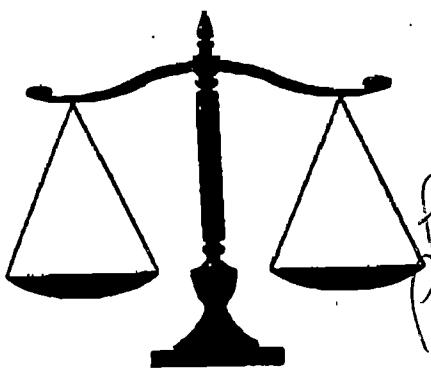

Brett - Please let Paul know your correct fax #
Thanks

********** -COMM. JOURNAL- ********** DATE FEB-06-2001 ***** TIME 17:17 *** P.01

MODE = MEMORY TRANSMISSION START=FEB-06 17:11 END=FEB-06 17:17

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-DOJ/OFC OF LEGAL COUNSEL -

********** - - ***** - 202 305 8524- *********

Fax Transmission

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To: Chris Bartolomucci Date: 2/6/01

Office # ( ) 456-7963 Pages: 20 (including cover sheet)

Fax#: ( ) 456-2146

Subject: Executive Privilege Materials

Comments: Here are the Reagan Memo, the Cutler & Mikva Memos, and documents generated in connection with preparation of a Quern Memo to replace Cutler/Mikva. I had thought there was a draft Ruff memo, but the most recent draft I've found is a 5/7/96 Quern memo.

Also attached is a never-finalized memo concerning executive privilege in the litigation context. This 8/4/94 draft represented a minor revision of a draft from Bush I.

REV_00260094

Source: All Sources : Federal Legal - U.S. : Administrative Agency Materials : US Attorney General Opinions
Terms: ("fbi" or "federal bureau of investigation")and director and acting and confirm! (Edit Search)

*1996 OLC LEXIS 6, **

OPINION OF THE OFFICE OF LEGAL COUNSEL

THE CONSTITUTIONAL SEPARATION OF POWERS BETWEEN THE PRESIDENT AND CONGRESS

This memorandum provides an overview of the constitutional issues that periodically arise concerning the relationship between the executive and legislative branches of the federal government. Although that relationship is shaped in part by the policy and political concerns of the President and Congress of the day, the political interaction between the President and Congress takes place within an enduring constitutional framework that confers powers and responsibilities on both elected branches. In this memorandum we discuss the general principles underlying separation of powers analysis, and we address certain specific questions that have arisen in the past. Any set of examples is necessarily illustrative rather than exhaustive, however, and the Office of Legal Counsel is always available to assist in reviewing legislation or other congressional action for potential separation of powers issues. This memorandum supersedes a 1989 memorandum that the Office of Legal Counsel provided to the General Counsels' Consultative Group. See Common Legislative Encroachments on Executive Branch Constitutional Authority, 13 Op. O.L.C. 299 (1989) (preliminary print). While we agree with many of the conclusions of that document, we have determined that subsequent decisions by the Supreme Court and certain differences in approach to the issues make it appropriate to revisit and update the Office's general advice on separation of powers issues.

1996 OLC LEXIS 6

May 7, 1996

CORE TERMS: appointment, duty, appointed, removal, inferior, entity, federal government, anti-aggrandizement, appoint, presidential, tenure, presentment, advice, bicameralism, per curiam, delegation, legislative branch, vacancy, incumbent, temporary, arbitrator, constitutional authority, secretary, recess, memorandum, Vacancies Act, power to remove, appointee, regulation, reporting

ADDRESSEE:
[*1]

Memorandum for the General Counsels of the Federal Government

OPINIONBY: DELLINGER

OPINION:
Constitutional Separation of PowersOpinion of the Office of Legal Counsel I. General Principles

The Constitution reflects a fundamental conviction that governmental "power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it." The Federalist No. 48, at 332 (James Madison) (Jacob E. Cooke ed., 1961), quoted in Metropolitan Washington Airports Auth. ("MWAA") v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 273 (1991). The founders, not content to rely on paper definitions of the rights secured to the people, "viewed the principle of separation of powers

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consistent with the approach taken by most Attorneys General in the past, and it accords with what we find to be the most persuasive scholarship on the original understanding and early practice of the separation of powers under the United States Constitution. While we do not rest any conclusions on the potentially shifting ground of scholarly consensus, we note the existence of a number of impressive studies arguing that the principle of separation was originally understood to be flexible, open-ended, and consistent with a variety of actual institutional relationships among the three branches. Furthermore, it seems undeniable that early practice under the Constitution reflected a loose rather than strict understanding of the required separation. See, e.g., Susan Low Bloch, The Early Role of the Attorney General in our Constitutional Scheme: In the Beginning There was Pragmatism **[*33]** , 1989 Duke L.J. 561; Gerhard Casper, An Essay in Separation of Powers: Some Early Versions and Practices, 30 Wm. & Mary L. Rev. 211 (1989); William B. Gwyn, The Indeterminacy of the Separation of Powers and the Federal Courts, 57 Geo. Wash. L. Rev. 474 (1989); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 93 Colum. L. Rev. 1 (1994); Peter M. Shane, Independent Policymaking and Presidential Power: A Constitutional Analysis, 57 Geo. Wash. L. Rev. 596 (1989). However, given the very emphasis the general principle places on evaluating constitutional questions in light of the overall structure and functioning of the federal government, the principle's application to specific questions is unavoidably difficult, and the answers we or the courts reach ordinarily should be viewed as quite specific to context. Once again, we note that the areas of foreign relations and national defense present unique considerations, in light of the President's much greater constitutional authority to act in those areas. Furthermore, although the general principle marks the boundary of the law of separation of powers, it is inappropriate for the executive to regard **[*34]** this as defining the outer limit of proper separation of powers policy objections to legislation. In analyzing the validity of congressional action, we are mindful of the respect it is appropriate for the executive branch to pay to an equal and coordinate branch of the government. However, the executive branch is not bound by precisely the same rules of deference that guide the courts in exercising their power of judicial review. Judicial deference to the legislative choices embodied in statutes is one of the means by which the courts themselves avoid interfering improperly with the constitutional powers of the politically responsible branches. (In the case of most statutes, judicial review involves scrutinizing the legal and policy judgments of the President who signed the legislation into law as well as those of the Congress that enacted it.) The courts, it should be remembered, are also deferential to purely executive branch decisions, and for the same basic reason: the constitutional structure makes the President, like Congress, politically responsible. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984) ("[w]hile agencies are **[*35]** not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . 20. 20. policy choices"). The Constitution's very structure suggests the importance of maintaining the hallmarks of "executive administration essential to effective action" Myers, 272 U.S. at 134. as well as the accountability to the public that stems from vesting ultimate authority in a single, politically responsible officer. Rejecting the argument that it was unsafe to delegate the executive power to a single official, Alexander Hamilton wrote that "one of the weightiest objections to a plurality in the executive . 20. 20. is that it tends to conceal faults, and destroy responsibility." The Federalist No. 70, at 476 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), cited in In re Sealed Case, 838 F.2d at 527 n.27 (Ginsburg, R.B., J., dissenting). Then-Judge Ginsburg explained that "[t]he unity of the executive branch was intended to serve the ends of responsibility and accountability." Id. Several quite common types of legislation threaten the structural values protected by the general separation of powers principle even **[*36]** if the courts are unlikely to invalidate them. Examples of such legislation may include burdensome reporting requirements, attempts to dictate the processes of executive deliberation, and legislation that has the purpose or would have the effect of "micromanaging" executive action. Executive branch agencies should be careful to object to any legislation that unduly reduces the accountability of officials or agencies to the President, or that unnecessarily interferes with the flexibility and efficiency of executive decision making and action. Such legislation undercuts the constitutional purpose of creating an energetic and responsible

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executive branch.

II. Common Separation of Powers Issues

A. Bicameralism/Presentment Questions

The Supreme Court's holding in INS v. Chadha, 462 U.S. 919 (1983), was emphatic: Congress can exercise "the legislative power of the Federal Government" only "in accord with a single, finely wrought and exhaustively considered, procedure" -- passage by both houses and presentment to the President. As a matter of practical reality, much of the federal government's legislative activity is undertaken by officers and agencies outside the legislative **[*37]** branch (in the form of regulations), but as a rule such entities act under statutory delegation from Congress. The delegating legislation is, for Chadha purposes, the congressional exercise of legislative power. See Chadha, 462 U.S. at 953 n.16. Id. at 951. Applying that rule, the Court struck down a statutory mechanism in the Immigration and Nationality Act by which a single house of Congress could override decisions of the Attorney General. The effect of the Court's decision was to invalidate the similar "legislative veto" provisions found in many other statutes. A statutory provision conditioning the executive's ability to take action on approval by one or both houses of Congress or by a congressional committee is as invalid as a provision enabling one of these bodies to "veto" executive action, and for the same reason: it is a legislative attempt to exercise authority beyond the legislative sphere in a mode not conforming to the requirements of bicameralism and presentment. See, e.g., American Fed'n of Gov't Employees v. Pierce, 697 F.2d 303, 306 (D.C. Cir. 1982). In addition to the classic legislative veto mechanism invalidated by Chadha, we think that the **[*38]** requirement of bicameralism and presentment is infringed whenever a single house, committee, or agent of Congress attempts to direct the execution of the laws, to determine the "final disposition of the rights of persons outside the legislative branch" or to promulgate rules or standards intended to bind the actions of executive or administrative officials that have not been approved by both houses and presented to the President. See, e.g., Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1108 (9th Cir. 1988), modified as to attorney fees, 893 F.2d 205 (1989) (en banc); We agree with the court of appeals in Lear Siegler that many separation of powers issues can properly be analyzed under either the Chadha rule (forbidding Congress to exercise legislative power except by bicameralism and presentment) or the anti-aggrandizement principle (forbidding Congress to exercise executive power). Attempts to resolve constitutional issues by categorizing an exercise of authority as "in its essence, 'legislative' or 'executive'," can be confusing and, in any event, miss the point that under either analysis, "the critical issue is whether Congress or its agent **[*39]** seeks to control . 20. 20. the execution of its enactments without respect to the Article I legislative process." 842 F.2d at 1108 (emphasis in original). In Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 276 (1991), the Supreme Court concluded that it was unnecessary to resolve the categorization issue because the exercise of authority was unconstitutional however it was viewed. cf. Mistretta v. United States, 488 U.S. 361, 396 (1989) (distinguishing Sentencing Guidelines from political policy making on the grounds that "they do not bind or regulate the primary conduct of the public").

For many decades, the congressional Joint Committee on Printing ("JCP") has attempted to exercise the legislative authority to promulgate rules and procedures binding on the executive branch's activities relating to printing, publication, and (more recently) data storage. In 1920, President Wilson vetoed an appropriations bill because it purported to confer on the JCP the power to promulgate regulations governing printing by executive officials or agencies: Congress has no power, he explained, to "endo[w] a committee of either **[*40]** House or a joint committee of both Houses with power to prescribe 'regulations' under which executive departments may operate." Veto Message on Legislative, Executive and Judicial Appropriation Bill, H.R. No. 764, 66th Cong., 2d Sess. 2 (1920), reprinted in 59 Cong. Rec. 7,026 (1920); see Constitutionality of Proposed Legislation

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Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 62-63, 65 (1933) (quoting and endorsing President Wilson's reasoning). In 1984, we concluded that legislation granting the JCP authority to promulgate regulations that "would require executive departments to submit annual plans outlining their intended activities and to seek advance approval of all projected goals, policies, strategies, purchases, publications, and means of distribution" with respect to printing, word processing, and data storage and retrieval was unconstitutional. Constitutionality of Proposed Regulations of Joint Committee on Printing, 8 Op. O.L.C. 42, 42 (1984). The proposed regulations would have established general rules binding the conduct of executive officials without those rules being approved by both houses of Congress and presented to the President, in plain violation of Article **[*41]** I's procedural requirements. We also determined that the proposed regulations were not authorized by any of the statutes concerning the JCP. 8 Op. O.L.C. at 43-46. That point was not relevant to the constitutional analysis, however, since Congress cannot circumvent the bicameralism and presentment requirement by delegating legislative authority to a part or agent of itself even by means of a statute itself duly passed and presented. We have also advised that the statutory provision authorizing the JCP "unilaterally to create exceptions to the [statutory] rule that all printing must be accomplished through the GPO [Government Printing Office]" has no lawful force under Chadha. Id. at 51 & n.14; see also Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. at 58-60 (bill subjecting Treasury Department decisions on tax refunds to review and disallowance by congressional joint committee would be unconstitutional).

The requirement of bicameralism and presentment also can be violated in more convoluted ways. Section 431 of the General Education Provisions Act, for example, subjected final regulations of the Department of Education to a forty-five day report-and-wait **[*42]** provision In themselves report-and-wait mechanisms usually are valid, as we discuss more fully later in this memorandum. and provided that the final regulation would not become effective if Congress "by concurrent resolution, find[s] that the final regulation is inconsistent with the Act . 20. 20. and disapprove[s] such final regulation." 20 U.S.C. § 201232(d) (Supp. IV 1980). Concurrent resolutions are not legislation within the meaning of the Constitution, see U.S. Const. art. 20I, § 207, cl. 203, because they are not presented to the President. Accordingly, Attorney General Civiletti advised the Secretary of Education that the subjection of the Education Department's delegated lawmaking authority to congressional control and revision by means other than those required by Article I was unconstitutional. "[O]nce a function has been delegated to the executive branch, it must be performed there, and cannot be subjected to continuing congressional control except through the constitutional process of enacting new legislation." Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President, 4A Op. O.L.C. 21, 27 (1980) (opinion of the **[*43]** Attorney General).

Similarly , while Congress has near-plenary authority in deciding to grant, limit or withhold appropriations, the Department of Justice has long contended that the appropriations power may not be used to circumvent the restrictions the Constitution places on the modes of legislative action. See, e.g., Authority of Congressional Committees to Disapprove Action of Executive Branch, 41 Op. Att'y Gen. 230 (1955) (opining that legislation authorizing congressional committees to disapprove Defense Department contracts is unconstitutional). Several years before Chadha, for example, this Office advised that Congress could not validly provide for the indirect implementation of a legislative "veto" by an appropriations rider that would prospectively deny funding for the implementation of any regulation disapproved in the future by such a "veto." See Appropriations Limitation for Rules Vetoed by Congress, 4B Op. O.L.C. 731 (1980). Our reasoning in that opinion is equally applicable to appropriations provisions that attempt to cut off funding that would otherwise be available on the basis of any future expression of disapproval by Congress that does not take the **[*44]** form of new legislation. The same analysis would apply, as well, to a provision prohibiting the expenditure of funds for some purpose, but allowing a future expression of approval by committee action to remove the prohibition.

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In carrying out its legitimate legislative functions, Congress "enjoys ample channels to advise, coordinate, and even directly influence an executive agency [including by] direct communication with the [agency]." FEC v. NRA Political Victory Fund, 6 F.3d 821, 827 (D.C. Cir. 1993), cert. dismissed, 115 S. Ct. 537 (1994). As a practical matter, therefore, congressional committees and individual members of Congress often are able to sway the decisions of the executive officials with whom they deal. In addition, congressional committees can exercise limited but legally coercive authority over persons outside the legislative branch through the power to issue subpoenas to compel testimony. The Supreme Court has reasoned that the "congressional power of inquiry" is necessary to "'enable [Congress] efficiently to exercise [the] legislative function[s] belonging to it under the Constitution.'" Barenblatt v. United States, 360 U.S. 109, 111 (1959) (quoting **[*45]** McGrain v. Daugherty, 273 U.S. 135, 160 (1927)). Like Congress's substantive powers to legislate -- which it exists only to serve -- the power of inquiry is "subject to the limitations placed by the Constitution on governmental action," id. at 112, including the anti-aggrandizement and general separation of powers principles. In light of the capacity of Congress to extend its influence beyond the legislative sphere by informal means that are sometimes troubling although not unlawful, it is imperative that the executive branch consistently assert the rule of constitutional law that formal control of executive decision making and administration is subject to the requirements of Article I, and especially to the constitutional authority of the President to participate in the legislative process through the presentment mechanism. The executive branch has a constitutional obligation not to accede to legislative action that does not conform to Article I. Advising the Secretary of Education that she could validly implement departmental regulations despite a legislative "veto," Attorney General Civiletti wrote that "recognition of these concurrent resolutions as legally binding would **[*46]** constitute an abdication of the responsibility of the executive branch, as an equal and coordinate branch of government with the legislative branch, to preserve the integrity of its functions against constitutional encroachment." Congress' Disapproval of Agency Regulations, 4A Op. O.L.C. at 29.

B. Appointment Clause and Related Questions

The Appointments Clause provides that

> [The President,] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. 20II, § 2, cl. 2. As the language of the Appointments Clause suggests, offices in the constitutional sense "are only those established or recognized by the Constitution or by act of Congress." Inventions International Exposition, 18 Op. Att'y Gen. 171, 171 (1885); see also id. ("the President **[*47]** cannot create an office"). In Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), the Supreme Court held that the terms of the Appointments Clause set out the only means by which Congress may provide for the appointment of "Officers of the United States." The officers at issue in Buckley were the six voting members of the Federal Election Commission, four of whom were appointed by congressional officials and two by the President, subject to the approval of the Senate and the House of Representatives. The statutory scheme thus violated the Appointments Clause in two distinct ways, by vesting appointment power in officials not listed in the Clause and by subjecting presidential

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nominees to **confirmation** by the House. 424 U.S. at 126-27. Id. at 124-37. Principal officers must be appointed by the President with the advice and consent of the Senate; inferior officers will be appointed in the same manner unless Congress by statute provides for their appointment by the President, the "Head[] of [a] Department[]," or the courts. Id. at 132; See Appointment of Assistant Secretary of State, 6 Op. Att'y Gen. 1, 1 (1853) ("without there be[ing] express enactment to the contrary **[*48]** . 20. 20. the appointment of any officer of the United States belongs to the President, by and with the advice and consent of the Senate"). see also Freytag v. Commissioner, 501 U.S. 868, 878 (1991) ("the Constitution limits congressional discretion to vest power to appoint 'inferior Officers' to three sources"). Despite the apparent clarity of its language, however, the Appointments Clause has provided the occasion for many opinions of the Attorneys General and of this Office. We do not state anything novel in observing that the Appointments Clause sometimes presents difficult questions of interpretation. Attorney General Legar remarked in an 1843 opinion that "[n]o points of our fundamental law are more difficult than those involved in this whole subject of appointments." Appointment and Removal of Inspectors of Customs, 4 Op. Att'y Gen. 162, 164 (1843).

1. Who is Required to Be an "Officer of the United States"? Not everyone who performs duties for the federal government is an "officer" within the meaning of the Appointments Clause. From the early days of the Republic, this term has been understood to embrace the ideas of "tenure, duration, emolument, and duties." **[*49]** United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868). Because Hartwell has long been taken as the leading statement of the constitutional meaning of "officer," In an opinion discussing an Appointments Clause issue, Attorney General Kennedy referred to Hartwell as providing the "classical definition pertaining to an officer." Communications Satellite Corporation, 42 Op. Att'y Gen. 165, 169 (1962). Hartwell itself cited several earlier opinions, including United States v. Maurice, 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15,747) (Marshall, Circuit Justice), see 73 U.S. at 393 n.*, and in turn has been cited by numerous subsequent Supreme Court decisions, including United States v. Germaine, 99 U.S. 508, 511-12 (1879), and Auffmordt v. Hedden, 137 U.S. 310, 327 (1890). These latter two decisions were cited with approval by the Court in Buckley v. Valeo, 424 U.S. 1, 125-26 & n.162 (1976) (per curiam). that statement is worth repeating in full:

> An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.
>
> The employment of the defendant was in **[*50]** the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe. A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.

Id. at 393.

Hartwell and the cases following it specify a number of criteria for identifying constitutional officers, and in some cases it is not entirely clear which criteria the court considered essential to its decision. Nevertheless, we believe that from the earliest reported decisions onward, the constitutional definition of officer has involved at least three necessary conditions.

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a. Employment by the Government: The Distinction between Appointees and Independent Contractors. An officer's duties are permanent, continuing, and based upon **[*51]** responsibilities created through a chain of command rather than by contract. Underlying an officer is an "office," to which the officer must be appointed. As Chief Justice Marshall, sitting as circuit justice, wrote: "Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer." United States v. Maurice, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747). Chief Justice Marshall speaks here of being "employed under a contract"; in modern terminology the type of non-officer status he is describing is usually referred to as that of independent contractor. In Hartwell, this distinction shows up in the opinion's attention to the characteristics of the defendant's employment being "continuing and permanent, not occasional or temporary," as well as to the suggestion that with respect to an officer, a superior can fix and then change the specific set of duties, rather than having those duties fixed by a contract. 73 U.S. at 393.

The distinction between employees and persons whose relationship to the government takes **[*52]** some other form also appears in later decisions. In this memorandum, the term "officer" will be used to refer exclusively to "Officers of the United States" in the constitutional sense; other full-time government servants will be called "employees." The question in United States v. Germaine, 99 U.S. 508 (1879), concerned whether a surgeon appointed by the Commissioner of Pensions "to examine applicants for pension, where [the Commissioner] shall deem an examination . 20. 20. necessary," id. at 508 (quoting Rev. Stat. § 204777), was an officer within the meaning of the Appointments Clause. The surgeon in question was "only to act when called on by the Commissioner of Pensions in some special case"; furthermore, his only compensation from the government was a fee for each examination that he did in fact perform. Id. at 512. The Court stated that the Appointments Clause applies to "all persons who can be said to hold an office under the government" and, applying Hartwell, concluded that "the [surgeon's] duties are not continuing and permanent and they are occasional and intermittent." Id. (emphasis in original). The surgeon, therefore, was not an officer of **[*53]** the United States. Id. Germaine clearly was discussing the concept of "officer" in the constitutional, and not simply a generic, sense: the alternative basis for the holding was that the surgeon was not an officer because he was appointed by the Commissioner who, as the head of a bureau within the Interior Department, could not be a "Head of Department" with the authority to appoint officers. Id. at 510-11.

The Court employed the same reasoning in Auffmordt v. Hedden, 137 U.S. 310 (1890). Pursuant to statute, an importer dissatisfied with the government's valuation of dutiable goods was entitled to demand a reappraisement jointly conducted by a general appraiser (a government employee) and a "merchant appraiser" appointed by the collector of customs for the specific case. Despite the fact that the reappraisement decision was final and binding on both the government and the importer, id. at 329, the Court rejected the argument that the merchant appraiser was an "inferior Officer" whose appointment did not accord with the requirements of the Appointments Clause.

> He is an expert, selected as such. 20. 20. 20. He is selected for the special case. He has no general **[*54]** functions, nor any employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case. 20. 20. 20. He has no claim or right to be designated, or to act except as he may be designated. 20. 20. 20. His position is without tenure, duration, continuing emolument, or continuous duties . 20. 20. 20. Therefore, he is not an 'officer,' within the meaning of the clause.

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Id. at 326-27.

We believe that under its best reading, Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), reflects and endorses this distinction, and that suggestions to the contrary misread the opinion. First, Buckley cites both Germaine and Auffmordt approvingly. See id. at 125-26 & n.162. Second, in several of its statements of the definition of "officers," Buckley, sometimes citing Germaine explicitly, says that the term applies to appointees or appointed officials who exercise significant authority under federal law, thus recognizing the possibility that non-appointees might sometimes exercise authority under federal law. See, e.g., 424 U.S. at 131 ("Officers" are "all appointed officials exercising responsibility **[*55]** under the public laws"). It is true that at other points in its opinion, the Buckley Court used language that, taken in isolation, might suggest that the Appointments Clause applies to persons who, although they do not hold positions in the public service of the United States, exercise significant authority pursuant to federal law. See id. at 141. However, we think such a reading of Buckley is unwarranted. So understood, Buckley must be taken to have overruled, sub silentio, Germaine and Auffmordt -- cases upon which it expressly relies in its analysis, see id. at 125-26 & n.162 -- and its repeated quotation of the Germaine definition of "officer" as "all persons who can be said to hold an office under the government" would make no sense. The apparently unlimited language of some passages has a simpler explanation: there was no question that the officials at issue in Buckley held "employment[s]," Maurice, 26 F. Cas. at 1214, under the federal government, and thus the question of the inapplicability of the Appointments Clause to persons not employed by the federal government was not before the Court. The post-Buckley Supreme Court has often assessed **[*56]** the validity of statutes that would starkly pose Appointments Clause issues if, in fact, the Court had adopted the position that wielding significant authority pursuant to the laws of the United States, without more, requires appointment in conformity with that Clause. In none of these cases has the Court even hinted at the existence of an Appointments Clause issue. See, e.g., Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985) (upholding statutory requirement that registrants under a federal regulatory scheme submit to binding arbitration conducted by a panel of arbitrators who are private individuals not appointed by one of the methods specified in the Appointments Clause and are subject only to limited judicial review); FERC v. Mississippi, 456 U.S. 742 (1982) (upholding requirement that states enforce federal regulatory scheme relating to utilities); Lake Carriers' Ass'n v. Kelley, 456 U.S. 985 (1982) (mem.), aff'g 527 F. Supp. 1114 (E.D. Mich. 1981) (three-judge panel) (upholding statute that granted states authority to ban sewage emissions from all vessels); Train v. National Resources Defense Council, Inc., 421 U.S. 60 (1975) (construing provision **[*57]** of Clean Air Act that gave states authority to devise and enforce plans for achieving congressionally defined, national air quality standards). The Supreme Court's decision in Buckley, we conclude, did not modify the long-settled principle that a person who is not an officer under Hartwell need not be appointed pursuant to the Appointments Clause. Some recent opinions of this Office have read Buckley more broadly as repudiating the historical understanding of the Appointments Clause and endorsing the proposition we reject here -- that is, that all persons exercising significant federal authority, by virtue of that fact alone, must be appointed pursuant to the Appointments Clause. We are aware of four opinions in which our disagreement with this understanding of Buckley would cause us to reach a different conclusion on the Appointments Clause question presented. See Constitutionality of Subsection 4117(b) of Enrolled Bill H.R. 5835, the "Omnibus Budget Reconciliation Act of 1990," 14 Op. O.L.C. 170, 171 (1990) (preliminary print) (statutory scheme under which congressional delegations and physicians' organizations of certain states exercise "significant authority" **[*58]** violates Appointments Clause); Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. O.L.C. 249, 264-65 (1989) (preliminary print) (provisions of False Claims Act authorizing qui tam suits by private parties violate Appointments Clause because qui tam relators exercise "significant governmental power"); Representation of the United States Sentencing Commission in Litigation, 12 Op. O.L.C. 21, 31-33 (1988) (preliminary print) (private party **acting** as counsel for United States agency must be

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appointed pursuant to Appointments Clause); Proposed Legislation to Establish the National Indian Gaming Commission, 11 Op. O.L.C. 73, 74 (1987) (Appointments Clause problems raised where state and local officials given authority to waive federal statute). Our conclusion that the more limited historical understanding of the Appointments Clause is correct requires us to disavow the Appointments Clause holdings of those opinions. To the extent that our current reading of Buckley is inconsistent with the Appointments Clause reasoning of other opinions of this office, that reasoning is superseded. See Common Legislative Encroachments on Executive Branch Constitutional Authority, **[*59]** 13 Op. O.L.C. 299, 300 (1989) (preliminary print).

b. The Exercise of Significant Authority. Chief Justice Marshall's observation that "[a]lthough an office is 'an employment,' it does not follow that every employment is an office," United States v. Maurice, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) (Marshall, Circuit Justice), points to a second distinction as well -- although not one that was at issue in Maurice itself. An officer is distinguished from other full-time employees of the federal government by the extent of authority he or she can properly exercise. As the Court expressed this in Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam):

> We think that the term "Officers of the United States" as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in United States v. Germaine, [means] that any appointee exercising significant authority pursuant to the laws of the United States . 20. 20. must . 20. 20. be appointed in the manner prescribed by [the Appointments Clause].

Id. at 125-26 (emphasis added). See Appointments in the Department of Commerce and Labor, 29 Op. Att'y **[*60]** Gen. 116, 118-19, 122-23 (1911) (official authorized to perform all the duties of the Commissioner of Fisheries, who was appointed by the President and **confirmed** by the Senate, was an officer; scientists, technicians, and superintendent of mechanical plant in the Bureau of Standards were employees rather than officers); Second Deputy Comptroller of the Currency -- Appointment, 26 Op. Att'y Gen. 627, 628 (1908) ("The officer is distinguished from the employee in the greater importance, dignity, and independence of his position"; official authorized to exercise powers of the Comptroller of the Currency in the absence of the Comptroller was clearly an officer). In contrast, "[e]mployees are lesser functionaries subordinate to officers of the United States." Id. at 126 n.162.

The distinction between constitutional officers and other employees is a long-standing one. See, e.g., Burnap v. United States, 252 U.S. 512, 516-19 (1920) (landscape architect in the Office of Public Buildings and Grounds was an employee, not an officer); Second Deputy Comptroller of the Currency -- Appointment, 26 Op. Att'y Gen. 627, 628 (1908) (Deputy Comptroller of the Currency was "manifestly an officer **[*61]** of the United States" rather than an employee). At an early point, the Court noted the importance of this distinction for Appointments Clause analysis. See Germaine, 99 U.S. at 509. The status of certain officials traditionally appointed in modes identical to those designated by the Appointments Clause is somewhat anomalous. For instance, low-grade military officers have always been appointed by the President and **confirmed** by the Senate and understood to be "Officers of the United States" in the constitutional sense; in Weiss v. United States, 114 S. Ct. 752, 757 (1994), the Supreme Court recently indicated its agreement with that understanding. It is at least arguable, however, that the authority exercised by second lieutenants and ensigns is so limited and subordinate that their analogues in the civil sphere clearly would be employees. There are at least three possible explanations. (1) Congress may make anyone in public service an officer simply by requiring appointment in one of the modes designated by the Appointments Clause. The Clause, on this view, mandates officer status for officials with

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significant governmental authority but does not restrict the status to such **[*62]** officials. This apparently was the nineteenth-century view, see, e.g., United States v. Perkins, 116 U.S. 483, 484 (1886) (cadet engineer at the Naval Academy was an officer because "Congress has by express enactment vested the appointment of cadet-engineers in the Secretary of the Navy and when thus appointed they become officers and not employees"). While recognizing that Congress may make anyone in the public service an officer, Attorney General Kennedy rejected the argument that Congress evinces and effectuates such an intention merely by providing for the public servant to be appointed by a method that coincidentally conforms with the Appointments Clause. See Communications Satellite Corporation, 42 Op. Att'y Gen. 165, 167 (1962) ("it does not follow" from the Constitution that "every appointment authorized by law which is preceded by nomination and **confirmation** necessarily renders the appointee an officer"). (2) Certain officials are constitutional officers because in the early Republic their positions were of greater relative significance in the federal government than they are today. Cf. Buckley, 424 U.S. at 126 (postmasters first class and clerks of district courts **[*63]** are officers). (3) Even the lowest ranking military or naval officer is a potential commander of United States armed forces in combat -- and, indeed, is in theory a commander of large military or naval units by presidential direction or in the event of catastrophic casualties among his or her superiors.

The Supreme Court relied on the officer/employee distinction in its recent decision in Freytag v. Commissioner, 501 U.S. 868 (1991). In Freytag, the Court rejected the argument that special trial judges of the Tax Court are employees rather than officers because "they lack authority to enter a final decision" and thus arguably are mere subordinates of the regular Tax Court judges. In fact, as the Court pointed out, the chief judge of the Tax Court can assign special trial judges to render final decisions in certain types of cases, a power that the government conceded rendered them, in those circumstances, "inferior officers who exercise independent authority." The Court rejected the argument that special trial judges could be deemed inferior officers for some purposes and employees for others. 501 U.S. at 882. Id. at 881. The Court put some weight on the fact that **[*64]** the position of special trial judge, as well as its duties, salary, and mode of appointment, are specifically established by statute; The text of the Appointments Clause implies that offices in the sense of the Clause must be established in the Constitution or by statute. See U.S. Const. art. 20II, § 202, cl. 202 (specifying certain officers and then referring to "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law"). the Court also emphasized that special trial judges "exercise significant discretion" in carrying out various important functions relating to litigation in the Tax Court. Id. at 881-82.

Applying the same understanding of the distinction between officers and employees, this Office has concluded that the members of a commission that has purely advisory functions "need not be officers of the United States" because they "possess no enforcement authority or power to bind the Government." Proposed Commission on Deregulation of International Ocean Shipping, 7 Op. O.L.C. 202, 202-03 (1983). For that reason, the creation by Congress of presidential advisory committees composed, in whole **[*65]** or in part, of congressional nominees or even of members of Congress does not raise Appointments Clause concerns.

Since employees do not wield independent discretion and act only at the direction of officers, they do not in their own right "exercis[e] responsibility under the public laws of the Nation," Buckley, 424 U.S. at 131. That an employee may not exercise independent discretion does not, of course, mean that his or her duties may not encompass responsibilities requiring the exercise of judgment and discretion under the ultimate control and supervision of an officer. In Steele v. United States (No. 202), 267 U.S. 505, 508 (1925), the Supreme Court noted that a "deputy marshal is not in the constitutional sense an officer of the United States," yet "is called upon to exercise great responsibility and discretion" in "the enforcement of the peace of the United States, as that is embraced in the enforcement of federal law." But deputy marshals act at the direction of "the United States marshal under whom they serve," id., who is an officer in the constitutional sense. As a constitutional matter, therefore, an

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employee may be selected in whatever manner Congress **[*66]** directs. Conversely, "any appointee" in federal service who "exercis[es] significant authority pursuant to the laws of the United States" must be an officer in the constitutional sense and must be appointed in a manner consistent with the Appointments Clause. See Appointment and Removal of Inspectors of Customs, 4 Op. Att'y Gen. 162, 164 (1843) (Congress may not provide for the appointment of "any employe[e], coming fairly within the definition of an inferior officer of the government," except by a mode consistent with the Appointments Clause). 424 U.S. at 126. Congress and the President may not avoid the strictures of the Clause by vesting federal employees with the independent or discretionary responsibility to perform any "significant governmental duty." Id. at 141. Buckley illustrates this last point. The FEC commissioners appointed by congressional officials were undoubtedly employees of the federal government but they could not constitutionally exercise the enforcement powers the statute attempted to grant them because their mode of appointment precluded them from being officers. 424 U.S. at 137-41.

c. BAppointment to a Position of Employment within the Federal [*67] Government. Finally, United States v. Hartwell, 73 U.S. (6 Wall.) 385 (1868), and the other major decisions defining "Officers of the United States" all reflect the historical understanding that a constitutional officer is an individual who is appointed to his or her office by the federal government. The Appointments Clause simply is not implicated when significant authority is devolved upon non-federal actors. The delegation to private persons or non-federal government officials of federal-law authority, sometimes incorrectly analyzed as raising Appointments Clause questions, can raise genuine questions under other constitutional doctrines, such as the non-delegation doctrine and the general separation of powers principle. Compare Confederated Tribes of Siletz Indians v. United States, 841 F. Supp. 1479, 1486-89 (D. Or. 1994) (confusing Appointments Clause with separation of powers analysis in holding invalid a delegation to a state governor) with United States v. Ferry County, 511 F. Supp. 546, 552 (E.D. Wash. 1981) (correctly dismissing Appointments Clause argument and analyzing delegation to county commissioners under non-delegation doctrine). In Hartwell the **[*68]** Court stated, "[a]n office is a public station, or employment, conferred by the appointment of government. 20. 20. 20. The employment of the defendant was in the public service of the United States." Id. at 393; see also United States v. Germaine, 99 U.S. 508, 510 (1879) (founders intended appointment pursuant to the Appointments Clause only for "persons who can be said to hold an office under the government about to be established under the Constitution"). It is a conceptual confusion to argue that federal laws delegating authority to state officials create federal "offices," which are then filled by (improperly appointed) state officials. Rather, the "public station, or employment" has been created by state law; the federal statute simply adds federal authority to a pre-existing state office. Accordingly, the substantiality of the delegated authority is immaterial to the Appointments Clause conclusion. See Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power & Conservation Planning Council, 786 F.2d 1359, 1365 (9th Cir. 1986) ("because the Council members do not serve pursuant to federal law," it is "immaterial whether they exercise some significant executive **[*69]** or administrative authority over federal activity"), cert. denied, 479 U.S. 1059 (1987). An analogous point applies to delegations made to private individuals: the simple assignment of some duties under federal law, even significant ones, does not by itself pose an Appointments Clause problem. One might also view delegations to private individuals as raising the same considerations as suggested by the distinction drawn earlier between appointee and independent contractor -- so long as the statute does not create such tenure, duration, emoluments and duties as would be associated with a public office, the individual is not the occupant of a constitutional office but is, rather, a private party who has assumed or been delegated some federal responsibilities.

In our view, therefore, the lower federal courts have been correct in rejecting Appointments Clause challenges to the exercise of federally derived authority by state officials, See, e.g., Seattle Master Builders, 786 F.2d at 1364-66. The particular state officials at issue were serving on an entity created by an interstate compact established with the consent of

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as a vital check against tyranny." Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam). In order to safeguard liberty, therefore, the Constitution creates three distinct branches of government -- Congress, the President, and the federal judiciary -- and assigns to them differing roles in the exercise of the government's powers. The resulting division of governmental authority is not a mere set of housekeeping rules indicating which branch presumptively performs which **[*2]** functions; it is, rather, a fundamental means by which the Constitution attempts to ensure free, responsible, and democratic government. See MWAA, 501 U.S. at 272 ("The ultimate purpose of this separation of powers is to protect the liberty and security of the governed."). The constitutional separation of powers advances this central purpose by "assur[ing] full, vigorous, and open debate on the great issues affecting the people"; Bowsher v. Synar, 478 U.S. 714, 722 (1986). by "placing both substantive and procedural limitations on each [branch]"; MWAA, 501 U.S. at 272. and by maintaining a "system of . 20. 20. checks and balances" among the three branches. Morrison v. Olson, 487 U.S. 654, 693 (1988). James Madison described the "policy" lying behind "distributions of power" -- "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other." The Federalist No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961), quoted in Buckley, 424 U.S. at 122-23.

Although the structure of the Constitution is designed to obviate the danger to liberty posed by each of the branches, See INS v. Chadha, 462 U.S. **[*3]** 919, 951 (1983) (the Constitution's separation of powers is designed to counteract the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power"). the founders were particularly concerned with the Congress's potential for improvident or overreaching action: "the tendency of republican governments is to an aggrandizement of the legislat[ure] at the expense of the other departments." The Federalist No. 49, at 315-16 (James Madison) (Clinton Rossiter ed., 1961), cited in United States v. Brown, 381 U.S. 437, 444 n.17 (1965). Many specific aspects of the Constitution's separation of governmental powers embody the founders' "profound conviction . 20. 20. that the powers conferred on Congress were the powers to be most carefully circumscribed" and the founders' recognition of the particular "'propensity'" of the legislative branch "'to invade the rights of the Executive.'" INS v. Chadha, 462 U.S. 919, 947 (1983) (quoting The Federalist No. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). Executive branch lawyers thus have a constitutional obligation, one grounded not in parochial institutional interests but in **[*4]** our fundamental duty to safeguard the liberty of the people, to assert and maintain the legitimate powers and privileges of the President against inadvertent or intentional congressional intrusion. As Attorney General William Mitchell put it long ago:

> Since the organization of the Government, Presidents have felt bound to insist upon the maintenance of the Executive functions unimpa[i]red by legislative encroachment, just as the legislative branch has felt bound to resist interferences with its power by the Executive. To acquiesce in legislation having a tendency to encroach upon the executive authority results in establishing dangerous precedents.

Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 64 (1933). The Attorney General noted that "[t]he first presidential defense of the integrity of the powers of the Executive under the Constitution was made by Washington himself" and that "[f]rom that day to this the Presidents, with very few exceptions, have felt the necessity for refusing to overlook encroachments upon the executive power." 37 Op. Att'y Gen. at 64.

The Constitution, however, "by no means contemplates total separation of **[*5]** each of these three essential branches of Government." Buckley, 424 U.S. at 121. Instead, "'[w]hile

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Congress, but that fact is not significant for Appointments **[*70]** Clause purposes. The crucial point was that "[t]he appointment, salaries and direction" of the officials were "state-derived": "the states ultimately empower the [officials] to carry out their duties." Id. at 1365. The Supreme Court's recent decision in New York v. United States, 112 S. Ct. 2408 (1992), which held that Congress cannot "commandeer" state officials to serve federal regulatory purposes, reenforces this conclusion. Where state officials do exercise significant authority under or with respect to federal law, they do so as state officials, by the decision and under the ultimate authority of the state.

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991), does not suggest a different conclusion. The constitutional issue in that case was the validity of a statutory provision subjecting the Airports Authority "to the veto power of" a Board of Review composed of members of Congress purportedly "**acting** 'in their individual capacities.'" Id. at 270. The Supreme Court held that the Board in fact acted as an agent of Congress and that the Board's veto power therefore represented an unconstitutional **[*71]** enlargement of congressional authority. Nothing in the Court's opinion suggests that there would have been any constitutional problem if Congress had delegated the same power to the Authority subject to review by the executive branch. the District of Columbia City Council, See Techworld Dev. Corp. v. D.C. Preservation League, 648 F. Supp. 106, 115-17 (D.D.C. 1986). qui tam relators under the False Claims Act, We believe that United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 757-59 (9th Cir. 1993) (rejecting Appointments Clause challenge to False Claims Act), cert. denied, 114 S. Ct. 1125 (1994), reached the correct result but through an incorrect line of analysis. See id. at 758 (Clause not violated because of the relative modesty of the authority exercised by the relator). The better analysis, in our view, is that of the court in United States ex rel. Burch v. Piqua Engineering, Inc., 803 F. Supp. 115 (S.D. Ohio 1992), which held that "because qui tam plaintiffs are not officers of the United States, the FCA does not violate the Appointments Clause." Id. at 120. We now disapprove the Appointments Clause analysis and conclusion of an earlier opinion **[*72]** of this Office, Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. O.L.C. 249 (1989) (preliminary print) (arguing that the qui tam provisions violate the Clause). and plaintiffs under the citizen suit provisions of the Clean Water Act. Here the Court phrased its analysis in terms of separation of powers, but the challenge to the statute was, at its core, based on the Appointments Clause. See Chesapeake Bay Found. v. Bethlehem Steel Corp., 652 F. Supp. 620, 624 (D. Md. 1987) (Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), "does not stand for the proposition . 20. 20. that private persons may not enforce any federal laws simply because they are not Officers of the United States appointed in accordance with Article II of the Constitution"). The same conclusion should apply to the members of multinational or international entities who are not appointed to represent the United States. At least where these entities are created on an ad hoc or temporary basis, there is a long historical pedigree for the argument that even the United States representatives need not be appointed in accordance with Article II. See, e.g., Alexander Hamilton, The **[*73]** Defence No. 37 (Jan. 6, 1796), reprinted in 20 The Papers of Alexander Hamilton 13, 20 (Harold C. Syrett ed., 1974):

> As to what respects the Commissioners agreed to be appointed [under the Jay Treaty with Great Britain], they are not in a strict sense OFFICERS. They are arbitrators between the two Countries. Though in the Constitutions, both of the U [nited] States and of most of the Individual states, a particular mode of appointing officers is designated, yet in practice it has not been deemed a violation of the provision to appoint Commissioners or special Agents for special purposes in a different mode.

The traditional view of the Attorneys General has been that the members of international commissions hold "an office or employment emanating from the general treaty-making power, and created by it and" the foreign nation(s) involved and that members are not constitutional officers. Office -- Compensation, 22 Op. Att'y Gen. 184, 186 (1898). We believe that the Appointments Clause doubts sometimes voiced about legislation requiring the concurrence of state or local officials, Indian tribes, or private persons as a condition precedent to federal action are equally **[*74]** without merit. Some of our prior opinions express such concerns. Because that view, we now conclude, cannot be reconciled with Appointments Clause principles or caselaw, we expressly disavow it.

Determining whether an individual occupies a position of private employment or federal employment can pose difficult questions. The Supreme Court recently set forth rules for making this determination in Lebron v. National Railroad Passenger Corp., 115 S. Ct. 961 (1995). There, the Court found itself faced with the question of whether Amtrak is a private corporation or an agency of the government. Amtrak is chartered by Congress and incorporated under the District of Columbia Business Corporation Act. Id. at 967. The organic statute expressly provides that Amtrak "shall be operated and managed as a for-profit corporation, and is not a department, agency, or instrumentality of the United States Government." 49 U.S.C. § 2024301(a)(2)-(3). The Court ruled that this provision "is assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress' control 20. 20. 20. 20. But it is not for Congress to make the final determination of Amtrak's **[*75]** status as a government entity for purposes of determining the constitutional rights of citizens affected by its actions." 115 S. Ct. at 971. However, the Court held that an entity is "what the Constitution regards as the Government," if the entity is government-created and government-controlled. Id. at 971. Because Amtrak was created "by special law for the furtherance of governmental objectives," it is government-created. The Court also referred to this as a "policy-implementing" role. Id. at 973. This is to distinguish government agencies and instrumentalities, such as Amtrak, from truly private corporations that, though created pursuant to statutory authority, do not implement any government policy, but instead pursue profit and the policies of their shareholders. Id. at 974. Because federally appointed members of Amtrak's governing board hold "voting control" and there is no provision for this government control to sunset, Amtrak is government-controlled. The Court contrasted Conrail, which it determined is not what the Constitution regards as the government. By statute the federal government appoints a voting majority of Conrail's board of **directors.** Nevertheless, **[*76]** the Court held that Conrail is not part of the government, because the government's voting control will shift to the private shareholders if Conrail's debt to the federal government falls below half of its total indebtedness and because "'[t]he responsibilities of the federal **directors** are not different from those of the other **directors** -- to operate Conrail at a profit for the benefit of its shareholders' -- which contrasts with the public-interest 'goals' set forth in Amtrak's charter." Id. (quoting Regional Rail Reorganization Act Cases, 419 U.S. 102, 152 (1974)). In some passages, the Court spoke in terms of the First Amendment and individual rights, for instance:

> We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the **directors** of that corporation, the corporation is part of the Government for purposes of the First Amendment.

Id. We do not, however, believe that the Court meant to imply that it is within Congress's power to exempt federal instrumentalities from the Constitution's structural requirements, such **[*77]** as the Appointments Clause and the separation of powers doctrine, that apply

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to all other federal agencies. We believe instead that the references to individual rights are explained by two considerations. First, the issue in the case was whether Amtrak had violated the petitioner's First Amendment rights, and so did not raise any structural issues. Second, the Constitution imposes certain obligations on all government entities, state as well as federal. In other words, not all government entities, within Lebron's definition, are part of the federal government; many are part of a state or local government or of an interstate compact. See id. at 973 (citing Pennsylvania v. Board of **Directors** of City Trusts, 353 U.S. 230 (1957) (per curiam)). These latter entities are not subject to the separation of powers doctrine or the Appointments Clause. Because the Court was concerned with all entities that the Constitution regards as within the government, not just the federal government, it naturally phrased its opinion in terms of the obligations that apply to all organs of government, not just the organs of the federal government. Ultimately, we can conceive of no principled **[*78]** basis for distinguishing between the status of a federal entity vis-a-vis constitutional obligations relating to individual rights and vis-a-vis the structural obligations that the Constitution imposes on federal entities. See Brief of Appellant United States, Wilkinson v. United States, Nos. 2095-5144, 91-5174 (D.C. Cir. Nov. 22, 1995). It therefore is not surprising that the Court did not consistently limit its language to individual rights. See, e.g., Lebron, 115 S. Ct. at 973 ("It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form."). Thus, we do not believe that Congress may evade the "solemn obligations" of the doctrine of separation of powers by resorting to the corporate form any more than it may evade the obligations of the Bill of Rights through this artifice.

d. Summary. An appointee (1) to a position of employment (2) within the federal government (3) that carries significant authority pursuant to the laws of the United States is required to be an "Officer of the United States." Each of these three conditions is independent, and all three must [*79] be met in order for the position to be subject to the requirements of the Appointments Clause.

We recently applied this principle in determining whether the Appointments Clause represents a blanket proscription against participation by the federal government in binding arbitration. Typically, arbitrators are private individuals chosen by the parties to the dispute. In a binding arbitration, the decision of the arbitrators is mandatory upon the parties, subject only to limited judicial review. The view that the Appointments Clause prohibits federal government participation in binding arbitration proceeds from the misinterpretation of Buckley discussed above. We reasoned that although it is "beyond dispute that arbitrators exercise significant authority, at least in the context of binding arbitration involving the federal government," Memorandum for John Schmidt, Associate Attorney General, from Walter Dellinger, Assistant Attorney General, re: Constitutional Limitations on Federal Government Participation in Binding Arbitration, at 10 (Sept. 7, 1995). the standard binding arbitration mechanism does not implicate the Appointments Clause. Arbitrators

> **are manifestly private [*80] actors who are, at most, independent contractors to, rather than employees of, the federal government. Arbitrators are retained for a single matter, their service expires at the resolution of that matter, and they fix their own compensation. Hence, their service does not bear the hallmarks of a constitutional office -- tenure, duration, emoluments, and continuing duties. Consequently, arbitrators do not occupy a position of employment within the federal government, and it cannot be said that they are officers of the United States. Because arbitrators are not officers, the Appointments Clause does not place any requirements or restrictions on the manner in which they are chosen.**

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Memorandum for John Schmidt, Associate Attorney General, from Walter Dellinger, Assistant Attorney General, re: Constitutional Limitations on Federal Government Participation in Binding Arbitration, at 10 (Sept. 7, 1995). We nevertheless noted that it is possible for a theoretical binding arbitration mechanism to run afoul of the Appointments Clause. As indicated, arbitrators whose sole or collective decisions are binding on the government exercise significant authority. If any such arbitrator were to [*81] occupy a position of employment within the federal government, that arbitrator would be required to be appointed in conformity with the Appointments Clause. See Freytag v. Commissioner, 501 U.S. 868, 881 (1991). Thus, if a federal agency were to conduct binding arbitrations and to employ arbitrators with whom it provided all relevant attributes of an office, all such arbitrators would be required to be appointed in conformity with the Appointments Clause. See Federal Government Participation in Binding Arbitration, at 13. The only case that to our knowledge addresses this question agreed with our analysis and conclusion, and held that the Appointments Clause does not prohibit the federal government from entering into binding arbitration. See Tenaska Washington Partners v. United States, 34 F. Cl. 434, 440 (1995) ("the OLC Memorandum is a thorough and persuasive analysis").

2. Who May Be an Inferior Officer? Since all officers of the United States may be appointed by the President with the advice and consent of the Senate, the only Appointments Clause significance to the distinction between principal and inferior officers lies in Congress's ability to provide **[*82]** for the appointment of inferior officers by one of the alternative means listed in the Clause. The Supreme Court has observed that "[t]he line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn." Morrison v. Olson, 487 U.S. 654, 671 (1988). Unfortunately, the Court's own decisions provide only modest additional guidance. In Morrison, the Court declined to "attempt . 20. 20. to decide exactly where the line falls" because it found that the independent counsel "clearly falls on the 'inferior officer' side of that line." Id. at 671. The Court advanced several factors that pointed to that conclusion: (1) The counsel was removable by the Attorney General, thus making her "to some degree 'inferior' in rank and authority." Id. (2) The counsel's duties were limited, particularly with respect to policy making and administration. (3) The counsel's tenure was limited to the particular "mission that she was appointed for." Id. at 672. The Court also compared the independent counsel's status to that of other officials who had been considered inferior officers in earlier decisions. **[*83]** See 487 U.S. at 672-73 (discussing cases dealing with vice-consuls, election supervisors, and United States commissioners). The Court also took note of its "reference in United States v. Nixon, 418 U.S. 683, 694, 696 (1974), to the Office of Watergate Special Prosecutor -- whose authority was similar to that of [the independent counsel] -- as a 'subordinate officer'" and concluded that this characterization was "consistent" with its conclusion that independent counsels are inferior officers. See 487 U.S. at 673. The Court's other recent Appointments Clause decisions shed little additional light on the subject. Buckley simply asserted that the members of the FEC were "at the very least" inferior officers. Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam). In Freytag, no one claimed that the special trial judges at issue were principal, as opposed to inferior, officers; instead, the case involved the distinction between inferior officers and employees. Freytag v. Commissioner, 501 U.S. 868, 880-82 (1991). The military judges under review in Weiss, like all commissioned officers in the armed forces, were appointed with the advice and consent of the **[*84]** Senate. Weiss v. United States, 114 S. Ct. 752, 757 (1994). Justice Souter concurred in the Court's opinion on the understanding that the military judges at issue there are inferior officers. Id. at 763. He reasoned that there were substantial points to be made on either side of the question whether they were principal or inferior officers and concluded that the Court should defer "to the political Branches' [implicit] judgment" that the military judges were inferior officers. Id. at 769. Although Justice Souter's admonition that "it is ultimately

hard to say with any certainty on which side of the line" between principal and inferior status a given officer may fall, id., is indubitably correct, the executive branch cannot invoke the principle of judicial deference he properly used to decide the issue in Weiss.

We agree with the court of appeals in Silver v. United States Postal Service, 951 F.2d 1033 (9th Cir. 1991), that the particular factors Morrison discussed do not constitute an exhaustive or exclusive list. See id. at 1040 ("The nature of each government position must be assessed on its own merits."). The Silver court noted that the official **[*85]** at issue in that case, the Postmaster General, "performs many tasks and has many responsibilities," but determined the office to be an inferior one because the Postmaster General "does not have 'control'" and "serv[es] at the pleasure of the" Board of Governors of the Postal Service. Id. This approach is consistent with the one we have taken in the past. For example, in concluding that United States Attorneys are inferior officers whose appointment could be vested in the Attorney General, we rejected the argument that the constitutional term "inferior" means "'petty or unimportant'"; instead, we concluded that the term connotes amenability to supervision by the superior "in whom the power of appointment is vested." United States Attorneys -- Suggested Appointment Power of the Attorney General -- Constitutional Law (Article 202, § 202, cl. 202), 2 Op. O.L.C. 58, 58-59 (1978) (quoting Collins v. United States, 14 Ct. Cl. 568, 574 (1878)); see also Department of Housing and Urban Development -- Delegations of Authority -- 42 U.S.C. § 203533, 3535, 2 Op. O.L.C. 87, 89 (1978) (deputy assistant secretary, who is subject to direction by an assistant secretary, is "unquestionably" **[*86]** an inferior officer). In determining whether an officer may properly be characterized as inferior, we believe that the most important issues are the extent of the officer's discretion to make autonomous policy choices and the location of the powers to supervise and to remove the officer. While an officer responsible only to the President for the exercise of significant discretion in decision making is probably a principal officer, an officer who is subject to control and removal by an officer other than the President should be deemed presumptively inferior.

3. Who May Appoint Inferior Officers? The Appointments Clause does not define "Heads of Departments" or "Courts of Law," and questions have arisen about which entities are included by these terms within the "possible repositories for the appointment power." Freytag v. Commissioner, 501 U.S. 868, 884 (1991). Earlier Attorneys General have accorded these terms a broad construction. See, e.g., Authority of Civil Service Commission to Appoint a Chief Examiner, 37 Op. Att'y Gen. 227 (1933). The same is true of the courts, The exception to this broad reading of the Clause was Buckley's unsurprising conclusion that **[*87]** "neither Congress nor its officers [are] included within the language 'Heads of Departments.'" Buckley v. Valeo, 424 U.S. 1, 127 (1976) (per curiam). which have held that the Tax Court, Freytag, 501 U.S. at 892. The Court in Freytag concluded that it is constitutional for the chief judge of the Tax Court to appoint special trial judges because the Tax Court, though an Article I legislative court, "exercise[s] judicial power and perform[s] exclusively judicial functions" and thus is a "Court[] of Law" within the meaning of the Clause. Id. Justice Scalia argued in a concurring opinion that the Tax Court should be treated as a "Department" and the chief judge as its "Head." Id. at 914-22 (Scalia, J., concurring in part and concurring in the judgment). Justice Souter recently has suggested that the opinion of the Court in Freytag did not actually resolve the question of whether the judges of the Tax Court, including the chief judge, are principal officers. Weiss v. United States, 114 S. Ct. 752, 768 (1994) (Souter, J., concurring). a special division of a court of appeals created primarily for the purpose of appointing independent counsels, Morrison v. Olson **[*88]** , 487 U.S. 654 (1988). In Morrison, the Court indicated that there is some "constitutional limitation on 'incongruous' interbranch appointments," id. at 677, despite the broad language the Appointments Clause uses in describing Congress's discretion on the subject. A statute vesting in a court the power to appoint officers **acting** in areas in which judges "have no special knowledge or expertise," id. at 676 n.13, for example, might create tension between the court's normal functions and "the performance of [its] duty to appoint." Id. at 676. We think that this limitation is probably of little practical significance with respect to presidential

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appointments in light of the fact that it is difficult to conceive a plausible argument that vesting the power in the President to appoint any officer (other, perhaps, than some legislative officers) could ever be constitutionally "incongruous." and the Governors of the Postal Service (as a collective head of department), Silver v. United States Postal Serv., 951 F.2d 1033, 1038 (9th Cir. 1991). can be vested with appointments power. The interpretive difficulties lie in determining exactly how broadly the term "Department" **[*89]** should be read.

We think that the "Departments" to which the Appointments Clause refers are not limited to those major divisions of the executive branch that are headed by members of the President's cabinet. The Appointments Clause thus differs from Section 4 of the Twenty-fifth Amendment, the language and history of which **confirm** that the "principal officers of the executive departments" it mentions are the members of the Cabinet. U.S. Const. amend. XXV, § 204; see Freytag, 501 U.S. at 886-87; id. at 917 (Scalia, J., concurring in part and concurring in the judgment). In 1933, **Acting** Attorney General Biggs opined that Congress could authorize the Civil Service Commission to appoint an inferior officer. Authority of Civil Service Commission to Appoint a Chief Examiner, 37 Op. Att'y Gen. 227 (1933). His opinion noted that the Commission "ha[d] certain independent executive duties to perform," was "responsible only to the Chief Executive," id. at 229, and was "not a subordinate Commission attached to one of the so-called executive departments," id. at 231. As "an independent division of the Executive Branch," he concluded, the Commission was a "Department" for Appointments **[*90]** Clause purposes and its three commissioners, collectively, "the 'head of a Department' in the constitutional sense." Id. The fact that the commissioners were not members of the Cabinet was not controlling, the **Acting** Attorney General concluded, because the Cabinet itself is not a creation of the Constitution. Id. "The Cabinet, as such, was not provided for by the Constitution and it follows therefore that the interpretation of the Constitution cannot depend upon such consideration." 37 Op. Att'y Gen. at 231; accord Freytag, 501 U.S. at 916-17 (Scalia, J., concurring in part and concurring in the judgment). We find this opinion persuasive and note that the Court's opinion in Freytag ultimately reserved the question of whether the heads of entities other than cabinet-level departments can be vested with the power to appoint inferior officers. See Freytag, 501 U.S. at 887 n.4. While the opinion of the Court in Freytag rejected the argument that "every part of the Executive Branch is a department," 501 U.S. at 885, we do not think that the Court's reasoning is inconsistent with the 1933 Justice Department opinion. The Court's chief concern was that part of the **[*91]** Appointments Clause's purpose is to prevent "the dangers posed by an excessively diffuse appointment power." Id. The Court observed that "[g]iven the inexorable presence of the administrative state, a holding that every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint." Id. We do not think that our view that entities other than cabinet-level agencies can be "Departments" for the purposes of the Appointments Clause leads to this constitutionally troublesome result. We assume the continuing validity of United States v. Germaine, 99 U.S. 508 (1879), which held that the head of a bureau within an executive branch department was not the head of a department. Most of the discrete units of the executive branch in fact are subordinate to some larger executive agency, and therefore are not departments under Germaine. The **Federal Bureau of Investigation,** for example, wields far-reaching law enforcement authority, but as a component of the Justice Department it is not itself a "Department" for purposes of the Appointments Clause. Legislation authorizing the appointment of inferior officers by a subordinate officer **[*92]** within a department with the approval of the head of the department, see United States v. Hartwell, 73 U.S. (6 Wall.) 385, 392-94 (1868); see also Germaine, 99 U.S. at 511 (explaining Hartwell), does not transgress this principle because for constitutional purposes the appointment should be deemed to be made by the department head. We also note that the four concurring Justices in Freytag expressly adopted the reading of the Appointments Clause set forth in the 1933 Attorney General's opinion: that "the term 'Departments' means all independent executive establishments." 501 U.S. at 919 (Scalia, O'Connor, Kennedy, & Souter, JJ., concurring in part and concurring in the judgment). Cf. United States v. Germaine, 99 U.S. 508 (1879)

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(Commissioner of Pensions, as head of a bureau within the Interior Department, was not a "Head of Department"). The court of appeals in Silver found no constitutional problem with a statute vesting the power to appoint an inferior officer, the Deputy Postmaster General, in an entity consisting of the Governors of the Postal Service (principal officers who are collectively the "head of a Department") and the Postmaster General (an inferior **[*93]** officer appointed by the Governors). See 951 F.2d at 1036-41. This conclusion might be justified on either of two rationales. (1) As Justice Souter recently noted, it remains unresolved whether "the Appointments Clause envisions appointment of some inferior officers by other inferior officers," Weiss v. United States, 114 S. Ct. 752, 768 (1994) (Souter, J., concurring), and it may be that there is no constitutional objection to designating one or more inferior officers to be the head of a department with the power to make appointments. (2) It might be argued that although as a general matter the head of a department must be a principal officer and a collective head of department must consist of exclusively principal officers, the association of an inferior officer with a collective head of department in making a specific appointment is constitutionally harmless.

We would apply the reasoning of the 1933 opinion in concluding that it is constitutional for Congress to vest the power to appoint inferior officers in the heads of the so-called independent agencies -- those agencies whose heads are not subject to removal at will by the President and that conventionally are understood **[*94]** to be substantially free of policy direction by the President. Except for the attenuated nature of the President's supervisory authority, most of the independent agencies are clearly analogous to major executive agencies. They exercise governmental authority without being subordinated to any broader unit within the executive branch, and Congress has implicitly characterized them as "Departments" for Appointments Clause purposes by permitting their heads to appoint officials who plainly are inferior officers. See Freytag, 501 U.S. at 918 (Scalia, J., concurring in part and concurring in the judgment) (noting that most inferior officers in independent agencies are appointed by neither the President nor a Cabinet official). Nothing in the original history of the Clause suggests any intention to exclude from the scope of the Clause separate establishments that are not subject to plenary presidential control. In late-eighteenth century English, the term "department" had no specialized governmental or organizational meaning. For example, Dr. Johnson defined "department" as "[s]eparate allotment; province or business assigned to a particular person," 1 Samuel Johnson, A Dictionary **[*95]** of the English Language (1755), to which Webster added the gloss "in which a class of duties are allotted to a particular person." 1 Noah Webster, American Dictionary 58 (1828), quoted in Freytag, 501 U.S. at 920 (Scalia, J., concurring in part and concurring in the judgment) (founders chose "Department" to connote "separate organization"). In its foundational legislation, the First Congress used the word both for the Departments of Foreign Affairs (later, State) and War and for the Department of the Treasury, even though it pointedly did not term Treasury an "executive department" as it did State and War. Compare Act of July 27, 1789, ch. 204, 1 Stat. 28-29 (establishing the Department of Foreign Affairs) and Act of Aug. 7, 1789, ch. 207, 1 Stat. 49-50 (establishing the Department of War) with Act of Sept. 2, 1789, ch. 2012, 1 Stat. 65-67 (establishing the Department of the Treasury). A substantial body of scholarship views this terminological choice as reflecting an intention to make Treasury at least partially independent of the President, although by means other than limiting the latter's removal power. See Lawrence Lessig & Cass R. Sunstein, supra **[*96]** note 33, at 27-29; Gerhard Casper, supra note 33, at 240-42; Peter M. Shane, supra note 33, at 615-16. Finally, in reserving the question of appointments by "the head of one of the principal agencies," the Freytag Court itself included as examples of those agencies the "independent" FTC and the SEC as well as the clearly executive CIA, which suggests that the Court did not perceive a difference between the two types of agencies, at least in the Appointments Clause context. 501 U.S. at 887 n.4. We see no reason to exclude the independent regulatory agencies from the class of entities that are "Departments" for Appointments Clause purposes.

We note that, even accepting the reasoning of the 1933 Justice Department opinion, some

entities may exercise governmental authority in so limited a manner that they need not be viewed as "Departments" even though their heads are responsible only to the President. For example, the Committee for Purchase from People Who Are Blind or Severely Disabled, the members of which are appointed by the President alone, 41 U.S.C. § 2046(a), appears to exercise significant authority but is subordinate to no larger executive agency. Id. §§ 2046-48c. **[*97]** Given the narrow scope of the Committee's powers, however, we do not think that the Committee necessarily should be analyzed as a collective head of a department for Appointments Clause purposes.

4. Legislation Lengthening the Tenure of an Officer. As the Court held in Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam), the Appointments Clause by its terms and its structure prohibits Congress from itself exercising the power to appoint "Officers of the United States." The text and structure of the Clause reflect a deliberate constitutional choice to deny to the legislature the power to select the individuals who exercise significant governing authority as non-legislative officers of the federal government. See id. at 129-31 (reviewing the debates in the Philadelphia convention). Buckley noted that the Constitution expressly authorizes the selection of the Speaker of the House and the President pro tempore of the Senate from among the membership of those bodies, see U.S. Const. art. I, § 202, cl. 205; id. art. 20I, § 203, cl. 205, and held that nothing in the Constitution forbids Congress from appointing non-members as legislative branch officials **[*98]** to "perform duties . 20. 20. in aid of those functions that Congress may carry out by itself." 424 U.S. at 127-28, 139. This choice to exclude Congress as such from the appointments process can be set at naught by means other than legislation overtly vesting in Congress the power of appointment. Accordingly, the executive branch has traditionally viewed statutes that constitute an effective exercise by Congress of the power to appoint as violations of the Appointments Clause.

This issue sometimes arises in connection with statutes that attempt to extend the tenure of an officer with a set term, thus potentially denying the President the power he or she would otherwise have to reappoint the officer or select someone else. In 1951, for example, the President requested the Justice Department's views on the validity of a statute extending the terms of the members of a commission. See Displaced Persons Commission -- Terms of Members, 41 Op. Att'y Gen. 88 (1951). According to the original legislation creating the commission, the terms were to expire in June 1951, but prior to that date Congress amended the legislation to extend the commissioners' tenure to August 1952. **Acting** Attorney **[*99]** General Perlman advised the President that, while he did not think "there can be any question as to the power of the Congress to extend the terms of offices which it has created," this legislative power is subject "to the President's constitutional power of appointment and removal." Id. at 90. However, because the legislation did not attempt to restrict the President's authority to remove the commissioners at will, it was constitutionally harmless: the President remained free to exercise his appointment power simply by removing the incumbents from office at any time. See id. ("As so construed, the [extension legislation] presents no constitutional difficulties."); see also Pension Agents and Agencies, 14 Op. Att'y Gen. 147, 148-49 (1872) (discussing President's power to remove officer serving a term extended by statute). In this circumstance, Congress's action in lengthening an officer's term does not have the effect of usurping the power of appointment the Constitution vests in the President rather than in Congress. Cf. In re Benny, 812 F.2d 1133, 1142-43 (9th Cir. 1987) (Norris, J., concurring in the judgment):

> [T]he Appointments Clause precludes Congress from **[*100]** extending the terms of incumbent officeholders. I am simply unable to see any principled distinction between congressional extensions of the terms of the incumbents and more traditional forms of congressional appointments. Both implicate the identical constitutional evil -- congressional selection of the individuals filling nonlegislative offices.

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We think that the Department's 1951 opinion adopted the correct approach to this issue: while the power to lengthen the tenure of an incumbent officer is incident to Congress's general power to create, determine the duties of, and abolish offices, See Crenshaw v. United States, 134 U.S. 99 (1890); Civil Service Retirement Act -- Postmasters -- Automatic Separation from the Service, 35 Op. Att'y Gen. 309, 314 (1927) ("If, as stated in [Embry v. United States, 100 U.S. 680, 685 (1879),] Congress may at any time add to or take from compensation fixed, it may also, it would seem, by analogy, at any time shorten or lengthen a term of office."). that power cannot legitimately be employed to produce a result that is, practically speaking, a congressional reappointment to office. On this reasoning, the extension of tenure of officers **[*101]** serving at will raises no Appointments Clause problem, but lengthening the term of an officer who may be removed only for cause would be constitutionally questionable. In 1987, this Office issued an opinion that may be read to hold that legislation extending the term of any officer, even one serving at the pleasure of the President, is unconstitutional. See Reappointment of United States Parole Commissioners, 11 Op. O.L.C. 135 (1987). At the time it was issued, that opinion was directly contrary to long-standing executive branch precedent. See, e.g., Displaced Persons Commission -- Terms of Members, 41 Op. Att'y Gen. at 90-91. We recently revisited the question presented in the 1987 opinion and concluded that it was in error. See Legislation Extending the Terms of Office of United States Parole Commissioners (July 15, 1994) (publication forthcoming in 18 Op. O.L.C. (1994)). We therefore reaffirmed the traditional view that legislation extending the term of an officer subject to removal at will does not violate the Appointments Clause and disavowed our 1987 suggestion to the contrary. However, this conclusion, which we think sound in principle, has been rejected by the courts **[*102]** in at least one context. The Bankruptcy Amendments and Federal Judgeship Act of 1984 extended the tenure of bankruptcy judges, who can be removed only for cause, and that provision has been sustained repeatedly against constitutional challenge. The leading case, In re Benny, 812 F.2d 1133 (9th Cir. 1987), held that a statutory extension of tenure "becomes similar to an appointment" only "when it extends the office for a very long time." Id. at 1141; see also In re Investment Bankers, Inc., 4 F.3d 1556, 1562 (10th Cir. 1993) (agreeing with Benny and noting that the contrary Appointment Clause argument "has been rejected by every court that has considered it"), cert. denied, 114 S. Ct. 1061 (1994). We do not find especially persuasive the reasoning of Benny, Benny asserted that Wiener v. United States, 357 U.S. 349 (1958), implicitly rejected any Appointments Clause argument against term-extension legislation. 812 F.2d at 1141. We think that this overstates Wiener. Wiener dealt only with the President's removal power and did not consider any issue regarding the Appointments Clause. The date on which the President removed the plaintiff in **[*103]** Wiener from office was in fact within the term of office for which the plaintiff was originally appointed, although part of the backpay the plaintiff ultimately recovered was for a period after his original term would have expired. See 357 U.S. at 350-51 (term should have expired on March 1, 1954 as the law stood at the time plaintiff was appointed; President removed plaintiff on December 10, 1953; plaintiff recovered backpay for four months after March 1, 1954, because commission's authorization was extended after his appointment). The additional Supreme Court cases that Benny and other opinions have cited are distinguishable. See, e.g., Benny, 812 F.2d at 1141 (citing Shoemaker v. United States, 147 U.S. 282 (1893), which upheld legislation imposing additional duties on an officer); In re Tom Carter Enters., 44 B.R. 605, 607 (C.D. Cal. 1984) (citing Shoemaker and cases dealing with issues under the Contracts Clause and the Philippine Organic Act). Benny also pointed out that the First Congress twice extended the tenure of the first Postmaster General. 812 F.2d at 1142. While we

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agree that this fact supports the argument that Congress generally **[*104]** possesses the power to extend terms, the original Postmaster General served at the pleasure of the President, and thus the First Congress's actions placed no practical limitation on the appointments power. and it is possible that the doctrine of Benny is limited to its factual context. The result reached in the Benny line of cases was as a practical matter much less troublesome than its reverse, which would have put in question an enormous number of decisions within the bankruptcy system. It is therefore possible to characterize these decisions as a sensible resolution of a legal quandary, which may have compromised constitutional logic but did so at no real cost to the ultimate purposes of the Constitution. However, while this view of the cases may be quite sensible from a political-science perspective, it leaves the constitutional law on the subject in some disarray. However, the reasoning set forth in Benny and the cases that follow it is susceptible to general application, and it is unclear that the courts could repudiate Benny's conclusion with respect to other officers without undercutting the legitimacy of those cases.

The relevant precedents contemplate a **[*105]** continuum. At the one end is constitutionally harmless legislation that extends the term of an officer who is subject to removal at will. At the other end is legislation, constitutionally objectionable even under Benny, that enacts a lengthy extension to a term of office from which the incumbent may be removed only for cause. Legislation along this continuum must be addressed with a functional analysis. Such legislation does not represent a formal appointment by Congress and, absent a usurpation of the President's appointing authority, such legislation falls within Congress's acknowledged authority -- incidental to its power to create, define, and abolish offices -- to extend the term of an office. As indicated, constitutional harm follows only from legislation that has the practical effect of frustrating the President's appointing authority or amounts to a congressional appointment.

Our recent opinion on legislation extending the terms of members of the United States Sentencing Commission is illustrative of this functional approach. After the Sentencing Commission had been appointed, Congress enacted legislation "to provide [that] a member of the United States Sentencing Commission **[*106]** may continue to serve until a successor is appointed or until the expiration of the next session of Congress." Pub. L. No. 102-349, 106 Stat. 933 (1992). Commissioners may be removed only for cause. 28 U.S.C. § 20991(a). We concluded that the statute did not function to violate the President's appointment power. See Whether Members of the Sentencing Commission Who Were Appointed Prior to the Enactment of a Holdover Statute May Exercise Holdover Rights Pursuant to the Statute (Apr. 5, 1994) (publication forthcoming in 18 Op. O.L.C. (1994)). The statute left the President free to "nominate whomever he want[ed] at precisely the same time as he could before [the statute was enacted]." Id. at 10. We noted that the effect of the legislation could actually be to augment the President's power by giving him "the option of retaining the holdover officer until he chooses to nominate a successor." Id.

We acknowledged the argument that the statute might give Congress the opportunity to appoint, in effect, an incumbent to a new term because the President's removal authority is statutorily restricted and the Senate might refuse to **confirm** any presidential nominee in order to retain **[*107]** a congressionally favored incumbent. Id. But this argument was unavailing for two reasons. First, the argument is unduly speculative insofar as it hypothesizes contumacious conduct on the part of the Congress, and whatever danger such a possibility might entail was mitigated by the limitation on the period for which a holdover may continue to serve. Second, we noted that the holdover provision is

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the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.'" Mistretta v. United States, 488 U.S. 361, 381 (1989) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). The Constitution thus guards against "the accumulation of excessive authority in a single Branch" not by providing mutually exclusive lists of executive, legislative, and judicial powers, but by imposing on each of the three branches "a degree of overlapping responsibility, a duty of interdependence as well as independence." Id. at 381. The Supreme Court repeatedly has rejected the "'archaic view of the separation of powers as requiring three airtight departments of government.'" Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) (citation omitted). In doing so, the Court has noted that such a view is "inconsistent with the origins of th[e] doctrine" as **[*6]** well as with "the contemporary realities of our political system." Id. at 441; see also id. at 442 & n.5 (noting that James Madison in The Federalist No. 2047 and Justice Joseph Story in his famous treatise on the Constitution rejected the claim that the Constitution requires an absolute separation). The constitutional boundaries between the powers of the branches must be determined "according to common sense and the inherent necessities of the governmental co-ordination." J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928).

Some general observations on the sources and methodology we employ in analyzing separation of powers questions are appropriate. We believe that the constitutional structure obligates the executive branch to adhere to settled judicial doctrine that limits executive and legislative power. While the Supreme Court's decisions interpreting the Constitution cannot simply be equated with the Constitution, we are mindful of the special role of the courts in the interpretation of the law of the Constitution. "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 **[*7]** Cranch) 137, 177 (1803).

The Supreme Court's decisions interpreting the constitutional separation of powers among Congress, the President, and the courts recognize the founders' basic concern over the "encroaching nature" of power, as well as their specific belief that Congress is potentially the most dangerous branch. "It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.'" Mistretta, 488 U.S. at 382 (citation omitted). The Court's decisions have employed three distinct principles in resolving separation of powers disputes. First, where "[e]xplicit and unambiguous provisions of the Constitution prescribe and define . 20. 20. just how [governmental] powers are to be exercised," Chadha, 462 U.S. at 945, the constitutional procedures must be followed with precision. Second, where the effect of legislation is to vest Congress itself, its members, or its agents with "'either executive power or judicial power,'" the statute is unconstitutional. MWAA, 501 U.S. at 274 (citation **[*8]** omitted). We shall refer to this theme in the Supreme Court's separation of powers jurisprudence as "the anti-aggrandizement principle." Finally, legislation that affects the functioning of one of the other branches may be unconstitutional if it prevents the affected branch "from accomplishing its constitutionally assigned functions." Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) (legislation affecting the executive branch); accord CFTC v. Schor, 478 U.S. 833, 851, 856-57 (1986) (legislation affecting the judiciary). We refer to this line of reasoning as "the general separation of powers principle."

Our analyses are guided and, where there is a decision of the Court on point, governed by the Supreme Court's decisions on separation of powers. At the same time, the executive branch has an independent constitutional obligation to interpret and apply the Constitution. Indeed, Article II specifically requires the President to take an oath or affirmation "to preserve, protect and defend the Constitution." U.S. Const. art. 20II, § 201, cl. 208. That obligation is of particular importance in the area of separation of powers, where the issues

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> unarguably valid as applied to Sentencing Commissioners who took office after the statute's enactment. We concluded that "[i]t is simply not persuasive to argue that the President's appointment power is effectively frustrated when incumbent commissioners hold over but not when subsequent commissioners hold over." Id.
>
> We also found it significant that the holdover statute was neutral in its application. We reserved the question of whether a holdover statute "might amount to a prohibited congressional designation, even if the holdover period is for a short time," if the statute "would create or repeal holdover provisions for selective members of the same commission or for classes of members on the same commission, e.g., those appointed on a certain date or those from a particular **[*108]** political party." Id. at 14 n.8.

5. Legislation Imposing Additional Duties on an Officer. The executive branch has consistently maintained that a statute creating a new office and conferring it and its duties on the incumbent of an existing office would be unconstitutional under the Appointments Clause. See, e.g., President Buchanan's signing statement dated June 25, 1860, relating to the Civil Appropriations Act for fiscal year 1861, in 5 Messages and Papers of the Presidents, 1789-1897, at 597-98 (1897) (construing Act to avoid the constitutional problem). Congress's recognized authority to alter the duties and powers of existing offices could be employed to achieve substantially the same result if the legislature were unconstrained in the duties it could add to an office. The same possibility is not presented by Congress's power to reduce or limit the duties of an officer. Except with respect to (certain) constitutional officers, Congress has plenary authority to eliminate offices altogether, subject to the general separation of powers principle. The lesser-included power to take away part of an officer's authority does not in itself enable Congress to choose **[*109]** which individual will exercise authority and thus does not implicate the Appointments Clause. See United States v. San Jacinto Tin Co., 125 U.S. 273, 284 (1888) (Congress, as "the legislative body which created the office" of Attorney General, has the authority to put "restrictions . 20. . upon the exercise of [the Attorney General's] authority").

In Crenshaw v. United States, 134 U.S. 99 (1890), the Supreme Court upheld a statute that affected undergraduates ("cadet midshipmen") at the Naval Academy by redesignating them as "naval cadets" and restricting the circumstances in which they would be commissioned upon graduation. The Court concluded that "Congress did not thereby undertake to name the incumbent of any office. It simply changed the name, and modified the scope of the duties." Id. at 109.

The Supreme Court accordingly has interpreted the Constitution to limit the legislature's discretion. The leading case, Shoemaker v. United States, 147 U.S. 282 (1893), concerned a statute that created a commission to select the land for Rock Creek Park in the District of Columbia. Three of the five members were to be appointed by the President and **confirmed** by the Senate; **[*110]** the persons holding two existing federal offices, the chief of engineers of the Army and the engineer commissioner of the District, were declared members ex officio. The Court rejected an Appointments Clause challenge to the assignment of the two engineers to the new commission:

> [W]e do not think that, because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the President and **confirmed** by the Senate. It cannot be doubted, and it has frequently been the case, that Congress may

> increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.

Id. at 301. The legislation at issue was valid, the Court concluded, because the new duties assigned to the engineers "cannot fairly be said to have been dissimilar to, or outside of the sphere of," the engineers' existing responsibilities. Id.

The Shoemaker rule ensures "that Congress [is] not circumventing the Appointments Clause by unilaterally appointing an incumbent to a new and distinct office." Weiss v. United States, **[*111]** 114 S. Ct. 752, 759 (1994). For the imposition of new duties on an officer to be valid under Shoemaker, two requirements must be met. First, as in Shoemaker itself, the legislation must confer new duties on "offices, . 20. 20. [not] on any particular officer." Olympic Fed. Sav. & Loan Ass'n v. **Director,** Office of Thrift Supervision, 732 F. Supp. 1183, 1192 (D.D.C.) (emphasis in original), appeal dismissed as moot, 903 F.2d 837 (D.C. Cir. 1990). "Had the Chief of Engineers of the United States Army or the Engineer Commissioner of the District of Columbia resigned from office after the commission was established, he would no longer have served on the commission -- the new Chief of Engineers or Engineer Commissioner would have taken over those duties." Id. at 1192-93 (discussing facts in Shoemaker). The statute at issue in Olympic Federal, in contrast, abolished certain offices (the three-person Federal Home Loan Bank Board) while simultaneously defining the duties of a new office (the **Director** of OTS) and designating as the first **Director** the holder of one of the abolished offices (the chair of the Federal Home Loan Bank Board). See id. at **[*112]** 1186. The Olympic Federal court correctly determined that by doing so the statute in effect appointed the particular individual who was chair of the old board to a new position. Id. at 1193. The Olympic Federal court thought the legislation would have been valid if Congress had created a three-person directorate for the OTS and designated the members of the former board as the **directors.** (The court reasoned that the germaneness requirement of Shoemaker would be satisfied because OTS was absorbing the duties of the old board as well as acquiring other, related ones.) 732 F. Supp. at 1193. We reached a similar conclusion in 1980 in opining that Congress could merge the Court of Claims and the Court of Customs and Patent Appeals and designate the members of those courts to serve as members of the merged court. See Legislation Authorizing the Transfer of Federal Judges from One District to Another, 4B Op. O.L.C. 538, 541 (1980). The "merger situation . 20. 20. involves the end of one institution and the continuance of its major functions in another," and it was reasonable for Congress "to provide in this context for the relocation of experienced and capable judicial **[*113]** personnel, and for their continuing to perform the functions of the office to which they were originally appointed." Id.

The second facet of the Shoemaker rule is the requirement that the new duties be "germane to the offices already held by" the affected officers. 147 U.S. at 301. This inquiry is necessarily case-specific. In Weiss, the Court examined closely the specific duties of military judges and the general responsibilities of military and naval officers and concluded that they are so intertwined that the selection by the Judges Advocate General of certain military and naval officers to serve for a time as military judges is consistent with the germaneness requirement. 114 S. Ct. at 759-60. In giving advice on this issue, we also have looked at the reasonableness of assigning the new duties "in terms of efficiency and institutional continuity," and we have asked whether "it could be said that [the officers'] functions . 20. 20. [with the additional duties] were within the contemplation of those who were in the first place responsible for their appointment and **confirmation.**" Legislation Authorizing the Transfer of Federal Judges from One District to Another, 4B **[*114]** Op. O.L.C. 538, 541 (1980).

The Weiss decision may have weakened judicial enforcement of Shoemaker's germaneness requirement by suggesting that some legislation that adds new duties is valid regardless of

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whether it satisfies the requirement. The opinion of the Court stressed the fact that "[i]n Shoemaker, Congress assigned new duties to two existing offices, each of which was held by a single officer. This no doubt prompted the [Shoemaker] Court's description of the argument as being that 'while Congress may create an office, it cannot appoint the officer.' . 20. 20. But here the statute authorized an indefinite number of military judges, who could be designated from among hundreds or perhaps thousands of qualified commissioned officers." 114 S. Ct. at 759. For that reason, the Court concluded, there was "no ground for suspicion here that Congress was trying to both create an office and also select a particular individual to fill the office." Id. The Court nevertheless went on to consider the germaneness issue and concluded that the duties of military judges are adequately related to the duties of the commissioned officers from whom the judges are selected. **[*115]** Id. at 760.

In a separate opinion, Justice Scalia argued that "'germaneness' is relevant whenever Congress gives power to confer new duties to anyone other than the few potential recipients of the appointment power specified in the Appointments Clause," because "taking on . 20. 20. nongermane duties . 20. 20. would amount to assuming a new 'Offic[e]' within the meaning of Article II, and the appointment to that office would have to comply with the strictures of Article II." Id. at 770 (Scalia, J., concurring in part and concurring in the judgment). We find Justice Scalia's reasoning persuasive and believe that in an appropriate setting the executive branch should urge the Court expressly to accept it. In light of the Weiss Court's detailed examination of the germaneness issue, this may not require the Court in fact to modify the doctrine of that case because it is unclear to us that the Court actually intended to hold germaneness constitutionally irrelevant in Weiss-type circumstances. The Court may instead simply have been emphasizing the fact that assignment of new and nongermane duties to a few specific officers not only violates the Appointments Clause per se, **[*116]** but also fails under the more general anti-aggrandizement principle of its decisions. We believe that it is appropriate, therefore, to review proposed new-duties legislation for germaneness even where the new duties are assigned to large or indefinite groups.

6. The Ineligibility and Incompatibility Clauses. The Constitution places two important restrictions on the universe of persons who may be appointed to serve as officers of the United States. U.S. Const. art. 20I, § 206, cl. 202. One possible restriction is notable for its absence from the Constitution: although Articles I and II and the Twelfth Amendment establish citizenship and age requirements for serving as a member of Congress, the President, or the Vice President (and also set varying minimum age requirements), see U.S. Const. art. 20I, § 202, cl. 202 (Representatives); id. art. 20I, § 203, cl. 203 (Senators); id. art. 20II, § 201, cl. 204 (the President); id. amend. 20XII (Vice President), the Constitution places no such limitations on anyone who becomes an officer through one of the processes prescribed by the Appointments Clause. The Ineligibility Clause states that "[n]o Senator or Representative **[*117]** shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time." Id. The Clause "restricts the President's power to appoint Members of Congress," and "[i]t has long been settled within the executive branch that the President, in exercising his powers of appointment under Article 20II, § 202, cl. 202, will not make an appointment in violation of the . 20. 20. clause." Members of Congress Holding Reserve Commissions, 1 Op. O.L.C. 242, 244 (1977). The most common problem under the Ineligibility Clause arises from legislation that creates a commission or other entity and simultaneously requires that certain of its members be Representatives or Senators, either ex officio or by selection or nomination by the congressional leadership. Unless the congressional members participate only in advisory or ceremonial roles, or the commission itself is advisory or ceremonial, the appointment of members of Congress to the commission would violate the Ineligibility Clause. After FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. **[*118]** Cir. 1993), cert. dismissed, 115 S. Ct. 537 (1994), it appears that designating a member of Congress to serve on a commission with any executive functions, even in what was expressly labeled a ceremonial or advisory

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role, may render the delegation of significant governmental authority to the commission unconstitutional as a violation of the anti-aggrandizement principle. See id. at 826-27.

The Incompatibility Clause provides that "no Person holding any Office under the United States, shall be a Member of either House during his continuance in Office." U.S. Const. art. 20I, § 206, cl. 202. The Clause is primarily a restriction on Congress and its members: the Incompatibility Clause "disqualifies individuals who have already been appointed from assuming or retaining seats in Congress." Reserve Commissions, 1 Op. O.L.C. at 244; cf. Members of Congress Serving in the Armed Forces, 40 Op. Att'y Gen. 301 (1943). The Incompatibility Clause does not prohibit members of Congress from serving in positions that are not offices in the constitutional sense. See, e.g., Proposed Commission on Deregulation of International Ocean Shipping, 7 Op. O.L.C. 202, 202-03 (1983) (members **[*119]** of Congress may serve as members of a "purely advisory" commission because the members need not be officers). However, the President's duty to take care that the law of the Incompatibility Clause is observed requires him or her to ensure that appointments Cf. Special Deputization of Members of Congress, at 1 n.1 (May 25, 1994) (publication forthcoming in 18 Op. O.L.C. (1994)) (recognizing Incompatibility Clause requirement but finding it unnecessary to reach that issue). and legislation creating governmental positions are consistent with the Clause. See, e.g., Case of the Collectorship of New Orleans, 12 Op. Att'y Gen. 449, 451 (1868) ("in view of the" Incompatibility Clause, an executive officer's acceptance of a seat in Congress "must be considered as having the legal character of a resignation of the office"); Appointments to the Commission on the Bicentennial of the Constitution, 8 Op. O.L.C. 200, 207-08 (1984) (providing advice about "various structural arrangements within the Commission that might be designed to respect the Incompatibility Clause"). The suggestion in this Office's 1977 opinion on the Clause that "exclusive responsibility for interpreting and enforcing **[*120]** the Incompatibility Clause rests with Congress," Reserve Commissions, 1 Op. O.L.C. at 242, thus was an overstatement.

7. The Recess Appointments Clause. With respect to officers of the United States, the Constitution vests the President with the "Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. 20II, § 202, cl. 203. "A long line of opinions of the Attorneys General, going back to 1823 . 20. 20. and which have been judicially approved . 20. 20. has firmly established that . 20. 20. [t]he President's power to make recess appointments . 20. 20. extends to all vacancies existing during the recess regardless of the time when they arose." Recess Appointments -- Compensation, 3 Op. O.L.C. 314, 314 (1979) (citations omitted); accord Executive Authority to Fill Vacancies, 1 Op. Att'y Gen. 631 (1823). The most thorough judicial treatment of the issue, which quotes extensively from Attorney General Wirt's 1823 opinion, is United States v. Allocco, 200 F. Supp. 868 (S.D.N.Y. 1961), aff'd, 305 F.2d 704 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963). **[*121]** Although there was some early uncertainty about the President's power to make appointments under the Recess Appointments Clause during intrasession recesses, that question was settled within the executive branch by an often-cited opinion of Attorney General Daugherty concluding that the President is so authorized. Executive Power -- Recess Appointments, 33 Op. Att'y Gen. 20 (1921). The most difficult problem of interpretation under the Clause today is determining how substantial an intrasession recess must be to give rise to the President's power. There must be a vacancy in order for the President to exercise the authority granted by the Recess Appointments Clause. See Recess Appointments, 3 Op. O.L.C. at 317 (the power to make a "recess appointment presupposes the existence of a vacancy," and an appointment cannot in itself remove an incumbent so as to create a vacancy). In many situations, whether a vacancy exists will depend on the correct interpretation of a holdover provision in the statute creating the office. The scanty caselaw on this issue -- which is a matter of statutory construction rather than of constitutional law -- is not easily reconciled. Compare Staebler v. **[*122]** Carter, 464 F. Supp. 585 (D.D.C. 1979) with Mackie v. Clinton, 827 F. Supp. 56 (D.D.C. 1993), vacated as moot, Nos. 93-5287 & 93-5289, 1994 WL 163761 (D.C. Cir. Mar. 9, 1994). Attorney General Daugherty concluded that a twenty-eight-

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day recess was sufficient, but cautioned that "the term 'recess' must be given a practical construction." Id. at 24-25. We agree with his view that the President has discretion to make a good-faith determination of whether a given recess is adequate to bring the Clause into play. "In this connection I think the President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate. 20. 20. 20. But there is a point, necessarily hard of definition, where palpable abuse of discretion might subject his appointment to review." 33 Op. Att'y Gen. at 25. Giving advice on how the President may properly exercise that discretion has proven a difficult task. See Recess Appointments During the Recess of the Senate Beginning January 3, 1992, 16 Op. O.L.C. 15 (1992) (preliminary print) (eighteen-day recess a sufficient **[*123]** period, particularly in light of fact that except for a brief formal session on January 3 the Senate would actually be absent for fifty-four days); Recess Appointments, 3 Op. O.L.C. at 316 (President may make recess appointments "during a summer recess of the Senate of a month's duration").

8. Acting and Interim Appointments. Early Attorneys General repeatedly opined that the President enjoyed a constitutional power of appointment empowering the President to make temporary or ad interim appointments to offices in cases of need without conforming to the requirements of the Appointments or Recess Appointments Clause. See, e.g., Appointment of **Acting** Purser, 6 Op. Att'y Gen. 357, 365 (1854) (executive power of "filling up a vacancy by an appointment of one to act ad interim, and for a particular exigency, in a distant service" could be exercised to make temporary appointment of **acting** purser despite statutory prohibition on anyone **acting** as purser prior to Senate **confirmation)**; Executive Power of Appointment, 4 Op. Att'y Gen. 248, 248 (1843) (appointment power is derived from President's Take Care Clause duty, "an obligation imposed by the constitution, and from the **[*124]** authority of which no mere act of legislation can operate a dispensation," although President could not pay interim appointees without an appropriation). Their initial reaction to congressional legislation on the subject of vacancies was therefore to view it as having neither the purpose nor the effect of supplanting the President's preexisting constitutional authority. See Office and Duties of Attorney General, 6 Op. Att'y Gen. 326, 352 (1854) ("Perhaps the truer view of the question is to consider the . 20. 20. statutes as declaratory only, and to assume that the power to make such temporary appointment is a constitutional one."). After the enactment of the Vacancies Act of 1868, 15 Stat. 168, however, the Attorneys General treated the Act as providing the exclusive means of making temporary appointments to those offices covered by the statute. See, e.g., Appointments Ad Interim, 17 Op. Att'y Gen. 530 (1883); Appointments Ad Interim, 16 Op. Att'y Gen. 596, 596-97 (1880) (authority to fill vacancy in the office of Navy Secretary is "a statutory power," and when the power is exhausted, "the President is remitted to his constitutional power of appointment"). A 1904 **[*125]** opinion attempted to synthesize the older and the more recent views, treating as reasonable and legitimate Congress's wish to cabin presidential discretion to make interim appointments while the Senate is in session, but describing as a "fundamental right as Chief Executive" the President's authority "to make such a temporary appointment, designation, or assignment of one officer to perform the duties of another whenever the administration of the Government requires it." Temporary Recess Appointments, 25 Op. Att'y Gen. 258, 261 (1904); see also Promotion of Marine Officer, 41 Op. Att'y Gen. 291, 294 (1956) (President has constitutional authority to appoint "key military personnel to positions of high responsibility" without following statutory procedures).

There is little modern caselaw on the President's power to make temporary appointments to offices requiring Senate **confirmation.** Indeed, at least one court has indicated a judicial willingness to defer to the views of the Attorney General on the President's authority to make temporary appointments. See Olympic Federal Sav. & Loan Ass'n v. **Director,** Office of Thrift Supervision, 732 F. Supp. 1183, 1197-98 (D.D.C.) ("The Attorney **[*126]** General is charged with responsibility for ensuring that only lawfully appointed officials act on behalf of the United States, and consequently his interpretation of law on this subject is entitled to great deference."), appeal dismissed as moot, 903 F.2d 837 (D.C. Cir. 1990). The "leading"

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judicial decision is a brief per curiam court of appeals opinion denying a motion for a stay of the district court's mandate pending appeal, Williams v. Phillips, 482 F.2d 669 (D.C. Cir. 1973) (per curiam). Williams was a challenge to the legality of actions taken by the **acting director** of the Office of Economic Opportunity on the grounds that the President lacked authority to appoint an **acting director** of that office and to continue the interim appointment for over four months without submitting to the Senate any nomination to the position of **director.** The district court declared the President's action unlawful. The court of appeals refused to grant a stay of the district court's order because in its judgment the **acting director** had failed to show the requisite likelihood of success on the merits. The brief discussion in Williams of the merits emphasized that Article II "unequivocally **[*127]** requires an officer of the United States to be **confirmed** by the Senate unless different provision is made." The court nevertheless observed that "[i]t could be argued" that the President has "an implied power, in the absence of limiting legislation . 20. 20. to appoint an **acting director** for a reasonable period of time before submitting the nomination of a new **director** to the Senate" 482 F.2d at 670. Because of its procedural posture, Williams did not actually resolve the constitutional issue, but it suggested somewhat obliquely that what non-statutory power the President possesses to make interim appointments to offices requiring Senate **confirmation** can be employed only for a "reasonable time required by the President to select persons for nomination." Id. at 671. Looking to the thirty-day period that was, at the time, permitted temporary appointments under the Vacancies Act for an indication of what a reasonable period would be, Williams concluded that even if the implied power existed, a four-and-a-half-month period without any nomination was unreasonable. Id. at 670-71. Our opinions have struggled with the meaning of Williams. See, e.g., Power of the President **[*128]** to Designate **Acting** Member of the Federal Home Loan Bank Board, 1 Op. O.L.C. 150, 151-52 (1977) (court of appeals' opinion in Williams "can perhaps be read as disagreeing with" the argument that the President has no non-statutory authority or "as perhaps agreeing" that he does have such authority, "in the absence of a limiting statute," subject, of course, to the condition that he must submit a nomination within a reasonable time). Since Williams was decided, the Vacancies Act has been amended to provide for an initial appointment period of 120 days. Up to two extensions, each lasting 120 days, may be made depending on the specific circumstances of the vacancy. Moreover, the Vacancies Act also tolls the running of these periods when particular conditions obtain. See 5 U.S.C. § 203348. Thus, the Vacancies Act allows temporary appointments, in appropriate circumstances, of durations well in excess of even one year. Accordingly, we would not currently view a four-and-a-half-month temporary appointment as necessarily exceeding a reasonable duration, provided that a nomination is submitted to the Senate.

On the assumption that Williams can be read to indicate that "[t]o **[*129]** keep the Government running calls for the designation of **acting** officials to fill vacancies in the absence of express statutory authority," Department of Energy -- Vacancies, 2 Op. O.L.C. 113, 117 (1978) (citing Williams), we have argued that the reasonableness of a given interim appointment should be measured not by a per se rule but by a variety of pragmatic factors. Those factors include "the difficulty of finding suitable candidates," id. at 118, "the specific functions being performed by the [interim officer]; the manner in which the vacancy was created (death, long-planned resignation) . 20. 20. and particular factors affecting the President's choice [such as] a desire to appraise the work of [the interim officer] or the President's ability to devote attention to the matter." Status of the **Acting Director,** Office of Management and Budget, 1 Op. O.L.C. 287, 290 (1977). However, given the ambiguity of the Williams opinion, we have urged caution, even when the relevant department head has statutory authority to designate another official to serve in an **acting** capacity. See **Acting** Officers, 6 Op. O.L.C. 119, 121-22 (1982).

We recently revisited the vacancies **[*130]** question in relation to the United States Commission on Civil Rights. The Commission is headed by an eight-member committee that works on a part-time basis, while its day-to-day functioning is administered by a staff **director.** The statute creating the position of staff **director** vests the authority to appoint

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the staff **director** in the President, subject to the concurrence of a majority of the members of the Commission. In keeping with the Department of Justice's long-standing position, we concluded that, when confronted with a vacancy in the position of staff **director,** the President has constitutional authority to appoint an **acting** staff **director,** unless Congress had statutorily limited this authority. We stated:

> The President's take care authority to make temporary appointments rests in the twilight area where the President may act so long as Congress is silent, but may not act in the face of congressional prohibition. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Thus, the Vacancies Act, 5 U.S.C. §§ 203345-3348, constitutes a restriction on the President's authority, as opposed to a source of power. If it applies to a given **[*131]** position, the Vacancies Act constitutes the sole means by which a temporary appointment to that position may be made.

Appointment of an **Acting** Staff **Director** of the United States Commission on Civil Rights, at 3 (Jan. 13, 1994) (publication forthcoming in 18 Op. O.L.C. (1994)).

We concluded that Congress had not limited the President's constitutional authority with respect to the appointment of an **acting** staff **director** of the Civil Rights Commission. The Vacancies Act does not apply to the position of staff **director.** The Vacancies Act only applies to temporary appointments "[w]hen an office[]" is vacant. 5 U.S.C. § 203346 (emphasis added). Because the staff **director** for the Commission on Civil Rights 20is not a constitutional officer, the Vacancies Act does not apply. See Olympic Fed. Sav. & Loan Ass'n v. **Director,** Office of Thrift Supervision, 732 F. Supp. 1183, 1195 (D.D.C.) (finding that "officer" as used in the Vacancies Act, 5 U.S.C. § 203346, means "constitutional officer"), appeal dismissed as moot, 903 F.2d 837 (D.C. Cir. 1990). Indeed, since the Commission is an exclusively investigatory and advisory body, see Hannah v. Larche, 363 U.S. 420, 441 (1960), **[*132]** none of the positions at the Commission are constitutional offices. See Statement on Signing the United States Commission on Civil Rights Act of 1983, 2 Pub. Papers 1634, 1635 (Nov. 30, 1983) (Statement by the Department of Justice). Accordingly, the Vacancies Act does not apply to the Commission at all. In addition, the statute creating the position is silent on the subject of temporarily filling a vacancy in that position. Consequently, we concluded that the President was free to exercise his constitutional authority to appoint an **acting** staff **director.** A federal district court ruled to the contrary, but its decision has been vacated. See George v. Ishimaru, 849 F. Supp. 68 (D.D.C. 1994), vacated as moot, No. 94-5111 1994 WL 517746 (D.C. Cir. Aug. 25, 1994).

9. Other Issues of Combined, Collective, and Interbranch Authority and the Appointments Clause. The Appointments Clause prohibits Congress or the President from obscuring the lines of authority and responsibility within the federal government: the political branches cannot vest the power to perform "a significant governmental duty" of an executive, administrative, or adjudicative nature in any federal official **[*133]** who is not appointed in a manner consistent with the Clause. Buckley v. Valeo, 424 U.S. 1, 141 (1976) (per curiam). The Clause, however, does not prohibit creative combinations of officers and authorities as long as a person or body with legitimate appointing authority under the Clause has appointed -- and therefore is accountable for -- all federal officials with such power. Cf. Weiss v. United States, 114 S. Ct. 752, 768 (1994) (Souter, J., concurring); Silver v. United States Postal Serv., 951 F.2d 1033, 1040-41 (9th Cir. 1991).

The Appointments Clause therefore does not forbid the exercise of authority by a decision-making body with a collective head that consists of principal officers and an inferior officer

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removable by them. See Silver, 951 F.2d at 1040-41. Nor is the Clause offended by the delegation of concurrent authority to a Senate-**confirmed** officer and her deputy when the latter is appointed by a head of department. See Department of Housing and Urban Development -- Delegations of Authority, 2 Op. O.L.C. 87, 89-91 (1978). In both cases all of the officials performing significant governmental duties are validly appointed officers.

The exercise of **[*134]** authority by a group of principal officers, some of whom serve at the President's pleasure while others are removable by the President only for cause, presents no Appointments Clause issue: once again, the Clause's procedures for appointing federal officials so that they may wield "significant authority" have been met. The Clause's strictures are likewise satisfied by arrangements in which a head of department, pursuant to a statute, designates a subordinate to sit in his or her stead on a commission or board: if the designation by the head were authorized by statute, then it would itself be an appointment in conformity with the Clause, and even if it were not, the designee would be **acting** for or on behalf of the head of department, whose actions, for constitutional purposes, are the head's.

Finally, the Appointments Clause does not invalidate commissions composed of members or appointees from more than one branch of the government. Mistretta v. United States, 488 U.S. 361, 412 (1989), upheld the constitutionality of the Sentencing Commission, which includes at least three federal judges and the Attorney General as an ex officio non-voting member, while Buckley concluded **[*135]** that a commission consisting of a mixture of presidential appointees and members of Congress selected by the Speaker and President pro tempore can validly exercise "powers . 20. 20. essentially of an investigative and informative nature," 424 U.S. at 137. Interbranch entities are subject to constitutional review on other grounds, including the anti-aggrandizement and general separation of powers principles, but their interbranch nature does not in itself raise any Appointments Clause question.

C. Removal Power Issues

1. The Executive's Removal Power. The first great constitutional debate in the First Congress concerned the power to remove officers of the United States. A wide range of views was expressed over the respective roles -- or lack thereof -- of the President and Congress in removal matters, Professor Gerhard Casper has identified seven "major positions [in the First Congress] on the question of the location of the removal power," ranging from the view that the President has illimitable authority to remove any non-judicial officer to the argument that Congress has plenary discretion over removal issues under the Necessary and Proper Clause. See Gerhard Casper, **[*136]** supra note 33, at 234-35. but ultimately, as the Supreme Court has interpreted the "Decision of 1789," Congress rejected a legislative role in removal in favor of recognizing plenary presidential power over officers appointed by the President with the advice and consent of the Senate. See Bowsher v. Synar, 478 U.S. 714, 723-24 (1986); see also Myers v. United States, 272 U.S. 52, 111-44 (1926) (discussing debates and subsequent acquiescence in the legislative decision).

The nineteenth-century Justices interpreted the First Congress's actions as illustrative of a more general principle that "the power of removal [is] incident to the power of appointment." Ex parte Hennen, 38 U.S. (13 Pet.) 230, 259 (1839). Thus, it was determined that inferior officers appointed by a department head were not removable by the President (absent statutory authorization to do so) but by the secretary who appointed them and that a new appointment by the proper officer amounted to a removal of the previous incumbent by operation of law. Id. at 260-61; accord The President and Accounting Offices, 1 Op. Att'y Gen. 624 (1823). In United States v. Perkins, 116 U.S. 483 (1886), the **[*137]** Court held that, "when Congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest." Id. at 485. Although the Court did not address any questions about presidential removal powers, its reasoning about Congress's authority to limit department heads' removal power could logically be applied to the President with respect to inferior officers whose

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appointment is vested by statute in the President alone. "The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed. The head of a Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto." Perkins, 116 U.S. at 485. The President similarly "has no constitutional prerogative" to make appointments without senatorial advice and consent "independently" of congressional authorization -- that is, the President **[*138]** may make appointments without the advice and consent of the Senate only if Congress authorizes the President to do so. See Myers, 272 U.S. at 161-62 (noting without deciding the question). The power to suspend an officer, finally, was held to be "an incident of the power of removal." Burnap v. United States, 252 U.S. 512, 515 (1920) (relying primarily on nineteenth-century precedents). The Court's conclusions in Hennen, Perkins, and Burnap remain good law. We do not read Morrison v. Olson, 487 U.S. 654 (1988), to cast any doubt on the continuing vitality of these decisions. See id. at 689 n.27, 690 n.29 (implicitly reaffirming Perkins).

The seminal twentieth-century cases on removal, Myers and Humphrey's Executor v. United States, 295 U.S. 602 (1935), both addressed the power to remove officers appointed by the President with the advice and consent of the Senate. Myers held unconstitutional a statute requiring Senate approval of the President's decision to remove certain postmasters. The Court based its holding in part on its interpretation of the "Decision of 1789" and on its understanding of the President's constitutional role. "Made responsible **[*139]** under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal. 20. 20. 20. Each head of a department is and must be the President's alter ego in the matters of that department where the President is required by law to exercise authority." 272 U.S. at 132-33. An illimitable removal power, Myers concluded, is a necessary incident to the President's power and responsibility to take care that the laws are faithfully executed. Id. at 163-64. The Court dismissed the argument that the rationale for giving the President plenary removal authority over heads of department and other great officers of state simply did not apply to postmasters with the observation that Congress could extend civil service tenure protection to the latter simply by vesting their appointment "in the head[] of department[] to which they belong." 272 U.S. at 174.

Any suggestion in Myers that the Supreme Court would invalidate all limitations on the President's power to remove officers appointed with the advice and consent of the Senate was firmly repudiated **[*140]** less than a decade later by Humphrey's Executor. The case concerned the President's power to remove a member of the Federal Trade Commission on the grounds of policy differences, despite the existence of a for-cause removal provision in the statute establishing the Commission. The statute establishing the FTC included a provision stating that a commissioner "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office," which the Court construed as intended "to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here." Humphrey's Ex'r, 295 U.S. at 623, 626. The Court dismissed Myers as inapposite because a postmaster is "an executive officer restricted to the performance of executive functions," and "the necessary reach of the decision" only "goes far enough to include all purely executive officers [and] no farther." 295 U.S. at 627-28. Humphrey's Executor expressly repudiated the language in Myers suggesting that the President's general executive powers and Take Care Clause responsibilities rendered it unconstitutional for Congress to reduce or eliminate presidential control over **[*141]** the administration of federal law. "In the course of the opinion [in Myers], expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of stare decisis. In so far as they are out of harmony with the views here set forth, these expressions are disapproved." Humphrey's Ex'r, 295 U.S. at 626. By contrast, the Court examined the functions of the FTC and concluded that it was "an

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administrative body" exercising "quasi-legislative or quasi-judicial powers," rather than an agency of the executive branch. Id. at 628. The Court reasoned that Congress possesses the authority in creating such a body "to require [it] to act in discharge of [its] duties independently of executive control." Id. at 629. See also id. at 628:

> The FTC was created by Congress to "carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other special duties as a legislative or judicial aid. 20. 20. 20. Its duties are to be performed without executive leave and, in the contemplation of the statute, must be free from **[*142]** executive control." In Wiener v. United States, 357 U.S. 349 (1958), the Court extended the scope of Humphrey's Executor by inferring the existence of a for-cause limitation on the President's power to remove an officer with quasi-adjudicatory functions, even in the absence of an express statutory removal restriction. The rationale of Wiener, which is essentially that Congress must have implied a for-cause removal restriction when the Court believes that the functions of the agency demand such tenure protection, 357 U.S. at 353-56, seems questionable. There would be nothing illogical in a legislative decision, for example, to protect against review or revision of the decisions of the agency, see id. 354-55, while placing the agency's decision makers within the control of the President. Congress has made such decisions from the beginning of the Republic. To the extent that Wiener assumes that control is and ought to be a binary matter -- either plenary or non-existent -- its reasoning is difficult to reconcile with more recent separation of powers decisions that reject such an either/or approach to presidential control. See, e.g., Morrison v. Olson **[*143]** , 487 U.S. 654 (1988). Despite these possible flaws in its logic, however, Wiener's holding continues to be followed. See FEC v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993) (concluding that the members of the Federal Election Commission probably are removable only for cause despite the absence of an explicit statutory restriction on removal), cert. dismissed, 115 S. Ct. 537 (1994).
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> The rationale in Humphrey's Executor for upholding Congress's power "to forbid [the commissioners'] removal except for cause" was in fact identical to that for recognizing the President's plenary removal power over "purely executive officers." "[I]t is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." 295 U.S. at 629. The constitutionality of congressional limitations on presidential removal authority thus depended under Humphrey's Executor on the legitimacy of a legislative decision to reduce or eliminate the President's control over a particular agency or officer, and that in turn depended on the nature of the functions performed by the agency **[*144]** or officer. Congress's decision was considered legitimate in Humphrey's Executor because the Court viewed the FTC as "a body of experts" "charged with the enforcement of no policy except the policy of the law" and concluded that "[s]uch a body cannot in any proper sense be characterized as an arm or an eye of the executive". 295 U.S. at 624, 628. We do not find the Court's reasoning in Humphrey's Executor completely persuasive. The Court's assertion about the FTC's "enforcement of no policy except the policy of the law," id. at 624, does not differentiate the FTC, except perhaps as a matter of degree, from the many undoubtedly executive agencies upon which Congress imposes mandatory duties. The Court also stated that an FTC member is "an officer who occupies no place in the executive department," but the Court may only have meant that the FTC is "an agency of the legislative or judicial departments of the government," id. at 628, in which case questions would arise under current constitutional doctrine as to the legitimacy of an Article I entity exercising law-making authority without following bicameralism and presentment, see INS v. Chadha, 462 U.S. 919

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often do not give rise **[*9]** to cases or controversies that can be resolved by the courts. This is due in part to the limits of jurisdiction and justiciability that Article III places on the courts. In addition there may be legislation that violates one of the three principles outlined above and yet is unlikely to reach the courts in a form or context in which the judiciary will be able to identify or remedy the constitutional problem. An example of such legislation would be an enactment that does not, when viewed in isolation, violate the constitutional principles we have identified, but as to which constitutional difficulties arise when the statute is examined in conjunction with other similar enactments. Because, absent a refusal by the executive to enforce any of these cumulative enactments, the courts may not have an opportunity to review the statute in its full context, it is incumbent upon the executive to object to such legislation before it becomes law. Burdensome reporting requirements may illustrate this problem. Even if no single reporting requirement violates the general separation of powers principle, see Administrator of Gen. Servs., 433 U.S. at 443, the cumulative effect of many such requirements **[*10]** might prevent the executive from **acting** with the dispatch and efficiency that the Constitution intends and that, indeed, Congress expects. The Attorneys General and this Office have a long tradition of carrying out this constitutional responsibility, one that dates back to Attorney General Edmund Randolph's 1791 opinions on the constitutionality of a national bank. See The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinions (publication forthcoming in 18 Op. O.L.C. (1994)) (reprinting, with commentary, the bank opinions). Persuaded by Secretary of the Treasury Hamilton's opinion defending the validity of the legislation, President Washington declined to accept the Attorney General's arguments that the bank bill was unconstitutional and signed it into law. The Supreme Court upheld the President's conclusion that Congress could charter a national bank in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). We believe therefore that it is important in addressing separation of powers matters to give careful consideration to the views of our predecessors and to what seems to us to be the import of the Constitution's text, history, and structure. **[*11]** For an example of an opinion that is, in our view, an exemplary model of the approach this Office should take in interpreting the Constitution, see Article II, Section 2, Clause 3 -- Recess Appointments -- Compensation (5 U.S.C. § 205503), 3 Op. O.L.C. 314 (1979).

To be sure, respect for the legislative branch of the government requires a degree of deference to legislative judgments. From the beginning of the Republic, the executive branch has interpreted the Constitution with a due regard for the constitutional views of Congress. See, e.g., Thomas Jefferson, The Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791) (Opinion of the Secretary of State), in 5 Writings of Thomas Jefferson 284, 289 (Paul L. Ford ed., 1895) (arguing that the President should not veto a bill on constitutional grounds, "if the pro and the con hang so even as to balance his judgment," out of "a just respect for the wisdom of the legislature"). Respect for Congress also demands that the executive, like the judiciary, construe statutes so as to avoid constitutional problems. See, e.g., Appropriations Limitation for Rules Vetoed by Congress, 4B Op. O.L.C. 731, 732 n.3 **[*12]** (1980) ("It is our practice to interpret statutes in ways that avoid constitutional infirmities, whenever possible."). However, it is also the President's "duty to pass the executive authority on to his successor, unimpaired by the adoption of dangerous precedents." Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. at 65. Thus, for example, in declining to comply with a request from the House of Representatives that he deemed an intrusion on the treaty power, President Washington explained that "as it is essential to the due administration of the government, that the boundaries fixed by the [C] onstitution between the different departments should be preserved: A just regard to the Constitution and to the duty of my Office . 20. 20. forbids a compl[i]ance with your request." Message to the House of Representatives (Mar. 30, 1796), reprinted in 35 Writings of George Washington 5 (John C. Fitzpatrick ed., 1940). Our constitutional analyses are informed by both of these concerns. The correct resolution of separation of powers questions demands that due respect be given to two distinct constitutional axioms. The first axiom is that the Constitution's creation of a vigorous **[*13]** executive and an independent judiciary must not be undermined by legislative encroachment. The second axiom is that the Constitution

(1983), **[*145]** or of an Article III non-judicial entity "bind[ing] or regulat[ing] the primary conduct of the public," Mistretta v. United States, 488 U.S. 361, 396 (1989). We do not think that the "independent" regulatory agencies could be viewed today as within the legislative or judicial branches. See id. at 386 n.14 (SEC is "not located in the Judicial Branch").

In Morrison v. Olson, 487 U.S. 654 (1988), the Supreme Court upheld a provision of the Ethics in Government Act that forbids the removal of an independent counsel appointed under the Act except for cause. The Court explained that under "[t]he analysis contained in our removal cases," the constitutional question is whether Congress has "interfere[d] with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed.'" Id. at 689-90. Morrison reasoned that the Attorney General retained adequate control over the independent counsel to safeguard "the President's ability to perform his constitutional duty." Id. at 691.

Morrison's broader significance is defined by the office in question. The removal restriction upheld in Morrison **[*146]** concerned an inferior officer with a sharply limited and highly unusual function, the investigation of particular allegations about the conduct of high-ranking executive branch officials. In that context, although it declined to decide "exactly what is encompassed within the term 'good cause,'" the Court held that "because the independent counsel may be terminated for 'good cause,' the Executive . 20. 20. retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act." 487 U.S. at 692. The Morrison Court thus had no occasion to consider the validity of removal restrictions affecting principal officers, officers with broad statutory responsibilities, or officers involved in executive branch policy formulation. A much older decision, Shurtleff v. United States, 189 U.S. 311 (1903), had held that a for-cause provision did not oust the President's power, derived from the power of appointment, to remove an officer at will, but after Humphrey's Executor, Shurtleff appeared confined to its factual setting (where the official's tenure had no fixed termination). See Kalaris **[*147]** v. Donovan, 697 F.2d 376, 395 & n.76 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983). Bowsher, however, cited Shurtleff in connection with a more general suggestion that "the enumeration of certain specified causes of removal" may not "exclud[e] the possibility of removal for other causes." 478 U.S. at 729. Bowsher and Morrison together suggest that a generous reading of the President's (or a department head's) power to remove an inferior officer for cause may be essential to the constitutionality of removal restrictions concerning even those officers whose functions are narrow.

The Supreme Court's removal cases establish a spectrum of potential conclusions about specific removal limitations. At one end of the spectrum, restrictions on the President's power to remove officers with broad policy responsibilities in areas Congress does not or cannot shelter from presidential policy control clearly should be deemed unconstitutional. We think, for example, that a statute that attempts to limit the President's authority to discharge the Secretary of Defense would be plainly unconstitutional and that the courts would so hold. The Tenure of Office Act of 1867, ch. **[*148]** 20154, 14 Stat. 430 (1867), expressly provided the Secretaries of War and the Navy, among others, with terms longer than that of the President who appointed them, subject only to presidential removal with the consent of the Senate. President Andrew Johnson's attempt to remove the Secretary of War was the legal basis for his impeachment and near-removal from office. (The Act had been passed over President Johnson's constitutionally based veto.) As the Court stated in Morrison, Myers "was

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undoubtedly correct . 20. 20. in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role." 487 U.S. at 690. With respect to an officer serving at the President's pleasure, the President may remove the incumbent by direct order or by appointing his or her successor after receiving the advice and consent of the Senate. See, e.g., Quackenbush v. United States, 177 U.S. 20, 25 (1900); Presidential Appointees -- Resignation Subject to the Appointment and Qualification of a Successor, 3 Op. O.L.C. 152 (1979). At the other end of the spectrum, we believe that for cause and fixed **[*149]** term limitations on the power to remove officers with adjudicatory duties affecting the rights of private individuals will continue to meet with consistent judicial approval: the contention that the essential role of the executive branch would be imperiled by giving a measure of independence to such officials is untenable under both precedent and principle.

Between these two extremes, the arguments are less clear, and it is imperative that the executive branch carefully examine removal limitations in pending legislation for their impact on the President's ability to exercise his or her constitutional powers and carry out his or her duties. In situations in which Congress does not enact express removal limitations, we believe that the executive branch should resist any further application of the Wiener rationale, under which a court may infer the existence of a for-cause limit on presidential removal, except with respect to officers whose only functions are adjudicatory. On the basis of precedent, and in light of the understandable tendency of Article III judges to value tenure protection positively, it is safe to assume that courts will continue to apply Wiener with respect **[*150]** to officials whose primary duties involve the adjudication of disputes involving private persons. In reviewing pending legislation, furthermore, we should be aware that legislative silence about the President's removal power over administrative agency officers invites judicial policy choices that may be contrary to those the President or Congress intended.

2. Congressional Removal Power. Unless it limits its own discretion by statute, Congress enjoys plenary authority to remove its own officers, as do the individual houses of Congress. The two houses of Congress also have complementary roles in the congressional power to impeach and remove any civil officer of the United States. See U.S. Const. art. 20I, § 202, cl. 205; id. art. 20I, § 203, cl. 206. In addition, Congress has the general authority to legislate in ways that in fact terminate an executive branch officer or employee's tenure by defunding a position, for example, or by legislating mandatory retirement rules that apply to incumbents. Congress's authority in this regard is bounded, to be sure, by independent constitutional limitations such as the Bill of Attainder Clause, U.S. Const. art. 20I, § 209, cl. **[*151]** 203. See United States v. Lovett, 328 U.S. 303 (1946) (provision in appropriations statute prohibiting the payment of compensation to three specified executive branch employees because of their political beliefs was an unconstitutional bill of attainder). The executive branch, however, has long maintained that the Constitution does not permit this legislative authority to be deployed abusively as a de facto removal power. See Civil Service Retirement Act -- Postmasters -- Automatic Separation from the Service, 35 Op. Att'y Gen. 309, 312-15 (1927) (deeming mandatory retirement statute constitutional because it could not fairly be viewed as an encroachment on the President's removal power). The Supreme Court's decisions **confirm** the executive position. In Myers v. United States, 272 U.S. 52 (1926), the Court at one point portrayed the issue before it in terms of congressional aggrandizement, id. at 161, and modern decisions have redescribed the enduring rationale of Myers in anti-aggrandizement terms. See Morrison v. Olson, 487 U.S. 654, 686 (1988) ("the essence of the decision in Myers was the judgment that the Constitution prevents Congress

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from 'draw[ing] **[*152]** to itself . 20. 20. the power to remove'"); Bowsher v. Synar, 478 U.S. 714, 724-26 (1986). Legislation that can properly be described as exercising the power of removal is unconstitutional, therefore, because it amounts to an attempt on Congress's part "to gain a role in the removal of executive officials other than its established powers of impeachment and conviction." Morrison, 487 U.S. at 686. One could also describe the reasoning directly in terms of the impeachment and removal powers. See U.S. Const. art. 20I, § 202, cl. 205 (House has "sole Power of Impeachment"); id. art. 20I, § 203, cl. 206 (Senate has "sole Power to try all Impeachments"); id. art. 20II, § 204 ("President, Vice President and all civil Officers" are subject to impeachment and removal). These powers stem from "[e]xplicit and unambiguous provisions of the Constitution [that] prescribe and define" the only means by which Congress may remove officers. INS v. Chadha, 462 U.S. 919, 945 (1983). We think, for example, that "ripper" legislation that ostensibly abolished an office while simultaneously proceeding to recreate it would be a transparent, and unconstitutional, attempt to remove the **[*153]** officer in question and therefore would violate the anti-aggrandizement principle. See Constitutionality of Proposed Legislation Requiring Renomination and Reconfirmation of Executive Branch Officers Upon the Expiration of a Presidential Term, 11 Op. O.L.C. 25, 26 (1987).

The executive branch also has resisted attempts by the Senate to "reconsider" the nomination of an officer to whose appointment that body has already given its advice and consent once the President has taken steps to complete the appointment. In 1931, for example, President Hoover declined to return to the Senate resolutions notifying him that it had **confirmed** three nominees to the Federal Power Commission. The President explained that "the return of the documents by me and reconsideration by the Senate would be ineffective to disturb the appointees in their offices. I cannot admit the power in the Senate to encroach upon Executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination." Message to Senate, January 10, 1931, quoted in United States v. Smith, 286 U.S. 6, 28 n.3 (1932); see also United States v. Smith, 286 U.S. 6, 37-48 (1932) (discussing **[*154]** historical practice). Such senatorial action is both an unconstitutional attempt to remove the officer and a violation of the anti-aggrandizement principle, in that it is a legislative attempt to exercise power after the constitutionally prescribed role of the legislative body has been completed. In Smith the Supreme Court rejected a challenge to the right of one of President Hoover's appointees to sit on the Federal Power Commission, but based its holding on its construction of the Senate's rule permitting reconsideration. The Court thus did not reach the executive's constitutional arguments. See 286 U.S. at 34 ("we have, therefore, no occasion to consider the constitutional objection").

D. Issues Involving the Boundaries of the Legislative Sphere

The Supreme Court decisions articulating the Court's anti-aggrandizement principle make it plain that Congress's formal authority is limited to the enactment of legislation and activities in aid of the legislative process such as investigation and oversight. The Gramm-Rudman Act's vesting in a congressional agent of the power to exercise policy-making control over the post-enactment decisions of executive officials is the paradigmatic **[*155]** example of congressional action in violation of this limitation. See Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating the relevant provision of the Act). Respect for Congress's legitimate and broad authority to legislate is consistent with our duty as officials of the executive branch to identify instances in which Congress transgresses the boundaries of its constitutional sphere of operations.

1. The Paradox of the Congressional Agencies. From reading the bare text of the Constitution, one might not expect there to exist any formally separate entities within the legislative branch other than the two houses themselves. From an early date, however, Congress has created distinct agencies, under its special supervision, for various purposes. Some of these agencies, or the officers who head them, exercise authority that seems

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incompatible or at least difficult to reconcile with the Supreme Court's anti-aggrandizement decisions. Of special interest are the Smithsonian Institution (and its subordinate bureaus, such as the John F. Kennedy Center for the Performing Arts ("J.F.K. Center")), the Library of Congress, the General Accounting Office ("GAO") (headed by the Comptroller **[*156]** General), the Government Printing Office ("GPO"), and the Office of the Architect of the Capitol. The composition of the Smithsonian's Board of Regents and of the Board of Trustees of the J.F.K. Center presents a separate problem under Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), because members of Congress serve on these boards through appointment by the Speaker and the President pro tempore. See 20 U.S.C. § 2042 (Regents of Smithsonian); Id. § 2076h(a) (Trustees of J.F.K. Center). The head of each of these agencies exercises authority with respect to executive officials or private persons that could be seen as problematic under Bowsher v. Synar, 478 U.S. 714 (1986), which held unconstitutional the Comptroller General's exercise of controlling authority over executive branch budgeting.

We believe that many of the powers currently exercised by the presently existing congressional agencies may be deemed constitutionally harmless. Most of the functions undertaken by the Library of Congress, the basic accounting tasks of the GAO, and all of the duties of the Architect of the Capitol can comfortably be described as in aid of the legislative process. See Springer **[*157]** v. Government of the Philippine Islands, 277 U.S. 189, 202 (1928). The activities undertaken by the Smithsonian and its bureaus also seem to fit under a broad construction of that concept, a construction that is supported by historical practice stretching far back into the antebellum Republic. Cf. Springer, 277 U.S. at 211 (Holmes, J., dissenting) ("Congress long ago established the Smithsonian Institution, to question which would be to lay hands on the Ark of the Covenant"). The GPO's involvement in executive branch printing is also supported by a substantial historical pedigree, see Joint Res. No. 2025, 36th Cong., 1st Sess., 12 Stat. 117 (1860), but in the twentieth century the executive branch has repeatedly been compelled to resist congressional attempts to empower the GPO to exercise genuine discretion over executive decisions. Under the modern understanding of the separation of powers, we do not think that Congress validly can empower the GPO to play any role that is not purely ministerial with respect to the executive branch. The review authority of the Librarian of Congress over the Copyright Arbitration Royalty Panel, see 17 U.S.C. §§ 20801-803, is permissible **[*158]** because the Librarian's tenure is not protected by an explicit for-cause removal limitation, and we therefore infer that the President has at least the formal power to remove the Librarian at will. Formal removal authority is sufficient to render the Librarian subject to the President's control for constitutional purposes. See Bowsher v. Synar, 478 U.S. 714, 726-27 (1986). We think that under Bowsher the fact that a President is highly unlikely to remove a Librarian is legally irrelevant. Id. at 727 n.5. We note that the historical lineage of, and long-standing acquiescence of the Presidents in, these legislative agencies and most of their activities are important to our conclusion that those activities are constitutionally permissible: we think it highly doubtful that Congress constitutionally could create new legislative agencies with operational powers, or afford existing agencies novel powers, with respect to executive officials or private persons.

Our conclusion about the limits on Congress's authority to create legislative branch agencies with powers reaching beyond the legislative branch is consistent with the decision in Hechinger v. Metropolitan Washington **[*159]** Airports Authority, 36 F.3d 97 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 934 (1995), where the court of appeals held unconstitutional Congress's response to the Supreme Court's decision in Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991). After MWAA struck down a congressionally constituted board with the power to review and reverse the decisions of the Airports Authority, Congress created a similar, congressionally controlled board of review with the power to delay, but not to control, the Authority's implementation of decisions. The court rejected the argument that the new board's powers were constitutional because of this distinction: the very purpose of this board was to bring congressional policy views to bear on the decisions of the Authority by enabling congressional agents to participate directly in the Authority's decision-making processes. Under the Supreme Court's

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rigorous understanding of the anti-aggrandizement principle, any such extension of legislative power beyond the legislative sphere is invalid. We therefore believe that Hechinger was correctly decided.

2. Reporting Requirements. [*160] Many statutes empower executive branch agencies to take certain actions only after a specified period following the provision of notice or of a report to Congress. The Department of Justice has long acknowledged the constitutionality of such report-and-wait provisions, see, e.g., Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 63 (1933) ("[n]o one would question the power of Congress to provide for delay in the execution of . 20. 20. an administrative order"), and the Supreme Court in INS v. Chadha, 462 U.S. 919 (1983), "specifically recognized" report-and-wait requirements "as a constitutionally acceptable alternative to the legislative veto." Implementation of the Bid Protest Provisions of the Competition in Contracting Act, 8 Op. O.L.C. 236, 246 (1984); see Chadha, 462 U.S. at 935 n.9, 955 n.19. While individual instances of congressional investigation and oversight may be objectionable on policy grounds, and in certain situations may involve information with respect to which the President is constitutionally entitled to assert executive privilege, the conduct of investigation into, and oversight concerning, executive actions is **[*161]** generally well within the power of Congress. See Buckley v. Valeo, 424 U.S. 1, 137-38 (1976) (per curiam). The Constitution presupposes that all executive branch action is taken under the legal authority of officers of the United States and that it is those officers (and not their subordinates) who are constitutionally responsible for those actions. See U.S. Const. art. 20II, § 204 (civil officers may be impeached). It is our view, therefore, that the executive branch is generally entitled to resist congressional demands that employees be questioned about their actions and that as a matter of constitutional comity Congress ordinarily is obligated to respect an executive decision to send a superior officer to present testimony and answer questions about the actions of a subordinate officer. (The last statement does not apply to congressional investigations connected with impeachment or with other legitimate investigations into the actions of specific officers.) Although the details of executive responses to congressional demands for information have changed somewhat, the general principle that Congress ought not employ its powers of investigation to disrupt the lines of **[*162]** responsibility and authority within the executive branch is very old. See Thomas Jefferson, Opinion of the Cabinet (Apr. 2, 1792), in I The Writings of Thomas Jefferson 304 (Andrew A. Lipscomb ed., 1903) (advising President Washington "that neither the committee nor [the] House [of Representatives] had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President"). Report-and-wait provisions generally are constitutional means of assisting Congress in carrying out these legitimate activities. This is not to say that an unconstitutional report-and-wait provision cannot be imagined. A provision that imposed so lengthy a delay as to in effect nullify the executive's power to take action substantively authorized by the Constitution or a statute might be invalid as a violation of the anti-aggrandizement or general separation of powers principle.

Simple reporting requirements, which again are sometimes objectionable on policy grounds, are clearly constitutional as a general matter. "Congress may at all times call on [the heads of executive departments] **[*163]** for information or explanation in matters of official duty." Office and Duties of Attorney General, 6 Op. Att'y Gen. 326, 344 (1854); see Chadha, 462 U.S. at 955 n.19; see also Duties of the Attorney General, 1 Op. Att'y Gen. 335, 336 (1820) (Congress could by legislation require Attorney General to prepare report on claims against the United States). In the past, this Office has made constitutional objections to so-called "concurrent" reporting provisions that require an executive agency to submit a given report simultaneously to the President and Congress. See Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress, 6 Op. O.L.C. 632 (1982); Inspector General Legislation, 1 Op. O.L.C. 16, 17 (1977). The argument is that such provisions interrupt the lines of responsibility within the executive branch and interfere with a presidential prerogative to control the presentation of the executive branch's views to

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Congress. On the other hand, advocates of such provisions might argue that a concurrent reporting provision does not, as a formal matter, enlarge congressional powers at the expense of the executive, because the power to require information **[*164]** is well within Congress's legitimate legislative authority.

We think that concurrent reporting requirements are best analyzed under the general separation of powers principle. That principle first requires an inquiry into "the extent to which" a given reporting provision "prevents the Executive Branch from accomplishing its constitutionally assigned functions." Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) (citation omitted). Many conceivable concurrent reporting requirements, particularly ones touching on the President's responsibility for the conduct of foreign affairs and for national defense, would have a serious negative impact on the President's performance of his "constitutionally assigned functions." A statutory requirement that the Secretary of State report simultaneously to the President and Congress on the status of United States relations with a given foreign power, for instance, would fall within that description. Moreover, such a provision ought to fail the courts' final test under general separation of powers analysis -- whether the statute's impact on the executive "is justified by an overriding need to promote objectives within the constitutional **[*165]** authority of Congress." Administrator of General Services, 433 U.S. at 443. The hypothesized reporting requirement could seriously impair the President's ability to formulate foreign policy and conduct negotiations and addresses an area in which Congress's constitutional authority is limited. Similarly, legislation that attempted to impose concurrent reporting requirements across a broad spectrum of executive branch activities might well constitute so serious an interference with the President's fulfillment of his obligations under the Take Care Clause, U.S. Const. art. 20II, § 203, that it should be deemed invalid. The courts, however, might uphold the validity of a concurrent reporting requirement imposed for a legitimate congressional purpose on a specific agency with limited, domestic, and purely statutory duties.

As a practical political matter, concurrent reporting requirements clearly weaken the President's control over the executive branch and by doing so increase congressional leverage on the President and other officials of the executive branch. By doing so they impair the Constitution's "'great principle of unity and responsibility in the Executive department.'" **[*166]** Myers v. United States, 272 U.S. 52, 131 (1926) (quoting James Madison). For this reason, we think the presumption should be that the executive branch will object to any concurrent reporting provision in proposed legislation.

3. Congressional Agents in Non-Legislative Contexts. The Supreme Court's decisions make it clear that legislation placing members or agents of Congress on a board or commission that is outside the legislative branch is immediately suspect. The constitutional "location" of a given entity is not a matter of congressional fiat; Congress cannot define away an anti-aggrandizement problem simply by declaring that a given entity is within or without the legislative branch. The result in Bowsher v. Synar, 478 U.S. 714 (1986), for example, would not be changed by a statute providing that the General Accounting Office is an executive branch agency. Through the Comptroller General, an official removable by Congress, the legislature would still be exercising ultimate authority over executive decisions. In fact, the Comptroller General does have obligations to the executive branch as well as to Congress. See Bowsher, 478 U.S. at 746 (Stevens, J., concurring **[*167]** in the judgment). The question is, we think, a matter of the relationship between the entity's functions and the formal powers Congress can assert over and through it. In Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991), for example, the board at issue was the board of review of an entity, the Airports Authority, created by a compact between Virginia and the District of Columbia, and the review board members were appointed by the Authority. However, by federal legislative mandate, the Authority was compelled to appoint a review board made up exclusively of members of Congress selected from a pool determined by Congress. See id. at 268-69. Congress's agents on the board thus were able to exercise ultimate control over important operational decisions

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of the Authority, in violation of the Constitution's constraints on the exercise of congressional power. Id. at 275-77.

The Court of Appeals for the D.C. Circuit recently came to a similar conclusion in FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), cert. dismissed, 115 S. Ct. 537 (1994), in striking down part of a section of the Federal **[*168]** Election Campaign Act, 2 U.S.C. § 437c(a)(1). That section provides that the Secretary of the Senate and Clerk of the House or their designees are to be members of the Federal Election Commission "ex officio and without the right to vote." The Secretary and the Clerk are self-evidently agents of Congress, but the Commission argued that their presence was constitutionally harmless because their only formal role was informational and advisory. The court rejected the argument, reasoning that the very point of placing the Secretary and Clerk on the Commission was to influence the Commission's actions and that

> Congress must limit the exercise of its influence, whether in the form of advice or not, to its legislative role. 20. 20. 20. What the Constitution prohibits Congress from doing, and what Congress does in this case, is to place its agents "beyond the legislative sphere" by naming them to membership on an entity with executive powers.

6 F.3d at 827 (citation omitted). We believe that NRA Political Victory Fund was correctly decided: however modest the ability of Congress's agents to influence the Commission's actions may have been formally, the statute placed the agents **[*169]** intended to communicate that influence within the very heart of an agency charged with enforcing federal law. The anti-aggrandizement principle properly can be interpreted to forbid even modest attempts by Congress to intervene in the enforcement of the laws once "its participation [in the passage of legislation] ends." Bowsher v. Synar, 478 U.S. 714, 733 (1986).

E. The General Separation of Powers Principle

The proper application of the general separation of powers principle is highly specific to context, and thus few generalizations are possible. For example, in the past we have expressed concern that legislation delegating federal authority to state or local officials or private persons could undermine the executive branch's ability to carry out its functions and thereby violate the principle. See, e.g., Constitutional Limitations on "Contracting Out" Department of Justice Functions under OMB Circular A-76, 14 Op. O.L.C. 106, 114-15 (1990) (preliminary print). The delegation question actually at issue in our 1990 opinion concerned OMB requirements to contract out governmental work. Executive branch delegations to non-federal entities, we now think, are properly analyzed **[*170]** as raising issues about the executive's statutory authority to delegate. We continue to believe that such delegations can raise questions with respect to the constitutional separation of powers, In theory, Congress's authority to delegate law-making authority to anyone, including the President, is limited by the non-delegation doctrine, which prohibits standardless grants of legislative power. That doctrine is, however, essentially moribund in the courts. See, e.g., Yakus v. United States, 321 U.S. 414 (1944) (upholding broad delegation). In any event, the problem of delegation in the separation of powers context is not, or not primarily, one of congressional failure to specify the limits and standards relevant to the delegated authority, but rather the interference with executive (or judicial) branch functions created by the bestowal of federal-law authority on non-federal entities. Cf. Currin v. Wallace, 306 U.S. 1, 15-16 (1939) (upholding statute requiring supermajority vote by participants in regulated activity before executive branch could take certain action). and that in certain circumstances, a congressional delegation of authority to non-federal officials or to **[*171]** private parties

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might have a significant impact on the executive branch's ability to fulfill its constitutional functions. If so, the delegation might be invalid under the general separation of powers principle. A common form of "delegation" -- the grant of authority to state, local, or tribal officials or to private parties to stop federal action by declining to consent to it -- is unlikely to present a constitutional problem. Such legislation merely sets a condition on the executive branch's exercise of authority that the executive would not possess at all in the absence of the legislation. In upholding a statute requiring a supermajority of regulated farmers to agree before the Secretary of Agriculture could exercise certain powers, the Supreme Court rejected the argument that the statute impermissibly delegated legislative power, reasoning that such legislation does not, strictly speaking, involve a delegation of authority to the farmers at all. See Currin v. Wallace, 306 U.S. 1, 15-16 (1939). By requiring the Secretary, as one of the prerequisites to the exercise of power granted him by statute, to ascertain the agreement of a certain percentage of those who would be **[*172]** affected, the statute at issue in Currin had done nothing but add another condition to the availability of the power. Id. at 15 ("Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market 'unless two-thirds of the growers voting favor it.'").

A recent district court opinion that reached the opposite conclusion illustrates, in our judgment, the fallacy involved in attempting to discern a separation of powers problem in this sort of legislation. See Confederated Tribes of Siletz Indians v. United States, 841 F. Supp. 1479 (D. Or. 1994) (appeal pending). The statute at issue prohibits the location of gaming establishments on land acquired by the Department of the Interior in trust for the benefit of a Native American tribe when the land in question is off-reservation. The statute permits the Secretary to grant a waiver of the prohibition, but requires him or her to obtain the concurrence of the relevant state governor before finally approving the waiver. The district court denied that the act was similar for constitutional purposes to the legislation upheld in Currin or the False Claims Act provisions sustained **[*173]** in the qui tam cases: "Instead we have a statute in which Congress delegates to a state official the power to veto a favorable determination by an official of the Executive Branch who was legislatively charged with making that determination." 841 F. Supp. at 1488. Therefore, the court concluded, the provision requiring the governor's concurrence violated the Appointments Clause and the general separation of powers principle. Id. at 1489. We think that the district court went wrong in its description of the legislation it was reviewing: the only final determination the Secretary is "legislatively charged with making" under 25 U.S.C. § 202719(b)(1)(A) is a determination that the statutory conditions -- inter alia, that the relevant governor concurs in the Secretary's findings that granting the waiver will be beneficial to the tribe and harmless to its neighbors -- have been satisfied. The governor's concurrence, from the Secretary's perspective, is as much a fact about the world as the predicted effects of the casino (or the concurrence of the supermajority of farmers at issue in Currin) -- it is one more condition that must be met before the Secretary can exercise the **[*174]** waiver power Congress has provided, albeit a condition that the Secretary may be able to satisfy using different methods (persuasion, for example) than those employed in satisfying other conditions (economic forecasts of the impact of a casino, for example).

For somewhat similar reasons, there is no separation of powers problem with legislation that defines a federal rule of law by reference to state or foreign law. The Supreme Court held in United States v. Sharpnack, 355 U.S. 286 (1958), that the Constitution permits Congress to provide for the application, as bases for federal prosecution, of subsequently enacted state criminal laws in federal enclaves. The Court concluded that such a prospective congressional adoption of "future state legislative action in connection with the exercise of federal legislative power" does not involve "a delegation by Congress of its legislative authority to the States" at all. Id. at 294. On the basis of Sharpnack's reasoning, we think that no special separation of powers issues are raised by the role of the states under such legislation. The courts of appeals have applied the rationale of Sharpnack to a variety of federal statutes **[*175]** that require consideration of state or foreign laws in determining the application of federal law. See, e.g., United States v. Rioseco, 845 F.2d 299, 302 (11th Cir. 1988)

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("Congress has delegated no power, but has itself set out its policies and has implemented them").

F. Statutory Construction

Issues involving the constitutional separation of powers between the President and Congress most often arise in the context of a statute that raises or proposed legislation that would raise questions under one of the three headings we have identified. For this reason, it is worth recalling the "cardinal principle" of statutory interpretation that statutes be construed to avoid raising serious constitutional questions, where such a construction is reasonably available. See, e.g., Crowell v. Benson, 285 U.S. 22 (1932).

An important subset of these questions relate to statutes that do not plainly state that they apply to the President. The Supreme Court and this office have adhered to a plain statement rule: statutes that do not expressly apply to the President must be construed as not applying to the President, where applying the statute to the President would pose a significant question **[*176]** regarding the President's constitutional prerogatives. See, e.g., Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992); Memorandum for Jack Quinn, Counsel to the President, from Walter Dellinger, Assistant Attorney General, re: Application of 28 U.S.C. § 20458 to Presidential Appointments of Federal Judges (Dec. 18, 1995). This principle has two sources in the constitutional context within which the Congress drafts statutes. The first is the interpretive canon of avoiding serious constitutional questions. See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

The second source is the constitutional principle of separation of powers. The purpose of the constitutional separation of powers is to prevent an excessive accumulation of authority in any of the three branches of the federal government. The plain statement safeguards "the 'usual constitutional balance'" of power. Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)); see Franklin, 505 U.S. at 800-01. Given the central position that the separation of powers doctrine **[*177]** occupies in the Constitution's design, this rule also serves to "assure[] that the legislature has in fact faced, and intended to bring into issue, the critical matters" of the balance of power between the three branches of the federal government. See United States v. Bass, 404 U.S. 336, 349 (1971).

This plain statement rule has been applied frequently by the Supreme Court as well as this office with respect to statutes that might otherwise be susceptible of an application that would affect the President's constitutional prerogatives, were one to ignore the constitutional context. For instance, in Franklin the Court was called upon to determine whether the Administrative Procedure Act, 5 U.S.C § 20701, authorized "abuse of discretion" review of final actions by the President. The APA authorizes review of final actions by an "agency," which it defines as "each authority of the Government of the United States." 5 U.S.C. § 20701(b)(1). From this definition, the APA expressly exempts Congress, the courts, the territories, and the DC government.

Even though the statute defined agency in a way that could include the President and did not list the President among the express exceptions **[*178]** to the APA, Justice O'Connor wrote for the Court,

> [t]he President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's

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performance of his statutory duties to be reviewed for abuse of discretion.

505 U.S. at 800-01 (emphasis added). To amplify, she continued, "[a]s the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements." Id. at 801. Numerous other Supreme Court decisions employ this approach. See, e.g., Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989) (holding that the Federal Advisory Committee Act does not apply to committees that advise the President on the discharge of his exclusive constitutional functions because doing so would raise serious separation of powers questions); Sale v. Haitian Centers Council, Inc., 113 S. Ct. **[*179]** 2549 (1993) (refusing to give the Refugee Act extraterritorial application because doing so could conflict with the President's constitutionally committed authority); Nixon v. Fitzgerald, 457 U.S. 731 (1982) (President was immune from suit because Congress had failed to create a cause of action expressly against the President of the United States).

In addition to the Supreme Court precedents, this office has frequently applied the plain statement rule in the context of the separation of powers between the executive and legislative branches. For example, we were asked whether the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 20621-634, prohibits the President from considering the age of judicial candidates when determining whom to nominate for federal judgeships. See Judges -- Appointment -- Age Factor, 3 Op. O.L.C. 388 (1979). We concluded that the ADEA should not be read to apply to the presidential appointment of federal judges:

> The power to appoint Federal judges, who hold office on good behavior, is by tradition and design one of the most significant powers given by the Constitution to the President. It provides one of the few administrative mechanisms **[*180]** through which the President can exert a long-term influence over the development and administration of law in the courts. The President's present power to exert that influence to the fullest by preferring candidates for appointment who are likely to have long, rather than short, careers on the bench is therefore a matter of constitutional significance. Whether Congress could deny the President that power by requiring him to disregard utterly the age of candidates for appointment has never been considered by the courts, but because of the gravity of the constitutional questions it raises, we would be most reluctant to construe any statute as an attempt to regulate the President's choice in that way, absent a very clear indication in the [statute].

Id. at 389. See also Memorandum for Jack Quinn, Counsel to the President, from Walter Dellinger, Assistant Attorney General, re: Application of 28 U.S.C. § 20458 to Presidential Appointments of Federal Judges (Dec. 18, 1995); Constraints Imposed by 18 U.S.C. § 201913 on Lobbying Efforts, 13 Op. O.L.C. 361, 366-68 (1989) (preliminary print); Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted **[*181]** a Claim of Executive Privilege, 8 Op. O.L.C. 101 (1984); Memorandum for Richard T. Burress, Office of the President, from Laurence H. Silberman, Deputy Attorney General, re: Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution, at 2, 5 (Aug. 28, 1974); Memorandum for Egil Krogh, Staff Assistant to the Counsel to the President, from William H. Rehnquist, Assistant Attorney General, re: Closing of Government Offices in Memory of Former President Eisenhower (Apr. 1, 1969).

III. Constitutional Requirements and Policy Concerns

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delegates to Congress broad power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [of Congress], and all other Powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." U.S. Const. art. I, § 208, cl. 2018 (emphasis added). The Necessary and Proper Clause thereby authorizes Congress not only to choose any appropriate means of exercising the legislative powers it has been delegated, but also "to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government" as a whole, M'Culloch v. Maryland, 17 U.S. at 420, including the powers vested in the President. In our analyses, we fully acknowledge the broad sweep of Congress's powers while insisting, as we must, that those powers cannot be legitimately employed so as to undermine the constitutional authority of the executive branch.

A. Express Procedures: The Bicameralism and Presentment

Requirements and the Appointments **[*14]** Clause

While the expression "separation of powers" does not appear in the Constitution, the Constitution does require both separation and interdependence on some matters by specifying, expressly and precisely, the procedures that must be followed. Where the constitutional text is unequivocal as to the manner in which the branches are to relate, any attempt to vary from the text's prescriptions is invalid. In such circumstances "the balance" between the branches "already has been struck by the Constitution itself" in the text. Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 486 (1989) (Kennedy, J., concurring). The Court has identified two such express procedures relating to the separation of executive and legislative powers: the bicameralism and presentment requirements for legislation, and the Appointments Clause.

Congress's broad authority to take action that has "the purpose and effect of altering the legal rights, duties, and relations of persons . 20. 20. outside the Legislative Branch," INS v. Chadha, 462 U.S. 919, 952 (1983), is limited by the procedural requirements of Article I. With a few express exceptions found or rooted in the constitutional **[*15]** text, Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 276 n.21 (1991), The House of Representatives has the power to impeach any civil officer of the United States, see U.S. Const. art. 20I, § 202, cl. 205; id. art. 20II, § 204, and the Senate to try and, if convinced that the officer is guilty of "high Crimes and Misdemeanors," to remove him or her from office, id. art. 20I, § 203, cls. 205, 6; id. art. 20II, § 204. The Senate also acts on its own in exercising its advice and consent powers with respect to treaties and the appointment of officers. Congress and congressional committees, furthermore, may take certain actions in aid of Congress's legislative tasks that have legal consequences for specific persons outside the legislative branch; a congressional committee, for example, may issue a subpoena to a witness. See Lear Siegler, Inc. Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1108 (9th Cir. 1988), modified as to attorney fees, 893 F.2d 205 (1989) (en banc). We disagree with the Lear Siegler court's application of this principle to the question before it. Article I requires that Congress **[*16]** take such action "in accord with a single, finely wrought and exhaustively considered, procedure" -- bicameral passage and presentation to the President followed by presidential signature or bicameral repassage by a two-thirds majority. Chadha, 462 U.S. at 951; see U.S. Const. art. 20I, §§ 201, 7. The classic and often-repeated violation of this express textual requirement is the "legislative veto" mechanism invalidated in Chadha. The statute at issue in Chadha provided for a one-house "veto" of certain decisions by the Attorney General. A two-house "veto" satisfies bicameralism but is inconsistent with the requirement of presentment, and soon after Chadha the Court summarily invalidated a statute employing this mechanism. See United States Senate v. FTC, 463 U.S. 1216 (1983) (mem.). These Supreme Court decisions vindicated the executive branch's long-held objections to any form of legislative "veto." See Memorandum for the Attorney General from President Franklin D. Roosevelt (Apr. 7, 1941), reprinted in Robert H. Jackson, A Presidential Legal Opinion, 66 Harv. L. Rev. 1353, 1357-58 (1953)

The conclusion that a particular provision of proposed legislation probably would not be held unconstitutional by the courts is not equivalent to a determination that the legislation is constitutional per se. The judiciary is limited, properly, in its ability to enforce the Constitution, both by Article III's requirements of jurisdiction and justiciability and by the obligation to defer to the political branches in cases of doubt or where Congress or the President has special constitutional responsibility. This last point is true not only with respect **[*182]** to true "political questions," i.e., constitutional issues the resolution of which is committed by the Constitution to (one of) the political branches, but also as to areas which, although not absolutely insulated from judicial review, demand extraordinary judicial respect for the decisions of a coordinate branch. See, e.g., United States v. Butenko, 494 F.2d 593, 603, 605 (3d Cir. 1974) (en banc) (broad presidential power to order covert surveillance for foreign affairs and national security purposes does not "justify completely removing" judicial enforcement of the Fourth Amendment; however, the "strong public interest" in "the efficient operation of the Executive's foreign policy-making apparatus" should make a court "wary of interfering"). In such situations, the executive branch's regular obligation to ensure, to the full extent of its ability, that constitutional requirements are respected is heightened by the absence or reduced presence of the courts' ordinary guardianship of the Constitution's requirements. Furthermore, even where on any view the letter of the Constitution is satisfied, the Constitution's intention to separate the federal government's powers can appropriately **[*183]** be invoked as a sound reason for objecting to legislation that undermines or imperils that separation. The constitutional separation of powers, to make the point in a different way, is a political as well as a legal principle. Justice Robert Jackson once wrote that "[i]t is hard to conceive a task more fundamentally political than to maintain amidst changing conditions the balance between the executive and legislative branches of our federal system." Robert H. Jackson, The Supreme Court in the American System of Government 62 (1955).

The Constitution demands of the executive and legislative branches alike an "ethic of institutional responsibility" in defending their respective roles in the overall constitutional structure. See Richard A. Champagne, Jr., The Separation of Powers, Institutional Responsibility, and the Problem of Representation, 75 Marq. L. Rev. 839, 844 (1992). For example, legislation that attempts to structure the very details of executive decision making, or that imposes onerous and repetitive reporting requirements on executive agencies, is troubling from a separation of powers standpoint even if the individual statutes could not easily be described **[*184]** in themselves as unconstitutional. The overall effects of such micromanagement for the constitutional separation of powers obviously can be tremendous, and yet it is unlikely that judicial intervention can or would preserve the constitutional balance. The executive branch thus has the primary responsibility for presenting, in as forceful and principled a way as possible, the separation of powers problems with all legislation that has such effects. In carrying out this Office's various roles in the executive's review of existing and proposed legislation, we intend to bear this obligation in mind, and we are pleased to be of assistance to other components of the executive branch in their efforts to analyze, from a policy standpoint as well as from a strictly legal basis, the impact of legislation on the constitutional separation of congressional and presidential powers.

Walter Dellinger

Assistant Attorney General

Source: All Sources : Federal Legal - U.S. : Administrative Agency Materials : **US Attorney General Opinions**
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(concurrent resolution); Constitutionality of Proposed **[*17]** Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 60-62 (1933) (joint congressional committee); Constitutional Issues Raised by Inter-American Convention on International Commercial Arbitration, 4B Op. O.L.C. 509, 512-13 (1980) (one-house veto of "private" action).

The Supreme Court has applied a similar analysis to the Appointments Clause of Article II, Section 2. In Buckley v. Valeo, 424 U.S. 1, 138-39 (1976) (per curiam), the Court concluded that "Congress' power under [the Necessary and Proper] Clause is inevitably bounded by the express language of Art. II, § 2, cl. 2," and that consequently Congress cannot provide for the appointment of "'Officers of the United States,'" except through a procedure that "comports with" the Appointments Clause. Buckley vindicated the long-standing constitutional view of the executive branch. See, e.g., Constitutionality of Resolution Establishing United States New York World's Fair Commission, 39 Op. Att'y Gen. 61 (1937). Pursuant to the language of the Clause, principal officers must be appointed by the President with the advice and consent of the Senate, while Congress is limited in providing alternative means for the appointment **[*18]** of inferior officers to the "possible repositories for the appointment power." Freytag v. Commissioner, 501 U.S. 868, 884 (1991). (Those repositories are "the President alone, . 20. 20. the Courts of Law, or . 20. 20. the Heads of Departments." U.S. Const. art. 20II, § 202, cl. 202.)

The rules of law derived from the requirements of bicameralism/presentment and the Appointments Clause have the clear and powerful effect of invalidating any inconsistent congressional action. Congress may not employ any mode of exercising legislative power other than through bicameralism and presentment. The Appointments Clause's list of those who may appoint officers is exclusive, and Congress cannot authorize anyone else to appoint officers of the United States. The major difficulty in applying the bicameralism/presentment and Appointments Clause requirements lies in determining whether a particular action falls within the scope of the prescribed procedures. In section II of this memorandum, we discuss questions that have arisen concerning the scope of both requirements.

B. The Anti-Aggrandizement Principle

Although the founders were concerned about the concentration of governmental **[*19]** power in any of the three branches, their primary fears were directed toward congressional self-aggrandizement, See Mistretta v. United States, 488 U.S. 361, 411 n.35 (1989) (distinguishing Bowsher v. Synar, 478 U.S. 714 (1986), as resting on "the special danger recognized by the Founders of congressional usurpation of Executive Branch functions"). and the Supreme Court's decisions call for careful scrutiny of legislation that has the purpose or effect of extending Congress's authority beyond the legislative process. Just as the textual requirement of bicameralism and presentment limits the means by which Congress may legislate, so the anti-aggrandizement principle limits the means by which Congress may influence the execution (or adjudication) of the laws. The fact that the anti-aggrandizement principle does not rest on a particular provision of the Constitution does not make it any less important and legitimate a feature of the law of separation of powers than those features such as bicameralism and presentment that do have specific textual loci.

> The Framers regarded the checks and balances they had built into the tripartite Federal Government as a self-executing safeguard **[*20]** against the encroachment or aggrandizement of one branch at the expense of the other. 20. 20. 20. This Court has not hesitated to enforce the principle of separation embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it.

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Buckley v. Valeo, 424 U.S. 1, 122-23 (1976) (per curiam). The Constitution affords Congress great latitude in making policy choices through the process of bicameral passage and presentment. However, "once Congress makes its choice in enacting legislation, its participation ends," and "Congress can thereafter control the execution of its enactment only indirectly -- by passing new legislation." Bowsher v. Synar, 478 U.S. 714, 733-34 (1986). While Congress may inform itself of how legislation is being implemented through the ordinary means of legislative oversight and investigation, the anti-aggrandizement principle forbids Congress, directly or through an agent subject to removal by Congress, "The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." Bowsher **[*21]** , 478 U.S. at 726. An officer subject to removal by Congress is subordinate to Congress as a matter of constitutional law and must be viewed as an agent of Congress for separation of powers purposes. Id. at 730. The Constitution expressly prescribes the only means by which the houses of Congress may participate in the removal from an ongoing office of a non-legislative official -- impeachment by the House and trial by the Senate. Id. at 723. from intervening in the decision making necessary to execute the law. See id. at 733-34; FEC v. NRA Political Victory Fund, 6 F.3d 821, 827 (D.C. Cir. 1993), cert. dismissed, 115 S. Ct. 537 (1994). Bowsher upheld the view of the Constitution long maintained by the executive branch. See, e.g., Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 56 (1933) (unconstitutional for Congress to give a joint committee of Congress authority "to approve or disapprove executive acts").

In Bowsher, the Court held that a provision of the Gramm-Rudman Deficit Reduction Act was unconstitutional because it vested in the Comptroller General (an official "removable only at the initiative of Congress," **[*22]** 478 U.S. at 728) the power to make post-enactment decisions about how the executive branch should implement budget reduction legislation. The Court rejected the argument that self-aggrandizing legislation can be upheld when it is as a practical matter harmless or de minimis and dismissed as beside the point Justice White's vigorous argument that "[r]ealistic consideration of the nature of the Comptroller General's relation to Congress . 20. 20. reveals that the threat to separation of powers . 20. 20. is wholly chimerical." 478 U.S. at 774 (White, J., dissenting); see also Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 269 n.15 (1991) ("the likelihood that Congress" actually would exercise its authority to remove the members of the review board under consideration in MWAA was "irrelevant for separation-of-powers purposes"). In contrast, the Court upheld the validity of the laws challenged in Morrison v. Olson, 487 U.S. 654 (1988) (independent counsel provisions of Ethics in Government Act of 1978), and CFTC v. Schor, 478 U.S. 833 (1986) (regulations implementing section of the Commodity Exchange Act), in **[*23]** part because the Court saw no reason to view those laws as examples of legislative aggrandizement. Morrison, 487 U.S. at 694 ("We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch."); Schor, 478 U.S. at 856 ("Unlike Bowsher, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch.").

Like the express requirements of the bicameralism/presentment process and the Appointments Clause, the anti-aggrandizement principle puts a powerful constraint on congressional power: legislative action that falls within the scope of the principle is unconstitutional. The bicameralism/presentment and anti-aggrandizement requirements converge when Congress attempts to vest in itself or its agents the power to take action with legal effects outside the legislative branch by some means other than the textually prescribed procedure of bicameral passage of a bill and presentation to the President. Such an attempt is unconstitutional regardless of whether one views the attempt as a violation of the bicameralism/presentment requirement for legislation or as **[*24]** a self-aggrandizing intrusion into the sphere of activity of another branch. See MWAA, 501 U.S. at 274-77. However, the two requirements do not always work in tandem. A statute providing that the

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President can exercise additional authority over some issue with the approval of a single house of Congress would not amount to congressional self-aggrandizement but would violate the bicameralism requirement. Similarly, it is difficult to view the designation by statute of agents of Congress to be non-voting members of an extra-legislative decision-making body as leading to the exercise of legislative authority in violation of Chadha, but such designation may well run afoul of the anti-aggrandizement principle. See, e.g., NRA Political Victory Fund, 6 F.3d at 826-27. The complementary limit on the principle is that, as the Court understands it, the principle applies only to congressional action that amounts to formal or direct self-aggrandizement -- for example, the placement of congressional agents on a body with prosecutorial or law enforcement powers -- no matter how limited the power thereby seized by Congress. See NRA Political Victory Fund, 6 F.3d at 826-27. The **[*25]** Court reviews legislation that arguably increases Congress's power indirectly by weakening the executive politically under the less stringent general separation of powers principle. See Morrison, 487 U.S. at 694. A significant difficulty in applying the anti-aggrandizement principle arises from the uncertain line between minor (but unconstitutional) aggrandizements and (constitutional) exercises of Congress's broad investigative and oversight powers. Compare NRA Political Victory Fund, 6 F.3d at 826-27 (unconstitutional for Congress to place agents within an entity exercising final decision-making authority) with McGrain v. Daugherty, 273 U.S. 135 (1927) (constitutional for Congress to issue subpoenas). In section II, we discuss some of the questions that have arisen.

C. The General Separation of Powers Principle

Legislation that affects the constitutional separation of powers but is consistent with the requirements of bicameralism/presentment, the Appointments Clause, and the anti-aggrandizement principle is subject to less searching scrutiny. Legislation impinging on the President's responsibilities in the areas of foreign affairs and national defense poses unique **[*26]** issues in the application of the general principle of separation of powers, requiring a more searching examination of the validity of congressional action. While some older judicial opinions used language suggesting that any overlap between the powers wielded by the different branches is illegitimate, See, e.g., Springer v. Philippine Islands, 277 U.S. 189, 201 (1928) (discussing the "exclusive character of the powers conferred upon each of the three departments"). On the present Court, Justice Scalia adheres to a version of this view. See, e.g., Morrison v. Olson, 487 U.S. 654, 703-04 (1988) (Scalia, J., dissenting) (criticizing the Court for focusing on "such relatively technical details as the Appointments Clause and the removal power" rather than on "the principle of separation of powers"). the modern Supreme Court interprets the general principle of separation of powers in light of Madison's assertion that the separation necessary to free government is violated only "'where the whole power of one department is exercised by the same hands which possess the whole power of another department.'" Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 442 n.5 (1977) **[*27]** (quoting The Federalist No. 47, at 325-26 (James Madison) (Jacob E. Cooke ed., 1961) (emphasis in original)). Madison's language about "the whole power of [a] department" should not be construed in a woodenly literalistic manner. As the Supreme Court's decisions indicate, the point is that the principle of separation of powers safeguards the overall constitutional role and function of the affected branch. Indeed, this would seem to have been Madison's view as well: during the great debate in the First Congress over the President's authority to remove executive branch officers, Madison argued against congressional power to limit the President's authority on the ground that such limitations would distort the constitutionally ordained role of the executive. See Myers v. United States, 272 U.S. 52, 131 (1926) (quoting Madison). Therefore, "in determining whether [an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." Id. at 443. Cf. CFTC v. Schor, 478 U.S. 833, 856-57 (1986) ("the separation of powers question **[*28]** presented in this litigation is whether Congress impermissibly undermined . 20. 20. the role of the Judicial Branch"). An affirmative answer to the question of whether Congress has prevented the executive or judiciary from accomplishing its functions,

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furthermore, would not lead inexorably to the judicial invalidation of the statute: in that case, the Court has stated, it would proceed to "determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." Administrator of Gen. Servs., 433 U.S. at 443. Although most of the Court's decisions applying the general separation of powers principle have concerned legislation arguably interfering with the executive or judiciary, the Court's approach is applicable in other circumstances as well. For example, United States v. Nixon, 418 U.S. 683 (1974), addressed the argument that a subpoena duces tecum addressed to the President in the course of a criminal proceeding was a judicial encroachment on the executive's autonomy. The Court rejected the argument, holding in the circumstances of the case that the President's "generalized interest in confidentiality" was outweighed **[*29]** by "the demonstrated, specific need [of the courts and the accused] for evidence in a pending criminal trial." Id. at 713. The threat to the President's constitutionally based interest posed by compelled disclosure in such (presumably rare) circumstances was slight, the Court concluded, while "the allowance of the privilege to withhold evidence . 20. 20. would . 20. 20. gravely impair the basic function of the courts." Id. at 712. The Court built on its reasoning in United States v. Nixon in formulating the test set out a few years later in Administrator of General Services, under which it examined the impact of an adverse decision on the constitutional functions of the executive and judicial branches.

The Court's current understanding of the general principle of separation of powers is illustrated by Morrison v. Olson, 487 U.S. 654 (1988). See also Mistretta v. United States, 488 U.S. 361 (1989). Mistretta upheld the validity of Congress's decision to create the Sentencing Commission as an independent entity within the judicial branch composed, in part, of Article III judges against the claim that the Commission violated the general separation of powers **[*30]** principle. Id. at 383. As in Morrison, the Court looked to the impact of the challenged legislation on the ability of the affected branch to fulfill its duties and concluded that the legislation posed no real threat to the integrity or authority of the judiciary. Id. at 384. In Morrison, the Court concluded that the restrictions in the independent counsel statute on the executive's supervisory and removal powers did not violate the principle. While the Court acknowledged that the statute rendered the independent counsel "free from Executive supervision to a greater extent than other federal prosecutors," it was unpersuaded that the limitations placed on that supervision meant that the President would not be able "to perform his constitutionally assigned duties." Id. at 696. The Court also addressed the statute's imposition of a for-cause requirement on the Attorney General's power to remove an independent counsel, arguably a violation of the rule of Myers v. United States, 272 U.S. 52 (1926) (holding unconstitutional a statute requiring Senate advice and consent to the presidential removal of certain postmasters). Morrison distinguished Myers as based **[*31]** on what we have called the anti-aggrandizement principle, 487 U.S. at 686 (like Bowsher v. Synar, 478 U.S. 714 (1986), Myers involved "Congress' attempt to involve itself in the removal of an executive official"), and rejected the argument that the constitutionality of a for-cause removal requirement depends on whether an official is classified as "purely executive," id. at 689. The proper inquiry, the Court concluded, was the compatibility of the restriction on the executive's removal power with the general separation of powers principle that Congress cannot legislate in such a way that the President cannot carry out his constitutional functions. Ultimately, the Court was "simply [unable to] see how the President's need to control the [counsel's] exercise of . 20. 20. discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." Id. at 691-92. In light of the narrow range of the independent counsel's jurisdiction, her essential insulation from any significant policy-making role, and the well-established principle that Congress can limit the removal authority **[*32]** of a head of department when granting that officer the power to appoint subordinates, the Court concluded that the independent counsel statute did not fundamentally undermine the executive's constitutional authority.

The Supreme Court's basic formulation of the general principle of separation of powers is

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[Separation of Powers] [2]

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COMMENT: Congressional Power vis a vis the President and Presidential Papers

Sandra E. Richetti

SUMMARY:
... The concept of "separation of powers" that has emerged as a result of the framework of the Constitution denotes three separate and independent branches of government, each with its own powers that cannot be infringed upon by any other branch. ... On writ of certiorari to the Supreme Court, Nixon argued that the PRMPA violated principles of separation of powers and that it offended the presumption of confidentiality of presidential communications set forth in United States v. Nixon. ... Although the Court in Nixon v. Administrator of General Services did recognize that Congress may regulate the President so long as it does not usurp any of the President's constitutional power, it did not place as much importance on principles of executive privilege as it had in United States v. Nixon. Indeed, the Court rendered it difficult to ascertain exactly when presidential confidentiality would prevail over congressional demands for disclosure. ... Instead, the court reasoned that judicial review only ensured that the President complied with the PRA and did not alter the control vested in the archivist or the executive branch. ... Thus, the court ordered the archivist to take all necessary measures to ensure that all federal records on the PROFS system, with the exception of purely presidential records under the PRA, were preserved. ...

TEXT:
[*773]

The concept of "separation of powers" [1] that has emerged as a result of the framework of the Constitution denotes three separate and independent branches of government, each with its own powers that cannot be infringed upon by any other branch. [2] However, this concept has its limits because the three branches of government must interact in order for the government to function effectively; hence, the "separation of powers" can never exist in the strictest sense. [3] Thus, for example, the powers of the President, as head of the executive branch, will from time to time be affected by the legislative and judicial branches. [4]

This comment will first examine the concept of separation of powers and how it has been handled by the courts, particularly
[*774] with respect to the extent that Congress may exert power over the President. Second, it will examine the historical background with respect to the power of the President over the presidential papers. Third, this comment will analyze the effect of the Nixon administration on the issue. Fourth, it will discuss Congress' passage of the Presidential Records Act to deal with the issue. Fifth, it will examine the effect of the Reagan/Bush administrations on issues of presidential control over executive papers. Finally, this comment will conclude with an analysis of the extent to which the legislative branch may and should be able to encroach on the autonomy of the President with respect to control over the

court found that the recordkeeping procedures of the NSC were "arbitrary and capricious" and in violation of the FRA. [161] Finally, the court found that the archivist violated his duties of providing adequate guidelines and failed to prevent the destruction of valuable information contained on the PROFS system. [162] Thus, the court ordered the archivist to take all necessary measures to ensure that all federal records on the PROFS system, with the exception of purely presidential records under the PRA, were preserved. [163]

VI. ANALYSIS AND CONCLUSION

The impact of the decision in Armstrong v. Bush is unclear. On the one hand, the result of the decision was to prevent the destruction of the information on the PROFS system by the President. [164] However, the court's analysis itself leads to the conclusion that the PRA is a judicially unenforceable statute that really only ensures that the President does not remove or destroy presidential papers at the conclusion of the term in office.

Indeed, the President may dispose of records that the President does not wish to preserve without any veto power on the part of the archivist or Congress. [165] The only possible exception to this is if Congress decides to pass legislation to prohibit a proposed disposal. However, this could only occur when the archivist brings the proposed disposal to Congress' attention. [166] Given that the archivist is a purely executive official removable by the President, it is not difficult to imagine a situation in which certain important historical materials may escape Congress' attention altogether.
[*796]

Furthermore, although the PRA does require the President to create, maintain, and preserve a system of records, [167] it does not provide any remedy if the President does not do so. In effect, the PRA relies heavily upon voluntary compliance by the President.

As such, the PRA may recognize the traditional deference granted to presidential communications to a greater degree than suggested in Nixon v. Administrator of General Services. Therefore, the PRA may be more in accordance with the principles of United States v. Nixon, wherein the Supreme Court recognized that there was more to protecting the President's communications than non-interference with constitutional functions. [168] The PRA may reflect a congressional realization that the President's communications should be accorded more protection than suggested in Nixon v. Administrator of General Services. However, if this were true, Congress probably would have expressly precluded judicial review rather than leaving to the courts the decision of whether it was impliedly precluded. Furthermore, the language of the PRA suggests that the President's duties are mandatory rather than discretionary, as the lower court recognized in Armstrong v. Bush. [169] Thus, it is this author's opinion that the PRA probably does not impliedly preclude judicial review. Nevertheless, there are many safeguards written into the PRA which protect the President's discretion and control of the materials; hence, based on Nixon v. Administrator of General Service, it is unlikely that the courts will ever find the PRA to be an infringement on the President's powers and thus, unconstitutional.

However, the fact that the President has to take the PRA into account at all in the course of making decisions on policy may be a hinderance in itself. Indeed, Presidents in the future will invariably be more careful with regard to their records if they choose to comply with the PRA. This will be true because not only will they have to be more cautious about what is communicated, but they will also have to submit to Congress proposals for disposal of certain information the archivist deems valuable. [170]

Although Congress has no veto power over disposal decisions, the President may not wish for Congress to view executive branch materials that the President plans to dispose. This in itself could cause a President to exercise caution when communicating. Addi **[*797]** tionally, the

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President's disposal decisions are subject to congressional legislation. [171] Of course, the President would have an opportunity to veto the bill that prohibits the disposal. Undeniably, if Congress overrides a presidential veto by a two-thirds vote, there is a strong possibility that the President's interest in confidentiality will not be great enough to counter a compelling interest in preserving the information. This would comport with the analysis in United States v. Nixon, whereby the Court determined that the President's need for confidentiality is of constitutional proportion and can only be overridden by a compelling interest.

Thus, the PRA may serve an important function by allowing Congress to at least inspect materials before they are destroyed, so as to preclude destruction of information that it has a compelling interest in retaining. However favorable this may be, the possibility exists that Presidents, through good faith compliance with the PRA, may screen their own communications and less readily speak openly and freely for fear that Congress may at some point examine and scrutinize what they have preserved as a record.

If the President does not wish to comply with the PRA, it may be possible for the President to pressure the archivist not to submit the proposed disposal to Congress, because the archivist works directly for the President. However, a President may not wish to pressure the archivist in this way and the archivist, who is a professional, may not wish to follow the President's command. Hence, the President would still be affected by the PRA, for without it this option would not be considered at all.

Concededly, it is beneficial to the public to place ownership of presidential papers in the hands of the United States; thus, valuable information of social or historical importance will be maintained and preserved when the President does not object. The PRA would have accomplished much if that was its only goal. The constitutionality of such law cannot be doubted for it recognizes that the President is elected to serve the public, but it offers the President the latitude to make decisions without fear that open and full discussion may lead to disclosure of secret information. However, the provisions of the PRA may go a step beyond the presumption of confidentiality recognized in United States v. Nixon, for they mandate that the President create and maintain a record system and subject presidential records to Congressional disclosure.
[*798]

The decision in Armstrong v. Bush adds another dimension to the dilemma: executive materials may be subject to disclosure under the FRA by way of review of the agency head's and archivist's actions under the "arbitrary and capricious" standard of the APA. Although this does not impede the President in the decisionmaking process, this does effectively subject executive materials to congressional regulation and possible public disclosure. The extent to which these materials are subject to claims of executive privilege is unclear. On the one hand, the same principles should apply to executive branch materials as apply to the President's own materials because it is the autonomy of the entire branch that is protected, and not just that of the President. On the other hand, however, the court in Armstrong v. Bush asserted that agency materials did not deserve the same protection as did the President's day-to-day communications. [172]

The decision in Armstrong v. Bush, however, was not that of the Supreme Court. Consequently, the issues that are raised by that decision and by the area of presidential autonomy will not be resolved until the Supreme Court has the opportunity to decide them. In the meantime, President Clinton and future Presidents face the uneasy task of ascertaining whether or not compliance with the PRA is necessary. As for the archivist, the court in Armstrong v. Bush has made the role more clear for the time being: the archivist will be busy ensuring that federal agencies have complied with the FRA but not so busy when it comes to the President.

FOOTNOTES:

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n1 The term "separation of powers" is defined as follows:

The governments of states and the United States are divided into three departments or branches: the legislative, which is empowered to make laws, the executive, which is required to carry out the laws, and the judicial, which is charged with interpreting the laws . . . one branch is not permitted to encroach on the domain or exercise the powers of another branch.

BLACK'S LAW DICTIONARY 951-52 (6th ed. abr. 1991).

n2 Article I of the Constitution defines the powers of the legislative branch; Article II defines those of the executive branch; and Article III outlines the powers of the judicial branch of government. U.S. CONST. art. I-III. The framework of the Constitution sets up a system of a limited government; that is, the distribution of authority among the branches of government gives to each branch the power to limit or expand the authority of another branch. PETER M. SHANE & HAROLD H. BRUFF, THE LAW OF PRESIDENTIAL POWER 31 (1988).

n3 See Archibald Cox, Executive Privilege, 122 U. PA. L. REV. 1383, 1388 (1974) ("Interaction, not independence, has historically been characteristic of the operation of the three branches of our government").

n4 Cox, cited at note 3, at 1388.

n5 295 U.S. 602 (1935).

n6 Humphrey, 295 U.S. at 629-30.

n7 15 U.S.C. 41-77 (1991). Section 41 of the Federal Trade Commission Act provides as follows:

A commission is created and established, to be known as the Federal Trade Commission . . . which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. . . . Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

15 U.S.C. 41.

n8 Humphrey, 295 U.S. at 629-32.

n9 Id. at 624.

n10 Id. at 628-30. The Court distinguished these officials from presidential appointees that performed "purely executive functions" that were removable by the President at will. Id.

n11 SHANE & BRUFF, cited at note 2, at 305. Shane & Bruff point to the fact that the FTC has concurrent jurisdiction with the Justice Department to prosecute antitrust violations. Id.

n12 Id.

n13 343 U.S. 579 (1952).

n14 Youngstown, 343 U.S. at 582.

n15 Id. at 583.

n16 Id.

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n17 Id.

n18 Id. at 585.

n19 Youngstown, 343 U.S at 585-89. Justice Jackson, in a concurring opinion, outlined the relationship of presidential power with respect to Congress. Id. at 635 (Jackson, J., concurring). Jackson's analysis was as follows:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

Id. at 635-38.

n20 Id. at 585-89.

n21 Eric R. Glitzenstein & Alan B. Morrison, The Supreme Court's Decision in Morrison v. Olsen: A Common Sense Application of the Constitution to a Practical Problem, 38 AM. U. L. REV. 359, 370 (1989). The Court generally has been concerned with the encroachment of any branch of government with respect to any other. Id.

n22 462 U.S. 919 (1983).

n23 Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163, 214 (codified at 8 U.S.C. 1254(a)(1) (1993)). Section 244(a)(1) of the Act provides, in pertinent part: (a) the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who . . . (1) is deportable under any law of the United States . . . and proves that . . . he was and is a person of good moral character; and is a person whose deportation would . . . result in extreme hardship.

8 U.S.C. 1254(a)(1).

n24 Chadha, 462 U.S. at 951-59.

n25 Id. at 957-59. Earlier, in Buckley v. Valeo, 424 U.S. 1 (1976), the Court had discussed the constitutionality of the Federal Election Campaign Act of 1971, 18 U.S.C. 437 (1971 & Supp. 1993). Buckley, 424 U.S. at 6. The Court held that Congress' appointment of officers to the Federal Election Commission violated separation of powers because the officers were given wide-ranging enforcement powers; hence, they must have been appointed by the President pursuant to Article II of the Constitution. Id. at 140.

n26 See, e.g., Chadha, 462 U.S. at 951-9; Buckley, 424 U.S. at 140.

n27 Cox, cited at note 3, at 1384.

n28 Id.

n29 Id.

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n30 Id. at 1384-87.

n31 Id. at 1391. For instance, James Wilson, addressing the Pennsylvania Ratification Convention asserted: "the executive power is better to be trusted when it has no screen. . . . He cannot act improperly, and hide either his negligence or inattention . . . ." Id. (citation omitted).

n32 Cox, cited at note 3, at 1392.

n33 Carl McGowan, Presidents and Their Papers, 68 MINN. L. REV. 409, 410 (1983). For instance, George Washington took his papers with him when he left office, and Congress, apparently believing them to be privately owned, purchased the papers from Washington's heir fifteen years later for $ 20,000. Id. at 410-11 (citation omitted).

n34 Id. at 411.

n35 Id. at 412-13. For instance, Abraham Lincoln's son Robert was once found destroying Lincoln's Civil War correspondence. Id. at 412.

n36 Id. at 414.

n37 Id. at 415.

n38 Cox, cited at note 3, at 1396.

n39 Carl Bretscher, Presidential Records Act: The President and Judicial Review under the Records Acts, 60 GEO. WASH. L. REV. 1477, 1480 (1992).

n40 Cox, cited at note 3, at 1404. For example, in some instances Congress had explicitly given the President the discretion to decide whether or not to deliver the documents. Id. at 1397. Other instances of non-disclosure involved presidential challenges to the particular body to deal with the subject of the requested documents. Id. at 1398.

n41 Id. at 1403 (citation omitted).

n42 Id.

n43 Prior to the Nixon administration, Congress' regulation of executive branch documents was predominantly limited to the Federal Records Act of 1943, 44 U.S.C. 21002118, 2501-2506, 2901-2909, 3101-3107, 3301-3324 (1984) ("FRA"). The FRA represents a series of statutes that originated with the Disposal of Records Act, ch. 192, 57 Stat. 380 (1943) and the Federal Records Act, ch. 849, 64 Stat. 583 (1950). These acts were eventually amended by the National Archives and Records Administration Act of October 19, 1984, Pub. L. No. 98-497, 98 Stat. 2280 (1984).

The FRA requires that "the head of each federal agency make and preserve records containing adequate and proper documentation of the . . . transactions of the agency." 44 U.S.C. 3101. Furthermore, it is the duty of each agency head to "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency," 44 U.S.C. 3102, and to "establish safeguards against the removal or loss of records." 44 U.S.C. 3105.

In addition, the FRA orders the archivist to provide guidelines to federal agencies and promulgate standards and procedures which may be followed; furthermore, the archivist has a duty to inspect the record management programs of the federal agencies. 44 U.S.C. 2904. If it is discovered that any federal agency practice was in violation of the FRA, the archivist

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must inform the head of the agency in writing of the violation and make recommendations for corrective measures. 44 U.S.C. 2115. If the corrective measures are not taken, the archivist must notify the President and Congress of the violation. 44 U.S.C. 2115.

The FRA also provides that no federal record can be alienated or destroyed except as authorized by the Act. 44 U.S.C. 3314. A "record" is defined under the Act as follows: "All books, papers, maps, photographs, machine readable materials, or other documentary materials . . . preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them." 44 U.S.C. 3301.

Pursuant to the FRA, records can be disposed of if, upon request of the agency head, the archivist believes that they lack "sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government." 44 U.S.C. 3303(a).

Accordingly, the FRA regulated the creation, maintenance, preservation, and disposal of federal records. However, the Act did not place ownership of the records in the United States. Further, though the FRA applied to the entire Executive Branch, the FRA apparently did not govern access to Presidential materials for it regulated only agency heads. Indeed, in enacting the FRA Congress' concern was not with the protection of executive privilege; instead, the FRA represented a concern for the maintenance of an orderly system of records management in the Executive Branch. Bretscher, cited at note 39, at 1488-89.

Furthermore, in Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980), the Supreme Court determined that the FRA did not confer a private right of action on private plaintiffs, but rather that Congress' intention was that the FRA be enforced through a system of administrative standards. Kissinger, 445 U.S. at 149. For instance, the FRA provides that the agency heads and the archivist must request the Attorney General to initiate an action to recover records removed from the agency in violation of the Act. Id. at 149; 44 U.S.C. 3106.

Another major regulation of executive materials was had through the Freedom of Information Act, 5 U.S.C. 552 (1970), which was passed in 1966 and directs each "agency" of the federal government to make publicly available all agency records that do not fall within certain exemptions. 5 U.S.C. 552(a)(3). The Freedom of Information Act is a disclosure statute only and does not direct agencies to create or preserve records. Kissinger, 445 U.S. at 152.

n44 418 U.S. 683 (1974).

n45 Nixon, 418 U.S. at 707.

n46 Id. at 687.

n47 Id. at 688.

n48 Id. Nixon publicly released edited transcripts of 43 conversations in which portions of 20 of the subpoenaed documents were included. Id.

n49 Id.

n50 Nixon, 418 U.S. at 688-89.

n51 Id. at 714.

n52 Id. at 689-90.

n53 Id. at 690.

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n54 Id. at 703.

n55 Nixon, 418 U.S. at 703.

n56 Id. at 704-05.

n57 Id. at 705-06.

n58 Id. at 708.

n59 Id. Furthermore, the Court reasoned that a President must be free to have open and free discussions with advisors in private so that policies may be shaped without hinderance. Id.

n60 Nixon, 418 U.S. at 706.

n61 Id. The Court further asserted that construing Article II powers as providing to the President an absolute, unqualified privilege against enforcement of the criminal laws would do violence to the notion of a constitutionally "workable government" and upset the role of the Judiciary as provided by Article III of the Constitution. Id. at 707.

n62 The Court noted that although the President's interest in confidential communications was not explicitly set forth in the Constitution, it is related to the effective function of the President in carrying out the duties of the office, and as such had its roots in the Constitution. Id. at 705-06.

n63 Id. at 712-13. The Court examined the interests in the administration of justice in light of the Fifth and Sixth Amendments and found that the constitutional need for production of evidence in a criminal trial was essential. Id. at 711-13. Furthermore, the Court reasoned that, while the President's interest in confidentiality was only general, the need for production of evidence at a particular trial was more specific and crucial. Id. at 713.

n64 Id. at 714-15.

n65 Nixon, 418 U.S. at 708.

n66 See id. at 705-06.

n67 Id. at 706.

n68 Interestingly, in 1948 Congressman Richard M. Nixon, addressing the issue of executive privilege, asserted as follows:

That would mean that the President could have arbitrarily issued an Executive order . . . denying the Congress of the United States information it needed to conduct an investigation of the executive department and the Congress would have no right to question his decision.

Any such order of the President can be questioned by the Congress as to whether or not that order is justified . . . .

Cox, cited at note 3, at 1396 (citation omitted).

n69 433 U.S. 425 (1977).

n70 Pub. L. No. 93-526, 88 Stat. 1695 (1974) (codified as amended at 44 U.S.C.A. 2111 note (1984)). The act provides, in relevant part: 101. (a) Notwithstanding any other law or

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any agreement or understanding . . . any Federal employee in possession shall deliver, and the Archivist of the United States . . . shall receive, obtain, or retain, complete possession and control of all original tape recordings of conversations which were recorded . . . and which-(1) involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government; . . . .

(b)(1) Notwithstanding any other law or any other agreement . . . the Archivist shall receive, retain, or make reasonable efforts to obtain . . . the Presidential historical materials of Richard M. Nixon . . . . 102. (a) None of the tape recordings or other materials . . . shall be destroyed . . . except as hereafter may be provided by law. (b) Notwithstanding any other provision of this title . . . the tape recordings and other materials . . . shall, immediately . . . be made available, subject to any rights, defenses, or privileges which the Federal Government or any other person may invoke, for use in any judicial proceeding . . . .

44 U.S.C.A. 2111 note (1984).

The PRMPA represented a Congressional response to President Nixon's intention to have the millions of documents and hundreds of tape recordings that had been accumulated while in office shipped to him in California. Nixon v. GSA, 433 U.S. at 430.

n71 Id. at 432. Nixon's intention to retain his papers was illustrated by the NixonSampson agreement, in which Nixon and the Administrator of General Services, Arthur B. Sampson, agreed that Nixon was to be vested of all legal and equitable title to the materials. Id. at 431. Further, the agreement recited that the materials were to be deposited near Nixon's home in California at a government facility. Id. The documents were to be held in the facility for three years, subject to Nixon's right to reproduce any materials. Id. at 432. At the end of the term, Nixon was to donate the documents to the United States but could exercise the right to withdraw any document without formality for any purpose as he saw fit. Id. The tape recordings, on the other hand, were to be donated to the United States after five years; however, Nixon retained the right to direct that the administrator destroy any tapes. Id. Moreover, the tapes were to be destroyed at the time of Nixon's death or on September 1, 1984, whichever came first. Id.

Prior to the passage of the PRMPA, Nixon had filed suit seeking enforcement of the Nixon-Sampson agreement. Id. Nixon v. Sampson, 389 F. Supp. 107 (D.C. Cir. 1975). For a discussion of the legislative history of the PRMPA, see Nixon v. Richey, 513 F.2d 430, 43945 (D.C. Cir. 1975).

n72 Nixon v. GSA, 433 U.S. at 434-35.

n73 44 U.S.C.A. 2111 note. Further, the PRMPA prohibited destruction of such materials, made them available for court subpoena, afforded Nixon access to any materials for any purpose consistent with the PRMPA, and directed the administrator to promulgate regulations governing access to the materials. 44 U.S.C.A. 2111 note.

n74 44 U.S.C.A. 2111 note. Specifically, 104 of the PRMPA lists the factors which the Administrator must take into account in promulgating the regulations as follows: (1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term "Watergate'; (2) the need to make such recordings and materials available for use in judicial proceedings; (3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings to information relating to the Nation's security; (4) the need to protect every individual's right to a fair and impartial trial; (5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials; (6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and (7) the need to give to

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Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

44 U.S.C.A. 2111 note.

n75 44 U.S.C.A. 2111 note.

n76 Nixon v. GSA, 433 U.S. at 429-30. The PRMPA was signed by President Ford in December of 1974, four months after Nixon had resigned as President. Id. at 429. Nixon commenced this action the day after Ford signed the PRMPA. Id. Nixon challenged the constitutionality of the PRMPA based on principles of separation of powers. Id. at 440.

n77 Id. at 430.

n78 Id. at 440. In addition to the separation of powers and privilege claims, Nixon also argued that the PRMPA offended his privacy interest, his First Amendment association rights, and the Bill of Attainder Clause. Id. at 429. However, the Court determined that these additional arguments were without merit. Id. at 455-84.

n79 Id. at 440.

n80 Id. at 441.

n81 Nixon v. GSA, 433 U.S. at 441.

n82 Id. at 443 (citing Nixon v. GSA, 408 F. Supp. 321, 342 (D.C. Cir. 1976)).

n83 Id. at 443.

n84 Id. at 444.

n85 Id. The Court also focused on the fact that the materials were available for use in judicial proceedings subject to a valid claim of executive privilege, that the materials which were purely private were to be returned to Nixon, and that the PRMPA did not make any materials available to Congress for inspection. Id.

n86 Nixon v. GSA, 433 U.S. at 449-50.

n87 418 U.S. 683 (1974).

n88 Nixon v. GSA, 433 U.S. at 449. However, the Court determined that its review of executive privilege was limited to the process by which the President's materials would be screened by the archivists, for pursuant to the PRMPA, any subsequent disclosure to the public would be subject to any asserted privilege of the President. Id. at 450. The Court also noted that purely private materials would be protected and returned to the President. Id.

n89 Id. at 451-52. The Court noted that in light of this historical practice, executive officials should recognize that their communications may be subject to examination by the archivists. Id. at 452. Further, the Court noted that the archivists " "record for discretion in handling confidential material is unblemished.' " Id. (citation omitted).

n90 Id. Among these interests were the need for procedures to preserve materials for historical and governmental purposes, the need to restore public confidence in the political process, and the need for the materials in civil and criminal litigation. Id. at 452-53.

n91 Id. at 455. Nixon continued to mount challenges to the taking of his materials pursuant

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to the PRMPA. See, e.g., Nixon v. United States, 782 F. Supp. 634 (D.C. Cir. 1991), in which it was determined that Nixon did not have legal title to his papers, but instead, as President, held them as trustee for the people of the United States. Id. at 643.

n92 Nixon v. GSA, 433 U.S. at 450.

n93 Id.

n94 Id. at 451.

n95 Id. at 454.

n96 Id. at 443.

n97 Compare note 92 and accompanying text with note 60 and accompanying text.

n98 Nixon v. GSA, 433 U.S. at 450.

n99 Id.

n100 McGowan, cited at note 33, at 431.

n101 Id. at 426.

n102 Pub. L. No. 95-591, 92 Stat. 2523 (codified at 44 U.S.C. 2201-2207 (1989)).

n103 Presidential Records Act of 1978, H.R. REP. No. 95-1487, 95th Cong., 2d Sess. 2 (1978).

n104 44 U.S.C. 2202. Vice-presidential records are treated in the same manner as presidential records for purposes of the PRA. 44 U.S.C 2207.

n105 44 U.S.C. 2203(a).

n106 44 U.S.C. 2203(b). "Documentary material" is defined under the PRA to be "all books, correspondence, memorandums, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, motion pictures . . . ." 44 U.S.C. 2201(1).

Presidential records include "any documentary materials relating to the **political activities** of the President or members of his staff, but only if such activities relate to or have a direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President." 44 U.S.C. 2201(2)(A).

Personal records include "all documentary materials . . . of a purely private or nonpublic character" such as:

(a) diaries, journals, or other personal notes . . . not prepared or utilized for . . . transacting Government business; (b) materials relating to private political associations . . . having no relation to . . . the carrying out of . . . duties . . .; and (c) materials relating exclusively to the President's own election to the office of the Presidency . . . which have no relation to . . . the carrying out of . . . duties of the President.

44 U.S.C. 2201(3).

n107 44 U.S.C. 2203(c).

n108 The Archivist of the United States is an executive official who is appointed by the

presidential papers.

I. SEPARATION OF POWERS

The concept of "separation of powers" has important implications in the area of presidential power, particularly with respect to the extent to which such power can be limited by Congress. In 1935, the Supreme Court in Humphrey's Executor v. United States [5] asserted, "the fundamental necessity of maintaining each of the three general departments . . . entirely free from the control . . . of the others . . . is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution." [6]

Nonetheless, Humphrey upheld a provision of the Federal Trade Commission Act [7] that limited the President's power to remove persons appointed to the Federal Trade Commission. [8] The Court determined that Congress could create an independent agency, such as the Federal Trade Commission, in which the appointees could not be removed by the President for policy reasons, but instead were removable only for cause. [9] The Court supported this decision by declaring that the duties of the Federal Trade Commission were quasi-legislative and quasi-judicial, and as such wholly discon **[*775]** nected from the executive branch; hence, presidential removal would threaten the powers of such department. [10]

However, as a practical matter, the Court allowed Congress to create agencies which in effect could succeed in independent execution of the laws without presidential control. For instance, independent agencies are often involved in prosecuting violations of laws. [11] Therefore, despite the rigid separation of powers discussion undertaken in Humphrey, the Court has permitted Congress to limit the President's power to remove appointees involved in execution of the laws. [12]

Later, the Supreme Court recognized that the President's powers could not be viewed independently of the other branches of government, and that Congress was crucial in shaping the role of the President. In Youngstown Sheet and Tube Co. v. Sawyer, [13] the Supreme Court examined the scope of presidential power with respect to the legislative branch. [14] In Youngstown, the Korean conflict caused President Truman to direct the Secretary of Commerce to seize and operate the nation's steel mills when labor disputes threatened a strike. [15] President Truman notified Congress of his actions after he had issued the order. [16] The steel companies brought suit against the Secretary of Commerce arguing that the seizure was unconstitutional because it was not congressionally authorized. [17]

In the course of its opinion, the Court discussed the power of the presidency with respect to Congress. Specifically, the Court held that the President's power to act must stem from either the Constitution or from an act of Congress. [18] Finding neither to exist in this case, the Court found the seizure unconstitutional. [19] In sum,
[*776] the Court found that the President could not exercise any legislative power without Congressional approval; furthermore, the President's power to act, in the area of legislation or otherwise, was largely defined with respect to the powers that Congress could lawfully exercise and the powers that Congress had chosen to delegate to the President. [20]

Although the Court in Youngstown had recognized that the President's powers could not be viewed independently of Congressional powers, the Court has consistently guarded against the usurpation by Congress of powers which the Constitution has vested in the President. [21] For instance, in Immigration and Naturalization Services v. Chadha, [22] the Court struck down a provision of the Immigration and Nationality Act [23] which gave to either House of Congress the power to veto a deportation decision of the Immigration and Naturalization Service. [24] The Court asserted that Congress could not legislate and take away the President's

President with the advice and consent of the Senate and may be removed by the President. 44 U.S.C. 2103(a). The President must communicate the reasons for such removal to Congress. 44 U.S.C. 2103(a).

n109 44 U.S.C. 2203(c)(1).

n110 44 U.S.C. 2203(c).

n111 44 U.S.C. 2203(d)-(e).

n112 See, generally, 44 U.S.C. 2203.

n113 See H.R. REP. No. 1487 at 13.

n114 See note 108 and accompanying text. Congress, in enacting the PRA, did not want to place any limitations on the authority of the President to remove the Archivist so that actual control of presidential papers would remain within the executive branch. H.R. REP. No. 1487 at 2.

n115 44 U.S.C. 2203(f)(1)-(2).

n116 44 U.S.C. 2203(f)(3). The archivist, upon making such determination, must publish notice of the intended disposal in the Federal Register at least 60 days ahead of the scheduled date of disposal. 44 U.S.C. 2203(f)(3).

n117 44 U.S.C. 2203(f)(1).

n118 44 U.S.C. 2204. Documents which may be restricted include those: (1) authorized to be kept secret for national security and foreign policy reasons; (2) relating to the appointment of federal officials; (3) exempted from disclosure by statute; (4) trade secrets and commercial or financial information which is confidential; (5) confidential communications between the President and advisors concerning requests for advice; and (6) personnel and medical files of which disclosure would be an invasion of privacy. 44 U.S.C. 2204(a)(1)-(6).

n119 44 U.S.C. 2204(b)(3). However, a person denied any presidential record because it has been restricted pursuant to the PRA may file an administrative appeal with the archivist or his designee. 44 U.S.C. 2204(b)(3).

n120 Bretscher, cited at note 39, at 1486-87.

n121 H.R. REP. No. 14876 at 6-7.

n122 Id. at 13.

n123 Id.

n124 44 U.S.C. 2204(a).

n125 See note 120 and accompanying text.

n126 See note 120.

n127 See 44 U.S.C.A. 2201 note.

n128 721 F. Supp. 343 (D.C. 1989), aff'd in part, rev'd in part, 924 F.2d 282 (D.C. Cir. 1991), on remand, 810 F.Supp 335 (D.C. 1993).

n129 Armstrong, 721 F. Supp. at 344-45. PROFS, a computer system marketed by IBM, allowed for users of the system to send three types of messages to other users: "(1) short "notes' or mail; (2) larger documents, which the recipient could revise; and (3) individual calendars." Id. at 345.

n130 Id. at 345 n.1.

n131 5 U.S.C. 552 (1970). See note 43.

n132 Armstrong, 721 F. Supp. at 347; See also Armstrong, 810 F. Supp. at 337.

n133 Armstrong, 721 F. Supp. at 347.

n134 Id. The procedures for preservation of the PROFS information by the EOP were limited. Id. at 345. For example, the NSC made backup tapes of information that had not already been deleted by the senders or receivers of the information. Id. The backup tapes were kept for only two weeks before disposal. Id. Other entities in the EOP kept backup tapes for four to six weeks before disposal. Id.

n135 Id.

n136 Id. at 348.

n137 Id. at 353 n.16.

n138 Armstrong, 721 F. Supp. at 348.

n139 Id. at 350.

n140 Id.

n141 Id. In addition, the defendants urged that the information on the PROFS system did not constitute a "record" for purposes of the PRA or FRA. Id. at 348.

Although the plaintiffs brought claims pursuant to the FOIA, the court did not address these claims because it found that the FOIA constituted a "disclosure statute, and a disclosure statute only" and as such it imposed no obligations for record maintenance. Id. at 345 (citing Kissinger, 445 U.S. at 152).

n142 5 U.S.C. 701 (1993). The APA provides, in relevant part, that ""agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2).

n143 Armstrong, 721 F. Supp. at 351.

n144 Id. at 354-55.

n145 Id. at 350.

n146 Id.

n147 Id. at 352 (citing 44 U.S.C. 2203(a)). Specifically, the court said that 2203(a) requires that "through the implementation of records management controls . . . the President shall document the performance of his duties" and assure that such documents "are maintained as Presidential records." Id.

n148 Armstrong, 721 F. Supp. at 353.

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n149 Id. Specifically, the court found significant the fact that ownership of the records was transferred to the United States in determining that the President's actions under the PRA would not constitute a political question. Id. Additionally, the court denied that judicial review under the PRA would display a lack of respect for the President or that it was impossible for want of judicially manageable standards. Id. (citing Baker v. Carr, 369 U.S. 208 (1962)).

n150 Id. at 354. The court concluded that the FRA was also enforceable through the APA, although it concentrated its discussion solely on the PRA. Id. at 351-54. In addition, the Court found that there were genuine issues of fact as to whether the PROFS information constituted a "record" for purposes of the PRA and FRA and whether the NSC's recordkeeping procedures were "arbitrary and capricious." Id. at 353-54.

n151 Armstrong v. Bush, 924 F.2d 282, 287 (D.C. Cir. 1991).

n152 Armstrong, 924 F.2d at 287.

n153 Id.

n154 Id.

n155 Id. at 290.

n156 Id.

n157 Armstrong, 924 F.2d at 290. Thus, the court asserted: "it is difficult to conclude that Congress intended to allow courts, at the behest of private citizens, to rule on the adequacy of the President's records management practices or overrule his record creation, management, and disposal decisions." Id. (citation omitted).

Consequently, the court deemed significant the fact that under the PRA neither Congress nor the archivist had the authority to veto a decision of the President to dispose of records. Id. Also, the court noted that the PRA did not give the archivist authority to examine or question the President's record management practices. Id.

n158 Id. at 297. Nevertheless, the court did agree with the lower court's decision that the FRA did not impliedly preclude judicial review. Id. at 291-92. Although the court did find that the FRA precluded a private citizen from directly enforcing the FRA against an agency official, the FRA did not preclude a challenge against the agency head or archivist through the APA based on their failure to take enforcement action. Id. at 294-95.

The court based this determination on the holding in Kissinger, 445 U.S. at 148, which maintained that the FRA precluded private enforcement in favor of a system of administrative enforcement. Armstrong, 924 F.2d at 294. Further, the court noted that the legislative history of the FRA did not indicate a congressional mandate against judicial review under the APA's "arbitrary and capricious" standard. Id. at 295.

Crucial to this determination was the court's finding that the separation of powers concerns inherent in the PRA did not exist with respect to the FRA because the President's day-to-day operations were not at stake. Id. at 292. Hence, the court affirmed the lower court's decision that the APA authorized judicial review of the NSC's recordkeeping procedures and of the archivist's alleged breach of duty under the FRA. Id. at 297.

n159 Armstrong v. Bush, 810 F. Supp. 335 (D.C. 1993).

n160 Armstrong, 810 F. Supp. at 340-41.

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n161 Id. at 342-48. This finding was based on the fact that the NSC gave discretion of determining what was a federal record to its staff, the material on the computer system was different from the copy that is printed out and preserved, and there was no adequate supervision of the staff's determination of what constituted a record. Id.

n162 Id. at 348.

n163 Id. at 350.

n164 Id.

n165 44 U.S.C. 2203(d)-(e).

n166 44 U.S.C. 2203(d)-(e).

n167 44 U.S.C. 2203(a).

n168 See notes 61 and 62 and accompanying texts.

n169 See note 148 and accompanying text.

n170 44 U.S.C. 2203(d)-(e).

n171 H.R. REP. No. 1487 at 13.

n172 See note 158.

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constitutionally authorized veto power; hence, Congress' only recourse was to pass a law which would be subject to the presidential veto. [25]
[*777]

II. HISTORICAL DEVELOPMENT

As the above analysis reveals, as long as Congress does not attempt to usurp power that was vested in the President by the Constitution, Congress can regulate or otherwise affect the President's overt exercise of powers. [26] This general approach historically defined the interplay between the President and Congress with respect to control over the President's actions. However, traditionally, an exception has existed where Congress attempted to interfere with the President's autonomy and internal decisionmaking processes. [27] This exception generally has been referred to as the executive privilege. [28] The executive branch had frequently invoked executive privilege in cases in which Congress or the judiciary had attempted to obtain documents concerning communications within the executive branch. [29]

The Constitution does not provide for an executive privilege to withhold information from Congress or the judiciary; the concept arose from a strict theory of separation of powers. [30] The intent of the Framers of the Constitution with respect to executive privilege is not entirely clear. On the one hand, there were those that argued that such privilege did not exist. [31] On the other hand, some Presidents believed that the President had the power to withhold executive papers from Congress and did in fact withhold documents. [32] Indeed, such Presidents believed that their papers were their personal property. [33]

The concept of private ownership rendered difficult the preservation of presidential papers. [34] For instance, many papers were ei **[*778]** ther destroyed by Presidents, bequeathed to heirs, or destroyed by the Presidents' heirs. [35] A dramatic increase in the number of records preserved occurred when President Franklin D. Roosevelt established the presidential libraries, consisting of depositories for the President's materials upon completion of the President's term or terms in office. [36] However, these libraries did not have the effect of altering the private ownership principle because the President had discretion over whether to deposit any papers therein. [37]

Consequently, the private ownership principle was consistent with the presidential withholding of documents. Although requests for documents were often complied with by the Presidents, [38] at times various Presidents chose to withhold disclosure to Congress, to the judiciary, or to the public in order to protect the confidentiality of internal communications. [39] However, most of these decisions could be justified by reasons other than preserving the President's need for privacy. [40] Yet, President Jackson, in refusing to deliver to the Senate papers regarding the removal of money from the Bank of the United States, wrote as follows:

I have yet to learn under what constitutional authority that branch of the Legislature has a right to require of me an account of any communication. . . . Might I be required to detail to the Senate the free and private conversations I have held with those officers on any subject relating to their duties and my own. [41]

Thus, it was apparent that claims of executive privilege had relied in some part on the President's need for privacy with respect to internal communications. [42] This traditional approach recognized that the President must be free to discuss and deliberate in private without fear that the communications or decisionmaking processes would later be subjected to scrutiny.
[*779]

III. THE EFFECT OF THE NIXON ADMINISTRATION

The Nixon administration had a negative impact on presidential privilege for the necessities of the times mandated that the tension between the privilege and need for disclosure be resolved in favor of the latter. [43] The Nixon administration and the Watergate inci **[*780]** dent handed to the Supreme Court an opportunity to explore the doctrine of executive privilege and its effect on presidential withholding of documents. In United States v. Nixon, [44] the Court denied President Nixon's claim that executive privilege precluded the President from being amenable to judicial process. [45] Here, President Nixon was named an unindicted co-conspirator in the Watergate incident by a grand jury of the United States District Court for the District of Columbia. [46] Subsequently, the special prosecutor had a subpoena issued to Nixon requiring that he produce certain tapes, papers, and other writings relating to meetings between Nixon and his advisors. [47] After releasing some of the requested information, [48] Nixon filed a motion to quash the subpoena based on a claim of executive privilege. [49]

The district court denied the motion to quash, holding that the judiciary had the final word with respect to claims of executive privilege. [50] The court issued an order for in camera inspection of the subpoenaed material. [51] Nixon appealed to the United States Court of Appeals for the District of Columbia Circuit. [52] The special prosecutor and Nixon then each filed a petition to the Supreme Court for a writ of certiorari before judgment, both of which were granted. [53]

On appeal, Nixon argued that the subpoena should be quashed because the separation of powers doctrine prohibited judicial review of the President's claim of executive privilege, [54] and that, for purposes of constitutional law, executive privilege should prevail over the subpoena. [55] After finding that the controversy was indeed susceptible to judicial review, the Court examined Nixon's claim of
[*781] an absolute privilege and the need to protect the communications between Presidents and their advisors. [56] The Court stated that the privilege of presidential confidentiality arose from the supremacy of the branches of government within their own area of constitutional duties; hence, the protection of the President's confidentiality had constitutional underpinnings. [57] Consequently, the Court asserted that there was a presumptive privilege in favor of presidential communications. [58] The Court based this assertion on the expectation of a President to the confidentiality of conversations and correspondence and on the deference accorded to the privacy of all citizens. [59]

However, the Court did not rule in favor of the President's "presumptive privilege." Instead, the Court held that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege . . . ." [60] The Court further stated that absent a claim of a need to protect military, diplomatic, or national security, the interest in confidentiality alone was not hindered by an in camera inspection of the documents. [61] The Court weighed the President's need for confidentiality [62] against the need for fair administration of criminal laws, and found that a generalized interest in confidentiality alone could not outweigh the need for fair adjudication of a criminal case. [63] Hence, the Court ordered that the President comply with the subpoena, but cautioned that, with respect to an in camera inspection of presidential
[*782] material, the district court had a heavy burden of ensuring that any evidence not relevant to the prosecution was not released. [64]

The Court in United States v. Nixon struck a fair balance between the need for presidential privacy and the need for disclosure. The Court recognized that a President necessarily

demands a high level of confidentiality in order for decisionmaking to be effective. [65] The Court appeared to place this demand within the realm of constitutional protection. [66] However, it also recognized that some fundamental interests, especially those rooted in the Constitution, must prevail over a generalized interest in privacy absent more compelling circumstances. [67] The fact that this was a criminal case involving the President may have influenced the Court to ensure that the subpoena did issue, for the public's interest in learning of any possible criminal activities of its elected leader was indeed compelling. Even so, the Court's decision represented a fair and reasonable method of examining a President's claim of executive privilege. [68]

Consequently, the principles underlying the decision in United States v. Nixon were further discussed in a later case involving Congressional regulation of presidential papers. In Nixon v. Administrator of General Services, [69] the Supreme Court examined the constitutionality of the Presidential Recordings and Materials Preservation Act ("PRMPA"). [70]
[*783]

The PRMPA was passed in an effort to abrogate the NixonSampson agreement. [71] The general purpose of the PRMPA was to keep all materials pertaining to the Nixon administration in the custody of the archivist of the United States. [72] Specifically, the PRMPA provided that complete control and possession of papers, documents and other objects and materials that constituted historical materials would be in the United States. [73] Additionally, the PRMPA directed that the administrator take into account the need to give to Nixon tape recordings and other materials not pertaining to the interest in providing the public with the truth about Watergate, along with those materials not of historic significance. [74]
[*784] In addition, judicial review by the United States District Court for the District of Columbia was provided for under the PRMPA. [75]

Consequently, Nixon filed an action in the District Court for the District of Columbia challenging the constitutionality of the PRMPA and seeking an injunction against its enforcement. [76] The district court determined that the PRMPA did not violate the Constitution and, therefore, dismissed the action. [77] On writ of certiorari to the Supreme Court, Nixon argued that the PRMPA violated principles of separation of powers and that it offended the presumption of confidentiality of presidential communications set forth in United States v. Nixon. [78]

The Court, in analyzing the PRMPA, determined that it did not violate principles of separation of powers. [79] First, the Court rejected Nixon's claim that the congressional delegation of decisionmaking power to an executive officer related to disclosure of presidential materials constituted an interference with executive branch business. [80] Instead, the Court opined that because control of the materials was given to the Administrator of General Services and the career archivists, who were all executive officials appointed by
[*785] the President, legislative non-interference was demonstrated. [81]

Furthermore, the Court asserted that Nixon's argument represented an " "archaic view of the separation of powers as requiring three airtight departments of government'." [82] Instead, the proper inquiry in analyzing separation of powers issues was whether the PRMPA deterred the executive branch from accomplishing its proper functions as set forth in the Constitution. [83] The Court concluded that the PRMPA contained appropriate safeguards to protect executive branch functions. [84] Indeed, the fact that the materials remained in the control of the executive branch and could be released only absent an applicable executive privilege was of particular significance. [85]

The Court also rejected Nixon's assertion of presidential privilege with respect to the materials. [86] The Court, relying on the analysis set forth in United States v. Nixon, [87]

recognized that a President, and even a former President, may assert a privilege with respect to communications made in performance of official responsibilities and in the process of shaping policies and making decisions. [88]

Notwithstanding, the Court contended that the screening of materials by archivists presented a very limited interference with the need for confidentiality in presidential decisionmaking; indeed, the archivists had historically reviewed presidential materials on a confidential basis for purposes of maintaining presidential libraries. [89] Furthermore, consistent with the requirements of United States v. Nixon, the Court concluded that intrusions into executive **[*786]** confidentiality were justified by substantial government and public interests. [90] Thus, the Court concluded that the PRMPA did not violate any principle of executive privilege and was therefore constitutional. [91]

Interestingly, the Court in Nixon v. Administrator of General Services did not appear to attach the same weight to the President's need for confidentiality in communications that it did in United States v. Nixon. The Court instead opined that "an absolute barrier to all outside disclosure is not practically or constitutionally necessary . . . . There has never been an expectation that the confidences of the Executive Office are absolute and unyielding." [92] The Court based this assertion on the fact that former Presidents had deposited papers in presidential libraries for preservation and disclosure. [93] Further, the Court stated the expectation of the confidentiality of presidential communications had consistently been limited in the past and is subject to erosion after a President leaves office. [94] Accordingly, the Court concluded that claims of executive privilege by themselves must yield to congressional purposes of preservation of materials for important government and historical reasons. [95]

Although the Court in Nixon v. Administrator of General Services did recognize that Congress may regulate the President so long as it does not usurp any of the President's constitutional power, [96] it did not place as much importance on principles of executive privilege as it had in United States v. Nixon. [97] Indeed, the Court rendered it difficult to ascertain exactly when presidential confidentiality would prevail over congressional demands for disclosure. Of course, Congress will almost always have an interest in preservation of presidential materials. The Court indicated that this interest will overcome the President's need for confidential **[*787]** ity. [98] Indeed, the Court suggested that unless the President can invoke a specific privilege, such as the need to protect military secrets, the bare interest in confidentiality will never be sufficient to override Congress' power to regulate presidential materials. [99]

This analysis, if taken to its extreme, would render constitutional any regulation enacted by Congress to control access to virtually all of the President's materials, excepting those materials to which the President may invoke a specific need for a privilege. Thus, presidential decisionmaking could be hindered through the President's knowledge that any communications of historical significance may be subject to regulation and disclosure.

IV. THE PRESIDENTIAL RECORDS ACT

Although the Supreme Court provided answers to questions regarding control over Nixon's records, the Nixon administration left Congress with the recognition that the United States lacked a clear policy with respect to the papers of the President. [100] The PRMPA applied only to Nixon, and the question of ownership of presidential documents remained open. [101]

In 1978, Congress attempted to resolve the issues surrounding executive privilege and the ownership of presidential materials through enactment of the Presidential Records Act ("PRA"). [102] The House Report accompanying the PRA stated the purposes of the Act as follows: "(1) to establish the public ownership of records created by future Presidents . . . in the course of discharging their official duties; and (2) to establish procedures governing the preservation and public availability of these records at the end of a Presidential

administration." [103] The PRA provides that the United States retains complete ownership, possession, and control of presidential records. [104]

Consequently, during the term in office, the President has the duty to create and manage adequate records ensuring that "the activities, deliberations, decisions, and policies that reflect the per **[*788]** formance of his constitutional, statutory, or other official or ceremonial duties are adequately documented . . . ." [105] Furthermore, the PRA requires that all documentary materials produced or received by the President, the President's staff, or the President's assistants be characterized and maintained as either presidential or personal records. [106]

Additionally, the PRA provides that the President can dispose of any records no longer of historical, evidentiary, administrative or informational value. [107] The only restriction placed on the President is the duty to obtain, in writing, the archivist's [108] views concerning the intended disposal. [109] If the archivist notifies the President that Congress will not be consulted regarding disposal of the records, the President can then dispose of the records immediately. [110] If, however, the archivist believes the records to be of significant interest, Congress will be notified and the President must submit disposal schedules to Congress and wait sixty days before disposal. [111] However, neither the archivist nor Congress has a veto power over the decision of the President to dispose of the records. [112] Congress does, however, have the power to pass legisla **[*789]** tion to prohibit the disposal of certain records. [113]

At the conclusion of the President's term or terms in office, the duty to maintain, preserve, and provide access to presidential records shifts to the Archivist of the United States, [114] whose responsibility it is to ensure that all such records are deposited in an archival facility operated by the United States. [115] The archivist is, however, authorized to dispose of any records that had been examined and determined to lack any administrative, historical, or informational value. [116]

The PRA also gives to the archivist the duty to make presidential records available to the public as quickly and as completely as possible. [117] Notwithstanding this duty, the PRA places restrictions on public access to presidential records. For example, the President can specify durations, not to exceed twelve years, in which access to certain documents may be withheld. [118] Full discretion is given to the archivist to restrict any records, and such decisions are not subject to judicial review. [119] Furthermore, the PRA neither expressly provides for judicial review of the President or archivist nor confers any private right of action; hence, the question remains as to whether judicial review may have been impliedly precluded by the PRA. [120]

Congress enacted the PRA with the decision in Nixon v. Administrator of General Services in mind. [121] Specifically, Congress wanted to ensure that it did not encroach on the President's ability
[*790] to perform the duties assigned by the Constitution. [122] Thus, total control of the recordkeeping system was left in the hands of the executive branch through the President and the archivist, a purely executive official removable by the President. [123] Congress also left the President with discretion in the preservation or disposal of records and allowed the President to restrict access for twelve years. [124] Furthermore, Congress did not provide for judicial review of the PRA and left open the question of whether it was impliedly precluded. [125]

By including all of these safeguards, Congress seemed to recognize the need to protect the confidentiality of the President's communications. However, Congress, in relying solely on the decision in Nixon v. Administrator of General Services, in reality did not attach significance to

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the traditional deference that was accorded to a President's claim of confidentiality; instead, it concentrated only on non-interference with the President in carrying out the duties which were constitutionally delegated to the President. Through the PRA, Congress may have effectively placed a barrier on a President's ability to communicate freely without the realization that someday, whether at the conclusion of the presidential term or twelve years in the future, the President's actions will be subject to public disclosure. This very possibly could have a chilling effect on a President concerned with maintaining a favorable image in history.

Nonetheless, because questions of judicial review were left open, [126] and the PRA may not be enforceable against the President, the President may be able to dispose of any information the President wishes not to disclose. If this is true, then the PRA may have left the President with substantial discretion so as not to impinge on presidential decisionmaking processes. As the discussion that follows will reveal, this was a crucial determination that the courts were forced to examine after passage of the PRA.
[*791]

V. THE EFFECT OF THE REAGAN AND BUSH ADMINISTRATIONS

The PRA was effective on January 20, 1981; [127] thus Ronald Reagan was the first President to be affected by its terms. In Armstrong v. Bush, [128] Reagan's alleged involvement in the selling of arms to Iran in order to subsidize the Contras in Nicaragua ("IranContra") provided the courts with the opportunity to answer questions of judicial review and determine the effect that the PRA had upon the President and executive privilege.

President Reagan, at the conclusion of his administration, began preparing to destroy information contained on the PROFS system, the inter-office computer communications system used by employees within the **Executive Office of the President** ("EOP"). [129] The PROFS system became significant during the congressional investigation of Iran-Contra, for it appeared that messages which discussed the scheme were sent via PROFS by certain participants. [130] When journalist Scott Armstrong, the National Security Archive, and other private citizens and entities ("plaintiffs") heard of the proposed disposal, they filed suit in the District Court for the District of Columbia against then President Bush as head of the EOP, the National Security Council ("NSC") and against the Archivist of the United States ("defendants") seeking declaratory and injunctive relief under the Freedom of Information Act ("FOIA"), [131] the PRA, and the FRA. [132]

The plaintiffs alleged that information contained on the PROFS system constituted either agency records, thus falling under the FOIA or the FRA, or presidential records, thus governed by the PRA. [133] The plaintiffs also contended that the NSC's recordkeeping procedures were "arbitrary and capricious"; thus, the archivist had shirked his responsibilities under the PRA and FRA to ensure that the PROFS system information was properly managed. [134]

[*792] Therefore, plaintiffs sought to enjoin the destruction of the PROFS information and to compel the President and the NSC to classify the information under either the FRA or PRA. [135]

The defendants moved to dismiss the action or, in the alternative, for summary judgment. [136] However, they did not raise a challenge to the constitutionality of the PRA itself; [137] instead, the defendants argued that implying a private cause of action into the PRA or the FRA violated the principles of separation of powers. [138] Further, the defendants emphasized that the legislative history of the PRA demonstrated Congress' concern with not interfering with presidential performance of constitutional duties, as set forth in Nixon v. Administrator of General Services. [139]

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Accordingly, the defendants contended that, to further this aim, Congress ensured that control of the records be vested in the executive branch through the archivist. [140] Therefore, judicial review of the PRA would result in an improper transfer of control to the judiciary and would violate separation of powers. [141] Moreover, the defendants asserted that even if a private cause of action could be implied, the President's actions demonstrated complete compliance; further, his actions were unreviewable because the actions were committed to the President's discretion under the Administrative Procedures Act ("APA"). [142] Hence, the defendants claimed that, because they were discretionary, these actions constituted the unreviewable exercise of political authority and represented purely political questions. [143]

The lower court denied the defendants' motions to dismiss and
[*793] for summary judgment. [144] The court disagreed that judicial review of the PRA constituted the judicial usurpation of executive power. [145] Instead, the court reasoned that judicial review only ensured that the President complied with the PRA and did not alter the control vested in the archivist or the executive branch. [146]

Moreover, the court determined that the PRA, by its terms, was not discretionary; indeed, the language of the PRA was mandatory. [147] Accordingly, the court contended that although the President was given some discretion over how to manage the presidential records, the PRA nevertheless imposed an affirmative duty on the President to ensure that records were maintained. [148] The court also concluded that the presidential compliance with the PRA did not constitute a political question. [149] Thus, the court found that the PRA and the FRA were enforceable through the APA. [150]

The defendants appealed to the United States Court of Appeals for the District of Columbia Circuit, and asserted that the plaintiffs, as private parties, lacked standing to assert claims under the PRA or FRA. [151] Furthermore, the defendants claimed that the President's actions were not reviewable under the PRA or FRA because the PRA precluded judicial review of presidential actions and the FRA precluded judicial review of agency actions. [152]

The court, affirming the lower court's decision not to grant summary judgment, first determined that the plaintiffs had standing
[*794] because they were in the "zone of interests" to be protected by the statutes. [153] Specifically, the court decided that the intention of Congress in enacting both the PRA and the FRA was to secure to private researchers access to the records and history of the United States government. [154]

However, the court reversed the lower court's determination that the PRA did not preclude judicial review. [155] The court opined that the intention of Congress in enacting the PRA was to balance two competing goals: (1) to ensure the preservation and public ownership of presidential materials, and (2) to effectuate a policy of minimal interference with the President's day-to-day operations and retain executive control of the materials. [156] Thus, the court reasoned that Congress impliedly precluded judicial review so that the President would be required to maintain the records, but that implementation of the requirement would be left to the President's own discretion. [157] Furthermore, the court reversed the lower court's determination that the APA authorized judicial review of the President's actions under the PRA, because the President was not an "agency" for purposes of the APA; accordingly, the court remanded the case to the district court. [158]
[*795]

On remand, the district court examined the recordkeeping practices of the NSC with respect to the PROFS system, as well as the practices of the archivist in providing adequate guidelines for its preservation. [159] First, the court determined that some of the information on the PROFS system did indeed rise to the level of a "record" under the FRA. [160] Second, the

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SYMPOSIUM: **Executive Privilege** Since United States v. **Nixon:** Issues of Motivation and Accommodation

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SUMMARY:
... What better time to contemplate the shadow cast by President **Nixon's** Watergate-era abuses on subsequent presidential assertions of **executive privilege** than as the House of Representatives contemplates the impeachment of another President for, among other things, asserting **executive privilege** in a manner that allegedly constituted an abuse of power. Independent Counsel Kenneth Starr's inclusion in his impeachment referral of President Clinton's very assertion of **executive privilege** both evidences and contributes to the vulnerability of the privilege - and to the vulnerability of Presidents willing to assert it. ... Although Rozell makes no such claim regarding the FBI/DEA Memorandum, these more difficult questions arise in the context of President Clinton's assertion of **executive privilege** in Independent Counsel Starr's investigation involving the President and Monica Lewinsky. ... Rozell also describes as indefensible President Clinton's assertion of **executive privilege** in the context of a House committee investigation of the termination of employees of the White House Travel Office. ... Other executive branch officials first should seek to accommodate **Congress's** legitimate needs and exhaust alternatives, which requires them to express to **Congress** their concerns about confidentiality in terms other than assertions of **executive privilege.** ... In response, executive branch officials, typically - and appropriately - acting at this stage without presidential involvement, convey to **Congress** their confidentiality concerns in terms other than **executive privilege.** ... As part of this process of achieving appropriate accommodations, executive branch officials must convey to **Congress** their confidentiality concerns in terms other than **executive privilege.** ...

TEXT:
[*1127]

The events that dominate our national consciousness on this twenty-fifth anniversary of United States. v. **Nixon** [1] underscore the value of Mark Rozell's enterprise. What better time

up conversations about potential wrongdoing in the White House." Id. at 1070.

n17. The United States Court of Appeals for the District of Columbia Circuit recognized this duty of each branch to accommodate the legitimate needs of the other in considering a House subcommittee's request for executive branch information: "The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme." United States v. AT&T, 567 F.2d 121, 130 (D.C. Cir. 1977).

n18. 418 U.S. 683, 708 (1974). The Court in **Nixon** held that the need for confidentiality in presidential communications was outweighed by prosecutorial need in the particular context of a criminal trial of President **Nixon's** close advisers, where President **Nixon** was named as an unindicted co-conspirator. The Court noted the likely limited effect of its holding: "We cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." Id. at 712.

n19. Harmon, supra note 6, at 10. The memorandum explained further,

The President must maintain a climate in which executive branch advisers do not feel compelled to write and speak for a larger audience. That is, he must be able to assure his advisers that their deliberations will be made public, if at all, only in exceptional circumstances. Anything that undermines this assurance impairs, to a degree, the ability of the executive branch to perform its constitutional functions. This is the basis of the constitutional privilege for executive branch deliberations.

Id. at 10-11.

n20. Rozell, supra note 2, at 1124.

n21. Clearly, as the court noted, "purely private conversations that did not touch on any aspect of the President's official duties or relate in some manner to presidential decision-making would not properly fall within the **executive privilege.**" In re Grand Jury Proceedings, 5 F. Supp. 2d 21, 26 (D.D.C.), aff'd in part, rev'd in part sub nom. In re Lindsey, 158 F.3d 1263 (D.C. Cir.), and cert denied, 119 S. Ct. 466 (1998) (footnote omitted). The court appropriately recognized, however, that "the President does need to address personal matters in the context of his official decisions." Id.

n22. The court required Independent Counsel Starr to demonstrate "first, that each discrete group of the subpoenaed materials likely contains important evidence; and second that this evidence is not available with due diligence elsewhere." Id. at 28 (quoting In re Sealed Case, 121 F.3d 729, 754 (D.C. Cir. 1997)).

n23. See Letter from Attorney General Janet Reno to the President (May 23, 1996) (on file with author); see also Letters from Jack Quinn, Counsel to the President, to William F. Clinger, Jr., Chairman, Committee on Government Reform and Oversight, U.S. House of Representatives (May 3, May 9, May 30, June 25, and Aug. 15, 1996) (on file with author) (describing factual background and legal basis for assertion of privilege).

n24. See Rozell, supra note 2, at 1103 ("[A] number of controversies during his presidency bring to light how his administration exercised that power in a crafty, even hidden-hand, fashion.").

n25. Id. at 1102.

n26. Id. at 1082.

n27. See Harmon, supra note 6, at 16.

n28. **Executive Privilege** - Secrecy in Government: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Gov't Operations, 94th Cong. 125 (1975) (statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel).

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to contemplate the shadow cast by President **Nixon's** Watergate-era abuses on subsequent presidential assertions of **executive privilege** than as the House of Representatives contemplates the impeachment of another President for, among other things, asserting **executive privilege** in a manner that allegedly constituted an abuse of power. Independent Counsel Kenneth Starr's inclusion in his impeachment referral of President Clinton's very assertion of **executive privilege** both evidences and contributes to the vulnerability of the privilege - and to the vulnerability of Presidents willing to assert it.

Professor Rozell and I agree upon much, beginning with the basic legitimacy of the principle of **executive privilege.** Although both United States v. **Nixon** and the Clinton impeachment inquiry involved criminal investigations, Rozell appropriately focuses primarily on disputes between the executive branch and **Congress,** the far more typical context in which **executive privilege** issues arise. Such disputes require balancing the President's need for confidentiality against **Congress's** legitimate need for executive branch information. I agree with Rozell that "in a democratic republic, the presumption gener **[*1128]** ally should be in favor of openness, but it is also important to recognize that Presidents have legitimate secrecy needs." [2]

Rozell persuasively argues that President **Nixon's** shadow has created an imbalance against **executive privilege.** Presidents fearing criticism, including comparisons to President **Nixon,** may have been at times unduly reluctant to assert the privilege, or even to address the issue more generally. [3] Rozell opens his article with the promising suggestion that "there is a need to reestablish the legitimacy of **executive privilege** and an understanding of its proper scope and limits in our constitutional system." [4] Undoubtedly, the legitimacy of **executive privilege** depends on careful application of a clear and principled understanding of the privilege, particularly in times of a weakened presidency. Rozell devotes surprisingly little attention, however, to defining his view of the "proper scope and limits" of **executive privilege** or developing a framework for analyzing the legitimacy of assertions of **executive privilege.**

Instead, the bulk of Rozell's article seeks to describe and assess seriatim every presidential assertion and significant potential assertion of **executive privilege** since United States v. **Nixon.** As in his previous works, Rozell has created a valuable resource by compiling historical information that can be difficult to obtain. Yet despite our shared basic understandings **[*1129]** about the legitimacy of **executive privilege,** I find myself disagreeing with his analysis of many of these specific incidents. [5] He often is harshly critical of the actions of Presidents and executive branch officials, though it is difficult to discern a pattern to his criticism. He accuses Presidents in some instances of unjustifiably withholding information from **Congress,** and elsewhere of inappropriately backing down and withdrawing claims of **executive privilege,** thereby weakening the privilege.

Criticism from both sides certainly could be warranted if a President fails to act consistently across incidents or Presidents do not act consistently with each other. Yet Rozell's specific criticisms often do not seem based on these or other principled grounds. Moreover, many of the same incidents of which Rozell is most critical seem to me good examples of how the system should work when the President and **Congress** disagree about the release of executive branch material, with the two branches reaching agreements that seek to accommodate the needs of both. In the end, Rozell's unduly harsh assessments, including likening President Clinton to President **Nixon,** may contribute to the very problem he decries: the undermining of the legitimacy of **executive privilege.**

Professor Rozell and I seem to hold disparate conceptions of both the appropriate scope of **executive privilege** and the optimal process for resolving disputes between **Congress** and the executive branch about the disclosure of information. And our views on scope and process seem to flow in part from different perspectives on the role that partisan, personal and institutional interests on the parts of both branches can be expected to play in **executive**

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privilege disputes. The Framers of the Constitution appreciated that the President and Members of **Congress** would be political actors, motivated at times by partisanship, personal self-interest, and institutional concerns, and **[*1130]** devised a constitutional system that takes account of these anticipated motivations. So, too, must an appropriate understanding of **executive privilege** reflect and accommodate this basic political reality. Rozell's analysis would benefit from a fuller consideration of the appropriate contours of **executive privilege,** and in particular the accommodation process, which is a central feature of executive branch policy in this area and the process actually used to negotiate with **Congress** to seek to accommodate the legitimate needs of both branches.

A few examples may illustrate the differences in our approaches first to scope and then to process. With regard to scope, Rozell describes **executive privilege** as appropriately asserted for "shielding materials relating to national security or maintaining the privacy of internal deliberations over official governmental matters." [6] He accurately and approvingly describes the function of the privilege as enabling Presidential advisors "to deliberate and discuss policy options without fear of public disclosure of their every utterance." [7] In application, however, Rozell apparently would require more of Presidents than is suggested by these general descriptions, though what more is not clear.

For example, Rozell harshly criticizes President Clinton's assertions of **executive privilege:** "The Clinton administration has made elaborate and mostly indefensible claims of **executive privilege.** Prior to the so-called Lewinsky scandal, the administration made several claims of **executive privilege** - only one of which appeared designed to protect the constitutional preroga **[*1131]** tives of the executive branch." [8] Although he warns generally of the dangers of facile comparisons of Presidents with President **Nixon,** Rozell apparently believes that a direct comparison is warranted in the case of President Clinton: "Is it any longer possible to restore the proper balance to the exercise of **executive privilege?** Because of the Watergate taint and Clinton's more recent abuses, that may take years to happen." [9] Rozell, however, fails to substantiate his attempt to associate President Clinton's use of **executive privilege** with President **Nixon's** Watergate abuses.

President Clinton, for example, asserted **executive privilege** to prevent the release of a memorandum to the President from the Director of the FBI and the Administrator of the DEA. The memorandum conveyed confidential advice and recommendations regarding the Clinton Administration's efforts to combat drug trafficking. This was a candid and confidential advice memorandum from two high-ranking executive branch officials to the President. Such a memorandum, typically described as a presidential communication, is widely and properly recognized as falling at the very core of **executive privilege.**

Of course, **executive privilege** is a qualified privilege, and the President's need for confidentiality must be balanced against **Congress's** need for the document. Here the Members of **Congress** who requested the FBI/DEA Memorandum asserted no particularized need for it, such as having a related bill under consideration. Indeed, Rozell references allegations that the request was a politically motivated attempt to embarrass the President in an election year. [10]

Professor Rozell's brief analysis of this incident does not adequately explain why he views the assertion as indefensible, let alone why it does not meet his own standard of "maintaining the privacy of internal deliberations over governmental matters." He apparently would require a greater showing of harm to the public interest than the chilling effect on advice and deliberations that the courts, including the Supreme Court, have recognized as supporting the privilege. He also misstates the applicable test for assessing whether congressional need is sufficient to override the privilege, without offering any citation or explanation for his formulation: "Lacking a real threat to na **[*1132]** tional security or to the public interest posed by revealing internal deliberations, **Congress's** request for information must override the President's claim of privilege, unless it can be specifically demonstrated that **Congress's**

actions were outside the scope of any legitimate investigation." [11] He goes so far as to suggest that congressional need is adequate "even for pursuit down "blind alleys.'" [12] In fact, under the controlling case law presidential communications are "presumptively privileged," and the privilege can be overridden in the congressional setting only by a showing that the information is "demonstrably critical to the responsible fulfillment of the [congressional entity's] functions." [13] Citing this "controlling case law," the Attorney General advised President Clinton of her determination that the subcommittee that requested the FBI/DEA Memorandum had failed to make the requisite showing of need to overcome the clearly applicable privilege. [14]

Moreover, Rozell's assessment of this claim of privilege seems to be influenced by what he views as a desire on the part of President Clinton to protect himself from embarrassment that might result from releasing the document. [15] Elsewhere, **[*1133]** too, where he is critical of presidential action, Rozell seems to suggest that an assertion of **executive privilege** is illegitimate where a President is motivated by a concern that disclosure of information would prove embarrassing. He at times seems to equate an effort to avoid embarrassment with an effort to hide evidence of executive branch wrongdoing. [16] Rozell's analysis thus implicitly raises interesting questions about the role motive should play in **executive privilege.**

Clearly motive matters. Where a President asserts **executive privilege** in order to hide evidence of illegal acts or other wrongdoing by high level executive officials, the assertion is illegitimate. In fact, motive matters for both the President and **Congress,** because both have a constitutional obligation to respect and accommodate the legitimate needs of the other. [17] Both branches also have an obligation to consider the long-term interests of their institutions and the public interest more generally. In some instances, for example, the institutional interests of the presidency may require an assertion of **executive privilege** that conflicts with other of the President's short-term personal interests, such as where public release of an advice memorandum would reflect well on the President, but would severely chill the willingness of advisers to be candid in the future. Finally, although relevant, motive is extremely difficult to assess. Rarely will there be direct evidence of congressional or presidential motive. Reliance on motive to assess the legitimacy of particular requests for information or assertions of privilege thus must be exercised with caution.

Unlike situations where requested information would reveal executive branch wrongdoing, the fact that release of a deliberative communication to the President likely would embarrass the President typically should not defeat an otherwise **[*1134]** legitimate claim of privilege. Indeed, it is not merely coincidental, but inherent in the nature of presidential communications that they often could prove embarrassing if publicly released: that is a fundamental reason for the very existence of the privilege. The Supreme Court in United States v. **Nixon** recognized

the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. [18]

The Department of Justice Office of Legal Counsel also implicitly addressed the inherent connection between the need for confidentiality and potential embarrassment to the President in a 1981 memorandum where it noted that executive branch advisers "may hesitate - out of loyalty or perhaps, as the Supreme Court suggested, out of self-interest - to make remarks that might later be used against their colleagues or superiors." [19] A President's political adversaries can be expected to seek presidential communications and executive branch deliberative information for the very reason that public disclosure might prove embarrassing to the President, which Rozell notes may have been the motivation behind the request for the

FBI/DEA Memorandum to President Clinton. The presidential communications privilege rests on a recognition that the public interest is served by allowing Presidents to receive candid advice from their top officials, and confidentiality is critical to the willingness of advisers to be forthcoming, particularly where **[*1135]** the advice is potentially embarrassing to the President. Thus, the President's confidentiality needs appropriately may prevail, whether or not the information is personally embarrassing, where **Congress** has not demonstrated an adequate overriding need.

Difficult cases may arise where the information sought not only would prove embarrassing to the President but arguably would reveal presidential wrongdoing, or where the assertion of the privilege itself otherwise may be viewed as an abuse of power. Although Rozell makes no such claim regarding the FBI/DEA Memorandum, these more difficult questions arise in the context of President Clinton's assertion of **executive privilege** in Independent Counsel Starr's investigation involving the President and Monica Lewinsky. Again, Rozell attacks President Clinton's motive: "there is little evidence... the Clinton White House undertook this drawn-out battle merely to make a principled stand on **executive privilege.** All evidence to date suggests that Clinton used **executive privilege** to frustrate and delay the investigation ...." [20] Although Rozell does not address the issue of impeachment, his criticism is similar to that of Independent Counsel Starr, who in his impeachment referral and testimony before the House Judiciary Committee charged President Clinton with abuse of power for these and other assertions of privilege in the course of Starr's investigation.

A thorough analysis of the Lewinsky assertion, including how the analysis changes as **executive privilege** moves from the congressional to the independent counsel and impeachment settings, is not possible here. Again, though, Rozell oversimplifies in condemning the assertion, which in my view clearly does not constitute an impeachable offense.

Independent Counsel Starr had contended that **executive privilege** was wholly inapplicable because what was at issue was the President's personal, not official, conduct. Starr therefore claimed the right to compel presidential advisers to testify before the grand jury without any showing of particularized need to overcome the privilege. The district court rejected this argument, agreeing instead with the President that the communications at issue involved official matters, such as impeachment, domestic and foreign policy matters, and assertions of official privileges, arising out of the independent counsel investigation involving the President's personal relationship with **[*1136]** Lewinsky. [21] The district court therefore required Starr to make an ex parte showing of need to the court, and then, not surprisingly, ruled that under the applicable test, Starr's need for evidence in a criminal investigation outweighed the President's need for confidentiality. [22] After prevailing on the legal principle in dispute, but losing in its application to his own situation, the President declined to appeal. Although this assertion of **executive privilege** fairly may be criticized, particularly with the benefit of hindsight, an issue of principle was involved and on this issue the court ruled for the President.

Rozell also describes as indefensible President Clinton's assertion of **executive privilege** in the context of a House committee investigation of the termination of employees of the White House Travel Office. This assertion was appropriate in my view. The factual background and issues raised are quite complex and not fully considered by Rozell. The Attorney General explained the basis for the assertion in a publicly released letter to the President advising him that the assertion would be appropriate. [23] Briefly, of particular importance was that the congressional request was highly unusual and intrusive in that it sought confidential documents prepared by the Office of White House Counsel in order to assist the President and his staff in responding to the very House committee that made the request. The request thereby threatened the ability of the President to have the effective assistance of his White House Counsel in considering privilege and other issues of importance **[*1137]** to the presidency that often arise in congressional oversight investigations.

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Perhaps more fundamental than my differences with Rozell over the scope of **executive privilege** are our disparate views about the appropriate process to be followed to resolve information disputes between **Congress** and the executive branch. To summarize some recurring themes in Rozell's analysis with which I disagree: Rozell criticizes Presidents since President **Nixon** for seeking to avoid personally asserting **executive privilege** and for asserting the privilege only as a last resort. He accuses Presidents of improperly "inventing" other rationales for noncompliance with congressional requests for information, often to promote personal or partisan interests. He applauds **Congress** when it forces the President to invoke **executive privilege** and criticizes the executive branch when it reaches an accommodation with **Congress,** implying that ultimate resolution of disputes demonstrates the illegitimacy of earlier executive branch objections. He evaluates disputes in terms of which branch was the victor and which the loser.

In my view, Rozell's assessments rest on a fundamentally misguided approach to **executive privilege.** For reasons I will discuss, I believe that direct presidential involvement in responding to congressional requests for information should be avoided whenever possible. I agree that only Presidents may assert **executive privilege** in disputes with **Congress,** but they should do so only when absolutely necessary, only as a last resort, typically late in the process. Other executive branch officials first should seek to accommodate **Congress's** legitimate needs and exhaust alternatives, which requires them to express to **Congress** their concerns about confidentiality in terms other than assertions of **executive privilege. Congress** should be respectful of these confidentiality concerns and not demand that the President personally assert **executive privilege** where legislative needs do not outweigh confidentiality concerns. And, finally, reaching an accommodation with **Congress,** even late in the game, does not inherently constitute a loss for the executive branch, threatening to the legitimacy of **executive privilege.** Nor does it demonstrate that the executive branch was unjustified in raising confidentiality concerns.

My views are consistent with the accommodation process actually used to resolve disputes between the executive branch and **Congress.** There certainly is room to differ about the optimal process to be followed. But Rozell does not critique or find **[*1138]** fault with the accommodation process; he fails even to acknowledge that Presidents and executive branch officials are following a process. Rozell instead impugns Presidents' motives, accusing President Bush, for example, of being "crafty" and "hidden-handed" and intentionally concealing his use of **executive privilege** by devising inappropriate grounds for withholding information. [24] In fact, many of the executive branch actions of which Rozell is harshly critical were entirely consistent with long-standing and principled executive branch practice.

When viewed through the lens of the accommodation process, greater consistency emerges across the incidents Rozell attributes to individual Presidents' personal motivations and distinct approaches to the issue of **executive privilege.** For example, Rozell characterizes "Bush's strategy" as seeking to "further the cause of withholding information by not invoking **executive privilege,**" but instead by "cloaking the use of **executive privilege** under different names." [25] There may well be ascertainable differences in Presidents' willingness to accommodate congressional requests for information, as well as in the relative value Presidents place on openness in government. To the extent that differences exist, I would tend to favor greater openness, as apparently Rozell would. Rozell's analysis, however, does not establish such differences, nor does it explain why he condemns Bush for being "crafty, even hidden-handed," while he praises Ford's "cautious, non-confrontational approach" of "avoiding the phrase "**executive privilege**' and using other legal bases for withholding information." [26]

The practice of seeking to avoid a formal assertion of **executive privilege** and first discussing confidentiality concerns in other terms is, in my view, a central and valuable component of the accommodation process, not the "strategy" of a single President. Moreover,

differences among incidents and Presidents often seem attributable to **Congress,** including to the role politics plays in motivating the congressional requests. For example, the number and nature of congressional requests vary to a **[*1139]** significant degree with whether the same political party that commands majorities in **Congress** also occupies the presidency.

The accommodation process effectively takes account of the institutional, partisan and personal interests that may arise in disputes between **Congress** and the President over executive branch information. This long-standing practice is premised on a respect for **Congress** as a coordinate branch of government with legitimate needs for information that sometimes conflict with the executive branch's needs for confidentiality. Both branches have a constitutional obligation to work together in good faith to resolve such conflicts. Often the initial congressional request for executive branch information seeks more than is legitimately needed, particularly in times of divided government where partisanship is more likely a factor. In response, executive branch officials, typically - and appropriately - acting at this stage without presidential involvement, convey to **Congress** their confidentiality concerns in terms other than **executive privilege.** Executive branch policy prohibits an assertion of privilege until the President and the Attorney General are satisfied that the executive branch has discharged its constitutional duty to accommodate **Congress's** legitimate needs. [27] Typical accommodations include **Congress** substantially narrowing its initial request, or the executive branch briefing members of **Congress** on the subject matter of the requested documents, or the executive branch showing - but not relinquishing control of - the documents to particular members of **Congress.** It misses the point to attempt to categorize such resolutions in terms of wins and losses.

The reality of congressional oversight of the executive branch is not a neat theoretical world but one that requires the messy give and take of negotiations. The institutional conflicts and political motivations sometimes inherent in this aspect of the relationship between the President and **Congress** are best resolved through a process that allows for flexibility, a balancing of competing interests, and compromise. As part of this process of achieving appropriate accommodations, executive branch officials must convey to **Congress** their confidentiality concerns in terms other than **executive privilege.** Far from being a "hidden-handed" or "crafty" attempt to avoid presidential involvement, this process maximizes the likelihood of reaching an appropriate accommodation of **Congress's** needs. **[*1140]** Only when this process fails is presidential invocation of **executive privilege** appropriate. The alternative of routine early involvement by the President seems impractical, insufficiently respectful of **Congress,** and likely to encourage the solidification of positions on both sides.

Executive privilege is unlikely ever to be a popular constitutional principle, or even one well understood by the general public. In times of constitutional crisis and a weakened presidency, assertions of **executive privilege** become particularly easy targets. It is precisely during such times of difficulty, however, that respect for the principle of **executive privilege,** and maintaining a principled approach to the application of the privilege, is most critical.

Returning to the months following Watergate proves instructive. In reaction to President **Nixon's** failed attempt to use **executive privilege** to withhold certain tape recordings containing evidence of wrongdoing, **Congress** considered legislation to limit the ability of Presidents to assert **executive privilege.** Now-Supreme Court Justice Antonin Scalia, who was then serving as the Assistant Attorney General for the Office of Legal Counsel, had the unenviable task of defending **executive privilege** before a Senate subcommittee considering the legislation. He informed the subcommittee that its bill would unconstitutionally infringe on the President's authority to assert **executive privilege.**

Now, as then, the President's authority to assert **executive privilege** in appropriate circumstances constitutes a vital component of our constitutional system of government. To quote from Assistant Attorney General Scalia's Senate testimony in 1975:

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I realize that anyone saying a few kind words about **Executive privilege** after the events of the last few years is in a position somewhat akin to the man preaching the virtues of water after the Johnstown flood, or the utility of fire after the burning of Chicago. But fire and water are, for all that, essential elements of human existence. And **Executive privilege** is indispensable to the functioning of our system of checks and balances and separation of powers. [28]

I would add that the President personally bears a special burden to safeguard the principle of **executive privilege.** Each **[*1141]** President has a responsibility to preserve the constitutional authorities of the office. President **Nixon's** assertion of **executive privilege** for the purpose of hiding wrongdoing clearly weakened **executive privilege.** So, too, may less egregious, yet unwise presidential assertions. In other instances, though, the good of the presidency may require Presidents to assert **executive privilege,** even at high personal costs where unfair comparisons to President **Nixon** are sure to follow.

FOOTNOTES:

n1. 418 U.S. 683 (1974).

n2. Mark J. Rozell, **Executive Privilege** and the Modern Presidents: In **Nixon's** Shadow, 83 Minn. L. Rev. 1069, 1126 (1999).

n3. Rozell carries this point too far, however, in arguing that **Nixon's** successors routinely have concealed their use of **executive privilege:** "A common tactic is to devise some other phrase or use some other power to justify withholding information when an **executive privilege** claim would have been appropriate." Id. at 1071. As I will discuss, this criticism reflects a fundamental misunderstanding of the elements of the process of accommodation, a long-standing practice by which the President and **Congress** resolve disputes regarding access to executive branch materials.

I also disagree with Rozell's implicit suggestion that each President should adopt new guidelines on **executive privilege.** For example, the procedures President Reagan set forth in a 1982 memorandum remain in effect today, and there is great value in such continuity. See Memorandum from President Ronald Reagan to the Heads of Executive Departments and Agencies, Re: Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982).

n4. Rozell, supra note 2, at 1072. I also fully endorse his conclusion that legislation defining and limiting **executive privilege** is unwarranted - and would add that such legislation might encounter significant constitutional impediments - because **Congress** possesses ample powers to challenge presidential assertions of **executive privilege,** including its authorities related to oversight, appropriations, confirmations and impeachment.

n5. In some instances, my disagreement stems not from differences in analysis, but from what I view as mistaken characterizations of the relevant facts, which admittedly can be difficult to ascertain in this area. For example, Rozell states that the Bush Administration created a "secret opinions policy" to deny **Congress** a legal opinion of the Department of Justice's Office of Legal Counsel (OLC). He asserts that "**Congress** traditionally has not been denied access to OLC decision memoranda." Id. at 1114. In fact, the policy of keeping confidential certain sensitive OLC legal opinions was not new to the Bush Administration and is entirely consistent with the principle of **executive privilege.** Rozell himself notes that President Reagan asserted **executive privilege** to prevent the release to **Congress** of OLC legal opinions. See id. at 1099.

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n6. Id. at 1071. He also describes the privilege as "an accepted doctrine when appropriately applied to two circumstances: (1) certain national security needs and (2) protecting the privacy of White House deliberations when it is in the public interest to do so." Id. at 1070. This latter characterization is somewhat narrower, and unduly so, in that it refers only to "White House deliberations." The privilege also is available for deliberative communications that take place elsewhere in the executive branch, as well as for nondeliberative presidential communications. See In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997) (discussed infra at note 13); Memorandum from John Harmon, Assistant Attorney General, Office of Legal Counsel, to the Attorney General, Re: The Constitutional Privilege for Executive Branch Deliberations: The Dispute with a House Subcommittee over Documents Concerning the Gasoline Conservation Fee (Jan. 13, 1981) (on file with author). Finally, **executive privilege** has long been recognized as appropriately asserted to protect information regarding open law enforcement investigations. See 40 Op. Att'y Gen. 45, 46 (1941).

n7. Rozell, supra note 2, at 1122.

n8. Id. at 1118 (footnote omitted).

n9. Id. at 1125.

n10. See id. at 1121.

n11. Id.

n12. Id.

n13. Senate Select Committee on Presidential Campaign Activities v. **Nixon,** 498 F.2d 725, 731 (D.C. Cir. 1974). The United States Court of Appeals for the District of Columbia Circuit first articulated this standard in refusing to enforce a subpoena issued by the Senate Select Committee on Presidential Campaign Activities for tape recordings of conversations in President **Nixon's** offices. See id. at 726.

The D.C. Circuit recently reviewed the law of **executive privilege,** including as discussed in Senate Select Committee and United States v. **Nixon,** and confirmed that "the **Nixon** cases establish the contours of the presidential communications privilege." In re Sealed Case, 121 F.3d 729, 744 (D.C. Cir. 1997). The court there considered an assertion of **executive privilege** in the context of an Independent Counsel investigation and held that where the President invokes presidential communications privilege, the documents become presumptively privileged and the privilege is more difficult to surmount than in the more general case of deliberative communications. Moreover, the court held that unlike the deliberative process privilege, which applies only to the deliberative or advice portions of the document sought, the presidential communications privilege encompasses documents in their entirety, including purely factual information, and extends to post-decisional communications. See id. at 744-46.

n14. Letter from Attorney General Janet Reno to the President (Sept. 30, 1996) (on file with author).

n15. Rozell states, "Clinton never made a case that releasing the memorandum would cause any undue harm. It appeared that he only stood to harm his own political standing by releasing a document that contained embarrassing information." Rozell, supra note 2, at 1121.

n16. For example, Rozell characterizes President George Washington's views on **executive privilege** as follows: "At no point did [President Washington] believe that a President could withhold information to protect himself from politically embarrassing information or to cover-

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SYMPOSIUM: **EXECUTIVE PRIVILEGE** AND THE CLINTON PRESIDENCY: Restoring Balance to the Debate Over **Executive Privilege:** A Response to Berger

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SUMMARY:
... The Clinton scandal of 1998-1999 reinvigorated the national debate over **executive privilege.** ... He asks, "Who has a more legitimate interest in inquiring whether a law has been faithfully executed than the lawmaker?" [29] **Executive privilege** remains dubious if **Congress** has an absolute, unlimited power of inquiry. ... [60] He believed that he had an absolute power of **executive privilege**--one that could be claimed on behalf of the entire executive branch of government. ... [232] Foley's thesis is most germane to the analysis of how to resolve the dilemma of **executive privilege:**

> ... [234] Such resolutions to the dilemma of **executive privilege** are antithetical to the nature of a constitutional system that tolerates and cultivates abeyances. ...

In this Essay, Professor Rozell responds to Raoul Berger's **Executive Privilege:** A Constitutional Myth. *Berger's work claims that* ***executive privilege*** *does not have a constitutional basis. Addressing Berger's textual, historical, and structural arguments, Professor Rozell argues contrarily that* ***executive privilege*** *is a legitimate power when exercised properly and that to view* ***executive privilege*** *as a constitutional absolute is improper. As such, Professor Rozell recognizes the limits of* ***executive privilege*** *and suggests that it may be subject to a balancing test when weighed against demands for information. He argues that presidents should not use this power to protect information that is merely embarrassing or politically damaging but rather should reserve this power for the most compelling reasons--such as protecting certain national security needs or preserving White House confidentiality when it is in the public interest to do so. Professor Rozell argues that the separation of powers doctrine can resolve* ***executive privilege*** *dilemmas, as the political branches settle informational disputes between themselves, with limited judicial*

Therefore, there is much evidence that **executive privilege** is, in many instances, a legitimate, not usurped, power. The exercise of a presidential power creates a strong presumption of validity, especially when the coordinate branches of government accept the legitimacy of such authority.

B. ***Executive Privilege*** *and the Early Presidents*

To understand the Framers' view of executive branch secrecy requires an examination of governmental decision-making in the early republic. The intentions of the Framers are illuminated by how they put constitutional principles into practice. As Berger writes, an analysis of the early years of the republic is "more nearly contemporaneous with the forging of the Constitution." [105]

The first presidential administration established the most important precedents for the exercise of executive power. George Washington understood the crucial role **[*556]** he played in establishing precedents for the future. As he wrote on May 5, 1789, to James Madison, "As the first of every thing, *in our situation* will serve to establish a precedent, it is devoutly wished on my part, that these precedents may be fixed on true principles." [106]

Washington established important precedents for **executive privilege.** The first concerned a congressional request to investigate the failure of a 1791 military expedition by General Arthur St. Clair against American Indians. [107] The House of Representatives established an investigative committee "to call for such persons, papers, and records, as may be necessary to assist their inquiries." [108] The committee requested from the President documents regarding St. Clair's expedition. [109]

Washington convened his Cabinet to determine how to respond to this first-ever request for presidential materials by a congressional committee. [110] He wanted to discuss whether any harm would result from public disclosure and, most pertinently, whether he could rightfully refuse to submit documents to **Congress.** [111] Along with Hamilton, Knox, and Edmund Randolph, Thomas Jefferson attended the meeting. He later recalled:

> We had all considered and were of one mind 1. that the house was an inquest, & therefore might institute inquiries. 2. that they might call for papers generally. 3. that the Executive ought to communicate such papers as the public good would permit, & ought to refuse those the disclosure of which would injure the public. Consequently were to exercise a discretion. 4. that neither the [committees] nor House has a right to call on the head of a [department], who & whose papers were under the [President] alone, but that the [committee] [should] instruct their chairman to move the house to address the President. [112]

Washington eventually determined that disclosing the information would not harm the national interest and that it was a necessary action in order to vindicate St. Clair. [113] Although Washington chose to negotiate with **Congress** over the committee's request and eventually decided to turn over relevant information, he had taken an affirmative position on the executive branch's right to withhold information. **[*557]** Importantly, Washington determined that he had the right to withhold information if disclosure would injure the public. He did not believe that it was appropriate to withhold embarrassing or politically damaging information. [114] Unfortunately, this distinction between exercising secrecy in the public interest as opposed to doing so out of self-interest would be lost on some of Washington's successors.

In 1794, the Senate directed Secretary of State Edmund Randolph, "'to lay before the Senate

the correspondences which have been had between the Minister of the United States at the Republic of France, [Gouverneur Morris] and said Republic, and between said Minister and the office of Secretary of State.'" [115] The Senate later amended the motion to address the President instead of Minister Morris. [116] The amended version also "requested" rather than "directed" that such information be forwarded to **Congress.** [117] Believing that disclosure of the correspondence would be inappropriate, Washington sought the advice of his cabinet. [118] Three cabinet members expressed their opinions:

> "General Knox is of the opinion, that no part of the correspondences should be sent to the Senate:
>
> Colonel Hamilton, that the correct mode of proceeding is to do what General Knox advises; but the principle is safe, by excepting such parts as the President may choose to withhold:
>
> Mr. Randolph, that all correspondence proper, from its nature, to be communicated to the Senate, should be sent; but that what the President thinks is improper, should not be sent." [119]

The Attorney General William Bradford wrote separately: "'it is the duty of the Executive to withhold such parts of the said correspondence as in the judgment of the Executive shall be deemed unsafe and improper to be disclosed.'" [120]

Washington responded as follows to the Senate's request:

> "After an examination of [the correspondence], I directed copies and translations to be made; except in those particulars, which, in my judgment, for public considerations, ought not to be communicated.
>
> **[*558]** These copies and translations are now transmitted to the Senate; but the nature of them manifest the propriety of their being received as confidential." [121]

Washington allowed the Senate to examine some parts of the correspondence, subject to his approval. [122] He believed that information damaging to the "public interest" could be withheld from **Congress.** [123] The Senate never challenged his action. [124]

In 1796, John Jay had completed U.S. negotiations with Great Britain over unsettled issues from the American Revolution. [125] Because many considered the settlement unfavorable to the United States, **Congress** took a keen interest in the administration's actions in the negotiations. [126] Not only did the Senate debate ratification of the Jay Treaty, but the House also set out to conduct its own investigation. The House passed a resolution requesting from Washington information concerning his instructions to the U.S. Minister to Britain regarding the treaty negotiations. [127] Washington refused to comply with the House request and replied:

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in

> the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent. [128]

[*559] Washington explained that "the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office . . . forbids a compliance with your request." [129]

The House debated the propriety of Washington's action. [130] The House took no substantive action other than passing two non-binding resolutions: one asserting that **Congress** need not stipulate any reason for requesting information from the Executive; [131] and the other proclaiming that the House had a legitimate role in considering the expediency with which a treaty was being implemented. [132] The chief constitutional architect, James Madison, who was then a Representative, disagreed in part with Washington's action and defended the House's "right" to request information from the President. [133] Madison also proclaimed, however, on the House floor, "that the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure of it at the time." [134]

During ratification, the Senate voted to keep the treaty secret, as Hamilton wrote, "because they thought [the secrecy] the affair of the President to do as he thought fit." [135] The Senate minority opposed to ratification listed seven objections to the treaty. [136] None cited Washington's decision not to seek advice from the Senate. [137]

Thomas Jefferson recognized the legitimacy of executive branch secrecy. As President, he classified his correspondence as either public or secret. [138] He withheld correspondence deemed secret from both the public and **Congress.** [139] For example, in 1807, President Jefferson denied a congressional request to provide information about the Aaron Burr conspiracy. [140] Burr had been involved with a secessionist conspiracy, resulting in treason charges. [141] Most relevant to the **executive privilege** debate was a January, 1807 House resolution requesting that the President "lay before this House any information in possession of the Executive, except such as he may deem the public welfare to require not to be disclosed." [142] **Congress** clearly had acknowledged the President's right to exercise his discretion to withhold information. Jefferson replied to the congressional resolution by announcing Burr's guilt and **[*560]** asserting a need to withhold information about the other alleged conspirators: "In this state of the evidence, delivered sometimes, too, under the restrictions of private confidence, neither safety nor justice will permit the exposing names, except that of the principal actor, whose guilt is placed beyond question." [143] Jefferson also had written to the U.S. District Attorney conducting the Burr prosecution that it was "the necessary right of the President of the [United States] to decide, independently of all other authority, what papers, coming to him as President, the public interests permit to be communicated, & to whom." [144]

The principal author of the Constitution, James Madison, also withheld information from **Congress** during his presidency. [145] He purposefully withheld information about French trade restrictions against the United States that eventually led to widespread support for war against Great Britain. [146] Madison, and later President James Monroe, withheld information from **Congress** regarding the U.S. takeover of the Florida territory. [147] On February 15, 1816, the Senate Committee on Foreign Relations issued a report stating:

> If it be true that the success of negotiations is greatly influenced by time and

> accidental circumstances, the importance to the negotiative authority of acquiring regular and secret intelligence can not be doubted. The Senate does not possess the means of acquiring such intelligence. It does not manage the correspondence with our ministers abroad nor with foreign ministers here. . . .
>
> The President . . . manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. [148]

Although numerous presidents have exercised **executive privilege,** not all have done so judiciously. As with all other grants of authority, the power to do good is also the power to do bad. The only way to avoid the latter--and consequently eliminate the ability to do the former--is to strip away authority altogether.

The evidence for the legitimacy of **executive privilege** in many instances is convincing. Critics of **executive privilege** take too narrow a view of the Constitution. They also have an unrealistic understanding of how our governing system should **[*561]** work. **Executive privilege** not only is constitutional, occasionally it is necessary to the effective discharge of the President's duties.

The Supreme Court has struck down important legislative control devices, expanding the scope of the President's powers. [149] The Court has determined that secrecy is a necessary condition for the President to carry out many of his constitutional duties, especially in foreign affairs. [150]

Under U.S. law, the power to classify information is given to the Executive, not to the Legislature. [151] Congressional decision-making is purposefully slow and indecisive. **Congress** may be out of session sometimes when foreign policy problems arise. One argument stated often in favor of **executive privilege is that Congress** does not always maintain secrets. Although true, **Congress** certainly is not unique in that regard. The executive branch does not always maintain secrets either. Once sensitive information is turned over to any large group of officials, there is no guarantee that someone will not divulge what he or she knows for policy, partisan, or personal reasons. For that reason, **executive privilege** may be necessary occasionally to substantially limit the circle of individuals with access to sensitive information, especially when national security is at stake.

The preservation of national security sometimes requires secrecy. Under certain circumstances, the right to exercise **executive privilege** is a necessary precondition for the Chief Executive to achieve national security aims. Additionally, the Chief Executive needs sound staff advice, and the quality of his counsel depends ultimately on the degree of its candor.

C. *The Need for Candid Advice*

The President's constitutional duties necessitate that he be able to consult with advisers without fear of public disclosure of their advice. If officers of the executive branch believed that their confidential advice could eventually be disclosed, the quality of that advice would be seriously damaged. [152] Indeed, it would be difficult for advisers to be completely honest and frank in their discussions if their every word might someday be disclosed to partisan opponents or to the public. Averell Harriman **[*562]** testified to **Congress,** "The President is entitled to receive the frank views of his advisers and therefore must be able to protect the personal or confidential nature of their communications with him." [153] William P. Bundy also testified, "If officers of an administration should come to feel that their confidential advice would be disclosed, short of a period of many years, I do believe that the consequences in terms of honesty, candor, courage, and frankness within the executive branch could be very serious indeed." [154]

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Executive privilege recognizes this common sense notion. Indeed, in *United States v. **Nixon***, [155] the Supreme Court not only recognized the constitutionality of **executive privilege,** but the occasional need for secrecy in the operation of the presidency:

> The valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties . . . is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. . . . The confidentiality of Presidential communications has . . . constitutional underpinnings. . . . The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution. [156]

In 1979, the Court iterated its support of **executive privilege** based on the need for candid interchange among advisers: "Documents shielded by **executive privilege** remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice, including analysis, reports and expression of opinion." [157]

The Court has recognized that the need for candid interchange is an important basis for **executive privilege.** Although it is well recognized that **Congress** needs access to executive branch information to carry out its oversight and investigative duties, it does not follow that **Congress** must have full access to the details of every executive branch communication. Congressional inquiry, like **executive privilege,** has limits. That is not to suggest that presidents can claim the need for candid advice to **[*563]** restrict any and all information. In fact, **Congress'** power of inquiry trumps a claim of **executive privilege** unless the President can make a showing of need for secrecy. [158]

D. *Limits on Congressional Inquiry*

Congress' power of inquiry, though broad, is not unlimited. [159] Berger's claim that the Constitution granted **Congress** an absolute power of inquiry is unfounded, as there is nothing in Article I, or in any part of the Constitution, that substantiates that claim. The debates at the Constitutional Convention and at the subsequent ratifying conventions provide little evidence that the Framers intended to confer such authority on **Congress.** The legitimacy of the congressional power of inquiry is indeed unquestioned. [160] Berger's argument that this power is unlimited simply goes too far.

Regarding the power of inquiry, a distinction must be drawn between sources of information generally and those necessary for the legislative branch to perform its legislative and investigative functions. [161] There is a strong presumption of validity to a congressional request for information relevant to these functions. [162] The presumption weakens in the case of a congressional "fishing expedition"--a broad, sweeping quest for any and all executive branch information that is of interest to **Congress** for no specified reason. [163] Indeed, **Congress** itself has recognized that there are limits on its power of inquiry.

[*564] Nonetheless, Berger believes that **Congress** has an absolute, unlimited power to compel disclosure of all executive branch information. [164] His view has been echoed by Representative John Dingell (D-Mich.) who said that members of **Congress** "'have the power under the law to receive each and every item in the hands of the government.'" [165] This expansive view of congressional inquiry is as wrong as the belief that the President has the

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unlimited power to withhold all information from **Congress.** There are inherent constitutional limits on the powers of the respective governmental branches. The common standard for legislative inquiry has been whether the requested information was vital to **Congress'** lawmaking and oversight function. [166] It is ironic that Berger maintains that **executive privilege** lacks validity because it is not specifically granted by the Constitution and then argues that **Congress** possesses an absolute, unlimited inquiry power despite a similar lack of such a constitutional grant.

E. *The Other Branches Exercise Confidentiality*

Executive privilege also can be defended on the basis of accepted practices of secrecy in the other branches of government. Members of **Congress** receive candid, confidential advice from committee staff and legislative assistants. [167] Congressional committees meet on occasion in closed session to "mark-up" legislation. **Congress** is not obligated to disclose information to another branch. A court subpoena will not be honored without a vote of the legislative chamber concerned. Members of **Congress** enjoy a constitutional form of privilege that absolves them from having to account for their official behavior, particularly regarding speech, anywhere but in **Congress.** [168] As with the **Executive, this privilege** does not extend into the realm of criminal conduct. [169]

Secrecy also is found in the judicial branch. It is difficult to imagine more secretive deliberations than those that take place in Supreme Court conferences. David O'Brien refers to secrecy as one of the "basic institutional norms" of the Supreme Court. [170] "Isolation from the Capitol and the close proximity of the justices' chambers within the Court promote secrecy, to a degree that is remarkable . . . . The **[*565]** norm of secrecy conditions the employment of the justices' staff and has become more important as the number of employees increases." [171] Members of the Judiciary claim immunity from having to respond to congressional subpoenas. [172] The norm of judicial privilege also protects judges from having to testify about their professional conduct. [173]

It is inconceivable that secrecy, so common to the legislative and judicial branches, should not be exercised by the executive branch. [174] The executive branch regularly is engaged in a number of activities that are secret in nature. George C. Calhoun explains that the executive branch

> presents . . . matters to grand juries; assembles confidential investigative files in criminal matters; compiles files containing personal information involving such things as census, tax, and veterans information; and health, education and welfare benefits to name a few. All of these activities must, of necessity, generate a considerable amount of confidential information. And personnel in the executive branch . . . necessarily prepare many more confidential memoranda. Finally, they produce a considerable amount of classified information as a result of the activities of the intelligence community. [175]

In the cases of legislative, judicial, and executive branch secrecy, a common purpose is being served: to arrive at more prudent policy decisions than those that would be determined through an open process. In each case, the end result is what will be subject to scrutiny. Indeed, accountability is built into secretive decisionmaking processes. The elected public officials must justify the end result at some point.

F. *Restoring the Balance*

The post-Watergate period has witnessed a breakdown in the proper exercise of **executive privilege. Because of Nixon's** abuses, Presidents Ford and Carter kept **executive**

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privilege at a distance and resorted to other constitutional and statutory means to preserve executive branch secrecy. [176] President Reagan tried to restore **executive privilege** as a presidential prerogative but ultimately failed when **[*566]** congressional committees threatened administration officials with contempt citations and adopted other retaliatory actions to compel disclosure. [177] President Bush, like Ford and Carter before him, avoided **executive privilege** when possible and used other means to preserve secrecy. [178] President Clinton has exercised **executive privilege** more often than all of the other post-Watergate presidents combined, often times improperly. [179] In the post-Watergate era, therefore, presidents either have avoided uttering the words "**executive privilege**" and have protected secrecy through other sources of authority (Ford, Carter, Bush), or they have tried to restore **executive privilege** and failed (Reagan, Clinton).

Clinton's aggressive use of **executive privilege** at least served to revive the national debate over this presidential power. Therefore, now is the appropriate time to discuss how to restore a sense of balance to the **executive privilege** debate.

The dilemma of **executive privilege** is that it is troubling to permit governmental secrecy in a political system predicated on leadership accountability. On the surface, the dilemma is a complex one to resolve: it is questionable whether the public can hold democratically elected leaders accountable when such leaders are able to deliberate in secret or to make secretive decisions.

Under certain circumstances, presidential exercise of **executive privilege** fits comfortably within the embrace of our constitutional system. Nonetheless, in recent years, **executive privilege** has fallen into disrepute because of the abuses of that power by presidents seeking to conceal wrongdoing. The modern pattern of (1) executive branch recriminations that suggest that legislators and independent counsels unnecessarily meddle in the affairs of the executive branch; and (2) accusations that the executive branch's failure to divulge all information constitutes criminal activity, has been unhealthy to our governing system. Currently, there appears to be a lack of recognition by the political branches of each other's legitimate powers and interests in the area of governmental secrecy. To restore some sense of balance to the modern debate over **executive privilege,** the following must be recognized.

First, when used under appropriate circumstances, **executive privilege** is a legitimate constitutional power. The weight of the evidence refutes the assertion that the **executive privilege** is a "constitutional myth." [180] Consequently, presidential administrations should not be devising schemes for achieving the ends of **executive privilege** while avoiding any mention of the constitutional doctrine. Furthermore, **Congress** and judicial entities must recognize that the executive branch, like the legislative and judicial branches, has a legitimate need to deliberate in secret and that **[*567]** not every assertion of **executive privilege** is automatically a devious attempt to conceal wrongdoing.

Second, **executive privilege** is not an unlimited, unfettered presidential power. **Executive privilege** should be exercised only rarely and for the most compelling reasons. **Congress** has the right, and often the duty, to challenge presidential assertions of **executive privilege.** [181] **Congress** should make challenges, especially when such assertions clearly are not related to the two primary categories: (1) protecting certain national security needs; or (2) protecting the privacy of White House deliberations when it is in the public interest to do so.

Third, there are no clear, precise constitutional boundaries that determine, *a priori*, whether any particular claim of **executive privilege** is legitimate. The resolution to the dilemma of **executive privilege** is found in the political ebb and flow of the separation of powers system. There is no need for any precise definition of the constitutional boundaries surrounding **executive privilege.** Such a power cannot be subject to precise definition

because it is impossible to determine in advance all of the circumstances under which presidents may have to exercise that power. A return to the traditional separation of powers theory provides the appropriate resolution to the dilemma of **executive privilege** and democratic accountability.

III. RESOLVING THE DILEMMA: THE SEPARATION OF POWERS

In response to the constitutional dilemma posed by the presidential use of **executive privilege,** it is often tempting to try to devise a remedy that would eliminate any potential future conflict. Berger believes there is just one answer to the question of how to resolve this constitutional dilemma: eliminate the source of power from which the dilemma originates. [182] In his view, "Secrecy in the operations of government is an abomination." [183] Berger concludes that actions during the **Nixon** presidency proved that point. During the **Nixon** presidency, Berger writes, "'confidentiality' was the vehicle for the cover-up of criminal acts and conspiracies by [**Nixon's**] aides, an instrument he repeatedly employed for the obstruction of justice." [184]

Berger accurately describes **Nixon's** exercise of **executive privilege.** In addition, one easily could add the more recent actions of the Clinton administration to the list of presidential misuse of **executive privilege.** Yet, many of the critiques of **executive privilege** focus on the incredible abuses of one or a few administrations. Generalizing from these abuses of power, many critics of **executive privilege** maintain that there **[*568]** must be completely open deliberations within the executive branch of government--a position never adopted, even by the "open" presidencies of Gerald R. Ford or Jimmy Carter. [185] These critics, while having identified an undeniable problem, call for a simplistic, blanket solution: if a power such as the **executive privilege** potentially can be abused, then it must be eliminated in favor of completely open, public deliberations. Such critics perceive openness as the only means by which to assure accountability from the executive branch. [186]

Underlying this argument against **executive privilege** is the view that, given the need for democratic accountability and the specific powers conferred upon the legislative branch by Article I of the Constitution, **Congress** always must be supreme in the lawmaking process. Berger that there should be no exceptions to that rule. [187]

Yet, as James W. Ceaser argues, the belief that **Congress** must always be supreme in the lawmaking process "is based on a narrow and legalistic understanding of the Constitution and on a failure to recognize the real purpose for which the founders adopted the theory of separation of powers." [188] The failure to understand or to accept the Founders' theory of the separation of powers has resulted in a quest for absolutes on the issue of **executive privilege.** Dogmatically opposed to **executive privilege** under any circumstance, Berger and others want to eliminate such a power because of past abuses and the real potential for future abuses. [189] Yet, this remedy elevates the exception--the abuse of power--into the rule, leading to the call for a broad, sweeping, and ultimately an impractical solution.

Many of President **Nixon's** defenders, on the other hand, elaborated the equally suspect argument that **Congress** and the public have no authority to limit and constrain the exercise of executive powers. **Nixon** took this viewpoint to the extreme, claiming that any action undertaken by the President is legitimate. **Nixon's** attorneys argued that the manner in which **executive privilege** is exercised "is a matter of presidential judgment alone." [190] In *United States v. Sirica*, [191] Judge George MacKinnon expressed best of all the notion of an unlimited **executive privilege:**

> In my opinion an absolute privilege exists for presidential communications. . . . Strict confidentiality is so essential to the **[*569]** deliberative process that it

should not be jeopardized by any possibility of disclosure. [192]

Neither dogmatic view of **executive privilege** presents an accurate assessment of the separation of powers system. Neither outlook provides a workable resolution to the dilemma of **executive privilege.** Only a proper understanding of the separation of powers can help resolve the inherent conflict between governmental secrecy and the "right to know."

The alternative proposed by Berger and his followers--completely open executive branch deliberations--is worse than the danger they seek to eliminate. Any power can be abused once it has been created. Because secrecy is occasionally vital to the proper functioning of the presidency, periodic attempts to abuse this power may be an unavoidable price that must be accepted. To demand that presidents exercise their powers fully to advance an activist policy agenda, that they strictly conform to the letter of every legal and constitutional provision in the exercise of their powers, and that they remain fully subordinate to the legislative authority in all areas, is to expect nothing less than an ideal world--one in which the trustworthiness of chief executives is never at issue; in which the legal and constitutional provisions pertaining to the presidency are unmistakably clear, consistent, and do not unduly constrain the exercise of presidential authority; and in which legislators are concerned only with high-minded matters of policy and the public good. As the Founders understood so well, such a state of affairs never will exist given the undeniable foibles of human beings. There are better ways to check the potential abuse of power than elimination of the source of power altogether. The dilemma of **executive privilege** can be resolved by means other than eliminating that authority altogether or effectively trying to do so through the use of onerous legalistic constraints.

Furthermore, the pro-imperial presidency view--the one in which the Chief Executive exercises his authority unfettered by congressional constraints, **Congress** defers to executive fiat, and the only check on presidential power takes place on election day--also misunderstands the separation of powers doctrine. The resolution to the dilemma of **executive privilege** is not simply to allow the President to determine for himself the scope and limits of his own authority. As Louis W. Koenig has written, "John Locke would have been flabbergasted" by **Nixon's** assertion that any action undertaken by the President is legal. [193]

A proper understanding of the separation of powers is rooted in the founding period and the early years of the Republic. The Founders recognized an implied constitutional prerogative of presidential secrecy, a power they believed was occasionally necessary and proper. [194] The leading Founders either exercised or **[*570]** acknowledged the right of executive branch secrecy in the early years of the Republic. [195] In devising the American constitutional system, they sought to limit the Executive's powers to reduce the threat of tyranny. Yet, this perceived need to limit power never implied either weak government or a subordinate executive branch. As political scientist L. Peter Schultz has written, "The separation of powers constitutes an attempt to solve one of the major problems of government, that of providing for both reasonable government and forceful government without sacrificing either." [196]

It is well recognized that the leading Founders exercised considerable foresight in establishing a constitutional system capable of adapting to the needs of changing times. That foresight has been especially useful to the conduct of foreign policy, an area in which some claims of **executive privilege** are especially compelling. When it came to writing the articles of the Constitution concerning the executive branch, the Framers exercised great care not to constrain all executive power with constitutional exactitude.

A proper understanding of the separation of powers is founded also on the notion that there are inherent limitations on the prerogative powers of the presidency. The eventual resolution of the **Nixon** Administration's scandals shows that **Congress** and the Judiciary, when given good reason to believe that the claim of privilege is being abused, have institutional mechanisms that can be used to compel the President to divulge information. The separation

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of powers provides the vital mechanisms by which the other branches of government can challenge executive claims of privilege.

The answer to the question of how **executive privilege** can be properly exercised and constrained is found in an examination of the roles of the other branches in ensuring that the executive branch does not abuse its powers.

A. *Role of* ***Congress***

One solution to the dilemma of **executive privilege** that is proposed occasionally is to establish a statutory definition of that power, specifying the circumstances under which **executive privilege** can be exercised. [197] Fortunately, no such legislative solution to the dilemma has been enacted. Any *a priori* "solution" is bound to fail, given the impossibility of determining all of the circumstances under which **executive privilege** may be exercised in the future. As former Attorney General Edward Levi **[*571]** has explained, "The lesson of history is that the reasonableness of an assertion of confidentiality cannot be determined in advance on the basis of neat categories." [198]

Congress already has the institutional capability to challenge claims of **executive privilege** by means other than eliminating the right to withhold information or attaching statutory restrictions on the exercise of that power. For example, if members of **Congress** are not satisfied with the response to their demands for information, they have the option of retaliating by withholding support for the President's agenda or his executive branch nominees. In one famous episode during the **Nixon** Administration, the Senate Judiciary Committee threatened the confirmation of Richard Kleindienst to the office of Attorney General until a separate access-to-information dispute had been resolved. [199] That action resulted in President **Nixon** ceding to the Senators' demands. [200] If information can be withheld only for the most compelling reasons, it is not unreasonable for **Congress** to attempt to force the President's hand by making him weigh the importance of withholding the information against that of moving forward a nomination or piece of legislation. Presumably, information being withheld for purposes of vital national security or constitutional concerns would take precedence over pending legislation or a presidential appointment. If not, there must be little justification for withholding the information in the first place.

Congress possesses numerous other means by which it can compel presidential compliance with requests for information. First, **Congress** maintains control over the governmental "purse-strings," a formidable power over the executive branch. [201] Additionally, **Congress** often relies on the subpoena power or a contempt of **Congress** charge to compel release of withheld information. [202] It is not merely the exercise of these powers that matters, but the threat that **Congress** may resort to such powers. During the Reagan/Bush years, **Congress** had a great deal of success at compelling executive branch disclosure of information through the subpoena and contempt of **Congress** powers. [203]

In the extreme case, **Congress** also has the power of impeachment--the ultimate weapon with which to threaten the Executive. [204] Clearly, this congressional power cannot be routinely exercised as a means of compelling disclosure of information and consequently will not constitute a real threat in commonplace information disputes. Nonetheless, in the case of a scandal of Watergate-like proportions, in which other **[*572]** remedies have failed, **Congress** can threaten to exercise its ultimate power over the President. For a time in 1998, **Congress** considered an impeachment article against President Clinton for his abuse of presidential powers, including **executive privilege.** [205] Ultimately, **Congress** dropped that particular article. [206]

In the vast majority of cases, it can be expected that the President will comply with requests for information rather than withstand retaliation from **Congress.** Presidential history is

intervention. Finally, he proposes that each administration should adopt guidelines that provide members of the executive branch with formal procedures for handling and resolving ***executive privilege*** *issues.*

TEXT:
[*541] INTRODUCTION

The Clinton scandal of 1998-1999 reinvigorated the national debate over **executive privilege.** Much like President Richard M. **Nixon's** actions in the Watergate scandal, President Clinton's aggressive and improper use of **executive privilege** brought disrepute to this constitutional power. Of course, the improper use of a constitutional power by one or even a number of presidents does not render that power illegitimate. Yet, during the **Nixon** period, a single work of scholarship on **executive privilege** loomed large and seemed to lend credibility to the view that this presidential power lacked a constitutional foundation: Raoul Berger's ***Executive*** **[*542]** ***Privilege:*** *A Constitutional Myth.* It was a monumental study many years in the making that fortuitously was published during a period of intense national debate over **executive privilege.** [1]

Berger's thesis dovetailed nicely with the widespread sentiment of the time that **executive privilege** was an unconstitutional vehicle for presidential abuse of power. [2] Nonetheless, Berger's analysis was flawed. His book surely had the markings of an impressively documented lawyer's brief against **executive privilege,** but it lacked the crucial scholarly component of being a balanced presentation of evidence and analysis.

Berger's study was hugely influential in its time and it remains a fixture in legal and scholarly analyses today. With the current revival of the debate over **executive privilege,** it is an appropriate time to review and critique his analysis. As Clinton's presidency draws to an end, there is a clear need to bring an appropriate balance to the study and the exercise of **executive privilege.**

To be sure, in critiquing Berger's analysis, I am not championing the opposite view--that **executive privilege** is an unlimited presidential prerogative. Rather, **executive privilege** is a legitimate power when it is exercised properly. Any claim of **executive privilege** is open to challenge and, as with other governmental powers, it may be subject to a balancing test when weighed against demands for access to information.

I. BERGER ON **EXECUTIVE PRIVILEGE**

The Constitution never explicitly grants to the Executive the power to withhold information. Berger maintains that a determination of the scope of the executive power requires a strict reading of the Constitution. [3] He does not accept the idea of an implied power of **executive privilege.** [4] Rather, he believes that the constitutional Framers did not give the Executive the power to withhold information. [5] Quite simply, had the Framers intended for the Executive to have the power of **executive privilege,** they would have granted it in Article II. Therefore, Berger proclaims **executive privilege** "a constitutional myth." [6]

To make a convincing case against **executive privilege** requires much more than an assertion that such a power lacks a specific constitutional provision. Throughout history, presidents have exercised formidable powers not explicitly granted by the **[*543]** Constitution. [7] **Congress** has done so as well. [8] Accordingly, critics of **executive privilege** also must show that the Framers clearly did not intend for such a power to be exercised and that the Framers created impediments to prevent such a power from ever being adopted.

Berger believes that the Framers made **Congress** the supreme player in the making of foreign policy and never intended the Executive to play the lead role. [9] Because many claims of **executive privilege** center around national security and foreign policy, this argument

replete with examples of chief executives who tried to invoke privilege or threatened to do so, only to back down in the face of congressional challenges. [207]

If certain members of **Congress** believe that the **executive privilege** power is too formidable, the remedy resides not in crippling presidential authority, but in exercising the vast array of powers already at **Congress'** disposal. Sotirios A. Barber contends that presidential preeminence in foreign policymaking "cannot be explained by comparing that executive and legislative powers are enumerated in the Constitution." [208] Barber correctly explains that **Congress** possesses formidable powers, but at times has failed to exercise them fully. [209] Over three decades ago, Senator J. William Fulbright (D-Ark.) argued that **Congress** acquiesced too often to presidential authority in foreign affairs and charged his colleagues not to allow the Chief Executive to act unilaterally in foreign policy or in a secretive fashion: "I conclude that when the president, for reasons with which we can all sympathize, does not invite us into his high-policy councils, it is our duty to infiltrate them as best we can." [210]

Nonetheless, Louis Koenig refutes the oft-stated belief that the presidency has become imperial while **Congress'** powers have atrophied. Koenig cites the example of the **Nixon** Presidency as proof that **Congress** has both possessed and exercised formidable powers when it wanted to so:

> The imperial presidency thesis excessively downgrades **Congress** and misstates the historical experience of the presidency. Time and again, **Congress** prevailed over **Nixon. Congress** ended his once secret war in Cambodia by cutting off its funds. His claims of massive powers to impound funds or abolish programs were rejected both by **Congress** and **[*573]** the courts. His modest program proposals were rejected by **Congress** more frequently than any other contemporary president. Ultimately, **Nixon's** certain impeachment by the House of Representatives drove him from the presidency. . . . [The presidency] contains substantial weaknesses of power which the imperial thesis obscures. [211]

The resolution of executive-legislative disagreements over withheld information need not occur through such combative techniques. Rooted in the separation of powers is the notion that the potential stalemate that results from the executive branch's refusal to release information can be overcome by mutual accommodation and compromise. I disagree with the assessment of the former Attorney General William French Smith, who argued that there are inherent problems with holding any members of **Congress** in confidence regarding sensitive information. [212] The divulging of sensitive information to a few trusted and highly respected members of **Congress** has succeeded in the past. For example, during the Second World War, President Franklin Delano Roosevelt frequently confided sensitive national security information to trusted members of **Congress,** and they respected the sanctity of that information. In times of great uncertainty over the appropriateness of withholding information, the President can, in secret chambers, discuss the problem with a few members of **Congress** who are highly trusted within their own institution.

The circumstances surrounding treaty negotiations is particularly complex because of the obvious need for the Executive to keep discussions confidential combined with the Senate's constitutional authority of "advice and consent." [213] In diplomatic negotiations, to publicly divulge negotiating positions before an agreement has been reached is highly imprudent. The flexibility of negotiating positions is compromised by such revelations, making highly difficult the achievement of an agreement between or among the parties. Chief Justice William Rehnquist has argued that the use of private discussions between the President and some members of **Congress** can satisfy both **Congress'** right to know and the needs of diplomatic negotiations:

> Frequently the problem of overly broad public dissemination of such negotiations can be solved by testimony in executive session, which informs the members of the committee of **Congress** without making the same information prematurely available throughout the world. The end is not secrecy as to the end product--the treaty--which of course should **[*574]** be exposed to the fullest public scrutiny, but only the confidentiality as to the negotiations which lead up to the treaty. [214]

A statutory resolution to the dilemma of **executive privilege** is not needed. **Congress** already possesses the constitutional means by which to challenge the executive branch when it withholds information. [215] **Congress** has had substantial success using its existing powers to compel disclosure of withheld information. In fact, **Congress** appears to have gained the upper hand in its disputes with the executive branch over information policy. When it comes to **executive privilege,** there is no convincing evidence for the view that the President is imperial, capable of doing whatever he wants.

B. *Role of the Courts*

In the realms of foreign affairs and national security policymaking, the courts generally have been deferential to the so-called "political branches." The Judiciary's role in the separation of powers is not regarded as one of arbitrating conflicts between the political branches over how foreign policy should be conducted. On many occasions, courts have recognized that the judicial branch may not be best suited for deciding complex matters of foreign affairs, national security and intelligence policy. [216] Louis Fisher explains the usual judicial response to congressional attempts **[*575]** at posing constitutional challenges to the President's national security decisions:

> **Congress** must be prepared, and willing, to exercise the ample powers within its arsenal. When it acquiesces to executive initiatives, the record clearly shows that legislative inaction will not be cured by judicial remedies. Four times during the Reagan administration, members of **Congress** filed suit in federal court to have President Reagan's military actions in El Salvador, Nicaragua, Grenada, and the Persian Gulf held unconstitutional and illegal. Four times the federal courts gave **Congress** the same message: if you fail to challenge the president, don't come to us. Justice Lewis Powell put it well in the treaty termination case of *Goldwater v. Carter* (1979): "If the **Congress** chooses not to confront the President, it is not our task to do so." **Congress** has the constitutional power. It needs also the institutional courage and constitutional understanding to share with the president the momentous decision to send U.S. forces into combat. [217]

This recognition of the limitations on the role of the courts does not preclude a role for the Judiciary in arbitrating constitutional, rather than policy, disputes. As the Supreme Court affirmed in *United States v. **Nixon***, the separation of powers does not guarantee

> an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, **[*576]** undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. [218]

The Court clarified that when a claim of privilege is made to protect national security or foreign policy deliberations, such a claim often is difficult for another branch to overcome in a balancing of constitutional powers. [219] Yet, while upholding the "constitutionally based" nature of the privilege, the Court also made it clear that the privilege may, at times, have to defer to the constitutionally-based powers of a coordinate branch of government. [220] Although the Court did not specify the exact balance of powers between the branches, it did affirm that the judicial branch has the authority to compel production of information when needed in a criminal case:

> We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial. [221]

Other court cases have affirmed that it is appropriate to apply a balancing test of competing interests when disputes arise over executive branch information policies. [222] In *United States v. **Nixon***, the Supreme Court exhibited the capacity of the Judiciary to pose as a viable check on presidential abuses of **executive privilege.** [223]

There also is considerable legal precedent for *in camera* review of sensitive information by the courts. [224] Rather than simply compelling disclosure of privileged **[*577]** information for open court review, it may be appropriate for the executive branch to convince the court, in secret chambers, of the necessity of nondisclosure. The courts repeatedly have affirmed their right to decide in particular cases whether the necessity of protecting sensitive information outweighs the need for evidence in criminal justice matters. [225] Little evidence exists to support the claim that the Judiciary does not administer this duty carefully and prudently. As Chief Justice John Marshall asserted in *United States v. Burr*, [226] the President has the right to protect privileged information, but this right does not override the authority of the judiciary to review protected documents:

> The president, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production. . . . I can readily conceive that the president might receive a letter which it would be improper to exhibit in public . . . . The occasion for demanding it ought, in such a case, to be very strong, and to be fully shown to the court before its production could be insisted on. . . . Such a letter, though it be a private one, seems to partake of the character of an official paper, and to be such as ought not on light ground to be forced into public view. [227]

The Judiciary clearly plays a less active role than the **Congress** in resolving **executive privilege** disputes. Institutional conflict between the political branches usually should resolve informational controversies. Constant judicial intervention in such controversies is neither practical nor desirable. Nonetheless, the courts may get involved in those conflicts in which they are a party and in disputes that the political branches cannot resolve without judicial intervention.

CONCLUSION

The dilemma of **executive privilege** cannot be resolved with constitutional exactitude. To try to do so would be to attempt to impose a solution that is **[*578]** antithetical to the

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American constitutional culture. The dilemma can best be resolved on a case-by-case basis, through the normal ebb-and-flow of politics as envisioned by the Framers of the governing system in the United States. Exactitude cannot be achieved in a government that must accommodate ever-changing circumstances. The genius of the American constitutional system is its enormous capacity to maintain its legitimacy and stability by accommodating changing circumstances without sacrificing the fundamental values that underlie the system.

The search for constitutional absolutes--e.g., that **executive privilege** is a myth or that **executive privilege** is an unfettered prerogative--is misguided. Our constitutional system cannot guarantee certitude with regard to how every informational policy dispute in government will be resolved, nor should it. Two **executive privilege** claims that, on the surface, appear equally valid, may be treated very differently from one another given different circumstances--e.g., the political composition of **Congress,** the membership of a particular investigating committee, the popularity of the President, and the like. In the Bush Administration, one presidential claim of **executive privilege** that had little to do with national security concerns prevailed in part because of the popularity of a Cabinet member who might otherwise have been held in contempt of **Congress,** and in part because the chair of the committee in charge of the investigation failed to vigorously pursue the matter. [228] On numerous other occasions in the modern presidency, **Congress** has prevailed over administration claims of privilege either because of its vigorous challenges to those actions or due to the unwillingness of some post-Watergate presidents to resist congressional demands. [229]

It is implausible that a strict, legalistic definition of **executive privilege** could have determined in advance the appropriate resolution to each controversy. What is problematic in the post-Watergate years is the delegitimization of **executive privilege** due to **Nixon's,** and more recently Clinton's, abuses of power.

Many advocates of the strong presidency now decry the so-called "imperial **Congress"** and the Legislature's propensity to solve informational disputes through the use of narrow legalisms. [230] Rather than an appropriate exercise of the separation of powers mechanism moderating presidential power, more often intransigent positions are adopted by members of the political branches. This development **[*579]** represents a regrettable deviation from the Framers' notion of the separation of powers and from the traditional dynamic that occurred between the political branches over executive branch secrecy until the **Nixon** years. Through the normal political process of confrontation, compromise, and accommodation, the coordinate branches usually had resolved satisfactorily their differences over **executive privilege** matters. We cannot solve our modern dilemma by resorting to the solution that was rejected by the Framers--that is, by demanding constitutional certitude.

Michael Foley makes the point that constitutional dogmatism could have the effect of dangerously exposing the unresolvable elements of the separation of powers and the inconsistencies of the constitutional system. He correctly explains that certain constitutional problems are not amenable to definitive solutions. [231] In fact, an advanced constitutional culture is one that tolerates and even cultivates the existence of what he calls "abeyances," defined as, "those constitutional gaps which remain vacuous for positive and constructive purposes." [232] Foley's thesis is most germane to the analysis of how to resolve the dilemma of **executive privilege:**

> There is simply more to be gained by cultivating and protecting abeyances and in preventing political issues and institutional differences from inciting intransigent divisions and entrenched constitutional dogmatism. In not extending claims to their logical but provocative conclusions; in not seeking to maximize advantages irrespective of their repercussion; and in promoting "comity" by which positions are acknowledged and honored in the cause of achieving a means of cooperation

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> within a context brooding with adversity, political participants can transform immobilism into productive interplay. The unremitting dissonance of a separated powers system, therefore, can condition those who work within it to the need to strive continuously against a background of conflict and dispute, in order to achieve any sense of common purpose. [233]

Nonetheless, critics of **executive privilege** make the case that such a power potentially is dangerous, thereby requiring either elimination of that power or the imposition of severe legal constraints on its exercise. [234] Such resolutions to the dilemma of **executive privilege** are antithetical to the nature of a constitutional system that tolerates and cultivates abeyances. Those resolutions demonstrate a lack of understanding of a separation of powers system in which the exercise of **executive [*580] privilege** is sometimes necessary. Ceaser makes the point that the exercise of prerogative powers is appropriate for unusual circumstances and that "the exception or extreme case need not define the rule." [235] In creating the separation of powers system, the Framers did not envision the resort to strict legalisms as the means to resolve customary inter-branch disputes. Ceaser's explanation of the Framers' theory of the separation of powers is germane to this analysis:

> The executive power, although it cannot always be subject to precise limitations, can still be watched, checked, and supervised by other institutions possessing an equal or greater regard among the people. Following this theory, the founders placed the greater part of the lawmaking power in **Congress,** thereby reducing the prospect that the prerogative power would ever be carried over into normal governance. Moreover, the very presence of institutions as powerful as the **Congress** and the Supreme Court could serve to check the executive power. Finally, there is a sense in which the founders made the legislative power supreme not so much by giving it the law-making power as by giving it the power to impeach and convict the president. By this means the legislature can dismiss the person exercising the executive power, even though it cannot exercise that power itself. [236]

Many critics of **executive privilege** too readily assume that any invocation of that power is, by definition, suspect--that no one wants to refuse to disclose information unless he or she has "something to hide." To avoid future Watergate-like scandals and to resolve the dilemma of **executive privilege,** they offer solutions that are more troublesome than the problems they wish to eliminate. The resolution to the dilemma of **executive privilege** is, in a sense, right before our eyes. The Founders' theory of separation of powers offers the necessary mechanisms by which prerogative powers can be exercised, challenged, and constrained.

Although there is no need for any statutory definition of, or limitations on, **executive privilege,** the post-Watergate years demonstrate that it is prudent for each presidential administration to adopt a set of procedures on how it will exercise **executive privilege.** [237] The failure to do so in the Ford and Carter Administrations--though perhaps necessitated by the political environment of the mid-to-late 1970s--resulted in a great deal of confusion both within each administration and between the political branches. There is no small irony to the fact that these two presidencies--predicated on promises to be "open" and in every possible way unlike the **Nixon** Administration--in failing to adopt their own **[*581] executive privilege** guidelines operated officially under the guidelines established in the **Nixon** memorandum. [238] President Reagan adopted new **executive privilege** guidelines in 1982, [239] which remained in effect throughout the Reagan/Bush years. [240] The Bush Administration routinely did not abide by those guidelines. [241] The Clinton Administration adopted revised **executive privilege** guidelines in 1994 [242] and the President clearly violated some of the new procedures during the Monica Lewinsky scandal investigation. [243]

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To avoid confusion regarding the exercise of **executive privilege,** it would be eminently sensible for each new administration to promulgate a set of guidelines on the use of that power. These guidelines need not diverge substantially, or even at all, from one administration to the next. Yet, each administration should issue a presidential directive to make unmistakably clear how members of the executive branch are to handle **executive privilege** matters. Each administration should not pose its guidelines in the form of legalisms, but rather, should outline the formal procedures of the administration for handling and resolving **executive privilege** issues. The guidelines also should identify only broad categories of areas in which issues of **executive privilege** might arise. The traditional categories are national security, confidential deliberations, enforcement of criminal justice, and privacy of executive branch officials. Specific cases of **executive privilege** should be dealt with as they arise, as all such cases cannot be anticipated in advance.

Regardless of how the guidelines are set up--whether, for example, the President personally must assert **executive privilege,** or the use of that power must be approved by the Attorney General--responsibility for the exercise of that prerogative resides ultimately with the President. Consequently, accountability is not compromised by the exercise of **executive privilege** because the President will have to justify his use of that power to the electorate or to one or both of the coordinate branches of government. To accept the legitimacy of a properly constrained **executive privilege** power in the system of separated powers is to place an important trust in the President that he will exercise this power prudently and in the public interest, and to know that the American populace can hold him accountable for the manner in which he discharges such constitutional authority.

When properly exercised, **executive privilege** clearly is constitutional. Despite the evidence, **executive privilege** remains mired in controversy. Much of the **[*582]** controversy can be attributed to the fact that--as with other constitutional powers--not every president has exercised **executive privilege** prudently or properly. **Executive privilege** became most controversial during the Watergate era and then later on during the Clinton scandal. Regarding President **Nixon's** actions, Berger explains that "'confidentiality' was the vehicle for the cover-up of criminal acts and conspiracies by his aides, an instrument he repeatedly employed for the obstruction of justice." [244]

Berger's description of governmental secrecy in the **Nixon** White House is indisputable. Similarly harsh judgments can be made legitimately regarding President Clinton's aggressive use of **executive privilege** to thwart inquiries from the Office of Independent Counsel.

Nonetheless, it is important not to generalize from the abuses of any particular administration that "secrecy in the operations of government is an abomination." [245] It is no more valid to argue against the legitimate exercise of **executive privilege** because of the abuses of that power by Presidents **Nixon** and Clinton than it is to dismiss the legitimate exercise of legislative inquiry because of the abuses of that power by Senator Joseph McCarthy (R-Wis.) in the 1950s.

In certain circumstances, **executive privilege** is a necessary and proper power that is open to challenge. Like other governmental powers, it may be subject to a balancing test when weighed against demands for information. Presidents should not lightly exercise this power. They should reserve **executive privilege** for the most compelling reasons--such as protecting certain national security needs or preserving White House confidentiality when it is in the public interest to do so. **Executive privilege** never should be used to protect an administration from revealing embarrassing or politically damaging information. Past attempts to do so have given **executive privilege** a bad name. Restoring the good name of **executive privilege** is ultimately important to the effective discharge of presidential responsibilities.

FOOTNOTES:

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n1 *See* RAOUL BERGER, **EXECUTIVE PRIVILEGE:** A CONSTITUTIONAL MYTH (1974).

n2 *See id.* at 5-9.

n3 *See id.* at 51 (examining the definition of "executive power" in Article II of the U.S. Constitution).

n4 *See id.* at 12.

n5 *See id.* ("And we should be slow to import into the words 'executive power' an implication which curtails an established legislative power.").

n6 *Id.*

n7 War powers and executive agreements are two examples. *See id.* at 74 (noting that the presidential decision to send "armed forces to repel invasion of Korea or Vietnam" lacked constitutional support).

n8 Creating independent regulatory agencies is an example.

n9 *See* BERGER, *supra* note 1, at 35 & n. 124.

n10 HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 4 (1990).

n11 LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 36 (1990).

n12 *See* BERGER, *supra* note 1, at 10 (noting that the "scope of the congressional power . . . can not be diminished by presidential fiat").

n13 2 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 1044 (1907) (quoting H.R. REP. NO. 36-394 (1860)).

n14 *See* ***Executive Privilege:*** *Hearing Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong. 245 (1971) (statement of Raoul Berger) [hereinafter ***Executive Privilege***].

n15 U.S. CONST. art. I, § 5, cl. 3.

n16 Raoul Berger, *The Incarnation of* ***Executive Privilege***, 22 UCLA L. REV. 16, 17 (1974) [hereinafter Berger, *Incarnation*].

n17 George C. Calhoun, *Confidentiality and* ***Executive Privilege,*** *in* THE TETHERED PRESIDENCY: CONGRESSIONAL RESTRAINTS ON EXECUTIVE POWER 173 (Thomas M. Franck ed., 1981).

n18 *See* Raoul Berger, ***Executive Privilege*** *vs. Congressional Inquiry*, 12 UCLA L. REV. 1043, 1056 (1965) ("The first one in line for interrogation . . . is properly the official himself.") [hereinafter Berger, *Congressional Inquiry*].

n19 *Id.* at 1058-60 (citing Coke, 4 Inst. 11; Howard v. Gossett, 10 Q.B. 359, 379-80, 116 Eng. Rep. 139, 147 (1845)).

n20 ***Executive Privilege,*** *supra* note 14, at 245 (statement of Raoul Berger). Article I, Section 6, clause 1 of the Constitution provides that "for any speech or debate in either House [members] shall not be questioned in any other place." U.S. CONST. art. I, § 6, cl. 1.

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Berger notes that there is no comparable guarantee in Article II against anyone else examining the Executive. *See* ***Executive Privilege,*** *supra* note 14, at 245 (statement of Raoul Berger).

n21 U.S. CONST. art. II, § 4.

n22 3 HINDS, *supra* note 13, at 183.

n23 *See* BERGER, *supra* note 1, at 37.

n24 *See id.*

n25 *Id.* at 37 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 158 (Max Farrand ed., 1966)).

n26 *See id.*

n27 *Id.* at 38 (quoting U.S. CONST. art. II, § 3).

n28 U.S. CONST. art. II, § 3.

n29 BERGER, *supra* note 1, at 3.

n30 *See id.* at 13.

n31 ***Executive Privilege,*** *supra* note 14, at 278 (statement of Raoul Berger).

n32 *See* U.S. CONST. art. II, § 2, cl. 1.

n33 *See* U.S. CONST. art. II, § 2, cl. 2.

n34 *See* U.S. CONST. art. I, § 8.

n35 *See* BERGER, *supra* note 1, at 119 (noting the "all but total takeover of foreign relations by the President").

n36 U.S. CONST. art. II, § 2.

n37 *See* BERGER, *supra* note 1, at 120-21.

n38 *See id.* at 122.

n39 *See id.* at 126-27.

n40 *Id.* at 127.

n41 ***Executive Privilege,*** *supra* note 14, at 283 (statement of Raoul Berger).

n42 *Id.* at 31 (statement of J. William Fulbright).

n43 *See* BERGER, *supra* note 1, at 118-21.

n44 *See id.* at 2 & n.6 (citing W.P. Rogers, *Constitutional Law: The Papers of the Executive Branch*, 44 A.B.A. J. 941 (1953)).

n45 *See* Berger, *Congressional Inquiry, supra* note 18, at 1058-60.

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n46 273 U.S. 135 (1927).

n47 *Id.* at 161.

n48 *See* H.R. REP. NO. 97-2, at 35-36 (1981).

n49 *See id.*

n50 *See id.*

n51 *Id.* at 30.

n52 *See* IRVING L. JANIS, GROUPTHINK 172 (2d ed. 1982).

n53 *See id.* at 178-86.

n54 *See* H.R. REP. NO. 97-2 at 40 (1981).

n55 *See id.*

n56 *See* BERGER, *supra* note 1, at 289.

n57 *See* Berger, *Incarnation, supra* note 16, at 16 ("The Framers provided for limited secrecy by **Congress** alone, thereby excluding executive secrecy from the public.").

n58 DAVID WISE, THE POLITICS OF LYING: GOVERNMENT DECEPTION, SECRECY, AND POWER 339 (1973) (quoting President Richard M. **Nixon)**.

n59 *See* BERGER, *supra* note 1, at 254.

n60 *See id.* at 254-55.

n61 *See* Berger, *Incarnation, supra* note 16, at 4.

n62 *See* Mark J. Rozell, ***Executive Privilege*** *and the Modern Presidents: In* ***Nixon's*** *Shadow*, 83 MINN. L. REV. 1069, 1124-25 (1999) (noting that Clinton's misuse of **executive privilege** did more to undermine and discredit it than reestablish its legitimacy) [hereinafter Rozell, ***Nixon's*** *Shadow*].

n63 *See, e.g., id.* at 11, 21, 26-27, 29 (discussing other examples of abuses of **executive privilege)**; Norman Dorsen & Shattuck, ***Executive Privilege:*** *The President Won't Tell, in* NONE OF YOUR BUSINESS: GOVERNMENT SECRECY IN AMERICA, 27-60 (Norman Dorsen & Stephen Gillers eds., 1975) (arguing against "discretionary" **executive privilege)**; Note, *Military and State Secrets Privilege*, 91 YALE L.J. 570, 579 (1982) (criticizing the use of **executive privilege** for information of "minimal security value" to counter allegations of misconduct).

n64 *See* BERGER, *supra* note 1, at 8 (agreeing with Senator Fulbright's statement that "secrecy and subterfuge are themselves more dangerous to democracy than the practices they conceal").

n65 Berger, *Incarnation, supra* note 16, at 26.

n66 *See id.* at 4-5, 24 (noting the corrupt use of government secrecy during the **Nixon** Administration).

n67 *See* THE FEDERALIST NOS. 68-77 (Alexander Hamilton).

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n68 *See id.*

n69 *See id.* at 50.

n70 *See id.*

n71 *See* LOUIS W. KOENIG, THE CHIEF EXECUTIVE 14 (revised ed. 1968).

n72 *See id.*

n73 *See id.* at 14-16.

n74 *See* J.W. PELTASON, CORWIN & PELTASON'S UNDERSTANDING THE CONSTITUTION 9 (10th ed. 1985).

n75 *See id.*

n76 *See id.* at 10-11.

n77 *See* BERGER, *supra* note 1, at 1-2.

n78 *See supra* note 57.

n79 *See* BERGER, *supra* note 1, at vii-viii.

n80 *See* THE FEDERALIST NO. 64 (John Jay).

n81 *See* THE FEDERALIST NO. 64 (John Jay), NO. 70 (Alexander Hamilton).

n82 THE FEDERALIST NO. 64 vol. 2, at 12 (John Jay) (Tudor Publ'g Co. ed. 1937).

n83 *See* BERGER, *supra* note 1, at 128-29.

n84 *See* THE FEDERALIST NO. 64, *supra* note 82, vol. 2, at 12-13 (John Jay).

n85 *See* BERGER, *supra* note 1, at 13.

n86 *See* THE FEDERALIST NO. 64, *supra* note 82, vol. 2, at 12-13 (John Jay).

n87 *See id.*; THE FEDERALIST NO. 75 (Alexander Hamilton) (refuting the belief that the Constitution assigns to the Senate the preeminent role in treaty-making). Hamilton wrote, "To have intrusted the power of making treaties to the Senate alone, would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations." THE FEDERALIST NO. 75, *supra* note 82, vol. 2, at 82 (Alexander Hamilton).

n88 *See* BERGER, *supra* note 1, at 127.

n89 *See* U.S. CONST. art. II, § 1.

n90 *See* U.S. CONST. art. II, § 2.

n91 *See* MICHAEL FOLEY, THE SILENCE OF CONSTITUTIONS: GAPS, 'ABEYANCES' AND POLITICAL TEMPERAMENT IN THE MAINTENANCE OF GOVERNMENT, at xi-xii (1989).

n92 J.W. PELTASON, CORWIN AND PELTASON'S UNDERSTANDING THE CONSTITUTION 88 (10th ed. 1988).

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potentially undermines a frequently cited justification for **executive privilege**--that the Executive possesses prerogative powers that are especially compelling in the international realm.

Berger is not alone in rejecting the existence of prerogative powers. For example, Harold Hongju Koh wrote, "The constitutional system of checks and balances is not suspended simply because foreign affairs are at issue." [10] In addition, Louis Henkin agreed that "constitutionalism implies limited government. For our subject, that means that the Constitution should be expounded so that there can be no extraconstitutional government, that, in principle and in effect, no activity of government is exempt from constitutional restraints, not even foreign affairs . . . ." [11] Therefore, by implication, critics argue that **executive privilege** cannot be legitimate, because to make a claim for its legitimacy would be tantamount to arguing that the Executive has the authority to act without congressional consent or even knowledge.

Furthermore, Berger contends that the President is always accountable to **Congress;** yet, **Congress** need not be accountable to the President. [12] An 1860 report of the House of Representatives stated, "The conduct of the President is always subject to the constitutional supervision and judgment of **Congress;** while he, on the contrary, has no such power over either branch of that body." [13] According to Berger, the Framers recognized the need for secrecy in government and gave that power to **Congress.** [14] As support, he cites Article I, Section 5(3) of the Constitution: "Each **[*544]** House shall keep a Journal of its proceedings, and from time to time, publish the same excepting such parts as may in their judgement require secrecy." [15] Because no such mention of secrecy is made in Article II, Berger maintains that "in the Constitution the Framers provided for limited secrecy by **Congress** alone, thereby excluding executive secrecy from the public." [16]

A former special counsel to the U.S. Attorney General, George C. Calhoun attributes much of the interbranch conflict over **executive privilege** to the "belief of many in the government that each branch *owns* the information it develops." [17] According to Berger, **Congress** possesses not only its own information *but also* the Executive's. [18] He maintains that the Framers "patently modeled" the U.S. **Congress** after the British Parliament and thereby made **Congress** the nation's "Grand Inquest." [19] Consequently, the President has no constitutional authority to resist **Congress'** demands for information. As Berger explained to the Subcommittee on Separation of Powers, "there is no word in the Constitution that expresses any intention whatsoever to curtail the normal attribute of the legislative power . . . [and] there is not a single word in any one of the conventions expressing any intention to curtail the legislative power of investigation." [20]

Berger maintains that the Executive's accountability to **Congress** also is guaranteed by the Article II, Section 4 provision for impeachment: "The President . . . shall be removed from Office on Impeachment for and Conviction of Treason, Bribery, or other high Crimes and Misdemeanors." [21]

To properly conduct an impeachment proceeding, the House of Representatives must have complete access to the executive branch's information. In support of this argument, Berger notes an 1843 House Report, which stated the following: "The House of Representatives has the sole power of impeachment . . . a power which **[*545]** implies the right of inquiry on the part of the House to the fullest and most unlimited extent." [22] If this interpretation of the House's inquiry power is correct, then the case for **executive privilege** is weakened. Obviously, the House cannot investigate the Executive if the President can withhold any information that he chooses.

Berger argues that the Article II, Section 3 provision for a presidential delivery to **Congress** of information on the state of the Union also repudiates **executive privilege:** "He shall from

n93 *See* BERGER, *supra* note 1, at 4.

n94 *See* Berger, *Congressional Inquiry, supra* note 18, at 1058-60.

n95 *See id.*

n96 *Id.* at 1117.

n97 *See* BERGER, *supra* note 1, at 10-11.

n98 James W. Ceaser, *In Defense of Separation of Powers, in* SEPARATION OF POWERS--DOES IT STILL WORK? 168, 171 (Robert A. Goldwin & Art Kaufman eds., 1986).

n99 *See* BERGER, *supra* note 1, at 10-11.

n100 *See, e.g.*, Watkins v. United States, 354 U.S. 178 (1957) (holding invalid a petitioner's conviction for refusing to answer questions as to whether he had known that certain persons were members of the Communist Party).

n101 *See* United States v. **Nixon,** 418 U.S. 683 (1974) (upholding a subpoena directing President **Nixon** to produce certain tape recordings and documents relating to his conversations with aides and advisers).

n102 U.S. CONST. art. II, § 3.

n103 *See* BERGER, *supra* note 1, at 37.

n104 *See id.*

n105 Berger, *Congressional Inquiry, supra* note 18, at 1078.

n106 Letter from George Washington to James Madison (May 5, 1789), *in* 30 THE WRITINGS OF GEORGE WASHINGTON, 1745-1799, at 311 (John Fitzpatrick ed., 1931-1944).

n107 *See* 3 ANNALS OF CONG. 493 (1792).

n108 *Id.*

n109 *See id.*

n110 *See* Berger, *Congressional Inquiry, supra* note 18, at 1079.

n111 *See id.*

n112 1 THE WRITINGS OF THOMAS JEFFERSON, 1760-1775, at 189-90 (Paul Ford ed., 1892).

n113 *See* BERGER, *supra* note 1, at 167.

n114 *See id.*

n115 Abraham Sofaer, ***Executive Privilege:*** *An Historical Note*, 75 COLUM. L. REV. 1319 (1975) (quoting 4 ANNALS OF CONG. 38 (1794)) [hereinafter Sofaer, ***Executive Privilege***].

n116 *See id.*

n117 *See id.*

n118 *See id.*

n119 *Id.* (quoting *Cabinet Opinion*, Jan. 28, 1794, *in* 4 THE WORKS OF ALEXANDER HAMILTON 505-06 (J.C. Hamilton ed., New York, C.S. Francis 1851)).

n120 *Id.* at 1320 (quoting Letter of William Bradford to President Washington, *in* 4 THE WORKS OF HAMILTON, *supra* note 119, at 494-95).

n121 *Id.* (quoting *American State Papers*, 1 FOREIGN RELATIONS 329 (1833)).

n122 *See id.* at 1321.

n123 *See id.*

n124 *Id.*; *see also* Abraham Sofaer, *Executive Power and Control Over Information: The Practice Under the Framers*, 1977 DUKE L.J. 1, 8 (citing 4 ANNALS OF CONG. 56 (1794)) [hereinafter Sofaer, *Executive Power and Control*].

n125 *See* Sofaer, *Executive Power and Control, supra* note 124, at 8.

n126 *See id.*

n127 *See* 5 ANNALS OF CONG. 760-62 (1796).

n128 1A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, 186-87 (James D. Richardson ed., Washington, Government Printing Office, 1896) [hereinafter COMPILATION].

n129 *Id.*

n130 *See* 5 ANNALS OF CONG. 771-72 (1796).

n131 *See id.* at 771-72.

n132 *See id.* at 771.

n133 *See id.* at 773.

n134 *Id.*

n135 10 THE WORKS OF ALEXANDER HAMILTON 107 (Henry C. Lodge ed., 1904) (1971).

n136 *See* Sofaer, *Executive Power and Control, supra* note 124, at 14-15.

n137 *See id.*

n138 *See id.* at 15.

n139 *See id.* at 14-15.

n140 *See id.* at 16-17.

n141 *See* THOMAS P. ABERNATHY, THE BURR CONSPIRACY 237 (1954).

n142 16 ANNALS OF CONG. 336 (1807).

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n143 COMPILATION, *supra* note 128, at 400.

n144 Letter from Thomas Jefferson to George Hay (June 12, 1807), *in* 9 THE WRITINGS OF JEFFERSON, *supra* note 112, at 55.

n145 *See* Sofaer, ***Executive Privilege,*** *supra* note 115, at 19-24.

n146 *See id.*

n147 *See id.* at 28-45.

n148 8 COMPILATION OF REPORTS OF THE COMMITTEE ON FOREIGN RELATIONS, U.S. SENATE, 1789-1901, Doc. No. 56-231, at 24 (1901).

n149 *See, e.g.*, Bowsher v. Synar, 478 U.S. 714 (1986) (holding that powers vested in the Comptroller General under a legislative provision violated the Constitution's command that **Congress** play no direct role in the execution of the laws); Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983) (striking down a congressional veto provision that operated to overrule the Attorney General and mandate deportation of an alien).

n150 *See* Chicago and S. Airlines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (holding that final orders regarding a citizen carriers' application to engage in overseas and foreign air transportation embody presidential discretion beyond the competence of the courts to adjudicate).

n151 *See* 50 U.S.C. § 401 (1994).

n152 *See* United States v. **Nixon,** 418 U.S. 683, 708 (1974).

n153 ***Executive Privilege,*** *supra* note 14, at 353 (statement of Averell Harriman).

n154 *Id.* at 320-21 (statement of William P. Bundy).

n155 418 U.S. 683 (1974).

n156 *Id.* at 705-06, 708.

n157 Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 (1979).

n158 *See* ***Nixon***, 483 U.S. at 709-13.

n159 *See, e.g.*, Wilkinson v. United States, 365 U.S. 399 (1961) (upholding a conviction for not admitting before **Congress** to being a member of the Communist party); Watkins v. United States, 354 U.S. 178 (1957) (reversing a conviction for the giving of information about members of the Communist Party).

n160 *See, e.g.*, Sinclair v. United States, 279 U.S. 263 (1929) (upholding the conviction of a witness who refused to testify before a committee); McGrain v. Daugherty, 273 U.S. 135 (1927) (holding that the authority of **Congress** to require pertinent disclosures in aid of its own constitutional power is not abridged because the information also may be of use in pending legal suits).

n161 *See* Senate Select Comm. on Presidential Campaign Activities v. **Nixon,** 498 F.2d 725, 731 (1974) ("The sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions.").

n162 *See id.*

n163 Nonetheless, as Louis Fisher observes, the courts consistently have ruled that the congressional power of investigation is available, even for pursuit down "blind alleys." *See* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN **CONGRESS** AND THE PRESIDENT 187 (4th ed. 1997); *see also* Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (holding that congressional inquiry into activities of respondent organization to determine whether they were potentially harmful to the morale of the U.S. Armed Forces was within the legitimate legislative sphere). In a balancing test between a seemingly strong presidential claim to **executive privilege** and a blind congressional pursuit, the inquiry power of **Congress** may have to yield to the executive branch.

n164 *See* BERGER, *supra* note 1, at 4.

n165 H.R. REP. NO. 97-968, at 83 n.1 (1982). For a classic study of secrecy and legislative inquiry, see Irving Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. PITT. L. REV. 755-84 (1959).

n166 *See* Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of* ***Congress***, 66 N.Y.U. L. REV. 563, 617 (1991).

n167 *See* Gravel v. United States, 408 U.S. 606, 612 (1972).

n168 *See id.* at 612

n169 *See id.* at 615.

n170 DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 150 (2d ed. 1990).

n171 *Id.* at 150-51.

n172 *See* **Nixon** v. Sirica, 487 F.2d 700, 738-40 (1973) (Mackinnon, J., concurring in part and dissenting in part) (summarizing **Congress's** claim of "absolute privilege to decide itself whether its members or employees should respond to subpoenas").

n173 *See id.* at 740.

n174 *See* Soucie v. David, 448 F.2d 1067, 1080 (D.C. Cir. 1971) (Wilkey, J., concurring).

n175 Calhoun, *supra* note 17, at 174.

n176 *See* Rozell, ***Nixon's*** *Shadow, supra* note 62, at 1072-94.

n177 *See id.* at 1094-103.

n178 *See id.* at 1103-18.

n179 *See id.* at 1118-26.

n180 The phrase "Constitutional Myth" was coined by Raoul Berger. *See* BERGER, *supra* note 1, at 1.

n181 *See* Peterson, *supra* note 166, at 613.

n182 *See* Berger, *Incarnation, supra* note 16, at 4.

n183 *Id.* at 29.

n184 *Id.*

n185 *See* Rozell, ***Nixon's*** *Shadow, supra* note 62 at 1077.

n186 *See* 1 ***Executive Privilege,*** *supra* note 14, at 65-74, 88 (comments of Senator J. William Fulbright).

n187 *See* BERGER, *supra* note 1, at 14.

n188 *See* Ceaser, *supra* note 98, at 190.

n189 *See supra* Pts. I-II.

n190 Brief of Richard M. **Nixon** in Opposition to Plaintiffs' Motion for Summary Judgment, Senate Select Comm. on Presidential Campaign Activities v. **Nixon,** 366 F. Supp. 51 (D.D.C. 1973) (No. 1593-73) *in* 9 WEEKLY COMP. PRES. DOC. 1174, 1179 (Sept. 24, 1973).

n191 487 F.2d 700 (D.C. Cir. 1973).

n192 *Id.* at 742.

n193 LOUIS W. KOENIG, THE CHIEF EXECUTIVE 11 (5th ed. 1986).

n194 *See* MARK J. ROZELL, **EXECUTIVE PRIVILEGE:** THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 32-42 (1994) [hereinafter ROZELL, DILEMMA OF SECRECY].

n195 *See id.* at 25-32.

n196 L. Peter Schultz, *The Separation of Powers and Foreign Affairs, in* SEPARATION OF POWERS, *supra* note 98, at 118, 119.

n197 *See, e.g.*, James Hamilton & John C. Grabow, *A Legislative Proposal for Resolving* ***Executive Privilege*** *Disputes Precipitated by Congressional Subpoenas*, 22 HARV. J. ON LEGIS. 145 (1984).

n198 Letter from Edward Levi to Vice President Nelson Rockefeller (June 13, 1975) (on file with author).

n199 *See* LOUIS FISHER, THE POLITICS OF SHARED POWER: **CONGRESS** AND THE EXECUTIVE 72 (4th ed. 1998).

n200 *See id.*

n201 *See* U.S. CONST. art. I, § 8.

n202 *See* 2 U.S.C. § 190 (2000).

n203 *See* ROZELL, DILEMMA OF SECRECY, *supra* note 194, at 108-41.

n204 *See* U.S. CONST. art. IV, § 2.

n205 *See* EMILY FIELD VAN TASSEL & PAUL FINKELMAN, IMPEACHABLE OFFENSES 274 (1999).

n206 *See id.*

n207 *See* FISHER, *supra* note 199, at 15-18 (noting the failed assertions of **executive privilege** by Presidents Reagan and Clinton).

N208 Sotirios A. Barber, *The Supreme Court and* ***Congress's*** *Responsibilities in Foreign Affairs, in* TAKING THE CONSTITUTION SERIOUSLY: ESSAYS ON THE CONSTITUTION AND CONSTITUTIONAL LAW 231 (Gary L. McDowell ed., 1981).

n209 *See id.* at 233.

n210 J. WILLIAM FULBRIGHT, THE ARROGANCE OF POWER 46 (1966).

n211 *See* KOENIG, *supra* note 193, at 11-12.

n212 Letter from William French Smith to Rep. John D. Dingell (Nov. 30, 1982) *cited in* STAFF OF HOUSE COMM. ON PUBLIC WORKS AND TRANSP., 97TH CONG., REPORT ON CONTEMPT OF **CONGRESS** 77, 79 (Comm. Print 1982); *see also supra* note 29.

n213 U.S. CONST. art. II, § 2.

n214 ***Executive Privilege,*** *supra* note 14, at 434 (statement of Justice William Rehnquist).

n215 *See supra* notes 3-29 and accompanying text.

n216 *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 727-30 (1971) (Stewart, J., concurring) (upholding the denial of an injunction the United States government sought against the publication by the NEW YORK TIMES of the contents of a classified study entitled *History of U. S. Decision-Making Process on Viet Nam Policy*); Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (holding that the Civil Aeronautics Act, which provides that orders of the Civil Aeronautics Board that grant or deny applications by citizens to engage in overseas and foreign air transportation, which are subject to the approval of the President, creates an implied exception to the provision of the Act for the judicial review of the Board's orders other than those "in respect of any foreign air carrier subject to the approval of the President."); Coleman v. Miller, 307 U.S. 433, 453-55 (1939) (upholding a judgment of the Supreme Court of Kansas denying a writ of mandamus, applied for in that court by senators of the State and members of its house of representatives for the purpose of compelling the Secretary of the Senate to erase an endorsement purporting to show that a resolution for the ratification of a proposal to amend the federal Constitution had passed the Senate, and to restrain the officers of the Senate and the other house of the legislature from signing the resolution and the Secretary of State of Kansas from authenticating it and delivering it to the Governor); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) (holding that the seizure and sale in Mexico, as a military contribution, of property at the time owned and in the possession of a Mexican citizen, by a duly commissioned military commander of what must be accepted by the courts as the legitimate government of Mexico, in the progress of a revolution, and when conducting active independent operations, is not subject to reexamination or modification by a court of the United States in an action of replevin involving the title to such property); Holtzman v. Schlesinger, 484 F.2d 1307, 1309-10 (2d Cir. 1973) (deciding the court had no power to decide on the authorization of **Congress** to enter into a conflict in Cambodia); Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982) (refusing to grant an injunction to stop military aid to El Salvador); United Presbyterian Church in the U.S.A. v. Reagan, 557 F. Supp. 61, 65-66 (D.D.C. 1982) (refusing to rule on the constitutionality of Executive Order 12333, which established the framework in which American governmental and military agencies are to effectuate the process of gathering foreign intelligence and counterintelligence information, and the manner in which intelligence-gathering functions would be conducted at home and

abroad, on the grounds that it is a political question); Atlee v. Laird, 347 F. Supp. 689, 703 (E.D. Pa. 1972), *aff'd without opinion*, 411 U.S. 421 (1973) (refusing to rule on the question of the power of the President to wage a "war" in Southeast Asia).

n217 Louis Fisher, *War Powers: The Need for Collective Judgment, in* DIVIDED DEMOCRACY: COOPERATION AND CONFLICT BETWEEN THE PRESIDENT AND **CONGRESS** 199, 215 (James A. Thurber ed., 1991).

n218 United States v. **Nixon,** 418 U.S. 683, 706 (1974).

n219 *See id.* at 706, 710.

n220 *See id.* at 707.

n221 *Id.* at 713.

n222 *See, e.g.*, United States v. American Tel. & Tel. Co., 567 F.2d 121, 125 (D.C. Cir. 1977); United States v. American Tel. & Tel. Co., 551 F.2d 384, 394 (D.C. Cir. 1976); Senate Select Comm. on Presidential Campaign Activities v. **Nixon,** 498 F.2d 725, 728-29 (D.C. Cir. 1974).

n223 *See* ***Nixon***, 418 U.S. at 706.

n224 *See, e.g.*, Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 275-76 (4th Cir. 1980) (suggesting that the parties waive a jury trial in favor of an *in camera* disposition of a tort action involving sensitive naval documents); United States v. Boyce, 594 F.2d 1246, 1252 (9th Cir. 1979) (examining classified materials *in camera* to determine if they contained exculpatory evidence useful to accused spy Christopher Boyce); United States v. Lyon, 567 F.2d 777, 783 (8th Cir. 1977) (examining *in camera* the testimony of two C.I.A. representatives made under oath); **Nixon** v. Sirica, 487 F.2d 700, 707-08 (D.C. Cir. 1973) (holding that the *in camera* examination of presidential tape recordings was "necessary and appropriate" to identify relevant evidence); United States v. Jolliff, 548 F. Supp. 229, 231-32 (D. Md. 1981) (noting the strong legal precedent supporting *in camera* examinations of confidential evidence).

n225 *See, e.g.*, Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 791 (D.C. Cir. 1971) (upholding a conservation group's discovery request for nuclear testing information after the redacting of military and diplomatic statements); Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 946 (Ct. Cl. 1958) (holding that a document concerning an advisory opinion of a subordinate to an agency head was privileged).

n226 25 F. Cas. 187 (1807).

n227 *Id.* at 190, 191-92.

n228 *See* ROZELL, DILEMMA OF SECRECY, *supra* note 194, at 134-35.

n229 *See* Rozell, ***Nixon's*** *Shadow, supra* note 62, at 1069-126.

n230 *See* TERRY EASTLAND, ENERGY IN THE EXECUTIVE: THE CASE FOR A STRONG PRESIDENCY (1992) (arguing for a strong presidency in order to achieve what the constitutional Framers saw as good government); THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989) (compiling essays critical of legislative intrusions on executive powers); The Imperial **Congress** (Gordon S. Jones & John A. Marini eds., 1988) (compiling essays that recall the original purposes of the separation of powers, how it has been undermined, and ways to restore it).

n231 *See* FOLEY, *supra* note 91, at 77.

n232 *Id.* at xi.

n233 *Id.* at 76.

n234 *See* BERGER, *supra* note 1, at 58 (finding that a president's powers are only those strictly enumerated by the founding fathers, and that "lacking an 'enumerated' power, action is illegal").

n235 Ceaser, *supra* note 98, at 176.

n236 *Id.*

n237 *See* ROZELL, DILEMMA OF SECRECY, *supra* note 194, at 83-141.

n238 *See id.* at 85-89, 97-101.

n239 Memorandum from President Regan to Heads of Executive Departments and Agencies, Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982) (on file with author).

n240 *See* ROZELL, DILEMMA OF SECRECY, *supra* note 194, at 110-11, 124-26.

n241 *See id.* at 126-40.

n242 Memorandum from Lloyd Cutler to All Executive Department and Agency General Counsels (Sept. 28, 1994) (on file with author).

n243 *See* Rozell, ***Nixon's*** *Shadow, supra* note 62, at 1069-126.

n244 Berger, *Incarnation, supra* note 16, at 29.

n245 *Id.*

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time to time give to the **Congress** information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient." [23]

Berger believes that this constitutional duty of presidents is yet another measure of **Congress'** absolute power of inquiry. [24] The original provision presented at the Constitutional Convention allowed the President little discretion in determining the kind of information he could exclude from a congressional inquiry. In the rejected version, the Framers established "his duty to inform the Legislature of the Condition of the U.S. so far as may respect his Department." [25] The final, adopted version, Berger believes, did not limit the President's duty to supply **Congress** with information. [26] In fact, the President's duty to provide information "'from time to time,'" according to Berger, "is the reciprocal of the familiar legislative power to inquire." [27]

Finally, Berger cites the Article II, Section 3 provision that the President "shall take care that the laws be faithfully executed" [28] as evidence that the Executive must be accountable to the legislative branch. He asks, "Who has a more legitimate interest in inquiring whether a law has been faithfully executed than the lawmaker?" [29] **Executive privilege** remains dubious if **Congress** has an absolute, unlimited power of inquiry.

A. *The Framers' Fear of Tyranny*

Fearing that a strong Executive might at some time be transformed into a tyrannical ruler, the Framers sought to devise a governmental system of limited powers. Given the colonial experiences with the abuses of power by King George III, the Framers were determined that the American constitutional system should preempt **[*546]** the possibility of ever having an arbitrary and tyrannical Executive. [30] The Framers also made the Legislature the supreme lawmaking branch. In his statement to the Senate Subcommittee on Separation of Powers, Berger noted that James Madison, the chief constitutional architect, explained, "'In republican government, the legislative authority necessarily predominates.'" [31]

According to this view, the Framers so feared executive power that they made the Legislature the supreme branch of government in all policy areas, even in foreign affairs. Specifically, the Constitution grants to the President two exclusive powers: to receive ambassadors and to act as Commander in Chief of the armed forces. [32] The President must share with the Senate the treaty-making power as well as the power to appoint ambassadors. [33] **Congress** possesses such formidable powers as declaring war and regulating commerce. [34] Berger maintains that the President cannot be the director of foreign policy and that the reality of executive preeminence in that area is due to a gradual presidential usurpation of power. [35]

According to Berger, a telling example of presidential usurpation of congressional authority is the treaty-making power. He cites the provision of Article II, Section 2 of the Constitution that states, "He shall have power, by and with the advice and consent of the Senate, to make treaties," [36] to substantiate the argument that presidents have been acting unconstitutionally. [37]

The Senate, according to Berger, has the right to participate in the negotiation and formulation of treaties, as well as in their ratification. [38] From his study of the Constitutional Convention, Berger concludes that the Framers intended the treaty-making power to have belonged to the Senate. [39] "It was the President . . . who was finally made a participant in the treaty-making process, which had been initially lodged--after the pattern of the Continental **Congress**--in the Senate alone." [40] Berger believes there is no presidential privilege to withhold information on the development of treaties and he explained his position in the following manner to a congressional committee:

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> **[*547]** How can you help "make" a treaty if you don't know a thing about how it is being negotiated? How can the Senate "advise" as to the "making" of a treaty if it is kept in the dark? That doesn't mean that you have to play strip poker in full view of the public. The alternative to operation in a gold fish bowl is not necessarily a darkroom. [41]

Despite the Framers' fear of a tyrannical Executive and notwithstanding their efforts to constrain presidential power, even in foreign policy, the ascendance of the President in foreign policymaking has become widely accepted. Nonetheless, echoing an argument by Berger, former Senator J. William Fulbright (D-Ark.) once countered, "Usurpation is not legitimized simply by repetition, nor is a valid power nullified by failure to exercise it." [42] Berger maintains that presidents have usurped such authority, in contravention of the constitutional scheme. [43] In essence, he argues that the Framers--who sought to limit and control executive authority--could not have possibly accepted such a broad-based, independent power as the right to withhold information. He asserts that, logically, a Chief Executive who is subservient to the will of the Legislature has no such right.

B. *The "Right" and the Need to Know*

In a democratic society, a premium is placed on the values of open government and freedom of information. For our democracy to properly function, both **Congress** and the public must be fully informed of the activities of the Executive Branch. [44] **Congress** must have adequate information to carry out its primary functions and a well-informed citizenry cannot be kept in the dark about its government's actions.

The executive branch is an essential source of information for **Congress.** In order to best know how to appropriate funds for the military and assistance to foreign governments, to oversee the bureaucracy, and to review treaties and executive agreements, **Congress** needs access to executive branch information. Without adequate information, members of **Congress** are unable to weigh alternatives, to estimate costs and benefits, and to develop strategies to improve government policies. **Congress** often must rely on executive branch information to determine whether public policies are being executed faithfully. For Berger, **Congress,** the "Grand Inquest" of the nation, can never legitimately be denied access to executive branch information. [45] Berger looks to constitutional support for this view, including one **[*548]** leading Supreme Court case, *McGrain v. Daugherty.* [46] In *McGrain,* Justice Willis Van Devanter offered the following judgment:

> In actual legislative practice power to secure needed information by such [investigative] means has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution . . . . [47]

From this perspective, congressional access to executive branch information not only is a practical necessity, but is legally required. In Berger's view, the executive branch never really loses "control" over information because it does not own that information.

Members of **Congress** reasonably maintain that executive branch information not only must be available, but also must be received in a timely fashion. [48] Most legislators want timely information so that they can play a substantive role in the early stages of decision-making. [49] To be precise, they prefer being "consulted" to merely being "informed." [50] Divulging previously withheld information after a decision has been made does little to advance

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Congress's role in the policy process. A 1981 House of Representatives Report on **Congress** and foreign policymaking stated the dilemma well: "Unless consultation is timely, it loses a good deal of its impact and 'effective' relations are of only symbolic value." [51]

A strong argument against **executive privilege** is that decision-makers benefit from exposure to numerous viewpoints. Irving Janis' classic study, *Groupthink*, shows that, from a policymaker's perspective, it is important to avoid conformity, to seek out different opinions, and to resist isolation from outside opinions. [52] Janis illustrates the disastrous consequences of decisions made by like-minded groups of individuals who resisted different points of view. [53] Consequently, an Executive may withhold information at his peril from people whom he knew would disagree with his position. Members of **Congress** believe they are particularly well-situated to provide the Executive with diverse opinions.

The 1981 House Report on **Congress** and foreign policy also noted an important obstacle to the Executive seeking out diverging viewpoints: a lack of trust in **Congress.** The Report quoted a White House official who agreed that presidents need **[*549]** constructive advice from members of **Congress.** [54] Yet, the Executive instead often keeps secrets because "even when the President has stressed the sensitivity of an issue Members of **Congress** have walked outside and talked to the press on the White House grounds." [55]

Berger disputes the fears of public disclosure of sensitive information. [56] Moreover, he argues that the public has a right to know everything about the operations of the executive branch in a democratic system of government. [57] **Executive privilege** can only hinder the free flow of information and ideas.

Executive privilege indeed appears difficult to accommodate in a government based on accountability. It is dubious to assume that executive branch officials can be held accountable for their actions when the public and **Congress** do not know what these officials are doing.

Perhaps most ironic is the following quotation from former President Richard M. **Nixon,** made just three months prior to the Watergate break-in: "'When information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and--eventually--incapable of determining their own destinies.'" [58]

C. *Misuses of the Privilege*

Presidents and their staffs have invoked **executive privilege** to cover-up illegal or unethical governmental activities. They have used **executive privilege** to hide embarrassing information or to maintain an advantage in policy debates with congressional opponents.

Concerns about government misuse of **executive privilege** are certainly wellfounded. Indeed, there are numerous examples of executive branch officials concealing information of minimal security value to cover-up governmental misconduct. For example, during the **Nixon** administration, President **Nixon** refused to allow certain aides to testify when called to appear before congressional committees. [59] The President attempted to use **executive privilege** to conceal wrongdoing by members of his administration. [60] He believed that he had an absolute **[*550]** power of **executive privilege**--one that could be claimed on behalf of the entire executive branch of government. [61]

More recently, President Clinton has made extensive use of **executive privilege** in circumstances that do not warrant the exercise of that power. His attempts to resist legitimate inquiries from the Office of Independent Counsel by using **executive privilege** gave additional ammunition to critics who charge that such a presidential power naturally leads to abuses. [62]

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Given these abuses of **executive privilege,** it is no wonder that critics such as Berger perceive any such claim of that presidential power as suspect. [63] For many critics of **executive privilege,** the evils of nondisclosure clearly outweigh any potential evil that may result from executive disclosure of sensitive information. [64] For those who accept the need for a balancing test, their scale always tips decisively in favor of candor and openness. In Berger's opinion, there is no need for a balancing test because **executive privilege** always is illegitimate. He argues, "Against the debatable assumption that fear of disclosure to **Congress** may inhibit 'candid interchange' and impair administration, there is the proven fact that such exchanges have time and again served as the vehicles of corruption and malversation . . . ." [65]

II. A RESPONSE TO BERGER

Berger maintains that government secrecy is undemocratic and leads to abuses of power. [66] Nonetheless, the weight of the evidence in many instances tilts in favor of **executive privilege.** Berger's detailed presentation is impressive; yet, he clearly overstates his case. For example, although the Framers wanted to preserve liberty by **[*551]** limiting power, they never set out to cripple executive power. [67] Any power can be used for either good or bad purposes. The Framers devised institutional mechanisms to avoid the abuse of power, but they never intended to destroy executive power altogether as a means of protecting liberty. [68]

When exercised under the appropriate circumstances, **executive privilege** has clear constitutional, political, and historical underpinnings. The American separation of powers system provides for **executive privilege,** but not without limitations. **Executive privilege** is legitimate when exercised for necessary and compelling reasons. The exercise of that power is always open to challenge by those with compulsory power. Many claims of **executive privilege** fail the balancing test because, in a democratic system, the presumption generally should be in favor of openness. Unfortunately, one defense of **executive privilege** is based on the false claim that this power is an absolute, unlimited prerogative. This claim is as misguided as the belief that the Framers rejected for all times and under all circumstances any such exercise of presidential power.

A. *The Constitutional Period*

Berger points to the Framers' fear of tyranny as proof that the Constitution provides for a subordinate executive power. [69] He identifies the colonial experiences under King George III as the key points of reference for the Framers in creating the executive power. [70]

The argument that the Framers sought to devise a weak Executive because of their experience under King George's rule neglects the true point of reference for these Constitution-makers--their governing experiences under the Articles of Confederation. During that period, most of the states had extraordinarily weak governors with terms of office as brief as six months or one year, no power to reelect the incumbent, and no powers independent of the state legislatures. [71] The most telling exception was New York, which had an independent executive with full administrative powers, a three-year term, and unlimited eligibility for reelection. [72] Of the state governments during the Articles of Confederation, New York could claim the most efficient, competent administration. [73]

At the national level, no single executive existed under the Articles of Confederation. [74] The Continental **Congress,** a deliberative assembly, had authority **[*552]** for governing the separate states. [75] The failures of governance under this system precipitated the 1787 Constitutional Convention in Philadelphia, where the Framers set forth a new governing plan. Because of the inability of the separate sovereign states to raise a national militia, to carry

out interstate commerce, and to conduct a coherent foreign policy, the Framers established a new constitutional system, which included an independent, single-member Executive with substantial powers. [76]

Contrary to Berger, that **executive privilege** is mentioned nowhere in the Constitution does not preclude the exercise of that power. Recall his interpretation that Article I, Section 5, clause 3 of the Constitution provides for an exclusive legislative privilege to keep secrets. [77] No comparable provision exists in Article II, leading Berger to conclude that the Framers intentionally excluded the President from exercising secrecy. [78]

This narrow reading of the Constitution is not credible. First, this raises the question of how Berger can oppose **executive privilege** because of the lack of an explicit grant in the Constitution and yet favor the congressional power of inquiry, which also is nowhere mentioned in the document. In practice, both the executive and the legislative branches exercise a vast array of powers not expressly provided in the Constitution.

Second, Berger claims that the fact that the phrase "**executive privilege**" did not exist until 1958 means that such a presidential power cannot be grounded in our constitutional scheme. [79] This argument fails, however, because all presidents going back to George Washington have practiced what we today call "**executive privilege.**" Whether that phrase was a part of the common language at a particular time is irrelevant. The logic of Berger's argument would lead to the rejection of judicial review, congressional investigations, and many other legitimate powers.

Third, judging from the writings of the leading Framers who frequently stressed the needs for "secrecy" and "despatch" in government, [80] it is hard to imagine that these same people believed that secrecy was so evil that it had to be excluded from the executive article. The Framers understood secrecy as so obvious an executive power--and a judicial one as well--that there was no need for a specific grant of that power in the Constitution. Perhaps, the Framers specified such a grant of power in Article I because secrecy could not be assumed to have resided in a legislature. Several selections from the *Federalist Papers* indeed support executive branch secrecy. [81]

[*553] Furthermore, *Federalist No. 64* [82] contradicts Berger's interpretation of the Senate's role in treaties. From the Article II, Section 2 "Advice and Consent" Clause, Berger concludes that the Framers precluded the exercise of **executive privilege** because the Senate cannot give advice on matters over which it is not informed. [83] John Jay maintained that there are circumstances under which a President may have to resort to secret measures in treaty-making. [84] Berger assigns the Senate the preeminent role in treaty-making. [85] Jay portrayed the President and Senate as making substantial contributions of their own based on their particular institutional strengths. [86]

Nonetheless, a President who includes the Senate in the negotiation stage acts prudently; otherwise, he threatens rejection of the treaty. Still, to suggest that presidents should involve the Senate at each stage of the treaty-making process is not to conclude that such action is required in every case. There are occasions when presidents must deliberate with foreign leaders in secret over the development of treaties. **Executive privilege** may support the exercise of such secretive negotiations in certain circumstances. [87] Refusing a Senate request for information on the development of a treaty may be exceptional and it may be imprudent in most cases; but notwithstanding the latter, such a refusal is not illegal.

Central to Berger's argument is the view that the Framers made **Congress** preeminent in foreign policymaking. [88] He asserts that, logically, the subordinate branch of government cannot keep secrets from the preeminent one. The evidence, however, supports a different view. The key members of the Committee of Style at the Constitutional Convention--

Alexander Hamilton, Rufus King, and Governeur Morris--shaped the language of Article II to allow the Executive to exercise vast powers. The Vesting Clause, [89] the lack of any enumeration of duties in the Commander in Chief Clause, [90] and many silences about such powers as war, diplomatic powers, and control over executive departments all left the President with a vast reserve of unspecified authority. Michael Foley explains that the U.S. Constitution contains many such silences--what he calls "constitutional **[*554]** abeyances"--that allow for the discretionary exercise of authority according to circumstances. [91] Jack W. Peltason writes that Article II "gives the President a power that has never been defined or enumerated and, in fact, cannot be defined since its scope depends largely upon circumstances." [92]

In Berger's view, in a system based on legislative supremacy, there is no constitutional basis for **executive privilege.** Recall that he cites the Article II, Section 4 provision for impeachment as proof of this position. [93] Berger believes that the Framers "patently modeled" the U.S. **Congress** after the British Parliament. [94] He points out that, historically, both the colonial legislatures and the British Parliament were able to compel disclosure of executive information. [95] For Berger, "History, the traditional index of constitutional construction, discloses that a sweeping power of legislative inquiry had been exercised by Parliament and by the colonial legislatures." [96] Berger concludes that **Congress** must have the same limitless power of inquiry as entrusted to the British Parliament. [97]

The problem is that Berger equates the power of the Executive in a presidential system with that of a parliamentary system. Yet, as James W. Ceaser writes, "Under a presidential system the essential executive force is never extinguished or in doubt; under a parliamentary system the executive force cannot be guaranteed (and in practice has not been)." [98]

Berger's argument rests upon the belief that the power of inquiry in a governmental system based on the separation of powers is as unquestioned and extensive as the power of inquiry in a system that rejects the concept of separation of powers. [99] A system of separated powers by its nature does not elevate one branch to supreme status. The Supreme Court has ruled that the congressional power of inquiry has limits. [100] The Court also has determined that, in cases of inquiry into possible criminal actions, the Executive has to release pertinent information. [101] **[*555]** **Congress** does not possess a complete, unlimited power of inquiry. Neither does the Executive possess an unfettered power to withhold any and all information from **Congress.**

Congress certainly has a very strong claim to any germane executive branch information in cases of impeachment and investigations into executive branch corruption. That the presumption is strongly in favor of **Congress'** demands for information in those circumstances does not bolster Berger's argument that the legislative power of inquiry is therefore absolute. It means merely that the balancing test shifts decisively in **Congress's** favor.

Berger's interpretation of Article II, Section 3, of the Constitution--"He shall from time to time give to the **Congress** Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient" [102] --is misleading. Referring to the original version proposed at the Constitutional Convention--rather than the just-recited adopted version--Berger argues that the Framers intended to limit the discretion of the President to present information in the State of the Union address. [103] Therefore, Berger's argument rests on the assumption that historians should look primarily to the original provision for Article II, Section 3, introduced at the Convention, to understand the meaning of that provision in its adopted form. [104] The adopted version means the opposite of what Berger suggests. In practice, presidents have used the State of the Union address to present information that they wanted to reveal to **Congress,** not information that **Congress** compelled them to present.

Source: All Sources : Secondary Legal : **Law Reviews, Combined**
Terms: **"executive privilege" and date(aft 1997) and nixon and congress** (Edit Search)

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SYMPOSIUM: **EXECUTIVE PRIVILEGE** AND THE CLINTON PRESIDENCY: INVOKING **EXECUTIVE PRIVILEGE:** NAVIGATING TICKLISH POLITICAL WATERS

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SUMMARY:
... In support of his argument, he points to early precedents set during the Washington Administration and to congressional leverage over the executive branch. ... [257] At various points, the memorandum cites Garfinkel for the proposition that **Congress** cannot "divest the President of his control over national security information in the Executive Branch by vesting lower-ranking personnel in that Branch with a 'right' to furnish such information to a Member of **Congress** without receiving official authorization to do so. ... [262] From Egan he extracted a sentence-"'The authority to protect such [national security] information falls on the President as head of the Executive Branch and as Commander in Chief"" -without acknowledgi[g] that Egan was decided on statutory, not constitutional, grounds. ...

TEXT:
[*583]

In this Article, Louis Fisher acknowledges the constitutional legitimacy of **executive privilege,** but he argues that legal and political limits render the scope of the privilege narrower than what is commonly believed. In support of his argument, he points to early precedents set during the Washington Administration and to congressional leverage over the executive branch. Though he recognizes the executive branch's interest in ensuring that information is disclosed through authorized channels and its concern about disclosures of information that may embarrass the administration or one of its agency's, he asserts that there is no legal or constitutional justification for concealing such information. Dr. Fisher further argues that **Congress'** need for information to govern supports an investigatory power that trumps the executive branch's claim to exclusive control of information in national security and foreign affairs cases.

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II. Using Congressional Leverage

Exquisite legal and constitutional arguments may have to play second fiddle to the political leverage that **Congress** can exert when it wants. As mentioned previously, this may involve the simple act of having to appropriate funds to implement a treaty, thus elevating the House to equal partnership with the Senate. Either house may decide to roll out heavy artillery to get the administration's attention by unleashing the impeachment power or holding an executive official in contempt of **Congress.** On other occasions, the administration may agree reluctantly to release sensitive papers and documents because that is the only way to jump-start the confirmation process. [95]

A. The Impeachment Power

When President Washington denied the House the papers it requested regarding the Jay Treaty, he said that the only ground on which the House might have **[*596]** legitimately requested the documents was impeachment, "which the resolution has not expressed." [96] Presumably, if **Congress** had requested the documents on that basis, Washington would have acquiesced. The power of impeachment, said President Polk, gives to the House of Representatives:

the right to investigate the conduct of all publicofficers under the Government. This is cheerfully admitted. In such a case the safety of the Republic would be the supreme law, and the power of the House in the pursuit of this object would penetrate into the most secret recesses of the Executive Departments. It could command the attendance of any and every agent of the Government, and compel them to produce all papers, public or private, official or unofficial, and to testify on oath to all facts within their knowledge. [97]

Even short of impeachment, the exercise of **executive privilege** is inappropriate when there are serious charges of administrative malfeasance. President Jackson, a zealous defender of executive prerogatives, told **Congress** that if it could:

point to any case where there is the slightest reason to suspect corruption or abuse of trust, no obstacle which I can remove shall be interposed to prevent the fullest scrutiny by all legal means. The offices of all the departments will be opened to you, and every proper facility furnished for this purpose. [98]

The Supreme Court has noted that the power of **Congress** to conduct investigations "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste." [99]

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While defending a broad theory of **executive privilege,** Attorney General William French Smith admitted in 1982 that he would not try "to shield documents [from **Congress]** which contain evidence of criminal or unethical conduct by agency officials from proper review." [100] During a news conference in 1983, President Ronald Reagan said, "[W]e will never invoke **executive privilege** to cover up wrongdoing." [101] It would not be the first time. After the Iran-Contra story broke in November 1986, **[*597]** President Reagan permitted his two former national security advisers, Robert McFarlane and John Poindexter, to testify before **Congress,** [102] allowed his Cabinet officials, including Secretary of State George Shultz and Secretary of Defense Caspar Weinberger, to discuss with **Congress** their conversations with the President, [103] and made available to **Congress** thousands of sensitive, classified documents. [104] The purpose of this extraordinary cooperation was to forestall any possibility of an impeachment effort. [105]

B. The Contempt Power

When executive officials refuse to comply with a congressional request for information, the contempt power may be used asan instrument of legislative coercion. In 1975, **Congress** clashed with the executive branch over reports compiled by the Department of Commerce identifying U.S. companies that had been asked to join the Arab boycott of Israel. [106] Commerce Secretary Rogers Morton initially refused to comply with a subpoena from a House Interstate and Foreign Commerce subcommittee, but the prospect of contempt proceedings was sufficient incentive for him to release the material to the subcommittee. [107]

In 1980, President Carter threatened to withhold documents concerning his oil import fee. After a subcommittee of the House Government Operations Committee voted to hold Energy Secretary Charles W. Duncan, Jr., in contempt of **Congress** for refusing to produce the documents, Duncan bowed to the congressional will. [108] White House Senior Associate Counsel Douglas B. Huron said that he did not think that **executive privilege** ever was asserted formally, although the White House considered it. [109] In any event, the subcommittee received the material it wanted.

In 1982, the House actually voted to hold in contempt Anne (Gorsuch) Burford, Administrator of the Environmental Protection Agency (EPA), when she refused to **[*598]** release certain documents. [110] The House Public Works Committee, seeking documents on the EPA's enforcement of the "Superfund" program, was advised by the agency that there would be no objection "so long as the confidentiality of the information in those files was maintained." [111] Shortly thereafter, the Reagan Administration decided that **Congress** could not see, under any circumstances, documents in active litigation files. [112] A memorandum from President Reagan to Gorsuch claimed that the documents in question represented "internal deliberative materials containing enforcement strategy and statements of the Government's position on various legal issues which may be raised in enforcement actions relative to the various hazardous waste sites" by the EPA or the Justice Department. [113] Accepting that position, congressional oversight would have to be put on hold for years until the government completed its enforcement and litigation actions.

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After the committee held Gorsuch in contempt, the House of Representatives voted 259 to 105 to support the contempt citation. [114] To create the top-heavy majority, 55 Republicans joined 204 Democrats. [115] After the matter had a short detour to court, the Administration eventually agreed to release "enforcement sensitive" documents to **Congress.** [116] Although the legislative branch eventually prevailed, [117] the litigation highlighted a serious weakness of the contempt process. If the President opposes the release of documents to **Congress,** there is little likelihood that the Justice Department will vigorously prosecute someone in the administration who is doing the President's bidding. At the very least, the ability of the administration to take the matter to court will delay the delivery of documents to **Congress.** [118]

In 1995, the House Committee on Government Reform and Oversight began a detailed inquiry into the firing of seven Travel Office employees at the Clinton White House. [119] After the President invoked **executive privilege** to keep documents from the committee, it voted 27 to 19 to hold White House Counsel Jack Quinn in contempt. [120] **[*599]** Before the contempt citation could be taken to the floor, the disputed documents were released to the committee. [121]

C. The Appointment Power

Until the President submits the name of a nominee to the Senate, **Congress** has no grounds for gaining access to the files relating to the individual's employment with the government. Requests for personnel and medical files might be regarded by the President as unwarranted intrusions into personal privacy. President Grover Cleveland once withheld from the Senate various papers and documents that pertained to a suspended official. The power to remove, he said, was solely an executive prerogative and could not be shared or compromised with the Senate. [122]

If the President, on the other hand, is trying to insure confirmation and needs the cooperation and goodwill of the Senate, he may be forced to surrender documents that could otherwise be withheld under the doctrine of **executive privilege.** On July 31, 1986, President Reagan invoked **executive privilege** to deny to the Senate certain internal memos that Chief Justice-designee William H. Rehnquist had written while serving in the Justice Department from 1969 to 1971. [123] The reason given for withholding the memos was familiar: to protect the confidentiality and candor of the legal advice submitted to presidents and their assistants. [124] Nevertheless, Democrats on the Senate Judiciary Committee began rounding up votes to subpoena the papers. [125] Committee Democrats had agreed with Republicans to vote on both Rehnquist and Associate Justice-designee Antonin Scalia on August 14, but the impasse over the papers threatened to delay the votes. [126]

In an op-ed piece for the Los Angeles Times, Senator Edward M. Kennedy put the matter succinctly: "Rehnquist: No Documents, No Senate Confirmation." [127] Hoping to move the nominations of Rehnquist and Scalia along, President Reagan agreed to a narrowed request

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by the committee for twenty-five to thirty documents written by Rehnquist during his career in the Justice Department. [128] The eight **[*600]** Democrats on the Senate Judiciary Committee picked up two moderate Republicans to form a majority in favor of a subpoena. [129] A few days later the Committee requested and received additional documents prepared by Rehnquist for the Justice Department. [130] The nominations of Rehnquist and Scalia then went forward as scheduled. [131]

Two years later, the Senate replayed the same drama. The nomination of Stephen S. Trott for Ninth Circuit judge was delayed four months because Senators Kennedy and Howard Metzenbaum wanted internal documents from the Justice Department. [132] Refusing to release the documents, the department explained: "'As you know, it is a longstanding policy of the Department not to provide copies of internal, deliberative memoranda to persons outside the Department.'" [133] That may have been "longstanding policy," but the Trott nomination did not proceed until the Department yielded, which it eventually did. Having received the documents they wanted, Kennedy and Metzenbaum released their hold. [134]

In 1991, the appointment of the U.S. Ambassador to Guyana was delayed seventeen months until Senator Jesse Helms received documents he wanted from the State Department. [135] During a visit by Helms to Chile in 1985, one of his aides was accused of leaking U.S. intelligence information to the government of former Chilean President Augusto Pinochet. [136] Helms insisted that the State Department show him secret cable traffic regarding the visit, but the Department refused to turn over two cables, which they called internal memoranda. [137]

When the Deputy Chief of Mission at the U.S. Embassy in Chile was later nominated in June 1990 for the position of ambassador to Chile, [138] Helms had the necessary leverage. After Helms renewed his request for the cables and the State Department again refused, he blocked the nomination. [139] As the months rolled by and Helms held firm, Deputy Secretary of State Lawrence S. Eagleburger came to Helms' **[*601]** office one day to show him the memos, which had been critical of both Helms and his aide. Helms released the hold and the nomination went forward. [140]

In March 1994, a House subcommittee subpoenaed the records of six cases handled by the Environment and Natural Resources Division of the Justice Department. [141] The subcommittee's request reflected congressional interest for the past several years in the work of the Environmental Crimes Section (ECS) and the shift of prosecution responsibilities from U.S. Attorneys in the field to Washington officials. [142] In an effort to mediate the dispute, Attorney General Janet Reno allowed subcommittee staff to interview line attorneys within ECS. [143] President Clinton did not intervene in this subcommittee- department dispute. White House Communications Director Mark Gearan announced, "'We will not assert any privilege or waiver.'" [144]

In addition to sending the subpoenas, subcommittee chairman John Dingell (D- Mich.) and ranking minority member Dan Schaefer (R-Colo.) released letters to the Senate Judiciary Committee asking that the confirmation of Lois Schiffer be delayed. [145] She had been serving

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as Acting Attorney General of the Environment and Natural Resources Division and had been nominated for the position on February 2, 1994. [146] Schaefer expressed his concern about her confirmation because of what he described as "'obstruction of the subcommittee's work on oversight of the nation's environmental laws.'" [147]

As the dispute deepened, ECS chief Neil S. Cartusciello announced his resignation. [148] By that time, the subcommittee had begun receiving some of the documents it had subpoenaed. [149] After Schiffer moved to find a replacement for Cartusciello, the hearing on her nomination tentatively was scheduled. [150] After some further delays, and after the subcommittee was satisfied with the cooperation it had received from the Justice Department, Schiffer was confirmed by the Senate on October 6, 1994. [151]

[*602]

These examples illustrate that **Congress** has sufficient tools at its command to wrest from the executive branch the documents it needs to fulfill congressional duties. The question is whether lawmakers will press their advantage. The issue is "not the adequacy of congressional power to obtain information, but the willingness of committee chairs and staffers to aggressively pursue information." [152]

III. Shouting "National Security" is Not Enough

Those who write about **executive privilege** sometimes imply that the mere claim by the administration of "national security" (or "foreign affairs" or "diplomacy") is sufficient to establish an unreviewable presidential power. In a recent article, Saikrishna Prakash writes that "national security considerations strongly bolster the case for an **executive privilege.** . . . Properly wielded, an **executive privilege** could lead to . . . enhanced supervision of foreign affairs . . . ." [153]

Writing for the Court in the Watergate tapes case, Chief Justice Burger rejected an "absolute, unqualified" presidential privilege of immunity from judicial process. [154] However, in clumsy dicta, he seemed to cede ground if the President claimed a "need to protect military, diplomatic, or sensitive national security secrets." [155] If the Supreme Court wants to accept such presidential arguments, it is free to do so. **Congress,** however, should not follow in its steps. The Watergate tapes case concerned judicial, not congressional, access to executive branch information. [156]

Unlike the judiciary, **Congress** has express constitutional powers and duties in the fields of military affairs and national security. When **Congress** passed the Freedom of Information Act (FOIA), requiring executive agencies to make documents available to the public, it set forth nine exemptions from the Act, including matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." [157] Another exemption excluded "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

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[158] Yet another exemption excluded "records or information compiled for law enforcement [*603] purposes." [159] These exemptions are some of the grounds for denying members of the public information from executive agencies. They do not apply to **Congress;** FOIA specifically provides that these exemptions do not constitute "authority to withhold information from **Congress.**" [160]

A. Controlling National Security Information

A 1996 memorandum prepared by the Office of Legal Counsel of the Justice Department (OLC) argued that a congressional enactment "would be unconstitutional if it were interpreted 'to divest the President of his control over national security information in the Executive Branch by vesting lower-ranking personnel in that Branch with a "right" to furnish such information to a Member of **Congress** without receiving official authorization to do so.'" [161] OLC based this position on the following separation of powers rationale:

[T]he President's roles as Commander in Chief, head of the Executive Branch, and sole organ of the Nation in its external relations require that he have ultimate and unimpeded authority over the collection, retention and dissemination of intelligence and other national security information in the Executive Branch. There is no exception to this principle for those disseminations that would be made to **Congress** or its Members. In that context, as in all others, the decision whether to grant access to the information must be made by someone who is acting in an official capacity on behalf of the President and who is ultimately responsible, perhaps through intermediaries, to the President. The Constitution does not permit **Congress** to circumvent these orderly procedures and chain of command-and to erect an obstacle to the President's exercise of all executive powers relating to the Nation's security-by vesting lower-level employees in the Executive Branch with a supposed "right" to disclose national security information to Members of **Congress** (or anyone else) without the authorization of Executive Branch personnel who derive their authority from the President. [162]

According to this analysis, two congressional statutes and pending language in [*604] a Senate bill were unconstitutional. [163] The Department's position relies on generalizations and misconceptions about the President's roles as Commander in Chief, head of the executive branch, and "sole organ" of the nation in its external relations.

1. Commander in Chief

The Constitution empowers the President to be Commander in Chief, but that title must be understood in the context of military responsibilities that the Constitution grants to **Congress.** Article II reads, "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . ." [164] For the militia, **Congress**-not the President-does the calling. The Constitution gives to **Congress** the power to provide "for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions." [165] The

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Commander in Chief Clause also was intended to preserve civilian supremacy. [166]

Article I empowers **Congress** to declare war, raise and support armies, and make rules for the land and naval forces. The debates at the Philadelphia Convention made clear that the Commander in Chief Clause did not grant the President unilateral, independent power other than the power to "repel sudden attacks." [167] Roger Sherman said the President should be able "to repel and not to commence war." [168] Taking the country from a state of peace to a state of war was a deliberative process that required congressional debate and approval. James Mason told his colleagues that he was for "clogging rather than facilitating war." [169] At the Philadelphia ratifying convention, James Wilson expressed the prevailing sentiment that the system of checks and balances "will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress . . . ." [170]

The framers gave **Congress** the power to initiate war because they believed that presidents, in the search for fame and personal glory, would have a bias that favored war. [171] John Jay warned in Federalist No. 4 that "absolute monarchs will often make **[*605]** war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans." [172] James Madison made the same point. Writing in 1793, he called war:

the true nurse of executive aggrandizement. . . . In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle. [173]

The historical record is replete with examples of **Congress** relying on the regular legislative process, including access to information held by the executive branch, to control the President's actions in military affairs. [174] There is no evidence from these sources that the Framers intended the Commander in Chief Clause to deny to members of **Congress** information needed to supervise the executive branch and learn of agency wrongdoing.

2. Head of the Executive Branch

The Framers placed the President at the head of the executive branch to provide for unity, responsibility, and accountability. There can be no doubt that such an authorization of power was an important principle for assuring that the President, under Article II, Section 3, was positioned to "take Care that the Laws be faithfully executed." [175] The delegates at the Constitutional Convention rejected the idea of a plural executive, preferring to anchor that responsibility in a single individual. Said John Rutledge, "A single man would feel the greatest responsibility and administer the public affairs best." [176]

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Yet, placing the President at the head of the executive branch did not remove from **Congress** the power to direct certain executive activities and to gain access to information needed for the performance of its legislative duties. At the Convention, Roger Sherman considered the Executive "nothing more than an institution for carrying the will of the Legislature into effect." [177] It was never the purpose to make the President personally responsible for executing all the laws. Rather, he was to **[*606]** ensure that the laws be faithfully executed, including laws that excluded him from some operations in the executive branch. For example, from an early date, **Congress** vested in certain subordinate executive officials the duty to carry out specified "ministerial" functions without interference from the President. [178] On many occasions, attorneys general have advised presidents that they have no legal right to interfere with administrative decisions made by the auditors and comptrollers in the Treasury Department, [179] pension officers, [180] and other officials. [181] The President is responsible for seeing that administrative officers faithfully perform their duties, "but the statutes regulate and prescribe these duties, and he has no more power to add to, or subtract from, the duties imposed upon subordinate executive and administrative officers by the law, than those officers have to add or subtract from his duties." [182] In several decisions, the Supreme Court has recognized that **Congress** can impose certain duties on executive officials that are beyond the control and direction of the President. [183]

These principles were underscored by a confrontation during the Reagan administration. In 1984, **Congress** passed the Competition in Contracting Act (CICA) [184] to give the Comptroller General certain authorities over agency contracting. President Reagan signed the bill, but instructed Attorney General Edwin Meese III to inform all executive branch agencies how to comply with the statute "in a manner consistent with the Constitution." [185] A memorandum from the Justice Department concluded that the contested provision for the Comptroller General was unconstitutional and should not be enforced by the agencies. [186] In effect, the administration had exercised an item veto by deciding what parts of a statute to carry out. This was part of a larger strategy devised by enthusiasts who believed in the **[*607]** theory of a "unitary executive," with all parts of the executive branch directly accountable and subordinate to the President. [187]

This theory was repeatedly struck down in the courts. In upholding the provisions of CICA, a New Jersey district court judge stated that the position of the Reagan administration "flatly violates the express instruction of the Constitution that the President shall 'take care that the Laws be faithfully executed.'" [188] Once a bill is enacted into law, the President executes all of it, not just the parts he favors. The district court's ruling was upheld on appeal by the Third Circuit. [189] The Ninth Circuit, in upholding the Comptroller General provision, said that once Reagan put his signature to CICA it became "part of the law of the land and the President must 'take care that [it] be faithfully executed.'" [190] In his role as head of the executive branch, the President has no authority to "employ a so-called 'line item veto' and excise or sever provisions of a bill with which he disagrees." [191] A later attempt by the Justice Department to challenge the constitutionality of CICA also was turned aside in the courts. [192]

Agencies have a direct responsibility to **Congress,** the body that creates them. In 1854, Attorney General Caleb Cushing advised departmental heads that they had a threefold relation: to the President, to execute his will in cases in which the President possessed a

constitutional or legal discretion; to the law, which directs them to perform certain acts; and to **Congress,** "in the conditions contemplated by the Constitution." [193] Agencies are created by law and "most of their duties are prescribed by law; **Congress** may at all times call on them for information or explanation in matters of official duty; and it may, if it sees fit, interpose by legislation concerning them, when required by the interests of the Government." [194]

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3. "Sole Organ" in Foreign Affairs

During debate in the House of Representatives in 1800, John Marshall said that

the President "is the sole organ of the nation in its external relations, and its sole representative with foreign nations." [195] This remark was later incorporated in Justice Sutherland's opinion in United States v. Curtiss-Wright Export Corp., [196] to suggest that the President is the exclusive policymaker in foreign affairs. [197] However, Justice Sutherland wrenched Marshall's statement from context to imply a position that Marshall never held. At no time, either in 1800 or later, did Marshall ever suggest that the President could act unilaterally to make foreign policy in the face of statutory limitations.

The debate in 1800 focused on the decision of President John Adams to turn over to England someone who had been charged with murder. [198] Because the case was already pending in an American court, some members of **Congress** thought that President Adams should be impeached for encroaching upon the judiciary and violating the doctrine of separated powers. [199] It was then that Marshall intervened to say that there was no basis for impeachment. [200] Adams, by carrying out an extradition treaty entered into between England and the United States, was not attempting to make national policy single-handedly. Instead, he was carrying out a policy made jointly by the President and the Senate (for treaties). [201] Only after the policy had been formulated through the collective effort of the executive and legislative branches (by treaty or by statute) did the President emerge as the "sole organ" in implementing national policy. The President merely announced policy; he did not alone make it. Consistent with that principle, Marshall later decided a case as Chief Justice of the Supreme Court and ruled that, in a conflict between a presidential proclamation and a congressional statute governing the seizure of foreign vessels during wartime, the statute prevails. [202]

Sutherland's use of the "sole organ" remark in Curtiss-Wright prompted Justice Robert Jackson to say in 1952 that the most that can be drawn from Sutherland's decision is the intimation that the President "might act in external affairs without congressional authority, but not that he might act contrary to an act of **Congress.**" [203] Jackson also noted that "much of the opinion is dictum." [204] In 1981, the **[*609]** District of Columbia Circuit cautioned against placing undue reliance on "certain dicta" in Sutherland's opinion: "To the extent that denominating the President as the 'sole organ' of the United States in international affairs constitutes a blanket endorsement of plenary Presidential power over any matter extending beyond the borders of this country, we reject that characterization." [205]

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B. Role of the Courts

In the period immediately after World War II, federal courts typically deferred to presidential responsibilities in military and diplomatic affairs. In 1948, the Supreme Court said it would be

intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. **206**

A few years later, in the midst of the Korean War, the Court again avoided a clash with the executive branch over national security affairs. It said that the Judiciary "should not jeopardize the security which the [government's] privilege [to withhold evidence from a pending lawsuit] is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." **207**

These attitudes have long since been superseded by statutory grants of power to the courts, inviting them to exercise independent judgment on matters of national security. **208** Nevertheless, some courts continue to defer to the President. In 1980, the Fourth Circuit remarked that the "executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance." **209** The Fourth Circuit freely expressed its uneasiness in this area: "[T]he courts are unschooled in diplomacy and military affairs, a mastery of which would be essential to passing upon an executive branch request that a foreign intelligence wiretap be authorized." **210** The court even referred **[*610]** to the executive branch "as the pre-eminent authority in foreign affairs." **211** However obsequious federal judges decide to behave, **Congress**-given its explicit constitutional duties-does not have to assume the same posture.

1. The Pentagon Papers

In the Pentagon Papers case in 1971, the Supreme Court decided that two newspapers were constitutionally entitled to publish a Defense Department secret study that was critical of U.S. policy in the Vietnam War. **212** Justice Stewart wrote a concurrence that spoke approvingly of independent president power:

If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the

Introduction

Presidents and scholars identify a variety of constitutional principles and practices to justify **executive privilege.** There is no doubt that there are reasonable grounds for withholding documents from **Congress** and for prohibiting some executive officials from testifying before congressional committees. Just as there are sound reasons for **executive privilege,** however, there are also legal and political limits. Impressive claims for **executive privilege** can be offset by persuasive arguments that **Congress** needs access to information to fulfill its constitutional mandates. In many cases, the politics of the moment or practical considerations override legal principles. Efforts to discover enduring and enforceable norms in this area invariably fall short.

This Article examines some of the misconceptions about the extent of **executive privilege.** Part I reviews the precedent established during the Washington Administration for withholding documents from **Congress.** Close examination reveals that the scope of presidential authority has been greatly exaggerated. **Congress** had access to more documentation than is commonly believed and could have had more **[*584]** if it had demanded it. Part II focuses on congressional leverage. The power to impeach, to hold executive officials in contempt, and to block nominations may force executive officials to release documents that they otherwise would want to keep private and confidential. Even if a President announces perfectly plausible grounds for the withholding of documents, he may be forced to surrender to the will of **Congress** to achieve more important goals. Part III examines the overly general-and generous-claim that **executive privilege** has especially strong, if not unreviewable, authority in the fields of foreign affairs, diplomacy, and national security.

I. Identifying Constitutional Principles: Early Congressional Investigations

The Constitution makes no specific reference to an executive power allowing the President to withhold documents from **Congress,** nor does it specifically recognize a need on the part of **Congress** for information from the Executive in order to legislate. It is now routine, however, to consider both powers implied in the operation of the executive and legislative branches. Long before the Supreme Court acknowledged that fact, [1] the political branches already had reached a rough understanding and worked out accommodations. When these two implied powers collide, one wonders which should prevail. No magic formula yields a ready and reliable answer, for too much depends on individual circumstances and political requirements.

A. Robert Morris Inquiry

During the First **Congress,** the House of Representatives debated a request from Robert Morris to investigate his conduct as Superintendent of Finance. [2] The matter was referred to a select committee consisting of James Madison, Theodore Sedgwick, and Roger Sherman. [3]

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Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. [213]

At first glance, this sentence seems logical: if one clause is valid, the other follows. There is, however, no necessary linkage between the two. The President's largely unshared power to conduct foreign affairs does not imply a largely unshared power to determine the policy for internal security. The conduct of foreign policy usually involves the implementation of national security policy determined jointly by **Congress** and the President. Conduct may be executive, but the policymaking power is executive-legislative. That proposition is true to an even greater extent in the "maintenance of our national defense," as Justice Stewart expressed it. [214] **Congress** shares that responsibility with the President. In the field of foreign affairs, the Constitution does not give "a large degree of unshared power" either to **Congress** or to the President. [215]

Justice Stewart offered other broad views about presidential power:

[I]t is clear to me that it is the constitutional duty of the Executive-as a matter of sovereign prerogative and not as a matter of law as the courts know law- through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its **[*611]** responsibilities in the fields of international relations and national defense. [216]

No one doubts that the President has important duties and prerogatives in protecting confidential information. The more difficult question is the degree to which **Congress** can share in those duties and prerogatives by enacting restrictive legislation and, on that issue, Stewart's concurrence provides no answer.

Justice Stewart did acknowledge that the President lacks a monopoly: "This is not to say that **Congress** and the courts have no role to play." [217] Yet, he appeared to assign to **Congress** a narrow, subordinate role: "Undoubtedly **Congress** has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets." [218] In any event, a single concurrence by one justice has no authoritative value in settling or defining constitutional issues.

Two other points about the Stewart concurrence deserve comment. First, his overall analysis depends almost entirely upon a single case, Curtiss- Wright, [219] which is itself deeply flawed. Second, largely because he concluded that the presidential power in national defense and international relations is "largely unchecked by the Legislative and Judicial branches," [220] and that there is "the absence of the governmental checks and balances present in other areas of our national life," [221] he concluded that the Pentagon documents should be published in the newspapers. Because of what he believed to be inadequate governmental checks on presidential power, Justice Stewart declared that "the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry-in an informed and critical public opinion which alone can here protect

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the values of democratic government." [222] It was for that reason that he supported "an informed and free press" to enlighten the people. [223]

2. Recent Statutory Changes

Judicial attitudes have become somewhat more emboldened in recent decades, in part because of congressional legislation. In 1973, the Supreme Court decided that it had no authority to examine in camera certain documents regarding a planned **[*612]** underground nuclear test to sift out "non-secret components" for their release. [224] In response, **Congress** passed legislation that clearly authorized courts to examine executive records in judges' chambers as part of a determination of the nine categories of exemptions in the Freedom of Information Act. [225] The Foreign Intelligence Surveillance Act of 1978 [226] required a court order to engage in electronic surveillance within the United States for purposes of obtaining foreign intelligence information. [227] The Chief Justice appoints a special court, the Foreign Intelligence Surveillance Court (FISC), to review applications submitted by government attorneys. [228] In 1980, **Congress** passed the Classified Information Procedures Act (CIPA) [229] to establish court procedures for allowing judges to screen classified information to determine whether it could be used during the trial. [230]

These statutes bring the courts a long way in terms of attitude, procedures, and capability in passing judgment on national security matters. Even if courts were to continue to defer to the President, the same attitude should not be taken by **Congress.** Unlike the courts, **Congress** has explicit duties under the Constitution to declare war, [231] provide for the common defense, [232] raise and support armies, [233] and provide and maintain a navy. [234] Legislative expertise exists in the Armed Services Committees, the defense appropriations subcommittees, the Budget Committees, the intelligence committees, and other legislative panels.

Deference towards the executive branch by the courts need not mean deference by **Congress.** Two recent decisions by the Supreme Court-one in 1988 and the other in 1989-have been misinterpreted by the executive branch and some scholars to confer an unwarranted independent authority on the part of the President in foreign affairs and national security.

3. Department of the Navy v. Egan

A memorandum by the Office of Legal Counsel in 1996 relied in part on **[*613]** Department of the Navy v. Egan [235] to maximize presidential power. [236] Egan, however, is fundamentally a case of statutory construction. The case involved the Navy's denial of a security clearance to Thomas Egan, who worked on the Trident submarine. [237] Egan subsequently was removed. [238] He then sought review by the Merit Systems Protection Board (MSPB), [239] but the Supreme Court upheld the Navy's action by holding that the denial of a security clearance is a sensitive and discretionary judgment call committed by law to the executive agency with

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the necessary expertise for protecting classified information. [240] The conflict in this case was within the executive branch, between the Navy and the MSPB and not between **Congress** and the executive branch.

The focus on statutory questions was evident throughout the case. As the Justice Department noted in its brief submitted to the Supreme Court: "The issue in this case is one of statutory construction and 'at bottom . . . turns on congressional intent.'" [241] The parties were directed to address this question: "Whether, in the course of reviewing the removal of an employee for failure to maintain a required security clearance, the Merits Systems Protection Board is authorized by statute to review the substance of the underlying decision to deny or revoke the security clearance." [242]

The statutory questions concerned Sections 7512, 7513, 7532, and 7701 of title 5 of the United States Code. The Justice Department's brief analyzed the relevant statutes and their legislative history and could find no basis for determining that **Congress** intended the MSPB to review the merits of security clearance determinations. [243] The entire oral argument before the Court on December 2, 1987, was devoted to the meaning of statutes and what **Congress** intended by them. [244] At no time did the Justice Department suggest that classified information could be withheld from **Congress.**

The Court's deference to the Navy did not cast a shadow over the right of **Congress** to sensitive information. The Court decided merely the "narrow question" of whether the MSPB had statutory authority to review the substance of a decision to deny a security clearance. [245] Although the Court referred to independent **[*614]** constitutional powers of the President, including those as Commander in Chief and head of the executive branch, [246] and noted the President's responsibility with regard to foreign policy, [247] the case was decided on statutory grounds. In stating that "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs," [248] the Court added this key qualification: "unless **Congress** specifically has provided otherwise." [249] The Court appears to have borrowed this thought and language from the Justice Department's brief: "Absent an unambiguous grant of jurisdiction by **Congress,** courts have traditionally been reluctant to intrude upon the authority of the executive in military and national security affairs." [250] Nothing in the legislative history of the Civil Service Reform Act of 1978 convinced the Court that the MSPB could review, on the merits, an agency's security-clearance determination. [251]

In citing the President's role as Commander in Chief, the Court stated that the President's authority to protect classified information "flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant." [252] If **Congress** had never enacted legislation regarding classified information, certainly the President could act in the absence of congressional authority. Yet, if **Congress** acts by statute, it can narrow the President's range of action.

It is helpful to place Egan in the context of Justice Jackson's three categories laid out in the Steel Seizure Cases of 1952: [253] (1) when the President acts pursuant to congressional

authority, his authority is at its maximum because it includes everything that he possesses under the Constitution, plus what **Congress** has delegated to him; [254] (2) when he acts in the absence of congressional authority, he operates in a "zone of twilight" in which he and **Congress** share concurrent authority; [255] (3) when he acts against "the expressed or implied will of **Congress,** his power is at its lowest ebb." [256] Egan belongs in the middle category. The President's range is broad until **Congress** enters the "zone of twilight" and exerts its own authority.

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4. The Garfinkel Case

The OLC memorandum also misapprehended the litigation that led to the Supreme Court's decision in American Foreign Service Ass'n. v. Garfinkel. [257] At various points, the memorandum cites Garfinkel for the proposition that **Congress** cannot "divest the President of his control over national security information in the Executive Branch by vesting lower-ranking personnel in that Branch with a 'right' to furnish such information to a Member of **Congress** without receiving official authorization to do so." [258] Yet, the progression of this case from district court to the Supreme Court and back to the district court illustrates how a lower court may exaggerate the national security powers of the President at the expense of congressional prerogatives. The district court's interpretation of executive power was quickly vacated by the Supreme Court.

In 1983, President Reagan directed that all federal employees with access to classified information sign "nondisclosure agreements" or risk the loss of their security clearance. [259] **Congress,** concerned about the vagueness of some terms and the loss of access to information, passed legislation to prohibit the use of appropriated funds to implement the nondisclosure policy. [260]

In 1988, District Court Judge Oliver Gasch held that **Congress** lacked constitutional authority to interfere by statute with nondisclosure agreements drafted by the executive branch to protect the secrecy of classified information. [261] Among other authorities, Judge Gasch relied on Egan and Curtiss-Wright. [262] From Egan he extracted a sentence-"'The authority to protect such [national security] information falls on the President as head of the Executive Branch and as Commander in Chief'" n263-without acknowledgi[9] that Egan was decided on statutory, not constitutional, grounds. [264] From Curtiss-Wright, he concluded that the "sensitive and complicated role cast for the President as this nation's emissary in foreign relations requires that congressional intrusion upon the President's oversight of national security information be more severely limited than might be required in matters of **[*616]** purely domestic concern." [265] In fact, the issue in Curtiss-Wright was whether **Congress** could delegate its powers to the President in the field of foreign relations. [266] The previous year, the Court had struck down the National Industrial Recovery Act because it delegated an excessive amount of legislative power to the President in the field of domestic policy. [267] The question before the Court in Curtiss-Wright was limited to whether **Congress** could use more general standards when delegating its authority in foreign affairs. The Court held that more general standards were permissible because of the changing circumstances that prevail in international affairs. [268] The issue before the Court was the extent to which **Congress** could delegate its power (embargo authority), not the existence of independent and autonomous powers for the President.

Having mischaracterized both Supreme Court decisions, Judge Gasch concluded that **Congress** had passed legislation that "impermissibly restricts the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations." [269]

On October 31, 1988, the Supreme Court noted probable jurisdiction in the Garfinkel case. [270] Both the House and the Senate submitted briefs objecting strongly to Judge Gasch's analysis of the President's power over foreign affairs. [271] During oral argument, after Edwin Kneedler of the Justice Department spoke repeatedly about the President's constitutional role to control classified information, one of the justices remarked, "But, Mr. Kneedler, I just can't-I can't avoid interrupting you with this thought. The Constitution also gives **Congress** the power to provide for a navy and for the armed forces, and so forth, and often classified information is highly relevant to their task." [272]

On April 18, 1989, the Court issued a per curiam order that vacated Judge Gasch's order and remanded the case for further consideration. [273] In doing so, the Court cautioned Judge Gasch to tread with greater caution in expounding upon constitutional matters: "Having thus skirted the statutory question whether the **[*617]** Executive Branch's implementation of [nondisclosure] Forms 189 and 4193 violated § 630, the court proceeded to address appellees' argument that the lawsuit should be dismissed because § 630 was an unconstitutional interference with the President's authority to protect the national security." [274] The Court emphasized that the district court "should not pronounce upon the relative constitutional authority of **Congress** and the Executive Branch unless it finds it imperative to do so. Particularly where, as here, a case implicates the fundamental relationship between the Branches, courts should be extremely careful not to issue unnecessary constitutional rulings." [275]

On remand, Judge Gasch held that the plaintiffs (American Foreign Service Association and members of **Congress)** failed to state a cause of action for courts to decide. [276] By dismissing the plaintiff's complaint on this ground, Judge Gasch did not address any of the constitutional issues. [277]

C. Continued Executive-Legislative Collisions

In the 1970s and 1980s, **Congress** and the executive branch clashed over access to "national security" and "foreign affairs" documents. On each occasion, the Justice Department insisted that these documents could not be shared with a congressional committee. In the end, the administration was forced to drop its pretensions of having an exclusive role in determining what to release. Federal courts applied the necessary pressure in the first dispute. In the next two confrontations, the power of **Congress** to hold an executive official in contempt was sufficient leverage to pry loose the documents.

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1.The AT&T Cases

The first dispute began in 1976 when Representative John Moss and his subcommittee requested from the American Telephone and Telegraph Co. (AT&T) information on "national security" wiretaps by the administration. [278] AT&T was willing to release the information, but the Justice Department intervened to prevent compliance with the subcommittee subpoena, arguing that compliance might lead to public disclosure of vital information injurious to national security. [279] President Ford wrote directly to Representative Moss, "'I have determined that compliance with the subpoena would involve unacceptable risks of disclosure of extremely sensitive **[*618]** foreign intelligence and counterintelligence information and would be detrimental to the national defense and foreign policy of the United States and damaging to the national security.'" [280]

A district court judge decided that if a final determination had to be made about the need for secrecy and the risk of disclosure, "it should be made by the constituent branch of government to which the primary role in these areas is entrusted. In the areas of national security and foreign policy, that role is given to the Executive." [281]

This judicial deference to presidential power was soon overturned by Judge Harold Leventhal of the District of Columbia Circuit, who rejected the claim of the Justice Department that the President "retains ultimate authority to decide what risks to national security are acceptable." [282] In the opinion of the District of Columbia Circuit, the cases cited by the administration did not "establish judicial deference to executive determinations in the area of national security when the result of that deference would be to impede **Congress** in exercising its legislative powers." [283]

Leventhal urged executive and legislative officials to settle their differences out of court, noting that a "compromise worked out between the branches is most likely to meet their essential needs and the country's constitutional balance." [284] Continued disagreement between the Justice Department and the subcommittee forced the appellate court to intervene again to give additional guidance. [285] Leventhal dismissed the idea that the dispute was primarily a "political question" beyond the court's jurisdiction. [286] When a dispute consists of a clash of authority between the two branches, "judicial abstention does not lead to orderly resolution of the dispute," [287] for neither branch had "final authority in the area of concern." [288] In a dispute of this nature, judicial intervention helps promote the "smooth functioning of government." [289]

Leventhal urged the parties to resolve their differences by seeking middle- ground positions. He noted that the Framers, in adopting a Constitution with general and overlapping provisions, anticipated that "a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system." [290] Each branch "should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular **[*619]** fact situation." [291] The case finally was

dismissed on December 21, 1978, after the Justice Department and the subcommittee settled their differences. [292]

2. Proceedings Against Henry Kissinger

On November 6, 1975, the House Select Committee on Intelligence issued a subpoena to Henry Kissinger, Secretary of State, commanding him to provide documents relating to covert actions. [293] After he failed to comply with the subpoena, the Committee met in open session to determine what action should be taken against him. By a vote of 10 to 2, the Committee recommended that the Speaker certify the committee report regarding Kissinger's contumacious conduct and proceed to a contempt citation. [294]

Acting on the advice of the Justice Department, President Ford invoked **executive privilege** on November 14 to keep the material from the committee. [295] He said that the documents included "recommendations from previous Secretaries of State to previous Presidents," jeopardizing the internal decisionmaking process. [296] A few days later, in a letter to the Committee, Ford cautioned that the dispute "involves grave matters affecting our conduct of foreign policy and raises questions which go to the ability of our Republic to govern itself effectively." [297] Recognizing that **Congress** had constitutional responsibilities "to investigate fully matters relating to contemplated legislation," [298] Ford told the Committee that he directed Kissinger not to comply with the subpoena on the grounds of **executive privilege** because the documents "revealed to an unacceptable degree the consultation process involving advice and recommendations to Presidents Kennedy, Johnson, and **Nixon.**" [299] Ford pointed out that some of the documents concerned the National Security Council (NSC), and that, as of November 3, Kissinger was no longer his Assistant for National Security **[*620]** Affairs. [300] As to those materials, "there has been a substantial effort by the NSC staff to provide these documents." [301]

Calling the contempt threat "frivolous," Kissinger warned that it would have adverse effects worldwide: "'I profoundly regret that the committee saw fit to cite in contempt a secretary of state, raising serious questions all over the world what this country is doing to itself.'" [302] On December 9, three committee members and two staff members visited the White House to determine which documents would be made available. [303] The next day, they received an oral briefing on the information that had been the target of the subpoena and an NSC aide read verbatim from documents concerning the covert actions. [304] On December 10, the committee chairman announced that the White House was in "substantial compliance" with the subpoena and that the planned contempt action was "moot." [305]

3. The James Watt Episode

The third dispute concerned a decision by Interior Secretary James Watt to withhold thirty-one documents from a House subcommittee in 1981. [306] The confrontation quickly escalated to a committee subpoena for the documents and a recommendation by the House Committee

on Energy and Commerce that Watt be cited for contempt. [307] When the full committee acted, the vote to hold Watt in contempt was 23 to 19. [308]

Attorney General William French Smith advised President Reagan to invoke **executive privilege** on the ground that "the interest of **Congress** in obtaining information for oversight purposes is, I believe, considerable weaker than its interests when specific legislative proposals are in question." [309] This was a remarkably ineffective argument. Courts have held consistently that the investigative power is available not merely to legislate or when a "potential" for legislating exists, but even for pursuits down blind alleys. [310] At the Philadelphia Convention, George Mason **[*621]** remarked that Congressmen "are not only Legislators but they possess inquisitorial

powers. They must meet frequently to inspect the Conduct of the public offices." [311] Moreover, **Congress** easily could erase Smith's artificial distinction by introducing a bill whenever it had oversight in mind.

Smith also claimed that all the documents at issue were "either necessary and fundamental to the deliberative process presently ongoing in the Executive Branch or relate to sensitive foreign policy considerations." [312] Attorney General Smith's comments about "foreign policy considerations" force one to wonder whether the Attorney General and his legal assistants in the Justice Department were unaware that **Congress** had a clearly legitimate and constitutionally-based reason for requesting the information. The dispute with Watt concerned the impact of Canadian investment and energy policies on American commerce, [313] an issue clearly within the enumerated constitutional power of **Congress** to "regulate Commerce with foreign Nations" and its authority to oversee the particular statute that established the nation's policy on foreign investments. [314]

The eventual outcome of this dispute demonstrated that the documents were not, as Smith argued, of "fundamental" importance to the deliberative process. They could have been, and eventually were, shared with the subcommittee. The White House delivered the documents to a secure room on Capitol Hill and only subcommittee members reviewed them. [315] Conditions were imposed: the technical assistance of subcommittee staff would not be available, and members could not photocopy the documents, but could take notes. [316] Subcommittee members, however, were granted access to the papers they wanted.

4. Immigration Cases

Newspaper stories in 1999 revealed the extent to which the Immigration and Naturalization Service (INS) relies on secret or classified evidence to take action against aliens. In late 1999, an immigration judge ordered the release of an Egyptian who had been kept in jail for three and a half years on grounds that the INS considered him a national security threat. [317] Classified FBI evidence linked him to **[*622]** Sheik Omar Abdel Rahman who had been convicted of conspiring to bomb the United Nations. [318] The judge held that most of the evidence was "'double or triple hearsay.'" [319] INS Commissioner Doris Meissner "took the unusual step of citing 'national security implications' as a basis for asking [Attorney General

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Janet] Reno to order that [the Egyptian] not be released." [320] The previous month, a federal district judge in New Jersey had ruled that "it was unconstitutional to detain a Palestinian immigrant on the basis of secret evidence." [321] Representative David Bonior recently introduced legislation to prohibit the use of classified evidence in deportation proceedings. [322] In approximately twenty pending immigration cases, the INS is relying on secret evidence. [323]

D. Congressional Access to Executive Branch Employees

In 1997, the Select House and Senate Intelligence Committees considered legislation to expand executive employee access to **Congress.** A Senate report explained that current "executive branch policies on classified information could interfere with [the Select Intelligence Committee's] ability to learn of wrongdoing within the elements over which it has oversight responsibility." [324] In creating the Intelligence Committees in the 1970s, **Congress** relied heavily on them to guard the interests of **Congress** as an institution. [325] To a great degree, **Congress** delegated to the committees the responsibility for monitoring and controlling the intelligence community.

A memorandum of November 26, 1996, from the Office of Legal Counsel (OLC), an office within the Department of Justice, analyzed the constitutionality of two congressional enactments concerning the rights of federal employees to provide information to **Congress:** [326] the Lloyd-LaFollette Act [327] and Section 625 of the **[*623]** Treasury, Postal Service Appropriation Act for Fiscal 1997. [328] Both statutory provisions give executive employees the right to furnish information to either chamber of **Congress** or to a committee or member thereof.

1. The Lloyd-LaFollette Act

The OLC memorandum swept broadly to challenge the constitutionality of the Lloyd-LaFollette Act, originally enacted in 1912. [329] The statute responded to presidential efforts to block the flow of information from executive employees to **Congress.** For example, in 1902, President Theodore Roosevelt issued a "gag order" prohibiting executive branch employees from seeking to influence legislation "individually or through associations," except through heads of departments. [330] Failure to abide by this presidential order resulted in possible dismissal from government service. [331] In 1909, President William Howard Taft issued another gag order, forbidding any bureau chief or subordinate in government to apply to either house of **Congress,** to any committee of **Congress,** or to any member of **Congress,** for legislation, appropriations, or congressional action of any kind,

except with the consent and knowledge of the head of the department; nor shall any such person respond to any request for information from either House of **Congress,** or any committee of either House of **Congress,** or any Member of **Congress,** except through, or as authorized by, the head of his department. [332]

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Through language added to an appropriations bill in 1912, **Congress** nullified the gag orders issued by Roosevelt and Taft. [333] The debate on this provision underscored **Congress'** concern that the gag orders would put congressional committees in the position of hearing only "one side of a case": the views of Cabinet officials rather than the rank-and-file employees of a department. [334] Members wanted agency employees to express complaints about the conduct of their supervisors. [335] The stated purpose of the legislation was to ensure that government employees could exercise **[*624]** their constitutional rights to free speech, to peaceable assembly, and to petition the government for redress of grievances. [336]

Lawmakers viewed the gag orders as an effort "to prevent the **Congress** from learning the actual conditions that surrounded the employees of the service." [337] If agency employees could speak only through the heads of departments, "there is no possible way of obtaining information excepting through the Cabinet officers, and if these officials desire to withhold information and suppress the truth or to conceal their official acts it is within their power to do so." [338] Another legislator remarked, "The vast army of Government employees have signed no agreement upon entering the service of the Government to give up the boasted liberty of the American citizens." [339] Even more explicit was the following statement delivered during a debate in the Senate:

Mr. President, it will not do for **Congress** to permit the executive branch of this Government to deny to it the sources of information which ought to be free and open to it, and such an order as this, it seems to me, belongs in some other country than the United States. [340]

Section 6 of the Postal Services Appropriations Act of 1912 added the language used to nullify the gag orders. [341] Section 6, known as the Lloyd- LaFollette Act, provided a number of procedural safeguards to protect agency officials from arbitrary dismissals. The final sentence of Section 6 reads: "The right of persons employed in the civil service of the United States, either individually or collectively, to petition **Congress,** or any Member thereof, or to furnish information to either House of **Congress,** or to any committee or member thereof, shall not be denied or interfered with." [342]

The Civil Service Reform Act of 1978 later supplemented Section 6 and codified it as permanent law. [343] The conference report elaborated on the need for executive employees to disclose information to **Congress:**

The provision is intended to make clear that by placing limitations on the kinds of information any employee may publicly disclose without suffering reprisal, there is no intent to limit the information an employee **[*625]** may provide to **Congress** or to authorize reprisal against an employee for providing information to **Congress.** For example, 18 U.S.C. 1905 prohibits public disclosure of information involving trade secrets. That statute does not apply to transmittal of such information by an agency to **Congress.** Section 2302(b)(8) of this act

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The House learned a day later that the Senate had passed a resolution empowering President George Washington to appoint three commissioners to inquire into the receipts and expenditures of public moneys during Morris' administration. [4]

The select committee of Madison, Sedgwick, and Sherman issued a report, recommending that a five-member committee be appointed to examine Morris' **[*585]** performance in office. John Lawrence [Laurance] and William Smith were added to the three already in place. [5] Elbridge Gerry objected on grounds that the House was pretending it still had the power of the Continental **Congress,** which possessed both legislative and executive powers. He said that the President was

the only competent authority to take cognizance of the conduct of officers in the Executive Department; if we pursue the proposed plan of appointing committees, we destroy the responsibility of Executive officers, and divest the House of a great and essential privilege, that of impeaching our Executive officers for mal- administration. [6]

Gerry favored the Senate's approach of appointing three commissioners to do the job. [7] Theodorick Bland opposed the appointment of commissioners "as creating an unnecessary expense." [8] Madison supported the five-man committee, arguing "that the House should possess itself of the fullest information in order to doing justice to the country and to public officers." [9] The committee was appointed and issued a report on February 16, 1791. [10]

The committee investigation did not produce a direct collision between **Congress** and the Washington Administration because the area of inquiry concerned activities that occurred during the previous Continental **Congress.** Nevertheless, it is important to note that **Congress** debated which branch of government-legislative or executive-was the proper party for investigating executive matters. [11] The House decided, as Madison noted, that it was necessary for **Congress** to acquire the necessary information in order to "do justice" to the country and to public officers. [12]

B. Major General Arthur St. Clair Investigation

Two years later, on March 27, 1792, the House appointed a committee to inquire into the heavy military losses suffered by the troops of Major General Arthur St. Clair to Indian tribes. [13] Out of 1400 troops, 657 were killed and another 271 wounded. [14] The House committee was empowered "to call for such persons, papers, **[*586]** and records, as may be necessary to assist their inquiries." [15] William Giles, regarding the inquiry as "indispensable" and "strictly proper," concluded that the House is "the proper source, as the immediate guardians of the public interest." [16] Similar to the inquiry of Morris, some representatives thought the investigation should be conducted by President Washington. [17] A motion to that effect was rejected 21 to 35, after which the House inquiry was supported 44 to 10. [18]

would not protect an employee against reprisal for public disclosure of such statutorily protected information, but it is not to be inferred that an employee is similarly unprotected if such disclosure is made to the appropriate unit of the **Congress.** Neither title I nor any other provision of the act should be construed as limiting in any way the rights of employees to communicate with or testify before **Congress.** [344]

As codified in 1978, any interference with the right of executive branch employees in communicating with **Congress** becomes an enforceable right along with other prohibited personnel practices. The United States Code now provides that various qualifications to the provision on prohibited personnel practices "shall not be construed to authorize the withholding of information from the **Congress** or the taking of any personnel action against an employee who discloses information to the **Congress.**" [345]

2. Whistleblower Protection Act of 1989

Congress supplemented these federal employee protections by enacting legislation in 1989, finding that "[f]ederal employees who make disclosures described in section 2302(b)(8) of title 5, United States Code, serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditures" [346] and that "protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service." [347] Employees may disclose information that they reasonably believe evidences a violation of any law, rule, or regulation, or constitutes gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. [348] Such disclosures are permitted unless "specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." [349] In signing the bill, President George Bush said that "a true whistleblower is a public servant of the **[*626]** highest order. . . . [T]hese dedicated men and women should not be fired or rebuked or suffer financially for their honesty and good judgment." [350]

3. Congressional Action in 1998

In order to examine the objections raised by the OLC, the Senate Select Committee on Intelligence held two days of hearings in 1998. [351] Professor Peter Raven-Hansen of the George Washington University Law School and I appeared the first day to rebut the OLC's position that the President has ultimate and unimpeded authority over the collection, retention, and dissemination of national security information. [352] On the second day of hearings, I testified alongside an attorney from the OLC. [353]

Based on these hearings and its own independent staff analysis, the Committee reported legislation despite claims by the Justice Department that the bill was an unconstitutional invasion of presidential prerogatives. [354] The Committee acted unanimously, voting 19 to 0 to report the measure. [355] The bipartisan vote for legislative prerogatives was solid. The

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Senate report said that the "Administration's intransigence on this issue compelled the Committee to act." [356] The bill passed the Senate by a vote of 93 to 1. [357]

The House Permanent Select Committee on Intelligence took a different approach in drafting the legislation, but also rejected the Administration's claim that the President exercised exclusive control over national security information. I testified before the House Committee as well. [358] Like the Senate, the House Committee dismissed the assertion that the President, as Commander in Chief, "has ultimate and unimpeded constitutional authority over national security, or classified, information. Rather, national security is a constitutional responsibility shared by the executive and legislative branches that proceeds according to the principles and practices of comity." [359] The two committees reported and enacted legislation with this language: **[*627]** "national security is a shared responsibility, requiring joint efforts and mutual respect by **Congress** and the President." [360] The statute further provided that "**Congress,** as a co-equal branch of Government, is empowered by the Constitution to serve as a check on the executive branch; in that capacity, it has a 'need to know' of allegations of wrongdoing within the executive branch, including allegations of wrongdoing in the Intelligence Community." [361]

Conclusion

To perform its constitutional functions, **Congress** depends on information obtained from the executive branch. The Supreme Court remarked in 1927:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information-which not infrequently is true-recourse must be had to those who do possess it. [362]

Investigation is a prerequisite for intelligent lawmaking, and much of the information that **Congress** requires is located within the executive branch. **Congress** needs information to enact legislation, to oversee the administration of programs, to inform the public,and to protect its integrity, dignity, reputation, and privileges. To enforce these constitutional duties, **Congress** possesses the inherent power to issue subpoenas and to punish for contempt. [363] The Supreme Court has said that the power of **Congress** to conduct investigations "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste." [364]

The power of **Congress** to investigate reaches all sectors of executive branch activity, not merely domestic policy, but also foreign, military, and national security policy. The first major congressional investigation, in 1792, involved the ill-fated expedition of Major General St. Clair. [365] To buttress its power to investigate, **Congress** frequently enacts statutory language that requires the executive branch to produce information. [366] When **Congress** passed the Budget and Accounting Act of **[*628]** 1921, [367] it directed the newly

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established Bureau of the Budget (now the Office of Management and Budget) to provide **Congress** with information: "The Bureau shall, at the request of any committee of either House of **Congress** having jurisdiction over revenue or appropriations, furnish the committee such aid and information as it may request." [368] The current version regarding congressional requests for information in the budget area appears in title 31 of the United States Code. [369]

As part of the National Security Act, **Congress,** in 1991, required the "Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities" to "keep the intelligence committees fully and currently informed of all intelligence activities, other than a covert action." [370] The procedures for covert actions are spelled out elsewhere. The intelligence committees are to receive "any information or material concerning intelligence activities . . . which is requested by either of the intelligence committees in order to carry out its authorized responsibilities." [371]

Congress also relies on the assistance ofemployees within the executive branch. Upon the request of a congressional committee or a committee member, any officer or employee of the State Department, the U.S. Information Agency, the Agency for International Development, the U.S. Arms Control and Disarmament Agency,

or any other department, agency, or independent establishment of the United States Government primarily concerned with matters relating to foreign countries or multilateral organizations may express his views and opinions, and make recommendations he considers appropriate, if the request of the committee or member of the committee relates to a subject which is within the jurisdiction of that committee. [372]

The text and intent of the Constitution, combined with legislative and judicial precedents over the past two centuries, provide strong support for congressional access to information within the executive branch. Without that information, **Congress** would be unable adequately to discharge its legislative and constitutional duties. It could not properly oversee executive branch agencies, which are creatures of **Congress.** Part of legislative access depends on executive employees-the rank- **[*629]** and-file-who are willing to share with **Congress** information about operations within their agencies. On the basis of two centuries of experience, **Congress** knows the value of gaining access to information regarding agency corruption and mismanagement that an administration may want to conceal.

No doubt the executive branch has an interest in seeing that agency information is disclosed only through authorized channels. Part of that concern has been directed toward controlling information that might be embarrassing to the agency, and the administration, if released. There is no legal or constitutional justification for concealing that kind of information. To the extent that the concern of the executive branch is directed toward the control of information that might be damaging to national security, the intelligence committees have procedures in place designed to protect against such damage. To question these procedures would put the executive branch in the position of asserting that only its procedures can safely protect national security, even at the cost of denying **Congress** the information it needs to discharge its constitutional duties.

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FOOTNOTES:

n1 See, e.g., United States v. **Nixon,** 418 U.S. 683, 711 (1974) (holding that, to the extent that the President's interest in withholding information for the purpose of confidentiality "relates to the effective discharge of a President's powers, it is constitutionally based"); McGrain v. Daugherty, 273 U.S. 135, 175 (1927) ("A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.").

n2 See 1 Annals of Cong. 1129 (Joseph Gales ed., 1789).

n3 See id. at 1164.

n4 See id. at 1191.

n5 See 2 Annals of Cong. 1464 (1790).

n6 Id. (statement of Rep. Elbridge Gerry).

n7 See id. at 1464-65.

n8 Id. at 1465 (statement of Rep. Theodorick Bland).

n9 Id. (statement of Rep. James Madison).

n10 See id. at 1964.

n11 See id. at 1465.

n12 See id.

n13 See 3 Annals of Cong. 493 (1792).

n14 See George C. Chalou, St. Clair's Defeat, 1792, in 1 **Congress** Investigates, A Documented History, 1792-1974, at 7 (Arthur M. Schlesinger, Jr. & Roger Bruns eds., 1975).

n15 3 Annals of Cong. 493 (1792).

n16 Id. at 490.

n17 See id. at 491-92.

n18 See id. at 493.

n19 1 The Writings of Thomas Jefferson 304 (Andrew A. Lipscomb & Albert Ellery Bergh eds., Library ed. 1904).

n20 Id. at 305.

n21 Letter from George Washington to the Secretary of War (Apr. 4, 1792), in 32 The Writings of George Washington 15 (John C. Fitzpatrick ed., 1939).

n22 Id. at 16.

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n23 See 3 Annals of Cong. at app. 1052-59, 1106-13, 1310-17.

n24 1The Writings of Jefferson, supra note 19, at 304.

n25 See 4 Annals of Cong. 38 (1794).

n26 Cabinet Opinion of H. Knox, Alexander Hamilton, & Edm. Randolph (Jan. 28, 1794), in 4 The Works of Alexander Hamilton 505 (John C. Hamilton ed., New York, Charles S. Francis & Co. 1851).

n27 Id.

n28 Id. at 505-06.

n29 Cabinet Opinion of Wm. Bradford (1793), in 4 The Works of Hamilton, supra note 26, at 494-95.

n30 4 Annals of Cong. 56 (1794).

n31 Abraham D. Sofaer, **Executive Privilege:** An Historical Note, 75 Colum. L. Rev. 1318, 1321 (1975).

n32 See 5 Annals of Cong. 394 (1796).

n33 Id. at 400.

n34 Id. at 400-01.

n35 Id. at 426.

n36 Id. at 428.

n37 See id. at 437, 466-74.

n38 See id. at 759.

n39 Id. at 461 (statement of Rep. Harper).

n40 See id. at 802-20.

n41 Id. at 642 (statement of Rep. Williams).

n42 Id. (statement of Rep. Williams).

n43 Id. at 588 (statement of Rep. Freeman).

n44 Id. at 437 (statement of Rep. Madison).

n45 Id. at 438 (statement of Rep. Madison).

n46 See id.

n47 Id. (statement of Rep. Madison).

n48 See id.

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n49 See id. at 760-62.

n50 Id. at 760.

n51 Id. at 761.

n52 Letter from Alexander Hamilton to George Washington (Mar. 24, 1796), in 20 The Papers of Alexander Hamilton 81-82 (Harold C. Syrett ed., 1974).

n53 Editor's Introductory note to Letter from Alexander Hamilton to George Washington (Mar. 7, 1796), in 20 The Papers of Hamilton, supra note 52, at 66.

n54 Letter from Alexander Hamilton to George Washington (Mar. 7, 1796), in 20 The Papers of Hamilton, supra note 52, at 69 (alteration in original).

n55 Id. at 69.

n56 5 Annals of Cong. 771 (1796). For the votes, see id. at 782-83.

n57 Id. at 773.

n58 Id.

n59 Id.

n60 See id. at 991.

n61 Id. at 970.

n62 Id. at 970-71.

n63 See id. at 1291.

n64 See id.

n65 See id. at 1280.

n66 See 1 Stat. 459 (1796).

n67 See Letter from Thomas Jefferson to John Breckenridge (Aug. 12, 1803), in 10 The Writings of Thomas Jefferson 407, 408 (Albert Ellery Bergh ed., Definitive ed. 1907).

n68 Id. at 411.

n69 Id.

n70 Id. at 410.

n71 Special Message to the Senate and House of Representatives of the United States (Oct. 21, 1803), in 1 A Compilation of the Messages and Papers of the Presidents, 1789- 1902, at 362-63 (James D. Richardson ed., 1905); see also 13 Annals of Cong. 18, 382 (1803).

n72 See 13 Annals of Cong. 385 (1803).

n73 See id. at 385-419.

n74 See id. at 419.

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n75 See 2 Stat. 245, 247 (1803).

n76 See Ivan M. Stone, The House of Representatives and the Treaty-Making Power, 17 Ky. L.J. 216, 233 n.53 (1929).

n77 See id.

n78 See id. at 234.

n79 Chalfant Robinson, The Treaty-Making Power of the House of Representatives, 12 Yale Rev. 191 (1903); see also Stone, supra note 76, at 234-35.

n80 See Stone, supra note 76, at 235.

n81 See 2 Arthur C. Hinds, Precedents of the House of Representatives § 1526, at 990 (1907) [hereinafter Hinds' Precedents].

n82 See 24 Stat. 1018 (1886); 25 Stat. 1370 (1885); 24 Stat. 975 (1883); 2 Hinds' Precedents, supra note 81, §§ 1526-1528, at 990-91.

n83 For the development of reciprocal trade legislation, see Louis Fisher, President and **Congress** 133-55 (1972).

n84 See Louis Fisher, Constitutional Conflicts between **Congress** and the President 239 (1977).

n85 See id.

n86 S. Rep. No. 94-941, at 2 (1976).

n87 See International Security Assistance and Arms Export Control Act of 1976, § 507, Pub. L. No. 94-329, 90 Stat. 729, 765 (1976); see also Pub. L. No. 94-537, 90 Stat. 2498 (1996) (authorizing appropriations for the International Security Assistance and Arms Control Act of 1976).

n88 Agreement on Friendship, Defense and Cooperation Between the United States of America and the Kingdom of Spain, July 2, 1982, U.S.-Spain, Complementary Agreement Three, Art. 2, 34 U.S.T. 3966, 3966.

n89 Id.

n90 See Uruguay Round Agreements, submitted Sept. 27, 1994.

n91 See (check the purposes section of the bill).

n92 See GATT Implementing Legislation: Hearings on S. 2467 Before the Senate Comm. on Commerce, Science, and Transportation, 103d Cong. 302-12 (1994) (statement of Harvard Law School Prof. Laurence H. Tribe).

n93 U.S. Const. art. I, § 8, cl. 3.

n94 See Bruce Ackerman & David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799 (1995); Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221 (1995).

n95 See Nada Mourtada-Sabbah, Le Privil ge de Executif Aux États-Unis 221-351 (1999).

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n96 5 Annals of Cong. 760 (1796).

n97 Special Message to the House of Representatives (Apr. 20, 1846), in A Compilation of the Messages and Papers of the Presidents, 1789-1902, supra note 71, at 431, 434.

n98 13 Cong. Deb. app. at 202 (1836-37). For the entire discussion, see id. at 189-225.

n99 Watkins v. United States, 354 U.S. 178, 187 (1957).

n100 Letter from Attorney General William French Smith to Rep. John Dingell, reprinted in H.R. Rep. No. 97-968, at 41 (1982).

n101 The President's News Conference, 1 Pub. Papers 238, 239 (Feb. 16, 1983).

n102 See Theodore Draper, A Very Thin Line: The Iran- Contra Affairs 498 (1991).

n103 See id. at 540.

n104 Theodore Draper, Foreword to The Iran-Contra Scandal: The Declassified History, at xiii (Peter Kornbluh & Malcolm Byrne eds., 1993); see generally The Iran-Contra Scandal, supra (containing a collection of documents relating to the Iran- Contra affair).

n105 Attorney General Edwin Meese III thought the Iran-Contra affair had the potential for "toppling" the President and triggering impeachment proceedings in the House. See Testimony in trial of Oliver North (Mar. 28, 1989) in Draper, supra note 102, at 521.

n106 See 31 Cong. Q. Almanac 343 (1975).

n107 See 31 Cong. Q. Almanac 343-44 (1975); see also 121 Cong. Rec. 33,872-76, 36,038-39, 40,230, 40,768-69 (1975) (noting highlights of the proceedings for the record).

n108 See Elder Witt, Carter Foiled in First Tilt With **Executive Privilege,** Cong. Q. Wkly. Rep., May 17, 1980, at 1352.

n109 See **Executive Privilege,** Revisited, Cong. Q. Wkly. Rep., June 21, 1980, at 1753.

n110 See 128 Cong. Rec. 31746-76 (1982).

n111 H.R. Rep. No. 97-968, at 11 (1982).

n112 See id. at 15, 21.

n113 Id. at 42.

n114 See 128 Cong. Rec. 31,746-76 (1982).

n115 See id.

n116 See United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983); H.R. Rep. No. 98-323, at 18-40 (1983).

n117 See House of Representatives, 556 F. Supp. at 153.

n118 See Stanley M. Brand & Sean Connelly, Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which **Congress** May Enforce Investigative Demands Against Executive Branch Officials, 36 Cath. U. L. Rev. 71, 79-81 (1986).

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n119 See id.

n120 See id.

n121 See David Johnston, Panel Acts to Gain Travel Office Papers, N.Y. Times, May 10, 1996, at A26; Eric Schmitt, White House Gives Committee More Papers in Dismissal Case, N.Y. Times, May 31, 1996, at A20.

n122 See Louis Fisher, Grover Cleveland and the Senate, 7 Cong. Stud. 11 (1979).

n123 George Lardner, Jr. & Al Kamen, Reagan Uses **Executive Privilege** to Keep Rehnquist Memos Secret, Wash. Post, Aug. 1, 1986, at A1.

n124 See id.

n125 See Howard Kurtz & Ruth Marcus, Democrats Seek to Subpoena Papers, Wash. Post, Aug. 2, 1986, at A1.

n126 See George Lardner, Jr. & Al Kamen, Senators to Push for Rehnquist Memos, Wash. Post, Aug. 5, 1986, at A4.

n127 Edward M. Kennedy, Rehnquist: No Documents, No Senate Confirmation, L.A. Times, Aug. 5, 1986, Part II, at 5.

n128 See Al Kamen & Howard Kurtz, Rehnquist Told in 1974 of Restriction in Deed, Wash. Post, Aug. 6, 1986, at Al.

n129 See id.

n130 See Senators Are Given More Rehnquist Data, Wash. Post, Aug. 8, 1986, at A3.

n131 See Al Kamen, Rehnquist Confirmed In 65-33 Senate Vote; Scalia Approved as Associate Justice, 98-0, Wash. Post, Sept. 18, 1986, at A1.

n132 See Ruth Marcus, Impasse Over Justice Documents Ends, Wash. Post, Mar. 25, 1988, at A23.

n133 Id. (quoting Assistant Attorney General John R. Bolton).

n134 See id.

n135 See Al Kamen, Ambassador to Guyana is Appointed After 17-Month Standoff, Wash. Post, Nov. 29, 1991, at A40.

n136 See id.

n137 See id.

n138 See id.

n139 See id.

n140 See id.

n141 See Jim McGee, House Panel Subpoenas Justice, Wash. Post, Mar. 12, 1994, at A4.

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n142 See id.

n143 See id.

n144 Id. (quoting Mark Gearan).

n145 See id.

n146 See id.

n147 Id. (quoting Rep. Shafer).

n148 See Jim McGee, Environmental Crimes Controversy Lingers Under Reno, Wash. Post, Apr. 7, 1994, at A25.

n149 See Jim McGee, Chief of Environmental Crimes Section Quits, Wash. Post, Apr. 2, 1994, at A4.

n150 See Al Kamen, Teaming Up, Wash. Post, July 13, 1994, at A15.

n151 See 140 Cong. Rec. 28359-60 (1994). For further details on this controversy, see Staff of Subcomm. on Oversight and Investigations of the Comm. On Energy and Commerce, 103d Cong., Damaging Disarray: Organization Breakdown and Reform in the Justice Department's Environmental Crimes Program, 103-T (Comm. Print 1994); Neal Devins, Congressional-Executive Information Access Disputes: A Modest Proposal-Do Nothing, 48 Admin. L. Rev. 109, 123-25 (1996).

n152 Devins, supra note 151, at 133.

n153 Saikrishna Bangalore Prakash, A Critical Comment on the Constitutionality of **Executive Privilege,** 83 Minn. L. Rev. 1143, 1145 (1999).

n154 United States v. **Nixon,** 418 U.S. 683, 706 (1974).

n155 Id.

n156 A footnote in the Court's decision makes this distinction clear: "We are not here concerned with . . . congressional demands for information . . . ." Id. at 712 n.19.

n157 5 U.S.C. § 552(b)(1) (1994).

n158 Id. § 552(b)(5).

n159 Id. § 552(b)(7).

n160 Id. § 552(d).

n161 Memorandum from Christopher H. Schroeder, Office of Legal Counsel, to Michael J. O'Neil, General Counsel of the Central Intelligence Agency, Nov. 26, 1996, at 3 (on file with author) [hereinafter OLC Memo].

n162 Id. at 4.

n163 See infra Pt. III.D.

n164 U.S. Const. art. II, § 2.

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According to the account of Thomas Jefferson, President Washington convened his Cabinet to consider the extent to which the House could call for papers and persons. Jefferson reported that the Cabinet considered and agreed:

first, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion. Fourth, that neither the committee nor House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President. [19]

According to Jefferson, the Cabinet concluded that "there was not a paper which might not be properly produced." [20] President Washington instructed Secretary of War Henry Knox to "lay before the House of Representatives such papers from your Department, as are requested by the enclosed Resolution." [21] Washington also thought it appropriate for St. Clair, who had expressed an interest in retiring, to make himself fully available to the House: "I should hope an opportunity would thereby be afforded you, of explaining your conduct, in a manner satisfactory to the public and yourself." [22] The House committee examined papers furnished by the executive branch, listened to explanations from department heads and other witnesses, and received a written statement from General St. Clair. [23] The general principle of **[*587] executive privilege** had been established because the President could refuse papers "the disclosure of which would injure the public." [24] The language here is significant. The President was concerned about injury to the public, not to himself or his associates. Presidents were not entitled to withhold information simply because it might embarrass the administration or reveal improper or illegal activities.

C. Diplomatic Correspondence with France

In 1794, the Senate adopted a resolution requesting President Washington to submit certain diplomatic correspondence concerning U.S. policy with France. [25] At a Cabinet meeting, he received advice from Secretary of War Henry Knox that "no part of the correspondences should be sent to the Senate." [26] Secretary of Treasury Alexander Hamilton agreed with Knox, adding that "the principle is safe, by excepting such parts as the President may choose to withhold." [27] Attorney General Edmund Randolph, who would soon become Secretary of State, said that "all the correspondence proper, from its nature, to be communicated to the Senate, should be sent; but that what the President thinks improper, should not be sent." [28] William Bradford, replacing Randolph as Attorney General, was of the opinion that "it is the duty of the Executive to withhold such parts of the said correspondence as in the judgment of the Executive shall be deemed unsafe and improper to be disclosed." [29]

Washington, carving out some room, notified the Senate that he had "directed copies and translations to be made; except in those particulars which, in my judgment, for public considerations, ought not to be communicated." [30] Apparently, the Senate accepted this

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n165 Id. art. I, § 8, cl. 15.

n166 See 10 Op. Att'y Gen. 74, 79 (1861).

n167 2 The Records of the Federal Convention of 1787, at 318 (Max Farrand ed., 1937) [hereinafter Constitutional Debates].

n168 Id.

n169 Id. at 319.

n170 2 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution 528 (Jonathan Elliot ed., 1941).

n171 See William Michael Treanor, Fame, the Founding, and the Power to Declare War, 82 Cornell L. Rev. 695, 699-700 (1997).

n172 The Federalist No. 4, at 101 (John Jay) (Benjamin Fletcher Wright ed., 1961).

n173 6 The Writings of James Madison 174 (Gaillard Hunt ed., 1906).

n174 See generally Louis Fisher, Presidential War Power (1995).

n175 U.S. Const. art. II, § 3.

n176 1 Constitutional Debates, supra note 167, at 65.

n177 Id.

n178 See Louis Fisher, The Politics of Shared Power: **Congress** and the Executive 127-28 (1998).

n179 See, e.g., 1 Op. Att'y Gen. 624 (1823); 1 Op. Att'y Gen. 636 (1824).

n180 See, e.g., 4 Op. Att'y Gen. 515 (1846).

n181 See, e.g., 1 Op. Att'y Gen. 678 (1824); 1 Op. Att'y Gen. 705 (1825); 1 Op. Att'y Gen. 706 (1825); 2 Op. Att'y Gen. 480 (1831); 2 Op. Att'y Gen. 507 (1832); 2 Op. Att'y Gen. 544 (1832); 5 Op. Att'y Gen. 287 (1851); 11 Op. Att'y Gen. 14 (1864); 13 Op. Att'y Gen. 28 (1869).

n182 19 Op. Att'y Gen. 685, 686-87 (1890).

n183 See, e.g., United States v. Louisville, 169 U.S. 249, 253-55 (1898); United States v. Price, 116 U.S. 43, 44 (1885); Butterworth v. Hoe, 112 U.S. 50, 68 (1884); United States v. Schurz, 102 U.S. 378, 394-95 (1880); Kendall v. United States, 37 U.S. 522, 610 (1838).

n184 31 U.S.C. §§ 3551-3556 (1994).

n185 2 Pub. Papers 1053 (1984).

n186 See Office of Legal Counsel, Department of Justice, Memorandum for the Attorney General, "Implementation of the Bid Protest Provisions of the Competition in Contracting Act" (Oct. 17, 1984), at 15 (on file with the author).

n187 For an excellent analysis of the deficiencies of this theory, see Morton Rosenberg, **Congress'** Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of

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the Reagan Administration's Theory of the Unitary Executive, 57 Geo. Wash. L. Rev. 627 (1989).

n188 Ameron, Inc. v. United States Army Corps of Engineers, 610 F. Supp. 750, 755 (D. N.J. 1985) (quoting U.S. Const. art. II, § 3); see also Ameron, Inc. v. United States Army Corps of Engineers, 607 F. Supp. 962 (D. N.J. 1985).

n189 See Ameron, Inc. v. United States Army Corps of Engineers, 809 F.2d 979, 980 (3d Cir. 1986); Ameron, Inc. v. United States Army Corps of Engineers, 787 F.2d 875, 876 (3d Cir. 1986).

n190 Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1124 (9th Cir. 1988) (quoting U.S. Const. art. I, § 7).

n191 Id.

n192 See United States v. Instruments, S.A., Inc., 807 F. Supp. 811, 816 (D.D.C. 1992).

n193 6 Op. Att'y Gen. 326, 344 (1854).

n194 Id.

n195 10 Annals of Cong. 613 (1800).

n196 299 U.S. 304 (1936).

n197 See id. at 320.

n198 See 10 Annals of Cong. 532 (1800).

n199 See id. at 552 (statement of Rep. Harper).

n200 See id. at 596 (statement of Rep. Marshall).

n201 See id. at 597, 613-14.

n202 See Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804).

n203 Youngstown Co. v. Sawyer, 343 U.S. 579, 636 n.2 (1952).

n204 Id.

n205 American Intern. Group v. Islamic Republic of Iran, 657 F.2d 430, 438 n.6 (D.C. Cir. 1981).

n206 Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

n207 United States v. Reynolds, 345 U.S. 1, 10 (1953).

n208 See infra Pt. III.B.2.

n209 United States v. Truong Dinh Hung, 629 F.2d 908, 913 (4th Cir. 1980).

n210 Id. at 913-14.

n211 Id. at 914.

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n212 See New York Times Co. v. United States, 403 U.S. 713, 728-29 (1971) (Stewart, J., concurring).

n213 Id. at 728-29 (Stewart, J., concurring).

n214 Id. at 729 (Stewart, J., concurring).

n215 Id. (Stewart, J., concurring).

n216 Id. at 729-30 (Stewart, J., concurring).

n217 Id. at 730 (Stewart, J., concurring).

n218 Id. (Stewart, J., concurring).

n219 See id. at 727 n.2, 728-29 n.3 (Stewart, J., concurring) (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)).

n220 Id. at 727 (Stewart, J., concurring) (footnotes omitted).

n221 Id. at 728 (Stewart, J., concurring).

n222 Id. (Stewart, J., concurring).

n223 Id. (Stewart, J., concurring).

n224 Environmental Protection Agency v. Mink, 410 U.S. 73, 78 (1973).

n225 See Freedom of Information Act Amendments § 4(B), Pub. L. No. 93-502, 88 Stat. 1562 (codified as amended at 5 U.S.C. § 552 (1994)); see also H.R. Rep. No. 93-1380, at 8-9, 11-12 (1974).

n226 Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. § 1801 (1994)).

n227 See 50 U.S.C. § 1802.

n228 See id.

n229 Pub. L. No. 96-456, 94 Stat. 2025 (codified at 18 U.S.C. app. 3 §§ 1-16 (1994)).

n230 See 18 U.S.C. app. 3 § 4.

n231 See U.S. Const. art. I, § 8, cl. 11.

n232 See id. art. I, § 8, cl. 1.

n233 See id. art. I, § 8, cl. 12.

n234 See id. art. I, § 8, cl. 13.

n235 484 U.S. 518 (1988).

n236 OLC Memo, supra note 161, at 6-7.

n237 See Egan, 484 U.S. at 522.

n238 See id.

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n239 See id.

n240 See id. at 529-30.

n241 Brief for the Petitioner at 22, Egan (No. 86- 1552) (quoting Clarke v. Securities Industry Ass'n, 479 U.S. 388, 400 (1987)).

n242 Id. at (I) (emphasis added).

n243 See Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit at 4-5, 13, 15-16, 18, Egan (No. 86-1552).

n244 See Transcript of Oral Argument, Egan (No. 86- 1552).

n245 See Egan, 484 U.S. at 520.

n246 See id. at 527.

n247 See id. at 529.

n248 Id. at 530.

n249 Id. (emphasis added).

n250 Brief for the Petitioner at 21, Egan (No. 86- 1552).

n251 See Egan, 484 U.S. at 531 n.6.

n252 Id. at 527.

n253 See Youngstown Co. v. Sawyer, 343 U.S. 579 (1952).

n254 See id. at 635 (Jackson, J., concurring).

n255 Id. at 637 (Jackson, J., concurring).

n256 Id. (Jackson, J., concurring).

n257 490 U.S. 153 (1989).

n258 OLC Memo, supra note 161, at 3.

n259 See National Security Decision Directive 84; see also Louis Fisher, Congressional-Executive Struggles Over Information Secrecy Pledges, 42 Admin. L. Rev. 89, 90 (1990).

n260 See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1988, Pub. L. No. 100-202, § 630, 101 Stat. 1329-31, 1329-432; Treasury, Postal Service, and General Government Appropriations Act of 1989, Pub. L. No. 100-440, § 619, 102 Stat. 1721, 1756.

n261 See National Fed'n of Fed. Employees v. United States, 688 F. Supp. 671, 683 (D.D.C. 1988).

n262 See id. at 676, 684-85.

n263 Id. at 685 (quoting Department of the Navy v. Egan, 484 U.S. 518, 527 (1988)).

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n264 See id.

n265 Id.

n266 See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315 (1936).

n267 See Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

n268 See Curtiss-Wright, 299 U.S. at 329.

n269 National Fed'n of Fed. Employees v. United States, 688 F. Supp. 671, 685 (D.D.C. 1988).

n270 See American Foreign Service Ass'n v. Garfinkel, 488 U.S. 923 (1988).

n271 See Brief and Motion of the Speaker and Leadership Group for Leave to File Brief Amici Curiae Out of Time, American Foreign Service Ass'n (No. 87-2127); Motion for Leave to File Brief Amicus Curiae Out of Time and Brief of the United States Senate as Amicus Curiae, American Foreign Service Ass'n (No. 87-2127).

n272 Transcript of Oral Argument at 57-58, Garfinkel (No. 87-2127).

n273 See American Foreign Service Ass'n. v. Garfinkel, 490 U.S. 153 (1989) (per curiam).

n274 Id. at 158.

n275 Id. at 161.

n276 American Foreign Service Ass'n v. Garfinkel, 732 F. Supp. 13, 16 (D.D.C. 1990).

n277 See id. at 16, 17.

n278 See Timothy S. Robinson, Judge Halts Hill Probe of Wiretaps, Wash. Post, July 23, 1976, at A1.

n279 See id.

n280 Id. (quoting President Ford).

n281 United States v. American Tel. & Tel. Co., 419 F. Supp. 454, 461 (D.D.C. 1976).

n282 United States v. American Tel. & Tel. Co., 551 F.2d 384, 392 (D.C. Cir. 1976).

n283 Id.

n284 Id. at 394.

n285 See United States v. American Tel. & Tel. Co., 567 F.2d 121 (D.C. Cir. 1977).

n286 See id. at 126.

n287 Id.

n288 Id.

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n289 Id.

n290 Id. at 127.

n291 Id.

n292 See House Select Committee on Congressional Operations, 95th Cong. Court Proceedings and Actions of Vital Interest to the **Congress,** Current to December 31, 1978, at 50 (Comm. Print 1978).

n293 See H.R. Rep. No. 94-693, at 4-5 (1975).

n294 See id. at 2.

n295 See The President's News Conference of November 14, 1975, in 2 Pub. Papers 1866, 1867 (1975).

n296 Id.

n297 Letter to the Chairman of the House Select Committee on Intelligence About Contempt Resolutions Concerning Testimony of Secretary of State Henry Kissinger, in 2 Pub. Papers 1887 (1975).

n298 Id.

n299 Id. at 1889.

n300 See id. at 1889-90.

n301 Id. at 1890.

n302 31 Cong. Q. Almanac 406 (1975) (quoting Secretary of State Kissinger).

n303 See id. at 407.

n304 See id.

n305 Id.

n306 See William Chapman, Hill Panel Votes to Cite Watt for Contempt, Wash. Post, Feb. 26, 1982, at A1.

n307 See id.

n308 See id.

n309 Staff of House Committee on Energy and Commerce, 97th Cong., **Executive Privilege:** Legal Opinions Regarding Claim of President Ronald Reagan in Response to a Subpoena Issued to James G. Watt, Secretary of the Interior 3 (Comm. Print 1981) [hereinafter **Executive Privilege**].

n310 See, e.g., Eastland v. United States Servicemen's Fund, 421 U.S. 491, 509 (1975).

n311 2 Constitutional Debates, supra note 167, at 206; see also id. at 199 (Mason's comments, as recorded by Madison).

n312 **Executive Privilege,** supra note 309, at 2.

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n313 See Chapman, supra note 306, at A5.

n314 U.S. Const. art. I, § 8, cl. 3.

n315 See H.R. Rep. 97-898, at 8 (1982).

n316 See id.; Contempt of **Congress:** Hearings Before the House Committee on Energy and Commerce, 97th Cong. 385-94 (1982); Margot Hornblower, White House Avoids Hill Showdown Over Documents, Wash. Post, Mar. 17, 1982, at A5.

n317 See Lorraine Adams and David A. Vise, INS Drops Plea to Reno to Detain Egyptian, Wash. Post, Nov. 30, 1999, at A5.

n318 See id.

n319 Id. (quoting Donn Livingston, an immigration judge).

n320 Benjamin Weiser, U.S. Frees Man Jailed 3 Years on Secret Data, N.Y. Times, Nov. 30, 1999, at A1.

n321 Id. at B12.

n322 See id.

n323 See David Cole, Editorial, No More Secret Evidence, Wash. Post, Dec. 3, 1999, at A41.

n324 S. Rep. No. 105-24, at 26 (1997).

n325 Senator Walter Huddleston, who served on the Senate Intelligence Committee, remarked in 1980, "[T]he two broadly based Intelligence Committees will be acting as proxies for the American people." 126 Cong. Rec. 13095 (1980). Congressman Lee Hamilton, as chairman of the House Intelligence Committee, underscored that point in 1985: "The House and Senate Intelligence Committees provide the only check on intelligence agencies outside the executive branch." 131 Cong. Rec. 32436 (1985).

n326 Memorandum from Christopher H. Schroeder, Office of Legal Counsel, to Michael J. O'Neil, General Counsel of the Central Intelligence Agency, Nov. 26, 1996 (on file with author).

n327 5 U.S.C. § 7211 (1994).

n328 Pub. L. No. 104-208, 110 Stat. 3009-359 (codified at 5 U.S.C. § 7301 (1994)).

n329 See 37 Stat. 539, 555 (1912).

n330 48 Cong. Rec. 4513 (1912).

n331 See id.

n332 Id.

n333 See 37 Stat. 539 (1912).

n334 48 Cong. Rec. at 4657 (1912).

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n335 See id.

n336 See id. at 5201.

n337 Id. at 5235.

n338 Id. at 5634 (statement of Rep. Lloyd).

n339 Id. at 5637 (statement of Rep. Wilson).

n340 Id. at 10674 (statement of Sen. Reed).

n341 See 37 Stat. 539, 555 (1912).

n342 Id.

n343 See 5 U.S.C. § 7211 (1994).

n344 S. Rep. No. 95-1272, 132 (1978).

n345 5 U.S.C. § 2302(b) (1994).

n346 Pub. L. 101-12 § 2(a)(1), 103 Stat. 16 (1989).

n347 Id. § 2(a)(2).

n348 See id. § 1213(a)(1).

n349 Id.

n350 Remarks on Signing the Whistleblower Protection Act of 1989, in 1 Pub. Papers 391 (1989).

n351 See Disclosure of Classified Information to **Congress,** 1988: Hearings Before the Senate Select Comm. on Intelligence, 105th Cong. (1998).

n352 See id. at 13-39.

n353 See id. at 45.

n354 See S. Rep. No. 105-165 (1998).

n355 See id. at 2.

n356 Id. at 5.

n357 See 144 Cong. Rec. at S1564 (daily ed. Mar. 9, 1998).

n358 See Record of Proceedings on H.R. 3829, The Intelligence Community Whistleblower Protection Act: Hearings Before the House Permanent Select Committee on Intelligence, 106th Cong. 32-53 (1998).

n359 H.R. Rep. No. 105-747, pt.I, at 15 (1998).

n360 Intelligence Community Whistleblower Protection Act of 1998, Pub. L. No. 105-272, § 701(b)(1), 112 Stat. 2413 (1998).

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n361 Id. § 701(b)(3); see also H.R. Rep. No. 105- 780, at 19 (1998).

n362 McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

n363 See Eastland v. United States Servicemen's Fund, 421 U.S. 491, 505 (1975); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 207 (1821).

n364 Watkins v. United States, 354 U.S. 178, 187 (1957).

n365 See 3 Annals of Cong. 490 (1792).

n366 See supra Pt. III.

n367 Pub. L. 67-13, 42 Stat. 20 (1921).

n368 Id. § 212.

n369 See 31 U.S.C. § 1113 (1994).

n370 Pub. L. 102-88 § 502, 105 Stat. 442 (1991).

n371 50 U.S.C. § 413a (1994), as added by the 1991 Intelligence Authorization Act, Pub. L. 102-88, 105 Stat. 442 (1991); Staff of House Permanent Select Committee on Intelligence, 104th Cong., Compilation of Intelligence Laws and Related Laws and Executive Orders of Interest to the National Intelligence Community 20 (Comm. Print 1995).

n372 2 U.S.C. § 194(a) (1994).

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arrangement, but had senators wanted to press the matter, they might have forced the release of more material. As Abraham Sofaer notes, "[N]othing would have prevented a majority from demanding the material, especially in confidence, or from using their power over foreign policy, funds and offices to pressure the President to divulge." [31]

[*588]

D. The Jay Treaty

Another executive-legislative conflict occurred in 1796 after President Washington informed **Congress** that the Jay Treaty had been ratified. His message was sent on March 1, 1796. [32] The very next day, Representative Edward Livingston stated that "it was very desirable, therefore, that every document which might tend to throw light on the subject should be before the House." [33] He offered a resolution that President Washington "be requested to lay before this House a copy of the instructions given to the Minister of the United States who negotiated the Treaty with Great Britain, . . . together with the correspondence and other documents relative to the said Treaty." [34] Recognizing that some of the negotiations were probably unfinished, Livingston modified his resolution by adding this language: "Excepting such of said papers as any existing negotiation may render improper to be disclosed." [35] Explaining the role of the House in the treaty process, Livingston said that the House possessed "a discretionary power of carrying the Treaty into effect, or refusing it their sanction." [36] Without the papers, the House might decide to withhold appropriations needed to implement the Treaty. Representative Albert Gallatin agreed that the House did not have to acquiesce in decisions agreed to by the President and the Senate if a treaty encroached upon powers expressly reserved to the House, such as the regulation of trade. [37]

After weeks of debate, the House supported the Livingston resolution by a margin of 62 to 37. [38] Curiously, some of the documents had already been shared with the House. Livingston, as chairman of the House Committee on American Seamen, "together with the whole committee, had been allowed access to these papers, and had inspected them. The same privilege, he doubted not, would be given to any member of that House who would request it." [39] It was during this period that **Congress** passed legislation to provide for the relief and protection of American seamen, many of whom had been impressed by Great Britain. [40] One member of the House said that with respect to the papers on the Jay Treaty, "he did not think there were any secrets in them. He believed he had seen them all." [41] He remarked that "[f]or the space of ten weeks any member of that House might have seen them." [42] Another member of **[*589]** the House noted that his colleagues could have walked over to the office of the Secretary of the Senate to see the papers, but why, he said, "depend upon the courtesy of the Clerk for information which might as well be obtained in a more direct channel?" [43]

Madison, who voted for Livingston's resolution, elaborated on his views regarding executive-legislative struggles over information. He began by avowing his intent to proceed "with the utmost respect to the decorum and dignity of the House, with a proper delicacy to the other departments of Government, and, at the same time, with fidelity and responsibility, for our constituents." [44] He wanted the resolution drafted in such a form "as not to bear even the appearance of encroaching on the Constitutional rights of the Executive." [45] Livingston's amendment to his resolution, Madison felt, went a long way toward removing constitutional objections. [46] Madison proposed the following language to further ease the tensions between

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the branches: "Except so much of said papers as, in his judgment, it may not be consistent with the interest of the United States, at this time, to disclose." [47] Madison's amendment failed by a vote of 37 to 47. [48]

In denying the House request for papers, Washington cited a number of reasons, including the need for caution and secrecy in foreign negotiations as well as the exclusive role of the Senate to participate as a member of the legislative branch in treaty matters. [49] Washington said that the only ground on which the House might request documents regarding treaty instructions and negotiations would be impeachment, "which the resolution has not expressed." [50] Washington's decision to withhold documents from the House was not an exercise of **executive privilege,** because he acknowledged that "all the papers affecting the negotiation with Great Britain were laid before the Senate, when the Treaty itself was communicated for their consideration and advice." [51]

Washington's message to the House is unsatisfactory on several grounds. First, the House was not requesting documents as part of the treaty process. That process was complete; the Jay Treaty had been negotiated, approved by the Senate, and ratified. The House merely was requesting documents as part of the post-treaty process-the appropriation of funds to implement the treaty. The House had a right to whatever papers it needed to make an informed legislative judgment. Second, Washington seemed to understand that right; a letter from Hamilton to Washington **[*590]** implied that Washington had initially considered giving the House the papers it requested:

The course you suggest has some obvious advantages & merits careful consideration. I am not however without fears that there are things in the instructions to Mr. Jay which good policy, considering the matter externally as well as internally, would render it inexpedient to communicate. This I shall ascertain to day. A middle course is under consideration-that of not communicating the papers to the house but of declaring that the Secretary of State is directed to permit them to be read by the members individually. [52]

In other words, because Washington seemed prepared to submit the papers to the House, Hamilton was offering an intermediate position of retaining the papers in the custody of the Secretary of State while allowing members of the House to come and read them in his presence. The editor of Hamilton's papers reported that, in an unfound letter to Hamilton, Washington "apparently suggested that he planned to comply with the request in Livingston's resolution." [53]

Hamilton, no longer in the administration, later advised President Washington to deny the House the documents it requested on the Jay Treaty. He thought that production of the papers "cannot fail to start [a] new and unpleasant Game-it will be fatal to the Negotiating Power of the Government if it is to be a matter of course for a call of either House of **Congress** to bring forth all the communication however confidential." [54] Having taken a hard line, Hamilton cautioned Washington not to appear too abrupt or imperious when communicating to the House: "[A] too peremptory and unqualified refusal might be liable to just criticism." [55] Hamilton's admonishment was good advice.

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Shortly after Washington's message to the House on the papers, Representative Thomas Blount introduced two resolutions, which were both adopted 57 to 35, stating that the House of Representatives did not claim any agency in making treaties,

but, that when a Treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of **Congress,** it must depend, for its execution, as to such stipulations, on a law or laws to be passed by **[*591] Congress.** And it is the Constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good. [56]

Madison, supporting the Blount resolutions, said that the House "must have a right, in all cases, to ask for information which might assist their deliberations on the subjects submitted to them by the Constitution; being responsible, nevertheless, for the propriety of the measure." [57] Madison was "as ready to admit that the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure of it at the time." [58] Yet, Madison expressed some misgivings about Washington's rationale that the papers were not related to any objective of the House:

[The rationale] implied that the Executive was not only to judge of the proper objects and functions of the Executive department, but, also, of the objects and functions of the House. He was not only to decide how far the Executive trust would permit a disclosure of information, but how far the Legislative trust could derive advantage from it. It belonged, he said, to each department to judge for itself. If the Executive conceived that, in relation to his own department, papers could not be safely communicated, he might, on that ground, refuse them, because he was the competent though a responsible judge within his own department. If the papers could be communicated without injury to the objects of his department, he ought not to refuse them as irrelative to the objects of the House of Representatives; because the House was, in such cases, the only proper judge of its own objects. [59]

The House had driven home its point: if a treaty entered into by the President and the Senate required legislation and appropriations to be carried out, the House would be strongly positioned to insist on whatever papers and documentation it needed to judge the merits of the treaty. Denied such information, it could threaten to block implementation. It might easily tell the President: "Sorry, without additional documents supplied by you, we have inadequate grounds to pass the necessary legislation."

[*592]

Precisely those conditions prevailed in 1796 because President Washington needed the support of both Houses to pass an appropriation of $ 90,000 to implement the Jay Treaty. [60] Congressman Samuel Maclay lamented the situation, noting that members of the House, having been denied the papers they requested, "were left to take their measures in the dark; or, in other words, they were called upon to act without information." [61] He proposed the following preamble and resolution:

The House . . . are of opinion that [the treaty] is in many respects highly injurious to the interests of the United States; yet, were they possessed of any information which could justify the great sacrifices contained in the Treaty, their sincere desire to cherish harmony and amicable intercourse with all nations, and their earnest wish to co-operate in hastening a final adjustment of the differences subsisting between the United States and Great Britain, might have induced them to waive their objection to the Treaty; . . . Therefore,

Resolved, That, under the circumstances aforesaid, and with such information as the House possess, it is not expedient at this time to concur in passing the laws necessary for carrying the said Treaty into effect. [62]

The House never voted on Maclay's language. After a lengthy debate, the bill to appropriate funds to implement the treaty passed by the narrow margin of 51 to 48. [63] James Madison voted against the bill. [64] An earlier test vote showed the House divided 49 to 49, with the Speaker willing to break the tie to support the treaty. [65] The appropriation was enacted into law. [66] Given the closeness of the vote, had the opposition maintained a narrow margin, it seems reasonable that President Washington would have shared with the House-or with a few selected opponents-the documents needed to swing some votes.

E. The Louisiana Purchase

In 1803, after President Jefferson entered into negotiations with France for the Louisiana Purchase, he had considerable doubts about the legality of what he had done. On the basis of a provisional appropriation of $ 2 million to be applied toward the purchase of New Orleans and the Floridas, the Jefferson Administration entered **[*593]** into an agreement with France to buy the whole of the Louisiana Territory. [67] Jefferson thought that the executive officials who had negotiated the terms "have done an act beyond the Constitution." [68] Because **Congress** would have to "ratify and pay for it," [69] the treaty "must of course be laid before both Houses, because both have important functions to exercise respecting it." [70]

Jefferson sent copies of the ratified treaty to both the House of Representatives and the Senate, explaining: "You will observe that some important conditions can not be carried into execution but with the aid of the Legislature, and that time presses a decision on them without delay." [71] The House debated at length a resolution asking Jefferson to submit certain papers and documents relating to the treaty. [72] Some portions of the resolution were adopted, others rejected. [73] The resolution as a whole went down to defeat, 57 to 59. [74] With or without the resolution, there is little doubt that the administration was willing to provide the House with whatever documents it needed to support the treaty. Subsequently, the House joined the Senate in passing legislation to enable Jefferson to take possession of the Louisiana Territory. [75]

F. Subsequent Disputes

On other occasions, the House opposed treaties that required appropriations, two examples being the Gadsden Purchase Treaty with Mexico in 1853 [76] and the Alaskan Purchase Treaty with Russia in 1867. [77] The need to have support from both houses for certain treaties was recognized in a reciprocity treaty with the Hawaiian Islands in 1876. [78] A proviso made the treaty dependent on the consent by both houses. [79] A commercial treaty with Mexico in 1883 contained a clause making its validity **[*594]** dependent on action by both houses. [80] The House Committee on Ways and Means interpreted the language to mean that the House had a voice in treaties affecting revenue. [81] Although additional conventions extended the time available for congressional approval, the House refused to support the treaty and it did not take effect. [82] The use of statutes that authorize reciprocal trade agreements have also protected the prerogatives of the House in other matters of foreign commerce, tariffs, and revenues. [83]

The House continues to make its will felt in treaty matters. Although the Ford Administration believed it could enter into an executive agreement with regard to military bases in Spain, the Senate insisted it be done by treaty. [84] Later, members of both the House and the Senate objected to language in the treaty that appeared to make appropriations mandatory over a five-year period. [85] In the end, the prerogatives of the appropriations and authorization committees were respected. The Senate Resolution of Advice and Consent contained a declaration that the sums referred to in the Spanish treaty "shall be made available for obligation through the normal procedures of the **Congress,** including the process of prior authorization and annual appropriations." [86] **Congress** enacted legislation in 1976 to authorize the appropriation of funds needed to implement the Spanish treaty. [87]

The Spanish Bases Treaty was replaced by an executive agreement in 1982, but congressional interests were again protected. The agreement stipulated that the supply of defense articles and services are subject to "the annual authorizations and appropriations contained in United States security assistance legislation." [88] Although the agreement promised support "in the highest amounts, the most favorable terms, and the widest variety of forms," it also conditioned such support on what "may be **[*595]** lawful and feasible." [89] In blunter terms: Spain would get what **Congress** decided.

The role of the House in international agreements was debated again in 1994 when President Clinton submitted the Uruguay Round Agreements to **Congress** as a bill rather than as a treaty. [90] The purpose of the bill was to implement the worldwide General Agreements on Tariffs and Trade (GATT). [91] Professor Laurence H. Tribe testified that certain features of the bill would so alter the dynamics of state-federal relations that ratification of a treaty by two-thirds of the Senate was necessary, given the Senate's special role in representing the states as political units. [92] However, there are no clear constitutional guidelines on the types of national policythat must be included in a treaty only and not in a statute. The subject matter of NAFTA and GATT-international trade-is certainly within the constitutional jurisdiction of **Congress** as a whole to "regulate commerce with foreign nations" [93] and therefore merits action by both houses through the regular statutory process. [94]

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[Separation of Powers] [3]

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SYMPOSIUM: **EXECUTIVE PRIVILEGE** AND THE CLINTON PRESIDENCY: **EXECUTIVE PRIVILEGE:** THE CLINTON ADMINISTRATION IN THE COURTS

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SUMMARY:
... [1] This Essay focuses on a relatively rare setting: the judicial treatment of **executive privilege** claims. ... [23] President **Nixon** refused to comply fully with the subpoena, asserting **executive privilege.** ... [40] The court thus was asked to determine: "How far down the line does the presidential communications privilege go?" [41] To resolve this question, the court applied the general separation of powers principle: "The ultimate question is whether restricting the presidential communications privilege to communications that directly involve the President will 'impede the President's ability to perform his constitutional duty.'" [42] The court then concluded that the general separation of powers principle required that it apply the presidential communications privilege to communications received by presidential advisors within the scope of their advisory roles. ...

TEXT:
[*631]

Exploring the role of the judicial branch of the federal government in Clinton- era **executive privilege** claims, Neil Kinkopf suggests that courts have misunderstood **executive privilege.** Professor Kinkopf points out that federal courts have given different treatment to **executive privilege** claims asserted in judicial and congressional arenas, protecting the Judiciary from encroachment by the executive branch, while avoiding becoming involved in controversies among the political branches. He argues that the judicial confusion about **executive privilege** stems from the fact that courts have interpreted cases such as Clinton v. Jones to be about the separation of powers between the executive and judicial branches, rather than about the interpretation of federal jurisdictional statutes. Professor Kinkopf proposes judicial and legislative responses that could provide remedies for the problem of judicial misunderstanding of **executive privilege** in the future.

The Jones case presented a peculiarly apt setting for the application of the Clear Statement Rule. The Court pointed to the two major federal jurisdiction statutes as the source of federal court authority to hear the lawsuit. [112] Federal courts have "jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." [113] Federal courts also have "jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $ 75,000, exclusive of interest and costs, and is between citizens of different states." [114] Neither of these jurisdictional statutes states that it applies to the President. Indeed, the primary setting in which these statutes operate likely involves civil litigation among private individuals or corporations. The APA, by contrast, operates exclusively in the context of federal administrative action. [115]

The clear statement rule avoids interpreting legislation to alter the balance of governmental power when **Congress** has not expressed statutorily such an intention **[*648]** and thus has not rendered, even implicitly, a judgment that the alteration is constitutionally permissible. In fact, because **Congress** appears to have made an exhaustive review of the APA's applicability to the spectrum of federal authorities, it is conceivable that **Congress** also considered the possibility that the statute might apply to the President. [116] The federal question and diversity jurisdiction statutes, by contrast, do not waive the sovereign immunity of the federal government or operate primarily as mechanisms to regulate the behavior of federal agencies or officials. [117] Nothing on the face of these statutes would draw **Congress'** attention to the separation of powers question that President Clinton raised in Jones. [118]

The Jones case also directly implicated the clear statement rule's competency rationale. The President's arguments in Jones were political, as is inevitable with such a separation of powers issue. He argued that the burdens of civil litigation would substantially distract him from the duties of his office and that civil litigation would be used as a political weapon. [119] The Supreme Court responded that, "Most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant." [120] It is difficult to imagine a group of nine lawyers believing this assertion at the time the opinion was written. [121] In hindsight, each of the President's assertions seems powerful, while the Court's response appears preposterous and naive. In light of subsequent events, the **[*649]** prospect of politically motivated litigation against a President seems anything but remote. [122]

The most significant error in Jones, however, was not the Court's political judgment. Rather, the most important misstep was the Court's decision to attempt a political judgment at all. The Clear Statement Rule reflects the understanding that the Judiciary is not well-equipped to make political judgments; indeed, it is designed to be ill-equipped to make such determinations. [123] For this reason, the Court repeatedly defers to the expressed, or fairly implied, judgment of the political branches in separation of powers cases, [124] and it abstains from supplying a judgment in cases in which the political branches cannot be fairly understood to have spoken. Distracted by the misperception that its own turf was at stake, the Court in Jones failed to recognize that the political branches had never made the judgment that the general federal civil jurisdiction statutes would not upset the separation of powers if applied to the President, even for suits arising from occurrences that pre-date his term in office.

The Court in **Nixon,** by contrast, came to the correct conclusion because it involved enforcement of the criminal law. [125] It simply presents no genuine separation of powers issue to say that the President is subject to the prohibitions of the federal criminal code. Thus, the President may not commit mail fraud or bribery. Applying these proscriptions to the President in no way threatens any separation of powers value.

The ratification debates demonstrate the understanding that the President would be subject to the criminal laws. [126] Opponents of the Constitution's ratification raised as a chief objection the prospect of a President who, like a monarch, would not be **[*650]** subject to the proscriptions of the criminal law. [127] Advocates of ratification repeatedly highlighted the President's amenability to law as an important feature of the document. [128] These considerations find expression in the text of the Constitution.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States, but the party convicted shall nevertheless be liable to indictment, trial, judgment and punishment, according to law. [129]

It is a fundamental premise of the structure of the presidency that the President is not exempt from the criminal law.

The **Nixon** case presented these fundamental considerations. The investigation in that case centered on criminal wrongdoing by the President and his close aides and advisers. [130] President **Nixon** had been named an unindicted co- conspirator. [131] Compelling the President to comply with a subpoena duces tecum under these circumstances does not generate tension with the constitutional separation of powers. Given the fundamental commitment that the President be subject to criminal proscriptions, compliance with the subpoena was consonant with the constitutional structure of the office.

The problem with **Nixon** is not the decision itself, but the way it has come to be understood, especially in Espy. The court in Espy did not pay careful attention to the factual setting of the prosecutor's request for information. The investigation of Secretary Espy did not implicate even remotely the possibility of presidential involvement. Absorbed by concern for its own constitutional turf, the District of Columbia Circuit asserted the mechanisms of criminal law enforcement as a proxy **[*651]** for its own Article III powers. [132] This led the court to discount the force of the President's privilege claim. The court ignored the possible chilling effect of overriding **executive privilege** in a context like Espy. Future presidents will be hamstrung in their ability to conduct any sort of internal investigation into allegations of wrongdoing. Undermining the ability of the President to root out misfeasance within the executive branch does not advance the values underlying the constitutional structure of an independent executive.

Espy's formulation of the standard governing **executive privilege** in the criminal law

context-that evidence be "directly relevant" n133-is less troublesome than how courts understa[d] that standard. As long as courts erroneously see their own constitutional position at stake in these disputes, they predictably will undervalue legitimate assertions of need to keep presidential communications confidential. Judges should understand that their constitutional position is not implicated significantly when they accommodate generally applicable criminal procedure statutes, which were enacted without regard for the peculiar setting of investigations of the executive branch, to that unique and delicate setting.

V. Proposal

A. Judicial Response

The Court's approach to constitutional privilege claims is basically sound. Conceptualizing the issue as one of separation of powers is appropriate. Within the separation of powers setting, the Judiciary typically and properly defers to the judgment of the political branches. [134] Problems arise when the Court mischaracterizes the separation of powers issue as implicating the constitutional functions of the Judiciary. This leads the Court to be less deferential and, as seen in Jones, to venture political judgments on questions that the political branches have not addressed. [135] The Clinton-era privilege litigation demonstrates how important it is for the Court to characterize properly the nature of the separation of powers issue before it and to apply its Clear Statement Rule in order to refrain from filling a void with its own political judgment.

The specific harm of Jones-that civil litigation is available as a political weapon against the President-remains on the books. [136] An exploration of all the possible systemic ramifications of political litigation is beyond the scope of this Essay. [137] The **[*652]** Jones litigation and its aftermath-the Lewinsky investigation and the impeachment proceedings-show that there are some significant problems with political litigation. The most pernicious consequence may be what can be referred to as distraction. By occupying the time and attention of the President and **Congress** for such a lengthy period, the matter necessarily displaced other policy items from the agendas of those institutions.

Political scientists write about the importance of agenda-setting. First, whoever controls the agenda-the order and timing in which matters are considered-can control outcomes. Second, **Congress** and the President can complete a finite set of business, which is markedly smaller than the set of demands for action placed on those institutions. Consequently, the ability to set the agenda and determine what actions will be considered, and in what order, can shape and, under certain circumstances, even control which actions are taken and which are neglected or rejected. [138]

The Jones precedent allows any individual or organization that can muster a colorable civil lawsuit to exert substantial influence over, or even to commandeer, the agenda of the federal government. Yet, these litigants are private individuals or organizations which are not democratically accountable. Thus, Jones grants unaccountable actors significant control over

the agenda of the federal government.

The Jones case itself provides an illustration. The lawsuit would not have proceeded without the funding of a political organization that was opposed to the President-the Rutherford Institute. [139] It would be difficult to overstate the extent to which the decisions of this organization reshaped the agenda of the federal government over a period of several years.

Temporary presidential immunity from civil lawsuits would not mean that the President is entirely immune from investigation of wrongdoing that falls outside the category of criminal wrongdoing. **Congress** holds vast investigative and oversight jurisdiction and is not shy about asserting it. [140] A major difference between a congressional inquiry and a civil lawsuit is that **Congress** is democratically accountable. If oversight and investigation of the Administration occupy too significant a position on the federal agenda, the public can demand that **Congress** curtail or scale back its inquiries and turn its focus to matters the public deems more worthy of governmental attention. The public ultimately can enforce its demand at **[*653]** the ballot box, but it has no corresponding leverage over a private entity, such as the Rutherford Institute.

B. A Legislative Response

Edified by the spectacle that followed the Supreme Court's decision in Jones, **Congress** should respond by enacting appropriate legislation. For an analogy, **Congress** might look to the statutory regime governing public access to federal documents. The generally applicable statute is the Freedom of Information Act (FOIA). [141] FOIA grants to the public a right of nearly immediate access to a wide range of federal information. [142] The Supreme Court held that FOIA does not apply to the Office of the President. [143] The statute covers the Executive Office of the President, [144] but the Supreme Court relied on legislative history to carve the Office of the President out of the Executive Office of the President and then to exempt the Office of the President from FOIA. [145] Subsequently, **Congress** enacted the Presidential Records Act (PRA) [146] to regulate the public disclosure of presidential records. [147] The PRA allows the President to maintain all presidential records and their confidentiality throughout his term or terms of office and for up to twelve years thereafter. [148]

[*654]

In the context of civil litigation, **Congress** should recognize that the unique status of the President requires a specifically tailored jurisdictional regime, just as the generally applicable FOIA does not account adequately for the special sensitivity of presidential records. As the PRA grants immunity to presidential records from disclosure during the President's term in office, while at the same time recognizing that orderly public disclosure thereafter serves a significant public benefit, **Congress** should recognize that the President should be immune from civil lawsuits during the term of his office. Once that term ends, however, it is proper for the President to be subject to civil lawsuit. The PRA prevents the system of public disclosure from being used as a political weapon against the President. **Congress** also should provide a deterrent against the system of civil litigation being used in a similar fashion.

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The plaintiff in Jones raised legitimate concerns regarding the potential effects of a temporary immunity that could last as long as eight years. [149] The plaintiff's concerns centered on the possibility that evidence might be lost or difficult to discover after the temporary immunity finally elapses. [150] The Court chose to vindicate these interests and to look to "case management" to accommodate the President's concerns. [151] Having seen that the tools of case management are ineffective, **Congress** should instead try to accommodate the legitimate concern of plaintiffs in the context of temporary presidential immunity.

This accommodation can be made by requiring the President, should he decide to invoke the temporary immunity, to post a bond to compensate the plaintiff for any losses that might result from delaying discovery and trial. The decision whether to require a bond in a given case and the amount of the bond should be left to the discretion of the trial judge, who would examine the particular circumstances of the case and its evidentiary setting. This requirement would be similar to the provision allowing a judge to require that a plaintiff post a bond as a condition to receiving a preliminary injunction. [152]

The following is a draft of what temporary presidential immunity legislation might look like:

SECTION 1. Once filed, all legal proceedings that may prejudice the unofficial legal rights of the person serving as President shall be suspended temporarily during the period for which the person serves as President without regard to when the events giving rise to such legal proceedings may have occurred. [153]

[*655]

SECTION 2. If a party files a cause of action covered by Section 1, the district court may, in its discretion, order the President to give security, in such sum as the court may deem proper, for the payment of such costs and damages as may be incurred or suffered as a result of the delay occasioned by the temporary immunity granted by Section 1.

Conclusion

The **executive privilege** cases arising from the Clinton Administration have raised important separation of powers issues. The judicial misperception that these cases significantly involved the constitutional role of the judiciary has been a source of real harm to our political system. Nevertheless, it is not too late for **Congress** and the courts to take appropriate action to prevent mischief in the future.

FOOTNOTES:

n1 See Mark J. Rozell, **Executive Privilege:** The Dilemma of Secrecy and Democratic Accountability 142-57 (1994); Dawn Johnsen, **Executive Privilege** Since United States v. **Nixon:** Issues of Motivation and Accommodation, 83 Minn. L. Rev. 1127, 1140 (1999).

n2 The Reagan and Bush Administrations spawned some relevant judicial doctrine, especially in connection with the investigation of the Iran-Contra scandal, but it does not compare in quality or quantity to the judicial response to the Clinton Administration.

n3 See Mark J. Rozell, **Executive Privilege** and the Modern Presidents: In **Nixon's** Shadow, 83 Minn. L. Rev. 1069, 1069 (1999).

n4 See Laurence H. Tribe, 1 American Constitutional Law 769-71 (3d ed. 2000).

n5 See id. It is tempting to add a category that arises by negative implication, an ultra vires privilege. Under this privilege, the President properly may refuse to comply with a demand for evidence that the requester has no authority to demand. The typical case involves a congressional demand for documents or testimony that do not fall within **Congress'** investigative or oversight authority. See, e.g., Christopher H. Schroeder & Neil Kinkopf, What about Burton's Contempt for the Constitution?, Legal Times, Aug. 17, 1998, at 25. The ultra vires privilege would not fall within the definition offered above because it is grounded in the constitutional attributes of **Congress** rather than the presidency. For this reason, it is not a power or privilege inhering in the President.

n6 See, e.g., Thomas W. Lippman, Clinton Keeps Papers On Haiti From House; **Executive Privilege** Invoked in Panel's Probe of Killings, Wash. Post, Sept. 26, 1996, at A20 (reporting on President Clinton's refusal to "turn over 47 documents subpoenaed by House investigators probing whether the administration knew that security agents of Haiti's U.S.-backed government had murdered political opponents")lter Pincus, Official Balks At Hearing On Bosnia, Wash. Post, Apr. 17, 1996, at A6 (reporting on a Clinton Administration official's claim to **executive privilege** regarding an investigation into the Administration's "policy of tolerating Iran's shipment of arms to Bosnia's Muslim-led government in 1994 and 1995 in violation of a U.N. embargo").

n7 See In re Lindsey, 158 F.3d 1263, 1267 (D.C. Cir. 1998) (per curiam).

n8 See Clinton v. Jones, 520 U.S. 681, 684 (1997). The Supreme Court, of course, already had recognized absolute presidential immunity for acts taken within the broad parameters of office. See **Nixon** v. Fitzgerald, 457 U.S. 731, 756 (1982). In Jones, President Clinton asserted a temporary immunity from suits arising from events that preceded his election as President. See Jones, 520 U.S. at 681.

n9 418 U.S. 683 (1974).

n10 See infra notes 29-35 and accompanying text.

n11 According to this principle, no branch may act in a way that prevents another branch from performing its constitutionally assigned role. An action that threatens to do so is unconstitutional unless its impact is justified by an overriding need to promote objectives within the constitutional authority of the encroaching branch. See **Nixon** v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977); see also infra notes 12-20 and accompanying text.

n12 A number of the novel privilege claims that the Clinton Administration asserted do not fall within this category because the Administration grounded them in the distinct category of common law privileges. Rule 501 of the Federal Rules of Evidence authorizes the federal courts to develop the common law of evidentiary privileges. These common law privileges are not constitutionally mandatory and may be repealed or altered by statute. Thus, the Administration's claim of government attorney- client privilege did not raise a novel claim of constitutional **executive privilege.** Insofar as the government attorney-client privilege is asserted in the context of communications between the President and a government attorney acting within the scope of an attorney-client relationship, it is identical to the presidential

communications privilege. The government attorney- client privilege's much broader application-to executive branch lawyering that does not implicate the President-is an instance of the common law evidentiary privilege. See In re Lindsey, 158 F.3d at 1267-68. The protective function privilege raised by the Clinton Administration was not asserted to be a presidential privilege. Instead, the protective function privilege was raised as a privilege of the Secretary of the Treasury, who asked the court to recognize the privilege under its Rule 501 authority. See In re Sealed Case, 148 F.3d 1073, 1075 (D.C. Cir. 1998) (per curiam).

n13 See infra Pt. II.

n14 See generally Rozell, supra note 1, at 142-57 (discussing the potential political nature of congressional response to claims of **executive privilege)**.

n15 See Morrison v. Olson, 487 U.S. 654, 699-700 (1988) (asserting **executive privilege** in response to congressional oversight hearings into the administration of the Superfund by the EPA); Senate Select Comm. v. **Nixon,** 498 F.2d 725 (D.C. Cir. 1974). In Senate Select Committee, President **Nixon** had invoked **executive privilege** to protect recorded conversations between him and his aides that were the subject of a subpoena duces tecum by the Senate Select Committee investigating wrongdoing in connection with the 1972 presidential campaign and election. See Senate Select Comm., 498 F.2d at 726-27.

n16 See Senate Select Comm., 498 F.2d at 731 (applying a presumption of privilege when claimed by the President, unless **Congress** demonstrates that the requested evidence is critical to its function); cf. Raines v. Byrd, 521 U.S. 811, 833 (1997) (Souter, J., concurring): [T]he contest here . . . is in substance an interbranch controversy about calibrating the legislative and executive powers, as well as an intrabranch dispute between segments of **Congress** itself. Intervention in such a controversy would risk damaging the public confidence that is vital to the functioning of the Judicial Branch by embroiling the federal courts in a power contest nearly at the height of its political tension.

n17 See Rozell, supra note 1, at 151-52.

n18 520 U.S. 681 (1997).

n19 See United States v. **Nixon,** 418 U.S. 683, 708 (1974). Numerous commentators agree that the Court in **Nixon** was correct on this point. See, e.g., Rozell, supra note 1, at 142- 57; Steven G. Calabresi, Caesarism, Departmentalism, and Professor Paulsen, 83 Minn. L. Rev. 1421, 1422 (1999) (arguing that the dispute in **Nixon** was nonjusticiable under the separation of powers doctrine); Johnsen, supra note 1, at 1140 ("[E]xecutive privilege is indispensable to the functioning of our system of checks and balances and separation of powers."). Nevertheless, some remain convinced that the Constitution's textual silence-buttressed by its structure and original understanding-refutes any claim of **executive privilege.** See Raoul Berger, **Executive Privilege:** A Constitutional Myth (1974); Saikrishna Bangalore Prakash, A Critical Comment on the Constitutionality of **Executive Privilege,** 83 Minn. L. Rev. 1143 (1999). I accept as correct the Court's view, though it is beyond the scope of this Essay to attempt to resolve the disagreement in the literature.

n20 The Court declared, "The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." **Nixon,** 418 U.S. at 708.

n21 See id. at 687.

n22 See id.

n23 See id. at 687-88.

n24 See id. at 688.

n25 See id. at 703.

n26 See id.

n27 See id. at 706. As to **Nixon's** claim, the Court ruled that the qualified privilege was overcome by the demonstrated and particularized need of the criminal justice system. See id. at 713.

n28 See, e.g., Clinton v. New York, 524 U.S. 417 (1998) (applying bicameralism and presentment requirements to a delegation to the President); Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 946-51 (1983) (applying bicameralism and presentment requirements to a legislative veto); Buckley v. Valeo, 424 U.S. 1, 124-43 (1976) (per curiam) (applying the Appointments Clause).

n29 See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995) (holding that the constitutional separation of powers was violated when a provision of the Securities Exchange Act directed courts to reopen final judgments).

n30 See, e.g., Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991); Bowsher v. Synar, 478 U.S. 714 (1986). In Bowsher, the Court struck down the Gramm-Rudman Balanced Budget Act, which authorized the Comptroller General to make cuts necessary to bring the federal budget into balance. Because **Congress** had statutory authority to remove the Comptroller, the Court concluded that **Congress** could control the Comptroller and, through him, could control the power to make budget cuts. Therefore, **Congress** had aggrandized its own power. This rationale would have been a more persuasive basis for the Court's holding in Chadha. See Tribe, supra note 4, at 678-79. The Court also recharacterized one of its earlier cases, Myers v. United States, 272 U.S. 52 (1926), which declared unconstitutional a statute requiring the President to receive the advice and consent of the Senate before removing a postmaster first class. The Court in Bowsher contended that the constitutional defect of the removal provision was that it aggrandized **Congress'** power. See Bowsher, 478 U.S. at 724-26.

n31 **Nixon** v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977).

n32 See id. This formulation has been repeated often. See, e.g., Clinton v. Jones, 520 U.S. 681 (1997); Loving v. United States, 517 U.S. 748 (1996); Mistretta v. United States, 488 U.S. 361, 381 (1989); Morrison v. Olson, 487 U.S. 654 (1988); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).

n33 See Plaut, 514 U.S. at 240.

n34 See generally Neil Kinkopf, Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors, 50 Rutgers L. Rev. 331, 348-57 (1998) (outlining the major court decisions on separation of powers).

n35 See Clinton v. Jones, 520 U.S. 681; In re Lindsey, 158 F.3d 1263 (D.C. Cir. 1998); In re Sealed Case, 148 F.3d 1073 (D.C. Cir. 1998); In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997) [hereinafter Espy].

n36 See Espy, 121 F.3d at 734.

n37 See id. Espy was acquitted on all 30 counts that were submitted to the jury; the judge dismissed eight additional counts. See Neil A. Lewis, Espy is Acquitted on Gifts Received While in Cabinet, N.Y. Times, Dec. 3, 1998, at A1.

n38 See Espy, 121 F.3d at 735. The White House Counsel recommended that the President take no action in large part because Espy already had tendered his resignation and made payments reimbursing all of the questionable gratuities. The President accepted his counsel's recommendation. See id.

n39 See id.

n40 See id.

n41 Id. at 746.

n42 Id. at 751 (quoting Morrison v. Olson, 487 U.S. 654, 691 (1988)). Judge Wald's opinion poses this question within the broad separation of powers framework, first noting that "'even when a branch does not arrogate power to itself, . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.'" Id. (quoting Loving v. United States, 517 U.S. 748, 757 (1996)).

n43 See id. at 751-52.

n44 See id. at 752.

n45 See id. at 753-54.

n46 See id. at 753.

n47 For a discussion of this aspect of **Nixon,** see infra notes 75-79 and accompanying text.

n48 Espy, 121 F.3d at 753-54 (emphasis added). The court made these statements in the course of denying an argument that the judicial "need" for the evidence be greater-specifically that it be "critical" to an accurate judicial determination. See id. at 754.

n49 Id. at 754.

n50 Id. (citing Fed. R. Crim. Pro. 17(c)).

n51 See In re Lindsey, 158 F.3d 1263, 1268 (D.C. Cir. 1998) (per curiam); In re Sealed Case, 148 F.3d 1073, 1075 (D.C. Cir. 1997).

n52 See In re Lindsey, 158 F.3d at 1271-73.

n53 See In re Lindsey, 158 F.3d at 1268; In re Sealed Case, 148 F.3d at 1075.

n54 See supra notes 19-20 and accompanying text.

n55 See In re Sealed Case, 148 F.3d at 1074. The Secret Service is a bureau within the Department of the Treasury.

n56 See In re Sealed Case, 148 F.3d at 1075-79.

n57 520 U.S. 681 (1997).

n58 See id. at 684.

n59 457 U.S. 731 (1982).

n60 See id. at 757-58.

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n61 See Jones, 520 U.S. at 684.

n62 See id. at 697.

n63 See id. at 698.

n64 Id. at 701 (quoting Loving v. United States, 517 U.S. 748 (1996)).

n65 See id.

n66 See id.

n67 See id.

n68 Id. at 708. For a criticism of this assurance, see infra notes 136-40 and accompanying text.

n69 See Jones, 520 U.S. at 708.

n70 Id. at 703-04 ("The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution.") (emphasis added).

n71 Id. at 704. The Court offered no citation for this proposition and it directly contradicted its holding in Dalton v. Specter. 511 U.S. 462, 472-74 (1994) (finding that "claims simply alleging that the President has exceeded his authority are not 'constitutional' claims subject to judicial review under the" Franklin exception for review of constitutional claims). The Court later referred to Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), and Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), but, in Dalton, it construed these cases as limited to the question of whether the President had violated the Constitution. See Dalton, 511 U.S. at 463. The Court in Dalton expressly rejected the proposition that the courts have the authority to review presidential action merely to determine whether the action is within the law. See id. at 472. A claim that presidential action is ultra vires is not sufficient to invoke the court's jurisdiction, according to the Dalton decision. See id. The claim must assert an independent constitutional violation. See id. The Courts pronouncement in Dalton is deeply flawed. First, it ignores a fundamental commitment of the Constitution's structure: that the federal government is a government of limited and enumerated powers. The Dalton decision offers no response to the argument that ultra vires action is unconstitutional as a violation of this component of the Constitution's structure. Even taking a clause-bound approach, ultra vires action by the President violates the Take Care Clause: the President's duty to take care that the law be faithfully executed includes taking care to comply with the Constitution and the limits it imposes on governmental action. See U.S. Const. art. II, § 3; see also Neil Kinkopf, The Progressive Dilemma, 75 Notre Dame L. Rev. (forthcoming 2000). Nevertheless, the Court only recently had decided Dalton and ought to have attempted to explain how it squared with the broad assertion in Jones.

n72 See Jones, 520 U.S. at 703.

n73 Id. at 702.

n74 See McCulloch v. Maryland, 17 U.S. (1 Wheat.) 316, 407 (1819).

n75 418 U.S. 683 (1974).

n76 Id. at 707.

Introduction

The Clinton Administration is fertile ground for an examination of **executive privilege.** No administration since President **Nixon's** has yielded such a spate of **executive privilege** controversies. These controversies play out in a variety of fora and are resolved most frequently through the process of political accommodation. [1] This Essay focuses on a relatively rare setting: the judicial treatment of **executive privilege** claims. [2]

Exactly what "**executive privilege**" means has never been entirely clear. While presidents since George Washington have asserted some form of the privilege, it is emblematic of the privilege's mutability that the phrase "**executive privilege**" was not coined until the Eisenhower Administration. [3] **Executive privilege** is remarkably **[*632]** protean; it can assume a seemingly limitless array of forms and, consequently, is difficult to grasp. Regarding **executive privilege** as a heading for these multifarious claims is a standard account. [4] For the purposes of this Essay, "**executive privilege**" refers to the variety of privileges and immunities, grounded in the constitutional structure of the presidency, that allow the President to withhold information or refrain from participation in the processes of the other branches. These privileges and immunities include the state secrets privilege, the presidential communications privilege, and the presidential immunity from civil suit for official acts. [5] In addition to asserting several of the sanctioned categories of **executive privilege** listed above, [6] the Clinton Administration has claimed a number of privileges and immunities that had never before been the subject of judicial rulings, including the government attorney-client privilege [7] and temporary presidential immunity from civil suit. [8]

The Clinton Administration has seen two important developments in the judicial doctrine of separation of powers. First, in the twenty-five years since the Supreme Court held, in United States v. **Nixon,** [9] that **executive privilege** is grounded in the constitutionally created separation of powers, the Court has substantially developed **[*633]** and consolidated its understanding of separation of powers. [10] Federal courts in the Clinton era have adapted the **Nixon** holding to this recently consolidated doctrine. When ruling on the Clinton claims, the courts have followed the standard account, regarding each claim as an application of the general separation of powers principle, rather than as a distinct privilege. [11] Thus, courts have accepted the notion that this welter of factually disparate claims actually forms a single doctrinal category. [12] Second, despite having identified the relevant framework and legal principles for resolving **executive privilege** claims, the courts repeatedly have misapplied the doctrinal framework to those claims. [13]

In resolving the Clinton-era claims of **executive privilege,** the courts have followed another element of the standard account of **executive privilege**-the validity of any specific claim of **executive privilege** will depend on whether it is asserted in the congressional or judicial arena. [14] When the privilege is asserted in response to a congressional inquiry, the President's claim is pitted against **Congress'** constitutional powers of investigation and oversight. [15] The courts are reluctant to get involved in **[*634]** a dispute between the political branches. [16] When the President asserts the privilege in a judicial proceeding, the courts understand the primary separation of powers battle line to be drawn between the President's constitutional powers and those of the Judiciary. [17] This assumption, however, is a misunderstanding. The forum does not define the separation of powers combatants.

n77 Id. at 709.

n78 The lone exception comes in Section 3, which defines treason. See U.S. Const. art. III, § 3 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.").

n79 Indeed, the Supreme Court invoked Article III, but never cited the provision of Article III with which President **Nixon's** position conflicted. This failure to cite authority has led a variety of commentators to denounce the opinion as an unfounded assertion of judicial superiority. See, e.g., Akhil Reed Amar, **Nixon's** Shadow, 83 Minn. L. Rev. 1405, 1411 (1999) ("[**Nixon**] imperialized the Judiciary and marginalized the legislature.").

n80 520 U.S. 681 (1997).

n81 Id. at 682.

n82 See U.S. Const. art. III.

n83 See 28 U.S.C. § 1331 (1994).

n84 See 28 U.S.C. § 1332. Even though these statutes use the language of Article III, neither confers jurisdiction to the fullest extent that Article III permits. For example, Article III allows jurisdiction in any case that presents a federal question. Section 1331, however, limits federal question jurisdiction to federal questions asserted in a well-pleaded complaint. See Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908). It does not extend jurisdiction to any case in which a significant federal law defense, including a constitutional defense, is asserted if the plaintiff did not raise a federal question in pleading its claim. See id. Section 1332 limits diversity jurisdiction even more sharply from the baseline of constitutional permissibility. It imposes an amount-in-controversy threshold, currently $ 75,000, that must be exceeded to invoke federal jurisdiction. See 28 U.S.C. § 1332(a). Moreover, the statute also requires complete diversity of the parties to establish jurisdiction; if any plaintiff is a citizen of the same state as any defendant, § 1332 denies jurisdiction. See 28 U.S.C. § 1332(a)(1); see also Strawbridge v. Curtiss, 7 U.S. (1 Cranch) 267, 267 (1806). Yet, the Constitution allows jurisdiction under conditions of minimal diversity, where at least one claimant is diverse from a defendant. See U.S. Const. art III, § 2. **Congress** enacted the federal interpleader statute on this understanding. See 28 U.S.C. § 1335.

n85 See Jones, 520 U.S. at 685.

n86 Id. at 753.

n87 The opinion cites two academic treatments of **executive privilege,** neither of which establishes the proposition for which the court cites them. See Rozell, supra note 1, at 142-57; Norman Dorsen & John Shattuck, **Executive Privilege, the Congress** and the Courts, 35 Ohio St. L. Rev. 1 (1974). Professor Rozell draws the same distinction as the court but similarly fails to explain why the arena in which the claim of **executive privilege** is asserted should affect the constitutional analysis. Professor Rozell aptly notes that **Congress** has political tools available to force disclosure. See Rozell, supra note 1, at 148- 49. These tools are not available to the Judiciary. See id. at 151. Yet, it is not clear why or how this bears on the question of whether the privilege applies and, if so, whether it is overcome by countervailing considerations. Vague intimations of Richard **Nixon's** lawyer, James St. Clair, aside, no President has defied a court order to submit to judicial process. See Michael Stokes Paulsen, **Nixon** Now: The Courts and the Presidency After Twenty-five Years, 83 Minn. L. Rev. 1337, 134-49 (1999). At least one commentator, however, apparently believes that this would be permissible. See id.

n88 See The Federalist No. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961).

n89 See id. at 321-22.

n90 See The Federalist Nos. 47, 48, 51 (James Madison).

n91 See supra Pt. II.

n92 See The Federalist No. 51, supra note 88, at 322- 23 (James Madison).

n93 This is also how the general separation of powers principle has been applied. The only two cases in which the Court has held that a statute violates the general separation of powers principle have involved legislative encroachment on the Judiciary. See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982); Hayburn's Case, 2 U.S. (2 Dall.) 408, 412 (1792).

n94 The requirement that the separation of powers concern be genuine is an important qualification, although the executive branch sometimes overlooks it. See Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to Jack Quinn, Counsel to the President (Dec. 18, 1995) (visited Apr. 9, 2000) <http://www.usdoj.gov/olc/ mem ops.htm> (stating that statutes "'are construed not to include the President unless there is a specific indication that **Congress** intended to cover the Chief Executive.'" (quoting Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Egil Krogh, Staff Assistant to the Counsel to the President (Apr. 1, 1969))); see also The Constitutional Separation of Powers Between the President and **Congress,** Op. Off. Legal Counsel (visited Apr. 9, 2000) <http://www.usdoj.gov/olc/ mem ops.htm>. This qualification is important because it distinguishes the rule of construction from Richard **Nixon's** famous assertion that "When the President does it that means it is not illegal." Excerpts from Interview with **Nixon** about Domestic Effects of Indochina War, N.Y. Times, May 20, 1977, at A16 (interview by David Frost).

n95 This is not to say that clear statement rules generally are appropriate or sound. See generally Richard Posner, The Federal Courts: Crisis and Reform 285 (1985); William Eskridge & Phillip Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593 (1992).

n96 Similarly, the Court has adopted the Clear Statement Rule for questions involving the vertical separation of powers-that is, federalism. In that context, the Clear Statement Rule is designed also to accord due regard to the sovereignty of the states and to ensure that the federal government has considered the ramifications of applying a generally applicable statute in that unique setting. See, e.g., Gregory v. Ashcroft, 501 U.S. 452 (1991) (holding that the Age Discrimination in Employment Act would apply to the mandatory retirement age of state judges only if the statute clearly covered this situation); see also William N. Eskridge, Jr., et al., Legislation and Statutory Interpretation 354-62 (2000) (discussing interpretive canons used to protect state authority from federal encroachment).

n97 See, e.g., Morrison v. Olson, 487 U.S. 654 (1988) (upholding the independent counsel statute, which clearly was designed to limit the President's control over prosecutorial functions vested in the independent counsel); **Nixon** v. Administrator of Gen. Servs., 433 U.S. 425 (1977) (applying a highly deferential standard to determine whether the Presidential Records Act violated the separation of powers doctrine).

n98 This rule of construction is closely related to the so-called avoidance canon, under which the courts will construe a statute to avoid raising constitutional questions if there is an alternative ground on which to decide the case. For example, the Supreme Court refused to interpret the Federal Advisory Committee Act (FACA), 5 U.S.C. app. 2 § 1 et seq. (1994), which requires open meetings by advisory committees that comprise members who are not federal officials, as applying to the American Bar Association's Committee on Judicial

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Nominations. The Court's rationale was to avoid the serious separation of powers concerns that would arise if this advisory function could not be performed in confidence. Achieving that construction, however, meant significant interpretive contortions. See Public Citizen v. United States Dept. of Justice, 491 U.S. 440, 443 (1989) ("[W]e cannot believe that [FACA] was intended to cover every formal and informal consultation between the President or an Executive agency and a group rendering advice."). The District of Columbia Circuit also employed the avoidance canon to FACA in holding that the First Lady is a government official; therefore, the President's health care task force was not subject to FACA. See Association of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898 (1993). For a criticism of this approach, see Frederick Schauer, Ashwander Revisited, 1995 Sup. Ct. Rev. 71 (1995).

n99 The Federalist No. 78, supra note 88, at 465 (Alexander Hamilton).

n100 See U.S. Const. art. III, § 1.

n101 505 U.S. 788 (1992).

n102 5 U.S.C. § 551 et seq. (1994).

n103 See Franklin, 505 U.S. at 796.

n104 See 5 U.S.C. § 704 (1994).

n105 5 U.S.C §§ 551(1), 701(b)(1).

n106 The Office of the President is an administrative unit that encompasses the President and his closest staff. It is a subset of the Executive Office of the President. See Kissinger v. Reporter's Comm. for Freedom of the Press, 455 U.S. 136 (1980); see also infra note 144.

n107 5 U.S.C §§ 551(1), 701(b)(1).

n108 See id.

n109 See Franklin v. Massachusetts, 505 U.S. 788 (1992). Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by **Congress** before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion .Id. at 800-01.

n110 457 U.S. 731 (1982).

n111 Franklin, 505 U.S. at 801.

n112 See Clinton v. Jones, 520 U.S. 681, 685 (1997).

n113 28 U.S.C. § 1331 (1994).

n114 28 U.S.C. § 1332.

n115 See Franklin, 505 U.S. at 796-801.

n116 See id. For example, the list of exceptions demonstrates that **Congress** thought about how the statute should apply to **Congress,** the territories, and the District of Columbia. It is not much of a leap to conclude that **Congress** probably thought about whether the APA might also apply to the President.

n117 Of course, the jurisdiction statutes regulate the Article III Judiciary by defining the

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cases to which the judicial power extends. The APA is designed to grant the federal Judiciary the authority to review the administrative actions of federal agencies. See 5 U.S.C. § 581. The federal question and diversity jurisdiction statutes are designed to grant the federal Judiciary jurisdiction to hear a broad range of controversies, mainly involving parties that are wholly private. See 28 U.S.C.§§ 1331-1332.

n118 Shifting the focus to the federal statutes creating the federal causes of action at issue in Jones (Title VII and § 1983) would not alter this point. The application of these statutes to a sitting president is far removed from the context in which each would typically operate.

n119 See Clinton v. Jones, 520 U.S. 681, 692-706 (1997).

n120 Id. at 708.

n121 It may not be implausible, however, in the case of the nine justices that decided Clinton v. Jones. The relevant background for Jones would have included significant experience with contemporary litigation and a substantial political office. None of the justices possessed either. By virtue of the experience of each of the individual justices, the Court was singularly unqualified to comprehend the issues and arguments involved in that case. See Verbatim, The Chron. Higher Educ., Sept. 24, 1999 ("If [the Supreme Court] is going to settle politically charged cases, it seems to me the relevant experience is politics. If you go back to the Supreme Court of the 40s and 50s, justices had substantial experience . . . . Today we have these kind-of virgins-nine justices whose cumulative political experience is slight.").

n122 To its speculation that summary judgment would prove an effective defense against political harassment, the court added its conclusion, "History indicates that the likelihood that a significant number of such cases will be filed is remote." Jones, 520 U.S. 681, 709 (1997). History now demonstrates that "a significant number of such cases" is one.

n123 See supra notes 94-100 and accompanying text.

n124 Where the political branches, through bicameralism and presentment, have determined that an institutional arrangement does not upset the proper balance of governmental power, the Court will not second guess their assessment. See, e.g., Mistretta v. United States, 488 U.S. 361, 381 (1989) (holding that a court will invalidate an act of **Congress** only for compelling constitutional reasons); Morrison v. Olson, 487 U.S. 654 (1988) (emphasizing the importance of a congressional determination). Even when applying an anti- aggrandizement analysis, the Court does not make a judgment about whether a given measure will in fact yield a shift in power among the branches. See Bowsher v. Synar, 478 U.S. 714, 730 (1986) (refusing to engage in a "judicial assessment" of how a statute might, as a "practical result," affect the balance of power between the branches).

n125 See United States v. **Nixon,** 418 U.S. 683 (1974).

n126 This Essay does not offer an opinion as to whether a criminal indictment may be issued, or a trial commenced, against a President while still in office.

n127 See, e.g., The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania, Pennsylvania Packet and Daily Advertiser, Dec. 18, 1787, reprinted in The Essential Antifederalist 53, 66 (W.B. Allen & Gordon Lloyd eds., 1985) (espressing the fear that the President may use his power to "screen from punishment the most treasonable attempts that may be made on the liberties of the people")orge Mason, Objections to the Constitution of Government formed by the Convention, 1787, reprinted in The Essential Antifederalist, supra, at 11, 12 (expressing the fear that the President might use his power to "screen from punishment those whom he had secretly instigated to commit [a] crime, and thereby prevent discovery of his own guilt").

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n128 See, e.g., The Federalist No. 69 vol. 2, at 40, 41 (Alexander Hamilton) ("The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law.").

n129 U.S. Const. art. I, § 3 (emphasis added).

n130 See United States v. **Nixon,** 418 U.S. 683, 687-88 (1974). Although President **Nixon** was not a named defendant, he was an unindicted co-conspirator.

n131 See id. at 687.

n132 See Espy, 121 F.3d 729, 753-54 (D.C. Cir. 1997).

n133 Id. at 754.

n134 See supra note 124.

n135 See supra notes 119-24 and accompanying text.

n136 See Clinton v. Jones, 520 U.S. 681 (1997).

n137 Political litigation may have some salutary consequences. For example, subjecting the President to the various discovery mechanisms authorized by the Federal Rules of Civil Procedure is apt to afford the public access to a greater quantum of information about the President.

n138 See, e.g., Kenneth Arrow, Social Choice and Individual Values (1963).

n139 See Robert W. Gordon, Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair, 68 Fordham L. Rev. 639, 681 (1999) ("The Jones case was at this point being prolonged and financed by ideological opponents of the President, the Rutherford Institute.").

n140 Though vast, this jurisdiction is not unlimited. See, e.g., Kilbourn v. Thompson, 103 U.S. 168 (1880); see also Schroeder & Kinkopf, supra note 5, at 25.

n141 5 U.S.C § 552 (1994). Other statutes-such as the Federal Records Act, 44 U.S.C. § 2901-are important to the overall system of federal record maintenance and disclosure, but are not sufficiently analogous to illuminate the issue of temporary presidential immunity from civil suit.

n142 FOIA requires that the agency subject to a request for information make a determination on the request within 10 days, absent unusual circumstances. See 5 U.S.C. § 552(a)(6). FOIA requesters know that in practice it takes much longer to get an actual response. In addition, FOIA excludes significant categories of information from its disclosure requirements. See 5 U.S.C. § 552(b).

n143 See Kissinger v. Reporters' Comm. for Freedom of the Press, 445 U.S. 136, 138 (1980).

n144 The Executive Office of the President (EOP) is a more encompassing entity than the Office of the President. The EOP includes some of the permanent agencies, staffed largely by civil servants, that are housed administratively within the White House, such as the Office of Management and Budget and the Council of Economic Advisers. See White House Offices and Agencies <http://www.whitehouse.gov/WH/EOP/html/EOP org.html>. The Office of the President consists of the President's immediate staff and advisers.

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n145 See Kissinger, 445 U.S. at 156.

n146 44 U.S.C. §§ 2201-2206.

n147 See 44 U.S.C. § 2201.

n148 At the conclusion of his presidency, the President must turn over all records to the Archivist. The President may designate that records containing certain sensitive categories of information be withheld from access for up to 12 additional years. All other records are to be disclosed within five years or once the Archivist finishes cataloging them, if that is completed earlier. See 44 U.S.C. §§ 2203-2204.

n149 See Jones v. Clinton, 72 F.3d 1354, 1363 (1996).

n150 See id.

n151 See Clinton v. Jones, 502 U.S. 681, 702 (1997).

n152 See Fed. R. Civ. P. 65(c).

n153 This language is modeled on the Soldiers' and Sailors' Relief Act of 1940, 50 U.S.C. app. 510 (1994).

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Executive privilege cases arising in the judicial arena do not implicate significantly the Judiciary's constitutional role or authority. This misunderstanding has led courts astray during the Clinton era, especially in Clinton v. Jones. [18]

This Essay seeks to explain how the courts have misunderstood **executive privilege** and to propose remedies for that misunderstanding. The Essay will set forth the doctrine of separation of powers and locate **executive privilege** controversies within that doctrine, including those involving President Clinton. With this background, the Essay then will explain how the Judiciary's misperception that its own turf was at stake in these cases led it to misapply the separation of powers doctrine. Finally, this Essay will offer a specific legislative proposal to redress this error.

I. **Executive Privilege**

The Supreme Court has recognized that the categories of **executive privilege** flow from a common source-the constitutional separation of powers. [19] United States v. **[*635] Nixon** expressly sets forth this position. **Nixon** recognized **executive privilege** as rooted in the constitution. [20]

Seven aides and advisers to President Richard **Nixon,** each serving on the staff of either the White House or the Committee to Re-Elect the President, were indicted for a variety of crimes. [21] Although the President was not indicted, he was named as an unindicted co-conspirator. [22] The district court granted the special prosecutor's motion for a subpoena duces tecum to the President requiring him to submit audio tapes of conversations with several of his indicted aides relating to their activities. [23] President **Nixon** refused to comply fully with the subpoena, asserting **executive privilege.** [24]

The Supreme Court concluded that the separation of powers encompasses the concept of **executive privilege.** [25] Although the Court did not articulate a specific separation of powers principle from which the privilege derives, it did conclude that the privilege is necessary to the proper functioning of the executive branch. [26] The Court further concluded that recognizing a qualified, rather than an absolute, privilege under the facts of **Nixon** would not violate the separation of powers doctrine. [27]

At the time **Nixon** was decided, the Supreme Court had not attempted to articulate a doctrinal framework to govern the resolution of separation of powers disputes. In the years since, however, the Court has set forth such a framework. Outside the limited group of cases in which a textual provision is directly controlling, [28] the Court looks to whether one branch has acted to aggrandize its own **[*636]** power. [29] If a branch has acted to aggrandize its own power, the action- typically enactment of a statute-is unconstitutional. [30] For all other separation of powers cases, the Court applies a general separation of powers principle: no branch may "prevent[ ] [another] Branch from accomplishing its constitutionally assigned functions," [31] unless it is justified by an overriding need to promote objectives within the

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constitutional authority of the acting branch. [32]

The general separation of powers principle, in its formulation and its application, is extremely deferential. The only instances in which a statute has been found unconstitutional under that principle involved congressional encroachments on the Judiciary. [33] When the Court's own power is not at stake, the Judiciary has deferred to the judgment of the political branches, expressed by enactment through bicameralism and presentment, that the statute or statutorily authorized action at issue does not prevent **Congress** or the President from fulfilling its constitutional roles. [34]

[*637]

II. Applying the Doctrinal Framework to the Clinton Administration

A. The Espy Case

In the recent spate of cases involving the Clinton Administration, the courts consistently have applied this general separation of powers principle to determine whether to recognize a privilege and how to define the parameters of the privilege. [35] The most significant case dealing with a claim of the presidential communications privilege did not involve an investigation of the President himself; instead, it concerned an investigation of the Administration's first Secretary of Agriculture, Mike Espy.

Espy was the subject of allegations that he had received illegal gifts from lobbyists and entities subject to the Department of Agriculture's regulatory jurisdiction. [36] These allegations led to the appointment of an independent counsel to investigate and, ultimately, prosecute Espy. [37] President Clinton also responded to the allegations. He ordered the White House Counsel to conduct a separate investigation to determine whether the President should take any disciplinary or executive action. [38] These distinct investigations collided when the grand jury, at the behest of the independent counsel, subpoenaed all of the records, notes, and documents that the White House Counsel had compiled in the course of its investigation. [39]

The President asserted privilege over eighty-four documents covered by the grand jury subpoena, including documents that were not prepared for the President and were never viewed by the President personally. [40] The court thus was asked to determine: "How far down the line does the presidential communications privilege go?" [41] To resolve this question, the court applied the general separation of powers principle: "The ultimate question is whether restricting the presidential communications privilege to communications that directly involve the President will 'impede the President's ability to perform his constitutional duty.'" [42] The court then concluded **[*638]** that the general separation of powers principle required that it apply the presidential communications privilege to communications received by presidential advisors within the scope of their advisory roles. [43]

As in United States v. **Nixon,** the court in Espy ruled that the presidential communications privilege is a qualified privilege. [44] The court returned to **Nixon** for guidance in determining whether the President ultimately could withhold the subpoenaed documents. [45] The court read **Nixon** to require a balance between the President's interest in confidentiality and the public interest in disclosure. [46] The public interest, however, is described in terms of the judicial role, as it was in **Nixon.** [47] The court in Espy cited **Nixon** in characterizing the interest that weighs against the President's interest as the "need for evidence in a pending criminal trial" in which the evidence bears on, or is relevant to, "an accurate judicial determination." [48]

The court in Espy then concluded that the balance would require the President to disclose privileged information whenever the evidence is "directly relevant" and is not available "with due diligence" from another source. [49] The first requirement-that the evidence be directly relevant-does not obviously yield a significant change from the generally applicable discovery requirement that evidence be relevant. The opinion itself concedes, "In practice, this component can be expected to have limited impact." [50] Thus, the court in Espy reduced the separation of powers to a rule of etiquette: a prosecutor should approach the President only if the evidence sought is not reasonably available elsewhere.

B. In re Lindsey and In re Sealed Case

In two of the most widely reported Clinton-era cases, the Administration asked the courts to recognize previously untested privilege claims: the government attorney-client privilege and the protective function, or secret service, privilege. Neither case **[*639]** yielded a Supreme Court opinion. The Administration did not contend in either case that the privilege was constitutionally based. Instead, the Administration asked the District of Columbia Circuit to recognize the privilege under Federal Rule of Evidence 501, which authorizes the federal courts to develop common law evidentiary privileges. [51]

The court recognized the government attorney-client privilege, but held that the privilege dissolves in the context of a criminal proceeding. [52] In this setting, the relevant inquiry focuses on the presidential communications privilege as expounded in Espy. [53] Thus, the availability of the privilege comes under the general separation of powers principle. [54] The President did not assert the protective function privilege. Instead, the Secretary of the Treasury asserted this privilege to prevent Secret Service officers from being required to testify before the grand jury. [55] Because the President was absent from this proceeding and the Treasury Department did not raise the separation of powers issue, the court did not discuss the general separation of powers principle and resolved the case under its common law precedents as authorized by Rule 501. [56]

C. Clinton v. Jones

The lone case to draw an opinion on the merits from the Supreme Court is also the most prominent privilege case of the Clinton Administration: Clinton v. Jones. [57] In Jones, President Clinton asserted temporary immunity from civil suit for actions undertaken before he took office as President. [58] Thus, he sought to extend a qualified application of **Nixon** v. Fitzgerald. [59] In **Nixon,** the Supreme Court held that the President enjoys absolute immunity from civil suit for actions undertaken within the broad parameters of his official capacity. [60] The Court rejected President Clinton's claim of temporary immunity. [61]

President Clinton's principal argument relied on the separation of powers principle. He contended that requiring the President to submit to civil litigation while **[*640]** in office would undermine seriously his ability to fulfill his constitutional role, thus violating the general separation of powers principle. [62] The Supreme Court agreed that the President had identified the relevant question. [63] In articulating the general separation of powers test, the Court "recognized that 'even when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.'" [64] The Court, however, was unpersuaded by the President's contention that submitting to civil litigation would undermine impermissibly his ability to perform his constitutional duties. [65]

The Court believed that requiring the President to defend a civil lawsuit would not place a substantial burden on him. It found support for this view in history; only three presidents had ever been subject to suit for their private conduct. [66] The Supreme Court also anticipated that the district court would be capable, through sensitive case management, to accommodate the schedule and other exigencies of the presidential defendant. [67] As to the President's concern that his amenability to suit would "generate a large volume of politically motivated harassing and frivolous litigation," Justice Stevens assured that "[m]ost frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant." [68]

The Supreme Court, however, did not stop at rejecting the President's "predictive judgment" that allowing civil lawsuits to proceed against him while in office would disrupt his presidency seriously. [69] The Court also asserted what it perceived as the Judiciary's own institutional interest in the question: the vitality of its "traditional Article III jurisdiction." [70] The Court saw two components of that traditional constitutional jurisdiction implicated in Jones. First, "[W]hen the President takes official action, the Court has the authority to determine whether he has acted within the law." [71] Second, the President is subject to judicial process in "appropriate **[*641]** circumstances." [72] Here, the Court is referring to instances in which the President has been required to testify or make information available in the context of a judicial proceeding. These grounds illuminate the Court's position: the President will be subject to the judicial process-as a party, or a witness, or a source of evidence-in those instances that implicate the Court's "traditional Article III jurisdiction." [73]

III. Judicial Confusion

The Judiciary's confusion stems from a simple misunderstanding: judges fail to remember

that it is a statute they are expounding. [74] In each of the Clinton-era privilege cases, the courts have viewed the separation of powers dispute as placing the President against the Judiciary. Properly construed, these cases set the President against the operation of a statute.

A. United States v. **Nixon**

The seed of this confusion was sown in United States v. **Nixon.** [75] In **Nixon,** the Supreme Court viewed the President's assertion of privilege as being in tension with "the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions[, which] would plainly conflict with the function of the courts under **[*642]** Article III." [76] The Court elaborated, "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." [77]

It may have been that the President's assertion of privilege would have conflicted with the goals of criminal justice. It is odd, though, to conceptualize this conflict as implicating Article III. If withholding the evidence-in **Nixon,** the Watergate tapes-would have thwarted a prosecution, this would have prevented the effectuation not of Article III, but of the provisions of the federal criminal code that the Watergate defendants were charged with violating. Article III does not create a criminal justice system or, with one exception, define criminal law. [78] Nothing in Article III required prosecution of the Watergate defendants. Thus, President **Nixon's** position with regard to turning over the Watergate tapes was in conflict with a congressional enactment, and not with any requirement of Article III. [79]

B. Clinton v. Jones

The Court followed **Nixon** decision's lead in Clinton v. Jones. [80] It saw the case as "merely asking the courts to exercise their core Article III jurisdiction to decide cases and controversies." [81] This formulation oversimplified the source of federal jurisdiction. Article III does not confer jurisdiction on the federal courts to hear cases such as the Jones lawsuit. Instead, Article III generally looks to **Congress** to determine whether, and to what extent, to grant the federal courts jurisdiction to hear cases. [82]

The Clinton v. Jones decision did not implicate jurisdiction conferred directly by the Constitution. The authority of the federal courts to hear the Jones case was based not on Article III, but on the two statutes that confer the vast majority of federal jurisdiction: the general federal question statute [83] and the diversity of citizenship **[*643]** statute. [84] As a result, the Jones case did not involve a tension between Article III and Article II. Rather, the case raised a conflict between the constitutional attributes of the presidency and the application of a congressional enactment. The question in Jones was whether the operation of a statute would yield to the President's institutional interests. [85]

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The Court of Appeals fell into this same trap in Espy. The court declared, "The President's ability to withhold information from **Congress** implicates different constitutional considerations than the President's ability to withhold evidence in judicial proceedings." [86] Regrettably, Judge Wald's opinion does not identify what these different considerations might be. [87]

[*644]

C. Constitutional Structure

Readers of the Federalist should not have been surprised at the Court's confusion, or that its confusion would influence its separation of powers analysis. Madison anticipated that each branch would be ambitious and would seek to expand its power. [88] Moreover, each branch was expected to be vigilant in protecting its turf against incursions by the other branches. [89] The Constitution is designed to cultivate and to capitalize on these institutional instincts. [90]

In the privilege cases, however, the Judiciary's self-defense instinct leads it to conceptual confusion. In each case involving the Clinton Administration, the Judiciary saw the asserted privilege as representing a threat to the constitutional powers of the judicial branch. [91] Having perceived a threat, the Judiciary naturally placed little weight on the asserted privilege.

Because the Constitution structures the branches in opposition to one another, the power of each can be understood only in relation to the power of the others. [92] By minimizing the importance of the presidential privilege, the Judiciary can be understood to have placed relatively greater weight on its own institutional interests and to have asserted its own power. Thus, the courts responded to the threats to their own position as the Constitution's structure anticipates they will-by acting in self-defense and according little value to the competing interests of the other branches. [93]

IV. Statutory Construction: The Clear Statement Rule

Dispelling the illusion that claims of **executive privilege** implicate the Judiciary's constitutional position, we find a recurring issue of statutory construction: a broadly applicable statute that presents genuine separation of powers concerns if applied to the President. In construing such statutes, the Court repeatedly has invoked the Clear Statement Rule: a court interprets the statute to apply to the President only if it clearly expresses this application. [94] The reason for this rule is simple and sound. [95] **[*645]** Due regard for separation of powers dictates that **Congress** and the President expressly consider the ramifications of applying a general statute to the President and provide assurances that the statute will not apply in a way that impairs the President's ability to function within the constitutional structure of government. [96] Once a statute's scope is clearly determined to include the President, the Court is extremely deferential to the implicit judgment of the

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political branches that such application is consistent with the constitutional separation of powers. [97] When it is not evident that **Congress** ever considered whether the statute would apply to the President, the justification for deference is attenuated because the enactment of the statute no longer clearly implies a judgment by the political branches that applying the statute to the President will not upset the constitutional balance of power between the branches. [98]

[*646]

The federal Judiciary is not a political branch. The judicial branch is designed to be insulated from politics in order "to secure a steady, upright, and impartial administration of the laws." [99] The Constitution grants federal judges life tenure, during good behavior, and provides that their salaries may not be reduced while in office. [100] Because federal judges may be removed only in extraordinary circumstances, they are not subject formally to the supervision and control of any other political actor or constituency. The federal Judiciary's independence and insulation from politics render it institutionally the least competent branch to make political judgments.

Following the implications of this design, the courts have at times strained the text of a statute to conclude that it does not cover the President. For example, the Supreme Court in Franklin v. Massachusetts [101] held that the Administrative Procedure Act's (APA) [102] provision of judicial review of final agency action does not apply to final administrative action undertaken by the President. [103]

The APA grants to the Judiciary the jurisdiction to review final agency actions. [104] The APA defines an "agency" to be:

each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include-(A) the **Congress;** (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia. [105]

On a straight textual analysis, the term agency would seem to encompass the Office of the President. [106] That office is, under any natural usage, an "authority of the **[*647]** Government of the United States." [107] Under the maxim, expressio unius est exclusio alterius (the expression of one thing is the exclusion of another), the express exception of other potentially covered authorities strengthens the textual case that the term agency includes the Office of the President. The heads of the other branches of the federal government are excluded under the first two exceptions. [108] Application of the expressio unius maxim would suggest that the two exceptions were strong evidence that the head of the branch that was not excepted-the President-is included. Nevertheless, the Court in Franklin refused to read the APA's judicial review provisions to cover the President unless expressly provided by the statute. [109] To support this position, the Court cited **Nixon** v. Fitzgerald, [110] which it characterized as holding that the "Court would require an explicit statement by **Congress** before assuming **Congress** had created a damages action against the President." [111]

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SYMPOSIUM: **EXECUTIVE PRIVILEGE** AND THE CLINTON PRESIDENCY: **EXECUTIVE PRIVILEGE** AND INTERBRANCH COMITY AFTER CLINTON

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SUMMARY:
... [1] Giving precise content to the powers of these three great departments of the national government has proven difficult. ... [29] Furthermore, individual members of **Congress** rarely will have standing to assert separation of powers claims against the executive branch. ... [120] It is possible, however, that the national parties have become more polarized over the past two decades; one study shows strikingly greater output of important legislation with unified government than with divided government during this period. ... [123] Of the thirty-one investigations that met Mayhew's criteria, almost exactly as many occurred during periods of unified government as occurred during times of divided government. ... On the other hand, if the trend toward increasing polarization between the parties suggested by data on legislative output over the past two decades is accurate, [125] we might expect to see higher levels of interbranch conflict over **executive privilege** during times of divided government. ...

TEXT:
[*657]

Although both constitutional theory and practical considerations offer powerful reasons for **Congress** and the President to prefer negotiation rather than litigation of separation of powers disputes, the Clinton Administration litigated and lost several important cases dealing with presidential power. Some commentators have suggested that these rulings will undermine the presidency for years after Clinton leaves office. Professor Entin assesses some factors, notably the phenomenon of divided government, that might have contributed to the difficulty of reaching interbranch accommodations in recent years and suggests that the long-term implications of the adverse judicial rulings may be less severe than the pessimists fear.

Introduction

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making notes about policy deliberations.

But the impact on executive branch relationships with **Congress** is likely to be rather less bleak than this overall picture suggests. A major factor here is that **Congress** does not have law enforcement authority. Although legislators might want to expose executive misbehavior, the denouement of the Iran-Contra hearings might give pause to thoughtful members of **Congress.** The two highest officials tried in the wake of those congressional hearings had their convictions overturned because of the prosecution's inability to demonstrate that it had not relied on their immunized testimony on Capitol Hill. [110] As for the reluctance of presidential aides to write down their candid views during policy deliberations, this unfortunate problem did not begin with the Clinton litigation. [111] Administrators in various agencies and departments have noted that what the executive branch regards as overly intrusive congressional oversight had been adversely affecting the quality of deliberation for years before Clinton's troubles. [112] Finally, both **Congress** and the President retain many incentives to reach workable accommodations about information disputes. [113] Litigating such disputes will continue to have costs in time, money, and flexibility. If, as Judge **[*673]** Posner has written, the impeachment process demonstrated the resiliency of American government, [114] perhaps the less epic disputes over presidential privilege will do less long-term harm than proponents of a strong presidency might now fear.

III. On Divided Government and **Executive Privilege** Disputes

The acrimonious relationship between President Clinton and **Congress** is widely attributed to the fact that, for most of his administration, the legislative branch has been controlled by the political opposition. Divided government is widely believed to be undesirable. Divided government certainly played a major role in the Clinton impeachment, and in the **Nixon** and Andrew Johnson impeachments as well. We should hesitate, however, before attributing too much additional significance to partisan division.

Divided government has been a common feature of American politics since Andrew Jackson's time. For almost half the period since 1832, the United States has lacked unified partisan control of the political branches. [115] Focusing more specifically on the years since World War II, an era during which divided government has been even more common, political scientists have raised questions about the conventional wisdom deploring the phenomenon. For example, David Mayhew has shown that **Congress** has passed about as many important laws during times of divided government as during unified government. [116] Mayhew defined these measures as those that were so regarded at the time by knowledgeable journalists and those that have been so regarded in retrospect by policy specialists. [117] Mayhew's landmark study has stimulated an outpouring of further literature, most of which has generally confirmed his conclusions. [118] His work has been extended in two significant respects. First, Mayhew focused only on bills that passed, not on bills that failed. Although passage of significant legislation is unaffected by divided government, major legislative proposals are more likely to fail under divided government than under unified government. [119] Second, Mayhew viewed the decline in the absolute number **[*674]** of important laws passed since 1980 as evidence of greater reliance on omnibus legislation during recent years. [120] It is possible, however, that the national parties have become more polarized over the past two decades; one study shows strikingly greater output of important legislation with unified government

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than with divided government during this period. [121]

Executive privilege disputes between **Congress** and the President typically do not arise in the context of debating proposed legislation. Rather, they occur primarily in oversight and investigation. [122] Mayhew, unlike most other political scientists who have investigated divided government lately, examined the incidence of high-profile congressional investigations of executive misconduct between 1946 and 1990. [123] Of the thirty-one investigations that met Mayhew's criteria, almost exactly as many occurred during periods of unified government as occurred during times of divided government. [124] These findings suggest that partisan differences are unlikely to affect the incidence of **executive privilege** disputes. On the other hand, if the trend toward increasing polarization between the parties suggested by data on legislative output over the past two decades is accurate, [125] we might expect to see higher levels of interbranch conflict over **executive privilege** during times of divided government. This, in turn, suggests that the Clinton Administration's judicial defeats might indeed encourage a more assertive **Congress** to press even harder for executive branch information than it has done in the past. How far this trend will go remains uncertain due to the institutional incentives to reach accommodation that have already been discussed. [126] There were, apparently, only about thirty information disputes per year between 1964 and 1973, while perhaps hundreds of thousands of requests for information were processed amicably during the same era. [127] Even if some members **[*675]** of **Congress** take a more confrontational approach in the wake of the judicial rulings adverse to the Clinton Administration, the legislative branch might well lack the institutional capacity to handle an enormous increase in the number of disputes with the White House and the executive establishment. Indeed, many supporters of the legislative veto backed off from using that device as often as they might have desired in the years before Chadha precisely because that prospect threatened to leave **Congress** with no time to do anything but review administrative regulations. [128]

Conclusion

Proposals to avoid judicial resolution of constitutional issues may strike many people as subversive of the rule of law. After all, courts are supposed to decide legal disputes. Nevertheless, there are strong arguments against resort to the judicial process to determine once and for all the frontier between congressional and presidential power in **executive privilege** and related matters. Although Bill Clinton might have weakened his office, it remains unclear to what extent his legal defeats will have long-term consequences. Both **Congress** and the White House will have good reason to try to reach workable arrangements to promote an effective government in the future.

FOOTNOTES:

n1 See U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a **Congress** of the United States, which shall consist of a Senate and House of Representatives."); id. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); id. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the **Congress** may from time to time ordain and establish."). The implications of the linguistic differences in these

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vesting clauses is beyond the scope of this Article. For a suggestion that these differences imply a very strong presidency, see Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1186-206 (1992).

n2 Of course, the people elect the President only indirectly by choosing the members of the Electoral College. See U.S. Const. art. II, § 1, cl. 2; id. amend. XII. This detail does not detract from the notion that the chief executive is nonetheless accountable to the people.

n3 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."); cf. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.").

n4 See U.S. Const. art. I, § 7, cl. 2.

n5 See id. art. II, § 2, cl. 1.

n6 See id. art. I, § 8, cl. 11.

n7 Id. art. II, § 2, cl. 2.

n8 Richard E. Neustadt, Presidential Power 33 (1960) (footnote omitted).

n9 1 Alexis de Tocqueville, Democracy in America 20 (Phillips Bradley ed., 1945) (1835).

n10 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

n11 See, e.g., Clinton v. City of New York, 524 U.S. 417 (1998) (invalidating the Line Item Veto Act; Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) (holding that members of **Congress** may not exercise direct control over local airports); Mistretta v. United States, 488 U.S. 361 (1989) (upholding the constitutionality of federal sentencing guidelines); Morrison v. Olson, 487 U.S. 654 (1988) (rejecting a challenge to the independent counsel provisions of the Ethics in Government Act); Bowsher v. Synar, 478 U.S. 714 (1986) (striking down the central mechanism for reducing federal budget deficits in the Gramm- Rudman-Hollings Act); Immigration Naturalization Service v. Chadha, 462 U.S. 919 (1982) (invalidating a legislative veto provision in the Immigration and Nationality Act); **Nixon** v. Administrator of Gen. Servs., 433 U.S. 425 (1977) (upholding the Presidential Recordings and Materials Preservation Act); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (rejecting the original method for appointing members of the Federal Election Commission); United States v. **Nixon,** 418 U.S. 683 (1974) (limiting the scope of **executive privilege** in criminal investigations).

n12 See, e.g., United States v. American Tel. & Tel. Co., 551 F.2d 384 (D.C. Cir. 1976), appeal after remand, 567 F.2d 121 (D.C. Cir. 1977); United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983); Neal Devins, Congressional- Executive Information Access Disputes: A Modest Proposal-Do Nothing, 48 Admin. L. Rev. 109 (1996) [hereinafter Devins, Congressional-Executive Information]; Jonathan L. Entin, **Congress,** the President, and the Separation of Powers: Rethinking the Value of Litigation, 43 Admin. L. Rev. 31 (1991) [hereinafter Entin, Rethinking Litigation]; Peter M. Shane, Legal Disagreement and Negotiation in a Government of Laws: The Case of **Executive Privilege** Claims Against **Congress,** 71 Minn. L. Rev. 461 (1987) [hereinafter Shane, Legal Disagreement]; Peter M. Shane, Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information, 44 Admin. L. Rev. 197 (1992) [hereinafter Shane, Negotiating for Knowledge]. One prominent commentator has argued that courts should refuse to resolve separation of powers disputes between the legislative and executive

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branches. See Jesse H. Choper, Judicial Review and the National Political Process 260-379 (1980). But see Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 15-17 & n.101 (1988) (criticizing the premises of Choper's argument); Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 621 n.194 (1984) (noting that Choper's proposal would require significant modification of justiciability doctrines).

n13 H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949).

n14 See Entin, Rethinking Litigation, supra note 12, at 53; Shane, LegalDisagreement, supra note 12, at 465-66.

n15 See infra Pt. II.

n16 See M.J.C. Vile, Constitutionalism and the Separation of Powers 13-18 (1967).

n17 The Federalist No. 47, at 302 (James Madison) (Clinton Rossiter ed., 1961). Madison went on to warn that tyranny impended only "where the whole power of one department is exercised by the same hands which possess the whole power of another department." Id. at 302-03.

n18 The Federalist No. 48, supra note 17, at 308 (James Madison) (Clinton Rossiter ed., 1961).

n19 The Federalist No. 51, supra note 17, at 321-22 (James Madison) (Clinton Rossiter ed., 1961).

n20 Id. at 322.

n21 See U.S. Const. art. II, § 1, cl. 8.

n22 See id. art. VI, cl. 3.

n23 See Louis Fisher, Constitutional Dialogues 233-34 (1988); Joseph M. Bessette & Jeffrey Tulis, The Constitution, Politics, and the Presidency, in The Presidency in the Constitutional Order 3, 11 (Joseph M. Bessette & Jeffrey Tulis eds., 1981); Paul Brest, The Conscientious Legislator's Guide to Constitutional Interpretation, 27 Stan. L. Rev. 585, 587 (1975); Stephen F. Ross, Legislative Enforcement of Equal Protection, 72 Minn. L. Rev. 311, 313-14 (1987).

n24 See, e.g., U.S. Const. art. I, § 9 (prohibiting bills of attainder, ex post facto laws, expenditures not authorized by an appropriations statute, and titles of nobility, as well as limiting the grounds for suspending habeas corpus); id. amend. I (forbidding laws that establish or limit free exercise of religion, or that abridge freedom of speech, press, and assembly); id. amend. V (banning double jeopardy, self- incrimination, or uncompensated takings of private property, as well as deprivation of life, liberty, or property without due process of law).

n25 See, e.g., id. amend. XIII, § 2); id. amend. XIV, § 5; id. amend. XV, § 2.

n26 See, e.g., Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 644-50 (2000); City of Boerne v. Flores, 521 U.S. 507 (1997); Katzenbach v. Morgan, 384 U.S. 641 (1966).

n27 See U.S. Const. art. III, § 2, cl. 1.

n28 See, e.g., Cynthia R. Farina, Supreme Judicial Court Advisory Opinions: Two Centuries of Interbranch Dialogue, in The History of the Law in Massachusetts 353 (Russell K. Osgood

ed., 1992); Mel A. Topf, The Jurisprudence of the Advisory Opinion Process in Rhode Island, 2 Roger Wms. U. L. Rev. 207, 213-14 (1997); Margaret M. Bledsoe, Comment, The Advisory Opinion in North Carolina: 1947 to 1991, 70 N.C. L. Rev. 1853 (1992); Terrance A. Smiljanich, Commentary, Advisory Opinions in Florida: An Experiment in Intergovernmental Cooperation, 24 U. Fla. L. Rev. 328 (1972).

n29 See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

n30 See, e.g., Raines v. Byrd, 521 U.S. 811 (1997); Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000); Chenoweth v. Clinton, 181 F.3d 112 (D.C. Cir. 1999), cert. denied, 120 S.Ct. 1286 (2000); see also Department of Commerce v. U.S. House of Representatives, 119 S.Ct. 765, 779 (1999) (finding no "substantial federal question" in suit filed by one branch of **Congress** after resolving identical issue in case brought by other plaintiffs). For discussion of recent congressional standing jurisprudence, see Neal Devins & Michael A. Fitts, The Triumph of Timing: Raines v. Byrd and the Modern Supreme Court's Attempt to Control Constitutional Confrontations, 86 Geo. L.J. 351 (1997); Jonathan L. Entin, The Dog That Rarely Barks: Why the Courts Won't Resolve the War Powers Debate, 47 Case W. Res. L. Rev. 1305, 1308-09 (1997). At the same time, individual members do have standing to litigate personal claims that they have been treated in a discriminatory manner. See, e.g., Powell v. McCormack, 395 U.S. 486 (1969).

n31 See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (establishing constitutional requirements for standing); Air Courier Conference v. Postal Workers, 498 U.S. 517 (1991) (outlining prudential requirements for standing).

n32 On justiciability, see, e.g., **Nixon** v. United States, 506 U.S. 224 (1993); Goldwater v. Carter, 444 U.S. 996, 1002-06 (1979) (Rehnquist, J., concurring). But see Davis v. Bandemer, 478 U.S. 109, 121-27 (1986) (declining to apply the nonjusticiability doctrine); Immigration Naturalization Service v. Chadha, 462 U.S. 919, 940-43 (1983) (same); Baker v. Carr, 369 U.S. 186, 217 (1962) (same). On ripeness, see, e.g., Abbott Laboratories. v. Gardner, 387 U.S. 136 (1967).

n33 See Bessette & Tulis, supra note 23, at 9-10; Frederick Schauer, Easy Cases, 58 S. Cal. L. Rev. 399, 414 (1985). There is room for debate over what constitutes a bill that is subject to bicameralism and presentment, see INS v. Chadha, 462 U.S. 919 (1983), or over who is an officer of the United States, see Morrison v. Olson, 487 U.S. 654 (1988).

n34 Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

n35 See 2 The Collected Works of Abraham Lincoln 495 (Roy P. Basler ed., 1953) (stating his acceptance of the Scott judgment as determinative of the rights of the parties to the case but rejecting the outcome as a "political rule"); see also 3 id. at 255.

n36 6 A Compilation of the Messages and Papers of the Presidents, 1789-1897, at 5, 9 (James D. Richardson ed., Washington: Government Printing Office 1896) [hereinafter Messages and Papers of the Presidents].

n37 17 U.S. (4 Wheat.) 316 (1819).

n38 2 Messages and Papers of the Presidents, supra note 36, at 576, 582.

n39 Ch. 74, 1 Stat. 596 (expired 1801).

n40 Jefferson explained in an 1804 letter to Abigail Adams that "nothing in the Constitution has given [the Judiciary] a right to decide for the executive, more than to the executive to

decide for them." 4 The Writings of Thomas Jefferson 560, 561 (H.A. Washington ed., Washington, Taylor & Maury 1854).

n41 See Fisher, supra note 23, at 209-15.

n42 See Elizabeth Drew, Washington Journal 5, 45, 304- 05, 328 (1975).

n43 410 U.S. 113 (1973); see Neal Devins, Shaping Constitutional Values 100 (1996). Regan and Bush sought several times to persuade the Court to overrule Roe. See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 844 (1992); Devins, supra, at 109-10.

n44 See Edward H. Levi, Some Aspects of Separation of Powers, 76 Colum. L. Rev. 371, 391 (1976).

n45 See Nelson W. Polsby, **Congress** and the Presidency 206-09 (4th ed. 1986).

n46 See Robert F. Nagel, Constitutional Cultures 18-22 (1989).

n47 See id. at 21; Shane, Legal Disagreement, supra note 12, at 464-65, 492, 501-14.

n48 See id. at 494-96; Shane, Negotiating for Knowledge, supra note 12, at 220-22.

n49 See Devins, Congressional-Executive Information, supra note 12, at 131, 133.

n50 See id. at 114, 135; Shane, Negotiating for Knowledge, supra note 12, at 201.

n51 See Contempt Proceedings Against Secretary of Commerce, Rogers C. B. Morton: Hearings and Related Documents Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Cong. (1975).

n52 See Devins, Congressional-Executive Information, supra note 12, at 125; Shane, Negotiating for Knowledge, supra note 12, at 202-03.

n53 See The Petroleum Import Fee: Department of Energy Oversight: Hearings Before a Subcomm. of the House Comm. on Government Operations, 96th Cong. (1980). At one point, the Subcommittee on Environment, Energy, and Natural Resources voted to hold Secretary Duncan in contempt. See id. at 139.

n54 See Independent Gasoline marketers Council v. Duncan, 492 F. Supp. 614 (D.D.C. 1980).

n55 See The Petroleum Import Fee, supra note 53, at 142; Devins, Congressional-Executive Information, supra note 12, at 125-26; Shane, Negotiating for Knowledge, supra note 12, at 203-05.

n56 See Shane, Legal Disagreement, supra note 12, at 501-08.

n57 See id. at 501-07; Shane, Negotiating for Knowledge, supra note 12, at 205-07.

n58 See IRS Senior Employee Misconduct Problems: Hearings Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations, 101st Cong. (1989); Shane, Negotiating for Knowledge, supra note 12, at 213- 14.

n59 See Shane, Negotiating for Knowledge, supra note 12, at 213-14.

n60 See id. at 214-17.

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n61 551 F.2d 384 (D.C. Cir. 1976), appeal after remand, 567 F.2d 121 (D.C. Cir. 1977).

n62 See id.

n63 See id. at 395.

n64 Id. at 394.

n65 Id. at 395.

n66 United States v. American Tel. & Tel. Co., 567 F.2d 121, 127 (D.C. Cir. 1977).

n67 Id. at 131.

n68 See Devins, Congressional-Executive Information, supra note 12, at 131.

n69 For more details on this dispute, see id. at 118- 20; Shane, Legal Disagreement, supra note 12, at 508-14; Shane, Negotiating for Knowledge, supra note 12, at 207-10.

n70 556 F. Supp. 150 (D.D.C. 1983).

n71 Id. at 153.

n72 See Shane, Legal Disagreement, supra note 12, at 513-14. In addition to encouraging parties involved in interbranch disputes to negotiate rather than litigate their disagreements, the District of Columbia Circuit has sometimes denied legislators judicial relief under the doctrine of equitable discretion. Under this doctrine, plaintiffs with standing to sue had their cases dismissed even when no alternative avoidance device was available. This practice provokes considerable controversy. For a careful analysis, see Sophia C. Goodman, Note, Equitable Discretion to Dismiss Congressional-Plaintiff Suits: A Reassessment, 40 Case W. Res. L. Rev. 1075 (1990). The Supreme Court's restrictive approach to standing for congressional plaintiffs may well have sounded the death knell for this doctrine. See supra note 30 and accompanying text.

n73 462 U.S. 919 (1983). See also Process Gas Consumers Group v. Consumer Energy Council, 463 U.S. 1216 (1983), aff'g mem. Consumer Energy Council v. FERC, 673 F.2d 425 (D.C. Cir. 1982) (invalidating one-house legislative veto of administrative regulations); United States, Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (en banc) (per curiam) (invalidating two- house veto of administrative regulations).

n74 See Louis Fisher, The Legislative Veto: Invalidated, It Survives, Law & Contemp. Probs., Autumn 1993, at 273, 288-91; but see Jessica Korn, The Power of Separation 39-40 (1996) (contending that provisions in appropriations should not be regarded as legislative vetoes).

n75 See Fisher, supra note 74, at 292.

n76 The sophistication, knowledge, and resources of parties to interbranch disputes suggests that compromise will not systematically disadvantage one side. The possibility of such inequalities in other settings has prompted dissents from the general enthusiasm for alternative dispute resolution. See, e.g., Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073 (1984). Because lawyers representing the legislative and executive branches have different roles than do attorneys for private litigants, see Shane, Legal Disagreement, supra note 12, at 493- 94, concerns that government attorneys will be adversely affected by negotiated resolution of interbranch disputes have little validity in this context, whatever cogency they might have in other contexts. See Kevin C. McMunigal, The Costs of Settlement: The Impact

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of Scarcity of Adjudication on Litigating Lawyers, 37 UCLA L. Rev. 833, 848-77 (1990).

n77 520 U.S. 681 (1997).

n78 See id. at 684-85.

n79 See id. at 686-87.

n80 See id. at 692.

n81 See id. at 693-94.

n82 See id. at 702.

n83 Id.

n84 See id. at 703-05.

n85 See id. at 705-07.

n86 See id. at 708.

n87 See id. at 707-08.

n88 See id. at 708-09.

n89 See id. at 708.

n90 See id. at 724 (Breyer, J., concurring).

n91 See id. at 722 (Breyer, J., concurring).

n92 See id. at 723 (Breyer, J., concurring).

n93 In re Sealed Case, 148 F.3d 1073, 1074-76 (D.C. Cir.) (per curiam), cert. denied sub nom. Rubin v. United States, 525 U.S. 990 (1998).

n94 See id. at 1074.

n95 See id. at 1076.

n96 See id. at 1075.

n97 Id. at 1076.

n98 See id. at 1078.

n99 See id. at 1077-78.

n100 See id. at 1079. This point is reminiscent of the Supreme Court's suggestion that **Congress** might act to allow the President to obtain a postponement of private damage actions relating to his conduct before taking office. See Clinton v. Jones, 520 U.S. 681, 709 (1997).

n101 See In re Lindsey, 158 F.3d 1263 (D.C. Cir.) (per curiam), cert. denied sub nom. Office of the President v. Office of Indep. Counsel, 525 U.S. 996 (1998).

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n102 See id. at 1267.

n103 See id. at 1282-83.

n104 Id. at 1276.

n105 See id. at 1278-83.

n106 See id. at 1267 (citing In re Sealed Case (Espy), 121 F.3d 729, 754 (D.C. Cir. 1997)).

n107 See Clinton v. Jones, 520 U.S. 681, 722-23 (1997) (Breyer, J., concurring in the judgment).

n108 See Mark J. Rozell, **Executive Privilege:** The Dilemma of Secrecy and Democratic Accountability 83-141 (1994); Randall K. Miller, Congressional Inquests: Suffocating the Constitutional Prerogative of **Executive Privilege,** 81 Minn. L. Rev. 631, 670-79 (1997); Mark J. Rozell, **Executive Privilege** and the Modern Presidents: In **Nixon's** Shadow, 83 Minn. L. Rev. 1069 (1999).

n109 See In re Lindsey, 158 F.3d at 1286-87 (Tatel, J., concurring in part and dissenting in part); Randall K. Miller, Presidential Sanctuaries After the Clinton Sex Scandals, 22 Harv. J.L. & Pub. Pol'y 647, 673-74 (1999).

n110 See United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991); United States v. North, 910 F.2d 843 (D.C. Cir. 1990), modified on reh'g, 920 F.2d 940 (D.C. Cir. 1990).

n111 See Shane, Negotiating for Knowledge, supra note 12, at 225.

n112 See id. ("Executive employees also believe that **Congress** underweighs the negative impact of oversight on executive branch deliberations . . . .").

n113 See Devins, Congressional-Executive Information, supra note 12, at 114.

n114 See Richard A. Posner, An Affair of State 263-64 (1999).

n115 See Morris P. Fiorina, An Era of Divided Government, 107 Pol. Sci. Q. 387, 388 (1992). For a comparative perspective, see Matthew Soberg Shugart, The Electoral Cycle and Institutional Sources of Divided Presidential Government, 89 Am. Pol. Sci. Rev. 327 (1995).

n116 See David R. Mayhew, Divided We Govern 76 (1991).

n117 See id. at 37-50.

n118 See, e.g., David W. Brady & Craig Volden, Revolving Gridlock (1998); Morris Fiorina, Divided Government (2d ed. 1996); Keith Krehbiel, Pivotal Politics: A Theory of U.S. Lawmaking (1998).

n119 See Sarah A. Binder, The Dynamics of Legislative Gridlock, 1947-76, 93 Am. Pol. Sci. Rev. 519 (1999); George C. Edwards et al., The Legislative Impact of Divided Government, 41 Am. J. Pol. Sci. 545 (1997).

n120 See Mayhew, supra note 116, at 76.

n121 See Bruce I. Oppenheimer, The Importance of Elections in a Strong Congressional Party Era: The Effect of Unified vs. Divided Government, in Do Elections Matter? 120, 126- 34 (Benjamin Ginsberg & Alan Stone eds., 3d ed. 1996).

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n122 See Miller, supra note 109, at 632 ("Over the past two decades, **Congress** and the President have engaged in increasingly bitter constitutional warfare over access to information."); Matthew Cooper Weiner, Note, In the Wake of Whitewater: **Executive Privilege** and the Institutionalized Conflict Element of Separation of Powers, 12 J.L. & Pol. 775, 776 (1996) ("[T]he Executive branch has either invoked or threatened to invoke **executive privilege** in nearly all of the major political 'scandals' of modern times . . . .").

n123 To qualify, an investigation must have generated at least 20 front-page stories in the New York Times during any **Congress** in the relevant time period. The story must have involved a charge of executive misconduct by a congressional committee member, committee staffer, witness, or informant, or a response to such a charge by a current or former executive official. See Mayhew, supra note 116, at 9-11.

n124 See id. at 31-32.

n125 See supra text accompanying note 123 .

n126 See supra text accompanying note 76.

n127 See supra note 50 and accompanying text.

n128 See Barbara Hinkson Craig, Chadha: The Story of an Epic Constitutional Struggle 49-50, 56-57 (1988).

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The Constitution divides federal power into three separate but overlapping categories: legislative, executive, and judicial. [1] Giving precise content to the powers of these three great departments of the national government has proven difficult. Part of the difficulty has been political. Both **Congress** and the President are elected by and accountable to the people in whose name the Constitution was adopted, although only the chief executive has a truly national constituency. [2] On a more basic level, however, the Constitution did not precisely define the powers it vested in the federal **[*658]** government. Instead, the Framers established a complex set of checks and balances to structure relationships between and among the branches to promote the twin values of governmental efficiency and individual liberty. [3] For example, **Congress** was given the legislative power, but the President received a qualified veto over bills approved by the House and Senate, which may, in turn, override an executive veto by a supermajority vote in both chambers. [4] The President was made Commander in Chief of the armed forces, [5] but **Congress** was granted the power to declare war. [6] The President was authorized to appoint "Officers of the United States," but subject to "the Advice and Consent of the Senate." [7]

The result was "a government of separated institutions sharing powers." [8] This has provided ample opportunity for turf battles between the political branches, a perennial aspect of American public life. **Congress** and the President have often sought judicial resolution of separation of powers disputes, because, as Alexis de Tocqueville wrote more than a century and a half ago, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question," [9] and because, as Chief Justice Marshall observed even longer ago, "It is emphatically the province of the judicial department to say what the law is." [10] Although the Supreme Court has decided a surprisingly large number of these disputes over the past three decades, [11] both judges and commentators have urged the **[*659]** political branches to find alternative ways of resolving their disagreements. [12] Judges have been reluctant to resolve the "great silences of the Constitution," [13] and commentators have maintained that the political system as a whole would be better served if these matters were negotiated rather than adjudicated. [14] Nevertheless, the Clinton Administration litigated several disputes relating to the scope of presidential privilege and lost almost every time. [15] Although the issues arose in the context of lawsuits in which **Congress** was not a party, the legislative branch might regard the resolution of those cases as grounds for greater assertiveness in future turf battles with the White House.

This Article assesses some of the implications of the Clinton litigation for future **executive privilege** controversies, with particular emphasis on whether this litigation might have reduced the prospects for interbranch accommodation. Part I summarizes the argument for negotiation rather than litigation of **executive privilege** disputes between **Congress** and the President. Next, Part II assesses the possible impact of recent judicial rulings on the White House's negotiating position. Finally, Part III briefly considers the role of divided government that has loomed so large in the impeachment and related controversies.

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I. Arguments Against Litigating Interbranch Disputes

A. Arguments from Constitutional Structure

Those who prefer negotiation to litigation of **executive privilege** and similar disputes emphasize the structure of the Constitution. In particular, the Framers rejected the "pure doctrine" of separation of powers, which assigns each branch a unique and unshared function, in favor of a checks and balances system that gives each branch limited control over the operation of the other branches. [16] This decision reflected Madison's view that separation of powers "did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other." [17] Instead of relying on "parchment barriers," [18] the Framers sought to provide each branch with "the necessary constitutional means and personal motives to resist encroachments of the others." [19] The constitutional design was based on the premise that "[a]mbition must be made to counteract ambition" [20] in a way that would channel interbranch relationships in a constructive direction. The constitutional design, in other words, afforded the political branches ample resources with which to defend their positions without relying on the Judiciary to serve as referee. Moreover, that design appears to authorize, if not to require, legislators as well as presidents to make their own judgments about the meaning of the Constitution.

Among the provisions that empower these nonjudicial officials to interpret the Constitution are the oath requirement for both the chief executive [21] and members of **Congress.** [22] Faithfulness to their oath requires these persons to consider the constitutionality of their actions. [23] Moreover, several other provisions of the **[*661]** Constitution specifically prohibit some types of legislation, [24] whereas others authorize the passage of "appropriate" laws. [25] In this regard, the Supreme Court has held that **Congress** is not strictly bound by judicial interpretations of equal protection for purposes of implementing the Fourteenth Amendment, although any legislation passed under this authority is subject to judicial review. [26] Even if they wanted to, therefore, members of **Congress** and the President cannot avoid passing on some constitutional issues.

Beyond this practical necessity, the courts simply cannot resolve every interesting or important dispute about the meaning of the Constitution. First, the judicial power extends only to cases and controversies. [27] This precludes the federal courts from issuing advisory opinions on pending policy issues, something that some state courts may do under certain circumstances. [28] This, in turn, means that only those with standing may challenge government actions in court. If too many persons are affected, no private party will have standing to litigate a generalized grievance. [29] Furthermore, individual members of **Congress** rarely will have standing to assert separation of powers claims against the executive branch. [30] Even if all the barriers **[*662]** to standing are surmounted, [31] other avoidance techniques such as the justiciability and ripeness doctrines could prevent courts from resolving interbranch disputes. [32] Where judicial resolution is unavailable, therefore, **Congress** and the President have no choice but to address some constitutional issues on their own.

As a practical matter, the political branches do interpret the Constitution without guidance from the courts. That document defines important political understandings that typically go

unremarked because they are so commonplace. Everyone understood that the Twenty-second Amendment prevented Presidents Eisenhower, Reagan, and Clinton from seeking election to a third term and that Edward Kennedy had to wait until he had turned thirty years old to succeed to his brother John F. Kennedy's Senate seat. Nor is there any doubt that bills must satisfy the bicameralism and presentment requirements to become laws, or that the Senate must confirm officers of the United States. [33] At the same time, members of **Congress** had to decide for themselves whether there were grounds to impeach President Clinton-and Presidents **Nixon** and Andrew Johnson before him-with no judicial guidance.

Finally, history shows that legislative and executive officials feel free to disagree with judicial interpretations of the Constitution. Abraham Lincoln emphasized his opposition to the Dred Scott decision [34] central to his unsuccessful campaign for the Senate in 1858, [35] and he repeated this position in his first inaugural address:

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[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers . . . . [36]

Other chief executives have taken similar positions contending that judicial interpretations of the Constitution are not necessarily conclusive. Andrew Jackson vetoed a bill to recharter the Second Bank of the United States, which he regarded as unconstitutional, even though the constitutionality of that institution had been upheld in McCulloch v. Maryland. [37] Old Hickory explained:

The **Congress,** the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others . . . . The authority of the Supreme Court must not, therefore, be permitted to control the **Congress** or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve. [38]

Along the same lines, Thomas Jefferson pardoned persons who had been convicted under the Sedition Act of 1798, [39] a law he denounced as infringing First Amendment rights, although lower courts had upheld the measure. [40] Modern chief executives have also denounced what they regarded as objectionable constitutional interpretations by the Judiciary. Franklin D. Roosevelt went so far as to propose his unsuccessful Court-packing plan, [41] Richard **Nixon** implied that he would obey only a "definitive" Supreme Court ruling in the Watergate tapes case, [42] and Presidents Reagan and Bush repeatedly denounced the Court's decision in Roe v. Wade. [43]

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In short, the structure of the Constitution clearly allows and sometimes mandates that the political branches interpret it without judicial guidance. Beyond these matters of principle,

other pragmatic considerations have prompted courts and commentators to encourage **Congress** and the President to avoid litigation of turf disputes.

B. Arguments from Practicality

Political negotiation rather than litigation of **executive privilege** and similar disputes seems fully consistent with the constitutional design, but it also has important practical advantages. Perhaps the most important of these is that an effective government requires a degree of interbranch comity that is inconsistent with frequent resort to the judicial process. The American governmental system rests on unexpressed understandings and an uncodified but shared sense of limits. [44] Understandings are unexpressed and the sense of limits is shared, but uncodified because participants in the political process generally recognize the need to avoid open warfare and because both structural and institutional factors dampen inevitable conflicts. [45]

Judicial rulings, on the other hand, raise the stakes of any particular conflict. This happens because lawsuits clearly identify winners and losers. Decisions are accompanied by opinions setting out rationales that not only explain the specific result, but also presumably will control the disposition of analytically similar disputes that might arise in the future. [46] The prospect of litigation therefore creates incentives for both sides to assert maximum positions for short-term advantage in court and to characterize opposing views as illegitimate. [47] Greater reliance on negotiation can enable participants to focus on taking each disagreement as a problem to be solved rather than as an opportunity to score rhetorical points. [48] Moreover, the inherent delays in the court system may exacerbate tension and prevent timely resolution of disputes. [49] From this perspective, negotiated resolutions of specific disagreements can decide discrete questions in ways that can form the basis for other informal arrangements of subsequent interbranch conflicts while recognizing the contrasting but legitimate interests of both **Congress** and the White House.

This nonconfrontational model reflects much of traditional interbranch dispute resolution. The overwhelming majority of congressional requests for information **[*665]** from the executive branch are honored. [50] Even when the executive branch initially refuses to provide information to **Congress,** the dispute typically is resolved without resort to litigation. For example, in 1975, Secretary of the Interior Rogers Morton refused to disclose information about U.S. companies that had been asked to comply with the Arab boycott of Israel. A subcommittee of the House Committee on Interstate and Foreign Commerce voted to hold Morton in contempt. [51] The day before the full committee would have voted on the contempt citation the Secretary made the records available to the subcommittee Chair under an agreement that kept the information confidential. [52] In 1980, Secretary of Energy Charles Duncan refused to give documents concerning President Carter's imposition of a highly controversial fee on petroleum imports to a subcommittee of the House Committee on Government Operations. [53] Several weeks later, following a district court decision in a private lawsuit that invalidated the fee, [54] the Administration disclosed all of the contested documents. [55] In 1982, the Reagan Administration allowed members of a House subcommittee restricted access to a dozen documents relating to Secretary of the Interior James Watt's decision in a controversy over Canadian eligibility to hold American mineral leases; [56] the decision came after seven months of acrimony and with Watt facing an

imminent contempt vote. [57]

Although the threat of litigation clearly loomed in some of these cases, other information disputes have been resolved amicably. In 1989, for instance, a House subcommittee investigating allegations of Internal Revenue Service corruption was given limited access to the records of a taxpayer who reportedly had been targeted for **[*666]** an audit after one of his business competitors bribed an IRS agent. [58] This arrangement was negotiated despite the general prohibition on disclosing taxpayer records to third parties and grand jury information relating to an ongoing criminal probe. [59] The intelligence committees in both the House and the Senate also have negotiated successfully for access to intelligence information held by the executive branch without resort to litigation or the threat of litigation. [60]

The reluctance to rely on ultimate judicial resolution of information disputes is not confined to legislative and executive officials. Courts have encouraged parties involved in pending litigation to negotiate their differences. Perhaps the most notable illustration of this phenomenon is United States v. American Telephone & Telegraph Co., [61] which involved a congressional subpoena to the telephone company covering information about warrantless domestic wiretaps for national security purposes. The Justice Department obtained an injunction preventing AT&T from turning over the records encompassed by the subcommittee subpoena, [62] but the United States Court of Appeals for the District of Columbia Circuit instructed the executive branch to negotiate with the subcommittee in hopes of reaching a compromise that would accommodate the interests of both sides. [63] Judge Leventhal explained: "A court decision selects a victor, and tends thereafter to tilt the scales. A compromise worked out between the branches is most likely to meet their essential needs and the country's constitutional balance." [64] Because the parties had almost reached such a compromise, "[t]he court may be of assistance in avoiding the broad confrontation now tendered, and in facilitating a complete accord . . . ." [65] After the parties failed to reach agreement after remand to the district court, the court of appeals once more declined to resolve the controversy. Emphasizing that "the coordinate branches do not exist in an exclusively adversary relationship to one another," Judge Leventhal urged "each branch [to] take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation" so as to "avoid[ ] the mischief of polarization of disputes." [66] Although the parties had clarified their positions, the court declined to "impose a rigid arrangement" but to "continue approach of **[*667]** gradualism." [67] Thereafter the Justice Department and the subcommittee reached a settlement and the case was dismissed. [68]

Several years later, a federal district court declined to resolve a highly contentious dispute involving a House subcommittee and Anne Gorsuch, the administrator of the Environmental Protection Agency, and a House subcommittee. She was cited for contempt after refusing, on instructions from President Reagan, to comply with a subpoena to turn over records relating to the Agency's enforcement of the Superfund program. [69] In United States v. House of Representatives of the United States, [70] Judge Smith dismissed the Justice Department's suit seeking a declaration that Gorsuch had acted lawfully in withholding the subpoenaed records. Instead, he encouraged the parties to negotiate their differences: "The difficulties apparent in prosecuting Administrator Gorsuch for contempt of **Congress** should encourage the two branches to settle their differences without further judicial involvement. Compromise and cooperation, rather than confrontation, should be the aim of the parties." [71] Gorsuch resigned a month later. The White House subsequently turned over all of the disputed records,

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although, some sensitive documents were disclosed subject to confidentiality provisions. [72]

Finally, even when the courts actually rule on disputes, the political branches sometimes work out their own accommodations to circumvent the judicial resolutions. The most notable example of this phenomenon is the legislative veto, which supposedly was invalidated in Immigration and Naturalization Service v. Chadha. [73] Despite the Court's ruling in Chadha, **Congress** during the following decade passed **[*668]** over two hundred legislative veto provisions, mostly in appropriations bills. [74] The executive branch acquiesced, largely because these devices afford greater flexibility than strict compliance with the legislative formalities purportedly required by Chadha. [75]

In sum, both constitutional theory and practical considerations provide powerful arguments that **Congress** and the White House should avoid litigating over **executive privilege** and similar disputes. The political branches must negotiate some of these disputes because judicial review may be unavailable. Even when the courts are theoretically accessible, the Judiciary still may avoid resolving such disputes. The cost, delay, and uncertainty of litigation also afford powerful incentives to prefer compromise. [76]

II. The Impact of the Clinton Litigation

The Clinton Administration has been involved in several lawsuits in which presidential power was at least indirectly in question. One of these cases concerned the chief executive's temporary immunity from private lawsuits regarding events that occurred before he took office; the others, decided in the appellate courts rather than the Supreme Court, concerned testimonial privileges for Secret Service agents and White House lawyers. Although **executive privilege** was not directly at issue in these rulings, the rejection of the executive branch's position might have implications for future relationships between **Congress** and the President.

A. Clinton v. Jones

In Clinton v. Jones, [77] a unanimous Supreme Court rejected the argument that a **[*669]** sitting President is entitled to defer lawsuits relating to his private conduct before taking office. Former Arkansas state employee Paula Corbin Jones sued President Clinton for allegedly boorish sexual advances that occurred during Clinton's tenure as governor of Arkansas. [78] Clinton sought to delay proceedings until his presidential term of office had ended. [79]

The Court rejected his request for several reasons. First, no precedent supported the request. Only three sitting chief executives had been subjected to civil suits for their pre-presidential conduct. [80] Second, absolute presidential immunity from civil damages relating to official conduct was intended to prevent the Chief Executive from being intimidated by extraneous

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influences in the performance of his official duties. However, Clinton based his request for delay on potential distraction rather than intimidation. [81] Moreover, whatever potential for distraction actually existed would not interfere with the Chief Executive's performance of his constitutional duties. Allowing this private lawsuit to proceed would hardly overwhelm the presidency in light of the historical paucity of civil tort claims against sitting presidents' private behavior before taking office. [82] The Court also held that even "quite burdensome interactions" with the judicial branch do not impermissibly burden the President. [83] Courts may review official presidential conduct, subject the Chief Executive to judicial process under the right conditions, and even compel the President to testify or provide information. [84] Having concluded that the Constitution did not entitle Clinton to a delay in the trial, the Court further held that the district judge abused her discretion in deferring the trial while allowing discovery to proceed. [85] The district judge failed to give adequate weight to Jones's interest in avoiding prejudice arising from the passage of time and gave too much weight to the possibility that other unrelated lawsuits might prevent Clinton from performing his official duties. [86] Any actual burden on the chief executive's schedule could be handled as it arose. [87] Finally, the Court discounted the prospect of politically inspired lawsuits designed to hinder or distract the President because of the availability of sanctions for vexatious litigation. [88] Also, such cases typically are resolved before trial and therefore would make few demands on his time. [89]

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Only Justice Breyer questioned this analysis, but even he concurred in the judgment, concluding because Clinton failed to justify his request for a trial postponement. [90] Breyer was skeptical of the Court's assumption that presidents have little reason to fear hostile private lawsuits initiated by political enemies, [91] and warned that if his fears were vindicated, the Judiciary would have to develop rules to accommodate the chief executive in such cases. [92]

B. The Secret Service Case

During the course of investigating Clinton's relationship with Monica Lewinsky, Independent Counsel Kenneth Starr sought to compel the testimony, before a grand jury, of Secret Service agents assigned to guard the President. [93] The Treasury Department, of which the Secret Service is a part, resisted the subpoenas on the basis of a protective function privilege. [94] A unanimous panel of the U.S. Court of Appeals rejected this privilege claim.

The court noted that this was apparently the first time that agents guarding the President had ever been compelled to testify about their work. [95] The court also emphasized that the case arose under Rule 501 of the Federal Rules of Evidence, rather than under the Constitution. [96] While agreeing that protecting the Chief Executive was "a public good of the utmost importance," [97] the court found that the government had provided insufficient reason to believe that rejection of the asserted privilege would place the President at risk. [98] Moreover, the very narrowness of the proposed privilege, the government's inability to enforce a gag rule against agents who do not have to agree to confidentiality are not sworn to secrecy as a condition of employment, and the expiration of the privilege at the end of the presidential term effectively vitiated whatever utility the privilege may have. [99] Accordingly, the court left the question of recognizing such a privilege to **Congress.** [100]

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C. Government Attorney-Client Privilege

The last of the Clinton-related cases involved the assertion of attorney-client privilege by Bruce Lindsey, Deputy White House Counsel, when he testified before the grand jury empaneled by the independent counsel. [101] Lindsey invoked **executive privilege** at one point to avoid answering some questions, but he abandoned that claim on appeal after it was rejected by the district court. [102] The court of appeals rejected Lindsey's attorney-client privilege claims on the basis that a government lawyer has an obligation not to withhold information relating to possible criminal activities from a grand jury. [103] The majority recognized that its ruling might "chill some communications between government officials and government lawyers," but emphasized that those officials seeking complete confidentiality could always talk with private counsel instead. [104] The court went on to reject several arguments that Lindsey was functioning as the President's personal attorney, so the privilege still did not apply. [105]

D. Implications

Assessing the significance of these cases for future **executive privilege** disputes between **Congress** and the White House is complicated by several factors. The most obvious of these factors is that Jones and the Secret Service case did not involve any claim of **executive privilege.** The third case, Lindsey, did have an **executive privilege** component, but that argument fell by the wayside after the district court concluded that, in the context of a criminal investigation, the independent counsel had shown both a strong need for the information and the unavailability of that information from any other source. [106]

As Justice Breyer suggested in his Jones concurrence, however, the import of these decisions might be less in the details of judicial rationale than in the bottom line: in all these cases, what many regarded as the President's position was rejected. Because the chief executive appears more vulnerable to suit, his adversaries might be emboldened to try their luck. [107] Moreover, the weakness of the **executive privilege** claim in Lindsey could encourage **Congress** to resist presidential assertions of privilege even more strongly than the legislative branch already does. Indeed, one **[*672]** lesson of the post-Watergate era has been the practical difficulty that presidents face in asserting **executive privilege.** [108]

On this view, one legacy of the Clinton Administration is the weakening of the presidency. There are, however, reasons to doubt the magnitude of the harm that the executive branch has suffered at Clinton's hands. To be sure, Lindsey might well complicate the White House's deliberative processes by subjecting staff lawyers to outside interrogation into potential criminal misconduct. Because of increased media and congressional concern over executive illegality and the personalization of much contemporary political discourse, presidents might choose to rely less on government lawyers and more on personal attorneys who can assert attorney-client privilege. [109] Moreover, the prospect that government lawyers will be required to testify about possible official illegalities might well discourage presidential advisors from

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AUTHOR-ABSTRACT:
The Office of White House Counsel sits at the intersection of law, politics, and policy. Its distinctive challenge is to advise the president to take actions that are both legally sound and politically astute. Often called "the president's lawyer," the counsel's office serves, more accurately, as the "presidency's lawyer," with tasks that extend well beyond the exclusively legal. Drawing on interviews with previous occupants of the office, the authors examine the unit's numerous activities, its place in the larger White House and executive branch, and the experiences of those who have served as counsel.

BODY:
The White House counsel's office is at the hub of virtually all presidential activity. Its mandate is to be watchful for and attentive to legal issues that may arise in policy and political contexts involving the president. To fulfill this responsibility, it monitors and coordinates the presidency's interactions with other players in and out of government. Often called "the president's lawyer," the counsel's office serves, more accurately, as the "presidency's lawyer," with tasks that extend well beyond exclusively legal ones. These have developed over time depending on the needs of different presidents, the relationship between a president and a counsel, and contemporary political conditions.

Today, the office carries out many routine tasks, such as vetting all presidential appointments and advising on the application of ethics regulations to White House staff and executive branch officials, but it also operates as a "command center" when crises or scandals erupt. Thus, the more sharply polarized political atmosphere of recent years has led to greater responsibility, as well as heightened political pressure and visibility, for the traditionally low-profile counsel's office. The high-stakes quality of its work has led to a common sentiment among counsels and their staff that there is "zero tolerance" for error.
Law, Politics, and Policy

A helpful way to understand the counsel's office is to see it as sitting at the intersection of law, politics, and policy. Consequently, it confronts the difficult and delicate task of trying to reconcile all three without sacrificing too much of any one. The distinctive challenge confronting the counsel's office is to advise the president to take actions that are both legally

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Federal ethics statutes and regulations typically are more stringent than those enacted in the states. Likewise, the standards for the legislative and executive branches are different, creating the need for former congresspersons and staffers to be carefully briefed.

> At the beginning of my tenure, we circulated [an ethics] memo that had all the details. Everyone who was going to be appointed by the President would get this memo, everyone on the White House staff got this memo. It was a memo from me and it laid out in detail what all the rules were. But then I also would meet with groups of people who were about to enter on to their jobs, in some cases they already had entered on to the jobs, maybe thirty at a time.... (Wallison 2000, 27)

These orientation sessions would be reprised when an individual left the White House. For example, the counsel staff would review the Presidential Records Act and "remind everyone that these are presidential documents; you're not walking out of the White House with them; these are things that become part of the permanent record" (Brady 1999, 7).

The need to educate and monitor staffers is particularly acute during the campaign seasons, both congressional and presidential. The counsel's office staff provide general briefings and memoranda about campaign activities. Changes in the associated statutes may create an even greater need for this information.

> We had two very active ethicists in the Office. One of them was Beth Nolan and the other was Cheryl Mills.... So the driving force was that the Hatch Act had just been amended and it has caused some changes. It now allowed people to get more involved than they had been previously. (Mikva 2000, 17)

As is suggested by the counsel's role in responding to document requests and subpoenas directed to members of the White House staff and other executive branch officials, many counsels also have had to oversee investigations. Whether conducted by independent counsels or congressional committees, these proceedings have consumed much of the counsel's resources.

> My first job [in the Clinton administration], which occupied the bulk of my time really, was to look in to the so-called White House--Treasury relationship having to do with the RFC [request for comment] in reference to the Justice Department of the whole Whitewater matter.... Then I had to look into the Espy case; I had to look into the Cisneros case, et cetera.... A lot of [developing ethics rules for the White House staff] was done in collaboration with the so-called Office of Legal Ethics, which is

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> an independent quasi-executive branch agency, and which has the responsibility under the various ethics statutes to write regulations, give opinions as to what you can and cannot do. (Cutler 1999, 20)

Bernard Nussbaum (1999, 4) described Washington as practicing a "culture of investigation." That environment is not likely to change in the near future. Although the expiration of the independent counsel statute almost certainly will alter the investigatory process, investigations will doubtless continue, with profound implications for the counsel's office.

Handling White House Contacts with the Department of Justice and the Rest of the Executive Branch

Depending on the course of politics and policy in an administration, the White House counsel routinely interacts with most executive branch departments and agencies. Because of the nature of its responsibilities, the Department of Justice is especially important.

Department of Justice. Three factors have influenced the extent and nature of a White House counsel's contact with the Department of Justice: the scope of the president's judicial agenda, including judicial nominations; the strength of the president's relationship with the attorney general; and the relative activism of the White House counsel and the attorney general as policy makers. A larger judicial agenda creates the need for more contacts with the Justice Department. Similarly, a strong presidential relationship with an activist attorney general may establish a line of communication that often excludes the White House counsel.

Former counsels strongly recommend that the counsel's office function as a gatekeeper for all contacts between the White House and the Department of Justice.

> All requests for OLC opinions had to go through me, all communications with the department had to go through my office.... there were certain exceptions but no one could call over to the Deputy Attorney General and the solicitor general directly; they had to go through me. My typical point of contact was the Deputy Attorney General for everything except OLC opinions, then I would call the head of OLC. (Culvahouse 1999b, 16)

This oversight is designed to ensure that communications between the White House and the Justice Department are properly conducted. Any effort to influence the legal judgments of the department would generate significant difficulties for an administration. Reagan counsel Culvahouse recalled, for instance, that departmental statements of administrative policy were routinely reviewed unless Justice was issuing them.

Attorney general. The attorney general and the White House counsel appear, at first glance, to have similar advisory roles and jurisdictions. Notwithstanding differences in accountability (e.g., the attorney general is subject to Senate confirmation) and location, the distinctive contributions of the White House counsel and the attorney general more often have been negotiated through practice than by invoking abstract principles. Conflict has occurred frequently, and presidential libraries contain numerous memoranda of understanding between attorneys general and White House counsels.

White House counsels and attorneys general have rarely been equals within an

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administration. Presidents have tended to name either an attorney general or a White House counsel with whom they were well acquainted. The selections have, more often than not, been connected to the judicial agenda of the president: a larger judicial agenda generally has coincided with the nomination of a presidential colleague to the attorney general's office.

The appointment of a close presidential colleague as White House counsel may allow the counsel's office to enter into more substantive policy discussions. Although C. Boyden Gray (1999, 2) hedged his comments with a series of qualifiers, he acknowledged his influence on several key legislative negotiations:

> [President George H. W. Bush] kept drawing me into the Civil Rights Bill in 1990-1991. I didn't really want to do that because it was very difficult politically, but he kept yanking me back into it.... But I would say that civil rights was legal policy, not necessarily part of the counsel's office historically any more than the ADA [Americans with Disabilities Act] was. I did very little on the ADA act.... I had a lot to do in the prior administration about teeing it up for then--Vice President Bush to make it a campaign promise during the '88 campaign. But I spent very little time on it once we got in the White House.... I was involved very little, maybe ten or twenty hours worth. It was very little. The hours I spent were very important, it turned out, but I was not involved in the day-to-day negotiation of the language or the lobbying.... I had to have permission to work on the Clean Air Act. I wanted to work on it because I had an interest in it but it was something that [Chief of Staff John] Sununu was wary about and the President was a little nervous about because of the time it would take from other responsibilities.

Office of Legal Counsel. The resources of the OLC--including its institutional memory--render it an invaluable source of legal expertise for the White House counsel. Quite simply, the counsel's office cannot provide all the information and the advising that an administration needs.

> OLC is the single most important legal office in the government. More important really in terms of scholarship and memory and research--White House counsel's office doesn't really have the staff to do all [that] and they shouldn't. It should be done in OLC.... the White House doesn't go to court without the department.... OLC was a huge problem for us in the sense

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> that they were putting on a brake. We were free to ignore their advice but you knew so you did so at your peril because if you got into trouble you wouldn't have them there backing you up, you wouldn't have the institution backing you up.... When in doubt, ask them and they'll tell you where the land mines are. (Gray 1999, 18-19, 21)

Several other counsels echoed Gray's (1999) description of the OLC as a formidable ally and a significant check on the White House counsel's office. Precisely because of the similarities in their responsibilities, however, the relationship between the two can be highly competitive. Both are recognized as legal experts immersed in politics and policy. The fact that these offices' jurisdictions are blurred and unclear only exacerbates the tensions.

> The real conflict between offices, inherent conflict, is between the White House counsel's office and the Office of Legal Counsel at the Justice Department because the White House counsel's office is growing and growing and is acquiring more and more capabilities to do that kind of research and analysis that the Office of Legal Counsel does and it does it for the President. The White House always wins over the agencies, always, because they're closer to the President. So they have first dibs, if you will, on any issue that comes up to the presidential level. If there's a constitutional question about the President's power, if they want, they can make that decision on their own without consulting the OLC. Whenever you get a situation like that where some group has first opportunity and doesn't even have to inform the other group over time that first group is going to grow larger and larger and more competent and eventually freeze out completely the Office of Legal Counsel. (Wallison 2000, 21-22)

Similarly, Gray (1999) stressed that the ambitions of the White House counsel's office can endanger an administration. He advised reestablishing the OLC as an influential legal commentator, concluding that the advantages gained from the OLC's insights far outweigh any disadvantages resulting from its sometimes critical stance.

Still, this competitive relationship does reflect differences between the units. The White House counsel is appointed by the president and does not require Senate confirmation. The members of the Justice Department include presidential appointees who are subject to Senate confirmation, nominees who need not be confirmed, and careerists. Thus, department officials have numerous and crosscutting loyalties. Furthermore, although the president's claim to executive privilege for communications with the White House counsel has been

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delimited in recent years, the Reagan administration may well have sacrificed the possibility of presidents successfully making such claims about the OLC.

> It had to do with a request by the Senate Judiciary Committee for all of William Rehnquist's files when he was head of the Office of Legal Counsel at the Justice Department.... I thought that was simply harassment and I thought they were trying to create the kind of issue they could use to stop the nomination. I and the person who was then head of the Office of Legal Counsel in the Justice Department both felt this was a good executive privilege claim because the Office of Legal Counsel is the lawyer for the entire government, and in effect for the President, and everyone discloses everything to them to get rulings about legal issues. The whole underpinning of the attorney/client privilege, which is part of the executive privilege, is to get people to disclose all relevant information so you can give them the right advice. I thought, if there was ever a case, this was it. So I sent a memo to the President saying I thought he ought to claim executive privilege in this case, but Meese did not like at all that idea. We debated it in front of the President and the President decided he wouldn't claim it.... In the future, if someone wants the files of the Office of Legal Counsel, they are more likely to get them because this precedent exists. (Wallison 2000, 20)

Clearly, then, requesting a legal interpretation from the OLC is a strategic undertaking. If the counsel does not involve the OLC--or, having received the OLC's interpretation, sets it aside--the White House is isolated and will lack support for its actions. This is risky and even dangerous. Boyden Gray (1999), for example, unequivocally concluded that the White House should never go to court without Justice's support. At the same time, the OLC is staffed by experts who cannot claim executive privilege and, in any event, have allegiances that extend beyond the White House.

Other departments and agencies. The White House counsel's contacts throughout the rest of the executive branch are extensive. At the very least, the counsel's office communicates with the general counsels of departments and agencies and processes the paperwork associated with every presidential nominee or appointee. Indeed, with the notable exception of the Justice Department, the White House counsel typically communicates with the executive branch departments and agencies through the general counsels.

> We used to have more or less monthly meetings of all the general

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> counsels.... It's a little more difficult to meet with the general counsels of the so-called independent agencies, as you know, but we do meet even with them on some matters.... A lot of it has to do with the ground rules for executive privilege and turning documents over to Congress which we don't think should be turned over to Congress but which the department under the thumb of Congress always wants to turn over without ever consulting the President whose privilege it is not to provide them. (Cutler 1999, 7)

Boyden Gray (1999) added that exceptions to this rule occurred only when the secretary or the agency chief executive had matters to discuss with the White House counsel. Occasionally, Gray said, he would speak with the deputy secretary. (2) Again, the Justice Department was the standard exception. The White House counsel and the attorney general typically communicated with each other daily.

Principal Relationships in the White House

Within the White House Office, the counsel's principal relationship--and greatest source of influence--has been with either the president or the chief of staff. To whom the counsel reports has frequently been a product of individual counsels' past professional relationships, and this authority relationship has been clearly established at the time of appointment. This clarity is essential if the president wishes to avoid destructive competition between two units that are crucial to the success of the administration and its policy agenda.

The President

In electing to have the White House counsel report directly to the president, presidents often have appointed individuals who were their long-standing friends or professional colleagues. (3) Even with the advantage of a prior relationship with the president, counsels have faced various challenges to their position and their influence. The White House staff is likely to include a number of longtime presidential colleagues, all of whom may compete for access to the Oval Office

Of course, even if the counsel is able to sustain a close relationship with the president, there is no guarantee that the president will seek or follow advice. President Gerald Ford's decision to pardon former president Richard Nixon, arguably the most significant legal decision of his administration, was made without any consultation. Counsel Philip Buchen provided only post hoc support and legal reasoning.

Two administrations have recruited counsels to raise the profile and significantly re-establish the counsel's office within the Washington community. President Jimmy Carter appointed Lloyd Cutler to meet these needs; President Bill Clinton named Cutler, former congressman and U.S. court of appeals judge Abner Mikva, and then former U.S. attorney and D.C. Corporation counsel Charles Ruff. Cutler (1999, 10-11), in particular, has stressed that he entered office with a promise of direct communication with the president.

> When I was asked by the President [Carter] to take this job, it was a mid-life crisis of his administration, the so-called "malaise" period. I

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said, "What kind of a role do you want me to play?" I knew him, but I didn't know him that well. He said, "I want you to play sort of a Clark Clifford role." I got that in writing and, of course, Clifford was so venerable and such a great storyteller, everybody thought that Harry Truman never made a move without consulting Clark Clifford. And every time I got left out of a meeting I would go to Jordan or I would go to the President and I would say, "I think that Harry Truman would have wanted Clark Clifford in this meeting." I was older than all the rest of them so nobody could gainsay me....

The White House counsel and presidential privileges. The issue of confidentiality in the president's communications with the White House counsel has been a matter of intense concern. Of the various legal privileges that a president or a counsel might claim--executive privilege, government attorney--client privilege, work product protection, deliberative process protection, and common interest doctrine--most salient are executive privilege and government attorney--client privilege. (4)

Because the White House counsel's office is in the unique position of providing both political and legal advice to the president, navigating the shoals of presidential privileges is an especially tricky venture. Judicial acceptance of a privilege claim is determined by many factors, such as whether the conversation is political or legal; whether the person is communicating with the president in a legal or political capacity; whether the request for presidential communications comes from the courts, Congress, or an independent counsel; whether the information is needed in a civil or criminal proceeding; whether the asserted public interest in confidentiality outweighs another institution's need for the information; and whether the requested information is available from an alternative source. Varying combinations of these factors will produce different judicial outcomes, making for complex and unpredictable results.

The Clinton administration was embroiled in numerous legal controversies in which it vigorously asserted a whole host of privilege claims, and it found little comfort in the resulting federal court decisions. Legal scholars and commentators reacted critically to the administration's decision to litigate. In contrast, most other White Houses found ways to assert such claims but ultimately chose to resolve the conflicts through compromise. In essence, the Clinton administration forced the issue into the judicial process, and the courts ruled against it, narrowing considerably any maneuverability for future claims.

Chief of Staff

The Reagan administration chose an alternative authority relationship in which the White House counsel reported to the chief of staff. Reagan's White House counsels had previously been professional colleagues of the chiefs of staff. Even so, a change in the chief of staff did not necessarily result in the appointment of a new counsel. The Reagan counsels left office for a variety of personal and institutional reasons: Fred Fielding, because he "was ready to go out into the real world"; and Peter Wallison, because of pressures generated by Iran-contra (Wallison 2000, 1). A. B. Culvahouse, the third and final Reagan counsel, served two chiefs of staff: Howard Baker and Kenneth Duberstein.

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Although reporting to the president through the chief of staff might appear to be a disadvantage, Culvahouse (1999b, 21) disagreed.

> [Howard Baker] is my mentor and my friend. He was my ace in the hole in the White House. I think to the extent I was an effective White House counsel is because he gave me a lot of support as did the President. But people did not try to go around me or over me very frequently and never very successfully.

Still, the Reagan counsels presided over an office that was widely seen as being focused more on law than on policy.

> In the Reagan White House, the counsel's office was viewed as sort of an additional final check. Unlike ... some other White House counsel's offices, we didn't really have a policy agenda. We felt like we were to be honest brokers as well as lawyers. (Culvahouse 1999b, 2)

It may be that having the counsel report to the chief of staff, rather than directly to the president, contributed to changing the orientation of the office.

White House Staff

The White House counsel's office is in contact with virtually every unit in the White House. The consequent dialogues and negotiations add immeasurably to the office's workload. Tight deadlines compound the difficulties.

> [For] everything else [apart from Iran-contra] there were lots of cooks, lots of principals and lots of lawyers, and sometimes just trying to reach a decision or trying to force a decision in a timely way tended to be a lot of what I did.... The timing was forced by your own judgment or sometimes you'd have deadlines. Sometimes you'd have the ranking Republican on the committee calling up and saying if you don't tell us what you think the committee is going to go forward tomorrow regardless. (Culvahouse 1999b, 28)

The following list provides examples of the units with which the counsel's office routinely has established strong relationships.

* Communications, regarding presidential speeches, travel, and campaign expenses. This relationship may be especially close during the campaign seasons, when travel expenses and contacts are subject to strict legal standards.

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* Legislative Affairs, regarding legislation, nominations, and confirmations. Some White House counsels have participated directly in legislative negotiations, even communicating directly with senators about judicial appointments.

* Personnel Office, regarding appointments and clearances. This responsibility also causes the White House counsel's office to consult regularly with the FBI and (at least through the Clinton years) the ABA.

* Office of Political Affairs, regarding travel and campaign expenses.

* Press Office, regarding presidential press conferences. In some administrations, the counsel's office also has prepared presidential statements about federal court rulings that affect the presidency or the executive branch.

* OMB, regarding budget proposals, rescissions, and deferrals.

* NSC staff, regarding foreign policy.

Organization and Operations

Since the 1970s, the size of the White House counsel's office has expanded from two to three attorneys to more than forty at times during the Clinton administration. Some former counsels attribute this growth to the increasingly hostile Washington environment faced by recent presidents and the mounting scrutiny of their appointees. Lloyd Cutler (1999, 7) recalled, for example,

> In Carter's day, when I came in, including myself, there were six lawyers.
>
> Twenty-five years later, under Clinton, there are probably forty lawyers,
>
> fifty lawyers. Part of that is dealing with the attacks on the President
>
> and these enormous vetting responsibilities that descend on the White House
>
> counsel.

Similarly, John Tuck, an aide to Chief of Staff Howard Baker in the Reagan White House, recalled "a whole huge shadow counsel's office" that developed following the Iran-contra revelations (as quoted in Baker 1999, 15).

Internal Division of Labor

The counsel's office has been structured internally in numerous ways. Typically, however, the White House counsel, as a senior presidential adviser, participates in myriad activities and issues, many of which are unpredictable and unplanned. Indeed, the counsel's time often is consumed almost completely in handling crises or unexpected demands. Thus, Reagan counsel Peter Wallison (2000, 34) remembered,

> At least politics and crises are the two things that you have to be sure
>
> [to handle]--one of the reasons you want to get a staff that is capable and
>
> has the lines of authority and lines of responsibility clear is that at
>
> some point you are going to be completely consumed with something and that

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means your office has to function without you. So you need a really good and capable deputy, which I had [in] Jay Stephens, and you need very good lawyers, and then they have to know what their areas of responsibility are so that they don't have to keep coming to you.

Counsels beginning with John Dean have all included at least one deputy counsel on their staffs (see the appendix). A deputy counsel routinely serves as the primary overseer of workflow within the office as well as a substitute for the counsel. The deputy also may perform other tasks at the direction of the counsel.

James Castello was the deputy who really was my person and managed the staff and was at the second meeting I couldn't be at if I was at the first one. [He] probably had the most to do with the legislative agenda. He met regularly with the legislative office and made sure that there weren't any surprises on the Hill that the President didn't know about or what was going up as our core legislation didn't have any pitfalls in it. (Mikva 2000, 21)

Such deputies typically are charged with assuring that the counsel sees only the highest-priority items. On personnel issues, for instance, Reagan counsel Culvahouse (1999b, 4) stated,

I clearly was the principal advisor to the President ... within the White House on the vetting process which included not only the people to be nominated by the President but also people who would be appointed by the President even if they did not require Senate confirmation as well as anyone who would get a White House staff badge.... I never saw their files or anything, unless there was a problem. So the default rule was if there was a problem certified as such by my deputy then it would be put on my desk. So I saw 10 per cent of the files roughly.

In the Clinton White House, longtime presidential confidant Bruce Lindsey served for much of the administration as a "deputy counsel for special projects." According to Abner Mikva (2000, 17), besides a host of other activities,

there was always a special project he was involved in either for the President or because the President would indicate to me or [Chief of Staff]

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sound and politically astute. For example, A. B. Culvahouse recalled his experience on arriving at the White House as counsel and having to implement President Reagan's earlier decision to turn over his personal diaries to investigators during the Iran-contra scandal.

> Ronald Reagan's decision to turn over his diary--that sits at the core of the presidency.... You're setting up precedents and ceding a little power. But politically, President Reagan wanted to get it behind him. (As quoted in Bendavid 1994, 13)

Nonetheless, Culvahouse (1999b, 28) added, the counsel is

> the last and in some cases the only protector of the president's constitutional privileges. Almost everyone else is willing to give those away in part inch by inch and bit by bit to win the issue of the day, to achieve compromise on today's thorny issue.

Indeed, Lloyd Cutler, counsel to both Presidents Carter and Clinton, made a similar point, observing that the most challenging part of the counsel's job is to be the one to tell the president no. Cutler (1999, 3-4) noted that in return for being

> on the cutting edge of problems, the counsel needs to be someone who has his own established reputation ... someone who is willing to stand up to the president, to say "No, Mr. President, you shouldn't do that for these reasons."

Consequently, the most essential task a counsel can perform for a president is to act as an early warning system for potential legal trouble spots before they erupt. For this role, a counsel must keep his or her "antennae" constantly attuned. Being at the right meetings at the right time and knowing which people have information or the technical expertise in specific policy or legal areas are key. Lloyd Cutler (1999, 4) noted,

> the White House counsel will learn by going to the staff meetings, et cetera, that something is about to be done that has buried within it a legal issue which the people who are advocating it either haven't recognized or push under the rug.

Disaster can also strike when counsels do not make good use of the Office of Legal Counsel (OLC) in the Department of Justice for guidance on prevailing legal interpretations and opinions on the scope of presidential authority. The counsel must sift through the legal opinions and offer the president his or her best recommendation. Cutler (1999, 4) described how this process works:

> [OLC staffers] are where the President has to go or the President's counsel

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> Leon [Panetta] that he wanted somebody that could really use his clout effectively. For instance, Bruce was the point man on the baseball strike.... I don't think I said Bruce, go do the baseball strike. It was known that we needed somebody who could go in there and say the President really thinks this ought to be done or that ought to be done, and nobody could do that like Bruce.

In addition, the counsel's immediate staff (often an administrative assistant and an executive secretary) usually is responsible for ensuring that external deadlines are met and internal work is parceled out appropriately. Culvahouse (1999b, 8), for example, reported having

> three non-attorney people who worked for me: an executive assistant, an administrative assistant and an executive secretary. The first two spent most of their time assigning out projects and making sure the work was done and the deadlines were observed.

In recent White Houses, aides with the title of "special counsel" have on occasion appeared in the counsel's office. Typically, these are staffers assigned to handle short-term or "crisis" situations that may involve congressional or other investigations, such as Iran-contra or Whitewater. Most observers attribute the swelling of the counsel's office over the course of an administration to such crises and to the heightened external scrutiny of administrations.

Moreover, given the range of diverse responsibilities that have come to be lodged in the White House counsel's office, some substantive division of labor usually appears. For instance, a deputy counsel and one or more other members of the office participated in judicial selection in the Carter, Reagan, George H. W. Bush, and Clinton administrations, which also appears to be the case in the George W. Bush White House.

Similarly, after the initial flurry of vetting for nominations and appointments at the beginning of an administration, typically one assistant or associate counsel and a security assistant (and staff) in the office handle FBI and financial disclosure reports (see, e.g., Wallison 2000, 12 ff). This lawyer also is responsible for taking the confidential reports to the chairs and ranking minority members of the appropriate Senate committees, with potentially problematic allegations flagged. In the second term of the Clinton administration, a "senior counsel" was among those handling these responsibilities.

Other tasks that commonly have been assigned to particular lawyers in the counsel's office have included interpreting ethics legislation and additional ethics rules issued by an administration. As noted earlier, counsels provide this advice for staffers in the White House Office and Executive Office of the President and, on occasion, for cabinet officials and other presidential appointees. Still other attorneys in the counsel's office focus on issues of international trade and transportation, defense and national security policy (to support the counsel's role as chair of the War Powers Committee), and government regulation. Presidential travel also has been assigned to a counsel's office attorney. In the Reagan White House, for example,

> Alan Raul ... was in charge of presidential travel. That was a big and

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difficult issue because of what had to be paid for by private funds, by political funds or by government funds. So they were constantly, the people in the political office and in the travel office, they were constantly calling Alan for advice on that subject. (Wallison 2000, 31)

Rhythms of Quadrennial Governance

Over the course of a presidential term, the activities, demands, and emphases of the counsel's office typically follow common patterns. The first year is both demanding and somewhat distinctive. After that, the work of the counsel's office--like much of the rest of the administration--to a significant extent reflects the presidency's efforts to respond to external deadlines. Other tasks arise more routinely throughout an administration.

First year. A major task that begins well before Inauguration Day and continues throughout most of the first year is vetting for nominations and appointments. C. Boyden Gray (1999, 1) remembered, "For the first year that's all you do, is read FBI reports and ABA reports. It's not much fun. Financial disclosure reports. It's not much fun."

During this early period as well, the counsel's office seeks to ensure that all White House staffers and political appointees are informed of the ethics statutes, executive orders, and other administration rules under which they must work. Gray (1999, 13) described his approach to handling the task: "My rule of thumb was: 'If it's fun, stop! If it feels good, stop! If you're having fun, you're doing something wrong!'"

At the outset, too, the counsel's office needs to give White House staffers instructions on how to keep their files. Phillip Brady (1999, 9) recalled that in the George H. W. Bush administration, the counsel and deputy counsel "tried to be very careful to ensure all new employees were given a counsel's office memo that would articulate what presidential documents are and what needed to be preserved and that sort of thing."

The initial weeks and months of a new administration also bring numerous other demands. Chief among them: the president's budget must be submitted by early February; the economic report is due at about the same time. The legislative agenda, congressional messages, and bills must be drafted and sent to Congress. The counsel's office is involved in all of these activities.

Annual cycles. Especially important annual cycles are the preparation of the president's budget and the drafting of the State of the Union address and the Economic Report of the President. Although the counsel's office is not the central player, it does perform the pivotal role of ensuring that the officials involved act in accordance with prevailing legal and ethical guidelines.

Electoral cycles. As the midterm congressional elections or a presidential reelection campaign approaches, the counsel's office faces other tasks. The office may well be besieged with requests for advice from White House aides and political appointees throughout the executive branch about the sorts of partisan and electoral activities in which they and their aides are legally permitted to engage. In most administrations, the counsel and staff try to anticipate such requests and related problems by sending out written guidelines and holding information sessions.

Then, as elections approach,

the President becomes more involved in direct politics which raises

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> questions about ... how much of his time would be devoted to it, who pays for it, all those things. That becomes much more important every two years. Whether the President is running for election or not, usually he's out doing things, raising funds or otherwise supporting candidates which require you to make these kinds of allocations in the best possible way to avoid charges of various kinds. (Wallison 2000, 32-33)

Recalling the allegations of illegal fundraising preceding the 1996 presidential election, Abner Mikva (2000, 18) regretted that

> none of us saw fit to raise a warning flag for the president.... I had seen what goes on in state politics. I'd been a state legislator for ten years. I know governors in Illinois pick up the phone when they're sitting in the governor's office and lean on people to give money to their campaign and the party. It's just a fact of life and I suspect it goes on in most states.... I think this government came in to the White House not very sensitive to the fact that the White House and the federal government is a different place. So I should have warned the President.

The presidential electoral cycle also can influence submission of judicial nominations to the Senate. Former Deputy Counsel Phillip Brady (1999, 4) noted that "as you get closer and closer to presidential elections the Senate becomes less and less receptive to confirming nominees for lifetime appointments depending on what happens in the next presidential election."

Final year. The last year of a presidency also can be "dangerous" (Culvahouse 1999a, 5). As the final days of the Clinton presidency highlighted, this is a time when requests for pardons, commutations, executive orders, and other presidential actions may be likely to reach fever pitch. It also is a time when presidents may be especially responsive to those who have supported and worked with them for numerous years.

More regular tasks. Many of the other tasks handled by the counsel's office are performed throughout an administration. Reagan counsel Culvahouse (1999b, 8-9) recalled, for example, this included the judicial selection committee, which met

> every two weeks and more frequently if--basically the idea was to get people's nominations up as soon as possible so if the FBI was able to process background checks and all the materials were in we sometimes would meet every week.

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Executive orders also need to be drafted throughout an administration.

In contrast, Culvahouse (1999b, 9) continued,

> Congress tends to work in fits and starts.... The legislative agenda can be heavy or it can be light. There were also Statements of Administration policy that we would review.... Sometimes we would say, "This should not come out of the White House; the Justice Department or the State Department should issue this." Sometimes we would be involved in deciding who ought to comment on the bill, and who ought to testify. If it was going to be a Statement of Administration policy, which is in effect attributed to the President, we would look at those carefully. Those would be in effect a letter that would say here's what the Administration thinks about S-332, the omnibus such and such act.

In addition, throughout an administration, new individuals must be nominated for and appointed to positions throughout the executive branch. After the first year, "The nomination process was fairly continuous.... So every week there would be nominations to be processed, people to be vetted, ethics agreements to be looked at" (Wallison 2000, 9). Informing new hires about ethics regulations also had to continue.

Crises/scandals/unexpected events. Counsels, of course, find themselves (and their staffs) handling unexpected situations and, on occasion, crises, at least as seen from the administration's perspective. As chair of the War Powers Committee, the counsel has responsibilities whenever U.S. troops are (or may become) involved in hostilities.

A scandal of one sort or another seems likely to occur at some point during an administration. In the words of Peter Wallison (2000, 33),

> you can always count on ... some kind of big scandal.... And when I went in to that office I assumed there was going to be a blizzard. What I didn't realize was that there would be a hundred-year snow in the form of Iran-Contra....

Lloyd Cutler, who served as counsel for both Presidents Carter and Clinton, observed that the job has become more driven by scandal and congressional efforts to probe more deeply into administrations:

> We were doing executive privilege in the Carter days; we were doing it in the Clinton days. We had demands from congressional committees for White House documents and agency documents; drafts of legal opinions, for

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example, were so much more pervasive. Mostly, it's the difference that when I worked for Carter while we did have the Billy Carter problem and a few others, Hamilton Jordan's alleged drug violations--which turned out to be entirely untrue, while we had a couple of those, most of what I did was substantive.... In Clinton's time I had the same understanding that I could be in on all these things but I had to put in so much of my own daily effort, and my staff did, on the investigations of the President, Whitewater, et cetera, that I had no time.... working for Carter--which was a year and a half--not more than 20 per cent [of the counsel's work] was what I call playing defense. Under Clinton it was closer to 80 per cent. (1999, 8)

Turnover: Counsel and Deputy Counsel

Given the demands on the counsel as well as the often unforgiving nature of Washington, it is scarcely surprising that relatively few counsels stay in the position for more than two years. Only Philip Buchen (Ford) and C. Boyden Gray (George H. W. Bush) stayed throughout an administration. Fred Fielding worked even longer as counsel to Ronald Reagan, serving from January 1981 until February 1986 (see the appendix).

In recent presidencies, counsels have departed for a variety of reasons. Some--such as John Dean--became directly involved in administration scandals. Others--J. Fred Buzhardt, Peter Wallison--departed after the president or chief of staff who brought them to the White House was forced out. Still other counsels joined the White House staff explicitly on a temporary basis to help handle political or policy crises. In Democratic administrations, such figures have tended to be well-respected "old Washington hands" themselves (like Lloyd Cutler, Abner Mikva, and Charles Ruff). In the Reagan administration, by contrast, the new counsel, A. B. Culvahouse, was a trusted associate of the incoming chief of staff, Howard Baker, who himself fit the same profile.

When counsels have left the White House, in virtually all cases, their deputies have departed within several months. The only exception was Clinton aide Bruce Lindsey, who was lodged in the counsel's office from 1993 through 2000, working under multiple counsels (and always with a second deputy counsel).

In addition, turnover has been somewhat higher among deputies than among counsels. Typically, deputy counsels leave to pursue other opportunities both in and outside the administration. From 1971 through 2000, no deputy counsel succeeded a counsel, although at least one (Cheryl Mills) turned down the job when it was offered to her. Clinton's sixth counsel, Beth Nolan, served as an associate counsel in the first term. Deputy counsels Cheryl Mills and William P. Marshall served as associate counsels (Mills under Nussbaum, Cutler, Mikva, and Quinn; Marshall under Ruff) before being named deputies.

Conclusion

In sum, the counsel's office can be characterized as a monitor, coordinator, negotiator,

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recommender, and translator. It monitors ethics matters, coordinates the president's message and agenda with other executive branch units, negotiates on the president's behalf with Congress and others, recommends actions to the president, and translates or interprets the law in its broadest context throughout the executive branch. It oversees all of the political and policy actions the president takes to ensure compliance with legal and constitutional requirements. No paper goes in or out of the president's office without the counsel's review.

The challenges for this office are daunting. The paper flow is relentless; the pressures, both time and political, are crushing; the scope of its tasks extends to every facet of the president's political and constitutional responsibilities; and the potential for disaster is as close as the next crisis. The counsel's office performs both routine and extraordinary tasks and participates in domestic as well as foreign policy making. Because its charge covers such a wide swath and there is no time for on-the-job training, an incoming counsel must conquer the sharp learning curve immediately, expect the unpredictability of events, and get used to making crucial decisions with incomplete information.

As a consequence of the increasing polarization and politicization of U.S. government, there has been a greater recognition of the highly influential role the counsel's office can play. These heightened stakes have intensified the strains under which counsels operate. Counsels must understand the "fishbowl" nature of the office, and they must be especially vigilant about reining in presidents in the last year of their administrations. Counsels must recognize as well that maintaining good relations with the OLC is critical as an institutional check on their own instincts, despite the tensions that can arise between these two legal units.

Finally, the counsel's office sits on the edge of a precipice: it is the last line of defense for the institution of the presidency. Its ultimate role as protector of presidential privileges and prerogatives means that its advice will have profound implications for the power of the presidency.

Appendix

Counsels and Deputy Counsels, 1969-2001

Administration	Counsel	Date
Clinton	Beth Nolan	8/99 to 1/01
	Charles F. C. Ruff	2/97 to 8/99
	John (Jack) Quinn	11/95 to 2/97
	Abner Mikva	9/94 to 11/95
	Lloyd N. Cutler	3/94 to 9/94
	Bernard W. Nussbaum	1/93 to 3/94
Bush	C. Boyden Gray	1/89 to 1/93

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Reagan	A. B. Culvahouse	1987 to 1/89
	Peter Wallison	4/86 to --
	Fred F. Fielding	1/81 to 2/86
Carter	Lloyd Cutler	10/79 to 1/81
	Robert J. Lipshutz	1/77 to 8/79
Ford	Philip W. Buchen	8/74 to 1/77
Nixon	J. Fred Buzhardt	1/74 to 8/74
	Leonard Garment	5/73 to 1/74
	John Dean	7/70 to 4/73
	John Ehrlichman	1/69 to 11/69

Administration	Deputy	Date
Clinton	Bruce R. Lindsey	1/93 to 1/01
	William P. Marshall	12/99 to 1/01
	Cheryl Mills	/96 to 8/99
	Kathleen Wallman	/96 to --
	James Castello	3/95 to --
	Joel I. Klein	7/93 to 3/95
	Vincent W. Foster	1/93 to 7/93
Bush	John P. Schmitz	1/89 to 1/93
Reagan	Phillip D. Brady	/88 to 1/89
	Jay B. Stephens	/86 to/87
	Richard A. Hauser	1/81 to --
	Herbert E. Ellingwood	1/81 to --
Carter	Michael Cardozo	10/79 to 1/81
	Joseph Onek	9/79 to 1/81
	Margaret A. McKenna	1/77 to 12/79

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Ford	Edward C. Schmults	10/75 to 1/77
	Roderick Hills	4/75 to 10/75
	Philip Areeda	10/74 to 2/75
Nixon		
	Fred Fielding	5/73 to 1/74 (on counsel staff since 10/70)

(1.) John Dean established the White House counsel's office under Richard Nixon. Dean was the first counsel whose duties primarily focused on lawyering, and he was the first to seek out new legal responsibilities and draw them into a separate office in the White House. Although presidents from FDR through Nixon had aides with the titles of "special counsel" or "counsel," such staffers typically had more wide-ranging policy responsibilities. The Eisenhower White House to some extent was an exception: Gerald Morgan, as special counsel, and Edward McCabe, an associate special counsel, worked on tasks quite similar to some of those in the contemporary counsel's office. See, for example, Rabkin (1995), Strine (1995), and Walcott and Hult (1995).

(2.) Nonetheless, communications with independent regulatory agencies were handled with special care and circumspection.

(3.) Most recently, President George W. Bush named longtime Texas associate Alberto R. **Gonzales** his White House counsel.

(4.) The courts view these two as clearly distinct. **Executive privilege** is the constitutionally based protection of confidentiality of a president's communications with any government officer when the chief executive seeks advice on the exercise of official governmental duties. Its purpose is to promote candid and frank discussions between a president and his advisors. Government attorney-client privilege is a variant of the common-law attorney-client privilege, but with the following crucial distinctions:

1. the client is the Office of the President of the United States; and

2. the advice being rendered by a government attorney to the president is "for the purpose of securing primarily either (i) an opinion on law; or (ii) legal services; or (iii) assistance in some legal proceeding" (In re Sealed Case, 737 F. 2d at 98 to 99 [quoting U.S.v. United Shoe Machinery Corp., 89 F. Supp. 357, 358 to 59 (D. Mass. 1950)] in In re Bruce Lindsey [Grand Jury Testimony], 158 F. 3d 1263 [D.C. Cir. 1998]).

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has to go to get an opinion on whether something may properly be done or not. For example, if you wish to invoke an executive privilege not to produce documents or something, the routine now is you go to the Office of Legal Counsel and you get their opinion that there is a valid basis for asserting executive privilege in this case.... You're able to say [to the judge who is going to examine these documents] the Office of Legal Counsel says we have a valid basis historically for asserting executive privilege here.

The counsel's office is the channel through which most paper and people must pass on the way to the president and, equally, through which all outputs from the Oval Office must be monitored and evaluated. The unit exists in a fishbowl, is subject to searing public criticism when it makes the slightest misstep, and yet prompts intense loyalty among those who have been privileged to serve in it.

Functions of the White House Counsel's Office

Although the White House counsel's office has assumed different tasks in different administrations, the broader contours of its responsibilities began to take shape under Counsel Fred Fielding in the Nixon administration and have been remarkably consistent since the Ford years. (1)

Advising on the Exercise of Presidential Powers and Defending the President's Constitutional Prerogatives

The counsel's responsibilities associated with presidential powers are highly volatile. They involve such activities as routinely reviewing (and occasionally drafting) executive orders, reviewing pardon and commutation recommendations, approving covert action proposals, interpreting treaties and executive agreements, examining presidential statements for consistency and compliance with legal standards (and in anticipation of legal challenges), and participating in editing the State of the Union address. Tasks that have consistently related to the defense of a president's constitutional prerogatives are fewer in number. These have generally focused on issues related to executive privilege, war powers, and presidential disability or succession.

The present Washington political environment is notable for partisanship, polarization, and confrontation. Presidential actions are subject to extraordinary scrutiny, and a twenty-four-hour news cycle accelerates the pace of decision making, making any distinction between the "routine" and the more "crisis-laden" exercise of a president's constitutional powers essentially artificial. At any time, political events may transform an otherwise routine exercise of presidential powers into an extraordinary undertaking. As Clinton counsel Bernard Nussbaum (1999, 6) concluded, "Small (and not so small) policy and political problems grow into legal problems. It was my job to make sure that these political and policy brushfires didn't become conflagrations."

A White House counsel must be well informed about political developments throughout the White House and the executive branch. Such knowledge is crucial if a counsel is to manage the conflicts that can result when Congress, a court, or an independent counsel exercising prosecutorial functions demands information from a sitting president who refuses to accede.

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Despite the primacy of high-stakes politics in these stand-offs, some political accommodation, rather than a purely "legal" answer, is typically the outcome. As many counsels have discovered, the best legal judgments about appropriate presidential response often have been overridden by political considerations.

> I think this President operated on the premise pretty much and I certainly did that whatever the legal consequences or legal parameters were of executive privilege, if Congress really wanted something, politically it almost was impossible to deny it. The more you stood on privilege, the more you pointed to precedents, the more you showed these are the things that the President didn't turn over, the more they could make political hay out of it. (Mikva 2000, 5)

In relative terms, the counsel's role in regard to war powers has been less controversial. As chair of the War Powers Committee, the counsel is responsible for notifications to Congress. In keeping with presidential views that the War Powers Resolution is unconstitutional, however, counsels have provided Congress with a minimum of information "in the interest of comity." In the words of A. B. Culvahouse (1999b, 5), "There is a real kabuki dance that was done. You sent a notice up to the Hill while protesting all the time that you're not providing notice." Like a kabuki dance, the war powers dialogue is often quite ceremonial, lacks a clear beginning or ending, and reveals much about the competition for political power. Typically, precedent is followed very closely, with past letters serving as models for correspondence.

Presidential disability and succession also require the counsel's attention. Culvahouse (2000) has commented on this recurring issue of temporary presidential medical incapacity:

> This is an area where the lack of an institutional memory is atrocious. The White House should not have to re-invent a process each time the POTUS [President of the United States[has surgery. We did the same thing when President Reagan had surgery (I think for skin cancer) in '87/'88.

Further complicating the counsel's work as protector of presidential powers and constitutional prerogatives is the lack of clarity associated with the counsel's responsibilities as an advocate. The White House counsel provides legal advice to the office of the presidency, not to the individual president. As such, the counsel protects the powers of the office within the constitutional order of separated powers. Determining whether the office or the individual is under attack, however, may be difficult.

> In fact, when I was first introduced to this job by Fred Fielding he said to me, "You are counsel to the office of the presidency. You are not counsel to the President." ... However, in practice, it's not a very useful guide, because you really don't know--when issues like Whitewater come up--whether you're representing the President or the presidency.... But as

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soon as it becomes clear--and there's no bright line here--that this isn't

just noise by political opponents, but in fact relates to the President's

personal conduct, then the President should have his own lawyer. (Wallison

2000, 25)

Identifying and drawing these distinctions often has generated controversy. For instance, Clinton counsel Bernard Nussbaum was widely viewed as failing to differentiate between advocacy on behalf of the office and on behalf of an individual president. For his part, Nussbaum wrote in his resignation letter that he left "as a result of controversy generated by those who do not understand, nor wish to understand, the role and obligations of a lawyer, even one acting as White House counsel." (As quoted in Marcus and Devroy 1994, A1)

Overseeing Presidential Nominations and Appointments to the Executive and Judicial Branches

White House counsel advising about presidential nominees and appointees to the executive branch typically has focused on nominations to the top Justice Department positions and to the general counsel positions in the departments and agencies. Nussbaum (1999, 5) bluntly stated that his office "appointed the Attorney General, head of the FBI, Justice Department officials (Dellinger--I sent him over to OLC from the White House counsel's office)."

White House counsels also stress their need to appoint a counsel to the National Security Council (NSC) staff. Lloyd Cutler argued for appointing the NSC counsels to the White House counsel's office rather than to the NSC staff; C. Boyden Gray (1999, 23) emphasized the importance of a low-key NSC observer:

We worked out a deal that I could name [National Security Assistant Brent

Scowcroft's] deputy legal advisor to the NSC, Steve Rademaker.... But that

can be tricky. It was tricky and a huge problem in Iran-Contra....

Scowcroft agreed that I should never be in a situation like that. That's

why he allowed me to have Rademaker in there.

The extent to which the counsel's office has been involved in the judicial appointment process has differed across administrations (Goldman and Slotnick 1997, 1999; Goldman et al. 2001). In several recent administrations, the White House counsel oversaw the process from start to finish: the counsel chaired the judicial selection committee, supervised the vetting and clearance process, and prepared the nominee for confirmation. In every administration, the judicial nomination process required the careful coordination of several White House offices, consultation with the Justice Department, and extended negotiations with U.S. senators.

The selection process varies for district, circuit, and Supreme Court nominations. Senators tend to be more involved in nominations to the U.S. district courts than they are in nominations to the courts of appeal or, especially, to the U.S. Supreme Court. Partisanship, though, plays an important role in determining the amount of influence that each player will have in the process.

Unlike the Supreme Court, with courts of appeal and district courts you had

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> to deal with the local Republican, in our case senators, if there were senators. If there weren't senators, the governors, congressmen and congresswomen. District courts, I seldom got involved. The Justice Department had a lot of protracted negotiations ... about whether this was an appropriate person and so forth or was this a person who shared the President's judicial philosophy. Courts of appeal I would more often get involved. There would be disputes between the senators and the Justice Department. There would be disputes between maybe two Republican senators from the same state, between the governor and the more senior congressman or congresswoman. (Culvahouse 1999b, 20-21)

Yet, over time, the selection process has shifted from being centered in the Justice Department to being firmly ensconced in the White House, albeit with the status of the Attorney General always a factor. Carter counsel Robert Lipshutz encountered considerable resistance from the Department of Justice when he sought to participate in judicial selection.

> [White House involvement in judicial appointments] was a struggle within the Justice Department because, number one, the White House was stepping into what many, particularly career people, and even Griffin [Bell, the Attorney General] too, felt should be strictly their prerogative and that is helping the President pick the judges. (Lipshutz 1999, 11)

White House involvement in lower court nominations increased during the Reagan years and had become routine by the time Bill Clinton took office.

> The judicial selection process is centered in the White House Office. A lot of other White House counsel's offices did not have the breadth and authority we had (maybe because of Foster and his access to the First Lady). We had special responsibility for Court of Appeals and Supreme Court appointments. (Nussbaum 1999, 5)

From the Reagan years onward, the judicial selection committee chaired by the counsel typically included members of the White House counsel's office and the Department of Justice. In the Clinton administration, it also included representatives from the first lady's office and the office of legislative affairs. The selection committee's assessments were both legal and political, weighing the potential nominee's legal philosophy and the likelihood of Senate confirmation.

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Well, it's all done in conjunction with the Department of Justice and it's pretty obvious to any lawyer who the candidates are. It's not rocket science. The question is always, "Can you get the person you really ...?" What's the matrix of confirmability with whom you really want to go with? You can't do your ideal person, usually, because there's a confirmation problem or there's a background problem or there's a money problem or there's something. So it never lines up perfectly. (Gray 1999, 9)

Members of the Clinton counsel's office were invited to the personal interviews with prospective lower federal court nominees, which were conducted by senior officials in the Department of Justice's Office of Policy Development. Counsel staff also contacted senators about possible nominees, working with senior members and staffers of the Senate Judiciary Committee.

In addition, the counsel's participation in the nomination and appointment process has consistently involved the office in supervising the vetting and clearance process (FBI, IRS, 278 forms and financial disclosure forms) for all presidential nominees to the executive and judicial branches. The time and resources consumed by these reviews are extraordinary (see, e.g., Light and Thomas 2001; Sullivan 2001).

Well, the FBI thing takes roughly three months although you can speed it up. You can do an expedite and do it in a week if someone has been through it before. I think we did Cheney over a long weekend. But if you're starting from scratch with somebody, normally it's three to four months depending on how old they are.... It can take people three months just to fill out the forms so you really have to hammer people.... (Gray 1999, 21-22)

When the background checks were complete--or even while they were progressing--decisions had to be made about whether to proceed with the nomination or appointment. In each administration, White House counsels noted that different standards were applied to appointments than to nominations and also to nominations for more and for less visible positions.

You'd have some people that you might never send up to the Hill for confirmation, but because they were strong allies of the President, supporters and/or were people that had a lot to offer, you might appoint them to the President's Foreign Intelligence Advisory Board rather than nominate them to be undersecretary of defense because the President has

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unilateral appointment authority. Maybe they go to a Schedule C position in OMB [Office of Management and Budget] or DAS [Deputy Assistant Secretary], Treasury or whatever. You were pretty darn pure about cabinet people, deputy secretar[ies]. We were awfully pure about State, Defense, Treasury, Justice.... (Culvahouse 1999b, 32)

Then, when the nominations were sent to the Senate, negotiations had to be conducted about the legislators' access to the reports.

How much of the FBI files do they get to see[?] We conduct the search; we do the FBI for our benefit not for their benefit.... That was subject to enormous negotiation.... Huge fights over that.... You have to negotiate them one by one.... (Gray 1999, 16)

Beyond vetting the nominees, the counsel's office sometimes prepared them for the confirmation hearings.

We [the Reagan administration] did a lot of murder boards, not just for judicial nominees but for a lot of people. I probably did fifty murder boards in my twenty-two months.... You get a bunch of lawyers and legislative types pretending to be senators and acting like horse's rear ends.... What you want to do is anticipate questions, to make it more difficult for him or her than it is going to be in fact, and hit all of the areas that he or she is going to be questioned about. Supreme Court nominees are very difficult because the hearings go on forever and ever.... There should be an understanding that a good enough answer is good enough. We're not striving for perfection here--we're striving for B-plus--and that you don't critique during the first two hours. You only critique on breaks thereafter.... This person already is the President's nominee. (Culvahouse 1999b, 18-19)

Advising on Presidential Actions Relating to the Legislative Process

Congressional relations are a daily fact of life for the White House staff and, therefore, for the counsel's office. In recent administrations, this has involved counsel aides in reviewing legislative proposals; reviewing bills presented for signature or veto and drafting signing statements and veto messages; reviewing State and Defense Department authorizations and

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appropriations proposals; drafting budget rescissions and deferrals; participating in the negotiations associated with Senate treaty hearings; and joining legislative negotiations concerning policy, document requests, treaties, and nominations.

The extent to which the counsel's office has participated in policy negotiations has varied within and across administrations. Among the counsels who were deeply engaged in policy making was C. Boyden Gray, who recalled,

> The question is whether you take the lead or just participate in negotiations. I basically had to lead all the negotiations with the civil rights groups and the Congress on the Civil Rights Bill. I was sitting at the center of the table. I did not lead but I was a participant in all the negotiations down in [George] Mitchell's conference room in the Senate--endless, endless meetings on the Clean Air Act. They would go until two, three, four in the morning sometimes. I wasn't leading those, but I was there. (1999, 4; see also Cutler 1999, 15)

At a minimum, counsels have routinely been consulted about legislative matters. The resultant advising typically has involved as much politicking as it has lawyering. For example, the Reagan and Bush administrations seized on signing statements, which are drafted by the counsel's office, as opportunities for statutory interpretation by the executive. These presidents used signing statements to urge courts to give the same legal weight to the "executive intent" of legislation as they traditionally have given to its legislative intent. Accordingly, the counsel's office became deeply involved in the associated political and policy debates.

Educating White House Staffers about Ethics Rules and Records Management and Monitoring for Adherence

Perhaps the most prominent of the newer demands confronting the counsel's office is the intensified scrutiny of a range of ethical matters. The increased stress on ethics has generated the need for a central coordinator who is alert to potential problems and able to take preemptive (or corrective) action. This emphasis involves counsel staffers in a range of activities, including distinguishing between White House expenses and campaign expenses; reviewing presidential travel; approving requests for appointments with the president and monitoring the requests for propriety, seemliness, legality, and executive privilege issues; responding to document requests and subpoenas directed to the president and to other White House and executive branch officials by congressional committees and independent counsels; and serving as the ethics officers for White House staff and executive branch political appointees. Past counsels underscore that this work is essential to a president's early success because it allows an administration to put its own people in place, establish responsible procedures, and advance its policy initiatives.

Ethics laws, to quote C. Boyden Gray (1999, 1), "are quite complicated and obscure and overworked and ought to be deregulated." The White House counsel's office is needed to explain these laws to both political appointees and members of the White House staff. This role is particularly important at the outset of an individual's service in the White House or executive branch, throughout the campaign season, and during investigations.

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THE WHITE HOUSE 2001 PROJECT
THE WHITE HOUSE INTERVIEW PROGRAM
REPORT NO. 21

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Staff and top staffers. There is no "one best way" to set things up. Depending upon the background and interests of the Chief of Staff and the top aides, the office is frequently involved in congressional relations, communications strategies, and political liaison. For instance, former members of Congress such as Howard Baker, Leon Panetta or Henson Moore, were naturally drawn into this arena. Michael Deaver was deeply involved in communications planning as James Baker's deputy, even before he took over the operation formally.

At the outset of the Reagan administration, James Baker explicitly excluded the Chief of Staff office from policy development, leaving that to Counselor Edwin Meese. Baker assumed responsibility for process. (Deaver) Michael Deaver, who had the title of Assistant Chief of Staff, was responsible for scheduling and travel, the East Wing (the offices of the First Lady and the military) and anything to do with communications. When David Gergen left the White House, Deaver formally took on responsibility for communications. Richard Darman, who replaced Deaver, did not have responsibility for scheduling, which remained with Deaver, but he did oversee management and administration. Another Deputy, James Cicconi, was primarily responsible for overseeing the decision making process. (Cicconi) When Donald Reagan succeeded Baker, he put three deputies in place, and allowed the Chief of Staff office to expand considerably. But Howard Baker reverted to a simple model, with two top assistants, one of whom specialized in decision process management. (H. Baker and Tuck) When Baker's deputy, Kenneth Duberstein became Chief of Staff, the same model was retained.

Little changed under President Bush's first Chief of Staff, John Sununu. He had one deputy, responsible for overseeing White House operations, and with a varied portfolio beyond that (Card) By the fall of 1991, Sununu had only one top aide, the deputy, Andrew Card, along with the usual complement of lower-level aides. As Card described a key element of his job:

> I was kind of the bad guy in the White House. As deputy Chief of Staff I did basically all of the salaries. And I was tough. I would say, "No, we're not going to pay that much... I was also very tough on the number of commissioned officers you could have... (Card)

Under Samuel Skinner, the Chief of Staff's staff grew back to a deputy and a counselor (Henson Moore and Cameron Findlay, respectively). Moore dealt mainly with White House mechanics (Moore), with press, scheduling, and speechwriting reporting to him. He also became involved in congressional relations, and the job evolved beyond that:

> As it turned out, Sam (Skinner) did not like to travel, so I did all the traveling with the President. . .When you travel with the President you become the Chief of Staff at that point because the staff is supposed to move with the President. (Moore)

When James Baker replaced Skinner at the end of the administration he brought in his own people, but kept the basic model. In fact, his deputy, Bob Zoellick, "actually ran the White House at that time," while Baker functioned mainly as chairman of the Bush re-election campaign. (J. Baker, II)

The Clinton chiefs followed a familiar organizational pattern, with two deputy chiefs (or the equivalent) serving under the Chief of Staff, but Leon Panetta, in the process of strengthening the Chief of Staff role, expanded the Chief of Staff office. Initially, under Mack McLarty, the responsibilities of the deputies were defined rather loosely, as McLarty adjusted to the particular strengths of Mark Gearan and Roy Neel, and to get along without Harold Ickes, whom he had hoped to employ. (McLarty) When Panetta succeeded McLarty, he made Ickes deputy in charge of political affairs and some oversight of substantive issues, while Erskine Bowles took charge of scheduling and management of White House personnel. Panetta also placed senior Presidential advisers George Stephanopoulos and Rahm Emanuel in the Chief of Staff office, assuming that they would report to the President through the Chief of Staff. Moreover, with the 1996 election impending, Panetta placed additional White House staff units – speechwriting and communications – in the now-expanded Chief of Staff office. As Chief of Staff, after the election, Bowles in part reverted to the earlier pattern, taking considerable scheduling responsibility himself, while speechwriting and communications were dropped from the Chief of Staff office. However, as noted

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above, the Chief of Staff office did not shrink back to the simpler model of prior administrations. The senior advisers and others stayed, and the overall staff grew, in part to coordinate the now-expanded office.

Informal Structures

Not all organizational structuring – recurring, predictable activities and responsibilities – is found on organization charts. Successful Chiefs of Staff have supplemented formal arrangements by initiating regular group meetings with key White House personnel. This has been a key management tool for all chiefs so long as the senior staff meetings do not get too large and unwieldy. (Card; H. Baker)

In addition, different chiefs and/or deputies have taken the lead in initiating meetings to plan communications strategy (Deaver), brief the Cabinet, plan the President's schedule (Moore), or organize task forces or "war rooms" for the pursuit of unusually important projects. The extreme case of informal structuring can be found in the small group Al Haig brought together during the waning days of the Nixon administration to handle the routine business of the White House while the President focused on his fight for political survival. (Jones) In any case, the desirability or need for such organizational innovations will most likely be dictated by a President's particular agenda and by circumstances, such as the onset of a campaign season or the development of major legislative efforts like Carter's energy plan or Clinton's health care initiative.

CONTROLLING THE FLOW OF PEOPLE AND PAPER

Getting Control of the Paper Flow

The Chief of Staff must take responsibility for the operation of the White House. To do so, lines of authority must flow to and through his office to the President. No matter how White House functions are organized, the information flow must be up and to the Chief of Staff, usually through the staff secretary, cabinet secretary and deputy Chiefs of Staff. Only by monitoring the full flow of paper to the President can a Chief of Staff assure that all relevant information has been received and all relevant points of view represented.

The fundamental purpose of orderly processes in the White House is to provide the basis for the best-informed decisions possible. The job of the Chief of Staff is to assure that all relevant voices are hear in the decision process, and that choices are made in light of full information. James Baker summarized:

> You have to make sure you have an orderly system, that you have a system that's fair. Otherwise, you start the leaking in the press, one against the other. You have to have a system that lets the President hear all sides. And you have to have one, that if you're going to be running the White House, you have to know what's going on. (J. Baker, II)

To assure such fairness, all recent White Houses have employed a decision process whereby decision memoranda are routinely circulated, usually by the staff secretary, to all officials with expertise or a stake in a Presidential decision. The Chief of Staff must monitor the workings of this process closely, for it is here, in the framing of the decision and the description of options, that staffers may be tempted to push their own particular interests, or substitute them for those of their principals. As Howard Baker said of this kind of problem:

> Well, that's exactly the level of detail where it occurs, in the staffing of the memo that's going to the President, the decision memo with the options describing – that's where all the fights occur – describing what the background is, describing the discussion, describing the options... We tried not to let that spill up to the President but sometimes the memos were so controversial... we just couldn't forge consensus about what this paper would look like. (H. Baker)

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Due to the crucial position of the staff secretary in the operation of this system, it is imperative that the Chief of Staff pick a trustworthy staff secretary. Mark Siegel, who served under Carter, noted that Hamilton Jordan, even before he became Chief of Staff, was careful to place his own man, Rick Hutcheson, in that position.

> Hamilton is a very smart guy and he understood and we discussed that he (Jordan) would control the paper and control the presidency. He would control the paper in the Oval Office, controlled everything. And why he selected this – Rick, at that point he was a baby.

The Chief of Staff or someone on his staff must supplement the staff secretary in the exercise of judgment as to what gets to the President and what does not. Deputy Chief of Staff Andrew Card, who had this responsibility under Bush, contrasted the staff secretary's monitoring with his own:

> They did it watching for policy or consistency of language. I did it to protect the President. Is this something the President has to have today?... the staff secretary job is to be pretty policy wonkish, too. This policy is inconsistent with the one we had the President say last week....That was more of an editorial role; mine was more of how do I protect the President in there from wasting his time and energy. (Card)

Leon Panetta made a similar point:

> I wanted to funnel all of the issues and decision making that ultimately had to go to the President through the Chief of Staff's operation. That helped a great deal because it came in kind of a vacuum in which staff people and others weren't getting decision on issues unless they had to take it to the President. And there is a lot of decision, frankly, that you could make that don't necessarily have to go to the President..... So my role was to make decisions. If they were important decisions, I would always brief the President. But having those decisions made, whether it's scheduling, whether it's this, whether it's that, keeps that place running. (Panetta)

Beyond decision memoranda, Presidents will also require background papers on issues. President Clinton, for instance, "would want maybe a summary with several pages of backup on a particular matter we were considering." (McLarty) The Chief of Staff is often responsible for the preparation of such materials, and likewise for their thoroughness and balance. At the very least, the Chief of Staff must monitor what goes to the President. If the President's out box contains material that never went through the in box – if, in other words, people are bypassing the staff system, the Chief of Staff must address the problem. Whether by paper or in person, such "end runs" will tend to upset the balance of the decision system.

Of course, the discretion implied in these accounts is liable to abuse, as well as to the perception of abuse. Although H.R. Haldeman denied that he tried to control policy in the Nixon White House, the perception that he did nevertheless was strong. Thus it is important for the Chief of Staff to involve other White House staff in his decision processes (Panetta), and to maintain confidence in the essential accessibility of both the process and the President. Sherman Adams imposed a similar procedural rule during the Eisenhower administration. (Adams)

Adjusting and Conforming to the President's Style

The President must feel comfortable with the people on the White House staff and the way it works. Although "the Chief of Staff's personality dominates the way the White House works, it can only be done if it has the blessing of the President," noted one person who served in that office.

If a President wishes to keep control of a lower level decisional or administrative matter, there is little a Chief of Staff can do. That such an arrangement may be ineffective needs to become obvious to a President before the system can be streamlined. Ford, Carter and Clinton found this out the hard way at the beginning of their administrations.

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Landon Butler, who worked in the Carter White House stated: "We were a direct reflection of what the President wanted around him and what he needed. In our case, Carter played a very hands-on role in virtually every aspect of putting the White House together." (Butler) Mack McLarty also set up the type of system that Clinton wanted:

> I think the President's style also wanted a large range of opinions, to be coordinated for sure. But he is clearly an engaged person in terms of both his political style, his personality and his policy-making style. So that was kind of the framing of it. I think that's how we approached it. (McLarty)

In explaining this, McLarty also noted that the operation of "the White House and to some extent the administration... was clearly driven by the campaign. And I think to have dramatically altered that would have created a whole other set of dynamics and problems." (McLarty) A senior official familiar with the Clinton operation added:

> Mack had a very untenable situation in that regard and did the best he could with that... his authority was constantly and often inadvertently or indirectly undermined by the President's willingness or indulgence... (to allow individuals who had developed a relationship with him on his campaign to see him). (background interview)

Most other recent Presidents have had a very different operating style, which encouraged much more staff control over his schedule, speeches, and visitors. This has been the case for all but Carter and Ford. And, like Clinton, Ford rather quickly abandoned the "spokes-of-the-wheel" system of open access for a more structured system with a strong chief, even though the title "Chief of Staff" was carefully eschewed. He was encouraged to do so by Donald Rumsfeld who accepted the President's offer to oversee White House operations only if he be given the authority of a Chief of Staff. Carter, after trying to do without a Chief of Staff altogether, in the style of his Democratic predecessors, ultimately turned to Hamilton Jordan, then Jack Watson as Chief of Staff, though neither was what one would call a "strong" chief.

Guarding the Door to the Oval Office

A very important aspect of the Chief of Staff role is to guard the flow of people and paper into the Oval Office. Time is an incredibly important Presidential commodity. It is up to the Chief of Staff to help him manage it effectively. "You need to have discipline and order and be discriminating," said James Baker. (J. Baker, I)

Limiting access to the Oval Office serves another purpose. It saves the President from his friends and supporters. Presidents are politicians and as such, like to please. What they don't like to do is say "no." Thus an important function of the Chief of Staff is to protect the President by eliminating or reducing those politically embarrassing situations which put a President on the spot. Sometimes, of course, obstructing access can be carried too far. Donald Regan overly protected Ronald Reagan. The President's friends had to go public to reach him. On the other hand, when H.R. Haldeman kept people out of the Oval Office, he was following Nixon's wishes. According to one insider, Haldeman "was implementing Nixon's instructions faithfully, maybe harshly but doing it.... He [Nixon] was a recluse...and did not enjoy the give and take of special pleadings and wouldn't do it." (background interview)

Among the Chiefs of Staff there was also a consensus that Presidents need to be protected from what James Baker called "Oh by the way, decisions," i.e. decisions that are made on the spur of the moment without staff consultation or consideration of consequences. "It's not in anyone's interest, "stated Baker, "to get 'oh by the way decisions' as a guy is leaving a meeting." One way to discourage this practice is for Presidents to issue a generic warning at their first cabinet meeting that such practices will be considered out of order and not tolerated. (Baker, I)

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Because the job of the staff is to run interference for the President, especially when the discussion turns from the prepared agenda, "the Chief of Staff needs to know what the President is telling people and what they're telling him. You need to have an understanding with him about it." (J. Baker, I) In Reagan's case, he regularly informed his staff if he met with anyone without the staff being present. In Bush's case, unless the meeting was listed as private, an aide from the Chief of Staff office would always be in attendance. (Moore) Being with the President also involves traveling with him. Either the Chief of Staff or a designated deputy should be on all trips away from the White House.

Coordinating Presidential Appearances and Statements

The office of the Chief of Staff must be involved in scheduling the President, which includes long-range (perhaps three months) planning. The Chief of Staff need not personally be deeply involved, however. For instance, in the first Reagan term, James Baker delegated responsibility for scheduling (along with communications and relations with the First Lady and her office) to deputy Michael Deaver. (Deaver). Similarly, Henson Moore, under Samuel Skinner, had responsibility for scheduling, and also had the speechwriters and the press office reporting to him. But whether it is the Chief of Staff or a deputy, all these streams – where the President will be, what the President will say, and how attention will be gained for it – must come together

As gatekeeper, the Chief of Staff must review all Presidential schedules, briefings, and speeches. Leon Panetta noted, "If it was a low-level speech to a particular group, I would just sometimes review it very quickly but let the people involved with the policy have the largest impact." But on high-level speeches, such as State of the Union or other major pronouncements, Panetta paid close attention. (Panetta) Much of the friction between him and Dick Morris, Clinton's political adviser, stemmed from Morris' penchant for changing speeches that had gone through the Chief of Staff clearance process. So strongly did Panetta object to this end-running, that he threatened to quit unless it was stopped. And it was. The Wednesday night meetings in the Mansion were used to bring the principals together to debate and hopefully iron-out their differences. Such special-purpose group meetings, regular or ad hoc, can be used to supplement the normal staff meetings in planning and integrating the President's schedule and message.

MANAGING INFORMATION AND BROKERING OPINIONS

In performing the gatekeeper's role, the Chief of Staff must function as an honest broker. Practically all of the chiefs and their deputies interviewed considered such a role essential. James Baker was advised by a predecessor: "Be an honest broker. Don't use the process to impose your policy views on the President." The President needs to see all sides. He can't be blindsided. (J. Baker II) Additionally, cabinet members need to know that their position will be fairly represented, especially if they encounter difficulty in presenting it themselves. Mack McLarty noted that former Chiefs he talked with had

> (A) pretty high degree of consensus about the honest-broker approach, that the Chief of Staff certainly needed to be viewed by cabinet members and others as someone who would not shape information in a way that would unduly affect the President's decision making. The cabinet officers and others had the right to expect their information to be fairly presented. (McLarty)

Honest brokerage does not mean having no opinions, or refusing to offer them when asked by the President. It does, however, mean assuring that the decision process will include all relevant points of view, without allowing the agenda or views of the Chief of Staff to bias or distort that process. (Jones) Nor is it enough to be in fact an honest broker. The Chief of Staff must be perceived as such by those seeking access, in person or for their ideas, to the President.

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Although chiefs disagreed on how tight personal access to the President should be, there was unanimity that it should be administered fairly with sensitivity to the position of those who wished to gain an audience. As James Baker put it, "You walk around with a target on your chest and on your back. You use up your chits pretty quickly because the job of the Chief of Staff is to say 'no' to people. Everybody wants something from the President, and your job is to say no or say yes, maybe, but." (J. Baker, I)

Being a good listener is another attribute of the honest brokering function. According to Howard Baker, "There wasn't a day went by when in a senior staff meeting somebody didn't point out to me something that I didn't know about and was not sensitive to. It was an early warning system that worked very well." (H. Baker)

Perhaps the key element in the role of the broker is the process of soliciting opinions prior to Presidential decisions – a process that also can work in the direction of consensus building. While the primary responsibility for doing this, usually via formal memoranda, falls to the Staff Secretary, it is a process the Chief of Staff must monitor. It is the main point at which people will attempt to get access to the decision process – even to the point of staffers substituting their views for, e.g., a cabinet member's. As Howard Baker's deputy, John Tuck, said:

> Well, that's exactly the level of detail where it occurs, in the staffing of the memo that's going to the President, the decision memo with the options describing the discussion, describing the options. And all the fights occur on just exactly that level of detail. We tried not to let that spill up to the President but sometimes the memos were so controversial – and I can only think of one or two where the memo was bigger than it should have been because we just couldn't forge a consensus about what this paper would look like. (Tuck, in H. Baker)

As a broker, the Chief of Staff is also responsible for Presidential briefings. The regular morning meetings between the President and Chief of Staff are a time for briefings. But for more formal briefings, involving multiple participants, the Chief normally works with other staffers. Panetta described such a process:

> Just to give you an example, clearly national security issues where there were decisions related to what was going to happen in Bosnia... (etc.) would go to the President. What I would do is work with the National Security Adviser and basically set up the briefing so they could make their presentation to the President. And, because of the nature of this President usually even on scheduling issues, you'd go in with a schedule. You'd present a proposed schedule to the President but you would let him obviously comment on that as well. (Panetta)

III. ADVISORY ROLES

ADVISING THE PRESIDENT ON POLITICS, POLICY, AND MANAGEMENT

Although the Chief of Staff is first and foremost an honest broker, it is unlikely that a staffer so close to a President would not be called upon as an adviser, as well. This is particularly true in areas of the Chief's special interest or competence. Leon Panetta, for example, as a former OMB director, was an adviser on budgetary matters. (Panetta). Mack McLarty, with a background in private business, advised President Clinton on his economic planning. (McLarty)

One important aspect of advising is integrating policy and politics. Most other advisers, inside and outside the White House, specialize in one or the other. But the Chief of Staff is expected to be conversant with both. James Baker gave an example of this in discussing the advice President Bush received concerning the economy in 1992:

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> I want to tell you the problem there was not so much that President Bush wasn't listening to (his advisers)... But he was listening to his economic advisers, who were giving him good economic advice – *good economic advice* – but lousy political advice. This, I think, was the fault of the White House staff and organization at the time. They should have been able to see that, while the economy might not have needed any action... we nevertheless needed an economic or domestic policy agenda around which to coalesce a campaign. (J. Baker II)

More generally, Baker described the Office of the Chief of Staff as "the place where policy and politics come together." (J. Baker, I)

PROTECTING THE PRESIDENT'S INTERESTS

The role of the Chief of Staff as adviser to the President is inherently problematic, however, since as it has the potential to conflict with the role of honest broker. Nevertheless, the Chief of Staff is often required to advise, especially when that consists of carrying bad news or disagreement to the President. Others may want to, but often find that they cannot. This falls under the category of protecting the interests of the President. One former Chief of Staff spoke to this issue:

> Second, you've got to have a person who can *tell you what they think*... and it's rare when you're President. Most people come up to me as Chief of Staff and say I'm going in and tell him it's the dumbest thing I've ever seen and he's simply got to change it. They get in there, slobber all over him, kiss his ring, tell him how wonderful he is, leave and walk out and say, gee, I really told him. I'd say that's the most groveling, sycophantic behavior I've ever seen in my life. And they say, no, I told him... People just simply do not walk in, point their finger at the President and say, look: that's wrong. (background interview)

Henson Moore explained:

> It's just something about the Oval Office, there's something about the aura of the power of a President that people just won't say what really needs to be said to a President except a very choice few people who are so close to him and were so close to him before he was President that they can overcome it, or they have such a position of trust and respect held for them by the President that they don't feel intimidated." (Moore)

"Sam Skinner and I were not that close to the President. We were staff and he listened to us politely, but if his initial instinct was different from mine or Sam's, he'd go with his initial instinct. We didn't have the ability to turn him from that." (Moore) A factor that aggravated this problem in the Bush White House was the President's decision to keep White House operations separate from the campaign. The effectively kept Skinner, the Chief of Staff, out of the political loop and greatly limited his overall influence, even with elements of his own staff. (Skinner),

The protection of the President's interests is perhaps most crucial in times of crisis. The Iran-Contra affair in the Reagan administration illustrated what can happen when the advisory system fails to work well. James Baker made that clear:

> When (President Reagan) got in trouble was when that system broke down after I left and after Mike Deaver left, particularly. They got him to agree to some things on Iran-Contra and other things that were a mistake. Bill Casey always wanted to go in there and see the President by himself. But as long as the President would tell us, then we could act to either say, "Wait a minute. Do you really want to do this or do you not?" (J. Baker I; see also Deaver)

Mack McLarty also faced a crisis when the Whitewater accusations began to fly. Here, protection of the President's interests had more to do with coping with forces beyond the presidency. He described his approach:

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> The way you deal with that I think as effectively as you can, and I think we were reasonably good at it, is to really try to segment it and separate is as much as you possibly can and isolate it. You've got to deal with it, but we did set up a task force to deal with it. Therefore, you've got people who are concentrating on this, capable, skilled, dealing with the issues and then that allows, obviously, the agenda to go forward... (McLarty)

Presidents may even need to be protected from themselves. H.R. Haldeman, President Nixon's Chief of Staff, wrote:

> I soon realized that this President had to be protected from himself. Time and again I would receive petty vindictive orders... after a Senator made an anti-Vietnam War speech: "Put a 24-hour surveillance on that bastard." And so on and on and on. If I took no action, I would pay for it. The President never let up. He'd be on the intercom buzzing me ten minutes after such an order... I'd say "I'm working on it," and delay and delay until Nixon would one day comment, with a sort of half-smile on his face, "I guess you never took action on that, did you?" "No." "Well, I guess it was the best thing . . ." (Haldeman)

NEGOTIATING WITH THE ENVIRONMENT CONGRESS, THE DEPARTMENTS, AND OTHERS

Chiefs of staff need to get around. They cannot remain closeted in the White House. However, one of the areas of difference among the various Chief of Staff was how much visibility they should personally have. Howard Baker, James Baker, Dick Cheney, and Ken Duberstein all urged the Chief of Staff to stay in the background and not become the center of attention. James Baker saw it as a function of the Chief of Staff to keep the press informed of developments, but to do so on a background basis. "That's not leaking, that's spinning," he said. (Baker, I) Increasingly, however, chiefs have functioned as spokespersons, negotiators, and occasionally, as go-betweens on key issues. Sununu linked the Bush White House to conservative groups, James Baker to the Republican political establishment in 1992, while McLarty developed and maintained the Clinton administration's contacts with the business community.

A key element of the role of most recent Chiefs of Staff has been congressional relations. Though the White House has an office that specializes in this, the Chief of Staff has nonetheless become a major administration spokesman, at least since the emergence of James Baker in that role in the early Reagan years. Prior to that, even a former member of Congress like Donald Rumsfeld did relatively little in that area. (Rumsfeld)

A more common view among more recent chiefs was that of Howard Baker:

> I think it's enormously important though for a President to have a good understanding of the Congress and what's going on up thee and even perhaps a good relationship. A Chief of Staff from that setting can help almost always. Leon Panetta helped and I think I helped. (H. Baker)

John Tuck went so far as to say that Baker "became in fact the congressional affairs guy as well as the Chief of Staff" because members trusted him and "knew what he said would be the policy of the administration." (Tuck, in H. Baker) While that will not often be the case, Andrew Card nonetheless estimated that congressional relations is "probably a good 30 per cent of the responsibility" of the Chief of Staff. (Card)

Another "external" aspect of the Chief of Staff job is dealing with the press. The Chief of Staff may be asked to play a public role as spokesperson for the administration on Sunday talk shows and the like. Beyond that, there is much room for a quieter role. As James Baker pointed out:

> You have to be willing to background the press. Background, not leak. There's a big difference. But one of the things Cheney told me before I took the job, he said, "Be sure you spend a lot of time with the press giving them your spin, why you're doing these things. Talk to them. But always do it invisibly. (J. Baker, II)

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James Baker argued that the "on the record" public presence, attempted by Donald Regan, worked less well because "nobody wanted to hear it from the Chief of Staff. He wasn't elected. They wanted to hear it from the President." (J. Baker, II)

Leon Panetta met regularly with the press for formal and informal briefings.

> You met with the press in the Roosevelt Room to brief them on issues. For example, if we were putting out a budget or putting out a major issue... and you wanted to make sure that the press would give it the kind of emphasis that we wanted, you would do briefings... Then sometimes I would do a one-on-one briefing with a reporter in the Chief of Staff's office. And it varied depending on what the issue was. I didn't do that for everything. (Panetta)

The Chief of Staff also may become involved in cabinet relations, though this is likely to be a smaller part of the job. The White House normally has a cabinet secretary to handle most of the load. Indeed, a veteran of the office noted that "there is natural tension between the Chief of Staff and a cabinet." Presidents have varied in whether they have given the Chief of Staff cabinet rank. The same official's take on that was "I don't know that it makes any difference."

Finally, the Chief of Staff must deal in some ways with interest groups, at least to the extent of scheduling the President for fundraisers. In turn, according to Panetta, the White House must be sensitive to donors:

> These are the kind of big players who are always around.... They are constantly the people you turn to because they have the money for these events. I think, as a result of that, there is without question a greater sensitivity to the issues that they are involved with... .Now, does it control policy, which is the major question in the minds of the American people? Does it control policy? Not necessarily but it sure as hell has an impact as far as decision that are made. It is a factor and it is a growing factor. (Panetta)

Panetta reported that he did feel obligated to meet with and listen to such people. (Panetta)

IV. Personal Styles and Attributes

The Variety of Approaches and People

Both Presidents and Chiefs of Staff come from a variety of backgrounds, display a diversity of personal strengths, weaknesses, and operating styles, and encounter widely differing circumstances during their time in the White House.

Much of the advice relevant to this mix of factors is embedded in what has gone before. Certainly the key is for the Chief of Staff to adapt to the style of the President. The hands-on approach of Jimmy Carter or Bill Clinton certainly required a different form of staff support than the hands-off approach of Ronald Reagan. (Butler; McLarty; Baker I). Likewise, the temperament of the chief executive requires adjustments. The essential factor, perhaps, is achieving the trust of the President. Leon Panetta stated that:

> The first and foremost quality that is essential is trust. You've got to have their trust. To some extent, you have to build that trust because you're just going in to a job, you have to prove yourself. But, ultimately, if you have that trust and you develop that trust, you can do the job. (Panetta)

One also needs to adapt to the various other prominent actors in the White House. Mack McLarty stressed the importance of the Vice President:

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> Another concept I felt strongly about that was not necessarily echoed from the other Chiefs of Staff (with whom he spoke) was that the Vice President be integrated into the Office of the President. Clinton and Gore clearly ran as a team; the Vice President was someone of real standing, a strong personality. And the President's wishes were to have Vice President Gore as an integral part of the team... to keep the Vice President in the information flow and in important meetings... and also have certain areas where he or she would have direct responsibility... (McLarty)

Leon Panetta elaborated upon the importance of the First Lady:

> I think, if there's anything that is probably as common a trend in the White House as Presidents who don't want to offend people, it's that they have very tough first ladies who have been through a lot of the battles and just by the nature of what they've gone through are very strong individuals. (Panetta)

Panetta developed a weekly briefing session for Hillary Clinton for the first six or eight months of his tenure as Chief of Staff. After that, the necessary trust having been established, the meetings "kind of faded away." (Panetta). Similarly, in the Reagan White House, part of Michael Deaver's value as deputy Chief of Staff lay in the confidence that Nancy Reagan placed in him. (Deaver) When Deaver left, Donald Regan was unable to establish such a relationship, which helped lead to his downfall.

Chiefs of staff have come from very different backgrounds. Washington savvy, as noted above, is a desirable trait regardless of background. But there was at least a suggestion that people who have been top decision-makers have a harder time adjusting to the staff role than others do, as both Governor Sununu and Treasury secretary (and former Merrill Lynch CEO) Regan discovered. A former official noted, "I think the most difficult thing for a governor to make the change to becoming a Chief of Staff is that a governor is a principal and a Chief of Staff is staff. You must realize that the spotlight is not supposed to be shining on me; it is supposed to be shining on the other guy." (background interview) Marlin Fitzwater, who served under Reagan and Bush, uttered a similar refrain: "In the end every Chief of Staff is a servant of the President, and the more independence they ask for or try to carve out for themselves, the more likely they are to fail." (Fitzwater)

Regardless of background, one final piece of people-oriented advice from James Baker, reiterating advice noted above, would seem to apply to all who would be Chief of Staff:

> One very important rule in Washington generally is to surround yourself with the best people you can get. People who are so insecure that they are not willing to put really good people in as their deputies don't succeed. If they're worried so much about their *own* visibility or public persona that they're not going to put somebody strong in, then they're going to fail. (J. Baker, I)

"YOU ARE NOT THE PRESIDENT"

James Baker, Ken Duberstein, and others reiterate the importance of the chief never forgetting the staff component of his title. Remember you are staff, not elected or appointed by President and confirmed by the Senate. "The Chief of Staff has the second most powerful job in government but it's staff. The minute you forget that you're in trouble." (Baker, I) In another interview, Baker repeated much the same warning, "You're really powerful but every bit of that power is derivative from the President. The minute you forget that you get in trouble. And it would be totally inappropriate to call a committee chairman and say, 'Come down to my office to negotiate.' Sometimes they might want to. If one of them wanted to come down, that's fine. You do that. But generally speaking, I went up there and I spent a lot of time up there." (J. Baker, II)

Duberstein made the point with a story of a "crusty Democratic congressman" who once said to him,

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> "Duberstein, you're smarter than 95 per cent of the SOB's up here. You know it and we know it. But what you have to remember is we're elected and you ain't." One of the best pieces of advice I ever got. (Duberstein)

Not only must Chief of Staff keep their own egos in check, but they must be sensitive to the egos and interests of others who work in the White House. Long hours, constant pressures, and personal ambitions, can produce dysfunctional behavior that undercuts a team effort. According to Henson Moore, a former member of Congress and deputy chief in the Bush administration:

> The hours are very long. The pressure is very great for the President, to have him be successful. The warfare and backstabbing is more acute there than I ever saw in the department or ever saw in the Congress. If something goes wrong, you don't want to be blamed for it; you want to put the blame on somebody else. You want to have an exit strategy that you leave as a hero not as a dog." (Moore)

McLarty's deputy, Roy Neel, offered a similar warning:

> The White House... nurtures junkies who grow to feel like they have to have this rush of the daily pressures and the high stakes stuff. That can be good for a while but it does burn people out. Someone has to be there to evaluate when someone has burned out. You can't leave it to the individuals to decide when they've lost their effectiveness." (Neel)

V. DEVELOPING A DAILY SCHEDULE

COMPONENTS

The daily schedule of the Chief of Staff can best be seen as having four components. The first and primary component is to ensure that the President's daily schedule accomplishes what the President needs at that point in time. Every meeting the President has is discussed with the Chief of Staff before it is put on the schedule. The Chief of Staff reviews the President's daily schedule with his staff to assure any changes or modifications are needed.

And as noted previously, when the schedule calls for Presidential travel, as it often will, either the Chief of Staff or a member of the chief's staff will almost always be a part of the traveling party, performing the kind of coordination on the road that the Chief of Staff must provide in the White House itself. (Skinner) The second component of the daily schedule of the Chief of Staff is to ensure that every speech the President makes or position the White House takes is consistent with broad Presidential themes. Every policy that moves through the White House has to be cleared by the Chief of Staff. The third component of the daily schedule is representing the President in meetings with members of Congress, the departments, or constituent groups. The Chief of Staff has the authority to negotiate on behalf of the President within certain boundaries. In summary, the Chief of Staff is the trainmaster of the White House. He has to make sure the trains run on time, (Card) but the Chief of Staff also needs to make sure they don't collide. If the Chief of Staff does not personally oversee all of this activity, a designated deputy must be given both the responsibility and the authority.

DAILY ROUTINE

There is a clear rhythm in all administrations. The morning meetings of the Chief of Staff begin with a small group of top staff within the chief' s office and then move to a larger meeting that includes all senior staff, and finally to a private meeting between the chief and the President - all by 9:00 am. The chief may also attend the President's national security briefing which also occurs in the early morning. In the occasional instance where this

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pattern has not been faithfully followed, problems have arisen. Samuel Skinner, for instance, notes that this was not always the case during his term as Chief of Staff, but advises that it ought to be. (Skinner)

The White House day generally begins at 7:00am with a meeting which includes the deputy Chiefs of Staff, and perhaps the press secretary and congressional liaison. In the Bush administration, OMB director Richard Darman often attended. Overnight issues such as national emergencies, economic reports, or intelligence materials (Brady) are addressed here. The 7:00am discussion provides a framework for the larger meeting of senior staff at 7:30 or 8:00am. The senior staff meeting includes top White House aides, most of whom carry the designation "Assistant to the President". This group, which tends to be 10-15 in number, is overseen by the Chief of Staff. There is a sense throughout the various administrations that only senior staff should attend, not their designees. The senior staff meetings usually begin with a discussion of the schedule of the President's day (Brady).

After the senior staff meet, the Chief of Staff meets alone with the President (usually at 8:30 or 9:00), depending on the President's personal schedule. At this meeting the President is briefed on his schedule for the day, issues in Congress, and other matters that emerged in the senior staff meeting earlier.

Some variations on the daily schedule of the Chief of Staff involve the re-election process when the Chief of Staff might meet in the evenings with campaign staff, budget negotiations and other dealings with members of Congress, and national crises.

VI. CONCLUSION

The tasks of the Chief of Staff are many, varied, subtle and critically important to the success of a presidency. While there can be no simple prescription for doing the job right, certain principles do emerge from the experiences of those who have held the position. Very briefly summarized, they are:

Gain control.
The White House is large and complex, and its responses to events must often be immediate. This is not an environment conducive to lengthy discussion or loose management. Successful chiefs have been "strong" ones, but not self-interested or autocratic.

Adapt to the stylistic preferences and needs of the President.
Just as Presidents differ, optimal approaches to working with them will also. Nothing is more important to remember than that the power of the Chief of Staff derives only from the President. A chief who forgets this precept, who acts as if he were President, will get into trouble sooner or later.

Protect the President.
Adjusting to the Presidential style does not preclude compensating for Presidential weaknesses. H.R. Haldeman's well-known tales of the Presidential orders he did not carry out serve as a lesson and a warning for any Chief of Staff. (Jones) Above all, help the President avoid making what James Baker calls "oh, by the way" decisions, where commitments are made without sufficient staffing or thoughtful consideration. (J. Baker, I)

Choose bright, trustworthy and loyal subordinates.
Be willing to delegate work to them in the certainty that it will get done as it should.

Be an honest broker.
Arguably, this is the most important point of all.

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Run a lean shop, be flexible, and establish a rhythm.

Under most circumstances, keep the Chief of Staff office itself relatively lean, to keep the management challenges of that office reasonable. Be sensitive for the need of informal, fluid, often temporary organizational devices (regular meetings, war rooms, etc.) to cope with particular problems and opportunities. In addition to establishing clear rhythms for normal presidential and White House days, be careful to include in discussions and decisions only those with a need and competence to be there. But be careful at the same time not to create groups that are too unwieldy to accomplish their work.

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ABOUT THE WHITE HOUSE 2001 PROJECT

http://whitehouse2001.org

Presidency scholars lead a two-part project designed to provide incoming White House staff members with information on operating key White House offices and to help Presidential nominees fill out the tidal wave of forms they face in the appointments process. Funded by The Pew Charitable Trusts, a foundation known for the stature of its programs and the nonpartisan nature of its organization, the White House 2001 Project works with two broad, Pew initiatives: The Transition to Governing Project of the American Enterprise Institute and the Presidential Appointee Initiative of the Brookings Institution. White House 2001 was designed and developed by the board and members of the Presidency Research Group, the worldwide professional organization of scholars focused on the American presidency and a section of the American Political Science Association.

THE WHITE HOUSE INTERVIEW PROGRAM

Unlike corporations both large and small, a White House begins without a record compiled by its previous occupants. The goal of the White House Interview Program is to smooth the path to power by furnishing incoming staff with substantive information about the operation of seven White House offices critical to an effective beginning: Chief of Staff, Staff Secretary, Press Office, Office of Communications, Office of the Counsel to the President, Office of Management and Administration, and the Office of Presidential Personnel. Through interviews with current and former White House staff members from the last six administrations, the White House Interview Program provides new staff with detailed information about how their White House offices function, the organization of their units, and the roles played by the heads of each office.

In addition to this institutional memory, the White House Interview Program provides a support package of important tools previous staff have identified as invaluable. These tools include a "rolodex" of contact information about the people who previously served in their posts with current addresses and phone numbers. The White House Interview Program also provides the first ever detailed organization charts of White House offices approximately every six months through the Carter administration. The scholars associated with the project, researching and writing about the White House staff, are nationally recognized for their work on the presidency. They are: Professors Peri Arnold, MaryAnne Borrelli, John Burke, George Edwards, Karen Hult, Nancy Kassop, John Kessel, Martha Joynt Kumar, Bradley Patterson, James Pfiffner, Terry Sullivan, Kathryn Dunn Tenpas, Charles Walcott, Shirley Anne Warshaw, and Stephen Wayne.

NOMINATION FORMS ONLINE

In order to address the volume of information required from appointees and the problem of the plethora of forms to be filled out by nominees, the *Nomination Forms Online* program provides a software package that nominees can use to complete the myriad of forms required by the White House, the FBI, the US Office of Government Ethics, and, where appropriate, the Senate committee of jurisdiction. The software uses innovative programming techniques so that the software distributes repetitive information across the several forms nominees must complete. The software allows the nominee to store information for future use in completing annual reports. It also makes available a portable file of data in standard formats so the nominee can share information, at his or her discretion, with the White House Office of Presidential Personnel and other agencies. Nomination Forms Online is freeware.

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THE WHITE HOUSE 2001 PROJECT
REPORT SERIES

available in PDF format (as noted) from: http://whitehouse2001.org

GENERAL SERIES

This collection of reports from the White House 2001 Project describe topics of general concern to White House operations. Those in the general series marked with an asterisk (*) are currently only available to the Presidential Transition Team.

1. Opportunities and Hazards – The White House Interview Program
2. Meeting the Freight Train Head On – Planning for the Presidential Transition
3. Lessons from Past Transitions
4. A Tale of Two Transitions: 1980 and 1988
5. The Presidency and the Political Environment*
6. The White House World – Start Up, Organization, and the Pressures of Work Life*
7. A Guide to Inquiry*
8. Analyzing Questionnaires – Executive Forms for Nominees*
9. Changing the White House Personal Data Statement
10. Report Series Index
11. WH2001 Contacts Database, Alphabetic
12. WH2001 Contacts Database, by Administration
13. WH2001 Contacts Database, by Office

WHITE HOUSE STAFF SERIES

This collection of reports from the White House 2001 Project create an "institutional memory" for the White House Staff. Currently, these reports are available only to the Presidential Transition Team. Look for a release of these reports in the Spring of 2001.

21. Office of the Chief of Staff
22. Organization Charts for the Office of Chief of Staff
23. Office of the Staff Secretary
24. Organization Charts for the Office of the Staff Secretary
25. Office of Management and Administration
26. Organization Charts for the Office of Management and Administration
27. Office of Presidential Personnel
28. Organization Charts for the Office of Presidential Personnel
29. Office of Counsel to the President
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THE WHITE HOUSE 2001 PROJECT
THE WHITE HOUSE INTERVIEW PROGRAM

THE CHIEF OF STAFF

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INTRODUCTION

The office of White House Chief of Staff is crucial to the successful operation of the contemporary presidency. As former President Gerald Ford explained:

> I started out in effect not having an effective Chief of Staff and it didn't work. So anybody who doesn't have one and tries to run the responsibilities of the White House I think is putting too big a burden on the President himself. You need a filter, a person that you have total confidence in who works so closely with you that in effect his is almost an alter ego. I just can't imagine a President not having an effective Chief of Staff. (Ford)

Ford's second Chief of Staff, Richard Cheney, elaborated on the need for effective White House organization:

> Well, it's crucial in terms of how he's going to function as President, whether or not he's effective. His reach, his ability to sort of guide and direct the government, to interact with the cabinet, to deal effectively with the Congress, to manage his relationship with the press, all of those are key ingredients to his success. The White House staff structure and set up and how it functions as an organization determines whether or not he is successful in these relationships. No matter how hard he works or how smart he might be, he can't do it by himself.

The job of the White House Chief of Staff has many common elements from one administration to the next. But there are also key differences, resulting mainly from different Presidents' ideas work styles and beliefs about how the White House should operate. Many former chiefs have stressed that the chief's most important job at the beginning of an administration is simply to find out "what the job is." Mack McLarty, for instance, reported that after talking to most of his predecessors about the job, James A. Baker III told him, "Well, Mack, you just kind of have to be there." (McLarty) In any case, a Chief's understanding of the job has to arise out of close communication between the new President and Chief of Staff, since the President defines the chief's role. But former chiefs likewise stress the value of understanding the basic nature of the job, the possible variations in its performance, and, above all, the pitfalls that any Chief of Staff must avoid. The best way to do this is to talk with those who have held the job before. A typical comment is that of Landon Butler, deputy Chief of Staff in the Carter administration:

> I think, by and large, we learned far more from our predecessors than we did from any written material. We learned from our predecessors and they were very helpful. They genuinely wanted us to be successful at running the White House at least. (Butler)

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To supplement such conversations, though not to substitute for them, we present here a summary of the wisdom offered by former chiefs in extensive interviews.

I. Basic Elements of the Job in Brief

As recently as the beginning of the Carter administration, it was possible to argue that the White House could be run without a Chief of Staff. Those days are past. The complexity of the modern White House requires discipline and coordination that can only be achieved if there is a central coordinating point, someone other than the President to oversee the operation. This job is not easy. Long days, constant crises, and persistent rivalries, much of them built into the institutional structure and processes, the roles of the personnel that occupy the White House, and overlapping missions and interests, create a pressured short time-frame in which to operate. Many chiefs see their job as the second most important and most difficult in Washington. To underline the point, James Baker, who served as Chief of Staff under two Presidents, includes the Chief of Staff office along with Presidential personnel and the counsel as the three jobs that should be filled first, because these people have "got to help the President pick the rest of the administration." (J. Baker, I)

Roles

Most Chiefs of Staff agree on the critical roles they must perform. These, while interrelated, fall into two broad categories: managerial and advisory.

1. Managerial roles

- select the key people on the White House staff, and oversee them
- structure the White House staff system, including the Chief of Staff office
- control the flow of people and paper into the Oval Office, adjusting it to the President's style of doing business
- manage the flow of information and opinion to and from the President and do so in a way that brokers honestly among differing perspectives and recommendations

2. Advisory roles

- advise the President on issues of politics, policy and management
- protect the interests of the President
- negotiate with the environment of the presidency, including Congress, the executive branch, and extra-governmental political groups and individuals

Operating Styles and Environments

Although they agree on the roles, they do not agree on a single, "best" way for a Chief of Staff to achieve them. Some of their disagreement stems from the differing people and circumstances involved. The exact nature of the Chief of Staff job will depend upon such things as

- Presidential styles

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- the circumstances in which they inherited their job, and some from
- the personnel with whom they had to contend and budget they had to administer
- partisanship (precedents and advice from earlier administrations)

Variations in the White House environment also naturally affect organizational arrangements, operational procedures, and personnel decisions. Such factors include the shape of the staff, particularly at the time the chief assumes office, coordination with other White House units, and the structure of day-to-day activities that must vary with the President's style, decisional time frame, and to some extent, the administration's priorities. As we will see below, a chief's role is a reflection of the President. The Chief of Staff is always limited by the President's preferences, views, and habits of management and leadership.

Personal Attributes, Strategies, and Tactics

In addition to role, structure, and processes, the chiefs agreed that certain personal attributes, political strategies, and operational tactics are more likely than others to be successful. Decisiveness, sensitivity, credibility, and political savvy are deemed essential traits for the job.

Strategies based on realistic assumptions about public expectations, those that correctly anticipate elite and public reactions, and those that consider the mood of the country and are designed to work within the broad parameters of public opinion are more apt to achieve the desired goal. Similarly, tactics that incorporate the President's bully pulpit to gain political leverage, that see information as an instrument of power, are also most likely to be successful in today's public-media environment.

Chiefs of staff and their deputies also expressed general agreement on the dangers that may be encountered. Their warnings to future chiefs echoed difficulties that tend to be intrinsic to the job. We will explore these areas of agreement and disagreement in our summary of their advice to the future Chief of Staff.

II. Managerial Roles

Selecting and Managing White House Personnel

Ultimately, the entire White House staff, with very few if any exceptions, will report to the President through the Chief of Staff. At the outset of an administration, the Chief of Staff should and often has been primarily responsible for putting together the staff in the first place. Having one's own people is essential. Loyalty, energy, dependability, temperament, and work style are important attributes for working in the White House. At the same time, a chief must ensure that no matter what personal agendas aides may have (and most aides do have them), it is the *President's* agenda they pursue. (Moore) More generally, James Baker advised would-be Chiefs of Staff that:

> The people who succeed in Washington are the people who are not afraid to surround themselves with really good, strong people. If you're afraid to surround yourself with really top-notch, quality people – because you're afraid they'll overshadow you or what not, and there is a lot of that that goes on – you're not going to succeed. A strong White House staff buys the President one hell of a lot... (J. Baker, II)

Typical of a Chief given responsibility for selecting his team was John Sununu in the Bush administration, a White House observer related:

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> When the White House staff was put together, there was very little interaction with the other part of the transition. In other words, it was basically Sununu did his own thing . . .anybody that was appointed by the President, that would be an assistant to the President, deputy assistant to the President, special assistant to the President, the President was involved. But to his credit, he gave a very long leash to John Sununu – "If that's the team you want, that's okay. Or, "Are you sure you really want to do it? If you really want to do it it's okay." But the benefit of the doubt went with John Sununu in putting together the White House staff. (background interview)

In order to exercise effective control over White House operations, Chiefs of Staff must be able to pick at least their principal deputies. Prior to the beginning of an administration, the Chief of Staff-designate should oversee the White House transition which should be separate from the rest of the transition to government. Two criteria deemed essential in the initial choice of top staff aides are political savvy and Washington experience. James Baker noted:

> It [political credentials] gives you far more cachet in policy debates and inter-departmental policy... If you've been out there fighting the political wars with the President, you're in a better position to speak to those issues than other people who just maybe gave some money... .(J. Baker, I)

W. Henson Moore, Samuel Skinner's deputy and a former Member of Congress, remarked that both the Chief of Staff and the deputies... "really ought to have some political experience. This is no place to have on the job training in politics...they've got to have some political instincts." (Moore)

Marlin Fitzwater likewise noted the difference between the management challenges of the White House and those elsewhere, and the importance of both Washington experience and personal relationships:

> When you talk about management of the White House from the Chief of Staff, you're really talking about twenty people, a very small group. And that turns out to be a very personal kind of thing. Then there's a second circle of management in which you're kind of directing cabinet officers and deciding agenda issues and matters like that that grow out of it. But in terms of the people management it's a very small group and it's always a personality kind of thing. And that's also why I think businessmen have such a difficult time. There's always this kind of feeling when you bring in businessmen or businesswomen with experience and they'll bring some professionalism to the organization. And they always fail because they always think in line-staff structural relationships and in business they don't have to worry about personal relationships because they have the power. They give orders; they take away your salary; they can fire you; they can give you bonuses. And in the White House all those normal management techniques go out the window. Oftentimes you can't fire people. (Fitzwater)

A third factor, implicit in the advice that the Chief of Staff pick the top staff, is loyalty. Samuel Skinner noted that

> Once a loyalist of a President gets in there... it's the normal tendency of everybody including Presidents and Chiefs of Staff and everybody else to honor that loyalty and, if somebody is trying to push them out, to protect them. So there's a tendency, if loyalists get in to the White House and they... don't have a duty and responsibility to the Chief of Staff as having put them there, the thief of staff can have them go around him very easily unless you have a President who never lets that happen. Even though you control the process, there are ways to get around it.

Naturally a Chief of Staff who comes in the middle of an administration usually does not have the luxury of completely cleaning house, but must be able to have some flexibility in getting the shop in order and his people placed. This was the problem that beset Skinner and to a lessor extent, Leon Panetta when they took over for Sununu and Mack McLarty respectively. In the words of Moore,

> The President had his staff. He had been goaded, pushed, convinced into getting rid of Sununu and Card, people... he liked. And he wasn't going to hear of anybody else being replaced on that staff. So once that

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> word gets out to the people who are supposed to be reporting to you and taking orders from you that you can't touch them, you have limited authority to really make things happen. (Moore; see Skinner)

Skinner concurred, noting that "the President also made it quite clear that he did not want a wholesale change in his staff." (Skinner) But, said Skinner,

> A good friend of mine, Vernon Jordan, told me... you've got to have your own people in order to make anything work in Washington. I think those people have to be accountable. The only other way you're going to do that is to fire one of the President's favorites and let it be know that you've got to fire him. That's hard to do.

Leon Panetta encountered some of the same difficulty when he attempted to replace press secretary Dee Dee Myers with Michael McCurry at the beginning of his tenure as Chief of Staff. Nonetheless, Panetta managed to bring in a core of key people upon whom he could depend. Both Howard and James Baker likewise insisted on bringing in a solid group of their own people when they took over the Chief of Staff office during the Reagan and Bush administrations. As Howard Baker's deputy, John Tuck recalled:

> He picked his own team, as you well know, except for Marlin (Fitzwater) who stayed, who was there before. Everybody else changed over and it was just understood that when Senator Baker became the Chief of Staff that it was going to be a Baker team... (This permitted) a strong Chief of Staff system where the decisions and the decision making process and the people and the access to the President of papers and people was controlled by one person. (Tuck, in H. Baker)

Along the same line, James Baker noted that you don't have to fire people to move them out. When he brought his team aboard the White House in 1992, he chose to "layer" the existing staff, moving the new people to the key jobs. "They probably resented that, and probably rightly so. They weren't fired, but they were layered." (J. Baker, II)

Keeping people too long, however, can be a problem, especially if personalities clash or working styles conflict with one another. Ford's Chiefs of Staff faced such a situation in dealing with long-time aide and speechwriter Robert Hartmann, whose dismissal from the White House was out of the question. The solution to this internal problem was to circumvent Hartmann whenever possible. James Baker likewise advised that "one good way to discipline people when you're in a political environment like that in the government is to cut them out of meetings." (Baker, II) While sometimes effective in the short run, this approach can allow a persistent source of conflict to remain rooted in the White House. It also opens the door to end runs by people who are out of the loop but who still have access to the President. (Fitzwater)

The same kind of problem can appear when a President wants to replace people, but is reluctant to simply let them go. This invites friction and discontent. As Howard Baker put it, "If you cut the dog's tail off, cut it all off at once." (H. Baker)

More commonly, the problem connected to long-term White House service is burnout. A Chief of Staff taking over in mid-term may find, as Alexander Haig did during the Watergate affair and Skinner did after Sununu, that key personnel simply have burned out under the relentless pressure of White House work. (Jones and Skinner) Skinner's advice: "I think just find them another job... You probably ought to refresh on a regular basis." (Skinner)

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STRUCTURING THE STAFF

The White House Office

A Chief of Staff can think of structuring in three different senses. The first is structuring the White House Office as a whole. Since most White House staffers report to the President through the Chief of Staff, the Chief of Staff must work with the President to set up an overall reporting and decision making system for the WHO. As many White House veterans have noted, this is best done as soon as possible after the election, so the White House staff will be ready to function immediately after the inauguration, if not sooner.

The experience of recent presidencies indicates that there has been relatively little variation in the overall design of the White House in terms of offices and responsibilities. The basic model for the modern White House dates back to the Nixon administration, and has been modified, but only at the margins since then. Thus, it is likely that the major political offices – Congressional Relations, Public Liaison, Communications and Press, etc., will appear in some form in any new administration, as will the key staff organizations, such as the Office of Management and Administration and the Staff Secretariat. Likewise, the basic model for the NSC and its staff, as well as the domestic policy staff, has become stable. The Clinton White House's employment of the National Economic Council to deal specifically with economic policy has further institutionalized the operation of a White House-based economic group that has functioned in some form since the Ford administration.

Within this overall framework, however, there are have been important differences in operating patterns. Most generally, one can distinguish between relatively "strong" and "weak" Chiefs of Staff. This is, of course, an oversimplification, but it does point to a contrast in organizational strategies. The primary differences are in the degree to which the Chief of Staff controls information flow to the President and the extent of the Chief of Staff's control over the President's schedule. As previously noted, the contrast between Sununu and Skinner in the Bush administration and between McLarty and Panetta in Clinton's illustrates the strong and weak models of Chief of Staff. From these example it is also clear that the relative "strength" of a Chief of Staff is not just a matter of the Chief of Staff's preference, but is also dependent upon circumstances. The key point, however, is that the Chief of Staff is bound by the President's habits and operating style. The job of the Chief of Staff is to make the best of that, and to compensate where possible for whatever weaknesses emerge.

A further dimension of Chief of Staff "strength" involves the scope of his control of information and access. While all chiefs have sought to oversee the flow of paper and people in the areas of domestic policy and politics, chiefs have varied in their relationship with the National Security Assistant (NSA) and the NSC staff in general. The NSA is one of the principal potential White House competitors of the Chief of Staff. Some Chiefs, such as Leon Panetta (Panetta), have insisted that the NSC go through them, while others have not. This is not always the choice of the Chief of Staff alone. Nonetheless, it can be a fateful choice. In the first four years of the Reagan administration, for instance, the NSA did not report through Chief of Staff James Baker, but through Counselor Edwin Meese. Moreover, once William Clark became NSA, his long-time relationship with the President rendered him outside staff control. (J. Baker II) In hindsight, Baker indicated that he would want his own person in the job of NSA from the start.

Similarly, some chiefs have taken a hands-on approach to the Office of Management and Administration -- again, Panetta is an example (Torkelson) -- while others have not.

On the whole, the "strong" model tends to be the one lauded by most of those who have served as Chief of Staff or Deputy Chief of Staff. Indeed, Skinner and McLarty are the only recent Chiefs of Staff since Hamilton Jordan under Carter who did not clearly attempt this approach. But the Chiefs caution that this "strength" must be exercised within the understanding that the Chief of Staff is not the President, and that the Chief of Staff serves only the President's agenda.

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Organization of the Office of the Chief of Staff

General Patterns

The second structural responsibility of the Chief of Staff is to design his office. As Howard Baker observed,"... a Chief of Staff and a national security adviser...are now so loaded with responsibility and with paper... that they sort of get in the same category as the President does. If they don't have somebody prompting them or watching out for them, they'll get in the same fix." (H. Baker) Again, there has not been a great deal of variation in the organizational schemes for the Chief of Staff office, but there have been different approaches to dividing responsibility.

Most Chief of Staff offices have been relatively lean, with one or two deputies reporting directly to the Chief. Most Democratic administration have had two deputies, with one assigned to handle political chores while the other oversees White House operations. Republican White Houses have sometimes relied on just one deputy, whose job has varied. Michael Deaver, under Reagan, for instance, specialized in communications. Andrew Card, under Bush, specialized in administration.

> Reporting came to both of us, both Skinner and me, as to what was going on in Congress. I spent a lot of time talking to congressmen trying to assist the White House in every way. So it was kind of a loose dividing of reporting authority. I don't recall there ever being anything in writing about all that... .(Moore)

In addition to the Chief of Staff and deputy or deputies, there have usually been two or three assistants (variously titled "Personal Assistant," "Executive Assistant," "Staff Assistant," or just "Secretary") to the Chief of Staff and one person at roughly the Staff Assistant level to work under each deputy. By 1998, this number had grown to five.

Beyond that, Chiefs of Staff have varied with regard to the placement of additional people and duties directly within the Office of the Chief of Staff. Donald Regan, for instance, formally had three deputies (holding the rank of deputy assistant to the President), one of whom, Frederick Ryan, supervised the administration's Private Sector Initiative, and with it a substantial staff.

Election season has normally brought substantial campaign responsibilities to the Chief of Staff. This has often been reflected in the addition of people reporting to the Chief of Staff. Jack Watson's office, at the end of the Carter administration, for example, contained several deputies, including a labor liaison and a research director. Leon Panetta's office likewise expanded, providing an organizational home for Counselors and Senior Advisers such as Rahm Emanuel, and George Stephanopoulos, while assuring that they reported to President Clinton through Panetta.

When elections are not impending, a relatively lean Chief of Staff operation is still a viable option. However, the most recent trend is in the other direction. The second four years of the Clinton White House have witnessed a continuation of the practice of placing senior advisers in the Chief's office. Under John Podesta in 1998, for instance, were two Counselors (Paul Begala and Doug Sosnick) and a Senior Adviser (Emanuel) plus two deputy slots, one assistant deputy, the Deputy Director of Millennium Projects, and eight others who assisted these people. Thus the total personnel at the level of staff assistant or above numbered 20. That compares with seven under James Baker in 1992.

Division of Labor in Recent Administrations

A key issue in this organization is how the work is divided among the Chief of Staff and the deputies. There are clearly more demands upon the Chief of Staff Office than one individual can satisfy. Delegation is therefore critical (See Baker II) Patterns have varied depending mainly on the interests and experiences of the Chief of

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Brett

THE WHITE HOUSE 2001 PROJECT
THE WHITE HOUSE INTERVIEW PROGRAM
REPORT NO. 29

THE WHITE HOUSE COUNSEL'S OFFICE

MARYANNE BORRELLI
CONNECTICUT COLLEGE

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VIRGINIA POLYTECHNIC INSTITUTE

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STATE UNIVERSITY OF NEW YORK – NEW PALTZ

HIGHLIGHTS:

- "One of the best legal jobs in the country...you're always on the cutting edge of problems and you're giving this mixture of legal and policy advice all the time."
  — Lloyd Cutler
- "Nothing went to the president...that didn't go through the Counsel's Office."
  — Peter Wallison
- "So FDR announced that he was creating this White House Counsel, and Judge [Samuel] Rosenman was going to be the White House Counsel. One of the press people asked him, 'Mr. President, what's he going to do?' And FDR supposedly answered, 'Legal stuff.' That's about as good a description as there probably is: 'Legal stuff.'"
  — Abner Mikva

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Undertaken by presidency scholars and funded by the Pew Charitable Trusts, the White House Interview Program provides information to incoming presidential staff on White House transitions and operations. See http://whitehouse2001.org for more information.

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often quite ceremonial, lacks a clear beginning or ending, and reveals much about the competition for political power.

Typically, precedent is followed very closely, with past letters serving as models for correspondence.

> War Powers is less of a problem because you can always rely on OLC to give you the tick-tock on that. That's a shared responsibility; I never worried much about war powers... (Gray interview, p. 6)

> ... the War Powers Act discussions were very desultory. I think I saw my role and most of the lawyers involved in the process saw their role and the political people saw their role as trying to make sure that we did the minimum necessary to comply with the notice provisions and other provisions the act required of us so we didn't give Congress a free hit. (Mikva interview, p. 13)

Advising on Presidential Disability and Succession

C. Boyden Gray observed that the Counsel's Office is singularly responsible for designing decision-making procedures for presidential disability and succession.

> There's a Twenty-fifth Amendment, that's all – we didn't inherit much on that but we did develop a big decision tree thing which worked when [President Bush] had his thyroid problem and I think has worked since. That was a big contribution to the Counsel's Office, the work that we did to put that all together.... I don't think we involved anybody outside the White House but I sat down and did it with the Chief of Staff ... [and] the White House doctor.... What happens: If X then go to Y; if Z then go back to A. It's just a decision tree on how to handle disability and it worked like a charm faultlessly, perfectly when he went into the hospital. (Gray interview, p. 6)

A.B. Culvahouse has commented on this recurring issue of temporary presidential medical incapacity.[1]

> This is an area where the lack of an institutional memory is atrocious. The White House should not have to re-invent a process each time the POTUS [President of the United States] has surgery. We did the same thing when President Reagan had surgery (I think for skin cancer) in '87/'88.

The Limits of Advocacy

Complicating the Counsel's work as a protector of presidential powers and constitutional prerogatives is the lack of clarity associated with the Counsel's responsibilities as an advocate. The White House Counsel provides legal counsel to the *office* of the presidency, not to the *individual* president. As such, the Counsel's Office protects the powers of the office within the constitutional order of separated powers. Determining whether the office or the individual is under attack, however, may be difficult.

> In fact, when I was first introduced to this job by Fred Fielding he said to me, "You are counsel to the office of the presidency. You are not counsel to the President." I absorbed that and thought I understood what it all meant. However, in practice, it's not a very useful guide, because you really don't know -- when issues like Whitewater come up -- whether you're representing the President or the presidency. For example, counsel can certainly with a lot of noise created by the President's political opponents, even if they are allegations concerning the President's own personal conduct. But as soon as it becomes clear -- and there's no bright line here -- that this isn't just noise by political opponents, but in fact relates to the President's personal conduct, then the President should have his own lawyer. (Wallison interview, p. 25)

Identifying and drawing these distinctions, however, often has generated controversy. For instance, Clinton Counsel Bernard Nussbaum was widely viewed as failing to make this distinction between advocacy on behalf of the office and on behalf of an individual president. For his part, Nussbaum wrote in his

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[1] Personal communication A.B. Culvahouse to Martha Joynt Kumar, White House Interview Program, October 9, 2000.

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resignation letter that he left "as a result of controversy generated by those who do not understand, nor wish to understand, the role and obligations of a lawyer, even one acting as White House Counsel." (As reported in Marcus and Devroy, 1994)

2. *Overseeing Presidential Nominations & Appointments to the Executive and Judicial Branches*

Participating in the Selection of Presidential Nominees and Appointees to the Executive Branch

White House Counsel advising about presidential nominees and appointees to the executive branch has typically focused on nominations to the top Justice Department positions and to the General Counsel positions in the departments and agencies. Bernard Nussbaum bluntly stated that his office "appointed the Attorney General, head of the FBI, Justice Department officials (Dellinger -- I sent him over to OLC from the White House Counsel's Office)." (Nussbaum interview, p. 5)

Within the White House, White House Counsels stressed their need to appoint a counsel to the National Security Council (NSC) staff. Lloyd Cutler argued for appointing the NSC Counsels to the White House Counsel's Office, rather than to the NSC staff; C. Boyden Gray emphasized the need for a low key NSC observer.

> We worked out a deal that I could name [Scowcroft's] deputy legal advisor to the NSC, Steve Rademaker:... But that can be tricky. It was tricky and a huge problem in Iran-Contra.... Scowcroft agreed that I should never be in a situation like that. That's why he allowed me to have Rademaker in there. I don't know how the current administration has done this. I don't know whether the White House Counsel has his person in the NSC operation but that to me was very important, very, very important. (Gray interview, p. 23)

Participating in the Selection of Presidential Nominees to the Judicial Branch

The extent to which the Counsel's Office has been involved in the judicial appointment process has varied across administrations. (Goldman and Slotnick 1997, 1999) In several recent administrations, the White House Counsel oversaw the process from start to finish: the Counsel chaired the judicial selection committee, supervised the vetting and clearance process, and prepared the nominee for confirmation. In every administration, the judicial nomination process required the careful coordination of several White House offices, consultation with the Justice Department, and extended negotiations with U.S. Senators.

The selection process routinely varies for district, circuit, and Supreme Court nominations. Senators tend to be more involved in nominations to the U.S. District Courts than they are in nominations to the Courts of Appeal or, especially, to the U.S. Supreme Court. Partisanship, though, plays an important role in determining the amount of influence that each player will have in the process.

> Unlike the Supreme Court, with courts of appeal and district courts you had to deal with the local Republican, in our case senators if there were senators. If there weren't senators, the governors, congressmen and congresswomen. District courts, I seldom got involved. The Justice Department had a lot of protracted negotiations ... about whether this was an appropriate person and so forth or was this a person who shared the President's judicial philosophy. Courts of appeal I would more often get involved. There would be disputes between the senators and the Justice Department. There would be disputes between maybe two Republican senators from the same state, between the governor and the more senior congressman or congresswoman. (Culvahouse interview, pp. 20-21)

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The selection process itself has shifted from being centered in the Justice Department to being firmly ensconced in the White House, albeit with the status of the Attorney General always a factor. Carter Counsel Robert Lipshutz recalled that the Department of Justice believed that judicial selection was its distinctive responsibility.

> [White House involvement in judicial appointments] was a struggle within the Justice Department because, number one, the White House was stepping into what many, particularly career people, and even Griffin [Bell, the Attorney General] too, felt should be strictly their prerogative and that is helping the President pick the judges. (Lipshutz interview, p. 11)

During the Reagan administration, White House involvement in lower court nominations increased. By the Clinton years, such involvement had become routine, although the Justice Department continued to participate in the process. Members of the Clinton Counsel's Office were invited to the personal interviews with prospective lower federal court nominees, which were conducted by senior officials in the DOJ's Office of Policy Development. Counsel staff also contacted senators about possible nominees, working with senior members and staffers of the Senate Judiciary Committee.

> The judicial selection process is centered in the White House office. A lot of other White House Counsel's Offices did not have the breadth and authority we had (maybe because of Foster and his access to the First Lady). We had special responsibility for Court of Appeals and Supreme Court appointments. (Nussbaum interview, p. 5)

From the Reagan years onward, the judicial selection committee chaired by the Counsel typically included members of the White House Counsel's Office and the Department of Justice. In the Clinton administration, it also included representatives from the First Lady's Office and the Office of Legislative Affairs. The selection committee's assessments were both legal and political, weighing the potential nominee's legal philosophy and the likelihood of Senate confirmation. [See the Wallison interview for an extended discussion of the Reagan judicial selection process.]

> Well, it's all done in conjunction with the Department of Justice and it's pretty obvious to any lawyer who the candidates are. It's not rocket science. The question is always, "Can you get the person you really...?" What's the matrix of confirmability with whom you really want to go with. You can't do your ideal person, usually, because there's a confirmation problem or there's a background problem or there's a money problem or there's something. So it never lines up perfectly. (Gray interview, p. 9)

Supervising the Vetting and Clearance Process

The Counsel's participation in the nomination and appointment process has minimally and consistently involved the Office in supervising the vetting and clearance process (FBI, IRS, 278 forms and financial disclosure forms) for all presidential nominees to the executive and judicial branches. The time and resources consumed by these reviews is extraordinary. (See "Rhythms" in the Organization and Operations section, on this work over the course of an administration.)

> Well, the FBI thing takes roughly three months although you can speed it up. You can do an expedite and do it in a week if someone has been through it before. I think we did Cheney over a long weekend. But if you're starting from scratch with somebody, normally it's three to four months depending on how old they are. If they're twenty-one, it won't take that long. If they're fifty-one, they have a whole life to go through especially if they've traveled. So it takes three months, average . It can take people three months just to fill out the forms so you really have to hammer people and say, "The FBI can't start until they know where you live and that means filling out the form." (Gray interview, pp. 21-22)

When the background checks were complete – or even while they were progressing – decisions had to be made about whether to proceed with the nomination or appointment. In each administration, White House Counsels noted that different standards were applied to appointments than to nominations, and to nominations for less visible and more visible positions.

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> [Y]ou'd have some people that you might never send up to the Hill for confirmation, but because they were strong allies of the President, supporters and/or were people that had a lot to offer, you might appoint them to the President's Foreign Intelligence Advisory Board rather than nominate them to be undersecretary of defense because the President has unilateral appointment authority. Maybe they go to a Schedule C position in OMB or DAS [Deputy Assistant Secretary], Treasury or whatever. You were pretty darn pure about cabinet people, deputy secretar[ies]. We were awfully pure about State, Defense, Treasury, Justice.... You make different calls about whether or not the person had access to classified information, whether or not they had grant contract awarding authority. Different people are suited for different things. Take a look at the [Senate] committee. There were some committees that would take no prisoners and others – the finance committee, I think, was pretty terrific about exercising discretion, where youthful indiscretions ... were not disenfranchising if the person was a great Treasury securities expert. (Culvahouse interview, p. 32)

Then, when the nominations were sent to the Senate, negotiations had to be conducted about the legislators' access to the reports.

> How much of the FBI files do they get to see[?] We conduct the search; we do the FBI for our benefit not for their benefit.... That was subject to enormous negotiation.... Huge fights over that.... You have to negotiate them one by one.... [O]nce you concede to one committee, you can't cut back for another committee; they're going to demand the same treatment. But it's got to be renegotiated and reinvented every time. (Gray interview, p. 16)

Preparing the Nominee for the Confirmation Hearing

Beyond vetting the nominees, the Counsel's Office sometimes prepared them for the confirmation hearings. This preparation could take the form of "murder boards."

> We [the Reagan administration] did a lot of murder boards, not just for judicial nominees but for a lot of people. I probably did fifty murder boards in my twenty-two months.... You get a bunch of lawyers and legislative types pretending to be senators and acting like horse's rear ends.... You can have too many [people on a murder board]. To me, there is an art to running a murder board. I've seen some where too many people are trying to impress the nominee, which is not what you want to do. What you want to do is anticipate questions, to make it more difficult for him or her than it is going to be in fact, and hit all of the areas that he or she is going to be questioned about. Supreme Court nominees are very difficult because the hearings go on forever and ever. In my view, there should be four or five questioners max. There should be an understanding that a good enough answer is good enough. We're not striving for perfection here – we're striving for B-plus – and that you don't critique during the first two hours. You only critique on breaks thereafter.... This person already is the President's nominee. It's too late [to educate them to policy positions]. The object is to get them confirmed and make sure they're not so immobilized with promises and commitments that they can't exercise discretion with a full range of options. (Culvahouse interview, pp. 18-19)

3. Advising on Presidential Actions Relating to the Legislative Process

In recent presidential administrations, tasks in this category have included reviewing legislative proposals; reviewing bills presented for signature or veto, and drafting signing statements and veto messages; reviewing State and Defense Department authorizations and appropriations proposals; drafting budget rescissions and deferrals; participating in the negotiations associated with Senate treaty hearings; and being involved in legislative negotiations concerning policy, document requests (see also executive privilege, above), treaties, and nominations.

Congressional negotiations are a daily fact of life for the White House staff and, therefore, for the White House Counsel's Office.

> Well, to begin with there is hardly anything the president can do without the cooperation of the Congress. Most of his programs require congressional approval. The budget requires congressional action. Congress is always slow and we go through these continued crises of shutting down the government and continuing resolutions, et cetera. Getting Congress to move is very, very important. (Cutler interview, p. 34)

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The extent to which the Counsel's Office has been involved in these policy negotiations has varied within and across administrations. Two Counsels who were deeply engaged in policy making were Lloyd Cutler and C. Boyden Gray.

> Well, you had a lot of dealings with Congress because both the members and their staffs would call you up about things they were particularly interested in that they wanted you to take up with the President, or get a decision favorable to their constituent or whatever. I was used to a considerable extent to do what you might call lobbying Congress, although I'm not a lobbyist myself in the normal sense of the word. (Cutler interview, p. 15)

> The question is whether you take the lead or just participate in negotiations. I basically had to lead all the negotiations with the civil rights groups and the Congress on the Civil Rights Bill. I was sitting at the center of the table. I did not lead but I was a participant in all the negotiations down in [George] Mitchell's conference room in the Senate -- endless, endless meetings on the Clean Air Act. They would go until two, three, four in the morning sometimes. I wasn't leading those, but I was there. (Gray interview, p. 4)

At a minimum, however, Counsels have routinely been consulted about legislative matters. The resultant advising has typically involved as much politicking as it did lawyering. For example, the Reagan and Bush administrations seized upon signing statements, which are drafted by the Counsel's Office, as opportunities for statutory interpretation by the executive. These administrations used signing statements to urge courts to give the same legal weight to the "executive intent" of legislation as courts have traditionally given to its legislative intent. Accordingly, the Counsel's Office became deeply involved in the associated political and policy debates.

4. Educating White House Staffers About Ethics Rules & Records Management & Monitoring for Adherence

Among the tasks in this category are distinguishing between White House expenses and campaign expenses; reviewing presidential travel; approving requests for appointments with the president, monitoring these for propriety, seemliness, legality, and executive privilege issues; responding to document requests and subpoenas directed to the president and to other White House and executive branch officials by congressional committees and Independent Counsels; and serving as the ethics officer for the White House staff and executive branch political appointees. [In this list, links are needed from the subpoena and ethics officer points to the Torkelson interview.] Past Counsels stress that this work is essential to a president's early success, because it allows an administration to put its people in place, to establish responsible procedures, and to advance its policy initiatives.

Perhaps the most prominent of the newer demands confronting the Counsel's Office is the intensified scrutiny of ethical matters within a presidential administration. This has generated a need for a central coordinator, alert to potential problems and able to take pre-emptive (or corrective) action. This issue arena is one of the many that draws the Counsel's Office closer to other White House units, and that obliges it to develop constructive relationships with Congress and various other political actors.

Ethics laws, to quote C. Boyden Gray, "are quite complicated and obscure and overworked and ought to be deregulated." (Gray interview, p. 1) The White House Counsel's Office is needed to explain these laws to political appointees and to the members of the White House staff. This role is needed particularly at the outset of an individual's service in the White House or executive branch, throughout the campaign season, and during investigations. (See "Rhythms" in Organization and Operations)

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Orienting New White House Staff and Executive Branch Officers

Federal ethics statutes and regulations are typically more stringent than those enacted in the states. Likewise, the standards for the legislative and executive branches are different, creating the need for former Congress members and staffers to be carefully briefed.

> At the beginning of my tenure, we circulated [an ethics] memo that had all the details. Everyone who was going to be appointed by the President would get this memo, everyone on the White House staff got this memo. It was a memo from me and it laid out in detail what all the rules were. But then I also would meet with groups of people who were about to enter on to their jobs, in some cases they already had entered on to the jobs, maybe thirty at a time.... All through the administration anyone who was going to be appointed to a job [was affected]. And I would go through what the rules were and then I would give them a little lecture about how important it was to abide by these rules and how the President was trusting them to abide by these rules; that every time something happens, at no matter what level of an agency, it is always the President's responsibility that it happened. "You've been appointed by Ronald Reagan. I will vouch for his honesty and his integrity and his desire to do things the right way. So you owe him a responsibility to act in the most ethical possible way. If there's ever a question you should check with your Counsel or you can check with me and I'll be happy to provide you with any advice that you need on these questions." (Wallison interview, p. 27)

These orientation sessions would be reprised when an individual left the White House. For example, the Counsel staff would review the Presidential Records Act and would "remind everyone that these are presidential documents; you're not walking out of the White House with them; these are things that become part of the permanent record." (Brady interview, p. 7)

Monitoring and Educating Staffers During Campaigns

The need to educate and monitor staffers is particularly acute during the campaign seasons, both congressional and presidential. Then, the Counsel's Office staff has been called upon to provide general briefings and to circulate a more general memo about campaign activities. Changes in the associated laws may create an even greater need for this information.

> [W]e had two very active ethicists in the Office. One of them was Beth Nolan and the other was Cheryl Mills. Both of them, that was their field. Beth was in charge of ethics in the White House and Cheryl was her deputy. So the driving force was that the Hatch Act had just been amended and it has caused some changes. It now allowed people to get more involved than they had been previously. As I recall, it was Beth probably who said we really need to get a memo out to everybody telling them what they can and can't do and not to overread the Hatch Act changes thinking they can do more than they should. (Mikva interview, p. 17)

Reviewing Investigations and Associated Proceedings

As is suggested by the Counsel's role in responding to document requests and subpoenas directed to members of the White House staff and other executive branch officials, many Counsels have had to oversee investigations. Whether conducted by Independent Counsels or congressional committees, these proceedings have consumed much of the Counsel's resources. (See also the Organization and Operations and the Lessons Learned sections.)

> My first job [in the Clinton administration], which occupied the bulk of my time really, was to look in to the so-called White House – Treasury relationship having to do with the RFC in reference to the Justice Department of the whole Whitewater matter.... Then I had to look into the Espy case; I had to look into the Cisneros case, et cetera.... A lot of [developing ethics rules for the White House staff] was done in collaboration with the so-called Office of Legal Ethics, which is an independent quasi-Executive Branch agency, and which has the responsibility under the various ethics statutes to write regulations, give opinions as to what you can and cannot do. Now every department has an ethics officer so there is frequent consultation with the ethics officers. But a lot of that came up in this Whitewater, Treasury, White House contact investigation. (Cutler interview, p. 20) [Cf. the Office of Government Ethics in the Executive Office of the President — http://www.usoge.gov/]

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Bernard Nussbaum has described Washington as practicing a "culture of investigation." (Nussbaum interview, p. 4) That environment is not likely to change in the near future. Although the expiration of the Independent Counsel statute will almost certainly alter the investigatory process, investigations will doubtless continue and will have profound implications for the Counsel and the Counsel's Office.

5. HANDLING DEPARTMENT, AGENCY, AND WHITE HOUSE STAFF CONTACTS WITH THE DEPARTMENT OF JUSTICE

The relations between the Justice Department and the Counsel's Office often are quite close. On occasion, for example, DOJ appointees and Counsel staff members have been recruited to and from one another's offices. This occurred most recently in the case of Clinton Counsel Beth Nolan, who was the Assistant Attorney General-designate in the Office of Legal Counsel. Similarly, Clinton Solicitor General Walter Dellinger previously served as an Associate Counsel and as Assistant Attorney General for the OLC.

Monitoring Contacts with the Department of Justice

The Counsel's Office functions as a gatekeeper for all contacts between the White House and the Department of Justice.

> ... all requests for OLC opinions had to go through me, all communications with the department had to go through my office.... [T]here were certain exceptions but no one could call over to the Deputy Attorney General and the solicitor general directly; they had to go through me. My typical point of contact was the Deputy Attorney General for everything except OLC opinions, then I would call the head of OLC. (Culvahouse interview, p. 16)

The White House Counsel's oversight is meant to ensure that communications between the White House and the Justice Department are properly conducted. Any effort to influence the legal judgments of the Department would generate significant difficulties for an administration. Reagan Counsel A.B. Culvahouse noted, for instance, that departmental statements of administrative policy were routinely reviewed *unless* Justice was issuing them. Contacts with the DOJ, in brief, have serious implications for presidential power and for policy development, and therefore are carefully supervised.

Requesting OLC Legal Opinions

The resources of the OLC -- including its institutional memory -- render this office an invaluable source of legal expertise for the White House Counsel. Quite simply, the Counsel's Office cannot provide all the information and the advising that an administration needs.

> OLC is the single most important legal office in the government. More important really in terms of scholarship and memory and research – White House Counsel's Office doesn't really have the staff to do all [that] and they shouldn't. It should be done in OLC.... [T]he White House doesn't go to court without the department..... OLC was a huge problem for us in the sense that they were putting on a brake. We were free to ignore their advice but you knew so you did so at your peril because if you got into trouble you wouldn't have them there backing you up, you wouldn't have the institution backing you up. So you did it at your risk; you did it at your risk.... You're best able to avoid the land mines if ... you restore the rightful place of the Office of Legal Counsel. When in doubt, ask them and they'll tell you where the land mines are. (Gray interview, pp. 18-19, 21)

Several other Counsels echoed Gray's description of the OLC as a formidable ally and a significant check on the White House. However, precisely because of the similarities in their responsibilities, the relationship between the White House Counsel and the OLC can be highly competitive. Both are recognized

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as legal experts immersed in politics and policy. Exacerbating matters, the jurisdictions of their offices, having evolved through practice, are blurred and lack strict bureaucratic rationality.

Yet, to an even larger extent, this competitive relationship reflects differences between the organizations. The White House Counsel is appointed by the president and does not require Senate confirmation. The members of the Justice Department include presidential appointees who are free of Senate confirmation, presidential nominees who are subject to Senate confirmation, and careerists. As such, Department officials have numerous and crosscutting loyalties. Further, while the president's claim to executive privilege in regard to communications with the White House Counsel has been delimited in recent years, any possibility of the president successfully making such a claim in regard to the OLC may have been sacrificed in the Reagan administration.

> ... it had to do with a request by the Senate Judiciary Committee for all of William Rehnquist's files when he was head of the Office of Legal Counsel at the Justice Department.... I thought that was simply harassment and I thought they were trying to create the kind of issue they could use to stop the nomination. I and the person who was then head of the Office of Legal Counsel in the Justice Department both felt this was a good executive privilege claim because the Office of Legal Counsel is the lawyer for the entire government, and in effect for the President, and everyone discloses everything to them to get rulings about legal issues. The whole underpinning of the attorney/client privilege, which is part of the executive privilege, is to get people to disclose all relevant information so you can give them the right advice. I thought, if there was ever a case, this was it. So I sent a memo to the President saying I thought he ought to claim executive privilege in this case, but Meese did not like at all that idea. We debated it in front of the President and the President decided he wouldn't claim it.... [I]t turned out not to be as serious a problem as I thought, except that it creates a precedent. In the future, if someone wants the files of the Office of Legal Counsel, they are more likely to get them because this precedent exists. The result of that is that some people aren't going to go to the Office of Legal Counsel for advice if they have to disclose things that they don't want turned over to a Senate committee. (Wallison interview, p. 20)

Requesting a legal interpretation from the OLC, therefore, is clearly a strategic undertaking. If the Counsel does not involve the OLC -- or, having received the OLC's interpretation, proceeds to set it aside -- the White House is isolated and will lack support for its actions. Politically, this is risky and even dangerous. C. Boyden Gray, for example, unequivocally concluded that the White House should never go to court without Justice's support. At the same time, the OLC is staffed by experts who cannot claim executive privilege and, in any event, have allegiances that extend beyond the White House.

PRINCIPAL RELATIONSHIPS IN THE EXECUTIVE BRANCH

Depending on the course of politics and policy in a presidential administration, the White House Counsel will interact with most of the executive branch departments and agencies. Likewise, given its functions, this Office could -- and often does -- interact with every White House unit. At the very least, the Counsel's Office will communicate with the General Counsels throughout the executive branch, and will also process the paperwork associated with every presidential nominee or appointee. Having acknowledged the extent and scope of the Office's network, this section highlights the offices and departments with which past Counsels were in most frequent contact.

THE WHITE HOUSE

Within the White House, the Counsel's principal relationship -- and greatest source of influence -- has been either the president or the Chief of Staff. To whom the Counsel reports has frequently been a product of individual Counsels' past professional relationships, and this authority relationship has been clearly

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established at the time of appointment. This clarity is essential, if the president wishes to avoid destructive competition between two offices that are crucial to the success of the administration and its policy agenda.

The President

In electing to have the White House Counsel report directly to the president, presidents often have appointed individuals who were their longstanding friends or professional colleagues. Counsels with this profile included the following individuals:

> Ford Counsel Philip Buchen, a former classmate and law firm partner of the President;
> Carter Counsel Robert Lipshutz, a longtime friend and former attorney for the President;
> Bush Counsel C. Boyden Gray, who worked for George Bush throughout his twelve-year tenure in the White House; and
> Clinton Counsel Bernard Nussbaum, who had hired Hillary Rodham Clinton to work on the Nixon impeachment investigations and remained a good friend of the Clintons throughout the intervening years.

Even with the advantage of a prior relationship with the president, Counsels have faced various challenges to their position and their influence. Some have found that prior relationships were insufficient guarantees of influence.

> I talked to Hillary about some of these things [policy and political problems]. She agreed with me about the Independent Counsel, but she folded on me. She just came in and said, "The President wants to get on with his agenda." There was trust and confidence between the First Lady and me, but she was torn between me and her husband. I had only a few friends in the White House, including the First Lady. (Nussbaum interview, p. 7)

The White House staff is likely to include a number of longtime presidential colleagues, all of whom may compete for access to the Oval Office.

Of course, even if the Counsel is able to sustain a close relationship with the president, there is no guarantee that the president will seek or follow advice. President Ford's decision to pardon former President Richard Nixon, arguably the most significant legal decision of his administration, was made without any consultation. Counsel Philip Buchen provided only *post hoc* support and legal reasoning.

Two administrations have recruited Counsels to raise the profile and significantly re-establish the Counsel's Office within the Washington community (see, too, "Turnover" in Organization and Operations). President Jimmy Carter appointed Lloyd Cutler to meet these needs; President Bill Clinton named Cutler, and then former Congressman and U.S. Court of Appeals Judge Abner Mikva and former U.S. Attorney and D.C. Corporation Counsel Charles Ruff. Cutler, in particular, has publicly stressed that he entered office with a promise of direct communication with the president. He claimed to have held President Carter to that commitment.

> When I was asked by the President [Carter] to take this job, it was a mid-life crisis of his administration, the so-called "malaise" period. I said, "What kind of a role do you want me to play?" I knew him, but I didn't know him that well. He said, "I want you to play sort of a Clark Clifford role." I got that in writing and, of course, Clifford was so venerable and such a great storyteller, everybody thought that Harry Truman never made a move without consulting Clark Clifford. And every time I got left out of a meeting I would go to Jordan or I would go to the President and I would say, "I think that Harry Truman would have wanted Clark Clifford in this meeting." I was older than all the rest of them so nobody could gainsay me.... In theory I had the same deal with President Clinton but I didn't have the time to really capitalize on it. (Cutler interview, pp. 10-11)

The White House Counsel and Presidential Privileges

The issue of confidentiality in the president's communications with the White House Counsel is currently a matter of intense concern. Of the various legal privileges that a president or a Counsel *might* claim

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The White House Staff

The White House Counsel's Office is in contact with virtually every unit in the White House. The consequent dialogues and negotiations add immeasurably to the Office's workload. Tight deadlines compound the difficulties.

> Everything else [apart from Iran-contra] there were lots of cooks, lots of principals and lots of lawyers, and sometimes just trying to reach a decision or trying to force a decision in a timely way tended to be a lot of what I did. For right or wrong, we have to get an answer to this question and get it today. ... The timing was forced by your own judgment or sometimes you'd have deadlines. Sometimes you'd have the ranking Republican on the committee calling up and saying if you don't tell us what you think the committee is going to go forward tomorrow regardless. (Culvahouse interview, p. 28)

The scarcest resource is always time, obliging the Counsel to exercise careful judgment in determining which meetings to attend and in allocating staff. (See Organization and Operations for a more detailed discussion of these issues.)

Past Counsels have stressed that their participation in domestic and foreign policy-making may facilitate decision-making and avert difficulties. Notably, the Counsel has chaired the War Powers Committee in recent administrations and, in a number of White Houses, has regularly attended the meetings of senior domestic policy-makers. In particular, legislative advising draws the Counsel's Office into contact with a wide range of other White House units. This circumstance has prevailed since the Eisenhower administration.

> [I]t is our judgment that Counsel to the President should have, in addition to his other functions, the responsibility of coordinating the development of the proposed legislative program for the President. After the legislative program has been approved by the President it should be the function of Counsel to coordinate the content of the State of the Union message, the Budget Message, and Economic Report, as well as special legislative messages to make sure they comport with the President's program.
>
> This part of the Counsel's job during the Eisenhower Administration worked exceedingly well during those eight years.... This function ... will require that Counsel to the President work very closely with the Director of the Office of Management and Budget, the Secretaries of the various departments, and also the General Counsels of the various departments. He will also have to work very closely with the President's Press Secretary, the President's Assistant in charge of Congressional Relations, the Chairman of the Council of Economic Advisors, and the President's Assistant in charge of preparing Presidential messages. (Memo, Eisenhower Special Counsel Gerald Morgan and Associate Special Counsel Edward McCabe to Ford White House Counsel Philip Buchen, 2 October 1974.)

The following list provides examples of the units with which the Counsel's Office has predictably and consistently established strong relationships.

- Communications Office, regarding presidential speeches, travel, and campaign expenses. This relationship may be especially close during the campaign seasons, when travel expenses and contacts are subject to strict legal standards.
- Legislative Affairs, regarding legislation, nominations, and confirmations. Some White House Counsels have participated directly in legislative negotiations, even communicating directly with Senators about judicial appointments.
- Personnel Office, regarding appointments and clearances. This responsibility also causes the White House Counsel's Office to consult regularly with the FBI and the ABA. C. Boyden Gray noted that the relationship between these two offices was so close that his assistant married the director of the Office of Presidential Personnel. (Gray interview, p. 26)
- Office of Political Affairs, regarding travel and campaign expenses.

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EXECUTIVE SUMMARY

Given that the United States of America is governed under the rule of law, and that the President is its elected Chief Magistrate, the role of the White House Counsel's Office is to maintain the presidency in lawful tension with all other elements, in and out of government. As the burdens of the nation's highest office grow, so do the responsibilities of what is often called "the president's lawyer" but is more accurately described as the "presidency's lawyer." The myriad tasks of this complex office include: *monitor* ethics matters; *coordinate* the president's message and agenda within the executive branch units; *negotiate* on the president's behalf with Congress and other vectors; *recommend* actions to the president; and *translate* or interpret the law in its broadest context throughout the Executive branch. Often overlooked is its separate role as *protector* of the Office, in everything from scrutinizing the security of its workers to the legal boundaries all must maintain. So encompassing are the sweeping burdens of this office that no adequate job description exists. Suffice it that the White House Counsel's Office is a mirror held up to the highest office in the land. As such, it is forever the stuff of tomorrow's front page headlines.

LESSONS LEARNED

i) Name the Counsel as early as possible.
ii) Prepare to enter an empty office
iii) Meet with the outgoing Counsel
iv) Expect a steep learning curve, the unpredictability of events, and deadlines dictated by the media
v) Know where to go for information.
vi) Maintain good relations with the Office of Legal Counsel in the Department of Justice
vii) Divide the Counsel's Office when scandals arise.
viii) Monitor the president closely in the last year of the term
ix) Be aware of sharp public criticism of the White House Counsel's Office
x) Understand the impact of the loss of government attorney-client privilege
xi) Note the continuing significance of issues of executive privilege and other presidential prerogatives
xii) Recognize the difficult political environment for the judicial appointment process

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- Press Office, regarding presidential press conferences. In some administrations, the Counsel's Office has also prepared presidential statements about federal court rulings that affect the presidency or the executive branch.
- Office of Management and Budget, regarding budget proposals, rescissions, and deferrals.
- National Security Council staff, regarding foreign policy.

DEPARTMENTS AND AGENCIES

Perhaps the most distinctive contribution of the White House Counsel to the wider White House staff comes through its consultations with the Department of Justice, and more specifically with the Office of Legal Counsel. The White House Counsel, as discussed in the Functions section above, properly serves as the gatekeeper for all communications with the Department of Justice.

The Department of Justice

The extent and nature of a White House Counsel's contact with the Department of Justice has been particularly influenced by three factors:

1. The extent of the president's judicial agenda, including judicial nominations;
2. The strength of the president's relationship with the Attorney General; and
3. The relative activism of the White House Counsel and the Attorney General as policy-makers.

A larger judicial agenda creates the need for more contacts with the Justice Department. Similarly, a strong presidential relationship with an activist Attorney General may establish a line of communication that is more exclusive of the White House Counsel.

All of the Justice Department contacts, however, are made in a political environment that is highly suspicious of White House – Justice Department associations. Close relationships between Presidents and Attorneys General in the Nixon and Reagan administrations, for example, injured the credibility of both of these offices. This, in its turn, hampered the officeholders' ability to implement their policy decisions. Likewise, past executive privilege decisions may discourage presidents from contacting the Justice Department, because those communications have even less protection than do those with White House aides.

The Attorney General

The Attorney General and the White House Counsel appear, at first glance, to share similar advisory roles and jurisdictions. Notwithstanding differences in accountability (the Attorney General is subject to Senate confirmation) and circumstances (executive branch department vs. White House), the distinctive contributions of the White House Counsel and the Attorney General have more often been negotiated through practice than by invoking abstract principles. Conflict has occurred frequently, and presidential libraries contain numerous memoranda of understanding between attorneys general and White House Counsels.

White House Counsels and Attorneys General, however, have rarely been equals within an administration. Presidents have tended to name either an Attorney General or a White House Counsel with whom they were well-acquainted. The selections have, more often than not, been connected to the judicial agenda of the president: a longer judicial agenda has generally coincided with the nomination of a presidential colleague to the Attorney General's office.

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The appointment of a close presidential colleague to the White House Counsel's Office, however, may allow the Office to enter into more substantive policy discussions. Though C. Boyden Gray hedges his comments with a series of qualifiers, he acknowledges that he did influence the direction of several key legislative negotiations.

> [President Bush] kept drawing me into the Civil Rights Bill in 1990-1991. I didn't really want to do that because it was very difficult politically, but he kept yanking me back into it.... But I would say that civil rights was legal policy, not necessarily part of the Counsel's Office historically any more than the ADA [Americans with Disabilities Act] was. I did very little on the ADA act.... I had a-lot to do in the prior administration about teeing it up for then-Vice President Bush to make it a campaign promise during the '88 campaign. But I spent very little time on it once we got in the White House.... I was involved very little, maybe ten or twenty hours worth. It was very little. The hours I spent were very important, it turned out, but I was not involved in the day-to-day negotiation of the language or the lobbying.
>
> I had to have permission to work on the Clean Air Act. I wanted to work on it because I had an interest in it but it was something that [Chief of Staff John] Sununu was wary about and the President was a little nervous about because of the time it would take from other responsibilities. Again, I could only do it because I had discharged my other obligations. I think at the end of the day people were appreciative of my being involved in it. (Gray interview, p. 2)

The Office of Legal Counsel (OLC)

If the White House Counsel and the Attorney General regularly vie for the president's attention, the White House Counsel's Office and the Office of Legal Counsel are even more frequently competitors in legal interpretation. Though cooperative relationships have been established – doubtless facilitated by the exchange of personnel between the offices – they tend to jockey for advantage within an administration. (See Functions, especially item 5 on White House Counsel – Justice Department relations, for an extended discussion of these practices.)

> I doubt there was very much communication directly with the Office of Legal Counsel that didn't go through White House Counsel's Office. In fact, as I've said many times in forums that have talked about this issue, the real conflict between offices, inherent conflict, is between the White House Counsel's Office and the Office of Legal Counsel at the Justice Department because the White House Counsel's Office is growing and growing and is acquiring more and more capabilities to do that kind of research and analysis that the Office of Legal Counsel does and it does it for the President. But there is a real tendency on the part of cabinet officers also to come to the White House Counsel's Office and ask for advice about legal issues. ... [M]ost of the time the Office of Legal Counsel at the Justice Department never hears about it. It just goes on. But when the White House has a constitutional question that's really the point at which this becomes quite sensitive because that is an area that the Office of Legal Counsel has traditionally handled for the White House. But if the White House staff is large enough and they consider themselves strong enough and smart enough, they can handle those things too and advise the President on constitutional issues. The White House always wins over the agencies, always, because they're closer to the President. So they have first dibs, if you will, on any issue that comes up to the presidential level. If there's a constitutional question about the President's power, if they want, they can make that decision on their own without consulting the OLC. Whenever you get a situation like that where some group has first opportunity and doesn't even have to inform the other group over time that first group is going to grow larger and larger and more competent and eventually freeze out completely the Office of Legal Counsel. I think that['s] a long-time trend that's going to occur. (Wallison interview, pp. 21-22)

On this same point, C. Boyden Gray has stressed that the ambitions of the White House Counsel's Office (in Wallison's words, above, "large enough ... strong enough ... smart enough") can endanger an administration. Gray advises re-establishing the OLC as an influential legal commentator, concluding that the advantages gained from the OLC's insights far outweigh any disadvantages resulting from its sometimes critical stance.

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Other Executive Branch Departments and Agencies

With the notable exception of the Justice Department, the White House Counsel typically communicates with the executive branch departments and agencies through the General Counsels.

> We used to have more or less monthly meetings of all the General Counsels of the departments and the executive branch. It's a little more difficult to meet with the General Counsels of the so-called independent agencies, as you know, but we do meet even with them on some matters.... Typically a lot of it would be show and tell, what we're doing and what that General Counsel thought was a problem that would go to the White House. A lot of it has to do with the ground rules for executive privilege and turning documents over to Congress which we don't think should be turned over to Congress but which the department under the thumb of Congress always wants to turn over without ever consulting the President whose privilege it is not to provide them. (Cutler interview, p. 7)

C. Boyden Gray noted that the White House Counsel's Office is "supposed to be the lead focal point for all of [the General Counsels'] dealings with the White House.... They come to you. We tried to have meetings on a regular basis but it degenerated after a while because you saw them all so much anyway." (Gray interview, p. 23) He added that exceptions to this rule occurred, in most departments and agencies, only when the secretary or the agency chief executive had issues to discuss with the White House Counsel. Occasionally, Gray said, he would speak with the deputy secretary. Communications with the independent regulatory agencies were handled with special care and circumspection.

The Justice Department, however, was the standard exception. The White House Counsel and the Attorney General typically were in daily communication with one another.

ORGANIZATION AND OPERATIONS

The internal organization of the White House Counsel's Office has changed considerably since John Dean established the unit in the Nixon White House. Dean was the first Counsel whose duties primarily focused on "lawyering," and he was the first as well to seek out new legal responsibilities and draw them into a separate office in the White House.

Since the 1970s, the size of the Office of White House Counsel has expanded from two to three attorneys to more than 40 lawyers at times during the Clinton administration. Some former Counsels attribute this growth to the increasingly hostile Washington environment faced by recent presidents and the mounting scrutiny of their appointees. Lloyd Cutler recalls, for example: "In Carter's day, when I came in, including myself, there were six lawyers. Twenty-five years later, under [Bill] Clinton, there are probably forty lawyers, fifty lawyers. Part of that is dealing with the attacks on the President and these enormous vetting responsibilities that descend on the White House counsel." (Cutler interview, p.7) Similarly, John Tuck, an aide to Chief of Staff Howard Baker in the Reagan White House, recalled "a whole huge shadow Counsel's Office" that developed following the Iran-contra revelations. (In Baker interview, p. 15).

Although presidents from FDR through Richard Nixon had aides with the titles of "Special Counsel" or "Counsel," such staffers typically had more wide-ranging policy responsibilities. The origin of the title "Special Counsel" can be traced back to Samuel Rosenman, the FDR speechwriter who oversaw much domestic policy during World War II. Rosenman served on the New York state court of last resort until FDR finally persuaded him to move to Washington to work full-time for the President in the early 1940s. "Special Counsel" was viewed as an appropriate title for the lawyer and former judge. Later aides with the title (for example, Clark Clifford and Charles Murphy in the Truman administration, Theodore Sorensen under Kennedy, Harry McPherson in the Johnson White House, and John Ehrlichman in the first year of the Nixon administration) also were lawyers and typically participated in policy development and speechwriting. The

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Eisenhower White House to some extent was an exception: Gerald Morgan, as Special Counsel, and Edward McCabe, an Associate Special Counsel, worked on tasks quite similar to some of those in the contemporary Counsel's Office.

INTERNAL DIVISION OF LABOR

The Counsel's Office has been structured internally in numerous ways. Typically, however, the White House Counsel, as a senior presidential adviser, participates in myriad activities and issues, many of which cannot be predicted or planned for. Indeed, the Counsel's time often is consumed almost completely in handling crises or unexpected demands. Thus, Reagan Counsel Peter Wallison remembered: "At least politics and crises are the two things that you have to be sure [to handle]— one of the reasons you want to get a staff that is capable and has the lines of authority and lines of responsibility clear is that at some point you are going to be completely consumed with something and that means your office has to function without you. So you need a really good and capable deputy, which I had [in] Jay Stephens, and you need very good lawyers, and then they have to know what their areas of responsibility are so that they don't have to keep coming to you." (Wallison interview, p. 34)

Deputy Counsels

Counsels beginning with John Dean all have included at least one Deputy Counsel on their staffs. (For occupants of this position, see Appendix Two) A Deputy Counsel routinely serves as the primary overseer of workflow within the Office as well as a substitute for the Counsel. The Deputy also may perform other tasks at the direction of the Counsel.

> James Castello was the deputy who really was my person and managed the staff and was at the second meeting I couldn't be at if I was at the first one. [He] probably had the most to do with the legislative agenda. He met regularly with the legislative office and made sure that there weren't any surprises on the Hill that the President didn't know about or what was going up as our core legislation didn't have any pitfalls in it. (Mikva interview, p. 21)

Such deputies typically are charged with assuring that the Counsel sees only the highest priority items. On personnel issues, for instance, Reagan Counsel, A.B. Culvahouse stated:

> ...I clearly was the principal advisor to the President ... within the White House on the vetting process which included not only the people to be nominated by the President but also people who would be appointed by the President even if they did not require Senate confirmation as well as anyone who would get a White House staff badge. Even the Park Service people who pruned the plants would come through the White House Counsel's Office. I never saw their files or anything, unless there was a problem. So the default rule was if there was a problem certified as such by my deputy then it would be put on my desk. So I saw 10 per cent of the files roughly. (Culvahouse interview, p. 4)

Likewise, C. Boyden Gray noted: "My deputy [inaudible] read far more forms than I did but if there were problems with any high-ranking person it got kicked up to me and then I would have to deal with it, either deal with it with the President, or deal with the cabinet officer if it was one of his top people" (Gray interview, p. 11).

In the Clinton White House, long-time presidential confidant Bruce Lindsey served for much of the administration as a "Deputy Counsel for Special Projects." According to Abner Mikva, besides a host of other activities,

> ... there was always a special project he was involved in either for the President or because the President would indicate to me or [Chief of Staff] Leon [Panetta] that he wanted somebody that could really use his clout effectively. For instance, Bruce was the point man on the baseball strike. ... I don't think I said Bruce, go do the

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> baseball strike. It was known that we needed somebody who could go in there and say the President really thinks this ought to be done or that ought to be done, and nobody could do that like Bruce. So he spent a lot of time on things like that. (Mikva interview, p. 17)

Immediate Support Staff

In addition, the Counsel's immediate staff (often an administrative assistant and an executive secretary) usually is responsible for assuring that external deadlines are met and internally work is parceled out appropriately. A.B. Culvahouse, for example, reported having "three non-attorney people who worked for me: an executive assistant, an administrative assistant and an executive secretary. The first two spent most of their time assigning out projects and making sure the work was done and the deadlines were observed." (Culvahouse interview, p. 8)

Special Counsels

In recent White Houses, aides with the title of "Special Counsel" have on occasion appeared in the Counsel's Office. Typically, these are staffers assigned to handle short-term or "crisis" situations that may involve congressional or other investigations, such as the Iran-contra or Whitewater affairs. Most observers attribute the swelling of the Counsel's Office over the course of an administration to such crises and the heightened external scrutiny of administrations.

Other Work

Moreover, given the range of diverse responsibilities that have come to be lodged in the Office of White House Counsel, some substantive division of labor usually appears. For instance, a Deputy Counsel and one or more other members of the Office participated in judicial selection in the Carter, Reagan, Bush, and Clinton administrations. Although presidents have always paid most attention to nominations to the U.S. Supreme Court, recent White Houses also have focused on nominations to the U.S. Courts of Appeals and, to a somewhat lesser extent, the U.S. District Courts.

Similarly, after the initial flurry of "vetting" for nominations and appointments at the beginning of an administration, typically one Assistant or Associate Counsel and a Security Assistant (and staff) in the Office handle FBI and financial disclosure reports on nominees to executive branch openings (see, e.g., Wallison interview, pp. 12ff). The lawyer also is responsible for taking the confidential reports to Capitol Hill to the chairs and ranking minority members of the appropriate Senate committees, with potentially problematic allegations flagged. In the second term Clinton White House, a "Senior Counsel" was among those handling these responsibilities.

Other tasks that commonly have been assigned to particular lawyers in the Counsel's Office have included interpreting ethics legislation and additional ethics rules issued by an administration for staffers in the White House Office and Executive Office of the President, and, on occasion, for cabinet officials and other presidential appointees. Presidential travel and distinctions between "official" and "political" events and funding also have received specialized scrutiny. Moreover, Reagan Counsel A.B. Culvahouse recalled:

> Someone in my office would have reviewed and approved anything that the President said, signed or issued his name to -- from the ridiculous declaring next week national dairy goat week which is the kind of thing that happens all the time, to pretty important things, veto messages, signing statements. And we would not only review it for form and legality but if it were legislation we would also have a recommendation: should the president sign, should he veto, should he let it become law without his signature....We would approve scheduling requests. If people were coming in to see the President, we would get a list of the attendees and look at them for

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> propriety and seemliness and should the President see someone who ten years ago had been convicted of something. (Culvahouse interview, p. 8)

Still other attorneys in the Counsel's Office focus on issues of international trade and transportation, defense and national security policy (to support the Counsel's role as chair of the War Powers Committee), and government regulation. As noted earlier, another primary responsibility of the Office is to protect presidential prerogatives, frequently on matters involving executive privilege, the issuance of executive orders, or interpretation of legislation.

RHYTHMS OF QUADRENNIAL GOVERNANCE

Over the course of a presidential term, the activities, demands, and emphases of the Counsel's Office typically follow common patterns. The first year is both demanding and somewhat distinctive. After that, the work of the Counsel's Office -- like much of the rest of the administration -- to a significant extent reflects the presidency's efforts to respond to external deadlines. Other tasks arise more routinely throughout an administration.

First Year

A major task that begins well before Inauguration Day and continues through most of the first year is vetting for nominations and appointments. C. Boyden Gray remembered: "for the first year that's all you do, is read FBI reports and ABA reports. It's not much fun. Financial disclosure reports. It's not much fun." (Gray interview, p. 1)

During this early period as well, the Counsel's Office seeks to assure that all White House staffers and political appointees are informed of the ethics statutes, executive orders, and other administration rules under which they must work. Gray described his approach to handling the task: "My rule of thumb was: 'If it's fun, stop! If it feels good, stop! If you're having fun, you're doing something wrong!' That's the way I summed up all the rules." (Gray interview, p. 13)

At the outset, too, the Counsel's Office needs to give White House staffers instructions on how to keep their files. Phillip Brady recalled that in the Bush administration, the Counsel and Deputy Counsel "... tried to be very careful to ensure all new employees were given a Counsel's Office memo that would articulate what presidential documents are and what needed to be preserved and that sort of thing." (Brady interview, p. 9)

The initial weeks and months of a new administration also bring numerous other demands. Chief among them: the president's budget must be submitted by February 2nd, the economic report is due at about the same time, and the legislative agenda, congressional messages, and bills must be drafted and sent to Congress. The Counsel's Office is involved in all of these activities.

Annual Cycles

Especially important annual cycles are the preparation of the president's budget and the drafting of the State of the Union address and the Economic Report of the President. Although the Counsel's Office is not the central player in any of these, it does perform the pivotal role of ensuring that the processes and the officials involved act in accordance with prevailing legal and ethical guidelines.

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Electoral Cycles

As the mid-term congressional elections or a presidential re-election campaign approaches, the Counsel's Office faces other tasks. The Office may well be besieged with requests for advice from other White House staffers and from political appointees throughout the executive branch about the sorts of partisan and electoral activities they and their aides are legally permitted to engage in. In most administrations, the Counsel and staff try to anticipate such requests and related problems by sending out written guidelines and holding information sessions.

Clinton Counsel Abner Mikva remembered the memo he wrote to White House staffers and other political appointees for the 1996 presidential campaign:

> The idea came from the fact that that kind of the same memo had been written every four years since anybody could remember. I think we even had a copy of the memo that not Gray but one of the predecessors had sent out— maybe Fielding; it may have been Fielding— sent out during his [tenure]. (Mikva interview, p. 17)

Moreover, as elections approach,

> ...the President becomes more involved in direct politics which raises questions about ... how much of his time would be devoted to it, who pays for it, all those things. That becomes much more important every two years. Whether the President is running for election or not, usually he's out doing things, raising funds or otherwise supporting candidates which require you to make these kinds of allocations in the best possible way to avoid charges of various kinds. (Wallison interview, pp. 32-33)

Mikva noted that in retrospect, "None of us saw fit to raise a warning flag for the President."

> I had seen what goes on in state politics. I'd been a state legislator for ten years. I know governors in Illinois pick up the phone when they're sitting in the governor's office and lean on people to give money to their campaign and the party. It's just a fact of life and I suspect it goes on in most states. I'm sure it went on in Arkansas. I think this government came in to the White House not very sensitive to the fact that the White House and the federal government is a different place. So I should have warned the President. (Mikva interview, p. 18)

Indeed, Lloyd Cutler has remarked,

> When a president is up for re-election, there are all sorts of temptations, things apresident wants to do that may be legally questionable but that he wants to do to get re-elected. For a White House Counsel, those are the hardest calls to make. You should tell a White House Counsel to leave before that last year of a president's firstterm. (Cutler, Duke panel transcript, p.6)

The presidential electoral cycle also can influence submission of judicial nominations to the Senate. Former Deputy Counsel Phillip Brady noted: "There's a political year consideration, too, as you get closer and closer to presidential elections the Senate becomes less and less receptive to confirming nominees for lifetime appointments depending on what happens in the next presidential election." (Brady interview, p. 4)

Final Year

The last year of a presidency can be "dangerous." (Culvahouse, Duke panel transcript, p. 5) This is a time when requests for pardons, commutations, executive orders, and other presidential actions may be likely to reach fever pitch. It also is a time when presidents may be especially responsive to those who have supported and worked with them for numerous years.

More Regular Tasks

Many of the other tasks handled by the Counsel's Office are performed throughout an administration. Reagan Counsel A.B. Culvahouse recalled, for example, this included the judicial selection committee, which

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met "every two weeks and more frequently if— basically the idea was to get people's nominations up as soon as possible so if the FBI was able to process background checks and all the materials were in we sometimes would meet every week." (Culvahouse interview, pp. 8-9) Executive orders also need to be drafted throughout an administration.

In contrast, Culvahouse continued:

> Congress tends to work in fits and starts. ... The legislative agenda can be heavy or it can be light. There were also Statements of Administration policy that we would review. If it was a statement of Justice Department policy, we would not review it. Sometimes we would say, "This should not come out of the White House; the Justice Department or the State Department should issue this." Sometimes we would be involved in deciding who ought to comment on the bill, and who ought to testify. If it was going to be a Statement of Administration policy, which is in effect attributed to the President, we would look at those carefully. Those would be in effect a letter that would say here's what the Administration thinks about S-332, the omnibus such and such act. (Culvahouse interview, p. 9)

> Other legislative decisions to which the Counsel's Office responds are more routine: There was someone who handled the disease of the week. Congress passes all of these little bills all the time establishing that cystic fibrosis week will be such and such and a presidential proclamation is required. So somebody has to read what Congress said and then prepare the proclamation. It's called the disease of the week. When there was all this talk about testing urine and blood for drugs, I had someone handle that, and he was our fluids man. It was pretty informal but yet I knew what each of the people in the Office would be handling. So I could always bring that person in— . (Wallison interview, p. 16)

In addition, throughout an administration, new individuals must be nominated for and appointed to positions throughout the executive branch. After the first year, "The nomination process was fairly continuous... So every week there would be nominations to be processed, people to be vetted, ethics agreements to be looked at" (Wallison interview, p. 9). Informing new hires about ethics regulations also had to continue.

Meanwhile, questions about presidential travel continually arise. In the Reagan White House, for example, "Alan Raul ... was in charge of presidential travel. That was a big and difficult issue because of what had to be paid for by private funds, by political funds or by government funds. So they were constantly, the people in the political office and in the travel office, they were constantly calling Alan for advice on that subject." (Wallison interview, p. 31)

Crises / Scandals / Unexpected Events

Counsels, of course, find themselves (and their staffs) handling unexpected situations and, on occasion, crises, at least as seen from the administration's perspective. As chair of the War Powers Committee, the Counsel has responsibilities whenever U.S. troops are (or may become) involved in hostilities.

Lloyd Cutler, who served as Counsel for both Presidents Jimmy Carter and Bill Clinton, observed that the job has become more driven by scandal and congressional efforts to probe more deeply into administrations:

> We were doing executive privilege in the Carter days; we were doing it in the Clinton days. We had demands from congressional committees for White House documents and agency documents; drafts of legal opinions, for example, were so much more pervasive. Mostly, it's the difference that when I worked for Carter while we did have the Billy Carter problem and a few others, Hamilton Jordan's alleged drug violations -- which turned out to be entirely untrue, while we had a couple of those, most of what I did was substantive. ... In Clinton's time I had the same understanding that I could be in on all these things but I had to put in so much of my own daily effort, and my staff did, on the investigations of the President, Whitewater, et cetera, that I had no time. ... I would say working for Carter -- which was a year and a half -- not more than 20 per cent [of the Counsel's work] was what I call playing defense. Under Clinton it was closer to 80 per cent. (Cutler interview, p. 8)

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A scandal of one sort or another also is likely to occur at some point during an administration. In the words of Peter Wallison:

> ...you can always count on ... some kind of big scandal. It just is like that; something is going to happen. And when I went in to that office I assumed there was going to be a blizzard. What I didn't realize was that there would be a hundred-year snow in the form of Iran-Contra. You don't know those things. I knew there would be something that was really going to take my time and for the last six months I was there it was virtually all Iran-Contra. I just couldn't get away from it. (Wallison interview, p. 33)

THE COUNSEL'S DAILY SCHEDULE

Although there certainly is no "typical day" for a White House Counsel and the larger Office, some daily routines can be identified. For the Counsel, most days involve a stream of meetings, including meetings of the White House senior staff, meetings with the Counsel staff, participation in discussions of policy initiatives and major speeches, and weekly or bi-weekly sessions on judicial nominations. President Bush's Counsel, C. Boyden Gray, pithily summarized the job as "Meetings all day long. Meetings, meetings, meetings" (Gray interview, p. 25). When surprises or crises occur, of course, the Counsel is typically on call.

Peter Wallison, for example, remembers:

> I would usually arrive at the White House about seven in the morning. The staff meeting was at eight; that is, the senior staff meeting was at eight. So I would come in; I'd read the newspapers.... to see if there was anything in the newspapers, anything I hadn't already heard on the radio coming in in the morning or before I went to bed the night before. ... In most cases, I would then go to the staff meeting at eight o'clock. Sometimes I would go down to [Chief of Staff Donald] Regan's office in advance of the staff meeting and I would raise a subject that I saw in the papers or heard about, something like that, that I thought he might want to talk about at the staff meeting or that he might not want to talk about at the staff meeting or he might have to have an answer if the question comes up at the staff meeting about what I thought. ... I would get ten, fifteen minutes with him about something before the staff meeting started. That was fairly rare. Then we'd go in the staff meeting. ... Then after the staff meeting ... every morning I would have my own staff meeting. ... And I would review with them the things that came up at the senior staff meeting that would relate to the things that they were doing. So they would each get directions about what were the issues the White House was dealing with today and what they were going to hear from their clients. (Wallison interview, pp. 30-31)

A. B. Culvahouse's recollections are similar:

> We'd have a senior staff meeting which was twenty-five people in the Roosevelt Room every morning at 7:30. Then we'd have a meeting in [Chief of Staff Howard] Baker's office that was never on the schedule but which everyone knew about of six people. Howard [Baker], [Deputy Chief of Staff Kenneth] Duberstein, [Press Secretary Marlin] Fitzwater, [National Security Assistant Colin] Powell, me, [Assistant to the President for Communications Thomas] Griscom and Dan Crippen. ...It was basically referred to as the "real meeting." ...[The first meeting was about] what was going to happen, what was coming up, sort of broadly defined. But it was not a secure meeting because if you talked about anything really interesting it would find its way to the press. (Culvahouse interview, pp. 25-26; cf. interview with Baker, p. 16)

Culvahouse also had a daily staff meeting "... at least early on, during the Iran-Contra investigations, and then I would meet with the other staff at least twice a week." (Culvahouse interview, p. 27)

After meeting with the Counsel staff, in Peter Wallison's words, the Counsel "... start[s] to handle the crises of the day, whatever they happened to be. Mostly that's what you did. William French Smith was once asked what it was like to be Attorney General and he said it's one damn thing after another. And that's basically what it's like to be White House counsel; it's one damn thing after another." (Wallison interview, p. 31)

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Often, at least for contemporary Counsels, the days and weeks can be long ones. Some recall six-day weeks and weekdays of more than twelve hours, especially when crises arise. Taking over in the aftermath of the Iran-contra revelations, A.B. Culvahouse reported:

> I'd try to get in by 7:15 so I could read the President's intelligence daily brief and get a briefing particularly on the Iran-Contra investigations, anything that had changed since the night before. I tended to leave probably 10-ish. Then I'd work like from 8:00 to 6:00 on Saturday. I worked every Sunday for the first while and then after about six months I tried to keep Sundays free for my family ... Of course you have the secure telephone at home which quickly became the blankity-blank White House phone because it would ring at all hours of the day and night. It had a unique ring. (Culvahouse interview, p. 27)

In the scandal-plagued Clinton administration, "being on Clinton's legal team, with its 18-hour workdays and constant pressure, burned people out. [Special Counsel Jane] Sherburne recalls working in her windowless office day after day, never seeing daylight." (Oliphant, 2000, p. 5) Clinton's third Counsel, Abner Mikva, commented on the physical demands:

> I came in at sixty-nine and I was actually seventy by the time I left and the physical schedule was just more than I could handle. I would come in at six-thirty in the morning and leave at nine at night. I was the first one out of the White House. They were all still doing scheduling meetings and all kinds of things. I'd never served a president younger than I was and I realized that maybe if I'd had the personal relationship with him beforehand, which I didn't, maybe I could have played the nice graybeard that would be called in once in a while to consult. But to run the kind of schedule that the rest of the senior staff was running and that he had every reason to expect out of a White House Counsel was way beyond me. I walked out totally exhausted. It turned out I had pneumonia. I didn't realize that until after I left. (Mikva interview, pp. 22-23)

With some understatement, Jonathan Turley, a George Washington University law professor, remarked: "'This was not a job to envy. Every[one] in the Clinton administration seemed to age before our eyes.'" (Oliphant, 2000, p. 4)

Under less harried circumstances in the Reagan administration, Peter Wallison recalled:

> I didn't make a habit of it, I don't think, of being in on Saturdays. When Iran-Contra started, I did; I would go in Saturdays and Sundays. But before that it was a pretty easy job actually except for the constant pressures. It didn't involve my having to work very late most of the time. As a lawyer I was used to working twelve hours a day. I would always work twelve hours a day no matter when I got to the office. A tough day was sixteen hours but twelve hours was a pretty ordinary day. I doubt I left before seven many times; I probably left at eight. I don't have a distinct recollection of this but I do know that I wasn't seeing my family all that much during this time. (Wallison interview, p. 43)

The more striking memory may be the constant pressure. Wallison also observed:

> In the White House you never get away from the tension and the pressure of the job. You can go home but you turn on the television or you listen to the radio or you look at a newspaper and there are things that you are working on or you know about or you know are coming at you that are in those media. So, even though you don't even recognize it, you're constantly at work and constantly under pressure. It can be extremely wearing for that reason. As I say, you don't recognize it. You don't know that you are always in front of an audience. You don't realize that but you are because your mind is constantly occupied with what is going on in your office. ... When you're in the White House you've got all the opponents that there are, in effect; all the political opponents are at you all the time. When you're in the Treasury Department or even when you're working for the Vice President—I had left that out—the pressure is much less. ... Everyone, however, has an interest in what the White House is doing so you have a legion of opponents. (Wallison interview, pp. 35-36)

Nonetheless, C. Boyden Gray has commented that, despite the "never-ending" pressure, "... some of it is unnecessary. I can say that looking back on it; perhaps I'm not sure I felt that way at the time. There are meetings that you don't have to attend, stuff you don't have to do. You have to discipline yourself just to walk away from it and go to the gym and work out. You can find time. I found time." (Gray interview, p. 25) And, Mikva recalled, serving as Counsel was "exciting. You're at the point of some very important decisions.

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Whether you're making them or not, you're involved in the decisional process. You're dealing with interesting people, interesting situations. There just was not a single boring moment that I had." (Mikva interview, p. 23)

TURNOVER: COUNSEL AND DEPUTY COUNSEL

Given the demands on the Counsel as well as the often unforgiving nature of Washington, it is scarcely surprising that relatively few Counsels stay in the position for more than two years. Only Philip Buchen (Ford) and C. Boyden Gray (Bush) stayed through their administrations. Fred Fielding worked even longer as Counsel to Ronald Reagan, serving from January 1981 until February 1986. (See Appendix Two)

In recent presidencies, Counsels have departed for a variety of reasons. Some -- such as John Dean -- became directly involved in administration scandals. Others -- J. Fred Buzhardt, Peter Wallison -- departed after the president or chief of staff who brought them to the White House was forced out. Still other Counsels joined the White House staff explicitly on a temporary basis, to help handle political or policy crises. In Democratic administrations, such figures have tended to be well respected, "old Washington hands" themselves (like Lloyd Cutler, Abner Mikva, and Charles Ruff). In the Reagan administration, by contrast, the new Counsel, A.B. Culvahouse, was a trusted associate of the incoming Chief of Staff, Howard Baker, who himself fit this same profile.

When a Counsel has left the White House, in virtually all cases, his deputies have departed within several months. The only exception has been Clinton aide Bruce Lindsey, who was lodged in the Counsel's Office (typically as a "Deputy Counsel to the President for Special Projects") from 1993 through 2000, working under multiple Counsels (and always with a second Deputy Counsel).

In addition, there has been somewhat higher turnover among deputies than among Counsels. Typically, Deputy Counsels leave to pursue other opportunities both in and outside the administration. Over the period from 1971 through 1999, no Deputy Counsel has succeeded a Counsel, although at least one (Cheryl Mills) turned down the job when it was offered to her. Clinton's sixth Counsel, Beth Nolan, served as an Associate Counsel in the first term. Deputy Counsels Cheryl Mills and William P. Marshall served as Associate Counsels (Mills under Nussbaum, Cutler, Mikva, and Quinn, and Marshall under Ruff) before being named Deputies.

LESSONS LEARNED

Advice from former Counsels can be helpful in trying to avoid some of the pitfalls from the past as well as in preparing for the rigors of the job prior to entering it. The following points are offered in that spirit, and have been culled from comments of past Counsels, published articles and general observation:

NAME THE COUNSEL AS EARLY AS POSSIBLE.

The president-elect (or, even better, the presidential nominee) should appoint the Counsel at the earliest possible time, since this position is key to shepherding the nomination and confirmation processes for all other presidential appointments.

According to C. Boyden Gray:

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> I can't emphasize enough the difficulty of absorbing all you have to absorb. It is bewildering. It is absolutely bewildering. And if people don't understand it they're going to get into trouble again and again and again. (Gray interview, p. 7)

> Bush asked me to go to work for him two weeks before he was elected and he said, "I should have asked you two months ago." The White House Counsel's Office -- you asked [about] the people who shovel the most papers around and deliver them. The volume of paper that goes through the White House Counsel's Office is ten times the other offices combined. ... Because of all the forms and the other nomination papers. (Gray interview, p. 8)

> The day a president is elected people should be shot right into the FBI the very next day. ...You should start people filling out those forms, I think, before the election. Certainly, the day of the election there ought to be 100 people doing nothing but filling out those forms. (Gray interview, p. 10).

Bernard Nussbaum, the first of six Counsels for President Clinton, echoed these sentiments about the need for an early start.

> I was offered the job only a week before it was announced on January 6th. I was offered it in late December, when I went to Little Rock. I was appointed very late in the process. A president-elect needs to start by November, by the day after the election. He [the Counsel] needs to hire staff, hire secretaries - some were detailed over from the departments. And that was not a good thing. Detailing hurt the president. (Nussbaum interview, p. 1)

PREPARE TO ENTER AN EMPTY OFFICE

Most former Counsels have remarked about the lack of any institutional memory. There are a few folders, letters, and memos that have been left behind on such matters as war powers and presidential disability and succession, and A.B. Culvahouse talked about twenty- to twenty-five binders that he left for C. Boyden Gray as the next incoming Counsel (Culvahouse interview, p. 7). Generally, however, there is little paper in the Office when a new Counsel enters. Bernard Nussbaum recalled:

> When you walk into the White House at the beginning of an administration, it is empty. It is an amazing thing. All of the files are gone. Even the secretaries are gone (except one - Linda Tripp was my secretary for a year). Nobody knew what to expect. The Democrats were stunned. This was the first time in a generation (since 1968) that they were in power (with the exception of Carter). Nobody knows anything. But the minute you walk into the office, the phones are ringing. It's as if the ten biggest litigation cases in your life are going on simultaneously. I got a call from the State Department on the first day - and there were no lawyers over there, either. I went to the office straight from the inauguration, and went to work right away, doing executive orders on that first day. (Nussbaum interview, p. 1)

Gray remembers that the only materials left behind when he took over were "Folders that lay out some of the statutory - the [inaudible] [Anti-]Deficiency Act, the Ethics in Government Act, the Hatch Act, the Presidential Records Act, all of these." (Gray interview, p. 6)

Clearly, this is a matter that future Counsels may wish to modify. As Lloyd Cutler said, "This is an area [lack of institutional memory] where there could be a very substantial improvement" (Cutler interview, p.22)[3]

[3] Until 1999, the National Security Council (NSC) staff retained records from one presidential administration to another, effectively building a "continuing archive on every pending [foreign policy] problem" (Cutler interview, p. 22) from the Truman Administration onward. When court rulings during the Clinton Administration declared that the NSC was subject to the Presidential Records Act, NSC staffers began copying the documents that they deemed essential to on-going governance. In October 2000, as this memo was being finalized, the files were still being duplicated and the National Archives and Records Administration (NARA) was still working with the National Security Council staff to determine where the original files would be deposited. Members of the White House Counsel's office, therefore, may wish to consult with the NSC staff to determine the status of this process. They should also note that NARA makes provision for expedited processing of documents requested by White House policy-makers.

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MEET WITH THE OUTGOING COUNSEL

Especially because of the lack of materials available to the new counsel, many former counsels have discussed the importance of meeting with their predecessor prior to taking over. Noted C. Boyden Gray:

> I don't think Bernie Nussbaum spent as much as an hour with me. Vince Foster spent a little more time with John Schmitz [the deputy counsel]. But I spent maybe ten or fifteen hours with A.B. Culvahouse. I had been in the White House already for eight years and I still felt I didn't understand what I was doing... [I]t is enormously difficult to come in cold and understand all the statutes that apply... all the rules about travel... It's just very, very difficult. (Gray interview, p. 5)

EXPECT A STEEP LEARNING CURVE, THE UNPREDICTABILITY OF EVENTS, AND DEADLINES DICTATED BY THE MEDIA

Because the Counsel's responsibilities cover such broad territory, many have commented on the simply overwhelming nature of the materials that need to be mastered. The job entails a steep learning curve at the beginning, knowing where the "land mines" are, being sufficiently flexible to be able to switch gears immediately and respond to breaking crises, and working with incomplete information, especially when there is a need for a decision by the evening news. As Clinton Counsel Charles Ruff observed, "It's a job for which no training or experience exists for the crosscurrents of legal, political and constitutional issues." (Oliphant, 2000, p. 4)

In particular,

> The incoming White House counsel should interview previous White House counsel and be thoroughly immersed on all of the land mines that he or she is going to face... [The land mines are] all over the place. They're all over the place. (Gray interview, p. 21)

At the same time, one must always be prepared for the unexpected. Clinton Counsel Abner Mikva remarked: "there are those kinds of crises and the crisis management of walking in every morning, no matter what you have on your list of things to do, that isn't what you're going to spend your time on because something happens in between." (Mikva interview, p. 10)

And, always, past occupants urge, the Counsel has to pay attention to the news media.

> You better worry about the media, because the media sets the agenda... Your day starts with *The Wall Street Journal, The New York Times, Washington Post.* They set the agenda. You may have four or five things on your list to do for the day. You probably won't get to any of them. (Nussbaum, Duke panel transcript, p. 5)

The demands of the media can be a special problem for those coming to the White House from private practice.

> It's this terrible dilemma. If you're a lawyer, you want to have all the facts. And usually you want to have all the facts before you give advice to someone about what to do about it. In the White House, you have to act on the basis of what information you can get some time before the six o'clock news because if you don't have a White House position and the news is "the White House is divided and can't make up its mind," some opposition senator will go on the air and use up the space and tell you what was done wrong. So, you have to adjust to that; you have to operate on the basis of hunch and experience. (Cutler interview, pp. 12-13)

As Counsel, Cutler also said, "You're acting on the basis of not enough information and there's always this gnawing fear that you've gotten something wrong or you've said something you shouldn't have said." (Cutler interview, p. 31)

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KNOW WHERE TO GO FOR INFORMATION.

Having ready access to information, and knowing how and where to get it, as well as who has it, are clearly the most critical practical components of the job. A. B. Culvahouse, Lloyd Cutler and C. Boyden Gray emphasize the importance for a Counsel to "make sure you're part of the process. You cannot recognize the problems or deal with the problems unless you see them in their inception." (Culvahouse in Quade, 1988, p. 37). Cutler was quoted above with similar advice about recognizing the legal aspects of issues discussed in meetings (Cutler interview, p. 4), and Gray, also, noted the need to know which meetings to attend (Gray interview, p. 29).

Speaking anonymously, one Deputy Counsel offered the following advice:

> [Y]ou will get every possible issue thrown at you, and there is no way you could have technical, legal expertise on all of them. Thus, the key quality to doing the Counsel's job well is to establish good personal relations with people throughout government, and to know where to go and whom to ask when you need specific information to do your job effectively.

MAINTAIN GOOD RELATIONS WITH THE OFFICE OF LEGAL COUNSEL IN THE DEPARTMENT OF JUSTICE

All Counsels agree it is essential to maintain good relations with the Office of Legal Counsel in the Department of Justice. They emphasize how critical it is to know when to turn to OLC for legal advice. C. Boyden Gray, for example, maintains that, as Counsel, "you're best able to avoid the land mines if... you restore the rightful place of the Office of Legal Counsel. When in doubt ask them, and they'll tell you where the land mines are." (Gray interview, p. 21)

DIVIDE THE COUNSEL'S OFFICE WHEN SCANDALS ARISE

When scandals arise, previous Counsels have walled off or isolated "scandal management" from the routine office tasks. Typically, "Special Counsels" have been appointed to work exclusively on the crisis, along with additional staff members that are specifically tasked to that purpose. A.B. Culvahouse recalled, for example, that Reagan Chief of Staff Howard Baker "told me to focus on Iran-contra and get a separate staff up and running to handle that and let my deputy handle the more routine stuff." (Culvahouse interview, p. 25) Clinton Chief of Staff Leon Panetta explained the value of separating handling scandals from other tasks:

> What you don't want to do is consume the general counsel's operation by that scandal. What you want to do is make sure that that's pulled out of the normal operation so that there is a separate focus on that. So you can basically say that crisis is being handled, these are people that are involved with it and it doesn't tie up the rest of the operation. (Panetta interview, p. 38)

MONITOR THE PRESIDENT CLOSELY IN THE LAST YEAR OF THE TERM

A.B. Culvahouse has cautioned Counsels to beware of a president in his last year in office. "Never forget that your most important contribution is what you *don't* let happen in the last year of a presidency. That last year is a dangerous time." (Culvahouse, Duke panel transcript, p. 5, emphasis in original) In a similar vein, Lloyd Cutler has said,

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> When a president is up for re-election, there are all sorts of temptations, things a president wants to do that may be legally questionable but that he wants to do to get re-elected. For a White House Counsel, those are the hardest calls to make. You should tell a White House Counsel to leave before that last year of a president's first term. (Cutler, Duke panel transcript, p.6)

BE AWARE OF SHARP PUBLIC CRITICISM OF THE WHITE HOUSE COUNSEL'S OFFICE

The Office of White House Counsel is under attack these days -- for some of its actions during the Clinton administration, and even for its very existence. The title alone of a Duke University conference panel, "Should the White House Counsel's Office be Abolished?," dramatically underscores the highly controversial nature of this office. A former competitor of the Counsel's Office, Carter Attorney General Benjamin Civiletti elaborated: "The White House Counsel's Office is an abomination, structurally inefficient, lots of potential for conflict because of its political nature." (Civiletti, Duke panel transcript, p.1)

UNDERSTAND THE IMPACT OF THE LOSS OF GOVERNMENT ATTORNEY-CLIENT PRIVILEGE

The existing skepticism surrounding the Counsel's Office has been further heightened by the dark implications many observers see from the loss of government attorney-client privilege, as a consequence of unsuccessful litigation by the Clinton administration. There is now even less reason for a president to use a White House Counsel for strictly legal purposes. Rather, presidents seem likely to turn to private counsel more often, especially when legal matters are unclear as to whether they involve "the president" or "the presidency." All of the Counsels interviewed for this project reacted strongly to these court decisions: some decried the choice to litigate matters of privilege at all (Gray), rather than to seek accommodation with the source of the demand for testimony and documents, while others (such as Cutler, Nussbaum, Mikva) lamented the very real and damaging consequences of these decisions. Abner Mikva concluded:

> [The attorney-client rulings] make it almost impossible for a president to function the way we want a president to function. It's a very sad legacy. But, I think they had to litigate. They had no option. (Oliphant, 2000, p. 3)

Clinton Counsel Charles Ruff elaborated:

> There's always a choice [whether to litigate the president's privileges]. You can acquiesce. We ended up deciding that the principles involved were sufficiently important to the institution that they needed to be pursued. (Oliphant, 2000, p. 6)

The fallout from these rulings on presidential privilege and, more generally, from the hostile and polarized political atmosphere caused by the independent counsel statute, has been considerable. Mikva, for example, recalls that he took no notes, kept nothing in writing.

> We just never put anything in writing. At least I did[n't]. All the habits I learned as a good litigator where I took detailed notes about what was going on I threw out the window. (Mikva interview, p. 1)

One of his successors, Charles Ruff, operated the Office in the same way. "We did not take notes. We were subject to subpoena. People were very careful not to put things down in writing." (Oliphant, 2000, p. 2)

> Future White House Counsels should study carefully the body of court opinions on presidential privileges. The District Court and D.C. Circuit Court of Appeals rulings in the matter of Bruce Lindsey's grand jury testimony are the key ones that deal with government attorney-client privilege and executive privilege. [*In re Sealed Case* (Bruce R. Lindsey) (Grand Jury Testimony), 5 F. Supp. 2d, 21 (D.D.C. 1998); *In re: Bruce Lindsey* (Grand Jury Testimony), 158 F. 3d 1263 (D.C. Cir. 1998)]

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NOTE THE CONTINUING SIGNIFICANCE OF ISSUES OF EXECUTIVE PRIVILEGE AND OTHER PRESIDENTIAL PREROGATIVES

Presidents Ronald Reagan and Bill Clinton took diametrically opposed approaches to executive privilege: Reagan waived privilege and submitted his diaries and thousands of White House documents to the Iran-contra investigators, while Clinton vigorously asserted his privileges and chose to litigate them in court. Yet, despite their contrasting strategies, both Reagan and Clinton were sharply criticized for damaging this constitutional power for future presidents. White House Counsels view with enormous care their responsibility to protect and guard a president's constitutional prerogatives, such as executive privilege.

RECOGNIZE THE DIFFICULT POLITICAL ENVIRONMENT FOR THE JUDICIAL APPOINTMENT PROCESS

One final word of caution for the next Counsel is a warning about how poisoned the process for judicial appointments has become. Speculation abounds that there may be anywhere from one to four Supreme Court vacancies sometime during the next president's term of office, vacancies that will fall directly into the Counsel's lap. The experience of getting federal judicial nominees through the confirmation process during the Clinton administration was a torturous one, with historic delays and much ill will. There does not appear to be reason for optimism that this confrontational relationship will change in the near future, especially if conditions of divided government persist.

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APPENDICES

APPENDIX ONE
FUNCTIONS OF THE OFFICE OF WHITE HOUSE COUNSEL

i) Advise on the Exercise of Presidential Powers and Defend the President's Constitutional Prerogatives

- review (and, in unusual cases, draft) executive orders
- review all recommendations for pardoning and commutation
- review requests for federal disaster relief
- review CIA drafted intelligence findings and approve covert action proposals
- interpret treaties and executive agreements
- review all presidential statements and speeches for consistency and compliance with legal standards, and in anticipation of legal challenges
- participate in editing the State of the Union address
- advance recommendations about executive privilege
- chair the president's War Powers Committee
- manage the processes associated with presidential disability or succession

ii) Oversee Presidential Nominations and Appointments to the Executive and Judicial branch

- participate in the selection of nominees for the top Justice Department positions participate in the selection of General Counsel nominees throughout the executive branch and in the NSC staff
- chair the joint White House – Department of Justice judicial selection committee
- supervise the vetting and clearance process (FBI, IRS, 278 forms, and financial disclosure forms) for all presidential nominees and appointees to the executive and judicial branches
- negotiate Senate access to the FBI reports on each nominee
- conduct "murder boards" to prepare nominees for Senate confirmation hearings

iii) Advise on Presidential Actions Relating to the Legislative Process

- review legislative proposals from the president, Executive Office of the President, and executive departments and agencies
- review bills presented for signature or veto, preparing signing statements and veto messages
- review State and Defense Department authorizations and appropriations proposals
- draft budget rescissions and deferrals
- participate in negotiations associated with Senate treaty hearings
- participate in legislative negotiations concerning policy, document requests, treaties, and nominations

iv) Educate White House Staffers about Ethics Rules and Records Management and Monitor for Adherence

- distinguish between government expenses and campaign expenses
- review presidential travel

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- approve requests for appointments with the president, monitoring those for propriety, seemliness, legality, and executive privilege issues
- respond to document requests and subpoenas, directed to the President and to other White House and executive branch officials, by Congressional committees and Independent Counsels
- serve as the ethics officer for the White House staff and senior executive branch appointees

v) *Handle Department, Agency, and White House Staff Contacts with the Department of Justice*

- conduct all consultations with the Office of Legal Counsel and other Justice Department offices
- request OLC legal opinions on matters of constitutional law
- consult with and coordinate department and agency General Counsels

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Name the Counsel as early as possible. 28
Prepare to enter an empty office 29
Meet with the outgoing Counsel 30
Expect a steep learning curve, the unpredictability of events, and deadlines dictated by the media 30
Know where to go for information. 31
Maintain good relations with the Office of Legal Counsel in the Department of Justice 31
Divide the Counsel's Office when scandals arise 31
Monitor the president closely in the last year of the term 31
Be aware of sharp public criticism of the White House Counsel's Office 32
Understand the impact of the loss of government attorney-client privilege 32
Note the continuing significance of issues of executive privilege and other presidential prerogatives 33
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APPENDIX TWO: COUNSELS AND DEPUTY COUNSELS, 1969 -2000

Administration	Counsel	Dates	Deputy(ies)	Dates
Clinton	Beth Nolan	8/99-	Bruce R. Lindsey	1/93-
			William P. Marshall	12/99-
	Charles F. C. Ruff	2/97-8/99	Cheryl Mills	/96-8/99
	John (Jack) Quinn	11/95-2/97	Kathleen Wallman	/96-
	Abner Mikva	9/94-11/95	James Castello	3/95-
	Lloyd N. Cutler	3/94-9/94		
	Bernard W. Nussbaum	1/93-3/94	Joel I. Klein	7/93- 3/95
			Vincent W. Foster	1/93-7/93
Bush	C. Boyden Gray	1/89-1/93	John P. Schmitz	1/89-1/93
Reagan	A.B. Culvahouse	1987-1/89	Phillip D. Brady	/88-1/89
			Jay B. Stephens	/86-/87
	Peter Wallison	4/86-		
	Fred F. Fielding	1/81-2/86	Richard A. Hauser	1/81-
			Herbert E. Ellingwood	1/81-
Carter	Lloyd Cutler	10/79-1/81	Michael Cardozo	10/79-1/81
			Joseph Onek	9/79-1/81
	Robert J. Lipshutz	1/77-8/79	Margaret A. McKenna	1/77-12/79
Ford	Philip W. Buchen	8/74-1/77	Edward C. Schmults	10/75-1/77
			Roderick Hills	4/75-10/75
			Philip Areeda	10/74-2/75
Nixon	J. Fred Buzhardt	1/74-8/74		
	Leonard Garment	5/73-1/74	Fred Fielding	5/73-1/74 (on counsel staff since 10/70)
	John Dean	7/70-4/73		
	John Ehrlichman	1/69- 11/69		

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About the White House 2001 Project

http://whitehouse2001.org

Presidency scholars lead a two-part project designed to provide incoming White House staff members with information on operating key White House offices and to help presidential nominees fill out the tidal wave of forms they face in the appointments process. Funded by The Pew Charitable Trusts, a foundation known for the stature of its programs and the nonpartisan nature of its organization, the White House 2001 Project works with two broad, Pew initiatives: The Transition to Governing Project of the American Enterprise Institute and the Presidential Appointee Initiative of the Brookings Institution. White House 2001 was designed and developed by the board and members of the Presidency Research Group, the worldwide professional organization of scholars focused on the American presidency and a section of the American Political Science Association.

The White House Interview Program

Unlike corporations both large and small, a White House begins without a record compiled by its previous occupants. The goal of the White House Interview Program is to smooth the path to power by furnishing incoming staff with substantive information about the operation of seven White House offices critical to an effective beginning: Chief of Staff, Staff Secretary, Press Office, Office of Communications, Office of the Counsel to the President, Office of Management and Administration, and the Office of Presidential Personnel. Through interviews with current and former White House staff members from the last six administrations, the White House Interview Program provides new staff with detailed information about how their White House offices function, the organization of their units, and the roles played by the heads of each office.

In addition to this institutional memory, the White House Interview Program provides a support package of important tools previous staff have identified as invaluable. These tools include a "rolodex" of contact information about the people who previously served in their posts with current addresses and phone numbers. The White House Interview Program also provides the first ever detailed organization charts of White House offices approximately every six months through the Carter administration. The scholars associated with the project, researching and writing about the White House staff, are nationally recognized for their work on the presidency. They are: Professors Peri Arnold, MaryAnne Borrelli, John Burke, George Edwards, Karen Hult, Nancy Kassop, John Kessel, Martha Joynt Kumar, Bradley Patterson, James Pfiffner, Terry Sullivan, Kathryn Dunn Tenpas, Charles Walcott, Shirley Anne Warshaw, and Stephen Wayne.

Nomination Forms Online

In order to address the volume of information required from appointees and the problem of the plethora of forms to be filled out by nominees, the *Nomination Forms Online* program provides a software package that nominees can use to complete the myriad of forms required by the White House, the FBI, the US Office of Government Ethics, and, where appropriate, the Senate committee of jurisdiction. The software uses innovative programming techniques so that the software distributes repetitive information across the several forms nominees must complete. The software allows the nominee to store information for future use in completing annual reports. It also makes available a portable file of data in standard formats so the nominee can share information, at his or her discretion, with the White House Office of Presidential Personnel and other agencies. Nomination Forms Online is freeware.

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THE WHITE HOUSE 2001 PROJECT
THE WHITE HOUSE INTERVIEW PROGRAM
REPORT NO. 29

THE WHITE HOUSE COUNSEL'S OFFICE

MaryAnne Borrelli, *Connecticut College*
Karen Hult, *Virginia Polytechnic Institute*
Nancy Kassop, *State University of New York – New Paltz*

INTRODUCTION

The White House Counsel's Office is at the hub of all presidential activity. Its mandate is to be watchful for and attentive to legal issues that may arise in policy and political contexts in which the president plays a role. To fulfill this responsibility, it monitors and coordinates the presidency's interactions with other players in and out of government. Often called "the president's lawyer," the Counsel's Office serves, more accurately, as the "presidency's lawyer," with tasks that extend well beyond exclusively legal ones. These have developed over time, depending on the needs of different presidents, on the relationship between a president and a Counsel, and on contemporary political conditions. The Office carries out many routine tasks, such as vetting all presidential appointments and advising on the application of ethics regulations to White House staff and executive branch officials, but it also operates as a "command center" when crises or scandals erupt. Thus, the more sharply polarized political atmosphere in recent years has led to greater responsibility and demands, as well as heightened political pressure and visibility, on the traditionally low-profile Counsel's Office. The high-stakes quality of its work has led to a common sentiment among Counsels and their staff that there is "zero tolerance" for error in this office.

In sum, the Counsel's Office might be characterized as a monitor, a coordinator, a negotiator, a recommender, and a translator: it *monitors* ethics matters, it *coordinates* the president's message and agenda with other executive branch units, it *negotiates* with a whole host of actors on the president's behalf (not the least of which is Congress), it *recommends* myriad actions to the president, and it *translates* or interprets the law (whether it is the Constitution, federal rules and regulations, treaties or legislation) for all executive branch officials. Past Counsels have lamented that there is no job description for this office, while the opening quote from Peter Wallison makes clear that even if there was, it would be all-consuming and all-inclusive of everything that goes in and out of the president's office.

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OVERVIEW

In simple terms, the Counsel's Office performs five basic categories of functions: (1) advising on the exercise of presidential powers and defending the president's constitutional prerogatives; (2) overseeing presidential nominations and appointments to the executive and judicial branches; (3) advising on presidential actions relating to the legislative process; (4) educating White House staffers about ethics rules and records management and monitoring adherence; and (5) handling department, agency and White House staff contacts with the Department of Justice (see Functions section). In undertaking these responsibilities, the Counsel's Office interacts regularly with, among others, the president, the Chief of Staff, the White House Office of Personnel, the Press Secretary, the White House Office of Legislative Affairs, the Attorney General, the Office of Management and Budget (on the legislative process), the General Counsels of the departments and agencies, and most especially, the Office of Legal Counsel in the Department of Justice (see Relationships section). In addition to the Counsel, the Office usually consists of one or two Deputy Counsels, a varying number of Associate and Assistant Counsels, a Special Counsel when scandals arise, a Senior Counsel in some administrations, and support staff. Tasks are apportioned to these positions in various ways, depending on the Counsel's choices, though most Counsels expect all Office members to share the ongoing vetting for presidential appointments (see Organization and Operations section).

Certain responsibilities within the Office are central at the very start of an administration (e.g., vetting for initial nominations and shepherding the appointment process through the Senate), while others have a cyclical nature to them (e.g., the annual budget, the State of the Union message), and still others follow an electoral cycle (e.g., determining whether presidential travel and other activities are partisan/electoral/campaign or governmental ones) (see Organization and Operations). There is, of course, the always unpredictable (but almost inevitable) flurry of scandals and crises, in which all eyes turn to the Counsel's Office for guidance and answers. Watergate, Iran-contra, Whitewater, the Clinton impeachment, and the FBI files and White House Travel Office matters were all managed from the Counsel's Office, in settings that usually separated scandal management from the routine work of the Office, so as to permit ongoing operations to continue with minimal distraction. Among the more regular tasks that occur throughout an administration are such jobs as directing the judicial nomination process, reviewing legislative proposals (the president's, those from departments and agencies, and bills Congress has passed that need the Counsel's recommendation for presidential signature or veto), editing and clearing presidential statements and speeches, writing executive orders, and determining the application of executive privilege (see both Relationships and Organization and Operations sections).

Perhaps, the most challenging task for the Counsel is being the one who has the duty to tell the president "no," especially when it comes to defending the constitutional powers and prerogatives of the presidency. Lloyd Cutler, Counsel for both Presidents Carter and Clinton, noted that, in return for being "on the cutting edge of problems," the Counsel needs to be someone who has his own established reputation... someone who is willing to stand up t o the President, to say, "No, Mr. President, you shouldn't do that for these reasons." There is a great tendency among all presidential staffs to be very sycophantic, very sycophantic. It's almost impossible to avoid, "This man is the President of the United States and you want to stay in his good graces," even when he is about to do something dumb; you don't tell him that. You find some way to put it in a very diplomatic manner. (Cutler interview, pp. 3-4)

LAW, POLITICS AND POLICY

A helpful way to understand the Counsel's Office is to see it as sitting at the intersection of law, politics and policy. Consequently, it confronts the difficult and delicate task of trying to reconcile all three of these without sacrificing too much of any one. It is the distinctive challenge of the Counsel's Office to advise the

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president to take actions that are both legally sound and politically astute. A 1994 article in *Legal Times* warned of the pitfalls:

> Because a sound legal decision can be a political disaster, the presidential counsel constantly sacrifices legal ground for political advantage. (Bendavid, 1994, p. 13)

For example, A.B. Culvahouse recalled his experience upon arriving at the White House as counsel and having to implement President Reagan's earlier decision to turn over his personal diaries to investigators during the Iran-contra scandal.

> Ronald Reagan's decision to turn over his diary - that sits at the core of the presidency. ... You're setting up precedents and ceding a little power. But politically, President Reagan wanted to get it behind him. (Bendavid, 1994, p. 13)

Nonetheless, Culvahouse added, the Counsel is "the last and in some cases the only protector of the President's constitutional privileges. Almost everyone else is willing to give those away in part inch by inch and bit by bit in order to win the issue of the day, to achieve compromise on today's thorny issue. So a lot of what I did was stand in the way of that process..." (Culvahouse interview, p. 28)

Because of this blend of legal, political and policy elements, the most essential function a Counsel can perform for a president is to act as an "early warning system" for potential legal trouble spots before (and, ultimately, after) they erupt. For this role, a Counsel must keep his or her "antennae" constantly attuned. Being at the right meetings at the right time and knowing which people have information and/or the necessary technical knowledge and expertise in specific policy or legal areas are the keys to insuring the best service in this part of the position. C. Boyden Gray, Counsel for President Bush, commented: "As Culvahouse said -- I used to say that the meetings I was invited to, I shouldn't go to. ... It's the meetings I wasn't invited to that I'd go to." (Gray interview, p. 26) Lloyd Cutler noted that

> ....the White House Counsel will learn by going to the staff meetings, et cetera, that something is about to be done that has buried within it a legal issue which the people who are advocating it either haven't recognized or push under the rug. He says, "Wait a minute. We've got to check this out," and goes to the Office of Legal Counsel and alerts them and gets their opinion. But for the existence of the White House Counsel, the Office of Legal Counsel would never have learned about the problem until it was too late. (Cutler interview, p. 4)

One other crucial part of the job where the legal overlaps with the policy and the political -- and which can spell disaster for Counsels who disregard this -- is knowing when to go to the Office of Legal Counsel for guidance on prevailing legal interpretations and opinions on the scope of presidential authority. It is then up to the White House Counsel to sift through these legal opinions, and to bring into play the operative policy and political considerations in order to offer the president his or her best recommendation on a course of presidential action. Lloyd Cutler described how this process works:

> They [OLC staffers] are where the President has to go or the President's counsel has to go to get an opinion on whether something may properly be done or not. For example, if you wish to invoke an executive privilege not to produce documents or something, the routine now is you go to the Office of Legal Counsel and you get their opinion that there is a valid basis for asserting executive privilege in this case. ...You're able to say [to the judge who is going to examine these documents] the Office of Legal Counsel says we have a valid basis historically for asserting executive privilege here. (Cutler interview, p. 4)

C. Boyden Gray underscored the critical importance of OLC's relationship to the Counsel's Office:

> They [OLC] were the memory... We paid attention to what they did. [Vincent] Foster never conferred with them. When they [the Clinton Counsel's Office] filed briefs on executive privilege, they had the criminal division, the civil division and some other division signing on the brief; OLC wasn't on the brief... In some ways they [OLC] told us not to do things but that was helpful. They said no to us... I can give you a million examples. They would have said to Vince Foster, "Don't go in and argue without thinking about it." They would have prevented the whole healthcare debacle [referring to the Clinton Counsel's Office's position that Hillary Rodham Clinton was a government official for FACA purposes] ... [T]he ripple effect of that one decision is hard to exaggerate: it's hard to calculate. (Gray interview, pp. 18-19)

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In addition, Gray continued,

> ... OLC has this long institutional memory of how to deal with Congress in situations like this [referring to the Clinton Counsel's Office's agreement to permit the president to give grand jury testimony to Independent Counsel Ken Starr] and they would have said, "Hey, have you thought about [this]?" (Gray interview, p. 20)

Thus, the Counsel's Office is the channel through which most paper and people must pass on the way to the president, and, equally, through which all outputs from the Oval Office must be monitored and evaluated. The pace of the work is incessant, and the pressure to ensure against errors of substance or judgment, unrelenting. The Office exists in a fishbowl, is subject to searing public criticism when it makes the slightest misstep, and yet prompts intense loyalty among those who have been privileged to serve in it.

The following sections will provide more detailed information on the functions of the Office, the relationships it maintains with other governmental units, and its organization and routine operations. A final section on Lessons Learned from prior Counsels will close with some practical advice and cautions for its future occupants.

FUNCTIONS OF THE WHITE HOUSE COUNSEL'S OFFICE

Although the White House Counsel's Office has assumed different tasks in different administrations, the broader contours of its responsibilities began to take shape under Counsel Fred Fielding in the Nixon administration, and have been remarkably consistent since the Ford years. These responsibilities generally fall into the following categories. (For a summary, see Appendix One)

1. Advising on the exercise of presidential powers and defending the president's constitutional prerogatives;
2. Overseeing presidential nominations and appointments to the executive and judicial branches;
3. Advising on presidential actions relating to the legislative process;
4. Educating White House staffers about ethics rules and records management and monitoring adherence; and
5. Handling department, agency, and White House staff contacts with the Department of Justice.

1. ADVISING ON THE EXERCISE OF PRESIDENTIAL POWERS & DEFENDING THE PRESIDENT'S CONSTITUTIONAL PREROGATIVES

Counsel tasks related to presidential powers include routine review of executive orders (and, in unusual cases, drafting them); reviewing all pardoning and commutation recommendations; reviewing requests for federal disaster relief; reviewing CIA-drafted intelligence findings and approving covert action proposals; interpreting treaties and executive agreements; examining all presidential statements for consistency and compliance with legal standards, and in anticipation of legal challenges; and participating in editing the State of the Union address. Tasks that have consistently related to the defense of a president's constitutional prerogatives are fewer in number. These have generally focused on issues related to executive privilege, war powers, and presidential disability or succession. [In this list, links are needed from the executive orders, pardoning, and war powers points to the Culvahouse interview.]

The responsibilities associated with presidential powers are highly volatile. The present Washington political environment is notable for partisanship, polarization, and confrontation. Presidential actions and

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decisions are subjected to extraordinary scrutiny, and a twenty-four hour news cycle accelerates the pace of decision-making. For these reasons, any distinction between the "routine" and the more "crisis-laden" exercise of a president's constitutional powers is essentially artificial. At any time, political events may transform an otherwise routine exercise of presidential powers into an extraordinary undertaking. As Clinton Counsel Bernard Nussbaum concluded, "Small (and not so small) policy and political problems grow into legal problems. It was my job to make sure that these political and policy brushfires didn't become conflagrations." (Nussbaum interview, p. 6) Consequently, a White House Counsel must be well informed about political developments throughout the White House and the executive branch.

Advising on Executive Privilege

Issues relating to the president's constitutional prerogatives require both an awareness of politics and an attentiveness to precedents. Nowhere are these two requirements more critical than in the intensely sensitive clashes that can result when Congress, a court, or an independent counsel exercising prosecutorial functions demands information (documents or testimony) from a sitting president who refuses to accede to such demands.

Despite the primacy of high-stakes politics in these stand-offs between the branches, some degree of political accommodation, rather than a purely "legal" answer, is more often the outcome of such conflicts. Although presidents are fiercely protective of their prerogatives, they may also recognize the practical need to find some compromise to break the political logjam. White House Counsels often find themselves caught in the cross-hairs, where their best legal judgment about the appropriate presidential response is often overridden by more forceful political considerations from influential political advisors.

> Once we began to understand it, we decided to negotiate when the problem came up. As a result, I don't think we ever had a showdown on [executive privilege]. For instance, if a committee wanted certain documents and certain information we would try to figure out everything we could properly give to them and sit down with them – either I would, [Assistant to the President for Congressional Relations] Frank Moore would or someone else would – and try to negotiate on disclosing everything we possible could. I don't think we had any confrontations of any serious consequence on the whole executive privilege issue as a result of that. (Lipshutz interview, p. 27)

> I think this President operated on the premise pretty much and I certainly did that whatever the legal consequences or legal parameters were of executive privilege, if Congress really wanted something, politically it almost was impossible to deny it. The more you stood on privilege, the more you pointed to precedents, the more you showed these are the things that the President didn't turn over, the more they could make political hay out of it. As I say, we operated on the premise that you could resist and you could maybe negotiate but that, by and large, if Congress really wanted anything you have to give [it] to them, therefore, better act forthcoming.

> I think the worst rap they put on this administration was that they have stonewalled on anything with the exception of Monica – obviously it was stonewalled. (Mikva interview, p. 5)

A more detailed discussion of executive privilege, specifically referencing recent decisions in this area, can be found in the Relationships and in the Lessons Learned sections.

Advising on War Powers

In relative terms, the Counsel's role in regard to war powers has seemed less controversial. As chair of the War Powers Committee, the Counsel is responsible for notifications to Congress. In keeping with presidential views of the War Powers Resolution as unconstitutional, though, Counsels have provided Congress with a minimum of information "in the interest of comity." In the words of A.B. Culvahouse, "There is a real kabuki dance that was done. You sent a notice up to the Hill while protesting all the time that you're not providing notice." (Culvahouse interview, p. 5) Like a kabuki dance, the war powers dialogue is

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THE WHITE HOUSE 2001 PROJECT
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REPORT NO. 6

THE WHITE HOUSE WORLD
START UP, ORGANIZATION, AND THE PRESSURES OF WORK LIFE

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move these people away as if they were [Lyndon B.] Johnson loyalists. Well, she may or may not have been but she knew how the place worked; she was willing and eager to share that with us. It took us about a week of stumbling around before we brought her back in to a prominent position in the Press Office."

There is a whole group of people in the Office of Management and Budget who know White House operations. **William Galston**, who worked on education issues in the first term of the Clinton Administration described the importance of permanent people in the Executive Branch. "Just think about it institutionally," he said.[16] "There are very few people in senior staff positions in the Congress who didn't start out with junior staff positions in the Congress. There is a training process. But somehow when you get to the White House, the cycle of training and experience is broken and it's as though you're starting over again with each administration." What that means "is that a lot of power shifts to the more permanent executive branch presence's. Now that's not all bad. For example, without the assistance of senior OMB people, career people, I would have been lost in the early months on my job... .You have to figure out that they're there and you have to figure out how to interact usefully and respectfully."

COMING IN TIRED

If the President-elect moved directly from the campaign into transition mode, it is quite possible he failed to rest during that time period. The result is coming into the White House tired. If he is exhausted, so too will be his staff as wherever a President is during the transition he is certain to have staff who follow his moves. **David Gergen** described the problem and the Clinton example. "I do believe that the physical pacing of the President is so important. The transition time is one in which its extremely important to put him down for a while to recharge the engines. You come off a grueling campaign and everybody is exhausted. If you don't allow those people to have some time, especially the candidate, to find himself or herself again, get yourself back together and be ready for what is going to hit in January, you're just asking for enormous problems," he said.[17] For Reagan it was not difficult to take time off after the election and get rested. "That was sort of his natural bent anyway," **Gergen** observed. "After he did a picture, he relaxed; that was his way of life. Then you get up for the next one. Clinton I saw at renaissance weekend in Hilton Head in late December or early January 1993. I was stunned at the pace he was trying to keep. He came in tired. He would stay up half the night partying and enjoying himself, seeing friends. He'd be up at six o'clock in the morning to play football. He was going on like four hours sleep. He had been doing it all through the transition." The result was a President who came into office without having taken time off to make the switch from campaigning to governing.

EARLY MISTAKES COST VALUABLE ENERGY

Especially in the area of appointments, the early months are difficult ones replete with opportunities to go off track. **Jerry Jones**, who worked in the Personnel Office in the Nixon White House, told of the huge number of resumes he had to deal with that had been requested by those working in the transition. He was brought into the White House to deal with letters solicited by the personnel transition team from people whose names were in *Who's Who in America.* The transition team had sent letters to them asking they send in names of people appropriate for jobs in the administration. They enthusiastically did so.

> The EOB [Executive Office Building]'s halls on the first floor, over by the Personnel Office, were *stacked* with letters from these people. And then, when they didn't hear from them - which they

[16] Interview with William Galston, Martha Joynt Kumar, College Park, MD., June 5, 1997.

[17] White House Interview Program, Interview with David Gergen, Martha Joynt Kumar, Shirlington, Virginia, August 26 , 1999.

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> couldn't do because there were *multi-thousands* of these letters and resumes *everywhere* - it simply broke the system down. Then, when they didn't hear, they wrote *again*. So there were then *twice as many letters*. Then, when they didn't hear again, they started *calling*. They all thought their recommendations - because they're important people - should be listened to. Then, when they *weren't*, which they couldn't possibly be— there were at that time 555 presidentially-appointed jobs. There were about 3,000 Schedule C jobs, [there] were about 150 some odd ambassadorial appointments - of which about 30 were politically appointed - and there were 300 and some odd federal judgeships, of which vacancies came up from time to time as people retired. That's a *very small* group of people. And if you have 50,000 resumes, how do you even begin to deal with it? Well, they *couldn't*. It was a huge black eye.

One mistake in the appointment process can draw the energy of a new administration into areas where it had not planned to go. "The John Tower confirmation, failure to confirm, that was a serious bump in the road for us," observed **Andrew Card** who served as Deputy Chief of Staff in the early part of the Bush Administration.[18] The Tower confirmation was a problem because it was unanticipated and it threatened to compromise their routines and focus. "It preoccupied senior staff attention at the White House for probably two weeks when we couldn't afford to give it the attention." They were lucky for the selection of Richard Cheney to be Secretary of Defense in place of John Tower. "The President's selection of Cheney was masterful. The background check was fast because it was easy. There were no skeletons that anybody could find and Cheney knew the process, the process knew him. So we stopped the bleeding very, very quickly." If Cheney had not been so easy to confirm they could have faced a loss of momentum. "If we had stumbled after the Tower problems I think it would have taken us a long time to recover and it would have jeopardized any momentum we had on the policy side," **Card** said.

EMPTYING OUT THE OFFICES

One of the difficult tasks at the end of the administration is emptying out the offices of political appointees and for those coming in, making certain the deed was done in a complete fashion. Chair huggers are rampant in the White House and throughout the administration. If it is a transition involving a change in party, the White House is automatically cleared. In a transition involving the same party and where a Vice-President is the President-elect, the problems of clearing the desks is magnified. Then it requires canceling White House passes and leaving people on the payroll for a short period of time. In the transition from the Reagan to the Bush administrations, one official familiar with the process said White House staff had their passes canceled a week after the Inauguration but they were kept on the payroll for two to three weeks.[19]

> In a hostile transition, pressure is there to protect the people out in the departments and agencies, which makes it difficult for those coming into the White House to set up their administration. The Executive Branch is more difficult to clear out than is the White House. Traditionally, the President-elect chooses to empty out the offices under his own direction or have the incumbent President fire people. At the request of President-elect Clinton, President Bush sent letters to people they appointed informing them they were terminated. A person involved in that transition said people out in the departments sought to hold onto their jobs by requesting of the Bush people: "'Don't tell them I'm around; let them find me'. 'I've done a good job; of course, they want me on their team.' 'They'd be foolish to replace me'," people said.[20] In fact, they did clear the decks and then requested of each department head a

[18] White House Interview Program, Interview with Andrew Card, Martha Joynt Kumar, Washington, D.C., May 25, 1999.
[19] Background interview.
[20] Background interview.

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briefing book with the responsibilities sketched out for each of the political appointees from the Schedule Cs to the department secretary.

A friendly transition has unanticipated problems. Those coming into office believe the transition will be a smooth one and fail to take into account the two issues they will confront: bringing in their own people and thinking through representation of their party's coalition. One person familiar with the transition from Presidents Reagan to Bush observed:

> I think the friendly takeover was more difficult than the hostile because in the friendly takeover there was almost an expectation for the people who were left in the Reagan Administration that they would stay on and how dare you punish me and fire me. President Reagan did not clear the decks basically. His people basically were there. Many of them assumed they would move on but there were a lot who were holding on and because they hadn't been asked to leave assumed they could stay. I think that was very, very uncomfortable and it also had policy ramifications. Then there were, 'I was doing a perfectly good job at the Department of Agriculture and President Bush fired me because he disagreed with our policies.' It wasn't because he disagreed with the policies. And then there was a backlash in the policy debate. So I think that was more difficult. At least when you have a hostile takeover there's an expectation on those who are in jobs that they are likely to be out of them.[21]

A friendly transition has the additional problem of taking into account all of the factions within a part. "The other thing is, in a friendly takeover, there's still the reality that there are different camps. When it's a hostile takeover you don't have to worry about the different camps," said an observer.[22] "When we came in as the Bush team, we had to worry about the old Reagan team, we had to worry about the Bob Dole campaign workers, the Pat Buchanan campaign workers, the Republican factions that complicated both the personnel process and the early policy debate process." The personnel issue in a friendly transition is especially difficult because it is unanticipated and little attention is given to it when something could be done to ameliorate hard feelings towards the incoming team. In the case of the transition from Presidents Reagan to Bush, the incoming people could have insisted President Reagan fire people rather than leave the task to those coming in. The hard feelings felt by those asked to leave remained for years to come.

WHITE HOUSE ORGANIZATION

The White House is difficult to organize because it is a political organization required to perform management tasks. It does so in an environment where staff turnover is high and loyalty is to the President, not to the staff member who hired them. As unique an operation as it is in some ways, a White House is subject to patterns that repeat themselves from one administration to another. It is no accident, for example, that the communications operations of Presidents Nixon, Reagan, and Clinton had striking similarities. No matter what party the President represents or what the goals of their administrations were, all of the Chief Executives needed an effective communications operation to win a second term and to push through policies of interest to them. Each President and his staff developed a communications operation that had strong central direction with the Chief of Staff involved in the development of strategies, a coordinated effort within the process, liaison, and policy shops of the White House, and a planning operation that thought through events several weeks out. The President didn't talk to their predecessors about these operations nor did many of their staff. They all came to the same conclusion about what worked. That pattern repeats itself all over the White House no matter who the incumbent is, what party he represents, or who he hires. All of the successful

[21] Background interview.
[22] Background interview.

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presidents have had a sense of the importance of the White House staff to the success of their administrations and to their effectiveness as Chief Executives.

What An Effective White House Staff Buys for a President

The White House staff extends the reach of a President and increases his capacity to handle the crushing responsibilities of those early weeks and months. "The Chief of Staff, the national security advisor and all the layers involved, function as an extension of the President" observed former Chief of Staff **Howard Baker.** "They extend his ability to operate, his understanding of issues." They represent "an extension of his own governance," he said.[23] "It's crucial in terms of how he's going to function as President, whether or not he's effective," observed **Richard Cheney,** former Chief of Staff to President Ford.[24] "A President can do a lot just based on his own personal skills but there's a limit. His reach, his ability to sort of guide and direct the government, to interact with the cabinet, to deal effectively with the Congress, to manage his relationship with the press, all of those are key ingredients to his success." The staff is particularly important because of the difficulty moving policy in Washington. You need people in place because "there's not a lot that he can do by himself" observed former Chief of Staff **James Baker** observed.[25] "Most of it, he has to do with the iron triangle up there in Washington, D.C.-the press, the Congress, and the political groups."

James Baker spoke of the importance of getting in place a good White House team. "I think it bought us a successful first year, which we then translated into a successful first term... .it was our conclusion - mine and my people's-that the way presidents are judged in terms of success or failure is whether they can move things through the Congress, whether they can accomplish change in legislation. Therefore, we formed this legislative strategy group that was really the most effective operation I think in the White House. Trying to turn policy into law, trying to get things moving through. That was the major operative element in the Reagan White House. That legislative strategy group."[26]

Donald Rumsfeld discussed the importance of the White House staff in ordering the decision-making process. "He has the Congress, the press, and office seekers and friends and people promoting policy positions all trying to get access," he said.[27] "The staff system should discipline that whole process in a way that what comes up has been reasonably rationalized and comes up in a reasonably orderly way .... So [the President] ought to want that White House staff to put a discipline and integrity into the process, create a structure, that will give him reasonable assurance that 'what you see is what you get'," **Rumsfeld** said. "He has to make the decisions. He needs a staff that will preserve his options in areas where he ought to be the decision-maker. The staff must figure out how to send things forward to him so that the decision that's made not only decides that single issue but decides more than that issue. That way the same kinds of issues don't keep popping back up."

A White House Is President Centered

While White House staff members will deal directly far more with the Chief of Staff than they will with the President, the President sets the tone for a White House and it is to him staff members assign their allegiance, not the Chief of Staff. **Marlin Fitzwater,** who worked under seven Chiefs during his years in the

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[23] White House Interview Program, Interview with Howard Baker, Martha Joynt Kumar, Washington, D.C., November 12, 1999.

[24] White House Interview Program, Interview with Richard Cheney, Martha Joynt Kumar, Washington, D.C., July 27, 1999.

[25] James Baker III interview, November 16, 1999.

[26] White House Interview Program, Interview with James A. Baker, III, Martha Joynt Kumar and Terry Sullivan, Houston, TX., July 7, 1999.

[27] Donald Rumsfeld interview.

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Reagan and Bush White Houses, observed. "The Chief of Staff is not as important as the President," he said.[28] "The President is still the ultimate manager. And, if a Chief of Staff doesn't reflect what he wants to do or the way he wants to do it, chaos will result because people will follow the President and not the Chief of Staff." The people who come into the White House are there because of the President, not the Chief of Staff. "You have to remember that every person in the White House has a private constituency; that's how they got there. Somebody liked them and got them there. It seldom is the Chief of Staff. And that private constituency almost always is loyal to the President. If you're the Press Secretary or the deputy Press Secretary or the assistant Press Secretary for the kids in the lower press office, every one of them has a little power base of their own that got them that job with the White House and it's always directly traceable to the President. They worked for the President; their family knows the President; the President liked them, something. But he is the source of all power in the White House."

The President is the central resource in a White House and his office serves as a complementary tool of governing. A President and his staff regularly employ the mystique of the Oval Office as a resource as he seeks to convince others to do what he wants them to do. President Ford explained how he did so: "I'm not sure I was always successful but I tried. When we were having a terrible dispute about delivering some arms to Turkey that they had bought and paid for but the Greek lobby was opposed to, I tried to bring members of the House and Senate down to explain they were both NATO [North Atlantic Treaty Organization] allies."[29] He continued: "I would bring down members of the House and Senate and say this is plain justice. You can't not deliver on what you promised. And we tried to use the Oval Office for that benefit." At the same time, the Oval Office comes between a President and his staff.

The mystique that helps a President as he seeks to persuade others interferes with his getting a honest opinion from many of his staff. "There were many times when people would stand around in the Oval Office, where you're always intimidated, and they'd tell the President what they thought the President wanted to hear and then they'd walk out in the Roosevelt Room across the hall and say, 'Did we do the right thing?'," explained a senior staff member who spent several years working in the White House.[30] "I said, 'Well, you have a reservation about it? Why didn't you tell the President about it?' 'Well, he seemed like he was comfortable with it.' 'Well, he should know you're uncomfortable with it.', the advisor related. "And I'd go back and talk to the President, "I know you met with [OMB Director]and [head of the Council of Economic Advisors] but you should know that you probably got the impression that [CEA advisor] thought this was okay. The truth is [he] has some reservations.'," he said. Without staff willing to serve as an interpreter between the President and those bringing him advice, the Chief Executive can end up with many a false impression.

Organizing a White House Staff Has Several Parts

As former White House Staff Secretary and Personnel chief, **Jerry Jones**, expresses it: "if you figure that the White House is going to determine whether your government is going to be successful or not, and if I'm right that it is, it is the brain of the Executive Branch, then you've got to do it *right*," he said.[31] Setting up a White House involves four components: organization, process, values, and people. "*You can't start too early and you can't get good enough people*....You have to *organize it* properly. You have to have the proper *process*. You have to have the *proper values* and you have to have the *proper people*. The President is the key to all of that and he's got to know that he has to do that." That means a President must start directly after his election to select his

[28] Marlin Fitzwater interview.
[29] President Ford interview.
[30] Background interview.
[31] White House Interview Program, Interview with Jerry Jones, Martha Joynt Kumar, Rosslyn, Virginia, April 11 , 2000.

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key staff. But in order to do so, he needs to be aware of the importance of the staff in his governance. Presidents come to understand their importance after they have been in office, but rarely do they have the understanding as they come to power that they will have later on in their administration. Of recent presidents, only Presidents Bush and Reagan paid attention to their key White House staff picks in their first two weeks. President Clinton did not announce his pick for Chief of Staff until mid-December and the remainder of his White House staff came on board five days before the Inauguration.

STAFF STRUCTURE

The Place of the Chief of Staff

President Gerald Ford discussed the importance of having a Chief of Staff in order to put in place a process for gathering information from Cabinet officers. He said: "Well, that was one of the benefits of shifting to have the Chief of Staff be the filter. He would demand that cabinet officers or others who had a request had to put it in writing, they had to make their best case and that made it easier for me to look at it. Sometimes I would see the cabinet officers; sometimes I would just act on the documents that were submitted. It was a big time saver and I think much more effective the way we ended up."[32]

The priorities of the Chief of Staff are fairly similar no matter who holds the position or their party. **Donald Rumsfeld** described what others agree are key activities for a Chief. "First is knowing what the priorities are, and the second is getting the right people," he said.[33] "Another area is seeing that problems are dealt with early, preferably before they become major problems. A fourth is to see that you're arranged in a way that you don't have problems you don't need. That involves setting a tone, tempo and behavior pattern that is not going to lead to scandal or crossed wires among departments and the like."

One former Chief of Staff discussed the manner in which a small item can turn around to create a problem you had not even considered arising if you and your President do not have a clear communications line. His President reviewed the list for state dinners and in one instance decided a particular Cabinet officer should be taken off the list. "'He was at the last three,'" the President told his Chief of Staff.[34] "'There are other people who should go to these things,' [the President] said to me. I said fine. I didn't sense any particular reason why that person had to be there at that particular one. I said okay and the list went out." It was not long before the Chief heard from the Cabinet officer. "Well, the cabinet officer went ballistic and said [in attendance would be the] President of [the XYZ] country and it's terribly important I be there. We're doing all this business with them and it's absolutely necessary that I be there.'" The Chief went to talk with the President who held firm in his position the Cabinet member should not be there. The next day the Cabinet member was at the White House and "stays afterwards and says, 'Mr. President, I simply have to be at that dinner.' The President is a good guy, he says, 'Fair enough. I'll figure out how to do it,' never telling him that he was the one that took him off in the first place, never telling him that he was the one that denied it in the second place, not intentionally but unintentionally, leaving the impression that I did it. And the guy believed I did it." The result was: "So, suddenly, I've got a problem with a cabinet officer I don't need, because the President didn't know how to deal with something like that. He didn't understand what the inevitable effects would be of his making that decision that way."

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[32] President Ford interview.

[33] Donald Rumsfeld interview.

[34] Background interview.

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A Chief of Staff is good for about two years. The reason they generally do not stay longer is because of the enemies they make. Their job is often to say "no" to people, something that earns them the enmity of many. **James Baker** told President-elect Reagan that he thought a Chief of Staff should most likely stay only two years. "When he asked me to take the job and I took it, I said, 'Mr. President, these jobs are best performed in two-year increments.' The Chief of Staff is a big target," he said.[35] "You walk around with a target on your chest and on your back. You use up your chits pretty quickly, because the job of the Chief of Staff is to say no to people. Everybody wants something from the President, and your job is to say no or to say yes, maybe, but-. You use your political capital up fairly quickly."

One person who worked under several chiefs of staff described the kind of discipline a Chief of Staff needs to exercise: "They can't be a procrastinator. They have to be disciplined enough to get the work done. They also have to be disciplined enough to say no— no, you can't see the President; no, we're not putting that on the schedule. So what I'm trying to get to is a typical politician is sometimes not a very good Chief of Staff because politicians don't like to say no."[36]

The 'Spokes-of-the-Wheel": A Disagreement

There is some disagreement on the idea of the Spokes of the Wheel and its effectiveness as a management mechanism in a White House. Donald Rumsfeld was entirely opposed to it and James Baker a proponent. **Rumsfeld** describes the concept in the following terms:

> .... .the only thing that happens where the spokes come in to the hub is that it gets overheated and the bearings have to be replaced - and that's going to be either the President or you, or both.... . And we did [get away from it], in relatively short order. You simply have to have a structure where things are reasonably tidy and you know who is doing what, and what the President is saying, to whom, and there's some record of it. You can have a number of things going on off to the side - that are not part of the system - but you start multiplying that and you're just going to have a mess.

James Baker used the term "spokes-of-the-wheel" but he and his staff organized their operation in such a manner as to eliminate the "oh, by the way" aspect of the decision making associated with the concept. What Baker applauded is the inclusion of people and their ideas while at the same time making certain the Chief of Staff and other senior staff are aware of the ideas people are taking to the President and have the commitment of the Chief Executive to hold off on making decisions until the ideas were staffed out in the normal process. He described the system:

> we had a spokes-of-the-wheel type approach to the White House, where any cabinet officer who wanted to see the President could, on twenty-four hours notice. Anybody who wanted to see the President alone could see the President. The President also had a post office box number where people could write him and not have to go through the staff. But the President committed that he would always debrief us about those communications, and he did. For the most part, it worked really, really well.[37]

There were times, though, that someone was able to slip by and get to the President without the Chief of Staff knowing about it. **James Baker** provided an example.

> I remember one time, Bill Clark in a leaks investigation ordered lie detector tests for everybody following a National Security Council meeting. Well, that meant the Vice President of the United

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[35] James Baker III interview, July 7, 1999.

[36] Background interview.

[37] James Baker III interview, July 9, 1999.

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> States was going to be strapped up to a lie detector. [George] Shultz, the Secretary of State, said, 'Not me. I'm leaving. Put me on the lie detector. If you've got that little faith in my word, I'm out of here.' I said the same thing. The minute the President - He had okayed that when the National Security Advisor, Bill Clark, had come in to see him one-on-one. But after it was all reviewed, I'll never forget Reagan's saying, 'Bill shouldn't have done that,' picking up the phone and calling Clark.

In order to have control over the process and make certain others can't slip unnoticed to see the President and get his ear and agreement, a Chief of Staff has to assert control over several aspects of White House operations. **James Baker** speaks of the need to control a variety of operations. "I had the make-the-trains-run-on-time responsibility, the political responsibility. You'll see there [referring to the memorandum] I had the press office, the communications office, congressional liaison, the things that you need to do to make policy successful, to get it through the legislative branch," he said. He controlled: "The paper, the schedule, the politics, the legislative strategy, and the message, and the bully pulpit," he said. By implication, his role in policy was important as well because he controlled the legislative strategy and communications. "The policy wonks can go in there and they can do whatever they want to on policy. They can do it forever. But to implement it, you have to have this side of the equation," he noted. Thus, while he did not control the substance of policy, it would be difficult for anyone to implement it without his involvement.

A Well Run White House System: Orderly, Fair, and Collegial

James Baker: "You have to make sure you have an orderly system, that you have a system that's fair. Otherwise, you start the leaking in the press, one against the other. You have to have a system that lets the President hear all sides. And you have to have one, that if you're going to be running the White House, you have to know what's going on. You have to have a system where you're in the know. We had that."

Marlin Fitzwater discussed the payoff of a system of collegiality. "The Chief of Staff has to manage in a way that makes everybody in the staff believe their access to the President is greater because of it, their reputation is enhanced because of it, their increased attention is greater because of it. Generally that involves a management process of, again, collegiality, of having meetings with various people, talking to legislative folks, talking to communications folks, taking them in to see the President, letting people know that if they go through the Chief of Staff they have more access not less; they have more power not less; they have more prestige not less. If you ever get the idea you have less, you'll find other ways to do it; you'll circumvent them. Everybody in the White House is an egocentric, power-hungry kind of person. You wouldn't be there if you weren't."[38]

Consensus was a key ingredient to the manner in which Robert Rubin worked when he was in the White House and in the Treasury Department as well. **David Dreyer**, who observed him at close range, commented on the three elements of Rubin's style: "One was that he spoke with great authority. Two [was] he was a fabulous listener and, three, he believed in consensus.... Rubin was independently respected for his achievements in the private sector. He was a great listener and believed, certainly at Treasury when I observed him most closely and at the White House when I often observed him, that everybody—I mean everybody—had some kind of a contribution to make. So, for example, when we worked together at Treasury, he'd have people from the scheduling office in policy meetings. One of them every once in a while would say something that may not have had value in and of itself but which triggered a thought or an impulse on Rubin's part that he didn't get from anybody else. So he was eager to have people—junior, senior; related, unrelated—in the meetings and got the most out of whoever was there. Third, once he had a policy and he had heard everyone and a decision was made, it was imposed and implemented in such a way that people

[38] White House Interview Program, Interview with Marlin Fitzwater, Martha Joynt Kumar, Deale, Maryland, September, 1999.

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didn't feel they had been rolled over. So in the course of executing a policy, there weren't a lot of people on background trying to establish their independent judgment with the generalists saying if only Rubin had listened it would have gone better."

White House Staff Size and Office Configuration: Similar Patterns Among Administrations

The similarities in the organization of White House staff are found with greater frequency than are the differences between administrations. The functions performed by staff remain pretty much the same, the numbers of people on the staff and the supplementary help also is fairly constant, the turnover of staff, and the structure of offices is relatively stable.

In the last 30 years the White House staff has ebbed and flowed but one can expect to be working with a total size of around 600. In large measure the differences are more ones in how "staff" is calculated than it is a matter of how many people are sitting in offices in the West Wing and in the Old Executive Office Building. **John Rogers**, who headed the Office of Management and Administration in the Reagan White House, made the point. "I had a number that I thought was necessary, no matter what Administration. About 600 people are needed for a modern White House staff. Even if you went back to the Reagan Administration, I think we had 361 on the White House payroll, as I recall. Another 400 were somewhere else. Sometimes the number is disguised within details, etc., but 600 turns out to be the average."[39]

While this figure has not been a particularly troublesome one for Republicans who rarely make promises to cut the staff, Democrats have had difficulty reconciling their White House staff needs with the promises they made prior to coming into the White House to cut the staff by 25%. Presidents Carter and Clinton both made such a promise. In order to meet their promises, the presidents made heavy use of interns, volunteers, and detailees from governmental institutions. In the Press Office, for example, on any day in the Lower Press Office where there are six staff members on the payroll, their numbers are supplemented by three interns who are present to relieve them on tasks, such as answering the phones and directing calls. Volunteers work in offices throughout the White House on tasks where they have specific knowledge or skill. The Presidential Correspondence and Messages unit is staffed almost entirely by volunteers, who are typically retirees, as well as interns who are rotated in during the year in three waves corresponding to the semesters and summer terms.

In addition to volunteers for seasonal tasks such as helping to handle the crowd of youngsters at Easter and the decorating of the White House at Christmas, some work on operations within offices. The Office of Presidential Personnel is the spot traditionally relying most heavily on volunteers, most especially at the beginning of an administration when the personnel load is the heaviest. **Bob Nash** discussed the use of volunteers as the Clinton personnel staff moved from the transition operation into the White House. He said: "There were 220 people total. That included Dick Riley. We got up to about 220 probably around— at least by December 1 I believe we had that many. Most of those people stayed until January 20. On January 20, a little over 100 people came here. Most of those were volunteers. The headhunters came here."[40] In addition, there were lawyers who volunteered their time to aid in the process of vetting the names of nominees. Once a sufficient number of names has been generated and the personnel process has settled into a rhythm of a normal staffing operation, volunteers are used for tasks such as the computer operation.

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[39] White House Interview Program, Interview with John Rogers, Martha Joynt Kumar, New York, New York, November 10, 1999.

[40] White House Interview Program, Interview with Bob Nash, Martha Joynt Kumar and Terry Sullivan, Washington, D.C., September 1, 2000.

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While the number of staff have hovered at the 600 number, there has been a growth in the number of commissioned staff members and in the degree of specificity of the titles staff have. In the Chief of Staff's operation, for example, Hamilton Jordan carried the title Assistant to the President when he operated as Chief of Staff. Today Chief of Staff John Podesta carries the title and his major assistant carry titles such as Counselor to the Chief of Staff, Deputy Chief of Staff for Operations. A President can expect staff members to stay an average of around 18 months with senior staff remaining around two years.

In the seven offices in our study, there are three that have had the same basic structure over the past four administrations: the Press Office, Personnel, and Counsel. The offices that have been fairly fluid in terms of structure and personnel are the Chief of Staff, Staff Secretary, Communications, Management and Administration. What ties the three offices that have had a consistent structure is the permanence of the tasks and constituencies they deal with. Their numbers have changed over the years, some units have been added in each, and staff titles have grown, but the offices perform similar functions in each administration. They serve the needs of the press corps following the President, staff up an administration, and vet nominees as well as handle legal issues coming into a White House. The structure of the offices of Chief of Staff, Staff Secretary, Communications, and Management and Administration depend upon, first, the choice of the President in selecting a Chief and then he in turn generally chooses those heading the other three offices. More than is so with the first three offices, these three vary substantially in their structure from the time of the Reagan White House to the Clinton one. Each of the offices has existed during most of the last fifteen years but sometimes not as an independent office.

Decisions and Routines

Establishing Routines

A well run White House depends upon an established process of routines relating to the flow of information and the way decisions are made. **Roger Porter**, who worked in four of the last six administrations observed: "There needs to be established a set of routines that people understand and are comfortable with that allow a whole series of tasks to be performed without an enormous amount of stress and hardship. Once those routines get established and they are made efficient then they help the whole flow of the place."[41] He commented that: "in the absence of those routines getting established then you have an enormous number of fire drills where something comes up and you discover that we're behind and we have to catch up, we have to do things in hurry and then you pull every one off. You feel like you're in an organization that is staggering from one deadline to another." If you can get your routines in place then you can devote time and energy to the substance of problems. **Porter** said: "The less efficient routines that have gotten established then the more you're going to be doing these fire drills that are very draining and very exhausting. When you come to the end of a fire drill, you're sort of tired and you say I wish we had one more day because we got 90 per cent of the way there but we didn't get 100 per cent of the way there." When you have operations routinized, problems are flagged earlier and everything works more smoothly.

There are limitations to the degree to which routines and order can be imposed on the staff. As one who worked in the White House for 12 years under seven chiefs of staff, **Marlin Fitzwater** described what happens when a Chief of Staff institutes a system of line management. "Occasionally you'll find a Chief of Staff who tries to set up a line staff management relationship that says so-and-so reports to the assistant for policy and the assistant for policy reports to the domestic czar; the domestic czar reports to the Chief of Staff

[41] White House Interview Program, Interview with Roger Porter, Martha Joynt Kumar, Cambridge, MA., October 22, 1999.

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and so forth," he said.[42] "They always fail because people won't obey the lines of authority. First of all, they are not there to make a career of it. They are there for a year or two. They are there for their own thing and, again, everybody's looking to the President. So people just tear that apart. You can see it happening as sure as anything." Establishing order is attractive as a concept but difficult to develop and maintain.

Implementation of Decisions

One recurring area of weakness in a White House is the implementation of decisions already reached. Former Clinton Chief of Staff **Mack McLarty** said that in his discussions with those who previously served in the position, a recurring theme of their conversations was the importance of implementation of decisions already reached. There was "a pretty good theme of follow-through and execution with the cabinet, not just to get certain policies decided on but to get them implemented; that they felt there was a weakness of actually getting things implemented and executed," he said.[43] In the Clinton White House, the implementation of decisions was a secondary concern to get them made in the first place. "That was something that we focused on early on but we didn't end up doing too much of that. That tended to be more honor system," someone familiar with the process commented.[44] "In other words, if the President would send something back, he would send some document back and there'd be a question on it— Bruce Reed, what about blank— it would more be the case that we would depend on Bruce Reed sending an answer back than that we would be calling Bruce and saying what about that. I don't think that there was particularly a conceptual or a principal reason for that as much as it was just a time thing." What they did deliver "were a lot of information memos, not a lot in percentage terms but there were a lot of information memos that we would get in a given period of time or a week that would be in response to things that the President had asked. Occasionally he would ask about something— Bob Rubin or Gene Sperling or somebody would see him in some other meeting and give him an answer orally." They did not set up a system for formally tracking decisions. " We thought about trying to do a real serious tracking system and we just ended up thinking that the cost-benefit analysis part of it didn't warrant it; there were undoubtedly some things that slipped through the cracks but not important enough to kind of do this whole time-intensive thing. Again, there was a period there where we kind of tried to do a little of that but we ended up not really following it through very actively."

Handling Crises

There is a common approach to handling crises whether the administration is Democratic or Republican and the crisis domestic or foreign policy. The Chief of Staff has the role of managing the team and making certain a group is tasked with dealing with a crisis allowing the remainder of the White House staff to handle their tasks. **Leon Panetta** observed: "The role of a Chief of Staff is not so much a management position as a battlefield position in that you have a certain mission that you want to accomplish for the day with the President that's laid out for that day. In the process of trying to do that mission you suddenly will find yourself under fire with mortar shells, artillery shells coming in on all kinds of crises. What can happen is the troops can panic because of those kinds of events taking place and you lose sight of the larger mission that you have to accomplish. So what you have to do is you have to have the discipline to be able to handle that kind of incoming fire and yet make sure the troops keep their eye on the mission and keep.... So to do that, if a crisis is hitting and something breaks, normally what I would do is set up almost a kind of crisis task force team immediately on that issue so that I could say to the rest of the staff you do your thing; we've got control of this."[45] He continued: "What you want to do is make sure that that's pulled out of the normal operation so

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[42] Marlin Fitzwater interview.

[43] White House Interview Program, Interview with Thomas McLarty, Martha Joynt Kumar, Washington, D.C., November 16, 1999.

[44] Background interview.

[45] White House Interview Program, Interview with Leon Panetta, Martha Joynt Kumar, Monterey Bay, CA., May 4, 2000.

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that there is a separate kind of focus on that. So you can basically say that crisis is being handled, these are people that are involved with it and it doesn't tie up the rest of the operation."

Watergate made governing difficult as the attention of the senior staff and the Cabinet officers as well was directed towards dealing with the crisis. Since so much of the time of the principals was consumed by Watergate related issues, Chief of Staff **Alexander Haig** had a system that relied heavily on the deputies to move the operations of government. He said:

> Every day the staff went over the business of the country and the designated Cabinet members joined us on Monday, Wednesday, and Friday. A good part of those meetings was consumed with just handling the ongoing public relations crisis. It doesn't take long to realize that the principals walked out of these meetings and into the maelstrom and by the end of the day hadn't done what the President wanted done. So I put a substructure together of the principals' key assistants, their deputies, or their hand-picked agents. My deputy in turn ran that meeting for me. He would sit in on the earlier principals' meeting, make notes on everything that was decided on, and then meet with the subgroup who in turn would and could spend all day getting the decisions implemented. That modified system began to work very well. I would pursue such a system today, Watergate or no Watergate crisis. It was both efficient and built better teamwork.[46]

During crises, the Chief of Staff sometimes puts in place a group of people he can contact who will offer him feedback on the issues related to the crisis. In addition to his deputies on whom he relied for their attention to the details of running the government, **Alexander Haig** had a group of lawyers from outside of Washington with whom he discussed the Watergate situation. He said: "because of my set of problems during Watergate, I had legal people, constitutional lawyers, experienced political lawyers, criminal lawyers, all kinds. That included men like Maurice Liebman from Chicago. He was a lovely, wonderful man although he was a Democrat at heart. I also brought in a professor from Duke University and a professor from Chicago; a judge from Chicago." They came in and provided him with an outside perspective, something presidents do as well.

RELATIONSHIPS

The White House as a Complex Web of Interrelationships

A good clue to the complicated interrelationships surrounding a White House can be found in something so simple as the arrangements for washing the windows. **Chris Hicks**, who headed the Office of Management and Administration noted: "if you paint that colonnade along the Rose Garden, where the press room is on the other side, GSA [General Service Administration] is responsible for painting to the glass doors that go in to the mansion and washing the windows on those doors, the French doors. But the residence staff is responsible on the other side of the glass. It's the same pane of glass."[47] The White House occupies eighteen acres and has several agencies and departments in charge of operations found there. The Department of Interior is involved in the building because the Residence is a national park, President's Park, maintained by the National Park Service. The General Service Administration maintains the property, including making repairs to the West and East wings, which are not part of President's Park. The Navy operates the White House mess as well as Camp David, the Secret Service establishes and maintains security for the President and the grounds, the White House Communications Agency – the old Army Signal Corps – provides sound for presidential events and sometimes film as well. The residence staff, some on detail from

[46] White House Interview Program, Interview with Alexander Haig, Martha Joynt Kumar, Washington, D.C., December 22, 1999.
[47] White House Interview Program, Interview with Christopher Hicks, Martha Joynt Kumar, Washington, D.C., November 18, 1999.

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the Interior Department, maintain the house itself and perform the duties incidental to running the White House as a home.

The operations of the White House are carried out by an infrastructure of people who have little visibility yet they are crucial to making the operations work. Often their work must be done on an emergency basis and under less than ideal conditions. When President Bush and Margaret Thatches were speaking in Aspen, Colorado on the occasion of the anniversary of the Aspen Institute, Saddam Hussein invaded Kuwait. "So we have two heads of state, both of whom need to be communicating with their respective governments and other heads of state and we're managing it out of a Winnebago parked halfway up a mountaintop," commented Bonnie Newman who served as director of the Office of Management and Administration.[48] "You've got people actually holding hand-held transmitters to keep that signal going. That's what folks don't appreciate, a lot of that background stuff, and that it's apt to be a nineteen-year-old private in the army who is operating the TelePrompTer from the basement of some hotel while a President is making a very significant speech."

The web of relationships in a White House most often predate the incumbents and are impervious to the efforts of the temporary inhabitants to get control of their operations. **Hicks** described the origins of the Signal Corps entry into the White House. "I never got control of the military office or the Signal phone system. That started during the [Franklin] Roosevelt Administration. Talk about detailees. During World War II it was decided they needed to be able to have President Roosevelt get in touch with Winston Churchill anytime he wanted so the Defense Department detailed over these people from the Army Signal Corps and they've stayed ever since."[49]

Relations with the Congress

Whether they are Chiefs of Staff or directors of Personnel, or heads of the Office of Legislative Affairs, senior White House staff spend a great deal of time managing the President's relations with members of Congress and handling with them issues important to the Chief Executive. It is a central aspect of the lives of all three of those occupying the above posts. **Kenneth Duberstein**, who worked in the Legislative Affairs unit, explained the manner in which in the area of appointments the Chief of Staff, Legislative Affairs and Personnel come together to work with people on the Hill.[50]

> That requires a close coordination between personnel and the congressional relations staff. We certainly had it at the beginning of the administration and at the end of the Reagan Administration with Bob Tuttle. One of the legislative affairs people on the Senate side sat in on all final personnel meetings. As personnel decisions went to the President, they were reviewed first by the Chief of Staff and then by the President but sitting in the room as the personnel head made his pitch to the President was the Chief of Staff. The other person who had been consulted in advance was the head of congressional relations. That's the way I think it should work. The personnel office [head] obviously has done his or her personal checks with the political affairs office but the congressional relations person has to take the lead on the Hill.

The object of passing names by people on the Hill is to discover political problems you might otherwise not discover though you will wish you did. **Duberstein** continued:

> It would have to go to the Hill and say, "Here are the people we are thinking about. I don't know if you know any of these folks. Do you have any sense of them? This is not a final decision that's going

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[48] White House Interview Program, Interview with Bonnie J. Newman, Martha Joynt Kumar, Washington, D.C., January 26, 2000.

[49] Christopher Hicks interview, November 18, 1999.

[50] White House Interview Program, Interview with Kenneth Duberstein, Martha Joynt Kumar, Washington, D.C., August 12, 1999.

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> to the President. Here are the three candidates; here is the short list." They may say he is terrific or she is wonderful or I never heard of this one. "Well, that person is close to ex-senator— it's not from your state, it's from another state. That's where the recommendation came from. Oh. I'll check it out." That's what you're looking for. You're looking for pitfalls. You're not looking for a veto; you're looking for pitfalls. You're looking to say, "Oh. There may be a problem here," separate and apart from the FBI stuff. Political problems; political vetting. You're saving the President problems because if in fact he goes forward with an intent to nominate and a nomination and then it blows up, you are spending chips that you're going to need elsewhere.

Chase Untermeyer, who headed the Personnel office in the Bush Administration, went to the Hill when he was asked to do so or when he explained policy. "If summoned would clearly be that occasion by a senator who was upset, wanted to know why you weren't naming somebody he wanted named or more people from his state. So my job was to sit there and listen," **Untermeyer** said.[51] "And I remember I had several good meetings with Senator [Claiborne] Pell who at the time was the chairman of the Foreign Relations Committee on ambassadorships since that is always very sensitive and to let him know what the administration was planning to do on ambassadorships."

Chief of Staff **James Baker** discussed the importance for the Chief of Staff going up to the Hill to discuss matters important to members of Congress. He stressed the importance for White House staff to remember their position as staff, most especially in relation to those serving in elected political office. He said: "But I went up there. Occasionally I would see some members of Congress in my office. Sometimes they would come down. But it's a hell of a lot better for you to go to them. They're committee chairmen. You're just a staff person. You're really powerful, but every bit of that power is derivative from the President. The minute you forget that you get in trouble," Baker commented.[52]

Relations with the Hill are shaped by the President himself, particularly those Chief Executives who are interested in establishing good personal relationships with members. **Leon Panetta** discussed his view of presidents from his vantage point as chairman of the Budget Committee. "The other thing is Reagan also had a tremendous relationship with the American people and his ability to use the bully pulpit. So he could bring an awful lot of pressure down on you by going directly to the public, probably more so than almost anybody I've seen even including Clinton," he commented.[53] "The ability to generate in the public— suddenly the willingness to call a member of Congress or do something as a result of the speech. We'd always wait and see kind of that onslaught coming. So a combination of his personality plus his kind of relationship with the American people was very powerful." Thus, for Reagan, his relationship with members of Congress was personal both in terms of his work and that of his staff in their relations with individuals on the Hill and it was institutional as well as with a political and communications machine capable of creating pressure on both House members and Senators in an effort to spur them into particular actions.

Relations with the Cabinet

Cabinet relations are not simple ones for anyone, the President included. **President Ford** indicated he at first thought he would have open access to Cabinet members but soon he found that was not a realistic policy. He needed a filter to protect himself. "I started out with the concept that any cabinet member or top executive in the administration could have direct access to me. In effect, that undercut the role of the Chief of Staff," he said. "I shortly found out that was impractical. A President doesn't have that much time every day to meet with the various cabinet officers and other top people. You've got to have the Chief of Staff as

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[51] White House Interview Program, Interview with Chase Untermeyer, Martha Joynt Kumar, Houston, TX., July 6, 1999.

[52] White House Interview Program, Interview with James A. Baker, III, Martha Joynt Kumar, Houston, TX., November 16, 2000.

[53] Leon Panetta interview.

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sort of a filtering spot. I changed the policy, I guess it was, within two months." A President must be careful, though, that when he has the Chief of Staff as the filter, the Chief does so as an "honest broker" representing the articulated views of the Cabinet secretaries and not his own view.

Often the relations between the Chief of Staff and the Cabinet secretaries involve discipline or stroking. One person who watched the operations of several Cabinet secretaries in their relations with the White House observed: "And it's usually either over significant policy or it might be discipline. 'Okay, you're a loose cannon out there; come in to my office, shut the door and we'll argue about it. We want you toeing the line on this thing or whatever'," the person commented.[54] He then continued. "Jack Kemp was probably the best example... It was when he would make utterances about economic policy. Come on; you're job is HUD. Stay focused on HUD. Don't talk about Latvia and Estonia. Or don't criticize us." The Cabinet hear from others on the White House staff in addition to the Chief of Staff.

> Now during the Reagan Administration it was more Mike Deaver disciplining the cabinet— stay on message; stay on message; stay on message— "I understand that you met with the press the other day and you did not talk about our tax cut plan. Every time you talk to the press talk about our tax cut plan. I don't care what else you're talking about." So there was discipline and I think that comes from the Chief of Staff. The other thing a Chief of Staff should do is be sensitive to when a cabinet member feels abused because inevitably that will get to the President. So you want to try to address it so the President doesn't have to. Or tell the President that so and so feels unloved today or something like that and the President will pick up the phone and call the cabinet member and then they feel loved.

Relationships with the First Lady and the Vice President

For many working in a White House, there are several individuals and groups involved in the work you are doing. In all White Houses, the staff think through their relationships with the First Lady as well as the Vice-President. **Leon Panetta** discussed the importance of having the support of all three people when you come into a White House. "I think it's absolutely essential in a job like Chief of Staff you have to have the full support and confidence of the President, even beyond that the respect and confidence of the first lady and the Vice President because you need to have the ability to make some very tough decisions and some crucial decisions. If you're worried that every step you take you're going to be undercut by those above you because they don't trust your judgment then you're in trouble," he said.[55] "The first and foremost quality that is essential is trust. You've got to have their trust... .when I went in as Chief of Staff I went in and said to the President, I have to have your full support because there are some decisions that have to be made and I need to make sure that I have your full support and trust in that process. I said the same thing to the First Lady as well as the Vice President." **Don Baer,** who served as the head of the Office of Strategic Planning and Communications, had to think through the needs of the President and then those of the offices of the First Lady, the Vice President, and Cabinet officers. In discussing the pressures associated with his office and position, he observed: "You have to make sure you're managing the relationships with the First Lady and her operation and the Vice President and his operation or cabinet secretaries who want to or interest groups. It's a lot [of pressure]," observed **Don Baer** of the operations of the Office of Strategic Planning and Communications.[56]

Those are relationships that can harm a staff member more than they can help them. Many of the staff members interviewed in talking about why a particular staff member left, remarked the person "got crossways

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[54] Background interview.
[55] Leon Panetta interview.
[56] Don Baer interview.

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with the First Lady." That was a theme that came up with people in the Reagan White House and it arose in the Clinton White House in terms of the First Lady being involved in hiring staff members. Senior staff members were interviewed by Hillary Clinton as well as by President Clinton when they came to work at the White House. For Panetta and others, the interview was an opportunity to make certain what their relationships would be and to bring on board the First Lady and Vice-President as well as the President.

Outsiders as Sounding Boards

In addition to Alexander Haig who used a sounding board of outsiders during Watergate, there are those in the White House who confer regularly with a group of people who do not work in the government. **Tom Griscom**, Director of Communications in the Reagan White House when Howard Baker was Chief of Staff, commented on the group of people he assembled. "One of the things I did was have an informal group that I would talk to every week just to make sure you don't lose perspective," he commented.

> I never put the whole group together. A lot of times, because of the press of business, they were telephone conversations. Sometimes you could sneak away for a little bit during lunch and catch up. But they were not formal sessions; they were more informal, give-and-take. They worked because it was all kept private. This was not trying to say, 'Look who I can talk to,' or somebody on the outside saying, 'Well, they're asking my advice.' I think that was important. It was really designed to understand what we're doing right; what we're doing wrong. That's how they always started. The first piece of advice most of them gave— and they were right— is you will come in there with your breath taken away when you look at the magnitude of what you have to deal with. And you come in from the outside and you're not tainted by the White House, but within a short period of time you'll get consumed. What you'll find is that your ability to carve out any time to think and look ahead will go away. Sure enough, that's what happened. You get so consumed by the day-to-day management that you stop and want to know where you are, how you are doing and what you are missing.[57]

While others commended the efforts made by White House staff to get a view from outside of the building, few were able to do so. Very few people found they had time to step back and assess where they were or look backward at what they had done and how they could improve their operation. Occasionally White House staff will have a retreat of some sort where they assess their operations, as the Press Office staff did during the Ford Administration, but such meetings do not take place on a regular basis. In the Clinton White House there were assessments of particular events and how a week went in terms of its being a good or a bad one for the administration, but presidents and their staffs do not seem able to find time to assess their operations, only the outcomes from them.

THE PRESSURES ASSOCIATED WITH WHITE HOUSE WORK LIFE

"When they come to the White House there's no forty-hour week and they shouldn't expect it," said **President Gerald Ford.**[58] "It has to be almost a twenty-four-hour-a-day job for both the President and the staff." The White House is a place where the work load is heavy, the hours long, the pressures great, and the benefits many fold. As hard as people say the work is, few would trade the time they spent working in the

[57] Thomas Griscom interview.

[58] Gerald Ford interview.

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White House nor is there a shortage of people wanting to work there. **Donald Rumsfeld** expressed the view of many that their service involved dual aspects. He related his experience:

> in the White House you are very much at the center of things. There is an amazing flow of information. It is stimulating, because there's so much pressure. In my case, it was working with just a truly wonderful human being; a fine, decent, honorable, good person. The disadvantages for me—and I don't know that it's universal—is that some people like being an assistant and others don't. The disadvantage for me was that I had run large organizations and then I found myself back as an assistant. And I knew, as anyone in that job ought to know, that no one really cares what you think. What they really want to know when they ask you a question is *what the President thinks.* Therefore you constantly have to answer, respond and behave in a way that reflects what you believe to be the President's thinking and the President's best interest. That causes a change in how you handle yourself. You're not as natural. You're not as responsive. You're not as open, because you're trying to do it in a way that serves him and his presidency. That is a very different kind of a job than *running* something yourself. So it has those pluses and those minuses.[59]

WORKING IN A WHITE HOUSE

The pressures relate to the volume and variety of the work, the heavy commitment of hours and days, the generous amount of criticism directed towards the President and individual White House staff members, and the narrow margin of error allowed to those working for the President. Though less numerous than the pressures, the benefits are an important component of White House work life. They revolve around the importance of and respect accorded to White House work as well as having a part in history as it is made.

Working in a White House has clear rewards, most especially because it is interesting and important work. "It's exciting," said **Abner Mikva**. "You're at the point of some very important decisions. Whether you're making them or not, you're involved in the decisional process. You're dealing with interesting people, interesting situations. There just was not a single boring moment that I had."[60] Satisfaction comes with the work and with one's place in history as well. **James Fetig**, who served as the liaison to the Press Office for the National Security Council, commented: "The benefit as a citizen is to understand the glory of this republic and how it works, to have a chance to serve the American people and serve the Constitution and the highest office of the land first-hand, personally; to be there, to be part of history; to stand in places where history has been made. It's a very uplifting and motivating thing to do. When you walk through the gate of the White House every morning, you have no question of why you're at work. Getting motivated to go to work at the White House was never an issue, never a problem whatsoever. It was a delight to do no matter how frustrating it could be day by day, hour by hour."

Pete Roussel discussed his first day on the job as a Deputy Press Secretary, which gives life to the assertion that one witnessed history at close quarters and then also the pressure that comes with such a position. He was called in to see Chief of Staff James Baker who told him he was to get on a plane for Phoenix, Arizona. Roussel related that Baker told him:

> Tomorrow morning at ten a.m. the President is going to walk into the briefing room here and announce the appointment of a woman named Sandra Day O'Connor to the United States Supreme Court, a historic appointment; the first female justice," he said. 'I just hung up with her. She's going to be swamped with press when this gets out. I've told her you're on the way; you'll handle it.' At that point I had two thoughts: basically the first one was, 'hey pal, your first day here and you've been

[59] White House Interview Program, Interview with Donald Rumsfeld, Martha Joynt Kumar, Chicago, Il., April 25, 2000.

[60] White House Interview Program, Interview with Abner Mikva, Martha Joynt Kumar and Terry Sullivan, Chicago, Il., April 26, 2000.

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> handed an assignment that will never happen again; you'd been given a front row on history in a sense.' The second thought I had was a much less positive one and it was emphasized to me by Baker as I was walking out the door and—this goes to the whole issue of working with the press in the White House—what he basically said was in essence, these weren't his exact words, 'Right now only a handful of people know about this. You can count them on your hands. So if this gets out before ten a.m. tomorrow morning, good luck.' Not a real reassuring thought at that point knowing that such things can happen.[61]

There is pressure that comes with knowing the information should not come out and that you will be held responsible if it does.

People work in a White House at the senior level rarely serve out a full four year term with the President working in the same job. They either leave or they shift from one position to another as happened in the current administration with Robert Rubin, George Stephanopoulos, Bruce Lindsey, Gene Sperling, Leon Panetta, Bruce Reed, Rahm Emanuel, and Sylvia Matthews. In fact, Matthews, Sperling, Lindsey, and Reed are still in the Clinton White House, though no one is in the same position he or she held in January 1993. Most who work in a White House expect to work two years and then leave for another post outside of the building. Though the benefits of working there are many, the pressures are indeed great and the toll service in a White House takes is heavy in terms of one's time, energy, and family and personal life.

CONSTANTLY ON THE JOB

White House working hours are long no matter what the administration nor the office one works in. **Alexander Haig** described the heavy commitment of time he made when he worked in the White House as Chief of Staff. "I usually was in by seven and I never went home before midnight seven days a week. I did that for two years," he said.[62] In addition to his two years observing that schedule when he served as Chief of Staff, Haig followed the same schedule earlier for his four years serving as the deputy to National Security Adviser Henry Kissinger. In fact, **Haig** commented, it was worse working for Kissinger:

> because Henry used to have his ideas at night. He would call me at one, two o'clock in the morning, three o'clock in the morning and I had just gotten home. He didn't sleep but four hours a night. I didn't sleep but three hours a night. And I did that for seven years. That's the kind of job it is and that's why you have to change. People do get burnout.

While few worked the hours Alexander Haig observed, a normal White House day involves little time for oneself or one's family. **Marlin Fitzwater** discussed the demands of a day and observed that you really have only about two hours to yourself when you work at the White House. He said:

> You usually leave about 7:30 or 8:00. This is the worst part. You get home at 9:00—it takes an hour to get home—have a drink and you realize that you have to be in bed by 11:00 in order to have enough sleep to deal with the next day. So basically your entire private life is boiled down to between 9:00 and 11:00. That's tough to take. That's the part that people can't understand. People ask, what's it like to work in the White House? How many hours do you work? But the idea that there's really only two hours a day where you can deal with yourself or your family, that's the tough part.[63]

The constant pressure to be at the White House means people have little time to spend with their families. **Ron Nessen** discussed the lack of time he had with his child. "I left home at 6:30, as I said, and I,

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[61] Pete Roussel interview.

[62] White House Interview Program, Interview with Alexander Haig, Martha Joynt Kumar, Washington, D.C., December 22, 2000.

[63] Marlin Fitzwater interview.

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usually because I had this thing about returning phone calls, got home at 9:30 or 10:00 or later if there was something going on. My son was eighteen months old then. I never saw him. Sometimes I'd wake him up at 11:00 to play with him because that was the only time I'd see him."[64] **Phillip Brady** talked about the illusion for young children their father is not around. "One night I put my oldest son to bed," he said. "It was on a Sunday night. I put him to bed and he said without any sense of sarcasm, 'See you next week, Dad.' I was home all that next week; it was just that I'd leave before he got up and I got home after he went to bed. So the only time I could possibly see him was on the weekend when we weren't traveling."[65]

PHYSICAL STRESS

White House work has a physical dimension to it. **James Fetig**, who was the press officer for the National Security Council working with the Press Office, discussed the physical difficulties inherent in working in a White House. "The most difficult thing that anybody ought to know when they come in is going to be physical," he said. "It's the lack of sleep. The phone rings most nights and you almost never have a night of uninterrupted sleep. You start averaging four to five hours of sleep and the rest of the time you're at work."[66]

Margita White, who headed the Office of Communications, provides us with an example of the physical toll of White House work. It involved an offer, which she accepted, to take a position on the Federal Communications Commission.

> I came back on *Air Force One* three-thirty in the morning—I had been on *Air Force One* or the press plane back and forth—from a six-state trip, regional briefings and what have you. I got home about three-thirty or four, went to bed, got up at six, knocked over a full pot of coffee on my leg, was taken in to the shower with cold water and then to the emergency room and I had second-degree burns all the way down my leg. As they peeled off the skin and I was in the emergency room, I had a phone call from Dick Whalley who was then the chairman of the FCC. He [Dick Whalley] said I just want Margita to know what I did. He talked to my ex-husband and he [Dick Whalley] had just found out that there was going to be a vacancy on the FCC and he had gone to the White House and said I want Margita White. When I came to, I learned about this. I thought, you know, I think I want to do that.[67]

RECOGNIZING BURNOUT

There is no optimum amount of time to spend working at the White House but burnout is a real factor. The difficulty with burnout is people rarely recognize it in themselves. Accompanying the burnout factor is what **Chase Untermeyer** dubs the "White House Narcotic." if a person is on the White House staff that at some point they should want to leave otherwise they run a couple of risks. One of which is White House burnout. The other is sort of the opposite, which you can call the White House narcotic, the sense that this is all too wonderful, I can't possibly leave it; I can't possibly leave being in a situation in which if you walk into the White House Mess you see famous people or various cabinet secretaries; or out on the lawn: 'There are all these flags today. I wonder who's coming?' Or walking through the lobby of the West Wing: 'What movie

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[64] Ron Nessen interview.

[65] White House Interview Program, Interview with Phillip Brady, Martha Joynt Kumar, McLean, VA., August 17, 1999.

[66] White House Interview Program, Interview with James Fetig, Martha Joynt Kumar, Rockville, MD., February 5, 1999.

[67] White House Interview Program, Interview with Margita White, Martha Joynt Kumar, Washington, D.C., October 26, 1999.

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star will I see?' All of that is wonderful to the degree of telling stories at the Thanksgiving dinner table but from the point of view of really doing anything with your life I think it's of limited value."[68]

People on their own rarely recognize they are reaching the point of burnout but when they do, the President should honor their request to leave. Most often in a White House, others have to recognize it for them. "If it's your job to oversee fifteen people, if you're the Chief of Staff or the deputy Chief of Staff, you can figure out pretty quickly– there's so much happening so quick. There's so much performance going on," said one person who worked in a senior level White House position.[69] "It doesn't take you long to evaluate it. It doesn't mean somebody makes one mistake and they're gone but you can pick it up pretty quickly. Attitude is a big thing; energy level, enthusiasm. And you have to differentiate between success and failure. The success/failure issue as opposed to the effectiveness/energy/enthusiasm issue. There are going to be successes and failures." Those at the top have to be aware of the need to recognize burnout in others as well as in themselves.

GETTING IT RIGHT

Did you get it right? Is the President satisfied with what you did, if indeed your work rises to his level of attention. **Don Baer** described the pressure associated with getting it right. There is "a lot of pressure and stress on you about in the meantime how did the thing that you planned a week ago play today when the President went out and did it. How did it play in the press? Did all the pieces of it fit together and go the way you had planned? How did he feel about it because you don't always have the time [to go over it] in specifics and even if you do he's not going to remember most of them to tell him exactly what he's doing and why he's doing it and what his place in all this is; here's what he's going to say. What did he want to say? Did it come out the way he thought it would?" Those are all concerns associated with the job you are doing for the President.

Ann Lewis indicated that in addition to the physical strain of working the number of hours one does in a White House, there is an emotional strain that comes with the impact of your work. "The second is the emotional strain when everything you may say and do is enormously important, is watched so closely, and has potentially the impact that a White House statement does."[70] **Jody Powell** discussed the pressure of getting things right. "There's a tremendous amount of pressure to get things right, to not make a problem worse or create a new problem because you either got it wrong in terms of understanding it or you said it wrong. I didn't find that particularly onerous but it is probably the biggest source of pressure, that you need to be careful. You have to be careful but you can't be so careful that you're not communicating either. So you're balancing those two things."[71]

HOSTILE POLITICAL CLIMATE

An added stress in the Clinton White House and was a factor of somewhat lesser importance in the Reagan and Bush White Houses was that associated with a plethora of lawsuits and their attendant subpoenas requiring people appear on the Hill and before grand juries. **Ann Lewis** indicated you need to add in these pressures when considering the stresses of White House work life. "You add to that being in, as we are, a hostile political climate in which the danger of lawsuits, special investigators, having your notes or papers sort

[68] White House Interview Program, Interview with Chase Untermeyer, Martha Joynt Kumar, Houston, TX., July 6, 1999.
[69] Background interview.
[70] White House Interview Program, Interview with Ann Lewis, Martha Joynt Kumar, Washington, D.C., July 9, 1999.
[71] White House Interview Program, Interview with Jody Powell, Washington, D.C., August 2, 2000.

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of called in on any particular issue is ever present," she said.[72] "I think the biggest impact is that it takes time away from positive things. You're in a defensive mode much of the day. The things that it does, which I actually think are not bad, are that you remember to think all decisions through very carefully. You have a much more structured decisionmaking process than I think you would if you didn't always think someone was looking over your shoulder or tomorrow you'll get a subpoena on that or you'll see it in the *Washington Post* or whatever." At the same time the process of making decisions was improved, it was accompanied by a reluctance to take risks. "I think it slowed things down tremendously and made it more difficult and I think people were a lot more cautious sometimes than they needed to be just because it was easier to do nothing because nothing could be criticized than it would be to take a risk and do something even if it wasn't that much of a risk."

SCRUTINY

With litigation now so important a factor in White House work life, there has been something of a common understanding among staff that one limits the amount of notes one takes. "There a lot of times when somebody would literally take out a pen and start writing something and someone would say, 'What are you writing?' And people going, 'Oh. You're right,'" said **Jodie Torkelson**.[73]

> It wasn't— yes, I think everybody just knew that writing in this administration turned out to be deadly to people and nobody wanted to get subpoenaed. I had staff that got subpoenas because they took a phone message from David Watkins and they had David Watkins written down on one of those pads that make the little Xerox copy. When they did a subpoena for anything that had to do with David Watkins and travel office, whatever, they ended up having to be subpoenaed and they had to go and testify all because they wrote the guy's name down because he called about his health benefits. That's all it was. So it wasn't like it was irrational behavior; it was so silly the kinds of people that were getting dragged in to things for the dumbest of reasons that no one felt secure writing anything down. You just didn't. If you didn't want to have a legal bill, you didn't take a note.

Scrutiny of those working in a White House can be so severe even when you are saying nothing you are indicating an answer. **Ron Nessen** discussed the kind of scrutiny the words of a Press Secretary receive from the reporters listening in the briefing. "One time a reporter asked me about rumors that Bill Simon was going to resign as Secretary of the Treasury or he was going to be fired as Secretary of Treasury. And there was some discussion in the White House of whether he was going to stay or go. I knew about the discussion. The reporter said what about the rumors that Simon's going to be fired or something. I was trying to think how am I going to answer this; I don't want to lie about it. There is some talk but nothing's decided. So I just took a second to think about what I was going to say and the reporter starts scribbling down wildly because of this long pause, this long pause when I was thinking of what I was going to say. He interpreted that to mean something. There's a lot of scrutiny," he said." You have to be careful what you don't say or how quickly you say it."

NO MARGIN OF ERROR

Ray Jenkins spoke of pressures in addition to the time one spends at the White House. He said: "It is a high-stress job but it is high stress not because of the long hours but because there is absolutely no margin for error whatsoever. Now you're going to make errors and then you spend the rest of your time correcting

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[72] Ann Lewis interview, July 7, 1999.

[73] Jodie Torkelson interview.

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but you just have to remember that once a problem reaches the White House basically it has no solution. If it had a solution it would have been solved at some level lower down. It's so often a roll of the dice. Sometimes you roll seven and sometimes you roll eleven. The stress is not so much from the long hours—because the hours literally are twenty-four hours a day. It doesn't matter if you're at the White House or whether you're at home or in San Francisco or where. The stress arises from the burden of the job rather than the length of the hours."

Marlin Fitzwater provided an example of an instance when a minor error by an entry level staff member in the White House quickly turned into a presidential level decision on whether to fire her. A young woman mixed up the contents of two envelopes with presidential talking points ending up in an envelope marked for Sam Donaldson. "The talking points, unfortunately, were written by some legislative affairs person and it said, 'Greetings. Hello, members of Congress. Glad to have you here today. (Hold up your hand or shake hands or something).'," Fitzwater said. "This is really written by some guy who has never met the President probably, some kid who is trying to be thorough so he puts in all the instructions which happens often when you're writing briefing papers. Anyway, Sam got it, ran a story on the evening news about Ronald Reagan is so dumb he doesn't even know enough to say hello and shake hands." While an innocent mistake, it caused reverberations that were felt right up to the Oval Office. "Yet it was a mistake of such magnitude and ramifications, it was on national television; the basis for a story and the President of the United States thought she should be fired." While the discussion between the President, the Chief of Staff Howard Baker, and Fitzwater resulted in the woman keeping her job, it is surprising to consider such an action rises to the presidential level and does so quickly. For Fitzwater, "it was always a great example of the risk you face and the small margin for error. That's a lot of tension. If you think of a twenty-year-old kid taking a first or second job and having to live every day with the idea that if they happen to give somebody the wrong piece of paper their career is over.[74]

REDUCING THE SLOPE OF THE LEARNING CURVE

Those coming into the White House have strong forces lined up against them as they set about to create a smooth running operation. The people populating it come in at one time, they do not know one another, and they are required to make decisions of great magnitude from their first day on the job. In addition, there is scant written information on White House operations left behind by those who preceded them. Working in their favor, though, are the good will of the public and the Washington community and the benefits to be reaped from learning from those who preceded them. Most often on Inauguration Day there is a feeling of good will among the public and in the Washington community for those who begin their term in office and a willingness to give them time as they find their way. It is a period "where you want to wish the new guy well whether you voted for him or not, and you want to give him the benefit of the doubt initially," commented James Cicconi about the early months of a President's term.[75]. "So there is a period where there is almost a suspension of partisanship, a knowing suspension of it and where a sense of fair play enters in." If an administration makes use of information relating to the start up and the operations of those administrations preceding them, a President and his team can make even greater use of their early days in the White House. As is true of any institution, the White House is an organization that has rhythms and routines associated with its operations that one can discern. Perhaps the most effective resource for those accompanying the Chief Executive as he enters office is the group of those who previously served in the White House. Not only are the previous occupants a source of a great of information on where one can find the gears and levers

[74] Marlin Fitzwater interview.

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operating the institution, those who worked in the building are almost uniformly eager to help those who succeed them. It is up to the President and his staff to find them and then to make use of the information they possess.

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Dr. Martha Joynt Kumar is currently serving as Director of the White House 2001 Project. In addition to her work on the project, she is at work on a book under contract with the Johns Hopkins University Press, **Wired for Sound and Pictures: The President and White House Communications Policies**. Her published works include **Portraying the President: The White House and the News Media** and a variety of articles on presidential-press relations, including ones found in the **Harvard International Journal of Press & Politics, Presidential Studies Quarterly,** and the recent edition of Congressional Quarterly's **Guide to the Presidency.**

She has received grants from the Ford Foundation and The Pew Charitable Trusts and a fellowship from the Joan Shorenstein Center of the Kennedy School at Harvard University. She is a Senior Fellow at the Academy of Leadership at the University of Maryland and is a professor in the Department of Political Science at Towson University. She is on leave from her position from 1998 to 2001 in order to direct the White House 2001 Project. In 1998 she received a University of Maryland System Regents' Award for Scholarship. A year earlier she was recognized for her work on behalf of presidency scholars with the Richard E. Neustadt Award presented to her by the Presidency Research Group, a section of the American Political Science Association. She served as President of the group. She received her B.A. from Connecticut College and her Masters and Ph.D. in political science from Columbia University. She is a member of Phi Beta Kappa.

ABOUT THE WHITE HOUSE 2001 PROJECT

http://whitehouse2001.org

Presidency scholars lead a two-part project designed to provide incoming White House staff members with information on operating key White House offices and to help presidential nominees fill out the tidal wave of forms they face in the appointments process. Funded by The Pew Charitable Trusts, a foundation known for the stature of its programs and the nonpartisan nature of its organization, the White House 2001 Project works with two broad, Pew initiatives: The Transition to Governing Project of the American Enterprise Institute and the Presidential Appointee Initiative of the Brookings Institution. White House 2001 was designed and developed by the board and members of the Presidency Research Group, the worldwide professional organization of scholars focused on the American presidency and a section of the American Political Science Association.

THE WHITE HOUSE INTERVIEW PROGRAM

Unlike corporations both large and small, a White House begins without a record compiled by its previous occupants. The goal of the White House Interview Program is to smooth the path to power by furnishing incoming staff with substantive information about the operation of seven White House offices critical to an effective beginning: Chief of Staff, Staff Secretary, Press Office, Office of Communications, Office of the Counsel to the President, Office of Management and Administration, and the Office of Presidential Personnel. Through interviews with current and former White House staff members from the last six administrations, the White House Interview Program provides new staff with detailed information about how their White House offices function, the organization of their units, and the roles played by the heads of each office.

In addition to this institutional memory, the White House Interview Program provides a support package of important tools previous staff have identified as invaluable. These tools include a "rolodex" of contact information about the people who previously served in their posts with current addresses and phone numbers. The White House Interview Program also provides the first ever detailed organization charts of White House offices approximately every six months through the Carter administration. The scholars associated with the project, researching and writing about the White House staff, are nationally recognized for their work on the presidency. They are: Professors Peri Arnold, MaryAnne Borrelli, John Burke, George Edwards, Karen Hult, Nancy Kassop, John Kessel, Martha Joynt Kumar, Bradley Patterson, James Pfiffner, Terry Sullivan, Kathryn Dunn Tenpas, Charles Walcott, Shirley Anne Warshaw, and Stephen Wayne.

NOMINATION FORMS ONLINE

In order to address the volume of information required from appointees and the problem of the plethora of forms to be filled out by nominees, the *Nomination Forms Online* program provides a software package that nominees can use to complete the myriad of forms required by the White House, the FBI, the US Office of Government Ethics, and, where appropriate, the Senate committee of jurisdiction. The software uses innovative programming techniques so that the software distributes repetitive information across the several forms nominees must complete. The software allows the nominee to store information for future use in completing annual reports. It also makes available a portable file of data in standard formats so the nominee can share information, at his or her discretion, with the White House Office of Presidential Personnel and other agencies. Nomination Forms Online is freeware.

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THE WHITE HOUSE 2001 PROJECT
REPORT SERIES

available in PDF format (as noted) from: http://whitehouse2001.org

GENERAL SERIES

This collection of reports from the White House 2001 Project describe topics of general concern to White House operations. Those in the general series marked with an asterisk (*) are currently only available to the Presidential Transition Team.

1. Opportunities and Hazards – The White House Interview Program
2. Meeting the Freight Train Head On – Planning for the Presidential Transition
3. Lessons from Past Transitions
4. A Tale of Two Transitions: 1980 and 1988
5. The Presidency and the Political Environment*
6. The White House World – Start Up, Organization, and the Pressures of Work Life*
7. A Guide to Inquiry*
8. Analyzing Questionnaires – Executive Forms for Nominees*

WHITE HOUSE STAFF SERIES

This collection of reports from the White House 2001 Project create an "institutional memory" for the White House Staff. Currently, these reports are available only to the Presidential Transition Team. Look for a release of these reports in the Spring of 2001.

21. Office of the Chief of Staff
22. Organization Charts for the Office of Chief of Staff
23. Office of the Staff Secretary
24. Organization Charts for the Office of the Staff Secretary
25. Office of Management and Administration
26. Organization Charts for the Office of Management and Administration
27. Office of Presidential Personnel
28. Organization Charts for the Office of Presidential Personnel
29. Office of Counsel to the President
30. Organization Charts for the Office of Counsel to the President
31. Press Office
32. Organization Charts for the Press Office
33. Office of Communications
34. Organization Charts for the Office of Communications

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THE WHITE HOUSE 2001 PROJECT
WHITE HOUSE INTERVIEW PROGRAM
REPORT NO. 6

THE WHITE HOUSE WORLD
START UP, ORGANIZATION, AND THE PRESSURES OF WORK LIFE

Martha Joynt Kumar,
Director, White House 2001 Project
Towson University

When you enter your West Wing office for the first time, you are going to know right off you are in a world different from any you have experienced. "When you walk into the White House at the beginning of an administration, it is empty," commented **Bernard Nussbaum**, Counsel to President Clinton.[1] "All of the files are gone. Even the secretaries are gone." Your predecessors records are sitting in a warehouse waiting the creation of a Clinton library. While you may or may not have furniture in your office, one object you assuredly will have is a ringing telephone. "I think my first day I got 300 phone calls from people asking specifically for me," related **Jan Naylor Cope** who worked in the Office of Presidential Personnel.[2] A deputy to a senior adviser in the Clinton White House described the ringing phone when he walked into his boss's office. He entered "and found that the office was empty and that all eight of his telephone lines were ringing. I didn't pick up the phone. And the reason for that was, once I said hello and identified myself, I didn't know how to help any person who was on the other end of the line. If it was a reporter asking me a question about the President's schedule, I didn't know the answer. If it was a White House staff person who I had never met, I wouldn't have been able to find their office. And so I stood, not particularly knowing what to do, with his telephone ringing off the hook."[3] **Bernard Nussbaum** answered his phone commenting on the business of the first day: "the minute you walk into the office, the phones are ringing. It's as if the ten biggest litigation cases in your life are going on simultaneously," he said. "I went to the office straight from the inauguration, and went to work right away, doing executive orders on that first day." No records, no furniture, no support staff, no information while at the same time you face a deluge of phone calls from people asking for answers to questions for which most likely you have no response. All of this makes for a first day that is an anomaly in the prior experience of most who go to work at the White House.

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[1] White House Interview Program, Interview with Bernard Nussbaum, Martha Joynt Kumar and Nancy Kassop, New York, New York, November 9, 2000.

[2] White House Interview Program, Interview with Jan Naylor Cope, Martha Joynt Kumar, Washington, D.C., June 8, 2000.

[3] Background interview.

REV_00260412

FORCES WORKING AGAINST A SMOOTH TRANSITION INTO THE WHITE HOUSE

In addition to the lack of memory and the immediate demands for action greeting staff members, there are natural forces working against a smooth transition to power. First, a White House is organized around a President who may or may not come in with a sense of how important his staff will be to the success of his administration. Second, the White House is an artificial construct created all at once from a pool of people many of whom do not know one another. Third, it is difficult to weave together the necessary elements of campaign people and old White House and Washington hands. Fourth, it takes every administration time to discover the knowledgeable people working within the White House and in the Office of Management and Budget. Fifth, mistakes made early make it difficult to catch up and get ahead. Sixth, too many people come into office tired and have difficulty responding to the rush of work in terms of its volume and variety. Seventh, emptying out offices in the White House and in the Executive Branch is a daunting task, most especially if the transition does not involve a change in party

IT TAKES A PRESIDENT TIME TO APPRECIATE THE PLACE OF STAFF

President Ford discussed his initial lack of appreciation for the margin staff buys for a President. "I started out in effect not having an effective Chief of Staff and it didn't work," said former **President Gerald R. Ford.**[4] "So anybody who doesn't have one and tries to run the responsibilities of the White House I think is putting too big a burden on the President himself. You need a filter, a person that you have total confidence in who works so closely with you that in effect his is almost an alter ego. I just can't imagine a President not having an effective Chief of Staff." The Chief of Staff represents the staff and the need a President has to organize his time and his tasks. When he began his tenure as President, Ford had an open door policy with Cabinet officers and top administration officials. He soon found he had little time to do anything other than meet with those who requested his attention. "Traditionally every cabinet officer wants to see the President as often as possible and other top people as well," said President Ford. "The net result is there aren't that many hours in a day with all the other obligations that you have to handle on a daily basis."

If the President does not choose a Chief of Staff, the framework for the White House staff structure is not established and filled in. President Clinton did not announce a Chief of Staff until mid-December in 1992. Until he named Thomas McLarty, no choices could be made on the decision-making process to be used for the Chief Executive and the President-elect's relations with Congress and the news media had no permanent staff member assigned to them until right before Clinton and Gore came to Washington. The senior White House staff was appointed five days before the Inauguration, which left them no time to organize their White House before they came in.

THE WHITE HOUSE AS AN ARTIFICIAL CONSTRUCT

A White House is constructed from a standing start; not gradually developed through experience. The people who come into a White House are coming into a building governed by the rules of politics and moved by its dynamics rather than a common understanding of rules of management. "The most important thing to

[4] President Gerald Ford interview.

REV_00260413

grasp first is how much a White House itself, especially as it starts off after a change in the party occupying the White House, resembles a city hall," noted **Lloyd Cutler**, who served as Counsel to both Presidents Carter and Clinton.[5] "It is very, very difficult to organize. It isn't as if General Electric bought a company and sent in a management team that had worked together for twenty years and then they came to reshape this company that they bought. A new President naturally relies on the people who helped him get elected and also then seeks ethnic balance, geographic balance, leading public figures, experts in various fields." Inevitably these people do not know each other well as the administration begins. Yet they are required to gather and analyze information and then make decisions whether or not their decision making process is in order.

At the same time a White House is pulled together from disparate sources, the President and his senior staff often have to withstand strong pressure from groups to get their people on board. One veteran White House staff member described the pressure a President faces:

> The incoming White House can't have a deaf ear or political tin ear but it must be disciplined to withstand that kind of pressure. It's always going to happen and you have to have very diplomatic outreach teams and you have to have people in the White House that are open and receptive but you cannot populate the government and the White House by quota. It just won't give you the team you have to have.[6]

Thus, as you are putting together your staff, you need to develop strategies and mechanisms to fend off those you want to hold at arms length and not let into the building.

The Required Four Types of Knowledge: Campaign, President, Policy, & White House

One of the most difficult aspects of a transition into the White House is the need to accommodate in the government those who work in the campaign while at the same time integrating into the operation those who know the President even though they did not work in the campaign, and those with White House and Washington experience, and people who have substantive knowledge in the areas of social, economic, and national security policy. "You want somebody who was at least served in the upper echelons of the White House staff and knows what goes on, knows how that place runs. You've absolutely got to have that," **Leon Panetta** said.[7] "I would then say with that person you're going to assign one of your top campaign people who knows people, knows personnel and knows the politics of the President and who they screwed and who they don't want to screw and brings a political sense to that. That's the best combination. If you can get those two in one person you're even better off. If you can get those with two people they can work together that's good as well."

Campaign People

The problem with having campaign people come into the government is they remain to be tested on the ability to govern. Those who work in campaigns think in a short time span, see the world in black and white, and have a sense of attack. While fit for campaigning, these qualities are not necessarily what you want to emphasize in governing. "Campaigns are inevitably exercises of shifting tides and winds and expediency" observed **Roger Porter** who worked in all four of the last Republican administrations.[8] "You're trying to

[5] White House Interview Program, Interview with Lloyd Cutler, Martha Joynt Kumar and Nancy Kassop, Washington, D.C., 1999.
[6] Background interview.
[7] White House Interview Program, Interview with Leon Panetta, Martha Joynt Kumar, Monterey Bay, CA., May 4, 2000.
[8] White House Interview Program, Interview with Roger Porter, Martha Joynt Kumar, Cambridge, Massachusetts, October, 1999.

REV_00260414

resolve this little thing here and this little thing there and keep this group on board and what we have here. That is different than governing. I think there is some merit in having people recognize the distinction between the way decisions get made in a campaign and how processes occur during a campaign," he observed. When you campaign you are living a very different life than is true when governing. "You have to build coalitions. You're not in an us-them, we've got to defeat them; we've got to destroy them. There's just a different mentality. That's the way it has to be in a campaign. During a campaign, if you don't win, it doesn't matter. But when you govern you've got to figure how to build a coalition and work with others because in fact in our system power is so widely distributed and fragmented that that's the only way you can effectively govern. Those are not necessarily the same set of skills that get illuminated during the course of a campaign."

Martin Anderson explained the dynamic of bringing into the White House people who worked on the campaign.

> They work so long and so hard and become so much of the team that when their candidate wins they automatically come in. It's just the most natural thing in the world. Positions are found for them. That's why I've always argued that if you can identify the key people a candidate surrounded himself with six to nine months or the year before the election, I can tell you what's going to happen. You can tell because they all come in."[9] It doesn't make a difference if they have the qualities needed to govern. "In my experience, it's a secondary consideration," he said. There are several priorities for a President. "With Reagan it was real clear. He knew what he wanted to do. He wanted people to help him do it so they agreed with him. They should be competent for the job. We didn't want idiots. They should know what they were doing. But given the choice of taking someone who was competent and fully agreed with Reagan and someone who was brilliant and disagreed, you took the first one. You also want loyalty, total, absolute loyalty and enthusiasm. Then if they know something about Washington that's nice but not that critical.

When they come into a White House even if they fit in in terms of their substantive contributions, campaign people, especially those working in the political and communications areas, often find the adjustment a difficult one because of the differences in the technology they work with in a White House. In a campaign, the operations involve the newest technology for accumulating and delivering information. A White House is traditionally at the low end of the tech spectrum. **Jodie Torkelson**, who headed the Office of Management and Administration, provides a glimmer of the contrast. "A lot of these folks had worked in telecommunications or very modern areas," she said of those working in the campaign. "Everybody had a laptop and everybody had cell phones. They expected when they went to the White House to find those kinds of things and it was a shock when you walked in the door you had a big old phone with big square buttons that lit up. You had about six lines across and you have to push here; if you wanted to transfer a call you had to click twice on the receiver. It was so archaic."[10] Making the changes in the system the incoming crew want to make can take the whole of the administration. Making do takes time as well.

Personal Presidential Choices

In addition to choosing his own Chief of Staff, a President will select four or five other senior staff members. President Ford explained his picks. "The Press Secretary, I made the choice. First Jerry terHorst, then he left and then Ron Nessen. Those were personal choices," he said. As a veteran of the Hill, **President Ford** chose his legislative liaison. "I felt I had a better knowledge of the kind of a person who ought to do that and I picked Jack Marsh who had been in Congress with me as a southern Democrat. Then when I went

[9] White House Interview Program, Interview with Martin Anderson, Martha Joynt Kumar, Stanford, California, May 5, 2000.
[10] White House Interview Program, Interview with Jodie Torkelson, Martha Joynt Kumar, Washington, D.C., October 19, 2000.

REV_00260415

as Vice President he was over at the Pentagon as legislative liaison for the Pentagon. Then when I became President I drafted Jack to come and be my legislative liaison," he recounted. "Another is your speechwriter. In my case I felt I wanted to pick the head of speechwriting and I picked Bob Hartmann who had been my Chief of Staff when I was Vice President. A speechwriter has to have an intimate relationship with the President and the President with the speechwriter," he declared. "Those are the kind of people that a President has to pick personally." They may make different choices, but presidents will select a handful of people to occupy positions they consider to be crucial to the manner in which their presidency functions.

Substantive Policy People

As a White House starts up, substantive policy people must be represented from its creation. **Leon Panetta** discussed some of the blend here.

> You want the most qualified people in those kinds of positions because as you go through the decision-making process you may want to make some changes, you may want to bring some political input in to it. You have got to have the substance down so you know what the hell you're getting in to. You make political judgments on top of that but you, by God, need to know what's really involved in that decision making process and you're not going to get that with— if you put campaign types in these positions, their first thought will be the politics of it. You want somebody in these positions whose first thought is not the politics of it but the substance of it. What's the right economic policy? What's the right national security policy? What's the right policy in terms of the counsel and the law? You want people that make straight calls on that. It's easy to make political decisions on top of that.[11]

An area where political and substantive people clashed in the Clinton White House was on economic policy and the priority to be accorded to deficit reduction. **David Dreyer**, who worked for Robert Rubin, discussed the conflict that can take place between political and policy people. "There are times when the political people were advising him [Rubin] he couldn't quote, unquote break a campaign promise by under-funding or not funding a particular program where he was able to persuade them and cabinet people who represented those programs that we had to hit a particular dollar figure on deficit reduction where the financial markets would regard as credible," he said.

> That, in tandem with Lloyd Bentsen going out on a Sunday news broadcast and talking about an energy tax to demonstrate seriousness and purpose about deficit reduction were key things which got the markets believing that we were actually going to do what we had set out to do. There were some strong-willed individuals seated around that table from the [James] Carvilles and the [Paul] Begalas representing the President's political promises— and they had an important brief to argue— and the programmatic people like Secretary [Robert] Reich at the Labor Department and Dick Riley at Education. He got all of those people singing off of the same sheet of music about the President's priorities and the depth of the deficit reduction we were going to do and that meant that some of our tax promises and some of our programmatic initiatives weren't going to be as fulfilled or as out front as they wanted them to be.[12]

People with White House Experience

A well functioning White House is generally a blend of people from the campaign and those with a previous tour of service in the White House. **James Cicconi**, who served in the Reagan and Bush administrations, discussed the advantage of prior service. "I was a hell of a lot better at my job under

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[11] Leon Panetta interview.

[12] White House Interview Program, Interview with David Dreyer, Martha Joynt Kumar, Washington, D.C., August 1, 1999.

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President Bush because I had worked in a more junior position under President Reagan," he said.[13] "I was able to see how Darman and others, how that job functioned, when it functioned well, when it functioned poorly, how it needed to adapt to the President's style of work. I saw how it worked; I saw how White Houses work and are structured, how decisions get made. I learned the importance of speaking up and how to affect a decision, how to deal with pressure and stress in the job and balance things in your life at the same time. I was a lot better the second time around than I would have been coming in cold, a lot better."

William Galston, who worked in the Clinton White House, observed: "the only institutional memory that counts is what's in somebody's head. A database across time is no substitute for someone who's been there before and is going back."[14] **James Baker** discussed what you learn from being in or near a White House. His first experience with a White House was coming to meetings there during the Ford Administration when he came in place of the Secretary of Commerce, Rogers C.B. Morton, who was ill at the time. Baker said he learned the following: "How options should go to the President. How decisions should be made. The role of the honest broker. The land mines that you have to be aware of as Chief of Staff." Once he came in as Chief of Staff, his earlier time had served him well as he prepared to come in.

Those people who have not worked on a campaign are looked upon with suspicion. **Gerald Warren** who worked in the Press Office and the Office of Communications in the Nixon and Ford White Houses explained his entry and the manner in which he sought to fit in.

> I walked in to the White House for the first time on January 21 early in the morning. I had come in on the red eye. I was advised by a very wise person who had been through this before to skip the inauguration festivities because I wasn't a member of the team. I wasn't in the campaign. I was told that I was going to be initially viewed as an outsider who wasn't in the trenches with the [Richard] Nixon folks so I should go in as quietly as possible. So I did. That turned out to be true. I was a newspaper editor. I wasn't identified as a Nixon person. I had to overcome that within the staff.[15]

When asked how one overcomes the initial cool response of those who have worked with the President-elect, **Warren** said. "I think just by quietly going about your work and learning the ropes of the White House staff, how the White House staff works and doesn't work, which is a very difficult thing for people coming in for the first time to do.".

DISCOVERING KNOWLEDGEABLE INSIDERS

It takes some while before those coming into a White House appreciate the knowledge of the White House support staff. The White House has rhythms that repeat themselves from one administration to another. It generally takes some while, though, before the new people appreciate the importance of those who have served sometimes for several presidents. "There are certain people who have that metronome in their head and know how it's supposed to work, like the clerk downstairs in the White House," observed **Warren**. "There's always someone in each office, some secretary in each office, who has the key, who knows how it works. The difficult thing is to find that person and then, in the case of a Republican administration replacing a Democrat or Vice versa, protecting that person and saying please help us." Invariably such people are demoted until the new staff recognize the usefulness of those who previously served. In the case of the Press Office, for example, Connie Gerard worked for press secretaries from George Reedy through Marlin Fitzwater. "Each of us going in, in those circumstances, seems to make the same mistake," he said. "They

[13] White House Interview Program, Interview with James Cicconi, Martha Joynt Kumar, Washington, D.C., November 29, 1999.
[14] Interview with William Galston, Martha Joynt Kumar, College Park, MD., June 5, 1997.
[15] White House Interview Program, Interview with Gerald Warren, Martha Joynt Kumar, Middleburg, Virginia, October, 1999.

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REV_00260444

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

Sharing Grand Jury Information with Intelligence Agencies

OA/NARA#: 2184 / 2095
9804

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REV_00260445

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

Shedd, Dennis W.

OA/NARA#: 2182/2093
9802

Box 53
Folder 2

Office of Legal Policy
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D. C. 20530

DATE: 6/21/02

TO: Brett Kavanaugh

Re: Shedd

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PAGES: _30___ (including cover)

FROM: Wendy Keefer
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FILED
OCT 14 1999
LARRY W. PROPES, CLERK
COLUMBIA, S.C.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

ENTERED
10-14-99

MARIE T. CROSBY,

Plaintiff,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

vs.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,

Defendant.

C.A. No. 3:97-3588-19BD

ORDER

This case is before the Court for review of the Report and Recommendation filed by United States Magistrate Judge Bristow Marchant on June 30, 1999 (as supplemented on September 3, 1999). In the Report, Magistrate Judge Marchant recommends that the Court grant defendant's motion for summary judgment on plaintiff's Family and Medical Leave Act ("FMLA") claim because Congress did not properly enact the FMLA under § 5 of the fourteenth amendment and, therefore, has not abrogated defendant's eleventh amendment immunity from suit.[1] Although plaintiff has not objected to this

[1]The Court previously accepted Magistrate Judge Marchant's recommendation that defendant is entitled to summary judgment on plaintiff's claim under the Americans with Disabilities Act ("ADA").

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(Rev. 8/82)

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recommendation, the United States of America – which the Court permitted to intervene – has objected.

After carefully reviewing the record and the controlling legal principles, the Court concludes that the Report is proper. Accordingly, the Court will accept the Report, overrule the United States' objections, and grant summary judgment for defendant on the FMLA claim.

IT IS SO ORDERED on this the 13th day of October, 1999, at Columbia, South Carolina.

Dennis W. Shedd

DENNIS W. SHEDD
UNITED STATES DISTRICT JUDGE

REV_00260448

9-3-99

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

FILED

SEP 3 1999

LARRY W. PROPES, CLERK
COLUMBIA, S. C.

MARIE T. CROSBY,

Plaintiff,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,

Defendant.

Civil Action No. 3:97-3588-19BD

SUPPLEMENTAL

REPORT AND RECOMMENDATION

Plaintiff, a former division director with the Defendant South Carolina Department of Health and Environmental Control (hereinafter "DHEC"), filed this employment discrimination action pursuant to Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, et. seq., and the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, et. seq. On June 30, 1999, the undersigned issued a Report and Recommendation recommending that Defendant's motion for summary judgment be granted as to both Plaintiff's ADA claim and her FMLA claim. On August 5, 1999, the Honorable Dennis W. Shedd, United States District Judge, granted the Defendant's motion for summary judgment on Plaintiff's ADA claim. See Order dated August 5, 1999.

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With regard to Plaintiff's FMLA claim, the undersigned recommended dismissal on the grounds that the FMLA was not properly enacted under Congress' § 5 enforcement powers, and that Congress has therefore not abrogated the state's Eleventh Amendment immunity from suit. Report and Recommendation, at pp. 16-19. In his order of August 5, 1999, Judge Shedd determined that "[b]ecause the constitutionality of the FMLA has...been called into question, the Court - acting pursuant to 28 U.S.C. § 2403 and Fed.R.Civ.P. 24(c)- shall hold this issue in abeyance pending review by the Attorney General of the United States, who shall be permitted to intervene on behalf of the United States of America if she deems appropriate." See Order dated August 5, 1999. On August 27, 1999, the United States of America ("United States") intervened and filed a memorandum in opposition to Defendant's motion to dismiss or for summary judgment, solely addressing the issue of the FMLA's abrogation of the States' immunity. Judge Shedd thereafter remanded this matter to the undersigned for further consideration of Defendant's motion in light of the United States' intervention.

Discussion

Plaintiff alleges that the Defendant violated her rights under the Family and Medical Leave Act, 29 U.S.C. § 2601, et. seq., by not restoring her to the position of Division Director or an equivalent position when her physician released her to return to her duties, but not in the Heritage Building, on September 30, 1998.[1] Defendant asserts that Plaintiff's FMLA claim is

[1]The full factual background and evidence of record in this case are set forth in the undersigned's Report and Recommendation filed on June 30, 1999.

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(Rev.8/82)

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barred pursuant to the Eleventh Amendment to the United States Constitution.[2] Specifically, the Defendant argues that enactment of the FMLA fails to meet the requirement that such an Act be a proper exercise of Congress' enforcement power under the Fourteenth Amendment.

In its brief, the United States argues that the FMLA properly abrogates the immunity of the states under the Eleventh Amendment, spending considerable space extolling the virtues of the Act. However, while the goals and requirements of the Act are laudable, the question before the Court is whether it is constitutional. After carefully reviewing the brief filed by the United States, the undersigned is unpersuaded by the arguments presented. For the reasons previously set forth and discussed in the Report and Recommendation of June 30, 1999, the undersigned continues to agree with the majority of courts which have addressed this issue in finding that Congress did not effectively abrogate the States' Eleventh Amendment Immunity in enacting the FMLA. See Kilvitis v. County of Luzerne, ____ F.Supp. 2d ___, 1999 WL 428246 (M.D.Pa. June 25, 1999); Sims v. University of Cincinnati, 46 F.Supp.2d 736 (S.D.Ohio 1999); McGregor v. Goord, 18 F.Supp.2d 204 (N.D.N.Y. 1998); Thomson v. Ohio State University Hospital, 5 F.Supp. 2d 574 (S.D.Ohio 1998); Driesse v. Florida Board of Regents, 26 F.Supp.2d 1328 (M.D.Fla. 1998); Garrett v. Board of Trustees of Univ. of Alabama, 989 F.Supp. 1409 (N.D.Ala. 1998), appeal pending, 11th Cir. No. 98-6069; Post v. State of Kan., No. 98-1238, 1998 WL 928677 at * 3 (D.Kan. Dec. 10, 1998)["Of the district courts which have now considered the issue, the majority and all of the more recent cases have concluded that the Eleventh Amendment bars FMLA claims

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[2]The Eleventh Amendment provides as follows:
The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state.

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(Rev.8/82)

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against state agencies."]; but see Iolliffe v. Mitchell, 986 F.Supp. 339, 342-343 (W.D.Va. 1997); Biddlecome v. Univ. of Texas, No. 96-1872, 1997 WL 124220 (S.D.Tex. 1997); Knussman v. State of Md., 935 F.Supp. 659, 663 (D.Md. 1996)[3].

Conclusion

Based on the foregoing, it remains the recommendation of the undersigned that the Defendant's motion to dismiss and for summary judgment be **granted** as to Plaintiff's FMLA claim, and that this case be **dismissed**.

Bristow Marchant
United States Magistrate Judge

Columbia, South Carolina

September 3, 1999

[3]As the Kilvitis opinion points out, the court in Knussman only considered whether Congress expressed its intent to abrogate the Eleventh Amendment, specifically noting that the parties had neither briefed nor argued whether Congress acted pursuant to a valid exercise of power in doing so.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

FILED
AUG - 5 1999
LARRY W. PROPES, CLERK
COLUMBIA, S C

MARIE T. CROSBY,

Plaintiff,

vs.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,

Defendant.

C.A. No. 3:97-3588-19BD

ENTERED
8-5-99

ORDER

The Court has received the Report and Recommendation ("the Report") filed in this case by United States Magistrate Judge Bristow Marchant.[1] The Court has carefully reviewed the Report and concludes that it is proper concerning plaintiff's ADA claim. Accordingly, the Court will grant summary judgment in defendant's favor on that claim.

Concerning plaintiff's FMLA claim, Magistrate Judge Marchant recommends that the Court grant summary judgment in favor of defendant based on his conclusion that Congress did not properly enact it under § 5 of the 14th Amendment. Because the constitutionality of the FMLA has therefore been called into question, the Court – acting pursuant to 28 U.S.C. § 2403 and Fed. R. Civ. P. 24(c) – shall hold this issue in abeyance

[1]Although she sought and obtained an extension of time (until July 26, 1999) to file objections to the Report, Plaintiff has not filed objections to the Report.

pending review by the Attorney General of the United States, who shall be permitted to intervene on behalf of the United States of America if she deems appropriate.

The Court directs the Clerk of Court to immediately forward a copy of this Order to the United States Attorney for the District of South Carolina. The United States Attorney shall notify the Court by no later than August 27, 1999, of the United States' position on this matter.

IT IS SO ORDERED on this the 5th day of August, 1999, at Columbia, South Carolina.

Dennis W. Shedd

DENNIS W. SHEDD
UNITED STATES DISTRICT JUDGE

REV_00260454

e 7-1-99 rw

FILED
JUN 30 1999
LARRY W. PROPES, CLERK
COLUMBIA, S.C.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

MARIE T. CROSBY, Plaintiff,	Civil Action No. 3:97-3588-19BD
v.	
SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, Defendant.	REPORT AND RECOMMENDATION

Plaintiff, a former division director with the Defendant South Carolina Department of Health and Environmental Control (hereinafter "DHEC"), filed this employment discrimination action pursuant to Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, et. seq., and the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, et. seq..[1] The Defendant filed a motion to dismiss and for summary judgment pursuant to Rules 12(b)(1) and 56, Fed.R.Civ.P., on October 13, 1998. Plaintiff filed a memorandum in opposition to Defendant's motion on November 16, 1998, and Defendant filed a reply memorandum on November 25, 1998.

[1]Plaintiff also initially asserted claims under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e, et. seq.; and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et. seq.. However, Plaintiff has withdrawn her claims under Title VII and the ADEA. See Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, at p. 2.

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Defendant's motion is now before the Court for disposition.[2]

Background and Evidence

The evidence before the Court, considered in the light most favorable to the Plaintiff, shows that she was employed by the Defendant as Division Director of the Inspection of Care (IOC) Division of the Bureau of Certification from 1992 until her departure from the agency in November 1996. Price Deposition, p. 54; Plaintiff's Deposition, pp. 22-23.[3] The IOC was one of two divisions in the Bureau of Certification, the other division being the Certification Division. Plaintiff's Deposition, pp. 133, 135. The Bureau of Certification was in turn one of a number of DHEC bureaus comprising the Health Regulations section of the agency.

REV_00260456

Office of Legal Policy
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PAGES: 49 (including cover)

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

CIVIL ACTION NO.: 3:94-1196

FILED
JUN 14 1994
LARRY W. PROPES, CLERK
COLUMBIA, S. C.

JOSEPH ALLEY, ET AL.,

PLAINTIFFS,

VS.

STATE OF SOUTH CAROLINA, ET AL.,

DEFENDANT.

6/10/94; TEN A.M.; COLA., SC

BEFORE: THE HON. DENNIS W. SHEDD

UNITED STATES DISTRICT COURT JUDGE

TRANSCRIPT ORDERED BY ATTORNEYS FOR THE DEFENDANTS

THE ABOVE-ENTITLED CASE WAS CALLED FOR MOTION, REPORTED BY ME, JANE G. LA PORTE, OFFICIAL COURT REPORTER FOR THE U.S. DISTRICT COURT, BY MEANS OF STENOGRAPHIC MACHINE, AND TRANSCRIBED BY ME.

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JANE G. LA PORTE

UNITED STATES DISTRICT COURT

1845 ASSEMBLY STREET COLUMBIA SC 29201

803-254-6239

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LAWSUIT. YOU PLAN TO HAVE THEM BACK?

MR. WHITE: THEY ARE NOT DEFENDANTS.

THE COURT: WHY DID YOU DROP THEM? DO YOU THINK THEY VIOLATED YOUR STATE CONSTITUTIONAL RIGHTS OR DON'T YOU?

MR. WHITE: THE VIOLATION OF CONSTITUTIONAL RIGHTS REGARDING OBTAINING INJUNCTION AND ENDING THE VIOLATION OF STATE CONSTITUTIONAL RIGHTS.

THE COURT: OH, I KNOW CLEARLY WHAT YOU WANT. I MEAN, IT IS CLEARLY WHAT YOU WANT. YOU WANT THAT FLAG TO COME DOWN.

MR. WHITE: THAT'S RIGHT, YOUR HONOR.

THE COURT: I UNDERSTAND.

I'M JUST TRYING TO SEE WHERE WE STAND THIS MORNING. I JUST WANT TO UNDERSTAND THAT.

IN READING YOUR FILINGS, WHAT IS YOUR CONSTITUTIONAL THEORY, YOUR FOURTEENTH AMENDMENT IS THAT REALLY 42-1983, WHAT IS THE CONSTITUTIONAL THEORY? YOU JUST CLAIM GENERALLY FOURTEENTH AMENDMENT. WHAT DO YOU MEAN BY THAT?

MR. WHITE: IT WOULD CALL ON 1983 AND MAYBE SOME INDICATION OF 1985, 1986.

THE COURT: ALL RIGHT.

THANK YOU VERY MUCH, MR. WHITE.

I'M GOING TO COME BACK TO YOU. THANK YOU VERY MUCH.

MR. WHITE: THANK YOU.

THE COURT: ALL RIGHT.

NOW, TURN TO YOU, MR. SHINE. YOU ARE NEXT UP FOR ME THIS MORNING.

YOU CLAIM THE GOVERNOR HAS NO AUTHORITY. I WANT TO TALK ABOUT THE GOVERNOR FIRST. YOU CLAIM THE GOVERNOR HAS NO AUTHORITY UNDER STATE LAW TO TAKE THAT FLAG DOWN; IS THAT CORRECT?

MR. SHINE: THAT'S CORRECT.

THE COURT: THANK YOU VERY MUCH.

MR. WHITE -- THANK YOU VERY MUCH.

MR. WHITE, CAN YOU CITE ME ANY SPECIFIC STATUTE OR CONSTITUTIONAL PROVISION WHICH SAYS THE GOVERNOR OF THE STATE OF SOUTH CAROLINA HAS THE AUTHORITY TO BRING THAT FLAG DOWN?

MR. WHITE: YOUR HONOR, MS. VALTORTA HAS COME PREPARED TO ADDRESS THAT.

THE COURT: ALL RIGHT.

HEAR FROM YOU ON THAT.

MS. VALTORTA: WELL, YOUR HONOR, THE GOVERNOR IS CHAIRMAN OF THE STATE BUDGET AND CONTROL BOARD, WHICH CONTROLS THE STATE HOUSE COMMITTEE.

THE COURT: WELL, YOU ARE MAKING ARGUMENT ABOUT THE BUDGET AND CONTROL BOARD NOW; AREN'T YOU?

MR. WHITE: TOGETHER WITH THE GOVERNOR. AND I'M SAYING THAT THOSE ENTITIES TOGETHER HAVE CONTROL OVER THE STATE HOUSE GROUNDS.

THE COURT: ALL RIGHT.

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LET ME ASK YOU THIS:

CAN YOU GIVE -- CAN YOU CITE ME ANY STATUTE IN SOUTH CAROLINA OR CONSTITUTIONAL PROVISION -- LET ME SAY, DO YOU DOUBT THAT THE OFFICE OF GOVERNOR AS DEFINED IN HIS AUTHORITY IS BY THE CONSTITUTION AND STATUTES OF SOUTH CAROLINA?

MS. VALTORTA: NO. I DO NOT DOUBT THAT.

THE COURT: I AGREE WITH YOU, IT SHOULDN'T BE DOUBTED. BECAUSE THAT'S THE LAW IN SOUTH CAROLINA. THAT BEING THE CASE, NOW, TELL ME -- CITE TO ME SPECIFICALLY A STATUTORY OR CONSTITUTIONAL PROVISION WHICH SAYS THE GOVERNOR OF SOUTH CAROLINA CAN TAKE THAT FLAG DOWN.

MS. VALTORTA: WELL, I WOULD SAY THROUGH EXECUTIVE ORDER. I WOULD CITE SOUTH CAROLINA CODE SECTION 13-340, I BELIEVE, IS THE SECTION.

IN ORDER TO PREVENT DISRUPTION OF PEACE, THE STATE -- THE GOVERNOR COULD ORDER THE FLAG TO COME DOWN. AND SINCE THERE IS NO AUTHORITY AT PRESENT TO HAVE IT UP THERE, THAT HE WOULD BE WELL WITHIN HIS POWERS TO DO THAT.

THE COURT: WAIT A MINUTE NOW. WAIT A MINUTE NOW. EXECUTIVE ORDER, YOU AREN'T ASSERTING THAT THE GOVERNOR BY EXECUTIVE ORDER CAN DO SOMETHING THAT HE'S NOT OTHERWISE AUTHORIZED TO DO?

LET SAY, FOR INSTANCE, THE STATE HOUSE COULD NOT PASS THE BUDGET. COULD THE GOVERNOR BY EXECUTIVE ORDER ESTABLISH A

BUDGET FOR THE STATE OF SOUTH CAROLINA? JUST SAY THE STATE CAN'T COME TO AN AGREEMENT, BY EXECUTIVE ORDER HEREIN IS THE BUDGET FOR THE STATE OF SOUTH CAROLINA. DO YOU MEAN THAT? DO YOU?

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MS. VALTORTA: NO. BUT THAT'S A DIFFERENT ISSUE. HERE YOU HAVE AN ISSUE WHERE THE FLAG WAS PUT UP THERE BY CONCURRENT RESOLUTION.

THE COURT: I KNOW THAT. I KNOW HOW IT WAS PUT UP THERE. I'M TALKING TO MR. MEDLOCK OR SOMEBODY FROM HIS OFFICE IN A FEW MINUTES.

CAN YOU CITE ME TO A SPECIFIC STATUTE, OTHER THAN WHAT YOU SAY IS EXECUTIVE ORDER, WHICH I DON'T AGREE WITH YOU ON. IS THERE ANY SPECIFIC STATUTE OR CONSTITUTIONAL PROVISION WHICH GIVES THE GOVERNOR THE RIGHT TO BRING THAT FLAG DOWN?

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MS. VALTORTA: WELL, CANDIDATES FOR GOVERNOR HAVE SAID THAT THEY WOULD TAKE IT DOWN THROUGH EXECUTIVE ORDER.

THE COURT: WAIT A MINUTE NOW. WAIT A MINUTE NOW. SO LET ME SEE YOUR AUTHORITY IS WHAT SOMEBODY RUNNING FOR POLITICAL OFFICE SAYS THE LAW IS? THAT'S YOUR LEGAL AUTHORITY THIS MORNING?

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MS. VALTORTA: NO.

THE COURT: LET ME SAY, I HOPE FOR YOUR SAKE YOU HAVE

MORE THAN THAT.

MS. VALTORTA: YES.

THE COURT: LET ME ASK YOU THIS:

DO YOU WANT ME TO HOLD EVERYBODY RUNNING FOR OFFICE LIABLE FOR WHAT THEY SAY, THE TRUTH OF WHAT THEY SAY?

MS. VALTORTA: WELL, THAT WOULD BE NICE. BUT OBVIOUSLY YOU CAN'T DO THAT.

THE COURT: WELL, IF YOU DID, LET ME SUGGEST YOU ARE GOING TO BE FILING MORE LAWSUITS PROBABLY.

MS. VALTORTA: I WOULD SAY.

THE COURT: THAT'S NO SLIGHT -- THAT'S NO SLIGHT ON PEOPLE RUNNING FOR OFFICE.

BUT I JUST POINT OUT I THINK THE FALLACY OF SAYING SOMEBODY IN THE POLITICAL CONTEST SAYING SOMETHING RUNNING FOR OFFICE, DECIDES WHAT THE LAW IN SOUTH CAROLINA IS.

ALL RIGHT.

LET ME SAY -- WHO SPEAKS FOR THE ATTORNEYS GENERAL'S OFFICE? WHO SPEAKS FOR THE ATTORNEY GENERAL'S OFFICE? DO YOU? I JUST WANT TO ASK MR. MEDLOCK --

MR. MEDLOCK: YES, SIR.

THE COURT: -- I WASN'T SURE HOW YOU DIVIDE THIS UP. I KNOW YOU ARE BUSY AND FARM SOME ISSUES OUT. I KNOW YOU HAVE

CONTROL OVER IT.

DO YOU THINK THE GOVERNOR HAS AUTHORITY UNDER STATE LAW TO TAKE THAT FLAG DOWN?

MR. MEDLOCK: YOUR HONOR WE DECIDED SOMETIME AGO THE LEGISLATURE HAS THE AUTHORITY TO REMOVE THE FLAG.

THE COURT: I'M NOT DISAGREEING WITH YOU. THE GOVERNOR DOESN'T HAVE ANY -- LET ME ASK YOU THIS:

MR. MEDLOCK: THAT WAS OUR POSITION.

THE COURT: I READ YOUR OPINION. AND THAT'S WHY I ASKED THIS QUESTION. YOU CAN'T CITE ME TO ANY AUTHORITY FOR THE GOVERNOR TO TAKE THAT FLAG DOWN; CAN YOU?

MR. MEDLOCK: WE CANNOT.

THE COURT: THANK YOU VERY MUCH. DON'T SIT DOWN YET. AND I WANT TO MAKE THAT CLEAR, THAT'S NOT AIMED AT THIS PARTICULAR GOVERNOR, GOVERNOR CAMPBELL. YOU ARE TALKING THE OFFICE OF GOVERNOR; ISN'T THAT CORRECT?

MR. MEDLOCK: THAT IS CORRECT.

THE COURT: AND YOUR ANALYSIS WOULD BE THE SAME IF SOMEBODY HAD ASKED YOU TO APPLY THAT ANALYSIS TO THEN GOVERNOR HOLLINGS UNDER WHOSE TENURE THE FLAG WENT UP; GOVERNOR RUSSELL, GOVERNOR MC NAIR, GOVERNOR WEST, GOVERNOR EDWARDS OR GOVERNOR RILEY, YOUR POSITION IS CONSISTENT ON THAT. IT IS NOT THE GOVERNOR'S PREROGATIVE TO TAKE THAT FLAG DOWN; ISN'T THAT CORRECT?

MR. MEDLOCK: THAT'S CORRECT.

THE COURT: LET ME ASK YOU THIS QUESTION AND SEE IF YOU WANT TO ANSWER. IF YOU DECIDE YOU DON'T WANT TO, I'M NOT GOING TO FORCE YOU TO. AND I'M GOING TO LEAVE THE SITTING GOVERNOR OUT OF THIS. SO IT IS NOT ANY KIND OF PERSONAL MATTER.

SO LET'S TURN TO THE ELECTION OF THE NEW GOVERNOR NEXT YEAR. IF THE GOVERNOR WERE TO GO OVER AND TAKE THAT FLAG DOWN, WOULD THAT ACTION BE LEGAL?

MR. MEDLOCK: THE GOVERNOR WHO WISHES TO REMOVE THE FLAG SHOULD WORK WITH THE GENERAL ASSEMBLY.

THE COURT: IS THAT -- I COULD PRESS YOU FURTHER ON THAT -- IS THAT ALL YOU CARE TO SAY ABOUT THAT?

MR. MEDLOCK: THAT'S ALL I KNOW ABOUT THAT.

THE COURT: IN OTHER WORDS, THE GOVERNOR CAN'T DO IT BY HIMSELF?

MR. MEDLOCK: THAT'S CORRECT.

THAT'S CONSISTENT WITH THE OPINION WE HAVE WRITTEN -- ALL OF THE OPINIONS THAT WE HAVE WRITTEN.

THE COURT: I AGREE WITH YOU A HUNDRED PERCENT. YOUR POSITION HERE THIS MORNING IS EXACTLY CONSISTENT, YOU ARE EXACTLY RIGHT. THAT'S WHY I TRY TO HELP OUT OVER HERE. ALTHOUGH SOME CANDIDATE RUNNING FOR GOVERNOR MAY SAY HE'S GOING TO DO THAT, NO BASIS IN STATE LAW FOR HIM TO DO THAT.

THANK YOU VERY MUCH.

I'M GOING TO COME BACK TO YOU. THANK YOU VERY MUCH.

LET ME SAY THIS: GOVERNOR'S MOTION TO DISMISS IS GRANTED. THE GOVERNOR IS OUT OF THIS CASE. THE GOVERNOR HAS NO AUTHORITY WHATSOEVER TO TAKE THAT FLAG DOWN.

NOW, LET'S TURN TO THE BUDGET AND CONTROL BOARD, MR. SHINE.

MR. SHINE: YES, YOUR HONOR.

THE COURT: YOU SAY THERE -- YOU SAY THERE'S NO AUTHORITY FOR THE STATE BUDGET AND CONTROL BOARD?

MR. SHINE: THAT'S CORRECT.

THE COURT: LET'S LEAVE THAT ARGUMENT ALONE FOR A MINUTE. LET'S LEAVE THAT ARGUMENT ALONE FOR A MINUTE. YOU ALSO CLAIM ELEVENTH AMENDMENT IMMUNITY; DON'T YOU?

MR. SHINE: ABSOLUTELY, YOUR HONOR.

THE COURT: BECAUSE THE STATE BUDGET AND CONTROL BOARD, YOU BELIEVE, IS ALTER EGO OF THE STATE?

MR. SHINE: THAT'S CORRECT.

THE COURT: DO YOU ALSO CLAIM THE STATE BUDGET AND CONTROL BOARD IS NOT A PERSON?

MR. SHINE: THAT'S CORRECT.

THE COURT: UNDER THE WILL DECISION, 1983 DECISION?

MR. SHINE: THAT'S CORRECT, WE CITED THAT IN OUR --

THE COURT: I HAVE READ WHAT YOU FILED. THANK YOU VERY MUCH.

ALL RIGHT.

WHO SPEAKS OVER HERE? MR. WHITE ON THIS ONE?

MR. WHITE: I DO.

THE COURT: AS TO THE STATE BUDGET AND CONTROL BOARD, WHY MAY THEY NOT ASSERT AN ELEVENTH AMENDMENT IMMUNITY IN THIS FEDERAL ACTION -- IN THE FEDERAL ACTION?

LET ME SAY, WE ALL UNDERSTAND WHAT AN ELEVENTH AMENDMENT IS, IS THE RIGHT OF THE STATE TO ASSERT IN A FEDERAL CASE THAT THEY WILL NOT BE SUED IN THE STATE FORUM.

WHY CAN'T THE STATE BUDGET AND CONTROL BOARD ASSERT ELEVENTH AMENDMENT IMMUNITY IN THIS ACTION?

MR. WHITE: YOUR HONOR, THEY CAN ASSERT ELEVENTH AMENDMENT IMMUNITY. WE HAD HOPED THEY WOULD NOT. WE THOUGHT THEY HAD AN INTEREST IN THIS SUIT, THEY WOULD WANT TO COME IN AS INTERVENORS.

THE COURT: THEY HAVE AN INTEREST, THEY WANT TO BE SUED IN THE PROPER FORUM, STATE OF SOUTH CAROLINA. THEY HAVE CONFIDENCE IN THE STATE OF SOUTH CAROLINA AND ITS OFFICIALS AND ITS JUDGES, ISN'T THAT CORRECT?

MR. SHINE: THAT'S CORRECT.

THE COURT: WAIT A MINUTE NOW. THAT DOESN'T MEAN YOU DON'T HAVE CONFIDENCE IN ME; DOES IT?

MR. SHINE: I HAVE FULL CONFIDENCE IN YOUR HONOR.

THE COURT: YOU JUST SAY THAT'S AN ELEVENTH AMENDMENT RIGHT OF THE STATE TO ASSERT, AND THE STATE WANTS TO ASSERT IT. AND YOU ASSERT IT ON BEHALF OF THE STATE BUDGET AND CONTROL BOARD, THAT IS A RIGHT PEOPLE HAVE -- OF SOUTH CAROLINA

HAVE. THEY HAVE THAT RIGHT TO HAVE YOU ASSERT IT?

MR. SHINE: THAT'S CORRECT, YOUR HONOR.

IN FACT, IT IS AGAINST PUBLIC POLICY NOT TO ASSERT THE ELEVENTH AMENDMENT.

THE COURT: I TELL YOU THIS MUCH, STATE ASSERTS ELEVENTH AMENDMENT IMMUNITY EVERYDAY IN THIS COURT, ALMOST EVERY SINGLE DAY. YOU DON'T DISAGREE THEY CAN'T ASSERT IT?

MR. WHITE: WE DON'T DISAGREE THEY CAN ASSERT IT. WE ASK THEY NOT -- WE THINK THEY SHOULD PROPERLY BE HERE TO REPRESENT THE PEOPLE OF THE STATE.

THE COURT: LET ME GET THIS STRAIGHT. THE PLAINTIFF BRINGING THE LAWSUIT WANTS TO ADVISE YOU ON HOW TO DEFEND YOUR CLIENT THAT HE'S SUING. DO YOU WANT TO TAKE HIS ADVICE?

MR. SHINE: NO.

MR. WHITE: WE DON'T EXPECT THEM TO. WE INVITE THEM TO. BUT YOU WE DON'T EXPECT THEM TO.

THE COURT: THANK YOU VERY MUCH.

I EXPECT AND TRUST YOU ALL GOING TO GET JOINED UP IN AN ACTION YOU ALL HAVE YOUR SAY AT SOME POINT.

LET ME ASK OF THE ATTORNEY GENERAL'S OFFICE AGAIN, MR. MEDLOCK --

MR. MEDLOCK: YES, SIR.

THE COURT: -- YOU DON'T DISPUTE, DO YOU, I MEAN IT IS NOT YOUR CLIENT SO YOU DON'T HAVE TO ANSWER, BUT I'M ASKING YOU AGAIN BECAUSE YOU ARE HERE AND YOU LOOKED AT THE LAW THE

APPEARANCES:

FOR THE PLAINTIFF:

MR. GARY WHITE AND
MS. LAURA PUCCIA VALTORTA
2009 LINCOLN STREET
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FOR THE DEFENDANTS:

MR. ROBERT DEWAYNE COOK
SC ATTORNEY GENERAL
PO BOX 11549
COLUMBIA, SC

AND

MR. EDWIN E. EVANS
SC ATTORNEY GENERAL
PO BOX 11549
COLUMBIA, SC

AND

MR. THOMAS TRAVIS MEDLOCK
SC ATTORNEY GENERAL
PO BOX 11549
COLUMBIA, SC

STATE BUDGET AND CONTROL BOARD THEY CAN ASSERT ELEVENTH AMENDMENT IMMUNITY; CAN'T THEY? STATE BUDGET AND CONTROL BOARD, THEY CAN ASSERT ELEVENTH AMENDMENT IMMUNITY PROPERLY; CAN'T THEY?

MR. MEDLOCK: I'M GOING TO DEFER TO MR. EVANS.

THE COURT: THAT'S WHY I ASKED YOU EARLIER WHO'S HANDLING --

MR. EVANS: AGAIN, WE DIDN'T PRECISELY RESEARCH THAT FOR THE PURPOSE OF THIS HEARING.

BUT TRADITIONALLY STATE BUDGET AND CONTROL BOARD HAS BEEN RECOGNIZED AS A STATE ACTOR.

THE COURT: RECOGNIZED AS AN ALTER EGO. IF THEY ARE ALTER EGO, YOU DON'T DISPUTE THEY CAN ASSERT AN ELEVENTH AMENDMENT IMMUNITY?

MR. EVANS: WE HAVE NEVER DISPUTED THAT.

THE COURT: THANK YOU VERY MUCH.

LET ME SAY, BASED -- AND LET ME TELL YOU WHY ELEVENTH AMENDMENT IMMUNITY IS AN ISSUE. I HAVE TO LOOK AT THIS AS A COURT OF LIMITED JURISDICTION. AND ELEVENTH AMENDMENT IMMUNITY, IF ASSERTED, REMOVES SUBJECT MATTER JURISDICTION AS TO THAT PARTY.

ELEVENTH AMENDMENT IMMUNITY IS ABSOLUTELY CORRECT.

ALSO, LET ME SAY ON THE BASIS, MR. SHINE, OF THE WILL DECISION, THEY ARE NOT A PERSON WITHIN THE MEANING OF THE 1983 STATUTE, THE STATE BUDGET AND CONTROL BOARD IS DISMISSED FROM

THIS ACTION.

MR. SHINE: THANK YOU.

THE COURT: ALL RIGHT.

NOW, LET ME TURN -- LET ME TURN TO THE STATE OF SOUTH CAROLINA, JUST AS TO THE JURISDICTIONAL QUESTION. AND I GUESS ELEVENTH AMENDMENT EXPERT, I GUESS I TALK TO YOU.

I FIND IT PUZZLING, WHY ISN'T THE STATE OF SOUTH CAROLINA ASSERTING THE ELEVENTH AMENDMENT?

MR. EVANS: YOUR HONOR, AGAIN, I WOULD ASSERT THE ELEVENTH AMENDMENT, IF THE PLAINTIFFS WERE SEEKING INJUNCTION AGAINST THE STATE, WE ARE NOT HEAR FOR THAT PURPOSE. WE ARE HERE ONLY FOR THE PURPOSE OF LIMITED PARTICIPATION, ADVISE THE COURT OF THE STATE LAW ISSUES IN THIS CASE.

THE COURT: NO. BUT YOU DON'T THINK THEY CONTROL THE CONSTITUTIONAL ISSUE, DO YOU?

MR. EVANS: PARDON ME?

THE COURT: YOU DON'T THINK THEY CONTROL THE CONSTITUTIONAL ISSUE?

MR. EVANS: THEY MAY VERY WELL REMANUFACTURE THE NECESSITY OF CONSTITUTIONAL RULING ON THOSE ISSUES.

THE COURT: THE POINT IS, THIS LAWSUIT -- THIS IS NOT THE STATE COURT ACTION, THIS IS THE FEDERAL COURT ACTION. I KNOW YOU UNDERSTAND. I'M JUST SORT OF STATING IT FOR THE RECORD. THIS CASE IS HERE BECAUSE OF THE FEDERAL CONSTITUTIONAL CLAIM. I HAVE TO ADDRESS THAT. THAT'S WHY I

ASKED MR. WHITE UNDER HIS CONSTITUTIONAL THEORY, WHETHER OR NOT THERE IS AUTHORITY TO FLY THE FLAG MAKES NO DIFFERENCE, NO DIFFERENCE WHATSOEVER.

I KNOW YOU ASSERT, AND I HAVE READ YOUR PAPERS, YOU ASSERT THAT THERE IS NO STATE AUTHORITY TO FLY THE FLAG. THAT MAKES NO DIFFERENCE TO HIS CONSTITUTIONAL CLAIM. HIS CONSTITUTIONAL CLAIM IS, IT IS UP THERE WHETHER IT IS UP THEREBY AUTHORITY OR NOT, MY CONSTITUTIONAL RIGHTS, MY CLIENTS' CONSTITUTIONAL RIGHTS ARE BEING VIOLATED, IT HAS TO COME DOWN; ISN'T THAT CORRECT?

MR. EVANS: THAT'S HIS ASSERTION. IT IS UP TO YOUR HONOR TO DETERMINE WHETHER ANY STATE AUTHORITY MAY INTERPLAY WITH THE CONSTITUTIONAL QUESTIONS.

WE ARE HERE FOR THE LIMITED PARTICIPATION MUCH AS THE FEDERAL COURTS OFTEN REQUIRE US TO BE REPRESENTING THE STATE TO ADVISE ON THE STATE LAW ISSUES AS THEY CAME INTO PLAY.

THE COURT: I ASKED YOU TO BE HERE BEFORE ON OCCASION WHEN YOU DECLINED. I ASKED YOU TO BE HERE. I'M JUST ASKING YOU THAT.

MR. EVANS: THAT'S COMPLETELY CONSISTENT WITH THE ELEVENTH AMENDMENT FOR THE LIMITED PARTICIPATION BY THE STATE. I WOULD AGREE WITH YOUR HONOR, IF THE PLAINTIFF WERE INTENDING TO ENJOIN THE STATE, I THINK THE ELEVENTH AMENDMENT WOULD CLEARLY BAR THAT.

THE COURT: OKAY.

SO?

MR. EVANS: FOR THE LIMITED PARTICIPATION OF BEING ADVISED OF THE CRITICAL STATE LAW ISSUES, THAT IS CONSISTENT WITH ELEVENTH AMENDMENT RECOGNIZED BY FEDERAL STATUTORY LAW.

THE COURT: LET ME ASK YOU THIS, ON THE QUESTION OF STATE LAW AS TO THE AUTHORIZATION OF THE FLAG FLYING: DO YOU THINK THAT'S BEEN DEALT WITH HERE OR IN STATE COURT?

MR. EVANS: THE BETTER FORUM WOULD BE THE STATE COURT FOR RESOLUTION OF THAT ISSUE, TO THE EXTENT IT MEANS FURTHER RESOLUTION, OF COURSE, ADJUDICATED BY THE ATTORNEY GENERAL.

THE COURT: AND SO I JUST WANT TO BE SURE I UNDERSTAND YOUR THEORY. BUT WHAT IF I RAISE THE QUESTION OF ELEVENTH AMENDMENT THIS MORNING, FOR JURISDICTIONAL PURPOSE. THE STATE OF SOUTH CAROLINA HAS BEEN SUED IN STATE COURT, YOU HAVE FILED -- YOU CLEARLY HAVE FILED -- LET ME SAY, I READ YOUR FILINGS, AND I THINK, QUITE FRANKLY, I'M GOING TO GUESS YOU ARE GOING TO MAKE EXACTLY THE SAME FILING IN STATE COURT, IF YOU HAVEN'T ALREADY DONE THAT.

MR. EVANS: WE HAVEN'T BEEN SERVED. BUT WE WILL TAKE A CONSISTENT POSITION. I DON'T KNOW WHAT THE ISSUES ARE IN THE STATE COURT FORUM.

THE COURT: STRIKES ME YOUR FILING DIDN'T ADDRESS THE CONSTITUTIONAL ISSUE HERE. BUT IT DID ADDRESS THE STATUTORY ISSUE.

MR. EVANS: THAT'S CORRECT. AND THAT WAS -- THAT'S OUR LIMITED PARTICIPATION.

THE COURT: SO IF I WERE TO RAISE THE QUESTION THIS MORNING OF THE STATE OF SOUTH CAROLINA BEING IN THIS LAWSUIT -- IN THIS LAWSUIT, AND ASK YOU YOUR POSITION AS I'M RAISING IT, EVERYBODY HAS NOTICE OF IT, IT'S BEEN RAISED BY THE GOVERNOR, I THINK IT IS CLEARLY RAISED BY THE WHAT THE LAW IS, YOUR POSITION WOULD BE THE STATE WOULD ASSERT ELEVENTH AMENDMENT IMMUNITY?

MR. EVANS: AGAIN, YOUR HONOR, AS AN EXECUTIVE OFFICER I CANNOT WAIVE THE STATES ELEVENTH AMENDMENT IMMUNITY.

THE COURT: YOU HAVE TO ASSERT IT.

MR. EVANS: NOR CAN ANYONE ELSE WHO REPRESENTS ANY OF THE STATE OFFICERS. I WOULD NOT SAY WE HAVE TO ASSERT IT, I BELIEVE AS YOUR HONOR NOTED IT IS A LIMITATION ON THIS COURT'S JURISDICTION TO AWARD RELIEF AGAINST THE STATE.

AND WHETHER IT IS CERTIFIED OR NOT, THAT IS A SUBJECT MATTER JURISDICTION LIMITATION.

THE COURT: YOU AGREE WITH ME?

MR. EVANS: IF, IN FACT, THE PLAINTIFF IS HERE BEFORE YOU TODAY TO SEEK INJUNCTION AGAINST THE STATE, I WOULD AGREE WITH YOU, ELEVENTH AMENDMENT WOULD BAR THAT RELIEF.

THE COURT: WELL, --

MR. EVANS: BAR THIS COURT ENTERING THAT RELIEF.

THE COURT: WELL, THAT'S WHAT HE'S ASKING YOU SUED IN

THIS LAWSUIT.

MR. EVANS: I BELIEVE THE PLAINTIFFS' COUNSEL WOULD ADVISE THE COURT THE STATE CAN PARTICIPATE CONSISTENT WITH ELEVENTH AMENDMENT, AT LEAST ADVISE THE COURT OF THE CRITICAL STATE LAW ISSUES TO THE EXTENT THAT HELP OR ASSIST THE COURT IN RESOLVING THE FEDERAL ISSUES.

THE COURT: I APPRECIATE THAT. BUT WHAT YOU JUST TOLD ME IS, AND I AGREE WITH YOU, THE BETTER FORUM TO DECIDE WHAT STATE LAW IS, YOU DON'T -- LET'S JUST GET THIS STRAIGHT, YOU ARE NOT STANDING HERE SAYING YOU WANT THE FEDERAL COURTS TO TELL THE PEOPLE OF SOUTH CAROLINA WHAT THEIR LAW IS?

MR. EVANS: I DON'T WANT TO GET CAUGHT IN MR. SHINE'S SPOT AND SAYING I DON'T HAVE CONFIDENCE IN HIS HONOR TO RESOLVE STATE LAW ISSUES. BUT TRADITIONALLY --

THE COURT: BUT YOU HAVE CONFIDENCE IN THE CONSTITUTIONAL SYSTEM BY WHICH I HAVE LIMITED AUTHORITY. LET'S GET TO THE BOTTOM, YOU ARE NOT ASKING THE FEDERAL COURTS GET INVOLVED.

MR. EVANS: WELL, AGAIN, TO THE EXTENT THAT THE COURT MAY NEED THAT INFORMATION FOR RESOLUTION OF THE STATE LAW ISSUES, THE COURT CAN CERTIFY THAT QUESTION TO STATE SUPREME COURT IS ONE OPTION.

THE COURT: LET ME ASK YOU ABOUT THAT. THAT'S CROSSED MY MIND.

WHY DO YOU THINK THE STATE SUPREME COURT WOULD TAKE A

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CERTIFICATION FROM ME WHEN THE ACTION IS PENDING IN ITS OWN COURT SYSTEM RIGHT NOW?

I'M JUST ASKING WHAT YOU THINK.

MR. EVANS: IT WOULD BE PURELY SPECULATIVE. IT'S AN ISSUE OF LAW MAY VERY WELL TAKE JURISDICTION UNDER THE CERTIFICATION RULE.

IF YOUR HONOR PLEASE, IF I CAN DETOUR GOING BACK TO OUR ROLE REPRESENTING THE STATE HERE IN OUR LIMITED PARTICIPATION. BEFORE THERE WAS A CERTIFICATION RULE, THE QUESTIONS WERE CERTIFIED TO THE ATTORNEY GENERAL BY COMMON PRACTICE IN THE DISTRICT COURT AND THAT'S AGAIN OUR ROLE TODAY.

THE COURT: SO ARE YOU GLAD THERE'S A CERTIFICATION PROCESS TO THE SUPREME COURT NOW OR NOT?

MR. EVANS: I DON'T KNOW. I ENJOYED BEING THE SUPREME COURT. BUT THERE IS A PROCESS THERE IF THE COURT BELIEVES THAT RESOLUTION OF THOSE CRITICAL STATE ISSUES IS NECESSARY FOR THIS COURT TO CONSIDER THE FEDERAL QUESTIONS PENDING THE CERTIFICATION PROCESS EXISTS.

THE COURT: RIGHT.

LET'S GO BACK. I DON'T SEE HOW -- HOW THE RESOLUTION OF THE STATE ISSUE -- HOW I WOULD RESOLVE THAT ISSUE IN THE FIRST INSTANCE. BECAUSE WHETHER IT IS AUTHORIZED TO FLY OR NOT, THE CONSTITUTIONAL CLAIM STILL STANDS; DOESN'T IT, MR. WHITE?

MR. WHITE: YOUR HONOR, THE CONSTITUTIONAL CLAIM

WOULD STILL STAND. I BELIEVE WE DO HAVE THE PENDENT STATE CLAIMS IN THIS ACTION, BUT WE AGREED THE STATE IS THE PROPER FORUM FOR THAT.

THE COURT: IF YOU AGREE TO THAT, WHY DID YOU FILE A SUIT IN FEDERAL COURT?

MR. WHITE: WELL, WE DO HAVE FEDERAL ISSUES.

THE COURT: WELL, WAIT A MINUTE NOW. STATE COURTS CAN DECIDE FEDERAL CONSTITUTIONAL ISSUES; CAN'T THEY?

MR. WHITE: THEY CAN. WE THINK THE BETTER FORUM FOR THAT IS HERE IN FEDERAL COURT.

THE COURT: YOU DON'T HAVE CONFIDENCE IN THE STATE COURT ON FEDERAL QUESTIONS?

MR. WHITE: WE DO NOT.

THE COURT: I CAN'T FIND LAWYERS OUT THERE WITH MUCH CONFIDENCE.

MR. WHITE: WE DO HAVE CONFIDENCE IN YOUR HONOR ON FEDERAL ISSUES AND IN THE STATE COURT ON STATE ISSUES. WE THINK THE PROPER FORUM FOR THE STATE ISSUES IS THE STATE; PROPER FORUM FOR FEDERAL ISSUES IS FEDERAL COURT.

THE COURT: THANK YOU VERY MUCH.

(DISCUSSION HELD OFF THE RECORD.)

THE COURT: YOU KNOW WHAT -- COUPLE THINGS --

MR. MEDLOCK: YOUR HONOR, COULD I JUST CLARIFY ONE THING WE HAVE IN THE STATE COURT ACTION NOW PENDING. I WILL ASSERT THE SAME POSITION THERE THAT I HAVE ASSERTED HERE.

THE COURT: I HAD NO DOUBT THAT YOU WOULD. YOU MIGHT BE SURE YOU TALK TO YOUR ASSISTANTS. I DON'T KNOW. I WAS THE ONE SAYING I THOUGHT YOU FILED THE EXACT SAME PAPER. QUITE FRANKLY, I EXPECT YOU TO DO THAT.

MR. MEDLOCK: FILED ESSENTIALLY THE SAME DOCUMENTS. WE SIMPLY REPORT TO THE STATE COURT, AS WE ARE REPORTING TO THE FEDERAL COURT, WHAT THE STATE OF THE LAW IS IN THE VIEW OF THE ATTORNEY GENERAL'S OFFICE.

THE COURT: I'M GOING TO ASK A QUESTION BASED ON HISTORY IN JUST ONE SECOND ABOUT THAT.

BUT LET ME ASK NOW: I DON'T THINK CERTIFICATION WOULD WORK. BECAUSE CERTIFICATION DON'T I HAVE TO CERTIFY THAT THE QUESTION WILL BE DISPOSITIVE? I CAN'T CERTIFY TO THE STATE SUPREME COURT BECAUSE -- I CAN'T SAY: "MEMBERS OF THE STATE SUPREME COURT, BY THE WAY YOU CAN CHECK, I HAVE CERTIFIED QUESTIONS. AND I'M PLEASED TO SAY I HAVE THEM, EXCEPT THOSE QUESTIONS AT LEAST TWO IN THE LAST TWO YEARS, AND I APPRECIATE THEIR GUIDANCE ON STATE LAW QUESTIONS. AND I WILL TELL YOU THIS, I HAVE HAD REQUESTS FOR CERTIFICATION MORE THAN THAT, THAT I DIDN'T FOLLOW.

BUT I CAN'T SAY TO THE STATE SUPREME COURT: "TELL ME WHETHER OR NOT THE FLAG IS UP BY AUTHORITY." BECAUSE IT WILL BE DISPOSITIVE OF THE FEDERAL ISSUES BECAUSE IT WILL NOT BE, IT WILL NOT BE.

THE FEDERAL CONSTITUTIONAL CLAIM WILL REST ON THE

FLAG FLYING, NOT WHETHER IT IS FLYING BY AUTHORITY OR NOT. YOU SORT OF HAVE AN ARGUMENT IN THERE, MAYBE IT MIGHT BE MOOTED OUT I GUESS. BUT THAT'S NOT THE SAME THING AS CERTIFICATION ISSUE.

MR. SHINE?

MR. SHINE: YOUR HONOR, TO ASSIST THE COURT ON ELEVENTH AMENDMENT ISSUE REGARDING ALL --

THE COURT: YOU THINK I NEED SOME HELP, MR. SHINE?

MR. SHINE: NO, SIR. I THINK YOU DID QUITE WELL. I'M GOING TO SUGGEST ELEVENTH AMENDMENT CANNOT BE WAIVED.

THE COURT: IT CAN BE WAIVED BY THE GENERAL ASSEMBLY.

MR. SHINE: ONLY BY GENERAL ASSEMBLY HAS SPOKEN TO THAT IN THE TORT CLAIMS ACT.

THE COURT: ONLY FOR THE PURPOSE OF THAT TORT CLAIMS ACT; DIDN'T THEY?

MR. SHINE: THAT'S CORRECT, YOUR HONOR.

THE COURT: ALL RIGHT.

LET ME SAY -- JUST LET ME SAY, I APPRECIATE THE ATTORNEY GENERAL FILING THIS CASE. BUT THEY DIDN'T COME IN JUST AS SOMEBODY TO ADVISE. THEY WERE SUED, THEY WERE NAMED DEFENDANTS IN THIS CASE.

BEFORE I MAKE MY RULING ON THAT, LET ME ASK THIS: IT IS NOT CRYSTAL CLEAR TO ME ON THE HISTORY OF THE AMERICAN FLAG FLYING, IS THE ACT OR JOINT RESOLUTION UNDER WHICH THE AMERICAN FLAG FLIES -- AND THIS HAS NO BEARING ON THIS, JUST A QUESTION OF HISTORY.

AND

MR. SAMUEL W. HOWELL

HAYNSWORTH, MARION, MCKAY AND GUERARD

PO BOX 7157

COLUMBIA, SC

AND

MR. JAMES WALKER COLEMAN

HAYNSWORTH, MARION, MC KAY AND GUERARD

PO BOX 1119

CHARLESTON, SC 29402

AND

MR. MARK ELAM

OFFICE OF THE GOVERNOR

PO BOX 11369

COLUMBIA, SC 29202]

AND

MR. JOSEPH DAWSON SHINE

GENERAL COUNSEL

SOUTH CAROLINA BUDGET AND CONTROL BOARD

PO BOX 12444

COLUMBIA SC 29211

REV_00260460

YOU SAY THAT'S THE -- IS IT 1906 JOINTS RESOLUTION; IS THAT IT?

MR. COOK: THAT'S CORRECT, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. COOK: NINETEEN-O-SIX JOINT RESOLUTION AUTHORIZING THE SECRETARY OF STATE TO FLY THE AMERICAN FLAG AND THE STATE FLAG.

THE COURT: SO THAT'S WHERE AUTHORITY COMES FROM?

MR. COOK: PROVIDED FOR THE APPROPRIATION TO DO THAT.

THE COURT: ALTHOUGH IT CAME DOWN DURING SOME PERIOD WHEN THEY HAD TO DO SOME WORK ON THE STATE HOUSE, IT WAS DOWN ACTUALLY IN VIOLATION OF THAT STATUTE. YOU JUST COULDN'T CARRY THAT OUT BECAUSE YOU COULDN'T GET UP THERE AND TO FLY IT.

WHEN IT WENT BACK UP IN 1962 OR 63, THE AMERICAN FLAG, IT WAS STILL PURSUANT TO THE 1906 JOINT RESOLUTION?

MR. COOK: YES, SIR.

THE COURT: THAT'S WHAT I THOUGHT.

THANK YOU VERY MUCH. LET ME SAY THIS THEN: IT IS A MATTER OF SUBJECT MATTER JURISDICTION. THE STATE OF SOUTH CAROLINA -- BY THE WAY, MR. ABLE, YOU WANT TO INTERVENE IN THIS MATTER, IN PART TO ASSERT ELEVENTH AMENDMENT; ISN'T THAT CORRECT?

MR. ABLE: THAT'S ONE OF THE DEFENSES WE PUT IN OUR ANSWER, YOUR HONOR.

THE COURT: IF I FIND FOR THE STATE ON THE ELEVENTH

AMENDMENT IMMUNITY, YOU DON'T NEED TO INTERVENE IN THIS ACTION.

MR. ABLE: WELL, ALL DEFENDANTS WOULD BE OUT. THERE WOULD BE NO PENDING CASE.

THE COURT: I DON'T KNOW THAT ALL THE DEFENDANTS WOULD BE OUT. STATE HOUSE COMMITTEE IS IN. STATE HOUSE COMMITTEE, YOU HAVEN'T MOVED TO BE DISMISSED; HAVE YOU?

MR. HOWELL: NO, YOUR HONOR.

THE COURT: QUITE FRANKLY, BECAUSE MAYBE UNDER EX-PARTY YOU HAVE A PROBLEM WITH PROSPECTIVE INJUNCTIVE RELIEF AGAINST THE MEMBERS OF YOUR COMMITTEE PERHAPS.

MR. HOWELL: THAT'S RIGHT.

AS WELL AS THE INDIVIDUAL MEMBERS.

THE COURT: YOU MIGHT COULD MOVE TO GET THE NAME OUT. BUT, I MEAN, EVERYBODY -- ALL THE PLAYERS WOULD STILL BE IN FROM YOUR PERSPECTIVE; ISN'T THAT RIGHT?

MR. HOWELL: THAT'S RIGHT.

THE COURT: THAT'S WHY YOU ASSERTED TENTH AMENDMENT NOT ELEVENTH AMENDMENT; ISN'T THAT CORRECT?

THE COURT: I THOUGHT YOU WERE CORRECT IN DOING THAT PROBABLY.

BUT LET ME SAY THIS: QUESTION OF SUBJECT MATTER JURISDICTION STATE OF SOUTH CAROLINA UNDER THE ELEVENTH AMENDMENT IS DISMISSED FROM THIS ACTION. DISMISSED FROM THIS ACTION.

NOW, WELL I HAVE DISMISSED YOU FROM THIS ACTION, MR.

MEDLOCK. BUT I MAY, IF YOU WANT TO STAY HERE, WE AREN'T GOING TO BE MUCH LONGER. IF YOU WANT TO STAY AND COMMENT ON SOME OF THE QUESTIONS, I WILL BE GLAD TO HAVE YOUR LEGAL INPUT, AS I HAVE HAD ALREADY, IF YOU WANT TO STAY WITH US FOR JUST A FEW MINUTES.

MR. MEDLOCK: IF I COULD?

THE COURT: I UNDERSTAND YOU ARE NOT A PARTY ANYMORE. MAYBE I WOULD HAVE TO ADD YOU BACK TO MAKE YOU ANSWER. I'M SURE YOU WOULD ANSWER IF I ASKED YOU.

MR. MEDLOCK: THANK YOU VERY MUCH.

THE COURT: LET ME ASK YOU ABOUT YOUR CONSTITUTIONAL THEORY FOR JUST A SECOND -- JUST A SECOND. I'M NOT GOING TO SPEND MUCH TIME ON IT. WE ARE NOT GOING TO TALK ABOUT THE MERITS OF THIS ACTION.

DO I UNDERSTAND YOUR CONSTITUTIONAL -- YOUR FEDERAL CONSTITUTIONAL THEORY TO BE THAT BECAUSE SOMEBODY FINDS SOME ACT OF THE STATE OFFENSIVE, THAT VIOLATES THEIR FEDERAL CONSTITUTIONAL RIGHTS?

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MS. VALTORTA: WELL, IT'S MORE THAN THAT, YOUR HONOR.

THE COURT: ALL RIGHT.

TELL ME WHAT MORE IT IS.

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MS. VALTORTA: WE ARE SAYING THAT SINCE 1962 WHEN THE CONFEDERATE BATTLE FLAG WAS RAISED ON THE CAPITAL DOME, IS, IN

EFFECT, A SORT OF PUBLIC FORUM, A PUBLIC FORUM LIMITED TO ONE NARROW VIEWPOINT.

THE COURT: NO. IT IS NOT ONE VIEWPOINT. IT FLIES THE AMERICAN FLAG AND THE SOUTH CAROLINA FLAG, TOO.

MS. VALTORTA: THOSE TWO FLAGS DO NOT REPRESENT PARTISAN VIEWPOINTS.

THE COURT: WELL, MAYBE THEY DON'T TO YOU, BUT THEY MIGHT TO SOMEBODY ELSE.

MS. VALTORTA: WELL, I THINK THAT THE CONTROVERSY SURROUNDING THIS ISSUE SHOWS THAT THE CONFEDERATE FLAG REPRESENTS PARTISAN -- VERY PARTISAN VIEWPOINTS.

THE COURT: WELL, LET ME ASK YOU THIS, THOUGH. IN 1968 AND 69, DIDN'T THE AMERICAN FLAG REPRESENT THE SAME THING TO PEOPLE WHO WERE OPPOSED TO THE WAR IN VIETNAM?

MS. VALTORTA: WELL, I DON'T THINK THOSE PEOPLE DENIED THAT IT HAD AUTHORITY -- THE FLAG HAD AUTHORITY OVER THEM.

I THINK THAT THE CONFEDERATE --

THE COURT: WAIT A MINUTE. NO. NO. WAIT ONE MINUTE. NO. NO. NO.

YOUR ARGUMENT ISN'T THAT THE FLAG LACKS AUTHORITY OVER THEM, IT IS THAT IT'S OFFENSIVE, SOMEHOW CHILLS THEIR RIGHTS OF ASSOCIATION.

MY POINT IS, CAN YOU REALLY CONSISTENTLY MAKE YOUR CONSTITUTIONAL CLAIM ABOUT THE CONFEDERATE FLAG AND NOT MAKE IT

ABOUT THE SOUTH CAROLINA FLAG, THE AMERICAN FLAG?

MORE THAN THAT, THE PALMETTO TREE? WHAT IF AN ENVIRONMENTALIST WAS UPSET THAT THE PALMETTO TREE IS ON THE STATE LICENSE TAG -- IS IT STILL? OR BIRD? IT USED TO BE -- IT IS ON THE FLAG -- AN ENVIRONMENTALIST SAYS: "I'M VERY UPSET ABOUT THAT BECAUSE THAT REMINDS ME THAT PALMETTO TREES WERE CUT DOWN TO MAKE FORT MOULTRIE. AND I FIND THAT OFFENSIVE. IT CHILLS MY RIGHTS TO HAVE ENVIRONMENTAL GROUPS COME TO SOUTH CAROLINA."

ISN'T THAT THE SAME CONSTITUTIONAL CLAIM?

MS. VALTORTA: I NEVER HEARD THAT ARGUMENT.

THE COURT: YOU JUST HEARD IT FROM ME. RESPOND TO IT.

MS. VALTORTA: WELL, I'M SAYING THAT I BELIEVE THAT THE STATE FLAG AND THE UNITED STATES FLAG REPRESENT THE STATE AS A WHOLE AT THIS TIME. WHEREAS, --

THE COURT: WAIT A MINUTE NOW. WAIT A MINUTE NOW. WAIT A MINUTE.

I DON'T WANT TO OFFEND ANYBODY'S SENSIBILITY. HAS THE CLEMSON FLAG THROWN OVER THE STATE HOUSE, CLEMSON UNIVERSITY FLAG?

MS. VALTORTA: PERHAPS IT SHOULD BE GIVEN OPPORTUNITY TO FLY THERE. BECAUSE BY PUTTING THE CONFEDERATE BATTLE FLAG UP ON THE CAPITAL BUILDING WHICH REPRESENTS A VERY CONTROVERSIAL VIEWPOINT IS REALLY SAYING --

THE COURT: SO THE STATE CAN'T DO ANYTHING THAT'S CONTROVERSIAL THEN? AND CONTROVERSIAL IS DEFINED IF ANYBODY FINDS IT UNCONSTITUTIONAL?

MS. VALTORTA: THE STATE HAS NO AUTHORITY TO FLY THE FLAG.

THE COURT: DOESN'T MAKE ANY DIFFERENCE TO YOUR CONSTITUTIONAL ARGUMENT. YOU ALREADY TOLD ME THAT.

MS. VALTORTA: WELL, I THINK THAT IN A SENSE, I MEAN, THE FACT THE FLAG IS THERE DIVIDES THE STATE INTO DISTINCT GROUPS.

AND I DON'T BELIEVE THAT THE AMERICAN FLAG OR THE STATE FLAG DO THAT. AND FURTHER, THE CONFEDERATE BATTLE FLAG HAS NO LEGAL ASSOCIATION TO THE STATE ACCEPT HISTORICAL CONTEXT.

THE COURT: WELL, BUT SO WHAT? FOR YOUR CONSTITUTIONAL CLAIM, SO WHAT?

MS. VALTORTA: WELL, I THINK IT CHILLS THE FREE SPEECH OF PEOPLE WHO OPPOSE THE FLAG.

THE COURT: WELL, I UNDERSTAND THAT'S YOUR CLAIM. WHY COULDN'T SOMEBODY MAKE THAT CLAIM ABOUT ANYTHING THAT THE STATE DOES?

LET ME MAKE IT CLEAR TO EVERYBODY -- NO. NO. NO. I'M NOT DETERMINING NOW ON WHETHER OR NOT THE FLAG SHOULD BE THERE AT ALL. I'M JUST DOING WHAT -- YOU LAWYERS HAVE BEEN WITH ME BEFORE KNOW, I'M EXPLORING YOUR LEGAL THEORY.

AND MAYBE YOU CAN'T ANSWER ANYMORE TODAY. MAYBE YOU HAVEN'T HAD TIME TO THINK THROUGH IT. IF YOU DON'T WANT TO ANSWER ANYMORE QUESTIONS.

MS. VALTORTA: I COULD JUST SAY THAT I MEAN THE PUBLIC FORUM HAS BEEN CREATED BY THAT PARTICULAR FLAG, BY THAT CONTROVERSIAL FLAG. BECAUSE THE CONFEDERATE BATTLE FLAG --

THE COURT: WELL, THE AMERICAN FLAG CAN BE CONSTITUTIONAL, TOO; CAN'T IT?

MS. VALTORTA: WELL, I DON'T BELIEVE ANYONE WOULD DISPUTE IT INCLUDES EVERYONE.

THE COURT: WHAT ABOUT FLAG BURNING? FLAG BURNING THE AMERICAN FLAG? THAT'S PRETTY CONTROVERSIAL.

MS. VALTORTA: WELL, I WOULDN'T SAY THAT ANYONE DISPUTES THE FACT THAT THE AMERICAN FLAG REPRESENTS THEM.

THE COURT: IT DOESN'T MAKE ANY DIFFERENCE WHETHER IT REPRESENTS THEM. IT MIGHT BE OFFENSIVE TO THEM. YOU SAY AS LONG AS IT REPRESENTS YOU, IT CAN'T VIOLATE YOUR CONSTITUTIONAL RIGHTS.

I MEAN, WHAT IF SOMEBODY -- LET ME GIVE YOU ANOTHER EXAMPLE. WHAT IF SOMEBODY CLAIMED THAT THEY DIDN'T LIKE THE AMERICAN POLICY IN HAITI. AND THEY WORKED WITH GROUPS THAT WANTED TO CHANGE THE AMERICAN POLICY IN HAITI TOWARD HAITI, WHICH, LET ME SAY, IS VERY VALID FOR PUBLIC DEBATE. I'M NOT SAYING IT IS NOT. AND THEY FILED A LAWSUIT HERE IN THIS COURT AND SAID: "YOU HONOR, THAT FLAG -- AMERICAN FLAG FLYING IN

SOUTH CAROLINA OVER THE STATE HOUSE INDICATES TO US AND TO PEOPLE WHO AGREE WITH US THAT WE SUPPORT THE AMERICAN POLICY IN HAITI, SOUTH CAROLINA SUPPORTS IT; THEREFORE, OUR FRIENDS WON'T COME TO SOUTH CAROLINA TO TALK TO US ABOUT OVERTURNING THE AMERICAN POLICY IN HAITI, THAT'S CHILLING. THAT HAS A CHILLING IMPACT AND VIOLATES OUR CONSTITUTIONAL RIGHTS."

IT IS THE SAME EXACT THEORY.

MS. VALTORTA: WELL, I THINK THAT THE AMERICAN FLAG REPRESENTS -- ONE OF THE THINGS IT REPRESENTS IS THE ABILITY AND THE RIGHTS OF CITIZENS TO DISPUTE WHAT THE AMERICAN GOVERNMENT --

THE COURT: YOU THINK THAT?

MS. VALTORTA: WELL, I'M SURE THAT IT DOES. AND THAT FREEDOM OF SPEECH AND FREEDOM OF -- THE FREEDOM TO DISPUTE GOVERNMENT ACTIONS IS INHERENT IN THE AMERICAN FLAG; WHEREAS THE CONFEDERATE FLAG REPRESENTS ONE OPINION.

THE COURT: THAT'S WHAT YOU SAY. THAT IT MAY REPRESENT THAT TO YOU.

MS. VALTORTA: THAT'S WHAT THE PLAINTIFFS SAY.

THE COURT: THAT'S RIGHT. YOU SAY THAT. I MEAN, THE PLAINTIFFS SAY THAT'S CORRECT.

LET ME SAY, I'M NOT GOING TO PRESS YOU ANY FURTHER ON YOUR THEORY. I WANT YOU TO THINK ABOUT IT BEFORE YOU COME BACK IN.

MR. WHITE: MAY I HAVE A WORD ON THAT?

THE COURT: YOU SURE MAY, MR. WHITE. I DON'T LET TWO LAWYERS ON THE SAME SIDE ARGUE, BUT I'M GOING TO LET YOU ARGUE.

MR. WHITE: JUST -- THE AMERICAN FLAG AND STATE FLAG ARE UP THERE BY LAW.

THE COURT: STOP.

YOU HAVE ALREADY TOLD ME THAT MAKES NO DIFFERENCE.

MR. WHITE: I MAY HAVE BEEN WRONG.

THE COURT: WAIT A MINUTE NOW. WAIT A MINUTE. I DON'T MIND TWO LAWYERS ON THE SAME SIDE ARGUING, BUT I'M NOT SO SURE I LIKE ONE SIDE ON THE SAME SIDE TAKING TWO DIFFERENT POSITIONS.

NOW, LET ME TELL YOU QUITE FRANKLY, MR. WHITE, I THINK YOU HAVE SEEN THE BOX YOU HAVE GOTTEN YOURSELF IN ON YOUR ANALYSIS.

I THINK YOU ARE RIGHT IN THE FIRST INSTANCE. WHETHER OR NOT THAT FLAG IS UP WITH AUTHORITY OR NOT, CANNOT MAKE A DIFFERENCE UNDER YOUR CONSTITUTIONAL ATTACK.

MR. WHITE: WELL, THERE IS --

THE COURT: BECAUSE YOU KNOW WHY, SUPREMACY CLAUSE OF THE U.S. CONSTITUTION, THAT'S WHY.

IF IT IS UP -- LET ME GIVE EVERYBODY AN EXAMPLE. IN CASE YOU DON'T REMEMBER, SOUTH CAROLINA SCHOOLS WERE ALL SEGREGATED. AND YOU KNOW THIS, MR. MEDLOCK, VERY WELL. YOU WERE INVOLVED IN A LOT OF THIS. I DON'T MEAN HAVING IT, BUT WORKING WITH EDUCATORS AND ALL OPPOSING THIS.

SEGREGATION IN SOUTH CAROLINA WAS UNDER COLOR OF STATE LAW; WASN'T IT?

MR. MEDLOCK: YES.

THE COURT: DE JURE; WASN'T DE FACTO, THE LAW OF SOUTH CAROLINA TO HAVE SEPARATE SCHOOLS; ISN'T THAT CORRECT?

MR. MEDLOCK: THAT'S CORRECT.

THE COURT: ALTHOUGH THAT WAS AUTHORIZED BY LAW, IT HAD TO FALL TO THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION; DIDN'T IT?

MR. MEDLOCK: THAT IS CORRECT, SIR.

THE COURT: THANK YOU VERY MUCH.

THAT'S WHY, MR. WHITE, THE AUTHORITY CANNOT MAKE A DIFFERENCE IN YOUR CONSTITUTIONAL ARGUMENT, FEDERAL CONSTITUTIONAL ARGUMENT.

MR. WHITE: THERE'S ONE THING THAT I'M NOT SURE WHAT YOUR HONOR WILL THINK OF IT, BUT THERE ARE LEGITIMATE GOVERNMENT PURPOSES FOR HAVING THE SYMBOL OF THE UNITED STATES AND SYMBOL OF THE STATE OF SOUTH CAROLINA OVER THE STATE HOUSE DOME.

WE WOULD ASSERT THERE'S NO LEGITIMATE GOVERNMENT PURPOSE FOR THE FLAG OF THE CONFEDERACY PREVAIL AGAINST THE CONSTITUTION OF THE UNITED STATES WHICH STANDS FOR THOSE THINGS, THE BILL OF RIGHTS AND FOURTEENTH AMENDMENT STAND AGAINST, THAT THERE IS NO LEGITIMATE GOVERNMENT PURPOSE FOR IT TO BE UP BEYOND THE HISTORICAL PURPOSE FOR WHICH IT PASSED AT

PROCEEDINGS:

THE COURT: CALL THE CASE PLEASE, MADAM CLERK.

THE CLERK: PLEASE THE COURT:

THIS IS THE CASE OF JOSEPH ALLEY ET AL -VERSUS- THE STATE OF SOUTH CAROLINA, ET AL.

CIVIL ACTION NUMBER 3:94-1196.

THE COURT: COUNSEL READY TO PROCEED?

ALL RIGHT.

LET'S SAY FOR THE RECORD WHO WE HAVE.

MR. SHINE, YOU ARE HERE REPRESENTING WHO?

MR. SHINE: STATE BUDGET AND CONTROL BOARD AND GOVERNOR OF SOUTH CAROLINA.

THE COURT: MR. ELAM?

MR. ELAM: GOVERNOR CAMPBELL.

THE COURT: MR. HOWELL?

MR. HOWELL: STATE HOUSE COMMITTEE AND THE LEGISLATIVE MEMBERS OF THE LEGISLATURE.

THE COURT: ALL RIGHT.

MR. ABLE?

MR. ABLE: I REPRESENT THE INTERVENOR'S, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. EVANS: ED EVANS, YOUR HONOR, TRAVIS MEDLOCK, WE REPRESENT THE STATE OF SOUTH CAROLINA.

THE COURT: THANK YOU VERY MUCH.

MR. COOK: BOB COOK FOR THE STATE.

THE END OF THE CENTENNIAL.

THE COURT: LET ME SAY, YOU HAVE A CHANCE PERHAPS IN THE FUTURE TO EXPRESS YOUR CONSTITUTIONAL THEORY TO ME.

AND LET ME SAY THIS, WE AREN'T GETTING FURTHER INTO THE MERITS. I WANT TO EXPLORE IT SOME TO SEE IF I UNDERSTAND, I THINK I DO UNDERSTAND WHAT YOUR THEORY IS.

MR. WHITE: TO THAT EXTENT, WE WOULD LIKE TO MOVE TO ALLOW THE STATE OF SOUTH CAROLINA TO COME IN FOR THE PURPOSE OF ADVISING THE COURT ON STATE LAW. AND WE THINK THEY HAVE DONE THAT ADEQUATELY.

WE THINK THEIR CONTINUED PARTICIPATION WOULD BE OF ASSISTANCE IN THAT REGARD IF THEY ARE WILLING TO DO THAT.

THE COURT: I DON'T NEED IT. THANK YOU VERY MUCH FOR YOUR REQUEST. I DON'T NEED IT. THEY HAVE DONE A GOOD JOB EXPLAINING THE HISTORY. THEY HAVE DONE THE BEST JOB OF EXPLAINING WHAT THE HISTORY IS.

LET ME SAY, MR. SHINE, WOULD YOU STAND UP FOR ME PLEASE.

MR. SHINE: YES, SIR.

THE COURT: LET ME SAY THIS ON THE RECORD, MR. ELAM, TOO, YOU SIGNED THE FILING. LET ME HAVE YOU STAND UP FOR ME. YOU FOLKS DID THEY BEST JOB OF ADDRESSING LEGAL ISSUES IN THIS CASE.

I DIDN'T ASK YOU VERY MANY QUESTIONS BECAUSE YOUR POSITIONS WERE STATED ACCURATELY. I DIDN'T JUST ACCEPT THEM.

I THOUGHT I KNEW SOME OF THE LAW ANYWAY. BUT I WENT BACK AND RESEARCHED THE LAW. SO I SAY THAT ON THE RECORD, YOUR FILING WAS MOST HELPFUL TO THE COURT.

THANK YOU VERY MUCH.

NOW, AND I APPRECIATE YOU WANTING THE ATTORNEY GENERAL TO BE HERE. HE'S EXPLAINED THE HISTORY, AND EXPECT HE'S GOING TO FURTHER ELABORATE ON THE HISTORY IN STATE COURT AS WE MOVE ALONG.

NOW, LET ME SAY THIS ABOUT THIS CONSTITUTIONAL THEORY THAT I HEAR IN THIS CASE.

THERE ARE VERY SERIOUS QUESTIONS ABOUT THIS CONSTITUTIONAL THEORY -- ABOUT THE CONSTITUTIONAL THEORY, THAT IT VIOLATES THE FEDERAL CONSTITUTION, ABOUT THE THEORY.

NOW, WE'LL JUST HAVE TO SEE THE APPLICATION OF IT. BUT EVERY FEDERAL COURT THAT I CAN FIND HAS DISMISSED ANY SORT OF SIMILAR THEORY FOR WHAT THEY ARE HEARING IN THIS CASE. AT ANY RATE, I WANT TO MAKE THAT COMMENT. WE'LL SEE WHERE IT GOES.

(DISCUSSION HELD OFF THE RECORD.)

THE COURT: MR. HOWELL, WE HAVE HAD A LITTLE DISCUSSION, SIR, ABOUT THE ELEVENTH AMENDMENT. DO YOU WANT ME TO TAKE UP THE ELEVENTH AMENDMENT JUST ON THE STATE HOUSE COMMITTEE? YOU JUST WILLING TO LET THAT RIDE FOR RIGHT NOW.

MR. HOWELL: I JUST AS SOON LET IT RIDE.

THE COURT: I THOUGHT SO. I JUST WANT TO BE SURE ON

THE RECORD.

THANK YOU VERY MUCH.

LET ME JUST MAKE A FEW COMMENTS HERE. LET ME JUST BE CONSISTENT -- WAIT ONE SECOND, MR. ABLE -- TO BE CONSISTENT. SOMEBODY COULD SAY I SHOULD GO AHEAD AND WAIVE YOU OUT. THE TRUTH IS THE PLAYERS ON YOUR COMMITTEE WOULD STILL BE IN FRONT OF THIS COURT. SO I'M GOING TO LEAVE THAT ALONE FOR RIGHT NOW.

I WANT EVERYBODY TO UNDERSTAND I COULD TAKE THE NAME STATE HOUSE COMMITTEE, AND IT COULD BE WRONG. BUT ALL THE MEMBERS OF THE STATE HOUSE COMMITTEE ARE STILL GOING TO BE IN THIS CASE.

ALL RIGHT.

MR. ABLE, YOU STOOD UP?

MR. ABLE: YES, SIR.

MAY IT PLEASE THE COURT:

SINCE THE STATE IS OUT AND THE MOTION TO INTERVENE ON BEHALF OF THE STATE IS MOOTED BY THAT, WE WOULD MAKE AN ORAL MOTION TO BE ALLOWED TO INTERVENE AT LEAST AS PERMISSIVE INTERVENORS TO PARTICIPATE WITH THE STATE HOUSE COMMITTEE.

THE COURT: TAKEN UNDER CONSIDERATION. YOU HAVE A STATE HOUSE STATE ACTION. I DON'T KNOW IF YOU FILED TO INTERVENE OVER THERE OR NOT.

MR. ABLE: THAT ACTION HAS NOT BEEN COMMENCED.

THE COURT: I DON'T KNOW ABOUT THAT.

MR. ABLE: IT HASN'T BEEN. I FILED, AND IT'S BEEN FILED NOT SERVED.

THE COURT: LISTEN TO ME, I'M NOT MAKING ANY RULING AS FAR AS SOME ACTION YOU WANT TO BE IN, IT IS NOT GOING TO BE IN THIS COURTROOM. I THINK IT IS PRETTY CLEAR TO YOU, YOU BETTER SEE WHAT ELSE YOU WANT TO DO.

MR. ABLE: I WILL BE THERE.

THE COURT: I'M NOT TELLING YOU TO DO IT. BUT THE POINT IS, I THINK I MADE IT PRETTY CLEAR, THE STATE LAW QUESTION ISN'T GOING TO BE RESOLVED IN THIS COURT. BECAUSE I HAPPEN TO AGREE, I THINK IT WAS THE GOVERNOR'S POSITION THAT FEDERAL COURTS SHOULDN'T BE DICTATING TO STATES ON STATE LAW MATTERS. AND THAT HAPPENS TO BE MY PHILOSOPHY AS WELL. THAT'S WHAT I'M GOING TO DO.

THANK YOU VERY MUCH.

MR. ABLE: THANK YOU, SIR.

THE COURT: NOW, LET ME JUST MAKE A FEW COMMENTS TO YOU. AND THEN I WILL ISSUE A FINAL RULING THAT I'M GOING TO ISSUE TODAY.

LET ME SAY, WE HAVE PEOPLE HERE TODAY ALL OF WHOM ARE GOOD LAWYERS, ALL OF WHOM HAVE AN INTEREST IN THE COMMUNITY. SOME HAVE INTEREST POSITIONS OF POWER.

LET ME TELL YOU THREE INCIDENTS THAT HAVE HAPPENED IN MY COURTROOM IN THE LAST -- IN THE LAST MONTH AND A HALF OR SO.

FIRST, AND I THINK I'M GOING TO TAKE A GUILTY PLEA IN THIS CASE TODAY, I HAVE HAD THE OCCASION TO HAVE BEFORE ME A YOUNG MAN WHO SHOT HIS SCHOOLMATE AT A SCHOOL HERE IN THE CAPITAL CITY.

SECOND, I HAVE HAD THE OCCASION RECENTLY TO TAKE A GUILTY PLEA OF ANOTHER YOUNG MAN WHO GRADUATED FROM A HIGH SCHOOL IN THIS CITY -- GRADUATED FROM HIGH SCHOOL AND HE CANNOT READ AND WRITE.

AND THEN LAST WEEK, AND THIS IS UNBELIEVABLE TO ME, I SENTENCED A MAN FOR BRANDISHING A FIREARM. AND THEN WHEN I GOT THE INFORMATION, THIS IS WHAT HAPPENED, AND I PUT THIS ON THE RECORD BECAUSE ALL OF YOU FOLKS ARE IMPORTANT PEOPLE. AND I THINK YOU NEED TO KNOW ABOUT THE OTHER ISSUES OUT THERE THAT MAY REQUIRE SOME ATTENTION.

I'M NOT GOING TO DENIGRATE THE CONSTITUTIONAL CLAIM ABOUT THE CONFEDERATE FLAG. BUT IT STRIKES ME WE ARE TAKING A WHOLE LOT OF TIME IN THIS WHOLE STATE ON THE CONFEDERATE FLAG, WHEN THERE ARE OTHER ISSUES, EVERY-DAY ISSUES THAT SOME MAY CONSIDER A LITTLE MORE IMPORTANT.

THIS MAN CAME IN, AND HIS HOUSE HAD BURNED DOWN. AND SO HE HAD TO GO TO WHAT HE CALLED THE PROJECTS. BUT I CAN TELL YOU IT IS HOUSING UNITS WITHIN BLOCKS OF THAT DOME WHERE THOSE FLAGS FLY.

HE SAID -- AND ALL THE TESTIMONY FROM ALL SIDES -- CRACK COCAINE IS BEING SOLD EVERYWHERE IN THE PRESENCE OF

CHILDREN, GUNS PRESENT. THIS MAN SAID IN HIS HOUSING UNIT, WHEN HE AND HIS WIFE WOULD LEAVE FOR ANY REASON, PEOPLE WOULD BREAK IN EVERY TIME THEY LEFT AND THE WOULD STEAL EVERYTHING IN THEIR HOUSE, EVERYTHING.

ON ONE OCCASION HE WENT TO THE POLICE STATION HERE IN COLUMBIA TO -- AND I'M NOT PICKING ON COLUMBIA, BUT THIS IS THE CAPITAL CITY IN WHICH THEY FLAG IS FLYING -- WENT TO THE POLICE STATION AND COMPLAINED ABOUT A BURGLARY. AND WHEN HE GOT BACK TO HIS HOUSE WITH THE POLICE, STRANGERS HAD MOVED INTO HIS HOUSE. THEY WERE IN HIS BED, THEY WERE SITTING ON HIS FURNITURE, AND THEY WOULD NOT LEAVE.

IT SOUNDS LIKE SOMETHING OUT OF THAT MOVIE ESCAPE FROM NEW YORK CITY. AND HE SAID, PLEASE MAKE THEM LEAVE MY HOUSE. AND THE POLICE SAID YOU GOT TO EVICT THEM. WHAT DO YOU MEAN I HAVE GOT TO EVICT THEM? THEY DON'T LIVE HERE. THEY DON'T LIVE HERE.

AND SO HE'S CONCERNED ABOUT HIS WIFE, QUITE FRANKLY, WHO USED CRACK. AND CRACK DEALERS WERE GIVING HER CRACK COCAINE. AND HE DIDN'T WANT HIS WIFE TO HAVE CRACK ANYMORE. SO HE ASKED THEM TO NOT GIVE HER ANY MORE CRACK. THEY WERE BREAKING INTO HIS HOUSE, THREATENING HIM, THE CRACK DEALERS WERE, HERE IN COLUMBIA. COMING DOWN TO LURE HIS WIFE AWAY WITH CRACK COCAINE.

HE SAID TO THE POLICE, CAN I PROTECT MYSELF? THE POLICEMAN SAID, YES, YOU SURE CAN. SO HE GOT A GUN TO PROTECT

HIMSELF. HE GOT INTO A SCUFFLE WITH A COUPLE OF COCAINE DEALERS, WHEN HE WENT AFTER THEM BRANDISHING A FIREARM.

HE'S NOW IN FEDERAL PRISON FOR HAVING THAT FIREARM. HE WAS A CONVICTED FELON, BUT HE WAS CHARGED WITH OTHER THINGS.

LET ME SAY THIS, IT IS A LITTLE DIFFICULT TO SIT HE AS A FEDERAL JUDGE AND HEAR AND READ ABOUT AND SEE THE EFFORT THAT'S BEING PUT IN BY THE GOOD PEOPLE OF SOUTH CAROLINA ON T CONFEDERATE FLAG ISSUE, WHEN I WILL DARE SAY THOSE THREE EXAMPLES I JUST MENTIONED -- THEY DON'T CARE IF THAT FLAG FL OR NOT. THEY WANT THEIR LIFE IMPROVED, AND THEY WANT SOMETH ELSE DONE TO IMPROVE THEIR LIFE.

AND I JUST SAY THAT FOR WHAT IT'S WORTH. BECAUSE BELIEVE THIS, I HAVE GREAT CONFIDENCE IN THE PEOPLE IN SOUT CAROLINA. I HAVE GREAT CONFIDENCE IN THE OFFICIALS, BOTH ELECTED AND THE JUDICIAL OFFICIALS WHO ARE ELECTED BY THOSE ELECTED OFFICIALS. AND I'M COMFORTABLE THEY CAN DEAL WITH CONFEDERATE FLAG ISSUE IN A WAY, ON STATE LAW, THEY CAN DE WITH IT. THAT'S A PROPER FORUM FOR IT. THERE ARE PEOPLE GOODWILL ON ALL SIDES OF THE ISSUES IN SOUTH CAROLINA.

THE FLAG ISSUE I JUST SUSPECT AND HOPE THAT THE MATTER WILL BE RESOLVED, AND BE RESOLVED IN A MANNER SO W ALL -- EVERYBODY CAN CONCENTRATE ON THE KIND OF PROBLEMS POINTED OUT TO YOU.

I JUST THINK IT IS DISGRACEFUL THOSE CONDITION

IN SOUTH CAROLINA.

I WILL JUST TELL, YOU THAT'S MY OPINION. AND WE OUGHT TO BE USING OUR TIME AND EFFORTS AND RESOURCES TO ADDRESS THOSE REAL PROBLEMS.

THOSE PEOPLE I TALKED ABOUT, I DARE SAY, THEY DON'T CARE -- THEY DON'T CARE IF ANY FLAG IS ON THAT DOME. THEY DON'T CARE ABOUT THAT. THEY WANT THERE LIVES IMPROVED AND BE SURE THAT CHILDREN AREN'T GOING TO BE SHOT WHEN THEY GO TO SCHOOL HERE IN COLUMBIA.

NOW, LET ME SAY THIS, ALSO, MR. SHINE, YOU AND MR. ELAM POINTED OUT AND RAISED THE QUESTION OF ABSTENTION IN THIS CASE. THAT IS, IF THERE IS A STATE LAW MATTER THAT CAN BE RESOLVED AND SHOULD BE RESOLVED IN THE STATE FORUM, THAT THE FEDERAL COURT SHOULD DO THAT.

AND UNDER THE PULLIAM DECISION WHICH, QUITE FRANKLY, JUSTICE SCALIA, IN MY OPINION, CAUSED DEFERRAL RATHER THAN ABSTENTION.

PERHAPS UNDER BURFORD AS WELL, I BELIEVE IT IS PROPER FOR THIS COURT TO ABSTAIN ANY FURTHER IN THIS MATTER.

LET ME MAKE IT VERY CLEAR, LET ME MAKE IT VERY CLEAR, I AM DEFERRING ON MR. WHITE'S CONSTITUTIONAL CLAIM. I WANT YOU TO UNDERSTAND THAT, MR. WHITE.

I DON'T KNOW HOW THE MATTER IS GOING TO BE RESOLVED. I DON'T KNOW. I SUSPECT SOME EFFORT WILL BE PUT INTO GETTING IT RESOLVED IN COURT OR IN THE GENERAL ASSEMBLY OR SOMEHOW.

LET ME SAY, I DON'T KNOW. BUT IF WHATEVER THAT RESOLUTION TURNS OUT TO BE, MR. WHITE, IF YOU AREN'T SATISFIED WITH IT, YOU CAN COME BACK AND PRESENT YOUR CONSTITUTIONAL CLAIM HERE IN THIS COURT.

NOW, I HAVE ALREADY TOLD YOU I THINK THAT CLAIM IS VERY TENUOUS AND QUESTIONABLE. BUT I'M NOT RULING ON IT HERE. AND I WILL GIVE YOU FURTHER CHANCE TO PRESENT IF WE GET THAT FAR.

I'M GOING TO MAKE IT VERY CLEAR, I'M GIVING THE STATE COURT THE TIME TO DEAL WITH THE STATE COURT ISSUES; HOWEVER, I AM NOT DEFERRING TO STATE COURT ON QUESTIONS OF FEDERAL CONSTITUTIONAL LAW.

IF THAT MATTER COMES UP AGAIN, THE PARTIES CAN COME BACK TO ME, AND I WILL DECIDE THE QUESTIONS OF FEDERAL CONSTITUTIONAL LAW.

LET ME SAY THIS: I THANK ALL OF YOU FOR BEING HERE THIS MORNING. I APPRECIATE YOUR PARTICIPATION. I APPRECIATE WHAT YOU FILED WITH THE COURT.

ALL RIGHT.

ANYTHING FURTHER?

MR. SHINE: NOTHING FURTHER.

MR. WHITE: NOTHING FROM THE PLAINTIFF AT THIS TIME.

THE COURT: THANK YOU VERY MUCH. THANK YOU ALL VERY MUCH.

THE MARSHAL: ALL RISE.

REV_00260505

THE COURT: ALL RIGHT.

MS. VALTORTA: LAURA VALTORTA FOR THE PLAINTIFF.

MR. WHITE: GARY WHITE FOR THE PLAINTIFF.

THE COURT: MR. WHITE.

GOOD MORNING.

MR. WHITE: GOOD MORNING, YOUR HONOR.

THE COURT: ALL RIGHT.

SOME OF YOU HAVE BEEN IN FRONT OF ME BEFORE, OTHERS OF YOU HAVEN'T.

LET ME TELL YOU HOW WE ARE GOING TO PROCEED. I READ ALL YOUR FILINGS. I JUST WANT YOU TO ANSWER MY QUESTIONS. I HAVE SOME COMMENTS, AND I WANT YOU TO ANSWER THE QUESTIONS THAT I ASK YOU. THAT'S HOW WE ARE GOING TO PROCEED.

MR. WHITE, AS WE GET STARTED, I WANT TO ASK YOU JUST A FEW QUESTIONS TO GET US STARTED HERE THIS MORNING.

MR. WHITE: ALL RIGHT.

THE COURT: ALL RIGHT.

LET ME ASK YOU THIS:

YOU, IN YOUR COMPLAINT, YOU AREN'T ALLEGING -- I JUST WANT TO GET THIS STRAIGHT FOR THE RECORD, I DON'T THINK IT MATTERS TO YOUR CONSTITUTIONAL THEORY, I JUST WANT TO GET IT STRAIGHT ON THE RECORD -- YOU AREN'T CLAIMING, ARE YOU, THAT THERE WAS ANY PROTEST REASON FOR THE FLAG BEING RAISED ORIGINALLY IN 1962?

YOU DON'T ASSERT THAT; DO YOU?

MR. WHITE: NOT ORIGINALLY. ALTHOUGH CONTINUING TO FLY PAST THE CENTENNIAL PERIOD WE THINK DOES SEND A MESSAGE --

THE COURT: I'M NOT TALKING ABOUT SENDING A MESSAGE. I KNOW YOU CLAIM IT SENDS A MESSAGE. I'M ASKING, DO YOU THINK THERE'S RACIAL PURPOSE BEHIND ITS CONTINUED FLYING?

MR. WHITE: THE CONTINUED FLYING WE DO.

NOW, THE ORIGINAL FLYING OF THE FLAG WAS IN HONOR OF THE CENTENNIAL. WE HONOR THAT.

THE COURT: YOU DON'T THINK IT WAS PUT UP ORIGINALLY FOR RACIAL REASONS BUT CONTINUES TO FLY FOR RACIAL REASONS?

MR. WHITE: THAT'S CORRECT.

THE COURT: LET ME ASK YOU THIS:

UNDER YOUR CONSTITUTIONAL THEORY, THE QUESTION OF WHETHER OR NOT THE STATE HAS AUTHORITY TO FLY THAT FLAG DOESN'T MAKE ANY DIFFERENCE, DOES IT, IF THE FLAG IS UP -- IF IT IS UP BY AUTHORITY, YOU STILL CLAIM CONSTITUTIONAL DEPRAVATION.

SO THE QUESTION OF WHETHER OR NOT IT IS UP WITH LEGAL AUTHORITY REALLY ISN'T RELEVANT TO YOUR CONSTITUTIONAL THEORY; IS THAT CORRECT?

MR. WHITE: THAT'S CORRECT.

THERE'S A STATE ACTION THAT'S A STATE ISSUE, WE RECOGNIZE THAT AS A STATE ISSUE.

THE COURT: OKAY. ALL RIGHT.

AND YOU ARE HERE IN FRONT OF ME ON THE FEDERAL CONSTITUTIONAL ISSUE?

MR. WHITE: THAT'S RIGHT, YOUR HONOR.

THE COURT: ALL RIGHT. ALL RIGHT.

LET ME ASK YOU THIS:

ISN'T THIS A CASE IN WHICH YOU ARE FORUM SHOPPING? IT'S CLEAR TO ME WHAT'S HAPPENED IS, YOU FILED AN ACTION IN FEDERAL COURT NAMING EVERYBODY I THINK YOU THOUGHT MIGHT HAVE SOME ROLE IN THE FLAG. I'M NOT FAULTING YOU FOR THAT AT THIS POINT, I'M JUST SAYING THAT'S WHAT YOU DID.

THEN YOU FILED A STATE ACTION NAMING BASICALLY THE SAME GROUP OF PEOPLE; IS THAT CORRECT, AS DEFENDANTS?

MR. WHITE: WE DID.

BUT WE REVIEWED THE STATE -- PROPER PARTY WAS THE STATE. THE ONLY PARTY IN THE STATE ACTION IS THE STATE OF SOUTH CAROLINA.

THE COURT: ALL RIGHT.

LET ME GET BACK FOR A SECOND, I'M GOING TO COME BACK TO YOU ON THAT IN A SECOND.

YOU FILED AN ACTION AGAINST EVERYBODY IN FEDERAL COURT. THEN YOU FILED AN ACTION AGAINST ALL THOSE SAME PEOPLE IN STATE COURT.

AND THEN AFTER YOU HEARD FROM THE DEFENDANTS, AND YOU FOUND OUT THAT MOST OF THE DEFENDANTS WOULD FIGHT YOU EXCEPT FOR THE STATE OF SOUTH CAROLINA THROUGH THE ATTORNEY GENERAL, YOU DROP EVERYBODY FROM YOUR STATE ACTION, SO THAT YOU ARE LEFT WITH ONLY -- ARE YOU NOT ONLY FORUM SHOPPING BUT DEFENDANT

SHOPPING; AREN'T YOU?

MR. WHITE: WELL, WE ARE TRYING TO FIND WHAT AVENUE WE CAN GO TO GET RELIEF.

THE COURT: YOU ARE TRYING TO FIND THE DEFENDANT, AND YOU DID FIND THE DEFENDANT, WHO'S GOING TO AGREE WITH YOU; ISN'T THAT WHAT YOU HAVE DONE?

MR. WHITE: WELL, THE STATE OF SOUTH CAROLINA DOES TAKE THE SAME POSITION WE DO.

THE COURT: THAT'S RIGHT.

MR. WHITE: AND WE HAVEN'T REALLY SOUGHT THAT OUT. THAT'S JUST THE RESPONSE WE HAVE GOT.

THE COURT: THAT'S WHAT HAPPENED. YOU FILED A FEDERAL ACTION, YOU FILED A STATE ACTION. YOU GET RESPONSES IN THE FEDERAL ACTION WHICH WAS FILED FIRST, AND YOU FIND OUT THAT ALL THE DEFENDANTS YOU SUED EXCEPT FOR ONE IS GOING TO FIGHT YOU.

SO THEN IN THE STATE ACTION YOU DROP ALL THE DEFENDANTS WHO ARE GOING TO FIGHT YOU AND JUST KEEP IN THE DEFENDANT WHO AGREES WITH YOU; THAT'S WHAT HAPPENED?

MR. WHITE: WE BASICALLY KNEW WHAT THE RESPONSES OF MOST OF THE DEFENDANTS WERE GOING TO BE ANYWAY.

THE COURT: ALL RIGHT.

MR. WHITE: AND THE REASON THAT THE ONLY DEFEND IN THE STATE ACTION IS THE STATE IS THAT IN FEDERAL COURT THE INDIVIDUALS ARE RESPONSIBLE UNDER THE CIVIL RIGHTS ACT, WE

REALIZE THAT.

THE COURT: ALL RIGHT.

MR. WHITE: IN THE STATE COURT WE FEEL WE CAN SUE THE STATE SINCE IT IS A STATE COURT.

THE COURT: LET ME ASK YOU THIS:

YOU ALLEGE STATE CONSTITUTIONAL VIOLATIONS IN YOUR STATE COURT ACTION; DON'T YOU?

MR. WHITE: WE DO, YOUR HONOR.

THE COURT: BUT YOU DON'T THINK THE GOVERNOR THE STATE BUDGET AND CONTROL BOARD OR STATE HOUSE COMMITTEE -- YOU DON'T THINK ANY OF THOSE PEOPLE BY THEIR ACTIONS HAVE DEPRIVED YOU OF STATE CONSTITUTIONAL RIGHTS?

MR. WHITE: WE HAVE ALLEGED THAT.

THE COURT: NO YOU HAVEN'T, NOT AGAINST THOSE DEFENDANTS. YOU DROPPED THEM.

MR. WHITE: WE DID DROP THEM.

THE COURT: ALL RIGHT.

THAT'S MY POINT.

SO AS WE STAND HERE TODAY, YOU DON'T THINK ANYBODY -- ANY OF THE NAMED DEFENDANTS WHO YOU ORIGINALLY NAMED IN THE STATE COURT ACTION, WHICH WERE THE SAME DEFENDANTS HERE IN FRONT OF ME TODAY, YOU DON'T THINK THEY VIOLATED YOUR STATE CONSTITUTIONAL RIGHTS?

MR. WHITE: WELL, I DON'T WANT TO FORECLOSE THAT.

THE COURT: WELL, YOU DROPPED THEM FROM YOUR

Sixth Circuit Balance

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

OA/NARA#: 2179/2090
9799

Box 53
Folder 3

REV_00260506

REV_00260507

Counsel's Office, White House

Kavanaugh, Brett

Smith, Lavenski

Subject Files

OA/NARA#: 2182/2093
9802

Box 53
Folder 4

Arkansas State Conference

National Association For The Advancement of Colored People

P.O. Box 25314 • Little Rock, Arkansas 72221 • Telephone (501) 376-2227 • Fax (501) 227-9215

DALE H. CHARLES, State President

Atty. Jimmie Wilson, First Vice-President
Pinkey McFarlin, Second Vice-President
Doris Bonet, Third Vice-President

C. Diane Charles, Secretary
Marjorie Jackson, Treasurer

April 8, 2002

Senator Patrick Leahy
United State Senate
Chairman Judiciary Committee
443 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Leahy:

As the President of the Arkansas State Conference of Branches NAACP, I am writing to express our concern that Attorney Lavenski Smith, who is from Arkansas, has not been given a confirmation hearing. President Bush nominated Mr. Smith approximately a year ago for the Eighth Circuit Court, however, he has not been given a hearing before the Judiciary Committee.

While I understand there are some partisan issues involved, I am asking you as Chairman of Judiciary Committee to, immediately, schedule a hearing on behalf of the confirmation of Mr. Smith for the Eight Circuit Court. It is my opinion that Mr. Smith is a fine individual and has served the people of Arkansas well in his capacity as a public official.

For additional information, you may contact me at (501) 227-7231or by e-mail at dhcharles@prodigy.net

Sincerely,

Dale Charles

Dale Charles
President

DC: cdc

Arkansas State Conference

National Association For The Advancement of Colored People

P.O. Box 25314 • Little Rock, Arkansas 72221 • Telephone (501) 376-2227 • Fax (501) 227-9215

DALE H. CHARLES, State President

Atty. Jimmie Wilson, First Vice-President
Pinkey McFarlin, Second Vice-President
Doris Bonet, Third Vice-President

C. Diane Charles, Secretary
Marjorie Jackson, Treasurer

April 8, 2002

Senator Blanche Lincoln
United State Senate
359 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Lincoln:

As a constituent of yours and the President of the Arkansas State Conference of Branches NAACP, I am writing to express our concern that Attorney Lavenski Smith, also, a resident of Arkansas, has not been given a confirmation hearing. President Bush nominated him approximately a year ago for the Eighth Circuit Court; however, he has not been given a hearing before the Judiciary Committee.

While I understand there are some partisan issues involved, I am asking you to, immediately, call and write Senator Patrick Leahy to urge him to schedule a confirmation hearing on behalf of Mr. Smith. It is my opinion that Mr. Smith is a fine individual and he has served the people of Arkansas well in his capacity as a public official.

For additional information you may contact me at (501-227-7231) Page 1(877) 558-1520 or by e-mail at dhcharles@prodigy.net

Sincerely,

Dale Charles

Dale Charles
President

DC: cdc

REV_00260509

Smithsonian Exhibit

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

OA/NARA#: 1824/1742
9632

Box 53
Folder 5

REV_00260510

Smithsonian
National Museum of American History

24 June 2002

Ms. Linda Gambatesa
Deputy Assistant to the President and
Director, Oval Office Operations
The White House
1600 Pennsylvania Ave., NW
Washington, D. C. 20500

Dear Ms. Gambatesa:

Betty Monkman, the White House Curator, has asked that I contact you directly about the forthcoming exhibition, *September 11, 2001: Bearing Witness to History* at the National Museum of American History. On behalf of the Museum, I would like to ask your help in directing the enclosed letter to President Bush, so that we could borrow the following objects for temporary exhibition.

- bullhorn used by President Bush to address workers at Ground Zero
- the New York Port Authority shield given to President Bush by Arlene Howard, mother of slain officer George Howard

The Smithsonian would greatly appreciate your assistance in processing this paperwork and moving forward with the loan of these objects for exhibition. We understand the NY Port Authority shield may not be available until the dedication ceremony for the opening of the exhibition, September 10. The Museum staff will work closely with the President, you, and other White House staff to coordinate this loan for the duration of the exhibition -- until January 11, 2003.

If this meets with the President's approval, please have him or his designee sign and date both copies of the enclosed Incoming Loan Agreement (at the bottom of the back of each of the two pages) and return them to us as soon as possible in the enclosed return envelope. Due to problems with timely mail delivery, we would appreciate it if you communicate by fax to 202-786-2423 or e-mail to bowert@si.edu in addition to regular mail which should be sent to P. O. Box 37012, MRC 640, National Museum of American History, Washington, D. C. 20013. A countersigned copy of the loan agreement will be returned to you for the President's records.

If you wish to discuss the loan with me, please call me at 202-357-2271 or by e-mail to zoidis@si.edu. If you have questions concerning the loan agreement process, please contact me at the above address, or bowert@si.edu.

Thank you for your support of the Smithsonian's National Museum of American History.

Sincerely yours,

Marilyn Zoidis

Marilyn Zoidis
Lead Curator, September 11 Exhibition
Smithsonian Institution, National Museum of American History
PO Box 37012, MRC 629
Washington, DC 20013

Enclosure: NMAH Facilities Report
NMAH Agreement for Incoming Loan
Return envelope

Cc: Tom Bower
Melinda Machado

Smithsonian Institution

Lawrence M. Small
Secretary

June 21, 2002

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

The Smithsonian's National Museum of American History, Behring Center is preparing an extraordinary exhibition, *September 11, 2001: Bearing Witness to History*, to mark the first anniversary of the terrorist attacks on the United States of America. The tragic events of last September have challenged this museum to fulfill its responsibility to the American people to collect and interpret history as it happens.

September 11, 2001: Bearing Witness to History will bring together objects, images, and personal stories that help tell the story of this historic day and its impact. The title of the exhibition suggests that we are all witnesses to history; we have all been affected by the events of September 11. In immediate and evocative ways, objects will connect visitors to compelling stories of the attack sites, the rescue and recovery efforts, and the response of local, national, and global communities.

The exhibition will be installed in a prominent gallery on the Museum's second floor, adjacent to the main entrance off the National Mall and across from the First Ladies exhibition. We will open the exhibition to the public on September 11, 2002, and it will remain on view for four months, closing January 11, 2003. We believe this is an invaluable opportunity to reach out to Americans.

Your strong, determined leadership in a time of crisis united the American people, and your firm actions provided essential stability for a nation in shock. To illustrate your key role in "bearing witness," we would like to request the loan of the following objects:

- the bullhorn you used to address workers at Ground Zero, and
- the New York Port Authority shield presented to you by Arlene Howard, mother of slain officer George Howard.

We understand the strong attachment you feel for George Howard's shield and only ask for you to temporarily part with it -- so that it can be shared with the American people.

A member of my staff will be in touch with your office to answer any questions. We appreciate your willingness to consider our request.

All the best,

Smithsonian Institution Building
1000 Jefferson Drive SW
Washington DC 20560-0016
202.357.1846 Telephone
202.786.2515 Fax

NATIONAL MUSEUM OF AMERICAN HISTORY 2002.6019
~~Smithsonian Institution~~

12th Street at Constitution Avenue, N.W., Washington, D.C. 20560
Office of the Registrar 202-357-1894

AGREEMENT FOR INCOMING LOAN

Date: 24 June 2002

From: George W. Bush, President of the United States (Lender's Name) (Additional Contact)

The White House, Washington, D.C. 20500 (Address) ( ) (Telephone Number)

To: Marilyn Zoidis, Curator (Curatorial Unit) (202) 357-2271 (Telephone Number)

In accordance with the **Conditions** printed on the reverse, the objects listed below are borrowed for the following purpose only (give name of exhibition, when applicable):

September 11, 2001: Bearing Witness to History

For the period To Be Determined - September 2002 to 12 January 2003
(From estimated time objects leave Lender's custody until their return and receipt by Lender; see "Shipping" below)

Initiated by: _____
(NMAH Curatorial Signature)

Objects	Description of Objects (Include dimensions, weight, and brief report of condition; attach recent photo(s) if available)	Insurance Value(s)
	Bullhorn used by President Bush to address workers at Ground Zero The New York Port Authority shield given to President Bush by Arlene Howard, mother of slain officer George Howard	

(attach continuation sheet if necessary)

INSURANCE: (see **Conditions** on reverse)

_____ carried by National Museum of American History
_____ by Lender: estimated premium charges $_____
_____ insurance waived

PACKING and SHIPPING: The following packing and shipping arrangements are proposed subject to review and approval by the NMAH Registrar's Office in consultation with the Lender:

Objects to be packed by: _____ Lender _____ NMAH Other: _____
To be shipped from (address and contact): _____

To arrive no later than (date): _____ Via: _____
To be returned to above address (unless otherwise notified) Via: _____

COSTS: Borrower will pay all costs of packing, shipping, insurance, unless otherwise noted here:

CREDIT LINE: _____
(For exhibition label and catalog)

SPECIAL REQUIREMENTS for handling, installation, etc. (attach continuation sheet if necessary):

2900 **PLEASE READ CONDITIONS AND SIGN ON REVERSE** SI-2880 REV. 91-08-15

REV_00260516

CONDITIONS GOVERNING LOAN

Care and Preservation

1. The National Museum of American History , Smithsonian Institution (the"Museum") will give to objects borrowed the same care as it does comparable property of its own. Precautions will be taken to protect objects from fire; theft; mishandling; dirt and insects; and extremes of light, temperature and humidity while in the Museum's custody. It is understood by the Lender and Museum that all tangible objects are subject to gradual inherent deterioration for which neither party is responsible.

2. Evidence of damage at the time of receipt or while in the Museum's custody will be reported immediately to the Lender. It is understood that objects which in our opinion show evidence of infestation may be fumigated at the discretion of the Museum.

3. The Lender will be requested to provide written authorization for any alterations, restoration, or repair. The Museum may examine objects by all modern scientific methods.

4. The Museum retains the right to determine when, if, and, for how long objects borrowed will be exhibited.

Transportation and Packing

1. The Lender certifies that the objects lent are in such condition as to withstand ordinary strains of packaging and transportation and handling. A written report of condition of objects prior to shipment must be sent by the lender to the Museum. Otherwise, it will be assumed that objects are received in the same condition as when leaving the Lender's possession. Condition records which may include photographs will be made at the Museum on arrival and departure.

2. Costs of transportation and packing will be borne by the Museum unless the loan is at the Lender's request. The method of shipment must be agreed upon by both parties.

3. Government regulations will be adhered to in international shipments. As a rule, the Lender is responsible for adhering to its country's import/export requirements and the Borrower is responsible for adhering to its country's import/export requirements.

4. The Lender will assure that said objects are adequately and securely packed for the type of shipment agreed upon, including any special instructions for unpacking and repacking. Objects will be returned packed in the same or similar materials as received unless otherwise authorized by the Lender.

Insurance

1. Objects will be insured for the amount specified herein by the Smithsonian Institution under its "all risk" wall-to-wall policy subject to the following standard exclusions: wear and tear, gradual deterioration insects, vermin or inherent vice; repairing, restoration or retouching process; hostile or warlike action, insurrection, rebellion, etc.; nuclear reaction, nuclear radiation or radioactive contamination.

   Insurance will be placed in the amount specified by the Lender herein which must reflect the fair market value. If the Lender fails to indicate an amount, the Smithsonian, with the implied concurrence of the Lender, will set a value only for purposes of insurance for the period of the loan. Said value is not to be considered an appraisal.

2. If the Lender elects to maintain his own insurance coverage, then prior to shipping the Museum must be supplied with a certificate of insurance naming the the Smithsonian Institution and the United States Government as additional insureds or waiving rights of subrogation. If the Lender fails to provide said certificate, this failure shall constitute a waiver of insurance by the Lender (see No. 4 below .) The Smithsonian Shall not be responsible for any error or deficiency in information furnished by the Lender to the insurer or for lapses in coverage.

3. In the case of long-term loans, it is the responsibility of the Lender to notify the Museum of updated insurance valuations.

4. If insurance is waived by the Lender, this waiver shall constitute the agreement of the Lender to release and hold harmless the Smithsonian Institution and the United States Government from any liability for damage to or loss of the loan property.

5. The amount payable by insurance secured in accordance with this loan agreement is the sole recovery available to the Lender from Smithsonian in the event of loss or damage. Any recovery for depreciation or loss of value shall be calculated as a percentage of the insured value specified by the Lender in the Agreement.

Reproduction and Credit

1. Unless otherwise notified in writing by the Lender, the Museum may photograph or reproduce the objects lent for educational, catalog, and publicity purposes.

2. It is understood that objects or exhibit may be photographed by the general public.

3. Unless otherwise instructed in writing, the Museum will give credit to the Lender as specified on the face of this agreement in any publications. Whether individual labels are provided for objects on display is at the discretion of the Museum.

Change in Ownership and/or Address

It is the responsibility of the Lender or his agent to notify the Museum promptly, in writing, if there is any change in ownership of the objects (whether through inter vivos transfer or death) or if there is a change in the identity or address of the Lender. The Museum assumes no responsibility to search for a Lender (or owner) who cannot be reached at the address-of-record.

Return of Loans

1. Unless otherwise agreed in writing, a loan terminates on the date specified on the face of this agreement. If no date is specified, the loan shall be for a reasonable period of time, but in no event to exceed three years. Upon termination of the loan, the Lender is on notice that a return or renewal must be effected, or else an unrestricted gift of the object will be inferred.

2. Objects will be returned only to the Lender-of-Record or to a location mutually agreed upon in writing by the Museum and the Lender-of-Record. In case of uncertainty, the Museum reserves the right to require a Lender/Claimant to establish title by proof satisfactory to the Museum.

3. When the loan is returned, the Museum will send the Lender a receipt form. If this form is not signed and returned within thirty days after mailing , the Museum will not be responsible for any damage or loss.

4. If the Museum's efforts to return objects within a reasonable period following the termination of the loan are unsuccessful, then the objects will be maintain at the Lender's risk and expense for a maximum of two years. If after two years the objects have not been claimed, then and in consideration for maintenance and safeguarding, the Lender/Owner shall be deemed to have made the objects an unrestricted gift to the Museum.

Applicable Law

The agreement shall be construed in accordance with law of the District of Columbia.

I have read and agree to the above **conditions** and certify that I am authorized to agree thereto.

Signed: _____ Date: _____

☐ Owner ☐ Authorization Agent

Title: _____

Approved for the National Museum of American History:

Signed: _____ Date: _____

Title: _____

Please Sign and Return Both Copies

REV_00260517

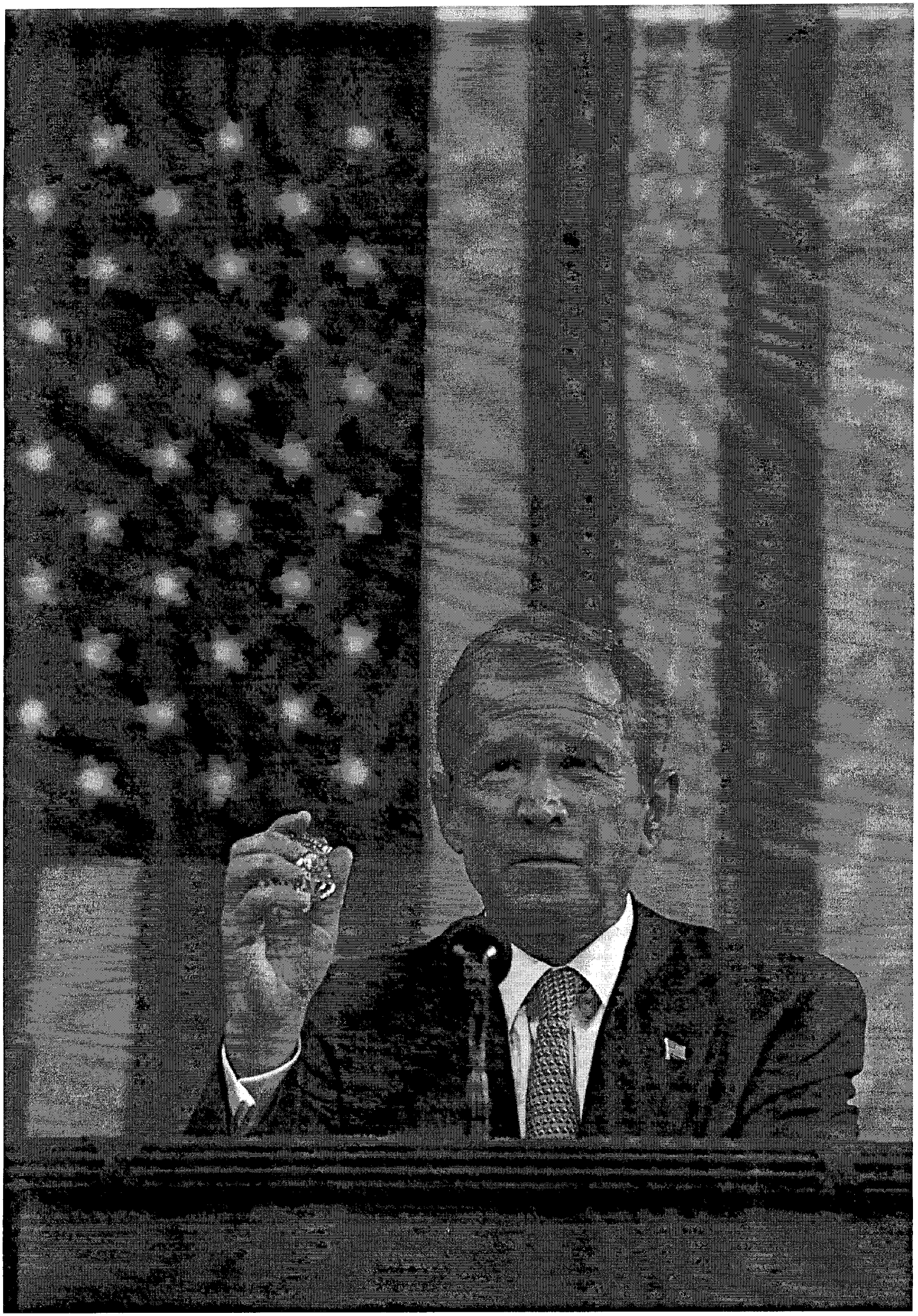


AUTHORITY
POLICE
1012

REV_00260520

Solicitor General Reports

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

OA/NARA#: 2165/2076
9695

Box 53
Folder 6

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

TELEFAX TO:

RECIPIENT'S NAME: Brett Kavanaugh

AGENCY/FIRM: _____

ADDRESS: _____

_____

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TELEFAX NUMBER: (202) 456-5104

NUMBER OF PAGES SENT (INCLUDING COVER PAGE): 5

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ROOM NUMBER: Room 5143

TELEPHONE NUMBER: (202) 514-2206

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COMMENTS:

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TRANSMITTED: DATE: 3/25/03 TIME: 10:36 a.m. INITIALS: eb

REV_00260522

Counsel's Office, White House

Kavanaugh, Brett

Solicitor General's Office Updates

Subject Files

OA/NARA#: 1652/1520
9603

Box 53
Folder 7

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

TELEFAX TO:

RECIPIENT'S NAME: Brett Kavanaugh

AGENCY/FIRM:

ADDRESS:

TELEPHONE NUMBER: (202) 456-7984

TELEFAX NUMBER: (202) 456-5104

NUMBER OF PAGES SENT (INCLUDING COVER PAGE): 5

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SENDER'S NAME: Paul Clement

ROOM NUMBER: 5712

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TELEFAX NUMBERS: (202) 541-9769

COMMENTS:

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TRANSMITTED: DATE: 4/23/02 TIME: 10:55 am INITIALS: eb

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

TELEFAX TO:

RECIPIENT'S NAME: Brett Kavanaugh

AGENCY/FIRM:

ADDRESS:

TELEPHONE NUMBER: (202) 456-7984

TELEFAX NUMBER: (202) 456-1647

NUMBER OF PAGES SENT (INCLUDING COVER PAGE): 3

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SENDER'S NAME: Paul Clement

ROOM NUMBER:

TELEPHONE NUMBER: (202) 514-2206

TELEFAX NUMBERS: (202) 514-9769

COMMENTS:

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TRANSMITTED: DATE: 2/12/02 TIME: 11:45am INITIALS: eb

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

February 11, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- **Office of Solicitor General to Argue in Public Housing Cases.** On February 19, the Department will argue as petitioner in *HUD v. Rucker*, a case that has been consolidated with *Oakland Housing Authority v. Rucker*. The question presented is whether a statutorily required provision in a public housing lease — which provides that any drug-related activity by the tenant, the tenant's family, or anyone under the tenant's control provides cause to terminate the lease — is breached by drug-related activity of which the tenant did not know or have reason to know.

- **Solicitor General to Argue as *Amicus Curiae* in School Voucher Case.** On February 20, the Department will argue as *amicus curiae* in support of the petitioners in *Zelman v. Simmons-Harris*, which the Supreme Court has ordered consolidated with *Hanna Perkins School v. Simmons-Harris* and *Taylor v. Simmons-Harris*. The question presented is whether the Establishment Clause of the First Amendment prevents a State from providing tuition aid as part of a general assistance program to the parents of children who attend failing public schools and authorizing the parents to use that aid to enroll their children in a private school of their own choosing, without regard to whether the school is religiously affiliated. The Department will argue that the program at issue survives constitutional scrutiny.

- **Office of Solicitor General to File Brief in Criminal Case.** On February 19, the Department will brief a brief as petitioner in *United States v. Ruiz*. The question presented is whether before pleading guilty, a criminal defendant has a constitutional right to obtain exculpatory information,

including impeachment material, from the government, and, if so, whether that right may be waived through a plea agreement.

- **Office of Solicitor General to File Brief in Criminal Case.** On February 19, the Department will file a brief as petitioner in *United States v. Drayton*. The question presented is whether an officer who informs a passenger on a bus that the officer is conducting drug and illegal weapons interdiction and asks the passenger for consent to search, while another officer stays at the front of the bus without blocking the exit, has effected a "seizure" of that passenger withing the meaning of the Fourth Amendment and *Florida v. Bostick*, 501 U.S. 429 (1991).

- **Office of Solicitor General to File Brief in Criminal Case.** On February 19, the Department will file a brief as petitioner in *United States v. Cotton*. The question presented is whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence requires a court of appeals to vacate the enhanced sentence notwithstanding the defendant's failure to object to the sentence, the government's having introduced overwhelming proof of the fact that supports the enhanced sentence, and the defendant's having had notice that the fact could be used to seek an enhanced sentence.

- **Office of Solicitor General to File Brief in Social Security Case.** On February 19, the Department will file a brief as respondent in *Gisbrecht v. Barnhart*. The question presented is whether a court, when determining a "reasonable" attorney's fee under 42 U.S.C. 406(b), which is paid as a deduction from the back benefit award of a claimant for social security benefits who obtained a favorable judgment in court, should calculate the fee based on the "lodestar" method (which multiplies the hours that the attorney worked by the reasonable hourly rate, with certain adjustments for other relevant factors), or instead by applying a rebuttable presumption that the attorney should receive 25% of the back benefit award, which is the maximum award permitted by the statute. The Department will argue that courts should employ the former method.

- **Office of Solicitor General to File Brief in Criminal Case.** On February 22, the Department will file a brief as respondent in *Harris v. United States*. As framed by the Court, the question presented is: Given that a finding of "brandishing," as used in 18 U.S.S. Sec. 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of "brandishing" be alleged in the indictment and proved beyond a reasonable doubt?

B. THIS WEEK

- Nothing to report.

C. LAST WEEK

- Nothing to report.

MEMORANDUM

TO: Alberto R. Gonzales

CC: Counsel's Office Attorneys

FROM: Brett M. Kavanaugh

DATE: January 16, 2002

RE: Office of Solicitor General Update

Attached is the latest update from the Solicitor General.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

TELEFAX TO:

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AGENCY/FIRM:

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OFFICE OF THE SOLICITOR GENERAL

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Washington, DC 20530

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

July 8, 2002

MEMORANDUM FOR THE ATTORNEY GENERAL

From: for Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- **Office of Solicitor General To File Petition for Certiorari in Drug Trafficking Case.** On July 12, the Department will file a petition for certiorari in *United States* v. *McGowan*. The question presented is whether the Federal Rules of Evidence categorically bar expert testimony about the structure and modus operandi of drug-trafficking organizations. The Department will argue that such evidence may be admitted where ordinary standards for relevant expert testimony are satisfied.

- **Office of Solicitor General To File Brief in Abortion Protest Cases.** On July 12, the Department will file a brief in *Scheidler* v. *NOW* and *Operation Rescue* v. *NOW*. The questions presented are: (i) whether The Racketeer Influenced and Corrupt Organizations Act (RICO) authorizes private parties to seek injunctive relief, and (ii) whether obtaining by threat control over a corporation's assets constitutes "extortion" for purposes of the Hobbs Act. The Department will argue that only the Attorney General may obtain injunctive relief under RICO, and that obtaining such control can constitute extortion of property.

B. THIS WEEK

- **Office of Solicitor General Filed Brief as Petitioner in Indian Affairs Case.** On July 8, the Department filed a brief as petitioner in *United States* v. *White Mountain Apache Tribe*. In 1960, Congress declared that a former military post in Arizona would "be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any

part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." The question presented is whether that act of Congress authorizes the award of money damages against the United States for alleged breach of trust in connection with such property; the Department argued that it does not.

- **Office of Solicitor General Filed Petition for Certiorari in Related Immigration Cases.** On July 3, the Department filed a petition for certiorari in *INS* v. *Chen*. The questions presented are: (i) whether the court of appeals wrongly reversed the Board of Immigration Appeals' assessment of a witness's credibility, and (ii) whether, following such reversal, the court of appeals improperly declined to remand other legal and factual issues for determination by the Board. The Department argued that the court of appeals erred on both points.

On July 5, the Department filed a petition for certiorari in *INS* v. *Ventura*. The question presented is whether, after reversing one of the Board of Immigration Appeals' determinations in a case, the court of appeals improperly declined to remand other legal and factual issues for determination by the Board. The Department argued that the case should be either consolidated with *Chen* or held pending disposition of the petition in *Chen*.

- **Office of Solicitor General Filed Brief as Intervenor in Transportation Case.** On July 5, the Department filed a brief as intervenor in *Pierce County* v. *Guillen*. To comply with federal law, a State that seeks federal funding for highway safety improvements must compile and collect certain data to support its request; Section 409 of Title 23 restricts individuals' ability to discover and use such compilations in litigation. The questions presented are: (i) whether the Supreme Court of Washington issued a final appealable judgment, (ii) whether a private individual has standing to challenge Section 409, (iii) whether Section 409 shields data compiled by local governments for reasons unrelated to obtaining federal highway funding, and (iv) whether Section 409 is a valid exercise of Congress's powers under Article I of the Constitution. The Department argued that finality and standing were satisfied, that Section 409 shelters only information compiled for highway safety purposes, and that Section 409 is a proper exercise of congressional power.

C. LAST WEEK

- Nothing to report.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

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UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

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Counsel's Office, White House

Kavanaugh, Brett

Subject Files

[Southern California Americans for Democratic Action Email on Barbara Boxer]

OA/NARA#: 2162/2073
9692

Box 53
Folder 8

REV_00260555

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

[Special Access Request]
[Folder 1]

OA/NARA #: 1825/1743
9633

Box 53
Folder 9

FAX

Office of the Historian
Bureau of Public Affairs
U.S. Department of State
Washington, DC 20520

Date March 5, 2003
Number of pages including cover sheet 13

To:
Brett M. Kavanaugh

Phone
Fax Phone 202-456-5104
CC:

From:
Paul Claussen
Chief, Special Projects
Division (PA/HO)

E-mail Claussenp@State.gov
Phone 202-663-1126
Fax Phone 202-663-1289

REMARKS:

☐ Urgent ☐ For your review ☐ Reply ASAP ☐ Please comment

Followup to our phone conversation of February 11, 2003 - Department of State now urgently needs Clinton White House materials on Middle East.

Paul

From → e-forms in unlimited system

- Appl. Form for summons

-

- Summary of what I've been doing on Policy reach museum

FAX

Office of the Historian
Bureau of Public Affairs
U.S. Department of State
Washington, DC 20520

Date Feb 11, 2003
Number of pages including cover sheet 4

To: Brett M. Kavanaugh

Phone
Fax Phone 202-456-5104
CC:

From:

Paul Claussen
Chief, Special Projects
Division (PA/HO)

E-mail Claussenp@State.gov
Phone 202-663-1126
Fax Phone 202-663-1289

REMARKS:

☐ Urgent ☐ For your review ☐ Reply ASAP ☐ Please comment

As we discussed on the phone just now.

Paul

Counsel's office, White House
Kavanaugh, Brett

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9795

REV_00260564

MEMORANDUM

If a witness refuses to comply with a duly authorized subpoena from a Senate committee, a committee may initiate a civil action to enforce the subpoena. The procedures for civil enforcement of Senate subpoenas are established in 2 U.S.C. § 288d and 28 U.S.C. § 1365. Under the subpoena enforcement statute, a subpoena may be enforced civilly only by the Senate's adoption of a resolution directing the Legal Counsel to bring an action in district court to enforce the subpoena.

Following a witness's refusal to comply with a subpoena after having been ordered and directed to do so, the first step toward civil enforcement of the subpoena is for the committee to report a resolution to the Senate by a majority vote at a committee meeting at which a majority of the committee's members are physically present. 2 U.S.C. § 288d(c)(1). The committee must accompany the resolution with a report that describes the procedure followed in issuing the subpoena, the extent to which the witness complied with the subpoena, any objections or privileges raised by the witness, and the reasons that the committee decided to proceed by civil enforcement,

rather than by certifying a criminal action for contempt of Congress or initiating a contempt proceeding directly before the Senate. 2 U.S.C. § 288d(c)(2).

The Whitewater committee resolution specifically authorizes the committee to report resolutions for civil enforcement of committee subpoenas to the Senate. S. Res. 120, 104th Cong., 1st Sess. § 5(b)(10) (1995). The committee must order and direct a witness to comply with a documentary subpoena before seeking to enforce it civilly. S. Res. 120, § 5(b)(1).

At any time following the resolution's being reported to the Senate, it is in order to move to proceed to the consideration of the resolution. A motion to proceed to consideration of the resolution is highly privileged and not debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion is agreed to. 2 U.S.C. § 288j(a)(1). Once the Senate proceeds to consideration of a resolution to enforce a subpoena, there are no prescribed limits on debate on the resolution. Of the five civil subpoena enforcement actions initiated by the Senate, four have been agreed to by unanimous consent, and one, involving Senator Packwood's diaries, was authorized by roll call vote after two days of debate.

There is one significant limitation on the Senate's ability to invoke the civil enforcement mechanism. The civil enforcement statute excludes from its coverage actions against "an officer or employee of the Federal Government acting within his official capacity." 28 U.S.C. § 1365(a). The legislative history of this provision explains that it "should be construed

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narrowly. Therefore, a subpena against Federal government officers or employees not acting within the scope of their official duties is not excluded from the coverage of this jurisdictional statute." Public Officials Integrity Act of 1977, S. Rep. No. 170, 95th Cong., 1st Sess. 92 (1977). The question that the Senate, and a court, would need to consider in addressing potential civil enforcement of a documentary subpoena to a former government employee is whether the then-employee prepared the documents within, or outside, his official duties. The answer to that question may be heavily dependent upon analysis of the facts in a particular case.

Once a civil enforcement resolution has been reported by the committee and adopted by the Senate, the Senate Legal Counsel files a civil action in federal district court in the District of Columbia applying in the committee's name for a declaratory judgment or an order requiring the witness to comply with the committee's subpoena. In his or her response to the committee's application, the witness has an opportunity to raise any objections or privileges implicated by the subpoena. If the court agrees with the committee's position and overrules the witness's objections, the court would issue an order requiring the witness to comply with the committee subpoena. The committee would then provide the witness with another opportunity to answer its questions or to produce the required documents.

Continued refusal to testify or produce documents in obedience to an order of the court would be punishable as a contempt of the court's order. The committee would initiate a

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summary contempt proceeding in court by applying for an order to show cause why the witness should not be held in contempt for disobeying the court's order. If the court overruled the witness's objections to a contempt order, the court would impose upon the witness sanctions to compel the witness to obey the court's order to testify. These sanctions could include incarceration, imposition of a daily fine, or both. The sole purpose of these sanctions under the civil enforcement mechanism, rather than a criminal contempt proceeding, is to compel the witness to provide the testimony or documents that the committee seeks. Therefore, the witness may purge the contempt at any time by agreeing to obey the court's order to testify. If the witness should continue to refuse to comply, the period of incarceration or other sanction would extend as long as the committee continued to seek the witness's testimony -- presumably for the duration of the committee's investigation.

A district court order adjudging the witness in contempt could be appealed to the court of appeals and review could be sought from the Supreme Court. The decision whether the district court's order imposing sanctions on the witness should be stayed pending review by the court of appeals, or should be enforced immediately, rests within the courts' discretion.

The Senate has invoked the civil enforcement mechanism five times, since the subpoena enforcement statute was enacted in 1978. On two occasions in the early 1980s, the Senate Permanent Subcommittee on Investigations enforced subpoenas to witnesses. On a third occasion, in 1987, the Senate Iran-Contra Committee applied for an order requiring a witness to

REV_00260568

comply with a directive to consent to disclosure of his foreign bank records. The committee ultimately obtained the materials, but not through the enforcement proceeding. The civil enforcement mechanism was used a fourth time in 1989 when the Senate committee hearing evidence in Judge Alcee Hastings' impeachment trial obtained an order directing a witness to testify. Finally, in 1993-94, the Senate Ethics Committee enforced its subpoena to Senator Packwood for the Senator's diaries.

REV_00260569

WASHINGTON LEGAL FOUNDATION

Legal Background

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Vol. 11 No. 8

February 16, 1996

THE CONGRESSIONAL SUBPOENA POWER

by

Douglas R. Cox

Each House of Congress has historically exercised the subpoena power as an adjunct to its investigatory functions. In most cases, the recipient of a congressional subpoena complies with its terms, or negotiates a more limited response that is acceptable to both sides; there is accordingly no public dispute over the subpoena, and no issue arises as to how such a subpoena might be enforced, if the recipient had refused to comply.

The recent controversy over the Whitewater notes of former associate counsel to the President, William Kennedy, squarely — albeit briefly — presented the question of how the Senate could secure enforcement of two committee subpoenas against a recalcitrant witness. In December 1995, the Senate's Special Committee To Investigate Whitewater Development Corporation and Related Matters issued subpoenas for notes taken by Kennedy during his service in the White House. The Administration directed Kennedy not to comply, and proffered a host of legal objections to the subpoenas. The Special Committee and the Senate thereafter voted to seek judicial enforcement of the outstanding subpoenas. An accommodation was ultimately reached and the subpoena enforcement action became moot.

The Kennedy subpoenas were unusual: the Administration's interest in the Kennedy notes, Kennedy's ethical obligations arising out of his former service as an associate counsel to the President, and repeated references by all involved to executive privilege gave the dispute the atmospherics of a constitutional struggle between the legislative and the executive branches. Nonetheless, the subpoenas were addressed not to any Administration official, but to Kennedy, a private citizen. Under the applicable statute, that fact greatly strengthened the Senate's legal position on enforcement.

Judicial enforcement of a congressional subpoena can become a more complicated question, however, when the subpoena is addressed to an executive branch official who invokes executive privilege in response. As discussed below, Congress faces surprising uncertainties in seeking direct enforcement of such a subpoena, but possesses numerous tools to vindicate its interests by indirect means.

Douglas R. Cox is counsel for the law firm Gibson, Dunn & Crutcher and former Principal Deputy Assistant Attorney General in the U.S. Department of Justice's Office of Legal Counsel at the end of the Bush Administration.

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REV_00260570

Congressional Authority To Seek Enforcement of Subpoenas

Congress has broad investigative authority. In order to exercise that authority effectively, Congress has long exercised the power to issue subpoenas in order to secure documents and testimony. The rules of both Houses of Congress authorize the issuance of subpoenas in certain circumstances. *E.g.*, House Rule XI(2)(m); Standing Senate Rule XXVI. In turn, the Supreme Court has held that Congress must have some enforcement mechanism available in order to ensure that its subpoenas are obeyed. *E.g.*, *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) ("the power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function."); *id.* at 175 ("some means of compulsion are essential to obtain what is needed.").

Congressional subpoenas, of course, may present many issues other than enforceability. A subpoena may be issued in apparent violation of the relevant rule, or seek information outside the scope of the issuing committee's jurisdiction, or provide other bases for challenging its validity. But if a valid subpoena is issued to a serving member of the Administration, and if the President instructs that official to assert executive privilege with respect to the subpoena, what steps could be taken to secure enforcement of the subpoena?

Each House has essentially **three** possible routes to seek enforcement of its subpoenas: a civil action; a referral to the United States Attorney for criminal prosecution for contempt of Congress; and arrest by a congressional officer, traditionally the Sergeant-at-Arms. None of these routes provides a certain means to compel compliance.

Civil Enforcement. Civil enforcement is obviously the least draconian of the three enforcement mechanisms listed above. There is, however, no explicit statutory authority for either House of Congress to seek enforcement of its subpoenas against executive branch officials in the face of an assertion of executive privilege.

The Senate — but not the House — has explicit statutory authority to seek civil enforcement of its subpoenas against private individuals. 2 U.S.C. §§ 288b, 288d; 28 U.S.C. § 1365. The Special Committee and the Senate invoked those statutes in seeking enforcement against William Kennedy. 141 Cong. Rec. S18920-21 (daily ed. Dec. 19, 1995). Section 1365, however, contains an important exception for executive branch officials: the statute provides that "[t]his section shall not apply to an action to enforce . . . any subpoena or order issued to an officer or employee of the Federal Government acting within his official capacity." The Senate report accompanying Section 1365 provided that "[t]his exception in the statute is not intended to be a Congressional finding that the Federal courts do not now have the authority to hear a civil action to enforce a subpoena against an officer or employee of the Federal Government. However, if the Federal courts do not now have this authority, this statute does not confer it." 1978 U.S. Code Cong. & Admin. News 4216, 4307-08.

Arguably, the statutory exception should be read to preclude any civil enforcement action, at least by the Senate, against an executive branch official, on the theory that Section 1365 is meant to be the exclusive mechanism for such an enforcement action. At a minimum, the exception in Section 1365 clouds the authority of the Senate to seek civil enforcement of subpoenas against executive branch officials under any other statute.

Both Houses of Congress may have additional statutory authority to seek judicial enforcement of subpoenas under the grant of federal question jurisdiction found in 28 U.S.C. § 1331. In *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51, 59-61 (D.D.C. 1973), for example, the district court dismissed a subpoena enforcement action brought under Section 1331 solely on the ground that the amount in controversy requirement had not been satisfied. Section 1331 thereafter was amended to eliminate the amount in controversy requirement. *See also United States v. American Tel. & Tel. Co.*, 551 F.2d 384, 389 (D.C. Cir. 1976) (asserting jurisdiction over subpoena dispute under Section 1331). Nonetheless, no clear mechanism exists for either House of

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Congress to seek civil enforcement of a subpoena against an Administration official who asserts executive privilege.

Further, the courts have shown considerable reluctance to involve themselves in this type of inter-branch dispute, with its obvious constitutional overtones. *E.g.*, *American Tel. & Tel. Co.*, 551 F.2d at 394 ("This dispute between the legislative and executive branches has at least some elements of the political-question doctrine in it. A compromise worked out between the branches is most likely to meet their essential needs and the country's constitutional balance."); *United States v. House of Representatives of the United States*, 556 F. Supp. 150, 152 (D.D.C. 1983) ("When constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted," dismissing declaratory judgment action brought by the Justice Department to vindicate an assertion of executive privilege). As a result, there are significant obstacles to effective civil enforcement of a congressional subpoena against a determined Administration.

Referral for Criminal Prosecution. The statutes governing criminal contempt of Congress are found at 2 U.S.C. §§ 192 and 194. Section 192 defines the offense of contempt of Congress as including refusal to testify or to produce documents in response to a demand by either House. The offense is a misdemeanor, punishable by a fine of "not more than $1,000 nor less than $100" and imprisonment for "not less than one month nor more than twelve months." Section 194 provides that whenever a witness fails to appear for testimony or to produce documents, the President of the Senate or the Speaker of the House must refer the matter "to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action." Thus, the effectiveness of criminal referrals as an enforcement mechanism depends entirely on Section 194's direction that the United States Attorney has a "duty" to refer the matter to a grand jury.

Section 194 does not purport to require that a contumacious witness be prosecuted: even were the United States Attorney legally compelled by Section 194 to refer the matter to the grand jury, and even were the jury to return an indictment, the prosecutor could, consistent with the language of Section 194, refuse to sign the indictment, and no prosecution would result.

Moreover, the constitutional principle of separation of powers requires that the United States Attorney, as a member of the executive branch, retain discretion as to the exercise of the prosecutorial power in an individual case, and Congress may not by legislation take that discretion away. *See*, *e.g.*, *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case").

The Justice Department has opined that Section 194 cannot be construed, as a matter both of statutory interpretation and constitutional principle, to require the U.S. Attorney to prosecute for contempt of Congress an executive branch official in this context. "Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege," 8 Op. Off. Legal Counsel 101 (1984); *see also* "Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act," 10 Op. Off. Legal Counsel 68 (1986).

Congress was unable to secure the criminal prosecution of the Administrator of the Environmental Protection Agency in 1982. The Administrator, at the President's direction, refused to release certain documents to a House Subcommittee on grounds of executive privilege. The House approved a contempt of Congress resolution, and the Speaker referred the matter to the U.S. Attorney for the District of Columbia. Significantly, the United States Attorney declined to prosecute, citing ongoing negotiations between the parties, and a separate suit brought by the Department of Justice to block enforcement of the subpoena. *See United States v. House of Representatives*, *supra.* Eventually, the negotiations resulted in an accommodation and the contempt citation was "withdrawn."

Conceivably, Congress could seek to invoke the statute governing independent counsels in an effort to secure a criminal contempt prosecution, but that statute imposes procedural hurdles of its

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own. Indeed, independent counsels are required to "comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws," unless such compliance "would be inconsistent with the purposes" of the independent counsel statute. 28 U.S.C. § 594(f)(1). Thus, an independent counsel would presumably adhere to the Justice Department's interpretation prohibiting, on both statutory and constitutional grounds, the application of 2 U.S.C. § 194 to executive branch officials in the context of an executive privilege dispute. Even if an independent counsel were to ignore that interpretation, the serious constitutional problems with such a prosecution would remain.

Section 194 thus does not appear to present a credible threat to executive branch officials, and its effectiveness as a means of securing enforcement of congressional subpoenas is limited.

Arrest By Congressional Officers. There remains the option of self-help: either House, faced with a contumacious witness, could presumably order one of its officers to effect an arrest and to bring the witness to the bar of the aggrieved House. The Supreme Court has held that Congress has the inherent power to imprison individuals for contempt. *Jurney v. MacCracken*, 294 U.S. 125 (1935). Indeed, both *Jurney* and *McGrain*, cited above, arose in those circumstances: the Sergeant-at-Arms of the Senate had arrested a contumacious witness, who filed a petition for habeas corpus. *Jurney*, 294 U.S. at 143; *McGrain*, 273 U.S. at 154. This option is sometimes described as "the inherent contempt power."

It is far from plain, however, that the courts today would countenance a congressional assertion of combined judicial authority (the contempt resolution) and executive power (imprisonment), even if those powers were exercised as "incidental" to the legislative power. Moreover, as a practical matter, instances in which a House of Congress would be prepared to order the arrest of an executive branch official for contempt are presumably rare. Finally, the same constitutional considerations that limit the application of the criminal contempt statute to executive branch officials asserting a claim of executive privilege would seem to require similar limitations on whatever inherent self-help authority Congress possesses. *See* 8 Op. Off. Legal Counsel at 140 n.42.

Other Enforcement Tools Available To Congress

Is Congress really all that powerless in subpoena disputes with the executive branch? Of course not. As an historical matter, Presidents have been reluctant to assert executive privilege in all but the most clear-cut cases, and as noted above, accommodation rather than confrontation has been the keynote of most congressional attempts to obtain executive branch documents or testimony.

Moreover, Congress retains a host of other tools to secure the information and testimony it needs. Not least of these is the force of public opinion: in the Kennedy dispute, for example, many newspapers opined editorially that the Administration should make Kennedy's notes available to the Senate, and Senators rushed to enter those editorials in the Congressional Record. Moreover, even assuming that a citation for contempt does not lead to criminal prosecution, presumably few Administrations — and few officials within an Administration — would welcome a contempt citation, with the resultant publicity and public criticism.

Congress can also delay action on bills favored by the Administration, or use the power of the purse to increase pressure on the executive branch; Administration nominations can be placed on hold in the Senate; and ultimately, of course, Congress possesses the constitutional power of impeachment.

Congress thus retains ample means by which to defend its legitimate interests and to secure the information and testimony it requires. History demonstrates that these indirect means are sufficient to enable Congress to perform its legislative function, even if constitutional or other considerations limit the effectiveness of more direct means of subpoena enforcement.



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REV_00260573

Service of Congressional Subpoena
On U.S. Citizens Abroad

Congressional Oversight Manual at CRS-33: "Service may be effected anywhere in the United States. The subpoena power reaches aliens in the United States. Securing compliance of United States nationals and aliens living in foreign countries present more complex problems."

Grabow at 83: "With respect to the issuance of a subpoena to a witness residing on foreign soil, the simple answer is that the Congress may issue and seek to serve a subpoena anywhere, whether in this or any other country; to obtain attendance, a house of Congress retains its historical power to enforce its subpoenas by issuing a warrant ordering its Sergeant-at-Arms to arrest a witness and bring him or her before the bar of the parent body. If the witness were outside of the country, however, the only realistic means of securing compliance would be judicial enforcement. If, as seems likely, a court would enforce a congressional bupooena in circumstances similar to that in which it would enforce its own subpoenas, Congress would likely be able to obtain enforcement of a subpoena issued to a United States national in a foreign country*, but not a subpoena issued to an alien abroad."

*Judicial subpoenas may be issued upon U.S. nationals in foreign countries. See 28 USC §1783.

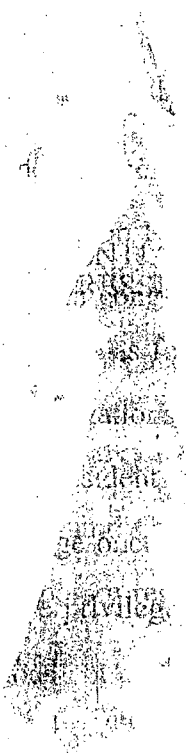

National Archives & Records Administration

facsimile TRANSMITTAL

[redacted]

to: Alberto R. Gonzales

fax #: (202) 456-6279

re: NLMS 2003-036

date: June 17, 2003

pages: [3 Pages (including cover sheet)].

From the desk of...

Nancy Smith
Director
Presidential Materials Staff
700 Pennsylvania Avenue, NW
Washington, D.C. 20408
Telephone: (202) 501-5700
Fax: (202) 501-5709
Email: nancy.smith@nara.gov

National Archives and Records Administration

700 Pennsylvania Avenue, NW
Washington, DC 20408-0001

VIA FACSIMILE
(NLMS 2003-036)

June 17, 2003

The Honorable Alberto R. Gonzales
Counsel to the President
The White House
Washington, D.C. 20502

Re: *United States v. Philip Morris, Inc., et al., No 99-CV-2496 (GK) (D.D.C.)*

Dear Judge Gonzales:

This letter is being written to provide you, on behalf of the incumbent President, with notice that, pursuant to ongoing discovery in the above-captioned action, the Justice Department has determined that additional Clinton Presidential and Gore Vice Presidential textual and email records should now be disclosed to defendants. Pursuant to the Presidential Records Act (PRA), 44 U.S.C. 2205(2), and Executive Order 13233, the National Archives and Records Administration (NARA) is providing you with this formal notice of our intent to make these records available to defendants in the litigation, absent the assertion of privilege.

The records at issue constitute 32 pages previously identified on various of the government's privilege logs, and subsequently made subject to one or more challenges by defendants. These records have since been made available to Bruce Lindsey and Lisa Brown, who represent President Clinton and Vice President Gore, respectively, in this litigation, for the purpose of reassessing the government's continuing claims of privilege. The representatives, upon further review, have informed DOJ that they have no objection to this group of records being released in whole or in part to defendants under the provisions of the governing protective order in the lawsuit (Order #123, dated February 14, 2002).

Consistent with the provisions of EO 13233 and Order #123, the incumbent President has 21 days from receipt of this letter to inform us of your decision with respect to any remaining privilege concerns or other reasons for continued nondisclosure of these documents. The Justice Department has asked that, if at all possible, your review be expedited for this group of records. We are here providing this further set of documents for White House Counsel's review.

REV_00260576

If you have any questions relating to this request, please contact me at (202) 501-5700, or Jason Baron in the Office of General Counsel, at (301) 837-1499.

Sincerely,

Nancy Kegan Smith

NANCY KEGAN SMITH
Director
Presidential Materials Staff

cc:
H. Christopher Bartolomucci, White House Counsel's Office
Paul P. Colborn, DOJ/OLC
Bruce R. Lindsey, Representative of President William J. Clinton
Lisa Brown, Representative of Vice President Albert Gore
David S. Klontz, DOJ Civil Tobacco Litigation Team
Jason R. Baron, NARA Office of General Counsel

REV_00260577

National Archives & Records Administration

facsimile TRANSMITTAL

[redacted]

to: Alberto R. Gonzales

fax #: (202) 456-6279

re: Notification of intent to release Bush Presidential records (NLMS 2003-041)

date: June 24, 2003

pages: [4 Pages (including cover sheet)].

Copies of these records will be delivered to Brett Kavanaugh's office today.

From the desk of...

Nancy Smith
Director
Presidential Materials Staff
700 Pennsylvania Avenue, NW
Washington, D.C. 20408
Telephone: (202) 501-5700
Fax: (202) 501-5709
Email: nancy.smith@nara.gov

National Archives and Records Administration

700 Pennsylvania Avenue, NW
Washington, DC 20408-0001

VIA FACSIMILE
(NLMS 2003-041)

June 24, 2003

The Honorable Alberto R. Gonzales
Counsel to the President
The White House
Washington, D.C. 20502

Dear Judge Gonzales:

In accordance with the requirements of the Presidential Records Act (PRA), 44 U.S.C. §§2201-2207 and Executive Order 13233, this letter constitutes a formal notice from the National Archives and Records Administration (NARA) to the incumbent President of our intent to open Bush Presidential records in response to the Freedom of Information Act (FOIA) request listed in Attachment A.

This material, consisting of 324 pages, was previously restricted from release under 44 U.S.C. §2204(a)(1) and/or 5 U.S.C. §552(b)(1). In accordance with sections 3.5 and 3.6 of Executive Order 12958, as amended, archivists at the George Bush Library returned copies of these documents to the originating and/or equity agencies for a classification review. These documents have subsequently been declassified in whole or in part by those agencies. Because these records do not require closure under any of the six PRA Presidential restrictive categories that President Bush imposed, including confidential communications requesting or submitting advice, or any applicable FOIA exemptions, NARA is proposing to open these 324 pages.

In order to fulfill the White House Counsel's Office request that NARA provide the incumbent President with document-level information about formerly classified material proposed for release as well as the agencies authorizing their declassification, copies of these Bush Presidential records can be found at Attachment B. Please inform us at your earliest convenience of your decision with respect to any privilege claims. We are also concurrently informing former President Bush's representative, James W. Cicconi, of our intent to release these records. Pursuant to E.O. 13233, NARA will not release the documents unless and until former President Bush and the incumbent President agree to authorize access to the records.

If you have any questions relating to this request, please contact me at (202) 501-5700 or NARA General Counsel Gary M. Stern at (301) 837-3026.

Sincerely,

Nancy Kegan Smith

NANCY KEGAN SMITH
DIRECTOR
Presidential Materials Staff

Enclosures

REV_00260579

cc: Brett Kavanaugh
Associate Counsel to the President
Paul Colborn
Office of Legal Counsel, Department of Justice
Gary M. Stern
General Counsel, National Archives and Records Administration
Doug Menarchik
Director, George Bush Library

REV_00260580

ATTACHMENT A

Case Number	Requester	Request Topic	Pages Proposed for Opening
1998-0099-F/2	Allison Astorino-Courtois	Persian Gulf Conflict	324

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REV_00260581

National Archives & Records Administration

facsimile TRANSMITTAL

[redacted]

to: Alberto R. Gonzales

fax #: (202) 456-6279

re: NLMS 2003-042

date: June 24, 2003

pages: [3 Pages (including cover sheet)].

From the desk of...

Nancy Smith
Director
Presidential Materials Staff
700 Pennsylvania Avenue, NW
Washington, D.C. 20408
Telephone: (202) 501-5700
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Email: nancy.smith@nara.gov

National Archives and Records Administration
700 Pennsylvania Avenue, NW
Washington, DC 20408-0001

VIA FACSIMILE
(NLMS 2003-042)

June 24, 2003

The Honorable Alberto R. Gonzales
Counsel to the President
The White House
Washington, D.C. 20502

Re: *United States v. Philip Morris, Inc., et al., No 99-CV-2496 (GK) (D.D.C.)*

Dear Judge Gonzales:

This letter is being written to provide you, on behalf of the incumbent President, with notice that, pursuant to ongoing discovery in the above-captioned action, the Justice Department has determined that additional Clinton Presidential and Gore Vice Presidential e-mail records should now be disclosed to defendants. Pursuant to the Presidential Records Act (PRA), 44 U.S.C. 2205(2), and Executive Order 13233, NARA is providing you with this formal notice of our intent to make available to defendants in the litigation, absent the assertion of privilege.

The records at issue constitute approximately 700 pages previously identified on various of the government's privilege logs, and subsequently made subject to one or more challenges by defendants. These records have since been made available to Bruce Lindsey and Lisa Brown, who represent President Clinton and Vice President Gore, respectively, in this litigation, for the purpose of reassessing the government's continuing claims of privilege. The representatives, upon further review, have informed DOJ that they have no objection to this group of records being released to defendants under the provisions of the governing protective order in the lawsuit (Order #123, dated February 14, 2002).

Consistent with the provisions of EO 13233 and Order #123, the incumbent President has 21 days from receipt of this letter to inform us of your decision with respect to any remaining privilege concerns or other reasons for continued nondisclosure of these documents. The Justice Department has asked that, if at all possible, your review can be expedited for this group of records. We are here providing this further set of documents for White House Counsel's review.

REV_00260583

If you have any questions relating to this request, please contact me at (202) 501-5700, or Jason Baron in the Office of General Counsel, at (301) 837-1499.

Sincerely,

Nancy Kegan Smith

NANCY KEGAN SMITH
Director
Presidential Materials Staff

cc:
H. Christopher Bartolomucci, White House Counsel's Office
Paul P. Colborn, DOJ/OLC
Bruce R. Lindsey, Representative of President William J. Clinton
Lisa Brown, Representative of Vice President Albert Gore
David S. Klontz, DOJ Civil Tobacco Litigation Team
Jason R. Baron, NARA Office of General Counsel

REV_00260584

THE WHITE HOUSE

WASHINGTON

June 3, 2003

Nancy Smith
Director, Presidential Materials Staff
National Archives and Records Administration
Washington, DC 20408

Dear Ms. Smith:

This letter approves access by historians from the Office of the Secretary of Defense to the National Security Council institutional files as requested by Alfred Goldberg, OSD Historian. These NSC files are maintained as presidential records by the National Archives and Records Administration. The OSD Historical Office has requested access for Dr. Richard Hunt, who is working on a history of OSD from 1969-73. Future requests will identify individual historians and provide their specific research subjects. The Historical Office also will verify the historians' clearances with the National Archives and Records Administration.

This letter does not pre-approve the disclosure of any records or information reviewed or obtained by the historians during their research. All rights, privileges and immunities pertaining to the reviewed records, and the information contained therein, are reserved pending subsequent review and decision. The review of all documents selected by the OSD Historical Office for potential declassification or publication will be coordinated by the NSC in accordance with applicable law, including Executive Order 13233.

Sincerely,

Brett M. Kavanaugh

Brett M. Kavanaugh
Associate Counsel to the President

Cc: William Leary
Alfred Goldberg

REV_00260586

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

State - Foreign Assets

OA/NARA#: 2165/2076
9695

Box 53
Folder 11

U.S. Department of Justice
Civil Division
Federal Programs Branch
901 E St. N.W. Rm 862
Washington, D.C. 20004

Carol Federighi
Trial Attorney

Tel: (202) 514-1903
Fax: (202) 616-8460 (alternate numbers, 616-8470/8202)

FAX TRANSMITTAL COVER SHEET

DATE: August 7, 2002

TO: JOCK SCHARFEN
456-9110

FROM: CAROL FEDERIGHI

THERE ARE A TOTAL OF ___ PAGES INCLUDING THIS COVER PAGE IN THIS TRANSMITTAL.

JAMES COOPER-HILL, P.C.
ATTORNEY AT LAW
1114 EAST MAIN STREET
ROCKPORT, TEXAS 78882
(361) 729-3566
FAX (361) 729-3946
E-MAIL: Corpusla@AOL.com

JAMES COOPER-HILL
Board Certified, Commercial Real Estate Law
Board Certified, Residential Real Estate Law
Texas Board of Legal Specialization

Also admitted in Ohio, California and Colorado

October 15, 2001

Honorable Colin L. Powell
Department of State
2201 C Street NW
Washington, D.C. 20520

Re: Daliberti et al vs. Republic of Iraq; Cause No. 96-CV-1118 in the United States District Court for the District of Columbia.

Dear Mr. Secretary:

My co-counsel, Andrew Hall and Nelson Jones, and I represent four United States citizens and their spouses who are the plaintiffs and judgment creditors in the above referenced matter. Each of the four men were detained by the government of Iraq in three episodes. Chad Hall was kidnaped at gunpoint in Kuwait in 1992, transported across the border into Iraq and tortured.

Ken Beaty was captured at a checkpoint and held hostage for seven months in 1993. Iraq sought to have the sanctions lifted in exchange for his release but after the delivery of $5 million in exempt medical supplies, Senator David Boren (D. Okla) obtained his release from Deputy Premier Tarriq Azziz and brought Mr. Beaty home.

David Daliberti and Bill Barloon were also captured at a checkpoint. Again the government of Iraq attempted to link their release to a lifting of the sanctions. Then Congressman Bill Richardson negotiated directly with Premier Saddam Hussein and brought the men home.

Suit was filed in May, 1996 on behalf of these four men and their spouses pursuant to the Anti-Terrorism & Effective Death Penalty Act of 1996. While Iraq sought dismissal and challenged the suit over a period of several years, the matter was tried earlier this year and a judgment entered against Iraq. A copy of the Judgment and Order is enclosed.

The time for any appeal has now passed and the judgment is final. All that is left is to levy on assets of the Republic of Iraq to obtain satisfaction of the judgment. Under existing law both the Department of State and the Department of the Treasury are required to assist in this effort.

EXHIBIT
C

An informal request was made of the State Department in June this year but assistance in satisfying the judgment was refused. This letter is a formal request that the Department of State provide the assistance the law requires and comply with the following statute:

> "At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under §1605(a)(7), the Secretary of the Treasury and the Secretary of State shall fully, promptly and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state." 28 U.S.C. §1610(f)(1)(A).

A similar letter is being sent this date to the Secretary of the Treasury, likewise seeking the assistance which the law requires. Two weeks from the date of this letter, a Writ of Execution will be requested from the court if an affirmative response is not forthcoming within that time period.

We all look forward to your assistance in bringing justice and closure to these brave Americans who have suffered at the hands of terrorist states.

Very truly yours,

James Cooper-Hill

JCH/ns
cc: Andrew Hall
Nelson Jones

REV_00260589

REV_00260590

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

[State and Local Governments with Antidiscrimination Ordinances]

OA/NARA#: 1824/1742
9632

Box 53
Folder 12

State and Local Governments with Antidiscrimination Ordinances that Include Sexual Orientation

Employer Name	State	Expressly relates to K	Emply. Disc. (implied)	Religious Exempt	Ordinance Number(s)	Status/Information	Contact Information
City of Alameda	CA					No such ordinance - See email from Deputy City Clerk. Discrimination based upon sexual orientation not mentioned.	Emailed to City Clerk, ordinances not online.
City of Albany	NY	Yes			Code of the City of Albany, New York, v22, Part I Administrative Legislation, Chapter 48, Equal Employment Opportunity; Affirmative Action, et al, Article III Omnibus Human Rights Law, Section 48-26 (E.3)	Discrimination in contracts based on sexual orientation prohibited.	
City of Albuquerque	NM				Section 13, Housing Authority	Does not mention sexual orientation in criteria for doing business within bounds of building affordable housing. GOV TV (Government Access Cable Channel): does not allow discrimination based upon sexual orientation.	
City of Alexandria	VA		Yes	Yes	Muni. Code 12, Chapter 4 "Human Rights Ordinance"; Sec. 12-4-5, 12-4-6	Employers may not discriminate on the basis of sexual orientation. City contractors may not discriminate--but does not mention sexual orientation. Religious exemption when religion is a bona fide occupational qualification.	
City of Alfred	NY	Yes			Article II, Section I	"No person, corporation, or other legally recognized entity within corporation limits of the Village shall discriminate against any person or persons for reasons of race, color, religion, age, sex, marital status or sexual orientation."	
City of Ames	IA		Yes		Chapter 14, Secton 14.6(1)(a)	"It shall be an unfair or discriminatory practice for any Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, national origin, religion, disability or sexual orientation of such applicant or employee, unless based upon the nature of the occupation."	
City of Amherst	MA					nf	City clerk to mail to Regan 3/14/01
City of Anchorage	AK					Ban on employment discrimination. Does not include sexual orientation.	
City of Ann Arbor	MI	Yes			Chapter 112. Non-Discrimination, Chapter 98. Building Safety and Engineering, Chapter 8. Boards and Commissions, Chapter 14. Purchasing, Contracting and Selling Procedures	Discrimination in contracts based on sexual orientation prohibited.	
City of Anoka	MN					nf	City Clerk confirmed via phone that code does not contain non-discrimination provision re employment

Yes = Contains provision
Maybe = May be interpreted to contain such provision
NA = Not Applicable
nf = Not Found
K = Contract(or)

Work Product for
Salvation Army National Corporation

Determined to be an Administrative Marking Per E.O. 13526, SEC 3.4 (B)

Blair Allan
Craig Schultz
Loeb & Loeb LLP
(213) 688-3400

State and Local Governments with Antidiscrimination Ordinances that Include Sexual Orientation

Privileged and ~~Confidential~~

Employer Name	State	Expressly relates to K	Empty Disc. (Implied)	Religious Exempt	Ordinance Number(s)	Status/Information	Contact Information
City of Morgantown	WV					nf	Emailed city clerk at cityclerk@morgantown.com - codes not online. Unable to contact by phone.
City of Mountain View	CA		Maybe		Standard Provisions - Section 1.01	General City policy to not discriminate on the basis of sexual orientation. Purchasing/Contract Negotiation stated that current boilerplate language states that "each contractor/vendor shall not discriminate due to ... sexual orientation ...."	Left message with City Attorney's office. City Attorney (650-903-6490) forwarded to Public Works. Spoke with attorney (Shelly Emerson 2/28/01 12:00 PM). Fred Irwin of Purchasing/Contract Negotiation
City of New Haven	CT				Title III,Chapter 12 1/2 Article II, Section 12 1/2-23	Discrimination not allowed in City Contracts; language does not include sexual orientation.	
City of New Orleans	LA					Not specified in code. Although Human Rights Ordinance includes "sexual orientation."	(504) 565-7916 - Director of Human Relations Commission - demanded request in writing. Emailed him at earlja@new-orleans.la.us. - email returned.
City of New York	NY					1st site applies to city employees - emailed from web site to procurement agency. Procurement agency sent email advising City Attorney would handle, who sent me to City Clerk. City Clerk said that State of New York Statutes superceded City's Code. State of New York Statutes prohibits employment discrimination generally, but does not include sexual orientation.	
City of Oakland	CA		Yes		Municipal Code Article VIII Fiscal Administration Section 807-808 and Title 9 Public Peace,Morals, and Welfare, Chapter 9.44 Discrimination based on Sexual Orientation	Chapter 9.44.020 and Chapter 9.44.040 generally prohibit employment discrimination on the basis of sexual orietation, AIDS, or ARC status. Article 8, Section 808 only requires the City to review their bidding procedures every two years to determine the race and gender disparity. If they determine identifiable discrimination, the City shall establish "a narrowly tailored race and/or gender business participation program" to remedy the discrimination.	
City of Oberlin	OH					nf	no web site
City of Olympia	WA				05.80.040 - Prohibited practices designated	Housing Discrimination and hate crimes covered.	
City of Orlando	FL		Yes		Titel II, Chapter 57, Article One, Section 57.14(1) [NOTE: Sexual Orientation not applicable]; Article II, Chapter 57, Articles Two and Three establish Minority (race) and Women's Business Enterprise to allow for equal opportunity in bidding on City contracts	"It shall be unlawful for an employer, because of race, religion, color, national origin, sex, age, handicap or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."	

Yes = Contains provision
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NA = Not Applicable
nf = Not Found
K = Contract(or)

Work Product for
Salvation Army National Corporation

Blair Allan
Craig Schultz
Loeb & Loeb LLP
(213) 688-3400

State and Local Governments with Antidiscrimination Ordinances that Include Sexual Orientation

Employer Name	State	Expressly relates to K	Emply. Disc. (implied)	Religious Exempt	Ordinance Number(s)	Status/Information	Contact Information
City of Orono	ME		Yes	Yes	Chapter 24 article IV	Discrimination based upon sexual orientation for all employers in city is prohibited. "This article does not…apply to a religious corporation, association, or organization."	Emailed city clerk at: kmorrill@spsd.org for information
City of Oxford	PA					nf	E-mail to Chamber of Commerce 3/16/01
City of Pacifica	CA					nf	Call to City Manager's Office 3/07/01 - confirmed no such code provisions or ordinances.
City of Palo Alto	CA				Title 2 Administrative Procedure, Chapter 2.30 Contracts Purchasing Procedures, Section 2.30.150(7) [Note: Does not prohibit discrimination on the basis of Sexual Orientation]	"If awarded the contract, the bidder will not discriminate in the employment of any person under the contract because of race, color, national origin or ancestry, or religion, of any such person."	
City of Pasadena	CA				Title 4 Revenue and Finance, Chapter 4.09 Affirmative Action in Contracting; Title 8 Health and Safety, Chapter 8.82 Discrimination Against Victims of AIDS	4.09.050 specifically provides for equal employment opportunities in contracting with the city through a "Disadvantaged business enterprise programs" for those "minority" or "economically" disadvantaged businesses or businesses owned and controlled primarily by women. 8.82.030 specifically prohibits any employer from discriminating against those suffering from AIDS or an AIDS related condition.	
City of Philadelphia	PA	Yes			§17-402. Contract Requirements	Discrimination in contracts based on sexual orientation prohibited. "Each city contract shall provide [that]…discrimination with regard to…sexual orientation…constitutes a substantial breach of such city contract."	
City of Phoenix	AZ	Yes		Yes	Article V Affirmative Action Supplier's Ordinance Section 18-4(a)(2) [Employment Discrimination generally] and Section 18-4(a)(5).	"[I]t is an unlawful employment practice for employers that are vendors, suppliers, or contractors doing business with the City of Phoenix which employ 35 or more persons to fail or refuse to hire or to discharge or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's sexual orientation." "The provisions concerning sexual orientation…shall not apply to a bona fide religious organization."	Equal Opportunity Dept. (602) 262-7716

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NA = Not Applicable
nf = Not Found
K = Contract(or)

Work Product for
Salvation Army National Corporation

Blair Allan
Craig Schultz
Loeb & Loeb LLP
(213) 688-3400

State and Local Governments with Antidiscrimination Ordinances that Include Sexual Orientation

Employer Name	State	Expressly relates to K	Emply. Disc. (Implied)	Religious Exempt	Ordinance Number(s)	Status/Information	Contact Information
City of Pittsburgh	PA	Yes	Yes		Tile One, Article VII, Chapter 161, Section 161.02 Competitive Bidding; Exceptions; Title Six, Article V, Chapter 659, Section 659.02 Unlawful Employment Practices	161.02(e)(5) Prohibits the city from contracting with business who has obtained goods or products made under sweatshop conditions where any worker has been "discriminated against in employment in any way on the basis of sex, race, religion, age, disability, sexual orientation, national origin, political opinion, or social or ethnic origin." 659.02(a) It is an unlawful employment practice "[f]or any employer to refuse to hire any person or otherwise to discriminate against any person with respect to hiring, tenure, compensation, promotion, discharge or any other terms, conditions, privileges directly or indirectly related to employment because of race, color, religion, ancestry, national origin, place of birth, sex, sexual orientation, age, nonjob related handicap or disability."	
City of Plattsburgh	NY					nf	
City of Portland	OR	Yes		Yes	Title 3.100.005 City Policies Relating to Equal Employment Opportunity, et al.; Title 23.01.040 Re: Exceptions; Title 23.01.050 Discrimination in Employment	"It shall be unlawful to discriminate in employment on the basis of...sexual orientation, [or] gender identity...." Exemption for "space within a church...or other facility used primarily for religious purposes." 2/25/98--City adopted ordinance mandating those who want to do more than $2500 in business per year with the City to verify they do not discriminate on the basis of sexual orientation.	
City of Portland	ME		Yes	Yes	Section 2-48, City Ordinances; Code of Ordinances Sec. 13.5-23(a); Sec. 13.5-34(b)	City shall not discriminate on the basis of sexual orientation. "It shall be unlawful employment discrimination, in violation of this article, except where based on a bona fide occupational qualification: (a) For any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of sexual orientation...." "This article does not...(b) Apply to a religious corporation, association or organization...."	
City of Providence	RI				Chapter 21 REVENUE AND FINANCE	Nondiscrimination on the basis of sexual orientation not a part of contract requirements.	
City of Pullman	WA				Pullman City code Ch. 114 - Unable to pull Washington Code, website search engine down.	City shall not discriminate in hiring on the basis of sexual orientation. Contracts handled under "Washington State Standard Specifications for Road, Bridge and Construction," which includes a nondiscrimination clause which does not include sexual orientation.	Called Public Works Director for copy of standardized contract. Mark Workman (509) 334-4555 (left message). I spoke with Mark Workman 3/8/01. He advised.
City of Raleigh	NC		Maybe		Division II Part 4 Chapter 1 Article A Section 4 1004(d)	(d) The City Manager is directed to establish such policies as will insure that there is no discrimination in any function or area of City government. City policy is to oppose discrimination on the basis of sexual orientation.	

Yes = Contains provision
Maybe = May be interpreted to contain such provision
NA = Not Applicable
nf = Not Found
K = Contract(or)

Work Product for
Salvation Army National Corporation

Blair Allan
Craig Schultz
Loeb & Loeb LLP
(213) 688-3400

State and Local Governments with Antidiscrimination Ordinances that Include Sexual Orientation

Employer Name	State	Expressly relates to K	Emply. Disc. (Implied)	Religious Exempt	Ordinance Number(s)	Status/Information	Contact Information
City of Riverside	CA	Yes			Chapter 6.26 Prohibition Against Aids Discrimination, Section 6.26.055. See Also Chapter 3.18 Equal Employment Opportunities for Public Works Contracts [providing that all contracts with the city in excess of $25,000 shall contain an affirmative action plan]	"All contracting agencies of the City of Riverside, or any department thereof, acting for or on behalf of the City, shall include in all contracts... a provision obligating the contractor, franchisee, lessee, concessionaire, or other party of the agreement not to discriminate on the ground or because of race, color, creed, national origin, ancestry, age, sex, sexual orientation, or disability including the medical condition AIDS or any condition related thereto."	
City of Rochester	NY					nf	
City of Rockville	MD				City Code, Chapter 17 - Procurement and Contract Formation	Sexual orientation not specified in contractor's hiring practices. Only housing nondiscrimination based upon sexual orientation mentioned in code.	
City of Sacramento	CA		Yes		Title 9 Public Peace, Morals and Welfare, Chapter 9.20.020; Title 5 Business Licenses and Regulations, Chapter 5.28.1490 and 5.28.2440 prohibit licensees and franchisees contracting with the city to provide cable access from discriminating on the basis of race, color, religion, national origin, sex, or marital status.	It is an unlawful practice for any employer to "fail or refuse to hire, or discharge an individual, discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate or classify employees in any way which would adversely affect his or her status as an employee" on the basis of sexual orientation.	
City of Salt Lake	UT					No sexual orientation language found.	
City of San Diego	CA	Yes	Yes	Maybe	Nondiscrimination Policy, Chapter 2 Administration, Section 22.3504; Chapter 5 Public Safety, Morals, and Welfare, Section 52.9603(a)(1) Generally prohibits employers from discriminating on the basis of sexual orientation.	"It is the policy of the city of San Diego not to accept bids or proposals from, nor to engage in business with, any business firm that has discriminated on the basis of race, gender, religion, national origin, ethnicity, sexual orientation, age, disability, or any other form of unlawful discrimination in its solicitation, selection, hiring or treatment of another business. Exemption for "bona fide occuptational qualification."	
City of San Francisco	CA	Yes			S.F. Admin. Code Ch. 12B	Discrimination in contracts based on sexual orientation prohibited. "All contracting agencies of the City...shall include in all contracts...a provision obligating the contractor not to discriminate on the basis of the fact or perception of...sexual orientation, gender identity, domestic partner status...."	
City of San Jose	CA	Yes			Title 4 Revenue, Finance and Business Taxes, Chapter 4.08 Violations of this Chapter, Section 4.08.070 [10.48.030 Generally prohibits any employer from discriminating on the basis of AIDS or any AIDS related condition only]	"It shall be a violation of this chapter for any contractor to discriminate or grant preferenctial treatment on the basis of race, sex, color, age, religion, sexual orientation, disability, ethnicity, or national origin, in the performance of any contract with the city or with the redevelopment agency of the city of San Jose."	

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City of Santa Barbara	CA	Yes		Maybe	Chapter 9.126 Non-Discriminatory Employment Provisions for All Contracts of the City, Section 9.126.020; Chapter 9.132.080 Prohibits Employment Discrimination on the basis of AIDS, ARC, or HIV.	"The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, national origin, ancestry, sexual orientation, political affiliation, or beliefs in sex, age, physical handicap, medical condition, marital status or pregnancy, except where such discrimination is based on bona fide occupational qualification."	
City of Santa Cruz	CA		Yes		Title 9 Peace, Safety and Morals, Chapter 9.83, Section 9.83.030 and Section 9.83.070	Section 9.83.030 States it is an unlawful employment practice for any employer to fail to hire, refuse to hire, or discharge any individual for any "discriminatory reason" [as defined "as a result of that person's race, color, creed, religion, national origin, ancestry, disability, marital status, sex, gender, sexual orientation, height, weight, or physical characteristics"]. Section 9.83.070 states that with respect to city services, facilities, and transactions, "[t]he city shall be bound by the provisions of this chapter to the same extent as private individuals."	
City of Santa Monica	CA		Yes	Yes	Article 4 Public Welfare, Morals, and Policy, Chapter 4.40.030	"It shall be unlawful employment practice for an employer to fail or refuse to hire, or to discharge any indivdual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment on the basis, in whole or in part, of such individual's sexual orientation." "No part of this chapter shall apply to bona fide religious organizations."	
City of Seattle	WA	Yes			SMC 14.04.040 Unfair employment practices	Discrimination in contracts based on sexual orientation prohibited. "It is an unfair employment practice within the city for any employer to discriminate." Discrimination includes sexual orientation.	
City of Shorewood Hills	WI					nf	Website does not have codes. Emailed Village Trustee Mark Sundquist PRA 6 No phone listed for Administration. Sent second email to a different Village trustee, Peter Hans, PRA 6
City of Somerville	MA					nf	Codes not listed on website. "Doing business with City page" does not include Contract sample. Emailed city clerk at jlong@ci.somerville.ma.us
City of Sorrento	ME					nf	no web site.

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City of South Portland	ME		Yes	Yes	Article VI, Division 1, Sec. 10-1101, et. seq.	Discrimination based on sexual orientation prohibited if usual place of employment is within city limits. Includes religious exemption--Nothing in this article applies to "a religious corporation, association, or organization."	Emailed city clerk at: Info@Orono.org
City of Southampton	NY	Yes			Article 15--Human Rights Law	Discrimination in contracts based on sexual orientation prohibited. Standardized language used references Article 15 (Human Rights Law) which includes sexual orientation.	Requested info from Richard J. Blowes, Town Management Services Administrator, Rblowes@town.southampton.ny.us - referred to Town Attorney's office, gave my fax and phone number. Spoke with Celia Gilvary, Assistant Town Atty in charge of contracts 631.287.3065
City of Spokane	WA					Human Rights Commission established "[t]o promote and secure mutual understanding and respect among all people regardless of race, color, sex, ancestry, gender, religion, affectional/sexual orientation, age, disability, familial/marital status, or economic condition."	
City of Springfield	MA					nf	no web site.
City of St. Louis	MO	Maybe		Yes	St. Louis Revised Code Ch. 3.44.120	Discrimination based upon sexual orientation unlawful in city funded programs. "No person shall, on the ground of...sexual orientation...be subjected to discrimination under any program or activity receiving funding...directly or indirectly from the City of St. Louis." Exemption for religious organizations using property for religious purposes.	
City of St. Paul	MN	Yes			Chapter 183, City Ordinances, Human Rights and "Model Affirmative Action Plan" for non-construction contractor(s), Page 6	Discrimination based upon sexual or affectional orientation in contracting disallowed by City's contractual requirements.	
City of Stamford	CT				Stamford CT Charter & Code, Chapter 47, Article IV, Section 47.15	Sexual orientation not mentioned in contractor's hiring practices.	
City of Syracuse	NY		Yes	Yes	"Local Law No. 2" County of Onandaga, NY	"This law is created to eliminate and prevent discrimination based upon sexual or affectional preference or sexual orientation ..." Includes all employers with more than 4 employees. "Nothing contained in this law shall be construed to bar any religious or denominational institution or organization, or any organization operating for charitable or educational purposes...from giving preference to persons of the same religious or...from making such selection...to promote the religious principles for which it is established or maintained."	Received from Syracuse, NY City Clerk's Office.

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City of Takoma Park	MD				Ord. 1989-52; 1992-33	Illegal to discriminate against city employees based on sexual orientation. "The City should treat all employees and applicants for employment fairly...sexual orientation...[is] not relevant to their treatment."	
City of Tampa	FL		Yes	Maybe	Ord. 92-147, Sec. 2, 9-10-92	Illegal to discriminate against city employees based on sexual orientation with religious exemptions. "It is an unlawful employment practice for an employer to fail or refuse to hire...any individual, or, otherwise to discriminate...with respect to that person's...sexual orientation." Exemption when sexual orientation is a bona fide occupational qualification.	
City of Telluride	CO		Yes	Maybe	Title 11, Chapter 11.04, Section 11.04.020	"It shall be unlawful for any person who is an employer or employment agency, directly or indirectly, to discriminate [defined as unequal treatment... because of that person's sexual orienation, heterosexuality, homosexuality, or bisexuality; race, color, creed, religion, ancestry, national origin, gender, pregnancy or childbirth; age, marital status, physical or mental disabilities, family responsibility, military status, or political affilation] against any person with regard to application, employment, hiring, occupational training, tenure, promotion, compensation, layoff, discharge, or any other term or condition of employment except when based upon a bona fide occupational qualification."	
City of Toledo	OH		Yes	Yes	Chapter 115, Section 115.04(b) [Contracts - does not apply to sexual orientation]; Chapter 158, Section 158.02(a) [General - AIDS]; Chapter 554 [General]	554.02(a): "No employer... shall discriminate against any person with regard to hire, discharge, tenure... solely on grounds of race, religious creed, color, national origin, ancestry, sex, handicap, age, or sexual orientation." 115.04(b) "There shall be included in all leases entered into by the City... and all contracts for services to be performed for the City, a provision that lessee or contractor shall not refuse to serve and shall not refuse to employ any person on account of race, color, or religion..."	
City of Troy	NY					nf	Written request submitted 3/08/01; response due 3-5 days
City of Tucson	AZ	Yes			Tucson Code Ch. 28 Art. XII, Sec. 28-138	Discrimination based on sexual orientation with contractors and/or vendors prohibited. Contractor must provide that, "the contractor will not discriminate against any employee or applicant...because of...sexual orientation."	
City of Tybee Island	GA					nf	
City of Urbana	IL				Code 1975, Sec. 2.70	No sexual orientation language in City's contracting requirements.	

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City of Vancouver	WA	Maybe			City Code Sec. 3.05.242 (Ord. M-3129, Sect 2 (part), 1994)	"All contracts by and between the city and contractors for any public work or improvement exceeding the sum of five thousand dollars shall comply with the city workforce diversity program established pursuant to Ordinance M-3082 (Ord. M-3129 Sec. 2 (part), 1994)."	
City of Virginia Beach	VA	Maybe			City Code Sec. 2-224.5(b) (Ord. No. 2309, 2-28-95)	"Compliance with the provisions of section 2-224.2, 'Employment discrimination by contractor prohibited," shall be considered in the RFP evaluation and contractor selection process."	
City of Washington	DC					nf	Message with General Counsel Ben Briant 3/16/01
City of Watertown	NY					No specific code/ordinance regarding employing contractor; however City passed a resolution 5/2/88 establishing Equal Employment Affirmative Action Plan ensuring equal employment opportunities for the City.	Resolutions unavailable on-line. Contact: City Manager @ (305) 785-7790
City of West Hollywood	CA	Yes			Municipal code Sections 9.28-9.44	Municipal code generally prohibits employment discrimination based on sexual orientation, religion, and AIDS. Section 9.28.050 specifically states: "Any employer, employment agency or labor or organization who is, or wishes to become, a contractor with the city for public works or for goods and services is subject to the provisions of this chapter relating to discrimination in its employment and to the nondiscrimination of this chapter."	
City of West Lafayette	IN				Municipal Code Sec. 24.09(a)	"All contractors doing business with the city in an aggregate amount greater than fifty thousand dollars per year, except those specifically exempted by regulations promulgated by the human relations commission and approved by the common council shall take affirmative action to insure that applicants and employees are treated, in respect to employment, in a manner which provides equal employment opportunity and tends to eliminate inequality based upon race, color, creed, religion, ancestry, national origin, sex, disability, age, marital status, or status with regard to public assistance."	
City of West Palm Beach	FL	Yes			Section 8 of the Procurement Code (Equal Opportunity)	Section 8: "No person shall be excluded from participation in, denied benefits of,or otherwise discriminated against in connection with procurement by the City on the grounds of race, color, national origin, gender, sexual orientation, or physical impairment."	Call into City Clerk 3/12/01 re general non-discrimination clause

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City of Worcester	MA		Maybe		Part II, Article 22, Section 1 and Section 6	Establishes the foundation of a Human Rights Commission to "assure that every individual [has] equal access to and benefit from all public services... to protect the individual enjoyement and exercise of civil rights..." and to investigate "the denial of equal access to and discrimination in employment, housing, education, recreation, and public accomodation... against a person based on race, color, religious creed, national origin, gender, age, ancestry, marital status, parental status, sexual orientation, disability, or source of income."	Call into purchasing director 3/01/01.
City of Yellow Springs	OH		Yes		Village Ordinance No. 632.02(a)	Nothing specific to contractors. Ordinance states: "It shall be an unlawful practice for any employer, because of the race, color, religion, sex, sexual preference, national origin, handicap or ancestry of any person, to refuse to hire or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment."	
City of York	PA		Yes		City Ordinance Article 185.05(a)	"It shall be an unlawful discriminatory practice... for any employer because of the race, color, religious creed, ancestry, age, sex, national origin, sexual orientation, or non job related disability or the use of a guide or support animal because of the disability of any individual or contractor, to refuse to hire or employ or contract with, or to bar or to discharge from employment such individual or independent contractor, or to otherwise discriminate against such individual or independent contractor with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract, if the individual or independent contractor is the best able and most competent to perform the services required."	
City of Youngstown	OH					nf	City Hall (330) 742-8700
City of Ypsilanti	MI					nf	Ordinance Dept. (734) 485-4393
County of Alameda	CA		Maybe		Title 6, Chapter 6.24, Section 6.24.030	Nothing regarding employment specifically to contractors. Section 6.24.030 Prohibits employment discrimination on the basis of AIDS, and Section 3.08.040 prohibits employment discrimination for those in the civil service. Section 2.32.020 does, however, state that it is "the public policy of the county... to create an environment in which all men, women, and children... may realize the highest potential unhampered by any discrimination based on race, ethnicity, religion, national origin, immigrant status, gender, age, actual or perceived sexual orientation, and mental or physical disabilities protected by the Americans With Disabilities Act."	
County of Albany	NY					nf	E-mail to County Clerk 3/16/01

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County of Arlington	VA		Yes		Code of County of Arlington, Virginia Ch. 31 Sec. 31-3	It shall be unlawful for any employer to discriminate on the basis of sexual orientation. It shall be an unlawful housing practice...to discriminate on the basis of sexual orientation.	
County of Benton	OR					None found as of 3/16/01	Call into HR Department 3/07/01 and 3/08/01. Will research with County Counsel and get back to Regan in a few days.
County of Boulder	CO					nf	Message with office of County Counsel (Shelly Bailey) 3/16/01
County of Broward	FL		Yes	Yes	Pt. II Code of Ordinances, Ch. 16 1/2, Art. II.	It is a discriminatory practice for an employer to discriminate on the basis of sexual orientation. Religious corporations or associations are exempt when carrying on religious activities. Employers are exempt when qualification is bona fide occupational qualification.	
County of Cerro Gordo	IA					nf	
County of Clallam	WA		Maybe		Home Rule Charter, Article 10, Section 10.30	"In the exercise of its powers or in the performance of its duties, the county shall ensure that no person is discriminated against because of race, creed, political ideology, color, national origin, sex, marital status, sexual orientation, age, the presence of sensory, mental, or physical handicap, or any other basis not reasonably related to the accomplishment of a legitimate governmental purpose, and shall take whatever affirmative action necessary to accomplish this purpose as defined in the state and federal constitutions and applicable court interpretations."	
County of Clark	WA					Code only provides for antidiscrimination in employment for the County Department of Public Works (2.32.070)	
County of Cook	IL	Yes	Yes		Cook County Human Rights Ordinance, III(B)(1) [General Employment Discrimination] and VII(B)	"The purchasing agent for the County, and all other department heads, as authorized, shall include a provision in all county contracts that sets forth the County's policies with respect to unlawful discrimination [discrimination against a person because of the actual or perceived status, practice, or perceived expression of that person's race, color, sex, age, religion, disability,national origin, ancestry, sexual orientation, marital status, parental status, military discharge status, source of income, or housing status] and sexual harassment, as embodied in this Ordinance..."	

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City of Ashland	OR		Maybe		Resolution No. 1993-17 (May 1993); Ashland Municipal Code Sec. 3.8.40	City Ordinances prevent housing discrimination. Applies to City Employees. Contractors are covered by the "Oregon Model Public Contract Rules Manual," as published by the Oregon Attorney General. City Policy is to prohibit discrimination on the basis of sexual orientation.	Emailed City Administrator (dick@ashland.or.us) Dick Wanderscheid for copy of Affirmative Action Statement.
City of Aspen	CO	Maybe	Yes		Title 15, Chapter 15.04, Section 15.04.570(b) and (f)	(b) "It shall be unlawful for any person, directly or indirectly, to discriminate against any employee with regard to application for employment, hiring, occupational training, tenure, promotion, compensation, layoff, discharge, or any other term or condition of employment except when based upon a bona fide occupational qualification." (f) "Whenever it appears that the holder of a permit, license, franchise, benefit, or advantage, issued by the City of Aspen is in violation of this section... the City of Aspen may take such action regarding the temporary or permanent suspension of the violator's City of Aspen business license, permit, franchise, benefit or advantage as it considers appropriate based on the facts disclosed to it."	
City of Athens	OH				Ord. No. 0-157-97	Added Sexual Orientation as a protected category in the Community Relations Ordinance.	
City of Atlanta	GA	Yes	Yes		Muni. Code Pt. II, Ch. 2, Art. X, Div. II, Sec. 2-414; Pt. II, Ch. 94, Art. IV, Sec. 94-97, Sec. 94 112	Discrimination in contracts based on sexual orientation prohibited. Religious Exemption for sale or lease of property. Overall employment discrimination ban on basis of sexual orientation.	
City of Austin	TX				§ 7-4-2 DISCRIMINATORY EMPLOYMENT PRACTICES PROHIBITED	Sexual orientation not included in definition of discriminatory employment practices by vendors or contractors.	
City of Baltimore	MD		Yes		Article 4, Subtitle 3, Section 3-1	"... it shall be an unlawful employment practice for any employer to discriminate [on the basis of race, color, religion, national origin, ancestry, sex, age, physical or mental capability, marital status, or sexual orientation] against an individual with respect to hire, tenure, promotion, terms, conditions, or privileges of employment..."	Contact office of Legislative Reference @ 410-396-4731
City of Bar Harbor	ME		Yes		Chapter 8, Section 8.07 Discrimination Based on Sexual Orientation, 8.07.03.01.01	It is unlawful "[f]or any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of sexual orientation or because of such reason to discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions, or privileges, or any matter directly or directly related to employment..."	
City of Berkeley	CA	Yes			Section 13.26.070 Nondiscrimination provisions of a contract.	Discrimination in contracts based on sexual orientation prohibited.	

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County of Cuyahoga	OH	Yes	Yes		Code Section 1.02 (Affirmative Action Policy)	"It is the policy of the county to ensure equal employment opportunity. Discrimination against any person in recruitment, training, examination, appointment, promotion, retention, discipline or any other aspect of personnel administration because of race, religion, national origin, sex, ancestry, age, disability, sexual orientation, or veteran status is prohibited... In the area of contracting for goods, services, and construction, the county requires all bidders for public contracts executed by the Board of County Commissioners comply with its affirmative action policy."	
County of Dane	WI	Yes			Ch. 19.58	Contractors with county may not discriminate based upon sexual orientation.	
County of Essex	NJ					nf	Message with County Administrator 3/14/01
County of Fulton	GA		Yes		Code of Ord. Ch. 38, Article 1; Sec. 38-1; Ch. 154, Article 1, Sec. 154-3	Fulton County has equal opportunity for every citizen and employee regardless of sexual orientation. Opposes discrimination and harassment in work place based on sexual orientation.	
County of Hennepin	MN					nf	
County of Honolulu	HI		Yes		Revised Ord. Of Honolulu Sec. 1-11.1; 1-11.2. See also, Ord. 88-16	Honolulu County may not discriminate against its employees based on sexual orientation.	
County of Howard	MD				Title 12, Subtitle 2, Section 12.208(II)(a); religious exception applies to Educational Institutions only [Sec. 12.208(III)(b)]	"It shall be unlawful if, because of discrimination; an employer: (1) Discharges a person; (2) Refuses to hire a person; (3) Acts against a person with respect to compensation or other terms and conditions of employment; or (4) Limits, segregates, classifies or assigns employees." "Discrimination" does not include discrimination on the basis of sexual orientation.	
County of Ingham	MI				Equal Opportunity/Affirmative Action Policy 1 re: Purchasing and Contracting Policy), rev. 8/12/82	"All persons or firms selling or contracting in any manner with the various departments and agencies of Ingham County government shall be required to file an "Affidavit of Equal Opportunity/Affirmative Action" at least once a calendar year, with the office of the Ingham County Comptroller." No sexual orientation language in Affidavit.	
County of Jefferson	KY		Yes		County Code Section 92.06(A)(1)	It is an unlawful practice "to fail to hire or to discharge any individual, otherwise discriminate against any individual with respect to his or her compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, national origin, age forty (40) and over, disability, sex, gender identity, or sexual orientation."	

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County of King	WA	Yes			City Code Section 12.17.020 (A) (Ord. 13981 Sec. 3, 2000)	It is an unfair contracting practice for a: King County government agency, business enterprise doing business in unincorporated King County or business enterprise required to comply with this chapter by the terms of an agreement with King County under K.C.C. 12.17.100 to discriminate against a person with respect to the bid, award or referral of a contract or with respect to the conditions, terms, price, performance standards or other provisions of a contract;" (Note: "Discriminate" is defined to refer to those actions which "adversely affect or differentiate between or among individuals or groups of individuals, by reasons of race, color, age, gender; marital status, sexual orientation, religion, ancestry, national origin, [or] disability...."	
County of Los Angeles	CA				County Ord. Section 2.07.020	County shall not discriminate in employment on the basis of sexual orientation.	
County of Marin	CA		Maybe		Ord. Sec. 2.42.020	"County policy to prohibit discrimination based on...sexual orientation."	
County of Miami-Dade	FL				Ordinance Nos. 82-37 and 98-30; Resolution No. R-1049-93	Together the three require city manager to consider affirmative action plans with respect to minorities and women when considering contract bids and to require documentation establishing that contractors have non-discriminatory employment and procurement policies.	
County of Minnehaha	SD		Yes		County Equal Opportunity Statement	"In compliance with Title VII of the Civil Rights Act of 1964 as amended and under authority of SDCL 7-8-20, it is the policy of the Minnehaha County government to provide equal employment opportunities to all persons irrespective of race, color, creed, age, sex, disability, sexual orientation, national origin, veteran's status or any other non-merit factors." No specific ordinance re: discrimination on the basis of sexual orientation.	
County of Montgomery	MD	Yes			City Code Sec. 11B-33 (a)	"Each contractor and subcontractor must comply with the requirements of Chapter 27, and all federal civil rights requirements prohibiting discrimination in employment."	
County of Multnomah	OR	Yes			Ordinance No. 90, Division 60.030 (2) (revising County Code No. MCC 2.20.250(B)	"Every county contract shall contain a provision prohibiting discrimination by the contractor based on race, religion, color, sex, marital status, familial status, national origin, age, mental or physical disability, sexual orientation, source of income, or political affiliation in programs, activities, services, benefits and employment."	
County of Nassau	NY					nf	
County of Northhampton	PA					nf	

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County of Onandaga	NY		Yes	Yes	"Local Law No. 2" County of Onandaga, NY	"This law is created to eliminate and prevent discrimination based upon sexual or affectional preference or sexual orientation ..." Includes all employers with more than 4 employees. "Nothing contained in this law shall be construed to bar any religious or denominational institution or organization, or any organization operating for charitable or educational purposes...from giving preference to persons of the same religious or...from making such selection...to promote the religious principles for which it is established or maintained."	Received from Syracuse, NY City Clerk's Office.
County of Palm Beach	FL				Palm Beach County Code. Ch. 15 Human Rights, Article 3 - Housing	Sexual orientation discrimination illegal in housing.	
County of Prince Georges	MD					nf	
County of Salt Lake	UT					nf	Submitted written request 3/8/01. Regan to receive response in 3-5 days.
County of San Mateo	CA		Yes		Ord. 2125, 2498; Ord 3511, 3580	San Mateo created a Human Relations Commission to prevent discrimination, including sexual orientation. The County ordinance for contractors does not refer to sexual orientation.	
County of Santa Barbara	CA				Ord. 3653 Sec.2; Ord. 2993	Santa Barbara prohibits discrimination based on sexual orientation for any employees of civil service. The County ordinance for contractors does not refer to sexual orientation.	
County of Santa Cruz	CA					nf	Check sent to Clerk of the Board to process copies of Affirmative Action policy 3/14/01
County of Sonoma	CA					nf	Left message with County Counsel's office 3/15/01
County of Suffolk	NY				Form CM11--Standard contract with the city of Boston/County of Suffolk	Standard contract does not include "sexual orientation" language. Sexual Orientation discrimination illegal in housing.	
County of Tompkins	NY					nf	Left message with County Counsel's office (Mitchell Morris) 3/15/01
County of Ventura	CA				No code ordinance; language printed on all standard contracts with the County (does not apply to sexual orientation)	All contracts with County must set forth following language: "The following Affirmative Action compliance policy for contractors and vendors is hereby established as the policy and practice of our company: Our company will recruit, employ, and treat applicants and employees without regard to race, age, color, sex, religion, ancestry, national origin, marital status or handicap..."	Submitted written request 3/8/01. Regan to receive response in 3-5 days.

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State and Local Governments with Antidiscrimination Ordinances that Include Sexual Orientation

Employer Name	State	Expressly relates to K	Emply. Disc. (Implied)	Religious Exempt	Ordinance Number(s)	Status/Information	Contact Information
County of Wayne	MI	Yes			Ord. 537, Sec. 125-4 (effective Sept. 1999)	Prohibits discrimination of contractors based on sexual orientation	
County of Westchester	NY					Per Law Dept., cannot give out information re County Code; suggest contact Pace Law School re research request	E-mail to Pace Law School, Social Justice Center, 3/16/01
State of California	CA		Yes		Cal Gov Code Sec. 12935; Labor Code Sec. 1102.1; Cal Gov Code Sec. 12940	Dept. of Fair Employment and Housing adopts rules and regulations and conducts hearings to oversee housing and employment discrimination based on sexual orientation. (24 Cal.3d.458; 235 Cal.App.3d 654) prohibits discrimination based on sexual orientation. Unlawful for employer to discriminate based on sexual orientation. "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification...for an employee, because of...sexual orientation...to refuse to hire or employ the person." "Employer' does not include a religious association or corporation not organized for private profit."	
State of Colorado	CO					NA	
State of Connecticut	CT	Yes		Yes	Conn. Gen. Stat. Sec. 4a-60a; Conn. Gen. Stat. Sec. 46a-81p	Contracts of the state and political subdivisions shall not discriminate any person or group based on sexual orientation. Religious organizations are exempt from sexual orientation discrimination. "Every contract to which the state or any political subdivision of the state...is a party shall [provide]...the contractor agrees that...the contractor will not discriminate...on the grounds of sexual orientation." "This provision...shall not apply to a religious corporation...with respect to the employment of individuals to perform work connected with the carrying on...of its activities."	
State of Delaware	DE					NA	
State of Hawaii	HI		Yes	Yes	HRS Sec 42F-103, HRS Sec 368-1, HRS Sec 368-2, HRS Sec 368-3	Prohibits discrimination of individual grants and subsidies based on sexual orientation. Prohibits discrimination of individuals based on sexual orientation in employment, housing, public accomodations and state financial assistance. Prohibits employers, employment agencies or labor organizations to discrimination based on sexual orientation. Religious organizations are exempt from discriminating against individuals based on their sexual orientation. Nothing in this part will "prohibit or prevent any religious organization...from...making a selection calculated to promote the religious principles for which the organization is established or maintained."	

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State of Illinois	IL			Yes	775 ILCS 5/1-103, 775 ILCS 5/2-101, 775 ILCS 5/2-102	Unlawful discrimination means to discriminate against a person because of their race, color, religion, national origin, ancestry, age, set, etc. NOT sexual orientation. Employer does not include religious organizations. Prohibits employers from discrimination on the basis of citizenship status or unlawful discrimination.	
State of Maryland	MD					Illegal to discriminate based on sexual orientation when dealing with the housing authority.	
State of Massachusetts	MA				Mass. Gen. Laws Ch. 151B, Sec. 2	Unlawful discrimination based on race, color religious creed, national origin, ancestry or sex. Does NOT include sexual orientation.	
State of Minnesota	MN		Yes	Yes	Minn. Stat. Sec. 363.01, Minn. Stat. Sec. 363.02, Minn. Stat. Sec. 363.03	Per statute, a local commission created for the purpose of dealing with discrimination based on sexual orientation. Religious or fraternal corporations, associations, or societies are exempt from employing individuals based on sexual orientation. States it is an unfair employment practice for an employer or a labor organization to discriminate based on sexual orientation. "Except when based on a bona fide occupational qualification, it is an unfair employment practice...for an employer, because of...sexual orientation...to discriminate against a person."	
State of Montana	MT					NA	
State of Nevada	NV	Yes			Nev. Rev. Stat. Ann. Sec. 338.125	Contracts with the state and political subdivisions "must contain...[an agreement] not to discriminate...because of...sexual orientation."	
State of New Hampshire	NH				RSA 21-I:52	State employees shall have no "employment action taken on account of such person's sexual orientation."	
State of New Jersey	NJ	Yes			N.J. Stat. Sec. 10:5-32, N.J. Stat. Sec. 10:5-33	Public works contract shall be awarded to any contractor, subcontractor or business firm who guarantees equal opportunity with regards to sexual orientation. The contractor must agree, "During performance of this contract, [the contractor] will not discriminate against any employee or applicant for employment because of...sexual orientation...."	
State of New Mexico	NM				N.M.Stat.Ann. Sec. 11-13-1 (Indian Gaming Compact)	Section 4(5) Mandates that "the Tribe shall adopt laws prohibiting theTribe, the Gaming Enterprise and a Management Contractor from discriminating in the employment of persons to work for the gaming Enterprise or in the Gaming Facility on the grounds of race, color, national origin, gender, sexual orientation, age or handicap."	
State of New York	NY				NY CLS Exec Sec. 296 (2000)	Prohibits employment discrimination generally, does NOT include sexual orientation.	
State of Pennsylvania	PA					NA	

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State of Rhode Island	RI				R.I. Gen. Laws Section 28-5-7 and 28-5.1-7	Generals laws state that it is unlawful to refuse to hire any applicant, or to refuse to render service to any state citizen, based on race, color, religion, sex, sexual orientation, age, national origin, or disability.	
State of Vermont	VT		Yes	Yes	3 V.S.A. Sec. 961; 3 V.S.A. Sec. 963; 21 V.S.A. § 495; 21 V.S.A. § 1726	Employers shall not discriminate based on sexual orientation. An employee organization entering into an agreement shall not discriminate based on sexual orientation. State of Vermont states it is unlawful employment practice for any employer, employment agency or labor organization to discriminate based on sexual orientation. Employers shall not discriminate based on sexual orientation. "It shall be an unfair labor practice for an employer...to discriminate against an employee on account of...sexual orientation." "The provisions of this section prohibiting discrimination on the basis of sexual orientation shall not be construed to prevent any religious...organization [from] taking any action with respect to matters of employment which is calculated...to promote...religious principles...."	
State of Washington	WA					NA	
State of Wisconsin	WI	Yes			Wis. Stat. Sec. 234.29	Contractors and subcontractors engaged in the construction of economic development or housing projects shall not discriminate against any person or group based on sexual orientation.	
Ann Arbor School District	MI				Ann Arbor Public School District Board of Education Policies1000-1600, 9000-9730	N/A	
Central County Emergency 911	MO					nf	Confirmed via phone that no written policy prohibiting
City School Board of Rochester	NY					nf	
County of Broward School District	FL	Yes	Yes		School Board Policy No. 4001.1	"The School Board of Broward County, Florida shall not discriminate against students, parents or guardians of students, employees, applicants, contractors, or individuals participating in school board sponsored activities... This policy is established to provide an environment free from discrimination and harassment based upon age, race, color, disability, gender, marital status, national origin, religion, or sexual orientation."	
County of Dade School District	FL		Yes		School Board Rules, Chapter 4, Section 4A-1.01; Chapter 3, Section 3G-1.04 provides for a Business Development and Assistance Program for minority and women's businesses to participate in procurement contracting with the school board	"It is the policy of the School Board that no person will be denied acess, employment, training, or promotion on the basis of gender, race, color, religion, ethnic or national origin, political beliefs, marital status, age, sexual orientation, social and family background, linguistic preference, pregnancy, or disability, and that merit principles will be followed."	
Lake Washington School District	WA					nf	

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County of Leon School District	FL				School Board Policy No. 2.29	"The policies, procedures, and practices of the school district shall be administered in a manner that does not discriminate against applicants or employees because of race, color, religion, national origin, age, gender, disability, marital status, or status as a veteran."	
Town of Middlebury	VT					nf	
Minneapolis Public Library	MN					nf	
Village of Oak Park	IL	Yes			Oak Park Illinois Village Code, Ch. 13 Human Rights, Article 3 - Fair Employment Practices Section 13-3-4 Contracts with Village of Oak Park	Any contracts with the Village of Oak Park shall incorporate provisions of Section 13-3-1: unlawful to refuse to employ based on sexual orientation.	
Pinellas County School District	FL					nf	
Seattle Public Library	WA					nf	
Town of West Hartford	CT					The City of West Hartford had the complete code for the city was available online. There was no mention in the code about sexual orientation or discrimination.	

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City of Bloomington	IN		Yes		Code of City of Bloomington Ch. 2.21.030 et seq.	Basic sexual orientation clause applies to employees of city and other employers, not defined in contractors affirmative action statement. Sexual orientation not included in definition of discriminatory employment practices by vendors or contractors.	
City of Boston	MA		Yes		Form CM11--Standard contract with the city of Boston/County of Suffolk	Standard contract does not include "sexual orientation" language. Sexual Orientation discrimination illegal in housing.	
City of Boulder	CO	Yes			Title 12, Human Rights, Ch 1, 12-1-1	Discrimination in contracts based on sexual orientation prohibited.	
City of Brighton	NY					nf	
City of Brisbane	CA					nf	
City of Brookline	MA	Yes			SECTION 4.5.1 UNLAWFUL PRACTICE	May not discriminate on basis of sexual orientation in contracts with city.	
City of Buffalo	NY					Buffalo has a commission which investigates discrimination, but does not have actual ordinance.	
City of Burlington	VT					nf	Message to City Clerk 3/16/01
City of Cambridge	MA		Yes	Yes	Section 2.76.110 (posting of policy) Section 2.76.120 (Acts prohibited)	Discrimination in employment based on sexual orientation prohibited. Religious exemption when discrimination is related to bona fide religious purpose.	
City of Carrboro	NC				Article II, Section 4-6(a)	"No discrimination shall be excercised, threatended or promised against, or in favor of, any employee because of his/her race, religion, color, creed, national origin, political beliefs, sex, disability, or sexual orientation." Applies only to employees of city.	Contact City Clerk (Sarah Williamson) @ 919-918-7309
City of Carson City	NV					nf	Phone request to DA's office 3/14/01; will research and respond
City of Castine	ME		Yes		Castine Anti-Discrimination Ordinance	"We... affirm the right of every person to fair and equal treatment regardless of any differences in race, color, national origin, language, gender, or sexual orientation. It is therefore declared to be the policy of the Town of Castine to prevent discrimination in employment, town services, housing, access to public accomodations, and education because of sexual orientation."	Contact Town Clerk @ (207) 326-4502
City of Cathedral City	CA		Maybe		Title 11 PEACE, MORALS AND SAFETY Chapter 11.88 PROHIBITION AGAINST ARBITRARY DISCRIMINATION	Public policy of city to prevent discrimination of the basis of sexual orientation. Sexual orientation language not specific to contracts.	
City of Cedar Rapids	IA					nf	HR Director to send via mail 3/16/01

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City of Champaign	IL	Yes			MUNICIPAL CODE Chapter 12.5 FINANCES AND PURCHASES ARTICLE III. EQUAL OPPORTUNITY IN PU RCHASING ORDINANCE Sec. 12-5.63. Policy.	All contracts must include a provision pledging nondiscrimination based on sexual orientation.	
City of Chapel Hill	NC					No sexual orientation language found	
City of Charlottesville	VA	Yes		Yes	Chapter 22 PUBLIC PROCUREMENT* ARTICLE I. IN GENERAL Sec. 22-11. Provisions required in certain contracts.	Contract must pledge non-disrimination based on sexual orientation. Exemption where there is a bona fide occupational qualification.	
City of Charlottesville School District	VA					nf	Board clerk confirmed no administrative policies re employment discrimination 3/14/01
City of Chicago	IL		Maybe		CHAPTER 2-160 HUMAN RIGHTS	General policy of nondiscrimination on the basis of sexual orientation.	
City of Cleveland	OH		Yes	Yes	Title V, Chapter 667, Section 667.05(a)	"No person shall refuse to employ or to bar or to discharge from employment any person because of race, religion, color, sex, sexual orientation, national origin, age, disability, ethnic group or Vietnam-era or disabled veteran status of such person."	Contact Public Administration Library (Karen Martines) @ 912-623-2919
City of Cleveland Heights	OH	Yes			Administrative Code 171.08(a)(b) and 171.09(a)	"Each contract entered into between the City and a construction manager, who may be a general contractor, shall require that in hiring employees and the selection of contractors with respect to the contract, and in the performance of the contract, the construction manager and any person acting on his behalf shall not, by reason of race, creed, sex, sexual orientation, handicap or color, discriminate against any person in the employment of labor or workers who are qualified and available to perform work to which the contract relates."	Contact City Attorney @216-291 5775
City of Colorado Springs	CO					No ordinance found with sexual orientation language.	
City of Columbia	MO		Yes		CHAPTER 12 HUMAN RELATIONS	Language does not include contracts.	
City of Columbus	OH		Yes		Title 23 GENERAL OFFENSES CODE Chapter 2331 DISCRIMINATORY PRACTICES; CIVIL RIGHTS; DISCLOSURE	Ordinance 2550-93 repealed most affirmative action codes related to contracts; only language is now in 2331 that prohibits discrimination in employment, housing and accommodations.	
City of Corvallis	OR		Yes		Chapter 1.23, Section 1.23.050	"It shall be unlawful to discriminate in employment on the basis of an individual's race, religion, color, sex, national origin, marital status, age, or disability... sexual orientation, source of income or familial status..."	Contact City Manager's office @ 541-766-6963 or emely.day@ci.corvallis.or.us

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City of Crested Butte	CO	Yes	Maybe	Yes	Article 2-6, Section 2-6-3 Discriminatory Employments Practices Prohibited; Section 2-6-6 Penalties and Civil Liability	"It shall be unlawful for any person who is an employer or employment agency, directly or indirectly, to discriminate [defined as unequal treatment on the basis of "race, color, creed, religion, ancestry, national origin, sex, age, marital status, physical or mental disability, sexual orientation, family responsibility, or political affiliation"] against any person with regard to application for employment, hiring...or any other term or condition of employment..." Section2-6-6(c) Mandates that any holder of a permit, license, franchise, benefit, or advantage issued by the Town of Crested Butte found in violation of the anti-discrimination policies risks "temperary or permanent suspension" of those benefits.	Information not available on-line; Contace Town Clerk (Linda) @ 970-349-5338
City of Cupertino	CA					No language found.	
City of Dallas	TX				Ord. 15-B	Anti-discrimination policy in contracts does not include sexual orientation.	
City of Daly City	CA					nf	City clerk confirmed via phone that code does not contain non-discrimination provision re employment (City "piggy-backs" State and Federal ordinances.
City of Davenport	IA				CHAPTER 2.58 CIVIL RIGHTS COMMISSION	Language does not include contracts.	
City of Davis	CA		Maybe		SECTION 10.01.020 POLICY	General city policy prohibits discrimination on the basis of sexual orientation.	
City of Dayton	OH					nf	Letter request to Office of Public Affairs 3/13/01
City of De Kalb	IL		Yes		CHAPTER 49 HUMAN RELATIONS COMMISSION	Language does not include contracts.	
City of Decatur	GA				CHAPTER 1 GENERAL PROVISIONS Sec. 1 7. Ordinances not affected by Code.	Contracts entered into by the city are "not affected by Code."	
City of Denver	CO				CHAPTER 28 HUMAN RIGHTS ARTICLE V. NONDISCRIMINATION IN CITY CONTRACTS FOR GOODS AND SERVICE S	Language does not includes sexual orientation.	
City of Detroit	MI					Phone request to City Clerk's office 3/12/01; will research and respond.	
City of Durham	NC				Article II, Chapter 8.6, Section 8.6-5(a) Employers; Chapter 26, Section 26-5(a) Encouragement of M/WBE Contracting [mandates that the city and contractors working for the city take affirmative steps to contract with minority (defined as "Black Americans") and women's businesses]	"It is a discriminatory Practice for any employer to fail or refuse to hire, or to discharge any individual or otherwise to discriminate against any individual with respect to that individual's compensation, terms, conditions, or privileges of employment, because of race, color, religion, sex, national origin, disability, or age."	Equal Opportunity/Equal Assurance Department - 919.560.4180

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City of East Hampton	NY					No Code provisions re discrimination; affirmative action; equal opportunity; or diversity	
City of East Lansing	MI	Yes	Yes		City Code Ch. 4, Sect.1.127(b) and (g); sub-section (b) prohibits employment discrimination generally; sub-section (g) prohibits employment discrimination as to contractors	"A contract which the City, a political subdivision, or an agency thereof, is a party shall contain a covenant by the contractor and his/her subcontractors not to discriminate against an employee or applicant for employment with respect to hire, tenure, terms, conditions, or privileges of employment, including a benefit plan or system or a matter directly or indirectly related to employment, because of race, color, religion, national origin, age, sex, height, weight, marital status, handicap, sexual orientation, student status or use by an individual of adaptive devices or aids."	
City of Eastchester	NY					nf	Town Attorney confirmed no antidiscrimination provisions in City Code 3/16/01
City of Eugene	OR	Yes		Yes	4.625, 4.655 Human Rights - Fair Employment Practice Provisions in City Contracts.	Discrimination in contracts based on sexual orientation prohibited. Exemption when compliance would "substantially burden a person's exercise of religion."	
City of Evanston	IL	Yes			Chapter 12, Section 1-12-5	All contractors, bidders, vendors, etc. contracting with the city shall include in their contracts an EEO clause certifying that said contractor/bidder/vendor, etc. "will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, marital status, national origin or ancestry, or age or physical or mental disabilities...."	Contact Town Clerk (Mary Morris) @ 847-866-2925
City of Falmouth	ME		Yes	Yes	Chapter 19, Article II, Section 3	"It shall be unlawful employment discrimination for any employer to fail to hire or otherwise discriminate against any applicant for employment because of sexual orientation or because of such reason to discharge or discriminate with respect to hire, tenure; promotion, transfer, compensation, terms, conditions or privileges of employment..."	
City of Fayetteville	AR					nf	City Clerk confirmed via phone that code does not contain non-discrimination provision re employment 3/14/01
City of Flint	MI				DEPT. OF EQUAL OPPORTUNITY/CONTRACT COMPLIANCE	Language does not include sexual orientation.	
City of Fort Collins	CO				CHAPTER 13 HUMAN RELATIONS, ARTICLE II. DISCRIMINATION	Language defining discrimination does not include sexual orientation.	
City of Fort Worth	TX	Maybe			Chapter 17 HUMAN RELATIONS" ARTICLE III. DISCRIMINATION DIVISION 3. EMPLOYMENT PRACTICES Sec. 17-67. Discrimination prohibited.	Employment discrimination on the basis of sexaul orientation banned. May not "participate in a contractual...arrangement...that has the effect of subjecting a...qualified applicant...to the discrimination prohibited by this provision."	

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City of Gainesville	FL		Yes	Yes	City Code Part II Code of Ordinances, Chapter 8 Discrimination, Article III Equal Employment Opportunity, Section 8-48	"It shall be an unlawful employment practice for an employer to [f]ail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his/her compensation, terms, conditions or privileges of employment because of the individual's sexual orientation." Religious exemption when discrimination is for a bona fide occupational qualification.	
City of Grand Ledge	MI					nf	Confirmed via phone that no provisions in City Code prohibiting employment discrimination 3/14/01
City of Grand Rapids	MI				Chapter 11 PURCHASES, CONTRACTS AN D SALES* Sec. 1.517. Provision Against Discrimination I n Contracts.	Ordinance relating to discrimination in contracts does not include sexual orientation language.	
City of Harrisburg	PA	Yes	Yes		Chapter 4-105, Section 4-105.1 and 4-105.6	Section 4-105.1: It shall be an unlawful employment practice "for any employer to refuse to hire any person... because of race, color, religion, ancestry, national origin, place of birth, sex, age, national origin, place of birth, sex, age, non-job related handicap or disability, familial status, marital status, GED, or sexual preference/orientation." Section 4-105.6: "All contracts entered into by the City and its purchasing and contracting agencies shall obligate the contractor to comply with this Code relating to fair employment practices..."	Contact City Clerk @ 717-255-3060
City of Hartford	CT	Yes			Chapter 2 ADMINISTRATION, ARTICLE VII. FINANCE DIVISION 3. PURCHASES AND CONTRACT S* Sec. 2-558. Discrimination in employment or housing by contractors with city.	Discrimination in contracts based on sexual orientation prohibited.	
City of Henderson	KY					nf	Confirmed via phone that no provisions in City Code prohibiting employment discrimination 3/14/01
City of Honolulu	HI		Yes		CHAPTER 1, ARTICLE 11	Nondiscrimnation policy on the basis of sexual orientation does not specifically mention contracts; Chapter 6 Article 29. Standards for the Appropriation of Funds to Private Organizations contains anti-discrimination language that does not include sexual preference.	
City of Houston	TX				Chapter 15 CONTRACTS* ARTICLE II. ANTI-DISCRIMINATION PROVISIONS IN CITY CO NTRACTS* Sec. 15-17. Equal employment opportunity clause	Language does not include anti-discrimination on the basis of sexual orientation or preference.	

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City of Iowa City	IA		Yes	Yes	Title 2, Chapter 3, Section 2-3-1 Employment Practices	"It shall be unlawful for any employer to refuse to hire, accept, register, classify, upgrade or refer for employment, or to otherwise discriminate in employment against any other person or to discharge any employee because of age, color, creed, disability, gender identity, marital status, national origin, race, religion, sex, or sexual orientation."	
City of Ithaca	NY	Yes			CODE OF THE CITY OF ITHACA, NEW YOR K, v3 Updated through 12-15-2000 PART I ADMINISTRATIVE LEGISLATION Chapter 39, CONTRACTS	Discrimination in contracts based on sexual orientation prohibited.	
City of Kalamazoo	MI					nf	HR confirmed with City Clerk that there are no antidiscrimination provisions in City Code 3/16/01
City of Kansas City	MO				PART II CODE OF ORDINANCES Chapter 38 HUMAN RELATIONS* ARTICLE III. DISCRIMINATORY PRACTICE S*	Does not include language related to contracts.	
City of Key West	FL				PART II CODE OF ORDINANCES TITLE VII. GENERAL SERVICES 72.00 DISCRIMINATION* HUMAN RIGHTS GENERALLY	Does not include language related to contracts.	
City of Lafayette	IN	Maybe			Chapter 2.07 COMMISSION ON HUMAN RELATIONS	No specific language with regards to contracts, refers to overall business with the city.	
City of Laguna Beach	CA		Yes	Yes	Title 1 GENERAL PROVISIONS Chapter 1.07 DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION	"An 'employer' shall not include a religious association or corporation not organized for private profit."	
City of Lancaster	PA		Maybe			City code information only available if purchased; HRC Worknet indicates that city prohibits discrimination in public and private employment.	
City of Lawrence	KS					nf	Left message for Assistant City Manager for Administrative Services & Legal Services Director Dave Corliss - 3/16/01
City of Lexington	KY		Yes	Yes	Chapter II, Article II, Section 2-33(1) [Note: City and County government is merged]	"It is the policy of the Lexington Fayette Urban County Government to safeguard all individuals within Fayette County from discrimination in employment, public accomodation, and housing on the basis of sexual orientation or gender identity, as well as from discrimination on the basis of race, color, religion, national origin, sex, disability, and age forty and over."	

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City of Lithia Springs	GA					nf	Message with City Clerk 3/16/01
City of Long Beach	CA				Chapter 2.72 EQUAL OPPORTUNITY CONTRACT COMPLIANCE PROGRAM	Nondiscrimination language does not include sexual orientation.	
City of Long Island	ME					nf	
City of Los Angeles	CA	Yes			DIVISION 10 - CONTRACTS CHAPTER 1 - CONTRACTS GENERAL ARTICLE 1 - CONTRACTS REQUIREMENT	"Notwithstanding any provision of any ordinance of the City of Los Angeles to the contrary, every contract...with or on behalf of the City of Los Angeles shall contain...a provision obligating the contractor not to discriminate in his employment practices...because of...sexual orientation."	
City of Louisville	KY				TITLE III: ADMINISTRATION Chapter 36: City Employment Provisions AFFIRMATIVE ACTION PLAN FOR CONTRACTORS AND VENDORS § 36.170 FINDINGS, PURPOSE, AND POLICY.	Language does not include sexual orientation.	
City of Madison	WI				CHAPTER 3 OFFICIALS, BOARDS, EMPLOYEES AND PUBLIC RECORDS Section 3.58 AFFIRMATIVE ACTION ORDINANCE.	Language does not include sexual orientation.	
City of Malden	MA					nf	Call into city clerk 3/15/01
City of Mansfield	CT					nf	Asst. Town Manager confirmed via phone 3/14/01 that there are no code provisions prohibiting employment discrimination.
City of Miami Beach	FL		Maybe	Yes		General nondiscrimination policy includes protection of sexual orientation. Religious organizations are exempted from ordinances dealing with sexual orientation.	
City of Milwaukee	WI	Yes			Section 109-15 of the Milwaukee Code of Ordinances - CITY OF MILWAUKEE - INVITATION, INSTRUCTIONS, TERMS AND CONDITIONS - FOR FORMAL BID & CONTRACT	NONDISCRIMINATION: The successful bidder will not discriminate against any employee or applicant for employment because of age, race, creed, color, sex, sexual orientation, disability, national origin or ancestry, and as provided by Section 109-15 of the Milwaukee Code of Ordinances. This provision must be included in all subcontracts.	
City of Minneapolis	MN	Yes			Title 7 Chapter 139.10 "affectional preference" and specifically in Title 7, Chapter 139.50.1 Provisions required in contracts with city.	"During performance of the contract, the contractor will not discriminate against any employee or applicant for employment because of...affectional preference...."	

Yes = Contains provision
Maybe = May be interpreted to contain such provision
NA = Not Applicable
nf = Not Found
K = Contract(or)

Blair Allan
Craig Schultz
Loeb & Loeb LLP
(213) 688-3400

Analysis of Antidiscrimination Ordinances That Include Sexual Orientation	
Total number of ordinances with antidiscrimination clauses that expressly relate to contractors	48
Total number of ordinances with religious exemptions from antidiscrimination ordinances that either expressly or impliedly relate to contractors	28
Percent of total number of ordinances with antidiscrimination clauses that expressly relate to contractors	20.5%
Percent of total number of ordinances with religious exemptions from antidiscrimination ordinances that either expressly or impliedly relate to contractors	12.0%
Total number of ordinances banning discrimination by all employers and that may be implied to relate to contractors	55
Total number of ordinances with religious exemptions that apply to antidiscrimination contract clauses	6

Total number of ordinances with antidiscrimination clauses that may relate to contractors	6
Total number of ordinances with exemptions that may include religious organizations	4
Percent of total number of ordinances with antidiscrimination clauses that may relate to contractors	2.6%
Percent of total number of ordinances with exemptions that may include religious organizations	1.7%
Total number of ordinances with an antidiscrimination policy that may ban employment-based discrimination	13

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REV_00260617

Analysis of Instances of Antidiscrimination Ordinances That Include Sexual Orientation	
Total number of ordinances with antidiscrimination clauses that either expressly or impliedly ban employment discrimination by contractors	54
Total number of ordinances that clearly exempt religious organizations plus total number of ordinances with exemptions that may include religious organizations	32
Percent of total number of ordinances with antidiscrimination clauses that either expressly or impliedly ban employment discrimination by contractors	23.1%
Percent of total number of ordinances that clearly exempt religious organizations plus total number of ordinances with exemptions that may include religious organizations	13.7%

Not Done	0
Total Codes and Cities Investigated	234
Codes Not Found or Available	45
Total Codes and Cities found	189

REV_00260618

Work Product for
Salvation Army National Corporation

Blair Allan
Craig Schultz
Loeb & Loeb LLP
(213) 688-3400

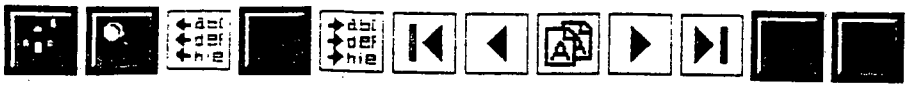

City of Seattle Legislative Information Service

Information updated as of May 5, 2000 9:19 AM

Council Bill Number: 112928
Ordinance Number: 119748

AN ORDINANCE related to contracts; creating a new Seattle Municipal Code Chapter 20.45 requiring contractors on City contracts to provide employee benefits to their employees with domestic partners equivalent to those provided to their employees with spouses.

Date introduced/referred: Oct 4, 1999
Date passed: Nov 22, 1999
Status: Passed As Amended
Vote: 9-0
Date of Mayor's signature: Nov 23, 1999

Committee: Public Safety, Health & Technology
Sponsor: PODLODOWSKI

Index Terms: EMPLOYEE-BENEFITS, DOMESTIC-PARTNERS, CONTRACTS, CONSULTANT-CONTRACTS

Text

Note to users: {- indicates start of text that has been amended out
-} indicates end of text that has been amended out
{+ indicates start of text that has been amended in
+} indicates end of text that has been amended in

AN ORDINANCE related to contracts; creating a new Seattle Municipal Code Chapter 20.45 requiring contractors on City contracts to provide employee benefits to their employees with domestic partners equivalent to those provided to their employees with spouses.

WHEREAS, employee benefits routinely comprise between 30 and 40 percent of total employee compensation; and

WHEREAS, discrimination in the provision of employee benefits between employees with domestic partners and employees with spouses results in unequal pay for equal work; and

WHEREAS, Seattle law prohibits discrimination based on marital status and/or sexual orientation; and

WHEREAS, contractors with the City of Seattle are required to comply with the City's nondiscrimination laws; and

WHEREAS, it is the City's intent, through the contracting practices outlined herein, to equalize the total compensation between similarly situated employees with spouses and employees with domestic partners; Now, therefore

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

REV_00260619

Section 1. There is hereby added to the Seattle Municipal Code a new Chapter 20.45 to read as follows:

Chapter 20.45 City Contracts - Non-Discrimination in Benefits

20.45.010 Definitions. For the purposes of this chapter,

A. "Contract" means a contract for public works, consulting, or supplies, material, equipment or services as set forth in SMC Ch. 3.18.800 et seq., estimated to cost Thirty Three Thousand Dollars ($33,000.00) or more in 1999, consistent with the competitive threshold requirements of, and as adjusted pursuant to, Seattle Municipal Code Sections 3.18.840 and 3.114.140.

Grants?

B. "Contract awarding authority" means the City officer, department, commission, employee, or board authorized to enter into or to administer contracts on behalf of the City.

C. "Department" means the Executive Services Department.

D. "Director" means the Executive Services Department Director.

E. "Domestic Partner" means any person who is registered with his/her employer as a domestic partner, or, in the absence of such employer-provided registry, is registered as a domestic partner with a governmental body pursuant to state or local law authorizing such registration. Any internal employer registry of domestic partnership must comply with criteria for domestic partnerships specified by rule by the Department.

F. "Employee benefits" means the provision of bereavement leave; disability, life, and other types of insurance; family medical leave; health benefits; membership or membership discounts; moving expenses; pension and retirement benefits; vacation; travel benefits; and any other benefits given to employees, provided that it does not include benefits to the extent that the application of the requirements of this chapter to such benefits may be preempted by federal or state law.

20.45.020 Discrimination in the provision of benefits prohibited.

A. No contractor on a City contract shall discriminate in the provision of employee benefits between an employee with a domestic partner and an employee with a spouse, subject to the following conditions:

1. In the event that the contractor's actual cost of providing a particular benefit for the domestic partner of an employee exceeds that of providing it for the spouse of an employee, or the contractor's actual cost of providing a particular benefit for the spouse of an employee exceeds that of providing it for the domestic partner of an employee, the contractor shall not be deemed to discriminate in the provision of employee benefits if the contractor conditions providing such benefit upon the employee agreeing to pay the excess costs.

2. The contractor shall not be deemed to discriminate in the provision of employee benefits if, despite taking reasonable measures to do so, the contractor is unable to extend a particular employee benefit to domestic partners, so long as the contractor provides the employee with a cash equivalent.

B. Other options for compliance allowed.

Provided that a contractor does not discriminate in the provision of benefits between employees with spouses and employees with domestic partners, a contractor may:

1. Elect to provide benefits to individuals in addition to employees' spouses and employees' domestic partners;

2. Allow each employee to designate a legally domiciled member of the employee's household as being eligible for spousal equivalent benefits; or

3. Provide benefits neither to employees' spouses nor to employees' domestic partners.

C. Requirements inapplicable under certain conditions.

The Director may waive the requirements of this chapter where:

1. Award of a contract or amendment is necessary to respond to an emergency;

2. The contractor is a sole source;

3. No compliant contractors are capable of providing goods or services that respond to the City's requirements;

4. The contractor is a public entity;

5. The requirements are inconsistent with a grant, subvention or agreement with a public agency;

6. The City is purchasing through a cooperative or joint purchasing agreement;

D. Requests for waivers of the terms of this Chapter are to be made to the Department by the contract awarding authority in a manner prescribed by the Department. Decisions by the Department to issue or deny waivers are final.

Waiver Process?

E. The Director may reject an entity's bid or proposal, or terminate a contract, if the Director determines that the entity was set up, or is being used, for the purpose of evading the intent of this Chapter.

F. No contract awarding authority shall execute a contract with a contractor unless such contractor has agreed that the contractor will not discriminate in the provision of employee benefits as provided for in this chapter.

G. All contracts awarded by the City shall contain provisions developed by the Department prohibiting discrimination in the provision of employee benefits, including provisions containing appropriate remedies for the breach thereof as prescribed by SMC Ch. 20.45.040, except as exempted by this chapter or rule.

20.45.030 Limitations.

The requirements of this Chapter only shall apply to those portions of a contractor's operations that occur (i) within the City; (ii) on real property outside of the City if the property is owned by the City or if the City has a right to occupy the property, and if the contractor's presence at that location is connected to a contract with the City; and (iii) elsewhere in the United States where work related to a City contract is being performed. The requirements of this Chapter shall not apply to subcontracts or subcontractors of any contract or contractor.

20.45.40 Powers and duties of the Director.

The Executive Services Department Director shall have the power to:

A. Adopt rules and regulations, in accordance with this chapter and the Administrative Code of The City of Seattle (SMC Chapter 3.02),

establishing standards and procedures for effectively carrying out this chapter;

B. Determine and impose appropriate sanctions and/or liquidated damages for violation of this chapter by contractors including, but are not limited to:

1. Disqualification of the contractor from bidding on or being awarded a City contract for a period of up to 5 years; and

2. Contractual remedies, including, but not limited to, liquidated damages and termination of the contract.

C. Examine contractor's benefit programs covered by this chapter;

D. Impose other appropriate contractual and civil remedies and sanctions for violations of this chapter;

E. Allow for remedial action after a finding of non-compliance, as specified by rule.

F. Perform such other duties as may be required by ordinance or which are necessary to implement the purposes of this chapter.

20.45.050 Effective date.

The provisions of this chapter shall apply to any contract awarded on or after September 30, 2000.

Section 2. On October 1, 2001, the Department will present to the Council a status report on the implementation of these provisions. This status report will include options for expanding the provisions to cover additional City contracts, including but not limited to employee benefits, franchise, concessions, and contracts under the formal competitive bid threshold, and will specifically outline alternative program options and associated resource requirements.

F/U Report on 10/1/01

Section 3. Consistent with the Copernicus project objectives of improving and streamlining our contracting processes while still pursuing important social and economic policies of the City, the Department will evaluate the provisions of the new "Boost" program, this "Non-Discrimination in Benefits" ordinance, and the "City Contracts -Prevention of Discrimination Ordinance (SMC Ch. 20.44) in order to recommend ways to harmonize the various rules, processes and legislation with each other and with existing rules, processes and legislation related to contracting. By September 30, 2000, the Department will present to the Council a proposal for reducing time and cost of contracting, from a baseline established in December of 1999. On October 1, 2001, the Department's status report to Council on implementation and possible expansion of the provisions of this Chapter will include documentation of further contract processing efficiencies.

Section 4. Severability. The provisions of this ordinance are declared to be separate and severable. If a court of competent jurisdiction, all appeals having been exhausted or all appeal periods having run, finds any provision of this ordinance to be invalid or unenforceable as to any person or circumstance, such offending provision shall, if feasible, be deemed to be modified to be within the limits of enforceability or validity. However, if the offending provision cannot be so modified, it shall be null and void with respect to the particular person or circumstance, and all other provisions of this ordinance in all other respects, and the offending provision with respect to all other persons and all other circumstances, shall remain valid and enforceable.

Section 5. This ordinance shall take effect and be in force thirty (30) days from and after its approval by the Mayor, but if not

REV_00260622

approved and returned by the Mayor within ten (10) days after presentation, it shall take effect as provided by Municipal Code Section 1.04.020.

Passed by the City Council the _____ day of _____, 1999, and signed by me in open session in authentication of its passage this _____ day of _____, 1999.

_____
President _____ of the City Council

Approved by me this _____ day of _____, 1999.

_____
Mayor

Filed by me this _____ day of _____, 1999.

_____
City Clerk
November 22, 1999

EBFinal#2.doc
(Ver. 1)

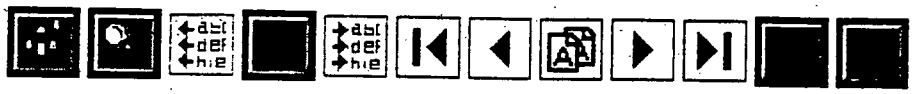

REV_00260623

REV_00260624

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

State Department - Victims of Terrorism [Folder 1]

OA/NARA#: 2165/2076
9695

Box 53
Folder 13

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

State Department - Victims of Terrorism [Folder 2]

OA/NARA#: 2165/2076
9695

Box 53
Folder 14

REV_00260625

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

TO: Brett Kavanaugh

DATE: 1-23-02

FAX #: Phone (67984) 61647

Number of pages _____ (excluding this page)

FROM:

Jay Lefkowitz
General Counsel
Office of Management and Budget
Washington, DC 20503
Phone: (202) 395-5044
Fax: (202) 395-7289

Comments:

(C) in the case of a claim filed by a parent or legal guardian, information demonstrating the claimant's status as a parent or legal guardian;

(D) information regarding collateral sources of payments the claimant, or the individual on whose behalf the claimant is filing, has received or is entitled to receive as a result of the act of international terrorism.

(c) The claim form shall state clearly and conspicuously that filing of a claim under this Program constitutes a waiver as described in section 109(c).

SEC. 106 ELIGIBILITY

(a) In General. - The Commission shall review each claim filed under this Program and determine whether the claimant is an eligible individual under subsection (b) of this section.

(b) Eligible Individuals. -- A claimant is an eligible individual if the Commission determines that such claimant is --

(1) where the act of international terrorism occurs within the United States, an individual who suffered physical injury or death as a direct result of the act of international terrorism;

(2) where the act of international terrorism occurs outside the United States, an individual who, as of the date on which the act of international terrorism occurred, (A) was a national of the United States or an employee of the United States Government; and (B)(i) suffered physical injury or death as a direct result of the act of international terrorism, or (ii) was held hostage for a period of at least one week as a direct result of an act of international terrorism and not solely for ransom;

(3) in the case of a decedent who is an individual within the meaning of subparagraph (b)(1) or (b)(2), the personal representative of

the decedent who files a claim on behalf of the decedent; or

(4) in the case of an individual who is an individual within the meaning of subparagraph (b)(1) or (b)(2), and who is less than 18 years of age, incompetent or incapacitated, the parent or legal guardian of the individual who files a claim on behalf of the individual.

(2) An individual identified by the Attorney General to have been a participant or conspirator in the act of international terrorism, or a representative of such individual, shall not be eligible to receive compensation under the Program.

(c) Exclusion for Armed Conflict. - This Program does not apply to any claim arising out of injury or death sustained while engaged in armed conflict by a member of the U.S. Armed Forces serving on active duty. The Secretary of Defense shall determine promptly whether the incident giving rise to the claims shall be deemed an armed conflict for the purposes of the preceding sentence. The Secretary of Defense's determination under this subsection shall be final and conclusive, and it shall not be subject to review in any judicial, administrative or other proceeding.

SEC. 107 NATURE OF AWARDS

(a) Awards shall be made without regard to the negligence or any other theory of liability of the claimant or of the individual on whose behalf the claimant is filing a claim.

(b) In the event of a death resulting from an act of international terrorism, there shall be an award of $1 million to an eligible individual, adjusted at three-year intervals beginning January 1, 2005, to reflect changes in the consumer price index for the immediately preceding three-year period.

(c) In the event of physical injury or having been held a hostage as a direct result of an act of international terrorism, compensation shall be determined on the net present value of the economic and noneconomic

losses demonstrated by the claimant, provided that the amount awarded shall not exceed the amount provided for under the preceding subsection.

(d) The portion of any award for actual and projected pain and suffering or emotional distress resulting from a physical injury shall not exceed $250,000, adjusted at three year intervals beginning January 1, 2005, to reflect changes in the consumer price index for the immediately preceding three year period.

(e) Amounts may not be awarded for punitive or exemplary purposes.

(f) The Commission shall reduce the amount awarded by the amount of the collateral source payments the claimant has received or is entitled to receive as a result of the act of international terrorism.

SEC. 108 LIMITATIONS ON CLAIMS

(a) Single Claim. -- Not more than one claim may be submitted under this Program by an individual or on behalf of an individual with respect to an act of international terrorism.

(b) Time Limitation for Filing. -- No claim may be filed on the basis of an act of international terrorism after the date that is 2 years after the date of publication in the Federal Register of a determination under section 104(a) of this Act.

(c) Bar on Other Claims. - No claim may be made in any judicial, administrative, or other proceeding if such claim could have been filed under this Act in the absence of subsection (b).

SEC. 109 INTERNATIONAL TERRORISM BEFORE EFFECTIVE DATE

(a) Compensation may be awarded under this Act, subject to the provisions of subsections (b) and (c) of this section, to eligible individuals for an acts of international terrorism that took place before the effective date of this Act and which occurred on or after November 1, 1979.

(b) The Secretary of State, in consultation with the Attorney General, shall issue, promptly upon the request of a claimant potentially covered under subsection (a), a determination whether an incident that occurred on or after November 1, 1979, and before the date of enactment of this Act was an Act of international terrorism as defined in section 103(h) of this Act. Such requests will be considered only if made within one year after the date of enactment of this Act.

(c) By filing a claim under this section, the claimant, or the individual on whose behalf the claimant is filing, (1) waives any right to file and any right to continue to pursue any judicial, administrative or other proceeding for damages sustained as a result of the act of international terrorism, and (2) relinquishes all claims and rights to compensatory and punitive damages and amounts awarded as judicial sanctions under such judgments.

SEC. 110 PAYMENT OF AWARDS

(a) Judgment Fund. - Awards under this Program shall be paid from the appropriation made under section 1304 of title 31, United States Code.

(b) Conforming Amendment. - Section 1304(a)(3) of title 31, United States Code, is amended by adding the following new subsection (E) -

> "(E) pursuant to a final decision of the Foreign Claims Settlement Commission under the Compensation for Victims of International Terrorism Act of 2002."

SEC. 111 EXCLUSIVITY OF REMEDY

(a) In General. - Subject to subsections (b) and (c) of this section, this Program constitutes the exclusive remedy in the United States with respect to the injury or death of an eligible individual caused by an act of international terrorism after the effective date of this Act. The United States or a foreign state, or instrumentalities thereof, shall have no liability to eligible individuals, their legal representatives, spouses, dependents, next of kin, heirs, successors, assignees, and any other persons entitled to recover damages in a judicial, administrative, or other proceeding in the United

States as a result of the injury or death caused by an act of international terrorism.

(b) Nothing in this Act limits or otherwise affects any right of recovery against persons or entities who may be involved in an act of international terrorism and who are not foreign states or instrumentalities or officials thereof.

(c) Nothing in this Act limits or otherwise affects any right of an eligible individual to bring an action to obtain collateral source payments.

(d) Conforming Amendments. --

(1) Section 1605, title 28 of the United States Code is amended -
(A) in subsection (a), by striking subparagraph (7);
(B) by striking subsection (e); and
(C) by striking subsection (f).

(2) Section 1610, title 28 of the United States Code is amended -

(A) in subsection (a), by striking subparagraph (7);
(B) in subsection (b)(2), by striking ",or (7)"; and
(C) by striking subsection (f).

(3) Section 589 of Title V of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, as enacted in Public Law 104-208, Div. A, title I, sec. 101(c) is repealed.

SEC. 112 SUBROGRATION

(a) The United States shall be subrogated, to the extent of the payments, to all rights related to an injury or death of an individual paid under the Program.

(b) Nothing in this Act shall limit or otherwise affect any right of the United States, including any right of recovery from a foreign state or instrumentality thereof, under any applicable law.

SECTION BY SECTION ANALYSIS

SEC. 101 SHORT TITLE

This section provides that this Act may be cited as the "Compensation for Victims of International Terrorism Act of 2002."

SEC. 102 ESTABLISHMENT OF PROGRAM

This section establishes the Compensation for Victims of International Terrorism Program ("Program"). The Program is a comprehensive federal system under which monetary awards will be made in accordance with this Act to eligible individuals who are physically injured or killed as a result of an act of international terrorism. As Congress recognized in section 626 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002 (Public Law 107-77), there is a pressing need to rationalize the current piecemeal approach to compensation for victims of international terrorism.

This Program is modeled loosely on the compensation program that was established by Congress for the victims of the September 11 attacks (see Title IV of the Air Transportation Safety and System Stabilization Act, Public Law 107-42). This Program, however, sets in place a permanent structure to compensate victims of future acts of international terrorism, and covers acts of international terrorism both in the United States and abroad. Instead of a Special Master appointed by the Attorney General, as is the case with the September 11 program, the review and adjudication of claims is committed to the Foreign Claims Settlement Commission ("Commission"). The Commission is a quasi-independent agency of the Department of Justice which has career staff with substantial experience handling large-scale claims programs.

SEC. 103 DEFINITIONS

This section sets forth the definitions of critical terms in this Act. Notably, the Act relies on the definition of "international terrorism" already contained in 18 U.S.C. 2331. The definition of "employee of the United States Government" modifies and expands upon the

definition in 5 U.S.C. 8101, which applies to the federal worker's compensation program administered by the Department of Labor. It is intended to be a broad definition, covering all categories of U.S. government personnel, including the military, Civil Service employees, members of the Foreign Service (including locally employed staff), and personal service contractors.

SEC. 104 ADMINISTRATION

This section lays out the administrative framework of the Program. As set forth in subsection (a), the first step is that upon the occurrence of a terrorist incident, the Secretary of State, after consultation with the Attorney General, will issue a written determination if he concludes that the incident is an act of "international terrorism" within the meaning of the Act. This determination, which must be published in the Federal Register, triggers the application of the Program.

The second step is that claimants may file claims for compensation with the Foreign Claims Settlement Commission. Subsection (b) explains that the Commission shall have jurisdiction to receive, examine, adjudicate and render final decisions with respect to claims. A decision to make an award shall be in writing, and copies of such decision shall be transmitted to the Secretary of State, the Secretary of the Treasury, and the Attorney General. When the Commission decides to make an award of compensation, the transmittal of the final decision will be accompanied by certification of the award to the Secretary of the Treasury for payment out of the Judgment Fund (31 U.S.C. 1304).

Subsection (b) further provides that except to the extent inconsistent with the provisions of the Act, the provisions of title I of the International Claims Settlement Act of 1949, as amended (22 U.S.C. 1621 et seq.) will apply to claims filed under the Program. Accordingly, the Program can take advantage of the existing statutory authorities of the Commission, for example, to promulgate regulations necessary to perform its functions; to give public notice of the time when claims may be filed; to take evidence through documents, hearings, and depositions; to issue awards in accordance with the applicable principles of international law, justice and equity; and to issue final decisions.

Finally, subsection (c) authorizes such sums as may be necessary to pay the administrative and support costs for the Department of State, the Department of Justice, and the Foreign Claims Settlement Commission in carrying out the provisions of this Act.

SEC. 105 FILING OF CLAIMS

This section sets forth claims filing procedures similar to those established for the victims of the September 11 terrorist attacks. Subsection (a) requires claims for compensation to be filed with the Commission on a standard form and to state the factual basis for eligibility for compensation and the amount of compensation sought.

Subsection (b) directs the Commission to develop a form that claimants will use when submitting claims. In the case of a claim filed with respect to a decedent, the claim form should request information demonstrating the decedent's death as a direct result of the act of international terrorism. In the case of a claim not involving a death, the claim form should request information concerning (1) the physical harm that the claimant suffered as a direct result of the act of international terrorism; and (2) information concerning any economic and noneconomic losses that the claimant, or the individual on whose behalf the claimant is filing a claim, suffered as a direct result of the act of international terrorism. The claim form also should request information regarding collateral source payments the claimant, or the individual on whose behalf the claimant is filing, has received or is entitled to receive as a result of the act of international terrorism.

Subsection (c) provides that the claim form will state clearly and conspicuously that filing of a claim under this Program constitutes a waiver as described in section 109(c).

SEC. 106 ELIGIBILITY

This section contains provisions governing the eligibility of claimants for compensation. Subsection (a) explains that the Commission will review each claim filed

under this Program and determine whether the claimant is an eligible individual.

Subsection (b) sets forth the criteria for a determination that a claimant is an "eligible individual." Where the act of international terrorism occurs within the United States, this would be an individual who suffered physical injury or death as a direct result of the act of international terrorism. Where the act of international terrorism occurs outside the United States, this would be an individual who, as of the date on which the act of international terrorism occurred, (A) was a national of the United States or an employee of the United States Government; and (B)(i) suffered physical harm or death as a direct result thereof or (ii) was held hostage for a period of at least one week as a direct result thereof and not solely for ransom. In the case of a decedent, the "eligible individual" is the personal representative of the decedent who files a claim on behalf of the decedent. In the case of an individual who is less than 18 years of age, incompetent, or incapacitated, the parent or legal guardian is an "eligible individual." An individual identified by the Attorney General to have been a participant or conspirator in the act of international terrorism, or a representative of such individual, shall not be eligible to receive compensation under this Act.

Subsection (c) clarifies that the Program does not apply to any claim arising out of injury or death sustained while engaged in armed conflict by a member of the U.S. Armed Forces serving on active duty. The Secretary of Defense will determine whether the incident giving rise to the claims should be deemed an armed conflict for the purposes of the Program.

SEC. 107 NATURE OF AWARDS

Section 107 sets forth conditions regarding compensation awarded under the Program. Subsection (a) provides that compensation under the Program is to be awarded without regard to the negligence or any other theory of liability of the claimant, or of the individual on whose behalf the claimant is filing a claim.

Subsection (b) provides that in the event of a death resulting from an act of international terrorism, there

will be an award of $1 million to the eligible individual. This amount will be adjusted for inflation.

Subsection (c) provides that in the event of physical injury or hostage-taking directly resulting from an act of international terrorism, compensation shall be determined on the basis of the net present value of the economic and noneconomic losses demonstrated by the claimant, up to the amount available for death claims.

Subsection (d) places a cap of $250,000 on that portion of an award regarding actual and projected pain and suffering or emotional distress from a physical injury. This amount will be adjusted for inflation.

Subsection (e) provides that compensation awarded under the Program may not include punitive or exemplary damages.

Subsection (f) directs the Commission to reduce the amount of compensation awarded by the amount of the collateral source payments the claimant, or the individual on whose behalf the claimant is filing a claim, has received or is entitled to receive as a result of the act of international terrorism.

SEC. 108 LIMITATIONS ON CLAIMS

Subsection (a) provides that not more than one claim may be submitted under this program by an individual or on behalf of an individual.

Subsection (b) provides that no claim may be filed after the date that is 2 years after the date of publication in the Federal Register of a determination under section 104 of this Act.

Subsection (c) provides that no claim may be made in any judicial, administrative, or other proceeding if such claim could have been filed under this Act in the absence of a statute of limitations issue.

SEC. 109 INTERNATIONAL TERRORISM BEFORE EFFECTIVE DATE

Subsection (a) permits victims of acts of international terrorism that took place before the effective date of this Act and which occurred on or after

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Enclosed for your consideration is a legislative proposal entitled "Compensation for Victims of International Terrorism Act," along with a sectional analysis. This legislation would establish a comprehensive federal program to compensate eligible individuals who are physically injured or killed as a result of an act of international terrorism.

As the Congress recognized in section 626 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002 (Public Law 107-77), there is a pressing need for a program to compensate victims of international terrorism in a fair, coherent, and timely manner. Currently, compensation for victims is highly erratic -- dependent on a number of legislative programs, litigation, and in many cases private relief bills. This ad hoc approach raises serious questions of equity and fairness for the victims. In addition, there is a particular need to provide a rational compensation program where state-sponsored terrorism is involved. Recent legislation permitting a handful of victim plaintiffs to attach the blocked assets of foreign states designated as sponsors of terrorism is not only arbitrary but undermines U.S. foreign policy and national security interests.

The Honorable
J. Dennis Hastert
Speaker of the House of Representatives

November 1, 1979, to opt into this new compensation program. This date was selected in order to allow victims of prior acts of international terrorism abroad, including the Iranian hostage and Beirut victim plaintiffs, to take advantage of the Program.

Subsection (b) provides that the Secretary of State, in consultation with the Attorney General, shall promptly, upon the request of a potentially covered claimant, issue a written determination as to whether an incident is an act of international terrorism within the meaning of this Act. In cases where such a determination is made, victims of that prior act of international terrorism may submit claims to the Commission under the Program. All requests by potential claimants for determinations that prior incidents are covered by the Program established by the Act must be made within one year after the date of enactment.

Subsection (c) makes clear that upon the submission of a claim for compensation under this section, the claimant, or the individual on whose behalf the claimant is filing a claim, (1) waives any right to file or to continue to pursue a civil action (or to be a party to an action) in any court for damages sustained as a result of the terrorist incident, and (2) relinquishes all claims and rights to compensatory and punitive damages and amounts awarded as judicial sanctions under such judgments. The preceding sentence does not apply to a civil action to obtain collateral source payments.

SEC. 110 PAYMENT OF AWARDS

Subsection (a) provides that awards under this Program will be paid from the Judgment Fund pursuant to the appropriation made under 31 U.S.C. 1304.

Subsection (b) makes a conforming amendment to 31 U.S.C. 1304.

SEC. 111 EXCLUSIVITY OF REMEDY

This section makes clear that litigation against the United States and foreign states cannot be a part of a fair, timely, and rational compensation scheme for U.S. victims of international terrorism.

Subsection (a) provides that subject to subsections (b) and (c), the compensation awarded under the Program is the exclusive means by which U.S. nationals and U.S. government employees who are injured or killed by an act of international terrorism may receive compensation. Therefore, any judicial, administrative or other proceedings against the United States or a foreign state, or instrumentalities thereof, are barred.

Subsection (b) clarifies that nothing in this Act limits or otherwise affects any right of recovery against individuals or entities who may have been involved in an act of international terrorism who are not foreign states or instrumentalities or officials thereof.

Subsection (c) provides that nothing in this Act limits or otherwise affects any right of an eligible individual to bring a civil action to obtain collateral source payments.

Subsection (d) makes certain conforming amendments to the Foreign Sovereign Immunities Act and related legislation in order to preclude suits for damages against foreign states designated as sponsors of terrorism and against foreign officials acting in their official capacity. This would rectify the current situation in which certain victims who have been able to obtain default judgments against foreign states are able to collect hundreds of millions of dollars in payments, while other U.S. victims obtain far less. However, as set forth in section 109, those plaintiffs who have obtained judgments under 28 U.S.C. 1605(a)(7) would be entitled to opt in to this new compensation system.

SEC. 112 SUBROGRATION

Subsection (a) provides that for each individual paid under this section, the United States becomes subrogated, to the extent of the payments, to rights of that individual.

Subsection (b) provides that nothing in this Act shall limit or otherwise affect any right of the United States, including any right of recovery from a foreign state or instrumentality thereof, under any applicable law.

Background

Victims of international terrorism currently are eligible to receive compensation under a variety of legislative schemes. If they are U.S. government employees, they are entitled to federal benefit programs designed to replace income and other expenses, and in some cases death gratuity benefits. Private victims, whether they are U.S. nationals or foreign nationals, may receive compensation from their employers or insurers, and in the case of aircraft incidents from airlines or airlines' insurers. Both U.S. government and private U.S. victims also are eligible for assistance from the Crime Victims Fund administered by the Department of Justice.

In the case of the victims of the September 11 terrorist attacks, Congress has established a special compensation program administered by the Attorney General, acting through a Special Master. *See* Title IV of the Air Transportation Safety and System Stabilization Act (Public Law 107-42). Victims of the attacks (including both U.S. and foreign nationals) may file claims for compensation and any awards are paid from the U.S. Treasury. Legislation has been introduced recently seeking to bring the U.S. victims of the East Africa bombings within the September 11 compensation program.

In addition, certain U.S. victims and their families are filing lawsuits seeking compensatory and punitive damages against designated foreign state sponsors of terrorism. A series of measures were enacted beginning in 1996 to repeal the historic immunity of foreign states from litigation, thus permitting victims or their survivors to sue designated terrorist states, and to collect on their default judgments either out of blocked assets or the U.S. Treasury.

In short, different levels of compensation are being provided to victims of international terrorism depending on the terrorist incident at issue, their ability to identify a foreign state sponsor of terrorism and pursue litigation, or their effectiveness in obtaining Congressional support for private relief. Also, recent legislation permitting collection against the blocked assets of foreign states undermines U.S. foreign policy and national security interests. The legislation impairs our ability to use blocked assets as diplomatic leverage and invites similar measures by other countries. Moreover, legislative initiatives permitting the attachment of diplomatic or consular property may contravene our international legal obligations.

A Rational Compensation Program

In view of the foregoing, the Administration believes that a comprehensive and rational program to compensate victims of international terrorism is urgently needed. The proposed legislation establishes just such a program, building upon the legislation enacted to compensate the September 11 victims.

The proposed legislation contains the following key elements:

- Acts of "international terrorism" (as defined in the statute) both within and outside the United States would be covered by the program.

- Where the act of international terrorism occurs outside the United States, all U.S. national and U.S. government employee victims would be covered. Where the act of international terrorism occurs within the United States, all victims (including foreign nationals) would be covered.

- The Secretary of State, after consultation with the Attorney General, would make a threshold determination as to whether a terrorist incident comes within the scope of the program. If the incident is covered, a victim or victim's representative will be able to recover without having to prove in a court action who was responsible for the act of international terrorism.

- Claimants would then file claims for compensation with the Foreign Claims Settlement Commission (an agency within the Department of Justice with expertise in handling claims). The Commission would review the claims and issue a lump-sum award.

- In the event of a death directly resulting from an act of international terrorism, an eligible individual would receive an award of $1 million, adjusted for inflation.

- In the event of physical injury or hostage-taking directly resulting from an act of international terrorism, an eligible individual would be entitled to economic and noneconomic losses, up to the same amount as available for death claims.

- The amount of the compensation would be reduced by any payments the claimant has received or is entitled to receive from collateral sources.

- The Foreign Claims Settlement Commission would issue a final, written decision, and certify any award to the Secretary of Treasury for payment.

- Awards would be paid from the Judgment Fund, for which there is already a permanent, indefinite appropriation under 31 U.S.C. 1304.

- Victims or survivors of acts of international terrorism abroad after November 1, 1979, would be permitted to "opt in" to the new system in return for waiving rights to file or continue to pursue any court action. This would permit the Iranian hostage and Beirut victims to take advantage of this new program.

- This Act would be the exclusive remedy for compensating eligible individuals for death or injury resulting from an act of international terrorism. Individuals could not file lawsuits against the U.S. government or foreign states, or instrumentalities thereof.

- Nothing in the Act, however, limits rights of recovery against private individuals or entities who may be responsible for the act of international terrorism.

- The United States would be subrogated, to the extent of the payments, to all rights related to the injury of an individual paid under the program.

The Administration looks forward to working with you on this important legislative package.

Sincerely,

Colin Powell

A BILL

To establish a comprehensive federal program to compensate victims of international terrorism.

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

SEC. 101 SHORT TITLE

This Act may be cited as the "Compensation for Victims of International Terrorism Act of 2002."

SEC. 102 ESTABLISHMENT OF PROGRAM

There is established the Compensation for Victims of International Terrorism Program ("Program") under which monetary awards shall be made in accordance with this Act to eligible individuals who are physically injured or killed as a result of an act of international terrorism.

SEC. 103 DEFINITIONS

In this Act, the following definitions apply:

(a) Abroad. - The term "abroad" means outside the United States.

(b) Claimant. - The term "claimant" means an individual filing a claim for compensation under this Act.

(c) Collateral Source. - The term "collateral source" means life insurance, pension funds, death benefit or disability programs, and payments by Federal, State or local governments related to the act of international terrorism, and payments from whatever source similar in purpose to the foregoing.

(d) Commission. - The term "Commission" means the Foreign Claims Settlement Commission.

(e) Economic Loss. - The term "economic loss" means any pecuniary loss resulting from the injury inflicted as a result of the act of international terrorism, including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due

to death, burial costs, and loss of business or employment opportunities.

(f) Employee of the United States Government. - The term "employee of the United States Government" means a civilian employee in any branch of the Government of the United States, including an officer or employee of an instrumentality wholly owned by the United States, a member of the U.S. armed forces, or an individual rendering personal service to the United States similar to the service of a civilian employee of the United States or a member of the U.S. armed forces, with pay, without pay or for nominal pay, when a statute authorizes the acceptance or use of the service, or authorizes payment of travel or other expenses of the individual, but does not include an independent contractor.

(g) Noneconomic Losses. - The term "noneconomic losses" means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), and other nonpecuniary losses of any kind or nature.

(h) International Terrorism. - The term "international terrorism" has the meaning given in section 2331(1), title 18 of the United States Code.

(i) National of the United States. - The term "national of the United States" has the meaning given in section 101(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)).

(j) Personal Representative. - The term "personal representative" means an executor or administrator of the estate of the deceased, or persons who perform substantially the same function under applicable law.

(k) United States. - The term "United States" means the States, the District of Colombia, the Commonwealth of Puerto Rico, the Commonwealth of the Mariana Islands, the territories and possessions of the United States, the territorial sea of the United States, and the airspace above them.

SEC. 104 ADMINISTRATION

(a) Threshold Determination. -

(1) Upon the occurrence of a terrorist incident, the Secretary of State, after consultation with the Attorney General, shall promptly determine in writing whether an act of international terrorism as defined in section 103(h) of this Act has taken place.

(2) The Secretary of State's determination under this section shall be final and conclusive, and it shall not be subject to review in any judicial, administrative or other proceeding.

(3) If the Secretary determines that an act of international terrorism as defined in section 103(h) has taken place, the Secretary shall publish such a determination in the Federal Register and transmit a copy of it to the Commission.

(b) Commission. -

(1) Upon receipt of the threshold determination set forth in subsection (a), the Commission shall have jurisdiction to receive, examine, adjudicate, and render final decisions with respect to claims filed under section 105 in accordance with the provisions of this Act.

(2) A decision of the Commission to make an award with respect to a claim shall be contained in a written, final decision of the Commission on that claim. The Commission shall transmit to the Secretary of State, the Secretary of the Treasury, and the Attorney General copies of all final decisions made by the Commission under the Program.

(3) When a final decision of the Commission makes an award of compensation, the transmittal of the final decision shall be accompanied by the Commission's certification of that award to the Secretary of the Treasury for payment.

(4) Except to the extent inconsistent with the provisions of this Act, the provisions of title I of the International Claims Settlement Act of 1949, as amended (22 U.S.C. 1621 et seq.) shall apply to claims filed under the Program.

(c) Authorization of Appropriations. -- There are authorized to be appropriated such sums as may be necessary to pay the administrative and support costs for the Department of State, the Department of Justice, the Department of Defense, and the Foreign Claims Settlement Commission in carrying out the provisions of this Act.

SEC. 105 FILING OF CLAIMS

(a) In General. -- Claims for compensation under the Program shall be filed with the Commission on the form developed under subsection (b) and shall state the factual basis for eligibility for compensation and the amount of compensation sought.

(b) Claim Form. --

(1) The Commission shall develop a form that claimants shall use when submitting claims under subsection (a).

(2) The claim form at a minimum shall request -

(A) in the case of a claim filed with respect to a decedent, information demonstrating the decedent's death as a direct result of the act of international terrorism;

(B) in the case of a claim not involving a death, information demonstrating - (i) the physical harm that the claimant suffered as a direct result of the act of international terrorism; and (ii) any economic and noneconomic losses that the claimant, or the individual on whose behalf the individual is filing, suffered as a direct result of the act of international terrorism;

Summary of Section 15 of H.R. 3210,
Terrorism Risk Protection Bill

Generally, Section 15 of H.R. 3210 creates a federal cause of action for claims relating to certified terrorist acts and limits damages and attorneys fees recoverable from defendants other than the perpetrators of the acts and their co-conspirators. Section 15(e) permits judgment holders to satisfy their judgments with blocked assets of the terrorist party or an agency or instrumentality of that party. While different from the Cannon-Issa amendment previously offered to the Anti-Terrorism bill, the attachment provisions of Section 15(e) share the same objective. They make blocked terrorist assets available to satisfy judgments and provide for a very restrictive Presidential waiver, all which conflict with, but do not repeal, the provisions of current law. As discussed below, in major part, subsection (e) bears little relationship to the rest of the provisions of Section 15.

A. Cause of Action

Subsections (a)-(d) are designed to to limit the exposure of insurance companies, airlines, property managers and the like, for liability arising from actions perpetrated by terrorists. While these provisions create a broad and exclusive cause of action for acts determined by the Secretary of the Treasury to be acts of terrorism committed in the United States from the time of enactment until 2003,[1] they provide for remedies that are meant to be restrictive in nature, with certain exceptions. They provide for an exclusive remedy for "claims arising out of, relating to, or resulting from such acts of terrorism," supplanting all other federal and state law causes of action.[2] The determination by the Secretary giving rise to

[1] Section 5(b) of the bill restricts determinations of "acts of terrorism" to acts occurring within the "covered period," which is defined in Section 20 to mean the period between enactment and January 1, 2003; the section permits the Secretary of the Treasury to extend the period by up to two years. Under Section 19(1)(B)(ii) of the bill, an "act of terrorism" includes only an act occurring within the United States or against U.S. domestic air carriers or U.S. flag vessels.

[2] Currently, 18 U.S.C. 2333 provides a similar Federal cause of action for international terrorism. It provides:

> Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States

the cause of action is not subject to review. Except for the perpetrators of the acts themselves, liability for non-economic damages is limited and, punitive damages may not be awarded, unless the defendant is "any person" who commits or knowingly commits the underlying terrorist act[3]. Collateral sources of compensation must be offset, and attorneys fees are capped at 20 percent. The United States would be subrogated to all claims that are paid by the United States under the Act.

B. Attachment of Blocked Assets

Subsection (e) provides that persons with judgments for compensatory damages against a terrorist party on the newly created cause of action, *or* pursuant to section 1605(a)(7) of the Foreign Sovereign Immunities Act, may satisfy those judgments out of the frozen assets of that terrorist party, including those of any agency or instrumentality of the party. The bill's provision for the satisfaction of judgments issued pursuant to section 1605(a)(7) would appear to have no relationship whatsoever to the other provisions of the bill.[4]

This attachment provision does not appear to replace the existing provision at 28 U.S.C. 1610(f)(1)(A) governing the use of blocked assets to satisfy judgments, which has been waived by the President, since no reference is made to an amendment to the Foreign Sovereign Immunities Act. Subsection (e) also provides a Presidential waiver of its own, but applies only to property that is subject to the

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and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

18 U.S.C. 2337, however, states explicitly that no action shall be maintained under section 2333 against "a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority." The Flatow amendment, 28 U.S.C. 1605 note, cited in most of the terrorism lawsuits against foreign states, provides only for a federal cause of action against the "official, employee or agent of a foreign state," but not against the state itself. Some courts recognize a federal common law cause of action in such cases.

[3] See subsection (b).

[4] Subsection (a) provides for a federal cause of action for acts perpetrated against individuals or organizations, but waivers of immunity are not necessary under section 1605(a)(7).

Vienna Conventions on Diplomatic and Consular Relations and then only to such property if has not been used for any non-diplomatic purpose (including use as rental property). Thus, it would not permit the President to waive the provision's application to Iran's diplomatic and consular property, since it has all been leased to private parties, with perhaps the exception of the Chancery.

The one thing that does not appear in this new bill that was in Cannon-Issa is the waiver of U.S. Government sovereign immunity. Thus, Iran FMS Trust Fund monies and Tribunal awards would not be subject to garnishment and attachment. Ironically, therefore, the Iran plaintiffs would be left with virtually nothing but the diplomatic and consular property in this bill, property barely sufficient to satisfy completely even one judgment against Iran.

REV_00260650

State Department Documents [1]

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

OA/NARA#: 1822/1740
9630

Box 53
Folder 15

Brent –

Would you create for me -- and maintain near your office -- a misc files for State Dept related docs? These 3 documents should go in that file.

Thanks

Beverly

Document Originally Attached to Following Page

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

DATE RECEIVED: 8/23/01

NAME OF CORRESPONDENT: US Department of State

SUBJECT: Macedonian Peace Deal

ROUTE TO:		ACTION		DISPOSITION		
OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	DATE M/D/YR	TYPE RESP	C D	COMPLETED M/D/YR
	CUGONZ	A	8/23/01		C	
	ACTION COMMENTS:					
	Courtney	A				
	ACTION COMMENTS:					
	ACTION COMMENTS:					
	ACTION COMMENTS:					

COMMENTS:

ADDITIONAL CORRESPONDENTS: MEDIA:

REV_00260652

Lotus Domino Fax Server

Media Reaction Fax Server Cover Page

U.S. Department of State
Media Reaction

To: **Senior Adviser**

Subject: Issue Focus: MACEDONIAN PEACE DEAL
Date:
Pages: 14 , including cover page

From: U.S. Department of State
Company: Media Reaction (INR-R-MR)
Address: Stephen Shaffer, Acting Director
Kathleen Brahney, Branch Chief

Phone: (202) 619-6511
Fax: (202) 619-5507

"In The Balkans, A Conflict Of Interests Among Allies"

Alberto Negri speculated in leading, business-oriented Il Sole-24 Ore (8/21): "There is a 'peculiar' aspect to NATO's mission in Macedonia. In fact, in order to 'sell' the peace accords with the Albanians to the reluctant Slavic majority, the United States has committed to funding a promotional campaign throughout the country. A very good initiative...aimed at hampering an almost unavoidable ethnic friction, but perhaps the Macedonians--and not only them--would have also liked...an explanation about what happened during these past two years at the border between Kosovo and Macedonia. There is the impression that...a new campaign will have to be funded--aimed, this time, at convincing Macedonians that, when (NATO forces) leave, within 30 or 40 days, all will be finished with the disarmament of the guerillas; otherwise, the campaign should be addressed to the Western public opinion to explain why (NATO) soldiers will have to remain in Macedonia, probably with different tasks, instead. This latter hypothesis...would explain why the Alliance is studying its moves so in-depth...before landing in Skopje. However, (NATO's) hesitant attitude doesn't justify what happened in Kosovo after KFOR entered the country in 1999.... In Kosovo, close to the border with Macedonia, in Urosevo, the United States installed the Camp Bondsteel military base. From that strategic place...one might have expected more accurate control by the Americans over KLA and the Albanian guerrillas."

RUSSIA: "NATO Comes To Stay"

Fyodor Lukyanov mused in reformist Vremya MN (8/23): "Macedonia is a major milestone for NATO now that it has taken on the job of the chief guarantor of peace in post-Cold War Europe. As NATO goes there, it is sure to get embroiled in internal politics, becoming part of the state system and acting as its prop. Clearly, having the peacekeepers withdraw in 30 to 40 days, as planned by Brussels, is out of the question. Without the prop, the state will collapse. The agreement, made possible by the Western peace brokers, won't hold without them."

"NATO's Intervention Fraught With War"

Yuliya Petrovskaya wrote on page one of reformist Vremya MN (8/23): "Formally, the operation is impeccable: The Alliance has a request from the legitimate government, a peace agreement signed by the principal parties, and the NLA's consent to surrender the arms.... Contrary to NATO's statements, there is no guarantee that it won't be drawn into the Macedonian standoff. Direct involvement is not ruled out, with NATO troops free to use force, if attacked."

"Rebels Like NATO's Style"

Georgiy Stepanov held in reformist Izvestiya (8/20): "NATO is not quite sure of itself. Diplomats in the member countries of the Alliance have many doubts about its mission.... The rebels hope that the presence of NATO troops will 'freeze' the current status quo, letting them stay in the positions they now control. The Albanians need the peacekeepers. The Slavs don't. As Essential Harvest gets under way, the rebels are expected to surrender at least 6,000 to 8,000 weapons. Some sources put their arsenal at 10,000. NATO's estimate is different. It hopes to collect 2,300 to 2,500 weapons. Naturally, the Albanians prefer NATO's approach. They like NATO's style, in general."

AUSTRIA: "Meaning Well"

Foreign affairs writer Gerhard Plott commented in liberal Der Standard (8/21): "It is questionable whether the Albanian rebels can be disarmed.... Alarms should be ringing in NATO considering the past experience in Kosovo with disarming KLA fighters.... In Kosovo, the United States was satisfied with the 'antique weapons' that were handed in, while the modern armament was hidden and reappeared in Macedonia.... NATO is hoping for a successful Operation Essential Harvest, but it

would be the first time that a rebel army in permanent combat delivers its weapons."

"A Test For Europe"

Senior foreign affairs editor Norbert Mayer wrote mass-circulation Kurier (8/18): "NATO is undertaking yet another risky action on the Balkans in order to contribute a little to the stability in the region.... This time it will be a test of the credibility of EU foreign and security policy because the United States is only marginally involved.... But military presence and the deployment of an ever-increasing number of troops is insufficient to give the region a perspective for the future.... While making significant investments and improving the infrastructure of Macedonia would provide peace and stability."

BELGIUM: "Dialogue And Concessions"

In the wake of the recent bomb attacks by ETA in Spain and violence in Corsica, diplomatic correspondent Mia Doornaert held in independent Catholic De Standaard (8/21): "It is an illusion to believe that a policy of dialogue and concessions--as imposed by the EU and NATO in Macedonia--will automatically stop the tradition of nationalistic violence. If that proved to be impossible even in democracies like France and Spain, it is much more difficult to believe that such a recipe can work in the Balkans."

BULGARIA: NATO's Harvest Is In Vain"

Center-left Novinar commented (8/23): "NATO's Essential Harvest...may be in vain.... The concealed arms are enough for at least three civil wars."

"A New State Is A Good Decision"

Yordan Velichkov wrote in largest-circulation Trud (8/21): "Is there a way out of the Macedonian crisis?... The most acceptable option for all ethnic groups is uniting all Albanians from former Yugoslavia in a separate state or uniting them with Albania.... It's far more reasonable to take from Macedonia the five or six thousand kilometers of territory densely populated by Albanians now, than to lose the republic's whole territory to Albanian hands later. There is no other way out of the conflict."

GREECE: "Concerns"

Pro-government, large-circulation Ta Nea wondered in its lead editorial (8/23): "A step toward peace or the unknown?... It is not certain that all Albanian guerrillas subscribe to the agreement nor is it certain that they will all surrender their weapons! At the same time, nothing excludes the possibility that the Albanian irregulars may be re-armed by their allies in Kosovo, who in turn were armed by the partners of those who are now going there to disarm them! If hostilities resume and if the NATO force is subject to attacks, will the 30-day mandate remain unchanged or will it be extended in time and content?"

"Fabrication Of Consensus"

Popular, influential, anti-American Eleftherotypia editorialized (8/19): "The United States is funding a $250,000 campaign aimed at influencing FYROM's public opinion and parliament in favor of the ratification of the agreement signed by Slav-Albanian parties, simply because they are realizing that the agreement would not be easily accepted. Do they really believe that Balkan peoples are so naive that they ignore who ignited the fire in Kosovo--which then spilled over to FYROM--and who armed and encouraged the UCK?... The agreement is fragile because Albanian guerrillas are called to surrender their weapons to NATO voluntarily amidst serious concerns that they will instead pass

them over to Kosovo through non-controlled borders. However, it is better to have a U.S.-funded advertising campaign--if indeed U.S. participation ends there--than a U.S. involvement like in Kosovo, which worsened the situation instead of bringing peace. Wherever there were U.S. interventions, larger wounds were opened that couldn't heal. Such interventions are simply in favor of more weapons sales by U.S. industries, which have every interest to fuel the fire instead of putting it out in crisis areas around the planet. Consequently whose fault is it that 'the majority of the world sees the prime rogue state today as the United States' as Robert Jervis, president of the American Political Science Association recently stressed?"

THE NETHERLANDS: "NATO As Collector"

Influential NRC Handelsblad has this editorial (8/22): "NATO has obligated itself diplomatically.... One of the prerequisites of peacekeeping interventions is having an exit strategy. The 30-day period appears to provide this.... An extension of the mandate need not be the greatest evil. The real risk lies in NATO being made partisan in the conflict between the two population groups. The portents are there already."

"The Elephant And The Mouse"

Left-of-center Trouw editorialized (8/23): "Despite broad support for NATO mission Operation Essential Harvest, skepticism prevails. NATO has made itself extremely dependent on cooperation from both the Macedonian government and the Albanian rebels. We need practically just one wrong shot and NATO will be packing its bags. Moreover, we have to wait and see if the rebels are kind enough to turn in their Kalashnikovs. Like [Dutch Member of Parliament] Middelkoop said: If the mouse squeaks a few times, the elephant will run away.... Under these circumstances, one could wonder if Essential Harvest is indeed of decisive importance in harvesting the arms.... [Dutch Member of Parliament] Hoekema is right when he says that this mission is mainly of psychological and political importance."

NORWAY: "Unsafe Peace"

Independent VG commented (8/23): "NATO's official decision on starting operation 'Essential Harvest' was no surprise. Too much is at stake for both the West and the Balkans if the bloody disturbances in Macedonia should continue.... What NATO fears the most is that the fighting will start again and that NATO soldiers will get killed.... Many fear that the engagement in Macedonia might last much longer than a month and demand many more that 3500 soldiers."

"Fast In And Fast Out Again"

Social democratic Dagsavisen opined (8/23): "There is something half-hearted about the parties' will for peace in Macedonia. The compromises have only been decided on after massive pressure from the EU and from the United States. The rhetoric, the insults that the parties use about each other are not very promising for the future. What nevertheless creates a certain optimism, is the way that the British vanguard has been received by both parties."

ROMANIA: "American Thinking: Inexplicable"

In opposition Cotidianul, Stefan Augustin Doinas commented (8/21): "We supposed that the Americans were thinking like us [the Romanians] and that the pacification of the Balkans was the real reason for NATO's involvement in the conflict which set Yugoslavia on fire. Now, we realize, with a deep regret, that this pacification was not fulfilled, the theater of war has moved from Serbia to Macedonia and the United States' attitude in this region of Europe continues to remain inexplicable. Some say that the United States is supporting the Muslim Albanians to decrease the Slavs' influence in the Balkans, which will favor the Russians whose whose imperial game cannot be closed; or that

the United States is looking for an agreement with the Albanian Muslims to have a playing chip in mediating the conflict between the Arabs and the Israelis in the Middle East. "

"Bet On Peace Is Lost From The Beginning"

In independent Ziua, foreign policy analyst Cristian Stefanescu wrote (8/21): "The last years' experience and the terms in which the [peace] agreement was worked out led us to believe that we are facing a huge failure. The Balkans, as well as the Middle East, taught us that when our feelings of identity are transformed into weapons, there is no way back. And when a dialogue is ended by acknowledging the uselessness of bridges of communication, the bet on peace is lost from the beginning."

SLOVENIA: "Whose Harvest?"

Left-of-center Delo opined in a front page editorial (8/23): "Operation Essential Harvest seems so undefined that even General Wesley Clark...warns about the unpredictable consequences of this inadequately outlined operation. It has not even been agreed whether the peaceful 'harvesting' of Albanian [weapons] may turn into a military intervention, and about what should be done if this really happens."

SPAIN: "The Third Mission"

Left-of-center El Pais wrote (8/23): "It is still to be seen what will happen once NATO pulls its troops out [of Macedonia]: Thirty days is a short period of time to complete a definitive disarmament.... It is significant that the United States is participating...contrary to the initial desire of Bush to pull his forces out of the Balkans."

"NATO And Macedonia"

Conservative La Vanguardia held (8/21): "In this operation, not only is the fate of Macedonia as a unified country in a state of play, but also the credibility of NATO.... The limits placed on the mission raise grave questions. What will happen, for example, after the NATO soldiers have left the scene with the collected weapons? Not all NATO members want to repeat history with a grand invasion in Macedonia. For this reason, they have opted for a limited mission. Only time will tell if it will be enough to prevent another conflict."

SWITZERLAND: "Essential Harvest--And Plan B"

In the center-right, German-language Neue Zürcher Zeitung, Markus Spillmann wrote (8/23): "NATO is dispatching 3,500 soldiers to Macedonia to disarm the forces of the ethnic Albanian National Liberation Army (UCK).... That is Plan A. The question is, what happens if Plan A fails? Plan B, according to Brussels, is to cancel the operation and immediately withdraw the troops. So, should a few Albanian guerrillas or a hothead among the ethnic Slavs decide not to cooperate, the most important institution of trans-Atlantic security will turn tail and run.... In Macedonia the Alliance has made itself hostage to a political process that could very easily fail. Perhaps all will go well. If not, it would be good to have a better Plan B."

TURKEY: "The Unwilling Peace"

Zafer Atay wrote in economics/politics Dunya (8/22): "The agreement sounds very nice as a text, yet its implementation is not going to be that easy. There is a serious mistrust between the sides, and it will be way too optimistic to believe that these groups will forget everything and start working together for peace. The peace was achieved due to immense efforts from both NATO and the EU.... The most important issue remains the weapons that Albanian groups have. It remains to be seen

whether they are going to give back all of their weapons."

"The Reluctant Peace In Macedonia"

Necati Ozfatura wrote in conservative/religious Turkiye (8/22): "The Macedonian ultra-nationalists are the main obstacle toward implementation.... If the Macedonian militia groups continue their provocations, the peace process could easily turn into a war situation.... This is actually a reluctant peace that is due to pressure as well as intervention from outside. Since fanatics do not welcome this agreement, its fate is on shaky ground."

EAST ASIA

JAPAN: "Fears Linger Over Rekindling Of Fighting"

Liberal Mainichi observed (8/23): "NATO governments have finally approved a plan to send in thousands of troops to collect weapons from ethnic Albanian rebels in Macedonia. It took NATO more than two months to approve the plan because of the time taken to confirm the continuation of a cease-fire reached between Macedonian government troops and rebels. Although NATO Secretary General Robertson appears optimistic about the dispatch of NATO troops to Macedonia, some member nations are cautious about the deployment of a large force out of concerns that it might rekindle fighting and subsequently involve NATO troops. The U.S. military's 'passive' participation in the troops dispatch has indirectly made West European member nations more cautious. The Macedonian situation remains far from promising. It is still explosive."

SOUTH ASIA

BANGLADESH: "The Peace Plan For Macedonia"

Conservative, Bangla- language Ittefaq commented (8/17): "Muslims have been in favor of peace from the beginning, although they had to take up arms. It was the Macedonian government who refused to negotiate with the rebels for peace. However, a peace plan mediated by the West has been signed. The Muslim rebels immediately accepted the plan, terming it their victory against the government's repression. According to the plan, the Muslim rebels will surrender their arms to a NATO force, and some of the Muslims' demands will be accepted. We would heave a sigh of relief if the signing of the peace plan had ended the conflict. It is really unfortunate that fresh fighting has begun. We would urge all sides to work for peace. We hope that the recent clashes were isolated incidents and that a complete peace will be established in Macedonia. The rebels will surrender their arms if the plan is implemented. It is the responsibility of the NATO force to ensure that the Muslims do not face repression once they surrender their arms. Any kind of failure in this will worsen the situation. We hope that the Western-mediated peace plan will be implemented in a perfect way."

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Thursday, August 23, 2001

MACEDONIAN PEACE DEAL: INCREASING PESSIMSIM

Observers in Europe weighed in on the peace agreement reached in Macedonia last Thursday. The hopeful tone struck one week ago by some European observers virtually evaporated, replaced by increasing pessimism that peace in the region is, at best, an iffy proposition. *Opinionmakers foresaw many risks and obstacles ahead for all parties--including the two antagonists and the international contingent.* ***Foremost among their concerns was that "serious mistrust" between the ethnic Albanian and Slavic sides remains,*** *marked by continuing episodes of violence which could ultimately threaten the implementation of the Ohrid peace deal.* ***Commentators also proffered their assessments on the role of NATO and its Operation Essential Harvest. Flattering portraits were scarce.*** *Only a few media voices believed that the Alliance "got it right" this "third" time around--a reference to other NATO missions in Bosnia and Kosovo. Meanwhile, the regional media from FYROM, Kosovo and Albania was replete with harsh and insulting recriminations. Notably absent was any prediction of peaceful days to come. Salient themes follow:*

ALBANIAN 'TERRORISTS'...: Pro-government and independent dailies in Skopje--consistent ly referring to the Albanian rebels as "terrorists"--expressed dismay that NLA leaders are being "legitimized" as "politicians" in the peace process. There was also heavy press coverage of the attack on the Orthodox monastery in Lesok. Pro-government Utrinski Vesnik blamed the blast on Albanian "terrorists," contending that their aim was to "undermine the historic, cultural and...national identity of the Macedonians in the Tetovo region." Commentators also aimed their criticisms at the U.S., suggesting that it is biased toward the ethnic Albanians, and that the Albanians "do what they want with the stupid Americans."

... AND SLAVIC 'CHAUVINISTS': Analysts in Pristina and Tirana railed against Slavic "extremists" and "hot heads" who are "trying in different ways to obstruct [the Ohrid] agreement." Muslim voices in Bangladesh and Turkey joined the fray, also condemning the "ultra-nationalist" Slavic government as the "main obstacle" to peace.

NATO MISSION--TOO LITTLE, TOO SHORT, TOO MUCH, JUST RIGHT?: Outside the region, the focus was more on NATO. Some European observers--most vociferously in the conservative British press--believed that the Alliance was getting involved, once again, in a scenario in which it had no business. Greek columnists went further, suggesting that not only does NATO go where it should not, but also that it then goes on to fail in its missions. Others--for instance, in the center-left media in Germany--were critical of the time and troop limits set by the Alliance for Operation Essential Harvest, holding that an expanded mission must be an option. The few optimistic media voices in Britain, Germany and Italy tended to argue that the Alliance mission is crucial and that its plan of action is on target. They also were quick to emphasize that the operation has gone ahead "without U.S. front-line forces." They welcomed this as helping to "pave the way for other missions which European states may have to undertake on their own."

EDITOR: Diana McCaffrey

EDITOR'S NOTE: This survey is based on 47 reports from 21 countries, August 17-23. Editorial excerpts from each country are listed from the most recent date.

EUROPE

FORMER YUGOSLAV REPUBLIC OF MACEDONIA: "It Is Obvious Who Is For War"

Independent Dnevnik ran this editorial by Branko Geroski (8/22): "The campaign for promoting the Ohrid peace deal, for which the generous and creative Americans will invest a fantastic sum of

$250,000, started with the demolishing of the church in Lesok, a mean attack carried out by heretics who Western diplomats and media promote as peacemakers and fighters for rights.... Some--foreign and domestic--allegedly concerned about the threatened peacemaking process, recently asked me why Dnevnik had changed its policy from supporting peace to supporting war. Dear readers, do not buy such stories and do not allow such morons to convince you that you are wrong. We have not changed and we are definitely not wrong. Yes, something has changed. The Lesok monastery--part of it--does not exist any more. Some 70 Macedonian families have been left without men. Many things have changed for the worse.... We are not for war. It is obvious who is for war. It is obvious who started this. It is obvious who breaches the cease fire and kills the fragile peace. We are the same--we were and are still for peace. The terrorists were and are still for war. Only the foreigners changed their policy. For them, Ahmeti was a bandit. Now he is Mr. Nice Guy. It does not matter to them who started the war. They do not want to admit that the Macedonians are victims in this war. They do not support peace. They want us to capitulate."

"Attack On Lesok Monestary: Situation On Ground Is Not Optimistic"

Pro-government Utrinski Vesnik's Saso Colakovski editorialized (8/22): "The message of the attack [on the Lesok monestary] was to undermine the historic, cultural and finally, the national identity of the Macedonians in the Tetovo region.... The situation on the ground is not optimistic. On the contrary. In the tactics of the terrorists we can recognize their attempt to maintain low conflict intensity. For two reasons. The first, short-term, is accomplished when the Macedonian forces respond to provocation. The second, long-term, is the plan to transform the 'Harvest' mandate into a demarcation mandate.... The problematic attitude of Europe--and particularly the United States--towards the crisis in Macedonia originates in the American support for the Albanian radicals in Kosovo. This support has become private and profit-inspired now."

"NLA In System More Dangerous Than Gangs"

Pro-government Utrinski vesnik ran an editorial by Saso Colakovski (8/21): "The Tetovo village of Sipkovica, where NLA leader Ali Ahmenti held a press conference and displayed flags of NATO, the EU, the United States and Albania reminded one of a protectorate. His press conference is worth perceiving from another angle, too. Similar to the already established pattern in Kosovo (with Hasim Thaci) designed by Western intelligence, in two-three weeks, Ahmeti will most likely replace his uniform with a suit which will represent his public promotion from a war leader to a civilian politician. There are a few elements worth mentioning in this story. First, the international community made a critical strategic move by naming the Macedonian security forces and the terrorist gangs as the 'two sides.'... After putting Ahmeti at the negotiating table (through Xhaferi and Imeri), Western advisers suggested to the Macedonian authorities that they should make big compromises because their ' position on the ground is bad.' Macedonia sustained this cynicism too (after pressures for 'restraint' and 'proportionate response'), but bringing Ahmeti in Sipkovica turned our frustrations into inhibitions. Does anyone remember that Ahmeti is on Bush's and the EU's black lists?

"Does anyone remember that the Macedonian state pursues him for crimes he has committed in the past six months? I can see the outcome. ONA accepts to lay down arms, thus washing its hands of the massacres in Grupcin and Ljubanci. Then, ANA takes responsibility for the killings. Ahmeti claims he has no idea who the new guys are. Marvelous. That's how Hasim Thaci became a politician. That's how the UCK became OVPMB. Macedonia still needs a leader who will tell the truth, no matter how painful it is!"

"Ali, NATO And The Forty Thieves"

Independent Dnevnik carried an editorial by Zarko Jordanoski (8/21): "I admit that those theories that NATO, that is, the United States, invented the NLA to destroy Macedonia once seemed realistic to me. However, after the news conference of Ahmeti in Sipkovica it is quite clear that the Albanians do

what they want with the stupid Americans. The stupidity was incorporated from the very beginning of the crisis when NATO and the EU decided that terrorist aggression should be resolved by making political concessions to the Albanians and by blocking the Macedonian security forces. It should have been the other way around, which would have made the crisis end sooner. NATO could have thus said that it had maintained peace in a sovereign state--a 'partner for peace.' Even after that, the democratic system in Macedonia could have started being fixed. But in order to avoid the truth that the UN 'protectorate' was a source of instability, NATO (protecting itself) did a great job for the terrorists allowing them to increase their appetites. To maintain their stupid concept, NATO and the EU had address some facts. First, they had to prove that the Albanians were really endangered species in Macedonia. How did all those reporters (notably Badinter) feel, who described Macedonia as 'success story?' It was 'bingo' for the terrorists. Second, they had to prove that the conflict was not imported from Kosovo, because if it was it should not be resolved with political methods. That is why the Americans had to tell the neat and naïve Germans to 'lose' border control. Third, they had to prove constantly that the Macedonian army and police were not capable of coping with the terrorists. That is why they had to threaten 'poor' Trajkovski with The Hague and with sanctions to evacuate terrorists together with their trainers--'work on' the Ukrainians, bring Zlenko to Ohrid, etc. Super bingo for the NLA! After they brought the peace plan to the 'Harvest' stage, they realized that they needed Ahmeti. If he had said 'no,' they would have appeared morons. That is why any disarmament was better that none. And Ahmeti was 'generous' too. He will deliver all pieces of weapons except for those that he will not deliver. Bravo! The Americans buy this! After this, not only that he will display flags of the EU, NATO and the United States in his 'liberated territory' in Sipkovica, but he will sleep in sheets made of those flags."

YUGOSLAVIA (KOSOVO): "For Albanians, Religious Buildings Are A Special Cult"

Pro-LDK Bota Sot commented (8/23): "NLA leaders have unanimously condemned the destruction of the Orthodox monastery in Lesok.... Thus the NLA denied speculations and the most monstrous accusations of the Macedonian Slav extremist circles.... They accused Albanians for the damage inflicted to this ecclesiastical building.... They blame Albanians, even compare them with the Taliban in Afghanistan!... In the Albanian-Macedonian conflict (when it comes to the burning and destruction of the religious and cultural buildings) Talibans were the Macedonian Slav paramilitaries themselves. With their killing machinery and military and paramilitary punitive expeditions they burned and destroyed 50 mosques and many Albanian villages, including many objects of the Albanian culture that clearly proves the autochthony of the Albanian population in Macedonia."

"Slav Paramilitaries, Nationalists Against Albanians, NATO"

Pro-LDK Bota Sot had this comment (8/22): "The line of extreme nationalism of the Macedonian Slavs (including some 20,000 paramilitaries who are, most likely under Georgievski's command) is obstructing the implementation of the peace agreement.

"Their sole objective is to realize the Macedonian Academy of Sciences scenario on the partition of the territory.... Behind this scenario for the failure of this agreement stands a part of the Macedonian Slav official authorities. For five days Macedonian Slav extremists have blocked the road to Kosovo thus cutting the main supply for NATO peacekeeping troops in Kosovo, until the Western powers meet a long list of demands set by Todor Petrov, the president of the Macedonian World Congress. Of course, these demands are damaging for Albanians and for the peace agreement. These demands...are oriented against the United States and especially against NATO.... These chauvinist forces think that only the renewal of the interethnic conflict can facilitate realization of their demands for the partition across ethnic lines, meaning that there would be an ethnic cleansing of Albanians from Kumanovo region and northern Macedonia. The alliance should also disarm the 20,000 strong formations of the Macedonian Slav paramilitaries.... The international community should reward the good cooperation Albanians have offered for implementing the agreement. It will be done by disarming simultaneously the NLA and the Macedonian Slav paramilitaries."

"The Alliance Should Move Quickly To Implement Peace"

Pro-LDK Bota Sot commented (8/20): "Macedonia lives these days between the implementation of the peace agreement and the chauvinist exponents of the Macedonian Slav side who are trying various ways to obstruct this agreement. They are doing that by inciting hatred against the Albanians but also against the NATO deployment in this country. In that context the Macedonian Slav chauvinists have blocked the highway that connects Skopje and Kosovo thus obstructing NATO's use of its main supply line for its peacekeeping forces in Kosovo, unless Western powers meet a long list of demands which are damaging to Albanians and against the reached agreement for peace. On the other side, a good portion of the Macedonian media have created new tensions with their tendentious reporting instead of creating a climate for the relaxation of the interethnic relations in Macedonia."

"'Harvesting' The Peace"

Independent tabloid Kosova Sot had this comment (8/20): "The actual military operation is starting in an atmosphere different from before. The feeling of distrust toward the West has increased while a part of the Macedonian Slavs see Europeans and Americans as the allies of the 'Albanian terrorists.' Added to the skepticism greatly expressed by the political class of Skopje, a hostile climate surrounds international troops which could make it hard for them to complete their mission of collecting arms from the Albanian guerrilla. There are numerous elements to support this claim. Immediately after the signing of the peace agreement, Georgievski and other Macedonian leaders said that the parliament would not ratify the agreement if the NLA did not hand over all weapons. Parallel to these rather unenthusiastic statements, the fighting and victims on the ground pose a serious threat to the agreement. It is clear now that Macedonians are trying to minimize the demands from the agreement by making its ratification harder and perhaps later hindering the practical implementation of its provisions."

"Is The Macedonian National Interest Anti-Western?"

The publisher of independent Koha Ditore, Veton Surroi, opined (8/19): "Albanians are aware that the partition of Macedonia would set a precedent that will have an influence on Kosovo and Bosnia partitioning. Albanians of the Balkans have shown their consistency in their policy towards the Euro-Atlantic mainstream. Another consequence of this policy is about the communication of Albanians across borders. Ethnic Macedonians will easily understand that the Albanians need to have communication among them. The ability of Albania, Kosovo and Macedonia to communicate free of strong borders is an essential part of the Albanian national interest. At the same time this is a part of the regional Balkans' interests and of the interests of a new Europe.

"With this the Albanian national interest becomes part of a historic development followed by the most developed countries in the world. The question is where do the national interests of the Albanians and Macedonians confront each other? Nowhere but in a primitive and anti-Western manifestation that was 'spontaneously' organized by a part of the Macedonian political bloc. Instead of a Macedonian vision oriented towards the West, Ukraine suddenly became favorite, NATO hated and American citizens were recommended not to travel to Skopje, as was the case with Tehran some time ago."

"Albanians Did Not Win The War--Just A Battle"

Pro-LDK Bota Sot had this comment (8/19): "Although the Albanian-Macedonian Slavs agreement brings 'a moment of a relieved breath' for Albanians, it in fact just initiates a process of seeking their legal national rights. Therefore the agreement does not mark 'the winning of the war' but only 'of a single battle' which should reconsolidate the Albanian subject in Macedonia around joint projects

from the program of the national movement for the resolution of the Albanian issue."

ALBANIA: "The Last Macedonian Ravings "

Medium-circulation, independent Koha Jonë front paged the following op-ed piece (8/17): "Imaginary enemies are always essential for a state with dictatorial nuances in order to keep the establishment standing and the nationalistic spirit alive. That is what seems to be happening with the Macedonian government. Although there is a very balanced president there, the executive structure of this state is very far from Trajkovski. Defeated in the nationalistic battle, 'ashamed' before the anti-Albanian militants, the prime minister of Macedonia is looking for an enemy to bill with all of his political failures. The Macedonian authorities declared yesterday that Albania has supported the terrorists who have acted there. While all are trying to implement the Ohrid agreement, while the internationalists are turning the final pages of their projects on the future of Macedonia, while the NATO troops are awaiting orders to 'march' to the Macedonian land, while both ethnic groups are being relieved from fears and refugees get ready to return, this accusation comes from the 'dark' Macedonian offices. There have been previous attempts by the reckless Macedonian diplomacy to incriminate Albania but they have faded away quickly. The Macedonian hotheads that sought for about six months the political and military execution of the Albanians are stuck in a trap from international pressure and the signature they put in Ohrid. And in order to come out 'clean' in front of those who had asked for weapons to fight the Albanians, they are trying to shift the hatred of the Macedonian population toward Albania. After the failed undertaking to save Macedonia from the Albanian seed or at least to leave the Albanians in the status they had been before, Georgievski is now trying to assume the merits of a moderate politician who cannot be blamed for FYROM's mess, but was always on the defensive. Of course, finding an outside enemy and exporting the guilt is not easy for the hotheaded PM, especially now that some graves of murdered Albanians are being discovered. It would be better for the Macedonian government to seriously obey the instructions of the internationalists in order to come out of this threshold of civil war with honor, giving up on ravings and daydreaming, and for the Macedonians to try and establish fragile bridges with the Albanian ethnic group."

BRITAIN: "Third Time Right"

The liberal Guardian editorialized (8/23): "NATO's intervention in Macedonia...has been a remarkably smooth and uncontested affair.... One reason is that the mission's mandate is narrow and carefully agreed with the contending sides.... NATO is not there to enforce it. Its primary duty is to collect weapons from the guerrillas and ensure they qualify for amnesty. The model is not the role NATO has been playing in Kosovo or Bosnia, but what happened in the Presevo valley of south Serbia earlier this year.... A second reason for NATO's almost relaxed approach to its current intervention is that it is acting, for the first time in its history, as a 'coalition of the willing.'... This is an important precedent, symbolized most strikingly by the absence of American ground troops.... [But] the fact that a NATO operation has gone ahead without U.S. frontline forces helps to loosen Europe's excessive dependence on its transatlantic links and paves the way for other missions which European states may have to undertake on their own. Arguments between Washington and the Europeans postponed action in Bosnia and Kosovo. This time, at last, the lessons of dissension and delay have been learnt. The major issue for NATO's new mission is how it ends.... The Macedonian parliament will have to ratify the arrangements for providing greater civil rights to the Albanian minority as the ethnic Albanian guerrillas hand in their weapons. Whether some guns are hidden is not the main issue. More important is what happens when NATO leaves.... The [OSCE] ought to prepare now to enlarge its observer missions to monitor progress when NATO withdraws."

"Nothing But A Make-Work Scheme For NATO"

An opinion piece by Simon Jenkins in the conservative Times read (8/22): "I have not read a single commentator on the Balkans who regards this week's Operation Essential Harvest as anything but a

make-work scheme for NATO. Macedonia should be left alone to handle its own internal affairs. But if NATO must meddle, given its partial responsibility for this conflict, the Macedonian government might reasonably expect it to come down unequivocally on its side. NATO should occupy the rebel areas, disarm the troops and keep the peace. NATO should side with an elected government, not glamorize the NLA and its pectorals and bandannas. Yet this is precisely what NATO has said it will not do.... Using British soldiers as NATO's political mercenaries is immoral. They are not defending British territory, British citizens or British interests. They cannot argue that they are protecting Europe or promoting world peace. By bolstering the egos of a group of insurgents in a tiny Balkan state, this intervention has done the opposite. Any villain with a grouse against his government can cause mayhem and know that Lord Robertson will come running, cameras at the ready.... The argument for Britain's latest Balkan adventure has not been discussed or tested in public. It cannot go unchallenged."

"Disarmament In Macedonia: It's Just A Balkan Coffee Break"

Andrew Apostolou judged in the conservative Daily Telegraph (8/21): "The Macedonian peace deal is a post-dated suicide note. All the elements of failure are present: futile disarmament and incentives for partition. Fumbling mediators have struggled to deal with venal and dishonest local politicians. The mediators have naively assumed that both the ethnic Macedonians and ethnic Albanians want to keep Macedonia intact. In an unfortunate echo of 10 years ago, the cry has gone up that this Balkan calamity, like Yugoslavia in 1991, is an issue to be settled by Europeans.... For all their griping, the Europeans crave American leadership. Without the committed weight of the United States behind them, the mediators have been undermined. The Western mediators have been manipulated and outmaneuvered. Ethnic Albanians and ethnic Macedonians alike repeatedly lied to the mediators.... The Macedonian government has called for an end to fighting while handing out weapons to ethnic Macedonian civilians.... Although war-related deaths have been below 200, the conflict has displaced tens of thousands, laying the foundations of a future partition. The peace agreement will accelerate this trend towards ethnically concentrated populations.... Each side wishes to dominate, not to cooperate, making partition a temptation for ethnic Albanians and ethnic Macedonians alike. There has been diplomatic babble about a 'Belgian model' for Macedonia. Perhaps, if Macedonia becomes as boring as Belgium, then nobody will want to die for it. If only that were true."

FRANCE: "NATO's Harvest"

Right-of-center Les Echos said in its editorial (8/23): "As opposed to its mission in Kosovo, [NATO] is keeping all weapons in their sheaths: proof that NATO can also play a preventive role."

GERMANY: "Between War And Peace"

Martin Winter commented in left-of-center Frankfurter Rundschau (8/23): "The decisive question in Macedonia is not whether British parachuters will be ambushed when collecting weapons. The difference between war and peace is whether the EU succeeds in stabilizing the process of a peaceful conflict settlement.... This is the only context where NATO's mission makes sense.... Nobody seriously believes that NATO will collect all weapons in a period of 30 days.... But the envoys and all sides involved will get a breather and time to cool down.... This alone will not be enough. The EU must now also keep to its promises: first, pressure for a quick amendment to the Constitution must be kept up. And second, the people in Macedonia need to see a peace dividend. And this means: greater economic assistance. Great risks remain for the soldiers as well as for the peace process. There is no guarantee for success. But the EU has at least created a opportunity and it would be utterly irresponsible not to take advantage of it."

"NATO On A Risky Mission"

Berthold Kohler penned the following editorial in the front page of center-right Frankfurter Allgemeine (8/23): "A lot is at stake in Macedonia. If the young state disintegrates, the whole architecture of southeastern Europe would begin to sway. That is why the conflict must be contained as quickly as possible, if necessary with a 'robust' intervention. Right now, only NATO is able to do that. If the Alliance turned out to be a paper tiger in this mission, the conflict in Macedonia would not be the only one that could spiral out of control.... Defending its own credibility must be one of NATO's goals in Macedonia. Insisting on the fact that NATO troops are given a realistic mandate and sufficient means to cope with the perceived risks is not lack of solidarity with the Alliance but loyalty to it."

"No Alternative"

Juergen Spengler commented on national radio station Deutschlandfunk of Cologne (8/22): "It is necessary to discuss in a critical way the pros and cons of the EU/NATO mission, but there is no alternative.... If NATO tried to get out of the mission, the price would be to expose itself to ridicule. This would, under certain circumstances, be tolerable but more important is that NATO has to live up to is word. It cannot afford breaking promises and losing its credibility.... But the decisive question is whether the chance for peace in Macedonia would be greater with or without NATO. The answer is clear. If the Alliance withdrew, a bloody civil war is likely to begin. No, there is really no alternative to 'Essential Harvest.' However, NATO is again performing only an emergency operation. The international community lacks the will to discard the obviously failed concept of a multi-ethnic state and to restructure the region in the western Balkans. And it does not have the courage to risk something in order to implement such a plan, give [NATO] a robust mandate, and accept military risks. This lack of courage is understandable, since the politicians' fear of the voters is too great and is justified. What they need are really sound arguments to convince the people that it is worthwhile risking the lives of one's own soldiers to force the peoples in the Balkans to make peace."

"Operation Sunshine"

Stefan Kornelius has this to say in center-left Sueddeutsche Zeitung of Munich (8/22): "In Macedonia, NATO is about to make a similar mistake [as in Kosovo]. Even though there is a military goal (the collection of weapons) and a time frame (30 days), the Alliance is again ignoring the real purpose of the operation. The forces will be nothing but a buffer, a bulwark between separatists and the Macedonian army. They are supposed to calm down both sides, halt further skirmishes, and make possible a political process.... Seen from this angle, NATO is working much more than in previous missions as a midwife for democracy. But...who controls the territory from which the KLA withdraws? Who guarantees ethnic diversity? Who decides when radicals no longer want peace and want to divide Macedonia? With its tight mandate, NATO has given up any chance of escalating the situation. It makes itself predictable, small, and thus assailable. And the mood in the sending states can be used as a tool by the radical forces in Macedonia.... If violence escalates, if soldiers are involved in fighting and killed, for the peoples in the NATO states this would be a shock. The damage for the Alliance and the Balkans would be immense. The secretary general of the Alliance and the chancellor should have the courage to mention these dangers, even though they have signed a sunshine mandate."

"Thanksgiving In Albanian"

Bernhard Kueppers argued in an editorial in center-left Sueddeutsche Zeitung of Munich (8/21): "The KLA in Macedonia will only turn in its less important weapons to NATO's disarmament forces. But this is only one reason why KLA leader Ahmeti wants to meet NATO forces in Macedonia in a 'friendly' way. Another aspect is more important. Ahmeti and the KLA leaders in the background in Kosovo and in the Albanian diaspora consider the 'voluntary disarmament' their victory, because NATO factually upgraded the KLA as a negotiating partner and accepted it as a guarantor of peace in the region. This will help the KLA get rid of its image as a gang of thugs.... NATO must watch out not to be misused in the end. Like during the recognition of the Republika Srpska in Bosnia and the

tolerated displacement of Serbs from Kosovo, the Alliance could be used for the territorial solution of ethical questions in Macedonia."

"One Step, No More"

P. Bumeder said in a commentary on regional radio station Radio Kultur of Berlin (8/18): "The agreement is one step to settle the conflict, no more. Macedonia still stands on the brink of war. Individual exchanges of fire and skirmishes are still a daily event. Every day can bring the country closer to war, and NATO will not be able to change this situation too much if it confines itself to...collecting weapons. Nevertheless, this mission in Macedonia is not an outing in uniforms.... The Western forces could turn into a buffer between two highly armed and pugnacious parties. In such a situation, the KLA would like to hide behind such a buffer and continue to control the regions which it had won with military means over the past few months. The 'harvest,' which NATO has now promised to reap, will not be promising in such a case. Under the current mandate, NATO is not allowed to use military means to increase the 'harvest yield.' It may be possible that the soldiers will return as frustrated and unsuccessful 'harvesters' after 30 days."

ITALY: "NATO Mission In Macedonia Begins"

Defense analyst Andrea Nativi wrote in pro-government, leading center-right Il Giornale (8/23): "A successful outcome of 'Essential Harvest' is the only alternative to the dismantling of Macedonia and to a civil war.... Obviously no one is fooling himself into thinking that that the guerrillas will, indeed, turn in all the weapons in their possession.... 'Essential Harvest' is important also for other reasons: first of all, the absence of U.S. troops."

"NATO In Macedonia: Operational Phase Of Disarmament Mission Begins"

Leading business-oriented Il Sole-24 Ore noted (8/23): "As he announced at the beginning of Operation 'Essential Harvest,' Robertson pointed out that the mission is indispensable to stability in the area.... Robertson underlined that, even if this is a peace operation, NATO troops, if attacked, 'will respond' in order to defend themselves. There are still doubts about a mission that has been criticized since the planning phase. First of all, the doubts concern the presence in Macedonia of guerrillas who refuse to turn in the weapons.... Secondly, there is uncertainty about the real number of weapons that NATO will have to collect."

"A Quick Mission Full Of Risks"

An analysis in pro-Democratic Left Party L'Unita held (8/23): "The strongest doubts concern the short period of time set by NATO for this mission: Only one month to collect the weapons from the Albanian guerrillas, and then everybody will return home. NATO missions in Bosnia and in Kosovo have continued for years and nobody has ever mentioned returning home. That would be like giving up the work done so far and letting the 'film' about local conflicts start all over again. Why has a precise deadline been set in the case of Macedonia, then? The answer can be found in the fear of getting stuck in a crisis that a prolonged NATO presence would, paradoxically, risk feeding. How? By adding to the hopes of those--both Slovenians and Albanians--who count on the armed presence of Western nations as a defense against destruction by the enemy, but also as possible sponsors of a territorial partition, based on ethnicity. The supporters of single-community solutions--independent states or highly autonomous regions--hope that, with time, Western nations will become convinced that peaceful coexistence is impossible, and that the only solution is the total or partial separation of the two communities. NATO does not want to give time to the extremists to define a way--through provocations, ambushes and attacks--to implement their plan, i.e., to convince Western nations that putting up single-ethnic or single-religious blocs is the only way to achieve peace. Hence the West's determination to end the mission soon in order not to become trapped into that logic."

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

DATE RECEIVED: 8/6/01

NAME OF CORRESPONDENT: William Elliott Burk

SUBJECT: Russia

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	ACTION DATE M/D/YR	DISPOSITION TYPE RESP	C D	COMPLETED M/D/YR
	CUGONZ	A	8/6/01		C	
	Courtney	A				

ACTION COMMENTS:

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ADDITIONAL CORRESPONDENTS: MEDIA:

REV_00260667



July 31, 2001 A.D.
To White House Counsel
ALBERTO R. GONZALES
The White House

Dear White House Counsel Alberto R. Gonzales

Since the USA *is hurtling toward certain economic and thermonuclear destruction,* possibly sometime in your lifetime, as a Christian, save the USA and as many lives as possible. **It is God's choice for you to choose between life or death for America!!!**

Pres. Reagan ***humbled*** Russia into cooperating ("without firing a shot") *by* ***massively building up the USA military strength*** making a possible victory by Russia in WWIII a zero probability event, therefore Russia **relented** and **cooperated** for a short time under Pres. Boris Yeltsin.

REV_00260668

Angels are much more intelligent than men and it is an important reason why every effort possible to obey the Bible and Word of God is so important in the White House.

It is very good that President Bush is trying to stop the demonic slaughter of millions of babies, however it would be even better if he advocated the Christian America Amendment on the website titled "Christian America Amendment" advocating a Constitutional Amendment where free exercise under the law for all Christian religions is again possible by law, as it was in the days of America's Founding Fathers. America became a nonchristian nation by the "Treaty of Tripoli, Article 11" and must repent by law and return to Jesus as the **Christian America Amendment** allows.

The early Founding Fathers of America wanted to establish God's Kingdom here on Earth by the USA and later broken their covenant to God and repudiated a Christian nation in favor of legal polytheism and persecution of the free exercise of all Christian religions.

In Federal Government, it is God's will to care for the economic prosperity of the "common man," that is for Christians to have a higher standard of living I will briefly write of the three pillars of revitalizing America with a sustainable higher standard of living of most people if you will allow the Holy Spirit to teach you in these matters. It is God's will to establish His Kingdom, His Government Here on Earth Today!

Because most people serve money instead of God as Jesus commanded, and greed and capital formation are the idols of their lives, "carrot and stick" tax incentives and economic packages must be passed into law.

Because God labels the End Times government the Beast such incentives are needed!

1) **ITC Investment Tax Credits 10% for 10 years resulting in effectively 100%** of the cost of new factories and installed manufacturing equipment in the USA. (WTO treaty forbids such necessary tax credits so America will die under the UN world government.)

2) **10% minimum Tax Credit for ongoing corporation Research and Development,** Research and Experimentation, instead of merely a tax credit for the increase over the base ongoing corporate budget. (By development of new products and the ITC tax credits, the factories and jobs will be built in the USA the rest of the world will envy and purchase making a sustainable general higher standard of living possible through the labor unions efforts in achieving the necessary economic ripple effects from the workers in the manufacturing sector for us in the service sector.

By producing more and better products in the USA, the rest of the world will come to buy them. R&D drives GDP growth in economics.

(Economist Dr. Robert Solo of M.I.T won a Nobel Prize in Economics for his contribution in understanding of in general, increasing R&D results in increasing GDP.)

3) Moderate Tariffs, Duties and Quotas. Moderate tariffs, not 10% tariffs "across the board nonsense" that would drive domestic inflation, but carefully calculated tariffs, duties and quotas necessary to stimulate domestic production and provide for manufacturing base necessary for a sustainable USA economy. (In contrast, closing America's factories results in cheaper goods resulting in price deflation as a short term "high," but inflation will again surface taking its' toll.)

America should have a "BUY AMERICAN FIRST" policy as it once did. Also as selling Israel to God's enemies was forbidden and you and America as a once Christian nation by covenant are also forbidden to sell America to God's enemies as is being done in television and in national security.

In the United Nations and NATO it is usually just the USA and Britain going it alone. The UN is only a deception and sin against God and Mankind, helping their enemies to take their lives ultimately as the Apocalypse of Jesus has written.

The **"Cold War" national security measures that George Bush's father ended must be restored immediately,** or America has literally NO SECURITY.

Why let God's enemies work at USA National Labs and steal national secrets, including all the atomic bomb secrets?

Is America only made up of traitors or is there a remnant pleasing to God's will so to be righteous before Him?

As China's Dr. Lee and other foreign nationals plunders and loots America's technology, there is only sincere mutual deception operative as National Security.

As the "Beast" and the beasts in the Book of Daniel representing the world governments in a time line, people behave as animals in regards to money and greed and a tax system/economic policy that recognizes this basic fundamental sin of most people in regards to the service of money.

The recent tax cut bill was an economic disaster to the future of America, because of an inadequate manufacturing sector to absorb and expand using those additional funds in the economy so by producing more, *there would not be future inflation by having given consumers more money to spend.* And by taking money from those paying Social Security Taxes and giving most of it to the rich and some to the rest in a last drunken "credit card spending spree" until America is fully destroyed economically, making the complete fall to the waiting arms of the U.N. monster beast America created as its' leaders were deceived into making treaties with God's enemies. Keep in mind, supernatural spirits, whether it be the Holy Spirit controlling Christians as written in the Book of Acts of the early Christians and hopefully of you, and evil spirits, deceiving spirits and the power of sin as Apostle Paul wrote in Romans 6-8 that caused Apostle Paul to do evil, until he repented by the power and grace of Jesus Christ the Creator.

Only by the power of Holy Spirit can leaders and nations be pleasing to Him. Therefore we are to seek His power in our lives, and not be drunk with the power of other spirits in government.

Regarding the Jewish people, the Federal Reserve Chairman is a wonderful person, friendly and I would be honored to know him personally and have him as my friend. However as "Worth" magazine wrote, Alan Greenspan worships money and greed.

Jesus said "you cannot serve money and God!" Greenspan fails to establish the prosperity of the common man as his goal and policy.

In the Bible in Romans 11:28 Apostle Paul writes the Jewish people are your enemies (better believe the truth Jewish people are enemies to the long term welfare of the USA), and Fed Chairman's Alan Greenspan's view to reduce most of the American people to global economic productivity units and poverty, is great sin against Jesus and great harm to the future of the USA in free trade.

(Yes at the Second Coming or their personal repentance in accepting their and our Messiah Jesus some Jews will convert and come to eternal salvation and be our friends indeed, those whom God fore knew from the beginning of the World will be saved, however as for now, they are indeed your enemies, especially in their government policies for they oppose defenses and the Kingdom of God at their every vote.)

The **"New Economy" is a great lie** and deception making out if everyone gets college degrees, then most the economy being consumer and service sector oriented would somehow get productive, when in fact, the service sector, despite raising employment standards requiring college degrees that have little job relevance, does NOT raise general economic productivity in the for most of the economy.

As the **"New Economy" ravages the middle class with free trade,** with lower buying power with reduced discretionary budgets with a lower standard of living, fewer consumer goods are purchased causing a spiraling falling economy in the long term for the USA outlook. Although there will be minor "upticks" in the economy as the business cycle is not dead, the **general trend of the economy will be a falling standard of living for most people this century as ALL macroeconomists will confirm.**

The looting of the Social Security Trust Fund for the recent tax-cut and refund, will indeed give a temporary boost to the general economy, however it will soon be the end of America as a world leader unless you repent and act righteously in economic policy. Instead of the Social Security funds being used to buy the electric power companies and paying the dividends to Social Security recipients in the coming decades, the "Beast" capitalistic ***electric utilities are turning to expose how truly greedy and cruel they actually are!!!***

As the "dot.com" or "dot.bombs" did NOT have a valid business model, neither does America's extremists libertarian economists have a valid business model for America's economy. ***It isn't a matter of closing "buggy whip" factories, it is a matter of closing almost ALL factories*** with a gradually falling standard of living for most people. The typical false economic paradigm is people are taking low paying service sector jobs and losing high paid factory jobs.

The truth is there is NO way to pay American service sector jobs more than Chinese service sector jobs in the long term of about a century of a declining standard of living for most American people.

So therefore it is not merely a matter of losing "high paid" factory jobs, it is matter of free trade driving down the general standard of living for most Americans in the service sector as decades pass. America is truly on a down hill spiral.

The New Economy is a great LIE, just as the forbidden World Government of the United Nations bringing false hopes that will ultimately result in the premature fall and destruction of the USA. Overqualified ditch diggers and other positions in the service sector DO NOT GENERALLY HELP ECONOMIC PRODUCTIVITY.

Ditch diggers with college degrees will NOT help productivity and many jobs that now require college degrees will make NO DIFFERENCE in the global marketplace.

People with doctorate degrees, are not ALWAYS better qualified than those with lesser academic achievements.

The Tech sector of the economy will drive about 20% of the USA economy according to major macroeconomists, the ***remaining 80% of the USA economy is made up of basic goods and services and is generally NOT helped in productivity by excessive college degrees.***

The ONLY way to sustain the general standard of living is through manufacturing increasing (productivity) and NOT DECREASING USA MANUFACTURING.

In the **movie "It's A Wonderful Life"** Jimmy Stewart has the opportunity to turn his hometown into a wonderful place, making the most of people's talents, abilities and making the most of their money as a Godly Steward in a savings and loan company, or in your case, the federal government.

The Republican Party policy has been generally to ***turn America into the greedy nightmarish commercial Babylon that Jimmy Stewart in the movie did his best to stop!*** You must stop America from turning into the nightmarish commercial Babylon as the Creator of the Universe, Jesus Christ commands this of you!

The Bible has written, **"be moderate in all things"** and this includes **moderate socialism.**

Congress needs to hire and seek truthful academic counsel in legislation and policies in order to honor God and truth is their duty to the nation.

In the Old Testament God use to "wink at sin."

In the New Testament, Jesus destroys and smashes nations for their sins. The Bible has written "speak truth to each other."

In the Book of Galatians 3 the promises made to Abraham are promises now made to us including the land of Israel.

God claims Israel to be His Land in Joel 3.

God condemns those who "divide the land" to war and eternal damnation.

All diplomatic efforts of America to divide up Israel must stop, and the USA must also withdraw from the United Nations which has made laws, by Security Council Resolution to divide up the land of Israel. (All PLO protesters should be systematically exiled as necessary from the land promised to Abraham.)

Although these government policy proposals and positions sound "extremist" and unworkable, America would not be facing God's wrath and on the "fast track" to economic destruction and thermonuclear war if America's sins were NOT rising to heaven as a terrible stench in the nostrils of God.

"God is Light" Apostle John writes in 1John 1:5, and even the light waves are being sold to the devil in the name of predatory global capitalism to God's enemies so the children and future of America would be only, heartache and ruin.

Since Congress DARED to sell God and the light spectrum, **God has decided to sell America to His enemies as He sold ancient Israel.** If Congress will repent, then God will relent and repent of His judgment to destroy America.

Revelation 18:13 condemns predatory capitalism of those who sell the "minds, souls and bodies of men!" Economist Adam Smith in the "Wealth of the Nations" once wrote of the "invisible hand" of God guiding economic activity.

God has literally turned His hand against America and will gradually destroy the nation until, or if there is any suitable repentance.

Congress, by turning America into global competitive predatory capitalism by LAW, has brought and is bringing the ruin of the people and destruction of the nation written of in Revelation 18 and the rest of the Bible.

As corporations evidence in their behaviors, it is often the devil's hand that now guides business decisions.

In the Bible, in the Book of Nehemiah, Nehemiah was threatened by enemies, such as Russia, and raised the defenses and built up the military of Jerusalem so God's enemies, though they intended war, did not fire a shot, as recorded in the Holy Scriptures. To make a treaty to leave *America defenseless against an expected First Strike violates God's Command to NOT make treaties with His Enemies and is treason against the Creator of the Universe leaving America defenseless against our enemies.*

In Summary, just the threat of using lethal force is enough to deter God's enemies, if the nation is in God's will. In the Law of Moses, it is the promise of God who will make His enemies to be at peace with the nation that is called by His Name and obeys His Holy Spirit.

Pres. Boris Yeltsin was very cooperative to USA interests and advice in his time of office.

Human nature has NOT changed in Russia, as they threaten and buildup militarily, and again they must be humbled into cooperation by massively building up the USA military. Russia clearly designates the USA as their enemy every time the USA talks about defending itself.

If Russia were a friend and militarily allied with the USA, the defenses of the USA would pose no potential threat against them and would be ignored by Russia instead of threatening to race ahead in the arms race to build ever increasing numbers of strategic nuclear missile systems and mirving their warheads even more then they do now!

Capitalistic resources are NOT allocated upon domestic economic productivity and need and godly responsibility as Jesus would Himself, but according to **supranational corporations' needs to serve their greed and lust to control nations without loyalty to the USA in many cases.**

Just as "you are the temple of God" in the New Testament, you are to "drive out the money changers" from your heart and turn America's government from predatory capitalism to Christian socialism as Jesus and His disciples practiced.

Jesus said go out into the highways and byways and "seize them violently" and bring them into the wedding feast of the Lamb in the original Greek manuscripts as well as the fact Jesus said **"I came to bring a sword and NOT peace (and safety treaties)."** Jesus said a "violent man takes the kingdom by force" and He meant favorable administration bias and schooling would be required of Christian nations as America once was.

It is NOT the "free marketplace of ideas," but biased coercion that Jesus requires of the marketplace and highways of commerce so to win men's souls to the Creator! Jesus requires heavy favoritism and bias in favor of the weighted evidence and truth in all forums of debate and thought.

Voluntary "free market" level trading playing field arguments in the evangelism/ideology of Christianity is the doctrine of demons as world government with God's enemies.

The public light waves must be used for the common good as Jesus Himself would in broadcasting, or the consequences include selling most children to sin and social destruction.

Instead of the White House listening to the rich and greedy, understand Jesus has given the death sentence to those with ***"excessive luxuries"*** written of in Revelation 18. Apostle James writes to his Christian audience "WOE" to the rich Christians. The Bible WARNS you the rich rule you for evil and not for your good! In general rich people are BAD GOVERNMENT as they could help the nation and the common man, but do not in their worship of greed and idolatry of riches.

Isaiah 45:3 has written it is your Christian duty to take the riches of darkness and use them for general welfare and good of the people Israel who are in the nation you have rule over.

Wealth transfer from the unrighteous rich to God's people is God's Command today as God does not change!

As the fable of **"Robin Hood" you are to take from the rich and give to the poor to do the will of Jesus as faithful stewards in government.**

Jesus said you would have wealth you did not earn and many houses in the New Testament. In the Old Testament God also promised "cities and houses you did not build."

In the Old Testament, God promised houses that we did not build, not just spoils of war, but sacrificial social love in providing for the needs of the Body of Jesus Christ. De 6:10 (Cities including houses Israel did not build as part of the blessing to serve Jehovah would be theirs.)

To give tax breaks and refunds to the rich is a great evil temptation to them and evil to the nation.

Since you are helping to send the rich and wealthy to the lake of fire by helping them buy "excessive luxuries" instead of investing in the future of America by tax credits in manufacturing productivity, you have done evil before the LORD in tax law.

It is true, God promised great riches to King Solomon in the O.T., however God did so for His stated purpose that His Will and kingdom be established here on earth as it is in Heaven.

The Law of Moses prohibits the king amassing wealth and gold to himself as King Solomon did and was a contributing factor to his terrible end when "the LORD departed from Solomon." De 17:18 God forbids the excessive luxuries wealth of silver and gold to belong the king of Israel.

The Biblical king was to establish the COVENANT OF JEHOVAH with the wealth of the nation as the WHITE HOUSE is to establish the COVENANT OF JESUS with the wealth of the nation and disciple all nations.

There are two types of kings and leaders, "the basest of men" or "a man after God's own heart." Choose carefully who will be kings of America.

"You are a nation of kings and priests" and are to FORBID by TAX LAWS, excessive personal wealth, as it is a great sin of all kings/citizens in a democracy, based upon De 17:18 and Revelation 18.

The American government at the end of the 19th century and early twentieth, use to *warn of the dangers of "democracy" in the context of warning of the dangers of "communism."* When most people have turned against the Creator of the Universe, the principles of a democracy doing what is righteous, falls to the earth as the citizens trample the truth in their lust of power and evil in television and other entertainment. Truth MUST be subsidized as Jesus is Truth!

It is your duty in government to NOT to be swept away by the hypocrisy and paradigms and delusions of most people in business.

The **DMCA** Digital Millennium Copyright Act of 1998 MUST be changed so COPYRIGHTS may only be renewed no more than a total of twenty one years. Making OLD BOOKS, MUSIC, and Television available as **LIBRARIES ALREADY DO** FOR NEWER MUSIC, MOVIE and BOOKS. "Selling the minds, souls and bodies of men" on the altar of Babylon America Capitalism is eternal death as Revelation 18 has written in the Bible. Making thinking only a luxury of those capable of buying copyright information is a great evil to God!

IF BLIND GREED was not the "guiding force" of Congress in Copyright Law, music could be recorded from NAPSTER just as listening on AM/FM Radio as long as the music was NOT SOLD for MONEY, as that would be "piracy."

Putting entire libraries of nonfiction books on the INTERNET will help turn America's people back to truth and knowledge instead of strangling the souls and minds of children with Federal Copyright Laws!

I advocate Copyrights be renewed no more than 21 twenty-one years, at least 22 year old books, music, and movies will be available to the children, as the heritage of America and the people's of the world who wish to be influenced by America's knowledge of decades past.

For the heritage of the children, everyone must have and will have INTERNET access to 22 year old nonfiction, fiction books, music and movies. *Selling the heritage of the children to the devil for money is great evil.* Old books need to be downloadable and readable on computers for the good of the common man and for the good of the children.

Embryonic stem cell research must be banned in order to obtain God's blessing. However Stem cells from blood supplies may be used for research as they do not involve the murder of convenience of a human baby.

You are spirit, although the conceptus cells become the placenta, the spirit of the infant was created at the moment of conception. As the infant's body is built, the **spirit inhabits it!**

Termination of the conceptus, although the body has not formed is non sequitur as Jesus said on the cross, "Father receive my spirit."

You are an eternal spirit, an unique person created in the "image and likeness" of God. The spirit of murder should not prevail in the murder of the conceptus, and the resulting murder of the spirits of human babies.

In the Book of Acts the early Christians were in the City of Jerusalem Temple worshiping Jesus openly until Acts Chapter 8 when the great persecutions broke out. Acts 2 and chapter 4 have written it is the will of Jesus and His Apostles Christians practice some socialism and meet the needs of ALL of the saints and not just be selfish as many were practicing with their personal wealth.

Therefore today's Christians are to practice some moderate socialism. (For example BPA has provided reasonably price federal public electric power with good wages for the workers until recently.) In contrast, recent artificial/contrived refinery/oil shortages and electricity "shortages" with horrific price gouging, show the evil and utterly ruthless nature of ungodly corporations. Federal intervention is unfortunately required in such cases.

Therefore God would prosper most Christians and you are to make it your policy also instead of reducing most people to certain poverty in this century with sinful "free trade."

It is God's will for government to bless His people with prosperity, to establish His will here on Earth as Jesus commanded in the Lord's Prayer in Matthew 6.

It is great SIN for harlot Christians to curse most Christian in America with poverty, based upon the Holy Scriptures of the Bible.

When America's economy is ravaged by "free trade" then the Earth's last hope to hold off World War III will end forever.

There are **no "free lunches" in economics.**

ONLY BY PRODUCING MORE GOODS, MAY THERE BE MORE WEALTH IN THE FUTURE TO SPREAD AROUND THROUGH TAXES AND ECONOMIC RIPPLE EFFECTS!

Congress ordered the Federal Reserve to "fudge" and make up "fairy tales" about service sector productivity in the economy, giving a false sense of security of America's financial future.

Instead of a "kinder and gentler" future for America, the free trade economics of reducing Americans to global economic productivity units have been implemented by Government, as if people are mere animals instead of being created in the "image and likeness" of God.

Men need to be employed as the Holy Spirit leads, in order to feel they have personal value in most cases, and it is your duty in government, to school, to train and employ human resources in the nation as Jesus would and as the Holy Spirit leads you.

Corporations did not have a white collar middle management fat/bloat problem in the past, but were trying to obey the Christian edict and Command of Jesus to pay people more than they are worth as Jesus said He was a generous man and Christians would have an abundance of houses and wealth. There should be mercy and grace in growing old instead of being reduced to poverty by free trade animals by the government God labels as the "Beast" whom makes men and women mere economic productivity units, subject to cost benefit analyses as their idol paradigm in government administrations. Now even older teachers can't find work in many cases because of age discrimination in employment.

Manufacturing once made up about 40% of the USA economy and is now collapsed to about 9% of the GDP. The high standard of living enjoyed by most Americans is unsustainable economically in the long term as ALL MACROECONOMISTS will confirm to you.

As teachers are being paid more and students are being "dumbed down" with their textbooks in math and other subjects the **economic "productivity" in the service sector of the economy is actually "NEGATIVE" overall** and has been so for many years.

It is necessary for the **Library of Congress** to put twenty year old K-12 textbooks, with emphasis on math textbooks to stop the "dumbing down" of America's children. If given a chance, the Copyright Lawyers would greedily close down libraries charging for every "use/read" book bringing God's Wrath upon the USA. To "sell the minds of men" is sin. Truth must be sacrificed for and subsidized as Jesus is the Truth!

The Federal Reserve is completely wrong in saying productivity is generally improving over the years, although recently, the bad news of negative productivity is gradually becoming their view also.

ONLY BY PRODUCING **MORE** (manufacturing **more**) MAY A HIGHER STANDARD OF LIVING BE **SUSTAINABLE** IN THE LONG TERM IN THE USA. This can ONLY be done by manufacturing in the vast majority of cases. When more goods are produced, then there will be more wealth in the future to spread around through economic ripple effects and **moderate** socialism.

ONLY by "Carrot and Stick" tax credits may the manufacturing sector's production will increase in the USA. This is necessary due to the greedy beast like nature of money and corporations' short term objectives.

It is cheaper for immoral supranational corporations to *cannibalize America and build similar factories in Mexico* and other nations and the product quality is often just as high. Without manufacturing tax credits for additional new factories ***America's economic future is bleak with certain poverty for most to eventually result.***

I have given you the basic solutions and Holy Spirit truth in economics. It is said "Economics is an Art and NOT a Science." **Take a chance and believe what the Holy Spirit is saying to you in economics!**

Keep in mind, unless you can turn America's leaders to repent in Christian laws, defenses and in economics, America is doomed.

Inflating the money supply, without corresponding increases in sustaining manufacturing will ONLY result in tragic inflation and a lower standard of living for most Americans in the long term. Excessive capital formation and excessive stock prices results in predatory inflation. Once capital is formed, then investment must be made according to the needs of the economy for greater production to meet appropriate consumer demand for USA made products.

Anytime excessive money is created through the Federal Reserve, stocks or services results in price distortion and through economic ripple effects a lower standard of living generally will result.

In the past, when America's corporations respected Jesus and America, then they invested in America and their employees so everyone possible would have a better future in America. However today's corporations are supranational/multinational and quasi nations in their own legal and administrative rule making and usually care nothing for their employees, firing the weak and old as productivity falls, slashing the standard of living and destroying nations as they serve the idolatry of quarterly profits.

*As **China "HUMBLES THE USA"** by slowing down the INTERNET* at times and having our surveillance airplane *chopped up into pieces,* and Russia's President reveals the truth to CBS that *Russia is not a "partner"* and does not "evidently" want to take the steps necessary to be an ally of the USA and NATO, any consideration of upgrading Russia's status in NATO to a full member must be forever shelved or destruction for America will possibly realized much sooner!

Deuteronomy 7:2 and 23:6 **LITERALLY FORBIDS TREATIES WITH GOD'S ENEMIES!** *It is also God's Command today as God is "the same today, yesterday, yes forever!"* God's Law is fulfilled in Christ and Romans 3:31 has written it is our Duty to God to establish His Law!

Every law passed by Congress either is a law for good or for evil. **Today it is also SIN to make treaties with God's enemies!**

The USA must repent of making treaties with God's enemies as God Himself requires this! Although this may be inconvenient, do note America and the British Empire could of assimilated the entire Earth in the Bible's "Manifest Destiny" for God's people to rule the nations after World War II.

In 1 Kings 22:48 **King Jehoshaphat's entire merchant marine shipping fleet of ancient Israel was completely destroyed by God as a sign of His displeasure of making a treaty with God's enemy. FREE TRADE IS SIN TODAY!**

Most **supranational corporations have no American national loyalty,** and usually *serve only greed and profits.*

Yes the corporations have an interest in America as a customer base to make money, but that is just about all as America turns into the Babylon "Beast" that sells men's souls and minds in the service of money!

America should change its laws so to return to maximum of ten hours a day for workers, unless there is an extenuating circumstances/emergency other than saving employee benefits sacrificed on the altar of not hiring more employees. Working people twelve hours a day is NOT helping them change from "gory to glory" in God's image nor helping their children. Amen

Finally, Apostle Paul said it was God's will because "Eve was deceived" that women, are NEVER to be appointed to positions of authority as National Security Advisor.

Modern science shows, although equally intelligent as men statistically, women's two brain hemispheres are hard wired together so emotionalization of ideas, instead of abstract logical reasoning is usually the case.

As a result women will speak thousands of more words every day than the average man in order to comfort herself and "emotionalize" the stress.

Also as God is "Always the same" it is written Isaiah 3:12

"woe to you when women and children rule over you!"

Men do not usually emotionalize thoughts and seek "emotional release" through talking as women do, men instead turn to spirits in their thinking more often instead of turning to emotion for comfort, whether good spirits, as the Holy Spirit and the Spirit of Jesus in you, or men turn to seducing devils and their ideas (literally) to help them make their decisions.

This is a reason why men are the "head" of the marriage as men seek spiritual guidance more regularly in their thinking as God essentially excluded the emotional "release" brain mechanism women have with a differently "wired" brain.

1 Timothy 2:12* "And I do not allow a woman to teach nor to exercise authority *over* a man, but to be in silence.

13* For Adam was formed first, then Eve.

14* And **Adam was not deceived,** but *the woman being deceived* has come to be in transgression."

Although some twist the Scriptures with radical false assumptions, the context is Adam was not deceived and Eve was deceived and more prone to being deceived.

"Braided hair" is in the context of gold and cosmetic enhancements and not primarily a reference to the Greek cult prostitutes in the area of Pastor Timothy's church. God does not want His people looking as the wealthy and prostitutes do.

Excessive personal wealth and outlandish/worldly clothing is sin for Christians, men or women.

"Excessive luxuries" such as gold is judged to be a sin worthy of eternal damnation as written in Revelation 18.

Apostle Peter had NO personal gold or silver, as the needs of the Body of Christ were too great and numerous.

In the Book of Judges chapter 4 Prophetess Deborah (a woman ruler) did righteously rule Israel, however it was in the context of exceedingly evil and "wicked men" who were unsuitable for righteous leadership in God's sight.

God is always the same and sometimes today in the context of wicked men of America, some women who have the gift of being a prophet are suitable for America's sinful government today.

It would be desirable for America, who was once a Christian nation by law, again become a Christian nation by law, by adopting the Christian America Amendment so God could bring His blessings again upon America instead of certain looming tragic destructions.

The Law of Moses through the Apocalypse/Revelation describes the tragic punishment nations as America any other nation that breaks His covenant they made in past centuries, as America has broken the Covenant of Jesus.

God SOLD Israel to His enemies in Judges 4:1-2 because all of Israel was practicing evil in God's sight!

Today, as "God is the same," God is selling America to His enemies for America's great sins and evil practices and Congress passed the "fast track trade" laws necessary to sell America to her enemies.

Since God has judged America to be destroyed, even the lightwaves/frequency-spectrum are being sold to His enemies so the children will be destroyed by television and the media.

Unlike Israel in the Bible whose soverignty as a nation was restored after 2,500 years, America, once the USA is destroyed by THERMONUCLEAR WAR, we will never be restored as a nation, though some people may reinhabit the USA after centuries of radioactivity declining, similar to the destruction described in Revelation 18.

In Summary, men are usually less prone to being deceived, as Adam was NOT deceived in the Garden of Eden, having women advisors in critical leadership positions is sin as most born again Christian women will agree.

Life begins at conception, when an egg and sperm join together, inside or outside the womb. The Embryo may be frozen for perhaps a thousand years and grown in a test tube or womb at that time. "God is Spirit" and Jesus on the cross asked His Father to receive His Spirit.

You are an eternal spirit and you will exist forever in Heaven or Hell if you refuse to repent of sin. Albeit a short life for embryos outside of a womb, it is still a life nevertheless. Revelation 18 gives those who sell the bodies of men and their souls eternal damnation and eternal separation from the loving Creator, Jesus. For humans to be parasites preying upon the lives of embryos for their stem cells is an abomination before God and a great evil sin.

The question of why the general population was swept away by NAZI Socialism and Soviet Communism was recently asked.

The answer is: In the Old Testament God wipes out most life on Earth for disobeying Him and as Jesus said "many are called, few are chosen," the Apocalypse generally describes global genocide as the consequence for nations to make covenant and then break their Covenant with Jesus the Creator of the Universe.

A more academic answer is the governments of Germany and Russia, "dumbed down" their captive public school children. As the NAZI's indoctrinated the youth corps so Russia today is indoctrinating their youth in the NAZI style. Also there was leader worship in Germany and Christian worship of God ignored and persecuted. Russia & China have designated America as their enemy they are preparing to kill and destroy, although they say "nothing personal":(

Without the "Spirit of God" as it is written, "Where the Spirit of the Lord is, there is liberty."

Without the spiritual anointing that breaks the yokes of "strong feelings" caused by deluding spirits, the spirits of the children are often taken captive and the mobs of democracy are swept away by Lucifer, the "god of this world."

With a different set of false paradigms, America's government is being "swept away" by deluding spirits of "free trade" bringing poverty to most USA citizens instead of prosperity as commanded by God in the Bible. Free Trade will destroy the USA just as surely as Nazi or Soviet Communist paradigms.

In the same deluding spirit as the Soviets, America's schools are "dumbing down" the children with strong delusional spirits of evolution of life from the simple to the complex which CATEGORICALLY have no factual basis in the "Hard Sciences."

Instead of teaching the children they are loved and created by a loving Creator of the Universe, and will inherit eternal life and love if they will help the Creator make them and other disciples into the "image and likeness" of God, they are falsely indoctrinated into the false religion of the "evolution of life" and they were created as animals as an "accident of nature."

God chides Israel in how they love "seducing spirits and loving a "stupid spirit." Instead of teaching children to love an "excellent spirit" as the Prophet Daniel and love the Holy Spirit, the children are left to being captivated by stupid spirits, that literally make children and adults stupid. There is a season of pleasure with sin and loving stupid spirits brings pleasure to many Americans.

As a result the public school indoctrinated children are captivated by delusional spirits and will work to break society and destroy the nation in their selfish delusional religious indoctrination by the public schools.

To make sure the children are completely destroyed by the educational process in the USA they are taught there are No Absolute Truths or moral values, where religion is a choice of "life style" and not as a basis of moral behavior and guiding values in "secular" or multi theistic government that America has become.

The Bible has written to "train up a child in the way they should go" and NOT wait until their adults to evangelize them.

Jesus said let the children come to Him and not OPPOSE the Creator of the Universe as the Public Schools and the U.S. Courts have wickedly done. The Public Schools hinder the children from coming to Jesus and our Heavenly Father!

The Public Schools and the Courts have turned against Jesus almost completely where even Congress forbids their Chaplains from using the Name of Jesus in their prayers, inviting guest Chaplains of every religion and praying to the demons of "Mystical Babylon" that helped destroy ancient Israel.

As a result America is being turned over to spirits of strong delusion 2Thessalonians 2:11 When the truth is rejected, they God sends lies to dominate the minds of government. Free Trade to the ruin of the common man and to the USA is one such strong delusion for America's death.

Opposing a Christian USA by law where there is free exercise of all Christian religions is another wicked delusion the harlot Christians of America hold to in many cases.

God cannot be mocked, if America's leaders do not want the truth, then God sends them lies. As Prophet Jeremiah stated, "Truly Thou Art A God Who Deceives." Jesus is the Truth in all fields of knowledge including in politics, Hold Fast To the Truth. Amen

It is our duty to rule and reign with Christ Jesus as He started ruling thousands of years ago as written in Rev 1:5

If Christians are traitors or play the harlot for other ideologies or philosophies, then tragic judgment is incurred.

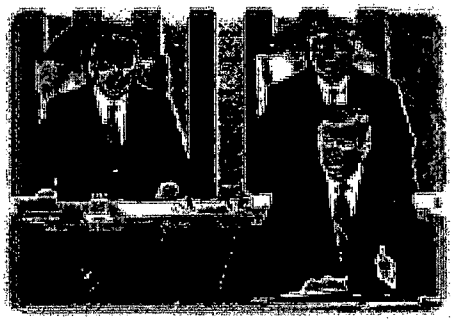

The Creator of the Universe is making His final Call for America to again become His Kingdom and Government here on Earth. The salvation of America and her allies is your duty.

It is your duty in government to NOT be swept away with false paradigms and the peer group hypocrisy of sin but always be led by the Holy Spirit, Romans 8:14.

To make treaties with God's enemies, Russia and the United Nations is sin against God. Russia and China designated the USA as their planned military objective to be destroyed, although Pres. Putin said, "nothing personal!" As convoluted the diplomatic paradigms are, the Russians have made it very clear America will be eventually destroyed by them and leaving America effectively defenseless against their attack is their highest priority in making treaties. Jesus said "love your enemies" and NOT make treaties with His enemies. Get the USA out of the U.N. and end the treaties with God's enemies of Russia and China and stop building them up economically so to bring WWIII at the soonest possible time.

God today, is gradually destroying America because of the sins of "free trade" with His enemies.

As a result of "free trade" with God's enemies, God's Judgment and wrath are literally being poured out upon America. Judgment starts at the "house of God" the USA, and not with Russia, whom is God's enemy. 1 Peter 4:17.

Russia in recent years has made treaty arrangements with Iran to come in against Israel in any warfare conflict making Russia the enemy of God from all reasonable perspectives.

Sen. Chuck Hagel, Nebraska Republican and a member of the Senate Foreign Relations Committee, said on CNN he believes some Republicans may be unhappy with the president´s glowing praise of Mr. Putin, who is a former KGB agent and communist apparatchik. But Mr. Hagel says he believes it was a "wise course of action to take," given the "immense impact" Russia will have "on the future of the world."

Part of the written Law of God's punitive curses was God would raise up more enemies against Israel and bring more evil upon the nation, if His people and nation failed to repent.

The **USA was once a God fearing and covenant Christian nation** with the states having **state churches** in a majority of cases. Amen

America is making the same policy error as prior to World War II, in **building up Japan and Germany economically so they could launch world war II.** In Revelation 18 *God gives* ***"CAPITALISTS" His wrath*** *of eternal damnation for their dedication to greed of* ***selling the "minds, souls and bodies of men."***

Jesus said to give money to His enemies in some cases, however it needs to be in way that **glorifies** our Heavenly Father and Savior Jesus and **not in a way that glorifies the death of the USA and most life on the planet in building up His enemies to launch the war they are preparing for.**

Jesus said Love your enemies, but not make sinful treaties putting them in a World Government of the United Nations where they will gain control the World Government and destroy all Christians and most life on the Earth!

Get the USA out of the U.N. Amen!

Jesus Bless You and Help you always.
Grace, Love and Blessings forever in Jesus,
Respectfully your servant,

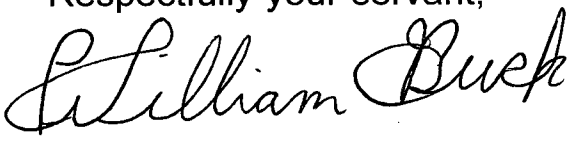

Pastor William E. Burk

PRA 6

Voice Phone: **PRA 6**

E-mail **PRA 6**

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Love One Another



Love One Another

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The USA broke the covenant of Jesus and turned to legal polytheism and usually making evangelical Christians a persecuted minority in America where it is illegal to evangelize in the workplace starting with laws as the Civil Rights Act of 1964.

By actually forbidding the Name of Jesus from being used in prayers in the Congress in official prayers by the Chaplains, Congress is hypocritically denying the Kingdom and Government of God here on Earth in favor of polytheism ruling America in the name of religious toleration and ignore the fact God has damned America to destruction for playing the "harlot" as ancient Israel played the "harlot" and was destroyed by God's Judgment. Jesus said, "You cannot serve legal polytheism and God" to paraphrase His words and when government and Christian leaders conspire against Him to oppose a Christian government and fight even for the rights of occult to practice their false religions, they are working against God serving the devil wrecking havoc upon America helping to bring even more evil supernatural powers against America to "wear down the saints."

The immediate short term prognosis of America's future is poor, as "free trade" reduces the standard of living for most Americans gradually to poverty, more and more Americans will gradually vote Democratic in national elections for their social safety nets and basic needs for their families.

"Free Trade," by gradually **destroying the middle class and enslaving most Americans with poverty** in coming decades, has damned America to fall to destruction.

America will fall as the economy is devastated by free trade, before the forbidden U.N. World Government which will eventually be governed by God's enemies and will turn to destroy the USA in their madness along with most life on Earth forever. . . . .

The legacy of the Republicans, in *seducing the world to predatory capitalism and free trade and world government* will be a dead planet Earth. . . . . forever

God is against a cost benefit analyses for everything and for everyone attaching a money benefit for every act of government.

The early Christians practiced Christian Socialism and Socialism is not always subject to superficial cost benefit analyses.

As the Bible has written in Acts 2 and chapter 4, it is the duty of everyone to practice Christian Socialism and meet the basic needs of Christians, and the Republicans need to repent of their lawless type of freedom which is basically the sin of lawlessness "anomia in the Greek."

(Personally I always vote a straight ticket of Republican and have done so for decades, including voting for President Reagan twice, primarily because of the usually more Christian oriented abortion and defense policies.) The Holy Spirit said when George Bush was a candidate, **"I will elect myself"** speaking of George Bush's coming electoral victory as George would be God's Servant. However in four years, without repentance of sins, George Bush will only serve one term as president, with probably Al Gore as the next president.

What to do then? Jesus being God is quite intelligent and has **adequate economic policies** if you will listen more carefully to His Holy Spirit.

Jesus is literally the whole Truth of all spheres/areas of knowledge.

The whole foundational legal basis of the United Nations is illegal based upon the Bible and is wrong, flawed Sin against God being based upon sinful and forbidden treaties with God's enemies.

Jesus said "love your enemies" and NOT to put your enemies in a forbidden world government where one day they will gain control and use the immense military resources of NATO and the UN military treaty organizations to destroy the USA and most life on Earth!

Although President Wilson was a seminary student, he was deceived and sinned against Jesus, just as Judas Iscariot sinned against Jesus by trying to send mankind to destruction and their deaths.

Any interpretation of the World "Beast" Government in the Apocalypse has most people dying as a result of U.N. World Government, however Wilson refused to acknowledge God's prohibition on WORLD GOVERNMENT.

Jesus said "make loans to your enemies and do not even expect repayment." However Jesus did not say to build up God's enemies of Russia and China across the board with forbidden trade treaties, so to help them prepare for World War III and planetary extinction of most life including the deaths of most Christians.

Jesus intended to make loans/gifts to His enemies on the basis of glorifying our Heavenly Father and bringing His Kingdom here on Earth as it is in Heaven!

Directly or indirectly helping Russia to destroy the USA by sinful "free trade" does not fulfill the "spirit" of the **command to love** by Jesus.

Since the father of President Bush was pushing for the World Government "NEW WORLD ORDER" of the United Nations and having everything in the White House "run on automatic" instead of as *Godly kings with a "hands on attitude"* as King Solomon in giving the judgment between the two mothers, and *day to day handling the minutiae of government,* America has fallen to a Babel/chaos that the people have begun to despise.

Pres. Clinton has even signed a Presidential directive absorbing a "first strike" by Russia so no weapons will survive to retaliate against Russia, inviting Russia to attack whenever they feel the need to do so, without fear of retaliation.

Jesus said "men will be traitors" in the last days and it is difficult to find some to save America and obey Jesus and defend His Kingdom as Jesus said, under certain circumstances, "My servants would fight" and also ordered His disciples to buy swords so to use lethal force when necessary!

Since even international trade treaties with God's enemies are forbidden by Jehovah-Jesus, Free Trade must be replaced by "Managed Free Trade," on a case by case basis with each nation as the Holy Spirit leads you else God's curse is upon America for indiscriminate trading with our enemies.

Building up the economy of Japan and Germany prior to World War II did not stop, but in fact hastened the onset of World War II.

Building up Russia and China economically across the board, will result in the onset of World War III that much sooner. NAZI Germany fought war at the first possible moment after their military forces were at sufficient strength levels!!!

The free traders are truly traitors, accelerating God's enemies ability to prepare and go to the brink of global war and to planetary death.

Just as Pres. George Bush "clothes himself with Jesus Christ" and the power of God every day, or at least tries, other leaders allow in various degrees, "seducing spirits" spiritual beings of the devil "the Great Deceiver."

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Washington Director

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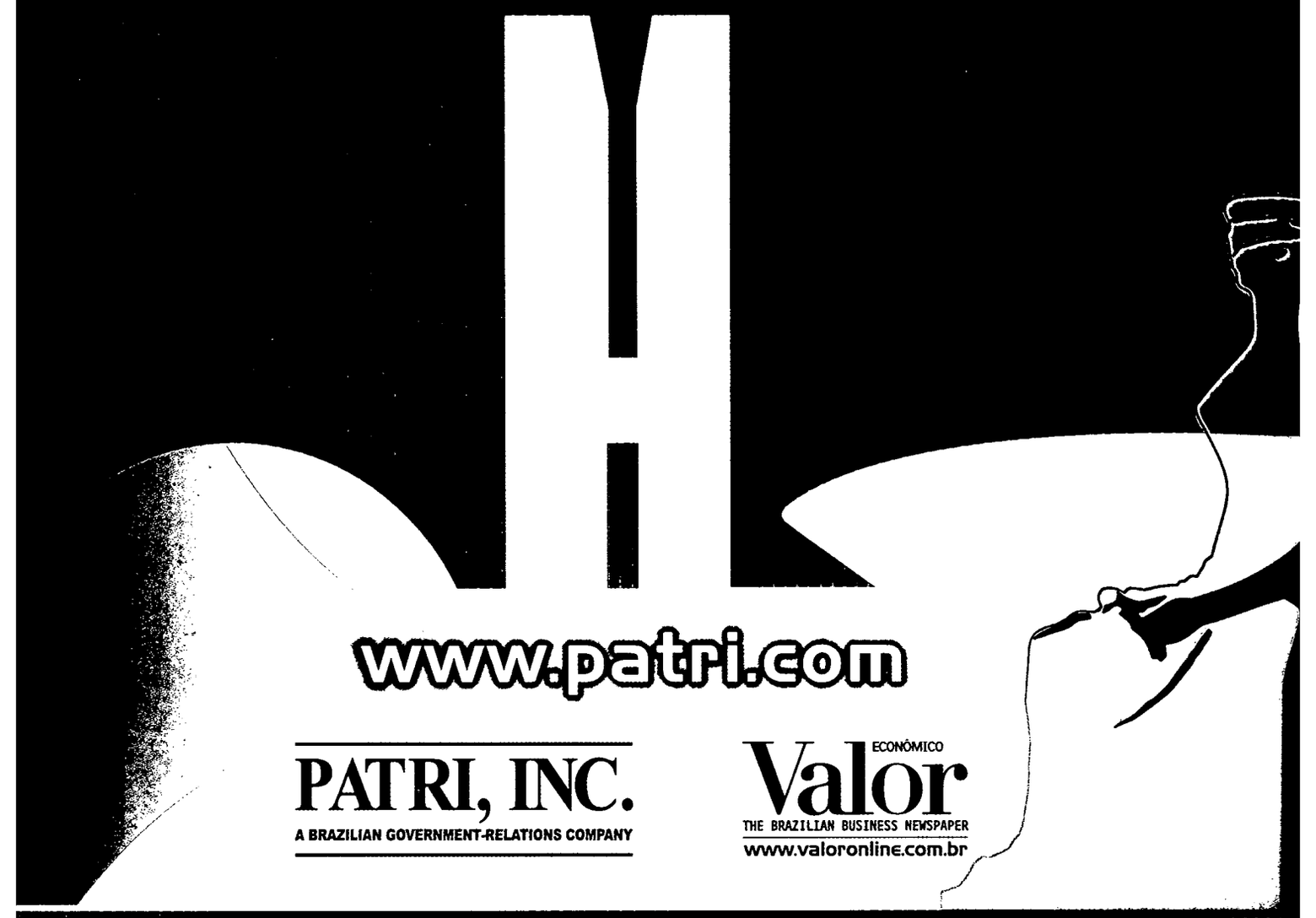

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Counsel's Office, White House

Kavanaugh, Brett

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State Department, Henry Kissinger
Transcripts [1]

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2014-0544-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

A. Closed by Executive Order 13526 governing access to national security information.
B. Closed by statute or by the agency which originated the document.
C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

This Document was withdrawn on 7/19/2018 by SAH

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S81	2	10/06/1973	P1/b1;

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COLLECTION:
Counsel's Office, White House
SERIES:
Kavanaugh, Brett - Subject Files
FOLDER TITLE:
State Department, Henry Kissinger Transcripts [1]
FRC ID:
9674
OA Num.:
1911
NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F
2014-0544-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

A. Closed by Executive Order 13526 governing access to national security information.
B. Closed by statute or by the agency which originated the document.
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Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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Records Not Subject to FOIA

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This Document was withdrawn on 7/19/2018 by SAH

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S84	3	10/06/1973	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [1]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

2014-0544-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

A. Closed by Executive Order 13526 governing access to national security information.
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C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
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Records Not Subject to FOIA

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Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S84	3	10/06/1973	P1/b1;

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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [1]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

2014-0544-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

A. Closed by Executive Order 13526 governing access to national security information.
B. Closed by statute or by the agency which originated the document.
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Freedom of Information Act - [5 U.S.C. 552(b)]

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Records Not Subject to FOIA

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This Document was withdrawn on 7/19/2018 by SAH

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

State Department, Henry Kissinger Transcripts [2]

OA/NARA#: 1911/1829
9674

Box [illegible]

Folder 1

REV_00260730

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S96	2	10/06/1973	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [2]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

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Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S96	2	10/06/1973	P1/b1;

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COLLECTION:
Counsel's Office, White House
SERIES:
Kavanaugh, Brett - Subject Files
FOLDER TITLE:
State Department, Henry Kissinger Transcripts [2]
FRC ID:
9674
OA Num.:
1911
NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S115	2	10/06/1973	P1/b1;

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COLLECTION:
Counsel's Office, White House
SERIES:
Kavanaugh, Brett - Subject Files
FOLDER TITLE:
State Department, Henry Kissinger Transcripts [2]
FRC ID:
9674
OA Num.:
1911
NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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Freedom of Information Act - [5 U.S.C. 552(b)]

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b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S115	2	10/06/1973	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [2]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S148	1	10/07/1973	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [2]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

This Document was withdrawn on 7/19/2018 by SAH

Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S148	1	10/07/1973	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [2]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

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Records Not Subject to FOIA

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Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S149	2	10/07/1973	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [3]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

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Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S149	2	10/07/1973	P1/b1;

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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [3]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
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FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S165	4	10/08/1973	P1/b1;

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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [3]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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P3 Release would violate a Federal statute [(a)(3) of the PRA]
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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [3]

FRC ID:
9674

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2017-0345-F

RESTRICTION CODES

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S169	2	10/08/1973	P1/b1;

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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [3]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S169	2	10/08/1973	P1/b1;

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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [3]

FRC ID:
9674

OA Num.:
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NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S206	3	10/10/1973	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [3]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S206	3	10/10/1973	P1/b1;

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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [3]

FRC ID:
9674

OA Num.:
1911

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1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S207	1	10/10/1973	P1/b1;

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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [3]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S207	1	10/10/1973	P1/b1;

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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [3]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

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This Document was withdrawn on 7/19/2018 by SAH

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

State Department, Henry Kissinger
Transcripts [4]

OA/NARA#: 1911/1829
9674

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PARTIAL
RELEASE

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S185	2	10/08/1973	P1/b1;

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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [4]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S185	2	10/08/1973	P1/b1;

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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [4]

FRC ID:
9674

OA Num.:
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FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S216	2	10/10/1973	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [4]

FRC ID:
9674

OA Num.:
1911

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1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

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This Document was withdrawn on 7/19/2018 by SAH

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S216	2	10/10/1973	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [4]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

A. Closed by Executive Order 13526 governing access to national security information.
B. Closed by statute or by the agency which originated the document.
C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

This Document was withdrawn on 7/19/2018 by SAH

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S230	2	10/10/1973	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [4]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - S230	2	10/10/1973	P1/b1;

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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [4]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - T172	2	01/06/1974	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [5]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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B. Closed by statute or by the agency which originated the document.
C. *Closed in accordance with restrictions contained in donor's deed of gift.*

Freedom of Information Act - [5 U.S.C. 552(b)]

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This Document was withdrawn on 7/19/2018 by RAF

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - T172	2	01/06/1974	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [5]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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This Document was withdrawn on 7/19/2018 by RAF

REV_00260765

Counsel's Office, White House
Kavanaugh, Brett

State Department, Henry Kissinger
Transcripts [6]

Subject Files

OA/NARA#: 1911/1829
9674

Box 54
Folder 5

REV_00260766

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - T282	3	01/28/1974	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [7]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - T282	3	01/28/1974	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [7]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - T284	2	01/29/1974	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [7]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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This Document was withdrawn on 7/19/2018 by SAH

REV_00260770

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - T284	2	01/29/1974	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [7]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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This Document was withdrawn on 7/19/2018 by SAH

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - T371	3	02/11/1974	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [7]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - T371	3	02/11/1974	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [7]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

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This Document was withdrawn on 7/19/2018 by SAH

Counsel's Office, White House

Kavanaugh, **Brett**

Subject Files

State Department, Henry Kissinger
Transcripts [8]

OA/NARA#: 1911/1829
9674

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Folder 7

REV_00260774

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - T378	1	02/12/1974	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [8]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

This Document was withdrawn on 7/19/2018 by SAH

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - T378	1	02/12/1974	P1/b1;

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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [8]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

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This Document was withdrawn on 7/19/2018 by SAH

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - T380	3	02/12/1974	P1/b1;

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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [8]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - T380	3	02/12/1974	P1/b1;

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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [8]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

A. Closed by Executive Order 13526 governing access to national security information.
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C. Closed in accordance with restrictions contained in donor's deed of gift.

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This Document was withdrawn on 7/19/2018 by SAH

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - T167	2	01/06/1974	P1/b1;

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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [8]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

A. Closed by Executive Order 13526 governing access to national security information.
B. Closed by statute or by the agency which originated the document.
C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
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This Document was withdrawn on 7/19/2018 by SAH

REV_00260779

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	Telcon - T167	2	01/06/1974	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [8]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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P3 Release would violate a Federal statute [(a)(3) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

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Freedom of Information Act - [5 U.S.C. 552(b)]

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This Document was withdrawn on 7/19/2018 by SAH

REV_00260780

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The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	TELCON - T379	3	02/12/1974	P1/b1;

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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [9]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

This Document was withdrawn on 7/17/2018 by DRS

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	TELCON - T74	1	12/06/1973	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House
SERIES:
Kavanaugh, Brett - Subject Files
FOLDER TITLE:
State Department, Henry Kissinger Transcripts [9]
FRC ID:
9674
OA Num.:
1911
NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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Records Not Subject to FOIA

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Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	TELCON - T77	1	12/06/1973	P1/b1;

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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [9]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	TELCON - T172	2	01/06/1974	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House
SERIES:
Kavanaugh, Brett - Subject Files
FOLDER TITLE:
State Department, Henry Kissinger Transcripts [10]
FRC ID:
9674
OA Num.:
1911
NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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Records Not Subject to FOIA

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	TELCON - T172	2	01/06/1974	P1/b1;

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COLLECTION:
Counsel's Office, White House
SERIES:
Kavanaugh, Brett - Subject Files
FOLDER TITLE:
State Department, Henry Kissinger Transcripts [10]
FRC ID:
9674
OA Num.:
1911
NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

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Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

This Document was withdrawn on 7/18/2018 by DRS

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Withdrawal Marker
The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	TELCON - T185	3	01/08/1974	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [10]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	TELCON - T185	3	01/08/1974	P1/b1;

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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [10]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

A. Closed by Executive Order 13526 governing access to national security information.
B. Closed by statute or by the agency which originated the document.
C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

This Document was withdrawn on 7/18/2018 by DRS

Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	TELCON - T200	2	01/09/1974	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House
SERIES:
Kavanaugh, Brett - Subject Files
FOLDER TITLE:
State Department, Henry Kissinger Transcripts [10]
FRC ID:
9674
OA Num.:
1911
NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	TELCON - T200	2	01/09/1974	P1/b1;

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COLLECTION:
Counsel's Office, White House
SERIES:
Kavanaugh, Brett - Subject Files
FOLDER TITLE:
State Department, Henry Kissinger Transcripts [10]
FRC ID:
9674
OA Num.:
1911
NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	TELCON - T282	3	01/28/1974	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House
SERIES:
Kavanaugh, Brett - Subject Files
FOLDER TITLE:
State Department, Henry Kissinger Transcripts [11]
FRC ID:
9674
OA Num.:
1911
NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	TELCON - T282	3	01/28/1974	P1/b1;

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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [11]

FRC ID:
9674

OA Num.:
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NARA Num.:
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FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	TELCON - T284	2	01/29/1974	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House
SERIES:
Kavanaugh, Brett - Subject Files
FOLDER TITLE:
State Department, Henry Kissinger Transcripts [11]
FRC ID:
9674
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FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	TELCON - T284	2	01/29/1974	P1/b1;

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COLLECTION:
Counsel's Office, White House
SERIES:
Kavanaugh, Brett - Subject Files
FOLDER TITLE:
State Department, Henry Kissinger Transcripts [11]
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RESTRICTION CODES

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	TELCON - T338	3	02/04/1974	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [11]

FRC ID:
9674

OA Num.:
1911

NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	TELCON - T338	3	02/04/1974	P1/b1;

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COLLECTION:
Counsel's Office, White House
SERIES:
Kavanaugh, Brett - Subject Files
FOLDER TITLE:
State Department, Henry Kissinger Transcripts [11]
FRC ID:
9674
OA Num.:
1911
NARA Num.:
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FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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Withdrawal Marker
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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	TELCON - T371	3	02/11/1974	P1/b1;

This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House
SERIES:
Kavanaugh, Brett - Subject Files
FOLDER TITLE:
State Department, Henry Kissinger Transcripts [12]
FRC ID:
9674
OA Num.:
1911
NARA Num.:
1829

FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	TELCON - T371	3	02/11/1974	P1/b1;

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COLLECTION:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
State Department, Henry Kissinger Transcripts [12]

FRC ID:
9674

FOIA IDs and Segments:
2017-0345-F

OA Num.:
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RESTRICTION CODES

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Telcon	TELCON - T378	1	02/12/1974	P1/b1;

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COLLECTION:
Counsel's Office, White House
SERIES:
Kavanaugh, Brett - Subject Files
FOLDER TITLE:
State Department, Henry Kissinger Transcripts [12]
FRC ID:
9674
OA Num.:
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FOIA IDs and Segments:
2017-0345-F

RESTRICTION CODES

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Kavanaugh, Brett - Subject Files
FOLDER TITLE:
State Department, Henry Kissinger Transcripts [12]
FRC ID:
9674
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FOIA IDs and Segments:
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Kavanaugh, Brett

Subject Files

Status of HSC (Homeland Security Council) Within EOP (Executive Office of the President)

OA/NARA#: 2165/2076
9695

Box 55
Folder 6

REV_00260813

- either option is available
- §905 of ITS Act provides adequate authority to include under Title III [WHO]
  less disruptive

- EOP security → Interior
  [closing]

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Search Title 31

Notes
Updates
Parallel authorities (CFR)
Topical references

Sec. 901. - Establishment of agency Chief Financial Officers

(a)

There shall be within each agency described in subsection (b) an agency **Chief Financial** Officer. Each agency **Chief Financial** Officer shall -

(1)

for those agencies described in subsection (b)(1) -

(A)

be appointed by the President, by and with the advice and consent of the Senate; or

(B)

be designated by the President, in consultation with the head of the agency, from among officials of the agency who are required by law to be so appointed;

(2)

for those agencies described in subsection (b)(2) -

(A)

be appointed by the head of the agency;

(B)

be in the competitive service or the senior executive service; and

(C)

be career appointees; and

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(3)

be appointed or designated, as applicable, from among individuals who possess demonstrated ability in general management of, and knowledge of and extensive practical experience in financial management practices in large governmental or business entities.

(b)

(1)

The agencies referred to in subsection (a)(1) are the following:

(A) The Department of Agriculture.

(B)

The Department of Commerce.

(C) The Department of Defense.

(D)

The Department of Education.

(E) The Department of Energy.

(F)

The Department of Health and Human Services.

(G) The Department of Housing and Urban Development.

(H)

The Department of the Interior.

(I) The Department of Justice.

(J)

The Department of Labor.

(K) The Department of State.

(L)

The Department of Transportation.

(M) The Department of the Treasury.

(N)

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The Department of Veterans Affairs.

(O) The Environmental Protection Agency.

(P)

The National Aeronautics and Space **Administration**.

(2)

The agencies referred to in subsection (a)(2) are the following:

(A) The Agency for International Development.

(B)

The Federal Emergency Management Agency.

(C) The General Services **Administration**.

(D)

The National Science Foundation.

(E) The Nuclear Regulatory Commission.

(F)

The Office of Personnel Management.

(G) The Small Business **Administration**.

(H)

The Social Security **Administration**.

(c)

(1)

There shall be within the Executive Office of the President a **Chief Financial** Officer, who shall be designated or appointed by the President from among individuals meeting the standards described in subsection (a)(3). The position of **Chief Financial** Officer established under this paragraph may be so established in any Office (including the Office of **Administration**) of the Executive Office of the President.

(2)

The **Chief Financial** Officer designated or appointed

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under this subsection shall, to the extent that the President determines appropriate and in the interest of the United States, have the same authority and perform the same functions as apply in the case of a **Chief Financial** Officer of an agency described in subsection (b).

(3)

The President shall submit to Congress notification with respect to any provision of section 902 that the President determines shall not apply to a **Chief Financial** Officer designated or appointed under this subsection.

(4)

The President may designate an employee of the Executive Office of the President (other than the **Chief Financial** Officer), who shall be deemed "the head of the agency" for purposes of carrying out section 902, with respect to the Executive Office of the President

Next

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REV_00260818

Stem Cell

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

OA/NARA#: 341/237
9122

Box 55
Folder 7

REV_00260819

■ PUBLIC POLICY ■

Cells, Fetuses, and Logic

Who is being sentimental, who rational, in this debate?

RAMESH PONNURU

AMERICANS' attitudes toward abortion are notoriously muddled. But it is safe to say that they tend to dislike pro-lifers more than pro-choicers, even when they themselves favor curbs on abortion. Pro-lifers have a suspect, a frightening, passion. They are agitators; they are religious zealots. Pro-choicers, on the other hand, are the party of reason. They see all the pitfalls of prohibiting abortion. They understand that abortion raises issues much more complex than sentimental slogans about "protecting unborn babies" can capture.

This is, I think, a widespread view about the combatants in the abortion wars. It is also close to 180 degrees from the truth. Sentiment has been the pro-choicers' ally more often than not. The pro-life position, on the other hand, must ultimately be rooted in rigorous logic. A pro-life position that is merely sentimental is a weak and unsustainable thing—as demonstrated, most recently, in the controversy over embryonic stem-cell research.

Pro-choicers can depend more reliably on sentiment than pro-lifers for the simple reason that distressed pregnant women elicit more sympathy than endangered fetuses. Nobody remembers being a fetus. Nobody has held a fetus's hand. But many women know what it is like to be pregnant under difficult circumstances, or can easily imagine it. All of us, men and women alike, have known or can imagine a woman we care about in that situation: a sister, a friend. The fetus has almost no emotional claim on us. It—we think of the young fetus as an "it," not a "he" or "she," although of course every fetus has a chromosomally determined sex—is an abstraction to us, usually nameless.

Smart people have attempted to found moral theory on natural sentiments: One thinks of no less a figure than Adam



Smith. But these attempts are doomed. Untutored sentiment is a poor guide to morality. No profound knowledge of history or psychology is necessary to see that our sympathy often fails to recognize the legitimate moral claims of those we do not know or of those we do not look like. Tender feelings alone cannot lead us to grasp the requirements of decency or justice. It takes abstract reasoning to tell us, first, that the fetus is a living human being, and then to follow that premise to the eventual conclusion that abortion is a violation of human rights.

To say that the pro-life position is rooted in abstract logic is not, of course, to deny that its adherents possess strong emotions about the matter, or even that their emotions are stronger than those of pro-choicers. As Richard Brookhiser has remarked in this connection, thoughts, if they are taken seriously, do not lie idly on the mind's table. They lead to further thoughts, and emotions and sensibilities form around them like crystals.

Nor do I mean to suggest that pro-lifers never make non-rational appeals. Many pro-choicers find the pro-life movement's rhetoric about "babies" manipulative. Fetuses aren't babies, they say. But pro-lifers don't really hold the views they hold because they think fetuses are babies; rather, they know that fetuses are members of human race. (Fifteen-year-olds, 31-year-olds, and 62-year-olds aren't babies, either, but nobody thinks it's okay to kill them.) The campaign against partial-birth abortion is an attempt by pro-lifers to win support from Americans in the "mushy middle" by stressing the grisliness of some abortions. But pro-lifers took up that campaign as a tactic, not because they really believe one method of abortion is worse than another.

For pro-choicers, however, an appeal to sentiment is frequently not merely a tactic or a bit of loose rhetoric but the entirety of the argument. Katha Pollitt, *The Nation*'s engaging feminist columnist, jeers at pro-lifers for fretting about the fate of clusters of cells smaller than a fingernail. But surely size cannot be our criterion for determining when rights should be protected.

If the appeal of sentiment has been powerful in the debate over abortion, it has been irresistible in the one over embryonic stem cells. Research using these cells may yield cures or treatments for Parkinson's disease, Alzheimer's, and other ailments. But the extraction of the cells, and thus the research, requires the destruction of embryos. A recent cover story on stem cells in *Newsweek* was typical of press coverage in following the usual script of pro-life religious fanatics vs. science. But this is in fact a conflict in which the average person's emotional reaction is almost completely one-sided. On the one hand, people—movie stars, relatives of congressmen and journalists, your next-door neighbor—with terrible diseases. On the other hand, what looks like a clump of cells in some lab.

Indeed, the pro-abortion writer Anna Quindlen has advocated stem-cell research on the precise grounds that it would make people even more emotionally inclined to dismiss concerns about abortion: "[S]ome who believe that life

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begins at conception may look into the vacant eyes of an adored parent with Alzheimer's or picture a paralyzed child walking again, and take a closer look at what an embryo really is." Quindlen would have us judge difficult moral questions by taking a look and forming a picture—by acts of dumb perception rather than of intellection. This is not surprising coming from a woman whose nonfiction oeuvre practically constitutes a sustained implicit brief against the application of logic to social controversies.

More surprising, perhaps, is that many people who are usually pro-life have adopted this way of thinking, or rather not thinking, to justify embryonic stem-cell research. Here is Republican senator Orrin Hatch speaking to the *New York Times*: "I just cannot equate a child living in the womb, with moving toes and fingers and a beating heart, with an embryo in a freezer." He has made similar comments elsewhere, with particular emphasis on the womb/freezer distinction and the embryo's lack of visibly human characteristics. But surely neither temperature nor location is morally decisive. Nobody would question whether a twelve-year-old who had been conceived in a lab was a human being entitled to full rights as such.

Wall Street Journal editor Robert Bartley, who while not a pro-lifer himself is a frequent ally of pro-lifers, has made a similar argument for embryonic stem-cell research. Using the term for a six-day-old embryo, he writes, "I would find a funeral service for a blastocyst grotesque." Most miscarriages do not occasion funerals either, but presumably Bartley would not deny that what miscarriages end are tiny human lives. Blastocysts may not look like human beings at first glance. But on reflection, they look *exactly* like human beings—exactly like human beings at that stage of development; exactly like all of us once looked. (Not that stem-cell research and miscarriages raise the same moral issues. Michael Kinsley remarks in *Time* that since pro-lifers are not exercised about the thousands of miscarriages that happen every year—a "mass slaughter of embryos"—they shouldn't oppose the destruction of a few embryos for medical research. This is a miscarriage of logic. The elderly die in large numbers every year, too, but that doesn't mean it's okay to extract organs they need to survive for research purposes.)

One virtue of the pro-life position is its clarity. Life begins at conception, and taking human life can be allowed under only the strictest of circumstances. Pro-choicers have a much harder time drawing a line past which life is unambiguously protected. Their views of when life begins generally fall into one of three categories: 1) The fetus, like Schrödinger's cat, exists in a kind of suspended state of life/non-life until the mother decides what she wants; 2) there is some continuum in which a fetus that is not a human life gradually becomes one; or 3) we don't really need to think about this obscure theological mystery. (Oddly enough, in the philosophical literature on abortion it is more common to see pro-choicers speculating on when "ensoulment" might occur than to see pro-lifers pondering the question.) In practice, they appear to draw the line at birth. At least their most powerful contingent, the judges, do.

■

When do pro-life supporters of stem-cell research believe life begins?

■

A pro-life position not rooted in logic ends up having the same line-drawing problem. When do pro-life supporters of stem-cell research believe life begins? They would seem to believe that a clump of matter that is not a person somehow becomes inhabited by a person as it develops. Rather than defend this theoretical disaster bordering on superstition, some of these pro-lifers have resorted to the name games that pro-choicers have used in the past: Blastocysts aren't embryos, embryos that have not been implanted are pre-embryos, etc. But none of these nominal distinctions—nor the biological distinctions they denote—mark a point of moral distinction.

Bartley describes himself as a member of the "mushy middle" on abortion as though it were good in itself not to draw principled distinctions. He opposes partial-birth abortion because it is ugly, supports stem-cell research because nobody grieves for blastocysts, seeks a middle ground because the extremists are off-putting: a clump of positions united only by sensibility.

The trouble with this middle ground is that, in addition to giving up territory that should be defended, it is itself indefensible territory. Slippery slopes are slippery because the logic that starts you down them will lead you further down. During the stem-cell debate, people have said that it's okay to use embryos for research because we already "discard" plenty of embryos as a byproduct of *in vitro* fertilization; they could with equal validity say that we should allow research on five-month-old fetuses because we allow them to be aborted. Judges have said that we have to allow partial-birth abortion, or even euthanasia, because we allow abortion. The *Washington Post* says that the logic of abortion rights does not permit the law to charge people with murder when they kill an unborn child in the course of an assault on a pregnant woman, even if the woman considers it murder.

Slippery-slope arguments rarely succeed because people discount the possibility of remote future horrors; they think they will be able to stop the slide. But horrors can get less horrible as the future becomes less remote. People adjust their sensibilities. In 1973, not even pro-abortion lawyers were challenging Texas's law against partial-birth abortion. Back then, embryo-killing research would have seemed monstrous. I have read the argument (in *Reason*, the libertarian magazine, as it happens) that people predicted all kinds of dire consequences from *in vitro* fertilization that did not happen, so why not allow cloning? One of the dire consequences of *in vitro* fertilization, however, is precisely that we are debating cloning now.

A common trope of the press coverage of the stem-cell conflict—which reeks of weariness at the continued existence of pro-lifers—is that it's a shame this "scientific issue" has gotten caught up in the "politics" of abortion. But it is caught up in the issue because the premises of the arguments are the same: Either conception results in a new human being deserving of legal protection or it doesn't. No amount of sophisticated hairsplitting over bioethics is going to work if it ignores that awkward, obvious question. **NR**

REV_00260821

SUPREME COURT PRACTICE

SEVENTH EDITION

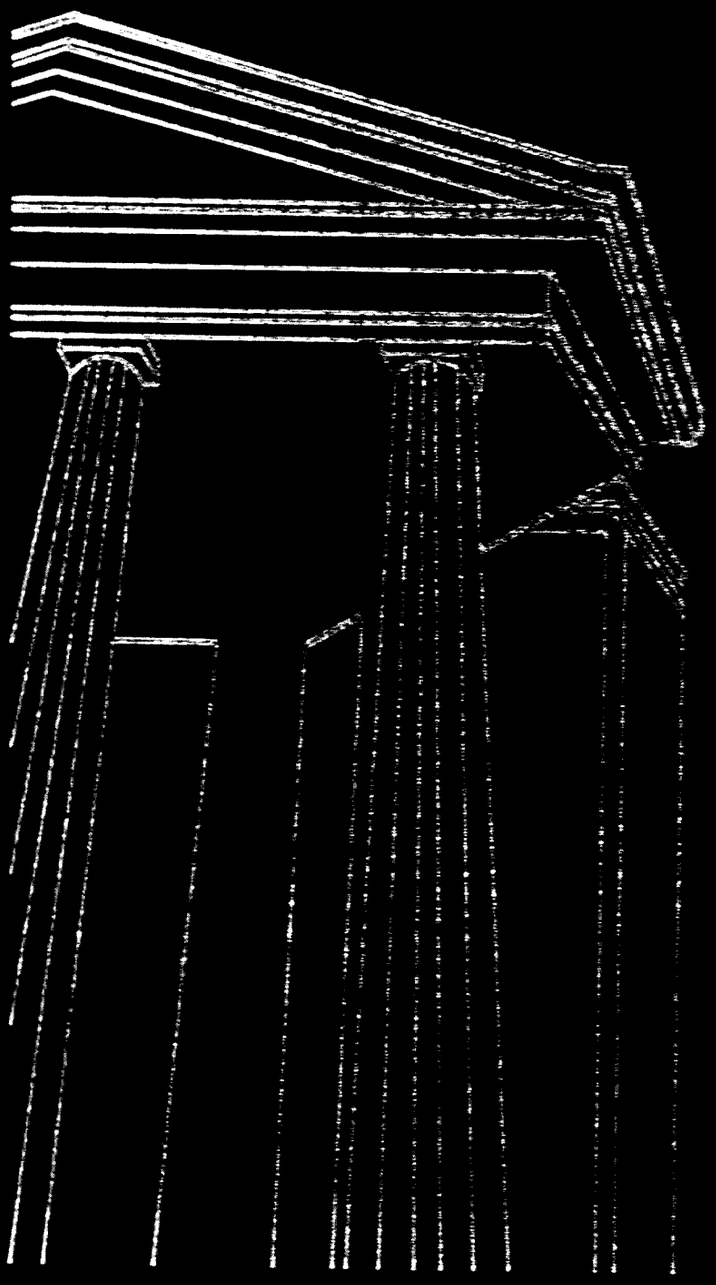

Robert L. Stern
Eugene Gressman
Stephen M. Shapiro
Kenneth S. Geller

REV_00260822

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

OA/NARA#: 1824/1742
9632

Subpoena From the Superior Court of the District of Columbia

Box 56
Folder 2

REV_00260823

May 13, 2003

MEMORANDUM FOR: BRETT KAVANAUGH
ASSOCIATE COUNSEL

FROM: TERRY GOOD
OFFICE OF RECORDS MANAGEMENT

RE: SUBPOENA FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

The Office of Records Management, with the assistance of the Office of the Chief Information Officer, has searched and compiled two listings relevant to the request of Perham Gorgji, the Attorney for the Government, in the case of the United States vs. Edwardo Ramos, which is assigned the case number M591-03.

This information was abstracted from the Worker and Visitor Entrance System (WAVES) data base of the United States Secret Service.

The Subpoena requests a "list of individuals authorized for entry at the White House on January 24, 2003." One of the two lists responds to this demand. It contains information about the people who were cleared into the Complex on January 24, 2003, as either visitors, workers, or members of the Press Corps. It does not include staff. It is arranged alphabetically by last name and includes the following additional information in columns, reading from left to right, first name, middle initial, date of birth, Social Security number, USSS identifying number, USSS badge number, access type (visitor, worker, press), time of arrival, USSS post of arrival, time of departure, USSS post of departure, date appointment was made, date and time of appointment, and date and time of departure. No one with the surname "RAMOS" appears in this listing.

The second list contains the names of people surnamed "RAMOS" who were cleared in to the Complex for all days in January, 2003. No "EDWARDO's" appear on this list. This information was pulled from the same data base as the first list. Given the much smaller number of people, it was possible to include more of the fields in this list.

It should be emphasized that the Office of Records Management merely performs a custodial role for this information. Questions regarding the design, the completeness and the accuracy of the data should be addressed to the USSS, having designed and maintained the system.

Superior Court of the District of Columbia

CRIMINAL DIVISION

SUBPOENA

UNITED STATES

vs. Case No. M591-03

EDWARDO RAMOS

To: Terry Goode - White House Office Records Manager

YOU ARE HEREBY COMMANDED:

To appear before the Criminal Division Courtroom 219 of the Superior Court of the District of Columbia, 500 Indiana Avenue, N.W. Washington, D.C., on the 14th day of MAY, 2003, at 8:45 a.m. as a witness for

TRIAL

☒ and bring with you. VALID PHOTO I.D. AND THIS SUBPOENA, ALSO LIST OF INDIVIDUALS AUTHORIZED FOR ENTRY AT WHITE HOUSE ON JANUARY 24, 2003.

and do not depart from the Court without leave thereof.

WITNESS, the Honorable Chief Judge of the Superior Court of the District of Columbia, and the seal of said Court this 13 day of MAY, 2003.

Clerk, Superior Court of the District of Columbia

Officer in Charge District

PERHAM GORJI
Attorney for Government/Defendant

Phone No. 202-353-9848

Authorization as required by D.C. Code § 14-307 and *Brown v. U.S.*, 567 A. 2d 426 (D.C. 1989), is hereby given for issuance of subpoena for medical records.

Date Judge

RETURN ON THIS SUBPOENA IS REQUIRED ON OR BEFORE THIS DATE:

☐ I hereby certify that I have personally served, or have executed as shown in "REMARKS," the above subpoena on the individual at the address below.

Name and Title of Individual Served	Address (If different than shown above)

☐ I hereby certify that, after diligent investigation, I am unable to locate the individuals, company, corporation, etc., named in above subpoena for the reason(s) as shown in "REMARKS".

Date(s) of Endeavor	Date and Time of Service
REMARKS	Signature of Title of Server

TOTAL P.02

REV_00260825

U.S. Department of Justice
United States Attorney
District of Columbia

Judiciary Center
555 Fourth St. N.W.
Washington, D.C. 20530

FAX

To:	Terry Goode - White House Office Records Manager	From:	Perham Gorji- AUSA
Fax:	202-456-2129	Phone:	202- 353-9848
Date:	May 13, 2003		
Re:	Emergency Subpoena, M591-03, Trial Date: 5-14-03		
Page(s):	2, including cover		

COMMENTS:

U.S. ATTORNEY FACSIMILE COMMUNICATION

WAVES - January 2003 - Last Name: RAMOS

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REV_00260827

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CALLER_PHONE	6-1662	CALLER_ROOM			

PRA 6

WAVES - January 2003 - Last Name: RAMOS

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REV_00260837

WAVES - January 2003 - Last Name: RAMOS

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REV_00260838

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PRA 6

WAVES - January 2003 - Last Name: RAMOS

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REV_00260840

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REV_00260841

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REV_00260842

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REV_00260843

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WAVES - January 2003 - Last Name: RAMOS

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WAVES - January 2003 - Last Name: RAMOS

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REV_00260846

WAVES - January 2003 - Last Name: RAMOS

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PRA 6

REV_00260829

WAVES - January 2003 - Last Name: RAMOS

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REV_00260847

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REV_00260848

WAVES - January 2003 - Last Name: RAMOS

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TOD	1/6/2003 4:21:03 PM	POD	D4		
APPT_MADE_DATE	1/23/2002 3:07:00 PM	Total_People	175		
APPT_START_DATE	1/8/1997 1:46:00 PM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	N7	POST	WIN		
TERMINAL_SUFFIX	17	LastEntryDate	1/23/2002 3:07:00 PM		
visitee_namelast	YATES	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	ALL	MEETING_ROOM	WH/OEB/NEO		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-3358	CALLER_ROOM			

REV_00260849

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	LORENZO	NAMEMID	C
DOB					
UIN				ACCESS_TYPE	WO
TOA		POA			
TOD		POD			
APPT_MADE_DATE	6/8/2000 2:58:00 PM	Total_People	182		
APPT_START_DATE	9/28/2001 5:00:00 PM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	SH	POST	WIA		
TERMINAL_SUFFIX	ZS	LastEntryDate	1/3/2003 1:50:00 PM		
visitee_namelast	BONOS	visitee_namefirst	KERRY	visitee_phone	0-0
MEETING_LOC	OEOB	MEETING_ROOM	OEOB/NEOB		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-2230	CALLER_ROOM			

PRA 6

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	LUIS	NAMEMID	A
DOB	PRA 6				
UIN				ACCESS_TYPE	WO
TOA	1/22/2003 5:02:51 PM	POA	B0402		
TOD	1/23/2003 5:02:51 AM	POD			
APPT_MADE_DATE	1/26/2001 5:51:00 PM	Total_People	284		
APPT_START_DATE	1/19/2002 11:00:00 AM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	NJ	POST	WIJ		
TERMINAL_SUFFIX	49	LastEntryDate	9/30/2002 6:20:00 PM		
visitee_namelast	TANIS	visitee_namefirst		visitee_phone	0053236
MEETING_LOC	ALL	MEETING_ROOM	WW/OEO/NEO		
CALLER_NAME_LAST	TANIS	CALLER_NAME_FIRST			
CALLER_PHONE	0053236	CALLER_ROOM			

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	LILIAN	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	WO
TOA	1/10/2003 3:33:35 PM	POA	D0101		
TOD	1/10/2003 4:08:23 PM	POD	A5		
APPT_MADE_DATE	1/23/2002 3:07:00 PM	Total_People	175		
APPT_START_DATE	1/8/1997 1:46:00 PM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	N7	POST	WIN		
TERMINAL_SUFFIX	17	LastEntryDate	1/23/2002 3:07:00 PM		
visitee_namelast	YATES	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	ALL	MEETING_ROOM	WH/OEB/NEO		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-3358	CALLER_ROOM			

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	LILIAN	NAMEMID	
DOB					
UIN				ACCESS_TYPE	WO
TOA	1/7/2003 7:23:12 AM	POA	D0102		
TOD	1/7/2003 2:50:52 PM	POD	D4		
APPT_MADE_DATE	1/23/2002 3:07:00 PM	Total_People	175		
APPT_START_DATE	1/8/1997 1:46:00 PM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	N7	POST	WIN		
TERMINAL_SUFFIX	17	LastEntryDate	1/23/2002 3:07:00 PM		
visitee_namelast	YATES	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	ALL	MEETING_ROOM	WH/OEB/NEO		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-3358	CALLER_ROOM			

PRA 6

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	LILIAN	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	WO
TOA	1/30/2003 9:36:50 AM	POA	A0101		
TOD	1/30/2003 9:37:03 AM	POD	A1		
APPT_MADE_DATE	1/23/2002 3:07:00 PM	Total_People	175		
APPT_START_DATE	1/8/1997 1:46:00 PM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	N7	POST	WIN		
TERMINAL_SUFFIX	17	LastEntryDate	1/23/2002 3:07:00 PM		
visitee_namelast	YATES	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	ALL	MEETING_ROOM	WH/OEB/NEO		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-3358	CALLER_ROOM			

REV_00260854

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	LILIAN	NAMEMID	
DOB		PRA 6			
UIN				ACCESS_TYPE	WO
TOA	1/16/2003 11:27:33 AM	POA	D0102		
TOD	1/16/2003 1:09:25 PM	POD	D3		
APPT_MADE_DATE	1/23/2002 3:07:00 PM	Total_People	175		
APPT_START_DATE	1/8/1997 1:46:00 PM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	N7	POST	WIN		
TERMINAL_SUFFIX	17	LastEntryDate	1/23/2002 3:07:00 PM		
visitee_namelast	YATES	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	ALL	MEETING_ROOM	WH/OEB/NEO		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-3358	CALLER_ROOM			

REV_00260855

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	GABRIEL	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	WO
TOA		POA			
TOD		POD			
APPT_MADE_DATE	9/24/2002 5:49:00 PM	Total_People	1		
APPT_START_DATE	3/20/2000 11:10:00 AM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	A0	POST	WIA		
TERMINAL_SUFFIX	20	LastEntryDate	9/24/2002 8:32:00 PM		
visitee_namelast	DESO	visitee_namefirst		visitee_phone	0059210
MEETING_LOC	ALL	MEETING_ROOM	EW		
CALLER_NAME_LAST	DESO	CALLER_NAME_FIRST			
CALLER_PHONE	0059210	CALLER_ROOM			

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	JOSEPH	NAMEMID	
DOB	**PRA 6**				
UIN				ACCESS_TYPE	VA
TOA		POA			
TOD		POD			
APPT_MADE_DATE	1/3/2003 2:43:00 PM	Total_People	5		
APPT_START_DATE	1/5/2003 10:30:00 AM	APPT_END_DATE	1/5/2003 12:30:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	AS	POST	WIA		
TERMINAL_SUFFIX	ZS	LastEntryDate	1/3/2003 2:43:00 PM		
visitee_namelast	BATTAGLIA	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	WH	MEETING_ROOM	SOUTHLAWN		
CALLER_NAME_LAST	BATTAGLIA	CALLER_NAME_FIRST	TODD		
CALLER_PHONE	6-8668	CALLER_ROOM			

REV_00260830

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	ERNIE	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	WO
TOA		POA			
TOD		POD			
APPT_MADE_DATE	12/9/2002 11:48:00 AM	Total_People	7		
APPT_START_DATE	12/9/2002 11:40:00 AM	APPT_END_DATE	9/2/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	DB	POST	WID		
TERMINAL_SUFFIX	XB	LastEntryDate	1/14/2003 10:40:00 AM		
visitee_namelast	QUARMBY	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	OEOB	MEETING_ROOM	23		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-4259	CALLER_ROOM			

REV_00260857

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	FERNANDO	NAMEMID	
DOB	**PRA 6**				
UIN				ACCESS_TYPE	WO
TOA		POA			
TOD		POD			
APPT_MADE_DATE	1/26/2001 5:51:00 PM	Total_People	284		
APPT_START_DATE	1/19/2002 11:00:00 AM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	NJ	POST	WIJ		
TERMINAL_SUFFIX	49	LastEntryDate	9/30/2002 6:20:00 PM		
visitee_namelast	TANIS	visitee_namefirst		visitee_phone	0053236
MEETING_LOC	ALL	MEETING_ROOM	WW/OEO/NEO		
CALLER_NAME_LAST	TANIS	CALLER_NAME_FIRST			
CALLER_PHONE	0053236	CALLER_ROOM			

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	LILIAN	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	WO
TOA	1/31/2003 3:14:17 PM	POA	K0101		
TOD	1/31/2003 3:15:55 PM	POD	K0102		
APPT_MADE_DATE	1/23/2002 3:07:00 PM	Total_People	175		
APPT_START_DATE	1/8/1997 1:46:00 PM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	N7	POST	WIN		
TERMINAL_SUFFIX	17	LastEntryDate	1/23/2002 3:07:00 PM		
visitee_namelast	YATES	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	ALL	MEETING_ROOM	WH/OEB/NEO		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-3358	CALLER_ROOM			

REV_00260859

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	LILIAN	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	WO
TOA	1/30/2003 9:56:29 AM	POA	B0402		
TOD	1/30/2003 6:36:37 PM	POD	B4		
APPT_MADE_DATE	1/23/2002 3:07:00 PM	Total_People	175		
APPT_START_DATE	1/8/1997 1:46:00 PM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	N7	POST	WIN		
TERMINAL_SUFFIX	17	LastEntryDate	1/23/2002 3:07:00 PM		
visitee_namelast	YATES	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	ALL	MEETING_ROOM	WH/OEB/NEO		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-3358	CALLER_ROOM			

REV_00260860

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	LILIAN	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	WO
TOA	1/31/2003 7:41:57 AM	POA	D0101		
TOD	1/31/2003 3:08:42 PM	POD	D3		
APPT_MADE_DATE	1/23/2002 3:07:00 PM	Total_People	175		
APPT_START_DATE	1/8/1997 1:46:00 PM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	N7	POST	WIN		
TERMINAL_SUFFIX	17	LastEntryDate	1/23/2002 3:07:00 PM		
visitee_namelast	YATES	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	ALL	MEETING_ROOM	WH/OEB/NEO		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-3358	CALLER_ROOM			

REV_00260861

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	LILIAN	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	WO
TOA	1/24/2003 4:07:50 PM	POA	D0102		
TOD	1/24/2003 4:27:16 PM	POD	D4		
APPT_MADE_DATE	1/23/2002 3:07:00 PM	Total_People	175		
APPT_START_DATE	1/8/1997 1:46:00 PM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	N7	POST	WIN		
TERMINAL_SUFFIX	17	LastEntryDate	1/23/2002 3:07:00 PM		
visitee_namelast	YATES	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	ALL	MEETING_ROOM	WH/OEB/NEO		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-3358	CALLER_ROOM			

REV_00260862

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	LILIAN	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	WO
TOA	1/27/2003 7:39:09 AM	POA	D0101		
TOD	1/27/2003 4:23:48 PM	POD	D4		
APPT_MADE_DATE	1/23/2002 3:07:00 PM	Total_People	175		
APPT_START_DATE	1/8/1997 1:46:00 PM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	N7	POST	WIN		
TERMINAL_SUFFIX	17	LastEntryDate	1/23/2002 3:07:00 PM		
visitee_namelast	YATES	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	ALL	MEETING_ROOM	WH/OEB/NEO		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-3358	CALLER_ROOM			

REV_00260863

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	LILIAN	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	WO
TOA	1/13/2003 1:35:11 PM	POA	D0102		
TOD	1/14/2003 1:35:11 AM	POD			
APPT_MADE_DATE	1/23/2002 3:07:00 PM	Total_People	175		
APPT_START_DATE	1/8/1997 1:46:00 PM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	N7	POST	WIN		
TERMINAL_SUFFIX	17	LastEntryDate	1/23/2002 3:07:00 PM		
visitee_namelast	YATES	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	ALL	MEETING_ROOM	WH/OEB/NEO		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-3358	CALLER_ROOM			

REV_00260864

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	GONZALO	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	WO
TOA		POA			
TOD		POD			
APPT_MADE_DATE	11/17/2000 9:33:00 AM	Total_People	182		
APPT_START_DATE	9/28/2001 5:00:00 PM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	SH	POST	WIG		
TERMINAL_SUFFIX	LS	LastEntryDate	1/3/2003 1:50:00 PM		
visitee_namelast	BONOS	visitee_namefirst	KERRY	visitee_phone	0-0
MEETING_LOC	OEOB	MEETING_ROOM	OEOB/NEOB		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-2230	CALLER_ROOM			

REV_00260865

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	LILIAN	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	WO
TOA	1/14/2003 10:13:34 AM	POA	D0101		
TOD	1/14/2003 6:31:01 PM	POD	D4		
APPT_MADE_DATE	1/23/2002 3:07:00 PM	Total_People	175		
APPT_START_DATE	1/8/1997 1:46:00 PM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	N7	POST	WIN		
TERMINAL_SUFFIX	17	LastEntryDate	1/23/2002 3:07:00 PM		
visitee_namelast	YATES	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	ALL	MEETING_ROOM	WH/OEB/NEO		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-3358	CALLER_ROOM			

REV_00260866

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	MELANY	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	VA
TOA	1/21/2003 10:00:00 AM	POA	vis		
TOD	1/21/2003 10:00:00 PM	POD			
APPT_MADE_DATE	1/17/2003 5:17:00 PM	Total_People	46		
APPT_START_DATE	1/21/2003 10:00:00 AM	APPT_END_DATE	1/21/2003 12:00:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	HW	POST	WIH		
TERMINAL_SUFFIX	LW	LastEntryDate	1/17/2003 5:17:00 PM		
visitee_namelast	GRAY	visitee_namefirst	EMILY	visitee_phone	0-0
MEETING_LOC	WH	MEETING_ROOM	RESIDENCE		
CALLER_NAME_LAST	GRAY	CALLER_NAME_FIRST	EMILY		
CALLER_PHONE	6-1204	CALLER_ROOM			

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	LILIAN	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	WO
TOA	1/28/2003 7:36:03 AM	POA	D0102		
TOD	1/28/2003 7:36:03 PM	POD			
APPT_MADE_DATE	1/23/2002 3:07:00 PM	Total_People	175		
APPT_START_DATE	1/8/1997 1:46:00 PM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	N7	POST	WIN		
TERMINAL_SUFFIX	17	LastEntryDate	1/23/2002 3:07:00 PM		
visitee_namelast	YATES	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	ALL	MEETING_ROOM	WH/OEB/NEO		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-3358	CALLER_ROOM			

REV_00260867

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	LILIAN	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	WO
TOA	1/21/2003 7:39:17 AM	POA	D0101		
TOD	1/21/2003 4:04:18 PM	POD	A5		
APPT_MADE_DATE	1/23/2002 3:07:00 PM	Total_People	175		
APPT_START_DATE	1/8/1997 1:46:00 PM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	N7	POST	WIN		
TERMINAL_SUFFIX	17	LastEntryDate	1/23/2002 3:07:00 PM		
visitee_namelast	YATES	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	ALL	MEETING_ROOM	WH/OEB/NEO		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-3358	CALLER_ROOM			

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	LILIAN	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	WO
TOA	1/17/2003 9:55:39 PM	POA	B0401		
TOD	1/18/2003 9:55:39 AM	POD			
APPT_MADE_DATE	1/23/2002 3:07:00 PM	Total_People	175		
APPT_START_DATE	1/8/1997 1:46:00 PM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	N7	POST	WIN		
TERMINAL_SUFFIX	17	LastEntryDate	1/23/2002 3:07:00 PM		
visitee_namelast	YATES	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	ALL	MEETING_ROOM	WH/OEB/NEO		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-3358	CALLER_ROOM			

REV_00260869

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	LILIAN	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	WO
TOA	1/16/2003 1:13:49 PM	POA	K0102		
TOD	1/16/2003 1:26:28 PM	POD	K1		
APPT_MADE_DATE	1/23/2002 3:07:00 PM	Total_People	175		
APPT_START_DATE	1/8/1997 1:46:00 PM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	N7	POST	WIN		
TERMINAL_SUFFIX	17	LastEntryDate	1/23/2002 3:07:00 PM		
visitee_namelast	YATES	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	ALL	MEETING_ROOM	WH/OEB/NEO		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-3358	CALLER_ROOM			

REV_00260870

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	LILIAN	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	WO
TOA	1/23/2003 8:00:11 AM	POA	D0102		
TOD	1/23/2003 8:00:11 PM	POD			
APPT_MADE_DATE	1/23/2002 3:07:00 PM	Total_People	175		
APPT_START_DATE	1/8/1997 1:46:00 PM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	N7	POST	WIN		
TERMINAL_SUFFIX	17	LastEntryDate	1/23/2002 3:07:00 PM		
visitee_namelast	YATES	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	ALL	MEETING_ROOM	WH/OEB/NEO		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-3358	CALLER_ROOM			

REV_00260871

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	LILIAN	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	WO
TOA	1/22/2003 12:00:13 PM	POA	D0102		
TOD	1/22/2003 1:14:32 PM	POD	D3		
APPT_MADE_DATE	1/23/2002 3:07:00 PM	Total_People	175		
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APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	N7	POST	WIN		
TERMINAL_SUFFIX	17	LastEntryDate	1/23/2002 3:07:00 PM		
visitee_namelast	YATES	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	ALL	MEETING_ROOM	WH/OEB/NEO		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-3358	CALLER_ROOM			

REV_00260872

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	LILIAN	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	WO
TOA	1/21/2003 4:33:49 PM	POA	D0102		
TOD	1/21/2003 9:31:23 PM	POD	B4		
APPT_MADE_DATE	1/23/2002 3:07:00 PM	Total_People	175		
APPT_START_DATE	1/8/1997 1:46:00 PM	APPT_END_DATE	9/30/2003 11:59:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	N7	POST	WIN		
TERMINAL_SUFFIX	17	LastEntryDate	1/23/2002 3:07:00 PM		
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MEETING_LOC	ALL	MEETING_ROOM	WH/OEB/NEO		
CALLER_NAME_LAST		CALLER_NAME_FIRST			
CALLER_PHONE	5-3358	CALLER_ROOM			

REV_00260873

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	VIRIGINIA	NAMEMID	
DOB					
UIN				ACCESS_TYPE	VA
TOA		POA			
TOD		POD			
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APPT_START_DATE	1/5/2003 10:30:00 AM	APPT_END_DATE	1/5/2003 12:30:00 PM		
APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	AS	POST	WIA		
TERMINAL_SUFFIX	ZS	LastEntryDate	1/3/2003 2:43:00 PM		
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MEETING_LOC	WH	MEETING_ROOM	SOUTHLAWN		
CALLER_NAME_LAST	BATTAGLIA	CALLER_NAME_FIRST	TODD		
CALLER_PHONE	6-8668	CALLER_ROOM			

PRA 6

REV_00260832

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	FRANK	NAMEMID	
DOB	PRA 6				
UIN				ACCESS_TYPE	VA
TOA	1/8/2003 1:45:47 PM	POA	D0102		
TOD	1/8/2003 3:10:52 PM	POD	D1		
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APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	TC	POST	WIT		
TERMINAL_SUFFIX	XC	LastEntryDate	1/8/2003 10:07:00 AM		
visitee_namelast	STYLES	visitee_namefirst	ANGELA	visitee_phone	0-0
MEETING_LOC	OEOB	MEETING_ROOM	352		
CALLER_NAME_LAST	WINGARD	CALLER_NAME_FIRST	DORIS		
CALLER_PHONE	5-5802	CALLER_ROOM			

PRA 6

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	ROOSEVELT	NAMEMID	
DOB		PRA 6			
UIN				ACCESS_TYPE	VA
TOA	1/7/2003 10:00:00 AM	POA	VIS		
TOD	1/7/2003 10:00:00 PM	POD			
APPT_MADE_DATE	1/7/2003 9:26:42 AM	Total_People	100		
APPT_START_DATE	1/7/2003 10:00:00 AM	APPT_END_DATE	1/7/2003 12:00:00 PM		
APPT_CANCEL_DATE					
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ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	SH	POST	WIN		
TERMINAL_SUFFIX	SH	LastEntryDate	1/7/2003 9:29:05 AM		
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MEETING_LOC	WH	MEETING_ROOM	RESIDENCE		
CALLER_NAME_LAST	PENNY	CALLER_NAME_FIRST	SARAH		
CALLER_PHONE	6-1662	CALLER_ROOM			

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	DANIEL	NAMEMID	
DOB					
UIN	PRA 6			ACCESS_TYPE	VA
TOA		POA			
TOD		POD			
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ESCORT_TYPE					
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LAST_UPDATEDBY	AS	POST	WIA		
TERMINAL_SUFFIX	ZS	LastEntryDate	1/3/2003 2:43:00 PM		
visitee_namelast	BATTAGLIA	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	WH	MEETING_ROOM	SOUTHLAWN		
CALLER_NAME_LAST	BATTAGLIA	CALLER_NAME_FIRST	TODD		
CALLER_PHONE	6-8668	CALLER_ROOM			

WAVES - January 2003 - Last Name: RAMOS

NAMELAST	RAMOS	NAMEFIRST	ANAMARIS	NAMEMID	
DOB		PRA 6			
UIN				ACCESS_TYPE	VA
TOA	1/22/2003 11:00:00 AM	POA	vis		
TOD	1/22/2003 11:00:00 PM	POD			
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APPT_CANCEL_DATE					
ESCORT_TYPE					
ESCORT_NAME_LAST		ESCORT_NAME_F			
LAST_UPDATEDBY	LJ	POST	WIN		
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visitee_namelast	BARFIELD	visitee_namefirst		visitee_phone	0-0
MEETING_LOC	WH	MEETING_ROOM	RESIDENCE		
CALLER_NAME_LAST	BARFIELD	CALLER_NAME_FIRST	TIFFANY		
CALLER_PHONE	6-6306	CALLER_ROOM			

REV_00260836

Supreme Court Consultation

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

OA/NARA#: 2175/2086
9795

Box 56
Folder 3

REV_00260874

Untitled Document

June 10, 2003
The Honorable George W. Bush
The White House
1600 Pennsylvania Ave, NW
Washington, DC 20500

Dear Mr. President:

The Constitution dictates that federal judges be nominated by the President with the advice and consent of the Senate. I write to begin the process of fulfilling that Constitutional mandate.

In recent history, Presidents have announced their intention to nominate candidates to fill Supreme Court vacancies shortly after the positions have become available. The short time between the creation of a Supreme Court vacancy and the announcement of a potential replacement leaves little time for Senators to fulfill their constitutional duties to advise the President on whom to nominate.

Recent press reports have indicated that the White House is actively vetting potential nominees in preparation for Chief Justice Rehnquist's or any other Supreme Court justice's retirement. Because it appears you are actively engaged in this process and because I hold so important my constitutional obligation to advise you on these matters, I write to offer my input at this stage.

I start by encouraging you to use the same principles that guide me in evaluating judicial nominees. I consider three criteria: excellence, diversity, and moderation. I am confident that excellence will be a primary consideration for you because I know we agree that judges should be among the best lawyers the bar has to offer. I also know that you will consider the importance of diversity, as you have especially in working with me to put judges on the bench in New York.

When it comes to moderation, I am disappointed that we diverge with increasing frequency. I do not want judges who are too far Left or too far Right, because I believe judges who come to the bench with extreme ideologies are likely to make law, not interpret it. You, more than any other President in history, have chosen judges through an ideological prism. The White House's reliance on ideology when it has come to selecting lower court nominees has led to conflict that has frustrated both of us. If you were to select a mainstream nominee, you would do the process, the Judiciary, and the nation a real service.

REV_00260876

I would add a fourth consideration: the willingness to answer questions forthrightly. For the Senate to perform its constitutional role properly, we must have answers to appropriate questions. Several of your nominees have refused to answer questions that legal ethicists have said are clearly appropriate. The same questions were asked by Republican Senators and answered by Democratic nominees when President Clinton was in office, and the same questions have been answered by several of your own nominees. Clearly, there is nothing inappropriate about a nominee discussing his or her views on already decided Supreme Court cases, on the First Amendment, the Second Amendment, the Fourth Amendment, the Eleventh Amendment, the Fourteenth Amendment, the right to privacy, the Commerce Clause, the Spending Clause, or any of the other pressing constitutional issues of the day.

As you know, I have voted for well over 90% of the judges you have nominated, most of them Republicans, most of them conservatives (but mainstream conservatives), and many if not most of them pro-life. I have no litmus test when it comes to what a nominee believes, but if a nominee refuses to answer my fair and reasonable questions and I am unpersuaded that the nominee will preserve balance on the court to which he or she is nominated, I am compelled to vote no.

Having outlined the criteria I would hope you would consider, I want to offer the names of five potential Supreme Court nominees for your consideration. There is a rich tradition of Senators offering specific advice to Presidents on Supreme Court nominations. Most recently, when President Clinton was considering judicial nominees, he received advice from Senator Hatch.

According to Senator Hatch in his book, Square Peg, he advised President Clinton to consider nominating both Justice Ginsburg and Justice Breyer to the Supreme Court. He believed that both would win easy Senate confirmation and, while left of center, were "highly honest and capable jurists," and "far better than the other likely candidates from a liberal Democratic administration." My advice is offered in the same manner and with the goal of helping you identify a nominee who could win 100 Senators' votes, not just 51.

While there are scores of Democrats whom I would hope you would consider, I am offering only individuals who either are Republicans or have previously been nominated by Republican Presidents. The candidates I would advise you to consider are:

The Honorable Arlen Specter, Republican Senator from Pennsylvania.

The Honorable Ann Williams, Judge, Seventh Circuit Court of Appeals, nominated by President Ronald Reagan to the Northern District of Illinois.

The Honorable Edward Prado. Judge, Fifth Circuit Court of Appeals, nominated by you and unanimously confirmed by the 108th Senate.

The Honorable Michael Mukasey, Judge, Southern District of New York, nominated by President Ronald Reagan.

The Honorable Stanley Marcus, Judge, Eleventh Circuit Court of Appeals, nominated by President Ronald Reagan.

All of these individuals appear to be legally excellent, ideologically moderate, and several of them would add diversity to the Court. All of them have a history of bipartisan support, are within the mainstream, and have demonstrated a commitment to the rule of law. While I would need to do additional research on them and question them personally before announcing my unqualified support, my initial review of their records is promising.

This is far from an exhaustive list and I appreciate that you may have other individuals in mind should a vacancy arise. I would welcome the opportunity to evaluate any candidates you are considering and provide input before any nomination is made, consistent with the Constitution's mandate that the Senate advise the President on judicial nominations.

My profound hope is that, should there be a Supreme Court vacancy this summer, you will nominate a candidate who will unite us, not divide us. I am confident that by working together we can achieve that goal. I look forward to hearing from you soon.

Sincerely,
Charles E. Schumer
United States Senator

TOM DASCHLE
SOUTH DAKOTA

United States Senate
Office of the Democratic Leader
Washington, DC 20510–7020

June 17, 2003

The Honorable George W. Bush
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. President:

I know that Senator Leahy, the Ranking Democrat on the Senate Judiciary Committee, and Senator Schumer, the Ranking Democrat on the Courts Subcommittee, have written to you over the last several weeks to indicate Democratic Senators' desire to consult with you should a vacancy arise on the United States Supreme Court. On behalf of the entire Senate Democratic Caucus, I want to emphasize that we remain hopeful that we would have meaningful, bipartisan consultation in advance of any Supreme Court nomination. We believe that it is not necessary to have a divisive confirmation fight over a Supreme Court appointment. If there are vacancies, we would like to see them filled by nominees who unite all Americans.

Should you be willing to convene a meeting of Senate leaders from both parties to begin a bipartisan process of consultation, I stand ready to participate in good faith in such a process and know that Senator Leahy and others would do so as well.

Sincerely,

Tom Daschle
Senate Democratic Leader

REV_00260882

THE WHITE HOUSE

WASHINGTON

June 17, 2003

Dear Senator Leahy:

Thank you for your letter of May 14 to the President, which we received recently due to screening procedures for regular White House mail.

Your letter first suggests that the Senate has moved with appropriate dispatch in considering the President's judicial nominees. We respectfully disagree with respect to appeals court nominees. While the Senate has confirmed 105 district court judges, the Senate has voted on only 26 of the President's 42 appeals court nominees. Of the 16 appeals court nominees who still have not received votes, 8 have been waiting since 2001. More than 10% of the 167 regional appeals court seats still remain vacant, including a dozen that have been declared "judicial emergencies" by the Judicial Conference of the United States.

Delays in Senate votes on appeals court nominees are not new: In the last three Administrations, too many appeals court nominees have had to wait years for a vote, and some have never received votes. As President Bush has stated repeatedly since the 2000 campaign (and as the Chief Justice and the American Bar Association have also advocated), every judicial nominee should receive a timely hearing and vote. In speeches on the Senate floor, you agreed with then-Governor Bush on this principle in 2000. But the problem of delayed and denied votes for appeals court nominees unfortunately has not improved in his Administration. More appeals court nominees had to wait at least a year for a hearing in the 107th Congress than in the last 50 years combined. Only 53% of President Bush's appeals court nominees in the 107th Congress received votes, compared to more than 90% in the last three Presidents' first two years. Judicial historian Sheldon Goldman independently examined the statistics and concluded that the 107th Congress was the least efficient in modern history in holding hearings and votes on appeals court nominees.

We acknowledge the work of the Senate on district court nominees, but more has to be done to address circuit vacancies and to end the delays in consideration of appeals court nominees, which have been the persistent problem in the last three Administrations. To ensure a fair and orderly process no matter who is President or which party controls the Senate, the President has respectfully urged the Senate to seek bipartisan agreement on a process that will provide every judicial nominee a timely up or down vote.

Your letter also references the possibility of a Supreme Court vacancy. If such a vacancy arises during his Presidency, President Bush will nominate an individual of high integrity, intellect, and experience. The Senate will have an opportunity to assess the President's nominee and exercise its constitutional responsibility to vote up or down on the nominee. I would be pleased to visit with you about the process and to consider suggestions you or others may have.

Sincerely,

Alberto R. Gonzales
Counsel to the President

The Honorable Patrick J. Leahy
United States Senate
Washington, D.C. 20510

Copy: The Honorable Bill Frist
The Honorable Thomas Daschle
The Honorable Orrin Hatch

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

OA/NARA#: 1825/1743
9633

Supreme Court - OSG (Office of Solicitor General) Updates

Box 56
Folder 4

REV_00260885

MEMORANDUM

TO: Alberto R. Gonzales

CC: Counsel's Office Attorneys

FROM: Brett M. Kavanaugh

DATE: September 28, 2001

RE: Office of Solicitor General Update

Attached is the latest update from the Solicitor General.

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

Supreme Court Updates from Solicitor General

OA/NARA#: 340/236
9121

Box 56
Folder 5

REV_00260887

MEMORANDUM

TO: Alberto R. Gonzales

CC: Attorneys in the Counsel's Office

FROM: Brett M. Kavanaugh

DATE: April 16, 2001

RE: Supreme Court Update

Attached please find this week's Supreme Court update from the Acting Solicitor General. The Court issued no decisions this week, but did grant certiorari in two cases that raise important questions under the Americans with Disabilities Act.

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

April 16, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Barbara D. Underwood
Acting Solicitor General

Subject: Weekly Report

I. Supreme Court Decisions

A. Grants of Certiorari

On April 16, the Supreme Court granted certiorari in the following cases:

1. *Mickens* v. *Taylor*, No. 00-9285. The Supreme Court granted Mickens's application for a stay of execution, which had been scheduled for tomorrow in Virginia. The Court also granted certiorari on the following question: Did the Court of Appeals err in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known? We have not participated in the case to date, and are determining whether participation is warranted at this stage.

2. *Toyota Motor Mfg., Ky. Inc.* v. *Williams*, No. 00-1089. This case presents the question whether an employee with physical impairments that prevent her from performing some but not all of her assigned duties suffers from a "disability" within the meaning of the Americans with Disabilities Act (ADA). We have not participated in the case to date, and are determining whether participation is warranted at this stage.

3. *US Airways, Inc.* v. *Barnett*, No. 00-1250. The case presents the question whether the ADA, as the Ninth Circuit held en banc, requires an employer to reassign a disabled employee to a different position as a "reasonable accommodation" even though another employee is entitled to hold

that position under employer's bona fide and established seniority system. We have not participated in the case to date, and are determining whether participation is warranted at this stage.

II. Supreme Court Arguments

During the week of April 16, we are presenting arguments in the following cases:

1. *Tyler* v. *Cain*, No. 00-5961. The case presents the question whether a state prisoner's second or successive petition for a writ of habeas corpus asserting a claim under *Cage* v. *Louisiana*, 498 U.S. 39 (1990) (per curiam), satisfies AEDPA's requirement at 28 U.S.C. 2244(b)(2)(A) that such petitions rely "on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." We contend that this provision requires that the determination that the new rule is retroactive be made by the Supreme Court in either an explicit statement or in the application of the new rule in post-conviction review, not by a lower court applying the general principles of retroactivity announced in prior Supreme Court decisions. We then argue that the Court should not make *Cage* retroactive because its rule about the proper definition of reasonable doubt in jury instructions does not satisfy either exception to the general rule against retroactive application outlined in *Teague* v. *Lane*, 489 U.S. 299 (1989). The *Cage* decision neither placed conduct beyond the reach of the state to prosecute nor was it a watershed rule of criminal procedure central to an accurate determination of innocence or guilt.

2. *New Hampshire* v. *Maine*, No. 130 (original). New Hampshire brought this original action claiming that its boundary with Maine in Portsmouth Harbor extends to the low water mark of the Maine shore. The practical focus of the dispute is the Portsmouth Naval Shipyard, a federal facility that is located on Seavey's Island in the harbor. Maine currently exercises jurisdiction over the Shipyard, so New Hampshire residents who work at the Shipyard are required to pay Maine income taxes. The Court invited us to express our views and we contend that the doctrine of res judicata bars New Hampshire's claim because of a 1976 consent decree that New Hampshire and Maine agreed to in a prior original action in the Supreme Court concerning the lateral marine boundary in the vicinity of the current dispute. See 434 U.S. at 1-4. In that consent decree, the states agreed to be bound by King George II's 1740 order that fixed the boundary between the states "thro the Mouth of Piscataqua Harbor and up the Middle of the River." Because the 1976 consent decree set the boundary at the "Middle of the River," New Hampshire cannot now maintain that the boundary extends to the low water mark of the Maine shore.

3. *United States v. United Foods, Inc.*, No. 00-276. The case presents the question whether the assessments imposed pursuant to the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. 6101 *et seq.*, on members of the mushroom industry for advertising programs to support the industry violate the First Amendment. We contend that the assessments are constitutional for the reasons the Supreme Court identified in a 1997 decision, *Glickman v. Wileman Bros. & Elliot, Inc.*, that rejected a First Amendment challenge to similar generic advertising programs

for California tree fruits: the assessments "impose no restraint on the freedom of any producer to communicate any message to any audience"; "do not compel any person to engage in any actual or symbolic speech"; and "do not compel the producers to endorse or to finance any political or ideological views." We argue that the court of appeals erred in distinguishing *Glickman* on the basis that mushrooms are not as extensively regulated as California peaches, plums, and nectarines. The Supreme Court did not base its decision in *Glickman* on the extent of regulation and the justification for imposing mandatory assessments to fund generic advertising programs – avoiding "free rider" problems – is implicated whether a commodity is regulated or not. In addition to our argument that *Glickman* is controlling, we argue that the program is government speech, which the First Amendment does not constrain regardless whether the speech is funded from general tax revenues or from targeted exactions on those who benefit most from the speech.

4. *Alabama* v. *Bozeman*, No. 00-492. The case presents the question whether a one-day transfer of a federal prisoner to state custody for purposes of arraignment, without completing the trial on the state charges, violates Article IV(e) of the Interstate Agreement on Detainers (IAD) and requires dismissal of the state charges. While Bozeman was serving time in federal prison, Covington County, Alabama officials obtained custody of Bozeman, pursuant to the IAD, for his one-day arraignment on state criminal charges. Bozeman was returned to federal prison the next day. The Supreme Court of Alabama later dismissed the state charges against Bozeman under Article IV(e) of the IAD, which provides that if "trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment . . . such indictment, information or complaint shall not be of further force or effect, and the court shall enter an order dismissing the same with prejudice." We contend as *amicus curiae* that the Supreme Court of Alabama erred in dismissing based on a technical and wholly harmless defect. The Alabama decision conflicts with the vast majority of federal courts that have not required dismissal under the IAD for *de minimis* transfers and ignores the principle of statutory construction *de minimis non curat lex* -- "the law cares not for trifles." Under this principle, we argue that the one-day transfer of Bozeman for arraignment purposes does not require dismissal. Rather, the rapid return of Bozeman to federal custody furthers the purpose of Article IV(e), which is to minimize any interruption of a prisoner's participation in rehabilitative programs.

5. *Cedric Kushner Promotions, Ltd.* v. *King*, No. 00-549. The case involves the Racketeer Influenced and Corrupt Organizations Act (RICO), which makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. 1962(c). The question presented is whether a claim may be maintained under this provision when the alleged RICO "enterprise" is a corporation and the "person" charged with the violation is an officer and employee of the corporation acting within the scope of his corporate duties. We argue as *amicus curiae* that a RICO claim may be maintained in that situation because although the "person" charged must be distinct from the "enterprise" under Section 1962(c), a corporate employee is sufficiently distinct from the corporation to satisfy the

distinctness requirement. The plain language of the statute – "any person employed by . . . any enterprise" – indicates that corporate employees are proper defendants when the alleged racketeering enterprise is the corporation. We urge the Court to adopt the test that an individual RICO defendant is sufficiently distinct from the alleged RICO enterprise when the defendant and the enterprise are either legally or practically separable. That test provides a workable standard and serves the statute's underlying purposes by preventing racketeers from escaping RICO liability merely by incorporating their activities.

III. Supreme Court Filing

A. Brief on the Merits

On March 9, we filed a brief in *Verizon Communications, Inc.* v. *FCC*, No. 00-587. The case involves challenges to two important aspects of the FCC's regulations implementing the Telecommunications Act of 1996: pricing methodology and combinations rules. On remand from the Supreme Court, see *AT&T* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), the Eighth Circuit invalidated the key regulation defining the FCC's forward-looking cost methodology, known as "total element long-run incremental cost" or TELRIC. The cost methodology is used by state public utility commissions to determine the amount incumbent local exchange carriers (ILECs) can recover from new entrants for the provision of interconnection and access to network elements. The appeals court, while recognizing the validity of a forward-looking cost methodology, rejected the Commission's determination that cost should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration. We argue that the regulation is a reasonable policy choice on a matter that Congress left for the FCC to resolve. The FCC's forward looking cost methodology promotes the 1996 Act's purpose of bringing meaningful competition to local telecommunications markets and ensuring the efficient use of existing network facilities. Federal agencies governing other regulated industries and most state public utility commissions have employed similar forward-looking cost methodologies that take into account the costs of efficient, currently available alternatives.

The Court will also decide the validity of FCC rules requiring that ILECs, at the request of a new entrant and for a cost-based fee, combine certain elements in their networks that they do not ordinarily combine. We contend that the Supreme Court in *Iowa Utilities Board* rejected the Eight Circuit's view that the 1996 Act "unambiguously indicates that requesting carriers will combine the unbundled elements themselves." The Supreme Court held that the statutory provision allowing "requesting carries to combine' [network elements] does not say, or even remotely imply, that elements *must* be provided only [in discrete pieces] and never in combined form." 525 U.S. at 394. We also argue that these FCC combinations rules are consistent with the 1996 Act's mandate that ILECs provide new entrants with "nondiscriminatory access" to network elements.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

TELEFAX TO:

RECIPIENT'S NAME: Brett Kavanaugh

AGENCY/FIRM: _____

ADDRESS: _____

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TELEPHONE NUMBER: (202) 456-7984

TELEFAX NUMBER: (202) 456-1647

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TRANSMITTED: DATE: 4/16/01 TIME: 5 pm INITIALS: eb

MEMORANDUM

TO: Alberto R. Gonzales

CC: All Attorneys in Counsel's Office

FROM: Brett M. Kavanaugh

DATE: May 1, 2001

RE: Supreme Court Update

Attached please find the latest Supreme Court update from the Acting Solicitor General.

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

April 30, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Barbara D. Underwood
Acting Solicitor General

Subject: Weekly Report

LAST WEEK

I. Supreme Court Decisions

A. Decisions on the Merits

On April 24, 2001, the Court decided the following two cases:

1. *Atwater v. City of Lago Vista*, No. 99-1408. The case presented the question whether the Fourth Amendment prohibits officers who have probable cause to believe that a crime has been committed from arresting the suspect because the crime is a traffic offense punishable only by a fine. We argued as *amicus curiae* that the reasonableness of an arrest supported by probable cause should not turn on the classifications of crimes as misdemeanors or felonies, on variable judicial definitions of a "breach of the peace," or on a jurisdiction's decision to enforce the criminal law through a sanction other than imprisonment. We contended that the common law recognized that the arrest authority of police could be expanded by statute to include arrests for misdemeanors not involving a breach of the peace, and the longstanding practice of the federal government and every State confirms that understanding.

In an opinion written by Justice Souter, the Court affirmed, agreeing with our arguments. Reviewing English common-law usage of "breach of the peace," the Court found no consensus supporting Atwater's position that the common law confined warrantless misdemeanor arrests to actual

breaches of the peace. Nor did the Court find evidence that the ratifiers of the Fourth Amendment sought to limit peace officers' warrantless misdemeanor arrest authority to instances of actual breach of the peace. Finally, the court found no historical evidence -- either in judicial precedent or legal commentary -- that Atwater's claimed rule has ever become "woven . . . into the fabric" of American law. Accordingly, the Court refused to restrict the scope of permissible warrantless misdemeanor arrests, and held that Atwater's arrest was constitutional. Justice O'Connor dissented, joined by Justices Stevens, Ginsburg, and Breyer. Because "reasonableness" is the "touchstone" of Fourth Amendment analysis, she would have held that "when there is probable cause to believe that a fine-only offense has been committed, the police officer should issue a citation unless the officer is able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the additional intrusion of a full custodial arrest" (internal quotation marks and brackets omitted).

2. *Alexander v. Sandoval*, No. 99-1908. The case presented the question whether an implied private right of action exists to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination based on race, color or national origin discrimination under any program or activity receiving federal financial assistance. Sandoval brought suit under Title VI challenging the Alabama Department of Public Safety's official policy of administering its driver's license examination only in the English language. Rather than disputing that its program discriminates in violation of Title VI, Alabama contended that there is no private right of action to enforce agency regulations implemented pursuant to Title VI, a position rejected by both lower courts. We argued that Congress enacted Title VI at a time when courts widely recognized an implied private right of action for individuals injured by violations of a statute or its implementing regulations, that although such liberal implication of private rights of action is no longer the rule, Title VI must be interpreted in light of the legal context at the time of enactment in order to discern congressional intent, and that the regulations prohibiting disparate impact discrimination are valid and consistent with the statutory language, legislative history, and Supreme Court precedent.

In an opinion written by Justice Scalia, the Court reversed, rejecting our arguments. The Court declined to give "dispositive weight to the expectations that the enacting Congress had formed in light of the contemporary legal context" (internal quotation marks omitted). Although the Court had previously recognized a private right of action to enforce Title VI itself, it noted that the "rights-creating language" found in Section 601 of Title VI ("[n]o person . . . shall . . . be subjected to discrimination") is absent from Section 602, which authorizes regulations ("[e]ach Federal department and agency . . . is authorized and directed to effectuate the provisions" of Section 601). The Court further stated that the methods that Section 602 provides for enforcing its authorized regulations fail to manifest an intent to create a private remedy. Additionally, the Court found it "most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress." Justice Stevens dissented, joined by Justices Souter, Ginsburg, and Breyer. He accused the Court of misinterpreting relevant precedent and offering a "flawed an unconvincing analysis of the relationship between" Sections 601 and 602 that "ignor[ed] more plausible and persuasive explanations" set forth in

prior opinions.

3. On April 25, 2001, the Court decided *Daniels v. United States*, No. 99-9136. The case presented the question whether a defendant, whose sentence was enhanced under a federal recidivist provision because of prior state convictions, and whose state convictions have not been set aside by any court, may challenge his federal sentence under 28 U.S.C. 2255 based on the claim that the prior state convictions are constitutionally invalid. Daniels was convicted of firearm possession by a convicted felon in violation of 18 U.S.C. 922(g). Because he had two prior state robbery convictions, he was sentenced under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e). He later filed an application under 28 U.S.C. 2255 seeking to challenge his sentence on the ground that the prior state convictions used to enhance his sentence were constitutionally invalid. The district court and the Ninth Circuit held that, under the Supreme Court's decision in *Custis v. United States*, 511 U.S. 485 (1994), Daniels was not entitled to raise such a challenge under 28 U.S.C. 2255 unless his prior convictions were obtained without counsel. We argued that the court of appeals decision was correct because in *Custis*, the Supreme Court held that a defendant could not, *at sentencing*, challenge the validity of prior state convictions used to enhance his sentence unless those convictions were obtained without counsel. Federal prosecutors, the Court held, should not be forced "to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States." 512 U.S. at 496. It would make little sense and defeat the rationale of *Custis*, we argued, to hold that the defendant could not challenge the validity of his state convictions at sentencing, only to let him collaterally challenge the same convictions one minute *after* sentencing -- with no other change in circumstances -- under 28 U.S.C. 2255.

In an opinion written by Justice O'Connor, the Court affirmed, agreeing with our arguments. The Court noted that "a district court evaluating a § 2255 motion is as unlikely as a district court engaged in sentencing to have the documents necessary to evaluate claims arising from long-past proceedings in a different jurisdiction." Noting that "the State does have a real and continuing interest in the integrity of its judgments," and that "[o]ur system affords a defendant convicted in state court numerous opportunities to challenge the constitutionality of his conviction," the Court concluded that "the defendant is not entitled to another bite at the apple simply because that conviction is later used to enhance another sentence," and therefore held that the *Custis* rule extends to Section 2255 proceedings as well. Justices Souter filed a dissenting opinion, joined by Justices Stevens and Ginsburg. He argued that finality concerns and the difficulty of reviewing old state convictions should not bar collateral review in this case, and that "[i]n denying [prisoners] the right to attack convictions later when attacks are worth the trouble, the Court adopts a policy of promoting challenges earlier when they may not justify the effort and perhaps never will." Justice Breyer also filed a dissenting opinion, arguing that *Custis* was wrongly decided and should be overturned.

The same day, the Court held in *Lackawanna County District Attorney v. Coss*, No. 99-1884, that relief is similarly unavailable to state prisoners through a petition for a writ of habeas corpus under 28 U.S.C. 2254. We did not participate in that case.

II. Supreme Court Filings

A. Briefs on the Merits

1. On April 23, 2001, we filed a brief in *Ashcroft v. Free Speech Coalition*, No. 00-795. The case presents the question whether provisions of the Child Pornography Prevention Act of 1996 that criminalize the possession and distribution of material that appears to be of a minor engaging in sexually explicit conduct, or that is presented in such a way so as to convey the impression that it is of a minor engaging in such conduct, violates the First Amendment. We argue that the statute embodies Congress's judgment, based on abundant evidence, that such depictions are intrinsically related to the sexual abuse of real children. Under the analysis applied in *New York v. Ferber*, 458 U.S. 747 (1982), that form of child pornography, like child pornography involving real children, is unprotected by the First Amendment. First, the governmental interest at stake is the "compelling" one of protecting children from sexual exploitation. Second, the depictions at issue are "intrinsically related" to the sexual abuse of children: pedophiles use such depictions to seduce other children into sexual activity and to whet their appetites for sexual abuse; the existence of such material makes it far more difficult to establish that a pornographic image is of a real child, endangering the government's ability to enforce existing child pornography laws; and such material is exchanged for pictures of real children engaged in sexually explicit conduct, and adds fuel to the underground market for child pornography. Finally, the value of depictions of children engaged in sexually explicit conduct is exceedingly modest, if not *de minimis*. Thus, like depictions of real children engaged in sexually explicit conduct, depictions that are virtually indistinguishable from such depictions are categorically unprotected by the First Amendment.

2. On April 27, 2001, we filed a brief in *United States Postal Service v. Gregory*, No. 00-758. The case presents the question whether a federal agency, when disciplining or removing an employee for misconduct pursuant to the Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.*, may take account of prior disciplinary actions that are the subject of pending grievance proceedings. The Court of Appeals for the Federal Circuit held that an agency may not take such actions into consideration. The court reasoned that consideration of such actions would risk harming the legitimacy of the disciplinary process by allowing the use of potentially unreliable evidence – the ongoing prior disciplinary actions – to support an agency action. We contend that both longstanding administrative practice and common sense support the Merit Systems Protection Board's rule that agencies may consider an employee's disciplinary record – without regard to pending grievances – in calibrating the discipline for subsequent misconduct. That rule is not arbitrary and capricious, or otherwise contrary to law. Accordingly, it should be given effect.

B. Petitions for Certiorari

1. On April 23, we filed a petition for certiorari in *United States v. GWI PCS 1, Inc.*, No. 00-1621. The case presents the questions (1) whether it is proper for a court in bankruptcy

proceedings to use the equitable mootness doctrine to override the FCC's exclusive statutory authority to issue and regulate licenses for electromagnetic spectrum, and (2) whether respondents' obligation to pay their $1.06 billion winning bid can be treated by a bankruptcy court as a constructive fraudulent conveyance on the basis of that court's own determination of the value of the licenses. We argue that the Fifth Circuit's holding that the bankruptcy-law doctrine of "equitable mootness" permitted it to affirm the lower court's orders -- notwithstanding either their illegality or the bankruptcy court's usurpation of the FCC's regulatory authority -- is incorrect and represents a substantial intrusion into the regulatory authority Congress has conferred on federal administrative agencies. Indeed, in this very case, the decision undermines and distorts the increasingly important market-based system of license allocation that Congress established in 47 U.S.C. 309(j), and that the FCC implemented through its carefully crafted auction system. For those reasons, and because the decision below concededly conflicts with a decision of the Second Circuit on a closely related issue, review by the Court is warranted.

2. On April 26, we filed a petition for certiorari in *United States v. Jones*, No. 00-1643. The case presents the questions (1) whether a district court's failure to advise a counseled defendant at his guilty plea hearing that he has the right to the assistance of counsel at trial, as required by Federal Rule of Criminal Procedure 11(c)(3), is subject to plain-error, rather than harmless-error, review on appeal when the defendant fails to preserve the claim of error in the district court; and (2) whether, in determining if a defendant's substantial rights were affected by a district court's deviation from the requirements of Federal Rule of Criminal Procedure 11(c)(3), the court of appeals may review only the transcript of the guilty plea colloquy, or whether it may also consider other parts of the official record. Because this case presents the same questions as *United States v. Vonn*, No. 00-973, which is currently before the court, we argue that this petition should be held pending the Court's decision in that cas e, and then disposed of accordingly.

THIS WEEK

I. Supreme Court Decision

A. Decision on the Merits

1. On April 30, 2001, the Court decided *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, No. 00-292, which presented the question whether and under what circumstances an Indian Tribe's agreement to arbitrate disputes arising out of a standard form contract entered into with a private party, and to have judgment entered upon the final arbitration award "in any court having jurisdiction thereof," constitutes a valid waiver of the Tribe's sovereign immunity from suit in state court. As *amicus curiae*, we argued that an arbitration clause in a standard form contract does not constitute an express and unequivocal consent to suit in state court, at least where the agreement is ambiguous regarding whether an enforcement action can be brought in tribal courts.

In a unanimous opinion written by Justice Ginsburg, the Court reversed, rejecting our arguments. Because the contract required resolution of all contract-related disputes by binding arbitration, whose ensuing awards may be reduced to judgment "in accordance with applicable law in any court having jurisdiction thereof," "[t]he contract's choice-of-law clause makes it plain enough that a 'court having jurisdiction' to enforce the award in question is the Oklahoma state court in which C & L filed suit." The Court rejected the Tribe's argument that an arbitration clause "is not a waiver of immunity from suit," and noted that the contract was in no way ambiguous, and that it had been proposed and prepared by the Tribe itself.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

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MEMORANDUM

TO: Alberto R. Gonzales
Counsel Attorneys

FROM: Brett M. Kavanaugh

DATE: April 10, 2001

RE: Supreme Court Update

Attached please find this week's Supreme Court update from the Acting Solicitor General.

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

April 9, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Barbara D. Underwood
Acting Solicitor General

Subject: Weekly Report

I. Supreme Court Filing

A. Brief on the Merits

1. On April 6, we filed a brief for the federal petitioners in the consolidated cases of *National Cable Television Ass'n* v. *Gulf Power Co., et al.* and *Federal Communication Commission and United States of America* v. *Gulf Power Co.* Since the inception of cable television service, cable operators have leased space on telephone or electric utility poles, or in underground conduits, for the attachment of cable distribution facilities, such as coaxial or fiber-optic cable and associated equipment. In 1978, Congress enacted the Pole Attachments Act, 47 U.S.C. 224, to address the problem of utilities charging monopoly rents to cable operators for these attachments. The Pole Attachments Act, as amended by the Telecommunications Act of 1996, directs the FCC to set "just and reasonable" rates that a utility may charge for "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." To implement these provisions, the FCC promulgated regulations to ensure reasonable rates and nondiscriminatory access for pole attachments, including those used to provide cable modem Internet access and wireless communications services. On consolidated petitions for review by several utility companies, the U.S. Court of Appeals for the Eleventh Circuit held that the Commission lacks statutory authority to regulate pole attachment rates for cable Internet access and wireless telecommunications services.

In our brief, we argue that the Pole Attachments Act unambiguously calls on the Commission to regulate all pole attachments by cable television systems or telecommunications service providers, including attachments simultaneously used to provide high-speed Internet access and conventional cable television programming, and attachments by providers of wireless telecommunications services. This is the most natural reading of the statute's language, which does not limit the scope of the Act based on the type of services offered by the cable system or telecommunications carrier. We also point out that this interpretation is supported by the policies underlying the Act. To the extent there is any ambiguity, we argue that the Court should defer to the FCC's interpretation, which is reasonable and should therefore be controlling.

MEMORANDUM

TO: Alberto R. Gonzales
Counsel Lawyers

FROM: Brett M. Kavanaugh

DATE: April 3, 2001

RE: Supreme Court

Attached please find the Acting Solicitor General's weekly report on Supreme Court activity involving the United States. Nothing in this week's report warrants wider notice or distribution within the White House.

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

April 2, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Barbara D. Underwood
Acting Solicitor General

Subject: Weekly Report

I. Supreme Court Decisions

A. Decision on the Merits

On April 2, 2001, the court decided *Texas* v. *Cobb*, No. 99-1702. The case presented the question whether an accused's Sixth Amendment right to counsel attaches to questioning about one crime when he has been charged with committing another, factually related crime. As *amicus curiae* supporting petitioner, we argued that the police did not violate Cobb's Sixth Amendment right by eliciting incriminating statements from him on his murder of two individuals after he was charged with burglary of the individuals' home and was represented by counsel on the burglary charge, because no Sixth Amendment right to counsel had attached on the murder charge.

The majority (Chief Justice Rehnquist, joined by Justices O'Conner, Scalia, Kennedy, and Thomas), concluded that, because under *McNeil* v. *Wisconsin* the Sixth Amendment right to counsel is offense specific, the right to counsel does not necessarily extend to offenses that have not been charged but are factually related to the charged offenses. The Court concluded that two offenses should be considered separate offenses when each requires proof of a fact that the other does not. The test applied is the same test as that used in *Blockburger* v. *United States* to delineate the scope of the Fifth Amendment's Double Jeopardy Clause. Under the test, burglary and murder qualify as different offenses, and thus the Court concluded that the police did not violate respondent's Sixth Amendment right to counsel in questioning him about the murders. The majority rejected the contention that the offense-specific rule will permit law enforcement officers near complete license to conduct uncounseled interrogations, because even though the Sixth Amendment right does not attach to uncharged offenses, defendants retain the ability under *Miranda* to refuse any police questioning.

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Justice Kennedy, joined by Justices Scalia and Thomas, filed a concurring opinion. Justice Kennedy noted that the majority opinion does not explicitly reaffirm or give approval to *Michigan* v. *Jackson*, which bars an officer from approaching a defendant to interrogate him on a charged offense when he has invoked the right to counsel. Justice Kennedy stated his belief that the underlying theory of *Jackson* is questionable and concluded that, if *Jackson* remains good law, "its protections should apply only where a suspect has made a clear and unambiguous assertion of the right not to speak outside the presence of counsel," the same unambiguous election required to invoke Fifth Amendment rights.

Justice Breyer, joined by Justices Stevens, Souter, and Ginsberg, dissented. Justice Breyer concluded that for Sixth Amendment purposes, the term "same offense" should be interpreted to cover criminal acts that are closely related to or inextricably intertwined with the particular crime set forth in the charging instrument. The dissenters, relying on *Jackson*, argued that once the Sixth Amendment right to counsel attaches, "law enforcement officials are required, in most circumstances, to deal with the defendant through counsel rather than directly, even if the defendant has waived his Fifth Amendment rights." The dissenters contended that on the majority's view of the law, because the police remain free to question the suspect about any other related crime not actually charged in the indictment, little remains of the Sixth Amendment right to "communicate through counsel."

B. Grant of Certiorari

On April 2, 2001, the Court granted certiorari in *Kansas* v. *Crane*, No. 00-957. The question presented is whether the Due Process Clause of the Fourteenth Amendment requires a State to prove that a sexually violent predator cannot control his criminal sexual behavior before the State can civilly commit him. We have not participated in the case to date and are determining whether participation is warranted at this stage.

II. Supreme Court Filings

A. Brief on the Merits

On March 28, 2001, we filed a brief in *Calcano-Martinez v. INS*, No. 00-1011, a companion case to *INS* v. *St. Cyr*, No. 00-767. The case presents the question whether the court of appeals correctly concluded that it lacked jurisdiction on direct petitions for review over petitioners' non-constitutional challenges to their final removal orders, but that the district court had habeas corpus jurisdiction to entertain those challenges under 28 U.S.C. 2241 (the general habeas corpus statute). The petitioners are aliens who were each convicted of an aggravated felony prior to the effective date of IIRIRA but placed in removal proceedings and charged with removability based on the conviction after the effective date of IIRIRA; they challenged their removal orders on the basis that they should have been considered eligible for discretionary relief from removal because they were convicted before the effective date of the repeal of the discretionary relief provision.

We contend that Congress has precluded all judicial review of petitioners' contention that they are eligible for discretionary relief from deportation under former 8 U.S.C. 1182(c). Petitioners were properly found removable based on their convictions for aggravated-felony offenses. Accordingly, although removal orders are generally subject to review by petition for review in the court of appeals, such review of petitioners' contentions is precluded by 8 U.S.C. 1252(a)(2)(C), which provides that no court may review a removal order entered against an alien who is removable because of an aggravated-felony conviction. Review under that provision is limited to the contention that the offense of which the alien was convicted does not meet the statutory definition of an aggravated felony, or that the individual is not an alien, or to a substantial constitutional challenge to a removal order.

We also contend that Congress has precluded the district courts from reviewing challenges to aggravated felons' removal orders by habeas corpus or otherwise. Congress's unmistakable intent in the judicial-review provisions of the Immigration and Nationality Act is to channel challenges to removal orders into the courts of appeals. The court of appeals' ruling that petitioners' challenges could proceed in district court cannot be reconciled with the legislative scheme for judicial review of removal orders that Congress has enacted. Finally, we contend that Congress's preclusion of review of petitioners' claims does not violate the Suspension Clause of Article I, Section 9, the Due Process Clause, or Article III. However, if the Court concludes that judicial review of petitioners' claims is required by the Constitution, then that review should proceed in the court of appeals, not the district court.

B. Petitions for Certiorari

1. On March 29, 2001, we filed a petition for a writ of certiorari in *United States Department of Justice* v. *Maydak*, No. __-___. Exemption 7(a) of the Freedom of Information Act (FOIA) exempts from its general disclosure requirement law enforcement records and information the production of which "could reasonably be expected to interfere with [law] enforcement proceedings." 5 U.S.C. 552(b)(7)(A). Exemption 7(a) permits the government to justify withholding by a general categorical showing. The questions presented in the case are (1) whether, contrary to traditional summary judgment principles, a government motion for summary judgment based on Exemption 7(A)'s broad categorical protection of law enforcement records and information forfeits the government's ability to raise any other, more particularized FOIA exemptions, unless the government simultaneously establishes the applicability of each of those other exemptions in a manner that would permit the district court to grant summary judgment on them; and (2) whether, under FOIA, a court may order, as a remedy for the government's failure timely to prove the applicability of other asserted exemptions, the wholesale release of grand jury materials or other information the disclosure of which is separately prohibited by federal law or which would directly impair the interests of third parties not before the court.

While the direct appeal of his conviction for various crimes was pending, respondent submitted a FOIA request to the U.S. Attorney's office that had prosecuted him for copies of "any and all

documents which pertain to me, mention me, or list my name." The request was denied under Exemption 7(A). Respondent filed suit, and the district court concluded that the documents were properly withheld under Exemption 7(A). The district court did not address other exemptions identified by the government in its cross motion for summary judgment. Subsequently, but before the completion of briefing on respondent's appeal, the Department of Justice determined that the 7(a) exemption no longer applied. The Department requested the court of appeals to remand the case to permit the district court to rule on the applicability of the other, more particularized exemptions. The court of appeals denied the motion to remand and ordered full disclosure of all requested documents.

We contend that the Court should grant certiorari and reverse the decision of the court of appeals. By requiring the government, on pain of forfeiting other important exemptions, to make the particularized showings that Exemption 7(A)'s categorical protection was designed to avoid, the court of appeals has eliminated much of the meaningful application of Exemption 7(A). We maintain that the court of appeals' decision departs from the practice of other circuits, conflicts with decisions of the Supreme Court governing both FOIA litigation and general summary judgment principles, and prescribes an unworkable procedure that already has begun to interfere with pending enforcement proceedings. Finally, we argue that nothing in FOIA permits courts to remedy perceived litigation missteps by the government by ordering the release of documents that are independently protected from disclosure by other federal laws or that would reveal private and sensitive information about third parties not before the court.

2. On April 2, 2001, we filed a petition for certiorari in *United States* v. *Arvizu*, No. __-___. The questions presented are (1) whether the court of appeals erroneously departed from the totality of the circumstances test that governs reasonable suspicion determinations under the Fourth Amendment by holding that particular facts observed by a law enforcement officer were entitled to no weight and could not be considered as a matter of law; and (2) whether, under the totality of the circumstances test, the Border Patrol agent in this case had reasonable suspicion that justified a stop of a vehicle near the Mexican border.

The court of appeals suppressed evidence found in a consent-based search of respondent's minivan after concluding that the consent was tainted by a stop that was unlawful because it was not based on reasonable suspicion. The court of appeals excluded from its analysis of reasonable suspicion respondent's dramatic reduction in speed upon seeing a Border Patrol vehicle, respondent's visible nervousness, unnatural waving by the children in the minivan, the registration of the minivan to a non-local address that is very close to the Mexican border and on a street that is used as a staging area for smuggling, indications that there was bulky cargo on the floor of the minivan, the direction that respondent was traveling (respondent was not headed toward nearby recreation areas and was not following a sensible route to recreation areas farther north), and the agent's conclusion that the minivan was not familiar as local traffic.

We contend that the decision of the court of appeals departed fundamentally from the Supreme

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Court's totality-of-the-circumstances test for determining whether reasonable suspicion exists. By declaring as a matter of law that law enforcement officers may not consider certain facts when forming a suspicion of illegal activity, the court of appeals created a direct conflict with decisions of the Supreme Court and other courts of appeals and incorrectly excluded critical evidence in this case. The Ninth Circuit's effort to graft bright-line rules onto the necessarily fact-specific reasonable suspicion inquiry should be rejected. Finally, we contend that correcting the court of appeals' erroneous narrowing of the reasonable suspicion inquiry is a matter of great importance to law enforcement, and particularly to the national effort to halt the transportation of illegal aliens away from border areas.

MEMORANDUM

TO: Alberto R. Gonzales

CC: Counsel's Office Attorneys

FROM: Brett M. Kavanaugh

DATE: September 12, 2001

RE: Office of Solicitor General Update

Attached is the latest update from the Solicitor General.

U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

The Solicitor General

September 11, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

Nothing to report.

B. THIS WEEK

- **Solicitor General Files Briefs in Related Telecommunications Act Cases:** The Department filed on September 10 a brief in *Mathias v. Worldcom Technologies* and a brief in *United States v. Public Service Commission of Maryland* (consolidated with *Verizon Maryland Inc. v. Public Service Commission of Maryland*). The Telecommunications Act of 1996 establishes comprehensive procedures to open local telecommunications markets to competition through the formation of interconnection agreements between incumbent local exchange carriers and potential competitors providing, *inter alia*, for the lease of incumbents' network elements. The Telecommunications Act permits state public utility commissions to assume certain regulatory authority over those agreements and provides, in Section 252, that such exercises of authority are subject to review in federal court. 47 U.S.C. 252(e)(6).

  The first question presented in *Mathias v. Worldcom Technologies* is whether a state commission's action relating to enforcement of a previously approved Section 252 interconnection agreement is a "determination under [Section 252]" and thus reviewable in federal court under Section 252(e)(6). The second is whether a state commission's acceptance of Congress's invitation to implement a federal regulatory scheme that provides for review of state commission determinations in federal court constitutes a waiver of Eleventh Amendment

REV_00260912

immunity. The third and final question is whether an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the Telecommunications Act can be maintained under the *Ex parte Young* doctrine.

The related question presented in *United States v. Public Service Commission of Maryland* is whether a federal district court has subject matter jurisdiction under 28 U.S.C. 1331, either in addition to or in the alternative to jurisdiction under Section 252, to determine whether a state public utility commission's order interpreting or enforcing an interconnection agreement violates the Act.

C. LAST WEEK

- **Solicitor General Files Brief as Amicus Curiae in Sixth Amendment Case:** On September 4, the Department filed an amicus brief in support of the respondent in *Mickens v. Taylor*. The question presented is whether the Court of Appeals erred in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest of which it should have known. The Department argued that the Sixth Amendment is not violated under such circumstances unless an actual conflict adversely affected counsel's performance.

- **Solicitor General Files Brief as Amicus Curiae in Medicaid Eligibility Case:** On September 7, the Department filed an amicus brief in support of the petitioner in *Wisconsin Department of Health and Family Services v. Blumer*. Under the Medicaid program, the federal government provides funding to the States for the provision of medical services to eligible needy persons. Statutory provisions establish requirements for determining the eligibility of a married individual who lives in a nursing home or is otherwise institutionalized, but who has a spouse who is not institutionalized (the "community spouse"). The question presented is whether a federal statute that provides for a "fair hearing" procedure in which a State may increase the amount of resources available to the community spouse permits Wisconsin to use the "income-first" method of determining eligibility and thereby treat excess income of the institutionalized spouse as available to the community spouse. The Department argued that the Medicaid program permits use of the income-first method.

- **Solicitor General Files Brief as Amicus Curiae in "Family and Medical Leave Act" Case:** On September 7, the Department filed a brief in support of the petitioners in *Ragsdale v. Wolverine World Wide*. The Family and Medical Leave Act (FMLA) requires covered employers to provide eligible employees with a 12-week period of leave for specified reasons, including "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. 2612(a)(1)(D). The Act in turn directs the

Secretary of Labor to prescribe regulations to carry out the Act's provisions. The question presented is whether the Secretary has acted permissibly in providing by regulation that (with certain exceptions) employer-provided leave does not count against the Act's 12-week period until the employer notifies the employee of its designation as FMLA leave. The Department argued that the regulation in question is valid because the Secretary reasonably determined that full achievement of the statutory purpose that the worker be able to plan his treatment or care-giving activities at the outset of his leave requires that the employee be made aware at the outset of the period of his rights and responsibilities under the Act.

REV_00260914

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

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RECIPIENT'S NAME: Brett Kavanaugh

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UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

TELEFAX TO:

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

August 6, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

Nothing to report.

B. THIS WEEK

- **Solicitor General to File Brief in Supreme Court's Review of U.S. Department of Transportation's Disadvantaged Business Enterprise Program:** The Department expects to file on August 10 a brief for respondent in *Adarand Constructors, Inc. v. Mineta.* The questions presented are (1) whether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination; and (2) whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.

C. LAST WEEK

Nothing to report.

MEMORANDUM

TO: Alberto R. Gonzales

CC: Counsel's Office Attorneys

FROM: Brett M. Kavanaugh

DATE: July 16, 2001

RE: Office of Solicitor General Update

Attached is the latest update from the Solicitor General.

Lori,
Please circulate
to all attorneys.
Brett

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

July 16, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

LAST WEEK

A. Briefs on the Merits

1. The Department filed on July 12 a brief for petitioner in *United States* v. *Knights*, No. 00-1260. *Knights* presents the question whether an agreement to a term of probation that authorizes any law enforcement officer to search a person or premises with or without a warrant, and with or without individualized suspicion of wrongdoing, constitutes a valid consent to search. The Department contends that respondent's consent to search was valid and enforceable as applied to a search conducted for investigative purposes, and that nothing in the Fourth Amendment prevents a defendant from granting such consent as a condition of release on parole. The Department's brief argues that an individual may voluntarily give advance consent to search, a constitutional right may be relinquished through an agreement with the government, and requiring consent to search as a condition of probation is not an unconstitutional condition.

2. The Department also filed on July 12 a brief as amicus curiae supporting petitioner in *McKune* v. *Lile*, No. 00-1187. The question presented is whether the Fifth Amendment privilege against compelled self-incrimination prevents a State from encouraging incarcerated sexual offenders to participate in a clinical rehabilitative program, in which participants must accept responsibility for their offenses, by conditioning the availability of certain institutional privileges on participation in the program. The Department contends that nothing in the Self Incrimination Clause precludes a State from adopting, or encouraging inmates to participate in, a rehabilitative program in which information

about a participant's past sexual history that indicates a current risk may be revealed. In light of the significant restrictions inherent in any sound penal regime, and in the absence of arbitrary state action, the minor changes in the privileges available to a prisoner who declines to participate do not result in unconstitutional compulsion. Moreover, any burden on Fifth Amendment rights is justified by the State's legitimate penological interests in rehabilitating convicted sexual offenders.

THIS WEEK

I. Supreme Court Filings

A. Briefs on the Merits

1. The Department anticipates filing on July 16 a brief for petitioner in *United States* v. *Dusenbery*, No. 00-6567. The question presented is whether the Due Process clause requires that the government give actual notice to a person whose assets are the subject of an administrative forfeiture.

2. The Department anticipates filing on July 19 a brief for petitioner in *United States* v. *Arvizu*, No. 00-1519. The questions presented are (1) whether the court of appeals erroneously departed from the totality of the circumstances test that governs reasonable suspicion determinations under the Fourth Amendment by holding that particular facts observed by a law enforcement officer were entitled to no weight and could not be considered as a matter of law; and (2) whether, under the totality of the circumstances test, the Border Patrol agent in this case had reasonable suspicion that justified a stop of a vehicle near the Mexican border.

NEXT WEEK

I. Supreme Court Filings

A. Brief on the Merits

1. The Department anticipates filing on July 27 a brief for petitioner in *Ashcroft* v. *American Civil Liberties Union*, No. 00-1293. The Child Online Protection Act (COPA) make is unlawful to make any communication for commercial purposes by means of the World Wide Web that is available to minors and that includes material that is "harmful to minors," unless good faith efforts are made to prevent children from obtaining access to such material. COPA relies in part on "community standards" to identify material that is "harmful to minors." The question presented is whether the court of appeals properly barred enforcement of COPA on First Amendment grounds because COPA relies on community standards to identify material that is harmful to minors.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

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Justice Scalia filed a dissenting opinion, in which Chief Justice Rehnquist and Justice Thomas joined, and Justice O'Connor joined in part. Justice Scalia contended that the statute clearly stripped the courts of jurisdiction to review the claims of aliens found deportable by reason of their criminal acts, that the majority improperly treated the "clear statement" requirement as a requirement of specific "magic words," and that the canon favoring avoidance of constitutional questions did not give license to courts to rewrite statutes so as to subvert clear congressional intent. The dissent also argued that reading the statute to strip the courts of habeas jurisdiction would not violate the Suspension Clause, Art. 1, § 9, cl. 2, because that clause does not confer a right to habeas relief but rather sets forth when the privilege of the writ may be suspended and because even if the Suspension Clause guarantees some constitutional minimum of habeas relief, it could not be understood to guarantee the right to judicial compulsion of the exercise of executive discretion.

Justice O'Connor filed a separate dissenting opinion in which she explained her view that even assuming that the Suspension Clause guarantees some minimum extent of habeas review, the rights asserted by St. Cyr fall outside of the scope of that review.

5. *Calcano-Martinez v. INS*, No. 00-1011. In this companion case to *St. Cyr*, the Court considered the additional question whether a court of appeals on petition for review may entertain challenges to the merits of INS final removal orders, even orders going to the availability of discretionary relief, notwithstanding the broad preclusion of review set forth in IIRIRA (8 U.S.C. 1252(a)(2)(C).

In an opinion by Justice Stevens, the Court agreed with our position that the court of appeals lacked jurisdiction to hear the petitions for direct review, but held that, as in *St. Cyr*, the petitioners could proceed with their petitions for habeas corpus. Justices Scalia and O'Connor filed dissenting opinions relying on their respective dissents in *St. Cyr*.

B. Grants of Certiorari

On June 25, the Court granted petitions for writs of certiorari in seven cases:

1. *Owasso Independent School Dist.* v. *Falvo*, No. 00-1073. The Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. 1232g(b)(1), prohibits the furnishing of federal funds to an educational institution that has a policy or practice of releasing, without parental consent, students' "education records," which are defined as "those records, files, documents, and other materials which--(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." The question presented is whether allowing students to grade each other's homework and tests as their teacher goes over the correct answers aloud in class violates FERPA's prohibition against the release of "education records." The Department of Education (DoE) has a longstanding interpretation, explained in a 1993 letter, that "FERPA would not prohibit teachers from allowing students to grade a test or homework

assignment of another student or from calling out that grade in class, even though such grade may eventually become an education record." The district court deferred to the DoE's interpretation of FERPA. The Tenth Circuit reversed on the FERPA claim, holding that the DoE's interpretation conflicted with the plain meaning of the statute and in any event was not entitled to deference because it was contained in an opinion letter rather than a formal interpretive regulation. The Department argued that although the court of appeals erred in concluding that FERPA prohibits students from grading the homework and tests of other students in the classroom, Supreme Court review would be unwarranted and premature given the DoE's pending issuance of regulations or other formal guidance setting forth a more detailed and comprehensive analysis of the meaning of "education records" under FERPA.

2. *Wisconsin Dept. of Health and Family Services* v. *Blumer*, No. 00-952. The federal government, through the Medicaid program, provides partial funding to the States for the provision of medical services to eligible needy persons. This case arises out of the Medicaid program's "spousal impoverishment" provisions, 42 U.S.C. 1396r-5, which establish special rules for married couples where only one spouse is in a nursing home or other institution. These provisions govern the allocation of income and resources (*i.e.*, assets) between the institutionalized spouse and the "community spouse" for purposes of determining Medicaid eligibility. The question presented is whether Wisconsin's "income first" requirement, Wis. Stat. Ann. § 49.455(8)(d), which treats income otherwise attributable to the institutionalized spouse as available to the community spouse to meet that spouse's minimum monthly maintenance needs, is consistent with the federal statute, 42 U.S.C. 1396r-5(e)(2)(C). The Wisconsin Court of Appeals invalidated the state law as inconsistent with the federal statute, which it interpreted as requiring a "resource first" rather than an "income first" methodology. While the federal Healthcare Financing Administration (now known as the Centers for Medicare & Medicaid Services) has issued interim rules allowing states to adopt either methodology, the agency is planning to promulgate final regulations addressing this issue within 90 days. In light of this imminent regulatory guidance, which might render review of this case unnecessary, the Department argued that the Court should defer review of this matter in this case.

3. *Edelman* v. *Lynchburg College*, No. 00-1072. In implementing Title VII of the Civil Rights Act of 1964, the EEOC promulgated a regulation, 29 C.F.R. 1601.12(b), that allows a charge of employment discrimination filed with the Commission to be amended to cure "technical defects or omissions, including the failure to verify the charge," and states that such an amendment to verify a charge "will relate back to the date the charge was first received" by EEOC, even if the verification of the charge is made after the statutory limitation period for filing a charge. Petitioner sent an unsworn letter to the EEOC charging that he was denied tenure by respondent as a result of sex discrimination. After an interview with the EEOC, petitioner filed an EEOC Form 5 Charge of Discrimination with a verified signature, which was received by the EEOC thirteen days after the expiration of the applicable limitation period. Petitioner sued under state law and Title VII, and the district court granted respondent's motion to dismiss the Title VII claims on the ground that petitioner had failed to file a timely charge of discrimination. The Fourth Circuit affirmed, holding that the EEOC regulation permitting the verification of the discrimination charge to relate back to the date petitioner filed his

unsworn letter is contrary to the statute and therefore invalid. The Department argued that the issue presented--the validity of 29 C.F.R. 1601.12(b)--is sufficiently important to the enforcement of federal employment-discrimination law to warrant the Court's review. While Title VII requires that a charge be filed within a specified limitation period and that a charge be verified before EEOC can require the respondent to participate in its investigation, the statute does not require that the charge be verified during the statutory limitation period. Because the court of appeals' decision is erroneous and conflicts with the decisions of several other circuits, the Department urged the Court to grant the petition for a writ of certiorari.

4. *Verizon Maryland, Inc.* v. *Public Service Comm'n of Maryland*, No. 00-1531; and *United States* v. *Public Service Comm'n of Maryland*, No. 00-1711. The Telecommunications Act of 1996 establishes comprehensive procedures to open local telecommunications markets to competition through the formation of interconnection agreements between incumbent local exchange carriers and potential competitors providing, *inter alia*, for the lease of incumbents' network elements. The 1996 Act permits, but does not require, state public utility commissions to assume regulatory authority over those agreements and provides that such exercises of authority are subject to review in federal court. The Court granted the petitions for a writ of certiorari limited to the question whether a federal district court has subject-matter jurisdiction under 28 U.S.C. 1331 to determine whether a state commission's action interpreting or enforcing an interconnection agreement violates the 1996 Act. The Court scheduled these cases for oral argument in tandem with *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878, in which the Court granted the petition for a writ of certiorari on March 5, 2001.

5. *Ragsdale* v. *Wolverine Worldwide, Inc.* No. 00-6029. The Family and Medical Leave Act of 1993 (FMLA) provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . because of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. 2612(a)(1)(D). Department of Labor (DoL) regulations implementing these provisions, 29 C.F.R. 825 et seq., require employers "to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee" in writing. Another regulation states that "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement."

Petitioner sued respondent, her former employer, after she exhausted her 30 weeks of employer-provided sick leave, none of which was designated as FMLA leave, and then was denied a request for an additional 12 weeks of FMLA leave. In the decision below, the Eighth Circuit affirmed the district court's grant of summary judgment for respondent on the FMLA claim, holding that the applicable DoL regulation is invalid because it "convert[s] the statute's minimum of federally-mandated unpaid leave into an entitlement to an additional 12 weeks of leave unless the employer specifically and prospectively notifies the employee that she is using her FMLA leave." The Department argued that the court of appeals erred in holding invalid a DoL regulation that is designed to ensure that employees

covered by the FMLA are able to make informed choices concerning the exercise of their statutory rights.

6. *National R.R. Passenger Corp.* v. *Morgan*, No. 00-1614. The question presented is whether a plaintiff may bring a suit under a federal anti-discrimination statute after the limitations period has lapsed if incidents that occurred within the limitations period are "sufficiently related" to the otherwise time-barred claims. The Department has not participated in the case to date, and is determining whether participation is warranted at this stage.

7. *Kelly* v. *South Carolina*, No. 00-9280. The question presented is whether the state courts' reusal to inform petitioner's sentencing jury that he would never be eligible for parole if sentenced to life imprisonment rather than death violated *Simmons* v. *South Carolina*, 512 U.S. 154 (1994). The Department has not participated in the case to date, and is determining whether participation is warranted at this stage.

C. Invitation

On June 25, the Court invited the Solicitor General to file a brief expressing the views of the United States on the petition for certiorari in *Kentucky Ass'n of Health Plans* v. *Miller, Kentucky Comm'r of Ins.*, No. 00-1406. The Employee Retirement Income Security Act (ERISA) preempts any state law that "relates to" ERISA-covered employee benefit plans, unless it is a state law "which regulates insurance." Petitioner health maintenance organizations (HMOs) make limited networks of health care providers available to ERISA health benefit plans. Kentucky's "Any Willing Provider" law requires HMOs to open their networks to any provider in the geographical region willing to meet the network contract terms. The question presented is whether Kentucky's AWP statute is preempted by ERISA or whether it is saved from preemption because it "regulates insurance."

The Court has scheduled an additional nonargument session on Thrusday, June 28th at which the remaining decisions from this Term are expected to be issued.

NEXT WEEK

Nothing to report.

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

June 26, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: RE for Theodore B. Olson
Solicitor General

Subject: Weekly Report

LAST WEEK

I. Supreme Court Decisions

A. Decisions on the Merits

On June 18, the Court decided three cases in which the Department participated:

1. *United States* v. *Mead*, No. 99-1434. The case presented the questions whether judicial deference is owed to the tariff classification rulings issued by the Customs Service under 19 U.S.C. 1502(a), and whether the Customs Service reasonably interpreted the statutory phrase "diaries, notebooks and address books, bound" to include the spiral-bound and ring-bound day planners imported by respondent. The Department contended that ordinary *Chevron* deference applies to classification rulings of the Customs Service and that under the proper standard of deference, the Customs Service classification ruling in this case should have been affirmed.

In an opinion by Justice Souter, the Court held that the customs ruling had no claim to judicial deference under *Chevron* because there was no indication in the statute that Congress intended tariff rulings to have the force of law. The Court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." The Court explained that an agency may show that Congress has delegated such authority in a variety of ways, such as a grant of authority to engage in adjudication or notice-and-comment rulemaking, and that there will sometimes be reason for *Chevron* deference when no such administrative formality was required or afforded, if there

is some other indication of a comparable congressional intent. The customs ruling here, however, failed to qualify for *Chevron* deference, although the Court concluded that it might still be entitled to some lesser form of deference under *Skidmore* v. *Swift & Co.*, and remanded to the court of appeals for further action.

Justice Scalia dissented. He characterized the majority opinion as abandoning the *Chevron* doctrine for a presumption that agency discretion does not exist unless a statute expressly or impliedly provides for it, and rejected that view. Justice Scalia contended that there is no necessary connection between the formality of agency procedures and the power of the agency administering the procedure to resolve authoritatively questions of law.

2. *Saucier* v. *Katz*, No. 99-1977. The case presented two questions: (1) whether, in a case alleging the use of constitutionally excessive force, the test for qualified immunity and the reasonableness test under the Fourth Amendment are identical, such that a finding of unreasonable force under the Fourth Amendment necessarily precludes qualified immunity; and (2) whether the court of appeals erred in concluding that petitioner's use of force to detain respondent, which consisted of carrying respondent from the crowd to a waiting van and pushing him inside without injuring him, so clearly exceeded the amount of force permitted by the Fourth Amendment as to warrant denial of qualified immunity. The Department argued that the Fourth Amendment reasonableness test and the qualified immunity test are distinct and that the minimal use of force that occurred here as petitioner was guarding then-Vice-President Gore was not so clearly unlawful as to deprive the officer of qualified immunity.

In an opinion by Justice Kennedy, the Court agreed with our position. The Court held that the test for reasonableness of force under the Fourth Amendment, which requires analysis of the objective reasonableness of an officer's action, is distinct from the test for qualified immunity, which includes the further dimension of whether the law put an officer on notice that a particular amount of force used in particular circumstances was excessive. Applying that principle, the Court held that the officer was entitled to summary judgment because there was no clearly established rule prohibiting the officer from acting as he did.

Justice Ginsburg wrote an opinion concurring in the judgment, which Justices Stevens and Breyer joined. She would have held that in the context of an excessive force claim there is no distinction between the test for reasonableness under the Fourth Amendment and the test for qualified immunity. According to Justice Ginsburg, the proper test for the qualified immunity claim here is whether a reasonable officer, identically situated, would have believed that the force employed was lawful.

Justice Souter wrote an opinion concurring in part and dissenting in part. Justice Souter agreed with the Court's determination that the qualified immunity test is distinct from the test governing the underlying merits, but would have remanded the case for application of the qualified immunity standard.

3. *Idaho* v. *United States*, No. 00-189. The case presented the question whether the United States holds title, in trust for the Coeur d'Alene Tribe, to lands underlying portions of Coeur d'Alene Lake and the St. Joe River that are within the Coeur d'Alene Indian Reservation. Because the State of Idaho conceded that the 1873 Executive Order establishing the Coeur d'Alene Indian Reservation included submerged lands in the reservation, under *United States* v. *Alaska*, 521 U.S. 1 (1997), the only remaining question was whether, at the time of Idaho's admission to the Union, Congress clearly intended to defeat Idaho's title to these submerged lands. The Department contended that Congress did so intend.

In an opinion by Justice Souter, the Court agreed with our position. The Court concluded that the historical record indicated that, prior to Idaho's admission to the Union, Congress knew that the reservation included submerged lands and had authorized modification of the reservation solely by agreement with the Tribe. The Court considered this evidence, together with evidence from the period just after statehood suggesting that Congress did not understand statehood to have affected the submerged lands in question, sufficient to show that Congress intended to defeat Idaho's title to the submerged lands.

Chief Justice Rehnquist, joined by Justices Scalia, Kennedy, and Thomas, dissented. The dissenters took the view that the evidence relied on by the majority showed at best only that at the time of Idaho statehood, the executive branch intended the submerged lands in question to remain in trust for the Tribe, and that the existence of such an intent on the part of the executive branch was insufficient to defeat Idaho's title to the lands.

B. Denial of Stay of Execution

On June 18, the Court denied without comment the application for a stay of execution and the petition for habeas corpus in *In Re Juan Raul Garza*, Nos. A-1072 & 00-10456 and the application for a stay of execution and the petition for certiorari in *Garza* v. *Lappin*, Nos. A-11-1 and 00-10631.

C. Grant of Certiorari

On June 18, the Court granted a writ of certiorari in *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushik Co.*, No. 00-1543. The questions presented are (1) whether every claim-narrowing amendment designed to comply with a provision of the Patent Act--including those provisions not related to prior art--automatically creates prosecution history estoppel regardless of the reason for the amendment; and (2) whether a finding of prosecution history estoppel completely bars application of the doctrine of equivalents. The Department has not participated in the case to date, and is determining whether participation is warranted at this stage.

D. Invitation

On June 18, the Court invited the Solicitor General to file a brief expressing the views of the United States on the petition for certiorari in *Chevron U.S.A. Inc.* v. *Echazabal*, No. 00-1406. The Americans with Disabilities Act provides that employers may require as a qualification for a job that the employee not pose a direct threat to the health or safety of other individuals in the workplace. The court of appeals ruled that the "direct threat" defense cannot be used to argue that the accommodation would pose a direct threat to the disabled individual, but can only be used when an accommodation poses a direct threat to others in the workplace. The questions presented is whether a person who is unable to carry out essential functions of a job without incurring a direct threat to the person's own health or life is a qualified individual for that job within the meaning of the Americans with Disabilities Act.

II. Supreme Court Filings

A. Briefs on the Merits

1. On June 21, the Department filed a brief for petitioner in *Massinari* v. *Sigmon Coal Dist.*, No. 00-1307. The case involves the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*, which established the United Mine Workers of America Combined Benefit Fund to finance health care benefits for retired miners and their dependents who worked under collective bargaining agreements that promised lifetime health care benefits. The Act directs the Commissioner of Social Security to assign responsibility for beneficiaries of the Fund to the "signatory operator" or "related person" of the operator that formerly employed them, if that signatory operator (or related person) is still "in business." 26 U.S.C. 9706(a). The question presented is whether the Commissioner is permitted to assign beneficiaries to the successor in interest of a signatory operator that is no longer in business. The Department argues that the Act grants the Commissioner this authority because the statutory definitions of the term "related person" reaches the direct successor in interest of the signatory operator. This construction of the statute is far more consistent with the background, legislative history, and purposes of the Coal Act than is the contrary definition of "related person" adopted by the court of appeals, which excludes the direct successor in interest of the signatory operator.

2. On June 21, the Department filed a brief for respondent in *Chickasaw Nation* v. *United States*, No. 00-507. The case presents the question whether Section 20(d) of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2719(d), exempts Indian Tribes from the wagering excise and occupational taxes imposed by the Internal Revenue Code. The Department argues that IGRA directs that all provisions of the Code "concerning the reporting and withholding of taxes with respect to * * * [a player's] winnings" are to apply to Tribes as they would to States, and that IGRA's parenthetical reference to Chapter 35 of the Internal Revenue Code, which imposes federal wagering taxes and exempts state lotteries from those taxes, cannot be read as a federal excise tax exemption for the Tribes.

B. Petition for Certiorari

On June 22, the Department filed a brief as *amicus curiae* urging the Court to grant the petitions for a writ of certiorari in Nos. 00-1751, 00-1777, and 00-1779, *Zelman* v. *Simmons-Harris*, *Hanna Perkins School* v. *Simmons-Harris*, and *Taylor* v. *Simmons-Harris* on the question whether the Establishment Clause of the First Amendment prevents a State from providing tuition aid as part of a general assistance program to the parents of children who attend failing public schools and authorizing the parents to use that aid to enroll their children in a private school of their own choosing, without regard to whether the school is religiously affiliated. The Department argues that the decision of the Sixth Circuit invalidating the Ohio Pilot Project Scholarship Program as a violation of the Establishment Clause conflicts with decisions of the Ohio Supreme Court and the Wisconsin Supreme Court upholding this and a similar tuition aid program, and that this conflict should be resolved by the Court so policymakers can know whether general assistance programs that make government funds available to individuals to enable them to obtain social services from private entities, including entities with religious affiliations, are a constitutionally permissible option for addressing failing public schools and other important social problems. The Department contends that the Sixth Circuit erred in striking down the Ohio program, which comports with the central tenets of the Supreme Court's Establishment Clause jurisprudence.

THIS WEEK

I. Supreme Court Decisions

A. Decisions on the Merits

On June 25, the Court decided five cases in which the Department participated:

1. *FEC* v. *Colorado Republican Fed. Campaign Comm.*, No. 00-191. The case presents the question whether the First Amendment grants a political party the right to make unlimited campaign expenditures in coordination with the party's congressional candidates, notwithstanding the limits on such coordinated expenditures imposed by the Federal Election Campaign Act of 1971, 2 U.S.C. 431, *et seq.* (FECA). In 1996, the Supreme Court sustained respondent's challenge to petitioner's enforcement action, holding that independent, uncoordinated party expenditures are not subject to FECA's limits, but the Court declined to reach respondent's claim that Section 441a(d)'s limits on coordinated expenditures violate the First Amendment on its face. This time, the Court reached and rejected respondent's facial challenge.

The Department argued that a party's coordinated expenditures are functionally and constitutionally indistinguishable from direct monetary contributions to a candidate, and thus may be restricted in order to prevent circumvention of FECA's contribution limits. Because the Court

previously sustained the contribution limits against First Amendment challenges, and because FECA allows political parties to make much larger coordinated expenditures than other political committees, the Department argued that FECA limits on party spending are constitutional. In an opinion by Justice Souter, the Court agreed. While expenditure limits are subject to closer constitutional scrutiny than limits on contributions, Congress's treatment of coordinated party spending as the functional equivalent of contributions is constitutionally permissible to avoid the risk of political corruption and its appearance. Substantial evidence demonstrates how FECA's restrictions are tested by a system of tallying contributions in order to connect donors to candidates through the accommodation of a party, and how the contribution limits would be eroded if inducement to circumvent them were enhanced by removing restrictions on parties' coordinated spending.

Justice Thomas, joined by Justices Scalia and Kennedy and joined in part by the Chief Justice, dissented. He argued that *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), should be overruled because it inadequately protects core rights of political speech and association. Even under the *Buckley* standard, the challenged restrictions on spending by political parties are too broad and too burdensome on political speech to pass constitutional muster.

2. *United States* v. *United Foods*, No. 00-276. The case presents the question whether the assessments imposed pursuant to the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. 6101 *et seq.*, on members of the mushroom industry for advertising programs to support the industry violate the First Amendment. The Department argued that the assessments are constitutional for the reasons the Supreme Court identified in a 1997 decision, *Glickman* v. *Wileman Bros. & Elliot, Inc.*, that rejected a First Amendment challenge to similar generic advertising programs for California tree fruits: the assessments "impose no restraint on the freedom of any producer to communicate any message to any audience"; "do not compel any person to engage in any actual or symbolic speech"; and "do not compel the producers to endorse or to finance any political or ideological views." Respondent, a large mushroom producer, wants to promote its brand of mushrooms as superior to those grown by other producers, and thus objects to having to pay for the contrary message favored by a majority of producers. In an opinion by Justice Kennedy, the Court struck down the program as an unconstitutional compelled speech subsidy. The Court distinguished the mushroom marketing program from that sustained in *Wileman* because the mandated assessments for speech in that case were ancillary to a more comprehensive regulatory program. Here, in contrast, the funds at issue are mostly used for generic advertising and there are no marketing orders regulating mushroom production and sales, no antitrust exemption, and nothing preventing individual producers from making their own marketing decisions. The expression respondent is required to support is thus not germane to any purpose of the association independent from the speech itself. The Court refused to entertain the Department's argument that this case involves permissible government speech because this theory was not advanced below.

Justice Stevens filed a concurrence noting that although important government interests might justify a compelled subsidy for expression in other cases, the interest in making one entrepreneur

finance advertising for the benefit of his competitors, including some who are not required to contribute, is insufficient in this case. Justice Thomas concurred, stating his view that there is no First Amendment distinction between compelled subsidies for advertising and compelled speech, both of which must be subjected to the most stringent First Amendment scrutiny. Justice Breyer, joined by Justice Ginsburg and joined in part by Justice O'Connor, dissented. He found the Court's reasons for distinguishing *Wileman* unpersuasive, and argued that the Court had improperly discounted the importance of the regulatory interests served by the challenged program.

3. *Nevada* v. *Hicks*, No. 99-1994. Respondent Hicks, a member of the Fallon Paiute-Shoshone Tribes of western Nevada, filed suit in tribal court alleging tort claims and civil rights violations under 42 U.S.C. § 1983 against state game wardens who had executed state-court and tribal-court search warrants to search Hicks's home on the Tribes' reservation and seize big-horn sheep's head trophies. As *amicus*, the Department argued that the tribal court had jurisdiction over the claims against petitioners, because the Court recognized in *Strate* v. *A-1 Contractors*, 520 U.S. 438 (1997), that "tribes retain considerable control"--both regulatory and adjudicatory--"over non-member conduct on tribal land" within a reservation, as well as authority over the conduct of nonmembers elsewhere within a reservation where that conduct involves "consensual relationships with the tribe or its members" or affects "the political integrity, the economic security, or the health or welfare of the tribe." The Department contended this test was met here because petitioners entered into a consensual relationship with the Tribe when they obtained authorization from the tribal court to execute the warrants, and because a Tribe's political integrity and welfare are threatened when state officials, invoking the Tribe's own authority, are alleged to have violated the rights of its members on its reservation.

In an opinion by Justice Scalia, the Court rejected this position, holding that the tribal court did not have jurisdiction to adjudicate the claims. As to nonmember defendants such as the game wardens, a tribal court's inherent adjudicatory authority is at most as broad as the tribe's regulatory authority, and "the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations . . . cannot survive without express congressional delegation," *Montana v. United States*, 450 U.S. 544 at 564 (1981). Whether the acts occurred on tribal land is only one factor to be considered, and while that factor may sometimes be dispositive, tribal ownership is not alone sufficient to support regulatory jurisdiction over nonmembers. Tribal authority to regulate the conduct of state officers executing a search warrant to investigate a violation of state laws that occurred off the reservation is not essential to tribal self-government or internal relations, the Court held, and the State's interest in executing process is considerable. Indeed, such enforcement no more impairs the Tribes' self-government than federal enforcement of federal law impairs state government. Congress has not stripped the States of their inherent jurisdiction on reservations with regard to off-reservation violations of state law. The federal statutory scheme neither prescribes nor suggests that state officers cannot enter a reservation to investigate or prosecute such violations, nor has Congress explicitly granted tribal courts jurisdiction over federal civil rights claims arising from acts occurring on reservation

land. Concurring opinions were filed by Justices Souter and Ginsburg, while Justice O'Connor concurred in part, and Justice Stevens concurred in the judgment only.

4. *INS* v. *St. Cyr*, No. 00-767. The respondent, an alien found removable because of his criminal conviction for an aggravated felony, applied for discretionary relief from removal. The Board of Immigration Appeals (BIA) concluded that he was ineligible for discretionary relief under the former 8 U.S.C. 1182(c) because that provision had been repealed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Respondent filed a petition for a writ of habeas corpus in district court under 28 U.S.C. 2241, contending that Congress's repeal of Section 1182(c) did not apply to his conviction, which was entered before the repeal, even though his removal proceedings were commenced after the repeal. The district court and the Second Circuit agreed and granted habeas corpus. The questions presented were whether the district court had habeas jurisdiction over respondent's challenge to his final removal order; and whether the BIA properly concluded that respondent is not eligible for discretionary relief under Section 1182(c) because his removal proceeding was commenced after the repeal of Section 1182(c) became effective.

With respect to the first issue, the Department contended that the court of appeals' decision could not be squared with the structure of judicial review of removal orders that Congress has enacted, and could lead to significant delays in the removal of criminal aliens from the United States, despite Congress's concern that the removal of criminal aliens should be expedited. With respect to the second issue, the Department argued that the court of appeals misinterpreted Section 304 of IIRIRA, which repealed 8 U.S.C. 1182(c) and comprehensively replaced the old system of deportation, including proceedings for discretionary relief, with a wholly new system of removal that provides different eligibility criteria for discretionary cancellation of removal. The Department further contended that the court of appeals relied on a misapprehension of the presumption against retroactive application of federal statutes, which has no operation in this removal context.

In an opinion by Justice Stevens, the Court held that the federal court retained jurisdiction under Section 2241 over challenges to a final removal order against an alien removable by reason of a criminal offense. In reaching this conclusion, the Court relied on the strong presumption in favor of judicial review of administrative action, the lack of an explicit statement of congressional intent to repeal habeas jurisdiction, the canon favoring construing statutes to avoid substantial constitutional questions, and historical practice in the immigration context. The Court also held that discretionary relief remains available for aliens, like St. Cyr, whose convictions were obtained through plea agreements and who would have been eligible for discretionary relief at the time of their pleas. The Court concluded that the statutory provisions eliminating discretionary review did not apply retroactively to aliens like St. Cyr because Congress had not directed retroactive application with the requisite clarity and such application would violate considerations of fair notice, reasonable reliance, and settled expectations.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

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NEXT WEEK

I. Supreme Court Decisions

On June 25, the Court will hold a non-argument session at which opinions and orders are expected to be issued.

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

June 19, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

LAST WEEK

I. Supreme Court Decisions

On June 11, the Court decided five cases in which the Department participated:

1. *Nguyen* v. *INS*, No. 99-2071. The case involved 8 U.S.C. 1409, which governs the acquisition of United States citizenship by persons born to one United States citizen parent and one noncitizen parent when the parents are unmarried and the child is born outside of the United States. The statute provides that a child born out of wedlock acquires at birth the nationality of a citizen mother, but requires legitimization, a declaration of paternity under oath by the father, or a court order of paternity when the father is the citizen parent. The case presented the question whether this statutory distinction is consistent with the equal protection component of the Fifth Amendment's Due Process Clause. The Department had argued that Section 1409 survives equal protection scrutiny because the statue reflects careful congressional consideration of the relationships between unwed citizen parents and their children born abroad and draws reasonable distinctions between unmarried citizen mothers and unwed citizen fathers. In an opinion by Justice Kennedy, the Court agreed with our position. The Court held that the requirements on unmarried citizen fathers are justified by two important governmental interests: assuring that a biological parent-child relationship exists and ensuring that the child and citizen parent have some demonstrated opportunity to develop a relationship that consists of meaningful ties between child and citizen parent and, in turn, the United States. The Court also held that the means Congress chose substantially relate to these interests.

Justice Scalia, joined by Justice Thomas, concurred, writing separately to reiterate his view that the Court lacks power to confer citizenship on a basis other than that prescribed by Congress and thus, even if the Court had found the statute unconstitutional, the Court could not confer citizenship on petitioner.

Justice O'Connor, joined by Justices Souter, Ginsburg and Breyer, dissented. The dissenters argued that the "majority opinion represents far less than the rigorous application of heightened scrutiny" for sex-based classifications that the Court's "precedents require." The dissenters emphasized that sex-neutral alternatives could have accomplished the governmental goals.

2. *Kyllo* v. *United States*, No. 99-8508. At issue was whether the use of a thermal imaging device to record the amount of heat emanating from a house constitutes a search within the meaning of the Fourth Amendment. The Department had argued that use of the device from the street outside a house is not a search because, inter alia, there is no objectively reasonable expectation of privacy in the heat emanating from one's home. The Court, in an opinion by Justice Scalia, held that use of a thermal imaging device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, constitutes a Fourth Amendment search. The Court rejected the Department's reliance on the fact that the thermal imager detected "only heat radiating from the exterior surface of the house" on the grounds that the Court had previously held that use of eavesdropping devices that "picked up only sound waves that reached the exterior of the phone booth" constituted a search and that such a distinction "would leave the homeowner at the mercy of advancing technology."

Justice Stevens, joined by the Chief Justice, Justice O'Connor, and Justice Kennedy, dissented. The dissenters emphasized that the thermal imaging device did not reveal any information about the interior of the home and criticized the holding for creating an overbroad rule with "uncertain" contours.

3. *Alabama* v. *Bozeman*, No. 00-492. The case presented the question whether a one-day transfer of a federal prisoner to state custody for purposes of arraignment, without completing the trial on the state charges, violates Article IV(e) of the Interstate Agreement on Detainers (IAD) and requires dismissal of the state charges. While Bozeman was serving time in federal prison, Covington County, Alabama officials obtained custody of Bozeman, pursuant to the IAD, for his one-day arraignment on state criminal charges. Bozeman was returned to federal prison the next day. The Supreme Court of Alabama later dismissed the state charges against Bozeman under Article IV(e) of the IAD, which provides that if "trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment . . . such indictment, information or complaint shall not be of further force or effect, and the court shall enter an order dismissing the same with prejudice." The Department had contended as *amicus curiae* that the Supreme Court of Alabama erred in dismissing based on a technical and wholly harmless defect. In a unanimous opinion by Justice Breyer, the Court held that the literal language of Article IV(e) provides an absolute bar on any further criminal proceedings when a defendant is returned to the original place of imprisonment before trial.

4. *Cedric Kushner Promotions, Ltd.* v. *King*, No. 00-549. The case involved the Racketeer Influenced and Corrupt Organizations Act (RICO), which makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. 1962(c). The question presented was whether a claim may be maintained under this provision when the alleged RICO "enterprise" is a corporation and the "person" charged with the violation is the sole owner, and an employee, of the corporation. The Department argued as *amicus curiae* that a RICO claim may be maintained in that situation, because although the "person" charged must be distinct from the "enterprise" under Section 1962(c), a corporate employee is sufficiently distinct from the corporation to satisfy the distinctness requirement. In a unanimous opinion by Justice Breyer, the Court agreed with our position and held that Section 1962(c) applies when a corporate employee unlawfully conducts the affairs of the corporation of which he is the sole owner – whether he conducts those affairs within the scope, or beyond the scope, of corporate activity. The Court stated that RICO's plain language and the statute's underlying purposes support the view that the formal legal distinction that incorporation creates between "person" and "enterprise" satisfies the distinct entity requirement.

5. *Kansas* v. *Colorado*, No. 105 (original). The State of Kansas brought this original action to enforce its rights under the Arkansas River Compact. In an earlier decision, the Supreme Court accepted the Special Master's recommendation that Colorado be held liable for violations of the Compact resulting from post-Compact well pumping in Colorado. After further proceedings, the Master issued a Report recommending that Kansas be awarded money damages for losses that occurred as a result of the violations, including aggregate losses to past and future Kansas water users, and that prejudgement interest be awarded on damages from 1969 to the present. Both Kansas and Colorado filed exceptions to the recommended remedy. The Department contended that the exceptions should be overruled because the recommended remedy fell within the Court's broad discretion to fashion a fair and equitable remedy for Colorado's violations of the Compact.

In an opinion by Justice Stevens, the Court overruled all but one of the exceptions and remanded the case to the Special Master for preparation of a final judgment. The Court rejected Colorado's arguments that the recommended damages award violated the Eleventh Amendment and that the unliquidated nature of Kansas's money damages barred an award of prejudgment interest. The Court held that the Special Master properly determined the appropriate rate for the prejudgment interest award, but sustained Colorado's exception that prejudgment interest should begin accruing in 1985, when Kansas filed its complaint, rather than 1969, when Colorado knew or should have known that it was violating the Compact. And the Court held that the Special Master properly determined the value of the crop losses attributable to the Compact violations.

Justice O'Connor, joined by Justices Scalia and Thomas, filed an opinion concurring in part and dissenting in part. Justice O'Connor argued that the award of prejudgment interest was improper on the ground that Kansas and Colorado could not have intended liability for prejudgment interest when

they entered into the Compact because at that time prejudgment interest was unavailable on claims for unliquidated or unascertainable damages.

II. Supreme Court Filings

A. Brief of the Merits

1. The Department filed on June 15 a brief as *amicus curiae* supporting respondent in *J.E.M. Supply v. Pioneer Hi-Bred Intl.*, No. 99-1996. The question presented is whether patents issued under 35 U.S.C. 101 granting the right to exclude others from sexually reproducing plants or plant varieties, or from selling or using plants or plant varieties reproduced by means of sexual reproduction (by seed), are invalid because the Plant Variety Protection Act of 1970, 7 U.S.C. 2321, *et seq.*, and the Plant Patent Act of 1930, 35 U.S.C. 161-164, are the exclusive means of obtaining a federal statutory right to exclude others from reproducing, selling, or using plants or plant varieties. In *Diamond* v. *Chakrabarty*, 447 U.S. 303, 313 (1980), the Court held with respect to sexually reproduced plants that "[t]here is nothing in [the PVPA's] language or history to suggest that" the law was enacted because Section 101 precluded patenting of living things. We contend that there is no reason to overrule *Chakrabarty*'s construction of Section 101 and revisit *Chakrabarty*'s reasoning concerning the relationship between Section 101 and the Plant Variety Protection Act.

B. Petition for Certiorari

On June 11, the Department filed an acquiescence to the petition for certiorari in *Young* v. *United States*, No. 00-1567. The question presented is whether the three-year lookback period for determining the priority and nondischargeability of taxes pursuant to Sections 507(a)(8)(A)(i) and 523(a)(1)(A) of the Bankruptcy Code is tolled during the pendency of a debtor's prior bankruptcy case. The courts of appeals are in direct conflict on the question, and thus we do not oppose the granting of the petition in this case. We note in our petition, however, that the House and Senate have passed bills that would amend the Bankruptcy Code to resolve this question by making clear that the three-year lookback provision of the Code is tolled and extended for any period in which the automatic stay was in effect in a prior bankruptcy case.

C. Other

1. On June 14, the Department filed a Brief in Opposition to an Application for a Stay of Execution and Original Writ of Habeas Corpus in *In Re Juan Raul Garza*, Nos. A-1072 & 00-10456. The questions presented are (1) whether petitioner has satisfied the requirements for a stay of execution, as described in *Barefoot* v. *Estelle*, 463 U.S. 880 (1983); (2) whether petitioner's claim under *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), and *Shafer* v. *South Carolina*, 121 S. Ct. 1263 (2001), satisfies the requirements for review of second or successive motions for collateral review

under 28 U.S.C. 2255, which inform the Court's consideration of an original habeas petition; (3) whether Section 2255 is inadequate or ineffective to test the legality of petitioner's detention under *Simmons* and *Shafer*; and (4) whether denial of relief on petitioner's claim under *Simmons* and *Shafer* would constitute an unconstitutional suspension of the writ of habeas corpus. Petitioner has previously exhausted a direct appeal and a first collateral review of his convictions and death sentence under Section 2255. We contend that petitioner cannot make the extraordinary showing required for a stay of execution or for habeas relief, because his *Simmons* claim -- that his sentencing jury should have been instructed that the only alternative to a death sentence was life imprisonment without the possibility of release -- was correctly rejected on direct review, and he is procedurally barred from relitigating the claim now. The Court denied the application and petition without comment on June 18.

2. On June 16, the Department filed a Brief in Opposition to an Application for a Stay of Execution and Petition for Certiorari in *Garza* v. *Lappin*, Nos. A-11-1 and 00-10631. The questions presented are (1) whether petitioner has satisfied the requirements for a stay of execution, as described in *Barefoot* v. *Estelle*, 463 U.S. 880 (1983); and (2) whether petitioner is entitled to have his death sentence vacated based on Report No. 52/01 of the Inter-American Commission on Human Rights, which concluded that his sentences violate his rights under the American Declaration of the Rights and Duties of Man (American Declaration) because evidence was introduced at the capital punishment phase of unadjudicated murders committed in Mexico, and that his execution would violate the Charter of the Organization of American States and the American Declaration. We contend that petitioner's application for a stay and petition for certiorari should be denied because the Commission does not have the power to issue binding orders on member states and the Commission's recommendation in this case does not give rise to a judicially enforceable right that may be invoked in a petition for a writ of habeas corpus. Thus petitioner cannot satisfy the requirements for a stay of execution. The Court denied the application and petition without comment on June 18.

THIS WEEK

I. Supreme Court Decisions

A. Decisions on the Merits

On June 18, the Court decided three cases in which the Department participated:

1. *United States* v. *Mead*, No. 99-1434. The case presented the questions whether judicial deference is owed to the tariff classification rulings issued by the Customs Service under 19 U.S.C. 1502(a), and whether the Customs Service reasonably interpreted the statutory phrase "diaries, notebooks and address books, bound" to include the spiral-bound and ring-bound day planners imported by respondent. We contended that ordinary *Chevron* deference does apply to classification rulings of the Customs Service and that under the proper standard of deference, the Customs Service classification ruling in this case should have been affirmed.

In an opinion by Justice Souter, the Court held that the customs ruling had no claim to judicial deference under *Chevron* because there was no indication in the statute that Congress intended tariff rulings to have the force of law. The Court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." The Court explained that an agency may show that Congress has delegated such authority in a variety of ways, such as a grant of authority to engage in adjudication or notice-and-comment rulemaking, and that there will sometimes be reason for *Chevron* deference when no such administrative formality was required or afforded, if there is some other indication of a comparable congressional intent. The customs ruling here, however, failed to qualify for *Chevron* deference. Finally, the Court concluded that although the ruling in this case was not entitled to *Chevron* deference, it might still be entitled to some lesser form of deference under *Skidmore* v. *Swift & Co.*, and remanded to the court of appeals for further action.

Justice Scalia dissented. He characterized the majority opinion as abandoning the *Chevron* doctrine for a presumption that agency discretion does not exist unless a statute expressly or impliedly provides for it, and rejected that view. Justice Scalia contended that there is no necessary connection between the formality of agency procedures and the power of the agency administering the procedure to resolve authoritatively questions of law.

2. *Saucier* v. *Katz*, No. 99-1977. The case presented two questions: (1) whether, in a case alleging the use of constitutionally excessive force, the test for qualified immunity and the reasonableness test under the Fourth Amendment are identical, such that a finding of unreasonable force under the Fourth Amendment necessarily precludes qualified immunity; and (2) whether the court of appeals erred in concluding that petitioner's use of force to detain respondent, which consisted of carrying respondent from the crowd to a waiting van and pushing him inside without injuring him, so clearly exceeded the amount of force permitted by the Fourth Amendment as to warrant denial of qualified immunity. We contended that the Fourth Amendment reasonableness test and the qualified immunity test are distinct and that the minimal use of force that occurred here as petitioner was guarding then Vice-President Gore was not so clearly unlawful as to deprive the officer of qualified immunity.

In an opinion by Justice Kennedy, the Court agreed with our position. The Court held that the test for reasonableness of force under the Fourth Amendment, which requires analysis of the objective reasonableness of an officer's action, is distinct from the test for qualified immunity, which includes the further dimension of whether the law put an officer on notice that a particular amount of force used in particular circumstances was excessive. Applying that principle, the Court held that the officer was entitled to summary judgment because there was no clearly established rule prohibiting the officer from acting as he did.

Justice Ginsburg wrote an opinion concurring in the judgment, which Justices Stevens and Breyer joined. She would have held that in the context of an excessive force claim there is no

distinction between the test for reasonableness under the Fourth Amendment and the test for qualified immunity. According to Justice Ginsburg, the proper test for the qualified immunity claim here is whether a reasonable officer, identically situated, would have believed that the force employed was lawful.

Justice Souter wrote an opinion concurring in part and dissenting in part. Justice Souter agreed with the Court's determination that the qualified immunity test is distinct from the test governing the underlying merits, but would have remanded the case for application of the qualified immunity standard.

3. *Idaho* v. *United States*, No. 00-189. The case presented the question whether the United States holds title, in trust for the Coeur d'Alene Tribe, to lands underlying portions of Coeur d'Alene Lake and the St. Joe River that are within the Coeur d'Alene Indian Reservation. Because the State of Idaho conceded that the 1873 Executive Order establishing the Coeur D'Alene Indian Reservation included submerged lands in the Reservation, under *United States* v. *Alaska*, 521 U.S. 1 (1997), the only remaining question was whether, at the time of Idaho's admission to the Union, Congress clearly intended to defeat Idaho's title to these submerged lands. We contended that Congress did so intend.

In an opinion by Justice Souter, the Court agreed with our position. The Court concluded that the historical record indicated that, prior to Idaho's admission to the Union, Congress knew that the reservation included submerged lands and had authorized modification of the Reservation solely by agreement with the Tribe. The Court considered this evidence, together with evidence from the period just after statehood suggesting that Congress did not understand statehood to have affected the submerged lands in question, sufficient to show that Congress intended to defeat Idaho's title to the submerged lands.

Chief Justice Rehnquist, joined by Justices Scalia, Kennedy, and Thomas, dissented. The dissenters took the view that the evidence relied on by the majority showed at best only that at the time of Idaho statehood, the executive branch intended the submerged lands in question to remain in trust for the Tribe, and that the existence of such an intent on the part of the executive branch was insufficient to defeat Idaho's title to the lands.

B. Denial of Stay of Execution

On June 18, the Court denied without comment the application for a stay of execution and the petition for habeas corpus in *In Re Juan Raul Garza*, Nos. A-1072 & 00-10456.

Also on June 18, the Court denied without comment the application for a stay of execution and the petition for certiorari in *Garza* v. *Lappin*, Nos. A-11-1 and 00-10631.

C. Grant of Certiorari

On June 18, the Court granted a writ of certiorari in *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushik Co.*, No. 00-1543. The questions presented are (1) whether every claim-narrowing amendment designed to comply with a provision of the Patent-Act -- including those provisions not related to prior art -- automatically creates prosecution history estoppel regardless of the reason for the amendment; and (2) whether a finding of prosecution history estoppel completely bars application of the doctrine of equivalents. We have not participated in the case to date, and are determining whether participation is warranted at this stage.

D. Invitation

On June 18, the Court invited the Solicitor General to file a brief expressing the views of the United States on the petition for certiorari in *Chevron U.S.A. Inc.* v. *Echazabal*, No. 00-1406. The Americans with Disabilities Act provides that employers may require as a qualification for a job that the employee not pose a direct threat to the health or safety of other individuals in the workplace. The court of appeals ruled that the "direct threat" defense cannot be used to argue that the accommodation would pose a direct threat to the disabled individual, but can only be used when an accommodation poses a direct threat to others in the workplace. The questions presented is whether a person who is unable to carry out essential functions of a job without incurring a direct threat to the person's own health or life is a qualified individual for that job within the meaning of the Americans with Disabilities Act.

II. Supreme Court Filings

A. Briefs on the Merits

1. On June 21, the Department will file a brief for petitioner in *Halter* v. *Sigmon Coal Dist.*, No. 00-1307. The case involves the United Mine Workers of America Combined Benefit Fund, which finances health care benefits for retired miners and their dependents who worked under collective bargaining agreements that promised lifetime health care benefits. The Coal Act, 26 U.S.C. 9701 *et. seq.*, directs the Commissioner of Social Security to assign responsibility for beneficiaries of the Fund to the "signatory operator" or "related person" of the operator that formerly employed them, if that signatory operator (or related person) is still "in business." 26 U.S.C. 9706(a). The question presented is whether the Coal Act permits the Commissioner to assign beneficiaries to the successor in interest of a signatory operator that is no longer in business.

2. On June 21, the Department will file a brief for respondent in *Chickasaw Nation* v. *United States*, No. 00-507. The case presents the question whether Section 20(d) of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(d), exempts Native American Tribes from the wagering excise and occupational taxes imposed under the Internal Revenue Code.

MEMORANDUM

TO: Alberto R. Gonzales

CC: All Attorneys in Counsel's Office

FROM: Brett M. Kavanaugh

DATE: May 13, 2001

RE: Supreme Court Update

Attached please find the latest Supreme Court update from the Acting Solicitor General.

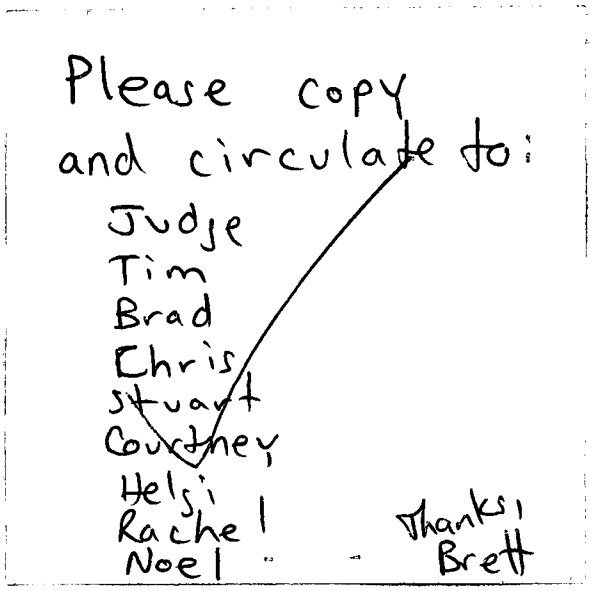

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

May 9, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Barbara D. Underwood
Acting Solicitor General

Subject: Weekly Report

LAST WEEK

I. Supreme Court Decision

A. Decision on the Merits

1. On April 30, 2001, the Court decided *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, No. 00-292, which presented the question whether and under what circumstances an Indian Tribe's agreement to arbitrate disputes arising out of a standard form contract entered into with a private party, and to have judgment entered upon the final arbitration award "in any court having jurisdiction thereof," constitutes a valid waiver of the Tribe's sovereign immunity from suit in state court. As *amicus curiae*, we argued that an arbitration clause in a standard form contract does not constitute an express and unequivocal consent to suit in state court, at least where the agreement is ambiguous regarding whether an enforcement action can be brought in tribal courts.

In a unanimous opinion written by Justice Ginsburg, the Court reversed, rejecting our arguments. Because the contract required resolution of all contract-related disputes by binding arbitration, whose ensuing awards may be reduced to judgment "in accordance with applicable law in any court having jurisdiction thereof," "[t]he contract's choice-of-law clause makes it plain enough that a 'court having jurisdiction' to enforce the award in question is the Oklahoma state court in which C & L filed suit." The Court rejected the Tribe's argument that an arbitration clause "is not a waiver of immunity from suit," and noted that the contract was unambiguous and had been proposed and prepared by the Tribe itself.

THIS WEEK

I. Supreme Court Filings

A. Briefs on the Merits

1. On May 7, we filed a brief for the petitioner in *Chao v. Mallard Bay Drilling, Inc.*, No. 00-927. The case presents the question whether the United States Coast Guard has "exercise[d] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health" concerning the "working conditions of employees" (29 U.S.C. 653(b)(1)) on "uninspected vessels" (46 U.S.C. 2101(43)) so as to displace application of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* ("OSH Act"). We contend that the Fifth Circuit erred in concluding that the Coast Guard has exclusive jurisdiction over the regulation of working conditions of seamen so as to preclude the application of the OSH Act to a fatal accident aboard a Mallard drilling barge.

We argue that the Fifth Circuit's holding rests on an interpretation of Section 4(b)(1) of the OSH Act (29 U.S.C. 653(b)(1)) that is inconsistent with its text, the purpose of the Act, the history surrounding the enactment of the Act, and the long-standing interpretation of the Act by the Secretary of Labor. Contrary to the view of the Fifth Circuit, Section 4(b)(1) does not create industry-wide exemptions from the OSH Act based on limited exercises of regulatory authority by other federal agencies. Rather, the Act is displaced only when another agency actually has regulated the working conditions at issue or has articulated a policy that the working conditions should not be regulated. Because the Coast Guard has done neither, the OSH Act continues to apply.

2. We anticipate filing on May 10 a brief for petitioner in *United States v. Vonn*, No. 00-973. The questions presented are: (1) whether a district court's failure to advise a counseled defendant at his guilty plea hearing that he has the right to the assistance of counsel at trial, as required by Federal Rule of Criminal Procedure 11(c)(3), is subject to plain-error, rather than harmless-error, review on appeal when the defendant fails to preserve the claim of error in the district court; and (2) whether, in determining if a defendant's substantial rights were affected by a district court's deviation from the requirements of Rule 11(c)(3), the court of appeals may review only the transcript of the guilty plea colloquy, or whether it may also consider other parts of the official record.

NEXT WEEK

On May 14, the Court has a non-argument session at which opinions are expected to be released.



UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

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Washington, DC 20530

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

June 19, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Theodore B. Olson
Solicitor General

Subject: Weekly Report

LAST WEEK

I. Supreme Court Decisions

On June 11, the Court decided five cases in which the Department participated:

1. *Nguyen* v. *INS*, No. 99-2071. The case involved 8 U.S.C. 1409, which governs the acquisition of United States citizenship by persons born to one United States citizen parent and one noncitizen parent when the parents are unmarried and the child is born outside of the United States. The statute provides that a child born out of wedlock acquires at birth the nationality of a citizen mother, but requires legitimization, a declaration of paternity under oath by the father, or a court order of paternity when the father is the citizen parent. The case presented the question whether this statutory distinction is consistent with the equal protection component of the Fifth Amendment's Due Process Clause. The Department had argued that Section 1409 survives equal protection scrutiny because the statue reflects careful congressional consideration of the relationships between unwed citizen parents and their children born abroad and draws reasonable distinctions between unmarried citizen mothers and unwed citizen fathers. In an opinion by Justice Kennedy, the Court agreed with our position. The Court held that the requirements on unmarried citizen fathers are justified by two important governmental interests: assuring that a biological parent-child relationship exists and ensuring that the child and citizen parent have some demonstrated opportunity to develop a relationship that consists of meaningful ties between child and citizen parent and, in turn, the United States. The Court also held that the means Congress chose substantially relate to these interests.

Justice Scalia, joined by Justice Thomas, concurred, writing separately to reiterate his view that the Court lacks power to confer citizenship on a basis other than that prescribed by Congress and thus, even if the Court had found the statute unconstitutional, the Court could not confer citizenship on petitioner.

Justice O'Connor, joined by Justices Souter, Ginsburg and Breyer, dissented. The dissenters argued that the "majority opinion represents far less than the rigorous application of heightened scrutiny" for sex-based classifications that the Court's "precedents require." The dissenters emphasized that sex-neutral alternatives could have accomplished the governmental goals.

2. *Kyllo* v. *United States*, No. 99-8508. At issue was whether the use of a thermal imaging device to record the amount of heat emanating from a house constitutes a search within the meaning of the Fourth Amendment. The Department had argued that use of the device from the street outside a house is not a search because, inter alia, there is no objectively reasonable expectation of privacy in the heat emanating from one's home. The Court, in an opinion by Justice Scalia, held that use of a thermal imaging device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, constitutes a Fourth Amendment search. The Court rejected the Department's reliance on the fact that the thermal imager detected "only heat radiating from the exterior surface of the house" on the grounds that the Court had previously held that use of eavesdropping devices that "picked up only sound waves that reached the exterior of the phone booth" constituted a search and that such a distinction "would leave the homeowner at the mercy of advancing technology."

Justice Stevens, joined by the Chief Justice, Justice O'Connor, and Justice Kennedy, dissented. The dissenters emphasized that the thermal imaging device did not reveal any information about the interior of the home and criticized the holding for creating an overbroad rule with "uncertain" contours.

3. *Alabama* v. *Bozeman*, No. 00-492. The case presented the question whether a one-day transfer of a federal prisoner to state custody for purposes of arraignment, without completing the trial on the state charges, violates Article IV(e) of the Interstate Agreement on Detainers (IAD) and requires dismissal of the state charges. While Bozeman was serving time in federal prison, Covington County, Alabama officials obtained custody of Bozeman, pursuant to the IAD, for his one-day arraignment on state criminal charges. Bozeman was returned to federal prison the next day. The Supreme Court of Alabama later dismissed the state charges against Bozeman under Article IV(e) of the IAD, which provides that if "trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment . . . such indictment, information or complaint shall not be of further force or effect, and the court shall enter an order dismissing the same with prejudice." The Department had contended as *amicus curiae* that the Supreme Court of Alabama erred in dismissing based on a technical and wholly harmless defect. In a unanimous opinion by Justice Breyer, the Court held that the literal language of Article IV(e) provides an absolute bar on any further criminal proceedings when a defendant is returned to the original place of imprisonment before trial.

4. *Cedric Kushner Promotions, Ltd.* v. *King*, No. 00-549. The case involved the Racketeer Influenced and Corrupt Organizations Act (RICO), which makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. 1962(c). The question presented was whether a claim may be maintained under this provision when the alleged RICO "enterprise" is a corporation and the "person" charged with the violation is the sole owner, and an employee, of the corporation. The Department argued as *amicus curiae* that a RICO claim may be maintained in that situation, because although the "person" charged must be distinct from the "enterprise" under Section 1962(c), a corporate employee is sufficiently distinct from the corporation to satisfy the distinctness requirement. In a unanimous opinion by Justice Breyer, the Court agreed with our position and held that Section 1962(c) applies when a corporate employee unlawfully conducts the affairs of the corporation of which he is the sole owner – whether he conducts those affairs within the scope, or beyond the scope, of corporate activity. The Court stated that RICO's plain language and the statute's underlying purposes support the view that the formal legal distinction that incorporation creates between "person" and "enterprise" satisfies the distinct entity requirement.

5. *Kansas* v. *Colorado*, No. 105 (original). The State of Kansas brought this original action to enforce its rights under the Arkansas River Compact. In an earlier decision, the Supreme Court accepted the Special Master's recommendation that Colorado be held liable for violations of the Compact resulting from post-Compact well pumping in Colorado. After further proceedings, the Master issued a Report recommending that Kansas be awarded money damages for losses that occurred as a result of the violations, including aggregate losses to past and future Kansas water users, and that prejudgement interest be awarded on damages from 1969 to the present. Both Kansas and Colorado filed exceptions to the recommended remedy. The Department contended that the exceptions should be overruled because the recommended remedy fell within the Court's broad discretion to fashion a fair and equitable remedy for Colorado's violations of the Compact.

In an opinion by Justice Stevens, the Court overruled all but one of the exceptions and remanded the case to the Special Master for preparation of a final judgment. The Court rejected Colorado's arguments that the recommended damages award violated the Eleventh Amendment and that the unliquidated nature of Kansas's money damages barred an award of prejudgment interest. The Court held that the Special Master properly determined the appropriate rate for the prejudgment interest award, but sustained Colorado's exception that prejudgment interest should begin accruing in 1985, when Kansas filed its complaint, rather than 1969, when Colorado knew or should have known that it was violating the Compact. And the Court held that the Special Master properly determined the value of the crop losses attributable to the Compact violations.

Justice O'Connor, joined by Justices Scalia and Thomas, filed an opinion concurring in part and dissenting in part. Justice O'Connor argued that the award of prejudgment interest was improper on the ground that Kansas and Colorado could not have intended liability for prejudgment interest when

they entered into the Compact because at that time prejudgment interest was unavailable on claims for unliquidated or unascertainable damages.

II. Supreme Court Filings

A. Brief of the Merits

1. The Department filed on June 15 a brief as *amicus curiae* supporting respondent in *J.E.M. Supply v. Pioneer Hi-Bred Intl.*, No. 99-1996. The question presented is whether patents issued under 35 U.S.C. 101 granting the right to exclude others from sexually reproducing plants or plant varieties, or from selling or using plants or plant varieties reproduced by means of sexual reproduction (by seed), are invalid because the Plant Variety Protection Act of 1970, 7 U.S.C. 2321, *et seq.*, and the Plant Patent Act of 1930, 35 U.S.C. 161-164, are the exclusive means of obtaining a federal statutory right to exclude others from reproducing, selling, or using plants or plant varieties. In *Diamond* v. *Chakrabarty*, 447 U.S. 303, 313 (1980), the Court held with respect to sexually reproduced plants that "[t]here is nothing in [the PVPA's] language or history to suggest that" the law was enacted because Section 101 precluded patenting of living things. We contend that there is no reason to overrule *Chakrabarty*'s construction of Section 101 and revisit *Chakrabarty*'s reasoning concerning the relationship between Section 101 and the Plant Variety Protection Act.

B. Petition for Certiorari

On June 11, the Department filed an acquiescence to the petition for certiorari in *Young* v. *United States*, No. 00-1567. The question presented is whether the three-year lookback period for determining the priority and nondischargeability of taxes pursuant to Sections 507(a)(8)(A)(i) and 523(a)(1)(A) of the Bankruptcy Code is tolled during the pendency of a debtor's prior bankruptcy case. The courts of appeals are in direct conflict on the question, and thus we do not oppose the granting of the petition in this case. We note in our petition, however, that the House and Senate have passed bills that would amend the Bankruptcy Code to resolve this question by making clear that the three-year lookback provision of the Code is tolled and extended for any period in which the automatic stay was in effect in a prior bankruptcy case.

C. Other

1. On June 14, the Department filed a Brief in Opposition to an Application for a Stay of Execution and Original Writ of Habeas Corpus in *In Re Juan Raul Garza*, Nos. A-1072 & 00-10456. The questions presented are (1) whether petitioner has satisfied the requirements for a stay of execution, as described in *Barefoot* v. *Estelle*, 463 U.S. 880 (1983); (2) whether petitioner's claim under *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), and *Shafer* v. *South Carolina*, 121 S. Ct. 1263 (2001), satisfies the requirements for review of second or successive motions for collateral review

under 28 U.S.C. 2255, which inform the Court's consideration of an original habeas petition; (3) whether Section 2255 is inadequate or ineffective to test the legality of petitioner's detention under *Simmons* and *Shafer*; and (4) whether denial of relief on petitioner's claim under *Simmons* and *Shafer* would constitute an unconstitutional suspension of the writ of habeas corpus. Petitioner has previously exhausted a direct appeal and a first collateral review of his convictions and death sentence under Section 2255. We contend that petitioner cannot make the extraordinary showing required for a stay of execution or for habeas relief, because his *Simmons* claim -- that his sentencing jury should have been instructed that the only alternative to a death sentence was life imprisonment without the possibility of release -- was correctly rejected on direct review, and he is procedurally barred from relitigating the claim now. The Court denied the application and petition without comment on June 18.

2. On June 16, the Department filed a Brief in Opposition to an Application for a Stay of Execution and Petition for Certiorari in *Garza* v. *Lappin*, Nos. A-11-1 and 00-10631. The questions presented are (1) whether petitioner has satisfied the requirements for a stay of execution, as described in *Barefoot* v. *Estelle*, 463 U.S. 880 (1983); and (2) whether petitioner is entitled to have his death sentence vacated based on Report No. 52/01 of the Inter-American Commission on Human Rights, which concluded that his sentences violate his rights under the American Declaration of the Rights and Duties of Man (American Declaration) because evidence was introduced at the capital punishment phase of unadjudicated murders committed in Mexico, and that his execution would violate the Charter of the Organization of American States and the American Declaration. We contend that petitioner's application for a stay and petition for certiorari should be denied because the Commission does not have the power to issue binding orders on member states and the Commission's recommendation in this case does not give rise to a judicially enforceable right that may be invoked in a petition for a writ of habeas corpus. Thus petitioner cannot satisfy the requirements for a stay of execution. The Court denied the application and petition without comment on June 18.

THIS WEEK

I. Supreme Court Decisions

A. Decisions on the Merits

On June 18, the Court decided three cases in which the Department participated:

1. *United States* v. *Mead*, No. 99-1434. The case presented the questions whether judicial deference is owed to the tariff classification rulings issued by the Customs Service under 19 U.S.C. 1502(a), and whether the Customs Service reasonably interpreted the statutory phrase "diaries, notebooks and address books, bound" to include the spiral-bound and ring-bound day planners imported by respondent. We contended that ordinary *Chevron* deference does apply to classification rulings of the Customs Service and that under the proper standard of deference, the Customs Service classification ruling in this case should have been affirmed.

In an opinion by Justice Souter, the Court held that the customs ruling had no claim to judicial deference under *Chevron* because there was no indication in the statute that Congress intended tariff rulings to have the force of law. The Court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." The Court explained that an agency may show that Congress has delegated such authority in a variety of ways, such as a grant of authority to engage in adjudication or notice-and-comment rulemaking, and that there will sometimes be reason for *Chevron* deference when no such administrative formality was required or afforded, if there is some other indication of a comparable congressional intent. The customs ruling here, however, failed to qualify for *Chevron* deference. Finally, the Court concluded that although the ruling in this case was not entitled to *Chevron* deference, it might still be entitled to some lesser form of deference under *Skidmore* v. *Swift & Co.*, and remanded to the court of appeals for further action.

Justice Scalia dissented. He characterized the majority opinion as abandoning the *Chevron* doctrine for a presumption that agency discretion does not exist unless a statute expressly or impliedly provides for it, and rejected that view. Justice Scalia contended that there is no necessary connection between the formality of agency procedures and the power of the agency administering the procedure to resolve authoritatively questions of law.

2. *Saucier* v. *Katz*, No. 99-1977. The case presented two questions: (1) whether, in a case alleging the use of constitutionally excessive force, the test for qualified immunity and the reasonableness test under the Fourth Amendment are identical, such that a finding of unreasonable force under the Fourth Amendment necessarily precludes qualified immunity; and (2) whether the court of appeals erred in concluding that petitioner's use of force to detain respondent, which consisted of carrying respondent from the crowd to a waiting van and pushing him inside without injuring him, so clearly exceeded the amount of force permitted by the Fourth Amendment as to warrant denial of qualified immunity. We contended that the Fourth Amendment reasonableness test and the qualified immunity test are distinct and that the minimal use of force that occurred here as petitioner was guarding then Vice-President Gore was not so clearly unlawful as to deprive the officer of qualified immunity.

In an opinion by Justice Kennedy, the Court agreed with our position. The Court held that the test for reasonableness of force under the Fourth Amendment, which requires analysis of the objective reasonableness of an officer's action, is distinct from the test for qualified immunity, which includes the further dimension of whether the law put an officer on notice that a particular amount of force used in particular circumstances was excessive. Applying that principle, the Court held that the officer was entitled to summary judgment because there was no clearly established rule prohibiting the officer from acting as he did.

Justice Ginsburg wrote an opinion concurring in the judgment, which Justices Stevens and Breyer joined. She would have held that in the context of an excessive force claim there is no

distinction between the test for reasonableness under the Fourth Amendment and the test for qualified immunity. According to Justice Ginsburg, the proper test for the qualified immunity claim here is whether a reasonable officer, identically situated, would have believed that the force employed was lawful.

Justice Souter wrote an opinion concurring in part and dissenting in part. Justice Souter agreed with the Court's determination that the qualified immunity test is distinct from the test governing the underlying merits, but would have remanded the case for application of the qualified immunity standard.

3. *Idaho* v. *United States*, No. 00-189. The case presented the question whether the United States holds title, in trust for the Coeur d'Alene Tribe, to lands underlying portions of Coeur d'Alene Lake and the St. Joe River that are within the Coeur d'Alene Indian Reservation. Because the State of Idaho conceded that the 1873 Executive Order establishing the Coeur D'Alene Indian Reservation included submerged lands in the Reservation, under *United States* v. *Alaska*, 521 U.S. 1 (1997), the only remaining question was whether, at the time of Idaho's admission to the Union, Congress clearly intended to defeat Idaho's title to these submerged lands. We contended that Congress did so intend.

In an opinion by Justice Souter, the Court agreed with our position. The Court concluded that the historical record indicated that, prior to Idaho's admission to the Union, Congress knew that the reservation included submerged lands and had authorized modification of the Reservation solely by agreement with the Tribe. The Court considered this evidence, together with evidence from the period just after statehood suggesting that Congress did not understand statehood to have affected the submerged lands in question, sufficient to show that Congress intended to defeat Idaho's title to the submerged lands.

Chief Justice Rehnquist, joined by Justices Scalia, Kennedy, and Thomas, dissented. The dissenters took the view that the evidence relied on by the majority showed at best only that at the time of Idaho statehood, the executive branch intended the submerged lands in question to remain in trust for the Tribe, and that the existence of such an intent on the part of the executive branch was insufficient to defeat Idaho's title to the lands.

B. Denial of Stay of Execution

On June 18, the Court denied without comment the application for a stay of execution and the petition for habeas corpus in *In Re Juan Raul Garza*, Nos. A-1072 & 00-10456.

Also on June 18, the Court denied without comment the application for a stay of execution and the petition for certiorari in *Garza* v. *Lappin*, Nos. A-11-1 and 00-10631.

C. Grant of Certiorari

On June 18, the Court granted a writ of certiorari in *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushik Co.*, No. 00-1543. The questions presented are (1) whether every claim-narrowing amendment designed to comply with a provision of the Patent-Act -- including those provisions not related to prior art -- automatically creates prosecution history estoppel regardless of the reason for the amendment; and (2) whether a finding of prosecution history estoppel completely bars application of the doctrine of equivalents. We have not participated in the case to date, and are determining whether participation is warranted at this stage.

D. Invitation

On June 18, the Court invited the Solicitor General to file a brief expressing the views of the United States on the petition for certiorari in *Chevron U.S.A. Inc.* v. *Echazabal*, No. 00-1406. The Americans with Disabilities Act provides that employers may require as a qualification for a job that the employee not pose a direct threat to the health or safety of other individuals in the workplace. The court of appeals ruled that the "direct threat" defense cannot be used to argue that the accommodation would pose a direct threat to the disabled individual, but can only be used when an accommodation poses a direct threat to others in the workplace. The questions presented is whether a person who is unable to carry out essential functions of a job without incurring a direct threat to the person's own health or life is a qualified individual for that job within the meaning of the Americans with Disabilities Act.

II. Supreme Court Filings

A. Briefs on the Merits

1. On June 21, the Department will file a brief for petitioner in *Halter* v. *Sigmon Coal Dist.*, No. 00-1307. The case involves the United Mine Workers of America Combined Benefit Fund, which finances health care benefits for retired miners and their dependents who worked under collective bargaining agreements that promised lifetime health care benefits. The Coal Act, 26 U.S.C. 9701 *et. seq.*, directs the Commissioner of Social Security to assign responsibility for beneficiaries of the Fund to the "signatory operator" or "related person" of the operator that formerly employed them, if that signatory operator (or related person) is still "in business." 26 U.S.C. 9706(a). The question presented is whether the Coal Act permits the Commissioner to assign beneficiaries to the successor in interest of a signatory operator that is no longer in business.

2. On June 21, the Department will file a brief for respondent in *Chickasaw Nation* v. *United States*, No. 00-507. The case presents the question whether Section 20(d) of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(d), exempts Native American Tribes from the wagering excise and occupational taxes imposed under the Internal Revenue Code.

NEXT WEEK

I. Supreme Court Decisions

On June 25, the Court will hold a non-argument session at which opinions and orders are expected to be issued.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

June 6, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Barbara D. Underwood
Acting Solicitor General

Subject: Weekly Report

LAST WEEK

I. Supreme Court Decisions

A. Decisions on the Merits

On May 29, the Court decided the following six cases in which the government participated:

1. *PGA Tour, Inc.* v. *Martin*, No. 00-24. This case presented the question whether Title III of the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, regulates standards established for competitors (here, professional golfers) in athletic competitions held at places of public accommodation, and, if so, whether Title III requires professional sports organizations to grant selective waivers of their substantive rules of athletic competition in order to accommodate disabled competitors such as Martin, a professional golfer who has a circulatory disorder in his right leg, making it medically necessary for him to use a golf cart rather than walk the golf course. As *amicus curiae*, the Department argued that petitioner's operation of golf courses during tournaments falls squarely within Title III's prohibition on discrimination in places of public accommodation and that the courts below appropriately considered the relevant factors in concluding that a waiver of the PGA Tour's walking rule would not fundamentally alter its competitions, which are intended to measure shot-making skills rather than walking endurance. In an opinion written by Justice Stevens, the Court agreed with the Department's arguments and held that (1) the PGA Tour is a "public accommodation" during its tours and qualifying rounds, and is therefore subject to Title III of the ADA, and (2) allowing Martin to use a golf cart would neither "alter

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forth a more detailed analysis of the meaning of "education records" under FERPA and the application of that term and of FERPA not only to the particular practice at issue in this case, but also to a variety of other practices. Under the circumstances, the Department believes that it would be premature for the Court to grant review in this case to consider the meaning of "education records" under FERPA.

THIS WEEK

I. Supreme Court Decisions

A. Decisions on the Merits

On June 4, the Court decided two cases in which the Department participated:

1. *Pollard* v. *E.I. du Pont de Nemours & Co.*, No. 00-763. The case presents the question whether an award of front pay in a Title VII action is subject to the cap on compensatory and punitive damages established by the Civil Rights Act of 1991, 42 U.S.C. 1981a(b)(3). The Department argued that it is not, and the Court unanimously agreed. Petitioner sued respondent, her former employer, alleging that she had been subjected to a hostile work environment based on her sex, in violation of Title VII of the Civil Rights Act of 1964. The district court awarded her, as relevant here, $300,000 in compensatory damages, the maximum permitted under 42 U.S.C. 1981a(b)(3). The district court observed that the award was insufficient to compensate petitioner but was bound by an earlier Sixth Circuit holding that front pay was subject to the damages cap of 1981a(b)(3). The Sixth Circuit affirmed. The Supreme Court reversed in a unanimous opinion authored by Justice Thomas (Justice O'Connor did not participate), holding that front pay is not an element of compensatory damages subject to the statutory cap. Rather, front pay is a form of equitable relief--like injunctions, reinstatement, backpay, lost benefits, and attorney's fees--that was available under Section 2000e-5(g) prior to the 1991 amendments. Those amendments expanded the available remedies to include compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and punitive damages. The 1991 amendments also capped these compensatory and punitive damages, but excluded from the definition of compensatory damages "any . . . type of relief authorized under section [2000e-5(g)]." Because the 1991 Act did not amend Section 2000e-5(g), which at the time had been consistently interpreted as authorizing awards of front pay, the Court held that the 1991 Act's cap on damages does not limit a court's ability to award equitable relief, including front pay, under Section 2000e-5(g).

2. *United Dominion Indus.* v. *United States*, No. 00-157. This case involves the tax treatment of product liability losses (PLL), which a corporation may carry back a maximum of ten years from the loss year and use as a deduction in the carryback year pursuant to 26 U.S.C. 172(b). PLL occurs when a taxpayer has a net operating loss (NOL) for the year and the NOL is attributable in whole or in part to deductions for product liability expenses. The question presented is whether the availability of the PLL carryover for affiliated entities that file a consolidated return is to be determined

by aggregating the income and expenses of the consolidated entities or, instead, separately calculating the income and expense of each entity. The Department argued that the court of appeals correctly applied Treasury Regulations in ruling that the proper method is to determine PLL separately for each entity and, therefore, that the product liability expenses of an entity with positive income may not be included in the PLL carryback for the consolidated group.

In an opinion authored by Justice Souter, the Court rejected the Department's position and held that PLL must be calculated on a consolidated, single-entity basis. The tax code and regulations governing affiliated groups of corporations filing consolidated returns provide only one definition of NOL which applies to the consolidated entity. Because the exclusive definition of NOL is consolidated NOL, comparable tax treatment of PLL for the consolidated and the conventional taxpayer can be achieved only if product liability expenses are compared with the loss amount at the consolidated level after consolidated NOL has been determined. Justice Thomas filed a concurring opinion and Justice Stevens dissented.

B. Dismissal of Certiorari

1. On June 4, the Court dismissed the writ of certiorari in *Florida* v. *Thomas*, No. 00-391 for lack of jurisdiction. The Florida Supreme Court held below that a warrantless search of a vehicle incident to the driver's arrest was not valid where the police officer's first contact with the driver occurred after the driver had voluntarily exited the vehicle, unless there was some threat to officer safety or of destruction of evidence. The question presented was whether this holding conflicts with *New York* v. *Belton*, 453 U.S. 454 (1981), in which the Supreme Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." As *amicus curiae* supporting petitioner, the Department contended that the Florida Supreme Court's limitation of *Belton* to circumstances in which the arrestee exits a vehicle at the direction of law enforcement officers finds no support in precedent or principle and should be rejected. The Court held, however, that because the Florida Supreme Court had remanded for a determination whether the challenged search was nonetheless lawful under *Chimel* v. *California*, 395 U.S. 752 (1969), the decision below is not a final judgment and the Supreme Court thus lacks jurisdiction to decide the question on which certiorari was granted.

C. Grant of Certiorari

1. On June 4, the Court granted the United States' petition for a writ of certiorari in *United States* v. *Arvizu*, No. 00-1519. The questions presented are (1) whether the court of appeals erroneously departed from the totality of the circumstances test that governs reasonable suspicion determinations under the Fourth Amendment by holding that particular facts observed by a law enforcement officer were entitled to no weight and could not be considered as a matter of law; and (2) whether, under the totality of the circumstances test, the Border Patrol agent in this case had reasonable

suspicion that justified a stop of a vehicle near the Mexican border. In the petition for a writ of certiorari, the Department contended that the Ninth Circuit's decision in this case departed fundamentally from the Supreme Court's totality-of-the-circumstances test for determining whether reasonable suspicion exists. By declaring as a matter of law that law enforcement officers may not consider certain facts when forming a suspicion of illegal activity, the court of appeals created a direct conflict with decisions of the Supreme Court and other courts of appeals and incorrectly excluded critical evidence in this case.

D. Denial of Certiorari

1. On June 4, the Court denied the United States' petition for a writ of certiorari in *United States* v. *Cyprus Amax Coal Co., et al.*, No. 00-360. The case presented the questions whether a taxpayer may commence an action to recover an unconstitutional tax without filing a timely claim for refund as required by Section 7422(a) of the Internal Revenue Code, 26 U.S.C. 7422(a), and whether such an action is subject to the specific statute of limitations in 26 U.S.C. 6511(a) that applies, by its terms, to any suit to recover "any tax imposed by this title," or is instead subject only to the general statute of limitations in 28 U.S.C. 2401(a) that applies to "every civil action commenced against the United States."

E. Invitation

1. On June 4, the Supreme Court invited the Solicitor General to file a response to the petition for rehearing of the order denying a writ of certiorari in *Nichols* v. *United States*, No. 00-8900. Petitioner, currently serving a life sentence for his involvement in the Oklahoma City bombing, seeks a new trial alleging that he was prejudiced by the government's improper withholding of potentially exculpatory evidence in FBI files. His original petition for a writ of certiorari was denied, and he now seeks rehearing in light of the recent discovery of several thousand documents related to the bombing investigation that were not turned over to defense counsel during discovery.

II. Supreme Court Filings

A. Briefs on the Merits

1. On June 8, the Department expects to file a brief for respondents in *Verizon Communications Inc.* v. *FCC*, No. 00-511. The case involves challenges to two important aspects of the FCC's regulations implementing the Telecommunications Act of 1996: pricing methodology and combinations rules. On remand from the Supreme Court, see *AT&T* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), the Eighth Circuit invalidated the key regulation defining the FCC's forward-looking cost methodology, known as "total element long-run incremental cost" or TELRIC, used by state public utility commissions to determine the amount incumbent local exchange carriers (ILECs) can recover

from new entrants for the provision of interconnection and access to network elements. The court of appeals, while recognizing the validity of a forward-looking cost methodology, rejected the Commission's determination that cost should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration. The Court will also consider whether the court of appeals erred in holding that neither the Takings Clause nor the Telecommunications Act of 1996 requires incorporation of an ILEC's historical costs in the rates it charges new entrants. In addition, the Court will decide the validity of FCC rules requiring that ILECs make available their own unbundled network elements combined in new ways or in combination with elements provided by requesting carriers.

NEXT WEEK

I. Supreme Court Decisions

On June 11, the Court will hold a non-argument session at which opinions and orders are expected to be issued.

. . . an essential aspect of the game of golf" nor "fundamentally alter the character of the competition" by granting Martin an advantage over other golfers. In dissent, Justice Scalia, joined by Justice Thomas, took the view that the PGA Tour is not a public accommodation because professional golfers could not be considered "customers" of the tour, and that the majority's analysis that allowing Martin to ride in a court would not fundamentally alter the nature of PGA Tour golf was incoherent.

2. *Atkinson Trading Co.* v. *Shirley*, No. 00-454. This case presented the question whether the Navajo Nation may impose a hotel occupancy tax on non-Indian overnight guests at the Trading Post operated by petitioner on lands petitioner owns in fee, when the Trading Post is subject to federal regulations under the Indian Trader statutes, petitioner's land is wholly surrounded by Indian lands on the Navajo Reservation, and petitioner and its guests receive necessary government services from the Navajo Nation. As *amicus curiae*, the Department argued that the tax was valid. The Department noted that in *Montana* v. *United States*, 450 U.S. 544 (1981), the Court held that a Tribe may tax or regulate the activities of nonmembers on nonmember fee land within a reservation if the nonmembers enter "consensual relationships with the tribe or its members," or if their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." The Department contended that the tax is valid under either *Montana* exception.

In a unanimous opinion written by Chief Justice Rehnquist, the Court rejected the Department's arguments. First, the Court found that the consensual relationship exception was inapplicable because that exception "requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself," and that a "nonmember's consensual relationship in one area . . . does not trigger tribal civil authority in another." The Court also found the second exception to be inapplicable because that exception "grants Indian tribes nothing beyond what is necessary to protect tribal self-government or to control internal relations" (internal quotation marks omitted), and because the tax at issue here was not "necessary to vindicate the Navajo Nation's political integrity." Justice Souter concurred, joined by Justices Kennedy and Thomas, emphasizing the irrelevance of "whether the land at issue is fee land, or land owned by or held in trust for an Indian tribe."

3. *New Hampshire* v. *Maine*, No. 130 (original). New Hampshire brought this original action claiming that its boundary with Maine in Portsmouth Harbor extends to the low water mark of the Maine shore. The practical focus of the dispute is the Portsmouth Naval Shipyard, a federal facility that is located on Seavey's Island in the harbor. Maine currently exercises jurisdiction over the Shipyard, so New Hampshire residents who work at the Shipyard are required to pay Maine income taxes. In response to the Court's invitation to express the Department's views, the Department contended that the doctrine of *res judicata* bars New Hampshire's claim because of a 1976 consent decree that New Hampshire and Maine agreed to in a prior original action in the Supreme Court concerning the lateral marine boundary in the vicinity of the current dispute. Because the 1976 consent decree set the boundary at the "Middle of the River," New Hampshire cannot now maintain that the boundary extends to the low water mark of the Maine shore.

In a unanimous opinion written by Justice Ginsburg, the Court agreed with the Department's arguments, and held that the doctrine of judicial estoppel, which "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase," bars New Hampshire from asserting that the Piscataqua River boundary runs along the Maine shore.

4. *Booth* v. *Churner*, No. 99-1964. This case presented the question whether the Prison Litigation Reform Act of 1995, which provides that a prisoner may not bring an action with respect to prison conditions "until such administrative remedies as are available are exhausted," requires a prisoner suing prison officials for money damages to exhaust administrative remedies that address the problem identified by the inmate, but that do not permit the recovery of money damages. In *McCarthy* v. *Madigan*, 503 U.S. 140, 150 (1992), the Court construed a federal provision requiring inmates to exhaust such "plain, speedy, and effective remedies as are available" to excuse exhaustion when an inmate seeks only money damages and the prison's grievance procedure does not offer such relief. Congress subsequently amended the Act to tighten the exhaustion requirement by eliminating the qualifying terms "plain, speedy, and effective," removing the requirement that administrative remedies must meet certain minimum acceptable standards of fairness and effectiveness, and eliminating a court's discretion to excuse the plaintiff's failure to exhaust when exhaustion would not be appropriate or not in the interests of justice. The Department argued as *amicus curiae* that these changes reflect a judgment that inmates must exhaust all available remedies without regard to whether the administrative process provides for the recovery of the particular type of relief the inmate seeks.

In a unanimous opinion written by Justice Souter, the Court agreed with the Department's arguments. In addition to accepting the Department's argument based on the post-*McCarthy* amendments, the Court concluded that "the word 'exhausted' has a decidedly procedural emphasis," and "makes sense only in referring to the procedural means, not the particular relief ordered," thus rendering irrelevant the types of recovery afforded by the available administrative remedies.

5. *NLRB* v. *Kentucky River Community Care, Inc.*, No. 98-1815. This case presented the questions (1) whether the National Labor Relations Board reasonably concluded that an employee's exercise of ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards does not constitute the exercise of "independent judgment" that makes an employee a "supervisor" under Section 2(11) of the National Labor Relations Act, 29 U.S.C. 152(11); (2) whether the Board permissibly requires the party who alleges that an employee is excluded from the rights and protections afforded by the Act as a supervisor to bear the burden of proving the individual's supervisory status; and (3) whether, applying its interpretation of "independent judgment" and its allocation of the burden of proving supervisory status, the Board reasonably concluded that respondent's registered nurses are "employees" rather than supervisors and thus are entitled to the rights and protections afforded by the Act. The Department argued that the Board's determination that the registered nurses in this case are not supervisors and therefore covered by the Act is consistent with the statutory language, its purpose, and long-standing

principles applied by the Board and the courts in administering the Act in a wide variety of employment contexts.

In a decision written by Justice Scalia, the Court agreed with the Department's argument regarding the burden of proof, but rejected the Department's argument regarding the merits of the case. The Court concluded that by eliminating "ordinary professional or technical judgment" from the category of "independent judgment," the Board "insert[ed] a startling categorical exclusion into statutory text that does not suggest its existence," and that such categorical exclusion "turns on factors that have nothing to do with the degree of discretion an employee exercises." The court found the Board's reference to "directly less-skilled employees" to be likewise devoid of "textual justification" and "conceptual justification." Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, concurred in part and dissented in part. Justice Stevens agreed with the Court regarding the burden of proof, but would have deferred to the Board's interpretation of the statute, concluding that "since Congress has expressly provided that professional employees are entitled to the protection of the Act, there is good reason to resolve the ambiguities consistently with the Board's interpretation."

6. *Buckhannon Board & Care Home* v. *West Virginia Dep't of Health and Human Resources*, No. 99-1848. The case presented the question whether a civil rights plaintiff may recover attorney's fees as a "prevailing party" under 42 U.S.C. 1988 when, as a result of plaintiff's suit, the defendant voluntarily provides the plaintiff with the requested relief. Petitioners are operators of residential board and care homes who sought a declaratory judgment invalidating a West Virginia statute requiring that all residents of such homes be capable of "self-preservation," *i.e.*, evacuating themselves from the building without assistance in case of fire; petitioners contended that the statute violates the Fair Housing Amendments Act and the Americans with Disabilities Act. While the action was pending, West Virginia amended the law to delete the challenged self-preservation requirement. Although the home did not obtain the change in state law through an enforceable judgment, consent decree, or settlement, it nevertheless claimed that it was entitled to attorney's fees as the prevailing party because it obtained the relief it sought through West Virginia's voluntary conduct in response to plaintiffs' lawsuit which brought to the State's attention the flaws in its law. As *amicus curiae*, the Department argued that the determination whether petitioners should be considered prevailing parties entitled to attorneys fees should be guided by three central considerations: (1) whether their complaint has legal merit; (2) whether they received actual relief that redressed their grievances; and (3) whether petitioners' lawsuit played a substantial role in inducing respondents to change their ways.

In an opinion by Chief Justice Rehnquist, the Court rejected the Department's arguments. The Court concluded that "prevailing party" is a term of art meaning "one who has been awarded some relief by the court," and that it would be inconsistent with the meaning of "prevailing party" to "allow[] an award where there is no judicially sanctioned change in the legal relationship of the parties." The Court found no support for an opposite conclusion in the legislative history of Section 1988 and declined to "determine which way . . . various policy arguments cut," given what the Court viewed as "the clear meaning of 'prevailing party' in the fee-shifting statutes." Justice Scalia concurred, joined by

Justice Thomas, and elaborated on the Court's discussion of the meaning of "prevailing party." Justice Ginsburg dissented, joined by Justices Stevens, Souter and Breyer. She rejected the Court's definition of "prevailing party" as unsupported by history or logic, and would have accepted the broader definition the Department urged, because such a definition "suitably advances Congress' endeavor to place private actions, in civil rights and other legislatively defined areas, securely within the federal law enforcement arsenal."

B. Grant of Certiorari

1. On May 29, the Court granted a petition for a writ of certiorari in *Thomas* v. *Chicago Park District*, No. 00-1249, which involves a First Amendment challenge to a Chicago Park District ordinance that requires a permit for any event in a city park that involves more than 50 people or utilizes amplified sound. The Department has not participated in the case to date, and is determining whether participation is warranted at this stage.

C. Invitation

1. On May 29, the Supreme Court invited the Solicitor General to file briefs expressing the views of the United States on the petition for certiorari in *John Deere Insurance Co.* v. *Nueva*, No. 00-1491. Federal law requires registered interstate motor carriers to file with the Department of Transportation a proof of insurance "sufficient to pay . . . for each final judgment against the registrant. 49 U.S.C. 13906(a)(1). Under the applicable federal regulations, insurance policies filed to satisfy this requirement incorporate, or are deemed to incorporate, the "Form MCS-90" endorsement, which is promulgated by regulation and provides, in relevant part, that an insurer who issues a policy to a registered motor carrier will pay "any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles . . . regardless of whether or not each motor vehicle is specifically described in the policy . . . ." The question presented is whether the Form MCS-90 endorsement attached to an insurance policy issued to a motor carrier requires the issuing insurer to pay a judgment entered against parties (in this case a different motor carrier and its driver) that are not entitled to coverage under the base policy, even where there is no "final judgment . . . against the insured" motor carrier named in the insurer's policy.

II. Supreme Court Filings

A. Briefs on the Merits

1. On May 30, the Department filed a brief for the United States and the Federal Trade Commission as *amici curiae* supporting respondent in *TRW, Inc.* v. *Andrews*, No. 00-1045, addressing the question whether the limitation period under the Fair Credit Reporting Act, which allows private damage actions for violations of the Act to be brought "within two years from the date on which the liability arises," begins to run at the time of an alleged violation, even if the potential plaintiff has no

reason to know that she has been injured. The case involves petitioner's disclosures of allegedly inaccurate derogatory credit information concerning respondent after a third party had fraudulently used respondent's identifying information to obtain credit without respondent's knowledge. Although the district court entered partial summary judgment for petitioner because some of the challenged credit report disclosures had occurred more than two years prior to the lawsuit, the court of appeals reversed in part and remanded for trial on those claims because respondent had no reason to suspect the disclosures relating to the identity theft had occurred until after she obtained a copy of her credit reports in connection with the refinancing of her mortgage. The Department argues that the court of appeals correctly applied a "discovery rule" interpreting the Act's limitation provision to begin running when a party knows or should know that she has been injured.

2. On May 31, the Department filed a brief for respondents in *New York* v. *FERC*, No. 00-0568 and *Enron Power Marketing, Inc.* v. *FERC*, No. 00-0809. These consolidated cases present the questions (1) whether Section 201(b) of the Federal Power Act, which authorizes the Federal Energy Regulatory Commission (FERC) to regulate "the transmission of electric energy in interstate commerce," gives FERC jurisdiction over the service of transmitting electricity from generators to retail customers, even if located in the same state, where the transmission service is "unbundled" from the State-regulated retail sale of electricity and the consumer can choose a preferred power supplier; (2) whether FERC properly determined that the FPA, which reserves to the States the regulation of local electricity distribution and retail sales, does not confer jurisdiction to FERC to regulate retail transmission service that is sold together with electricity in a "bundled" transaction between a public utility and its retail customer where the customer cannot choose his power supplier. The Department argues that because electricity is commingled in interconnected power systems without regard to the location of its source or ultimate user, Congress's express grant of authority over interstate transmission allows FERC to regulate all electric transmissions over power systems that are connected to an interstate power grid. Because the Act leaves to the States the regulation of retail electricity sales but does not specify whether a bundled retail sale of electricity along with the associated transmission should be treated as a single retail transaction subject to state jurisdiction or, instead, as a transmission transaction subject to federal jurisdiction and a retail sale of energy subject to state regulation, the Department argues that FERC reasonably resolved the FPA's ambiguity by leaving such bundled retail sales to state jurisdiction.

B. <u>Responses to Invitations</u>

1. On May 30, the Department responded to the Court's invitation to file a brief expressing the views of the United States in *Ragsdale* v. *Wolverine Worldwide, Inc.* No. 00-6029. The Family and Medical Leave Act of 1993 (FMLA) provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . because of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. 2612(a)(1)(D). Department of Labor (DOL) regulations implementing these provisions, 29 C.F.R. 825 et seq., require employers "to designate leave, paid or unpaid, as FMLA-qualifying, and to give

notice of the designation to the employee" in writing. Another regulation states that "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement."

Petitioner sued respondent, her former employer, after she exhausted her 30 weeks of employer-provided sick leave, none of which was designated as FMLA leave, and then was denied a request for an additional 12 weeks of FMLA leave. In the decision below, the Eighth Circuit affirmed the district court's grant of summary judgment for respondent on the FMLA claim, holding that the applicable DOL regulation is invalid because it "convert[s] the statute's minimum of federally-mandated unpaid leave into an entitlement to an additional 12 weeks of leave unless the employer specifically and prospectively notifies the employee that she is using her FMLA leave." The Department argues that although the court of appeals erred in holding invalid a DOL regulation that is designed to ensure that employees covered by the FMLA are able to make informed choices concerning the exercise of their statutory rights, further review is unwarranted at this time because there is no squarely presented conflict with the decisions of other circuits and the anomalous factual circumstances involved in this case make it a less than optimal vehicle for resolution of the question presented.

2. On June 1, the Department responded to the Court's invitations to file a brief expressing the views of the United States in *Edelman* v. *Lynchburg College*, No. 00-1072. In implementing Title VII of the Civil Rights Act of 1964, the EEOC promulgated a regulation, 29 C.F.R. 1601.12(b), that allows a charge of employment discrimination filed with the Commission to be amended to cure "technical defects or omissions, including the failure to verify the charge," and states that such an amendment to verify a charge "will relate back to the date the charge was first received" by EEOC, even if the verification of the charge is made after the statutory limitation period for filing a charge. Petitioner sent an unsworn letter to the EEOC charging that he was denied tenure by respondent as a result of sex discrimination. After an interview with the EEOC, petitioner filed an EEOC Form 5 Charge of Discrimination with a verified signature, which was received by the EEOC thirteen days after the expiration of the applicable limitation period. Petitioner sued under state law and Title VII, and the district court granted respondent's motion to dismiss the Title VII claims on the ground that petitioner had failed to file a timely charge of discrimination. The Fourth Circuit affirmed, holding that the EEOC regulation permitting the verification of the discrimination charge to relate back to the date petitioner filed his unsworn letter is contrary to the statute and therefore invalid. The Department argues that the issue presented by this case--the validity of 29 C.F.R. 1601.12(b)--is sufficiently important to the enforcement of federal employment-discrimination law to warrant the Court's review. While Title VII requires that a charge be filed within a specified limitation period and that a charge be verified before EEOC can require the respondent to participate in its investigation, the statute does not require that the charge be verified during the statutory limitation period. Because the court of appeals' decision is erroneous and conflicts with the decisions of several other circuits, the Department urges the Court to grant the petition for a writ of certiorari.

3. On June 1, the Department responded to the Court's invitations to file a brief expressing the views of the United States in *Wisconsin Dept. of Health and Family Services* v. *Blumer*, No.

00-952. The federal government, through the Medicaid program, provides partial funding to the States for the provision of medical services to eligible needy persons. This case arises out of the Medicaid program's "spousal impoverishment" provisions, 42 U.S.C. 1396r-5 (1994 & Supp. IV 1998), which establish special rules for married couples where only one spouse is in a nursing home or other institution. These provisions govern the allocation of income and resources (*i.e.*, assets) between the institutionalized spouse and the "community spouse" for purposes of determining Medicaid eligibility. The question presented is whether Wisconsin's "income first" requirement, Wis. Stat. Ann. § 49.455(8)(d) (West 1997), which treats income otherwise attributable to the institutionalized spouse as available to the community spouse to meet that spouse's minimum monthly maintenance needs, is consistent with the federal statute, 42 U.S.C. 1396r-5(e)(2)(C). The Wisconsin Court of Appeals invalidated the state law as inconsistent with the federal statute, which it interpreted as requiring a "resource first" rather than an "income first" methodology. While the federal Healthcare Financing Administration has issued interim rules allowing states to adopt either methodology, the agency is planning to begin promulgating final regulations addressing this issue within 90 days. In light of this imminent regulatory guidance, which might render review of this case unnecessary, the Department argues that the Court should defer review of this matter in this case.

4. On June 1, the Department responded to the Court's invitations to file briefs expressing the views of the United States in *Montemayor* v. *Corporate Health Ins., Inc.*, and *Rush Prudential HMO, Inc.* v. *Moran*, Nos. 00-665 and 00-1021. The question presented in these cases is whether state laws providing for external independent review of managed care organizations' medical necessity decisions are preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 et seq. or by the Federal Employees Health Benefits Act of 1959, 5 U.S.C. 8901 et seq. These cases present separate challenges by health insurers and managed care companies to Texas and Illinois state laws providing binding independent external review of decisions made by health maintenance organizations (HMOs) or health insurers that particular health care services furnished or proposed to be furnished to an enrollee are not medically necessary. In *Montemayor*, the Fifth Circuit held that enforcement of the Texas independent review law is preempted by ERISA, while the Seventh Circuit held in *Rush Prudential* that a substantially similar Illinois law is not preempted and may be enforced. Despite this conflict and the importance of the issues involved, the Department argues that further review of the preemption question is not warranted at this time because Congress is in the process of addressing this issue through federal legislation. The Department argues that at this time, with Congress actively considering the various alternatives, it would be appropriate for the Court to defer to the possibility of a comprehensive legislative resolution of the important social policy issues bound up in the principal question presented in these cases.

5. On June 1, the Department responded to the Court's invitations to file a brief expressing the views of the United States in *Chubb & Son, Inc.* v. *Asiana Airlines*, No. 00-720. The question presented is whether the United States and the Republic of Korea were in 1995 in a treaty relationship under the Warsaw Convention (The Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11,

reprinted in 49 U.S.C. 40105 note), which limits the liability of air carriers for personal injury, or damaged, lost, or delayed baggage or cargo transported internationally by aircraft. The Warsaw Convention was amended by the Hague Protocol of 1955, which provides that "between the Parties to this Protocol, the [Warsaw] Convention and the Protocol shall be read and interpreted together as one single instrument and shall be known as the Warsaw Convention as amended at The Hague, 1955" and that "[a]dherence to this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol." The Second Circuit held that "in 1995 when this dispute arose, the United States had ratified the Original Warsaw Convention but not the Hague Protocol, while South Korea had adhered to the Hague Protocol but not the Original Warsaw Convention" and that accordingly there was no treaty relationship between the nations at that time. The Department argues that the court of appeals correctly resolved this question because at the time that the dispute arose, there was no treaty relationship between the United States and South Korea under the Original Warsaw Convention, the Hague Protocol, or a hybrid treaty consisting of those provisions of the Original Convention that were not amended by the Protocol. The Department furthermore argues that review is unwarranted because there is no conflict among the courts of appeals on that question, and the ruling of the court of appeals will have only limited effects and is interlocutory.

6. On June 1, the Department responded to the Court's invitations to file a brief expressing the views of the United States in *Owasso Independent School Dist.* v. *Falvo*, No. 00-1073. The Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. 1232g(b)(1), prohibits the furnishing of federal funds to an educational institution that has a policy or practice of releasing, without parental consent, students' "education records," which are defined as "those records, files, documents, and other materials which-- (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." The question presented is whether allowing students to grade each other's homework and tests as their teacher goes over the correct answers aloud in class violates FERPA's prohibition against the release of "education records." The Department of Education has a longstanding interpretation, explained in a 1993 letter, that "FERPA would not prohibit teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class, even though such grade may eventually become an education record." The district court deferred to the Department of Education's interpretation of FERPA. The Tenth Circuit reversed on the FERPA claim, holding that the Department of Education's interpretation conflicted with the plain meaning of the statute and in any event was not entitled to deference because it was contained in an opinion letter rather than a formal interpretive regulation.

The Department argues that although the court of appeals erred in concluding that FERPA prohibits students from grading the homework and tests of other students in the classroom, Supreme Court review is not warranted at this time. The question presented was a matter of first impression for the court of appeals in this case, and the question has not been addressed by any other court of appeals in the more than 25 years since FERPA was enacted. Furthermore, in response to the court of appeals' decision, the Department has decided to issue regulations or other formal guidance setting

UNITED STATES DEPARTMENT OF JUSTICE

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Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

May 14, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Barbara D. Underwood
Acting Solicitor General

Subject: Weekly Report

LAST WEEK

I. Supreme Court Filings

A. Briefs on the Merits

1. On May 7, we filed a brief for the petitioner in *Chao v. Mallard Bay Drilling, Inc.*, No. 00-927. The case presents the question whether the United States Coast Guard has "exercise[d] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health" concerning the "working conditions of employees" (29 U.S.C. 653(b)(1)) on "uninspected vessels" (46 U.S.C. 2101(43)) so as to displace application of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* ("OSH Act"). We contend that the Fifth Circuit erred in concluding that the Coast Guard has exclusive jurisdiction over the regulation of working conditions of seamen so as to preclude the application of the OSH Act to a fatal accident aboard a Mallard drilling barge.

We argue that the Fifth Circuit's holding rests on an interpretation of Section 4(b)(1) of the OSH Act (29 U.S.C. 653(b)(1)) that is inconsistent with its text, the purpose of the Act, the history surrounding the enactment of the Act, and the long-standing interpretation of the Act by the Secretary of Labor. Contrary to the view of the Fifth Circuit, Section 4(b)(1) does not create industry-wide exemptions from the OSH Act based on limited exercises of regulatory authority by other federal agencies. Rather, the Act is displaced only when another agency actually has regulated the working conditions at issue or has articulated a policy that the working conditions should not be regulated. Because the Coast Guard has done neither, the OSH Act continues to apply.

2. On May 10, we filed a brief for petitioner in *United States v. Vonn*, No. 00-973. The questions presented are: (1) whether a district court's failure to advise a counseled defendant at his

guilty plea hearing that he has the right to the assistance of counsel at trial, as required by Federal Rule of Criminal Procedure 11(c)(3), is subject to plain-error, rather than harmless-error, review on appeal when the defendant fails to preserve the claim of error in the district court; and (2) whether, in determining if a defendant's substantial rights were affected by a district court's deviation from the requirements of Rule 11(c)(3), the court of appeals may review only the transcript of the guilty plea colloquy, or whether it may also consider other parts of the official record.

We argue that plain-error review applies when a defendant fails to raise in the district court any contention that the court failed to give him advice required by Rule 11(c)(3) before accepting his guilty plea. The plain-error rule serves two interests in this context -- promoting judicial economy and preventing parties from manipulating the system by allowing courts to lapse into error without objection and then later using that error to overturn an unfavorable result. We further argue that in determining whether error affected the outcome of the proceeding, an appellate court should look to the entire record, not just the record of the guilty plea proceeding itself.

3. On May 10, we filed a brief as *amicus curiae* supporting petitioners in *Great-West Life & Annuity Insur. Co.* v. *Knudson*, No. 99-1786. The case presents the question whether a civil action brought under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA) to redress a violation of, or to enforce, a term of a plan that requires a plan participant or beneficiary to reimburse the plan for medical expenses paid by the plan if the participant or beneficiary receives a recovery from a third-party tortfeasor, constitutes an action for "appropriate equitable relief" authorized by Section 502(a)(3). We contend that Section 502(a)(3) does authorize this type of suit. The Supreme Court has stated that the common law of trusts is "a starting point for analysis of" ERISA, *Harris Trust & Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000), and we argue that an action to enforce a reimbursement term of an ERISA plan is analogous to a traditional suit in equity to obtain repayment from a beneficiary of an advance made from a trust.

B. Response to Invitation

1. On May 10, we responded to the Court's invitation to file a brief expressing the views of the United States in *Arons* v. *Office of Disciplinary Counsel of the Supreme Court of Delaware*, No. 00-509. The case presents the question whether the Individuals with Disabilities Education Act ("IDEA"), which requires that States afford parties to administrative "due process" hearings "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities," 20 U.S.C. 1415(h)(1) (Supp. IV 1998), establishes a clear federal right to non-lawyer representation in those proceedings that preempts a contrary state rule against the unauthorized practice of law. We question the Supreme Court of Delaware's view that the IDEA does not establish a clear federal right to non-lawyer representation, noting that the court erred in failing to defer to the Secretary of Education's construction of the statute. Nonetheless, we contend that the question whether IDEA authorizes lay representation does not warrant the Supreme Court's review at this time. The Supreme Court of Delaware is the first court to

have squarely addressed the question, and the decision will impact only a small number of cases in Delaware.

THIS WEEK

I. Supreme Court Decisions

A. Decision on the Merits

1. On May 14, the Court decided *United States v. Oakland Cannabis Buyers' Cooperative*, No. 00-151. The case presented the question whether medical necessity is a legally cognizable defense to a charge of distributing drugs in violation of the Controlled Substances Act (CSA). We argued that the text, structure and purpose of the CSA establish a judgment by Congress that precludes a medical necessity defense. By classifying marijuana as a Schedule I controlled substance, Congress has declared that marijuana has "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use * * * under medical supervision." 21 U.S.C. 812(b)(1).

In an opinion written by Justice Thomas, the Court agreed with our position and reversed a judgment of the Ninth Circuit that had instructed a district court to include a medical necessity exemption to an injunction sought by the government to end marijuana distribution at the Cooperative. The Court stated that "it is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute," but did not decide that question because a medical necessity exception "is at odds with the terms of the Controlled Substances Act." Congress classified marijuana as a Schedule I substance, a category reserved for those substances that have "no currently accepted medical use in treatment in the United States." The Court also rejected the Cooperative's argument that the district court had "broad equitable discretion" to tailor the injunctive relief to account for medical necessity.

Justice Stevens, joined by Justices Souter and Ginsburg, concurred in the judgment. He emphasized that the case involved only whether a medical necessity defense justified the *distribution* of marijuana. Justice Stevens also maintained that the Court's "precedent has expressed no doubt about the viability of the common-law defense" as a general matter.

B. Grants of Certiorari

1. On May 14, the Court granted our petition for a writ of certiorari in *United States* v. *Knights*, No. 00-1260. The case presents the question whether respondent's agreement to a term of probation that authorized any law enforcement officer to search his person or premises with or without a warrant, and with or without individualized suspicion of wrongdoing, constituted a valid consent to a search by a law enforcement officer investigating crimes. We argue that the Ninth Circuit incorrectly

held that the Fourth Amendment prohibits law enforcement officers who are seeking evidence of criminal activity from searching based on the consent given by respondent's agreement to that term of probation, which is a common term of probation in California.

2. On May 14, the Court granted a petition for a writ of certiorari in *McKune* v. *Lile*, No. 00-1187. The case involves a prison sex abuse treatment program that requires participants to disclose past sexual misconduct or suffer significantly reduced personal privileges. The Tenth Circuit held that the program creates a real and appreciable risk of self-incrimination, in violation of prisoners' Fifth Amendment rights. The question presented is whether revocation of correctional institution privileges violates the Fifth Amendment privilege against self-incrimination when such revocation is based upon a prisoner's failure to accept responsibility for his crimes as part of a sex offender treatment program. We have not participated in the case to date, and are determining whether participation is warranted at this stage.

3. On May 14, the Court granted a petition for a writ of certiorari in *Alabama* v. *Shelton*, No. 00-1214. The case presents the question whether the imposition of a suspended or conditional sentence in a misdemeanor case triggers a defendant's Sixth Amendment right to counsel. We have not participated in the case to date, and are determining whether participation is warranted at this stage.

NEXT WEEK

I. Supreme Court Decisions

A. Decisions on the Merits

On May 21, the Court has a non-argument session at which opinions are expected to be released.

II. Supreme Court Filing

A. Brief on the Merits

We anticipate filing on May 25 a brief for petitioner in *EEOC v. Waffle House*, No. 99-1823. The case presents the question whether an employee's agreement to arbitrate employment-related disputes with an employer bars the Equal Employment Opportunity Commission (EEOC), as plaintiff in an enforcement action against the employer, from obtaining victim-specific remedies for discrimination against the employee, such as backpay, reinstatement, and damages.

MEMORANDUM

TO: Alberto R. Gonzales

CC: Counsel's Office Attorneys

FROM: Brett M. Kavanaugh

DATE: May 31, 2001

RE: Supreme Court Update

Attached is the latest Supreme Court update from the Acting Solicitor General.

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

May 30, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: Barbara D. Underwood
Acting Solicitor General

Subject: Weekly Report

LAST WEEK

I. Supreme Court Decisions

A. Decisions on the Merits

On May 21, the Court decided the following two cases:

1. *Bartnicki v. Vopper*, Nos. 99-1687 and 99-1728. This case presented the question whether the imposition of civil liability under 18 U.S.C. 2511(1)(c) and (d) for using or disclosing the contents of illegally intercepted communications, where the defendant knows or has reason to know that the interception was unlawful but is not alleged to have participated in or encouraged it, violates the First Amendment. As intervenor, we had defended the application of the federal statute to the conduct in this case on the grounds that the statutory scheme furthers important and substantial government interests that are unrelated to the suppression of free expression, namely the interest in preventing the aggravated injury to privacy that occurs when illegally intercepted communications are subsequently exploited or publicly disseminated, and the interest in preventing illegal interception. The Court, in an opinion by Justice Stevens, held that the interests served by the regulation could not justify the limit on use or disclosure of the communications, because the interest in deterring illegal interception would be better served by punishing the interceptor, and because the privacy interest in communication must give way to the interest in publishing matters of public concern.

Justice Breyer, joined by Justice O'Connor, concurred. Justice Breyer emphasized the special circumstances of the Court's holding, namely that (1) the defendants acted lawfully up until the time of final disclosure and (2) the information publicized involved the threat of potential physical harm to others, a matter of unusual public concern. Justice Breyer explained that, in his view, the Court's holding did not imply a broad constitutional immunity for the media, because the competing First Amendment interest in fostering private speech would in many instances justify regulations limiting the use or disclosure of illegally intercepted communications.

The Chief Justice, joined by Justices Scalia and Thomas, dissented. The dissenters criticized the holding on the basis that it hinders, rather than advances, the purposes of the First Amendment by chilling the speech of the millions of people who rely on electronic technology to communicate each day.

2. *United States* v. *Hatter*, No. 99-1978. This case presented a challenge to the 1983 extension of Social Security and Medicare taxes to the salaries of sitting federal judges as an unconstitutional diminution of those judges' compensation in violation of the Compensation Clause, which provides that Article III judges shall receive compensation for their services which "shall not be diminished during their Continuance in Office." In an opinion by Justice Breyer, the Court accepted our position that *Evans* v. *Gore*, 253 U.S. 245 (1920), which held that the Compensation Clause prohibits Congress from taxing the salaries of federal judges, should be overruled. The Court held that the Compensation Clause does not prohibit the imposition of a non-discriminatory tax on the salaries of federal judges, but prohibits taxation that singles out judges for special unfavorable treatment. Under this rule, the special retroactive Social Security rules for federal judges violated the Compensation Clause by effectively singling out federal judges for unfavorable treatment, but the Medicare tax, because it was extended generally to all federal employees, did not violate the Compensation Clause. The Court also held that the constitutional violation did not end when Congress increased statutory salaries by an amount greater than the amount of taxes deducted illegally.

Justice Scalia, concurring in part and dissenting in part, agreed with the Court that extending the Social Security Act to sitting Article III judges violated the Compensation Clause but would have held that extending the Medicare tax to federal judges also was unconstitutional. Justice Scalia rejected the nondiscrimination principle embraced by the majority and concluded that exemption from a certain tax can constitute part of a judge's compensation (and thus may not be reduced consistent with the Compensation Clause) and that the exemption from the Medicare tax was a part of the judge's compensation here. Justice Thomas, concurring in the judgment in part and dissenting in part, would have followed *Evans* v. *Gore* and held that any tax that reduces a judge's net compensation violates the Compensation Clause.

3. *The Wharf (Holdings) Limited* v. *United International Holdings, Inc.*, No. 00-347. This case presented the question whether a company that sold an oral option to buy stock while secretly intending never to honor the option violated Section 10(b) of the Securities Exchange Act of 1934,

which prohibits using "any manipulative or deceptive device or contrivance" "in connection with the purchase or sale of any security," and Rule 10b-5, the corresponding regulation. In a unanimous opinion by Justice Breyer, the Court agreed with our position as amicus curiae and held that petitioner's conduct violated Section 10(b), because petitioner conceded that the option was a security within the meaning of the statute, and petitioner's intent not to honor the option was properly considered a misrepresentation in connection with the sale of that option. The Court rejected the contention that Section 10(b) does not reach oral agreements and the contention that the secret reservation not to permit the exercise of the option falls outside Section 10(b) because it does not relate to the value of a security purchased or the consideration paid.

B. Grant of Certiorari

On May 21, the Supreme Court granted our petition in *Ashcroft v. ACLU*, No. 00-1293. The case concerns the Child Online Protection Act (COPA), which makes it unlawful to make any communication for commercial purposes by means of the World Wide Web that is available to minors and that includes material that is "harmful to minors," unless good faith efforts are made to prevent children from obtaining access to such material. COPA relies in part of community standards to identify material that is "harmful to minors." The question presented is whether the court of appeals properly barred enforcement of COPA on First Amendment grounds because it relies on community standards to identify material that is harmful to minors.

II. Supreme Court Filings

A. Brief on the Merits

On May 25, we filed a brief in *EEOC v. Waffle House*, No. 99-1823. The case presents the question whether an employee's agreement to arbitrate employment-related disputes with an employer bars the Equal Employment Opportunity Commission (EEOC), as plaintiff in an enforcement action against the employer, from obtaining victim-specific remedies for discrimination against the employee, such as backpay, reinstatement, and damages. We argue that the court of appeals, in holding that such an agreement does bar the EEOC seeking victim-specific remedies, reached a result that is (1) inconsistent with the plain language and structure of the Title VII (and ADA) enforcement scheme, (2) could seriously compromise the EEOC's ability to enforce antidiscrimination laws, and (3) is not supported by countervailing policy considerations.

B. Petition for Certiorari

On May 25, we filed a petition in *United States Department of Housing and Urban Development v. Rucker*, No. 00-1770. The case involves 42 U.S.C. 1437d(*l*)(6), which provides that public housing leases must contain a clause stating that "any drug-related criminal activity on or off [the] premises engaged in by a public housing tenant, any member of the tenant's household, or any

guest or other person under the tenant's control, shall be cause for termination of tenancy." The question presented is whether such a lease clause is violated by drug-related criminal activity of household members, regardless of whether it can be shown that the tenant knew, or had reason to know, of the drug activity. We argue that such activity does violate the lease clause, and that the contrary decision of the court of appeals failed to grant proper deference to HUD's considered view that that provision does not admit of an "ignorant owner" or "innocent owner" exception. The court of appeals' decision drains much of the meaning and significance from the statute and its accompanying regulation, thereby depriving public housing authorities of an important tool to achieve safe and liveable public housing, and depriving public housing tenants of protection that Congress found to be important for their security and well-being.

THIS WEEK

I. Supreme Court Decisions

A. Decisions on the Merits

On May 29, the Court decided the following six cases in which the government participated:

1. *PGA Tour, Inc. v. Martin*, No. 00-24. This case presented the question whether Title III of the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, regulates standards established for competitors (here, professional golfers) in athletic competitions held at places of public accommodation, and, if so, whether Title III requires professional sports organizations to grant selective waivers of their substantive rules of athletic competition in order to accommodate disabled competitors such as Martin, a professional golfer who has a circulatory disorder in his right leg, making it medically necessary for him to use a golf cart rather than walk the golf course. As *amicus curiae*, we argued that petitioner's operation of golf courses during tournaments falls squarely within Title III's prohibition on discrimination in places of public accommodation and that the courts below appropriately considered the relevant factors in concluding that a waiver of the PGA Tour's walking rule would not fundamentally alter its competitions, which are intended to measure shot-making skills rather than walking endurance. In an opinion written by Justice Stevens, the Court agreed with our arguments and held that (1) the PGA Tour is a "public accommodation" during its tours and qualifying rounds, and is therefore subject to Title III of the ADA, and (2) allowing Martin to use a golf cart would neither "alter . . . an essential aspect of the game of golf" nor "fundamentally alter the character of the competition" by granting Martin an advantage over other golfers. In dissent, Justice Scalia, joined by Justice Thomas, took the view that the PGA Tour is not a public accommodation, because professional golfers could not be considered "customers" of the tour, and that the majority's analysis that allowing Martin to ride in a court would not fundamentally alter the nature of PGA Tour golf was incoherent.

2. *Atkinson Trading Co. v. Shirley*, No. 00-454. This case presented the question whether the Navajo Nation may impose a hotel occupancy tax on non-Indian overnight guests at the Trading

Post operated by petitioner on lands petitioner owns in fee, when the Trading Post is subject to federal regulations under the Indian Trader statutes, petitioner's land is wholly surrounded by Indian lands on the Navajo Reservation, and petitioner and its guests receive necessary government services from the Navajo Nation. As *amicus curiae*, we argued that such a tax was valid. We noted that in *Montana v. United States*, 450 U.S. 544 (1981), the Court held that a Tribe may tax or regulate the activities of nonmembers on nonmember fee land within a reservation if the nonmembers enter "consensual relationships with the tribe or its members," or if their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." We contended that the tax is valid under both *Montana* exceptions.

In a unanimous opinion written by Justice Rehnquist, the court rejected our arguments. First, the Court found that the consensual relationship exception was inapplicable because that exception "requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself," and that a "nonmember's consensual relationship in one area . . . does not trigger tribal civil authority in another." The court also found the second exception to be inapplicable because that exception "grants Indian tribes nothing beyond what is necessary to protect tribal self-government or to control internal relations" (internal quotation marks omitted), and because the tax at issue here was not "necessary to vindicate the Navajo Nation's political integrity." Justice Souter concurred, joined by Justices Kennedy and Thomas, and emphasized the irrelevance of "whether the land at issue is fee land, or land owned by or held in trust for an Indian tribe."

3. *New Hampshire* v. *Maine*, No. 130 (original). New Hampshire brought this original action claiming that its boundary with Maine in Portsmouth Harbor extends to the low water mark of the Maine shore. The practical focus of the dispute is the Portsmouth Naval Shipyard, a federal facility that is located on Seavey's Island in the harbor. Maine currently exercises jurisdiction over the Shipyard, so New Hampshire residents who work at the Shipyard are required to pay Maine income taxes. In response to the Court's invitation to express our views, we contended that the doctrine of res judicata bars New Hampshire's claim because of a 1976 consent decree that New Hampshire and Maine agreed to in a prior original action in the Supreme Court concerning the lateral marine boundary in the vicinity of the current dispute. Because the 1976 consent decree set the boundary at the "Middle of the River," New Hampshire cannot now maintain that the boundary extends to the low water mark of the Maine shore.

In a unanimous opinion written by Justice Ginsburg, the Court agreed with our arguments, and held that the doctrine of judicial estoppel, which "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase," bars New Hampshire from asserting that the Piscataqua River boundary runs along the Maine shore.

4. *Booth v. Churner*, No. 99-1964. This case presented the question whether Prison Litigation Reform Act of 1995, which provides that a prisoner may not bring an action with respect to

prison conditions "until such administrative remedies as are available are exhausted," requires a prisoner suing prison officials for money damages to exhaust administrative remedies that address the problem identified by the inmate, but that do not permit the recovery of money damages. In *McCarthy v. Madigan*, 503 U.S. 140, 150 (1992), the Court construed a federal provision requiring inmates to exhaust such "plain, speedy, and effective remedies as are available" to excuse exhaustion when an inmate seeks only money damages and the prison's grievance procedure does not offer such relief. Congress subsequently eliminated the qualifying terms "plain, speedy, and effective," eliminated the requirement that administrative remedies must meet certain minimum acceptable standards of fairness and effectiveness, and eliminated a court's discretion to excuse the plaintiff's failure to exhaust when exhaustion would not be appropriate or in the interests of justice. We argued as *amicus curiae* that these changes reflect a judgment that inmates must exhaust all available remedies without regard to whether the administrative process provides for the recovery of the particular type of relief the inmate seeks.

In a unanimous opinion written by Justice Souter, the Court agreed with our arguments. In addition to accepting our argument based upon the post-*McCarthy* statutory history, the Court concluded that "the word 'exhausted' has a decidedly procedural emphasis," and "makes sense only in referring only to the procedural means, not the particular relief ordered," thus rendering irrelevant the types of recovery afforded by the available administrative remedies.

5. *NLRB v. Kentucky River Community Care, Inc.*, No. 98-1815. This case presented the questions (1) whether the National Labor Relations Board reasonably concluded that an employee's exercise of ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards does not constitute the exercise of "independent judgment" that makes an employee a "supervisor" under Section 2(11) of the National Labor Relations Act, 29 U.S.C. 152(11); (2) whether the Board permissibly requires the party who alleges that an employee is excluded from the rights and protections afforded by the Act as a supervisor to bear the burden of proving the individual's supervisory status; and (3) whether, applying its interpretation of "independent judgment" and its allocation of the burden of proving supervisory status, the Board reasonably concluded that respondent's registered nurses are "employees" rather than supervisors and thus are entitled to the rights and protections afforded by the Act. We argued that the Board's determination that the registered nurses in this case are not supervisors and should be covered by the Act is consistent with the statutory language, its purpose, and long-standing principles applied by the Board and the courts in the Act's administration in a wide variety of employment contexts.

In a decision written by Justice Scalia, the Court agreed with our argument regarding the burden of proof, but rejected our argument regarding the merits of the case. The Court concluded that by eliminating "ordinary professional or technical judgment" from the category of "independent judgment," the Board "insert[ed] a startling categorical exclusion into statutory text that does not suggest its existence," and that such categorical exclusion "turns on factors that have nothing to do with the degree of discretion an employee exercises." The court found the Board's reference to "directly

less-skilled employees" to be likewise devoid of "textual justification" and "conceptual justification." Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, concurred in part and dissented in part. Justice Stevens agreed with the Court regarding the burden of proof, but would have deferred to the Board's interpretation of the statute, concluding that "since Congress has expressly provided that professional employees are entitled to the protection of the Act, there is good reason to resolve the ambiguities consistently with the Board's interpretation."

6. *Buckhannon Board & Care Home v. West Virginia Dep't of Health and Human Resources*, No. 99-1848. The case presented the question whether a civil rights plaintiff may recover attorney's fees as a "prevailing party" under 42 U.S.C. 1988 when, as a result of plaintiff's suit, the defendant voluntarily provides the plaintiff with the requested relief. Petitioners are operators of residential board and care homes who sought a declaratory judgment invalidating a West Virginia statute requiring that all residents of such homes be capable of "self-preservation," i.e., evacuating themselves from the building without assistance in case of fire; petitioners contend that the statute violates the Fair Housing Amendments Act and the Americans with Disabilities Act. While the action was pending, West Virginia amended the law to delete the self-preservation requirement. Although the home did not obtain the change in state law through an enforceable judgment, consent decree, or settlement, it nevertheless claimed that it was entitled to attorney's fees as the prevailing party because it obtained the relief it sought through West Virginia's voluntary conduct in response to plaintiffs' action which brought to the State's attention the flaws in its law. As *amicus curiae*, we argued that the determination whether petitioners should be considered prevailing parties entitled to attorneys fees should be guided by three central considerations: (1) whether their complaint has legal merit; (2) whether they received actual relief that redressed their grievances; and (3) whether petitioners' lawsuit played a substantial role in inducing respondents to change their ways.

In an opinion by Chief Justice Rehnquist, the Court rejected our arguments. The Court concluded that "prevailing party" is a term of art meaning "one who has been awarded some relief by the court," and that it would be inconsistent with the meaning of "prevailing party" to "allow[] an award where there is no judicially sanctioned change in the legal relationship of the parties." The Court found no support for an opposite conclusion in the legislative history of Section 1988, and declined to "determine which way . . . various policy arguments cut," given what the Court viewed as "the clear meaning of 'prevailing party' in the fee-shifting statutes." Justice Scalia concurred, joined by Justice Thomas, and elaborated on the Court's discussion of the meaning of "prevailing party." Justice Ginsburg dissented, joined by Justices Stevens, Souter and Breyer. She rejected the Court's definition of "prevailing party" as not supported by history or logic, and would have accepted the broader definition that we pressed, because such a definition "suitably advances Congress' endeavor to place private actions, in civil rights and other legislatively defined areas, securely within the federal law enforcement arsenal."

B. Grant of Certiorari

On May 29, the Court granted a petition for a writ of certiorari in *Thomas v. Chicago Park District*, No. 00-1249, which involves a First Amendment challenge to a Chicago Park District ordinance that requires a permit for any event in a City park that involve more than 50 people or utilizes amplified sound. We have not participated in the case to date, and are determining whether participation is warranted at this stage.

C. Invitation

On May 29, the Supreme Court invited the Solicitor General to file briefs expressing the views of the United States on the petition for certiorari in *John Deere Insurance Co. v. Nueva*, No. 00-1491. Federal law requires registered interstate motor carriers to file with the Department of Transportation a proof of insurance "sufficient to pay . . . for each final judgment against the registrant. 49 U.S.C. 13906(a)(1). Under the applicable federal regulations, insurance policies filed to satisfy this requirement incorporate, or are deemed to incorporate, the "Form MCS-90" endorsement, which is promulgated by regulation and provides, in relevant part, that an insurer who issues a policy to a registered motor carrier will pay "any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles . . . regardless of whether or not each motor vehicle is specifically described in the policy . . . ." The question presented is whether the Form MCS-90 endorsement attached to an insurance policy issued to a motor carrier requires the issuing insurer to pay a judgment entered against parties (in this case a different motor carrier and its driver) that are not entitled to coverage under the base policy, even where there is no "final judgment . . . against the insured" motor carrier named in the insurer's policy.

II. Supreme Court Filings

A. Brief on the Merits

On May 31, we anticipate filing briefs for respondents in *New York* v. *FERC* , No. 00-0568 and *Enron Power Marketing, Inc.* v. *FERC*, No. 00-0809. These consolidated cases present the questions (1) whether the Federal Energy Regulatory Commission (FERC) may preempt state jurisdiction over the intrastate transmission of energy from generators to retail customers; (2) whether FERC has jurisdiction under the Federal Power Act (FPA), 16 U.S.C. 792 *et seq.*, to regulate all transmission of electric energy that is sold to retail customers at a "bundled" price; (3) whether FERC has jurisdiction and an obligation under the FPA to eliminate pervasive "undue discrimination" in the provision of interstate electric energy transmission services by requiring transmission-owning utilities to provide interstate transmission services on the same terms to all users, for all interstate transmissions, including transmissions bundled with retail sales; and (4) whether the court of appeals erred in ruling that FERC had discretion to interpret the FPA as denying FERC the necessary jurisdiction to remedy the undue discrimination it had found in the provision of interstate transmission.

NEXT WEEK

I. Supreme Court Decisions

A. Decisions on the Merits

On June 4, the Court will hold a non-argument session at which opinions are expected to be released.

II. Supreme Court Filings

A. Brief on the Merits

On June 8, we anticipate filing a brief for respondents in *Verizon Communications Inc. v. FCC*, No. 00-511, which is consolidated with several other cases presenting the same questions. The case involves challenges to two important aspects of the FCC's regulations implementing the Telecommunications Act of 1996: pricing methodology and combinations rules. On remand from the Supreme Court, see *AT&T* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), the Eighth Circuit invalidated the key regulation defining the FCC's forward-looking cost methodology, known as "total element long-run incremental cost" or TELRIC. The cost methodology is used by state public utility commissions to determine the amount incumbent local exchange carriers (ILECs) can recover from new entrants for the provision of interconnection and access to network elements. The appeals court, while recognizing the validity of a forward-looking cost methodology, rejected the Commission's determination that cost should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration. The Court will also consider whether the court of appeals erred in holding that neither the Takings Clause nor the Telecommunications Act of 1996 requires incorporation of an ILEC's historical costs in the rates it charges new entrants. The Court will also decide the validity of FCC rules requiring that ILECs make available their own unbundled network elements combined in new ways or in combination with elements provided by requesting carriers.

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE SOLICITOR GENERAL

10th & Constitution Avenue, N.W.

Washington, DC 20530

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precludes a medical necessity defense. By classifying marijuana as a schedule I controlled substance, Congress has declared that marijuana has "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use * * * under medical supervision." 21 U.S.C. 812(b)(1). Congress therefore banned the distribution of marijuana for any purposes unless the person dispensing the drug is a practitioner registered with the Drug Enforcement Administration to conduct research that has been specifically approved by the Food and Drug Administration, and Congress additionally established procedures for the reclassification or descheduling of controlled substances by the Attorney General, subject to judicial review. We further note that the 1998 statute that Congress passed in specific response to attempts by States to legalize medical use of marijuana unambiguously stated that "marijuana * * * has not been proven safe and effective for medical purposes" and that marijuana may not be used for medical purposes "without * * * the approval of the Food and Drug Administration."

We argue that a district court lacks the equitable discretion to craft an injunction that permits the distribution of marijuana for medical use in violation of the Act based on the court's own view that such conduct furthers the public interest. A district court may not override Congress's ban on the unauthorized distribution of marijuana for all purposes by reweighing the scientific and medical data and social policies considered by Congress, the Attorney General, and the Secretary of Health and Human Services, and concluding that the public interest supports the illegal distribution of marijuana.

III. Supreme Court Filings

A. Briefs on the Merits

On March 26, we filed a brief as *amicus curiae* in *Lorillard Tobacco Co. v. Reilly*, Nos. 00-596 and 00-597. The case presents the questions (1) whether state regulations that restrict the advertising of tobacco products near a school or playground are preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA), and (2) whether such regulations violate the First Amendment.

Regarding preemption, we argue that FCLAA does not reflect any purpose by Congress to preempt advertising location restrictions like those at issue here. FCLAA's preemption provision reaches only restrictions or prohibitions that are "based on smoking and health." The restrictions at issue here are "based on" the location of the advertising; they are not "based on smoking and health." Congress used the phrase "based on smoking and health" to limit the scope of preemption to regulations that require or prevent the advertisement of a message concerning the relationship between smoking and health. Because the restrictions at issue here apply without regard to the message of the advertising, they are not preempted.

That conclusion is especially evident, we contend, when FCLAA is viewed as a whole. When Congress amended the preemption provision to its current form, it both reestablished federal warning requirements for cigarette labels and preserved the FTC's authority to require warnings in advertising in order to prevent unfair or deceptive advertising practices. The preemption provision is best understood as displacing state regulations that could interfere with that federal warning program -- such as those that

require or prohibit health messages in labeling or advertising. State restrictions on the location of advertising, however, do not interfere with federal warning requirements. They are therefore not preempted.

Regarding the First Amendment, we argue that the State's restrictions on advertising near schools and playgrounds satisfy the established standards for evaluating the constitutionality of restrictions on commercial speech. The State's interests in preventing unlawful distribution of tobacco products to minors and protecting minors from the health consequences of smoking are compelling, and the State's restrictions on advertising are also directly and materially related to preventing underage tobacco use. By placing restrictions on advertising within 1000 feet of schools and playgrounds, the State has carefully tailored its restrictions to the areas where children are most likely to be repeatedly and unavoidably exposed to tobacco advertising. The State's restrictions also leave petitioners with ample opportunities to convey information about their products to adults, such as through outdoor advertising outside the school and playground zones, and through newspapers, magazines, direct mail, and personal solicitation.

We urge the Court to reject petitioners' proposal to apply strict scrutiny to what they assert are content or viewpoint based restrictions on commercial speech. The middle-tier scrutiny set forth in *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), strikes the appropriate balance between a seller's interest in proposing a commercial transaction and the State's right to regulate speech that is intimately bound up with economic activity. Moreover, the restrictions at issue here do not entirely prohibit the dissemination of information about tobacco, and they are directly related to preservation of a fair bargaining process. The State justifiably views any bargain between tobacco manufacturers and children as inherently unfair, both because the State has made the sale of tobacco products to children unlawful, and because so many children lack the maturity in judgment to resist the tobacco industry's appeals to excitement, glamour, and independence, and to appreciate the addictive power and health risks of tobacco products.

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

March 27, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: BDC for
Barbara D. Underwood
Acting Solicitor General

Subject: Weekly Report

I. Supreme Court Decisions

A. Decisions on the Merits

On March 20, 2001, the Court decided the following two cases:

1. *Buford* v. *United States*, No. 99-9073. The question presented was whether a district court's determination that a defendant's prior convictions are not "related" for purposes of the career offender provision of the Sentencing Guidelines is subject to a deferential standard of review. Prior sentences imposed in related cases are to be treated as one sentence for purposes of the Sentencing Guideline's career offender provision. The District Court, in sentencing the petitioner for armed bank robbery, found that the petitioner's joint sentencing for five prior state-court convictions was a matter of administrative convenience rather than a "consolidation for sentencing" within the meaning of the Guidelines, and thus treated the offenses as unrelated and the petitioner as a career offender. The Court of Appeals for the Seventh Circuit held that whether cases have been consolidated for trial or sentencing is a matter of fact, to be reviewed deferentially on appeal. We argued that the court of appeals correctly applied a deferential standard of review because the question requires an inquiry into facts as determined by the district court rather than an exercise in statutory construction likely to establish widely applicable principles of law, and because the Sentencing Reform Act provides that courts of appeals should give "due deference" to the district court's application of the guidelines to the facts. 18 U.S.C. 3742(e).

The Supreme Court affirmed the judgment of the Seventh Circuit in a unanimous opinion by Justice Breyer, agreeing with our arguments. The Court held that deferential review is appropriate because 18

U.S.C. 3742(e) refers to "due deference," and because "the district court is in a better position than the appellate court to decide whether a particular set of individual circumstances demonstrates 'functional consolidation.'" This is so, the Court concluded, because trial judges are more familiar with trial and sentencing practices in general, including consolidation procedures. Furthermore, "factual nuance may closely guide the legal decision, with legal results depending heavily upon an understanding of the significance of case-specific details," thus rendering the district court better suited to make the determination. The Court downplayed any benefits of uniformity arising from de novo review, noting that "[t]he legal question at issue is a minor, detailed, interstitial question of sentencing law," not a "generally recurring, purely legal matter."

2. *Traffix Devices, Inc. v. Marketing Displays, Inc*, No. 99-1571. The case presented the questions whether and to what extent a party may maintain a trade dress infringement action under the Lanham Act to challenge the copying of product features after a utility patent covering the features has expired. The functionality doctrine of trademark law bars utilitarian features -- features that affect the purpose, action, performance or the facility or economy of processing, handling, or using a good -- from being withdrawn from the public domain as trade dress. We argued as *amicus curiae* that the functionality doctrine precludes a trade dress claim where an expired utility patent discloses that the feature alleged as trade dress contributes to the operation of the formerly patented device. We maintained that this rule would serve the interests of judicial economy and would be consistent with the patent-law goal of balancing the need to encourage new advances in technology with the goal of ensuring that those advances eventually enter the public domain. We further argued that the approach adopted by the court of appeals creates an unnecessary conflict between the Lanham Act and patent law.

The Supreme Court reversed the judgment of the Sixth Circuit in a unanimous opinion by Justice Kennedy, agreeing with our arguments and holding that because MDI's design was functional, its trade dress claim was barred. The Court determined that the expired patent had "vital significance in resolving the trade dress claim," because a utility patent "is strong evidence that the features therein claimed are functional," and "[i]f trade dress protection is sought for those features[,] the strong evidence of functionality based on the previous patent adds great weight to the statutory presumption that features are deemed functional until proved otherwise by the party seeking trade dress protection." The Court found that MDI failed to carry its burden of overcoming the strong evidentiary inference of functionality based on the disclosure of its design in the claims of the expired patents, finding that "[t]he rationale for the rule that the disclosure of a feature in the claims of a utlity patent constitutes strong evidence of functionality is well illustrated in this case." Because the Court found that functionality had been established, it declined to consider whether the design had acquired secondary meaning, and declined to determine whether the Patent Clause of the Constitution, of its own force, prohibits the holder of an expired utility patent from claiming trade dress protection.

On March 21, the Court decided the following two cases:

1. *Circuit City Stores, Inc. v. Adams*, No. 99-1379. The case presented the question whether the Federal Arbitration Act (FAA) applies to arbitration clauses in contracts of employment. Section 2 of the FAA provides that "a written [arbitration] provision in any maritime transaction or a contract evidencing a transaction involving commerce * * * shall be valid, irrevocable, and enforceable * * * ." 9 U.S.C. 2. Section 1, however, excludes from the Act "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." We argued, as *amicus curiae*, that the Ninth Circuit correctly ruled that § 1 excludes every employment contract that would otherwise be covered under the Act. We contended that although the phrase "engaged in commerce" is today considered a term of art indicating that Congress does not want to legislate to the full extent of its Commerce Clause authority, that was not the meaning of the phrase when the FAA was enacted in 1925. At that time, the Supreme Court's Commerce Clause decisions indicated that Congress could not regulate beyond those "engaged in commerce" so the exclusion should be read to exclude any employment contract that Congress can reach. We also argued that the § 2 coverage provision ("transaction *involving commerce*") and the § 1 exclusion ("contracts of workers *engaged in commerce*") are coextensive because "involving" and "engaged in" had the same meaning in 1925. Furthermore, we argued, the legislative history of the FAA clearly indicates that the FAA was not meant to apply to employment contracts.

The Court rejected our position and reversed and remanded the decision of the Ninth Circuit, in an opinion written by Justice Kennedy. The Court rejected respondents' contention that the word "transaction" in § 2 extends only to commercial contracts, and that therefore an employment contract is not a "contract evidencing a transaction involving commerce" at all. If that were true, the Court concluded, the separate § 1 exemption would be pointless.

Next, the Court concluded that the statute should be interpreted in accordance with the canon of *ejusdem genesis*, under which "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Therefore, regarding the reference in § 1 to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," the Court held that the residual clause ("any other class of workers engaged in foreign or interstate commerce") must be read in accordance with the terms that preceded it ("seamen" and "railroad employees") and therefore should be read to refer only to transportation workers.

Even if the term "engaged in commerce" stood alone in § 1, the Court concluded, the outcome would be the same, because that phrase is "understood to have a more limited reach." The Court rejected the argument that, because the Commerce Clause is now construed more expansively than it was in 1925, the term should be read correspondingly to cover a broader swath. "[T]his fact alone," the Court determined, "does not give us basis to adopt, by judicial decision rather than amendatory legislation, an expansive construction of the FAA's exclusion provision that goes beyond the meaning of the words Congress used" (internal quotation marks and citation omitted).

Justice Stevens dissented, joined by Justices Ginsburg and Breyer, and in part by Justice Souter. Reviewing at length the history leading up to the passage of the FAA, Justice Stevens concluded that "no one interested in the enactment of the FAA ever intended or expected that § 2 would apply to employment contracts." He found further support for his position in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), in which the Court resolved a labor dispute regarding the scope of an arbitration clause in a collective-bargaining agreement without relying on the FAA, in a situation where, in Justice Stevens' view, relying on the FAA would have been natural had the *Lincoln Mills* Court believed that the § 1 exclusion referred only to transportation workers. He concluded that the Court "misuse[d] its authority" by "refus[ing] to look beyond the raw statutory text" to consider "countervailing considerations that were expressed by Members of the enacting Congress and that remain valid today."

Justice Souter also filed a dissenting opinion, joined by Justices Stevens, Ginsburg, and Breyer. He concluded that "[t]he statute is * * * entitled to a coherent reading as a whole by treating the exemption for employment contracts as keeping pace with the expanded understanding of the commerce power generally" (citation omitted). He rejected the Court's reliance on *ejusdem generis*, which he characterized as a "fallback" that should be rejected "if there are good reasons not to apply it." Justice Souter would not have applied *ejusdem generis* because, in his view, "it is imputing something very odd to the working of the congressional brain to say that Congress took care to bar application of the Act to the class of employment contracts it most obviously had authority to legislate about in 1925, contracts of workers employed by carriers and handlers of commerce, while covering only employees 'engaged' in less obvious ways, over whose coverage litigation might be anticipated with uncertain results." Rather, "[i]t would seem to have made more sense either to cover all coverable employment contracts or to exclude them all."

2. *Egelhoff v. Egelhoff*, No. 99-1529. The case presented the question whether ERISA preempts a state law that purports to revoke the designation of beneficiary made pursuant to the terms of an ERISA plan. David Egelhoff designated petitioner Donna Rae Egelhoff, his wife at the time, as beneficiary under ERISA life insurance and pension plans. David and Donna Rae subsequently divorced. Donna Rae remained the beneficiary of record under both plans, however, and after David's death in 1994 she received the life insurance proceeds. Respondents, who are David's children from another marriage and other statutory heirs, filed an action seeking to recover the life insurance proceeds and pension benefits, relying on a State of Washington statute that revokes upon divorce a provision made in favor of the former spouse during marriage "that relates to the payment or transfer at death of the decedent's interest in a nonprobate asset." The Washington Supreme Court agreed with respondents' position, rejecting petitioner's claim that ERISA preempted the state statute. As *amicus curiae* supporting petitioner, we argued that because the Washington statute regulates the designation of beneficiaries and payment of benefits, it "relate[s] to any employee benefit plan" and thus ERISA expressly preempts the state law, see 29 U.S.C. 1144(a). The Washington statute squarely conflicts with several substantive provisions of ERISA and thus, we maintained, is also preempted under ordinary conflict preemption principles.

The Supreme Court reversed and remanded the judgment of the Washington Supreme Court in an opinion by Justice Thomas, agreeing with our arguments. Because a state law relates to an ERISA plan,

and is therefore preempted, "if it has a connection with or reference to such a plan," the Court noted that "to determine whether a state law has the forbidden connection, we look both to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive, as well as to the nature of the effect of the state law on ERISA plans" (internal quotation marks omitted). Applying that framework, the Court concluded that the Washington statute has an "impermissible connection with ERISA plans" because it "binds ERISA plan administrators to a particular choice of rules for determining beneficiary status," thus requiring administrators to "pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents" and thereby "implicat[ing] an area of core ERISA concern." Specifically, the Court noted, the statute "runs counter to ERISA's commands that a plan shall 'specify the basis on which payments are made to and from the plan,' § 1102(b)(4), and that the fiduciary shall administer the plan 'in accordance with the documents and instruments governing the plan,' § 1104(a)(1)(D), making payments to a 'beneficiary' who is 'designated by a participant, or by the terms of [the] plan.' § 1002(8)." Furthermore, the Court held that "[t]he Washington statute also has a prohibited connection with ERISA plans because it interferes with nationally uniform plan administration," which is impossible "if plans are subject to different obligations in different States."

Finally, the Court rejected respondent's arguments that ordinary ERISA preemption analysis should not apply because the Washington statute allows employer opt-out, because it involves both family law and probate law, traditional areas of state regulation, or because a finding of preemption here would require a finding of preemption of the various state statutes that disinherit murdering heirs.

Justice Scalia concurred, joined by Justice Ginsburg. In a one-paragraph opinion, he noted the continued uncertainty of the meaning of the "relate to" provision, and stated that ERISA can take on "a plausible and precise content, only by interpreting the 'relate to' clause as a reference to our ordinary pre-emption jurisprudence."

Justice Breyer dissented, joined by Justice Stevens. He concluded that the statute was not preempted by ERISA and argued that "[t]here is no direct conflict or contradiction between the Washington statute and the terms of the plan documents here at issue." Rather, he expressed the view that the Washington statute merely served a gap-filling role, by providing what would happen when a beneficiary designation is invalid. "To refer to state property law to fill in that blank," he concluded, "cannot possibly create any direct conflict with the plan documents." Nor did he agree with the Court's conclusion that the Washington statute "interfere[d] with nationally uniform plan administration" by requiring administrators to "familiarize themselves with state statutes." Any burden, he concluded, was minimal, consisting of nothing more than a "one-time requirement that would fall primarily upon the few who draft model ERISA documents, not upon the many who administer them. So meager a burden cannot justify pre-empting a state law that enjoys a presumption against pre-emption."

B. Grants of Certiorari

On March 26, the Court granted petitions for a writ of certiorari in the following cases:

1. *EEOC v. Waffle House*, No. 99-1823. The case presents the question whether an employee's agreement to arbitrate employment-related disputes with an employer bars the Equal Employment Opportunity Commission (EEOC), as plaintiff in an enforcement action against the employer, from obtaining victim-specific remedies for discrimination against the employee, such as backpay, reinstatement, and damages. Based on a claim filed with it, the EEOC brought this action in district court alleging that respondent had engaged in unlawful employment practices on the basis of disability. Respondent moved to compel arbitration or to dismiss the action under the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, on the ground that the claimant had agreed to arbitrate employment-related disputes. The district court denied the motion, finding that claimant and respondent had not entered into an agreement to arbitrate. The court of appeals affirmed the district court's refusal to compel arbitration, concluding (contrary to the view of the district court) that claimant and respondent had agreed to arbitration, but that that agreement did not prevent the EEOC from bringing this public enforcement action. The court also held, however, that, although the EEOC could obtain general injunctive relief, the agreement between claimant and respondent did preclude the EEOC from obtaining other, victim-specific forms of relief, such as backpay, reinstatement, and compensatory and punitive damages. We contend that the appeals court's decision conflicts with the purposes and practices of the dual system of private and public enforcement established by the 1972 amendments to Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. 2000e-5(f)(1) (providing the EEOC with independent authority to bring suit in court). We urged the Court to grant certiorari because the decision in this case, and a similar one from the Second Circuit, conflict with a decision of the Sixth Circuit holding that an indistinguishable arbitration agreement has no effect on the ability of the EEOC to obtain all of the forms of relief authorized by Congress, including the precise forms of victim-specific relief barred by the Fourth Circuit.

2. *Adarand Constructors, Inc. v. Mineta*, No. 00-730. The case presents the questions (1) whether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination, and (2) whether the United States Department of Transportation's (DOT) current Disadvantaged Business Enterprise (DBE) program is narrowly tailored to serve the compelling governmental interest of remedying the effects of racial discrimination that impede the ability of socially and economically disadvantaged individuals to participate in opportunities created by government contracting.

We contended that further review of the issues raised by petitioner is not, at this time, warranted, because the court of appeals in this case correctly and carefully applied the test of strict scrutiny to evaluate the constitutionality of the DOT's DBE program, and its decision does not conflict with any decision of this Court or any other court of appeals. We noted that this case focused primarily on a specific aspect of the DOT's small business program -- the use of Subcontractor Compensation Clauses -- that had been discontinued before the court of appeals issued its decision, and petitioner sought only prospective relief. Consequently, we argued, the case has become somewhat divorced from the concrete context of an actual application that traditionally assists this Court in deciding cases. Moreover, we noted, other federal courts are now reviewing the current DOT DBE program, and those cases will permit a number of circuits to address the constitutionality of the program in a context with a more meaningful forward-looking effect, and

consequently provide this Court with the opportunity to conduct further review as appropriate.

3. *McCarver v. North Carolina*, No. 00-8727. The case presents the question whether the execution of a mentally retarded person violates the Eighth Amendment's prohibition against cruel and unusual punishment. We have not participated in this case, and we are determining whether participation is warranted.

D. Invitations

On March 26, the Supreme Court invited the Solicitor General to file briefs expressing the views of the United States on the petitions for certiorari in the following cases:

1. *Rush Prudential HMO, Inc. v. Moran*, No. 00-1021. Section 4-10 of the Illinois Health Maintenance Organization Act provides that, if a patient's primary care physician deems a proposed procedure desired by the patient to be medically necessary, but the HMO disagrees and denies coverage for the procedure, the patient may have the HMO's decision reviewed by an outside physician, and the HMO must abide by the reviewing physician's determination. The case presents the question whether Section 4-10 is preempted by ERISA. The Court previously called for the views of the United States in *Montemayor v. Corporate Health Insurance, Inc.*, No. 00-0665, which raises virtually the same issue.

2. *Edelman v. Lynchburg College*. The case presents the questions (1) whether 29 C.F.R. 1601.12(b), which provides that a Title VII "charge may be amended to cure technical defects or omissions, including the failure to verify the charge," is invalid; and (2) if so, whether equitable tolling is appropriate with regard to a charging party who relied on that regulation.

II. Supreme Court Arguments

During the week of March 26, we are presenting oral arguments in the following cases:

1. *United Dominion Industries v. United States*, No. 00-157. The case involves the tax treatment of "product liability losses," which a corporation may carry back a maximum of ten years from the loss year and use as a deduction in the carryback year. 26 U.S.C. 172(b). Such losses occur when a taxpayer has a net operating loss for the year and the net operating loss is attributable in whole or in part to deductions for product liability expenses. The question presented is whether the availability of the "product liability loss" carryover for affiliated entities that file a consolidated return is to be determined by aggregating the income and expenses of the consolidated entities or, instead, separately calculating the income and expense of each entity. We argue that the court of appeals correctly applied Treasury Regulations in ruling that the proper method is to determine "product liability loss" separately for each entity and, therefore, that the product liability expenses of an entity with positive income may not be included in the "product liability loss" carryback for the consolidated group. Under the governing Treasury regulations, the product liability expenses of each affiliate must be netted against the income of that affiliate in

determining the "separate taxable income" of that affiliate. When, as in this case, an affiliate has positive taxable income, then all of the product liability expenses have been used to reduce taxable income and there is no unconsumed product liability expenses to carryback on the consolidated return. The text and history of Section 172 make clear that the "taxpayer" to whom the "product liability loss" provisions apply is the corporation that has itself incurred product liability expenses and is unable fully to utilize them because of an insufficient amount of income. We argue that Congress did not intend to provide any additional tax benefit to a profitable corporation that used all of its product liability expenses as deductions against current income. Allowing the consolidated return to carryback "product liability losses" for profitable affiliates that already used the product liability expenses to reduce total income amounts to a double deduction and encourages significant tax avoidance abuses, in contravention of Congress's express intent that consolidated returns not be employed as an artifice for tax avoidance.

2. *Atkinson Trading Co. v. Shirley*, No. 00-454. As *amicus curiae*, we address the question whether the Navajo Nation may impose a hotel occupancy tax on non-Indian overnight guests at the Trading Post operated by petitioner on lands petitioner owns in fee, when the Trading Post is subject to federal regulations under the Indian Trader statutes, petitioner's land is wholly surrounded by Indian lands on the Navajo Reservation, and petitioner and its guests receive necessary government services from the Navajo Nation. The Court's decisions in *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981), and *Strate* v. *A-1 Contractors*, 520 U.S. 438, 446 (1997), hold that a Tribe may tax or regulate the activities of nonmembers on nonmember fee land within a reservation if the nonmembers enter "consensual relationships with the tribe or its members," or if their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." We contend that petitioner has, for *Montana* purposes, entered into a "consensual relationship" with the Navajo Nation by conducting a substantial business within the boundaries of the Tribe's Reservation, under regulations issued by the Secretary of the Interior that afford the Tribe the opportunity to play a substantial role in regulating that business. By applying for and accepting a federal Indian Trader's license under those regulations, petitioner has accepted privileges of trade to which the Tribe may attach a tax. That conclusion supports the tax here, even though the Navajo tax is formally assessed against petitioner's customers, rather than against petitioner itself. We also contend that the Tribe's occupancy tax is valid under *Montana's* second test because petitioner's business is subject to comprehensive federal regulations, enforceable by the Tribe, that reflect a conclusion by the Secretary of the Interior that petitioner's operations do have a direct effect on the Tribe and its members.

3. *United States v. Oakland Cannabis Buyers' Cooperative*, No. 00-151. The case presents the question whether medical necessity is a legally cognizable defense to a charge of distributing drugs in violation of the Controlled Substances Act (CSA). We argue that the Ninth Circuit's decision recognizing a medical necessity defense cannot be squared with the CSA, which makes it illegal to "manufacture, distribute, or dispense, or possess with intent to manufacture distribute, or dispense," any controlled substance, "except as authorized" under the Act. 21 U.S.C. 841(a)(1).

We contend that the text, structure and purpose of the CSA establish a judgment by Congress that

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TEXAS *v.* COBB

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 99–1702. Argued January 16, 2001– Decided April 2, 2001

While under arrest for an unrelated offense, respondent confessed to a home burglary, but denied knowledge of a woman and child's disappearance from the home. He was indicted for the burglary, and counsel was appointed to represent him. He later confessed to his father that he had killed the woman and child, and his father then contacted the police. While in custody, respondent waived his rights under *Miranda* v. *Arizona,* 384 U. S. 436, and confessed to the murders. He was convicted of capital murder and sentenced to death. On appeal to the Texas Court of Criminal Appeals, he argued, *inter alia,* that his confession should have been suppressed because it was obtained in violation of his Sixth Amendment right to counsel, which he claimed attached when counsel was appointed in the burglary case. The court reversed and remanded, holding that once the right to counsel attaches to the offense charged, it also attaches to any other offense that is very closely related factually to the offense charged.

Held: Because the Sixth Amendment right to counsel is "offense specific," it does not necessarily extend to offenses that are "factually related" to those that have actually been charged. Pp. 4–11.

(a) In *McNeil* v. *Wisconsin,* 501 U. S. 171, 176, this Court held that a defendant's statements regarding offenses for which he has not been charged are admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses. Although some lower courts have read into *McNeil*'s offense-specific definition an exception for crimes that are "factually related" to a charged offense, and have interpreted *Brewer* v. *Williams,* 430 U. S. 387, and *Maine* v. *Moulton,* 474 U. S. 159, to support this view, this Court declines to do so. *Brewer* did not address the question at issue here. And to the extent *Moulton* spoke to the matter at all, it expressly referred to the offense-specific nature of the Sixth Amend-

REV_00261012

Syllabus

ment right to counsel. In predicting that the offense-specific rule will prove disastrous to suspects' constitutional rights and will permit the police almost total license to conduct unwanted and uncounseled interrogations, respondent fails to appreciate two critical considerations. First, there can be no doubt that a suspect must be apprised of his rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation. See *Miranda, supra,* at 479. Here, police scrupulously followed *Miranda*'s dictates when questioning respondent. Second, the Constitution does not negate society's interest in the police's ability to talk to witnesses and suspects, even those who have been charged with other offenses. See *McNeil, supra,* at 181. Pp. 4–9.

(b) Although the Sixth Amendment right to counsel clearly attaches only to charged offenses, this Court has recognized in other contexts that the definition of an "offense" is not necessarily limited to the four corners of a charging document. The test to determine whether there are two different offenses or only one is whether each provision requires proof of a fact which the other does not. *Blockburger* v. *United States,* 284 U. S. 299, 304. The *Blockburger* test has been applied to delineate the scope of the Fifth Amendment's Double Jeopardy Clause, which prevents multiple or successive prosecutions for the "same offense." See, *e.g., Brown* v. *Ohio,* 432 U. S. 161, 164–166. There is no constitutional difference between "offense" in the double jeopardy and right-to-counsel contexts. Accordingly, when the Sixth Amendment right to counsel attaches, it encompasses offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test. Pp. 9–11.

(c) At the time respondent confessed to the murders, he had been indicted for burglary but had not been charged in the murders. As defined by Texas law, these crimes are not the same offense under *Blockburger*. Thus, the Sixth Amendment right to counsel did not bar police from interrogating respondent regarding the murders, and his confession was therefore admissible. P. 11.

___ S. W. 3d ___, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., filed a concurring opinion, in which SCALIA and THOMAS, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined.

REV_00261013

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 99–1702

TEXAS, PETITIONER *v.* RAYMOND LEVI COBB

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

[April 2, 2001]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The Texas Court of Criminal Appeals held that a criminal defendant's Sixth Amendment right to counsel attaches not only to the offense with which he is charged, but to other offenses "closely related factually" to the charged offense. We hold that our decision in *McNeil* v. *Wisconsin*, 501 U. S. 171 (1991), meant what it said, and that the Sixth Amendment right is "offense specific."

In December 1993, Lindsey Owings reported to the Walker County, Texas, Sheriff's Office that the home he shared with his wife, Margaret, and their 16-month-old daughter, Kori Rae, had been burglarized. He also informed police that his wife and daughter were missing. Respondent Raymond Levi Cobb lived across the street from the Owings. Acting on an anonymous tip that respondent was involved in the burglary, Walker County investigators questioned him about the events. He denied involvement. In July 1994, while under arrest for an unrelated offense, respondent was again questioned about the incident. Respondent then gave a written statement confessing to the burglary, but he denied knowledge relating to the disappearances. Respondent was subse-

REV_00261014

nized in other contexts that the definition of an "offense" is not necessarily limited to the four corners of a charging instrument. In *Blockburger* v. *United States,* 284 U. S. 299 (1932), we explained that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.*, at 304. We have since applied the *Blockburger* test to delineate the scope of the Fifth Amendment's Double Jeopardy Clause, which prevents multiple or successive prosecutions for the "same offence." See, *e.g.*, *Brown* v. *Ohio,* 432 U. S. 161, 164–166 (1977). We see no constitutional difference between the meaning of the term "offense" in the contexts of double jeopardy and of the right to counsel. Accordingly, we hold that when the Sixth Amendment right to counsel attaches, it does encompass offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test.[3]

While simultaneously conceding that its own test "lacks the precision for which police officers may hope," *post,* at 10, the dissent suggests that adopting *Blockburger*'s definition of "offense" will prove difficult to administer. But it is the dissent's vague iterations of the "'closely related to'" or "'inextricably intertwined with'" test, *post,* at 10, that would defy simple application. The dissent seems to presuppose that officers will possess complete knowledge of the circumstances surrounding an incident, such that the officers will be able to tailor their investigation to avoid addressing factually related offenses. Such an

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[3] In this sense, we could just as easily describe the Sixth Amendment as "prosecution specific," insofar as it prevents discussion of charged offenses as well as offenses that, under *Blockburger*, could not be the subject of a later prosecution. And, indeed, the text of the Sixth Amendment confines its scope to "all criminal *prosecutions.*"

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assumption, however, ignores the reality that police often are not yet aware of the exact sequence and scope of events they are investigating– indeed, that is why police must investigate in the first place. Deterred by the possibility of violating the Sixth Amendment, police likely would refrain from questioning certain defendants altogether.

It remains only to apply these principles to the facts at hand. At the time he confessed to Odessa police, respondent had been indicted for burglary of the Owings residence, but he had not been charged in the murders of Margaret and Kori Rae. As defined by Texas law, burglary and capital murder are not the same offense under *Blockburger*. Compare Texas Penal Code Ann. §30.02(a) (1994) (requiring entry into or continued concealment in a habitation or building) with §19.03(a)(7)(A) (requiring murder of more than one person during a single criminal transaction). Accordingly, the Sixth Amendment right to counsel did not bar police from interrogating respondent regarding the murders, and respondent's confession was therefore admissible.

The judgment of the Court of Criminal Appeals of Texas is reversed.

It is so ordered.

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quently indicted for the burglary, and Hal Ridley was appointed in August 1994 to represent respondent on that charge.

Shortly after Ridley's appointment, investigators asked and received his permission to question respondent about the disappearances. Respondent continued to deny involvement. Investigators repeated this process in September 1995, again with Ridley's permission and again with the same result.

In November 1995, respondent, free on bond in the burglary case, was living with his father in Odessa, Texas. At that time, respondent's father contacted the Walker County Sheriff's Office to report that respondent had confessed to him that he killed Margaret Owings in the course of the burglary. Walker County investigators directed respondent's father to the Odessa police station, where he gave a statement. Odessa police then faxed the statement to Walker County, where investigators secured a warrant for respondent's arrest and faxed it back to Odessa. Shortly thereafter, Odessa police took respondent into custody and administered warnings pursuant to *Miranda* v. *Arizona,* 384 U. S. 436 (1966). Respondent waived these rights.

After a short time, respondent confessed to murdering both Margaret and Kori Rae. Respondent explained that when Margaret confronted him as he was attempting to remove the Owings' stereo, he stabbed her in the stomach with a knife he was carrying. Respondent told police that he dragged her body to a wooded area a few hundred yards from the house. Respondent then stated:

> "I went back to her house and I saw the baby laying on its bed. I took the baby out there and it was sleeping the whole time. I laid the baby down on the ground four or five feet away from its mother. I went back to my house and got a flat edge shovel. That's all

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> I could find. Then I went back over to where they were and I started digging a hole between them. After I got the hole dug, the baby was awake. It started going toward its mom and it fell in the hole. I put the lady in the hole and I covered them up. I remember stabbing a different knife I had in the ground where they were. I was crying right then." App. to Pet. for Cert. A–9 to A–10.

Respondent later led police to the location where he had buried the victims' bodies.

Respondent was convicted of capital murder for murdering more than one person in the course of a single criminal transaction. See Texas Penal Code Ann. §19.03(a)(7)(A) (1994). He was sentenced to death. On appeal to the Court of Criminal Appeals of Texas, respondent argued, *inter alia*, that his confession should have been suppressed because it was obtained in violation of his Sixth Amendment right to counsel. Relying on *Michigan* v. *Jackson*, 475 U. S. 625 (1986), respondent contended that his right to counsel had attached when Ridley was appointed in the burglary case and that Odessa police were therefore required to secure Ridley's permission before proceeding with the interrogation.

The Court of Criminal Appeals reversed respondent's conviction by a divided vote and remanded for a new trial. The court held that "once the right to counsel attaches to the offense charged, it also attaches to any other offense that is very closely related factually to the offense charged." ___ S. W. 3d ___ 2000 WL 275644, *3 (2000) (citations omitted). Finding the capital murder charge to be "factually interwoven with the burglary," the court concluded that respondent's Sixth Amendment right to counsel had attached on the capital murder charge even though respondent had not yet been charged with that offense. *Id.*, at *4. The court further found that respon-

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dent had asserted that right by accepting Ridley's appointment in the burglary case. See *ibid.* Accordingly, it deemed the confession inadmissible and found that its introduction had not been harmless error. See *id.*, at *4–*5. Three justices dissented, finding *Michigan* v. *Jackson* to be distinguishable and concluding that respondent had made a valid unilateral waiver of his right to counsel before confessing. See 2000 WL, at *5–*13 (opinion of McCormick, P. J.).

The State sought review in this Court, and we granted certiorari to consider first whether the Sixth Amendment right to counsel extends to crimes that are "factually related" to those that have actually been charged, and second whether respondent made a valid unilateral waiver of that right in this case. 530 U. S. 1296 (2000). Because we answer the first question in the negative, we do not reach the second.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." In *McNeil* v. *Wisconsin,* 501 U. S. 171 (1991), we explained when this right arises:

> "The Sixth Amendment right [to counsel] . . . is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings– whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.*, at 175 (citations and internal quotation marks omitted).

Accordingly, we held that a defendant's statements regarding offenses for which he had not been charged were admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses. See *id.*, at 176.

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Some state courts and Federal Courts of Appeals, however, have read into *McNeil*'s offense-specific definition an exception for crimes that are "factually related" to a charged offense.[1] Several of these courts have interpreted *Brewer* v. *Williams*, 430 U. S. 387 (1977), and *Maine* v. *Moulton*, 474 U. S. 159 (1985)– both of which were decided well before *McNeil*– to support this view, which respondent now invites us to approve. We decline to do so.

In *Brewer*, a suspect in the abduction and murder of a 10-year-old girl had fled from the scene of the crime in Des Moines, Iowa, some 160 miles east to Davenport, Iowa, where he surrendered to police. An arrest warrant was issued in Des Moines on a charge of abduction, and the suspect was arraigned on that warrant before a Davenport judge. Des Moines police traveled to Davenport, took the man into custody, and began the drive back to Des Moines. Along the way, one of the officers persuaded the suspect to lead police to the victim's body. The suspect ultimately was convicted of the girl's murder. This Court upheld the federal habeas court's conclusion that police had violated the suspect's Sixth Amendment right to counsel. We held that the officer's comments to the suspect constituted interrogation and that the suspect had not validly waived his right to counsel by responding to the officer. See 430 U. S., at 405–406.

Respondent suggests that *Brewer* implicitly held that the right to counsel attached to the factually related murder when the suspect was arraigned on the abduction

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[1] See, *e.g.*, *United States* v. *Covarrubias*, 179 F. 3d 1219, 1223–1224 (CA9 1999); *United States* v. *Melgar*, 139 F. 3d 1005, 1013 (CA4 1998); *United States* v. *Doherty*, 126 F. 3d 769, 776 (CA6 1997); *United States* v. *Arnold*, 106 F. 3d 37, 41 (CA3 1997); *United States* v. *Williams*, 993 F. 2d 451, 457 (CA5 1993); *Commonwealth* v. *Rainwater*, 425 Mass. 540, 556, 681 N. E. 2d 1218, 1229 (1997); *In re Pack*, 616 A. 2d 1006, 1010–1011 (Pa. Super. 1992).

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charge. See Brief for Respondent 4. The Court's opinion, however, simply did not address the significance of the fact that the suspect had been arraigned only on the abduction charge, nor did the parties in any way argue this question. Constitutional rights are not defined by inferences from opinions which did not address the question at issue. Cf. *Hagans* v. *Lavine,* 415 U. S. 528, 535, n. 5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio,* this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us").

Moulton is similarly unhelpful to respondent. That case involved two individuals indicted for a series of thefts, one of whom had secretly agreed to cooperate with the police investigation of his codefendant, Moulton. At the suggestion of police, the informant recorded several telephone calls and one face-to-face conversation he had with Moulton during which the two discussed their criminal exploits and possible alibis. In the course of those conversations, Moulton made various incriminating statements regarding both the thefts for which he had been charged and additional crimes. In a superseding indictment, Moulton was charged with the original crimes as well as burglary, arson, and three additional thefts. At trial, the State introduced portions of the recorded face-to-face conversation, and Moulton ultimately was convicted of three of the originally charged thefts plus one count of burglary. Moulton appealed his convictions to the Supreme Judicial Court of Maine, arguing that introduction of the recorded conversation violated his Sixth Amendment right to counsel. That court agreed, holding:

> "Those statements may be admissible in the investigation or prosecution of charges for which, at the time the recordings were made, adversary proceedings had not yet commenced. But as to the charges for which

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> Moulton's right to counsel had already attached, his incriminating statements should have been ruled inadmissible at trial, given the circumstances in which they were acquired.'" 474 U. S., at 168 (quoting *State* v. *Moulton,* 481 A. 2d 155, 161 (1984)).

We affirmed.

Respondent contends that, in affirming reversal of both the theft and burglary charges, the *Moulton* Court must have concluded that Moulton's Sixth Amendment right to counsel attached to the burglary charge. See Brief for Respondent 13–14; see also Brief for the National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 22–23. But the *Moulton* Court did not address the question now before us, and to the extent *Moulton* spoke to the matter at all, it expressly referred to the offense-specific nature of the Sixth Amendment right to counsel:

> "The police have an interest in the thorough investigation of crimes for which *formal charges* have already been filed. They also have an interest in investigating new or additional crimes. Investigations of either type of crime may require surveillance of individuals already under indictment. Moreover, law enforcement officials investigating an individual suspected of committing one crime and *formally charged* with having committed another crime obviously seek to discover evidence useful at trial of either crime. In seeking evidence pertaining to *pending charges*, however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused. . . . On the other hand, to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activi-

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> ties." 474 U. S., at 179–180 (emphasis added; footnote omitted).

See also *id.*, at 168 ("[T]he purpose of their meeting was to discuss the *pending charges*"); *id.*, at 177 ("[T]he police knew . . . that Moulton and [the informant] were meeting for the express purpose of discussing the *pending charges* . . ." (emphasis added)). Thus, respondent's reliance on *Moulton* is misplaced and, in light of the language employed there and subsequently in *McNeil*, puzzling.

Respondent predicts that the offense-specific rule will prove "disastrous" to suspects' constitutional rights and will "permit law enforcement officers almost complete and total license to conduct unwanted and uncounseled interrogations." Brief for Respondent 8–9. Besides offering no evidence that such a parade of horribles has occurred in those jurisdictions that have not enlarged upon *McNeil*, he fails to appreciate the significance of two critical considerations. First, there can be no doubt that a suspect must be apprised of his rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation. See *Miranda* v. *Arizona*, 384 U. S., at 479; *Dickerson* v. *United States*, 530 U. S. 428, 435 (2000) (quoting *Miranda*). In the present case, police scrupulously followed *Miranda*'s dictates when questioning respondent.[2] Second, it is critical to

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[2] Curiously, while predicting disastrous consequences for the core values underlying the Sixth Amendment, see *post*, at 3–7 (opinion of BREYER, J.), the dissenters give short shrift to the Fifth Amendment's role (as expressed in *Miranda* and *Dickerson*) in protecting a defendant's right to consult with counsel before talking to police. Even though the Sixth Amendment right to counsel has not attached to uncharged offenses, defendants retain the ability under *Miranda* to refuse any police questioning, and, indeed, charged defendants presumably have met with counsel and have had the opportunity to discuss whether it is advisable to invoke those Fifth Amendment rights.

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recognize that the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses.

> "Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser. Admissions of guilt resulting from valid *Miranda* waivers are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'" *McNeil*, 501 U. S., at 181 (quoting *Moran* v. *Burbine*, 475 U. S. 412, 426 (1986)).

See also *Moulton, supra*, at 180 ("[T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at the time, would unnecessarily frustrate the public's interest in the investigation of criminal activities").

Although it is clear that the Sixth Amendment right to counsel attaches only to charged offenses, we have recog-

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Thus, in all but the rarest of cases, the Court's decision today will have no impact whatsoever upon a defendant's ability to protect his Sixth Amendment right.

It is also worth noting that, contrary to the dissent's suggestion, see *post*, at 1–2, 3, there is no "background principle" of our Sixth Amendment jurisprudence establishing that there may be no contact between a defendant and police without counsel present. The dissent would expand the Sixth Amendment right to the assistance of counsel in a criminal prosecution into a rule which " 'exists to prevent lawyers from taking advantage of uncounseled laypersons and to preserve the integrity of the lawyer-client relationship.'" *Post*, at 5 (quoting ABA Ann. Model Rule of Profesional Conduct 4.2 (4th ed. 1999)). Every profession is competent to define the standards of conduct for its members, but such standards are obviously not controlling in interpretation of constitutional provisions. The Sixth Amendment right to counsel is personal to the defendant and specific to the offense.

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SUPREME COURT OF THE UNITED STATES

No. 99–1702

TEXAS, PETITIONER *v.* RAYMOND LEVI COBB

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

[April 2, 2001]

JUSTICE KENNEDY, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring.

The Court's opinion is altogether sufficient to explain why the decision of the Texas Court of Criminal Appeals should be reversed for failure to recognize the offense-specific nature of the Sixth Amendment right to counsel. It seems advisable, however, to observe that the Court has reached its conclusion without the necessity to reaffirm or give approval to the decision in *Michigan* v. *Jackson,* 475 U. S. 625 (1986). This course is wise, in my view, for the underlying theory of *Jackson* seems questionable.

As the facts of the instant case well illustrate, it is difficult to understand the utility of a Sixth Amendment rule that operates to invalidate a confession given by the free choice of suspects who have received proper advice of their *Miranda* rights but waived them nonetheless. The *Miranda* rule, and the related preventative rule of *Edwards* v. *Arizona,* 451 U. S. 477 (1981), serve to protect a suspect's voluntary choice not to speak outside his lawyer's presence. The parallel rule announced in *Jackson*, however, supersedes the suspect's voluntary choice to speak with investigators. After *Jackson* had been decided, the Court made the following observation with respect to *Edwards*:

> 'Preserving the integrity of an accused's choice to communicate with police only through counsel is the

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> essence of *Edwards* and its progeny– not barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone. If an accused knowingly and intelligently' pursues the latter course, we see no reason why the uncounseled statements he then makes must be excluded at his trial." *Patterson* v. *Illinois,* 487 U. S. 285, 291 (1988).

There is little justification for not applying the same course of reasoning with equal force to the court-made preventative rule announced in *Jackson;* for *Jackson*, after all, was a wholesale importation of the *Edwards* rule into the Sixth Amendment.

In the instant case, Cobb at no time indicated to law enforcement authorities that he elected to remain silent about the double murder. By all indications, he made the voluntary choice to give his own account. Indeed, even now Cobb does not assert that he had no wish to speak at the time he confessed. While the *Edwards* rule operates to preserve the free choice of a suspect to remain silent, if *Jackson* were to apply it would override that choice.

There is further reason to doubt the wisdom of the *Jackson* holding. Neither *Miranda* nor *Edwards* enforces the Fifth Amendment right unless the suspect makes a clear and unambiguous assertion of the right to the presence of counsel during custodial interrogation. *Davis* v. *United States,* 512 U. S. 452, 459 (1994). Where a required *Miranda* warning has been given, a suspect's later confession, made outside counsel's presence, is suppressed to protect the Fifth Amendment right of silence only if a reasonable officer should have been certain that the suspect expressed the unequivocal election of the right.

The Sixth Amendment right to counsel attaches quite without reference to the suspect's choice to speak with investigators after a *Miranda* warning. It is the com-

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mencement of a formal prosecution, indicated by the initiation of adversary judicial proceedings, that marks the beginning of the Sixth Amendment right. See *ante,* at 4 (quoting *McNeil* v. *Wisconsin,* 501 U. S. 171, 175 (1991)). These events may be quite independent of the suspect's election to remain silent, the interest which the *Edwards* rule serves to protect with respect to *Miranda* and the Fifth Amendment, and it thus makes little sense for a protective rule to attach absent such an election by the suspect. We ought to question the wisdom of a judge-made preventative rule to protect a suspect's desire not to speak when it cannot be shown that he had that intent.

Even if *Jackson* is to remain good law, its protections should apply only where a suspect has made a clear and unambiguous assertion of the right not to speak outside the presence of counsel, the same clear election required under *Edwards*. Cobb made no such assertion here, yet JUSTICE BREYER's dissent rests upon the assumption that the *Jackson* rule should operate to exclude the confession no matter. There would be little justification for this extension of a rule that, even in a more limited application, rests on a doubtful rationale.

JUSTICE BREYER defends *Jackson* by arguing that, once a suspect has accepted counsel at the commencement of adversarial proceedings, he should not be forced to confront the police during interrogation without the assistance of counsel. See *post,* at 3–5 (dissenting opinion). But the acceptance of counsel at an arraignment or similar proceeding only begs the question: acceptance of counsel for what? It is quite unremarkable that a suspect might want the assistance of an expert in the law to guide him through hearings and trial, and the attendant complex legal matters that might arise, but nonetheless might choose to give on his own a forthright account of the events that occurred. A court-made rule that prevents a suspect from even making this choice serves little purpose,

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especially given the regime of *Miranda* and *Edwards*.

With these further remarks, I join in full the opinion of the Court.

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SUPREME COURT OF THE UNITED STATES

No. 99–1702

TEXAS, PETITIONER *v.* RAYMOND LEVI COBB

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

[April 2, 2001]

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

This case focuses upon the meaning of a single word, "offense," when it arises in the context of the Sixth Amendment. Several basic background principles define that context.

First, the Sixth Amendment right to counsel plays a central role in ensuring the fairness of criminal proceedings in our system of justice. See *Gideon* v. *Wainwright,* 372 U. S. 335, 344 (1963); *Powell* v. *Alabama,* 287 U. S. 45, 57 (1932).

Second, the right attaches when adversary proceedings, triggered by the government's formal accusation of a crime, begin. See *Brewer* v. *Williams,* 430 U. S. 387, 401 (1977); *Kirby* v. *Illinois,* 406 U. S. 682, 689 (1972); *Massiah* v. *United States,* 377 U. S. 201, 206 (1964).

Third, once this right attaches, law enforcement officials are required, in most circumstances, to deal with the defendant through counsel rather than directly, even if the defendant has waived his Fifth Amendment rights. See *Michigan* v. *Jackson,* 475 U. S. 625, 633, 636 (1986) (waiver of right to presence of counsel is assumed invalid unless accused initiates communication); *Maine* v. *Moulton,* 474 U. S. 159, 176 (1985) (Sixth Amendment gives defendant right "to rely on counsel as a 'medium' between him and the State"). Cf. ABA Model Rule of Professional Conduct

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jeopardy law, but police officers in the field, to navigate *Blockburger* when they question suspects. Cf. *New York* v. *Belton*, 453 U. S. 454, 458 (1981) (noting importance of clear rules to guide police behavior). Some will apply the test successfully; some will not. Legal challenges are inevitable. The result, I believe, will resemble not so much the Sargasso Sea as the criminal law equivalent of Milton's "Serbonian Bog . . . Where Armies whole have sunk."

There is, of course, an alternative. We can, and should, define "offense" in terms of the conduct that constitutes the crime that the offender committed on a particular occasion, including criminal acts that are "closely related to" or "inextricably intertwined with" the particular crime set forth in the charging instrument. This alternative is not perfect. The language used lacks the precision for which police officers may hope; and it requires lower courts to specify its meaning further as they apply it in individual cases. Yet virtually every lower court in the United States to consider the issue has defined "offense" in the Sixth Amendment context to encompass such closely related acts. See *ante*, at 5, n. 1 (majority opinion) (citing cases from the Third, Fourth, Fifth, Sixth, and Ninth Circuits as well as state courts in Massachusetts and Pennsylvania); *Taylor* v. *State*, 726 So. 2d 841, 845 (Fla. Ct. App. 1999); *People* v. *Clankie*, 124 Ill. 2d 456, 462–466, 530 N. E. 2d 448, 451–453 (1988); *State* v. *Tucker*, 137 N. J. 259, 277–278, 645 A. 2d 111, 120–121 (1994), cert. denied, 513 U. S. 1090 (1995). These courts have found offenses "closely related" where they involved the same victim, set of acts, evidence, or motivation. See, *e.g.*, *Taylor* v. *State*, *supra*, at 845 (stolen property charges and burglary); *State* v. *Tucker*, *supra*, at 278, 645 A. 2d, at 121 (burglary, robbery, and murder of home's occupant); *In re Pack*, 420 Pa. Super. 347, 355–356, 616 A. 2d 1006, 1010 (1992) (burglary, receiving stolen property, and theft charges), appeal denied, 535 Pa. 669, 634 A. 2d 1117 (1993). They have found offenses

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unrelated where time, location, or factual circumstances significantly separated the one from the other. See, *e.g.*, *Commonwealth* v. *Rainwater*, 425 Mass. 540, 547–549, and n. 7, 681 N. E. 2d 1218, 1224, and n. 7 (1997) (vehicle theft charge and earlier vehicle thefts in same area), cert. denied, 522 U. S. 1095 (1998); *Whittlesey* v. *State*, 340 Md. 30, 56–57, 665 A. 2d 223, 236 (1995) (murder and making false statements charges), cert. denied, 516 U. S. 1148 (1996); *People* v. *Dotson*, 214 Ill. App. 3d 637, 646, 574 N. E. 2d 143, 149 (murder and weapons charges), appeal denied, 141 Ill. 2d 549, 580 N. E. 2d 123 (1991).

One cannot say in favor of this commonly followed approach that it is perfectly clear– only that, because it comports with common sense, it is far easier to apply than that of the majority. One might add that, unlike the majority's test, it is consistent with this Court's assumptions in previous cases. See *Maine* v. *Moulton*, 474 U. S., at 162, 167, 180 (affirming reversal of both burglary and theft convictions); *Brewer* v. *Williams*, 430 U. S., at 389, 390, 393, 406 (affirming grant of habeas which vacated murder conviction). And, most importantly, the "closely related" test furthers, rather than undermines, the Sixth Amendment's "right to counsel," a right so necessary to the realization in practice of that most "noble ideal," a fair trial. *Gideon* v. *Wainwright*, 372 U. S., at 344.

The Texas Court of Criminal Appeals, following this commonly accepted approach, found that the charged burglary and the uncharged murders were "closely related." All occurred during a short period of time on the same day in the same basic location. The victims of the murders were also victims of the burglary. Cobb committed one of the murders in furtherance of the robbery, the other to cover up the crimes. The police, when questioning Cobb, knew that he already had a lawyer representing him on the burglary charges and had demonstrated their belief that this lawyer also represented Cobb in respect to

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the murders by asking his permission to question Cobb about the murders on previous occasions. The relatedness of the crimes is well illustrated by the impossibility of questioning Cobb about the murders without eliciting admissions about the burglary. See, *e.g.*, Tr. 157 (Feb. 19, 1997) (testimony by police officer who obtained murder confession) ("Basically what he told us is he had gone over to the house to burglarize it and nobody was home"); 22 Record, State's Exh. 20 (typed statement by Cobb) (admitting that he committed the murders after entering the house and stealing stereo parts). Nor, in my view, did Cobb waive his right to counsel. See *supra*, at 4–5. These considerations are sufficient. The police officers ought to have spoken to Cobb's counsel before questioning Cobb. I would affirm the decision of the Texas court.

Consequently, I dissent.

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4.2 (2001) (lawyer is generally prohibited from communicating with a person known to be represented by counsel "about the subject of the representation" without counsel's "consent"); Green, A Prosecutor's Communications with Defendants: What Are the Limits?, 24 Crim. L. Bull. 283, 284, and n. 5 (1988) (version of Model Rule 4.2 or its predecessor has been adopted by all 50 States).

Fourth, the particular aspect of the right here at issue– the rule that the police ordinarily must communicate with the defendant through counsel– has important limits. In particular, recognizing the need for law enforcement officials to investigate "new or additional crimes" not the subject of current proceedings, *Maine* v. *Moulton, supra,* at 179, this Court has made clear that the right to counsel does not attach to any and every crime that an accused may commit or have committed, see *McNeil* v. *Wisconsin,* 501 U. S. 171, 175–176 (1991). The right "cannot be invoked once for all future prosecutions," and it does not forbid "interrogation unrelated to the charge." *Id.,* at 175, 178. In a word, as this Court previously noted, the right is "offense specific." *Id.,* at 175.

This case focuses upon the last-mentioned principle, in particular upon the meaning of the words "offense specific." These words appear in this Court's Sixth Amendment case law, not in the Sixth Amendment's text. See U. S. Const., Amdt. 6 (guaranteeing right to counsel "[i]n all criminal prosecutions"). The definition of these words is not self-evident. Sometimes the term "offense" may refer to words that are written in a criminal statute; sometimes it may refer generally to a course of conduct in the world, aspects of which constitute the elements of one or more crimes; and sometimes it may refer, narrowly and technically, just to the conceptually severable aspects of the latter. This case requires us to determine whether an "offense"– for Sixth Amendment purposes– includes factually related aspects of a single course of conduct other

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than those few acts that make up the essential elements of the crime charged.

We should answer this question in light of the Sixth Amendment's basic objectives as set forth in this Court's case law. At the very least, we should answer it in a way that does not undermine those objectives. But the Court today decides that "offense" means the crime set forth within "the four corners of a charging instrument," along with other crimes that "would be considered the same offense" under the test established by *Blockburger* v. *United States,* 284 U. S. 299 (1932). *Ante*, at 9. In my view, this unnecessarily technical definition undermines Sixth Amendment protections while doing nothing to further effective law enforcement.

For one thing, the majority's rule, while leaving the Fifth Amendment's protections in place, threatens to diminish severely the additional protection that, under this Court's rulings, the Sixth Amendment provides when it grants the right to counsel to defendants who have been charged with a crime and insists that law enforcement officers thereafter communicate with them through that counsel. See, *e.g.*, *Michigan* v. *Jackson*, *supra*, at 632 (Sixth Amendment prevents police from questioning represented defendant through informants even when Fifth Amendment would not); *Rhode Island* v. *Innis,* 446 U. S. 291, 300, n. 4 (1980) (Fifth Amendment right, unlike Sixth, applies only in custodial interrogation).

JUSTICE KENNEDY, JUSTICE SCALIA, and JUSTICE THOMAS, if not the majority, apparently believe these protections constitutionally unimportant, for, in their view, "the underlying theory of *Jackson* seems questionable." *Ante*, at 1 (KENNEDY, J., concurring). Both the majority and concurring opinions suggest that a suspect's ability to invoke his Fifth Amendment right and "refuse any police questioning" offers that suspect adequate constitutional protection. *Ante*, at 8, n. 2 (majority opinion);

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see also *ante*, at 2–3 (KENNEDY, J., concurring). But that is not so.

Jackson focuses upon a suspect– perhaps a frightened or uneducated suspect– who, hesitant to rely upon his own unaided judgment in his dealings with the police, has invoked his constitutional right to legal assistance in such matters. See *Michigan* v. *Jackson*, 475 U. S., at 634, n. 7 ("The simple fact that [a] defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly") (quoting *People* v. *Bladel*, 421 Mich. 39, 63–64, 365 N. W. 2d 56, 67 (1984)). *Jackson* says that, once such a request has been made, the police may not simply throw that suspect– who does not trust his own unaided judgment– back upon his own devices by requiring him to rely for protection upon that same unaided judgment that he previously rejected as inadequate. In a word, the police may not force a suspect who has asked for legal counsel to make a critical legal choice without the legal assistance that he has requested and that the Constitution guarantees. See *McNeil* v. *Wisconsin*, *supra*, at 177 ("The purpose of the Sixth Amendment counsel guarantee . . . is to protec[t] the unaided layman at critical confrontations' with his expert adversary") (quoting *United States* v. *Gouveia*, 467 U. S. 180, 189 (1984)). The Constitution does not take away with one hand what it gives with the other. See *Gideon* v. *Wainwright*, 372 U. S., at 344 (Sixth Amendment means that a person charged with a crime need not "face his accusers without a lawyer to assist him"); *Michigan* v. *Jackson*, *supra*, at 633, 635 (presuming "that the defendant requests the lawyer's services at every critical stage of the prosecution" even if the defendant fails to invoke his Fifth Amendment rights at the time of interrogation); cf. *Edwards* v. *Arizona*, 451 U. S. 477, 484–485 (1981) (when accused has expressed desire to deal with police through counsel, police may not reinitiate interrogation until counsel has been

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made available); ABA Ann. Model Rule of Professional Conduct 4.2, p. 398, comment. (4th ed. 1999) ("Rule 4.2 . . . exists to prevent lawyers from taking advantage of uncounseled laypersons and to preserve the integrity of the lawyer-client relationship").

For these reasons, the Sixth Amendment right at issue is independent of the Fifth Amendment's protections; and the importance of this Sixth Amendment right has been repeatedly recognized in our cases. See, *e.g.*, *Michigan* v. *Jackson*, *supra*, at 636 ("We conclude that the assertion [of the right to counsel] is no less significant, and the need for additional safeguards no less clear, when the request for counsel is made at an arraignment and when the basis for the claim is the Sixth Amendment").

JUSTICE KENNEDY primarily relies upon *Patterson* v. *Illinois*, 487 U. S. 285 (1988), in support of his conclusion that *Jackson* is not good law. He quotes *Patterson*'s statement that the Constitution does " 'not ba[r] an accused from making an *initial* election as to whether' " to speak with the police without counsel's assistance. *Ante*, at 1–2 (quoting *Patterson* v. *Illinois*, *supra*, at 291).

This statement, however, cannot justify the overruling of *Jackson*. That is because, in *Patterson* itself, this Court noted, "as a matter of some significance," that, at the time he was interrogated, *the defendant had neither retained nor accepted the appointment of counsel*. 487 U. S., at 290, n. 3. We characterized our holding in *Jackson* as having depended upon "the fact that the accused ha[d] asked for the 'help of a lawyer' in dealing with the police," 487 U. S., at 291 (quoting *Michigan* v. *Jackson*, *supra*, at 631), and explained that, "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect," 487 U. S., at 290, n. 3 (citing *Maine* v. *Moulton*, 474 U. S., at 176).

JUSTICE KENNEDY also criticizes *Jackson* on the ground

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that it prevents a suspect "from . . . making th[e] choice" to "give . . . a forthright account of the events that occurred." *Ante*, at 3. But that is not so. A suspect may initiate communication with the police, thereby avoiding the risk that the police induced him to make, unaided, the kind of critical legal decision best made with the help of counsel, whom he has requested.

Unlike JUSTICE KENNEDY, the majority does not call *Jackson* itself into question. But the majority would undermine that case by significantly diminishing the Sixth Amendment protections that the case provides. That is because criminal codes are lengthy and highly detailed, often proliferating "overlapping and related statutory offenses" to the point where prosecutors can easily "spin out a startlingly numerous series of offenses from a single . . . criminal transaction." *Ashe* v. *Swenson*, 397 U. S. 436, 445, n. 10 (1970). Thus, an armed robber who reaches across a store counter, grabs the cashier, and demands "your money or your life," may through that single instance of conduct have committed several "offenses," in the majority's sense of the term, including armed robbery, assault, battery, trespass, use of a firearm to commit a felony, and perhaps possession of a firearm by a felon, as well. A person who is using and selling drugs on a single occasion might be guilty of possessing various drugs, conspiring to sell drugs, being under the influence of illegal drugs, possessing drug paraphernalia, possessing a gun in relation to the drug sale, and, depending upon circumstances, violating various gun laws as well. A protester blocking an entrance to a federal building might also be trespassing, failing to disperse, unlawfully assembling, and obstructing Government administration all at one and the same time.

The majority's rule permits law enforcement officials to question those charged with a crime without first approaching counsel, through the simple device of asking

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questions about any other related crime not actually charged in the indictment. Thus, the police could ask the individual charged with robbery about, say, the assault of the cashier not yet charged, or about any other uncharged offense (unless under *Blockburger*'s definition it counts as the "same crime"), all *without notifying counsel.* Indeed, the majority's rule would permit law enforcement officials to question anyone charged with any crime in any one of the examples just given about his or her conduct on the single relevant occasion without notifying counsel unless the prosecutor has charged every possible crime arising out of that same brief course of conduct. What Sixth Amendment sense– what common sense– does such a rule make? What is left of the "communicate through counsel" rule? The majority's approach is inconsistent with any common understanding of the scope of counsel's representation. It will undermine the lawyer's role as "'medium'" between the defendant and the government. *Maine* v. *Moulton, supra,* at 176. And it will, on a random basis, remove a significant portion of the protection that this Court has found inherent in the Sixth Amendment.

In fact, under the rule today announced by the majority, two of the seminal cases in our Sixth Amendment jurisprudence would have come out differently. In *Maine* v. *Moulton,* which the majority points out "expressly referred to the offense-specific nature of the Sixth Amendment right to counsel," *ante,* at 7, we treated burglary and theft as the same offense for Sixth Amendment purposes. Despite the opinion's clear statement that "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses," 474 U. S., at 180, n. 16, the Court affirmed the lower court's reversal of both burglary and theft charges even though, at the time that the incriminating statements at issue were made, Moulton had been charged only with theft by receiving, *id.*, at 162, 167, 180.

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Under the majority's rule, in contrast, because theft by receiving and burglary each required proof of a fact that the other did not, only Moulton's theft convictions should have been overturned. Compare Me. Rev. Stat. Ann., Tit. 17–A, §359 (1981) (theft) (requiring knowing receipt, retention, or disposal of stolen property with the intent to deprive the owner thereof), with §401 (burglary) (requiring entry of a structure without permission and with the intent to commit a crime).

In *Brewer* v. *Williams,* the effect of the majority's rule would have been even more dramatic. Because first-degree murder and child abduction each required proof of a fact not required by the other, and because at the time of the impermissible interrogation Williams had been charged only with abduction of a child, Williams' murder conviction should have remained undisturbed. See 430 U. S., at 390, 393–395, 406. Compare Iowa Code §690.2 (1950 and Supp. 1978) (first-degree murder) (requiring a killing) with Iowa Code §706.2 (1950) (repealed 1978) (child-stealing) (requiring proof that a child under 16 was taken with the intent to conceal the child from his or her parent or guardian). This is not to suggest that this Court has previously addressed and decided the question presented by this case. Rather, it is to point out that the Court's conception of the Sixth Amendment right at the time that *Moulton* and *Brewer* were decided naturally presumed that it extended to factually related but uncharged offenses.

At the same time, the majority's rule threatens the legal clarity necessary for effective law enforcement. That is because the majority, aware that the word "offense" ought to encompass something beyond "the four corners of the charging instrument," imports into Sixth Amendment law the definition of "offense" set forth in *Blockburger* v. *United States,* 284 U. S. 299 (1932), a case interpreting the Double Jeopardy Clause of the Fifth Amendment, which Clause uses the word "offence" but otherwise has no relevance

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here. Whatever Fifth Amendment virtues *Blockburger* may have, to import it into this Sixth Amendment context will work havoc.

In theory, the test says that two offenses are the "same offense" unless each requires proof of a fact that the other does not. See *ante*, at 9 (majority opinion). That means that most of the different crimes mentioned above are not the "same offense." Under many States' laws, for example, the statute defining assault and the statute defining robbery each requires proof of a fact that the other does not. Compare, *e.g.*, Cal. Penal Code Ann. §211 (West 1999) (robbery) (requiring taking of personal property of another) with §240 (assault) (requiring attempt to commit violent injury). Hence the extension of the definition of "offense" that is accomplished by the use of the *Blockburger* test does nothing to address the substantial concerns about the circumvention of the Sixth Amendment right that are raised by the majority's rule.

But, more to the point, the simple-sounding *Blockburger* test has proved extraordinarily difficult to administer in practice. Judges, lawyers, and law professors often disagree about how to apply it. See, *e.g.*, *United States* v. *Woodward*, 469 U. S. 105, 108 (1985) *(per curiam)* (holding that lower court misapplied *Blockburger* test). Compare *United States* v. *Dixon*, 509 U. S. 688, 697–700 (1993) (opinion of SCALIA, J.) (applying *Blockburger* and concluding that contempt is same offense as underlying substantive crime); with 509 U. S., at 716–720 (REHNQUIST, C. J., concurring in part and dissenting in part) (applying *Blockburger* and deciding that the two are separate offenses). The test has emerged as a tool in an area of our jurisprudence that THE CHIEF JUSTICE has described as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." *Albernaz* v. *United States*, 450 U. S. 333, 343 (1981). Yet the Court now asks, not the lawyers and judges who ordinarily work with double

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

March 19, 2001

MEMORANDUM FOR THE ATTORNEY GENERAL

From: RDC for Barbara D. Underwood
Acting Solicitor General

Subject: Weekly Report

I. Supreme Court Arguments

During the week of March 19, we are presenting oral arguments in the following cases:

1. *Kansas* v. *Colorado*, No. 105 (original), a case brought by the State of Kansas to enforce its rights under the Arkansas River Compact. In an earlier decision, the Supreme Court accepted the Special Master's recommendation that Colorado be held liable for violations of the Compact resulting from post-Compact well pumping in Colorado. After further proceedings, the Master issued a Report recommending that Kansas be awarded money damages for losses that occurred as a result of the violations, including aggregate losses to past and future Kansas water users, and that prejudgement interest be awarded on damages from 1969 to the present. Both Kansas and Colorado filed exceptions to the recommended remedy. We contend that the exceptions of Kansas and Colorado should be overruled because the recommended remedy falls within the Court's broad discretion to fashion a fair and equitable remedy for Colorado's violations of the Compact.

2. *C&L Enterprises, Inc.* v. *Citizen Potawatomi Nation*, No. 00-292, which presents the question whether and under what circumstances an Indian Tribe's agreement to arbitrate disputes arising out of a standard form contract entered into with a private party, and to have judgment entered upon the final arbitration award "in any court having jurisdiction thereof," constitutes a valid waiver of the Tribe's sovereign immunity from suit in state court. Substantial interests of the United States are involved in the case because of its special relationship with Indian Tribes, the interest in sound application of principles of foreign sovereign immunity upon which petitioner relies, and the need to ensure that arbitration agreements entered into by the federal government are not erroneously construed as waivers of sovereign immunity.

As *amicus curiae*, we argue that an arbitration clause in a standard form contract does not constitute an express and unequivocal consent to suit in state court, at least where the agreement is ambiguous regarding whether an enforcement action can be brought in tribal courts.

3. *Saucier* v. *Katz*, No. 99-1977. The case presents two questions: (1) whether, in a case alleging the use of constitutionally excessive force, the test for qualified immunity and the reasonableness test under the Fourth Amendment are identical, such that a finding of unreasonable force under the Fourth Amendment necessarily precludes qualified immunity; and (2) whether the court of appeals erred in concluding that petitioner's use of force to detain respondent, which consisted of carrying respondent from the crowd to a waiting van and pushing him inside without injuring him, so clearly exceeded the amount of force permitted by the Fourth Amendment as to warrant denial of qualified immunity. With respect to the first issue, we contend that the Fourth Amendment reasonableness test and the qualified immunity test are distinct. We contend that "objective reasonableness" is the standard for the Fourth Amendment merits inquiry, whereas the qualified immunity determination asks whether the officer's conduct was so obviously constitutionally excessive that no reasonable officer could have concluded otherwise. We note that because the merits inquiry is usually treated as a question of fact for the jury, equating it with the qualified immunity determination would effectively require the question of qualified immunity to be resolved at trial. This result undermines a critical function of qualified immunity—providing immunity from suit, not just from liability. With respect to the second issue, we argue that the minimal use of force that occurred here was not so clearly unlawful that no reasonable officer could have thought it to be lawful at the time.

4. *Timothy Booth* v. *C.O. Churner, et al.*, No. 99-1964. The question presented is whether a prison inmate suing prison officials for money damages is required by the Prison Litigation Reform Act of 1995 to exhaust prison administrative remedies that address the problem identified by the inmate, but that do not permit the recovery of money damages. The Court's decision in this case will affect the United States' interest in defending litigation against the Bureau of Prisons and in ensuring the efficacy of the Bureau's administrative remedy program. In *McCarthy* v. *Madigan*, 503 U.S. 140, 150 (1992), the Court construed a federal provision requiring inmates to exhaust such "plain, speedy, and effective remedies as are available" to excuse exhaustion when an inmate seeks only money damages and the prison's grievance procedure does not offer such relief. Congress subsequently eliminated the qualifying terms "plain, speedy, and effective," eliminated the requirement that administrative remedies must meet certain minimum acceptable standards of fairness and effectiveness, and eliminated a court's discretion to excuse the plaintiff's failure to exhaust when exhaustion would not be appropriate or in the interests of justice. We argue as *amicus curiae* that these changes reflect a judgment that inmates should exhaust all available remedies without regard to whether the administrative process provides for the recovery of the particular type of relief the inmate seeks.

5. *The Wharf (Holdings) Limited* v. *United International Holdings, Inc.*, No. 00-347. The case presents two questions: (1) whether an action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.10b-5, may be based on misrepresentations about a person's intention to sell securities; and (2) whether an action

under Section 10(b) and Rule 10b-5 may be based on misrepresentations made in connection with an oral contract to purchase or sell a security. With respect to the first question, we contend as *amicus curiae* that an action under Section 10(b) may be based on misrepresentations about a person's intention to sell securities because Section 10(b) covers "*any* manipulative or deceptive device or contrivance" and prohibits "*all* fraudulent schemes in connection with the purchase or sale of securities." Thus, the language of Section 10(b) does not limit the subject matter of the misrepresentation that may form the basis for liability. And misrepresentation of one's intention to perform a promise is a well recognized form of fraud. We argue that a misrepresentation of one's intention to sell a security is made "in connection with the purchase or sale of any security" because an option on a security is itself a security under the Act and a contract to purchase or sell a security is a purchase or sale of a security under the Act. We contend that restricting claims to misrepresentation about value would undermine the Act's purpose of ensuring honest securities markets and promoting full disclosure.

We contend that the second question is not properly before the Court because respondents' theory of liability and the court of appeals decision are premised on the completed sale of a security—the purchase of an option, which is itself a security under the Act. If the Court does address the question, we argue that Section 10(b) applies to an oral contract to sell a security because nothing in the Act suggests that contracts for the sale of securities must be in writing and oral contracts to sell securities are generally enforceable under the laws of all 50 States.

6. *Nevada v. Hicks*, No. 99-1994, in which a divided Ninth Circuit panel held that the Fallon Tribal Court had jurisdiction over civil rights and tort claims filed by a member of the Fallon Paiute-Shoshone Tribe against Nevada wildlife officials arising from the seizure of big-horn sheep's head trophies on allotted land within the Tribe's Reservation. The case presents two questions: (1) whether a tribal court may exercise adjudicatory jurisdiction over a suit brought by a tribal member against state officials in their personal capacities, where the suit arises out of the state officials' conduct on trust lands within the Tribe's reservation in the execution of a search warrant authorized by a tribal court; and (2) whether, when state officials sued in their personal capacities in tribal court invoke an immunity defense arising under federal law, the state officials must litigate the defense in tribal court before proceeding to federal court.

We argue as *amicus curiae* that the tribal court does have jurisdiction over the claims against petitioners, because the Court has recognized that "tribes retain considerable control"—both regulatory and adjudicatory—"over non-member conduct on tribal land" within a reservation, as well as authority over the conduct of nonmembers elsewhere within a reservation where that conduct involves "consensual relationships with the tribe or its members" or affects "the political integrity, the economic security, or the health or welfare of the tribe." We contend that here, that test is met. Petitioners entered into a consensual relationship with the Tribe because, in order to execute the warrants, they were required to, and did, obtain authorization from the tribal court. Furthermore, a Tribe's political integrity and welfare are threatened when state officials, invoking the Tribe's own authority, are alleged to have violated the rights of its members on its reservation.

We further argue that the tribal court should be afforded the initial opportunity to consider petitioners' federal defenses of qualified and official immunity. As the Court has recognized, exhaustion of tribal court procedures promotes tribal self-government, enables the tribal court to consider the limitations on its own authority, and avoids simultaneous litigation in federal court.

Finally, although the tribal court has jurisdiction over the claims against petitioners, they, like defendants in state court, should have an opportunity to obtain a federal forum for the adjudication of claims arising under federal law. Under 28 U.S.C. 1441, a state court defendant has a right to remove federal claims (and pendent state claims) to federal court. Here, a comparable result may be obtained by a federal court injunction against tribal court adjudication of the federal claims.

II. Supreme Court Filing

A. Brief on the Merits

1. *Idaho v. United States*, No. 00-189. The case presents the question whether the United States holds title, in trust for the Coeur d'Alene Tribe, to lands underlying portions of Coeur d'Alene Lake and the St. Joe River that are within the Coeur d'Alene Indian Reservation. The State of Idaho concedes that the 1873 Executive Order establishing the Coeur D'Alene Indian Reservation included submerged lands in the Reservation, so under *United States v. Alaska*, 521 U.S. 1 (1997), the only remaining question is whether, at the time of Idaho's admission to the Union, Congress clearly manifested its intent to defeat Idaho's title to these submerged lands. We contend that Congress did intend to withhold from Idaho title to the submerged lands because Congress intended to retain ownership of the entire Reservation that was set aside in the Executive action and was aware at the time of Idaho's statehood that the Reservation contained submerged lands. Also indicating that Congress intended to retain ownership of the submerged lands for the Tribe is the fact that retention of the submerged land was necessary to enable Congress to achieve its purposes in setting aside the Reservation: enabling tribal members to continue their fishing and other uses of the lake and associated rivers and preserving Congress's ability to bargain in good faith with the Tribe concerning possible cession of a portion of its Reservation. We also argue that Congress's requirement at the time that territories seeking statehood include in their proposed state constitutions a clause disclaiming state title to all land owned or held by Indian tribes further indicates that Congress intended to retain lands for the Tribe in Idaho.

Sylvia C. James v. USA

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

OA/NARA#: 1822/1740
9630

Box 56
Folder 6

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THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

DATE RECEIVED: 7/12/01

NAME OF CORRESPONDENT: Sylvia C. James

SUBJECT: James v. USA, POTUS, etc.

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	ACTION DATE M/D/YR	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED M/D/YR
	CUGONZ	A	7/12/01		C	
	Brett	A				

ACTION COMMENTS:

COMMENTS: file in general litigation files. → Brett

Brett Kavanaugh
6-7984

ADDITIONAL CORRESPONDENTS: MEDIA:

rec'd 7/10 Counsel's Office

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Sylvia C. James	]	1: 01CV487
Plaintiff	]	
Vs.	]	Affidavit
United States Government and	]	
President George Bush and	]	Exhibit E to Amendment
Attorney General John Ashcroft		
Defendants		

Plaintiff, being first duly sworn according to law, says:

Listed below is the additional relief sought in this complaint.

The way our capitalistic society is set up today where people have the right to make as much money as possible off another person amounts to slavery and that violates the Thirteenth Amendment. Thus, this must be changed.

We Black Americans need help. The American Government should pay Black America reparations for what we have had to endure. The American Government needs to compensate Black America for playing God over us for all of these centuries. The American Government needs to compensate Black America for teaching and forcing Blacks to work towards getting their rewards after death, rather than allowing us the necessities of life while we are living. The American Government needs to compensate Black America for denying us the necessities of life for all these centuries and forcing us to go hungry, live in indecent housing unfit for humans or animals, denying us health care, etc. The American Government needs to compensate Black America for singling us out as the Canaanites in the Bible for discriminatory inhumane treatment. The American Government must compensate Black America for giving Black America over to a depraved mind.

Black Americans should be given reparations but in part that must be given by making the necessities of life free to all.

I want my reward while I am living and can make use of it. The American Government has wronged me by enslaving and mistreating me and forcing me to act out the role of Jesus Christ while playing God over me and attempting to force me to work towards getting my reward after death. The American Government owes me big time. I hate the idea of a God, and I have been wronged by having the Government force the idea of a God and a higher power on me. I deserve 50 million dollars.

In the past, no value has been put on a person's right to have a good sex life. No value has been given to a person's right to enjoy consensual sex. Consensual sex has only been seen as immoral and wrong. Well, in order to teach the world that consensual sex is important and is something to be valued, I'm going to put a monetary value on it. I also deserve the 50 million dollars for being raped at the age of 18. In addition to deserving the money because I was raped, I deserve the money because consensual sex was not available to me at the time. I deserve the money because consensual sex was not available to me when I was a child growing up. I also deserve the money because consensual sex is not truly available to me now as an adult. For example, in North Carolina, there are several laws on the books against not only children, but against adults having consensual sex. The court does not need to hold a hearing to determine if I was raped because the court should know I was raped. That was the only sex available. Consensual sex was not available, and as I've just pointed out, it is not truly available now.

I am holding the Roman Catholic Church and the church in general as responsible for my being raped. In addition, I am holding all the governments who act out the role of God responsible. Since they are all working together, I see them as being responsible. I am also holding the state of North Carolina responsible. Although I deserve 50 million dollars, I am interested in the world sharing. I don't want all of that money. I just want what is reasonable in a sharing society. Also, I mainly want a change in our society. I am mainly interested in having all the governments change their laws whether they actually pay me or not. The one thing that separates me from most other rape victims is that I did not victimize myself by supporting the church and religion which supports rape.

In addition to paying reparations to Blacks, the American Government should make things right for all peoples who have been wronged. It is not

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only Black America, but also the poor, who are mostly required to act out the role of Jesus Christ.

It is in the interests of America to provide for everyone, not just for some. Deserving White Americans and people from other races must be paid reparations. Timothy McVeigh should be paid reparations. No one should be forgotten or considered unimportant. Everyone must be treated on an equal basis.

The whole world should share the world's wealth, and everyone throughout the world should have the right to the necessities of life.

The land and the resources of the earth should not be something that individual people own. These should be something that all people on earth make use of while they are alive. Today, people believe that because they pay for a house, they own it. They believe that because that is what is said. But that is not true. The minute they fail to pay taxes on their homes and land, the Government takes their home and land. Buying a home and having decent housing is a source of stress for the masses, no matter what people pay for their homes and no matter if they are buying or renting. People are under constant stress to make more and more money to pay for the necessities of life. People are under constant stress to cheat other people and make a profit on them. We need to eliminate that stress. We need a change. All people should have access to free housing and free utilities. However, unlike what I now have, people should not just have access to free housing, which is substandard. It should be decent housing. In order for all people to have true access to equal treatment, the necessities of life should be free to all people. It is not equal treatment if the poor do not have access to the same luxuries that the rich have. Such luxuries are a necessity in today's world.

Everyone should have the right to the necessities of life; the proper food, clothing, health protection including good health care, decent housing free from such things as rats and roaches, a telephone, a cellular phone, electricity, heat, air conditioning, water, indoor bathrooms, refrigerator, stove for cooking, microwave, washer and dryer, bed and other furniture, radio, television, cable TV, VCR, CD player, computer, computer printer, child care, maid/cleaning service, convenient transportation including a car of their own, spending money, the right and money to do fun things for entertainment such as go to the movies, clubs, go dancing, golfing, bowling, skating, go to the state fair, go to amusement parks, travel and go on

vacation, the right to a good sex life, the right to a good education including sex education, the right to have children or not, the right to abortion and other contraception, the right to feel safe, loved, important and special and the right to happiness, etc. We should have certain established human rights, which we are guaranteed.

Even though we need convenient public transportation, I find that there are times when I absolutely need a car, and I can't get around it. Thus, people need a car.

Also, people should have the right to have pets. A pet has to eat and a pet has other needs including health care needs. So included in our necessities of life should be costs for taking good care of pets such as dogs and cats. Many people think of pets such as dogs and cats as a part of the family. I do. People have spent centuries domesticating dogs and cats as part of the family, and it is not right to refuse to feed them when we can. When I see people refusing to feed animals such as lost and stray cats and dogs just for the hell of it, I see that as similar to refusing to feed people who are in need. That is wrong. Animals in general deserve rights also. Some people might say that if we include owning a pet as a necessity of life, then some people might get a dog or a cat to get extra money. But why should we care why they do it as long as long as they take good and humane care of the animal?

We need to legalize sex outside marriage. Adultery should not be a crime. People can choose to live with whomever they wish. Also, people can choose to have sex with only one person or with no one if that is their choice. But people can not own another person. Slavery is against the law. The institution of marriage violates the Thirteenth Amendment. Thus, we should get rid of the institution of marriage. People should not be led to believe that through marriage, they have the right to own another person. Also, since there is no God, all marriages are based on a lie anyway. In addition, it is impossible for two people to become one person. That is crazy. Thus, all current marriages should be declared null and void, and no more marriages should be allowed in the future. It should not be legal to take advantage of another person just because they give their consent. In addition, I find that much of the unhappiness in the world today is caused because people believe that they are supposed to find that one person who was meant for them, and thus they run into so much difficulty and heartache trying to find that one faithful person for them and trying to force that person to be faithful to them, when that is not natural.

Nudity should be legalized.

Children should be given rights including sexual rights just as adults.

We should get rid of holidays, which are dedicated to religion, war and superstition. I want the State and Federal Government to stop celebrating holidays such as Easter, Memorial Day, Veterans' Day, Thanksgiving and Christmas, etc., which are dedicated to religion, war and superstition. Government employees should be given other days off. Also the workweek should be shortened to give men and women more time to spend with their families and children and so that people can have more leisure time. If we are going to make family life top priority in this nation, we are going to have to make a serious cut in the workweek. I am not advocating shutting our businesses down. People need to share the work. We need to hire more people to do one job so that people don't have to work such long hours and so that a person can have more leisure time off and more personal time off. Eight hours a day for 5 days a week is too long. But the guards in the jail work from 6 a.m. to 6 p.m. and the next shift come in and work from 6 p.m. to 6 a.m. Guards can work like this for six days a week. Also, others such as bus drivers and nurses work extremely long hours. That is insane. That means they are slaves to the state or the city or to their jobs, and they can not possibly have a decent personal life.

In addition, we should not create meaningless, busy work just to keep people working and to give people something to do. The world has been built up. We can now afford to share the wealth. We can now afford to enjoy ourselves and have fun. We can afford to have some serious time off for leisure and for other person things. We do not have to keep enslaving ourselves with work.

Our criminal justice system should be humane and geared towards rehabilitation, not punishment and revenge. A person should not loose their rights just because they are charged with a crime or convicted of a crime. A person should not lose their citizenship just because they are suspected of a crime or convicted of a crime. Criminals and suspects should not be handcuffed. Police should not carry weapons. Guns and nuclear weapons must be removed from our society.

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The world should be seen as one society. It is so obvious that the different leaders of the different governments around the world act together as one. The different people in the different nations around the world should also have the opportunity to work together as one world. Our blockades must be removed from around the world, and we need to withdraw our armed forces from around the world. We don't want to keep alienating people and treating them wrong. We don't need a military, and we should not have one. War is murder and war is wrong.

Our obligations on earth are to the living, not to the dead. Our system should be changed to where we are worth more alive than we are dead. The dead should be disposed of, not preserved. We need to convert the ancient shrines, temples, mosques, tombs, churches, etc into market places, shops, shopping malls, shopping centers, banks, housing areas for the living, restaurants, libraries, massage parlors and/or other areas that can be truly used by the living. In America, many of our churches are down town and converting them into something that are useful such as shops, etc. would be perfect. Also, in America, many of our churches are located in rural areas, where converting churches to shops, banks, libraries, etc. would be quite helpful to the community. We need to start cremating all the dead. We should stop pretending that the dead are just resting and that they have any needs or power and that they are able to do anything further after their deaths.

A President should be chosen based on merit.

A President should have the right to make decisions as the need arises. No one can predict what they are going to do beforehand. Thus, I am asking for relief based on what I now see that we need.

This the 8 th day of June, 2001

Sylvia C James

Sylvia C. James, Plaintiff, Affiant

Sworn to and subscribed before
me this 8th day of June, 2001

Notary Public Victoria B Butts
My commission expires: Aug. 6, 2002

REV_00261052

CERTIFICATE OF SERVICE BY MAIL

Sylvia C. James	]	1: 01CV487
Plaintiff	]	
Vs.	]	
United States Government and	]	
President George Bush and	]	
Attorney General John Ashcroft		
Defendants		

The undersigned hereby certifies that on June 8, 2001 she served a copy of the attached Exhibit E to Amendment by placing said copy in a postpaid envelope addressed to the persons hereinafter named at the addresses stated below, which is the last known addresses, and by depositing said envelopes and contents in the United States Mail at Chapel Hill, North Carolina.

Addressees:

President George Bush
1600 Pennsylvania Ave NW
Washington DC 20500

John Ashcroft
Attorney General of the United States
U.S. Department of Justice, Room 5111
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Benjamin H. White, Jr. &
John W. Stone, Jr.
Office of United States Attorney
101 South Edgeworth St.
Greensboro, NC 27401

Timothy McVeigh
USP Terre Haute
Highway 63 South
Terre Haute, Indiana 47808

Sylvia C James

Sylvia C. James, Plaintiff

Counsel's Office, White House
Kavanaugh, Brett

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Linda.figura@do.treas.gov @ inet
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Carlos E. Bonilla/OPD/EOP@EOP
barbara.lucas@ost.dot.gov @ inet

REPORTS OF INSURERS' CLAIMS ESTIMATES (from BBC news 9/14)

Swiss Re	$1B
Munich Re	$900M
AIG	$500M
Zurich Financial	$400M
Axa	$300M-$400M
Scor	$150M-$200M
Chubb	$100M-$200M
CGNU	$51M
Berkshire Hathaway	3-5% of total loss
Lloyd's	"Substantial"

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Terrorism Insurance [Folder 3]

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Congressional Press Releases November 1, 2001, Thursday

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Congressional Press Releases

November 1, 2001, Thursday

SECTION: PRESS RELEASE

LENGTH: 800 words

HEADLINE: SENATE BANKING COMMITTEE LEADERS REACH AGREEMENT WITH ADMINISTRATION ON TERRORISM RISK INSURANCE LEGISLATION

BYLINE: PAUL S. **SARBANES,** SENATOR, SENATE

BODY:
:Thursday, November 1, 2001

SENATE BANKING COMMITTEE LEADERS REACH AGREEMENT WITH ADMINISTRATION ON TERRORISM RISK INSURANCE LEGISLATION

Senators Paul S. **Sarbanes** (D-Md), Phil Gramm (R-Tex), Chris **Dodd** (D-Conn), and Mike Enzi (R-Wyo) have reached agreement with the Administration on legislation to ensure the continued availability and affordability of terrorism risk insurance. The title of the legislation is the "Terrorism Risk Insurance Act of 2001."

"I am very pleased to announce this timely agreement," Senator **Sarbanes** said. "It represents a temporary, targeted, focused plan to allay uncertainties about the continuing availability of insurance at affordable prices. As we approach the end of the calendar year, when many policies are due to expire, it offers a responsible framework for proceeding with economic activities which are essential to the viability of our economy but which otherwise might not be possible." Senator Gramm commented, "I am pleased that of the various proposals that have been discussed, we have agreement on the one plan that provides no money to the insurance industry. Under our plan, we enter into a partnership with the industry to share the risk against insurance attacks, but all of the funds in the program would go directly to assist Americans who might become victims of terrorism. With this program, business in America can go on, without interruption from the terrorist threats."

"This measure - in short - can help seal cracks in our economic foundation that might occur in the event of future terrorist attacks," said Senator **Dodd.** "It acts as a 'homeland security' defense for our economy, and is definitely one 'policy' our nation should be willing to underwrite. I commend the Administration, Chairman **Sarbanes,** and Senators Gramm and Enzi for their leadership, and for everyone recognizing that this isn't about a single interest, but about our national interest."

"This bill represents a consensus between four members of the Senate Banking Committee with much different backgrounds and constituencies - This is not a compromise," said Sen. Enzi. "This legislation gives protection to taxpayers by forcing industry to be accountable for the first payments of any insurance claims and the bill also provides the proper federal

backstop to protect small businesses and our economy as a whole."

The Act is a direct response to the events of September 11th, which have raised urgent questions about the future availability and affordability of insurance for losses resulting from terrorist attacks. In the absence of such insurance, lenders could be reluctant to finance real estate purchases, construction, or business investments in plant and equipment. With the expiration of many existing insurance policies looming on January 1, 2002, significant economic disruption could occur at that time.

The Terrorism Risk Insurance Act of 2001 establishes the Terrorism Insured Loss Shared Compensation program within the Department of the Treasury. Under this program, the Federal government would share the risk of future terrorist attacks with the insurance industry for two years. The Secretary of the Treasury would have the authority to extend the program for one additional year. In order to participate in the program, an insurance company must offer terrorism coverage in all of its property/casualty policies.

State regulation of insurance companies would continue uninterrupted, except that the definition of a "terrorist act" would be established by the legislation. States would be required to allow rate changes to take effect immediately during the first year of the program.

Any claims for property damage, personal injury or death arising from a terrorist act that occurs while the program is in effect would be consolidated in a single Federal district court assigned by the Judicial Panel on Multidistrict Litigation, and **punitive damages** would not be available.

In each of the first year two years of the program, Federal cost- sharing would become available after total losses exceed $10 billion, and the Federal government would assume responsibility for 90% of losses between $10 billion and $100 billion. If losses exceed $100 billion, Congress would determine the appropriate mechanism for ensuring payment. If the program is extended for a third year, Federal cost-sharing would become available after total losses exceed $20 billion, with the Federal government again assuming 90% of the responsibility for losses up to $100 billion. The program would cover only those property/casualty losses arising from act of terrorism, with the Treasury Secretary, in concurrence with the Secretary of State and the Attorney General, certifying whether an event is a terrorist act.

LOAD-DATE: November 5, 2001

Source: News & Business > News > **News Group File, Most Recent Two Years** ⓘ
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McConnell

On page 29, strike line 1 and all that follows through page 30, line 17, and insert the following:

SEC. 10. PROCEDURES FOR CIVIL ACTIONS.

(a) **FEDERAL CAUSE OF ACTION.**--

(1) **IN GENERAL.**--There shall exist a Federal cause of action for claims arising out of or resulting from an act of terrorism, which shall be the exclusive cause of action and remedy for such claims, except as provided in subsection (f).

(2) **PREEMPTION OF STATE ACTIONS.**--All State causes of action of any kind for claims arising out of or resulting from an act of terrorism that are otherwise available under State law, are hereby preempted, except as provided in subsection (f).

(b) **GOVERNING LAW.**--The substantive law for decision in an action described in subsection (a)(1) shall be derived from the law, including applicable choice of law principles, of the State in which the act of terrorism giving rise to the action occurred, except to the extent that--

(1) the law, including choice of law principles, of another State is determined to be applicable to the action by the district court hearing the action; or

(2) otherwise applicable State law (including that determined under paragraph (1), is inconsistent with or otherwise preempted by Federal law.

(c) **FEDERAL JURISDICTION.**--

(1) **IN GENERAL.**--Notwithstanding any other provision of law, not later than 90 days after the date of the occurrence of an act of terrorism, the Judicial Panel on Multidistrict Litigation shall assign a single Federal district court to conduct pretrial and trial proceedings in all pending and future civil actions for claims arising out of or resulting from that act of terrorism.

(2) **SELECTION CRITERIA.**--The Judicial Panel on Multidistrict Litigation shall select and assign the district court under paragraph (1) based on the convenience of the parties and the just and efficient conduct of the proceedings.

(3) **JURISDICTION.**--The district court assigned by the Judicial Panel on Multidistrict Litigation shall have original and exclusive jurisdiction over all actions under paragraph (1). For purposes of personal jurisdiction, the district court assigned by the Judicial Panel on Multidistrict Litigation shall be deemed to sit in all judicial districts in the United States.

(4) **TRANSFER OF CASES FILED IN OTHER FEDERAL COURTS.**--Any civil action for claims arising out of or resulting from an act of terrorism that is filed in a Federal district court other than the Federal district court assigned by the Judicial Panel on Multidistrict Litigation under paragraph (1) shall be transferred to the Federal district court so assigned.

(5) **REMOVAL OF CASES FILED IN STATE COURTS.**--Any civil action for claims arising out of or resulting from an act of terrorism that is filed in a State court shall be removable to the Federal district court assigned by the Judicial Panel on Multidistrict Litigation under paragraph (1).

(d) **APPROVAL OF SETTLEMENTS.**--Any settlement between the parties of a civil action

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described in this section for claims arising out of or resulting from an act of terrorism shall be subject to prior approval by the Secretary after consultation by the Secretary with the Attorney General.

(e) **LIMITATION ON DAMAGES.**--

(1) **IN GENERAL.**--Punitive or exemplary damages shall not be available for any losses in any action described in subsection (a)(1), including any settlement described in subsection (d), except where--

(A) punitive or exemplary damages are permitted by applicable State law; and

(B) the harm to the plaintiff was caused by a criminal act or course of conduct for which the defendant was convicted under Federal or State criminal law, including a conviction based on a guilty pea or plea of nolo contendere.

(2) **PROTECTION OF TAXPAYER FUNDS.**--Any amounts awarded in, or granted in settlement of, an action described in subsection (a)(1) that are attributable to punitive or exemplary damages allowable under paragraph (1) of this subsection shall not count as insured losses for purposes of this Act.

(f) **CLAIMS AGAINST TERRORISTS.**--Nothing in this section shall in any way be construed to limit the ability of any plaintiff to seek

[Page: S5483] ***GPO's PDF***

any form of recovery from any person, government, or other entity that was a participant in, or aider and abettor of, any act of terrorism.

(g) **EFFECTIVE PERIOD.**--This section shall apply only to actions described in subsection (a)(1) arising out of or resulting from acts of terrorism that occur during the effective period of the Program, including any applicable extension period.

Mr. *McCONNELL*. Mr. President, this amendment replaces the liability section of the underlying bill with the liability section proposed in the compromise bill sponsored by Senator *Gramm* and myself.

The compromise has three principal elements. First, consolidation of all claims in a single Federal district court; second, approval of settlements by the Secretary of the Treasury; third, a ban on punitive damages, unless the defendant has been convicted of a criminal offense that is related to the plaintiff's injury.

The first two provisions should not spark any controversy. The proponents of the underlying bill themselves have agreed to Federal jurisdiction over these claims, and the approval of settlements by the Secretary of the Treasury simply protects the taxpayer dollars that will be exposed to potentially enormous lawsuits under this program. And since the underlying bill now--unlike an earlier version--prudently bans punitive damages against the Federal Treasury, this approval process ensures that a party does not attempt to casually circumvent that ban through a settlement.

So, again, this is a debate about whether we should expose American victims of terrorism to punitive damages--damages that heap additional punishment on American victims, even after the plaintiff has been fully compensated for his or her injuries.

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Counsel's Office, White House

Kavanaugh, Brett

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Bills and Other Statutes [EMPTY]

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Blocked Assets

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Kavanaugh, Brett

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Terrorism Insurance [Folder 3]:
Message

OA/NARA#: 1825/1743
9633

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Kevin Warsh
10/17/2002 09:59:16 AM

Record Type: Record

To: Scott McClellan/WHO/EOP@EOP, Claire E. Buchan/WHO/EOP@EOP

cc: See the distribution list at the bottom of this message
Subject: Final Draft of President's Statement -- Terrorism Insurance

Attached is final draft, subject to go-ahead from Leg Affairs later today.

Final draft statement Oct 17 2002.c

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release
October 17, 2002

STATEMENT BY THE PRESIDENT

The Congress today took an important step toward putting America's hard hats back on the job. The agreement reached by House and Senate conferees on terrorism insurance will help create new jobs for America's workers and billions in new investment.

I am pleased that the agreement provides a Federal backstop for costs associated with acts of terrorism, ensures meaningful industry participation in any losses resulting from terrorist acts, fully consolidates lawsuits in a single Federal court, and provides fair and certain resolution of claims. Although we significantly improved legal procedures to prevent abusive lawsuits against victims of terrorism, I am disappointed that we could not get agreement on even stronger measures to protect our economy. I urge the House and Senate to act quickly to get this bill to my desk.

Message Copied To:

Karl C. Rove/WHO/EOP@EOP
Daniel J. Bartlett/WHO/EOP@EOP
Stuart W. Bowen/WHO/EOP@EOP
Keith Hennessey/OPD/EOP@EOP
Brett M. Kavanaugh/WHO/EOP@EOP
Kristen Silverberg/WHO/EOP@EOP
Matthew Kirk/WHO/EOP@EOP
Brian C. Conklin/WHO/EOP@EOP
Kirk Blalock/WHO/EOP@EOP

October 17, 2002

To Members of the House Republican Leadership:

On behalf of the U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector and region, I write to urge you to support the proposed terrorism insurance compromise negotiated today and to explain why we strongly support the liability provisions of the proposed terrorism insurance compromise.

It is vital that the Congress pass this legislation before adjourning for the year. The economy has lost more than $15 billion and 300,000 jobs in the construction industry alone as a result of a lack of terrorism insurance coverage. We expect this legislation to provide a much needed boost to the economy, providing jobs to hundreds of thousands of workers across the country.

Although the U.S. Chamber would have preferred more extensive litigation management provisions, providing a federal cause of action and consolidation of claims has significant benefits:

- First, without this legislation, and the federal cause of action that it provides, businesses would have absolutely NO protection from predatory lawsuits that result from any future terrorist incident – they would still face forum shopping and multiple claims in state courts; courts known for rendering outrageous awards.
- Second, having these trials in federal court will provide consistent rulings, fair procedures for both plaintiffs and defendants, and provide for the use of relevant state laws that ban or otherwise limit the availability of punitive damages;
- Third, this legislation will prevent a "rush to the court-house," which would otherwise give early lawsuit filers an advantage over later claimants; and
- Fourth, the proposal represents an improvement over the Senate bill, which did not contain consolidation for trial purposes. This provision

will significantly reduce administrative and legal costs, reduce redundant, repetitive and costly discovery, and will enable both plaintiffs and defendants to deal with only one trial, rather than multiple trials with potentially inconsistent outcomes.

Of course, we would have preferred to improve the legal system even more, particularly with respect to punitive damages. However, these improvements are substantial, which will add some needed momentum to the economy and is far preferable to no improvements. Ultimately we believe that this bill will improve the legal rights of both plaintiffs and defendants and, importantly will help American workers and the economy.

Considering the negative impacts on the economy that doing nothing will entail, moving a bill that backstops reinsurers and provides for exclusive federal court jurisdiction and consolidation is preferable to a continued stalemate. In short, it is the U.S. Chamber's view that this proposed solution is preferable to no action and that it should be enacted into law.

Sincerely,

R. Bruce Josten

cc: Chairman James Sensenbrenner
Chairman Michael Oxley

Counsel's Office, White House

Kavanaugh, Brett

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be bifurcated. Initially, juries will be instructed to determine liability and the amount of compensatory damages, if any; also, the jury is to return a special verdict on the question whether a punitive damages award is warranted. If the jury answers yes to the punitive damages question, the trial will be resumed for the presentation of evidence and instructions relevant to the amount appropriate to award as punitive damages. After postverdict trial court review and subsequent appellate review, the amount of the final punitive damages judgment will be paid into the trial court. The trial court will then order payment of litigation expenses, including the plaintiff's attorney's fees, and instruct the clerk to divide the remainder equally between the plaintiff and the State General Fund. The provision for payment to the State General Fund is applicable to all judgments not yet satisfied, and therefore would apply to the judgment in Gore's case.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

For the reasons stated, I dissent from this Court's disturbance of the judgment the Alabama Supreme Court has made. **[***851]**

APPENDIX TO OPINION OF GINSBURG, J.

STATE LEGISLATIVE ACTIVITY REGARDING PUNITIVE DAMAGES

State legislatures have in the hopper or have enacted a variety of measures to curtail awards of punitive damages. At least one state legislature has prohibited punitive damages altogether, unless explicitly provided by statute. See N. H. Rev. Stat. Ann. § 507:16 (1994). We set out in this appendix some of the several controls enacted or under consideration in the States. The measures surveyed are: (1) caps on awards; (2) provisions for payment of sums to state agencies rather than to plaintiffs; and (3) mandatory bifurcated trials with separate proceedings for punitive damages determinations.

[*615] I. CAPS ON PUNITIVE DAMAGES AWARDS

* *Colorado* -- Colo. Rev. Stat. §§ 13-21-102(1)(a) and (3) (1987) (as a main rule, caps punitive damages at amount of actual damages).

* *Connecticut* -- Conn. Gen. Stat. § 52-240b (1995) (caps punitive damages at twice compensatory damages in products liability cases).

* *Delaware* -- H. R. 237, 138th Gen. Ass. (introduced May 17, 1995) (would cap punitive damages at greater of three times compensatory damages, or $ 250,000).

* *Florida* -- Fla. Stat. §§ 768.73(1)(a) and (b) (Supp. 1992) (in general, caps punitive damages at three times compensatory damages).

* *Georgia* -- Ga. Code Ann. § 51-12-5.1 (Supp. 1995) (caps punitive damages at $ 250,000 in some tort actions; prohibits multiple awards stemming from the same predicate conduct in products liability actions).

* *Illinois* -- H. 20, 89th Gen. Ass. 1995-1996 Reg. Sess. (enacted Mar. 9, 1995) (caps punitive damages at three times economic damages).

* *Indiana* -- H. 1741, 109th Reg. Sess. (enacted Apr. 26, 1995) (caps punitive damages at greater of three times compensatory damages, or $ 50,000).

* *Kansas* -- Kan. Stat. Ann. §§ 60-3701(e) and (f) (1994) (in general, caps punitive damages at lesser of defendant's annual gross income, or $ 5 million).

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* *Maryland* -- S. 187, 1995 Leg. Sess. (introduced Jan. 27, 1995) (in general, would cap punitive damages at four times compensatory damages).

* *Minnesota* -- S. 489, 79th Leg. Sess., 1995 Reg. Sess. (introduced Feb. 16, 1995) (would require reasonable relationship between compensatory and punitive damages).

* *Nevada* -- Nev. Rev. Stat. § 42.005(1) (1993) (caps punitive damages at three times compensatory damages if compensatory damages equal $ 100,000 or more, and at $ 300,000 if the compensatory damages are less than $ 100,000).

[*616] * *New Jersey* -- S. 1496, 206th Leg., 2d Ann. Sess. (1995) (caps punitive damages at greater of five times compensatory damages, or $ 350,000, in certain tort cases).

* *North Dakota* -- N. D. Cent. Code § 32-03.2-11(4) (Supp. 1995) (caps punitive damages **[**1619]** at greater of two times compensatory damages, or $ 250,000).

* *Oklahoma* -- Okla Stat., Tit. 23, §§ 9.1(B)-(D) (Supp. 1996) (caps punitive **[***852]** damages at greater of $ 100,000, or actual damages, if jury finds defendant guilty of reckless disregard; and at greatest of $ 500,000, twice actual damages, or the benefit accruing to defendant from the injury-causing conduct, if jury finds that defendant has acted intentionally and maliciously).

* *Texas* -- S. 25, 74th Reg. Sess. (enacted Apr. 20, 1995) (caps punitive damages at twice economic damages, plus up to $ 750,000 additional noneconomic damages).

* *Virginia* -- Va. Code Ann. § 8.01-38.1 (1992) (caps punitive damages at $ 350,000).

II. ALLOCATION OF PUNITIVE DAMAGES TO STATE AGENCIES

* *Arizona* -- H. R. 2279, 42d Leg., 1st Reg. Sess. (introduced Jan. 12, 1995) (would allocate punitive damages to a victims' assistance fund, in specified circumstances).

* *Florida* -- Fla. Stat. §§ 768.73(2)(a)-(b) (Supp. 1992) (allocates 35% of punitive damages to General Revenue Fund or Public Medical Assistance Trust Fund); see *Gordon* v. *State*, 585 So. 2d 1033, 1035-1038 (Fla. App. 1991), aff'd, 608 So. 2d 800 (Fla. 1992) (upholding provision against due process challenge).

* *Georgia* -- Ga. Code Ann. § 51-12-5.1(e)(2) (Supp. 1995) (allocates 75% of punitive damages, less a proportionate part of litigation costs, including counsel fees, to state treasury); see *Mack Trucks, Inc.* v. *Conkle*, 263 Ga. 539, 540-543, 436 S.E.2d 635, 637-639 (Ga. 1993) (upholding provision against constitutional challenge).

[*617] * *Illinois* -- Ill. Comp. Stat., ch. 735, § 5/2-1207 (1994) (permits court to apportion punitive damages among plaintiff, plaintiff's attorney, and Illinois Department of Rehabilitation Services).

* *Indiana* -- H. 1741, 109th Reg. Sess. (enacted Apr. 26, 1995) (subject to statutory exceptions, allocates 75% of punitive damages to a compensation fund for violent crime victims).

* *Iowa* -- Iowa Code § 668A.1(2)(b) (1987) (in described circumstances, allocates 75% of punitive damages, after payment of costs and counsel fees, to a civil reparations trust fund); see *Shepherd Components, Inc.* v. *Brice Petrides-Donohue & Assoc., Inc.*, 473 N.W.2d 612, 619 (Iowa 1991) (upholding provision against constitutional challenge).

* *Kansas* -- Kan. Stat. Ann. § 60-3402(e) (1994) (allocates 50% of punitive damages in

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medical malpractice cases to state treasury).

* *Missouri* -- Mo. Rev. Stat. § 537.675 (1994) (allocates 50% of punitive damages, after payment of expenses and counsel fees, to Tort Victims' Compensation Fund).

* *Montana* -- H. 71, 54th Leg. Sess. (introduced Jan. 2, 1995) (would allocate 48% of punitive damages to state university system and 12% to school for the deaf and blind).

* *New Jersey* -- S. 291, 206th Leg., 1994-1995 1st Reg. Sess. (introduced Jan. 18, 1994); A. 148, 206th Leg., 1994-1995 1st Reg. Sess. (introduced Jan. 11, 1994) (would allocate 75% of punitive damages to New Jersey Health Care Trust Fund).

* *New Mexico* -- H. 1017, 42d Leg., 1st Sess. (introduced Feb. 16, 1995) (would allocate punitive damages to Low-Income Attorney Services Fund).

* *Oregon* -- S. 482, 68th Leg. Ass. (enacted July 19, 1995) (amending **[***853]** Ore. Rev. Stat. §§ 18.540 and 30.925, and repealing Ore. Rev. Stat. § 41.315) (allocates 60% of punitive damages to Criminal Injuries Compensation Account).

[*618] * *Utah* -- Utah Code Ann. § 78-18-1(3) (1992) (allocates 50% of punitive damages in excess of $ 20,000 to state treasury).

III. MANDATORY BIFURCATION OF LIABILITY AND PUNITIVE DAMAGES DETERMINATIONS

* *California* -- Cal. Civ. Code Ann. § 3295(d) (West Supp. 1995) (requires bifurcation, on application of defendant, of liability and damages phases of trials in which punitive damages are requested).

* *Delaware* -- H. R. 237, 138th Gen. Ass. (introduced May 17, 1995) (would require, at **[**1620]** request of any party, a separate proceeding for determination of punitive damages).

* *Georgia* -- Ga. Code Ann. § 51-12-5.1(d) (Supp. 1995) (in all cases in which punitive damages are claimed, liability for punitive damages is tried first, then amount of punitive damages).

* *Illinois* -- H. 20, 89th Gen. Ass., 1995-1996 Reg. Sess. (enacted Mar. 9, 1995) (mandates, upon defendant's request, separate proceeding for determination of punitive damages).

* *Kansas* -- Kan. Stat. Ann. §§ 60-3701(a) and (b) (1994) (trier of fact determines defendant's liability for punitive damages, then court determines amount of such damages).

* *Missouri* -- Mo. Rev. Stat. §§ 510.263(1) and (3) (1994) (mandates bifurcated proceedings, on request of any party, for jury to determine first whether defendant is liable for punitive damages, then amount of punitive damages).

* *Montana* -- Mont. Code Ann. § 27-1-221(7) (1995) (upon finding defendant liable for punitive damages, jury determines the amount in separate proceeding).

* *Nevada* -- Nev. Rev. Stat. § 42.005(3) (1993) (if jury determines that punitive damages will be awarded, jury then determines amount in separate proceeding).

* *New Jersey* -- N. J. Stat. Ann. §§ 2A:58C-5(b) and (d) (West 1987) (mandates separate proceedings for determination of compensatory and punitive damages).

[*619] * *North Dakota* -- N. D. Cent. Code § 32-03.2-11(2) (Supp. 1995) (upon request of

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either party, trier of fact determines whether compensatory damages will be awarded before determining punitive damages liability and amount).

* *Oklahoma* -- Okla. Stat., Tit. 23, §§ 9.1(B)-(D) (Supp. 1995-1996) (requires separate jury proceedings for punitive damages); S. 443, 45th Leg., 1st Reg. Sess. (introduced Jan. 31, 1995) (would require courts to strike requests for punitive damages before trial, unless plaintiff presents *prima facie* evidence at least 30 days before trial to sustain such damages; provide for bifurcated jury trial on request of defendant; and permit punitive damages only if compensatory damages are awarded).

* *Virginia* -- H. 1070, 1994-1995 **[***854]** Reg. Sess. (introduced Jan. 25, 1994) (would require separate proceedings in which court determines that punitive damages are appropriate and trier of fact determines amount of punitive damages).

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THE WHITE HOUSE

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Counsel's Office, White House

Kavanaugh, Brett

Terrorism Insurance Backup File [1]

Subject Files

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REV_00261173

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1600 Pennsylvania Avenue, NW
Washington, DC 20500

Emily Willeford
10/09/2001 07:52:30 AM

Record Type: Record

To: Carol J. Thompson/WHO/EOP@EOP, Elizabeth N. Camp/WHO/EOP@EOP

cc:
Subject: final terrorism insurance memo

FYI for the 11 am meeting.
---------- Forwarded by Emily Willeford/OPD/EOP on 10/09/2001 07:51 AM ----------

D. Marcus Sumerlin 10/08/2001 04:02:59

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Emily Willeford/OPD/EOP@EOP, Eric H. Otto/OPD/EOP@EOP, Gary R. Edson/NSC/EOP@EOP
Subject: final terrorism insurance memo

Please find attached a final version of the terrorism insurance memo for your principal.

Thanks,

Marc



deputies insurance memo 10-08-01.d

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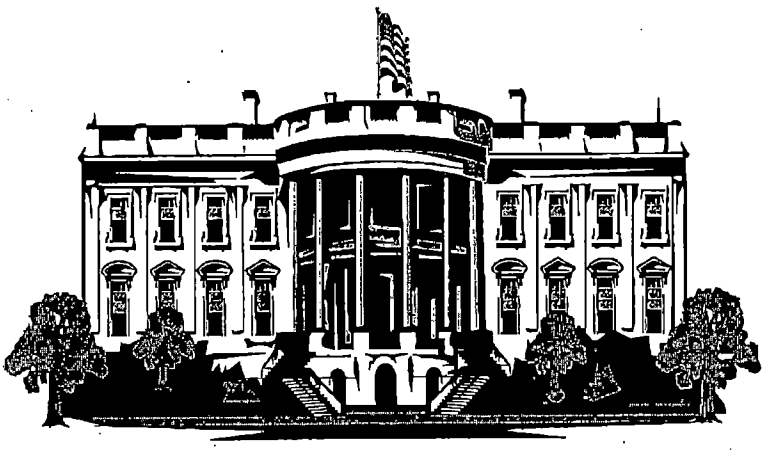

FAX COVER SHEET

EMILY WILLEFORD
NATIONAL ECONOMIC COUNCIL
THE WHITE HOUSE
WASHINGTON, DC 20502
PHONE: 202/456-5804 FAX: 202/456-0127

DATE: OCTOBER 10, 2001 NUMBER OF PAGES (INCL. COVER): 6
TO: BRETT KAVANAUGH

FAX: 61647

COMMENTS: FROM MARC SUMERLIN. THANK YOU.

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UNIFORM PRODUCT CODING MATRIX (DRAFTED 10/5/01)

Line of Business	Filing Code	Line of Insurance	Description	NAIC Annual Statement Line
Property			Coverage protecting the insured against loss or damage to real or personal property from a variety of perils, including—but not limited to—fire, lightening, business interruption, loss of rents, glass breakage, tornado, windstorm, hail, water damage, explosion, riot, civil commotion, rain, or damage from aircraft or vehicles.	
	1.010	Commercial	Property insurance coverage sold to commercial ventures.	01—02.1
	1.020	Personal	Property insurance coverage sold for personal, family or household purposes.	01—02.1
Crop			Coverage protecting the insured against loss or damage to crops from a variety of perils, including but not limited to fire, lightening, loss of revenue, tornado, windstorm, hail, flood, rain, or damage by insects.	
	2.010	Crop-Hail	All other crop or hail insurance products.	02.1
	2.020	Federally Reinsured	Crop insurance coverage that is either wholly or in part reinsured by the Federal Crop Insurance Corporation (FCIC) under the Standard Reinsurance Agreement (SRA). This includes the following products: Multiple Peril Crop Insurance (MPCI); Catastrophic Insurance, Crop Revenue Coverage (CRC); Income Protection and Revenue Assurance.	02.2
Flood			Coverage protecting the insured against loss or damage to real or personal property from flood. (Note: If coverage for flood is offered as an additional peril on a property insurance policy, file it under the applicable property insurance filing code.)	
	2.310	Commercial	Separate flood insurance policy sold to commercial ventures.	02.3
	2.320	Personal	Separate flood insurance policy sold for personal, family or household purposes.	02.3
Farmowners			A package policy for farming and ranching risks, similar to a homeowners policy, that has been developed for farms and ranches and includes both property and liability coverage for personal and business losses. Coverage includes farm dwellings and their contents, barns, stables, other farm structures and farm inland marine, such as mobile equipment and livestock.	
	3.010	Commercial	Farmowners insurance sold to commercial ventures.	03
	3.020	Personal	Farmowners insurance sold for personal, family or household purposes.	03
Homeowners			A package policy combining real and personal property coverage with personal liability coverage. Coverage applicable to the dwelling, appurtenant structures, unscheduled personal property and additional living expense are typical. Includes mobile homes at a fixed location.	
	4.010	Owner Occupied	Homeowners insurance sold to owners occupying the described property.	04
	4.020	Tenants	Homeowners insurance sold to tenants occupying the described property.	04
	4.030	Condos	Homeowners insurance sold to condominium owners occupying the described property.	04

REV_00261182

Line of Business	Filing Code	Line of Insurance	Description	NAIC Annual Statement Line
		Umbrella and Excess (Personal)	Non-business liability protection for individuals above a specific amount set forth in a basic policy issued by the primary insurer; or a self-insurer for losses over a stated amount; or an insured or self-insurer for known or unknown gaps in basic coverages or self-insured retentions.	
	17.221		Claims Made	17
	17.222		Occurrence	17
		Other	Other Liability not specifically described above.	
	17.231		Claims Made	17
	17.232		Occurrence	17
		Product Liability	Coverage for losses or injuries caused by defect or malfunction of the product.	
	18.010		Claims Made	18
	18.020		Occurrence	18
Auto Liability			Coverage that protects the insured against financial loss because of legal liability for motor vehicle related injuries, or damage to the property of others caused by accidents arising out of ownership, maintenance or use of a motor vehicle (including recreational vehicles).	
		Auto No-fault (Personal Injury Protection—PIP)	PIP that provides for the use of an automobile no-fault benefits in states that have enacted mandatory or optional no-fault automobile insurance coverages. PIP usually includes benefits for medical expenses, loss of work income, essential services, accidental death and funeral expenses.	
	19.011	Private Passenger		19.1
	19.012	Commercial		19.3
		Other Auto Liability	Auto liability coverage, other than personal injury protection, for all motor vehicles.	
	19.021	Private Passenger		19.2
	19.022	Commercial		19.4
Auto Physical Damage			Motor vehicle coverage (including collision, vandalism, fire and theft) that insures on a first party basis against material damage to the insured's vehicle.	
	21.110	Private Passenger	Auto physical damage coverage for motor vehicles that are used in connection with personal, family or household purposes.	21.1
	21.220	Commercial	Auto physical damage coverage for motor vehicles that are used in connection with a business, commercial establishments, or activities carried on for gain or profit.	21.2
Aircraft	22		Coverage for aircraft (hull) and their contents; aircraft owners' and aircraft manufacturers liability to passengers, airports and other third parties.	22
Fidelity	23		A bond covering an employer's loss resulting from an employee's dishonest act (e.g., loss of cash, securities, valuables, etc.)	23

REV_00261191

Line of Business	Filing Code	Line of Insurance	Description	NAIC Annual Statement Line
Surety	24		A three-party agreement where the insurer agrees to pay a second party (the obligee) or make complete an obligation in response to the default, acts, or omissions of a third party (the principal or obligor).	24
Burglary and Theft			Coverage for property taken or destroyed by break-in and entering the insured's premises; burglary or theft; forgery or counterfeiting; fraud; and off-premises exposure. Includes Fidelity and Surety coverage written as part of a Crime and Fidelity program.	
	26.010	Commercial	Burglary and theft coverage for commercial enterprises.	26
	26.020	Personal	Burglary and theft coverage for personal or household risks.	26
Boiler and Machinery	27		Coverage for the failure of boilers, machinery and other electrical equipment. Benefits include (i) property of the insured, which has been directly damaged by the accident; (ii) costs of temporary repairs and expediting expenses; and (iii) liability for damage to the property of others. Coverage also includes inspection of the equipment.	27
Credit			Coverage purchased by manufacturers, merchants, educational institutions, or other providers of goods and services extending credit, for indemnification of losses or damages resulting from the nonpayment of debts owed to them for goods or services provided in the normal course of their business.	
	28.010	Credit Personal Property	Insurance covering a creditor's security interest in such property when written in connection with a credit transaction that: (1). Covers perils to the goods purchased through a credit transaction or used as collateral for a credit transaction and that concerns a creditor's interest in the purchased goods or pledged collateral either in whole or in part; or (2). Covers perils to goods purchased in connection with an open-end credit transaction as specified in the NAIC Model Act on Credit Personal Property. NOTE: Credit life accident and health insurance products and credit unemployment insurance should be reported under this code.	28
	28.020	Single Interest	Credit personal property insurance covering only the seller's or creditor's interest in the goods purchased through the credit transaction or pledged as collateral in the credit transaction.	28
Other Lines of Business	33		Coverages not described under previous Lines of Insurance.	33
Title	34		Coverage that guarantees the validity of a title to real and personal property. Buyers of real and personal property and mortgage lenders rely upon the coverage to protect them against losses from undiscovered defects in existence when the policy is issued.	None
Interline Filings	35		A filing consisting of one or more forms, classification or territories that applies to more than one line of business (e.g., cancellation provisions; declarations page).	None

REV_00261192

Line of Business	Filing Code	Line of Insurance	Description	NAIC Annual Statement Line
	4.040	Mobile Homes	Homeowners insurance sold to owners occupying the described mobile home.	04
	4.050	Other	All other Homeowners insurance products.	04
Commercial Multiple Peril			The non-liability portion of a multiple peril policy for a commercial enterprise. The policy packages two or more insurance coverages protecting an enterprise from various property and liability risk exposures. Frequently includes fire, allied lines, various other coverages (e.g., difference in conditions) and liability coverage. Such coverages would be included in other annual statement lines, if written individually. Include under this line of business multi-peril policies (other than farmowners, homeowners and automobile policies) that include coverage for liability other than auto.	
		Commercial Package Policy	The CPP provides a broad package of property and liability coverages for commercial ventures other than those provided insurance through a businessowners policy. (The older special multi peril programs (SMP) also use this code.)	
	5.110		Non-Liability Portion	05.1
	5.120		Liability Portion	05.2
	5.210	Builders' Risk Policies	Typically written on a reporting or completed value form, this coverage insures against loss to buildings in the course of construction. The coverage also includes machinery and equipment used in the course of construction and to materials incidental to construction.	05.1
		Businessowners	The non-liability portion of a businessowners policy (BOP). The BOP provides a broad package of property and liability coverages for small and medium sized apartment buildings, offices, and retail stores.	
	5.310		Non-Liability Portion	05.1
	5.320		Liability Portion	05.2
	5.410	Manufacturers Output Policies	Provides broad form all risks coverage of personal property of an insured manufacturer that is located away from the premises of the manufacturer at the time of a claim.	05.1
		Other Package Policies	All other Commercial Multiple peril insurance products.	
	5.510		Non-Liability Portion	05.1
	5.520		Liability Portion	05.2
Mortgage Guaranty			Insurance that indemnifies a lender for loss upon foreclosure if a borrower fails to meet required mortgage payments.	
	6.010	MG-Fixed Rate Mortgages	The type of loan in which the interest rate will not change for the entire term of the loan.	06
	6.020	MG-Trust/Pools	Insure pools of loans secured by instruments constituting a first lien on real estate and evidenced by pass-through certificates or other instruments.	06
	6.030	MG-Variable Mortgages	The type of loan in which the interest rate may vary or float periodically throughout the term of the loan based on an interest rate index.	06

REV_00261183

Line of Business	Filing Code	Line of Insurance	Description	NAIC Annual Statement Line
Ocean Marine	8		Coverage for ocean and inland water transportation exposures; goods or cargoes; ships or hulls; earnings; and liability.	08
Inland Marine			Coverage for property that may be in transit, held by a bailee, at a fixed location, or movable goods that are often at different locations (e.g., off-road constructions equipment), or scheduled property (e.g., Homeowners Personal Property Floater) including items such as live animals, property with antique or collector's value, etc. These lines also include instrumentalities of transportation and communication, such as bridges, tunnels, piers, wharves, docks, pipelines, power and phone lines, and radio and television towers.	09
	9.010	Animal Mortality	Coverage that provides a death benefit to the owner of a policy in the event of the death of the insured livestock.	09
	9.020	Difference in Conditions (DIC)	DIC is a special form of open-peril coverage written in conjunction with basic fire coverage and designed to provide protection against losses not reimbursed under the standard fire forms.	09
	9.030	EDP Policies	Coverage to protect against losses arising out of damage to or destruction of electronic data processing equipment and its software.	09
	9.040	Pet Insurance Plans	Veterinary care plan insurance policy providing care for a pet animal (e.g., dog or cat) of the insured owner in the event of its illness or accident.	09
	9.050	Other Commercial Inland Marine	All other inland marine coverage that is sold to commercial ventures.	09
	9.060	Other Personal Inland Marine	All other inland marine coverage that is sold for personal, family or household purposes.	09
Financial Guaranty	10		A surety bond, insurance policy, or an indemnity contract (when issued by an insurer), or similar guaranty types under which loss is payable upon proof of occurrence of financial loss to an insured claimant, obligee or indemnitee as a result of failure to perform a financial obligation.	10
Medical Malpractice			Insurance coverage protecting a licensed health care provider or health care facility against legal liability resulting from the death or injury of any person due to the insured's misconduct, negligence, or incompetence, in rendering or failure to render professional services.	
		Acupuncture	Medical malpractice for acupuncture procedures.	
	11.110		Claims Made	11
	11.120		Occurrence	11
		Ambulance Services	Medical malpractice for a ambulance service.	
	11.210		Claims Made	11
	11.220		Occurrence	11

REV_00261184

Line of Business	Filing Code	Line of Insurance	Description	NAIC Annual Statement Line
		Chiropractic	Medical malpractice for a chiropractor.	
	11.310		Claims Made	11
	11.320		Occurrence	11
		Community Health Centers	Medical malpractice for a community health center.	
	11.410		Claims Made	11
	11.420		Occurrence	11
		Dental Hygienists	Medical malpractice for a dental hygienist.	
	11.510		Claims Made	11
	11.520		Occurrence	11
		Dentists – General Practice	Medical malpractice for a general practice dentist.	
	11.610		Claims Made	11
	11.620		Occurrence	11
		Dentists – Oral Surgeons	Medical malpractice for a oral surgeon dentist.	
	11.710		Claims Made	11
	11.720		Occurrence	11
		Home Care Service Agencies	Medical malpractice for a home care service agency.	
	11.810		Claims Made	11
	11.820		Occurrence	11
		Hospitals	Medical malpractice for a hospital.	
	11.910		Claims Made	11
	11.920		Occurrence	11
		Licensed Practical Nurses	Medical malpractice for a licensed practical nurse.	
	11.101		Claims Made	11
	11.102		Occurrence	11
		Nurse Anesthetists	Medical malpractice for a nurse anesthetist.	
	11.111		Claims Made	11
	11.112		Occurrence	11
		Nurse Midwife	Medical malpractice for a nurse midwife.	
	11.121		Claims Made	11
	11.122		Occurrence	11
		Nurse Practitioners	Medical malpractice for a nurse practitioner.	
	11.131		Claims Made	11
	11.132		Occurrence	11
		Nursing Homes	Medical malpractice for a nursing home.	
	11.141		Claims Made	11
	11.142		Occurrence	11

REV_00261185

Line of Business	Filing Code	Line of Insurance	Description	NAIC Annual Statement Line
		Occupational Therapy	Medical malpractice for a occupational therapist.	
	11.151		Claims Made	11
	11.152		Occurrence	11
		Ophthalmic Dispensing	Medical malpractice for ophthalmic dispensing.	
	11.161		Claims Made	11
	11.162		Occurrence	11
		Optometry	Medical malpractice for an optometrist.	
	11.171		Claims Made	11
	11.172		Occurrence	11
		Osteopathy	Medical malpractice for a osteopathic physician.	
	11.181		Claims Made	11
	11.182		Occurrence	11
		Pharmacy	Medical malpractice for a pharmacist.	
	11.191		Claims Made	11
	11.192		Occurrence	11
		Physical Therapy	Medical malpractice for a physical therapist.	
	11.201		Claims Made	11
	11.202		Occurrence	11
		Physicians & Surgeons	Medical malpractice for a physician or surgeon.	
	11.211		Claims Made	11
	11.212		Occurrence	11
		Physicians Assistants	Medical malpractice for a physicians assistant.	
	11.221		Claims Made	11
	11.222		Occurrence	11
		Podiatry	Medical Malpractice for a podiatrist.	
	11.231		Claims Made	11
	11.231		Occurrence	11
		Private Duty Nurses	Medical malpractice for a private duty nurse.	
	11.241		Claims Made	11
	11.242		Occurrence	11
		Psychology	Medical malpractice for a psychologist.	
	11.251		Claims Made	11
	11.252		Occurrence	11
		Registered Nurses	Medical malpractice for a registered nurse.	
	11.261		Claims Made	11
	11.262		Occurrence	11

REV_00261186

Line of Business	Filing Code	Line of Insurance	Description	NAIC Annual Statement Line
		Speech Pathology	Medical malpractice for a speech pathologist.	
	11.271		Claims Made	11
	11.272		Occurrence	11
		Other	Medical malpractice not specifically described above.	
	11.281		Claims Made	11
	11.282		Occurrence	11
Earthquake			Property coverage for losses resulting from a sudden trembling or shaking of the earth, including that caused by volcanic eruption.	
	12.010	Commercial	Earthquake property coverage for commercial ventures.	12
	12.020	Personal	Earthquake property coverage for personal, family or household purposes.	12
Workers' Compensation			Insurance that covers an employer's liability for injuries, disability or death to persons in their employment, without regard to fault, as prescribed by state or federal workers' compensation laws and other statutes. Includes employer's liability coverage.	
	16.010	Alternative Workers' compensation	Other than standard workers' compensation coverage, employer's liability and excess workers' compensation(e.g., large deductible, managed care).	16
	16.020	Employers Liability	Employers liability coverage for the legal liability of employers arising out of injuries to employees. This code should be used when coverage is issued as an endorsement, or as part of a statutory workers' compensation policy. When coverage is issued as a stand-alone policy, or as an endorsement a package policy, the appropriate "Other Liability" code should be used (i.e., 17.101 or 17.102).	16
	16.030	Excess Workers' Compensation	Either specific and/or aggregate excess workers' compensation insurance written above an attachment point or self-insured retention.	33
	16.040	Standard Workers' Compensation	Insurance that covers an employer's liability for injuries, disability or death to persons in their employment, without regard to fault, as prescribed by state or federal workers' compensation laws and includes within the basic policy employer's liability coverage.	16
Other Liability			Coverage protecting the insured against legal liability resulting from negligence, carelessness, or a failure to act resulting in property damage or personal injury to others.	
		Commercial General Liability	Flexible & broad commercial liability coverage with two major sub-lines: premises/operations sub-line and products/completed operations sub-line.	
	17.011		Claims Made	17
	17.012		Occurrence	17

REV_00261187

Line of Business	Filing Code	Line of Insurance	Description	NAIC Annual Statement Line
		Completed Operations	Policies provided to contractors covering liability to persons who have incurred bodily injury or property damage from defective work or operations completed or abandoned by or for the insured, away from the insured's premises.	
	17.021		Claims Made	17
	17.022		Occurrence	17
		Comprehensive Personal Liability	Comprehensive liability coverage for exposures arising out of the residence premises and activities of individuals and family members. (Non-business liability exposure protection for individuals.)	
	17.031		Claims Made	17
	17.032		Occurrence	17
		Contractual Liability	Liability coverage of an insured who has assumed the legal liability of another party by written or oral contract.	
	17.041		Claims Made	17
	17.042		Occurrence	17
		Day Care Centers	Liability coverage for day care centers.	
	17.051		Claims Made	17
	17.052		Occurrence	17
		Directors & Officers Liability	Liability coverage protecting directors or officers of a corporation from liability arising out of the performance of their professional duties on behalf of the corporation.	
	17.061		Claims Made	17
	17.062		Occurrence	17
		Elevators and Escalators Liability	Liability coverage for bodily injury or property damage arising from the use of elevators or escalators operated, maintained or controlled by the insured.	
	17.071		Claims Made	17
	17.072		Occurrence	17
		Employment Practices Liability	Liability protection for an employer providing personal injury coverage arising out of employment-related practices, personnel policies, acts, or omissions. Examples of claims such policies respond to are refusal to employ, termination, coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, and discrimination.	
	17.081		Claims Made	17
	17.082		Occurrence	17

REV_00261188

Line of Business	Filing Code	Line of Insurance	Description	NAIC Annual Statement Line
		Employee Benefit Liability	Liability protection for an employer for claims arising from provisions in an employee benefit insurance plan provided for the economic and social welfare of employees. Examples of items covered are pension plans, group life insurance, group health insurance, group disability income insurance, and accidental death and dismemberment.	
	17.091		Claims Made	17
	17.092		Occurrence	17
		Employers Liability	Employers liability coverage for the legal liability of employers arising out of injuries to employees. This code should be used when coverage is issued as a stand-alone policy, or as an endorsement to a package policy. When this coverage is issued as an endorsement to a statutory workers' compensation policy, the appropriate "Workers' Compensation" code should be used (i.e., Code 16.020).	
	17.101		Claims Made	17
	17.102		Occurrence	17
		Environmental Pollution Liability	Liability coverage of an insured to persons who have incurred bodily injury or property damage from acids, fumes, smoke, toxic chemicals, waste materials or other pollutants.	
	17.121		Claims Made	17
	17.122		Occurrence	17
		Fire Legal Liability	Coverage for property loss liability as the result of separate negligent acts and/or omissions of the insured that allows a spreading fire to cause bodily injury or property damage of others. An example is a tenant who, while occupying another party's property, through negligence causes fire damage to the property.	
	17.131		Claims Made	17
	17.132		Occurrence	17
		Kidnap & Ransom Liability	Liability coverage up to specific limits for payments demanded by kidnappers for the release of an insured held against his or her will.	
	17.141		Claims Made	17
	17.142		Occurrence	17
		Liquor Liability	Coverage for the liability of an entity involved in the retail or wholesale sales of alcoholic beverages, or the serving of alcoholic beverages, to persons who have incurred bodily injury or property damage arising from an intoxicated person.	
	17.151		Claims Made	17
	17.152		Occurrence	17

REV_00261189

Line of Business	Filing Code	Line of Insurance	Description	NAIC Annual Statement Line
		Municipal Liability	Liability coverage for the acts of a municipality.	
	17.161		Claims Made	17
	17.162		Occurrence	17
		Nuclear Energy Liability	Coverage for bodily injury and property damage liability resulting from the nuclear energy material (whether or not radioactive) on the insured business's premises or in transit.	
	17.171		Claims Made	17
	17.172		Occurrence	17
		Personal Injury Liability	Coverage for the liability of an insured for injury to persons, other than bodily injury. Examples include discrimination, falsely arrest, illegal detainment, libel, malicious prosecution, slander, suffering mental anguish, and violation of privacy rights.	
	17.181		Claims Made	17
	17.182		Occurrence	17
		Premises and Operations (OL&T and M&C)	Policies covering the liability of an insured to persons who have incurred bodily injury or property damage on an insured's premises during normal operations or routine maintenance, or from an insured's business operations either on or off of the insured's premises.	
	17.191		Claims Made	17
	17.192		Occurrence	17
		Professional Errors and Omissions Liability	Coverage available to pay for liability arising out of the performance of professional or business related duties, with coverage being tailored to the needs of the specific profession. Examples include abstracters, accountants, insurance adjusters, architects, engineers, insurance agents and brokers, lawyers, real estate agents, stockbrokers.	
	17.201		Claims Made	17
	17.202		Occurrence	17
		Umbrella and Excess (Commercial)	Coverage for the liability of a commercial venture above a specific amount set forth in a basic policy issued by the primary insurer; or a self-insurer for losses over a stated amount; or an insured or self-insurer for known or unknown gaps in basic coverages or self-insured retentions. Note: Does not include excess workers' compensation insurance.	
	17.211		Claims Made	17
	17.212		Occurrence	17

REV_00261190

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Monday October 15 4:14 PM ET

Bush. Admin. Presents Insurance Plan

By MARCY GORDON, AP Business Writer

WASHINGTON (AP) - The Bush administration offered up a plan Monday to help insurance companies withstand a future terrorism shock while keeping the government out of the insurance business.

The proposal would split between the government and the insurance industry the costs property claims from future terror attacks. Taxpayers would pick up 80 percent of the first $20 billion in costs next year and insurers the rest. The government's share of costs would decrease gradually through 2004 and end after that, senior administration officials told reporters, speaking on condition of anonymity.

U.S. insurance companies that write policies protecting property could face payments of $30 billion to $50 billion for the Sept. 11 attacks in New York and northern Virginia, the biggest insured loss ever. Major reinsurance companies, which assume part of the risk covered by insurance firms, have said they won't renew terrorism coverage after Dec. 31, when many contracts expire and must be renewed.

The administration's plan is being presented as an alternative to legislation drafted by lawmakers and supported by the insurance industry, which would create a government-backed insurance industry pool to cover future terrorism losses. The industry-supported measure is modeled after a government-guaranteed insurance pool, funded by the industry, established in Britain in response to attacks by the Irish Republican Army. If insurance losses were to exceed the amount in the pool, the government would cover the difference.

That proposal is too complex and would put the government in the position of directly regulating the insurance industry and possibly rates charged for coverage, administration officials said. American insurance companies are regulated by the states in which they do business, without federal intervention.

Gretchen Schaefer, a spokeswoman for the American Insurance Association, said the trade group is eager to see details of the White House proposal and would not comment on it beforehand.

Rep. Michael Oxley, R-Ohio, chairman of the House Financial Services Committee, likewise had no immediate comment, his spokeswoman, Peggy Peterson, said.

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A spokesman for Sen. Paul Sarbanes, D-Md., head of the Senate Banking Committee, didn't immediately return a telephone call seeking comment.

The administration plan would put a $100 billion cap on the Treasury's liability for terror claims. If losses were higher, the Treasury secretary would ask Congress for guidance.

Under the White House proposal, the insurance industry's maximum costs would be $12 billion next year, $23 billion in 2003 and $36 billion in 2004.

Also:

-Next year, the government would pay 90 percent of claims exceeding $20 billion.

-In 2003, taxpayers would pick up all the first $10 billion in costs. An amount over $10 billion but equal to or less than $20 billion would be split evenly between the government and the industry. The government would pay 90 percent of costs over $20 billion.

-In 2004, the industry would cover all the first $20 billion. An amount over $20 billion but equal to or less than $40 billion would be evenly split, while the government would pay 90 percent of costs exceeding $40 billion.

-

On the Net: American Insurance Association: http://www.aiadc.org

Treasury Department: http://www.ustreas.gov

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Questions or Comments

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FACSIMILE TRANSMISSION COVER LETTER

To:	Brett Cavanaugh	**From:**	Matt Webb
Fax:	(202) 456-1647	**Pages:**	5 (including cover)
Phone:		**Date:**	October 10, 2001
Re:	Article & Editorial on Sep. 11th Litigation	**CC:**	

☐ **Urgent** **X For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

● **Comments:**

Brett –

Attached please find a copy of an article that ran in today's NY Times discussing the split in ATLA over whether to sue or not about the September 11th attacks as well as an editorial from today's Wall Street Journal on the same subject.

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DRAFT – OCTOBER 9, 2001

107TH CONGRESS
1ST SESSION

H.R. _____

To ensure swift and fair compensation for the victims of the terrorist attacks of September 11, 2001, to ensure that the terrorists and other culpable parties will be held legally liable for their actions, to prevent further economic harm to innocent bystanders to these events, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

A BILL

To ensure swift and fair compensation for the victims of the terrorist attacks of September 11, 2001, to ensure that the terrorists and other culpable parties will be held legally liable for their actions, to prevent further economic harm to innocent bystanders to these events, and for other purposes.

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

SECTION 1. SHORT TITLE

(a) SHORT TITLE. – This Act may be cited as the "September 11, 2001 Victim Compensation Act".

(b) REFERENCE. – Whenever in this Act, reference is made to a section or other provision, the reference shall be considered to be made to a section of the Air Transportation Safety and System Stabilization Act (P.L. 107-42).

contingency fees in connection with the assertion of a claim under this section that exceed:

(1) the amount of costs and reasonable expert witness fees incurred in prosecuting the claim; and

(2) a reasonable attorney fee.

In this subsection, a reasonable attorney fee shall be a fee based on the actual time spent and the reasonable expenses of an attorney incurred in providing legal services in connection with the prosecution of a claim under this section."

SECTION 10. SMALL BUSINESS RELIEF

(a) IN GENERAL. – There is hereby authorized to be appropriated $500,000,000 to the Small Business Administration to establish a September 11th Small Business Relief Fund. The purpose of the fund is to provide direct relief to small businesses, as defined in 15 U.S.C. § 632(a)(1), that have been directly affected by the terrorist attacks of September 11, 2001.

(b) Within 30 days of the date when this Act shall take effect, the Administrator shall publish eligibility guidelines consistent with this Act and the procedures under which the relief fund shall be administered. In establishing eligibility requirements and administrative procedures, the Administrator shall give priority to businesses located in close proximity of the site of the terrorist attacks that occurred on September 11, 2001.

(c) The Administrator shall begin accepting applications for the relief fund immediately upon publication of the eligibility guidelines and administrative procedures. /Not later than 21 days after the date on which an application is filed, the Administrator shall complete a review, make a determination and

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provide written notice to the applicant with respect to the application Such a determination shall be final and not subject to judicial review.

SECTION 11. FEDERAL CAUSE OF ACTION FOR DAMAGES RELATED TO FURTHER ACTS OF TERRORISM.

(a) DEFINITIONS. -- In this section, the following definitions apply:

(1) ACT OF TERRORISM. – The term "act of terrorism" means activity that –

(A) involves a violent act or an act dangerous to human life that is in violation of the criminal laws of the United States or of any state, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; and

(B) appears to be intended –

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by assassination or kidnapping.

(2) COLLATERAL SOURCE. – The term "collateral source" means all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to acts of terrorism.

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(3) ECONOMIC LOSS. – The term "economic loss" means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable state law.

(4) NONECONOMIC LOSS. – The term "noneconomic loss" means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.

(5) PROPERTY DAMAGE. – The term "property damage" means physical injury to or destruction of tangible or intangible property, or loss of tangible or intangible property that has not been physically injured or destroyed but has been evacuated, withdrawn from use or rendered inaccessible as a direct result of an act of terrorism.

(b) EXCLUSIVE FEDERAL CAUSE OF ACTION FOR DAMAGES. – There shall exist a Federal cause of action for damages arising out of, resulting from or related to any act of terrorism occurring on or after September 12, 2001. Notwithstanding section 40120(c) of title 49, United States Code, this cause of action shall be the exclusive remedy for damages arising out of, resulting from or relating to acts of terrorism occurring on or after September 12, 2001.

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(c) COGNIZABLE CLAIMS. – This cause of action shall be limited to –

(1) claims for breach of contract;

(2) claims for negligence or gross negligence to the extent that such claims seek relief for physical injury or death;

(3) claims for negligence or gross negligence to the extent that such claims seek relief for property damage; and

(4) claims for fraud to the extent that such claims are based on allegations of intentional affirmative misrepresentations.

(d) JURISDICTION. – The United States district courts shall have exclusive and original jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) arising out of, resulting from or relating to an act of terrorism committed on or after November 12, 2001. The judicial panel on multidistrict litigation, established by section 1407 of title 28, United States Code, shall transfer all claims arising out of, resulting from or relating to a particular act of terrorism to a single district court for both pretrial purposes and trial.

(e) SUBSTANTIVE LAW. – The substantive law for decision in any such suit shall be as follows:

(1) For a breach of contract claim or a fraud claim, the substantive law for decision shall be derived in accordance with the choice of law principles of the State of the district court designated by the multidistrict litigation panel pursuant to subsection (d).

REV_00261208

(2) For a negligence or gross negligence claim, the substantive law for decision shall be derived exclusively from the law of negligence of the State in which the act of terrorism occurred, unless such law is inconsistent with or preempted by Federal law.

(f) REMEDIES. –

(1) The remedies for breach of contract claims or fraud claims shall be governed by applicable state law.

(2) The remedies for negligence claims or gross negligence claims shall be as follows:

(A) Any individual or entity asserting negligence or gross negligence claims for physical injury or death shall be entitled to seek only economic and noneconomic losses.

(B) The liability of each defendant for economic losses resulting from gross negligence shall be joint and several among defendants.

(C) The liability of each defendant for economic losses resulting from negligence or intentional fraud shall be several only and shall not be joint. Each defendant shall be liable only for the amount of economic losses allocated to the defendant in direct proportion to the percentage of responsibility of the defendant for the harm to the claimant.

(D) The liability of each defendant for noneconomic losses resulting from negligence claims or gross negligence claims shall be several only and shall not be joint. Each defendant shall be

liable only for the amount of noneconomic losses allocated to the defendant in direct proportion to the percentage of responsibility of the defendant for the harm to the claimant.

(E) Any individual or entity asserting negligence or gross negligence claims for property damage shall be entitled to seek only the replacement cost of such property.

(F) The liability of each defendant for property damage losses shall be several only and shall not be joint. Each defendant shall be liable only for the amount of property damage losses allocated to the defendant in direct proportion to the percentage of responsibility of the defendant for the harm to the claimant.

(G) Neither punitive damages nor any other form of relief not specified in this subsection shall be recoverable under this cause of action.

(H) Any judgment awarded to an individual or entity under this subsection shall not include interest prior to judgment.

(I) Any judgment awarded to an individual or entity under this subsection shall be reduced by the amount of collateral source compensation the individual or entity has received or is entitled to receive as a result of an act of terrorism.

(g) REASONABLE ATTORNEY FEES. – In no event shall any attorney charge, demand, receive or collect contingency

fees in connection with the assertion of a claim under this section that exceed:

(1) the amount of costs and reasonable expert witness fees incurred in prosecuting the claim; and

(2) a reasonable attorney fee.

In this subsection, a reasonable attorney fee shall be a fee based on the actual time spent and the reasonable expenses of an attorney incurred in providing legal services in connection with the prosecution of a claim under this section.

(h) LIMITATIONS PERIOD. – A negligence claim or a gross negligence claim under this section must be commenced within one year. This period shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier, if the physical injury or property damage was caused by latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within the property.

(i) EXCLUSION FOR RECOVERY AGAINST TERRORISTS. – Nothing in this section shall in any way limit the ability of any individual or entity to seek any form of recovery from any person, entity or government alleged to be a knowing participant in any act of terrorism, or to limit the liability of such a person.

SECTION 12. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect on the date of the enactment of this Act, and shall apply to any claim (or cause of action) resulting from or relating to the

terrorist attacks of September 11, 2001 or any act of terrorism occurring on or after September 12, 2001.

Tuesday, October 09, 2001 (5:00 pm)

REV_00261212

SECTION 2. FINDINGS AND PURPOSES

(a) FINDINGS. – The Congress finds as follows:

(1) In the wake of the tragic terrorist attacks of September 11, 2001, we as a Nation must give the highest priority to providing full, fair and swift compensation to those individuals, family members, and businesses most seriously harmed.

(2) Virtually every individual and business in the country suffered as a result of the terrorist attacks of September 11, 2001 – many citizens were put out of work, countless businesses were closed or otherwise disrupted, and the lives of all Americans were disrupted in countless ways.

(3) At a time when national unity should be our paramount concern, it is important to minimize court battles amongst our citizens related to the terrorist attacks of September 11, 2001, and to minimize the damage that these attacks have wrought on our nation's economy.

(4) Although numerous programs are being implemented by the Federal Emergency Management Administration, the Small Business Administration and various state and local agencies to assist small businesses that were affected by the terrorist attacks, Congress recognizes that additional help is necessary for those small businesses that were directly and most severely affected by the terrorist attacks and their aftermath.

REV_00261197

(b) PURPOSES – The purposes of this Act are:

(1) To ensure swift, full and fair compensation for those who suffered personal injury, death, or property damage as a result of the terrorist attacks.

(2) To ensure that our civil justice system does not punish Americans for the evil acts of terrorists or further their goal of crippling the U.S. economy.

(3) To assist all victims of the terrorist attacks in their efforts to seek recovery from anyone who knowingly participated in a conspiracy to perpetrate the attacks.

(4) To assist small businesses that were most directly and severely affected by the terrorist attacks.

SECTION 3. REGISTRATION AND RECORDATION OF AIRCRAFT

Section 201 is amended by inserting the following at the end:

"(f) LIMITATION ON LIABILITY. – Section 44112(b) of such title is amended by inserting at the beginning "Notwithstanding any federal or state statute, regulation, or judicial interpretation to the contrary,".

SECTION 4. DEFINITIONS

Section 402 is amended –

(a) By redesignating subsection (8) as subsection (9); and

(b) By inserting after subsection (7) the following:

"(8) PROPERTY DAMAGE. – The term "property damage" means physical injury to or destruction of tangible or intangible property, or loss of tangible or intangible property that has not

been physically injured or destroyed but has been evacuated, withdrawn from use or rendered inaccessible as a direct result of the terrorist attacks of September 11, 2001.

SECTION 5. PURPOSE

Section 403 is amended by inserting the following after "2001":

"and to provide for a fair, orderly and expeditious process for the resolution of all claims arising out of those crashes".

SECTION 6. LIMITATION ON CIVIL ACTION

Section 405(c)(3)(B)(i) is amended by striking "Federal or State".

SECTION 7. FEDERAL CAUSE OF ACTION FOR DAMAGES

(a) Section 408 is amended –

(1) by striking "(a) IN GENERAL. –".

(2) by redesignating the heading of subsection (b) as "SEC. 409. – FEDERAL CAUSE OF ACTION FOR DAMAGES".

(3) by striking subsection (c).

(4) by redesignating paragraphs (1) and (2) as subsections (a) and (c) respectively, and by striking paragraph (3).

(5) by amending the redesignated subsection (a) by inserting "resulting from or relating to" directly after "arising out of" in each place it appears.

(6) by inserting the following after the redesignated subsection (a):

"(b) COGNIZABLE CLAIMS. – This cause of action shall be limited to –

(1) claims for breach of contract;

(2) claims for negligence or gross negligence to the extent that such claims seek relief for physical injury or death;

(3) claims for negligence or gross negligence to the extent that such claims seek relief for property damage; and

(4) claims for fraud to the extent that such claims are based on allegations of intentional affirmative misrepresentations.".

(7) by amending the redesignated subsection (c) to read as follows:

"(c) SUBSTANTIVE LAW. – The substantive law for decision in any such suit shall be as follows:

(1) For a breach of contract claim or a fraud claim, the substantive law for decision shall be derived in accordance with the choice of law principles of the State of New York.

(2) For a negligence or gross negligence claim, the substantive law for decision shall be derived exclusively from the law of negligence of the State in which the crash occurred, unless such law is inconsistent with or preempted by Federal law.".

(8) by inserting after the redesignated subsection (c) the following:

"(d) REMEDIES. –

(1) The remedies for breach of contract claims or fraud claims shall be governed by applicable state law.

(2) The remedies for negligence claims or gross negligence claims shall be as follows:

(A) Any individual or entity asserting negligence or gross negligence claims for physical injury or death shall be entitled to seek only economic and noneconomic losses (as defined in Section 402).

(B) The liability of each defendant for economic losses resulting from gross negligence shall be joint and several among the defendants responsible for such gross negligence.

(C) The liability of each defendant for economic losses resulting from negligence or intentional fraud shall be several only and shall not be joint. Each defendant shall be liable only for the amount of economic losses allocated to the defendant in direct proportion to the percentage of responsibility of the defendant for the harm to the claimant.

(D) The liability of each defendant for noneconomic losses resulting from negligence claims or gross negligence claims shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic losses allocated to the defendant in

direct proportion to the percentage of responsibility of the defendant for the harm to the claimant.

(E) Any individual or entity asserting negligence or gross negligence claims for property damage (as defined in Section 402) shall be entitled to seek only the replacement cost of such property.

(F) The liability of each defendant for property damage losses shall be several only and shall not be joint. Each defendant shall be liable only for the amount of property damage losses allocated to the defendant in direct proportion to the percentage of responsibility of the defendant for the harm to the claimant.

(G) Neither punitive damages nor any other form of relief not specified in this subsection shall be recoverable under this cause of action.

(H) Any judgment awarded to an individual or entity under this subsection shall not include interest prior to judgment.

(I) Any judgment awarded to an individual or entity under this subsection shall be reduced by the amount of collateral source compensation the individual or entity has received or is entitled to receive as a result of the terrorist attacks of September 11, 2001.

"(e) REPORT TO CONGRESS. – Within eighteen months after the enactment of the "September 11,

2001 Victim Compensation Act," the United States District Court for the Southern District of New York shall provide Congress with a report describing the number and nature of the claims brought under this section and the aggregate amount of compensation being sought by all claimants. On the basis of that report, Congress shall promptly take whatever action is determined to be necessary (including approval of appropriate compensation plans and appropriation of funds) to ensure that individuals and entities receive full compensation for legitimate claims and to ensure that the liability regarding such claims is not borne primarily by persons not involved in the perpetration of terrorist attacks. There is hereby authorized to be appropriated sufficient funds for the United States District Court for the Southern District of New York to create this report.

"(f) LIMITATIONS PERIOD. – A negligence claim or a gross negligence claim under this section must be commenced within one year. This period shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier, if the physical injury or property damage was caused by latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within the property.

"(g) EXCLUSION FOR RECOVERY AGAINST TERRORISTS. – Nothing in this section shall in any way limit the ability of any individual or entity to

seek any form of recovery from any person, entity or government alleged to be a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act, or to limit the liability of such a person".

(b) Section 409 is amended by redesignating the section as Section 410.

SECTION 8. JURISDICTION

The Air Transportation Safety and System Stabilization Act (P.L. 107-42) is amended by inserting the following new Section after Section 410:

"SEC. 411. ORIGINAL AND EXCLUSIVE JURISDICTION FOR ALL CIVIL ACTIONS.

"The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) arising out of, resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001. For purposes of personal jurisdiction, the United States District Court for the Southern District of New York shall be deemed to sit in all judicial districts in the United States."

SECTION 9. REASONABLE ATTORNEY'S FEES

The Air Transportation Safety and System Stabilization Act (P.L. 107-42) is amended by inserting the following new Section after Section 411:

"SEC. 412. REASONABLE ATTORNEY'S FEES.

(a) REASONABLE ATTORNEY FEES. – In no event shall any attorney charge, demand, receive or collect

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FACSIMILE TRANSMISSION COVER LETTER

To:	Brett Cavanaugh	**From:**	Jim Wootton
Fax:	(202) 456-1647	**Pages:**	14 (including cover)
Phone:		**Date:**	October 4, 2001
Re:	Airline Liability Bill Expansion	**CC:**	

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- **Comments:**

Brett –

Attached is a draft copy of the revised airline liability bill that would provide additional liability protections to the other elements of the business community. We have also attached a summary of the draft. This is very much a work in progress and the coalition we have put together has not signed-off on this yet (we are meeting tomorrow afternoon). Just wanted you to see the direction in which we are heading.

THE INFORMATION IN THIS FACSIMILE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL TO WHOM IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED AND CONFIDENTIAL. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS FACSIMILE IN ERROR, PLEASE NOTIFY THE ABOVE REFERENCED SENDER IMMEDIATELY AT (202) 463-5724.

DRAFT 10/4/2001

107TH CONGRESS
1ST SESSION

H.R. _____

IN THE HOUSE OF REPRESENTATIVES

A BILL

To ensure swift and fair compensation for the victims of the terrorist attacks of September 11, 2001, to hold the terrorists legally liable for their actions, to prevent further economic harm to innocent bystanders to these events, and for other purposes.

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

SECTION 1. SHORT TITLE

(a) SHORT TITLE. – This Act may be cited as the "September 11, 2001 Victim Compensation Act".

(b) REFERENCE. – Whenever in this Act, reference is made to a section or other provision, the reference shall be considered to be made to a section of the Air Transportation Safety and System Stabilization Act (P.L. 107-42).

SECTION 2. FINDINGS AND PURPOSES

(a) FINDINGS. – The Congress finds as follows:

(1) In the wake of the tragic terrorist attacks of September 11, 2001, we as a Nation must give the highest priority to providing full, fair and swift compensation to those individuals, family members, and businesses who were most seriously harmed.

(2) Virtually every individual and business in the country suffered as a result of the terrorist attacks of September 11, 2001 – many citizens were put out of work, countless businesses were closed or otherwise disrupted, and the lives of all Americans were disrupted in countless ways.

(3) At a time when national unity should be our paramount concern, it is important to minimize court battles amongst our citizens related to the terrorist attacks of September 11, 2001, and to minimize the damage that these attacks have wrought on our nation's economy.

(4) Although numerous programs are being implemented by the Federal Emergency Management Administration, the Small Business Administration and various state and local agencies to assist small businesses that were affected by the terrorist attacks, Congress recognizes that additional help is necessary for those small businesses that were directly and most severely affected by the terrorist attacks and their aftermath.

(b) PURPOSES – The purposes of this Act are:

(1) To ensure swift, full and fair compensation for those who suffered personal injury, death, or property damage as a result of the terrorist attacks.

(2) To ensure that our civil justice system does not punish Americans for the evil acts of terrorists or further their goal of crippling the U.S. economy.

(3) To assist all victims of the terrorist attacks in their efforts to seek recovery from anyone who knowingly participated in a conspiracy to perpetrate the attacks.

(4) To preserve the ability of all insured individuals and entities to recover under their insurance policies for business interruption and other damages they may have sustained as a result of the attacks.

(5) To assist small businesses that were most directly and severely affected by the terrorist attacks.

SECTION 3. REGISTRATION AND RECORDATION OF AIRCRAFT

Section 201 is amended by inserting the following at the end:

"(f) LIMITATION ON LIABILITY. – Section 44112(b) of such title is amended by inserting at the beginning "Notwithstanding any federal or state statute, regulation, or judicial interpretation to the contrary,".

SECTION 4. DEFINITIONS

Section 402 is amended –

(a) By redesignating subsection (8) as subsection (9); and

(b) By inserting after subsection (7) the following:

"(8) PROPERTY DAMAGE. – The term "property damage" means physical injury to or destruction of tangible or intangible property, or loss of tangible or intangible property that has not been physically injured or destroyed but has been evacuated,

REV_00261216

withdrawn from use or rendered inaccessible as a direct result of the terrorist attacks of September 11, 2001".

SECTION 5. PURPOSE

Section 403 is amended by inserting the following after "2001":

"and to provide for a fair, orderly and expeditious process for the resolution of all claims arising out of those crashes".

SECTION 6. LIMITATION ON CIVIL ACTION

Section 405(c)(3)(B)(i) is amended by striking "Federal or State".

SECTION 7. FEDERAL CAUSE OF ACTION FOR DAMAGES

(a) Section 408 is amended –

(1) by striking "(a)" and "IN GENERAL".

(2) by redesignating the heading of subsection (b) as "Sec. 409. – FEDERAL CAUSE OF ACTION FOR DAMAGES".

(3) by redesignating paragraphs (1), (2) and (3) as subsections (a), (b) and (c) respectively.

(4) by redesignating subsection (c) as subsection "(b)".

(b) The new Section 409 is amended –

(1) by striking subsection (2) and inserting the following:

"(2) SUBSTANTIVE LAW. – The substantive law for decision in any such suit shall be as follows:

(A) For a breach of contract claim, the substantive law for decision shall be derived in accordance with the choice of law principles of the State of New York.

(B) For a negligence claim, the substantive law for decision shall be derived exclusively from the law of negligence of the State in which the crash occurred, unless such law is inconsistent with or preempted by Federal law"; and

(2) by striking subsection (3) and redesignating subsection (2) as subsection (3);

(3) by inserting after subsection (1) the following:

"(2) COGNIZABLE CLAIMS. – This cause of action shall be limited to –

(A) claims for breach of contract;

(B) claims for negligence alleging physical injury or death; and

(C) claims for negligence alleging property damage.

(4) by inserting after subsection (3) the following:

"(4) REMEDIES. –

(A) The remedies for breach of contract claims shall be governed by applicable state law.

(B) The remedies for negligence claims shall be as follows:

(i) Any individual or entity asserting negligence claims for physical injury or death shall be entitled to seek only economic and noneconomic losses (as defined in Section 402).

(ii) The liability of each defendant for economic losses shall be joint and several among defendants.

(iii) The liability of each defendant for noneconomic losses shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic losses allocated to the defendant in direct proportion to the percentage of responsibility of the defendant for the harm to the claimant.

(iv) Any individual or entity asserting negligence claims for property damage (as defined in Section 402) shall be entitled to seek only the replacement cost of such property.

(v) The liability of each defendant for property damage losses shall be several only and shall not be joint. Each defendant shall be liable only for the amount of property damage losses allocated to the defendant in direct proportion to the percentage of responsibility of the defendant for the harm to the claimant.

(vi) Neither punitive damages nor any other form of relief not specified in this subsection shall be recoverable under this cause of action.

(vii) Any judgment awarded to an individual or entity under this subsection shall not include interest prior to judgment.

(viii) Any judgment awarded to an individual or entity under this subsection shall be reduced by the amount of collateral source compensation the individual or entity has received or is entitled to receive as a result of the terrorist attacks of September 11, 2001.

(5) REASONABLE ATTORNEYS' FEES. – In no event shall any attorney charge, demand, receive or collect contingency fees in connection with the assertion of a claim under this section that exceed:

(A) the amount of costs and reasonable expert witness fees incurred in prosecuting the claim; and

(B) a reasonable attorney's fee.

In this subsection, a reasonable attorney's fee shall be a fee based on the actual time spent and the reasonable expenses of an attorney incurred in providing legal services in connection with the prosecution of a claim under this section.

(6) REPORT TO CONGRESS. – Within eighteen months after the enactment of the "September 11, 2001 Victim Compensation Act," the United States District Court for the Southern District of New York shall provide Congress with a report describing the number and nature of the claims brought under this section and the aggregate amount of compensation being sought by all claimants. On the basis of that report, Congress shall promptly take whatever action is determined to be necessary (including approval of appropriate compensation plans and appropriation of funds) to ensure that individuals and entities receive full compensation for legitimate claims and to ensure that the liability regarding such claims is not borne primarily by persons not involved in the perpetration of terrorist attacks.

(7) LIMITATIONS PERIOD. – No claim for negligence may be filed under this section after the date that is one year after the date of enactment of the "September 11, 2001 Victim Compensation Act".

(5) by striking subsection (b) and inserting the following:

"(b) EXCLUSION FOR RECOVERY AGAINST TERRORISTS. – Nothing in this section shall in any way limit the ability of any individual or entity to seek any form of recovery from any person alleged to be a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act, or to limit the liability of such a person".

(c) Section 409 is amended by redesignating it as Section 410.

SECTION 8. JURISDICTION

(a) Title IV is amended by inserting the following at the end of Section 410:

"Sec. 411. ORIGINAL AND EXCLUSIVE JURISDICTION FOR ALL CIVIL ACTIONS.

The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001. For purposes of personal jurisdiction, the United States District Court for the Southern District of New York shall be deemed to sit in all judicial districts in the United States".

SECTION 9. SMALL BUSINESS RELIEF

(a) IN GENERAL. – There is hereby authorized to be appropriated $500,000,000 to the Small Business Administration to establish a September 11th Small Business Relief Fund. The purpose of the fund is to provide direct relief to small businesses,

as defined in 15 U.S.C. § 632(a)(1), that have been directly affected by the terrorist attacks of September 11, 2001.

(1) Within 30 days of the date when this Act shall take effect, the Administrator shall publish eligibility guidelines consistent with this Act and the procedures under which the relief fund shall be administered.

(2) In establishing eligibility requirements and administrative procedures, the Administrator shall give priority to businesses located in close proximity of the site of the terrorist attacks which occurred on September 11, 2001.

(3) The Administrator shall begin accepting applications for the relief fund immediately upon publication of the eligibility guidelines and administrative procedures.

(4) Not later than 21 days after the date on which an application is filed, the Administrator shall complete a review, make a determination and provide written notice to the applicant with respect to the application Such a determination shall be final and not subject to judicial review.

SECTION 10. EFFECTIVE DATE.

(a) EFFECTIVE DATE. – This Act and the amendments made by this Act shall take effect on the date of the enactment of this Act, and shall apply to any claim (or cause of action) resulting from or relating to the terrorist attacks of September 11, 2001.

Thursday, October 04, 2001 (5:45 pm)

REV_00261222

Summary Of "September 11, 2001 Victim Compensation Act"

The recently enacted Air Transportation Safety and System Stabilization Act (the "ATSSSA") was a first step toward addressing the economic ramifications of the September 11 tragedy, focusing primarily on the airline industry. The proposed September 11, 2001 Victim Compensation Act (the "Victim Compensation Act") would complete that effort by amending the ATSSSA to add provisions that would ensure swift and fair compensation for the victims of the terrorist attacks of September 11, 2001 and prevent further economic injury to innocent bystanders to those events.

I. Principal Provisions

The ATSSSA established a federally funded September 11th Victim Compensation Fund (the "Victim Fund") from which persons physically injured or killed in the events in New York, Pennsylvania, and Virginia (or their representatives) may obtain compensation. Persons who seek compensation from the Victim Fund waive their right to pursue claims through litigation. However, persons eligible to make claims to the Victim Fund are free to pursue their claims through traditional litigation. Further, any person who sustained personal or economic injuries resulting from the September 11th events (*i.e.*, claims not presently compensable by the Victim Fund) also is free to litigate.

The proposed Victim Compensation Act would set ground rules for the tidal wave of litigation that is now likely to ensue. Thousands of injured parties should be expected to sue hundreds of non-terrorist defendants (*e.g.*, airlines, aircraft manufacturers, aircraft component manufacturers, airport authorities, security companies, building owners, building managers, architects, building contractors, building components manufacturers and suppliers, employers). The guiding principles of the Act are (a) to ensure an orderly, equitable process for providing swift compensation for persons who present legitimate claims and (b) to protect innocent bystanders from being further victimized by the specter of misguided or excessive claims.

The bill would not restrict or otherwise affect the type and scope of claims that may be asserted against the September 11 terrorists or any person or entity that aided or abetted their activity. However, the bill would:

- Confirm the intent of the ATSSSA that all court claims arising out of the events of September 11 must be filed in the U.S. District Court for the Southern District of New York.

- Confirm that the sole cause of action by which a person may seek compensation from non-terrorists for injuries/damages sustained in the September 11 attacks is the new federal cause of action established by the ATSSSA.

- Establish that under the new federal cause of action for asserting claims against non-terrorists, a claimant may sue for breach of contract (with the substantive law derived from the jurisdiction designated by the choice of law principles normally applied by the New York court) or for negligence (applying the same elements and other governing

substantive law as a negligence claim under the law of the jurisdiction where the relevant aircrash occurred (either New York, Pennsylvania, or Virginia)). (Thus, other causes of action (*e.g.*, fraud-based claims) would not be available.)

- Establish that this new federal cause of action will be available only to persons who allegedly have sustained personal injury (including death) or property damage. (Thus, for example, the cause of action would not be available to persons who arguably have claims only for lost profits (without any property damage) or emotional distress (unaccompanied by physical injury).)

- Establish that as to remedies from non-terrorists, persons who assert personal injury/death claims may obtain through litigation the same remedies as are available from the ATSSSA-created Victim Fund. As to such claims, the liability of each defendant for economic losses would be joint and several, but as to noneconomic losses, each defendant shall be liable only in direct proportion to its responsibility for the alleged harm. Persons who assert property damage claims may recover the replacement cost of such loss. As to such claims, the liability of each defendant shall also be proportional.

- Preclude the award of any punitive damages against non-terrorists.

- Limit any attorney contingency fees to lodestar fees, costs, reasonable expert witness fees, and reasonable expenses.

- Require that all negligence claims against non-terrorists be filed within one year; breach of contract claims would be governed by normal rules.

- Require that within 18 months, the court handling the claims shall report to Congress on the number and nature of the claims and the total amount of the claims asserted to that point.

- Declare that upon receiving the court's report regarding the claims filed, Congress "will take whatever action is determined to be necessary (including approval of appropriate compensation plans and appropriation of funds) to ensure that individuals and entities receive full compensation for legitimate claims and to ensure that the liability regarding such claims is not borne primarily by persons not involved in the perpetration of terrorist attacks."

- Provide a $500 million appropriation to the Small Business Administration to establish a September 11th Small Business Relief Fund to provide immediate relief to small businesses that have been directly affected by the terrorist attacks.

II. Rationale

The core dual rationale for the legislation is (a) to ensure that parties injured by the events of September 11 may obtain swift and fair compensation and (b) also to ensure that

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such compensation burdens are not visited primarily on parties that played no role in the primary causative act – the terrorists' hijacking and crashing of four commercial aircraft. The bill achieves those fundamental purposes in several ways:

- ***First,*** the bill will establish a process by which litigation claims will be filed and by which the court will report to Congress the nature and aggregate amount of such claims. In the bill, Congress will commit to take the necessary steps (including appropriations) to ensure that legitimate claims will be reasonably compensated without placing that burden on persons and entities not involved in the terrorist activity that was the primary cause of the injurious events on September 11. Hopefully, any necessary federal appropriations can be financed from assets seized essentially as war reparations from the terrorists and any governments or other entities that in any way aided and abetted their heinous acts.

- ***Second,*** every American family and business was affected by the September 11th attacks – Americans nationwide were glued to their television sets, mourning for the victims and worrying about the safety of their families. People stayed home, many businesses closed, and numerous trips and conventions were cancelled. If each and every individual or business affected in any way by the terrorist attacks were allowed to bring a lawsuit to seek recovery for economic losses related to the attacks with no cap on total liability, it would delay justice for those who were most injured – and it could devastate the American economy. For that reason, the bill would focus the litigation process on the claims that are most deserving of compensation – claims for personal injury and property damage. Further, the bill would prohibit the award of punitive damages based on the view that the judicial system should not punish Americans for the acts of terrorists and thereby help the terrorists achieve their evil ends by wreaking further havoc on the U.S. economy.

- ***Third,*** the bill would simplify the litigation process by establishing two causes of actions – a breach of contract action (tracking traditional state law principles) and a negligence action (derived wholly from state negligence law of the three jurisdictions where the primary injuries occurred). The bill requires that all tort claims be filed within one year, so that the court will be able to determine rapidly the full array of defendants and tort claims that must be resolved and proceed to do so as quickly as possible. Since the Victims Fund will be open to receiving claims for two years, claimants who become disenchanted with the litigation process will still have an opportunity to seek recovery through the Victims Fund. (Breach of contract claims will be governed by normal limitations rules, since many of those claims will be insurance coverage matters that may not ripen within a shorter period.)

- ***Fourth,*** in enacting the ATSSSA, Congress intended that the Victim Fund would be the primary source of payments for personal injury and wrongful death claims. However, it is now apparent that because of the absence of any restraints on the litigation process, the incentives will push most eligible claimants toward filing litigation and away from the Victim Fund. The bill would impose some restrictions on the litigation process, a step that would make the Victim Fund more attractive.

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- ***Fifth,*** the bill would not affect the prosecution of any claims against the terrorists or their co-conspirators. Further, the bill would not in any way affect the ability of persons with insurance coverage – such as business interruption coverage – to file claims with their insurance carriers and to bring litigation related to those coverage claims.

- ***Sixth,*** the bill would provide $500 million in direct and expedited relief to small businesses that have been directly and severely affected by the terrorist attacks. This provision will help to mitigate the business losses of persons whose claims for purely economic losses may be limited by the bill.

10/4/01 at 5:45 pm

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ACT OF TERRORISM - For purposes of this Act, an "act of terrorism" means any act, certified by the Secretary of the Treasury in his sole discretion after consultation with the Secretary of State [the Secretary of Defense} and the Attorney General, as a violent act or act dangerous to human life, property or infrastructure, within the United States, that appears to be intended to intimidate or coerce the civilian population of the United States and to influence the policy or affect the conduct of the United States government by intimidation or coercion. The Secretary shall not certify any act as an act of terrorism if it is committed in the course of a war declared by the Congress of the United States. Any certification determination by the Secretary shall be final.

anguish, and loss of enjoyment of life; economic losses include medical expenses lost earnings, and other out-of-pocket expenses.

We also recommend the following policies, but believe they will be difficult to pass:

- For any civil action from a terrorist event against anyone other than the perpetrators, aiders, non-economic damages would be limited to $500,000 and available only to plaintiffs who suffered physical injury.
- For any civil action from a terrorist event against anyone other than the perpetrators, aiders, defendants would be liable only for acts of gross negligence.

Private Sector Reinsurance of Terrorism

Private insurers would be free to form reinsurance pools to diversify their risk. The federal government could also provide tax-exempt status to the assets of any new terrorism reinsurance pool. We believe that private pools could be formed under state laws, obviating the need for a federal charter.

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LIABILITY - 5 PRINCIPLES

(1) certification as terrorist incident by Secretary of Treasury

(2) federal cause of action - so preempt state suits

(3) consolidation of cases in single federal court - selected by Judicial Panel on Multidistrict Litigation

(4) high standard for liability - gross negligence

(5) limitations on damages
→ punitives - NONE
→ non-economic - limits

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Price-Anderson Act

(42 U.S.C. 2014)

Purpose -- To encourage the development of the nuclear industry and to ensure prompt and equitable compensation in the event of a nuclear incident.

Coverage -- For licensed nuclear power plants indemnified by the Nuclear Regulatory Commission (NRC), the Act provides for three tiers of protection against third party "public liability arising from a nuclear incident" (covering "any legal liability" with certain exceptions):

(1) Private insurance: Each reactor must purchase the maximum private insurance commercially available (currently $200 million).
(2) Retrospective pooling: If damage from an incident exceeds $200 million, each of the 110 reactors is assessed a pro-rata share of the excess up to $83.9 million, capped at $10 million per year per reactor ($83.9x 110= $9.23 billion pool+ $200 million= $9.43 billion coverage cap to the industry). The NRC may in specified circumstances, on a case-by-case basis, postpone all or part of the annual deferred premium. NRC also may provide reinsurance or guarantee payment of deferred premiums if there is a shortfall. In that event, NRC must advance necessary funds based on a Congressional appropriation or (to the extent approved in appropriation Acts) by issuing obligations to the Treasury.
(3) Government commitment: If damage exceeds $9.43 billion, the Act contains a moral commitment from Congress to provide full and prompt compensation to the public, based on a plan the President submits.

[For contractors and suppliers indemnified by the Department of Energy, the Act provides full indemnification up to $9.43 billion without private insurance. In effect, the government self-insures against nuclear incidents from contractual activities conducted on its behalf.]

Basis of Liability -- Liability is based on state tort laws of the jurisdiction where the incident occurs. Since many states provide strict liability for ultrahazardous activities, it's possible that liability for a nuclear incident could be established without fault. For "extraordinary nuclear occurrences," the Act requires waiver of certain defenses so that claimants need not prove fault and defendants may not claim charitable or sovereign immunity. In limited situations, the Act supercedes state law with uniform rules such as a limitation on awarding punitive damages or the time in which claims may be brought.

Consolidated Jurisdiction -- Claims are consolidated in a single U.S. District Court where the incident occurs. This channels liability through one court to one source of funds, so there is no need to sue all potential defendants or allocate liability among multiple defendants.

International Coverage -- Damages for injuries suffered in other countries from incidents in the U.S. may be sought in U.S. courts under the Act. The Act cannot control liability exposure in other countries.

Sunset -- The Act sunsets provisions permitting coverage for potential licensees and new contracts. Congress renewed and amended the 1957 Act in 1966, 1969, 1975, and 1988.

FAIR Plans --Fair Access to Insurance Requirements
(12 U.S.C. 1749bbb)

Purpose -- To create statewide plans to make essential property insurance more readily available in urban areas following the 1968 riots by providing Federal reinsurance for property losses arising from "riots or civil disorders." The statutory authority terminated in 1985, but 29 states still run FAIR programs.

Role of FEMA -- The FEMA Director, in consultation with a public-private Advisory Board, establishes and carries out the FAIR program, the Federal reinsurance program (including a "National Insurance Development Fund"), and a Federal crime insurance program, described below. FEMA reports to Congress at least annually on its operations under the Act.

Reinsurance -- FEMA is authorized to offer reinsurance from the National Insurance Development Fund to each insurer or pool for property losses arising from "riots or civil disorders." Reinsurance is offered only on "standard lines" of property insurance, as defined.

Premiums -- Insurers pay FEMA reinsurance premiums, determined by FEMA in consultation with the Advisory Board, for deposit into the Fund. FEMA thereafter may adjust premiums after consulting with the Advisory Board and the NAIC. The Fund can borrow from the Treasury to meet its needs.

Reimbursement for Losses -- The Act requires states to pass legislation stating that they will reimburse FEMA for any reinsured losses up to 5% of the aggregate property insurance premiums earned in that state during the previous year, to the extent the losses exceed the amount FEMA received in reinsurance premiums.

Federal Crime Insurance -- FEMA is required to critically review the market availability in each state of burglary and robbery insurance at affordable rates. If there is a critical unavailability, FEMA must make it available at affordable rates through the facilities of the Federal government after consulting with state insurance authorities in estimating what rates are affordable.

Participation in State FAIR Plans -- Participation in a state FAIR plan is required for an insurer to qualify for Federal reinsurance. (Most states also require property insurers to join the FAIR program before getting a certificate of authority to do business.) Each insurer wishing to participate in a FAIR program must cooperate with the appropriate state insurance authority in establishing and carrying out the FAIR plan. Plans are approved and administered by state insurance authorities. Plans must be run in a way that makes essential property insurance more readily available in urban areas. Plans must include various requirements regarding property inspection, reporting of reasons for declining coverage or requiring changes in the property, etc. A potential insured can request coverage under the program after being denied coverage otherwise.

Pool Re (Pool Reinsurance Co. Ltd.)

Purpose -- To create an independent, mutual reinsurance company backed by the government that provides reinsurance to member companies for property loss and business interruption due to fire and explosion from "acts of terrorism" (primarily car bombs) that the insurance and reinsurance markets would not otherwise insure. Since its inception in 1993, Pool Re has covered three major losses for a total of 600 million pounds.

Participants -- Member companies are insurers (and Lloyd's syndicates) authorized to underwrite property insurance and business interruption for risks located in England, Wales and Scotland. Currently there are about 200 members, including all of the largest insurers in the U.K. commercial insurance market.

Reinsurance Coverage -- Members are required to offer reinsurance to first line insurers in excess of the retention, which is 100,000 pounds per "head of cover" per incident or 2.5 million pounds per policy per cover per incident. "Heads of cover" include: (1) buildings and completed structures, (2) other property (including contents, engineering contractors and computers), (3) business interruption, and (4) book debts (unclear how many heads of cover there actually are). Insureds have the option of buying protection beyond the 100,000 pounds of coverage, in which case the insurer cedes the additional premium to Pool Re, which assumes the risk.

Government (Retrocession) Liability -- Under the retrocession agreement, the government becomes liable to make payments to Pool Re when Pool Re's financial resources, including a [500 million] pound loan facility, have been exhausted. Members may reinsure only with Pool Re, which agrees to reinsure each member in excess of its retention. The Reinsurance (Acts of Terrorism) Act of 1993 enabled the Secretary for Trade and Industry to enter into the retrocession agreement with Pool Re subject to the consent of the Treasury. Pool Re's only retrocessionaire is the government.

Premiums -- Pool Re is funded through "market" rate premiums set by the government in exchange for the government underwriting excess exposure to the fund. Companies pay rates depending on the locations of risks in different geographic zones -- currently 150 pounds per million pounds of coverage in metropolitan areas, and 30 pounds per million of coverage in rural areas. The retrocession agreement provides that when Pool Re's funds reach one billion pounds, a retrocession premium becomes payable to the government. If Pool Re incurs an underwriting loss (an underwriting year is closed after three years), each member must pay an additional premium equivalent to 10% of the underwriting loss subject to a maximum of 10% of the premium income it paid to Pool Re for the underwriting year in question. If Pool Re makes an underwriting profit, each member is entitled to a 10% return premium.

Certification -- According to the retrocession agreement, the Secretary of State is required to provide a certificate to the effect that an "act of terrorism" has occurred for which indemnity is claimed under a reinsurance agreement.

Dispute resolution -- The agreements provide a dispute resolution procedure in addition to the usual arbitration clause.

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War Damage Corporation Act
56 Stat. 174 (1942)

Purpose -- To establish WDC as a subsidiary of the Reconstruction Finance Corporation (RFC) to provide property owners in the U.S. with reasonable insurance protection against loss or damage from enemy attack or U.S. military resistance during WWII, since basic fire and extended coverages contained a war risk exclusion.

History -- WDC was established in 1941 as the War Insurance Corporation and renamed the WDC in 1942. It is a subsidiary of the RFC, which was established by Congress in 1940 to aid in the national defense program. The WDC program grew from the War Risk Insurance Act of 1914 (38 Stat. 711), which provided insurance for maritime vessels and was amended in 1917 in response to WWI. WDC's charter and all policies expired in 1947. WDC's assets were liquidated by 1949, and in 1957 its stock was transferred to the Secretary of the Treasury for cancellation after all suits against the WDC had been settled.

Coverage -- The Act directs the RFC to empower the WDC to use its funds to provide, through insurance, reinsurance or otherwise, reasonable protection against loss or damage to real or personal property resulting from enemy attack or U.S. military resistance, with such exceptions as WDC, with the approval of the Secretary of Commerce, may deem advisable.

RFC Funding -- The Act directs the RFC, upon the request of the Secretary of Commerce and with the President's approval, to provide funds to WDC and issue obligations sufficient to carry out the Act's purposes. The aggregate amount of funds supplied by the RTC may not exceed $1 billion.

Premiums -- WDC protection would be made available upon the payment of such premium and subject to such terms and conditions as WDC may establish with the approval of the Secretary of Commerce.

Establishment of Rates -- In view of the national interest involved, the Act required WDC to establish from time to time uniform rates for each type of property for which protection was made available. To establish a basis for such uniform rates, the Act required WDC to estimate the average risk of loss on all property of such type in the U.S.

Limitation of Protection -- Protection was available only in the U.S., its territories and possessions, and other places determined by the President to be under U.S. dominion and control, and not to property on which the Maritime Commission was authorized to provide marine war-risk insurance. WDC, with approval of the Secretary of Commerce, could suspend or restrict protection in areas in consideration of loss of control by the U.S.

Losses Sustained between Dec. 7, 1941 and the Start-Up Date -- WDC was authorized to provide compensation without requiring an insurance contract or payment of premium, adjusting the loss as if a policy were in effect.

Compensating Victims of Terrorism: The Current Framework in the United States

SUMMARY

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I. INTRODUCTION

> The political and psychological potential of hostage-taking as a symbolic act of power is of the greatest magnitude. No social organization sharing in the power structure of any society is immune. The fear inspired by the possible use of hostages by very small groups to exert pressure on very large groups within the existing power structure is potentially one of the most disruptive forces in technologically advanced societies.[1]

As this passage suggests, the effects of terrorism are devastating, not only to those individuals involved in a particular terrorist incident, but to society in general. Fortunately, many nations have made progress toward dealing with terrorism's societal effects.[2] However, many individuals directly affected by terrorists—those suffering the most immediate harm—have largely been ignored in the United States and elsewhere:

> A number of other countries have had diplomats kidnapped and held hostage but inquiries by our embassies abroad revealed that none of them has any regular legislative or administrative program

1. R. CRELINSTEN & D. SZABO, HOSTAGE-TAKING ix (1979).
2. *See, e.g.*, LEGISLATIVE RESPONSES TO TERRORISM (Y. Alexander & A. Nanes eds. 1986).

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and is a result of the individual's relationship with the [U.S.] Government."[63] A family member is any dependent of a captive or any other individual who is a member of the captive's family or household.[64]

The Victims of Terrorism Compensation Act is thus "permanent" in that it is not restricted to victims of any particular terrorist incident. It is limited only by the requirements that the victim be associated with the U.S. government and that the compensable incident have occurred after January 21, 1981,[65] the date of the release of the Iranian hostages.[66] The Iranian hostages are included in the Act, and specifically provided a payment of $50 per day of captivity.[67]

The nonmonetary benefits of the Victims of Terrorism Compensation Act are similar to those of the Hostage Relief Act. For example, the Secretary of the Treasury is authorized to establish interest-bearing savings funds to which captives' pay and allowances may be allotted.[68] Captives and family members are entitled to payment of medical and health care expenses arising from the terrorist incident to the extent such expenses are not covered by insurance or a government program.[69] The Act provides for the extension of portions of the Soldiers' and Sailors' Civil Relief Act to captives,[70] thereby staying legal actions against them during the period of their captivity. Captives, their spouses, and their children are also entitled to educational benefits for a period not to exceed forty-five months.[71]

Notwithstanding these similarities, the Victims of Terrorism Compensation Act differs sharply from the Hostage Relief Act because it provides that monetary benefits be paid directly to captives or their family members. Iranian hostages receive a payment of $50 per day of captivity.[72] Other individuals taken captive after November 4, 1979, the date of the taking of the Iranian hostages,[73] will receive a payment of "not less than one-half of the amount of the worldwide average per diem rate under section 5702 of this title which was in effect for each day that individual was so held."[74] The Act further provides that compensation be paid in case of disability or death pursuant to regulations prescribed by the President.[75]

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63. *Id.*
64. *Id.*
65. *Id.* § 803, (100 Stat.) 882.
66. *See supra* notes 24-28 and accompanying text.
67. Victims of Terrorism Compensation Act § 802, (100 Stat.) 879.
68. *Id.* § 803, (100 Stat.) 879-80.
69. *Id.* § 803, (100 Stat.) 880.
70. *Id.* § 803, (100 Stat.) 881.
71. *Id.* § 803, (100 Stat.) 881-82.
72. *See supra* note 67 and accompanying text.
73. *See supra* notes 22-23 and accompanying text.
74. Victims of Terrorism Compensation Act § 803, (100 Stat.) 880-81. Indirect victims receive no monetary award for any mental anguish they may have suffered. *See id.*
75. *Id.* § 803, (100 Stat.) 882-83.

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nt.[75]

Stat.) 879.

Stat.) 880-81. Indirect victims
have suffered. *See id.*

Another significant difference between the Hostage Relief Act and the Victims of Terrorism Compensation Act is that the latter provides benefits for members of the military taken captive in a terrorist incident,[76] while the former makes no mention of them. Members of the military receive nonmonetary benefits similar to those described above. They will have their pay and allowances deposited in an interest-bearing savings fund,[77] will receive payment of medical expenses arising from the terrorist incident,[78] and will receive educational assistance.[79] Medical and educational benefits are also provided for the dependents of such captives.[80] Probably the most important benefit provided to military personnel is a monetary payment similar to that designated for other U.S. government employees.[81] Members of the military are also entitled to disability and death compensation as determined by the President.[82]

The Victims of Terrorism Compensation Act is obviously a major step in the direction of compensating victims of terrorism. It provides a permanent source of benefits, both monetary and nonmonetary, which can be immediately implemented in response to a terrorist incident. Victims will no longer have to endure a long uncompensated period, awaiting special legislation. This Act does not, however, compensate all victims or fully compensate those it does cover. Victims may thus be forced to turn to a more traditional source of obtaining compensation for injuries—the courts.

IV. LEGAL ACTIONS IN U.S. COURTS

While many victims have brought lawsuits seeking recovery for injuries sustained in terrorist incidents, these actions have for the most part been unsuccessful. The two cases described below, probably the most important in this area, illustrate the typical problems that terrorist victims will continue to face in such suits.

A. Suits by U.S. Citizens—The Iranian Hostage Suits

Perhaps the most prolific source of hostage compensation litigation has been the Iranian hostage incident.[83] The seminal case stemming from that incident is *Persinger v. Islamic Republic of Iran*.[84] The decision in that case

76. *Id.* § 806, (100 Stat.) 884-89.
77. *Id.* § 806, (100 Stat.) 884.
78. *Id.* § 806, (100 Stat.) 886-87.
79. *Id.* § 806, (100 Stat.) 887-88.
80. *See supra* notes 78-79 and accompanying text.
81. Victims of Terrorism Compensation Act § 806, (100 Stat.) 884-85. *See supra* note 74 and accompanying text.
82. *Id.* § 806, (100 Stat.) 885-86.
83. *See supra* notes 22-30 and accompanying text.
84. Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C. Cir.), *cert. denied*, 105 S. Ct. 247 (1984).

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was extremely important because it ultimately disposed of several other similar suits.[85]

Persinger involved an action for damages brought by a former Iranian hostage, U.S. Marine Sergeant Gregory Allen Persinger, and his parents, against the Islamic Republic of Iran for injuries inflicted during the seizure and detention of the American hostages at the United States Embassy in Tehran.[86] The district court dismissed the action, holding that the Executive Order implementing the Algiers Agreement[87] validly extinguished the plaintiffs' claims, first because the President has the power to " 'dispose of private claims against foreign states to resolve, or avoid, international crises,' "[88] and "in the alternative, because even in the absence of a valid executive order, Iran would be immune under the Foreign Sovereign Immunities Act [FSIA] from suit for tortious acts in the United States Embassy in Tehran."[89]

On appeal, the District of Columbia Circuit Court initially affirmed the district court's first basis, holding the Executive Order enforceable.[90] The United States, which had intervened as a party defendant, petitioned the circuit court for a rehearing, which was granted.[91] The court's first decision was then vacated, and a second opinion issued in which the court upheld the district court's dismissal on the alternative basis—that Iran remained immune under the FSIA.[92]

The effect of the second opinion was to make any consideration of the issue of the Executive Order's validity improper,[93] since the FSIA provides that, unless an express exception exists, "a foreign state shall be immune from the jurisdiction of the courts of the United States."[94] The only FSIA exception considered possibly applicable to Iran by the court states that immunity shall not apply in cases where damages are sought from a foreign state "for personal injury or death, or damage to or loss of property, occurring *in the United States* and caused by the tortious act or omission of that foreign state or any official or employee of that foreign state while acting within the scope of his office or employment."[95]

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85. *Persinger*, 729 F.2d at 838 n.3.
86. *See supra* notes 22-30 and accompanying text.
87. *See supra* note 28 and accompanying text.
88. *Persinger*, 729 F.2d at 837, *citing* Persinger v. Islamic Republic of Iran, No. 81-00230, slip op. at 2 (D.D.C. Aug. 21, 1981). *Cf.* Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding an executive order issued as part of the effort to implement the Algiers Agreement).
89. *Persinger*, 729 F.2d at 837-38.
90. Persinger v. Islamic Republic of Iran, No. 81-2003 (D.C. Cir. Oct. 8, 1982), *vacated*, 729 F.2d at 835.
91. *Persinger*, 729 F.2d at 837.
92. *Id.*
93. *Id.* at 838.
94. 28 U.S.C. § 1604 (1982).
95. 28 U.S.C. § 1605(a)(5) (1982) (emphasis added).

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In determining whether this exception applied to Iran, the court examined the issue of "whether Congress, in enacting the FSIA, intended to exercise its jurisdiction to give [United States] courts . . . competence to hear suits against foreign states for torts committed on United States embassy premises abroad."[96] The court concluded, on the basis of the statutory language, the legislative history, and "the consequences of adopting a contrary position,"[97] that the exception did not apply.[98]

The claims brought by Sergeant Persinger's parents specifically sought damages for mental and emotional distress suffered within the United States as a result of a family member's detention.[99] The Persingers argued that the FSIA exception, which had not applied to their son's claim, did apply to their's, and they were therefore not prevented from bringing suit against Iran.[100] The circuit court held, however, that the FSIA exception requires not only the injury, but also the tort causing it to have occurred in the United States.[101] The court pointed out the inconsistency of holding otherwise:

> It would be anomalous to say that Congress intended to deny a remedy to [Sergeant Persinger]—a hostage imprisoned for more than a year—and yet also intended to expose Iran to suit by his parents for their emotional distress. Indeed, [the Persingers'] argument would have the result that had one hostage died in Tehran and another been released and died in the United States, both deaths being due to injuries inflicted while they were held hostage, the district court would have jurisdiction over the second suit but not over the first. Such results would deprive the statute of any policy coherence.[102]

The court concluded that it was prohibited by the FSIA from taking jurisdiction over any of the Persingers' claims against Iran.[103]

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96. *Persinger*, 729 F.2d at 839.

97. Such a position was described as:

> [t]he "functional equivalent" of making U.S. embassies part of the U.S. territory "for jurisdictional purposes." Such a result could, for example, cause the French government to be subject to suit in the United States if a French government vehicle were involved in an automobile accident on the U.S. embassy grounds in West Germany. Furthermore, foreign states "might hesitate in providing services to U.S. embassies or consulates were they to be subject to suit in U.S. courts for negligent acts or omissions on those premises." In addition, since some foreign states base their sovereign immunity decisions on reciprocity, or parity of reasoning, it is possible that a decision to exercise jurisdiction in this case would subject the United States to suits abroad for torts committed on the premises of embassies located here.

Id. at 841 (citations omitted).

98. *Id.* at 839.

99. *Id.* at 842.

100. *Id.*

101. *Id.*

102. *Id.* at 842-43.

103. *Id.*

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Persinger thus rang the death knell for the Iranian hostage suits.[104] Furthermore, due to the circuit court's broad interpretation of the protection afforded by the FSIA, *Persinger* places a virtually insurmountable barrier before any future terrorist victim's suit involving state-sponsored terrorism abroad.

B. *Suits by Aliens*

United States citizens have not been the only terrorist victims seeking compensation through the U.S. courts. The case of *Tel-Oren v. Libyan Arab Republic* involved a lawsuit brought by alien victims of terrorism against alien terrorists in a United States federal court.[105] The terrorist incident forming the basis of the suit occurred on March 11, 1978, when thirteen members of the Palestinian Liberation Organization (PLO) landed by boat in Israel.[106] The terrorists set out for the main highway between Haifa and Tel Aviv, where they seized two civilian buses, a taxi, and a car. The passengers were taken hostage with the result that twenty-two adults and twelve children were killed and seventy-three adults and fourteen children were seriously wounded. Most of the victims were Israeli citizens; a few were American or Dutch citizens.

The alien victims brought suit against the terrorists in a United States district court, asserting jurisdiction under several statutes,[107] most notably the Alien Tort Statute.[108] In a terse per curiam decision, the court of appeals affirmed the lower court's dismissal of the action.[109] Each of the circuit judges did, however, file a lengthy concurrence, fully explaining his own reasoning behind the dismissal, and these three concurrences are where the importance of the case lies. On wholly separate and distinct grounds, each judge found that an alien plaintiff could not bring a lawsuit against an alien terrorist in a United States federal court.

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104. *See supra* note 85; *see also* McKeel v. Islamic Republic of Iran, 722 F.2d 582 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 243 (1984) (also holding FSIA precludes jurisdiction in an Iranian hostage suit).

105. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *aff'g*, 517 F. Supp. 542 (D.D.C. 1981), *cert. denied*, 470 U.S. 1003 (1985).

106. The facts are taken from Judge Edwards' opinion in *Tel-Oren*. *Tel-Oren*, 726 F.2d at 776.

107. Both the alien and the U.S. citizen plaintiffs claimed federal question jurisdiction under 28 U.S.C. § 1331 (1982), diversity jurisdiction under 28 U.S.C. § 1332 (1982), and jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 (1982). *Tel-Oren*, 726 F.2d at 775. The district court rejected plaintiffs' arguments for jurisdiction under the diversity statute and the Foreign Sovereign Immunities Act, and those arguments were abandoned by the plaintiffs on appeal. *Tel-Oren*, 726 F.2d at 799 n.3. The circuit court declined, with very little discussion, to extend jurisdiction to the U.S. citizen plaintiffs under 28 U.S.C. § 1331, the Alien Tort Statute being inapplicable to them. *See Tel-Oren*, 725 F.2d at 779 n.4, 800.

108. 28 U.S.C. § 1350 (1982).

109. *Tel-Oren*, 726 F.2d at 775.

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In the first concurrence, Judge Edwards initially found that the Alien Tort Statute granted the plaintiffs in *Tel-Oren* a right to sue under two possible theories. Under one theory, he claimed that an expansive view of the Alien Tort Statute could be taken, following the reasoning of the Second Circuit in the case of *Filartiga v. Pena-Irala*.[110] In that case, the Second Circuit held that torture by a state official violated the "law of nations" as described in the Alien Tort Statute,[111] and the plaintiffs were thus entitled to bring suit in a U.S. federal district court.[112]

Judge Edwards' second jurisdictional theory was derived from *Adra v. Clift*,[113] in which the court based Alien Tort Statute jurisdiction on first, a violation of a municipal tort law, and second, a law of nations violation. Judge Edwards noted that while the plaintiff's action in *Adra* was "grounded directly on a domestic tort"—the unlawful taking of a minor child from a parent—it implicated a law of nations violation, the falsifying of a passport.[114] The *Adra* court's jurisdiction to decide the domestic tort issue would thus allow it to also decide the law of nations issue.[115]

Judge Edwards was, however, unable to find Alien Tort Statute jurisdiction under either theory on the *Tel-Oren* facts. He noted a major distinction between *Tel-Oren* and *Filartiga* in that, while the *Filartiga* defendant "acted under color of state law," the *Tel-Oren* plaintiffs did "not allege facts to show that official or state-initiated torture [was] implicated . . . ."[116] Judge Edwards was also unable to find that an act of terrorism constituted a law of nations violation as required by the Alien Tort Statute.

> While [the United States] unequivocally condemns all terrorist attacks, that sentiment is not universal. Indeed, the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus. . . . [T]errorism has evoked strident reactions and sparked strong alliances among numerous states. Given this division, I do

110. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). In *Filartiga*, the Second Circuit found an alien defendant liable to alien plaintiffs for causing the death of a seventeen-year-old who was one plaintiff's son and the other's brother. The victim had been tortured to death by the defendant, Pena-Irala, who was at that time Inspector General of Police in Asuncion, Paraguay. The Filartigas' claimed that the death was in retaliation for Dr. Filartiga's political activities and beliefs. *Id.* at 878-80.

111. *Id.* at 884.

112. *Id.* at 887-88.

113. 195 F. Supp. 857, 862-65 (D. Md. 1961). In *Adra*, an alien plaintiff sued his former alien wife and her American husband, contending that he was legally entitled to custody of his daughter by the wife, that the daughter was being wrongfully withheld from him, and that the defendants had concealed the child's name and nationality by falsifying her passport, a violation of the law of nations. *Id.* at 860-62.

114. *Tel-Oren*, 726 F.2d at 786.

115. *Id.* at 786-87.

116. *Id.* at 791. "Nor do I think they could," Judge Edwards stated, "so long as the PLO is not a recognized member of the community of nations." *Id.*

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> not believe that under current law terrorist attacks amount to law of nations violations.[117]

Judge Edwards thus concluded that, while the Alien Tort Statute served as a basis of jurisdiction for the alien plaintiffs, the fact that they received their injuries from private citizens acting as terrorists prevented them from bringing suit.

Judge Bork, on the other hand, found that the Alien Tort Statute itself prevented a federal court from having jurisdiction in *Tel-Oren*. He first held that the case should be dismissed on act of state and political question grounds,[118] since adjudication "would present grave separation of powers problems" in United States foreign policy matters.[119] He also pointed out the difficulty of the required "analysis of international legal principles," such as the status of terrorism, "that are anything but clearly defined and that are the subject of controversy touching 'sharply on national nerves.' "[120]

The major thrust of Judge Bork's opinion, however, is that the Alien Tort Statute does not itself provide alien plaintiffs with a right to bring suit in a federal district court. He analogized the statute to the federal question jurisdiction statute,[121] stating that "[n]either of those statutes either expressly or impliedly grants a cause of action. Both statutes merely define a class of cases federal courts can hear; they do not themselves even by implication authorize individuals to bring such cases."[122] Judge Bork thus reasoned that the right to bring suit must arise from the law of nations in order for jurisdiction to be extended under the Alien Tort Statute.[123] He found that neither the United States treaties which the *Tel-Oren* plaintiffs cited,[124] nor "international human rights law" provided the requisite right of action.[125]

Judge Robb disposed of the case by holding it nonjusticiable under the political question doctrine.[126] As with Judge Bork, one of Judge Robb's major concerns was maintaining the separation of governmental powers in United States foreign policy matters:

> Cases which would demand close scrutiny of terrorist acts are far beyond [the] limited exceptions to the traditional judicial reticence displayed in the face of foreign affairs cases. That traditional deference to the other branches has stemmed, in large part, from a fear of undue interference in the affairs of state, not only of this nation but of all nations.[127]

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117. *Id.* at 795.
118. *Id.* at 801.
119. *Id.* at 805.
120. *Id.* (*citing* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964)).
121. 28 U.S.C. § 1331 (1982).
122. *Tel-Oren*, 726 F.2d at 811.
123. *Id.* at 816.
124. *Id.* at 808-10.
125. *Id.* at 816-19.
126. *Id.* at 823.
127. *Id.* at 825.

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Judge Robb also hesitated to extend United States federal jurisdiction in an area with almost limitless potential plaintiffs:

> The victims of international violence perpetrated by terrorists are spread across the globe. It is not implausible that every alleged victim of violence of the counterrevolutionaries in such places as Nicaragua and Afghanistan could argue just as compellingly as the plaintiffs here do, that they are entitled to their day in the courts of the United States.[128]

Like Judges Edwards and Bork, Judge Robb therefore also came to the conclusion that because jurisdiction did not exist, dismissal was proper.[129]

The significance of *Tel-Oren* is that it severely limits the possibility that an alien plaintiff will be able to seek compensation from any terrorist defendant in a United States federal court. The desirability of such a limitation and possible further ramifications of *Tel-Oren* for U.S. terrorist victims[130] are issues that will continue to invite close scrutiny.[131]

V. PRIVATE COMPENSATORY METHODS

The oldest[132] and most sophisticated form of terrorist victim compensation now available is private insurance. Kidnap, ransom and extortion (K/R&E) insurance is currently offered by seven insurance companies, although only three—American International Group, Lloyd's of London, and Chubb & Son—dominate the field.[133] It is estimated that more than half of the Fortune 500 companies maintain some form of K/R&E insurance.[134] Companies with such insurance usually keep that fact:

> cloaked in secrecy. One reason might be that insurers and corporate executives rarely discuss the topic in public or even behind closed doors. Companies fear that if they reveal that their executives . . . are covered by K/R&E, the publicity will only bring

128. *Id.* at 826.

129. *Id.* at 827.

130. Such victims would be those U.S. citizens victimized by "private" terrorists or involved in terrorist incidents within the United States since *Persinger* precludes actions against state-sponsored terrorists inflicting injuries abroad. *See supra* notes 96-103 and accompanying text.

131. For a critical discussion of *Tel-Oren* and its theoretical implications, see Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 211 (1987).

132. This compensation system dates back to the Middle Ages:

> Although Lloyd's [of London] in the 1930s was the first insurer to offer kidnap insurance in modern times, the concept is almost 500 years old. With the advent of shipping in the 1200s, pirates and other enemies not only seized ships' cargoes but also the wealthy traders who were sometimes aboard. At first, cargoes were insured. Then, in 1500, the Guidon de la Mer, a French marine code, first provided for kidnap insurance. . . . In 1681, Louis XIV of France provided for the insurance when he included the provision in his Ordonnance de la Marine.

Schussel, *supra* note 13, at 5-6.

133. *Id.* at 4-5.

134. *Id.* at 5.

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> trouble. Indeed, most policies require that the coverage be kept confidential or the policies become void. Therefore, only a few key people in a corporation may know of the coverage, and many who are covered never hear about it.[135]

A company may typically maintain ransom coverage from $1 million to more than $20 million, paying premiums ranging from $1,000 to more than $100,000.[136] The coverage in K/R&E policies can be quite comprehensive. For example, a policy obtained through American International Group may include the following:

> (1) Payment of ransom for kidnapping or alleged kidnapping;
>
> (2) payment of ransom on a threat to kill or bodily injure an insured;
>
> (3) protection against loss by reason of destruction, disappearance, or wrongful appropriation of ransom monies while being delivered;
>
> (4) payment of expenses incurred for negotiators and consultants, reward, interest costs of a loan, legal fees, damages, and salaries;
>
> (5) payment of loss of earnings resulting from an interruption of business caused by a kidnapping or extortion incident;
>
> (6) payment of an accidental death and dismemberment benefit if an insured sustains bodily injury during a kidnap; and
>
> (7) payment of a wrongful detention benefit, reimbursing the insured for salary losses and other costs resulting from involuntary confinement by a host government or other organization.[137]

K/R&E policies should become increasingly popular because, "[w]ith improved protection afforded to government interests, terrorist activities directed at business concerns are likely to increase."[138] Policies covering family members, rather than employees, should also become more common as terrorists begin to target family members of corporate employees.[139] This may occur because "[f]amilies may not be as well protected as corporate staff and [terrorist] kidnappers may perceive them as more willing to pay a ransom quickly than a corporation."[140] Currently, such insurance is only available at a price prohibitive to most individuals. As terrorism incidents continue to increase, however, K/R&E insurance may prove to be a more attractive, if not the only, method available for private U.S. citizens to obtain terrorist victim compensation.

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135. *Id.*

136. *Id.*

137. AIG Special Services Division, *The Policy*, in SPECIAL RISK INSURANCE (copy on file with *Texas International Law Journal*).

138. AIG Special Services Division, *Corporate Kidnapping*, in SPECIAL RISK INSURANCE (copy on file with *Texas International Law Journal*).

139. AIG Special Services Division, *Individual/Family Kidnapping*, in SPECIAL RISK INSURANCE (copy on file with *Texas International Law Journal*).

140. *Id.*

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VI. CONCLUSION

While victims of terrorism often went uncompensated in the past, various schemes have developed within the United States to remedy this situation. Statutes like the Victims of Terrorism Compensation Act guarantee that some future victims will be compensated for their injuries. Private insurance, when available, performs the same function for those not covered by such statutes.

However, not all terrorist victims come within the purview of these schemes. Methods available to individuals not provided for by statute or covered by insurance have proven largely unsuccessful. Decisions like *Persinger* and *Tel-Oren* have made recovery through the U.S. court system highly unlikely for these individuals. It is inevitable, therefore, that there will be individuals, including U.S. citizens, who will be victimized by terrorism and forced to suffer injury without remedy.

Ultimately, the issue of terrorist victim compensation has the potential to extend even beyond those involved in a specific terrorist incident. The words of one scholar best sum up the final ends of terrorist victimization:

> Those not involved in an incident either directly or by virtue of knowing someone who is involved may still feel touched by a particular incident. The psychology of terror and the fear of indiscriminate or random violence are key factors here. . . . Whether people actually avoid visiting Israel, walking in certain areas of Belfast, accepting certain diplomatic missions or business posts, or speaking out publicly on various issues out of fear of being targeted by terrorists is not easily measured or verified. However, it is a fact that most ordinary citizens will accept severe curtailment of civil liberties in the name of security. This is the ironic lesson that has been repeatedly demonstrated in country after country faced with serious terrorist campaigns. This fact alone is sufficient evidence that the general public is victimized in some way by terrorist acts.[141]

*Kimberly A. Trotter**

141. R. CRELINSTEN & D. SZABO, *supra* note 1, at 130.

* J.D. Candidate 1987, University of Texas.

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> for the payment of compensation in such cases. All followed the practice of continuing salary payments, as does the United States, and a few granted cash bonuses for family expenses or extra leave on an ad hoc basis.[3]

This shortcoming has been recognized in recent years and subsequent analysis has resulted in the formulation of several responses from nations affected by terrorist acts. The purpose of this Note is to provide a guide to the various methods available in the United States to gain compensation for terrorist victims.[4] Section II examines the problem of defining who is a victim of terrorism. Section III discusses relevant statutory remedies. In Section IV, the use of legal actions in U.S. courts as a method for obtaining compensation receives attention. Section V focuses on private compensatory methods.

II. DEFINING THE "VICTIM OF TERRORISM"

The threshold question to be answered when considering terrorist victim compensation is who is a victim of terrorism; that is, who is to be compensated. Obviously, any hostages held in a terrorist incident are direct victims[5] of terrorism,[6] but some persons beyond the hostages themselves may also be victims.

For example, family members of hostages may suffer compensable injuries[7] during a terrorist incident:

> Family, friends, and close associates of direct victims may undergo even greater stress during or after an incident than the direct

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3. PRESIDENT'S COMMISSION ON HOSTAGE COMPENSATION, THE FINAL REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S COMMISSION ON HOSTAGE COMPENSATION, at 29 (Sept. 21, 1981) [hereinafter COMMISSION REPORT]. Private U.S. citizens are not entitled to statutory terrorist victim compensation. *See infra* notes 31-35 and 63-66 and accompanying text.

4. This Note is limited to a discussion of compensatory methods applicable to victims receiving personal injuries due to a terrorist incident; *i.e.*, former hostages and their families. A discussion of compensation for "economic" injuries, *i.e.*, property damage, is beyond the scope of this Note.

5. The direct-indirect label is used to distinguish victims who are actively involved in a terrorist incident, *i.e.*, hostages, from those who are incidentally affected by the incident, *i.e.*, hostage families. A different, but useful, model of hostage victim labeling is provided in R. CRELINSTEN & D. SZABO, *supra* note 1, at 3-6, where hostages are labeled "passive" or "secondary" victims, and those who are expected to fulfill the terrorist's demands are labeled "active" or "primary" victims.

6. Terrorism has been described as "the threat and use of psychological and physical force—including intimidation, coercion, repression, and, ultimately, destruction of human lives and property—for the purpose of attaining real or imaginary ideological and political goals." LEGISLATIVE RESPONSES TO TERRORISM, *supra* note 2, at v. Another description characterizes terrorism as "a fear-provoking tactic involving the callous use of innocent people to achieve political or personal ends." R. CRELINSTEN & D. SZABO, *supra* note 1, at ix.

7. *See infra* note 37 and accompanying text.

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victim himself, by virtue of the fact that the latter's coping mechanisms have been fully activated to deal with the situation, whereas the former feels totally helpless and useless.[8]

Diego C. Asencio, former United States Ambassador to Brazil and a former terrorist hostage,[9] has stated that: "the [hostage] knows what condition he is in, how he is feeling, what to expect, but the family is in a state of uncertainty. . . . I am convinced that in some cases members of the family suffer more even than the victim."[10]

Providing benefits to a hostage's family members may also be of immense psychological benefit to the hostage himself. As Representative Daniel A. Mica has noted:

> We have learned from the hostage experience in Iran that, in a long-term hostage situation, a major concern of a captive is for the welfare of his or her family. We have not fully provided for security of our personnel until we have enacted legislation which provides safeguards against the mental as well as physical strain which sometimes comes with serving our country overseas.[11]

The decision of who is a compensable victim of terrorism thus reaches beyond just providing for those involved in a particular hostage incident. Different compensatory methods will have their own peculiar and competing goals to satisfy, in addition to monetary compensation. Ultimately, the definition of "terrorist victim" will reflect the compensatory method selected.

III. STATUTORY REMEDIES

A. *Statutory Aims*

United States statutes regarding compensation for victims of terrorism allow benefits only to U.S. government employees who have been involved in a hostage incident and their families.[12] This restriction has come about for two reasons. First, many terrorist incidents have involved U.S. government

8. R. CRELINSTEN & D. SZABO, *supra* note 1, at 130.

9. Ambassador Asencio was held hostage in Bogota, Colombia for 61 days. Asencio, *The Psychological Impact of Communication on the Hostage and Family: A Hostage Experience in Colombia*, in PROCEEDINGS OF THE 10TH ANNUAL SYMPOSIUM ON THE ROLE OF BEHAVIORAL SCIENCE IN PHYSICAL SECURITY—"OUTTHINKING THE TERRORIST: AN INTERNATIONAL CHALLENGE" 1 (1985) *reprinted in H.R. 1956 and H.R. 2019, Benefits to Federal Employees Who are Victims of Terrorism: Joint Hearings Before the Subcomm. on Civil Service and the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service and the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 99th Cong., 1st Sess. 139, 140 (1985) [hereinafter *Joint Hearings*].

10. *Joint Hearings*, *supra* note 9, at 72-73 (testimony of Diego C. Asencio, former United States Ambassador to Brazil).

11. *Joint Hearings*, *supra* note 9, at 18 (statement of Rep. Daniel A. Mica).

12. *See infra* notes 33-35, 62-64 and accompanying text. The Internal Revenue Code provides for the exclusion from gross income of:

> [a]mounts received by an individual as disability income attributable to injuries incurred as a direct result of a violent attack which the Secretary of State determines to be a terrorist attack and which occurred while such individual was an employee of

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employees rather than private citizens.[13] Government employees stationed abroad are often both the easiest prey and the greatest prize for terrorists wishing to strike out at the United States.[14] In describing his own hostage experience, Ambassador Asencio stated, "the gentlemen who held me were not angry at me personally but, in fact, were interested only in my value as a symbol, as a representative of the President of the United States, of the people of the United States. . . ."[15]

The second reason for limiting compensation to government employees is the view that such compensation fulfills a duty owed by the United States to its employees. The President's Commission on Hostage Compensation,[16] for example, recommended "that the Government view its obligation toward the [Iranian] hostages as those of an employer and assume the costs of restoring the hostages to health, provide disability compensation if their health cannot be restored, provide compensation for material losses and safeguard their employment rights and career prospects."[17] The Hostage Relief Act of 1980[18] established "the principle that the government as a reasonable and compassionate employer had a responsibility to . . . hostages to provide . . . some material relief to partially offset the duress suffered by them and their families."[19] Apparently, the question of the existence of a similar duty to private citizens victimized abroad because they are Americans has yet to be decided.[20]

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the United States engaged in the performance of his official duties outside the United States.

I.R.C. § 104 (a)(5) (1982).

13. *See* Appendix D, COMMISSION REPORT, *supra* note 3, at 88-99 (setting out dates, locations, and descriptions of 50 terrorist incidents involving U.S. officials from 1968 to 1980). United States Representative Patricia Schroeder has related the story of a State Department employee who stated that "[g]overnment employees overseas, regardless of agency and whether they work in Africa, the Middle East, South America, or Paris, are terrorism targets purely because they are Government employees. Carrying a diplomatic or official passport can be an automatic death warrant." *Joint Hearings, supra* note 9, at 1 (statement of Rep. Patricia Schroeder). *But see* Schussel, *Kidnap & Ransom Insurance: The Industry's Red Hot, Hush Hush Topic,* 37 CONTACT No. 3 at 3, 4 (1985) ("[I]n 1984, incidents against American businesses overseas for the first time exceeded those against the U.S. government.") (CONTACT is a publication of the American International family of insurance companies and agencies) (copy on file with *Texas International Law Journal*).

14. *Joint Hearings, supra* note 9, at 91 (testimony of Vice President L. Bruce Laingen, National Defense University). Mr. Laingen was held hostage in Tehran, Iran for 444 days. Appendix C, COMMISSION REPORT, *supra* note 3, at 85.

15. *See Joint Hearings, supra* note 9, at 71.

16. *See infra* note 38 and accompanying text.

17. COMMISSION REPORT, *supra* note 3, at 31.

18. *See infra* note 21.

19. *Joint Hearings, supra* note 9, at 43 (statement of Norman Painter, President, Local 1812, American Federation of Government Employees).

20. *Id.* at 67 (statement of Rep. Patricia Schroeder).

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B. *The Hostage Relief Act of 1980*

The Hostage Relief Act of 1980[21] was the first statute expressly drafted to compensate victims of a particular act of terrorism. The Act was passed in response to the Iranian hostage incident[22] in which seventy-two persons were seized or forced into protective refuge in Tehran, Iran.[23] All but one of these persons was a U.S. government employee or a person working under contract to the U.S. government, and fifty-two of these were held in captivity for 444 days.

On January 19, 1981, the United States and Iran entered into the Declaration of the Government of the Democratic and Popular Republic of Algeria (Algiers Agreement),[24] a treaty providing for, among other things, the release of the American hostages.[25] President Jimmy Carter issued Executive Order 12,283 on the same day in fulfillment of the United States' commitment under the Agreement.[26] That Order directed the Secretary of the Treasury to issue the regulations necessary to enforce the provisions of the Agreement, and directed that he notify all appropriate courts of his action.[27] The hostages were released on January 20, 1981. President Ronald Reagan implemented the Algiers Agreement by Executive Order on February 24, 1981.[28] Among the provisions of the Agreement, it was agreed that no hostage would bring suit against Iran for damages incurred during the hostage incident.[29] The penalty for instituting such a suit was a fine of $50,000 and a ten-year prison term.[30]

21. Hostage Relief Act of 1980 §§ 101-301, 5 U.S.C. § 5561 (1982).

22. H.R. REP. NO. 1349, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4178.

23. The facts are taken from COMMISSION REPORT, *supra* note 3, at 3-10.

24. Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, United States-Iran, 20 I.L.M. 224 (1981) [hereinafter Algiers Agreement].

25. *Id.* at 225.

26. Exec. Order No. 12,283, 3 C.F.R. 114-15 (1982), *reprinted in* 50 U.S.C. § 1701 notes at 261-62 (Supp. 1987).

27. *Id.*

28. Exec. Order No. 12,294, 3 C.F.R. 139-40 (1982), *reprinted in* 50 U.S.C. § 1701 notes at 263-64 (Supp. 1987).

29. Algiers Agreement, *supra* note 24, at 227; *see also* 31 C.F.R. § 535.216(a) (1986), prohibiting:

> [p]ersons subject to the jurisdiction of the United States . . . from prosecuting in any court within the United States or elsewhere, whether or not litigation was commenced before or after January 19, 1981, any claim against the Government of Iran arising out of events occurring before January 19, 1981 relating to: (1) The seizure of the hostages on November 4, 1979; (2) The subsequent detention of such hostages; (3) Injury to United States property or property of United States nationals within the United States Embassy compound in Tehran after November 3, 1979; or (4) Injury to United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran.

30. 31 C.F.R. § 535.701 (1986).

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In an attempt to compensate the Iranian hostages by some alternative means, Congress enacted the Hostage Relief Act of 1980.[31] The Act designates compensable victims of terrorism as "American hostages" and "family members."[32] An American hostage is defined as any individual who, while in the civil service or the military or while a citizen or resident alien of the United States rendering personal service to the United States abroad, is placed in "captive status" during the applicable hostage period.[33] Captive status means a missing status due to "hostile action abroad . . . which is directed against the United States during the hostage period . . . ."[34] A family member is defined as any dependent of an American hostage and any member of the hostage's family or household.[35]

The Hostage Relief Act is important not only because of its particular purpose, but also because it expressly recognizes that a hostage's family members are compensable victims. The benefits provided by the Act were specifically tailored to meet the differing needs of hostages and their families. Thus, the Act provided several very specific and goal-oriented benefits that were formerly unavailable. Among these were:

> [1] Creation of an interest-bearing salary savings fund, including retroactive interest on salary held prior to establishment of the fund.
>
> [2] Reimbursement of medical expenses of the hostages and members of their families which are attributable to the hostage experience. . . .
>
> [3] Extension of the Soldiers and Sailors Relief Act to hostages, thereby permitting courts to defer legal actions against hostages and their families when the enforced absence is prejudicial to their defense.
>
> [4] Exemption from gross income of compensation paid while in hostage status.
>
> [5] Exclusion from income tax when an employee dies as a result of hostile action.
>
> [6] Deferred assessment of taxes and penalties and refund of any tax collected before enactment.
>
> [7] Authorization for spouse to file joint [income tax] return.

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31. Hostage Relief Act of 1980, §§ 101-301, 5 U.S.C. § 5561 (1982).

32. *Id.* § 101, 5 U.S.C. § 5561 (1982).

33. *Id.* § 101(1), 5 U.S.C. § 5561 (1982). Congress chose not to compensate the one Iranian hostage who was a private U.S. citizen. *See id.* § 101, 5 U.S.C. § 5561 (1982). "Congress has made a clear distinction between the private American hostage and public official hostages in the Hostage Relief Act of 1980 by providing only . . . tax relief benefits . . . to the private citizen while making the government employees eligible for the other benefits . . . ." COMMISSION REPORT, *supra* note 3, at 32. *See also supra* notes 16-20 and accompanying text.

34. Hostage Relief Act of 1980 § 101(4)(A), 5 U.S.C. § 5561 (1982).

35. *Id.* § 101(3), 5 U.S.C. § 5561 (1982).

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[8] Reimbursement of educational expenses (post-secondary) of hostage families . . . and retraining of hostages.[36]

While the Act was of enormous benefit to the victims of the Iranian hostage incident, it lacked any means of compensating the hostages or their families for all of their damages; no compensatory monetary award existed for the pain, suffering, and mental anguish of the victims and their families.[37] Furthermore, since the Act was enacted expressly to compensate the American hostages in Iran, it was an ad hoc response. No permanent legislation existed for the benefit of subsequent terrorist victims. The issues of hostage compensation and U.S. policy towards terrorist victims thus became the topic of study for the President's Commission on Hostage Compensation.

C. *The President's Commission on Hostage Compensation and the War Claims Act of 1948*

The President's Commission on Hostage Compensation was formed by President Jimmy Carter on January 19, 1981,[38] for the purpose of "making recommendations to the President as to whether the United States should provide financial compensation to the United States nationals held hostage in Iran . . . ."[39] In its study, the Commission considered the events surrounding the Iranian hostage incident, the existing statutory remedies and benefits available to the hostages, and the obligation of the United States government to provide compensation to the hostages.[40] Ultimately, the

36. Appendix G, COMMISSION REPORT, *supra* note 3, at 120. *See generally* Hostage Relief Act of 1980 §§ 101-301, 5 U.S.C. § 5561 (1982) (statutorily providing these benefits).

37. American tort law generally recognizes three basic kinds of compensable losses suffered by victims in personal injury actions. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 8.1, at 540 (1973). First, there are losses relating to lost wages and lost earning capacity. A tort victim is normally entitled to recover for his lost wages and for "any loss of working capacity resulting from his injury, whether the loss in capacity actually reduces his earnings or not." *Id.* Second, there are expenses incurred due to the injury, usually medical expenses. "The value of any services rendered as the result of an injury is the usual measure of recovery for this particular element of damage. . . . [R]ecovery is not limited to expenses of treatment. Any reasonable expense, adequately proved to be the result of the injury, is an item of damage." *Id.* at 543. Finally, victims receive "intangible" injuries, often described as pain, suffering, and mental anguish. *Id.* at 544. Courts will typically allow "fair" or "reasonable" compensatory damages for such injuries. *Id.* at 545.

Indirect victims, such as family members, may also suffer from intangible injuries. Recovery of damages for "mental distress" may be allowed where "it would appear that there was a very high degree of probability that the mental disturbance would follow, and that the defendant [the terrorist, for example] proceeded in conscious and deliberate disregard of it, so that the defendant's conduct would properly be called wilful, wanton or reckless." PROSSER AND KEETON ON THE LAW OF TORTS § 12 (W. Page Keeton 5th ed. 1984).

38. Exec. Order No. 12,285, 3 C.F.R. 117-18 (1982).

39. COMMISSION REPORT, *supra* note 3, at 1.

40. *See generally* COMMISSION REPORT, *supra* note 3, for a detailed discussion of each of these topics.

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Commission concluded that paying "compensation in the tort sense was not appropriate."[41] The Commission specifically recommended "that the United States Government make no payment to the Iranian hostages or their family members of any compensation intended to be the equivalent to compensatory damages for injuries incurred as the result of the unlawful detention of the hostages by the Iranian Government."[42] Instead, "[t]he Commission considered various bases under which direct financial benefits for the hostages might be warranted and concluded that monetary benefits, modeled after [the War Claims Act of 1948,[43] a] statute providing similar payments to American prisoners of war and wartime civilian internees on account of their detention, would be appropriate."[44]

The War Claims Act allows for the compensation of prisoners of war,[45] civilian U.S. citizen internees captured by hostile forces,[46] and certain employees of contractors working abroad for the United States.[47] Benefits received under the Act are payable only to designated beneficiaries, usually the captive himself or his immediate family members.[48]

Using the War Claims Act as a precedent, the Commission recommended that legislation be adopted providing for payment to the hostages equivalent to $12.50 per day[49] for each day of captivity.[50] While the Commission acknowledged that distinctions existed between prisoners of war and civilian

41. Letter from James S. Dwight, Jr., Chairman, President's Commission on Hostage Compensation, to President Ronald Reagan (Sept. 21, 1981), *reprinted in* COMMISSION REPORT, *supra* note 3, at i.

42. COMMISSION REPORT, *supra* note 3, at 35-36.

43. War Claims Act of 1948, 50 U.S.C. App. §§ 2001-2017 (1982).

44. COMMISSION REPORT, *supra* note 3, at 20. The War Claims Act may have been chosen as the Commission's model for hostage compensation because of the then recent release of Vietnam POWs who had received awards under this statute. *Joint Hearings*, *supra* note 9, at 49 (statement of Walter F. Weiss, Congressional Liaison, American Foreign Service Association).

45. War Claims Act of 1948, 50 U.S.C. App. § 2005 (1982).

46. *Id.* § 2004.

47. *Id.* § 2003. Compensable employees are described in 42 U.S.C. § 1701(a) which provides compensation for injury proximately resulting from a war-risk hazard.

48. War Claims Act of 1948, 50 U.S.C. App. §§ 2004(d), 2005(c) (1982). Benefits due to U.S. contractor employees are payable to the employee or his dependents. *Id.* § 2003(a) (referring to 42 U.S.C. § 1701(b)).

49. The selection of this specific amount sparked some controversy:

> The Commission noted that the daily detention benefit payable to persons eligible under the War Claims Act was last adjusted upward in 1970 and now stands at $5.00 per day for prisoners of war. The Commission felt it proper to recommend that the President suggest to the Congress a further upward adjustment in this figure [for the hostages] to $12.50 per day to take into account the impact of inflation since 1970.

COMMISSION REPORT, *supra* note 3, at 22. This figure was subsequently referred to as "ridiculous"; Letter from Brice M. Clagett to Rep. Patricia Schroeder (June 12, 1985), *reprinted in Joint Hearings*, *supra* note 9, at 38; "condescending"; *id.* at 73 (statement of Diego C. Asencio); and an "insult"; *id.* at 80 (statement of Thomas D. Boyatt, former United States Ambassador to Brazil).

50. *Joint Hearings*, *supra* note 9, at 33.

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internees held during war on the one hand, and the hostages on the other,[51] the Commission also felt "that the holding of hostages by international terrorists and the well-documented tendency of some nations to disregard international standards for the treatment of prisoners of war and internees have brought the two situations much closer together."[52]

It is significant that the Commission chose the War Claims Act as its model, since this Act, like the Hostage Relief Act of 1980, expressly allows for the compensation of a hostage's family.[53] Unlike the Hostage Relief Act, however, the War Claims Act does not provide specific nonmonetary benefits, such as payment of medical expenses, to either a hostage or his family. Benefits are provided as a lump sum monetary award,[54] and in the event of the hostage's death, the designated family members are entitled to the lump sum which the hostage himself would have received.[55]

Ultimately, the Commission's recommendations, including the $12.50 per day payment to the Iranian hostages, were never implemented.[56] Sensing the inequity in such a result,[57] members of Congress subsequently introduced several bills that provided some form of compensation to the Iranian hostages as well as a permanent compensation system for future terrorist victims.[58]

D. The Victims of Terrorism Compensation Act

The most recent legislative attempt at compensating victims of terrorism is the Omnibus Security and Antiterrorism Act of 1986.[59] The pertinent portion of that statute is Title VIII, the Victims of Terrorism Compensation Act,[60] which provides benefits for "captives" and their "family members."[61] A captive is defined as an individual held involuntarily while such individual is in the civil service, or a U.S. citizen, national, or a resident alien rendering service to the United States.[62] "Captive status" is defined as "a missing status which, as determined by the President, arises because of a hostile action

51. *Id.* at 20.
52. *Id.* at 21.
53. *See supra* notes 32-35 and accompanying text.
54. War Claims Act of 1948, 50 U.S.C. App. §§ 2003(a), 2004(c), 2005(b) (1982).
55. *Id.* §§ 2003(a), 2004(d), 2005(b).
56. H.R. REP. No. 201, 99th Cong., 1st Sess., pt. 1, at 6 (1985) [hereinafter HOUSE REPORT]; *see also Joint Hearings, supra* note 9, at 19 (statement of Ronald I. Spiers, Under Secretary of State for Management); *id.* at 41 (statement of Walter F. Weiss, Congressional Liaison, American Foreign Service Association).
57. *See* HOUSE REPORT, *supra* note 56, at 25.
58. *E.g.*, H.R. 1956, 99th Cong., 1st Sess. (1985); H.R. 2019, 99th Cong., 1st Sess. (1985); H.R. 2851, 99th Cong., 1st Sess. (1985).
59. Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 1986 U.S. CODE CONG. & AD. NEWS (100 Stat.) 853 (Supp. No. 8).
60. *Id.* § 801, (100 Stat.) 879 [hereinafter Victims of Terrorism Compensation Act].
61. Victims of Terrorism Compensation Act § 803, (100 Stat.) 879.
62. *Id.*

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Can Tort Law Be Ethical?

A proposal to curb ill-gotten gains.

BY MICHAEL HOROWITZ

SOMEONE STICKS A LOADED GUN to your head and asks for your wallet. Do you resist if you know the bullets are cheap and likely (but not certain) to be duds?

Today, mass tort litigation creates similar bet-your-life scenarios for increasing numbers of industries. Federal circuit court judge Richard Posner has noted that when a jury can "hold the fate of an industry in the palm of its hand . . . and hurl [it] into bankruptcy . . . the industry is likely to settle—whether or not it really is liable." Law increasingly counts for little in mass tort cases; fixing the size of payoffs to make the cases go away has become its primary function.

Think otherwise? Then imagine yourself general counsel of McDonald's, faced with a nationwide class action brought on behalf of millions of Happy Meal customers who claim that their diabetes, obesity, and heart attacks were caused by your products, and with a companion series of suits brought by government agencies that paid for their medical care.

Your first reaction would be fury and incredulity. You know—or think you do—that french fries aren't cigarettes. You know that McDonald's tried and failed to sell low-fat hamburgers, that it gainfully employs vast numbers of young people, that millions of customers enjoy its products every day. That's when reality intrudes.

The first dose would come when you noted that the damages claimed in the combined suits vastly exceed the entire net worth of McDonald's—that it will be out of business if the cases are tried and lost. You then realize that the company's files almost certainly contain memos discussing the health effects of your products. You also note that the public is less aware of the risks of eating Big Macs than of smoking Camels, that you've done little to advise your customers of those risks, that many of those patrons are young and unschooled, that you've made it hard for them to know the fat and calorie content of what you sell, that armies of expert witnesses and government officials are prepared to second-guess your menu and recipe decisions and to allege that "junk foods" are killing America. Your government relations vice president then describes the price the company will pay for waging sustained public war on political officials eager for massive lawsuit windfalls they can spend without having to pass tax increases. Your media people also warn that document leaks and angry politicians orchestrated by media-savvy lawyers can metastasize the company's happy face image into a skull and crossbones faster than you can say asbestos or Bill Gates.

Finally, you note that 8 or 9 state supreme courts—or has it now become 19 or 20?—are, like the Florida Supreme Court, dominated by tort lawyers implacably eager to redistribute your assets without regard to fault. And, if that isn't enough, the value of the company's stock has dropped precipitously since the lawsuits were filed. As a prudent lawyer and company officer, you'll soon come to understand what you need to do.

First, make sure all your competitors—Popeyes and Taco Bell, as well as Wendy's and Burger King—are also named in the suit. Then, after learning from your marketing people that the bottom won't drop out of sales as long as you (and your competitors) don't add more than 30 cents to the price of Big Macs, conduct a kabuki ritual of discovery proceedings whose singular objective is a settlement that will increase burger prices by no more than a quarter (with comparable increases for chicken wings and burritos).

Settling will be easy, for all you'll need to do is pay a nickel a burger for the next 25 years to the 300 or so lawyers who brought and control the cases. To be sure, this tort tax on your products will hurt business, and you'll be squeezed some by the nutrition education programs and modest salt and calorie reductions you'll be required to implement as part of the settlement. But offering a nickel rather than a penny a burger for legal fees (and offering government health care programs more lucrative settle-

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ments than individual plaintiffs) will do wonders in getting a settlement you can live with. Among other things, it will convert the lawyers who sued you into self-interested guarantors of the health of the fast food industry; and it will immediately return your stock price to where it was when the cases were brought.

The settlement will of course add eight or ten new tort lawyer billionaires to the Forbes 400 and will give the tort bar more disposable income to "invest" in the political process than all parties now spend in all U.S. elections in any given year. But that will be the next industry's worry, not yours.

The above scenario is, precisely, the story of the great asbestos and tobacco lawsuits of the 1990s. It explains why, in order to save itself, Dow threw its Dow Corning division to the wolves in the junk science breast-implant cases. As former *Washington Post* business editor David Ignatius has written, it will one day be the story of an oil industry that sits with global warming risk memos in its files if droughts or floods depreciate property values in different regions of the country. And consider this recent Department of Agriculture report: Carbonated soda provides more sugar in a typical 2-year-old's diet than cookies, candies, and ice cream combined, while more than half of 8-year-olds drink a can of soda per day and a third of all teenage boys drink at least three cans per day. Do you think for a second that creative tort lawyers won't try to link this "soda addiction" to any number of present and future health and social ills? Are you ready, Coke? Will you be ready when the tort bar dominates 30 state supreme courts? Cheer up, for you'll be able to get out of it all without too much damage if you pay the tort lawyers a penny a can for 25 years or so. On second thought, maybe you'll need a penny and a half to make them go away.

Under every canon of legal ethics, these blackmail scenarios should be proscribed. The central premise of legal ethics—that lawyers are fiduciaries restricted to reasonable and risk-based fees—is shattered when, as in the tobacco cases, lawyers are scheduled to receive $200,000 per hour fees for late-filed, copycat cases. Fee ethics mandates are said to be particularly critical in contingency fee cases where, as courts and scholars have noted, $100-million cases seldom require ten times as much risk and effort as $10-million cases. In fact, the relationship of case size to attorney risk is reversed in mass tort cases, where survival threats to defendants make $245-billion cases more than a thousand times harder, to win than "mere" $245-million cases.

The central premise of legal ethics is shattered when lawyers receive $200,000 per hour fees for late-filed, copycat cases.

President Bush proposed during the campaign to apply to lawyers in mass tort cases the Internal Revenue Code provisions that govern fiduciary breaches of duty by pension fund trustees, foundation executives, and employees of 501(c)(3) non-profits. Under this so-called Jim and Tammy Faye Bakker provision of the 1996 Taxpayer Bill of Rights, overreaching fiduciaries have the "choice" of refunding their excess payments or paying a federal tax of $2 for every dollar they keep. Under the president's proposed reform, attorneys in successful mass tort cases would be handsomely but not obscenely compensated. Based on a developed body of law governing the compensation of lawyers in shareholder suits, mass tort fees would be based on high hourly "lodestar" fees multiplied by a factor as high as six to cover the risks the lawyers assumed when they brought their cases.



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Acting as if President Bush's reform proposal never had been made, a group of tobacco attorneys recently sold a 12-year strip of about $1 billion in future fees for $308.1 million in immediate cash—thereby transferring the risk of non-payment of their fees to banks and investors. That cash-out was reported to be the first step in a planned two-year securitization of all future fees from the tobacco lawsuits, estimated to provide a payout of no less than $3 billion and as much as $10 billion.

Perhaps the lawyers and their bankers believed that the Bush proposal was not meant to be applicable to the tobacco settlement fees, and early comments from unnamed Bush spokesmen may have given them grounds to believe that this was so. If so, the lawyers and their bankers are in for a rude surprise. Page 80 of the president's budget contains this terse and, to taxpayers, cheering sentence: "The budget also assumes additional public health resources for the States from the President's proposal to extend fiduciary responsibilities to the representatives of States in tobacco lawsuits."

The Bush budget thus ensures that members of Maryland's congressional delegation will soon be asked to decide whether sick Maryland smokers (and the government agencies that pay for their care) or tobacco attorney Peter Angelos will receive the overwhelming bulk of the $1.1 billion fee now sought by Angelos. They will do so knowing that Angelos's services were rendered under a statute which, in the words of the state senate president, Mike Miller, "changed centuries of precedent to ensure a win." They will do so with the country's leading ethics scholars arguing that almost all of the money must go to Maryland rather than Angelos if codes of ethics are to have any meaning at all. Ted Kennedy, meanwhile, will get to vote on whether the bulk of the $775 million awarded to the Massachusetts tobacco lawyers should go to them or that state's health authorities. This comes in the face of sworn testimony by tort lawyers from other states that the Massachusetts attorneys added little or nothing to the settlement received by Massachusetts. Other members of Congress will have similar opportunities to decide whether fiduciary standards that still allow tobacco lawyers to be paid as much as $3,000 per hour are too ungenerous to those lawyers.

The Bush proposal will chill the plans of the tobacco lawyers to take a $3-$10 billion payoff and run. It sets up what will be a defining national debate on the role and rule of lawyers. Finally, it offers the tort bar the lesson that many Americans are now also learning: Don't underestimate George W. Bush. ◆



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CONSOLIDATION

LANGUAGE

(a) SUBJECT MATTER JURISDICTION. Notwithstanding any other law, within 90 days of an act of terrorism as defined in section 803, the Judicial Panel on Multidistrict Litigation shall assign a single federal district court to conduct pre-trial and trial proceedings in all pending and future civil actions for property damage, personal injury, or death arising out of or resulting from a single act of terrorism as defined in section 803, and shall transfer all such pending civil actions to that district court. The Judicial Panel on Multidistrict Litigation shall select and assign the district court based on the convenience of the parties and the just and efficient conduct of the proceedings. The district court assigned by the Judicial Panel on Multidistrict Litigation shall have original and exclusive jurisdiction over all such actions. For purposes of personal jurisdiction, the district court assigned by the Judicial Panel on Multidistrict Litigation shall be deemed to sit in all judicial districts in the United States.

[Subsections (b) and (c) would ensure transfer of cases filed in other courts.]

PURPOSE

- A single federal court and a uniform standard of liability are necessary to ensure that the legal system is not overwhelmed by multiple cases in multiple courts in multiple states -- with similar claims in multiple forums decided under widely varying standards for liability, causation, defenses, and damages.

- Consolidation of cases in a single court is a common procedure in mass tort cases and was a central feature of the legislation recently enacted by Congress for the tort cases arising out of the September 11 attacks.

ANALOGUE IN AIR TRANSPORTATION ACT

- Section 408(b) of the Air Transportation Act consolidates all cases arising out of the September 11 attacks in a single federal court.

PUNITIVE DAMAGES

LANGUAGE

(e) PUNITIVE DAMAGES. Punitive damages, exemplary damages, and other damages not intended to compensate the plaintiff for actual losses shall not be available in any civil action subject to this title.

PURPOSE

- In mass tort cases, only a limited pool of resources will be available to plaintiffs who prove liability (whether because of bankruptcy or settlement).

- Because of the limited pool of resources, it would be grossly inequitable and unfair to allow one plaintiff or class of plaintiffs to receive an excessive award -- including a punitive component entirely unrelated to the plaintiff's injuries -- that could greatly limit or outright preclude recovery by other plaintiffs.

- Even for defendants who face no possibility of bankruptcy, the possibility of massive punitive or non-economic damages creates pressure to settle even unmeritorious cases and economic instability for potential defendants in terrorism cases.

- A business defendant who engages in the kind of wrongdoing that otherwise would trigger punitive damages will face a variety of federal and state criminal and administrative investigations and sanctions.

ANALOGUE IN AIR TRANSPORTATION ACT

- Section 405(b)(5) of the Air Transportation Act precludes recovery of punitive damages in the victims' claims process, and Section 408(a) limits any recovery against air carriers to the limits of their liability policies, which essentially precludes punitive damages against air carriers.

OFFSET

LANGUAGE

(f) OFFSET. In determining the amount of any money damages available under this title, the court shall offset any compensation or benefits received or entitled to be received by the plaintiff or plaintiffs from any collateral source, including the United States or any federal agency thereof, in response to or as a result of the act of terrorism

PURPOSE

- This procedure, which Congress adopted for the victims claims process applicable to individual cases arising out of the September 11 terrorist attacks, will ensure that plaintiffs are compensated for their losses, yet also prevent double recovery by plaintiffs. It thus will help preserve the limited pool of defendant resources available for successful plaintiffs without penalizing injured victims.

- The procedure is consistent with the principle that first-party private insurance and, where necessary, standard government benefits have been (and should be) the primary means for promptly and appropriately compensating the parties injured in a terrorism attack. Through these resources, injured parties will receive appropriate care and compensation without resort to an inefficient judicial process that would trigger widespread bankruptcies.

- Even in ordinary tort cases, many states offset past and prospective insurance benefits paid or payable to the plaintiff against the plaintiff's recovery.

ANALOGUE IN AIR TRANSPORTATION ACT

- Section 405(b)(6) of the Air Transportation Act requires that recovery by a claimant in the victims' claims process be reduced by the amount of collateral source compensation the plaintiff has received or is entitled to receive.

NON-ECONOMIC DAMAGES

LANGUAGE

(g) NON-ECONOMIC DAMAGES. Each defendant shall be liable only for the amount of non-economic damages allocated to the defendant in direct proportion to the percentage of responsibility of the defendant for the harm to the claimant. No plaintiff may recover non-economic damages unless the plaintiff suffered physical harm.

PURPOSE

- The proposed language is more modest than many proposals: It would not eliminate non-economic damages, nor would it impose proportional fault for *economic* damages. In addition, this proposal for proportional liability for non-economic damages is less restrictive than state law provisions that may apply to many cases litigated under the cause of action recently established by Congress for the September 11 events.

- Without this provision, a court could hold any defendant "jointly and severally" liable for the full amount of the plaintiff's non-economic damages, even for those damages unrelated to the defendant's actions or attributable to the terrorists.

- Some studies suggest that non-economic damages can comprise 40-50% of damages in certain classes of tort cases. If *any* defendant, even the marginally involved, could be made to pay the full extent of non-economic damages in a mass terrorism incident, these damages could easily threaten to bankrupt hundreds of legitimate businesses.

- Limitations on joint and several liability are commonplace. At least thirty-seven states have enacted some form of proportional liability. Indeed, seventeen states have adopted proportional liability *even for economic damages*. Another eight states have adopted proportional liability *for economic and non-economic damages* for any marginally-involved defendant (e.g., one found to be less than 50% at fault).

ANALOGUE IN AIR TRANSPORTATION ACT

- Section 408(a) of the Air Transportation Act limits recovery against air carriers to the limits of their liability policies, which is an effective cap on non-economic damages against air carriers, and applies state law limits on joint and several liability, which in many cases will be more restrictive than this proposal.

SUBSTANTIVE STANDARD FOR LIABILITY

LANGUAGE

(h) SUBSTANTIVE LAW. The standard of care for the federal cause of action . . . shall be gross negligence. Unless otherwise specified in this title, the district court shall derive other substantive principles of liability for the federal cause of action from the principles of the common law.

PURPOSE

- The gross negligence standard is a middle-ground standard between simple negligence and intentional wrongdoing and is particularly appropriate in tort cases where, by definition, the injury has been caused by the criminal acts of an intervening third party, not by legitimate bystander property and business owners.

- A simple negligence standard would generate undue pressure towards a massive settlement and/or bankruptcy, yet legitimate businesses should not be forced to bankruptcy as a result of damage and injuries caused by terrorists, at least absent serious wrongdoing on the part of these legitimate businesses.

- On a forward-looking basis, a simple negligence standard for terrorism cases would inevitably discourage normal economic activity, particularly in locales that are susceptible to terrorist attacks. For similar reasons, the law of torts traditionally has established that criminal acts by an intervening agent are often so unlikely in any *particular* instance or *specific* location that the burden of taking continual precautions against them almost always exceeds the apparent risk.

ANALOGUE IN AIR TRANSPORTATION ACT

- Section 408(b) of the Air Transportation Act provides that the substantive standard for liability is to be derived from the law of the State where the incident occurred. That procedure could be unwieldy and unfair in a mass terrorism incident that occurs in multiple states.

Cox 40

Measure HR 3210
Amendment No. 1b

F:\M7\COX\COX.090

Agreed To?	C. YES ✓	No	Wdn
Voice Vte	Yeas 26	Nays 21	

AMENDMENT OFFERED BY MR. COX

TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE OFFERED BY MR. OXLEY

Page 28 of the amendment, line 1, after "claimed by" insert "or against".

November 7, 2001
F:\V7\110701\110701.047

LaFalce 74

Measure HR 3210

Amendment No. 1a

H.L.C.

F:\M7\LAFALC\LAFALC.074
[strike tort reforms]

Agreed To?	YES	No ✓	Wdm
Voice Vte	Yeas 24	Nays 32	

AMENDMENT OFFERED BY MR. LAFALCE

TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE OFFERED BY MR. OXLEY

Strike line 18 on page 26 of the amendment and all that follows through line 10 on page 29 (and conform the table of contents accordingly).

F:\M7\BENTSE\BENTSE.019 BENTSEN 19

Measure H.R. 3210

Amendment No. 1e

Agreed To?	YES ✓	No	Wdm
Voice Vte ✓	Yeas	Nays	

AMENDMENT OFFERED BY MR. BENTSEN

TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE OFFERED BY MR. OXLEY

Page 28 of the amendment, after line 23, insert the following:

Nothing in this subsection may be construed to limit an action by an injured party for damages other than a claim for commercial property and casualty insurance resulting from an act of terrorism causing a triggering determination.

U.S. CHAMBER INSTITUTE FOR LEGAL REFORM
1615 H STREET, N.W.
WASHINGTON D.C. 20062-2000
FAX: 202-463-5302

FACSIMILE TRANSMITTAL SHEET

TO: Brett Cavanaugh	FROM: Aileen F. Maguire
COMPANY:	DATE: 9/24/2001
FAX NUMBER: 202-456-6279	TOTAL NO. OF PAGES INCLUDING COVER:
PHONE NUMBER:	SENDER'S REFERENCE NUMBER:
RE:	YOUR REFERENCE NUMBER:

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

Please review attached draft letter.

DRAFT

September 24, 2001

The Honorable Mitchell E. Daniels, Jr.
Director
Office of Management and Budget
725 17th Street, NW
Washington DC 20503

Dear Mitch:

As you can see from the attached letter the U.S. Chamber of Commerce supported the passage of the Air Transportation Safety and System Stabilization Act last Friday. Unfortunately, however, we have concerns that the legislation is too limited in its protections against this tragedy becoming a litigation bonanza for the plaintiffs' trial bar, thus drawing resources from victims and businesses. We hope the White House will join the business community in supporting a broadening of its provisions in the weeks ahead.

Of more immediate concern, however, is the scope of Section 408, entitled "Limitation on Air Carrier Liability," in dealing with litigation arising out of the events of September 11, 2001. Specifically, it is our understanding that Section 408(b) entitled "Federal Cause of Action" applies to all litigation and not just litigation against air carriers, notwithstanding the general title of Section 408. We are concerned that some are interpreting Section408(b) as not applying to businesses such as the manufacturer of the aircraft involved, the lessors of the aircraft, anyone with interests in the area of the crashes, and the insurers of any of these parties.

Mitch, as this is a matter of extreme importance to the business community -- on which the recovery of our economy largely depends -- I would appreciate your sending me a clarification of this matter as soon as possible.

Sincerely,

Attachment

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

September 21, 2001

To Members of the U.S.House of Representatives:

I am writing on behalf of the U.S. Chamber of Commerce, the world's larget business federation, representing more than three million businesses and organizations of every size, sector, and region, to commend you for your prompt efforts to assist the airline industry as well as the victims of the tragic events of September 11, 2001. The continued viability of the airline industry is critical to the American public, economy and national defense. Unfortunately, I must also voice serious concerns about the liability provisions of the Air Transportation Safety and System Stabilization Act of 2001.

Specifically, we are concerned that the bill will have dramatic and negative unintended consequences on the entire business community, possibly spawning litigation against many other parties including the manufacturer of the aircraft involved, suppliers of components for the aircrafts, the lessors of the aircraft, anyone with interests in the area of the crashes, and the insurers of any of these parties. While we share the goal of assisting the airline industry during this time of crisis, the liability provisions of the legislation are incomplete and may create a flood of litigation arising out of the horrible events of last week, delaying compensation to deserving parties.

Accordingly, we strongly urge you to carefully consider the liability limitation provisions of the legislation and make clear that they apply to all affected parties and not just those related to the airline industry. If, however, you are unable to make these changes at this time, we strongly urge you to commit to readdressing the liability aspects within the next few weeks.

Sincerely,

R. Bruce Josten

R. Bruce Josten

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
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September 21, 2001

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Sincerely,

R. Bruce Josten

Source: All Sources > Federal Legal - U.S. > **USCS - United States Code Service; Code, Const, Rules, Conventions & Public Laws**
Terms: **airline stabilization and liability and date(aft 9-15-2001)** (Edit Search)

*107 P.L. 42, *; 115 Stat. 230;*
2001 Enacted H.R. 2926; 107 Enacted H.R. 2926

UNITED STATES PUBLIC LAWS
107th Congress -- 1st Session
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PUBLIC LAW 107-42 [H.R. 2926]
SEPT. 22, 2001

107 P.L. 42; 115 Stat. 230; 2001 Enacted H.R. 2926; 107 Enacted H.R. 2926

RELATED NEWS SEARCH: ◆ 107 P.L. 42
BILL TRACKING REPORT: ◆ 107 Bill Tracking H.R. 2926
FULL TEXT VERSION(S) OF BILL: ◆ 107 H.R. 2926

An Act

To preserve the continued viability of the United States air transportation system.

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

[*1] SECTION 1. SHORT TITLE.

This Act may be cited as the "Air Transportation Safety and System Stabilization Act".

TITLE I--**AIRLINE STABILIZATION**

[*101] SEC. 101.--AVIATION DISASTER RELIEF.

(a) In General.--Notwithstanding any other provision of law, the President shall take the following actions to compensate air carriers for losses incurred by the air carriers as a result of the terrorist attacks on the United States that occurred on September 11, 2001:

(1) Subject to such terms and conditions as the President deems necessary, issue Federal credit instruments to air carriers that do not, in the aggregate, exceed $ 10,000,000,000 and provide the subsidy amounts necessary for such instruments in accordance with the provisions of the Federal Credit Reform Act of 1990 (2 U.S.C. 661 et seq.).

(2) Compensate air carriers in an aggregate amount equal to $ 5,000,000,000 for--

(A) direct losses incurred beginning on September 11, 2001, by air carriers as a result of any Federal ground stop order issued by the Secretary of Transportation or any subsequent order which continues or renews such a stoppage; and

(B) the incremental losses incurred beginning September 11, 2001, and ending December 31, 2001, by air carriers as a direct result of such attacks.

(b) Emergency Designation.--Congress designates the amount of new budget authority and outlays in all fiscal years resulting from this title as an emergency requirement pursuant to section 252(e) of the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C.

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losses; and

(ii) the amount of compensation to which the claimant is entitled based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant.

(2) Negligence.-- With respect to a claimant, the Special Master shall not consider negligence or any other theory of **liability.**

(3) Determination.-- Not later than 120 days after that date on which a claim is filed under subsection (a), the Special Master shall complete a review, make a determination, and provide written notice to the claimant, with respect to the matters that were the subject of the claim under review. Such a determination shall be final and not subject to judicial review.

(4) Rights of claimant.-- A claimant in a review under paragraph (1) shall have--

(A) the right to be represented by an attorney;

(B) the right to present evidence, including the presentation of witnesses and documents; and

(C) any other due process rights determined appropriate by the Special Master.

(5) No punitive damages.-- The Special Master may not include amounts for punitive damages in any compensation paid under a claim under this title.

(6) Collateral compensation.-- The Special Master shall reduce the amount of compensation determined under paragraph (1)(B)(ii) by the amount of the collateral source compensation the claimant has received or is entitled to receive as a result of the terrorist-related aircraft crashes of September 11, 2001.

(c) Eligibility.--

(1) In general.-- A claimant shall be determined to be an eligible individual for purposes of this subsection if the Special Master determines that such claimant--

(A) is an individual described in paragraph (2); and

(B) meets the requirements of paragraph (3).

(2) Individuals.-- A claimant is an individual described in this paragraph if the claimant is--

(A) an individual who--

(i) was present at the World Trade Center, (New York, New York), the Pentagon (Arlington, Virginia), or the site of the aircraft crash at Shanksville, Pennsylvania at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes of September 11, 2001; and

(ii) suffered physical harm or death as a result of such an air crash;

(B) an individual who was a member of the flight crew or a passenger on American Airlines flight 11 or 77 or United Airlines flight 93 or 175, except that an individual identified by the Attorney General to have been a participant or conspirator in the terrorist-related aircraft crashes of September 11, 2001, or a representative of such individual shall not be eligible to receive compensation under this title; or

(C) in the case of a decedent who is an individual described in subparagraph (A) or (B), the personal representative of the decedent who files a claim on behalf of the decedent.

(3) Requirements.----

(A) Single claim.--Not more than one claim may be submitted under this title by an individual or on behalf of a deceased individual.

(B) Limitation on civil action.--

(i) In general.--Upon the submission of a claim under this title, the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001. The preceding sentence does not apply to a civil action to recover collateral source obligations.

(ii) Pending actions.--In the case of an individual who is a party to a civil action described in clause (i), such individual may not submit a claim under this title unless such individual withdraws from such action by the date that is 90 days after the date on which regulations are promulgated under section 407.

[*406] SEC. 406. PAYMENTS TO ELIGIBLE INDIVIDUALS.

(a) In General.--Not later than 20 days after the date on which a determination is made by the Special Master regarding the amount of compensation due a claimant under this title, the Special Master shall authorize payment to such claimant of the amount determined with respect to the claimant.

(b) Payment Authority.--This title constitutes budget authority in advance of appropriations Acts and represents the obligation of the Federal Government to provide for the payment of amounts for compensation under this title.

(c) Additional Funding.--

(1) In general.-- The Attorney General is authorized to accept such amounts as may be contributed by individuals, business concerns, or other entities to carry out this title, under such terms and conditions as the Attorney General may impose.

(2) Use of separate account.-- In making payments under this section, amounts contained in any account containing funds provided under paragraph (1) shall be used prior to using appropriated amounts.

[*407] SEC. 407. REGULATIONS.

Not later than 90 days after the date of enactment of this Act, the Attorney General, in consultation with the Special Master, shall promulgate regulations to carry out this title, including regulations with respect to--

(1) forms to be used in submitting claims under this title;

(2) the information to be included in such forms;

(3) procedures for hearing and the presentation of evidence;

(4) procedures to assist an individual in filing and pursuing claims under this title; and

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(5) other matters determined appropriate by the Attorney General.

[*408] SEC. 408. LIMITATION ON AIR CARRIER **LIABILITY.**

(a) In General.--Notwithstanding any other provision of law, **liability** for all claims, whether for compensatory or punitive damages, arising from the terrorist-related aircraft crashes of September 11, 2001, against any air carrier shall not be in an amount greater than the limits of the **liability** coverage maintained by the air carrier.

(b) Federal Cause of Action.--

(1) Availability of action.-- There shall exist a Federal cause of action for damages arising out of the hijacking and subsequent crashes of American Airlines flights 11 and 77, and United Airlines flights 93 and 175, on September 11, 2001. Notwithstanding section 40120(c) of title 49, United States Code, this cause of action shall be the exclusive remedy for damages arising out of the hijacking and subsequent crashes of such flights.

(2) Substantive law.-- The substantive law for decision in any such suit shall be derived from the law, including choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law.

(3) Jurisdiction.-- The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.

(c) Exclusion.--Nothing in this section shall in any way limit any **liability** of any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act.

[*409] SEC. 409. RIGHT OF SUBROGATION.

The United States shall have the right of subrogation with respect to any claim paid by the United States under this title.

TITLE V--AIR TRANSPORTATION SAFETY

[*501] SEC. 501.--INCREASED AIR TRANSPORTATION SAFETY.

Congress affirms the President's decision to spend $ 3,000,000,000 on airline safety and security in conjunction with this Act in order to restore public confidence in the airline industry.

[*502] SEC. 502. CONGRESSIONAL COMMITMENT.

Congress is committed to act expeditiously, in consultation with the Secretary of Transportation, to strengthen airport security and take further measures to enhance the security of air travel.

TITLE VI--SEPARABILITY

[*601] SEC. 601.--SEPARABILITY.

If any provision of this Act (including any amendment made by this Act) or the application thereof to any person or circumstance is held invalid, the remainder of this Act (including any amendment made by this Act) and the application thereof to other persons or circumstances shall not be affected thereby.

REV_00261309

Speaker of the House of Representatives.
Vice President of the United States and President of the Senate.

Source: All Sources > Federal Legal - U.S. > **USCS - United States Code Service; Code, Const, Rules, Conventions & Public Laws**
Terms: **airline stabilization and liability and date(aft 9-15-2001)** (Edit Search)
View: Full
Date/Time: Wednesday, September 26, 2001 - 11:19 AM EDT

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901(e)). Such amount shall be available only to the extent that a request, that includes designation of such amount as an emergency requirement as defined in such Act, is transmitted by the President to Congress.

[*102] SEC. 102. AIR TRANSPORTATION STABILIZATION BOARD.

(a) Definitions.--In this section, the following definitions apply:

(1) Board.-- The term "Board" means the Air Transportation Stabilization Board established under subsection (b).

(2) Financial obligation.-- The term "financial obligation" means any note, bond, debenture, or other debt obligation issued by an obligor in connection with financing under this section and section 101(a)(1).

(3) Lender.-- The term "lender" means any non-Federal qualified institutional buyer (as defined by section 230.144A(a) of title 17, Code of Federal Regulations (or any successor regulation) known as Rule 144A(a) of the Securities and Exchange Commission and issued under the Security Act of 1933, including--

(A) a qualified retirement plan (as defined in section 4974(c) of the Internal Revenue Code of 1986 (26 U.S.C. 4974(c)) that is a qualified institutional buyer; and

(B) a governmental plan (as defined in section 414(d) of the Internal Revenue Code of 1986 (26 U.S.C. 414(d)) that is a qualified institutional buyer.

(4) Obligor.-- The term "obligor" means a party primarily liable for payment of the principal of or interest on a Federal credit instrument, which party may be a corporation, partnership, joint venture, trust, or governmental entity, agency, or instrumentality.

(b) Air Transportation Stabilization Board.--

(1) Establishment.-- There is established a board (to be known as the "Air Transportation Stabilization Board") to review and decide on applications for Federal credit instruments under section 101(a)(1).

(2) Composition.-- The Board shall consist of--

(A) the Secretary of Transportation or the designee of the Secretary;

(B) the Chairman of the Board of Governors of the Federal Reserve System, or the designee of the Chairman, who shall be the Chair of the Board;

(C) the Secretary of the Treasury or the designee of the Secretary; and

(D) the Comptroller General of the United States, or the designee of the Comptroller General, as a nonvoting member of the Board.

(c) Federal Credit Instruments.--

(1) In general.-- The Board may enter into agreements with 1 or more obligors to issue Federal credit instruments under section 101(a)(1) if the Board determines, in its discretion, that--

(A) the obligor is an air carrier for which credit is not reasonably available at the time of the transaction;

(B) the intended obligation by the obligor is prudently incurred; and

(C) such agreement is a necessary part of maintaining a safe, efficient, and viable commercial aviation system in the United States.

(2) Terms and limitations.----

(A) Forms; terms and conditions.--A Federal credit instrument shall be issued under section 101(a)(1) in such form and on such terms and conditions and contain such covenants, representatives, warranties, and requirements (including requirements for audits) as the Board determines appropriate.

(B) Procedures.--Not later than 14 days after the date of enactment of this Act, the Director of the Office of Management and Budget shall issue regulations setting forth procedures for application and minimum requirements, which may be supplemented by the Board in its discretion, for the issuance of Federal credit instruments under section 101(a)(1).

(d) Financial Protection of Government.--

(1) In general.-- To the extent feasible and practicable, the Board shall ensure that the Government is compensated for the risk assumed in making guarantees under this title.

(2) Government participation in gains.-- To the extent to which any participating corporation accepts financial assistance, in the form of accepting the proceeds of any loans guaranteed by the Government under this title, the Board is authorized to enter into contracts under which the Government, contingent on the financial success of the participating corporation, would participate in the gains of the participating corporation or its security holders through the use of such instruments as warrants, stock options, common or preferred stock, or other appropriate equity instruments.

(3) Deposit in treasury.-- All amounts collected by the Secretary of the Treasury under this subsection shall be deposited in the Treasury as miscellaneous receipts.

[*103] SEC. 103. SPECIAL RULES FOR COMPENSATION.

(a) Documentation.--Subject to subsection (b), the amount of compensation payable to an air carrier under section 101(a)(2) may not exceed the amount of losses described in section 101(a)(2) that the air carrier demonstrates to the satisfaction of the President, using sworn financial statements or other appropriate data, that the air carrier incurred. The Secretary of Transportation and the Comptroller General of the United States may audit such statements and may request any information that the Secretary and the Comptroller General deems necessary to conduct such audit.

(b) Maximum Amount of Compensation Payable Per Air Carrier.--The maximum total amount of compensation payable to an air carrier under section 101(a)(2) may not exceed the lesser of--

(1) the amount of such air carrier's direct and incremental losses described in section 101 (a)(2); or

(2) in the case of--

(A) flights involving passenger-only or combined passenger and cargo transportation, the product of--

(i) $ 4,500,000,000; and

(ii) the ratio of--

(I) the available seat miles of the air carrier for the month of August 2001 as reported to the Secretary; to

(II) the total available seat miles of all such air carriers for such month as reported to the Secretary; and

(B) flights involving cargo-only transportation, the product of--

(i) $ 500,000,000; and

(ii) the ratio of--

(I) the revenue ton miles or other auditable measure of the air carrier for cargo for the latest quarter for which data is available as reported to the Secretary; to

(II) the total revenue ton miles or other auditable measure of all such air carriers for cargo for such quarter as reported to the Secretary.

(c) Payments.--The President may provide compensation to air carriers under section 101(a)(2) in 1 or more payments up to the amount authorized by this title.

[*104] SEC. 104. LIMITATION ON CERTAIN EMPLOYEE COMPENSATION.

(a) In General.--The President may only issue a Federal credit instrument under section 101(a)(1) to an air carrier after the air carrier enters into a legally binding agreement with the President that, during the 2-year period beginning September 11, 2001, and ending September 11, 2003, no officer or employee of the air carrier whose total compensation exceeded $ 300,000 in calendar year 2000 (other than an employee whose compensation is determined through an existing collective bargaining agreement entered into prior to September 11, 2001)--

(1) will receive from the air carrier total compensation which exceeds, during any 12 consecutive months of such 2-year period, the total compensation received by the officer or employee from the air carrier in calendar year 2000; and

(2) will receive from the air carrier severance pay or other benefits upon termination of employment with the air carrier which exceeds twice the maximum total compensation received by the officer or employee from the air carrier in calendar year 2000.

(b) Total Compensation Defined.--In this section, the term "total compensation" includes salary, bonuses, awards of stock, and other financial benefits provided by an air carrier to an officer or employee of the air carrier.

[*105] SEC. 105. CONTINUATION OF CERTAIN AIR SERVICE.

(a) Action of Secretary.--The Secretary of Transportation should take appropriate action to ensure that all communities that had scheduled air service before September 11, 2001, continue to receive adequate air transportation service and that essential air service to small communities continues without interruption.

(b) Essential Air Service.--There is authorized to be appropriated to the Secretary to carry out the essential air service program under subchapter II of chapter 417 of title 49, United States Code, $ 120,000,000 for fiscal year 2002.

REV_00261301

(c) Secretarial Oversight.--

(1) In general.-- Notwithstanding any other provision of law, the Secretary is authorized to require an air carrier receiving direct financial assistance under this Act to maintain scheduled air service to any point served by that carrier before September 11, 2001.

(2) Agreements.-- In applying paragraph (1), the Secretary may require air carriers receiving direct financial assistance under this Act to enter into agreements which will ensure, to the maximum extent practicable, that all communities that had scheduled air service before September 11, 2001, continue to receive adequate air transportation service.

[*106] SEC. 106. REPORTS.

(a) Report.--Not later than February 1, 2001, the President shall transmit to the Committee on Transportation and Infrastructure, the Committee on Appropriations, and the Committee on the Budget of the House of Representatives and the Committee on Commerce, Science, and Transportation, the Committee on Appropriations, and the Committee on the Budget of the Senate a report on the financial status of the air carrier industry and the amounts of assistance provided under this title to each air carrier.

(b) Update.--Not later than the last day of the 7-month period following the date of enactment of this Act, the President shall update and transmit the report to the Committees.

[*107] SEC. 107. DEFINITIONS.

In this title, the following definitions apply:

(1) Air carrier.-- The term "air carrier" has the meaning such term has under section 40102 of title 49, United States Code.

(2) Federal credit instrument.-- The term "Federal credit instrument" means any guarantee or other pledge by the Board issued under section 101(a)(1) to pledge the full faith and credit of the United States to pay all or part of any of the principal of and interest on a loan or other debt obligation issued by an obligor and funded by a lender.

(3) Incremental loss.-- The term "incremental loss" does not include any loss that the President determines would have been incurred if the terrorist attacks on the United States that occurred on September 11, 2001, had not occurred.

TITLE II--AVIATION INSURANCE

[*201] SEC. 201.--DOMESTIC INSURANCE AND REIMBURSEMENT OF INSURANCE COSTS.

(a) In General.--Section 44302 of title 49, United States Code, is amended--

(1) in subsection (a)(1)--

(A) by striking "subsection (b)" and inserting "subsection (c)"; and

(B) by striking "foreign-flag aircraft--" and all that follows through the period at the end of subparagraph (B) and inserting "foreign-flag aircraft.";

(2) by redesignating subsections (b), (c), and (d) as subsections (c), (d), and (e), respectively;

(3) by inserting after subsection (a) the following:

"(b) Reimbursement of Insurance Cost Increases.--

"(1) In general.-- The Secretary may reimburse an air carrier for the increase in the cost of insurance, with respect to a premium for coverage ending before October 1, 2002, against loss or damage arising out of any risk from the operation of an American aircraft over the insurance premium that was in effect for a comparable operation during the period beginning September 4, 2001, and ending September 10, 2001, as the Secretary may determine. Such reimbursement is subject to subsections (a)(2), (c), and (d) of this section and to section 44303.

"(2) Payment from revolving fund.-- A reimbursement under this subsection shall be paid from the revolving fund established by section 44307.

"(3) Further conditions.-- The Secretary may impose such further conditions on insurance for which the increase in premium is subject to reimbursement under this subsection as the Secretary may deem appropriate in the interest of air commerce.

"(4) Termination of authority.-- The authority to reimburse air carriers under this subsection shall expire 180 days after the date of enactment of this paragraph.";

(4) in subsection (c) (as so redesignated)--

(A) in the first sentence by inserting ", or reimburse an air carrier under subsection (b) of this section," before "only with the approval"; and

(B) in the second sentence--

(i) by inserting "or the reimbursement" before "only after deciding"; and

(ii) by inserting "in the interest of air commerce or national security or" before "to carry out the foreign policy"; and

(5) in subsection (d) (as so redesignated) by inserting "or reimbursing an air carrier" before "under this chapter".

(b) Coverage.--

(1) In general.-- Section 44303 of such title is amended--

(A) in the matter preceding paragraph (1) by inserting ", or reimburse insurance costs, as" after "insurance and reinsurance"; and

(B) in paragraph (1) by inserting "in the interest of air commerce or national security or" before "to carry out the foreign policy".

(2) Discretion of the secretary.-- For acts of terrorism committed on or to an air carrier during the 180-day period following the date of enactment of this Act, the Secretary of Transportation may certify that the air carrier was a victim of an act of terrorism and in the Secretary's judgment, based on the Secretary's analysis and conclusions regarding the facts and circumstances of each case, shall not be responsible for losses suffered by third parties (as referred to in section 205.5(b)(1) of title 14, Code of Federal Regulations) that exceed $ 100,000,000, in the aggregate, for all claims by such parties arising out of such act. If the Secretary so certifies, the air carrier shall not be liable for an amount that exceeds $ 100,000,000, in the aggregate, for all claims by such parties arising out of such act, and the Government shall be responsible for any **liability** above such amount. No punitive damages may be awarded against an air carrier (or the Government taking responsibility for an air carrier under this paragraph) under a cause of action arising out of such act.

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(c) Reinsurance.--Section 44304 of such title is amended--

(1) by striking "(a) General Authority.--"; and

(2) by striking subsection (b).

(d) Premiums.--Section 44306 of such title is amended--

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(2) by inserting after subsection (a) the following:

"(b) Allowances in Setting Premium Rates for Reinsurance.--In setting premium rates for reinsurance, the Secretary may make allowances to the insurance carrier for expenses incurred in providing services and facilities that the Secretary considers good business practices, except for payments by the air carrier for the stimulation or solicitation of insurance business.".

(e) Conforming Amendment.--Section 44305(b) of such title is amended by striking "44302 (b)" and inserting "44302(c)".

[*202] SEC. 202. EXTENSION OF PROVISIONS TO VENDORS, AGENTS, AND SUBCONTRACTORS OF AIR CARRIERS.

Notwithstanding any other provision of this title, the Secretary may extend any provision of chapter 443 of title 49, United States Code, as amended by this title, and the provisions of this title, to vendors, agents, and subcontractors of air carriers. For the 180-day period beginning on the date of enactment of this Act, the Secretary may extend or amend any such provisions so as to ensure that the entities referred to in the preceding sentence are not responsible in cases of acts of terrorism for losses suffered by third parties that exceed the amount of such entities' **liability** coverage, as determined by the Secretary.

TITLE III--TAX PROVISIONS

[*301] SEC. 301.--EXTENSION OF DUE DATE FOR EXCISE TAX DEPOSITS; TREATMENT OF LOSS COMPENSATION.

(a) Extension of Due Date for Excise Tax Deposits.--

(1) In general.-- In the case of an eligible air carrier, any airline-related deposit required under section 6302 of the Internal Revenue Code of 1986 to be made after September 10, 2001, and before November 15, 2001, shall be treated for purposes of such Code as timely made if such deposit is made on or before November 15, 2001. If the Secretary of the Treasury so prescribes, the preceding sentence shall be applied by substituting for "November 15, 2001" each place it appears--

(A) "January 15, 2002"; or

(B) such earlier date after November 15, 2001, as such Secretary may prescribe.

(2) Eligible air carrier.-- For purposes of this subsection, the term "eligible air carrier" means any domestic corporation engaged in the trade or business of transporting (for hire) persons by air if such transportation is available to the general public.

(3) Airline-related deposit.-- For purposes of this subsection, the term "airline-related deposit" means any deposit of--

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(A) taxes imposed by subchapter C of chapter 33 of such Code (relating to transportation by air); and

(B) taxes imposed by chapters 21, 22, and 24 with respect to employees engaged in a trade or business referred to in paragraph (2).

(b) Treatment of Loss Compensation.--Nothing in any provision of law shall be construed to exclude from gross income under the Internal Revenue Code of 1986 any compensation received under section 101(a)(2) of this Act.

TITLE IV--VICTIM COMPENSATION

[*401] SEC. 401.--SHORT TITLE.

This title may be cited as the "September 11th Victim Compensation Fund of 2001".

[*402] SEC. 402. DEFINITIONS.

In this title, the following definitions apply:

(1) Air carrier.-- The term "air carrier" means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation and includes employees and agents of such citizen.

(2) Air transportation.-- The term "air transportation" means foreign air transportation, interstate air transportation, or the transportation of mail by aircraft.

(3) Claimant.-- The term "claimant" means an individual filing a claim for compensation under section 405(a)(1).

(4) Collateral source.-- The term "collateral source" means all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001.

(5) Economic loss.-- The term "economic loss" means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

(6) Eligible individual.-- The term "eligible individual" means an individual determined to be eligible for compensation under section 405(c).

(7) Noneconomic losses.-- The term "noneconomic losses" means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.

(8) Special master.-- The term "Special Master" means the Special Master appointed under section 404(a).

[*403] SEC. 403. PURPOSE.

It is the purpose of this title to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related

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aircraft crashes of September 11, 2001.

[*404] SEC. 404. ADMINISTRATION.

(a) In General.--The Attorney General, acting through a Special Master appointed by the Attorney General, shall--

(1) administer the compensation program established under this title;

(2) promulgate all procedural and substantive rules for the administration of this title; and

(3) employ and supervise hearing officers and other administrative personnel to perform the duties of the Special Master under this title.

(b) Authorization of Appropriations.--There are authorized to be appropriated such sums as may be necessary to pay the administrative and support costs for the Special Master in carrying out this title.

[*405] SEC. 405. DETERMINATION OF ELIGIBILITY FOR COMPENSATION.

(a) Filing of Claim.--

(1) In general.-- A claimant may file a claim for compensation under this title with the Special Master. The claim shall be on the form developed under paragraph (2) and shall state the factual basis for eligibility for compensation and the amount of compensation sought.

(2) Claim form.----

(A) In general.--The Special Master shall develop a claim form that claimants shall use when submitting claims under paragraph (1). The Special Master shall ensure that such form can be filed electronically, if determined to be practicable.

(B) Contents.--The form developed under subparagraph (A) shall request--

(i) information from the claimant concerning the physical harm that the claimant suffered, or in the case of a claim filed on behalf of a decedent information confirming the decedent's death, as a result of the terrorist-related aircraft crashes of September 11, 2001;

(ii) information from the claimant concerning any possible economic and noneconomic losses that the claimant suffered as a result of such crashes; and

(iii) information regarding collateral sources of compensation the claimant has received or is entitled to receive as a result of such crashes.

(3) Limitation.-- No claim may be filed under paragraph (1) after the date that is 2 years after the date on which regulations are promulgated under section 407.

(b) Review and Determination.--

(1) Review.-- The Special Master shall review a claim submitted under subsection (a) and determine--

(A) whether the claimant is an eligible individual under subsection (c);

(B) with respect to a claimant determined to be an eligible individual--

(i) the extent of the harm to the claimant, including any economic and noneconomic

Council of Economic Advisers
November 15, 2001

Macroeconomic Consequences of Interrupting Terrorist Risk Insurance

- The absence of insurance coverage for terrorism risks will likely reduce the willingness of lenders to provide financing for existing commercial structures.
    - The result will look like a "credit crunch."
    - The credit crunch of 1990-1991 – in which the aggregate value of existing structures fell by about $320 billion – provides one guide to the likely effect.
    - To be conservative, assume that one-half (or five percent) of the decline in value was due to the credit crunch.
    - A comparable reduction today would be roughly $200 billion in the value of corporate real estate, occurring shortly after the January 1, 2002 expiration of existing contracts.
- The lack of availability of terrorist risk insurance would also likely deter construction of new projects.
    - Again, using 1990-1991 as a guide, we estimate that the level of construction in non-residential structures would decline roughly $10 billion (at annual rates) over the four quarters of 2002.
- The impact triggers an overall reduction in 2002 GDP of 0.3 percentage point.
    - The reduced growth rate of GDP is equal to 0.8 percentage point in the first quarter of 2002, 0.7 percentage point in the second quarter of 2002, and diminishing thereafter.
        - The source of the decline is that the decline in asset values reduces the consumption purchases of the household sector.
        - In addition, lower valuations reduce the incentive to invest in new structures. This effect reinforces the liquidity effects noted above. The net effect is a reduced path for investment in non-residential structures.

Example of a $50 Billion Terrorist Event

A $50 billion event would be similar in scale to the World Trade Center attacks, which are estimated to have caused losses to commercial property and casualty insurers in the neighborhood of $40 billion. To walk through how this proposal would handle such an event, this document analyzes the outcomes through the three ranges of the program: The first $10 billion industry retention, the $10-25 billion policyholder surcharge, and the $25-50 billion government/industry cost sharing.

Assumptions: This analysis assumes that the event affects the 25 largest gross primary insurers (the World Trade Center attack affected 24 primary insurers). The American Insurance Association data that was available for strictly commercial lines only gives per-company information for net written premiums. Using this data does not indicate a preference for using net versus gross premiums.

$10 Billion Industry Retention: The first $10 billion will be borne by industry. The affected insurers (the 25 largest) have net commercial premiums of $79.2 billion. Thus, if the per-company cap of 6% is reached for all companies, the affected companies will pay, in total, $4.75 billion. This leaves $5.25 billion to be advanced by Treasury. To recapture the $5.25 billion from the industry as a whole, which has $134.3 billion in premiums, would require companies to pay an amount roughly equal to 4% of their annual premiums (3.91%). The Treasury, which would have the authority on how to structure these payments, could require each firm to pay 1% per year over 4 years.

$10-25 Billion Policyholder Surcharge: The next $15 billion will be advanced by the government and then recouped by a surcharge on all policyholders. Treasury has discretion over form, size, and timing of the surcharge. To recoup $15 billion in 1 year, the Treasury would have to levy an 11.2% surcharge. The Treasury could choose to stretch the collection process over 10 years, leaving an annual surcharge of 1.12%. It should be noted that this actually overstates the amount of surcharge needed, as over time, the amount of premiums written can be expected to grow.

$25-50 Billion Government/Industry Cost Sharing: Of the remaining $25 billion, ninety percent ($22.5 billion) will come directly from the government. The remaining ten percent ($2.5 billion) could be paid by three possible sources: policyholders, industry as a whole, or the affected companies. This considers all three options:

Policyholders: Treasury would advance the $2.5 billion to the affected companies and recoup it through an added surcharge on all policyholders. To recoup this over one year an additional surcharge of 1.8% would be required. Conforming with the previous assumption, Treasury could charge .18% per year over ten years. This would bring the total surcharge to 1.3% per year over three years. Note, this is an overestimate due to expected growth in premiums.

Industry as a whole: Treasury would advance the $2.5 billion to the affected companies and recoup it through an added assessment on all insurance companies. A 1.8% assessment would be needed to recoup the $2.5 billion over 1 year. Spreading this out over 4 years would result in a .45% additional assessment. This would bring the total assessment for the entire event for all companies to 1.45% per year over 4 years.

Affected Companies: The affected companies would be obliged to pay the $2.5 billion industry share of losses in proportion to each company's share of the insured losses.

Pass HR 3210
Keep the Wheels of American Commerce Turning

Don't let terrorists hobble the U.S. economy. We need legislation to create a federal backstop for terrorism insurance immediately.

Airports Council International – North America
Alliance of American Insurers
Alliance of Automobile Manufacturers
American Association of Airport Executives
American Bankers Association
American Bankers Insurance Association
American Council for Capital Formation
American Council of Independent Laboratories
American Insurance Association
American Iron & Steel Institute
American Resort Development Association
American Road & Transportation Builders Association
American Nursery & Landscape Association
American Society of Association Executives
American Tort Reform Association
American Trucking Associations
America's Community Bankers
APICS, the Educational Society for Resource Management
Associated Builders and Contractors
Associated General Contractors of America
Association of American Railroads
Association of Financial Guaranty Insurors
Building Owners and Managers Association
The Business Roundtable
Club Managers Association of America
Commercial Mortgage Securities Association
Community Associations Institute
Consumer Bankers Association
Consumer Mortgage Coalition
Council of Growing Companies
Council of Insurance Agents and Brokers
Edison Electric Institute
Electronic Financial Services Association
Electronic Retailing Association
Electronic Representatives Association International
Financial Services Roundtable
Greater Washington Society of Association Executives
Hotel Association of New York City, Inc.
Illinois State Chamber of Commerce
Independent Insurance Agents of America
Institute of Real Estate Management
International Association of Amusement Parks and Attractions
International Council of Shopping Centers
International Dairy Foods Association
International Franchise Association
Interstate Natural Gas Association of America
Manufactured Housing Institute
Mortgage Bankers Association of America
Motion Picture Association of America
National Apartment Association
National Association of Chain Drug Stores
National Association of Home Builders
National Association of Independent Insurers
National Association of Industrial & Office Properties
National Association of Manufacturers
National Association of Mutual Insurance Companies
National Association of Professional Insurance Agents
National Association of Real Estate Investment Trusts
National Association of Realtors
National Council of Chain Restaurants
National Court Reporters Association
National Food Processors Association
National Lumber and Building Materials Dealers Association
National Marine Manufacturers Association
National Multi Housing Council
National Petrochemical & Refiners Association
National Retail Federation
National Tank Truck Carriers, Inc.
The New England Council
Nuclear Energy Institute
Outdoor Power Equipment Aftermarket Association
Printing Industries Association of America, Inc.
Portland Cement Association
Real Estate Board of New York
The Real Estate Roundtable
Reinsurance Association of America
Reserve Officers Association
Society of American Florists
Truck Renting and Leasing Association
United States Chamber of Commerce
United States Telecom Association
Yellow Pages Publishers Association

WSJ
10/10/01

REVIEW & OUTLOOK

War Profiteers

Things must be getting back to normal: There's litigation in the air. Yesterday the Supreme Court denied an appeal from Microsoft, which means that the case will continue to work its way through the lower courts. At the same time, the High Court shut down an effort to reverse a state ban on cities suing gun manufacturers over crime costs. Meanwhile, the trial lawyers are crossing their hearts and hoping everyone believes they have no intention of litigating liability for the World Trade Center attack.

The day after the worst atrocity on American home soil, trial lawyers association president Leo V. Boyle posted a letter on the group's Web site titled "A National Tragedy." For "the first time in our history," Mr. Boyle announced, "the Association of Trial Lawyers of America, in this time of national crisis, urges a moratorium on civil lawsuits that might arise out of these awful events."

Oh, bravo. Now, we don't question their horror at the attack. But if our tort warriors really wanted to demonstrate solidarity with the nation—and especially with those families whose loved ones were buried in the rubble of lower Manhattan—a pledge to accept a reform limiting outrageous fees would be more persuasive than a moratorium with no real meaning. Especially when they can count on friends in Congress to protect their core interests. Does anyone believe that Tom Daschle and Richard Gephardt didn't know exactly what they were doing when they made sure that the airline bailout bill that ended up going before both their Houses wasn't the one that would have limited attorneys fees?

The lost passage we refer to appears in the version of the bill introduced by Rep. Don Young (R., Ark.). It reads as follows: "ATTORNEY FEES.—Reasonable attorneys fees for work performed in any action commenced pursuant in this section shall be subject to the discretion of the court, but in no event shall any attorney charge, demand, receive, or collect for services rendered, fees in excess of 25% of the damages ordered by the court to be paid pursuant to this section." Contingency fees, of course, normally scale up from 33%.

With airlines desperate for cash and warning of imminent bankruptcies, it wasn't likely in any event that the bill was going to get held up over lawyers fees. Now any future claimants have two choices: Either sue in federal court in New York, or submit a claim to a federal compensation fund to be administered by a special master appointed by the Attorney General—and give up the right to sue.

The devil . . . er, the plaintiffs bar . . . is in the details.

ATLA says it is encouraging people to take the administrative route and has set up a program to provide pro bono representation for those in need. But because no one knows what the criteria or award levels will be, victims and their families not in immediate need of money will likely hang back until they see what's what—one reason a moratorium has little significance now. After all, claimants have two years to file. And whatever pious advisories ATLA might send its members, they're still free to do what comes naturally.

This is all the more reason to try to rescue some good from the wreckage by applying a reform endorsed by George W. Bush in the campaign: Redefine the fee relationship between a tort lawyer and his client as a fiduciary one. A version of this principle already operates in so-called securities cases. Here, lawyers fees are determined by the lodestar method: They submit bills detailing the hours they worked, which a court then multiplies by a reasonable rate that factors in a measure of the risk involved. Not only would such a reform ensure that money from this tragedy go to widows and orphans rather than their attorneys; it would set a badly needed example for all future mass tort claims. Courts are still dealing with cases from the 1993 World Trade Center bombing.

Tort lawyers, of course, shrink from the sunshine of hourly rates. They'd be loath to abandon the percentage-of-the-take arrangement, which can translate into hourly rates of tens of thousands of dollars. It strikes us that behind ATLA's counsels of restraint lurks an understanding that theirs is not the kind of business that would show very well in the public spotlight of this particular crisis.

All the more reason to address the issue head-on, with clarifying legislation if necessary and administratively where possible. We would think, for example, that a ruling on reasonable fees would be one of the first issues a special master for the September 11 attacks would address, especially for a largely administrative process where no one has to prove causation. And if the master does limit fees on the administrative side, it becomes even more important to have them limited on the courtroom option, so that attorneys advising their clients which road to take do so without a strong personal incentive to sue.

ATLA's pronouncements of self-restraint notwithstanding, the fact that their Congressional partners deep-sixed any limitations on legal fees in the airline bailout bill tells us that some folks want this door kept ajar. If only on the principle of helping those who have a hard time helping themselves, we'd sure like to know if we could count on ATLA's support for some supplemental legislation making it harder for the lawyers to stick their hands into the pockets of the victims.



PROJECT FOR INTERNATIONAL RELIGIOUS LIBERTY

Michael J. Horowitz
Director

MEMO

December 3, 2001

TO: **INTERESTED PARTIES**
RE: **Tort Reform and the Insurance/Terrorism Bill**
FROM: Michael Horowitz MH

Having neither seen the House bill nor learned of its House floor timetable, I discovered that the House was actually voting on the bill while discussing its need for a lodestar/multiplier provision with a key House staffer, Jeff Emerson.

Had I known of the legislative timetable I would have been in touch with many of you both earlier and on a more urgent basis. ***More importantly, had I looked at a copy of the House bill itself, I would have been able to suggest a much easier legislative fix than the lengthy and somewhat complicated one I've previously circulated to most of you.***

The legislative fix that I hope can ultimately be made would substitute the following language for the **"reasonable fees . . . not in excess of 20 percent"** cap of Section 15(a)(7) of the House bill:

> **"reasonable fees ... payable on a lodestar multiplier basis as awarded in shareholder cases."**

That's it -- all that needs to be done to create a precedent of extraordinary value, and to block tort lawyers from receiving unethical fees likely to aggregate to billions of dollars in the terrorism cases covered by the House bill.

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Had lodestar/multiplier language been put before the Financial Services Committee or House on a timely basis, I believe that it rather than a 20% cap reform would have been adopted. But this is water under the bridge, and I'm writing to discuss what can be still done to achieve this critical outcome.

Step One: Because the tort provisions in the substitute bill passed by the House (HR 3210) differ from the bill approved by the Committee, for which a report was issued (HR3357), there is real uncertainty regarding the "reasonable fee" language of Section 15(a)(7) of the bill. Therefor, perhaps Mr. Oxley can make a brief floor statement strongly emphasizing that the courts are expected to carefully review the reasonableness of legal fees resulting from cases covered by the bill. In such a statement, he could make clear that lodestar/multiplier formulas are, at the least, highly appropriate approaches that the courts can take to ensuring that such fees are, as the House bill explicitly requires, reasonable. ***Even more promising would be the issuance of a new Committee report explicitly defining lodestar/multiplier fees as the means of complying with the bill's reasonable fee language. This prospect arises from the fact, noted above, that a Committee report was issued on HR 3210, even though the House voted for the language contained in a substitute bill, HR 3357.***

Step Two: I've learned that that Senator John McCain will become deeply involved with the bill. Insofar as its tort reform provisions are concerned, this is likely to be good news. I have previously discussed the need for lodestar/multiplier fees in mass tort cases with Senator McCain, and found him an enthusiastic supporter of the reform. McCain's key staffer Jeanne Bumpus is likely to be solid and knowledgeable on the issue, as are key staffers to Senators Lott, Gramm and McConnell. ***As indicated in the earlier memo I sent to most of you, I strongly believe that removing the House bill's ban on punitive damages – the provision which has thus far drawn most of the fire from the tort bar and Democrats – would be a cheap price to pay for a lodestar/multiplier provision and precedent. I hope to press this point with Senators and Senate staff interested in the bill's tort reform provisions. A key question is whether the Administration agrees with this strategy and is prepared to press it.***

Step three: Whatever happens in the Senate bill, achieve the step two outcome in conference.

I'm sending this memo to tort reform advocates, to key House and Senate staffers, and to Administration members involved with the bill. I hope that it sparks action to enact a provision that will truly protect terrorism victims from unethical, overreaching fees – one that will also establish a precedent whose strategic importance to the American legal, business and political systems is in my judgement impossible to overstate.

Responding to the Events of September 11 : A Picture of What Congress Has Already Done and Suggestions for What Should Still Be Done

I. Congress's Immediate Response: Compensating Victims and Keeping the Civil Aviation System Up and Running.

In the days following the September 11 terrorist attacks, two concerns immediately surfaced. First, how could Congress help ensure that the victims of these terrorist attacks received compensation for their injuries? Second, in light the huge financial losses suffered by airlines during the temporary shutdown after September 11, and the potentially unlimited liability facing the two airlines that were the subjects of the terrorist attacks, what could Congress do to ensure that America's airlines remained up and running?

A. The Air Transportation Safety and System Stabilization Act

Congress swiftly responded to these two questions by enacting the Air Transportation Safety and System Stabilization Act of 2001. In that act, Congress outlined the two mechanisms that would be available to victims of the air tragedies for compensation, and provided a liability backstop so that the airlines could obtain insurance and keep running.

1. Compensating Victims of the September 11 Attacks

Congress created a system in which the victims of the September 11 tragedies could elect to pursue compensation through one of two options, the Victim Compensation Fund or litigation. These two options are mutually exclusive — a claimant may pursue either one of these two remedies, but not both.

A. The Victim Compensation Fund

The Victim Compensation Fund was created to compensate individuals injured by the events of September 11. This federally-funded program provides a mechanism through which victims of the terrorist attacks can be compensated without the time and expense of litigation. Eligible individuals may file a claim with the Special Master, who will review the claim and make a determination as to the amount that the claimant will be awarded. No punitive damages may be awarded in the Victim Compensation Fund. In addition, any award to a claimant will be reduced by the amount of any collateral compensation received by the claimant. Many issues about the Fund, including which payments will be deemed to be "collateral" are to be determined by the Attorney General and the Special Master.

B. Litigation

The Air Transportation Safety and Stabilization Act created a federal cause of action for individuals who opt to sue, and provided that all claims resulting from or relating to the terrorist attacks would be brought in the United States District Court for the Southern District of New York.

The Air Transportation Safety and System Stabilization Act also limited the liability of air carriers in litigation arising out of September 11 to amount of liability insurance of the air carrier.

The language of the act is not entirely clear regarding what happens once the air carriers, and other defendants covered by the amendments to this legislation, reach the limits of their coverage. One possibility is that plaintiffs will be faced with the prospect of a judgement against defendants from whom they cannot collect. In the face of such a possibility some potential plaintiffs might elect not to sue and would choose to seek compensation in the Victim Compensation Fund. Once the group of potential defendants have reached the limits of their coverage, the federal government may be pressured to assume at least partial responsibility for any judgment above the limits of the air carrier's liability insurance.

2. Terrorist Events involving Air Carriers within the Six Months of September, 2001

The Air Transportation Safety and System Stabilization Act also provided that if any acts of terrorism occurred "on or to" an air carrier within 180 days of September 22, 2001, the Secretary may certify that that air carrier was a victim of terrorism. Upon such a certification, the air carrier would not be liable for losses suffered by third parties that exceed $100 million in the aggregate, and the government would be liable for any liability above $100 million. In addition, no punitive damages may be awarded against an air carrier for claims arising under this section.

B. Increasing Aviation Security

On November 19, 2001, Congress passed the Aviation and Transportation Security Act. While most of the sections of this bill pertain to aviation security, the bill also clarified several provision of the Air Transportation Safety and System Stabilization Act by:

- making clear that electing to submit a claim to the Special Master does not limit a plaintiff's right to pursue a lawsuit against any person who is a knowing participant in a plan to commit a terrorist act,

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- extending the liability limits afforded to air carriers to also cover aircraft manufacturers, airport sponsors, or a persons with a property interest in the World Trade Center on September 11, 2001,

- clarifying that the liability limitation does not extend to air transportation security businesses unless the air transportation security business is an airline or airport sponsor; and

- limiting the total liability of the City of New York to $350,000,000.

In sum, after the two bills were passed, Congress had set in place mechanisms for dealing with the events of September 11, and had limited the liability of airlines should there be any additional terrorist attacks in the months after September 11. Neither of these bills, however, addressed the potential liability that could result from a potential terrorist attack more than six months in the future.

II. Why a Reinsurance Bill is Necessary

The Air Transportation Safety and System Stabilization Act was intended, in its own words "to preserve the continued viability of the air transportation system." In other words, Congress limited the liability of the airlines for the events resulting from September 11, so that the airlines could continue to operate, and established a mechanism so that the victims of the September 11 tragedies could be compensated. Since the September 11 attacks, many insurers and reinsurers are taking a careful look at what type of insurance they can provide to their clients in light of the new risk of terrorist attacks. While the insurance industry has expressed a strong commitment to honor the obligations that resulted from the September 11 attacks, when it comes to contracting for insurance for the future, some reinsurers have expressed that they are seeking to limit or exclude coverage for terrorist attacks. A principal reason for the insurers' decision is that normal insurer methods of assessing risk, actuarial determination, do not work with respect to acts of terrorism. Unlike hurricanes, fires, or illness, there is no past database that might be used to make even reasonable speculative determinations about future risks of terrorist acts.

III. Why It Makes Sense to Include Civil Justice Reforms in the Terrorism Risk Protection Act

Trial lawyers have employed several traditional tactics in attempting to make sure that civil justice reforms are not included in the Terrorism Risk Protection Act. Misinformation abounds regarding what the civil justice provisions in H.R. 3210 do, and why these provisions should be included in the final legislation. For example, during consideration of this issue in the House of Representatives, Minority Whip Bonoir incorrectly stated in a memo that the civil justice provisions would shield a baggage screener who intentionally participated in a terrorist plot from liability. Mr. Bonoir's statement is a prime example of the confusion and misinformation surrounding these civil justice provisions This paper will clear up this and other misconceptions and explain why these provisions should be included in the bill.

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A. Answering The Passover Question: Why Is This Bill Unlike All Others?

On the last night of Passover, the youngest child in a family is asked to explain "why is this night different from all others?" Similarly, opponents of civil justice reforms have publicly questioned why this bill should be different from other "tort reform" measures. In other words, why should Senators and Representatives who have opposed civil justice reforms in the past support reforms in this bill? This is why:

1. These Provisions Will Protect Unlimited Expenditure of Federal Government Funds

Under H.R. 3210, when an act of terrorism occurs, the terrorist act may be a "triggering event," setting into motion the system of government assistance to the insurance industry, and partial industry repayment of that federal assistance. Essentially, the system is set up so that the government will provide assistance to commercial insurers in proportion to their losses, above a certain level. This means that the amount of money the federal government pays out under this bill is directly related to amount of losses that an insurer pays out, including losses related to litigation and settlement of claims. Therefore, the civil justice reform provisions in the bill are not directed solely at traditional tort law defendants; taxpayers will ultimately pay a substantial portion of the liability costs that may arise under this act. The civil justice reform provisions of the bill do ensure that each person is adequately compensated, but may also place rational limits on the expenditure of federal tax dollars. Even more stringent limits have been placed on government liability in the past.

For example, before 1946, individuals could not bring lawsuits against the federal government because of the doctrine of sovereign immunity. In 1946, Congress passed the Federal Tort Claim Act ("FTCA"), which partially repealed the doctrine of sovereign immunity and authorized tort lawsuits against the United States under certain circumstances. When Congress enacted the FTCA, however, it put the following procedural safeguards in place so that the government would not be subject to unlimited liability:

- No suit may be brought until the claim has been submitted to the appropriate federal agency and that agency denies the claim or fails to act within six months.[1]
- No jury trials are permitted- all claims must be tried to a judge.[2]
- No punitive damages are allowed.[3]
- No strict liability is permitted.
- The government is not liable, even if negligent, if its acts could be deemed "a discretionary function," in essence, a bad policy judgment.

While the FTCA has been amended since 1945, there has been no serious attempt to modify or repeal its liability limits. It has served both tort victims and the government well. The procedural safeguards of the FTCA reflect the well-reasoned view of Congress that when federal

1 28 U.S.C. § 2675.
2 28 U.S.C. § 2402.
3 28 U.S.C. § 2674.

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dollars are at stake, individuals should be compensated for their injuries, but should not receive any "windfalls" in their damage awards.

2. In Cases Arising Under This Bill, The Lawsuits Would Result From the Acts of Terrorists — Not Actions of the Defendants

First, tort law exists, at least in part, to compensate injured individuals when someone else's wrongful act is responsible for their injuries. Second, tort law is also supposed to deter wrongful conduct and encourage socially responsible behavior by holding individuals responsible for the injuries that they have caused.

In the litigation that would be covered by the reinsurance bill, the second of these two rationales is substantially reduced. Punitive damages would be available in an action against a terrorist or anyone who aided him. The terrorists would be the only defendants who acted with conscious disregard for human life. Non-terrorists defendants may have been careless or negligent, but their behavior pales when compared with the culpability of the actual party who caused the harm — the terrorist. Because the deterrence rationale for tort law is substantially reduced, Congress should focus on the remaining goal of tort law: What is the best way in which to assure that future victims of terrorist attacks are compensated?

B. The Civil Justice Reform Provisions of H.R. 3210

H.R. 3210 contains four civil justice reform provisions. In the event of a future terrorist attack, these four provision would enable victims of the attack to be fairly compensated for the injuries that they have suffered. Inclusion of these provisions in the final legislation would help ensure that taxpayer dollars are not wasted on litigation costs or "windfall" recoveries to a small group of plaintiffs, but are used to compensate injured individuals.

1. All cases are brought in the same federal court

This section simply states that all claims arising out of a terrorist event would be brought in the same federal court. This section is similar to the Air Transportation Safety and System Stabilization Act, which provides that all claim arising out of the September 11 attacks will be brought in the federal court for the Southern District of New York. In addition, this procedure is common in mass tort cases, where claims are often consolidated in the same court in order to take advantage of the judicial economy that flows from having one judge, who is very familiar with the case, decide all of the relevant legal issues.

2. No punitive damages are permitted

H.R. 3210 would not allow punitive damages in litigation arising out of a terrorist attack, except in claims against anyone who intentionally participates in a terrorist plot or participates in a conspiracy to commit such an act. Defendants who did not knowingly participate in the terrorist act (such as the owner of a building or property that was the target of an act of terrorism) could not be held liable for punitive damages. Their conduct, which may be negligent

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or careless, does not and should not create a basis for the punishment. Punishment should be restricted to the terrorists and those who assist them.

Punitive damages, as their name suggests, exist to punish defendants. The theory behind punitive damages is that in some instances, if a defendant engages in highly morally objectionable conduct, the civil justice system should impose additional damages against the defendant to punish the conduct in question and deter similar conduct in the future. Punitive damages awards do not compensate victims for injuries that they have suffered. Injured parties are compensated with two types of compensatory damages: economic (i.e. awards for lost wages or bills) and non-economic (i.e. awards for pain and suffering). Because punitive damages do not compensate the victims, they are considered a "windfall recovery."

The prohibition on punitive damages is appropriate here because federal funds will be used, at least in part, to pay the judgments and settlements under this bill. There is strong precedent for prohibiting punitive damages where federal funds are involved. A prohibition on punitive damages already exists with respect to claims against the federal government under the Federal Tort Claims Act. In addition, the Air Transportation Safety and System Stabilization Act does not allow punitive damages to be awarded to claimants in the Victim Compensation Fund. Congress has therefore already expressed its judgment that federal dollars should not be used to award punitive damages. Including a similar provision in the reinsurance bill is a continuation of this sound Congressional public policy.

Finally, from an insurance perspective, allowing punitive damages for claims involving future acts of terrorism creates a situation where there is a risk without any reward. It is highly unlikely that punitive damages would be awarded against a negligent or careless defendant for the terrorist acts of another party. Nevertheless, even a remote possibility of such an award creates a situation in which there no way for an insurer to measure the risk. Insurers cannot possibly know when or where terrorists will strike again or the extent and breadth of that risk. Consequently, there is no way for an insurer to calculate the cost of insuring against such a punitive damages award. Therefore, allowing punitive damages would create a situation in which there is an uninsurable risk with no corresponding reward. The "reward" is nonexistent because it is unlikely that a plaintiff will ever benefit from the possibility of punitive damages.

3. Joint liability is abolished for noneconomic damages

Joint liability refers to the rule that when two or more defendants substantially contribute to an injury, each defendant can be held liable for the full amount of the judgment, regardless of the degree to which the jury finds the defendant to have been at fault. The principle underlying joint liability is that each defendant's wrongful conduct is substantial enough to pay for the plaintiff's injury, so the plaintiff should be fully compensated and should not suffer if one defendant is absent from the jurisdiction or bankrupt.

H.R. 3210 modifies the traditional joint liability rule by providing defendants will not be jointly liable for noneconomic damages (i.e. pain and suffering). According to H.R. 3210, each defendant may be jointly liable for economic damages (what the person actually lost — wages,

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health cares costs, etc.) if the relevant state law allows,[4] but each defendants would only be liable for non-economic damages in proportion to its responsibility for the harm to the plaintiff.

It is sensible to include this provision in a reinsurance bill because the events that would be covered by the reinsurance bill are completely different in kind from the typical tort on which this rule is based. In a typical tort case, there is an assumption that each defendant's wrongful acts have substantially contributed to the plaintiff's injury. In cases of terrorism, however, the potential defendants (such as owners of buildings or businesses that are attacked) have absolutely nothing to do with the individuals or groups creating the harm (i.e. terrorists). In plain English, these defendants should not be held liable for the pain and suffering caused by terrorists. Because federal dollars are at stake, it is also reasonable to include this reform so that the federal government is not held liable for the pain and suffering caused by terrorists.

4. Collateral Sources Are Considered

The collateral source rule means that, in general, a judgment against a defendant is not reduced if the plaintiff receives money from sources other than (collateral to) the defendant. For example, if a defendant negligently injures a plaintiff and the plaintiff has to go to the hospital for assistance, the plaintiff can sue the defendant for the hospital bill, even if the plaintiff's insurance has reimbursed him or her for the bill. The principle rationale for this rule is that a defendant who has acted wrongfully should not benefit from the plaintiff's foresight in purchasing insurance.

H.R. 3210 modifies this rule, providing that an award to a plaintiff in litigation after a terrorist event shall be reduced by the amount that the plaintiff has received from a collateral source. A similar rule applies to the Victim Compensation Fund, where awards by the Special Master are reduced by amounts that individuals have received from collateral sources.

Including the collateral source rule reform in this legislation is sound for the very same reasons that it was logical to include this in the Victim Compensation Act. As explained above, the plaintiffs in litigation arising under this bill will receive federal dollars. Federal funds are not unlimited, and decisions must be made regarding how to allocate resources between plaintiffs. This provision would ensure that funds are used to compensate injured persons who have not yet been compensated, rather than providing "additional" recovery to those who have already been compensated.

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[4] Because the statute does not address economic damages, the substantive law of the state where the accident occurred would determine economic damages. The traditional joint liability rule remains in effect in thirteen states. Twelve states have abolished the joint liability. In the remaining twenty-five states, a modified joint liability rule exists. There are several ways in which the states have modified the traditional joint liability rule. For example, in California joint liability has been abolished for noneconomic damages. In other states, joint liability is abolished for defendants whose fault does not meet a certain level. For example, in New Jersey, joint liability is abolished for defendants who are less than 60% at fault.

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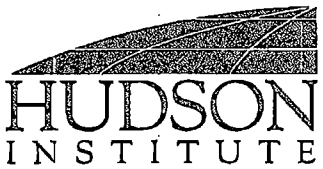

PROJECT FOR INTERNATIONAL RELIGIOUS LIBERTY

Michael J. Horowitz
Director

FAX TO: Wayne Abernathy, Hunter Bates, Jeanne Bumpus, Ben Cohen, Cesar Conda, David Crane, Terry Haines, David Keating, Charles Kolb, Jay Lefkowitz, John Schmitz, Jim Wootton

FROM: Michael Horowitz MH

Crunch time is here; I'm aware that the insurance industry wants nothing to stand in the way of an insurance bill. I know that, in concert with the tort bar, the industry has generated the powerful impression that there will be no bill if attorney fee caps are attached to it.

I believe that the above view is both right and wrong, and is in all events short-sighted, for the following reasons:

- ***The anti-fee cap alarms are in fact valid, even as the attorneys fee provision that needs to be added to the bill is not a fee cap.*** The needed reform is an ***uncapped*** fee ***formula*** similar to the one routinely used in many contingency fee cases where there is no lack of lawyers willing to bring tough cases on behalf of poor and vulnerable clients. ***All who oppose the House bill's 20% cap are right to do so;*** as the tobacco cases have shown, multi-billion dollar, $100,000+ per hour fees are literally routine in mass tort cases even with contingency fee percentages far lower than 20%. In sum: the issue at play has nothing to do with fee caps, but with whether hourly times multiplier fee formulas or percentile fee formulas are the fairest means of attracting able plaintiffs' lawyers ***while also*** honoring fiduciary principles and protecting terrorism victims.

- ***In this regard, it is significant that the Federal courts have construed the "reasonable fee" term in Federal statutes to mean hourly fees times multiplier and not percentile fees – precisely the reform needed for the insurance bill.*** (For example, the courts have

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so construed the "reasonable fee" provision of the Civil Rights laws.) As noted above and elsewhere, there is no paucity of attorneys ready, willing, and able to handle complex and high-risk cases against powerful and fully-financed defendants even though paid on an hourly times multiplier rather than percentile basis.

- ***All other tort reform provisions in the insurance act will have no meaningful effect; they barely provide fig leave cover to any claim that the insurance bill has "tort reform" provisions in it.*** This is particularly true of the punitive damages provision – on which many Republicans and conservatives have mistakenly focused, with shrewd don't-throw-me-in-the-briar-patch support from a sophisticated tort bar. The willingness of the tort bar to accept a McCain bill with a punitive damage provision in it results from the fact few expect many serious punitive damage claims in terrorism cases.

I again urge long-term – indeed, even short-term – ***strategic*** thinking before ceding the opportunity to fight for a fee formula that will significantly increase the recoveries of terrorism victims. Such an effort will require its adversaries to show what they will not be able to do: that hourly times multiplier contingency fee formulas will not produce a full supply of willing and able lawyers to litigate terrorism cases. It will compel them to defend fees like those that have been paid in the tobacco cases – in many instances $100,000+ per hour payments that have gone to lawyers in limited-risk copycat cases.

It should also be noted that a meaningful fee formula provision in the insurance bill will also create a powerful precedent in support of the President's mass tort case fee reform initiative. ***That initiative addresses the present likelihood that 30-50 tort lawyer billionaires (and many more centi-millionaires) will be created in the next 5-10 years as a result of unreasonable fee grabs from vulnerable clients in mass tort cases.***

It is hard to seriously contend that clients whose lawyers are paid with hourly times multiplier fee formulas are underrepresented; application of such a formula to lawyers in cases where taxpayers will be paying 80¢ on every dollar of payout is thus both a critical and minimal step. In such a situation, the Federal government has both the right and responsibility to ensure that terrorism victims, and not their lawyers, receive the bulk of federally subsidized payments.

HUDSON INSTITUTE

PROJECT FOR INTERNATIONAL RELIGIOUS LIBERTY

TO: Wayne Abernathy, Hunter Bates, Jeanne Bumpus, Ben Cohen, Cesar Conda, David Crane, Peter Davidson, Viet Dinh, Terry Haines, Brett Kavanaugh, Charles Kolb, Jay Lefkowitz, Steve Moore, John Schmitz

Michael J. Horowitz
Director

I don't know what's now happening with negotiations re the terrorism insurance bill, but am writing to urge a ***strategic*** approach to the matter.

Doing so, in my opinion, leads to two outcomes:

- the take-current-rights-from-victims provisions in the House bill, very much including the punitive damage provision, are ankle-biter items that will have limited impact on terrorism cases and no serious precedential value in future tort reform battles; and, most of all

- the 20% fee cap of the House bill will be of no more effect in curbing windfall, multi-billion $100,000+ per hour fees than such a provision would have had in the tobacco cases. In the tragic event of a terrorist catastrophe, payouts are likely to be in the high billions and, as such, a 20% cap will still put billions of *taxpayer dollars* in lawyers' rather than victims' pockets.

I reiterate my hope that the Administration and Congressional leadership will move towards the President's mass tort fee reform – one that *rejects* fee caps and calls for an uncapped, judicially administered fee *formula* based on hourly fees times risk multipliers.

In my opinion, such a reform is worth more, by orders of magnitude, than the tort reform provisions in the House bill – even as it will be far easier to defend. It's hard to imagine how opponents will justify killing an insurance bill based on the claim that lawyers won't be available to represent terrorism victims because "mere" fees of $2000-$3000 per hour will be all they can hope for. ***That's my idea of a tort reform debate – one that finally puts conservatives on the side of consumers and exposes the unethical overage of today's mass tort case fees.***

Carpe diem; I'm at your pleasure.

Michael Horowitz

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Source: All Sources > Secondary Legal > Law Reviews, Combined
Terms: "war risk exclusion" and insurance and law /10 economics (Edit Search)

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NOTE: Landowner Liability For Terrorist Acts *

* Awarded the Sindell Brothers Award for outstanding tort law scholarship presented each year to a Case Western Reserve University Law School student. In addition, awarded the first annual Case Western Reserve Law Review Outstanding Student Note Award, as selected by the editors and faculty advisor.

Melinda L. Reynolds

SUMMARY:
... The specter of terrorism within the United States has become frighteningly real. ... For "new" causes of action, like landowner liability for terrorism, courts may be especially tempted to use policy considerations to define foreseeability. ... Especially when viewed in the context of commercial leaseholds, current formulations of landlord liability will not provide the most efficient methods of victim compensation or increased prevention when the crime in question is terrorism. ... The question of whether mere warnings about the risk of crime (or terrorism) on the premises could ever be sufficient to avoid liability has not been addressed by litigation. ... Some of the implications of this doctrine are raised in Samson v. Saginaw Professional Building, Inc., where the Michigan Supreme Court upheld a finding of liability against a landlord for a criminal act committed by a patient of a tenant mental health clinic against an employee of another tenant. ... Our goals as a society are crime/terrorism prevention and victim compensation, but landlord liability seems equitable only as a prevention technique, not as a compensation mechanism. ...

TEXT:
[*155] [*156]

Introduction

The specter of terrorism within the United States has become frighteningly real. The World Trade Center and Oklahoma City bombings have effectively erased the traditional American paradigm of terrorism as a foreign problem. These two incidents alone caused staggering national losses. The World Trade Center bombing in February of 1993 killed six people and injured more than a thousand others, created a crater 150-200 feet deep, and damaged the massive complex five levels down and two levels up from the explosion. [1] Economically, total damage was estimated at over $ 510 million, [2] with claims in civil lawsuits filed totaling over $ 1.9 billion. [3] And while the World Trade Center bombing was repeatedly called "the single most destructive act of terrorism ever committed . . . in the United States," [4] a preliminary estimate from the **[*157]** Oklahoma City bombing put damage at over $ 652 million. [5]

against terrorism. However, it is not clear that tort remedies provide a cost-effective incentive to do so. Finally, imposing liability on landlords may have extensive undesirable consequences, as landlords may not respond as desired. Examining these issues will support the hypothesis of the previous section: landowner liability by itself is not the most appropriate legal response to domestic terrorism.

A. Defining Terrorism

In terms of framing appropriate legal responses, a threshold issue for legislatures and courts will be who gets to decide when an act constitutes terrorism. [134] Certainly, in order to determine whether landlord liability can be an effective preventive measure, the behavior to be prevented must be defined. For purposes of this Note, the term terrorism has generically been used to refer to bombings--the type of act most likely to impact landowners. [135] It **[*181]** seems, however, that no "one definition of terrorism has gained universal acceptance," even the United Nations is unable to agree on a definition. [136] Whatever its definition, Americans have traditionally considered terrorism to be a matter for international law. Americans think that if terrorism occurs in the United States, it must have "come in" across borders. [137] Clearly though, as shown by the Oklahoma City bombing, terrorist acts may be entirely domestic. Further, the face of terrorism has changed over the past two decades. Skyjackings and spectacular raids like the one at the Munich Olympics have been replaced [138] by car bombs. [139] Based on this analysis, the definition of terrorism will no doubt change as both politics and technology change. One constant is that terrorists have very different motivations from ordinary criminals; a terrorist **[*182]** act is neither profit-motivated nor a random assault, it is usually part of a larger plan, [140] and is usually calculated for media effect. If landlord liability for criminal acts is applied to terrorism, we are effectively saying that these types of definitional differences do not matter, although they must affect the kinds of preventive measures that are effective. [141]

B. Preventing Terrorism

Just as in the context of criminal acts, making landlords liable for terrorist acts really means that we want landlords to assist in prevention or protection. [142] While in the criminal context structural changes by landlords (e.g., alarms and lighting) are of prime importance, most experts agree that structural changes by themselves will not thwart a terrorist attack. As Richard Moore, an associate director with FEMA, explained, "You can make a building less susceptible to severe damage, but it's got to be done in concert with other things--security for instance . . . ." [143] Experts agree that the most effective counterterrorist measure is intelligence, especially infiltration of terrorist organizations. [144] There are therefore three principal ways to prevent terrorist acts: structural changes to buildings, private security changes, and government actions. To determine whether landlords should be held liable, the effectiveness of the first two must be evaluated. Based on the following analysis, the argument for resting the primary burden of prevention with governments rather than private landowners is even stronger here than in the context of regular crime.

Attempting to prevent terrorism assumes that terrorist groups act rationally; that is, they attempt to minimize costs and achieve their own ideas of successful outcomes. Indeed, there is evidence that terrorist groups respond to measures that raise the risks of a particular type of attack. [145] In this regard, while creating an absolutely damage-proof building is both architecturally impossible and prohibitively expensive, there are a number of ways to make build- **[*183]** ings more resistant to "human evil." [146] Various structural modifications include imposing setbacks, [147] preventing flying glass, [148] and infrastructure supports. [149] Structural changes are not cheap, however, and in fact may increase dangers for other perils (e.g., fire). [150] Changes of a preventive rather than protective nature, like restricting access and using camera surveillance are more practical. [151]

For what has been called "the most terrible weapon in a terrorist's arsenal" [152] --the car bomb--adequate preventive measures may not exist. Robert Kupperman, a terrorism expert

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at the Center for Strategic and International Studies in Washington, noted that car bombs are a "throw away" weapon requiring little planning or support and fewer participants than the more traditional terrorist acts. [153] A munitions expert who formerly worked with the CIA noted that very few places in the United States are protected from car bomb attacks. "People in the intelligence community have been warning for years that this kind of thing could come to the United States . . . . And in the United States, we have bigger cars than they do in Europe." [154] Indeed, it seems the simplest of terrorist **[*184]** plots and weapons can foil the most sophisticated security. Security at the Olympic games in Atlanta involved more than 30,000 police and security experts, more than 2,000 explosives experts, 40 bombsniffing dogs, 1,000 video cameras, 200,000 I.D. badges, 100 computerized command centers, and microchips that stored digital images of the bearer's palmprint; all at a cost of over $ 117 million. [155] The security teams in Atlanta had practiced against a release of nerve gas, a massive bomb attack inside the games, and a plane hijacking, but were unable to protect visitors from a crude pipe-bomb left unattended in a bag. [156]

A further problem with preventive measures is that they serve to merely relocate criminal behavior. For example, while fortification of diplomatic facilities has resulted in a decrease of known terrorist missions aimed at them, incidences of assassinations and hostage-takings outside protected facilities against civilians has increased. [157] This substitution phenomenon suggests that all landowners would have to continually refine structural and procedural security to thwart terrorists ready to relocate or develop new tactics in order for preventive measures to be effective. This highlights the need for more retaliatory or interventionist measures by government.

Experts believe that the preferred way to prevent terrorism is to "identify and break up terrorist cells, possibly expel or prevent the entry of individual terrorists and thwart their plans." [158] The FBI, which has the primary responsibility for counterterrorism measures in the United States, [159] perceives that counterterrorism is still a "growing field" and has transferred a number of agents from counterintelligence to that area. [160] One question raised after the Oklahoma City bombing was whether any free society could ever prevent terrorist acts. [161] As Fred Moore of FEMA noted, "I don't **[*185]** think any government, even the most authoritarian, has found a way to eliminate terrorism." [162] Indeed, even though the Oklahoma City tragedy appears wholly domestic, it seems likely that many acts of terrorism within the United States will be perpetrated by those who come from outside the country or flee the country afterwards. Without a unified international effort, or at least consensus on means of deterrence and agreement to accept the costs that a global antiterrorism strategy would entail, efforts by agencies of any one nation seem destined to be reactive. [163] These comments suggest that at the least a national policy, rather than the state-bystate approach inherent in landlord tort liability, is warranted.

Many of the same concerns about the effectiveness of private citizens as compared to government in preventing regular crime apply in the terrorism context. The differences noted above--that structural changes are even less effective but more costly, and that there is a greater necessity for national if not international government intervention--reinforce the conclusion that landlord liability as a method of increasing terrorism prevention should be restricted.

C. Warnings

In addition to intervention, the term "prevention" as used here is assumed to include protection, or measures designed to lessen the damage caused by terrorist attacks. One way of protecting tenants and invitees is to require landlords to warn them about terrorist threats received. The question of whether mere warnings about the risk of crime (or terrorism) on the premises could ever be sufficient to avoid liability has not been addressed by litigation. Theoretically at least, warnings themselves could be an adequate security measure in response to lower levels of foreseeable terrorism. However, if warnings would be sufficient, there may still be a question about whether it would be equitable or efficient to require

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landlords to issue them. Disclosure of terrorist threats is not an easy issue as there are several competing concerns in a determination of when to notify tenants or customers. Disclosure could theoretically reduce lawsuits if the threat is carried out, but could hurt business if it is not. Disclosure can encourage public dialogue that can help law enforcement--or encourage copycats. For example, after the World Trade Center bombing there were seventy bomb threats a day in New York City. [164] The classic "boy who cries wolf" syndrome creates a risk that real threats will be ignored. [165] **[*186]** Finally, however, there are advantages to public notification in that citizens can help with prevention. For example, British officials in particular were dependent upon citizens to help spot IRA bombs. [166]

If a landlord guesses incorrectly and does not issue a warning, certainly issues of notice and reasonable response are implicated. [167] For example, over Easter weekend in 1995, Disneyland received a threat that a chemical attack would take place. [168] Disneyland officials decided not to warn visitors, but did summon health officials and a chemical warfare team before the FBI determined it was a hoax. [169] If something had gone wrong that weekend, Disneyland would have been faced with the prospect of defending its decision not to warn customers in front of an unsympathetic jury. The best solution to this problem may be to statutorily establish that landowners have a duty to inform the appropriate government authority if they are aware of any risks. The authority can then make a determination about any necessary warnings. In that way private landowners have a clear role in prevention, while determinations about public policy are left to the experts.

D. Issues from the World Trade Center Bombing Litigation

The civil litigation following the World Trade Center bombing provides examples of some of the more detailed legal issues likely to arise when landlord liability is applied to acts of terrorism. An examination of some of these concerns (namely, **insurance,** mass tort, and evidentiary issues) reinforce the conclusion that this type of litigation, which requires massive amounts of resources to pursue, will not likely provide an efficient legal response to domestic terrorism.

1. **Insurance**

Since the targets of terrorist attacks are likely to be commercial leaseholds, and since commercial leaseholds generally carry **insurance,** litigation following a terrorist act will likely consist of a **[*187]** battle between **insurance** companies. Insurers of tenants will attempt to subrogate claims that they have been forced to pay, probably by alleging that either the policyholder or someone else (i.e., the landlord) was negligent. [170] For example, in the World Trade Center litigation, one **insurance** company, Phoenix Assurance, is seeking to recoup a $ 5-10 million payout on a property and business interruption policy for Teleport Communications Group, Inc., a World Trade Center tenant. A lawyer for Phoenix Assurance notes, "**Insurance** companies have an obligation to policyholders and shareholders to minimize their losses." [171] In fact, **insurance** companies with significant claims are well represented among the remaining plaintiffs in the World Trade Center litigation. [172] Of course, having **insurance** companies involved as final litigants first requires that they have decided to honor policyholders' claims. [173]

When claims are significant, [174] insurers may try to avoid them under any number of exceptions to coverage. For example, insurers might try to argue that a terrorist bombing is not a covered "occurrence" because it was technically not an accident but a deliberate act. Theoretically, this type of maneuvering should not be successful, "as the use of the term 'accident' was not intended to deprive policyholders of coverage for deliberate acts of violence against them by unknown third parties." [175] A more likely tactic when damages from a terrorist attack are at issue may be for insurers to claim refuge under a "**war risk exclusion." The war risk exclusion** generally bars coverage for damages resulting from "war, invasion, civil war, revolution, insurrection or warlike operations, whether there be a declaration of war or not." [176] In practice, this exclusion has generally been limited to actions

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taken by hostile **[*188]** government entities or attempts to overthrow government entities. [177] For example, at least one **insurance** company has tried, albeit without success, to argue that the **war risk exclusion** should preclude coverage for damages resulting from a hijacking. [178] Further, should **insurance** companies attempt to assert an exclusion, they generally have the burden of proof to show why coverage should not apply. [179] Specifically with regard to the World Trade Center, shortly after the bombing, two of the biggest carriers in the property and business-disruption fields took different positions on whether the **war risk exclusion** would apply in that instance. [180] In many European countries, **insurance** policies now include specific terrorism exclusions, however, the World Trade Center's policies did not. [181]

Given that **insurance** companies for tenants injured by a terrorist act will most likely have to honor claims for property loss, business interruption, and general liability, [182] it is likely that they will attempt to subrogate claims via litigation. As **insurance** companies undoubtedly have the resources to be powerful plaintiffs, commercial landlords whose properties have been the site of terrorist attacks will likely be harder pressed to defend themselves against allegations of negligence than their residential counterparts whose tenants' losses may often be uninsured.

2. Mass Torts

Due to the nature of the terrorist attacks contemplated, a great number of plaintiffs will be involved in subsequent litigation against landlords for a given incident. In the wake of the World **[*189]** Trade Center bombing, an eight-firm steering committee was appointed to direct the litigation of the 170 civil actions filed. [183] For purposes of judicial economy (if not ecology), [184] it makes sense to litigate all the World Trade Center claims simultaneously. It is also important to ask, however, whether there will be any undesirable side-effects to doing so.

For example, in more typical class action cases, [185] concerns arise as to whether the focus will shift from client to lawyer, from damages to attorney's fees, and from litigation to settlement. Apart from saving costs, which primarily benefit the defendant, it is probably to the plaintiffs' advantage to have the cases consolidated, since their claims will tend to reinforce each other. [186] Apparently, in this case the Port Authority thought that the cost of litigating all the claims separately would far outweigh any such intangible benefit gained by the plaintiffs. As long as these types of concerns of both defendants and plaintiffs can be managed efficiently, which remains to be seen in the World Trade Center litigation, perhaps the fact that terrorist acts will create mass tort litigation is not a significant problem, at least as to its effect on the substantive law. **[*190]**

3. Evidentiary Issues

In attempting to hold landlords liable for terrorist acts, some interesting evidentiary issues may develop. For example, in the wake of the bombing, the World Trade Center has undertaken significant additional structural modifications and security procedures. [187] It does not appear to have been addressed yet, but one question may be whether the plaintiffs can introduce evidence of these subsequent remedial measures to attempt to prove that the Port Authority either knew that existing security was inadequate or that alternate cost-effective safety measures were available. The New York equivalent of Federal Rule of Evidence 407, which excludes "evidence of the subsequent remedial measures . . . offered to prove negligence or culpable conduct" [188] would be at issue. As the Federal rule itself notes, however, it "does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." [189] Thus, plaintiffs' attorneys will likely find a way to get evidence of the modifications admitted.

Another evidentiary issue that will undoubtedly arise in terrorism cases against landlords, and

indeed has arisen in the World Trade Center litigation, involves whether discovery of previously conducted security studies should be allowed. Plaintiffs in the World Trade Center bombing case requested that the Port Authority turn over some sixty-two documents that relate to security audits of the complex conducted in the mid-1980s. [190] The Port Authority has resisted production of the materials on grounds that the documents "are subject to the public interest privilege and/or that they contain information which is neither material nor necessary in the prosecution of the action." [191] Discovery of the security reports is **[*191]** a key issue for the plaintiffs since they allegedly contain comments like "the vulnerability of the World Trade Center to the terrorist is substantial . . . . It is an extremely inviting target," and that the parking garage "presents an enormous opportunity at present for a terrorist to park an explosive filled vehicle that could affect vulnerable areas." [192] The same reports also allegedly contain specific recommendations to tighten security, including closer monitoring of the garage, and banning all public parking. The lawsuit filed by Phoenix Assurance alleges that "as far as we can tell, [the reports were] almost entirely ignored." [193] In attempting to establish that the Port Authority was negligent in failing to protect tenants from the bombing, the plaintiffs are attempting to show that the Port Authority was aware of security problems and did not respond reasonably to them. Plaintiffs' attorneys are therefore also undertaking discovery by seeking testimony of consultants and Port Authority employees who might have been aware of the risk. [194]

As noted above, the plaintiffs claimed that the documents should be produced since they are relevant to Port Authority's recklessness (or knowledge) and foreseeability. [195] In response, the **[*192]** Port Authority argued that since the explosion occurred on a sublevel, any information about a safety system, device, or practice occurring at or above the concourse level is irrelevant. [196] The judge dismissed the Port Authority's argument, holding that "the mere fact that the explosion occurred in a level beneath the concourse does not necessarily render irrelevant the documents . . . relating to the concourse or floors above the concourse." [197] Further, he noted that "the PA may assert as a defense that, while numerous recommendations were made, it was unable to take all of the recommended steps because of, inter alia, cost and that therefore it had to prioritize the implementation of them." [198] The judge warned that by asserting such a defense--that it acted reasonably and with due care in following the reports and implementing recommendations found therein--the Port Authority could then be compelled to produce the documents. [199]

While the public interest privilege may be specific to a quasigovernmental agency like the Port Authority, many of the relevance and policy issues noted could easily arise in a completely private setting. For example, though not raised by the Port Authority, other relevancy arguments could include whether the type of harm is not specifically addressed by the security report, the security report is out-of-date, or even that the contents of the report would likely cause the jury to be prejudiced against the defendant. Finally, defendants are likely to make the policy argument that the admissibility of security reports may actually constitute a disincentive to conduct them in the first place. Therefore, evidentiary issues specific to terrorism will require significant resources and add another layer of complexity to an already complex area of litigation.

E. The Effects of Finding Landlords Liable

All of the problems endemic to terrorism discussed above suggest that imposing liability on landowners is not an efficient mechanism for increased prevention. Further, imposing liability on landowners may have some unintended, potentially negative effects because landowners may not respond as desired. Such unintended consequences may be divided into five categories: (1) landowners **[*193]** may not respond to liability with increased security; (2) landowners may even treat liability as a disincentive to engage in further security measures; (3) landowners may use liability as justification for impinging on tenants' rights; (4) landowners may shift resources to other investments (unintended macroeconomic consequences); and (5) landowners may attempt to shift the risk of liability to other parties.

1. Liability as Incentive

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In determining whether landowner liability will result in increased protection against terrorist attacks, beyond the analysis of which preventive measures may be effective against terrorism, [200] an examination of whether landowner liability has resulted in increased security measures against regular criminal acts may be helpful. Commentators have argued both for and against liability under tort law as an effective deterrent (or incentive). For example, one author argues that finding landlords liable for protecting tenants and invitees has induced landlords to make "considerable efforts" to render their buildings negligence-proof, if not crimeproof, by hiring extra lobby personnel and security guards, and improving lighting. [201] Further, apparently due to liability exposure, almost every major fast food company has recently hired a security director and over the past ten years these companies' security budgets have approximately doubled. [202]

The same author notes that tort law as a deterrent is only moderately successful, and questions whether deterrence benefits outweigh the costs imposed. [203] For example, it is unclear whether imposing liability on landlords actually prevents crime overall or merely serves to relocate it. [204] Many commentators also point out the social costs, including potential violations of tenants' rights, and increased chances for corruption, discriminatory enforcement, and vigilantism, which could result from the deputization of the citizenry and the fact that law enforcement essentially becomes private. [205] For example, from 1969 to 1990 the value of private **[*194]** security industries rose from $ 2.5 million to $ 18 billion annually and the number of employees increased from fewer than 300,000 to nearly two million. [206] Currently private security personnel outnumber police by more than two to one, but are largely unregistered and usually not as well trained. [207]

Despite these concerns, and while it seems unfair to find that a person is entitled to more protection from a landowner than from police, business and industry do have the financial and technical resources available for aiding the prevention of crime [208] (or terrorism). It therefore seems reasonable to conclude that while imposing liability on landlords does provide a moderate incentive to increase crime prevention, such incentive must be evaluated on a cost-benefit basis. For terrorism, this analysis suggests that the preventive measures that landlords can take by applying private resources seem to be less cost-effective than the measures that government can take by applying public resources.

2. Liability as Disincentive

The propensity for liability to act as a disincentive is perhaps most apparent under the voluntary assumption of duty theory of liability. [209] In the commercial context, this type of liability would likely be triggered frequently since a large percentage of commercial landowners provide some level of security. For example, assume that there are two landlords who both can foresee that at some point there will probably be a terrorist act upon one of their tenants (e.g., each leases to an abortion clinic). One landlord chooses to ignore various threats, while one hires a security guard in response. When tenants or their invitees ultimately suffer injuries, under the voluntary assumption of duty theory, the landlord who hired the security guard is more likely to be found to have a duty and will probably face a jury to defend the reasonableness of his conduct. [210] Under this analysis, it is hard to see why any landlord would initially take what is undoubtedly the safer course, **[*195]** since he would be, at best, in the same position as his counterpart who did nothing--facing a potentially hostile jury to defend his conduct. On the other hand, if the landlord does not provide security, he still has not eliminated risk. Without empirical data, it is difficult to gauge disincentive effects. However, it seems reasonable to conclude that if not a disincentive, the incentive effects of tort liability in this context are often muted.

3. Effects of Landlord Liability on Tenants' Rights

As one commentator has noted, it is perhaps "axiomatic" that "as a landlord's duty to protect . . . tenants increases, so too the landlord's right to screen, control and evict tenants

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increases." [211] Some of the implications of this doctrine are raised in Samson v. Saginaw Professional Building, Inc., [212] where the Michigan Supreme Court upheld a finding of liability against a landlord for a criminal act committed by a patient of a tenant mental health clinic against an employee of another tenant. While the court did not specify how landlords should deal with such high risk tenants, [213] the court did seem to imply that a landlord has some responsibility to assess the risks caused by tenants. [214] This prompted one commentator to caution, "There is a difference, however, between requiring a landlord to act once a dangerous condition becomes apparent, and encouraging him to discriminate against certain tenants based on their prior records, their occupations, or the types of invitees they may be expected to attract. Samson appears to do the latter." [215] In another instance, a court upheld a landlord's right to refuse the tenancy of an ex-convict, noting that "in choosing his tenants, a landlord has a legitimate interest in protecting his property, and an interest in protecting the health, safety, and welfare of his other tenants. He may consider any criteria, but especially criteria relevant to these ends." [216]

Encouraging this type of behavior among landlords, especially in the application of liability to terrorism, would seem to invite discrimination against unpopular organizations. Indeed, this controversy recently arose in New York, where a judge ruled that a landlord could break an abortion clinic's lease "if his purpose is to **[*196]** protect other tenants against security risks arising from the clinic's presence in his . . . building." [217] The landlord based the eviction on the clinic's failure to follow his regulations, which were designed to prevent the clinic from performing abortions. The judge found the landlord's regulations to be reasonable, holding that "a landlord must exercise reasonable care to protect its tenants against any foreseeable dangers." [218] The judge's ruling, which never mentions the word abortion, cites seventeen incidents that were "directly related" to the abortion clinic, including gunshots, assaults on employees, rocks thrown at clinic windows, smashed cars, a false bomb scare, a tenant's doors glued shut, and the anonymous posting of a threatening note that read in part "you risk injury or death if you are caught near these premises." [219] The ruling allowed the landlord to start eviction proceedings against the clinic, even though it had eight years left on its lease and was not in default of rent. [220]

Negative reaction against the decision was swift and raised many of the civil rights concerns that result from imposing a duty to protect on landlords in this context. For example, Rep. Charles Schumer (D-Brooklyn) noted: "It's an open invitation to the extremist fringe in the pro-life movement to harass and intimidate landlords until they evict clinics." [221] Priscilla Smith, attorney for Center for Reproductive Law & Policy, stressed that "saying the clinic created an unsafe environment is the same as saying that, 'We can't have Jewish people in our neighborhood because we can't have people coming here and burning crosses.' It's an easy way of trying to hide your discriminatory actions." [222] And Donna Lieberman, attorney with the New York Civil Liberties Union noted: **[*197]**

> The court has approved a landlord's effort to evict a tenant because the landlord failed to secure the safety of the building for the tenant, which is a basic landlord obligation. . . . There was never any showing that the performance of abortions presented any danger to the security of the building. [223]

Finally, stressing contractual rather than public policy considerations, David Rosenberg, a Manhattan lawyer, noted:

> I would hope that commercial tenants' groups would rally behind this tenant. If it stands up, then a lease has almost no meaning for a tenant. . . . It's a contract. The tenant hasn't

violated it. And the tenant has a right to expect to continue to operate according to the original contract. [224]

4. Macroeconomic Consequences--Risk Shifting

Besides inviting tenants' rights violations, imposing a duty to provide security on landlords may prove to be economically inequitable to some controversial tenants. Theoretically, landlords leasing to more expensive stores can pass on the added cost of security to customers, but businesses catering to a lower-income clientele may not necessarily be able to do so without losing customers who are more sensitive to prices than security. [225] This could ultimately cause smaller or marginally profitable landlords, especially with high-risk or controversial tenants, to leave the commercial real estate market for more lucrative investments. [226]

Short of leaving the market, some landlords may respond to liability for criminal/terrorist acts on their premises by simply refusing to provide security and disclaiming all responsibility for security--perhaps by informing prospective tenants that security is their own responsibility. This does not, however, eliminate the risk of liability if crime/terrorism, is found to be foreseeable; a more prudent alternative available to landowners would be to attempt to modify tort liability by shifting risk back to tenants. [227] Including **[*198]** exculpatory clauses in leases is one method of allocating risk in a contractual arrangement. While few courts have specifically addressed the use of exculpatory clauses respecting criminal acts, [228] in general, a commercial tenant may agree to exonerate a landlord from liability for future acts of negligence, for both property damage and personal injury. [229] Exculpatory clauses in residential leases have often been found to be against public policy, and therefore invalid, although, their use in the commercial context has not been as restricted. [230] There are some limitations on the use of exculpatory clauses in commercial leases. Five states [231] impose statutory restrictions (e.g., New York law invalidates any agreement that exempts a lessor from liability for personal injury or property damage resulting from the lessor's negligence in operation or maintenance of the property). Additionally, there appears to be a consensus that exculpatory clauses cannot insulate landlords from intentional, wanton, or willful behavior. [232] Some courts have found that exculpatory clauses only protect landlords from passive negligence, not active negligence. [233] A few courts have held that an exculpatory clause cannot release a landlord who has violated a statutory provision. [234] Further, an exculpatory clause is usually binding only on parties to the lease. Third-parties like the tenants' employees or invitees are not precluded from bringing suit against the landlord in this instance, although the existence of these types of provisions may provide for the landlord's later indemnity claim against the tenant. [235] Finally, a court may always choose to invalidate an exculpatory clause as unconscionable if there is evidence of grossly unequal bargaining power. [236] In summary, exculpatory **[*199]** clauses in commercial leases have generally been held enforceable in enough cases to warrant landlords' use of them if confronted with liability for terrorist acts. In this regard, exculpatory clauses will likely provide a more efficient mechanism of allocating risks than the use of negligence standards, at least as to damage suffered by tenants.

5. Intended Effects

In the midst of this analysis of the negative effects, the potential for positive, intended effects should not be forgotten. If one of society's primary concerns is to ensure that victims are compensated fully, society may consider certain market or macroeconomic effects to be secondary. In other words, the weight given to the value of private victim compensation may be so high that market inefficiencies are minor in comparison. If so, the cost of terrorist prevention may often be "cheapest" to the landowner. [237] As with victim compensation, perhaps the danger is so grave that society considers the prevention of terrorism by all reasonable methods, not just strictly cost-effective ones, desirable. Further, there is evidently

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some relationship between opportunity and certain types of crimes, as well as the magnitude of harm and security measures, so that often the landlord is not entirely blameless. [238] Finally, the "political" benefit of imposing liability may be that pressure for legislative reform is eventually brought to bear by more influential landlords disgusted or threatened by current litigation practices. [239] **[*200]**

F. Summary

Landlord liability for criminal acts has not resulted in clear guidelines about when duty will be imposed or what security responses will be considered sufficient. These problems, which mitigate attempts at increased prevention and protection, would only be exacerbated by the application of this doctrine to acts of domestic terrorism. Our goals as a society are crime/terrorism prevention and victim compensation, but landlord liability seems equitable only as a prevention technique, not as a compensation mechanism. Expansive theories of liability, which have as their primary goals giving compensation to victims, while certainly desirable, are best run by the government with funds raised from society as a whole. Any rules placing burdens on landowners should therefore have prevention, rather than compensation, as their primary goal. This conclusion suggests that narrower theories of liability, designed only to induce landowners to take cost-effective measures to prevent terrorism, [240] should be implemented.

Theoretically, cost-effective levels of protection could be derived empirically--for example, some types of structural changes must be more effective than others in certain settings. Under the current state of the law, however, an efficient standard is not likely to emerge. [241] In fashioning a legal response to terrorism, perhaps other systems that have been forced to address the problem more extensively will provide direction toward a comprehensive solution.

III. Alternative Legal Responses to Domestic Terrorism

The primary conclusion offered by this Note is that using current legal theories of landlord liability for criminal acts as a method of recovery by victims of domestic terrorism is not the best legal response, given goals of increased prevention and victim compensation. Courts deciding this issue will likely be confronted by societal pressures both to expand and contract the scope of landowners' duties. [242] Their decisions may be affected by the availability of other alternatives able to adequately address concerns about victim compensation and prevention. The alternatives presented here are only intended to be a basis for consideration and not definitive proposals. Discussion is limited to how these types of representative alternatives can, either **[*201]** separately or in combination, achieve the goals and address the problems presented.

A. Comprehensive Federal Legislation

Even though victim compensation seems to be a task best handled by government entities rather than private individuals, in this context current legislation would not appear to adequately redress the injuries of non-government affiliated victims of terrorist acts. [243] Therefore, perhaps the most equitable and efficient solution to the victim compensation issue is to amend current legislation to provide for a comprehensive platform of victim compensation for acts of domestic terrorism. Further, the use of legislation to establish minimum levels of reasonable care has apparently proven to be effective in the residential context. [244] Federal legislation specifying minimal structural and procedural antiterrorism measures for commercial buildings over certain sizes could be implemented, much as in the residential context, as the basis for public sanctions or as a guideline in the application of tort liability. [245] A statutory violation would arguably be conclusive of liability--replacing foreseeability--resulting in greater predictability and lowered use of judicial resources. [246] Alternatively, federal legislation could provide direct compensation to landowners. For example, landowners in Northern Ireland are compensated directly by the British government

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for losses from terrorist attacks. Police certification that the injury was related to a terrorist attack is required for reimbursement, but no premiums are paid. Funding comes from tax revenues throughout Great Britain. [247] Claims in Northern Ireland are relatively small when compared with the two incidents referred to throughout this Note. [248] Further, under this system there does not appear to be any incentive for landowners to take preventive measures. For these reasons (potential size of losses and lack of incentives), the Northern Ireland legislative response does not seem appropriate for adoption in the United States. **[*202]**

B. Government Assisted **Insurance**

It is pragmatic to assume that if domestic terrorism continues, United States **insurance** companies will follow the lead of their European counterparts and begin to write terrorism exclusions into commercial property policies. When continental and British insurers took this course in 1993, fears of an economic crisis prompted the British government to promise that it would ensure that coverage for terrorist acts would be available to landowners in Great Britain. [249] The British government essentially agreed to become the "reinsurer of last resort" for losses caused by terrorist acts. [250] To do so it formed "Pool Re," a mutual reinsurance company, to provide the coverage excluded by private insurers. [251] The British system provides five layers of terrorism coverage to a landowner, with the government having final responsibility if all layers are exhausted. [252] Premiums charged for the additional Pool Re coverage are determined based on a number of different factors, some of which are apparently particular to the "terrorism **insurance**" market. [253] Another part of the premium structure is that an "IRA levy" is attached by the British government to all household and vehicle policies written, to shift the cost of **insurance** from London to other parts of the country. [254] While it does spread risks, there are problems with the British reinsurance scheme. There seems to be no incentive for insureds to take preventative measures. Certainly, premium reductions are common in other contexts, and as was **[*203]** discussed earlier, there are measures landlords can take to mitigate the effects of, if not prevent, terrorism. [255]

In a somewhat similar vein, the Overseas Private Investment Corporation ("OPIC") was formed by the United States government at least partly to "underwrite political risk **insurance** in friendly, less developed countries." [256] If political risk was defined to include terrorism, the principles of OPIC could theoretically be applied in developing a model for government provided domestic terrorism **insurance,** whereby the United States government could act as either a direct or indirect insurer for terrorism risks. The lessons learned from the shortcomings of the British system, like ensuring that premiums reflect preventive measures and using levies to spread the cost of premiums throughout the country, could be integrated. When **insurance** is used in this manner, economic efficiency is aided because **insurance** companies, in setting premiums reflective of precautions taken, will help minimize the cost of accident prevention. Landlords will have a clearer standard to follow; mitigating tendencies to either overprotect or do nothing. In this manner, the costs of victim compensation can be at least partially borne by the party best able to spread the risk--the government--in an economically efficient manner that also provides incentives for landlords to take measures to help prevent, or lessen the effect of, terrorist attacks.

C. Contract Theories

Once society is assured that victims of domestic terrorism will be fully compensated, via comprehensive legislation and government assisted **insurance** as suggested above, there are strong philosophical arguments for letting the market function via contract liability alone. [257] Market or contract based theories partially depend on the premise that it is the government's, and not the private sector's, duty to protect citizens. Further, even if there is a private sector duty, it is not fair to single out landlords. [258] Some **[*204]** theories provide that whatever security measures are necessary will be implemented by landowners on their own because customers will demand them. "By letting the market police itself . . . the more efficient level

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When considered with other recent terrorist attacks and threatened attacks, [6] these incidents suggest that domestic terrorism is an emerging national problem. Americans must therefore develop innovative solutions to address the issues of prevention and victim compensation.

Initial responses to domestic terrorism have resulted in what some have called the "hardening" of America. [7] Government responses to domestic terrorism have included both modifications to existing agencies' priorities as well as legislation providing for limited victim compensation and expanded law enforcement powers. [8] This Note considers the American common law response to **[*158]** domestic terrorism--landowner liability for terrorist acts--as typified by the civil litigation following in the wake of the World Trade Center bombing.

After the World Trade Center bombing over 174 suits were filed against the Port Authority, the owner of the World Trade Center complex. [9] The suits involve "a relatively murky area of the law," [10] namely a landowner's responsibility to protect tenants or invitees against criminal acts of third parties. In brief, the courts face the issue of whether the Port Authority, as landowner, was negligent in either its assessment of the foreseeability of the harm of a terrorist attack or the adequacy of the security measures it took in response to that assessment.

An examination of this particular legal response to domestic terrorist acts is critically important for several reasons. First, beyond the economic effects that can be imagined at the individual party level, the placement of liability could also have significant macroeconomic results. [11] Further, imposing civil liability on land- **[*159]** lords may have extensive implications for individual rights to privacy, as well as availability of fairly-valued rental space for more controversial tenants. [12] These issues must be measured against the harsh inequity that could result if civil suits are not allowed, as some innocent victims will invariably not be made whole by **insurance** or victim-compensation-type statutes. [13] Finally, no precedent appears to squarely address civil recoveries for acts of domestic terrorism as described here; [14] hence plaintiffs' reliance on the general body of law dealing with landlord liability for criminal acts of third parties. The question at hand then is whether this body of law is the best way to achieve equitable victim compensation and increased antiterrorism protection. [15]

In the wake of terrorist attacks in the United States, injured parties inadequately compensated by **insurance** or statutory assistance programs are likely to turn to civil lawsuits against landowners for relief. These suits will involve claims under the general rubric of "landlord liability for criminal acts of third parties." If based on current doctrines, claims involving terrorist acts will only exacerbate problems of unpredictability, inequity, and inefficiency endemic to claims presently involving more typical criminal acts. A nationwide legal response consisting of federal legislation, government-assisted **insurance,** and judicial decisions restricting recovery to more narrowly drawn theories of liability is necessary to provide more equitable and efficient answers to concerns about both victim compensation and prevention.

Part I of this Note presents potential legal responses available to victims of domestic terrorism by reviewing victim-compensationtype statutes that might apply and by examining how potential civil claims could be brought using landowner liability for criminal acts of third parties. [16] The examination of contemporary landowner **[*160]** liability will focus on problems arising from the use of foreseeability as a legal element, since this appears to be a primary cause of the current unpredictability in the law. The implications of applying existing liability theories in the environment of commercial leaseholds are also examined in detail since they will have particular importance in the context of terrorism. Part II examines how issues particularly related to terrorism will affect the application of existing doctrines, with the conclusion that the exclusive use of these types of claims is not the most appropriate legal means to achieve society's goals. Part III presents alternative legal responses that may provide more comprehensive victim compensation as well as the predictable legal outcomes which will cause landowners to take cost-effective preventive measures.

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of protection will emerge as business owners seek to attract customers by using the most cost effective measures." [259]

Advantages to traditional contract liability include the ability to potentially cure a dangerous situation before a terrorist act occurs via traditional contract remedies like rent abatement, repair and offset, rescission, or even termination of the lease if contracted security measures are not provided. [260] In the commercial context, the uses of exculpatory clauses and indemnification provisions result in a more efficient allocation of risks than the legal rules now in effect, at least when tenants are the victims. [261] They result in greater precision in the negotiated solution, as each party's responsibilities are defined, and the bearer of the risk is clearly identified. This in turn allows procurement of appropriate **insurance,** as well as preventive security measures by the party bearing the risk (avoiding overlap of duties). [262] Provisions regarding risks related to terrorist acts and the provision of security against them should therefore be explicitly provided for in every commercial tenant's lease and pursuing a contract remedy should always be considered an appropriate legal response where applicable.

D. Tort Reform

When contract claims are not available, and if recommendations regarding victim compensation are not implemented, the problems with the negligence theories of landlord liability for criminal acts can be lessened so that they can be considered appropriate legal responses in that limited context. In those instances, since victim compensation is not assured, equity demands that landlord liability not be rejected. To mitigate the primary problems involved in the negligence formulations discussed above, foreseeability should be treated as a question of law and reserved for the court. The courts **[*205]** should then promulgate clear standards of liability and appropriate responsive security measures with an eye toward uniformity among jurisdictions. And finally, the courts should be responsive to concerns about landlords as social insurers, landlords operating in the commercial context, and the limited ability of landlords to prevent terrorism, by restricting the definition of duty.

Conclusion

In the wake of the World Trade Center and Oklahoma City bombings, America is learning how to deal with domestic terrorism by "hardening" our buildings and stepping-up security. We have not yet, however, developed methods for providing equitable and efficient legal remedies for victims of domestic terrorism. Since statutory victim compensation provisions in place will likely not provide full relief, victims are apt to pursue civil litigation against the one party likely to have sufficient, available assets--the landowner. Victims will likely proceed, and in fact have proceeded in the World Trade Center bombing case, under the theory that landlords have a duty to protect tenants from criminal acts of third parties. However, the body of law in this area is unsettled. Landowners are generally unable to predict liability or develop appropriate responses once liability is imposed. Liability varies from jurisdiction to jurisdiction and indeed even from court to court. Many of the problems with landlord liability in this area have resulted from courts' treatment of the concept of foreseeability as establishing duty. In applying this theory of liability to terrorist acts, the issue of foreseeability is stretched to its outer limit; all of its shortcomings are accentuated. Further, courts will be asked to develop standards for terrorism liability in an environment of conflicting pressures; to both restrict duty, in the face of growing concern that landlords should not be social insurers, and to expand duty, in the face of the increasing visibility of terrorist acts.

While it is not clear how courts will define liability in view of these pressures, it seems certain that imposing tort liability on landlords for terrorist acts is not the most appropriate legal response. Victim compensation is best handled by the ultimate riskspreader, the government. To the extent society's concerns involve victim compensation and risk spreading, comprehensive federal legislation and government assisted **insurance** should be the primary

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remedies. To the extent society's concerns involve prevention, or antiterrorist measures, perhaps government is again the most efficient actor. Still, landlords can often effectively contribute through structural and procedural changes in security designed to aid both in the prevention and mitigation of damage. Sufficient incentives for this role can likely be achieved by making premiums under a **[*206]** government assisted **insurance** program contingent on attaining certain specifically defined safety levels, establishing statutory minimums for security measures based on building types, and allowing the market to function via contractual risk shifting provisions, such as exculpatory clauses. Limited tort liability (i.e., with clear, uniform standards of duty and sufficient responses) should only be used as a safety net when necessary to prevent inequity. How our society responds to domestic terrorism will necessarily be indicative of our opinions about the current state of the American legal system. To achieve society's goals of both victim compensation and prevention, we must forge equitable yet efficient legal responses from the stockpile of alternatives at our disposal.

FOOTNOTES:

n1 See Jeffrey S. Green & Ira Tripathi, Coping with Chaos: The World Trade Center Bombing and Recovery Effort, 27 Urb. Law. 41, 41 (1995).

n2 See Daniel Wise, Lawyers Pack World Trade Center Hearing, N.Y. L.J., May 9, 1994, at 1 (**insurance** industry estimate).

n3 See Mitchell Pacelle, Onslaught of Civil Suits Begins in World Trade Center Bombing, Wall St. J., June 28, 1994, at B1, B10.

n4 Ralph Blumenthal, Prosecutors Describe "Horror" as Trial in Towers Blast Opens, N.Y. Times, Oct. 5, 1993, at B1.

n5 See Paul English, Preliminary Estimate Puts Bomb Losses at $ 652 Million: Uncovered Costs To Stagger State Budget Resources, The Daily Oklahoman, May 19, 1995, at 1. Oklahoma Governor Frank Keating noted that the loss amount "not only makes it the most catastrophic dollar loss in American history for a terrorist act, but in Oklahoma it's without doubt the greatest loss to the public and private sectors ever." Id.

n6 Including, for example, the Centennial Park bombing at the Olympics in Atlanta, the Amtrak derailment in Arizona, Unabomber bombings and threats, and abortion clinic attacks. "Scarcely a week goes by without at least one terrorist related incident making the headlines." Ileana M. Porras, On Terrorism: Reflections on Violence and the Outlaw, 1994 Utah L. Rev. 119, 119. The director of the CIA recently told Congress that he expects an increase in domestic terrorism over the next decade. See Sunday Today (NBC television broadcast, Jan. 7, 1996).

n7 See, e.g., Tom Masland et al., Fighting Back; Life in the Bull's-Eye, Newsweek, May 1, 1995, at 56. For example, security measures at the World Trade Center in the aftermath of the bombing reflect both structural and procedural changes, including wrapping columns with steel, painting windows with shatter-resistant coating, installing a hydraulic crash barrier, using an online photo ID system, restricting access to the towers, hiring of hundreds of new security guards, moving outside parking away from the building, see id., and restricting parking in the underground garage where the bomb was detonated. See Richard Lacayo, How Safe is Safe? Americans Must Decide How Much Freedom They Are Willing to Trade for More Security, Time, May 1, 1995, at 68, 71. After the Oklahoma City bombing, changes were implemented at Federal buildings around the country. All in all, officials put more than 8,000 federal buildings on "second-level alert"--requiring all employees and visitors to identify themselves "until further notice." Masland et al., supra, at 56. And although he had opposed the action for some time, President Clinton agreed to a ban of vehicular traffic in front of the White House. See Kathy Lewis & G. Robert Hillman, White House Barriers Erected: Clinton Cites Terrorist Fears, The Record (Northern N.J.), May 21, 1995, at A1. In arguing for the

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measure, Treasury Secretary Robert Rubin said that "the bombings of the federal building in Oklahoma City and the World Trade Center in New York are reminders of a growing terrorist threat." Id. at A3.

n8 For example, the Federal Emergency Management Agency (FEMA), which is best known for its response to disasters like floods or earthquakes, has also begun to focus on the problem of "technological events" like major acts of terrorism. See Scott S. Greenberger, FEMA Focuses on Prevention, Telegram & Gazette (Worcester, Mass.), May 2, 1995, at A1, A2. After the World Trade Center bombing, FEMA came up with recommendations to make structures safer, proposing designs for stronger windows and doors. See id. at A3. In responding to the Oklahoma City bombing, in a more traditional role, FEMA is expected to offset about $ 33 million of the loss, as well as provide for rebuilding-loan programs. See English, supra note 5, at 1.

The Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescission Act, 1995, as its name implies, appropriates some $ 66 million for the demolition and rebuilding of the Federal building and authorizes an appropriation of Community Development Block Grant funds of approximately $ 39 million to be used "to assist property and victims damaged and economic revitalization" in a specified area around the bombing site. Pub. L. No. 104-19, section 2007(c), 109 Stat. 194, 252-53 (1995) [hereinafter Emergency Anti-Terrorism Act]. More controversial anti-terrorism provisions of this Act include establishing a $ 34 million "Counterterrorism Fund" for the Department of Justice, and appropriating $ 77 million for a "Domestic Counterterrorism Center" for the FBI. See section 2007(c), 109 Stat. at 249-50.

The Antiterrorism and Effective Death Penalty Act of 1996, signed by President Clinton in April of this year, authorizes $ 1 billion in law enforcement spending over four years, provides for the designation of terrorist groups, bans fund raising in the U.S. for designated terrorist groups, streamlines deportation procedures for terrorists, requires plastic explosives to contain chemical markers, and strengthens penalties for many acts of terrorism. Pub. L. No. 104-132, section 301-823, 110 Stat. 1214, 1247-317 (1996) [hereinafter Antiterrorism Act of 1996]; see also infra note 17.

Recent events including the Centennial Park bombing at the Atlanta Olympics have triggered another round of proposals for increased antiterrorism spending. See Top Priority in Terrorism Fight, The Post And Courier (Charleston, S.C.), Aug. 1, 1996, at 12 (discussing a bill sponsored by Senator Judd Gregg which would add another $ 78.7 million to the Antiterrorism Act of 1996).

n9 Some of these suits have either been settled or dismissed, but of the original suits, 126 involved personal injuries (containing a total of 294 individual claims), 17 involved property damage (containing a total of 159 claims, most of them for cars in the parking garage), and 31 involved business interruption (containing 194 claims filed by companies with offices in the World Trade Center or their insurers). See Wise, supra note 2, at 5.

n10 See Pacelle, supra note 3, at B1.

n11 For example, after the World Trade Center explosion some investors expressed concerns about the Port Authority's ability to pay off some of its $ 4.1 billion in public improvement bonds. See Jon Nordheimer, Crisis at the Twin Towers: The Port Authority; Complex **Insurance** Issues in Aftermath of Explosion, N.Y. Times, Mar. 2, 1993, at B5; see also infra notes 225-36 and accompanying text (discussing macroeconomic effects of imposing liability on landowners or tenants and the effect of exculpatory clauses).

n12 See infra notes 217-24 and accompanying text.

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n13 See infra notes 17-23 and accompanying text.

n14 The term "terrorism" is generally used here to refer to bombing-type acts since they will most often have the greatest effect on landowners. See infra notes 134-41 and accompanying text (discussing in more detail the definition of terrorism).

n15 Throughout this Note, societal goals of increased victim compensation and antiterrorism are presumed. This presumption is based on an economic theory of torts which holds that liability is imposed on defendants in order to (1) compensate those who are harmed and (2) provide incentives for tortfeasors to limit risk-producing behavior to efficient levels (in this case theoretically complete deterrence). See Uri Kaufman, When Crime Pays: Business Landlords' Duty to Protect Customers From Criminal Acts Committed on the Premises, 31 S. Tex. L. Rev. 89, 103 (1990).

n16 The topic of landowner liability for criminal acts of third parties has been commented on extensively. See, e.g., William H. Hardie, Jr., Foreseeability: A Murky Crystal Ball for Predicting Liability, 23 Cumb. L. Rev. 349, 364 n.61 (1992) (listing no less than fifteen law review pieces discussing landlord liability for criminal acts of third parties); Kaufman, supra note 15, at 92 n.13 (discussing representative pieces advocating extreme proposals). Therefore, it is not within the scope of this Note to fully address it, rather the discussions presented here focus on landowner liability for terrorist acts.

n17 See Emergency Anti-Terrorism Act, supra note 8, at 253 (making other appropriations to various governmental agencies for rebuilding). In view of the magnitude of the claims noted earlier, this is not likely to provide sufficient compensation. Additional assistance should also be available to some government employees. See infra note 20 and accompanying text (citing the Victims of Terrorism Compensation Act, Pub. L. No. 99399, section 801, 100 Stat. 879 (1986)). Also, the Antiterrorism Act of 1996 specifically provides for mandatory victim restitution as well as additional compensation for victims of terrorism via The Victims of Crime Act of 1984. See Antiterrorism Act of 1996, supra note 8, at 1227-41 (mandatory victim restitution), 1243-47 (assistance to victims of terrorism). However, obtaining restitution from terrorists will probably not provide adequate compensation in the majority of cases. See infra notes 25-26 and accompanying text (noting that terrorists will often have insufficient or hard-to-reach assets). Further, while the Antiterrorism Act of 1996 specifically authorizes Federal funding of state crime victim compensation programs which provide assistance to victims of terrorism, these types of programs provide very limited compensation (for example, limited medical expenses and lost wages). See infra note 23 and accompanying text.

n18 Michael Ratner & Beth Stephens, Tyrants, Terrorists and Torturers Brought to Justice; U.S. Courts Provide Compensation for Victims, N.Y. L.J., May 15, 1995, at S5 (quoting the Torture Victim Protection Act (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992)).

n19 The Warsaw Convention generally allows damages up to $ 75,000 against international airlines for accidental injuries. See Deborah Squiers, Court Dismisses Damages Suit in Airport Death, N.Y. L.J., Apr. 2, 1990, at 1.

n20 See Kimberly A. Trotter, Compensating Victims of Terrorism: The Current Framework in the United States, 22 Tex. Int'l L.J. 383, 392 (1987).

n21 See id. at 393.

n22 Id. at 401. Of course, this statement assumes that victims are unable to satisfy losses completely via **insurance** recoveries.

n23 While it may be possible for victims to obtain partial recovery under more traditional state-sponsored crime victim compensation funds, if available, these generally provide a

significantly lower recovery than a civil suit, so there is still an incentive to sue. See Rex A. Sharp, Paying for the Crimes of Others? Landowner Liability for Crimes on the Premises, 29 S. Tex. L. Rev. 11, 16 n.11 (1987).

n24 If the victim is an invitee of a commercial tenant, it might be possible for the victim to include the commercial tenant as a responsible party, since if the lessee has exclusive control and possession it may be considered to have the same protective duties as a landlord. See, e.g., Daniels v. Shell Oil Co., 485 S.W.2d 948, 951 (Tex. Civ. App. 1972). For purposes of this Note, references to landlords or landowners are presumed to include tenants where tenants retain exclusive control and possession of the leased premises. Further, employees of tenants or landlords may likely be precluded from bringing suit against one or the other since their injuries may be exclusively addressed by workers' compensation. See, e.g., Daniel Wise, Law Firms Based in World Trade Center Regroup: Lawyers See Potential for Dozens of Liability Claims, N.Y. L.J., Mar. 2 1993, at 1 (noting that Port Authority employees are precluded from recovery outside of worker's compensation in the World Trade Center bombing); see also infra note 127 (discussing invitees and employees of tenants). Recently, victims (including the owner of the World Trade Center) have also attempted to hold chemical manufacturers responsible--alleging that they could have made the ammonium nitrate, an ingredient in the bombs used in Oklahoma City and at the World Trade Center, less explosive. See Hassan Fattah, Federal Court Dismisses Case Against ICC, Chemical Week, July 17, 1996, at 12.

n25 See Alexander Stille, The PLO: A Suit Provides an Inside Look, 10 Nat'l L.J. 1 (1987). The 1985 murder of Leon Klinghoffer (an elderly man in a wheelchair who was ostensibly singled out because of his Jewish name and United States passport by Palestinians who hijacked the cruise ship, Achille Lauro) came to symbolize terrorism in the late 1980's much as the World Trade Center, Oklahoma City, and Centennial Park bombings do in the mid-1990's. Recently, the PLO has tentatively agreed to underwrite a peace institute in order to settle the lawsuit. If the agreement is finalized, the Klinghoffers will drop all legal claims against the PLO. See Beth J. Harpaz, Klinghoffers, PLO Plan Peace Institute In Terror Victim's Memory, AP, Jan. 18, 1996, available in LEXIS, Nexis Library, AP File.

n26 For example, what is certain to be the first of many lawsuits involving the Centennial Park bombing was filed less than a week after the explosion. The suit, filed by a woman injured in the blast, asks for $ 500,000 in damages and alleges that security guards did not evacuate people quickly enough. See FBI Continues Investigation of Olympic Blast (CNN news broadcast, Aug. 3, 1996).

n27 See Sharp, supra note 23, at 54-55. Further, the landlord could be held liable via vicarious liability. See id. at 55; see also Sharp v. W.H. Moore, Inc., 796 P.2d 506 (Idaho 1990) (noting that security service's liability could be imputed to landlord as a result of agency relationship).

n28 And, where applicable, the landowner's insurer.

n29 See B.A. Glesner, Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises, 42 Case W. Res. L. Rev. 679, 790 (1992).

n30 See id. at 688. "Courts within a single jurisdiction may differ as to the appropriate basis for liability; even appellate courts have misinterpreted or ignored their own state supreme court's analysis of the issue." Id. at 688. One South Carolina District Court has noted, "the wide range of approaches taken by courts in other jurisdictions establishes only that support can be found for practically any position." Id. (quoting Cooke v. Allstate Management Corp., 741 F. Supp. 1205, 1209 n.1 (D.S.C. 1990)).

n31 See Robert S. Schoshinski, American Law of Landlord and Tenant section 4.14 (1980).

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n32 While some have held that landlord tort liability has therefore undergone a "drastic metamorphosis," see Glesner, supra note 29, at 684, or "revolution," others claim that this aspect of landlord-tenant law merely reflects an "integration . . . into the mainstream of contract and tort law." Charles J. Goetz, Wherefore the Landlord-Tenant Law "Revolution?"--Some Comments, 69 Cornell L. Rev. 592, 602 (1984). Under the latter theory, these other branches of law began incorporating "such notions as optimal risk-bearing, transaction costs, and externalities" that put pressure on "antiquated landlord-tenant doctrines." Id. at 599-600. This theory seems more plausible in that the landlord's duty to protect tenants originated in the residential context, arguably in response to the changed relationship (now considered contractual) of modern landlord and tenant. See, e.g., Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir. 1970) ("In our judgment the trend toward treating leases as contracts is wise and well-considered. . . . Leases of urban dwelling unites should be interpreted and construed like any other contract."). Given that this area of the law is responsive to changes in contract and tort doctrines, any reform in those areas will in turn influence the courts' adoption of landlord liability for acts of terrorism.

n33 439 F.2d 477 (D.C. Cir. 1970).

n34 See Miriam J. Haines, Landlords or Tenants: Who Bears the Costs of Crime? 2 Cardozo L. Rev. 299, 317-18 (1981).

n35 See Joan L. Neisser, The Tenant as Consumer: Applying Strict Liability Principles to Landlords, 64 St. John's L. Rev. 527, 532 (1990).

n36 Kline, 439 F.2d at 481.

n37 For example, the court's first basis for liability, maintaining common areas in a reasonably safe condition, perhaps reflects an economic efficiency argument; namely, since the landlord has exclusive control, it is cost-effective for him, rather than tenants, to take preventive action. Tenants' responses would necessarily be duplicative or involve collective action with high transaction costs; tenants lack security expertise, and the landlord is in the best position to ensure against risk via **insurance.** See Peter S. Selvin, Landlord Tort Liability for Criminal Attacks on Tenants: Developments Since Kline, 9 Real Est. L.J. 311, 315 (1981). On the other hand, in recognizing that there are limits to liability, or that the landlord is not an "insurer," the court may be acknowledging that public policy or fairness dictates that a landlord should not be liable when he is not at fault. See Sharp, supra note 23, at 16.

n38 See Schoshinski, supra note 31, section 4.15, at 219.

n39 In this regard, Kline may be limited to its facts, in that the tenant specifically advised the landlord about other prior criminal acts on the premises, see Kline, 439 F.2d at 479 n.3, and the landlord had actually decreased security measures since the inception of the tenant's lease. See Schoshinski, supra note 31, section 4.15, at 218-19.

n40 See supra note 30 and accompanying text.

n41 See infra notes 115-27 and accompanying text.

n42 Haines, supra note 34, at 343 n.144. See also Marvin F. Milich, Protecting Commercial Landlords From Liability for Criminal Acts of Third Parties, 15 Real Est. L.J. 236, 241 (1987) (citing cases involving commercial landlords where theories of recovery paralleled those in cases involving residential landlords). Further, it is generally acknowledged that residential landlord/tenant law was the "impetus for the modern trend imposing a duty upon commercial landowners." Donna Lee Welch, Case Comment: Ann M. v. Pacific Plaza Shopping Center: The California Supreme Court Retreats from its "Totality of the Circumstances" Approach to Premises Liability, 28 Ga. L. Rev. 1053, 1064 n.64 (1994).

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n43 With this said, the first theory listed above, strict liability, sparingly adopted in residential suits, does not seem to have ever been successfully applied in the commercial context. See, e.g., Sharp, supra note 23, at 73-76 (citing Davis v. Allied Supermarkets, Inc., 547 P.2d 963, 965 (Okla. 1976), which held that in spite of the risk spreading policy behind strict liability, "it does not seem that shifting the financial loss caused by crime from one innocent victim to another innocent victim is proper"); Jeffrey Fowler, Rowe v. State Bank of Lombard: The Key to Unlocking a Landlord's Duty to Provide Security, 23 J. Marshall L. Rev. 131 (1989) (discussing Rowe v. Lombard State Bank, 531 N.E.2d 1358 (Ill. 1988) which rejected strict liability but held the commercial landlord liable on other grounds). Further, even those who would argue for increased application of strict liability for landlords in the residential setting seem to agree that its application to the commercial setting is not appropriate. See Frank F. Gibson & Elliot Klayman, Landlord Liability: A New Dimension, 25 Am. Bus. L.J. 1, 27-28 (1987) (holding that the policy considerations favoring strict liability in the defective products context apply in the residential but not commercial leasehold context). Therefore, this theory is not discussed here.

n44 See Kline, 439 F.2d at 481.

n45 See Glesner, supra note 29, at 690.

n46 See id. at 691.

n47 See id. at 690.

n48 Kline, 439 F.2d at 484.

n49 See Bob Gibbins & Yii-Chwen (Francis) Pan, Landlords and Third-Party Criminal Conduct, Trial, Mar. 1986, at 48. Many courts that have adopted this rule cite the Restatement of Torts in support, which states that:

one who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts section 323 (1977). This is effectively an exception to the "no duty to rescue" rule, which holds that "the fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." section 314.

n50 See John M. Adler, Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others, 1991 Wis. L. Rev. 867, 884.

n51 See Glesner, supra note 29, at 696. A landlord's failure to provide adequate security could also result in a breach of contract claim. See id. at 698 n.88.

n52 See David C. Markatos, Property Law: The Growing Accountability of Landlords for Third-Party Criminal Attacks, 1991 Ann. Surv. Am. L. 501, 508. Cases brought under this theory are often fact-intensive and result in unpredictable jurisprudence. See id.

n53 See id. at 510.

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n54 See Glesner, supra note 29, at 696. See also Jardel Co., Inc. v. Hughes, 523 A.2d 518 (Del. 1987) (finding that since mall owner had voluntarily undertaken to provide a security program, sufficiency of that program constituted jury question).

n55 In the residential context, a "handful" of courts have held that the implied warranty of habitability should include a duty to provide security. See Markatos, supra note 52, at 521-22. In the commercial context, a duty to provide security "would have to be confined as an independent material provision of the lease." Haines, supra note 34, at 326 n.91. While some commentators have argued for the extension of residential habitability warranties to certain commercial settings, see Robert A. Levinson & Michael N. Silver, Do Commercial Property Tenants Possess Warranties of Habitability? 14 Real Est. L.J. 59 (1985), in practice such application has been restricted. When used in the commercial context, this theory has generally involved conditions existing at the inception of the lease. See Gibbons & Pan, supra note 49, at 48.

n56 See Sharp, supra note 23, at 30. This claim may also give rise to a tort claim of misrepresentation or fraud. See e.g., O'Hara v. Western Seven Trees Corp. Intercoast Management, 142 Cal. Rptr. 487, 491 (Cal. Ct. App. 1977) (holding that cause of action exists if tenant justifiably relies on landlord's misrepresentations concerning safety). But see Cooke v. Allstate Management Corp., 741 F. Supp. 1205, 1216 (D.S.C. 1990) (stating that landlord's opinion that apartment was "safe" was inadequate to support claim for misrepresentation).

n57 Pacelle, supra note 3, at B10.

n58 See id.; see also infra notes 190-99 and accompanying text (discussing the issue of whether discovery of previous security studies should be allowed).

n59 See Pacelle, supra note 3, at B10; Douglas Feiden, D. Witter Fights WTC Lease, Says It Was Duped by PA, Daily News (New York), July 25, 1996, at 36. Some have suggested that Dean Witter's suit is largely motivated by business reasons rather than security concerns. While the firm locked in to a long-term lease at $ 35 per square foot, rents in the building have generally decreased to the point that some tenants now pay less than $ 25 per square foot. See id.

n60 See Glesner, supra note 29, at 698 n.88. Further, when contract claims are brought, they often appear as alternatives to claims based on tort theories and are therefore cursorily pleaded and prone to dismissal by courts. See Markatos, supra note 52, at 516.

n61 See Markatos, supra note 52, at 516.

n62 See Richmond Medical Supply Co. v. Clifton, 369 S.E.2d 407 (Va. 1988).

n63 See Markatos, supra note 52, at 516.

n64 See infra notes 228-36 and accompanying text.

n65 See Glesner, supra note 29, at 688.

n66 See W. Page Keeton et al., Prosser and Keeton on the Law of Torts section 30, at 164-65 (5th ed. 1984).

n67 With this said, the last basis for negligence claims, statutory violations, appears primarily in the residential context. Statutory requirements for the provision of different security measures do appear to be a growing trend, however, and may be applied with more frequency in the commercial context in the future. A landlord's compliance with statutory

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requirements usually does not protect him from liability, however, since they generally represent only minimum measures. See Glesner, supra note 29, at 702. For these reasons, and since no statutes currently address required antiterrorism measures, this basis for liability is not addressed extensively here, although it is suggested infra at notes 24446 and accompanying text.

n68 Of these questions, the issue of when an act is foreseeable (thereby establishing duty) is the most troublesome and is discussed in detail in the text. The issue of proximate cause, or more specifically, determining when a criminal act intervenes between the negligence of the landlord and injury to the tenant, is also dependent on foreseeability since if the defendant should have foreseen the criminal's actions, such actions will not be considered superseding causes. See Restatement (Second) Torts sections 448-49 (1977). Technically, the plaintiff must also prove the threshold issue that the landlord's act or omission was the legal cause of his injury as well. However, courts have apparently not discussed this concept in detail. One author contends that while it is not clear that the causal link between provisions of security and likelihood of crime is legally sufficient, "situational crime prevention" studies do find that there is some relationship between opportunity and crime. Madeline Johnson, Landlord's Responsibility for Crime: Determining Legal Causation, 17 Real Est. L.J. 234, 241 (1989). Similar arguments may arise with regard to the relationship between "opportunity" and the incidence of terrorism, although terrorists' motivations differ from those of "ordinary" criminals. See infra notes 140, 145 and accompanying text.

While it has apparently not been a recurring issue in the regular crime cases, if landlords are held liable for the effects of terrorist acts, they may attempt to argue that the behavior of controversial tenants (e.g., performing abortions) itself constitutes a superseding cause that precludes their being held liable. See infra notes 211-24 (discussing the effects of landlord liability on controversial tenants).

The reasonableness of a landlord's response also involves issues of foreseeability since landlords effectively need to predict what types of security will prove adequate to prevent attempted crimes. However, courts have not been consistent in finding what measures constitute adequate security. They have addressed the sufficiency of any number of security measures, from security guards to alarms to lighting, in different ways. See Jardel Co. v. Hughes, 523 A.2d 518, 525 (Del. 1987) (holding that whether one security guard on premises for each nightly shift was sufficient was question for jury); Peacock's, Inc. v. Shreveport Alarm Co., 510 So. 2d 387, 400 (La. Ct. App. 1987) (finding landlord partially liable for negligently allowing access to alarm controls); Shepard v. Drucker & Falk, 306 S.E.2d 199, 202 (N.C. Ct. App. 1983) (allowing landlord to present testimony comparing lighting at apartment complex with other complexes, since it was proper attempt to show whether reasonable care had been exercised). But see Carrigan v. New World Enterprises, Ltd., 446 N.E.2d 265, 270 (Ill. App. Ct. 1983) (holding landlord's breach of contractual obligation to maintain burglar alarm was not sufficient to trigger liability for tenant's rape). In one case, the court denied recovery where "the plaintiff failed to adduce testimony from a qualified expert in the field of building security thereby leaving the jury" to speculate regarding the deficiencies in security, if any, at the time of the incident. Iannelli v. Powers, 498 N.Y.S.2d 377, 382 (N.Y. App. Div. 1986). Certainly, questions of when more sophisticated antiterrorism security measures are reasonable will be even more difficult for courts to handle. For example, when are crash barriers and photo I.D. access reasonable? This issue seems destined to foster a battle of experts at trial. See supra note 7 and accompanying text; infra notes 142-63.

n69 See, e.g., Glesner, supra note 29, at 707.

n70 See id. at 704.

n71 224 N.W.2d 843 (Mich. 1975).

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n72 Id. at 849 (citation omitted).

n73 See Glesner, supra note 29, at 703. Unlike under the special relationship formulation, there is no presumption that landlord's have a duty to protect tenants. Id.

n74 531 N.E.2d 1358 (Ill. 1988).

n75 Id. at 1367-68. Some commentators have noted that this dual role of foreseeability is problematic. While foreseeability is usually understood to define and limit the scope of a pre-existing duty, it is not generally used to "justify the imposition of duty." Haines, supra note 34, at 339; see also Sharp, supra note 23, at 21.

n76 Kline v. 1500 Massachusetts Avenue Apartment Corp., 439 F.2d 477, 480 n.3, 483 (D.C. Cir 1970).

n77 Samson v. Saginaw Professional Building, Inc., 224 N.W.2d 843, 851 (Mich. 1975).

n78 See Old v. Lefmark Management Co., 1995 WL 500619, at *2 (Tex. Ct. App. Aug. 24, 1995). The letter also requested that "if the results of this survey indicate additional security is needed for the common areas, please take the appropriate action necessary to protect our employees and customers." Id. The actual notice standard is also apparently reflected in Rowe, where plaintiffs had to prove that the landlord actually knew that unauthorized possession of master keys would lead to illegal entry. See 531 N.E.2d at 1367-68,

n79 See Fowler, supra note 43, at 145. In some cases, it is clear that courts have also used the defendants' security precautions as evidence of their "constructive notice" of risks. See Hardie, supra note 16, at 400.

n80 See infra notes 190-99 and accompanying text (discussing the existence of a security report warning of susceptibility to terrorist attacks).

n81 See Fowler, supra note 43, at 145.

n82 See Welch, supra note 42, at 1060.

n83 See id.

n84 See Markatos, supra note 52, at 513 (quoting the court in Isaacs v. Huntington Memorial Hosp., 695 P.2d 653 (Cal. 1985) (criticized by Ann. M. v. Pacific Plaza Shopping Center, 863 P.2d 207 (Cal. 1993))). This prompted one Florida court in rejecting this definition to declare that it would not "sacrifice the first victim's right to safety upon the altar of foreseeability by slavishly adhering to the . . . notion that at least one criminal assault must have occurred on the premises before the landlord can be held liable." Paterson v. Deeb, 472 So. 2d 1210, 1219 (Fla. Dist. Ct. App. 1985) (rejecting the prior similar incidents rule).

n85 See Markatos, supra note 52, at 513. In jurisdictions following this rule, there is a general sense that in order to qualify as "prior similar incidents," crimes must be on the premises, be sufficient in number and recent enough to put the landlord on notice, and be sufficiently similar in nature to the incident in question. See Glesner, supra note 29, at 706.

n86 695 P.2d 653 (Cal. 1985). See Welch, supra note 42, at 1061.

n87 863 P.2d 207 (Cal. 1993).

n88 See id. The court went on to note, however, that the foreseeability of the harm should still be balanced against the burden of the duty imposed--reserving the questions of whether

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I. Analysis of Potential Claims

A. Victim Compensation for Terrorist Attacks in the United States--Statutory Claims

While there are some statutory provisions addressing victim compensation for acts of terrorism, they have traditionally been inadequate for a number of reasons. For example, the only appropriation aimed at providing direct assistance to victims of the Oklahoma City bombing seems to be the $ 39 million Community Development Block Grant. [17] Other statutory provisions, which theoretically apply to victims of terrorism or other international incidents, apply only in narrow sets of circumstances. For example, the Torture Victim Protection Act provides that a "private cause of action in federal court against individuals who commit such abuses while acting under 'actual or apparent authority, or color of law, of **[*161]** any foreign nation,'" may be brought by or on behalf of a United States citizen who was a victim of torture or summary execution. [18] The Warsaw Convention [19] addresses incidents on international airlines, and the Victims of Terrorism Compensation Act provides relief only to victims associated with the United States government. [20] Moreover, even those victims who do fall under one of these "patchwork" statutory provisions are generally not fully compensated. [21] Thus, "it is inevitable . . . that there will be individuals, including United States citizens, who will be victimized by terrorism and forced to suffer injury without remedy." [22] If statutory recoveries are insufficient, victims are likely to turn to the courts, bringing civil suits against one of the parties involved to obtain compensation for their injuries. [23]

B. Civil Litigation--Background

In the types of terrorist acts contemplated here, parties that could be potentially held responsible by victims include the terrorist organization, security firms, and landowners. [24] Bringing suit **[*162]** against the responsible terrorist organization itself is not unheard of. For example, the son and daughter of Leon Klinghoffer sued the Palestinian Liberation Organization ("PLO") after their father was murdered during the Achille Lauro incident. [25] However, as in ordinary criminal cases, plaintiffs are not likely to target those parties where recovery is difficult due to insufficient or hard-toreach assets. Security firms or landlords would seem to provide an easier recovery. Indeed, if it can be proved that a security firm was negligent in its provision of services, it should be susceptible to liability itself. [26] However, a landlord would likely not escape liability even in that case, because if a landlord has an affirmative duty to protect the plaintiff, then the landlord remains liable for negligence in selecting, directing, or supervising the security agency. [27] The likely target for injured plaintiffs will be the solvent party with the most broadly defined responsibility for protection--the landowner. [28]

C. Landowner Liability for Criminal Acts of Third Parties

This landowner-as-target hypothesis is borne out by the many suits filed as a result of criminal acts of third parties. A victim of a terrorist (or criminal) act could file a complaint against an allegedly negligent landlord for failing to secure the premises under a number of different theories, with differing likelihoods of success. While landlords now have some duty to protect their tenants from third-party crime in practically every jurisdiction, [29] the extent of **[*163]** such duty varies greatly depending upon the jurisdiction, and sometimes even the court. [30]

1. Background

For a full understanding of the problems involved in predicting the success of these claims, some background is necessary. The unsettled state of the law in this area is due to several factors. Traditionally, landlords did not have any special duty regarding the security of their tenants, a corollary of the rule that private parties generally have no duty to rescue others. [31] Only within the last twenty-five years have landlords been held liable to their tenants for

a commercial leasehold that is "inherently dangerous" or in the immediate proximity to a substantially similar business that has experienced prior crimes could trigger a duty without itself being the site of any prior similar incidents. See id. at 215-16; Welch, supra note 42, at 1065-66.

n89 As one commentator noted, "The Ann M. Court reasoned that landowners would unjustly become the insurers of public safety if plaintiffs could prove the degree of foreseeability required to impose liability without offering evidence of prior similar crimes." Mark Bianchi, Tort-Law--Revisiting Isaacs: A Commercial Landowner's Duty to Protect Against Criminal Acts of Third Parties--Ann M. v. Pacific Plaza Shopping Center, 28 Suffolk U. L. Rev. 306, 311 (1994). "The court decided to revisit Issacs in light of the increase in violent crime and pressure from the court of appeals." Id. at 311 n.29 (citations omitted).

n90 See Glesner, supra note 29, at 679-82 (noting a correlation between increasing crime rates and landlord liability in general); Milich, supra note 42, at 236 (noting that "not to be overlooked as influencing modern-day judges is the rising crime rate."); Welch, supra note 42, at 1057 (noting that "crime problems of epidemic proportions caused courts to recognize . . . exceptions to their judicially created no-duty rules.").

n91 See infra Part III discussing alternatives.

n92 See Markatos, supra note 52, at 514. Obviously, prior similar crimes on the premises remain highly probative under this theory, which effectively holds only that an absence of prior similar crimes does not foreclose liability. See, e.g., Whittaker v. Saraceno, 635 N.E.2d 1185, 1188 (Mass. 1994) ("The previous occurrence of similar criminal acts on or near a defendant's premises is a circumstance to consider, but the foreseeability question is not conclusively answered in favor of a defendant landlord if there has been no prior similar criminal act.").

n93 See, e.g., Kaufman, supra note 15, at 97 ("To date, only California has adhered to this rule in the business-invitee context.").

n94 See Markatos, supra note 52, at 514.

n95 See Green Cos. v. DiVencenzo, 432 So. 2d 86 (Fla Dist. Ct. App. 1983).

n96 Daniel P. Kennedy, Inadequate Security and Premises Liability, Trial, June, 1991, at 56.

n97 If a landlord is aware of such reports, at some level of specificity to her premises she may be considered to have notice under even the most restrictive definition of foreseeability. See supra notes 76-81 and accompanying text (discussing the role of notice in varying definitions of foreseeability).

n98 See Kaufman, supra note 15, at 97.

n99 See id. at 98.

n100 See Sharp, supra note 23, at 32-34.

n101 See infra notes 164-69 and accompanying text (discussing the use of warnings against terrorist attacks).

n102 See infra notes 211-24 and accompanying text (discussing the negative implications to these types of tenants of imposing this duty on landlords).

n103 Hardie, supra note 16, at 367.

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n104 In fact, foreseeability has been held to just be a tool of the courts; changing as needed to mask public policy decisions about how broad a landowner's duty should be. See Hardie, supra note 16, at 393; Welch, supra note 42, at 1057 n.25.

n105 For example, one commentator feels that:

Courts are uncomfortable with jury determinations of foreseeability as an element of duty in causes of action that have not yet matured and that have not yet been established as common theories with which the court is familiar. Until this maturation occurs, courts simply will continue to decide cases on the basis of policy considerations.

Hardie, supra note 16, at 392. Of course, this does not bode well for the development of a clear definition of foreseeability in landowner liability for acts of terrorism.

n106 See Johnson, supra note 68, at 247. This is basically a permutation of the famous "Hand formula." See United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). One commentator has noted, however, that in an evaluation of this "formula" for criminal acts, the third factor, probability, has been underplayed since it is the most difficult to evaluate. See Johnson, supra note 68, at 248. Johnson further notes that empirical studies suggest a causal link between physical conditions controlled by the landlord and crime, but that there is no way to determine the exact probability of a given crime given a certain condition. See id.; supra note 68.

n107 Further, in evaluating available alternatives, the landowner is generally found culpable if a reasonable person would have chosen an option that would have avoided the injury. See Johnson, supra note 68, at 248. However, reasonable landlords have much less information about what measures will prevent the commission of terrorism than they do about regular crime.

n108 See Hardie, supra note 16, at 390.

n109 See Kaufman, supra note 15, at 100.

n110 As one commentator has noted:

Courts and commentators have long recognized that any case which goes to a jury under general instructions on the foreseeability of a heinous crime almost invariably results in a verdict for the plaintiff. With hindsight, juries inevitably find that more security should have been employed since the security provided was in fact inadequate. It is precisely for this reason that most cases surviving a motion for summary judgment result in large settlements for the plaintiffs.

Id.

n111 In other words, spend more on protection than the theoretically efficient legal standard would require in order to take into account the court's "margin of error" in determining fault. See Kaufman, supra note 15, at 105.

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n112 See id.

n113 See Sharp, supra note 23, at 19.

n114 There is no reason for plaintiffs not to forego suit because their legal fees are a percentage of recovery; there is little incentive for defendants to proceed to trial because they do have real legal costs and the probability of success and range of potential verdicts will be hard to quantify. See Hardie, supra note 16, at 405. This arguably puts defendants in the position of settling on amounts in excess of optimum.

n115 See supra note 42.

n116 See Royal Neckwear Co. v. Century City, Inc., 252 Cal. Rptr. 810 (Cal. Ct. App. 1988) (holding that a commercial landlord does not owe a duty to safeguard tenant's property from foreseeable criminal activity by third parties); Craig v. AAR Realty, 576 A.2d 688 (Del. Super. Ct. 1989) (denying liability of owner of large mall who did not retain control); Czech v. Aspen Indus. Ctr., 368 A.2d 938 (N.J. Super. 1976) (rejecting liability for landlord, the court distinguished commercial from residential tenancies in terms of fairness and public interest); Exxon v. Tidwell, 867 S.W.2d 19, 21 (Tex. 1993) (stating that the general rule in a commercial setting "is that a landlord is not liable to a lessee for injuries caused by an unsafe condition, which can include the unreasonable risk of harm from criminal intrusions, unless the landlord was aware of the latent dangerous condition at the time the premises were let."); Glesner, supra note 29, at 684 n.16 (noting that "many courts apply a lower standard of security for commercial buildings").

n117 See Glesner, supra note 29, at 684 n.16.

n118 See, e.g., Gibson & Klayman, supra note 43, at 27-28 (noting that "in most instances [commercial tenants] bargaining power is comparable--or perhaps superior--to that of the landlord. They can protect themselves by demanding express warranties that improve safety").

n119 See Selvin, supra note 37, at 328 n.61 (quoting Dietz v. Miles Holding Corp., 277 A.2d 108, 110 n.2 (D.C. App. 1971) which stated that "the residential housing market offers markedly less alternatives to tenants than does the commercial office building market").

n120 See id. at 323. For example, most commercial buildings by definition must be open to the public during the business day. In one case involving a government building, the court held that it was that nature of a such a building that it "remain accessible and open to the steady flow of dissimilar citizens" and that this was a reality that the court should realize in imposing liability. Id. at 327 (quoting Turner v. United States, 473 F. Supp. 317 (D.D.C. 1979)).

n121 See id. at 325.

n122 An apartment building, for example, is fairly self-contained. A commercial premises, like the World Trade Center, can extend over a city block (parking garages, walkways, plazas, etc.). Theoretically, the landlord's protective liability should diminish as does his control--varying with proximity, although it is not clear where it should end. See Selvin, supra note 37, at 330; Sharp, supra note 23, at 14 n.3.

n123 See Selvin, supra note 37, at 328.

n124 See id. at 324.

n125 See Gibson & Klayman, supra note 43, at 27. This consideration may not translate well to the terrorism context because of the often sophisticated and extensive security and

structural measures required. For example, in the World Trade Center case, Dean Witter, certainly a sophisticated tenant, claims to have relied on the Port Authority's representations. See supra notes 57-59 and accompanying text.

n126 This rationale does not necessarily imply the same result if only one tenant occupies the leasehold, since then the tenant would be best able to provide protection. See Comment, Torts--Landlord-Tenant Relations--Landlord has Duty to Take Reasonable Precautions to Protect his Tenants Against Criminal Acts of Third Parties--Kline v. 1500 Massachusetts Ave. Apartment Corp., 45 N.Y.U. L. Rev. 943, 951 n.53 (1970) [hereinafter Landlord-Tenant Relations].

n127 A final difference between commercial and residential tenancies is that a business expects customers and has employees. It has been assumed here that invitees, employees of tenants, and tenants are treated in the same manner (i.e., entitled to the same protection). Indeed this seems to be the case in most jurisdictions. See Doyle v. Exxon, 592 F.2d 44 (2d Cir. 1979) (finding duty to protect employee of tenant); Ann M. v. Pacific Plaza Shopping Ctr., 863 P.2d 207, 212-13 (Cal. 1993) (stating that because the commercial tenant generally is not a natural person and because it acts through its employees, "it cannot be seriously asserted that a tort duty that a landlord owes to protect the personal safety of its tenants should not extend to its tenant's employees"); Haines, supra note 34, Landlord-Tenant Relations, supra note 126, at 950; Selvin, supra note 37, at 325. But see Cornpropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975) (denying plaintiff-shopper's complaint stressing both the absence of landlord-tenant relationship and that the case involved commercial vs. residential property).

Under this assumption, standards of liability would theoretically not be affected by the difference. A complete discussion of this issue is beyond the scope of this Note, therefore it is assumed for present purposes that invitees and employees of tenants are treated in the same manner as tenants wherever possible. However, employees of tenants will often be precluded from filing suit due to worker's compensation statutes. See supra note 24.

n128 See supra note 30 and accompanying text.

n129 While this is the case with many types of claims, it is particularly disturbing in the context of terrorism where preventive measures seem most effective when conducted based on a consistent national, if not international, scale. See infra notes 158-63 and accompanying text.

n130 See Glesner, supra note 29, at 761; supra notes 111-12.

n131 See Glesner, supra note 29, at 773.

n132 See id. at 707; supra note 113 and accompanying text.

n133 One additional issue beyond the scope of this paper is the treatment of government entities in their roles as landlords. As evidenced by the Oklahoma City bombing, government buildings may often be the target of terrorist attacks. While there may be certain filing or notification requirements specific to government landlords, it appears that there are tenable arguments that there should be no difference between suing government and private landlords, since the former are acting in a proprietary capacity. See Wise, supra note 24, at 1. See generally, Attorney General's Advocacy Institute, U.S. Dept. of Justice, Federal Tort Claims Act Litigation Seminar (1990); Irvin M. Gottlieb & Paul H. Gantt, Uncle Sam as a Landlord under the Federal Tort Claims Act (1967).

n134 For example, in other areas of the law, the success of a claim often depends, at least in part, on who gets to define it; that is, whether an act results in the violation of a federal statute (as defined in federal court) or in a breach of contract (as defined in state court).

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n135 Cases brought as a result of terrorist bombings on airlines, such as the Pan Am incident over Lockerbie, involve very different legal theories than those at issue here since the standard for liability is outlined statutorily under the Warsaw Convention. See, e.g., In re Air Disaster at Lockerbie Scotland on December 21, 1988, 37 F.3d 804 (2d Cir. 1994). Other United States cases have involved acts that could be defined as terrorism, but do not raise the same issues as the types of acts involving domestic landowners as contemplated here. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (relatives of Israelis killed in a PLO attack brought suit under the Alien Tort Claims Act); New Market Investment Corp. v. Fireman's Fund Ins. Co., 774 F. Supp. 909 (E.D. Pa. 1991) (Chilean grapes laced with cyanide seized at customs). More random acts of retribution not involving political overtones (e.g., acts committed by disgruntled employees and sociopathic individuals) are also not addressed here. See, e.g., Douglas Waller & Tom Morganthau, Caught by Surprise, Newsweek, Mar. 8, 1993 at 28 (quoting Jerry Bremer, the State Department's top counterterrorism official in the 1980s who commented after the World Trade Center bombing, "We shouldn't automatically assume this is the beginning of a new world war. . . . It's entirely plausible that this is some disgruntled employee who's been fired."); cf. Vrndavan v. Malcolm, No. 64839, 1994 WL 86225 (Ohio Ct. App. March 17, 1994) (involving a lone gunman entering Cleveland public library at noon and randomly shooting three people). Finally, a number of domestic cases use the term "terrorism" or "terroristic" but really involve more ordinary, random criminal activity, such as "terroristic threatening," which is a misdemeanor in some states. See, e.g., Parker v. Norris, 859 F. Supp. 1203 (E.D. Ark. 1994).

n136 Porras, supra note 6, at 125. See also Captain Bruce T. Smith, Assertion of Adjudicatory Jurisdiction by United States Courts Over International Terrorism Cases, Army Law., Oct. 1991, at 15 (noting that each state has advanced a different definition of the term; in effect, "one man's terrorist is another man's freedom fighter"). The term terrorism has therefore been held to be "Humpty Dumpty," or anything we want it to be. See Porras, supra note 6, at 124; see also, R. Thackrah, Terrorism: A Definitional Problem, in Contemporary Research on Terrorism 24 (Paul Wilkenson & Alasdair M. Stewart eds., 1987). A federal statute currently defines terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents," usually intended to influence an audience. 22 U.S.C. section 2656f(d)(2) (1994) (prescribing annual country reports on terrorism by the Secretary of State). The United States Department of Defense calls it "the unlawful use or threatened use of force or violence against individuals or property, with the intention of coercing or intimidating governments or societies, often for political or ideological purposes." Smith, supra, at 15.

n137 See Porras, supra note 6, at 144.

n138 See Waller & Morganthau, supra note 135, at 28 (contending that the reason for the change are intelligence agencies' increased abilities to monitor terrorist activities).

n139 See infra notes 152-54 and accompanying text.

n140 See Ayaz R. Shaikh, A Theoretic Approach to Transnational Terrorism, 80 Geo. L.J. 2133, 2174 n.15 (1992).

n141 And further, they should affect who we want to have define (courts vs. legislatures) the behavior that constitutes terrorism. A case-by-case development of a definition in the courts would seem destined to perpetuate the unpredictability and inequity currently associated with foreseeability.

n142 See supra note 15 and accompanying text.

n143 Greenberger, supra note 8, at A1.

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n144 "If you want to counter terrorism, 80 percent is a matter of getting good intelligence. . . . You can fiddle around with the other 20 percent all you want, but in terms of prevention, intelligence is the key." Masland et al., supra note 7, at 56-57 (quoting L. Paul Bremer, who headed President Reagan's counterterrorism office).

n145 See Shaikh, supra note 140, at 2134.

n146 Mark A. Hofmann, Perils an Impossible Task, Bus. Ins., June 12, 1995, at 3.

n147 "The critical thing is to keep the weapons as far from the building as possible, by imposing some setbacks." Id. (quoting Eve Hinman, security analyst with Failure Analysis Associates). Examples of setbacks include pop-up bollards, such as pipes filled with concrete that can be recessed to street level and raised when needed to restrict vehicular traffic. See id.

n148 "In a bomb attack, generally speaking, the primary sources of both property damage and bodily injury is flying glass." Id. (quoting Ron Massa, president of Loron Corp., a high-tech security consultant, who also noted that a 1993 Irish Republican Army bombing in London showered the surrounding area with 700 tons of shattered glass). After the Oklahoma City bombing, more than 400 buildings in the area had glass broken and about 75% of the people injured were hurt by flying glass. See Hofmann, supra note 146, 148, at 3; see also Leslie Scism & Joe Davidson, **Insurance** Losses in Oklahoma Bombing Seen Topping Several Hundred Million, Wall St. J. May 4, 1995, at A4. Preventive measures include installing laminated glass, like that used in cars. Hofmann, supra note 146, at 3.

n149 Bombs, for example, produce enormous vertical thrust capable of "peeling roofs right off like a sardine can," requiring that they essentially be tied down. Hofmann, supra note 146, at 3. As opposed to retro-fitting buildings for restricting access, structural hardening is much more difficult, is costly, and is of questionable effectiveness. The Oklahoma City bombing made us all familiar with the structural concerns present in trying to protect against a bomb blast. See id.

n150 See id. For example, security bars on windows can hamper a tenant's escape from a burning building.

n151 "I think the answer has to be in the prevention area as opposed to protection." Id. (quoting Fred Deacon, highly respected risk engineering manager for Kemper **Insurance)**.

n152 Christopher Dickey, Car Bombs: A Potent Weapon of Fear, Newsweek, Mar. 8, 1993, at 29.

n153 See Waller & Morganthau, supra note 135, at 28.

n154 Dickey, supra note 152, at 29; see also Sunday Today, (NBC television broadcast, Jan. 7, 1996) (interviewing Brian Jenkins, a terrorism expert who noted a trend discernible in the 1990's toward the increasing incidence of large-scale indiscriminate violence exemplified by car bombs).

n155 See James Adams & Maurice Chittenden, 18-Minute Countdown To Carnage, Sunday Times (London), July 28, 1996, section 1, at 2.

n156 See id.

n157 Shaikh, supra note 140, at 2141-42. In 1990, for example, "hard" targets (military, government, and diplomatic) accounted for 25% of attacks, businesses and other targets accounted for 75%. See id. at 2142 n.42 (citing United States Department of State, Patterns

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of Global Terrorism: 1990 37 (1991).

n158 Howard M. Shapiro, The FBI in the 21st Century, Address at the Cornell Law School (Oct. 18, 1994), in 28 Cornell Int'l. L.J. 219, 223 (1995); see also James Q. Wilson, The Case for Greater Vigilance, Time, May 1, 1995, at 73 ("Terrorist groups . . . are best attacked by infiltration. This means either planting an undercover agent in their midst or recruiting one of their members as an informant. This is the job of the FBI.").

n159 See Shapiro, supra note 158, at 223.

n160 See id.

n161 See Wilson, supra note 158, at 73.

n162 Greenberger, supra note 8, at A1.

n163 See, e.g., Shaikh, supra note 140, at 2134.

n164 See James Rainey, Threats of Terrorism: When to Tell the Public, L.A. Times, July 4, 1995, at 1, available in 1995 WL 2062176.

n165 See id.

n166 See id.

n167 See supra notes 76-81 and accompanying text. For example, while the United States Department of Transportation is now required to assess the safety of foreign airports and issue warnings when they do not meet safety standards, airlines themselves decide what, if anything, to tell passengers about known threats. Many airline officials feel compelled to disclose threats because of litigation following the Pan Am Lockerbie incident, where juries awarded almost $ 40 million to plaintiffs for Pan Am's failure to take proper precautions. A terrorist bomb downed Pan Am Flight 103 over Lockerbie, Scotland in 1988. Travelers on the flight were not informed that terrorists had threatened several flights, like Flight 103, that had originated in Frankfurt, Germany.

n168 See Rainey, supra note 164, at 1.

n169 See id.

n170 See Pacelle, supra note 3, at B1. One New York **insurance** lawyer notes that "**insurance** companies do not pay any large losses without a fight. I call it **insurance** nullification by litigation." Id.

n171 Id. (quoting Phoenix Assurance lawyer Blair Fensterstock).

n172 See, e.g., Wise, supra note 2, at 1 (noting that one firm represents 20 **insurance** companies seeking to recover over $ 75 million in claims).

n173 For damage attributable to a terrorist attack, any number of policies might apply. Direct physical damage to insured property as a result of fire, smoke, or vibrations is generally covered by a property policy. Indirect losses resulting from a tenant's loss of use of their property may be covered by either a property or business interruption policy. General liability policies should cover tenants for damages they may incur because of damage to a third party (e.g., if a customer's business is interrupted because of the terrorist act). See Rhonda D. Orin, **Insurance** May Provide Glimmer of Light for Darkened World Trade Center Businesses, N.Y. L.J., Mar. 10, 1993, at 1.

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n174 Using the World Trade Center bombing as an example, indirect losses alone can often be significant. New York City officials have estimated that companies and government agencies could lose $ 692 million if the World Trade Center was closed for a week. See id.

n175 Id. at 7.

n176 Id. at 6.

n177 See id.

n178 See Orin, supra note 173, at 1. The court, in Pan American World Airways v. Aetna Casualty & Surety Co., 505 F.2d 989 (2d Cir. 1974), relied on the fact that Pan Am was covered by an "all risk" policy, where all risks not excluded are automatically included.

n179 See Orin, supra note 173, at 1 (citing Emons Indus. Inc. v. Liberty Mut. Fire Ins. Co., 545 F. Supp. 185, 189 (S.D.N.Y. 1982) ("New York law places the burden of proof upon the **insurance** company to show any exclusions.")).

n180 Hartford said that there should be no problem with coverage because under its policies the exclusion only applies if war has been declared. Aetna argued that it was too soon to say how the exclusion would be applied. See Wise, supra note 24, at 1. The spokesperson for Hartford said that standard clauses (in this case coverage exclusions for damage attributable to "insurrection and acts of war") are recommended to the industry by the **Insurance** Services Office, a trade organization, and that each company has its own interpretation of such language. Id.

n181 See William B. Bice, Comment, British Government Reinsurance and Acts of Terrorism: The Problems of Pool Re, 15 U. Pa. J. Int'l. Bus. L. 441, 448 n.39 (1994) (stating that the World Trade Center provides an ideal example of a no-exclusion policy). Should incidences of domestic terrorism continue, it may not be long until domestic insurers covering U.S. commercial risks attempt to use terrorism exclusions as well.

n182 See supra note 173 and accompanying text.

n183 See Today's News Update, N.Y. L.J., Aug. 2, 1994, at 1. The World Trade Center cases were consolidated on June 4, 1994 upon a motion of the Port Authority which argued that (1) the claims all involved Port Authority's liability; (2) the salient facts involved (place, date, time) were the same in every case; (3) the fact that there were some issues of law and fact that were not common should not defeat the motion to consolidate since there was at least one important issue of law/substantial fact in common; and (4) consolidation would avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent injustice resulting from divergent decisions based on the same facts. See Green & Tripathi, supra note 1, at 48-49.

n184 As Justice Sklar noted in the course of the first conference of the World Trade Center litigation, "We have to have coordination to avoid wasting your time and my time, . . . failure to organize . . . would be anti-ecological. . . ." Wise, supra note 2, at 1.

n185 Courts have avoided the use of class actions for "mass accidents," perhaps largely because of differences between plaintiffs' injuries or damages. See Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986) (allowing certification of a class action for asbestos claims).

n186 In the World Trade Center litigation, of the roughly 114 lawyers representing the 661 claimants, only four objected to the creation of the committee, and they will manage their cases separately. See Today's News Update, supra note 183, at 1. The lawyer leading the committee, Blair Fensterstock, represents Phoenix Assurance Co., one of the **insurance**

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companies attempting to subrogate claims related to the blast. See Wise, supra note 2, at 1, 5; see also supra note 9 (discussing the types of claims filed). In making recommendations for the committee, Fensterstock acknowledged that it is not always easy to please the variety of plaintiffs. For example, some lawyers with personal injury claims are concerned that their clients' interests might get lost if the committee is dominated by lawyers representing commercial clients. See Wise, supra note 2, at 5.

n187 See supra note 7.

n188 Fed. R. Evid. 407. New York state courts do not follow the Federal Rules of Evidence, but they do follow a common law rule which holds that evidence of subsequent remedial measures is not admissible at trial to prove the negligence or culpable conduct of a defendant. See Particia A. Brass, Federal Rule of Evidence 407: Should It Apply to Products Liability, 11 Touro L. Rev. 253, 280 (1994).

n189 Fed. R. Evid. 407.

n190 See Matter of World Trade Center Bombing Cases, N.Y. L.J., Apr. 14, 1995, at 26.

n191 Id. "The public interest privilege applies to 'confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or their sources should not be divulged.'" Id. (quoting Cirale v. 80 Pine St. Corp., 316 N.E.2d 301, 303 (N.Y. 1974)). While perhaps limited to quasi-governmental agencies like the Port Authority, many of the policy arguments presented by the public interest privilege issue are likely to be raised in admissibility questions generally. For example, in arguing against discovery of the documents on this basis, the Port Authority emphasized that in preparing the reports, employees consulted with the "FBI, CIA, the National Security Agency, the Department of Defense, Scotland Yard, and intelligence and counterintelligence agencies of Israel, France, Switzerland, and Italy," and claimed that revealing the contents of the report would discourage such cooperation in the future. Matter of World Trade Center Bombing Cases, supra note 190, at 26. Further, the Port Authority argued that the documents should not be revealed because they contained information which could adversely affect security if used by a "person intending to engage in activity injurious to persons and property at the World Trade Center. . . ." Id. Finally, the Port Authority argued that the plaintiffs would not be foreclosed from establishing that their injuries resulted from Port Authority's lack of due care since they could go to other sources (e.g., expert testimony) to establish negligence. See id. at 27.

The plaintiffs responded that the public interest privilege should be construed narrowly because: (1) the public interest privilege would not apply to a private landlord in this instance, a fortiori it should not be applied here; and (2) the Port Authority failed to show how revealing the security reports would inhibit communication. See id. at 26. They also alleged that the public interest would be better served if the documents were disclosed because the revelation of the Port Authority's vulnerabilities would force it to take remedial measures, and that even if privilege applies, all of the Port Authority's concerns could be met via use of a confidentiality order. See id. at 26-27.

The judge ordered an in camera review of the documentation in order to determine whether it should be privileged. See Matter of World Trade Center Bombing Cases, supra note 190, at 27. He is expected to decide which security reports the plaintiffs may receive in September, 1996. See Feiden, supra note 59, at 36.

n192 Pacelle, supra note 3, at B10.

n193 Id.

n194 See Wise, supra note 2, at 5. This may raise an interesting agency question: when

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could a landlord be considered to have constructive knowledge of the risks? However, this question is beyond the scope of this Note. In this case, since the reports were apparently prepared for the Port Authority's executive director, it seems clear that the Port Authority would be considered to have constructive knowledge.

n195 See Matter of the World Trade Center Cases, supra note 190, at 26. Also, as discussed above, Dean Witter alleges that the Port Authority misrepresented security in lease negotiations, so that evidence of the Port Authority's knowledge is necessary in proving its claims of fraud. See id.

n196 See id. at 27.

n197 Id.

n198 Id. The judge cited Nallan v. Helmsley-Spear, Inc., 407 N.E.2d 451, 458 n.8 (N.Y. 1980), for the proposition that the jury may take into account the cost of the safety measures in determining the reasonableness of the safety measures. See id.

n199 See id.

n200 See supra notes 142-63 and accompanying text.

n201 See Gary T. Schwartz, Reality in the **Economic** Analysis of Tort **Law:** Does Tort **Law** Really Deter?, 42 UCLA L. Rev. 377, 416 (1994).

n202 See id.

n203 See id. at 444.

n204 See Glesner, supra note 29, at 773.

n205 See id.; see also Kaufman, supra note 15, at 109 n.24 ("The police function is highly specialized, involving skills and training which the government alone can provide. There is no room for the private devices of frontier days."); infra notes 211-224 and accompanying text (discussing potential violations of tenants' rights that could result). But see Fred C. Zacharias, The Politics of Torts, 95 Yale L.J. 698, 709 n.70 (1986) (arguing that "there is little danger that imposing liability will cause [security officers] to become vigilantes or 'officious intermeddlers' into private affairs").

n206 See Glesner, supra note 29, at 785.

n207 See id. In the context of terrorism, private security firms have initiated specialization in "crises response" services to respond to "acts of violence . . . directed at a company, governmental agency or individuals. . . ." Wackenhut Corporation Crisis Response Services Brochure (on file with author).

n208 See Kaufman, supra note 15, at 112 n.106 (quoting President's Commission on Law Enforcement, Report: The Challenge of Crime in A Free Society 35, 289 (1967)); Zacharias, supra note 205, at 709 ("The government's general responsibility for law enforcement does not eliminate the business's separate duty to supplement public compensation and public protection.").

n209 See supra notes 49-54 and accompanying text.

n210 This passage is based loosely on the "two restaurants" example in Adler, supra note 50, at 884.

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criminal acts of third parties. [32] Another cause of the unsettled nature of this doctrine may be some of the competing policy considerations evident throughout its uneven evolution, appearing first in the seminal case, Kline v. 1500 Massachusetts Avenue Apartment Corp. [33]

The Kline court imposed a duty on residential landlords to take reasonable steps to protect tenants from foreseeable criminal acts. This case is generally said to mark the initial departure from the traditional view that landlords had no duty to protect tenants. The court achieved this by extending the traditional landlord duty to maintain common areas in a reasonably safe condition beyond prevention from physical defects to protection from criminal acts. [34] This was done by: (1) applying the warranty of habitability **[*164]** to defects in security, and (2) by recognizing a special relationship between landlord and tenant; [35] both of which are critical theories of recovery in many jurisdictions today. While Kline provided an important remedy to victims of crime, it was also the harbinger of some of the uncertainty that continues to mark this area of the law. In defining the standard of landlord liability, for example, the Kline court equivocally remarked that the "landlord is no insurer of his tenants' safety, but he certainly is no bystander." [36] This rather tentative assertion apparently reflects the tension the court recognized in trying to fashion an efficient yet equitable result. [37] Further, Kline gives little guidance about what security measures are required of landlords once duty is established. [38] Subsequent cases have read Kline both narrowly and broadly; depending on jurisdiction and setting. [39] Answers to the two questions raised in Kline, namely the appropriate standard for establishing duty given efficiency and equity concerns, and the definition of appropriate responses to any duty imposed, will no doubt continue to occupy courts when the crime in question is terrorism.

2. Current Theories of Recovery

Depending on the jurisdiction and court, [40] any number of theories of landowner liability may be available for victims of terrorism. Current theories may be aggregated into five principal groups: (1) strict liability; (2) duty to maintain safe common areas; (3) voluntary assumption of duty to protect; (4) contract; and (5) negligence. An examination of the differing theories available is important in order to determine which of them will prove most **[*165]** successful for victims of terrorism. Outcomes for victims of more typical crimes vary primarily because their theories of liability use different definitions of foreseeability and require different landlord behavior. Further, different theories emphasize certain underlying policy concerns, which could have implications for how complaints alleging landlord liability for terrorist acts will be received by courts. Finally, although landlord liability for criminal acts first arose in a residential context, this Note focuses on commercial landlord liability since terrorist acts are most likely to involve that type of leasehold. While the appropriateness of the application is examined at the conclusion of this section, [41] commentators feel that most jurisdictions have generally "made no explicit distinction between commercial and residential landlords" in holding landlords liable for the criminal acts of third parties. [42] Therefore, this discussion initially assumes a commercial setting. [43]

a. Safe Common Areas

The duty to maintain common areas in a safe condition is perhaps the most traditional of all the theories of recovery. As the court in Kline noted, this duty applies the same rationale as the longstanding duty of landlords to protect tenants from unsafe physical defects. [44] To sustain this claim, a tenant must show both that **[*166]** the landlord had control of the area and knowledge of the defective condition, and that the defects foreseeably enhanced the risk of criminal activity. [45] Accessibility defects (e.g. defective locks) seem to trigger liability most often under this theory. [46] Perhaps because of its traditional nature, this approach has gained wide acceptance, even in jurisdictions reluctant to recognize landlord liability. [47] This theory of liability may have important ramifications for holding landlords liable for acts of terrorism due to its focus on the landlord's exclusive control of common areas. For example, in Kline, the court noted that the landlord is in an even better position than the police to take preventive measures. "Municipal police cannot patrol the entryways and the hallways, the

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n211 Glesner, supra note 29, at 762.

n212 224 N.W.2d 843 (Mich. 1975); see also supra notes 70-72 and accompanying text (discussing the "special relationship" theory of liability).

n213 See Haines, supra note 34, at 344 (noting that "the majority opinion gives little guidance on this problem").

n214 See Samson, 224 N.W.2d at 849 (stating that "if the risk of death or serious bodily injury to a number of persons, the law requires that some care be exercised even though the probability is slight that the incident will occur").

n215 Haines, supra note 34, at 345.

n216 Collins v. AAA Homebuilders, 333 S.E.2d 792, 793 (W. Va. 1985).

n217 N.Y. Judge's Decision Turns Tenants Into Victims, Newsday, Nov. 1, 1995, at A28. (citing Long Island Gynecological Services, P.C. v. 1103 Stewart Ave. Associates Ltd. Partnership, No. 4890-95, 1995 WL 686571 (N.Y. Sup. Ct. Oct. 16, 1995), rev'd, 638 N.Y.S.2d 959 (N.Y. App. Div. 1996)). The Appellate Division has now enjoined the landlord from evicting the clinic pending the outcome of the appeal to the Court of Appeals. See Today's News Update, N.Y. L.J., Dec. 15, 1995, at 115.

n218 John T. McQuiston, Justice in Nassau Says Landlord May Evict Abortion Clinic, N.Y. Times, Oct. 31, 1995, at B1, B4. The landlord first told the clinic in January that they could no longer perform abortions, but then, after consulting with his attorney, revised the regulations to prohibit "tenants from 'engaging in any activity which, in and of itself, jeopardizes the safety or property of other tenants.'" Id.

n219 McQuiston, supra note 218, at B1; see also Peterson, Abortion Clinic Can Get Boot, Sez Judge, Daily News, Oct. 31, 1995, at 21 (noting that protesters also often aggressively confronted patients and staff, and sometimes other tenants of the building by mistake); New York: Judge Allows Abortion Clinic Eviction, in Abortion Report, Oct. 31, 1995, at 1 [hereinafter Abortion Report].

n220 See Peterson, supra note 219, at 21.

n221 Id.

n222 Abortion Report, supra note 219, at 1.

n223 McQuiston, supra note 218, at B1, B4.

n224 Id.

n225 See Sharp, supra note 23, at 51 (arguing that in the private context the "free market is better at allocating security resources").

n226 See Glesner, supra note 29, at 773; Haines, supra note 34, at 351 (both discussing this principle as applied to criminal acts). Also, short of leaving the real estate market, many landlords are likely to "overprotect" since it is difficult to set clear guidelines for liability given current negligence standards. This is an inefficient use of resources as the amount spent on protection (and passed on to consumers) will not reduce enough accidents to justify its costs. See supra notes 111-12 and accompanying text.

n227 Of course, landlords who have attempted to delegate security duties to an outside firm are attempting to shift risk as well, but will likely be less successful. See supra notes 26-

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27 and accompanying text.

n228 See Haines, supra note 34, at 346.

n229 See William K. Jones, Private Revision of Public Standards: Exculpatory Agreements in Leases, 63 N.Y.U. L. Rev. 717, 727-28 (1988).

n230 "Courts have distinguished between residential and commercial leases, ruling that exculpatory clauses in most residential leases will be voided as against public policy." Daniel G. Hise, Landlord and Tenant--Exculpatory Clause in Lease Void as Against Public Policy--Cappaert v. Junker, 413 So. 2d 378 (Miss. 1982), 3 Miss. C. L. Rev. 253, 258 (1983). But see College Mobile Home Park and Sales, Inc. v. Hoffman, 241 N.W.2d 174, 177 (Wis. 1976) (arguing that the categorical distinction between residential and commercial leases is "artificial and arbitrary" in this context).

n231 See Jones, supra 229, at 729 (discussing statutes in New York, Illinois, Massachusetts, Maryland, and Georgia).

n232 See Jones, supra note 229, at 730.

n233 See, e.g., Vermes v. American Dist. Telegraph Co., 251 N.W.2d 101 (Minn. 1977) (holding that failure to advise tenant of qualities of jewelry store that might be undesirable was "active" negligence that could not be relieved by broad exculpatory clause in lease).

n234 See Hise, supra note 230, at 256; Jones, supra note 229, at 728-32.

n235 See Jones, supra note 229, at 731.

n236 See id.; see also Haines, supra note 34, at 347-48 n.159; Hise, supra note 230, at 258.

n237 For example, the following analysis as to criminal acts was presented in Craig v. A.A.R. Realty Corp., 576 A.2d 688 (Del. Super. Ct. 1989):

Of all the involved parties, the cost of crime reduction is cheapest to the landowner. For the criminal, imposing civil liability on him in addition to existing criminal sanctions does not deter him from committing the crime. Imposing duty on the patron, so that he must protect and compensate himself, may result in crime reduction, but only at the expensive cost of the patron staying home. . . . While the patron holds just one expensive [to society] option, staying home, the landowner holds many options . . . [such as] installation of better lighting, fences, or guard service. . . .

Id. at 693. Concerning terrorism, the issuance of warnings may be an example of where costs are clearly lowest to the landowner.

n238 See Johnson, supra note 68, at 250. And in some cases, of course, it may be clear that the landlord acted irresponsibly. For example, it may be possible to set the negligence standard high enough (e.g., actual notice for duty) that a true fault-based liability standard is approximated.

n239 Under a "political effects model," a new rule imposes liability on a well-represented group, which is expected to activate legislative attention to the problem, so that in the long run, the legislature will provide a solution and make the determination of who should bear

accident costs and how. See Zacharias, supra note 205, at 725. While Zacharias argues that his model would work in the context of landlord liability for criminal acts, he might reject the imposition of liability on landlords for acts of terrorism for the same reasons he rejects liability for hijacking airlines. See id. at 750.

n240 See generally Kaufman, supra note 15, at 103-08.

n241 "To effectively guide primary behavior . . . legal rules must inform people of liabilities that will be imposed for particular behavior. To do that they must be clear, they must refer to verifiable facts and they must not call for unachievable behavior." Adler, supra note 50, at 920.

n242 See supra notes 89-91 and accompanying text.

n243 See supra notes 17-23 and accompanying text.

n244 See supra note 67 and accompanying text.

n245 See, e.g., Haines, supra note 34, at 353-54 (arguing that courts may not provide the most appropriate forum for determining the type of protection to which tenants should be legally entitled, and that legislatures should act to place duty on landlords to use reasonable care, which should be specifically defined at a minimum level).

n246 And providing a consistent national benchmark for establishing duty.

n247 See Bice, supra note 181, at 463-64.

n248 All losses in Northern Ireland between 1968 and 1993 totaled Sterling695 million. See id. at 464.

n249 See id. at 447-48 (listing potential economic consequences of the lack of coverage for terrorism losses including: widespread business bankruptcies; bank lending bases secured by property becoming suspect; property developers becoming unable to secure financing; and pension funds becoming unable to rely on income from property investments). The British government was also pressured to step in by the Association of British Insurers, who argued that "terrorism is a political problem and that the government should therefore bear the losses." Id. at 448 n.36.

n250 Reinsurance is "the **insurance** by an insurer of the liability of another insurer arising under contracts of **insurance** which the latter has entered into"--practically meaning that "reinsurers insure direct insurers for a pre-determined part of their liability." Id. at 442-43.

n251 See id. at 441.

n252 The layers are (1) a primary layer of regular property coverage with a policyholder's direct insurer; (2) if that is exhausted, an additional layer of up to Sterling100,000, also with direct insurers; (3) and (4) two layers provided directly through Pool Re, if premiums paid to Pool Re are exhausted (third), member insurers in the pool contribute an additional 10% (fourth); and (5) if all these are exhausted, the British government is ultimately is liable for all excess losses. See generally Bice, supra note 181, at 449-54. Pool Re has approximately 115 **insurance** companies and 120 Lloyd's syndicates as members who "cede" premiums to the pool to reinsure risks of terrorism. See id. at 450.

n253 For example, "target risk" is determined by rate setting personnel based on whether and to what extent a particular property is at risk of terrorist attack. See id. at 452.

n254 See id.

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n255 See id. at 459, 461-62.

n256 Id. at 466. In general, OPIC offers programs to insure United States investments in developing countries against currency inconvertibility and expropriation, as well as political violence. Most forms of long-term investment (equity, debt, loan guarantees, and leases) may be insured.

n257 The choice between tort and contract law is perhaps philosophical. A contract view would suggest that tort law should act only when there is no possibility to contract (and even then the outcome should mirror what the parties would have done), while a tort view would suggest that tort law should control when society has decided that it (and not the parties themselves) should set the applicable standards. See Thomas C. Galligan Jr., Contortions Along the Boundary Between Contracts and Torts, 69 Tul. L. Rev. 457, 46162 (1994). Whatever the philosophical view, the landlord-tenant relationship is predicated, before all else, on a contract.

n258 "The fact that government and law enforcement authorities cannot prevent criminal attacks does not justify transferring such responsibility to business proprietors." Kaufman, supra note 15, at 109 n.90 (quoting Fager, Liability of Business Proprietors for Criminal Acts of Third Persons, 29 Fed'n Ins. Couns. Q. 29, 33 (1978)); see also Sharp, supra note 23, at 17.

n259 Kaufman, supra note 15, at 110.

n260 See Haines, supra note 34, at 323; see also supra note 63 and accompanying text.

n261 Exculpatory clauses will generally not preclude suits in tort by plaintiffs who are not parties to the lease. See supra note 235 and accompanying text. If actions for victims of domestic terrorism were restricted to those based on contract, the victim compensation legislation suggested here would be expected to provide exclusive recovery for those victims precluded from tort suits.

n262 See Jones, supra note 229, at 733.

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garages and the basements of private multiple unit . . . dwellings. They are neither equipped, manned, nor empowered to do so." [48] This type of emphasis on control and efficiency provides a powerful argument for using this theory to require landlords to provide at least minimal structural security measures against terrorist acts.

b. Voluntary Assumption of Duty

Another traditional theory of landlord liability involves a landowner's voluntarily assumed duty to provide security. Under this theory, if a landowner voluntarily assumes the performance of duties for security, he should be required to perform those duties carefully. [49] Even courts that have limited a landowner's duty to protect a tenant from the criminal acts of others absent any affirmative conduct on the part of the landowner would likely find a duty if the landlord provided some type of security in what proved to be a negligent manner. [50] In practice, these claims can arise as a **[*167]** result of the landlord's express or implied promise to provide security, including representations in lease terms, oral statements, and advertisements. [51] Many decisions based on this theory use an implicit balancing test to determine liability, considering the degree of reliance assumed by the injured tenant as well as the potential burden to the landlord. [52] Courts using this balancing test may have particular difficulty in applying it to terrorism since both the degree of reliance by the tenant and burden to the landowner in preventing the crime are generally very high. Some commentators note that because this theory provides no positive incentive to provide security it results in landlords being less inclined to offer increased security protection. [53] Choosing to provide no security is theoretically risky for landlords, however, because the definition of what constitutes a voluntary provision of security differs by jurisdiction. [54] What constitutes a provision (or further, a negligent provision) of antiterrorism security is likely to be even less clear than in the context of more traditional criminal acts, so that predicting liability will continue to be at least as difficult.

c. Contract

Claims brought under contract theories may rely on either express or implied warranties [55] to provide security. A recovery theory based on express warranties would suggest that a landlord has a duty to provide the type and amount of security advertised. [56] The World Trade Center litigation provides an example of **[*168]** how liability based on express contract provisions could be triggered in the context of terrorism. One large tenant, Dean Witter, claims that it raised concerns about safety when it negotiated its lease in 1984 and 1985, but that it was assured in writing that security provisions at the World Trade Center surpassed "'all other comparable building complexes within the city' and that the parking garage was secure." [57] Dean Witter claims that it never would have leased the space, for about one billion dollars over twenty years, if it knew that the Port Authority already had knowledge that the parking garage was vulnerable to terrorist attack. [58] Dean Witter is asking to rescind its lease and demanding more than $ 220 million in property and punitive damages. [59]

Contract claims are usually thought to be brought less frequently than tort claims, since damages for the former are generally very limited--compensating the injured party for property damage, but not providing for pain and suffering or punitive damages. [60] Since contract claims are very fact-specific, they tend not to be as susceptible to arguments based on broader notions of social policy as some of the other theories presented here. [61] This will likely be a disadvantage for tenant-victims of terrorism urging courts to extend liability beyond the "four corners" of the lease. Further, of course, the injured party must have a legally cognizable basis for recovery under the contract as a party in privity, or perhaps as a third-party beneficiary.

However, there are often clear advantages to contract claims for plaintiffs. In one case where the court held that a landlord did not have a duty to protect a tenant from the criminal act of a third party, a recovery based on an express contract provision for the value of property

stolen was not precluded. [62] By imposing a contractual obligation to furnish security measures, courts may provide **[*169]** tenants with some means of correcting dangerous security problems before a tragedy occurs. [63] This aspect of contract claims may also have particular application for the prevention of terrorism to ensure that landowners provide bargained-for structural and procedural safeguards. Finally, especially in the commercial context, a landlord's liability may be modified by contractual provisions, such as exculpatory clauses, which generally result in a more efficient allocation of risk between the two parties. [64]

d. Negligence

The clear majority of claims in this area are based on negligence theories. [65] In order to sustain a negligence claim, a plaintiff must show that the defendant's behavior created an unreasonable risk of harm by departing from a reasonable standard of care, and that such behavior was the proximate cause of the plaintiff's damages. [66] A review of the various negligence formulations courts use provides ample support for the contention that the law regarding landlord liability for the criminal acts of third parties is unsettled. In general, a landlord's duty to provide security in this context may be based on a special relationship, special circumstances, or statutory requirements. [67] Recurring questions raised by this type of liability that have particular applications to terrorism include: when a criminal act should be deemed to be foreseeable; when a third party's criminal act should be considered a superseding cause; and when a landlord's response should be deemed reasonable. [68] Failure **[*170]** to adequately resolve these questions suggests that under the current state of the law, landlords are largely unable to accurately predict either liability or the appropriate level of responsive security precautions. [69] These problems will only be exacerbated when negligence claims, based on landlords' failure to protect tenants from terrorism, are allowed.

i. Negligence Formulations

Courts first developed the negligence formulation that landlords had a duty to protect tenants from criminal acts of third parties based on their special relationship because of the changing circumstances of the modern residential tenant. The underlying basis for this per se duty seems to be the landlord's superior position to perceive and prevent risks of criminal conduct. [70] For ex- **[*171]** ample, in Samson v. Saginaw Professional Building, Inc., [71] the Michigan Supreme Court, in adopting the special relationship theory in a commercial context, held that "the existence of this relationship between the defendant landlord and its tenants and invitees placed a duty upon the landlord to protect them from unreasonable risk of physical harm." [72] Conversely, under the special circumstances formulation of negligence, foreseeability of a criminal attack serves to establish both duty and proximate cause. [73] For example, in Rowe v. State Bank of Lombard, [74] the court, allowing a claim for the tenant's employees in spite of a finding that the landlord-tenant relationship was not a special relationship, held that "when knowledge of foreseeable harm is combined with the landlord's sole ability to guard against it, without undue burden, the landlord has the duty." [75]

ii. Foreseeability--Definitions

The definition of foreseeability is often the determining factor in negligence claims, with more expansive definitions more likely to result in findings of duty. Three more major and two more minor definitions of foreseeability are commonly used. The most restrictive view of foreseeability requires that the landowner actually had notice of the risks involved. Foreseeability is generally proven under this definition by representations made by tenants or others, either notifying the landlord of past crimes as in Kline, [76] or that attacks are possible or likely as in Samson. [77] In a recent case, to prove that the defendant landlord had knowledge of existing risks, the plaintiff introduced evidence in the form of a letter from a commercial tenant advising the landlord of crimes on the premises and requesting that a security review be performed. [78] **[*172]** This type of subjective condition has significant drawbacks in that it may discourage landlords from looking for unsafe conditions and from

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being amenable to tenants' reports of unsafe conditions. [79] Such a foreseeability rule for terrorism would generally result in landowners avoiding liability for these reasons, although perhaps not in the World Trade Center case. [80] Most jurisdictions imposing a duty based on foreseeability now use some type of "knew or should have known" standard instead. [81]

The prior similar incidents rule is a less restrictive, middleground definition which requires that a plaintiff produce evidence of prior similar criminal acts on the landowner's premises to establish foreseeability. [82] While widely used, especially in commercial settings, [83] the prior similar incidents rule also has several drawbacks. First, the landowner is effectively allowed one free assault before he can be held to have a duty. [84] Second, some commentators and courts have stated that the prior similar incidents rule leads to "arbitrary results and distinctions" since it is often unclear how close in time, near in location, or analogous in conduct the prior incidents must be. [85] If this standard were adopted in landowner liability for acts of terrorism cases, issues about where to draw the line for terrorist incidents (e.g., between a prior explosion and a bomb threat) would undoubtedly be at the forefront.

In perhaps the most famous denouncement of the prior similar incidents rule, the California Supreme Court, in 1985, abandoned it in Isaacs v. Huntington Memorial Hospital, [86] adopting instead the **[*173]** totality of the circumstances definition discussed below. However, in 1993, the California Supreme Court essentially re-adopted the prior similar incidents rule in Ann M. v. Pacific Plaza Shopping Center, [87] holding that a landowner is rarely, if ever, liable to a plaintiff absent evidence of prior similar crimes on the premises. [88] The return to the use of the prior similar incidents rule in California perhaps signals that the view of the landlord as "social insurer" has fallen out of favor. [89] If so, the curtailment of pro-victim approaches may have implications for how the application of landowner liability to acts of terrorism will be received by courts. In contrast, the rising rate of violent crime has often been held to be the primary influence in expanding the duty to protect. [90] Thus, it seems likely that judges will also feel pressure to interpret standards expansively in response to the increasing visibility of terrorism. How courts respond to these conflicting demands for either more restrictive or expansive liability in addressing landlord liability for acts of terrorism may depend on the alternatives to this type of liability presented. [91]

The totality of the circumstances approach mentioned above represents the high water mark of pro-victim landowner liability theories, requiring that courts analyze foreseeability in light of all the facts and on a case-by-case basis. [92] While some jurisdictions **[*174]** have applied it less frequently to commercial leaseholds, [93] the totality of the circumstances definition has been called the "touchstone" of foreseeability. [94] Factors that come in under the totality of the circumstances rule range from evidence of neighborhood crime (e.g., a computer printout of police records of reported crimes in the area), [95] to environmental criminology studies (including "physical structure of the building, lighting, traffic patterns, and social and ecological circumstances linked to the potential for a criminal event"). [96] By analogy, if studies about how terrorists choose targets are generally available, they could provide a basis for recovery under this formulation. [97] The extent of a landowner's role in determining foreseeability is unclear under this definition.

Two more minor definitions of foreseeability that have appeared occasionally in various jurisdictions are the "first line of defense" and "tempting target" theories. Under the former, even if foreseeability is rather low (e.g., no prior incidents), when a landlord's nonfeasance amounts to what would generally be considered gross negligence (e.g., no door locks), courts will usually find a duty. [98] While only a few courts have adopted the "tempting target" theory, a number of have acknowledged it as a factor in the determination on some other basis. [99] This theory proposes that some leaseholds are by their nature particularly attractive for crime: bars, concert halls, and casinos. [100] Both of these theories may have implications for the application of the landowner liability to terrorism in that the duty to simply warn of a terrorist threat would seem to be a good candidate for the "first line of defense rule," [101] and leaseholds with controversial clients (e.g., abortion clinics) might be seen as "tempting targets" for terrorists. [102] **[*175]**

iii. Foreseeability--Problems

Whatever its definition, determining foreseeability will likely be critical in predicting landowner liability in cases involving terrorist acts. When foreseeability is used both to establish duty and causation, it becomes a "murky crystal ball." [103] If foreseeability is used as a method of establishing liability in claims involving terrorism, courts must find a way to cure the problems of inefficiency and inequity it now generates. One such problem is that foreseeability is susceptible to judges' and juries' subjective beliefs. In the tort context, it seems that foreseeability should be related to fault. When applied to criminal acts, however, its boundaries often seem defined by courts' concerns about public policy. [104] For "new" causes of action, like landowner liability for terrorism, courts may be especially tempted to use policy considerations to define foreseeability. [105]

Similarly, judges and juries tend to focus on the severity of resulting harm when determining, with the benefit of hindsight, whether a criminal act was foreseeable. For example, a landowner's duty may be framed as to avoid creating unreasonable risks for his tenants. In assessing "reasonableness," the landowner should consider the severity of the harm, alternatives available to him, and the probability of harm. [106] While the severity of harm from terrorist acts is admittedly great, probability is very low for most leaseholds. Further, while the cost of safer alternatives may be generally low for ordinary criminal acts (e.g., safer locks, more lighting), the costs of preventing terrorism are generally significant. [107] This analysis would therefore suggest that fact finders **[*176]** must be especially reminded of the latter two components of the foreseeability/duty decision when determining liability for terrorist acts, since they will generally serve to temper the role that the severity of the harm should play.

Another of the problems with foreseeability in this context is whether it should be a question for the judge or jury. Because foreseeability is used in different ways by many courts, it is not clear whether courts have uniformly decided who should resolve the foreseeability issue. [108] What is clear is that if the question does go to the jury, the landlord will likely be the loser. Jury verdicts are likely to turn not so much on facts but on the jury's sense of right and wrong. [109] This puts landlords at an unfair disadvantage, creates confusion about what is required of them, and pressures them to settle. [110] Problems with juries deciding foreseeability will be greater in terrorism cases, as compared to ordinary criminal cases, since methods of determining foreseeability, as well as what constitutes a reasonable security response, are more likely to be beyond the common knowledge of the average juror.

Given this status quo, the chances for developing a clear definition of foreseeability for use in cases involving landowner liability for acts of terrorism are slim. When standards are unclear, some commentators believe that landlords will "overprotect." [111] The resulting "uncertainty zone" is wasteful to society because the amount spent on protection (and passed on to consumers) will not reduce enough violent acts to justify its costs, resulting in an inefficient use of resources. [112] Further, cases where summary judgment would have been proper instead go to the jury to determine foreseeability; resulting in judicial inefficiency. [113] Finally, a vague **[*177]** standard of duty works to the immediate economic disadvantage of the defendant, or landlord. [114] Therefore, should the negligence concept of landowner liability be applied to acts of terrorism, courts or legislatures must develop a more definitive standard of duty in order to ensure that these inefficiencies and inequities are not perpetuated.

3. Implications of a Commercial Setting

While the vast majority of the early cases imposing landlord liability for criminal acts involved residential buildings, acts of terrorism will probably target commercial leaseholds. Even though many commentators think that most jurisdictions have not distinguished between the two settings, [115] not all commentators or courts are of that opinion and many believe the application of the law should not be the same. [116] An analysis of the desirability of symmetry

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between the rules for residential and commercial leaseholds is important since any valid differences should affect the standards of duty adopted for terrorism.

First, since landlord liability for security was developed largely in response to courts' objectives of improving the quality of affordable housing, [117] the initial purpose behind the imposition of liability is different. Second, commercial tenants are generally in a much better bargaining position than residential tenants; they are more likely to be able to negotiate for the levels of security protection they feel are adequate. [118] This seems due to the fact that commercial tenants generally possess more resources and the fact that **[*178]** the commercial market generally offers more alternatives than the residential market. [119] Third, a landlord's physical control over the premises in the commercial setting is much lower. [120] The need for public access, as well as a larger area to be protected, normally means that commercial buildings require more extensive security. [121] A further control-type distinction is the definition of the premises boundary line. For example, when are parking lots or the street in front of a leasehold within the area that a landlord should protect? [122] Fourth, security in a commercial setting generally has a different purpose than in a residential one. Banks and stores do not hire guards for the primary purpose of protecting customers; they are there to protect assets. [123] An important economic distinction between the two settings is that most commercial tenants carry **insurance** and can theoretically pass on the costs of their own security measures through increased prices. [124] Finally, commercial tenants are often in a better position than the landlord to assess the safety of the premises; defects in security may remain undiscovered by a landlord unaware of a commercial tenant's particular safety needs. Commercial tenants are more likely to make a thorough inspection of the premises to determine if it is suitable for its purposes, relying less on the representations of the landlord. [125] These considerations suggest that the duty to provide security in a commercial context should be lower than in a residential one. [126] **[*179]** While this analysis does not necessarily demonstrate that there should be no landlord liability if applied to acts of terrorism, it does suggest that standards of duty should not be as strict as those used in the residential context. [127]

D. Summary

The many different theories of recovery, formulations of negligence, and definitions of foreseeability available to plaintiffs make it difficult for landlords to both assess their liability for protecting tenants and develop an appropriate response to that liability. Since successful theories of recovery vary by jurisdiction and even by court, [128] if landlord liability for criminal acts were applied to acts of terrorism, outcomes for victims would differ based on the location of the terrorist's target. [129] This confusion has led some commentators to note that regardless of Kline's admonition that they are not insurers, landlords must in fact overprotect. [130] This overprotection results in economic inefficiency and may prompt some landlords to seek other investment opportunities altogether. [131] Furthermore, the number of different theories available and reluctance of courts to specifically define foreseeability decreases the chances of judicially resolving a case at an early stage. [132] While current **[*180]** victim compensation statutes appear inadequate, the alternative of landlord liability for criminal acts is subject to these significant drawbacks. Especially when viewed in the context of commercial leaseholds, current formulations of landlord liability will not provide the most efficient methods of victim compensation or increased prevention when the crime in question is terrorism.

II. Landowner Liability When the Crime is Terrorism

Holding landlords liable for acts of terrorism raises issues beyond those involved in landlord liability for more mundane criminal acts. Topics more specific to terrorism that may affect the determination of whether landlord liability is an appropriate legal response can be divided into six categories: (1) defining terrorism; (2) preventing terrorism; (3) warnings; (4) **insurance;** (5) mass torts; and (6) evidentiary issues. [133] Further, by imposing liability on landlords, society is really asking that they assume responsibility for preventing or protecting

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Source: All Sources > Secondary Legal > **Law Reviews, Combined**
Terms: **((insurance) /20 war or terrorism) and risk and property and life and (exclusion /20 (war or terrorism)) and date(aft 1995)** (Edit Search)

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Melinda L. Reynolds

SUMMARY:
... The specter of terrorism within the United States has become frighteningly real. ... For "new" causes of action, like landowner liability for terrorism, courts may be especially tempted to use policy considerations to define foreseeability. ... Especially when viewed in the context of commercial leaseholds, current formulations of landlord liability will not provide the most efficient methods of victim compensation or increased prevention when the crime in question is terrorism. ... The question of whether mere warnings about the **risk** of crime (or terrorism) on the premises could ever be sufficient to avoid liability has not been addressed by litigation. ... Some of the implications of this doctrine are raised in Samson v. Saginaw Professional Building, Inc., where the Michigan Supreme Court upheld a finding of liability against a landlord for a criminal act committed by a patient of a tenant mental health clinic against an employee of another tenant. ... Our goals as a society are crime/terrorism prevention and victim compensation, but landlord liability seems equitable only as a prevention technique, not as a compensation mechanism. ...

TEXT:
[*155] [*156]

Introduction

The specter of terrorism within the United States has become frighteningly real. The World Trade Center and Oklahoma City bombings have effectively erased the traditional American paradigm of terrorism as a foreign problem. These two incidents alone caused staggering national losses. The World Trade Center bombing in February of 1993 killed six people and injured more than a thousand others, created a crater 150-200 feet deep, and damaged the massive complex five levels down and two levels up from the explosion. [1] Economically, total damage was estimated at over $ 510 million, [2] with claims in civil lawsuits filed totaling over $ 1.9 billion. [3] And while the World Trade Center bombing was repeatedly called "the single most destructive act of terrorism ever committed . . . in the United States," [4] a preliminary

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landlords, society is really asking that they assume responsibility for preventing or protecting against terrorism. However, it is not clear that tort remedies provide a cost-effective incentive to do so. Finally, imposing liability on landlords may have extensive undesirable consequences, as landlords may not respond as desired. Examining these issues will support the hypothesis of the previous section: landowner liability by itself is not the most appropriate legal response to domestic terrorism.

A. Defining Terrorism

In terms of framing appropriate legal responses, a threshold issue for legislatures and courts will be who gets to decide when an act constitutes terrorism. [134] Certainly, in order to determine whether landlord liability can be an effective preventive measure, the behavior to be prevented must be defined. For purposes of this Note, the term terrorism has generically been used to refer to bombings--the type of act most likely to impact landowners. [135] It **[*181]** seems, however, that no "one definition of terrorism has gained universal acceptance," even the United Nations is unable to agree on a definition. [136] Whatever its definition, Americans have traditionally considered terrorism to be a matter for international law. Americans think that if terrorism occurs in the United States, it must have "come in" across borders. [137] Clearly though, as shown by the Oklahoma City bombing, terrorist acts may be entirely domestic. Further, the face of terrorism has changed over the past two decades. Skyjackings and spectacular raids like the one at the Munich Olympics have been replaced [138] by car bombs. [139] Based on this analysis, the definition of terrorism will no doubt change as both politics and technology change. One constant is that terrorists have very different motivations from ordinary criminals; a terrorist **[*182]** act is neither profit-motivated nor a random assault, it is usually part of a larger plan, [140] and is usually calculated for media effect. If landlord liability for criminal acts is applied to terrorism, we are effectively saying that these types of definitional differences do not matter, although they must affect the kinds of preventive measures that are effective. [141]

B. Preventing Terrorism

Just as in the context of criminal acts, making landlords liable for terrorist acts really means that we want landlords to assist in prevention or protection. [142] While in the criminal context structural changes by landlords (e.g., alarms and lighting) are of prime importance, most experts agree that structural changes by themselves will not thwart a terrorist attack. As Richard Moore, an associate director with FEMA, explained, "You can make a building less susceptible to severe damage, but it's got to be done in concert with other things--security for instance . . . ." [143] Experts agree that the most effective counterterrorist measure is intelligence, especially infiltration of terrorist organizations. [144] There are therefore three principal ways to prevent terrorist acts: structural changes to buildings, private security changes, and government actions. To determine whether landlords should be held liable, the effectiveness of the first two must be evaluated. Based on the following analysis, the argument for resting the primary burden of prevention with governments rather than private landowners is even stronger here than in the context of regular crime.

Attempting to prevent terrorism assumes that terrorist groups act rationally; that is, they attempt to minimize costs and achieve their own ideas of successful outcomes. Indeed, there is evidence that terrorist groups respond to measures that raise the **risks** of a particular type of attack. [145] In this regard, while creating an absolutely damage-proof building is both architecturally impossible and prohibitively expensive, there are a number of ways to make build- **[*183]** ings more resistant to "human evil." [146] Various structural modifications include imposing setbacks, [147] preventing flying glass, [148] and infrastructure supports. [149] Structural changes are not cheap, however, and in fact may increase dangers for other perils (e.g., fire). [150] Changes of a preventive rather than protective nature, like restricting access and using camera surveillance are more practical. [151]

For what has been called "the most terrible weapon in a terrorist's arsenal" [152] --the car

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bomb--adequate preventive measures may not exist. Robert Kupperman, a terrorism expert at the Center for Strategic and International Studies in Washington, noted that car bombs are a "throw away" weapon requiring little planning or support and fewer participants than the more traditional terrorist acts. [153] A munitions expert who formerly worked with the CIA noted that very few places in the United States are protected from car bomb attacks. "People in the intelligence community have been warning for years that this kind of thing could come to the United States . . . . And in the United States, we have bigger cars than they do in Europe." [154] Indeed, it seems the simplest of terrorist **[*184]** plots and weapons can foil the most sophisticated security. Security at the Olympic games in Atlanta involved more than 30,000 police and security experts, more than 2,000 explosives experts, 40 bombsniffing dogs, 1,000 video cameras, 200,000 I.D. badges, 100 computerized command centers, and microchips that stored digital images of the bearer's palmprint; all at a cost of over $ 117 million. [155] The security teams in Atlanta had practiced against a release of nerve gas, a massive bomb attack inside the games, and a plane hijacking, but were unable to protect visitors from a crude pipe-bomb left unattended in a bag. [156]

A further problem with preventive measures is that they serve to merely relocate criminal behavior. For example, while fortification of diplomatic facilities has resulted in a decrease of known terrorist missions aimed at them, incidences of assassinations and hostage-takings outside protected facilities against civilians has increased. [157] This substitution phenomenon suggests that all landowners would have to continually refine structural and procedural security to thwart terrorists ready to relocate or develop new tactics in order for preventive measures to be effective. This highlights the need for more retaliatory or interventionist measures by government.

Experts believe that the preferred way to prevent terrorism is to "identify and break up terrorist cells, possibly expel or prevent the entry of individual terrorists and thwart their plans." [158] The FBI, which has the primary responsibility for counterterrorism measures in the United States, [159] perceives that counterterrorism is still a "growing field" and has transferred a number of agents from counterintelligence to that area. [160] One question raised after the Oklahoma City bombing was whether any free society could ever prevent terrorist acts. [161] As Fred Moore of FEMA noted, "I don't **[*185]** think any government, even the most authoritarian, has found a way to eliminate terrorism." [162] Indeed, even though the Oklahoma City tragedy appears wholly domestic, it seems likely that many acts of terrorism within the United States will be perpetrated by those who come from outside the country or flee the country afterwards. Without a unified international effort, or at least consensus on means of deterrence and agreement to accept the costs that a global antiterrorism strategy would entail, efforts by agencies of any one nation seem destined to be reactive. [163] These comments suggest that at the least a national policy, rather than the state-bystate approach inherent in landlord tort liability, is warranted.

Many of the same concerns about the effectiveness of private citizens as compared to government in preventing regular crime apply in the terrorism context. The differences noted above--that structural changes are even less effective but more costly, and that there is a greater necessity for national if not international government intervention--reinforce the conclusion that landlord liability as a method of increasing terrorism prevention should be restricted.

C. Warnings

In addition to intervention, the term "prevention" as used here is assumed to include protection, or measures designed to lessen the damage caused by terrorist attacks. One way of protecting tenants and invitees is to require landlords to warn them about terrorist threats received. The question of whether mere warnings about the **risk** of crime (or terrorism) on the premises could ever be sufficient to avoid liability has not been addressed by litigation. Theoretically at least, warnings themselves could be an adequate security measure in response to lower levels of foreseeable terrorism. However, if warnings would be sufficient,

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there may still be a question about whether it would be equitable or efficient to require landlords to issue them. Disclosure of terrorist threats is not an easy issue as there are several competing concerns in a determination of when to notify tenants or customers. Disclosure could theoretically reduce lawsuits if the threat is carried out, but could hurt business if it is not. Disclosure can encourage public dialogue that can help law enforcement--or encourage copycats. For example, after the World Trade Center bombing there were seventy bomb threats a day in New York City. [164] The classic "boy who cries wolf" syndrome creates a **risk** that real threats will be ignored. [165] **[*186]** Finally, however, there are advantages to public notification in that citizens can help with prevention. For example, British officials in particular were dependent upon citizens to help spot IRA bombs. [166]

If a landlord guesses incorrectly and does not issue a warning, certainly issues of notice and reasonable response are implicated. [167] For example, over Easter weekend in 1995, Disneyland received a threat that a chemical attack would take place. [168] Disneyland officials decided not to warn visitors, but did summon health officials and a chemical warfare team before the FBI determined it was a hoax. [169] If something had gone wrong that weekend, Disneyland would have been faced with the prospect of defending its decision not to warn customers in front of an unsympathetic jury. The best solution to this problem may be to statutorily establish that landowners have a duty to inform the appropriate government authority if they are aware of any **risks.** The authority can then make a determination about any necessary warnings. In that way private landowners have a clear role in prevention, while determinations about public policy are left to the experts.

D. Issues from the World Trade Center Bombing Litigation

The civil litigation following the World Trade Center bombing provides examples of some of the more detailed legal issues likely to arise when landlord liability is applied to acts of **terrorism.** An examination of some of these concerns (namely, **insurance,** mass tort, and evidentiary issues) reinforce the conclusion that this type of litigation, which requires massive amounts of resources to pursue, will not likely provide an efficient legal response to domestic **terrorism.**

1. **Insurance**

Since the targets of terrorist attacks are likely to be commercial leaseholds, and since commercial leaseholds generally carry **insurance,** litigation following a terrorist act will likely consist of a **[*187]** battle between insurance companies. Insurers of tenants will attempt to subrogate claims that they have been forced to pay, probably by alleging that either the policyholder or someone else (i.e., the landlord) was negligent. [170] For example, in the World Trade Center litigation, one insurance company, Phoenix Assurance, is seeking to recoup a $ 5-10 million payout on a **property** and business interruption policy for Teleport Communications Group, Inc., a World Trade Center tenant. A lawyer for Phoenix Assurance notes, "Insurance companies have an obligation to policyholders and shareholders to minimize their losses." [171] In fact, insurance companies with significant claims are well represented among the remaining plaintiffs in the World Trade Center litigation. [172] Of course, having insurance companies involved as final litigants first requires that they have decided to honor policyholders' claims. [173]

When claims are significant, [174] insurers may try to avoid them under any number of exceptions to coverage. For example, insurers might try to argue that a terrorist bombing is not a covered "occurrence" because it was technically not an accident but a deliberate act. Theoretically, this type of maneuvering should not be successful, "as the use of the term 'accident' was not intended to deprive policyholders of coverage for deliberate acts of violence against them by unknown third parties." [175] A more likely tactic when damages from a terrorist attack are at issue may be for insurers to claim refuge under a "**war risk exclusion." The war risk exclusion** generally bars coverage for damages resulting from "**war,** invasion, civil **war,** revolution, insurrection or warlike operations, whether there be a

declaration of **war** or not." [176] In practice, this **exclusion** has generally been limited to actions taken by hostile **[*188]** government entities or attempts to overthrow government entities. [177] For example, at least one **insurance** company has tried, albeit without success, to argue that the **war risk exclusion** should preclude coverage for damages resulting from a hijacking. [178] Further, should **insurance** companies attempt to assert an **exclusion,** they generally have the burden of proof to show why coverage should not apply. [179] Specifically with regard to the World Trade Center, shortly after the bombing, two of the biggest carriers in the **property** and business-disruption fields took different positions on whether the **war risk exclusion** would apply in that instance. [180] In many European countries, **insurance** policies now include specific **terrorism exclusions,** however, the World Trade Center's policies did not. [181]

Given that **insurance** companies for tenants injured by a terrorist act will most likely have to honor claims for **property** loss, business interruption, and general liability, [182] it is likely that they will attempt to subrogate claims via litigation. As insurance companies undoubtedly have the resources to be powerful plaintiffs, commercial landlords whose **properties** have been the site of terrorist attacks will likely be harder pressed to defend themselves against allegations of negligence than their residential counterparts whose tenants' losses may often be uninsured.

2. Mass Torts

Due to the nature of the terrorist attacks contemplated, a great number of plaintiffs will be involved in subsequent litigation against landlords for a given incident. In the wake of the World **[*189]** Trade Center bombing, an eight-firm steering committee was appointed to direct the litigation of the 170 civil actions filed. [183] For purposes of judicial economy (if not ecology), [184] it makes sense to litigate all the World Trade Center claims simultaneously. It is also important to ask, however, whether there will be any undesirable side-effects to doing so.

For example, in more typical class action cases, [185] concerns arise as to whether the focus will shift from client to lawyer, from damages to attorney's fees, and from litigation to settlement. Apart from saving costs, which primarily benefit the defendant, it is probably to the plaintiffs' advantage to have the cases consolidated, since their claims will tend to reinforce each other. [186] Apparently, in this case the Port Authority thought that the cost of litigating all the claims separately would far outweigh any such intangible benefit gained by the plaintiffs. As long as these types of concerns of both defendants and plaintiffs can be managed efficiently, which remains to be seen in the World Trade Center litigation, perhaps the fact that terrorist acts will create mass tort litigation is not a significant problem, at least as to its effect on the substantive law. **[*190]**

3. Evidentiary Issues

In attempting to hold landlords liable for terrorist acts, some interesting evidentiary issues may develop. For example, in the wake of the bombing, the World Trade Center has undertaken significant additional structural modifications and security procedures. [187] It does not appear to have been addressed yet, but one question may be whether the plaintiffs can introduce evidence of these subsequent remedial measures to attempt to prove that the Port Authority either knew that existing security was inadequate or that alternate cost-effective safety measures were available. The New York equivalent of Federal Rule of Evidence 407, which excludes "evidence of the subsequent remedial measures . . . offered to prove negligence or culpable conduct" [188] would be at issue. As the Federal rule itself notes, however, it "does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." [189] Thus, plaintiffs' attorneys will likely find a way to get evidence of the modifications admitted.

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Another evidentiary issue that will undoubtedly arise in terrorism cases against landlords, and indeed has arisen in the World Trade Center litigation, involves whether discovery of previously conducted security studies should be allowed. Plaintiffs in the World Trade Center bombing case requested that the Port Authority turn over some sixty-two documents that relate to security audits of the complex conducted in the mid-1980s. [190] The Port Authority has resisted production of the materials on grounds that the documents "are subject to the public interest privilege and/or that they contain information which is neither material nor necessary in the prosecution of the action." [191] Discovery of the security reports is **[*191]** a key issue for the plaintiffs since they allegedly contain comments like "the vulnerability of the World Trade Center to the terrorist is substantial . . . . It is an extremely inviting target," and that the parking garage "presents an enormous opportunity at present for a terrorist to park an explosive filled vehicle that could affect vulnerable areas." [192] The same reports also allegedly contain specific recommendations to tighten security, including closer monitoring of the garage, and banning all public parking. The lawsuit filed by Phoenix Assurance alleges that "as far as we can tell, [the reports were] almost entirely ignored." [193] In attempting to establish that the Port Authority was negligent in failing to protect tenants from the bombing, the plaintiffs are attempting to show that the Port Authority was aware of security problems and did not respond reasonably to them. Plaintiffs' attorneys are therefore also undertaking discovery by seeking testimony of consultants and Port Authority employees who might have been aware of the **risk.** [194]

As noted above, the plaintiffs claimed that the documents should be produced since they are relevant to Port Authority's recklessness (or knowledge) and foreseeability. [195] In response, the **[*192]** Port Authority argued that since the explosion occurred on a sublevel, any information about a safety system, device, or practice occurring at or above the concourse level is irrelevant. [196] The judge dismissed the Port Authority's argument, holding that "the mere fact that the explosion occurred in a level beneath the concourse does not necessarily render irrelevant the documents . . . relating to the concourse or floors above the concourse." [197] Further, he noted that "the PA may assert as a defense that, while numerous recommendations were made, it was unable to take all of the recommended steps because of, inter alia, cost and that therefore it had to prioritize the implementation of them." [198] The judge warned that by asserting such a defense--that it acted reasonably and with due care in following the reports and implementing recommendations found therein--the Port Authority could then be compelled to produce the documents. [199]

While the public interest privilege may be specific to a quasigovernmental agency like the Port Authority, many of the relevance and policy issues noted could easily arise in a completely private setting. For example, though not raised by the Port Authority, other relevancy arguments could include whether the type of harm is not specifically addressed by the security report, the security report is out-of-date, or even that the contents of the report would likely cause the jury to be prejudiced against the defendant. Finally, defendants are likely to make the policy argument that the admissibility of security reports may actually constitute a disincentive to conduct them in the first place. Therefore, evidentiary issues specific to terrorism will require significant resources and add another layer of complexity to an already complex area of litigation.

E. The Effects of Finding Landlords Liable

All of the problems endemic to terrorism discussed above suggest that imposing liability on landowners is not an efficient mechanism for increased prevention. Further, imposing liability on landowners may have some unintended, potentially negative effects because landowners may not respond as desired. Such unintended consequences may be divided into five categories: (1) landowners **[*193]** may not respond to liability with increased security; (2) landowners may even treat liability as a disincentive to engage in further security measures; (3) landowners may use liability as justification for impinging on tenants' rights; (4) landowners may shift resources to other investments (unintended macroeconomic consequences); and (5) landowners may attempt to shift the **risk** of liability to other parties.

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1. Liability as Incentive

In determining whether landowner liability will result in increased protection against terrorist attacks, beyond the analysis of which preventive measures may be effective against terrorism, [200] an examination of whether landowner liability has resulted in increased security measures against regular criminal acts may be helpful. Commentators have argued both for and against liability under tort law as an effective deterrent (or incentive). For example, one author argues that finding landlords liable for protecting tenants and invitees has induced landlords to make "considerable efforts" to render their buildings negligence-proof, if not crimeproof, by hiring extra lobby personnel and security guards, and improving lighting. [201] Further, apparently due to liability exposure, almost every major fast food company has recently hired a security director and over the past ten years these companies' security budgets have approximately doubled. [202]

The same author notes that tort law as a deterrent is only moderately successful, and questions whether deterrence benefits outweigh the costs imposed. [203] For example, it is unclear whether imposing liability on landlords actually prevents crime overall or merely serves to relocate it. [204] Many commentators also point out the social costs, including potential violations of tenants' rights, and increased chances for corruption, discriminatory enforcement, and vigilantism, which could result from the deputization of the citizenry and the fact that law enforcement essentially becomes private. [205] For example, from 1969 to 1990 the value of private **[*194]** security industries rose from $ 2.5 million to $ 18 billion annually and the number of employees increased from fewer than 300,000 to nearly two million. [206] Currently private security personnel outnumber police by more than two to one, but are largely unregistered and usually not as well trained. [207]

Despite these concerns, and while it seems unfair to find that a person is entitled to more protection from a landowner than from police, business and industry do have the financial and technical resources available for aiding the prevention of crime [208] (or terrorism). It therefore seems reasonable to conclude that while imposing liability on landlords does provide a moderate incentive to increase crime prevention, such incentive must be evaluated on a cost-benefit basis. For terrorism, this analysis suggests that the preventive measures that landlords can take by applying private resources seem to be less cost-effective than the measures that government can take by applying public resources.

2. Liability as Disincentive

The propensity for liability to act as a disincentive is perhaps most apparent under the voluntary assumption of duty theory of liability. [209] In the commercial context, this type of liability would likely be triggered frequently since a large percentage of commercial landowners provide some level of security. For example, assume that there are two landlords who both can foresee that at some point there will probably be a terrorist act upon one of their tenants (e.g., each leases to an abortion clinic). One landlord chooses to ignore various threats, while one hires a security guard in response. When tenants or their invitees ultimately suffer injuries, under the voluntary assumption of duty theory, the landlord who hired the security guard is more likely to be found to have a duty and will probably face a jury to defend the reasonableness of his conduct. [210] Under this analysis, it is hard to see why any landlord would initially take what is undoubtedly the safer course, **[*195]** since he would be, at best, in the same position as his counterpart who did nothing--facing a potentially hostile jury to defend his conduct. On the other hand, if the landlord does not provide security, he still has not eliminated **risk.** Without empirical data, it is difficult to gauge disincentive effects. However, it seems reasonable to conclude that if not a disincentive, the incentive effects of tort liability in this context are often muted.

3. Effects of Landlord Liability on Tenants' Rights

As one commentator has noted, it is perhaps "axiomatic" that "as a landlord's duty to

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protect . . . tenants increases, so too the landlord's right to screen, control and evict tenants increases." [211] Some of the implications of this doctrine are raised in Samson v. Saginaw Professional Building, Inc., [212] where the Michigan Supreme Court upheld a finding of liability against a landlord for a criminal act committed by a patient of a tenant mental health clinic against an employee of another tenant. While the court did not specify how landlords should deal with such high **risk** tenants, [213] the court did seem to imply that a landlord has some responsibility to assess the **risks** caused by tenants. [214] This prompted one commentator to caution, "There is a difference, however, between requiring a landlord to act once a dangerous condition becomes apparent, and encouraging him to discriminate against certain tenants based on their prior records, their occupations, or the types of invitees they may be expected to attract. Samson appears to do the latter." [215] In another instance, a court upheld a landlord's right to refuse the tenancy of an ex-convict, noting that "in choosing his tenants, a landlord has a legitimate interest in protecting his **property,** and an interest in protecting the health, safety, and welfare of his other tenants. He may consider any criteria, but especially criteria relevant to these ends." [216]

Encouraging this type of behavior among landlords, especially in the application of liability to terrorism, would seem to invite discrimination against unpopular organizations. Indeed, this controversy recently arose in New York, where a judge ruled that a landlord could break an abortion clinic's lease "if his purpose is to **[*196]** protect other tenants against security **risks** arising from the clinic's presence in his . . . building." [217] The landlord based the eviction on the clinic's failure to follow his regulations, which were designed to prevent the clinic from performing abortions. The judge found the landlord's regulations to be reasonable, holding that "a landlord must exercise reasonable care to protect its tenants against any foreseeable dangers." [218] The judge's ruling, which never mentions the word abortion, cites seventeen incidents that were "directly related" to the abortion clinic, including gunshots, assaults on employees, rocks thrown at clinic windows, smashed cars, a false bomb scare, a tenant's doors glued shut, and the anonymous posting of a threatening note that read in part "you **risk** injury or death if you are caught near these premises." [219] The ruling allowed the landlord to start eviction proceedings against the clinic, even though it had eight years left on its lease and was not in default of rent. [220]

Negative reaction against the decision was swift and raised many of the civil rights concerns that result from imposing a duty to protect on landlords in this context. For example, Rep. Charles Schumer (D-Brooklyn) noted: "It's an open invitation to the extremist fringe in the pro-**life** movement to harass and intimidate landlords until they evict clinics." [221] Priscilla Smith, attorney for Center for Reproductive Law & Policy, stressed that "saying the clinic created an unsafe environment is the same as saying that, 'We can't have Jewish people in our neighborhood because we can't have people coming here and burning crosses.' It's an easy way of trying to hide your discriminatory actions." [222] And Donna Lieberman, attorney with the New York Civil Liberties Union noted: **[*197]**

The court has approved a landlord's effort to evict a tenant because the landlord failed to secure the safety of the building for the tenant, which is a basic landlord obligation. . . . There was never any showing that the performance of abortions presented any danger to the security of the building. [223]

Finally, stressing contractual rather than public policy considerations, David Rosenberg, a Manhattan lawyer, noted:

I would hope that commercial tenants' groups would rally behind this tenant. If it stands up,

then a lease has almost no meaning for a tenant. . . . It's a contract. The tenant hasn't violated it. And the tenant has a right to expect to continue to operate according to the original contract. [224]

4. Macroeconomic Consequences--**Risk** Shifting

Besides inviting tenants' rights violations, imposing a duty to provide security on landlords may prove to be economically inequitable to some controversial tenants. Theoretically, landlords leasing to more expensive stores can pass on the added cost of security to customers, but businesses catering to a lower-income clientele may not necessarily be able to do so without losing customers who are more sensitive to prices than security. [225] This could ultimately cause smaller or marginally profitable landlords, especially with high-**risk** or controversial tenants, to leave the commercial real estate market for more lucrative investments. [226]

Short of leaving the market, some landlords may respond to liability for criminal/terrorist acts on their premises by simply refusing to provide security and disclaiming all responsibility for security--perhaps by informing prospective tenants that security is their own responsibility. This does not, however, eliminate the **risk** of liability if crime/terrorism, is found to be foreseeable; a more prudent alternative available to landowners would be to attempt to modify tort liability by shifting **risk** back to tenants. [227] Including **[*198]** exculpatory clauses in leases is one method of allocating **risk** in a contractual arrangement. While few courts have specifically addressed the use of exculpatory clauses respecting criminal acts, [228] in general, a commercial tenant may agree to exonerate a landlord from liability for future acts of negligence, for both **property** damage and personal injury. [229] Exculpatory clauses in residential leases have often been found to be against public policy, and therefore invalid, although, their use in the commercial context has not been as restricted. [230] There are some limitations on the use of exculpatory clauses in commercial leases. Five states [231] impose statutory restrictions (e.g., New York law invalidates any agreement that exempts a lessor from liability for personal injury or **property** damage resulting from the lessor's negligence in operation or maintenance of the **property)**. Additionally, there appears to be a consensus that exculpatory clauses cannot insulate landlords from intentional, wanton, or willful behavior. [232] Some courts have found that exculpatory clauses only protect landlords from passive negligence, not active negligence. [233] A few courts have held that an exculpatory clause cannot release a landlord who has violated a statutory provision. [234] Further, an exculpatory clause is usually binding only on parties to the lease. Third-parties like the tenants' employees or invitees are not precluded from bringing suit against the landlord in this instance, although the existence of these types of provisions may provide for the landlord's later indemnity claim against the tenant. [235] Finally, a court may always choose to invalidate an exculpatory clause as unconscionable if there is evidence of grossly unequal bargaining power. [236] In summary, exculpatory **[*199]** clauses in commercial leases have generally been held enforceable in enough cases to warrant landlords' use of them if confronted with liability for terrorist acts. In this regard, exculpatory clauses will likely provide a more efficient mechanism of allocating **risks** than the use of negligence standards, at least as to damage suffered by tenants.

5. Intended Effects

In the midst of this analysis of the negative effects, the potential for positive, intended effects should not be forgotten. If one of society's primary concerns is to ensure that victims are compensated fully, society may consider certain market or macroeconomic effects to be secondary. In other words, the weight given to the value of private victim compensation may be so high that market inefficiencies are minor in comparison. If so, the cost of terrorist prevention may often be "cheapest" to the landowner. [237] As with victim compensation, perhaps the danger is so grave that society considers the prevention of terrorism by all

reasonable methods, not just strictly cost-effective ones, desirable. Further, there is evidently some relationship between opportunity and certain types of crimes, as well as the magnitude of harm and security measures, so that often the landlord is not entirely blameless. [238] Finally, the "political" benefit of imposing liability may be that pressure for legislative reform is eventually brought to bear by more influential landlords disgusted or threatened by current litigation practices. [239] **[*200]**

F. Summary

Landlord liability for criminal acts has not resulted in clear guidelines about when duty will be imposed or what security responses will be considered sufficient. These problems, which mitigate attempts at increased prevention and protection, would only be exacerbated by the application of this doctrine to acts of domestic terrorism. Our goals as a society are crime/terrorism prevention and victim compensation, but landlord liability seems equitable only as a prevention technique, not as a compensation mechanism. Expansive theories of liability, which have as their primary goals giving compensation to victims, while certainly desirable, are best run by the government with funds raised from society as a whole. Any rules placing burdens on landowners should therefore have prevention, rather than compensation, as their primary goal. This conclusion suggests that narrower theories of liability, designed only to induce landowners to take cost-effective measures to prevent terrorism, [240] should be implemented.

Theoretically, cost-effective levels of protection could be derived empirically--for example, some types of structural changes must be more effective than others in certain settings. Under the current state of the law, however, an efficient standard is not likely to emerge. [241] In fashioning a legal response to terrorism, perhaps other systems that have been forced to address the problem more extensively will provide direction toward a comprehensive solution.

III. Alternative Legal Responses to Domestic Terrorism

The primary conclusion offered by this Note is that using current legal theories of landlord liability for criminal acts as a method of recovery by victims of domestic terrorism is not the best legal response, given goals of increased prevention and victim compensation. Courts deciding this issue will likely be confronted by societal pressures both to expand and contract the scope of landowners' duties. [242] Their decisions may be affected by the availability of other alternatives able to adequately address concerns about victim compensation and prevention. The alternatives presented here are only intended to be a basis for consideration and not definitive proposals. Discussion is limited to how these types of representative alternatives can, either **[*201]** separately or in combination, achieve the goals and address the problems presented.

A. Comprehensive Federal Legislation

Even though victim compensation seems to be a task best handled by government entities rather than private individuals, in this context current legislation would not appear to adequately redress the injuries of non-government affiliated victims of terrorist acts. [243] Therefore, perhaps the most equitable and efficient solution to the victim compensation issue is to amend current legislation to provide for a comprehensive platform of victim compensation for acts of domestic terrorism. Further, the use of legislation to establish minimum levels of reasonable care has apparently proven to be effective in the residential context. [244] Federal legislation specifying minimal structural and procedural antiterrorism measures for commercial buildings over certain sizes could be implemented, much as in the residential context, as the basis for public sanctions or as a guideline in the application of tort liability. [245] A statutory violation would arguably be conclusive of liability--replacing foreseeability--resulting in greater predictability and lowered use of judicial resources. [246] Alternatively, federal legislation could provide direct compensation to landowners. For

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example, landowners in Northern Ireland are compensated directly by the British government for losses from terrorist attacks. Police certification that the injury was related to a terrorist attack is required for reimbursement, but no premiums are paid. Funding comes from tax revenues throughout Great Britain. [247] Claims in Northern Ireland are relatively small when compared with the two incidents referred to throughout this Note. [248] Further, under this system there does not appear to be any incentive for landowners to take preventive measures. For these reasons (potential size of losses and lack of incentives), the Northern Ireland legislative response does not seem appropriate for adoption in the United States. **[*202]**

B. Government Assisted **Insurance**

It is pragmatic to assume that if domestic **terrorism** continues, United States **insurance** companies will follow the lead of their European counterparts and begin to write **terrorism exclusions** into commercial **property** policies. When continental and British insurers took this course in 1993, fears of an economic crisis prompted the British government to promise that it would ensure that coverage for terrorist acts would be available to landowners in Great Britain. [249] The British government essentially agreed to become the "reinsurer of last resort" for losses caused by terrorist acts. [250] To do so it formed "Pool Re," a mutual reinsurance company, to provide the coverage excluded by private insurers. [251] The British system provides five layers of terrorism coverage to a landowner, with the government having final responsibility if all layers are exhausted. [252] Premiums charged for the additional Pool Re coverage are determined based on a number of different factors, some of which are apparently particular to the **"terrorism insurance"** market. [253] Another part of the premium structure is that an "IRA levy" is attached by the British government to all household and vehicle policies written, to shift the cost of **insurance** from London to other parts of the country. [254] While it does spread **risks,** there are problems with the British reinsurance scheme. There seems to be no incentive for insureds to take preventative measures. Certainly, premium reductions are common in other contexts, and as was **[*203]** discussed earlier, there are measures landlords can take to mitigate the effects of, if not prevent, terrorism. [255]

In a somewhat similar vein, the Overseas Private Investment Corporation ("OPIC") was formed by the United States government at least partly to "underwrite political **risk insurance** in friendly, less developed countries." [256] If political **risk** was defined to include **terrorism,** the principles of OPIC could theoretically be applied in developing a model for government provided domestic **terrorism insurance,** whereby the United States government could act as either a direct or indirect insurer for **terrorism risks.** The lessons learned from the shortcomings of the British system, like ensuring that premiums reflect preventive measures and using levies to spread the cost of premiums throughout the country, could be integrated. When insurance is used in this manner, economic efficiency is aided because insurance companies, in setting premiums reflective of precautions taken, will help minimize the cost of accident prevention. Landlords will have a clearer standard to follow; mitigating tendencies to either overprotect or do nothing. In this manner, the costs of victim compensation can be at least partially borne by the party best able to spread the **risk**--the government--in an economically efficient manner that also provides incentives for landlords to take measures to help prevent, or lessen the effect of, terrorist attacks.

C. Contract Theories

Once society is assured that victims of domestic **terrorism** will be fully compensated, via comprehensive legislation and government assisted **insurance** as suggested above, there are strong philosophical arguments for letting the market function via contract liability alone. [257] Market or contract based theories partially depend on the premise that it is the government's, and not the private sector's, duty to protect citizens. Further, even if there is a private sector duty, it is not fair to single out landlords. [258] Some **[*204]** theories provide that whatever security measures are necessary will be implemented by landowners on their own because

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estimate from the **[*157]** Oklahoma City bombing put damage at over $ 652 million. [5] When considered with other recent terrorist attacks and threatened attacks, [6] these incidents suggest that domestic terrorism is an emerging national problem. Americans must therefore develop innovative solutions to address the issues of prevention and victim compensation.

Initial responses to domestic terrorism have resulted in what some have called the "hardening" of America. [7] Government responses to domestic terrorism have included both modifications to existing agencies' priorities as well as legislation providing for limited victim compensation and expanded law enforcement powers. [8] This Note considers the American common law response to **[*158]** domestic terrorism--landowner liability for terrorist acts--as typified by the civil litigation following in the wake of the World Trade Center bombing.

After the World Trade Center bombing over 174 suits were filed against the Port Authority, the owner of the World Trade Center complex. [9] The suits involve "a relatively murky area of the law," [10] namely a landowner's responsibility to protect tenants or invitees against criminal acts of third parties. In brief, the courts face the issue of whether the Port Authority, as landowner, was negligent in either its assessment of the foreseeability of the harm of a terrorist attack or the adequacy of the security measures it took in response to that assessment.

An examination of this particular legal response to domestic terrorist acts is critically important for several reasons. First, beyond the economic effects that can be imagined at the individual party level, the placement of liability could also have significant macroeconomic results. [11] Further, imposing civil liability on land- **[*159]** lords may have extensive implications for individual rights to privacy, as well as availability of fairly-valued rental space for more controversial tenants. [12] These issues must be measured against the harsh inequity that could result if civil suits are not allowed, as some innocent victims will invariably not be made whole by **insurance** or victim-compensation-type statutes. [13] Finally, no precedent appears to squarely address civil recoveries for acts of domestic **terrorism** as described here; [14] hence plaintiffs' reliance on the general body of law dealing with landlord liability for criminal acts of third parties. The question at hand then is whether this body of law is the best way to achieve equitable victim compensation and increased antiterrorism protection. [15]

In the wake of terrorist attacks in the United States, injured parties inadequately compensated by insurance or statutory assistance programs are likely to turn to civil lawsuits against landowners for relief. These suits will involve claims under the general rubric of "landlord liability for criminal acts of third parties." If based on current doctrines, claims involving terrorist acts will only exacerbate problems of unpredictability, inequity, and inefficiency endemic to claims presently involving more typical criminal acts. A nationwide legal response consisting of federal legislation, government-assisted insurance, and judicial decisions restricting recovery to more narrowly drawn theories of liability is necessary to provide more equitable and efficient answers to concerns about both victim compensation and prevention.

Part I of this Note presents potential legal responses available to victims of domestic terrorism by reviewing victim-compensationtype statutes that might apply and by examining how potential civil claims could be brought using landowner liability for criminal acts of third parties. [16] The examination of contemporary landowner **[*160]** liability will focus on problems arising from the use of foreseeability as a legal element, since this appears to be a primary cause of the current unpredictability in the law. The implications of applying existing liability theories in the environment of commercial leaseholds are also examined in detail since they will have particular importance in the context of terrorism. Part II examines how issues particularly related to terrorism will affect the application of existing doctrines, with the conclusion that the exclusive use of these types of claims is not the most appropriate legal means to achieve society's goals. Part III presents alternative legal responses that may provide more comprehensive victim compensation as well as the predictable legal outcomes which will cause landowners to take cost-effective preventive measures.

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customers will demand them. "By letting the market police itself . . . the more efficient level of protection will emerge as business owners seek to attract customers by using the most cost effective measures." [259]

Advantages to traditional contract liability include the ability to potentially cure a dangerous situation before a terrorist act occurs via traditional contract remedies like rent abatement, repair and offset, rescission, or even termination of the lease if contracted security measures are not provided. [260] In the commercial context, the uses of exculpatory clauses and indemnification provisions result in a more efficient allocation of **risks** than the legal rules now in effect, at least when tenants are the victims. [261] They result in greater precision in the negotiated solution, as each party's responsibilities are defined, and the bearer of the **risk** is clearly identified. This in turn allows procurement of appropriate insurance, as well as preventive security measures by the party bearing the **risk** (avoiding overlap of duties). [262] Provisions regarding **risks** related to terrorist acts and the provision of security against them should therefore be explicitly provided for in every commercial tenant's lease and pursuing a contract remedy should always be considered an appropriate legal response where applicable.

D. Tort Reform

When contract claims are not available, and if recommendations regarding victim compensation are not implemented, the problems with the negligence theories of landlord liability for criminal acts can be lessened so that they can be considered appropriate legal responses in that limited context. In those instances, since victim compensation is not assured, equity demands that landlord liability not be rejected. To mitigate the primary problems involved in the negligence formulations discussed above, foreseeability should be treated as a question of law and reserved for the court. The courts **[*205]** should then promulgate clear standards of liability and appropriate responsive security measures with an eye toward uniformity among jurisdictions. And finally, the courts should be responsive to concerns about landlords as social insurers, landlords operating in the commercial context, and the limited ability of landlords to prevent terrorism, by restricting the definition of duty.

Conclusion

In the wake of the World Trade Center and Oklahoma City bombings, America is learning how to deal with domestic terrorism by "hardening" our buildings and stepping-up security. We have not yet, however, developed methods for providing equitable and efficient legal remedies for victims of domestic terrorism. Since statutory victim compensation provisions in place will likely not provide full relief, victims are apt to pursue civil litigation against the one party likely to have sufficient, available assets--the landowner. Victims will likely proceed, and in fact have proceeded in the World Trade Center bombing case, under the theory that landlords have a duty to protect tenants from criminal acts of third parties. However, the body of law in this area is unsettled. Landowners are generally unable to predict liability or develop appropriate responses once liability is imposed. Liability varies from jurisdiction to jurisdiction and indeed even from court to court. Many of the problems with landlord liability in this area have resulted from courts' treatment of the concept of foreseeability as establishing duty. In applying this theory of liability to terrorist acts, the issue of foreseeability is stretched to its outer limit; all of its shortcomings are accentuated. Further, courts will be asked to develop standards for terrorism liability in an environment of conflicting pressures; to both restrict duty, in the face of growing concern that landlords should not be social insurers, and to expand duty, in the face of the increasing visibility of terrorist acts.

While it is not clear how courts will define liability in view of these pressures, it seems certain that imposing tort liability on landlords for terrorist acts is not the most appropriate legal response. Victim compensation is best handled by the ultimate riskspreader, the government. To the extent society's concerns involve victim compensation and **risk** spreading,

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comprehensive federal legislation and government assisted insurance should be the primary remedies. To the extent society's concerns involve prevention, or antiterrorist measures, perhaps government is again the most efficient actor. Still, landlords can often effectively contribute through structural and procedural changes in security designed to aid both in the prevention and mitigation of damage. Sufficient incentives for this role can likely be achieved by making premiums under a **[*206]** government assisted insurance program contingent on attaining certain specifically defined safety levels, establishing statutory minimums for security measures based on building types, and allowing the market to function via contractual **risk** shifting provisions, such as exculpatory clauses. Limited tort liability (i.e., with clear, uniform standards of duty and sufficient responses) should only be used as a safety net when necessary to prevent inequity. How our society responds to domestic terrorism will necessarily be indicative of our opinions about the current state of the American legal system. To achieve society's goals of both victim compensation and prevention, we must forge equitable yet efficient legal responses from the stockpile of alternatives at our disposal.

FOOTNOTES:

n1 See Jeffrey S. Green & Ira Tripathi, Coping with Chaos: The World Trade Center Bombing and Recovery Effort, 27 Urb. Law. 41, 41 (1995).

n2 See Daniel Wise, Lawyers Pack World Trade Center Hearing, N.Y. L.J., May 9, 1994, at 1 (insurance industry estimate).

n3 See Mitchell Pacelle, Onslaught of Civil Suits Begins in World Trade Center Bombing, Wall St. J., June 28, 1994, at B1, B10.

n4 Ralph Blumenthal, Prosecutors Describe "Horror" as Trial in Towers Blast Opens, N.Y. Times, Oct. 5, 1993, at B1.

n5 See Paul English, Preliminary Estimate Puts Bomb Losses at $ 652 Million: Uncovered Costs To Stagger State Budget Resources, The Daily Oklahoman, May 19, 1995, at 1. Oklahoma Governor Frank Keating noted that the loss amount "not only makes it the most catastrophic dollar loss in American history for a terrorist act, but in Oklahoma it's without doubt the greatest loss to the public and private sectors ever." Id.

n6 Including, for example, the Centennial Park bombing at the Olympics in Atlanta, the Amtrak derailment in Arizona, Unabomber bombings and threats, and abortion clinic attacks. "Scarcely a week goes by without at least one terrorist related incident making the headlines." Ileana M. Porras, On Terrorism: Reflections on Violence and the Outlaw, 1994 Utah L. Rev. 119, 119. The director of the CIA recently told Congress that he expects an increase in domestic terrorism over the next decade. See Sunday Today (NBC television broadcast, Jan. 7, 1996).

n7 See, e.g., Tom Masland et al., Fighting Back; **Life** in the Bull's-Eye, Newsweek, May 1, 1995, at 56. For example, security measures at the World Trade Center in the aftermath of the bombing reflect both structural and procedural changes, including wrapping columns with steel, painting windows with shatter-resistant coating, installing a hydraulic crash barrier, using an online photo ID system, restricting access to the towers, hiring of hundreds of new security guards, moving outside parking away from the building, see id., and restricting parking in the underground garage where the bomb was detonated. See Richard Lacayo, How Safe is Safe? Americans Must Decide How Much Freedom They Are Willing to Trade for More Security, Time, May 1, 1995, at 68, 71. After the Oklahoma City bombing, changes were implemented at Federal buildings around the country. All in all, officials put more than 8,000 federal buildings on "second-level alert"--requiring all employees and visitors to identify themselves "until further notice." Masland et al., supra, at 56. And although he had opposed the action for some time, President Clinton agreed to a ban of vehicular traffic in front of the White House. See Kathy Lewis & G. Robert Hillman, White House Barriers Erected: Clinton

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Cites Terrorist Fears, The Record (Northern N.J.), May 21, 1995, at A1. In arguing for the measure, Treasury Secretary Robert Rubin said that "the bombings of the federal building in Oklahoma City and the World Trade Center in New York are reminders of a growing terrorist threat." Id. at A3.

n8 For example, the Federal Emergency Management Agency (FEMA), which is best known for its response to disasters like floods or earthquakes, has also begun to focus on the problem of "technological events" like major acts of terrorism. See Scott S. Greenberger, FEMA Focuses on Prevention, Telegram & Gazette (Worcester, Mass.), May 2, 1995, at A1, A2. After the World Trade Center bombing, FEMA came up with recommendations to make structures safer, proposing designs for stronger windows and doors. See id. at A3. In responding to the Oklahoma City bombing, in a more traditional role, FEMA is expected to offset about $ 33 million of the loss, as well as provide for rebuilding-loan programs. See English, supra note 5, at 1.

The Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescission Act, 1995, as its name implies, appropriates some $ 66 million for the demolition and rebuilding of the Federal building and authorizes an appropriation of Community Development Block Grant funds of approximately $ 39 million to be used "to assist **property** and victims damaged and economic revitalization" in a specified area around the bombing site. Pub. L. No. 104-19, section 2007(c), 109 Stat. 194, 252-53 (1995) [hereinafter Emergency Anti-Terrorism Act]. More controversial anti-terrorism provisions of this Act include establishing a $ 34 million "Counterterrorism Fund" for the Department of Justice, and appropriating $ 77 million for a "Domestic Counterterrorism Center" for the FBI. See section 2007(c), 109 Stat. at 249-50.

The Antiterrorism and Effective Death Penalty Act of 1996, signed by President Clinton in April of this year, authorizes $ 1 billion in law enforcement spending over four years, provides for the designation of terrorist groups, bans fund raising in the U.S. for designated terrorist groups, streamlines deportation procedures for terrorists, requires plastic explosives to contain chemical markers, and strengthens penalties for many acts of terrorism. Pub. L. No. 104-132, section 301-823, 110 Stat. 1214, 1247-317 (1996) [hereinafter Antiterrorism Act of 1996]; see also infra note 17.

Recent events including the Centennial Park bombing at the Atlanta Olympics have triggered another round of proposals for increased antiterrorism spending. See Top Priority in Terrorism Fight, The Post And Courier (Charleston, S.C.), Aug. 1, 1996, at 12 (discussing a bill sponsored by Senator Judd Gregg which would add another $ 78.7 million to the Antiterrorism Act of 1996).

n9 Some of these suits have either been settled or dismissed, but of the original suits, 126 involved personal injuries (containing a total of 294 individual claims), 17 involved **property** damage (containing a total of 159 claims, most of them for cars in the parking garage), and 31 involved business interruption (containing 194 claims filed by companies with offices in the World Trade Center or their insurers). See Wise, supra note 2, at 5.

n10 See Pacelle, supra note 3, at B1.

n11 For example, after the World Trade Center explosion some investors expressed concerns about the Port Authority's ability to pay off some of its $ 4.1 billion in public improvement bonds. See Jon Nordheimer, Crisis at the Twin Towers: The Port Authority; Complex Insurance Issues in Aftermath of Explosion, N.Y. Times, Mar. 2, 1993, at B5; see also infra notes 225-36 and accompanying text (discussing macroeconomic effects of imposing liability on landowners or tenants and the effect of exculpatory clauses).

n12 See infra notes 217-24 and accompanying text.

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n13 See infra notes 17-23 and accompanying text.

n14 The term "terrorism" is generally used here to refer to bombing-type acts since they will most often have the greatest effect on landowners. See infra notes 134-41 and accompanying text (discussing in more detail the definition of terrorism).

n15 Throughout this Note, societal goals of increased victim compensation and antiterrorism are presumed. This presumption is based on an economic theory of torts which holds that liability is imposed on defendants in order to (1) compensate those who are harmed and (2) provide incentives for tortfeasors to limit **risk**-producing behavior to efficient levels (in this case theoretically complete deterrence). See Uri Kaufman, When Crime Pays: Business Landlords' Duty to Protect Customers From Criminal Acts Committed on the Premises, 31 S. Tex. L. Rev. 89, 103 (1990).

n16 The topic of landowner liability for criminal acts of third parties has been commented on extensively. See, e.g., William H. Hardie, Jr., Foreseeability: A Murky Crystal Ball for Predicting Liability, 23 Cumb. L. Rev. 349, 364 n.61 (1992) (listing no less than fifteen law review pieces discussing landlord liability for criminal acts of third parties); Kaufman, supra note 15, at 92 n.13 (discussing representative pieces advocating extreme proposals). Therefore, it is not within the scope of this Note to fully address it, rather the discussions presented here focus on landowner liability for terrorist acts.

n17 See Emergency Anti-Terrorism Act, supra note 8, at 253 (making other appropriations to various governmental agencies for rebuilding). In view of the magnitude of the claims noted earlier, this is not likely to provide sufficient compensation. Additional assistance should also be available to some government employees. See infra note 20 and accompanying text (citing the Victims of Terrorism Compensation Act, Pub. L. No. 99399, section 801, 100 Stat. 879 (1986)). Also, the Antiterrorism Act of 1996 specifically provides for mandatory victim restitution as well as additional compensation for victims of terrorism via The Victims of Crime Act of 1984. See Antiterrorism Act of 1996, supra note 8, at 1227-41 (mandatory victim restitution), 1243-47 (assistance to victims of terrorism). However, obtaining restitution from terrorists will probably not provide adequate compensation in the majority of cases. See infra notes 25-26 and accompanying text (noting that terrorists will often have insufficient or hard-to-reach assets). Further, while the Antiterrorism Act of 1996 specifically authorizes Federal funding of state crime victim compensation programs which provide assistance to victims of terrorism, these types of programs provide very limited compensation (for example, limited medical expenses and lost wages). See infra note 23 and accompanying text.

n18 Michael Ratner & Beth Stephens, Tyrants, Terrorists and Torturers Brought to Justice; U.S. Courts Provide Compensation for Victims, N.Y. L.J., May 15, 1995, at S5 (quoting the Torture Victim Protection Act (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992)).

n19 The Warsaw Convention generally allows damages up to $ 75,000 against international airlines for accidental injuries. See Deborah Squiers, Court Dismisses Damages Suit in Airport Death, N.Y. L.J., Apr. 2, 1990, at 1.

n20 See Kimberly A. Trotter, Compensating Victims of Terrorism: The Current Framework in the United States, 22 Tex. Int'l L.J. 383, 392 (1987).

n21 See id. at 393.

n22 Id. at 401. Of course, this statement assumes that victims are unable to satisfy losses completely via insurance recoveries.

n23 While it may be possible for victims to obtain partial recovery under more traditional

state-sponsored crime victim compensation funds, if available, these generally provide a significantly lower recovery than a civil suit, so there is still an incentive to sue. See Rex A. Sharp, Paying for the Crimes of Others? Landowner Liability for Crimes on the Premises, 29 S. Tex. L. Rev. 11, 16 n.11 (1987).

n24 If the victim is an invitee of a commercial tenant, it might be possible for the victim to include the commercial tenant as a responsible party, since if the lessee has exclusive control and possession it may be considered to have the same protective duties as a landlord. See, e.g., Daniels v. Shell Oil Co., 485 S.W.2d 948, 951 (Tex. Civ. App. 1972). For purposes of this Note, references to landlords or landowners are presumed to include tenants where tenants retain exclusive control and possession of the leased premises. Further, employees of tenants or landlords may likely be precluded from bringing suit against one or the other since their injuries may be exclusively addressed by workers' compensation. See, e.g., Daniel Wise, Law Firms Based in World Trade Center Regroup: Lawyers See Potential for Dozens of Liability Claims, N.Y. L.J., Mar. 2 1993, at 1 (noting that Port Authority employees are precluded from recovery outside of worker's compensation in the World Trade Center bombing); see also infra note 127 (discussing invitees and employees of tenants). Recently, victims (including the owner of the World Trade Center) have also attempted to hold chemical manufacturers responsible--alleging that they could have made the ammonium nitrate, an ingredient in the bombs used in Oklahoma City and at the World Trade Center, less explosive. See Hassan Fattah, Federal Court Dismisses Case Against ICC, Chemical Week, July 17, 1996, at 12.

n25 See Alexander Stille, The PLO: A Suit Provides an Inside Look, 10 Nat'l L.J. 1 (1987). The 1985 murder of Leon Klinghoffer (an elderly man in a wheelchair who was ostensibly singled out because of his Jewish name and United States passport by Palestinians who hijacked the cruise ship, Achille Lauro) came to symbolize terrorism in the late 1980's much as the World Trade Center, Oklahoma City, and Centennial Park bombings do in the mid-1990's. Recently, the PLO has tentatively agreed to underwrite a peace institute in order to settle the lawsuit. If the agreement is finalized, the Klinghoffers will drop all legal claims against the PLO. See Beth J. Harpaz, Klinghoffers, PLO Plan Peace Institute In Terror Victim's Memory, AP, Jan. 18, 1996, available in LEXIS, Nexis Library, AP File.

n26 For example, what is certain to be the first of many lawsuits involving the Centennial Park bombing was filed less than a week after the explosion. The suit, filed by a woman injured in the blast, asks for $ 500,000 in damages and alleges that security guards did not evacuate people quickly enough. See FBI Continues Investigation of Olympic Blast (CNN news broadcast, Aug. 3, 1996).

n27 See Sharp, supra note 23, at 54-55. Further, the landlord could be held liable via vicarious liability. See id. at 55; see also Sharp v. W.H. Moore, Inc., 796 P.2d 506 (Idaho 1990) (noting that security service's liability could be imputed to landlord as a result of agency relationship).

n28 And, where applicable, the landowner's insurer.

n29 See B.A. Glesner, Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises, 42 Case W. Res. L. Rev. 679, 790 (1992).

n30 See id. at 688. "Courts within a single jurisdiction may differ as to the appropriate basis for liability; even appellate courts have misinterpreted or ignored their own state supreme court's analysis of the issue." Id. at 688. One South Carolina District Court has noted, "the wide range of approaches taken by courts in other jurisdictions establishes only that support can be found for practically any position." Id. (quoting Cooke v. Allstate Management Corp., 741 F. Supp. 1205, 1209 n.1 (D.S.C. 1990)).

n31 See Robert S. Schoshinski, American Law of Landlord and Tenant section 4.14 (1980).

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n32 While some have held that landlord tort liability has therefore undergone a "drastic metamorphosis," see Glesner, supra note 29, at 684, or "revolution," others claim that this aspect of landlord-tenant law merely reflects an "integration . . . into the mainstream of contract and tort law." Charles J. Goetz, Wherefore the Landlord-Tenant Law "Revolution?"--Some Comments, 69 Cornell L. Rev. 592, 602 (1984). Under the latter theory, these other branches of law began incorporating "such notions as optimal **risk**-bearing, transaction costs, and externalities" that put pressure on "antiquated landlord-tenant doctrines." Id. at 599-600. This theory seems more plausible in that the landlord's duty to protect tenants originated in the residential context, arguably in response to the changed relationship (now considered contractual) of modern landlord and tenant. See, e.g., Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir. 1970) ("In our judgment the trend toward treating leases as contracts is wise and well-considered. . . . Leases of urban dwelling unites should be interpreted and construed like any other contract."). Given that this area of the law is responsive to changes in contract and tort doctrines, any reform in those areas will in turn influence the courts' adoption of landlord liability for acts of terrorism.

n33 439 F.2d 477 (D.C. Cir. 1970).

n34 See Miriam J. Haines, Landlords or Tenants: Who Bears the Costs of Crime? 2 Cardozo L. Rev. 299, 317-18 (1981).

n35 See Joan L. Neisser, The Tenant as Consumer: Applying Strict Liability Principles to Landlords, 64 St. John's L. Rev. 527, 532 (1990).

n36 Kline, 439 F.2d at 481.

n37 For example, the court's first basis for liability, maintaining common areas in a reasonably safe condition, perhaps reflects an economic efficiency argument; namely, since the landlord has exclusive control, it is cost-effective for him, rather than tenants, to take preventive action. Tenants' responses would necessarily be duplicative or involve collective action with high transaction costs; tenants lack security expertise, and the landlord is in the best position to ensure against **risk** via insurance. See Peter S. Selvin, Landlord Tort Liability for Criminal Attacks on Tenants: Developments Since Kline, 9 Real Est. L.J. 311, 315 (1981). On the other hand, in recognizing that there are limits to liability, or that the landlord is not an "insurer," the court may be acknowledging that public policy or fairness dictates that a landlord should not be liable when he is not at fault. See Sharp, supra note 23, at 16.

n38 See Schoshinski, supra note 31, section 4.15, at 219.

n39 In this regard, Kline may be limited to its facts, in that the tenant specifically advised the landlord about other prior criminal acts on the premises, see Kline, 439 F.2d at 479 n.3, and the landlord had actually decreased security measures since the inception of the tenant's lease. See Schoshinski, supra note 31, section 4.15, at 218-19.

n40 See supra note 30 and accompanying text.

n41 See infra notes 115-27 and accompanying text.

n42 Haines, supra note 34, at 343 n.144. See also Marvin F. Milich, Protecting Commercial Landlords From Liability for Criminal Acts of Third Parties, 15 Real Est. L.J. 236, 241 (1987) (citing cases involving commercial landlords where theories of recovery paralleled those in cases involving residential landlords). Further, it is generally acknowledged that residential landlord/tenant law was the "impetus for the modern trend imposing a duty upon commercial landowners." Donna Lee Welch, Case Comment: Ann M. v. Pacific Plaza Shopping Center: The California Supreme Court Retreats from its "Totality of the Circumstances" Approach to Premises Liability, 28 Ga. L. Rev. 1053, 1064 n.64 (1994).

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n43 With this said, the first theory listed above, strict liability, sparingly adopted in residential suits, does not seem to have ever been successfully applied in the commercial context. See, e.g., Sharp, supra note 23, at 73-76 (citing Davis v. Allied Supermarkets, Inc., 547 P.2d 963, 965 (Okla. 1976), which held that in spite of the **risk** spreading policy behind strict liability, "it does not seem that shifting the financial loss caused by crime from one innocent victim to another innocent victim is proper"); Jeffrey Fowler, Rowe v. State Bank of Lombard: The Key to Unlocking a Landlord's Duty to Provide Security, 23 J. Marshall L. Rev. 131 (1989) (discussing Rowe v. Lombard State Bank, 531 N.E.2d 1358 (Ill. 1988) which rejected strict liability but held the commercial landlord liable on other grounds). Further, even those who would argue for increased application of strict liability for landlords in the residential setting seem to agree that its application to the commercial setting is not appropriate. See Frank F. Gibson & Elliot Klayman, Landlord Liability: A New Dimension, 25 Am. Bus. L.J. 1, 27-28 (1987) (holding that the policy considerations favoring strict liability in the defective products context apply in the residential but not commercial leasehold context). Therefore, this theory is not discussed here.

n44 See Kline, 439 F.2d at 481.

n45 See Glesner, supra note 29, at 690.

n46 See id. at 691.

n47 See id. at 690.

n48 Kline, 439 F.2d at 484.

n49 See Bob Gibbins & Yii-Chwen (Francis) Pan, Landlords and Third-Party Criminal Conduct, Trial, Mar. 1986, at 48. Many courts that have adopted this rule cite the Restatement of Torts in support, which states that:

one who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the **risk** of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts section 323 (1977). This is effectively an exception to the "no duty to rescue" rule, which holds that "the fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." section 314.

n50 See John M. Adler, Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others, 1991 Wis. L. Rev. 867, 884.

n51 See Glesner, supra note 29, at 696. A landlord's failure to provide adequate security could also result in a breach of contract claim. See id. at 698 n.88.

n52 See David C. Markatos, **Property** Law: The Growing Accountability of Landlords for Third-Party Criminal Attacks, 1991 Ann. Surv. Am. L. 501, 508. Cases brought under this theory are often fact-intensive and result in unpredictable jurisprudence. See id.

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n53 See id. at 510.

n54 See Glesner, supra note 29, at 696. See also Jardel Co., Inc. v. Hughes, 523 A.2d 518 (Del. 1987) (finding that since mall owner had voluntarily undertaken to provide a security program, sufficiency of that program constituted jury question).

n55 In the residential context, a "handful" of courts have held that the implied warranty of habitability should include a duty to provide security. See Markatos, supra note 52, at 521-22. In the commercial context, a duty to provide security "would have to be confined as an independent material provision of the lease." Haines, supra note 34, at 326 n.91. While some commentators have argued for the extension of residential habitability warranties to certain commercial settings, see Robert A. Levinson & Michael N. Silver, Do Commercial **Property** Tenants Possess Warranties of Habitability? 14 Real Est. L.J. 59 (1985), in practice such application has been restricted. When used in the commercial context, this theory has generally involved conditions existing at the inception of the lease. See Gibbons & Pan, supra note 49, at 48.

n56 See Sharp, supra note 23, at 30. This claim may also give rise to a tort claim of misrepresentation or fraud. See e.g., O'Hara v. Western Seven Trees Corp. Intercoast Management, 142 Cal. Rptr. 487, 491 (Cal. Ct. App. 1977) (holding that cause of action exists if tenant justifiably relies on landlord's misrepresentations concerning safety). But see Cooke v. Allstate Management Corp., 741 F. Supp. 1205, 1216 (D.S.C. 1990) (stating that landlord's opinion that apartment was "safe" was inadequate to support claim for misrepresentation).

n57 Pacelle, supra note 3, at B10.

n58 See id.; see also infra notes 190-99 and accompanying text (discussing the issue of whether discovery of previous security studies should be allowed).

n59 See Pacelle, supra note 3, at B10; Douglas Feiden, D. Witter Fights WTC Lease, Says It Was Duped by PA, Daily News (New York), July 25, 1996, at 36. Some have suggested that Dean Witter's suit is largely motivated by business reasons rather than security concerns. While the firm locked in to a long-term lease at $ 35 per square foot, rents in the building have generally decreased to the point that some tenants now pay less than $ 25 per square foot. See id.

n60 See Glesner, supra note 29, at 698 n.88. Further, when contract claims are brought, they often appear as alternatives to claims based on tort theories and are therefore cursorily pleaded and prone to dismissal by courts. See Markatos, supra note 52, at 516.

n61 See Markatos, supra note 52, at 516.

n62 See Richmond Medical Supply Co. v. Clifton, 369 S.E.2d 407 (Va. 1988).

n63 See Markatos, supra note 52, at 516.

n64 See infra notes 228-36 and accompanying text.

n65 See Glesner, supra note 29, at 688.

n66 See W. Page Keeton et al., Prosser and Keeton on the Law of Torts section 30, at 164-65 (5th ed. 1984).

n67 With this said, the last basis for negligence claims, statutory violations, appears primarily in the residential context. Statutory requirements for the provision of different security measures do appear to be a growing trend, however, and may be applied with more

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frequency in the commercial context in the future. A landlord's compliance with statutory requirements usually does not protect him from liability, however, since they generally represent only minimum measures. See Glesner, supra note 29, at 702. For these reasons, and since no statutes currently address required antiterrorism measures, this basis for liability is not addressed extensively here, although it is suggested infra at notes 24446 and accompanying text.

n68 Of these questions, the issue of when an act is foreseeable (thereby establishing duty) is the most troublesome and is discussed in detail in the text. The issue of proximate cause, or more specifically, determining when a criminal act intervenes between the negligence of the landlord and injury to the tenant, is also dependent on foreseeability since if the defendant should have foreseen the criminal's actions, such actions will not be considered superseding causes. See Restatement (Second) Torts sections 448-49 (1977). Technically, the plaintiff must also prove the threshold issue that the landlord's act or omission was the legal cause of his injury as well. However, courts have apparently not discussed this concept in detail. One author contends that while it is not clear that the causal link between provisions of security and likelihood of crime is legally sufficient, "situational crime prevention" studies do find that there is some relationship between opportunity and crime. Madeline Johnson, Landlord's Responsibility for Crime: Determining Legal Causation, 17 Real Est. L.J. 234, 241 (1989). Similar arguments may arise with regard to the relationship between "opportunity" and the incidence of terrorism, although terrorists' motivations differ from those of "ordinary" criminals. See infra notes 140, 145 and accompanying text.

While it has apparently not been a recurring issue in the regular crime cases, if landlords are held liable for the effects of terrorist acts, they may attempt to argue that the behavior of controversial tenants (e.g., performing abortions) itself constitutes a superseding cause that precludes their being held liable. See infra notes 211-24 (discussing the effects of landlord liability on controversial tenants).

The reasonableness of a landlord's response also involves issues of foreseeability since landlords effectively need to predict what types of security will prove adequate to prevent attempted crimes. However, courts have not been consistent in finding what measures constitute adequate security. They have addressed the sufficiency of any number of security measures, from security guards to alarms to lighting, in different ways. See Jardel Co. v. Hughes, 523 A.2d 518, 525 (Del. 1987) (holding that whether one security guard on premises for each nightly shift was sufficient was question for jury); Peacock's, Inc. v. Shreveport Alarm Co., 510 So. 2d 387, 400 (La. Ct. App. 1987) (finding landlord partially liable for negligently allowing access to alarm controls); Shepard v. Drucker & Falk, 306 S.E.2d 199, 202 (N.C. Ct. App. 1983) (allowing landlord to present testimony comparing lighting at apartment complex with other complexes, since it was proper attempt to show whether reasonable care had been exercised). But see Carrigan v. New World Enterprises, Ltd., 446 N.E.2d 265, 270 (Ill. App. Ct. 1983) (holding landlord's breach of contractual obligation to maintain burglar alarm was not sufficient to trigger liability for tenant's rape). In one case, the court denied recovery where "the plaintiff failed to adduce testimony from a qualified expert in the field of building security thereby leaving the jury" to speculate regarding the deficiencies in security, if any, at the time of the incident. Iannelli v. Powers, 498 N.Y.S.2d 377, 382 (N.Y. App. Div. 1986). Certainly, questions of when more sophisticated antiterrorism security measures are reasonable will be even more difficult for courts to handle. For example, when are crash barriers and photo I.D. access reasonable? This issue seems destined to foster a battle of experts at trial. See supra note 7 and accompanying text; infra notes 142-63.

n69 See, e.g., Glesner, supra note 29, at 707.

n70 See id. at 704.

n71 224 N.W.2d 843 (Mich. 1975).

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n72 Id. at 849 (citation omitted).

n73 See Glesner, supra note 29, at 703. Unlike under the special relationship formulation, there is no presumption that landlord's have a duty to protect tenants. Id.

n74 531 N.E.2d 1358 (Ill. 1988).

n75 Id. at 1367-68. Some commentators have noted that this dual role of foreseeability is problematic. While foreseeability is usually understood to define and limit the scope of a pre-existing duty, it is not generally used to "justify the imposition of duty." Haines, supra note 34, at 339; see also Sharp, supra note 23, at 21.

n76 Kline v. 1500 Massachusetts Avenue Apartment Corp., 439 F.2d 477, 480 n.3, 483 (D.C. Cir 1970).

n77 Samson v. Saginaw Professional Building, Inc., 224 N.W.2d 843, 851 (Mich. 1975).

n78 See Old v. Lefmark Management Co., 1995 WL 500619, at *2 (Tex. Ct. App. Aug. 24, 1995). The letter also requested that "if the results of this survey indicate additional security is needed for the common areas, please take the appropriate action necessary to protect our employees and customers." Id. The actual notice standard is also apparently reflected in Rowe, where plaintiffs had to prove that the landlord actually knew that unauthorized possession of master keys would lead to illegal entry. See 531 N.E.2d at 1367-68,

n79 See Fowler, supra note 43, at 145. In some cases, it is clear that courts have also used the defendants' security precautions as evidence of their "constructive notice" of **risks.** See Hardie, supra note 16, at 400.

n80 See infra notes 190-99 and accompanying text (discussing the existence of a security report warning of susceptibility to terrorist attacks).

n81 See Fowler, supra note 43, at 145.

n82 See Welch, supra note 42, at 1060.

n83 See id.

n84 See Markatos, supra note 52, at 513 (quoting the court in Isaacs v. Huntington Memorial Hosp., 695 P.2d 653 (Cal. 1985) (criticized by Ann. M. v. Pacific Plaza Shopping Center, 863 P.2d 207 (Cal. 1993))). This prompted one Florida court in rejecting this definition to declare that it would not "sacrifice the first victim's right to safety upon the altar of foreseeability by slavishly adhering to the . . . notion that at least one criminal assault must have occurred on the premises before the landlord can be held liable." Paterson v. Deeb, 472 So. 2d 1210, 1219 (Fla. Dist. Ct. App. 1985) (rejecting the prior similar incidents rule).

n85 See Markatos, supra note 52, at 513. In jurisdictions following this rule, there is a general sense that in order to qualify as "prior similar incidents," crimes must be on the premises, be sufficient in number and recent enough to put the landlord on notice, and be sufficiently similar in nature to the incident in question. See Glesner, supra note 29, at 706.

n86 695 P.2d 653 (Cal. 1985). See Welch, supra note 42, at 1061.

n87 863 P.2d 207 (Cal. 1993).

n88 See id. The court went on to note, however, that the foreseeability of the harm should

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I. Analysis of Potential Claims

A. Victim Compensation for Terrorist Attacks in the United States--Statutory Claims

While there are some statutory provisions addressing victim compensation for acts of terrorism, they have traditionally been inadequate for a number of reasons. For example, the only appropriation aimed at providing direct assistance to victims of the Oklahoma City bombing seems to be the $ 39 million Community Development Block Grant. [17] Other statutory provisions, which theoretically apply to victims of terrorism or other international incidents, apply only in narrow sets of circumstances. For example, the Torture Victim Protection Act provides that a "private cause of action in federal court against individuals who commit such abuses while acting under 'actual or apparent authority, or color of law, of **[*161]** any foreign nation,'" may be brought by or on behalf of a United States citizen who was a victim of torture or summary execution. [18] The Warsaw Convention [19] addresses incidents on international airlines, and the Victims of Terrorism Compensation Act provides relief only to victims associated with the United States government. [20] Moreover, even those victims who do fall under one of these "patchwork" statutory provisions are generally not fully compensated. [21] Thus, "it is inevitable . . . that there will be individuals, including United States citizens, who will be victimized by terrorism and forced to suffer injury without remedy." [22] If statutory recoveries are insufficient, victims are likely to turn to the courts, bringing civil suits against one of the parties involved to obtain compensation for their injuries. [23]

B. Civil Litigation--Background

In the types of terrorist acts contemplated here, parties that could be potentially held responsible by victims include the terrorist organization, security firms, and landowners. [24] Bringing suit **[*162]** against the responsible terrorist organization itself is not unheard of. For example, the son and daughter of Leon Klinghoffer sued the Palestinian Liberation Organization ("PLO") after their father was murdered during the Achille Lauro incident. [25] However, as in ordinary criminal cases, plaintiffs are not likely to target those parties where recovery is difficult due to insufficient or hard-toreach assets. Security firms or landlords would seem to provide an easier recovery. Indeed, if it can be proved that a security firm was negligent in its provision of services, it should be susceptible to liability itself. [26] However, a landlord would likely not escape liability even in that case, because if a landlord has an affirmative duty to protect the plaintiff, then the landlord remains liable for negligence in selecting, directing, or supervising the security agency. [27] The likely target for injured plaintiffs will be the solvent party with the most broadly defined responsibility for protection--the landowner. [28]

C. Landowner Liability for Criminal Acts of Third Parties

This landowner-as-target hypothesis is borne out by the many suits filed as a result of criminal acts of third parties. A victim of a terrorist (or criminal) act could file a complaint against an allegedly negligent landlord for failing to secure the premises under a number of different theories, with differing likelihoods of success. While landlords now have some duty to protect their tenants from third-party crime in practically every jurisdiction, [29] the extent of **[*163]** such duty varies greatly depending upon the jurisdiction, and sometimes even the court. [30]

1. Background

For a full understanding of the problems involved in predicting the success of these claims, some background is necessary. The unsettled state of the law in this area is due to several factors. Traditionally, landlords did not have any special duty regarding the security of their tenants, a corollary of the rule that private parties generally have no duty to rescue others. [31]

still be balanced against the burden of the duty imposed--reserving the questions of whether a commercial leasehold that is "inherently dangerous" or in the immediate proximity to a substantially similar business that has experienced prior crimes could trigger a duty without itself being the site of any prior similar incidents. See id. at 215-16; Welch, supra note 42, at 1065-66.

n89 As one commentator noted, "The Ann M. Court reasoned that landowners would unjustly become the insurers of public safety if plaintiffs could prove the degree of foreseeability required to impose liability without offering evidence of prior similar crimes." Mark Bianchi, Tort-Law--Revisiting Isaacs: A Commercial Landowner's Duty to Protect Against Criminal Acts of Third Parties--Ann M. v. Pacific Plaza Shopping Center, 28 Suffolk U. L. Rev. 306, 311 (1994). "The court decided to revisit Issacs in light of the increase in violent crime and pressure from the court of appeals." Id. at 311 n.29 (citations omitted).

n90 See Glesner, supra note 29, at 679-82 (noting a correlation between increasing crime rates and landlord liability in general); Milich, supra note 42, at 236 (noting that "not to be overlooked as influencing modern-day judges is the rising crime rate."); Welch, supra note 42, at 1057 (noting that "crime problems of epidemic proportions caused courts to recognize . . . exceptions to their judicially created no-duty rules.").

n91 See infra Part III discussing alternatives.

n92 See Markatos, supra note 52, at 514. Obviously, prior similar crimes on the premises remain highly probative under this theory, which effectively holds only that an absence of prior similar crimes does not foreclose liability. See, e.g., Whittaker v. Saraceno, 635 N.E.2d 1185, 1188 (Mass. 1994) ("The previous occurrence of similar criminal acts on or near a defendant's premises is a circumstance to consider, but the foreseeability question is not conclusively answered in favor of a defendant landlord if there has been no prior similar criminal act.").

n93 See, e.g., Kaufman, supra note 15, at 97 ("To date, only California has adhered to this rule in the business-invitee context.").

n94 See Markatos, supra note 52, at 514.

n95 See Green Cos. v. DiVencenzo, 432 So. 2d 86 (Fla Dist. Ct. App. 1983).

n96 Daniel P. Kennedy, Inadequate Security and Premises Liability, Trial, June, 1991, at 56.

n97 If a landlord is aware of such reports, at some level of specificity to her premises she may be considered to have notice under even the most restrictive definition of foreseeability. See supra notes 76-81 and accompanying text (discussing the role of notice in varying definitions of foreseeability).

n98 See Kaufman, supra note 15, at 97.

n99 See id. at 98.

n100 See Sharp, supra note 23, at 32-34.

n101 See infra notes 164-69 and accompanying text (discussing the use of warnings against terrorist attacks).

n102 See infra notes 211-24 and accompanying text (discussing the negative implications to these types of tenants of imposing this duty on landlords).

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n103 Hardie, supra note 16, at 367.

n104 In fact, foreseeability has been held to just be a tool of the courts; changing as needed to mask public policy decisions about how broad a landowner's duty should be. See Hardie, supra note 16, at 393; Welch, supra note 42, at 1057 n.25.

n105 For example, one commentator feels that:

Courts are uncomfortable with jury determinations of foreseeability as an element of duty in causes of action that have not yet matured and that have not yet been established as common theories with which the court is familiar. Until this maturation occurs, courts simply will continue to decide cases on the basis of policy considerations.

Hardie, supra note 16, at 392. Of course, this does not bode well for the development of a clear definition of foreseeability in landowner liability for acts of terrorism.

n106 See Johnson, supra note 68, at 247. This is basically a permutation of the famous "Hand formula." See United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). One commentator has noted, however, that in an evaluation of this "formula" for criminal acts, the third factor, probability, has been underplayed since it is the most difficult to evaluate. See Johnson, supra note 68, at 248. Johnson further notes that empirical studies suggest a causal link between physical conditions controlled by the landlord and crime, but that there is no way to determine the exact probability of a given crime given a certain condition. See id.; supra note 68.

n107 Further, in evaluating available alternatives, the landowner is generally found culpable if a reasonable person would have chosen an option that would have avoided the injury. See Johnson, supra note 68, at 248. However, reasonable landlords have much less information about what measures will prevent the commission of terrorism than they do about regular crime.

n108 See Hardie, supra note 16, at 390.

n109 See Kaufman, supra note 15, at 100.

n110 As one commentator has noted:

Courts and commentators have long recognized that any case which goes to a jury under general instructions on the foreseeability of a heinous crime almost invariably results in a verdict for the plaintiff. With hindsight, juries inevitably find that more security should have been employed since the security provided was in fact inadequate. It is precisely for this reason that most cases surviving a motion for summary judgment result in large settlements for the plaintiffs.

Id.

n111 In other words, spend more on protection than the theoretically efficient legal standard would require in order to take into account the court's "margin of error" in determining fault. See Kaufman, supra note 15, at 105.

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n112 See id.

n113 See Sharp, supra note 23, at 19.

n114 There is no reason for plaintiffs not to forego suit because their legal fees are a percentage of recovery; there is little incentive for defendants to proceed to trial because they do have real legal costs and the probability of success and range of potential verdicts will be hard to quantify. See Hardie, supra note 16, at 405. This arguably puts defendants in the position of settling on amounts in excess of optimum.

n115 See supra note 42.

n116 See Royal Neckwear Co. v. Century City, Inc., 252 Cal. Rptr. 810 (Cal. Ct. App. 1988) (holding that a commercial landlord does not owe a duty to safeguard tenant's **property** from foreseeable criminal activity by third parties); Craig v. AAR Realty, 576 A.2d 688 (Del. Super. Ct. 1989) (denying liability of owner of large mall who did not retain control); Czech v. Aspen Indus. Ctr., 368 A.2d 938 (N.J. Super. 1976) (rejecting liability for landlord, the court distinguished commercial from residential tenancies in terms of fairness and public interest); Exxon v. Tidwell, 867 S.W.2d 19, 21 (Tex. 1993) (stating that the general rule in a commercial setting "is that a landlord is not liable to a lessee for injuries caused by an unsafe condition, which can include the unreasonable **risk** of harm from criminal intrusions, unless the landlord was aware of the latent dangerous condition at the time the premises were let."); Glesner, supra note 29, at 684 n.16 (noting that "many courts apply a lower standard of security for commercial buildings").

n117 See Glesner, supra note 29, at 684 n.16.

n118 See, e.g., Gibson & Klayman, supra note 43, at 27-28 (noting that "in most instances [commercial tenants] bargaining power is comparable--or perhaps superior--to that of the landlord. They can protect themselves by demanding express warranties that improve safety").

n119 See Selvin, supra note 37, at 328 n.61 (quoting Dietz v. Miles Holding Corp., 277 A.2d 108, 110 n.2 (D.C. App. 1971) which stated that "the residential housing market offers markedly less alternatives to tenants than does the commercial office building market").

n120 See id. at 323. For example, most commercial buildings by definition must be open to the public during the business day. In one case involving a government building, the court held that it was that nature of a such a building that it "remain accessible and open to the steady flow of dissimilar citizens" and that this was a reality that the court should realize in imposing liability. Id. at 327 (quoting Turner v. United States, 473 F. Supp. 317 (D.D.C. 1979)).

n121 See id. at 325.

n122 An apartment building, for example, is fairly self-contained. A commercial premises, like the World Trade Center, can extend over a city block (parking garages, walkways, plazas, etc.). Theoretically, the landlord's protective liability should diminish as does his control--varying with proximity, although it is not clear where it should end. See Selvin, supra note 37, at 330; Sharp, supra note 23, at 14 n.3.

n123 See Selvin, supra note 37, at 328.

n124 See id. at 324.

n125 See Gibson & Klayman, supra note 43, at 27. This consideration may not translate

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well to the terrorism context because of the often sophisticated and extensive security and structural measures required. For example, in the World Trade Center case, Dean Witter, certainly a sophisticated tenant, claims to have relied on the Port Authority's representations. See supra notes 57-59 and accompanying text.

n126 This rationale does not necessarily imply the same result if only one tenant occupies the leasehold, since then the tenant would be best able to provide protection. See Comment, Torts--Landlord-Tenant Relations--Landlord has Duty to Take Reasonable Precautions to Protect his Tenants Against Criminal Acts of Third Parties--Kline v. 1500 Massachusetts Ave. Apartment Corp., 45 N.Y.U. L. Rev. 943, 951 n.53 (1970) [hereinafter Landlord-Tenant Relations].

n127 A final difference between commercial and residential tenancies is that a business expects customers and has employees. It has been assumed here that invitees, employees of tenants, and tenants are treated in the same manner (i.e., entitled to the same protection). Indeed this seems to be the case in most jurisdictions. See Doyle v. Exxon, 592 F.2d 44 (2d Cir. 1979) (finding duty to protect employee of tenant); Ann M. v. Pacific Plaza Shopping Ctr., 863 P.2d 207, 212-13 (Cal. 1993) (stating that because the commercial tenant generally is not a natural person and because it acts through its employees, "it cannot be seriously asserted that a tort duty that a landlord owes to protect the personal safety of its tenants should not extend to its tenant's employees"); Haines, supra note 34, Landlord-Tenant Relations, supra note 126, at 950; Selvin, supra note 37, at 325. But see Cornpropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975) (denying plaintiff-shopper's complaint stressing both the absence of landlord-tenant relationship and that the case involved commercial vs. residential **property)**.

Under this assumption, standards of liability would theoretically not be affected by the difference. A complete discussion of this issue is beyond the scope of this Note, therefore it is assumed for present purposes that invitees and employees of tenants are treated in the same manner as tenants wherever possible. However, employees of tenants will often be precluded from filing suit due to worker's compensation statutes. See supra note 24.

n128 See supra note 30 and accompanying text.

n129 While this is the case with many types of claims, it is particularly disturbing in the context of terrorism where preventive measures seem most effective when conducted based on a consistent national, if not international, scale. See infra notes 158-63 and accompanying text.

n130 See Glesner, supra note 29, at 761; supra notes 111-12.

n131 See Glesner, supra note 29, at 773.

n132 See id. at 707; supra note 113 and accompanying text.

n133 One additional issue beyond the scope of this paper is the treatment of government entities in their roles as landlords. As evidenced by the Oklahoma City bombing, government buildings may often be the target of terrorist attacks. While there may be certain filing or notification requirements specific to government landlords, it appears that there are tenable arguments that there should be no difference between suing government and private landlords, since the former are acting in a proprietary capacity. See Wise, supra note 24, at 1. See generally, Attorney General's Advocacy Institute, U.S. Dept. of Justice, Federal Tort Claims Act Litigation Seminar (1990); Irvin M. Gottlieb & Paul H. Gantt, Uncle Sam as a Landlord under the Federal Tort Claims Act (1967).

n134 For example, in other areas of the law, the success of a claim often depends, at least in part, on who gets to define it; that is, whether an act results in the violation of a federal

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statute (as defined in federal court) or in a breach of contract (as defined in state court).

n135 Cases brought as a result of terrorist bombings on airlines, such as the Pan Am incident over Lockerbie, involve very different legal theories than those at issue here since the standard for liability is outlined statutorily under the Warsaw Convention. See, e.g., In re Air Disaster at Lockerbie Scotland on December 21, 1988, 37 F.3d 804 (2d Cir. 1994). Other United States cases have involved acts that could be defined as terrorism, but do not raise the same issues as the types of acts involving domestic landowners as contemplated here. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (relatives of Israelis killed in a PLO attack brought suit under the Alien Tort Claims Act); New Market Investment Corp. v. Fireman's Fund Ins. Co., 774 F. Supp. 909 (E.D. Pa. 1991) (Chilean grapes laced with cyanide seized at customs). More random acts of retribution not involving political overtones (e.g., acts committed by disgruntled employees and sociopathic individuals) are also not addressed here. See, e.g., Douglas Waller & Tom Morganthau, Caught by Surprise, Newsweek, Mar. 8, 1993 at 28 (quoting Jerry Bremer, the State Department's top counterterrorism official in the 1980s who commented after the World Trade Center bombing, "We shouldn't automatically assume this is the beginning of a new world war. . . . It's entirely plausible that this is some disgruntled employee who's been fired."); cf. Vrndavan v. Malcolm, No. 64839, 1994 WL 86225 (Ohio Ct. App. March 17, 1994) (involving a lone gunman entering Cleveland public library at noon and randomly shooting three people). Finally, a number of domestic cases use the term "terrorism" or "terroristic" but really involve more ordinary, random criminal activity, such as "terroristic threatening," which is a misdemeanor in some states. See, e.g., Parker v. Norris, 859 F. Supp. 1203 (E.D. Ark. 1994).

n136 Porras, supra note 6, at 125. See also Captain Bruce T. Smith, Assertion of Adjudicatory Jurisdiction by United States Courts Over International Terrorism Cases, Army Law., Oct. 1991, at 15 (noting that each state has advanced a different definition of the term; in effect, "one man's terrorist is another man's freedom fighter"). The term terrorism has therefore been held to be "Humpty Dumpty," or anything we want it to be. See Porras, supra note 6, at 124; see also, R. Thackrah, Terrorism: A Definitional Problem, in Contemporary Research on Terrorism 24 (Paul Wilkenson & Alasdair M. Stewart eds., 1987). A federal statute currently defines terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents," usually intended to influence an audience. 22 U.S.C. section 2656f(d)(2) (1994) (prescribing annual country reports on terrorism by the Secretary of State). The United States Department of Defense calls it "the unlawful use or threatened use of force or violence against individuals or **property,** with the intention of coercing or intimidating governments or societies, often for political or ideological purposes." Smith, supra, at 15.

n137 See Porras, supra note 6, at 144.

n138 See Waller & Morganthau, supra note 135, at 28 (contending that the reason for the change are intelligence agencies' increased abilities to monitor terrorist activities).

n139 See infra notes 152-54 and accompanying text.

n140 See Ayaz R. Shaikh, A Theoretic Approach to Transnational Terrorism, 80 Geo. L.J. 2133, 2174 n.15 (1992).

n141 And further, they should affect who we want to have define (courts vs. legislatures) the behavior that constitutes terrorism. A case-by-case development of a definition in the courts would seem destined to perpetuate the unpredictability and inequity currently associated with foreseeability.

n142 See supra note 15 and accompanying text.

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n143 Greenberger, supra note 8, at A1.

n144 "If you want to counter terrorism, 80 percent is a matter of getting good intelligence. . . . You can fiddle around with the other 20 percent all you want, but in terms of prevention, intelligence is the key." Masland et al., supra note 7, at 56-57 (quoting L. Paul Bremer, who headed President Reagan's counterterrorism office).

n145 See Shaikh, supra note 140, at 2134.

n146 Mark A. Hofmann, Perils an Impossible Task, Bus. Ins., June 12, 1995, at 3.

n147 "The critical thing is to keep the weapons as far from the building as possible, by imposing some setbacks." Id. (quoting Eve Hinman, security analyst with Failure Analysis Associates). Examples of setbacks include pop-up bollards, such as pipes filled with concrete that can be recessed to street level and raised when needed to restrict vehicular traffic. See id.

n148 "In a bomb attack, generally speaking, the primary sources of both **property** damage and bodily injury is flying glass." Id. (quoting Ron Massa, president of Loron Corp., a high-tech security consultant, who also noted that a 1993 Irish Republican Army bombing in London showered the surrounding area with 700 tons of shattered glass). After the Oklahoma City bombing, more than 400 buildings in the area had glass broken and about 75% of the people injured were hurt by flying glass. See Hofmann, supra note 146, 148, at 3; see also Leslie Scism & Joe Davidson, Insurance Losses in Oklahoma Bombing Seen Topping Several Hundred Million, Wall St. J. May 4, 1995, at A4. Preventive measures include installing laminated glass, like that used in cars. Hofmann, supra note 146, at 3.

n149 Bombs, for example, produce enormous vertical thrust capable of "peeling roofs right off like a sardine can," requiring that they essentially be tied down. Hofmann, supra note 146, at 3. As opposed to retro-fitting buildings for restricting access, structural hardening is much more difficult, is costly, and is of questionable effectiveness. The Oklahoma City bombing made us all familiar with the structural concerns present in trying to protect against a bomb blast. See id.

n150 See id. For example, security bars on windows can hamper a tenant's escape from a burning building.

n151 "I think the answer has to be in the prevention area as opposed to protection." Id. (quoting Fred Deacon, highly respected **risk** engineering manager for Kemper Insurance).

n152 Christopher Dickey, Car Bombs: A Potent Weapon of Fear, Newsweek, Mar. 8, 1993, at 29.

n153 See Waller & Morganthau, supra note 135, at 28.

n154 Dickey, supra note 152, at 29; see also Sunday Today, (NBC television broadcast, Jan. 7, 1996) (interviewing Brian Jenkins, a terrorism expert who noted a trend discernible in the 1990's toward the increasing incidence of large-scale indiscriminate violence exemplified by car bombs).

n155 See James Adams & Maurice Chittenden, 18-Minute Countdown To Carnage, Sunday Times (London), July 28, 1996, section 1, at 2.

n156 See id.

n157 Shaikh, supra note 140, at 2141-42. In 1990, for example, "hard" targets (military, government, and diplomatic) accounted for 25% of attacks, businesses and other targets

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accounted for 75%. See id. at 2142 n.42 (citing United States Department of State, Patterns of Global Terrorism: 1990 37 (1991).

n158 Howard M. Shapiro, The FBI in the 21st Century, Address at the Cornell Law School (Oct. 18, 1994), in 28 Cornell Int'l. L.J. 219, 223 (1995); see also James Q. Wilson, The Case for Greater Vigilance, Time, May 1, 1995, at 73 ("Terrorist groups . . . are best attacked by infiltration. This means either planting an undercover agent in their midst or recruiting one of their members as an informant. This is the job of the FBI.").

n159 See Shapiro, supra note 158, at 223.

n160 See id.

n161 See Wilson, supra note 158, at 73.

n162 Greenberger, supra note 8, at A1.

n163 See, e.g., Shaikh, supra note 140, at 2134.

n164 See James Rainey, Threats of Terrorism: When to Tell the Public, L.A. Times, July 4, 1995, at 1, available in 1995 WL 2062176.

n165 See id.

n166 See id.

n167 See supra notes 76-81 and accompanying text. For example, while the United States Department of Transportation is now required to assess the safety of foreign airports and issue warnings when they do not meet safety standards, airlines themselves decide what, if anything, to tell passengers about known threats. Many airline officials feel compelled to disclose threats because of litigation following the Pan Am Lockerbie incident, where juries awarded almost $ 40 million to plaintiffs for Pan Am's failure to take proper precautions. A terrorist bomb downed Pan Am Flight 103 over Lockerbie, Scotland in 1988. Travelers on the flight were not informed that terrorists had threatened several flights, like Flight 103, that had originated in Frankfurt, Germany.

n168 See Rainey, supra note 164, at 1.

n169 See id.

n170 See Pacelle, supra note 3, at B1. One New York insurance lawyer notes that "insurance companies do not pay any large losses without a fight. I call it insurance nullification by litigation." Id.

n171 Id. (quoting Phoenix Assurance lawyer Blair Fensterstock).

n172 See, e.g., Wise, supra note 2, at 1 (noting that one firm represents 20 insurance companies seeking to recover over $ 75 million in claims).

n173 For damage attributable to a terrorist attack, any number of policies might apply. Direct physical damage to insured **property** as a result of fire, smoke, or vibrations is generally covered by a **property** policy. Indirect losses resulting from a tenant's loss of use of their **property** may be covered by either a **property** or business interruption policy. General liability policies should cover tenants for damages they may incur because of damage to a third party (e.g., if a customer's business is interrupted because of the terrorist act). See Rhonda D. Orin, Insurance May Provide Glimmer of Light for Darkened World Trade Center Businesses, N.Y. L.J., Mar. 10, 1993, at 1.

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n174 Using the World Trade Center bombing as an example, indirect losses alone can often be significant. New York City officials have estimated that companies and government agencies could lose $ 692 million if the World Trade Center was closed for a week. See id.

n175 Id. at 7.

n176 Id. at 6.

n177 See id.

n178 See Orin, supra note 173, at 1. The court, in Pan American World Airways v. Aetna Casualty & Surety Co., 505 F.2d 989 (2d Cir. 1974), relied on the fact that Pan Am was covered by an "all **risk**" policy, where all **risks** not excluded are automatically included.

n179 See Orin, supra note 173, at 1 (citing Emons Indus. Inc. v. Liberty Mut. Fire Ins. Co., 545 F. Supp. 185, 189 (S.D.N.Y. 1982) ("New York law places the burden of proof upon the **insurance** company to show any **exclusions.**")).

n180 Hartford said that there should be no problem with coverage because under its policies the **exclusion** only applies if **war** has been declared. Aetna argued that it was too soon to say how the **exclusion** would be applied. See Wise, supra note 24, at 1. The spokesperson for Hartford said that standard clauses (in this case coverage **exclusions** for damage attributable to "insurrection and acts of **war**") are recommended to the industry by the **Insurance** Services Office, a trade organization, and that each company has its own interpretation of such language. Id.

n181 See William B. Bice, Comment, British Government Reinsurance and Acts of Terrorism: The Problems of Pool Re, 15 U. Pa. J. Int'l. Bus. L. 441, 448 n.39 (1994) (stating that the World Trade Center provides an ideal example of a no-**exclusion** policy). Should incidences of domestic **terrorism** continue, it may not be long until domestic insurers covering U.S. commercial **risks** attempt to use **terrorism exclusions** as well.

n182 See supra note 173 and accompanying text.

n183 See Today's News Update, N.Y. L.J., Aug. 2, 1994, at 1. The World Trade Center cases were consolidated on June 4, 1994 upon a motion of the Port Authority which argued that (1) the claims all involved Port Authority's liability; (2) the salient facts involved (place, date, time) were the same in every case; (3) the fact that there were some issues of law and fact that were not common should not defeat the motion to consolidate since there was at least one important issue of law/substantial fact in common; and (4) consolidation would avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent injustice resulting from divergent decisions based on the same facts. See Green & Tripathi, supra note 1, at 48-49.

n184 As Justice Sklar noted in the course of the first conference of the World Trade Center litigation, "We have to have coordination to avoid wasting your time and my time, . . . failure to organize . . . would be anti-ecological. . . ." Wise, supra note 2, at 1.

n185 Courts have avoided the use of class actions for "mass accidents," perhaps largely because of differences between plaintiffs' injuries or damages. See Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986) (allowing certification of a class action for asbestos claims).

n186 In the World Trade Center litigation, of the roughly 114 lawyers representing the 661 claimants, only four objected to the creation of the committee, and they will manage their cases separately. See Today's News Update, supra note 183, at 1. The lawyer leading the

committee, Blair Fensterstock, represents Phoenix Assurance Co., one of the insurance companies attempting to subrogate claims related to the blast. See Wise, supra note 2, at 1, 5; see also supra note 9 (discussing the types of claims filed). In making recommendations for the committee, Fensterstock acknowledged that it is not always easy to please the variety of plaintiffs. For example, some lawyers with personal injury claims are concerned that their clients' interests might get lost if the committee is dominated by lawyers representing commercial clients. See Wise, supra note 2, at 5.

n187 See supra note 7.

n188 Fed. R. Evid. 407. New York state courts do not follow the Federal Rules of Evidence, but they do follow a common law rule which holds that evidence of subsequent remedial measures is not admissible at trial to prove the negligence or culpable conduct of a defendant. See Particia A. Brass, Federal Rule of Evidence 407: Should It Apply to Products Liability, 11 Touro L. Rev. 253, 280 (1994).

n189 Fed. R. Evid. 407.

n190 See Matter of World Trade Center Bombing Cases, N.Y. L.J., Apr. 14, 1995, at 26.

n191 Id. "The public interest privilege applies to 'confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or their sources should not be divulged.'" Id. (quoting Cirale v. 80 Pine St. Corp., 316 N.E.2d 301, 303 (N.Y. 1974)). While perhaps limited to quasi-governmental agencies like the Port Authority, many of the policy arguments presented by the public interest privilege issue are likely to be raised in admissibility questions generally. For example, in arguing against discovery of the documents on this basis, the Port Authority emphasized that in preparing the reports, employees consulted with the "FBI, CIA, the National Security Agency, the Department of Defense, Scotland Yard, and intelligence and counterintelligence agencies of Israel, France, Switzerland, and Italy," and claimed that revealing the contents of the report would discourage such cooperation in the future. Matter of World Trade Center Bombing Cases, supra note 190, at 26. Further, the Port Authority argued that the documents should not be revealed because they contained information which could adversely affect security if used by a "person intending to engage in activity injurious to persons and **property** at the World Trade Center. . . ." Id. Finally, the Port Authority argued that the plaintiffs would not be foreclosed from establishing that their injuries resulted from Port Authority's lack of due care since they could go to other sources (e.g., expert testimony) to establish negligence. See id. at 27.

The plaintiffs responded that the public interest privilege should be construed narrowly because: (1) the public interest privilege would not apply to a private landlord in this instance, a fortiori it should not be applied here; and (2) the Port Authority failed to show how revealing the security reports would inhibit communication. See id. at 26. They also alleged that the public interest would be better served if the documents were disclosed because the revelation of the Port Authority's vulnerabilities would force it to take remedial measures, and that even if privilege applies, all of the Port Authority's concerns could be met via use of a confidentiality order. See id. at 26-27.

The judge ordered an in camera review of the documentation in order to determine whether it should be privileged. See Matter of World Trade Center Bombing Cases, supra note 190, at 27. He is expected to decide which security reports the plaintiffs may receive in September, 1996. See Feiden, supra note 59, at 36.

n192 Pacelle, supra note 3, at B10.

n193 Id.

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n194 See Wise, supra note 2, at 5. This may raise an interesting agency question: when could a landlord be considered to have constructive knowledge of the **risks?** However, this question is beyond the scope of this Note. In this case, since the reports were apparently prepared for the Port Authority's executive director, it seems clear that the Port Authority would be considered to have constructive knowledge.

n195 See Matter of the World Trade Center Cases, supra note 190, at 26. Also, as discussed above, Dean Witter alleges that the Port Authority misrepresented security in lease negotiations, so that evidence of the Port Authority's knowledge is necessary in proving its claims of fraud. See id.

n196 See id. at 27.

n197 Id.

n198 Id. The judge cited Nallan v. Helmsley-Spear, Inc., 407 N.E.2d 451, 458 n.8 (N.Y. 1980), for the proposition that the jury may take into account the cost of the safety measures in determining the reasonableness of the safety measures. See id.

n199 See id.

n200 See supra notes 142-63 and accompanying text.

n201 See Gary T. Schwartz, Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?, 42 UCLA L. Rev. 377, 416 (1994).

n202 See id.

n203 See id. at 444.

n204 See Glesner, supra note 29, at 773.

n205 See id.; see also Kaufman, supra note 15, at 109 n.24 ("The police function is highly specialized, involving skills and training which the government alone can provide. There is no room for the private devices of frontier days."); infra notes 211-224 and accompanying text (discussing potential violations of tenants' rights that could result). But see Fred C. Zacharias, The Politics of Torts, 95 Yale L.J. 698, 709 n.70 (1986) (arguing that "there is little danger that imposing liability will cause [security officers] to become vigilantes or 'officious intermeddlers' into private affairs").

n206 See Glesner, supra note 29, at 785.

n207 See id. In the context of terrorism, private security firms have initiated specialization in "crises response" services to respond to "acts of violence . . . directed at a company, governmental agency or individuals. . . ." Wackenhut Corporation Crisis Response Services Brochure (on file with author).

n208 See Kaufman, supra note 15, at 112 n.106 (quoting President's Commission on Law Enforcement, Report: The Challenge of Crime in A Free Society 35, 289 (1967)); Zacharias, supra note 205, at 709 ("The government's general responsibility for law enforcement does not eliminate the business's separate duty to supplement public compensation and public protection.").

n209 See supra notes 49-54 and accompanying text.

n210 This passage is based loosely on the "two restaurants" example in Adler, supra note

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Only within the last twenty-five years have landlords been held liable to their tenants for criminal acts of third parties. [32] Another cause of the unsettled nature of this doctrine may be some of the competing policy considerations evident throughout its uneven evolution, appearing first in the seminal case, Kline v. 1500 Massachusetts Avenue Apartment Corp. [33]

The Kline court imposed a duty on residential landlords to take reasonable steps to protect tenants from foreseeable criminal acts. This case is generally said to mark the initial departure from the traditional view that landlords had no duty to protect tenants. The court achieved this by extending the traditional landlord duty to maintain common areas in a reasonably safe condition beyond prevention from physical defects to protection from criminal acts. [34] This was done by: (1) applying the warranty of habitability **[*164]** to defects in security, and (2) by recognizing a special relationship between landlord and tenant; [35] both of which are critical theories of recovery in many jurisdictions today. While Kline provided an important remedy to victims of crime, it was also the harbinger of some of the uncertainty that continues to mark this area of the law. In defining the standard of landlord liability, for example, the Kline court equivocally remarked that the "landlord is no insurer of his tenants' safety, but he certainly is no bystander." [36] This rather tentative assertion apparently reflects the tension the court recognized in trying to fashion an efficient yet equitable result. [37] Further, Kline gives little guidance about what security measures are required of landlords once duty is established. [38] Subsequent cases have read Kline both narrowly and broadly; depending on jurisdiction and setting. [39] Answers to the two questions raised in Kline, namely the appropriate standard for establishing duty given efficiency and equity concerns, and the definition of appropriate responses to any duty imposed, will no doubt continue to occupy courts when the crime in question is terrorism.

2. Current Theories of Recovery

Depending on the jurisdiction and court, [40] any number of theories of landowner liability may be available for victims of terrorism. Current theories may be aggregated into five principal groups: (1) strict liability; (2) duty to maintain safe common areas; (3) voluntary assumption of duty to protect; (4) contract; and (5) negligence. An examination of the differing theories available is important in order to determine which of them will prove most **[*165]** successful for victims of terrorism. Outcomes for victims of more typical crimes vary primarily because their theories of liability use different definitions of foreseeability and require different landlord behavior. Further, different theories emphasize certain underlying policy concerns, which could have implications for how complaints alleging landlord liability for terrorist acts will be received by courts. Finally, although landlord liability for criminal acts first arose in a residential context, this Note focuses on commercial landlord liability since terrorist acts are most likely to involve that type of leasehold. While the appropriateness of the application is examined at the conclusion of this section, [41] commentators feel that most jurisdictions have generally "made no explicit distinction between commercial and residential landlords" in holding landlords liable for the criminal acts of third parties. [42] Therefore, this discussion initially assumes a commercial setting. [43]

a. Safe Common Areas

The duty to maintain common areas in a safe condition is perhaps the most traditional of all the theories of recovery. As the court in Kline noted, this duty applies the same rationale as the longstanding duty of landlords to protect tenants from unsafe physical defects. [44] To sustain this claim, a tenant must show both that **[*166]** the landlord had control of the area and knowledge of the defective condition, and that the defects foreseeably enhanced the **risk** of criminal activity. [45] Accessibility defects (e.g. defective locks) seem to trigger liability most often under this theory. [46] Perhaps because of its traditional nature, this approach has gained wide acceptance, even in jurisdictions reluctant to recognize landlord liability. [47] This theory of liability may have important ramifications for holding landlords liable for acts of terrorism due to its focus on the landlord's exclusive control of common areas. For example, in Kline, the court noted that the landlord is in an even better position than the police to take

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50, at 884.

n211 Glesner, supra note 29, at 762.

n212 224 N.W.2d 843 (Mich. 1975); see also supra notes 70-72 and accompanying text (discussing the "special relationship" theory of liability).

n213 See Haines, supra note 34, at 344 (noting that "the majority opinion gives little guidance on this problem").

n214 See Samson, 224 N.W.2d at 849 (stating that "if the **risk** of death or serious bodily injury to a number of persons, the law requires that some care be exercised even though the probability is slight that the incident will occur").

n215 Haines, supra note 34, at 345.

n216 Collins v. AAA Homebuilders, 333 S.E.2d 792, 793 (W. Va. 1985).

n217 N.Y. Judge's Decision Turns Tenants Into Victims, Newsday, Nov. 1, 1995, at A28. (citing Long Island Gynecological Services, P.C. v. 1103 Stewart Ave. Associates Ltd. Partnership, No. 4890-95, 1995 WL 686571 (N.Y. Sup. Ct. Oct. 16, 1995), rev'd, 638 N.Y.S.2d 959 (N.Y. App. Div. 1996)). The Appellate Division has now enjoined the landlord from evicting the clinic pending the outcome of the appeal to the Court of Appeals. See Today's News Update, N.Y. L.J., Dec. 15, 1995, at 115.

n218 John T. McQuiston, Justice in Nassau Says Landlord May Evict Abortion Clinic, N.Y. Times, Oct. 31, 1995, at B1, B4. The landlord first told the clinic in January that they could no longer perform abortions, but then, after consulting with his attorney, revised the regulations to prohibit "tenants from 'engaging in any activity which, in and of itself, jeopardizes the safety or **property** of other tenants.'" Id.

n219 McQuiston, supra note 218, at B1; see also Peterson, Abortion Clinic Can Get Boot, Sez Judge, Daily News, Oct. 31, 1995, at 21 (noting that protesters also often aggressively confronted patients and staff, and sometimes other tenants of the building by mistake); New York: Judge Allows Abortion Clinic Eviction, in Abortion Report, Oct. 31, 1995, at 1 [hereinafter Abortion Report].

n220 See Peterson, supra note 219, at 21.

n221 Id.

n222 Abortion Report, supra note 219, at 1.

n223 McQuiston, supra note 218, at B1, B4.

n224 Id.

n225 See Sharp, supra note 23, at 51 (arguing that in the private context the "free market is better at allocating security resources").

n226 See Glesner, supra note 29, at 773; Haines, supra note 34, at 351 (both discussing this principle as applied to criminal acts). Also, short of leaving the real estate market, many landlords are likely to "overprotect" since it is difficult to set clear guidelines for liability given current negligence standards. This is an inefficient use of resources as the amount spent on protection (and passed on to consumers) will not reduce enough accidents to justify its costs. See supra notes 111-12 and accompanying text.

n227 Of course, landlords who have attempted to delegate security duties to an outside firm are attempting to shift **risk** as well, but will likely be less successful. See supra notes 26-27 and accompanying text.

n228 See Haines, supra note 34, at 346.

n229 See William K. Jones, Private Revision of Public Standards: Exculpatory Agreements in Leases, 63 N.Y.U. L. Rev. 717, 727-28 (1988).

n230 "Courts have distinguished between residential and commercial leases, ruling that exculpatory clauses in most residential leases will be voided as against public policy." Daniel G. Hise, Landlord and Tenant--Exculpatory Clause in Lease Void as Against Public Policy--Cappaert v. Junker, 413 So. 2d 378 (Miss. 1982), 3 Miss. C. L. Rev. 253, 258 (1983). But see College Mobile Home Park and Sales, Inc. v. Hoffman, 241 N.W.2d 174, 177 (Wis. 1976) (arguing that the categorical distinction between residential and commercial leases is "artificial and arbitrary" in this context).

n231 See Jones, supra 229, at 729 (discussing statutes in New York, Illinois, Massachusetts, Maryland, and Georgia).

n232 See Jones, supra note 229, at 730.

n233 See, e.g., Vermes v. American Dist. Telegraph Co., 251 N.W.2d 101 (Minn. 1977) (holding that failure to advise tenant of qualities of jewelry store that might be undesirable was "active" negligence that could not be relieved by broad exculpatory clause in lease).

n234 See Hise, supra note 230, at 256; Jones, supra note 229, at 728-32.

n235 See Jones, supra note 229, at 731.

n236 See id.; see also Haines, supra note 34, at 347-48 n.159; Hise, supra note 230, at 258.

n237 For example, the following analysis as to criminal acts was presented in Craig v. A.A.R. Realty Corp., 576 A.2d 688 (Del. Super. Ct. 1989):

Of all the involved parties, the cost of crime reduction is cheapest to the landowner. For the criminal, imposing civil liability on him in addition to existing criminal sanctions does not deter him from committing the crime. Imposing duty on the patron, so that he must protect and compensate himself, may result in crime reduction, but only at the expensive cost of the patron staying home. . . . While the patron holds just one expensive [to society] option, staying home, the landowner holds many options . . . [such as] installation of better lighting, fences, or guard service. . . .

Id. at 693. Concerning terrorism, the issuance of warnings may be an example of where costs are clearly lowest to the landowner.

n238 See Johnson, supra note 68, at 250. And in some cases, of course, it may be clear that the landlord acted irresponsibly. For example, it may be possible to set the negligence standard high enough (e.g., actual notice for duty) that a true fault-based liability standard is approximated.

n239 Under a "political effects model," a new rule imposes liability on a well-represented

group, which is expected to activate legislative attention to the problem, so that in the long run, the legislature will provide a solution and make the determination of who should bear accident costs and how. See Zacharias, supra note 205, at 725. While Zacharias argues that his model would work in the context of landlord liability for criminal acts, he might reject the imposition of liability on landlords for acts of terrorism for the same reasons he rejects liability for hijacking airlines. See id. at 750.

n240 See generally Kaufman, supra note 15, at 103-08.

n241 "To effectively guide primary behavior . . . legal rules must inform people of liabilities that will be imposed for particular behavior. To do that they must be clear, they must refer to verifiable facts and they must not call for unachievable behavior." Adler, supra note 50, at 920.

n242 See supra notes 89-91 and accompanying text.

n243 See supra notes 17-23 and accompanying text.

n244 See supra note 67 and accompanying text.

n245 See, e.g., Haines, supra note 34, at 353-54 (arguing that courts may not provide the most appropriate forum for determining the type of protection to which tenants should be legally entitled, and that legislatures should act to place duty on landlords to use reasonable care, which should be specifically defined at a minimum level).

n246 And providing a consistent national benchmark for establishing duty.

n247 See Bice, supra note 181, at 463-64.

n248 All losses in Northern Ireland between 1968 and 1993 totaled Sterling695 million. See id. at 464.

n249 See id. at 447-48 (listing potential economic consequences of the lack of coverage for terrorism losses including: widespread business bankruptcies; bank lending bases secured by **property** becoming suspect; **property** developers becoming unable to secure financing; and pension funds becoming unable to rely on income from **property** investments). The British government was also pressured to step in by the Association of British Insurers, who argued that "**terrorism** is a political problem and that the government should therefore bear the losses." Id. at 448 n.36.

n250 Reinsurance is "the **insurance** by an insurer of the liability of another insurer arising under contracts of insurance which the latter has entered into"--practically meaning that "reinsurers insure direct insurers for a pre-determined part of their liability." Id. at 442-43.

n251 See id. at 441.

n252 The layers are (1) a primary layer of regular **property** coverage with a policyholder's direct insurer; (2) if that is exhausted, an additional layer of up to Sterling100,000, also with direct insurers; (3) and (4) two layers provided directly through Pool Re, if premiums paid to Pool Re are exhausted (third), member insurers in the pool contribute an additional 10% (fourth); and (5) if all these are exhausted, the British government is ultimately is liable for all excess losses. See generally Bice, supra note 181, at 449-54. Pool Re has approximately 115 **insurance** companies and 120 Lloyd's syndicates as members who "cede" premiums to the pool to reinsure **risks of terrorism.** See id. at 450.

n253 For example, "target **risk**" is determined by rate setting personnel based on whether and to what extent a particular **property is at risk** of terrorist attack. See id. at 452.

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n254 See id.

n255 See id. at 459, 461-62.

n256 Id. at 466. In general, OPIC offers programs to insure United States investments in developing countries against currency inconvertibility and expropriation, as well as political violence. Most forms of long-term investment (equity, debt, loan guarantees, and leases) may be insured.

n257 The choice between tort and contract law is perhaps philosophical. A contract view would suggest that tort law should act only when there is no possibility to contract (and even then the outcome should mirror what the parties would have done), while a tort view would suggest that tort law should control when society has decided that it (and not the parties themselves) should set the applicable standards. See Thomas C. Galligan Jr., Contortions Along the Boundary Between Contracts and Torts, 69 Tul. L. Rev. 457, 46162 (1994). Whatever the philosophical view, the landlord-tenant relationship is predicated, before all else, on a contract.

n258 "The fact that government and law enforcement authorities cannot prevent criminal attacks does not justify transferring such responsibility to business proprietors." Kaufman, supra note 15, at 109 n.90 (quoting Fager, Liability of Business Proprietors for Criminal Acts of Third Persons, 29 Fed'n Ins. Couns. Q. 29, 33 (1978)); see also Sharp, supra note 23, at 17.

n259 Kaufman, supra note 15, at 110.

n260 See Haines, supra note 34, at 323; see also supra note 63 and accompanying text.

n261 Exculpatory clauses will generally not preclude suits in tort by plaintiffs who are not parties to the lease. See supra note 235 and accompanying text. If actions for victims of domestic terrorism were restricted to those based on contract, the victim compensation legislation suggested here would be expected to provide exclusive recovery for those victims precluded from tort suits.

n262 See Jones, supra note 229, at 733.

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preventive measures. "Municipal police cannot patrol the entryways and the hallways, the garages and the basements of private multiple unit . . . dwellings. They are neither equipped, manned, nor empowered to do so." [48] This type of emphasis on control and efficiency provides a powerful argument for using this theory to require landlords to provide at least minimal structural security measures against terrorist acts.

b. Voluntary Assumption of Duty

Another traditional theory of landlord liability involves a landowner's voluntarily assumed duty to provide security. Under this theory, if a landowner voluntarily assumes the performance of duties for security, he should be required to perform those duties carefully. [49] Even courts that have limited a landowner's duty to protect a tenant from the criminal acts of others absent any affirmative conduct on the part of the landowner would likely find a duty if the landlord provided some type of security in what proved to be a negligent manner. [50] In practice, these claims can arise as a **[*167]** result of the landlord's express or implied promise to provide security, including representations in lease terms, oral statements, and advertisements. [51] Many decisions based on this theory use an implicit balancing test to determine liability, considering the degree of reliance assumed by the injured tenant as well as the potential burden to the landlord. [52] Courts using this balancing test may have particular difficulty in applying it to terrorism since both the degree of reliance by the tenant and burden to the landowner in preventing the crime are generally very high. Some commentators note that because this theory provides no positive incentive to provide security it results in landlords being less inclined to offer increased security protection. [53] Choosing to provide no security is theoretically risky for landlords, however, because the definition of what constitutes a voluntary provision of security differs by jurisdiction. [54] What constitutes a provision (or further, a negligent provision) of antiterrorism security is likely to be even less clear than in the context of more traditional criminal acts, so that predicting liability will continue to be at least as difficult.

c. Contract

Claims brought under contract theories may rely on either express or implied warranties [55] to provide security. A recovery theory based on express warranties would suggest that a landlord has a duty to provide the type and amount of security advertised. [56] The World Trade Center litigation provides an example of **[*168]** how liability based on express contract provisions could be triggered in the context of terrorism. One large tenant, Dean Witter, claims that it raised concerns about safety when it negotiated its lease in 1984 and 1985, but that it was assured in writing that security provisions at the World Trade Center surpassed "'all other comparable building complexes within the city' and that the parking garage was secure." [57] Dean Witter claims that it never would have leased the space, for about one billion dollars over twenty years, if it knew that the Port Authority already had knowledge that the parking garage was vulnerable to terrorist attack. [58] Dean Witter is asking to rescind its lease and demanding more than $ 220 million in **property** and punitive damages. [59]

Contract claims are usually thought to be brought less frequently than tort claims, since damages for the former are generally very limited--compensating the injured party for **property** damage, but not providing for pain and suffering or punitive damages. [60] Since contract claims are very fact-specific, they tend not to be as susceptible to arguments based on broader notions of social policy as some of the other theories presented here. [61] This will likely be a disadvantage for tenant-victims of terrorism urging courts to extend liability beyond the "four corners" of the lease. Further, of course, the injured party must have a legally cognizable basis for recovery under the contract as a party in privity, or perhaps as a third-party beneficiary.

However, there are often clear advantages to contract claims for plaintiffs. In one case where the court held that a landlord did not have a duty to protect a tenant from the criminal act of

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a third party, a recovery based on an express contract provision for the value of **property** stolen was not precluded. [62] By imposing a contractual obligation to furnish security measures, courts may provide **[*169]** tenants with some means of correcting dangerous security problems before a tragedy occurs. [63] This aspect of contract claims may also have particular application for the prevention of terrorism to ensure that landowners provide bargained-for structural and procedural safeguards. Finally, especially in the commercial context, a landlord's liability may be modified by contractual provisions, such as exculpatory clauses, which generally result in a more efficient allocation of **risk** between the two parties. [64]

d. Negligence

The clear majority of claims in this area are based on negligence theories. [65] In order to sustain a negligence claim, a plaintiff must show that the defendant's behavior created an unreasonable **risk** of harm by departing from a reasonable standard of care, and that such behavior was the proximate cause of the plaintiff's damages. [66] A review of the various negligence formulations courts use provides ample support for the contention that the law regarding landlord liability for the criminal acts of third parties is unsettled. In general, a landlord's duty to provide security in this context may be based on a special relationship, special circumstances, or statutory requirements. [67] Recurring questions raised by this type of liability that have particular applications to terrorism include: when a criminal act should be deemed to be foreseeable; when a third party's criminal act should be considered a superseding cause; and when a landlord's response should be deemed reasonable. [68] Failure **[*170]** to adequately resolve these questions suggests that under the current state of the law, landlords are largely unable to accurately predict either liability or the appropriate level of responsive security precautions. [69] These problems will only be exacerbated when negligence claims, based on landlords' failure to protect tenants from terrorism, are allowed.

i. Negligence Formulations

Courts first developed the negligence formulation that landlords had a duty to protect tenants from criminal acts of third parties based on their special relationship because of the changing circumstances of the modern residential tenant. The underlying basis for this per se duty seems to be the landlord's superior position to perceive and prevent **risks** of criminal conduct. [70] For ex- **[*171]** ample, in Samson v. Saginaw Professional Building, Inc., [71] the Michigan Supreme Court, in adopting the special relationship theory in a commercial context, held that "the existence of this relationship between the defendant landlord and its tenants and invitees placed a duty upon the landlord to protect them from unreasonable **risk** of physical harm." [72] Conversely, under the special circumstances formulation of negligence, foreseeability of a criminal attack serves to establish both duty and proximate cause. [73] For example, in Rowe v. State Bank of Lombard, [74] the court, allowing a claim for the tenant's employees in spite of a finding that the landlord-tenant relationship was not a special relationship, held that "when knowledge of foreseeable harm is combined with the landlord's sole ability to guard against it, without undue burden, the landlord has the duty." [75]

ii. Foreseeability--Definitions

The definition of foreseeability is often the determining factor in negligence claims, with more expansive definitions more likely to result in findings of duty. Three more major and two more minor definitions of foreseeability are commonly used. The most restrictive view of foreseeability requires that the landowner actually had notice of the **risks** involved. Foreseeability is generally proven under this definition by representations made by tenants or others, either notifying the landlord of past crimes as in Kline, [76] or that attacks are possible or likely as in Samson. [77] In a recent case, to prove that the defendant landlord had knowledge of existing **risks,** the plaintiff introduced evidence in the form of a letter from a commercial tenant advising the landlord of crimes on the premises and requesting that a security review be performed. [78] **[*172]** This type of subjective condition has significant

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drawbacks in that it may discourage landlords from looking for unsafe conditions and from being amenable to tenants' reports of unsafe conditions. [79] Such a foreseeability rule for terrorism would generally result in landowners avoiding liability for these reasons, although perhaps not in the World Trade Center case. [80] Most jurisdictions imposing a duty based on foreseeability now use some type of "knew or should have known" standard instead. [81]

The prior similar incidents rule is a less restrictive, middleground definition which requires that a plaintiff produce evidence of prior similar criminal acts on the landowner's premises to establish foreseeability. [82] While widely used, especially in commercial settings, [83] the prior similar incidents rule also has several drawbacks. First, the landowner is effectively allowed one free assault before he can be held to have a duty. [84] Second, some commentators and courts have stated that the prior similar incidents rule leads to "arbitrary results and distinctions" since it is often unclear how close in time, near in location, or analogous in conduct the prior incidents must be. [85] If this standard were adopted in landowner liability for acts of terrorism cases, issues about where to draw the line for terrorist incidents (e.g., between a prior explosion and a bomb threat) would undoubtedly be at the forefront.

In perhaps the most famous denouncement of the prior similar incidents rule, the California Supreme Court, in 1985, abandoned it in Isaacs v. Huntington Memorial Hospital, [86] adopting instead the **[*173]** totality of the circumstances definition discussed below. However, in 1993, the California Supreme Court essentially re-adopted the prior similar incidents rule in Ann M. v. Pacific Plaza Shopping Center, [87] holding that a landowner is rarely, if ever, liable to a plaintiff absent evidence of prior similar crimes on the premises. [88] The return to the use of the prior similar incidents rule in California perhaps signals that the view of the landlord as "social insurer" has fallen out of favor. [89] If so, the curtailment of pro-victim approaches may have implications for how the application of landowner liability to acts of terrorism will be received by courts. In contrast, the rising rate of violent crime has often been held to be the primary influence in expanding the duty to protect. [90] Thus, it seems likely that judges will also feel pressure to interpret standards expansively in response to the increasing visibility of terrorism. How courts respond to these conflicting demands for either more restrictive or expansive liability in addressing landlord liability for acts of terrorism may depend on the alternatives to this type of liability presented. [91]

The totality of the circumstances approach mentioned above represents the high water mark of pro-victim landowner liability theories, requiring that courts analyze foreseeability in light of all the facts and on a case-by-case basis. [92] While some jurisdictions **[*174]** have applied it less frequently to commercial leaseholds, [93] the totality of the circumstances definition has been called the "touchstone" of foreseeability. [94] Factors that come in under the totality of the circumstances rule range from evidence of neighborhood crime (e.g., a computer printout of police records of reported crimes in the area), [95] to environmental criminology studies (including "physical structure of the building, lighting, traffic patterns, and social and ecological circumstances linked to the potential for a criminal event"). [96] By analogy, if studies about how terrorists choose targets are generally available, they could provide a basis for recovery under this formulation. [97] The extent of a landowner's role in determining foreseeability is unclear under this definition.

Two more minor definitions of foreseeability that have appeared occasionally in various jurisdictions are the "first line of defense" and "tempting target" theories. Under the former, even if foreseeability is rather low (e.g., no prior incidents), when a landlord's nonfeasance amounts to what would generally be considered gross negligence (e.g., no door locks), courts will usually find a duty. [98] While only a few courts have adopted the "tempting target" theory, a number of have acknowledged it as a factor in the determination on some other basis. [99] This theory proposes that some leaseholds are by their nature particularly attractive for crime: bars, concert halls, and casinos. [100] Both of these theories may have implications for the application of the landowner liability to terrorism in that the duty to simply warn of a terrorist threat would seem to be a good candidate for the "first line of defense rule," [101] and leaseholds with controversial clients (e.g., abortion clinics) might be seen as "tempting

targets" for terrorists. [102] **[*175]**

iii. Foreseeability--Problems

Whatever its definition, determining foreseeability will likely be critical in predicting landowner liability in cases involving terrorist acts. When foreseeability is used both to establish duty and causation, it becomes a "murky crystal ball." [103] If foreseeability is used as a method of establishing liability in claims involving terrorism, courts must find a way to cure the problems of inefficiency and inequity it now generates. One such problem is that foreseeability is susceptible to judges' and juries' subjective beliefs. In the tort context, it seems that foreseeability should be related to fault. When applied to criminal acts, however, its boundaries often seem defined by courts' concerns about public policy. [104] For "new" causes of action, like landowner liability for terrorism, courts may be especially tempted to use policy considerations to define foreseeability. [105]

Similarly, judges and juries tend to focus on the severity of resulting harm when determining, with the benefit of hindsight, whether a criminal act was foreseeable. For example, a landowner's duty may be framed as to avoid creating unreasonable **risks** for his tenants. In assessing "reasonableness," the landowner should consider the severity of the harm, alternatives available to him, and the probability of harm. [106] While the severity of harm from terrorist acts is admittedly great, probability is very low for most leaseholds. Further, while the cost of safer alternatives may be generally low for ordinary criminal acts (e.g., safer locks, more lighting), the costs of preventing terrorism are generally significant. [107] This analysis would therefore suggest that fact finders **[*176]** must be especially reminded of the latter two components of the foreseeability/duty decision when determining liability for terrorist acts, since they will generally serve to temper the role that the severity of the harm should play.

Another of the problems with foreseeability in this context is whether it should be a question for the judge or jury. Because foreseeability is used in different ways by many courts, it is not clear whether courts have uniformly decided who should resolve the foreseeability issue. [108] What is clear is that if the question does go to the jury, the landlord will likely be the loser. Jury verdicts are likely to turn not so much on facts but on the jury's sense of right and wrong. [109] This puts landlords at an unfair disadvantage, creates confusion about what is required of them, and pressures them to settle. [110] Problems with juries deciding foreseeability will be greater in terrorism cases, as compared to ordinary criminal cases, since methods of determining foreseeability, as well as what constitutes a reasonable security response, are more likely to be beyond the common knowledge of the average juror.

Given this status quo, the chances for developing a clear definition of foreseeability for use in cases involving landowner liability for acts of terrorism are slim. When standards are unclear, some commentators believe that landlords will "overprotect." [111] The resulting "uncertainty zone" is wasteful to society because the amount spent on protection (and passed on to consumers) will not reduce enough violent acts to justify its costs, resulting in an inefficient use of resources. [112] Further, cases where summary judgment would have been proper instead go to the jury to determine foreseeability; resulting in judicial inefficiency. [113] Finally, a vague **[*177]** standard of duty works to the immediate economic disadvantage of the defendant, or landlord. [114] Therefore, should the negligence concept of landowner liability be applied to acts of terrorism, courts or legislatures must develop a more definitive standard of duty in order to ensure that these inefficiencies and inequities are not perpetuated.

3. Implications of a Commercial Setting

While the vast majority of the early cases imposing landlord liability for criminal acts involved residential buildings, acts of terrorism will probably target commercial leaseholds. Even though many commentators think that most jurisdictions have not distinguished between the two settings, [115] not all commentators or courts are of that opinion and many believe the

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application of the law should not be the same. [116] An analysis of the desirability of symmetry between the rules for residential and commercial leaseholds is important since any valid differences should affect the standards of duty adopted for terrorism.

First, since landlord liability for security was developed largely in response to courts' objectives of improving the quality of affordable housing, [117] the initial purpose behind the imposition of liability is different. Second, commercial tenants are generally in a much better bargaining position than residential tenants; they are more likely to be able to negotiate for the levels of security protection they feel are adequate. [118] This seems due to the fact that commercial tenants generally possess more resources and the fact that **[*178]** the commercial market generally offers more alternatives than the residential market. [119] Third, a landlord's physical control over the premises in the commercial setting is much lower. [120] The need for public access, as well as a larger area to be protected, normally means that commercial buildings require more extensive security. [121] A further control-type distinction is the definition of the premises boundary line. For example, when are parking lots or the street in front of a leasehold within the area that a landlord should protect? [122] Fourth, security in a commercial setting generally has a different purpose than in a residential one. Banks and stores do not hire guards for the primary purpose of protecting customers; they are there to protect assets. [123] An important economic distinction between the two settings is that most commercial tenants carry insurance and can theoretically pass on the costs of their own security measures through increased prices. [124] Finally, commercial tenants are often in a better position than the landlord to assess the safety of the premises; defects in security may remain undiscovered by a landlord unaware of a commercial tenant's particular safety needs. Commercial tenants are more likely to make a thorough inspection of the premises to determine if it is suitable for its purposes, relying less on the representations of the landlord. [125] These considerations suggest that the duty to provide security in a commercial context should be lower than in a residential one. [126] **[*179]** While this analysis does not necessarily demonstrate that there should be no landlord liability if applied to acts of terrorism, it does suggest that standards of duty should not be as strict as those used in the residential context. [127]

D. Summary

The many different theories of recovery, formulations of negligence, and definitions of foreseeability available to plaintiffs make it difficult for landlords to both assess their liability for protecting tenants and develop an appropriate response to that liability. Since successful theories of recovery vary by jurisdiction and even by court, [128] if landlord liability for criminal acts were applied to acts of terrorism, outcomes for victims would differ based on the location of the terrorist's target. [129] This confusion has led some commentators to note that regardless of Kline's admonition that they are not insurers, landlords must in fact overprotect. [130] This overprotection results in economic inefficiency and may prompt some landlords to seek other investment opportunities altogether. [131] Furthermore, the number of different theories available and reluctance of courts to specifically define foreseeability decreases the chances of judicially resolving a case at an early stage. [132] While current **[*180]** victim compensation statutes appear inadequate, the alternative of landlord liability for criminal acts is subject to these significant drawbacks. Especially when viewed in the context of commercial leaseholds, current formulations of landlord liability will not provide the most efficient methods of victim compensation or increased prevention when the crime in question is terrorism.

II. Landowner Liability When the Crime is Terrorism

Holding landlords liable for acts of terrorism raises issues beyond those involved in landlord liability for more mundane criminal acts. Topics more specific to terrorism that may affect the determination of whether landlord liability is an appropriate legal response can be divided into six categories: (1) defining **terrorism;** (2) preventing **terrorism;** (3) warnings; (4) **insurance;** (5) mass torts; and (6) evidentiary issues. [133] Further, by imposing liability on

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Source: All Sources > Secondary Legal > Law Reviews, Combined
Terms: ((insurance) /20 war or terrorism) and risk and property and life and (exclusion /20 (war or terrorism)) and date(aft 1995) (Edit Search)

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COMMENT: Keeping the Peace - British, Israeli, and Japanese Legislative Responses to Terrorism

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SUMMARY:
... Even though terrorism is more commonplace in some regions than in others, all societies have become wary of its devastating impact. ... However, a particular definition will not shape a nation's terrorism counteraction policy as effectively as will its attitude toward terrorist violence. ... A nation will need to identify the factors that serve as catalysts for terrorist violence before it will be able to draft an effective terrorism counteraction policy. Although democratic states are frequently targeted for terrorist violence, the inherent strengths of such political systems make them insusceptible to many forms of terrorism. ... The Inspector General is further authorized to close any facility that serves a terrorist organization or its members. ... The Penal Law can also be applied to offenses committed in the course of a terrorist attack. ... The most striking Israeli legislation is that concerning assistance to victims of terrorism. ... Like Northern Ireland, Israel will not be able to enact legislation that will quell the enmity that has been the driving force behind terrorist violence in Israel. ... Advances in policy management, target security, and tactical responses have also curtailed the threat of terrorist activity. ...

TEXT:
[*405]

I. Introduction

In recent decades, the global community has been confronted with the phenomenon of terror as a means of protest. Even though terrorism is more commonplace in some regions than in others, all societies have become wary of its devastating impact. The threat posed by insurgents who seek to radically alter a nations' cultural, social, and political precepts has proven to be unpredictable, but efficient policy management can effectively safeguard potential targets and strengthen vulnerable weaknesses.

The United Kingdom, Israel, and Japan have each developed terrorism counteraction policies based upon legislation that specifically targets insurgent operations. While it is important that these initiatives be liberally construed in order to efficiently police terrorist behavior, it is equally important that these laws be narrowly tailored so as to protect individual liberties. Should these measures invade the sanctity of individual autonomy, terrorists will be better

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Palestinian groups, though a major threat, have recently been overshadowed by the emergence of militant Jewish fundamentalists who also seek to destroy the peace process. The assassination of Yitzak Rabin by a radical Jewish student has forced Israel to re-evaluate its policies on Jewish extremist groups. [153] However, even before Rabin's assassination, the extremist groups Kach [154] and Kahane Chai [155] were declared to be terrorist organizations after voicing support for a Kach affiliate who attacked an Islamic **[*433]** mosque. [156] Jewish extremists have proved to be a danger to a peaceful coexistence with Palestinians and have now been brought to the forefront of Israeli attention with Yitzak Rabin's assassination. [157]

B. Antiterrorist Legislation in Israel

The Prevention of Terrorism Ordinance, [158] which is only applicable to internationally-recognized Israeli borders, Jerusalem, [159] and the Golan Heights, [160] was the first antiterrorist legislation to be enacted by the state of Israel. [161] The Ordinance has no effect in the West Bank and the Gaza Strip. [162] It does not define terrorism; rather, it describes a "terrorist organisation" as: "a body of persons resorting in its activities to acts of violence calculated to cause death or injury to a person or to threats of such acts of violence." [163] Supporting a terrorist organization is punishable by a maximum of three years imprisonment and a fine of one- **[*434]** thousand pounds, [164] membership in a terrorist organization is an offense warranting a maximum prison sentence of five years, [165] and activity in a terrorist organization is subjected to a maximum term of twenty years imprisonment. [166]

The Ordinance requires that the government post notice in the Official Gazette stating that a particular group has been designated a terrorist organization. [167] If no such notice has been posted, the government must prove that one or more of a group's members is responsible for acts or threats of violence on behalf of or by order of the organization, or that one or more of a group's members claimed responsibility for acts or threats of violence on behalf of or by order of the organization. [168] An organization's **property** may also be confiscated by order of a district court in response to a request by the Inspector General. [169] The Inspector General is **[*435]** further authorized to close any facility that serves a terrorist organization or its members. [170]

The Penal Law [171] can also be applied to offenses committed in the course of a terrorist attack. Because offenses against the person, such as causing death or endangering **life** and health, are not excused if the offense is committed in connection with a political or religious motive, the Penal Law is equally applicable to terrorist activity. [172] Capital punishment may not be requested for regular offenses, but military courts are given the option of imposing the death penalty. [173] There are also special provisions in the Penal Law addressing unlawful associations and assemblies that supplement the Prevention of Terrorism Ordinance. [174] Certain provisions also provide for extraterritorial jurisdiction over **[*436]** offenses against humanity, [175] offenses against the state, [176] and offenses causing injury to nationals or residents of Israel. [177]

Upon conquering the West Bank and the Gaza Strip in 1967, the Commander of the Israeli Defense Forces issued the Proclamation on Law and Administration, [178] which declared that the British Mandate Defence (Emergency) Regulations, 1945, [179] which had been maintained by previous occupiers, would remain in force. The Defence (Emergency) Regulations list various terrorist offenses that fall under the title of Unlawful Associations and warrant a fine and imprisonment of one to ten years. [180] Unlike the domestic laws of Israel, the Defence (Emergency) Regulations grant the military far-reaching powers, such as administrative **[*437]** detention, travel restrictions, expulsions, and the demolition of a residence known to belong to a terrorist. [181]

In addition to these principal laws, Israel has also enacted specific laws to aid in the state's plan of terrorism counteraction. The Explosives Law [182] forbids the manufacture, trade, and transport of explosives without a permit granted by an authorized government Minister. [183] The Extradition Law [184] provides for the extradition of an individual from Israel to another

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state except in cases where the substantive offense is political in character [185] or if the offender is an Israeli citizen. [186] Under the Law of Return [187] an immigrant may be denied a visa if the Minister of the Interior determines that the individual has engaged in an activity directed against the Jewish people, may endanger public health, public safety, or state security, [188] or has a criminal past and is **[*438]** likely to endanger public welfare. [189] Furthermore, deportation is only permissible with regard to an individual who is in Israel without a permit of residence. [190]

The most striking Israeli legislation is that concerning assistance to victims of terrorism. Pensions will be granted to citizens who are injured by acts of terrorism within the state and abroad, [191] as is true of visa and permit holders who are injured by acts of terrorism within the state and areas controlled by the Israeli Defense Forces. [192] Israel will also provide victims of **terrorism** with funeral expenses, [193] medical expenses, [194] and subsidies for vocational education, health **insurance,** and guaranteed loans. [195]

C. Observations

Israel's experience with **terrorism** bears resemblance to that of the United Kingdom in that it has grown from centuries of religious and cultural turmoil. The Israeli-Palestinian peace agreement is a significant step toward ending disputes over geographic boundaries that have been the subject of numerous terrorist attacks, but the social strife inherent in the region will continue to plague any peace accord. Those who do press for further compromise will be not only challenged by radical terrorist organizations, but will also face resistance from militant civilians and communities that are ingrained with a hatred that will not diminish in their lifetimes. The Netanyahu administration is now facing these obstacles. Like Northern Ireland, Israel will not be able to enact legislation that will quell the enmity that has been the driving force behind **[*439]** terrorist violence in Israel. Unless Israelis and Palestinians can control their mutual animosity, current peace efforts will be in vain and terrorism will continue to afflict the region. The next century will be instrumental in healing ancient wounds that have compelled the terrorist violence of past decades.

V. Japan

Japan's antiterrorist policies have their foundation in statutory laws that date back to the late nineteenth century. However, it was sizable Communist-inspired demonstrations, many of which culminated in riotous disorders in the early 1950s, that brought the issue of terrorism before the legislature. [196] Unlike the United Kingdom and Israel, Japan has not experienced terrorism on an extensive scale. For this reason, Japan has adopted a practice of enacting antiterrorism legislation ex post facto. However, recent developments may compel Japan to enact initiatives that uniformly address the problem of terrorism.

A. Insurgent Organizations in Japan

The Japanese Red Army (JRA) [197] is comprised of a small number of former student activists who now operate in conjunction with the Popular Front for the Liberation of Palestine (PFLP) in Lebanon's Bekaa Valley. [198] The group is believed to have **[*440]** between twenty and thirty hard-core members encamped in Lebanon and a financial support base of 100-150 in Japan. [199] Financial assistance is mainly provided by the PFLP, other Palestinian terrorist groups, and Libya. [200] The most infamous of the JRA's activities was the 1972 attack of Lod Airport in Israel, [201] and the takeover of the American embassy in Kuala Lumpur. [202] The group's activity subsided in 1977, but its members re-emerged in 1986 in connection with other Asian terrorist organizations. [203] However, group fragmentation, apathy, and police arrests have severely limited the organization's activities.

The Chukaku-Ha, [204] comprised of approximately 3500 members, a political party, and a

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covert action wing (the Kansai Revolutionary Army), [205] is the largest and most powerful of **[*441]** several ultra-leftist factions. [206] Funds derived from membership dues, sale of the Zenshin newspaper, and fundraising campaigns are channelled to support 200 core members who have no other source of income. [207] The Chukaku-Ha's attacks, usually conducted with crude rockets, incendiary devices, and flamethrowers, [208] are targeted at **property** damage rather than human casualties. [209]

Within the past year, the Aum Shinrikyo (Cult of the Supreme Truth) has been designated as a "violence-prone organization." [210] The cult, comprised of 10,000 members in Japan [211] is most notorious for its gas attacks on the Tokyo subway system. [212] The cult has also been held responsible for other crimes, including murder, kidnappings, illegal weapons manufacture, torture, and child abuse. [213] The cult's guru, Asahara Shokou, along with 100 members, have since been arrested. [214] **[*442]**

B. Antiterrorism Legislation

The basic foundation for terrorism counteraction in Japan can be found within the Criminal Code of 1907. [215] Under the Code, crimes such as insurrection, homicide, assault, kidnapping, destruction of **property,** and rioting [216] can be prosecuted as acts of terrorism. [217] Furthermore, the Code's extraterritorial jurisdiction provisions, which were revised in 1987, [218] can also be used to bring acts of terrorism committed abroad within the jurisdiction of Japanese courts. [219] Although the Code is applicable to the basic common crimes inherent in terrorism, Japan has found it necessary to enact additional legislation to enhance its terrorism counteraction policy. **[*443]**

Following World War II, Japan enacted the Subversive Activities Prevention Law of 1952 [220] to control the activities of the Japanese Communist Party. [221] Even though suppression of the Communist Party was this law's original purpose, it can be utilized to suppress any terrorist organization. [222] Common crimes [223] normally addressed under the Criminal Code will be prosecuted under the Subversive Activities Prevention Law if committed with an objective of "the promotion or support of or opposition to any political doctrines or policy." [224] Additionally, the Subversive Activities Prevention Law will also be applied to treasonable offenses which the Criminal Code designates as subversive activities per se. [225] However, to be prosecuted under the Subversive Activities Prevention Law, a defendant must be affiliated with a subversive organization; otherwise he or she will face normal criminal proceedings under the Criminal Code. [226]

An organization's members who are convicted under the provisions of the Subversive Activities Prevention Law are subject to a maximum of seven years imprisonment or penal servitude. [227] The organization itself can be completely dissolved or be restricted **[*444]** from engaging in specific activities for a specified length of time. [228] The Public Security Investigation Agency may designate an organization as a danger and appropriate for surveillance and investigation, and may also request that the Public Security Commission dissolve the organization entirely. [229]

The Subversive Activities Prevention Law has not been without controversy. Arguments have been made, albeit unsuccessfully, that it infringes upon the constitutional guarantee of freedom of speech, [230] and critics have warned against possible infringement of the right to freedom of religion. [231] Demonstrators arrested during disturbances in the 1960s and 1970s were commonly tried under the riot provisions of the Criminal Code instead of the Subversive Activities Prevention Law. [232] The language of the Subversive Activities Prevention Law limits its application to situations in which there is a danger that the group will continue to repeat subversive activity in the future, and even then it will be applied "only within the minimum extent necessary to assure the **[*445]** public safety." [233] To many critics, it appears that the Subversive Activities Prevention Law has been largely ineffective. [234]

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Japan has further attempted to curtail the activities of subversive organizations, mainly the Japanese Mafia, through the enactment of the Law Preventing Illegal Activities by Members of Underground Organizations. [235] A group usually will be designated an underworld organization if its members have extensive criminal records. [236] This being the case, they will be banned from engaging in a number of specified activities. [237]

In the absence of an extradition treaty with a nation, [238] foreign terrorists can be extradited under the Law for the Extradition of Fugitive Criminals, [239] except in cases of a political nature. [240] In this respect, an immigrant who is determined by the Minister of Justice to be a danger to the public peace or national interest can be deported under the Immigration Control and Refugee Recognition Law. [241]

Japan has also countered the threat of terrorism by passing laws that restrict the use of explosives and nuclear materials. The **[*446]** Explosives Decree of 1884 [242] was revised in 1918 to supplement the Criminal Code with heavier penalties. [243] However, milder penalties have been instituted for the manufacture, sale, and import of explosives without permission under the Law Concerning the Control of Explosives and Similar Substances. [244] Japan enacted additional legislation to control explosives in 1972 with the Law for Punishment for the Use of Glass-Bottle Grenades [245] which makes the use, possession, or manufacture of gasoline bombs a criminal offense. [246] In 1988, Japan amended the Law for Control of Nuclear Source Material, Nuclear Fuel Material and Reactors [247] to ratify the Convention on the Physical Protection of Nuclear Material. [248]

Most recently, Japan passed the Law Concerning the Prevention of Bodily Harm Caused by Sarin Gas [249] in response to a **[*447]** number of terrorist attacks undertaken by Aum Shinrikyo. [250] The use of Sarin or other lethal chemicals warrants a maximum penalty of penal servitude for **life** [251] while production or possession carries a sentence of penal servitude of up to seven years. [252]

Furthermore, Japan has been active in subscribing to the resolutions of various international conventions. In recognition of the 1970 Convention for Suppression of Unlawful Seizure of Aircraft [253] and the 1971 Convention for the Suppression of Unlawful Acts Against Safety of Civil Aviation, [254] Japan enacted the Law Concerning Punishment for Unlawful Seizure of Aircraft and Similar Crimes [255] and the Law Concerning Punishment of Activities Endangering Aircraft. [256] Japan also has ratified the 1973 Convention for the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents [257] and the 1979 International Convention Against the Taking of Hostages [258] by enacting the Law Concerning Punishment for Hostage-Taking. [259]

C. Observations

As can be seen, Japan has enacted legislation to address specific terrorist threats rather than a uniform act to counter terrorism. Japan's current experiences with terrorist organizations **[*448]** can be addressed by either the Subversive Activities Prevention Law or the Criminal Code for prosecution. However, it appears that Japan will continue to enact specific legislation that directly addresses immediate threats, will subscribe to international conventions, and will rely upon the Criminal Code for enforcement of its antiterrorist policies. As long as such practices are effective in combatting future threats of terrorism, it would be unnecessary for Japan to expand in new directions.

VI. Conclusion

The antiterrorism legislation of the United Kingdom, Israel, and Japan has been seasoned by regional phenomena. In this respect, it is easy to dismiss each law as distinctively influenced.

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However, terrorist violence is an adhesive that will continue to bond each nation's current initiatives. The United Kingdom and Israel hold in common a territorial struggle seared by centuries of religious and cultural turmoil. Japan, though not troubled by the same degree of religious strife, has been the target of violent leftist political campaigns which have conceived a legislative response of similar effect. Each nation has criminalized the implements of terrorism through uniform and specific legislation. Furthermore, each nation has enacted legislation which prohibits the existence of the principle organizations responsible for terrorism. The efforts of all three nations are unique in framework, but analogous in essence.

The United Kingdom's quandary may only be resolved with independence for Northern Ireland. However, this is an unlikely option. Furthermore, independence will not ameliorate the religious schism in the population; the struggle will continue regardless of sovereignty. Negotiations between the British government and the IRA may curb the violence from a political perspective, but it will do little to improve relations between Catholics and Protestants. Therefore, the United Kingdom will have to look to the law to control further violence. However, legislation cannot extinguish the prejudices that continue to fuel the violence to which Northern Ireland has become accustomed. It is not only the terrorists who are instilled with animosity, but the population itself. Therefore, the PTA and the EPA will do little to solve the dilemma and continue to be criticized as meager means to an unattainable end. **[*449]**

The situation in Israel is comparable to that of the United Kingdom, but current political themes appear to be somewhat effective in pacifying the region's violent tendencies. What has now surfaced is a wave of violence aimed at corrupting the process of compromise. Like Northern Ireland, legislation will not be able to eradicate the abhorrence that is uniformly embraced by the opposing cultures occupying the region. As the Israeli military begins to withdraw from the Occupied Territories, the Gaza Strip and the West Bank will hopefully be able to relax the emergency measures that have been necessary to this day. However, the Jewish population that remains will still be militant, as will the Palestinians who both passively and actively support the Islamic campaign of terrorism. The Prevention of Terrorism Ordinance and the Defence (Emergency) Provisions mirror the British initiatives in form and substance. Although these laws have accomplished their basic purposes, it is naive to consider them solutions to the problem of terrorism. Each nation will continue to develop policies to supplement the tattered legislation that has valiantly attempted to prevent violent protest.

Unlike Northern Ireland and Israel, Japan enjoys an existence devoid of the everyday apprehension of impending violence. In this respect, it has been possible for Japan to rely upon its uniform Criminal Code to address terrorist infractions. The Subversive Activities Prevention Law has not been utilized to the same degree as the Criminal Code, and it is unlikely it will do so in the future. Japanese Leftist groups may very well pass from existence now that Communism's influence is dissipating from the global panorama. Furthermore, the Japanese Red Army has been effectively excluded from the country and is beginning to deteriorate as a major terrorist threat. Japan has been successful in controlling its national security with initiatives that criminalize behavior that sporadically erupts into violence. It is unlikely that Japan will ever have to undergo the legislative transformations attributable to Israel and the United Kingdom.

Terrorism will undoubtedly vex the international community as it progresses into the next century; however, the legislative initiatives of nations like the United Kingdom, Israel, and Japan have significantly contributed to a global condemnation of terrorism. Advances in policy management, target security, and tactical responses have also curtailed the threat of terrorist activity. A firm antiterrorist policy is in the best interest of most every **[*450]** nation, but its measures should create an environment hostile to terrorist behavior, not a system that hinders the daily operations of the general public. A nation's citizens should realize the extent of contemporary society's vulnerability and be willing to make concessions to successfully implement terrorism counteraction policies. However, incessant paranoia and

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initiatives that reach far beyond the relative threats posed by contemporary terrorists will only work against the status quo. If the global community does not observe this balance, society will be altered, and the terrorist will have triumphed.

FOOTNOTES:

n1. Sean Anderson & Stephen Sloan, Historical Dictionary of Terrorism 1 (1995).

n2. U.S. government agencies employ their own definitions that essentially encompass the basic principles inherent in the American perspective on terrorism:

The unlawful use or threatened use of force or violence by a revolutionary organization against individuals or **property** with the intention of coercing or intimidating governments or societies, often for political or ideological purposes. (U.S. Department of Defense).

The unlawful use of force or violence against persons or **property** to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives. (U.S. Federal Bureau of Investigation).

Premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents. (U.S. Department of State).

Violent criminal conduct apparently intended: (a) to intimidate or coerce a civilian population; (b) to influence the conduct of a government by intimidation or coercion; or (c) to affect the conduct of a government by assassination or kidnapping. (U.S. Department of Justice).

Louis Rene Beres, Note, The Meaning of Terrorism - Jurisprudential and Definitional Clarifications, 28 Vand. J. Transnat'l. 239, 240 (1995).

n3. Terrorism is defined as "the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear." Prevention of Terrorism (Temporary Provisions) Act 1989, 20(1) (Eng.).

n4. Such definitions are still rather simplistic when compared to those of scholars who seek definitions that encompass all the potential facets of the insurgent mentality. For example:

Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individuals, group or state actors, for idiosyncratic, criminal or political reasons, whereby - in contrast to assassination - the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat- and violence-based communication processes between terrorist (organisation), (imperiled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought.

Alex P. Schmid, The Response Problem as a Definition Problem, in Western Responses to Terrorism 7, 8 (Alex P. Schmid & Ronald D. Crelinsten eds., 1993).

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n5. See Ramsey Kleff, Terrorism: The Trinity Perspective, in Terrorism & Political Violence: Limits and Possibilities of Legal Control 13, 13 (Henry H. Han ed., 1993).

n6. Benjamin Netanyahu, Defining Terrorism, in Terrorism: How the West Can Win 7, 8 (Benjamin Netanyahu ed., 1986).

n7. See Benzion Netanyahu, Terrorists and Freedom Fighters, in Terrorism: How the West Can Win 25, 27 (Benjamin Netanyahu ed., 1986).

n8. Id.

n9. See Netanyahu, supra note 6, at 9.

n10. See id.

n11. National Advisory Committee on Criminal Justice Standards and Goals, Report of the Task Force on Disorders and Terrorism 3 (1976), cited in Anderson & Sloan, supra note 1, at 3.

n12. See Lawrence Freedman et. al., Terrorism and International Order 57 (1986).

n13. Id.

n14. See John M. Collins, Definitional Aspects, in Political Terrorism and Energy 1, 11-12 (Yonah Alexander & Charles K. Ebinger eds., 1982).

n15. Karl A. Seger, The Anti-Terrorism Handbook 4 (1990).

n16. Id. Such an example can be seen with the Japanese Red Army, a small Marxist organization that is now primarily supported and trained in the Middle East by the Popular Front for the Liberation of Palestine. See U.S. Dep't of State, Patterns of Global Terrorism: 1994 45 (1995) (hereinafter Patterns of Global Terrorism: 1994).

n17. Seger, supra note 15, at 5. It is often difficult to determine when certain activities of a state actually support a terrorist organization. See David E. Long, The Anatomy of Terrorism 107 (1990). Sometimes a state will provide financial support for a political party reputed to have its own terrorist factions. Id. An example would be Saudi Arabia's support for the PLO through the Al-Fatah which, although linked with terrorism, is the political wing of the PLO. Id. An inimical example would be Libya's support of the PLO through splinter groups that are exclusively committed to terrorist violence. Id.

n18. Seger, supra note 15, at 5. State supported training for terrorist groups does not always involve military-style camps or drills. Such training can often be technical in nature, such as surveillance, counterfeiting, forgery, communications, and recruitment techniques. See Long, supra note 17, at 108.

n19. A striking example of state-directed terrorism occurred in 1984, when Iran developed a special forces unit comprised of 2500 men, each willing to undertake suicide missions in order to spread Islamic fundamentalism throughout the Middle East and North Africa. Seger, supra note 15, at 5-6. According to former U.S. Secretary of State George P. Shultz, Syria, Libya, and North Korea have also been responsible for state-directed terrorism. See John B. Wolf, Antiterrorist Initiatives 24 (1989).

n20. It would be more expedient for a state to support, rather than directly operate a terrorist cell, in order to maintain a questionable distance from the terrorist act itself. See Long, supra note 17, at 106.

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n21. L. Paul Bremer III, The West's Counter-Terrorist Strategy, in Western Responses to Terrorism 255, 257 (Alex P. Schmid & Ronald D. Crelinsten eds., 1993).

n22. The late 1980s provide significant evidence that supports this assertion: the U.S. air strike on Libya in 1986 reduced the frequency of Libyan involvement in terrorist activities from 19 acts in 1986 to six in 1988; European Community-imposed sanctions against Syria led to the 1987 expulsion of Abu Nidal; the European Community simultaneously recalled its foreign ministers from Tehran and suspended all official high level exchanges with Iran after Ayatollah Khomeini's call for the execution of Salman Rushdie. See id. at 258.

n23. The Western European community has established the TREVI Group (Terrorism, Radicalism, Extremism, and Political Violence) which is comprised of each state's Ministers of Justice and Interior to regularly produce an agreed upon assessment of terrorist threats facing European Community nations by exchanging information on the movement and operating methods of particular groups. Id. at 260. Similarly, the International Police Organization (INTERPOL) now alerts member states of FBI arrest warrants for certain terrorists. Id.

n24. This practice needs to be adopted by the government as a whole and by individual entities in their respective capacities (military installations, defense contractors, municipal facilities, law enforcement, and the private sector). Seger, supra note 15, at 35. Examples can be seen in the universal screening of airline passengers with metal detectors, increased security at diplomatic facilities, "watch lists" of terrorists for border police, and covert tactical operations. Bremer, supra note 21, at 261.

n25. G. Davidson-Smith, Counterterrorism Contingency Planning and Incident Management, in Democratic Responses to International Terrorism 123, 125 (David A. Charters ed., 1991).

n26. Alex P. Schmid, Terrorism and Democracy, in Western Responses to Terrorism 14, 17 (Alex P. Schmid & Ronald D. Crelinstein, eds., 1993). These factors will not reduce terrorism if they fail to work properly. Id. Terrorist violence incensed in Northern Ireland and in Sri Lanka when free elections were stifled through the gerrymandering of election districts. Id. Unrestrained police brutality has also provided for a recourse to violence as exemplified by an unpunished police killing of a West Berlin demonstrator which gave rise to the German June 2nd movement of 1967. Id. Another contributing element occurs when the media cannot vent the grievances of the public, such as in the Basque country under the Franco Regime in Spain. Id.

n27. Id. at 18-19.

n28. Schmid, supra note 26, at 18-19.

n29. Id. at 15.

n30. Robert H. Kupperman & Darrell M. Trent, Terrorism: Threat, Reality, Response 13 (1979).

n31. Ninety-five percent of terrorist violence involves bombings, assassinations, armed assaults, kidnappings, hijackings, and hostage-taking, half of which are directed against American, French, Israeli, British, and Turkish targets. See Jeffrey Ian Ross, The Nature of Contemporary International Terrorism, in Democratic Responses to International Terrorism 17, 31-32 (David A. Charters ed., 1991).

n32. Seger, supra note 15, at 15. While a terrorist bombing that killed the governor of Idaho in 1905 took days to reach the world audience, a 1986 hijacking of a Karachi airliner was broadcast live on the morning news. Id.

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n33. Leonard Weinberg & William Eubank, Political Terrorism and Political Development, in Terrorism and Political Violence: Limits and Possibilities of Legal Control 29-30 (Henry H. Han ed., 1993).

n34. See Collins, supra note 14, at 12.

n35. See generally Clive Walker, The Prevention of Terrorism in British Law 267-72, (2d ed. 1992).

n36. In 1985, the press paid up to $ 12,500 for interviews with the Amal Militia during its hijacking of TWA 847. See James Adams, The Financing of Terror (1986), reprinted in Seger, supra note 15, at 15.

n37. See Schmid, supra note 26, at 18.

n38. See Seger, supra note 15, at 16.

n39. Modern transportation systems enabled members of the United Freedom Front to live in Ohio and travel to New Jersey, New York, Connecticut, and Massachusetts to rob banks, collect intelligence, and bomb targets. Id. These terrorists would leave on Monday morning and return undetected by Friday. Id. Members of the Brotherhood of Silence used vans and motor homes as safe houses and would travel U.S. interstate highways until a deadly confrontation with the authorities revealed a mobile arsenal of weapons, scanners, and tactical equipment. Id.

n40. In 1987 alone, the Dutch borders were crossed by 30,000 trains, 229,000 aircraft, and 232,000 ships. Volkskrant, July 12, 1988, at 1, cited in Schmid, supra note 26, at 14. Custom points were crossed by 114,000,000 people and almost 4000 weapons were confiscated. Id.

n41. Id. at 31.

n42. Id.

n43. Id.

n44. Anderson & Sloan, supra note 1, at 16.

n45. Bard E. O'Neill cites to the following seven basic types of strategic ideologies that have been adopted by terrorist groups over the century: 1) Anarchists are the most dangerous because they believe that all institutionalized political systems are illegitimate and should be eliminated; 2) Egalitarians seek to radically transform the social structure through a redistribution of equality and often advocate authoritarian and elitist regimes; 3) Traditionalists want to restore past systems and conventions based on ancestral heritage and religion; 4) Pluralists want to establish a system in which values of individual freedom, liberty, and participation will be emphasized, however there are few examples of such groups; 5) Secessionists renounce the nation state to which they are subjects and want to separate and establish an independent state; 6) Reformists aim to obtain more political, social and economic benefits for the people whom they claim to represent, but do not want to reject the current political system; and finally, 7) Preservationists seek to maintain the status quo by engaging in violence against non-ruling minorities. See Bard E. O'Neill, The Strategic Context of Insurgent Terrorism, in Terrorism and Political Violence: Limits and Possibilities of Legal Control 77-79 (Henry H. Han ed., 1993).

n46. See Weinberg & Eubank, supra note 33, at 30.

n47. Richard Schultz, Conceptualizing Political Terrorism: A Typology, in International

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Terrorism: Current Research and Directions 9-15 (Alan D. Buckley & Daniel D. Olson eds., 1980) noted in Anderson & Sloan, supra note 1, at 5. "Revolutionary Terrorism [is defined as] ... the threat and/or development of extranormal forms of political violence, in varying degrees, with the object of successfully effecting a complete revolutionary change (i.e., a change of fundamental political-social processes) within the political system." Id.

n48. Id. "Sub-Revolutionary Terrorism [is defined as] ... the threat and/or employment of extranormal forms of political violence, in varying degrees, with the objective of effecting various changes in the particular political system .... The goal is to bring about certain changes in the body politic, not to abolish it in favor of a complete system change." Id.

n49. Id. "Establishment Terrorism [is defined as] ... the threat and/or employment of extranormal forms of political violence in varying degrees, by an established political system, against both external and internal opposition. Id. Specifically such means may be employed by an established political system against other nation-states and groups external to the particular political system, as well as internally to repress various forms of domestic opposition/unrest and/or to move the populace to comply with programs/goals of the state." Schultz, supra note 47, at 5.

n50. See generally Grant Wardlaw, The Democratic Framework, in The Deadly Sin of Terrorism 5-11 (David A. Charters ed., 1994).

n51. The underlying conflict that plagues Northern Ireland can be traced back as early as the 1600s. See John E. Finn, Constitutions in Crisis 47 (1991). Protestant British and Scottish colonists forcibly settled Ulster Plantation amidst Catholic uprisings. Id. The conflict later solidified when King William's Protestant army defeated King James' Catholic army in 1689. Id. In the ensuing centuries, severe prejudices developed between the Catholic and Protestant populations, the former demanding the establishment of an independent Irish state, the latter remaining loyal to the crown. Id. The demands for some form of national political independence were satisfied by the foundation of the Irish Free State in 1922. Id. However, this settlement left Northern Ireland, as formed under the Government of Ireland Act of 1920, subservient to the British and in the control of the Loyalist Protestant majority. Id.

n52. David Bonner, The United Kingdom's Response to Terrorism, in Western Responses to Terrorism 174 (Alex P. Schmid & Ronald D. Chelinsten eds., 1993). The 1960s gave rise to a civil rights movement calling for reforms that would allow the Catholic minority to participate equally in the political and economic **life** of the province. See Brian J. Dorrian, Note, Meeting "Clear and Present Dangers?" British Legal Responses to Violent Irish Nationalism 50 U. Toronto Fac. L. Rev. 161, 163 (1993). The 1963 election of a moderate leader, Terrence O'Neill, significantly contributed to the progress of the civil rights movement and raised Catholic expectations, but also alienated the loyalist population. Id. The escalating violence culminated when the mainly Protestant police force opened fire on Catholic rioters in 1969. Id. Two nights of violent rioting ensued, and the British Army was subsequently summoned. Id.

n53. Great Britain has witnessed the hijacking and destruction of its aircraft abroad, the kidnapping and killing of its nationals abroad, as well as bombings, assassinations and attempted assassinations within its borders by foreign insurgents. Id. at 173. Terrorist incidents have surfaced in connection with the political affairs of India, Iran, Iraq, Israel, Libya, and Syria. Id. The British Isles have also seen domestic violence perpetrated by Welsh and Scottish nationalists, neo-Fascists, radical animal rights activists, and Anarchists such as the Angry Brigade. Id.

n54. Anderson & Sloan, supra note 1, at 148.

n55. Id. Due to this resurgence of violence, both the United Kingdom and Ireland officially

able to assert the myth that they are liberators of the oppressed and not violent insurrectionists.

This Comment will discuss different aspects of contemporary society which function as catalysts for terrorist violence and survey British, Japanese, and Israeli legislative initiatives that attempt to control the activities of terrorist organizations that actively operate in each nation. Part II will focus upon intrinsic obstacles, such as definitional inconsistencies, threat assessment, and contributing factors that effective policy management must surmount. Parts III, IV, and V will survey British, Israeli, and Japanese legislative countermeasures, respectively, and briefly profile terrorist cells operating within each nation. Part VI will compare each nation's initiatives and comment upon the future of terrorism in light of the **[*406]** current state of British, Israeli, and Japanese antiterrorism legislation.

II. Framework for Legislative Control

Before undertaking a study of a particular nation's antiterrorism legislation, one should be familiar with several elements that will have a universal impact upon the effectiveness of such measures. This section will focus upon general areas that are significant to any study of terrorism.

It should be recognized that a comprehensive definition of the term "terrorism" is very elusive. Instead of searching for a catch-all explanation of the phenomenon, it would be more practical for a nation to identify terrorism's root causes in order to ascertain a faction's infrastructure, support bases, and potential targets before formulating the proper means for response. In this regard, emphasis should be directed toward distinguishing the contemporary components of society that create an environment conducive to terrorism.

A. Definitional Obstacles

Establishing a proper and comprehensive definition of terrorism is a complicated task that still induces extensive debate. The cliche "one man's terrorist is another man's freedom fighter" illustrates how easily the definition can be obscured. [1] In western society, the term elicits graphic and horrid images of criminal violence and brutality. However, organizations or nations that actively sponsor or directly engage in terrorism perceive violence as the most effective means of bringing about the particular transformations they seek. A complete definition of the term must take these two opposing viewpoints into account. In this respect, defining "terrorism" has proven to be troublesome.

Nations such as Japan and Israel have not adopted an explicit statutory definition of "terrorism," but others, such as the United **[*407]** States [2] and the United Kingdom, [3] have developed such language. [4] However, a particular definition will not shape a nation's terrorism counteraction policy as effectively as will its attitude toward terrorist violence. The antiterrorism measures of the United **[*408]** Kingdom, Japan, and Israel have been formed by both global trends and regional factors unique to their individual histories. When developing future policies, it is not any one particular definition that will guide these states, but a general attitude shaped by what each state has learned from experience.

For purposes of this Comment, a strict analysis of the definition of "terrorism" is unnecessary. The term, however, does have important implications that should be noted. For example, the aforementioned freedom fighter cliche is very misleading. Terrorists prefer to classify themselves as freedom fighters or guerrillas struggling for national liberation, social justice, or other ideals. [5] In reality, a terrorist often directs violence at persons who have no connection with his or her alleged grievances. [6] People are often targeted indiscriminately for

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proscribed the IRA. Id.

n56. Id.

n57. Id.

n58. See Bonner, supra note 52, at 175.

n59. PIRA is the main Irish nationalist paramilitary and terrorist organization seeking to reunite the six counties of Northern Ireland with the rest of Ireland in order to form an "Irish Socialist Republic." Anderson & Sloan, supra note 1, at 292. This objective is sought primarily through revolutionary armed struggle rather than through political or diplomatic means. Id. PIRA has resorted to terrorism aimed at inflicting maximum casualties and has targeted civilians as well as military personnel. Id.

n60. See id. PIRA has also used its political wing - the Provisional Sinn Fein headed by Gerry Adams - to accomplish such goals. Bonner, supra note 52, at 175. PIRA had as many as 1000 hard-core members in the 1970s, but internal disputes have since cut this figure to between 200 and 500 members. Id. Even though membership appears to be small, PIRA is able to draw upon much support through sympathy and intimidation. Id.

n61. Anderson & Sloan, supra note 1, at 294. From 1969 to 1982, members of PIRA have been convicted of 2269 murders, 7521 bombings resulting in 608 deaths, and at least 1000 "kneecappings" (summary executions and threats against family members). Id. PIRA is compartmentalized into Active Service Units whose members only know each other and the person issuing orders from above so as to minimize damages should a member be caught. Department of Defense, Terrorist Group Profiles 56-59 (1988) (hereinafter Terrorist Group Profiles). The Active Service Units are subordinate to localized Brigades which are ultimately responsible to the PIRA operational authority, the Northern Command. Id. PIRA attacks have occurred outside of Northern Ireland, the most notorious being the Brighton Bombing of 1984 which was designed to kill Margaret Thatcher. Anderson & Sloan, supra note 1, at 295. PIRA operations have also been reported in western European nations such as West Germany and the Netherlands. Id. at 294.

n62. Id. at 293-94.

n63. Terrorist Group Profiles, supra note 61, at 57.

n64. Bonner, supra note 52, at 175.

n65. Terrorist Group Profiles, supra note 61, at 57. Libyan weapons were intercepted off the coasts of Ireland in 1973 and France in 1987. Id. Libya has also been reported to have given PIRA between one and two million British pounds. Id.

n66. Id. at 50.

n67. Id.

n68. Id.

n69. Terrorist Group Profiles, supra note 61, at 51-52.

n70. Id.

n71. Id. at 51.

n72. Anderson & Sloan, supra note 1, at 147.

n73. Bonner, supra note 52, at 177.

n74. Anderson & Sloan, supra note 1, at 357.

n75. Id. The UDA's legal status is due in large part to the fact that British security forces depend upon it for auxiliary support. Id.

n76. Id.

n77. Anderson & Sloan, supra note 1, at 359. The UVF ceased to exist officially in 1922 when most of its members joined the newly created Royal Ulster Constabulary. Id. However, the group reinstated itself in both 1966 and 1973 and declared war on all IRA members. Id.

n78. Id.

n79. Bonner, supra note 52, at 177.

n80. Anderson & Sloan, supra note 1, at 359.

n81. Id. In one of its more notorious attacks, the UFF shot and wounded current Sinn Fein President Gerry Adams as he was driving through Belfast. Id.

n82. Prevention of Terrorism (Temporary Provisions) Act 1989 (Eng.).

n83. See Walker, supra note 35, at 31. The Birmingham bombings of November 21, 1974, in which twenty-one people were killed and 184 injured, are often thought to have prompted the passage of the PTA. Id. However, both the Provisional and Official IRA had engaged in over 150 attacks in the two years preceding the PTA's creation. Id. Although the PTA has been deemed "panic legislation," it was modeled after the Northern Ireland (Emergency Provisions) Act 1973, the Prevention of Violence (Temporary Provisions) Act 1939, and the Immigration Act of 1971. Id. at 31-32. Nevertheless, the PTA is criticized because of the design defects that stem from its rapid passage.

n84. Northern Ireland (Emergency Provisions) Act 1996 (Eng.).

n85. An official review of the 1991 revision of the legislation recommended that a new statute be enacted with a number of changes. See generally J.J. Rowe, Review of the Northern Ireland (Emergency Provisions) Act 1991, Q.C., Cm.2706 (Feb 1995) (the Rowe Report) as cited in Kersi B. Shroff, The United Kingdom, in Terrorism: Foreign/International Legal Responses in Selected Foreign Countries 122 (Report for Congress, 1995) (analyzes the 1991 form of the EPA, but remains consistent with the 1996 revision).

n86. Walker, supra note 35, at 41.

n87. See Bruce W. Warner, Great Britain and the Response to International Terrorism, in The Deadly Sin of Terrorism 20 (David A. Charters ed., 1994).

n88. Shroff, supra note 85, at 124. Schedule 1, Part I, of the EPA lists substantive offenses such as murder, manslaughter, rioting, kidnapping, false imprisonment, conspiracy to murder, causing explosions, escaping from lawful custody, theft, robbery, burglary, intimidation, throwing a petrol bomb, criminal damage to **property,** possession of illegal firearms, aircraft hijacking, taking of hostages, financial assistance to **terrorism,** and breach of **exclusion** orders. Id.

n89. Id. at 124. Murder, manslaughter, theft, and intimidation can be certified out whereas rioting, causing grievous bodily harm by explosions and escaping from lawful custody cannot.

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See also Northern Ireland (Emergency Provisions) Act 1996, Sch. 1, Pt. I: Substantive Offenses (Eng.).

n90. Prevention of Terrorism (Temporary Provisions) Act 1989, 4-8, Sched. 2, (Eng.).

n91. Id. An order lasts for three years but can be revoked by the Secretary of State before the period expires. Id. at Sched. 2(1) and (2). A British citizen cannot be excluded from the entire United Kingdom. Id. at 7(4). A British citizen also cannot be excluded from Great Britain if he or she has been a resident of Great Britain throughout the last three years and is currently excluded from Northern Ireland. Id. at 5(4)(a) and (b). Likewise, a British citizen cannot be excluded from Northern Ireland if he or she has been a resident of Northern Ireland throughout the last three years and is currently excluded from Great Britain. Id. at 6(4)(a) and (b). **Exclusion** orders are used when there is sufficient information that indicates that an individual is involved with **terrorism** but where that individual cannot be prosecuted because of a lack of admissible evidence. See Rowe, supra note 85, at 6. Sixty-five people have been excluded from the entire United Kingdom, 410 from Great Britain, and seven from Northern Ireland. See C.A. Gearty & J.A. Kimbell, Terrorism and the Rule of Law 34 (1995) as cited in Shroff, supra note 85, at 129.

n92. See Northern Ireland (Emergency Provisions) Act 1996, Sched. 2. Organizations proscribed by the EPA are the Irish Republican Army, Red Hand Commandos, Cumann na mBan, Fianna Na mBan, Saor Eire, Ulster Freedom Fighters, Ulster Volunteer Force, Irish National Liberation Army, Irish People's Liberation Organization, and the Ulster Defence Force. Id. at 30(3). The Secretary of State may add or remove organizations from this list. Id. at 30(4). When an organization is listed, it becomes illegal for any person to: a) belong to the organization; b) solicit support for the organization; c) solicit membership or carry out orders of the organization; d) address any meeting of three or more persons knowing that the meeting is to: i) support a proscribed organization; ii) further the activities of a proscribed organization; or iii) be addressed by a member of a proscribed organization. Id. at 30(1)(a)-(d). It is also illegal to publicly wear any item of dress or display any article that arouses reasonable apprehension that he or she is a member or supporter of a proscribed organization (Id. at 31(a) and (b)) or to publicly conceal one's identity with a mask or a hood. Id. at 35. Furthermore, it is an offense to possess any article that could reasonably be assumed to be connected with the commission, preparation, or instigation of an act of terrorism connected with the affairs of Northern Ireland. Id. at 32(1).

n93. See Prevention of Terrorism (Temporary Provisions) Act 1989, Sched. 1 (Eng.). The PTA has only proscribed the Irish Republican Army (no specification is made between the Provisional IRA and the Official IRA) and the Irish National Liberation Army. See id. The language of PTA 2, relating to membership, support, and meetings of proscribed organizations, and PTA 3, relating to the display of public support, mirrors the language of EPA 30 and 32. However, no provisions of the PTA address the wearing of masks or hoods to conceal one's identity.

n94. See generally Walker, supra note 35, at 267-78.

n95. Shroff, supra note 85, at 132.

n96. Id. at 127; see also Northern Ireland (Emergency Provisions) Act 1996, Part V: Regulation of the Provision of Private Security Services (37-44) (Eng.).

n97. Shroff, supra note 85, at 127. The EPA requires a certification process for private security services through which certificates must be renewed every 12 months (see Northern Ireland (Emergency Provisions) Act 1996, 39(3) (Eng.)) and a certificate holder must notify the Secretary of State of a change of employees within 14 days of the change. See id. at 40. The Secretary of State may refuse to issue a certificate or revoke an existing certificate if he has reason to believe that a proscribed organization would benefit from the certificate or if

the applicant or certificate holder has persistently failed to comply with the requirements of Part V (Regulation of the Provision of Private Security Forces). See id. at 39(1) and (5).

n98. Shroff, supra note 85, at 127; see also Northern Ireland (Emergency Provisions) Act 1996, 38(2), (Eng.).

n99. Shroff, supra note 85, at 123. For example, both the police and armed forces may: 1) enter and search buildings, other than a dwelling house and seize any munitions or radio transmitters and receivers found therein; 2) stop and search persons in public places and seize any munitions or radio transmitters and receivers; 3) enter a non-dwelling building to search for and seize explosives; 4) stop and search persons in public places and seize explosives; 5) enter any premises to search for detained persons; 6) stop and question a person anywhere to ascertain identity, movements or knowledge of terrorist incidents; and, 7) enter any premises in the course of operations for preservation of peace or maintenance of order. Id.; see also Northern Ireland (Emergency Provisions) Act 1996, 17-24 (Eng.).

n100. See Northern Ireland (Emergency Provisions) Act 1996, 19 (Eng.) (Powers of arrest and seizure by members of Her Majesty's forces).

n101. Shroff, supra note 85, at 130. A person is guilty of an offense if he or she: a) discloses to another person information that is likely to prejudice an investigation; b) falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of, material which is or is likely to be relevant to an investigation. Prevention of Terrorism (Temporary Provisions) Act 1989, 17(2) (Eng.). An exception is made for disclosures by a legal adviser to a client or representative of a client or to any person in contemplation of or in connection with legal proceedings. Id. at 2C.

n102. Shroff, supra note 85, at 130. Such a person may be detained for up to 48 hours, which may be extended for an additional five days with the permission of the Secretary of State. See Prevention of Terrorism (Temporary Provisions) 1989, 14(4) and (5) (Eng.); see also R. v. Officer in Charge of Police Office, Castlereagh, ex parte Lynch, [1980] N.I. 126, 131, as cited in Shroff, supra note 85, at 130.

n103. Shroff, supra note 85, at 130. Immigration and customs officials may arrest a person without reasonable suspicion and subsequently detain him or her for up to 12 hours, which may be extended to 48 hours if there is reasonable suspicion. Id. Detention may also be extended for an additional five days with the permission of the Secretary of State. Id.; see Prevention of Terrorism (Temporary Provisions) Act 1989, 16 and Sched. 5, 1(b) and (c) (Eng.).

n104. Northern Ireland (Emergency Provisions) Act 1996 12(2)(b) (Eng.). After 1981, a number of trials were based on evidence obtained from accomplices turned informers under the promise of immunity ("Supergrasses"). See S.H. Bailey, et al, Civil Liberties 263 (1991) as cited in Shroff, supra note 85, at 126. Such trials were abandoned in 1986 when it was noted that judges were not sufficiently discriminating in the use of uncorroborated evidence. Id.

n105. Shroff, supra note 85, at 124. The latter proceeding requires the consent of both the court and the defendant. Id. Because defendants would often withhold their consent by refusing to recognize the court, a provision was enacted whereby the court is obliged to proceed, if it is not unjust to do so, without the defendant's consent if the prosecution wishes to conduct a preliminary inquiry for a scheduled offense. Id.; see also Northern Ireland (Emergency Provisions) Act 1996, 2 (Eng.).

n106. See Northern Ireland (Emergency Provisions) Act 1996, 3(2) (Eng.). Magistrates are no longer used for bail hearings in terrorist cases because it was the practice of the defendant's supporters to mob the courtroom and create a threatening atmosphere and

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subsequently intimidate the court. See Rowe, supra note 85, at 12.

n107. See Northern Ireland (Emergency Provisions) Act 1996, 5 (Eng.).

n108. See id. at 11; Shroff, supra note 85, at 124. Critics of this system argue that a judge will become biased against defendants after continually reviewing cruel and horrifying evidence. See Gearty & Kimbell, supra note 91, at 51. Statistics since 1980 show acquittal rates ranging from 29% to 50%. Id. However, the latest review of this provision found that intimidation still poses a threat to jury trials and that the current system should not yet be abandoned. See Rowe, supra note 85, at 15.

n109. Northern Ireland (Emergency Provisions) Act 1996, 11(5) and (6) (Eng.).

n110. See generally Prevention of Terrorism (Temporary Provisions) Act 1989, 9-13 (Eng.). These provisions are not applicable to acts committed outside the United Kingdom unless the omission of such acts would constitute a triable offense in the United Kingdom. Id. at 9(4).

n111. Shroff, supra note 85, at 130.

n112. See generally Criminal Justice Act, 1993, 51 (Eng.), as cited in Shroff, supra note 85, at 130.

n113. Shroff, supra note 85, at 127. If a conviction is obtained for intimidation, financial assistance for terrorism, or assisting another to retain the proceeds of terrorist-related activities, the court may also issue a confiscation order. Id. at 128. The court is allowed to assume that any **property** transferred to the defendant in the six years prior to the proceedings was the result of terrorist-related activities. Id.

n114. Id. at 131. Such offenses "include murder, manslaughter, kidnapping, abduction, causing explosions with intent to endanger **life or property,** and possessing firearms with an intent to injure." Id.

n115. Aviation Security Act, 1982 (Eng.); Aviation and Maritime Security Act, 1990 (Eng.), as cited in Shroff, supra note 85, at 131.

n116. Taking of Hostages Act, 1982, 4 (Eng.) as cited in Shroff, supra note 85, at 131. Also, the Internationally Protected Persons Act of 1978 grants extraterritorial jurisdiction over offenses committed against diplomats and government officials. Id.

n117. This conflict is grounded in the Biblical histories of Canaan (now Israel) and the Hebrew exodus from Egypt in the thirteenth century B.C. See Federal Research Division, Library of Congress, Israel: A Country Study 6, 17 (Helen Chapin Metz ed., 1990) (hereinafter Israel: A Country Study). The Palestinians (the Biblical Philistines) began their military push into Canaan around 1050 B.C., but were repelled by an increasingly powerful Israelite army commanded by King David. Id. However, in the sixth century B.C., the Babylonians conquered Jerusalem, thereupon scattering the Hebrew people into exile. Id. The Persian defeat of Babylonia in the mid-sixth century B.C. enabled the Jews to return to Israel, but the Roman Empire, upon conquering the Persians enveloped Israel in 332 B.C. Id. The Arab-Muslim conquest of 638 A.D. ended the rule of the Roman Empire, and the region, now Palestine, was subjected to Arab rule until Western Europe launched the Crusades of 1100 A.D. Id. The Arabs again took control of Jerusalem in 1291 A.D. Id. In 1516, the region was incorporated into the Ottoman Empire which remained in power until World War I. Id.

n118. See Israel: A Country Study, supra note 117, at 17-38.

n119. See id. at 38-44. The founding of the World Zionist movement took place in the late nineteenth century and contributed to increased Jewish immigration to Palestine. Id.

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Following the Holocaust of World War II, the movement for a sovereign Jewish state was met with violent opposition from Arab nationalists. Id.

n120. See Bernard Reich, Historical Dictionary of Israel lv-lvi (1992).

n121. See id. at lvi.

n122. Israel captured from Egypt both the Sinai Peninsula and the Gaza Strip in the summer of 1956, but eventually withdrew when United Nations peacekeepers were deployed to the Suez Canal region. See id. at lvii.

n123. Upon Egyptian President Nasser's call for the removal of United Nations forces, Israel launched a preemptive strike which subsequently drew Jordan, Syria, Iraq, and other Arab nations into the war. See id. at lvii-lviii. Israel's ultimate victory resulted in its occupation of the Sinai Peninsula, the Gaza Strip, the West Bank, East Jerusalem, and the Golan Heights. Id.

n124. Between February 1969 and August 1970, Egypt launched attacks against Israeli forces at the Suez Canal, but agreed to accept a U.N. Security Council Resolution devised by U.S. Secretary of State William Rogers after the Soviet Union began supporting Israel. See Israel: A Country Study, supra note 117, at 62-63.

n125. In what came to be known as the "Yom Kippur War," Syria and Egypt launched a surprise attack against Israel at its northern and southern borders. See id. at 64. Israel was eventually able to drive the invading armies back into their respective countries. See id. at 65. Israel entered into Syria and Egypt and threatened to overtake Damascus and the Egyptian Army, thus provoking Soviet intervention which prompted a cease fire negotiated by the United States. See id. at 66.

n126. Israel launched a major military action against the Palestine Liberation Organization (PLO) which was encamped in Lebanon in order to secure Israel's northern border and destroy the PLO infrastructure. Reich, supra note 120, at lx. Although the border was secured and the PLO withdrew from Lebanon, Israeli troops stationed in Lebanon were targeted for violent terrorist operations. Id.

n127. See Noemi Gal-Or, Countering Terrorism in Israel, in The Deadly Sin of Terrorism 139 (David A. Charters ed., 1994) citing Gabriel Ben-Dor, The Strategy of Terrorism in the Arab-Israeli Conflict: The Case of Palestinian Guerrillas, in Terrorism, Surprise and Control 139 (Yair Evron ed., 1979).

n128. Id.

n129. This Charter was adopted by the Palestine National Council of the PLO, on July 17, 1968. See The Arab-Israel Conflict and its Resolution: Selected Documents 136 (R. Lapidoth & M. Hirsch eds., 1992).

n130. Id. at 137, art. 9.

n131. See Agreement on the Gaza Strip and Jericho Area, Cairo, May 4, 1994, arts. VIII and XVIII (Government of Israel, Ministry of Foreign Affairs, Jerusalem).

n132. Anderson & Sloan, supra note 1, at 109.

n133. In addition to numerous attacks on civilian targets, different factions of Al-Fatah, such as Black September, Force-17, and the Hawari Group, were responsible for the assault on Israeli athletes at the Munich Olympics, the assassination of Jordan's Prime Minister, and the takeover and sabotage of several embassies. Terrorist Group Profiles, supra note 61, at

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12-13; Anderson & Sloan, supra note 1, at 113.

n134. Terrorist Group Profiles, supra note 61, at 12-13.

n135. Id.

n136. Anderson & Sloan, supra note 1, at 113.

n137. Id.

n138. U.S. Dep't of State, Patterns of Global Terrorism: 1995 61 (1996) (hereinafter Patterns of Global Terrorism: 1995). After splitting from the PLO, the PSF not only attacked Israeli and Arab targets, but PLO targets as well.

n139. Anderson & Sloan, supra note 1, at 289. The PSF numbers around 300 members and, in addition to several notorious attacks in the 1970s and the kidnapping of U.S. Army Colonel Ernest Morgan, it has claimed unconfirmed responsibility for other attacks. Id.

n140. An early break-away group from the Popular Front for the Liberation of Palestine, the DFLP has been involved only in border raids since 1988, but was responsible for the Ma'alot schoolhouse massacre in 1974, in which 27 children were killed and 134 people were wounded. Patterns of Global Terrorism: 1994, supra note 16, at 37-38.

n141. See Kenneth Katzman, Terrorism: Middle Eastern Groups and State Sponsors 15 (CRS Report for Congress, 1995). The DFLP split into two factions in 1991. Id. The Hawatmeh faction opposes the Declaration of Principles signed between the PLO and Israel in 1993 while the other faction is loyal to Arafat. Id. The Hawatmeh faction, which has since suspended its membership in the PLO, is now affiliated with ten other peace-rejectionist groups based in Damascus. Id.

n142. The PFLP was formed after the 1967 war and received its notoriety through several ruthless hijackings and killings in the 1970s. Terrorist Group Profiles, supra note 61, at 25-26. The PFLP was responsible for the bombings of several civilian airliners and buses, was the force behind the Japanese Red Arm's attack on Lod Airport, and has undertaken rocket, grenade, and knife attacks against Israeli civilians. Id.

n143. The PFLP-GC split from the PFLP to pursue the development of a conventional military, as can be seen in numerous attacks utilizing hang-gliders, hot air balloons, assault rifles, and anti-tank and anti-aircraft rockets. The PFLP-GC successfully engineered the release of 1150 Palestinian prisoners in exchange for three Israeli soldiers. See id. at 26-27; Patterns of Global Terrorism: 1995, supra note 138, at 60-61. The PFLP-GC's violent opposition to the PLO led to a further split which established the foundation of the Palestine Liberation Front (PLF). Patterns of Global Terrorism: 1995, supra note 138, at 58-59. The PLF further split into pro-Libyan, pro-Syrian, and pro-PLO factions. Id. The pro-PLO faction led by Abu Abbas is responsible for the attack on the cruise ship Achille Lauro. Id. An arrest warrant for Abu Abbas is still outstanding in Italy. Id.

n144. The 15 May Organization, was formed in 1979 and has never been affiliated with the PLO. Terrorist Group Profiles, supra note 16, at 8-9. It disbanded in 1984 after several bombings of U.S. and Israeli targets. Id.

n145. See Katzman, supra note 141, at 14-15.

n146. Lebanese Shiite clerics who subscribe to the Islamic revolutionary ideology of Ayatollah Khomeini founded the Hizballah after the Israeli invasion of Lebanon in 1982. Id. at 4-5. The organization's original goal was to form an Islamic republic in Lebanon, but it has since concentrated its efforts on disrupting the Israeli-Palestinian peace process. Id. The

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Hizballah is also trying to integrate into the Lebanese political system and now holds eight of 128 seats in the national assembly. Id.

n147. Reports have indicated that Iranian diplomats posted in Lebanon, Syria, and Sudan provide the Hizballah with logistical support. Iran is also reported to finance the organization with $ 60 to $ 100 million per year. Id.

n148. The Hizballah has conducted several notorious anti-Western attacks, such as bombings of the U.S. Marine Barracks, the U.S. Embassy, and the U.S. Embassy annex in Beirut. Katzman, supra note 141, at 4-5. It is also responsible for the hijacking of a TWA airliner, two Israeli-targeted bombings in Buenos Aires, and the detention of Western hostages in Lebanon. Id.

n149. HAMAS, which grew out of a Palestinian uprising in 1987, generally opposes the peace process, but does appear to be willing to participate in the newly formed Palestinian Authority which has resulted from the peace agreement. Id. at 6. The organization has a military wing, known as the Izz ad-Din al Qassam Brigades, but also engages in peaceful political activity, provides social services, supports charities, and finances education to needy Palestinians. Id.

n150. See Patterns of Global Terrorism: 1994, supra note 16, at 41. The number of hardcore members is unknown, but HAMAS has tens of thousands of sympathizers who lend both political and financial support. Id.

n151. Id.

n152. See id. at 53-54. In addition to bus attacks and cross-border raids against Israeli targets in the Gaza Strip and the West Bank, the PIJ has threatened to attack U.S. interests in both Jordan and Egypt due to its strong support of Israel. Id.

n153. Although Jewish extremists have used terrorism against Palestinian civilians in the West Bank and the Gaza Strip, the Israeli government has not been swift in responding to the problem. See P. Marcus, The Treatment of Terrorists in the Israeli Occupied Territories 3(2) Amer. U. J. Int'l. & Pol'y. 457 (1988) as cited in Ruth Levush, Israel, in Terrorism: Foreign/International Legal Responses in Selected Foreign Countries 69, 70 (Report for Congress, 1995).

n154. This organization was founded by Rabbi Meir Kahane who was assassinated in the United States in 1990. Katzman, supra note 141, at 11. Kahane was responsible for the creation of the Jewish Defense League in 1968, which operated in the United States, primarily for the protection of Orthodox Jews in New York City neighborhoods. See Anderson & Sloan, supra note 1, at 169-71. The Kach Party is an ultranationalist group favoring expulsion of the Arabs from both Israel and the West Bank and the Gaza Strip. Id.

n155. Founded by Meir Kahane's son, Binyamin, this group split from the Kach party following Meir Kahane's assassination. See Katzman, supra note 141, at 11.

n156. See Patterns of Global Terrorism: 1995, supra note 138, at 51. A Kach affiliate killed 40 people and wounded 150 people worshipping at a mosque in Hebron on February 25, 1994. Katzman, supra note 141, at 11. These groups have also claimed responsibility for several shootings in the West Bank and Hebron. Id. Israel banned both groups on March 13, 1994 in an effort to stem the furor caused by the Hebron massacre. Anderson & Sloan, supra note 1, at 172.

n157. Jewish terrorist groups were not considered to be a threat to the Israeli Defense Forces as of 1988. Israel: A Country Study, supra note 117, at 279-80. The Gush Emunim Underground launched several terrorist operations against Arab targets in the early 1980s.

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Id. Other smaller groups were responsible for less notorious attacks. Id.

n158. 1 L.S.I. 76, (1948). This Ordinance only applies during a state of emergency as declared by 9 of the Law and Administration Ordinance, 1948, 1 L.S.I. 7, (1948).

n159. See Law and Administration Ordinance (Amendment No. 11) Law, 1967, 21 L.S.I. 75, (1966-67); and Municipal Ordinance (Amendment No. 6) Law, 1967, 21 L.S.I. 75-76, (1967), as cited in Levush, supra note 153, at 72.

n160. See Golan Heights Law, 1981, 36 L.S.I 7, (1981-82), as cited in Levush, supra note 153, at 72.

n161. The Ordinance was enacted after the assassination of United Nations mediator Count Folke Bernadotte. Noemi Gal-Or, Countering Terrorism in Israel, in The Deadly Sin of Terrorism 137, 149 (David A. Charters ed., 1994). Although its intention was to eradicate domestic Jewish terrorism, the Ordinance also applies to foreign terrorism. Id.

n162. Levush, supra note 153, at 72. These territories were never officially annexed by Israel and military regulations apply to all people living within their jurisdictions; however, for common offenses, Jordanian law applies to the West Bank, Egyptian law applies to the Gaza Strip, and Israeli law applies to all of Israel. Id.

n163. Prevention of Terrorism Ordinance, 1948, 1 L.S.I. 76, (1948), 1.

n164. Id. at 4. A person who supports a terrorist organization: a) publishes, in writing or orally, words of praise, sympathy or encouragement for acts of violence calculated to cause death or injury to a person or for threats of such acts of violence; or b) calls for aid or support for acts of violence calculated to cause death or injury or threat of such; c) possesses propaganda materials; d) gives money or money's worth for the benefit of a terrorist organisation; e) puts a place at the disposal of a terrorist organisation as a place of action, meeting, propaganda, or storage; or f) puts an article at the disposal of a terrorist organisation. Id. Israel passed the Prevention of Terrorism (Amendment) Law, 1980, 34 L.S.I. 211, (1980), which adds: g) identifies with or supports a terrorist organization in a public place.

n165. Prevention of Terrorism Ordinance, 1948, 1 L.S.I. 76, (1948), 1. ""Member of a terrorist organisation' means a person belonging to it and includes a person participating in its activities, publishing propaganda in favour of a terrorist organisation or its activities or aims, or collecting moneys or articles for the benefit of a terrorist organisation or its activities." Id.

n166. Id. at 2. This offense includes:

performing a function in the management or instruction of a terrorist organisation or participating in the deliberations or the framing of the decisions of a terrorist organisation or acting as a member of a tribunal of a terrorist organisation or delivering a propaganda speech at a public meeting or over the wireless on behalf of a terrorist organisation.

Id.

n167. Id. at 8. In any legal proceeding, such notice serves as proof that the posted body of persons is a terrorist organisation unless the contrary is proven. Id. Furthermore, a final judgment which determines that a body of persons is a terrorist organization can be used as

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prima facie evidence that the group is a terrorist organization in any other legal proceeding. Id. at 11(a).

n168. See Prevention of Terrorism Ordinance, 1948, 1 L.S.I. 76, (1948), 7; see also Levush, supra note 153, at 75.

n169. See Prevention of Terrorism Ordinance, 1948, 1 L.S.I. 76, (1948), 5; see also Levush, supra note 153, at 74.

n170. Prevention of Terrorism Ordinance, 1948, 1 L.S.I. 76, (1948), 6(a). A **property** owner affected by such an action may appeal to a district court within fifteen days of receiving knowledge of the shut down. Id. at 6(b).

n171. Laws of the State of Israel, Special Volume, 5737-1977, as cited in Levush, supra note 153, at 72.

n172. Id.

n173. The death penalty has only been implemented in the Adolf Eichmann war crimes case. Levush, supra note 153, at 73.

n174. Penal Law, 5737-1977, art. 2, reprinted in Levush, supra note 153, at 73, states:

(1) any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates, incites or encourages any of the following unlawful acts:

(a) the subversion of the political order of Israel by revolution or sabotage;

(b) the overthrow by force or violence of the lawful government of Israel or of any other state, or of organized government;

(c) the destruction or injury of **property** of the State or of **property** used in commerce within the State or with other countries.

Id.

n175. Penal Law, 5737-1977, 4, as cited in Levush, supra note 153, at 76-77.

n176. Penal Law, 5737-1977, 5(a), reprinted in Levush, supra note 153, at 77, states:

The courts in Israel are competent to try under Israeli law a person who committed abroad an act which would have been an offense had it been committed in Israel and which injured or was intended to injure the State of Israel, its security, **property** or economy or its transport or communication links with other countries.

Id.

n177. Penal Law, 5737-1977, 7(a), reprinted in Levush, supra note 153, at 77, states:

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the mere fact that they are vulnerable and innocent. [7] Genuine freedom fighters generally do not deliberately attack children, a person passing by in the street, or people who merely have an ethnic or religious connection to a geographic area. [8] True terrorists often target people who are not the cause of the oppression that a freedom fighter would struggle against and thus break down the boundaries of acceptable conflict and draw in a civilian population that is then victimized at random. [9] Terrorists are also not guerrillas. Guerrillas are irregular soldiers who wage war on far superior military forces, not unarmed, unsuspecting, and defenseless civilians. [10]

Therefore, classifying terrorists as freedom fighters or guerrillas is a misconception that attempts to refute terrorism's implicit barbarity and legitimize outlandish criminal behavior. This manipulation is made possible by broad application of the term "terrorism." It does not merely apply to radical insurgent organizations that indiscriminately use violence as an ideological arm; instead it applies to any individual, group, or nation that utilizes **[*409]** physical force as a medium to invoke or obstruct political and social transformations. With such an extensive base, it is understandable that terrorism has yet to be defined with boilerplate language. Although a concise or an entirely accurate statement may prove elusive, terrorism, when broken down to a simple principle, is basically "the threat of violence and the use of fear to coerce, persuade, and gain public attention." [11]

B. Identifying the Threat

Geo-political controversies and ideological disagreements often serve as catalysts for terrorism. Violence directed against democratic states frequently results from political and social objectives that are so hopelessly extreme that the normal channels of democracy would not be likely to afford the radical results sought. [12] In non-democratic states, terrorists act out of desperation due to a lack of suitable means to obtain their desired objectives. [13] Regardless of their theater of operation, terrorist groups are either reactionaries who wish to restore former conventions or revolutionaries who wish to replace existing structures. [14]

It is rare for independent terrorist cells to have significant external contacts for support or an infrastructure that will ensure their longevity. [15] Such organizations are often limited in their capabilities, but may be able to contact other organizations that can provide them with necessary aid. [16] Organizations that receive support from sovereign nations can better maintain the group's existence through access to training, weapons, safe harbor, and **[*410]** logistical and administrative support. [17] Such support provides them with opportunities to travel internationally, obtain sophisticated weapons and explosives, and coordinate their objectives with other terrorist groups. [18]

Other nations may go so far as to directly organize, supply, and control terrorist cells for the purpose of creating a militant wing of a particular autocratic regime. [19] These organizations do not face difficulties with regard to sustenance, leadership, and support; however, state-directed organizations are rare due to the **risk** of international condemnation. [20] Although any insurgent group, whether independent or state-operated, can be unpredictably dangerous, overlooking an organization's support base could limit effective evaluation of its potential capabilities.

The goal of a terrorism counteraction policy is to make the political, economic, and psychological climate in which terrorists operate increasingly hostile in order to reduce terrorism to a point where it cannot divert a nation from its stated policies. [21] To achieve this end, an effective policy should focus upon a rule of law that delegitimizes terrorist activity. Further, it must make the practice of supporting terrorism unacceptable internationally in **[*411]** order to stifle financial and military assistance to insurgent groups. [22] Due to each culture's unique ethnocentric differences, these efforts should focus upon vigorous international cooperation and negotiation. [23] However, rigorous legal standards do not guarantee compliance, so a nation must also employ localized measures by continually re-evaluating threats to potential target sites, and then work to improve their protection. [24]

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The courts in Israel shall be competent to try under Israeli Law a person who committed abroad an act which would have been an offense had it been committed in Israel and which injured or was intended to injure the **life,** person, health, freedom or **property** of an Israeli national or resident of Israel.

Id.

n178. M. Shamgar, Military Government in the Territories Administered by Israel 1967-1980, The Legal Aspects 450 (1982), as cited in Levush, supra note 153, at 75, states:

The law in existence in the Region on June 7, 1967, shall remain in force, insofar as it does not in any way conflict with the provisions of this Proclamation or any Proclamation or Order which may be issued by me, and subject to modifications resulting from the establishment of government by the Israel Defense Forces in the Region.

Id.

n179. Government of Palestine, The Defence (Emergency) Regulations, 1945, as amended until Mar. 2, 1947, as cited in Levush, supra note 153, at 75.

n180. See British Mandate Defence (Emergency) Regulations, 1945, arts. 84 and 85. With regard to unlawful associations, memberships, management, holding office, and working for the association is prohibited; in addition, to affording a meeting place, fundraising, and publishing or distributing materials is impermissible. Levush, supra note 153, at 76.

n181. R. Shehadeh, Occupier's Law, Israel and the West Bank 184 (1985) as cited in Levush, supra note 153, at 76.

n182. Explosives Law, 1953, 8 L.S.I. 57, (1953-54) as cited in Levush, supra note 153, at 77.

n183. Levush, supra note 153, at 78. Israel does not have any specific regulations regarding nuclear materials even though it is speculated that it will have nuclear capabilities in the near future. Id.

n184. Extradition Law, 1954, 8 L.S.I. 144 (1953-54), reprinted in Levush, supra note 153, at 78. Section 2 states that an individual may be extradited if:

(1) An agreement providing for reciprocity as to the extradition of offenders exists between Israel and the state requesting his extradition ...

(2) he is accused or has been convicted in the requesting state of an offense of a non-political character and which, had it been committed in Israel, would be one of the offenses set out in the Schedule to this Law.

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Id.

n185. An example can be found in Nakash v. State of Israel, 40(4) P.D. 78, in which the appellant argued that his murder of an Arab night club owner in France was of a political character since it was in response to the French authorities' failure to adequately protect Jews from attacks organized by Arab organizations. Levush, supra note 153, at 78. The court authorized the extradition because the substance of the offense was not political in nature and held that the subjective motives of the appellant were irrelevant. Id.

n186. 8 Dinim (Laws) 4733 (1991-), cited in Levush, supra note 153, at 78. A citizen will be extradited if he or she committed the offense before acquiring Israeli citizenship. Id.

n187. Law of Return, 1950, 4 L.S.I 114, (1950), reprinted in Fundamental Laws of the State of Israel 156 (Joseph Badi ed., 1961).

n188. Id.

n189. Law of Return (Amendment), 1954, 8 L.S.I. 144, (1954), reprinted in Fundamental Laws of the State of Israel 332 (Joseph Badi ed., 1961).

n190. Entry into Israel Law, 1952, as amended, 6 L.S.I. 161 (1951-52), cited in Levush, supra note 153, at 79. An individual will not be deported if they are an Israeli national or if they are in possession of an immigrant visa granted under the Law of Return, 5710-1950. Id.

n191. See Victims of Hostile Action (Pensions) Law, 1970, 24 L.S.I. 131 (1969-70), cited in Levush, supra note 153, at 79.

n192. See Pensions for Victims of Hostile Actions (Definition of Area Held by the Israel Defense Forces), 1971, 31 Dinim 20409 (1993-), cited in Levush, supra note 153, at 79.

n193. See Victims of Hostile Action (Burial Expenses) Regulations, 1978, 31 Dinim 20385 (1993-), cited in Levush, supra note 153, at 79.

n194. See Victims of Hostile Action (Burial Expenses) Regulations, 1978, 31 Dinim 20395 (1993-), cited in Levush, supra note 153, at 79.

n195. See Victims of Hostile Action (Burial Expenses) Regulations, 1978, 31 Dinim 20399 (1993-), cited in Levush, supra note 153, at 79.

n196. Sung Yoon Cho, Japan, in Terrorism: Foreign/International Legal Responses in Selected Foreign Countries 89, 97 (Report for Congress, 1995).

n197. The JRA wishes to incite a world-wide Marxist-Leninist revolution by uniting leftist Japanese forces to eliminate imperialism and establish a "People's Republic" in Japan. Terrorist Group Profiles, supra note 61, at 118.

n198. See Terrorism and Democracy 170-85 (Peter Janke ed. 1992). The origins of the JRA are found in the Sekigun-Ha, a militant student group organized in 1969, which disbanded when the police detected plans to overtake the official residence of the Prime Minister. Id. at 172. Fifty-four members were arrested, and the remaining members, in search of international support, hijacked JAL flight Yodo-Go on March 31, 1970, and forced it to fly to North Korea. Id. at 175. However, the North Korean government restricted the group from conducting any activities and forced the hijackers to remain in North Korea until the late 1980s. Id. at 176. Soon after the hijacking, the Japanese police arrested 200 people in efforts to suppress the remainder of the group, but when Fusako Shigenobu was released from prison, she left Japan with a small number of followers. Id. They traveled to Lebanon were

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they reorganized as the Arab Red Army in order to gain strength as a faction of the Popular Front for the Liberation of Palestine, but soon changed their name to the Japanese Red Army. Id.

n199. Terrorist Group Profiles, supra note 61, at 118.

n200. Patterns of Global Terrorism: 1994, supra note 16, at 44.

n201. See Terrorism & Democracy, supra note 198, at 176-77. Three members, while still under the name of the Arab Red Army, attacked passengers with machine guns and grenades on May 30, 1972. Id. at 176. Twenty-four people were killed, many of whom were on a religious pilgrimage from Puerto Rico, and two of the terrorists committed suicide in the process. Id. at 177. The third member, Kozo Okamoto, was arrested and sentenced to **life** imprisonment, but was released along with 1150 Palestinian guerrillas in exchange for three Israeli soldiers held by the PFLP in 1985. Id. The purpose of this attack, though believed to have been to prove the JRA's loyalty to the PFLP, is still unknown. Id. at 176. See William A. Farrell, Blood and Rage: the Story of the Japanese Red Army 138-44 (1990) for a detailed account of the Lod Airport Massacre.

n202. Terrorist Group Profiles, supra note 61, at 119. In August of 1975, ten members took over the U.S. Consulate in Kuala Lumpur, Malaysia, and took 52 people hostage. Id. The terrorists demanded that seven JRA members be set free from Japanese prisons and transported to the Middle East. Id. Although Japan intended to release all seven JRA members, only five expressed willingness and were transported to Tripoli, Libya, via Kuala Lumpur. Id. The Japanese government later released nine imprisoned terrorists and paid six million dollars in exchange for 159 people taken hostage when the JRA hijacked a Japan Airlines plane in Bombay and forced it to land in Dhaka, Bangladesh in 1977. Id. Upon the release and payment, the hijackers were flown to Algeria. Id.

n203. See Terrorism & Democracy, supra note 198, at 182-83. Evidence revealed that JRA members were believed to be behind the formation and subsequent activities of the Anti-Imperialist International Brigade and the Anti-war Democratic Front. Id.

n204. Also known as the Middle Core or Nucleus Faction, this organization wants to terminate the current constitutional democracy in Japan, the monarchy, and United States-Japanese relations. Terrorist Group Profiles, supra note 61, at 115.

n205. Patterns of Global Terrorism: 1995, supra note 138, at 44.

n206. Anderson & Sloan, supra note 1, at 66-67. It is the largest and most militant of 23 factions that make up the Japanese New Left movement. Id. The group also rejects the "Japanese corporate state" as evidenced by "frequent attacks on the construction of the New Tokyo International Airport and against the subway and railroad mass-transit systems." Id.

n207. Terrorist Group Profiles, supra note 61, at 116.

n208. Patterns of Global Terrorism: 1994, supra note 16, at 37.

n209. See Terrorist Group Profiles, supra note 61, at 117. The group has been linked to the beating death of a railway trade union official in September of 1986, but other attacks have not produced human casualties. Id. For example, truck-mounted flamethrowers have been used to burn buildings, bombs have destroyed homes of executives and have been used to delay construction of the expanding Narita airport, and rocket-bombs and projectiles have been fired at targets such as the Imperial Palace and airports. Id.

n210. Cho, supra note 196, at 98.

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n211. Master of Terror, Asiaweek, Dec. 22, 1995 / Dec. 29, 1995, at 43; available in LEXIS, NEWS Library, ASIAWK File. In addition to its Japanese contingent, the cult also claims to have 100,000 member overseas, primarily in Moscow, but also in New York, Bonn, and Colombo. Id.

n212. See Steven R. Bowman, Chemical Agent Attacks in Japan, CRS Report for Congress May 4, 1995. In June of 1994, seven people were killed by a release of Sarin Gas in the cult's home town of Matsumoto. Id. On March 5, 1995, nineteen passengers on the Yokohama subway were hospitalized for eye and respiratory pain from unidentified fumes. Id. The most lethal attack came on March 20, 1995, when Sarin leaked from packages placed aboard five cars in Tokyo's subway system which killed 12 people and injured more than 5000. Id. One month later, April 19, 1995, 400 people were hospitalized following a "copy-cat" attack with tear gas. Id.

n213. Master of Terror, supra note 211, at 43.

n214. Id. Shokou's trial began in early May and could continue for another five years. Trial of the Century, Asiaweek, May 10, 1996, at 7; available in LEXIS, NEWS Library, ASIAWK File. In addition to the Japanese trial, a Russian court has ordered the cult to pay $ 4 million to families of cult members. Justice for All, Asiaweek, April 28, 1995; available in LEXIS, NEWS Library, ASIAWK File. This money is to be used to build a rehabilitation center for brainwashed cult members. Id.

n215. Law No. 45 of 1907, amended by Law No. 31 of 1991, cited in Cho, supra note 196, at 89.

n216. Id. at 90. Generally, a person is guilty of rioting under the Code if he assembles in a crowd for the purpose of using violence or intimidation (art. 106); however, rioting will be prosecuted as a terrorist offense if two or more people assemble for purposes of jointly causing injury to **life,** limb, or **property** (art. 208-2). Id. at 92. These assembly provisions also have been supplemented by the Law Concerning Punishment of Violent Acts, Law No. 60 of 1926, amended by Law No. 31 of 1991, arts. 5-7., which enhance the Code provisions to aggravated offenses which carry a maximum punishment of ten years of penal servitude. Id.

n217. See Cho, supra note 196, at 90. Additionally, attempts and conspiracies to commit such crimes also fall under the Code's terrorism provisions. Id.

n218. Under revised art. 4-2, if a crime observed by an international convention corresponds to a provision of the Criminal Code, Japan is obligated to punish anyone who commits the crime outside of the country. See K. Itoh, The 1987 Penal Code and Other Special Criminal Amendments Law: A Response to the Two UN Conventions Against International Terrorism 32 Jap. Ann. Int'l. 18 (1989), cited in Cho, supra note 196, at 95.

n219. Cho, supra note 196, at 94. Art. 1, 2, grants jurisdiction over anyone who "commits a crime on board a Japanese vessel or a Japanese aircraft outside Japan." Id. Art. 2 grants jurisdiction over anyone who commits a designated crime (insurrection, counterfeiting, and forgery of public documents) that threatens Japan. Id. Art. 3 grants jurisdiction over any Japanese national who commits a designated major crime (murder, bodily injury, kidnapping, and arson) outside of the country. Id. Finally, Art. 4 grants jurisdiction over any Japanese public official who is guilty of official corruption or drafting false official documents outside of Japan. Id.

n220. Law No. 240 of 1952, amended by Law No. 89 of 1993, cited in Cho, supra note 196, at 89.

n221. See John M. Maki, Japan's Subversive Activities Prevention Law, VI W. Pol. Q. 489-92 (1953).

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n222. Subversive Activities Prevention Law, Law No. 240 of 1952, amended by Law No. 89 of 1993, art. 1, reprinted in Cho, supra note 196, at 91, states that the law's purpose is:

To contribute to the preservation of public safety by establishing regulatory procedures for taking action against organizations which have carried out terroristic activities as organizational activities and supplementing the Criminal Code with additional penalties.

Id.

n223. Such crimes are riot, arson, the setting off and use of explosives, endangering the passage of or wrecking public conveyances, murder, robbery, interference in the exercise of duties and coercion of public officials. Maki, supra note 221, at 493.

n224. Id., citing art. 4, 1, P B.

n225. Cho, supra note 196, at 91. Subversive activities per se are crimes related to insurrection and treason, such as inducement of foreign aggression, and providing assistance to enemies. Maki, supra note 22, at 492-93.

n226. Cho, supra note 196, at 91.

n227. Subversive Activities Prevention Law, Law No. 240 of 1952, amended by Law No. 89 of 1993, art.38, P 1, construed in Cho, supra note 196, at 91.

n228. Subversive Activities Prevention Law, Law No. 240 of 1952, amended by Law No. 89 of 1993, arts. 5-7, construed in Cho, supra note 196, at 92.

n229. Cho, supra note 196, at 97. Sixteen groups have been targeted for surveillance and investigation under the Subversive Activities Prevention Law, but none have been dissolved. Id.

n230. Cho, supra note 196, at 93. In four separate cases, members of the Communist Party were indicted on charges of printing and distributing Communist literature in violation of art. 38, P 2, but challenged the Law's constitutionality as in violation of Article 21 of the Japanese Constitution. Id. Although the defendants were ultimately acquitted on other grounds, the constitutionality of the Act was upheld by the lower courts, three of which were affirmed by the Japanese Supreme Court. Id., citing the Gifu Case, 396 Hanrei Jiho 19 (1959)(affirmed by the Supreme Court, Dec. 21, 1964); Tsu and Kyoto Cases, 496 Hanrei Jiho 69 (1967) (affirmed by Supreme Court, July 20, 1967, and Sept. 22, 1967, respectively); and the Kushiro Case, 74 Hanrei Jiho 21 (1956)(affirmed by the Sapporo High Court, Mar. 30, 1956).

n231. Cho, supra note 196, at 98. The Aum Shinrikyo, which has been designated as a violence-prone organization, has been subjected to the Subversive Activities Prevention Law. Id. Critics have asserted that putting a religious organization under surveillance could be a violation of the Japanese Constitution's guarantee of freedom of religion. Id.

n232. Id. at 97. However, eight members of an ultra-nationalistic organization were indicted on charges of preparation of homicide and incitement to riot in violation of Articles 39 and 40 of the Subversive Activities Prevention Law. See 603 Hanrei Jiho 94 (1970), cited in Cho, supra note 196, at 93-94.

n233. Subversive Activities Prevention Law, Law No. 240 of 1952, amended by Law No. 89

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of 1993, art. 2, cited in Cho, supra note 196, at 91.

n234. Cho, supra note 196, at 97.

n235. Law No. 77 of 1991, amended by Law No. 89 of 1993, cited in Cho, supra note 196, at 93.

n236. Cho, supra note 196, at 93.

n237. The ban covers activities ranging from terroristic threats to extorting protection money. Id. at 93. Engaging in a banned activity can result in one year's imprisonment and a fine of up to one million yen. Id.

n238. An example is the extradition treaty between Japan and the United States that entered into force on May 26, 1980. Treaty on Extradition, May 26, 1980, U.S.-Japan, 31 UST 892, cited in Cho, supra note 196, at 96.

n239. Law No. 68 of 1953, amended by Law No. 89 of 1993, cited in Cho, supra note 196, at 96.

n240. Id. An example is a case in which a Chinese national hijacked a Chinese aircraft flying from Bejing to New York and forced it to land at Fukuoka Airport in Japan on December 16, 1989. Y. Kiyoshi, Political Offenses and Hijacking with the Japanese Law for the Extradition of Fugitives from Justice, 34 Jap. Ann. Int'l L. 69 (1991), construed in Cho, supra note 196, at 96. The terrorist claimed he was fleeing from arrest due to his involvement in the Tianamen Square demonstration, but it was revealed in court that he had actually been arrested for embezzlement. Id. Because this was not a political offense, the terrorist was extradited to China on April 24, 1990. Id.

n241. Cabinet Order No. 319 of 1951, amended by Law No. 94 of 1991, cited in Cho, supra note 196, at 97.

n242. Decree of the Dajokan, Law No. 3 of 1884, amended by Law No. 34 of 1918, cited in Cho, supra note 196, at 89.

n243. The amended Decree provided for the death penalty, penal servitude, or seven years to **life** incarceration. Id.

n244. Violations could result in a sentence of penal servitude not exceeding three years and fines not exceeding one million yen Law No. 290 of 1950, amended by Law No. 89 of 1993, art. 58, cited in Cho, supra note 196, at 92.

n245. Law No. 17 of 1974, cited in Cho, supra note 196, at 92. Anyone who endangers another's **life or property** through the use of a gasoline bomb is subject to a sentence of up to seven years of penal servitude whereas anyone charged with the possession or manufacture of a gasoline bomb can be fined up to 100,000 yen or sentenced to up to three years of penal servitude. Id.

n246. Cho, supra note 196, at 89. This legislation was passed in response to the "Molotov cocktail struggle" in which mass protests and demonstrations were inspired by left-wing student organizations and radical elements from various labor unions. Id.

n247. Law No. 166 of 1957, amended by Law No. 89 of 1993, cited in Cho, supra note 196, at 95-96. This revision incorporated new articles to make it an offense for any person to handle specified nuclear material without authority, to cause death, injury, or damage to **property** with a fission chain reaction or by diffusing radiation. Cho, supra note 196, at 96. Anyone guilty of such an offense or even attempting such an offense can be sentenced to

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penal servitude of up to ten years. Id. Any person who threatens to harm **life,** limb, or destroy **property** with nuclear material, or who demands that others not perform their duties or refrain from exercising their rights by threatening to steal nuclear material is subject to a minimum of three years penal servitude. Id.

n248. See International Terrorism: A Compilation of Major Laws, Treaties, Agreements, and Executive Documents 510 Comm. Print 1991, cited in Cho, supra note 196, at 95.

n249. Cho, supra note 196, at 93. The Law Concerning the Prevention of Bodily Harm Caused by Sarin Gas was enacted on April 19, 1995. Id.

n250. Id. at 94. Police raids of the cult's facilities have revealed large quantities of chemicals necessary for the production of Sarin gas as well as gun parts and machinery. Id.

n251. The Law Concerning Prevention of Bodily Harm Caused by Sarin Gas, Art. 5, cited in Cho, supra note 196, at 93.

n252. The Law Concerning the Prevention of Bodily Harm Caused by Sarin Gas, Art. 3, cited in Cho, supra note 196, at 93.

n253. Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, U.S.-Japan, 22 UST 1641, cited in Cho, supra note 196, at 95.

n254. Convention for the Suppression of Unlawful Acts Against Safety of Civil Aviation, 24 UST 567, cited in Cho, supra note 196, at 95.

n255. Law No. 68 of 1970, amended by Law No. 48 of 1978, cited in Cho, supra note 196, at 90.

n256. Law No. 87 of 1984, amended by Law No. 82 of 1977, cited in Cho, supra note 196, at 90.

n257. Convention for the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 28 UST 1975, cited in Cho, supra note 196, at 95.

n258. International Terrorism: A Compilation of Major Laws, Treaties, Agreements, and Executive Documents, supra note 248, at 510.

n259. Law No. 48 of 1978, amended by Law No. 52 of 1987, cited in Cho, supra note 196, at 90.

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Terms: **((insurance) /20 war or terrorism) and risk and property and life and (exclusion /20 (war or terrorism)) and date(aft 1995)** (Edit Search)
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Specific assessments should indicate the potential sources of attack, motivation, and form of aggression expected. [25] Furthermore, tactical teams are needed to contain and diffuse hostile situations. Such preventive and reactive measures will supplement the legal initiatives that a state will employ to effectuate its goals for countering terrorism.

Without effective implementation, legislative mandates will only serve as bare and empty attempts at containment. However, overzealous enforcement may create an oppressive atmosphere, intrude upon individual liberties, and generate public resentment. It may then be easier for terrorists to gain sympathy from segments of a population that are similarly constrained by anti-terrorist initiatives. This is not to assert, however, that a nation should not **[*412]** vehemently denounce terrorism and utilize its best combative resources. But policy-makers must acknowledge that terrorists often resort to violence because they feel constrained by the status quo; further suppression could make violent insurrection more attractive.

C. Contributing Factors

A nation will need to identify the factors that serve as catalysts for terrorist violence before it will be able to draft an effective terrorism counteraction policy. Although democratic states are frequently targeted for terrorist violence, the inherent strengths of such political systems make them insusceptible to many forms of terrorism. The ability to remove leaders through free elections, to protest freely through the media, and to resolve disputes in impartial courts reduces the necessity for violent social protest. [26]

However, there are also many intrinsic weaknesses in democratic states that foster the conditions for insurgencies. The democratic right to freedom of association provides terrorists with more latitude than that allowed by authoritarian states. [27] Inadequately protected targets, such as mass transit systems, are abundant and readily accessible, and the legal system can be inhibited by witness intimidation and the requirement of strict proof for conviction. [28]

The dilemma which democratic states face is that the only way to address such contributing factors is to curtail the freedoms inherent in their very existence. [29]

Terrorists seek to turn a nation's power and strength against itself by exploiting the weaknesses and vulnerabilities of its **[*413]** infrastructure; [30] but an attack will need publicity before it can trigger political or social transformations in the targeted culture. In this respect, targets are chosen for symbolic purposes and attacks are deliberately threatening and violent. [31] With the capabilities of the modern media, the old Chinese proverb "kill one and frighten ten thousand" could now read "kill one and frighten ten million." [32] The commercialization of violence has provoked increasingly spectacular operations in order to avoid monotony. [33] In order to transmit a more staggering psychological message, symbolism has taken precedence over substance with regard to target selection. [34] Nations such as the United Kingdom have realized the influential role of the media and have slowly enacted censorship laws to control the messages being broadcast. [35] Without such restrictions, the media can unwittingly contribute to the success of an operation. [36]

Another catalyst for terrorist violence is an intensified freedom of movement that has developed on an enormous scale. [37] Access to mass transportation allows international terrorist organizations to strike at targets anywhere in the world by planting bombs and fleeing the area before detonation. [38] Modern superhighways and easy access to air travel have enabled domestic terrorists to **[*414]** effectuate their plans with less chance of detection. [39] The volume of tourism and international migration in Western Europe is so enormous that keeping cross-border traffic under surveillance is beyond systematic control. [40] Restricting the ability to move freely throughout certain nations will generate disdain among

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many critics, but may be an unfortunate necessity for certain terrorism counteraction initiatives.

The differences between Western and non-Western perspectives on collective responsibility have also had a significant impact on terrorist violence. Western societies usually emphasize individual accountability and responsibility, while non-Western societies tend to hold all members of a social, ethnic, or religious group collectively responsible for assigned guilt. [41] As a result, non-Western insurgents will often target an entire group or culture. [42] Western insurgents, however, will target particular individuals, such as businessmen and politicians, more often than random passers-by. [43]

The contemporary international community has also been influenced by a century of political, social, and religious movements that each espouse distinct ideologies and seek different transmutations. Due to the great diversity of terrorist groups, a regular scheme of comparative analysis must take into account distinct political beliefs, unique organizational features, motivations, and tactics of a group. [44] A terrorist's ideology and ultimate goal have significant relationships to his or her strategies and operations. [45] **[*415]** Fundamentalist religions often perceive terrorist violence as a divine duty which ultimately relieves insurgents of the moral, political, and practical constraints that normally condemn indiscriminate and massive violence. [46] One terrorist may seek to completely obliterate a nation's government [47] whereas another may want only to change a particular practice rather than abolish an entire system. [48] Furthermore, a governing body itself may engage in terrorism in order to deter and weaken opposition. [49] As can be seen, the subjective factors that contribute to the identity of a terrorist cell vary greatly. **[*416]**

It should be realized that there is no concrete remedy that will entirely eradicate terrorism. The preceding discussion regarding contributing factors is a general survey of major contemporary trends, not a standard that will envelop each root cause. However, if these factors go unrestrained, they will serve as a conduit for terrorist violence. Policy-makers must recognize the aforementioned factors in order to avoid overrating or underrating the threat of terrorism. There is a danger that a nation will unknowingly effectuate the fundamental goals of a terrorist movement by devising unnecessary initiatives that counter misperceived threats, and thereby alter the status quo. [50]

III. United Kingdom

Antiterrorism legislation in the United Kingdom has been greatly, if not entirely, influenced by the ongoing controversy in Northern Ireland between the Catholic and Protestant populations. [51] The ramifications of the political violence inherent in the struggle are staggering: among a population of 1.5 million, 3000 people have been killed since 1969. [52] In addition, although this **[*417]** Comment focuses mainly upon Irish-based terrorism in the United Kingdom, the United Kingdom has experienced domestic terrorism from other sources and has also been repeatedly victimized by foreign insurgents. [53] However, it is violent Irish nationalism that has had the most severe impact upon British antiterrorist legislation.

A. Insurgent Organizations

The Irish Republican Army (IRA) was established in the mid-19th century, but did not become so titled until the Dublin Easter Rebellion of 1916. [54] The IRA was disbanded upon the creation of the Irish Free State in 1922, but again became active in 1939 when it undertook a bombing campaign in London, Manchester, Glasgow, and Birmingham. [55]

In 1969, internal disagreements over the group's Marxist ideology caused a split in the IRA. [56] One faction became the Official Irish Republican Army which renounced armed struggle in 1972, and eventually became the Worker's Party. [57] Although the Official Irish Republican Army has ceased using force and has developed a non-sectarian political approach to assert its views, it remains a proscribed organization in the United Kingdom. [58]

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The other faction formed the Provisional Irish Republican Army (PIRA) [59] in order to pursue the objectives of unifying **[*418]** Ireland under a socialist government and undermining British support for keeping Northern Ireland in the United Kingdom through military operations. [60] PIRA's terrorist campaign consists of bombings, assassinations, kidnappings, extortion, and robberies targeted against the British Army, Ulster security forces, prison and judicial officials, and Loyalist party members. [61] The objectives of PIRA's campaign are to raise to unacceptable levels the economic and political costs to Britain of maintaining troops in Northern Ireland, to provoke British and Northern Irish military and police forces to violate the human and civil rights of PIRA suspects or ordinary Catholics in the hope that such abuses will outrage Britain's domestic civil libertarians and excite international condemnation, and to forcibly mobilize Northern Irish Catholics into the struggle. [62] Financing has been generated through not only robberies of banks, post offices, and corporate payrolls, [63] but also through extortion, profits from small businesses, and defrauding the government. [64] Additionally, PIRA has been able to draw support from Irish Americans and Libya in the form of arms and money. [65] **[*419]**

A smaller Marxist group, the Irish National Liberation Army (INLA), was formed by dissidents of the Official IRA in 1975 and is considered to be the military arm of the Irish Republican Socialist Party, even though the party denies such a connection. [66] Feuding between the INLA and both wings of the IRA led to the murders of many members, including the group's founder, Seamus Costello. [67] In addition, subsequent internal fighting and arrests triggered by informants have severely weakened the group. [68] INLA attacks began in 1975 with shootings and bombings of British soldiers, Northern Ireland's security forces, Ulster government officials, and members of the Loyalist Party. [69] However, INLA received the most attention with the assassination of the British Conservative Party spokesman in 1979. [70] The group does not have international financial support and relies mainly on robberies of banks, trains, and payrolls for funding. [71] However, INLA has made contacts with the West German Revolutionary Cells and French Direct Action Leftist groups. [72]

Although terrorism within the United Kingdom is traditionally presumed to be executed only by Irish Catholics, Protestant cells have also been instrumental in shaping legislative responses. Loyalist terrorism has been limited to small groups that condemn links with the Irish Republic and resist political change. [73]

The Ulster Defense Association (UDA) was formed in 1971 for the ostensible purpose of protecting Protestant neighborhoods from IRA attacks, but it is suspected of supporting smaller death squad units that assume names separate from the UDA. [74] The UDA receives effective state support from the Ulster Defense Regiment, which is an official security organization dominated by sectarian Protestant militiamen, and which continues to hold legal existence in Northern Ireland. [75] **[*420]**

The Ulster Volunteer Force (UVF) is a proscribed group that was briefly political in the 1970s, but is mainly known for bombings, robberies, and murdering members of the Catholic community. [76] It was formed from the unification of all Ulster Protestant militias in 1913 in order to oppose the grant of an autonomous government to Ireland in which Protestants would have formed a minority. [77] This group also had effective state support from the Ulster Defense Regiment. [78]

The Ulster Freedom Fighters (UFF), which is basically a "counter terror" body that resists Catholic aggression and seeks to deteriorate the connection with the British government in order to establish an independent Northern Ireland. [79] The UFF splintered from the Ulster Defense Association and was proscribed in 1973, but continued to carry out numerous assassinations and bombings. [80] Although its targets have been IRA supporters and sympathizers, it has also carried out random attacks on prominent Catholics regardless of political affiliation in order to terrorize the Roman Catholic Community. [81]

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B. Antiterrorism Legislation

The Prevention of Terrorism (Temporary Provisions) Act [82] (PTA) is the current product of the British legislative response to terrorism. A barrage of violent Irish nationalism between 1972 and 1974 led to the somewhat hasty enactment of this initiative. [83] The **[*421]** PTA has been renewed and amended since its enactment in 1974 with the most recent alteration taking effect in 1989. Emergency legislation specific to Northern Ireland has also been enacted with the passage of The Northern Ireland Emergency Provision Act [84] (EPA). The most current revision was completed on June 17, 1996, and went into effect on August 25, 1996. [85] Critics point out that these two initiatives overlap both each other [86] and the common law. [87] Notwithstanding such criticism, both Acts remain at the forefront of British legislative responses to both domestic and international terrorism.

The EPA focuses on a system of scheduled offenses considered to be commonly committed in pursuit of terrorist activities and as such are given special treatment as to the mode of commitment, trial, and sentencing. [88] Some of these offenses can be certified out of EPA treatment and addressed in the normal manner if the Attorney General agrees that the commission of a particular offense has no connection with the purposes of the EPA. [89] Under the PTA, if a person is connected with the commission of a terrorist activity, the Secretary of State is granted the power to issue exclusion orders against him or her. [90] Such orders can **[*422]** exclude a person from entering either Great Britain, Northern Ireland, or the entire United Kingdom. [91]

The EPA proscribes ten paramilitary organizations [92] and the PTA proscribes two organizations. [93] In this respect, the media has been prohibited from broadcasting words spoken by representatives of proscribed organizations, or any statements supporting pro- **[*423]** scribed organizations. [94] However, the British government has appeased the media by ensuring the availability of official sources of information. [95]

The EPA also subjects private security services in Northern Ireland to intense scrutiny in order to prevent terrorist infiltration of such enterprises in order to extort funds from the public. [96] A constable is authorized to enter any premises where a business involving the provision of security services is operated and inspect employment records. [97] Any person who knowingly or recklessly furnishes false or misleading information during the certification process commits an offense. [98]

The EPA grants the police and armed forces broad powers of search, arrest, and detention which can be exercised without a warrant or reasonable suspicion. [99] Although the EPA gives similar authority to both constables and the army, any member of the armed forces on duty may detain suspected offenders for a maximum of only four hours. [100] The PTA also grants broad **[*424]** investigatory powers to the British police over the commission, preparation, instigation, or financing of terrorism. [101] For example, if a constable has reasonable suspicion that a person is simply connected with terrorist activity, the constable may arrest him or her without a warrant even though the person is not suspected of committing a specific crime. [102] Additionally, the PTA allows immigration and customs officials to examine and search persons and articles to determine if they are connected to terrorist activity. [103] Although the authorities are granted sweeping powers of arrest and detention under the EPA, evidence of admissions and confessions will not be admitted into court if there is unchallenged evidence of torture, inhumane treatment, violence, or threats of violence used to coerce a suspect into making a statement. [104]

The EPA establishes two forms of committal proceedings in Northern Ireland: a preliminary investigation in which the testimony of prosecution witnesses is obtained by the court under oath, and a preliminary inquiry in which written depositions are consi- **[*425]** dered by the court. [105] A person accused of a scheduled offense may only be granted bail by a judge of the High Court or the Court of Appeal, [106] but a magistrate may remand such an offender into custody for a maximum of 28 days. [107] Scheduled offenses are tried before a judge sitting

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without a jury to prevent the intimidation of witnesses and jurors. [108] However, the judge must give reasons for a conviction and a defendant is given a right of appeal on any ground without the leave of court or a certificate from the trial court judge. [109]

The PTA also criminalizes financial assistance to acts of terrorism or proscribed organizations. [110] The PTA absolves bankers and financial advisors from breaching any rules of confidence in order to encourage voluntary disclosure of any information based upon suspicion of funds being used to finance activities connected with terrorism. [111] In this respect, it is an offense to fail to disclose knowledge or suspicion of financial assistance of terrorism gained within the course of business **[*426]** dealings. [112] Furthermore, the EPA has provisions that allow for the confiscation of proceeds of terrorist activities. [113]

Although the PTA does not apply to offenses committed outside of the United Kingdom, section 4 of the Suppression of Terrorism Act of 1978 grants jurisdiction over offenses committed in countries that are members of the European Convention on the Suppression of Terrorism. [114] Jurisdiction is also granted over activities related to aviation and maritime security [115] and the taking of hostages. [116]

C. Observations

The United Kingdom has uniformly addressed terrorism under initiatives designed to control the domestic struggle in Northern Ireland. The PTA may have been frantically enacted under the duress of a seemingly uncontrollable IRA bombing campaign of the early 1970s, but it has also been molded into a powerful declaration of the United Kingdom's antiterrorist policy. Similar to the EPA, the PTA is a temporary measure that may one day be repealed entirely. As the United Kingdom attempts to mend its domestic troubles in the future, it will become necessary for the British Government to determine when to retire its temporary antiterrorism legislation altogether. But in the wake of developments of the past century, total abandonment of the Acts could prove unwise and a permanent legislative policy may better serve the interests of the United Kingdom. **[*427]**

The United Kingdom faces a unique problem in that it must cope with terrorism in essentially two environments. Great Britain has suffered through significant insurgencies, especially those which gave rise to the PTA, but on a scale quite different from that of Northern Ireland. With regard to Northern Ireland, the scars left by centuries of religious discrimination will not be healed by a withdrawal of the British military. There are no legislative initiatives that will be able to reverse the extreme bitterness and hatred between Catholics and Protestants. Furthermore, the presence of heavily armed British soldiers in Northern Ireland over the past two decades has not contributed to the development of a society in which political and social grievances are to be remedied through non-violent processes. The EPA constitutes perhaps the most efficient policy of countering violence that one can expect to be implemented in such an environment. But as its title states, the EPA is an emergency provision and not permanent. One hopes that the emergencies that have necessitated the implementation of the EPA will not only subside in the coming century, but serve as examples of what the people of Northern Ireland must work to avoid in the future.

IV. Israel

Similar to the United Kingdom, Israel's antiterrorism legislation has been shaped by internal threats resulting from centuries of conflict between Jews and Palestinians. [117] The fall of the Ottoman Empire on the eve of World War I gave rise to zealous **[*428]** Palestinian and Zionist independence movements, [118] both of which were further fueled by the rule of the British Mandate. [119] Israel officially came into being on May 14, 1948, and was immediately declared war upon by the Arab League. [120] An armistice was agreed upon the following year, [121] but major wars again erupted in 1956-57, [122] 1967, [123] 1969-70, [124] 1973, [125] and 1982.

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[126] These intense conflicts led to the Israeli antiterrorism measures in place today.

Palestinian terrorists generally seek to eradicate Israeli society as a whole rather than merely a single political entity or elite. [127] In this respect, Arab states are able to work against Israel, without **[*429]** being in a state of war, by supporting the activities of radical groups. [128] The recent peace movement has not been received with far-reaching support, especially from radical factions of the Palestine Liberation Organization (PLO) and organizations like Hamas and the Islamic Jihad. Nor has the Israeli government's cooperation with the Palestinians been widely supported by Israeli militants, as demonstrated by the assassination of Yitzak Rabin by a radical Jewish student. Achieving a lasting peace in this region will be a painstakingly long process that undoubtedly will be challenged by both Israeli and Palestinian terrorists.

A. Insurgent Organizations

Until 1993, the PLO operated under the Palestine National Charter [129] which explicitly states that the only way to liberate Palestine is through armed struggle. [130] The PLO, however, has since agreed to assume responsibility for public order and security in Gaza and Jericho, and to work toward preventing acts of terrorism, crime, and other hostilities. [131] This change in policy was made possible by the September 13, 1993, Peace Accord between the PLO and Israel, which "allowed mutual recognition and the eventual creation of an autonomous Palestinian government under PLO auspices within the West Bank and Gaza Strip." [132]

Prior to this peace agreement, groups affiliated with the PLO pursued policies of terrorism designed to eradicate the Jewish State. The Al-Fatah, [133] formed by Palestinian exiles in Kuwait in 1957, mounted border raids into Israel in 1965 and became the military **[*430]** arm of the PLO under the direction of Yassir Arafat in the late 1960s. [134] The Israeli invasion of Lebanon in 1982, and an air raid on the PLO's Tunisian headquarters in 1985, forced the Al-Fatah to relocate in several Mid-East countries. [135] Al-Fatah received some diplomatic leverage when, in 1988, Arafat reiterated the group's renunciation of terrorism and acknowledged Israel's right to exist before the United Nations. [136] But this international goodwill was damaged when Al-Fatah openly sided with Iraq during the Gulf War. [137]

Internal divisions over the Palestinian-Israeli peace agreements still plague the Popular Struggle Front (PSF), [138] which rejoined the PLO in 1991 after suspending its membership in 1974. [139] The Democratic Front for the Liberation of Palestine (DFLP), [140] which has always advocated the position that the formation of a Palestinian state does not require the destruction of Israel, had been coping with internal struggles and break-away factions prior to the Peace Accord. [141] The Popular Front for the Liberation of Palestine (PFLP), [142] whose inflexible Marxist ideology generated **[*431]** several internal disputes which led to the formation of other terrorist organizations, such as the PFLP-General Command (PFLP-GC) [143] and the Arab Organization of 15 May, [144] has suspended its participation in the PLO to continue a campaign of violence. [145]

A number of organizations not affiliated with the PLO continue to support the violent eradication of Israel. The Hizballah, [146] which is primarily directed from Iran, [147] seeks to rid the Lebanese region of all non-Islamic influences through a vigorous campaign of terrorism. [148] HAMAS, [149] a loosely-structured orga- **[*432]** nization that works primarily through mosques to recruit members, raise money, organize activities, and distribute propaganda, has become Al-Fatah's rival since its formation in 1987. [150] Militant factions of Hamas, whose strength is focused in the West Bank and the Gaza Strip, have conducted many attacks against Israel civilian and military targets, suspected Palestinian collaborators, and Al-Fatah rivals. [151] The Palestinian Islamic Jihad (PIJ) is actually a cohesive group of several factions which advocate the creation of an Islamic state and the destruction of Israel through holy war. [152] Because the PLO has not been able to successfully control these fundamentalist groups, Israel will be forced to stay alert to continued violence.

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Terms: **((insurance) /20 war or terrorism) and risk and property and life and (exclusion /20 (war or terrorism)) and date(aft 1995)** (Edit Search)

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ARTICLE: The Role of **Insurance** in the Battle against **Terrorism**

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SUMMARY:
... Several reasons make this statement relevant: The industry possesses no police power to counter terrorism; it makes no claims of general expertise in the field of study; [1] and it seldom discusses a terrorist event until after the fact. ... [18] They next apply this information to the language of a given insurance policy. ... An insurance policy is considered a policy of adhesion; [26] thus, the insurer decides the terms and the conditions of the policy without input from the potential policy buyer. ... Case law has warned carriers that if courts consider a term in an insurance policy to be ambiguous, the courts will look to the ordinary usage of the term [42] and even consult a dictionary to determine the word's meaning. ... Other products on the insurance market exist to handle the breakdown of electronic equipment, [91] but without such coverage, the business owner would face considerable uninsured losses. ...

TEXT:
[*353]

I. Introduction

Few businesses or arms of government would consider the **insurance** industry as an important component in the fight against **terrorism.** Several reasons make this statement relevant: The industry possesses no police power to counter **terrorism;** it makes no claims of general expertise in the field of study; [1] and it seldom discusses a terrorist event until after the fact. [2] Yet despite the industry's apparent lack of presence in the general discussion of the subject, one should not dismiss the **insurance** industry as irrelevant. In fact, the **insurance** industry has much to offer in the battle against **terrorism.**

The industry [3] employs many experts in the fields of **risk** control, disaster preparedness, and claims payment. Within the framework of this expertise, industry **risk** control representatives are able to recommend ways to "harden a business." Disaster preparedness experts, employed by carriers, plan to direct company resources to deal with mass disaster. [4] Claims representatives, after a loss, measure damage and make payments to insureds in accordance

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Further suppose the terrorist attacks a water supply and an employee at a business location drinks water while at work and dies. This certainly suggests that the water in the building's pipes is contaminated and, by extension, the building is now contaminated. The industry does not normally contemplate damaged water as the trigger. Typically, it implies coverage in the event that water causes the damage, however, the term remains undefined. Ambiguities under insurance policies are resolved in favor of the insured as previously discussed.

Though few chemical weapons attacks have occurred in the United States, government officials routinely state it is not a question of if, but rather of when. [80] John Deutsch, a former Director of Central Intelligence, points to a disturbing new terrorist trend spreading across the globe. He believes that more and more terrorists are using powerful explosives to attack mass-civilian targets. [81]

c. Nuclear Weapons

Next, we turn to those weapons constructed with radioactive elements. [82] Typically, we think of nuclear and thermonuclear **[*374]** weapons; however, non-fissile, "dirty" radioactive weapons also exist. Non-fissile weapons do not achieve nuclear reaction; they explode as conventional bombs. Because they are built with a component of radioactive isotopes, these elements spread out to poison the land and people with whom they come in contact.

Fissile nuclear weapons deliver five primary damage effects upon detonation: blast, heat, electromagnetic pulse, and direct and residual radiation. [83] With the exception of the last three items, nuclear weapons are similar to conventional bombs although their explosive force is enormously more powerful. [84]

Were blasts and heat the only sources of damage from a fissile weapon, it is likely that a policy would similarly respond to such events as it would to any other bomb blast claim (notwithstanding the potential **war exclusion** being raised). However, such super weapons yield a deadly flux of radioactive particles and electromagnetic pulse ("EMP") in addition to their more conventional effects. [85]

EMP arises when charged particles at the point of detonation move away from ground zero at the speed of light in the form of electromagnetic waves, not unlike the motion of radio waves. [86] These particles travel along wires, pipes, and conduits. [87] They travel through the air to find antennas. [88] They are attracted to any conductor. [89] From the conductor, the particles jump to attached electronic equipment and destroy it. [90] Even if a building escapes the tremendous blast and thermal radiation, it may sustain damage to its wiring and electronic components from the effects of EMP. **[*375]**

The business owner would find that the typical **property** policy contains the aforementioned electronic exclusion. Other products on the insurance market exist to handle the breakdown of electronic equipment, [91] but without such coverage, the business owner would face considerable uninsured losses.

Fissile weapons create two types of radiation. [92] The first form of radiation is immediate radiation in the form of deadly gamma and x-rays. [93] These exist for relatively short periods of time, but are particularly harmful to people within the lethal zone. [94] The lethal zone is where the radioactive dose delivered exceeds 1,000 REMS (radiation effects in man). [95] The zone is not uniform in size and is contingent upon the weapon's yield, height of burst and duration of fireball, to name a few factors. [96] Again, we would expect **life** insurance, benefits, worker's compensation policies, and health policies to respond to such injuries.

Residual radiation comprises the second form of radiation. [97] This is known as fallout. [98] When a nuclear fireball touches the ground, it throws radioactive particles into the air. [99] These particles descend and contaminate the land or **property.** [100] Some have short lives

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while particles of other isotopes linger. [101] **[*376]** This effect encounters a potential exclusion under **property** policies' nuclear exclusion, as previously discussed.

Recall that the ISO exclusion states that the policy will not pay for nuclear radiation or radioactive contamination, however caused. It does not, however, take away the coverage for ensuing fire. Some carriers issue proprietary coverage forms that might include a small sub-limit for radiation coverage; [102] however, this coverage is extremely limited in scope. [103] In most instances, a business would not likely find many policies that contain this type of coverage and would therefore face uninsured losses.

As the business owner can readily see, **insurance** plays an important role in one's planning in the fight against **terrorism.** While policies of **insurance** do not cover every possible loss scenario, the **insurance** industry provides a potential source of assistance in advance of any attack and after an attack, thereby helping a business return to its normal operations following a terrorist attack.

D. Are Insurers ready for the task?

Even as one contemplates the assistance that insurers can provide policy holders, one must question whether or not insurers should cover these types of losses in full, or if they should be circumscribed in some form. Domestic carriers do not have experience in dealing with multiple terrorist attacks and the subsequent damages created. If damages become exceedingly great, with attacks occurring more regularly, carriers might restrict coverage, such was the case in the United Kingdom. [104] Such a response, by **[*377]** American insurers, would be anti-consumer, on the one hand, but self-protective on the other. For even as carriers review damages, caused by terrorists, and claims are adjusted and paid, a carrier's expected claims losses continue.

Currently, policies of **insurance** cover damages resulting from **terrorism** (notwithstanding the aforementioned **exclusions).** However, because the incidence is currently low, carriers do not specifically factor **terrorism** rating charges into either the group I or group II **property insurance** premiums. [105] Similarly, **life insurance** companies, who use mortality tables to assist with their actuarial rating, do not contemplate the sudden death of several hundred policyholders at one moment. [106] Current coverage could change if terrorists were to create vast destruction in this country. One reason that carriers exclude damages for war is because carriers cannot actuarially rate for such massive calamity. War, by its very nature, is not predictable, and its damages are not truly insurable. Terrorists are capable of creating warlike damages given the right type of weapons and opportunity.

While it is difficult to say with certainty how hypothetical terrorist attacks might affect a carrier's bottom line, or even its financial solvency, we can state that such attacks will detrimentally affect profitability. Carriers must remain profitable in order to address the needs of all policyholders throughout a given year. Therefore, carriers need to examine whether or not it is appropriate to exclude any damages arising out of terrorist's actions, to limit payment to prescribed sub-limits, or else to determine a way **[*378]** to rate for the potential loss and to build this into pricing mechanisms. In the meantime, carriers will continue to address loss on a case-by-case basis.

IV. Insurer Vulnerabilities

Insurers deal with catastrophic loss every year. Tornadoes, hurricanes, earthquake, and large fires generate tremendous losses that concern carriers. [107] One can read most any insurance company's Third Quarter Financial Report to find a paragraph about the impact of catastrophic losses on a company's bottom line. [108] In fact, insurance companies buy insurance on their own books of business (called reinsurance), in part, to offset the financial consequences of large losses. [109]

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Carriers are vulnerable to losses caused by terrorists in two areas: (1) direct losses to their own facilities as a result of the effects of a weapon; and (2) significant damage losses sustained by policy holders as a result of powerful weapons of mass destruction. n110As to the former issue, a carrier might even be the target of a terrorist. Large insurance companies, as they are in the financial services sector of the economy, represet potentially appealing targets due to their prominence, relative ease of access, large numbers of people on site, the financial disruption such an attack would create to a large area, and finally for the press such an attack would be certain to generate.

Insurers take preventive measures against business disruption arising from a terrorist attack. As examples of such measures, insurers constantly back up their records and store the dup **[*379]** licate data off site. [111] Most major insurance companies limit access to their **property** through the use of guarded security checkpoints located at their entryways. For example, one can find this feature in the lobbies of SAFECO Insurance Company located in Seattle, Washington and St. Paul Insurance Company in St. Paul, Minnesota. One may also observe that additional security measures include the use of identification badges issued to employees and guests as well as the requirement for visitors to sign a log-in book. Furthermore, insurance companies purchase reinsurance on their books of business in order to protect against extraordinary and unforeseen losses, and to stabilize their business in the face of wide swings in profit and loss margins inherent in the insurance business. [112] Nevertheless, tremendous chaos would ensue in the aftermath of an attack against the corporate facilities of an insurance company.

V. Conclusion

Carriers have much to offer policyholders in the way of possible loss preventive services. Carriers excel at mitigating loss severity and frequency before it happens, whether or not the damages arise out of natural or man-made catastrophe. After a loss, carriers assist businesses to reestablish commerce through quick evaluation and payment of claims per the terms of their policies. At issue for business owners are considerations that surround their own business exposures as they relate to insurance policy coverage and exclusions. Many losses will be covered under current **property** policies. Businesses may find themselves uninsured or underinsured when faced with pollution claims, electronic damage claims, radiological claims, or war claims.

Carriers also have much at stake. Domestic insurers have never faced massive recurring losses attributable to terrorist activity. Profitability may suffer and degraded service to other policyholders might arise as a result of terrorist actions. Carriers need **[*380]** to contemplate whether or not they wish to continue to insure these types of catastrophic damages or whether they should limit coverage through sub-limits or higher deductibles.

FOOTNOTES:

n1 One possible exception to this statement is the specialized kidnap and ransom coverage provided by some insurers.

n2 An electronic database search yielded 15 articles in periodicals, published between 1985 and 2000, that for the most part, dealt with **insurance and terrorism** in the United Kingdom. Search of Infotrack Library (Dec. 5, 1999) (using the search words "**insurance and terrorism**").

n3 For the purposes of this article, industry includes **insurance** carriers and **insurance** agencies.

n4 1 James J. Markham, **Insurance** Institute of America, **Property** Loss Adjusting 91 (1st ed. 1990) [hereinafter 1 Markham].

n5 Id. at 172-175 (defining the scope of an adjuster's duties following a loss assignment).

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n6 1 Markham, supra note 4, at 51 (describing **exclusions** generally and listing **war** as an uninsurable peril).

n7 Loss control is referred to as **risk** control.

n8 Sam Howe Verhovek, Uncertainty Pains Oklahoma City, N.Y. Times, July 2, 1995, at 18 (noting that "six other structures collapsed and more than 300 were damaged").

n9 U.S. State Department, Travel Warnings & Consular Information Sheets, (visited Mar. 29, 2000) <http://travel.state.gov/travelwarnings.html>.

n10 The 1993 World Trade Center bombing in New York and the 1995 Oklahoma City attack.

n11 2 James J. Markham, Insurance Institute of America, **Property** Loss Adjusting 198-200 (1st ed. 1990).

n12 Samuel L. Glasstone et al., The Effects of Nuclear Weapons 158-160 (3rd ed. 1977) (comparing the effects of the nuclear blasts in Hiroshima and Nagasaki on buildings constructed from various materials).

n13 1 Markham, supra note 4, at 220.

n14 1 Markham, supra note 4, at 176.

n15 This is common industry practice.

n16 1 Markham, supra note 4, at 220 (discussing this process in the context of the duties of the adjuster).

n17 Id. at 218-223 (providing an "Overview of the Adjustment Process").

n18 Id. at 222.

n19 Id. at 91 (introducing the process for determining the amount of recovery).

n20 1 Markham, supra note 4, at 49 (providing guidance on understanding the nature of reading the exceptions to the definition of peril and the exceptions to exclusions).

n21 The reader should be aware that while this article puts forth a good faith effort to address insurance policy coverage issues, it is not the intention of the author to pre-adjust a business' loss nor is it the author's desire to cover every conceivable loss scenario.

n22 Other insurance products provide coverage for liability, work place injury, long term disability, health benefits, etc. These are not **property** policies.

n23 Likewise, **life** and health policies, benefits policies, and other policies that pay for the injuries or deaths people sustain as a result of covered loss, contain similar, but not identical coverage.

n24 Many Insurance companies subscribe to the Insurance Services Office (ISO). ISO, a New York based operation, publishes common insurance policy language, promulgates loss costs that carriers use to help determine their rates, establishes rules for classifying business operations, and provides other generic insurance services to the insurance industry. For further information about the ISO, see Welcome to Insurance Services Office, Inc. (visited Mar. 3, 2000) <http://www.iso.com>.

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n25 For example, compare Chubb, St. Paul, ISO, SAFECO, and Reliance **property** extensions. Each contains similar yet distinct coverage provisions (to review and compare policies, obtain them from a broker, carrier or insurance commissioner).

n26 Eric A. Wiening et al., Insurance Contract Analysis 377 (1st ed. 1992) (stating that "insurance policies are contracts of adhesion").

n27 Donald L. Hirsch et al., Casualty Claim Practice 145 (5th ed. 1992) (providing an example of how courts handle this unequal bargaining position when interpreting an ambiguity in the contract).

n28 See Hirsch et al., supra note 27, at 145 (insurance consumers generally cannot bargain for a policy's construction because it is non-negotiable).

n29 1 Markham, supra note 4, at 49 (explaining the role of definitions).

n30 Id. at 47-48 (discussing "all-**risks**" coverage).

n31 Causes of Loss Special Form CP1030, Insurance Services Office 1 (June 1995) (on file with author).

n32 Id.

n33 1 Markham, supra note 4, at 48-49 (discussing "all-**risks**" policies and the corresponding burden of proof placed on the insurer).

n34 Id.

n35 Pan Am. World Airways, Inc. v. Aetna Cas. and Sur. Co., 505 F.2d 989, 999. (2d Cir. 1974).

n36 Pan Am. World Airways, Inc. v. Aetna Cas. and Sur. Co., 505 F.2d 989, 999. (2d Cir. 1974).

n37 Sherwin-Williams Co. v. Insurance Co. of the State of Pennsylvania, 863 F. Supp. 542, 546, aff'd 105 F.3d 258 (N.D. Ohio 1994).

n38 Causes of Loss Special Form CP1030, Insurance Services Office 2-4 (June 1995) (on file with author).

n39 See Causes of Loss Special Form CP1030, supra note 38, at 2.

n40 Id. at 3.

n41 Building and Personal **Property** Coverage Form CP0010, Insurance Services Office 10 (June 1995) (on file with author).

n42 Joseph v. Utah Home Fire Ins. Co., 835 P.2d 885, 887 (Or. 1992).

n43 Smith v. State Farm Ins., 927 P.2d 111, 114 (Or. App. 1996).

n44 Building and Personal **Property** Coverage Form CP0010, Insurance Services Office 10 (June 1995) (on file with author).

n45 Causes of Loss Special Form CP1030, Insurance Services Office 7 (June 1995) (on file with author).

n46 Causes of Loss Special Form CP1030, Insurance Services Office 1 (June 1995) (on file with author).

n47 See Glasstone et al., supra note 12, at 1-2 (covering additional effects of nuclear weapons in the damages discussion).

n48 Causes of Loss Special Form CP1030, Insurance Services Office 2 (June 1995) (on file with author).

n49 Pan Am. World Airways, Inc. v. Aetna Cas. and Sur. Co., 505 F.2d 989, 999 (2d Cir. 1974).

n50 See 18 U.S.C. § 2332b(g)(5) (Supp. II 1996).

n51 Hague Convention IV, Oct. 18, 1907, Ch. 1, art. 1.

n52 Id.

n53 Evan Luard, International Recognition of Civil Wars 20-21 (1972) (discussing the disparity in foreign policies adopted by countries in the past, and eliciting past attempts to make international agreements concerning the action of third party countries in civil conflicts).

n54 See Luard, supra note 53, at 170-171.

n55 In Younis Brothers and Co. v. CIGNA Worldwide Ins. Co., the insured owned businesses in Liberia that were damaged by fire and looting, but CIGNA's policy excluded war and the courts upheld that coverage for losses caused by civil war, rebellion, and insurrection were excluded. 91 F.3d 13, 14 (1996) (holding Liberia was in a state of insurrection at the time of the loss). Insurrection is a political movement designed to overthrow a duly constituted government. Id.

n56 An example of such linkage is the airstrikes against Libya in 1986. The reprisal arose in response to Libyan sponsorship of a bombing of a German discotheque, frequented by United States military personnel. Mary Williams Walsh, Germany Finally to Try '86 Disco Bombing Case; Terrorism: Officials Say They At Last Have Answers For The Deadly Blast That Led The U.S. To Attack Libya, L.A. Times, Nov. 18, 1997, at A1.

n57 Pan Am. World Airways, Inc. v. Aetna Cas. and Sur. Co., 505 F.2d 989, 999 (1974).

n58 Id.

n59 1 Markham, supra note 4, at 174-175.

n60 Of Normalcy and Amour Propre, The Economist, Mar. 6, 1993, at 25 (referring to the "best guess of the city comptroller . . .").

n61 See Verhovek, supra note 8, at 18.

n62 Id.

n63 Insurance Information Institute Fact Book 1997, 72 (1996) [hereinafter III Fact Book 1997].

n64 Anthony Spaeth, Engineer of Doom; Cult Leader Shoko Asahara didn't just forecast armageddon, he planned it, Time, June 12, 1995, at 57.

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n65 Some **life** insurance policies contain a double indemnity clause for murder. Richard Morais, Double indemnity, Forbes, Nov. 18, 1985, at 280.

n66 III Fact Book 1997, supra note 63, at 83.

n67 However, this is not to say that U.S. insurers have not raised the **War Exclusion** in other parts of the World. See Pan Am. World Airways, Inc. v. Aetna Cas. and Sur. Co., 505 F.2d 989 (1974).

n68 See Spaeth, supra note 64, at 57 (stating that the Aumshin Rikyo cult had the capability to manufacture between 60kg to 80kg per month).

n69 James A. F. Compton, Military Chemical and Biological Agents 4-5 (1987) (discussing their primary purpose in military operations as "to kill, incapacitate, or seriously injure personnel . . .").

n70 Id. at 135 (introducing the operation of nerve agents).

n71 Id. at 6 (introducing the operation of blister agents).

n72 Id. at 87.

n73 See Compton, supra note 69 at 7, 87, 137, 360-404.

n74 Building and Personal **Property** Coverage Form CP0010, Insurance Services Office 10 (June 1995) (on file with author).

n75 AIG, for example, writes a site specific pollution policy.

n76 St. Paul Companies Premier **Property** Protection Form F0150, or its 42700 **Property** Form, for example, offers a $ 25,000 sublimit.

n77 Underwriters may attach total pollution exclusions.

n78 See AIG, supra note 75.

n79 See supra notes 38-40 and accompanying text.

n80 See The White House, Office of the Press Secretary, Remarks by the President To the Opening Session of the 53rd United Nations General Assembly (release date Sept. 21, 1998) (visited Mar. 15, 2000) <http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi:///oma.eop.gov.us/1998/9/22.2.text.1> (discussing the use of weapons of mass destruction as a violation of Article 3 of the Universal Declaration of Human Rights).

n81 John Deutsch, Terrorism, Think Again, Foreign Policy, #108, Fall 1997, at 11.

n82 In recent years, the press has reported uncertainty over the security of the former Soviet Union's stock pile of processed fissile material. See, Pat Towell, Russian Nuclear Material Vulnerable to Theft, Study Says, Cong. Wkly., Feb. 5, 2000, at 265. Such stories leave readers with the worried impression that rogue elements might obtain these elements in sufficient quantities to fabricate a radiological weapon.

n83 See Glasstone et al., supra note 12, at 1 (introducing the characteristics of nuclear explosions).

n84 Id.

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n85 Id. at 1-2, 632 (providing a formal definition of an EMP).

n86 Id. at 514-517 (describing the "origin and nature of the EMP").

n87 See Glasstone et al., supra note 12, at 520.

n88 Id. at 516.

n89 Id. at 515-520.

n90 Id. at 516.

n91 A business owner should contact their insurance agent to discuss the availability of boiler and machinery or breakdown coverage. Some breakdown coverage comes with computer policies.

n92 See Glasstone et al., supra note 12, at 1-2.

n93 Id. at 568-575 (describing the biological effects of nuclear injuries).

n94 Id. at 580-81 (providing a chart that summarizes clinical effects of acute ionizing radiation doses).

n95 Id. at 576 (defining the method of deriving the "biological dose," or RBE dose, which is stated in terms of REM (roentgen equivalent (in man)).

n96 See Glasstone et al., supra note 12, at 580-586.

n97 Id. at 1-2.

n98 Id. at 633 (defining fallout).

n99 Id.

n100 See Glasstone et al., supra note 12, at 633.

n101 Id. at 600 (linking the length of time an isotope will linger to that element's biological half-**life)**.

n102 St. Paul Companies Premier **Property** Protection Form F0150, at 9 (Jan. 1998) (on file with author).

n103 Id. The additional coverage benefit applies to radioactive contamination that arises out of material at a covered location, radioactive material used in operations, but it must not arise out of a nuclear reactor or out of nuclear fuel.

n104 In the United Kingdom, insurers and government established Pool Reinsurance Co. Ltd. in 1993 due to IRA attacks. Insurers pay the first 100,000 Pounds Sterling before the government steps in to act as the insurer of last resort. Carolyn Aldred, UK Terrorism Market Softens, Bus. Ins., Dec. 15, 1997, at 19.

n105 Typical factors include fire, wind, vandalism, and other forces of nature and man. **Terrorism** is neither a group I or group II peril. This is common industry practice (opinion of the author based on experience).

n106 **Life insurance** mortality tables provide **life** expectancy data for people. Such tables

are actuarially generated based upon mortality data of given age groups. The data is based upon natural occurring death rates. This is common industry practice (opinion of the author based on experience).

n107 .III Fact Book 1997, supra note 63, at 80-83.

n108 By way of example, three large insurance companies' Third Quarter results:

Chubb Group, 1999 Third Quarter Financial Statement, at 1 (1999); SAFECO Corporation, 1999 Third Quarter Financial Statement, at 2 (1999); Traveler's Group 1999 Third Quarter Financial Statement, at 1 (1999).

n109 This is common industry practice (opinion of the author based on experience).

n110 See supra notes 59-62 and accompanying text.

n111 .This is common industry practice (opinion of the author based on experience).

n112 Insurance Information Institute Fact Book 2000, 18 (1999).

Source: All Sources > Secondary Legal > **Law Reviews, Combined**
Terms: **((insurance) /20 war or terrorism) and risk and property and life and (exclusion /20 (war or terrorism)) and date(aft 1995)** (Edit Search)
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with the terms of insurance contracts. [5] Rapid payment of claims enables victims of catastrophic damage to return to business after a loss has occurred.

While insurers have much to offer their policyholders, a question arises as to whether a carrier should cover certain losses in the first place. Modern day weapons of mass destruction are **[*354]** sufficiently powerful to create damages so destructive that such damages might be analogous to destruction caused by war. Most policies exclude damages arising out of war because of the inability to underwrite for such an exposure. [6] Furthermore, insurers can sustain physical damage to their own facilities and to the assets upon which they rely for capital to pay claims.

The industry has much to offer its policyholders in the battle against terrorism. However, potential industry vulnerabilities to damages created by a terrorist act, in conjunction with the normal, ongoing, expected losses a carrier anticipates paying every year, might cause an insurer to reconsider if it should pay for terrorist-caused damages. On the other hand, deciding to restrict or limit payments to policyholders suffering from destruction brought on by a terrorist act is, at the very least, an anti-consumer position for a carrier to take.

This article attempts to examine the role of **insurance** in the context of potential damages, brought upon by acts of **terrorism,** to business. It further illustrates current **insurance** industry response to terrorist threats before and after such an event occurs.

II. Business Vulnerabilities to Terrorist Attack

The owner of a business should consider its vulnerabilities to a terrorist's attack in planning for contingencies arising out of interruption to their operations. Such consideration revolves around business operations that can be modified, as well as aspects and practices of the business that are not so easy to change. Industry loss control [7] employees can work with business owners to better facilitate a return to business operations following a terrorist's attack.

Naturally, some businesses are more likely to be targets of terrorists than others. For instance, large multinational corporations may have greater exposure to this threat than a corner drug store because of their reputation, product manufactured, or their relationship to a powerful nation. However, smaller businesses **[*355]** may suffer significant damage due to their close proximity to a large corporate facility. Indeed, in Oklahoma City, structures nearby the Murrah Federal Building sustained damage. [8] Similarly, in the recent attacks against United States' embassies in East Africa, nearby structures also sustained damage.

The Department of State routinely issues terrorist threat warnings, indicating the possibility of attack against U.S. citizens or corporations overseas. [9] Whether large or small, domestic or abroad, businesses may be able to employ the talents of insurance industry **risk** control experts to help with contingency planning in reducing their exposures to a terrorist's actions.

As a matter of practical consideration, business owners already contemplate scenarios giving rise to the loss of their operations. Fire, earthquake, severe wind, and theft, to name but a few, are perils businesses face every day. These prevalent dangers serve as the fundamental reasons businesses purchase insurance policies in the first place because it is far more likely that a business will suffer damage at the hands of nature or through the carelessness of man than they will at the hands of a terrorist, given that only two catastrophic terrorist actions have taken place in the United States in the past decade. [10] This is not to suggest that a business should summarily dismiss the threat of **terrorism.**

III. The **Insurance** Industry's Response

A. **Risk** Control, Contingency Planning and Disaster Preparedness

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Risk control employees routinely work with business owners to plan means by which they can recover after sustaining **[*356]** a loss, regardless of whether the loss is generated by the forces of nature or by the hand of man. Both causes of loss can be catastrophic in nature and the damage may be partial or complete. The reader should understand that **risk** control employees probably cannot answer a question of how to defend against nuclear attack, but they can respond to questions regarding the best means to protect against high winds, or to control fire spread. While **risk** control employees may not be experts in the field of terrorism, they are experts in the control of loss.

One mission of a **risk** control department is to provide advice on the best means by which an insured can mitigate damage before it happens. Many suggestions may be practices already in existence, while other ideas may never have been considered, but are quite simple to implement. In planning and preparing against harm caused by acts of terrorism, a business's overall goal should be to implement mechanisms that harden their operations against any possible damages caused by such acts.

Relevant **risk** control activities business persons must consider include: continuation of production; storage; electronic file backup; redundant production; **property;** suppliers; vehicles; and security of premises. These **risk** control alternatives allow businesses to employ industry practices in order to reduce the consequences of catastrophe well in advance of any possible loss.

1. Continuation of Production

A business owner, prior to sustaining a loss, should negotiate a mutual arrangement with an industry competitor that allows each to continue their individual business product's production at the other's location in the event of damage to their own facilities. Such arrangements might agree to additional shifts to continue production, as well as charge an extra amount of profit for the arrangement. Insurance extra expense coverage helps to defray this cost after a covered loss is sustained. [11] **[*357]**

2. Storage

Another means of insuring against loss caused by terrorist activity is for businesses to disperse their storage so that no single calamity destroys a significant portion of their stock.

3. Electronic file backup

Businesses should make copies of the electronic records generated and store them off site. Performance of this task should occur at least daily. Such practice will ensure that important documents are not destroyed in the event of a terrorist event. In general, it is sound business practice to back up records upon which a business relies for its own financial interests. Furthermore, in the event of loss, backup records will serve as important documentation to support claims made under the insurance policy.

4. Redundant Production

Larger companies may be able to shift production from one site to another, thereby ensuring continuation of operations. Businesses with redundant production capability in a facility distant from the location sustaining damage will have their operations less interrupted and may resume normal business practice with greater ease than businesses that do not benefit from the ability to shift production.

5. **Property**

The structural integrity of the business's building should be considered from the standpoint of the survivability of the premises (i.e. how quickly it can recover after damage) as well as the

survivability of the people who work within its four walls. Just as fire doors, sprinklers, firewalls and separations help to **[*358]** stop the spread of fire, concrete reinforced buildings withstand blast, even nuclear blast, better than wooden buildings. [12]

6. Suppliers

Businesses should attempt to conduct business deals with suppliers that will not similarly suffer damage from the same terrorist attack, should such an attack occur. It stands to reason that distant suppliers are not as susceptible to the damage created in the attack affecting the business entity at hand. In addition, the existence of several interchangeable suppliers, if possible, will ease the maintenance of confidentiality.

7. Vehicles

Businesses should disperse large auto fleets, if possible, to avoid simultaneous destruction.

8. Security of premises

Businesses should consider extra security measures such as fences, cameras, and lights as a means of further securing the premises of their operations. Such practice encourages potential attackers to find easier alternative targets to strike.

B. Rapid claims settlement and the return to business operations after a terrorist attack

Once a terrorist attack occurs, the industry's primary response is to assess damages and to indemnify its policy holders, per the terms of an insurance policy, as applied to the fact situation of the loss. [13] Carriers dispatch their claims representatives to **[*359]** assess damage. [14] And companies will adjust capital reserves to enable a carrier to meet its financial obligations to its policyholders. [15]

Concurrent with assessing damages, insurance companies review the policies covering the damage to determine the extent of insurance coverage. [16] Carriers examine the factual situation surrounding the loss. [17] They determine the cause of the loss and nature of the damages. [18] They next apply this information to the language of a given insurance policy. [19] A business owner must understand that a carrier refers to the language in the policy when an insurer examines losses to decide whether they will ultimately pay a claim in full, limit payment, or deny payment.

The provisions of the policy consist of various clauses, but two important policy provisions are the insuring agreement and the exclusions. These provisions are important to the policyholder because they determine what types of events are covered, the nature of the **property** that is covered, and, by way of exclusion, what sort of **property** or perils are excluded.

If the facts of the loss and extent of damages constitute a peril insured under the policy and no exclusions exist to eliminate coverage, the claim is paid. [20] If no covered peril exists or an exclusion operates to preclude insurance coverage, or in some instances, sub-limit coverage to a certain dollar amount, the carrier may deny payment of the claim or pay the sub-limit for the loss. In either instance, a business may find itself facing uninsured losses. **[*360]**

Therefore, with respect to the general discussion of **terrorism and insurance,** a business owner must understand the exposure he or she faces, the nature of the potential for coverage available to the business under the insuring provisions, and the potential for **exclusions** to eliminate or limit insurance coverage. Understanding this, the business owner can identify gaps in insurance coverage and take action to redress given **risk** transfer deficiencies.

C. Insurance Policies

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1. **Property** Policies

Many types of insurance policies exist that potentially cover the damages and losses caused by the destructive acts of terrorists. [21] For the purpose of this article, the insurance policy focus will be limited to **property** and inland marine policies that indemnify a business' **property** losses and income stream. However, the businesses insured must also give serious consideration to health, **life,** and worker's compensation policies because weapons, after all, kill and injure people in addition to their ability to destroy **property.**

Property policies consist of the following general categories: commercial **property** policies that cover building, contents, and loss of income; inland marine policies that essentially cover moveable **property** owned by a business; and automobile policies that cover the physical damage of automobiles owned by a business. [22]

In general, one can say that the commercial **property** policies of various insurance companies are similar, but not **[*361]** identical. [23] Commercial **property** policies outline what is covered and state a limit of coverage. They contain provisions that tell what an insured must do in the event of loss, describe how losses are adjusted and what form of cooperation is expected of an insured, and contain insuring provisions and exclusions.

Certain carriers publish their own proprietary language policies, while other carriers adopt more common insurance policy language generated by the Insurance Services Office Incorporated ("ISO"). [24] Even carriers that adopt ISO language policies might make certain proprietary changes to policy language or provide various **property** coverage enhancements in order to differentiate themselves from their competitors. [25]

The point is that one must understand the coverage they have purchased for their business not only in the context of terrorist inflicted damages, but for all types of potential losses.

An insurance policy is considered a policy of adhesion; [26] thus, the insurer decides the terms and the conditions of the policy without input from the potential policy buyer. [27] Like any **[*362]** contract, the customer can accept the policy as offered or reject it. Because of this concept, it is a well-founded principle in the insurance industry that any policy ambiguity favors the insured. [28] Thus, the policy contains many definitions of terms in order to provide clarity and to avoid ambiguity. [29]

i. All **Risk** Policies

The insurance industry offers broadly worded **property** policies. These policies are called "all **risk"** policies because they cover a vast number of perils subject to various exclusions. [30] For example, consider an ISO language policy. The insuring agreement states, in its "Causes of Loss-Special Form," that "when special is shown in the declarations, covered causes of loss means **risks** of direct physical loss unless the loss is (1) excluded in section B, exclusions; or (2) limited in section C, limitations...." [31] Under the broad language of "all **risk"** policies, an insured will assert that a covered loss was sustained. [32] Case law generally holds that insurance carriers have the burden of proof to demonstrate the operation of an exclusion. [33] If the carrier cannot prove such an existence, the carrier must pay the claim. [34] Pan American World Airways, Inc. v. Aetna Casualty and Surety Co. illustrates this view and in addition provides further examples specific to the discussion of **insurance and terrorism.** [35]
[*363]

While this proposition appears to be the prevailing view, the Northern District Court in Ohio took a counter viewpoint in Sherwin-Williams Co. v. Insurance Co. of the State of Pennsylvania, holding that losses are covered under an "all **risk"** policy unless the insurer specifically asserted that an exclusion applied. [36] The court further postulated that the burden of proof shifted to the insured to prove that the loss was covered. [37]

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For a business that is contemplating insurance coverage for terrorist-inflicted damage, these are significantly important factors. While it may initially appear that terrorist-caused destruction is covered under a policy, several exclusions may, in fact, serve to limit or eliminate coverage.

ii. Four General Exclusions Under **Property** Insurance Policies

Although the facts surrounding the terrorist induced loss may vary, it is in the business owner's best interest to fully contemplate four general **exclusions** that are frequently considered by an insurer. These **exclusions** include: electrical damage, pollution, nuclear, and **war.** [38] Because of the nature of the weapon system employed, the effects of the weapon, or the political status of the group employing the weapon that causes the damage, an insurer may raise one or more of these **exclusions** as policy defenses. As discussed previously, under a broadly phrased **property** policy, a carrier must generally prove the operation of one of these exclusions if they deny a claim.

a. Electrical Damage Exclusion

The electrical damage exclusion states, in pertinent part, that the insurer "will not pay for loss or damage caused by or re **[*364]** sulting from...artificially generated electric current, including electric arcing, that disturbs electrical devices, appliances or wires." [39] This exclusion could arise in the aftermath of the detonation of a nuclear bomb.

b. Pollution Exclusion

The pollution exclusion states, in pertinent part, that the insurer "will not pay for loss or damage caused by or resulting from...discharge, seepage, migration, release or escape of 'pollutants' unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the 'specified causes of loss.' But if loss or damage by the 'specified causes of loss' results, we will pay for the resulting damage caused...." [40]

The terms "pollutants" and "specified causes of loss" are terms that are commonly defined in the insured's policy. [41] As discussed, carriers define such terms in order to avoid future ambiguity and prospective litigation. Case law has warned carriers that if courts consider a term in an insurance policy to be ambiguous, the courts will look to the ordinary usage of the term [42] and even consult a dictionary to determine the word's meaning. [43] Thus, a biological toxin or some form of nerve agent or other chemical weapon would indeed meet the definition of "pollutant." [44]

However, a closer examination of the term, "specified causes of loss," is warranted for the review of an ISO "all **risk**" policy. Specified causes of loss means, in pertinent part, "fire...explosion...riot or civil commotion, vandalism...or water **[*365]** damage." [45] Thus, it would appear that the exclusion is not absolute, for if one of the specified causes of loss were to give rise to the damage, coverage could be available up to the limit or sublimit of insurance issued under the policy.

c. Nuclear Exclusion

The nuclear exclusion states, in pertinent part, that the insurer "will not pay for loss or damage caused directly or indirectly by...nuclear radiation, or radioactive contamination, however caused. But if loss by fire results, we will pay for that resulting loss or damage." [46] This exclusion is applicable in the event a terrorist employs a radiological weapon of any variety. Notice, however, that while fire related losses are covered, nuclear weapons yield other damaging effects besides those of blast and heat. [47]

d. **War Exclusion**

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The war exclusion states, in pertinent part, that the insurer "will not pay for loss or damage caused directly or indirectly by...(1) **war,** including undeclared or civil war; (2) warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or (3) insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these." [48] **[*366]**

Complex issues arise out of this exclusion. For instance, one might analogize to the old cliche that one man's terrorist is another man's freedom fighter, implying the notion that a terrorist may perhaps be a soldier.

While an **insurance** carrier may attempt to raise this **exclusion** under certain **terrorism** scenarios, on the whole, it would be difficult for a carrier to prove that a terrorist's actions fall under the ambit of the **war exclusion.** [49] To simply state that a terrorist is a soldier and that the **war exclusion** applies would not likely be provable by an insurer because the United States defines a terrorist as a criminal, not as a soldier. [50]

Questions remain as to what constitutes a war, a warlike force or what signifies a military force. Legal scholars and academics continuously debate these complicated issues. International conventions, specifically the Hague Convention of 1907 and the Geneva Conventions of 1949, provide further clarification on such issues, classifying who is a combatant, a belligerent, and a guerilla fighter.

To fall under the protective provisions of the Hague Convention, a soldier must act in a prescribed manner. [51] A responsible person must command him, carry arms openly, wear distinctive insignia, and operate lawfully in accordance with the laws and customs of war. [52] Terrorists typically fall short of acting in accordance with some or all of the provisions.

International customs and conventions govern forms of belligerency, though there may not actually be a universal international agreement of these customs. [53] International law suggests that a sovereign may recognize rebellions or insurrections within **[*367]** a country, but that certain conditions must prevail before a group might be recognized as a belligerency. Three general conditions typically are cited: (1) belligerents must occupy and administer a substantial part of territory; (2) they must adhere to the rules of war; and (3) they must be responsive to identifiable authority. [54] Thus, the reader can infer that a belligerent need not be a sovereign nation and that it is not enough to merely claim that a terrorist's actions constitute insurrection or revolution. These are conditions of a legal state that imply some form of sovereignty. [55] The actions of a few individuals rarely meet these high standards.

On the other hand, it may be possible to link the actions of terrorists to that of a sovereign authority. Evidence of such linkage could come in the form of a claim made by a foreign power or by a statement made by the United States government either in words or in deed. [56] However, once the exclusion is proved to be in operation, it precludes all coverage under any policy with such a clause.

In Pan American v. Aetna, the insurance company unsuccessfully argued that the terrorists acted under orders from a political movement or government in the Middle East when they hi-jacked a plane and subsequently destroyed it after forcing the **[*368]** pilot to land in Egypt. [57] The court held that the terrorist organization was not a government nor were its members acting as belligerents when they destroyed the jet. [58]

2. Assessment of Coverage

Carriers examine damages when investigating a claim. Following a terrorist attack, the carrier determines the cause and origin of such damages. Such an investigation normally reveals the

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evidence of any issues that might form the basis for raising an exclusion. [59] Examples would include the nature of the weapon employed, and its effects rendered in conjunction with any residues left are all to be taken into consideration in assessing damages.

i. Types of Damages

a. **Property** Damage

In comparison to the cost of Mother Nature's calamities, a terrorist's destructive act could ultimately surpass any loss costs paid out for a storm or flood. Consider the cost of the World Trade Center after the blast of 1993, in which estimates of damage approached the one-half billion dollars. [60] Similarly, the 1995 bombing of the Murrah Federal Building, in Oklahoma City, collapsed six other structures and damaged approximately 300 others to some degree. [61] While estimates of those damages vary considerably, one estimate of damage placed costs was approximately six hundred and fifty two million dollars. [62] **[*369]**

In these events, the damages included structural damage to buildings. Given the insuring agreement previously reviewed and contemplating the policy exclusions, it would seem that a **property** policy would respond to this type of damage. In these damage scenarios, the proof of a covered peril takes shape in the form of structural damage to a building and loss of its contents. An insurer would not likely prove the operation of an **exclusion,** with the possible exception of the **war exclusion** under some scenarios.

b. Death and Human Injuries

Consider the human damage that attacks generate. In Oklahoma City, 168 people were killed from one terrorist event and from one relatively small bomb. [63] And twelve people died and nearly 5,500 sustained injury when a Japanese terrorist group attacked the Tokyo subway system with sarin nerve gas in 1995. [64] These instances generate not only **property** losses but costs of worker's compensation, disability, health and hospital, and the costs paid for **life** insurance claims, to name but a few. Imagine the severity of the loss if the Tokyo subway attack resulted in the death of 5,500 people, rather than their actual injury; had the terrorists acted more proficiently, the results would have rendered greater tragedy and costs than actually ensued.

Consider a similar, but hypothetical, attack against a city in the United States. If 5,500 people died in the downtown core of a United States city, as a result of some weapon of mass destruction, **life** insurance costs alone could run staggeringly high. Even if one makes the conservative assumption that the average **life** insurance policy of a worker has a value of not more than $ 100,000 per person, the **life** insurance loss would amount to $ 550,000,000. Some policies have murder clauses that pay in ex **[*370]** cess of the policy's face value. [65] Also, employees may have additional layers of **life** insurance through work.

While the **life** insurance losses from a non-explosive event have been discussed, yet to be considered is the aspect of human injuries and the damage created by possible blast and fire to structures. If the hypothetical case is expanded to include such damages, perhaps to the extent of the damages incurred at the World Trade Center or the Murrah building, the damages measure up to those caused by major natural catastrophes. Consider the following insured losses for some major catastrophic events: 1995 Hurricane Opal $ 2,100,000,000; 1992 Hurricane Andrew $ 15,500,000,000; 1989 Hurricane Hugo $ 4,200,000,000; 1989 Loma Prieta Quake $ 960,000,000. [66]

i) Types of Weapons Employed

a. Traditional Weapons

The type of weapon employed by a terrorist is relevant in order to determine whether an

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exclusion might operate to limit or eliminate coverage. Historical events demonstrate that terrorists most frequently employ a conventional bomb. The terrorist attacks at the World Trade Center in Oklahoma City and the attacks against the U.S. military installations and embassies overseas most recently evidence the conventional bomb preference. The bombs employed were typically small because they were carried in standard vehicles. In many well-known terrorism events, the terrorists have driven adjacent to or inside of the intended target and exploded their weapons. Damages caused by this type of weapon are likely not excluded and insurers have yet to raise the **war exclusion** in the United States. [67] This may change if terrorists **[*371]** step up their operations in this country and if, in so doing, a link to a foreign sovereign is established.

b. Chemical and Biological Weapons

Terrorists evidently have access to chemical or biological weapons. The sarin nerve agent attack, in Tokyo, appears to be an isolated case, but a frightening case nevertheless because it demonstrates that "ordinary" people, without the backing of industry or government, can manufacture a deadly nerve agent. [68]

Chemical weapons primarily kill and injure people, although some can also persist for some duration as a liquid form to contaminate **property.** [69] A variety of chemical weapons exist. Nerve agents attack the body's nervous system. [70] Blister agents attack exposed skin and can damage unprotected respiratory systems. [71] Blood agents inhibit the supply of red blood cells moving oxygen in the body. [72] Agents have many names, such as phosgene, mustard gas, sarin, lewisite, soman, VX, and GB. [73] Biological agents, such as anthrax, West Nile encephalitis, and plague also infect people and might constitute "pollutants" under a **property** policy of insurance, especially if such germs entered the building's water supply. [74]

It is less likely that a **life** insurance policy will contain a pollution **exclusion** because many personal **life insurance** policies contain very few **exclusions.** While some older policies may contain a **war exclusion** and a suicide **exclusion,** this author has **[*372]** never encountered a pollution **exclusion** in a **life insurance** policy. The salient feature the business owner must recognize is that from an insurance standpoint, an attack employing these weapons would result in some form of pollution as defined in most **property** policies.

Were a business contaminated by such a chemical, notwithstanding any structural damage, it is likely that no employee would return to work until a competent authority certified decontamination of the premises. Thus, the business owner should immediately recognize the first existence of a potential gap in coverage due to the presence of the pollution exclusion. Some insurance products on the market exist to overcome some aspects of the exclusion. [75]

Pollution coverage is a sophisticated specialty area of **property** insurance. Few companies' policies read identically. Some carriers provide a sub-limit of $ 25,000 for **property** damage arising out of pollution, [76] while others completely exclude any pollution claims. [77] Still other policies, called site specific **insurance** policies, provide large limits and broad coverage to clean up contaminated **property.** [78] However, some of the general **exclusions (such as war** and nuclear **exclusions)** are found even in the broadest site-specific policies. Thus, even the most sophisticated pollution policies contain **exclusions.**

Recall that the particular ISO pollution exclusion policy provides limited coverage under a "specified causes of loss" provision. Such limited coverage includes "fire...explosion...riot or civil commotion, vandalism...or water damage."

[79] Should a terrorist release a chemical weapon through an explosive delivery system, an argument might be made that the trigger for coverage is met (fire or explosion). Likewise, if the terrorist employs nothing more than a vial of anthrax at an in **[*373]** sured's premises, it is possible that an argument for coverage can be made under an act of vandalism concept.

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Source: All Sources > Secondary Legal > Law Reviews, Combined
Terms: ((insurance) /20 war or terrorism) and risk and property and life and (exclusion /20 (war or terrorism)) and date(aft 1995) (Edit Search)

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ARTICLE: Coalitions and Quakes: Disaster Relief and its Prevention

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SUMMARY:
... Earthquakes and other calamities often generate substantial government- sponsored relief, but because disasters are not always followed by significant taxpayer-financed assistance there is the obvious question of when to expect post-disaster relief. ... If, in order to create or excite a formidable interest group, it is "advanta- geous" for a victim to be one of many ravaged by a given disaster, it is neverthe- less likely that the group of losers can grow too large. ... In contrast, when post- disaster relief is expected (because of sympathy and interest group pressures), "unrelated" interest groups will not oppose dramatically efficient precautions because of the expected savings in post-disaster relief. ... Yet in terms of positive political theory alone, pre-disaster relief, in the form of subsidized insurance, would seem more likely than an equivalent amount (in expected value terms) of post-disaster relief, if only because virtually all members of the interest group would benefit from and, therefore, support the pre-disaster alternative. ... When no relief scheme is in place, every disaster affords an opportunity for an interest group to take advantage of acute sympathy for victims in order to obtain post-disaster relief. ... Similarly, the federal government could, if it wished, find a political and legal means of requiring **property** owners (in specified regions) to carry earthquake insurance even without the provision of federally-sponsored pre-disaster or post-disaster relief. ...

TEXT:

I. Introduction

Earthquakes and other calamities often generate substantial government- sponsored relief, but because disasters are not always followed by significant taxpayer-financed assistance there is the obvious question of when to expect post-disaster relief. In turn, some understanding of the availability of public subsidies has implications for the structuring of

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democracies experience hurricanes--but not hurricanes that leave millions without shelter for more than a month. Much as democracies avoid major famines, it should also be the case that floods and earthquakes of comparable magnitude do far more damage in nondemocratic environments. Again, the mechanism that makes this plausible is that where responsive governments are concerned there will often be relief in the event of a major disaster and, in turn, the prospect of this relief sets in motion interests that favor disaster-mitigating investments. There is also the less interesting notion that democratic governments simply intercede more readily once a major disaster is underway.

The picture thus far is one of partial internalization. Some combination of public and interest-group pressure can be counted on to force occasional post- disaster relief. In the case of certain enormous disasters this relief can be counted on, but in other cases it is expected with some probability between zero and one. And even if these predictions are imperfect, and the source or nature of the public pressure not perfectly specified or well understood, the chance of relief makes at least some pre-disaster investments worthwhile. Citizens or politicians or even selfish interest groups are not so hobbled by collective action problems that they would miss the opportunity to make some of these efficient, pre- disaster investments, but it is unlikely that all desirable precautions are under- taken. This is especially the case because some disasters rarely rise to the level required for "forced" relief arising out of media coverage, sympathy, and the like. Thus, few fires or crimes rise to the level necessary to extract a decent chance of relief even though the government is very much in control of most of the relevant prevention efforts.

To the extent that there is this connection between expected relief payments (arising out of some unspecified mix of sympathy, political coalitions, and the like) and efficient, pre-disaster precautions, the process described here can also provide the underpinning for a normative theory of disaster relief. The implica- tion is that one might favor relief--with some allowances made for moral hazard problems--in order to bring about efficient disaster-mitigating investments. For example, if taxpayer-financed relief appeared inevitable after many violent crimes we might imagine a very different set of interests in favor of gun control, drug decriminalization, prison construction, and school funding. [35] But in the absence of post-disaster relief, we should not expect otherwise unconcerned interest groups to support efficient, pre-disaster precautions.

III. Insurance and relief

A. Insurance and the Likelihood of Relief

If a citizen can be sure of obtaining relief in the event of a given kind of disaster, and if this relief is at the expense of other taxpayers, then quite plainly there will be no need to purchase insurance to cover the potential loss. If, as is almost always the case, relief is less than certain and less than fully compensato- ry, then the citizen faces something of a tradeoff. It is quite likely that the presence of insurance will reduce the likelihood or level of relief, if only because there will be less sympathy from other voters. It is also likely that relief will be available only for uninsured losses. [36] If relief is indeed a function of interest group power and general sympathy, then there may be optimal levels of insur- ance and interest group politics to purchase [37] so that after a disaster there will be some certain amount of insurance coverage and then some probability of relief to cover uninsured losses. But the point here is that there is at least some tradeoff between insurance and "free" relief. In a manner of shorthand, we can imagine situations (or ranges) where individuals will prefer the (increased) potential for post-disaster relief over the purchase of insurance in advance of any disaster. [38] This is hardly a novel suggestion.

The strategic problem implicit in the tradeoff just described is complicated by the fact that insurance will generally cover both individual and widespread losses, while government-sponsored relief will virtually never be available for disasters striking just one, or even several individuals. [39] Conceptually, one might purchase insurance that provided coverage

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only in the event that the disaster that caused the insured's loss did not do widespread damage, but, practically speak- ing, the existence of such an insurance policy would destroy political sympathy for the victim.

I am suggesting, then, that since relief is more likely where there is no insurance, and because relief is uncertain in general and unlikely for disasters that strike narrowly, individuals face a difficult problem when they decide how much insurance to buy and how much to invest in interest group formation. There is obviously a technical solution to this wealth maximization problem, although it will differ across individuals according to their perceptions of collective action problems and their attitudes toward **risk.** Moreover, the "solu- tion" that will occur to individuals seems unfortunate. As already suggested, individuals might purchase less insurance the more they expect widespread losses and then relief. No special moral hazard or other social inefficiency is generated by the purchase of additional insurance for individualized losses alone, but the reality is that the very sale of such policies will reduce the likelihood of relief. I have been unable to find an insurance policy that provides for coverage in the event of flood, fire, or earthquake damage, but then, for example, only half as much coverage in the event that the locality is identified as a recipient of federal disaster relief or in the event that more than one thousand **properties** are damaged. If coverage cannot be bifurcated in this manner (between widespread and narrow disasters), individuals will buy less insurance the more they expect losses to be relieved. This reduction seems inefficient.

From the perspective of taxpayers at large this tendency seems especially unfortunate (but not particularly inefficient) because the less insurance pur- chased, the more likely the groundswell of sympathy for the victims of disasters. This claim may be most persuasive when put in unscientific terms: television broadcasts of uninsured **property** owners pointing to their horrible losses will most likely move public opinion in favor of government-financed (as well as private-charitable) relief. A related point is that audiences and voters project from their own circumstances. Most citizens do not have earthquake insurance but do have fire insurance and can therefore more readily favor relief after earthquakes than after fires. [40] In any event, for the present it is sufficient to see that individuals will underinsure because of the potential for relief of uninsured losses.

One obvious solution to this problem is to attempt to develop an expectation that relief will never be available for insurable **risks.** If individuals do not expect relief for uninsured losses because these losses could have been insured, then there will be no inclination to underinsure in the expectation of relief. Coalitions may or may not succeed in gaining relief after disasters caused by **terrorism or war,** for example, but inasmuch as **insurance** is not generally available for losses arising out of these events [41] there is no problem of encouraging "underinsur- ance." Private relief, normally funneled through charitable organizations, might be available for insurable but uninsured losses (and it would be difficult to ban such relief) but direct, publicly-funded relief might be reserved for uninsurable losses. The problem with this "solution" is that it is almost surely politically unacceptable or unworkable. There is no enforceable means of precommitment, no apparent inclination to limit relief to uninsurable losses, and many situations in which some victims of a disaster will be of sufficiently modest means that the decision to do without insurance will seem understandable rather than exces- sively risky or socially exploitative. A more normative project might make the argument that relief ought to be denied where losses would have been insurable, but I take the apparent social taste for relief efforts as given. My positive aim in this Section has been to explain when we might expect post-disaster relief; my normative aim is limited to suggestions that are within the realm of the political- ly acceptable. There is an argument to be made against (and in favor of) virtually all relief, for example, but that is simply not the point of the present project.

B. Promising Relief for Insured Losses

A more modest resolution to the problem caused by the tradeoff between insurance and relief

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is for the government to attempt to promise, if only through precedent, that when relief is provided it will cover losses whether or not they are insured, even if some insured victims gain recovery exceeding their losses. One reason for this promise is to encourage potential victims to buy the amount of insurance they want without any perceived need to decrease their coverage because of the probability of relief. If a business or residential **property** owner knows that relief, should it be forthcoming, will be for fifty percent or some other fraction of losses--be they insured or uninsured--then that potential victim will purchase an amount of coverage that comes close to what he or she would purchase in a world in which there were no chance of relief. It is likely that the insured will purchase slightly less insurance in a world where relief is possible, if only because the prospect of relief removes some **risk** of loss. But if relief is given only for uninsured losses, then it must surely be the case that the prospect of relief will cause substantially less insurance to be purchased. [42] In short, one rea- son to promise relief (even) for insured losses is to lessen the bias toward underinsurance that is introduced by prospective post-disaster relief.

The prospect of relief in addition to insurance does raise some moral hazard problems. If insurance added to relief holds out the prospect of recoveries exceeding the value (or even the replacement value) of what has been lost, insureds might do such things as bringing their valuables to flood and fire rather than taking them away to higher or safer ground. But because relief is never certain (and insurance comes with deductibles) [43] it is unlikely that insureds will behave in this manner. And as a cautionary measure it is also possible to legislate penalties for such fraudulent behavior. Finally, relief might be limited to cover losses to real **property** and crops, for example, in order to limit the opportunity for socially destructive but privately profitable behavior, which seems like more of a threat where personal **property** is concerned.

The most interesting effect of this promise, that if relief is forthcoming it will go to insured and uninsured losses alike, is that as more insurance is purchased, relief itself becomes less likely. [44] As discussed earlier, relief is more likely where there are sympathetic victims and political clout, and the first of these conditions is weakened when there are fewer victims who can claim to have been devastated by the disaster in question. Thus, an airplane crash never seems to elicit relief for the families of those who perish. The suggestion is that an important obstacle to relief is the fact that many of those who die will have substantial **life** insurance and, in any event, tort recoveries are likely. If television crews had trouble finding flood and earthquake victims who have lost virtually all their worldly goods, or did not find such victims representative, then relief would be much less likely after these disasters as well. Again, even if a potential victim were aware of this connection between insurance and relief, he or she would also realize that the individual decision to purchase insurance has virtually no effect on the probability of relief. However, when many individuals purchase insurance because of the promise that relief will not be limited to uninsured losses, it is almost inevitable that less relief will in fact be forthcoming. Although I empha- size the positive effect on the amount of insurance that will be purchased, a reasonable normative conclusion is that since much relief is administratively costly and regressive in distributional terms, the likely decrease in relief is probably a good thing in and of itself.

This relationship between insurance and relief may also form part of the explanation for the lack of generous relief following the deaths of members of the armed forces on active duty. When armed forces are involved in a conflict and suffer casualties, there is normally no special post-disaster relief, even though many families lose important sources of support. One obvious explanation goes to the coalition part of the theory; the victims are not from a convenient geo- graphical area and do not have an easy means of organization. Moreover, veterans groups might be expected to focus more on relief for survivors with disabilities or even on education benefits. In short, the families of those who die in the service of their country are in a sense one degree more removed from political organization than surviving veterans, and this difference may explain the absence of special relief. A second explanation suggests that the absence of this form of post-disaster relief stems from the existence of a death benefit that is specified in advance. There would surely be more public sympathy for

surviving families if there were no provision of a death benefit. This is especially so because individual combatants and their families are unlikely to be able to insure against the relevant losses because **life insurance** policies generally exclude losses from actual or imminent **wars.** [45] Yet the advance specification of a death benefit is a contributing but not sufficient explanation on its own because organized veterans groups often succeed in gaining post-war increases in various benefits even though lesser benefits were specified in advance. [46]

In any event, although I am suggesting that a kind of collateral source rule for relief might be a good thing, I have not suggested a means for making credible the promise of such a rule. But I suspect that if politicians simply an- nounced that relief would not be denied for insured losses, and then followed through on the first occasion when relief was otherwise legislated, a precedent would be set that would itself be politically difficult to break.

C. Uninsured Losses and Implicit Collusion

A logical implication of the argument about encouraging expectations regarding collateral benefits is that, as a budgetary matter, it may even be worthwhile for the government to subsidize the purchase of certain kinds of insurance in order to reduce the pressure for post-disaster relief. [47] In turn, representatives of citizens who expect relief in the future might sensibly oppose the promise of relief even for insured losses. After all, if this promise is likely to induce the purchase of insurance, and, the more insurance purchased, the less likely post-disaster relief, then it will be in the interests of a group of potential victims to discourage its members from purchasing insurance. In other words, it may not be rational for any given individual to vary the amount of insurance purchased because of the effect on the likelihood of relief, [48] but it will be sensi- ble for representatives of these individuals to encourage underinsurance in order to increase the amount of post-disaster relief. An interest group could do this either by helping to develop the precedent that relief is available only for uninsured losses or by discouraging attempts to legislate mandatory insurance. Potential victims may well prefer government-subsidized insurance (which can be worth more than the increased likelihood of relief), a topic to which I turn to shortly, but my point here is simply that unsubsidized insurance may be some- thing that these interest groups (or their agents) would wisely discourage.

Of course, it is unlikely that we will find much evidence of potential relief recipients or their representatives [49] behaving in the manner just described. Explicit expressions of interest in less relief (or promise of relief) rather than more would be sufficiently striking as to draw attention to the strategic behavior that underlies it. And, in turn, evidence of conscious manipulation of public sympathy would reduce the likelihood of relief. But there may be more subtle ways of maximizing relief in the manner suggested. Consider, for example, the fact that mortgagees in Southern California normally require borrowers to carry fire and other insurance on homes and other **properties,** but they apparently do not require earthquake insurance. [50] It is possible that these creditors recognize that if there is any substantial earthquake damage, then there will be fairly widespread damage and that relief will be forthcoming. This signal from lenders may itself be sufficient to encourage individuals to buy less earthquake insurance (and in the aggregate to make relief more likely), so that lenders may serve as subtle intermediaries.

It may also be no coincidence that California has historically been a state where it is difficult or expensive for lenders to enjoy deficiency judgments against defaulting mortgagors; [51] **property** owners are in fact "insured" in the sense that devastating earthquakes will either stimulate relief efforts or will be borne largely by lenders. In a regime where lenders do not look beyond the security offered by the **property** for the satisfaction of their loans, the insurance that is required by lenders is likely to be the only insurance that homeowners will find worthwhile to purchase. [52] In any event, it is not impossible that sophisticated lenders under- stand that to require earthquake insurance would be to reduce the likelihood of relief. And inasmuch as this relief is likely to generate economic activity it may even be in the lenders' narrow interest to prefer relief over insurance. [53] Alterna- tively, a competitive

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equilibrium among banks may be sustained where earth- quake insurance is not required (and there is some substantial probability of relief). [54]

A less subtle example of implicit collusion against insurance in order to maximize expected relief is offered by the experience following the National Flood Insurance Act of 1968. [55] Under the Act, the federal government subsi- dizes flood insurance (marketed by private firms) but only for **properties** located in a community that has qualified by enacting land-use and control measures aimed at reducing the flood hazard related to new construction. [56] But because only one-third of flood-prone communities had joined the program by 1973, there is reason to think that communities declined to enter the program because they feared that there would be less disaster relief in the event of flooding. [57] Al- though the Act sought to increase the purchase of insurance by promising that post-disaster relief would be unavailable to residents of qualified communities who failed to acquire flood insurance, it has been difficult to make this promise entirely credible. [58]

Finally, there is the possibility of a more extreme solution, if it can be called that, to the problem of strategic underinsurance: insurance could be mandated. All **property** owners, or all owners in specified regions, might be required to carry a given level of earthquake or flood or other insurance. [59] One problem with this approach is that many **property** owners sincerely prefer not to pay for this insurance. And the political problem is now familiar; mandatory insurance will be opposed if only because it makes disaster relief less likely. Moreover, it may be difficult to follow through and to deny relief to those who did not abide by the earlier mandates. Nevertheless, the evolution toward mandatory insurance for automobile owners [60] and in the area of health care suggests that this option should not be ignored. My intuition is that the first step toward such change should be a federal commitment to consider (but not to guarantee) relief only where a state government asks the federal government to match funds that the state has already agreed to provide. A state-federal partnership in post-disaster relief would serve to encourage efficient pre-disaster precautions (because the states would now internalize projected losses to a degree) and pre-disaster mandates. [61]

IV. Pre-Disaster Relief

A. Insurance and Relief Revisited

I have suggested that if individuals expected relief efforts (in the event that they are forthcoming) to cover insured as well as uninsured losses, then more insurance would be purchased and, in turn, less relief would materialize. Relief requires some combination of public sympathy and political power (with little of the latter needed where, for example, in the case of serious starvation the disaster is truly devastating), and the former is less likely the more insurance coverage there is in place. The same sort of thinking would appear to provide an easy answer to the question of why interest groups do not regularly obtain subsidized pre-disaster insurance rather than post-disaster relief. Yet in terms of positive political theory alone, pre-disaster relief, in the form of subsidized insurance, would seem more likely than an equivalent amount (in expected value terms) of post-disaster relief, if only because virtually all members of the interest group would benefit from and, therefore, support the pre-disaster alternative. [62] A United States Senator from California would probably do well to secure post- earthquake relief for the thousands of Californians who suffered earthquake- related losses, but there is some chance that other in-state interests will be indifferent to such relief. In contrast, it is almost impossible to imagine a world in which the Senator would not be encouraged to gain pre-earthquake insurance subsidies directly benefitting hundreds of thousands of constituents. The problem with this preference, of course, is that there will not be much public sympathy before an earthquake strikes. Californians may prefer pre-disaster to post-disaster relief, and their political agents may be inclined to work harder in order to get credit for such programs, but it seems likely that something more is needed in order to overcome the general pre-disaster reaction that this is but another interest group seeking a piece of the pie.

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On the other hand, if it is true that taxpayers in general might be better off not limiting post-disaster relief to uninsured losses, then it may also be the case that taxpayers are better off providing pre-disaster relief. Even if we hold the level of expected expenditure constant, it is possible that subsidizing insurance creates less of a distortion than the potential for relief of uninsured losses alone. The possibility of gaining relief for uninsured losses can be expected to discour- age the purchase of insurance, while a subsidy for insurance will presumably encourage the purchase of insurance. It is possible, or even likely, that the first distortion is greater than the latter. It is even possible that the two offset one an- other. The subsidy encourages insurance, but potential victims may (correctly) still expect some relief even though there was a pre-disaster subsidy for insurance and, therefore, may decrease their insurance purchases to the extent that they expect more relief for uninsured losses.

A second reason for preferring to give pre-disaster insurance subsidies rather than occasional post-disaster relief relaxes the assumption that the cost of the two programs will be the same. Taxpayers or their representatives may perceive both that sympathy for victims is great once a disaster occurs and that there is less sympathy if pre-disaster insurance had been available at a subsidized level but had not been purchased. In short, it may be economical to give in advance. Moreover, for reasons discussed earlier, recipients and their representatives may prefer less aid to more because the subsidy is directed to more recipients. Those who would have purchased insurance even if unsubsidized will almost surely prefer the subsidy; and even a majority of those who would not have purchased insurance may prefer a certain subsidy (should they choose to take it) over an uncertain payout, even if the latter has a somewhat higher expected value.

There is a kind of voting paradox in this preceding argument, and I am suggesting that this kind of intransitivity may explain a good deal of the legisla- tion we find. Given the "requirements" of sympathy and political influence, we often expect post-disaster relief and not pre-disaster subsidies because sympathy is absent before disaster strikes. But once we can expect some post-disaster relief, both potential victims and other taxpayers may prefer some package of pre- disaster subsidies over post-disaster relief even though a proposal for a pre- disaster subsidy would have lost to the possibility that nothing at all be done.

There is a third, related, and very practical reason to think that pre-disaster relief will sometimes prevail. It combines the redistributional characteristics of the preceding argument (regarding the preference, however intransitive, for insurance subsidy over post-disaster relief) with a return to the question of disaster mitigation and the encouragement of the optimal amount of insurance. When relief takes the form of subsidies for insurance it is fairly simple to reduce the overall loss from future disasters by conditioning relief on preventive steps. Thus, the subsidized insurance may be conditioned on certain building require- ments or flood-control plans and so forth. Again, it is useful to see that potential victims may join other taxpayers in preferring this approach over post-disaster relief. Some recipients will be planning to take these preventive steps in any event, and others will simply prefer the subsidy-in-hand (however conditioned) over the greater prospect of uncertain disaster relief. In any event, it is more difficult to condition post-disaster relief on preventive steps. As discussed previously, a promise that relief, if given at all, will only be given to those who had met certain building requirements or other disaster-mitigating conditions may not be credible. And the payment of relief only for reconstruction that meets certain requirements will normally affect only a small number of **property** owners likely to be affected by the next disaster. To be sure, the government could simply legislate, or virtually force the state government to enact and enforce, the behavior in question. But in practice this will be difficult to do unless attached to a carrot.

In short, I am suggesting that on both efficiency and public choice grounds the emergence of pre-disaster subsidies is not surprising. At the same time, I am not quite claiming that this form of relief dominates other outcomes. There is the potential for a kind of intransitivity, with pre-disaster relief appearing superior to post-disaster relief which seems preferable

(occasionally) to no relief which, in turn, seems to defeat pre-disaster relief. [63] One possibility is that we should expect instability as a kind of constant dissatisfaction with the status quo that generates change. [64] Alternatively, for reasons discussed presently, it is possible that the pre-disaster subsidy outcome is most likely to emerge as the stable equilibrium. [65] The case for instability is in part based on the fact that relief is difficult to predict because sympathy depends on media coverage and because political influence requires an interest group to form a successful coalition. But part of the case for instability also rests on the intransitivity sketched above; there may be constant movement from no relief to occasional (and increasing) post-disaster assistance, to pre-disaster insurance subsidies, and then, because of the absence of relief in the pre-disaster period, to no relief again.

The alternative argument, that the pre-disaster subsidy regime will prevail, is essentially one of endowment effects. When no relief scheme is in place, every disaster affords an opportunity for an interest group to take advantage of acute sympathy for victims in order to obtain post-disaster relief. The "no relief norm" in this way will constantly be challenged by occasions for relief. Somewhat similarly, post-disaster relief will always raise fears of moral hazard and of future relief expectations such that the presence of post-disaster relief may generate the movement to pre-disaster subsidies for many of the reasons discussed earlier. But it may be more difficult to move away from pre-disaster relief (to no relief) because the benefits of this change would be spread widely and thinly, while the costs will be concentrated in one narrower interest group. It is perhaps con- ventional wisdom to think that it is difficult to remove a program that benefits a well organized group, but this wisdom often seems correct.

Finally, pre-disaster subsidized insurance may reduce the chance of post- disaster relief, but it surely does not eliminate that possibility. Predicting the durability of a pre-disaster relief scheme is thus especially difficult because potential disaster victims and other taxpayers may not share expectations as to the likelihood of post-disaster relief in a regime with pre-disaster subsidies. I am satisfied to leave open the question of whether and when to expect not cycling but stability in the form of pre-disaster relief.

B. National Health Insurance

The contemporary debate about national health insurance has some relation to the political and economic phenomena discussed thus far. The prospect of an insurance scheme causes various interest groups to scramble into coalitions be- cause most schemes necessarily involve some cross-subsidies and, therefore, some winners and losers. If universal coverage is to emerge, then the political game is all the more intense because an implicit or explicit tax is necessary in order to finance health care for those who have not purchased it in the past and are unable to afford it (or corresponding taxes) in the future.

There are, of course, obvious differences between this interest group struggle and that associated with earthquakes, floods, and other discrete disasters. Even though discrete disasters generate victims who are plainly identifiable and easily organized (because of their geographic proximity), the pre-disaster high **risk** group is also identifiable and may be even easier to organize. As such, the major evolutionary advantage of post-disaster relief, it will be recalled, is not organiza- tional ability but rather the likelihood of sympathy from other taxpayers. In contrast, the subset of citizens in need of extensive health care is more difficult to organize. Some of these subsets may be especially successful in attracting charitable support, and a few may even be able to overcome problems of political organization, but by and large post-disaster relief is unlikely. [66] In the case of a particular disease, for example, afflicted citizens are usually dispersed and unlikely to be well-organized. And in the pre-disaster phase, the subset of citizens at high **risk** for the given disease is not nearly as identifiable as that for earthquakes and similar natural disasters.

This difference in dispersion and identifiability means that post-disaster relief for particular health problems is often unlikely, but it does not say much about the likelihood of any pre-

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disaster program. I use the term program rather than relief because a national health insurance scheme that covers treatment for an illness need not subsidize one group at the expense of another in ex ante terms. The move toward government-sponsored, rather than private, insurance may be fueled by problems of mobility rather than affordability. [67]

The comparison is more interesting when we force the affordability issue by thinking of the problem of uninsured patients who cannot afford critical care. One way to think about the apparent move toward national health insurance is to see that we have a post-disaster relief scheme currently in effect in the form of public and private subsidies to maintain emergency rooms and other hospital facilities used rather intensively by uninsured patients. [68] This form of disaster relief seems akin to what we would expect in the event of famine; it is difficult to imagine an affluent democracy (or perhaps any society) denying emergency medical care, [69] so that public sympathy generates relief even for a group with little political power. Given the reality of this post-disaster relief scheme, [70] taxpayers may sensibly prefer pre-disaster relief in the form of subsidized insurance over the post-disaster relief currently taking place in emergency rooms. The analogy is to the disaster mitigation features of subsidized flood (and perhaps earthquake) insurance. Just as taxpayers and potential victims may both benefit by a move from post-disaster to pre-disaster relief when the latter is in the form of subsidized insurance contingent on disaster-mitigating steps (such as flood planning and conformity to building codes), so too everyone may benefit if subsidized heath insurance leads to preventive rather than emergency care. The move can be beneficial in both financial and mortality terms. Put somewhat differently, there is also the possibility of evolution toward catastrophic health insurance (or health care), but the expenditures necessary to support more routine (but emergency room) care bring about the possibility of pre-"disaster" relief for all health problems. But either kind of national health insurance (uni- versal or catastrophic) is an example of pre-disaster relief succeeding post- disaster relief so long as substantial redistribution is involved.

I do not think a strongly normative position on this matter is warranted. It is remotely possible, for example, that subsidized health insurance will have a significant impact on work effort; better health care, like better food and lodging, is, after all, one of the things many citizens work hard to enjoy. In this, as in many other questions of public versus private provision, experimentation or experience may be necessary in order to understand better the interaction between economies of scale, incentives to work, moral hazards, well functioning markets, and other concerns. My point is simply that once we recognize the substantial post-disaster relief schemes that have arisen as part of the present system, it is no surprise to see a movement toward the alternative of pre-disaster relief. Once again, even if a majority of taxpayers, their representatives, or policy experts prefer no relief, or at least less relief, over pre-disaster relief (and that is not likely to be the case in health care), there is likely to be evolution from post- disaster to pre-disaster relief.

V. Conclusion

All disasters are not alike, and a theory of disaster relief must suffer immedi- ately from the problem of defining disaster. But I have tried to paint over such problems with a broad brush in order to make some progress on the question of when to expect relief and in order to generalize about alternatives to post- disaster relief. As it turns out, it is difficult to predict the scope of post-disaster relief because so much depends on the level of what I have called "sympathy" for victims. We can predict that relief is more likely after an earthquake than after a crime wave, but I do not claim to be able to predict which earthquakes (or hurricanes or explosions, for that matter) will generate the greatest relief efforts. To take but one problematic variable, if one disaster strikes soon after another it is possible that taxpayers will tire of financing relief efforts, but it is also possible that victims of the second disaster will benefit from the precedent regarding relief created in the aftermath of the first. [71]

I have suggested that there is often a kind of intransitivity among the (rough) policy options of post-disaster relief, no relief, and pre-disaster relief. I have also argued that in some

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situations cycling may not occur, because the order of consideration, as it were, can be expected over time to favor the pre-disaster relief outcome. [72] It is also possible that this dynamic operates outside of the context involving government-sponsored relief. Thus, one plausible description of the history of retirement plans is that in the beginning employers paid their workers in cash, with no fringe benefits, because employees could then make suitable individual savings (and other allocational) decisions. Over time there were retirements or deaths or disabilities that evoked sufficient sympathy as to cause employers or fellow workers to raise funds for the departing worker or for that worker's stricken family. The regime was then one of "no relief" with occasional "post-disaster relief." It is also easy to see how precedents might have been created so that the number of sympathy cases grew. In turn, these cases might have generated moral hazard fears, although they are not quite that, about the propensity to save and, more generally, pressure on the one side to make relief more certain and on the other side to defuse the case for relief by encour- aging pre-disaster planning. Retirement and other insurance plans may in this way have emerged through employer-organized "subsidies," or forced savings programs in place of wages. These programs seem like natural developments; post-disaster relief leads to pre-disaster plans. Moreover, the pre-disaster pro- grams need to be subsidized, mandated, or somehow encouraged (compared to private savings and consumption) or too many employees will allow disaster to strike if only to elicit post-disaster relief. To be sure, the tax system has come to play a role in this scheme, but tax laws might just as well have encouraged private savings through direct incentives. In any event, tax law may be the cart rather than the horse in this story.

In the case of this particular example, if we were to start all over again, a substantial case might be made against employer-organized retirement systems on grounds of free choice (and utility), mobility, and horizontal equity. With perfect foresight about the development of employer-sponsored plans, a substantial number of those who favored "no relief" might have preferred a different kind of pre-disaster planning or might have worked harder to forestall tax and other preferences for relief of any kind in order to encourage private ordering. But in the real workplace, the movement from no relief to post-disaster relief and then to pre-disaster relief seems almost inevitable. In turn, the expense of pre-disaster programs has encouraged the growth of part-time employment, not to mention contractions and self-employment, such that a subset of the work-force has been relegated to no relief. The kind of intransitivity explored in this Article is thus not limited to public programs.

Returning to the emergence of pre-disaster subsidies more generally, it is, of course, possible that I have overstated the positive case for pre-disaster programs. The future may bring about the gradual reduction and even withdrawal of flood insurance, subsidized health insurance, and even retirement plans. I have fol- lowed conventional wisdom in assuming that interest groups (and employees with endowment effects) will be good at protecting benefits they enjoy, [73] but in reality even the most cherished entitlements can disappear. Budget crises may cause gradual reductions in the level of the subsidy for flood insurance, for example, while the continued presence of a flood insurance program may suppress sympathy for post-disaster relief. More interesting, the threat of many uninsured victims (asking for post-disaster relief the next time around) and the problem of adverse selection may encourage not only the reduction of subsidies, but also the passage of accompanying legislation mandating the purchase of private insurance or requiring disaster-mitigating expenses. Similarly, the federal government could, if it wished, find a political and legal means of requiring **property** owners (in specified regions) to carry earthquake insurance even without the provision of federally-sponsored pre-disaster or post-disaster relief. More generally, there may be evolution toward insurance but not necessarily toward subsidized insurance. [74] The government could also find ways to require various disaster-mitigating expenditures with sticks rather than carrots. I suspect that these developments will be more likely if state-sponsored relief is a precondi- tion for federally-sponsored relief. [75]

Unsubsidized, mandated health insurance is perhaps the best current example of such a possibility. The potential for such unfunded mandates or regulations aimed at disaster

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mitigation makes plain both the deep and complicated involve- ment of government in private lives and the difficulty of attaching ideological labels to many policy proposals. If post-disaster relief is often a precursor to pre- disaster relief, and sometimes even a precursor to subsequent unfunded man- dates, then citizens and their representatives can be forgiven if they have mixed feelings about proposals for relief or for disaster-mitigation programs in the first place.

FOOTNOTES:

n1 It is arguable, however, that federal relief simply follows **property** damage rather than death or injury, although this distinction might itself have an obvious interest group explanation. The Los Angeles Rodney King Riots, for example, generated much less relief than the Northridge Earthquake soon thereafter, but the latter did twenty times more in the way of **property** damage. See Shante Morgan, Two Years Later, L.A. Riot Scars Run Deep, San Diego Union-Trib A3 (Apr 29, 1994) (victims of riots causing thousands of injuries, 55 deaths, and $ 1 billion in damage to buildings feel "ignored" in comparison to earthquake victims, although at least $ 0.6 billion in aid followed the riots). The Northridge earthquake caused between $ 20 and $ 30 billion of damage and was followed by more than $ 7 billion in relief. Michael Miller, Fire, Quake, Mud, Floods, Riots Dim California Dream, Reuters (Feb 9, 1994), available in LEXIS, News Library, Reuna File ($ 20 billion estimate); Emergency Supplemental Appropriations Act of 1994, Debate on HR 3759 on the House Floor, 103d Cong, 2d Sess, 140 Cong Rec H211-04 (1994) (statement of Rep. Lucille Roybal-Allard) (range of damage estimates); Emergency Supple- mental Appropriations Act of 1994, Pub L No 103-211, 108 Stat 3-14 (1994) (general allocation of $ 4.7 billion along with allocations to Small Business Administration ("SBA"), Departments of Education, Transportation, and Housing and Urban Development, the Veterans Health Administration, and President's Discretionary Fund (to be divided between earthquake and Midwest flood relief) totalling about $ 7.2 billion).

Any comparison between the gradual losses from problems such as urban decay with those from unique events such as earthquakes or riots leads to the familiar point that discrete events focus attention. A child in need of a liver transplant may attract more attention and monetary contributions than a nation of children in need of funding for prenatal care or kidney dialysis. See Guido Calabresi and Philip Bobbitt, Tragic Choices: The Conflicts Society Confronts in the Allocation of Tragically Scarce Resources 134-37 (Norton, 1978). More generally, my focus in this paper is on discrete losses that the state has not precommitted to compensate.

n2 By incidence I refer not to the identity of the ultimate beneficiaries of relief, but rather to the occasions on which substantial relief is forthcoming.

n3 It would be interesting to compare this to relief patterns in parliamentary systems with only at-large representation. I am unable to offer reliable, comparative data in part because most democracies have at least some geographic representation. But it is interesting that after the recent floods in Western European countries, with parliamentary democracies and strong political parties, there was no disaster relief for farmers and other (geographi- cally concentrated) interests. In contrast, in Japan, where geographical representation is thought to be important, the government gave $ 25,000 to every family that lost its home and $ 50,000 to each family that lost its head of household in an earthquake and tidal wave that caused massive destruction on the island of Okushiri. World News Tonight with Peter Jennings, ABC News (July 15, 1993) available in LEXIS, News Library, Script File. It is noteworthy that there are countries with geographic representation, such as New Zea- land and Britain, that have experimented with universal earthquake **insurance and with war** damage **insurance.** See G. Granville Slack, The **War** Damage Acts and the **War Risks Insurance** Act, 1939, Part II (Commodity **Insurance** Scheme) 11 (Butterworth, 2d ed 1944) (The British Act provided compensation for **war**-damaged **property** with 50% of the funds coming from a new tax on land owners and the other 50% coming out of general funds.). Note, however, that the United States had a similar act during World **War** II. Mark S. Rhodes,

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relief efforts. Inasmuch as these efforts sometimes take the form of pre-disaster subsidies, this Article aims to illuminate the choice between pre- and post-disaster relief.

The positive question of when relief is likely to be government subsidized refers implicitly to the American experience in which earthquakes, floods, and severe droughts trigger sympathy and government-funded relief more often than do crime waves, inner city decay, rural deterioration, and some diseases. It should be apparent that this comparison is difficult to prove because so much depends on the definitions and measures of relief that are used. For example, if all farm programs are seen as addressing the phenomenon of rural depopulation, all expenditures on urban-based crime, drug prevention, and education are linked to concerns about inner cities, and all funding of scientific research is interpreted as aimed at improving mortality statistics, then the amount spent on relief following droughts and earthquakes will seem trivial. Even so, the question of why relief follows some natural disasters rather than others remains, but the larger question of political priorities can be substantial- ly avoided. In this Article, I will assume that expenditures relating to crops, crimes, and science can be taken to reflect narrower interests than those noted above and that, in any event, there is something interesting about the fact that public expenditures are part of the reaction to some discrete losses but not others. It is surely the case that large, direct expenditures by the federal government are more likely following an earthquake than after an urban crime wave. [1]

Section II explores the characteristics of disasters that beget relief. Among other things, I suggest ways in which the prospect of disaster relief might generate desirable incentives for investments aimed at minimizing disaster- related losses in the first place. Section III turns to the conventional wisdom that people might decline to take preventive steps, including the purchase of insurance, because they expect relief in the event of disaster. I suggest that all parties might be better off if the government could credibly promise that in the event of relief insured losses would be compensated along with uninsured ones. Section IV considers the choice between post-disaster relief and pre-disaster subsidized insurance. I argue that there may be a kind of intransitivity among various policy options but that pre-disaster relief may be the alternative most likely to emerge. I conclude with an illustration involving health care politics and financing, for a move in the direction of national health insurance can be understood in terms of the choice among the options of no relief, post-disaster assistance, and pre-disaster subsidies. Among other things, the discussion suggests that pre-disaster subsidies (such as subsidized flood insurance) may be more beneficial than generally recognized and that it might be sensible to provide federal relief only where there are matching state-provided funds.

II. Explaining Post-Disaster Relief

A. The Positive Political Theory of Disaster Relief

An obvious but important explanation of the incidence [2] of post-disaster relief is that discrete natural disasters tend to affect limited geographic areas and often, therefore, relatively well organized interest groups. An earthquake in Los Angeles affects people who are already well organized by virtue of the structure of our political system. [3] If earthquake victims gain more federal aid in absolute or relative terms than do a similar number of citizens suffering from a given disease, then we might attribute that difference to the geographic concentration of earthquake victims who, through their representatives or electoral votes, can gain a greater share of the national pie. We expect such interest groups to be excellent at avoiding burdens and to be fairly successful at obtaining benefits. [4] This is especially true when the interest group is concentrated in several congres- sional districts or states, or is essentially coterminous with one state, because there is already in place a means of overcoming collective action problems and gaining political advantage over dispersed and disorganized fellow citizens. In contrast, those who suffer from a disease (or those who hope for government funds to support research about a disease) need to overcome collective action problems in organizing their claims. [5] Falling in between these extremes are disasters that

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Couch on **Insurance** 2d section 42:474 at 562 (Law Co-op, 2d ed 1982).

n4 See Saul Levmore, The Case for Retroactive Taxation, 22 J Legal Stud 265, 279 n 27, 285 (1993) (a kind of endowment effect may make organized interests especially determined to protect what they already enjoy). Success may also be tied to the chance that the jurisdiction affected by the disaster is considered pivotal in an upcoming political election. See, for example, Melissa Healy, Cheney Defends Plan to Rebuild Base Hit By Storm; Recovery: Defense Secretary Admits Proposal is Based on More than Military Needs. But He Rails Against Charges That Move is Motivated by Politics, LA Times A15 (Sept 3, 1992) (linking decision by President George Bush to rebuild Homestead Air Force Base after Hurricane Andrew to forthcoming presidential election).

n5 A major problem is the ability to suppress free riding in order to extract "taxes" or other seed capital from potential beneficiaries. Rent seeking by an interest group may be profitable but "investors" need a means of pooling their investments.

n6 It is tempting to suggest that modest success will also come to interest groups organized around issues of great absolute value to individual members. Thus, an increase in social security benefits may affect a group that is just as numerous as a group that would benefit from a plan to compensate victims of crime, but added social security benefits seem more likely to emerge from the political process than does compensation to crime victims. The latter group may be perfectly identifiable (as it will be, for example, if the proposal is to compensate victims of crimes committed in the past year) but most of its members will have relatively little to gain.

But one problem with this comparison, or suggestion, is that there are striking examples of nonrecurring interests with a great deal to gain but with little history of success. Consider, for example, the relatively low benefits paid to families of members of the military killed in active service. These extremely sympathetic victims are not associated with a moral hazard problem, suffer losses that are not easily insurable through private channels, and might work for fairly large ex post relief packages--but they are geographi- cally dispersed and otherwise unmotivated to organize.

There are, of course, examples of relief even where the victims are dispersed or appear unsympathetic. For example, governments may pay for emergency room care even when victims are at fault and (ostensibly) politically powerless. The discussion in the text claims only that among the factors explaining the incidence of relief, geographical and other organizational advantages are noteworthy.

n7 However, at least with respect to local capital markets, one way of rationalizing post-disaster relief is with the idea that these markets may be too inflexible to finance a rapid recovery.

n8 There is, of course, no recent experience with post-invasion relief claims. While the bombing of Pearl Harbor did produce some civilian casualties and business losses, virtually all those losses were traced to anti-aircraft activity, rather than direct enemy strikes. Walter Lord, Day of Infamy 158, 220 (Holt, 1957). It is unclear whether this fact makes relief more or less likely. In any event, inasmuch as post-disaster relief blossomed only in the last 25 years, see note 13, the Pearl Harbor experience is probably uninformative.

n9 See Rhodes, Couch on **Insurance** 2d section 1:61 at 159-60 (cited in note 3) (containing a standard form homeowners policy that excludes **war** damage from coverage). At least in the case of **life insurance, however, insurance** companies only use the **exclusion** in times of **war** or impending **war,** and then only for particular high-**risk** insureds (such as males of draft age). Janice E. Greider, et al, Law and the **Life Insurance** Contract 227 (Irwin, 5th ed 1984); Kenneth Black, Jr. and Harold D. Skipper, Jr., **Life** Insurance 138 (Prentice- Hall, 11th ed 1987).

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n10 There is also a connection between repetition and moral hazard and between repetition and the ability of citizens to expect that relief will be forthcoming. These matters are explored below.

n11 These benefits are occasionally added to "expected" benefits in the midst of an economic downturn (or election season). Note that previously promised unemployment benefits contain an element of pre-disaster relief because there are obvious cross-subsidies among insured workers.

n12 The bailout of Chrysler is a particularly interesting exception because the govern- ment received stock options which later proved quite profitable. Warren Brown, Chrysler's Driving Wheel Bids Farewell; Iacocca's and Automaker's Resurgence Were Intertwined, Wash Post H1 (Dec 27, 1992) (government earned $ 350 million from warrants and stock options issued in exchange for $ 1.2 billion in loan guarantees). In contrast, businesses in Los Angeles that received post-earthquake relief were not asked to promise to make pay- ments in the event that they thrived after rebuilding. Of course, to the extent that even the most powerful interest groups must join coalitions and therefore must face constraints, it is difficult to predict when interest groups will do better holding out for larger "subsi- dies" rather than benefits that are offset by extractions in the event of success. Universities might choose to lobby for scholarships rather than subsidized loan programs of somewhat smaller net benefit, but when we see loans (or Chrysler stock options) it is not always the case that the interest group has proved to be weaker than others.

n13 More generally, relief may beget relief in the sense that expectations about relief have something to do with past experience. The Alaska earthquake of 1964 is often given as the watershed event, after which major disasters often generated government-sponsored relief. Douglas C. Dacy and Howard Kunreuther, The Economics of Natural Disasters: Implications for Federal Policy 53-54 (Free Press, 1969) (The Alaska earthquake of 1964 produced the first U.S. legislation specifically aimed at a single disaster, despite the fact that Alaska's **property** damage was only average when compared to prior disasters.). See also Howard Kunreuther, Recovery from Natural Disasters: Insurance or Federal Aid? 9 (Am Enterprise Inst, 1973).

On the other hand, most examples of identification could also be explained on geographic grounds. For instance, South Dakota may benefit from drought relief because enough citizens from other states fear droughts themselves, but it is also possible that South Dakota--with its disproportionate power in the Senate--is simply good at getting relief. Political power may explain the fact that even small problems can receive attention and relief from federal agencies. See, for example, South Dakota Landslide Victims Need Assistance Now, 104 Cong Rec S9113-01 (July 15, 1994) (statement of Senator Larry Pressler urging relief in addition to the SBA loans already approved for home and business owners in the small town of Lead, South Dakota, where a slow-moving landslide caused damage).

n14 To the extent that these rules are state-initiated there is the puzzle as to why relief comes from the federal government. In the case of floodplains, it seems sensible that control and prevention are somewhat in the hands of the United States Army Corps of Engineers because relief is expected from the federal fisc. Oliver A. Houck, Rising Water: The National Flood Insurance Program and Louisiana, 60 Tulane L Rev 61, 66-71 (1985).

n15 Id at 71.

n16 The argument is a familiar one in the debate over the proper treatment of losses in an income tax system. See Mark Campisano and Roberta Romano, Recouping Losses: The Case for Full Loss Offsets, 76 Nw U L Rev 709 (1981) (arguing for symmetrical treatment of losses and profits in order to encourage efficient, if risky, investments). The problem is complicated by the fact that it is difficult to keep an even playing field among start-up companies, enterprises with past losses, and conglomerated firms.

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Note also that the casualty loss deduction in 26 USC section165(c)(3) (1988) of the tax code gives relief even for personal assets lost in a disaster. Louis Kaplow, The Income Tax as Insurance: The Casualty Loss and Medical Expense Deductions and the Exclusion of Medical Insurance Premiums, 79 Cal L Rev 1485, 1489-93 (1991) (casualty loss deduction covers assets used for the owner's consumption, such as a yacht destroyed by a storm).

n17 This is because the percentage of **property** losses covered by federal aid was in the range of the marginal tax rates on ordinary income and capital gains.

n18 In referring to "full internalization" below, I will assume that the government will actually pay only a fraction of losses in order to control moral hazards. In contrast, partial internalization will refer to the idea that the government pays still less, or gives relief less often, if only because there is insufficient sympathy or political support for "full" relief.

n19 An optimistic theorist might insist that war casualties are sufficiently in the public eye as to obviate the need for further political internalization. This is related to the well known claim that democracies do not engage in warfare with other democracies. Of course, this optimistic view suggests that there would not be relief in the event that a hostile military force inflicted losses, because such an event would be very much in the public eye.

Put differently, it is possible to categorize potential losses, or "disasters," as of the kind that the state can be expected to prevent in an efficient manner or of the kind regarding which the state could use some budgetary encouragement to prevent efficiently. The state might be expected to plan efficiently for the national defense, so that little would be gained by having it compensate those citizens who suffer losses from war- fare--poorly or well conducted.

n20 The argument can not be that relief is always provided in order to encourage ef- ficient prevention, because it is obvious that some crimes, fires, storms, and other "disasters" do not generate government-sponsored relief. If, instead, the idea is that benevolence (or political forces) encourages relief whenever it is plausible that government- sponsored mitigation steps would have efficiently minimized or prevented the disaster at issue, then the question is why these same forces do not simply encourage efficient preventive steps, without the intermediation of relief. Where private parties are concerned, it is easy to see both why the threat of damages might encourage efficient precaution- taking and why it might be easier to use losses as the triggering device instead of suits for unreasonable **risk** creation. But where public servants are concerned, the threat of payments for (disaster-related) losses will not necessarily encourage precautions because the losses are not paid by these agents themselves. At the very least, we will need a compli- cated theory to explain how disaster relief might best encourage efficient precautions.

n21 One possibility is that the federal government seeks credit for relief. Another is that it wishes to regulate, perhaps in order to attract rent seeking behavior, and plans to justify regulation as a means of lowering the costs of relief. An interesting possibility is that the federal government will or should condition relief on the provision of matching funds from state governments. This state-provided post-disaster relief must be drawn from a broad tax base or an affected group will simply agree to pay the state in order to re- ceive federal funds.

n22 See generally Houck, 60 Tulane L Rev 61 (cited in note 14).

n23 On the possible collective action problem among these interests, see note 30 and accompanying text.

n24 See, for example, notes 47 and 58 which discuss the inability of the government to follow through on its earlier threats that relief would be denied to those who did not participate in crop insurance or flood insurance programs.

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n25 Amartya Sen, The Economics of **Life** and Death, Sci Am 40 (May 1993); and Amartya Sen, Freedom and Needs, New Republic 31 (Jan 10 & 17, 1994).

n26 Sen, Sci Am at 43 (cited in note 25) ("If leaders must seek reelection and the press is free to report starvation and to criticize policies, then the rulers have an incentive to take preemptive action."); see also Sen, New Republic at 33-34 (cited in note 25).

n27 See Sen, Sci Am at 43-44 (cited in note 25) (noting that China continued the questionable agricultural policies of the "Great Leap Forward" despite the onset of a three-year famine that killed between 23 and 30 million people). See also Amartya Sen, Inequality Reexamined 77-78 (Harvard, 1992) (noting Emperor Haile Selassie's refusal to undertake famine relief measures in Ethiopia in 1973 because "wealth has to be gained through hard work" and because "those who don't work starve"). The implicit argument is that only a ruler who is not democratically accountable could survive while abiding by such a principle.

n28 One version of the argument is that citizens will respond to large-scale suffering of fellow citizens. Another version, which helps limit the argument to famines and to a small number of other disasters, is that such sympathy arises primarily where the disaster is perceived as having been avoidable by sensible government projects.

n29 Note that I do not argue that potential victims force the government to prevent famine. There are simply too many examples of repeat losers (even in democracies) to believe that otherwise disadvantaged regions or ethnic groups suddenly develop political power when famine is concerned. I therefore prefer the more indirect mechanism described in the text; powerful interest groups recognize that a major disaster will elicit sympathy and expenditures in favor of the disadvantaged.

n30 The collective action problem among interest groups may seem like an analytically serious problem of the theory suggested in the text. But we are generally ignorant of why and when collective action problems are overcome. Thus, when a tax measure includes generous depreciation deductions we are inclined to point to "business interests," even though these interests include a wide variety of trade associations and other entities which might suffer from their own collective action problems.

One partial solution to the collective action problem would involve some linkage. Mayors of large cities might be more inclined to support flood management programs if any surplus in the flood insurance program was promised to urban programs. But the question of linkage and direct competition among interest groups is beyond the scope of this Article.

There is also a related question of why charitable organizations succeed in organiz- ing around certain causes. There is both a collective action mystery and a disaster-related puzzle. Charities operate along with governments in some areas (for example, blood donations and museums) but not others (for example, crime control). I leave these questions for another effort.

n31 It is also possible that different interest groups will form or gain power in democracies and non-democracies.

n32 Sen favors not food distribution but rather wealth redistribution or employment programs which provide victims with purchasing power. Sen, Sci Am at 43 (cited in note 25). I have already noted that some (perhaps second-best) methods of avoiding serious famines may be relatively attractive to interest groups that can resolve any collective action problem among interest groups and concerned citizens. See note 30 and accompanying text.

n33 Although the collective action problem among interest groups is now more serious.

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n34 Sen, Sci Am at 41-43 (cited in note 25).

n35 I do not mean to take a position on the optimal size of these programs, but there is surely something to be said from the perspective of positive political theory for internal- izing a larger fraction of the real social costs of crime and other problems. The (positive and normative) case for compensating crime victims is sufficiently intricate as to require separate development.

For the present, it should be sufficient to note that even if the moral hazard problems associated with such a relief effort could be overcome, victims of crime would still be difficult to organize into an effective coalition because actual victims face serious collective action problems of their own, and potential victims are both unidentifiable and dispersed. Moreover, serious political opposition would be likely.

n36 Under the Federal Emergency Management Act ("FEMA"), all recipients must repay any government assistance that is duplicated by insurance proceeds. 44 CFR section 205.39 (f) (2) (1994). Similarly, the SBA will not provide relief for losses that are covered by insurance. 13 CFR section 123.3 (b)(3) (1995). In addition, victims are not eligible for relief when they "assumed the **risk,**" which includes situations where insurance was initially pur- chased but not maintained. 13 CFR section 123.3 (b)(4) (1995).

n37 The implication is that there is often a need to spend in order to gain interest group power.

n38 Kunreuther, Recovery From Natural Disasters at 30-32 (cited in note 13), illustrates how an individual may be better off declining to purchase insurance, taking out a large mortgage (because later relief may be tied to outstanding loans), and later enjoying an SBA loan and forgiveness grant along with a casualty loss tax deduction. Unfortunately, Kunreuther does not make the individual's ex ante estimate of the likelihood of relief in the event of a disaster explicit. Similarly, Kunreuther notes that SBA loans may make small losers whole, whereas flood insurance would have come with a deductible, but again there is no discount taken for the fact that, in the event of flooding, insurance payments are virtually certain while disaster relief is not. The implicit claim is that since many individuals do not purchase flood insurance even when the government subsidizes 90% of its cost, individuals must regard the disaster relief as quite likely. Id at 23.

n39 This suggests an interesting analogy, or contrast, between takings law and disaster relief. Insurance aside, one who suffers alone from a natural disaster is unlucky (because there is no prospect of relief if lightning hits one or two **properties)** while one who suffers alone as the result of a government program may be able to obtain just compensation as a result of having been "singled out." See Saul Levmore, Takings, Torts, and Special Inter- ests, 77 Va L Rev 1333 (1991). Insurance complicates this comparison. Relief is less likely to be forthcoming for insured losses, but insurance may often be unavailable for losses threatened by government actions. Indeed, takings law has been described as a substitute for (unavailable and difficult to provide) private insurance. Lawrence Blume and Daniel L. Rubinfeld, Compensation for Takings: An Economic Analysis, 72 Cal L Rev 569, 571 (1984). **Risk** averse individuals or **property** owners can buy insurance to cover most disas- ters, and can expect relief because of takings law in the event of individualized losses from government actions, but must hope to be on the winning side of interest group battles when it comes to losses suffered by many citizens because of government actions.

n40 This intuition is difficult to prove to the skeptical. We do not have the luxury of a controlled experiment in which a serious hurricane or earthquake strikes a region with a great deal of private insurance and then strikes another with little insurance. On the other hand, the fact that we do not experience post-disaster relief after airplane and railroad crashes (even where there is no tort recovery) and after fires suggests that relief may be associated with uninsured victims. The contrary impression would be that even where most victims are

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insured, the media can always stimulate sympathy and relief by locating and broadcasting information about uninsured victims.

n41 Regarding the **war exclusion,** see text accompanying note 9. The inclusion of terrorism in a special federal program designed to encourage insurers to undertake normally uninsurable **risks** indicates that the private **insurance** market has not generally provided "**terrorism insurance.**" Rhodes, Couch on **Insurance** 2d section 80:4 at 626 (cited in note 3); Providence Washington Ins. Co. v Lynn, 492 F2d 979, 984 n 3 (1st Cir 1974) (noting that the federal reinsurance program designed to provide coverage for "riot and civil disorder" also covers **terrorism)**.

The usual noninsurability of **war (and terrorism)** losses is itself interesting. The obvious explanation is that insurers fear that with such coverage the solvency of the **insurance** system might be in question. I do not find this explanation compelling if only because insurance could be written with some aggregate loss ceiling. Put differently, insur- ers could respond to the correlation among insureds' losses by reinsuring in the in- ternational market or offering only partial coverage.

n42 We might imagine a regime in which relief is promised only to those who have insurance, but this sort of regime is likely to cause the purchase of too much insurance. Moreover, for reasons mentioned earlier, it would be politically unacceptable to keep this promise.

n43 A 10% deductible is common with respect to earthquake insurance. Earthquakes and Earthquake Insurance, Hearing Before the Subcommittee on Policy Research and Insurance of the House Committee on Banking, Finance and Urban Affairs, 101st Cong, 2d Sess 54 (1990) (statement of John Drennan, Allstate Insurance Co.).

The details of these policies provide that losses are covered only if they exceed 10% of the **property's** insured value and that only 90% of losses above that ceiling are reimbursed. These "copayments" can be understood as a mechanism for avoiding claims for cracks and other damage that may not have been caused by the earthquake. In the case of flood insurance, the moral hazard problem is more obvious.

n44 It is, of course, possible either that the existence of pre-disaster insurance does not affect the likelihood of post-disaster relief or that a pre-disaster program signals the government's involvement in a problem and actually increases the likelihood of post- disaster relief. The (opposite) intuition, as reflected in the text, is shared by Professors Macey and Miller who, in the context of bank failures, suggest that deposit insurance might be understood as signalling to bank regulators that the insurance amount reflects the limit of the government's exposure in the event of failure. Jonathan R. Macey and Geoffrey P. Miller, Deposit Insurance, the Implicit Regulatory Contract, and the Mismatch in the Term Structure of Banks' Assets and Liabilities, 12 Yale J Reg 1, 23-24 (1995).

n45 Greider, et al, Law and the **Life** Insurance Contract at 227 (cited in note 9); Black and Skipper, **Life** Insurance at 138 (cited in note 9).

n46 Note also that the advance specification factor is a familiar one. An employer, such as a private school or charity, will sometimes raise funds in order to present a retiring or disabled employee with a substantial gift. But such gifts are much less likely in the pres- ence of employer-supported retirement programs or disability insurance.

n47 The Federal Crop Insurance Program subsidizes direct crop insurance for farmers by paying 30% of each producer's premiums up to a maximum 65% of each producer's adjusted yield. Matthew Bender, Agricultural Law section 120.A02, reprinted in Commission for the Improvement of the Federal Crop Insurance Program, Recommendations and Findings to Improve the Federal Crop Insurance Program 159-60 (GPO, 1989). Although the goal of the

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program was to replace disaster relief, the relatively low participation rate (approxi- mately 25%) has resulted in continued ex post relief. Federal Crop Insurance Commission Act of 1988, 134 Cong Rec H8228, H8230 (Sept 26, 1988) (statement of Rep. Ed Jones) ("producer participation in the program [has not been] sufficient to forestall the political pressures that always come to bear when natural disasters strike a wide path, especially in an election year.").

n48 Individuals may rationally underinsure because they know that there is a chance of relief for uninsured losses. But we should not expect individuals to further underinsure in order to increase the chance of relief, because any one person will have an insignificant effect on the overall amount of uninsured losses or on the probability that public sympathy will develop for devastated individuals.

n49 I ignore the possibility that their representatives might selfishly wish to maximize relief efforts in order to get credit for the program.

n50 Based on 1990 Congressional testimony, State Farm records indicated that only 28% of Californians with homeowners insurance also had earthquake insurance. Earth- quakes and Earthquake Insurance, 101st Cong 2d Sess at 60 (cited in note 43) (statement of Frank Nutter, The Earthquake Project, Alliance of American Insurers). On a more limited scale, an insurance company with 37,000 homeowner's policies in the Bay Area es- timated that only 30% of its policyholders had earthquake insurance. Id at 52 (statement of Peter Lefkin, Fireman's Fund Insurance Co.).

The Flood Disaster Protection Act of 1973, Pub L No 90-448, 82 Stat 476 (1973), codified as amended at 42 USCA sections 4001 et seq (1994), makes flood insurance a requirement on new mortgages for **property** in identified flood areas. A similar requirement has been recommended for earthquakes. See Howard Kunreuther, et al, Disaster Insurance Protection: Public Policy Lessons 253 (Wiley & Sons, 1978).

n51 John Mixon and Ira B. Shepard, Antideficiency Relief for Foreclosed Homeowners: ULSIA Section 511(b), 27 Wake Forest L Rev 455, 476 (1992) (noting that California homeowners are protected from deficiency judgments more than homeowners who lived in the oil-states were during the 1980's recession). California's anti-deficiency statutes, which were enacted in the 1930's, limit the mortgagee's right to seek a deficiency judgment and even eliminate that right in certain circumstances, such as a mortgage that is foreclosed through a private sale. David A. Leipziger, Deficiency Judgments in California: The Supreme Court Tries Again, 22 UCLA L Rev 753, 753 n 1 (1975); see generally the "anti-deficiency statutes" contained in the Cal Civ Proc Code sections 580a, 580b, 580d, 726 (West 1993).

n52 They may also insure home contents, but again there is quite a moral hazard associated with relief for such personal **property.** A less likely, but provocative, example of this implicit collusion may be the **exclusion** in most **insurance** policies for losses re- sulting from acts of **war.** The expectation may be that **insurance** will reduce the likelihood of charitable or governmental relief.

n53 There will also be fewer borrowers if **insurance** is required because **insurance** raises the cost of homebuying and so forth.

n54 Note that an insurance policy that covered earthquake-related losses in the event that fewer than 500 houses were damaged (or less subtly, in the event that no govern- ment-sponsored relief arrived) would dramatically reduce the likelihood of sympathy and relief.

n55 Pub L No 90-448, 82 Stat 476 (1968), codified as amended at 42 USCA sections 4001 et seq (1994).

n56 Id at section 4011(b) (flood insurance program should encourage participation by

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private insurers); id at section 4022 (no new flood insurance provided unless adequate land use and control measures are adopted).

n57 Kunreuther, Recovery from Natural Disasters at 25 (cited in note 13).

There is also evidence that even when communities qualified, most residents did not purchase flood insurance. Kunreuther, Disaster Insurance Protection at 6 (cited in note 50). In 1973, Congress attempted to overcome this problem by denying federal financial assistance for the construction or acquisition of buildings to communities and individuals that did not join the National Flood Insurance Program or purchase flood insurance after enrollment in the program. Id at 6-7.

n58 See for example, Kunreuther, Recovery from Natural Disasters at 24-25 (cited in note 13) (disaster aid provided after Tropical Storm Doria flooded homes of New Jersey residents who were eligible for flood insurance, even though the 1968 Act provided that such individuals were ineligible).

n59 If there is a competitive market in the provision of the insurance, price controls are unnecessary. In the case of health insurance, proposals for mandates are usually accompanied by regulation or price control plans because such competition is not universally expected.

n60 The automobile insurance example reflects an implication of the present Article, that victims who are unlikely to attract sympathy and post-disaster relief might choose pre-disaster precautions.

n61 See text accompanying note 21.

n62 In cases where pre-disaster subsidies exceed the expected value of the post-disaster relief that would have been available in the absence of a pre-disaster program, it is no mystery why interest groups might prefer pre- rather than post-disaster programs. But it does not appear to be the case that pre-disaster programs are more generous than their post-disaster "substitutes." The move to pre-disaster relief is thus not simply one of "entitlement creep."

n63 By "defeat" I mean prevails over in the political process.

n64 For a similar kind of cycling, see Saul Levmore, Parliamentary Law, Majority Decisionmaking, and the Voting Paradox, 75 Va L Rev 971 (1989).

n65 The cycling need not be the same for every disaster and relief program. But in the case of earthquakes and floods, for instance, it is easy to imagine that post-disaster relief defeats no relief (when sizable losses generate sympathy), that pre-disaster subsidized insurance defeats post-disaster relief, and then that no relief defeats pre-disaster subsidies. It is also possible that a proposal for pre-disaster unsubsidized mandates defeats pre- disaster subsidies--but that these are sometimes hard to live up to so that post-disaster relief again defeats no relief.

n66 To the extent that post-disaster relief is likely, there may be groups that would prefer for national health insurance proposals to fail. Insurance will extract premiums from these high **risk** groups while post-disaster relief would have provided relief at lower cost.

n67 The mobility problem is that workers who develop health problems will be un- wanted in new insurance pools. The most obvious solution to this problem is to break the link between the workplace and the insurance pool, but the evolution of tax laws and insurance schemes makes this difficult to do without a move toward a national or regional health system.

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n68 It has been estimated that the total annual cost of health care provided to uninsured Americans is $ 9.7 billion. Note, Eliminating Patient Dumping: A Proposal for Model Legislation, 28 Valp U L Rev 291, 292 (1993). As anecdotal evidence, it is often stated that much of this cost can be attributed to the failure of uninsured persons to seek medical care until they are in need of emergency care. Health Care Reform: Pizza Hut, McDonald's, and the Fast-Food Industry, 140 Cong Rec H6333-02, H6335 (July 27, 1994) (statement by Rep. Rosa Delauro).

n69 More accurately, voters will care for those with whom they empathize.

n70 I include the moral, political, and practical impossibility of moving to a no-relief scheme.

n71 When the Pacific Northwest floods of 1964 struck just eight months after the Alas- ka earthquake of 1964, a congressman from the Pacific Northwest cited the Alaska relief as precedent. Dacy and Kunreuther, The Economics of Natural Disasters at 54-55 (cited in note 13). Oregon Congressman Al Ullman stated that "we seek no preferential treatment, only assistance parallel to . . . the Alaska earthquake." Id at 54-55. The Pacific Northwest Disaster Relief Act of 1965, Pub L No 89-41, 79 Stat 131 (1965), provided Alaska with 30-year loans and $ 70 million for highway reconstruction. Dacy and Kunreuther, The Economics of Natural Disasters at 55 (cited in note 13). By contrast, neither the subsequent Upper Mississippi floods nor the extraordinarily destructive tornados that hit the Midwest on Palm Sunday, 1965 produced special legislation. Id.

n72 By order of consideration I refer to the familiar idea that where there is cycling and a voting paradox, the order of consideration will determine the outcome that is approved by majority (or other) vote. The same may be true here if voters are disinclined to return to a scheme that was once found deficient.

n73 See text accompanying note 4.

n74 Thus, there may be evolutionary advantages to workers' compensation systems and other no-fault systems over more ex post tort law even when such insurance schemes do not incorporate substantial redistributive components. But inasmuch as my sense is that most pre-disaster schemes do involve subsidies or other means of redistribution, I empha- size the option of pre-disaster relief and simply leave open the possibility of subsequent movement toward unsubsidized mandates.

n75 See text accompanying notes 21 and 61.

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strike a group that is previously organized but not geographical- ly--and therefore politically--advantaged. For example, Black Lung Disease was largely coincidental with membership in a single union (and also with residence in a small number of states), and Agent Orange posed a political task for previously organized veterans. We might surmise that previously organized victims are, at the very least, poised to act when disaster strikes and, in most cases, able to generate relief for the very reasons that they were able to organize in the first place. [6] Recurring disasters, such as crop failures or floods, might motivate groups to organize in preparation for future calamities.

On the other hand, nonrepetition can be an advantage in securing relief because unique disasters are less threatening to taxpayers. Compare, for example, the victims of a mad gunslinger who opens fire in a restaurant with those who suffer at the hands of an invading army which does damage before being subdued. These groups are similar in terms of geographic representation, likely exposure to media coverage, ongoing organization, and moral hazard concerns (none), and we might imagine them to be of identical size. And in neither case is there likely to be a failure of the capital markets such that victims would have difficulty borrowing funds in order to rebuild profitable businesses. [7] But I think it fair to say that relief is most unlikely in the gunslinger situation and yet possible in the "invasion" setting. [8] While the gunslinger's victims could have purchased private insurance more easily than the invasion's victims, I suspect that the important difference between the two settings is that relief seems more likely for unique disasters. In other words, it is difficult to rationalize compensa- tion for the victims of one murderer because we are unlikely to offer relief to all victims of murderers. Hence, even though victims of an invasion are hardly well organized, the uniqueness of the event makes relief plausible. However, we should recognize that "uniqueness" may simply camouflage the importance of insurability. It may be that victims of murder fail to gain relief because they could have insured, and that the invasion victims might get relief not because their problem is unique but rather because acts of **war** are generally excluded from **insurance** coverages. [9] If pieces of a meteor landed and did similar damage, my intuition is that there would be no relief unless the losses fell deeply and widely on a well organized interest group. If so, insurability and organization do all the predictive work, and uniqueness is superfluous. [10]

If, in order to create or excite a formidable interest group, it is "advanta- geous" for a victim to be one of many ravaged by a given disaster, it is neverthe- less likely that the group of losers can grow too large. For example, victims of crime may in reality simply be too numerous to subsidize. If the cost of relief is very great, even the most dispersed and passive majority will notice the grave threat to tax rates or other government programs; and if the cost is constrained by limiting each victim's relief, then the net potential recovery per victim may be sufficiently small that victims will not find it worthwhile to organize at all.

There are, of course, counterexamples where very large--but not well organized--subsets of the population extract reimbursement for discrete losses. Supplemental unemployment benefits may be one such example. [11] But relief for discrete losses suffered by a large unorganized subset of the population generally comes not in the form of taxpayer-sponsored relief, but instead in the form of (apparent) burden-shifting to another disfavored or unorganized group. Rules barring foreclosures and requirements that workplaces or buildings accommodate disabled persons illustrate this idea.

A related phenomenon concerns the structure of relief. When an interest group is successful in obtaining post-disaster relief, it is most unlikely to reim- burse the fisc in a future time period. Thus, if farmers in the Mississippi Valley gain aid after serious flooding, we do not expect that region to be required to pay higher taxes than the rest of the country in a year in which weather condi- tions and harvests are especially favorable. The very characteristics of interest group politics that are associated with the existence of post-disaster relief also support the interest group's ability to ward off special assessments or other "extra" burdens. There are important historical exceptions to this observation, including a windfall profits tax on domestically produced oil and higher taxes on businesses enjoying supernormal profits

during war, but these are relatively unusual political developments and are facilitated by the presence of wars, embargoes, and other salient events that focus political attention on large numbers of voters rather than on organized interests. [12]

Although geographic concentration seems to spawn relief, other variables must also play a role. West Virginia and California, for example, have suffered disasters that are fairly state-specific, but they are not equally successful in extracting federal funds. It may be useful to learn about the political experience and connections of those who represent these interests, but it is likely that there are other factors that explain the relative successes of various disaster victims. I turn first to considerations that do not have much to do with positive political theory and then in Section II-C to the possibility that the expectation of relief payments stimulates prudent disaster-mitigating investments earlier in time.

B. Other Considerations

1. Identification.

It is easy to imagine that voters are more likely to come to the assistance of fellow citizens when they can identify with these beneficiaries. A related possibili- ty is that relief may be conceived of as part of a mutual insurance arrangement. For instance, farmers in South Dakota may be among the first to favor relief for drought-stricken farmers elsewhere--both because they identify with those in need and because they hope that other voters will follow the precedent of relief when a drought hits South Dakota. [13] However, this is not an especially useful explanation for post-earthquake relief because voters know that earthquakes are far more likely in some locations than in others. Yet it is also possible that relief follows empathy which, in turn, may be linked to personal familiarity. Influential citizens or politicians (and their aides) may identify more with (or simply know many more of) the residents of Southern California than those of West Virginia.

2. Moral hazard.

The prospect of public assistance generally raises the fear of moral hazard. The most familiar example is that flood relief or subsidized flood insurance may encourage inefficient building on flood plains. It is difficult to assess the relative magnitudes of moral hazards, but it seems plausible that the moral hazard accompanying drought relief is less serious than that associated with such familiar relief as unemployment benefits. It is even more difficult to evaluate the moral hazard problem associated with earthquake relief--both because subsidies can be made to be conditional on disaster-mitigating steps [14] and because there is not much post-earthquake individual behavior at stake (although the prospect of relief may well lead to greater development in areas with substantial earth- quake **risk)**. In the case of flood insurance, subsidies are often contingent on a community or an individual insured adopting steps likely to mitigate damage, so that there may actually be less loss than there would have been in the absence of the insurance program in the first place. [15] Moreover, post-disaster relief may re- duce losses if relief funds can only be used to redevelop in accordance with disaster-mitigating regulations. Conditional relief can, at least in theory, reverse the obvious moral hazard accompanying the prospect of subsidizing victims. In any event, as a positive matter the moral hazard problem does not seem well correlated with the absence of disaster relief. Losses from war and unpreventable diseases do not, for example, normally trigger relief efforts, while post-flood relief, which is fairly common, may create a serious moral hazard problem.

3. Government as partner.

It may be tempting to think of some post-disaster relief as reflecting an implicit private-public partnership. We tax Californians when they prosper and therefore, the argument proceeds, we ought to subsidize them when they suffer from an earthquake. There is a ring of fairness to this explanation, but also a fairly intuitive efficiency claim about the neutral

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treatment of risky invest- ments. [16] The suggestion is that the correct amount of investment and **risk**-taking will be encouraged in a system where the government, if it shares in gains, also shares in losses. In the case of post-disaster relief it is even possible, as a positive matter, to point optimistically to the nature and magnitude of relief. The relief following recent California earthquakes, for example, could be described as mirroring the tax rates imposed (in the absence of disaster) by the federal government on profitable enterprises or perhaps on appreciated residences. [17]

But this optimistic, partnership-like view of relief is probably misguided. If the economic activity found in Southern California were instead in another location, far from a fault line, the federal government would still tax away a large share of the profit earned in these activities and would then not need to pay for disaster-related losses. The analysis is thus closely related to the moral hazard discussion in the preceding section because relief expenditures might be seen as efficient and fair only when the profits themselves (taxed away in good times) were somehow linked to the **risk** of earthquake or drought or other relief- prone disaster. Put differently, most of the activity that takes place in Southern California and that is taxed by the federal government could also occur (and be taxed) in other locations, so that post-earthquake relief is not necessary to encourage the activity. And as a matter of fairness alone it is difficult to see why taxpayers should pay Californians for the losses that they suffer when, or to the extent that, these activities take place in California because people enjoy living there rather than somewhere else. On the other hand, to the extent that more profitable farmland is likely to be in flood-prone areas, the partnership view is positively and normatively attractive with regard to flood relief, as well as many other kinds of disaster relief.

C. Democracy and Disaster

1. Internalization.

The most optimistic explanation for post-disaster relief is that governments agree to provide relief when, or even because, the prospect of such future expenditures creates desirable incentives for preventive measures. If taxpayers and their representatives know that they will pay for a substantial fraction of losses caused by floods, then there is an incentive to invest in such things as levees and floodplain management in order to economize on disaster relief. But, if the government paid the entire cost of relief and rehabilitation, there might be too substantial a moral hazard problem. A government that was forced to share in relief, however, might leave potential victims with suitable incentives even while encouraging itself to take the most efficient preventive measures. [18]

There are some enticing examples of this internalization idea. The rising popularity of national health insurance can, for example, be described as sensible because the government funds, and therefore controls, the direction of medical research and disease prevention efforts. This theory suggests, perhaps correctly, that relief would be provided in the event of a military invasion. It fails, howev- er, to predict the (rather universal) low level of relief for those who perish in the service of their country. [19]

But this straightforward internalization suggestion is far too optimistic. There is, first, a missing link in the argument. If the government is motivated by either public opinion or other means always to provide disaster relief, then why is it not simply and more directly motivated by the same forces to invest regularly in efficient mitigation? [20] Moreover, there does not appear to be much of a connec- tion between disasters that beget relief and disasters that could be efficiently minimized by the government. Post-disaster relief appears to be more likely following earthquakes and hurricanes than in the aftermath of major fires, but government-initiated prevention would seem to be at least as effective for fires. Similarly, there is rarely post-disaster relief for crime victims, although a govern- ment that compensated all victims of crime or, perhaps to avoid moral hazard problems, all victims of serious violent crime, would surely take the cost of crime much more seriously. Finally, the

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optimistic internalization argument, or the little that is left of it, is weakened by the fact that when the federal government provides relief, it is often the state and local governments that are better situated to effect preventive measures. [21]

In short, if the internalization argument suggested here were completely successful there would be no puzzle as to when government-sponsored relief was forthcoming because the claim would be that we would find relief whenever ef- ficient mitigation was in the same government's hands. Citizens would always demand relief as a precommitment to efficient precautions. In reality, however, relief is much more occasional. Moreover, the internalization idea lacks connec- tive fiber between payments and prevention. The prospect of paying losses in tort or contract may well motivate private parties to take efficient precautions, but it is hard to see how the prospect of disaster relief encourages legislators or bureaucrats to invest in precautions. If legislators or other government officials are simply inclined to do that which is socially desirable, disaster relief is a superfluous intermediating incentive. And if instead these agents need encourage- ment, it is hard to see how the prospect of disaster relief forces their hands with respect to pre-disaster precaution-taking.

2. Partial internalization.

I have imagined a (counterfactual) world in which disaster relief is promised in order to encourage the promisor or its agents to make efficient investments in disaster-mitigation, and I have suggested that ours is not such a world, if only because disaster relief is in fact not always forthcoming. It is possible, however, that some subset of efficient precautions is encouraged by the promise or history of disaster relief. In particular, if disaster relief follows public "sympathy" or interest group pressure of some kind, or even if relief is largely unpredictable, the government might wisely take cost effective precautions to reduce the subsequent costs of relief. The unpredictable quality of this impetus for relief might well generate too few precautions, but at least the precautions that are taken will be efficient. My suggestion is that whatever the explanation of the availability of disaster relief, the prospect of such relief will generate some efficient government- sponsored precautions.

If, for example, the government knew that it would be forced to compensate all losses from all hurricanes, then it might invest in every efficient precaution in order to reduce these expenditures. I have, of course, not yet specified the mechanism that would encourage such efficient investments--and indeed I have expressed some skepticism regarding the likelihood that "the government" has any incentive at all to do the sensible thing. But in order to consider the problem one layer at a time, assume for the present that the government is perfectly responsive to financial incentives, so that the prospect of spending now in order to save later is attractive. Under such an assumption it is again obvious that full internalization--reduced only to control moral hazard problems--will lead to efficient precaution-taking.

Now what if there is "partial internalization," so that the government is expected not to compensate a large fraction of all hurricane-related losses, for instance, but rather half (or some other fraction) of all losses caused by one out of two hurricanes? The government might perceive that political coalitions and media coverage are such that relief will not always be required, but it will know that there is some positive probability that it will be forced to provide post- disaster relief. This expectation should encourage the government to take some steps to reduce losses. If, for example, a better bridge can be constructed at a cost of one hundred million dollars, and this hurricane-resistant bridge provides an expected benefit in present value terms of five hundred million dollars, then the government is encouraged to invest in this precaution because it expects to pay about one-quarter of all hurricane-related losses, and the return to this investment is more than four hundred percent. In contrast, we might wish the government to build a given storm sewer system or stockpile relief supplies at a cost of $ 0.9 billion with an expected social benefit in present value terms of $ 1 billion, but a government that was perfectly responsive to financial incentives, that expected to pay only a fraction (such as 25 percent, or anything less than 90 percent) of losses, and that was otherwise unresponsive to voters and social costs would not invest in these precautions. The

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point is that partial internalization might lead to some efficient precautions, even if it is unlikely to encourage investment in all efficient, available precautionary projects. With this point in mind we can turn to the causal connection between expected relief expenditures and the incentive to invest in pre-disaster precautions.

3. Feedback loops.

a) Taking "sympathy" as given. It is possible that elected leaders or other public servants act in the best interests of their constituents and seek out effi- cient, disaster-mitigating steps suitable for government intervention. This optimis- tic view of disaster mitigation has very little to say about disaster relief. There is no social benefit from full or partial internalization, for the government is by hypothesis already eager to undertake efficient precautions. The occasional availability of post-disaster relief might simply be explained with a combination of most of the variables discussed in Sections II-A and B--but with no role for internalization.

I prefer to make something of the connection between post-disaster relief and a variety of pre-disaster programs. For example, there is little doubt that experi- ence with flood relief has generated both subsidized flood insurance programs and attempts to regulate the quantity and quality of development on flood plains. [22] It seems likely that other pre-disaster programs have arisen not (or not only) out of direct attempts by the government to solve collective action prob- lems or to provide public goods in an efficient manner, but rather as a reaction to, and in anticipation of, expected post-disaster relief costs.

One simple suggestion is that the political disposition toward occasional post-disaster relief (based on geography, "sympathy," and so forth) causes a variety of interest groups to respond with pre-disaster programs. [23] Some of these pre-disaster steps will be efficient precautionary investments and others may simply be redistributive or simply inefficient schemes designed to benefit some groups while attracting support (or minimizing strong opposition) because of their ability to reduce the likelihood, and therefore the expense, of post- disaster relief. Put differently, even if we are unable to develop a perfect positive theory of when to expect post-disaster relief, the prospect of some positive probability of paying out such relief generates pre-disaster effects. We might imagine that citizens or their public-regarding agents will take these pre-disaster steps if they anticipate paying out more post-disaster relief to their fellow citizens. Alternatively, and perhaps more strangely, we might imagine various selfish interest groups as supporting--or at least as not opposing--pre-disaster investments or regulations simply to avoid post-disaster relief efforts that will draw on the fisc and reduce the chance that programs favored by these interest groups can be funded. The most likely story is that important players in the political process oppose (even many of the most efficient) pre-disaster precau- tions when the likelihood of post-disaster relief is low, but favor (and certainly do not block) exceptionally efficient precautions when the probability of more expensive post-disaster relief is high.

I do not mean to ignore either the collective action problem that might exist among interest groups or the possibility that self-serving interest groups will propose inefficient spending programs in the name of disaster mitigation. Turning first to the problem of self-serving interest groups, it is noteworthy that a purely public-regarding citizen, politician, or group could encourage many efficient precautions not with pre-disaster subsidies--which are normally the easiest means of enriching the very interest groups that might lead the charge for such pre-disaster "mitigation"--but rather with unfunded mandates. The federal government could require private insurance, local building codes, zoning strate- gies, and other steps that might efficiently reduce the need for post-disaster relief at no obvious expense to the federal fisc. One problem with this strategy (on the part of concerned interest groups) is that it is difficult to displace the expectation of post-disaster sympathy. An unsubtle government will simply require these precautions or will announce that future relief is conditional on these pre-disaster precautions. Yet when disaster strikes, the political propulsion toward relief may not be inhibited by the fact that many victims did not abide by earlier warn- ings. [24]

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b) Famines and feedback mechanisms. Famines present a useful illustration of the feedback loop between post-disaster relief and pre-disaster precautions. Famines also present a striking example of the mechanism I have in mind because we tend to think of famines as completely avoidable, although in some sense starvation and malnutrition can be avoided at a cost in much the way all hurricane and crime losses might be prevented at a cost. Finally, famines offer an opportunity to think about the collective action problem among interest groups because some methods of relief or prevention generate obvious benefits to discrete groups.

Amartya Sen has explored the remarkable ability of democracies--or more precisely, nations with elected leaders and free presses--to avoid major fam- ines. [25] We might simply assume that this remarkable connection is robust; even poor democracies stave off famines while more affluent countries, that have neither a lively press to report on problems and incompetence, nor rulers who suffer in the event of disaster, endure famines. But what is the mechanism that averts this particular disaster? Sen implies that because elected leaders know that they will not survive an avoidable famine of great magnitude, they support investments in networks of roads, public employment programs, or other disaster-mitigating steps in order to prevent famines in the first place. [26] Put more cynically, elected leaders appear to survive easily in the face of some malnutrition and disease, but if these problems grow to some level of salience, then the media attention that follows makes it impossible for these leaders to survive in office.

There is room to quibble with this straightforward feedback mechanism because elected leaders might be able to blame those who preceded them by one or two terms for the failure to invest in infrastructure and the like. Indeed, Sen may really mean that once a famine strikes, a politically responsible government will be forced to take steps to avert a catastrophic event. If food shortages appear, a responsible government might be forced to redistribute wealth, release reserve stocks, engage in public works programs to redistribute wealth, and take other steps that lead the press and the electorate to marvel at their leaders in crisis rather than depose them at the next election. Sen's evidence may be consistent with this depiction of crisis and elected leadership because it suggests a connection between democracy and the absence of major famines. A cynic might even say that in democracies there will be more frequent crises because constituent groups perceive that the prospect of a major disaster will arouse the attention of otherwise unresponsive governments. In any event, the critical suggestion is that crises stimulate effective responses. Bits of Sen's work can be understood as favoring this alternative account of democracy and disaster, [27] but to a degree it is an unflattering picture (even) of democracy, for it suggests that democratic governments may preside over numerous small-scale tragedies that are in the aggregate no less horrible than the occasional large-scale disasters they avoid.

An ancillary view of the democracy-famine connection returns us to the internalization theme. While electoral feedback forces relief in the event of a famine, [28] it is the prospect of such costly relief that causes politicians to make more efficient pre-disaster investments in order to prevent famine in the first place. And if politicians are not inclined to make these investments because, as suggested earlier, current investments may only affect the likelihood of disaster long after they need to run for reelection, a variety of interest groups may nev- ertheless push politicians to make these investments because the potential economic burden of famine relief threatens competing programs that these other groups desire. [29] Perhaps the most likely story is that some citizens and politi- cians will propose sensible precautions and organized groups will not oppose these plans because the long-term investments are solid even from the perspective of the interest groups that do not immediately gain from precautionary steps. When post-disaster relief is not expected, interest groups will oppose even efficient precautions because the costs associated with these precautions are borne by taxpayers (including the members of these potent interest groups) although most of the benefits accrue to disaster victims. In contrast, when post- disaster relief is expected (because of sympathy and interest group pressures), "unrelated" interest groups will not

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oppose dramatically efficient precautions because of the expected savings in post-disaster relief.

Moreover, any collective action problem among citizens and these unrelated interest groups might be overcome by the work of "related" interest groups, such as those interested in road building or grain storage contracts, that stand to gain directly from famine avoidance investments. [30] Indeed, the dynamics among interest groups might explain the precise means by which democracies avoid serious famines; cash grants may lose out to roadbuilding, stockpiling, and in- kind distributions because the latter methods may more powerfully motivate interest groups to form coalitions with other groups which seek only to encour- age efficient investments that will create a bigger pie later on.

This internalization argument implicates democracy to the extent that informed voters will want their leaders to ease the suffering of fellow citi- zens--and that occasions will arise on which these voters will be painfully in- formed. [31] A democratic government can therefore be expected both to respond to and to mitigate such a disaster. In turn, some citizens or their agents or their selfish interest groups might wish for their government to invest in advance in order to avert famines if only because prevention is cheaper than the cure. Plainly, this indirect feedback story assumes that it is in fact generally less expensive to avoid famines in the first place than to provide aid once they occur.

In the case of famine, it is noteworthy that the prospect of relief probably creates little moral hazard because even if individuals knew that famine relief would be forthcoming, they would still hardly want to be among those who suffer before their fellow citizens apply sympathetic pressure or before their leaders step in to avert a major famine. One may quarrel with the proper method of intervention, [32] but it is difficult to be opposed to all disaster relief in the case of a large-scale famine.

c) Democracy and disaster mitigation. I am not suggesting that all disasters ought to generate relief. There are, for example, more serious moral hazard problems associated with relief following floods, hurricanes, and earthquakes. In advanced economies, most potential victims will be at little **risk** of serious personal injury where these natural disasters are concerned, and the prospect of relief for **property** losses may lead to greater losses than would be borne in the absence of expected relief. My point instead is that in all these cases relief may be "forced" on the government by a sympathetic citizenry, and the prospect of these relief expenses may stimulate disaster-mitigating steps--with no serious opposition because of the efficiency of these steps. In short, prevention may be undertaken if it is cheaper than a cure and, at least in theory, those who favor pre-disaster precautions will take the moral hazard problem into account when comparing the cost of prevention and cure. If the prospect of relief generates losses, interest groups may either favor disaster-mitigating investments that combat the moral hazard, perhaps by conditioning investments on certain behavior, or they will simply oppose the investments, knowing that they will do more harm than good. [33] Again, the critical triggering device (and one that separates responsive from nonresponsive governments) is that it is understood that in the event of a major disaster there is a positive chance that the govern- ment will be forced to provide relief. We might understand the correlation between democracy and the absence of famine as following from the notion that since a serious famine is expected to lead to relief with a probability of one, democracies always invest in preventing such famines because the prevention, or at least intervention once a famine begins and before it becomes severe, is much cheaper than the cure. In the case of other disasters, including less serious fam- ines, relief is less certain, perhaps because much depends on where the disaster strikes or how media coverage proceeds, so prevention is found less worthwhile.

More generally, once we recognize the implications of Sen's categorization of "serious famines," [34] the basic connection between democracy and disaster- avoidance can probably be made for most disasters. Much as democracies do experience some starvation and malnutrition, but not famines that claim the lives of twenty million citizens, so too

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SECTION-BY-SECTION ANALYSIS

Section 1. Short Title

Section 1 designates the short title of the Act as the "World Trade Center Liability Parity Act."

Section 2. Purpose

Section 2 sets forth the purpose of the Act. The purpose is to promote and encourage building on the site of the World Trade Center as a physical symbol of America's resolve to overcome terrorism by providing parity of treatment between air carriers protected under the recently adopted Air Transportation Safety and System Stabilization Act (the "Air Transportation Act") and the Port Authority of New York and New Jersey ("Port Authority") and other persons with property interests in the World Trade Center.

Section 101. Definitions

Section 101 defines "property owner" as the Port Authority and any other person with a property interest in the World Trade Center, whether that interest is fee simple, leasehold, or easement, either direct or indirect. The definition includes the 99-year lessees to the buildings known as World Trade Center Buildings 1, 2, 4, 5 and 7.

Section 102. Limit of Property Owners Liability

Section 102 amends Section 408(a) of the Air Transportation Act to provide that the liability of any property owner, as defined in the Act, with respect to all claims for liability of any sort, whether for compensatory or punitive damages, for contribution or indemnity, or for any other liability, arising from the terrorist-related aircraft crashes of September 11, 2001, shall be limited to the limits of liability insurance coverage available to such property owner. This provision places the property owners on equal footing with the air carriers, whose maximum claim liability was limited to the limits of their liability insurance by Section 408(a) of the recently adopted Air Transportation Act.

Section 103. Right of Subrogation

Section 103 qualifies the right of subrogation provided to the United States in Section 409 of the Air Transportation Act by providing that such right shall not exist against any air carrier or property owner.

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Brett –

Attached is a revised draft of the airline liability bill expansion and summary. Any comments you may have would be greatly appreciated.

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Summary of "Victims of Terrorism Compensation Act"

In the recently enacted Air Transportation Safety and System Stabilization Act (the "ATSSSA"), Congress addressed victim compensation and the economic ramifications of the September 11 tragedy, focusing primarily on the airline industry. The proposed Victims Of Terrorism Compensation Act (the "Victims Compensation Act") builds on those efforts by (1) establishing guidelines for litigation that results from any future terrorist acts in order to ensure swift and fair compensation to the victims of such attacks, while minimizing economic injury to innocent bystanders and (2) amending the ATSSSA to apply these guidelines to the terrorist attacks of September 11, 2001.

I. Principal Provisions

A. Title I – Civil Litigation Mechanism Addressing Future Acts of Terrorism.

Title I of the Victims Compensation Act establishes a federal cause of action for victims of terrorist attacks that occur after September 11, 2001 and provides the ground rules for pursuing litigation related to such acts. The guiding principles of this Title are (a) to ensure an orderly, equitable process for providing swift compensation for persons who present legitimate claims, and (b) to protect innocent bystanders from being further victimized by the specter of misguided or excessive claims.

The bill would not restrict or otherwise affect the type and scope of claims that may be asserted against knowing participants in any act of terrorism. However, with regard to claims related to a terrorist attack that are asserted against other individuals or entities, the bill would:

- Establish an exclusive, simplified federal cause of action that allows terrorism victims to bring claims sounding in breach of contract, intentional fraud, or negligence. (Other causes of action (*e.g.*, negligent misrepresentation or non-disclosure) would not be available.)

- Instruct the Judicial Panel for Multidistrict Litigation to transfer all claims related to a particular terrorist attack to a single district court for pretrial purposes and any ensuing trial.

- Provide that the substantive law governing breach of contract or fraud claims would be derived from that of the State whose law would apply under the choice-of-law principles of the State of the district court to which the claims are transferred.

- Provide that the substantive law governing negligence claims would be derived from the law of the State in which the act of terrorism occurred, except to the extent that such law is inconsistent with – or preempted by – federal law.

- Allow negligence claims to be brought only by individuals or entities that have suffered personal injury or property damage. Thus, for example, the cause of action would not

be available to persons who arguably have claims only for lost profits (without any property damage) or emotional distress (unaccompanied by physical injury).

- Specify the remedies available under the new federal cause of action. Persons who assert negligence claims will be able to recover economic and noneconomic losses. The liability of each defendant for economic losses would be joint and several, but as to noneconomic losses, each defendant shall be liable only in direct proportion to its responsibility for the alleged harm. Persons who assert property damage claims may recover the replacement cost of such losses. As to such claims, the liability of each defendant shall also be proportional. Awards will not be subject to pre-judgment interest, and awards will be reduced by the amount of any collateral source compensation that the claimant has received.

- Preclude the award of any punitive damages against non-terrorists.

- Limit contingent attorney fees to lodestar-based fees, costs, reasonable expert witness fees, and reasonable expenses.

- Require that all negligence claims against non-terrorists be filed within one year of injury, except for claims arising from latent injuries arising out of substance exposures, which must be filed within one year of discovery or one year after such injuries should have been discovered through the exercise of reasonable diligence. Breach of contract and fraud claims would be governed by normal rules.

B. Title II – Amendments to the Air Transportation Safety And System Stabilization Act to Provide A Civil Litigation Mechanism Addressing The Events Of September 11th

Title II of the Victims Compensation Act supplements the ATSSSA by applying many of the provisions in Title I to lawsuits that are brought for injuries suffered in the September 11th terrorist attacks.

The ATSSSA established a federally funded September 11th Victim Compensation Fund (the "Victim Fund") from which persons physically injured and the representatives of those killed in the events in New York, Pennsylvania, and Virginia may obtain compensation. Persons who seek compensation from the Victim Fund waive their right to pursue claims through litigation. However, persons eligible to make claims to the Victim Fund who decide not to file a claim with the Victim Fund are free to pursue their claims through traditional litigation. Further, any person who sustained property or economic injuries resulting from the September 11th events also is free to litigate. As a result, it is expected that thousands of injured parties will sue hundreds of non-terrorist defendants (*e.g.*, airlines, aircraft manufacturers, aircraft component manufacturers, airport authorities, security companies, building owners, building managers, architects, building contractors, building components manufacturers and suppliers, employers).

REV_00261544

The proposed Victim Compensation Act would set similar ground rules for this likely tidal wave of litigation to those established in Title I for future acts of terrorism. As with Title I, the bill would not restrict or otherwise affect the type and scope of claims that may be asserted against the September 11 terrorists or any person or entity that aided or abetted their activity. However, the bill would:

- Confirm the intent of the ATSSSA that all court claims arising out of the events of September 11 must be filed in the U.S. District Court for the Southern District of New York.

- Confirm that the sole cause of action by which a person may seek compensation from non-terrorists for injuries/damages sustained in the September 11 attacks is the new federal cause of action established by the ATSSSA.

- Establish that under the new federal cause of action for asserting claims against non-terrorists, a claimant may sue for breach of contract or for intentional fraud (with the substantive law for such contract or fraud claims derived from the jurisdiction designated by the choice of law principles normally applied by the New York court) or for negligence (applying the same substantive law of the jurisdiction where the relevant aircrash occurred (either New York, Pennsylvania, or Virginia).

- Establish (as in Title I) that negligence claims under this new federal cause of action will be available only for personal injury, death, or property damage, and that such claims must be brought within one year (or, with regard to latent injuries resulting from substance exposures, within one year from the date of discovery or the date when such injuries should have been reasonably discovered).

- Establish the same remedies set forth in Title I for negligence and property damage claims (including the ban on punitive damages against non-terrorists and the reduction for collateral source compensation). Persons who assert property damage claims may recover the replacement cost of such losses. The joint and several liability provisions included in Title I would apply under Title II to lawsuits resulting from the September 11th terrorist attacks as well.

- Limit contingent attorney fees to lodestar-based fees, costs, reasonable expert witness fees, and reasonable expenses.

- Require that within 18 months, the court handling the claims shall report to Congress on the number and nature of the claims and the total amount of the claims asserted to that point. (The bill contains funding for the court's preparation of the report.)

- Declare that upon receiving the court's report regarding the claims filed, Congress "will take whatever action is determined to be necessary (including approval of appropriate compensation plans and appropriation of funds) to ensure that individuals and entities receive full compensation for legitimate claims and to ensure that the liability regarding

REV_00261545

such claims is not borne primarily by persons not involved in the perpetration of terrorist attacks."

II. Rationale

The core dual rationale for the legislation is (a) to ensure that parties injured by terrorist attacks (including the events of September 11) may obtain swift and fair compensation and (b) also to ensure that such compensation burdens are not visited primarily on parties that have played no role in the primary causative acts in such terrorist attacks. The bill achieves those fundamental purposes in several ways:

- ***First,*** the bill would streamline the litigation process for victims of future terrorist attacks (and victims of the September 11th attack) by establishing a limited number of theories for recovery – a breach of contract claim (tracking traditional state law principles), a fraud claim (limited to actions based on intentional affirmative misrepresentations) and a negligence claim (derived wholly from state negligence law of the jurisdictions where the primary injuries occur). The bill requires that all tort claims (except for claims for certain latent injuries) be filed within one year from discovery, so that the court will be able to determine rapidly the full array of defendants and tort claims that must be resolved and proceed to do so as quickly as possible. (Breach of contract and fraud claims will be governed by normal limitations rules, since many of those claims will be insurance coverage matters that may not ripen within a shorter period.)

- ***Second,*** the bill would not affect the prosecution of any claims against the terrorists or their co-conspirators. Further, the bill would not in any way affect the ability of persons with insurance coverage – such as business interruption coverage – to file claims with their insurance carriers and to bring litigation related to those coverage claims.

- ***Third,*** every American family and business was affected by the September 11th attacks – Americans nationwide were glued to their television sets, mourning for the victims and worrying about the safety of their families. People stayed home, many businesses closed, and numerous trips and conventions were cancelled. The same outpouring of emotion is likely to occur in the event of future terrorist attacks against our nation as well. As a result, the bill would focus the litigation process on the claims that are most deserving of compensation – claims for personal injury and property damage. Further, the bill would prohibit the award of punitive damages based on the view that the judicial system should not punish Americans for the acts of terrorists and thereby help the terrorists achieve their evil ends by wreaking further havoc on the U.S. economy.

- ***Fourth,*** with regard to the September 11th attacks, the bill will establish a process by which litigation claims will be filed and by which the court will report to Congress the nature and aggregate amount of such claims. In the bill, Congress would commit to take the necessary steps to ensure that legitimate claims will be reasonably compensated without placing that burden on persons not involved in the terrorist activity that was the primary cause of the September 11 events. Hopefully, any necessary federal appropriations can be financed from assets seized essentially as war reparations from the

REV_00261546

terrorists and any governments or other entities that in any way aided and abetted their heinous acts.

- ***Fifth,*** in enacting the ATSSSA, Congress intended that the Victim Fund would be the primary source of payments for personal injury and wrongful death claims. However, it is now becoming clear that because of the absence of reasonable restraints on the litigation process, the incentives will push most eligible claimants toward filing litigation and away from the Victim Fund. The bill would impose some reasonable restrictions on the litigation process, a step that would make the Victim Fund more attractive.

Monday, October 15, 2001 (5:45 pm)

REV_00261547

• Rove, Sumerlin, Silverberg, Fisher, Bair, Matt Kirk, Conklin, Krozner, Kavanaugh Westine, Mehlman

FYI / Kirk

156

VIA FACSIMILE

April 15, 2002

The Honorable Tom Daschle
Senate Majority Leader
5221 Capitol Building
Washington, DC 20510

The Honorable Dennis Hastert
Speaker of the House of Representatives
H232 Capitol Building
Washington, DC 20515

The Honorable Trent Lott
Senate Republican Leader
S-230 Capitol Building
Washington, DC 20510

The Honorable Richard Gephardt
House Democrat Leader
H-204 Capitol Building
Washington, DC 20515

Dear Congressional Leaders:

As a result of the events of September 11th, the nation's property and casualty insurance companies have or will pay out losses that will exceed $35 billion dollars. Since the first of January, many insurance companies, self-insurers and states have been faced with a situation where they are unable to spread the risk that they insure because of the unavailability of reinsurance protection. In the event of another major attack, some companies or perhaps a segment of the industry would face insolvency. While most states have approved a limited exclusion for terrorism with a $25 million deductible, exclusions for workers' compensation coverage are not permitted by statute in any state. The present situation poses a grave risk to the solvency of the insurance industry, state insurance facilities, economic development initiatives, and the ability of our states to recover from impacts of the September 11th attacks.

In the months after the attack on our nation, legislation passed in the House and was introduced in the Senate to create a backstop for the insurance industry so they could continue to provide protection to their customers. The Administration has also supported this concept. Currently, there is broad bi-partisan agreement for providing an insurance backstop. Governors believe this is an important goal that should not be inhibited by other issues.

Since late December, the lack of a financial backstop has started to ripple through the economy and will continue to do so. This will further impact the ability of the economy to recover from the current recession.

As Governors, we are facing many critical issues resulting from the September 11th crisis. The emerging problem in insurance coverage only serves to exacerbate our recovery efforts. In view of this, we, the undersigned Governors, respectfully urge the Congress to quickly complete its work on the terrorism reinsurance legislation in order to return stability to U.S. insurance markets.

Sincerely,

Sincerely,

Governor Jim Hodges
South Carolina

Governor John G. Rowland
Connecticut

Governor Mike Johanns
Nebraska

Governor Angus S. King Jr.
Maine

Governor Paul E. Patton
Kentucky

Governor Mike Huckabee
Arkansas

Governor Judy Martz
Montana

Governor Jim Geringer
Wyoming

Governor Don Siegelman
Alabama

Governor George H. Ryan
Illinois

Governor Bob Holden
Missouri

Governor Bill Owens
Colorado

Governor Mark R. Warner
Virginia

Governor Scott McCallum
Wisconsin

Governor Jeb Bush
Florida

Governor Jane Swift
Massachusetts

Governor Frank O'Bannon
Indiana

Governor Bob Taft
Ohio

ROBERT C. BYRD, WEST VIRGINIA, CHAIRMAN

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KAY BAILEY HUTCHISON, TEXAS
MIKE DEWINE, OHIO

TERRENCE E. SAUVAIN, STAFF DIRECTOR
STEVEN J. CORTESE, MINORITY STAFF DIRECTOR

United States Senate

COMMITTEE ON APPROPRIATIONS
WASHINGTON, DC 20510–6025

March 4, 2002

The Honorable Tom Ridge
Assistant to the President for Homeland Security
Executive Office of the President
The White House
Washington, DC 20502

Dear Governor Ridge:

In Securing the Homeland Strengthening the Nation, President Bush concludes that, "the threat of terrorism is an inescapable reality of life in the 21st Century. It is a permanent condition to which America and the entire world must adjust." We share the view that it is essential that Federal, state, and local governments must have a significant and sustained commitment to defend our homeland.

The Senate Appropriations Committee will be holding a series of hearings to examine closely the Federal response here at home to the events of September 11, 2001. The President's Budget for Fiscal Year 2003 includes requests for homeland defense funding in dozens of departments and agencies. In the Executive Order establishing the Office of Homeland Security, President Bush gives you the responsibility to certify that the funding levels contained in the Budget transmitted to the Congress are necessary and appropriate for the homeland security-related activities of the Executive Branch.

Therefore, you are the single Executive Branch official with the responsibility to integrate the many complex functions of the various Federal agencies in the formulation and execution of homeland defense programs. Your views and insights on the policies necessary to meet these objectives are critical to the Committee and the nation. As Chairman and Ranking Member of the Committee, we request that you testify before the Committee on April 9th, April 10th, or April 11th, 2002. The subcommittees of this Committee will address the detailed funding requests for the individual agencies and departments.

Thank you for your attention to this matter. We look forward to your early and positive response.

Sincerely yours,

Ted Stevens
Ranking Member

Robert C. Byrd
Chairman

RCB/TS:cek

THE WHITE HOUSE
WASHINGTON

June 16, 1992

Dear Mr. Chairman:

I am writing in response to your letter of June 11 to the President regarding your June 23 scheduled hearing. In that letter, you invited the Administration to send appropriate Administration officials to testify. We would propose to send Mr. Robert Mueller, Assistant Attorney General, Criminal Division, Department of Justice, and Mr. Laurence Urgenson, Acting Deputy Assistant Attorney General, Criminal Division, Department of Justice. In addition, I would note that the Administration has previously testified in great detail regarding pre-Desert Storm Iraq policy, the administration of the relevant programs and related investigations. I attach a copy of this testimony and ask that it be made available to all Committee Members before the hearing.

Your letter also requested the appearance of Mr. Nicholas Rostow, Special Assistant to the President and Senior Director for Legal Affairs, National Security Council; and Mr. C. Boyden Gray, Counsel to the President. As I advised the Chairman of the Committee on Banking, Finance and Urban Affairs in response to a similar request, it is the longstanding practice of the Executive Branch to decline requests for testimony by members of the President's personal staff. For that reason, I must decline your request for personal testimony by Messrs. Gray and Rostow. In light of the unusual circumstances presented here, however, the Administration is prepared to work with you to develop an alternative, mutually acceptable mechanism for making available to Members of the Committee the White House officials whose testimony you have sought.

Finally, attached to your letter was a request for documents from the Department of Agriculture, the State Department, the Department of Justice, the White House, the Department of the Treasury/U.S. Customs Service, and the Department of Commerce. In order to expedite a response to that request, we have forwarded it to the listed Departments outside the White House, and have directed them to respond directly to the Committee. In light of the large number of documents requested, it is unlikely that they or the White House will be able to meet the June 18

REV_00261552

response date, but we have requested that they respond as quickly as possible.

Sincerely,

Nicholas E Calio

Nicholas E. Calio
Assistant to the President for
Legislative Affairs

Chairman Jack Brooks
Committee on the Judiciary
House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6218

cc: The Honorable Hamilton Fish, Jr.

attachments

REV_00261553

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF HOMELAND SECURITY
WASHINGTON, D.C. 20502

March 4, 2002

MEMORANDUM TO JUDGE ALBERTO GONZALES
TIM FLANIGAN

CC: ADM. STEVE ABBOT, MARK HOLMAN, DAVID ADDINGTON, BRETT KAVANAUGH

FROM: EDWARD McNALLY

SUBJECT: SENATE REQUEST FOR GOV. RIDGE'S TESTIMONY

Attached for your information and review is a copy of today's letter to Governor Ridge from Senators Robert Byrd and Ted Stevens of the Senate Appropriations Committee concerning the forthcoming "series of hearings" to "examine closely the Federal response here at home" to the events of September 11th. The letter states:

> "As Chairman and Ranking Member of the Committee, we request that you testify before the Committee on April 9th, April 10th, or April 11th, 2002."

Last week I provided you with copies of the 1999 memorandum by the Attorney General which concluded, among other issues, that the Counsel to the President, e.g., was immune from a subpoena to testify. By way of additional background, also attached here are copies of a set of June 1992 letters from Nick Calio and Boyden Gray concerning requests for testimony by Nick Rostow (who then held John Bellinger's position) and Boyden Gray (the Administration declined), and also regarding former presidential Chief of Staff Howard Baker. Also included is a memorandum prepared by OLC in 1994 concerning "Congressional Requests for Testimony of White House Officials", which provides a detailed history of how various administrations have addressed these issues during the past 50 years. I am available to discuss these matters at any time that is convenient to you.

ROBERT C. BYRD, WEST VIRGINIA, CHAIRMAN

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ERNEST F. HOLLINGS, SOUTH CAROLINA
PATRICK J. LEAHY, VERMONT
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MIKE DEWINE, OHIO

TERRENCE E. SAUVAIN, STAFF DIRECTOR
STEVEN J. CORTESE, MINORITY STAFF DIRECTOR

United States Senate

COMMITTEE ON APPROPRIATIONS
WASHINGTON, DC 20510-6025

March 4, 2002

The Honorable Tom Ridge
Assistant to the President for Homeland Security
Executive Office of the President
The White House
Washington, DC 20502

Dear Governor Ridge:

In Securing the Homeland Strengthening the Nation, President Bush concludes that, "the threat of terrorism is an inescapable reality of life in the 21st Century. It is a permanent condition to which America and the entire world must adjust." We share the view that it is essential that Federal, state, and local governments must have a significant and sustained commitment to defend our homeland.

The Senate Appropriations Committee will be holding a series of hearings to examine closely the Federal response here at home to the events of September 11, 2001. The President's Budget for Fiscal Year 2003 includes requests for homeland defense funding in dozens of departments and agencies. In the Executive Order establishing the Office of Homeland Security, President Bush gives you the responsibility to certify that the funding levels contained in the Budget transmitted to the Congress are necessary and appropriate for the homeland security-related activities of the Executive Branch.

Therefore, you are the single Executive Branch official with the responsibility to integrate the many complex functions of the various Federal agencies in the formulation and execution of homeland defense programs. Your views and insights on the policies necessary to meet these objectives are critical to the Committee and the nation. As Chairman and Ranking Member of the Committee, we request that you testify before the Committee on April 9th, April 10th, or April 11th, 2002. The subcommittees of this Committee will address the detailed funding requests for the individual agencies and departments.

Thank you for your attention to this matter. We look forward to your early and positive response.

Sincerely yours,

Ted Stevens
Ranking Member

Robert C. Byrd
Chairman

RCB/TS:cek

REV_00261555

THE WHITE HOUSE
WASHINGTON

June 16, 1992

Dear Mr. Chairman:

I am writing in response to your letter of June 11 to the President regarding your June 23 scheduled hearing. In that letter, you invited the Administration to send appropriate Administration officials to testify. We would propose to send Mr. Robert Mueller, Assistant Attorney General, Criminal Division, Department of Justice, and Mr. Laurence Urgenson, Acting Deputy Assistant Attorney General, Criminal Division, Department of Justice. In addition, I would note that the Administration has previously testified in great detail regarding pre-Desert Storm Iraq policy, the administration of the relevant programs and related investigations. I attach a copy of this testimony and ask that it be made available to all Committee Members before the hearing.

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Finally, attached to your letter was a request for documents from the Department of Agriculture, the State Department, the Department of Justice, the White House, the Department of the Treasury/U.S. Customs Service, and the Department of Commerce. In order to expedite a response to that request, we have forwarded it to the listed Departments outside the White House, and have directed them to respond directly to the Committee. In light of the large number of documents requested, it is unlikely that they or the White House will be able to meet the June 18

REV_00261556

response date, but we have requested that they respond as quickly as possible.

Sincerely,

Nicholas E Calio

Nicholas E. Calio
Assistant to the President for
Legislative Affairs

Chairman Jack Brooks
Committee on the Judiciary
House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6218

cc: The Honorable Hamilton Fish, Jr.

attachments

REV_00261557

ANDREWS & KURTH
MAYOR, DAY, CALDWELL & KEETON
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TELEPHONE: 713.220.4200
FACSIMILE: 713.220.4285

FAX COVER SHEET

TO: Brett Kavanaugh COMPANY:

FROM: Terri Lacy EMPLOYEE NO.: 1175

DATE: December 21, 2001

FAX NO. : 202.456.5104 MATTER NO.: NO. OF PAGES (INCLUDING COVER SHEET) 3

CONFIRMATION NO.:

MESSAGE

To whom at the Post do we send this?

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TERRI LACY
DIRECT: 713.220.4482
email: terrilacy@akllp.com

December 21, 2001

The Washington Post Company
Washington, D.C.

Dear Sirs:

As President Bush's personal attorney, I write in response to Stephen Hensen's December 16 article regarding President Bush's Texas gubernatorial papers. Mr. Hensen alleges that Governor Bush's Administration somehow acted inappropriately by providing his official gubernatorial records to the George H.W. Bush Presidential Library at Texas A&M, rather than to the Texas State Library and Archives. Mr. Hensen's allegations are erroneous and misstate Texas law.

Contrary to Mr. Hensen's suggestions, Section 441.201 of the Texas Government Code expressly provides that "in consultation with the [Texas State Library and Archives] commission, a governor may designate an institution of higher education or alternate archival institution in the state, in lieu of the Texas State Library and Archives, as the repository for the records of the executive office of the governor created or received during that governor's term of office." Consistent with this law, in December 2000 then Governor Bush and the State Library and Archives Commission signed a Designation Agreement naming the George Bush Presidential Library and Museum in College Station, Texas, as the repository for the executive office records of Governor Bush's Administration. The records were then shipped to the Library with the knowledge of the Library's Director, David Alsobrook (a fact that belies Mr. Hensen's claim that Presidential Library officials were "surprised" at receiving the records).

Since that time, representatives for the State Library and Archives Commission, the federal National Archives and Records Administration, the Office of the Governor of the State of Texas and President Bush's personal representatives have worked diligently to finalize a memorandum of understanding concerning the processing of the papers. The parties plan to sign an interim memorandum that will govern the papers until the Texas Attorney General issues an opinion addressing certain issues that remain unresolved. After the issuance of that opinion, the parties will sign a final memorandum of understanding. In the meantime, however, requests from the public are being processed as expeditiously as possible consistent with the fact that it takes a substantial amount of time to properly catalogue this quantity of records.

HOU:727590.1

All of the parties in this process want the papers to be as accessible to the public as possible, and everyone has worked together in a spirit of cooperation to attain that goal.

Very truly yours,

Terri Lacy

Terri Lacy

1175:bt

JOHN A. MINTZ
ATTORNEY AT LAW
VIRGINIA AND WASHINGTON, D. C.
P.O. BOX 362 OAKTON, VA 22124
703-620-2537 FAX 703-620-0454

FACSIMILE TRANSMITTAL SHEET

TO: Brett Kavanaugh, Esq.	FROM: John A. Mintz
COMPANY: Associate Counsel to the President	DATE: 22 APRIL 2003
FAX NUMBER: 202-456-6279	TOTAL NO. OF PAGES INCLUDING COVER: ONE
PHONE NUMBER: 202-456-7984	SENDER'S REFERENCE NUMBER: 7014-21-22
RE: AMERICAN HISTORICAL ASSN. v NARA	YOUR REFERENCE NUMBER:

Brett, thanks for your call today advising of the proposed revised language in a statement that DOJ proposes to file today in captioned suit. We have reviewed the revised language you provided and I am authorized to advise you that my client will offer no objection to the proposed filing or to the statement, as revised.

John A. Mintz



Brett

James M. Wootton
President

August 19, 2002

Dr. Glenn Hubbard
Chairman
Council of Economic Advisors
Eisenhower Executive Office Building
17th and Pennsylvania Avenue, N.W.
Washington, D.C. 20502

Dear Dr. Hubbard:

Thank you for taking the time to meet with Robert Hahn, John Schmitz and me to discuss tort reform and federalism. As you know, we very much look forward to working with you to promote both of these ideas within this Administration. We know that these issues are of great importance to President Bush who, as a former Governor and a business leader, has a unique perspective and understanding of the importance of a limited federal government that protects our liberty through the effective exercise of its Constitutionally enumerated powers

As President Bush underscored during his campaign, our civil justice system faces extraordinary problems that directly impact the national economy and our liberty. The dramatic increase in the number of lawsuits and the magnitude of jury awards have resulted in more than just direct losses to national business for liability payouts. Indeed, the current tort system imposes additional costs on the society as a whole by increasing the prices of consumer goods, discouraging technological innovation, and decreasing the supply of reasonably priced insurance. Early work by Peter Huber estimated that the economic impact of tort liability on American individuals, government organizations, and businesses is at least $80 billion a year. (*Liability: The Legal Revolution and its Consequences* 11-14, (1990)). More recent work by the Council of Economic Advisors (CEA) estimates direct costs of nearly $180 billion, or 1.8% of the gross domestic product (*Who Pays for Tort Liability Claims? An Economic Analysis of the U.S. Tort Liability System,* Council of Economic Advisors, April 2002, citing Tillinghast-Towers Perrin, *U.S. Tort Costs: 2000, Trends and Findings on the Costs of the U.S. Tort System*). The CEA white paper also notes that only an estimated 20% of those costs go to claimants for economic damages.

Because of the close relationship between national prosperity and a unified national marketplace our federalist system from the beginning contained the constitutional tenant that regulation of interstate commerce (as opposed to the regulation of schools or other areas that are local in nature) comes within the special authority and competence of the national government. Notably, recent U.S. Supreme Court decisions,

ph (202) 463-5724 fax (202) 463-5302 jwootton@uschamber.com 1615 H Street, NW Washington, DC 20062-2000

including *United States v. Lopez* (514 U.S. 549 (1995)) and *United States v. Morrison* (529 U.S. 598 (2000)), have signaled that the Court is prepared to enforce this "enumerated powers" approach to the Constitution and its distinction between national and state authority. Thus, the President can and should be encouraged to take thoughtful and appropriate steps to address the abuses of our civil justice system whenever those abuses burden the free flow of the goods and services in interstate commerce.

In light of these developments, Governors John Engler (Michigan) and Frank Keating (Oklahoma) convened a Federalism Symposium in Washington, D.C. on June 6, 2001, to provide a forum to discuss how to advance simultaneously the federalism agenda of the governors, the original understanding and theoretical underpinnings of federalism, and the needs of the business community. Sponsored by the U.S. Chamber of Commerce Institute for Legal Reform, the Federalism Symposium was attended by leaders in the business community, senior state officials, Bush Administration and congressional representatives, scholars, and others.

The Symposium confirmed the broad recognition by federalism experts, such as Ted Olson and Robert Bork, that Federalist principles do not require the federal government to defer to state law standards of liability that burden interstate commerce or conflict with or impede federal laws, regulation, and policies in areas where the federal government acts pursuant to an enumerated power. They and other federalism scholars identified below conclude that the Commerce Clause authorizes the federal government to remove such impediments to interstate commerce, in part by enacting preemptive statutes and regulations concerning product safety and labeling. Far from violating core tenets of federalism, federal tort reform measures that preempt the current miscellany of ill-considered, inefficient, and oftentimes judicially-imposed state policies in these areas are consistent with the proper, constitutionally-delegated role of the federal government in our system of divided power.

The attached articles and copy of the Spring 2002 *Harvard Journal of Law and Public Policy* (in which the Symposium papers were published) provide a more comprehensive discussion. They are summarized below:

- Brief of Ted Olson (now Solicitor General of the United States) to the Supreme Court on behalf of the U.S. Chamber of Commerce in *Geier v. Amer. Honda Motor Corp.* - Olson discusses how "[R]ecent developments and trends in state tort law reveal an enhanced need for vigorous enforcement of implied preemption principles and related constitutional mandates in order to shield our national economy from the increasing burdens placed upon it by unconstrained, arbitrary, inconsistent, and excessive tort verdicts and ever-expanding liability rules."

- Robert H. Bork and Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J. L. & PUB. POL'Y 849 (2002) – Bork and

Commerce Clause's role to prevent efforts at state level

- Troy examine why the Commerce Clause, from an originalist perspective, permits the federal government to establish uniform safety and labeling standards and empowers the federal government to remove impediments to interstate commerce and maintain a vibrant national economy.

- Michael W. McConnell, Book Review, *Federalism: Evaluating the Founders' Design*, U. CHI. L. REV. 1483 (1987) –McConnell's analysis finds tort reform a suitable subject for federal action because a national forum prevents a narrow "faction" within the population – such as a judge or jury confronted with an unsympathetic, out-of-state corporate defendant – from effectively crafting policies that will affect the entire nation.

- C. Boyden Gray (former Counsel to President Bush), *Regulation and Federalism*, YALE J. REG. (1983) - Gray argues because many federal programs are "frequently inconsistent with local needs and preferences, administered by bureaucrats who are unaccountable to local citizens, and riddled with inefficiencies," federal involvement should be confined only to four areas, including products liability standards where "the combined effect of disparate state regulatory standards may intolerably burden interstate commerce."

- John Eastman, *Re-entering the Arena: Restoring a Judicial Role for Enforcing Limits on Federal Mandates*, 25 HARV. J. L. & PUB. POL'Y 931 (2002) – Eastman uses the Unfunded Mandates Reform Act (UMRA) as the basis for making two broader recommendations for incorporating constitutional considerations into Congressional deliberations. First, he proposes that Congress should consider the financial cut-offs established by UMRA as guidelines for determining limits on federal authority. Second, Eastman argues that the long-dormant non-delegation doctrine, which (in theory) prohibits the assignment of unbridled lawmaking powers to executive agencies, can also be used as a way of preventing costly federal regulations.

These analyses, along with the related Supreme Court jurisprudence, clearly support the principle that certain actions by the federal government to limit state tort liability for goods and services produced and sold in the national market do not violate the principles of federalism on which our nation was founded. On the contrary, such federal action is an essential part of the foundation of federalist theory.

We hope you find these pieces to be useful in your analysis and discussions with President Bush. If you would like to discuss any of these issues further, or have questions or comments, please do not hesitate to contact me, John or Bob.

Sincerely,

James M. Wootton
President

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FDA Approval of Drug Product Labeling Changes

Once FDA has approved an NDA, an applicant generally may not deviate from FDA-approved product labeling without submitting an NDA supplement that provides a full explanation of the basis for the change.[14] FDA permits two kinds of labeling supplements: (1) "pre-approval supplements," which require FDA approval before a change occurs; and (2) "changes being effected supplements," which may be implemented before FDA approval.[15] In either case, an applicant must provide supporting information for the proposed change, or alert FDA to the existence of such information elsewhere. The supporting evidence may take several forms, including company-conducted or independent studies, published reports, and compilations of adverse events. FDA evaluates the scientific evidence pertaining to the proposed change. It then determines whether the proposed labeling change is appropriate based on such factors as the frequency of the risk of a side-effect/bad outcome, the severity of the potential risks, and the potential benefits and risks associated with the proposed warning.

Unless the proposed changes are minor, an applicant typically submits labeling changes in a pre-approval supplement. Where an applicant uses a "changes being effected" supplement, its evidentiary obligations are not reduced. Thus, although use of a "changes being effected" supplement permits a manufacturer to make labeling changes upon filing its supplement, the regulation still requires the manufacturer to "give a full explanation of the basis for the change."[16] Therefore, although an applicant may implement a labeling change immediately, it must still give

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[14]21 CFR 314.70.

[15]21 CFR 314.70(b),(c).

[16]21 CFR 314.70(c).

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FDA a full explanation of the basis for the change that it has made. The more significant the proposed labeling change, the greater the explanation required. Accordingly, a drug manufacturer must have the same sound basis in scientific evidence for making a labeling change under this provision as it needs to obtain agency approval of a labeling change using the normal pre-approval supplement process.

If the agency disagrees with the changes made based on its evaluation of the evidence supporting the change, FDA notifies the company that the change is not approved. Should the company market the product using that unapproved labeling, it would violate the FDCA's prohibitions against marketing an unapproved new drug and against marketing a misbranded drug.[17]

Thus, in actual practice, only minor product labeling changes, like an editorial change, deletion of an ingredient affecting only the color of a drug product, or changes in the container or closure system for the drug product are generally made without FDA's prior approval. Furthermore, given the expense associated with any labeling change, manufacturers are reluctant to proceed under the provision allowing them to make a labeling change before getting FDA approval because it carries a risk that FDA will ultimately deny approval and thereby require another labeling change.

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[17]21 U.S.C. §§ 352, 355(a).

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B. THE FOOD AND DRUG ADMINISTRATION MODERNIZATION ACT

In 1997, Congress amended the FDCA by enacting the Food and Drug Administration Modernization Act ("the Modernization Act").[18] These amendments to the FDCA added an express preemption provision for over-the-counter drug labeling. That provision expressly preempts any state requirement for over-the-counter drugs that is "different from, in addition to, or otherwise not identical with" an FDA requirement.[19] This section also includes an exception from federal preemption for state laws adopted by public initiative or referendum enacted before September 1, 1997.[20]

C. CALIFORNIA PROPOSITION 65

In 1986, California adopted the Safe Drinking Water and Toxic Enforcement Act, also known as Proposition 65.[21] Under Proposition 65, in the course of doing business, persons must provide a clear and reasonable warning before exposing any individual to a chemical known to the state to cause cancer or reproductive toxicity.[22] Such a warning must clearly communicate that the chemical is known to the state to cause cancer, birth defects, or other reproductive harm.[23] The regulations promulgated under Proposition 65 also provide "safe harbor" warning messages that are deemed to satisfy the requirement for a clear and reasonable warning. With

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[18]Pub. L. No. 105-115, 111 Stat. 2296 (1997).

[19]21 U.S.C. § 379r(a).

[20]21 U.S.C. § 379r(d)(2).

[21]California Health and Safety Code § 25249.5, et seq.

[22]California Health and Safety Code § 25249.6.

[23]22 California Code of Regulations § 12601(a).

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respect to the nicotine therapy replacement products at issue here, that "safe harbor" warning consists of the following language: "Warning: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm."[24] Proposition 65 also includes a statutory federal preemption exemption, which excludes from coverage exposures to chemicals for which federal law governs the warnings in a manner that preempts state authority.[25]

Proposition 65 requires the Governor to publish a list of those chemicals known to cause cancer or reproductive harm. The Governor must cause that list to be revised at least annually to reflect additional knowledge.[26] Inclusion of a chemical on such a list is required where the chemical is known to the state to cause cancer or reproductive harm: (1) based upon the opinion of the state's qualified experts relying on scientifically valid testing, (2) based upon a determination by a body deemed to be authoritative by the state's qualified experts and the state's lead agency, or (3) based upon a requirement imposed by a state or federal agency that formally mandates that the chemical be labeled or identified as causing cancer or reproductive harm.[27]

As a general matter, California has deferred to FDA's expertise concerning regulation of drug products by adopting FDA regulations for purposes of California law.[28] More important, California has designated FDA as one of four authoritative bodies empowered to designate

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[24]22 California Code of Regulations § 12601(b)(4)(B).

[25]California Health and Safety Code § 25249.10(a).

[26]California Health & Safety Code § 25249.8.

[27]Id. California's regulation also addresses the requirements for a cognizable identification by an authoritative body of a chemical as causing reproductive toxicity. The pertinent regulation also provides for notice and public comment before a chemical may be added to the list of potentially hazardous chemicals.

[28]California Health and Safety Code § 110111.

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chemicals as reproductive toxins under Proposition 65.[29] Moreover, when it listed nicotine as a reproductive toxin under Proposition 65 on April 1, 1990, California relied upon FDA's action requiring a reproductive health warning to be included in the warning labeling for the prescription form of nicotine replacement therapy products as the sole basis for that listing.[30] Thus, California made no independent assessment of the potential reproductive toxicity of the nicotine contained in these products. Nor did it rely on a determination by any other entity deemed an authoritative body under the state's regulations.

II. STATEMENT OF THE FACTS

A. Dowhal's State Court Action

In 1998, Dowhal asked the California Attorney General to initiate an enforcement action against SmithKline Beecham and other drug manufacturers that marketed nicotine replacement therapy products in California on the ground that the warnings in their product labeling did not meet the requirements of Proposition 65. In pertinent part, FDA's approved warning for Defendants' products advised users as follows:

> If pregnant or breast-feeding, ask a health professional before use. Nicotine can increase your baby's heart rate. First try to stop smoking without the [name of product].

Exh. 1 to Joint Request For Judicial Notice at 5. Beginning in 1996 and continuing through 2001, in response to specific inquiries, FDA repeatedly advised Defendants that they might be

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[29]California Health & Safety Code § 25249.8; 22 California Code of Regulations § 12306(b), (k), (l)(4). The other entities designated as authoritative bodies are the International Agency for Research on Cancer, the National Institute for Occupational Safety and Health, and the United States Environmental Protection Agency.

[30]See J.A. 1562.

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liable for selling misbranded articles if they deviated from the FDA-approved warning labeling for these nicotine replacement therapy products. See Respondents Brief at 10-14, 18-20. Furthermore, FDA gave that advice on several occasions in response to a Defendant's inquiry concerning possible use of warnings that were proposed as compliant with Proposition 65. J.A. 1499-1501, 1504-06, 1514-17, 1520-21, 1568-69, 1571, 1632-36, 2401.

In a May 6, 1998 letter to FDA, the California Attorney General questioned whether Defendants' FDA-approved product labeling satisfied the requirements of Proposition 65. In its written response, FDA advised the California Attorney General that Defendants' warning labeling clearly and accurately identified the reproductive risks associated with their nicotine replacement therapy products and therefore met the FDCA's labeling requirements. FDA also opined that Defendants' warning labeling appeared to satisfy the California Attorney General's standards with respect to Proposition 65 because the warnings were "clear and reasonable." J.A. 1558-1561. After receiving FDA's letter, the Attorney General did not initiate an enforcement action.

On August 23, 1999, Dowhal filed this action in the Superior Court of the State of California, San Francisco County. He alleged that Defendants had committed past violations as well as ongoing violations of Proposition 65 by knowingly and intentionally causing women to be exposed to nicotine through the use of their products without providing the warnings that Proposition 65 required. In addition to civil penalties and restitution, Dowhal sought to enjoin Defendants to include with their products particular warnings that significantly differed from the warnings required by FDA. Plaintiff sought an injunction requiring Defendants to use the "safe harbor" warning set forth at page 8 supra in their labeling or, alternatively, to require them to include either the following warning or a comparable one:

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> If pregnant or breast-feeding, ask a health professional before use. Nicotine, whether from smoking or medication, can harm your baby. First try to stop smoking without the patch.

Exh. 1 to Jt. Request For Judicial Notice at 5 (emphasis added). Defendants opposed that request because federal law controlled the contents of these warnings and preempted any state law requirements mandating inconsistent labeling that would render the products misbranded under the FDCA.

B. The Superior Court's Decision

Ruling on cross-motions for summary judgment in a March 12, 2001 order, the Superior Court concluded that Defendants were entitled to summary judgment because federal law preempted application of Proposition 65 with respect to the warnings that they used in their product labeling. J.A. 2429-2432. Applying the doctrine of conflict preemption, the trial court held that the product warnings that FDA had approved for Defendants' use in marketing their products preempted the alternative warning requirements that Dowhal asserted were mandated by Proposition 65. The Superior Court reasoned that the applicability of conflict preemption was unaffected by the express statutory preemption clause and its exception in the Modernization Act. It then concluded that conflict preemption applied because Defendants could not comply with both FDA's warnings and the warnings Dowhal claimed were mandated by Proposition 65. Furthermore, the court found conflict preemption applicable because Dowhal's proposed warnings would frustrate the federal purpose of ensuring that warnings accurately reflect the known health risks associated with drug products.

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C. FDA's Disposition Of Dowhal's Citizen Petition

On August 2, 2000, one year after he filed his complaint, Dowhal filed a citizen petition with FDA asking the agency to change the warnings required in the labeling of nicotine replacement therapy products. Again, Dowhal asked FDA to require Defendants and any other manufacturers of a similar product to include a warning like the "harm your baby" warning set forth at page 11 supra.

On August 17, 2001, FDA responded to Dowhal's petition. Based on its review of the relevant information, including the information furnished by Dowhal in support of his citizen petition, FDA declined to adopt the warnings he proposed. Exh. 1 to Jt. Request for Judicial Notice. Instead, FDA asked each sponsor of a nicotine replacement therapy product to submit to the agency a labeling supplement with a new pregnancy warning containing the following wording:

> If you are pregnant or breast-feeding, only use this medicine on the advice of your health care provider. Smoking can seriously harm your child. Try to stop smoking without using any nicotine replacement medicine. This medicine is believed to be safer than smoking. However, the risks to your child from this medicine are not fully known.

This warning reflected language deemed appropriate by FDA given current knowledge about the use of nicotine replacement therapy products during pregnancy. It reflected a proper balance concerning the need to warn about the harms associated with continued smoking during pregnancy, the benefits of total nicotine abstinence, the need to provide information about the known risks of nicotine replacement therapy products, and the need to provide information about the relative risks of these products in comparison to the risks of smoking. In adopting this

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warning, FDA also determined that the Dowhal's proposed warning lacked sufficient support in scientific evidence.

As the FDA ultimately determined in addressing Dowhal's citizen petition, neither the "safe harbor" warning nor Dowhal's proposed "harm your baby" warning provided appropriate information concerning the nature of the risk posed by nicotine in the products. The absence of such information creates a danger that consumers may be misled about the risks associated with the products, which may result in consumer decisions concerning product use based upon an inaccurate array of information. The presentation of incomplete and misleading information in such warning labeling renders a product misbranded under the FDCA.

SUMMARY OF THE ARGUMENT

Defendants' use of the pregnancy warning that Dowhal advocated for these products would cause them to violate the FDCA's prohibition on selling misbranded drug products. Therefore, under the doctrine of conflict preemption, Proposition 65 could not be applied to Defendants' warning labels if it required Defendants to use Dowhal's proposed warning labeling. Conflict preemption would also apply because state law would pose an obstacle to the accomplishment of the full purposes and objectives of a federal statute, the FDCA.

1. In rejecting Dowhal's proposed warning in the context of addressing his citizen petition on August 17, 2001, FDA determined that Proposition 65 would conflict with the FDCA if it required use of Dowhal's proposed warning labeling. Thereafter, any state requirement mandating use of labeling that differed significantly from the FDA-approved labeling would be preempted. Moreover, where a federal agency has implemented a statute that it is charged with administering, its action may also be applied to conduct that occurred before the agency

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announced that decision. Therefore, FDA's construction of the FDCA's misbranding prohibition with respect to Dowhal's proposed warning labeling applies equally to Defendants' antecedent conduct.

Moreover, just as the doctrine of primary jurisdiction allows a trial court to rely upon an agency explanation issued after the filing of a lawsuit, this Court now may properly rely on FDA's application of the FDCA's misbranding provision in the agency's August 17, 2001 determination in order to affirm the Superior Court's grant of summary judgment for Defendants. Furthermore, FDA's determination concerning appropriate warning labeling reflects the agency's application of its unrivaled expertise to the relevant data. Because Congress has entrusted FDA to make any necessary judgments concerning what labeling provides the warnings necessary to avoid misbranding a product, a state court should defer to FDA's assessment and apply it in a way that assures the proper functioning of a comprehensive federal regulatory plan.

Conflict preemption also applies here because requiring Defendants to use Dowhal's proposed warning labeling to meet their duties under Proposition 65 would pose an obstacle to the accomplishment of the full purposes and objectives of Congress. State law must be applied here in a way that preserves the latitude necessary for the federal regulatory scheme to operate as Congress intended. FDA repeatedly cautioned the Defendants against changing their warning labeling unless they had an adequate factual basis to do so. Tellingly, Defendants had no new facts to present to FDA to support different warning labeling. Under these circumstances, applying Proposition 65 to require Defendants to use Dowhal's proposed warning labeling would thwart attainment of the goals Congress sought to achieve under the FDCA.

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2. Plaintiff erroneously contends that the Modernization Act exempts Proposition 65 from displacement under conflict preemption principles. The Superior Court correctly held that the Modernization Act affects only express preemption, not conflict preemption.

ARGUMENT

I. THE FDCA PREEMPTS THE ENFORCEMENT OF PROPOSITION 65 AS A STATE LAW BECAUSE IT WOULD CONFLICT WITH THE REQUIREMENTS OF FEDERAL LAW AND POSE AN OBSTACLE TO ACCOMPLISHING THE OBJECTIVES OF THIS FEDERAL STATUTE.

To assure adherence to the Supremacy Clause of the United States Constitution, federal law preempts enforcement of state law in certain circumstances.[31] Thus, federal law preempts state law where Congress has expressed a clear intent that a federal statute have that effect. Even absent explicit preemption language in a statute, federal law preempts state law where Congress has clearly intended to legislate comprehensively and thereby precluded the states from supplementing federal law. Finally, federal law preempts state law where compliance with both federal and state law is impossible or where state law poses an obstacle to accomplishing the full purposes and objectives of Congress as expressed in a statute.[32]

By enacting the FDCA, Congress established a comprehensive scheme of drug regulation. That regulatory plan promotes the important interest of protecting consumers from unsafe drugs. To advance that interest, the FDCA operates to ensure that drugs on the market are safe and effective. Thus, the FDCA prohibits the sale of misbranded drugs,[33] which it identifies as drugs

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[31]U.S. Const. art. VI, cl. 2.

[32]United States v. Locke, 529 U.S. 89, 109 (2000); Geier v. American Honda Motor Co., 529 U.S. 861, 873 (2000); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 698-99 (1984).

[33]See 21 U.S.C. § 331(b).

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that lack adequate warnings.[34] Given the comprehensive nature of drug regulation under this federal law, any state regulation must be compatible with the regulatory plan established under the FDCA.

Here, conflict preemption applies because requiring Defendants to use Dowhal's proposed warning labeling to meet their duties under Proposition 65 would conflict with federal law and pose an obstacle to accomplishing Congress's full purposes and objectives.[35]

A. Application Of Proposition 65 To Require Defendants To Use Dowhal's Proposed Warnings Would Make It Impossible For Them To Comply With Both Federal and State Law.

In support of the agency's role in assuring that misbranded drugs are not sold, Congress gave FDA authority to regulate the labeling of drug products. FDA's authority includes the power to require appropriate warnings on over-the-counter drugs and prohibit the sale of misbranded drug products.[36] Under the Act, an over-the-counter drug is deemed misbranded when "[i]ts labeling is false or misleading in any particular" or "[u]nless its labeling bears . . . such adequate warnings against use . . . where its use may be dangerous to health . . . in such

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[34]See 21 U.S.C. § 352(a) ("A drug or device shall be deemed to be misbranded if its labeling is false or misleading in any particular.") See also 21 U.S.C. § 352(f) (a drug or device shall be deemed to be misbranded "unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions. . . where its use may be dangerous to health . . . in such manner and form, as are necessary for the protection of users").

[35]English v. General Electric Co., 496 U.S. 72, 78-79 (1990). See also Geier v. American Honda Motor Co., 529 U.S. at 873; Laurence H. Tribe, American Constitutional Law, § 6-25 at 481 n. 14 (2d ed. 1988) (conflict preemption applies even "where Congress did not necessarily intend preemption . . . [if] the particular state law conflicts directly with federal law or stands as an obstacle to the accomplishment of federal objectives.").

[36]21 U.S.C. § 352(a), (f); 21 C.F.R. Part 201, Subpart C.

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manner and form as are necessary for the protection of users."[37] To constitute an adequate warning, a warning must in FDA's view be clear and truthful in all respects, not be misleading in any particular respect, and accurately communicate both the benefit-to-risk ratio and the proper use of the product in terms likely to be read and understood by the ordinary person.[38]

1. FDA's Action On Dowhal's Citizen Petition Showed That The FDCA Preempted Compelled Use Of Dowhal's Proposed Warning Labeling Under Proposition 65.

Under the FDCA, manufacturers of drug products may not make changes to product labeling previously approved by FDA unless those changes are accurate and not misleading. Therefore, to the extent that state law would require a manufacturer to use product labeling that misbrands a drug product, the FDCA preempts state law under the doctrine of conflict preemption.

It cannot be reasonably disputed here that the FDCA's requirements with respect to drug marketing preempt any inconsistent requirements imposed by Proposition 65. Thus, the critical question is whether the FDCA's prohibition against the sale of misbranded drugs conflicted with the warning labeling that Dowhal claimed was required by that state law.

In determining whether Dowhal's proposed warning labeling was prohibited under the FDCA, the analysis must start from the proposition that an agency's reasonable judgment with

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[37]21 U.S.C. §§ 352(a), 352(f).

[38]See 21 C.F.R. § 330.10(a)(4)(iii), (v). See also 21 U.S.C. § 355(d), which conditions FDA's approval of a new drug application upon the presentation of adequate tests to show the safety of the drug under the conditions prescribed, recommended, or suggested in the proposed labeling and upon the agency's finding that the labeling for the drug is not "false or misleading in any particular."

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respect to the meaning of its own statute is entitled to judicial deference.[39] Therefore, any reasonable agency determination as to what constitutes misbranding under the FDCA will ordinarily be controlling.

Here, FDA ultimately rejected Dowhal's proposed warning labeling as inconsistent with the FDCA's prohibition against misbranding. In its August 17, 2001 letter, FDA addressed Dowhal's citizen petition requesting the agency to require under the FDCA the same warning that he claimed Proposition 65 required. Exh. 1 to Jt. Request for Judicial Notice. In that letter, FDA also established a new pregnancy warning for nicotine replacement therapy products. That warning differed materially from the warning Dowhal sought. In formulating the new labeling requirement, FDA sought to fashion a warning that clearly and reasonably communicated all the known risks associated with these products as well as the relative reproductive risks associated with smoking in comparison to total abstinence from nicotine in any form. Exh. 1 to Jt. Request for Judicial Notice at 6-8.

Tellingly, FDA considered and rejected Dowhal's proposed Proposition 65-compliant warning labeling. Given the rejection of Dowhal's proposed warning labeling by FDA, the federal agency with expertise and paramount responsibility in the area of drug regulation, the agency's determination that use of such warning labeling would make Defendants' products misbranded carries controlling weight in a state court action brought by the very party that asked FDA to act on the matter. As the agency's August 17, 2001 determination made clear, use of Dowhal's proposed warning labeling would render the Defendants' products misbranded because

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[39]Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984).

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that warning overstated the known risks of product use by equating the hazards posed by small amounts of nicotine delivered by means other than through inhaled smoke with the risks of smoking,[40] Exh. 1 to Joint Request For Judicial Notice at 6-8. Accordingly, if Proposition 65 required Defendants to use Dowhal's warning labeling, that state law would conflict with the FDCA and would yield to federal law under the doctrine of conflict preemption.

2. The Preemptive Effect Of FDA's Disposition Of The Citizen Petition Also Governs The Application Of Proposition 65 To Defendants' Conduct Before FDA Issued Its Determination.

FDA's August 17, 2001 construction of the FDCA's misbranding prohibition with respect to Dowhal's proposed warning labeling also applies to the Defendants' conduct before that date. Where an agency has construed a statute that it is charged with administering, the agency's construction may also be applied to conduct that occurred before the agency announced that construction.[41] In Smiley v. Citibank (South Dakota), N.A., which also involved a federal statute that preempted state law, the Supreme Court held that a regulation setting forth the Comptroller of the Currency's construction of the National Bank Act was entitled to deference. More important, the Court explained that the Comptroller's construction merited deference even though that construction would apply to conduct that predated the issuance of the regulation containing the agency's construction. The Court concluded that applying the new statutory construction to

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[40]Cigarettes must carry one of four Surgeon General warnings. 15 U.S.C. § 1333(a)(1). One of the permissible warnings states: "Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight." That warning, which closely resembles the warning Dowhal sought, does not differentiate the known harmful effects associated with cigarette smoking from the potential risks of nicotine replacement products. Those risks are not yet scientifically substantiated.

[41]Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 744 n. 3 (1996).

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conduct completed before the regulation's issuance did not pose a risk of giving the regulation invalid retroactive effect. At least where an agency's construction filled a gap where there had been no contrary agency guidance, "it would be absurd to ignore the agency's current authoritative pronouncement of what the statute means."[42]

The same rule should govern here. Before FDA's disposition of Dowhal's citizen petition, the agency had not issued definitive advice concerning whether use of Dowhal's proposed warning labeling would render Defendants' products misbranded under the FDCA. Given FDA's August 17, 2001 determination, the agency's rejection of Dowhal's proposed warning labeling constitutes the agency's authoritative assessment of the relevant evidence. It also represents this federal agency's authoritative interpretation and application of the FDCA with respect to that warning labeling. In accordance with the Supreme Court's admonition in Smiley that it would be absurd to disregard an agency's current authoritative application of its governing statute in these circumstances, this Court should apply FDA's construction of the FDCA's requirements to the Defendants' adherence to the FDA-approved product labeling before August 17, 2001.

Although FDA may not have issued a formal directive until it acted on Dowhal's citizen petition, the agency's action on the petition did not reflect a new position by FDA concerning the application of the FDCA to Dowhal's proposed warning labeling. In fact, FDA repeatedly advised Defendants that such a warning could misbrand their products. Thus, the agency's formal determination confirmed the statute's applicability to Dowhal's proposed warning labeling based on the agency's review of all the relevant data. The determination showed the conflict between the FDCA's misbranding prohibition and any state law that required use of Dowhal's

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[42] 517 U.S. at 744 n. 3.

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proposed warning labeling. Where such a conflict exists between federal and state law, federal law preempts state law even with respect to transactions that have already been completed before the agency's determination confirming the conflict.[43]

Moreover, judicial application of FDA's August 17, 2001 statutory construction to the Defendants' conduct before that date closely parallels the doctrine of primary jurisdiction. Where the issues presented fall within an agency's specialized expertise and involve "technical and intricate questions of fact and policy that Congress assigned to a specific agency," the doctrine of primary jurisdiction permits a trial court to consider an agency explanation provided after the commencement of a lawsuit.[44]

FDA has now determined in a final agency action that use of Dowhal's proposed warning labeling would render these products misbranded. For the same reason that a trial court should rely upon an agency explanation issued after the filing of a lawsuit under the doctrine of primary jurisdiction, "it would be absurd to ignore the agency's current authoritative pronouncement of what the statute means" to resolve a question concerning whether use of Dowhal's proposed warnings would make Defendants' products misbranded under the FDCA.[45] Therefore, this Court may affirm the Superior Court's grant of summary judgment for Defendants based upon FDA's action on Dowhal's citizen petition.

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[43]See Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996). Given the pendency of Dowhal's citizen petition before FDA and the fact his petition presented the same questions his lawsuit raised, the Superior Court could have stayed the action pending FDA's disposition of the citizen petition either at the request of a party or sua sponte.

[44]See Wise v. Pacific Gas & Electric Co., 77 Cal. App. 4th 287, 295-96 (1999); Farmers Insurance Exchange v. Superior Court, 2 Cal. 4th 377, 380 (1992).

[45]Smiley v. Citibank (South Dakota, N.A.), 517 U.S. at 744 n. 3.

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FDA's August 17, 2001 determination also merits deference from a state court with respect to conduct that preceded the determination for another reason. That determination reflects a regulatory decision based upon this federal agency's application of a statute it is charged with administering. The determination necessarily involves applying the agency's expertise to the data relevant to deciding what warning label is appropriate for these products. In Chicago and North Western Transportation Company v. Kalo Brick and Tile Company,[46] the Supreme Court concluded that the ICC's judgment was entitled to deference in a state court because Congress had entrusted the agency with responsibility for making such judgments. The Court explained that, because "the judgment as to what constitutes reasonableness belongs exclusively to the Commission," it would frustrate Congressional intent as expressed in a federal statute "to permit the State of Iowa to use the threat of damages to require a carrier to do exactly what the Commission is empowered to excuse."[47] Here, where Congress has entrusted FDA to make any necessary judgments concerning what labeling provides the warnings necessary to keep a product from being misbranded, a state court must also defer to FDA's assessment.

Furthermore, especially where a party may challenge a federal agency's determination in federal court under the Administrative Procedure Act after exhausting available administrative remedies, that party may not bypass that judicial remedy by challenging the agency's determination indirectly by bringing an action under state law.[48] Tellingly, where judicial review

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[46]450 U.S. 311, 325-26 (1981).

[47]450 U.S. at 325-26. See also Deford v. Soo Line Railroad Co., 867 F.2d 1080, 1089 (8th Cir. 1989).

[48]See 5 U.S.C. § 701 et seq.

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is available under the federal system, review under state law is unavailable even where the agency did not make its determination until after the initiation of the state court action.[49]

To be sure, where the evidence bearing upon what warning labeling is appropriate has changed significantly over time, that change may affect whether FDA's determination concerning appropriate labeling may be fairly applied to prior conduct. Thus, if the FDA here had relied heavily on new facts to conclude that Dowhal's proposed warning labeling would render these products misbranded, it might bear on the acceptability of the labeling before those facts came to the agency's attention. Here, however, there is no suggestion that any significant evidentiary change occurred from the time Dowhal filed this suit until the agency's disposition of his citizen petition. Therefore, there can be no suggestion that Dowhal's proposed warning was at some earlier time compliant with the FDCA.

B. Application Of Proposition 65 To Require Dowhal's Proposed Warnings Would Frustrate Attaining The FDCA's Objectives.

The discussion above also shows that conflict preemption applies here because requiring Defendants to use Dowhal's proposed warning labeling to meet their duties under Proposition 65 would pose an obstacle to accomplishing Congress's full purposes and objectives.[50] As previously noted, by enacting the FDCA, Congress established a comprehensive regulatory plan

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[49]Chicago and Northwestern Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. at 326.

[50]English v. General Electric Co., 496 U.S. at 78-79. See also Geier v. American Honda Motor Co., 529 U.S. at 873; Laurence H. Tribe, American Constitutional Law, § 6-25 at 481 n. 14 (2d ed. 1988).

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designed to ensure the safety and effectiveness of drugs. Congress gave FDA plenary authority to regulate the labeling of drug products.[51]

State law must be applied in a way that preserves the latitude necessary for the federal regulatory scheme to operate as Congress intended.[52] As we have previously discussed, a drug manufacturer's use of the "changes being effected" supplement is generally limited to circumstances involving noncontroversial labeling changes. Although use of a "changes being effected" supplement permits a manufacturer to make labeling changes as soon as it files its supplement, the regulation requires the manufacturer to provide FDA with a satisfactory evidentiary basis for the change, especially with respect to any significant labeling change like the one Dowhal advocated. FDA's regulation does not allow a drug manufacturer to file such a submission without an adequate factual foundation. Moreover, standing alone, the fact that state law requires use of a particular warning cannot not constitute the necessary factual predicate.

Furthermore, FDA responded to specific inquiries from Defendants during the 1997-2001 period by advising them that they might be liable for selling misbranded drug products if they deviated from the FDA-approved warning labeling for these nicotine replacement therapy products. See Respondents Brief at 10-14, 18-20. Moreover, FDA gave that advice on several occasions in response to a Defendant's inquiry concerning possible use of warnings that were proposed as compliant with Proposition 65. J.A. 1499-1501, 1504-06, 1514-17, 1520-21,

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[51] 21 U.S.C. § 352(a), (f); 21 CFR Part 201, Subpart C.

[52] Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341, 347-48 (2001).

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Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735 (1996) 19, 20, 21

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5 U.S.C. § 701 et seq 23, 30

15 U.S.C. § 1333(a)(1) 19

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1568-69, 1571, 1632-36, 2401. Depriving Defendants of their ability to heed this advice without the risk of sustaining liability under a complementary state law system would plainly frustrate the objectives Congress sought to advance under the FDCA.[53]

In light of the nature of their particular products, these Defendants had another valid reason for hesitancy in adopting Plaintiff's proposed warnings based on their concern over liability for misbranding. With many drug products, strengthening the warnings on product labeling may carry only a moderate risk of causing confusion among consumers about whether to use a product. Here, nicotine, the ingredient in Defendants' products that made them subject to Proposition 65, is also present in cigarettes. Consumers use Defendants' products solely to assist their efforts to discontinue the use of cigarettes and thereby avoid further exposure to the serious health hazards posed by inhaled tobacco smoke.

Strengthening the warnings about the consumption of nicotine in these nicotine replacement therapy products carries an obvious risk of discouraging consumers from using the products. Such a warning would increase the risk that consumers would continue to be exposed to the much greater health risks of inhaled tobacco smoke. Given the possibility of causing such harmful consumer confusion, Defendants had good reason to avoid labeling changes that might render their products misbranded.

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[53]Based on the particular wording of the agency's communications to certain Defendants, FDA may have in some instances preempted application of Proposition 65 at least as to Proposition 65-compliant warnings that FDA considered and rejected for purposes of compliance with the FDCA. But because preemption applies to all the Defendants in this suit for their actions during entire time period at issue for the reasons set forth elsewhere in this brief, this Court need not consider the applicability of preemption based on FDA's specific communications to particular Defendants.

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The California Attorney General nevertheless asserts (Br. 33-35) that FDA's treatment of warning labeling requirements for Habitrol, another nicotine replacement therapy product marketed by a company that is not a party in this case, Novartis Consumer Health, Inc., shows that Defendants' use of Dowhal's proposed warning labeling would not cause them to misbrand their products. The Attorney General chiefly relies upon the fact that, when FDA approved the warning labeling for Habitrol in 1999, that warning labeling included the "harm your baby" warning Dowhal advocates under Proposition 65.

To begin with, this argument ignores the fact that, for FDA's regulatory purposes, every new drug is unique even if its formulation includes ingredients similar to or even identical to another drug product. FDA must evaluate each application based upon the submissions made by the applicant and all other relevant evidence that is available to the agency when it reviews the application. Thus, each NDA approval is manufacturer-specific. Accordingly, it does not necessarily follow that, because FDA has approved a label for one product, its approval for that product represents de facto approval for the identical warning for all similar products.

Furthermore, soon after FDA issued the approval for Habitrol, the agency determined that the scientific evidence regarding the potential harms from the use of the product did not, in fact, support the use of that warning. FDA's determination rendered this product misbranded. But in the exercise of its administrative discretion, FDA withheld pursuit of an enforcement action for misbranding against Habitrol's sponsor while the agency determined what language an appropriate warning should contain. Tellingly, after the agency addressed Dowhal's citizen petition, FDA instructed Habitrol's sponsor to submit an NDA Supplement containing the same labeling that the agency had approved in its August 17, 2001 determination. In so doing, FDA

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brought these products under a uniform labeling regime, but not a regime requiring the use of the "harm your baby" warning.

In any event, as our argument above shows, state law here conflicts with the FDCA to the extent that Proposition 65 requires Defendants to use Dowhal's proposed warning labeling. Therefore, this Court need not decide whether Proposition 65 may require a drug manufacturer to make a significant change in warning labeling where that manufacturer lacks adequate evidence to justify a labeling change under the federal regulatory plan created by the FDCA. Likewise, the Court also need not decide whether California law may require a drug manufacturer to make a significant change in warning labeling where FDA has explicitly cautioned the manufacturer against making an unwarranted change in warning labeling.

II. THE MODERNIZATION ACT DOES NOT AFFECT THE APPLICATION OF CONFLICT PREEMPTION HERE.

Dowhal contends (Br. at 21-29) that the Modernization Act exempts Proposition 65 from displacement under conflict preemption principles. But the Superior Court correctly held that the Modernization Act affects only express preemption, not conflict preemption.

The Modernization Act added to the FDCA an express preemption provision for over-the-counter drug labeling. That provision expressly preempts any state requirement regarding over-the-counter drugs that is "different from, in addition to, or otherwise not identical with" an FDA requirement.[54] That provision, however, also includes an exception from such federal

[54] 21 U.S.C. § 379r(a).

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preemption for state laws adopted by public initiative or referendum enacted prior to September 1, 1997, a classification that includes Proposition 65.[55]

A statutory provision that excludes a state law from the ordinary impact of express preemption does not affect conflict preemption. In Geier v. American Honda Company, the Supreme Court held that, even where Congress uses a savings clause to exempt a particular state law from the impact of express preemption, conflict preemption still applies where a conflict exists between state law and federal law that frustrates attaining a federal objective or makes it impossible for persons to comply with the both federal and state law.[56] In Geier, the Court cautioned against giving broad effect to such savings clauses where doing so would upset the careful regulatory scheme established by federal law. In reaching that result, the Court emphasized that "[c]onflict preemption turns on the identification of actual conflict, and not on an express statement of preemptive intent."[57]

Similarly, in Buckman Company v. Plaintiffs' Legal Committee,[58] which also involved the FDCA, the Court held that conflict preemption applied notwithstanding an express preemption provision that also contained a savings clause. There, plaintiffs asserted that another express preemption provision in the FDCA did not preempt their state law claims alleging fraud on the agency.[59] Reaffirming its analysis in Geier, the Court observed that "[n]either an express

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[55]21 U.S.C. § 379r(d)(2).

[56]529 U.S. 861, 870.

[57]529 U.S. at 884.

[58]531 U.S. 341 (2001).

[59]See 21 U.S.C. § 360k(a), in the Medical Device Amendments, Pub. L. No. 94-295, 90 Stat. 539 (1976).

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preemption provision nor a savings clause bars the ordinary working of conflict preemption principles."[60]

Furthermore, the particular language of the Modernization Act's exemption from express preemption confirms that the exemption does not affect conflict preemption. Section 21 U.S.C. § 379r(d)(2) exempts Proposition 65 from express preemption by virtue of its language that "this section shall not apply to a state requirement." (emphasis added) "This section" refers to the statutory provision entitled National Uniformity for Non Prescription Drugs, which sets forth the federal preemption provision.[61] Where Congress uses the "this section" formulation in a savings clause, it intends to limit the application of that savings clause to one particular express preemption provision.[62] Therefore, Congress plainly intended the exception it crafted for Proposition 65 to apply only with respect to the accompanying express federal preemption, not to conflict preemption.

The California Attorney General also contends (Amicus Br. at 33-35) that the Modernization Act eliminated FDA's authority to prohibit Defendants from using Dowhal's proposed warning. Here, he suggests that any refusal by FDA to permit Defendants to use that

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[60]531 U.S. at 352. The express preemption language and savings clause in 21 U.S.C. § 360k for medical devices, is similar to the Modernization Act's express preemption provision and its savings clause, which Dowhal relies on here. See also Freightliner Corporation v. Myrick, 514 U.S. 280 (1995) (implied preemption may apply despite presence of express preemption clause).

[61]See 21 U.S.C. § 379r(a).

[62]United States v. Locke, 529 U.S. 89, 106 (2000); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 385 (1992); AT&T Co. v. Central Office Telephone, Inc., 524 U.S. 214, 227-28 (1998).

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21 U.S.C. § 301 et seq 1
21 U.S.C. § 321(d) 1

21 U.S.C. § 331(a) 2
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Miscellaneous:

Laurence H. Tribe, American Constitutional Law, § 6-25 at 481 (2d ed. 1988) 16, 23

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STATEMENT OF THE INTEREST OF THE UNITED STATES

Plaintiff-Appellant Paul Dowhal challenges the Superior Court's holding that federal law preempted a state labeling requirement for over-the-counter nicotine replacement therapy products marketed by Defendants-Respondents SmithKline Beecham, et al. The United States has a substantial interest in this Court's resolution of that issue. On the merits of the issue, the United States appears as an amicus curiae in support of Defendants because it concurs that federal law preempted a labeling requirement that Plaintiff sought to apply to Defendants under state law.

The Food and Drug Administration ("FDA"), a component of the Department of Health and Human Services, is responsible for regulating drugs. These drugs include over-the-counter drug products, as defined by the Food, Drug, and Cosmetic Act ("FDCA" "the Act").[1] The FDCA's comprehensive scheme of drug regulation ensures that drugs are safe and effective for their intended uses. The Act specifically authorizes FDA to regulate the labeling of drug products, including appropriate warnings on over-the-counter drugs.[2] An over-the-counter drug is deemed misbranded under the FDCA when "[i]ts labeling is false or misleading in any particular." It is also misbranded "[u]nless its labeling bears . . . such adequate warnings against

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[1] 21 U.S.C. § 301 et seq. The FDCA vests regulatory and enforcement authority in the Secretary of Health and Human Services. See, e.g., 21 U.S.C. §§ 371-377; § 321(d). The Secretary has delegated his authority to the Commissioner of the FDA. 21 CFR 5.10. See also 21 U.S.C. § 393 (duties and powers of the FDA).

[2] 21 U.S.C. § 352(a), (f); 21 CFR Part 201, Subpart C.

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use . . . where its use may be dangerous to health . . . in such manner and form as are necessary for the protection of users."[3]

In granting summary judgment for Defendants, the trial court accepted their argument that compliance with the warning that Dowhal claimed was necessary to satisfy California law would require them to violate their product labeling duties under the FDCA. Therefore, the court determined that the FDCA preempted any California law requirement that imposed different obligations with respect to product labeling on these nicotine replacement therapy products. This Court's disposition of Dowhal's challenge to that ruling implicates FDA's interest in drug regulation.

1. STATUTORY AND REGULATORY BACKGROUND

A. THE FEDERAL FOOD, DRUG, AND COSMETIC ACT

The FDCA prohibits the misbranding of drugs in interstate commerce and empowers FDA to regulate the labeling of drug products, including the warnings on over-the-counter drugs.[4] Under the statute, an over-the-counter drug is misbranded where its labeling is false or misleading in any particular or if its labeling does not contain adequate warnings against any use dangerous to health.[5] FDA's regulations establish specific requirements for over-the-counter drug product labeling. These requirements are designed to mandate warnings that reflect the known risks based on reliable scientific evidence.[6]

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[3]21 U.S.C. §§ 352(a), 352(f).

[4]21 U.S.C. §§ 331(a), (b), (k), 352(a), (f); 21 CFR Part 201, Subpart C.

[5]21 U.S.C. §§ 352(a), 352(f).

[6]See 21 CFR 201.63(a), 201.66(c)(5)(iii)(iv)(ix).

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After reviewing new drug applications ("NDAs") submitted to the agency by the individual manufacturers, FDA approved Defendants' nicotine replacement therapy products. [7] In submitting an NDA for a specific drug product for an intended use, an applicant must provide "full reports of investigations which have been made to show whether or not such drug is safe for use and whether such drug is effective for use."[8] An applicant must also include "adequate tests by all methods reasonably applicable to show whether or not such drug is safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling."[9] In addition, applicants must furnish "substantial evidence that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the proposed labeling."[10] "Substantial evidence" must consist of adequate and well-controlled investigations, including clinical investigations by suitably qualified experts that provide a reasonable basis for concluding that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in its labeling.[11]

Because an evaluation of a drug product's effectiveness in conjunction with FDA review of an NDA is inextricably intertwined with the proposed labeling for the product, an applicant must submit proposed labeling along with the NDA.[12] In evaluating an NDA, FDA reviews all

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[7]FDA has approved other over-the-counter nicotine replacement therapy products marketed under Abbreviated New Drug Applications. 21 U.S.C. § 355(j).

[8]21 U.S.C. § 355(b)(1)(A).

[9]21 U.S.C. § 355(d).

[10]21 U.S.C. § 355(d)(5).

[11]21 U.S.C. § 355(e).

[12]21 U.S.C. § 355(b)(1)(F).

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the information submitted along with it to determine whether there is substantial evidence that the product will be effective and whether the benefits associated with the product outweigh any associated risks. Where the agency concludes both that the product will be effective and safe, FDA then determines how the relevant product information should be presented to the doctor. With respect to over-the-counter drugs, FDA determines how the information should be presented to the consumer in the product labeling.

Drug product labeling reflects not only the evidence submitted by the applicant in support of the NDA but also FDA's review of other relevant information. Such information may include studies completed during the drug development process, information about the chemical entity and how it acts in the body, information concerning the safety of similar drugs, and information concerning whether the drug is known to interact with any other substances. This information may also be included in the required labeling if it provides facts that a physician should know before prescribing the drug to a patient or information that a consumer should know before taking a drug.

What constitutes appropriate labeling for a drug product is not always obvious. Therefore, drug sponsors often have a dialogue with FDA about what should appear on a particular drug label. But when FDA ultimately approves an NDA, it also approves the final version of the product label. Because FDA cannot approve product labeling that would render a product misbranded, any product labeling must provide adequate directions for use and not be false or misleading.[13]

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[13]21 U.S.C. § 352(a), (c), (f).

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FRAMEWORK FOR A COMPENSATION PROGRAM FOR PRESCRIPTION DRUG INJURIES

Trial lawyers and other advocates of the current tort liability system for prescription drug injuries claim that the threat of potentially massive liability gives manufacturers an essential incentive to optimize their product quality and risk-management practices while simultaneously compensating individuals who have suffered injuries as a result of inadequacies in those practices. The purported incentive provided by the tort system, however, directly conflicts with the risk management analysis undertaken by FDA in its approval of new drugs and in its postmarket surveillance of drugs already in the marketplace. FDA's decision to approve a new drug represents the agency's determination that, based on current scientific knowledge, the benefits of the new drug product to the public health outweigh its risks. The approval decision is made with full knowledge of the fact that *all drugs* pose some risk to some portion of the patient population, and that further study and experience will, over time, provide additional information about risks both known and unknown at the time the drug is approved.

In reality, however, every new piece of safety information provided to the public by FDA and drug manufacturers after a new drug is approved and in use provides opportunistic trial lawyers with a marketing opportunity for a new class action. The costs of defending those state law tort suits -- and the ad hoc decisions of non-expert judges and inexperienced juries in those actions -- often create incentives that are inconsistent with the FDA's expert determination regarding the benefit to public health of individual drugs and the Agency's programs for overseeing and managing the unavoidable risks of prescription drugs. For example, State law verdicts (or the threat of such verdicts) in "failure to warn" tort suits create overwhelming incentives for manufacturers to expand and, consequently, complicate their prescription drug labeling, which directly conflicts with recent FDA efforts to streamline and simplify such labeling, which the agency has undertaken after extensive study of the problem of information overload on drug labels. In short, the current tort system constitutes a shadow regulatory regime that frustrates, conflicts with, and ultimately threatens to undermine the comprehensive regulatory system crafted by the FDA in the exercise of its unique expertise in regulating pharmaceuticals for the protection of public health.

Despite these conflicts, Federal regulators and courts have been reluctant to preempt State law tort claims – no doubt out of concern that preemption would deprive injured persons of compensation for drug-related injuries. In similar situations, however, Congress has responded by displacing tort liability and providing an alternative compensation regime. For example, when lawsuits threatened the supply and availability of childhood vaccines, Congress passed the National Childhood Vaccine Injury Act of 1986, which eliminated counterproductive litigation while providing an administrative system for compensating those injured by the inherent and inevitable risks of vaccines.

Similarly, sound public policy now demands the elimination of the tort system's ongoing interference with the FDA's management of new drug approval and adverse event surveillance programs designed to protect the public health. At the same time, FDA, Congress, industry and the public must ensure that those who are injured by prescription drugs are fairly compensated. In addition to frustrating FDA's public health objectives as noted above, the current tort system

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is unacceptably slow, expensive, and inefficient, with an enormous amount of compensation dollars diverted to lawyers, experts and other administrative costs. Even worse, a number of factors, including public perceptions of "big business" generally and the pharmaceutical industry specifically, the complexity of the legal and factual issues involved, and the varying leverage wielded by trial lawyers based upon the "inventory" of claimants they have been able to amass, frequently make the results of drug tort litigation fundamentally unfair to defendants and plaintiffs alike. These cases have become a crapshoot for plaintiffs, whose outcome depends not so much on the merits of the parties' respective claims as on substantively irrelevant factors, such as where suit was brought and who represents the plaintiffs. Thus, a new system is needed to spread the risk of pharmaceutical-related injuries among all those benefiting from prescription drugs and to provide swift, predictable, reasonable and fair compensation with maximum efficiency. To protect the public health for all Americans and to assure fair and efficient resolution of claims for drug-related injuries, we must find a better way.

Overview of Program

A tort replacement initiative in the prescription drug field would, like the Vaccine Act, substitute a "no-fault" reimbursement program covering certain injuries caused by prescription drugs for the existing tort/product liability system. Once in effect, the program would apply prospectively to future claims for prescription-related injury, regardless of when the drug was first prescribed or the injuries first began to develop.. Such a program would effectively eliminate the specter of "bet the company" mass tort litigation in which, despite the best efforts of scientists and regulators, an approved drug product is determined to have previously unknown or unpredictable adverse consequences when administered to the population at large. Coverage could be provided through a trust fund for those who could demonstrate the requisite injury caused by an FDA-approved prescription drug, provided that the drug was taken pursuant to and consistent with a prescription issued to the claimant by a qualified (or purportedly qualified) physician.

The program would allow claimants to recover economic damages (lost earnings and medical care expenses) from the fund consistent with established guidelines, place caps on the recovery of damages for death and non-economic damages, prohibit recovery of punitive and exemplary damages, and permit the recovery of only reasonable attorneys fees and costs. The program would be secondarily liable, and would not pay for items or services covered by collateral sources, such as federal and state benefit plans and private insurance. Moreover, the program could be designed to allow it to seek contribution from responsible third parties (*e.g.*, a physician/administrator who commits malpractice). Compensation awards would be paid from a trust fund that could be financed with a small levy on all prescription drugs covered by the program.

As noted above, FDA approval of a prescription drug as safe and effective represents the Agency's determination that the benefits of the drug product to patient populations outweigh the attendant risks. Some risks, however, remain in the use of all prescription drugs. Some of these risks, ranging from the minor side effects of many prescription drugs to the frequently significant impact of chemotherapy drugs on patients who might die absent treatment, are necessarily attendant upon use of the drug product. They are disclosed in labeling when their incidence has been demonstrated to be sufficiently connected to administration of the drug that FDA deems

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their disclosure appropriate to protecting the public health. The tort system theoretically bars recovery for those effects as a risk assumed by the patient (although in specific cases, plaintiffs have prevailed). The program, similarly, would not provide recovery for such effects.

Other prescription drug injuries, whether labeled or not, are so far removed from the benefits of the product that an individual drug user could not reasonably expect such an injury attendant to the benefit of the product. The best example is the severe adverse reaction that may occur in a small number of users of a drug who cannot be identified. The program would be designed to allow recovery for such injuries, even where the existing tort system might not.

Framework of Program

1. **Prescription Drugs to Be Covered:** Coverage would extend to all prescription drugs approved by FDA and issued through an authorized prescription written in the United States and trust territories or for Armed Forces members serving abroad and their dependents. The limitation to United States drugs is justified by importation and reimportation limitations placed on prescription drugs by the Prescription Drug Marketing Act and FDA's recent concerns regarding the scope of the personal use exemption to the importation and reimportation limitations.

2. **Uses to Be Covered:** Coverage would extend to all uses of an eligible prescription drug. Thus, the program would include both off-label use and allegations of erroneous prescribing or dosage.

(a) Attempting to exclude off-label uses would render the program ineffective for a large number of claims that currently clog the tort system.

(b) In addition, FDA's current labeling regulations require specific warnings related to common off-label uses where there is lack of substantial evidence of effectiveness of the use and association of the use with clinically significant risk or hazard.

(c) Regarding medication errors, the Fund would be authorized to pursue contribution claims from physicians or prescribers to the extent the Fund pays benefits for doctor or prescriber error.

3. **Claimant Eligibility:** The claim may be denied upon demonstration of use without a prescription issued to the claimant, use by the patient inconsistent with label or physician instructions and warnings, and/or misrepresentation by the patient to the prescriber concerning the existence of conditions material to determining whether the drug is contraindicated.

(a) As part of the petition process, the Claimant would bear the initial burden of providing the prescription and averring as to proper use and lack of material misrepresentation.

(b) The initial burden on the petitioner could also be satisfied by requiring a standardized affidavit from the prescribing physician as to existence and necessity of prescription and appropriate instruction of and disclosure to the patient.

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(c) The Fund could challenge the claim based on medical records and other evidence, but would bear the burden of persuasion.

4. **Parties to be Covered:** The Program would cover manufacturers, health care providers, and pharmacists, with the Fund able to pursue contribution claims against providers and pharmacists for prescribing errors. Such broad coverage would prevent diversion of disproportionate tort burdens to health care providers and pharmacists.

5. **Injuries to be Covered:** The program would include, subject to determination of causation as noted below, all injuries except those within the known risks identified on the labeling at the time the prescription was issued that are so likely to manifest themselves as part of the benefits of the product that their occurrence should reasonably be expected.

(a) To control administrative costs and prevent the system from being overloaded by trivial or frivolous claims, consideration could be given to establishing an injury threshold for compensable claims under the system. Injuries falling below the seriousness threshold would not be compensated.

(b) As noted below, specific determination of those injuries (and their magnitude) that are sufficiently known and likely to occur could be tied to FDA's determinations of risk as reflected in its labeling decisions. Caps on damages for wrongful death or pain and suffering, similar to the $250,000 cap for each contained in the Vaccine Act, would be included.

(c) Over time, experience with the administration of the system may provide a basis for establishing schedules setting compensation amounts for certain injuries. Such schedules could apply presumptively, with claimants free to offer evidence demonstrating that the scheduled compensation would be insufficient and inappropriate under the circumstances and that, subject to applicable caps, a higher compensation amount should be awarded.

(d) Claims alleging fear of future injury based on exposure (i.e., medical monitoring claims) would not be covered unless FDA determines medical monitoring is warranted based upon experience with a particular drug

(e) Punitive damages would be unavailable under the system.

(f) Under the broad preemption of pharmaceutical-related claims associated with the system, there would be no provision for residual common law or statutory claims for medical monitoring, punitive damages, or liability in excess of awarded amounts.

6. **Determination of Causation**: Over time, FDA would make drug-by-drug determinations of the types and magnitude of injuries that would be entitled to the rebuttable presumption of causation. These determinations would be made as part of FDA's labeling or approval decisions, and would be reviewed periodically based on adverse event reports, additional information requested or received from the manufacturer or other sources, and experience to date of petition determinations.

(a) All other injuries would be subject to proof of causality by preponderance of evidence.

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(b) FDA's labeling requirements, both proposed and current, require that labeling categorize adverse reactions by frequency (most frequent, less frequent, and rare) and severity. These determinations could provide the basis for distinguishing between known adverse reactions whose occurrence and magnitude can reasonably be expected from use of the product (those that are most frequent or least severe and should therefore be excluded from coverage) and the known but unpredictable severe adverse reaction.

(c) As the entity ultimately responsible for the risk-benefit determination that permits marketing of a pharmaceutical product, FDA is in the best position to ultimately decide which risks inherent in the product are part of the trade-off for the product's benefits, and which are so out of proportion to the benefits that a claimant should be compensated.

7. **Administration of Program:** Under enabling legislation, the Secretary of Health and Human Services would promulgate regulations establishing a system for the efficient and expeditious determination of petitions, which might include, at the Secretary's discretion, contracting with outside parties experienced in the adjustment of medical claims to make an initial determination of eligibility and amount of award, subject to de novo review by a Special Master and APA review by a district court, thus combining private sector, administrative and judicial resources.

8. **Funding of Program:** Funding would be based on a tax on wholesale sales of each prescription drug.

(a) Adjustments should be considered as cost information is developed or to address other inequities (*e.g.*, adjustments to impose equal tax burdens on manufacturers of "brand name" and "generic" products that present identical risk factors).

(b) Implementing legislation should provide for consideration of the feasibility of the use of risk rating after a set period of years.

REV_00261613

Source: Legal > States Legal - U.S. > Florida > Statutes & Legislative Materials > **FL - LexisNexis Florida Annotated Statutes - Book Browse** ⓘ
TOC: Florida Statutes > /. . . / > PART II DAMAGES > **768.72 Pleading in civil actions; claim for punitive damages.**
Terms: **"punitive damages" /15 assess or award or recover**
Section: **Fla. Stat. § 768.72**

Fla. Stat. § 768.72

LexisNexis (TM) Florida Annotated Statutes

*** THIS DOCUMENT IS CURRENT THROUGH THE 2002 LEGISLATIVE SESSION ***
*** September 2002 Annotation Service ***

TITLE XLV TORTS
CHAPTER 768 NEGLIGENCE
PART II DAMAGES

♦ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Fla. Stat. § 768.72 (2002)

768.72 Pleading in civil actions; claim for punitive damages.

(1) In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted.

(2) A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. As used in this section, the term:

(a) "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.

(b) "Gross negligence" means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

(3) In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of an employee or agent only if the conduct of the employee or agent meets the criteria specified in subsection (2) and:

(a) The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;

(b) The officers, directors, or managers of the employer, principal, corporation, or other legal entity knowingly condoned, ratified, or consented to such conduct; or

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(c) The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.

(4) The provisions of this section shall be applied to all causes of action arising after the effective date of this act.

HISTORY: s. 51, ch. 86-160; s. 1172, ch. 97-102; s. 22, ch. 99-225.

LexisNexis (TM) Notes:
CASE NOTES
TREATISES AND ANALYTICAL MATERIALS
LAW REVIEWS

CASE NOTES
Admiralty Law : Personal Injuries : Maritime Tort Law
Antitrust & Trade Law : Consumer Protection
Business & Corporate Entities : Corporations : Shareholders & Other Constituents : Actions Against Corporations
Civil Procedure : Pleading & Practice : Pleadings : Heightened Pleading Requirements
Civil Procedure : Pleading & Practice : Pleadings : Amended Pleadings
Civil Procedure : Disclosure & Discovery
Civil Procedure : Discovery Methods : Interrogatories
Civil Procedure : Appeals : Appellate Jurisdiction
Civil Procedure : Appeals : Appellate Jurisdiction : State Court Review
Civil Procedure : Appeals : Reviewability
Constitutional Law : Civil Rights Enforcement : Civil Rights Act of 1871
Torts : Damages : Damages Generally
Torts : Damages : Punitive Damages
Torts : Procedure : Discovery
Torts : Procedure : Preemption

Admiralty Law : Personal Injuries : Maritime Tort Law

1. In a maritime claim brought by an employee, the trial court erred when it denied the employer's motion to strike a demand for punitive damages because the employee failed comply with state law procedure set forth in Fla. Stat. ch. 768.72, which required a proffer of record evidence to support a punitive damages claim; as the requirement in ch. 768.72 of showing a reasonable basis for punitive damages did not contradict substantive maritime law and because the standards for whether punitive damages were recoverable remained the same, the statute did not impose additional obligations on the employee who filed in a state court. Norwegian Cruise Lines v. Zareno, 712 So. 2d 791, 1998 Fla. App. LEXIS 7520 (June 24, 1998).

Antitrust & Trade Law : Consumer Protection

REV_00261615

Source: Legal > Legislation & Politics > **State Codes, Constitutions, Court Rules & ALS, All** ⓘ
TOC: Official Code of Georgia Annotated > /. . . / > ARTICLE 1. GENERAL PROVISIONS > **§ 51-12-5.1. Punitive damages**
Terms: **"punitive damages" /15 ("conscious" or intentional)** (Edit Search)

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O.C.G.A. § 51-12-5.1

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TITLE 51. TORTS
CHAPTER 12. DAMAGES
ARTICLE 1. GENERAL PROVISIONS

♦ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

O.C.G.A. § 51-12-5.1 (2002)

§ 51-12-5.1. Punitive damages

(a) As used in this Code section, the term "punitive damages" is synonymous with the terms "vindictive damages," "exemplary damages," and other descriptions of additional damages awarded because of aggravating circumstances in order to penalize, punish, or deter a defendant.

(b) Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of **conscious** indifference to consequences.

(c) **Punitive damages** shall be awarded not as compensation to a plaintiff but solely to punish, penalize, or deter a defendant.

(d) (1) An award of punitive damages must be specifically prayed for in a complaint. In any case in which punitive damages are claimed, the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made. This finding shall be made specially through an appropriate form of verdict, along with the other required findings.

(2) If it is found that punitive damages are to be awarded, the trial shall immediately be recommenced in order to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case. It shall then be the duty of the trier of fact to set the amount to be awarded according to subsection (e), (f), or (g) of this Code section, as applicable.

(e) (1) In a tort case in which the cause of action arises from product liability, there shall be no limitation regarding the amount which may be awarded as punitive damages. Only one award of punitive damages may be recovered in a court in this state from a defendant for any act or omission if the cause of action arises from product liability, regardless of the

number of causes of action which may arise from such act or omission.

(2) Seventy-five percent of any amounts awarded under this subsection as punitive damages, less a proportionate part of the costs of litigation, including reasonable attorney's fees, all as determined by the trial judge, shall be paid into the treasury of the state through the Office of Treasury and Fiscal Services. Upon issuance of judgment in such a case, the state shall have all rights due a judgment creditor until such judgment is satisfied and shall stand on equal footing with the plaintiff of the original case in securing a recovery after payment to the plaintiff of damages awarded other than as punitive damages. A judgment debtor may remit the state's proportional share of punitive damages to the clerk of the court in which the judgment was rendered. It shall be the duty of the clerk to pay over such amounts to the Office of Treasury and Fiscal Services within 60 days of receipt from the judgment debtor. This paragraph shall not be construed as making the state a party at interest and the sole right of the state is to the proceeds as provided in this paragraph.

(f) In a tort case in which the cause of action does not arise from product liability, if it is found that the defendant acted, or failed to act, with the specific intent to cause harm, or that the defendant acted or failed to act while under the influence of alcohol, drugs other than lawfully prescribed drugs administered in accordance with prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to that degree that his or her judgment is substantially impaired, there shall be no limitation regarding the amount which may be awarded as punitive damages against an active tort-feasor but such damages shall not be the liability of any defendant other than an active tort-feasor.

(g) For any tort action not provided for by subsection (e) or (f) of this Code section in which the trier of fact has determined that punitive damages are to be awarded, the amount which may be awarded in the case shall be limited to a maximum of $250,000.00.

(h) This Code section shall apply only to causes of action arising on or after April 14, 1997.

HISTORY: Code 1981, § 51-12-5.1, enacted by Ga. L. 1987, p. 915, § 5; Ga. L. 1993, p. 1402, § 18; Ga. L. 1997, p. 837, § 1.

NOTES:
CODE COMMISSION NOTES. --Pursuant to Code Section 28-9-5, in 1997, in subection (f) "tort-feasor" was substituted for "tortfeasor" in two places and "judgment" was substituted for "judgement" near the middle and "April 14, 1997" was substituted for "the effective date of this subsection" at the end of subsection (h).

LAW REVIEWS. --For article, "Products Liability Law in Georgia Including Recent Developments," see 43 Mercer L. Rev. 27 (1991). For article, "The Case for Allowing Punitive Damages in Georgia Wrongful Death Actions: The Need to Remove an Unjust Anomaly in Georgia Law," see 45 Mercer L. Rev. 1 (1993). For article commenting on the 1997 amendment of this section, see 14 Georgia St. U. L. Rev. 63 (1997). For annual survey article on tort law, see 50 Mercer L. Rev. 335 (1998). For annual survey article discussing tort law, see 51 Mercer L. Rev. 461 (1999). For article, "Insurance," see 53 Mercer L. Rev. 281 (2001).

For note, "Mack Trucks, Inc. v. Conkle: The Georgia Supreme Court Tells the Legislature to Keep On Truckin' When Appropriating Punitive Damage Awards to the State Treasury," see 45 Mercer L. Rev. 1439 (1994).

For comment, "Are Excessive Punitive Damages Unconstitutional in Georgia?: This Question and More in Colonial Pipeline Co. v. Brown," see 6 Ga. St. U.L. Rev. 85 (1989). For comment, "Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective," see 40 Emory L.J. 303 (1991).

JUDICIAL DECISIONS

REV_00261617

Source: Legal > States Legal - U.S. > Idaho > Statutes & Legislative Materials > **ID - Idaho Code Annotated** ⓘ
TOC: Idaho Code Annotated > / . . . / > CHAPTER 16. [PERIODIC PAYMENT OF JUDGMENTS -- LIMITATION ON CERTAIN TORT DAMAGES AND LIABILITIES] > **§ 6-1604. Limitation on punitive damages**
Terms: **"punitive damages" /10 award or assess or recover** (Edit Search)

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Idaho Code § 6-1604

Idaho Code
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*** STATUTES CURRENT THRU THE 2002 CUMULATIVE SUPPLEMENT ***
*** (2ND REGULAR SESSION OF THE 56TH LEGISLATURE) ***
*** ANNOTATIONS CURRENT THROUGH MARCH 19, 2002 ***

CODE OF CIVIL PROCEDURE
TITLE 6. ACTIONS IN PARTICULAR CASES
CHAPTER 16. [PERIODIC PAYMENT OF JUDGMENTS -- LIMITATION ON CERTAIN TORT DAMAGES AND LIABILITIES]

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Idaho Code § 6-1604 (2002)

§ 6-1604. Limitation on punitive damages

(1) In any action seeking recovery of punitive damages, the claimant must prove, by a preponderance of the evidence, oppressive, fraudulent, wanton, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.

(2) In all civil actions in which punitive damages are permitted, no claim for damages shall be filed containing a prayer for relief seeking punitive damages. However, a party may, pursuant to a pretrial motion and after hearing before the court, amend the pleadings to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the pleadings if the moving party establishes at such hearing a reasonable likelihood of proving facts at trial sufficient to support an **award of punitive damages.** A prayer for relief added pursuant to this section shall not be barred by lapse of time under any applicable limitation on the time in which an action may be brought or claim asserted, if the time prescribed or limited had not expired when the original pleading was filed.

(3) The limitations on noneconomic damages contained in this act are not applicable to punitive damages.

(4) Nothing in this section is intended to change the rules of evidence or standards of proof used by a trier of fact in finding punitive damages.

HISTORY: I.C., § 6-1604, as added by 1987, ch. 278, § 1, p. 571.

NOTES:
COMPILER'S NOTES. The words "this act" refer to S.L. 1987, ch. 278, which is compiled as §§ 5-335, 5-336, 6-801 -- 6-804, 6-807, 6-1601 -- 6-1605, 12-123, 12-301 -- 12-303, 28-22-

REV_00261618

104, 41-336A, 41-1329, 41-1329A, 41-1815, 41-2401, and 72-311.

Section 18 of S.L. 1987, ch. 278 read: "The provisions of this act shall take effect on July 1, 1987, provided however, that Section [Sections] 1 through 11 shall apply only to causes of action which accrue on and after July 1, 1987. Provided further, that Section 6-1603, Idaho Code, as enacted herein, is hereby repealed and does sunset for causes of action which accrue after June 30, 1992."

CITED IN: Doe v. Cutter Biological, 844 F. Supp. 602 (D. Idaho 1994); Mac Tools, Inc. v. Griffin, 126 Idaho 193, 879 P.2d 1126 (1994); Vaught v. Dairyland Ins. Co., 131 Idaho 357, 956 P.2d 674 (1998); McGilvray v. Farmers New World Life Ins. Co., -- Idaho --, 28 P.3d 380 (2001); King v. Lang, -- Idaho --, 42 P.3d 698 (2002).

ANALYSIS
Basis for Award.
Burden of Proof.
Determining Amount of Damages.
Discretion of Court.
Failure to Strike Improper Claim.
Federal Diversity Cases.
Hearing.
No Malice Found.

BASIS FOR **AWARD.**

Punitive damages are reserved for the most unusual and compelling circumstances; the reason for the disfavor with regard to awarding punitive damages is the emphasis on punishment and deterrence rather than compensation of plaintiff, which is the normal role for a civil action. O'Neil v. Vasseur, 118 Idaho 257, 796 P.2d 134 (Ct. App. 1990).

As a matter of law, the failure to disclose a subsequently discovered fact, absent a duty to do so, is not such conduct that would support an **award of punitive damages** under this section. Duffin v. Idaho Crop Imp. Ass'n, 126 Idaho 1002, 895 P.2d 1195 (1995).

Nominal damages to a landowner who was prevented from accessing his property by an easement across a neighbor's property, where the neighbor erected a locked gate across the easement road, supported a **punitive damages award** because overwhelming evidence showed that the neighbor was aware of the easement. Harwood v. Talbert, -- Idaho --, 39 P.3d 612 (2001).

BURDEN OF PROOF.

The district judge did not abuse his discretion by denying plaintiff's claim for punitive damages where defendant failed to establish a reasonable likelihood he could prove by a preponderance of the evidence that plaintiff acted oppressively, fraudulently, wantonly, maliciously or outrageously. Weaver v. Stafford, 134 Idaho 691, 8 P.3d 1234 (2000).

DETERMINING AMOUNT OF DAMAGES.

Calculating 5% of insurance company's annual profit in arriving at an amount of punitive damages was a reasonable method of determining an appropriate amount for deterrent purposes where facts established deceptive marketing practices and bad faith denial of benefits practices by insurance company which were likely to continue if not deterred. Walston v. Monumental Life Ins. Co., 129 Idaho 211, 923 P.2d 456 (1996).

DISCRETION OF COURT.

Where the district court acted consistent with legal standards applicable to punitive damages and reached its decision by an exercise of reason, the court did not abuse its discretion in determining not to allow the jury to consider the plaintiff's claim for punitive damages. Polk v. Robert D. Larrabee Family Home Ctr., 135 Idaho 303, 17 P.3d 247 (2000).

FAILURE TO STRIKE IMPROPER CLAIM.

REV_00261619

Source: Legal > States Legal - U.S. > Illinois > Statutes & Legislative Materials > **IL - Illinois Compiled Statutes Annotated** ⓘ
TOC: Illinois Compiled Statutes Annotated > /. . . / > PART 11. TRIAL > **§ 735 ILCS 5/2-1115.05. Limitations on recovery of punitive damages in cases other than healing art or legal malpractice cases**
Terms: **"punitive damages" and wanton or willful or disregard or indifference** (Edit Search)

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735 ILCS 5/2-1115.05

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*** ANNOTATIONS CURRENT THROUGH MARCH 25, 2002 ***

CHAPTER 735. CIVIL PROCEDURE
CODE OF CIVIL PROCEDURE
ARTICLE II. CIVIL PRACTICE
PART 11. TRIAL

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

735 ILCS 5/2-1115.05 (2002)

§ 735 ILCS 5/2-1115.05. Limitations on recovery of **punitive damages** in cases other than healing art or legal malpractice cases

Sec. 2-1115.05. Limitations on recovery of **punitive damages** in cases other than healing art or legal malpractice cases. (a) In all cases on account of bodily injury, or physical damage to property based on negligence, or product liability based on any theory or doctrine, other than those cases described in Section 2-1115 [735 ILCS 5/2-1115], **punitive damages** may be awarded only if actual damages are awarded. The amount of **punitive damages** that may be awarded for a claim in any civil action subject to this Section shall not exceed 3 times the amount awarded to the claimant for the economic damages on which such claim is based.

(b) To recover **punitive damages** in cases described in subsection (a), a plaintiff must show by clear and convincing evidence that the defendant's conduct was with evil motive or with a reckless and outrageous **indifference** to a highly unreasonable risk of harm and with a conscious **indifference** to the rights and safety of others. "Clear and convincing evidence" means that measure or degree of proof that will produce in the mind of the trier of fact a high degree of certainty as to the truth of the allegations sought to be established. This evidence requires a greater degree of persuasion than is necessary to meet the preponderance of the evidence standard.

(c) In any action including a claim for **punitive damages,** a defendant may request that the issues relating to **punitive damages** be tried separately from the other issues in the action. If such a request is made, the trier of fact shall first hear evidence relevant to, and render a verdict upon, the defendant's liability for compensatory damages and the amount thereof. If the trier of fact makes an award of actual damages, the same trier of fact shall immediately hear any additional evidence relevant to, and render a verdict upon, the defendant's liability

for **punitive damages** and the amount thereof. If no award of actual damages is made, the claim for **punitive damages** shall be dismissed. If the defendant requests a separate proceeding concerning liability for **punitive damages** pursuant to this Section, and the proceeding is held, evidence relevant only to the claim of **punitive damages** shall be inadmissible in any proceeding to determine whether compensatory damages are to be awarded.

(d) The limitations of subsection (a) shall not apply in a case in which a plaintiff seeks damages against an individual on account of death, bodily injury, or physical damage to property based on any theory or doctrine due to an incident or occurrence for which the individual has been charged and convicted of a criminal act for which a period of incarceration is or may be a part of the sentence.

(e) Nothing in this Section shall be construed to create a right to recover **punitive damages.**

(f) This amendatory Act of 1995 applies to causes of action accruing on or after its effective date.

HISTORY:
Source: P.A. 89-7, § 15.

NOTES:
NOTE.
P.A. 89-7, which enacted this section, was declared unconstitutional in Best v. Taylor Mach. Works, 179 Ill. 2d 367, 228 Ill. Dec. 636, 689 N.E.2d 1057 (1997).

EFFECTIVE DATE.
Section 995 of P.A. 89-7 made this section effective upon becoming law. The Act was approved March 9, 1995 and applicable to causes of action as specified in each Section or part of the Act.

LEGAL PERIODICALS
For note, "Illinois' Landmark Tort Reform: The Sponsor's Policy Explanation," 27 Loy. U. Chi. L.J. 805 (1996).
For comment, "The 1995 Illinois Civil Justice Reform Act: Has the Baby Been Thrown Out with the Bath Water?," 20 S. Ill. U.L.J. 117 (1996).
For article, "Illinois Tort Reform: The Judge's Perspective," see 84 Ill. B.J. 124 (1996).
For article, "**Punitive Damages:** The U.S. Supreme Court's Meandering Path," see 83 Ill. B.J. 576 (1995).

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REV_00261621

Minnesota Statutes 2002, Table of Chapters

Table of contents for Chapter 549

549.20 Punitive damages.

Subdivision 1. **Standard.** (a) Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.

(b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

(1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or

(2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Subd. 2. **Master and principal.** Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if:

(a) the principal authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal deliberately disregarded a high probability that the agent was unfit, or

(c) the agent was employed in a managerial capacity with authority to establish policy and make planning level decisions for the principal and was acting in the scope of that employment, or

(d) the principal or a managerial agent of the principal, described in clause (c), ratified or approved the act while knowing of its character and probable consequences.

Subd. 3. **Factors.** Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

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Subd. 4. **Separate proceeding.** In a civil action in which punitive damages are sought, the trier of fact shall, if requested by any of the parties, first determine whether compensatory damages are to be awarded. Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages is not admissible in that proceeding. After a determination has been made, the trier of fact shall, in a separate proceeding, determine whether and in what amount punitive damages will be awarded.

Subd. 5. **Judicial review.** The court shall specifically review the punitive damages award in light of the factors set forth in subdivision 3 and shall make specific findings with respect to them. The appellate court, if any, also shall review the award in light of the factors set forth in that subdivision. Nothing in this section may be construed to restrict either court's authority to limit punitive damages.

HIST: 1978 c 738 s 4; 1986 c 444; 1990 c 555 s 15-18

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REV_00261623

Source: Legal > Legislation & Politics > **State Codes, Constitutions, Court Rules & ALS, All** ⓘ
TOC: Mississippi Code of 1972 Annotated > /. . . / > CHAPTER 1. PRACTICE AND PROCEDURE PROVISIONS COMMON TO COURTS > **§ 11-1-65. Punitive damages**
Terms: **"punitive damages" /15 ("conscious" or intentional)** (Edit Search)

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Miss. Code Ann. § 11-1-65

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*** CURRENT THROUGH THE 2002 REGULAR AND FIRST EXTRAORDINARY SESSION ***
*** STATE COURT ANNOTATIONS CURRENT THROUGH APRIL 30, 2002 ***
*** FEDERAL COURT ANNOTATIONS CURRENT THROUGH MARCH 10, 2002 ***

TITLE 11. CIVIL PRACTICE AND PROCEDURE
CHAPTER 1. PRACTICE AND PROCEDURE PROVISIONS COMMON TO COURTS

♦ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Miss. Code Ann. § 11-1-65 (2001)

§ 11-1-65. Punitive damages

(1) In any action in which punitive damages are sought:

(a) Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.

(b) In any action in which the claimant seeks an award of punitive damages, the trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages.

(c) If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing before the same trier of fact to determine whether punitive damages may be considered.

(d) The court shall determine whether the issue of punitive damages may be submitted to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount.

(e) In all cases involving an award of punitive damages, the fact finder, in determining the amount of punitive damages, shall consider, to the extent relevant, the following: the defendant's financial condition and net worth; the nature and reprehensibility of the defendant's wrongdoing, for example, the impact of the defendant's conduct on the plaintiff, or the relationship of the defendant to the plaintiff; the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm; the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; and any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages. The trier of fact shall be instructed that the primary

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purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others while the purpose of compensatory damages is to make the plaintiff whole.

(f) (i) Before entering judgment for an award of punitive damages the trial court shall ascertain that the award is reasonable in its amount and rationally related to the purpose to punish what occurred giving rise to the award and to deter its repetition by the defendant and others.

(ii) In determining whether the award is excessive, the court shall take into consideration the following factors:

1. Whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred;

2. The degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;

3. The financial condition and net worth of the defendant; and

4. In mitigation, the imposition of criminal sanctions on the defendant for its conduct and the existence of other civil awards against the defendant for the same conduct.

(g) The seller of a product other than the manufacturer shall not be liable for punitive damages unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller had actual knowledge of the defective condition of the product at the time he supplied same; or the seller made an express factual representation about the aspect of the product which caused the harm for which recovery of damages is sought.

(2) The provisions of Section 11-1-65 shall not apply to:

(a) Contracts;

(b) Libel and slander; or

(c) Causes of action for persons and property arising out of asbestos.

HISTORY: SOURCES: Laws, 1993, ch. 302, § 2, eff from and after July 1, 1993.

NOTES:
EDITOR'S NOTE. --Laws, 1993, ch. 302, § 5, effective July 1, 1993, provides as follows:
"SECTION 5. This act shall take effect and be in force from and after July 1, 1993. Procedural provisions of this act including subsections (1)(a), (b), (c) and (d) of Section 2 [§ 11-1-65] shall apply to all pending actions in which judgment has not been entered on the effective date of the act and all actions filed on or after the effective date of the act. All other provisions shall apply to all actions filed on or after July 1, 1994."

CROSS REFERENCES. --Provisions of this section as effecting exception to what otherwise might constitute consequential damages, see § 75-2-715.

JUDICIAL DECISIONS

REV_00261625

Source: Legal > Legislation & Politics > **State Codes, Constitutions, Court Rules & ALS, All** ⓘ
TOC: Montana Code Annotated > /. . . / > PART 2 DAMAGES > **27-1-221 Punitive damages -- liability -- proof -- award.**
Terms: **"punitive damages" /15 ("conscious" or intentional)** (Edit Search)

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Mont. Code Anno., § 27-1-221

MONTANA CODE ANNOTATED

*** THIS DOCUMENT IS CURRENT THROUGH THE 2001 LEGISLATION ***

TITLE 27 CIVIL LIABILITY, REMEDIES, AND LIMITATIONS
CHAPTER 1 AVAILABILITY OF REMEDIES -- LIABILITY
PART 2 DAMAGES

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Mont. Code Anno., § 27-1-221 (2001)

27-1-221 Punitive damages -- liability -- proof -- award.

(1) Subject to the provisions of 27-1-220 and this section, reasonable punitive damages may be awarded when the defendant has been found guilty of actual fraud or actual malice.

(2) A defendant is guilty of actual malice if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and:

(a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or

(b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.

(3) A defendant is guilty of actual fraud if the defendant:

(a) makes a representation with knowledge of its falsity; or

(b) conceals a material fact with the purpose of depriving the plaintiff of property or legal rights or otherwise causing injury.

(4) Actual fraud exists only when the plaintiff has a right to rely upon the representation of the defendant and suffers injury as a result of that reliance. The contract definitions of fraud expressed in Title 28, chapter 2, do not apply to proof of actual fraud under this section.

(5) All elements of the claim for punitive damages must be proved by clear and convincing evidence. Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence but less than beyond a reasonable doubt.

(6) Liability for punitive damages must be determined by the trier of fact, whether judge or jury. An award of punitive damages must be unanimous as to liability and amount.

(7) (a) Evidence regarding a defendant's financial affairs, financial condition, and net worth

REV_00261626

is not admissible in a trial to determine whether a defendant is liable for punitive damages. When the jury returns a verdict finding a defendant liable for punitive damages, the amount of punitive damages must then be determined by the jury in an immediate, separate proceeding and be submitted to the judge for review as provided in subsection (7)(c). In the separate proceeding to determine the amount of punitive damages to be awarded, the defendant's financial affairs, financial condition, and net worth must be considered.

(b) When an award of punitive damages is made by the judge, the judge shall clearly state the reasons for making the award in findings of fact and conclusions of law, demonstrating consideration of each of the following matters:

(i) the nature and reprehensibility of the defendant's wrongdoing;

(ii) the extent of the defendant's wrongdoing;

(iii) the intent of the defendant in committing the wrong;

(iv) the profitability of the defendant's wrongdoing, if applicable;

(v) the amount of actual damages awarded by the jury;

(vi) the defendant's net worth;

(vii) previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act;

(viii) potential or prior criminal sanctions against the defendant based upon the same wrongful act; and

(ix) any other circumstances that may operate to increase or reduce, without wholly defeating, punitive damages.

(c) The judge shall review a jury award of punitive damages, giving consideration to each of the matters listed in subsection (7)(b). If after review the judge determines that the jury award of punitive damages should be increased or decreased, the judge may do so. The judge shall clearly state the reasons for increasing, decreasing, or not increasing or decreasing the punitive damages award of the jury in findings of fact and conclusions of law, demonstrating consideration of each of the factors listed in subsection (7)(b).

(8) This section is not intended to alter the Montana Rules of Civil Procedure governing discovery of a defendant's financial affairs, financial condition, and net worth.

HISTORY:

En. Sec. 4290, Civ. C. 1895; re-en. Sec. 6047, Rev. C. 1907; re-en. Sec. 8666, R.C.M. 1921; Cal. Civ. C. Sec. 3294; Field. Civ. C. Sec. 1839; re-en. Sec. 8666, R.C.M. 1935; R.C.M. 1947, 17-208; amd. Sec. 2, Ch. 507, L. 1985; amd. Sec. 2, Ch. 627, L. 1987; amd. Sec. 33, Ch. 16, L. 1991; amd. Sec. 1, Ch. 328, L. 1997.

NOTES:

Part Cross-References

Periodic payment of certain future damages, Title 25, ch. 9, part 4.

REV_00261627

Source: Legal > Legislation & Politics > **State Codes, Constitutions, Court Rules & ALS, All** ⓘ
TOC: Nevada Revised Statutes Annotated > /. . . / > CHAPTER 42. DAMAGES > **§ 42.005. Exemplary and punitive damages: In general; limitations on amount of award; determination in subsequent proceeding**
Terms: **"punitive damages" /15 ("conscious" or intentional)** (Edit Search)

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NRS § 42.005

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*** ANNOTATIONS CURRENT THROUGH CASES PUBLISHED JUNE 4, 2002 ***

TITLE 3. REMEDIES; SPECIAL ACTIONS AND PROCEEDINGS
CHAPTER 42. DAMAGES

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

NRS § 42.005 (2002)

§ 42.005. Exemplary and punitive damages: In general; limitations on amount of award; determination in subsequent proceeding

1. Except as otherwise provided in NRS 42.007, in an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant. Except as otherwise provided in this section or by specific statute, an award of exemplary or punitive damages made pursuant to this section may not exceed:

(a) Three times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is $ 100,000 or more; or

(b) Three hundred thousand dollars if the amount of compensatory damages awarded to the plaintiff is less than $ 100,000.

2. The limitations on the amount of an award of exemplary or punitive damages prescribed in subsection 1 do not apply to an action brought against:

(a) A manufacturer, distributor or seller of a defective product;

(b) An insurer who acts in bad faith regarding its obligations to provide insurance coverage;

(c) A person for violating a state or federal law prohibiting discriminatory housing practices, if the law provides for a remedy of exemplary or punitive damages in excess of the limitations prescribed in subsection 1;

(d) A person for damages or an injury caused by the emission, disposal or spilling of a

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toxic, radioactive or hazardous material or waste; or

(e) A person for defamation.

3. If punitive damages are claimed pursuant to this section, the trier of fact shall make a finding of whether such damages will be assessed. If such damages are to be assessed, a subsequent proceeding must be conducted before the same trier of fact to determine the amount of such damages to be assessed. The trier of fact shall make a finding of the amount to be assessed according to the provisions of this section. The findings required by this section, if made by a jury, must be made by special verdict along with any other required findings. The jury must not be instructed, or otherwise advised, of the limitations on the amount of an award of punitive damages prescribed in subsection 1.

4. Evidence of the financial condition of the defendant is not admissible for the purpose of determining the amount of punitive damages to be assessed until the commencement of the subsequent proceeding to determine the amount of exemplary or punitive damages to be assessed.

5. For the purposes of an action brought against an insurer who acts in bad faith regarding its obligations to provide insurance coverage, the definitions set forth in NRS 42.001 are not applicable and the corresponding provisions of the common law apply.

HISTORY: 1989, ch. 218, § 2, p. 486; 1995, ch. 691, § 5, p. 2669.

CASE NOTES

EDITOR'S NOTE. --The cases below were decided under NRS 42.010 prior to its 1989 amendment and the enactment of this section by Acts 1989, ch. 218.
I. In General.
II. Punitive Damage Award Proper.
III. Punitive Damage Award Improper.

I. IN GENERAL.

PURPOSE OF PUNITIVE DAMAGES. --The concept of punitive damages rests upon a presumed public policy, to punish a wrongdoer for his act and to deter others from acting in similar fashion. Nevada Cement Co. v. Lemler, 89 Nev. 447, 514 P.2d 1180 (1973); Ace Truck & Equip. Rentals, Inc. v. Kahn, 103 Nev. 503, 746 P.2d 132 (1987).

Punitive damages are designed not to reward the victim but to punish the wrongdoer and deter fraudulent, malicious or oppressive conduct. Turnbow v. State, Dep't of Human Resources, 109 Nev. 493, 853 P.2d 97 (1993).

COMPENSATORY DAMAGES. --The Nevada Supreme Court indicates that the terms "bodily injury" only encompass compensatory damages, not punitive damages, for indemnification purposes. Lombardi v. Maryland Cas. Co., 894 F. Supp. 369 (D. Nev. 1995).

WHETHER THE RECORD CONTAINS SUFFICIENT EVIDENCE TO JUSTIFY AN AWARD OF PUNITIVE DAMAGES IS A QUESTION OF LAW, and for the court to decide. Austin v. C & L Trucking, Inc., 610 F. Supp. 465 (D. Nev. 1985).

BUT WHERE THE NECESSARY FACTUAL BASIS FOR PUNITIVE DAMAGES EXISTS, the amount of the award rests with the sound discretion of the jury. Austin v. C & L Trucking, Inc., 610 F. Supp. 465 (D. Nev. 1985).

ALLOWANCE OF PUNITIVE DAMAGES IS DISCRETIONARY. --A plaintiff is never entitled to punitive damages as a matter of right; their allowance or denial rests entirely in the

REV_00261629

Source: Legal > Legislation & Politics > **State Codes, Constitutions, Court Rules & ALS, All** ⓘ
Terms: **"punitive damages" /15 ("conscious" or intentional)** (Edit Search)

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N.C. Gen. Stat. § 1D-15

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*** STATUTES CURRENT THROUGH THE 2001 REGULAR SESSION ***
*** ANNOTATIONS CURRENT THROUGH MARCH 7, 2002 ***

CHAPTER 1D. PUNITIVE DAMAGES

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

N.C. Gen. Stat. § 1D-15 (2002)

§ 1D-15. Standards for recovery of punitive damages

(a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:

(1) Fraud.

(2) Malice.

(3) Willful or wanton conduct.

(b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.

(c) Punitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another. Punitive damages may be awarded against a person only if that person participated in the conduct constituting the aggravating factor giving rise to the punitive damages, or if, in the case of a corporation, the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages.

(d) Punitive damages shall not be awarded against a person solely for breach of contract.

HISTORY: 1995, c. 514, s. 1.

NOTES:
LEGAL PERIODICALS. --For article, "North Carolina's New Punitive Damages Statute: Who's Being Punished, Anyway?," see 74 N.C.L. Rev. 2174 (1996).
For article, "Judicial Boilerplate Language as Torts Decisional Litany: Four Problem Areas in North Carolina," see 18 Campbell L. Rev. 359 (1996).

CASE NOTES

Source: Legal > Legislation & Politics > **State Codes, Constitutions, Court Rules & ALS, All**
TOC: Page's Ohio Revised Code Annotated > /. . . / > [TRIAL BY JURY] > **§ 2315.21 Recovery of punitive or exemplary damages in tort actions.**
Terms: **"punitive damages" /15 ("conscious" or intentional)** (Edit Search)

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ORC Ann. 2315.21

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TITLE XXIII [23] COURTS -- COMMON PLEAS
CHAPTER 2315: TRIAL PROCEDURE
[TRIAL BY JURY]

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

ORC Ann. 2315.21 (Anderson 2002)

STATUS: CONSULT SLIP LAWS CITED BELOW FOR RECENT CHANGES TO THIS DOCUMENT
◆ LEXSEE 2001 Ohio HB 412 -- See sections 1, 2 and 4.

§ 2315.21 Recovery of punitive or exemplary damages in tort actions.

(A) As used in this section:

(1) "Tort action" means a civil action for damages for injury [n1] person or property. "Tort action" includes a product liability claim for damages for injury or loss to person or property that is subject to sections 2307.71 to 2307.80 of the Revised Code, but does not include a civil action for damages for a breach of contract or another agreement between persons.

(2) "Trier of fact" means the jury or, in a nonjury action, the court.

(B) Subject to division (D) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:

(1) The actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult, or that defendant as principal or master authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate;

(2) The plaintiff in question has adduced proof of actual damages that resulted from actions or omissions as described in division (B)(1) of this section.

(C)(1) In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages.

(2) In a tort action, the burden of proof shall be upon a plaintiff in question, by clear and convincing evidence, to establish that the plaintiff is entitled to recover punitive or exemplary damages.

(D) This section does not apply to tort actions against the state in the court of claims or to the extent that another section of the Revised Code expressly provides any of the following:

(1) Punitive or exemplary damages are recoverable from a defendant in question in a tort action on a basis other than that the actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult, or on a basis other than that the defendant in question as principal or master authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate;

(2) Punitive or exemplary damages are recoverable from a defendant in question in a tort action irrespective of whether the plaintiff in question has adduced proof of actual damages;

(3) The burden of proof upon a plaintiff in question to recover punitive or exemplary damages from a defendant in question in a tort action is one other than clear and convincing evidence;

(4) Punitive or exemplary damages are not recoverable from a defendant in question in a tort action.

HISTORY:

: 142 v H 1 (Eff 1-5-88); 146 v H 350 (Eff 1-27-97); 149 v S 108, § 2.01. Eff 7-6-2001.

Not analogous to former RC § 2315.21 (GC § 11421-1a; 120 v 707; Bureau of Code Revision, 10-1-53), repealed 133 v H 1201, § 1, eff 7-1-71.

NOTES:

n1* In division (A)(1), the HB 1 (142 v --) enactment reads "or loss to . . . " The law now reads as a result of the amendment in SB 108 (149 v --).

The provisions of § 3(A)(8) of SB 108 (149 v --) read as follows:

(8) Section 2315.21 of the Revised Code is revived, supersedes the version of the same section that is repealed by Section 2.02 of this act, and includes amendments to respond to division (C)(2) of section 2315.21 of the Revised Code having been held unconstitutional by the Supreme Court of Ohio in

Zoppo v. Homestead Ins. Co.

(1994), 71 Ohio St.3d 552.

CROSS-REFERENCES TO RELATED SECTIONS
Civil liability for--
Performing or attempting partial birth procedure, RC § 2307.53.
Terminating or attempting termination of pregnancy after viability, RC § 2307.52.
Civil recovery for criminal act, RC § 2307.60.
Court of common pleas; jurisdiction to award punitive or exemplary damages, RC § 2305.01.
Damages--
Cable television owner or operator, RC § 2307.62.
Disparagement of perishable agricultural or aquacultural food product, RC § 2307.81.
Nursing home resident grievance, RC § 3721.17.
Right of publicity in individual's persona, RC § 2741.07.
When jury shall determine amount of punitive or exemplary damages, RC § 2315.18.

REV_00261632

Source: Legal > Legislation & Politics > **State Codes, Constitutions, Court Rules & ALS, All** ⓘ
TOC: Oregon Revised Statutes Annotated > /. . . / > DAMAGES > **18.537. Standards for award of punitive damages; required review of award by court; additional reduction of award for remedial measures.**
Terms: **"punitive damages" /15 ("conscious" or intentional)** (Edit Search)

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ORS § 18.537

OREGON REVISED STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH THE 2001 REGULAR SESSION OF THE 71ST LEGISLATIVE ASSEMBLY ***

TITLE 2. PROCEDURE IN CIVIL PROCEEDINGS
CHAPTER 18. JUDGMENTS; COMPARATIVE NEGLIGENCE; DAMAGES; GARNISHMENT DAMAGES

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

ORS § 18.537 (2001)

18.537. Standards for award of punitive damages; required review of award by court; additional reduction of award for remedial measures.

(1) Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a **conscious** indifference to the health, safety and welfare of others.

(2) If an award of **punitive damages** is made by a jury, the court shall review the award to determine whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole, viewing the statutory and common-law factors that allow an award of punitive damages for the specific type of claim at issue in the proceeding.

(3) In addition to any reduction that may be made under subsection (2) of this section, upon the motion of a defendant the court may reduce the amount of any judgment requiring the payment of punitive damages entered against the defendant if the defendant establishes that the defendant has taken remedial measures that are reasonable under the circumstances to prevent reoccurrence of the conduct that gave rise to the claim for punitive damages. In reducing awards of punitive damages under the provisions of this subsection, the court shall consider the amount of any previous judgment for punitive damages entered against the same defendant for the same conduct giving rise to a claim for punitive damages.

HISTORY: 1995 c.688 § 2

CURRENT ANNOTATIONS

NOTES OF DECISIONS

Whether punitive damages are within range awardable by rational juror is not determined by fixed ratio between compensatory damages amount and punitive damages amount.

REV_00261633

Source: Legal > Legislation & Politics > **State Codes, Constitutions, Court Rules & ALS, All** ⓘ
TOC: Pennsylvania Statutes > /. . . / > CHAPTER 5. MEDICAL PROFESSIONAL LIABILITY > **§ 1303.505. Punitive damages**
Terms: **"punitive damages" /15 ("conscious" or intentional)** (Edit Search)

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40 P.S. § 1303.505

PENNSYLVANIA STATUTES, ANNOTATED BY LEXISNEXIS(TM)

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*** SEPTEMBER 2002 ANNOTATION SERVICE ***

PENNSYLVANIA STATUTES
TITLE 40. INSURANCE
CHAPTER 5C. MEDICAL CARE AVAILABILITY AND REDUCTION OF ERROR (MCARE) ACT
CHAPTER 5. MEDICAL PROFESSIONAL LIABILITY

✦ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

40 P.S. § 1303.505 (2002)

§ 1303.505. Punitive damages

(a) AWARD.--PUNITIVE DAMAGES MAY BE AWARDED FOR CONDUCT THAT IS THE RESULT OF THE HEALTH CARE PROVIDER'S WILLFUL OR WANTON CONDUCT OR RECKLESS INDIFFERENCE TO THE RIGHTS OF OTHERS. IN ASSESSING PUNITIVE DAMAGES, THE TRIER OF FACT CAN PROPERLY CONSIDER THE CHARACTER OF THE HEALTH CARE PROVIDER'S ACT, THE NATURE AND EXTENT OF THE HARM TO THE PATIENT THAT THE HEALTH CARE PROVIDER CAUSED OR INTENDED TO CAUSE AND THE WEALTH OF THE HEALTH CARE PROVIDER.

(b) GROSS NEGLIGENCE.--A SHOWING OF GROSS NEGLIGENCE IS INSUFFICIENT TO SUPPORT AN AWARD OF PUNITIVE DAMAGES.

(c) VICARIOUS LIABILITY.--PUNITIVE DAMAGES SHALL NOT BE AWARDED AGAINST A HEALTH CARE PROVIDER WHO IS ONLY VICARIOUSLY LIABLE FOR THE ACTIONS OF ITS AGENT THAT CAUSED THE INJURY UNLESS IT CAN BE SHOWN BY A PREPONDERANCE OF THE EVIDENCE THAT THE PARTY KNEW OF AND ALLOWED THE CONDUCT BY ITS AGENT THAT RESULTED IN THE AWARD OF **PUNITIVE DAMAGES.**

(d) TOTAL AMOUNT OF DAMAGES.--EXCEPT IN CASES ALLEGING **INTENTIONAL** MISCONDUCT, **PUNITIVE DAMAGES** AGAINST AN INDIVIDUAL PHYSICIAN SHALL NOT EXCEED 200% OF THE COMPENSATORY DAMAGES AWARDED. **PUNITIVE DAMAGES,** WHEN AWARDED, SHALL NOT BE LESS THAN $ 100,000 UNLESS A LOWER VERDICT AMOUNT IS RETURNED BY THE TRIER OF FACT.

(e) ALLOCATION.--UPON THE ENTRY OF A VERDICT INCLUDING AN AWARD OF PUNITIVE DAMAGES, THE PUNITIVE DAMAGES PORTION OF THE AWARD SHALL BE ALLOCATED AS FOLLOWS:

(1) 75% shall be paid to the prevailing party; and

REV_00261634

(2) 25% shall be paid to the Medical Care Availability and Reduction of Error Fund.

Source: Legal > Legislation & Politics > **State Codes, Constitutions, Court Rules & ALS, All** ⓘ
TOC: Pennsylvania Statutes > /. . . / > CHAPTER 5. MEDICAL PROFESSIONAL LIABILITY > **§ 1303.505. Punitive damages**
Terms: **"punitive damages" /15 ("conscious" or intentional)** (Edit Search)
View: Full
Date/Time: Friday, October 11, 2002 - 12:33 AM EDT

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Source: Legal > Legislation & Politics > **State Codes, Constitutions, Court Rules & ALS, All** ⓘ
TOC: South Dakota Codified Laws - South Dakota > /. . . / > CHAPTER 21-3. DAMAGES FOR TORTS > **§ 21-3-2. Punitive damages in discretion of jury**
Terms: **"punitive damages" /15 ("conscious" or intentional)** (Edit Search)

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S.D. Codified Laws § 21-3-2

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*** STATUTES CURRENT THROUGH 2003 ADVANCE CODE SERVICE PAMPHLET NUMBER 1. ***
*** ANNOTATIONS CURRENT THROUGH 2002 SD 62 ***

TITLE 21. JUDICIAL REMEDIES
CHAPTER 21-3. DAMAGES FOR TORTS

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

S.D. Codified Laws § 21-3-2 (2002)

§ 21-3-2. Punitive damages in discretion of jury

In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, or in any case of wrongful injury to animals, being subjects of property, committed intentionally or by willful and wanton misconduct, in disregard of humanity, the jury, in addition to the actual damage, may give damages for the sake of example, and by way of punishing the defendant.

HISTORY: Source: CivC 1877, §§ 1946, 1974; CL 1887, §§ 4580, 4607; RCivC 1903, §§ 2292, 2319; RC 1919, §§ 1965, 1991; SDC 1939 & Supp 1960, § 37.1902.
See Cal Civ Code, § 3294.

NOTES:
CROSS-REFERENCES.
Interference with lawful hunting or fishing, punitive damages authorized, § 41-1-10.
Minors, restriction on liability for punitive damages, § 26-1-4.
Persons of unsound mind, restriction on liability for punitive damages, § 20-11A-5.

ABUSE OF PROCESS.
Creditor who knowingly levied against exempt property of judgment debtor could be held liable for punitive damages resulting from conversion as well as interest; fact that damages were awarded by court on directed verdict rather than by jury was inconsequential and court could properly include a fixed amount as interest where length of time was certain. Roberts v. Shaffer (1916) 36 SD 551, 156 NW 67.
Surety on attachment bond is not liable in damages for wrongful attachment except upon showing that attachment was malicious and without probable cause. Slaughter v. Nolan (1918) 41 SD 134, 169 NW 232.
Upon showing of malice attending wrongful attachment, plaintiff may recover in separate action for damages in addition to action on attachment bond. Kirby v. First Nat. Bank of

REV_00261636

Va. Code Ann. § 8.01-52

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TITLE 8.01. CIVIL REMEDIES AND PROCEDURE
CHAPTER 3. ACTIONS
ARTICLE 5. DEATH BY WRONGFUL ACT

✦ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Va. Code Ann. § 8.01-52 (2002)

§ 8.01-52. Amount of damages

The jury or the court, as the case may be, in any such action under § 8.01-50 may award such damages as to it may seem fair and just. The verdict or judgment of the court trying the case without a jury shall include, but may not be limited to, damages for the following:

1. Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent;

2. Compensation for reasonably expected loss of (i) income of the decedent and (ii) services, protection, care and assistance provided by the decedent;

3. Expenses for the care, treatment and hospitalization of the decedent incident.to the injury resulting in death;

4. Reasonable funeral expenses; and

5. Punitive damages may be recovered for willful or wanton conduct, or such recklessness as evinces a conscious disregard for the safety of others.

Damages recoverable under 3, 4 and 5 above shall be specifically stated by the jury or the court, as the case may be. Damages recoverable under 3 and 4 above shall be apportioned among the creditors who rendered such services, as their respective interests may appear. Competent expert testimony shall be admissible in proving damages recoverable under 2 above.

The court shall apportion the costs of the action as it shall deem proper.

HISTORY: Code 1950, § 8-636.1; 1974, c. 444; 1977, cc. 460, 617; 1982, c. 441.

Source: Legal > States Legal - U.S. > Wisconsin > Statutes & Legislative Materials > **WI - Wisconsin Statutes** ⓘ
TOC: Wisconsin Statutes > /. . . / > CHAPTER 895. MISCELLANEOUS GENERAL PROVISIONS
> 895.85. Punitive damages.
Terms: **"punitive damages"** (Edit Search)

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Wis. Stat. § 895.85

WISCONSIN STATUTES

*** THIS DOCUMENT IS CURRENT THRU THE 2000-2001 LEGISLATION ***

PROVISIONS COMMON TO ACTIONS AND PROCEEDINGS IN ALL COURTS
CHAPTER 895. MISCELLANEOUS GENERAL PROVISIONS

✦ **GO TO THE CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Wis. Stat. § 895.85 (2001)

895.85. **Punitive damages.**

(1) DEFINITIONS. In this section:

(a) "Defendant" means the party against whom **punitive damages** are sought.

(b) "Double damages" means those court awards made under a statute providing for twice, 2 times or double the amount of damages suffered by the injured party.

(c) "Plaintiff" means the party seeking to recover **punitive damages.**

(d) "Treble damages" means those court awards made under a statute providing for 3 times or treble the amount of damages suffered by the injured party.

(2) SCOPE. This section does not apply to awards of double damages or treble damages, or to the award of exemplary damages under ss. 46.90 (6) (c), 51.30 (9), 51.61 (7), 103.96 (2), 134.93 (5), 146.84 (1) (b) and (bm), 153.85, 252.14 (4), 252.15 (8) (a), 610.70 (7) (b), 943.245 (2) and (3) and 943.51 (2) and (3)

(3) STANDARD OF CONDUCT. The plaintiff may receive **punitive damages** if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

(4) PROCEDURE. If the plaintiff establishes a prima facie case for the allowance of **punitive damages:**

(a) The plaintiff may introduce evidence of the wealth of a defendant; and

(b) The judge shall submit to the jury a special verdict as to **punitive damages** or, if the case is tried to the court, the judge shall issue a special verdict as to **punitive damages.**

(5) APPLICATION OF JOINT AND SEVERAL LIABILITY. The rule of joint and several liability does not apply to **punitive damages.**

HISTORY: History: 1995 a. 17; 1997 a. 71; 1999 a. 79.

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CASE NOTES:

NOTE: The first 3 cases noted below were decided prior to the adoption of s. 895.85.

Punitive damages may be awarded in products liability cases. Judicial controls over **punitive damage** awards are established. Wangen v. Ford Motor Co. 97 Wis. 2d 260, 294 N.W.2d 437 (1980).

Guidelines for submission of **punitive damages** issues to the jury in a products liability case are discussed. Walter v. Cessna Aircraft Co. 121 Wis. 2d 221, 358 N.W.2d 816 (Ct. App. 1984).

Regardless of the classification of the underlying cause of action, **punitive damages** are recoverable if the defendants conduct was "outrageous." Insurance coverage for **punitive damages** is not contrary to public policy. Brown v. Maxey, 124 Wis. 2d 426, 369 N.W.2d 677 (1985).

In awarding **punitive damages,** the factors to be considered are: 1) the grievousness of the wrongdoers acts; 2) the degree of malicious intent; 3) the potential damage that might have been caused by the acts; and 4) the defendants ability to pay. An award is excessive if it inflicts a punishment or burden that is disproportionate to the wrongdoing. That a judge provided a means for the defendant to avoid paying the **punitive damages** awarded did not render the award invalid. Gianoli v. Pfleiderer, 209 Wis. 2d 509, 563 N.W.2d 562 (Ct. App. 1997).

Nominal damages may support a **punitive damage** award in an action for intentional trespass. A grossly excessive punishment violates due process. Whether **punitive damages** violate due process depends on: 1) the reprehensibility of the conduct; 2) the disparity between the harm suffered and the **punitive damages** awarded; and 3) the difference between the award and other civil or criminal penalties authorized or imposed. Jacque v. Steenberg Homes, 209 Wis. 2d 605, 563 N.W.2d 154 (1997).

A circuit court entering default judgment on a **punitive damages** claim must make inquiry beyond the complaint to determine the merits of the claim and the amount to be awarded. Apex Electronics Corp. v. Gee, 217 Wis. 2d 378, 571 N.W.2d 23 (1998).

The Future of **Punitive Damages.** SPECIAL ISSUE: 1998 WLR No. 1.

The availability of **punitive damages** depends on the character of the particular conduct committed rather than on the theory of liability propounded by the plaintiff. The recovery of **punitive damages** requires that something must be shown over and above the mere breach of duty for which compensatory damages can be given. Unified Catholic Schools of Beaver Dam Education Association v. Universal Card Services Corp. 34 F. Supp. 2d 714, (1999).

Source: Legal > States Legal - U.S. > Wisconsin > Statutes & Legislative Materials > **WI - Wisconsin Statutes** ⓘ
TOC: Wisconsin Statutes > /. . . / > CHAPTER 895. MISCELLANEOUS GENERAL PROVISIONS > **895.85. Punitive damages.**
Terms: **"punitive damages"** (Edit Search)
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HR 1 LIABILITY LIMITS

`SEC. 2363. DEFINITIONS.

`For purposes of this subpart:

`(1) ECONOMIC LOSS- The term `economic loss' means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

`(2) HARM- The term `harm' includes physical, nonphysical, economic, and noneconomic losses.

`(3) NONECONOMIC LOSS- The term `noneconomic loss' means loss for physical or emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society or companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, or any other nonpecuniary loss of any kind or nature.

`(4) SCHOOL- The term `school' means a public or private kindergarten, a public or private elementary school or secondary school, or a home school.

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

`(6) TEACHER- The term `teacher' means--

`(A) a teacher, instructor, principal, or administrator;

`(B) another educational professional who works in a school;

`(C) a professional or nonprofessional employee who--

`(i) works in a school; and

`(ii)(I) in the employee's job, maintains discipline or ensures safety; or

`(II) in an emergency, is called on to maintain discipline or ensure safety; or

`(D) an individual member of a school board (as distinct from the board).

`SEC. 2364. APPLICABILITY.

`This subpart shall only apply to States that receive funds under this Act, and shall apply to such a State as a condition of receiving such funds.

`SEC. 2365. PREEMPTION AND ELECTION OF STATE NONAPPLICABILITY.

`(a) PREEMPTION- This subpart preempts the laws of any State to the extent that such laws are inconsistent with this subpart, except that this subpart shall not preempt any State law that provides additional protection from liability relating to teachers.

`(b) ELECTION OF STATE REGARDING NONAPPLICABILITY- This subpart shall not apply to any civil action in a State court against a teacher with respect to claims arising within that State if such State enacts a statute in accordance with State requirements for enacting legislation--

`(1) citing the authority of this subsection;

`(2) declaring the election of such State that this subpart shall not apply, as of a date certain, to such civil action in the State; and

`(3) containing no other provisions.

`SEC. 2366. LIMITATION ON LIABILITY FOR TEACHERS.

`(a) LIABILITY PROTECTION FOR TEACHERS- Except as provided in subsection (b), no teacher in a school shall be liable for harm caused by an act or omission of the teacher on behalf of the school if--

`(1) the teacher was acting within the scope of the teacher's employment or responsibilities to a school or governmental entity;

`(2) the actions of the teacher were carried out in conformity with Federal, State, and local laws (including rules and regulations) in furtherance of efforts to control, discipline, expel, or suspend a student or maintain order or control in the classroom or school;

`(3) if appropriate or required, the teacher was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice involved in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the teacher's responsibilities;

`(4) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher; and

`(5) the harm was not caused by the teacher operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to--

`(A) possess an operator's license; or

`(B) maintain insurance.

`(b) EXCEPTIONS TO TEACHER LIABILITY PROTECTION- If the laws of a State limit teacher liability subject to one or more of the following conditions, such conditions shall not be construed as inconsistent with this section:

`(1) A State law that requires a school or governmental entity to adhere to risk management procedures, including mandatory training of teachers.

`(2) A State law that makes the school or governmental entity liable for the acts or omissions of its teachers to the same extent as an employer is liable for the acts or omissions of its employees.

ate law that makes a limitation of liability inapplicable if the civil action was brought by an officer of a State or local government pursuant to State or local law.

`(c) LIMITATION ON PUNITIVE DAMAGES BASED ON THE ACTIONS OF TEACHERS-

`(1) GENERAL RULE- Punitive damages may not be awarded against a teacher in an action brought for harm based on the act or omission of a teacher acting within the scope of the teacher's employment or responsibilities to a school or governmental entity unless the claimant establishes by clear and convincing

evidence that the harm was proximately caused by an act or omission of such teacher that constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.

`(2) CONSTRUCTION- Paragraph (1) does not create a cause of action for punitive damages and does not preempt or supersede any Federal or State law to the extent that such law would further limit the award of punitive damages.

`(d) EXCEPTIONS TO LIMITATIONS ON LIABILITY-

`(1) IN GENERAL- The limitations on the liability of a teacher under this subpart shall not apply to any misconduct that--

`(A) constitutes a crime of violence (as that term is defined in section 16 of title 18, United States Code) or act of international terrorism (as that term is defined in section 2331 of title 18, United States Code) for which the defendant has been convicted in any court;

`(B) involves a sexual offense, as defined by applicable State law, for which the defendant has been convicted in any court;

`(C) involves misconduct for which the defendant has been found to have violated a Federal or State civil rights law; or

`(D) where the defendant was under the influence (as determined pursuant to applicable State law) of intoxicating alcohol or any drug at the time of the misconduct.

`(2) HIRING- The limitations on the liability of a teacher under this subpart shall not apply to misconduct during background investigations, or during other actions, involved in the hiring of a teacher.

`(e) RULES OF CONSTRUCTION-

`(1) CONCERNING RESPONSIBILITY OF TEACHERS TO SCHOOLS AND GOVERNMENTAL ENTITIES- Nothing in this section shall be construed to affect any civil action brought by any school or any governmental entity against any teacher of such school.

`(2) CONCERNING CORPORAL PUNISHMENT- Nothing in this subpart shall be construed to affect any State or local law (including a rule or regulation) or policy pertaining to the use of corporal punishment.

`SEC. 2367. ALLOCATION OF RESPONSIBILITY FOR NONECONOMIC LOSS.

`(a) GENERAL RULE- In any civil action against a teacher, based on an act or omission of a teacher acting within the scope of the teacher's employment or responsibilities to a school or governmental entity, the liability of the teacher for noneconomic loss shall be determined in accordance with subsection (b).

`(b) AMOUNT OF LIABILITY-

`(1) IN GENERAL-

`(A) LIABILITY- Each defendant who is a teacher shall be liable only for the amount of noneconomic loss allocated to that defendant in direct proportion to the percentage of responsibility of that defendant (determined in accordance with paragraph (2)) for the harm to the claimant with respect to which that defendant is liable.

`(B) SEPARATE JUDGMENT- The court shall render a separate judgment against each defendant in an amount determined pursuant to subparagraph (A).

`(2) PERCENTAGE OF RESPONSIBILITY- For purposes of determining the amount of noneconomic loss allocated to a defendant who is a teacher under this section, the trier of fact shall determine the percentage of responsibility of each person responsible for the claimant's harm, whether or not such person is a party to the action.

`(c) RULE OF CONSTRUCTION- Nothing in this section shall be construed to preempt or supersede any Federal or State law that further limits the application of joint liability in a civil action described in subsection (a), beyond the limitations established in this section.

`SEC. 2368. EFFECTIVE DATE.

`(a) IN GENERAL- This subpart shall take effect 90 days after the date of enactment of the No Child Left Behind Act of 2001.

`(b) APPLICATION- This subpart applies to any claim for harm caused by an act or omission of a teacher if that claim is filed on or after the effective date of the No Child Left Behind Act of 2001 without regard to whether the harm that is the subject of the claim or the conduct that caused the harm occurred before such effective date.

February 25, 2002

State Punitive Damages Provisions

- **Twenty-nine states and the District of Columbia have no limits on punitive damage awards (except by constitutional standards):**

  AZ, AR, CA, DE, DC, HI, ID, IL, IA, KY, ME, MD, MN, MS, MO, MT, NM, NY, OH, OR, PA, RI, SC, SD, TN, UT, VT, WV, WI and WY.

- **Six states have abolished punitive damages completely:**

  LA, MA, MI, NE, NH and WA.

- **Fifteen states have limited punitive damage awards:**

  AL: In nonphysical injury cases against large businesses, punitive damages are limited to the greater of three times compensatory damages or $500,000; in nonphysical injury cases against small businesses with a net worth of less than $2 million, limited to $50,000 or 10% of net worth up to $200,000; in personal injury cases, limited to the greater of three times compensatory damages or $1.5 million. Limits to be adjusted Jan. 1, 2003, and at three year intervals thereafter in accordance with the Consumer Price Index.

  AK: Punitive damages are limited to the greater of three times compensatory damages or $500,000. In cases involving actual malice, punitive damages are limited to the greater of four times compensatory damages or four times aggregate amount of financial gain that the defendant received as a result of its conduct or $7 million.

  CO: Punitive damages may not exceed compensatory damages.

  CT: Punitive damages in product liability actions are limited to two times compensatory damages.

  FL: Punitive damages are limited to the greater of three times compensatory damages or $500,000; if the trier of fact finds the defendant's conduct was "motivated solely by unreasonable financial gain" punitive damages may be awarded up to the greater of four times compensatory damages or $2 million; no cap applies if the defendant had a "specific intent to harm the claimant." Punitive damages may not be awarded more than once for a single act or course of conduct unless the court finds by clear and convincing evidence that the prior award was insufficient to punish the defendant.

  GA: Punitive damages are limited to $250,000 unless the plaintiff demonstrated that the defendant acted with a specific intent to harm.

IN: Punitive damages are limited to the greater of three times compensatory damages or $50,000.

KS: Punitive damages are limited to the lesser of $5 million or the defendant's annual gross income. If the court finds that the profitability of the conduct exceeds the amount of the general limitation, the court may award an amount equal to 1½ times the amount of the profit which the defendant gained or is expected to gain as a result of the conduct.

NV: Punitive damages are limited to three times compensatory damages if the amount of compensatory damages is $100,000 or more; and $300,000 if the amount of compensatory damages is less than $100,000. Limits do not apply to an insurer who acts in bad faith regarding its obligations to provide insurance coverage or in product liability actions.

NJ: Punitive damages are limited to greater of five times compensatory damages or $350,000.

NC: Punitive damages are limited to the greater of three times compensatory damages or $250,000.

ND: Punitive damages are limited to the greater of two times compensatory damages or $250,000.

OK: Punitive damages may not exceed the greater of $100,000 or compensatory damages. Where the jury finds by clear and convincing evidence that the defendant acted with malice or an insurer intentionally acted in bad faith, punitive damages may not exceed the greater of $500,000 or two times compensatory damages or the amount of the increased financial gain to the defendant.

TX: Punitive damages limited to the greater of two times economic damages plus amount equal to non-economic damages up to $750,000, or $200,000.

VA: Punitive damages may not exceed $350,000.

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January 25, 2002

State Joint and Several Liability Provisions

- **Fourteen states and the District of Columbia allow unlimited joint and several liability**:

  AL, AR, DE, DC, HI, IL, ME, MD, NC, PA, RI, SC, VT and VA.

- **Eleven states have abolished joint and several liability completely**:

  AK, AZ, CO, IN, KS, KY, LA, ND, OR, TN and WY.

- **Twenty-five states have limited joint and several liability**:

  CA: Joint liability has been abolished for noneconomic damages only.

  CT: Defendants are generally only liable in proportion to their share of responsibility. If a defendant is insolvent or its share is otherwise uncollectible, the remaining defendants may be required to pay that defendant's share of the damages according to their percentages of negligence.

  FL: If plaintiff is at fault, joint liability is abolished for: (a) any defendant found 10% or less at fault; (b) economic damages in excess of $200,000 for any defendant found to be more than 10% but less than 25% at fault; (c) economic damages in excess of $500,000 for any defendant found at least 25% but no more than 50% at fault; (d) economic damages in excess of $1 million for any defendant found more than 50% at fault. If plaintiff is not at fault, joint liability abolished for: (a) any defendant found to be less than 10% at fault; (b) economic damages for any defendant found at least 10% but less than 25% at fault; (c) economic damages in excess of $500,000 for any defendant found at least 25% but not more than 50% at fault; (d) economic damages in excess of $1 million for any defendant found at least 25% but not more than 50% at fault; and (e) economic damages in excess of $2 million for any defendant found more than 50% at fault. Joint liability does not apply to any defendant who is found to be less at fault than the plaintiff.

  GA: Joint liability applies, but can be disregarded in certain cases where the plaintiff is partially at fault.

  ID: Joint liability has been abolished, except in cases arising out of a violation of any state or federal law or regulation related to hazardous or toxic waste or substances or solid waste disposal sites, or any cause of action arising from the manufacture of any medical devices or pharmaceutical products.

  IA: Joint liability has been abolished for non-economic damages. Joint liability has been abolished for economic damages for defendants less than 50% at fault.

MA: Each defendant is liable to the extent of that defendant's proportionate share of the entire common liability, without regard to his relative degree of fault. Thus, in a two-defendant case, a defendant found 1% negligent can be compelled to pay 50% of the judgment.

MI: Joint liability has been abolished, except in medical malpractice cases or criminal conduct involving gross negligence or the use of drugs or alcohol.

MN: A defendant whose fault is 15% or less is only liable up to four times that defendant's percentage of fault.

MS: Joint liability has been abolished to the extent needed for the plaintiff to recover 50% of damages.

MO: If the plaintiff was at fault, joint liability is limited to two times the defendant's percentage of fault.

MT: Joint liability has been abolished except for defendants found to be more than 50% at fault, except that joint liability shall apply in actions arising from an act or omission that violates a state environmental law relating to hazardous or deleterious substances.

NE: Joint liability has been abolished for non-economic damages.

NV: Joint liability has been abolished for defendants less at fault than the plaintiff, except in products liability actions, strict liability actions, or actions involving the emission, disposal or spillage of a toxic or hazardous substance.

NH: Joint liability has been abolished for defendants less than 50% at fault.

NJ: Joint liability has been abolished for defendants less than 60% at fault.

NM: Joint liability has been abolished, except in strict liability cases, cases involving vicarious liability, or "situations not covered by any of the foregoing and having a sound basis in public policy."

NY: Joint liability has been abolished for non-economic damages for defendants less than 50% at fault, except when the defendant is found liable for: (1) use, operation, or ownership of a motor vehicle; (2) having acted with reckless disregard for the safety of others; (3) certain provisions of labor law; (4) unlawfully releasing hazardous substances; and (5) product liability actions where the manufacturer of the product is not a party to the action, jurisdiction over the manufacturer could not be obtained, and liability would have been imposed on the manufacturer through strict liability.

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OH: Joint liability has been abolished for non-economic damages, but only if the plaintiff was contributorily negligent or impliedly assumed the risk that caused the harm.

OK: Joint liability is abolished if the plaintiff was at fault.

SD: Joint liability is limited to two times the percentage of fault of any defendant found to be less than 50% at fault.

TX: Joint liability has been abolished except for defendants found to be more than 50% at fault. In cases involving toxic torts, a defendant is jointly liable if that defendant's fault is 15% or greater.

WA: Joint liability has been abolished if the plaintiff is found to be at fault.

WV: In medical malpractice actions, joint liability has been abolished for defendants found to be less than 25% at fault.

WI: Joint liability has been abolished for defendants found to be less than 51% at fault.

REV_00261663

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

March 8, 2000

Honorable Henry J. Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Administration, updating the preliminary views of the Department of Justice presented to you on October 26, 1999, regarding H. R. 1283, the "Fairness in Asbestos Compensation Act of 1999." H.R. 1283 has changed considerably since our last letter, which raised a number of issues and questions that we have spent the last several months analyzing. In recent weeks, we have received several amendments, including the latest amendment, in the nature of a substitute, on March 3.[1] We understand that the Committee has spent substantial time crafting the legislation, and we have met with your staff and others working on behalf of the proposed legislation. As we have informed your staff, we remain interested in continuing our dialogue about these very important and difficult issues.

Like the Committee, the Department of Justice wants to see asbestos claims processed fairly, efficiently, and quickly. We share the same concerns and sympathies for the victims of asbestos exposure. As the Committee knows, the diseases that result from exposure to asbestos can cause great suffering, and often lead to quick and painful deaths. Like the Committee, we have considered at great length the question of how to ensure prompt and appropriate compensation for individuals harmed by exposure to asbestos. The question for both the Department and the Committee, we believe, is whether the proposed solution improves upon the status quo by ensuring faster and more equitable compensation to asbestos victims. We could not support any proposal that fails to improve the present system or hinders the progress made in compensating asbestos victims.

We oppose H.R. 1283 for a number of reasons, including:

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[1] While the latest amendment has not yet been introduced, we understand that the Committee intends to make it a substitute for the currently pending bill. Therefore, in this letter, "H.R. 1283" refers to this amendment, entitled "Asbestos Compensation Act of 2000."

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seek further review through an appeal to the Court of Federal Claims, and ultimately to a U.S. Court of Appeals. Section 106.

Third, for a claimant determined to be medically eligible, if the claimant decided to use the administrative system, he/she would have to name all defendants and submit a verified, particularized statement providing, with respect to each defendant, the basis for the allegation. The amount of time permitted for such a filing is not yet determined. Section 103(a)(2). Fourth, upon finding that the claimant's statement met the requirements of the bill, the Administrator would have to provide notice to each named defendant. The Administrator is not given a deadline for doing so. Section 103(a)(3).

Fifth, each named defendant in turn would have the right to assert third party claims, and likely would be entitled to discovery for the purpose of obtaining information necessary to identify all such additional defendants. This discovery, to be determined by an Administrative Law Judge, would not be subject to statutory or regulatory deadlines and could itself take months, particularly given the history of disputes regarding the allocation of responsibility among asbestos defendants. Section 103(a)(4).

As we read H.R. 1283, it is only after these five events occur that the claimant would be entitled to receive a good faith settlement offer from the named defendants. It is entirely likely that a claimant under the new administrative system would face a substantial wait before receiving even an initial settlement offer, let alone full compensation. That is not a material improvement over the current system. Indeed, for many claimants, the wait to work their way through the system would follow the wait for the system to be erected, resulting in years of delay in compensation to the sick.

Moreover, even if a claimant is able to resolve his or her claim, H.R. 1283 would create the likelihood of bitter litigation over one of the most contentious issues in asbestos suits: apportionment of liability among the defendant companies. In many cases, it is this dispute which occupies the most time and resources. Rather than attempt to reduce this litigation, the legislation would insert the U.S. government further into the maelstrom, by obliging the Trustee to litigate against defendants in an effort to recover the funds awarded to the claimant. Section 104. The Trustee would be prohibited from even acknowledging in court the fact or the amount of the settlement for which it is seeking reimbursement. Section 209. Meanwhile, the defendants would remain as capable and likely as they are today to attempt to elude paying their appropriate share of liability. Given the litigation history over apportionment of liability, we believe years of litigation would be likely, involving the U.S. government in matters that previously have remained a private dispute, and - to the extent the defendants were successful individually in defeating U.S. attempts to recover the full settlement amount - leaving the taxpayer to pay the difference and reducing the funds available to victims in future settlements.

Finally, one aspect of H.R. 1283 raises constitutional concerns. H.R. 1283's provision for the appointment of the OAC's Medical Director by the Administrator of the OAC, Section 101(c), appears to run afoul of the Appointments Clause. The Director is an inferior officer whose appointment must be vested "in the President alone, in the Courts of Law, or in the Heads

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of Departments." Because the Attorney General may remove the Administrator of the OAC for cause (see Section 101(a)), we do not believe the Administrator to be the head of a department for purposes of the Appointments Clause.[7]

To be clear, the concerns we express about H.R. 1283 do not stem from a "can't-do" attitude, or from any objection that the Department of Justice, as opposed to another federal agency, is tasked with developing this proposed administrative process. If this bill were enacted, the Department of Justice would embrace this challenge with dedication to our statutory responsibilities and to the need to speed compensation to deserving claimants. Our concerns arise, regrettably, from our experience with similar administrative systems and our decades-long experience with asbestos litigation.

* * * *

As we noted at the outset, we remain interested in a dialogue with the Committee on how to improve the present state of asbestos compensation, which is far from perfect. However, to the extent that any legislation would improve the process, one might do better by building upon developments in the current system than by erecting new structures of the type proposed by H.R. 1283. As we have informed your staff, we remain willing to work with the Committee on this issue and to evaluate any other proposal for improving the present state of asbestos compensation.

Thank you once again for this opportunity to present our views. The Office of Management and Budget has advised us that from the standpoint of the Administration, there is no objection to submission of this letter. Please do not hesitate to call upon us if we may be of further assistance.

Sincerely,

Robert Raben
Assistant Attorney General

cc: Honorable John Conyers, Jr.
Ranking Minority Member

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[7] In addition to this concern, and the constitutional concern we raised in our letter of October 26, 1999, H.R. 1283 contains no congressional findings regarding the problems caused by the current approach to asbestos litigation, including its impact on victims, on the judicial system, and, most importantly, on interstate commerce. This may make it less likely that H.R. 1283 would withstand constitutional challenge under the Commerce Clause.

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- The process of compensating asbestos victims has improved since the 1980s, when the last comprehensive study on asbestos litigation was completed. While the current system is not ideal, we believe a new administrative process would undermine progress that has been made.
- H.R. 1283 would deprive asbestos victims of fair compensation, including victims who are demonstrably sick as a result of exposure to asbestos;
- H.R. 1283 would transfer costs now borne by defendant companies - who have been found legally responsible for the harm caused - to asbestos victims and the taxpayers; and
- H.R. 1283 would delay and worsen, rather than accelerate and improve, compensation to the sick.

I. The Asbestos Litigation and Compensation Process Has Improved

Like the Committee, we have been concerned by reports that the asbestos litigation and compensation process is an "elephantine" morass in need of reform.[2] In evaluating the state of asbestos litigation, the Supreme Court relied on a study using data from the mid-1980s. For the past several months, we have attempted to analyze the situation in asbestos litigation today. To some extent, our efforts have been hampered by the paucity of data and the absence of any more recent comprehensive study of asbestos caseloads, settlements and the like. Nevertheless, we are persuaded that the process for compensating victims of asbestos exposure has improved since the mid-1980s.

First, in recent years the parties to the asbestos controversy have settled hundreds of thousands of claims, a marked improvement over the more adversarial culture that permeated much of asbestos litigation at the time of the last major study. Working together, the plaintiff and defense bars have created a number of these private settlement mechanisms and national settlement programs, all of which have hastened the payment of claims to sick individuals, reduced the burden on the courts, and brought greater financial certainty to a number of defendants. For example, as the Committee was informed in its July 1999 hearing, Owens Corning alone has settled over 200,000 claims through the National Settlement Program it initiated in 1998. Another example is the Louisiana settlement agreement entered into by plaintiffs and defendants in 1998, which is creating numerous additional settlements.

Second, as to the claims that do remain on the court dockets, the courts have made considerable progress in managing these caseloads. In particular, state and federal courts around the country have instituted several case management controls that harness the volume of asbestos claims and permit the claims of the sickest victims to be expedited. These tools include multi-district consolidation in the Federal courts, the consolidation of similar claims for discovery and

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[2] See Ortiz v. Fibreboard, 119 S. Ct. 2295, 2302 (1999).

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trial, and procedures for those with less serious diseases to file claims in court without actively prosecuting them (i.e., pleural registries). This latter technique has resulted in a de facto stay for many claims of the less impaired. Thus, in courts utilizing pleural registries, even though the cases of the less impaired constitute a large part of the pending case backlog, they consume comparatively few judicial resources. In addition, several states have created distinct causes of action for different asbestos-related injuries, eliminating the incentive for victims to rush to court at the first physical sign of injury and permitting those who initially recover small amounts for minimal injury to return to court if their condition subsequently deteriorates.

Third, asbestos has become a "mature" tort, with many of the basic liability questions resolved. Over the past decade, the litigants have clarified some of the medical issues, made progress on product identification, causation, and apportionment of liability issues, and the defendant companies have resolved a number of disputes with their insurers. This has resulted in fewer disputes, less discovery, less repetition in depositions and trials, and, as a consequence, a higher percentage of available dollars going to the victims.

This is not to say, however, that the present state of asbestos litigation is ideal. There are still a large number of cases pending in the courts, and not every court system has instituted the case management and prioritization techniques used successfully by other courts. As a consequence, some cases migrate to forums that are historically more favorable to plaintiffs, resulting in inconsistent verdicts and settlements, and some deserving victims are still compensated too slowly.

For the Administration, a key question is whether the imperfections in the current system justify the substitution of untested administrative procedures and standards for the traditional court system. Given our concerns that the system would not work as hoped and would benefit culpable defendants at the expense of the victims and taxpayers, we think the case for this untested system has not been made.

II. H.R. 1283 Would Exclude Many Asbestos Victims From Fair Compensation

H.R. 1283 would create medical criteria according to which asbestos victims would be determined to be medically eligible or ineligible for compensation. At the outset, we note that legislating medical criteria to limit recipients of asbestos-related compensation sets standards that overstate the precision of existing diagnostic testing; and it precludes the incorporation of advances in medical knowledge by prescribing standards that may soon be outdated. Further, the proposed legislation does not foster fairness for people with diseases resulting from asbestos exposure.

First, the medical criteria in H.R. 1283 would result in sick people being denied compensation for their injuries. Even if we were to accept the proponents' avowed purpose of eliminating the claims of the non-sick while preserving the claims of the sick, the medical criteria in H.R. 1283 would not accomplish that goal. Experts from the Department of Health and Human Services, as well as many in the medical community, have indicated that the proposed medical criteria are too restrictive and would result in the denial of compensation to many

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injured and impaired patients.

For example, the proposed medical criteria for asbestosis would require a claimant with evidence of obstructive disease on lung function testing to demonstrate high levels of fibrosis on chest x-rays as well. Yet, as our colleagues at HHS have informed us, asbestos exposure may cause a mixed obstructive and restrictive pattern and, in some instances, cause predominantly obstructive disease. In addition, the use of objective norms to measure the lung function of every claimant treats all claimants as if their normal lung function is identical. This, of course, is not the case. Some patients may have pre-exposure lung functions well above average and may lose more than 20% of their lung capacity, yet fail to meet the lung function criteria in the proposed bill. H.R. 1283 would deny compensation to these people who have been demonstrably impaired by their exposure to asbestos. Further, patients with asbestosis may have shortness of breath with exertion and functional impairment demonstrated by reduced arterial oxygenation during exercise, yet not meet the lung function criteria in the bill. In addition, H.R. 1283 understates the degree of injury experienced by individuals with pleural disease who fail to meet the lung function criteria, and does not adequately provide screening for these individuals. As a result of the proposed medical criteria, we are informed that physically impaired asbestos victims would be denied compensation.

Second, the medical criteria of H.R. 1283 would eliminate many existing causes of action and injuries compensable under current state law. In many jurisdictions, for example, plaintiffs are entitled to sue and recover for scarring of the lungs or for an increased risk of lung cancer as a result of exposure to asbestos, regardless of impairment. Under H.R. 1283, those claims would no longer be recognized, prohibiting claimants exposed to asbestos from obtaining compensation. At best, the claimants alleging such injuries could recover reimbursement of medical monitoring costs, as compared to the significant compensation they might receive today. Section 306(a). In a system in which those who are not yet physically impaired are denied the right to bring a claim, it is unlikely that the plaintiffs' bar, which currently finances and facilitates much of the medical monitoring of the less seriously impaired, would have the necessary financial incentive to pursue claims for medical monitoring. As a result, many victims who today receive the peace of mind and prompt medical attention that results from medical monitoring - at little or no cost to the victims - would be denied that benefit.

Third, H.R. 1283 would make it effectively impossible for many victims of asbestos exposure, who also were smokers, to recover compensation from asbestos defendants for the damage done to them by asbestos. H.R. 1283 would prohibit presumptive eligibility for lung cancer victims, where the claimant has a "substantial history of smoking" and does not have a qualifying non-malignant condition. Section 304(b). As many experts have stated, the interaction of smoking and asbestos exposure is synergistic, and smokers exposed to asbestos are at an exponentially greater risk of developing lung cancer than smokers without asbestos exposure. Among those heavily exposed, for example, 80% of all lung cancers would have been

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eliminated in the absence of asbestos exposure, even had smoking habits not been changed.[3] Thus, contrary to the implication of H.R. 1283, many lung cancers involving both a substantial history of smoking and significant asbestos exposure would not have occurred but for the asbestos exposure. As for the requirement that lung cancer be accompanied by a qualifying non-malignant condition, HHS advises us that many studies have clearly shown that asbestos is a carcinogen and causes cancer independent of causing non-malignant disease, again contrary to the implication of H.R. 1283. In short, H.R. 1283 would prevent many victims of lung cancer from recovering compensation for a primary cause of their cancer - asbestos exposure.

Fourth, H.R. 1283 would prohibit courts from awarding punitive damages to victims. Section 202. Under H.R. 1283, punitive damages would be available only in administrative adjudications, thus diluting any right to opt out to a traditional court and eliminating the already-rare phenomenon of court-imposed punitive damages. Yet, even in the administrative context, where any possible concerns over jury-applied punitive damages would be eliminated, the legislation would make punitive damages available only where a "conscious, flagrant indifference" to a claimant was "the proximate cause" of the injury. And even if the claimant could satisfy this standard, he or she would be severely limited as to the amount of punitive damages available for past bad acts by culpable companies. Section 208(d). As we have stated with regard to other tort reform legislation, punitive damages serve an important deterrent function.

III. H.R. 1283 Would Impose Unwarranted Costs on Asbestos Victims and Taxpayers

In addition to our concerns with the medical criteria and the exclusion of asbestos victims, we have a number of concerns with the economic impact of the legislation. Specifically, we believe that H.R. 1283 would provide unwarranted benefits to asbestos companies to the detriment of victims of asbestos and the taxpayers.

First, to the extent that it is unable to recover from defendants the recommended aggregate settlement that it has already paid to claimants, the Asbestos Compensation Fund - the entity charged with paying claimants - would be required to reduce future recommended aggregate settlements, taking into account the outstanding deficit. Section 402(a)(4). This provision, in effect, creates an incentive for defendants to avoid paying the government in a timely manner, if at all, on the assumption that a deficient Fund reduces settlement values and therefore defendants' ultimate expense. Ultimately, this would lead to lower settlement values for deserving victims.

Second, although the stated intention of the program is for defendants ultimately to cover all expenses, under H.R. 1283, the Federal Treasury could advance the Office of Asbestos

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[3] See, e.g., A. Ritzen and L. Rosenstock, The Misuse of Epidemiology and Apportionment in Compensation for Occupational Disease, New Solutions, Winter 1993, at 29-36. R. Saracci, Interaction and Synergism, 12 American Journal of Epidemiology 465-466 (1980).

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Compensation (the "OAC") up to $100 million in start-up funds. Section 403(a). Past programs in which the Federal government has advanced funds have been largely unsuccessful in trying to recover from responsible parties. In programs such as the Black Lung Benefits Act and the Comprehensive Environmental Response, Compensation and Liability Act (the CERCLA Superfund), the government spent considerable resources to seek reimbursement from responsible parties, and yet in many instances failed, leaving the taxpayers to subsidize the programs, or reducing future settlements to cover the shortfall. Similarly, we are concerned that the defendant companies may not pay for all of the costs associated with the administration of the OAC.

Third, to the extent that less seriously injured claimants seek medical monitoring expenses, it is likely that the U.S. government would be left holding the bill. Unlike other parts of the legislation, no mechanism is even proposed for the defendants to fund medical monitoring. By contrast, the bill contemplates yearly non-administrative appropriations by the U.S. of up to $150 million, which would not be reimbursable. Section 403. It appears that payment for medical monitoring would be drawn from these appropriations.[4] In the coming years, therefore, the government could be required to pay billions of dollars for injuries caused by the asbestos companies. We see no justification for the taxpayers to assume such a liability from the defendant companies, particularly in light of the fact that courts consistently have found the asbestos companies legally responsible for asbestos-related harm.

As we understand it, one of the justifications offered for this taxpayer subsidy is that the United States should share in paying for the asbestos problem. This argument does not fully account for the substantial sums that the United States already has spent as a result of the asbestos problem. Over the past thirty years, the government has paid billions of dollars in health, medical, research, and abatement costs to address the problems created by the marketing and sale of asbestos products. Similarly, in the coming years U.S. taxpayers can expect to pay additional billions in such costs, without the additional financial burden placed on them by this legislation. To the extent the Committee believes the government should pay even more because the United States shares culpability with the asbestos companies for the sale and distribution of asbestos products, we believe that premise is misguided. Virtually every court has rejected the assertion that the United States is culpable for the harms inflicted by asbestos. Significantly, these rulings were based not on immunity doctrines but on factual findings that the liability of asbestos defendants should not be placed upon the United States. As one court concluded, the effort by the asbestos companies to transfer culpability to the government is a "grossly misplaced" attempt to "impose the woes of asbestos compensation upon the customer [the United States] whom they actively pursued."[5] Another court, after conducting a six-week trial on the

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[4] An earlier draft of the bill specified appropriations of $200 million annually for certain medical monitoring reimbursements. That provision has been excised from the current draft with no new provision to provide such funding.

[5] Glover v. Johns Manville, 525 F. Supp. 984, 986 (E.D. Va. 1979), aff'd in part, vacated in part and remanded, 662 F.2d 225 (4th Cir. 1981).

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issue, rejected the assertion that "the Government sacrificed the health of shipyard workers to the war effort." Instead, the court concluded, based on the facts, that "the Government took reasonable health and safety measures regarding asbestos use in the shipyard environment . . . ."[6]

Taken together, these various provisions, along with the elimination of many claims through the imposition of H.R. 1283's medical criteria, result in a massive transfer of funds – billions of dollars – to the defendant companies, financed by asbestos victims and taxpayers. We see no justification for such a significant subsidy, particularly given the fact that so many courts and juries have found asbestos companies liable to the people who have been exposed to their products.

We understand that some have asserted that cost-shifting is required to ensure the continued viability of defendant companies so that they will continue to have the capacity to compensate sick victims in the future. We agree that preserving the assets of companies in order to compensate sick victims is vital. However, proponents of H.R. 1283 have not demonstrated that the financial health of asbestos defendants, taken as a whole, is so dire as to require a large subsidy of the sort envisioned by H.R. 1283. The Treasury Department has examined publicly available information regarding a number of asbestos defendants. While the industry has seen bankruptcies in the past two decades, public filings (10K and 10Q reports) by many major industry participants do not indicate financial distress; to the contrary, their statements often inform shareholders and others that asbestos-related liabilities will not have a material impact upon the present or future financial performance of the companies. In fact, over the past decade, many of these companies successfully have recovered, or made agreements to recover, billions of dollars in insurance coverage. We do not doubt that some companies may be in distress due to asbestos-related liabilities, but we have not seen the kind of compelling financial data, on an industry-wide basis, to justify shifting the economic responsibility of these injuries from the culpable corporate defendants and their shareholders to the victims and the taxpayers. In addition, the Treasury Department informs us that some companies that have chosen to work cooperatively with plaintiffs to resolve their asbestos-related liabilities could be placed at a competitive disadvantage by H.R. 1283. Public policy should not seek to reward defendants that have chosen not to settle at the expense of those firms that have acknowledged their responsibility.

IV. H.R. 1283's Administrative System Would Delay Compensation to the Sick, Not Make It Better or Faster

While one of the stated goals of H.R. 1283 is to speed compensation to deserving claimants, our analysis of the proposal indicates the opposite. In our view, H.R. 1283 would

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[6] Johns Manville v. United States, 13 Cl. Ct. 72, 133 (1987), vacated on jurisdictional grounds, 855 F.2d 1571 (Fed. Cir. 1988); see also GAF v. United States, 19 Cl. Ct. 490, 499 (1990) (rejecting GAF's assertion that "the Government knowingly exposed its employees to asbestos hazards"), aff'd, 932 F.2d 947 (Fed. Cir. 1991), cert. denied, 502 U.S. 1071 (1992).

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delay compensation to sick victims of asbestos exposure.

A. Start-up Delays

The creation of an administrative structure to handle a large number of claims inherently requires a multitude of steps and decisions before that structure can begin to process the claims of the sick. Of necessity, these steps and decisions delay the processing of claims for those cases that are already pending. Based on our experience administering several compensation programs, we are convinced such delay would result were H.R. 1283 to be adopted.

First, we believe it would take a considerable amount of time to establish and effectively operate the proposed Office of Asbestos Compensation ("OAC"), which would serve both administrative and adjudicatory functions. As we read H.R. 1283, the OAC likely would need to hire and/or contract with hundreds, and perhaps over a thousand employees – including lawyers, physicians, claims reviewers, and administrative personnel – before it could adequately handle the large number of cases that would confront the OAC initially.

In this regard, a comparison to the National Vaccine Injury Compensation Program, established more than a decade ago, is instructive. That program processes cases that, while often medically complex, are nevertheless more streamlined than the average asbestos case in that vaccine cases do not require resolution of difficult and fact-intensive issues such as allocation, apportionment, or the exercise of subrogation rights against the industry. Yet, the vaccine program utilizes approximately 100 staffers in various agencies to handle the approximately 700 cases currently pending before it, and has resolved approximately 5,000 cases in its entire eleven-year history. We are concerned that, given similar staff-to-claim needs and even assuming some economies of scale accompanying the larger volume of asbestos cases, the OAC may need to hire a very large number of people to process the tens of thousands of claims that would be filed upon the commencement of OAC operations.

Second, in addition to hiring and training all of these people, the OAC, no matter how well-intentioned and diligent in purpose, would face further delays in opening due to the complex and controversial rules that would have to be promulgated before any claim could be processed. For example, as we read H.R. 1283, before processing a claim, the OAC must develop, based on difficult-to-obtain historical data, a "compensation grid" on which offers to the asbestos claimants would be based. Section 103(b)(2). The legislation appears to recognize the difficulty of this exercise by providing the OAC with subpoena power to collect information about prior settlements. Section 107(c). It is almost certain that litigants would challenge the process of developing this grid. This is precisely what occurred in the vaccine program, which has developed and modified its own compensation grid. Litigation and disputes over the development of the compensation grid would further delay compensation to the sick.

Third, the processing of asbestos claims would be further delayed by satellite litigation on at least two significant issues. First, even once developed, the "compensation grid" would lead to more litigation when affected parties were not satisfied by the outcome. Second, the medical criteria, and the controversy surrounding them, would lead to new litigation and multiple

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appeals. For example, the parties to the asbestos claims process almost certainly would litigate and appeal multiple questions involving claimants with asbestos-related lung cancer and a history of smoking. The uncertainty resulting from this litigation over new questions - which the parties, not the OAC, would initiate - would further delay compensation to asbestos victims facing progressive asbestos-related illness.

This delay in establishing the OAC is crucial because during this interim, start-up period, most of the pending asbestos claims would almost certainly grind to a halt. Although the bill allows for current claimants to continue with their case in court if trial commences within six months of the bill's enactment (Section 501(b)), only a marginal percentage of asbestos cases currently make it to trial, let alone within six months. Similarly, although the bill permits claimants to demand "right to sue" letters from the OAC if they do not receive an initial decision on medical eligibility quickly, that right is limited to those rare claimants with "a scheduled trial date within one year" after enactment. Section 501(c). In any event, even if a few claimants could return to court before the OAC was operational, the prospective change in the law that the bill represents (and, in particular, the development of the compensation grid) almost certainly would alter the defendants' litigating positions and create incentives to defer litigating and settling the pending cases until the OAC process sorted itself out. Therefore, for the years that it would take for the OAC to become operational, while many victims' disease would progress, their claims would not.

Again, a comparison to the vaccine program is illuminating. Although the National Childhood Vaccine Injury Act was passed by Congress in 1986, the vaccine program did not issue its first award for several years. In the interim, during the years it took to establish the vaccine office, most cases were stayed by the courts and little settlement progress was made. Once the vaccine claims resolution process commenced, it took twice as long to resolve claims as was predicted at the time the legislation was drafted (two years instead of one). Indeed, with the backlog created by the initial filing of approximately 4,300 cases by 1990, the vast majority of vaccine cases were not resolved in even two years. Thus, our experience indicates that, with the erection of any new administrative structure, pending cases tend to be delayed far longer than anticipated, no matter how well intentioned or diligent the staff. The result is delayed justice for deserving victims.

B. Delays in the Claims Resolution Process

Once the OAC was finally up and running, the proposed claims resolution process would not, in our view, materially improve upon the traditional court system. H.R. 1283's claims processing procedures would require a number of steps for each individual. First, as we understand the bill, a claimant would have to submit a detailed, complete medical file before a claim was considered filed. Section 102(b). Our experience with asbestos litigation indicates that it would often take months to complete such a file. Second, once the claim was successfully filed, the claimant would be required to wait up to thirty days for the Medical Director to make an initial decision regarding eligibility. If initially denied, the claimant would then be obligated to petition for review by a panel of two qualified physicians or an exceptional medical claims panel. Section 102(c). If the denial were affirmed by the review panel, the claimant would then

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U.S. SENATE Established 1947
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April 29, 2003

Background Paper

The Need for Class Action Reform

Class action lawsuits allow plaintiffs whose injuries might not be worth enough to justify bringing individual suits to combine their damages into one lawsuit against a common defendant. Class action lawsuits can facilitate the fair and efficient resolution of legitimate claims of numerous parties. For those reasons, federal and state courts' rules of civil procedure enable litigants to proceed on a class basis in appropriate cases.

In recent years, however, a relatively small number of class action plaintiffs' attorneys have abused the class action procedures. The effects have been dramatic: a distortion of our federalist system by the actions of a few rogue state courts; excessive compensation of attorneys at the expense of injured plaintiffs; unprecedented costs to the national economy; and an overall decline in public respect for our nation's judicial system.

Congress has been attempting to reform the class action rules for several years despite strong resistance from trial lawyers. On April 11, the Senate Judiciary Committee reported the Class Action Fairness Act (S. 274) after a favorable, bipartisan vote. The RPC will release a Legislative Notice when S. 274 is to be debated on the floor. Until then, this background paper examines why class action reform is necessary.

The Role of Federal Courts in Multi-State Class Actions

The U.S. Constitution provides for federal jurisdiction over all lawsuits between citizens of different states, i.e., those cases where the parties are of "diverse" citizenship.[1] The first Congresses enacted legislation narrowly construing "diversity jurisdiction" – long before the class action procedure had been contemplated.[2] Today, the most obviously "national" types of litigation – multi-million-dollar class action cases involving national companies engaging in interstate commerce with citizens of many states – are often stuck in state court. This is so because Congress has narrowly construed constitutional diversity to require *all* plaintiffs to be diverse from *all* defendants: "complete diversity." Consequently, national class actions with plaintiffs from all 50 states and defendants from multiple states are rarely eligible for federal

[1] U.S. Constitution, art. II, sec. 2, cl. 1.

[2] See Strawbridge v. Curtis, 7 U.S. (3 Cranch) 267 (1806) (explaining that the requirement of "complete diversity" was a creation of Congress, not of the Constitution).

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court. The result is that a few state courts are deciding cases with great national significance and effectively regulating national industries and professions beyond their state borders.

Much has been written accusing these state courts of incompetence, anti-business biases, and outright corruption. The Constitution provides for federal jurisdiction over cases between citizens of different states precisely so that parties never have to deal with questions of local bias. As Chief Justice Marshall once observed, "[H]owever true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."[3] The Senate need not pass judgment on the quality of state court judges – most of whom are undoubtedly of high integrity and competence – to recognize that parties to litigation should have a right to the protection of the constitutional safeguard, and that nationwide class actions should not be barred from the federal courts.

The Growing Abuse of Coercive Interstate Class Actions

A literal class action industry devoted to finding opportunities to extract financial payments from American business has developed in the past few decades. This class action industry is dominated by a focused group of class action plaintiffs' attorneys who "shop" throughout the nation for the friendliest courts to hear possible cases. As a result, businesses operating in the United States are increasingly at risk of being hauled into select state court jurisdictions where judges are quick to certify a class and where juries are wont to render extravagant awards.[4] Moreover, because each state is sovereign, the same defendant often faces copycat cases in different states, which frequently result in inconsistent judgments.

Forum-shopping has enabled clever attorneys to file in state court many lawsuits that implicate citizens of many states and interstate commerce – precisely the kinds of lawsuits best suited to the federal courts. However, due to the antiquated requirement of "complete diversity" in citizenship among plaintiffs and defendants, these attorneys have been able to craft their pleadings to evade federal court jurisdiction. For example, in Madison County, Illinois – one of the most notorious of the plaintiff-friendly class action jurisdictions in the nation[5] – a South Carolina law firm filed a purported class action on behalf of three named plaintiffs, none of whom lived in Madison County, against 31 defendants throughout the United States, none of whom were located in Madison County.[6] Instead, they base jurisdiction on the mere allegation that some as-yet-unknown class members live in Madison County.

The effect of encouraging such forum-shopping has been dramatic. One study estimates that "[v]irtually every sector of the United States economy is on trial in Madison County, Palm

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[3] Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809).

[4] Under the current legal system, "national class actions can be filed just about anywhere and are disproportionately brought in a handful of state courts whose judges get elected with lawyers' money." "Making Justice Work," editorial, Washington Post 25 Nov. 2002, at A-14.

[5] See, e.g., John H. Beisner and Jessica Davidson Miller, "Class Action Magnet Courts: The Allure Intensifies," Class Action Litigation Report, Vol. 4, No. 2 (BNA 2003).

[6] Beisner and Miller, "Class Action Magnet Courts: The Allure Intensifies," at 62.

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Beach County [Florida], and Jefferson County [Texas] – long distance carriers, gasoline purchasers, insurance companies, computer manufacturers and pharmaceutical developers."[7]

Current Class Action Abuses Continue to Harm Plaintiffs

Injured plaintiffs can also suffer due to insufficient judicial oversight of lawsuits that have come to be dominated by class action attorneys. The costs of litigation and the windfall profits to attorneys have produced a legal system that returns less than 50 cents on the dollar to people it is designed to help, and only 22 cents to compensate for actual economic loss.[8]

As a by-product of attorney-dominated class action litigation, many class action settlements consist of disproportionate payments of attorneys fees to plaintiffs' attorneys and nothing of real value to the injured plaintiffs. Indeed, in some settlements, the plaintiffs receive no cash whatsoever, while the attorneys purporting to represent them receive millions of dollars. For example, in a case against Blockbuster, Inc., customers who alleged they were charged excessive late fees for video rentals were to receive $1 coupons while their attorneys received over $9 million.[9] In an Illinois case about cellular phone charges, settling class members received coupons to buy future products (but not to pay current bills), while their attorneys received more that $1 million in fees.[10] In a similar "coupon" case settlement in California, class members received a $13 rebate towards the purchase of new computer monitors, while their attorneys received $6 million.[11] Given the unlikelihood that many class members will ever be able to convert these "coupons" into much of value, these settlements have the effect of granting the attorneys the vast majority of the economic value of the settlements.

Injured parties also suffer when they receive complicated settlement notices that do not adequately explain their right to challenge the settlement or to enjoy the full benefits of the settlement. Even more troubling, some have accused defendants of conspiring with plaintiffs' attorneys to produce confusing notices in order to ensure that the actual economic value of the settlement to the class members is lower than reported to the court.[12] Relatedly, some settlements have been crafted to provide very large payments to the "named" plaintiff – the original plaintiff who brought the suit prior to class certification – in order to persuade that plaintiff to agree to a settlement that will give fellow class members far less compensation (if any). Additional judicial scrutiny is necessary to ensure that the class members – those who allegedly have been injured, as opposed to their attorneys – understand their rights.

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[7] John H. Beisner and Jessica Davidson Miller, "They're Making a Federal Case Out of It," Civil Justice Report, No. 3 (Center for Legal Policy at the Manhattan Institute 2001), at 27.

[8] Tillinghast-Towers Perrin, U.S. Court Costs: 2002 Update, Trends and Findings on the Costs of the U.S. Tort System, at 1, available at http://www.tillinghast.com/tillinghast/publications/reports/2002_Tort_Costs_Update/Tort_Costs_2002_Update_rev.pdf. Tillinghast is an international actuarial and management consulting company that has been examining the U.S. legal system's costs in published studies since 1985.

[9] "Blockbuster customers to be reimbursed for late fees," Associated Press, 11 Jan. 2002, discussing Scott v. Blockbuster, Inc., No. D162-535 (Jefferson County, Texas, 2001).

[10] Michelle Singletary, "This 'Settlement' Doesn't Ring True," Washington Post 5 Sept. 1999, at H-01.

[11] Michelle Singletary, "'Coupon Settlements' Fall Short," Washington Post 12 Sept. 1999, at H-01.

[12] Genine C. Swanzey, *Using Class Actions to Litigate Mass Torts: Is There Justice for the Individual?*, 11 Georgetown Journal of Legal Ethics 421, 428 (1998); Arthur Bryant, "Class Actions for Settlement Only: An Invitation to Collusion," Legal Times 17 June 1996, at 19.

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The Costs of Runaway Litigation to the National Economy

Over the past decade, class action lawsuits have grown by over 1,000-percent.[13] This growth in class action litigation contributes to the increasing burdens that civil lawsuits place on the American economy.[14] While some of that increase in class actions may be due to legitimate increases in injuries to innocent plaintiffs, it is also due to a myriad of lawsuits filed with the intent of forcing early settlements. Plaintiffs' attorneys have manipulated the class action legal procedures in certain states to force early settlements on even the most frivolous of claims, especially if a pliant judge can be persuaded at an early stage to certify the case as a class action. Because class actions aggregate many potential claims into one lawsuit, and because many unfair, or even unconstitutional, certification rulings cannot be appealed until after an expensive trial on the merits, defendants often face the risk of a single judgment in the tens of millions or even billions of dollars.

The risk of a single, bankrupting award often forces defendants to settle the case with sizable payments even when the defendant has meritorious defenses. As one federal court explained, "The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail."[15] Thus, defendants facing non-meritorious class action lawsuits must decide whether to assume even a slight risk of an unfavorable jury award that could bankrupt the company. This "judicial blackmail" imposes increased costs on the economy, causing higher prices and lower wages (along with the enrichment of those attorneys who brought the weak claims in the first place).

Noting this drag on the American economy and the difficulty that insurers have in accounting for litigation risk, the chairman of Lloyd's of London recently remarked, "In such an environment, what hope is there to keep the spirit of risk-taking alive, to fuel the appetite for innovation and creation? Would those who trekked their way across the dusty plains, or built up vast commercial empires, or realised the dream of putting man on the Moon – would they have achieved any of this if they had to face the threat of being sued?"[16] When litigation costs become too unpredictable, the effect will be to dissuade investment, discourage entrepreneurship, increase the costs of risk planning, and threaten the core economic activities that have long characterized American capitalism.

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[13] Class Action Watch, Vol I, No. 2 (Spring 1999), available at http://www.fed-soc.org/Publications/classactionwatch/classaction1-2.pdf (finding increase of 1,315 percent over previous decade); Tillinghast-Towers Perrin at 1.

[14] In 2001, total damages, litigation expenses, and court-related costs amounted to $205 billion. Tillinghast-Towers Perrin at 3.

[15] Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996); see also Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense"); In the Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) (noting the "intense pressure to settle" rather than "roll[ing] the[] dice" by taking the case to a jury).

[16] Lord Levene (Chairman, Lloyd's of London), Speech to Union League of Chicago, 8 April 2003, at 12-13, available at http://www.lloyds.com/index.asp?ItemId=4776.

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S.274's Reforms Will Address These Problems

As will be discussed more fully in the forthcoming Legislative Notice, S.274 remedies the problems discussed in this background paper. First, it expands federal jurisdiction over class actions by eliminating the need for "complete diversity." The effect of this change will be to drive those cases that are multi-state, or national, in scope to federal court, while keeping state courts involved in adjudicating matters that primarily involve the forum state. This expanded federal jurisdiction will also eliminate the allure of forum shopping for the most favorable forum because defendants will be able to avail themselves of unbiased federal courts in high-dollar, multi-state cases.

The bill also has several consumer-protection provisions. It requires that notices be clear and not bogged-down with "legalese" so that plaintiffs can better understand their rights. It also requires that state attorneys general, or other relevant state officials, be notified of pending class action settlements so that these elected officials can protect their citizens. The bill also requires federal judges to scrutinize non-cash settlements to ensure that plaintiffs are treated fairly when their lawyers get cash settlements but they get coupons. And, it requires that the Judicial Conference study ways to ensure that lawyers are not getting unfair, outrageous fees at the expense of consumers.

Conclusion

Class actions are an important part of our litigation system that, when used properly, should produce a net savings to the litigation system and just recoveries to injured parties. But without reform, the class action process will remain a system ripe for exploitation, and the harm to the fundamental fairness of the civil justice system will continue to grow.

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Tort Reform [Folder 2] [2]

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

OA/NARA#: 2172/2083
9702

Box 58
Folder 12

LOCAL RULES OF PRACTICE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Effective February 1, 1997

Including Amendments Received Through October 1, 2000

Research Note

Use WESTLAW ® *to find cases citing or applying specific rules.* WESTLAW *may also be used to search for specific terms in court rules or to update court rules. See the* VA-RULES *and* VA-ORDERS *Scope Screens for detailed descriptive information and search tips.*

Amendments to these rules are published, as received, in the South Eastern Reporter 2d *advance sheets.*

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45. Subpoenas.

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cause shown, subpoenas compelling attendance at a deposition shall be served not later than eleven (11) days before the date of the deposition. No subpoena for the taking of depositions shall be issued by the Clerk unless there be exhibited to the Clerk a copy of the notice to take deposition together with a statement of the date and manner of service and of the names of the persons served, certified by the person who made service.

(G) Civil Actions—Place of Taking Deposition. Except with respect to a witness in a foreign country (See 28 U.S.C. § 1783), the Clerk shall, upon request, issue a subpoena for taking a deposition requiring the appearance of any party or witness at any place within the district or 100 miles from the place where that person resides, is employed, or transacts business in person, or is served, or at such other convenient place as is fixed by an order of court.

(H) Subpoenas in Blank. Whenever there is a question as to whether or not a subpoena in blank should be issued by the Clerk, the applicant shall be referred to a judge of this Court for a final determination. Before issuing a subpoena in blank, the Clerk shall determine the actual pendency of the action and the date and time set for hearing or trial. Except for good cause shown, a blank subpoena returnable in one division will not be issued out of another division. Blank subpoenas shall recite the title and number of the case and shall be completed in every detail except for the name and address of the witness. Returns of service shall be made promptly and filed with the Clerk. Service of subpoenas in blank shall be subject to the requirements of these Rules.

[Effective February 1, 1997.]

RULE 47. JURORS

(A) Jury Lists.

(1) The entire list of names drawn to serve a division of the Court for a particular period and for a particular action or case, together with the questionnaires prepared by the jurors, may be disclosed to counsel for the parties, or to any party acting pro se, unless the Court directs otherwise. However, no juror shall be approached, either directly or through any member of his or her immediate family, in an effort to secure information concerning such juror.

(2) When the jurors report for duty at a session of Court, the Clerk shall, upon request, make available to counsel for the parties, or to any party acting pro se, a list of such jurors.

(B) Peremptory Challenges. In civil actions where there are several plaintiffs and/or several defendants, and in a criminal case where there is more than one defendant, the Court may allow each or both sides more than the usual number of peremptory challenges permitted by law upon motion made at least twenty-one (21) days before the date set for commencement of trial. Untimely motions will not be entertained.

[Effective February 1, 1997; amended effective September 1, 2000.]

RULE 48. NUMBER OF JURORS—CIVIL ACTIONS

Unless otherwise provided by law, the jury in any civil action shall consist of at least six (6), but no more than twelve (12), persons.

[Effective February 1, 1997.]

RULE 51. PROPOSED JURY INSTRUCTIONS AND VOIR DIRE

Except as provided otherwise in a pretrial or scheduling order, in all cases tried to a jury, whether civil or criminal, the parties shall submit proposed instructions and voir dire questions to the Court in duplicate, with a copy to opposing counsel, at least five (5) business days before the scheduled trial date. Each instruction shall be set forth on a separate page and shall be numbered and identified appropriately by the party submitting it and the original shall bear at its foot a citation of the authority in support of the instruction. Instructions shall be filed as a group together with a cover sheet in pleading form and a certificate of service.

Instructions filed with the Court must be proffered to the Court during the instruction conference and ruled upon by the Judge in order to become a part of the official record for appeal.

[Effective February 1, 1997; amended effective September 1, 2000.]

RULE 54. COSTS—NOTICE OF APPEAL—JURY COSTS

(A) Payment in Advance. All fees and costs due the Clerk shall be paid in advance except as otherwise provided by law.

(B) Stipulation for Costs for Certain Admiralty and Maritime Claims. No stipulation for costs for complaints, petitions, counterclaims, and cross-claims, and the filing of an answer, appearance or claim shall be required, unless specifically ordered by the Court, except where now or hereafter required by statute, the Federal Rules of Civil Procedure, or the Supplementary Rules for Certain Admiralty and Maritime Claims heretofore or hereafter adopted by Congress or through the Rule Making process.

(C) Bond Premiums. If costs are awarded by the Court, the reasonable premiums or expense paid on any bond or other security given by the prevailing party shall be taxed as part of the costs.

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(D) Taxable Costs And Procedure For Taxing Costs.

(1) *Bill of Costs.* The party entitled to costs shall file a bill of costs as provided in 28 U.S.C. § 1920 and § 1924 within eleven (11) days, unless such time is extended by order.

Such bill of costs shall distinctly set forth each item thereof so that the nature of the charge can be readily understood. An itemization and documentation for requested costs in all categories shall be attached to the cost bill. Costs will be disallowed if proper documentation is not provided.

(2) *Objection to the Bill of Costs.* A party from whom costs are sought may serve an opposition to the bill of costs within eleven (11) days after service of the bill of costs. The opposition shall identify each item objected to, and the grounds for the objection. Within five (5) days thereafter, the prevailing party may serve responses to the objections.

If no objections are filed, the Clerk shall promptly proceed to tax the costs and shall allow such items specified in the bill of costs as are properly chargeable as costs. The Clerk shall give notice of such action to the parties or their counsel. The Court shall promptly review the action of the Clerk upon timely motion under Fed. R. Civ. P. 54(d). In the absence of a timely motion the action of the Clerk is final.

If objections are filed and the Clerk shall be unable to determine all or some of the properly chargeable costs, the application for such costs shall be referred to the judge who presided over the trial or, at the discretion of that judge, to a United States Magistrate Judge for report and recommendation under 28 U.S.C. § 636(b)(1)(B).

(E) Excessive and Unnecessary Costs. Any party applying for costs which are not recoverable or which are excessive shall be subject to sanction under Fed. R. Civ. P. 11.

(F) Notice of Appeal, Fees.

(1) Where there are multiple parties seeking to appeal jointly (e.g., where cases are consolidated or tried together or decided by a single judgment or order) and a joint notice of appeal is filed, the Clerk shall collect only one fee and only one cost bond if required. Where separate notices of appeal are filed, the Clerk shall collect separate fees and require separate bonds.

(2) Separate notices of appeal, separate fees, and separate bonds are required of a party who exercises a right of appeal under Fed. R. App. P. 4(a)(3), within fourteen (14) days of the date on which the first notice of appeal was filed.

(G) Jury Costs. Whenever any civil action scheduled for jury trial is settled, or otherwise disposed of in advance of the actual trial, then, except for good cause shown, juror costs, including service fees, mileage and per diem, shall be assessed equally against the parties and their counsel or otherwise assessed as directed by the Court, unless the Clerk is notified at least one full business day prior to the day on which the action is scheduled for trial in time to advise the jurors that it will not be necessary for them to attend.

Likewise, when any civil action, proceeding as a jury trial, is settled at trial in advance of the verdict, then, except for good cause shown, all jury costs, service fees, mileage and per diem shall be assessed equally against the parties and their counsel, or otherwise assessed as directed by the Court.

[Effective February 1, 1997; amended effective September 1, 2000.]

RULE 56. SUMMARY JUDGMENT

(A) Summary Judgment—Time of Filing. No motion for summary judgment will be considered unless it is filed and set for hearing or submitted on briefs, within a reasonable time before the date of trial, thus permitting a reasonable time for the Court to hear arguments and consider the merits after completion of the briefing schedule specified in Rule 7(E)(1).

(B) Summary Judgment—Listing of Undisputed Facts. Each brief in support of a motion for summary judgment shall include a specifically captioned section listing all material facts as to which the moving party contends there is no genuine issue and citing the parts of the record relied on to support the listed facts as alleged to be undisputed. A brief in response to such a motion shall include a specifically captioned section listing all material facts as to which it is contended that there exists a genuine issue necessary to be litigated and citing the parts of the record relied on to support the facts alleged to be in dispute. In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its listing of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.

[Effective February 1, 1997.]

RULE 62. APPEAL BOND—EXEMPTION FROM

(A) Exemption. The Commonwealth of Virginia, or any political subdivision or any office or agent thereof, shall not be required, unless otherwise ordered by the Court, to post a supersedeas bond or other undertaking which includes security for the payment of costs on appeal.

(B) Alternate to Supersedeas Bond. In lieu of any supersedeas bond, the parties may stipulate with respect to any agreement or undertaking. In lieu of any cost bond, the parties may stipulate with respect to any agreement or undertaking conditioned that the monies and properties of the Court are fully protected

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or prepaid. The prevailing party in the district Court should seriously consider this subdivision as, in the event of a reversal, the premium of any bond will be taxed as a part of the costs. All such stipulations must be approved by the Court and filed in the record.

[Effective February 1, 1997.]

RULE 65. SURETIES—SECURITY—BONDSMAN

(A) Security. In both civil actions and criminal cases, except as otherwise provided by law or by agreement of the parties, every bond, undertaking or stipulation must be secured by (1) the deposit of cash or negotiable government bonds, undertaking or stipulation; (2) the undertaking or guaranty of a corporate surety doing business in Virginia and holding a certificate of authority from the Secretary of the Treasury; or (3) the undertaking or guaranty of sufficient solvent sureties, residents of Virginia, who own real or personal property within the State of Virginia worth double the amount of the bond, undertaking or stipulation over all debts and liabilities, and over all obligations assumed on other bonds, undertakings or stipulations, and exclusive of all legal exemptions. A husband and wife may act as surety on a bond, but they shall be considered as only one surety. If a bond, undertaking or stipulation is executed by individual sureties, each surety shall execute an affidavit of justification, giving the full name, occupation, residence and business address, showing that he or she is qualified as an individual surety under the provisions of this Rule. Provided that, in criminal cases, this Rule shall not in any way modify, alter or change any of the provisions of the Bail Reform Act or any successor statute.

(B) Prohibited Sureties. Members of the bar, administrative officers or employees of this Court, the United States Marshal, his deputies or assistants, shall not act as a surety in any civil action, criminal case or other proceeding pending in this Court. A member of the bar may execute a bond as attorney-in-fact upon presenting a properly executed power of attorney.

(C) Powers of Clerk. To approve security, the Clerk or Deputy Clerk is authorized to approve all recognizances, stipulations, bonds, guaranties, or undertakings, in the penal sum prescribed by statute or order of the Court, whether the security be property or personal or corporate surety. If the bond is offered by a professional bondsman or a person qualifying under (A)(3) above, approval of the Court, Magistrate Judge or Bankruptcy Judge shall be obtained for penal sums in excess of $25,000.00.

(D) Professional Bondsman. Any person desiring to become surety for compensation (professional bondsman) on any bond required to be given in any matter before the Court or any of its Magistrate Judges or Bankruptcy Judges, or in any other matter under the jurisdiction of this Court, shall, before attempting to act, obtain approval of the Court. Application for such approval shall be by petition, duly sworn to, setting forth:

(1) That the applicant is of good moral character, is a citizen of the Commonwealth of Virginia, and residing within the boundaries of the Eastern District of Virginia.

(2) His or her full name, business and home address, marital status, and the nature of any business conducted by such person.

(3) Whether he or she is licensed in Virginia and/or any of the cities or counties of Virginia to act as a professional bondsman and, if so, where and whether such person has qualified in any of the Courts of Virginia to so act.

(4) Statement (signed by the owners) of assets (including both real estate and personal estate) and liabilities, and as to real estate, its description, location, how titled and any encumbrances thereon. If a partnership is involved, a statement of the assets of both the partnership and the individual parties must be included, signed by owners of the assets. Assets owned by third parties or jointly with parties who are not partners will not be considered.

(5) A list of any and all bonds on which such person is the surety, the nature of the bond and where lodged.

(6) That such person will quarter-annually file with the Court a list of all bonds upon which he or she is surety, whether any bonds are in default, whether any action on such bond has been instituted, and whether there are any unpaid judgments against such person.

(7) A certificate from a Court of record, or the Chief of Police of the home city or town, or of two other responsible citizens, that such person is of good moral character.

(8) A list of any and all criminal convictions, except traffic violations, and whether there are any pending indictments or warrants against such person.

(9) If the information provided under paragraph (4) above reveals a total net worth of at least $200,000.00, and the applicant is otherwise satisfactory, an order may be entered permitting the applicant to act until further order of the Court. Should at any time the total net worth stated in paragraph (4) fall below $200,000.00 as shown on any quarterly report, or the applicant have more bonds outstanding than can be adequately covered, in the Court's opinion, by the net worth shown, or the applicant fail to file on time any quarterly report, or if for any reason the Court should deem the security offered by the applicant to be inadequate or outstanding bonds not adequately se-

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cured, the Court may terminate the right of the applicant to act as surety on any bond, without notice.

[Effective February 1, 1997.]

RULE 67. DEPOSITS INTO COURT

Deposit Into Court Procedure. Upon entry of an order in any action involving the payment into Court of a sum of money to be deposited to the credit of the Court for the benefit of any party, the party for whose benefit the sum is to be deposited shall tender to the Court a sketch for an order identifying the desired depository (which must have sufficient collateral in the Federal Reserve Bank in Richmond as required by 31 C.F.R. § 202 [Circular 176]), the specific investment instrument with the rate of interest expected to be earned thereon, and the proposed disposition of the interest proceeds. The order should specify if the Clerk is directed to place the funds into an interest bearing account for the benefit of the party later determined by the Court to be entitled to the fund and interest earned thereon will be provided to the person receiving the funds. If the order does not specify that the funds are to be placed in an interest bearing account for the benefit of the person later determined by the Court to be entitled to the funds, the funds will be deposited into the Court's United States Treasury account, and no interest will accrue to any party's benefit. Interest earned thereon will accrue to the United States. The sketch shall be endorsed by the guardian ad litem of any party under a legal disability. Upon entry of such sketch, or any modification thereof, the party shall cause the same to be served on the Clerk in a manner similar to that required by Fed.R.Civ.P.67. The order shall also provide that the Clerk's registry assessment fee, as prescribed by the Judicial Conference of the United States and published in the Federal Register, be paid to the Clerk from the interest earned on the investment. At the time any request for disbursement of deposited funds is made, the party requesting disbursement shall provide the Clerk in writing the social security or tax identification number of any person to whom any payment is to be made.

[Effective February 1, 1997; amended effective September 1, 2000.]

RULE 71A. LAND CONDEMNATION ACTIONS

The guidelines for filing, docketing, recording and reporting land condemnation proceedings approved by the Judicial Conference of the United States at its March 6–7, 1975 Session are approved for use in this jurisdiction and are hereby adopted. The Clerk is directed to implement these guidelines and is authorized, where the United States files separate condemnation actions and a single declaration of taking relating to those separate actions, to establish a Master file in which the declaration of taking may be filed. The filing of the declaration of taking therein shall constitute a filing of the same in each of the actions to which it relates.

[Effective February 1, 1997.]

RULE 72. UNITED STATES MAGISTRATE JUDGES—DUTIES

Magistrate judges of this District serve as judicial officers of the Court and are authorized and specially designated to perform all duties authorized or allowed to be performed by United States magistrate judges by the United States Code and any rule governing proceedings in this Court.

Duties and cases may be assigned or referred to a Magistrate Judge by an Order entered in the action or on the instructions of a District Judge.

[Effective February 1, 1997.]

RULE 79. EXHIBITS AND DEPOSITIONS

(A) Trial Exhibits. In all civil actions, unless otherwise ordered by the Court, the party intending to offer exhibits at trial shall place them in a binder, properly tabbed, numbered and indexed, and the original and one copy shall be delivered to the Clerk, with copies in the same form to the opposing party, one (1) business day before the trial.

(B) Custody and Disposition of Models and Exhibits.

(1) *Custody.* After being marked for identification, exhibits offered or admitted in evidence in any action tried in this Court shall be placed in the custody of the Clerk, unless otherwise ordered by the Court. All other exhibits, models, and material not offered and admitted in evidence shall be retained in custody of the attorney or party producing same at trial, unless otherwise directed by the Court.

(2) *Removal.* Whenever any models, diagrams, exhibits, depositions, transcripts, briefs, tables, charts, paper writings, articles or other items or material or things have been placed in the custody of the Clerk for introduction into evidence or otherwise, and same are not admitted or marked for identification, or otherwise used, they shall be removed by the party who delivered or filed or lodged them with the Clerk immediately following the conclusion of the trial or other disposition of the action, unless otherwise directed by the Court. If such items are not withdrawn within ten days after the right to withdraw them exists, the Clerk may forward them to counsel or the party entitled to them, or destroy or make other disposition of them as the Clerk may deem appropriate.

(C) Disposition of Exhibits, Depositions, in Civil Cases. All exhibits, models, diagrams, depositions, transcripts, briefs, tables, charts, paper writings, arti-

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cles or other items or material or things, introduced, tendered, lodged or marked in the trial of a civil action or lodged, filed or delivered to the Clerk in anticipation of their introduction into evidence or for use at trial, shall be withdrawn by the parties to the litigation or their counsel upon the expiration of thirty (30) days after the judgment has become final and the time for appeal or application for a rehearing or further hearing shall have passed. If such items, material or things are not so removed within the time aforesaid, the Clerk may forward them to counsel or the party entitled thereto, or shall destroy or make such other disposition or use of them as the Clerk may deem appropriate. The Court may at any time direct or order one or more counsel to be the custodian of the exhibits and depositions rather than the Clerk.

[Effective February 1, 1997.]

RULE 80. OFFICIAL COURT REPORTERS TRANSCRIPTS—HEARING ON TRANSCRIPTS—RECORD ON APPEAL

(A) Preparation of Transcript. Where a Court reporter, under contract or officially employed, is called upon to prepare a transcript, or any portion thereof, in a civil or criminal case in which a party is acting pro se, or in a criminal case in which the defendant is entitled to counsel under the Criminal Justice Act, the Court reporter may, at his or her election, file said transcript or portion thereof with the Clerk of the United States District Court (or if the transcript or portion thereof is ordered by the Court of Appeals, it may be filed with the Clerk of the United States Court of Appeals), and the Clerk shall acknowledge receipt of said transcript and forward same to the pro se party or, if represented by counsel pursuant to appointment under the Criminal Justice Act, to the attorney representing said defendant.

(B) Court Reporter Management Plan. In accordance with the provisions of 28 U.S.C. § 753 and the requirements of a resolution adopted by the Judicial Conference of the United States at its session in March 1982, all district Courts have been required to file a Court Reporter Management Plan which is available for inspection and copying in the Office of the Clerk. This plan calls for the supervision, duties and assignments of Court reporters, including the work hours, fees for transcripts, etc. The transcript rates charged by reporters are governed by rates recommended by the Judicial Conference of the United States if adopted by this Court. The schedule of maximum fees which may be charged is posted in the Clerk's Office.

(C) Release of Transcript. The Clerk shall not release any transcript for copying or reproducing without an order of the Court, but counsel, interested parties, or the news media may examine any transcript on file.

(D) Obligation to Pay Court Reporter. The obligation to pay the reporter for any and all transcripts shall be the joint and several personal obligation of the attorney, and the party for whose benefit the transcript was obtained, when the order is placed, to the extent so ordered. Any charges for a transcript shall be payable upon the completion of the transcript or any segment thereof, when a proper bill for same has been submitted by the reporter. If proper charges for transcripts are not paid within a reasonable time after submission, the reporter may refer the matter to a judge for such action as may be deemed appropriate.

(E) Record on Appeal. Unless otherwise directed by the Court, the record on appeal in civil and criminal cases shall not include the examination of the jury on voir dire, counsel's opening statements, arguments of counsel (including arguments of counsel on motions) and the Court's charge to the jury unless there were exceptions to the charge.

Unless the parties file a written stipulation with the Clerk within twenty days after notice of appeal is filed designating the papers which shall constitute the record on appeal the Clerk shall certify and forward to the Court of Appeals all of the original pleadings and orders in the file jacket dealing with the action or proceeding in which the appeal is taken, unless otherwise instructed by the Court of Appeals.

(F) Daily or Expedited Copy. All requests for daily or expedited transcripts must be made in writing to the Court Reporter, if known, and, if not, to the Clerk, with copies to opposing counsel, not later than five (5) business days before the hearing or trial to be transcribed.

[Effective February 1, 1997.]

RULE 83.1 ATTORNEYS AND PRO SE PARTIES

(A) Eligibility. Any person who is a member of the bar in good standing in the Supreme Court of Virginia is eligible to practice before this Court upon admission.

(B) Initial Appearance. Any person who meets the requirements of the foregoing paragraph and who maintains a law office outside of Virginia shall set forth his or her Virginia State Bar I.D. Number on any initial pleading filed by such person.

(C) Procedure for Admission. Every person desiring admission to practice in this Court shall file with the Clerk written application therefor accompanied by an endorsement by two qualified members of the bar of this Court stating that the applicant is of good moral character and professional reputation. The form for such application may be obtained from the Clerk's Office of the Court. As a part of the application, the applicant shall certify that applicant has within ninety days prior to the submission of the application read or

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reread (a) The Federal Rules of Civil Procedure, (b) The Federal Rules of Criminal Procedure, (c) The Local Rules of the Court, and (d) The Federal Rules of Evidence. The applicant shall thereafter be presented by a qualified practitioner of the Court who shall in open Court by oral motion, and upon giving assurance to the Court that he has examined the credentials of the applicant and is satisfied the applicant possesses the necessary qualifications, move for his admission to practice.

The applicant shall in open Court take the oath required for admission, subscribe the roll of the Court, and pay to the Clerk the required fee. For such payment, he shall be issued a certificate of qualification by the Clerk. For good cause shown, the Court may waive payment of the fee.

(D) Foreign Attorneys.

(1) Upon written motion by a member of this Court, a practitioner from another state or the District of Columbia may appear and conduct specific cases pro hac vice before this Count including oral arguments of motions and trial, provided that:

(a) The rules of the federal courts of the district in which he or she maintains an office extend a similar privilege to members of the bar of this Court; and

(b) That such practitioners from another state or the District of Columbia shall be accompanied by a member of the bar of this Court in all appearances before this Court.

For purposes of this rule, a member of the bar of this Court shall be a person admitted to practice under subparagraph (C), Local Rule 83.1.

(2) All practitioners admitted before this Court for the purpose of participating in a particular proceeding (pro hac vice) shall be subject to the Local Rules of the United States District Court for the Eastern District of Virginia including, but not limited to, Appendix B of the Federal Rules of Disciplinary Enforcement. Applicants for pro hac vice admission shall complete a written application certifying that they have read the Local Rules of the Court and shall pay the required fee to the Clerk, provided that practitioners employed full-time by the United States of America may request exemption from the payment of such fee and the Clerk may grant such exemption. If the Court finds the application otherwise appropriate, upon payment of the required fee or upon the granting of an exemption by the Clerk to full-time employees of the United States of America, the Court may order the pro hac vice admission of the applicant. Revenues from pro hac vice admission fees shall be deposited in the District's non-appropriated funds account and disbursed on order of the Chief Judge of the District for such improvements to the Court's Administration of Justice as the Chief Judge finds appropriate.

(3) Except where a party conducts his or her own case, no pleading or notice required to be signed by counsel shall be filed unless signed by counsel who shall have been admitted to practice in this Court under subparagraphs (A), (B) and (C) of this Rule, with the office address where notice can be served upon said attorney, and who shall have such authority that the Court can deal with the attorney alone in all matters connected with the case. Such appearance shall not be withdrawn without leave of the Court. Service of notice or other proceedings on such an attorney shall be equivalent to service on the parties for whom the attorney appeared.

(E) Western District of Virginia. Any attorney admitted to practice in the Western District of Virginia shall be permitted to practice in the Courts of the Eastern District of Virginia upon the filing of a certificate from the Clerk of the Western District of Virginia showing that such attorney has been duly admitted to practice in that district.

(F) Attorneys Filing Pleadings. Any counsel presenting papers, suits or pleadings for filing, or making an appearance, must be members of the bar of this Court, or must have counsel who are members of the bar of this Court to join in the pleading by endorsement. Any counsel who joins in a pleading, motion, or other paper filed with the Court will be held accountable for the case by the Court. At least one person admitted to practice under subsection (C) of this Rule must personally be present at all hearings, pretrials, and trials. This obligation may not be avoided or delegated without leave of Court.

(G) Withdrawal of Appearance. No attorney who has entered an appearance in any civil or criminal action shall withdraw such appearance, or have it stricken from the record, except on order of the Court and after reasonable notice to the party on whose behalf said attorney has appeared.

(H) Practicing Before Admission or While Disbarred or Suspended. Any person who, before admission to the bar of this Court or during any disbarment or suspension, exercises any of the privileges of a member of the bar of this Court, or who pretends to be entitled so to do, shall be guilty of contempt of Court and subject to appropriate punishment therefor.

(I) Professional Ethics. With the exception of Virginia Rule of Professional Conduct 3.6 (the subject of which is covered by Local Criminal Rule 57), the ethical standards relating to the practice of law in this Court shall be the Virginia Rules of Professional Conduct, as published in the version effective January 1, 2000.

(J) Courtroom Decorum. Counsel shall at all times conduct and demean themselves with dignity and propriety. When addressing the Court, counsel shall rise unless excused therefrom by the Court. All statements and communications to the Court shall be clearly and audibly made from a standing position at the counsel

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table or, if the Court is equipped with an attorney's lectern, from a standing position behind the lectern, facing the Court or the witness. Counsel shall not approach the bench unless requested to do so by the Court or unless permission is granted upon the request of counsel.

Examination of witnesses shall be conducted by counsel standing behind the lectern or, if none, behind the counsel table. Counsel shall not approach the witness except for the purpose of presenting, inquiring about, or examining the witness with respect to an exhibit, unless otherwise permitted by the Court. Only one attorney for each party may participate in the examination or cross examination of a witness.

(K) Third-Year Law Student. An eligible law student qualifying pursuant to Paragraph II of the Plan for Third-Year Practice filed in each division of this Court is herewith given leave to participate in any civil or criminal case pursuant to said plan and as said plan may, from time to time, be amended. The Plan for Third-Year Practice is Appendix A to these Rules.

(L) Federal Rules of Disciplinary Enforcement. All counsel admitted to practice before this Court or admitted for the purpose of a particular proceeding (pro hac vice) shall be admitted subject to the rules, conditions and provisions set forth in full as Appendix B to these Rules.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

APPLICATION TO QUALIFY AS A FOREIGN ATTORNEY UNDER LOCAL RULE 83.1(D)

In Case Number _____, Case Name_____

To: The Honorable Judges of the United States District Court for the Eastern District of Virginia

PERSONAL STATEMENT

FULL NAME (no initials, please)_____

Bar Identification Number _____ State _____

Firm Name _____

Firm Phone #_____ Direct Dial #_____
FAX #_____

E-Mail Address _____

Office **Mailing** Address _____

Name(s) of federal court(s) in which I have been admitted

I certify that the rules of the federal court(s) in which I have been admitted and have my office extend a similar pro hac vice admission privilege to members of the bar of the Eastern District of Virginia.

I have not been reprimanded in any court nor has there been any action in any court pertaining to my conduct or fitness as a member of the bar.

I hereby certify that within ninety (90) days prior to the submission of this application I have read (a) The Federal Rules of Civil Procedure, (b) The Federal Rules of Criminal Procedure, (c) The Local Rules of this Court and (d) The Federal Rules of Evidence.

I am ___ am not ___ a full-time employee of the United States of America, and if so, request exemption from the admission fee.

_____
(Applicant's Signature)

I, the undersigned, do certify that I am a member of the bar of this Court, not related to the applicant; that I know the applicant personally, that the said applicant possesses all of the qualifications required for admission to the bar of this Court; that I have examined the applicant's personal statement. I affirm that his/her personal and professional character and standing are good, and petition the court to admit the applicant pro hac vice.

_____ Date_____
(Signature)

_____
(Typed or Printed Name)

Court Use Only:

Clerk's $25.00 Fee Paid_____ *or* Exemption Granted_____

The motion for admission is GRANTED _____ or DENIED_____

(Judge's Signature) _____

Date_____

(Rev. 8/31/00)

[Effective February 1, 1997; amended effective September 1, 2000.]

RULE 83.2 SALES AND DISTRIBUTION OF PROCEEDS OF SALES

(A) General. All sales shall be made by the United States Marshal, or an authorized Deputy United States Marshal in the name of the Marshal, and the provisions of Local Admiralty Rule (e)(15) subparagraphs (b); (c); (d) and (e) shall apply except as may be modified in this Rule.

(B) Confirmation by Court. All sales shall be subject to confirmation by the Court. The Marshal shall file with the Clerk on the day of sale a report thereof. An interested person may object to the sale by filing written objections with the Clerk within two (2) Court days following the sale in conformity with Local Admiralty Rule (e)(15)(c). If no objections are filed, the sale shall stand confirmed unless the Court

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orders otherwise within said time. If objections are filed within the said two days, the Clerk shall forthwith submit the report and objections to the Court for prompt disposition.

(C) Marshal's Discretion in Certain Instances. The Marshal may decline to knock down a vessel or other property to the highest bidder when the highest bid, in his or her opinion, is grossly inadequate.

(D) Deposit of Sale Proceeds. The proceeds of all sales by the Marshal shall be forthwith paid into the registry of the Court to be disposed of according to law.

(E) Distributions. All distributions of the proceeds of any sale shall be by order of Court.

(F) Certain Maritime Liens. Maritime liens filed before sale, including liens filed by leave of Court at anytime prior to sale, shall be paid first. Maritime liens filed after sale shall be paid last. Liens in each of the foregoing two classes shall preserve their respective rank as among themselves, except in the case of maritime liens of the first class, the order of priority between such liens shall be that those which have accrued within one year prior to the filing of the complaint shall be paid first, and claims which have accrued theretofore shall be paid in the inverse order of the years in which they accrued.

[Effective February 1, 1997.]

RULE 83.3 PHOTOGRAPHING, BROADCASTING AND TELEVISING IN COURTROOM AND ENVIRONS

(A) General. The taking of photographs and operation of tape recorders in the Courtroom or its environs, and radio or television broadcasting from the Courtroom or its environs during the progress of or in connection with judicial proceedings, including proceedings before a United States Magistrate Judge or Bankruptcy Judge, whether or not Court is actually in session, is prohibited. A judge may, however, permit (1) the use of electronic or photographic means for the presentation of evidence or the perpetuation of a record; and (2) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings. Environs, as used in this Rule, shall include any floor on which any Courtroom or hearing room is located, including all hallways, stairways, windows, and elevators immediately adjacent to any such floor.

(B) Exception. With permission of the party or parties to be photographed, pictures may be taken by any permanent occupant of any office within the environs aforesaid when the Court is not in session.

[Effective February 1, 1997.]

RULE 83.4 HABEAS CORPUS AND PROCEEDINGS IN FORMA PAUPERIS

(A) Standard Forms. All pro se petitions for writs of habeas corpus must be filed on a set of standardized forms to be supplied, upon request, by the Clerk without cost to the petitioner. Counsel filing a petition for writ of habeas corpus need not use a standardized form, but any petition shall contain essentially the same information as set forth on said form.

(B) Filing of Cases by Prisoners In Forma Pauperis. If a party desires to file a proceeding in forma pauperis under 28 U.S.C. § 1915(a), and if the party desiring to file such proceeding is then confined to a state or federal penal institution, the party shall, within thirty (30) days of the receipt of any order, accomplish one of the following:

(1) Remit the required filing fee to the Clerk of this Court, or

(2) Request an extension of time within which to pay the required fee and thereafter pay same, or

(3) Cause to be filed a statement of the prison account of the party showing (a) the amount on deposit in the prison account at the period beginning six months immediately preceding the submission of the complaint or petition herein, and (b) the deposits to that prison account within the six-month period, including the source of said funds so deposited in said account and the reasons for any withdrawal therefrom, and

(C) Effect of Permitting Partial Payment; Reconsideration of Status. Permission to proceed in forma pauperis by making a partial payment shall not be construed as authorizing the order of successive later payments after the order has been entered authorizing the party to proceed in forma pauperis. Whenever it appears that there may have been a change in the party's financial condition, the Court may reconsider whether the party may continue to proceed in forma pauperis.

(D) Site of Evidentiary Hearings—Prisoner Cases. In its discretion, the Court may conduct evidentiary hearings in prisoner cases at any penal institution in Virginia.

[Effective February 1, 1997.]

RULE 83.5 COMMUNICATION WITH JURORS

No attorney or party litigant shall personally, or through any investigator or any other person acting for the attorney or party litigant, interview, examine or question any juror or alternate juror with respect to the verdict or deliberations of the jury in any action, civil or criminal, except on leave of court

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granted upon good cause shown and upon such conditions as the court shall fix.

[Effective February 1, 1997.]

RULE 83.6 SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION

(A) The Court encourages the parties to meet and consult with each other to achieve settlement. Pursuant to 28 U.S.C. §§ 651, 652, and 653, as amended by the Alternative Dispute Resolution Act of 1998, the use of mediation as an alternative dispute resolution process in all civil actions, including adversary proceedings in bankruptcy, is authorized. Before the initial pretrial conference or in the scheduling order, litigants in all civil cases shall be advised of the availability of mediation and may request it. The continued utilization of settlement conferences as a form of mediation is also authorized.

(B) The parties by consent may select and compensate any mutually acceptable non-judicial mediator or neutral. No mediator or neutral may be compensated by contingent fee. After mediation ends, the parties and the mediator or neutral shall file under seal a report stating (1) the name and address of the mediator or neutral; (2) his or her compensation and who paid it; and (3) the result of the mediation.

(C) All Active United States District Judges, Senior United States District Judges, United States Magistrate Judges and United States Bankruptcy Judges are authorized (a) to act as mediators or neutrals; and (b) to appoint as mediators or neutrals any appropriately trained non-judicial person, in which event the appointing Order shall establish the compensation to be paid for the services of such non-judicial person and shall schedule a time for completion of mediation. Any participant or potential participant in ADR who is able to establish an inability to pay a pro rata share of the neutral's proposed compensation, may petition this court for the appointment of a judicial neutral.

(D) The appointment of a mediator or neutral shall not operate to postpone or stay the scheduling of any case or controversy nor shall such appointment be grounds for the continuance of a previously scheduled trial date or the extension of any deadlines previously scheduled by the Court.

(E) The substance of communication in the mediation process shall not be disclosed to any person other than participants in the mediation process; provided, however, that nothing herein shall modify the application of Federal Rule of Evidence 408 nor shall use in the mediation process of an otherwise admissible document, object or statement preclude its use at trial.

(F) The Chief Judge of the District shall appoint an ADR Administrator for the District. Duties of the Administrator shall include the following: implementing, administering, overseeing and evaluating the Court's ADR programs; providing rules for the qualification of mediators and neutrals; and consulting with the Chief Judge of the District, members of the bar, and the United States Attorney relative to exempting specific cases or categories of cases from ADR.

(G) **Disqualification of Neutrals.** Neutrals shall be disqualified from participation in any case in which the individual, his or her law firm, group, or organization may be personally affected by the outcome of the mediation or their impartiality may be called into question. Accordingly, the provisions of 28 U.S.C. § 455 apply to neutrals by application of this Local Rule. Neutrals shall also refrain from activity that may call into question their impartiality, for example, acceptance of gifts or favors of any kind from a party.

[Effective September 1, 2000.]

LOCAL CRIMINAL RULES

LOCAL CRIMINAL RULE 6. GRAND JURY

(A) **Charge to Grand Jury.** When a new grand jury is first convened, the Court shall deliver its charge but, if recessed and later reconvened, the Court shall not be required again to charge the grand jury, but may do so if deemed appropriate.

(B) Unless otherwise ordered by the Court, grand jurors selected for service shall be convened at the following locations:

(1) At Alexandria—on the first Tuesday in each month except July.

(2) At Norfolk—on the second Monday in each month.

(3) At Richmond—on the third Monday in each month except August.

(4) At Newport News—as ordered.

Whenever a Monday falls upon a legal holiday, the grand jury may be directed to convene on the next succeeding business day which is not a legal holiday, without the necessity of an order of Court. Grand jurors for each respective division of the Court shall be selected in accordance with the Jury Selection Act and the district plan implementing same.

[Effective February 1, 1997; amended effective September 1, 2000.]

LOCAL CRIMINAL RULE 12. CRIMINAL CASES—MOTIONS

(A) **General.** Within eleven (11) days from the date of arraignment, or such other time as may be

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Rule
(A) Issuance of Subpoenas.
(B) Return Date of Subpoenas.
(C) Proof of Service of Subpoenas.
(D) Subpoenas to Officials.
(E) Timely Service of Subpoenas for Trial or Hearings.
(F) Deposition Subpoenas.
(G) Civil Actions—Place of Taking Deposition.
(H) Subpoenas in Blank.
47. Jurors.
(A) Jury Lists.
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48. Number of Jurors—Civil Actions.
51. Proposed Jury Instructions and Voir Dire.
54. Costs—Notice of Appeal—Jury Costs.
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(D) Taxable Costs And Procedure For Taxing Costs.
(E) Excessive and Unnecessary Costs.
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(B) Alternate to Supersedeas Bond.
65. Sureties—Security—Bondsman.
(A) Security.
(B) Prohibited Sureties.
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Deposit Into Court Procedure.
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(B) Confirmation by Court.
(C) Marshal's Discretion in Certain Instances.
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(E) Distributions.
(F) Certain Maritime Liens.
83.3 Photographing, Broadcasting and Televising in Courtroom and Environs.
(A) General.
(B) Exception.
83.4 Habeas Corpus and Proceedings in Forma Pauperis.
(A) Standard Forms.
(B) Filing of Cases by Prisoners In Forma Pauperis.
(C) Effect of Permitting Partial Payment; Reconsideration of Status.
(D) Site of Evidentiary Hearings—Prisoner Cases.
83.5 Communication With Jurors.
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LOCAL CRIMINAL RULES

6. Grand Jury.
(A) Charge to Grand Jury.
(B) [Untitled].
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Rule
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LOCAL RULES

RULE 1. SCOPE OF RULES

(A) Application. These rules, made pursuant to the authority granted by Fed.R.Civ.P. 83 and Fed. R.Crim.P. 57 for the United States District Courts, as prescribed by the Supreme Court of the United States, so far as not inconsistent therewith, shall apply in all civil actions, criminal cases, and other proceedings in the United States District Court for the Eastern District of Virginia.

(B) Statutory Rules. 1 U.S.C. §§ 1–5, inclusive, shall, as far as applicable, govern the construction of these rules.

(C) Effective Date of Amendments. Amendments to these Local Rules shall take effect on the date of entry of the order authorizing the amendments and shall govern all proceedings thereafter commenced and, insofar as just and practicable, all then pending proceedings.

[Effective February 1, 1997.]

RULE 3. AREA AND DIVISIONS

(A) Area. The Eastern District of Virginia consists of the counties, cities and towns specified in 28 U.S.C. § 127, and the places for holding Court within the district are prescribed as Alexandria, Newport News, Norfolk and Richmond.

(B) Divisions. This district shall be divided into four divisions to be designated as the Alexandria, Newport News, Norfolk and Richmond Divisions; the place for holding Court for each of said divisions shall be the city whose name the division bears, and the territory comprising, and embraced in, each of the said divisions shall be as follows:

(1) The Alexandria Division shall consist of the City of Alexandria and the Counties of Loudoun, Fairfax, Fauquier, Arlington, Prince William, and Stafford and any other city or town geographically within the exterior boundaries of said counties.

(2) The Newport News Division shall consist of the Cities of Newport News, Hampton and Williamsburg, and the Counties of York, James City, Gloucester, Mathews, and any other city or town geographically within the exterior boundaries of said counties.

(3) The Norfolk Division shall consist of the Cities of Norfolk, Portsmouth, Suffolk, Franklin, Virginia Beach, Chesapeake, and Cape Charles, and the Counties of Accomack, Northampton, Isle of Wight, Southampton, and any other city or town geographically within the exterior boundaries of said counties.

(4) The Richmond Division shall consist of the Cities of Richmond, Petersburg, Hopewell, Colonial Heights and Fredericksburg, and the Counties of Amelia, Brunswick, Caroline, Charles City, Chesterfield, Dinwiddie, Essex, Goochland, Greensville, Hanover, Henrico, King and Queen, King George, King William, Lancaster, Lunenburg, Mecklenburg, Middlesex, New Kent, Northumberland, Nottoway, Powhatan, Prince Edward, Prince George, Richmond, Spotsylvania, Surry, Sussex, Westmoreland, and any other city or town geographically within the exterior boundaries of said counties.

(5) All of the waters, and the lands under such waters, adjacent and opposite to any city, county or town shall be a part of the division of which said city, county or town is a part, and wherever there are any waters between any city, county or town which are in different divisions, then such waters and land under them shall be considered to be in both divisions.

(6) In the event of any annexation or merger of any cities and/or counties the land lying within the merged or annexed area shall be deemed within the exterior boundaries of the original city or county to the same intent and purpose as if the annexation or merger had not occurred, unless otherwise modified by local rule.

(C) Division in Which Suits to Be Instituted. Civil actions for which venue is proper in this district shall be brought in the proper division, as well. The venue rules stated in 28 U.S.C. § 1391 et seq. also shall apply to determine the proper division in which

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an action shall be filed. For the purpose of determining the proper division in which to lay venue, the venue rules stated in 28 U.S.C. § 1391 et seq. shall be construed as if the terms "judicial district" and "district" were replaced with the term "division." However, the Clerk's office in any division shall accept for filing new complaints which, venue excepted, are in proper form. Such complaints shall be filed on the day submitted, stamped as having been "filed," deemed "filed" for all purposes, and forwarded to the division where venue lies for further proceedings.

[Effective February 1, 1997; amended effective September 1, 2000.]

RULE 4. SERVICE AND RETURN OF SUMMONS—ABATEMENT

(A) Service and Abatement. If service of a summons and complaint is sought other than under Fed. R.Civ.P. 4(d) but is not effected, the Marshal or other person responsible for effecting service shall return the summons and complaint to the Clerk with an endorsement thereon stating the reasons for failure to effect service.

All waivers of service obtained under Fed.R.Civ.P. 4(d) shall be filed within five (5) days after they are returned to plaintiff. Unless, within one hundred and twenty (120) days after the complaint is filed, a defendant has been served or has appeared or has waived service, the Clerk shall abate the action and dismiss it without prejudice as to such defendant(s) after having given, but received no response to, the notice required by Fed.R.Civ.P. 4(m).

Where the United States, its officers, corporations or agencies are served by mail pursuant to Fed. R.Civ.P. 4(i)(1)(A), service shall be effective on the date of the postmark or on the date received if there is no postmark or it is illegible. The United States Attorney shall file a certificate reporting the postmark and receipt dates.

(B) Withholding Service. Requests by a party to withhold the service of a summons and complaint, or a third-party summons and complaint upon parties as to whom waiver of service provisions are inapplicable shall not be granted by the Clerk without leave of Court first obtained; provided, however, that a party may request the Clerk to withhold the issuance and service of an in rem process upon advising the Clerk that the property subject to arrest or attachment is not within the jurisdiction or that arrangements have been made for the acceptance of service.

(C) Civil Cover Sheet. The Clerk shall require a complete and executed AO Form JS 44(a), Civil Cover Sheet, to accompany each civil action filed except as to actions filed by prisoners and other litigants proceeding pro se.

[Effective February 1, 1997.]

RULE 7. MOTIONS—CONTINUANCES—COURT ORDERS

(A) Grounds and Relief to Be Stated. All motions shall state with particularity the grounds therefor and shall set forth the relief or order sought.

(B) Address and Telephone Number of Attorney And Pro Se Litigants. All pleadings and motions shall include the attorney's office address and telephone number. All pleadings filed by non-prisoner litigants proceeding pro se shall contain an address where notice can be served on such person and a telephone number where such person can be reached or a message left. All pleadings filed by prisoners proceeding pro se *shall contain an address where notice can be served on such person.*

(C) Use of Forms. Motions and interrogatories on printed forms, multigraphed, mimeographed, or in any manner reproduced by machine process, other than a typewriter, computer or word processor, shall not be permitted unless the attorney filing same has deleted all extraneous matter and certifies that he or she has carefully reviewed the remaining portions and in good faith believes that the contents are pertinent to the case.

(D) Return Date. Except as otherwise provided by an order of the Court or by these Rules, all motions shall be made returnable to the time obtained from and scheduled by the Court for a hearing thereon. The moving party shall be responsible to set the motion for hearing or to arrange with opposing counsel for submission of the motion without oral argument. Unless otherwise ordered, a motion shall be deemed withdrawn if the movant does not set it for hearing (or arrange to submit it without a hearing) within thirty (30) days after the date on which the motion is filed. The non-moving party also may arrange for a hearing. Before endeavoring to secure an appointment for a hearing on any motion, it shall be incumbent upon the counsel desiring such hearing to meet and confer in person or by telephone with his or her opposing counsel in a good-faith effort to narrow the area of disagreement. In the absence of any agreement, such conference shall be held in the office of the attorney nearest the Court in the division in which the action is pending. In any division which has a regularly scheduled motions day, the motion should be noticed for the first permissible motions day.

(E) Briefs Required:

(1) All motions, unless otherwise directed by the Court and except as noted hereinbelow in subsection 7(E)(2), shall be accompanied by a written brief setting forth a concise statement of the facts and supporting reasons, along with a citation of the authorities upon which the movant relies. Unless otherwise directed by the Court, the opposing party shall file a responsive brief and such supporting documents as are appropriate, within eleven (11) days after service

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and the moving party may file a rebuttal brief within three (3) days after the service of the opposing party's reply brief. No further briefs or written communications may be filed without first obtaining leave of Court.

(2) Briefs need not accompany motions: (a) for a more definite statement; (b) for an extension of time to respond to pleadings, unless the time has already expired; and (c) for a default judgment.

(3) Except for good cause shown in advance of filing, opening and responsive briefs, exclusive of affidavits and supporting documentation, shall not exceed thirty (30) 8½ inch × 11 inch pages double-spaced using 10 pitch typeface and rebuttal briefs shall not exceed twenty (20) such pages.

(F) Continuances. Motions for continuances of a trial or hearing date shall not be granted by the mere agreement of counsel. Any such motion will be considered by the Court only in the presence of all counsel, and no continuance will be granted other than for good cause and upon such terms as the Court may impose.

(G) Filing of Pleadings. After the filing of the complaint, all pleadings, motions, briefs and filings of any kind must be timely filed with the Clerk's office of the division in which the case is pending.

(H) Extensions. Any requests for an extension of time relating to motions must be in writing and, in general, will be looked upon with disfavor.

(I) Determination of Motions Without Oral Hearing. In accordance with Fed. R. Civ. P. 78, the Court may rule upon motions without an oral hearing.

(J) Motions Against Pro Se Parties. It shall be the obligation of counsel for any party who files any dispositive or partially dispositive motion addressed to a party who is appearing in the action without counsel, to attach to, or include at the foot of, the motion, a warning consistent with the requirements of *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975). The warning shall state that:

(1) The pro se party is entitled to file a response opposing the motion and that any such response must be filed within twenty (20) days of the date on which the dispositive or partially dispositive motion is filed; and

(2) The Court could dismiss the action on the basis of the moving party's papers if the pro se party does not file a response; and

(3) The pro se party must identify all facts stated by the moving party with which the pro se party disagrees and must set forth the pro se party's version of the facts by offering affidavits (written statements signed before a notary public and under oath) or by filing sworn statements (bearing a certificate that it is signed under penalty of perjury); and

(4) The pro se is also entitled to file a legal brief in opposition to the one filed by the moving party.

(K) Court Orders—Objections Noted. Whenever counsel shall endorse an order and note with such endorsement any objection to the order, unless the grounds of such objection have been previously stated in the record, or unless the grounds are set forth in writing at the time and as a part of the endorsement, or a request made to the Court for a hearing, it will be assumed the objection is without effect and waived.

[Effective February 1, 1997; amended effective September 1, 2000.]

RULE 7.1 FINANCIAL DISCLOSURE

(A) Required Disclosure. A nongovernmental corporation, partnership, trust, other similar entity that is a party to, or that appears in, an action or proceeding in this Court shall:

(1) file two copies of a statement that

a. identifies all its parent entities (corporate or otherwise), and also identifies any publicly held entity (corporate or otherwise) that owns 10% or more of its stock; or

b. states that there is nothing to report under Rule 7.1(A)(1)(a); and

(2) file a supplemental statement containing such additional information as may be from time to time required by the Judicial Conference of the United States or this Court.

(B) Time for Filing. A statement or form required by Rule 7.1(A) shall be filed within fourteen (14) days of the party's first appearance, pleading, petition, motion, response, or other request addressed to the Court, except that the statement or form required by Rule 7.1(A) shall be filed simultaneously with any request for emergency relief such as a motion for temporary restraining order. A supplemental statement or form shall be filed promptly upon any change in the circumstances that Rule 7.1(A) requires the party to identify.

(C) Statement Delivered to Judge. The Clerk shall deliver a copy of the Rule 7.1(A) disclosure to each judge acting in the action or proceeding.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

_____

vs. Civil/Criminal Action No._____

_____

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FINANCIAL INTEREST DISCLOSURE STATEMENT

Pursuant to Local Rule 7.1 of the Eastern District of Virginia and to enable Judges and Magistrate Judges to evaluate possible disqualification or recusal, the undersigned counsel for _____ in the above captioned action, certifies that the following are parents, trusts, subsidiaries and/or affiliates of said party that have issued shares or debt securities to the public or own more than ten percent of the stock of the following:

_____

_____

Or

Pursuant to Local Rule 7.1 of the Eastern District of Virginia and to enable Judges and Magistrate Judges to evaluate possible disqualifications or recusal, the undersigned counsel for _____ in the above captioned action, certifies that there are no parents, trusts, subsidiaries and/or affiliates of said party that have issued shares or debt securities to the public.

Date

Signature of Attorney or Litigant
Counsel for_____

Note: Under L.R. 7.1(A)(1), this form is to be filed in duplicate with the Clerk of Court.

Rev. 8/31/00

[Effective September 1, 2000.]

RULE 16. PRETRIAL CONFERENCE

(A) Applicability of Rule 16. Proceedings upon a defendant's default and matters involving habeas corpus petitions, other pro se prisoner petitions, bankruptcy proceedings, condemnation cases, motions to vacate, reduce or modify sentences, probation violations, forfeitures, and reviews from administrative agencies, are not subject to the provisions of this rule, but the judge to whom any such case is assigned may, in his or her discretion, follow the procedure outlined herein in whole or in part in any case. (See, Fed. R.Civ.P. 16(b)).

(B) Initial Pretrial Conference and Order and Scheduling Order. In all other civil actions, as promptly as possible after a complaint or notice of removal has been filed, the Court shall schedule an initial pretrial conference to be conducted in accordance with Fed.R.Civ.P. 16(b), and in addition thereto, or in lieu thereof, not later than ninety (90) days from first appearance or one hundred and twenty (120) days after service of the complaint, the Court shall enter an order fixing the cut-off dates for the respective parties to complete the processes of discovery, the date for a final pretrial conference and, whenever practicable, the trial date, and providing for any other administrative or management matters permitted by Fed.R.Civ.P. 16 or by law generally.

The parties and their counsel are bound by the dates specified in any such orders and no extensions or continuances thereof shall be granted in the absence of a showing of good cause. Mere failure on the part of counsel to proceed promptly with the normal processes of discovery shall not constitute good cause for an extension or continuance.

[Effective February 1, 1997.]

RULE 26. DISCOVERY AND EXPERT DISCLOSURE

(A) Inapplicability of Certain Discovery Requirements.

(1) The provisions of Fed.R.Civ.P. 30(a)(2)(C) (oral depositions); Fed.R.Civ.P. 31(a)(2)(C) (depositions by written questions); Fed.R.Civ.P. 33(a) (written interrogatories); Fed.R.Civ.P. 34(b) requests for production and entry); and Fed.R.Civ.P. 36(a) (requests for admission) that a party may not serve such discovery before the time specified in Fed.R.Civ.P. 26(d) will not apply in this District.

(2) The provisions of Fed.R.Civ.P. 26(a)(1) (that a party shall provide certain initial disclosure without awaiting a discovery request); Fed.R.Civ.P. 26(d) (that a party may not seek discovery from any source before the parties have met and conferred as required by Fed.R.Civ.P. 26(f)); Fed.R.Civ.P. 26(f) (that the parties meet and plan for discovery prior to a scheduling conference); Fed.R.Civ.P. 30(a)(2)(A) (that a party must obtain leave of Court to take more than ten depositions); Fed.R.Civ.P. 32(a)(3) (that a deposition taken without leave of Court pursuant to a notice under Fed.R.Civ.P. Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition); and Fed.R.Civ.P. 33(a) (that limits the number of written interrogatories to 25 in number including all discrete subparts), will not apply in this District.

(3) A deposition taken without leave of Court pursuant to a notice under Fed.R.Civ.P. 30(a)(1) before the time required by Fed.R.Civ.P. 12 for filing an answer or responsive pleading shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition.

(B) Requirement of a Writing. All objections to interrogatories, depositions, requests, or applications under Fed.R.Civ.P. 26 through 37, as well as all motions and replies thereto concerning discovery matters, shall be in writing. If time does not permit the filing of a written motion, the Court may, in its discretion, waive this requirement.

(C) Objections to Discovery Process. Unless otherwise ordered by the Court, an objection to any

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interrogatory, request, or application under Fed. R.Civ.P. 26 through 37, shall be served within fifteen (15) days after the service of the interrogatories, request, or application, except that a defendant may serve any such objection within thirty (30) days after service of the summons and complaint upon that defendant and, within forty-five (45) days after service of the summons and complaint, shall serve responses to interrogatories, requests or applications that are served with the complaint and as to which no objection is made. The Court may allow a shorter or longer time. Any such objection shall be specifically stated. Any such objection shall not extend the time within which the objecting party must otherwise answer or respond to any discovery matter to which no specific objection has been made.

(D) Expert Disclosures.

(1) *Agreement Upon Disclosure.* Counsel are encouraged to agree upon the sequence and timing of the expert disclosures required by Fed.R.Civ.P. 26(a)(2). All such agreements must be in the form of a consent order entered by the Court.

(2) *Timing of Mandatory Disclosure.* Absent such a consent order or unless ordered otherwise, the disclosures required by Fed.R.Civ.P. 26(a)(2) shall be made first by the plaintiff not later than sixty (60) days before the earlier of the date set for completion of discovery or for the final pretrial conference, if any; then by the defendant thirty (30) days thereafter. Plaintiff shall disclose fifteen (15) days thereafter any evidence that is solely contradictory or rebuttal evidence to the defendant's disclosure.

(3) *Completion of Disclosure.* Whether accomplished by agreement pursuant to subsection 26(D)(1) or pursuant to the schedule set by subsection 26(D)(2), all parties shall complete all forms of expert disclosure and discovery not later than thirty (30) days after the date upon which plaintiff is, or would be, required by subsection 26(B)(2) to disclose contradictory or rebuttal evidence.

(4) *General Provisions.* For purposes of this rule, counter-claim plaintiffs, cross-claimants and third-party plaintiffs shall be plaintiffs as to all elements of the counter-claim, cross-claim or third-party claim. Answers to interrogatories directed at clarification of the written reports of expert witnesses disclosed pursuant to Fed.R.Civ.P. 26(a)(2) shall be due fifteen (15) days after service.

[Effective February 1, 1997.]

RULE 30. DEPOSITIONS—EXPENSES—SUMMARIES—REVIEWING DEPOSITIONS

(A) Discovery. Any party, or representative (officer, director or managing agent), of a party, filing a civil action in the proper division of this Court, must ordinarily be required, upon request, to submit to a deposition at a place designated within the division. Exceptions to this general rule may be made on order of the Court when the party, or representative of a party, is of such age or physical condition, or special circumstances exist, as may reasonably interfere with the orderly taking of a deposition at a place within the division. A defendant, who becomes a counterclaimant, cross-claimant or third-party plaintiff, shall be considered as having filed an action in this court for the purpose of this Rule. This subsection shall not apply to an involuntary plaintiff nor an interpleader plaintiff.

(B) Recording and Transcribing Transcript of Discovery Deposition. The expense of recording a deposition shall be paid by the party seeking to take same. The expense of transcribing the deposition shall be paid by any party ordering the preparation of the original. Any other party desiring a copy of said deposition shall pay for same at the copy rate. Parties may, by agreement, equally share the costs of attendance and transcribing, including such copies as desired.

(C) Attorneys' Fees. Unless the services of associate counsel are retained, in lieu of travel expense, it is not the policy of the Court to make an allowance of counsel fees in attending any deposition, except to the extent provided by statute, and otherwise in this Rule, but the Court reserves the right to make a reasonable allowance where the circumstances of the case may justify same.

(D) Security for Travel Expense. Any party desiring to take the deposition of a witness (not a party or representative of a party) for discovery or use at trial, or a party or representative of a party as ordered by the Court under (A), beyond a division of the Court in which the action is pending, shall, if such testimony cannot be readily procured in another manner, prepay or secure the reasonable cost of travel of not more than one opposing counsel to the place of taking the deposition and return therefrom, but in no event shall the reasonable costs of travel exceed an amount which would reasonably be required to be paid to associate counsel in the area in which the deposition is being taken unless insufficient time is allowed in giving the notice to take depositions.

(E) Travel Expense. The "costs of travel" as provided in this Rule shall consist of the reasonable costs of travel by air or other public transportation, or an allowance for travel by private automobile at the prevailing rate per mile as may be provided for federal government employees on official business, whichever means of transportation is reasonably selected and used, including the cost of transportation from the office or residence to the terminal of the public transportation and from the destination terminal to the place of the taking of the deposition, and reasonable overnight accommodations, if deemed reasonably necessary, and return. The Court may, in its discretion, make a reasonable allowance for food.

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The "cost of travel," as herein defined, shall apply to any witness (not a party or the representative of a party) required to attend the taking of a deposition. As to any witness attending a trial or hearing in a civil action, pursuant to Fed.R.Civ.P. 45(b)(2), the expense of such "cost of travel" shall be taxed as costs if said witness testifies or if it is reasonably necessary for the witness to appear, but said "costs of travel" shall be limited to what would have been expended if said witness resided at one hundred (100) miles from the place of the trial or hearing, together with such reasonable allowance, if required for the purpose of the witness testifying, for overnight accommodations and food. If the witness resided within one hundred (100) miles of the place of trial or hearing, the "cost of travel" shall be limited to the mileage and attendance fees as provided by law.

(F) Reviewing Depositions. Whenever depositions are expected to be presented in evidence, counsel shall, before the final pretrial conference or, if same are not then available, before the day of trial, review such depositions and (1) extract therefrom a short statement of the qualifications of any expert witness to read to the jury, (2) eliminate unnecessary and/or irrelevant matters, and (3) eliminate all objections and statements of counsel to avoid reading same to a jury. In the event counsel are unable to agree on what shall be eliminated, they shall submit to the Court for a ruling thereon before the date of trial. Failure to do so will constitute a waiver of objections.

(G) Summaries of Depositions. In all nonjury cases, counsel shall attach to any deposition a summary of the examination of the testimony of each witness, thereby pointing out the salient points to be noted by the Court.

(H) Reasonable Notice. As a general rule, eleven (11) days in advance of the contemplated taking of a deposition shall constitute reasonable notice of the taking of a deposition in the continental United States, but this will vary according to the complexity of the contemplated testimony and the urgency of taking the deposition of a party or witness at a particular time and place.

(I) Limits on Depositions. Unless otherwise permitted by the Court for good cause shown, such permission being granted only upon written motion to the Court pursuant to Local Rule 7, no party shall take more than five (5) depositions of non-party, non-expert witnesses, including depositions to be used at trial pursuant to Fed.R.Civ.P. 32(a)(3), whether upon oral examination pursuant to Fed.R.Civ.P. 30, or upon written questions pursuant to Fed.R.Civ.P. 31. Any party may be deposed. This limit may not be waived by agreement of counsel.

[Effective February 1, 1997.]

RULE 33. INTERROGATORIES

Unless otherwise permitted by the Court for good cause shown, such permission being granted only upon written motion to the Court pursuant to Local Rule 7, no party shall serve upon any other party, at any one time or cumulatively, more than thirty (30) written interrogatories, including all parts and sub-parts. This limit may not be waived by agreement of counsel.

[Effective February 1, 1997.]

RULE 37. MOTIONS TO COMPEL AND SANCTIONS

(A) Motions to Compel. After a discovery request is objected to, or not complied with, within time, and if not otherwise resolved, it is the responsibility of the party initiating discovery to place the matter before the Court by a proper motion pursuant to Fed.R.Civ.P. 37, to compel an answer, production, designation or inspection. Such motion must be accompanied by a brief as required by Local Rule 37(B).

(B) Briefing of Discovery Motions. Unless otherwise ordered, the scheduling and page limitation provisions of Local Rule 7(E) shall apply to all discovery motions; provided that the Court may elect to decide discovery motions without briefing.

(C) Compliance With Discovery Orders. After the Court has ruled on a discovery motion, any answer, production, designation, inspection, or examination required by the Court shall be completed within eleven (11) days after the entry of the order on the motion, unless otherwise ordered by the Court.

(D) Failure to Comply With Order. A party objecting to the failure of another party to comply with an order on a discovery motion shall be responsible for bringing the non-compliance before the Court by a proper motion for supplementary relief pursuant to Fed.R.Civ.P. 37.

(E) Consultation Among Counsel. Counsel shall confer to decrease, in every way possible the filing of unnecessary discovery motions. No motion concerning discovery matters may be filed until counsel shall have conferred in person or by telephone to explore with opposing counsel the possibility of resolving the discovery matters in controversy. The Court will not consider any motion concerning discovery matters unless the motion is accompanied by a statement of counsel that a good faith effort has been made between counsel to resolve the discovery matters at issue.

(F) Extensions. Depending upon the facts of the particular case, the Court in its discretion may, upon appropriate written motion by a party, allow an extension of time in excess of the time provided by the Federal Rules of Civil Procedure, these Rules, or previous Court order, within which to respond to or complete discovery or to reply to discovery motions.

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Any agreement between counsel relating to any extension of time is of no force or effect; only the Court, after appropriate motion directed thereto, may grant leave for any extension of time. Unless otherwise specifically provided, such extension will be upon the specific condition that, regardless of what may be divulged by such discovery, it will not in any manner alter the schedule of dates and procedure previously adopted by the Court in the particular case.

(G) Unnecessary Discovery Motions or Objections. The presentation to the Court of unnecessary discovery motions, and the presentation to another party or non-party of unnecessary discovery requests of any kind, as well as any unwarranted opposition to proper discovery proceedings, will subject such party to appropriate remedies and sanctions, including the imposition of costs and counsel fees.

(H) Sanctions. Should any party or attorney fail to comply with any of the provisions of this Local Rule 37, or otherwise fail or refuse to meet and confer in good faith in an effort to narrow the areas of disagreement concerning discovery, sanctions provided by Fed.R.Civ.P. 37, may be imposed.

(I) Filing of Discovery and Responses. Except for a party proceeding pro se unless otherwise permitted by the Court on its own initiative or for good cause shown by motion under Fed.R.Civ.P. 5(d), discovery materials, depositions upon oral examination and upon written questions, interrogatories, requests for documents, requests for admission, notices for depositions and production, requests for disclosure of expert information, expert information, disclosures, and answers and responses or objections to such discovery requests shall not be filed with the pleadings or papers in any case. Where specific discovery material may appropriately support or oppose a motion, the specific discovery material in question shall be appended as an exhibit to the motion, or in response thereto, without having been previously filed. Discovery material otherwise permitted to be used at trial may be properly so used, if otherwise admissible, without having been previously filed except by parties proceeding pro se.

[Effective February 1, 1997.]

RULE 38. DEMAND FOR JURY TRIAL

Any demand for jury in a civil action must be in writing and filed strictly in accordance with Fed. R.Civ.P. 38. Removal actions shall be governed by Fed.R.Civ.P. 81(C). In the event another party is added, the additional party may demand trial by jury at any time within twenty (20) days after such party is served with process or summons.

[Effective February 1, 1997.]

RULE 45. SUBPOENAS

(A) Issuance of Subpoenas. Attorneys of record in an action, or associates in firms of record, as officers of the Court, shall issue all subpoenas in the action as authorized by Fed.R.Civ.P. 45(a)(3).

Parties appearing pro se may apply for subpoenas in their own behalf. All such requests by such party must be accompanied by a memorandum setting forth the names and addresses of witnesses or the documents requested and why and for what purpose or purposes. All such requests by pro se parties shall be referred to a Judge or Magistrate Judge of this Court who shall first determine whether the requested subpoena shall issue; provided, however, that such determination shall not preclude any witness or person summoned or other interested party from later contesting the subpoena.

(B) Return Date of Subpoenas. All subpoenas shall be made returnable to the place, date and time of trial or hearing, unless otherwise ordered by the Court.

(C) Proof of Service of Subpoenas. In civil actions, the party issuing a subpoena for a trial, a hearing or contempt proceedings, or when it is otherwise necessary to file proof of service, shall file proof of service in the form required by Fed.R.Civ.P. 45(b)(3). Any such proof of service shall be filed promptly and, in any event, within the time during which the person served must respond to the subpoena. Lawyers and parties proceeding pro se shall file with the proof of service in civil actions, or before a witness is required to testify in criminal cases, a certificate that all required witness fees and expenses were served with the subpoena requiring the attendance of the witness.

(D) Subpoenas to Officials. Without first obtaining permission of the Court, no subpoena shall issue for the attendance at any hearing, trial or deposition of (1) the Governor, Lieutenant Governor, or Attorney General of any State; (2) a Judge of any Court; (3) the President or Vice–President of the United States; (4) any member of the President's Cabinet; (5) any Ambassador or Consul; or (6) any military officer holding the rank of Admiral or General.

(E) Timely Service of Subpoenas for Trial or Hearings. Except as otherwise ordered by the Court for good cause shown, subpoenas for attendance of witnesses at hearings or trials in civil actions shall be served not later than fourteen (14) days before the date of the hearing or trial.

(F) Deposition Subpoenas. Proof of service of a notice to take depositions as provided in Fed.R.Civ.P. 30(b) and 31(b) constitutes sufficient authorization for the issuance of a subpoena by the Clerk for the district in which the deposition is to be taken for the attendance of persons named or described therein. Except as otherwise ordered by the Court for good

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Diana L. Schacht
07/10/2001 06:51:10 PM

Record Type: Record

To: Jay P. Lefkowitz/OMB/EOP@EOP, Courtney S. Elwood/WHO/EOP@EOP

cc: Kristen Silverberg/WHO/EOP@EOP
Subject: tort reform

would you please look over this memo and give me your comments? I need to deliver it to Josh later tonight, or early tomorrow at the latest. Thanks for your help and your contributions. This will not be the last opportunity to put things on the list, but if you have anything else you wish to add now, that would be great.



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UNREASON IN THE LAW OF DAMAGES: THE COLLATERAL SOURCE RULE

John Doe, permanently injured through the negligence of Richard Roe, recovers a judgment against the tortfeasor. Damages awarded to Doe conform to the factfinder's estimate of his medical and hospital expenses, of a monetary translation of his pain and suffering, and of his loss of earnings prior to judgment and as projected into the future. In mitigation of damages the defendant offers evidence that Doe's losses were in fact reduced by proceeds from Roe's liability insurance and from the plaintiff's own hospitalization and accident insurance, by a brother's gift of medical care, by continued salary payments and pension benefits, by tax advantages accruing from the substitution of tax-free funds for his taxable salary, and by savings resulting from Doe's reduced living costs during his hospitalization and from the absence of normal business-related expenses. In the majority of American jurisdictions, only the evidence of payment by the defendant's insurer would be admitted in mitigation of damages — the rest being excluded as deriving from "collateral sources," sources unrelated to the defendant. In spite of the primarily compensatory theory behind tort damages,[1] Doe is thus placed in a better monetary position than he was in before the accident.

This so-called collateral source rule provides, in effect, that in an action for compensatory damages the defendant will not be permitted to establish that the plaintiff did not actually sustain the amount of injury alleged, if diminution resulted from the conduct of a third person.[2] Although the rule itself has been in use since 1854 [3] and the term "collateral source" in currency since 1871,[4] application in varied situations amidst a congeries of exceptions continues to spawn litigation. The many cases applying or declining to apply the rule have, however, only rarely provided a vehicle for its judicial rationalization or for an exposition of its underlying policies.[5]

The question of mitigation for benefits from a collateral source reflects a potential conflict between guiding objectives of tort law. The first is to compensate the injured party, to make him whole; the second and more dubious one is to burden the tortfeasor with the loss.[6] If the loss is reduced by the tortfeasor himself, damages can be mitigated without conflicting with either goal.[7] When a third party compensates

[1] Restatement, Torts § 901, comment *a* (1939); *id.* § 903.
[2] *Id.* § 920, comment *e*; McCormick, Damages § 90 (1935).
[3] See The Propeller Monticello v. Mollison, 58 U.S. (17 How.) 152 (1854); Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 Minn. L. Rev. 669 (1962).
[4] Harding v. Town of Townshend, 43 Vt. 536, 538 (1871); see Averbach, *The Collateral Source Rule*, 21 Ohio St. L.J. 231, 233 (1960).
[5] "[I]n this field logic is conspicuous by its absence." Browning v. War Office, [1963] 1 Q.B. 750, 762 (C.A. 1962) (dissenting opinion of Donovan, L.J.).
[6] The purpose being either deterrence or punishment, or both. See Restatement, Torts § 901 (1939).
[7] When one branch of the government is the tortfeasor and another branch pays for the loss, problems of identity arise. In United States v. Harue Hayashi, 282

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B. Legal Compensation Does Not Fully Compensate

Refusal to mitigate has often been rationalized on the ground that "legal 'compensation' for personal injuries does not actually compensate." [73] Proponents of this argument have in mind the difficulty of translating pain and suffering into monetary terms, the inconvenience of litigation, and the inroads into damage awards of legal fees and unanticipated inflation.[74] Although each of these fears is real, the argument is less than persuasive.

There is, first, the latitude permitted juries to fix damages for pain and suffering; it cannot be doubted that juries frequently use this rubric to provide for inconvenience, legal fees, and inflation — in addition to generous provision for pain and suffering. A second objection to the argument is that the amount and availability of collateral benefits received in any case are fortuitous and bear no relation to the extent a purely compensatory damage award falls short of making the plaintiff whole. Where the plaintiff has no insurance, participates in no wage-continuation plan, is not recipient of a donor's largess, and realizes no resultant savings, about the only benefit which refusal to mitigate adds to his damages is tax savings; a well-situated plaintiff, on the other hand, may be "compensated" several times over as the result of a no-mitigation rule. If the inadequacies of a compensatory ceiling on damages present a genuinely important problem, more reliable solutions than the collateral source rule seem called for. Awarding attorneys' fees to the successful party is one example of a remedy more accurately attuned to the evil sought to be cured.[75]

C. The Plaintiff Paid for the Benefit

Where the plaintiff has paid a consideration for the benefit received, either in premiums on an insurance policy or by surrender of accumulated sick leave in return for continued salary payments, judicial refusal to mitigate has been nearly inexorable. The force of this argument is such that even in Britain evidence of accident insurance proceeds continues to be excluded.[76] Careful analysis of the argument does, however, somewhat diminish its persuasiveness.

Consistent with the consideration theory, a court might exclude evidence of life insurance proceeds on the ground that the wrong merely accelerated payment, but nevertheless admit evidence of accident insurance proceeds. The suggested distinction turns on an inquiry which has not been made by the courts: why does one purchase accident insurance? If the insured is speculating on the possibility of double recovery in the event of an accident attributable to the wrong of another, exclusion of the evidence may be warranted; mitigation would give

[73] Hudson v. Lazarus, 217 F.2d 344, 346 (D.C. Cir.), *cert. denied*, 350 U.S. 856 (1954).

[74] See McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960); 2 HARPER & JAMES, TORTS § 25.22 (1956).

[75] See McWeeney v. New York, N.H. & H.R.R., *supra* note 74, at 43 (Lumbard, C.J., dissenting).

[76] Bradburn v. Great W. Ry., L.R. 10 Ex. 1 (1874), distinguished Browning v. War Office, [1963] 1 Q.B. 750, 759 (C.A. 1962). Donovan, L.J., dissented in *Browning* on the ground that the pension and insurance situations were indistinguishable. *Id.* at 761.

him less than he bargained for — although an enlightened jurisdiction might regard such a bargain as contrary to public policy. But it seems more likely that the insured is purchasing security — prompt and sure payments without the necessity of litigation and without regard to the liability and financial resources of prospective defendants.[77] The motives behind purchase of hospitalization insurance seem susceptible to similar characterization. If this view is correct, there exists no compelling reason why the insured should get more than he bargained for.

Similar motive analysis, albeit complicated by the involvement of employers and unions, might require mitigation for benefits from salary continuation plans, and exclusion of evidence of pension benefits, the latter being closer to life insurance proceeds.[78] However, a different sort of analysis, one based on the incongruity of ascertaining "loss of earnings" without regard to the actual continuation of earnings, suggests that pension benefits too ought to be admitted for mitigation purposes. Just as some jurisdictions permit mitigation for continued salary payments,[79] receipt of pension benefits — which are merely deferred compensation — ought to diminish the amount of earnings loss. But this earnings analysis would not permit mitigation where payments diminish the employee's accumulated sick leave, particularly if the accumulated time could be translated into cash at termination of employment.[80]

The most serious deficiency of the consideration argument, however, is its circularity. Insurance and employment benefit arrangements are contractual; the price to the beneficiary depends on the scope of benefits agreed upon. Should the insurer or employer acquire rights of reimbursement or subrogation, the cost of the arrangement to the beneficiary would go down. The legal result cannot properly be predicated on the consideration paid; rather, it must be the other way around.

D. The Plaintiff Was the Intended Donee

Even in Alabama, the American jurisdiction least receptive to the collateral source rule, gifts to the plaintiff are not usable for mitigation purposes.[81] Among the few exceptions to this rule are the *Restatement of Torts* position that gratuitous services by a public charity are admissible,[82] and occasional holdings that the value of services rendered gratuitously by a doctor may not be recovered by the plaintiff.[83] The argument is that the donor intended to confer a benefit, not on the tortfeasor, but on the plaintiff, and that mitigation would shift the benefit.

Concern for the donor's intent raises the obvious question of how that intent is to be determined. While the nurse-wife in *Daniels v. Celeste* [84] rather clearly did not intend to benefit the tortfeasor who injured her

[77] See Note, 63 HARV. L. REV. 330, 332 (1949).

[78] *But see* Browning v. War Office, [1963] 1 Q.B. 750, 762 (C.A. 1962) (dissenting opinion of Donovan, L.J.); Payne v. Railway Executive, [1952] 1 K.B. 26 (C.A. 1951).

[79] See pp. 743–44, *supra*.

[80] See Rigney v. Cincinnati St. Ry., 99 Ohio App. 105, 131 N.E.2d 413 (1954).

[81] Bachelder v. Morgan, 179 Ala. 339, 60 So. 815 (1912), criticized in Note, 14 ALA. L. REV. 148, 159 (1961).

[82] § 924, comment *f* (1939).

[83] *E.g.*, Coyne v. Campbell, 11 N.Y.2d 372, 183 N.E.2d 891, 230 N.Y.S.2d 1 (1962).

[84] 303 Mass. 148, 21 N.E.2d 1 (1939).

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husband, there is no reason to believe that charitable institutions or "Good Samaritans" harbor intentions hostile to the tortfeasor. Similarly, the intent of employers making gifts to injured employees may well be to tide them over the prejudgment period rather than to add to the eventual damage award. Besides, the reluctance of our jurisprudence to shift losses to defendants might outweigh the desirability of honoring the donor's intent, particularly if the nature of that intent is open to question and conflicts with the compensatory ideal. Finally, to permit mitigation does not deprive the plaintiff of all benefit, since he did have the services when he needed them and without cost. Awarding him the monetary value of the services in a judgment probably rendered several years later seems an unanticipated windfall.

E. Benefits May Be Hard To Compute

In *McWeeney v. New York, N.H. & H.R.R.*[85] Judge Friendly, recognizing the conflict between computing loss of earnings on a pretax basis and the desired compensatory ideal, nevertheless refused to permit mitigation in the amount of the plaintiff's tax savings. His primary reason was the difficulty of computing the tax which would have been payable on future earnings, especially since the task would be for the jury. The judge noted that whereas computation of damages involved only the ascertaining of normal earning power, postaccident earning power, life expectancy, and the present value of the sum so arrived at, intrusion of tax considerations would necessitate more difficult determinations. Among these are variations in gross income, an estimate of the exemptions and deductions likely to be available, and a prediction as to changes in tax rates.

Proof of some of these matters would obviously complicate the trial process, as might determination of the value of gratuitously rendered services and more remote resultant savings. But the trial judge, aided by counsel, might himself make all but the most speculative tax adjustments to the pretax earnings figure returned by the jury.[86] And even a rough estimate of the operative tax rate would bring the damage award closer to a compensatory level than is the result under the collateral source rule.[87]

F. Legislative Intent May Preclude Mitigation

Whatever the logical difficulties of denying mitigation for collateral benefits in a system of damages which is primarily compensatory, Congress and the state legislatures may make a considered decision that particular benefits are to be additional to an injured party's other remedies. Where such a legislative intent is ascertainable, mitigation is of course improper. Since 1939 the Internal Revenue Code may have reflected such a policy choice, damages recoverable for loss of earnings being expressly excluded from gross income.[88] Similarly, section 5 of the

[85] 282 F.2d 34 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960).

[86] This system is used in England, where there are no juries in accident cases. MAYNE & MCGREGOR, DAMAGES 262–64 (12th ed. 1961).

[87] British Transp. Comm'n v. Gourley, [1956] A.C. 185, 197, 204, 210 (1955).

[88] Int. Rev. Code of 1939, ch. 1, § 22(b)(5), 53 Stat. 10. Despite suggestions that the tax treatment of lost earnings was rooted in emotional factors, see

FELA,[89] which enumerates certain items which an employer can set off in an employee's suit under the act, might be read to reflect a congressional decision that no additional collateral benefits can be set off. Judicial practice, however, has been to determine whether a particular benefit falls within section 5; if not, the "collateral source rule" is invoked and mitigation denied — without discussion of the policy considerations behind this particular application of the rule.[90] A contrary legislative intent may, of course, be manifested. Australia's Social Services Consolidation Act, for example, prohibits payment of invalid pensions to a person possessing an enforceable claim against another.[91]

III. Conclusion

None of the arguments here canvassed justifies refusal to mitigate as a general proposition. There are, at any rate, sufficient doubts regarding the defendant's "deserving" to pay more than the amount needed to make the plaintiff whole, the suitability of the no-mitigation rule as a remedy for the putative inadequacies of legal compensation, the bona fides of the argument that the plaintiff has bargained for a recovery exceeding compensation, the nature and significance of the donor's intent, the difficulties inherent in computing a compensatory award, and the character of legislative purpose, to make automatic incantation of the "collateral source rule" the most dubious of practices. The nub of the problem seems to be the very existence of this particular legal formula. Invocation of the "rule" has too often been a substitute for analysis of the merits of the parties' claims. If the task of reasoning through to an answer appropriate to the kind of benefit involved is believed too difficult, a general rule confining damages to a compensatory level seems infinitely preferable to its opposite. The British courts, more tightly bound to precedent than are our own, have moved a long way toward this position. Surely American jurisdictions should now cease to compensate plaintiffs for earnings never lost and expenses never in fact incurred; it will then be appropriate to work out rules regarding more speculative "benefits" like tax and resultant savings and those — such as insurance — more remotely connected to the amount of damages caused by the defendant's conduct. Should such changes require revision of the venerable rules regarding subrogation and reimbursement, so much the better for the state of our law.

Harnett, *Torts and Taxes*, 27 N.Y.U.L. Rev. 614, 626 (1952), the exclusion from gross income was continued in 1954.

[89] 35 Stat. 66 (1908), 45 U.S.C. § 55 (1952).

[90] See, *e.g.*, New York, N.H. & H.R.R. v. Leary, 204 F.2d 461, 468 (1st Cir.), *cert. denied*, 346 U.S. 856 (1953).

[91] Social Services Consolidation Act, 1947–50, § 25(1)(d) (Austl.); Fleming, Torts 211 (2d ed. 1961).

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the injured party, complications arise. Achievement of both goals is not impaired where the third party acquires either a right to reimbursement from the proceeds of the injured party's suit against the tortfeasor, or his own subrogated cause of action directly against the wrongdoer. Thus is the problem of the third party resolved contractually under most property and fire insurance agreements,[8] and statutorily under most workmen's compensation acts.[9] In other situations, however, the third party has no recognized right to either reimbursement or subrogation; here the potential conflict between tort objectives might have been resolved by extending the availability of reimbursement and subrogation, or dealt with by permitting the defendant to benefit from diminution of the plaintiff's actual loss. Instead, the orthodox solution has been invocation of the collateral source rule, permitting the plaintiff to exceed compensatory limits in the interest of insuring an impact upon the defendant.[10] This Note will survey the situations in which the orthodox solution has been applied and the exceptions with which it has been encumbered, and examine critically the justifications advanced for refusal to mitigate in particular circumstances.

I. The State of the Law

A. *Insurance*

Except in Alabama, which does not recognize a collateral source rule,[11] American courts do not permit defendants to reduce damages by introducing evidence that plaintiffs have received proceeds from life, accident, or hospitalization insurance.[12] It was with respect to insurance that the British courts first excluded evidence of collateral benefits,[13] a position seemingly surviving the current British trend toward a compensatory ceiling on damages.[14] In neither country, however, does the rule apply to property or fire insurance proceeds; whether or not the contract expressly so provides, the insurer is subrogated to the insured's rights against the tortfeasor and the tortfeasor may prove the existence of a subrogee in mitigation of damages.[15] Contrary language in a few cases[16] seems explicable on the ground that the court tacitly assumed

F.2d 599 (9th Cir. 1960), the court reconciled apparently contradictory cases, explaining that the Government is a single entity for purposes of mitigation if the payments are from general tax monies appropriated for a specific purpose, such as the support of a Veteran's Administration hospital, but separate entities if the payments are made from special funded sources such as the Old Age and Survivor's Trust Fund.

[8] Vance, Insurance 786–90 (3d ed. 1951).

[9] *Id.* at 798; 46 Colum. L. Rev. 669, 673 n.20 (1946).

[10] See Note, 14 Ala. L. Rev. 148, 159–60 (1961); Note, 63 Harv. L. Rev. 330, 331 (1949).

[11] Jones v. Keith, 223 Ala. 36, 134 So. 630 (1931); see Note, 14 Ala. L. Rev. 148, 155–57 (1961).

[12] *E.g.*, Roth v. Chatlos, 97 Conn. 282, 116 Atl. 332 (1922) (accident insurance); Conley v. Foster, 335 S.W.2d 904 (Ky. Ct. App. 1960) (hospitalization insurance); Gaydos v. Domabyl, 301 Pa. 523, 152 Atl. 549 (1930) (life insurance).

[13] Bradburn v. Great W. Ry., L.R. 10 Ex. 1 (1874).

[14] See British Transp. Comm'n v. Gourley, [1956] A.C. 185; Browning v. War Office, [1963] 1 Q.B. 750 (C.A. 1962), p. 745 *infra*.

[15] Vance, Insurance 786–88 (3d ed. 1951).

[16] Allen v. Zickos, 37 Ala. App. 361, 68 So. 2d 841 (1953) (property); Morton v. Washington Light & Water Co., 169 N.C. 468, 86 S.E. 294 (1915) (fire).

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that the insurer would have a right of reimbursement out of the proceeds of the judgment.[17]

This distinction between accident and property insurance rests on technical grounds rooted in ancient rules of subrogation. Subrogation theory requires that both the insurer's and the tortfeasor's obligations to the insured be the same. Where there has been property damage, both tortfeasor and insurer have a duty to compensate the insured for actual damages; subrogation is therefore permitted. Accident insurance contracts, on the other hand, require the insurer to pay scheduled benefits rather than the damages which might be imposed on the tortfeasor.[18] This distinction perhaps merits preservation on the ground that the obligations of insurer and tortfeasor are more likely to coincide in property damage cases, thereby minimizing the incidence of multiple litigation. But wherever insurance equals or exceeds loss, a single suit by the insurer is sufficient; and where it fails to cover loss, reimbursement from the proceeds of the insured's suit will usually obviate the need for another trial. The cases, however, do not distinguish hospitalization insurance — which is likely to approximate the actual cost of medical services — from life or accident insurance,[19] nor do they inquire into the degree of correspondence between insurance proceeds and actual loss. Although subrogation is said to be based on general principles of equity,[20] courts do not imply rights to subrogation or reimbursement in accident or hospitalization insurance. Whether these rights may be expressly provided for by contract in the accident or hospitalization insurance context has not been determined, the industry practice being to the contrary.[21] Absent provision for subrogation or reimbursement, all but the Alabama courts have chosen to permit plaintiffs to add damage awards for gross loss to their insurance proceeds.

B. Employment and Welfare Benefits

When the plaintiff during the period of his disability receives salary or other payments from his employer, or benefits from pension or statutory welfare plans, a more complicated pattern is presented. Despite the incongruity of permitting plaintiffs to recover for loss of earnings when earnings have not in fact been interrupted, the majority of American jurisdictions exclude evidence of continued compensation, at least for the purpose of diminishing the amount of damages.[22] But here there is no solid front. Three jurisdictions, for example, draw a distinction between salary payments and gifts, admitting evidence of the former in mitigation of damages. Alabama permits the intention of the employer to control.[23] Proof that no services were performed during

[17] See Note, 14 ALA. L. REV. 148, 155 (1961).
[18] 46 COLUM. L. REV. 669, 672 n.16 (1946).
[19] *Compare* Conley v. Foster, 335 S.W.2d 904 (Ky. Ct. App. 1960), *with* Roth v. Chatlos, 97 Conn. 282, 116 Atl. 332 (1922).
[20] VANCE, INSURANCE 787 (3d ed. 1951).
[21] *Compare* Michigan Hosp. Serv. v. Sharpe, 339 Mich. 357, 63 N.W.2d 638 (1954), *with* Michigan Medical Serv. v. Sharpe, 339 Mich 574, 64 N.W.2d. 713 (1954). Subrogation was allowed in the latter on the ground that the contract there involved did contain an express subrogation clause.
[22] *E.g.*, Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1927).
[23] *Compare* Whiddon v. Malone, 220 Ala. 220, 124 So. 516 (1929), *with* Bachelder v. Morgan, 179 Ala. 339, 60 So. 815 (1912).

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the period covered by the payments is sufficient to exclude evidence of receipt in Missouri and in Pennsylvania,[24] although one Pennsylvania case suggests that payments equal to salary are admissible even though not required by contract and though no services were performed.[25] The courts of New York and Ohio [26] draw a different distinction, admitting evidence of continued salary payments unless made from accumulated sick leave. The argument seems to be that where sick leave is diminished, payments do not represent a net benefit to the plaintiff. This is especially clear if, as in an Ohio case,[27] the plaintiff could have collected salary for accumulated sick leave at the termination of his employment. British courts generally allow defendants to reduce damages by the amount of salary payments,[28] although where a plaintiff affirmed his moral obligation to repay his employer, he was permitted to recover "lost earnings" from the defendant, the court's decree directing him to repay his employer.[29] Those jurisdictions which permit continued salary payments to be set off against loss of earnings do not, however, allow the employer to enforce the successful plaintiff's moral obligation to reimburse,[30] nor do they give the employer a cause of action against the tortfeasor.[31] Contrary holdings seem to rest on the assumed existence of special relationships, such as that between shipowner and seaman.[32]

In most jurisdictions, evidence of pension and welfare fund payments received as a result of the plaintiff's injury are similarly inadmissible for mitigation purposes.[33] Almost all workmen's compensation statutes, however, provide that the insurer or employer is subrogated to the injured employee's claim against the tortfeasor.[34] Where they do not, a common law right of subrogation is denied and evidence of receipt of statutory compensation is excluded.[35] New York and Pennsylvania, which allow mitigation in the event of continued salary payments,[36] exclude evidence of statutory disability benefits.[37] With regard to pen-

[24] See Moon v. St. Louis Transit Co., 247 Mo. 227, 152 S.W. 303 (1912); Quigley v. Pennsylvania R.R., 210 Pa. 162, 59 Atl. 958 (1904).

[25] Pensak v. Peerless Oil Co., 311 Pa. 207, 166 Atl. 792 (1933).

[26] See De Paulis v. United States, 193 F. Supp. 7 (E.D.N.Y. 1961); Drinkwater v. Dinsmore, 80 N.Y. 390 (1880); D'Amico v. Resnick, 197 N.Y.S.2d 826 (Sup. Ct. 1960); Rigney v. Cincinnati St. R.R., 99 Ohio App. 105, 131 N.E.2d 413 (1954); Pittsburgh, C. & St. L. Ry. v. Fagin, 3 Ohio N.P. (n.s.) 30 (Super. Ct. 1905), *aff'd mem.*, 74 Ohio St. 491, 78 N.E. 1135 (1906).

[27] Rigney v. Cincinnati St. R.R., *supra* note 26.

[28] See Receiver for the Metropolitan Police Dist. v. Croyden Corp., [1957] 2 Q.B. 154 (C.A. 1956); Payne v. Railway Executive, [1952] 1 K.B. 26 (C.A. 1951).

[29] Dennis v. London Transp. Bd., [1948] 1 All E.R. 779 (K.B.).

[30] *Cf.* Alabama Power Co. v. Edwards, 219 Ala. 162, 121 So. 543 (1929).

[31] Standard Oil Co. v. United States, 153 F.2d 958 (9th Cir. 1946), *aff'd*, 332 U.S. 301 (1947). *Contra*, Philadelphia v. Philadelphia Rapid Transit Co., 337 Pa. 1, 10 A.2d 434 (1940) (dictum).

[32] *E.g.*, Jones v. Waterman S.S. Corp., 155 F.2d 992 (3d Cir. 1946).

[33] *E.g.*, Ring v. Minneapolis St. Ry., 176 Minn. 377, 223 N.W. 619 (1929) (pensions); Mobley v. Garcia, 54 N.M. 175, 217 P.2d 256 (1950) (relief payments).

[34] See note 9 *supra*.

[35] Crab Orchard Improvement Co. v. Chesapeake & O. Ry., 115 F.2d 277 (4th Cir. 1940) (W. Va. law), *cert. denied*, 312 U.S. 702 (1941); Overland Constr. Co. v. Sydnor, 70 F.2d 338 (6th Cir. 1934) (Ohio law); see Truscon Steel Co. v. Trumbull Cliffs Furnace Co., 120 Ohio St. 394, 166 N.E. 368 (1929).

[36] See notes 24 & 26 *supra*.

[37] Seidel v. Maynard, 279 App. Div. 706, 108 N.Y.S.2d 450 (1951) (per curiam); Philadelphia v. Philadelphia Rapid Transit Co., 337 Pa. 1, 10 A.2d 434 (1940) (dictum).

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sions Britain followed the American rule until 1963, when the Court of Appeal in *Browning v. War Office* allowed mitigation.[38] Distinguishing the insurance cases on the ground that the insured had paid a consideration, the court reasoned that damages were intended to be no more than compensatory and that plaintiffs ought not to receive windfalls. In response to the postwar institution of a comprehensive welfare scheme, Parliament enacted a rather arbitrary solution to the problem posed by receipt of benefits from a collateral source: one half of the statutory benefits received and likely to be received during the five years following injury are to be used to mitigate the tortfeasor's liability.[39]

Refusal to mitigate for employment and welfare benefits creates evidentiary problems, since receipt of such payments may be relevant to disputed issues other than the amount of damages. Although evidence inadmissible for one purpose may nevertheless be perfectly admissible for another,[40] the trial judge may exclude competent evidence whose probative value is "substantially outweighed by the risk that its admission will . . . create substantial danger of undue prejudice or of confusing the issues or of misleading the jury . . . ."[41] In *Tipton v. Socony Mobil Oil Co.*,[42] decided this Term by the Supreme Court, a Jones Act defendant introduced evidence that the plaintiff had accepted benefits under another compensation act, by its terms inapplicable to crew members,[43] in order to prove that the plaintiff was not a seaman within the jurisdictional requirements of the Jones Act.[44] The jury, never cautioned by the trial judge with respect to the limited use it might make of the evidence, found the plaintiff not a seaman within the Jones Act, obviating the necessity of reaching the question of damages. The Court vacated the judgment, apparently on the ground that the evidence lacked sufficient probative value as to the plaintiff's status to overcome its prejudicial effect. In *Eichel v. New York Cent. R.R.*,[45] also decided this Term, the defendant in a Federal Employers' Liability Act suit sought to introduce evidence that the plaintiff was receiving substantial disability benefits under the Railroad Retirement Act,[46] the defendant's purpose being to impeach the plaintiff's testimony regarding permanency of his injuries and his motives for not returning to work. Since the amount of the collateral benefit was crucially relevant here,

[38] [1963] 1 Q.B. 750 (C.A. 1962). Donovan, L.J., dissenting, found no logical distinction between pensions and insurance payments. *Id.* at 761.

[39] National Insurance (Industrial Injuries) Act, 1946, 9 & 10 Geo. 6, c. 62; National Insurance Act, 1946, 9 & 10 Geo. 6, c. 67; Law Reform (Personal Injuries) Act, 1948, 11 & 12 Geo. 6, c. 41; see Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 HARV. L. REV. 241 (1949); Note, 63 HARV. L. REV. 330, 333 (1949). On the theory that the plaintiff has incurred no expense, the value of drugs and medical services obtained under welfare legislation may not be recovered by the plaintiff. FLEMING, TORTS 210 (2d ed. 1961).

[40] 1 WIGMORE, EVIDENCE § 215 (3d ed. 1940).

[41] UNIFORM RULE OF EVIDENCE 45 (1953).

[42] 375 U.S. 34 (1963) (per curiam).

[43] Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901–50 (1958), as applied in the Outer Continental Shelf Lands Act, 67 Stat. 463 (1953), 43 U.S.C. § 1333(c)(1) (1958).

[44] 38 Stat. 1185 (1915), as amended, 46 U.S.C. § 688 (1958).

[45] 84 Sup. Ct. 316, *reversing per curiam* 319 F.2d 12 (2d Cir. 1963) (Friendly, J.).

[46] 49 Stat. 967 (1935), as amended, 45 U.S.C. § 228 (Supp. IV, 1963).

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Eichel more directly than *Tipton* posed the threat of prejudicing the damage award. The Court affirmed exclusion by the trial judge on the ground that "the likelihood of misuse by the jury clearly outweighs the value . . . . Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice . . . ." [47] The Court noted the undesirability of making receipt of federal statutory benefits evidence of malingering, the susceptibility of evidence of collateral benefits to misuse by juries, and its potentially prejudicial impact. While it remains to be seen whether the Supreme Court will continue this Term's venture into reviewing evidentiary rulings by trial judges,[48] *Tipton* and *Eichel* may prove useful in reminding the lower judiciary of the need to articulate their view of the probative value of admitted evidence of collateral benefits and to instruct juries carefully in the uses to which such evidence may properly be put.

C. *Gratuitous Services*

Three recurrent situations raise the question whether the plaintiff ought to recover damages for expenses never in fact incurred, a kind of benefit different from payments of insurance but like that of continued salary. The first involves gratuitously rendered hospital and medical expenses. Here the *Restatement of Torts* suggests that mitigation be permitted where the services are rendered by a public charity.[49] Neither the *Restatement* nor the few cases [50] which have followed it have offered any rationale for this particular exception to the no-mitigation rule; nor is it apparent why a plaintiff should be able to recover the value of services rendered gratuitously by a doctor or by a private hospital, but not those obtained from a public charity. Most courts have simply declined the *Restatement's* lead, preferring instead rigid application of the collateral source exclusionary rule.[51]

In the second typical situation the plaintiff seeks recovery of the value of services rendered gratuitously by an association of which he is a member. In *Coyne v. Campbell* [52] the New York Court of Appeals recently ruled in favor of the defendant, likening gratuitous medical services to employment benefits rather than to insurance proceeds, a distinction already embedded in the state's law of damages.[53] Disregarding the plaintiff's duty to repay the association in kind should occasion arise, the court found controlling the absence of consideration moving from the plaintiff. In a recent Wisconsin case, however, a precedent similar to *Coyne* was distinguished and a contrary result reached where

[47] 84 Sup. Ct. at 317.

[48] See *Id.* at 318 (Harlan, J., dissenting). A question now hangs over New York, N.H. & H.R.R. v. Leary, 204 F.2d 461 (1st Cir.), *cert. denied*, 346 U.S. 856 (1953), where evidence that the plaintiff would receive a Railroad Retirement Act pension at age 65 was admitted as relevant to his request that earnings loss be computed on the basis of service until age 70.

[49] § 924, comment *f* (1939).

[50] *E.g.*, Di Leo v. Dolinsky, 129 Conn. 203, 27 A.2d 126 (1942).

[51] *E.g.*, Hudson v. Lazarus, 217 F.2d 344 (D.C. Cir.), *cert denied*, 350 U.S. 856 (1954).

[52] 11 N.Y.2d 372, 183 N.E.2d 891, 230 N.Y.S.2d 1 (1962).

[53] *Compare* Healy v. Rennert, 9 N.Y.2d 202, 173 N.E.2d 777, 213 N.Y.S.2d 44 (1961), *with* Drinkwater v. Dinsmore, 80 N.Y. 390 (1880).

the plaintiff sought to collect accident insurance after receiving free hospitalization, the court relying on the fact that the plaintiff had paid a consideration for the accident insurance.[54]

The third kind of situation concerns recovery for the value of services gratuitously rendered by the plaintiff's wife or someone similarly situated. The general rule seems to be that mitigation is denied, permitting the plaintiff to recover for expenses not in fact incurred.[55] But in *Daniels v. Celeste*, where the ministering wife was a registered nurse and may have had to give up her employment to serve her husband, the Massachusetts court ruled against the plaintiff, reasoning that he had not "paid" for the services — and could not, since he could not legally contract with his own wife.[56] To the extent that the husband and wife are regarded as a single economic unit, the court's conclusion that the plaintiff had incurred no "loss" is difficult to understand and its decision absurdly legalistic. The gratuitous provision of services by the plaintiff's wife at the expense of her job seems, after all, clearly an a fortiori case for recovery, since it is the one case in which the plaintiff — his family group, at any rate — does in fact sustain an economic loss.

D. Tax Advantages

Section 104(a)(2) of the Internal Revenue Code of 1954 excludes from gross income "the amount of any damages received (whether by suit or by agreement) on account of personal injuries or sickness." A plaintiff who recovers for loss of earnings on a pretax basis is therefore placed in a better financial position than if he had earned the same amount of money. Nevertheless, most courts compute loss of earnings without regard to the tax savings, relying on the collateral source rule,[57] the conjectural nature of tax estimates,[58] the inability of juries to make the required computations and the complications which would otherwise be introduced into trials,[59] and the congressional intent to give injured parties a tax benefit.[60] In 1956 the House of Lords overruled contrary precedent and held that damages for lost earnings must be computed on a posttax basis.[61] The courts of Connecticut and Oklahoma [62] have subsequently adopted this position.

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[54] Kopp v. Home Mut. Ins. Co., 6 Wis. 2d 53, 94 N.W.2d 224 (1959), distinguishing Nelson v. Pauli, 176 Wis. 1, 186 N.W. 217 (1922) (by implication).

[55] *E.g.*, Houston & T.C.R.R. v. Gerald, 60 Tex. Civ. App. 151, 128 S.W. 166 (1910).

[56] 303 Mass. 148, 21 N.E.2d 1 (1939).

[57] Mitchell v. Emblade, 80 Ariz. 398, 298 P.2d 1034 (1956); Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 125 N.E.2d 77 (1955).

[58] Stokes v. United States, 144 F.2d 82 (2d Cir. 1944).

[59] McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960); Highshew v. Kushto, 235 Ind. 505, 134 N.E.2d 555 (1956).

[60] Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 125 N.E.2d 77 (1955); 69 HARV. L. REV. 1495, 1496 (1956).

[61] British Transp. Comm'n v. Gourley, [1956] A.C. 185 (1955), overruling Billingham v. Hughes, [1949] 1 K.B. 643 (C.A.). See MAYNE & MCGREGOR, DAMAGES 251–64 (12th ed. 1961). It has been suggested that a better solution, one which would deprive the defendant of a windfall, would be to tax the award. FLEMING, TORTS 209 (2d ed. 1961).

[62] Floyd v. Fruit Indus., Inc., 144 Conn. 659, 136 A.2d 918 (1957); O'Connor v. United States, 269 F.2d 578 (2d Cir. 1959) (limited to Oklahoma law in McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960)).

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E. Resultant Savings

Like tax savings, the expenses from which the plaintiff is relieved by virtue of his injury may be analogized to benefits received from a collateral source. In either case, to ignore the item when computing damages is to award the plaintiff a windfall. Whether or not a saving is taken into account seems to turn on its degree of remoteness and speculativeness, although the results exhibit little in the way of logical consistency. In one rather bizarre case, the defendant was not permitted to diminish the award for pain and suffering by the fact that the miscarriage which resulted from the injury he inflicted would spare the plaintiff the pain and suffering of childbirth.[63] Consistent with the general British tendency to confine damages to a compensatory level, the Court of Appeal allowed a setoff for board saved while the plaintiff recuperated in a nursing home, using the nursing home's allocation of food costs.[64] Furthermore, had he introduced evidence of the home's allocation of room costs, the defendant would have obtained a deduction for that, too. The court rejected figures based on the cost of room and board which the plaintiff would have incurred had she not been injured, apparently on the ground that since she was now getting less valuable accommodations, she was entitled to additional cash. A contrary choice would result in a shrinking of the plaintiff's position.

II. The Rationales Examined

That there is no single collateral source rule ought to have emerged from the foregoing survey of situations in which the measure of damages might be mitigated to the extent of collateral benefits. Accordingly, the policy considerations usually advanced to justify particular refusals to mitigate cannot be assayed in a vacuum, but must be examined in light of the situation with respect to which they are invoked. Nor should one be surprised if analysis suggests that mitigation be permitted in one case and not in another.

A. The Defendant Deserves To Pay

Perhaps the most pervasive rationale offered to justify exclusion of evidence of collateral benefits is the putative desirability of making the defendant pay the undiscounted amount of damages he has caused.[65] As one court has put it, "If there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing." [66] But this emphasis upon the burdens which the defendant ought to bear, rather than upon the sum necessary to make the plaintiff whole, is pregnant with difficulties.

One court has observed the fallacy behind the assumption that "there is some norm of damages which a defendant who has acted without

[63] Morris v. St. Paul City Ry., 105 Minn. 276, 117 N.W. 500 (1908).
[64] Shearman v. Folland, [1950] 2 K.B. 43 (C.A.).
[65] *E.g.*, Roth v. Chatlos, 97 Conn. 282, 116 Atl. 332 (1922).
[66] Grayson v. Williams, 256 F.2d 61, 65 (10th Cir. 1958).

reasonable care ought to pay for his careless act . . . ." [67] No such norm is available. Even the most flagrant wrongdoer ordinarily is not liable for damages unless harm in fact results from his conduct; and when harm does occur, his liability depends, not on the degree of fault, but on the extent of injury, the physical idiosyncracies and earning capacity of the injured person, and on the latter's own degree of culpability. Furthermore, there is no indication that refusals to mitigate have been sensitive to varying degrees of moral fault; the intentional wrongdoer, the merely negligent tortfeasor, and he who is subject to absolute liability are treated in the same fashion. Punitive damages are a more appropriate device for dealing with the intentional tortfeasor, since they do not depend on fortuitous circumstances. Besides, the ultimate burden of the damage award is frequently borne, not by the alleged wrongdoer, but by liability insurers and the premium-paying public, the uninsured defendant being the least likely to be able to satisfy a large judgment.[68] Not only is the relationship between fault and the amount of damages too attenuated to be useful,[69] but attempts to hold the defendant responsible for the "harm" he has caused beg the question. The very issue in controversy is what constitutes the "harm" to be compensated; does it include salary not in fact discontinued and medical expenses never actually incurred, or is it exclusive of insurance proceeds or expenses from which the injury relieves the victim?

Doubts also beset the assumption that windfalls, if indeed there are any, ought to go to the plaintiff rather than to the wrongdoer. Perhaps this is morally correct, but the rough moral judgment of the community may well be otherwise. Judicial fears that juries will inexorably use evidence of collateral benefits admitted for other purposes to diminish defendant's liability [70] at least suggest that the average man finds the plaintiff a more unconscionable beneficiary of windfalls than the defendant. Furthermore, the remedies of subrogation and reimbursement offer alternatives to allocating windfalls to the defendant. Workmen's compensation statutes already provide for such a result, and one court has suggested that an employer should have a right to intervene in his employee's suit and assert a claim for benefits paid.[71] But where the potential subrogee is a loss-spreading fund or is otherwise well able to bear the loss, subrogation shifts the loss to an individual less able to bear it or to another loss-spreader, thus adding the cost of the shift to the total economic loss to be borne by the public.[72] There is much to be said, therefore, for permitting the defendant to take advantage of collateral benefits, he being — after an unsuccessful lawsuit — most in need of them.

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[67] Browning v. War Office, [1963] 1 Q.B. 750, 765 (C.A. 1962) (opinion of Diplock, L.J.).

[68] 2 HARPER & JAMES, TORTS § 25.22, at 1346 & n.11 (1956). The treatise here incorporates James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L. REV. 537 (1952).

[69] *Id.* § 25.22. See generally EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951).

[70] See pp. 745–46 *supra*.

[71] Philadelphia v. Philadelphia Rapid Transit Co., 337 Pa. 1, 10 A.2d 434 (1940) (dictum).

[72] 2 HARPER & JAMES, TORTS § 25.23 (1956).

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HEADLINE: Will New Vaccine Statute Give Shot in Arm to Tort Reform?

BYLINE: BY **PETER HUBER; Peter Huber** is a lawyer and consultant in Washington, D.C., who is the author of a major report for the Department of Justice assessing the effects of the AT&T divestiture. He has written extensively on **insurance** and tort-related issues

BODY:
Something in the nature of "tort reform" slipped through the last Congress, attracting surprisingly little notice. The new legislation will provide at least the usual level of entertainment for the legal community. But the real story if longer and more interesting and features fewer lawyers.

The journey starts in the English countryside in 1798. Over the next two centuries, it makes stops in a variety of unexpected places, including a convention of legionnaires in Philadelphia, a squalid village in Bangladesh, and the Sampan community that floats on the hepatitis-infected waters of Hong Kong harbor. It concludes today in the Polk Street bars and bathhouses of San Francisco. Along the way, the U.S. liability courts get involved, so much so that Congress passes a law to try and keep them from putting an end to the saga. But I'm getting ahead of myself.

Vaccines have contributed more to public health in this country and around the world than any other medical product, device, or procedure. Until Salk and Sabin developed their vaccines in the late 1940s and 1950s, polio was still every parent's terror in this country. Cases of paralytic polio in the United States dropped from 57,000 in 1952 to four in 1984. The incidence of measles dropped from 900,000 reported cases and 2,000 deaths in 1941, to 1,500 reported cases and two deaths in 1983. Other vaccines against mumps, rubella, whooping cough, and countless other infectious diseases have been to spectacularly successful that many in this country haven't even the vaguest idea what the diseases look like.

The Revolution Continues

Nor is the revolution by any means over. Genetic engineering now provides the tools for synthesizing new vaccines against meningitis, chicken pox, and perhaps even AIDS. The recently developed Hepatitis B vaccine may prove to be the first confirmed anti-cancer prophylactic. Studies of communities that suffer from a high incidence of hepatitis have demonstrated quite a strong link with liver cancer.

All vaccines, however, are also somwhat risky. A recent report by the American Medical Association provides these sample statistics: one in 312,500 doses of whooping cough vaccine causes brain damage; one in 1 million doses of measles vaccine causes brain damage; one in 3.2 million doses of polio vaccine causes paralysis, mostly to unvaccinated adults coming in contact with vaccinated children.

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There is much debate about whether safer vaccines are currently feasible. The Food and Drug Administration, all pharmaceuetical companies, and the vast majority of pediatricians insist that they are moving toward better products as fast as they can, but that those currently in use represent the best possible compromises between effective protection, safe design, and proper (though not excessive) warning of the residual hazards. Not all lawyers agree.

Which brings us to our liability system. Professor Edmund Kitch of the University of Virginia Law School has recounted the story in more detail elsewhere. n1 Anyone who maintains that the "liability crisis" is a mirage, a conspiracy of the **insurance** companies, or merely a sober judicial response to irresponsible business practices and dangerous technologies has to work a bit harder explaining this one away.

n1 Kitch, The Vaccine Dilemma, Issues in Sci. & Tech., Winter 1986, at 108.

The first -- and certainly the happiest -- judicial chapter in the vaccination story was written at the turn of the century, when public programs requiring universal vaccination against smallpox came into legal prominence. The risk of contracting smallpox from the vaccine itself -- was worrisome.

More than a few opponents saw vaccination as an incomprehensible, high-tech experiment, forced on a helpless public by untrustworthy scientific experts and overbearing public officials, and they attacked it as an unconstitutional infringement on individual liberty. The Supreme Court, to which this argument was addressed, was unconvinced: "[Medical experts] generally have considered the risk of such an injury [from improper vaccination] too small to be seriously weighed against the benefits." n2 The program was upheld.

n2 Jacobson v. Massachusetts, 197 U.S. 11, 17-18 (1905).

The legal climate changed. Early signs of liability problems arose in the 1960s, n3 by the 1970s produced the major developments. The 1974 decision of Reyes v. Wyeth Labs n4 was probably the first big break in contemporary vaccine litigation. Plaintiffs won a series of subsequent cases including, in several instances, large awards of punitive damages.

n3 See, e.g., Parke, Davis & Co. v. Stromsodt, 411 F.2d 1390 98th Cir. 1969) (award of $ 500,000); Tinnerholm v. Parke, Davis & Co., 411 F.2d 48 (2d Cir. 1969) ($ 651,758); Sterling Drug Inc. v. Yarrow, 408 F.2d 978 (8th Cir. 1969) ($ 180,000).

n4 498 F.2d 1264 (5th Cir. 1974).

A few later cases reinforced the idea that vaccine manufacturers were absolutely liable for all side effects of their products, or should pay because the FDA-approved warnings were not as draconian as a jury later judged they should have been, or should be punished for preferring FDA-approved variants of a vaccine over alternatives preferred in other countries.

A handful of courts imposed liability even though the overwhelming weight of the scientific evidence indicated that the injury in question was not caused by the vaccine. Several of the suits won by plaintiffs almost certainly involved injuries not actually caused by the vaccine.

We need not retry these cases here. For valid reasons or otherwise, pharmaceutical companies and their insurers soon became firmly convinced that the liability system was both hostile and unpredictable. And although the trend solidified only in the 1980s, the more prescient companies recognized it a decade earlier.

Swine Flu Epidemic

This led to the first congressional attention to the vaccine liability problem. In January 1976,

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swine flu virus was identified as the source of an infection that caused numerous illnesses and one death at Fort Dix, N.J. There was also some fear at the time (later proved unfounded) that the epidemic of Legionnaires' disease had been caused by swine flu.

After meeting with physicians and public health experts, President Ford requested funds for an emergency mass-vaccination program, and Congress appropriated the money within three weeks. The vaccine, like those directed at other kinds of flu, was relatively easy to manufacture, and the pharmaceutical industry was initially prepared to go along. But with the Reyes decision still freshly in mind, the **insurance** companies were not.

From the Senate floor, Sen. Edward Kennedy (D-Mass.) denounced the **insurance** companies' "cupidity" and "lack of social obligation to the needs of the American people."

Despite the fact that several decades of experience have been gained in the administration of several hundred million influenza immunization doses, with very few lawsuits resulting from these programs, the **insurance** industry is apparently unwilling to participate, despite the extensive field trials of these new vaccines which show that they are safer than those employed in the past. . . . [E]ven more disturbing is the suggestion that other federally funded immunization programs are now threatened with lack of **insurance** coverage. . . . The position taken by the **insurance** industry in this country with respect to these immunization programs is incomprehensible to me. . . . One would have hoped that in our free enterprise system, the **insurance** industry might have been able to find some reasonable basis to undertake **insurance** coverage of so important a program, and at a reasonable price based upon actuarial experience.

When the hand-wringing was over, Congress passed the National Swine Flu Immunization Program. It provided for an action against the United States under the Federal Tort Claims Act as the exclusive remedy for personal injury from the vaccine. Pharmaceutical companies furnished the vaccine at cost.

And as it so often does, "cupidity" turned out to be annoyingly rational. A risk warning set out in the federal statute had been provided with every dose of the vaccine, even though at the time no one knew what, if any, side effects would ultimately materialize after the vaccine had been scratched into 45 million arms. And although Kennedy was confident the vaccine had no side effects, the side effects materialized nonetheless.

The vaccine, it turned out, caused or promoted Guillain-Barre syndrome, a rare but disabling impairment of the central nervous system. Thousands of claims were subsequently filed, totaling more than $ 3 billion. Many were litigated. Two of the resulting decisions were, as Kitch accurately describes them, "remarkably hostile" to the manufacturers and the federal government insurer. The government eventually stipulated to liability for the syndrome whenever it was clear that the impairment began within 10 weeks of vaccination. It paid out nearly $ 80 million on 700 claims.

Tiny Risks Loom Large

Public attitudes during this period grew increasingly sour. The very success of vaccination programs has sharpened the focus on the tiny residual risks created by the vaccines themselves; small risks loom much larger when big risks have been eradicated. After one major vaccine scare in Britain, thousands of parents declined to have their children immunized against whooping cough. In the United States, the Dissatisfied Parents Together (whose acronym, DPT, mimics that of one of the major three-in-one childhood vaccines) published an angry book, repeatedly denounced the industry's failure to come up with safer products, and applauded the stricter liability rules and punitive damages that had been assessed against various vaccine manufacturers.

One of the national television networks aired a documentary that pilloried the manufacturers

of the pertussis, or whooping cough, vaccine: The manufacturers, the story implied, had all but concealed the product's risks, obdurately refused to develop a safer substitute, and ignored experiments with a better product in use in Japan. By all more sober accounts from epidemiologists and physicians, this was all quite untrue. But the shift in public attitudes was inevitable nonetheless.

One must note, at the same time, that by the measures usually relied on by the tort system's defenders, there is nothing in all this to worry about. Swine flu liability costs were shouldered by the federal government; they cost the pharmaceutical companies nothing at all. With other vaccines, manufacturers have won most of the litigated cases, and have paid little in settlements in the past decade. The liability system is just applying some gentle pressure for the development of safer products. And, of course, compensating a few grievously injured victims who are greatly in need.

Then there is the real world. Neither pharmaceutical companies nor their insurers make money by basking in the glow of past successes. Insurers do not translate past loss records into current premiums; they set current premiums in anticipation of future losses. And the liability future in the vaccine business has unquestionably become very cloudy.

Insurers, as the swine flu debacle abundantly demonstrated, don't like these products. An increasing number of vaccine manufacturers don't either. In the past 20 years, the number of U.S. vaccine manufacturers has shrunk by more than half. We now depend on sole suppliers for vaccines against polio, rubella, measles, mumps, and rabies. In 1976, we clearly had no willing manufacturers of the swine flu vaccine at all. At one point in 1984 it appeared we might lose all sources of pertussis vaccine. Those companies that have stayed in the business have directed an ever-increasing fraction of their resources to insuring and defending against the liability problems. The price of all vaccines has risen accordingly -- by several thousand percent in some cases.

The fact is that vaccines are expensive to develop and manufacture, and profit margins historically have been quite low. And the last decade, we all know full well what it could be in the next. Once you get your vaccine on the market, the contemporary tort system has the power to blow away not only the product, which typically represents years of up-front research and dvelopment, but also (if you're unlucky enough) your entire company. Take a new vaccine, scratch it into 20 million arms, and only then discover that your chief pharmacologist used to work for A. H. Robins, and you are unquestionably in bad trouble. Why take the risk?

An Important Model

Last year Congress finally confronted the problem, if only halfheartedly, in the National Childhood Vaccine Injury Act. On Nov. 14, 1986, the President, in much the same spirit, signed a package bill that included that act. The act sets up an alternative compensation system for vaccine injuries. Although not the legislation I would have written, the act clearly represents about as much tort reform as Congress can currently stomach. As such, it is a very important model.

If the new program works reasonably well, it may be copied in other initiatives covering drugs and medical devices, other consumer products, and other types of services. If the program fails miserably, as it well may, it seems unlikely that we will see significant federal reforms in other areas of product liability law for quite some time. For better or worse, then, this act is now the model for product liability reform at the federal level.

Just what does it do? If tomorrow your two-year-old daughter is given a dose of pertussis vaccine made by Connaught Laboratories and suffers a seizure and brain damage within a day or two, she'll have a claim. In the first round she must sue Dr. Otis Bowen, secretary of Health and Human Services, in federal district court. She may not sue Connaught. She may

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not sue in state court. yet the new act says nothing about your daughter's pediatrician. More on that interesting omission later.

In this first round, the federal court must appoint a special master to hear the claim. The master determines whether your daughter's seizure was caused by Connaught's vacine. If he concludes it was, the master makes no additional inquiry about Connaught's negligence or fault; he simply decides on a dollar award. The act sets out criteria for that award. It generally allows for out-of-pocket and other economic losses. It places a $ 250,000 cap on pain and suffering and bars any punitive damages.

Starting All Over

The master's findings then go to the district judge. The judge, roughly speaking, can do the whole thing over again, though subject to the same limits and guidelines on causation and damages. All of this first round is to be completed within one year after your daughter files her claim.

Then comes Round 2 -- if you want it. If you don't like the district court's judgment, you simply reject it. Then, and only then, you are free to file an action against Connaught in state court under state law. But subject, now, to some additional rules and requirements prescribed by this new act.

Any state trial must be held in three separate phases; one for liability, one for compensatory damages, and one for punitive damages. In the state trial, Connaught may not be held liable for "unavoidable side effects."

Literally applied -- which it won't be -- that clause would mean that Connaught will hardly ever be liable at all, because most vaccine injuries today almost certainly are unavoidable, given the present state of the technology. (I doubt the limit will be seriously enforced: It is altogether too easy to invoke different procedures and products used in other countries to buttress a claim that no given injury was truly "unavoidable.") In the state trial, Connaught may not be held liable for inadequate warning on its vaccine, if the warning complied fully with FDA requirements. (Here again, however, the act contains an exception to its safe-harbor provision that might well eviscerate it.) And in the state trial, your daughter may not argue that Connaught failed to give direct warnings to her or to you, rather than to her pediatrician. Finally, you can't get punitive damages from Connaught in the state trial if Connaught did everything it was supposed to do under FDA rules, absent fraud or intentional misconduct.

How well will the whole scheme work? No one really has the faintest idea. But it's easy enough to sketch out two possible scenarios that cover the outer limits of what may materialize.

Optismistic View

The optimistic scenario first. No more than a couple of hundred claims are filed a year. Two-thirds are dismissed on their face as making claims for injuries not caused by the vaccine. The other one-third or so are scientifically meritorious, or at least credible. Reasonably generous awards are made reasonably quickly, in the first-round proceeding. A good number of claimants accept the awards and go home. The first round, in short, becomes everything that our tort system today is not: fast, fair, efficient, predictable, reasonable, and most important of all, widely perceived to be all of the above.

Those few who insist on going on to the second round, for whatever reason, soon wish they hadn't. The Connaughts of this world, and their **insurance** companies, take a hard line in every second-round proceeding. The word goes out: No settlements at this stage -- the settlement process comes during Round 1 of the act, or before, and thereafter there is no

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second chance. In Round 2, the Connaughts will litigate every issue, without exception, to the hilt. Every adverse judgment will be appealed to the end. Within a few years the plaintiffs bar gets the message, and comes to accept the first-round process as the central compensation mechanism.

If the **insurance** industry is really going to make this thing work, it is also going to have to close off the backdoor claims. Keep in mind that you and your daughter can still sue your pediatrician, or health maintenance organization, or the lab technician, or the syringe manufacturer, or the company that made the refrigerator in which the vaccine was stored, or the Ayatollah Khomeini, and no doubt will sue them all under the venerable shotgun method for choosing defendants in liability suits. So the word is going to have to go out here too that there is one pot and one procedure that will work easily, and other attempts to get at the **insurance** pool through defendants other than Dr. Bowen, will be fought tooth and nail.

Finally, in my optimistic scenario, the system begins to settle down and run smoothly. The act is recognized in most circles to be reasonably efficient and fair. It is expanded to include more vaccines than are currently covered. Similar systems are eventually established for other drugs and medical devices, and for other products further afield. We all live happily ever after.

The second scenario is the one that came close to sinking this legislation when it came up for the President's signature. Claims alleging vaccine injuries mushroom, from a hundred or so per year into the thousands. Essentially every child who gets a chill or a fever within a short time of being vaccinated, and who subsequently has serious health problems of one sort of another, files a claim. The first-round compensation system is administered clumsily and too generously. Costs mount rapidly. Before long, Bowen, the fund he administers, and the vaccine industry as a whole have become the funders of a broad-ranging new welfare programfor sick young children.

At the same time, the few children with possibly legitimate claims of vaccine-induced injury disdain the awards made in the first-round proceedings. THey rush off to state courts just as soon as they can. The state courts continue on their current path toward infinitely plastic liability rules, undisciplined tests of causation, and infrequent but randomly munificent awards.

Vaccine manufacturers and their insurers begin to settle second-round lawsuits. The word now goes out that the first round is a slush fund for almost anyone and the second round a still-active crap shoot for those with colorable claims. The act, in the style of a Hollywood production, comes to be known as Black Lung II -- a Woody Allen farce at which we laugh to conceal the horrified realization that life is dangerously uncontrollable.

Everyone who has criticized the tort system, as I frequently have, must hope that we will find a way to develop the first scenario and avoid the second. What will that take? Possibly more than anyone can provide. The main imponderable in all vaccine cases is causation. No one really knows for sure just what side effects most childhood vaccines cause.

The best evidence is epidemiological. This kind of evidence was available, for example, to link the swine flu vaccine to Guillain-Barre syndrome. The federal government paid out nearly $ 80 million to 700 claimants. Perhaps half of the cases compensated would have arisen anyway, even without the vaccine. This, indeed, is the central problem in all vaccine cases: correlation without causal connection.

Some vaccine risks are quire simple. Nearly all of the handful of polio cases that now occur annually in the United States are probably caused by the polio vaccine rather than a wild virus. But the causal links in many other cases are much more uncertain, and false positives are difficult to avoid. Millions of children are vaccinated every year. Millions of children also get sick. There is an inevitable and quite large chronological overlap between the two events.

A British epidemiological study, for example, arrived at numbers suggesting that pertussis vaccination may cause 30 cases to 40 cases of brain damage in this country every year. The mechanism, however, is not understood, and there are of course far more children who suffer brain damage from other causes. If we are the least bit loose about causation in such cases, the compensation scheme will be an unrelieved disaster.

Congress at least anticipated the potential problems. The act includes a "vaccine injury table;; that defines compensable conditions in terms of the interval between vaccination and onset of the condition. The table is derived from one prepared by the AMA. If a person experiences a condition X with severity Y within Z days of vaccination, he will be entitled to compensation. The injury table lists the vaccines, and a certain class of injuries, and a time limit -- 24 hours, or three days, or a week -- during which the first symptoms of the disease must materialize.

But there are many words in the statute, and this guarantees much slack. It is difficult, moreover, to predict how honestly and carefully sympathetic pediatricians (whose own exposure to liability probably increases whenever the fund does not pay) are going to handle this issue. Awards will often depend critically on just when symptoms first appear. There may be a very strong temptation for anyone who is feeling generous to fudge just a little bit in drawing up the records on the timing issue. Once again, if this happens in any significant degree, the program will be a disaster.

Saving on Attorney Fees

All the while, a compensation system like this one can afford to be more generous than the tort system. Indeed, it should be able to afford to be almost twice as generous, because the world should be able to save about that much on the lawyers that will not be needed. Nevertheless, the quid pro quo for accepting a complete, no-fault compensation system that moves quite quickly and smoothly must be that the new system operates more rationally, systematically, and predictably than tort law. I would suggest a rule of thumb. Fifty percent of false positives in the first round of this sytem will be tolerable. Anything much higher will not.

The Department of Health and Human Services can, of course, take some steps that may help keep things in order. It needs a short list of highly credible experts in the field, open-minded but also hard-nosed. It needs to work out a uniform, written set of guidelines on how the special masters should gather their evidence in a standardized, unemotional, and largely written format. And it should commit at the outset to generous, quick settlement of any case that fits the written criteria, while also committing to no settlement at all for those falling outside. The clearer the signals sent out at the beginning, the better the chance that the system will work.

The whole refractory problem of false positives and excess claims on the fund brings us, finally, to the most important issue. Dr. Bowen, who is privileged to be the named defendant in all first-round actions, is not personally wealthy. No one quite knows yet how he is to pay for all these suits against him. The House version of the act imposed a tax on childhood vaccines, at prescribed levels, to raise about $ 40 million a year. But that tax was not part of the Senate bill, and is not yet law.

The act as passed also contains a clause suspending its operation whenever it is too short of cash, so as of today there is in fact no program at all. The Congressional Budget Office estimates that claims will run at about two to three times the revenues that would be generated by the taxes proposed in the House, especially in the first few years. If these estimates are on target, the program will be legally obliged to shut down even before it starts up.

If Congress does not fund the program soon, an interesting if politically unlikely possibility is worth considering. The act provides for **subrogation:** If Brown pays off your daughter, he then gets her original claim against Connaught, if she had one. This **subrogation** clause means that the whole engine could be put in motion without any further action by Congress. If they ever feel so inclined, vaccine manufacturers and their insurers could get some money -- say, $ 30 million -- into the fund immediately. Lawyers on all sides would shuffle some paper and chant appropriate words about advance payment on contigent liabilities, and in short order, the system would be solvent.

This would permit the interested parties to test out the program without putting any tax on the federal books and would also permit them to abandon it if things quickly got out of hand. The world of Washington probably has too much inertia for anything like this ever to be tried. But if Congress (or the President) balks at appropriating the money, a backdoor, quasi-voluntary approach might be worth considering.

However, the program is ultimately funded, there is a unique and perhaps essential opportunity here to demonstrate that a fairer, more orderly and ultimately more generous approach than the current tort system is possible. We surely need one. Vaccines are by no means the only problem area.

Take a look at contraceptives. The Lippes Loop ad Cooper Seven intrauterine devices have gone the same way as the Dalkon Shield, even though for a good number of women the first two IUDs are probably safer options than anything else. There was recently a very big award against the manufacturer of the leading spermicide, which is used in conjunction with all the barrier methods of contraception. The pill has been the target of numerous lawsuits over the years. Overall, the range of choice is narrowing, the prices are going up, and contraceptive manufacturers are digging in and hunkering down.

The ultimate losers, as always, will be the consumers -- the women who rely on these drugs and devices to exercise what has recently become their constitutionally protected right to control their own procreative cycle.

The story repeats itself in other areas too. If you know someone who has morning sickness, tell her to see her lawyer. Bendectin, the only real drug for treating the condition, has been knocked off the market by a flood of entirely baseless litigation. Major manufacturers of anesthesiology equipment have been under intense pressure from the tort system, although one should note that surgery without anesthesia has its disadvantages too.

A good number of medical specialists, especially obstetricians and neurosurgeons, have begun to practice expensive and sometimes dangerous defensive medicine; some have abandoned their specialties entirely. The tort system as it now operates is a slow and demoralizing crap shoot for the injured plaintiff and the often puzzled defendant alike.

We are not, however, about to turn back the clock and resurrect the old pro-defendant tort rules that dominated the landscape 30 years ago. Accepting this political reality, we have no choice but to move forward to some different compensation system. Once again, this act -- if it ever gets funded -- will be one of the first real attempts in the area of medical products and devices. Like it or not, it's going to be the test case.

And amid all the breast-beating and pontificating by members of our learned profession, avidly representing themselves and sometimes their clients too, we should perhaps keep in mind a quite different scene: A woman is lying on a bed. Her body is covered with the most horrible sores imaginable. The scene is hardly new -- probably a billion people on the planet alive today have seen it in the flesh, as did countless others from every generation before ours. And yet no one reading this article will ever see the scene again. The woman is dying of a disease called smallpox.

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In 1798, Edward Jenner discovered that he could immunize people against this dreaded disease by infecting them with another much less serious virus, cowpox. In the 1960s, the World Health Organization (WHO) launched its final assault on smallpox. As it happens, my father worked on that project, and my personal obsession with vaccines may be rooted in the inordinate pride I have in his own modest involvement in that campaign. On Dec. 9, 1979, 181 years after Jenner's discovery, the WHO was able to declare that the last cases of smallpox in Bangladesh had been isolated and eliminated.

Smallpox has been eradicated from the face of this planet. There is no animal reservoir for the virus, so it will never return. This is a victory that can be repeated. Scientists have the tools. The question really is whether lawyers will let them develop and use them.

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NOTE: The Constitutionality of Offsetting Collateral Benefits Under Ohio Revised Code Section 2317.45.

Julie A. Schafer

SUMMARY:
... Beginning in the early 1980s a number of state legislatures, having perceived a "crisis" in the insurance industry, enacted statutes that limited the amount of damages a plaintiff could recover in a tort action. ... Although an insurance crisis certainly was a motivating force, at least in Ohio there was a concern over the plaintiffs who, under the collateral source rule, were receiving a double recovery. ... The fact that the source of the collateral benefit in this case was workers' compensation buttressed the court's statement that "[p]ayments made under Ohio Workers' Compensation Program are not, and were never meant to be complete compensation for an injured employee. ... Attention must also be paid to the trend in most states toward limiting tort liability, either through damage caps or through abrogation of the collateral source rule. ... The most compelling argument made by the common pleas court in Cook is that workers' compensation did not adequately compensate the victim for his injury. ... The prevalence of statutes limiting liability in all types of tort actions indicates that the abrogation of the collateral source rule will continue. ... If the goal of tort law is primarily to compensate the injured victim, then the elimination of the collateral source rule may serve this purpose more effectively than damage caps. ...

TEXT:

[*587] I. INTRODUCTION

Beginning in the early 1980s a number of state legislatures, having perceived a "crisis" in the insurance industry, enacted statutes that limited the amount of damages a plaintiff could recover in a tort action. n1 These statutes took a number of forms, including caps on noneconomic damages, the elimination of joint and several liability, and the elimination of the collateral source rule. n2

The primary focus of this Note is upon the theories that underlie the abrogation of the collateral source rule. This analysis will center upon a critique of Ohio's statutory elimination of the collateral source rule, as well as the various legislative modifications of the collateral source rule undertaken in other states.

Part II discusses the general theories behind liability caps. Part III analyzes the history of the collateral source rule, and Part IV examines the statutory elimination of the collateral source rule in Ohio and the accompanying case law. Part V suggests some improvements to the current Ohio statute.

II. PURPOSE OF LIABILITY CAPS

Much of the motivating force behind the enactment of liability caps came from a dramatic increase in medical malpractice litigation across several states. n3 Studies in these states concluded that because of the high dollar recoveries by plaintiffs in medical malpractice actions, insurance coverage was growing prohibitively expensive for a large portion of the population. n4 Consequently, [*588] state legislatures enacted laws to limit plaintiffs' recovery of damages, particularly punitive damages. Ohio is among those states. n5

(A) State the total amount of compensatory damages, past and future, to the Plaintiffs.

STATE YOUR ANSWERS IN FIGURES IN INK $ 400,000.00

(B) What portion of your answer to Interrogatory (A) is past damages, if any, to the Plaintiffs?

STATE YOUR ANSWERS IN FIGURES IN INK $ 34,000.00

(C) What portion of your answer to Interrogatory (A) is future damages, if any, to the Plaintiffs?

STATE YOUR ANSWERS IN FIGURES IN INK $ 366,000.00

IF YOU FIND THAT THERE ARE FUTURE DAMAGES, MOVE TO INTERROGATORY (D). IF YOU FIND THAT THERE ARE NO [*609] FUTURE DAMAGES, DO NOT ANSWER THE REMAINING QUESTIONS

(D) What are the portions of the future damages shown in your answer to Interrogatory (C) that fall into the following:

(1) Future economic loss $ 366,000.00

(2) Future noneconomic loss

THE TOTAL OF THESE TWO AMOUNTS MUST EQUAL YOUR ANSWER TO INTERROGATORY (C)

(E) What are the portions, if any, of future economic loss shown in your answer to Interrogatory (D)(1), if any, that fall into the following:

(1) Wages, salaries or other lost compensation (earning capacity) (fringe benefits) $ 300,000.00

(2) (Expenditures) (expenses) (costs) for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations $ 66,000.00

(3) Any other (expenditures) (expenses) (costs) brought on by injury to person

THE TOTAL OF FUTURE ECONOMIC LOSS MUST EQUAL YOUR ANSWER TO INTERROGATORY (D)(1). n103

As the jury verdict form shows under (E)(1), the amount of wages, salaries, or other lost compensation totaled $ 300,000, and the costs for medical care or treatment totaled $ 66,000. The workers' compensation benefits in this case compensated the victim for precisely the type of harm that the jury deemed should be compensated. Therefore, the common pleas court's comments concerning inadequate compensation of an injured party who receives workers' compensation are inapplicable to the present case. n104

V. CONCLUSION

The prevalence of statutes limiting liability in all types of tort actions indicates that the abrogation of the collateral source rule will continue. At least ten states have modified the collateral source rule either for medical malpractice actions or for personal injury actions. n105 Despite the argument that these statutes deprive a plaintiff of a full recovery while granting the defendant a windfall, these statutes allow a jury to determine the total compensation to which the plaintiff is entitled. The plaintiff then receives this amount -- although he may not receive the entire amount from the defendant -- and he may receive [*610] the amount over a period of years, but the plaintiff does receive the amount his injury is deemed to be worth. Damage caps, on the other hand, limit compensation to the statutory amount, regardless of the "true" value of the injury. If the goal of tort law is primarily to compensate the injured victim, then the elimination of the collateral source rule may serve this purpose more effectively than damage caps.

Ohio's latest modification of the collateral source rule, when considered with its provisions for medical malpractice actions and actions against political subdivisions, essentially abolishes the collateral source rule. Section 2317.45 is quite thorough in defining what types of benefits qualify as offsetting collateral benefits. The statute is much less clear concerning the procedures to enforce and review the disclosures made by the plaintiff. Section 2317.45, unlike some other statutes, defines the time period in which collateral benefits must be disclosed. Given the long time span covered by the statute, defendants need an opportunity to verify the accuracy of the collateral benefits, and to obtain review during the five-year period following the entry of

judgment.

The injustice of offsetting workers' compensation benefits, thereby creating a windfall for a defendant, could be remedied by explicitly excluding workers' compensation benefits from the provisions of the statute, or by providing a statutory right of **subrogation** for workers' compensation benefits.

The Ohio legislature may wish to avoid the problem of attorneys' fees by amending the statute to include terms similar to Alaska's statute, n106 requiring the court to award costs and attorneys' fees before evidence of collateral benefits may be introduced. This would eliminate one of the strong incentives parties may have to continue litigating.

Until the Ohio Supreme Court decides the constitutionality of section 2317.45, the statute likely will be challenged throughout the state. Given the earlier decisions by the supreme court, which permit the offsetting of collateral benefits in medical malpractice actions, it seems unlikely that the court would not permit offsetting of collateral benefits in other actions. The supreme court may be concerned that an injured plaintiff in a workers' compensation case could be denied a pain and suffering recovery. Rather than strike the entire statute, the court could require that, in order for the statute to apply, the jury's verdict must be divided into separate damage amounts. In that way, it would be clear whether the plaintiff was receiving a double recovery.

As a whole, section 2317.45 is a reasonable statute. Those who oppose the statute argue that the insurance crisis is a result not entirely of large verdicts, but of attorneys and insurance companies. n107 Even if this is true, this does not justify overturning section 2317.45. Instead, other statutes should be passed to deal with all of the forces that push insurance rates unreasonably high. The [*611] workers' compensation bureau and other administrative agencies that also battle rising costs can remedy the perceived unfairness of section 2317.45 by providing for **subrogation** rights. By doing so, these agencies would fall outside of the statute. Rather than overrule one important attempt to contain rising insurance costs, the courts and the legislature should resolve some of the finer details of section 2317.45, and concentrate upon containing costs in other areas.

FOOTNOTES:

n1 See Ruth Gastel, The Civil Justice System, INSURANCE INFORMATION INSTITUTE (Feb. 1991); Linda J. Gobis, Note, Lambert V. Wrensch: Another Step Toward Abrogation of the Collateral Source Rule in Wisconsin, 1988 WIS. L. REV. 857 (1988); Amanda E. Haiduc, Note, The Tale of Three Damage Caps: Too Much Too Little and Finally Just Right, 40 CASE W. RES. L. REV. 825 (1990); L. Timothy Perrin, Comment, The Collateral Source Rule in Texas: Its Impending Demise and a Proposed Modification, 18 TEX. TECH L. REV. 961 (1987); see generally Ralph D. Gaines Jr. & William K. Hancock, **Tort Reform** in Alabama: A Proponent's Perspective, 18 CUMB. L. REV. 649 (1988); Perry Pazer & Tim Hogan, The New Collateral Source Rule: Is It Constitutional?, 18 TRIAL L. Q. 9 (1987).

n2 See sources cited supra note 1.

n3 Haiduc, supra note 1, at 825. See generally Ruth Gastel, Medical Malpractice, INSURANCE INFORMATION INSTITUTE (Feb. 1991).

n4 See Haiduc, supra note 1, at 825; Gastel, supra note 3.

n5 OHIO REV. CODE ANN. § 2307.43 (Baldwin 1990). In August, 1991, the Ohio Supreme Court held that section 2307.43 was unconstitutional. Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991).

n6 Nancy L. Manzer, Note, 1986 **Tort Reform** Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability, 73 CORNELL L. REV. 628, 628 (1988). Some writers blame attorneys for the rising costs of insurance. See Dennis McLellan, Surfeit of Civil Suits is a Crime, Advocate of **Tort Reform** Says, L.A. TIMES, Aug. 15, 1990, at E1 (Orange County ed.). In this article, McLellan discusses a recent book by Robert V. Wills, entitled "Why Lawyers are Killing America." Id. Wills blames the rise in litigation for the spiraling costs of liability insurance. Id. Another author writes that "[t]he courts, insurance carriers and defense lawyers are the three main culprits in rising insurance defense costs," which translates into higher overall insurance rates. Defense Lawyer Fingers Culprits in Cost Spiral, THE NATIONAL UNDERWRITER COMPANY PROPERTY & CASUALTY/EMPLOYEE BENEFITS Edition 26

(Nov. 19, 1990).

n7 OHIO REV. CODE ANN. § § 2305.27, 2743.02, 2317.45 (Baldwin 1990).

n8 STANTON DARLING, OHIO CIVIL JUSTICE REFORM ACT (1987). The Sixth Circuit agreed that the state legislature intended to prevent double recoveries with section 2317.45.

The purpose of the Ohio law . . . seems to be to prevent injured plaintiffs from receiving a windfall due to their injury. The statute requires that damage awards be adjusted for collateral benefits received as a result of . . . the injury so that a plaintiff will receive, in total, only the amount that a jury has determined to be adequate compensation for the particular injury.

Baker v. Goldblatt, No. 91-3508, 1992 WL 12679, at *5 (6th Cir. Jan. 30, 1992).

n9 DARLING, supra note 8, at 3.

n10 Id.

n11 Perrin, supra note 1, at 961.

n12 Id. at 966.

n13 Id. at 983.

n14 Joseph F. Cunningham, Collateral Source: Double Judgment or Double Trouble, 9 DISTRICT LAW 34, 35 (1985).

n15 Gobis, supra note 1, at 860-61.

n16 263 N.E.2d 235 (Ohio 1970).

n17 Id. at 239.

n18 Id.

n19 OHIO REV. CODE ANN. § 2317.45 (Baldwin 1990).

n20 OHIO REV. CODE ANN. § 2317.45(B)(1). The relevant sections of the statute are reproduced below:

(A)(1) As used in this section:

(a) "Collateral benefits" means benefits that a plaintiff has received, or may be entitled to receive within the next sixty months after the entry of judgment, as a result of an injury, death, or loss to person or property that is a subject of a tort action, from any of the following:

(i) The government of the United States, or any state or any political subdivision of any state, under a program that provides medical, hospital, sickness, dental, or other health benefits, including, but not limited to, social security, medicare, or medicaid;

(ii) A federal, state, or political subdivision of a state disability income or workers' compensation program, or a wage continuation program of an employer;

(iii) A medical, hospital, sickness, dental, or other health insurance program;

(iv) An accident insurance program that provides medical, hospital, sickness, dental, or other health benefits;

(v) A contract or agreement under which medical, hospital, sickness, dental, or other health services are provided or under which the cost of those services are paid for or reimbursed.

(b) "Rights of **recoupment**" means rights or [sic] **recoupment** through **subrogation,** trust agreement, contract, lien, operation of law, or otherwise.

(c) "Tort action" means a civil action for damages for injury, death, or loss to person or property. "Tort action" includes a product liability claim that is subject to sections 2307.71 to 2307.80 of the Revised Code, but does not include a civil action for damages for a breach of contract or another agreement between persons.

(d) "Trier of fact" means the jury or, in a nonjury action, the court.

(2) As used in this division and divisions (B)(2)(a) and (c)(i) of this section, "plaintiff" includes, in a wrongful death action, the decedent and all beneficiaries of the action.

(B)(1) Except as provided in division (C) of this section, if a plaintiff in a tort action is entitled to an award of compensatory damages, that plaintiff shall disclose to the court after such entitlement is determined all relevant collateral benefits, all rights of **recoupment** relative to the disclosed collateral benefits, and the costs, premiums, or charges for any of the disclosed collateral benefits paid or contributed within the three-year period immediately preceding the accrual of the cause of action, by the plaintiff, any member of his immediate family, or the employer of the plaintiff or any member of his immediate family or, in a wrongful death action, the decedent, any beneficiary of the action, the employer of the decedent or any beneficiary of the action, any member of the immediate family of the decedent or any such beneficiary, or the employer of any member of the immediate family of the decedent or any such beneficiary.

n21 OHIO REV. CODE ANN. § 2317.45(B)(2). The full text of this subsection reads as follows:

(B)(2) Upon the disclosure required by division (B)(1) of this section, the court shall do all of the following:

(a) Determine whether both of the following are satisfied in relation to any of the disclosed collateral benefits:

(i) The plaintiff has received the disclosed collateral benefit or is reasonably certain to receive it within the next sixty months after the entry of judgment;

(ii) There are no rights of **recoupment** respecting the disclosed collateral benefit.

n22 OHIO REV. CODE ANN. § 2317.45(B)(2)(b). The full text of this subsection reads as follows:

(b) As to any disclosed collateral benefits in relation to which both requirements of division (B)(2)(a) of this section are satisfied, determine the total of the costs, premiums, or charges for such benefits paid or contributed within the three-year period immediately preceding the accrual of the cause of action, by the plaintiff, any member of his immediate family, or the employer of the plaintiff or any member of his immediate family or, in a wrongful death action, the decedent, any beneficiary of the action, the employer of the decedent or any beneficiary of the action, any member of the immediate family of the decedent or any such beneficiary, or the employer of any member of the immediate family of the decedent or any such beneficiary[.]

Two federal courts recently interpreted this subsection. In Deaton v. Dreis and Krump Manufacturing Co., 134 F.R.D. 219 (N.D. Ohio 1991), the district court held that in determining the amount of workers' compensation premiums paid by the employer that will be added back to the jury award, the employer's contribution is not limited to the amount paid on behalf of the particular employee. Id. at 225. That is, although the employer had paid only $ 5.27 in workers' compensation premiums for the plaintiff-employee, the court added back to the plaintiff's award the total amount of workers' compensation benefits the employer paid during the three years prior to the plaintiff's injury. Id. In this case, the employee had received $ 11,618.64 in workers' compensation, and the employer had paid $ 15,624 in premiums. Id. at 225. Therefore, the court concluded that the plaintiff's workers' compensation "which the statute requires be deducted from the verdict, is entirely offset by his employer's contribution." Id.

The Sixth Circuit disagreed with this interpretation in Baker v. Goldblatt, No. 91-3508, 1992 WL 12679 (6th Cir. Jan. 30, 1992). According to the court, "collateral benefits received by a plaintiff should be adjusted only by that portion of en employer's workers' compensation premiums directly related to the employment fo the particular plaintiff." Id. at *4.

n23 OHIO REV. CODE ANN. § 2317.45(B)(2)(c). The full text of this subsection reads as follows:

(c) Prior to entering judgment for the plaintiff, do both of the following:

(i) Subtract from the compensatory damages that the plaintiff otherwise would be awarded the amount of any disclosed collateral benefits in relation to which both requirements of division (B)(2)(a) of this section are satisfied;

(ii) Subject to the limitation specified in this division, add to the balance derived under division (B)(2)(c)(i)

of this section the total of any costs, premiums, and charges described in division (B)(2)(b) of this section. The amount of those costs, premiums, and charges that is added to that balance shall not exceed any amount subtracted pursuant to division (B)(2)(c)(i) of this section from the compensatory damages that the plaintiff otherwise would be awarded.

An example of how this would operate is as follows: Suppose that the jury renders a verdict for the plaintiff for compensatory damages in the amount of $ 10,000.00. Based upon evidence presented by the defendant, the judge determines that the plaintiff is entitled to collateral benefits from her insurance company of $ 6,000.00. The judge then subtracts the $ 6,000.00 of collateral benefits from the jury award for compensatory damages, which leaves the plaintiff with a $ 4,000.00 recovery. However, because the plaintiff paid $ 1,000.00 in premiums for the insurance coverage she received, the court adds this $ 1,000.00 to the $ 4,000.00 recovery. The result is that the plaintiff is entitled to receive $ 5,000.00 from the defendant.

n24 OHIO REV. CODE ANN. § 2317.45(B)(3). The full text of this subsection reads as follows:

(3) Except as provided in division (B)(1) of this section, in another section of the Revised Code, or in the Rules of Evidence, evidence of collateral benefits is not admissible in a tort action and shall not be submitted to or considered by the trier of fact in determining whether to award compensatory damages to a plaintiff in a tort action or in determining the amount of any such damages.

n25 OHIO REV. CODE ANN. § 2317.45(B)(1), (B)(2). Ohio's statute is unique with respect to the duration of its disclosure requirements. See, e.g., CONN. GEN. STAT. ANN. § 52-225a (West 1990) (providing that benefits up to the date of judgment may be deducted). See also MICH. COMP. LAWS ANN. § 600.6303 (West 1990) (Court must first determine that there is a previously existing contractual or statutory obligation on the part of the collateral source to pay the benefits before they may be deducted).

n26 OHIO REV. CODE ANN. § 2317.45(B)(2)(a)(i).

n27 22 AM. JUR. 2D Damages § 23 (1988). Black's Law Dictionary defines compensatory damages as "such as will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury." BLACK'S LAW DICTIONARY 390 (6th ed. 1990). Dan Dobbs writes that "[t]he damages award is substitutionary relief, that is, it gives the plaintiff money mainly by way of compensation, to make up for some loss that was not, originally, a money loss, but one that ordinarily may be measured in money." DAN DOBBS, REMEDIES 135 (1973).

n28 In Ohio, workers' compensation legislation became effective in 1913. See OHIO REV. CODE ANN. § § 4123.01-4123.99 (Baldwin 1990). The Ohio Constitution mandates the establishment of workers' compensation by employers. OHIO CONST. art. II, § 35. There is no right of **subrogation** included in the workers' compensation statutes, which means that an employee who receives workers' compensation benefits will fall within the scope of § 2317.45.

n29 81 AM. JUR. 2D Workmen's Compensation § § 1-3 (1976).

n30 Id. at § 2.

n31 Ohio Manufacturers' Association, THE FACTS ABOUT WHY OHIO NEEDS TOTAL REFORM FOR WORKERS' COMPENSATION 7 (Fall/1985 Reform Proposal).

Workers' Compensation rests upon the economic principle that those persons who enjoy the product of a business -- whether it be in the form of goods or services -- should ultimately bear the cost of the injuries or deaths that are incident to the manufacture, preparation and distribution of the product. . . . If the cost is a predictable incident of the operation, sound business judgment demands that it be included as an element of the price.

WEX S. MALONE, ET. AL., CASES AND MATERIALS ON WORKERS' COMPENSATION AND EMPLOYMENT RIGHTS 39 (1980).

n32 See OHIO REV. CODE ANN. § § 2317.45(B)(1), (B)(2)(c)(i).

n33 ALASKA STAT. § 09.17.070 (1990).

n34 See supra note 31.

n35 Perrin, supra note 1, at 991. **Subrogation** is "the substitution of one person in the place of another with reference to a lawful claim or right. . . . It is the machinery by which the equities of one man are worked out through the legal rights of another." 73 AM. JUR. 2D § 1 (1974). Conceptually, **subrogation** resembles other equitable doctrines which are designed to prevent unjust enrichment. "**[Subrogation]** is not an absolute right, but one which depends on the equities and attending facts and circumstances of each case." Id. at § 11. The factors to consider when determining whether a right of **subrogation** exists include: the secondary liability of the person claiming **subrogation** rights, or "the necessity of acting to protect his own interests, or . . . an agreement that he is to have security." Id.

n36 Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991).

n37 Id. at 772.

n38 Id.

n39 Id. at 773.

n40 Cook v. Wineberry Deli, Inc., No. 14841, 1991 WL 131485 (Ohio Ct. App., Summit Cty. July 17, 1991).

n41 Id. at *1.

n42 Id.

n43 Cook v. Wineberry Deli, Inc., No. CV88 08 2737, 1990 Ohio Misc. LEXIS 6, at *5. (Summit Cty. Oct. 8, 1990). Although the analysis of section 2317.45 is quite extensive, it is important to note that the judge adopted plaintiffs' brief, and incorporated it, verbatim, as the opinion of the court.

n44 Id. at *6. Although the research in the plaintiff's brief cites research to the contrary, there is an abundance of literature which cites a litigation explosion as a primary cause of rising insurance rates. See sources cited supra note 1.

n45 1990 Ohio Misc. LEXIS 6, at *6.

n46 Id.

n47 Id. at *6-7.

n48 Id. at *8-9. What is noticeably absent from the court's opinion is a discussion of the legislature's response to the insurance crisis in Ohio. Also absent from the court's analysis was a discussion of the widespread trends in other states which limited recoveries in tort actions. See supra notes 1-6.

n49 Cook v. Wineberry Deli, Inc., 1991 WL 131485, at *4 (Ohio Ct. App Summit Cty. July 17, 1991).

n50 1990 Ohio Misc. LEXIS 6, at *11. See OHIO CONST. art. I, § 5.

n51 1990 Ohio Misc. LEXIS 6, at *11.

n52 Id. at *13.

n53 Id. at *13-14. Although this analogy has some merit, arguably the true effect of the statute is to achieve an equitable apportionment of damages; this is the crucial difference between remittitur and section 2317.45. Remittitur occurs "[i]f money damages awarded by a jury are grossly excessive as a matter of law, [whereupon] the judge may order the plaintiff to remit a portion of the award." BLACK'S LAW DICTIONARY 1295 (6th ed. 1990). In contrast, the judge's deduction of collateral benefits under section 2317.45 is not based upon the assumption that the jury's award was excessive. Instead, the deduction is based upon the realization that the plaintiff's recovery was excessive. Under section 2317.45, the injured party still receives the compensation awarded by the jury. If remittitur were applied, the total recovery to which the injured party is deemed entitled would be reduced.

n54 1990 Ohio Misc. LEXIS 6, at *15.

n55 Id.

n56 Id. at *16.

n57 Id. at *16-17. This particular comment suggests that because the benefits are deducted from what a defendant otherwise would pay, justice was not achieved. Such a position ignores one of the primary goals of tort law: to compensate the injured party. This argument perhaps would be more persuasive in the criminal context where there are multiple purposes to be served by the judicial system. See generally SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES (1989).

n58 Cook v. Wineberry Deli, Inc., No. 14841, 1991 WL 131485, *5 (Ohio Ct. App. Summit Cty. July 17, 1991).

n59 OHIO CONST. art. 1, § 16.

n60 1990 Ohio Misc. LEXIS 6, at *20.

n61 1991 WL 131485 at *5-6.

n62 Cook v. Wineberry Deli, Inc., No. CV88 08 2737, 1990 Ohio Misc. LEXIS 6, at *24 (Summit Cty. Oct. 8, 1990).

n63 The statute violated due process under both the Ohio Constitution and the United States Constitution. U.S. CONST. amend. XIV., OHIO CONST. art. I, § 16.

n64 1990 Ohio Misc. LEXIS 6, at *33.

n65 Id.

n66 Id. at *34-35.

n67 Cook v. Wineberry Deli, Inc., No. 14841, 1991 WL 131485 at *7 (Ohio Ct. App. Summit Cty. July 17, 1991).

n68 Id.

n69 1990 Ohio Misc. LEXIS 6, at *42-43.

n70 Id. at *43. According to the court, "heightened rational basis" could be applied to the statute if an "important" rather than a "fundamental" right is infringed. Id. at *46-47.

n71 Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991).

n72 Id. at 772.

n73 Id.

n74 Jeffers v. Phillips Ready Mix, No. 90 CA 0057, 1991 Ohio App. LEXIS 50 (Greene Cty. Jan 8, 1991). The court makes no reference to the Cook decision. It appears that the constitutionality of section 2317.45 was not challenged.

n75 Id. at *1.

n76 Id.

n77 Id.

n78 Id. These collateral benefits were from workers' compensation. Id. This case is similar to Cook in that the plaintiffs received workers' compensation even though the employer had no responsibility for plaintiffs' injuries, yet the plaintiffs also received jury awards from defendants.

n79 Id. at *3.

n80 Id. at *4-5. Essentially, plaintiff is arguing that workers' compensation did not compensate him for this future pain and suffering, and therefore that this amount should not be deducted. See supra notes 28-32 and accompanying text.

n81 1991 Ohio App. LEXIS 50, at *6. This argument actually presents the opposite of what is discussed earlier. See supra notes 25-26 and accompanying text. That is, it seemed that one of the problems with section 2317.45 is that the defendant would have to rely upon the plaintiff's disclosure of collateral benefits. In this case, however, the plaintiff did not inform the jury of all his medical expenses, and the defendant had

evidence of benefits which exceed these disclosed expenses. In other words, the plaintiff has to be careful to inform the jury of all expenses, because he will be held accountable for all of the benefits, even if the jury was underinformed.

n82 1991 Ohio App. LEXIS 50, at *4.

n83 Id.

n84 Id. at *5. By holding this way, the court does overlook one of the purposes of section 2317.45: to prevent a double recovery.

n85 Id. at *6. Although the court does not explicitly say so, it appears that plaintiffs' argument in Cook that section 2317.45 deprived them of a jury trial had little merit in this court. See supra notes 50-58 and accompanying text.

n86 Sorrell v. Thevenir, slip op., No. 89 CL 121 (Ohio Ct. C.P. Gallia County Jan. 14, 1991).

n87 See Defendant's Notice of Appeal in the appendix to Defendant-Appellant's Brief at i, Sorrell (No. 91-CA04).

n88 Sorrell, slip. op. No. 89 CL 121, at 9.

n89 Id. at 5-12.

n90 Id. at 1.

n91 Id. at 2.

n92 Defendant-Appellant's Brief at 1-2, Sorrell (No. 91-CA-4).

n93 Id. at 2.

n94 See Defendant-Appellant's Brief, Sorrell (No. 91-CA04); Plaintiffs-Appellees Brief, Sorrell (No. 91-CA-4). See also supra notes 40-70 and accompanying text.

n95 See supra notes 8-9 and accompanying text. See generally PETER W. HUBER, LIABILITY (1988). Huber writes eloquently of the insurance crisis that spread across the United States over the past two decades.

n96 See supra note 8 and accompanying text.

n97 Id.

n98 See supra notes 96-97 and accompanying text.

n99 See ALASKA STAT. § § 09.17.070 (1989), 09.55.548 (Supp. 1986); ARIZ. REV. STAT. ANN. § 12-565 (1989); CAL. CIV. CODE § 333.1 (West 1990); CONN. GEN. STAT. ANN. § 52-225a (West 1990); FLA. STAT. ANN. § 768.76 (West 1990); IND. CODE ANN. § 34-4-36-2 (West 1990); MICH. COMP. LAWS ANN. § 600.6303 (West 1990); MINN. STAT. § 548.36 (1990); OR. REV. STAT. § 18.580 (1989); UTAH CODE ANN. § 78-14-4.5 (1990).

n100 OHIO REV. CODE ANN. § 2744.05 (Baldwin 1990).

n101 Menefee v. Queen City Metro, 550 N.E.2d 181 (Ohio 1990).

n102 See id.

n103 Cook v. Wineberry Deli, Inc., No. CV88 08 2737, 1990 Ohio Misc. LEXIS 6, at *55-56 (Summit Cty. Oct. 8, 1990).

n104 See supra notes 55-56 and accompanying text. The court in Jeffers alluded to the potential unfairness of deducting benefits that had not already compensated the injured party. See supra note 84 and accompanying text.

n105 See supra note 99 and accompanying text.

n106 See supra note 33 and accompanying text.

n107 See supra notes 46-48 and accompanying text.

While much of the emphasis in **tort reform** was upon controlling the rising cost of medical insurance, in large part due to high malpractice verdicts, there also was a concern about rising insurance rates in other highly litigious areas. One commentator suggested that in addition to rising insurance costs, state legislatures increasingly believed that the judicial system was not working efficiently and therefore that some sort of statutory damage limitation was necessary. "Although the 'insurance crisis' was the most widely publicized factor that led states to adopt **tort reform** measures, the state legislatures also were responding to scholarship indicating that the tort system failed to achieve its compensatory objectives and therefore should be substantially modified or even eliminated." n6

This perceived crisis in insurance led many states, including Ohio, to abolish the collateral source rule altogether. Ohio enacted statutes to eliminate the collateral source rule first for medical malpractice claims and for claims regarding political subdivision immunity, and then for general negligence claims. n7 Although an insurance crisis certainly was a motivating force, at least in Ohio there was a concern over the plaintiffs who, under the collateral source rule, were receiving a double recovery. n8 According to the author of Ohio's [*589] most recent statute abolishing the collateral source rule, the primary purpose of the statute is to prevent an injured party from receiving a double recovery. n9 The author noted previous legislative attempts to reduce awards by collateral benefits, including Ohio Revised Code section 2305.27, which applies to medical malpractice actions. n10

III. HISTORY OF THE COLLATERAL SOURCE RULE

Before addressing the specifics of the statutory modifications of the collateral source rule, it first seems appropriate to consider the rule's long history. The rule has both an evidentiary and a damage component. As one commentator explains, "[a]s a rule of evidence, it precludes introduction into evidence of any benefits the plaintiff obtained from sources collateral to the defendant. As a rule of damages, it forces the defendant to pay for the entire loss he caused despite independent recoveries by the plaintiff for the same loss." n11

One popular justification for the collateral source rule is that the defendant should not benefit from his wrongful conduct. n12 Other justifications are that "the plaintiff should retain any benefit he obtained on his own or which was intended for him alone, and . . . the defendant should not benefit from plaintiff's receipt of compensation from sources independent of the defendant." n13

Another commentator stated that "[i]t is considered better that an injured party receive double recovery than that a wrongdoer be relieved of liability for damages, especially since one purpose of accessing [sic] damages is to deter negligent conduct and encourage due care in the future." n14 However, another writer recognized that:

The collateral source rule has evolved from opposing principles of tort law. First, the rule conflicts with the compensatory function of tort law. Full compensation is provided when the plaintiff is restored to the position he or she occupied before the tort occurred. If a plaintiff receives compensation from a third party not connected to the defendant, receipt of these benefits should in theory be used to reduce the tortfeasor's total damages. However, the collateral source rule requires the tortfeasor to pay the judgment even though the plaintiff has already been partly or completely compensated for the injuries suffered. [*590] Thus, double recovery is possible and the plaintiff can be put in a better position than before the tort occurred. The collateral source rule also conflicts with the damage mitigation principle . . . because receipt of benefits from a collateral source does not act to mitigate damages. n15

The leading Ohio case on the collateral source rule is Pryor v. Webber. n16 In Pryor the plaintiff brought a negligence action and argued that evidence of diminished wages paid by her employer should not have been admitted. The Ohio Supreme Court agreed. In construing the collateral source rule, the court held that "the receipt of collateral benefits is deemed irrelevant and immaterial on the issue of damages." n17 Because the court held that the benefits were irrelevant, the jury should not hear evidence concerning plaintiff's receipt of employer benefits, nor should the court deduct the benefits.

The court stated that "[t]he entire theory of the collateral source rule is to keep the jury from learning anything about the collateral income so that it will not influence the decision of the jury." n18 The jury may decide in a plaintiff's favor regardless of whether the evidence of collateral benefits is introduced; however, the jury could deduct from its award an amount equal to, or greater than, the admitted benefits. Such an outcome could not be controlled or predicted by the trial judge.

IV. ABROGATION OF THE COLLATERAL SOURCE RULE

The Ohio legislature eliminated the collateral source rule by enacting Ohio Revised Code section 2317.45 (also referred to as H.B. 1), effective in 1988. n19 The scope of the statute is extremely broad. The statute provides:

[I]f a plaintiff in a tort action is entitled to an award of compensatory damages, that plaintiff shall disclose to the court after such entitlement is determined all collateral benefits, all rights of **recoupment** relative to the disclosed collateral benefits, and the costs, premiums, or charges for any of the disclosed collateral benefits paid or contributed within the three-year period immediately preceding the accrual of the cause of action. n20

[*591] Once disclosure is made by the plaintiff, the court must determine whether "[t]he plaintiff has received the disclosed collateral benefit or is reasonably certain to receive it within the next sixty months after the entry of judgment" and that "[t]here are no rights of **recoupment** respecting the disclosed collateral [*592] benefit." n21 Following this determination, the court must calculate the costs of premiums paid for the collateral benefit. n22 Then, the court must, "prior to entering judgment for the plaintiff . . . subtract from the compensatory damages that the plaintiff otherwise would be awarded the amount of any disclosed collateral benefits . . . [and] add to the balance derived . . . the total of any costs, premiums, and charges." n23

[*593] According to the statute, the court makes all determinations concerning the offset of the collateral benefits, and "evidence of collateral benefits is not admissible in a tort action and shall not be submitted to or considered by the trier of fact in determining whether to award compensatory damages to a plaintiff . . . or in determining the amount of any such damages." n24

A. Analysis

Certainly one of the most problematic aspects of Ohio's collateral benefits statute is the time frame during which benefits must be disclosed. The plaintiff [*594] is required to disclose all collateral benefits which meet the definitions in subsection (A)(1) and which were received three years prior to the accrual of the cause of action or which may be received up to five years following judgment. n25 According to subsection (B)(1), the plaintiff would wait until he or she is awarded damages before informing the court of any collateral benefits. If this is the case, not only will it be difficult for a plaintiff to collect and report all the benefits received, but it will be equally, if not more difficult, for the defendant to determine the accuracy and completeness of the plaintiff's disclosures. For example, if the judgment is entered three years after the cause of action accrued, the plaintiff must account for payments made up to six years earlier. In addition, the plaintiff must predict five years into the future what benefits will be received, and the defendant must rely upon this prediction. The statute does not provide for any special policing mechanism. If the plaintiff is "reasonably certain" to receive a benefit within five years, the court will consider it. n26 Although it is conceivable that the plaintiff will receive unanticipated benefits, the statute does not provide for a re-evaluation or opportunity for another hearing during the five-year period.

Another potential problem area concerns the meaning of "compensatory" damages as used in the statute. In general, compensatory damages are defined as:

[D]amages in satisfaction of, or in recompense for, loss or injury sustained. They compensate a plaintiff for actual injury or loss resulting, for instance, from bodily injury or property damage. The term covers all loss recoverable as a matter of right and includes all damages (beyond nominal damages) other than punitive or exemplary damages. n27

The meaning of compensatory damages in the context of section 2317.45 becomes important when considering an offset of workers' compensation [*595] benefits. n28 Workers' compensation is awarded upon a scale based upon the type of injury sustained, and its purpose is to prevent the hardship to an employee of proving employer negligence. n29 Workers' compensation essentially operates so that "a right to compensation is given for all injuries incident to the employment . . . the amount of which is limited and determined in accordance with a definite schedule." n30

There are many theories underlying workers' compensation. According to the Ohio Manufacturers'

Association:

The fundamental principle of the [Workers' Compensation Act] was the establishment of a balance between the interests of labor in receiving fair compensation for injured members of the work force, and the interests of industry in being able to anticipate the costs of compensation as a portion of its overall cost of doing business. Concessions were made on both sides in the attempt to balance these interests. Injured workers gave up the right to sue their employers by agreeing that their sole remedy would be compensation through a newly created state insurance fund. In return, employers agreed to prompt payment of compensation regardless of fault. n31

The issue with respect to workers' compensation and the operation of section 2317.45 is the following: Suppose that a plaintiff has received workers' compensation benefits, and receives a special jury verdict that includes damages for emotional pain and suffering. Theoretically, it is unclear whether the workers' compensation benefits should be deducted from the plaintiff's [*596] recovery, since workers' compensation benefits are not intended to compensate the plaintiff for emotional pain and suffering.

Thus, in the case of the plaintiff/employee who receives a large jury award for emotional pain and suffering, there is a strong argument that this plaintiff was never compensated by workers' compensation, and that, therefore, there should be no offset, particularly when the purported interest in enacting the statute was to prevent a double recovery. If a plaintiff was never compensated for pain and suffering, then there hardly could be a double recovery.

Although this is a theoretically sound argument, the legislature explicitly refers to the term "compensatory" throughout the text of section 2317.45. n32 If the legislature's ultimate goal was to limit judgment amounts as much as possible, then compensatory damages clearly would include traditional compensatory damages. Most likely the legislature's concern was upon limiting the final dollar amount of a plaintiff's recovery, as is the case with damage caps, rather than upon a direct correlation between the type of collateral benefit received and the particular type of damages awarded.

Yet another problematic area involves the awarding of attorneys' fees. In the typical case the jury most likely will render a verdict far enough in excess of the collateral benefits received that the attorney will be able to recover a fee from the excess. However, it is possible to imagine a situation in which, for example, over the course of several years the plaintiff has received, and spent, $ 20,000 in collateral benefits. After years of litigation, the plaintiff finally receives a jury verdict in an amount that is $ 20,000 or less. Because the collateral benefits are deducted before the defendant pays the judgment, there is no money available for the attorney. This poses several interesting issues.

First, this could deter a plaintiff's attorney from handling a case he otherwise might have because of a fear that no money will remain to pay his fee. Second, rather than discourage costly litigation, the statute encourages it. When faced with little or no recovery, both the plaintiff and the plaintiff's attorney have increased incentive to fight over the deduction of benefits. Third, an offset of nearly all of the judgment would result in an extremely dissatisfied plaintiff. An individual who was injured two or three years earlier, and who received benefits during those years, may have received only $ 200 or $ 300 per week, which probably was spent as it was received. After going through the time and expense of a trial, and after being awarded damages, the plaintiff still receives nothing. Such a result could encourage both the plaintiff and the plaintiff's attorney to settle for an amount below which the plaintiff may otherwise be willing to settle.

Alaska has solved the dilemma of recovering attorneys' fees by providing in its collateral benefits statute:

[*597] [A]fter the fact finder has rendered an award to a claimant, and after the court has awarded costs and attorneys fees, a defendant may introduce evidence of amounts received or to be received by the claimant as compensation for the same injury from collateral sources that do not have a right of **subrogation** by law or contract. n33

There remains the troubling issue that was the root of the collateral source rule: Should the defendant benefit from his wrong? When the collateral benefits consist of workers' compensation benefits, it appears even more unjust that the defendant should escape financial responsibility for his wrong while the state workers' compensation bureau does not.

On the other hand, if the view of the Ohio Manufacturers' Association is accepted, then workers'

compensation should absorb a loss which is an "incident" of employment. n34 While it seems unfair for the plaintiff to receive a double recovery, it also may seem unfair for workers' compensation to pay the defendant's bill. Perhaps the appropriate response to this issue would be to expand those programs that have **subrogation** rights. n35 Then, the defendant would be required to pay the amount of the judgment, the plaintiff would not receive a double recovery, and workers' compensation funds would be replaced. Rather than repeal the statute or declare it unconstitutional because of this discrepancy, those institutions that regularly pay such types of benefits could adopt **subrogation** rights.

B. Ohio Case Law

Relatively little litigation has arisen concerning the application and constitutionality of section 2317.45. The Ohio Supreme Court has not directly addressed the statute; however, given the split of opinion that is developing in the lower courts, it is likely that the supreme court will need to resolve the constitutionality of section 2317.45.

[*598] 1. Morris v. Savoy

In August, 1991, the Ohio Supreme Court held that the Ohio statute that placed a cap upon medical malpractice recoveries was unconstitutional. n36 Interestingly, however, the court held that section 2305.27, which abrogated the collateral source rule for medical malpractice claims, was constitutional. The court made a number of statements regarding the ability of the state legislature to modify the collateral source rule that indicate that, should the constitutionality of section 2317.45 be challenged, the court would hold it constitutional.

According to the court, the legislature's intent in enacting section 2305.27 was to prevent particular kinds of double recoveries, "specifically those which would duplicate recovery from funds that are directly, or indirectly, supported by the general public or the business community, e.g., public welfare or workers' compensation. . . ." n37

The court distinguished the unconstitutional damages cap from section 2305.27: "Such a setoff may inure to the benefit of the tortfeasor, but it does not do so to the detriment of the victim as does the damage cap of R.C. 2307.43. . . ." n38 The court also permitted a setoff of plaintiff's future workers' compensation payments "to the extent they can be determined with a reasonable degree of certainty." n39

2. Cook v. Wineberry Deli

In July 1991, the Court of Appeals for Summit County reversed a common pleas court decision holding section 2317.45 unconstitutional. n40 Because this case provides the most comprehensive analysis of section 2317.45 to date, the arguments provided by the lower court, and rejected by the court of appeals, will be discussed in detail. The arguments addressed in these two decisions comprise the major arguments in opposition to the constitutionality of section 2317.45.

After bringing a personal injury and loss of consortium action against defendant Wineberry Deli, the plaintiffs, Timothy and Karen Cook, received a jury award of $ 400,000 in compensatory damages. n41 Defendant moved to apply section 2317.45 to the $ 33,646.97 of workers' compensation benefits [*599] plaintiff received. n42 The common pleas court denied this motion and held that section 2317.45 unconstitutionally deprived plaintiffs of "their right to a jury trial, their right to an open court and a remedy, their right to due process, and their right to equal protection under the law." n43

Before analyzing the constitutional issues posed by the collateral benefits statute, the common pleas court reviewed some of the legislative history presented by plaintiffs. The court noted that the Ohio Alliance for Civil Justice "supported [the statute], originally citing a 'litigation explosion' as the root cause of unaffordable or unavailable liability insurance. It was also claimed that high jury awards caused liability insurance premiums to rise, making it impossible for business to operate with a safety net of insurance, consequently having a detrimental effect on investment and production." n44 The court also noted that the Ohio Alliance for Civil Justice received its support primarily from business and insurance companies. n45

One group opposing the passage of section 2317.45 was the Ohio Public Interest Campaign. The group argued that "the insurance industry had contrived the insurance crisis solely for the purpose of promoting and protecting 'organized price gouging' by underwriters." n46

Relying upon several studies, the common pleas court discussed evidence that

[I]nsurance industry profits had actually increased by 505% since 1985. Furthermore, the insurance industry enjoyed net gains of approximately 75 billion dollars between 1976 and 1985. A National Association of Attorneys General Report states that since 1975 the property/casualty stock index has risen more than 500%. This rise was five times the increase in the Dow Jones Industrial Average. n47

The court concluded that:

[T]he purpose of [the statute] was not to end the insurance crisis that was contrived by businesses and insurance companies. . . . [The statute] did not seek fairness for all; it favored businesses and insurance companies. . . . [It] [*600] was enacted as neither a means of ensuring the availability of insurance coverage, as set out in the bill's preamble, nor as a measure of fairness to all Ohio citizens, as stated by its backers. Rather, it was enacted in response to an 'insurance crisis' contrived by the insurance industry to promote and protect price gouging by underwriters, a basis having no relationship to its stated purpose. n48

The court of appeals did not address this lengthy legislative history. Instead the court noted:

[I]n enacting R.C. 2317.45, the Ohio Legislature was responding to what it perceived as a crisis in the insurance industry due to rising costs and premiums. To relieve this crisis, the legislature determined that the common law collateral source rule should be partly abrogated, thus relieving the insurance industry -- and, ultimately, the public -- of the burden of paying compensation in excess of that required to make injured parties whole. n49

a. Right to a Jury Trial

According to the common pleas court, section 2317.45 violates article 1, section 5 of the Ohio Constitution because it "plainly violates a negligently injured person's right to have all the facts in her or his case determined by a jury." n50 The court based its conclusion upon its perception that "the General Assembly has empowered the judiciary to 'materially change' and limit the right to have a jury determine the amount of any damages to be awarded in tort cases." n51

The common pleas court advanced two additional reasons that section 2317.45 violated the right to a jury trial. First, the court stated that "[t]he effect of the statute is closely akin to that of an automatic remittitur, a court determined reduction of the damages awarded by a jury because the court considers them excessive, even though they are not the result of passion or prejudice." n52 The court then noted that "[r]emittitur is looked on with disfavor [*601] in the Ohio courts, and historically, it may be done only with the consent of the plaintiff." n53

Second, the court disregarded the argument advanced by the defendant that the statute is designed to "prevent[] a double recovery by the plaintiff." n54 The court regarded this argument as "fallacious" and stated that it "presumes that the collateral benefit has completely compensated the tort victim." n55 The fact that the source of the collateral benefit in this case was workers' compensation buttressed the court's statement that "[p]ayments made under Ohio Workers' Compensation Program are not, and were never meant to be complete compensation for an injured employee. Consequently, it is wholly inappropriate to subtract Workers' Compensation benefits from [plaintiffs'] compensatory award." n56

The lower court also stated that even if it were to accept defendant's argument that plaintiffs would be receiving a double recovery, "[t]he wrong done to plaintiff by the defendant is not diminished in any way by the plaintiff's receipt of collateral benefits." n57 The plaintiff was held to be the party most entitled to benefit from the defendant's wrong.

The court of appeals rejected the lower court's reasoning. According to the court:

R.C. 2317.45 specifically preserves the inadmissibility of evidence of collateral benefits at trial, and therefore does not in any way invade the province of the jury in its determination of the central issues of liability and the damages suffered by the plaintiff. The true significance of R.C. 2317.45 does not come into operation until after trial and after the jury's verdict. Cook's argument [*602] ignores the obvious -- that the issue of collateral benefits was never before the jury under the collateral source rule, and this situation is not altered under R.C. 2317.45. Therefore, R.C. 2317.45 neither removes nor adds to any issues before the jury,

nor does it alter the trial proceedings in any manner. n58

b. Open Courts and Right to a Remedy

The common pleas court held that section 2317.45 violated Ohio Constitution article I, section 16, which provides that "all courts shall be open, and every person, for an injury done to him in his lands, goods, person or reputation, shall have remedy by due course of law." n59 The court reasoned that the plaintiff is denied a remedy when the jury renders a verdict for compensatory damages and the judge then deducts from that verdict. The court stated:

The parties are being told by the legislature that, regardless of what the finder of fact has determined, the defendant will not be held responsible for the full extent of plaintiff's resulting injuries. . . . The statute] strips a jury verdict of its purpose and significance. It is rendered a sterile, meaningless gesture and a mockery of what is supposed to be a meaningful remedy. n60

The court of appeals strongly disagreed with this argument. The court of appeals stated:

[I]n Cook's view, a meaningful remedy can be had only by holding the negligent tortfeasor responsible to the full extent of injuries suffered, regardless of the extent to which the plaintiff may already have been made whole through other sources of compensation. . . . By enacting R.C. 2317.45, the legislature has now shifted the emphasis in tort actions away from punishing the merely negligent tortfeasor, and toward ensuring that the plaintiff is fully compensated and made whole, regardless of the sources of compensation. Such a decision was properly within the province of the legislature to make. n61

c. Due Process

Because the right to a jury trial and to a remedy are considered fundamental, the common pleas court held that the state must demonstrate that [*603] the statute furthered a "compelling" state interest in order to comply with the requirement of due process of law. n62

The lower court found a number of flaws in the statute, each of which it held violated due process. n63 One problem which the court found particularly troublesome was the possibility of a "double deduction." n64 That is, even though the jury will not be informed of a plaintiff's receipt of collateral benefits, "there is no procedural safeguard for plaintiffs to prevent the jury from discounting the verdict to reflect their own sensibilities regarding collateral benefits and 'double recoveries.'" n65

The common pleas court was troubled by the fact that the defendant, and the defendant's insurance company would "reap the benefits of plaintiff's Workers' Compensation benefits. . . . Consequently, the injured party is saddled with the additional burden of supporting the liability insurance industry, rather than that burden properly being upon the defendant." n66

The court of appeals dispensed with this line of argument rather quickly. Treating both the due process and equal protection claims together, the court of appeals applied rational basis review because section 2317.45 "neither implicates any fundamental or substantive rights, nor creates any suspect classifications. . . ." n67 With respect to Cook's contention that the insurance crisis was a "hoax," the court of appeals responded by stating that the

[A]rguments, both pro and con, were thoroughly presented to and considered by the legislature when it deliberated the enactment of R.C. 2317.45. Even a cursory review of these arguments makes it clear that, at the very least, there were legitimate, debatable questions of whether an insurance crisis existed, and whether the remedy undertaken by the legislature was appropriate. n68

d. Equal Protection

Relying upon article I, section 2 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution, the common pleas court held that section 2317.45 violates equal protection because "it treats tort victims who are injured at work or who are entitled to certain government [*604] benefits differently from tort victims who receive benefits from a private insurer, therefore, requiring different treatment of those within the classification." n69 The court also regarded the classification as unconstitutional because it

separates victims of medical malpractice from the victims of other forms of negligence. Therefore, the court applied strict scrutiny. n70

Although the court of appeals rejected the lower court's equal protection argument, the court of appeals did not provide any substantive analysis to guide future cases. In this respect the recent Ohio Supreme Court decision in Morris v. Savoy n71 may be helpful. In Morris the supreme court considered, and rejected, the argument that the collateral benefits statute for medical malpractice claims violated equal protection. n72 According to the supreme court, "a line is drawn -- the statute covers only a 'medical claim' -- but does not make any internal distinctions among class members. All plaintiffs in medical malpractice must confront the same setoff of benefits from collateral sources." n73 The same is true for section 2317.45 -- all plaintiffs face the same setoff.

3. Jeffers v. Phillips Ready Mix

In January, 1991, the Ohio Court of Appeals for the Second District upheld section 2317.45, and applied the statute in order to deduct workers' compensation benefits from plaintiff-appellant's jury award. n74 In this case, plaintiff-appellant Jeffers (hereinafter referred to as plaintiff) sued the defendant, a third party, for injuries plaintiff suffered while working for Sowder Concrete Corporation. n75 Both the plaintiff and the defendant were found negligent. n76 The jury awarded the plaintiff $ 39,500 in damages, and then reduced this amount by 40% due to plaintiff's negligence. n77 The net amount of damages totaled $ 23,700. However, the plaintiff also received collateral benefits totaling $ 22,403.14. n78 The plaintiff appealed the trial court's deduction of these benefits from the $ 23,700 jury award.

[*605] The plaintiff made three arguments relevant to this Note. First, the plaintiff argued that "the collateral benefits should be subtracted from the damages assessed by the jury before factoring in [plaintiff's] comparative negligence." n79 Second, the plaintiff argued that because the jury awarded $ 14,000 for future pain and suffering although he would not have future medical expenses, this amount should not be offset. n80 Third, the plaintiff argued that the jury received evidence of $ 10,292.36 in medical bills as proof of the plaintiff's injury, but that the judge deducted $ 22,403.14 of collateral benefits. n81

The court systematically and straightforwardly overruled each of the plaintiff's objections to the operation of section 2317.45. The court held that collateral benefits are to be deducted from the jury award, reduced by the plaintiff's negligence. n82 The court reasoned that "[t]he answer is found in R.C. 2317.45 (B)(2)(c)(i), the operative portion of which reads . . . 'compensatory damages that the plaintiff otherwise would be awarded.'" n83 The plaintiff, but for the collateral benefits, would receive $ 23,700. Therefore, that is the amount from which the benefits should be deducted.

The court also rejected the plaintiff's future pain and suffering argument. The court did not consider whether in fact the plaintiff would receive a double recovery. Instead, the court held that "[t]he way the statute is written, compensatory damages includes all damages except punitive damages. While future pain and suffering is not something for which collateral benefits are received, it is not the province of the court to revise plain legislative enactments." n84

The court also held that the post-verdict proceeding to determine collateral benefits controls the amount that should be offset. According to the court, "it does not matter whether the jury was aware of the medical expenses in order [*606] for them to be deductible. . . . [T]he collateral benefits adjustment is a post verdict adjustment. It is a proceeding wherein additional evidence can be taken, but wherein a jury is not involved." n85

4. Sorrell v. Thevenir

In January 1991, the Ohio Court of Common Please for Gallia County held that section 2317.45 was unconstitutional. n86 The case currently is on appeal before the Ohio Court of Appeals for the Fourth District. n87 The lower court, concluded that "it is absurd to finance the tortious conduct of the defendant by appropriations from the Workers' Compensation system. Plaintiff's employer did not cause her injury but yet it is his premium that may be increased because of defendant's conduct." n88 The lower court held that section 2317.45 was unconstitutional because it violates the right to a jury trial, the right to a remedy found in the Ohio Constitution, and the right to due process under the Fourteenth Amendment and under the Ohio Constitution. n89

The facts of Sorrell illustrate the hardship that section 2317.45 can cause; whether that hardship justifies a finding of unconstitutionality is another issue entirely. In Sorrell, the plaintiff, a convenience store employee, successfully sued a customer who allegedly injured her during one of his frequent visits to the store. n90 The jury awarded the plaintiff $ 10,128.26 in damages, $ 5,128.26 allocated to lost wages and medical benefits, and $ 5,000 for pain and suffering. n91 The plaintiff had received $ 10,906.96 of workers' compensation benefits, and an additional $ 3,428.26 paid by the workers' compensation fund to the plaintiff's doctor. n92 The defendant argued that this amount should be offset from the jury award, thereby leaving the plaintiff with no recovery from the defendant. n93

[*607] On appeal, both the plaintiff and the defendant essentially put forth the arguments presented in the Cook case. n94 Hopefully, the court of appeals will reverse the lower court's decision in Sorrell just as the court of appeals did in Cook.

C. Analysis

The court of common pleas in Cook identified a number of inconsistencies in the collateral benefits statute; none of these inconsistencies alone, however, justified holding section 2317.45 unconstitutional. By stretching each inconsistency to its extreme, the lower court found no reasonable basis for the statute. The court of appeals properly reversed the lower court's decision. Hopefully, courts in other districts will follow the lead established in Cook.

The court of appeals decision in Cook was correct for a number of reasons. First, although there may be some evidence that the insurance industry concocted an insurance crisis in order to push H.B. 1 through the Ohio legislature, there is an abundance of evidence that such a crisis did indeed exist. n95 In addition, there is strong evidence that a primary purpose of the statute is to prevent the plaintiff from receiving a double recovery. n96 This interest is independent of the insurance issue, and may instead suggest that the legislature is more concerned about other aspects of tort liability. According to one commentator,

Tort scholars suggest that three of the tort system's primary objectives are promoting justice, deterring potentially injurious activities, and compensating accident victims. Although the justice and deterrence objectives often require the same outcomes, the compensation objective may require an outcome inconsistent with the other two goals. This potential inconsistency, coupled with the tort system's poor design for adequately compensating victims, suggests that compensation is at most a subsidiary goal of tort law, and perhaps is merely a means of fulfilling the justice and deterrence objectives. n97

Consequently, even though some evidence may arguably suggest that the insurance situation in Ohio was not of crisis proportions, other legitimate reasons remain for eliminating the collateral source rule. n98

[*608] Attention must also be paid to the trend in most states toward limiting tort liability, either through damage caps or through abrogation of the collateral source rule. This reform is not limited to the medical malpractice area. By 1990, as many as ten states had altered the traditional collateral source rule. n99

Neither court in Cook mentioned another Ohio statute that provides for the offsetting of collateral benefits against a political subdivision. This statute, Ohio Revised Code section 2744.05, provides that "[i]f a claimant receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against a political subdivision recovered by that claimant." n100

The Ohio Supreme Court has held that this statute is constitutional. n101 The court rejected an equal protection challenge, and applied rational basis review. n102 Given that the two other Ohio statutes that provide for a deduction of collateral benefits have survived equal protection scrutiny, it is likely that the third statute will be upheld as well.

The most compelling argument made by the common pleas court in Cook is that workers' compensation did not adequately compensate the victim for his injury. This argument parallels the earlier discussion concerning whether workers' compensation benefits could legitimately be deducted from an award for emotional pain and suffering. Although this argument may be persuasive in the appropriate case, the jury verdict in Cook illustrates that this is not a concern here. The jury verdict form is reproduced below:

Senate version of teacher liability protection

TITLE XI – TEACHER PROTECTION
As reported in S1

SEC. 1101. TEACHER PROTECTION.

The Act (20 U.S.C. 6301 et seq.) is amended by adding at the end the following:

TITLE X – TEACHER PROTECTION

SEC. 10001. SHORT TITLE.

This title may be cited as the 'Paul D. Coverdell Teacher Protection Act of 2001'.

SEC. 10002. FINDINGS AND PURPOSE.

(a) FINDINGS. – Congress makes the following findings:

(1) The ability of teachers, principals and other school professionals to teach, inspire and shape the intellect of our Nation's elementary and secondary school students is deterred and hindered by frivolous lawsuits and litigation.

(2) Each year more and more teachers, principals and other school professionals face lawsuits for actions undertaken as part of their duties to provide millions of school children quality educational opportunities.

(3) Too many teachers, principals and other school professionals face increasingly severe and random acts of violence in the classroom and in schools.

(4) Providing teachers, principals and other school professionals a safe and secure environment is an important part of the effort to improve and expand educational opportunities, which are critical for the continued economic development of the United States.

(5) Frivolous lawsuits against teachers maintaining order in the classroom impose significant financial burdens on local educational agencies, and deprive the agencies of funds that would best be used for educating students.

(6) Clarifying and limiting the liability of teachers, principals and other school professionals who undertake reasonable actions to maintain order, discipline and an appropriate educational environment is an appropriate subject of Federal legislation because –

(A) the scope of the problems created by the legitimate fears of teachers, principals and other school professionals about frivolous, arbitrary or capricious lawsuits against teachers is of national importance; and

(B) millions of children and their families across the Nation depend on teachers, principals and other school professionals for the intellectual development of children.

(b) PURPOSE. – The purpose of this title is to provide teachers, principals and other school professionals the tools they need to undertake reasonable actions to maintain order, discipline, and an appropriate educational environment.

SEC. 10003. PREEMPTION AND ELECTION OF STATE NONAPPLICABILITY.

(a) PREEMPTION. – This title preempts the laws of any State to the extent that such laws are inconsistent with this title, except that this title shall not preempt any State law that provides additional protection from liability relating to teachers.

(b) ELECTION OF STATE REGARDING NONAPPLICABILITY. – This title shall not apply to any civil action in a State court against a teacher with respect to claims arising within that State if such State enacts a statute in accordance with State requirements for enacting legislation –

(1) citing the authority of this subsection;

(2) declaring the election of such State that this title shall not apply, as of a date certain, to such civil action in the State; and

(3) containing no other provisions.

SEC. 10004. LIMITATION ON LIABILITY FOR TEACHERS.

(a) LIABILITY PROTECTION FOR TEACHERS. – Except as provided in subsections (b) and (c), no teacher in a school shall be liable for harm caused by an act or omission of the teacher on behalf of the school if –

(1) the teacher was acting within the scope of the teacher's employment or responsibilities related to providing educational services;

(2) the actions of the teacher were carried out in conformity with local, State, and Federal laws, rules and regulations in furtherance of efforts to control, discipline, expel, or suspend a student or maintain order or control in the classroom or school;

(3) if appropriate or required, the teacher was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the teacher's responsibilities;

(4) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher; and

(5) the harm was not caused by the teacher operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to –

(A) possess an operator's license; or

(B) maintain insurance.

(b) CONCERNING RESPONSIBILITY OF TEACHERS TO SCHOOLS AND GOVERNMENTAL ENTITIES. – Nothing in this section shall be construed to affect any civil action brought by any school or any governmental entity against any teacher of such school.

(c) EXCEPTIONS TO TEACHER LIABILITY PROTECTION. – If the laws of a State limit teacher liability subject to one or more of the following conditions, such conditions shall not be construed as inconsistent with this section:

(1) A State law that requires a school or governmental entity to adhere to risk management procedures, including mandatory training of teachers.

(2) A State law that makes the school or governmental entity liable for the acts or omissions of its teachers to the same extent as an employer is liable for the acts or omissions of its employees.

(3) A State law that makes a limitation of liability inapplicable if the civil action was brought by an officer of a State or local government pursuant to State or local law.

(d) LIMITATION ON PUNITIVE DAMAGES BASED ON THE ACTIONS OF TEACHERS. –

(1) GENERAL RULE. – Punitive damages may not be awarded against a teacher in an action brought for harm based on the action or omission of a teacher acting within the scope of the teacher's responsibilities to a school or governmental entity unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an action or omission of such teacher which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.

(2) CONSTRUCTION. – Paragraph (1) does not create a cause of action for punitive damages and does not preempt or supersede any Federal or State law to the extent that such law would further limit the award of punitive damages.

(e) EXCEPTIONS TO LIMITATIONS ON LIABILITY. –

(1) IN GENERAL. – The limitations on the liability of a teacher under this title shall not apply to any misconduct that –

(A) constitutes a crime of violence (as that term is defined in section 16 of title 18, United States Code) or act of international terrorism (as that term is defined in section 2331 of title 18, United States Code) for which the defendant has been convicted in any court;

(B) involves a sexual offense, as defined by applicable State law, for which the defendant has been convicted in any court;

(C) involves misconduct for which the defendant has been found to have violated a Federal or State civil rights law; or

(D) where the defendant was under the influence (as determined pursuant to applicable State law) of intoxicating alcohol or any drug at the time of the misconduct.

(2) HIRING. – The limitations on the liability of a teacher under this title shall not apply to misconduct during background investigations, or during other actions, involved in the hiring of a teacher.

SEC. 10005. LIABILITY FOR NONECONOMIC LOSS.

(a) GENERAL RULE. – In any civil action against a teacher, based on an action or omission of a teacher acting within the scope of the teacher's responsibilities to a school or governmental entity, the liability of the teacher for noneconomic loss shall be determined in accordance with subsection (b).

(b) AMOUNT OF LIABILITY. –

(1) IN GENERAL. – Each defendant who is a teacher, shall be liable only for the amount of noneconomic loss allocated to that defendant in direct proportion to the percentage of responsibility of that defendant (determined in accordance with paragraph (2)) for the harm to the claimant with respect to which that defendant is liable. The court shall render a separate judgment against each defendant in an amount determined pursuant to the preceding sentence.

(2) PERCENTAGE OF RESPONSIBILITY. – For purposes of determining the amount of noneconomic loss allocated to a defendant who is a teacher under this section, the trier of fact shall determine the percentage of responsibility of each person responsible for the claimant's harm, whether or not such person is a party to the action.

(c) RULE OF CONSTRUCTION. – Nothing in this section shall be construed to preempt or supersede any Federal or State law that further limits the application of joint liability in a civil action described in subsection (a), beyond the limitations established in this section.

SEC. 10006. DEFINITIONS.

For purposes of this title:

(1) ECONOMIC LOSS. – The term 'economic loss' means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

(2) HARM. – The term 'harm' includes physical, nonphysical, economic, and noneconomic losses.

(3) NONECONOMIC LOSSES. – The term 'noneconomic losses' means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation and all other nonpecuniary losses of any kind or nature.

(4) SCHOOL. – The term 'school' means a public or private kindergarten, a public or private elementary school or secondary school (as defined in section 14101, or a home school.

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

(6) TEACHER. – The term 'teacher' means a teacher, instructor, principal, administrator, other educational professional that works in a school, or an individual member of a school board (as distinct from the board itself).

SEC. 10007. EFFECTIVE DATE.

(a) IN GENERAL. – This title shall take effect 90 days after the date of the enactment of the Paul D. Coverdell Teacher Protection Act of 2001.

(b) APPLICATION. – This title applies to any claim for harm caused by an act or omission of a teacher if that claim is filed on or after the effective date of the Paul D. Coverdell Teacher Protection Act of 2001, without regard to whether the harm that is the subject of the claim or the conduct that caused the harm occurred before such effective date.

House version of teacher liability protection

PART D – TEACHER LIABILITY PROTECTION
As reported in HR1

SEC. 2301. SHORT TITLE.

This part may be cited as the 'Paul Coverdell Teacher Liability Protection Act of 2001'.

SEC. 2302. FINDINGS AND PURPOSE.

(a) FINDINGS – Congress makes the following findings:

(1) The ability of teachers, principals and other school professionals to teach, inspire and shape the intellect of our Nation's elementary and secondary school students is deterred and hindered by frivolous lawsuits and litigation.

(2) Each year more and more teachers, principals and other school professionals face lawsuits for actions undertaken as part of their duties to provide millions of school children quality educational opportunities.

(3) Too many teachers, principals and other school professionals face increasingly severe and random acts of violence in the classroom and in schools.

(4) Providing teachers, principals and other school professionals a safe and secure environment is an important part of the effort to improve and expand educational opportunities.

(5) Clarifying and limiting the liability of teachers, principals and other school professionals who undertake reasonable actions to maintain order, discipline and an appropriate educational environment is an appropriate subject of Federal legislation because –

(A) the scope of the problems created by the legitimate fears of teachers, principals and other school professionals about frivolous, arbitrary or capricious lawsuits against teachers is of national importance; and

(B) millions of children and their families across the Nation depend on teachers, principals and other school professionals for the intellectual development of children.

(b) PURPOSE – The purpose of this part is to provide teachers, principals and other school professionals the tools they need to undertake reasonable actions to maintain order, discipline and an appropriate educational environment.

SEC. 2303. PREEMPTION AND ELECTION OF STATE NONAPPLICABILITY.

(a) PREEMPTION – This part preempts the laws of any State to the extent that such laws are inconsistent with this part, except that this part shall not preempt any State law that provides additional protection from liability relating to teachers.

(b) ELECTION OF STATE REGARDING NONAPPLICABILITY – This part shall not apply to any civil action in a State court against a teacher with respect to claims arising within that State if such State enacts a statute in accordance with State requirements for enacting legislation –

(1) citing the authority of this subsection;

(2) declaring the election of such State that this part shall not apply, as of a date certain, to such civil action in the State; and

(3) containing no other provisions.

SEC. 2304. LIMITATION ON LIABILITY FOR TEACHERS.

(a) LIABILITY PROTECTION FOR TEACHERS – Except as provided in subsections (b) and (c), no teacher in a school shall be liable for harm caused by an act or omission of the teacher on behalf of the school if –

(1) the teacher was acting within the scope of the teacher's employment or responsibilities related to providing educational services;

(2) the actions of the teacher were carried out in conformity with local, State, and Federal laws, rules and regulations in furtherance of efforts to control, discipline, expel, or suspend a student or maintain order or control in the classroom or school;

(3) if appropriate or required, the teacher was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the teacher's responsibilities;

(4) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indi the rights or safety of the individual harmed by the teacher; and

(5) the harm was not caused by the teacher operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to –

(A) possess an operator's license; or

(B) maintain insurance.

(b) CONCERNING RESPONSIBILITY OF TEACHERS TO SCHOOLS AND GOVERNMENTAL ENTITIES – Nothing in this section shall be construed to affect any civil action brought by any school or any governmental entity against any teacher of such school.

(c) EXCEPTIONS TO TEACHER LIABILITY PROTECTION – If the laws of a State limit teacher liability subject to one or more of the following conditions, such conditions shall not be construed as inconsistent with this section:

(1) A State law that requires a school or governmental entity to adhere to risk management procedures, including mandatory training of teachers.

(2) A State law that makes the school or governmental entity liable for the acts or omissions of its teachers to the same extent as an employer is liable for the acts or omissions of its employees.

(3) A State law that makes a limitation of liability inapplicable if the civil action was brought by an officer of a State or local government pursuant to State or local law.

(d) LIMITATION ON PUNITIVE DAMAGES BASED ON THE ACTIONS OF TEACHERS –

(1) GENERAL RULE – Punitive damages may not be awarded against a teacher in an action brought for harm based on the action of a teacher acting within the scope of the teacher's responsibilities to a school or governmental entity unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an action of such teacher which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.

(2) CONSTRUCTION – Paragraph (1) does not create a cause of action for punitive damages and does not preempt or supersede any Federal or State law to the extent that such law would further limit the award of punitive damages.

(e) EXCEPTIONS TO LIMITATIONS ON LIABILITY –

(1) IN GENERAL – The limitations on the liability of a teacher under this part shall not apply to any misconduct that –

(A) constitutes a crime of violence (as that term is defined in section 16 of title 18, United States Code) or act of international terrorism (as that term is defined in section 2331 of title 18, United States Code) for which the defendant has been convicted in any court;

(B) involves a sexual offense, as defined by applicable State law, for which the defendant has been convicted in any court;

(C) involves misconduct for which the defendant has been found to have violated a Federal or State civil rights law; or

(D) where the defendant was under the influence (as determined pursuant to applicable State law) of intoxicating alcohol or any drug at the time of the misconduct.

(2) RULE OF CONSTRUCTION – Nothing in this subsection shall be construed to affect subsection (a)(3) or (d).

SEC. 2305. LIABILITY FOR NONECONOMIC LOSS.

(a) GENERAL RULE – In any civil action against a teacher, based on an action of a teacher acting within the scope of the teacher's responsibilities to a school or governmental entity, the liability of the teacher for noneconomic loss shall be determined in accordance with subsection (b).

(b) AMOUNT OF LIABILITY –

(1) IN GENERAL – Each defendant who is a teacher, shall be liable only for the amount of noneconomic loss allocated to that defendant in direct proportion to the percentage of responsibility of that defendant (determined in accordance with paragraph (2)) for the harm to the claimant with respect to which that defendant is liable. The court shall render a separate judgment against each defendant in an amount determined pursuant to the preceding sentence.

(2) PERCENTAGE OF RESPONSIBILITY – For purposes of determining the amount of noneconomic loss allocated to a defendant who is a teacher under this section, the trier of fact shall determine the percentage of responsibility of that defendant for the claimant's harm.

SEC. 2306. RULE OF CONSTRUCTION.

Nothing in this part shall be construed to affect any State or local law (including a rule or regulation) or policy pertaining to the use of corporal punishment.

SEC. 2307. DEFINITIONS.

For purposes of this part:

(1) ECONOMIC LOSS – The term 'economic loss' means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

(2) HARM – The term 'harm' includes physical, nonphysical, economic, and noneconomic losses.

(3) NONECONOMIC LOSSES – The term 'noneconomic losses' means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation and all other nonpecuniary losses of any kind or nature.

(4) SCHOOL – The term 'school' means a public or private kindergarten, a public or private elementary school or secondary school (as defined in section 14101, or a home school.

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

(6) TEACHER – The term 'teacher' means a teacher, instructor, principal, administrator, or other educational professional that works in a school, a local school board and any member of such board, and a local educational agency and any employee of such agency.

SEC. 2308. APPLICABILITY.

This part applies to any claim for harm caused by an act or omission of a teacher if that claim is filed on or after the effective date of the No Child Left Behind Act of 2001 without regard to whether the harm that is the subject of the claim or the conduct that caused the harm occurred before such effective date.

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TEXT:

I. INTRODUCTION

1. Occupying a firm place in the scientific and technologic realm cannot, and does not, insulate vaccines from the law. With powerful social and scientific forces vehemently advocating n1 and forcefully opposing n2 vaccines, the law, not surprisingly, plays an active role in vaccine development n3 and use. n4 Manufacturer liability for vaccine injuries arguably illustrates the most visible and contentious relationship between the law and vaccines.

2. Starting in the 1970s, and peaking in the 1980s with a national insurance crisis n5 as a significant part of the background, some vaccine manufacturers were forced to pay large awards or settlements to vaccine-injury victims and their families. n6 Consequently, vaccine manufacturers seriously threatened to cease producing vaccines, using the important role vaccines play in American public health as political leverage. n7 What makes this law-science standoff particularly interesting is that rather than forcing vaccine technology to bend to the law's demands, as has historically been the case for other inherently dangerous medical products, n8 Congress decided to reshape the law. n9

3. Congress enacted the 1986 **National Childhood Vaccine Injury Act** ("Vaccine Act") n10 to solve this vaccine crisis. The Vaccine Act outlined a comprehensive national initiative to coordinate and encourage vaccine use. n11 Congress included the National Vaccine Injury Compensation Program ("VICP" or "Compensation Program") within the larger piece of legislation to address specifically vaccine manufacturer liability. n12 The legislation mandated that victims first seek a remedy in a federally administered no-fault process before pursuing a civil court remedy against manufacturers. n13

4. This legislative solution to the vaccine crisis and its legal roots was both reasonable and revolutionary. Congress acted reasonably by making public health a priority. n14 By passing the Vaccine Act the national legislature acknowledged that legal change was not an alternative, it was an imperative. Congress created a legal revolution by not only conceiving and implementing a creative no-fault solution to the liability crisis, but by explicitly basing it on the aspirational Restatement n15 (Second) of Torts ("Second Restatement"). n16

5. The Compensation Program portion of the Vaccine Act was controversial when Congress adopted it. n17 Nevertheless, even the VICP's original detractors would have to admit that it has met its central goal n18 of preserving the American vaccine market without bankrupting the federal government. n19 The Compensation Program's success is evident in the contemporary vaccine market; although only a small number of manufacturers produce vaccines, vaccines are still available and widely used today. n20

tax on all vaccines, n121 may put the program in jeopardy.

55. Until this recent change, every dose of vaccine that is produced in this country and appears on the Vaccine Injury Table was subject to a risk-based excise tax. n122 The amount of tax on every dose of vaccine a manufacturer produced was determined by using actuarial principles assessing the risk the vaccine posed for injury. The graduated tax scale made the VICP act like an experience rated insurance program: the more dangerous the vaccine, the higher the tax. Of course, manufacturers had the opportunity to pass on the cost of the tax to bulk buyers, such as state governments, hospitals and clinics. Nevertheless, manufacturers initially paid the tax, and the proceeds were put into the Vaccine Trust Fund, where they accumulated to pay for the VICP's administration and awards. n123

56. To understand how the risk-based tax worked, consider the DPT n124 vaccine "cocktail," which protects against three diseases: diphtheria, pertussis ("whooping cough"), and tetanus. This single vaccine generates almost 75% of all of the injuries that the VICP covers, and primarily from only the pertussis component. n125 A vaccine that only protects against diphtheria and tetanus had an $ 0.06 excise tax per dose because those components are relatively safe. n126 Yet when the more dangerous pertussis bacteria was added to the vaccine, the excise tax jumped to $ 4.46 to pay for the injuries it would cause and to signify that the pertussis component of the vaccine is much more risky. n127

57. Other vaccines listed on the Vaccine Injury Table demonstrated this same pattern, with higher taxes identifying vaccines that pose higher risks. Under this insurance-like philosophy, the next highest vaccine tax was for oral ("live") polio vaccines. n128 This relatively high tax on the oral polio vaccine existed because its injuries create the second largest group of claims in the VICP. n129

58. Congress originally appropriated money to pay for injuries that occurred before the Compensation Program started in 1988. n130 By doing this, the initial vaccine tax levels were lower, paying only for prospective injuries. n131 Today, the VICP is financially independent of Congressional appropriations because the risk-based vaccine tax took into account the dangerousness of a vaccine, and accordingly determined a tax rate. n132

59. The Vaccine Trust Fund has a unique problem -- it has more money than it currently needs. n133 The VICP web site reports that the increasing combination of vaccines makes differentiating risk difficult for specific vaccines, accounting for the misfit between the tax revenue and Compensation Program costs. n134 Yet that does not fully explain why there is a misfit between the tax and program costs. The VICP works under a presumption that the individual risks of a vaccine can be measured, predicted, and incorporated into a tax formula in order to gather adequate financial reserves to pay compensation. Accurate scientific proof of the individual injuries each protective agent in a vaccine causes is crucial to the way the excise tax incorporates risk. When vaccines combine different protective agents in the same medium, the tax formula simply adds their individually established risk-based taxes.

60. The assumptions, that the tax will adequately estimate the risk of injury and accurately finance the Trust Fund by aggregating the individual vaccine risks, become less realistic as scientists begin to make more vaccines with higher numbers of components. This cumulative tax approach ignores the positive, negative, or unknown synergy of protecting against multiple diseases with one vaccine. n135 Consequently, new combinations of protective agents in a single medium makes it difficult to quantify how many people will eventually draw on the Trust Fund. This uncertainty is incompatible with the way the excise tax operates. n136 Without publicly examining the issue further, the Compensation Program administrators argue that the vaccine tax must eliminate the element of risk to eliminate the funding uncertainty.

61. The attack on the risk-based tax assumes that the risk component, and not the cumulative method of calculating, causes the over-funding problem. Under the current flat-tax system, which became effective last year, the tax will be a flat $ 0.75 per component of a vaccine but will continue to aggregate based on the number of components. n137 A trivalent vaccine, whether it protects against diphtheria, pertussis, and tetanus, or measles, mumps, and rubella, would have a $ 2.25 tax -- three times the $ 0.75 tax. Even if risk was what rendered the vaccine tax inaccurate, it does not eliminate the possibility that combining protective agents while only using simple addition to calculate the tax also constitutes part of the problem.

62. Without an explanation of why the winning $ 0.75 proposal is more accurate at determining injuries, and therefore Compensation Program costs, than the alternate proposal of a $ 0.84 tax, it is difficult to say how this will be any improvement over the current system. This really only proves that the previous risk

model, which is up to ten years old for some of the vaccines, is not in touch with current vaccine injuries; this change to a flat tax does not prove that risk is an unmanageable or undesirable part of the tax.

63. Nor does the mere change to a flat tax necessarily solve the over funding situation. The flat tax forecloses serious considerations of alternative explanations of why the VICP revenue and participation are mismatched. Rather than simply jumping to a "solution" for over funding, Congress should consider other reasons why there might be over funding, and if that reason indicates an inherent and worsening flaw in the Compensation Program's overall design. If Congress understands why the VICP has more money than it needs, it can make a better decision about the VICP's future format and what funding philosophy is best suited to maintaining the VICP's self-sufficiency. n138

64. The problem with adjusting the vaccine tax to eliminate the Trust Fund surplus with a flat tax of $ 0.75 per vaccine dose n139 produced is that the flat tax is a one-time solution. Lowering the Trust Fund reserves without identifying why it is over funded does not solve the underlying problem. Moreover, by lowering the Trust Fund reserves the Compensation Program no longer has the option of handling an unexpected vaccine crisis. n140 Without any financial flexibility, Congress would end up inefficiently duplicating a process it already has available to meet the "predictable unpredictability" of disease epidemics. n141

65. If VICP participation increases for any reason, a flat tax may quickly end the Compensation Program. A flat tax does not consider risk at all. By ignoring the relationship between the dangerousness of a vaccine and petitions filed in the Federal Claims Court, Congress makes the VICP vulnerable to one bad batch of vaccine bankrupting the entire no-fault program. Section 9510(d)(1) of the Internal Revenue Code, which governs the Vaccine Trust Fund, limits the liability of the federal government to the amount in the Trust Fund. n142 As an independent program, the federal government provides no backup funding after claims exhaust the Trust Fund.

66. If this flat tax coincides with the Third Restatement, the combination might incidentally eliminate a secondary warning system about vaccine dangerousness. n143 In reality, few vaccine users probably know about the risk-based vaccine tax, or that a higher tax implies a higher level of danger. Insurance, free programs, and lack of understanding and concern insulate many consumers from this sort of economic warning. However, cost conscious health care professionals who must purchase vaccines may be extremely sensitive to this type of information. To those intermediaries accustomed to seeing a risk-based tax incorporated into a vaccine's price, a flat tax might falsely indicate that a particular vaccine has become safer, or that all vaccines are equally safe. The Third Restatement requires that the learned intermediary play a larger role in weeding out inappropriate vaccination candidates, yet a flat tax may remove an important and easily understood vaccine warning.

E. Complementary Initiatives -- Internal and External Challenges

67. Other initiatives related to vaccines may interact with the Third Restatement or offset its effects on the vaccine market. Although universal health care is an unpopular subject, adopting more comprehensive health care coverage would significantly lessen the amounts awarded under the VICP. n144 As section 300aa-15(g) says, the VICP will not provide compensation for any item or service which could be paid for "under any State compensation program, under an insurance policy, or under any Federal or State health benefits program . . . or an entity which provides health services on a prepaid basis." n145 If Congress or state legislatures are inclined to subsidize health care costs, childhood vaccines will almost certainly be included. Not only are vaccines relatively low cost, n146 their opponents are less credible. n147

68. In addition, the new national vaccination tracking system may help epidemiologists refine risk assessments by making it easier to determine actual injuries and the rate of lawsuits those injuries spawn. n148 As a result of more descriptive and accurate data, Congress may be in a better position to assess other aspects of the VICP, such as the link between the Trust Fund surplus and the risk-based tax.

69. Alternatively, the vaccine reporting system can track more than mere adverse events. Already, some states or counties have achieved appreciable results by using a tracking system to send reminders to parents to make sure their children receive a full vaccination schedule. n149 However, these local tracking systems are imperfect. Moving from an area, even within the same state, puts individuals outside of the reach of the reminder program. A national system can increase the likelihood that all children will receive their

vaccinations. Of course, more vaccinations will result in a higher number of actual injuries, necessitating VICP coverage and making it especially important for Congress to ensure that the VICP is ready to handle the claims.

F. Assessment of Challenges and Recommendation

70. Congress has legitimate reasons to investigate the VICP. Following further study of these issues, Congress should adopt a clear plan of action to ensure the VICP's future, vaccine availability and safety, and manufacturer accountability based on what W. Kip Viscusi calls a strategy of principled products liability reform. n150 This plan of action can range from full preemption of non-VICP remedies to a simple amendment of the Vaccine Act's language. It might also include a new financing mechanism for the Trust Fund. Nevertheless, the changes must be purposeful, with "efficient incentives for controlling risks and efficient levels of insurance for the injured." n151

III. CONGRESS SHOULD MAKE SPECIFIC CHANEGS TO THE COMPENSATION PROGRAM BY AMENDING THE VACCINE ACT

71. Whatever changes take place in the Compensation Program, whether or not tied to the Third Restatement, must take into consideration the VICP's initial concerns for moderation. This concern for balance must translate into both form and function, providing a simple process accessible to the widest variety of petitioners with varying degrees of resources, while fostering the underlying philosophy that encourages safety and compensation.

A. Full Preemption of State Law

72. A new era for the VICP should start with less confusion than when the program began. One of the largest sources of confusion relates to whether the Compensation Program preempts state law. To resolve this problem, Congress should amend § 300aa-21 of the **National Childhood Vaccine Injury Act** to eliminate the petitioner's right to elect to reject the VICP award. Allowing the coexistence of federal and state regulation is fundamentally inconsistent in an area, such as vaccine liability, where Congress intends to use a heavy hand in shaping the complex legal balance between society, manufacturers and consumers. By eliminating the election option and fully preempting state law Congress will not only avoid confusion, it will have the control over vaccine liability necessary to institute more comprehensive reforms.

73. Full preemption of state law will also allow Congress to acknowledge the Third Restatement without fully adopting its standards. Whether or not supporting preemption in the abstract, the Third Restatement already anticipates increasing federal preemption of state law for medical product-related liability. In comment b to section 6, the Reporters state clearly that in the case of federal preemption, the Third Restatement's standards for liability cannot apply. n152 Though clearly federal supremacy would achieve this result without acknowledgment from the Reporters, the Third Restatement's discussion of preemption attempts to advertise it as a viable option.

74. Though not the best option, if Congress felt compelled to leave a state remedy in place, it should consider only allowing civil suits for defective manufacturing cases. Injuries from an imperfectly manufactured vaccine have received the most consistent legal treatment in this century. Allowing fault-based (negligence) lawsuits for defective manufacturing would minimize interjurisdictional inconsistencies for manufacturers in comparison to the inevitably varying standards for defective design and improper warning cases. Still, full preemption would provide the most organizational and procedural benefits, completely streamlining compensation for vaccine injuries.

75. If the Third Restatement makes state law less sympathetic to injured users, forcing more and more petitioners to elect to receive a VICP award, eliminating the state remedy would free the creative legal energy dealing with product liability complications to deal with the pressures on a larger VICP. Instead of marshaling political support for separate controls on state liability for manufacturers, Congress could work on substantive changes in the no-fault portion of the program.

B. Raise VICP Compensation Levels

76. Manufacturers of all products would like to see an end to liability, however, this sort of protection comes at consumers' expense. Consequently, a program that works to share equitably the costs and risks of injury must consider the consumer perspective. Though arguably fair now, the Compensation Program should increase its award levels. Of course, award levels should not exceed the actual money the program takes in through the vaccine tax. Running a deficit would jeopardize the VICP's independence and threaten Congress' current favor. Rather than retaining the financial surplus, the VICP could use the excess funds constructively. n153

77. One option is for the Compensation Program to increase awards. The first award increase should go to petitioners who allege a vaccine-related death. This initial increase has nothing to do with the permanence of losing a family member, because there is no valid way to measure and compare that grief with the pain families feel from living with a permanently injured child. The rationale behind this increase is equity; the Compensation Program already allows a variable award for injuries not resulting in death. These injury awards can increase or decrease on a case-by-case basis to justly compensate an individual and pay for comprehensive care. In contrast, the death award in the VICP has not changed in the past ten years. Instead of a flat $ 250,000 award, the VICP could allow a petitioner's estate to seek additional compensation for costs related to the vaccine injury and illness that led up to death, as well as the costs for preparing the petition to the VICP. Alternatively, Congress could simply raise the lump sum award.

78. Dedicating the surplus bounty toward expanding the VICP's administrative capacity or leaving it for a "rainy day" would be a more conservative approach. This could translate into a focus on quickly adjudicating the remaining backlogged cases by hiring an additional Special Master or sponsoring a study to assess the Compensation Program's current processes. Re-investing the surplus in the VICP will help meet unpredicted needs by making the no-fault program more resilient, which will become increasingly important in light of the upcoming changes to the VICP's financing mechanism. Arguably, the no-fault process can be considered as part of compensation under the VICP because it provides value to petitioners as an alternative to the awkward and slow moving civil courts. So, though petitioners would not necessarily receive higher awards from the Compensation Program under this more conservative approach, the process for awarding compensation would be strengthened and raised to a higher level.

79. Congress will have a separate concern for injury compensation if it fully preempts the election option for petitioners. The national legislature must ensure that petitioners will receive adequate compensation under whatever changes are implemented. One of the incentives for granting adequate compensation under the current system is the election option. Special Masters and others involved in the Compensation Program understand that a primary concern is to keep petitioners from ultimately going to the civil courts, which is why VICP awards must be competitive with state and federal court awards. Without an election option, the Compensation Program administrators have no competition from outside sources, and therefore they might let compensation levels drop. "They ought to be grateful for what they get" attitudes that can accompany entitlement programs such as the VICP might combine with the diminished incentive to make generous payments, all to consumers' detriment.

80. Determining how the legislation itself could mandate an increase in compensation to living petitioners is difficult because their awards are variable and independently determined. One option would be to add a flat monetary bonus to every successful petition in addition to the costs and future needs already incorporated in the award. Without knowing the exact scope of the current surplus, it is unlikely that the Compensation Program would be able to sustain this sort of award without a purposeful increase in the funding. Regardless, raising compensation levels deserves further consideration.

C. Flat Tax and Risk-Based Rebate

81. Compensation Program administrators cite difficulty in estimating the *future* risk of vaccines as one reason why a flat tax is preferable to the current risk-based tax. Given the potential for new vaccines and new vaccine combinations without well-defined risks, there are strong reasons to support a flat tax. However, the risk-based tax has worked well for the VICP. To lessen the problem of accurately determining and generating Compensation Program financing based on projected data without eliminating risk, Congress could impose a flat tax on every dose of vaccine produced and couple it with a risk-based rebate. By incorporating risk into the rebate, the VICP can use retrospective "hard" data based on actual injuries attributable to specific

manufacturers. n154 By imposing a risk criteria at the end of petition adjudication, rather than at the time of the initial excise tax levy, Congress can maintain the VICP's sensitivity to real vaccine safety issues while still improving Compensation Program administration.

82. The combination flat tax and risk-based rebate would help Congress maintain and even increase an incentive for manufacturers to improve vaccine safety. If, as proposed, Congress eliminates the post-election civil action option for VICP petitioners, the threat of product liability will no longer naturally urge this scientific and technological innovation. n155 Competition will not naturally provide the impetus for vaccine improvements as it encourages improvements in other products. With the tax-rebate combination, Congress can encourage manufacturers to lower wholesale vaccine costs and actually contribute a greater amount of money to the Compensation Program without shifting cost to buyers. Furthermore, unlike a flat tax acting alone, a flat tax combined with a risk-based rebate will still provide an indirect warning about a vaccine's safety.

83. With a flat tax/risk-based rebate program, Congress would tax manufacturers based on every dose of vaccine they produce. Regardless of the type of vaccine produced, manufacturers would pay the same flat fee. If a pharmaceutical company produces one million diphtheria vaccine doses, two million chicken pox vaccine doses, and three million polio vaccine doses, it would pay a tax equal to six million times a set fee (probably less than $ 0.80). n156 The money paid in taxes would be deposited into the Vaccine Trust Fund, and used primarily for paying VICP administration costs and no-fault awards to injured consumers.

84. After the VICP compensates injured consumers, a manufacturer would receive a percentage of the tax it paid in the form of a rebate. Since the flat tax will be actuarially set above the minimum revenue needed to run the program, part of the surplus funding would be returned to manufacturers based on how much the VICP paid to petitioners for injuries from that particular manufacturer's vaccine. The money remaining in the Trust fund after the VICP pays the rebates would be used to expand the VICP's coverage.

85. The Advisory Committee that oversees the VICP should commission an actuarial study of what the optimal flat tax would be if the goal was to create a sufficient surplus to expand Compensation Program coverage without a waiting period, and what sort of formula the Compensation Program should use to establish the rebate. Establishing a flat tax is relatively easy. The Advisory Committee can pick the target revenue goal and project the number of doses that will be manufactured in a given year. Though actual numbers of injuries and doses of vaccines produced may vary in one year, they should be close to the projections, which can be based on historical data and routine public health estimation of need. n157

86. Congress and the National Vaccine Advisory Committee can use this flat tax to keep the vaccine market stable. With a risk-based tax, such as the one that the Compensation Program previously used, manufacturers have less of an incentive to produce riskier vaccines, such as the pertussis vaccine, because they pay higher taxes. By relating the actual amount paid in taxes only to the number of doses a manufacturer produces, pharmaceutical companies would contribute to the Vaccine Trust Fund in proportion to the magnitude of their individual business, whether they produce one type of vaccine or many types of vaccines. This may help reverse the vaccine industry's monopolistic trend by eliminating any positive or negative incentives for producing one or more vaccines. With a flat tax all manufacturers, not just the richest ones, will be able to afford to pay the tax and still make a profit.

87. The tax revenue surplus in excess of the Compensation Program costs would then be available for rebates. The Advisory Committee can establish a merit-based system for the rebate. With a merit-based system, the Advisory Committee does not have to treat manufacturers equally, even when they produce a vaccine for the same disease. This means that if one form of the polio vaccine is safer than another, the manufacturer with the safest vaccine will get the most money back, if the Advisory Committee equates merit with safety. Under a safety formula, the maximum rebate will go to the manufacturers of vaccines with the fewest injuries, and the lowest rebate to manufacturers of vaccines with the most injuries. Merit might also be related to other factors, such as lower wholesale prices or profit-making, which might make vaccines more affordable to the poor. The Advisory Committee might consider money invested in vaccine safety research and development as meritorious. Alternatively, the rebate can reward a manufacturer who responds to a crisis with a full refund of the tax. Because the VICP currently has a surplus, this formula can be tested with actual, rather than projected, data.

88. By making the rebate optional the risk element would encourage manufacturers to improve vaccine

safety without further penalizing them, as liability would, when improvement is impossible. The rebate could spawn more than just research and development on vaccines to lower injuries and increase rebate amounts. Manufacturers might subsidize public screenings to better identify who should not take a vaccine. Manufacturers could produce multi-language translations of warnings for non-English vaccine users, reducing some of the burden for producing warnings that the CDC currently shoulders. Manufacturers might pay for state-based continuing medical education to update learned intermediaries on vaccine risks and benefits.

D. Expand the Vaccine Injury Table and the Aids to Interpretation

89. One of the benefits of the original VICP legislation is that it allows notice-and-comment rulemaking by the Secretary of Health and Human Services to amend the Vaccine Injury Table as well as the Aids to Interpretation. This allows both to reflect accurately scientific knowledge about injuries and present-day vaccine recommendations for children (and some adults) without an additional act of Congress. If the Third Restatement does influence the adjudication of vaccine injury disputes in the civil courts, as measured by increasing number of petitioners accepting VICP awards because state remedies are unlikely, then consider the Third Restatement's effect on claims for vaccines and injuries that the VICP excludes. Individuals injured by a VICP-excluded vaccine, or consumers whose type of injury are not covered by Compensation Program, may literally lack a forum to adjudicate their claims and award compensation in meritorious cases.

90. Vaccines that prevent non-childhood diseases may be used less frequently than the vaccines historically included in the VICP, but they are no less beneficial to society. The Secretary of Health and Human Services should use the VICP's notice-and-comment rulemaking authority to expand the Vaccine Injury Table and the Aids to Interpretation to include these other vaccines, and fully describe the symptoms that demonstrate a causal connection between the vaccine and an injury. With the tax and Trust Fund already in place, and with a current surplus, the Secretary has very few structural barriers to expanding the program. This is not to suggest that the Secretary is immune to political considerations, but with manufacturers placated by preemption of state remedies for childhood vaccines, their Congressional supporters should be amenable to a similar liability scheme for other vaccines.

91. Expanding the Compensation Program will also reduce legal confusion about which forums are appropriate for which injuries. What happens when an injured petitioner to the VICP received two or more vaccines at the same time, one covered and one excluded by the VICP? VICP case law suggests that an arbiter in the Compensation Program does not have to force an injured petitioner to decide which vaccine caused the injury when the symptoms they exhibit are related to more than one Compensation Program *covered* vaccine. n158 However, separating symptoms on the Vaccine Injury Table and the Aids to Interpretation from similar symptoms for excluded vaccines may be impossible. A single, unified vaccine injury forum would greatly reduce the potential for confusion, as well as create a cadre of very experienced adjudicators.

E. Add Consumer Protection Language

92. In addition to expanding the Vaccine Injury Table and the Aids to Interpretation to create a wider, more encompassing Compensation Program, Congress should update and create additional legislative history through hearings, the Congressional Record, public debate, and a purposes clause at the beginning of the Vaccine Act. Hopefully, this legislative history will reflect a sincere desire to benefit injured consumers as an important part of encouraging vaccine use. Currently, the Secretary has a mandate from the Compensation Program to seek out and encourage safer vaccines. n159 This is not equivalent to saying that an explicit purpose behind the Vaccine Act is to provide consumers legal protection from vaccine injuries.

93. Though sometimes superficial, especially in the face of contrary provisions explicitly benefiting manufacturers, consumer protection language has a strong role to play in vaccine injury compensation. An explicit intent to protect consumers helps the Federal Claims Court and Special Masters who administer the no-fault process, as well as the federal courts involved in the appeals process, to construe the statute effectively and accurately. n160 In turn, this consumer protection language helps these judicial actors enforce a balance between social, manufacturing, and consumer interests. Moreover, obvious Congressional intent sends a message to everyone involved in the manufacturing process that individuals should not be forced to bear the entire risk when manufacturers and the rest of society literally benefit at their expense.

F. Warn all Relevant Parties

94. Congress should amend the Vaccine Act to require manufacturers to provide warnings to both consumers and to health care providers. n161 There is no legitimate reason to minimize a manufacturer's duty to warn of a vaccine's inherent dangers if there will be no liability for such a failure to warn. The Third Restatement is only awkward and inefficient at requiring the warning go to the person most likely to put the information to good use. In reality, there are many times when a consumer and learned intermediary need to work together to form an opinion as to whether taking a vaccine is a good idea. This cooperation is impossible without the correct warnings. Despite other concerns, safety must be a central interest for Congress.

95. Contrary to the inevitable argument that these multiple warnings will require too much time and money from manufacturers, this is the smallest contribution that the manufacturers can make to vaccine safety in return for a ban on individual defective warning liability. Legislators should look to the successful experiment with warnings and oral contraceptives as a vision of the multilevel warnings that should accompany vaccines. Pharmaceutical manufacturers currently include written warnings with all oral contraceptive packages without diminishing the information that goes to health care professionals. n162 There is no reason to assume that manufacturers could not do the same for vaccines.

96. To accomplish the most widespread and effective warnings, Congress would only have to mandate direct consumer warnings. Regardless of a legal mandate, manufacturers would already be inclined to warn health care professionals about the risks and benefits of a vaccine as part of their marketing strategies. Furthermore, because the Third Restatement and the VICP do not eliminate malpractice liability for health care providers, those duty-bound learned intermediaries would likely seek out this information without prompting. In contrast, consumers are in an untenable position. Not only are consumers required by law to take vaccines, but they lack the political power to force manufacturers to deal with them directly and often do not have enough knowledge to question independently the risks and benefits of a vaccine.

97. These consumers with the least access to information are literally the most at risk from vaccines. Therefore, it is important for this legislative amendment to require that manufacturers design warnings to educate the intended audience reasonably and effectively. This means that a manufacturer would not satisfy its duty to warn by providing a learned intermediary with a simplified, non-technical warning. Nor would a manufacturer satisfy its duty to warn a consumer with a complex and virtually "plain-language-free" warning designed for scientists.

98. If there is no liability for failing to warn, Congress needs to consider how it will enforce this warning provision. Regulatory oversight might be insufficient by itself, therefore, Congress may want to consider adjusting the VICP petition process to aid enforcement. Congress could require a petitioner to submit information related to the vaccine warning associated with his or her claim. This would help the Department of Health and Human Services gather data on the manufacturers, and if necessary, commence internal administrative proceedings to investigate and penalize a manufacturer for noncompliance.

99. If, at the end of an investigatory process addressing a manufacturer's noncompliance, an administrative law judge held that a manufacturer failed to provide reasonable and adequate warnings, a number of relevant penalties would be available. First, such a penalty could suspend a manufacturer's right to receive a tax rebate. The penalty could be an additional fine, or require the manufacturer to submit to more frequent and stricter scrutiny of the warnings by the FDA. In outrageous cases of fraud and abuse, the manufacturer's vaccine could be excluded entirely from the VICP, reimposing civil liability under the standards currently specified in the VICP legislation allowing punitive damages. The reporting measures in conjunction with these possible licensing and administrative penalties against a manufacturer should ensure compliance with comprehensive warning legislation in the absence of civil liability.

IV. CONCLUSION

100. Richard Neely colorfully suggested that "only people who believe in Tinker Bell [can] have any firm expectation that Congress will do anything" to improve product liability. n163 As for Senate Bill 2760, one of the VICP's precursor bills, he found it "complicated but largely useless" as well as full of "weasel language." n164 Judge Neely also predicted that the House would eventually "gut" the clear and convincing standard to

be applied to jury decisions in design cases -- a standard he grudgingly valued. n165

101. Surprise Judge Neely, fairies are real! Not only did Congress manage to retain the clear and convincing standard, n166 they also managed to implement a workable program that alleviated the vaccine market stress. This demonstrates that, despite criticism and doubt, Congress is capable of identifying significant problems and implementing effective change. Moreover, Congress is an appropriate agent for change for the national vaccine market because it is swifter and more unifying than individual state legislatures or judicial districts. Consequently, as problems arise inside and outside of the VICP, Congress should not be afraid to seriously contemplate these challenges and to search out new solutions. Whether Congress decides to implement one or none of the changes this Note proposes, it must maintain its primary concern for public health and a balanced vaccine liability scheme.

102. **Appendix A**: Comparing Vaccine Liability in Civil Courts

[SEE TABLE IN ORIGINAL]

103. **Appendix B**: Process for Creating the Flat Tax and Risk-based Rebate Using Hypothetical Data

Step 1: Estimate program costs.

Determine the total number of dollars necessary to run an expanded VICP with a 20% surplus for one year.

<$ 40,000,000 in program expenses, $ 10,000,000 surplus>

Step 2: How many doses of vaccine will the VICP have to cover during the program year?

Use epidemiological and industry data to predict the number of doses of vaccines manufacturers will produce that year.

<200,000,000 doses of four different vaccines produced by two different manufacturers>

Step 3: Determine the flat tax.

Divide the total from **Step 1** by the number of doses of vaccine in **Step 2** to determine a flat tax.

<$ 50,000,000/200,000,000 doses = $ 0.25 tax per dose of vaccine>

To determine how much each manufacturer will pay in total taxes multiply the tax by the number of doses of vaccine they make.

<($ 0.25)(50,000,000 doses)(2 vaccines) = $ 25,000,000 tax to the Trust Fund>

Step 4: What is the maximum amount of money the VICP could return to manufacturers in the form of a rebate?

This sum can be calculated two ways. First, the Advisory Committee could decide on additional program objectives it would pay for out of the surplus, establishing a single amount. Though individual rebate amounts would vary, total manufacturer rebates could not exceed the remaining surplus. Using a rebate formula, *illustrated infra*, manufacturers would actually have their rebates scaled to a $ 5,000,000 surplus.

<NVAC wants to use $ 5,000,000 for other program goals>

<$ 5,000,000 in vaccine tax could be returned as a rebate>
<after calculating the rebate based on total surplus the rebate is adjusted proportionally so that they do not exceed $ 5,000,000>

Or, the surplus can remain an aggregate $ 10,00,000 and could be distributed using a rebate formula that will leave a surplus, as illustrated *infra*.

Step 5: What factors should determine the amount of a manufacturer's rebate?

In this instance Advisory Committee chooses two merit-related factors to determine the amount of rebate each manufacturer receives:

a) the number of injuries the VICP must pay per 1,000,000 doses of vaccine that specific manufacturer produces, and

b) the amount of profit the manufacturer makes on those 1,000,000 doses of vaccine.

The fewer the injuries and the lower the profit, the larger the rebate a manufacturer receives. In addition, the Advisory Committee can choose a constant, or a guaranteed rebate. Therefore if the rebate formula returns a negative figure the manufacturer receives only the predetermined rebate amount, and does not owe the VICP any money.

Step 6: What specific elements should an algebraic formula contain to reflect the preferred distribution of rebates to manufacturers?

In **Step 5** the Advisory Committee decided on the philosophical components of a formula, however, the formula must incorporate additional elements to make sure the rebates do not exceed the surplus, and that the formula takes into consideration the risk of each vaccine. Together these relevant elements are:

. the number of doses of vaccine a manufacturer produces
. the amount of profit the manufacturer makes on those vaccine doses
. the number of injuries that vaccine causes
. the tax a manufacturer pays on one vaccine
. the total number of vaccines a manufacturer produces
. the number of manufacturers making vaccines covered by the VICP
. VICP surplus
. the guaranteed 1% rebate amount
. the total number of rebates the VICP will have to pay
. the total number of injuries the VICP pays for the vaccines taxed in that year

Step 7: What does a rebate formula look like?

Rebate for one vaccine = [[S - (G)(V)]/V - [E + .01(P)]] + G

S= surplus = total tax revenue - program costs
G = guaranteed return of 1% of the tax
V = # of vaccines involved, the same vaccine produced by different manufacturers count as separate vaccines, **not** the # of doses
E = VICP expenses for injuries from that vaccine = VICP costs divided by the total number of injuries, and then multiplied by the number of injuries for that single vaccine
P = manufacturer profit on a vaccine in dollars

Rebate for a manufacturer = [SIGMA]rebates for each vaccine produced

Step 8: What would rebates using this formula look like?

The following table pulls together the hypothetical data described in this problem and shows four possible rebates.

[SEE TABLE IN ORIGINAL]

Manufacturer 1 rebate: $ 3,450,566

Manufacturer 2 rebate: $ 1,850,283

Total rebates to manufacturers: $ 5,300,849

Surplus left for the Advisory Committee to use in the VICP: $ 4,699,151

FOOTNOTES:

n1 An extensive list of organizations that support vaccine research, development, and use, ranging from the American Academy of Family Physicians to the National Institutes of Health. *See Vaccine Page Organizations-General* (visited June 1, 1998) <http://www.vaccines.com/organizations.htm>.

n2 *See Informed Parents Vaccination Home Page* (visited Feb. 28, 1998) <http://www.unc.edu/aphillip/www/vaccine/informed.htm> ("Why are a growing number of parents and health care professionals around the world questioning vaccination? The controversy stems from the thousands of deaths and permanent disabilities attributed to vaccination annually, as well as the many published medical studies, government statistics, congressional testimonies, and other credible sources that directly contradict commonly held assumptions about vaccine safety and effectiveness. Take no one else's word for it: Make your own informed vaccination decisions!"); *see also Welcome to the Concerned Parents for Vaccine Safety Home Page* (visited Feb. 27, 1998) <http://home.sprynet.com:80/sprynet/Gyrene/Home.htm> (a multi-level web site with downloadable documents and links to other philosophically-aligned sources of information).

n3 The Food and Drug Agency ("FDA"), the National Institutes of Health ("NIH"), and Centers for Disease Control and Prevention ("CDC") have the primary legal mandates to further and approve vaccine development and use. *See* Food Drug & Cosmetic Act, 21 U.S.C. § 355 (1994) (requiring FDA to grant approval before a drug can enter interstate commerce); *see also* Children's Vaccine Initiative, 42 U.S.C. § 283d (1994) (mandate to National Institute of Allergies and Infectious Diseases and National Institute of Child Health and Human Development to develop childhood vaccines to be used in United States and abroad).

n4 Vaccine cases have provided the context for some of the Supreme Court's most serious examinations of due process and compelled technology use. *See* Jacobson v. Massachusetts, 197 U.S. 11, 24-27, 38-39 (1905) (landmark case upholding constitutionality of compulsory vaccination laws); *see also* United States v. Anderson, 328 U.S. 699, 700 (1946) (involving criminal prosecution of U.S. military inductee for refusing vaccination).

n5 In the years prior to congressional reform of vaccine manufacturer tort liability, insurance premiums rose steeply, and benefits, including maximum policy payouts to manufacturers, declined rapidly. *See* Mitchell F. Dolin, *Excess Defense Coverage and Long-Tail Liabilities*, 32 TORT & INS. L.J. 875, 875, 883-87, 891-98 (1997) (discussing the role of third party insurance in defending product liability suits and the 1984-85 liability crisis, including the stop gap measure of overlapping multiple policies). *See generally* Kyle D. Logue, *Toward a Tax-Based Explanation of the Liability Insurance Crisis*, 82 VA. L. REV. 895 (1996) (describing the 1980s liability crisis and arguing that it was related to the tax reform efforts occurring at the same time).

n6 *See* Morris v. Parke, Davis & Co., 573 F. Supp. 1324, 1325 (C.D. Cal. 1983) (permitting plaintiff to pursue *punitive damages* under a market share theory, established in Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980), from DPT manufacturers if plaintiff could prove they had conscious disregard for safety).

n7 Some manufacturers, such as Connaught and Wyeth, actually ceased making the DPT vaccine. *See* 131 Cong. Rec. S3843-04 (daily ed. Apr. 2, 1985) (statement of Sen. Hawkins). After the Compensation Program, which absolved manufacturers of liability, was implemented, some manufacturers resumed production. *Cf.* NATIONAL VACCINE ADVISORY COMMITTEE, NATIONAL VACCINE PROGRAM, ADULT IMMUNIZATION, Appendix VII (1994) [hereinafter ADULT IMMUNIZATION] (listing Wyeth and Connaught as producing DPT vaccine).

n8 For instance, although breast implants are often used safely in post-radical mastectomy reconstructive surgery, and the data showing their dangerousness are equivocal at best, recent litigation against the

6. 1998 marks the tenth anniversary of the Compensation Program's implementation. Given the Compensation Program's basic success, this anniversary presents a natural time for reflection. Rather than allowing this examination to be self-congratulatory, this Note argues that Congress should vigorously scrutinize the VICP and the scientific and legal contexts in which it exists. Congress should first identify potential challenges to the efficient process the VICP uses and the vaccine market equilibrium it encourages. After considering the likelihood and strength of these challenges, Congress should contemplate making appropriate changes in the Vaccine Act to maintain vaccine availability, market equilibrium, and encourage increasing vaccine safety.

7. This Note has three main sections. Part II identifies factors that could challenge the VICP's operations and stabilizing effects on the vaccine market. Though identifying a number of potential external threats, this portion of the Note focuses particularly on the American Law Institute's ("ALI") newly authored n21 Restatement (Third) of Torts ("Third Restatement"). n22 Part II also looks at the recent simplification of the VICP's funding tax and other internal changes to the Compensation Program. If Congress actively reexamines the Compensation Program and determines that good cause exists to make changes, Part III suggests a course of action to minimize the negative effects of the threats and challenges discussed in Part II. This proposal centers around fully preempting all remedies for vaccine injuries outside the VICP, funding the VICP with a flat tax, and motivating manufacturer concern for safety with a risk-based rebate. Part IV concludes the Note.

II. CONGRESS SHOULD CRITICALLY REEXAMINE THE VICP

8. Before the 1986 **National Childhood Vaccine Injury Act,** vaccine-injured individuals could seek compensation from vaccine manufacturers in state courts. Under diversity jurisdiction, federal courts provided an alternative forum, yet the tort claims of defective vaccine manufacturing, defective vaccine design, or inadequate warnings were the same in both court systems. n23

9. After Congress passed the Vaccine Act, vaccine-injured individuals retained an election to sue manufacturers in these courts, n24 but only after going through a no-fault process. In this no-fault process, the petitioners sued the Compensation Program, with the Secretary of Health and Human Services, instead of the manufacturer, as the respondent. n25 Congress designed the no-fault Compensation Program to be more than a mere preliminary step to suing manufacturers directly. By creating a petitioner-friendly process with liberal compensation guidelines, Congress hoped to make the VICP so attractive that vaccine-injured individuals would not exercise their election option at all.

10. The sections of the Vaccine Act that created the Compensation Program spells out comprehensively the no-fault process. n26 The statute describes how a person petitions the Federal Claims Court for compensation, n27 serves notice on the Secretary of Health and Human Services, n28 and establishes the existence of a qualifying injury. n29 The legislation carves out special rules of discovery, and excludes the possibility of using the no-fault process findings in the civil courts. n30 The Vaccine Act also clearly defines the role of the Special Masters who hear claims and make final decisions, n31 including the preponderance standards of proof and scientific presumptions that operate to make it easy for a petitioner to succeed. n32 The legislation lists the multiple categories of compensation a Special Master can award, ranging from past and future medical care to special housing and educational costs. n33 The Vaccine Act establishes how a Special Master makes a final recommendation to the Claims Court, n34 and how a petitioner can appeal that decision to the Court of Appeals for the Federal Circuit. n35 The Vaccine Act also determines the exact process for a petitioner to reject a Claims Court judgment and seek redress in the civil court system. n36

11. During its first years, the Compensation Program encountered difficulty in implementing efficiently the Vaccine Act's legislative scheme, despite the clear process created by Congress. In 1991 Wendy Mariner, a professor of Health Law at the Boston University School of Public Health, evaluated for the Administrative Conference of the United States the Compensation Program's first working year. n37 In that report she suggested that the Compensation Program was capable of working through its early problems hearing claims and would settle into a regular working pattern if it did not run out of funding. n38 The three most important questions today are: Has the Compensation Program worked out its old problems? Has it met its objectives of reducing manufacturer liability and providing easy compensation to victims? Are new threats emerging to challenge the Compensation Program in the future?

manufacturer has severely affected the silicon breast implant market. *See* MARCIA ANGELL, SCIENCE ON TRIAL 19, 21-23, 111-32 (1996).

n9 Neither technological determinism, which posits that science and technology are independent forces that the law cannot drive, nor technological neutrality, which credits human choice for scientific and technological advances, adequately explain Congress' choice to reshape the law to benefit vaccine technology. Only the theory of technological realism, which asserts that law and science have a dynamic relationship, each one shaping the direction of the other, explains this incident. *See* PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY 10-15 (1995).

n10 42 U.S.C. § § 300aa-1 to -34 (1994).

n11 *See id.* § 300aa-2(a)(1)-(9) (describing the role the Director of the National Vaccine Program has in research, development, testing, licensing, production, procurement, distribution, use, evaluation, coordination, and funding of vaccines).

n12 *See id.* § § 300aa-10 to -34.

n13 *See id.* § 300aa-11.

n14 Representative Madigan introduced the first draft of the Vaccine Act on March 27, 1985. *See* 131 Cong. Rec. H1587 (daily ed. Mar. 27, 1985) (Statement of Rep. Madigan). Though later modified to create a no-fault program, Representative Madigan's proposed legislation clearly voiced the House's first priority as preserving vaccines as a part of the American public health system. *See id.* ("This legislation is based on three major principles: First, the childhood immunization program in this country is one of our most important health efforts; second, the future availability of some vaccines is in severe jeopardy; and third, those children injured by vaccines deserve fast and equitable compensation.").

n15 Promulgated by the American Law Institute ("ALI"), a Restatement furthers the ALI's purpose "to promote the clarification and simplification of the law and its better adaptation to social needs" by expressing the majority view of the law, and in some cases acting correctively by proposing what the law should be. *American Law Institute Bylaws*, § 1.01 (eff. May 17, 1994) (visited May 5, 1997) <http://www.ali.org/ali/bylaws2.htm> [hereinafter *ALI Bylaws*]. A Restatement is not law unless a legislature takes the unusual step of incorporating it into legislation, or a court takes notice of its standards and applies them.

n16 *See generally* RESTATEMENT (SECOND) OF TORTS (1963-64 Main Vol. & Supp.) [hereinafter SECOND RESTATEMENT].

n17 Representatives Dannmeyer, Fields, Nielson, and Schaefer jointly filed a dissenting view to H.R. 5546, The **National Childhood Vaccine Injury Act.** *See* **National Childhood Vaccine Injury Act** of 1986, H.R. REP. NO. 99-908, at 78, *reprinted in* 1986 U.S.C.C.A.N. 6344, 6382-3. Although agreeing that federal action was necessary, they objected to the financing mechanism, an excise tax, and believed that the bill "further erodes the concept of compensating victims of negligent acts, and provides authority for the establishment of several unnecessary and dulicative [sic] advisory councils and commissions." *Id.* at 6382. Of course, these House members also supported their own bill, H.R. 1780, which would have used liability capitation, damages not to exceed $ 1,000,000, and paid awards out of private insurance. *Id.* at 6382-83; *see also* WENDY K. MARINER, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, INNOVATION AND CHALLENGE: THE FIRST YEAR OF THE NATIONAL VACCINE INJURY COMPENSATION PROGRAM 6-8 (1991) [hereinafter FIRST YEAR] (describing the opposition of the Department of Justice to a new entitlement, and the opposition of the Department of Health and Human Services to "nearly automatic compensation" focusing on injuries when the agency was attempting to fulfill a concurrent mandate to promote vaccination (citation omitted)).

n18 *See* 131 Cong. Rec. S3843-04 (daily ed. Apr. 2, 1985) (statement of Sen. Hawkins) ("It is obvious that a legislative solution is needed to stabilize the supply of childhood vaccines and restore public confidence in the childhood immunization program."); *see also* Amendola v. Secretary Dep't Health & Human Servs., 23 Cl. Ct. 621, 626 (1991) (discussing the policy goals of the Vaccine Act); Stotts v. Secretary Dep't Health & Human Servs., 23 Cl. Ct. 352, 358 (1991) (stating that compensating vaccine injury victims was also a central goal of the VICP).

n19 *See* **National Childhood Vaccine Injury Act** of 1986, H.R. REP. NO. 99-908, at 78 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6382 (dissenting Representatives' views suggesting that the Compensation Program would put the federal government at risk financially).

n20 *See* ADULT IMMUNIZATION, supranote 7, at Appendix VII (listing all currently produced vaccines and their manufacturers).

n21 *See Heavy Substantive Agenda for ALI's 1997 Annual Meeting in Washington, D.C.* (visited May 5, 1997) <http://www.ali.org/ali/annupdate.htm>.

n22 RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 6(a) (Proposed Final Draft 1997) [hereinafter THIRD RESTATEMENT].

n23 *See generally* Wendy K. Mariner, *Compensation Program for Vaccine Related Injury Abroad: A Comparative Analysis*, 31 ST. LOUIS U. L.J. 599 (1987) (describing the history of American settlement of vaccine injury disputes and comparing it to international approaches).

n24 **National Childhood Vaccine Injury Act,** 42 U.S.C. § 300aa-21(a) (1994).

n25 *See id.* § 300aa-12(b) (parties involved in petitions).

n26 *See id.* § § 300aa-1 to -34; *see also* FIRST YEAR, *supra* note 17, at 11-20 (describing and evaluating the Compensation Program's implementation).

n27 *See* **National Childhood Vaccine Injury Act,** 42 U.S.C. § 300aa-11 (1994) (describing form, content, and limitation of petitions).

n28 *See id.* § 300aa-11(a)(1) (notice).

n29 *See id.* § 300aa-11(c) (evidence of injury in petition).

n30 *See id.* § 300aa-12(d)(3)(B) ("There may be no discovery in a proceeding on a petition other than the discovery required by the special master."); § 300aa-12(d)(4)(A) (no information required by a Special Master may be disclosed without the express written permission of submitting party).

n31 *See id.* § 300aa-12(d) (duties of Special Masters).

n32 *See id.* § 300aa-13(b) (matters to be considered).

n33 *See id.* § 300aa-15 (long list of factors to be considered for determining compensation).

n34 *See id.* § 300aa-12(e)(3) (Special Master's decision is final unless petitioner files an objecting motion).

n35 *See id.* § 300aa-12(f) (appeals).

n36 *See id.* § 300aa-21(a) (elections); *see also* § 300aa-22 (standards to be applied in a mandatory three-phase civil action after a petitioner elects to reject the Compensation Program award or judgment of no award).

n37 *See* FIRST YEAR, *supra* note 17; *see also* Administrative Conference Act of 1964, 5 U.S.C. § § 591-96 (1994) (establishing the Administrative Conference as an independent federal agency dedicated to evaluating how other federal agencies carry out their duties).

n38 *See* FIRST YEAR, *supra* note 17, at 3, 66-69.

n39 *See* Vaccine Trust Fund, I.R.C. § 9510 (1994).

n40 *See* National Vaccine Injury Compensation Program, *Summary of Current Issues, Report to the National Institutes of Health Pertussis Conference August, 1996* (visited June 11, 1997) <http://www.hrsa.dhhs.gov:80/bhpr/vicp/sumcur.htm#3> [hereinafter *Current VICP Issues*].

n41 *See generally* H.R. CONF. REP. 105-405 (1997) (Senate and House recommendations for 1998 fiscal year disbursements from the Vaccine Trust Fund to pay for Department of Justice and Federal Claims Court expenses related to the VICP); *see also* H.R. CONF. REP. 105-390 (1997) (Senate and House

recommendations for 1998 fiscal year disbursements from the Vaccine Trust Fund to pay for Department of Health and Human Services expenses related to the VICP).

n42 *See* National Vaccine Injury Compensation Program, *Monthly Statistics Report Through April 30, 1997* (visited June 11, 1997) <http://www.hrsa.dhhs.gov/bhpr/vicp/sumcur.htm> [hereinafter *VICP Statistics*].

n43 *See* National Vaccine Injury Compensation Program, *Background Information on VICP*, (visited June 11, 1997) <http://www.hrsa.dhhs.gov/bhpr/vicp/abdvic.htm> [hereinafter *VICP Background*].

n44 *See* ADULT IMMUNIZATION, *supra* note 7, at Appendix VII.

n45 *See, e.g., Lyme Disease Vaccine Proven To Work in Clinical Trial*, HEALTH LETTER CDC (Sept. 29, 1997), *available in* 1997 WL 7716620 (describing that a recent study concluded that a new lyme disease vaccine by Connaught is effective in preventing a disease that afflicts more than 16,000 American children and adults each year).

n46 One of the least understood aspects of product liability law is the role of perception in shaping legal change. A study of the trends in product liability law suits occurring in the federal courts during the same time frame as the vaccine liability "crisis" (1973 - 1986) indicates that vaccine manufacturers were not necessarily under extraordinary attack. TERENCE DUNGWORTH, PRODUCT LIABILITY AND THE BUSINESS SECTOR iii-v (1988). In fact, pharmaceutical manufacturers represented only 2.2% of all federal product liability defendants, and more than 60% of those cases related to the Dalkon Shield intrauterine device produced by A.H. Robins and the anti-nausea drug Bendectin produced by Merrill Dow -- not vaccines or their manufacturers. *See id.* 19, 39-43, 51.

Despite suffering from selection bias (the study did not include data on lawsuits in state courts) and confounding (asbestos litigation was unusually high in this time period, minimizing the real magnitude of health and pharmaceutical product cases) the study illustrates two important points. First, even if vaccines are particularly vulnerable to liability, the liability may be justified, not signaling a crisis. Second, Congress cannot project when public and industry perception will combine with real legal and scientific developments to signal a new "crisis" requiring attention and action. This Note argues that one rational response to uncertainty is to examine the issues that could combine with perception to create a new sense of crisis.

n47 For author's comparison of liability for vaccine injuries under different standards, see Appendix A.

n48 Product liability law, the broader body of law from which vaccine liability draws its own standards, has liberalized from its original fiercely pro-manufacturer stance. *See, e.g.*, MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916) (eliminated privity of contract requirement in tort, paving the way for remote purchasers to sue manufacturers directly, in this case an auto manufacturer); Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 438-40 (Cal. 1944) (allowing bystander to receive damages for injuries from an exploding bottle).

As plaintiffs became more successful in product liability lawsuits, the ALI's Second Restatement codified many of the standards related to the three basic causes of action: defective manufacturing, defective design, and inadequate warnings or instructions. *See* SECOND RESTATEMENT, *supra* note 16, § 402A cmts. f, i, k (comments on "Special Liability of Seller of Product for Physical Harm to User or Consumer"). In grappling with unavoidably unsafe, or inherently dangerous products, such as medical technologies, the Second Restatement delicately tries to balance the interests of industry, society, and consumers by adopting what is generally called a "consumer expectation test" under a negligence standard. *See id.*

n49 The legislative history suggests that lawmakers at the time recognized that a series of events, and not single happenings, were combining to create the crisis. For what appears to be a particularly anxious statement, see 132 Cong. Rec. E2755-02 (Aug. 6, 1986) (statement of Rep. Fred J. Eckert). ("The lawsuits are mounting. Huge settlements are leading insurance companies to review their liability policies. Premiums are increasing. Coverage is being reduced. Policies are being canceled altogether. Some vaccine manufacturers have already ceased producing their products because they concluded the liability risk is too great.").

n50 Less than two months after the proposed final draft of the Third Restatement was adopted by the ALI membership, it was submitted to the U.S. District Court for the Northern District of Alabama as legal authority. *See Citing Third Restatement, Union Carbide Also Wants Judgment in MDL*, 5MEALEY'S LITIG. REP.:

BREAST IMPLANTS 15 (July 24, 1997) (reporting progress of a pending case, In re Silicone Gel Breast Implant Products Liability Litigation, MDL 926, CV-92-P-10000-S (N.D. Ala. filed Apr. 1, 1994)).

n51 Professors Henderson and Twerski, the Reporters for the Third Restatement, characterized their job as restating *existing* law. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Arriving at Reasonable Alternative Design: The Reporters' Travelogue*, 30 U. MICH. J.L. REFORM 563, 564, 585 (1997). They acknowledge, however, that the Third Restatement sometimes takes principles from mere legal dicta to the creation of more modern standards, such as the highly controversial defective design standard. *See id.* at 563. Based on their articulated philosophy that the time has come for a new Restatement, these not-so-clearly existing standards must be intended to influence the law toward what are really new standards described in the Third Restatement.

n52 *See supra* note 50 and accompanying text.

n53 Judge Guido Calabresi and Jeffrey O. Cooper recount an anecdote about Judge Cardozo who, while sitting on the New York Court of Appeals, attended an ALI meeting to discuss the Restatement (First) of Torts. Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 866-67 (1996). Judge Cardozo, reportedly considering *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) at the time, helped persuade the ALI membership that negligence should be relational, that is, directed toward the plaintiff, to be actionable. *See id.* After the ALI meeting, Judge Cardozo returned to work and convinced a majority of the New York Court of Appeals that they should reverse the lower court's decision for the plaintiff in *Palsgraf* because the Restatement would resolve the problem that way. *See id.*

n54 Though the Reporters of the Third Restatement may characterize their roles as passive, the same is not necessarily true for the ALI. *See ALI Bylaws, supra* note 15, at § 1.01 ("The Institute's purposes are as stated in its Certificate of Incorporation: The particular business and objects of the society are educational, and are to *promote* the *clarification and simplification* of the law and its better *adaptation* to social needs, . . . and to *encourage and carry* on scholarly and scientific legal work.") (emphasis added).

n55 *See* American Law Institute, *Products Liability Restatement Gets Final Approval from Membership* (visited Mar. 26, 1998) <http://www.ali.org/ali/AMDRAFTS.HTM>.

n56 *See* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 759 (6th ed. 1995).

n57 *See* Terry Carter, *Subtle Tort Reform New Restatement Injects Fault Issue in Design Defect Cases*, 83 A.B.A. J. 18 (Aug. 1997).

n58 For example, James A. Henderson, Jr., who went from being a professor at the Boston University School of Law and a consultant to a manufacturer association, the National Product Liability Council, to a Reporter for the Third Restatement, testified before Congress in 1982 to support a national product liability standard limiting liability for manufacturers. *See To Regulate Interstate Commerce by Providing For a Uniform Product Liability Law, and For Other Purposes, Hearings on S. 2631 Before the Subcomm. for Consumers of the Comm. on Commerce, Science, and Transportation*, 97th Cong. 20 (Mar. 9, 1982). Tort reform also finds support from individuals at the state level. *See generally* RICHARD NEELY, THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS (1988) (state judge and politician supporting federal judicial activism to reform tort-based civil actions).

n59 The Third Restatement, even in its tentative drafts, served as the focus of numerous law review articles. *See, e.g.*, Jeffrey D. Winchester, Note, *Section 8(C) of the Proposed Restatement (Third) of Torts: Is it Really What the Doctor Ordered?*, 82 CORNELL L. REV. 644, 664-688 (1997) (discussing defective design standards in the Third Restatement's second tentative draft).

n60 *See* H.R. REP. NO. 99-908, at 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6367 ("Given the existence of the compensation system in this bill, the Committee strongly believes that Comment k [to section 402A of the Second Restatement] is appropriate and necessary as the policy for civil actions seeking damages in tort.").

n61 In the years following the Vaccine Act, courts interpreted congressional intent to allow the coexistence of federal and state remedies for vaccine injuries. *See, e.g.*, Mazur v. Merck & Co., Inc., 742 F.Supp. 239, 246-8 (E.D. Pa. 1990). In fact, Congress mandated that states maintain a remedy for vaccine

injuries. *See* **National Childhood Vaccine Injury Act,** 42 U.S.C. § 300aa-22(e) (1994) ("No State may establish or enforce a law which prohibits an individual from bringing a civil action against a vaccine manufacturer for damages for a vaccine-related injury or death if such civil action is not barred by this part.").

n62 *See* H.R. REP. NO. 99-908, at 25-26, *reprinted in* 1986 U.S.C.C.A.N. 6344, 6366-67.

n63 "Post-election" refers to lawsuits permitted after a Court of Federal Claims judgment. *See* **National Childhood Vaccine Injury Act,** 42 U.S.C. § 300aa-21 (1994).

n64 *See* Henderson & Twerski, *supra* note 51, at 564 ("Some contend that we have been political brokers. We are told, often by the same critics, that we have been ideologically rigid. It is hard to see how we could be both savvy political brokers and rigid ideologues. We plead not guilty on both counts of the indictment. We have heard from a multitude of voices. Arguments have been presented with both passion and intellectual rigor.").

n65 *See* Angela C. Rushton, Note, *Design Defects Under the Restatement (Third) of Torts: A Reassessment of Strict Liability and the Goals of a Functional Approach*, 45 EMORY L.J. 389, 400-8 (1996).

n66 *See* THIRD RESTATEMENT, *supra* note 22, § 2 (strict liability still applies to defectively manufactured products and simple negligence for design and warning cases)

n67 *See id.* § 6 and comments.

n68 *See* SECOND RESTATEMENT, *supra* note 16, § 402A cmt. k.

n69 *See* THIRD RESTATEMENT, *supra* note 22, § 6.

n70 *See id.*

n71 *See id.* § 6(b).

n72 *See id.* § 2(a).

n73 *See* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (1916).

n74 *See Products Liability Restatement Gets Final Approval from Membership, supra* note 56.

n75 *See* THIRD RESTATEMENT, *supra* note 22, § 6 cmt. a.

n76 *Compare* SECOND RESTATEMENT, *supra* note 16, § 402A cmt. c (a consumer has the right to expect reasonably safe goods and is "entitled to the maximum of protection . . . [from] those who market the products") *with* THIRD RESTATEMENT, *supra* note 22, § § 6(c)-(d) and comments (lacking explicit consumer protection language).

n77 THIRD RESTATEMENT, *supra* note 22, § 6(c) (emphasis added).

n78 *Id.* § 6(c) cmt. f (emphasis added).

n79 *See* Mazur v. Merck & Co., Inc., 964 F.2d 1348, 1357-8 (3d Cir. 1992) (applying the Second Restatement's learned intermediary rule, and concluding that neither nurses nor pharmacists are learned intermediaries under the Pennsylvania construction of the doctrine).

n80 The classic Second Restatement learned intermediary standard allows a manufacturer to provide warnings and instructions to health care professionals instead of consumers when that health care professional has an evaluative role. *See* SECOND RESTATEMENT, *supra* note 16, § 402A cmt. k. This doctrine is based on the unique capabilities health care professionals have in assessing risks and benefits of medical interventions. The Second Restatement's expectation is that these learned intermediaries will pass the manufacturer's warnings and instructions to consumers in a form most likely to facilitate informed consent.

n81 The new standard demands that a better/safer vaccine design be available at the time the vaccine in question was administered. *See* Carter, *supra* note 58, at 18. This prohibits evidence of the development of a safer vaccine design between the time of administration/injury and the law suit to suggest that the original design was negligent, especially when the newer design was produced by a competitor. *See id.* ("As a practical matter, admits Habush, plaintiffs lawyers regularly offer reasonable alternative designs in making

their cases. 'But this means it's no longer a strategic decision. . . . Now it's a threshold barrier to getting to a jury.'") (quoting Richard Habush, adviser to the Reporters for the Third Restatement, and a critic of the alternative design requirement).

n82 *See* THIRD RESTATEMENT, *supra* note 22, § 6 cmt. f.

n83 *See id.* § 6 cmt. b and corresponding Reporter's Note.

n84 *See id.*

n85 *See id.; see also id.* § 4(b) (rules governing compliance with regulations).

n86 *See* **National Childhood Vaccine Injury Act,** 42 U.S.C. § 300aa-22(b)(2)(1994) ("For purposes of [civil vaccine warning liability], a vaccine shall be presumed to be accompanied by proper directions and warning if the vaccine manufacturer shows that it complied in all material respects with all requirements under the Federal Food, Drug, and Cosmetic Act."). One issue that this Note does not attempt to solve is how Congress can substantively improve the way regulations ensure that manufacturers design safe vaccines and effective warnings to limit the number of injuries and deaths from inherent dangers. This should be a large concern for Congress if federal and state regulations become the benchmark for reasonableness in the absence of negligence-based civil liability, which currently provides an external motivation to make vaccines safe and warnings effective. *See* Mazur v. Merck & Co., Inc., 742 F.Supp. 239, 247 (E.D. Pa. 1990) (federal regulation and tort law serve different purposes). There is no objective evidence that these regulations actually demonstrate how reasonable designs and warnings should look.

n87 *See* THIRD RESTATEMENT, *supra* note 22, § 6(d).

n88 *See id.* § 6 cmt. d.

n89 *See* Richard C. Ausness, *Product Category Liability: A Critical Analysis*, 24 N. KY. L. REV. 423, 432-35 (1997) (general discussion of the risk utility test and its applications).

n90 *See* THIRD RESTATEMENT, *supra* note 22, § 6(d)(1).

n91 *Id.* § 6(d)(2).

n92 *See* SECOND RESTATEMENT, *supra* note 16, § 402A cmt. k.

n93 The VICP does say that manufacturers will not be excused from directly warning consumers if, when proved by clear and convincing evidence, they abused the lenient standard by willfully hiding risks or failing to use due care when proved by clear and convincing evidence. *See* **National Childhood Vaccine Injury Act,** 42 U.S.C. § 300aa-22(b)(2)(A)-(B) (1994).

n94 *See* THIRD RESTATEMENT, *supra* note 22, § 6 cmt. e ("When the content of the warnings is mandated or approved by a governmental agency regulation and a court finds that compliance with such regulation federally preempts tort liability, then no liability under this Section can attach.").

n95 *See id.*

n96 *See* **National Childhood Vaccine Injury Act,** 42 U.S.C. § § 300aa-(11), 14(a) (1994) (presumption of causation to vaccines in program, allowing non-Table childhood vaccine injuries to go through VICP, but not suggesting that all vaccines are childhood vaccines).

n97 *See* Carter v. Secretary Dep't Health & Human Servs., 21 Cl. Ct. 651, 653-55 (1990) (affirming Special Master's decision that petitioner failed to establish that her non-Table injury, juvenile rheumatoid arthritis, was caused by the covered rubella vaccine).

n98 More specific results are discussed in section II(E), *infra.*

n99 *See* H.R. REP. NO. 99-908, at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6346 (priority 4).

n100 *See* 131 Cong. Rec. S3843-04 (daily ed. Apr. 2, 1985) (statement of Senator Hawkins).

n101 *See* **National Childhood Vaccine Injury Act,** 42 U.S.C. § 300aa-21 (1994) (election option).

n102 *See VICP Background, supra* note 43.

n103 The enabling legislation's title (the **National *Childhood Vaccine* Injury Act)** indicates that the Compensation Program was designed to cover vaccines routinely recommended for children. However, this limitation does not exclude adults who take these same vaccines. *See* **National Childhood Vaccine Injury Act,** 42 U.S.C. § 300aa-11 (1994). Indeed, there are no age requirements for recovering under the VICP. *See id*; Schafer v. American Cyanamid Co., 20 F.3d 1, 5-7 (1st Cir. 1994) (finding that when both parents contracted polio from daughter who had been vaccinated and developed disease, other's acceptance of VICP award did not bar father and daughter from suing under Massachusetts law applied in federal court under diversity jurisdiction).

n104 *See* **National Childhood Vaccine Injury Act,** 42. U.S.C. § 300aa-11(b)(1)(B) (limiting pre-1988 injuries to a maximum of 3500 petitions); *see also* Charette v. Secretary of Dep't of Health and Human Servs., 33 Fed. Cl. 488, 491-93 (1995) (affirming Special Master's decision to dismiss claim by wife of man killed by anaphylactic reaction to typhoid vaccine, which is not included in VICP).

n105 "Routinely administered" is a term of art within the VICP. The Congressional mandate to the Secretary of Health and Human Services is to expand the VICP to cover more vaccines when the CDC determines that they should be "routinely administered" to children. *See* **National Childhood Vaccine Injury Act,** 42 U.S.C. § 300aa-14(e)(1)-(2) (1994) ("When . . . the Centers for Disease Control and Prevention recommends a vaccine to the Secretary for *routine administration* to children, the *Secretary shall*, within the 2 years of such recommendation, amend the Vaccine Injury Table" to include the vaccine in the Compensation Program) (emphasis added). *See generally* EMERGING VIRUSES (Stephen S. Morse, ed. 1993) (essays discussing the ecological and historical patterns of disease emergence, recession, and reemergence, including the potential for upcoming disease epidemics of new and old diseases).

n106 *See* discussion *supra* note 103.

n107 Despite the fact that the VICP now covers the hepatitis B vaccine, many contemporary adults were never vaccinated against the disease because the vaccine only became available in the late 1970s. Consequently, adults recently vaccinated against hepatitis B are taking a "childhood" vaccine. *See* W. Charles Cockburn, *Disease Control and Prevention in the 20th Century: The Role of Immunization, in* PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON THE ROLE OF THE INDIVIDUAL AND THE COMMUNITY IN THE RESEARCH, DEVELOPMENT, AND USE OF BIOLOGICALS, at 6 (Mar. 2-5, 1976); *see also* National Vaccine Injury Compensation Program, *Vaccine Injury Table* (eff. Mar. 24, 1997) (visited June 11, 1997) http://www.hrsa.dhhs.gov/bhpr/vicp/table.htm> (listing the Hepatitis B vaccine) [hereinafter *New Vaccine Injury Table*].

n108 *See The Whooping Cough Afflicts Teens, Adults: Preliminary Data Suggest Pertussis Often Causes Coughs in Grown-Ups*, WALL ST. J., Oct. 2, 1997.

n109 *See* AIDSW KLY. PLUS (Sept. 29, 1997), *available in* 1997 WL 11007305 (reporting positive findings from tests of the HPG-30 AIDS vaccine); Brigid Schulte, *Terrifying Risk in AIDS Fight: Volunteers Would Risk Lives to Find Vaccine Against Deadly Disease*, SEATTLE TIMES, Sept. 27, 1997, at A2 (announcing 50 AIDS activists' offer to receive an attenuated AIDS virus to further the pace of vaccine research and clinical trials).

n110 *See VICP Statistics, supra* note 42.

n111 *See* **National Childhood Vaccine Injury Act,** 42 U.S.C. § 300aa-1 to -34 (1994).

n112 The Surgeon General does not have a direct role in the VICP, however, that position has a number of similarities to the roles that key actors in the VICP play. Each individual creates policy, takes on particular causes by drawing public attention to problems, marshals resources committed to change, and sets scientific standards.

n113 *See* Sabin Russell, *Not Afraid To Speak Her Mind*, S.F. CHRON., Nov. 9, 1997, at 3Z3 (interview with Dr. Elders in which she expressed that being an activist, even if doing so is controversial, is a part of being a central public health figure).

n114 *See* Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905) (stating that a mandatory vaccination statute was constitutional despite the liberty interest implicated).

n115 *See* **National Childhood Vaccine Injury Act,** 42 U.S.C. § 300aa-14(c).

n116 O'Connell v. Shalala, 79 F.3d 170, 179 (1st Cir. 1996) ("The petitioners' interpretation means that every alteration to the text of a proposed rule -- even a minor technical or grammatical alteration -- would have to be rerouted through the [Advisory Committee], subject to a fresh notice-and-comment period. This extra step would be necessary even when the Secretary changes a proposed regulation *in accordance with the [Advisory Committee's] announced wishes* or to correct a syntactical bevue [sic]. Such a construction would create a nearly endless circle and attenuate the rulemaking process without achieving any corresponding benefit. Because it is difficult to believe that the Congress intended to prolong the revisory process by directing the Secretary to engage in a mindless minuet, the prospect of wasted motion cuts against the petitioners' interpretation.").

n117 *See* 42 U.S.C. § 300aa-14(c).

n118 Hepatitis B, conjugated and unconjugated Hib, and Varicella (chicken pox) have been added to the list of the vaccines the VICP covers. *See New Vaccine Injury Table, supra* note 107. The original Vaccine Injury Table focused on encephalopathy and seizure disorders, and now the VICP covers a wider range of defined injuries such as chronic arthritis, brachial neuritis, and thrombocytopenic purpura. *See id.* at (6)-(11).

n119 *See New Vaccine Injury Table, supra* note 107 (accompanying scientific exposition).

n120 *See* I.R.C. § 9510(c) (1994).

n121 *See* Pub. L. No. 105-34 § 904, 111 Stat. 788, 873-74 (1997) (codified at I.R.C. § 4131(b)).

n122 *See Excise Tax Financing of Federal Trust Funds, available in* 1993 WL 739690 (C.R.S.) (January 5, 1993) [hereinafter *Federal Trust Funds*] (explaining federal trust funds).

n123 *See* I.R.C. § 9510 (1994). After the change to a flat tax, the taxes are still placed into the Vaccine Trust Fund. *See id.*

n124 This is also called the DTP vaccine.

n125 *See VICP Statistics, supra* note 43.

n126 *See* I.R.C. § 4131(b) (1994) (amended by Pub. L. 105-34 § 904, 111 Stat. 788, 873-74 (1997)).

n127 *See id.*

n128 *See id.*

n129 *See VICP Statistics, supra* note 43.

n130 *See* **National Childhood Vaccine Injury Act,** 42 U.S.C. § 300aa-15j (1994).

n131 *See Federal Trust Funds, supra* note 122, at *11.

n132 *See id.*

n133 *See Current VICP Issues, supra* note 41.

n134 *See id.*

n135 This simple tax mechanism does not even come close to confronting the issues of separating risk when multiple vaccines are administered at the same time, or whether administering multiple vaccinations is ethical if scientists cannot estimate their combined risks.

n136 *See Current VICP Issues, supra* note 41.

n137 The compromise also rejected the Senate's proposal of limiting the flat tax to a two-year experiment with an evaluation of its permanent feasibility based on a study by the Secretary of the Treasury. *See* I.R.C. § 4131(b)(2) (Supp. 1997).

n138 There are numerous reasons why the Trust Fund might be overfunded. At the most simple level, the risk-based vaccine tax might be miscalculated, thereby "misdiagnosing" the need for compensation. Private insurance might be paying for injuries in lieu of public monies from the Trust Fund, which only pays for

unreimbursable costs. Still, successful vaccination campaigns in socioeconomically disadvantaged areas rely heavily on mass clinics where there may be inadequate screening for risk factors, and when injuries do occur, few attorneys are willing to take injury cases to the Compensation Program on a contingency fee basis. Each one of these explanations merits a different remedy, from changing the tax formula, to amending the Vaccine Act to cover different types of costs, to providing free legal assistance. Overfunding alone does not clearly suggest that the problem is related to a risk component in the tax.

n139 *See Current VICP Issues, supra* note 41 (flat tax level initially proposed in President Clinton's 1995 budget).

n140 *See generally* ARTHUR M. SILVERSTEIN, PURE POLITICS AND IMPURE SCIENCE (1981) (discussing the unexpected emergence of the "swine flu" in 1976, and the emergency legislative action Congress enacted to make the appropriate vaccine available).

n141 The recent tension between the United States and Iraq involved using anthrax as a biological weapon. *See* Fouad Ajami, *Saddam and a Sack of Sugar*, U.S. NEWS & WORLD REP., Dec. 1, 1997, at 46. Anthrax is a vaccine preventable disease, and the Michigan Biologic Products Institute ("MBPI") is the sole American anthrax vaccine producer. *See* ADULT IMMUNIZATION, *supra* note 7, at Appendix VII. Currently, Department of Defense contracts account for $ 20 million in annual sales by the MBPI, with virtually no private use (or liability) of the vaccine. *See Former Workers Question State Assessment of MBPI Value*, MICH. INFO. & RES. SERV., July 17, 1997, at 1-2. If the military and CDC decide that it is wise to vaccinate a wider number of Americans against anthrax, the State of Michigan would, understandably, be wary of liability. To allay Michigan's liability fears, and ensure that the vaccine would be available, the anthrax vaccine could be included in the VICP. Yet without a surplus, the Trust Fund might not be able to pay all of its meritorious claims for injuries from other vaccines in addition to anthrax injuries because the anthrax vaccine has never been taxed, nor is it included in any financial planning for the VICP.

A much more likely emergency scenario for a vaccine would revolve around a vaccine for the H5N1 "Hong Kong" or "Avian" influenza. *See* Brian Palmer, *A Bird-to-Human Flu*, U.S. NEWS & WORLD REP., Jan. 12, 1998, at 30;. Although influenza is normally treated as a routine illness, even in benign years it kills up to 20,000 Americans. *See* Laura Tangley, *Detecting Secrets of a Potential Killer: Scientists Home In on Why Bird Flu May Spawn the Next Deadly Pandemic*, U.S. NEWS & WORLD REP., Jan. 26, 1998, at 60. The possibility that this new flu strain may be as devastating as the 1918 worldwide Spanish influenza pandemic, which killed more than 20 million people, is particularly frightening for public health planners and virologists who see an inherent problem in finding a H5N1 vaccine culture medium. *See id.* at 61. Given the recent failure of several lots of Parke-Davis' Fluogen vaccine for a less virulent strain of influenza, the pressure is mounting on manufacturers to provide a safe and *effective* vaccine for this new killer disease. *See Flu Shot Advisory* (visited Oct. 5, 1997) <http://www.alaw.org/pr.121896.html> (warning about the Parke-Davis recall). Immunity from tort liability through the VICP would help encourage manufacturer efforts to address the potential epidemic, but it would also expose the VICP to a significant financial drain if even a small percentage of injuries result.

n142 *See* I.R.C. § 9510(d)(1) (1994).

n143 The primary warning about which courts are concerned comes directly from vaccine manufacturers in written disclosures of costs and benefits of specific vaccines. *See, e.g.*, Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1293 (5th Cir. 1974) (case brought for injuries infant sustained from Sabin oral polio vaccine, negligent warning claimed because only nurse saw vaccine package insert listing the vaccine's risks).

n144 *See* Hill v. American Cyanamid Co., No. 03 A01-9108-CV-267, 1992 WL 9466 at * 2 (Tenn. Ct. App. Jan. 24, 1992) (holding that state Medicaid reimbursement of illness costs were not unreimbursable expenses under the VICP and that a special master's finding of insufficient jurisdictional amount should be considered a final judgment, allowing the pursuit of state remedy).

n145 **National Childhood Vaccine Injury Act,** 42 U.S.C. § 300aa-15(g) (1994).

n146 *See VaCCINe: The Virginia Computerized Children's Immunization Network* (visited Oct. 5, 1997) <http://vmednet.gen.va.us/clinical/vaccine.html>.

n147 Opponents to mainstream medicine, whether they resist mandatory vaccination or fluoridation of

community water sources, tend to be labeled as illegitimate and unreliable. *See* Exner v. American Medical Association, 529 P.2d 863, 866-7 (Wash. Ct. App. 1974) (affirming dismissal of water fluoridation opponent's defamation lawsuit claiming that American Medical Association had personally attacked him in an article attempting to portray the activists in his cause as "charlatans" or "quacks"); Yiamouyiannis v. Consumers Union, Inc., 619 F.2d 932, 942 (2d Cir. 1980) (affirming dismissal of water fluoridation opponent's defamation lawsuit).

n148 *See VACCINE ADVERSE EVENT REPORTING SYSTEM (VAERS)* (visited Oct. 5, 1997) <http://www.fda.gov/cber/vaerstxt.html#info>; *see also* SUSAN S. ELLENBERG & ROBERT T. CHEN, THE COMPLICATED TASK OF MONITORING VACCINE SAFETY, PUB. HEALTH REP. 10, 11 (Jan. 11, 1997) ("Vaccines, like all other pharmaceutical products, are not entirely risk-free; while most known side effects are minor and self-limited, some vaccines have been associated with very rare but serious adverse effects. Because such rare effects are often not evident until vaccines come into widespread use, the Federal government maintains ongoing surveillance programs to monitor vaccine safety. The interpretation of data from such programs is complex and is associated with substantial uncertainty. A continual effort to monitor these data effectively and to develop more precise ways of assessing risks of vaccines is necessary to ensure public confidence in immunization programs.").

n149 *See* Jon S. Abramson, et al., *Development of a Vaccine Tracking System to Improve the Rate of Age-Appropriate Primary Immunization in Children of Lower Socioeconomic Status*, 126 J. PEDIATRICS 583, 585-86 (1995) (study conducted in Forsyth County, North Carolina, determined that tracking children from birth, combined with discussion of the importance of vaccination, telephone and mail reminders, resulted in a statistically significant increase in age-appropriate vaccination); Raja Mishra, *Immunization Score Rises*, DET. FREE PRESS, July 24, 1997, at B1 (state health officials attribute a new Michigan immunization database with partial credit for the 15% improvement in state immunization rates).

n150 *See* W. KIP VISCUSI, REFORMING PRODUCTS LIABILITY 209-215 (1991).

n151 *Id.* at 211 (using the word "insurance" broadly, meaning compensation for injuries as well as a level of confidence for individuals' future if they are injured).

n152 *See* THIRD RESTATEMENT, *supra* note 22, § 6 cmt. b.

n153 *See Current VICP Issues, supra* note 41.

n154 For author's example of how to plan for a flat tax and risk-based rebate see Appendix C, *infra*.

n155 *See* Margaret I. Lyle, Note, *Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy Reorganization and Legislative Compensation Versus the Common-Law Tort System*, 61 TEX. L. REV. 1297, 1352-55 (1983) (discussing how government assumption of compensation costs in overwhelming liability cases defeats market incentives for safety).

n156 The first proposal for a flat tax to reduce the Trust Fund Surplus was suggested at $ 0.51 per dose. *See Current VICP Issues, supra* note 41. The current flat tax rate is $ 0.75. *See* I.R.C. § 4131(b) (Supp. 1997).

n157 In implementing the flat tax Congress could include an incentive for manufacturers to lower vaccine costs by tying the tax to the wholesale per-dose cost of the vaccine. Typically, lowering price might raise concerns about lowering vaccine safety, however, the risk-based rebate described in the next section could overcome those concerns. The strongest argument against tying external factors to the tax is that doing so alters the flat nature of the tax even if the variables are unrelated to the risk of injury.

n158 *See* DiLeo v. Secretary Dep't Health & Human Servs., 23 Cl. Ct. 796, 799-800 (1991).

n159 *See* **National Childhood Vaccine Injury Act,** 42 U.S.C. § 300aa-27 (1994).

n160 *See* Rodriguez v. Secretary Dep't Health & Human Servs., 34 Fed. Cl. 57, 60 (1995) (affirming Special Master's decision to dismiss claim against VICP, and pointedly attacking petitioner's failure to cite supportive legislative history); *see also* Staples v. Secretary Dep't Health & Human Servs., 30 Fed. Cl. 348, 356-59 (1994) (affirming decision to dismiss VICP claim based on construction of legislative history as evidence of Congress' intent to exclude claims for vaccine preventable diseases contracted from community exposure).

12. The weight of the evidence suggests that the Compensation Program has settled into an effective routine and is meeting Congress' policy goals; no single issue or factor appears ready to destroy the VICP at this time. The Vaccine Trust Fund, n39 which pays for compensation to victims in the VICP, is running a surplus. n40 Both the Senate and the House recommended 1998 funding for the administrative aspects of the VICP at or above previous levels. n41 Finally, after nine years, the VICP has adjudicated the majority of its backlogged cases. n42 Only a relatively small number of petitioners to the Compensation Program elect to preserve their rights to civil remedies by rejecting VICP awards, and not all of them choose to seek redress in other courts. n43 Manufacturers continue to produce vaccines. n44 Vaccine research is continuing to progress, providing new hope for eliminating diseases. n45 Despite the good news that no one issue or event is imminently poised to ruin the VICP, Congress should remain vigilant, looking for problems before they occur. The VICP's current conditions demonstrate that it is functioning to meet the needs of 1986 America. These factors neither indicate how well the VICP is handling today's vaccine issues, nor if the Compensation Program is capable of addressing upcoming vaccine problems.

13. A cautious Congress must acknowledge that the world is changing. What works to maintain a vaccine liability equilibrium, satisfying consumers, victims, manufacturers, and public health officials now may not work in the future. Congress should not wait for a dramatic event, such as a sudden decrease in manufacturer concern for vaccine safety or improvement, to signal that it is time to reconsider the VICP. If Congress does wait for another disaster it will be ignoring one of the most important lessons of the last vaccine liability crisis: there may not be one single event to indicate that Congress needs to take action. n46 In general, the law that applies to vaccine injuries n47 tends to evolve slowly. n48 Therefore, Congress should be sensitive to the fact that though the Vaccine Act helped redirect the natural evolution of the vaccine-law interaction, it did not halt the evolution.

14. Key to this analytical viewpoint is understanding that one challenge to the compensation program or the vaccine market alone may not necessarily make any difference. However, when changes occur in rapid succession, or concurrently, they may have unintended effects. For example, if manufacturers only experienced liability in some high profile vaccine injury cases *or* lacked liability insurance in the 1970s and 1980s, vaccine prices may have gone up, but the problems would not have appeared as severe. By contrast, when manufacturers were losing cases *and* they could not buy sufficient liability insurance, that was perceived as significantly harmful. n49 This Note identifies separate, rising vaccine liability issues, and projects how they could combine to create a problematic legal and economic atmosphere. By recognizing flaws inherent in the Compensation Program, ("internal challenges"), as well as outside forces that may affect it ("external challenges"), Congress can make any necessary changes smoothly and gradually. The following sections identify five internal and external challenges to the VICP.

A. The Highly Conservative Third Restatement -- External Challenge

1. The Third Restatement will be influential

15. Congress should recognize that the Third Restatement of Torts is a highly influential scholarly work. n50 Moreover, the Third Restatement proposes to use its influence to further fundamentally different and radically conservative standards for product liability. n51 These standards may conflict with the purposes underlying the Compensation Program, thereby causing problems in the way it works.

16. When academic writing proposes new paths for the law, policy makers, judges, and practitioners may not take notice. However, this new Restatement stands to be more than academic, it is likely to affect state and federal law. n52 Although the Restatement cannot change law without judicial or legislative adoption, the ALI's membership is comprised of the same people active in legal reform who will make persuasive arguments for implementing the Third Restatement's standards in legislatures and courts. n53 While a transition from thoughts to application may not be the purpose of other writings that explore legal theory, it is consistent with the ALI's goal to affect the law. n54 Therefore, the heated debate in Washington, D.C. at the ALI's annual meeting in May, 1997 can be seen as a preview of the debate and legislative action to come. n55

17. Considering that the Second Restatement's position on product liability dominated American legal thought for over thirty years, the Third Restatement can rely on precedent to suggest that eventually it too will

n161 *See* **National Childhood Vaccine Injury Act,** 42 U.S.C. § 300aa-22(c) (1994) (absolving manufacturers of liability for failing to warn consumers directly).

n162 *See* SECOND RESTATEMENT, *supra* note 16, § 6 cmt. e.

n163 *See* NEELY, *supra* note 59, at 80.

n164 *See id.* at 161.

n165 *See id.*

n166 *See* **National Childhood Vaccine Injury Act,** § 300aa-22(b)(2)(B) (1994).

be widely applied. n56 Although change will likely take time, n57 there is no reason to believe that because the Third Restatement is also non-binding it will be any less acceptable to the institutions that create and administer the law than was the Second Restatement.

18. Furthermore, the national tort reform movement, which typically argues for more manufacturer protection and greater restraint on individual freedom to sue for injuries, has widespread advocates. n58 The new Restatement will almost certainly be used in future public debate as "evidence" of what is right or proper about liability, due to its highly visibility since its tentative drafts. n59

19. The ALI's vote last spring to adopt the Third Restatement should also attract Congress' attention because the Second Restatement was the explicit foundation for the Compensation Program. n60 Congress may take the Third Restatement as a sign that relying on the Second Restatement's philosophies is no longer advisable. Further, because Congress chose not to fully preempt state remedies, n61 Congress implicitly relied on the Second Restatement to shape the majority of the remedies available outside the Compensation Program. n62 If the law currently applied to post-election n63 vaccine cases in the state and federal courts no longer provides a realistic opportunity for adequate remedies for vaccine injuries based on the Third Restatement's standards, Congress may pay close attention.

2. What the Third Restatement Changes

20. One of the most contentious issues the ALI membership debated last spring centered around the decision to change the liability standards for medical products such as vaccines. n64 The disproportionately lengthy discussion about medical products and prescription drugs indicates just how strikingly different the Third Restatement is from the Second Restatement and majority law. In general, the Third Restatement makes it more difficult for a court that follows its position to impose liability on a vaccine manufacturer because the text moves toward a higher threshold for liability. n65 To make this turn toward the conservative, the Third Restatement uses two drafting devices.

21. First, the Third Restatement creates a dual liability standard by creating one standard for general product liability and another for medical products and prescription drugs. General liability, described in section 2, retains the more consumer-sympathetic standards the Second Restatement proposed. n66 In comparison, section 6, which narrowly applies to medical devices and prescription drugs such as vaccines, acknowledges the inherent social utility in medical products and adopts a manufacturer-sympathetic approach. n67 This special medical product standard makes it difficult for a plaintiff to recover against a manufacturer under most circumstances. In contrast, the Second Restatement treated legal liability for all *types* of products as a single issue. The Second Restatement only proposed different standards of liability if products posed different levels of dangerousness. n68 By isolating medical device and prescription drug liability, the Third Restatement minimizes opposition to higher liability thresholds. Consumer protection advocates focusing on automobile safety, for example, have no reason to object to the Third Restatement because car buyers retain a higher level of protection against manufacturer negligence.

22. The second drafting device the Reporters of the Third Restatement use to make the Third Restatement more conservative is the conservative language of the text itself. Though still arranging liability around the three basic causes of action, the Reporters use extensive comments, illustrations, and rationales to clarify the Third Restatement's intended impact. n69 The substance of this approach is outlined immediately below.

a. Defective manufacture of vaccines -- strict liability

23. The general rule for liability remains that "[a] manufacturer of a prescription drug or medical device who sells or otherwise distributes a defective drug or medical device is subject to liability for harm to persons caused by the defect." n70 A product is not considered defective unless "at the time of sale or other distribution" it "contains a manufacturing defect as defined in section 2(a)" of the general product liability standards. n71 That broader portion of the Third Restatement states that a product "contains a defect when [it] departs from its intended design even though all possible care was exercised in the preparation and marketing of the product." n72 Other than updating the language of this section to apply specifically to medical products, this strict liability standard remains consistent with Judge Cardozo's opinion in the benchmark product liability case *MacPherson v. Buick Motor Co.* n73

b. Defective design -- no liability unless absolutely no benefit

24. Defective design was the most contentious standard in the Third Restatement debated by the ALI membership. n74 Unlike the liability standard for defective vaccine production, in which the Third Restatement retains the traditional approach, n75 the Third Restatement reverses the liberal pro-consumer approach in defective design actions. Contrary to the Second Restatement, the Third Restatement does not find relevant the reasonable consumer's expectation of a design's safety. n76 Plaintiffs can no longer allege that a manufacturer was negligent if it failed to consider consumer toleration or preferences for risks when it designed a vaccine.

25. Instead of looking at reasonable consumer views, the Third Restatement standard asks whether a learned intermediary, having weighed the foreseeable risks of a vaccine against its therapeutic benefits, would have found it so dangerous that she or he would not have prescribed it for "*any* class of patients." n77 Comment f frames the issue by saying that a vaccine design is unreasonable only when objectively viewed, reasonable providers, possessing the knowledge that a reasonable drug manufacturer had or should have had about the risks and benefits attendant to the use of the drug or medical device, would [not] prescribe it for any class of patients. Given this very demanding objective standard, *liability is likely to be imposed only under unusual circumstances*. The court has the responsibility to determine when the plaintiff has met the burden of production for this demanding standard. n78

26. Although the plaintiff-victims and defendant-manufacturers will present expert testimony supporting their positions at trial, the Third Restatement lowers the threshold for reasonableness to the extent that a jury only has a minimal fact finding role and the testifying experts possess significant power to determine a case's outcome. Rather than requiring an affirmative decision that a vaccine design was or was not reasonable, the Third Restatement limits the jury's decision to believing or not believing in the existence of a class of users for whom the vaccine *may* be useful.

27. Note that the standard never specifically asks whether the testifying learned intermediary would find the vaccine design reasonable. The Third Restatement asks a learned intermediary, who is most likely a doctor, n79 to determine whether the vaccine has *any use at all*. Nor does the standard ask a learned intermediary to decide whether the manufacturer should suggest the vaccine is safe to use for people with the plaintiff's health background, even if that was implied or stated on the vaccine's label. The Third Restatement elevates the role of learned intermediaries beyond acting as conduits for warnings to the point where they are also vaccine design judges. n80 This, perhaps, forms a new learned intermediary standard. By pre-selecting physicians as the preferred scientific experts on vaccines, though virologists, biochemists, or other health professionals may have equally good or superior insight into the vaccine design and injury at issue, the Third Restatement expands the importance of health care providers.

28. By pinning liability to a health care provider's perspective, the Third Restatement ensures that lawsuits minimize outsider comparisons of the industry n81 and eliminates the plaintiff's viewpoint from affecting the proceedings. The Third Restatement reinforces this new learned intermediary standard by requiring a plaintiff to establish that a reasonable alternative design was *possible and available* when the vaccine was designed. n82 Potentially, the Third Restatement allows manufacturers that are the sole producers of a specific type of a vaccine to control their liability risks by exploring one vaccine design during development, thus effectively eliminating defective design as a cause of action.

29. This Third Restatement standard also highlights a growing deference to the regulatory systems that approve vaccine designs. n83 In a sophisticated argument, the Reporters suggest that if an appropriate government agency has already approved a vaccine design, courts should strongly consider not imposing what amounts to their additional, but unstated, regulation. n84 The Third Restatement weights its arguments in favor of the manufacturer and against judicial regulation of vaccine design by making it extremely difficult for a plaintiff to prevail in this type of suit. n85 Although taking the idea to an extreme, the Third Restatement parallels the VICP's rebuttable presumption that vaccine designs complying with federal regulatory requirements are *per se* reasonable and not negligent. n86

c. Defective warning -- new learned intermediary standard

30. The Third Restatement attempts to balance a lenient attitude toward manufacturer design choices by mandating warnings. n87 Hopefully, given the right information, a consumer can decide not to take the vaccine if his or her health background suggests that doing so is dangerous. n88 On a larger scale, the

theory behind warnings attempts to reduce the exposed group for whom a vaccine poses little benefit, but significant risks. n89

31. The Third Restatement states that a manufacturer will be held liable for injuries when the warning of foreseeable risks are not supplied to the "prescribing and other health care providers who are in a position to reduce the risks of harm in accordance with the instructions or warnings." n90 And if the manufacturer does not warn "the patient when [it] knows or has reason to know that health care providers will not be in a position to reduce the risks of harm in accordance with the instructions or warnings" the manufacturer can also be held liable for injuries. n91

32. This requirement that manufacturers be excused from liability if they adequately warn learned intermediaries in an evaluative role is not innovative in itself. The Second Restatement proposed a similar standard, n92 and the VICP went one step further by eliminating manufacturer responsibility for direct consumer warnings. n93 The Third Restatement does, however, suggest a more substantive standard for negligence when plaintiffs question warning and instruction adequacy. Although the Third Restatement does not go so far as to suggest a standardized warning for vaccines, it does explicitly state that, when a warning meets regulatory standards, courts should heavily consider that as adequate and reasonable. n94 Much in the same way that the new defective design standards hold reasonable consumer expectations of safety irrelevant, the Third Restatement suggests that courts not be overly concerned with the actual impact of a warning. n95

33. On one level this standard proposes an efficient system, allowing manufacturers to avoid liability based on a particular plaintiff-consumer's ability to comprehend a warning. Nevertheless, this new standard provides no clue as to when a court may legitimately examine the substance of a warning or instruction. Although the Third Restatement uses government regulation as a benchmark for adequacy, it does not suggest the level of accuracy or effectiveness a regulatory standard must demand in order to afford a complying warning or instructing a safe harbor from liability. Nor does the Third Restatement demand that these government regulations be concerned with consumer safety. The Reporters and the ALI membership could have kept the courts out of the business of regulating the substance of warnings by allowing compliance to absolve liability, but still require that the regulations demand reasonable warnings.

34. This failure to require reasonably effective warnings is disturbing when combined with the defective design standard. Under the Third Restatement, manufacturers have much more freedom to make vaccine designs suitable for only the smallest group of consumers without fear of liability. Nevertheless, when any medical product is useful for only a particular class of consumers it may be exceedingly dangerous for everyone else. The key to reducing injuries from the medical product, whether it is a prosthetic device or a vaccine, is to identify accurately those who should *and* should not use it. Warnings are one of the most powerful screening mechanisms that manufacturers possess to minimize injuries. An effective warning can also reduce defective design liability by screening out inappropriate users. The potentially dangerous attribute of the Third Restatement is that it relies so heavily, and perhaps naively, on executive agencies to protect consumers.

35. If the complex regulations mandating warnings already in force were so effective, and judicial oversight so unnecessary, there would be no vaccine injuries -- and yet vaccine injuries persist. By removing substantive judicial examination of warnings without a corresponding increase in concern by another legal entity, the Third Restatement does not adequately seek to protect consumers.

3. The Third Restatement's impact

36. As the Third Restatement's influence grows it will signal a significant shift in the American legal attitude toward injury recovery. The Reporters appear to hope the Third Restatement will do more than correct any overly liberal legal sympathy toward consumer-plaintiffs with a manufacturer-sympathetic legal system. The Reporters create the impression that they want the legal system to reject almost any vaccine injury complaint that does not allege defective manufacturing, fraud, or abuse.

37. The counter argument that these effects, should they materialize, are insignificant because the Compensation Program exists to take care of consumers, is inapposite. The Compensation Program does not cover every vaccine on the market. n96 Nor does the Compensation Program cover every potential vaccine-related injury or aggravation. n97 The potential result of the Third Restatement's growing influence

is a group of consumer-plaintiffs who neither receive adequate compensation in the VICP n98 nor have recourse in the state and federal courts.

38. As for the vaccine market, vaccine prices may fall and availability rise because of the diminished risk of liability. This result is consistent with the Compensation Program's economic goals. n99 Those goals, however, also looked to build public confidence in vaccination. n100 But with few quality controls built into the Third Restatement's manufacturer liability standards, it is difficult to imagine the legal devices available to encourage safety in a Third Restatement world. One interpretation of this economic effect is to suggest that though vaccine prices will fall, so will vaccine quality. This compromised quality may then affect the general consumer, and not just especially sensitive consumers whose injuries are unpredictable. When liability's deterrent effect slackens, manufacturers will no longer have the motivation to conduct further research and development to improve vaccine safety.

39. The Third Restatement and the VICP have a direct philosophical conflict. Congress designed the Compensation Program to be open ended, with an election for petitioners to seek redress directly from manufacturers in the state and federal civil courts. n101 Although the Third Restatement does not explicitly preclude this election option, it does so implicitly by establishing standards under which even a severely injured plaintiff is unlikely to succeed.

40. If Congress agrees with the Third Restatement's conservative effect on state and federal law, the national legislature has two choices for action. Congress can naively ignore the conflict, allowing a *de facto* end to the election option within the Compensation Program. Alternatively, Congress can institutionalize this change to the VICP by amending the Vaccine Act to exclude the election option.

41. Regardless of the choice it makes between these two options, Congress ultimately will be held accountable for the legal environment for vaccine injuries because it has already taken an active role in shaping vaccine liability. Congress, therefore, should act carefully in the way it supports or distances itself from the Third Restatement because it may unintentionally affect public perception of the Compensation Program and national vaccine initiatives.

42. The Compensation Program constitutes only one part of a larger Vaccine Act plan for widespread vaccination and disease prevention in the United States. Although Congress has the constitutional authority to pass legislation promoting and requiring vaccination to protect society's health, it still has an obligation to make sure that the pro-vaccination system it puts into place protects the rights of individuals. Congress strengthens the social legitimacy of its other vaccine programs by being able to show that it has created an efficient, just, and comprehensive system of injury compensation. In contrast, Congress undercuts its argument that its motivation is to protect the public from deadly diseases if its motivation appears to focus solely on protecting manufacturer liability interests. If Congress actively or passively allows the manufacturer-focused Third Restatement to affect negatively the way vaccine-injured individuals receive compensation, then it risks undermining public confidence in the Vaccine Act programs. To avoid this negative Third Restatement consequence, Congress will have to balance carefully the business, social, and individual interests in one of the most significant and cost effective health technologies of this century.

43. This philosophical conflict centering around the election option can substantially affect the Compensation Program by increasing the number of awards paid out of the Vaccine Trust Fund. VICP petitioners will elect to receive a Trust Fund award more frequently due to the low probability of winning a civil court judgment against a manufacturer under the Third Restatement's defective design and warning standards. Although Compensation Program statistics suggest that only an extremely small minority of petitioners elect to go to other courts to seek more favorable awards after a VICP judgment, n102 the election option was designed to be an important safety valve. Rather than requiring Compensation Program petitioners to accept lower award levels if the Trust Fund financing becomes insufficient to meet an increasing volume of meritorious claims, Congress created the election provision to force manufacturers back into paying compensation for the injuries they cause. Congress should not sacrifice this important balance between the need to guard business with protecting the consumer's right to be fairly compensated for injuries without explicit deliberation.

B. Emerging Diseases and New Vaccines -- External Challenges

44. When Congress created the VICP, it decided to cover a specific class of vaccines, those routinely given to children. n103 Several factors might have motivated this decision, including the political consideration that focusing on the needs of children is sometimes less controversial than concentrating on adult needs. The provisions of the VICP, however, suggest that the legislature intended the "childhood vaccine" limitation to constrain the volume of injuries going through the no-fault program to avoid overwhelming its administrative and financial capacity. n104 Yet what Congress once considered a constraint on the types of vaccines covered by the Compensation Program may become less meaningful as new vaccines are routinely administered to children for emerging or previously unpreventable diseases. n105

45. The problem does not end with the numbers of children vaccinated for emerging or previously untreatable diseases. The Compensation Program also compensates *adults* who are injured by vaccines routinely given to children. n106 This might be called a catch-up syndrome. Because these vaccines were not available when contemporary adults were children, the initial group of new vaccine recipients are larger than would normally be expected. n107 Therefore, the group of injured consumers may be larger than the Compensation Program can handle. In 1986 there was a certain logic to assuming children would make up the bulk of VICP petitioners; it was reasonable for Congress to assume that most adults are immune to "childhood" diseases because they were either vaccinated or had naturally developed an immunity from exposure to the wild virus. Nevertheless, new data indicates that some vaccines, including the most dangerous pertussis vaccine, do not provide lifelong immunity. n108 Re-vaccination against these diseases, whether in childhood or adulthood, multiplies the potential number of vaccine injuries the VICP will have to handle.

46. Furthermore, the line between adult and childhood vaccines is blurring. Vaccines for diseases such as hepatitis B are now routinely given to both adults and children. There are other diseases and vaccines which are not currently under Compensation Program, but are prime candidates for being included in the future because of their potential for helping children and adults. With vaccines, such as the HPG-30 AIDS vaccine, in the clinical trial phase of development and pushing science further, newer and riskier vaccines are not remote possibilities, they are close to being reality. n109 The risks these vaccines pose become more socially palatable when the diseases they prevent are deadly and the associated costs of caring for injuries and disability are higher. Many public health advocates would love to insulate all Americans against diseases such as AIDS with a vaccine, even if it did pose risks. To prevent these diseases and others from developing later, the most logical course of action is to vaccinate people when they are very young. Yet a vaccine's routine administration to children is almost an automatic qualifying factor for VICP coverage.

47. The net result of advancing technology confronting and successfully preventing new diseases is a larger group of vaccine-injured consumers. The social benefit of the vaccines may very well justify these injuries. However, social utility presents one of the best arguments for Congress ensuring that the VICP is financially and administratively capable of providing compensation to petitioners. Still, the VICP is not well prepared to handle a sudden or large influx of petitions. Although the Federal Claims Court, assisted by the Special Masters, has adjudicated more than 75% of the initial backlog of pre-1988 cases, n110 it has taken almost ten years to do so. A time lag due to an overload of cases may have been justified at the beginning of the Compensation Program because Congress was trying to draw cases specifically out of the civil courts and into the no-fault program. However, adjudication delays today would not serve any noble or useful purpose -- they would only highlight administrative weakness.

C. Key Actors and Vaccine Table Amendments -- Internal Challenge

48. Congress delegated authority to a number of different people and parties when it created the VICP, including the Secretary of Health and Human Services ("Secretary"), the Advisory Committee on Childhood Vaccines ("Advisory Committee"), the CDC, and the Compensation Program Director. n111 Over the past ten years these actors have carried out their work and made conservative changes in the VICP's coverage and operations in a generally quiet, unreported manner. The political process, pressures of public accountability, and the developing sciences of virology and immunology tend to limit these actors' choices when it comes to changing what vaccines the VICP covers, and how the Compensation Program operates. The relative lack of controversy and public attention have allowed the VICP to work during the past ten years without any significant legislative or judicial challenges to its original form and functions. However, this quiet

environment is not guaranteed, and could quickly change based on leadership or activism by one of the key players in the Compensation Program.

49. Each of these different people and parties charged with administering the VICP have the potential to make rapid or radical changes in it. As they confront more controversial and pressing issues, these key players may seize an opportunity to take action. The recent volatile break between the former Surgeon General Joycelyn Elders n112 and the Clinton administration is one example of how a single public health official can bring controversy to a highly respected position or program. n113 Granted, vaccines are not as taboo as the sexuality issues that Dr. Elders boldly confronted, but as long as vaccines predictably injure and kill children they remain controversial. The fact that many people have no realistic opportunity to give or withhold consent to vaccination because it is mandated by law underscores the volatile individual liberty issues that always percolate under the surface of public acceptance of vaccination. n114 The balance the uncontroversial VICP strikes between the individual and social concerns about vaccination helps to further public health efforts to control or eliminate diseases by quieting public objections to vaccination. Congress should consider how the roles of these key individuals may affect the future of the Compensation Program.

50. Take, for instance, the Secretary of Health and Human Services, who acts as a powerful gatekeeper for the Compensation Program. When Congress created the VICP it contemplated the development of beneficial new vaccines. Knowing that making injury compensation available reassures the public, manufacturers and the insurance industry, Congress added 42 U.S.C. § 300aa-14(c), empowering the Secretary to amend the Vaccine Injury Table and Aids to Interpretation through notice and comment rulemaking. n115 The Secretary holds a significant amount of discretion in making these amendments when the Centers for Disease Control and Prevention recommend that a new vaccine be administered routinely to children. The First Circuit decision in *O'Connell v. Shalala* affirmed this rulemaking authority by clarifying that the power to amend the Vaccine Injury Table is extremely broad, and even includes a power to remove vaccines from the program. n116 Although the Secretary must respond to a CDC recommendation of including a new vaccine on the Injury Table, the Secretary need not wait for a recommendation. Instead, the Secretary has the authority to act on independent initiative or even public petition. n117

51. With less than three years left in Secretary Shalala's tenure as the head of Health and Human Services, she may have more latitude to make significant changes that draw more public attention. For example, the Secretary might use the VICP to encourage manufacturers to develop and distribute riskier vaccines by placing them on the Injury Table before they are widely accepted. This would give manufacturers more liability protection and would be consistent with Secretary Shalala's personal trend of Vaccine Injury Table n118 and Aids to Interpretation amendments. n119

52. If there is a valid generalization from Secretary Shalala's actions, it is that people in key VICP roles will attempt to make the VICP more widely applicable. In doing so, the Secretary and other key Compensation Program players risk drawing negative scrutiny. This is not to suggest that they refrain from making necessary changes in the VICP simply to avoid controversy. Rather, the Secretary should take into consideration these opposing viewpoints and attempt to address them rationally to preserve the VICP's important work.

53. Congress should not take action to limit VICP key players' activism. That would hinder public health efforts and be nearly impossible to enforce. However, Congress should be aware that Americans have not reached a consensus on vaccine safety, the zone of protection manufacturers deserve, or the appropriate role the VICP should take in balancing future injury issues. If these key actors in the VICP do speak out more frequently and loudly than they have in the past by amending the Vaccine Injury Table, Congress should pay close attention. Whatever action Congress takes to silence or amplify these key players' arguments could affect the vaccine availability-liability balance, the growing effectiveness of public vaccination programs the Vaccine Act encourages, or the VICP's public acceptance and participation levels.

D. Flat Tax -- Internal and External Challenge

54. Congress was sensitive to the problems that expansion could pose to the VICP, whether that expansion comes from a greater number of petitioners accepting Trust Fund awards or larger numbers of vaccines and injuries being covered. As a result, the VICP legislation actually ties vaccine and injury inclusion in the VICP to adequate reserves in the Trust Fund. n120 However, a change in VICP funding, a $ 0.75 flat

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STRIKING A BALANCE BETWEEN PRODUCT AVAILABILITY AND PRODUCT SAFETY: LESSONS FROM THE VACCINE ACT

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SUMMARY:
... With such a record of success, it is perhaps surprising to discover that American vaccine policy remains in a state of flux. ... The Vaccine Act also adopts the learned intermediary doctrine, allowing manufacturers to fulfill their duty to warn by transmitting information to the treating physician rather than to the vaccinee directly. Finally, the Vaccine Act creates a presumption that manufacturer warnings that comply with the Food and Drug Administration (FDA) standards are adequate, thereby preventing state courts from performing an independent assessment of these warnings' sufficiency. ... First coined in 1967, the learned intermediary doctrine holds that, in the case of prescription pharmaceuticals, manufacturers satisfy their duty to warn by providing an adequate warning to the treating physician. ... In deciding that the learned intermediary doctrine does not apply in the mass vaccine context, the court in Davis drew an analogy to the situation where a manufacturer directly supplies a consumer with an over-the-counter nonprescription drug. ... Given that the manufacturer's duty to warn extends only to the physician, and the physician's informed consent duty is governed by the community practice standard, the vaccinee may receive neither a direct warning nor a physician performed risk assessment. ... At the same time, however, the FDA does not currently permit the sale of the non-cellular DTP vaccine. ...

TEXT:
[*1853] [*1854]

Introduction

During the twentieth century, America has developed a childhood immunization program that many praise as the most spectacular public health success in history. [1] Over a period of fifty years, the United States has dramatically reduced the annual occurrence of polio, whooping cough, and measles. [2] Diseases that once threatened to end prematurely the life of every American infant are now prevented with a routine series of early childhood vaccinations. [3]

With such a record of success, it is perhaps surprising to discover that American vaccine policy remains in a state of flux. At the heart of the controversy lies a legal debate that extends beyond the **[*1855]** relatively narrow field of childhood immunization. This debate focuses on the recurring product liability dilemma of how to properly establish a balance between product safety and product availability. Due to the social costs at stake, the debate

intermediary doctrine assumed would take place.

IV. The Relationship Between Federal and State Law

The Federal Government, through Congress and through the FDA, has played a key role in the development of American vaccine policy. [158] In designing the Vaccine Act, Congress had the opportunity to assert complete federal control over vaccine regulation by explicitly preempting state tort actions. [159] Congress, however, left petitioners with the option of pursuing civil tort actions, [160] although it created a presumption that manufacturers in compliance with FDA standards satisfy their warning duties [161] and prohibited direct warning actions. [162]

The congressional decision not to completely preempt state common law raises important questions about the proper relationship between federal regulatory and state common law regimes. On the one hand, given the Federal Government's predominate role in **[*1877]** twentieth century vaccine regulation, one can argue that the Vaccine Act should have explicitly declared vaccine regulation to be an exclusively federal matter. [163] On the other hand, one can also argue that the Federal Government has exercised too much influence by passing the Vaccine Act. According to this view, the Vaccine Act's creation of a presumption that warnings are adequate if they comply with FDA standards paralyzes States' common law ability to function as a vehicle for protecting its citizens from the dangers of inadequate warnings. [164] This section examines the inherent tension between federal regulation and state common law as these systems apply to the regulation of vaccine warnings.

A. The Preemption Doctrine

Article VI of the U.S. Constitution, in announcing the supremacy of federal law, provides the basis for the preemption doctrine. [165] Federal courts have recognized two types of preemption: statutory and regulatory. [166] Although stemming from different sources of federal law, both types [167] preempt state statutes, regulations, and common law. [168]

The U.S. Supreme Court has held that express language indicating a federal intent to preempt state law is a sufficient but not necessary condition for a finding of federal preemption. [169] Preemption may **[*1878]** also occur where federal intent to maintain exclusive control is implicit in the "structure and purpose" of the federal law. [170] The test for implied preemption is whether the federal law in question is so comprehensive as to occupy the entire field. [171]

Additionally, courts must find preemption where a conflict exists between state and federal laws. [172] Conflict preemption has three distinct subcategories: [173] first, when compliance with both federal and state law is impossible; [174] second, when state law interferes with the objectives of federal law; [175] and third, when state law obstructs the methods used to achieve federal objectives. [176]

In understanding preemption analysis, one must consider the limits to the preemption doctrine. The mere possibility of conflict between state and federal law does not lead to preemption. [177] Rather, the conflict must "necessarily exist." [178] Additionally, the concept of federalism carries with it a presumption against preemption. [179] Fearful of interfering with States rights, courts are very reluctant to preempt state law in areas of traditional state regulation. [180] Issues concerning health and safety are primary examples of traditional areas of state regulation. [181] **[*1879]**

B. FDA Regulation of the Vaccine Industry

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Arguments favoring federal preemption of state tort law remedies for vaccine injuries focus on the comprehensive nature of the FDA's regulation of the vaccine industry. [182] In order to assess such arguments, this Comment initially reviews the history and present state of the FDA's role in federal vaccine policy. [183]

The Federal Government's involvement with vaccine regulation began with the passage of the Virus, Serum, Toxin Act of 1902. [184] Under this federal legislation, the Public Health Service, and later the Department of Treasury, regulated the vaccine industry. [185] Although the names of the various administrative branches have changed over time, [186] the Federal Government has remained active in vaccine regulation throughout the twentieth century. [187] Presently, the FDA's Center for Drug and Biologics bears primary responsibility for vaccine regulation. [188]

Pursuant to the Federal Food, Drug, and Cosmetic Act of 1938, [189] the FDA is the primary regulator of vaccines. [190] The FDA meets its obligations in a two-fold manner. The FDA promotes public health by approving the use of new and safe treatments. [191] The FDA also protects public health by removing unsafe and ineffective drugs from the market. [192] As the federal guardian of vaccine safety, the FDA **[*1880]** has issued comprehensive regulations for the design and manufacture of vaccines. [193]

The FDA's regulation of vaccines begins prior to the manufacturing stage. [194] Initially, a potential manufacturer must apply to the FDA for a license to manufacture the vaccine. [195] FDA regulations require manufacturers to submit a sample lot of the vaccine and summaries of tests run on the lot. [196] These regulations take into account not only the vaccine itself, but also employee qualifications and responsibilities, [197] as well as the condition of the manufacturer's work area. [198]

The FDA has promulgated additional, specific rules for the production of the pertussis component of the DTP vaccine. [199] Manufacturers must test every lot of the pertussis component for potency [200] and toxicity. [201] A written release from the FDA serves as final approval of the DTP lot. [202]

In addition to regulating design and manufacture, the FDA carefully evaluates the labelling of vaccines. [203] The FDA requires that labels include the makeup of the vaccine, the administration schedule, and the indications and contraindications for usage. [204] Of particular importance to the preemption discussion is the fact that the FDA must approve all language contained in a vaccine label. [205] Once certain language is approved, manufacturers may not change label language without first filing a supplemental new drug application with the FDA. [206] Manufacturers who alter warning language **[*1881]** without FDA approval face criminal prosecution. [207]

The FDA, in deciding whether to approve or reject certain warning language, promotes a policy of uniform labelling and warnings. [208] While manufacturers must provide adequate warnings, manufacturers cannot insulate themselves from liability by issuing overly broad warnings. All information contained in vaccine labels and warnings must have clinical relevance. [209] The FDA only permits warnings about known hazards, not theoretical possibilities. [210]

C. Preemption Case Law

1. The courts' rejection of preemption claims brought by vaccine manufacturers

In the vaccine context, courts generally have not found an intent by Congress, or any agency, to preempt a State's failure to warn cause of action. [211] The Fourth Circuit's decision in Abbot v. American Cyanamid Co. [212] provides a well-organized discussion of the issues involved in the warning preemption debate. The plaintiff, after receiving a DTP vaccination manufactured by American Cyanamid, suffered severe neurologic injuries. [213] Raising a motion for summary

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judgment, the manufacturer argued that the plaintiff's failure to warn and design defect theories were preempted. [214] American Cyanamid offered what the Fourth Circuit described as a "broad" and a "narrow" preemption argument.

American Cyanamid's "broad" argument, essentially an occupation of field claim, insisted that the comprehensive nature of federal **[*1882]** vaccine regulation left no room for state regulation. [215] American Cyanamid cited the detailed labelling requirements imposed by FDA regulations as evidence that the FDA intended to regulate exclusively all aspects of vaccine labelling. [216] American Cyanamid argued that because the federal requirements regulated virtually every detail of the label, there should be no room for state action. [217]

The Fourth Circuit, however, refused to find preemption based upon occupation of field, stating that the comprehensiveness of federal regulations does not result in a per se finding of preemption. [218] The court began with the premise that issues addressed by congressional legislation are matters of national concern. [219] Every issue addressed by Congress, however, does not preclude concurrent state law. [220] Instead, proponents of federal preemption must overcome several adverse presumptions. [221] First, health and safety matters are traditionally areas of state concern and are not easily found to be preempted. [222] Second, given that agencies promulgate **[*1883]** very detailed regulations, [223] regulations lacking a clear intent to preempt presumptively do not occupy the field. [224]

American Cyanamid's "narrow" preemption argument took the form of a conflict of policy objectives, claiming that state tort law interfered with the intended effects of the federal vaccine policy. [225] According to the Fourth Circuit, the federal objective of FDA regulations was to promote vaccine safety. [226] The defendant argued that, in addition to safety, federal vaccine policy is committed to protecting the availability and use of the vaccines. [227] The imposition of excessive state tort law liability, the defendant argued, frustrates these policy objectives by driving manufacturers from the market. [228] In considering American Cyanamid's motion for summary judgment based on a policy objectives conflict, the court framed the issue as "whether the federal interest requires that federal regulations be viewed as having struck the balance between safety and quantity or whether the regulations merely establish minimum safety standards and allow state regulation to establish the balance." [229]

In an attempt to discern the nature of the federal policy that American Cyanamid claimed was harmed by state regulations, the Fourth Circuit turned to the Vaccine Act. [230] As a preliminary matter, the court rejected the defendant's argument that because the Vaccine Act does not expressly address preemption it is neutral on the matter. [231] Rather, the court turned to the Vaccine Act's legislative history [232] and found two assumptions weighing against a finding of **[*1884]** preemption. [233] First, the Vaccine Act recognizes that prior federal vaccine legislation, specifically the Federal Food, Drug, and Cosmetic Act [234] and the Public Health Service Act, [235] does not preempt state tort actions. [236] Second, the Vaccine Act expressly states that state tort actions remain available to aggrieved parties. [237] Finding that the Vaccine Act did not evince a federal intent to strike an immutable balance between vaccine safety and availability, the court refused to adopt the opposite policy determination. [238]

2. Preemption and the physical conflict dilemma

In Hurley v. Lederle Laboratories, [239] (Hurley II) the Fifth Circuit, like the Fourth Circuit in Abbot, did not find that FDA regulations completely preempted state warning claims. [240] The Fifth Circuit did, however, recognize that specific FDA regulations may result in a **[*1885]** limited preemption of state tort law when a manufacturer cannot satisfy a federal regulation without violating state law and vice versa. [241] This reasoning represented a compromise between two competing concerns. On the one hand, courts would place manufacturers in an inescapable bind by finding the FDA-approved warning insufficient. In order to meet a state-warning standard, the manufacturer would have to violate federal law. [242] On the other hand, the court in Hurley II found limits to the value of FDA-approved warnings. Given that the FDA

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only evaluates warnings based on the information submitted by manufacturers, the FDA's role in the warning evaluation process is somewhat "passive." [243] In approving designs, the FDA only considers the sufficiency of the proposed designs and does not consider alternative designs or regulation schemes. [244] The warnings approved by the FDA, therefore, may not represent the safest potential warnings, for the FDA may not have considered the full universe of relevant information. **[*1886]**

D. The Vaccine Act's Presumption of Warning Adequacy as an Attempt to Resolve the Physical Conflict Dilemma

The Vaccine Act's presumption of adequate warning when manufacturers comply with FDA standards may represent an attempt to balance the Fifth Circuit's conflicting views toward physical conflict preemption in Hurley II. [245] In the interest of insulating manufacturers from having to choose between federal criminal liability or state tort liability, the Vaccine Act begins with the assumption that the FDA-approved warning is adequate. [246] The Vaccine Act, however, takes into account the passive nature of the FDA's warning-evaluation process and compensates for this deficiency by allowing plaintiffs to rebut the presumption [247] with a showing that the manufacturer "engaged in fraud or intentional withholding of information." [248] If the manufacturer has not provided the FDA with all relevant information for examining the manufacturer's proposed warning, the Act does not insulate the manufacturer against state inadequate warning claims. [249]

V. Vaccine Act and Restatement 402A Comment k

Section 300aa-22(b)(1) of the Vaccine Act adopts Restatement (Second) of Torts section 402A comment k. Comment k represents an **[*1887]** important exception to the strict liability doctrine. [250] This exception recognizes that there exists a certain class of products that is incapable of being made safer, [251] but nonetheless provides great value to society. [252] Acknowledging the utilitarian interest in the availability of such "unavoidably unsafe" products, comment k directs that, so long as the "unavoidably unsafe" product is properly prepared and marketed, strict liability will not apply. [253] Because proper manufacturing and proper warnings are prerequisites to immunity, comment k only provides manufacturers with protection from liability premised on strict liability design defect claims. [254]

A. The Vaccine Act's Blanket Application of Comment k to All Vaccines Covered by the Act

The Vaccine Act's legislative history clarifies Congress' intention to apply comment k immunity to all vaccines covered by the Act. [255] In deciding to apply comment k to vaccines, Congress expressed fear that sympathetic juries would ignore the social utility of vaccines and routinely rule for innocent victims and against "equally "innocent'" manufacturers. [256] Congress, seeking to ensure the continued compensation of victims while removing economic disincentives for manufacturers, applied comment k to all vaccines covered by the Act and created a no-fault compensation system for injured parties **[*1888]** deprived of strict liability causes of action. [257]

The Vaccine Act's blanket adoption of comment k represents one of three possible ways of approaching "unavoidably unsafe" products. [258] As an alternative to insulating all vaccines from strict design defect liability, Congress could have eliminated comment k and subjected all designs to strict design defect liability. [259] Additionally, as a middle ground between blanket insulation and no insulation, Congress could have adopted a threshold test to determine whether a given vaccine warrants special protection. [260] This approach was developed by the California Court of Appeals in Kearl v. Lederle Laboratories. [261] The court in Kearl did not contest the basic concept of exceptional social utility underlying comment k. [262] Instead, the California Court of Appeals expressed concern with the manner of the comment's application. [263] Characterizing the judiciary's application of comment k as "routine" and

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"mechanical," [264] the court in Kearl held that before a jury hears the issue of design defect liability, a judge must make a threshold determination of whether to grant a defendant comment k immunity. [265] In making this decision, the judge should consider:

(1) whether, when distributed, the product was intended to confer an exceptionally important benefit that made its availability highly desirable; (2) whether the then-existing risk posed by the product both was "substantial" and "unavoidable"; and (3) whether the interest in availability (again measured as of the time of distribution) outweighs the interest in promoting enhanced accountability through strict liability design defect review. [266]

A third approach to the "unavoidably unsafe" product issue is to subject all products to strict design defect liability. [267] **[*1889]**

B. A Criticism of the Vaccine Act's Blanket Application of Comment k

Given the multitude of divergent judicial interpretations of comment k, Congress had no paradigmatic example to follow when drafting the Vaccine Act. [268] Textual and structural arguments exist both supporting and rebutting a blanket application of comment k to all vaccines. A close reading of the text of comment k and analysis of the comment's underlying policy, however, indicates that the concept of "unavoidably unsafe" products, defined by the Restatement as incapable of being made safe for their intended and ordinary use, [269] cannot support a blanket approach. [270]

1. Textual challenge

A literal reading of the text of comment k suggests that the "unavoidably unsafe" standard requires some sort of discerning test. [271] The comment begins with the words, "There are some products ...." [272] The American Law Institute's use of "some" indicates that not all products in a class automatically merit immunity from strict liability design defect claims. [273]

The comment continues, "In the present state of human knowledge, these products are quite incapable of being made safe for their intended and ordinary use." [274] Measuring from the time of distribution, a plain-language interpretation of these two clauses suggests that only a product that is not subject to improvement using **[*1890]** currently held scientific knowledge warrants comment k immunity. [275]

In order for the Vaccine Act to comport with the language of comment k, Congress would have to perform either a risk-utility analysis before promulgating section 22(b) or allow the judiciary to perform a risk-utility analysis at trial. [276] Given that Congress rejected the latter approach, [277] we must presume that Congress applied a risk-utility analysis to the vaccines covered by the Act. The language of comment k, however, raises questions as to whether the whole-cell DTP vaccine warrants classification as an "unavoidably unsafe" product. [278]

In order to reach the conclusion that the whole-cell DTP vaccine is not an "unavoidably unsafe" product, it is first necessary to provide some history concerning vaccine designs. The DTP vaccine currently licensed by the FDA consists of three parts - diphtheria toxoids, tetanus toxoids, and the whole cell pertussis component. [279] Adverse reactions to the DTP vaccine have been linked to the pertussis portion of the vaccine. [280] While the immunizing factors in the diphtheria and tetanus portion of the vaccine can be identified and purified, the offending elements of the pertussis portion cannot be removed. [281]

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Many experts in the medical community, concerned with the reactivity of the pertussis portion of the DTP vaccine, have advocated **[*1891]** the development of an alternative vaccine. [282] Currently, two alternatives to the whole-cell pertussis portion exist: acellular and non-cellular vaccines. [283] Although not currently manufactured, a non-cellular vaccine was discovered in the 1950s. [284] Testing of the non-cellular vaccine has revealed a product with adequate immunnogenicity but lower reactivity than its whole cell pertussis counterpart. [285]

In 1961, Eli Lilly & Company applied for a patent for a non-cellular pertussis vaccine named Tri-Solgen. [286] Upon FDA approval, Tri-Solgen dominated the market until the mid-1960s. [287] Of special importance to the comment k issue is an internal clinical evaluation run by Lederle Laboratories and Eli Lilly in 1967. [288] The test compared the relative reactivity of Lederle's Tri-Immunol vaccine, a whole-cell DTP vaccine, against Lilly's Tri-Solgen non-cellular vaccine. [289] The results of a test on 335 infants showed that the whole-cell vaccine had a much higher reactivity rate than did the non-cellular vaccine. [290] Although Lederle had first-hand evidence demonstrating the lower reactivity rate of the non-cellular pertussis vaccine, it continued to market the whole-cell version. [291]

In 1975, Lilly stopped producing Tri-Solgen. [292] Wyeth Laboratories secured an option to the rights for the manufacturing technology of Tri-Solgen. Wyeth could not, however, purchase Lilly's license, because FDA regulations require manufacturers of identical vaccines to acquire separate licenses. [293] During the late-1970s, Wyeth devel **[*1892]** oped its own non-cellular vaccine. [294] The FDA, however, refused to license Wyeth's product, citing both a lack of evidence showing that the non-cellular vaccine was superior to the whole-cell version and concerns about possible toxicity. [295] Since Lilly's withdrawal from the DTP market, only the whole-cell DTP vaccine has been available in the United States. [296]

Application of the language of comment k to the above-mentioned DTP history reveals that DTP may not qualify as an "unavoidably unsafe" product. [297] The scientific history suggests that manufacturers have possessed the knowledge and the production capabilities to produce a safer version of the DTP vaccine. [298] At the same time, however, the FDA does not currently permit the sale of the non-cellular DTP vaccine. [299] This analysis demonstrates that a textual interpretation of comment k does not, standing alone, resolve the safety versus availability dilemma in the context of design defect liability. Rather, one must examine the policy considerations underlying the strict liability doctrine and the exception to these considerations contained in comment k.

2. Policy challenge

Although the Vaccine Act's adoption of a blanket approach to comment k partially conflicts with a textual interpretation of the comment, Congress' decision nonetheless finds support in the case law of many jurisdictions. [300] Decisions announcing a blanket **[*1893]** approach recognize the analytical dilemmas created by rejecting a balancing test. [301] For example, in Brown v. Superior Court, [302] the Supreme Court of California stated:

It seems unjust to grant the same protection from liability to those who gave us thalidomide as to the producers of penicillin. If some method could be devised to confine the benefit of the comment k negligence standard to those drugs that have proved useful to mankind while denying the privilege to those that are clearly harmful, it would deserve serious consideration. [303]

These courts nonetheless elevate the consumer interest in the availability of drugs over the safety interest of holding manufacturers strictly liable for their products. [304]

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The Vaccine Act's blanket application of comment k is premised on concerns that strict product liability causes of action destabilized the vaccine market. [305] A 1986 Report, written by the House Committee on Energy and Commerce, illustrates congressional concern with the future of the country's universal immunization policy. [306] In explaining the need for legislation in this area, the House Report begins with a compelling assessment of the successes of American vaccine policy:

Vaccination of children against deadly, disabling, but preventable infectious diseases has been one of the most spectacularly effective public health initiatives this country has ever undertaken. Use of vaccines has prevented thousands of children's deaths each year and has substantially reduced the effects resulting from disease. Billions of medical and health-related dollars have been saved by immunizations. [307] **[*1894]**

The Report then discusses the small number of vaccinees who suffer permanent and sometimes deadly vaccine-related injuries. [308] The Report goes on to document the recent withdrawal of manufacturers from the vaccine market and the concomitant increase in vaccine prices. [309] After considering the benefits of universal vaccination and the recent instability of the market, the Committee on Energy and Commerce concluded that Congress must ensure the continued availability of children's vaccines. [310]

The legislative history demonstrates the utilitarian, policy-based reasoning underlying the Vaccine Act's adoption of comment k. This reasoning closely parallels the California Supreme Court's product-availability-over-product-safety approach in Brown v. Superior Court. The court in Brown candidly admitted that it was rejecting the increased safety benefits promoted by strict design defect liability in order to promote the rapid availability of highly beneficial drugs. [311] In reaching its decision to grant all prescription drugs comment k immunity, the California Supreme Court cited three policy considerations. First, society has a greater interest in the immediate availability of beneficial drugs than in the increased safety of these drugs. [312] Second, manufacturers, unsure of the future status of their products under a risk-benefit comment k analysis, will be deterred from developing new drugs. [313] Third, manufacturers carrying greater product liability insurance to cover design defect liability will raise the **[*1895]** price of vaccines and make vaccines unavailable to the average consumer. [314]

As was the case with the textual interpretation of comment k, the court in Brown relied on policy considerations that do not justify the Vaccine Act's application of blanket immunity for all vaccines. [315] Brown recognizes that there are certain socially valuable drugs that cannot be improved using current scientific knowledge. [316] Given the health benefits rendered by such drugs, Brown reads comment k as justifying the immediate marketing of the drugs, regardless of the fact that future scientific advances may allow safety improvements. [317] The court believed that the public could be harmed if manufacturers delayed distributing prescription drugs, whose safety could not be improved under current scientific knowledge, in order to avoid design defect liability. [318] As the previous discussion of the history of DTP testing indicates, however, manufacturers may currently possess the knowledge to produce a safer vaccine. [319] That knowledge may presently allow manufacturers to make safety alterations without significantly inhibiting the distribution of their product. [320]

Furthermore, both Brown and the Vaccine Act accept the ill-conceived policy notion that strict design defect liability deters investment in research and development. [321] Holding vaccine manufacturers strictly liable for design defects promotes, rather than deters, research and development. [322] Under a risk-utility approach to comment k, manufacturers who do not act on current scientific knowledge to produce safer vaccines would be held strictly liable for design defects. [323] Given that manufacturers are held to the knowl **[*1896]** edge of experts

in their fields, [324] most manufacturers will invest considerable time and resources into research and development in order to avoid design defect liability. [325]

Rather than promoting research and development, the Vaccine Act's blanket application of comment k removes incentives for vaccine manufacturers to improve their products. [326] By insulating vaccine manufacturers from strict design defect liability, the Vaccine Act implicitly announces that the Federal Government is satisfied with the current state of vaccine safety, and that the Government will not use the tort system to encourage manufacturers to improve their vaccines. [327]

VI. Recommendations

A. Direct Warnings

Evaluating the Vaccine Act's treatment of consumer warnings is a difficult task. On the one hand, the legislation banning direct failure to warn liability removes an important vehicle for promoting an informed patient population. [328] On the other hand, by requiring health care providers to distribute standard warnings written by the Secretary, the Act attempts to achieve, by way of regulation, the same result that Davis v. Wyeth [329] and its progeny achieved through the civil tort system. [330]

While this Comment applauds the design of the Vaccine Act's informational and recording requirements, it also recognizes that state law direct warning causes of action and federal reporting require **[*1897]** ments are not mutually exclusive. [331] If the ultimate goal of a universal vaccination policy is safety, federal legislation could maintain both a state common law-based direct duty to warn as well as federal reporting regulations. The combination of a state duty to warn and federal reporting requirements would combat lax community practices and the excessively pro-vaccine environment in two distinct ways. The federal regulations would compensate for inconsistent community practices by requiring physicians to distribute standardized vaccine information and to report contraindications. [332] At the same time, a common law direct warning rule would diminish the current universal vaccination policy's weakening of physician warnings by ensuring that individual vaccinees possess adequate information both to make an informed decision prior to vaccination and to protect against adverse reactions subsequent to vaccination. [333]

The Vaccine Act, however, clearly acknowledges its compromising purpose. [334] The Act seeks both to reduce manufacturer liability and to create a more pro-plaintiff compensation system. [335] Given its goal of insulating manufacturers from excessive liability, the Vaccine Act skillfully removes direct failure to warn liability while continuing to encourage an informed patient base through its vaccine information and reporting requirements. [336] **[*1898]**

B. Relationship Between Federal and State Law

Prior to the passage of the Vaccine Act, manufacturers were often caught between inconsistent state and federal warning standards. [337] Given that manufacturers may not alter the content of their warnings without FDA approval, [338] compliance with state law warning standards sometimes required manufacturers to violate federal law or regulations. Conversely, compliance with federal regulatory warning standards often exposed manufacturers to liability under state law. [339]

The Vaccine Act responded to this dilemma by creating a presumption that warnings complying with FDA standards are adequate. [340] This Comment credits the Vaccine Act for taking an affirmative step toward resolving the vaccine warning dilemma. The Vaccine Act's presumption initially tips the scales towards manufacturers while also giving plaintiffs a vehicle for overcoming the presumption. The Act, however, has imprudently moved from one

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extreme to the other. The legislation removes too much of the impetus for manufacturers to act on their actual or constructive knowledge concerning the adequacy of warnings. The presumption of warning adequacy allows manufacturers to disregard knowledge of actual deficiencies in their warnings so long as the warning complies with FDA standards. [341]

In lieu of the Vaccine Act's presumption of adequate warnings, this Comment proposes the following framework. If under state law a judge or jury finds that a manufacturer knew or should have known of an inadequacy in warning, [342] the court should determine whether **[*1899]** the manufacturer petitioned the FDA for a change in the warning language in order to resolve the inadequacy. [343] Manufacturers who fail to act on their knowledge or constructive knowledge of an inadequate warning should be held liable. [344] If the manufacturer has petitioned the FDA for a change in warning language and the FDA had rejected the petition, however, the manufacturer should not be found liable. [345]

This proposed framework seeks to force manufacturers to exercise all safety options within their capacity. The law should not allow manufacturers who do not address known or knowable warning inadequacies to seek shelter under a deferential presumption. FDA standards are designed to ensure safety, not to insulate manufacturers from confronting difficult safety issues. If Congress amends the Vaccine Act to reflect this framework, the deterrence function of warning liability would remain intact. At the same time, the amendment would recognize that deterrence has limits, and that state deterrence theories should not force manufacturers to choose between violating federal or state law.

C. Comment k

Congress' decision to grant blanket comment k immunity to all vaccines covered by the Vaccine Act conflicts with both the text and policy of comment k. [346] The fact that vaccines as a class have effectively reduced the risk of many formerly deadly diseases does not warrant a per se application of comment k immunity to all vac **[*1900]** cines. [347] According to the language of comment k, a vaccine only merits special protection when the danger posed by the vaccine is unavoidable and when the utility of the vaccine outweighs the risks. [348] As previously discussed, the Vaccine Act's blanket application of comment k is most suspect with regard to the DPT vaccine because numerous studies have indicated that manufacturers are currently capable of producing a safer vaccine. [349] This Comment does not question the utility of the DTP vaccine; it questions the wisdom of permanently justifying the dangers of the whole-cell DTP vaccine by applying to the vaccine the label "unavoidably unsafe." As discussed earlier, evidence exists indicating that DTP manufacturers may currently possess the ability to produce a safer vaccine. [350] At the present time, however, the FDA only permits the sale of the whole-cell vaccine. [351] The question must therefore be asked, what degree of design defect liability will best promote manufacturer investment of time and resources into the development of a new DTP vaccine that reduces adverse reactions?

This Comment recommends that Congress repeal the Vaccine Act's blanket application of comment k immunity. In place of a blanket application approach, Congress should adopt the three-part balancing test developed by the California Court of Appeals in Kearl. [352] The Kearl test provides a dual advantage. The three-part threshold test avoids the establishment of a federally endorsed status quo in which vaccine research and development has reached an acceptable endpoint. Under Kearl, manufacturers will recognize the possibility that the FDA will approve an alternative DTP vaccine. [353] In order to avoid potential design defect liability, manufacturers will invest in **[*1901]** research efforts to improve the whole-cell DTP vaccine and will petition the FDA for approval of their new designs. [354]

The Kearl test, while promoting manufacturer investment in improved safety, also accommodates the underlying theme of Brown v. Superior Court, namely that some drugs possess exceptional social utility and therefore warrant more lenient liability standards. [355]

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Two of the three-prongs of the Kearl test consider society's immediate need for beneficial drugs. The first prong considers the nature of the benefits of the drug in question, and the third prong considers the public's interest in the drug's availability. [356] The Kearl test, therefore, effectively provides DTP manufacturers with temporary immunity from strict design defect liability [357] while continuing to encourage manufacturers to search for a safer product.

This lack of permanent protection from strict design defect liability led the Supreme Court of California to overrule Kearl in Brown:

[Under the Kearl test, a] manufacturer's incentive to develop what it might consider a superior product would be diminished if it might be held strictly liable for harmful side effects because a trial court could decide, perhaps many years later, that in fact another product which was available on the market would have accomplished the same result. [358]

The impact of the court's criticism is not applicable because the FDA only allows manufacturers to market the whole-cell DTP vaccine. The possibility that the FDA may approve a new DTP vaccine will encourage, rather than discourage, individual manufacturers to improve their own products. [359] The court in Brown envisioned manufacturers halting all research efforts for fear that their future product would one day be found to be defective in design. [360] The codification of the Kearl test would not lead to this result. Under Kearl, the complacent DTP manufacturer, who continues to market an unsafe vaccine, will face liability for a defect in design. [361] **[*1902]**

No given formula for balancing society's need for vaccine availability with society's need for vaccine safety will satisfy all the parties involved. At present, the Kearl threshold test offers a viable compromise that both respects the social utility of the DTP vaccine and encourages the development of an even safer product. For these reasons, Congress should repeal the blanket application of comment k to all vaccines and instead codify the Kearl three-prong test.

Conclusion

The National Childhood Vaccine Injury Compensation Act of 1986 represents a much needed legislative response to the civil tort system's inability to achieve a proper balance between vaccine safety and vaccine availability. To a large degree, the Vaccine Act achieves its goals. Plaintiffs may seek compensation in a no-fault compensation system, and manufacturers are relieved of the burden and expense of defending vaccine injury law suits. The Vaccine Act's modification of state common law for plaintiffs who reject judgment under the statutory no-fault compensation program, however, places too much emphasis on vaccine availability and not enough emphasis on vaccine safety. In order to strike a more equitable balance, this Comment recommends that Congress take the following steps: (1) require manufacturers with knowledge of warning inadequacies to petition the FDA for a warning alteration before giving manufacturers the benefit of the presumption that warnings in compliance with FDA standards are adequate; and (2) adopt the three-factor Kearl test for determining "unavoidably unsafe" product status. Both recommendations respect the social utility of vaccines and will therefore promote a workable balancing of safety and availability interests.

If the majority of vaccine injury plaintiffs continue to accept judgment under the statutory no-fault compensation program, these changes will not have a large scale impact on vaccine injury litigation. As Congress begins to consider legislation in other areas of product liability law, however, it should take note of the shortcomings of the Vaccine Act's alteration of state tort law. Congress should also ensure that future statutory modifications of the civil tort

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over this issue is particularly intense in the context of children's vaccines. On the one hand, vaccine manufacturers insist that increased regulation and liability will make vaccine producers uninsurable and stymie research and development. [4] Given the indisputable social utility of children's vaccines, this argument carries significant merit. On the other hand, plaintiffs' coalitions and certain scientists insist that vaccine manufacturers currently market unsafe vaccines to American children. [5] As evidence, these groups cite the recurring incidence of brain damage and even death in young vaccine recipients. [6]

Recent legislative and executive proposals have once again brought the vaccine debate to the political forefront. In 1993, the Clinton administration introduced and successfully passed a bill providing free vaccines to eligible children. [7] Commenting on the legislation, President Clinton stated, "Our nation is the only industrialized nation in the world that does not guarantee childhood vaccination for all children. It ought to be like clean water and clean air. It ought to be part of the fabric of our life." [8]

Shortly after passing this initiative, Republican candidates for the House of Representatives published the "Contract with America." [9] Item nine of the Contract advocates the curtailment of state strict liability laws and the passage of uniform federal product liability legislation. [10] **[*1856]**

Although neither of these proposals directly affects vaccine-related injury litigation, both demonstrate the continuing difficulties our nation faces in its attempt to establish a workable balance between product availability and product safety. In the interest of increasing dialogue on this crucial issue, this Comment reexamines a recent legislative attempt to reform vaccine product liability litigation, the National Childhood Injury Compensation Act of 1986 (Vaccine Act). [11] This important legislation removed the common law element of negligence from vaccine product liability litigation by creating a no-fault compensation program funded by an excise tax on vaccines. [12] The Vaccine Act requires plaintiffs to file a claim against the Secretary of the Department of Health and Human Services (the Secretary) rather than against the vaccine manufacturer. [13] A valid claim includes an affidavit and documentation proving that the injuries received were caused by a vaccine. [14] If the petitioner is dissatisfied with the result of the no-fault litigation, she may reject the judgment and pursue a civil tort action against the vaccine manufacturer. [15]

Although the Vaccine Act permits vaccine-injury victims to sue manufacturers under state product liability laws, Congress limits the legal theories available to those who forego the Vaccine Act's compensation system. [16] The Vaccine Act affords protection consistent with Restatement (Second) of Torts section 402A comment k [17] (comment k) to vaccines covered by the Act, thereby shielding manufacturers from strict design defect liability. [18] The Vaccine Act also adopts the learned intermediary doctrine, allowing manufacturers **[*1857]** to fulfill their duty to warn by transmitting information to the treating physician rather than to the vaccinee directly. [19] Finally, the Vaccine Act creates a presumption that manufacturer warnings that comply with the Food and Drug Administration (FDA) standards are adequate, thereby preventing state courts from performing an independent assessment of these warnings' sufficiency. [20]

The Vaccine Act is important legislation because it represents an effort by both vaccine consumers and vaccine manufacturers to strike a middle ground between the seemingly incongruous goals of vaccine safety and vaccine availability. Instead of focusing on the statutory no-fault compensation program of the Vaccine Act, this Comment examines the role that the civil tort system plays in balancing product safety and product availability. As a device for framing this often amorphous topic, this Comment reviews and comments on the Vaccine Act's three fundamental alterations to state tort law for those plaintiffs, who, after rejecting the results of the statutory no-fault compensation program, proceed with a civil law suit against a vaccine manufacturer. Admittedly, the Vaccine Act's alterations of state tort law will not have a large impact on vaccine litigation because most vaccine injury claims are resolved within the statutory framework. The hope is, however, that an examination of the

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system establish a workable balance between product availability and product safety.

FOOTNOTES:

n1. See H.R. Rep. No. 908, 99th Cong., 2d Sess. 4 (1986) [hereinafter 1986 House Report] (stating that childhood vaccination has saved thousands of lives and billions of health care dollars), reprinted in 1986 U.S.C.C.A.N. 6344, 6345.

n2. Randall B. Keiser, Deja Vu All Over Again? The National Childhood Vaccine Injury Compensation Act of 1986, 47 Food Drug Cosm. L.J. 25, 25 (1982) (citing reduction of American polio incidence from 57,000 cases in 1952 to 4 in 1984, whooping cough incidence from 265,000 cases in 1934 to 2000 in 1982, and measles incidence from 2250 deaths in 1941 to 2 deaths in 1983).

n3. See 1986 House Report, supra note 1, at 4, reprinted in 1986 U.S.C.C.A.N. at 6345 (stating that vaccines have prevented thousands of deaths every year).

n4. National Childhood Vaccine-Injury Compensation Act of 1985: Hearing on S. 827 Before the Senate Comm. on Labor and Human Resources, 99th Cong., 1st Sess. 240 (1985) (statement of Robert Johnson, President, Lederle Lab.) (stating that number of carriers willing to insure Lederle in 1985 dropped from 26 to 8).

n5. See id. at 42 (statement of Jeffrey H. Schwartz, President, Dissatisfied Parents Together) (announcing Dissatisfied Parents Together's goal of enacting more stringent testing procedures for children's vaccines).

n6. See Vaccine Injury Compensation: Hearings on H.R. 5810 Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce, 98th Cong., 2d Sess. 73 (1984) [hereinafter 1984 Vaccine Hearing] (statement of Dr. Edward Brandt, Jr., Assistant Secretary of Health) (explaining that risk of permanent neurologic damage from DTP vaccine is one in 310,000).

n7. See 42 U.S.C. 1396s(a)(1)(A) (Supp. V 1993) (providing vaccinations at no charge for statutorily eligible children).

n8. Paul Richter, Child Vaccination Program Is Pushed Health, L.A. Times, Feb. 13, 1993, at A1 (internal quotation marks omitted).

n9. See Tony Mauro, Contract with America: The Common Sense Legal Reform Act, USA Today, Nov. 17, 1994, at A10 (stating that more than 300 Republican congressional candidates signed Contract with America on September 27, 1994).

n10. See The Republican "Contract with America,' Phila. Inquirer, Dec. 18, 1994, at C8.

n11. See 42 U.S.C. 300aa-1 to -34 (1988 & Supp. V 1993).

n12. Id. 300aa-15(i)(2) (1988) (providing for payments for vaccine-related injury or death through Vaccine Injury Compensation Trust Fund); see also 26 U.S.C. 9510(a) (1988 & Supp. V 1993) (mandating that revenues from taxes on vaccines provide monies for fund).

n13. 42 U.S.C. 300aa-12(b)(1) (1988 & Supp. V 1993).

n14. Id. 300aa-11(c).

n15. Id. 300aa-21(a)(1)-(2) (1988) (requiring that petitioner must file with Court of Federal Claims decision whether to accept compensation or pursue civil action within 90 days of court's final judgment). The Court of Federal Claims has jurisdiction over claims concerning compensation under the Vaccine Act. Id. 300aa-12(a) (Supp. V 1993).

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n16. See infra notes 51-57 and accompanying text (discussing limitations.on causes of action available under Vaccine Act).

n17. See Restatement (Second) of Torts 402A cmt. k (1965) (explaining that manufacturers of items that are unavoidably unsafe, such as prescription drugs, shall not be held strictly liable for injuries relating to their product, as long as product is manufactured properly and contains adequate warnings). The justification for the absence of strict liability lies in the fact that while these products can never become totally safe, they constitute a desirable and helpful product, furthering the health and well-being of society. Id.

n18. 42 U.S.C. 300aa-22(b)(1) (1988) (stating that manufacturer of vaccine shall not be liable for any vaccine-related injury or death caused by unavoidable side effects so long as manufacturer properly prepared and labeled vaccine with proper warnings).

n19. Id. 300aa-22(c) (providing that no manufacturer shall be liable in civil actions for failing to directly warn injured recipient).

n20. Id. 300aa-22(b)(2). But see id. 300aa-23(d)(2) (allowing plaintiff to rebut presumption by showing that manufacturer engaged in fraud or failed to exercise due care).

n21. See 1986 House Report, supra note 1, at 7, reprinted in 1986 U.S.C.C.A.N. at 6348 (stating that concerns of vaccine market instability led to creation of Vaccine Act); Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce, 99th Cong., 2d Sess., Childhood Immunizations 72 (Comm. Print 1986) [hereinafter Childhood Immunizations] (stating that manufacturers began fleeing from vaccine market in 1966).

n22. See 1986 House Report, supra note 1, at 7, reprinted in 1986 U.S.C.C.A.N. at 6348 (discussing dissatisfaction with current compensation system); 1984 Vaccine Hearing, supra note 6, at 111 (statement of Donna Gray, Dissatisfied Parents Together) (asking Congress for compensation program).

n23. See 1986 House Report, supra note 1, at 7, reprinted in 1986 U.S.C.C.A.N. at 6348.

n24. See Childhood Immunizations, supra note 21, at 86 (presenting results of vaccine manufacturer survey).

n25. See Childhood Immunizations, supra note 21, at 68.

n26. Childhood Immunizations, supra note 21, at 68.

n27. See Childhood Immunizations, supra note 21, at 67.

n28. See 1984 Vaccine Hearing, supra note 6, at 266 (statement of Dr. James Mason, Director, Center for Disease Control) (explaining that Connaught's inability to obtain insurance was reason for its withdrawal from market).

n29. See Childhood Immunizations, supra note 21, at 70-71.

n30. See Childhood Immunizations, supra note 21, at 71 (reporting that as of 1986, Center for Disease Control had four-month stockpile of oral polio vaccine and was attempting to establish 10-week stockpile of DTP vaccine).

n31. See 1986 House Report, supra note 1, at 4, reprinted in 1986 U.S.C.C.A.N. at 6345 (stating that price of vaccines has increased greatly due in part to increased litigation surrounding vaccine-related injuries or deaths).

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n32. Childhood Immunizations, supra note 21, at 63.

n33. See 1986 House Report, supra note 1, at 7, reprinted in 1986 U.S.C.C.A.N. at 6348 (discussing fear that withdrawal of one vaccine manufacturer could trigger outbreak of preventable disease).

n34. See 1986 House Report, supra note 1, at 6, reprinted in 1986 U.S.C.C.A.N. at 6347 (noting that very few individuals injured by vaccines ever receive compensation, and stating that "but for the relatively few who are injured by vaccine - through no fault of their own - the opportunities for redress and restitution are limited, time consuming, expensive, and often unanswered").

n35. See, e.g., Brooks v. Medtronic, Inc., 750 F.2d 1227, 1230-31 (4th Cir. 1984) (finding comment k applicable to drugs and medical devices); Brown v. Superior Court, 751 P.2d 470, 477 (Cal. 1988) (holding that comment k applies to all prescription drugs); Johnson v. American Cyanamid Co., 718 P.2d 1318, 1323 (Kan. 1986) (holding that sabin polio vaccine is unavoidably unsafe as matter of law).

n36. See Peggy J. Naile, Tort Liability for DTP Vaccine Injury and the Preemption Doctrine, 22 Ind. L. Rev. 655, 682 (1989) (stating that state-mandated vaccination removes choice element); Fay F. Spence, Alternatives to Manufacturers Liability for Injuries Caused By the Sabin-Type Oral Polio Vaccines, 28 Wm. & Mary L. Rev. 711, 734 (1986) (arguing that inadequate warning cannot constitute proximate cause of vaccine injury).

n37. See Spence, supra note 36, at 732 (arguing that mandatory vaccination makes adequacy of warning irrelevant).

n38. See 1986 House Report, supra note 1, at 6, reprinted in 1986 U.S.C.C.A.N. at 6347 (stating that lawsuits can take years to complete); Childhood Immunizations, supra note 21, at 87 (reporting results of manufacturer survey showing that of 299 claims filed between 1980 and 1985, 72% were still pending in 1985).

n39. See 42 U.S.C. 300aa-13(a)(1)(A)-(B) (1988) (directing that petitioner shall receive compensation if petitioner proves causation and Secretary of Health and Human Services fails to prove that unrelated factors caused injury); see also 1986 House Report, supra note 1, at 3, reprinted in 1986 U.S.C.C.A.N. at 6344 (referring to Vaccine Act as "no-fault" compensation system).

n40. See 42 U.S.C. 300aa-11(a)(2)(A) (1988 & Supp. V 1993) (explaining that petitioners may not bring civil action in state or federal court if seeking more than $ 1000 in damages unless petitioner has filed petition pursuant to Vaccine Act).

n41. See id. 300aa-21(a)(1)-(2) (1988) (stating that following entry of judgment, petitioner shall file election within 90 days either accepting or rejecting judgment).

n42. Ct. Cl. R. App. J., Rule 7 ("There shall be no discovery as a matter of right. The informal and cooperative exchange of information is the ordinary and preferred practice.").

n43. 42 U.S.C. 300aa-12(b)(1) (1988 & Supp. V 1993).

n44. See id. 300aa-12(d)(3)(A) (Supp. V 1993) (instructing special master to issue decision as to whether petitioner is entitled to compensation).

n45. See id. 300aa-12(d)(2)(A)-(E) (recommending that Court of Federal Claims provide for less rigid rules). The Vaccine Act specifically directs the Court of Federal Claims to promulgate rules that "provide for a less-adversarial, expeditious, and informal proceeding for the resolution of petitions." Id. 300aa-12(d)(2)(A).

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n46. See id. 300aa-14 (1988 & Supp. V 1993) (providing table of presumed causation for DTP, polio, and MMR vaccines).

n47. Id. 300aa-13(a)(1)(A) (1988).

n48. Id. 300aa-11(c)(1)(C)(ii)(I).

n49. Id. 300aa-13(a)(1)(A); see McClendon v. Secretary of Dep't of Health & Human Servs., 23 Cl. Ct. 191, 195-96 (1991) (holding that burden of proof required is preponderance of evidence rather than scientific certainty).

n50. See 42 U.S.C. 300aa-13(a)(1)(B). The Code states that illnesses or injuries not previously known to have a relation to the vaccine that are nonetheless proven to arise out of the administration of the vaccine do not fall into the category of "factors unrelated to the administration of the vaccine." Id. 300aa-13(a)(2)(A)-(B).

n51. See id. 300aa-21(a)(1)-(2).

n52. See id. 300aa-22(b)-(c) (granting comment k immunity to all vaccines, creating presumption of adequacy in all warnings that comply with FDA standards, and banning liability for direct failure to warn).

n53. See id. 300aa-22(b)(1).

n54. See id. 300aa-22(b)(2) (declaring that compliance with requirement of Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301-392 (1988 & Supp. V 1993), and Public Health Service Act, 42 U.S.C. 262 (1988), creates presumption of adequate warning).

n55. See id. 300aa-22(b)(2)(A), -23(d)(2)(A)-(C).

n56. See id. 300aa-22(c).

n57. See id. 300aa-22(e).

n58. See id. 300aa-25 to -28 (1988 & Supp. V 1993) (requiring physicians to record information related to administration of vaccine; requiring Secretary to write vaccine information materials for distribution by physicians; and requiring manufacturers to keep detailed records of manufacturing process).

n59. See id. 300aa-25(b)(1)(A)-(C) (1988).

n60. Id.

n61. See id. 300aa-26(a) (1988 & Supp. V 1993) (giving Secretary one year from promulgation of Act to develop and distribute materials).

n62. Id. 300aa-26(c) (Supp. V 1993).

N63. See id. 300aa-26(d) (1988 & Supp. V 1993).

n64. See id. 300aa-28(a)(1)-(4) (1988).

n65. Id. 300aa-28(a)(1).

n66. See id. 300aa-28(a)(2) (requiring report of any suspicious test results that might indicate potential safety hazard).

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n67. See id. 300aa-28(b)(1)-(2) (stating that manufacturer would be subject to civil penalty of $ 100,000, criminal fine of $ 50,000, or one year imprisonment).

n68. See supra note 56 and accompanying text (stating that vaccine manufacturer shall not be liable for claims arising solely out of manufacturer's lack of direct warning to injured vaccine recipient).

n69. Givens v. Lederle, 556 F.2d 1341, 1345 (5th Cir. 1977). The court in Givens held that the learned intermediary doctrine did not apply when a private physician administered a vaccine in a private setting because the setting resembled a clinic situation similar to that in Reyes. See also Reyes v. Wyeth Lab., 498 F.2d 1264, 1277 (5th Cir.) (following "mass vaccine" clinic exception to learned intermediary doctrine enunciated in Davis), cert. denied, 419 U.S. 1096 (1974); Davis v. Wyeth Lab., 399 F.2d 121, 131 (9th Cir. 1968) (holding that manufacturer must provide direct warning where vaccine is administered at mass clinic). But see Walker v. Merck & Co., 648 F. Supp. 931, 934 (M.D. Ga. 1986), aff'd, 831 F.2d 1069 (11th Cir. 1987) (limiting Fifth and Ninth Circuits' mass vaccine exceptions to polio cases); Johnson v. American Cyanamid Co., 718 P.2d 1318, 1324 (Kan. 1986) (applying learned intermediary doctrine solely because physician administered vaccine). Some commentators have argued that, given the courts' narrow reading of Davis and its progeny, the Vaccine Act's elimination of direct warning duty does not significantly alter products liability landscape. See Okianer C. Dark, Is the **National Childhood Vaccine Injury Act** of 1986 the Solution for the DTP Controversy?, 19 U. Tol. L. Rev. 799, 857 (1988) (arguing that plaintiffs may still have cause of action against manufacturer through such claims as negligent preparation, improper design, or failure to warn physician under strict liability standard).

n70. See Susan A. Casey, Laying an Old Doctrine to Rest: Challenging the Wisdom of the Learned Intermediary Doctrine, 19 Wm. Mitchell L. Rev. 931, 957 (1993) (asserting that learned intermediary doctrine overestimates physicians' willingness to serve as conduit between manufacturers and patients); Alan R. Styles, Prescription Drugs and the Duty to Warn: An Argument for Patient Package Inserts, 39 Clev. St. L. Rev. 111, 123 (1991) (arguing that under learned intermediary doctrine, doctors are not always willing to perform individualized risk assessments).

n71. See infra notes 152-57 and accompanying text (arguing that informational and reporting requirements both permit vaccinee to actively participate in risk-benefit analysis and reduce physician discretion in decision to utilize vaccine).

n72. See 1986 House Report, supra note 1, at 7, reprinted in 1986 U.S.C.C.A.N. at 6345 (stating that concerns propelling legislation are inadequacy of civil tort system as compensation mechanism and instability of vaccine market).

n73. See infra notes 334-35 and accompanying text (asserting that Act seeks to insulate manufacturer from liability as well as establish pro-plaintiff compensation system).

n74. See infra notes 331-32 and accompanying text (proposing combining federal reporting regulations with state common law-based direct warning rule).

n75. See Dark, supra note 69, at 848-49 (stating that Vaccine Act removes mass vaccine exception to learned intermediary doctrine); Theodore H. Davis & Catherine B. Bowman, No-Fault Compensation for Unavoidable Injuries: Evaluating the National Childhood Vaccine Injury Compensation Program, 16 U. Dayton L. Rev. 277, 304 (1991) (arguing that Act abrogates direct warning causes of action previously permitted under Davis and its progeny); Mary Beth Neraas, The **National Childhood Vaccine Injury Act** of 1986: A Solution to the Vaccine Liability Crisis?, 63 Wash. L. Rev. 149, 158 (1988) (stating that Act removes manufacturers' duty to warn ultimate users directly).

n76. See Sterling Drug v. Cornish, 370 F.2d 82, 85 (8th Cir. 1966) (labelling consumer's doctor as "learned intermediary" between manufacturer and consumer).

n77. See Reyes v. Wyeth Lab., 498 F.2d 1264, 1276 (5th Cir.) (stating that manufacturers of prescription drugs must only warn prescribing physicians), cert. denied, 419 U.S. 1096 (1974); Davis v. Wyeth Lab., 399 F.2d 121, 129 (9th Cir. 1968) (describing customary rule that manufacturer has duty only to warn physician prescribing drug); Dunkin v. Syntex Lab., 443 F. Supp. 121, 123 (W.D. Tenn. 1977) (stating that Tennessee law only requires prescription drug manufacturer to warn prescribing physician adequately); Buckner v. Allergan Pharmaceuticals, 400 So. 2d 820, 822 (Fla. Dist. Ct. App. 1981) (holding that manufacturer's duty to warn of drug's potential dangers is fulfilled by adequate warning to prescribing doctor); Seley v. G.D. Searle & Co., 423 N.E.2d 831, 839 (Ohio 1981) (arguing that position of physician as learned intermediary removes manufacturers' duty to warn ultimate consumers of prescription drugs directly).

n78. See Restatement (Second) of Torts, supra note 17, 388 (requiring manufacturers of potentially dangerous products to warn foreseeable ultimate users).

n79. See Spence, supra note 36, at 728 (identifying manufacturers' difficulty in providing direct warnings to users and insufficient patient knowledge as policy considerations supporting learned intermediary doctrine). Circuit Judge Wisdom, in Reyes v. Wyeth Laboratories, provided a persuasive justification for the learned intermediary doctrine:

Prescription drugs are likely to be complex medicines, esoteric in formula and varied in effect. As a medical expert, the prescribing physician can take into account the propensities of the drug, as well as the susceptibilities of his patient. His is the task of weighing the benefits of any medication against its potential dangers. The choice he makes is an informed one, an individualized medical judgment bottomed on a knowledge of both patient and palliative. Pharmaceutical companies then, who must warn ultimate purchasers of dangers inherent in patent drugs sold over the counter, in selling prescription drugs are required to warn only the prescribing physician, who acts as a "learned intermediary" between the manufacturer and consumer.

Reyes, 498 F.2d at 1276.

n80. See Reyes, 498 F.2d at 1276.

n81. Id.; see also Barbara Pope Flannagan, Products Liability: The Continued Viability of the Learned Intermediary Rule as it Applies to Product Warnings for Prescription Drugs, 20 U. Rich. L. Rev. 405, 413 (1986) (arguing that physician is only individual possessing knowledge of both patient and drug).

n82. Reyes, 489 F.2d at 1276; see Flannagan, supra note 81, at 413 ("The physician's knowledge of the patient and the drug are taken into account when the physician makes a medical judgment as to the appropriate course of treatment for a particular patient.").

n83. See Davis v. Wyeth Lab., 399 F.2d 121, 129 (9th Cir. 1968) (arguing that due to medical nature of warning, it is difficult to adequately warn lay consumer); Flannagan, supra note 81, at 413 (arguing that direct manufacturer warnings might mislead patient).

n84. See Dunkin v. Syntex Lab., 443 F. Supp. 121, 123 (W.D. Tenn. 1977) (stating that direct manufacturer warning may interfere with doctor-patient relationship); McKee v. American Home Prods. Corp., 782 P.2d 1045, 1055 (Wash. 1989) (en banc) (arguing that

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package inserts may confuse and frighten patients); Casey, supra note 70, at 948 (arguing that patient may fear discussing package insert with physician and decide to avoid medical treatment); Walter J. Curran, Package Inserts for Patients: Informed Consent in the 1980s, 305 New Eng. J. Med. 1564, 1566 (1981) (suggesting that package inserts may lead patients to question physician's prescription and reject therapy altogether).

n85. Flannagan, supra note 81, at 413 (discussing practical difficulties of direct warnings).

n86. Flannagan, supra note 81, at 413 (suggesting that physician can both answer patient questions and gauge whether patients fully understand nature of treatment).

n87. Casey, supra note 70, at 948 (stating that direct contact between manufacturer and patient is rare); Spence, supra note 36, at 728 (citing fact that patients receive prescription drugs through physician as reason for learned intermediary doctrine).

n88. Casey, supra note 70, at 948.

n89. See Seley v. G.D. Searle & Co., 423 N.E.2d 831, 840 (Ohio 1981) ("The patient is expected to place primary reliance upon the physician's judgment, and to follow his advice and instructions as to use of the drug.").

n90. See Casey, supra note 70, at 939-45 (citing mass vaccines, oral contraceptives, and intrauterine devices as products to which learned intermediary doctrine does not apply) (citing Davis v. Wyeth Lab., 399 F.2d 121, 131 (9th Cir. 1968) (holding that manufacturer must provide direct warning in mass immunization clinic context); Odgers v. Ortho Pharmaceutical Corp., 609 F. Supp. 867, 878 (E.D. Mich. 1985) (requiring oral contraceptive manufacturers to give user direct warning)).

n91. 399 F.2d 121, 131 (9th Cir. 1968).

n92. See Davis, 399 F.2d at 124.

n93. See id. at 122.

n94. See id. at 125 (stating that warnings to medical society were in package insert provided in every bottle of 100 doses).

n95. See id.

n96. See id. at 130 (stating that directly warning physician is only effective means by which warning would benefit patient).

n97. Id.

n98. Id.

n99. Id. at 131; see also Reyes v. Wyeth Lab., 498 F.2d 1264, 1277 (5th Cir.) (referring to "assembly line" nature of mass immunization clinics), cert. denied, 419 U.S. 1096 (1974).

n100. Davis, 399 F.2d at 131. Building on the Ninth Circuit's rationale, the Fifth Circuit later expanded the mass vaccine clinic exception to the learned intermediary doctrine. See Givens v. Lederle, 556 F.2d 1341, 1345 (5th Cir. 1977). Whereas the court in Davis imposed a structural distinction between mass clinics and private physicians, the Fifth Circuit in Givens evaluated the nature of the private-physician scenario and determined that the dispensation of vaccinations in the private physician scenario is more analogous to a visit to a mass clinic than a visit to a private physician's office, despite the presence of a physician. Id. (finding that administration of vaccine, although supervised by physician, resembled county health

clinic setting).

n101. Davis, 399 F.2d at 131.

n102. Id.

n103. Id.

n104. Id.

n105. Id.

n106. Id.

n107. See Childhood Immunizations, supra note 21, at 60 (stating that 50% of vaccines are administered through public sector programs); see also Reyes v. Wyeth Lab., 498 F.2d 1264, 1277 (5th Cir.) (discussing public health professor's testimony that majority of sabin polio vaccines are administered in mass vaccination clinics), cert. denied, 419 U.S. 1096 (1974).

n108. See supra notes 91-106 (discussing mass vaccine clinic exception to learned intermediary doctrine).

n109. Reyes, 498 F.2d at 1276 (validating learned intermediary doctrine on basis that physician can perform informed risk assessment by applying knowledge of both drug and patient's medical history).

n110. Casey, supra note 70, at 957 (questioning willingness and ability of physicians to serve as learned intermediaries); Styles, supra note 70, at 123 (arguing that physicians are not always willing to inform patients of prescription drug's risks).

n111. Styles, supra note 70, at 128-29 (stating that customary practice standard for informed consent requires physicians to warn patients only when medical community deems disclosure necessary); Gerald F. Tietz, Informed Consent in the Prescription Drug Context: The Special Case, 61 Wash. L. Rev. 367, 368 (1986) (arguing that informed consent doctrine does not adequately protect patients who receive prescription drugs).

n112. See Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir.) (stating basic premise that "every human being of adult years has a right to determine what shall be done with his own body"), cert. denied, 409 U.S. 1064 (1972); Marjorie Maguire Shultz, From Informed Consent to Patient Choice: A New Protected Interest, 95 Yale L.J. 219, 226-27 (1985) (arguing that doctor's responsibility for patient's well-being requires doctor to provide patient with sufficient information to allow patient to make intelligent, informed decision); Styles, supra note 70, at 113 (stating that informed consent doctrine obligates doctors to warn of proposed therapy's risks).

n113. See, e.g., Watkins v. United States, 482 F. Supp. 1006, 1013 (M.D. Tenn. 1980) (holding that physician was not required to warn patient of dermatological drug's side effects when giving such warnings was not common practice of medical community); Finley v. United States, 314 F. Supp. 905, 915 (N.D. Ohio 1970) (finding physician was not negligent because of lack of expert opinion that warning should have been given); Styles, supra note 70, at 128-29 (explaining that customary practice standard is determined by customs of medical profession itself, and is therefore not absolute); Tietz, supra note 111, at 309 (stating that medical customary practice standard is based on medical community customs rather than patients' expectations).

Some jurisdictions, recognizing that the customary practice standard is determined by physicians, have developed a more patient-oriented measure of informed consent. See

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Canterbury, 464 F.2d at 784 (defining scope of duty to warn as "when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy"). But see Styles, supra note 70, at 129 (stating that although Canterbury standard still governs in many jurisdictions, courts have not applied patient-oriented reasonableness test to prescription pharmaceutical cases).

n114. Watkins, 482 F. Supp. at 1013 (requiring informed consent only where such consent is standard practice in medical community); Finley, 314 F. Supp. at 915 (citing lack of evidence of community warning practice as reason for dismissal of failure to warn claim).

n115. See Styles, supra note 70, at 128-29 (explaining that physician's duty to warn only goes so far as local medical community deems appropriate). For an argument suggesting a stricter informed consent standard, see Canterbury, 464 F.2d at 274 (arguing that informed consent requires standard governing physicians rather than standard governed by physicians).

n116. Styles, supra note 70, at 130; see also Casey, supra note 70, at 948 (observing that patient may become intimidated by potential consequences or confused by medical terminology and consequently reject treatment).

n117. 819 F.2d 349 (2d Cir. 1987).

n118. See Plummer v. Lederle Lab., 819 F.2d 349, 352 (2d Cir. 1987).

n119. See id. (relating warning estimating one in six million chance of contracting contact polio).

n120. Id.

n121. See Casey, supra note 70, at 957 (arguing that physicians are not prepared to serve as learned intermediaries); Tietz, supra note 111, at 367 (arguing that doctors do not inform patients of important information about risks of serious side effects of prescription drug use) (citing J. Katz, The Silent World of Doctor and Patient 83 (1984)).

n122. See Casey, supra note 70, at 957-58 (arguing that medical community's ability and willingness to act as learned intermediary is overstated and that measuring scope of duty to warn by standard of practice of community affords, at best, only limited knowledge of risks associated with treatment).

n123. Id.

n124. See H.R. Rep. No. 1063, 98th Cong., 2d Sess. 2 (1984) (urging creation of permanent system to deliver comprehensive immunization services), reprinted in 1984 U.S.C.C.A.N. 4804, 4805.

n125. See Childhood Immunizations, supra note 21, at 103.

n126. See James M. Burke, DTP Controversy: An Assessment of the Liabilities of Manufacturers and Administering Physicians Under Several Legal Theories, 17 Seton Hall L. Rev. 541, 591-92 (1987) (advocating that manufacturers respond to doctors' lack of objectivity with "Dear Doctor" letters, pamphlets, and other advertisements); Casey, supra note 70, at 957-58 (arguing that initially adequate warnings may become insufficient when physician makes per se determination of drug's value). Graham v. Wyeth Lab., 666 F. Supp. 1483, 1487 (D. Kan. 1987), provides an illustration of the overpromotion phenomena. The plaintiff parents were provided with information prepared by the Missouri Department of Health describing the risks of the whole-cell vaccine, prior to their child receiving the DTP

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vaccination. Upon being asked questions about the side effects of the vaccine, however, a nurse responded that the warnings were "just statistics" and that the adverse reactions "didn't really happen." Id. The plaintiff infant daughter sustained severe and irreversible brain damage. Id. at 1485.

n127. See Burke, supra note 126, at 591-92 (stating that pro-vaccine environment creates false perception of utility of vaccines); Casey, supra note 70, at 957-58 (arguing that overpromotion leads to manufacturers' disregard for warnings).

n128. See, e.g., Salmon v. Parke, Davis & Co., 520 F.2d 1359, 1362 (4th Cir. 1975) (holding that manufacturer who knowingly ignores that warning is being disregarded may be liable for failure to warn); Incollingo v. Ewing, 282 A.2d 206, 222 (Pa. 1971) (holding that manufacturer with knowledge that learned intermediaries are ignoring otherwise valid warnings may be liable for failure to warn); Burke, supra note 126, at 592 (arguing that manufacturers ignoring environment in which their products are distributed may be liable for failure to warn under learned intermediary doctrine).

n129. 282 A.2d 206 (Pa. 1971).

n130. Incollingo v. Ewing, 282 A.2d 206, 222 (Pa. 1971).

n131. See id.

n132. See id.

n133. Id.

n134. See id.; Burke, supra note 126, at 592 (arguing that charging manufacturers with knowledge of environment will help restore objectivity of physician warnings).

n135. See Burke, supra note 126, at 592 (asserting that manufacturers have duty to "neutralize the effect of overpromotion" by using any available means, including advertisements, pamphlets, and even "Dear Doctor" letters).

n136. See 42 U.S.C. 300aa-22(a)-(c) (1988) (discussing standards of responsibility with regard to warnings).

n137. See Casey, supra note 70, at 958 (arguing that patients are not as susceptible to overpromotion as physicians are because manufacturers of prescription drugs do not generally market to patients).

n138. Burke, supra note 126, at 592.

n139. 42 U.S.C. 300aa-22(b)(2).

n140. See Incollingo v. Ewing, 282 A.2d 206, 222 (Pa. 1971) (holding drug manufacturer responsible for restricting drug use to "proper situations" where manufacturer knew or should have known of widespread misuse). The adequacy presumption created by the Vaccine Act is not easily rebutted. In order to rebut the presumption, plaintiffs must show that the manufacturer participated in a fraudulent, intentional, or wrongful withholding of information from the Secretary, or prove by clear and convincing evidence that the manufacturer did not exercise due care. Id.

n141. See Spence, supra note 36, at 732 (discussing argument that state vaccination laws, which require vaccinations prior to matriculation, remove choice element and therefore prevent vaccine from being proximate cause of vaccinee's injury).

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alterations to the civil tort system, codified by Congress in the Vaccine Act, will provide guidance for future legislative reforms in the area of product liability.

Part I explores the vaccine crisis that inspired Congress to reform vaccine litigation. Part II describes the Vaccine Act. Part III considers the Vaccine Act's adoption of the learned intermediary doctrine. Part IV analyzes the Vaccine Act's presumption that warnings complying with FDA standards are adequate and confronts the larger question of the proper relationship between federal regulations and state common law. Part V discusses the Vaccine Act's blanket application of comment k to all vaccines.

Following the evaluation of Congress' alteration of state tort law, Part VI offers a series of conclusions and recommendations for future legislative action. First, the Vaccine Act's elimination of a plaintiff's cause of action under a failure-to-warn tort theory represents a prudent compromise between the dual interests of reducing manufacturer liability and maintaining vaccine safety. Second, the presumption of warning adequacy in the Vaccine Act allows manufacturers to **[*1858]** disregard knowledge of vaccine inadequacies so long as the vaccine warning complies with FDA standards. To remedy this deficiency, Congress should require manufacturers with knowledge of warning deficiencies to seek FDA permission to modify their warnings even though existing warnings meet FDA standards. Third, Congress' blanket application of comment k immunity to all vaccines ignores research indicating that manufacturers may currently possess the scientific knowledge to produce safer, alternative vaccines. Congress therefore should amend the Vaccine Act by incorporating a risk-benefit analysis prior to awarding "unavoidably unsafe" status to a vaccine.

I. The Vaccine Crisis

In response to fears that the civil tort system had destabilized the vaccine market, Congress reexamined vaccine liability issues in the early 1980s. [21] In addition to concerns about the availability of vaccines, Congress received pressure from pro-plaintiff groups complaining about the civil tort system's inequities. [22] These dual concerns led Congress to the conclusion that American vaccine policy was in a state of crisis and required a systemic overhaul. [23]

A. Instability of the Vaccine Market

Several related incidents brought to light the instability of the American vaccine market. Fearful that the $ 3.5 billion in damages sought by vaccine injury victims between 1980 and 1984 presaged major financial exposure, [24] six manufacturers ceased production of vaccines. [25] Whereas at one time eight private pharmaceutical companies produced the diphtheria-tetanus-pertussis (DTP) vaccine, only two, Lederle and Connaught, continued to manufacture the DTP vaccine in 1986. [26] Similarly, by 1986, Lederle and Connaught were **[*1859]** the only manufacturers of polio vaccines. [27] The majority of vaccine manufacturers left the market citing the unavailability of product liability insurance. [28]

The decrease in the number of vaccine manufacturers resulted in a concomitant decline in the national vaccine stockpile. [29] In 1986, the vaccine stockpile had fallen below the Center for Disease Control's recommended six-month reserve supply. [30] Those manufacturers remaining in the vaccine market greatly increased their prices. [31] For example, a dose of the measles, mumps, and rubella (MMR) vaccine increased in cost from $ 2.71 in 1980 to $ 8.47 in 1986. [32] Congress therefore feared an actual vaccine shortage and the possible reemergence of formerly contained deadly diseases. [33]

B. The Inability of the Civil Tort System to Provide Adequate Compensation for Vaccine-Related Injuries

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n142. See Spence, supra note 36, at 732-34.

n143. Spence, supra note 36, at 732-34.

n144. See Casey, supra note 70, at 959 (explaining that patient plays important role in monitoring signs and symptoms of adverse reactions after use of drug); Tietz, supra note 111, at 389 (arguing that patient plays important role in monitoring adverse reactions to prescription drugs).

n145. Tietz, supra note 111, at 389.

n146. See Tietz, supra note 111, at 389 (asserting that prescription drug therapy requires continuous monitoring depending on patient's awareness of side effects and their symptoms in order to avoid time lag between ingestion of drug and side effect); see also Casey, supra note 70, at 359 (suggesting that doctor's role in detecting signs of adverse reactions ceases once patient leaves doctor's office).

n147. See Tietz, supra note 111, at 389 (highlighting patient awareness of potential side effects as crucial in order for drug therapy monitoring process to be effective, thereby requiring patient to be "coparticipant" in process).

n148. See Tietz, supra note 111, at 389 (noting that patient compliance with prescription drug therapy improves when patient is informed directly, rather than if physician treats patient as inactive participant).

n149. See 42 U.S.C. 300aa-26(a)-(d) (1988 & Supp. V 1993).

n150. Id. 300aa-26(c)(1)-(4).

n151. See id. 300aa-26(d)(2) (1988) (requiring physician to provide vaccine information material prior to administration of vaccine).

n152. See id. 300aa-26(a) (1988 & Supp. V 1993) (mandating dissemination of vaccine information by health care providers to legal representatives or vaccinees). The very nature of the information that the Secretary must include in the vaccine information - benefits, risks, and compensation for injuries - offers the vaccinee the opportunity to consider for herself the benefits and risks of vaccination.

n153. See supra note 84 and accompanying text.

n154. See Styles, supra note 70, at 128-29 (discussing customary practice standard of informed consent). Under the community practice standard, a physician, as a learned intermediary, is only required to communicate to the patient information that is deemed necessary by the medical community. Id. The Vaccine Act replaces the judgment of the medical community with the judgment of the Secretary of the Department of Health and Human Services (HHS). Id.; see also 42 U.S.C. 300aa-26(a) (1988) (requiring HHS Secretary to develop vaccine information). The Act, however, may still rely on physician discretion to the extent that it requires doctors to supplement the vaccine information with oral explanations in "appropriate cases" without specifying who is to make this determination. Id. 300aa-26(d) (Supp. V 1993). Given the Act's silence as to the meaning of "appropriate cases," id., physicians providing supplementary vaccine information may still be governed by the community practice standard. This result is no different than if Congress had required manufacturers to provide direct warnings to physicians. In both cases, the vaccinee has a finite amount of written information upon which the physician may or may not add his or her medical knowledge. This scenario is at least an improvement over a learned intermediary doctrine without a regulatory imposition of patient warnings.

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n155. See 42 U.S.C. 300aa-25(b)(1)(A)-(C) (1988) (detailing recording requirements for health care providers and manufacturers). The recording mandate requires that health care providers and manufacturers report to the Secretary the following information:

(A) the occurrence of any event set forth in the Vaccine Injury Table, including the events set forth in section 300-14(b) of this title which occur within 7 days of the administration of any vaccines set forth in the Table or within such longer period as is specified in the table or section, (B) the occurrence of any contraindicating reaction to a vaccine which is specified in the manufacturer's package insert, and (C) such other matters as the Secretary may by regulation require.

Id.

n156. Compare id. (setting out reporting requirements for health care providers and manufacturers) with Incollingo v. Ewing, 282 A.2d 206, 222 (Pa. 1971) (charging manufacturer with knowledge of environment in which drugs are distributed). The Vaccine Act approaches the problem of environmental overpromotion in a different manner than the court in Incollingo, which suggested that manufacturers be required to evaluate the state of mind of physicians receiving their warnings. Incollingo, 282 A.2d at 222. The Vaccine Act requires physicians to report directly certain contraindicating events. 42 U.S.C. 300aa-25(b)(1)(A)-(C).

n157. 42 U.S.C. 300aa-25(b)(1)(A)-(B).

n158. See, e.g., Food, Drug, and Cosmetic Act, 21 U.S.C. 351-392 (1988 & Supp. V 1993) (setting forth various policies regarding, inter alia, representation, revocation, certification, and required recording and reporting of information concerning various drugs); Public Health Service Act, 42 U.S.C. 241-289 (1988) (enumerating general powers and duties of Public Health Service, and establishing and specifying role and function of various medical institutions, services, and systems); Jennie Clarke, Federal Preemption: A Vaccine Manufacturer's Defense, 56 UMKC L. Rev. 515, 525-28 (1988) (documenting growth of federal involvement in vaccine regulation throughout 20th century).

n159. See Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (holding that Congress may preempt state law by explicitly announcing its intention in language of statute); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (concluding that scheme of federal regulation may be so highly pervasive as to allow reasonable inference that Congress intended to leave no room for States to supplement it).

n160. 42 U.S.C. 300aa-22(e) (1988).

n161. Id. 300aa-22(b)(2).

n162. Id. 300aa-22(c).

n163. Cf. Naile, supra note 36, at 689 (noting that all aspects of vaccine design, manufacturing, and labelling are overseen by FDA).

n164. See Richard C. Ausness, Federal Preemption of State Product Liability Doctrines, 44 S.C. L. Rev. 187, 276-77 (1993) (arguing that FDA only responds to warnings submitted by manufacturers and therefore may not be approving safest possible warnings).

n165. See U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States

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which shall be made in pursuance thereof ... shall be the supreme Law of the Land."); see also Ausness, supra note 164, at 191 (stating that Supremacy Clause is basis for preemption doctrine); Naile, supra note 36, at 683 (stating that Supremacy Clause gives Congress power to override state law).

n166. See Clarke, supra note 158, at 539; Benjamin W. Heineman, Jr. & Carter G. Phillips, Federal Preemption: A Comment on Regulatory Preemption After Hillsborough County, 18 Urb. 589, 591 n.10 (1986).

n167. See Ausness, supra note 164, at 191.

n168. See Ausness, supra note 164, at 191 (explaining that state common law, as well as state legislation, is preempted by federal law); Clarke, supra note 158, at 531 (stating that both statutory and regulatory preemption override laws promulgated by state legislatures and state courts); see also Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (stating that "federal regulations have no less preemptive effect than federal statutes"); Clarke, supra note 158, at 530 (noting that courts have used same principles in finding both statutory and regulatory preemption).

n169. See, e.g., Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (stating that preemption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose"); City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 633 (1973) (holding that federal law may expressly or impliedly preempt state law); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (holding that federal law may preempt state law either explicitly or implicitly).

n170. Jones, 430 U.S. at 525.

n171. See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983) (holding that dominant nature of federal interest will create presumption that state enforcement of law on same subject is prohibited); Fidelity Fed. Sav. & Loan Ass'n, 458 U.S. at 153 (finding implied preemption where federal regulation is so pervasive that it gives rise to inference that Congress completely occupied field).

n172. See Fidelity Fed. Sav. & Loan Ass'n, 458 U.S. at 153 (holding that conflict results in nullification of state law to extent of conflict with federal law).

n173. See Ausness, supra note 164, at 196-97.

n174. See Fidelity Fed. Sav. & Loan Ass'n, 458 U.S. at 153; Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963).

n175. See Fidelity Fed. Sav. & Loan Ass'n, 458 U.S. at 153; Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

n176. See Barbara L. Atwell, Products Liability and Preemption: A Judicial Framework, 39 Buff. L. Rev. 181, 186 (1991); see also International Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987) (finding that dumping claims under state law interfered with federal method of compliance with Clean Water Act).

n177. See Goldstein v. California, 412 U.S. 546, 554 (1973) (explaining importance of distinguishing between "possible" and "necessary" conflicts); Atwell, supra note 176, at 186 (arguing that actual conflict must exist to trigger conflict preemption doctrine).

n178. Goldstein, 412 U.S. at 555 (1973) (holding that only necessary conflict warrants overriding state law).

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n179. See Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (""We start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress'" (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).

n180. Id. (citing need to achieve balance between federal and state rights); see also United States v. Bass, 404 U.S. 336, 349 (1971) (stating that absent clear intent from Congress, Court will be reluctant to impose balance between federal and state rights).

n181. Atwell, supra note 176, at 188; see also Hillsborough County v. Automated Medical Lab., 471 U.S. 707, 716 (1985) (explaining presumption of peaceful coexistence between state and federal health and safety regulations).

n182. See, e.g., Hurley v. Lederle Lab., 651 F. Supp. 993, 999 (E.D. Tex. 1986) (stating that comprehensiveness of federal regulation demonstrates implied congressional intent to preempt state tort law), rev'd on other grounds, 863 F.2d 1173 (5th Cir. 1988); Naile, supra note 36, at 689 (arguing that comprehensiveness of federal regulations leaves no room for state tort law).

n183. For a comprehensive overview of FDA vaccine regulation, see Clarke, supra note 158, at 525-29.

n184. Pub. L. No. 57-274, 32 Stat. 728 (1902) (codified at 42 U.S.C. 141-143 (1988)); see Clarke, supra note 158, at 525 (describing allocation of regulatory responses during 20th century).

n185. Clarke, supra note 158, at 525 (noting that Congress passed 1902 Act following deaths of 12 children resulting from tetanus contamination from diphtheria and tetanus vaccine).

n186. See Clarke, supra note 158, at 525. In 1944, Congress passed the Public Health Service Act (PHSA). Pub. L. No. 78-410, 58 Stat. 682, 702 (1994) (codified at 42 U.S.C. 262 (1988)). The PHSA incorporated the Virus, Serum, Toxin Act and transferred regulatory responsibilities to the Federal Security Agency. Clarke, supra note 158, at 525. The Division of Biologics Standards (DBS), a subsidiary of the National Institutes of Health, assumed regulatory authority in 1955. Id. In 1972, DBS evolved into the FDA's Bureau of Biologics. Id. at 525-26.

n187. See supra notes 163-81 and accompanying text (discussing Federal Government's role in 20th century vaccine regulation).

n188. Clarke, supra note 158, at 526 (explaining that FDA's Office of Biologics Research and Review and the Bureau of Drugs together form the Center for Drugs and Biologics).

n189. 21 U.S.C. 301-392 (1988 & Supp. V 1993).

n190. 21 U.S.C. 371 (1988) (granting Secretary regulatory power).

n191. 50 Fed. Reg. 7452 (1985) (explaining FDA's attempt to rewrite revision in order to expedite approval process for beneficial drugs).

n192. Id. (describing protective role played by FDA).

n193. Clarke, supra note 158, at 527.

n194. See 21 C.F.R. 601.1 (1994) (requiring both establishment and product license).

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n195. Id.

n196. See id. 601.2 (requiring manufacturer to submit "data derived from nonclinical laboratory and clinical studies which demonstrate that the manufactured product meets prescribed standards of safety, purity, and potency").

n197. See id. 211.25 (requiring that all persons involved in manufacturing process have education, training, and experience necessary to carry out assignment).

n198. See id. 600.10 (allowing only designated individuals into vaccine-processing area).

n199. See id. 620.1 to .6 (providing requirements for propagation of bacteria, bacterial content, detoxification, potency tests, toxicity tests, dosage, and labelling).

n200. See id. 620.4 (prescribing laboratory test using mice as samples); see also Taber's Cyclopedic Medical Dictionary 1359 (16th ed. 1985) (defining potency as "strength of medicine").

n201. See 21 C.F.R. 620.5 (requiring toxicity test using mice as samples); see also Taber's Cyclopedic Medical Dictionary, supra note 200, at 1883 (defining toxicity as "the extent, quality, or degree of being poisonous").

n202. 21 C.F.R. 610.2 (stating that "a manufacturer shall not distribute a lot of a product until the lot is released by the Director").

n203. See, e.g., id. 610.60 to .65 (describing labelling requirements for DTP vaccine).

n204. Id.

n205. Id. 601.12.

n206. Id.; Clarke, supra note 158, at 529.

n207. Clarke, supra note 158, at 529; see also 21 C.F.R. 601.5(b)(3) (stating that FDA will revoke manufacturer's license and hold agency hearing for noncompliance if manufacturer fails to report labelling changes).

n208. See 50 Fed. Reg. 51,402 (1985) (naming uniformity as goal of regulation).

n209. 44 Fed. Reg. 37,442 (1979) (limiting relevant pharmacological information to that which is of significant, normal, and practical clinical applicability).

n210. 21 C.F.R. 201.56(c) (requiring that manufacturers base warnings on "data derived from human experience" and not on claims where there is inadequate evidence). The regulations further mandate that conclusions based on animal data shall be identified as such. Id.

n211. See Hurley v. Lederle Lab., 863 F.2d 1173, 1176 (5th Cir. 1988) (collecting federal and state decisions rejecting preemption claims); Knudsen v. United States, 691 F. Supp. 1346 (M.D. Fla. 1987); Foyle v. Lederle Lab., 674 F. Supp. 530 (E.D.N.C. 1987); Martinkovic v. Wyeth Lab., 669 F. Supp. 212 (N.D. Ill. 1987); Morris v. Parke, Davis & Co., 667 F. Supp. 1332 (C.D. Cal. 1987); MacGillivray v. Lederle Lab., 667 F. Supp. 743 (D.N.M. 1987); Graham v. Wyeth Lab., 666 F. Supp. 1483 (D. Kan. 1987), cert. denied, 498 U.S. 981 (1990); Wack v. Lederle Lab., 666 F. Supp. 123 (N.D. Ohio 1987); Patten v. Lederle Lab., 655 F. Supp. 745 (D. Utah 1987).

n212. 844 F.2d 1108 (4th Cir.), cert. denied, 488 U.S. 908 (1988).

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n213. See Abbot v. American Cyanamid Co., 844 F.2d 1108, 1110 (4th Cir.), cert. denied, 488 U.S. 908 (1988).

n214. See id.

n215. See id. at 1111-12.

n216. See id. at 1112; see also supra notes 203-07 and accompanying text (discussing labelling requirements).

n217. Abbot, 844 F.2d at 1112.

n218. Id. (citing Hillsborough County v. Automated Medical Lab., 471 U.S. 707, 719 (1985)) (stating that although all matters addressed by Congress are of national concern, not all matters of national concern warrant preemption). But see Naile, supra note 36, at 690. Naile argues that DTP regulations are distinguishable from the blood regulations in Hillsborough County. Id. First, the local interest in blood collection, the subject addressed by the court in Hillsborough County, is stronger than the local interest in vaccine regulation. Id. Second, the local regulations did not require the collectors to violate federal regulations, while state tort law may require vaccine manufacturers to violate FDA regulations. Id. Third, the FDA blood collection regulations expressly state their intent of nonexclusivity, while FDA vaccine regulations do not make a similar admission of nonexclusivity. Id.

Each of Naile's three arguments distinguishing Hillsborough County from the vaccine preemption debate misses a crucial point. By arguing that blood collection is a stronger local interest than vaccine regulation, Naile ignores the utilitarian benefits of infectious disease control. Local governments, acting in the best interest of their constituents, have a strong interest in establishing strong preventive vaccination programs. Concerning the argument that state tort verdicts might compel violation of federal vaccine regulations, Naile ignores the fact that the possibility of conflict is not a sufficient ground for preemption. See Goldstein v. California, 412 U.S. 546, 554-55 (1973) (distinguishing between possibility of conflict and inevitability of conflict). Finally, the lack of an affirmative statement of nonexclusivity in FDA vaccine regulations does not distinguish Hillsborough County. "When preemption by regulation is considered, courts are reluctant to find preemption by federal regulations when the agency does not make very clear an intent of preemption since agencies normally address problems in a detailed manner." Abbot, 844 F.2d at 1112.

n219. Abbot, 844 F.2d at 1112.

n220. Id. (noting that mere existence of federal legislation does not preempt all related state law).

n221. Id. The Court noted that preemption is difficult to find when: (1) Congress did not expressly manifest its intention to preempt, id. (citing Maryland v. Louisiana, 451 U.S. 725, 726 (1981)); (2) the preemption argument is based on the comprehensiveness of federal regulations, id. (citing Hillsborough County, 471 U.S. at 717); or (3) no federal remedy exists, id. (citing Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984)).

n222. Id.; Hillsborough County, 471 U.S. at 715.

n223. See Abbot, 844 F.2d at 1113 (citing Hillsborough County, 471 U.S. at 718).

n224. See id. at 1112 (noting that courts are more reluctant to infer preemption from comprehensiveness of regulations than from comprehensiveness of statutes).

n225. See id. at 1113.

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n226. See id. (stating overall goal of legislation is safety of drugs and biological products).

n227. See id.; see also Naile, supra note 36, at 527 (listing objectives of federal vaccine regulation as safety and efficiency).

n228. See Abbot, 844 F.2d at 1113.

n229. Id.; see also Hillsborough County, 471 U.S. at 721 (holding that federal objective of blood collection regulations was to establish minimum standards, not to strike balance of safety and quality). For other cases viewing federal regulations as minimum standards, see Brochu v. Ortho Pharmaceutical Corp., 642 F.2d 652, 658 (1st Cir. 1981); Salmon v. Parke, Davis & Co., 520 F.2d 1359, 1363 (4th Cir. 1975); Griffin v. United States, 500 F.2d 1059, 1060-67 (3d Cir. 1974); MacGillivray v. Lederle Lab., 667 F. Supp. 743, 746 (D.N.M. 1987); Toner v. Lederle Lab., 732 P.2d 297, 311 n.12 (Idaho 1987), cert. denied, 485 U.S. 942 (1988); Wooderson v. Ortho Pharmaceutical Corp., 681 P.2d 1038, 1055 (Kan.), cert. denied, 469 U.S. 965 (1984); Feldman v. Lederle Lab., 479 A.2d 374, 390 (N.J. 1984).

n230. See Abbot, 844 F.2d at 1113-14 (viewing Vaccine Act as most recent statutory expression of federal vaccine policy).

n231. Id. at 1113.

n232. See 1986 House Report, supra note 1, at 6, reprinted in 1986 U.S.C.C.A.N. at 6345 (stating that prior to passage of Vaccine Act, civil tort system was sole compensation mechanism).

n233. Abbot, 844 F.2d at 1113.

n234. 21 U.S.C. 301-393 (1988 & Supp. V 1993).

n235. 42 U.S.C. 200 to 300aaa-13 (1988 & Supp. V 1993).

n236. Abbot, 844 F.2d at 1113. While the court did not cite the specific language of the Vaccine Act, it noted that the purpose of the two earlier acts was to promote "the safety of dues and biologic products." Id. Moreover, the court noted that the Vaccine Act is "replete" with the assumption that "state tort and contract actions are available without preemption by earlier federal legislation." Id.

n237. 42 U.S.C. 300aa-22(a) (1988) (stating that except as otherwise provided, state law applies to vaccine injury civil actions); Abbot, 844 F.2d at 1113.

n238. Abbot, 844 F.2d at 1114. In Hurley v. Lederle Lab., the Fifth Circuit delivered an even stronger admonishment against the federal judiciary determining the objectives of federal vaccine policy. Hurley v. Lederle Lab., 863 F.2d 1173, 1177 (5th Cir. 1988) (Hurley II), rev'g 651 F. Supp. 993 (E.D. Tex. 1986) (Hurley I). The court in Hurley II acknowledged the theoretical possibility of removing state tort liability in order to further the policy objective of increasing vaccine supplies. Id. The court then proceeded to demonstrate that the wisdom of such a policy decision is uncertain. First, preempting state tort law might promote consumer insecurity concerning the quality of vaccines. Id. Second, the price increases caused by state tort damages may be passed on to the Federal Government, thereby eliminating the very need to preempt state tort law. Id. Given the potentially adverse consequences that would arise from a finding that state tort law conflicted with the objectives of federal vaccine policy, the Fifth Circuit found that there was no sufficient evidence on which to declare state tort law preempted. Id.

Interestingly, the Fifth Circuit's decision in Hurley II reversed a decision by the U.S. District

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Court for the Eastern District of Texas finding preemption based on, inter alia, an objectives conflict. Hurley v. Lederle Lab., 651 F. Supp. 993 (E.D. Tex. 1986) (Hurley I), rev'd, 863 F.2d 1173 (5th Cir. 1988) (Hurley II). In Hurley I, the district court found that allowing individual States to dictate warnings standards would irreparably harm the federal policy of warning uniformity. Id. at 1005-06.

With the Vaccine Act as a guide, the Fifth Circuit in Hurley II established a better and more consistent decision than the district court in Hurley I. The Vaccine Act's legislative history alleviates the need for courts to choose between indeterminative policy considerations. If Congress did not believe that state law warning actions damaged the Act's policy favoring uniformity, courts no longer have a need to find an objectives conflict.

n239. Hurley II, 863 F.2d at 1173.

n240. See id. (recognizing that in limited instances state law may conflict with federal law or regulations but finding that manufacturer's arguments so broadly phrased as to preempt all state product liability law for vaccine). The court noted that there should be a reluctance to find that "federal law implicitly preempts state law." Id.

n241. See id. at 1179 (finding that specific FDA approval of manufacturer warning preempts state inadequate warning claim, assuming FDA has all relevant information to make approval decision).

n242. Id. For arguments that physical conflicts, where the manufacturer cannot concurrently satisfy both federal and state law, place vaccine manufacturers in an unfair position, see Hurley I, 651 F. Supp. at 1000 (arguing that Texas common law determination of inadequate warnings can create physical conflict with FDA standards). See also Clarke, supra note 158, at 536-37 (asserting that state court juries often impose warning duties inconsistent with federal regulations); Naile, supra note 36, at 689 (arguing that state tort liability punishes manufacturer for not violating federal law).

Broader policy arguments against allowing state courts to find failure to warn liability are often raised in conjunction with the foregoing physical conflict arguments. Many argue that the FDA is in a better position to establish and judge warning standards than are state judges and juries. See, e.g., Pennington P. Landon, Federal Preemption and the Drug Industry: Can Courts Co-Regulate?, 43 Food Drug Cosm. L.J. 85, 116-17 (1988); Alan Schwartz, Proposals for Products Liability Reform: A Theoretical Synthesis, 97 Yale L.J. 353, 389 (1988). FDA officials have superior resources and superior technical expertise with which to make complicated safety policy decisions. Ausness, supra note 164, at 276. To allow state judges and juries to second-guess FDA standards defeats the safety enforcement structure that Congress established through its creation of the FDA. See Naile, supra note 36, at 694 (arguing that jury evaluation of FDA standards frustrates congressional intent in delegating exclusive authority to FDA to approve and license vaccines).

n243. See Hurley II, 863 F.2d at 1179 (noting that FDA only considers vaccine designs "if and when" manufacturers come forward with proposal).

n244. See id. (concluding that absence of FDA-approved alternatives to whole-cell vaccine does not indicate FDA disapproval of any such alternatives). There are other reasons for allowing state law to coexist with FDA regulations. Over the past decade, the FDA was forced to limit its budget and cut back on its staff. See Ausness, supra note 164, at 276 (stating that FDA has cut staff by 2000 since 1980 (citing Bruce A. Silverglade, Preemption - The Consumer Viewpoint, 45 Food Drug Cosm. L.J. 143, 144 (1990))). With reduced financial and staff capacities, the FDA has a diminished ability to independently assess vaccine warnings. See id.; see also Jones ex rel. Jones v. Lederle Lab., 695 F. Supp. 700, 711 (E.D.N.Y. 1988) (finding that limited FDA resources would restrict agency's ability to perform independently).

n245. See 1986 House Report, supra note 1, at 6, reprinted in 1986 U.S.C.C.A.N. at 6345 (outlining inadequacy of civil tort system as compensation mechanism and instability of vaccine market as reasons propelling vaccine legislation).

n246. 42 U.S.C. 300aa-22(b)(2) (1988). The presumption reflects a legislative discomfort with the litany of cases viewing FDA regulations as floors rather than ceilings. For cases finding that FDA regulations are minimum standards, see supra note 229.

n247. 42 U.S.C. 300aa-22(b)(2), -23(d)(2) (1988 & Supp. V 1993). Pursuant to 300aa-22 (b)(2)(A) and -23(d)(2), a plaintiff may vitiate the presumption by showing that the manufacturer engaged in fraud or intentional and wrongful withholding of information from the Secretary of Health either before or after approval of the vaccine, or other criminal or illegal activity relating to the safety and effectiveness of vaccines. Id. 300aa-23(d)(2)(A). Alternatively, the plaintiff may show by "clear and convincing evidence that the manufacturer failed to exercise due care notwithstanding its compliance with ... [the] Act." Id. 300aa-22(b) (2)(B).

This congressional approach closely parallels the Fifth Circuit's analysis in Hurley II. According to the Fifth Circuit, a finding of physical conflict is warranted where state law imposes standards violative of federal law and where the manufacturer has provided the FDA with all the information necessary to evaluate the proposed warning. Hurley v. Lederle Lab., 863 F.2d 1173, 1179 (5th Cir. 1988) (citing KVUE, Inc. v. Austin Broadcasting Corp., 709 F.2d 922, 931-32 (5th Cir. 1983)). The Fifth Circuit therefore held that the only question presentable to the jury was whether Lederle provided the FDA with all available information. Id. at 1179-80. In effect, the Vaccine Act arrives at the same result by allowing rebuttal of the warning presumption only if the manufacturer withheld material information.

n248. 42 U.S.C. 300aa-22(b)(2)(A), -23(d)(2)(A)-(C) (1988).

n249. Id. 300aa-23(d)(2)(B); see also supra note 246 (discussing ways plaintiff may overcome presumption that manufacturer warnings in compliance with FDA standards are adequate).

n250. See Dark, supra note 69, at 820-21 (explaining that where product is unavoidably unsafe, strict liability does not apply if product contains proper warning); Tim Moore, Comment K Immunity to Strict Liability: Should All Prescription Drugs Be Protected?, 26 Hous. L. Rev. 707, 708 (1989) (arguing that unavoidably unsafe products, properly manufactured and containing proper warnings, are not subject to strict liability).

n251. See Restatement (Second) of Torts, supra note 17, 402A cmt. k ("There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use.").

n252. See Restatement (Second) of Torts, supra note 17, 402A cmt. k (calling marketing and use of unavoidably unsafe products such as Pasteur vaccine "fully justified, notwithstanding the high degree of risk which they involve").

n253. Restatement (Second) of Torts, supra note 17, 402A cmt. k.

n254. See, e.g., Brochu v. Ortho Pharmaceutical Corp., 642 F.2d 652, 657 (1st Cir. 1981) (reading comment k to hold that absence of appropriate warning constitutes unreasonable danger, thus allowing strict liability claim); Kearl v. Lederle Lab., 218 Cal. Rptr. 453, 465 (Ct. App. 1987) (holding that comment k immunity concerns only design defects); Toner v. Lederle Lab., 732 P.2d 297, 305 (Idaho 1987) (holding that express language of comment k only immunizes manufacturers from strict liability for design defects and not for manufacturing or warning defects); Feldman v. Lederle Lab., 479 A.2d 374, 383 (N.J. 1984) (holding that comment k immunity does not insulate manufacturer from strict liability for

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failure to warn).

n255. 1986 House Report, supra note 1, at 26, reprinted in 1986 U.S.C.C.A.N. at 6367 ("The committee has set forth comment k in this bill because it intends that the principle in comment k regarding "unavoidably unsafe products'... apply to the vaccines covered in the bill ....").

n256. 1986 House Report, supra note 1, at 26, reprinted in 1986 U.S.C.C.A.N. at 6367 (discussing need to create alternative that compensates victim while not unduly penalizing manufacturer).

n257. See 1986 House Report, supra note 1, at 26, reprinted in 1986 U.S.C.C.A.N. at 6367 (allowing victim to seek relief even where vaccine is as safe as possible).

n258. See Brown v. Superior Court, 751 P.2d 470, 477 (Cal. 1988) (explaining that courts could apply strict liability doctrine to all products, apply comment k to all products, or apply threshold test to determine when comment k protection should apply).

n259. See id.

n260. See id.

n261. 218 Cal. Rptr. 453, 463-64 (Ct. App. 1985) (holding that judge must engage in three-prong test to decide whether to apply comment k).

n262. Kearl v. Lederle Lab., 218 Cal. Rptr. 453, 463 (Ct. App. 1985).

n263. Id. ("The statement that drugs are unavoidably [dangerous], and therefore within the protection of comment k, has become almost tautological." (quoting Comment, Can a Prescription Drug Be Defectively Designed? - Brochu v. Ortho Pharmaceutical Corp., 31 DePaul L. Rev. 247, 254 (1981))).

n264. Id.

n265. See id. at 463-64.

n266. Id. at 464.

n267. See Brown v. Superior Court, 751 P.2d 470, 477 (Cal. 1988).

n268. See Davis & Bowman, supra note 75, at 289 (explaining that different jurisdictions have employed divergent interpretations of comment k); Moore, supra note 250, at 724-25 (citing four separate approaches to comment k treatment). Compare Toner v. Lederle Lab., 732 P.2d 297, 308 (Idaho 1987) (holding that comment k immunity does not apply to all prescription drugs), cert. denied, 485 U.S. 942 (1988) with Brown, 751 P.2d at 482 n.11 (finding that immunity from strict design defect liability applies to all prescription drugs) and Grundberg v. UpJohn Co., 813 P.2d 89, 90 (Utah 1991) (holding that all drugs approved by FDA are "unavoidably unsafe" as matter of law).

n269. Restatement (Second) of Torts, supra note 17, 402A cmt. k.

n270. See Toner, 732 P.2d at 308 ("It is equally obvious that not all drugs are so perfectly designed that they cannot be made more pure or more safe, or that there are not safer, suitable alternatives."). An interesting counterargument, however, is that any improvement of a drug changes its chemical nature, thus creating an entirely new drug. According to this argument, the act of improving old drugs results in the creation of a new drug. Because the end result of improvement is a new drug, a manufacturer, by definition, cannot produce a

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In addition to concerns regarding the effects of liability on the vaccine market, Congress also voiced doubts about the sufficiency of the civil tort system as a compensation mechanism. [34] Certain components of state tort law present substantial barriers to compensation for victims of vaccine-related injuries. For example, many courts have bestowed "unavoidably unsafe" status upon vaccines, thereby foreclosing strict liability design defect claims. [35] Furthermore, the fact that vaccination is often made compulsory by law, makes it **[*1860]** extremely difficult, if not impossible, to prove proximate cause. [36] Specifically, manufacturers argue that better warnings about a vaccine's potential dangers would not persuade potential plaintiffs to forego receiving a vaccine because all children must receive vaccinations before beginning school and all children must attend school. [37] Vaccine-injury litigation is also extremely lengthy. Given the fact-intensive discovery needed to establish manufacturer liability, a victim of a vaccine-related injury must often wait years from the date of injury to receive compensation. [38]

II. The Vaccine Act

The Vaccine Act created a no-fault compensation system for victims of certain vaccine-related injuries. [39] For injuries occurring after passage of the Act, all petitioners alleging injury are required to participate in the Act's adjudication process. [40] If petitioners are not satisfied with the outcome of the statutory no-fault adjudication process, they may pursue traditional tort actions. [41]

The Vaccine Act restructures many aspects of civil torts litigation. [42] The Secretary, rather than the vaccine manufacturer, serves as the defendant. [43] The Office of Special Masters of the United States Court of Federal Claims acts as the trier of law and fact. [44] Rules of **[*1861]** procedure under the Vaccine Act are less formal than traditional rules. [45]

Petitioners in the no-fault compensation system may prove entitlement to compensation in two different ways. The Vaccine Act contains a Vaccine Injury Table listing certain injuries, symptoms of such injuries, and time limits for the onset of such injuries. [46] A petitioner able to demonstrate both that she suffered an injury listed in the vaccine table and that the first manifestation of the injury occurred within the time limit prescribed by the table creates a presumption of causation. [47] A petitioner who is unable to prove the existence of a table injury is still entitled to compensation if she can prove causation-in-fact. [48] Petitioners may satisfy the burden of proof by demonstrating causation-in-fact by a preponderance of the evidence. [49] Once a petitioner has established either a table injury or causation-in-fact by a preponderance of the evidence, the burden shifts to the respondent to prove that a factor unrelated to the administration of the vaccine caused the injury. [50]

As previously noted, after adjudication of their claims under the Vaccine Act's no-fault compensation system, petitioners may elect to reject the finding of the special master or judge and proceed to file a tort action in state or federal court. [51] The Vaccine Act does, however, place certain limitations on such civil causes of action. [52] The Act states that vaccine manufacturers are not liable for unavoidable side effects caused by vaccines that are properly prepared and accompanied by adequate warnings. [53] The Act also directs that manufacturer compliance with FDA warning standards creates a **[*1862]** presumption of adequate warnings. [54] Petitioners may rebut this presumption by demonstrating with clear and convincing evidence that the manufacturer did not exercise due care or that the manufacturer engaged in fraud or intentional withholding of information. [55] Additionally, the Act prohibits claims based on the direct failure to warn, when failure to provide a direct warning constitutes the sole claim. [56] Finally, although the Vaccine Act places limitations on certain tort claims, it expressly prohibits States from banning civil actions not proscribed by the Act itself. [57]

The Vaccine Act also creates certain information distribution and recording requirements for health care providers and vaccine manufacturers. [58] Pursuant to the Act, health care providers must report to the Secretary all injuries that are listed in the Vaccine Injury Table

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safer version of the same drug. See Brown, 751 P.2d at 478 (rejecting argument that improving drug's design will create new drug that cannot be considered definitionally as improved design of old drug).

n271. See Toner, 732 P.2d at 308 (arguing that comment contemplates risk-benefit analysis); Moore, supra note 250, at 722 (stating that language of comment k does not indicate any intent to provide blanket protection to all drugs).

n272. Restatement (Second) of Torts, supra note 17, 402A cmt. k.

n273. Restatement (Second) of Torts, supra note 17, 402A cmt. k.

n274. Restatement (Second) of Torts, supra note 17, 402A cmt. k.

n275. See Toner, 732 P.2d at 306 (stating that "unavoidable risk" requires no feasible alternative design that, at time of product's production, accomplishes same purpose with less risk). On the other hand, textual arguments certainly exist supporting Congress' blanket application of comment k immunity to all vaccines covered by the Vaccine Act. Comment k cites the Pasteur vaccine as an "outstanding example" of an "unavoidably unsafe" product. Id. Louis Pasteur, a 19th century French chemist, developed a rabies vaccine and made substantial contributions to the field of immunology. Taber's Cyclopedic Medical Dictionary, supra note 200, at 1239. Additionally, comment k speaks of "many ... vaccines" worthy of comment k treatment. Restatement (Second) of Torts, supra note 17, 402A cmt. k.

n276. The language of comment k would permit Congress to provide blanket comment k immunity, if, prior to promulgating the Vaccine Act, Congress performed an "alternative design" analysis for all of the vaccines covered. It is textually unacceptable, however, for Congress to legislate blanket immunity from strict liability under the guise of applying comment k. If Congress decides to insulate manufacturers from strict design defect liability, Congress should announce that it is abandoning comment k and is creating a new standard.

n277. See 1986 House Report, supra note 1, at 26, reprinted in 1986 U.S.S.C.A.N. at 6367 (explaining that comment k applies to all vaccines covered by Act).

n278. See infra notes 282-99 and accompanying text (stating that existence of equally effective, safer version of DTP supports view that whole-cell DTP is not "unavoidably unsafe").

n279. Naile, supra note 36, at 661.

n280. Naile, supra note 36, at 662.

n281. Naile, supra note 36, at 662; Toner v. Lederle Lab., 732 P.2d 297, 300 (Idaho 1987) (stating that complex nature of pertussis-causing organism is so complex that toxin cannot be deactivated) (citing Ezagui v. Dow Chem. Corp., 598 F.2d 727, 731 (2d Cir. 1979)), cert. denied, 485 U.S. 942 (1988).

n282. See Burke, supra note 126, at 547.

n283. Naile, supra note 36, at 668-69 (discussing acellular vaccine, used for mass immunization in Japan since 1991, and non-cellular vaccines as alternatives to whole-cell vaccine).

n284. Toner, 732 P.2d at 300 (noting that clinical testing of non-cellular vaccine occurred in early 1950s); Burke, supra note 126, at 568-70 (stating that Eli-Lilly developed non-cellular DTP vaccine in 1950s).

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n285. Burke, supra note 126, at 569-70; see Taber's Cyclopedic Medical Dictionary, supra note 200, at 896 (defining immunogenicity as "the capacity to stimulate the formation of antibodies").

n286. Burke, supra note 126, at 569.

n287. See Burke, supra note 126, at 569 (citing public relations campaign documenting Tri-Solgen's reduced reactivity rate as reason for non-cellular vaccine's success).

n288. See Burke, supra note 126, at 569 (discussing internal clinical evaluation comparing reaction rates between Tri-Solgen and whole-cell vaccine). The interoffice memo, released in 1985 by an organization named Dissatisfied Parents Together, was produced in response to a discovery request during DTP litigation. Id. at 569 n.163.

n289. Burke, supra note 126, at 569 (stating that Lederle initiated test to evaluate the purported success of Lilly's vaccine).

n290. Burke, supra note 126, at 259; see also Toner v. Lederle Lab., 732 P.2d 297, 300 (Idaho 1987), cert. denied, 485 U.S. 942 (1988).

n291. Burke, supra note 126, at 569.

n292. See Toner, 732 P.2d at 300; Burke, supra note 126, at 570.

n293. See Naile, supra note 36, at 668 (explaining that Wyeth could not meet FDA facility-licensing requirements).

n294. Naile, supra note 36, at 668.

n295. Naile, supra note 36, at 668.

n296. Burke, supra note 126, at 570.

n297. See Burke, supra note 126, at 575 (explaining that strongest argument against awarding whole-cell vaccine "unavoidably unsafe" product status is existence of equally effective and less dangerous alternative product); see also Toner, 732 P.2d at 306 (stating that existence of alternative design, posing less risk, would undermine purpose of comment k and would not receive immunity from liability). In Toner, the Idaho Supreme Court, in response to questions certified by the Ninth Circuit, did not find it necessary to determine whether the whole-cell DTP vaccine is an unavoidably unsafe product because the question as to the effects of comment k on strict liability was discussed simply to help answer the certified question of comment k's application to negligence claims. Id. at 303-04. Nevertheless, the Idaho Supreme Court did offer some hints as to what its answers would be. The court in Toner said that "not all drugs are so perfectly designed that they cannot be made more pure or more safe, or that there are not safer, suitable alternatives." Id. at 308. Given the conceptual framework offered by the court, the ability of DTP manufacturers to produce a non-cellular vaccine could preclude granting the whole-cell vaccine comment k status.

n298. See supra notes 282-95 and accompanying text (discussing manufacturer knowledge of potentially safer, alternative DTP vaccine).

n299. See Naile, supra note 36, at 668 (stating that FDA refused to license Wyeth Laboratories to produce Tri-Solgen or its own non-cellular vaccine).

n300. See Chambers v. G.D. Searle & Co., 441 F. Supp. 377, 380-81 (D. Md. 1975) (stating that comment k applies to all prescription drugs); Brown v. Superior Court, 751 P.2d 470,

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477 (Cal. 1988) (holding that comment k applied to all prescription drugs); Johnson v. American Cyanamid Co., 718 P.2d 1318, 1323 (Kan. 1986) (holding that sabin polio vaccine is unavoidably unsafe as matter of law).

n301. See, e.g., Brown, 751 P.2d at 479 (admitting that blanket approach may reduce potential for development of safer drugs); Terrie Bialostok Brodie, Brown v. Superior Court: Drug Manufacturers Get Immunized from Strict Liability for Design Defects, 19 Golden Gate U. L. Rev. 435, 441-42 (1989) (discussing Brown court's statement that Restatement lacks clarity as to proper application of comment k).

n302. 751 P.2d 470 (Cal. 1988).

n303. Brown, 751 P.2d at 481.

n304. See, e.g., id. at 479 (stating that both because drugs are very beneficial to society, and because holding drug manufacturers to strict liability standard may reduce drug availability, public policy favors negligence standard for drug manufacturers); Burke, supra note 126, at 559 (stating that application of negligence standard, rather than strict liability, for drugs is based on belief that product availability of certain drugs is more important than manufacturer accountability for drug defects).

n305. See supra note 1 and accompanying text.

n306. 1986 House Report, supra note 1, at 1-7, reprinted in 1986 U.S.C.C.A.N. at 6344-48 (stating purpose and need of new systems for compensating individuals who have been injured by vaccines routinely administered to children).

n307. 1986 House Report, supra note 1, at 4, reprinted in 1986 U.S.C.C.A.N. at 6345.

n308. 1986 House Report, supra note 1, at 4, reprinted in 1986 U.S.C.C.A.N. at 6347 ("While most of the Nation's children enjoy great benefit from immunization programs, a small but significant number have been gravely injured.").

n309. See 1986 House Report, supra note 1, at 4, 6-7, reprinted in 1986 U.S.C.C.A.N. at 6345, 6347-48 (describing how increased number of lawsuits against vaccine manufacturers and decreased availability of affordable product liability insurance has resulted in higher vaccine prices and manufacturer's withdrawal from vaccine market).

n310. See 1986 House Report, supra note 1, at 7, reprinted in 1986 U.S.C.C.A.N. at 6348 ("Thus, the withdrawal of even a single vaccine manufacturer would represent the very real possibility of vaccine shortages, and, in turn, increasing numbers of unimmunized children, and, perhaps, a resurgence of preventable diseases.").

n311. Brown v. Superior Court, 751 P.2d 470, 479 (Cal. 1988) ("Public policy favors the development and marketing of beneficial new drugs, even though some risks, perhaps serious ones, might accompany their introduction, because drugs can save lives and reduce pain and suffering.").

n312. Id.

n313. Id. According to this argument, the looming prospect of large damage awards will deter manufacturers from investing in socially valuable research and development. See Moore, supra note 250, at 718-19 (stating that manufacturers considering developing new drugs will be deterred because there is no assurance that state court will find drug "unavoidably unsafe" under risk-benefit analysis).

n314. See Brown, 751 P.2d at 479 (arguing that insurance will increase price and lower

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availability of pharmaceuticals).

n315. See Brodie, supra note 301, at 454-55 (arguing that Brown court's belief is without merit because design defect liability neither deters research and development nor destabilizes vaccine market); Moore, supra note 250, at 732 (arguing that design defect liability actually encourages research and development).

n316. See Brown, 751 P.2d at 479 (stating that it is not beneficial to withhold some drugs until scientific knowledge advances enough to determine all of drug's effects).

n317. See id. (stating that interest in availability of socially useful drugs outweighs benefit of postponing distribution until new scientific knowledge evolves).

n318. Id.

n319. See supra notes 286-92 and accompanying text (discussing Lederle and Eli Lilly tests of Tri-Immunol and Tri-Solgen in 1960s).

n320. See Moore, supra note 250, at 732-33 (arguing that design defect liability encourages research, but does not inhibit product availability).

n321. See Brown, 751 P.2d at 479; 1986 House Report, supra note 1, at 7, reprinted in 1986 U.S.C.C.A.N. at 6348 (suggesting that Vaccine Act will lead to more stable vaccine market because manufacturers will have better understanding of potential exposure to litigation).

n322. See Moore, supra note 250, at 732 (stating that design defect liability "fuels" research).

n323. See, e.g., Brochu v. Ortho Pharmaceutical Corp., 642 F.2d 652, 655 (1st Cir. 1981) (holding that existence of equally effective but safer version of product warranted finding of design defect); Toner v. Lederle Lab., 732 P.2d 297, 306 (Idaho 1987) (holding that drug must be as safe as possible in order to trigger comment k immunity), cert. denied, 485 U.S. 942 (1988).

n324. See John P. Reilly, The Erosion of Comment K, 14 U. Dayton L. Rev. 255, 260 (1989).

n325. See Moore, supra note 250, at 732.

n326. See Finn v. G.D. Searle & Co., 677 P.2d 1147, 1165 (Cal. 1984) (Bird, C.J., dissenting) (arguing that design defect liability encourages manufacturers to correct safety flaws); Christopher J. Albee & Dawn Kilgallen, Comment, Providing Blanket Comment K Immunity to All FDA Approved Ethical Drugs: The Defect in Grundberg v. Upjohn Co., 7 St. John's J. Legal Comment. 475, 493-94 (1991) (arguing that blanket application benefits manufacturers at expense of public safety).

n327. Comment k speaks of justified marketing. Blanket application of comment k to all vaccines implies that Congress considers the interest in vaccine availability strong enough to deflate safety concerns. But see 42 U.S.C. 300aa-27(a)-(b) (1988 & Supp. V 1993) (stating that Secretary of Health and Human Services shall promote development of safer vaccines and create task force).

n328. See Styles, supra note 70, at 113 (stating that adequate patient information satisfies informed consent doctrine).

n329. 399 F.2d 121 (9th Cir. 1968).

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n330. See supra notes 91-109 and accompanying text (discussing holding in Davis).

n331. See Cipollone v. Liggett Group, 112 S. Ct. 2608, 2628-29 (1992) (Blackmun, J., dissenting) (arguing that FDA regulations and state tort law can operate concurrently); Ausness, supra note 164, at 278 (arguing that federal regulation and state law can concurrently promote drug safety).

n332. See 42 U.S.C. 300aa-25(b)(1)(A)-(C) (1988) (setting forth vaccine reporting procedures for health care providers and vaccine manufacturers). The regulations can reduce the lack of physician-patient communication that results from the customary practice standard of informed consent. Furthermore, by providing physicians with several scenarios in which they must report to the Secretary, the regulations require doctors to consider seriously the risks of vaccination.

n333. See Incollingo v. Ewing, 282 A.2d 206, 222 (Pa. 1971) (arguing that manufacturer could be negligent for medical community's disregard of warnings). By charging manufacturers with knowledge of the medical community's ability to comprehend and implement manufacturer warnings, state tort law, in addition to federal regulations, ensures that physicians will become aware of the risks of vaccination. See Burke, supra note 126, at 592 (endorsing state law requirement that manufacturers use "Dear Doctor" letters and other advertising methods to present objective view of product and combat pro-vaccine environment).

n334. See 1986 House Report, supra note 1, at 7, reprinted in 1986 U.S.C.C.A.N. at 6348 (stating that rationales behind Vaccine Act were dissatisfaction with civil tort system as compensation mechanism and instability of vaccine market).

n335. See 1986 House Report, supra note 1, at 7, reprinted in 1986 U.S.C.C.A.N. at 6348.

n336. See 1986 House Report, supra note 1, at 29-30, reprinted in 1986 U.S.C.C.A.N. at 6370-71.

n337. See Naile, supra note 36, at 695 (stating that manufacturers cannot meet state common law standards until FDA authorizes change in warning or design).

n338. See supra notes 203-10 and accompanying text (discussing role of FDA in approval of warning labels).

n339. See Naile, supra note 36 and accompanying text.

n340. 42 U.S.C. 300aa-22(b)(2) (1988).

n341. FDA labelling requirements for vaccine potency illustrate the potential dangers of presuming the adequacy of a warning when it meets FDA standards. See 21 C.F.R. 620.6(d) (1994) (requiring that labels on DTP bottles state that vaccine has potency of 12 mouse protective units per dose); Burke, supra note 126, at 577-78 (stating that not all bottles contain 12 mouse protective units per dose as suggested on FDA mandated labels). But see 21 C.F.R. 620.4(g) (stating that despite label information, FDA will approve vaccine lot containing between 8 and 36 mouse protective units per dose). A "lot" is "that quantity of uniform material identified by the manufacturer as having been thoroughly mixed in a single vessel." Id. 600.3(y).

The FDA informs manufacturers of the actual mouse protection unit level upon approval of the vaccine. See Burke, supra note 126, at 577. If compliance with FDA warning standards is presumptively adequate, the Vaccine Act allows manufacturers to knowingly run the risk of a child receiving a triple dose of the vaccine. Id. at 578.

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n342. The proposal imputes to manufacturers the same standard applied in other warning cases. See W. Page Keeton et al., Prosser and Keeton on the Law of Torts 99, at 697 (5th ed. 1984 & Supp. 1988) (explaining that standard used in warning cases is that manufacturer must know or have reason to know of danger of product for liability to attach); Naile, supra note 36, at 679 (same).

n343. Manufacturers are not completely prohibited from changing warnings after initial FDA approval. See Clarke, supra note 158, at 529 (stating that FDA allows manufacturers to propose new language by filing supplemental new drug application).

n344. This Comment's endorsement of holding manufacturers liable, when they do not petition the FDA when they have knowledge of warning inadequacy, is premised on the theory that tort law encourages product safety. See Ausness, supra note 164, at 277.

This theory does not raise the problem, addressed in Hurley v. Lederle Lab., of placing manufacturers in an inescapable bind between federal and state mandates. Hurley v. Lederle Lab., 651 F. Supp. 993, 999 (E.D. Tex. 1986), rev'd, 863 F.2d 1173 (5th Cir. 1988). Manufacturers may attempt to meet state common law requirements through the FDA mechanism of new supplemental applications.

n345. Once the FDA has rejected a manufacturer's request to improve a warning, the physical conflict preemption dilemma, where the manufacturer cannot concurrently satisfy both federal and state laws, arises. See supra notes 239-49 and accompanying text. At this point, the function of tort law as a safety promoter ceases, and there is little reason to hold manufacturers to a standard not attainable without violating federal law.

n346. See supra notes 255-67 and accompanying text (discussing Congress' decision to apply blanket comment k immunity to vaccines covered by Vaccine Act).

n347. See George H. King, Note, A Prescription for Applying Strict Liability: Not All Drugs Deserve Comment K Immunization, 21 Ariz. St. L.J. 809, 824-25 (1989) (arguing that only unavoidably unsafe drugs providing exceptional benefits warrant comment k protection).

n348. Restatement (Second) of Torts, supra note 17, 402A cmt. k.

n349. See supra notes 285-99 and accompanying text.

n350. See supra notes 286-96 and accompanying text.

n351. See Burke, supra note 126, at 570 (stating that since production of Tri-Solgen stopped in 1970s, only whole-cell DTP vaccines have been available).

n352. Kearl v. Lederle Lab., 218 Cal. Rptr. 453, 463-64 (Ct. App. 1985) (rejecting blanket approach to application of comment k immunity). Kearl establishes a three-part test for determining whether a product is "unavoidably dangerous." The Kearl test requires determining: (1) whether the product was intended to confer a high benefit; (2) whether the then-existing risk of the product was "substantial" and "unavoidable"; and (3) whether the interest in availability at the time of distribution outweighs the interest in enhanced accountability. Id. at 464.

n353. See King, supra note 347, at 826 (stating that upon discovery of existence of safer drug, manufacturers would discontinue marketing less safe drug); Moore, supra note 250, at 732 (suggesting that imposition of strict design defect liability will encourage research and development).

n354. See Moore, supra note 250, at 732 (arguing that threat of financial liability will

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promote increased safety efforts by manufacturers).

n355. See Kearl, 218 Cal. Rptr. at 464 (incorporating weighing benefits of drug and public's interest in availability of drug into threshold test).

n356. Id.

n357. See Moore, supra note 250, at 729 (stating that beneficial drugs will continue to receive comment k protection under Kearl-like balancing test). Because the FDA currently approves only the whole-cell DTP vaccine, the DTP vaccine will qualify for "unavoidably unsafe" status.

n358. Brown v. Superior Court, 751 P.2d 470, 482 (Cal. 1988).

n359. See supra note 315 (discussing argument that strict design defect liability promotes manufacturer investment in research and development).

n360. See Brown, 751 P.2d at 482.

n361. See Kearl, 218 Cal. Rptr. at 464 (instructing that trial judge, when considering unavoidability of danger in product, should take into account "availability ... of any alternative product that would have as effectively accomplished the full intended purpose of the subject product"). Kearl announces to manufacturers that it is in their best interest to develop the equally effective alternative product rather than be presented with evidence that they are marketing an inferior and dangerous product. Id.

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and occur within seven days of vaccine administration. [59] Health care providers must also inform the Secretary of all incidents of contraindicating reactions listed in the manufacturer's vaccine package insert. [60]

The Vaccine Act also instructs the Secretary to develop and distribute vaccine information materials to health care providers. [61] The vaccine information materials must include explanations of: (1) the vaccine's benefits; (2) the vaccine's risks; (3) the existence of the National Vaccine Injury Compensation Program; and (4) other relevant information. [62] The Act then requires all health care providers administering vaccines to distribute the information to the legal representative of a child receiving the vaccine. [63]

Manufacturers must keep detailed records of their manufacturing process. [64] The Vaccine Act mandates recording the "manufacturing, process, testing, repooling, and reworking of each batch, lot, or other quantity of such vaccine including any significant problems encoun **[*1863]** tered in the production, testing, or handling of such batch, lot, or other quantity." [65] Upon discovery of a potential safety hazard involving a vaccine, a manufacturer must report the findings to the Secretary within twenty-four hours. [66] The Vaccine Act imposes both civil and criminal penalties on manufacturers for destroying, altering, falsifying, or concealing required records. [67]

III. Vaccine Act's Ban on Direct Failure to Warn Claims

As discussed in the preceding section, the Vaccine Act prohibits claims against manufacturers for failing to provide an adequate warning to the ultimate recipient of the vaccine. [68] This legislative decision directly conflicts with judicial decisions that required direct warnings at mass vaccine clinics where the vaccine is not administered by a private physician. [69] Thus, the legislation raises questions as to whether the Vaccine Act has sacrificed too many patient safety mechanisms. [70] After reviewing the learned intermediary doctrine and its exceptions, and the Vaccine Act's informational and reporting requirements, this Comment concludes that the Vaccine Act's informational and reporting requirements partially compensate for **[*1864]** many of the advantages lost by barring direct warning claims, namely informed consent and patient safety. [71] Given that Congress passed the Vaccine Act in response to concerns about vaccine availability and safety, [72] the decision to abolish direct warnings was a prudent compromise. [73] As the term "compromise" suggests, however, the Vaccine Act is not the ultimate protector of vaccinee safety, and future amendments should respond to this problem. [74]

A. The Learned Intermediary Doctrine

The Act's rejection of manufacturer liability for failure to provide a direct warning to the ultimate consumer amounts to a statutory adoption of the "learned intermediary doctrine." [75] First coined in 1967, [76] the learned intermediary doctrine holds that, in the case of prescription pharmaceuticals, manufacturers satisfy their duty to warn by providing an adequate warning to the treating physician. [77] The learned intermediary doctrine, therefore, serves as an important **[*1865]** exception to the common law rule that manufacturers must adequately warn the ultimate recipients of their products. [78]

Several policy considerations justify Congress' decision to insulate vaccine manufacturers from direct failure-to-warn liability. [79] First, the prescribing physician is in the best position to make an informed decision about the relative benefits and risks of using the drug. [80] The physician possesses knowledge of both the drug in question and the patient's medical history. [81] The physician can, taking into account the specific nature of the patient's medical history, perform an individualized balancing of the vaccine's benefits and the dangers of its use. [82]

Second, patients are not likely to possess the medical knowledge necessary to understand manufacturers' warnings. [83] Consumers with inadequate medical knowledge may ignore or misinterpret important warnings. [84] Third, direct warnings to consumers often take the form

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[*1866] of package inserts, [85] which unlike a doctor who is available for follow-up questions, cannot respond to all of the concerns and questions of individual consumers. [86] Fourth, prescription drug manufacturers do not always have adequate access to their ultimate consumers. [87] Because the prescription drug is not always distributed in its original packaging, the manufacturer may have difficulty relaying the warning to the ultimate consumer. [88] Finally, the learned intermediary doctrine accepts as reality that patients normally rely on their physicians to make medical decisions in the patient's best interest. [89]

B. Exceptions to the Learned Intermediary Doctrine

The learned intermediary doctrine is not without exceptions. [90] Two years after a court first coined the term "learned intermediary," the Court of Appeals for the Ninth Circuit announced the doctrine's first exception in Davis v. Wyeth Laboratories. [91] In Davis, the plaintiff received a sabin oral polio vaccine at a mass immunization clinic sponsored by Idaho public health officials and a local medical society. [92] Within thirty days of vaccination, the plaintiff developed paralysis from the waist down. [93] Although the manufacturer provided warnings to the medical society, [94] the purchaser of the vaccines, the plaintiff did not receive a warning. [95]

When considering the scope of the duty to warn, the court in Davis began with the proposition that the learned intermediary doctrine **[*1867]** ordinarily governs failure to warn cases involving prescription drugs. [96] Because the decision to vaccinate is a medical determination, the manufacturer best meets its duty to warn by providing the prescribing physician with adequate information. [97] After discussing the theoretical underpinnings of the learned intermediary doctrine, however, the court in Davis distinguished vaccines dispensed by a private physician from vaccines dispensed at mass clinics. When a private physician is involved, the individualized balancing of benefits and dangers envisioned by the authors of the learned intermediary doctrine may be expected. [98] Unlike private physicians, mass immunization clinics lack a one-on-one doctor-patient relationship, and therefore, an individualized balancing of the benefits and risks of vaccination is less likely. [99] The court in Davis reasoned that the prescriptive nature of the sabin drug is a result of the vaccine's administrative nature rather than some immutable characteristic of the drug itself: "Here, however, although the drug was denominated a prescription drug, it was not dispensed as such. It was dispensed to all comers at mass clinics without an individualized balancing by a physician of the risks involved." [100]

In deciding that the learned intermediary doctrine does not apply in the mass vaccine context, the court in Davis drew an analogy to the situation where a manufacturer directly supplies a consumer with an over-the-counter nonprescription drug. [101] In such a case, the manufacturer cannot impose its own endorsement of the drug's worth on the consumer. [102] Rather, the manufacturer must provide the consumer with the necessary information to weigh the benefits and risks of the drug. [103] Moreover, when a manufacturer sells a drug to an intermediate purchaser, the manufacturer must protect the ultimate consumer's autonomy by either providing a warning to the **[*1868]** ultimate consumer or by contractually obligating the intermediate purchaser to provide such a warning. [104] Wyeth Laboratories, having taken an active role in establishing the mass immunization clinic, knew that the medical society was not providing warnings to the vaccinees. [105] The court therefore concluded that Wyeth had not met its duty to warn the plaintiff of the risks of the sabin vaccine. [106]

The decision in Davis highlights one potential danger of congressional adoption of the learned intermediary doctrine under the Vaccine Act. A large percentage of American children receive polio and DTP vaccines in mass immunization clinics. [107] When vaccines are dispensed at a mass immunization clinic, the vaccinee is not likely to receive the benefit of a physician's individualized risk assessment, [108] and therefore, the rationale of the learned intermediary doctrine weakens. [109] The Vaccine Act, consequently, may prevent these children and their legal representatives from properly balancing the benefits and risks of vaccination.

C. Problems with Physicians Serving as Learned Intermediaries

Mass vaccination exceptions aside, the learned intermediary doctrine poses other dangers for vaccinees in the private physician context. By not requiring direct warnings to vaccinees, the learned intermediary doctrine implicitly assumes that private physicians will undertake an individualized balancing of benefits and risks before administering the vaccine. [110] The present state of the law concerning informed consent for prescription drugs, however, does not require full disclosure by the physician. [111] As a result, physicians **[*1869]** may not involve vaccinees in the decisionmaking process.

1. Customary practice standard of informed consent

The informed consent doctrine imposes minimum warning duties on physicians. [112] In the case of prescription drugs, courts have generally held physicians to a "customary practice standard." [113] Under the customary practice standard, a physician is under a duty to warn only if the medical community determines that disclosure is mandated. [114] The customary practice standard does not provide an absolute warning requirement because the medical community itself governs the scope of the duty to warn. [115]

As one scholar has commented, physicians are often unwilling to warn patients of the inherent risks of prescription drug use because the physicians fear that too much informed consent may frighten the patient and cause the patient to reject treatment. [116] Plummer v. Lederle Laboratories [117] provides a good example of this phenomenon. The plaintiff, Harry Plummer, contracted polio shortly after his grand **[*1870]** daughter was injected with the sabin vaccine. [118] Lederle Laboratories provided the administering physician with a warning detailing the danger of individuals contracting polio upon contact with the vaccinee. [119] In a pre-trial deposition, Dr. Cohen, the administering physician, made the following comments concerning his perceived duty, as a learned intermediary, to warn the vaccinee:

My feeling ... was that there is an extremely minute percentage of people who will have the complications from the drug. I felt that, again, because I had never experienced [other practicing physicians] giving these warnings, it ... wasn't necessary for me to do it; and ... I felt ... that giving the warning ... could scare off parents from bringing children in for future vaccinations, which to me were much more important than the warning itself for the few number of people who are going to contract disease .... [120]

Plummer demonstrates how the learned intermediary doctrine may result in physicians deciding not to perform an individualized balancing of the benefits and risks of vaccination. [121] Given that the manufacturer's duty to warn extends only to the physician, and the physician's informed consent duty is governed by the community practice standard, the vaccinee may receive neither a direct warning nor a physician performed risk assessment.

2. The weakening of the learned intermediary doctrine in an environment that supports universal vaccination

The dangers precipitated by the combined effect of the learned intermediary doctrine and the community practice standard are heightened in the vaccine context. [122] The current politico-medical environment in the United States is exceedingly pro-vaccine. [123] For example, the U.S. Government strongly endorses universal childhood immunization, [124] and all fifty States mandate vaccination prior to **[*1871]** entry into the public school system. [125]

Such extensive federal and state support for universal vaccination may have an

overpersuasive effect on physicians. Physicians, responding to government propaganda and manufacturer advertising, may become irreversibly persuaded by the value of vaccination and abandon patient-by-patient risk assessments. [126] When such overpromotion occurs, the value of manufacturer warnings to physicians becomes diluted. [127]

3. The responsibility of the manufacturer who has knowledge that its warning is not being followed

The foregoing discussion demonstrates how the pro-vaccine environment, in combination with the customary practice standard of informed consent, diminishes physicians' abilities to function as learned intermediaries. Prior to the passage of the Vaccine Act, state common law provided a mechanism for combatting a physician's inability or unwillingness to fully appreciate manufacturer warnings. [128] In Incollingo v. Ewing, [129] the Supreme Court of Pennsylvania addressed a manufacturer's failure to alter its warning in the face of evidence that the drug was being used indiscriminately. [130] The plaintiffs submitted evidence that the drug, Chloromycetin, should only be used in treating serious illnesses. [131] As the plaintiffs **[*1872]** brought to light, however, physicians were prescribing the drug to treat non-serious illnesses. [132] In reviewing the trial court's judgment for the plaintiff, the Supreme Court of Pennsylvania affirmed a jury instruction that the manufacturer's knowledge of, and subsequent inattention to, the fact that the drug was being used indiscriminately could result in a finding of negligence: "When a required warning is retained unchanged in the face of being widely disregarded, and the supplier knows or has reason to know of such wide disregard, a jury may be permitted to find the warning insufficient." [133]

Incollingo attaches liability to a manufacturer that possesses either actual or constructive knowledge that its warning is being ignored. [134] Applying the Incollingo rationale to the vaccine context, a trier of fact might find that the manufacturer failed to take adequate steps to remedy the fact that the pro-vaccine national environment has lessened physicians' ability to serve as effective learned intermediaries. [135]

Unfortunately, Congress did not include in the Vaccine Act a tort mechanism for overcoming physicians inability to serve as learned intermediaries. [136] Congress could have achieved this end in one of two ways. It could have required physicians to warn vaccinees directly [137] or, more in keeping with the learned intermediary doctrine, Congress could have required manufacturers to neutralize the pro-vaccine environment by mandating the use of "Dear Doctor" letters, which provide additional warnings to physicians, and other forms of advertising likely to reach the medical profession. [138] Rather than requiring manufacturers to recognize environmental barriers to physician warnings, the Vaccine Act creates a presumption that warnings that comply with federal regulatory standards are adequate. [139] This presumption will likely negate the environmental **[*1873]** awareness charged to manufacturers by cases such as Incollingo, [140] and as a result, vaccinees may once again suffer from a lack of individualized balancing by a learned intermediary.

D. Importance of Informed Consent After Immunization

Although the duty to warn is an important component of ensuring product safety, one scholar has argued that the necessity of informed consent is nullified by the fact that all fifty States mandate vaccination prior to entry into the public school system. [141] According to this argument, Congress' endorsement of the learned intermediary doctrine will not effect the results of individualized balancing because the States have already concluded that the benefits of universal vaccination outweigh the risks. [142] As a result, in theory, Congress' decision to adopt the learned intermediary doctrine simply amounts to the discharging of useless individual risk assessments. [143]

This argument fails to recognize that informed consent plays a role in post-vaccination decisionmaking, as well as in the initial decision whether or not to vaccinate. [144] Although doctors perform a valuable role in communicating complex medical information to patients,

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the patient nonetheless benefits from a direct warning. After a patient receives a vaccination, a period of time exists, which is sometimes quite large, in which adverse reactions are likely to occur. [145] An informed patient is better able to recognize the signs of an adverse reaction before the reaction becomes debilitating. [146] Because the vaccinee does not reside with the physician, the **[*1874]** physician's knowledge of the adverse reaction does little good in the post-vaccine scenario unless the physician has communicated the warning to the vaccinee. [147] In the interest of minimizing adverse reactions, a direct-warning rule better ensures that the patient is able to evaluate signs and symptoms than does the learned intermediary doctrine as applied under the community practice standard. [148] Even though patients may not legally reject vaccination, the absence of either a direct warning or a thorough balancing by a learned intermediary still puts the vaccinee's health at risk.

E. Vaccine Act's Informational and Recording Requirements

As the preceding discussion indicates, the Vaccine Act's preemption of direct failure to warn claims may actually increase the net number of vaccinees who do not receive sufficient warnings. The question thus arises whether the recording and informational requirements imposed by the Vaccine Act adequately compensate for the safety features sacrificed by eliminating direct failure to warn causes of action.

1. Vaccine informational materials

Concerning direct warnings for vaccinees, the Act requires that the Secretary furnish health care providers with vaccine information. [149] This information must discuss the benefits of the vaccine, the potential risks of the vaccine, the existence of the National Vaccine Injury Compensation Program, and other relevant information. [150] Health care providers are then required to distribute the information to the legal representative of the vaccinees. [151]

The vaccine information required by the Vaccine Act has a number of advantages. It allows the vaccinee or the vaccinee's legal representative to take an active role in the decision whether to vaccinate. [152] **[*1875]** As discussed earlier, one of the policy considerations underlying the learned intermediary doctrine is that vaccinees often do not have the requisite medical knowledge to understand direct warnings. [153] Now, however, the vaccine information creates a framework for performing a risk-benefit analysis and thus permits the vaccinee to participate in the ultimate decision. In addition, by requiring physicians to provide vaccinees with written information, the Vaccine Act serves, in part, to objectify the pro-vaccine environment. The written information removes some of the discretion formerly allocated to the physician under the customary practice standard of informed consent. [154]

2. Health care provider recording requirements

In addition to the Vaccine Act's mandate that physicians provide vaccinees with reliable information, the Act requires that physicians engage in certain recording practices with respect to the administration of vaccinations. [155] By requiring physicians to report certain recognizable events following vaccination, the Vaccine Act serves to combat the lack of individualized balancing by physicians that has occurred as a result of the excessively pro-vaccine environment. [156] **[*1876]** Pursuant to the recording requirements, even if a physician should forego an initial risk-benefit analysis, she is required to report adverse reactions and contraindications. [157]

The reporting scheme may play a significant role in reducing DTP-related adverse reactions. Because the DTP vaccine is given in three installments, the reporting requirements may encourage physicians to either eliminate or delay the second and third doses when a potential problem manifests itself. The health care provider recording mandates, therefore, may help reestablish the individualized physician balancing that the authors of the learned

REV_00261797



Peter Huber < PRA 6
05/11/2001 09:45:21 AM

Record Type: Record

To: Courtney S. Elwood/WHO/EOP

cc:
Subject: RE: Tort Reform

Hi Courtney, Good to hear from you, and I hope all is well with you in the seat of power.

George Priest at Yale is worth hearing from, and he knows everyone else, I'd definitely start with him. All the rest of the names that follow are simply dredged out of deep memory banks, and I'm sure George can give you a much better list.

Richard Epstein at Chicago is brilliant on this, as on everything, but the trouble with Richard is that he talks infinitely fast, and also forever, which can be frustrating for practical people who are trying to get things done. Lester Brickman (Cardozo? Somewhere in New York, anyway) is another academic who has had some quite creative ideas over the years, but he's another somewhat strange duck, like the rest of us in the tort movement I suppose. Mike McConnell used to be involved too, but I gather you want to make him a judge, so it may be too late to get him to say anything useful. David Bernstein is at George Mason - I coedited a book with him some years ago (Phantom Risk) and he has continued to write about rules of evidence, he's a nice guy, but rather a plodder, and by no means entertaining in front of an audience, but he too might have additional contacts.

As for me, though perfectly willing and pleased to come in and chat, I'm really not in the thick of this debate at all any more. My most recent involvement has been with junk science and rules of evidence - and even that stuff is now very dated, I just haven't kept pace with more recent developments.

I'll leave you with one annoyingly small thought that I've been floating for almost a decade, though with very limited success. Big tort reform, embodied in a "tort bill" seems almost impossible - the politics always shake out against you. So I've long believed that the real reforms would come interstitially, through small clauses inserted into dozens of other laws - clauses limiting liability in specific situations, facilitating recoupment and subrogation to eviscerate the scandal of double dipping (victims being paid twice, through first-party insurance, often federal insurance, and then again through third-party liability insurance by way of the tort system), etc. The objective should be to add a tort limiting clause to every Peace Corps bill, student aid bill, crime bill, etc. Ending with dozens and dozens of little picket fences of outright immunity, or limited liability, or limits on punitives, or tougher standards of scientific evidence. Thankless work, with little visible glory, but build enough of these and something good will happen over time.

Good luck
Peter

-----Original Message-----
From: Courtney_S._Elwood@who.eop.gov [mailto:Courtney_S._Elwood@who.eop.gov]
Sent: Friday, May 11, 2001 8:20 AM
To: phuber@khhte.com
Cc: mwilliams@khhte.com
Subject: Tort Reform

[Marilyn, If I've sent this to the wrong e-mail address for Peter, could you forward it to him? Thanks, and I hope all is well with you.]

Peter --

I hope all is well with you. These days, I am sure that you are fully occupied with the energy issues that are consuming our Nation. I can tell you that your recent editorial in the WSJ on nuclear power was well received here at the White House, and I was peppered with questions about you and your political philosophy. Keep up the good work.

I am writing today about a different issue -- tort reform. I know that many years ago you gave tort reform a great deal of thought and wrote some interesting things. As always, you were well ahead of your time. Are you still interested in, and thinking about, the subject? And, more important, do you have any ideas for ways to reform the civil justice system that you'd be in a position to share with a group here at the White House that has been tasked with addressing the issue? We are planning to invite six to ten people in (two or three at a time) to talk to the group and to present concrete proposals for reform. Whether or not you are interested, perhaps you could share with me who you think are the best thinkers these days on the subject.

-- Courtney

July 3, 2001

TO: Viet Dinh

FROM: David Karp

SUBJECT: Rulemaking Process for Federal Rules of Procedure and Evidence

This responds to your request for a description of the rulemaking process for federal rules of procedure and evidence. The statutes governing the process appear in chapter 131 of the Judicial Code (title 28), 28 U.S.C. §§ 2071-77. The main features of the system are as follows:

The Supreme Court has the power to prescribe "general rules of practice and procedure and rules of evidence" for cases in the federal district courts and courts of appeals. 28 U.S.C. 2072.[1] As provided in 28 U.S.C. 2073, the Supreme Court is advised and assisted in the rulemaking process by the Judicial Conference and its committees. The Judicial Conference is chaired by the Chief Justice and includes the chief court of appeals judges and selected district judges from each circuit (28 U.S.C. 331). The Chief Justice appoints the members of the Judicial Conference's committees.

Several committees of the Judicial Conference exist specifically for the purpose of developing and considering changes to the federal rules of procedure and evidence. These include an Advisory Committee on Civil Rules, which is generally responsible for proposed changes in the Federal Rules of Civil Procedure, an Advisory Committee on Criminal Rules, which is generally responsible for proposed changes in the Federal Rules of Criminal Procedure, an Advisory Committee on Evidence, which is generally responsible for proposed changes in the Federal Rules of Evidence, and an Advisory Committee on Appellate Rules, which is generally responsible for proposed changes in the Federal Rules of Appellate Procedure.[2] Above the advisory committees, there is a Standing Committee on Rules of Practice and Procedure. These various committees include a majority membership of judges, but also include members who are practitioners or academics. As discussed below, the Department is represented on these committees.

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[1] The process described in this memorandum relates to the generally applicable federal rules, such as the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the Federal Rules of Appellate Procedure. The individual federal courts also have authority to issue their own local rules as provided in 28 U.S.C. 2071, 2077.

[2] Thus, changes in Fed. R. Civ. P. 11 (relating to sanctions for litigation abuse) or Fed. R. Civ. P. 26 et seq. (relating to discovery) would be within the jurisdiction of the Advisory Committee on Civil Rules. Changes in Fed. R. Evid. 702 (relating to expert witnesses, including standards for scientific testimony) would be within the jurisdiction of the Advisory Committee on Evidence.

Under the normal operation of the process, changes in the federal rules are considered in the first instance by the appropriate advisory committee. With the approval of the Standing Committee on Rules of Practice and Procedure, an advisory committee will publish a proposed rules change for public comment. In addition to regularly receiving written comments concerning proposed rules changes, the advisory committees sometimes hold hearings, if members of the public wish to be heard directly.

Following the receipt of public comment, an advisory committee may forward a proposed rules change to the Standing Committee on Rules of Practice and Procedure. If the Standing Committee approves the change, it forwards the proposal to the Judicial Conference. If the Judicial Conference agrees, it forwards the proposal to the Supreme Court. The Supreme Court then decides whether to promulgate the change. Rules changes issued by the Supreme Court must be submitted to Congress for a review period of at least seven months, and must be submitted for such review no later than May 1 of the year in which they are to take effect, as provided in 28 U.S.C. 2074. Rules promulgated by the Court go into effect following the conclusion of the Congressional review period, unless Congress disapproves or modifies them by the enactment of legislation. As a practical matter, adoption of a rules change through the rulemaking process – from initial consideration by an advisory committee through the Congressional review period and effectiveness – typically takes about three years.

The Department has representation on the various advisory committees and the Standing Committee on Rules of Practice and Procedure of the Judicial Conference. Traditionally, the Department is represented on the Standing Committee by the Deputy Attorney General (or designee); on the Advisory Committee on Criminal Rules and on the Advisory Committee on Evidence by the Assistant Attorney General for the Criminal Division (or designee – currently Roger Pauley); on the Advisory Committee on Civil Rules by the Assistant Attorney General for the Civil Division (or designee); and on the Advisory Committee on Appellate Rules by the Solicitor General (or designee).

While OLP has not directly represented the Department on these committees, it has until recently chaired a civil rules working group – including members from the Associate Attorney General's office, the Civil Division, the Executive Office for U.S. Attorneys, Environment, Tax, Antitrust, and Civil Rights – that helped to formulate the Department's positions on changes in the Federal Rules of Civil Procedure. OLP has also been involved in the Department's work on changes in other rules, and originated a number of proposed rules changes which were eventually adopted through the rulemaking process or legislation – e.g., Fed. R. Crim. P. 32(c)(3)(E) (victims' right of allocution in sentencing); Fed. R. Evid. 413-15 (relating to similar crimes evidence in sex offense cases); Fed. R. Evid. 404(a)(1) (in part) (allowing negative character evidence concerning defendant where defendant attacks victim's character).

The Supreme Court's authority to issue rules of procedure and evidence, and the related advisory apparatus through the Judicial Conference and its committees, involve the exercise of delegated legislative power. Constitutionally, Congress has the ultimate authority over the rules of procedure and evidence in the federal courts. Congress may disapprove or modify rules proposed or adopted by the Supreme Court, and may affirmatively adopt rules of procedure and

evidence. For example, the Federal Rules of Evidence as a whole were initially enacted by Congress through legislation in 1975, after Congress held up and substantially modified the Rules of Evidence as the Supreme Court had proposed them a few years earlier. Examples of individual rules that were enacted through legislation, rather than the rulemaking process, include Fed. R. Evid. 412 (rape victim shield rule) and Fed. R. Evid. 413-15 (relating to similar crimes evidence in sex offense cases).

7 U.S. 267, *; 1806 U.S. LEXIS 331, **;
2 L. Ed. 435; 3 Cranch 267

LEXSEE 7 U.S. 267

STRAWBRIDGE ET AL. v. CURTISS ET AL.

SUPREME COURT OF THE UNITED STATES

7 U.S. 267; 1806 U.S. LEXIS 331; 2 L. Ed. 435; 3 Cranch 267

FEBRUARY, 1806 TERM

PRIOR HISTORY:
[**1]

THIS was an appeal from a decree of the circuit court, for the district of Massachusetts, which dismissed the complainants' bill in chancery, for want of jurisdiction.

Some of the complainants were alleged to be citizens of the state of Massachusetts. The defendants were also stated to be citizens of the same state, excepting Curtiess, who was averred to be a citizen of the state of Vermont, and upon whom the subpaena was served in that state.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:
If there be two or more joint plaintiffs, and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants, in the courts of the United States, in order to support the jurisdiction.

SYLLABUS:

REPORTER'S NOTES

If there be two or more joint plaintiffs, and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants, in the courts of the United States, in order to support the jurisdiction.

COUNSEL:

The question of jurisdiction was submitted to the court without argument by P. B. Key, for the appellants, and Harper, for the appellees.

On a subsequent day,

OPINIONBY:
MARSHALL

OPINION:

[*267] MARSHALL, Ch. J. delivered the opinion of the court.

The court has considered this case, and is of opinion that the jurisdiction cannot be supported.

The words of the act of congress are, "where an alien is a party; or the suit is between a citizen of a state where the suit is brought, and a citizen [**2] of another state."

The court understands these expressions to mean that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.

But the court does not mean to give an opinion in the case where several parties represent several distinct interests, [*268] and some of those parties are, and others are not, competent to sue, or liable to be sued, in the courts of the United States.

Decree affirmed.

REV_00261840

Courtney

REV_00261842

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

[Tort Reform Articles] [1]

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Terms: **"mass torts" and consolidation and uniform and judge and court and date(aft 1997)** (Edit Search)

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Spring, 1998

1998 Det. C.L. Rev. 7

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ARTICLE: AFTER AMCHEM AND AHEARN: THE RISE OF BANKRUPTCY OVER THE CLASS ACTION OPTION FOR RESOLVING **MASS TORTS** ON A NATIONWIDE BASIS, AND THE FALL OF FINALITY?

Greg M. Zipes *

* B.A., Stanford University; J.D., University of California, Los Angeles. The author practices commercial and bankruptcy law for Curtis, Mallet-Prevost, Colt & Mosle in New York City. I thank my colleagues at Curtis for their support, my wife Leila Rachlin for her encouragement and suggestions, and Mary Santillon and Sheila Doherty for their assistance in creating the final product. I also thank the members and staff of the Review and especially Kristen Sorrell for her help.

SUMMARY:
... Congress has offered few concrete solutions, and **judges** and attorneys have responded out of perceived necessity by devising a variety of methods for resolving **mass torts,** including the increasingly creative use of class actions and bankruptcy options. ... This section describes events leading up to Amchem and Ahearn, and concludes that the Supreme **Court** has, at least temporarily, reined in liberal readings of the requirements for class action certification to justify its use in **mass tort** litigation. ... Not surprisingly, parties tend to litigate **mass tort** cases with devices within the adversary system that are themselves less traditional and which provide some ability to deal with large groups of similarly situated parties: the class action, with a judicious use of case **consolidation** techniques, and the bankruptcy system. ... In sustaining the circuit **court's** decision in Amchem (and at the same time remanding Ahearn), the Supreme **Court** dealt a serious blow to the use of class actions in the **mass tort** context. ... A. Bankruptcy's Underpinnings of Collectivization of Claims and Debtor Rehabilitation: A Natural Advantage in Resolving **Mass Tort** Issues ... Far from assuming that each creditor will direct its own action against the debtor, bankruptcy assumes that the average creditor will not get involved at all. ... A different outcome in Amchem might have led to finality for companies with **mass tort** problems: future claimants would have been bound by the settlement. ...

TEXT:
[*8]

Introduction

Mass torts, such as those arising from asbestos or silicon implants, present the legal system with caldrons of sticky, bubbly and ill-smelling troubles. While different types of **mass torts**

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future claimants would want back-end opt out rights to keep pace with changing science and medicine, not to mention the possibility that the settlement might prove insufficient to pay their claim.

The circuit **court** concluded that a settlement with only one broadly defined class was a recipe for abuse: competent, diligent, and loyal representation of the entire class would not result when defendants had the opportunity to essentially select one or several plaintiffs' lawyers to represent the class. [93] Defendants' ability to select plaintiffs' lawyers in this manner might set up a "reverse auction" so worrisome to some commentators, in which defendants seek to identify the plaintiffs' lawyer who will submit the lowest plausible settlement offer on behalf of the plaintiff class in exchange for the promise of a hefty fee. [94] In other words, the defendants would have the opportunity to select those attorneys who will sue them. The **court** concluded that incentives involved may overwhelm the judgment of otherwise highly ethical lawyers. [95]

The Ahearn circuit **court** took a different approach with conflicts of interests, largely dismissing the concerns of the Amchem **court.** [96] The **court,** in a lengthy analysis, addressed, and rejected, the argument that the class counsel had impermissible conflicts due to concurrent representation of both present asbestos claimants and the class of future claimants, and concerns about purported conflicts within the future class. [97] Its approach was freewheeling: a class might consist of widely disparate groups, united only in their overall desire to see a case settle. However, this was not the important part of the analysis. The **court** placed a much greater emphasis on the process employed by the attorneys, asking if there was vigorous negotiation which would allay concerns over possible collusion. [98] The circuit **court** ultimately held that there was. [99] **[*30]**

In the absence of the Amchem Supreme **Court** decision, this second approach might have gained wide acceptance. It was a logical extension to prior **mass tort** cases, which were increasingly certifying classes that permitted attorneys to represent ever larger numbers of disparate members. The Ahearn **court** opened the door to a further loosening of the standards with respect to representation, as a more traditional conflict review was replaced by an analysis of whether vigorous and arms length negotiations took place between attorneys as aided by an activist **judge** and various experts. [100] More generally, its approach challenged the traditional assumption of the adversary system about the rights of parties to represent themselves or at least, in the class action, to be represented by similarly situated parties. It is evident as well that the Amchem circuit **court** was unwilling to view **mass tort** litigation as requiring a radical change from accepted adversary principles of individual autonomy and a generally passive, neutral **judge.** The Ahearn **court,** in contrast, proved more willing to accept the role of a **court** as a guardian and advocate in the process.

2. The Problem of Commonality and Typicality

The Ahearn and Amchem circuit **courts** also took a different approach to commonality and typicality. Many times, a class action involves determinations of when defendants or plaintiffs gained knowledge of the problem, what information defendants withheld from the public, and what they represented in product instructions. Also, punitive damage standards vary in the fifty jurisdictions, ranging from gross negligence to various levels of willfulness and wantonness. These questions are not entirely common to everyone in the class, but at the same time also may not be a sufficient reason to disassemble a class.

Typicality is a related problem. The argument can be made that no plaintiff could be typical of the numerous types of people who might have claims in a **mass tort** context. With settlement class actions especially, [101] the **[*31]** question arises as a mirror image to the adequacy of representation debate: whether "typicality" or "commonality" can be found by simply stating that all members in the class are united if they have an interest in working together to obtain the best possible result.

With the Amchem circuit **court** case, the **court** answered the question in the negative, finding the foregoing questions precluded a finding of commonality and typicality. There were simply too many disparate questions undermining class cohesion in that case. [102]

The Ahearn **court** disagreed with the Amchem analysis. The Ahearn **court** was satisfied with the settlement provision reached by the parties, which provided that if a shortfall occurred in any year, payments during that year were prioritized so that the sickest claimants were paid first.

This is in stark contrast to the Amchem case where the settlement attempted to award damages to class members based on the severity of their injuries alone . . . . We would likely agree with the [Amchem **Court]** that a class action requesting individual damages for members of a global class of asbestos claimants would not satisfy the typicality requirements due to the huge number of individuals and their varying medical expenses, smoking histories, and family situations. In Ahearn, only commonly held questions regarding insurance coverage for the class' injuries and establishment of an equitable distribution process to insure that all class members receive compensation were decided. As a result, this settlement is unaffected by the typicality and commonality problems cited in [the Amchem **Court** decision]. [103]

The Ahearn approach in particular drew criticism in the academic literature. Parties, and particularly defendants, could take advantage. Rather than resist class action certification, defendants might change their tactics and begin to seek provisional certification because they discovered this technique could assure low cost settlements as they found plaintiffs' attorneys willing to accept lower settlements in exchange for generous fees. [104] Once again, the Ahearn **court's** response to such assertions was that vigorous negotiation and review by the **court** could cure these concerns. The Ahearn **court's** approach **[*32]** made the **court,** which went so far as to meet the parties late at night, [105] a prime player in negotiations, and its review of the process in reaching the settlement, presumably under Rule 23(e), in effect cured any shortcoming in satisfying the other elements of certification.

3. The Problem of Judiciability of Future Claims in the Class Action and the Use of Settlement Class Actions

A further issue with class actions is how to bind future claimants, or parties who are not even certain whether they are, or will be, claimants, and whether Article III limits the people who can be in a class. [106] With long latency periods, the point at which a "future claims" class action is certified and the settlement approved may be decades before a class member discovers that he or she is ill. The question becomes how to represent this person. Judicial responses have varied, revealing uncertainty about the propriety of certifying future members in class actions. [107]

Notwithstanding the injunction against the inclusion of future claimants in the notes to Federal Rule 23, future claimants in fact were certified early in the rule's history. [108] One commentator has suggested that standing of future claimants should be limited to those circumstances in which (1) class members are likely to be aware of their injuries at the time of certification (such as in the defective heart valve or breast implant cases) and (2) the class representatives include present and future claimants so that at least some class members are in a position to monitor the adequacy of their attorneys' representation. [109] Another approach is to permit an opt-out of future claimants **[*33]** to avoid due process issues. [110] That having been noted, both the Ahearn and Amchem circuit **courts** seemed to permit certification of future claimants in class actions. [111] It is interesting, however, that the **courts** have acted in the absence of a strict statutory mandate, and this reflects a recognition that **courts** believe they have no other choice than to certify future claimants, shunting aside Article III judiciability issues because of the perceived absence of alternatives in the **mass tort** context. As described below, the Supreme **Court** in Amchem did not decide the

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appropriateness of future claimants in a class, and so the issue is not decided.

Along the same lines, settlement class actions became accepted practice before the Ahearn decision. These class actions are pre-negotiated, and generally the parties have no intention of litigating. [112] The Amchem circuit **court** found grave difficulties with settlement class actions, arguing that an absence of a vigorous clash of adversaries raised significant questions. [113] Once again, the Fifth Circuit found the problem of a lack of an adversarial **[*34]** posture between the parties could be resolved through vigorous good faith negotiations. [114]

G. The Amchem Supreme **Court** Case

In 1997, a divided Supreme **Court** rendered its eagerly anticipated decision in Amchem Products, Inc. v. Windsor. [115] In sustaining the circuit **court's** decision in Amchem (and at the same time remanding Ahearn), the Supreme **Court** dealt a serious blow to the use of class actions in the **mass tort** context. The Supreme **Court** focused on certification issues, agreeing with the circuit **court** that "class certification issues are dispositive." [116] The Supreme **Court** therefore found it unnecessary to address any Article III issues. [117]

The **Court** made clear that all the elements of Rule 23(a) and (b) must be considered in a settlement class action; they cannot be lumped together in some kind of "gestalt" settlement. [118] Subdivisions (a) and (b) focus **court** attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when a settlement class action is proposed by parties with no intention to litigate. The **Court** agreed with the Amchem circuit **court's** assessment that it is not sufficient to rely on the class members' claimed shared interest in the fairness of settlement or desire to be quickly compensated. The class action **court** must therefore dig deeper and find other bases to meet all the requirements of Rule 23(a), examining each element carefully. [119]

In spite of its more general language regarding class action certification, the Supreme **Court** in the end only examined the adequacy requirement of 23(a)(4) and the predominance requirements of 23(b)(3). For example, with respect to the adequacy of representation, the **Court** again agreed with the Third Circuit, holding that the "sprawling class" prevented adequate representation. [120] There were simply too many issues, such as time of exposure, length of exposure, and disparate state law, to permit representation by one set of attorneys. The Supreme **Court** agreed with the assessment of the case by the Third Circuit that "each plaintiff [in an action involving claims **[*35]** for personal injury and death] has a significant interest in individually controlling the prosecution of [his case]; each has a substantial stake in making individual decisions on whether and when to settle." [121]

While the **Court** did not approve this particular settlement class action, the **Court** did not preclude its use in other instances. Indeed, in the case of a proposed settlement,

a district **court** need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial. But other specifications of the rule-those designed to protect absentees by blocking unwarranted or overbroad class definitions-demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a **court** asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold. [122]

The **Court** criticized overly aggressive **court** involvement in the process, finding that if a nebulous general fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23 (a) and (b), and permitting class designation despite the impossibility of litigation, both class

counsel and **court** would be disarmed. [123] It indicated that the amount of each claim might make a difference, as Rule 23 is designed for parties with claims too small to litigate individually. It found that the **Court** of Appeals in fact did not ignore the terms of the settlement; instead, that **court** "homed in on settlement terms in explaining why it found the absentees' interests inadequately represented." [124] The Third Circuit's close inspection of the settlement in that regard, the **Court** concluded, was altogether proper. [125]

Although not directly addressed by the **Court,** lurking uncomfortably in the background are the ethical issues with respect to the attorneys' representation of such a large class with all of the potential intra-class conflicts. By focusing on Federal Rule 23(a)(4) and addressing the difficulties faced by the representatives of the class, the **Court** was able to indirectly express its disapproval of the attorneys' actions. **[*36]**

Without reaching Article III or constitutional issues, the **Court** implied that the form of notice to the settlement class presented a due process concern, stating that "we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous." [126] Parties seeking to settle nationwide class actions must consider that the Supreme **Court** has not decided this and other constitutional issues in the **mass tort** context.

The dissent in the Amchem case made many of the points of the Ahearn circuit **court.** It noted, for example, that the size of the settlement was indeed important and relevant, as asbestos lawsuits have taken up more than six percent of the federal docket in one recent year, thereby acknowledging that the problem might be addressed in the form of a mass settlement. [127] It was more sanguine than the majority view about the procedure employed by the district **court** in settling the case, stating that as long as the lower **court** considered the benefits and draw backs of settlement, the settlement agreement can satisfy the various elements of a class action even, apparently, in the absence of vigorous adversarial relationships. [128]

H. Unanswered Questions after Amchem and Ahearn

Potentially, Amchem will have a sweeping effect on class actions. However, its scope is ultimately unclear as long as Ahearn remains pending before the Supreme **Court,** now for the second time in two years. For now, the Supreme **Court** appears to have crossed three low barriers with respect to the use of class actions, notwithstanding its failure to approve the settlement in the Amchem case. First, it acknowledged that class actions have a role in resolving **mass torts,** rejecting claims that Rule 23 does not provide a specific statutory basis. [129] Second, it indicated its willingness to accept settlement class actions under certain conditions, which, however, it did not explain in very much detail. [130] Third, it appears to now accept the inclusion of future claimants in class actions, again under certain hazy circumstances, rejecting claims of a lack of standing. [131] **[*37]**

Further, although the Supreme **Court** remanded the Amchem case on the grounds that the members of the class faced impermissible conflicts, at the same time it stated that the proposed class was more "sprawling" than in any other cases. [132] Accordingly, an argument can be made that the case can be limited to its rather extraordinary facts.

However, such a position is problematic, because the Supreme **Court** also vacated the Ahearn decision, without any explanation except a reference to its Amchem decision. [133] The Supreme **Court** may have intended to seek a reexamination of all various statements made by the Ahearn **court** regarding adequacy of counsel, commonality, typicality, and the use of a limited fund class action in lieu of bankruptcy. Taken together, Amchem and Ahearn focus on the class action's tension in resolving **mass torts,** caught between the adversary system's ideal of individual rights and a world in which individual rights might have to give way to group solutions.

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Amchem highlights the perils of a **Court** which seeks to inject itself into the process, active in negotiations and review of the parties' actions. Amchem also makes clear that such a **court** should not substitute its own assessment of the fairness of the settlement for the dictates of Rule 23, which sets forth the requirements of a class action. More generally, Amchem discourages **court** activism, placing less importance on the **Court's** role in resolving class actions. It further seems to reaffirm the primacy of individual rights in class actions, signaling that the perceived **mass tort** crisis does not require an extraordinary departure from the principle of **court** passivity and neutrality.

Finally, Amchem creates significant problems for a company that wishes to resolve all its **mass tort** burdens with one fell swoop. The company most likely will not be able to settle with one set of attorneys. Instead, it will need to make sure that all the various subgroups, including present and future claimants and claimants from states with differing treatment of torts, are adequately represented by separate counsel. As it may be impossible to adequately represent future claimants, the settlement will have to provide for an opt-out, [134] creating further uncertainty for companies wishing to use the class action to quantify their damages. The foregoing text must be qualified: **[*38]** the Supreme **Court** simply stated in Amchem what it would not permit, and not what it would definitely permit.

As it turns out, the Supreme **Court** has an opportunity to address some of these questions in more detail. Earlier this year, the Fifth Circuit reconsidered its affirmation of the Ahearn case in response to the remand by the Supreme **Court.** It in turn summarily reaffirmed its prior decision in a five-paragraph decision finding that "we can find nothing in the Amchem opinion that changes our prior decision." [135] The Supreme **Court** has accepted certiorari, but as of the date of this article's publication has not decided the case.

The Fifth Circuit's rejoinder presents the Supreme **Court** with the opportunity to clarify certain issues left unresolved with Amchem. Most immediately, it will decide whether the Fifth Circuit is correct in its assessment that "there are two controlling differences between this case and Amchem. First, this class action proceeded under Rule 23(b)(1), Amchem was a Rule 23(b)(3) case. Second, there was no allocation or difference in award, according to nature or severity of injury, as there was in Amchem." [136]

It is by no means certain that the Supreme **Court** will get past certification issues. The Fifth Circuit, for example, did not articulate an analysis of Rule 23(a)(4) in light of Amchem, which may be a significant, or perhaps the only, reason why the Supreme **Court** accepted certiorari.

However, if the Supreme **Court** agrees with the Fifth Circuit on certification issues, it will presumably turn to constitutional issues. The Supreme **Court** at a minimum will have to answer the following questions to ensure confidence in the use of Federal Rule 23 in resolving the use of class actions:

1. Does a settlement of a nationwide class action violate a plaintiff's due process right to trial? The nationwide settlement might be seen as an attempt to improperly impact upon substantive tort law in all fifty states, with its cap on punitive damages and restricted right to trial.

2. Does the settlement create judiciability problems for a **court? The Court** may address the propriety of a lawsuit in which the parties clearly lacked the intention to litigate and the defendants chose their adversaries, with whom they came to agreement.

3. Does the settlement violate the due process rights of plaintiffs who do not know they were exposed to asbestos? The **Court** may decide the validity of the Fifth Circuit's conclusion that this case is no different **[*39]** from other class action cases in which **courts** decide the rights of unknown parties. [137]

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If the Supreme **Court** does not answer these questions in the Ahearn decision, litigants seeking to use the class action to achieve a national settlement will always face nagging constitutional issues that might be appealed.

I. Multi-District Litigation: A Note on the Effect of Amchem and Other Recent Supreme **Court** Precedent

In the **mass tort** context, class actions often go hand in hand with the **consolidation** of cases by the MDL Panel. Established in reaction to a spate of filings by the United States claiming that electrical equipment manufacturers violated anti-trust laws, [138] the MDL Panel has authority to consolidate all civil actions pending in federal district **courts** in to a single district. The cases must involve common questions of fact and transfer must serve interests of judicial economy, fairness, and the convenience of the parties and witnesses. [139]

The statute is intended to govern pretrial procedure only. It is distinct from class actions in that it is designed to consolidate already pending cases, and only for the pretrial process. However, the influence of the statute is much broader because a vast majority of the consolidated pretrial proceedings never return to district **court** for trial. [140] Instead, transferee **courts** often use mechanisms like settlement and dismissal to dispose of the "substantive part" of the case in the **mass tort** context. [141] **Consolidation** makes settlement easier, **[*40]** because **mass tort** defendants can readily quantify the costs and benefits of settling with all potential adversaries at the same time. They might gladly exchange upfront costs of settling in order to eliminate the uncertainty of ongoing piecemeal litigation. Indeed, prior to Amchem, it was an open secret that a multidistrict transfer for pretrial proceedings almost invariably resulted in settlement of the transferred claims, without the need for trial. [142] This observation ties into the earlier point that few, if any, **mass tort** cases ever make it to trial.

Further, district **courts** to which a case had been transferred under the MDL have routinely taken the next step and assigned the cases to themselves for trial, notwithstanding the MDL's plain reference as a pre-trial device. The reason is also seemingly very logical: after using one **judge** to supervise the massive discovery proceedings, it makes little sense to remand each case back to separate district **court judges** with little or no familiarity with the complex issues at hand for the purposes of conducting a trial. Rather, it makes perfect sense to keep the cases with the **judge** who supervised discovery. [143] Amchem and the more recent case of Lexecon v. Milberg Weiss Bershad Hynes & Learch [144] must negatively impact upon the use of MDL, further complicating the use of class actions in resolving **mass tort** issues. If it is true that a particular referral has with it an implicit goal of promoting settlement, then it should not be used in conjunction with class actions. Amchem makes this point about the limitations of the MDL indirectly, with its language that parties in cases subject to an MDL referral must be prepared to litigate. Lexecon, although a non-**mass tort** case, is much more explicit with this point and therefore relevant to the MDL **mass tort** discussion. [145]

In Lexecon, the issue was whether a district **court** to which a case had been transferred under the MDL for pretrial proceedings can also assign itself **[*41]** the case for trial. [146] In that case, Lexecon brought a diversity action in an Illinois district **court** against two law firms for various torts, including defamation, in connection with Lincoln Savings Bank litigation. [147] The defendant law firms requested that the case be transferred to the Arizona district **court** handling the Lincoln Savings Bank litigation. [148] The MDL Panel granted the motion and ordered the transfer. [149] Later, the Lincoln Savings Bank litigation settled, except for the Lexecon defamation claim. The Arizona **court** denied Lexecon's motion to request the MDL Panel to transfer back to the Illinois **court** and assigned the case to itself for trial, stating that the self-transfer was an efficient way of proceeding. [150] Trial on the action resulted in a judgment for the law firms and Lexecon appealed. [151]

After the Circuit **Court** affirmed, the Supreme **Court** reversed in a unanimous decision. [152] The Supreme **Court** stated that the MDL statute and legislative history are clear: cases must be remanded after the discovery stage is complete. [153] "Milberg may or may not be correct that permitting transferee **courts** to make self-assignments would be more desirable than preserving a plaintiff's choice of venue (to the degree that Section 1407(a) does so), but the proper venue for resolving that issue remains the floor of Congress." [154]

The Lexecon case removes any doubt that it is the Supreme **Court's** intent to snuff out liberal readings of statutes to address **mass tort** issues. Indeed, the Lexecon case represents a shift by at least part of the **Court:** the dissenters in Amchem, who were willing to accept an efficiency argument even in the face of an arguably clear note to Rule 23, switched their point of view and now require a more literal reading of statutes. Interestingly, Justice Breyer, who dissented in Amchem, cited Amchem with approval for this proposition. [155] Parties cannot take liberties with interpretations of statutes for the sake of efficiency, but what are they supposed to do? Perhaps the bankruptcy option will become more attractive to **mass tort** defendants. **[*42]**

II. The Bankruptcy System and Its Use in Resolving **Mass Torts**

The bankruptcy system has been described as follows: "It is the twofold purpose of the Bankruptcy Code to convert the estate of the bankrupt into cash and distribute it among creditors and then to give the bankrupt a fresh start . . . ." [156]

Speed and finality are important in the bankruptcy process. [157] **Mass torts** present the bankruptcy system with tricky questions and a dilemma: how in the world can bankruptcy **courts** quickly and fairly resolve the claims of **mass tort** victims, when their injuries may not even manifest themselves for years? Although the bankruptcy system has some decent answers to this question, bankruptcy statutes at the same time are vague in critical respects. What follows is an examination of bankruptcy's natural advantages over class actions in resolving **mass tort** claims especially in light of Amchem, followed by a cautionary tale of how, nevertheless, bankruptcy is not at all perfect as a method for their resolution. **[*43]**

A. Bankruptcy's Underpinnings of Collectivization of Claims and Debtor Rehabilitation: A Natural Advantage in Resolving **Mass Tort** Issues

The first goal of the bankruptcy system is to efficiently collect the assets of the debtor and distribute these assets to creditors according to a priority scheme under the Bankruptcy Code. [158] After much patchwork evolution, the system has developed a collectivist approach [159] and creditors who would normally be acting separately in prosecuting their cases and collecting on judgments (and, indirectly, fighting each other for scarce resources) are thrown together to pursue assets of the debtor. Similarly situated creditors share on a pro rata basis. [160] In fact, the bankruptcy system goes so far as to retroactively promote equality among similarly situated creditors, [161] providing for the "avoidance" and "recovery" by the bankruptcy estate of certain transfers made before the bankruptcy filing which favor some unsecured creditors over others. [162] As such, bankruptcy is immediately different from the greater adversary system, with its primary focus on group, rather than individual, rights. It further differs from the adversary system because it changes the incentives for a creditor who would otherwise vigorously pursue **[*44]** its case and seek to recover debtor assets: Because all creditors in the same class must share equally regardless of who uncovers the funds, individual creditors have less of an incentive to take the lead in an investigation of the debtor. While the bankruptcy system has safeguards to ensure that the debtor's affairs are fully investigated and that individual creditors are protected, [163] the overall outcome is that individual rights are far less important in bankruptcy than in the greater adversary system. Far from assuming that each creditor will direct its own action against the debtor, bankruptcy assumes that the average creditor will not get involved at all.

Creditors tolerate a group approach presumably because they have concluded that it is the

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best way to realize some return in a bad situation. For example, accounts receivable might be uncollectible if a particular creditor acts quickly in enforcing judgment and thereby closes down the business of the debtor. Bankruptcy, with its mechanisms in place for collecting such accounts receivable and providing for an orderly payment of debts from debtor assets, is more logical. [164]

Bankruptcy thereby deals with commonality and typicality issues differently from Article III **courts** acting under Rule 23's dictates. As the bankruptcy system seeks to provide similarly situated creditors with equal treatment, in theory at least the Bankruptcy Code assigns no distinction between future and present injuries of the same kind. It lumps this group into the same general category, as a pre-petition, unsecured debt. The paradigmatic example is of present and future judgment creditors of the debtor: an unsecured creditor who has already obtained a judgment is treated the same, under the Bankruptcy Code, as a creditor who has not yet obtained a judgment.

In exchange for submitting to bankruptcy, the debtor hopes to obtain a discharge of debts. [165] For a Chapter 7 debtor, discharge means that creditors are forever barred from collecting pre-petition debts. [166] For a reorganizing **[*45]** debtor filing under Chapter 11, the fresh start means that creditors cannot seek repayment of their debts as long as the debtor makes its payments pursuant to a confirmed plan. [167] The concept of discharge is a long established one [168] and is derived from the desire to restore to the debtor some measure of confidence in its capacity to control its future.

The law favors the granting of a discharge to an honest debtor and does not second guess a discharge if later the debtor's financial affairs are rectified, and the debtor is in a position to repay its debts. Reopening a bankruptcy case would explicitly threaten the Code's goal of debtor rehabilitation. [169] The debtor, then, has strong arguments that a confirmed plan should not be modified. Plans may be modified to take into account changes in a company's circumstances, or misjudgments by the **courts,** but the standard for modification is extremely hard to meet. [170] The modification of a debtor's Chapter 11 plan also affects creditors and thus threatens the Code's goal of fairness among creditors. Pre-petition secured creditors, trade creditors, and shareholders may justifiably oppose a modification of a plan in many cases because of the financial uncertainty that modification may bring to the debtor, which lessens their own chances for repayment under the plan.

In theory, the principles of speed and finality combine to provide a solution to the riddle of **mass torts.** Once a plan is proposed and approved, creditors are hard-pressed to complain that the settlement should be revisited should it become apparent that the debtor company in fact has assets to satisfy more of its pre-petition debts. Further, there is no ability of a creditor to "opt-out" of a plan. Such a result would violate the principle of a fresh start. Bankruptcy as a structural matter imposes **mass tort** solutions as a result of its efforts to rehabilitate the debtor. In sum, individuals have far less control of **[*46]** their destinies in bankruptcy, with its emphasis on group solutions. The fight still taking place in the case of class actions of group rights versus individual autonomy has been decisively won in the bankruptcy realm in favor of group rights.

B. The Expansive Definition of a Claim: Bankruptcy's Ability to Quantify Contingent Liabilities

Since finality is important, Congress elected to give an expansive definition to the word "claim." [171] The more expansive the definition, the more debts that can get discharged after treatment under a plan and the more complete the debtor's rehabilitation.

Under the Bankruptcy Code, the **court** is capable of estimating and reducing almost any claim to a dollar amount, no matter how speculative or tied to injunctive relief. [172] Likewise, a **court** may estimate an injury that might ordinarily be subject to a remedy of specific performance. [173] **[*47]**

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Likewise, a pre-petition cause of action is a pre-petition claim, regardless of whether it sounds in tort, breach of warranty, or contract. [174] Even with unliquidated, contingent, unmatured, and/or disputed obligations, **courts** have readily reduced the claim to a dollar and concluded that the obligation is classified as a pre-petition claim. [175] An obligation based on a guarantee on which there has been no pre-petition default, an obligation to pay taxes that the Internal Revenue Service has not yet assessed, and future obligations to pay on a settlement agreement are all claims that have been held to be pre-petition claims without much dissent. At the other end of the spectrum are cases in which a party has not yet even encountered a debtor's product, but still wishes to file a claim in bankruptcy. **Courts** may find that a party's claim is too speculative to be acknowledged as a claim in bankruptcy. [176]

The Bankruptcy Code does not identify a method or procedure to be used by a bankruptcy **court** to estimate contingent or unliquidated claims. [177] Bankruptcy **courts** have improvised, guided only by the requirement that substantive state law govern the ultimate value of the claim. [178]

Accordingly, bankruptcy appears, at first glance, to solve the "sprawling class" problem identified in Amchem very neatly: put simply, sprawling creditor classes are permitted in bankruptcy as long as the claimants are similarly situated. Further, as bankruptcy is not an Article III forum, it need **[*48]** not get involved with tricky issues of judiciability of a future claim. Instead, in a robotic manner to speed the debtor to a discharge, bankruptcy **courts** can and do reduce claims. A coherent federal statutory process is in place for disposing of all claims, past, present and future, whether contingent or not, and that process is the bankruptcy process. [179]

C. Bankruptcy and Its Ability to Modify State Law Under Certain Conditions

As set forth above, the Amchem **Court** had great difficulty with the use of class actions in resolving **mass tort** issues because of a lack of authority under Rule 23 to alter state law personal injury or punitive damage provisions. Bankruptcy does not suffer in the same way, as it may utilize several provisions to paper over troubling state law. First, a nationwide **consolidation** of personal injury cases is specifically sanctioned under the Bankruptcy Code. [180] Accordingly, a district **court's** reluctance to consolidate personal injury actions from different states in a single class is simply not an issue in the bankruptcy context. **[*49]**

Second, the Bankruptcy Code provides a neat statutory method for dealing with potentially deal breaking claimants, permitting the cramdown of a plan upon a class that might have greater rights under state law. [181] The cramdown provides specific authority to ignore the state **court** rights certain creditors as long as certain conditions are met. In return, the Bankruptcy Code provides at least theoretical procedural protection to those parties who are facing a cramdown. These parties are entitled to vote and intervene prior to the vote. In contrast, class actions do not provide specific authority for overriding a particular constituency's state law rights.

Third, the Bankruptcy Code explicitly subordinates punitive damages, thereby overruling substantive state law. [182] Bankruptcy can avoid the manifold issues arising from parties from different states claiming a right to punitive damages when there is a limited pool of assets. In contrast, **courts** attempting to settle class actions must struggle with a lack of statutory authority for overriding state law. Accordingly, although members of a class in bankruptcy must be "substantially similar," [183] the problem of a dissenting class can be solved with a cramdown or subordination.

Bankruptcy, therefore, provides a statutory solution which class actions cannot. The Dalkan Shield district **court** was reversed because the circuit **court** could find no basis for the district **court's** position in subordinating punitive damages. [184] If the case had been in bankruptcy, it is very possible, with the cramdown and subordination provisions of the Bankruptcy Code, that the outcome could have been statutorily defended. With the Amchem

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Supreme **Court** decision, the Dalkan Shield circuit **court** has been vindicated as it is clear that a general fairness argument should not be made to justify certification of a class in the Rule 23 context, and it appears that bankruptcy provides the only remedy, at the moment, if punitive damages are to be subordinated. **[*50]**

D. Bankruptcy's Paradox: The Debtor Need Not Be Insolvent to Gain the Finality of a Discharge

Companies which are not insolvent may nevertheless take advantage of bankruptcy. When Congress enacted the 1978 Bankruptcy Code, the requirement of insolvency as a pre-condition to filing a petition under any chapter of Title 11 was removed. [185] Solvent debtors can file petitions so long as they are willing to subject their assets to administration under the bankruptcy laws. A debtor's ability to repay debts in whole or in part is not adequate cause for dismissal of a case under the Bankruptcy Code. [186] Until a debtor proposes a plan, it is too speculative to conclude that reorganization is not in the best interests of the debtor and debtor's creditors simply because the debtor is solvent. Further, if a debtor is able to fully recover after confirmation of a plan, perhaps becoming wildly successful, it has no duty to pay pre-petition creditors. Interestingly, the bankruptcy cases that have spawned the most **mass tort** case law were filed by corporations that arguably are not insolvent. Attorneys saw the use of bankruptcy as an opportunity to resolve specific problems. [187]

In theory, therefore, a debtor corporation could gain its coveted discharge of **mass tort** liability in bankruptcy, permitting it to finally quantify its losses regardless of its actual insolvency. Bankruptcy, in theory, is a good option for an otherwise healthy company that faces a **mass tort** problem.

E. Bankruptcy's Ability to Deal with Conflicts of Interest: Avoiding Amchem's Uncomfortable Questions

Courts have barely begun to puzzle through attorney conflict of interest issues for nationwide settlements in the class action context. In distinct contrast, the bankruptcy system has well developed conflict of interest rules, for reasons that have nothing to do with **mass torts.** Rather, the bankruptcy system is cost conscious in a way that the general adversary system is not. There is also concern about protecting what is left of an often meager estate, **[*51]** lest over-reaching attorneys or other professionals drain it of wealth which by right should inure to the benefit of unsecured creditors. [188]

As a result of these and other concerns, prior **court** approval of counsel and other professionals by the debtor in possession of a Chapter 11 case or a trustee in a Chapter 7 case is necessary. Professionals must file an application with the **court** for an order approving their retention. In this application, the professionals must disclose all potential material conflicts and demonstrate their disinterestedness. [189] Also, as the attorneys must describe the scope of their anticipated services, including some time estimates, the **court** may later hold them to a more limited fee if the attorneys exceed the scope of their advertised services. Attorney behavior is therefore regulated from the start. **Courts** have held that they may examine the bankruptcy capabilities of the attorneys seeking retention and deny retention if they believe that the attorneys do not have the qualifications to perform bankruptcy work, regardless of the attorneys' proven abilities in other fields. [190]

Court supervision continues throughout the case because bankruptcy cases necessarily create numerous conflicts of interest. "The difficulty here is that alliances shift in the middle of the case, depending on the issues. Creditors may be allied against the debtor in, say, trying to bring the debtor to heel. But creditors and the debtor may be allied with each other in trying to maximize the return from the estate. As if this weren't complicated enough, the Bankruptcy Code goes even further. That is, at one point the Bankruptcy Code permits one person to occupy a dual role." [191] **[*52]**

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present different challenges to the legal system, they all share the common denominators of great expense, long delays and a review of innumerable, similar claims. [1] Congress has offered few concrete solutions, and **judges** and attorneys have responded out of perceived necessity by devising a variety of methods for resolving **mass torts,** including the increasingly creative use of class actions and bankruptcy options.

In the highly publicized case of Amchem Products, Inc. v. Windsor, [2] the Supreme **Court** struck down an imaginative use of class actions in the **mass tort** context, which will no doubt impact on approaches for resolving such **[*9]** claims. With Amchem, the Supreme **Court** expressed concern, among other things, about the perceived conflicts of interests in a "sprawling class," [3] and also the general lack of a coherent statutory basis for the use of class actions in resolving **mass tort** claims. [4] The Supreme **Court's** solution would be to implement a national legislative system to deal with the asbestos problem, [5] an idea that is not at all original and no more popular or practical now than when it was first proposed. [6] **[*10]**

Ironically, in the face of a demonstrated lack of resolve by Congress, non-Article III bankruptcy **courts** may become more prominent in the **mass tort** arena by default. The bankruptcy system at first glance does seem to be a perfect forum for resolving **mass tort** issues. The Bankruptcy Code provides a statutory basis for resolving large numbers of claims, thereby addressing a specific concern of the Supreme **Court,** and contains elaborate safeguards against conflicts of interests. [7] Furthermore, the Bankruptcy Code, through its priority system and by shifting debtor's resources from equity holders to other creditors in a plan of reorganization, appropriately penalizes those who take the risk in investing in a company. [8] In contrast, class actions usually do no such thing: they set aside limited funds for the payment of class action claims, while the company and its shareholders escape potentially unscathed.

However, the bankruptcy solution is itself problematic. First, the bankruptcy system, while facially sufficient for resolving large numbers of claims, in fact never before had to deal with such vexing problems as **mass torts. Courts** acting under the Bankruptcy Code have been forced to improvise. [9] **Courts** may take comfort in finding a system in place for **[*11]** resolving large numbers of claims, reciting Bankruptcy Code provisions like a talisman, but the reality is that bankruptcy **courts** are no more adept than other forums in resolving **mass tort** issues. Ironically, the Amchem class action was commenced exactly because of the perceived failure of the bankruptcy process in dealing effectively with **mass torts.** [10] Therefore, the Amchem case has the ironic effect of strengthening the role of a forum which the parties intended to avoid. Indeed, with Amchem, Article III **courts** have been sidelined as "inferior" bankruptcy **courts** are left to resolve cases involving literally billions of dollars and millions of lives. [11]

Part I of this article first describes the class action's role within the adversary system. Its growing use in resolving **mass torts** in the face of a lack of statutory support points to an equally obvious dearth of alternatives. This section describes events leading up to Amchem and Ahearn, and concludes that the Supreme **Court** has, at least temporarily, reined in liberal readings of the requirements for class action certification to justify its use in **mass tort** litigation. More broadly, the Supreme **Court** has created great doubt about the future of the use of class actions and **consolidation** techniques often used in conjunction with class actions in resolving **mass torts** which will, at the very least, make bankruptcy a more attractive option for companies facing liability.

Part II explores the bankruptcy system. For better or worse, it has definitively resolved questions that still plague class actions, with its wholly different approach to **mass tort** issues. It provides explicit authority for quantifying disputed, contingent or unliquidated claims, permits and legitimizes heavy **court** involvement in the litigation and settlement process and has flexible, but in the end, strict, conflict of interest statutes. Further, from a structural standpoint, many of the concerns expressed by the Supreme **Court** in Amchem

In bankruptcy, a debtor in possession must act in the best interest of the estate and its creditors. [192] As **courts** have noted, this duty sometimes runs against the debtor's desire for self-preservation. **Courts** are also necessary to monitor attorneys who wish to represent a debtor when the attorneys also represented the debtor prior to the bankruptcy filing date. **Courts** may also review attorney practices at the time of the fee application to ensure they have remained conflict free. [193]

Court involvement in the bankruptcy process permits a fine tuning of conflict of interest rules in a way not found in the greater adversary system. With **court** approval, attorneys can get out of a bankruptcy case during a temporary conflict, and then rejoin at some later date when the conflict no longer exists as long as they seek **court** approval. In contrast, once a conflict exists in the greater adversary system, the conflict is generally permanent. [194] **[*53]**

These conflict of interest rules provide the bankruptcy system with an obvious advantage over the class action. In a **mass tort** context, it may very well be necessary to grant flexibility to attorneys representing claimants. The issues of causation and damages are so complex that attorneys acting in good faith cannot always determine when or if they are involved in a conflict of interest. However, Amchem arguably ties attorneys' hands in the class action context. They are never sure if their representation of a large class will subject themselves to attack on appeal. In contrast, bankruptcy permits flexibility. Attorneys may rest easier with the assurance that they have obtained an order approving their retention and fees.

F. Bankruptcy **Court Judges:** Their Mandate to Intervene at All Stages of the Case Could Assist with **Mass Tort** Settlements

Bankruptcy **courts** possess greater power than **courts** in other forums to control discovery as well as other aspects of the case. They are unabashedly activist and in some cases non-neutral by design and therefore do not suffer the same stigma that activist district **court judges** do in class action cases. [195] This is a distinct advantage in resolving **mass torts,** which may require **court** intervention to review the negotiation process and the fairness of the settlement.

There are several reasons for bankruptcy **court** activism. First, as set forth above, bankruptcy **judges** must monitor conflicts of interest. Second, bankruptcy **judges** are not Article III **judges.** Bankruptcy **judges** are immediately distinguishable from other types of **judges** because of the considerable discretion they exercise in carrying out their duties by virtue of a statutory grant to review retention and fee applications of professionals and settlements reached between parties. [196] Indeed, bankruptcy **judges** proactively **[*54]** intervene at all stages of the proceeding in a way that is unheard of in the greater civil adversary system. [197] Bankruptcy **court** activism arises as a result, in part, of the bankruptcy **court's** roots as an administrative agency, which imbues the **court** with a predilection toward regulation of the participants. Prior to 1973, bankruptcy **judges,** then called referees, were involved in the day-to-day operations of bankruptcy cases. Their duties included, for example, organizing and scheduling meetings of creditors, setting up creditors' committees, appointing trustees, and setting trustees' fees.

The bankruptcy **judge's** function has been transformed. Since 1978, bankruptcy **judges'** roles as administrators has been largely removed by Congress. [198] In Congress' view, the lack of separation between administrative and judicial functions eroded public confidence in bankruptcy proceedings. Bankruptcy **judges** were seen as favoring certain trustees and they were dealing with administrative issues that "real" **judges** did not. This lack of separation was also a major reason for the establishment of the United States Trustee. [199] Regardless, the **court's** administrative roots give bankruptcy **judges** a historical legitimacy to intervene in cases.

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Third, unlike the generalist **judges** within the adversary system, bankruptcy **judges** are almost by definition experts in their field. [200] They are **[*55]** often chosen from the pool of bankruptcy attorneys, and, if not already proficient in the law when appointed, develop an expertise by examining the same types of cases over and over. Moreover, bankruptcy **courts** in different districts develop their own expertise. Attorneys representing large corporations will sometimes seek to file in the Southern District of New York or Delaware, for example, which have experience with such complex reorganizations.

Control is, to more of a degree than found in district **courts,** taken out of the hands of the litigants. This is because **judges** know the overall framework of the Bankruptcy Code and will not automatically accept an attorney's argument, which may be logical on its face, but which does not comport with the overall policy of the Bankruptcy Code. Common-law **judges,** in contrast, are generalists, seeing relatively few cases dealing with any given subject and having little control over their agendas. [201]

Perhaps as a result of these factors, negotiation and counseling in bankruptcy tend, much more than in general civil litigation, to take place under the supervision of the **court.** [202] Bankruptcy **courts are also courts** of equity and therefore have a further basis to intervene in situations as they deem appropriate. [203] In their decisions, **courts** also often justify their activist and equitable position by reciting the mantra that bankruptcy proceedings must conclude quickly. [204] In fact, bankruptcy **courts** have, in the name of **[*56]** promptly administrating the bankruptcy estate, unjustifiably assumed powers-they may only do what the Bankruptcy Code permits them to do. [205]

Once again, bankruptcy clearly provides a **judge** an activist role in the process. [206] In contrast, the **judge** presiding over a class action proceeding, as demonstrated by Amchem, does not necessarily have this institutional prerogative.

G. Bankruptcy: The Theory and Reality of **Mass Tort** Litigation

In theory, bankruptcy solves many of the problems still troubling class actions. It provides authority for resolving "future" claims, attaches importance to group rights, permits and legitimizes heavy **court** involvement, has strong conflict of interest statutes, and solves commonality problems through the "cramdown" and by other means.

Bankruptcy is, nevertheless, not a perfect forum for resolving **mass tort** issues. For example, as has been described above, bankruptcy ascribes a broad definition to a "claim." In fact, the circuits are divided and seem to have trouble in deciding when a "claim" arises in a limited number of recurring fact patterns including indemnification obligations, [207] liability under environmental clean-up statutes such as CERCLA, [208] and, not surprisingly, **[*57]** tort liability for exposure to toxic substances such as asbestos. [209] At one extreme, some **courts** have held that a claim arises as soon as the debtor engages in the actions that are the basis for the claim and have readily calculated future claims. [210] At the other extreme, **courts** have held that a claim does not arise until the creditor has a fully accrued cause of action under non-bankruptcy law. [211] The question of judiciability rears its head in bankruptcy in this context.

Further, just because a bankruptcy **court** decides that it can fix future claims does not mean it is out of trouble-indeed, far from it. Bankruptcy **judges** who undertake to estimate future claims may badly misjudge the number and types of claims. [212] This creates a definite problem of finality, which is so important to the bankruptcy process.

The Johns-Manville case illustrates the perils of **mass tort** claims estimation. In part, the problems with Manville's failure to anticipate future claims led to the use of class actions in Amchem and Ahearn. [213] In 1982, **[*58]** Manville filed a petition for relief under Chapter 11 of the Bankruptcy Code, as a result of an increasing number of current and expected tort claims against it for exposure to asbestos. As part of its Chapter 11 reorganization plan,

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Manville created the Asbestos Health Trust in 1986 as the sole fund through which present and future victims of asbestos-related diseases could satisfy their claims. [214] The intention was to rehabilitate; quantify the claims, separate them, and permit Manville to continue in business. The trust idea ran afoul of the bankruptcy priority scheme, which returns equity to share holders only when the other creditors have been paid. Nevertheless, it was deemed the only practical solution at the time. Such trusts have since been recognized as valid by Congress. [215] The trust soon ran out of money and the parties puzzled over how to resolve the dilemma.

In a sense, the bankruptcy presumption of plan finality prevailed, as the plan was not modified. However, the solution had the same effect. **Judge** Weinstein approved a class action settlement that revised rights with regard to the trust created to handle claims against Manville Corporation for personal injury due to exposure to asbestos. [216]

Judge Weinstein justified an increase to the trust assets through his power to "act equitably to protect all those claimants against the trust who were injured by Manville asbestos." [217] This language sounds suspiciously like the general equitable arguments rejected by the Supreme **Court** in Amchem. **Judge** Weinstein stated that he could wholly rely upon New York substantive law without looking to stretch the intent of Rule 23 at all, [218] finding that "no statute or decision [of New York law] limits the **courts'** equity powers to interpret New York substantive trust law. Acting under New York state law, the federal **courts** must protect the rights of trust beneficiaries." [219] The **court** thereby found a statutory hook to justify a settlement that allowed for the additional funding. [220] **[*59]**

Interestingly, the problems that arose in the Manville case regarding a shortfall in the trust as set up under the plan were completely predictable. From the start, the parties readily acknowledged that the trust fund would be insufficient to pay all claimants, but they saw no alternative and so proceeded headlong. [221]

This improvisation can be seen in other **mass tort** cases as bankruptcy **courts** grapple with liability issues. In denying a motion for estimation and the debtor's motion for the appointment of a panel of experts to assist in the liquidation of claims, the Dow Corning **court** exhorted the parties as follows:

The task of achieving a fair distribution of assets in the **mass tort** setting is onerous and profound. And of course, criticizing flawed approaches to an incredibly difficult problem is easy. The hard part is coming up with a better model . . . the **Court** has encouraged the parties to think creatively, to search the academic literature for new ideas and to not be afraid to try them. We again encourage the parties to try something new and better. [222]

If bankruptcy attorneys are required to "think creatively" and "search academic literature for new ideas" to resolve their **mass tort** issues, this appears to preclude bankruptcy as a means for resolving **mass torts** in light of the Supreme **Court's** teaching in Amchem that the floor of Congress, and not the **courts,** should be the place where new methods are proposed. However, such a conclusion would be too sweeping. As argued above, bankruptcy does have established procedures which can be used to resolve **mass torts** (ability to handle a large number of claims, activist **judges,** etc.). This dramatic call to action ignores the substantial basis for justifying **mass tort** solutions in the bankruptcy context.

It is necessary to acknowledge that the specific issue of treatment of future claimants in the **mass tort** context is largely unresolved in bankruptcy. Bankruptcy **courts,** so effective at reducing to monetary amounts future claims outside the **mass tort** context, are still finding ways to apply proven bankruptcy principles in the **mass tort** context. [223] A bankruptcy debtor is not free from worry just because it has confirmed a plan. Rather, the debtor must **[*60]** worry that **courts** may open the case up to reexamination, and determine whether a debtor

must contribute even more to a plan as occurred in Manville. Finality, the ultimate goal of any debtor, is very much in doubt when a plan can be changed and bankruptcy's principle of finality is circumvented.

Further, until recently, bankruptcy **courts** have not had to deal with the vexatious issues of causation and establishment of liability in the **mass tort** context, as the debtor rarely had a reason to contest liability. How bankruptcy **courts** resolve this issue is completely unsettled. Bankruptcy **courts** dealing with the issue admit as much. [224] As has been indicated above, this problem is not unique to bankruptcy, as very few, if any, nationwide class action cases have ever fully litigated liability issues.

Conclusion

A different outcome in Amchem might have led to finality for companies with **mass tort** problems: future claimants would have been bound by the settlement. [225] In refusing to certify the proposed class, the Supreme **Court** has created great uncertainty with respect to the use of class actions in resolving **mass tort** liability on a nationwide scale and, by default, bankruptcy becomes a more attractive alternative. As set forth above, bankruptcy has coherent answers to many of the questions outstanding in the class action context.

However, larger questions may be asked about the use of the bankruptcy solution. Bankruptcy stresses group rights over individual autonomy. If the Supreme **Court** correctly decided Amchem, with its assumptions that individual interests cannot be subsumed in a class and that **courts** should not act as protectors for individual claimants absent a specific statutory mandate, then bankruptcy's use can be viewed as problematic. Amchem implicitly reinforces the traditional notions of party control and a passive, neutral judiciary. The Supreme **Court** found that there is no need to alter these assumptions to address the perceived **mass tort** crisis.

The bankruptcy process may encourage abuse by parties which see benefits in dealing with large groups instead of individuals or small groups with their own agendas, exactly the concerns expressed by the Supreme **Court** in rejecting the proposed class in Amchem. Bankruptcy's use of activist, non-Article III **judges** may lead to forum shopping. Again, parties may see the benefits of bypassing entire groups of people who normally play a role in the **[*61]** adversarial process, and instead focus on convincing a **judge,** who by design plays a large role in the bankruptcy process.

These questions are too important to remain unresolved and will be addressed in the future. Until then, attorneys, when asked by a corporate client facing **mass tort** liability if it can gain finality through the use of the class action device or the bankruptcy process, must now answer in the negative, but with bankruptcy perhaps the better option for an ailing company. Amchem obviously creates great uncertainty in the use of the class action for such a purpose. The bankruptcy process has its own problems, most importantly that it has not proven it is capable of creating closure for a corporation seeking to discharge its present and future **mass tort** liabilities, notwithstanding its formidable tools for bringing cases to a conclusion quickly and efficiently under less unique circumstances.

FOOTNOTES:

n1 See a full definition of the term "**mass tort**" infra p. 14-15.

n2 117 S. Ct. 2231 (1997). The case was filed as Carlough v. Amchem Prods., Inc. Later, Robert A. Georgine was substituted as a representative plaintiff for Edward J. Carlough. The district **court** published several opinions in this case prior to the litigation of the class action certification issues which resulted in the Supreme **Court** case. See Carlough v. Amchem Prods., Inc., 834 F. Supp. 1437 (E.D. Pa. 1993), Carlough v. Amchem Prods., Inc., 158 F.R.D. 314 (E.D. Pa. 1993), Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994). Amchem's cousin, Flanagan v. Ahearn, 90 F.3d 963 (5th Cir. 1996), vacated and remanded,

117 S. Ct. 2503 (1997), aff'd sub. nom., In re Asbestos Litig., 134 F.3d 668 (5th Cir. 1998), cert. granted, sub nom., Ortiz v. Fiberboard Corp., 118 S. Ct. 2339 (U.S. June 22, 1998) (No. 97-1704) has its own consequences for class action law. These cases will be discussed in greater detail infra Part I.

n3 See Amchem, 117 S. Ct. at 2250.

n4 See id. at 2249.

n5 See id. at 2252.

n6 The Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by Chief Justice Rehnquist in 1990, called for a national solution as early as 1991. See Judicial Conference of the U.S. Ad Hoc Comm. on Asbestos Litig., Report of Ad Hoc Comm. on Asbestos Litig. 19 (1991). The Committee recommended that Congress create "a national system for resolving asbestos claims which at the very least permits consolidating all asbestos claims in a single forum." Id. at 30. As an alternative, the Committee recommended that Congress expressly authorize class actions or collective trials in asbestos cases. See id. at 36. In the absence of such changes, the Committee foresaw that all the defendants' resources for payment of these claims would be exhausted within a few years, leaving many claimants without remedy. In response, Congress took no immediate action whatsoever, and made only minor changes several years later to the Bankruptcy Code. See 11 U.S.C. § 524(g) (1994) (Congress recognized the bankruptcy **court's** authority to issue "channeling injunctions" in asbestos cases which preclude actions by third parties that would have the effect of circumventing trust distributions).

Along the same lines, on June 20, 1997, tobacco companies, states' attorneys general and public health advocates announced a settlement granting broad liability protection to the tobacco industry in exchange for large payments by the industry over a 25 year period. On September 17, 1997, President Clinton announced that the settlement must be toughened. Soon after, law makers were holding hearings and discussing various changes to the settlement in response to political pressures. In March and April, 1998, the Senate Commerce Committee negotiated and approved a bill substantially tougher on the tobacco companies than the original settlement. On April 8, 1998, RJR Nabisco Holdings Corporation CEO, Steven Goldstone, declared the proposed settlement dead and other tobacco companies followed suit. While it is too early to tell whether Congress will consider legislation anyway, it is likely that there will be no legislation this year. See Wall St. J., Apr. 9, 1998, at A3.

As the asbestos and tobacco examples demonstrate, legislative solutions to such difficult mass injury issues often require long waits and often fail to materialize. This failure by Congress to act in imposing an overall system reflects the "limitations of political decision-making generally, systematic deficiencies, including inadequate resources, poor data bases, sluggish proceedings, hostility to economic analysis, weak leadership, political vulnerability, lack of public support and participation, secrecy, sporadic enforcement, under and overdeterrence, inability to set priorities, lawlessness, and many others." Stacy L. Rahl, Modification of a Chapter 11 Plan in the **Mass Tort** Context, 92 Colum. L. Rev. 192, 202 n.60 (1992) (quoting Peter H. Schuck, Agent Orange on Trial, 290 (1986)) (the use of an administrative solution may in the end have negligible effects in decreasing the costs to the system and to the parties involved).

n7 The dissent in the ill fated Ahearn case made exactly this point, warning that the certification of the class was improper because it represented a "constructive bankruptcy." The dissent further stated that certification would impermissibly circumvent the "detailed protections of the Bankruptcy Code for the express purpose of imposing the entire cost of the bailout on Fibreboard's most vulnerable creditors, to the betterment of its shareholders." Ahearn, 90 F.3d at 993.

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n8 In commenting on the Amchem decision, Lawrence Tribe, who represented the respondents opposed to the asbestos settlement, stated "what we won't see now is the use of class-action litigation as a sort of cheap substitute for bankruptcy in which companies, in effect, purchase a cap on liability." Christopher Drew, Ruling Could Jeopardize Class-Action Settlements, N.Y. Times, June 27, 1997, at D15.

n9 A prime example of this improvisation can be seen with the Manville bankruptcy case. See infra at Part II.F; see also Frank Macchiarola, The Manville Personal Injury Settlement Trust: Lessons for the Future, 17 Cardozo L. Rev. 583 (1996). Macchiarola was a special master in the Manville case and set forth the convoluted history of the filing, with its manifold appeals, during which time the district **court** and Second Circuit struggled with the novel issues before them. After it was clear, for example, that the Manville trust as proposed in the confirmed Chapter 11 plan could not adequately fund claims, District **Judge** Weinstein approved a settlement which modified the parties' rights to the trust fund. Initially, the Second Circuit deemed this modification to be an impermissible modification of the plan which had been previously confirmed because it did not meet the Bankruptcy Code's procedure for modification. Therefore, the Second Circuit reversed and remanded. See id. at 611. However, on a motion for a rehearing, the Second Circuit **court** stated that "upon reconsideration, we conclude that our factual point [regarding priority of payment in the trust] was somewhat incorrect and that our legal point [that the payment priority was what the parties foresaw when they approved the plan] was entirely incorrect." Id. at 613. See also Steven L. Schultz, In re Joint Eastern and Southern District Asbestos Litigation: Bankrupt and Backlogged-A Proposal for the Use of Federal Common Law in **Mass Tort** Class Actions, 58 Brook. L. Rev. 553 (1992). Manville, and more generally, the problems the bankruptcy system faces when dealing with **mass tort** issues, are discussed in more depth, infra Part II.F.

n10 See Thomas A. Smith, A Capital Markets Approach to **Mass Tort** Bankruptcy, 104 Yale L.J. 367, 369 (1994).

n11 District **courts** face other diversions unknown to bankruptcy **courts.** For example, because of quick trial statutes, district **courts** often must sacrifice litigation of complex civil actions to concentrate on relatively minor criminal actions. At the end of these trials, they are required to impose the mandatory sentence without discretion. See United States Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 10 (1991) (approximately 100 federal offenses then carried mandatory minimum sentences).

n12 The adversary system in the United States depends upon advocates to gather and present evidence to a generally passive, neutral decision maker. See generally Frankel, Partisan Justice (1984); Stephen Landsman, The Adversary System: A Description and Defense (1984); Ellen E. Sward, Values, Ideology, and the Evolution of the Adversary System, 64 Ind. L.J. 301 (1989); cf. John H. Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823, 842 (1985) (describing the inquisitorial model found in certain countries which, inter alia, imposes upon the **judge** the role of actively questioning witnesses).

n13 "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party . . . ." Flanagan v. Ahearn, 90 F.3d 963, 998 (5th Cir. 1996) (quoting Hansbury v. Lee, 311 U.S. 32, 40 (1940)).

n14 See Gideon v. Wainright, 372 U.S. 335 (1963) ("In our adversary system of criminal justice, any person hailed into **court** . . . cannot be assured a fair trial unless counsel is provided for him. This seems to be an obvious truth.") But cf. In re Groban, 352 U.S. 330 (1957) (Frankfurter, J., concurring) ("The utmost devotion to one's profession and the fullest

recognition of the great role of lawyers in the evolution of a free society cannot lead one to erect a constitutional principal that no administrative inquiry can be had in camera unless a lawyer be allowed to attend."); Wolff v. McDonnell, 418 U.S. 539, 556 (1974) ("The right to counsel depends upon an analysis of the interests of the individual and those of the regime to which he is subject").

n15 See Rogello Lasso, Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process, 36 B.C. L. Rev. 479, 510 (1995). As reformers have noted, the two sides in fact often are not equally represented, and reformers have argued that a system requiring blanket mandatory disclosure rule and active judicial intervention during the discovery stage might better protect the party without adequate representation. See id.

n16 See, e.g., Fed. R. Civ. P. 26 advisory committee's note (1937 adoption) ("The more common practice in the United States is to take depositions on notice by the party desiring them, without any order from the **court,** and this has been followed in these rules".) Id.

n17 See Geoffrey C. Hazard, Ethics in the Practice of Law 120-35 (1978) (the inquisitional model, which places upon **judges** the potentially conflicting role of factfinder and decisionmaker, which in turn exacerbates biases to prejudice results, doesn't exist in the adversary system); Marshall v. Jerrico, 446 U.S. 238, 242 (1980) (the two sides are responsible for presenting their cases with earnestness and vigor); Mirjan Damaska, Presentation of Evidence and Factfinding Precision, 123 U. Pa. L. Rev. 1083 (1975).

n18 The common law tort is a wrong, independent of contract, that signifies an injury committed to the person or property of another. Further, a tort has been seen as a purely private dispute, subject to redress in a **court.**

n19 See Jack B. Weinstein & Eileen B. Hershenov, The Effect of Equity on **Mass Tort** Law 1991, U. Ill. L. Rev. 269, 274 (1991). **Mass tort** litigation should succeed in:

(1) fairly and expeditiously compensating numerous victims, and (2) deterring wrongful conduct where possible; while (3) preventing overdeterrence in **mass torts** from shutting down industry or removing needed products from the market, (4) keeping the **courts** from becoming paralyzed by tens or even hundreds of thousands of repetitive personal injury cases, and (5) reducing transactional costs of compensation.

Id.

n20 See Roger H. Trangsrud, Joinder Alternatives in **Mass Tort** Litigation, 70 Cornell L. Rev. 779, 780 (1985).

n21 Some would define a **mass tort** differently. See Richard A. Nagarda, In the Aftermath of the **Mass Tort** Class Action, 85 Geo. L. J. 295, 296, n.1 (1996) (defining **mass torts** differently, as different from "mass accidents" which do not involve latent issues, or "toxic torts" which involve latent issues but in a specific geographical area. **Mass torts** involve latent issues over a wide geographic area).

n22 See In re Northern Dist. of Cal. Dalkon Shield IUD Prod. Liab. Litig., 521 F. Supp. 1188, 1191 (N.D. Cal. 1981) ("Unconscionable possibility that large numbers of plaintiffs who are not first in line at the courthouse door will be deprived" of compensation), vacated, 693 F.2d 847 (9th Cir. 1982), and cert. denied, 459 U.S. 1171 (1983). Some have argued that the **courts** have treated **mass tort** law as a public law problem. See, e.g., Lester Brickman, The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?, 13 Cardozo L. Rev. 1819 (1992); Deborah R. Hensler, Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman, 13 Cardozo L. Rev. 1967 (1992).

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n23 Fed. R. Civ. P. 23. Class actions and **consolidation** techniques were developed by equity, where **courts** looked at the issues of fact and fairness in particular situations to fashion remedies. See Weinstein & Hershenov, supra note 19, at 270.

n24 Fed. R. Civ. P. 23(a).

n25 See Hannah v. Larche, 363 U.S. 420, 442 (1960) (the differing rules of fair play encompassed by the concept of due process vary according to the specific factual context and differing types of proceedings). See also Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Douglas, J., concurring opinion). "The very nature of due process negates any concept of inflexible procedures universally applicable to every applicable situation . . . . Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961) (quoting Joint Anti-Facist Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Justice, J., concurring opinion)). See also Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

n26 The Supreme **Court** has repeatedly emphasized the importance of rigorously and consistently applying each of these prerequisites in order to protect adequately the due process rights of class members not before a **court,** most recently with the Amchem case.

The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments-checks shorn of utility-in the settlement class context. First, the standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind-class certifications dependent upon the **court's** gestalt judgment or overarching impression of the settlement's fairness.

Amchem Prod., Inc. v. Windsor, 117 S. Ct. 2231, 2248 (1997). See also General Tel. Co. v. Falcon, 457 U.S. 147, 156-57 (1982); East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405-06 (1977); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969).

n27 The numerosity requirement of the class action was designed "to prevent members of a small class from being unnecessarily deprived of their rights without a day in **court.**" 7 Charles Wright & Arthur Miller, Federal Practice & Procedure § 1762, at 593 (1972).

n28 To make sure the important policy goal of individual autonomy is not sacrificed for efficiency, the Reporter for the 1966 amendments cautioned: "The new provision invites a close look at the case before it is accepted as a class action . . . ." Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 390 (1967).

n29 The Federal Rules of Civil Procedure contain compulsory joinder provisions which require that, outside the class action context, the **court** must join all parties necessary for the just adjudication of an action. See Fed. R. Civ. P. 19. The rules also provides for the permissive joinder of parties whose claims arise out of the same transaction or occurrence that forms the subject of the original dispute. See Fed. R. Civ. P. 20.

n30 See, e.g., Phillips v. Joint Legislative Comm., 637 F.2d 1014, 1022 (5th Cir. 1981); Pabon v. McIntosh, 546 F. Supp. 1328 (E.D. Pa. 1982). Other factors are relevant in determining numerosity. See also Doe v. Charleston Area Med. Ctr., Inc., 529 F.2d 638 (4th Cir. 1975) (where relief sought is injunctive and declaratory, even speculative and conclusory representations about the size of the class are sufficient); Arkansas Educ. Ass'n v. Board of Educ., 446 F.2d 763, 765-66 (8th Cir. 1971) (geographical diversion of the class is relevant); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 426 (8th Cir. 1970) (deterring massive

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wrong and fraud on the public is a consideration); Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648, 652-53 (4th Cir. 1967) (small size of potential recovery for individual litigants may be a factor in favor of finding class action certification).

n31 See Fed. R. Civ. P. 23(a). Commonality is satisfied where a question of law links the individual members. See American Fin. Sys., Inc. v. Harlow, 65 F.R.D. 94, 107 (D. Md. 1974). See also Deboer v. Mellon Mortgage Co., 64 F.3d 1171 (8th Cir. 1995), Forbush v. J.C. Penney Co., 994 F.2d 1101, 1106 (5th Cir. 1993).

n32 Typicality requires a **court** to focus on and compare the similarity between the named plaintiffs' legal and remedial theories and the legal and remedial theories of those whom they purport to represent to determine whether they are similar. See Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472 (5th Cir. 1986); Byes v. Telecheck Recovery Serv., 173 F.R.D. 421-24 (E.D. La. 1997). The typicality requirement assures that the representative's interests are so aligned with those of the class that vigorous pursuit of her own interests will necessarily further the interests of the class. See Jordan v. Los Angeles County, 669 F.2d 1311, 1321 (9th Cir. 1982).

n33 Fed. R. Civ. P. 23(b). Id.

n34 See Fed. R. Civ. P. 23(b)(1)(B), (b)(3). Rule 23(b)(2) permits class actions if "final injunctive relief or corresponding declaratory relief" is appropriate with respect to the entire class. Fed. R. Civ. P. 23(b)(2). The provision is not generally used to obtain monetary relief and therefore is less important in the **mass tort** class action context.

n35 See Fed. R. Civ. P. 23(b)(1)(B), (b)(3). Class actions may qualify under several of the categories of Rule 23(b). See In re A.H. Robins Co., 880 F.2d 709, 728 (4th Cir. 1989).

n36 Fed. R. Civ. P. 23(b)(1)(B). This rule may require a preliminary factfinding inquiry concerning the defendant's assets or exposure. See In re Northern Dist. of Cal., Dalkon Shield, IUD Prod. Liab. Litig., 693 F.2d 847 (9th Cir. 1982); In re Agent Orange Prod. Liab. Litig., 100 F.R.D. 718, 725 (E.D.N.Y. 1983), aff'd, 818 F.2d 145 (2d Cir. 1987).

n37 See Fed. R. Civ. P. 23(b)(1)(B). Rule 23(b)(1) should be chosen over (b)(3) to prevent "inconsistent adjudication or compromise of class interests." Robertson v. National Football Ass'n, 556 F.2d 682, 685 (2d Cir. 1977). But see County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1303 (2d Cir. 1990) (the **court** exercised its narrow discretionary power in permitting class members to opt out in a (b)(1) action).

n38 See Fed. R. Civ. P. 23(b)(3).

The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3).

n39 See Amchem, 117 S. Ct. at 2247. Rule 23(b)(3) is designed for situations in which "class-action treatment is not as clearly called for" as it is in Rule 23(b)(1) and (b)(2) situations. Rule 23(b)(3) permits certification where class suit "may nevertheless be convenient and desirable." Fed. R. Civ. P. 23 Advisory Committee's note. Common questions must "predominate over the questions affecting individual members"; and class resolution

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must be "superior to other available methods for the fair and efficient adjudication of the controversy." The Advisory Committee sought to cover cases "in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Id.

n40 See, e.g., Phillips Petroleum v. Shutts, 472 U.S. 797, 811 (1985) (due process entitles class members to a right to opt out from the class); Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1993). But see In re Agent Orange Prod. Liab. Litig., 996 F.2d 1425, 1437 (2d Cir. 1993) (right to opt out not required where it would be meaningless to future claimants).

n41 See Fed. R. Civ. P. 23(c)(2).

n42 See Fed. R. Civ. P. 23(b)(3). The **court** is required to disseminate "to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2).

n43 See In re A.H. Robins Co., 880 F.2d 709, 745 (4th Cir. 1989); John C. Coffee, Jr., The Corruption of the Class Action: The New Technology of Collusion, 80 Cornell L. Rev. 851 (1995).

n44 Fed. R. Civ. P. 23(e).

n45 When considering whether to approve a settlement, the **court** must determine whether the settlement is fair, reasonable, and adequate. See Girsh v. Jepson, 521 F.2d 153, 156-57 (3d Cir. 1975). "The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." In re General Motors Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 784 (1995). However, the **court** as guardian of the rights of absent class members is required to "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished." Id. at 785. (quoting 2 Newberg & Conte § 11.41 at 11-88 to 11-89). "The settlement must be both substantively reasonable compared to the likely rewards of litigation . . . and the result of good faith, arms length negotiations." Fickinger v. C.I. Planning Corp., 646 F. Supp. 622, 627 (E.D. Pa. 1986) (citations omitted). The decision whether to approve a settlement is for the sound discretion of the trial **court,** and that determination is reversible only for abuse of discretion. See Bryan v. Pittsburgh Glass Co., 494 F.2d 799, 801 (3d Cir. 1974).

n46 See Fed. R. Civ. P. 23 advisory committee's note (1966 revision).

A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Id. (citations omitted) (quotations in original).

n47 The bankruptcy system will be described infra Part II.

n48 The **courts** cannot ignore Erie R.R. v. Tompkins, 304 U.S. 64 (1938) or the Rules Enabling Act, 28 U.S.C. § 2072(b) (1994). See also Fed. R. Civ. P. 82.

n49 Further examples of this reluctance to use class actions to join plaintiffs with disparate claims abound. See In re School Asbestos Litig., 789 F.2d 996, 1007 (3d Cir. 1986) (the Third Circuit stated that "the dictates of state law may not be buried under the vast expanse

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about the use of class actions simply do not exist in the bankruptcy system. However, for a variety of reasons, the bankruptcy system's requirements of finality and speed are not always well suited for resolving **mass tort** claims, and bankruptcy **courts** find themselves having to **[*12]** guess, often unsuccessfully, at how to structure outcomes that are fair to future claimants and at the same time afford finality to the companies and creditors utilizing the bankruptcy system.

Part III concludes that, at least for the immediate future, companies facing **mass tort** liability may prefer bankruptcy to the class action option, but regardless of their choice will have to live with uncertainty as **courts** continue to grope for appropriate means for balancing concerns between the debtors and various claimants which are fighting for scarce resources.

I. Resolving **Mass Torts** in the Adversary System: An Uncomfortable Fit

A. The Adversary System: Stressing Individual Autonomy and Judicial Restraint

The adversary system's goals are simple: to uncover the truth of the matter subject to litigation and, where necessary, redress losses. [12] To achieve these goals, the judicial system relies upon two fundamental attributes, and both point to a system geared toward individualized justice. The first is party control. The litigants themselves establish the pace and timing of the litigation, with the expectation that a vigorous interchange between them will lead to the "truth." Indeed, this clash of adversaries as a means of ascertaining the truth is perhaps the most deeply rooted principle in Anglo-American law. Each party is afforded a due process right to "appear and be heard." [13] The constitutional right of trial by jury presupposes party initiative and the underlying principle of individual autonomy with a detailed evaluation of facts of each case. The emphasis of the adversary system is upon resolving **[*13]** private disputes: policy making is to be left to legislature consistent with the principle of separation of powers.

Likewise, the assumption that lawyers will do the litigating on behalf of the parties, while not explicit, is understood. [14] Attorneys are necessary because the two sides should be equally able to obtain information and present the case to an impartial fact finder. [15]

The Federal Rules provide the basic framework for attorneys during the discovery stage and up through trial. The opposing parties exercise a wide range of choice on whether, where, and when a lawsuit is filed and what resources to devote to the litigation. In general, the parties are left to their own devices for ensuring that the case moves toward trial in that with rare exceptions, no judicial order is required to conduct discovery. [16] Indeed, it has been widely noted that the American common-law system emphasizes party control of litigation rather than judicial prosecution and investigation. In short, an individual is in control of its own destiny.

The second attribute of the adversary system, and the flip side of individual autonomy, is the presence of a neutral decision maker. Although recently not as true, **judges** have traditionally been seen as passive arbiters of conflicting private interests who rule on questions of law. [17] Neutrality in **judges** is generally a good thing. For example, parties' knowledge that **judges** are neutral encourages them to settle without utilizing scarce **court** resources. **[*14]** They are aware of the ultimate strengths of their arguments and bargain accordingly, without calculating that they may obtain a special advantage in placing a matter before a **court or that the judge** will become an advocate for their side.

B. **Mass Torts:** A Definition and an Explanation of Its Tricky Fit Within the Adversary System

Mass torts do not fit comfortably within the adversary system, and even a coherent definition is elusive. Unlike with common law torts, [18] the number of injured parties is huge. [19] The adversary system seeks to provide individualized justice, but such an approach is not always practical with **mass torts** when thousands of claims must be dealt with quickly and

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of a federal class action. The parties' rights under state substantive law must be respected, and if that is not possible in a class action, then that procedure may not be used"). See also In re Tetracycline Cases, 107 F.R.D. 719, 724 (W.D. Mo. 1984) (class certification often denied in **mass tort** actions); In re RhonePoulenc Rohrer Inc., 51 F.3d 1293 (7th Cir. 1995). But see R. Barclay Surrick, Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?, 87 Dick. L. Rev. 265, 296 (1983).

n50 See In re Northern Dist. of Cal. Dalkon Shield IUD Prod. Liab. Litig., 521 F. Supp. 1188 (N.D. Cal. 1981), vacated, 693 F.2d 847 (9th Cir. 1982).

n51 Dalkon Shield, 521 F. Supp. at 1191.

n52 Id. at 1192.

n53 The bankruptcy system, discussed infra Part II, is a special category within the greater adversary system. Its goals are somewhat different from those goals traditionally associated with the civil adversary system, including, most notably, an explicit goal to rehabilitate the debtor.

n54 See Dalkon Shield, 693 F.2d 847 (9th Cir. 1982). See also Dunn v. Hovic, 1 F.3d 1371, 1387 (3d Cir. 1993) (the **court** also refused to place a cap on punitive damages in asbestos cases, noting a concern about punitive damages, but stating that it had no right to adopt an activist role to fix perceived problems).

n55 See In re Asbestos Litig., 90 F.3d 963, 993 (1996) (Smith, J., dissenting) (arguing that "this is simply a case of **judges**-both trial and appellate-trying too hard to solve the vexing problems posed by unending asbestos litigation.")

n56 Abram Chayes, The Role of the **Judge** in Public Law Litigation, 89 Harv. L. Rev. 1281, 1291 (1976). See also Geoffrey B. Hazard, The Effect of the Class Action Device Upon the Substantive Law, 58 F.R.D. 299, 30709 (1973) (describing societal changes which encouraged increased use of class action device).

n57 See Judith Resnick, Aggregation, Settlement and Dismay, 80 Cornell L. Rev. 918, 937 (1995) ("In practice, I believe we are witnessing the alteration of **court**-based individual adjudication-as it melds with 'alternative dispute resolution'. . . .") (citation omitted) (emphasis in original). See also Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 Stan. L. Rev. 1339, 1388-89 (1994) (stating that overall effects of judicial settlement promotion are unknown).

n58 See Coffee, supra note 43, at 853.

n59 See Coffee, supra note 43, at 858.

n60 See Thomas A. Smith, A Capital Market Approach to **Mass Tort** Bankruptcy, 104 Yale L.J. 367 (1994) (discussing psychological reasons why present and future claimants do not share similar outlooks).

n61 See Smith, supra note 60, at 367.

n62 See Flanagan v. Ahearn, 90 F.3d 963 (5th Cir. 1996), vacated and remanded, 117 S. Ct. 2503, aff'd sub nom. In re Asbestos Litig., 134 F.3d 668 (5th Cir. 1998).

n63 The MDL Panel, described in greater detail infra I(I), has been hailed as a means for forcing parties to reach settlements. Placing parties together in a case tends to lead to

settlements. As set forth below, the Amchem decision may force a reassessment of the efficacy of the MDL Panel in forcing settlements.

n64 See In re Asbestos Prod. Liab. Litig. (No. VI), 771 F. Supp. at 42224.

n65 See id. at 424.

n66 See Amchem, 117 S. Ct. at 2238.

n67 The CCR was a consortium of over 20 former asbestos manufacturers who faced financial ruin from the litigation. See id. at 2338.

n68 See id. at 2239.

n69 See id.

n70 See id.

n71 See id.

n72 See id. at 2240.

n73 This use of comprehensive schedules is similar to other cases. See, e.g., In re Rio Hair Naturalizer Prods. Liab. Litig., 1996 U.S. Dist. LEXIS 20440 (E.D. Mich. 1996).

n74 See id. at 2241.

n75 See Fed. R. Civ. P. 23(b)(3).

n76 See Amchem, 117 S. Ct. at 2241.

n77 See id. See also Carlough v. Amchem Prods., Inc., 834 F. Supp. 1437, 1467-68 (E.D. Pa. 1993).

n78 See Amchem, 117 S. Ct. at 2241. See also Carlough v. Amchem Prods., Inc., 158 F.R.D. 314, 336 (E.D. Pa. 1993).

n79 See Amchem, 117 S. Ct. at 2241.

n80 See id. at 2242. See also Georgine v. Amchem Prods., Inc., 878 F. Supp. 716, 726-27 (E.D. Pa. 1994).

n81 See Amchem, 117 S.Ct. at 2242. See also Georgine v. Amchem Prods., Inc., 83 F.3d 610 (1996).

n82 Ahearn, 90 F.3d at 971.

n83 Id. at 974.

n84 See Fed. R. Civ. P. 23(b)(1).

n85 See Ahearn, 90 F.3d at 972.

n86 See id. at 973.

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n87 See id.

n88 See id. at 972.

n89 See id. at 968.

n90 See Francis E. McGovern, Resolving Mature **Mass Tort** Litigation, 69 B.U. L. Rev. 659, 660 (1989) (class actions should not be used until litigation "matures," that is until the case has been tried often enough to eliminate all novel questions of fact and law). This concept has been picked up in subsequent cases. See Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (single **mass tort** class action creates a danger that a wide ranging and novel issue may be resolved in one case, thereby robbing the **courts** of the benefits of evolutionary legislation or case law). But see David Rosenberg, Comment, Of End Games and Openings in **Mass Tort** Cases: Lessons from a Special Master, 69 B.U. L. Rev. 695, 707-11 (1989) (maturity should not be a prerequisite to the use of class action procedures).

n91 See also In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 800-01 (3d Cir. 1995), cert. denied, 116 S. Ct. 88 (1995).

n92 See id. at 799-800.

n93 See id. at 630-31.

n94 There is a kind of accepted folk wisdom: that litigation or the threat of litigation cures improper incentives during settlement negotiations. With litigation as a real option, the defendants are more likely to bargain seriously. See Coffee, Jr., supra note 43 at 853 (1995). As set forth infra n.112, the threat of litigation generally does not exist in the **mass tort** context.

n95 See Georgine, 83 F.3d at 629. See also Coffee, Jr., supra note 43, at 853.

n96 See Ahearn, 90 F.3d at 975-76, n.8.

n97 See id. at 977.

n98 See id. at 971.

n99 See id. at 980. As to the alleged conflict between future and present members, the **court** found that the district **court** did not err in finding that the parties vigorously negotiated under the auspices of a former **judge,** and that present and future claimants both were united in wanting to avoid the risk of Fibreboard losing the coverage case and also to yield a maximum dollar amount. As to the intraclass conflict, the **court** found no "substantial" conflict, in that the negotiations were vigorous and there was no good alternative. See id. at 981.

n100 In the Amchem dissent, **Judge** Breyer applauded this approach, stating that the higher **courts** should defer more often to the district **courts,** concluding in the Amchem case that "the District **Court's** certification decision rests upon more than 300 findings of fact reached after five weeks of comprehensive hearings. . . . That **court** is far more familiar with the issues and litigants than is the **court** of appeals or are we . . . ." Amchem, 117 S. Ct. at 2253 (Breyer, J., concurring in part and dissenting in part).

n101 See John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669 (1986) (a discussion on a tendency for plaintiff's counsel to sell out the

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class to ensure a settlement and its fee). See also Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1 (1991) (stating that class actions are a boon to defense attorneys because in a settlement class action, plaintiffs' lawyers and defendants typically negotiate a settlement prior to filing the class action).

n102 See Georgine, 83 F.3d at 634.

n103 Amchem, 90 F.3d at 976 n.8 (citation omitted).

n104 Coffee, Jr., supra note 43, at 853. ("Not only do the plaintiffs' attorneys abandon the right to litigation at the outset which assures defendants that there is little downside risk from the use of this approach, but there is little opportunity for judicial oversight or intervention by other plaintiffs' attorneys.")

n105 See id. at 971.

n106 See Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). (To obtain Article III jurisdiction "first, the plaintiff must have suffered an 'injury in fact'-an invasion of a legally protected interest which is (a) concrete and particularized; and (b) 'actual or imminent, not conjectural or hypothetical.'") (citations omitted).

n107 See, e.g., Strong v. Arkansas Blue Cross & Blue Shield, Inc., 87 F.R.D. 498, 508 (E.D. Ark. 1980); Hines v. D'Artois, 383 F. Supp. 184, 188 (W.D. La. 1974), rev'd on other grounds, 531 F.2d 726 (5th Cir. 1976). See also Elizabeth R. Kaczynski, The Inclusion of Future Members in Rule 23(b)(2) Class Actions, 85 Colum. L. Rev. 397 (1985).

n108 See Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967). Although only two black doctors had actually applied for positions at the Newport News General and Nonsectarian Hospital, the **court** chose to recognize an additional 16 black physicians who practiced in the area in order to satisfy the numerosity requirement. The **court** justified its action on the grounds that the additional 16 class members might have found themselves victims of the hospital's allegedly discriminatory employment practices at some time in the future. See Cypress, 375 F.2d at 653 n.9.

n109 See Coffee, supra note 43, at 857.

n110 See id. at 855-56.

n111 See also In re A.H. Robins Co., 880 F.2d 709 (4th Cir. 1989) (affirming approval of class settlement resolving claims of class members with unmanifested symptoms of disease resulting from use of the Dalkon Shield); In re Agent Orange Prod. Liab. Litig., 996 F.2d 1425, 1433-34 (1993) (holding that class action properly included individuals who had been exposed to Agent Orange, but who had not yet manifested injury).

n112 The general lack of litigation in **mass tort** cases makes it difficult to assess whether the results of settlement class actions are as fair as those going to litigation. Indeed, this author was hard pressed to find any cases involving latent **mass tort** class actions that have gone through trial and not settled. Recently, this streak of non-litigated cases was broken in a silicon implant case, and its outcome may point even more to the perils of relying on the clash of adversaries in the **mass tort** context. Prior to litigation, the manufacturers of silicone gel breast implants had insisted that there was no scientific basis for liability. Indeed, the best studies yet conducted on this question, released shortly after a major settlement of a law suit, failed to demonstrate a causal relationship between breast implants and the alleged illnesses. See Marcia Angell, Do Breast Implants Cause Systemic Disease?, 330 New Eng. J. Med. 1748 (1994) (discussing Gabriel et al. study and others). Notwithstanding this lack of evidence, the manufacturers' concern about the outcome of a trial were justified, to a large

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extent. Without actually arriving at the merits of the law suit which was to be left for a later phase, a Louisiana jury found that the Dow Chemical Company had knowingly deceived women by hiding information about the health risks of silicone used in breast implants notwithstanding the lack of firm evidence of its harm. See Barry Meier, Dow Chemical Deceived Women On Breast Implants, Jury Decides, N.Y. Times, Aug. 19, 1997, at A1. Accordingly, the premise that litigated class actions might insure more rational or fair results than settlement class actions is questionable.

n113 See Georgine, 83 F.3d at 630. See also In re General Motors PickUp Truck Fuel Tank Prod. Liab. Litig., 55 F.3d. 768 (3d Cir. 1995) (rejecting the use of settlement class action when the class would not have been certified for litigation).

n114 See Ahearn, 90 F.3d at 988-89.

n115 117 S. Ct. 2231 (1997).

n116 Amchem, 117 S. Ct. at 2244.

n117 See id.

n118 See id. at 2248.

n119 See id. at 2248-49.

n120 See id. at 2249.

n121 Id. at 2246 (quoting Georgine, 83 F.3d at 633) (alterations in original).

n122 Id. at 2248 (citing Fed. R. Civ. P. 23 (b)(3)(D)). See also Fed. R. Civ. P. 23(c), (d).

n123 See Amchem, 117 S. Ct. at 2248.

n124 Id.

n125 See id. The Supreme **Court** cited Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 391 (1967) ("The interest [in individual control] can be high where the stake of each member bulks large and his will and ability to take care of himself are strong; the interest may be no more than theoretic where the individual stake is so small as to make a separate action impracticable." (footnote omitted)).

n126 Id. at 2252.

n127 See Amchem, 117 S. Ct. at 2253-54 (Breyer, J., concurring in part and dissenting in part).

n128 See id. at 2254.

n129 See discussion supra Part I.G.

n130 See discussion supra Part I.G.

n131 This conclusion may be overstated. The Supreme **Court** specifically refused to address Article III issues, although it has, in the past, permitted the inclusion of future claimants in class actions. See Amchem, 117 S. Ct. at 2244.

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n132 See id. at 2250.

n133 See Flanagan v. Ahearn, 117 S. Ct. 2503 (1997).

n134 See John C. Coffee, Jr., Class Wars: the Dilemma of **Mass Tort** Class Activism, 95 Colum. L. Rev. 1343 (1995) (Professor Coffee has suggested that the right to opt-out for the future claimant should occur at the time of the claimant's discovery of his injury, the appointment of representative plaintiff steering committees, and the implementation of an auction procedure for the choice of lead counsel to improve the accountability of the counsel selection process).

n135 Ahearn, 134 F.3d at 669.

n136 Id. at 670.

n137 Id.

n138 For a discussion of the history of the MDL, see Resnick supra note 57, at 927.

n139 See 28 U.S.C. § 1407(a) (1994) ("Civil actions involving one or more common questions of fact . . . may be transferred to any district for coordinated or consolidated pretrial proceedings.") (the "MDL").

n140 As of the late 1980s, less than one fifth of the cases within the MDL rubric were sent back to the originating **court.** See Patricia D. Howard, A Guide to Multidistrict Litigation, 124 F.R.D. 479, 480 (1989) (2600 of the 16,700 actions were remanded). See also Resnick, supra note 57, at 927.

n141 Indeed, during the first six years of MDL alone, about a quarter of the MDL litigations certified were **mass torts.** See Resnick, supra note 57, at 927.

From 1968, when it came into being, until 1975, the MDL panel transferred 168 litigations for consolidated pretrial treatment, including (by our count) 42 mass accident litigations (mostly air crashes) and three products liability cases (Dalkon, Celotex "technifoam" (house insulation) and a design defect/personal injury products liability litigation based on a faulty light plane engine). Thus about a quarter were torts. Of those 46 litigations, two included cases requesting class action certification.

Id. at 929.

n142 The MDL Panel itself has recognized that settlement or **consolidation** typically follows the transfer for pretrial proceedings under the MDL statute. See Richard A. Chesley & Kathleen Woods Kolodgy, Mass Exposure Torts: an Efficient Solution to a Complex Problem, 54 U. Cin. L. Rev. 467, 536 (1985). See In re Agent Orange Prod. Liab. Litig., 597 F. Supp. 740, 751-54 (E.D.N.Y. 1984), aff'd, 818 F.2d 145 (2d Cir. 1987).

n143 Use of the statute to justify assignment for trial was first recognized in Pfizer, Inc. v. Lord, 447 F.2d 122 (2nd Cir. 1971). Indeed, virtually every **court** to consider the question held or at least assumed that such authority existed under Section 1404(a) and the Judicial Panel on Multidistrict Litigation Rule 14(b) prior to the Lexecon case.

n144 118 S. Ct. 956 (1998).

n145 See Lexecon, 118 S. Ct. at 962-65.

n146 See id. at 959.

n147 See id.

n148 See id.

n149 See id.

n150 See id. at 960.

n151 See id.

n152 See id. at 960, 966.

n153 See id. at 964.

n154 Id.

n155 Other creative methods of resolving **mass tort** issues which do not have express statutory authority such as sampling, Glen O. Robinson and Kenneth S. Abraham, Collective Justice in Tort Law, 78 Va. L. Rev. 1481 (1992), are subject to attack under the Amchem logic.

n156 Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 353-54 (1985) (value maximization of the estate is "an important goal of the bankruptcy laws."). See also Katchen v. Landy, 382 U.S. 323, 328-29 (1966) ("This **Court** has long recognized that a chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period . . . .'") (citations omitted); Stellwagen v. Clum, 245 U.S. 605, 617 (1918); Williams v. United States Fidelity & Guar. Co., 236 U.S. 549, 554-59 (1915); Burlingham v. Crouse, 228 U.S. 459, 473 (1913); Wetmore v. Markoe, 196 U.S. 68, 77 (1904); S. Rep. No. 95-989, at 9 (1978) reprinted in 1978 U.S.C.C.A.N. 5787, 5795 (to encourage debtor "rehabilitation.").

n157 The investigation of the debtor must be done quickly to ensure that the debtor can put the matter behind him and get on with his new life. Just as importantly, creditors benefit from a quick resolution of the bankruptcy case because the debtor's assets have less time to disappear. See California Airmotive Corp. v. Bass, 354 F.2d 453 (9th Cir. 1965). The Bankruptcy Rules themselves mandate that the "rules shall be construed to secure the [expeditious and economical administration of every case under the bankruptcy code and the] just, speedy, and inexpensive determination of every [case and] proceeding." Fed. R. Bankr. P. 1001. See H. R. Rep. No. 95-595, at 5 (1977). Chapter 11 of the present Bankruptcy Code was part of the Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549. The first major revision of the bankruptcy laws since 1938, the bankruptcy code consolidated three reorganization chapters into a single business reorganization chapter, with the premise that business reorganizations should be quick and more efficient and provide greater protection to the debtor, creditors, and the public. See id.

n158 See 11 U.S.C. §§ 507, 726(a) (1994) (describing priority of distribution).

n159 United States bankruptcy law has its origins in the 1700's, when many of the colonies had their own set of comprehensive laws regulating debtor-creditor relations. This mishmash of rules continued almost uninterrupted for the first 109 years of this country's existence without major federal government intervention, notwithstanding the Bankruptcy Clause in the Constitution which empowers Congress to "establish . . . **uniform** Laws on the subject of Bankruptcies . . . ." U.S. Const. art. I, § 8, cl. 4. For a general discussion of the history of bankruptcy law, see In re Morris, 12 B.R. 321 (Bankr. N.D. Ill. 1981).

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n160 See In re Saybrook Mfg. Co., 963 F.2d 1490, 1495-96 (11th Cir. 1992) ("Section 507 of the Bankruptcy Code fixes the priority order of claims and expenses against the bankruptcy estate. Creditors within a given class are to be treated equally, and bankruptcy **courts** may not create their own rules of superpriority within a single class.") (citations omitted); In re Sun Runner Marine, Inc., 945 F.2d 1089, 1094 (9th Cir. 1991) ("To [pay certain pre-petition unsecured claims in full while others remain unpaid] would impermissibly violate the priority scheme of the Bankruptcy Code.") (citation omitted). See also In re FCX, Inc., 60 B.R. 405, 409-11 (Bankr. E.D. N.C. 1986) (**court** cannot alter distribution priorities absent inequitable conduct by claimant); In re Baldwin-United Corp., 43 B.R. 443, 457 (Bankr. S.D. Ohio 1984) ("It is . . . beyond travail that the most significant policy in bankruptcy jurisprudence is equality of treatment of like-situated creditors.").

n161 Even in situations where an unsecured creditor is not going to otherwise receive a distribution in a non-bankruptcy situation because the debtor did not have enough assets, the Bankruptcy Code's priority scheme under 11 U.S.C. § 502 may have the effect of redistributing the debtor's assets so that an unsecured creditor in fact receives a distribution.

n162 See 11 U.S.C. §§ 547-551 (1994). See also In re Freedom Group, Inc., 50 F.3d 408, 410 (7th Cir. 1995).

n163 See Greg M. Zipes, Discovery Abuse in the Civil Adversary System: Looking to Bankruptcy's Regime of Mandatory Disclosure and Third Party Control Over the Discovery Process for Solutions, 27 Cumb. L. Rev. 1107 (1997) (to compensate for potential abuses by the debtor in the face of weekly positioned adversaries, bankruptcy assigns the role of investigation of the debtor's financial affairs to third parties and requires the debtor to fully cooperate in exchange for a discharge).

n164 See Thomas H. Jackson, Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain, 91 Yale L.J. 857, 864 (1982) (arguing that if creditors united privately to draft a bankruptcy system, they would agree to implement something similar to the system in place because it (1) eliminates the strategic costs associated with collecting and (2) reduces variances in recoveries).

n165 See 11 U.S.C. § 727 (1994) ("The **court** shall grant the debtor a discharge . . . .").

n166 For a Chapter 7 debtor, discharge means that any prepetition debts can no longer be collected. 11 U.S.C. §§ 524-525 (1994) describe the effects of discharge, one of the most important being an injunction against collecting debts. See also Thomas H. Jackson, The Fresh-Start Policy in Bankruptcy Law, 98 Harv. L. Rev. 1393, 1406 (1985).

n167 See 11 U.S.C. § 1141 (1994).

n168 The concept stretches back to the English Statute of Anne in 1705. See Charles Jordan Tabb, The History of the Bankruptcy Laws in the United States, 3 Am. Bankr. L.J. 1, 10 (1995). A debtor who fully cooperated in the bankruptcy proceeding was not only granted a discharge, but was also granted a monetary allowance out of the bankruptcy estate. See id. The law at the same time provided for the death penalty for fraudulent bankrupts. See id. Since 1903, the discharge provision has survived many amendments and changes to the Bankruptcy Act and Code. See Teresa A. Sullivan et al., Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data, Wis. L. Rev. 1091 (1983).

n169 See In re Joint E. & S. Dist. Asbestos Litig., 878 F. Supp. 473 (E. & S.D. N.Y. 1995) (**court** refused to modify a confirmed plan, but sought other ways around the plan's harsh effects on future claimants). A complete discussion of this is contained infra Part II.F.

n170 11 U.S.C. § 1127(b).

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n171 § 101(5) of the Bankruptcy Code (11 U.S.C. § 101(5) (1994)) defines a claim as follows:

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

11 U.S.C. § 101(5) (1994).

n172 According to the legislative history:

The effect of the definition is a significant departure from previous law . . . . The definition is any right to payment, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . . By this broadest possible definition, and by the use of the term throughout the title 11, . . . the statute contemplated that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy **court.**

H.R. Rep. No. 95-595, at 309 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6266. See also S. Rep. No. 989 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5807-08.

n173 This sledgehammer approach to reducing claims to a monetary amount manifests itself with rejections of leases. § 365(g) of the Bankruptcy Code provides for the quantification of damages for a breach by a debtor of lease terms, notwithstanding that damages with leases often include specific performance in the absence of bankruptcy. See 11 U.S.C. § 365(g) (1994). "The purpose [of having the date of rejection relate back] is to treat rejection claims as pre-petition claims." H.R. 95-595, 95th Cong. 349 (1977). See also NLRB v. Bildisco & Bildisco, 465 U.S. 513, 531; In re Stewart Foods, 64 F.3d 141, 144 (4th Cir. 1995) (citing 11 U.S.C. §§ 365(g)(1), 502(g)) ("The rejection of an executory contract constitutes a breach of the contract, and a party's damages resulting from that rejection are treated as a pre-petition claim and receive the priority provided to general unsecured creditors."); United States v. Dewey Freight Sys., Inc., 31 F.3d 620 (8th Cir. 1994); In re Spectrum Info. Tech., Inc., 190 B.R. 741 (Bankr. E.D. N.Y. 1996); In re West Chestnut Realty of Haverford, Inc., 177 B.R. 501 (Bankr. E.D. Pa. 1995); In re Hooker Inv., Inc., 145 B.R. 138 (Bankr. S.D. N.Y. 1992); S. Rep. No. 95-989 at 60; 2 Lawrence P. King, Collier on Bankruptcy <para> 101.05 (15th ed. 1993).

n174 See, e.g., Southeastern Sprinkler Co. v. Meyertech Corp., 831 F.2d 410, 417 (3d Cir. 1987); King supra note 169.

n175 From both the language of the statute and the legislative history, it is clear that Congress intended that all of these types of obligations be treated as claims under the Code. See 11 U.S.C. § 101(5) (1994); S. Rep. No. 989, 95th Cong., 2d Sess. 21-22 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977).

n176 See In re Piper Aircraft Corp., 58 F.3d 1573 (11th Cir. 1995) (anticipated damages caused by the debtor's planes falling out of the sky in the future, even when based upon

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statistical probability, are too speculative to establish a claim).

n177 Neither § 502(c) of the Bankruptcy Code, the most logical place for such a provision, nor the Bankruptcy Rules sets forth a method.

n178 See Bittner v. Borne Chem. Co., 691 F.2d 134 (3rd Cir. 1982) (**court** estimating a breach of contract claim must rely upon the appropriate state law of contracts); In re Continental Airlines, Inc., 57 B.R. 842 (Bankr. S.D. Tex. 1985) (reviewing the merits of the claim to determine whether the claimant would prevail upon full litigation in the appropriate state forum).

n179 This is an oversimplification. As set forth infra, **courts** in fact struggle with determining how far into the future they may look to fix contingent claims in the **mass tort** context.

n180 28 U.S.C. § 157(b)(5) (1994) provides:

The district **court** shall order that personal injury tort and wrongful death claims shall be tried in the district **court** in which the bankruptcy case is pending, or in the district **court** in the district in which the claim arose, as determined by the district **court** in which the bankruptcy case is pending.

28 U.S.C. § 157(b)(5) (1994).

See also In re Dow Corning Corp., 103 F.3d 129 (6th Cir. 1996) (Dow Corning and its shareholders filed a motion to transfer to the Eastern District of Michigan when roughly 1500 non-breast implant personal injury tort claims were pending against them. The circuit **court** cited 28 U.S.C. § 157(b)(5) (1994) in reversing the Eastern District's decision to deny Dow's motion to transfer.) In acknowledging its own difficulties in estimating **mass tort** issues, the **court** noted that while one bankruptcy **court** successfully estimated the speculative damages which arise with **mass torts;** see A.H. Robbins, 839 F.2d at 198, another failed and its failure was "predictable," see Johns-Manville, 68 B.R. at 618. See also Smith, supra note 60, at 38289; In re A.H. Robins Co., 880 F.2d 694, 699 (4th Cir. 1989) (**Court** noted that experts' estimates of the recovery value of the Dalkon Shield claims ranged from $ 600 million to $ 7 billion dollars, but nevertheless the **court** settled upon an exact figure for these claims for the purposes of a plan.) It has also been suggested that parties may estimate claims in the case of a consensual plan of reorganization. See In re Dow Corning, 211 B.R. 545 (Bankr. E.D. Mich. 1997). See generally, Jeffrey Davis, Cramming Down Future Claims in Bankruptcy: Fairness, Bankruptcy Policy, Due Process, and the Lessons of the Piper Reorganization, 70 Am. Bankr. L.J. 329, 330 (1996).

n181 In re Joint E. & S. Dist. Asbestos Litig., 14 F.3d 726, 733 (2d Cir. 1993). The Second Circuit rejected the aggressive invocation of Rule 23(b)(1)(B) to accomplish a similar objective, stating "the function of the federal **courts** is not to conduct trials over whether a statutory scheme should be ignored because a more efficient mechanism can be fashioned by **judges.**" In re Joint E. & S. Dist. Asbestos Litig., 14 F.3d at 733.

n182 Payment of punitive damages is subordinated to payment of other classes of claims in Chapter 7 liquidation proceedings. See 11 U.S.C. § 726(4) (1994). See also In re Keene Corp., 162 B.R. 935, 948 (Bankr. S.D. N.Y. 1994) (discussing possible grounds for subordinating punitive damages claims).

n183 See 11 U.S.C. § 1122(a) (1994).

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efficiently. As individual rights are sometimes impacted, **courts** must remain active, supervise at all times and be a watch dog for the less powerful groups, which also contravenes the general principles of **court** passivity and neutrality. Although **mass torts** share the trait that all of the tort claims arising from the tortfeasor's behavior have at least some common factual basis, [20] in reality, **mass torts** fall into two categories. The first, and less problematic, is a single catastrophe **mass tort,** such as a plane crash. These torts are marked by a single identifiable incident or tragedy from which causation of injuries may be easily traced and the injuries are contemporaneous with the incident.

The second and much more problematic type is a latent tort, one in which an injury manifests itself only years, or decades, after exposure to a product. [21] **[*15]** The question of whether the product was even the cause of the injury is sometimes at issue. **Mass torts** in this second category are the focus of this article. They generally ensnare companies that would be healthy in the absence of a specific **mass tort** problem, but after a few individual unfavorable verdicts with punitive damages, would likely not only be unhealthy but bankrupt. As such, a **mass tort** in this second category does not involve a private dispute as with the garden variety negligence action, but is something more with a public policy component, because large companies or industries face ruin. [22]

Not surprisingly, parties tend to litigate **mass tort** cases with devices within the adversary system that are themselves less traditional and which provide some ability to deal with large groups of similarly situated parties: the class action, with a judicious use of case **consolidation** techniques, and the bankruptcy system. However, because class action and bankruptcy law did not contemplate **mass torts,** their use has been an uneasy fit.

C. The Class Action and Its Role Within the Adversary System

The class action was not designed to address the second type of **mass tort** described above. Federal Rule 23 sets forth the modern statutory basis for class action law suits. [23] While there are different types of class actions, all require the following:

(1) the class is so numerous that joinder of all members is impractible,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class. [24]

[*16]

Class actions represent an explicit exception to the adversary system principle that named parties conduct their own litigation. Rule 23(a)'s requirements of commonality, typicality, and adequacy of representation are considered an adequate substitute for this traditional due process safeguard. [25] Although some of Rule 23's elements require similar analysis (i.e. typicality and commonality), each must be looked at individually by **courts** in deciding whether to certify a class. [26]

The numerosity requirement is an important limitation on the use of the class action device. [27] Unless the class members are so numerous that joinder of all members is impracticable, it is preferable not to adjudicate the members' rights by means of a representative suit as this impacts upon individualized **[*17]** justice. [28] The inquiry focuses not simply on the number of class members, [29] but on the feasibility of joinder. [30]

Likewise, Rule 23(a)'s requirement of commonality demands that the members of the class share a common grievance. [31] The requirements of typicality and adequacy of representation

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n184 See discussion supra Part I.

n185 In re Keniston, 85 B.R. 202, 214 (Bankr. D. N.H. 1988).

n186 See 11 U.S.C. §§ 707, 1307 (1994).

n187 See Kathleen W. Meaney, The Asbestos Bankruptcy: JohnsManville's Petition for Reorganization Under Chapter 11 of the Bankruptcy Code-a Good Faith Filing or a Sham?, 19 Suffolk U. L. Rev. 55, 71 (1985).

n188 See Cohen & Thiros, P.C. v. Keen Enter., Inc., 44 B.R. 570, 573 (N.D. Ind. 1984) (fees must be monitored because every penny that goes to an attorney as an administrative fee or commission is a penny less to creditors).

n189 See Fed. R. Bankr. P. 2014(a). Rule 2014 requires the applicant to satisfy the **court** of

the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all the person's connections with the debtor, creditors, any other party in interest . . . .

Id. See also In re Alexander, 129 B.R. 183, 185 (Bankr. D. Minn. 1991) (purpose of § 327 of the Bankruptcy Code is to ensure that no conflict of interest arises as a result of such employment); In re Abraham, 163 B.R. 772, 780 (Bankr. W.D. Tex.1994).

n190 In re Michigan Interstate Ry. Co., 32 B.R. 325 (Bankr. E.D. Mich.1983) (**court** denied retention when attorneys were not specialists in bankruptcy law but were nevertheless sought to be retained because of their overall integrity).

n191 John D. Ayer, How to Think About Bankruptcy Ethics, 60 Am. Bankr. L.J. 355, 387 (1986); see also Nancy Rapoport, Turning and Turning in the Widening Gyre: the Problem of Potential Conflicts of Interest in Bankruptcy, 26 Conn. L. Rev. 913, 916 (1994); Hansen, Jones & Leta, P.C. v. Segal, 220 B.R. 434, 459-460 (D. Utah 1998) citing In re Curlew Valley Assoc., 14 B.R. 506, 511 (Bankr. D. Utah 1981) ("Actions that benefit one group may harm others. Secured creditors generally prefer conservative decisions in operating the ongoing business and expeditious prosecution of the bankruptcy case, as their interest lies in realizing collateral as quickly as possible if reorganization is not feasible and in avoiding the loss of value in their collateral and the loss of interest. On the other hand, while enjoying the automatic stay of creditors' claims, equity owners who will be paid last, if at all, may wish to pursue riskier investments and more litigation (which delays the prosecution of the bankruptcy) to increase the amount of their return . . . . In short 'reorganization involves the 'turbulent rivalry of many interests.'").

n192 As stated supra, the debtor in possession must act in the creditors' best interest, which is not always in the debtor's best interest. See 11 U.S.C. § 1107 (1994). An attorney who previously represented the debtor may not be capable of advising the debtor to compromise his own interests for the sake of creditors. **Courts** may disallow retention to avoid the otherwise inevitable situation where the attorney will be denied fees because he advised the debtor qua debtor instead of the debtor-in-possession, who should be protecting the interests of the creditors. See, e.g., In re Vlachos, 61 B.R. 473, 482 (Bankr. S.D. Ohio 1986) (Chapter 7 attorney for the debtor is not entitled to compensation from the estate for services rendered unless he can demonstrate that the services relate to the debtor's

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administrative responsibilities and the debtor is not capable of payment for services rendered). See John D. Ayer, Through Chapter 11 with Gun or Camera, but Probably Not Both: A Field Guide, 72 Wash. U. L.Q. 883 (1994). See also Nancy B. Rapoport, Seeing the Forest and the Trees: The Proper Role of the Bankruptcy Attorney, 70 Ind. L.J. 783, 807 (1995).

n193 See Levin & Weintraub v. Rosenberg, 330 F.2d 98 (2d Cir. 1964) (no statute of limitations for a **court** to review fee arrangements); In re EZ Feed Cube Co., 123 B.R. 69 (Bankr. D. Or. 1991).

n194 See Model Rules of Professional Conduct, Rule 1.9 (1994); Model Code of Professional Responsibility, Canon 4 (1980) (a lawyer must not represent a potential client if the representation jeopardizes confidences transmitted by a different client); Model Rule 1.7; Model Code, Canon 5 (a lawyer cannot represent a potential client if the representation would inhibit the lawyer's representation of another client); Model Rule 1.7; Model Code, Canon 5 (a lawyer cannot represent a third party if the lawyer has a personal financial stake in the outcome of the litigation). (For example, **courts** must take the side of the unrepresented unsecured creditors when considering the fairness of a particular settlement. In re Planned Protective Serv., Inc., 130 B.R. 94 (Bankr. C.D. Cal. 1991) (**court** should conduct a full and independent assessment of whether a compromise is fair and equitable and in the best interests of the creditors and the estate.)

n195 See Zipes, supra note 163, at 1150.

n196 Congress' expansion of the role of bankruptcy **judge** from mostly administrative to judicial in nature caused a Constitutional crisis. In the seminal case of Northern Pipeline Constr. v. Marathon Oil Pipeline Co., 458 U.S. 50, 87 (1982), the debtor wished to litigate a pre-petition state common law claim against a third party creditor in bankruptcy **court.** The Supreme **Court** did not permit the action, holding that an Article I bankruptcy **judge** cannot decide a state law claim that is unrelated to bankruptcy process. The **Court** went further, finding bankruptcy **judges** to be an unconstitutional infringement on Article III **judges.** In response to Marathon, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984, 128 U.S.C. § 157 (1994), establishing a core/non-core dichotomy. Bankruptcy **judges** have jurisdiction in core matters. "To be a core proceeding, an action must have as its foundation the creation, recognition, or adjudication of rights which would not exist independently of a bankruptcy environment." Acolyte Elec. Corp. v. City of New York, 69 B.R. 155, 173 (Bankr. E.D. N.Y. 1986). In noncore matters, the bankruptcy **court** acts as an adjunct to the district **court** in a fashion similar to a magistrate. See Taxel v. Electronic Sports Research, (In re Cinemationics, Inc.), 916 F.2d 1444, 1449 (9th Cir. 1990). Accordingly, in spite of Marathon, Congress realized that the bankruptcy **court's** jurisdiction was necessary to the efficient administration of the bankruptcy estate. Article III **courts** have apparently agreed, broadly construing bankruptcy **court** jurisdiction over core matters.

n197 For a more complete description of the role of bankruptcy **judges,** see Zipes, supra note 163, at 1150.

n198 The 1978 changes were enacted, in part, because of Congress' recognition of the need for a specialized **court.** First, district **courts** were overburdened by their case load. Congress recognized that bankruptcy matters would not receive the "expeditious disposition" they require if they were handled by the district **courts.** H.R. Rep. No. 95-595 (1997). Second, in light of the testimony before the commission concerning district **court judges'** "lack of interest in bankruptcy matters" Congress feared that bankruptcy cases would be placed at the bottom of **court** calendars. See also H.R. Rep. No. 95-595, at 14-15 (1977). (Arguing that bankruptcy **judges** are more competent than "generalist **judges** that only occasionally handled bankruptcy cases and would not have a sufficient understanding of the law and factual situations that arise in bankruptcy cases. [A generalist **judge]** would be unable to

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make the quick decisions that these cases so often require.").

n199 See Zipes, supra note 163, at 1159.

n200 Congress found that the bankruptcy area had "become too specialized and required too much expertise to be handled on an ad hoc basis by a generalist **court.**" H.R. Rep. No. 95-595.

n201 This may be less true for district **court judges** involved in **mass tort** cases. These **judges** develop special expertise after seeing the same **mass tort** issues time and again. This point was made by Justice Breyer in the Amchem dissent, when he stated that the appellate **courts** should not so easily second-guess the factual findings of the district **court judge,** who has the benefit of a close examination of the facts relating to the specific case. See Amchem, 117 S. Ct. at 2252 (Breyer, J., dissenting in part).

n202 See United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assoc., Ltd., 808 F.2d 363, 373 (5th Cir. 1987) (en banc), aff'd, 484 U.S. 365 (1988).

Early and ongoing judicial management of . . . cases is essential if the . . . process is to survive and if the goals of reorganizability on the one hand, and creditor protection, on the other, are to be achieved. In almost all cases the key to avoiding excessive administrative costs, which are borne by the unsecured creditors, as well as excessive interest expense, which is borne by all creditors, is early and stringent judicial management of the case.

United Savings Ass'n of Tex., 808 F.2d at 373 (footnotes omitted).

n203 See Cohen & Thiros, P.C. v. Keen Enter., Inc., 44 B.R. 570, 573 (N.D. Ind. 1984).

n204 See In re Croton River Club, Inc., 52 F.3d 41 (2d Cir. 1995) (the Second Circuit gave a bankruptcy **court** tremendous power to overrule a homeowners' association's decision, usually sacrosanct in New York state, all in the name of speed).

n205 See 11 U.S.C. § 105 (1994). See also United Savings Ass'n of Tex., 484 U.S. at 365; Worthington v. Ahlers, 485 U.S. 197, 206 (1988) (whatever equitable powers remain in bankruptcy **courts** can only be exercised within the confines of the Bankruptcy Code). However, bankruptcy **courts** remain **courts** of equity. They can do what is necessary to forward the bankruptcy system's goals, including to speed the case along. See In re Bonner Mall Partnership, 2 F.3d 899 (9th Cir. 1993).

n206 Hansen, Jones & Leta, P.C. v. Segal, 220 B.R. 434 (D. Utah 1998) (finding that although the debtor has a fiduciary duty to creditors of the estate, debtor's counsel does not).

n207 See Avellino & Bienes v. M. Frenville Co., 74 F.2d 332 (3d Cir. 1984) (state law rather than bankruptcy law is applied to determine when a claim arose). This case has been criticized in other circuits. See, e.g., In re Waterman S.S. Corp., 141 B.R. 552 (Bankr. S.D. N.Y. 1992). Section 502(e)(1)(B) disallows a creditor's claim if the claim is one for reimbursement of or contribution to a claimant that is "liable with the debtor on or has secured the claim of a creditor, to the extent that as of . . . the claim for reimbursement or contribution is contingent as of the time of its allowance or disallowance . . . ." 11 U.S.C. § 502(e)(1)(B) (1994). See In re Charter Co., 81 B.R. 644 (M.D. Fla. 1987), aff'd 862 F.2d 1500 (11 Cir. 1989).

n208 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1994). See, e.g., CMC Heartland Partners v. Union Pac. R.R., 3 F.3d

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200 (7th Cir. 1993); California Dep't of Health Servs. v. Jensen, 995 F.2d 925 (9th Cir. 1993); In re Chicago, Milwaukee, St. Paul & Pac. R.R., 974 F.2d 775 (7th Cir. 1992); United States v. LTV Corp., 944 F.2d 997 (2d Cir. 1991); In re Penn Cent. Transp. Co., 944 F.2d 164 (3d Cir. 1991); Lancaster v. Tennessee, 831 F.2d 118 (6th Cir. 1987); Erman v. Lox Equip. Co., 142 B.R. 905 (N.D. Cal. 1992); AM Int'l, Inc. v. Datacard Corp., 146 B.R. 391 (N.D. Ill. 1992); In re National Gypsum Co., 139 B.R. 397 (N.D. Tex. 1992); Sylvester Bros. Dev. Co. v. Burlington N. R.R., 133 B.R. 648 (D. Minn. 1991); United States v. Union Scrap Iron & Metal, 123 B.R. 831 (D. Minn. 1990); Juniper Dev. Group v. Kahn, 73 B.R. 494 (Bankr. D. Mass. 1987).

n209 See Grady v. A.H. Robins Co., 839 F.2d 198, 203 (4th Cir. 1988) (**court** found injuries claim arose at the time of the use of the product, rather than at the time of the injury which occurred after the bankruptcy filing date); In re Eagle-Picher Indus., Inc., 23 B.R. 203, 256, 262 (S.D. Ohio 1996) (holding that claims can be allowed and somewhat amazingly calculating the expected claims to be filed after the petition date to be $ 2,024,511,000); Schweitzer v. Consolidated Rail Corp., 758 F.2d 936 (3d Cir. 1985); In re UNR Indus., Inc., 725 F.2d 1111 (7th Cir. 1984); Waterman S.S. Corp. v. Aguiar, 141 B.R. 552 (Bankr. S.D.N.Y. 1992), vacated on other grounds, 157 B.R. 220 (S.D. N.Y. 1993); In re JohnsManville Corp., 57 B.R. 680, 686-88 (Bankr. S.D. N.Y. 1986). Examples of other types of cases in which the issue has been discussed include River Place E. Hous. Corp. v. Rosenfeld (In re Rosenfeld), 23 F.3d 833, 838 (4th Cir. 1994) (post-petition assessments for dues to a housing cooperative), Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1274-78 (5th Cir. 1994) (product liability action), In re Piper Aircraft Corp., 162 B.R. 619 (Bankr. S.D. Fla.) (product liability action), aff'd sub nom., Epstein v. Official Comm. of Unsecured Creditors of Piper Aircraft Corp., 168 B.R. 434, 43940 (S.D. Fla. 1994), Pettibone Corp. v. Ramirez (In re Pettibone Corp.), 90 B.R. 918, 930-32 (Bankr. N.D. Ill. 1988) (product liability action), Roach v. Edge (In re Edge), 60 B.R. 690 (Bankr. M.D. Tenn. 1986) (medical malpractice claim), Riso v. Francis (In re Riso), 58 B.R. 978, 979-80 (Bankr. D. N.H. 1986) (breach of non-compete clause) and In re O'Danny Boy, Inc., 35 B.R. 955, 957-58 (Bankr. S.D. Ohio 1983) (damage and waste to leased property).

n210 See Bruce S. Nathan, Protecting Corporate Creditors Under the Bankruptcy Code, Matthew Bender's Business Law Monographs, 48, Apr., 1997; see also supra note 209.

n211 See Nathan supra note 210.

n212 See In re Dow Corning Corp., 211 B.R. 545 (E.D. Mich. 1997).

n213 A further problem with the bankruptcy option is the sheer length of time each case remains in Chapter 11. In the Dow Corning bankruptcy, testimony revealed that **mass tort** bankruptcy cases involving public companies with assets of greater than $ 100 million in 1980 dollars, filed between October 1, 1979 and December 31, 1997, tend to linger in Chapter 11 bankruptcy for many years before confirmation. UNR Industries, Inc., for example, stayed in bankruptcy for 80 months prior to confirmation. See Does Exclusivity Foster Chaos or Cooperation?, Banker. Ct. Decision Wkly. News & Cmt., June 16, 1998, at A11. Of course, class action cases are no better. The Ahearn settlement is now approaching its sixth year of uncertainty.

n214 See In re Johns-Manville Corp., 68 B.R. at 621.

n215 11 U.S.C. §524(g).

n216 See id. at 575.

n217 Id. at 514.

n218 See In re Joint E. & S. Dist. Asbestos Litig., 982 F.2d at 734.

n219 Id.

n220 See In re Joint E. & S. Dist. Asbestos Litig., 1991 U.S. Dist. LEXIS 7527 (E.D.N.Y. & S.D.N.Y. May 16, 1991).

n221 Indeed, although the A.H. Robins trust, which was funded in accordance with the bankruptcy **court's** estimation of future claims, appears to have sufficient funds to pay all the claims in full, one **court** has questioned the **court's** "uncanny prognosticating ability," stating that "the **court** clearly feared that its estimate would not hit the mark as it felt compelled to take extraordinary measures to control the make-up and activities of the purportedly independent Claimants Trust." In re Dow Corning Corp., 211 B.R. 545, 601 n.60 (Bankr. E.D. Mich. 1997).

n222 In re Dow Corning Corp., 211 B.R. at 602-03.

n223 See supra note 210.

n224 See In re Dow Corning, 211 B.R. at 545.

n225 The dissent in Ahearn stated that the case was extraordinarily important, concluding that Fibreboard's litigation strategy was bound to lead other financially threatened companies to utilize it as a road map. See Flanagan v. Ahearn, 90 F.3d at 994 (Smith, J., dissenting).

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focus in significant part on potential conflicts of interest, ensuring that the representative has suffered the same injury as the other class members [32] and also is capable of litigating the claims of others.

Once these prerequisites are met, class action participants must also qualify under one of the subparts of Rule 23(b). [33] For the purposes of class actions in the **mass tort** context, Rule 23 (b)(1)(B) and (b)(3) are most **[*18]** important, [34] because they provide the **court** with some statutory justification for resolving **mass tort** claims facing an otherwise healthy company. [35] Rule 23(b)(1) permits certification when resolution of individual law suits would "substantially impair" other members' ability to protect their interests. This provision is most commonly used when "limited funds" are at stake or where "the prosecution of separate actions by or against individual members of the class would create a risk of . . . adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications . . . ." [36] It is a mandatory class action provision, with no risk that individual members will opt out of the class to pursue litigation to the prejudice of other members. [37] Accordingly, defendant companies seeking to limit their liability prefer lawsuits under this provision.

The Supreme **Court** has termed Federal Rule 23(b)(3) [38] to be the most "adventuresome" [39] of the class action provisions. Class actions under Rule **[*19]** 23(b)(3), often referred to as "non-mandatory" or "opt-out" class actions, are maintainable if they meet the requirements of "predominance" and "superiority." [40] Unlike Rule 23(b)(1), Rule 23(b)(3) does not require a request for declaratory or injunctive relief. It requires notice to all class members. [41] The notice must provide an opportunity for a potential class member to opt-out and warn the party that, if it does not request an exclusion, it will be bound by any subsequent judgment. [42] It is the provision which the Supreme **Court** directly addressed in Amchem.

Rule 23(b)(3) has been increasingly used in the **mass tort** context. [43] Litigants justify its use exactly because of its opt-out provision, which avoids nasty issues regarding the violation of due process rights of absent members and is arguably fairer to future claimants, who are not necessarily bound. At the same time, the provision creates a great deal of uncertainty for companies wishing to limit their liability by agreeing to settle a class action because of the claimants' right to opt-out and perhaps commence an individual suit. These elements will be discussed in further detail below.

While Rule 23(a) and (b) deal with certification, Rule 23(e) addresses the settlement of class actions. No class action may be "dismissed or compromised without **court** approval," [44] preceded by notice to class members. This **Court** blessing of a settlement is not a usual part of the adversary process. First, it impacts upon individualized choice in when and how to settle by inviting **court** intervention into the process. Second, the **Court's** independent inquiries, even in the absence of an objection to the proposed settlement by the litigants, represents a break from the **court's** normally neutral and passive mien with respect to how parties handle their case. However, this provision is useful when large groups of absent class members, with no real ability to protect their rights, are involved in a law suit. **[*20]** The **court** becomes their protectors. Although the standard for settlement under Rule 23(e) is vague and appears to give little guidance to the **courts** of a settlement standard, this is not as big a problem as it appears as **courts** have developed comprehensive tests to determine an adequacy of settlement. [45]

D. Problems with Class Actions in the **Mass Tort** Context Prior to the Amchem Supreme **Court** Decision and the Remand of Ahearn

As set forth above, the prerequisites of the class action are straight forward enough. However, the use of the class action in resolving **mass torts** is not at all obvious. Most fundamentally, the decidedly narrowing language of the Advisory Committee Note to Rule 23 discourages the use of class actions for resolving **mass torts.** [46]

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With this language, class actions instantly suffer in a way that bankruptcy [47] does not in that there is no statutory sanction for its use in resolving **mass torts.** After all, **courts** are not supposed to ignore substantive law to facilitate class action treatment. [48] Even in the absence of the generally strict constructionalist Supreme **Court,** it is likely that appellate **courts** would **[*21]** have had great problems with the creative approaches of lower **courts** or academics in applying class actions to **mass torts.** A pattern of reversing lower **courts** who take liberties in adapting class actions did in fact occur and found its ultimate manifestation in the Amchem decision. [49] Indeed, the sheer persistence of the **courts** in using the class actions in the face of this seemingly clear statutory authority points to desperation: the problems posed by **mass tort** law are not, in those **courts'** opinions, being addressed through legislative and other means.

Class actions as a way of resolving **mass torts** saw their first use with the Dalkan Shield litigation. [50] The district **court** took the large step of certifying a nationwide class on punitive damages issues. It saw a need to stop the injustice "that large numbers of plaintiffs who are not first in line at the courthouse door will be deprived of a practical means of redress," because companies will face financial ruin after verdicts in relatively few cases. [51] The district **court** also stated that it had the power to "certify a class when such a decision is in the collective best interest of the plaintiffs." [52] These reasons for approving certification, while perhaps logical, had no specific statutory basis. Debtor rehabilitation and equality of distribution of similarly situated creditors are not major goals of the greater adversary system, although they are in the bankruptcy system. [53] The circuit **court** reversed on the strength of its concern with the Advisory Committee's Note to Rule 23 discouraging the use of class actions for resolving **mass torts.** [54] **[*22]**

Nevertheless, the district **courts,** not the circuit **courts,** have to deal with the deluge of **mass tort** cases on a daily level, and some district **courts,** guided by their belief that something must be done, keep trying to push the boundaries of the use of the class action as did the Dalkon Shield **court.** [55]

This battle of the **courts** with respect to whether class actions may be used to resolve **mass torts** is reflected in scholarly articles as well. Some commentators argue large class actions serve to address the need to "formulate legal ideas in general or universal terms, rather than ad hoc." [56] Likewise, commentators have argued that class actions should be used to create new possibilities for resolving problems in an increasingly complex society. [57]

These commentators believe Rule 23 is a beneficial provision that should be given a broad reading to afford maximum flexibility. They argue that the provision in fact permits experimentation in uncharted territories, notwithstanding the infamous 1966 note, thereby permitting policymaking in **mass tort** adjudication that stimulates innovation; unbound by bad precedent in one jurisdiction, **mass tort judges** and lawyers in other jurisdictions may avoid past mistakes and undertake novel approaches to knotty problems. Further, corporations may seek to limit their risks and losses by joining together. [58]

However, other commentators have criticized this free wheeling approach of Rule 23. Regardless of the good policy reasons for using class actions, they return to the fact that there is simply no explicit federal basis for experimentation. One commentator stated that the recent **mass tort** cases prior to Amchem offered much room for concern regarding their treatment of claimants with different conditions and alteration of otherwise applicable state law, which arguably Rule 23 cannot and should not alter. [59] **[*23]**

In asbestos cases, for example, many have argued that there is a natural conflict of interest between claimants who already suffer from ailments, and those who have been exposed but are as of yet symptom free. [60] A **court** must also consider the conflicts within a potential class which includes members living in states that permit immediate substantial recoveries with a broad definition of punitive damages and members from other states. The **courts'** willingness to create a single class to accommodate these conflicting interests in the recent

settlements brought under the Rule 23 rubric, these commentators argued, seems highly questionable. [61]

Two cases stood out as foils in the debate regarding whether class actions are an efficient method for addressing **mass torts,** the Amchem case as it wound its way up to the Supreme **Court,** and the Ahearn [62] case, in which the **court** very self-consciously attempted to distinguish itself from Amchem. In general, the Amchem circuit **court** adopted the strict view that experimentation in class action settlements cannot be justified under case law precedent; the Ahearn circuit **court** adopted a more flexible approach. These two cases encapsulate the debate regarding the expanding use of class actions to resolve **mass torts** and will be the focus of the next section.

E. The Amchem and Ahearn Cases

The Amchem and Ahearn cases share some obvious commonalities. Both cases arose from the asbestos crisis, which threatened the health of affected individuals as well as major companies. Indeed, the fates of perhaps millions of individuals rested on the outcomes of the cases; each asbestos claimant was, or some day may be, adversely affected by past exposure to asbestos products manufactured by one or more of the over 20 companies sued for damages. They were also both "settlement" class actions, commenced by parties which had no intention to litigate, a recent phenomenon and increasingly common in the **mass tort** context.

The cases also differed in certain respects: (1) Ahearn was a mandatory class action brought under Federal Rule 23(b)(1), while Amchem was an optout class action under Federal Rule 23 (b)(3); and (2) Amchem did not involve a limited fund, while Ahearn did. The Ahearn circuit **court** found these **[*24]** differences to be highly significant and assumed its decision would survive regardless of the fate of Amchem. More generally, the Ahearn circuit **court** decision took a more aggressive approach in expanding class action precedent in adapting it to **mass torts;** the Amchem circuit **court** refused to do so. What follows is a brief history of the two cases as they wound their way through the appellate process, followed by a comparison of the circuit **courts'** treatment of the Rule 23 elements.

1. The Amchem Case: A Factual and Procedural History Leading to the Appeal to the Circuit **Court**

The Amchem class action settlement was made possible after eight federal **judges,** experienced in the management of complex asbestos cases, urged the Judicial Panel on Multidistrict Litigation [hereinafter MDL Panel] [63] to consolidate in a single district all asbestos complaints pending in federal **courts.** The MDL accepted their recommendation and transferred all asbestos cases then filed, but not yet on trial in federal **courts,** to a single district, the United States District **Court** for the Eastern District of Pennsylvania, before a single **judge** for pretrial proceedings. [64]

The order aggregated pending asbestos cases only. [65] After the **consolidation,** attorneys for plaintiffs and defendants formed steering committees and began settlement negotiations. [66] Once negotiations seemed likely to produce an agreement purporting to bind potential plaintiffs-those who did not manifest any injury and who were not represented by counsel in an action-CCR [67] agreed to settle, through separate agreements, the claims of plaintiffs who had already filed asbestos-related lawsuits. [68] Indeed, CCR had made clear throughout the settlement negotiations that it would not settle unless it could bind these future claimants, thereby permitting the CCR members to finally quantify their losses and continue free from annoying asbestos claims. [69] **[*25]**

After settling the various inventory claims, CCR and the plaintiffs' lawyers chosen by the CCR filed, within the space of a single day, a complaint, an answer containing general denials, and a proposed settlement agreement, along with a joint motion for conditional class certification.

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The parties never intended to litigate. [70]

The complaint identified nine lead plaintiffs, designating them and members of their families as representatives of a class comprising all persons who had not filed an asbestos-related lawsuit against a CCR defendant as of the date the class action commenced, but who (1) had been affected by asbestos or products containing asbestos attributable to a CCR defendant, or (2) whose spouse or family member had been so exposed. The complaint delineated no subclasses; all named plaintiffs were designated as representatives of the class as a whole. [71]

The settlement further provided that compensation above the fixed ranges was permitted for "extraordinary" claims, but otherwise placed both numerical caps and dollar limits on such claims. Class members were to receive no compensation for certain kinds of claims, even if otherwise applicable state law recognized such claims. The settlement altered state **court** rights in other ways, in that it failed to provide for compensation to family members of asbestos-exposed individuals for loss of consortium and for other relief. [72] In short, the stipulation did what Congress has refused to do, creating in effect a non-governmental administrative agency guided by a schedule of payments to compensate class members who met defined asbestos-exposure and medical requirements. [73] The **court** also altered state tort law by altering punitive damages and the right to trial for what it perceived to be a good cause, pushing boundaries in this way as well.

The settlement permanently bound class members who accepted the settlement, while CCR defendants had the opportunity to withdraw from the settlement after ten years, presumably to protect them against a higher than expected number of opt-outs. [74] On January 29, 1993, as requested by the settling parties, the district **court** conditionally certified, under Federal Rule of Civil Procedure 23(b)(3), [75] the encompassing opt-out class set forth in the settlement agreement. [76] In preliminary rulings, the **court** found that it had **[*26]** subject-matter jurisdiction [77] and approved the settling parties' plan for giving notice to the class. [78] The **court**-approved notice informed recipients that they could exclude themselves from the class, if they so chose, within a three-month opt-out period. [79]

Declaring class certification appropriate and the settlement fair, the district **court** preliminarily enjoined all class members from commencing any asbestos-related suit against the CCR defendants in any state or federal **court.** [80] Certain parties appealed and the United States **Court** of Appeals for the Third Circuit vacated the certification as further described below, holding that the requirements of Rule 23 had not been satisfied and setting the stage for the Supreme **Court** case. [81]

2. The Ahearn Case: A Factual and Procedural History Leading to the Appeal to the Circuit **Court**

The origins of Ahearn stretch back to 1991, when the Fibreboard Corporation sought a global solution to the overwhelming, or at least seriously distracting, asbestos claims being filed against it. The Ahearn case was one of the pending asbestos cases that did not fall under the ambit of the MDL referral which led to the Amchem settlement.

Fibreboard approached several leading plaintiffs' counsel to discuss settlement. There was no class action by future claimants against Fibreboard at the time; rather, Fibreboard chose counsel already litigating against it on behalf of claimants presently manifesting symptoms from asbestos exposure. Negotiations ensued under the supervision of the district **court,** including, most famously, a meeting at **Judge** Parker's house outside Tyler, Texas which resulted in an increase in the settlement offer by an aggregate of $ 35,000,000, and a chance midnight meeting by the attorneys at a Tyler coffeehouse. [82] The parties finally entered into agreements in 1993 settling present and future claims against Fibreboard. **[*27]**

Once the agreements had been reached, counsel also representing present claimants filed a

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complaint under Federal Rule 23(b)(1) on behalf of a nationwide asbestos damages class consisting exclusively of future asbestos claimants. The **court** almost immediately entered an order provisionally approving the class certification and a temporary restraining order enjoining commencement of further separate litigation against Fibreboard by putative class members. The agreements were then finalized and approved by the **court.** [83]

Although Ahearn was commenced under Rule 23(b)(1), [84] a mandatory provision of the class action rule, it was actually a hybrid and provided for a kind of opt-out. As part of the class action settlement, the defendants set aside funds for future claimants. Through spendthrift provisions, the settlement limited the amount of the trust assets that could be paid out in any given year. [85] The parties believed that this arrangement might protect assets so that they would be available to compensate injured class members whose claims develop far in the future.

Parties could in effect opt-out of the settlement, but faced procedural and substantive hurdles in doing so. [86] Before going to trial, an opt-out party had to submit to non-binding arbitration. If this did not result in a resolution of the claim, a **judge or judge's** designee from the Eastern District of Texas was to hold a settlement conference. If this in turn did not produce a settlement, the claimant was permitted to proceed against the trust in the tort system, complete with a jury trial if requested. [87] The recovery of the claimant in the tort system, however, was subject to the cap. Attorneys' fees for claimant's counsel were limited to 25% of the compensation paid to the claimant. Any resulting judgment would be paid out over a period of years depending upon the financial condition of the trust at the time. Therefore, the opt-out right was not a true opt-out, because any recovery of a party not opting out was capped by $ 500,000 per claim, with the elimination of punitive damages. [88] The district **court** certified the class action and the Third Circuit upheld the certification. [89] **[*28]**

F. The Varying Approaches of Amchem and Ahearn Circuit **Courts** in Resolving Class Action Issues

1. Adequate Representation: Selling Out of A Class

As set forth above, **courts** considering the adequacy of representation in class actions must consider the composition of the class and the various interests of parties within the class. [90] With a class action, a **court** may bind an absent person whose interests are considered in a class action, and as we have seen this aspect of the class action is not in accord with the usual practice within the adversary system with its emphasis on individualized justice. As such, the Amchem and Ahearn cases brought to the fore the debate on how much class actions may depart from the usual principles of the adversary system regarding the primacy of individual autonomy in guiding a case, as opposed to attorneys negotiating terms for the sake of efficiency.

In the Amchem case, the Third Circuit looked at two components with respect to adequate representation: (a) whether the named parties' interests were sufficiently aligned with the absentees'; and (b) the qualifications of counsel. [91] The Third Circuit was very concerned about the trampling of individual autonomy. Skeptical of the settlement agreement before it, the **court** held that Rule 23(a)'s requirements with respect to adequacy of counsel must be satisfied as if the case were going to be litigated, even though no litigation would actually take place. [92]

While acknowledging that the members of the class were united in seeking the maximum possible recovery, the **court** believed that the settlement made important decisions about allocation of settlement resources to the different plaintiffs, decisions that favored some claimants over others. Although all future claimants were thrown together under the settlement class, they were separated in their interests: for example, members with injuries **[*29]** that quickly manifest themselves might seek higher pay outs, while more theoretical

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JOHN M. OLIN PROGRAM IN LAW AND ECONOMICS CONFERENCE ON "TORT **REFORM": ARE PUNITIVE DAMAGES** REALLY INSIGNIFICANT, PREDICTABLE, AND RATIONAL? A COMMENT ON EISENBERG ET AL.

A. Mitchell Polinsky *

* Stanford Law School and National Bureau of Economic Research. Research on this comment was supported by the John M. Olin Program in Law and Economics at Stanford Law School. I received helpful comments from Joseph Bankman, Daniel Kessler, Daniel Rubinfeld, and Steven Shavell.

SUMMARY:
... THE preceding article by Theodore Eisenberg and his colleagues is one of the most ambitious empirical studies of punitive damages undertaken to date. ... In their sample, there are 2,849 compensatory damage awards, with a mean of $ 386,000, and 177 punitive damage awards, with a mean of $ 534,000. ... If a case settles, let the **settlement** amount equal the expected value of the trial outcome. ... The contrast between their inability to predict when, within a particular case category or jurisdiction, punitive damages will be awarded and their ability to predict the level of punitive damages given a punitive damage award is central to the point I want to make: Eisenberg et al.'s results are consistent with the possibility that, within each case category or jurisdiction, the decision to award punitive damages is random. ... The $ 400,000 amount can be described as consisting of a $ 100,000 compensatory damage payment plus a $ 300,000 punitive damage payment. ... What this implies about the relationship between the proper level of punitive damages and the level of compensatory damages depends on whether the change in the probability causes the punitive damage multiplier to fall less than proportionally or more than proportionally with the level of harm. ...

ABSTRACT

This comment on an empirical study of punitive damages by Theodore Eisenberg and several coauthors makes three main points. First, contrary to what they imply, punitive damages may be a significant factor in litigation despite the fact that only a small fraction of cases in their sample involve punitive damage judgments. Second, notwithstanding their interpretation, their results are consistent with the possibility that punitive damages are awarded on a random basis. Third, in opposition to their suggestion, punitive damages may

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punitive damages cases. The absence of such cases in a sample as broad as ours suggests that the punitive damages cases emphasized in the media are newsworthy precisely because they are so rare and because they depart from an explicable underlying pattern of awards." Id at 625. The two newspaper articles about the Eisenberg et al. study cited in note 3 also interpret their study as showing that punitive damages are both "modest" and "rare" (Felsenthal) or "small" and "rare" (Blum).

n9 Id.

n10 Id.

n11 This observation is an example of the general point that cases that go to trial may not be representative of the cases that settle. This point was first emphasized in George Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J Legal Stud 1 (1984). It has been elaborated on by many authors since then.

n12 This last assumption is made in part so that the example is most consistent with Eisenberg et al.'s statement that "pretrial effects should reflect what juries have done in prior cases." Id at 625. For purposes of the example, however, all that is necessary is that the **settlement** amount is positively related to the expected value of the trial outcome.

n13 In this example and in others below, I will for simplicity use the expected values of random variables. Thus, here I am assuming that there are 125 judgments because plaintiffs have a 50 percent chance of prevailing in each of 250 trials. This practice will not affect any of the points that the examples are used to illustrate.

n14 It would be easy to demonstrate in the example that if the **settlement** rates were the same, then the effect of punitive damages on **settlements** would exactly mirror the average effect of punitive damages on trials.

n15 For some evidence regarding the magnitude of this effect, see James S. Kakalik, Patricia A. Ebener, William L. F. Felstiner, Gus W. Haggstrom, and Michael G. Shanley, *Variation in Asbestos Litigation Compensation and Expenses*, 72-91 (R-3132-ICJ, Institute for Civil Justice, Rand Corp 1984) (especially table 9.2 and figure 9.1).

n16 This statement does not mean that every potentially large punitive damage case will settle before a trial judgment. Some notable exceptions are the Texaco-Pennzoil dispute, in which a jury awarded Pennzoil $ 3 billion in punitive damages, and the Exxon Valdez oil spill litigation, involving a $ 5 billion punitive damage judgment against Exxon. See Thomas C. Hayes, *Texaco Told to Pay $ 10.5 Billion*, NY Times (November 20, 1985), at D1 (the jury awarded $ 7.53 billion in actual damages plus $ 3 billion in punitive damages); and Caleb Solomon, *Exxon Is Told to Pay $ 5 Billion for Valdez Spill*, Wall St J (September 19, 1994), at A3. There are other reasons why these cases may have gone to trial, including possibly the reason discussed two paragraphs below.

n17 There is another factor that might cause punitive damage cases to be underrepresented in trial outcomes. Suppose that a defendant who is found liable at trial for punitive damages will suffer a reputational loss due to having been shown to have engaged in the type of conduct that justifies the imposition of punitive damages. For an individual this loss might take the form of a loss of social standing; for a business it might be a loss of sales. Because such a loss presumably is lower, possibly substantially so, if the case settles (especially if the **settlement** is subject to a confidentiality agreement), defendants will have stronger incentives to settle cases in which a punitive damage judgment is a possibility at trial.

n18 See *Supreme Court Rules Taxes Must Be Paid on Punitive Damages*, Wall St J

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(December 11, 1996), at B13, referring to *O'Gilvie v U.S.*, 65 USLW 4026. In 1991-92, the period studied by Eisenberg et al., the circumstances in which compensatory damages were not taxable and punitive damages were taxable were different than at present.

n19 For a summary of state policies in this regard, see *BMW of North America, Inc v Gore*, 116 SCt 1589, 1619 (appendix to dissenting opinion of Justice Ginsburg, describing in part the allocation of punitive damages to state agencies). Because relatively few states had such a policy during the period studied by Eisenberg et al., the point in the text regarding the effect of this policy probably has little bearing on their empirical results.

n20 See, generally, Tom Baker, *Transforming Punishment into Compensation: Insurance and Punitive Damages Law in Action* 23-30 (unpublished manuscript, Univ Miami School of Law, October 1996; pages cited refer to pagination of the unpublished manuscript).

n21 See, for example, Steven Shavell, *Suit, **Settlement,** and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J Legal Stud 55 (1982).

n22 These features of punitive damage law have been described by one prominent commentator as follows: "The law of punitive damages is characterized by a high degree of uncertainty that stems from the use of a multiplicity of vague, overlapping terms and the extraordinary deference accorded to juries who receive little meaningful guidance. . . . Jury instructions on the permissible magnitude of punitive damage assessments generally provide even less guidance than do those that purport to explain the bases of punitive damage liability." Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S Cal L Rev 1, 52-53 (1982). Note, however, that vagueness and uncertainty per se do not lead to divergent beliefs; parties might be in agreement about the distribution of possible outcomes. In addition, a countervailing consideration to the point in the text is that there may be more concurrence about whether the defendant will be found liable for compensatory damages in cases in which there is a plausible claim for punitive damages.

n23 Another implication of the divergent beliefs model of litigation, which reinforces this conclusion, is that the greater the stakes at trial, the greater the likelihood that the parties will go to trial (in essence, because a relatively optimistic plaintiff will more readily reject a **settlement** offer when the plaintiff has more to gain at trial). This point is noted in Robert D. Cooter and Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J Econ Literature 1067, 1076-77 (1989). However, whether this result carries over to models of litigation with asymmetric information depends on the specification of the model. Compare Lucian Arye Bebchuk, *Litigation and **Settlement** under Imperfect Information*, 15 Rand J Econ 404, 409 (1984); and Barry Nalebuff, *Credible Pretrial Negotiation*, 18 Rand J Econ 198, 204 (1987).

n24 Under a reasonable assumption about how litigation costs vary with the stakes of a case (that they increase with the stakes but less than proportionally), it can be demonstrated in the standard divergent beliefs model of litigation that raising the stakes will increase the likelihood of trial despite higher litigation costs. In other words, the result stated at the beginning of the preceding footnote holds even if litigation costs rise with the stakes (in the way assumed). The incentive to go to trial, however, is dampened due to the higher litigation costs. Moreover, the risk aversion and institutional effects still could dominate.

n25 Some empirical evidence that bears on this question is summarized by Cooter and Rubinfeld, at 1081 (cited in note 23):

A question investigated empirically . . . is whether augmenting compensatory damages will result in more or fewer trials. . . . Perloff and Rubinfeld (1987) found evidence suggesting that in antitrust cases . . . treble damages lead to a decrease in the proportion of cases resolved by trial and an increase in the number of **settlements.**

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Other studies, however, have suggested a contrary result, including Danzon and Lee Lillard (1983).

The citations are to Jeffrey M. Perloff and Daniel L. Rubinfeld, ***Settlements*** *in Private Antitrust Litigation*, in Lawrence J. White, ed, *Private Antitrust Litigation: New Evidence, New Learning* 149 (1988); and Patricia Munch Danzon and Lee A. Lillard, ***Settlement*** *out of Court: The Disposition of Medical Malpractice Claims*, 12 J Legal Stud 345 (1983). A contemporaneous empirical study that was not included in Cooter and Rubinfeld's survey observed that, "clearly, both higher mean trial awards and higher alleged damages have a positive and significant effect on the likelihood of a **settlement.** This may suggest that as the stakes in a trial are increased, parties intensify their efforts to reach a **settlement** and are more likely to succeed." See Gary M. Fournier and Thomas W. Zuehlke, *Litigation and* ***Settlement:*** *An Empirical Approach*, 71 Rev Econ and Stat 189, 193 (1989). (It should be noted, however, that Fournier and Zuehlke's result regarding the effect of litigation costs on the **settlement** rate is contrary to the intuition discussed above in the text.)

n26 Eisenberg et al, at 624, 649 (cited in note 1).

n27 Id at 632-37, 640-41, 644-47. They also consider whether the likelihood of a punitive damage award depends on the level of compensatory damages and the litigants' status (whether the litigant is an individual or a corporation). These variables generally are not significant (see id, table 4).

n28 Id at 644, 646.

n29 Id at 647.

n30 Id at 651-52.

n31 See the quoted material in the second paragraph of this section.

n32 Id at 652.

n33 There is a certain tension between their suggestion in the quoted passage that one could use their results to identify awards that "are questionable" and their disclaimer in the introduction of the article that their study "is not about the normative desirability of punitive damages." Id at 625.

n34 In discussing the rationality of punitive damages, I am focusing on the deterrence objective of punitive damages because the implications of the punishment objective of punitive damages are not as well developed or as widely agreed on.

n35 The principles of deterrence theory have been applied to punitive damage policy by several scholars, including Ellis, cited at note 22; Bruce Chapman and Michael Trebilcock, *Punitive Damages: Deterrence in Search of a Rationale*, 40 Ala L Rev 741 (1989); Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?* 40 Ala L Rev 1143 (1989); and Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 La L Rev 3 (1990).

n36 Under their formula, reported above in the text, a 10 percent increase in compensatory damages would imply a 7.82 percent increase in punitive damages.

n37 There is a countervailing consideration. Injurers who cause higher harms will have a greater incentive both to try to "cover up" the harm and, if they are unsuccessful and are sued, to spend more in litigation in order to reduce the chance of being found liable. Such

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behavior could lead to the probability of detection and liability falling with the level of compensatory damages. The implication of this possibility is discussed in note 38 below.

n38 As observed above, if the probability of detection and liability is independent of the level of harm, then punitive damages should rise proportionally with compensatory damages. Another possibility, not considered in the text, is that the probability falls with the level of harm (for reasons discussed in the preceding note). Then punitive damages should rise more than proportionally with compensatory damages.

n39 As the discussion in this section makes clear, the proper focus in terms of deterrence principles is on the chance that the defendant might have escaped liability in the circumstances of the case at hand. This inquiry may lead to a level of punitive damages that has no relationship to the level implied by the punitive damage formula suggested by Eisenberg et al.

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not be rational even if the level of punitive damages is systematically and positively related to the level of compensatory damages.

TEXT:

[*663] THE preceding article by Theodore Eisenberg and his colleagues [1] is one of the most ambitious empirical studies of punitive damages undertaken to date. [2] It undoubtedly will receive considerable attention in popular and academic circles, [3] and deservedly so. The authors painstakingly test the robustness **[*664]** of their results, and, as a consequence, the reader will find it hard not to be convinced of the validity of the empirical regularities that they identify.

For purposes of this comment, I will assume that their methodology is appropriate and that their empirical results are correct. The premise of this comment, however, is that they have seriously misinterpreted, or drawn incorrect conclusions from, their empirical results. I will take issue with each of their main points and argue that one *cannot* conclude from their study that punitive damages are insignificant, predictable, and rational.

Section I discusses why, contrary to what they imply, punitive damages may be a significant factor in litigation despite the fact that only a small fraction of cases in their sample involve punitive damage judgments. Section II explains why, notwithstanding their interpretation, their results are consistent with the possibility that punitive damages are awarded on a random basis. Section III shows why, in opposition to their suggestion, punitive damages may not be rational even if the level of punitive damages is systematically and positively related to the level of compensatory damages.

I. ARE PUNITIVE DAMAGES REALLY INSIGNIFICANT?

In this section I first discuss why Eisenberg et al. can be interpreted as claiming that punitive damages are, on average, not significant. I then explain why this conclusion does not follow from their empirical results. The explanation stems from showing that punitive damages can have a substantial effect on **settlements** even if punitive damages are not significant in trial outcomes.

One of the main empirical observations in Eisenberg et al.'s article is that punitive damages are awarded infrequently: [4] "The third numerical column of Table 1, Panel B, suggests the infrequency of punitive damages awards. For all case categories combined, punitive damages were awarded in 177, about 6 percent, of the jury trials at which plaintiffs prevailed. Since plaintiffs prevailed about half the time, punitive damages were awarded in about 3 percent of the jury trials." They observe that their conclusion is not an aberration: [5] "All credible sources confirm the pattern evident in Table 1 of punitive damages awards' frequency. Punitive damage awards are rare, and they are especially rare in the areas that have captured the most attention, products liability and medical malpractice."

Table 1 in their article also contains data concerning the magnitude of punitive damages when they are awarded. In their sample, there are 2,849 **[*665]** compensatory damage awards, with a mean of $ 386,000, and 177 punitive damage awards, with a mean of $ 534,000. [6] The total level of punitive damages awarded therefore is $ 94.5 million (= 177 x $ 534,000). If this amount is averaged over the 2,849 cases in which there are compensatory awards, the mean punitive award is $ 33,170, which is equivalent to 8.6 percent of the mean compensatory award (= $ 33,170/$ 386,000 x 100%). In other words, in their sample, punitive damages represent less than a 9 percent "tax" on compensatory damages. [7]

Given Eisenberg et al.'s explicit comments about the infrequency of punitive damages and the implications of their results regarding the magnitude of punitive damages, a reasonable interpretation of their position is that punitive damages are, on average, not significant. [8]

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Because the overwhelming majority of cases settle, however, a natural question is whether the general unimportance of punitive damage awards in cases that go to trial means that their effect on **settlements** is equally insignificant. Eisenberg et al. admit that they "do not account for the impact of punitive damages awards on cases that never reach trial." [9] But they suggest that **settlements** will mirror trial outcomes: [10] "The possibility of punitive damages likely shapes the **settlement** process in which the bulk of cases terminate. Perhaps uncounted thousands of cases settle on terms different than those on which they would otherwise settle because of the possibility of punitive damages. *But pretrial effects should reflect what juries have done in prior cases*" (emphasis added). By implication, therefore, if punitive damages are unimportant on average at trial, they will not have a significant **[*666]** effect on the **settlement** process either. This is the message suggested by Eisenberg et al. that I want to question.

The point I will emphasize here is that *even if punitive damage awards at trial are on average insignificant, it does not follow that the effect of punitive damages on **settlements** is minimal as well*. This point, moreover, will be seen to be consistent with the position that *in a particular case* the magnitude of the **threat** of punitive damages at trial will be reflected in the **settlement** amount *in that case*.

The key to understanding this point is the observation that the cases in which punitive damages are likely to be of greatest potential importance at trial are also cases that may be disproportionately likely to settle (for reasons explained below). [11] Thus, there could be very few judgments at trial in which punitive damages are awarded, yet **settlement** amounts might reflect a substantial component of punitive damages.

Let me provide a simple example. Suppose there two types of cases. Type A cases are those in which punitive damages are not an issue, and type B cases are those in which, if the plaintiff prevails at trial, she will be awarded $ 500,000 in punitive damages. In both types of case, plaintiffs have a 50 percent chance of prevailing at trial and will be awarded $ 100,000 in compensatory damages if they do prevail. Assume--and this is the key assumption--that 75 percent of all type A cases settle but that 98 percent of all type B cases settle. If a case settles, let the **settlement** amount equal the expected value of the trial outcome. [12]

Suppose there are 1,000 cases of type A and 100 cases of type B. Then 750 type A cases will settle for $ 50,000 each (= .5 x $ 100,000), and 250 type A cases will go to trial, resulting in 125 judgments of $ 100,000 in compensatory damages. [13] Similarly, 98 type B cases will settle for $ 300,000 each, with $ 50,000 of this amount attributed to the risk of compensatory damages and $ 250,000 attributed to the risk of punitive damages; and two type B cases will go to trial, resulting in one judgment in which $ 100,000 **[*667]** is awarded in compensatory damages and $ 500,000 is awarded in punitive damages.

Considering just the trial outcomes would show the following. There are 126 compensatory awards of $ 100,000 each and one punitive award of $ 500,000. Punitive damages are awarded in less than 1 percent of all trial judgments (one of 126). When averaged over the 126 judgments for plaintiffs, the mean punitive award is $ 3,968 (= $ 500,000/126). Thus, based on trial outcomes alone, one would conclude that punitive damages represent only a 4 percent "tax" on compensatory damages (= $ 3,968/$ 100,000 x 100%).

Now consider the cases that settle: 750 type A cases settle for $ 50,000, reflecting just the risk of compensatory damages, and 98 type B cases settle for $ 300,000, of which $ 50,000 is due to compensatory damages and $ 250,000 to punitive damages. Punitive damages affect the **settlement** amount in approximately 12 percent of the cases that settle (98 out of 848 **settlements)**, and $ 24.5 million is paid in **settlements** due to the risk of punitive damages (= 98 x $ 250,000). When averaged over the 848 cases that settle, the mean amount paid due to the risk of punitive damages is $ 28,892 (= $ 24,500,000/848). Thus, in **settlement** outcomes, punitive damages represent a 58 percent "tax" on compensatory

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damages (= $ 28,892/$ 50,000 x 100%).

In this example, therefore, even though punitive awards at trial occur less than 1 percent of the time and represent only a 4 percent tax on compensatory damages, the **threat** of punitive damages affects nearly 12 percent of all **settlements** and represents a 58 percent tax on compensatory damages in the **settlement** process. It would be a mistake to conclude that because punitive damages are not a significant factor in cases that go to trial, they also are not a significant factor in the **settlement** process. Moreover, the results in the example are consistent with the view that the **settlement** amount in each case reflects the expected value of the trial outcome in that case.

As noted, the key assumption in the example is that cases in which there is a **threat** of punitive damages are more likely to settle than cases involving just the **threat** of compensatory damages. [14] To understand why this assumption is plausible, consider why parties settle cases rather than litigate them at trial. One reason is to reduce litigation costs. Although some, possibly substantial, litigation costs are incurred prior to trial, proceeding through trial obviously adds to these costs. The additional costs can be avoided by settling prior to trial. A second reason parties may prefer to settle is to avoid **[*668]** risk. A **settlement** guarantees each party a fixed sum, whereas the trial outcome may be quite uncertain, both with respect to who prevails and how much will be awarded. The more risk averse are the parties (either one alone or both), the more significant is this advantage of **settlements.**

Both of these reasons for settling cases are stronger when there is the possibility of a punitive damage award. With respect to litigation costs, it is obvious that the greater the stakes in a case, the more the parties will spend in time and money at trial. [15] Since the possibility of punitive damages raises the stakes at trial--often dramatically--the amount spent on litigation if the case goes to trial would tend to be higher than in cases with similar compensatory damages but without the prospect of punitive damages. Hence, there will be a greater saving in litigation costs from settling punitive damage cases and a correspondingly greater incentive to settle them.

Similarly, because the stakes are higher in punitive damage cases, the risks are greater in such cases for both the plaintiff and the defendant if the parties go to trial. In the example discussed above, the possibility of punitive damages changed the risk from a fifty-fifty chance that the plaintiff would recover and the defendant would pay $ 100,000 to a fifty-fifty chance involving $ 600,000. If either or both of the parties is risk averse, then the benefit from settling--in the form of eliminating uncertainty about the trial outcome--is greater for cases in which punitive damages are an issue than for ordinary cases. Hence, to the extent that parties are risk averse, one would expect a disproportionately high **settlement** rate for cases involving punitive damages.

The preceding reasons why punitive damage cases tend to settle more frequently than ordinary cases also imply that "big" punitive damage cases will tend to settle more frequently than "small" punitive damage cases. This is because the higher the amount of punitive damages at stake, the more will be spent on litigation and the larger the risk for the parties. Consequently, there will be a greater advantage to settling more significant punitive damage cases. [16] This effect reinforces the point that the observed **[*669]** impact of punitive damages on trial outcomes may substantially understate the impact of punitive damages on **settlements.** [17]

There are two additional institutional reasons why punitive damage cases can be expected to settle more frequently than ordinary cases. First, in some circumstances the receipt of compensatory damages will not be treated as taxable income to individuals, but the receipt of punitive damages stemming from the same claim will be. [18] A plaintiff then would have a tax-based motivation to settle the case and characterize a disproportionate share (possibly

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all) of the **settlement** as compensation for actual harm. (Because of the practical difficulty of determining the extent to which a **settlement** reflects the **threat** of punitive damages, it often would be hard for the government to challenge this characterization.) Second, in states in which a portion of a punitive damage award is allocated to a state agency rather than to the plaintiff, [19] the plaintiff may be able to circumvent this levy on the punitive damage judgment by settling the case. (Again, it often would be difficult for the state to prevent this method of evading the state's levy.) When applicable, therefore, both of these considerations enhance the incentive to settle cases in which there is a **threat** of punitive damages. [20]

It should be observed, however, that there are other factors in the litigation process that could mitigate, or even reverse, the point that punitive damage cases tend to settle more frequently than ordinary cases. Consider, for example, a standard model of litigation in which parties go to trial rather than settle when they have sufficiently different beliefs about the plaintiff's **[*670]** expected recovery at trial (specifically, when the plaintiff is sufficiently more optimistic than the defendant). [21] It is plausible to suppose that such disagreements will be more frequent and more substantial when punitive damages are at issue in addition to compensatory damages. In particular, the vagueness of punitive damage law and the significant discretion of juries in awarding punitive damages presumably contribute to divergent beliefs about the plaintiff's expected recovery at trial. [22] And the fact that punitive damages are added to and can far exceed compensatory damages obviously increases the range of potential disagreement about the magnitude of the plaintiff's recovery. If the parties' beliefs do differ more often and more significantly when punitive damages are at issue, then, according to the model of litigation under consideration, cases involving punitive damages should be expected to go to trial with a greater frequency than cases in which only compensatory damages are in dispute. [23] If this effect dominates the litigation cost, risk aversion, and institutional effects discussed above, punitive damage cases will be "overrepresented" in trial outcomes, the opposite of the result I have been focusing on. [24]

[*671] Whether punitive damage cases settle more often or less often than ordinary cases is not a question that I am able to answer here *or a question that Eisenberg et al. addressed*. [25] But without knowing the answer, it is not possible to say whether the effect of punitive damages on trial outcomes is representative of the effect of punitive damages on **settlements.** Thus, even if punitive damage awards at trial are on average insignificant, it does not follow, as Eisenberg et al. implied, that the effect of punitive damages on **settlements** is minimal as well. For the reasons suggested in this section, the effect may well be substantial.

II. ARE PUNITIVE DAMAGES REALLY PREDICTABLE?

The point that is featured most prominently by Eisenberg et al.--and reinforced by their title--is that punitive damages are predictable. They also stress that the key to predicting the level of punitive damages is the level of compensatory damages.

The forcefulness with which they make these points is exemplified by the following passages: [26] "this article shows that some of the gravest concerns about punitive damages, their unpredictability and lack of relationship to compensatory damages, are less warranted than is commonly believed. In fact, the correlation between compensatory and punitive damages may make punitive damages one of the more explicable features of the legal system." "Far from picking numbers out of the air, jurors and judges across dozens of jurisdictions and many case categories determine punitive damages **[*672]** award levels with a startling consistency. . . . Our data . . . suggest an essential rationality and connection to compensatory damages."

The point I want to make here is that, notwithstanding their claims, *their results are consistent with the possibility that in each jurisdiction and case category jury decisions to award punitive damages are random*. To understand this point, it is important to distinguish

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between predicting whether punitive damages will be awarded at all and predicting the level of punitive damages in cases in which some punitive damages are awarded. Eisenberg et al. focus on the second issue. My point, in essence, is that even if the level of punitive damages can be predicted when punitive damages are awarded, *whether* punitive damages will be awarded could be randomly determined. I will now elaborate on these observations.

With respect to the first issue--whether punitive damages will be awarded--Eisenberg et al. show how the fraction of cases in which punitive damages are awarded depends on the case category and jurisdiction. [27] This fraction ranges from 2 percent for the "automobile tort" and "dangerous premises" categories to 27 percent for the "slander/libel" category, with a mean for the entire sample of 6 percent. Similar variation exists among jurisdictions. They readily admit that because they lack data on the degree of the defendant's misbehavior, they cannot explain, within each case category or jurisdiction, when punitive damages will be awarded. [28]

Eisenberg et al.'s main attention is given to the second issue--predicting the level of punitive damages in cases in which some punitive damages are awarded. Here they are more successful and account for a substantial fraction of the variation among punitive damage awards. They conclude that "after controlling for other factors, the level of punitive damages awarded is strongly and significantly correlated with the level of compensatory damages awarded." [29] In addition, they offer a simple formula for determining the mean punitive award from the compensatory award: the punitive award equals the compensatory award raised to the power of .782 and multiplied by 8.117. [30]

The contrast between their inability to predict when, within a particular case category or jurisdiction, punitive damages will be awarded and their ability to predict the level of punitive damages given a punitive damage **[*673]** award is central to the point I want to make: Eisenberg et al.'s results are consistent with the possibility that, within each case category or jurisdiction, the decision to award punitive damages is random. Their success in predicting the level of punitive damages when they are awarded does not negate this point.

A simple example will make my point concrete. Consider a case category in which plaintiffs prevail in 50 percent of the cases that go to trial and suppose that their compensatory damages when they do prevail is one of three values--$ 1,000, $ 10,000, or $ 100,000--with equal frequency. Let there be 5,000 cases in this category that go to trial. Suppose further that punitive damages are awarded 6 percent of the time when plaintiffs prevail (the average percentage in Eisenberg et al.'s sample) and that the punitive award is equal to twice the compensatory award. Finally, to underscore my point, *assume that the decision to award punitive damages is random*, determined, say, by spinning a roulette wheel in which six of the hundred numbers on the wheel result in a punitive damage award.

Now consider the "data" generated in this example. Plaintiffs will prevail in 2,500 of the 5,000 cases that go to trial. Six percent of the 2,500 cases--150 cases--will be ones in which punitive damages are awarded as a result of the spinning of the roulette wheel. Of these 150 cases, 50 will have compensatory damages of $ 1,000 and punitive damages of $ 2,000; 50 will have compensatory damages of $ 10,000 and punitive damages of $ 20,000; and 50 will have compensatory damages of $ 100,000 and punitive damages of $ 200,000.

These results are analogous to those found by Eisenberg et al. Indeed, the results are even stronger than theirs since, in this example, the level of punitive damages can be *perfectly* predicted from the level of compensatory damages; the formula is "the punitive award equals twice the compensatory award." *Yet, which 150 of the 2,500 plaintiff victories result in punitive damage awards was determined, by design, in a random way*. One would hardly be led to conclude, knowing this, that punitive damages are "one of the more explicable features of the legal system." Yet this is Eisenberg et al.'s conclusion [31] despite the fact that they cannot, given their data, rule out the possibility that the decision to award punitive damages is highly random.

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I am not, of course, suggesting (nor do I believe) that punitive damages are awarded in practice in a random way. Rather, my point is that, by focusing on the relationship between punitive damages and compensatory damages in the 177 cases in their sample in which punitive damages are **[*674]** awarded, Eisenberg et al. have drawn too strong a conclusion about the predictability of punitive damages. Despite their study, we still do not know much about what determines which 177 cases of the 2,849 cases in their sample are the ones in which punitive damages are awarded in the first place. In this important sense punitive damages are not nearly as predictable as they would have us believe.

III. ARE PUNITIVE DAMAGES REALLY RATIONAL?

In the last substantive section of their article, Eisenberg et al. discuss how their empirical results can be used to assess the reasonableness of actual punitive damage awards: [32] "Since the vast majority of punitive damages awards fit a regular and sober pattern, one could use that pattern to identify awards that, in light of historical practice, are questionable. The premises underlying such use would be: (1) *the present system usually leads to reasonable results*, (2) a few outlying awards . . . should be reeled in, and (3) it is sensible to define outlying awards by reference to the results of the mass of cases" (emphasis added). I have drawn attention in the preceding quotation to their first premise, which can be stated more fully as follows: the observed positive relationship between the level of punitive damages and the level of compensatory damages is rational. [33]

The point I want to make is that *the principal basis for assessing the rationality of punitive damages--deterrence theory--does not necessarily support their premise and may even imply in some contexts that the proper level of punitive damages is inversely, not positively, related to the level of compensatory damages.* [34]

To understand this point, it is necessary to briefly review some wellknown ideas from deterrence theory as that theory applies to punitive damages. [35] To achieve proper deterrence, injurers should be made to pay for the harm their conduct causes. If they are caught and found liable with certainty, **[*675]** then making them pay compensatory damages will accomplish this. But if they can escape liability sometimes, then the level of liability imposed on them when they are found liable needs to exceed compensatory damages so that, on average, they will pay for the harm done. This excess liability can be labeled "punitive damages."

For example, suppose that an injurer causes a $ 100,000 harm but is caught only with a one-in-four chance. If the injurer is made to pay just compensatory damages of $ 100,000 when he is caught, his average liability cost each time he causes harm will be only $ 25,000 (since he will pay $ 100,000 only every fourth time he causes harm). It is easy to see, however, that if he is made to pay $ 400,000 when he is caught, his average liability cost will be correct, equal to $ 100,000. The $ 400,000 amount can be described as consisting of a $ 100,000 compensatory damage payment plus a $ 300,000 punitive damage payment.

The preceding discussion suggests a simple formula for determining the level of punitive damages that achieves proper deterrence. Let h be the magnitude of harm and p be the probability that the injurer will be detected and found liable. Then the proper level of total liability is h/p. This amount would be composed of a payment of h in compensatory damages and $(h/p) - h$ in punitive damages. The punitive payment can be rewritten as $[(1 - p)/p]h$. In the example in the previous paragraph, h = $ 100,000 and p = .25, so punitive damages are, according to this formula, [(1 - .25)/.25]$ 100,000 = $ 300,000.

The punitive damage formula just described would seem to support the premise of Eisenberg et al. that there should be a systematic positive relationship between the level of punitive damages and the level of compensatory damages. The formula implies that, for any given

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probability of detection and liability, punitive damages should rise proportionally with compensatory damages. However, there still would be a discrepancy between the theory of deterrence and Eisenberg et al.'s findings since their formula for punitive damages would have punitive damages rising less than proportionally with compensatory damages. [36]

The discussion in the preceding paragraph presumed that the probability that the injurer will be detected and found liable is independent of the magnitude of compensatory damages. But this probability may not be constant. In fact, there are some reasons to believe that the probability of detection and liability will rise as the level of compensatory damages rises: higher harms may be more easily detected because they may be more difficult to **[*676]** hide, and the victims of higher harms will be more likely to sue, everything else being equal. [37]

If the probability rises with the level of compensatory damages, then the punitive damage multiplier--the term (1 - p)/p that multiplies *h* in the formula--would fall with the level of compensatory damages. What this implies about the relationship between the proper level of punitive damages and the level of compensatory damages depends on whether the change in the probability causes the punitive damage multiplier to fall less than proportionally or more than proportionally with the level of harm.

If the punitive damage multiplier falls less than proportionally, then the proper level of punitive damages rises with the level of compensatory damages, but not proportionally. This possibility is most consistent with Eisenberg et al.'s empirical results since, as noted above, they find that punitive damages rise less than proportionally with compensatory damages.

If, however, the punitive damage multiplier falls more than proportionally, then the proper level of punitive damages *falls* with the level of compensatory damages. *This outcome obviously is completely at odds with Eisenberg et al.'s premise that the observed positive relationship between the level of punitive damages and the level of compensatory damages is rational.*

That the level of punitive damages should fall with the level of compensatory damages is a realistic possibility, as the following example will suggest. Suppose a company that is responsible for trucking toxic waste to a dump site intentionally allows the waste to leak slowly onto the highway so that it will not be easily noticed or traced. Let the harm caused be $ 100,000 and assume that there is only a one-in-ten chance that the company will be caught and found liable. Then deterrence theory implies that the company should have to pay a total of $ 1 million (ten times the harm) if it is caught and found liable--$ 100,000 in the form of compensatory damages and $ 900,000 in the form of punitive damages.

Now consider a firm responsible for storing and treating toxic waste at a dump site. Suppose this firm, in order to reduce costs, uses unreasonably thin walls in constructing waste storage tanks. As a consequence, a rupture occurs, causing a major and highly visible spill that leads to harm of $ 100 million. This injurer presumably will not be able to escape detection and liability because the spill is highly visible, the cause of the spill is easily determined, and the magnitude of the harm virtually guarantees that litigation **[*677]** against the injurer will result. According to deterrence theory, no punitive damages are needed in this situation because there is, let us suppose, no chance that the injurer will escape liability. Thus, despite the fact that the harm from the dump site spill is a thousand times larger than the harm from the truck leakage, the proper level of punitive damages is lower (zero).

The discussion in this section has shown that from the perspective of deterrence theory, the rational relationship between the level of punitive damages and the level of compensatory damages could be one in which the two levels are positively related *or* negatively related. Even if they are positively related, there is no reason to suppose that punitive damages should rise less than proportionally, as Eisenberg et al. presume. [38]

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Thus, not only does deterrence theory not necessarily support their premise that the existing pattern of punitive damages is rational, deterrence theory may be antithetical to it in some contexts. From a public policy perspective, therefore, the relationship between punitive damages and compensatory damages observed by Eisenberg et al. is not a proper basis for determining what punitive damage judgments should be. [39]

* * *

Although the Eisenberg et al. study adds substantially to our empirical understanding of punitive damages, I believe--for the reasons set forth in this comment--that they have seriously misinterpreted, or drawn incorrect conclusions from, their empirical results. I have explained why punitive damages may be a significant factor in litigation despite the fact that only a small fraction of cases in their sample involve punitive damage judgments, why their results are consistent with the possibility that punitive damages are awarded on a random basis, and why punitive damages may not be rational even if the level of punitive damages is systematically and positively related to the level of compensatory damages. In a nutshell, punitive damages may be significant, unpredictable, and irrational, contrary to what Eisenberg et al. would have us believe. $$

FOOTNOTES:

n1 Theodore Eisenberg, John Goerdt, Brian Ostrom, David Rottman, and Martin T. Wells, *The Predictability of Punitive Damages*, in this issue, at 623. I refer to this article throughout as "Eisenberg et al."

n2 Some early empirical studies of punitive damages include William M. Landes and Richard A. **Posner,** *New Light on Punitive Damages*, 1986 Regulation 33 (September/October); Mark Peterson, Syam Sarma, and Michael Shanley, *Punitive Damages: Empirical Findings* (R-3311-ICJ, Institute for Civil Justice, RAND Corp, Santa Monica, Cal 1987); Stephen Daniels and Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn L Rev 1 (1990); and Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L Rev 1 (1992). Several other empirical studies are cited by Eisenberg et al. and are not repeated here.

n3 Even before publication, their article has been discussed in the national press. See Edward Felsenthal, *Punitive Awards Are Called Modest, Rare*, Wall St J (June 17, 1996), at B2; and Andrew Blum, *Study Finds Punitives Are Small, Rare*, Natl L J (July 1, 1996), at A6.

n4 Eisenberg et al, at 633 (cited in note 1).

n5 Id.

n6 Eisenberg et al. also present data on the *median* compensatory and punitive awards, which are $ 49,000 and $ 50,000, respectively. With respect to these numbers, they remark that "neither amount is strikingly high." Id. They do not comment on the *mean* compensatory and punitive awards other than to say that "the much higher mean awards indicate the influence of high-end awards." Id.

n7 Eisenberg et al. do not express their results in terms of a punitive damage "tax," as I have done here. Because the punitive damage tax is 8.6 percent and the frequency of punitive damage awards when plaintiffs prevail is 6.2 percent (= 177/2,849 x 100%), punitive damages appear somewhat more significant when described in this way.

n8 This interpretation is supported by the following passage in the introduction of their article: "Our subject is of the mass of cases, not the few headline-grabbing awards that dominate the news. The data analyzed here do not appear to include the most extreme

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SUMMARY:
... THE sizes and variability of punitive damage awards generate substantial debate. ... DESCRIPTION OF THE PUNITIVE LAWSUIT SAMPLE AND AWARD AMOUNTS ... The median punitive award for **settlements** is zero for all the categories. ... "Index # 1" of industry-related punitive award liability is the three-year moving average of this ratio, centered on the year of the lawsuit being considered. ... The independent variables include the compensatory award, the punitive award, the natural log of the market value of the firm's equity, and four measures of the firm's exposure to punitive award liability. ... One possibility is that publicity about the lawsuit, or about an adverse punitive award, imposes reputational costs on the defendant firm. ... The abnormal return is not significantly related to the sizes of the compensatory or punitive awards, nor to the specific content of the announcement. ... Conditional on knowledge of the compensatory award and that a punitive award will be assessed, roughly 50 percent of the variation in punitive awards can be explained using simple characterizations of the defendant firm, lawsuit type, and location of its filing. ... On average, press announcements of punitive damage lawsuits impose larger market value losses on the defendant firms than the total compensatory and punitive damages eventually awarded. ...

ABSTRACT

We examine several theoretical and empirical issues concerning punitive damage awards and their importance to business. First, we argue that previous justifications of punitive damage awards ignore the role of private contracting and reputation in assuring contractual

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Median	.000	.000	.000
Maximum	.000	.000	.000
SD	.000	.000	.000
Insurance claims		n = 48	
Mean	.000	.000	.000
Median	.000	.000	.000
Maximum	.000	.000	.000
SD	.000	.000	.000
Employment claims		n = 50	
Mean	.000	.000	.000
Median	.000	.000	.000
Maximum	.000	.000	.000
SD	.000	.000	.000
Asbestos claims		n = 14	
Mean	.000	.000	.000
Median	.000	.000	.000
Maximum	.000	.000	.000
SD	.000	.000	.000
Vehicular accidents		n = 3	
Mean	.000	.000	.000
Median	.000	.000	.000
Maximum	.000	.000	.000
SD	.000	.000	.000
Malpractice claims		n = 6	
Mean	.000	.000	.000
Median	.000	.000	.000
Maximum	.000	.000	.000
SD	.000	.000	.000
Miscellaneous claims		n = 57	
Mean	.000	.000	.000
Median	.000	.000	.000
Maximum	.000	.000	.000
SD	.000	.000	.000
All lawsuit types		n = 290	
Mean	.005	.000	.005
Median	.000	.000	.000
Maximum	.830	.005	.835
SD	.054	.000	.055

NOTE.--Summary statistics on compensatory, punitive, and total amounts awarded in 1,979 lawsuits in which plaintiffs sought punitive damage awards from publicly traded corporations. Verdicts were rendered or **settlements** made between 1985 and June 1996. The lawsuits are grouped in columns by outcome (defense verdict, plaintiff verdict, or **settlement)** and in rows by the lawsuit topic. In each cell, we report the mean, median,

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maximum, and SD of the punitive, compensatory, or total award for lawsuits in the cell. Positive award amounts for defense verdicts represent payments agreed to after the verdict.

TABLE 2

SUMMARY OF AWARD AMOUNTS (in $ millions)

	PLAINTIFF VERDICTS		
LAWSUIT TOPIC	**Compensatory Award**	**Punitive Award**	**Total Award**
Product liability	n = 310		
Mean	3.734	6.184	9.917
Median	1.059	.694	2.030
Maximum	50.000	101.000	150.000
SD	6.960	14.005	18.224
Fraud	n = 86		
Mean	5.301	14.811	20.287
Median	.154	.130	.540
Maximum	154.160	250.000	404.160
SD	20.437	42.989	60.114
Business negligence	n = 280		
Mean	2.096	20.693	22.861
Median	.152	.300	.525
Maximum	287.000	5,000.000	5,287.000
SD	17.449	298.763	316.486
Breach of contract	n = 108		
Mean	7.837	9.550	17.567
Median	.394	.000	.912
Maximum	130.000	400.000	500.000
SD	23.190	41.564	55.859
Insurance claims	n = 244		
Mean	.939	3.817	4.804
Median	.200	.100	.611
Maximum	25.000	100.000	100.432
SD	2.466	11.473	12.687
Employment claims	n = 168		
Mean	.852	2.693	3.578
Median	.250	.100	.500
Maximum	9.800	100.000	107.750
SD	1.700	10.880	12.184
Asbestos claims	n = 36		
Mean	2.419	2.909	5.328
Median	1.519	.000	1.519
Maximum	8.450	54.000	57.370
SD	2.707	9.474	10.315
Vehicular accidents	n = 98		
Mean	.992	.991	2.015

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Median	.376	.015	.545
Maximum	13.700	22.500	25.000
SD	1.750	2.938	3.919
Malpractice claims	n = 20		
Mean	.728	1.625	2.353
Median	.036	.027	.133
Maximum	5.900	24.000	25.250
SD	1.681	5.331	5.757
Miscellaneous claims	n = 245		
Mean	3.890	3.419	7.376
Median	.200	.040	.478
Maximum	416.000	125.000	541.000
SD	27.573	13.320	37.301
All lawsuit types	n = 1,595		
Mean	2.867	7.819	10.765
Median	.300	.130	.770
Maximum	416.000	5,000.000	5,287.000
SD	15.558	126.423	135.717

NOTE.--Summary statistics on compensatory, punitive, and total amounts awarded in 1,979 lawsuits in which plaintiffs sought punitive damage awards from publicly traded corporations. Verdicts were rendered or **settlements** made between 1985 and June 1996. The lawsuits are grouped in columns by outcome (defense verdict, plaintiff verdict, or **settlement)** and in rows by the lawsuit topic. In each cell, we report the mean, median, maximum, and SD of the punitive, compensatory, or total award for lawsuits in the cell. Positive award amounts for defense verdicts represent payments agreed to after the verdict.

TABLE 2

SUMMARY OF AWARD AMOUNTS (in $ millions)

	SETTLEMENTS		
LAWSUIT TOPIC	**Compensatory Award**	**Punitive Award**	**Total Award**
Product liability	n = 22		
Mean	.765	.000	.765
Median	.430	.000	.430
Maximum	4.400	.000	4.400
SD	1.032	.000	1.032
Fraud	n = 3		
Mean	1.157	2.500	3.657
Median	.900	.000	.900
Maximum	2.250	7.500	9.750
SD	.990	4.330	5.285
Business negligence	n = 5		

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Mean	1.629	.000	1.629
Median	2.055	.000	2.055
Maximum	2.600	.000	2.600
SD	1.124	.000	1.124
Breach of contract	n = 4		
Mean	1.381	.000	1.381
Median	.685	.000	.685
Maximum	3.353	.000	3.353
SD	1.733	.000	1.733
Insurance claims	n = 22		
Mean	1.482	.080	1.495
Median	.365	.000	.330
Maximum	19.450	1.750	19.450
SD	4.260	.373	4.168
Employment claims	n = 4		
Mean	1.045	.000	1.045
Median	.750	.000	.750
Maximum	2.637	.000	2.637
SD	1.130	.000	1.130
Asbestos claims	n = 9		
Mean	1.641	.000	1.641
Median	1.016	.000	1.016
Maximum	3.877	.000	3.877
SD	1.746	.000	1.746
Vehicular accidents	n = 9		
Mean	2.304	.000	2.304
Median	2.797	.000	2.797
Maximum	5.500	.000	5.500
SD	2.025	.000	2.025
Malpractice claims	n = 0		
Mean	. . .	. . .	. . .
Median	. . .	. . .	. . .
Maximum	. . .	. . .	. . .
SD	. . .	. . .	. . .
Miscellaneous claims	n = 16		
Mean	1.507	.000	1.507
Median	.307	.000	.307
Maximum	8.350	.000	8.350
SD	2.377	.000	2.377
All lawsuit types	n = 94		
Mean	1.372	.098	1.460
Median	.517	.000	.500
Maximum	19.450	7.500	19.450
SD	2.463	.792	2.609

NOTE.--Summary statistics on compensatory, punitive, and total amounts awarded in 1,979 lawsuits in which plaintiffs sought punitive damage awards from publicly

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traded corporations. Verdicts were rendered or **settlements** made between 1985 and June 1996. The lawsuits are grouped in columns by outcome (defense verdict, plaintiff verdict, or **settlement)** and in rows by the lawsuit topic. In each cell, we report the mean, median, maximum, and SD of the punitive, compensatory, or total award for lawsuits in the cell. Positive award amounts for defense verdicts represent payments agreed to after the verdict.

TABLE 2

SUMMARY OF AWARD AMOUNTS (in $ millions)

ALL LAWSUITS

LAWSUIT TOPIC	Compensatory Award	Punitive Award	Total Award
Product liability	n = 374		
Mean	3.140	5.126	8.265
Median	.652	.197	1.449
Maximum	50.000	101.000	150.000
SD	6.475	12.959	16.993
Fraud	n = 118		
Mean	3.886	10.858	14.837
Median	.070	.000	.262
Maximum	154.160	250.000	404.160
SD	17.547	37.221	51.935
Business negligence	n = 291		
Mean	2.047	19.910	22.025
Median	.151	.300	.523
Maximum	287.000	5,000.000	5,287.000
SD	17.117	293.069	310.433
Breach of contract	n = 147		
Mean	5.797	7.016	12.960
Median	.117	.000	.253
Maximum	130.000	400.000	500.000
SD	20.165	35.833	48.485
Insurance claims	n = 314		
Mean	.828	2.972	3.836
Median	.100	.000	.366
Maximum	25.000	100.000	100.432
SD	2.450	10.233	11.381
Employment claims	n = 222		
Mean	.662	2.038	2.719
Median	.154	.000	.284
Maximum	9.800	100.000	107.750
SD	1.525	9.528	10.685
Asbestos claims	n = 59		
Mean	1.726	1.775	3.501

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Median	.500	.000	.500
Maximum	8.450	54.000	57.370
SD	2.421	7.497	8.378
Vehicular accidents	n = 110		
Mean	1.063	.883	1.979
Median	.338	.010	.523
Maximum	13.700	22.500	25.000
SD	1.780	2.789	3.761
Malpractice claims	n = 26		
Mean	.560	1.250	1.810
Median	.015	.000	.067
Maximum	5.900	24.000	25.250
SD	1.499	4.700	5.120
Miscellaneous claims	n = 318		
Mean	3.090	2.634	5.765
Median	.071	.000	.177
Maximum	416.000	125.000	541.000
SD	24.314	11.774	32.907
All lawsuit types	n = 1,979		
Mean	2.377	6.317	8.749
Median	.196	.025	.478
Maximum	518.536	5,000.000	5,287.000
SD	18.242	113.507	121.940

NOTE.--Summary statistics on compensatory, punitive, and total amounts awarded in 1,979 lawsuits in which plaintiffs sought punitive damage awards from publicly traded corporations. Verdicts were rendered or **settlements** made between 1985 and June 1996. The lawsuits are grouped in columns by outcome (defense verdict, plaintiff verdict, or **settlement)** and in rows by the lawsuit topic. In each cell, we report the mean, median, maximum, and SD of the punitive, compensatory, or total award for lawsuits in the cell. Positive award amounts for defense verdicts represent payments agreed to after the verdict.

[*540] mean total award in plaintiff verdicts for six of the 10 categories of cases and less than 33 percent for three others. Only for vehicular accidents is the mean total **settlement** larger, and in that case it is only 14 percent larger. Averaging over all lawsuit types, the total **settlement** amount is 13.6 percent of the total amount awarded in plaintiff verdicts.

There are several mutually nonexclusive ways to interpret this result: (i) Perhaps small cases tend to settle, and large cases tend to proceed to trial. (ii) Punitive awards may not be important in cases that settle. (iii) Plaintiffs may be extremely risk averse, leading them to settle for less than the expected value of the trial outcome. (iv) Or perhaps **settlement** amounts do equal expected trial outcomes, but plaintiffs win verdicts, on average, only about 13.6 percent of the time. (v) It also is possible that plaintiffs eventually receive substantially less than the verdict amounts we have recorded, despite our attempts to track reductions in verdict awards in the Lexis/Nexis database. (vi) Yet another possibility is that there is a reporting bias. For example, cases in which **settlement** amounts remain sealed or

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unreported may differ from cases in which the **settlement** amounts are reported.

IV. DETERMINANTS OF PUNITIVE AWARD AMOUNTS

In this section we report on the empirical predictability of punitive awards, thereby addressing the controversy raised by Sunstein et al., Eisenberg et al., and Polinsky. [27] Table 3 summarizes the results of three regressions in which the dependent variable is the punitive award. The regressors include the following variables:

The Compensatory Award. According to the probability-of-detection theory, punitive awards should be a positive multiple of the compensatory award (and the multiple should be inversely correlated with the probability of detection and punishment). Alternatively, juries may treat compensatory and punitive awards as substitutes. If so, the punitive award should be negatively related to the compensatory amount. It also is possible that juries consider the distinction between compensatory and punitive awards to be arbitrary and assign total awards to plaintiffs without much regard to their classifications. In this case, the punitive and compensatory amounts should be unrelated.

The Square of the Compensatory Award. We include this term to allow for a nonlinear relation between the punitive and compensatory awards.

The Natural Log of the Market Value of the Defendant Company's Common **[*541]**

TABLE 3

DETERMINANTS OF PUNITIVE AWARD AMOUNTS

Variable	**Model 1**	**Model 2**	**Model 3**
Compensatory award	1.78 **	1.42 **	1.37 **
	(.000)	(.000)	(.000)
Compensatory award squared (X 10<-9>)	-9.57 **	-7.22 **	-.04
	(.000)	(.000)	(.980)
In of the market value of equity	.55 +	.89 **	.98 **
	(.071)	(.007)	(.002)
Index # 1 of industry exposure to punitive award liability	-.92	-1.30	-30.70
	(.978)	(.713)	(.374)
Number of defendants	.01	.04	1.57 *
	(.987)	(.956)	(.033)
Fixed effects for lawsuit type	Yes	Yes	Yes
Fixed year effects	Yes	Yes	Yes
Fixed state effects	Yes	Yes	Yes
Intercept	12.60 +	8.79	.45
	(.073)	(.210)	(.944)
n	1,087	807	668
Chi-squared (F-value for model 3)	446.7	340.7	8.41
p-Value	.000	.000	.000
Pseudo-R<2> (adjusted R<2> for model 3)	.018	.015	.508

NOTE.--Estimates of the relations between the punitive award and characteristics of the lawsuit and the defendant company. Model 1 is a Tobit regression using data from 1,087 cases, including cases in which the punitive and/or compensatory award is zero. Model 2 is a Tobit regression using data from 807 cases in which the compensatory award is positive. Model

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3 is an ordinary least squares regression using data from 668 cases in which positive punitive amounts are awarded. All coefficients except for the compensatory award and compensatory award squared are in millions. Values in parentheses are p-values.

+ Significant at the .10 level based on a two-tailed test.

* Significant at the .05 level based on a two-tailed test.

** Significant at the .01 level based on a two-tailed test.

Stock, Measured at the End of the Year Immediately Preceding the Year in Which a ***Settlement*** *or Verdict Is Reached*. We conjecture that award amounts are positively related to juries' perceptions of the defendants' abilities to pay. Firm size serves as a proxy for deep financial pockets.

The Number of Defendants. Some of the defendants of lawsuits in our sample share potential liability with other parties. The punitive award may be related to the number of parties that potentially share responsibility for an award, because multiple parties represent deeper pockets.

An Index ("Index # 1") of the Firm's Industry-Related Exposure to Punitive Lawsuits. Some lines of business attract more and different types of punitive lawsuits than others. Automobile manufacturers, for example, are defendants in many lawsuits prompted by automobile accidents, in which **[*542]** plaintiffs allege some type of product failure. We conjecture that punitive awards differ systematically across industries and according to the frequencies with which firms in an industry are targets of punitive lawsuits.

To test this hypothesis, we created an index of each firm's industry-related exposure to punitive award liability. Using data from all 1,979 lawsuits in our sample, we partitioned the lawsuits by year and the two-digit Standard Industrial Classification (SIC) code of the defendant company. The SIC codes are taken from the 1996 CRSP database and, when not available on CRSP, from the 1996 Compustat database. [28] The number of lawsuits in each year-SIC classification then is divided by the number of CRSP-listed firms with the same two-digit SIC. This ratio provides a measure of the relative intensity of punitive lawsuits in each year for each SIC category. "Index # 1" of industry-related punitive award liability is the three-year moving average of this ratio, centered on the year of the lawsuit being considered. Therefore, all firms in the same SIC category with punitive lawsuits in the same year have the same index of punitive award liability. Firms with lawsuits in different years, or in different SIC codes, generally have different index values.

Finally, we include dummy variables to control for the lawsuit type (using the categories reported in Table 1), the year, and the state in which the trial was heard (or in the case of **settlements,** where the lawsuit was filed). Results reported in Table 3 exclude the Exxon Valdez oil spill because the $ 5 billion punitive award in this case is an extreme outlier. (The next largest punitive award in our sample is $ 250 million.) [29]

Model 1 in Table 3 uses information from 1,087 lawsuits for which we have sufficient data on all variables. Some of these lawsuits were resolved in defendants' favor and have zero compensatory and punitive awards. Others have positive compensatory awards, but zero punitive awards. To accommodate the large number of zero punitive awards, we use a Tobit regression model. Model 2 includes data on 807 cases in which the compensatory award is positive. Because many of the punitive awards in these cases are zero, we use a Tobit regression model here also. Model 3 includes only cases in which positive punitive amounts were awarded. It is estimated using ordinary least squares.

[*543] The pseudo-R<2> in model 1 indicates that less than 2 percent of the total variation in punitive awards is explained using our control variables. Model 2 yields a similar

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result. The adjusted R<2> in model 3, in contrast, indicates that the explanatory variables explain about 51 percent of the variation in punitive awards *conditional on the award's being positive*. Thus, the model 3 result is similar to that reported by Eisenberg et al. [30] When we include cases in which punitive damages are not awarded, as in models 1 and 2, our ability to explain the total variation in the award amounts drops dramatically. This result is consistent with Polinsky's prediction: we can explain the level of punitive damages if we know they will be awarded, but we have a difficult time explaining any of the overall variation in awards. [31]

In fact, our ability to predict punitive awards, ex ante, most likely is even lower than the results in models 1-3 suggest. This is because one key variable in these regressions--the compensatory award--is not known until after the verdict. Plaintiffs and defendants might forecast the compensatory award, but they are unlikely to do so without error. (Indeed, regressions that seek to explain compensatory awards, using the explanatory variables listed in Table 3, yield pseudo R<2>'s of less than 3 percent.) To the extent that knowing the actual ex post compensatory damages provides better information on the jury than could be guessed at before the end of the trial, models 1-3 overestimate the amount of the variation in punitive damages that a typical firm can predict.

In all three models, the punitive award is positively and significantly related to the compensatory award. This indicates that juries do not treat punitive and compensatory awards as substitutes but, rather, award punitives as a positive multiple of the compensatory award. As indicated by the negative (and significant, in models 1 and 2) coefficient for the square of the compensatory award, however, the punitive award increases less than proportionately with the compensatory amount. Assuming that the penalties are optimal in the sense proposed by Becker, [32] this implies that the probability of detection rises with the size of the loss. This result, however, is not robust--including **[*544]**

TABLE 4

FACTORS AFFECTING THE LIKELIHOOD THAT PUNITIVE DAMAGES WILL BE AWARDED

Variable	Model 1	Model 2	Model 3	Model 4
Compensatory award (x 10<-7>)	2.16 **	.82 **	.58	.17
	(.000)	(.000)	(.101)	(.152)
Compensatory award squared (x 10<-16>)	-26.70 **	-1.85 **	-9.22	-.34
	(.000)	(.000)	(.148)	(.360)
ln of the market value of equity	-.05	...	-.02	...
	(.195)		(.735)	
Index of industry exposure to punitive award liability	3.30	1.53	-1.05	-1.94
	(.449)	(.652)	(.861)	(.680)
Number of defendants	-.12	-.20 **	-.18	-.218 *
	(.202)	(.004)	(.181)	(.026)
Intercept	21.67 **	19.52 **	21.26 **	20.67 **
	(.000)	(.000)	(.000)	(.000)
Fixed effects for lawsuit type	Yes	Yes	Yes	Yes
Fixed year effects	Yes	Yes	Yes	Yes
Fixed state effects	Yes	Yes	Yes	Yes
n	953	1,497	636	1,058
Pseudo-R<2>	.220	.203	.183	.192
Model chi-squared	287	411	135	221

NOTE.--Logistic regression estimates in which the dependent variable is

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equal to one if a punitive amount is awarded, and zero otherwise. Model 1 includes all cases in the sample for which the punitive award amount is reported and data are available on the firm's market value of equity. Model 2 includes additional firms without market value of equity data. Models 3 and 4 include only cases in which positive compensatory amounts are awarded. The p-values are in parentheses.

* Significant at the .05 level based on a two-tailed test.

** Significant at the .01 level based on a two-tailed test.

the Exxon Valdez case reverses the signs for the coefficients on both the compensatory award and its square.

In all three models, the coefficient on the log of the market value of equity is positive and statistically significant, indicating that punitive damages increase with firm size at a decreasing rate. This indicates that firms with deeper pockets (measured here by greater market value) have higher punitive damages. Neither Index # 1 of the vulnerability to punitive damages nor the number of defendants is significantly related to the level of punitive damages. Individual state coefficients are not reported in the tables, but the states with significant negative coefficients are California, Florida, Georgia, North Carolina, and South Dakota. Alabama and Texas have large positive coefficients.

Table 4 reports the results of tests designed to investigate the factors that affect the likelihood that punitive damages are awarded. In each regression, the dependent variable is equal to one if punitive damages were awarded **[*545]** and to zero otherwise. Regressions using the logit procedure are reported, although probit estimates produce similar results. [33]

Model 1 in Table 4 uses data from all cases, including those for which the compensatory award is zero. Model 3 excludes cases for which the compensatory award is zero. Because the firm size variable is statistically insignificant, it is excluded in models 2 and 4, thus permitting use of additional cases for which firm size data are not available. When cases with zero compensatory awards are included (models 1 and 2), the results indicate that the probability of a punitive award increases at a decreasing rate with the level of the compensatory award. When the firm size variable is excluded (models 2 and 4), the probability of a punitive award is negatively and significantly related to the number of defendants. This result suggests that multiple defendants are named in more speculative cases, or perhaps that multiple defendants pool resources and defend themselves more successfully. The pseudo-R<2>'s indicate that the regressors in models 1-4 explain only about 18-22 percent of the variation in the probability that punitive damages will be awarded.

V. SHARE VALUE EFFECTS OF IMPORTANT SUPREME COURT DECISIONS

A. Market-Wide Share Value Effects

The evidence in Table 2 indicates that adverse punitive damage judgments can be very costly to individual firms. Little is known, however, about the importance of punitive damages to businesses in general. To investigate this issue, we examine the effects on firm values of changes in the legal environment that affect firms' prospects of large punitive award liabilities.

Between April 1986 and May 1996, the U.S. Supreme Court rendered seven decisions regarding claims that punitive damage awards can be excessive. Table 5 contains summaries of these seven decisions. In the first five, the Supreme Court upheld lower courts' punitive awards and rejected claims that the awards were excessive (although in the Browning-Ferris case the Court based its decision on the defendant's failure to argue that the punitive

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performance. In the absence of externalities, punitive awards are not necessary to assure contractual performance even when firms face less than a 100 percent probability of being sued for contractual breach. Next, we examine empirically the sizes, determinants, and valuation impacts of punitive awards assessed against publicly held companies. We find that **settlement** amounts are low compared to jury awards, and punitive awards are highly variable and difficult to explain using characteristics of the lawsuit or defendant company. Supreme Court and legislative actions affecting punitive awards generally have not had systematic impacts on firm values. Specific punitive lawsuits, however, decrease the values of defendant companies by amounts that exceed **settlement** or jury verdict amounts, indicating that punitive lawsuits impose reputational costs on defendants.

TEXT:
[*527] I. INTRODUCTION

THE sizes and variability of punitive damage awards generate substantial debate. They also appear to affect some firms' business decisions. The prospect of high adverse awards so concerned cigarette manufactures that they agreed to pay over $ 350 billion to limit much of their punitive exposure. Defenders of punitive awards point out that punitive award liability was "the lever that brought the tobacco industry to the table." [1] Opponents of large punitive awards, however, claim that these awards impose undue costs **[*528]** on prospective defendants: "To play the game, you have to bet the corporation." [2] Supporters and opponents may not agree on many things, but they both agree that punitive damages are important.

One reason punitive awards are potentially costly to firms is that they appear to be both highly variable and large relative to the losses suffered by the plaintiff. In *Browning-Ferris Industries v. Kelco Disposal, Inc.*, compensatory damages of $ 52,146 were combined with a $ 6 million punitive judgment. In *Pacific Mutual Life v. Haslip*, compensatory damages of $ 200,000 prompted additional punitive damages of $ 3.84 million. And in *TXO Production Corp. v. Alliance Resources Corp.*, compensatory damages of $ 19,000 were boosted with a $ 10 million punitive award.

All three of these punitive awards were upheld by the U.S. Supreme Court. In recent decisions, however, the Court has reversed large awards. The Court ruled that the punitive damage award in *BMW v. Gore*, for example, was so excessive that it violated the Due Process Clause of the U.S. Constitution. Congress also recently has considered legislation that would place limits on punitive damages. In 1995, for example, the House of Representatives passed two bills that would cap punitive awards and impose costs on parties who refused **settlements** and subsequently received judgments for smaller amounts.

These efforts are based on a view that large punitive awards are overly costly to defendant companies and the overall economy. Little is known, however, about the importance of punitive awards for firm value and, hence, the value of judicial or legislative limits on such awards. Anecdotes about a few exceptionally large awards do not necessarily imply that firms in general expect large losses when cases are filed against them. Nor do they indicate that punitive damages impose large losses on the market as a whole. One objective of this article is to measure the valuation impacts of punitive awards, the lawsuits that bring them about, and judicial and legislative attempts to place limits on them.

We also examine the predictability of punitive damage awards. Sunstein et al. present a theory implying that potential punitive awards should be both unbounded and unpredictable. [3] The evidence about the predictability of punitive awards, however, is mixed. Consistent with their prediction, Sunstein et al. provide experimental evidence supporting the notion that dollar awards made by juries are inherently difficult to predict. Similar results using experimental markets are reported by Kahneman **[*529]** et al. [4] Using data from actual practice, however, Eisenberg et al. conclude that punitive damages are at least as predictable

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damages awarded violated the Due Process Clause). In the two **[*546]**

TABLE 5

INFORMATION ON IMPORTANT U.S. SUPREME COURT DECISIONS REGARDING PUNITIVE DAMAGE AWARDS, 1985-96

TITLE	DESCRIPTION	LOWER COURT OUTCOME
Aetna Life Insurance v. Lavoie	Breach of contract	$ 1,650 actual damages, $ 3.5 million punitive award
Bankers Life and Casualty v. Crenshaw	Breach of contract	$ 20,000 actual damages, $ 1.6 million punitive award
Browning-Ferris Industries v. Kelco Disposal, Inc.	Antitrust claim	$ 366,000 (treble) damages and court costs, $ 6.066 million punitive award
Pacific Mutual Life v. Haslip	Breach of contract	$ 200,000 actual damages, $ 3.84 million punitive award
TXO Production Corp. v. Alliance Resources Corp.	Title dispute	$ 19,000 actual damages, $ 10 million punitive award
Honda Motor Co. v. Oberg	Product liability	$ 900,000 actual damages, $ 5 million punitive award
BMW of North America v. Gore	Consumer fraud	$ 4,000 actual damages, $ 2 million punitive award

NOTE.--N.A. = not available.

TABLE 5

INFORMATION ON IMPORTANT U.S. SUPREME COURT DECISIONS REGARDING PUNITIVE DAMAGE AWARDS, 1985-96

U.S. SUPREME COURT DATES

TITLE	Writ	Argued	Decided	OUTCOME
Aetna Life Insurance v. Lavoie	N.A.	12/4/85	4/22/86	Award affirmed
Bankers Life and Casualty v. Crenshaw	N.A.	10/30/87	5/16/88	Award affirmed
Browning-Ferris Industries v. Kelco Disposal, Inc.	12/5/88	4/18/89	6/26/89	Award affirmed
Pacific Mutual Life v. Haslip	4/2/90	10/3/90	3/4/91	Award affirmed
TXO Production Corp. v. Alliance Resources Corp.	11/30/92	3/31/93	6/25/93	Award affirmed
Honda Motor Co. v. Oberg	1/14/94	4/20/94	6/24/94	Reversed and remanded
BMW of North America v. Gore	1/23/95	10/11/95	5/20/96	Reversed and remanded

NOTE.--N.A. = not available.

[*547] most recent cases, the Court reversed lower courts' rulings, arguing in part that the punitive awards were excessive. [34] Each of these seven decisions resolved some uncertainty regarding the Court's attitudes toward punitive awards. Thus, they affect many firms' exposure to punitive damage liability.

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Initially, we examine the Court decisions' effects on the values of a broad set of common stocks, using the CRSP equal weighted market index. For each Supreme Court case we focus on three event dates: when writ of certiorari was granted, when arguments were heard, and when the Court's decision was rendered. Table 6 reports the CRSP cumulative equal weighted index returns for two event windows around each of these dates: the 3-day window (-1, +1) centered on the event date (which we label day 0), and the 12-day window (-1, +10). To assess statistical significance, Table 6 also reports the following test statistic:

z(t[1], t[2]) = (R(t[1], t[2]) - (t[2] - t[1] + 1)R[-201,-2])/((t[2] - t[1] + 1)<0.5> s[-201,-2]).

Here, *R(t[1], t[2])* equals the cumulative index return measured over the (t[1], t[2]) interval, R[-201,-2] is the mean daily index return measured over the 200 trading days (-201, -2) relative to the event day, and s[-201,-2] is the SD of daily index returns over the (-201, -2) interval. Under the null hypothesis that the distributions of index daily returns are identical, independent, and asymptotically normal, *z(t[1], t[2])* is distributed approximately unit normal. Note that, since the numerator in *z(t[1], t[2])* is the *abnormal* index return, the sign of *z(t[1]*, t[2]) can differ from the sign of the raw return. [35]

Perhaps the most important recent Supreme Court decision regarding punitive awards is *BMW of North America v. Gore*, in which the Court reversed a $ 2 million punitive award (when actual damages were $ 4,000), arguing that the award was excessive. While the Court remained vague regarding exactly what constitutes excessive punitive awards, the decision received widespread publicity for signaling a limit to future punitive awards. As reported in Table 6, the CRSP equal weighted index increased in value 1.413 percent during the three trading days centered on the *BMW* decision date and 3.136 percent during the (-1, +10) 12-day window around the date. Both estimates are statistically significant at the 10 percent level. This result is consistent with the joint argument that punitive damages are important **[*548]**

TABLE 6

MARKET-WIDE STOCK RETURNS AROUND IMPORTANT U.S. SUPREME COURT DECISIONS

		CUMULATIVE AGGREGATE RETURNS AROUND THE FOLLOWING DATES Petition for Writ of Certiorari Granted	
CASE	TITLE	(-1, +1)	(-1, +10)
1	Aetna Life Insurance v. Lavoie	N.A.	N.A.
2	Bankers Life and Casualty v. Crenshaw	N.A.	N.A.
3	Browning-Ferris Industries v. Kelco Disposal, Inc.	.392	3.060
		(.11)	(.62)
4	Pacific Mutual Live v. Haslip	* -1.045	* -1.532
		(-2.00)	(-1.99)
5	TXO Production Corp. v. Alliance Resources Corp.	1.456	4.581
		(1.08)	(1.44)
6	Honda Motor Co. v. Oberg	.489	.907
		(-.20)	(-1.14)
7	BMW of North America v. Gore	-.168	2.265
		(-.96)	(.42)
Average, cases 1-5		.268	2.036

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t-statistic	(-.47)	(.04)
Average, cases 6-7	.161	1.586
t-statistic	(-.79)	(-.57)

NOTE.--Cumulative (raw) returns for the CRSP equal weighted index with dividends around key U.S. Supreme Court decisions regarding punitive damage awards, 1985-96. Test statistics, in parentheses, are distributed approximately as unit normal under the null hypothesis of no abnormal returns. Each test statistic is computed as the cumulative CRSP index return minus the expected return, divided by an estimate of the SE of the cumulative return. The expected return and SE are estimated from stock returns during the 200 trading days immediately preceding the event period. Each test statistic can have a sign that differs from its associated cumulative CRSP index return.

+ Significant at the .10 level based on a two-tailed test.

* Significant at the .05 level based on a two-tailed test.

** Significant at the .01 level based on a two-tailed test.

TABLE 6

MARKET-WIDE STOCK RETURNS AROUND IMPORTANT U.S. SUPREME COURT DECISIONS

		CUMULATIVE AGGREGATE RETURNS AROUND THE FOLLOWING DATES Arguments Heard	
CASE	TITLE	(-1, +1)	(-1, +10)
1	Aetna Life Insurance v. Lavoie	.316	1.766
		(.23)	(.81)
2	Bankers Life and Casualty v. Crenshaw	* 3.797	4.695
		(2.06)	(1.14)
3	Browning-Ferris Industries v. Kelco Disposal, Inc.	.413	1.943
		(.09)	(.26)
4	Pacific Mutual Live v. Haslip	** -2.353	+ -2.785
		(-2.69)	(-1.75)
5	TXO Production Corp. v. Alliance Resources Corp.	-.700	.692
		(-1.50)	(-1.02)
6	Honda Motor Co. v. Oberg	.650	1.830
		(.07)	(-.36)
7	BMW of North America v. Gore	.757	.642
		(1.91)	(.50)
Average, cases 1-5		-.295	1.262
t-statistic		(-.81)	(-.25)
Average, cases 6-7		.704	1.236
t-statistic		(1.26)	(.60)

NOTE.--Cumulative (raw) returns for the CRSP equal weighted index with dividends around key U.S. Supreme Court decisions regarding punitive damage awards, 1985-96. Test statistics, in parentheses, are distributed approximately as unit normal under the null hypothesis of no abnormal

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returns. Each test statistic is computed as the cumulative CRSP index return minus the expected return, divided by an estimate of the SE of the cumulative return. The expected return and SE are estimated from stock returns during the 200 trading days immediately preceding the event period. Each test statistic can have a sign that differs from its associated cumulative CRSP index return.

+ Significant at the .10 level based on a two-tailed test.
* Significant at the .05 level based on a two-tailed test.
** Significant at the .01 level based on a two-tailed test.

TABLE 6

MARKET-WIDE STOCK RETURNS AROUND IMPORTANT U.S. SUPREME COURT DECISIONS

		CUMULATIVE AGGREGATE RETURNS AROUND THE FOLLOWING DATES Decision Rendered	
CASE	TITLE	(-1, +1)	(-1, +10)
1	Aetna Life Insurance v. Lavoie	.194	.979
		(-.18)	(-.20)
2	Bankers Life and Casualty v. Crenshaw	.164	1.573
		(-.10)	(.04)
3	Browning-Ferris Industries v. Kelco Disposal, Inc.	-.749	1.344
		(-1.293)	(-.067)
4	Pacific Mutual Live v. Haslip	+ 2.192	* 6.199
		(1.83)	(2.50)
5	TXO Production Corp. v. Alliance Resources Corp.	.912	2.170
		(.34)	(-.25)
6	Honda Motor Co. v. Oberg	-.407	.866
		(-1.18)	(-.76)
7	BMW of North America v. Gore	* 1.413	+ 3.136
		(1.75)	(1.94)
Average, cases 1-5		.543	2.453
t-statistic		(.27)	(.91)
Average, cases 6-7		.503	+ 2.001
t-statistic		(.44)	(1.92)

NOTE.--Cumulative (raw) returns for the CRSP equal weighted index with dividends around key U.S. Supreme Court decisions regarding punitive damage awards, 1985-96. Test statistics, in parentheses, are distributed approximately as unit normal under the null hypothesis of no abnormal returns. Each test statistic is computed as the cumulative CRSP index return minus the expected return, divided by an estimate of the SE of the cumulative return. The expected return and SE are estimated from stock returns during the 200 trading days immediately preceding the event period. Each test statistic can have a sign that differs from its associated cumulative CRSP index return.

+ Significant at the .10 level based on a two-tailed test.

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* Significant at the .05 level based on a two-tailed test.
** Significant at the .01 level based on a two-tailed test.

[*549] to businesses and that the *BMW* decision substantially decreased firms' punitive liability exposure.

Other results in Table 6, however, are not consistent with the argument that businesses' punitive liability exposure is harmful. The only other case associated with statistically significant index returns is *Pacific Mutual Life v. Haslip*. The Court ruled seven to one that the large punitive award in this case did not violate the Due Process Clause of the U.S. Constitution. It is implausible to argue that this decision decreased firms' punitive liability exposure. Nonetheless, the index returns around this date are positive and statistically significant. Most other index returns in Table 6 are statistically insignificant. Thus, most Supreme Court decisions regarding punitive damages are not systematically associated with market-wide stock price changes.

B. Effects on Firms Defending Recent or Pending Punitive Damage Lawsuits

Whereas the previous section reports on market-wide effects of the Supreme Court decisions, in this section we investigate the effects on the values of firms defending recent or pending punitive damage lawsuits. Table 7 reports the mean 3-day (-1, +1) abnormal stock returns for firms that defended lawsuits seeking punitive damages within 365 days of each of the key dates for the seven Supreme Court decisions summarized in Table 5. Abnormal stock returns are calculated using coefficients estimated from a one-factor market model over days -230 through -31 relative to each Supreme Court date, using the Eventus software package. Standard errors for computing test statistics are calculated using the procedure described by Mikkelson and Partch. [36]

Several of the mean abnormal returns reported in Table 7 have large t-statistics. For example, 148 firms had punitive damage lawsuits decided or settled within 365 days of the decision date (April 22, 1986) of the *Aetna Life Insurance v. Lavoie* case. The mean cumulative abnormal return for these firms for the three trading days centered on this date is -1.56 percent, with a t-statistic of -5.61. By itself, this result suggests that news of the *Aetna* decision resulted in lower stock values of firms with pending or recently decided punitive lawsuits.

Overall, however, the results in Table 7 do not yield a consistent interpretation. The *TXO Production* decision date, for example, is associated with a statistically significant *positive* average abnormal return, even though this **[*550]**

TABLE 7

AVERAGE ABNORMAL STOCK RETURNS FOR FIRMS WITH RECENT, CURRENT, OR PENDING PUNITIVE AWARDS CASES

	Petition for Writ of Certiorari Granted	Arguments Heard	Decision Rendered
Aetna Life Insurance v. Lavoie	N.A.	n = 127 -.15 (-.64)	n = 148 -1.56 ** (-5.61)
Bankers Life and Casualty v. Crenshaw	N.A.	n = 189 -3.36 ** (-7.76)	n = 195 .05 (.22)
Browning-Ferris Industries v. Kelco			

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Disposal, Inc.	n = 185	n = 185	n = 200
	-.27	.35	.18
	(-1.36)	(1.42)	(.83)
Pacific Mutual Life v. Haslip	n = 260	n = 258	n = 253
	.04	-1.53 **	-.27
	(.22)	(-4.79)	(.41)
TXO Production Corp. v. Alliance Resources Corp.	n = 256	n = 261	n = 272
	.89 **	-.18	1.05 **
	(3.76)	(-.62)	(5.55)
Honda Motor Co. v. Oberg	n = 282	n = 276	n = 263
	-.35 +	.37	.24
	(-1.87)	(1.57)	(1.48)
BMW of North American v. Gore	n = 240	n = 163	n = 108
	-.27	.29	.18
	(-1.52)	(1.43)	(.93)

NOTE.--Mean 3-day abnormal stock returns for defendant companies in lawsuits seeking punitive awards that occur within 365 calendar days of U.S. Supreme Court actions concerning seven cases with important implications for punitive awards. Each cell presents the number of firms with lawsuits settled within 365 days of the Supreme Court action, the mean abnormal stock return (in percent) for the 3 days centered on the day of the Court action, and (in parentheses) the associated t-statistic. N.A. = not available.

+ Significant at the .10 level based on a two-tailed test.

** Significant at the .01 level based on a two-tailed test.

decision upheld a large punitive award. Furthermore, most of the average abnormal returns are not statistically significant.

We examined the sensitivity of the results in Table 7 to the inclusion of different sets of firms. For example, we restricted the samples to firms with pending lawsuits and to firms whose verdicts were rendered within 6 months or 3 months of the Supreme Court action. The results, however, are similar to those reported in Table 7: individual estimates have high associated t-statistics, but most are statistically insignificant. Overall, we infer that the Supreme Court decisions are not systematically associated with significant movements in the stock prices of firms with pending or recently decided punitive damage lawsuits.

[*551] *C. Cross-Sectional Differences in Share Value Reactions to Supreme Court Decisions*

Table 8 reports on our attempts to explain the cross-sectional variation in share value reactions to the *BMW* and *Honda* decisions. As in Table 7, we focus on firms with punitive award judgments or **settlements** within 365 days of the decision date. In each regression, the dependent variable is the 3-day abnormal stock return centered on the decision date, divided by its standard error. The independent variables include the compensatory award, the punitive award, the natural log of the market value of the firm's equity, and four measures of the firm's exposure to punitive award liability. The first measure, Index # 1, as described in Section IV, measures the firm's industry's exposure to punitive damage lawsuits. The second measure, Index # 2, equals Index # 1 multiplied by the average punitive damage award for these same lawsuits. The third and fourth measures of the firm's exposure to punitive award liability are interaction terms, in which Index # 1 (or Index # 2) is multiplied by the natural log of the market value of the firm's equity.

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Once again, many of the coefficients are statistically significant, but overall they do not support the notion that punitive damages are important to firms. Presumably, firms facing the highest expected punitive damages should have expected the largest benefits from either the *BMW* or the *Honda* decisions. But the coefficients on punitive damages are negative (and statistically significant in the *Honda* case). Index # 1 of the firm's exposure to punitive damages is positively and significantly related to abnormal returns for the *BMW* case. The net effect of the index, however, is actually negative because the interaction of the index with the firm's market value has a consistently larger impact. (Rerunning the regressions for the *BMW* case without the market value interactions produces a negative but statistically insignificant coefficient for Index # 1.)

More puzzling still, the results for the *Honda* case are not consistent with those for the *BMW* case. For example, the coefficients for the compensatory award are positive and statistically significant for the *BMW* case, but negative and statistically significant for the *Honda* case. Even the signs of the coefficients for firm size differ. Overall, we are unable to explain the cross section of abnormal stock returns for these cases in a consistent fashion.

VI. IMPACT OF CONGRESSIONAL ATTEMPTS TO LIMIT PUNITIVE AWARDS

During 1995 and 1996, the U.S. Congress considered and passed legislation that promised to limit many firms' exposure to punitive damage awards. The legislation ultimately was vetoed by President Clinton, and on May 9, 1996, the House of Representatives failed by 23 votes to override **[*552]**

TABLE 8

DETERMINANTS OF CROSS-SECTIONAL DIFFERENCES IN STOCK PRICE REACTIONS TO IMPORTANT U.S. SUPREME COURT DECISIONS

EXPOSURE TO PUNITIVE AWARD LIABILITY

Regression Number	Compensatory Award (x 10<-5>)	Punitive Award (x 10<-5>)	ln(MVE) (x 10<-4>)	Index # 1 (x 10<-1>)
Panel A: Effects of BMW of North America v. Gore on Values of Firms with Nearby Punitive Damage Award Cases (n = 106)				
1	5.29 **		7.58 **	4.94 *
	(4.67)		(3.43)	(2.59)
2		-5.58	7.41 **	8.51 **
		(-1.18)	(3.00)	(4.43)
3	6.53 **		3.90 *	
	(6.10)		(2.24)	
4		-5.40	7.07	
		(-1.04)	(.04)	
Panel B: Effects of Honda Motor Co. v. Oberg on Values of Firms with Nearby Punitive Damage Award Cases (n = 262)				
1	-6.96 **		-3.71	1.03
	(-5.15)		(-1.17)	(.54)
2		-6.84 **	-4.77	.18
		(-6.01)	(-1.52)	(.10)
3	-7.07		-4.00	
	(-5.27) **		(-1.77) +	

REV_00261925

4		-7.02 **	-4.53 *	
		(-6.27)	(-2.05)	

NOTE.--Estimated coefficients from regressions using the firm-specific 3-day standardized abnormal stock return as the dependent variable. In panel A, abnormal stock returns are measured over the three trading days centered on May 20, 1996, the day the U.S. Supreme Court handed down its decision in the BMW case. In panel B, abnormal stock returns are measured over the three trading days centered on June 24, 1994, the day the U.S. Supreme Court handed down its decision in the Honda Motor case. In each panel, observations are included only for firms that are defendants in punitive award cases within 365 calendar days, before or after, the date of the Supreme Court action. The regressors include the compensatory award divided by the firm's market value of equity, the punitive award divided by the firm's market value of equity, the natural log of the firm's market value of equity, and indices of the firm's exposure to punitive award liability. Index # 1 reflects the relative frequency of punitive award lawsuits for firms in the same industry during the 3-year period centered on the current year. Index # 2 is Index # 1 multiplied by the average punitive award in those same lawsuits. The t-statistics are in parentheses.

+ The estimated coefficient (or F-statistic) is significant at the 10% level.

* The estimated coefficient (or F-statistic) is significant at the 5% level.

** The estimated coefficient (or F-statistic) is significant at the 1% level.

TABLE 8

DETERMINANTS OF CROSS-SECTIONAL DIFFERENCES IN STOCK PRICE REACTIONS TO IMPORTANT U.S. SUPREME COURT DECISIONS

EXPOSURE TO PUNITIVE AWARD LIABILITY

Regression Number	Index # 2 (x 10<-9>)	Index # 1 x ln(MVE) (x 10<-3>)	Index # 2 x ln(MVE) (x 10<-11>)	ADJUSTED R<2>	F-STATISTIC
Panel A: Effects of BMW of North America v. Gore on Values of Firms with Nearby Punitive Damage Award Cases (n = 106)					
1		-3.17 *		.292	11.85 **
		(-2.48)			
2		-5.47 **		.151	5.68 **
		(-4.23)			
3	-1.52		9.14	.244	9.46 **
	(-.50)		(.50)		
4	-1.79		10.82	-.024	.39
	(-.51)		(.51)		

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Panel B: Effects of Honda Motor Co. v. Oberg on Values of Firms with Nearby Punitive Damage Award Cases (n = 262)

1	-5.39 (-.41)		.094	7.74 **
2	.33 (.03)		.123	10.18 **
3	-.81 (-.41)	.40 (.33)	.089	7.39 **
4	-2.47 (-1.26)	1.41 (1.18)	.125	10.29 **

NOTE.--Estimated coefficients from regressions using the firm-specific 3-day standardized abnormal stock return as the dependent variable. In panel A, abnormal stock returns are measured over the three trading days centered on May 20, 1996, the day the U.S. Supreme Court handed down its decision in the BMW case. In panel B, abnormal stock returns are measured over the three trading days centered on June 24, 1994, the day the U.S. Supreme Court handed down its decision in the Honda Motor case. In each panel, observations are included only for firms that are defendants in punitive award cases within 365 calendar days, before or after, the date of the Supreme Court action. The regressors include the compensatory award divided by the firm's market value of equity, the punitive award divided by the firm's market value of equity, the natural log of the firm's market value of equity, and indices of the firm's exposure to punitive award liability. Index # 1 reflects the relative frequency of punitive award lawsuits for firms in the same industry during the 3-year period centered on the current year. Index # 2 is Index # 1 multiplied by the average punitive award in those same lawsuits. The t-statistics are in parentheses.

+ The estimated coefficient (or F-statistic) is significant at the 10% level.

* The estimated coefficient (or F-statistic) is significant at the 5% level.

** The estimated coefficient (or F-statistic) is significant at the 1% level.

[*553] the veto. To further investigate the importance of punitive damages to businesses, we measure the market value impacts of eight important events in the development of this legislation. [37]

The eight key events are summarized in Table 9. On March 10, 1995, the House of Representatives passed legislation that would limit punitive damages to $ 250,000 or three times the compensatory damages, whichever is greater. On March 16, a bipartisan group of senators proposed a narrow version of product liability reform directed primarily at very small firms. Press articles interpreted this as evidence that the strong reforms passed by the House would not pass in the Senate. Nonetheless, on May 10, the Senate passed its own bill that was fairly close to the original House bill. Nearly one year later, on March 18, 1996, the House-Senate Conference Committee reported out legislation that conformed to the general

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limits passed by the House (limiting punitive damages for defective-product cases in state and federal courts to $ 250,000 or twice the amount of actual damages, whichever is higher). The White House immediately announced that it likely would veto the bill. The House (on March 21, 1996) and the Senate (on March 29, 1996) both passed the compromise bill, but neither vote was by the two-thirds majority necessary to override a presidential veto. On May 2, 1996, President Clinton vetoed the bill, and on May 9 the House failed to override the veto.

If **punitive damages** are bad for firms, we should expect the events that increased the likelihood of strong **reform** legislation (that is, on March 10, 1995, May 10, 1995, and March 18, 1996) to increase stock values, while events that decreased the likelihood of significant reform (on March 16, 1995, May 2, 1996, and May 9, 1996) should decrease stock values. The effects of the House and Senate votes on the conference bill (March 21 and March 29, 1996) are less clear. Both votes supported the conference compromise bill, but both were short of veto-proof margins and probably signaled that the bill ultimately would fail. It thus is reasonable to expect these votes to be associated with drops in market value.

Using these eight event dates, we conducted a set of experiments similar to those reported for the Supreme Court cases. The third column in Table 9 reports the 3-day market-wide stock returns for each of these eight dates. None of the eight dates are associated with statistically significant changes in the CRSP equal weighted stock index. Thus, despite the large political fights over punitive reform legislation, these events had a negligible effect on the overall market. **[*554]**

TABLE 9

STOCK RETURNS AROUND KEY DATES IN THE HISTORY OF PUNITIVE AWARD REFORM LEGISLATION

Date	Description of Event	**CRSP** Equal Weighted Index Return (%)	**Average Abnormal Stock Return for Firms** Defending Punitive Lawsuits (%)
3/10/95	House passes HR 988 (imposing costs in some circumstances on parties who refuse **settlements)**; House passes HR 956 (capping damage awards)	.94 (1.00)	.63 ** (2.97)
3/16/95	Headline on article when bills arrive in Senate: "House legal bill called all but dead in Senate"	.84 (.85)	-1.04 ** (-5.37)
5/10/95	Curb on punitive awards passed in Senate	.64 (.45)	.88 ** (2.95)
3/18/96	Press attention for product liability bill approved by House-Senate conference committee	1.24 (.90)	1.17 ** (3.12)
3/21/96	Bill passes in Senate 59-40, "not strong enough to override a veto"	.75 (.31)	-.61 + (-1.86)
3/29/96	Bill passes in House 259-158, "not strong	1.15	-.89 **

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as compensatory damages. [5] They find that nearly 50 percent of the cross-sectional variation in punitive damages can be explained with a simple linear model using compensatory damages and broad descriptions of the type of case (for example, medical malpractice or fraud).

Polinsky raises serious concern about the Eisenberg et al. study, noting that it excludes cases that have been settled and explains variation in punitive damages only when they have been awarded. [6] We address this issue by examining the predictability of punitive awards using data from both **settlements** and verdicts. We also attempt to explain the variation in punitive damages across all cases, rather than those merely in which punitive awards are levied.

An additional concern is not just whether punitive damages are predictable, but whether they are predictable for the right reasons. Landes and **Posner** and Polinsky and Shavell argue that punitive damages should be used when the probability of detection is low, so that the total penalty imposed on the defendant ensures that the firm internalizes the damages imposed on others. [7]

In this article we seek to add to this theoretical debate as well. We argue that relating punitive damages strictly to the probability of punishment ignores the role of private contracting and reputation in assuring contractual performance. The probability-of-detection justification for punitive awards holds only when the costs imposed on the plaintiff represent an externality or, alternatively, where a contractual relationship does not take place. One example of this may be environmental damage, such as that imposed by the Exxon Valdez oil spill. [8] Most activities over which punitive awards are **[*530]** brought, however--including fraud, product liability, business negligence, insurance claims, asbestos-related lawsuits, and employment claims--contain few obvious externality problems.

The recent Supreme Court case *BMW v. Gore* illustrates our argument. In this case, the original defendant sought damages because a car dealer had secretly retouched the paint job on his newly purchased automobile. As the case illustrates, the true underlying quality of a car's paint job is valuable to customers. Providing such high-quality paint jobs or handling procedures that cars never have to be retouched, however, is costly. There are no externalities in this situation, so customer demands will encourage firms to provide higher quality paint jobs, or careful handling procedures, up to the point at which the cost of doing so equals the marginal benefit obtained by the customers. Thus, paint job quality is assured even in the absence of punitive awards--and is enforced by the firm's reputational guarantee--*up to the level and cost of quality assurance that consumers demand*.

This article is organized as follows. In Section II we present our argument about the role of reputation in assuring contractual performance and the effect of punitive awards on firms' use of reputational guarantees. Section III describes the sample of punitive lawsuits we use to investigate punitive awards. We report tests that attempt to explain the sizes of punitive awards in Section IV. Sections V--VIII introduce several approaches to examine the importance of punitive awards. In Section V, we measure the valuation impacts of U.S. Supreme Court decisions that affect the expected sizes of future punitive awards, both on the market as a whole and on firms defending recent or current punitive award lawsuits. Section VI reports on similar tests of the valuation impacts of congressional attempts in 1995 and 1996 to limit the sizes of punitive awards. In Section VII, we explore whether the Supreme Court decisions and punitive reform legislation affected company values differently, depending on firms' exposures to punitive award liability. Finally, Section VIII examines the valuation effects on the defendant firms directly affected by individual punitive-seeking lawsuits. Section IX concludes the article.

II. THE THEORY OF PUNITIVE DAMAGES

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	enough to override a veto"	(.81)	(-4.74)
5/2/96	Common Sense Product Liability Legal	.57	-.77
	Reform Act vetoed by President Clinton	(.11)	(-1.56)
5/9/96	House fails to override veto by 23 votes	1.38	1.39 **
		(1.12)	(3.00)

NOTE.--Three-day stock returns and abnormal stock returns centered on each of eight dates in the development of punitive award legislation during 1995 and 1996. The second column reports the cumulative equal weighted CRSP index return for the 3 days centered on the reported date. The far right column reports average abnormal 3-day stock return for companies that were defendants in unresolved punitive award lawsuits on the date of the legislative development. Because our sample of firms ends in June 1996, the sample size of pending lawsuits declines over time, from 125 for the first date to eight for the last date. The t-statistics are in parentheses. For the index return, each test statistic is computed as the cumulative aggregate return minus the expected return, divided by an estimate of the SE of the cumulative return. The expected return and SE are estimated from stock returns during the 200 trading days immediately preceding the event period. For the firms with pending lawsuits, abnormal returns and t-statistics are calculated using estimates from a one-factor market model.

+ Significant at the .10 level based on a two-tailed test.

** Significant at the .01 level based on a two-tailed test.

[*555] The right-hand column in Table 9 reports the impact of the proposed legislation on the share values for companies that were defendants in unresolved punitive award lawsuits as of the event date. In this test, we do not include recently decided cases because, at most, the legislation could affect only cases that had not yet been decided. The sample period ends in June 1996, so the sample of pending lawsuits declines over time, from 125 cases for the first date to eight for the last date.

The results indicate that the share values of firms with pending punitive damage lawsuits generally were affected by the proposed legislative changes. In seven of the eight event periods, the average abnormal stock return is consistent with the hypothesis that the **threat** of large punitive damage awards adversely affects those firms facing suits. For example, the March 10, 1995, House passage of its aggressive reform bills is associated with an average increase of 0.63 percent in the stock values of firms with pending punitive lawsuits. The subsequent March 16, 1995, news that the Senate was unlikely to pass similar reforms corresponds to an average abnormal stock return of -1.04 percent for firms with pending lawsuits. As with most of the estimates reported in the last column of Table 9, these estimates are statistically significant at the 1 percent level.

One result is not consistent with the hypothesis that potentially large punitive damages matter. On May 9, 1996, the House failed by 23 votes to override President Clinton's veto of the compromise legislation. The associated 3-day average abnormal stock return for firms with pending punitive lawsuits is positive and statistically significant. Despite this finding, the overall results indicate that the proposed legislation had material and statistically significant effects on the share values of firms with pending punitive damage lawsuits. [38]

Table 10 attempts to explain the cross-sectional variation in stock prices shown in the third column in Table 9. Because of the small sample sizes available for 1996, we examine only

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the three events in 1995. In each regression in Table 10, the dependent variable is the cumulative abnormal stock return for the three trading days centered on the key event day, divided by its SE. The regressors are the compensatory amount eventually awarded in the case, the natural log of the defendant firm's market value of equity, Index # 1 of industry exposure, and an interaction term equal to the product of Index # 1 and the natural log of the market value of equity. The first row reports the results for the March 10, 1995, House passage of two aggressive reform bills. The second row reports results for the March 16, **[*556]**

TABLE 10

CROSS-SECTIONAL DETERMINANTS OF STOCK PRICE REACTIONS TO KEY DEVELOPMENTS IN PUNITIVE AWARD LEGISLATION

	Compensatory Award (x 10<-4>)	ln(MVE) (x 10<-2>)	Index # 1 of Exposure to Punitives
Effects of U.S. House of Representatives passage of anti-punitive-award legislation	-.92 *	2.47 **	10.98
	(-1.97)	(2.79)	(1.43)
Effects of publicity that passage of the legislation in the U.S. Senate was unlikely	-5.27	.84	14.95 *
	(-1.23)	(1.03)	(2.12)
Effects of U.S. Senate passage of anti-punitive-award reform legislation	-20.85 **	.52	40.81 **
	(-3.35)	(.43)	(3.89)

NOTE.--Estimated coefficients from ordinary least squares regressions using the firm-specific 3-day standardized abnormal stock return as the dependent variable. In the first row, abnormal stock returns are measured over the three trading days centered on March 10, 1995, the day the U.S. House passed two bills that would discourage large punitive awards. In the second row, abnormal stock returns are measured over the three trading days centered on March, 16, 1995, the day leading U.S. senators declared that passage in the Senate was unlikely. In the third row, abnormal stock returns are measured over the three trading days centered on May 10, 1995, the day a weaker form of punitive award reform legislation was passed in the U.S. Senate. Observations are included only for firms that are defendants in unresolved punitive award lawsuits. The regressors include the (eventual) compensatory award divided by the firm's market value of equity, the natural log of the firm's market value of equity, and an index of the firm's exposure to punitive award liability (which reflects the relative frequency of punitive award lawsuits for firms in the same industry during the 3-year period centered on the current year). The t-statistics are in parentheses.

+ Significant at the .10 level based on a two-tailed test.

* Significant at the .05 level based on a two-tailed test.

** Significant at the .01 level based on a two-tailed test.

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TABLE 10

CROSS-SECTIONAL DETERMINANTS OF STOCK PRICE REACTIONS TO KEY DEVELOPMENTS IN PUNITIVE AWARD LEGISLATION

	Index # 1 x ln(MVE)	n	Adjusted R<2>	F-Statistic
Effects of U.S. House of Representatives passage of anti-punitive-award legislation	-.68 (-1.31)	119	.094	4.05 **
Effects of publicity that passage of the legislation in the U.S. Senate was unlikely	-.92 + (-1.94)	119	.021	1.65
Effects of U.S. Senate passage of anti-punitive-award reform legislation	-2.45 ** (-3.49)	107	.120	7.61 **

NOTE.--Estimated coefficients from ordinary least squares regressions using the firm-specific 3-day standardized abnormal stock return as the dependent variable. In the first row, abnormal stock returns are measured over the three trading days centered on March 10, 1995, the day the U.S. House passed two bills that would discourage large punitive awards. In the second row, abnormal stock returns are measured over the three trading days centered on March, 16, 1995, the day leading U.S. senators declared that passage in the Senate was unlikely. In the third row, abnormal stock returns are measured over the three trading days centered on May 10, 1995, the day a weaker form of punitive award reform legislation was passed in the U.S. Senate. Observations are included only for firms that are defendants in unresolved punitive award lawsuits. The regressors include the (eventual) compensatory award divided by the firm's market value of equity, the natural log of the firm's market value of equity, and an index of the firm's exposure to punitive award liability (which reflects the relative frequency of punitive award lawsuits for firms in the same industry during the 3-year period centered on the current year). The t-statistics are in parentheses.

\+ Significant at the .10 level based on a two-tailed test.

* Significant at the .05 level based on a two-tailed test.

** Significant at the .01 level based on a two-tailed test.

[*557] 1995, report that Senate passage was unlikely, and the third row reports results for the May 10, 1995, passage in the Senate.

In both the first and third rows, the abnormal stock return is negatively related to the compensatory amount eventually awarded in these cases. This result is surprising, since one would expect that firms defending cases in which plaintiffs suffered large losses would benefit the most from the prospect of lower punitive award limits. In both rows, however, the abnormal stock return is positively related to Index # 1. This suggests that news of potential legislative **reforms** is most beneficial for firms in industries subjected to frequent **punitive damage** lawsuits. Furthermore, in the first row, the coefficient for the natural log of the market value of firm equity is positive and statistically significant, indicating that larger firms,

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with potentially great exposure to **punitive damage** liability, benefited most from the prospect of **punitive damage reform.**

Despite these findings, it is difficult to place too much confidence in them. The F-statistic in the second row is statistically insignificant, indicating that we cannot reject the hypothesis that the coefficients on all regressors are all equal to zero. For the first and third rows, the F-statistics are significant at the 1 percent level. In these cases, however, the adjusted-R<2>'s are low (.094 and .120, respectively), indicating that the models explain little of the cross-sectional variation in abnormal returns around the March 10, 1995, and May 10, 1995, dates. Thus, while the Table 9 results suggest that punitive damages are important to firms with pending lawsuits, the Table 10 results indicate that we cannot clearly discern the specific reasons why.

VII. THE VALUATION IMPACTS OF LEGAL CHANGES ON FIRMS WITH PUNITIVE EXPOSURE

The tests reported in previous sections examine the impact of Supreme Court decisions and legislation affecting punitive damages on market-wide stock price changes and on firms that are defendants in current or pending punitive award lawsuits. In this section we examine whether changes in the legal environment affect firms in systematically different ways. In particular, do changes affect firms differently depending on the firms' exposure to punitive award lawsuits?

To examine this issue, we estimate cross-sectional regressions for each date representing an important Supreme Court decision or news about a key legislative development. The dependent variable in each regression is each firm's cumulative abnormal return for the 3-day period centered on this date, divided by its SE. As before, abnormal returns are calculated from a one-factor market model estimated over days -230 through -31 relative **[*558]** to date 0, using the CRSP equal weighted portfolio as the market index. In a variation from previous tests, here we include data on *all* firms listed on the 1996 CRSP tapes that have at least 60 days' data during the estimation period.

The key independent variable in each regression is Index # 1 of the firm's industry-related exposure to punitive award liability. Because of the well-known effect of firm size on cross-sectional differences in returns, we also include the natural log of the market value of common stock as a control variable.

Table 11 reports on the coefficients estimated for the Index # 1 variable, plus the F-statistic calculated for each regression. Panel A contains the results for two important Supreme Court decisions, regarding *Honda Motor Co. V. Oberg* and *BMW of North America v. Gore*. Panel B contains results for each of the eight key legislation dates examined in Table 9. In none of the individual cross-sectional regressions is the coefficient for the industry-related index of punitive exposure statistically significant at the 5 percent level. In one case, regarding the March 18, 1996, press announcement that a compromise bill had emerged from the House-Senate Conference Committee, the Index # 1 coefficient is positive and significant at the 10 percent level. This isolated result is consistent with the hypothesis that stock price changes to news that some punitive awards might be limited were positively related to the firms' exposures to punitive award liability. Overall, however, there is little evidence to support the notion that firm value changes are sensitive to the firms' exposure to punitive liabilities.

To summarize our findings to this point, we examine the impacts on firm values of important Supreme Court decisions and recent legislation regarding punitive awards. Most evidence indicates that market-wide stock price changes, as well as the stock prices of firms that are defendants in current or pending punitive award cases, are not significantly affected by these changes in the legal environment. Furthermore, most firms' stock price changes are not significantly related to the firms' exposure to punitive award liability.

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We do find some limited evidence consistent with the hypothesis that changes in the legal environment affect firm values. In particular, the 1996 *BMW* Supreme Court decision corresponds to a statistically significant increase in all firms' values, particularly for firms in industries with significant exposure to punitive award liability. Also, news reports of pending legislation aimed at limiting the sizes of punitive awards are associated with positive changes in the values of firms with pending punitive award cases. In the next section, we examine the valuation effects not of changes in the legal environment, but of specific punitive lawsuits.

[*559] TABLE 11

THE RELATION BETWEEN STOCK RETURNS AND EXPOSURE TO PUNITIVE AWARD LIABILITY AROUND KEY SUPREME COURT DECISIONS AND DATES IN THE HISTORY OF PUNITIVE REFORM LEGISLATION

Date	Description of Event	Coefficient for Index # 1 of Industry-Related Punitive Liability Exposure (t-statistic)	F-Statistic (n)
	Panel A: Two Important U.S. Supreme Court Decisions		
6/24/94	Honda Motor Co. v. Oberg decision rendered	.086	.52
		(.93)	(7,203)
5/20/96	BMW of North America v. Gore decision rendered	.153	28.58
		(.88)	(8,184)
	Panel B: Important Legislation or Pending Legislation Announcement Dates		
3/10/95	House passes HR 988 (imposing costs in some circumstances on parties who refuse **settlements**); House passes HR 956 (capping damage awards)	-.060	.56
		(-.36)	(7,802)
3/16/95	Headline on article when bills arrive in Senate: "House legal bill called all but dead in Senate"	.083	27.48
		(.54)	(7,806)
5/10/95	Curb on punitive awards passed in Senate	.096	27.33
		(.59)	(7,638)
3/18/96	Press attention for product liability bill approved by House-Senate Conference Committee	.292	4.09
		+ (1.76)	(7,888)
3/21/96	Bill passes in Senate 59-40, "not strong enough to override a veto"	-.014	30.95

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		(-.09)	(8,066)
3/29/96	Bill passes in House 259-158, "not strong enough to override a veto"	.105	5.05
		(.73)	(8,079)
5/2/96	Common Sense Product Liability Legal Reform Act vetoed by President Clinton	-.111	65.67
		(-.59)	(8,113)
5/9/96	House fails to override veto by 23 votes	.119	5.33
		(.82)	(8,018)

NOTE.--Results from ordinary least squares regressions using cross-sectional data for each of several dates regarding actual or proposed changes in the legal environment. In each regression, the dependent variable is the 3-day standardized abnormal stock return centered on date in question (that is, the 3-day abnormal return divided by its SE). The independent variables are the natural log of the market value of common stock and the coefficient for the index (# 1) of industry-related punitive award liability. Data on all firms listed in the 1996 CRSP tapes are used in each regression, subject to firm-specific data availability to estimate the firm's abnormal stock return. The coefficients for the index of liability exposure are reported, along with the associated t-statistics.

+ Significant at the .10 level based on a two-tailed test.

[*560] VIII. VALUATION IMPACTS OF PUNITIVE LAWSUITS ON DEFENDANT COMPANIES

A. Average Valuation Impacts of Press Announcements about Punitive Lawsuits

In this section we examine the valuation effects on defendant companies when punitive award lawsuits or their outcomes are publicized. We searched the Lexis/Nexis "All News" database for newspaper stories of punitive award lawsuits. Of the 1,249 cases in our sample in which the defendant firm is listed in the 1996 CRSP daily returns database, we found at least one news story each for 351 cases. The type and timeliness of news coverage varies widely. We group the initial press reports into three groups: preverdict announcements, verdict or **settlement** announcements, and postverdict announcements. Verdict or **settlement** announcements, in turn, consist of **settlements,** defense verdicts, and plaintiff verdicts. Postverdict announcements consist of information that is favorable, unfavorable, or neutral for the defendant firm.

Table 12 reports on the average 2-day abnormal stock returns for the initial press announcements of punitive award lawsuits for all 351 cases and for each announcement type. The 2-day event window consists of the day before plus the day of the initial press report. As in our previous tests, abnormal returns are calculated as the difference between the actual 2-day return minus a forecast return from a one-factor market model. We estimate the market model using trading days -230 through -31 relative to the initial press date and measure market returns using the CRSP equal weighted index with dividends.

For all 351 initial press announcements, the average 2-day abnormal stock return is -0.45

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percent. The t-statistic is -2.70, which is statistically significant at the 1 percent level. The binomial sign test statistic is -1.91, which is significant at the 10 percent level. [39] These results indicate that, on average, the initial press report of a lawsuit seeking punitive damages is associated with a small but statistically significant decrease in the defendant company's stock value.

The valuation impact is not uniform across announcement types, however. For initial announcements about an upcoming or currently pending lawsuit, the average abnormal return is -1.02 percent with a t-statistic of -2.86. For the 188 cases in which the initial announcement is of a plaintiff verdict, the average abnormal return is -0.62 percent with a t-statistic of **[*561]**

TABLE 12

AVERAGE ABNORMAL STOCK RETURNS ON PRESS ANNOUNCEMENTS OF PUNITIVE LAWSUITS

Type of Press Announcement	**Initial Announcements (%)**	**Subsequent Announcements (%)**
Preverdict news	-1.02	.49
	(-2.86) *	(.38)
	[-1.98] *	[.82]
	n = 80	n = 10
Verdict or **settlement** news:		
Defense verdict	-.36	-.44
	(-.51)	(-.44)
	[-1.12]	[-.58]
	n = 15	n = 3
Settlement	-2.43	. . .
	(-1.35)	. . .
	[-.13]	. . .
	n = 4	n = 0
Plaintiff verdict	-.62	-1.36
	(-2.74) **	(-2.37) *
	[-1.94] +	[-1.60]
	n = 193	n = 47
Postverdict news:		
Neutral news	.62	.17
	(1.35)	(.26)
	[1.38]	[-.15]
	n = 25	n = 11
Postverdict news favorable to the defendant firm	1.29	.36
	(1.93) +	(.80)
	[.47]	[-.56]
	n = 18	n = 39
Postverdict news unfavorable to the defendant firm	-.11	-.06
	(-.16)	(-.14)
	[-.25]	[-1.23]
	n = 16	n = 25
All announcements	-.45	-.33

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	(-2.70) **	(-1.15)
	[-1.91] +	[-1.18]
	n = 351	n = 135

NOTE.--Average abnormal stock returns associated with 351 press announcements pertaining to lawsuits in which punitive damages were sought or awarded, involving 235 different defendant firms between 1979 and 1995. Each cell reports the mean 2-day abnormal return, the associated t-statistic (in parentheses), the z-statistic for the generalized sign test based on the proportion of positive abnormal returns (in brackets), and the number of announcements in that category. Events are grouped by announcement type and according to whether the announcement was the initial or a subsequent press announcement about the lawsuit. Abnormal returns are measured relative to a benchmark determined by a one-factor market model using the CRSP equal weighted index.

+ Significant at the .10 level based on a two-tailed test.

* Significant at the .05 level based on a two-tailed test.

** Significant at the .01 level based on a two-tailed test.

[*562] -2.74. Thus, the initial announcement of an upcoming or plaintiff verdict is associated with a statistically significant decrease in share values, on average. We infer that the loss associated with a plaintiff verdict is relatively small because the trial generates much information about the prospective award. Indeed, if investors accurately predict plaintiff outcomes, the average abnormal return to a plaintiff verdict would be zero. Evidently, investors are unable to perfectly anticipate trial outcomes.

Postverdict news also is not perfectly anticipated. Specifically, the average reaction to postverdict announcements that are favorable to the defendant firm is positive, 1.29 percent, and statistically significant at the 10 percent level. "Favorable" announcements include news that the firm won the right to appeal an earlier verdict or that the award amount was reduced. Unfavorable postverdict news, which includes announcements that the firm failed in an attempt to gain an appeal or have the award reduced, is associated with a small negative but statistically insignificant average stock price reaction. The average abnormal stock return to postverdict news that we label neutral also is statistically insignificant.

The average abnormal return to **settlement** announcements is negative and large in magnitude (-2.43 percent). This point estimate is consistent with Polinsky's [40] hypothesis that **settlements** involve the largest losses. The estimate, however, is not statistically significant. Combined with our earlier finding (see Table 2) that **settlement** amounts are relatively small, the data from our sample do not support Polinsky's hypothesis.

Many lawsuits received press attention after their initial news articles. The right-hand column in Table 12 reports on the valuation impacts of the first *subsequent* article that reported substantially new information about the lawsuit. For most types of subsequent announcements, the average abnormal returns are not significantly different from zero. Averaging across all subsequent announcements, for example, the mean abnormal return is -0.33 percent with a t-statistic of -1.15. The one exception is for subsequent announcements about plaintiff verdicts. In each of these cases, the lawsuit was the subject of a previous press article. Nonetheless, the mean 2-day abnormal stock return for these cases is -1.36 percent, with a t-statistic of -2.37. This provides further evidence that plaintiff verdicts are not fully anticipated and that they are associated with declines in the share values of the defendant companies.

The results imply that publicity about lawsuits involving actual or potential punitive awards

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are associated, on average, with declines in the values of the defendant companies. This is true particularly for any initial preverdict **[*563]**

TABLE 13

CHANGES IN THE MARKET VALUE OF EQUITY (in $ millions)

Type of Press Announcement	Minimum	Twenty-fifth Percentile	Median	Seventy-fifth Percentile	Maximum
Preverdict news (n = 80)	-2,019.1	-39.4	-2.4	13.5	1,317.9
Verdict or **settlement**:					
Defense verdict (n = 14)	-240.6	-40.3	-1.1	116.1	379.1
Settlement (n = 4)	-44.2	-32.7	-1.9	444.6	871.9
Plaintiff verdict (n = 193)	-1,554.2	-77.9	-8.5	18.9	1,802.3
Postverdict news:					
Neutral news (n = 25)	-580.8	22.1	3.2	68.2	292.2
Favorable news (n = 18)	-426.2	-81.6	3.4	39.7	669.3
Unfavorable news (n = 16)	-371.5	-49.8	-4.0	19.1	313.1
All announcements	-2,019.1	-62.0	-2.9	23.9	1,802.3

NOTE.--Summary statistics on the 2-day abnormal changes in common stock market values associated with 351 initial press announcements between 1979 and 1995 pertaining to lawsuits in which punitive damages were sought or awarded from 235 defendant firms. The events are categorized by the timing of the initial press announcement relative to the verdict or **settlement**. The abnormal stock value changes are calculated as the 2-day abnormal stock return times the market value of the firm's common stock measured 10 calendar days before the press announcement. The abnormal stock return is measured relative to a benchmark determined by a one-factor market model using the CRSP equal weighted index.

publicity about current or pending lawsuits, as well as for verdicts in favor of plaintiffs. Announcements of plaintiff verdicts are associated with stock value losses, on average, even for cases that previously received press attention.

B. Average Changes in Defendant Firms' Market Value of Equity

While punitive lawsuits are bad news for defendant companies, the average valuation impact is small in percentage terms. In Table 13 we report summary statistics on the dollar magnitude of the abnormal returns. For each firm, we compute the dollar change in the market value of equity by multiplying the firm's initial announcement 2-day abnormal stock return by the market value of its common stock, computed 10 calendar days before the initial press announcement. The distribution of company values is highly skewed, so the distribution of the change in the market value of equity is skewed and contains many extreme values. For the whole sample, the change in the market value of equity ranges from a low of -$ 2,019 million to a high of $ 1,802 million. To draw inferences about the average magnitudes of the changes in value, we therefore focus on the median **[*564]** changes. Table 13 also reports the changes in the twenty-fifth and seventy-fifth percentiles of the distribution of market value changes.

Over all firms, the median change in the market value of equity is negative, -$ 2.9 million. As

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a basis for comparison, in previous work we report a median market value loss of $ 5.5 million for firms investigated or charged with fraud. [41] Similarly, Karpoff, Lee, and Vendrzyk find that the median value loss to contractors charged with defense procurement fraud is $ 5.0 million. [42] Based on these medians, the average announcement period market value loss for defendant companies in punitive lawsuits is approximately half as large as that for firms involved with criminal, civil, or defense procurement fraud.

As might be expected, the median market value losses differ according to the nature of the initial press announcement. The median changes in market value are negative for preverdict announcements, **settlements,** plaintiff verdicts, and postverdict unfavorable information. Median changes in market value are positive for neutral and favorable postverdict announcements. An anomalous finding is that the median change in market value is negative for defense verdicts.

C. Reputational Effects and Defense Costs of Punitive Award Lawsuits

The market value losses for preverdict announcements, **settlements,** and plaintiff verdicts provide insight into the nature of the costs of punitiveseeking lawsuits on the defendant companies. For preverdict announcements, the median market value loss is $ 2.4 million. The median total award eventually reached for these cases is $ 1.7 million, or 71 percent of the initial market value loss. For **settlements,** the median total award is $ 0.8 million, which is 42 percent of the median announcement period market value loss for these firms (which, as reported in Table 13, is $ 1.9 million). The median total amount awarded by juries in our sample of plaintiff announcements is $ 6.9 million, or 81 percent of the $ 8.5 million median market value loss generated by the initial announcements of these cases.

These figures imply that preverdict news, **settlements,** and adverse jury verdicts have consequences that, on average, are more costly than the nominal amount of the awards. One possibility is that publicity about the lawsuit, or about an adverse punitive award, imposes reputational costs on the defendant firm. Such costs can arise from an increase in the firm's costs, or decrease in sales, that result from publicity about the case. As examples, **[*565]** product liability charges can decrease demand for the firm's product, breach of contract charges can increase contracting costs, and charges of discrimination or harassment by employees can raise the reservation wages of current or prospective employees. Another possibility is that the market value loss includes the defendant's defense costs, including any disruption to the firm's operations as a result of significant litigation.

Whether they are reputational or defense costs, our estimates suggest that they can be substantial. Consider, for example, adverse jury verdicts. If the only cost is the amount of the award, the average valuation impact of the verdict would be no greater than $ 6.9 million. A lower-bound estimate of the median reputational and defense cost therefore is the difference between the median market value loss ($ 8.5 million) and this amount, or $ 1.6 million. If investors previously were aware of the lawsuit, however, the implied reputational and defense cost is much higher. Suppose that the ex ante likelihood of an adverse jury ruling is 50 percent and that the firm's preverdict market value reflects this expectation. Then a drop in value of $ 8.5 million on the announcement implies that the ex ante total expected cost to the firm is twice that, or $ 17.0 million. Thus, if the jury-awarded cost to the firm is only $ 6.9 million, the implied reputational and defense cost is approximately $ 10.1 million (equal to $ 17.0 million - $ 6.9 million).

Since many jury awards are reduced through appeal or postverdict **settlements,** the portion of the total $ 17.0 million loss that could be attributed to reputational or defense costs could be even larger than $ 10.1 million. These figures imply that the reputational and defense loss make up a large share of the total cost to firms that have adverse jury verdicts in punitive award lawsuits.

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A. Guarantees through Reputation or Privately Agreed-to Penalties

Landes and **Posner** and Polinsky and Shavell argue that punitive awards help enforce contractual performance by forcing all parties in a trading relationship to internalize the costs of subpar performance. [9] According to this **[*531]** argument, the prospect of punitive liability offsets the chance that a party will not be held liable for any damages. The optimal punitive award therefore is decreasing in the probability that the underperforming party will be held liable. [10]

Punitive awards surely increase the expected cost to subpar contractual performance. What this line of reasoning misses, however, is the fact that in most contractual relationships, punitive awards are unnecessary to encourage optimal contractual performance. Indeed, the prospect of punitive awards can encourage too much investment to assure contractual performance, thereby increasing costs and contractual assurance beyond the optimal levels.

To see this point, consider contractual performance in a situation without the prospect of punitive awards. Contrary to the implication of Polinsky and Shavell's argument, this generally would not lead to underinvestment in assuring contractual performance. Breaching contracts, denying insurance claims, providing defective products, committing fraud, and causing employees to work in unsafe environments all impose costs. The parties that may incur these costs seek to decrease their likelihood, but generally are unwilling to pay enough to cover the costs of completely eliminating them.

As an example, insurance companies can be sued for wrongly denying claims from customers. An insurance company could choose to avoid such lawsuits by never denying claims. But such a policy is costly because it would encourage false claims. To finance a no-potential-for-lawsuit policy, the insurance company would have to charge correspondingly high premiums to finance its high costs. Presumably, some customers are unwilling to pay such high premiums. These customers prefer to buy insurance at lower rates from companies that reserve the right to deny payments. The policy of denying some claims can prevent fraudulent or uncovered claims, but it also increases the probability that the company will deny coverage to those with valid claims. Thus, customers and insurance companies can trade off the cost of insurance with the probability the company will deny valid **[*532]** claims. The optimal probability of denying claims--and the optimal price for insurance--is one that at the margin equates the benefits and costs.

Firms undoubtedly from time to time try to renege on promises of how they will make their decisions to deny coverage, but a similar solution exists here also. To the extent that insured individuals value decreasing the probability that they will be "held up" by the insurance company when coverage decisions are made, they will be willing to pay the additional costs associated with firms guaranteeing this outcome.

Consumers value reducing the probability that their implicit agreement with firms will be breached, but reducing that probability is costly. In the absence of punitive awards, consumers can reduce the probability of coverage denial by buying from insurance companies with large reputational investments or through privately negotiated penalty clauses. At some total penalty level, the cost to consumers of extra assurance exceeds the incremental expected cost of having their insurance claims denied. When the cost of denial is low, or when individuals can insure themselves at low cost, insurance companies will invest less in reputation and provide fewer guarantees. We observe this behavior in many areas of life, such as when people buy cars from fly-by-night dealers or through newspaper advertisements. Most people choosing to buy used cars with little quality assurance probably are not making mistakes. They face a relatively high probability of being defrauded, but they also pay less for their cars.

We illustrate our argument using insurance fraud, but the argument is the same for breaches

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It is possible to back out estimates of the implied reputational and defense cost using data on preverdict and **settlement** announcement market value losses, compared to the median awards in those cases. As reported above, the median awards in these cases are even smaller relative to the median market value losses than for the plaintiff verdict subsample. The uncertainty surrounding the outcomes for these cases differs also. For **settlements,** for example, the uncertainty about the size of the award is reduced to zero. Using median values, we estimate that the reputational plus defense cost is approximately 58 percent of the median market value loss in these cases. [43]

[*566] Table 14 presents summary information that permits us to investigate the sizes of the reputational and defense costs of different lawsuit types. For each lawsuit type, we report summary measures of the loss in market value on the initial press announcement, the size of the total award, the difference between the market value loss and the total award, and the ratio of the total award to the size of the market value loss. We include only cases for which the initial press announcement is of a pending lawsuit, a **settlement,** or a plaintiff verdict, and exclude defense verdicts and postverdict announcements. In a small number of cases, the change in the market value of equity is very small compared to the total award, implying extreme positive and negative values for the ratio of the penalty to the loss in market value. Since, for most firms, this ratio is small, the inclusion of such extreme values swamps any measure of the sample mean. We therefore exclude 41 cases for which the absolute value of the ratio of the total award to the loss in the market value of equity is greater than 2.0. Of the excluded cases, 22 have positive values of this ratio and 19 have negative values. [44]

Over all lawsuit types in this reduced sample, the median loss in market value is $ 9.6 million. The median total award is $ 3.9 million. Again, this comparison of medians suggests that, on average, firms experience market value losses that are not completely explained by the size of the award. This conclusion is implied also by the fact that the median ratio of the total award to the market value loss is only 0.01. (The mean is 0.16.)

Across lawsuit types, none of the median ratios of the total award to the change in market value of equity approach 1.0, suggesting that the implied reputational or legal cost penalties are substantial for all lawsuit types. In dollar terms, the largest implied median reputational costs are for business negligence ($ 22.1 million) and employment-related lawsuits ($ 16.2 million). Substantial costs are also implied for fraud ($ 8.1 million), vehicular accident ($ 5.8 million), and insurance claim ($ 3.3 million) lawsuits. These figures must be regarded as rough estimates only, however. As reported, the median reputational losses implied for breach of contract, products liability, and asbestos-related lawsuits are negative. For asbestos-related lawsuits, the median *ratio* of total award to the loss in market value is negative. In our sample, negative values arise when the median announcement period abnormal return, and hence the measured change in equity value, is positive. The occasional negative median values indicate that our estimates are highly variable, perhaps because of small sample sizes for some lawsuit types. **[*567]**

TABLE 14

COMPARISON OF THE AWARD AMOUNTS TO THE LOSSES IN FIRM VALUES

Type of Lawsuit	Loss in Equity Value	Total Award or Settlement	Difference between Loss and Total Award (Implied Reputational Loss)	Total Award Divided by Loss in Equity Value
Products liability (n = 54):				
Mean	-79.0	17.1	-96.1	.29
Median	1.7	11.6	-2.9	.00
Fraud (n = 14):				

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Mean	192.6	27.0	165.5	.35
Median	24.1	7.2	8.1	.17
Business negligence (n = 44):				
Mean	53.6	6.0	47.5	-.09
Median	22.9	1.5	22.1	.00
Breach of contract (n = 15):				
Mean	-48.0	15.5	-63.5	-.69
Median	1.3	5.2	-2.0	.03
Insurance claims (n = 26):				
Mean	40.3	11.4	28.9	.08
Median	15.2	5.7	3.3	.01
Employment claims (n = 36):				
Mean	21.3	8.8	12.6	.12
Median	19.6	1.3	16.2	.01
Asbestos claims (n = 13):				
Mean	-20.0	5.5	-25.5	-.30
Median	-14.8	2.5	-16.6	-.11
Vehicular accident claims (n = 7):				
Mean	8.2	4.0	3.5	.38
Median	6.7	.9	5.8	.13
Miscellaneous claims (n = 33):				
Mean	-.4	13.2	-13.6	.80
Median	10.4	4.5	.9	.03
Total--all lawsuits (n = 231):				
Mean	6.9	12.2	-5.3	.16
Median	.01	9.6	3.9	2.0

NOTE.--Summary statistics on the loss in market value and court-imposed penalties for 242 lawsuits between 1979 and 1995. The loss in market value is computed as the initial press announcement 2-day abnormal stock return times the firm's market value of equity measured 10 calendar days previously. Negative entries indicate that the mean (or median) change in firm value is positive. Only events for which the initial press article is about a current lawsuit, a verdict, or **settlement** are included. To eliminate extreme outliers, cases for which the absolute value of the ratio of the total award to the loss in market value exceeds 2.0 are excluded. All amounts, other than the ratios in the right-hand column, are in millions of dollars.

[*568] *D. Determinants of the Cross Section of Abnormal Returns to Initial Publicity about the Lawsuits*

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Table 15 reports on ordinary least squares regressions that are used to investigate the determinants of the cross section of abnormal returns to initial publicity about the punitive award lawsuits. For these tests, we use data on all the 287 observations for which the initial press announcements are about a pending lawsuit, **settlement,** or verdict. (Postverdict initial announcements are excluded.) The dependent variable is the 2-day announcement period abnormal return divided by its SE. Independent variables include characteristics of the lawsuit and the defendant firm.

In model 1, the regressors include measures of firm size, Index # 1 of the firm's exposure to punitive award lawsuits, the sizes of the compensatory and punitive awards, and dummy variables for the type of announcement. The abnormal return is positively and significantly related to the natural log of the value of the firm's common stock. Further investigation reveals that this result is partly attributable to several small firms for which the standardized announcement period abnormal return is negative and large in magnitude. Even excluding these cases, however, the coefficient on the log of the market value of equity is positive and statistically significant.

The positive relation does not imply that large firms have positive announcement period abnormal returns, however. Even among the top half of the firms partitioned by the market value of equity, the average standardized abnormal return is negative. [45] Rather, the positive relationship indicates that the percentage decrease in firm value on the initial press announcement of a punitive lawsuit is relatively small for large firms. We interpret this as indicating that the proportionate impact of a punitive lawsuit on firm value decreases with firm value.

The coefficient on Index # 1 of punitive liability exposure also is positive and is significant at the 5 percent level. This result indicates that the surprise of news about a punitive lawsuit, and therefore the decrease in firm value, is relatively small for firms in industries that are subject to frequent punitive lawsuits. Thus, capital markets appear to take into account a firm's potential to be sued for punitive damages in the valuation of the firm's common stock.

Other than for the constant term, none of the other coefficients in model 1 are significantly different from zero. The abnormal return is not significantly related to the sizes of the compensatory or punitive awards, nor to the specific content of the announcement. The coefficient for defense verdicts **[*569]**

TABLE 15

DETERMINANTS OF THE DEFENDANT FIRMS' ANNOUNCEMENT PERIOD ABNORMAL RETURNS

Variable	Model 1	Model 2	Model 3	Model 4
In of the market value of equity (%)	2.77	2.86	2.24	2.74
	** (4.08)	** (4.17)	** (3.49)	** (3.98)
Indices for industry exposure to punitive award liability:				
Index # 1 (based on relative frequencies of cases)	1.38	1.25	1.28	
	* (1.97)	+ (1.75)	+ (1.80)	
Index # 2 (based on relative frequencies of cases and award amounts) (x 10<-9>)				2.89

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				(.31)
Compensatory award divided by the market value of equity (x 10<-4>)	3.78	3.79		3.70
	(1.55)	(1.56)		(1.51)
Punitive award divided by the market value of equity (x 10<-4>)	-.64	-.64		-.67
	(-.70)	(-.70)		(-.74)
Total award divided by the market value of equity (x 10<-4>)			-1.74	
			(-1.00)	
Dummy variable for defense verdict announcement (%)	2.99	3.71	3.43	2.97
	(.52)	(.64)	(.58)	(.51)
Dummy variable for **settlement** announcement (%)	9.00	8.67	9.46	8.53
	(1.29)	(1.23)	(1.32)	(1.21)
Dummy variable for plaintiff verdict announcement (%)	-1.34	-1.11	.00	-1.10
	(-.50)	(-.41)	(.00)	(-.41)
Dummy variable for death involved (%)		1.76		
		(.52)		
Dummy variable for nondeath injury involved (%)		-2.16		
		(-.75)		
Intercept	-.47	-.48	-.39	-.44
	** (-4.60)	* (-4.65)	** (-4.11)	** (-4.34)
F-value	3.21	2.61	2.96	2.63
p-Value	[.003]	[.007]	[.008]	[.012]
Adjusted R<2>	.051	.048	.042	.038

NOTE.--Ordinary least squares estimates of the relations between standardized abnormal returns associated with 287 initial announcements of punitive award lawsuits and characteristics of the lawsuit and defendant company. This table contains results only for cases in which the first news article reports news of a current lawsuit, verdict, or **settlement**. The dependent variable is the 2-day announcement period abnormal stock return divided by its SE. Independent variables include the natural log of the market value of firm equity, indices for the firm's exposure to punitive award liability, the compensatory and punitive amounts awarded, and dummy variables for the type of news about the lawsuit. The t-statistics are in parentheses.

+ Significant at the .10 level based on a two-tailed test.

* Significant at the .05 level based on a two-tailed test.

** Significant at the .01 level based on a two-tailed test.

REV_00261942

[*570] is positive and for plaintiff verdicts is negative, but neither is significantly different from zero. Nor are the two coefficients significantly different from each other.

We conducted additional tests to examine the sensitivity of these results to alternate specifications and also to examine the influence of several additional explanatory variables. In model 2, we introduce two dummy variables that account for the nature of any personal injury or death involved in the lawsuit. Neither of these dummy variables is significantly related to the abnormal return, indicating that the lawsuits in which a victim suffered injury or death are not, on average, associated with unusually large market value losses to the defendant firm. In model 3, we enter the sum of the compensatory and punitive awards as a new regressor. The total award, however, is not significantly related to the standardized abnormal return. In model 4 we examine the effect of our second index of a firm's exposure to punitive award liability (Index # 2). This variable also is not significantly related to the abnormal return.

In summary, the announcement period abnormal return increases with firm size and also somewhat with our first index of the firm's exposure to punitive-seeking lawsuits. None of our attempts to explain the cross section of abnormal returns is very successful, however. The adjusted $R<2>$ values, for example, are no higher than 0.051. We conclude that, like the punitive awards, the changes in firms' values in response to initial publicity about the lawsuits are not easily explainable.

IX. CONCLUSIONS

Punitive damage awards represent potentially large and uncertain liabilities for parties to contracts. In this article we examine both theoretical and empirical issues related to punitive awards and their importance to businesses. First, we argue that, in the absence of externalities, punitive awards or other legal sanctions are not necessary to assure contractual performance, even when firms face less than a 100 percent probability of being sued for contractual breach. Firm values and the use of reputational investments to assure contractual performance, however, will be affected by both the size and predictability of prospective punitive awards.

Using a sample of 1,979 punitive lawsuits from 1985 to 1996, we then examine punitive awards' predictability, the valuation impacts of judicial and legislative actions that change firms' prospective punitive liabilities, and the valuation effects of punitive lawsuits on defendant companies. Our primary empirical findings are as follows:

1. Conditional on knowledge of the compensatory award and that a punitive award will be assessed, roughly 50 percent of the variation in punitive **[*571]** awards can be explained using simple characterizations of the defendant firm, lawsuit type, and location of its filing. Without prior information that the punitive award will be positive, however, only 1-2 percent of the variation in punitive awards can be explained. These results are consistent with Sunstein et al.'s experimental evidence and Polinsky's arguments that punitive awards are highly variable and unpredictable. [46] Inconsistent with Polinsky's argument, however, we do not find support for the notion that **settlements** represent bigger losses to firms than court verdicts.

2. We examine the impacts on firm values of several key Supreme Court decisions and congressional actions that changed, or sought to change, firms' exposure to punitive liabilities. There is little consistent evidence that Supreme Court or legislative actions have significant effects on firm values *in general*. For firms then facing punitive-seeking lawsuits, however, proposed reform legislation during 1995-96 had impacts on share values, with announcements increasing the likelihood of legislative reform generally increasing share values and announcements decreasing such likelihood generally decreasing share values.

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3. The strongest evidence that punitive awards affect share values comes from announcements of specific punitive lawsuits. The average abnormal stock return associated with the initial press announcement that a firm is a defendant in a lawsuit seeking punitive damages is negative and statistically significant. When the initial announcement reports that the lawsuit is pending, the average abnormal 2-day stock return is -1.02 percent. When the initial news is of a plaintiff verdict, the average abnormal return is negative and statistically significant but smaller (-0.62 percent), most likely because of information leakage before the initial press report of a verdict.

4. On average, press announcements of punitive damage lawsuits impose larger market value losses on the defendant firms than the total compensatory and punitive damages eventually awarded. For initial announcements about pending lawsuits, the median total award is 71 percent of the initial market value loss. For initial press reports of a plaintiff verdict, the median total award is 81 percent of the initial market value loss. And for initial press announcements about **settlements,** the median total award is 42 percent of the median initial market value loss. We attribute these differences to reputational or defense-related costs incurred by the defendant companies. These costs constitute a smaller fraction of the total market losses experienced by firms committing frauds [47] but are larger than the negligible reputational losses found for environmental violations. [48]

[*572] 5. We are unable to explain with consistency the cross-sectional variation in companies' stock price reactions for most of the news events we examine. For example, in 1994 the Supreme Court reversed a large punitive award in the *Honda Motor* decision. Abnormal stock returns for firms then involved in punitive lawsuits are negatively related to the sizes of their compensatory awards. For the subsequent *BMW* decision, however, which also reversed a large punitive award, abnormal stock returns for firms involved in punitive lawsuits are *positively* related to their compensatory awards. As another example, there is some evidence that the share value impacts of legislative attempts to limit punitive damages are positively related to firm size and the firm's industry's exposure to punitive lawsuits. These effects, however, are not consistent across different announcements in the legislative history.

Overall, the evidence indicates that punitive damages are highly variable and difficult to predict. They are important and costly to defendant firms, and such firms experience reputational or defense-related losses over and above the direct costs of the monetary awards. There is little consistent evidence, however, that changes in the legal environment that affect companies' exposure to punitive losses have significant effects on company values.

FOOTNOTES:

n1 Former Federal Trade Commission Chairman Michael Pertchuk, quoted by Peter Passell, The Split over Punitive Awards in Getting the Bad Guys, N.Y. Times, July 10, 1997, at D2.

n2 Michael Horowitz, director of the Hudson Institute's Project for Civil Justice, quoted by Passell, in *id.*

n3 Cass R. Sunstein, Daniel Kahneman, & David Schkade, Assessing Punitive Damages, 107 Yale L. Rev. 2071 (1998).

n4 Daniel Kahneman, David Schkade, & Cass R. Sunstein, Shared Outrage and Erratic Awards: The Psychology of Punitive Damages, J. Risk & Uncertainty (forthcoming).

n5 Theodore Eisenberg et al., The Predictability of Punitive Damages, 26 J. Legal Stud. 623 (1997).

n6 A. Mitchell Polinsky, Are Punitive Damages Really Insignificant, Predictable, and

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Rational? 26 J. Legal Stud. 663 (1997).

n7 William M. Landes & Richard **Posner,** Economic Analysis of Tort Law 160-65 (1993); and A. Mitchell Polinsky & Steve Shavell, Punitive Damages: An Economic Analysis, 11 Harv. L. Rev. 869 (1998).

n8 Note that the probability of punishment theory does not apply very well to this case either. The probability of detection in the case of the Exxon Valdez oil spill had to be close to 1.0. The award of punitive damages therefore cannot be justified by the notion that they were necessary to get Exxon to internalize the expected cost of the spill, ex ante. Issues raised in trial to determine imposition of punitive damages, such as the plaintiff's recklessness, also do not correspond well with the probability of punishment theory of punitive awards.

n9 Landes & **Posner,** *supra* note 7; Polinsky & Shavell, *supra* note 7.

n10 Craswell extends the discussion of penalty multiples in market relationships to when buyers are risk averse. Schwartz argues that punitive damages are unnecessary when contracts can internalize the cost of contractual breach, but claims a role for punitive awards when fewer than 100 percent of damaged parties sue to protect their interest. Unlike these arguments, our discussion implies that reputational guarantees efficiently enforce performance even when the probability of enforcement is less than 100 percent. For example, if the cost of bringing suit to enforce performance increases, the reputational investment and product price necessary to achieve a similar level of quality assurance will both have to increase. See Richard Craswell, Damage Multipliers in Market Relationships, 25 J. Legal Stud. 463 (1996); and Alan Schwartz, The Myth That Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures, 100 Yale L. J. 369 (1990).

n11 Benjamin Klein, Why Hold-Ups Occur: The Self-Enforcing Range of Contractual Relationships, 34 Econ. Inquiry 444 (1996); John R. Lott, Jr., Brand Names, Ignorance, and Quality Guaranteeing Premiums, 20 Applied Econ. 165 (1988).

n12 Michael R. Darby & Eli Karni, Free Competition and the Optimal Amount of Fraud, 16 J. Law & Econ. 87 (1973); Jonathan M. Karpoff & John R. Lott, Jr., The Reputational Penalty Firms Bear from Committing Criminal Fraud, 36 J. Law & Econ. 757 (1993); and John R. Lott, Jr., The Optimal Level of Criminal Fines in the Presence of Reputation, 17 Managerial & Decision Econ. 363 (1996).

n13 Karpoff & Lott, *supra* note 12.

n14 Our notion of an innovation in fraud technology is different from the external effect that occurs when others learn that a fraud has been committed. Third parties might change their behavior when they learn of a fraudulent action. For example, they might increase their own due diligence on entering contracts after learning of someone else's breach of contract. The information about the breach of contract, however, represents an external benefit, not a cost, because it allows the third parties to correct their previously mistaken beliefs regarding the true underlying probability of being defrauded.

n15 Karpoff & Lott, *supra* note 12, at 762-65.

n16 Benjamin Klein & Keith B. Leffler, The Role of Market Forces in Assuring Contractual Performance, 89 J. Pol. Econ. 615 (1981).

n17 Note 2 *supra*.

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n18 Dean v. Chrysler, Verdictum Juris Press, No. SF782213 (June 30, 1986, to August 1, 1986).

n19 Boroff & Boroff (her husband) v. BIC Corp & Munford, Inc., d/b/a Majik Market Stores, 90 Fla. Jury Verdict Rep. 2 (February 1990).

n20 Delong v. Chevron USA Inc. & Carlson, Jury Verdicts Wkly., No. 89447 (April 24, 1986).

n21 Trans Meridian, Inc. v. Amstar Corp., Jury Verdicts Wkly., No. C85-5389 (October 1, 1986).

n22 Talbot v. AMF Corp., Jury Verdicts Wkly., No. CV 84-3614 (October 27, 1986).

n23 Long et al. v. Fireman's Fund Ins. Co., Jury Verdicts Wkly., No. 329896 (January 17, 1986); Grossman v. Aetna Life Ins. Co., Verdictum Juris Press, No. 886-91c (April 22, 1986).

n24 Staps et al. v. Alcon Lab., Inc., LRP Publications case no. 82-1867 (September 19, 1986).

n25 Allen et al. v. Suburban Water Sys., Confidential Rep. for Attorneys, No. VC 006 498 (December 21, 1993).

n26 Doss & Garrett v. Disneyland, Jury Verdicts Wkly., No. 40-93-83 (February 25, 1986).

n27 Sunstein, Kahneman, & Schkade, *supra* note 3; Eisenberg et al., *supra* note 5; and Polinsky, *supra* note 6.

n28 Kahle and Walkling report that CRSP and Compustat SIC classifications frequently do not coincide. To minimize noise from inconsistent classifications, we use CRSP codes when available. See Kathleen M. Kahle & Ralph A. Walkling, The Impact of Industry Classifications on Financial Research, 31 J. Fin. & Quantitative Analysis 309 (1996).

n29 We also conducted several tests to examine the sensitivity of these results to alternative model specifications. For example, we included variables that indicate whether the incident involved a death or personal injury. The coefficients on these variables, however, are statistically insignificant, and their inclusion does not affect the overall explanatory power of the regressions.

n30 Eisenberg et al., *supra* note 5.

n31 Polinsky, *supra* note 6. Sunstein, Kahneman, and Schkade argue that Eisenberg et al. get a high R<2> because they regress the punitive award on the natural log of the compensatory award, rather than on the compensatory award itself. Restricting the relationship between the punitive and compensatory awards to be linear, however, has little effect on the estimated coefficients or any of our models' explanatory powers. Thus, it does not appear to be the case, as Sunstein, Kahneman, and Schkade argue, that the punitive awards are unpredictable because monetary damages are unbounded. See Sunstein, Kahneman, & Schkade, *supra* note 3, at 5 n.21.

n32 Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968).

n33 In an investigation of punitive awards arising from personal injury lawsuits, Pontiff also finds that punitive awards are not easily explained. In one model, however, he is able to

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explain 20 percent of the variation in the log of one plus the punitive award using detailed descriptions of the type of injury involved. Pontiff also finds that the probability of being sued is positively related to firm size, although (and in contrast to our findings) the award amount is unrelated to firm size. See Jeffrey Pontiff, Damages in Corporate Lawsuits: The Impact of Deep Pockets (Working paper, Univ. Washington 1998).

n34 The reasoning in the *Honda Motor* case was based on peculiarities in Oregon law that are not applicable to other states. *BMW of North America v. Gore* was the first direct attempt by the Court to limit these damages, although even here the Court remained vague about what constitutes excessive punitive awards.

n35 Calculating the test statistic using raw returns yields results that are qualitatively similar to those reported here. A possible extension of these tests would be to calculate expected index returns conditional on such other factors as interest rates.

n36 Wayne H. Mikkelson & M. Megan Partch, Withdrawn Security Offerings, 23 J. Fin. & Quantitative Analysis 119 (1988).

n37 Many states passed laws limiting punitive damages following the 1994 elections, thus weakening any overall impact of changes in federal law and decreasing the likelihood that our test will uncover significant share value effects.

n38 The legislation was written to apply only to cases filed after the law went into effect. Nonetheless, these results suggest that the investors regarded the legislation as having value consequences for firms with pending lawsuits as well.

n39 See Arnold R. Cowan, Nonparametric Event Study Tests, 2 Rev. Quantitative Fin. & Acct. 343 (1992).

n40 Polinsky, *supra* note 6.

n41 Karpoff & Lott, *supra* note 12.

n42 Jonathan M. Karpoff, D. Scott Lee, & Valaria P. Vendrzyk, Defense Procurement Fraud, Penalties, and Contractor Influence, 107 J. Pol. Econ. (in press, 1999).

n43 For comparison, in Karpoff & Lott, *supra* note 12, we find that the reputational loss accounts for up to 94 percent of the market value loss for firms committing frauds. Karpoff, Lott, and Rankine, in contrast, find that the reputational losses from environmental violations are negligible. See Jonathan M. Karpoff, John R. Lott, Jr., & Graeme Rankine, Environmental Violations, Legal Penalties, and Reputation Costs (Working paper, Univ. Washington 1998).

n44 Thus, the exclusion of these cases does not materially influence the median values reported in Table 14. Among the excluded extreme values, the largest in absolute value is -1,097. (In these tests, a negative loss value implies that the firm's market value of equity increased during the 2-day announcement period.)

n45 The median change in the market value of equity is also more negative for large firms than for small firms, reflecting the larger base from which the changes are calculated.

n46 Sunstein, Kahneman, & Schkade, *supra* note 3; Polinsky, *supra* note 6.

n47 Karpoff & Lott, *supra* note 12.

n48 Karpoff, Lott, & Rankine, *supra* note 43. $

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of contract, [11] frauds, [12] or other types of actions that can trigger punitive lawsuits. To restate the point, the wealth-maximizing probability of breach of contract or fraud is not zero: at some point, the costs of further reducing the probability exceed the expected benefits. In the absence of external costs, the optimal amount of quality assurance is reached without resort to punitive awards.

A role for extra penalties, such as punitive damage awards, exists when the action imposes costs on third parties. The most obvious example of this involves environmental damages. As we have pointed out elsewhere, [13] another example is an innovation that decreases the cost of delivering subpar **[*533]** results in a contractual relationship. For example, true innovations in committing fraud alter the underlying probability of third parties' being defrauded because potential defrauders also learn the innovation. [14]

B. Substitution of Punitive Damages for Private Quality Assurance

Since private mechanisms do not completely eliminate the occurrence of contractual breach or fraud, why not use punitive damages to deter all problems of contractual breach or fraud? One reason is that a policy of extremely high penalties imposes costs on *all* parties to a contract, not just the party that may commit the breach.

To see this, consider first the effects of an increase in legal sanctions, such as punitive damages, when they are perfect substitutes for reputation in deterring contractual breach or fraud. In this case, an increase in legal penalties will have no effect on the incidence of fraud. The increase will simply reduce customer reliance on reputation as a guarantor of promises.

It is unlikely, however, that third-party-imposed penalties are perfect substitutes for reputation. An increase in these penalties therefore will not cause a completely offsetting decrease in reputational investments, resulting in an overall increase in firms' expected penalties from subpar contractual performance. This will motivate firms to decrease the undesirable incidents. But if there are no externalities for the extra penalties to internalize, the penalty will also increase costs, harming consumers and dissipating wealth.

In previous work, we point out two reasons that reputation and third-party-imposed penalties are not perfect substitutes. [15] First, court-imposed penalties are limited to cases where evidence can be provided to a third party, while reputational losses rely on enforcement by the contracting parties (for example, customers). Second, as Klein and Leffler argue, reputation not only produces deterrence but also takes the form of sunk investments that produce additional services for customers. [16] Thus, an increase in third-party-imposed penalties will result in smaller than dollar-for-dollar reductions in reputational investments.

To the extent that punitive damages are large *and* variable, they impose **[*534]** an additional cost on firms. The notion that "to play the game, you have to bet the corporation" [17] implies that punitive awards can be arbitrarily large, with the potential to cause defendant companies financial distress. To avoid such distress and the costs that it brings, firms may alter their capital structures or investment policies. That is, they might consider not just the penalty's expected value but also such higher moments as its variance and skewness.

To the extent that court-imposed penalties are not perfect substitutes for reputational penalties, civil punitive (or criminal) penalties will increase the total penalty beyond the level that private contracting would reach. This forces the contracting parties to purchase more quality assurance than they desire. A deadweight loss is created as the extra cost of eliminating contractual breaches or frauds exceeds consumers' value of the reduction in probability of such breaches or frauds.

One argument in favor of legal suits is that they allow others to learn about a firm's behavior. Yet, if customers value knowing about these incidents more than it costs to produce this

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information, firms will try to convince their customers that the customers will learn about incidents when they occur. Even if fines are a more efficient mechanism to punish firms (as they undoubtedly are in some circumstances), penalty clauses could be enforced as part of private arbitration agreements.

III. DESCRIPTION OF THE PUNITIVE LAWSUIT SAMPLE AND AWARD AMOUNTS

The discussion in Section II implies that the sizes, predictability, and variability of punitive damage awards can have substantial impacts on defendant companies. The rest of this article investigates empirically the sizes, determinants, and valuation impacts of punitive awards assessed against publicly held corporations. To do so, we collected information on lawsuits from 1985 through June 1996 in which plaintiffs sought punitive awards using a search on the key word "punitive" in the Lexis/Nexis library "All Verdicts." This library includes reports primarily from LRP Publications' *Jury Verdict Research, Jury Verdict Weekly*, and the Association of Trial Lawyers of America. Information on additional cases from 1990 through June 1996 was obtained from the Lexis/Nexis National Law Review library. Each individual case was followed over time using these sources to try to determine whether any awards eventually were reduced on appeal. To be included in the sample, the defendant must be a publicly traded corporation with information available on the 1996 Center for Research in Security **[*535]** Prices (CRSP) or 1996 Compustat databases. The names of many companies listed in the Lexis/Nexis information do not exactly match the names of companies listed in the CRSP and Compustat databases or are subsidiaries of publicly traded corporations. To ensure an accurate match between the company names as listed in the Lexis/Nexis data and the CRSP and Compustat data, we used Dun and Bradstreet's *Million Dollar Directory* (1985-96 issues) to identify company and subsidiary names.

This search yielded information on 1,979 lawsuits in which the plaintiffs sought punitive awards from publicly traded companies from January 1985 through June 1996. Table 1 reports the distribution of the sample by year and the central topic of the lawsuit, as reported in the Nexis/Lexis database.

Product liability lawsuits are the most common type, with a total of 374 cases. Such suits allege that products malfunctioned or contained design defects. For example, in 1986 Chrysler paid $ 300,000 in compensatory damages and $ 3 million in punitive damages for "knowingly" producing a defective steering wheel. [18] A 1990 case involved an incident in which a woman set herself on fire with a malfunctioning cigarette lighter. [19]

Frauds, which represent 118 cases, involve claims that the defendant firms cheated on explicit or implicit contracts with suppliers, employees, franchises, or customers. As an example, in 1986 an independent Chevron dealer sued Chevron for fraudulently failing to account for fuel removed from the plaintiff's station and then allegedly punishing the dealer for complaining about this by terminating his dealership. [20]

There are a total of 291 business negligence claims and 147 breach of contract cases. Examples of breach of contract suits include a firm's alleged failure to deliver products as promised [21] and a distributor's claim that a manufacturer took away his market. [22] Insurance claims, which represent 314 cases, typically involve allegations of wrongful denial or incomplete coverage, from fire damage to medical expenses. [23] Employment claims include job discrimination, harassment, and contested dismissals. **[*536]**

TABLE 1

DESCRIPTION OF THE PUNITIVE AWARD LAWSUIT SAMPLE, 1985-96

Product Liability	Fraud	Business Negligence	Breach of Contract	Insurance Claims

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Panel A: Total Sample					
1985	18	11	3	9	23
1986	12	12	9	18	20
1987	26	12	23	15	35
1988	20	7	13	13	19
1989	28	18	17	15	29
1990	50	16	25	14	41
1991	39	9	48	12	45
1992	47	10	44	15	31
1993	46	11	35	13	27
1994	37	6	32	18	21
1995	33	6	31	5	18
1996	18	0	11	0	5
Total	374	118	291	147	314
Panel B: Subsample in Which Defendant Has Data Available on the 1996 CRSP Tapes					
Total	255	67	185	80	221
Panel C: Event Study Subsample--Events That Received Press Attention					
Total	81	20	62	24	42

NOTE.--Panel A reports the number of lawsuits seeking punitive damage awards from publicly traded corporations, January 1985-June 1996, grouped by year and lawsuit type. Cases were identified through the Lexis/Nexis database. To be included in the sample, the defendant firm must be listed on the 1996 Center for the Study of Security Prices (CRSP) or 1996 Compustat databases. Panel B reports on the subset of lawsuits from which data are available only from the 1996 CRSP database. Panel C reports on the subset of lawsuits for which data are available on the 1996 CRSP database and that received press coverage, as reported on Lexis/Nexis. The verdicts for all lawsuits in the sample were handed down between 1985 and June 1996, although the initial press announcements for several lawsuits occurred before 1985. Miscellaneous claims include allegations of wrongful death, premises liability, liability for vehicular accidents, trademark violations, libel, toxic exposure, and civil rights violations.

TABLE 1

DESCRIPTION OF THE PUNITIVE AWARD LAWSUIT SAMPLE, 1985-96

Employment Claims	Asbestos Claims	Vehicular Accidents	Malpractice Claims	Miscellaneous Claims	Total
Panel A: Total Sample					

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1985	22	0	6	5	26	123
1986	19	2	7	2	21	122
1987	20	10	6	3	35	185
1988	20	2	12	2	25	133
1989	15	11	10	1	35	179
1990	18	2	17	2	29	214
1991	18	6	12	1	38	228
1992	19	7	8	5	24	210
1993	23	16	11	3	38	223
1994	22	1	6	1	19	163
1995	23	2	11	0	23	152
1996	3	0	4	1	5	47
Total	222	59	110	26	318	1,979
Panel B: Subsample in Which Defendant Has Data Available on the 1996 CRSP Tapes						
Total	150	31	60	18	182	1,249
Panel C: Event Study Subsample--Events That Received Press Attention						
Total	48	14	10	0	50	351

NOTE.--Panel A reports the number of lawsuits seeking punitive damage awards from publicly traded corporations, January 1985-June 1996, grouped by year and lawsuit type. Cases were identified through the Lexis/Nexis database. To be included in the sample, the defendant firm must be listed on the 1996 Center for the Study of Security Prices (CRSP) or 1996 Compustat databases. Panel B reports on the subset of lawsuits from which data are available only from the 1996 CRSP database. Panel C reports on the subset of lawsuits for which data are available on the 1996 CRSP database and that received press coverage, as reported on Lexis/Nexis. The verdicts for all lawsuits in the sample were handed down between 1985 and June 1996, although the initial press announcements for several lawsuits occurred before 1985. Miscellaneous claims include allegations of wrongful death, premises liability, liability for vehicular accidents, trademark violations, libel, toxic exposure, and civil rights violations.

[*537] We separate out three types of lawsuits based on the medium involved. In 59 cases, punitive awards were sought for health-related concerns allegedly related to asbestos exposure. In 110 cases, punitive awards were sought because of injury that involved a vehicle driven by the defendant company's employee. And in 26 cases, plaintiffs alleged that the defendant company or its employees committed medical malpractice. In one such case, for example, a pharmaceutical company was sued for failure to warn of a medication's risks. [24]

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The 318 cases classified as miscellaneous include claims of premises liability, civil rights violations, unfair competition, wrongful death, and toxic torts. Examples include a 1993 case involving a chlorine gas leak [25] and a 1986 case in which plaintiffs objected to Disneyland's request that police detain them for intoxicated behavior. [26]

The overall number of punitive lawsuits in the sample increases from 1985 to the early 1990s and then declines in 1994 and 1995. Most of the growth from 1985 to 1990 is driven by product liability, insurance, and business negligence cases.

Panel B in Table 1 reports on a subset of the total sample for which the defendant firms are listed on the 1996 CRSP database. Tests that require data on the market value of the firm's equity or stock returns are conducted using firms from this subsample. Panel C of Table 1 contains information on the number of cases that also received press coverage. These cases are used in Section VIII to examine the share value effects of punitive lawsuits on defendant companies.

Table 2 reports summary statistics on the sizes of the compensatory and punitive awards for each type of punitive lawsuit. We also partition the sample into cases that resulted in jury verdict findings for plaintiffs, defendant verdicts, and **settlements.**

The most striking finding in Table 2 is that punitive and compensatory awards in **settlements** are so small relative to the penalties obtained in plaintiff verdicts. The mean punitive award in **settlements** is never more than 17 percent of the mean punitive award in plaintiff verdicts, and in seven categories punitive damages are never awarded in **settlements.** The median punitive award for **settlements** is zero for all the categories. It is possible that **settlements** do not properly distinguish between punitive and compensatory awards. Even so, the mean total **settlement** is less than 20 percent of the **[*538]**
[*539]

TABLE 2

SUMMARY OF AWARD AMOUNTS (in $ millions)

DEFENSE VERDICTS

LAWSUIT TOPIC	Compensatory Award	Punitive Award	Total Award
Product liability		n = 42	
Mean	.000	.000	.000
Median	.000	.000	.000
Maximum	.000	.000	.000
SD	.000	.000	.000
Fraud		n = 29	
Mean	.020	.000	.020
Median	.000	.000	.000
Maximum	.294	.000	.294
SD	.076	.000	.076
Business negligence		n = 6	
Mean	.138	.001	.139
Median	.000	.000	.000
Maximum	.830	.005	.835
SD	.339	.002	.341
Breach of contract		n = 35	
Mean	.000	.000	.000

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Source: Legal > Secondary Legal > Law Reviews & Journals > **Law Reviews, Combined** ⓘ
Terms: **"punitive damages" /10 reform and settlement and threat or induce and posner** (Edit Search)

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NOTE: PUNITIVE DAMAGES: A MISPLACED REMEDY: PUNITIVE DAMAGES: A MISPLACED REMEDY.

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* Class of 1993, University of Southern California Law Center. A.B. 1988, University of California (Irvine). The author gratefully acknowledges the assistance and insight of Dean Scott Bice throughout the preparation of this Note. I also thank Douglas Richardson for reading a cumbersome early draft. This Note is dedicated to Cynthia and David.

SUMMARY:
... Awarding punitive damages to civil plaintiffs "has been vigorously criticized throughout [this] Nation's history." ... Some authors and states view the primary purpose of punitive damages as compensation of plaintiffs, but most consider it to be deterrence of defendants. ... Perhaps the finder of fact who, under a scheme awarding punitive damages to society, has a personal stake in the punitive damages award will be *less* objective: "If jurors realized that any punitive damage award were to be returned to public use, the size of awards would not simply skyrocket. ... Because plaintiffs still get part of the punitive damages award, it is clear that the ABA proposal only partially accepts the windfall theory. ... This approach eliminates the plaintiff's windfall, a result with which this Note agrees, but it also seems to eliminate plaintiffs' incentive to have their attorneys argue the case for punitive damages. ... If *all* litigation costs would be paid under the decoupling proposal, then plaintiffs *would* have a good incentive to have their attorneys argue for punitive damages. ... The fallacy of this is that the most widely accepted justification for punitive damages is deterrence, not compensation. ... Defendants will still be assessed punitive damages, thus achieving deterrence, plaintiffs will not receive windfall recoveries, and society will be the winner.

The terms "punitive," "vindictive," or "exemplary" damages, and "smart-money" have been interchangeably applied to a class of money damages awarded in tort actions beyond what is needed to "compensate" the plaintiff for his injuries. [1]

[T]he essential idea of such damages being punitive, why is the jury not instructed to

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awards than under this Note's proposal (assuming that decoupling does indeed involve remunerating plaintiffs for litigation costs, including the costs of the underlying suit). This Note supports paying plaintiffs' attorneys a fee to cover only their costs incurred in arguing for punitive damages. Although the State might wish to pay attorneys the difference between their costs in arguing the underlying suit and the amount of plaintiffs' fees when the value of the underlying case is disproportionately low compared with punitive liability, [120] in *no* case would plaintiffs pay no fee. Therefore, because the State would pay a lower portion of attorneys' total costs under this Note's proposal, the State would keep a larger portion of punitive damages awards.

Overall, decoupling is a viable alternative to this Note's proposal. Both proposals argue that defendants should continue to pay punitive damages as before, that plaintiffs' windfall recoveries should be eliminated, that someone should be paid for attorney's costs incurred in litigating the punitive damages issue, and that the remainder of punitive **[*865]** damages awards should go to the State. The advantage of decoupling is that it leaves plaintiffs in the picture, thus avoiding potential conflicts of interest when the plaintiff's attorney has an interest in punitive damages and the plaintiff does not. [121] The advantages of this Note's proposal are that it (1) avoids making an exception to the American rule [122] and (2) results in the State recovering a greater portion of punitive damages awards.

3. *Regulatory Agencies*

Alternative advocates for punitive damages include various regulatory agencies, such as the Federal Aviation Administration, the Securities and Exchange Commission, the Environmental Protection Agency, and state agencies, such as state insurance commissions. [123] Judges could refer potential cases of punitive liability to these agencies for prosecution. [124] The FAA could prosecute cases involving airline manufacturer defendants, and the EPA could prosecute cases of alleged dumping of toxic wastes. If no currently existing agency seems appropriate for a particular type of conduct, then prosecution could be assigned to a new agency created solely to review punitive liability in cases unsuited to prosecution by other agencies.

Using regulatory agencies as punitive damages advocates has many benefits. The first is expertise. Industry standards and custom play a big part in determining what constitutes outrageous conduct. Because regulatory agencies have specialized knowledge of industry standards, their expert witness costs may be lower than in traditional litigation. This expertise could also lead to greater accuracy, which is very important to **[*866]** efficient deterrence. [125] Another benefit related to accuracy is consistency. Because each agency would have exclusive jurisdiction over specific types of punitive damages claims, each agency could monitor consistency more effectively than can court systems with general jurisdiction. Moreover, regulatory sanctions could be used as an alternative to punitive damages when compensatory damages and criminal fines are inadequate to deter undesirable conduct. [126] Finally, administrative agencies can enforce conduct even when no lawsuit is filed. [127] Whereas courts are constrained to decide only those matters brought to them, administrative agencies can proactively perform inspections and seek out improper conduct. They can also follow tips from persons injured enough to make a phone call but not enough to file a lawsuit.

The major problem with this alternative, however, is that it requires a third party to become familiar with the case, whereas plaintiffs' attorneys are already familiar with its every aspect. Furthermore, courts would be delegating tasks to agencies that those agencies should already be performing -- investigating, fining, and regulating improper industry behavior -- but which they are not performing well enough. [128] Increasing the size of our already gargantuan administrative bureaucracy to incorporate the role punitive damages now play is an unappealing option, and sufficiently increasing the efficiency of currently existing agencies may be hopeless. Paying plaintiffs' attorneys a fee to argue punitive damages could be implemented without such bureaucratic expansion and seems to be the more economical and

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less disruptive alternative.

IV. POTENTIAL PROBLEMS

The overwhelming majority of states still award 100% of punitive damages awards to civil plaintiffs, [129] even though all but the few that award punitive damages as compensation agree that plaintiffs have no **[*867]** inherent right to punitive damages and that punitive damages are a windfall. [130] The compensation rationale for awarding punitive damages to plaintiffs could be addressed by expanding compensatory damages, and the private attorney general rationale could be addressed by paying plaintiffs' attorneys to argue the case for punitive damages. These changes, however, may invoke substantial controversy.

A. CONSTITUTIONAL OBJECTIONS

The most critical potential problem is that awarding punitive damages to the State may be declared unconstitutional. This problem exists whether or not plaintiffs' attorneys are involved in advocating punitive damages. Potential constitutional challenges may be based on the Excessive Fines Clause of the Eighth Amendment (as incorporated by the Fourteenth Amendment), the Double Jeopardy and Takings clauses of the Fifth Amendment (as similarly incorporated), and the Due Process clauses (both substantive and procedural) of the Fifth and Fourteenth amendments.

1. *Excessive Fines and Double Jeopardy*

Although the Supreme Court held in *Browning-Ferris Industries v. Kelco Disposal, Inc.* that the Excessive Fines Clause of the Eighth Amendment poses no **threat** to punitive damages, [131] the Court specifically limited its holding to cases in which punitive damages are awarded *to civil plaintiffs:* "[W]e now decide only that [the Excessive Fines Clause of the Eighth Amendment] does not constrain an award of [punitive] damages in a civil suit when the government neither has prosecuted the action *nor has any right to receive a share of the damages awarded.*" [132] Therefore, the question of whether the Excessive Fines Clause constrains an award of punitive damages when the government *does* receive a share of the damages award was left open.

a. McBride v. General Motors: A Georgia district court in *McBride v. General Motors* [133] answered in the affirmative the question **[*868]** left undecided in *Browning-Ferris. McBride* is the first federal case to challenge the constitutionality of a statute prescribing that a portion of punitive damages go to a state entity. The plaintiffs initially filed a products liability lawsuit in a Georgia court against GM for injuries sustained in an automobile accident. [134] Before the conclusion of that action, the plaintiffs filed a declaratory judgment action in U.S. District Court asking that the following portion of Georgia's Tort **Reform** Act dealing with **punitive damages** be declared unconstitutional:

Seventy-five percent of any amounts awarded . . . as punitive damages [in a tort case in which the cause of action arises from products liability], less a proportionate part of the costs of litigation, including reasonable attorney's fees, all as determined by the trial judge, shall be paid into the treasury of the state . . . . [135]

The district court held the statute unconstitutional under the Due Process and Equal Protection clauses of the Georgia and the U.S. constitutions, the Excessive Fines Clause of the Eighth Amendment, and the Double Jeopardy Clause of the Fifth Amendment. [136] The due process and equal protection holdings were based on the finding that the defendant offered no rational explanation of why Georgia's statute applied only to products liability actions and not other tort actions, thus depriving product liability plaintiffs of a portion of their punitive damages recoveries not similarly taken from plaintiffs suing under different causes of action. [137] Because the due process and equal protection holdings pertained specifically to Georgia's

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statute, however, they are not relevant to the general constitutionality of awarding punitive damages to the State rather than to private plaintiffs.

The excessive fines and double jeopardy holdings in *McBride,* on the other hand, *were* based on this more general concern. The court held that the statute in question

converts the civil nature of the prior Georgia punitive damages statute into a statute where fines are being made for the benefit of the State, contrary to the constitutional prohibitions as to excessive fines and contrary to the double jeopardy clause of the Fifth Amendment to the Constitution of the United States. [138]

The court further held that "there can be no legitimate purpose for a state to involve itself in the area of civil damage litigation between private **[*869]** parties wherein punitive damages are a legitimate item of recovery, where the State, through the legislative process, preempts for itself a share of the award." [139] The court based these holdings largely on the inference from *Browning-Ferris* that punitive damages might be unconstitutional under the Excessive Fines Clause if a state has a right to receive a share of them. [140]

The problem with the court's holding in *McBride* is that it concludes that the statute is unconstitutional under these clauses without substantiating this conclusion, except by referencing the open question in *Browning-Ferris* and by stating that such a statute changes the character of the action from civil to something else. [141] The comment in *Browning-Ferris* was not a statement of substantive law; rather, it was a declination to broaden the Court's holding. The *McBride* court could have properly argued that its holding was *not inconsistent* with the *Browning-Ferris* dictum, but not that *Browning-Ferris* stated a legal conclusion substantiating the *McBride* holding. Furthermore, the *McBride* court had little justification or reason to find that awarding a portion of the award to the State would alter the civil status of the action. [142] This is the only explanation given by the court as to why awarding punitive damages to the State violates the Double Jeopardy Clause. [143] If changing the system did in fact transmute the punitive damages hearing into a *criminal* proceeding, then it would potentially violate the Double Jeopardy Clause in those cases also prosecuted criminally. [144] The court, however, did not say this; it did not specify into what the civil nature of the action was transformed. Thus, the excessive fines and double jeopardy holdings of *McBride* lack adequate substantiation. [145]

b. Burke v. Deere & Co.: A different federal district court in a more recent case came to a contrary conclusion about a slightly different **[*870]** statute. The court in *Burke v. Deere & Co.* [146] considered the constitutionality of Iowa's punitive damages statute. The case arose on motions by the defendants for judgment notwithstanding the verdict and for a new trial after the defendants were charged with $ 50 million in punitive damages. [147] Among other arguments, the defendants challenged Iowa's statute on double jeopardy and excessive fines grounds. [148] The statute stated, in relevant part, that if the defendant's conduct was not directed specifically at the plaintiff, then "after payment of all applicable costs and fees, an amount not to exceed twenty-five percent of the punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund." [149]

The *Burke* court held that the statute was *not* unconstitutional. [150] The court distinguished *McBride*'s holding regarding Georgia's statute on the ground that, unlike Georgia's statute, the Iowa statute did not give the State of Iowa an interest in the punitive damages award. [151] The court cited *Browning-Ferris* for the proposition that "[a] clear distinction can be made between funds that are to be placed into the state treasury and those funds that are to be placed into a civil reparations trust fund to be administered by the courts." [152] The court also rejected the defendant's Double Jeopardy Clause challenge, stating that "Deere fails to put forward any meaningful argument in this area, and this court is unaware of any such compelling law under the circumstances we have before us." [153] This conclusion is directly contrary to that of the *McBride* court. Hence, based on the subtle distinction that Georgia's

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statute awarded the funds to the state treasury, while Iowa's statute awarded the funds to a "civil reparations trust fund," the *Burke* court departed from the *McBride* holding.

The problem is that the *Burke* court, like the court in *McBride,* failed to adequately support its conclusions. The courts came to opposite conclusions, but neither court gave good reasons *why* it held as it did. The *Burke* holding, though, makes more sense in that it preserves the legal status quo. If punitive damages are to be rendered unconstitutional **[*871]** simply because the money goes to the State or a state fund, then good reasons should be articulated for so holding. Without good reasons, such punitive damages statutes should be deemed constitutional. No court of appeals has yet decided this issue.

The Excessive Fines and Double Jeopardy clauses were enacted to protect private citizens from excessive government wrath. *Defendants,* not plaintiffs, are the ones being fined for punitive damages, and *defendants* are the ones who might be subject to criminal sanctions in addition to punitive damages. Why, then, are these clauses of our Constitution being applied to protect civil *plaintiffs?* This is the precise effect of the *McBride* holding: The court declared the Georgia statute unconstitutional because the state received a portion of the award, not because the defendants were fined more than they would have been if the plaintiffs were to receive the money, nor because the defendants were subjected to any extra jeopardy beyond what would have been the case had they been required to pay punitive damages to the plaintiffs. The fact that the State, rather than plaintiffs, receives the money is merely incidental and should be irrelevant to the defendants -- those persons intended to be protected by the Fifth and Eighth amendments as applied to punitive damages. Therefore, if punitive damages statutes are constitutional when defendants must pay plaintiffs, it follows logically that they remain constitutional when the recipient of defendants' money changes. [154]

In addition to the illogic of changing the constitutionality of punitive damages based upon the identity of the recipient of the damages award, not all cases will trigger the Double Jeopardy or Excessive Fines clauses. Not all civil defendants subject to punitive damages are prosecuted criminally, and whether the punitive damages fine is "excessive" is a question of degree. Therefore, even if the clauses do apply when the State keeps punitive damages awards, they will not be violated in every case.

2. *Substantive Due Process and Takings*

Neither the *McBride* nor the *Burke* court addressed whether awarding punitive damages to the State rather than to a private plaintiff would be an unconstitutional taking of property from the plaintiff without due **[*872]** process or just compensation. [155] Two state courts, however, have considered these issues, and, like the two federal courts that considered the excessive fines and double jeopardy arguments, they came to opposite conclusions.

a. Gordon v. State: The Florida District Court of Appeals upheld the following statute in *Gordon v. State* [156] : "If the cause of action [were] based on personal injury or wrongful death, 60 percent of the [punitive damages] award shall be payable to the Public Medical Assistance Trust Fund . . .; otherwise, 60 percent of the award shall be payable to the General Revenue Fund." [157] The plaintiff challenged the statute after the court ordered him to pay sixty percent of his punitive damages to the state. [158] The court rejected the plaintiff's argument that the statute authorized an unconstitutional taking without due process, [159] basing its holding on the fact that the plaintiff had no "right" to recover punitive damages in the first place:

Unlike the right to compensatory damages, the allowance of punitive damages is based entirely upon considerations of public policy. Accordingly, it is clear that the very existence of an inchoate claim for punitive damages is subject to the plenary authority of the ultimate policy-maker under our system, the legislature. In the exercise of that discretion, it may

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place conditions upon such a recovery or even abolish it altogether. [160]

The court also rejected the plaintiff's argument that the statute violated his right to substantive due process. [161] The court held that the statute need bear only a "rational relation to a legitimate legislative interest or objective," [162] and the court identified two such legitimate objectives: (1) punishing defendants for what amounts to a public wrong and thereby deterring similar future conduct and (2) "discourag[ing] punitive damages claims by making them less remunerative to the plaintiff and his attorneys." [163] The *Gordon* court did not overlook the arguments **[*873]** in *McBride,* but rather found the *McBride* court's "brief discussion" of the issue "completely unpersuasive." [164]

b. Kirk v. Denver Publishing Co.: The Supreme Court of Colorado came to the opposite conclusion. In *Kirk v. Denver Publishing Co.* [165] it held that the following statute violated the Takings Clause:

One-third of all reasonable [punitive] damages collected pursuant to this section shall be paid into the state general fund. The remaining two-thirds of such damages collected shall be paid to the injured party. Nothing in this subsection . . . shall be construed to give the general fund any interest in the claim for exemplary damages or in the litigation itself at any time prior to payment becoming due. [166]
The plaintiff challenged the Colorado statute on appeal after he was awarded punitive damages at trial, arguing that the state should not receive any portion of the award. [167]

Contrary to the holding in *Gordon* that plaintiffs have no right to punitive damages, the *Kirk* court held that "there is no question that under Colorado law a judgment for exemplary damages qualifies as a property interest." [168] The court also held that the statute established an unconstitutional taking of the plaintiff's interest. [169] In short, the court concluded that the legislature had failed to compensate plaintiffs adequately for the one-third punitive damages recovery retained by the state. [170]

The major difference between the *Gordon* and *Kirk* holdings is that the Florida court in *Gordon* rejected the notion that plaintiffs have any vested right in punitive damages, while the Colorado court in *Kirk* asserted that plaintiffs do have such a right. The overwhelming majority of commentators have agreed with the *Gordon* court, that plaintiffs do not have a right to punitive damages and that punitive damages are awarded at the discretion of the trier of fact. [171] *Gordon* seems better grounded in accepted legal theory: If the plaintiff has no vested property right in potential punitive damages, then the State does not "take" the **[*874]** plaintiff's property for purposes of the Fifth Amendment when it requires that one third of those damages be paid to the State. [172]

3. *Procedural Due Process*

The U.S. Supreme Court held, in *Pacific Mutual Life Insurance Co. v. Haslip,* [173] that punitive damages awards are not so unfair to the defendant as to implicate the Due Process Clause. Under *Haslip,* the issue of whether the plaintiff receives the punitive damages award is irrelevant because the defendant could get the same process whether the money goes to the plaintiff or to the State. Even if the issue of who gets the damage award is relevant, the procedures for awarding punitive damages can be altered. If, for example, the issue of punitive damages is addressed in a separate hearing, additional procedural safeguards (that might confuse the jury if the issue of punitive damages were tried together with the underlying case) are possible. If the Constitution mandates that defendants be given additional procedural safeguards, then states can add these safeguards and still award the money to themselves. Under *Haslip,* however, such additional safeguards are unnecessary.

In general, considering the holdings discussed above, it is unclear whether paying a portion or all of punitive damages awards to the State or a state fund is constitutional. The better

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arguments, however, seem to be on the side of constitutionality. Plaintiffs have traditionally never had a right to receive punitive damages; therefore the Takings and Substantive Due Process clauses should not apply. Moreover, defendants are put to no more jeopardy nor are required to pay any greater fines when forced to pay the State rather than the plaintiff; therefore, the Double Jeopardy and Excessive Fines clauses should not apply. Finally, extra procedural protections for defendants are likely unnecessary; however, if additional procedures are mandated, these may be implemented, and punitive damages awards may still be paid to the State. These issues have not yet been decided by the Supreme Court or any U.S. court of appeals.

[*875] B. **SETTLEMENTS**

"This approach, providing for awards to general or state funds, is unprecedented in our legal system. It will generate difficult problems of application and administration, particularly for the large number of cases that are settled out of court." [174]

1. ***Settlements*** *Between Plaintiffs and Defendants*

Parties often settle their disputes before going to court. With compensatory damages, the parties have an incentive to avoid litigation costs (including the uncertainty of a trial), and plaintiffs are often willing to settle for the amount they expect the court to award in compensation after trial, less expected litigation costs. [175] If punitive damages liability is also at issue, and the punitive damages, if available, would be awarded primarily to the State, then the parties would have an even greater incentive to settle. Defendants would be willing to pay plaintiffs up to their expected combined compensatory and punitive liability, and plaintiffs would be willing to accept any amount beyond their expected compensatory damages. [176] This leaves a large zone for potential **settlement** of punitive damages claims. If each party understands the incentives of the other, then a compromise **settlement** would likely occur somewhere in the middle. [177] For example, if the defendant estimates punitive liability at $ 1 million, and if the plaintiff could expect no share of the punitive damages recovery after trial (because the money would go to the State, less fees to the plaintiff's attorney), then a likely **settlement** would be about $ 500,000 for the punitive damages issue. Not only would such **settlements** create another windfall for plaintiffs (at the State's expense, because absent **settlement** the State would have received the punitive damages after trial), but if $ 1 million was the proper amount to efficiently deter, the defendant would receive the wrong incentives and thus the deterrence goal of punitive damages would not be fully realized. [178]

But encouraging punitive damages **settlements** has some positive ramifications. Increased **settlement** rates would lower the costs of litigation for all parties involved, including court costs incurred by the State, because fewer cases would reach trial. The **settlement** price paid by **[*876]** defendants would constitute less-than-efficient deterrence, which would lead to an inefficient level of future precautions, but defendants would still pay more than full compensatory damages to settle. Plaintiffs are not harmed, and defendants are deterred to some extent. Furthermore, if defendants act too outrageously, society is still protected to some extent [179] through the criminal justice system.

Moreover, safeguards could be established. The trier of fact could be informed that many potential punitive damages cases settle. When defendants are finally brought to court -- because not all cases will settle -- judges could assess higher punitive damages than they would if **settlements** never occurred. [180] Other potential defendants will then have to consider, when deciding how to act, the risk of having to pay higher punitive damages awards if they act improperly. Therefore, even if a particular defendant is never brought to trial, others would be and thus all potential tortfeasors would have incentives to weigh the potential costs of their behavior. [181] As noted earlier, however, defendants forced to bear these excess damages might object. [182]

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Another possible solution is to make the **settlement** of punitive damages illegal. [183] The claim for punitive damages could be mandated to survive all **settlements.** Therefore, even if parties elect to settle the underlying suit for compensatory damages, the plaintiff's attorney would still be able to move the court to consider punitive damages afterward. This solves the conflict of interest problem between the plaintiff and the plaintiff's attorney [184] and forces defendants to pay an efficient level of punitive damages. The cost is that fewer cases would be settled, but the gain is efficient deterrence.

2. *Conflict of Interest for Plaintiffs' Attorneys*

Another problem is that plaintiffs' attorneys may have a conflict of interest when negotiating **settlements** for plaintiffs. They are sworn to represent the plaintiff, [185] yet they have a personal interest in obtaining **[*877]** punitive damages through trial because they are paid to be punitive damages advocates. For example, assume that the likely punitive damages award at a posttrial hearing is $ 100,000 and that the plaintiff's attorney could expect $ 20,000 in fees as the punitive damages advocate. Assume further that the defendant is willing to settle with the plaintiff for $ 30,000 more than the plaintiff can expect to be awarded in trial for arguably real yet unprovable damages. In this case, the plaintiff's attorney, in conjunction with his or her client, must choose between **settlement** (which would give the attorney a contingency percentage, for example, one third of $ 30,000, or $ 10,000) and trial (which would give the attorney an expected $ 20,000 as the punitive damages advocate). The plaintiff's best economic interest would be to settle, but the plaintiff's attorney's best economic interest may be to try the case to verdict.

This conflict, however, may be deceiving. If the plaintiff's attorney's punitive damages fee covers only the attorney's normal fee for trying a case, then the attorney has little incentive to discourage **settlements.** If the case settles, the attorney need not try the case and will therefore receive $ 10,000 for doing nothing, which is probably better than working for $ 20,000. Even if the attorney would perceive settling as contrary to the attorney's own best interests, the attorney must follow the rules of ethics and do what is in the client's best interest, which would be to settle, or withdraw from the case. [186] Alternatively, if the State makes the **settlement** of punitive damages claims illegal, as suggested above, [187] then the plaintiff's attorney need not worry about any potential conflict. The attorney need only follow the law.

3. ***Settlements*** *Between Plaintiffs' Attorneys and Defendants*

A problem related to plaintiffs settling their cases before trial is that plaintiffs' attorneys might personally settle the punitive damages claim with defendants. Plaintiffs' attorneys would have an incentive to settle for any amount greater than their fee for proving punitive damages on behalf of society, and defendants would have an incentive to settle for any amount less than the potential award. Because the potential punitive damages award assessed against the defendant will always be higher than the plaintiff's attorney's fee, a mutually beneficial "trade" seems likely. No profit-maximizing plaintiff's attorney or defendant would pass up **[*878]** such a deal if it were legally and morally permissible. Therefore, no defendants would be required to pay enough, and thus all defendants would be insufficiently deterred. Society would be the loser.

The solution to this problem, as to the problem of **settlements** between plaintiffs and defendants, is to make such **settlements** illegal. Absent such a prohibition, defendants would pay off plaintiffs' attorneys, who are supposed to be acting as public servants by prosecuting punitive damages claims for the benefit of society, to settle all cases with significant potential punitive damages liability. Paying such persons money to drop this public service seems intuitively unethical and should be illegal.

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C. REPRESENTATION

When the plaintiff is dismissed from the underlying lawsuit and the attorney moves the court to set a punitive damages hearing, who is the attorney's client? One possible answer is that the attorney no longer has a client and is now acting as a servant of the State [188] -- proving a case for the benefit of society and expecting to be paid for that service. This is analogous to other areas of the law, such as *qui tam,* antitrust, and RICO actions, where suits are brought by private parties who recover more than compensation for bringing the action -- treble damages, for example. When pursuing punitive damages, the attorney would not act as a representative of the plaintiff, but would act as a public servant and would be paid for doing so.

D. OPPOSITION FROM THE PLAINTIFFS' BAR

On the practical side, the new system suggested in this Note might never be implemented, not because it fails to offer substantial improvements over the current system, but because it would be opposed by special interest groups. The greatest opposition would likely come from the plaintiffs' bar: "The vigor of the plaintiffs' bar, the prevailing sympathetic temperaments of many state and federal judges, the disproportionately heavy representation of plaintiff attorneys in state legislatures and the United States Congress, and the tradition of two hundred years or so will not soon be overcome." [189] This opposition would stem from the expectation that fewer plaintiffs will sue if punitive damages go to the State -- a **[*879]** realistic expectation that would mean fewer clients for plaintiffs' attorneys. Also, net damage recoveries would be lower for plaintiffs absent the availability of punitive damages, which, in turn, would mean lower contingency fees. Therefore, plaintiffs' attorneys are likely to vigorously oppose any change to the current system that would take punitive damages away from plaintiffs.

The fact that plaintiffs' attorneys would be offered part of the State's punitive damages recovery only partially alleviates this problem. The pool of potential clients would still be diminished because fewer plaintiffs would file suit, and the State might pay less than the attorneys' customary contingency fee.

In order to counter the expected opposition of the plaintiffs' bar, other special interest groups will have to be enlisted to argue *for* the proposed reforms. A natural candidate for this role is the insurance industry. In fact, insurers have *already* argued that punitive damages should go to the State:

It has been contended by insurers that if such damages are recoverable at all they should go to the state, and without any charge upon them for attorney's fees. This position is taken, not to produce funds for the public treasury, but to reduce plaintiffs' incentive to seek such damages. The net result would be that some wrongdoers would go unpunished. It is not the loss to the state but the payment by defendants which inspires such suggestions. [190]
This Note advocates awarding punitive damages awards to the State *both* to produce funds for the public treasury and to eliminate the plaintiffs' windfall.

Realistically, therefore, special interest groups will both oppose and support the proposed reform. The best "general interest group," however, is society as a whole. Society should realize that plaintiffs do not deserve punitive damages and that the money could be put to better use in the hands of the state. Society would benefit from changing the punitive damages system, and the voting public should be capable of seeing this. Hopefully, special interest groups will not succeed in thwarting these generally beneficial **reforms.**

[*880] V. CONCLUSION

Textbooks often categorize **punitive damages** as a type of legal "remedy." [191] The fallacy of

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this is that the most widely accepted justification for punitive damages is deterrence, not compensation. [192] For purposes of deterrence, punitive damages are not really a remedy at all; their design is prospective, not retrospective. If they do serve as a remedy, they remedy harm to society as a whole, [193] not harm to civil plaintiffs who are otherwise compensated to the extent society chooses to compensate them. [194] When paid to civil plaintiffs, punitive damages are a windfall and are to that extent "misplaced."

I advocate a cleaner system. Let plaintiffs receive just compensation and no more. Plaintiffs' attorneys can argue the case for punitive damages and be paid a reasonable fee for their services -- let the State or a state fund retain the rest. With these slight modifications to current practice, proper incentives should be created for all parties involved. Defendants will still be assessed punitive damages, thus achieving deterrence, plaintiffs will not receive windfall recoveries, and society will be the winner.

FOOTNOTES:

n1 Note, *Exemplary Damages in the Law of Torts,* 70 HARV. L. REV. 517, 517 (1957).

n2 Lewis Lawrence Smith, *Punitive Damages,* 32 AM. L. REG. & REV. 517, 518-19 (1893).

n3 Smith v. Wade, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting).

n4 "The windfall theory suggests that compensatory damages have evolved into a system of total vindication for injured plaintiffs, covering all the injuries that punitive damages were meant to address." Brian M. English, Note, Oliver v. Raymark: *Holding the Line on Punitive Damages,* 63 NOTRE DAME L. REV. 63, 71 (1988).

n5 Note, *An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation,* 105 HARV. L. REV. 1900 (1992); *e.g.,* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 84 (1971) (Marshall, J., dissenting) ("These awards are not to compensate victims; they are only windfalls."); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins,* 37 VAND. L. REV. 1117, 1165 (1984) ("Considering the expanded and virtually unlimited access to compensatory damages, punitive damages simply provide a windfall to the plaintiff, penalize the innocent consumers or society, and unnecessarily sap the vitality of the economy upon which society is totally dependant [sic].").

n6 *E.g.,* Pegram v. Stortz, 6 S.E. 485, 497 (W. Va. 1888) ("The weight of reason is, I think, clearly with those who deny that such punitive damages ought ever to be given."); Ernest B. Lageson, *The Injustice of Punitive Damages,* FOR DEF., July 1986, at 1, 1 ("The **threat** of punitive awards improperly inflate [sic] civil **settlements** and verdicts. They are a major contributor to our current crises and should be abolished."); Sales & Cole, *supra* note 5, at 1118 ("The doctrine of punitive damages truly is an ancient legal concept that inexplicably has evaded commitment to the archives of history."); Steven J. Sensibar, *Punitive Damages: A Look at Origins and Legitimacy,* 41 FED'N INS. & CORP. COUNS. Q. 375, 386 (1991) ("The concept of punitive damages should not remain a part of the law any longer."); Hugh Evander Willis, *Measure of Damages When Property is Wrongfully Taken by a Private Individual,* 22 HARV. L. REV. 419, 420 (1909) ("[Punitive damages] are not allowed on any theory of compensation to the injured party, but rather for the purpose of punishing the wrongdoer and as a warning to others. Do such damages have any place in civil actions? The writer thinks not.").

n7 *E.g.,* Bass v. Chicago & N.W. Ry., 42 Wis. 654, 672 (1877) (Ryan, C.J.) ("It is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should recover anything more. And it is equally difficult to understand why, if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer, and not to the public in whose behalf he is punished."); James E. Duffy, Jr., *Punitive Damages: A Doctrine Which Should Be Abolished, in* DEFENSE RESEARCH

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INST., THE CASE AGAINST PUNITIVE DAMAGES 4, 9 (1969) ("[P]unitive damages are damages which exceed the amount necessary to compensate the plaintiff for his injury, imposed in the form of a criminal fine (which should be paid to the state, if anyone)."); Hon. Carmon C. Harris, *Exemplary Damages to the Public,* FOR DEF., May 1983, at 27, 27 ("Instead of the individual plaintiff receiving an exemplary damages award, the award should inure to the benefit of the public through award to the state."); John D. Long, *Punitive Damages: An Unsettled Doctrine,* 25 DRAKE L. REV. 870, 886 (1976) ("If a punitive award is a punishment by society of the errant defendant, something is to be said for paying the penalty to society rather than to some third party beneficiary."); Randall H. Endo, Recent Developments, *Punitive Damages in Hawaii: Curbing Unwarranted Expansion,* 13 U. HAW. L. REV. 659, 680 (1991) ("If the true purpose of punitive damages is to deter and punish (and not to increase compensation), then giving most of the money to the state is a logical alternative, and it will test the sincerity of the plaintiff's punitive claim."); Note, *supra* note 1, at 525 ("Even though it is conceded that exemplary damages properly carry out the punitive function of tort law, it may nevertheless be argued that such damages should go to the state as a 'fine' and not to the plaintiff as a windfall."); David Ira Rosenbaum, Comment, *Punitive Damages in Professional Malpractice Cases,* 61 TEMP. L.Q. 1431, 1480 (1988) ("Punitive damages, where appropriate, should be paid directly to the state. By giving the state the punitive damage award, the goals of punishment and deterrence could be advanced without giving the plaintiff a windfall.").

n8 AMERICAN BAR ASS'N, REPORT OF THE ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM 19 (1987) [hereinafter ABA REPORT OF THE ACTION COMMISSION]; *see* AMERICAN BAR ASS'N, ABA BLUEPRINT FOR IMPROVING THE CIVIL JUSTICE SYSTEM: A REPORT OF THE AMERICAN BAR ASSOCIATION WORKING GROUP ON CIVIL JUSTICE SYSTEM PROPOSALS 81-85 (1992) [hereinafter ABA BLUEPRINT].

n9 Harold Lee Schwab, *The State of Punitive Damages: Constitutional Law, Pretrial Strategy and Trial Techniques,* 41 FED'N INS. & CORP. COUNS. Q. 57, 63 (1990) ("[F]ive states, Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington, do not allow punitive damages.").

n10 *See* 2 JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 21.16 (1989 & Supp. 1992) (listing the states as Florida, Colorado, Georgia, Iowa, Missouri, Illinois, Utah, and Oregon). Florida enacted its statute in 1986, FLA. STAT. ANN. § 768.73 (West Supp. 1992); Colorado enacted its statute in 1986, COLO. REV. STAT. ANN. § 13-21-102 (West 1989) (held unconstitutional by the Colorado Supreme Court in Kirk v. Denver Publishing Co., 818 P.2d 262 (Colo. 1991), *see* discussion *infra* part IV.A.2.b.); Georgia enacted its statute in 1987, GA. CODE ANN. § 51-12-5.1 (Michie Supp. 1992) (held unconstitutional by a U.S. district court in McBride v. General Motors, 737 F. Supp. 1563 (M.D. Ga. 1990), *see* discussion *infra* part IV.A.1.a.); Iowa enacted its statute in 1986, IOWA CODE ANN. § 668A.1 (West 1991); Missouri enacted its statute in 1987, MO. ANN. STAT. § 537.675 (West 1991); Illinois enacted its statute in 1986, ILL. ANN. STAT. ch. 110, para. 2-1207 (Smith-Hurd Supp. 1992); Utah enacted its statute in 1989, UTAH CODE ANN. § 78-18-1 (1992); and Oregon enacted its statute in 1987, OR. REV. STAT. § 18.540 (1989). I add to Ghiardi and Kircher's list Kansas, which enacted its statute in 1985, KAN. STAT. ANN. § 60-3402 (1990).

n11 *See* Smith v. Wade, 461 U.S. 30, 35 (1983) ("Although there was debate about the theoretical correctness of the punitive damages doctrine in the latter part of the last century, the doctrine was accepted as settled law by nearly all state and federal courts, including this Court."); David L. Walther & Thomas A. Plein, *Punitive Damages: A Critical Analysis:* King v. Combs, 49 MARQ. L. REV. 369, 380 (1965) ("Arguments have been advanced in favor and against the doctrine in every state, and nearly every state has accepted the concept of exemplary damages to some degree.").

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separate the damages, and give only the compensatory part to the plaintiff and the balance to the county? The plaintiff is surely not entitled to them. [2]

TEXT:
[*841]

I. INTRODUCTION

Awarding punitive damages to civil plaintiffs "has been vigorously criticized throughout [this] Nation's history." [3] One criticism, the "windfall theory" of punitive damages, is that punitive damages are an unjust windfall to civil plaintiffs. [4] Many scholars and jurists have made this argument: [5] Some argue that punitive damages should be abolished outright [6] while others argue that the money should go to the State. [7]

[*842] This latter argument was partially endorsed in 1987 by the American Bar Association, when it proposed that a portion of punitive damages be awarded to plaintiffs and plaintiffs' attorneys as compensation for bringing suits to court, with the remainder going to the State. [8] Currently, five states bar all punitive damages, [9] and between 1986 and 1989 at least eight states adopted legislation similar to the ABA's proposal. [10] **[*843]** The vast majority of jurisdictions, however, continue to award punitive damages exclusively to plaintiffs. [11]

This Note revives the argument that punitive damages should be paid to society rather than to plaintiffs. Plaintiffs have neither a legal nor a moral right to punitive damages, [12] and the law lacks sufficient rationales for paying them such damages. [13] Punitive damages are assessed *in addition to* compensatory damages, [14] which compensate plaintiffs (to the extent society chooses to compensate them) for harm suffered. [15] Punitive damages are paid to plaintiffs only as an expediency: "The fact that the assessment goes to the plaintiff is incidental, and subservient to the necessity of giving an example to the community, and of punishing the defendant." [16] Society allows plaintiffs to recover punitive damages primarily to create an incentive to prove defendants' punitive liability. [17] This Note argues that this rationale is insufficient -- defendants will still be brought to justice if punitive damages go to society rather than to plaintiffs.

[*844] Although awarding punitive damages to the State is an old proposal, little attention has been given to its inherent problems. [18] Administratively, plaintiffs would have little incentive to bring the issue to a court's attention absent the potential for punitive damages recovery. [19] Constitutionally, awarding punitive damages to the State rather than to plaintiffs could implicate the Excessive Fines Clause of the Eighth Amendment, the Double Jeopardy, Due Process, and Takings clauses of the Fifth Amendment, and the Due Process Clause of the Fourteenth Amendment (both substantive and procedural). [20] However, neither the administrative nor the constitutional hurdles are insurmountable.

Part II of this Note acknowledges that punitive damages are a stable institution in the law and argues that, assuming punitive damages will continue to be paid by civil defendants, courts should award such damages to the State or a public fund rather than to civil plaintiffs. Part III suggests that the State might create incentives for advocacy by offering *plaintiffs' attorneys* a fee, or a portion of the punitive damages recovery, for proving defendants' punitive liability. The State or a public fund should receive the balance of the award, and the plaintiff should receive nothing. Part IV discusses likely objections to this proposal, including potential constitutional challenges and the treatment of **settlements.** This Note concludes that the benefits of awarding punitive damages to the state are significant and the problems surmountable. The current system **[*845]** of punitive damages, as it exists in most states, is neither perfect nor a "monstrous heresy." [21] Punitive damages are a valuable though misplaced remedy, whose purposes can better be served by awarding them to the public.

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n12 *See* Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures,* 69 VA. L. REV. 269, 292 (1983) ("As courts have uniformly held, no plaintiff has a right to punitive damages: the purpose of punitive damages is to vindicate the public interest, not that of a particular plaintiff.").

n13 *See infra* part II.B.

n14 *See* Bruce Chapman & Michael Trebilcock, *Punitive Damages: Divergence in Search of a Rationale,* 40 ALA. L. REV. 741, 745 (1989) ("Punitive, or exemplary, damages are an exception to the general rule that damages are compensatory.").

n15 Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072, 1074 (Wash. 1891) ("Exclusive of punitive damages, the measure of damages as uniformly adopted by the courts and recognized by the law is exceedingly liberal towards the injured party. There is nothing stinted in the rule of compensation."); *see infra* part II.B.1.b.

n16 Edw. C. Eliot, *Exemplary Damages,* 20 AM. L. REG. 570, 571 (1881).

n17 *See infra* part II.B.1.a.

n18 *See, e.g.,* DEFENSE RESEARCH INST., *supra* note 7, app. (proposing "model legislation" that abolishes punitive damages or, in the alternative, makes defendants pay punitive damages into state treasuries for the benefit of schools). The Defense Research Institute suggests that "[i]f the true purposes of punitive damages are to punish and deter, the change of the ultimate recipient of the funds from the plaintiff to state school funds is logical." *Id.* Notwithstanding the logic of this position, neither DRI nor the other proponents of paying punitive damages to the state, *see* sources cited *supra* note 7, discuss the practical difficulties of such a proposal.

For a checklist of problems involved in paying punitive damages to the state, see 2 GHIARDI & KIRCHER, *supra* note 10, § 21.16, which states:

Changes which provide for payment of punitive damages to general or state funds are unprecedented in tort cases. The legislation raises several issues which will have to be addressed: (1) Must the state or public agency be made a party to the litigation? (2) Does the public agency have an interest in the litigation and can it intervene in the action? Colorado and Georgia have attempted to head off some of these issues. (3) Can a state or public agency require a claimant to bring a punitive damage claim? (4) Does the claimant's attorney owe any duty to the state or public agency, such as notice? (5) Are the damages which are allocated to such an agency fines, forfeitures, or criminal penalties so as to affect the burden of proof, evidentiary rules, or the availability of insurance coverage?

n19 *See* Note, *supra* note 1, at 525-26 ("[I]f exemplary damages were to go to the public treasury, fewer wrongdoers would be punished, since a plaintiff would have no inducement to bring suit if the compensatory damages were likely to be small, or to contribute extra time and expense to establish a claim for exemplary damages once an action has been brought."). This Note addresses the problem by proposing that the government pay plaintiffs' attorneys a fee to argue the case for punitive liability. *See infra* part III.A.

n20 *See infra* part IV.A.

n21 *See* Fay v. Parker, 53 N.H. 342, 382 (1872).

n22 TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS 52 (1987); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984) ("Such damages are given to the plaintiff over and above the full compensation for

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the injuries, for the purpose of punishing the defendant not to do it again, and of deterring others from following the defendant's example.").

n23 Thomas C. Galligan, Jr., acknowledges that "augmented awards" are a windfall if awarded to plaintiffs. Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages,* 51 LA. L. REV. 3, 58 (1990). Galligan goes on to state, however, that "from the pure perspective of deterrence, the windfall concept is irrelevant." *Id.* This Note proposes that although the identity of the party to whom the money goes is irrelevant to the defendant and to society's deterrence goal, it is not completely irrelevant. Society need not give the money away. Rather, courts can put punitive damages awards to better uses than unjustly enriching plaintiffs. *See infra* part II.B.3.

n24 Steven Sensibar recently expressed his dissatisfaction with punitive damages in the following dramatic terms: "The entire American economic structure is threatened with extinction due to the predation of its entrepreneurial roots by punitive damages." Sensibar, *supra* note 6, at 386. Prof. David G. Owen has argued that "the increasing number and size of such awards may fairly raise the concern for the future stability of American industry." David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products,* 49 U. CHI. L. REV. 1, 6 (1982). *Contra* Don J. DeBenedictis, *Punitives Under Control,* A.B.A. J., May 1992, at 38 (reviewing a recent study done by Prof. Michael Rustad of Suffolk University Law School suggesting that punitive damages awards may actually be decreasing).

n25 For years, scholars and jurists have argued that "[r]eason and justice demand the declaration of the unconstitutionality of the doctrine of punitive damages." *See* Thomas A. Ford, *The Constitutionality of Punitive Damages, in* DEFENSE RESEARCH INST., *supra* note 7, at 15, 22. These arguments have been based on (1) the Due Process Clause, *see* Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury,* 40 ALA. L. REV. 975, 990 (1989); (2) the Excessive Fines Clause, *see* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989); (3) the Double Jeopardy Clause, *see* Duffy, *supra* note 7, at 10 (*contra* Southern Law Times, *Exemplary Damages, Where an Act Is Punishable Criminally,* 3 KAN. L.J. 369, 372 (1886)); and (4) other constitutional provisions, *see* David J. Fuller, *"Smart Money,"* 17 W. ST. U. L. REV. 305, 313 (1990) ("In California, there have also been challenges claiming that some punitive awards are in violation of the prohibition of *ex post facto* laws contained in the United States and California Constitutions."); Brian L. Lahargoue, Comment, *The Need for Federal Legislative* ***Reform of Punitive Damages,*** 20 SW. U. L. REV. 103, 107 (1991) (discussing First Amendment arguments against punitive damages).

n26 *See* 1 GHIARDI & KIRCHER, *supra* note 10, § 4.02 (listing the states that accept the compensation rationale); Walther & Plein, *supra* note 11, at 378 ("Although most states offer punishment as the foundation for punitive damages, some jurisdictions justify punitive damages on a theory of quasi-compensation."); Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages,* 41 N.Y.U. L. REV. 1158, 1173 (1966) ("When utilized to permit compensation for otherwise non-compensable losses, the law of punitive damages serves its historical function of expanding the law of compensatory damages.").

n27 *See, e.g.,* Neal v. Farmers Ins. Exch., 582 P.2d 980, 990 n.13 (Cal. 1978) ("The purpose of punitive damages is to punish wrongdoers and thereby deter commission of wrongful acts."); KEETON ET AL., *supra* note 22, § 2, at 9; Long, *supra* note 7, at 876 ("In the majority of jurisdictions the principal purpose of punitive damages is to punish flagrant wrongdoers and to deter them and others from engaging in flagrant conduct in the future."). *But see* Duffy, *supra* note 7, at 11 ("The vague public policy of granting punitive damages because of a deterrent effect is not supported by any empirical facts.").

Retribution is another rationale sometimes given for punitive damages. *See* Long, *supra* note 7, at 877 ("Such awards are said to offer an element of revenge both to the injured party and

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to society as a whole."). Arguably, though, "[t]he early idea of private vengeance has been supplanted by the criminal law, so that there is no longer any place for it in civil law." Willis, *supra* note 6, at 420. Even if this rationale is accepted, however, it still fails to support plaintiffs receiving the money. The goal of punishing the defendant does not support paying punitive damages to the *plaintiff. See infra* part II.B.1.

n28 Melvin M. Belli, Sr., *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society,* 49 UMKC L. REV. 1, 23 (1980) ("Perhaps, now, more than ever, punitive damages' stated purpose of punishment and deterrence has an important role to play in society. Civilization is so complex, industries so large, commodities so varied and complicated, and governments so encumbered, that checkmates are needed, wherever possible, to assure that a conscience is formed where there is no patent responsibility."); David G. Owen, *Punitive Damages in Products Liability Litigation,* 74 MICH. L. REV. 1257, 1265 (1976) ("Punitive or exemplary damages are assessed in addition to compensatory damages to punish the defendant for the commission of an aggravated or outrageous act of misconduct and to deter him and others from such conduct in the future.").

n29 Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective,* 40 EMORY L.J. 303, 340 (1991) ("A punitive damage rule that recognizes the role of the profit motive in a potential tortfeasor's decision-making process allows the courts to fashion efficient solutions to the problems they face and, at the same time, teaches the prospective wrongdoer that 'tort does not pay.'").

n30 *See* David Friedman, *An Economic Explanation of Punitive Damages,* 40 ALA. L. REV. 1125, 1126 (1989) ("If the tortfeasor pays compensatory damages equal to the full cost imposed on the victim, he bears all the costs of his act and so makes the efficient decision."); Duffy, *supra* note 7, at 11 ("In most instances, compensatory damages alone are sufficient to deter individuals from such acts."); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages,* 56 S. CAL. L. REV. 1, 23 (1982) ("Efficiency analysis should begin with the assumption that compensatory damages ordinarily will produce efficient results.").

n31 Society may not want "efficient" outrageous or malicious conduct. Hence, assessing punitive damages in addition to compensatory damages serves to channel conduct away from outrageousness. RICHARD A. **POSNER,** ECONOMIC ANALYSIS OF LAW 194 (3d ed. 1986) ("[W]e want to make sure that I am not indifferent between stealing and buying my neighbor's car."). Furthermore, the goal of full compensation may be impossible to achieve. For example, the victim might be dead, *see* Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment,* 56 S. CAL. L. REV. 133, 142 (1982) ("[T]he primary criteria for damages relate to the losses that death imposes on the victim's survivors. No account is given to the value of the victim's life to the victim himself."); or the victim's damages might not be severe enough to warrant incurring the up-front costs of a lawsuit (for example, when the outrageous act causes small amounts of harm to a large number of people). "Clearly in such cases the award of exemplary damages should aim at making the cost of such repetitive anti-social conduct uneconomical." Cox v. Stolworthy, 496 P.2d 682, 690 (Idaho 1972). It should be noted, however, that the class action is another alternative for dealing with minor injuries spread over large groups.

Prof. Robert Cooter has devised a formula for assessing punitive damages to rectify some of these problems -- a formula he calls the "rule of reciprocal":

For example, if 1/2 of tort victims who are entitled to recover actually bring suit, and those who do bring suit recover full, then, under certain conditions, 1/2 of the social costs caused by injurers will be externalized. In these circumstances, the ratio of total damages to compensatory damages paid by intentional wrongdoers should equal 2/1 for the sake of deterrence. In general, the punitive multiple should equal the reciprocal of the enforcement error . . . .

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Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?,* 40 ALA. L. REV. 1143, 1148 (1989).

n32 *See* Murphy v. Hobbs, 5 P. 119, 124 (Colo. 1884) ("Why not remit the punishment of defendant to a criminal forum?"); Sensibar, *supra* note 6, at 378 ("Punishment is the function of the criminal law, compensation that of the civil law."). *But see* Walther & Plein, *supra* note 11, at 382 ("It would seem, however, that if the criminal law has been deficient in the protection of society from wrongdoers, that this deficiency should more rationally be remedied by improving the administration of criminal justice, rather than providing bounties at the expense of the tortfeasor.").

n33 *See* Ellis, *supra* note 30, at 1-2 ("[C]ourts have concluded that even the combination of criminal prosecution and civil damage liability produces a suboptimal level of enforcement and have assessed punitive (or exemplary) damages in addition to compensatory damages.").

n34 *See* Owen, *supra* note 28, at 1289-90 ("Violations are apt to be especially prevalent, however, when the unlawful activity is profitable for the violator, when violations are difficult to detect or to prove, when violations are 'morally neutral,' when the rules are vague, when enforcement of the rules is infrequent, or when punishment is light."); *Vindictive Damages,* 4 AM. L.J. 61, 73 (1851) ("The principle argument adduced in favor of vindictive damages bases itself on the necessity that every community is under of affixing some punishment to violations of the law, which, though partaking more or less of the character of crimes, are yet not of importance enough to demand, or too subtle in their nature to admit of criminal prosecution.").

n35 Luther v. Shaw, 147 N.W. 18, 20 (Wis. 1914) ("The [criminal] law must be uniform as to persons and acts, must fix a maximum and minimum punishment on this basis, and cannot always be adjusted to particular circumstances of atrocity which occasionally occur."); *see* James D. Ghiardi, ***Punitive Damages*** *-- Legislative* ***Reform,*** 39 FED'N INS. & CORP. COUNS. Q. 189, 194 (1989) ("The criminal law and consumer fraud statutes do not adequately protect injured parties from or prevent outrageous conduct. Some wrongdoers choose to assume the risk of modest fines and continue their oppressive behavior if changing their conduct would mean a substantial economic loss.").

n36 Kink v. Combs, 135 N.W.2d 789, 798 (Wis. 1965) ("Certainly the consolidation of claims for compensation and punitive damages in one cause of action is in accord with modern principles of avoiding multiple trials.").

n37 "[T]here appears to be a modern trend in both U.S. courts and their respective state legislatures to tighten the standard for awarding punitive damages, limiting them only to the most egregious cases." Guy O. Kornblum, *The Current State of Bad Faith and Punitive Damage Litigation in the U.S.,* 23 TORT & INS. L.J. 812, 840 (1988); *see* Ghiardi, *supra* note 35, at 189 ("Since 1986, at least 25 states have enacted some sort of **[punitive damages] reform.**").

n38 *See* Ellis, *supra* note 30, at 51 ("If the applicable legal standard for assessing punitive damages were more certain, subjective predictions of the outcome of litigation would be closer, **settlement** would be more likely, and litigation costs would decline."); Ellis, *supra* note 25, at 988 ("[U]ncertainty as to potential liability **induces** overinvestment in liability avoidance, or worse, suppresses innovation, and results in higher insurance costs for all that are insured.").

n39 Forrest Campbell, Comment, Banker's Life: *Justice O'Connor's Solution to the Jury's Standardless Discretion to Award Punitive Damages,* 24 WAKE FOREST L. REV. 719, 742 (1989); *e.g.,* COLO. REV. STAT. § 13-21-102(1) (1987) (limiting punitive damages to the

amount of compensatory damages, or to three times that amount if the misconduct continues during trial); *see also* Note, *supra* note 1, at 530 ("Many courts have found a way to limit the jury's wide discretion by requiring some 'reasonable relationship' between actual and exemplary damages."); CONN. GEN. STAT. § 52-240b (Supp. 1990) (ordering that the court determine the amount of punitive damages in product liability actions, but limiting **punitive damages** to two times the amount of compensatory damages awarded).

For a critique of these **reforms,** see Ellis, *supra* note 30, at 60 ("In fact, [requiring that **punitive damages** bear a reasonable relationship to compensatory damages] neither provides meaningful guidance to decisionmakers nor increases certainty.").

n40 *E.g.,* Collens v. New Canaan Water Co., 234 A.2d 825, 831-32 (Conn. 1967) (holding that punitive damages may not exceed the amount of plaintiff's expenses of litigation, less taxable costs).

n41 Theodore B. Olson & Theodore J. Boutrous, Jr., *Constitutional Restraints on the Doctrine of Punitive Damages,* 17 PEPP. L. REV. 907, 924 (1990) ("[N]ine states . . . have enacted statutory limits on the size of punitive damages."); *see* Wheeler, *supra* note 12, at 314-20. For a discussion of the states that have enacted caps, see Ghiardi, *supra* note 35, at 195-96.

For a criticism of this approach, see Jason S. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law,* 87 COLUM. L. REV. 1385, 1406 (1987) ("[Punitive damages] caps could severely weaken incentives for safety by taking away the **threat** of high damages necessary to counteract the incentive-weakening effect of punitive safeguards."); Rosenbaum, *supra* note 7, at 1476 ("While capping punitive damage awards is another viable approach that has been taken to respond to the liability crisis, this measure may inhibit the goals of punishment and deterrence.").

n42 *See* Ellis, *supra* note 25, at 1005 ("[U]nder a traditional legal analysis, punitive damages are more analogous to fines than to damages. The determination of the appropriate amount of a fine is traditionally treated as a question of law, hence an issue for the judge, and not a question of fact for the jury."); Wheeler, *supra* note 12, at 302 ("Several efforts have been made to place the responsibility for deciding the size of a punitive damages award on the court and not on the jury."); Note, *supra* note 26, at 1171 ("Since criminal law has apparently recognized that the judge is more competent to [determine the quantity of punishment], it might be preferable to adopt a similar approach for punitive damages . . . .").

n43 *E.g.,* CAL. CIV. CODE § 3294 (West 1992); *see* Jewell Hargleroad, Comment, *Punitive Damages: The Burden of Proof Required by Procedural Due Process,* 22 U.S.F. L. REV. 99, 101-02 (1987) ("[T]he intermediate standard of clear and convincing evidence better serves as the standard for imposition of punitive damages."); Rosenbaum, *supra* note 7, at 1475 ("One of the most frequently considered and adopted **reforms** dealing with **punitive damages** requires the plaintiff to prove liability based on a clear and convincing standard."). For a list of the states adopting this evidentiary standard, see Ghiardi, *supra* note 35, at 191-92.

n44 *See* Rosenbaum, *supra* note 7, at 1476. For a discussion of the states that bifurcate trials for the issue of punitive damages, see Ghiardi, *supra* note 35, at 198.

n45 *Cf.* Note, *supra* note 1, at 524-25 ("One method of avoiding excessive punishment [when the defendant is subject to both tort and criminal actions] would be to allow a judge passing criminal sentence to take into consideration any civil penalties to which the offender had already been subjected.").

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n46 *See* Wheeler, *supra* note 12, at 322-51 (proposing that criminal procedural safeguards -- all of the Fourth and Fifth amendments and part of the Sixth Amendment -- should be applied to punitive damage trials).

n47 Robert D. Cooter, *Economic Analysis of Punitive Damages,* 56 S. CAL. L. REV. 79 (1982) (proposing that punitive damages be limited to intentional conduct and only so much as effectively deters that conduct); Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies,* 40 ALA. L. REV. 831 (1989) (arguing that deterrence is the only legitimate goal of punitive damages and proposing an alternative, efficient way to measure damages to deter properly).

n48 *See supra* note 11.

n49 The Court recently held in *Pacific Mutual Life Insurance Co. v. Haslip* that "[i]n view of [its] consistent history . . . the common-law method for assessing punitive damages is [not] so inherently unfair as to deny due process and be *per se* unconstitutional." 111 S. Ct. 1032, 1043 (1991). *See also* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 263-64 (1989) (holding that the Excessive Fines Clause does not apply to punitive damages awarded to plaintiffs in private suits).

n50 *See* Ghiardi, *supra* note 35, at 199 ("Although punitive damages are controversial, they have served a definite purpose in the American system of civil justice."); Johnston, *supra* note 41, at 1389 ("[P]unitive liability may in fact be an efficient liability rule despite pervasive imperfections in existing tort institutions.").

n51 Walther & Plein, *supra* note 11, at 373; *see* Willis, *supra* note 6, at 422 ("For any legal injury [the plaintiff] has sustained, the party injured is entitled to just compensation, and no more."); *see also id.* at 382 ("[T]he function of damages in civil law should be to make the injured party whole, not to confer upon him a profit at the expense of punishment to the defendant.").

n52 Long, *supra* note 7, at 882 ("The plaintiff, as the incidental recipient, generally has no right to punitive damages but rather receives them only if and as they are awarded by the jury (or by the court in the absence of the jury).").

n53 *See infra* notes 56-57.

n54 *See* Long, *supra* note 7, at 875 ("A few states take the position that punitive damages are exclusively compensatory in purpose and are needed to supplement compensatory damages. Precisely why the supplement is needed and why the awards are still labeled as 'punitive' are among the inscrutable matters of the law.").

n55 *See infra* part III.

n56 *Id.* at 878; *see also* Kink v. Combs, 135 N.W.2d 789, 798 (Wis. 1965) ("By allowing punitive damages the self interest of the plaintiff will lead to prosecution of the claim, while the same self interest of the plaintiff would lead him to refrain from instituting a criminal action at his own expense.").

n57 Owen, *supra* note 28, at 1287-88 ("[T]he prospect of punitive damages recoveries **induces** plaintiffs to act as 'private attorneys general' and thereby helps to increase the number of wrongdoers who are properly 'brought to justice.' This assistance is important, for many serious misdeeds deserving of punishment are beyond the reach of the criminal law and the public prosecutor.").

n58 *See* DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 221 (1973)

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("The use of punitive damages may thus free the legal system from what otherwise would be a complete dependence upon the official bureaucracy for prosecution of crime.").

n59 Neal v. Newburger Co., 123 So. 861, 863 (Miss. 1929) ("Punitive damages are punishing damages, and are awarded to the injured party as a reward for his public service in bringing the wrongdoer to account.").

n60 *See* Janigan v. Taylor, 344 F.2d 781, 786 (1st Cir.), *cert. denied,* 382 U.S. 879 (1965) ("It is more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them."); Katko v. Briney, 183 N.W.2d 657, 662 (Iowa 1971) ("Although not meant to compensate a plaintiff, the result is to increase his recovery. He is the fortuitous beneficiary of such an award simply because there is no one else to receive it.").

n61 KEETON ET AL., *supra* note 22, § 2, at 14 ("It is generally agreed that punitive damages are a windfall to the plaintiff and not a matter of right, and that it is always within the discretion of the jury or trial judge to withhold them.").

n62 *See infra* part III.

n63 In fact, the potential for punitive recovery may lead to overly aggressive plaintiffs and *over*deterrence of tortfeasors. Sales & Cole, *supra* note 5, at 1156 ("A byproduct of the continual success that plaintiffs have experienced in obtaining large punitive damage awards is the now universal practice of plaintiffs alleging and demanding punitive damages in an effort to increase the ultimate recovery from juries, and to compel defendants to settle meritless cases because of the fear that a jury will return an outrageous punitive damage award."); *see* TORT POLICY WORKING GROUP, *supra* note 22, at 50 ("[P]unitive damage claims have become a kind of legal lottery, where many plaintiffs' attorneys regularly file claims, recognizing that even if in any one lawsuit their probability of success is small, if enough such claims are filed eventually they may hit the jackpot."); Eliot, *supra* note 16, at 577 ("There would be fewer damage suits filling up the dockets of our courts with useless, or else unrightful litigation, if plaintiffs could recover only what they have suffered . . . .").

Another potential cost is that paying punitive damages to plaintiffs might encourage risk-seeking behavior. Note, *supra* note 5, at 1908-09. Potential plaintiffs might decide to take fewer safety precautions, or they might actively seek to become victims of torts, knowing that they have the potential for large punitive recoveries. *Id.* at 1909. This cost, however, is purely speculative.

n64 BLACK'S LAW DICTIONARY 283 (6th ed. 1990).

n65 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) ("States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury."); Sales & Cole, *supra* note 5, at 1118 ("[A]ctual damages currently recoverable compensate plaintiffs more than adequately for every conceivable element of physical, emotional, or imagined injury.").

n66 *See supra* note 31; Brewer v. Home-Stake Prod. Co., 434 P.2d 828 (Kan. 1967) (discussing the "American rule," whereby attorneys' fees are not generally recoverable); Chapman & Trebilcock, *supra* note 14, at 763 (There is a "special kind of injury to dignity in being maliciously, outrageously, or vindictively wronged by someone."); Ellis, *supra* note 30, at 10-11 (noting that litigation expenses are not typically recoverable); Ghiardi, *supra* note 35, at 194 ("In many instances the compensatory damages awarded do not fully compensate the injured party.").

n67 *See* Harold See, *Punitive Damages: A Supporting Theory,* 40 ALA. L. REV. 1227, 1227

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(1989) ("There would be scant disagreement with a policy of awarding damages, in addition to normal compensatory damages, that are even more *fully compensatory* in nature (to compensate for litigation costs, inconvenience, injury to dignity, or other social harm)."). *Contra Vindictive Damages, supra* note 34, at 62 ("If a plaintiff can never get more or less than what will actually compensate him, it is plain that the *intention or motive* of the wrongdoer ought never to be allowed to intervene to affect the amount recovered."); Judith L. White, Comment, *Critical Reappraisal of Punitive Damages Encompassing Attorneys' Fees: Normative Analysis and Pragmatic Concerns,* 42 BAYLOR L. REV. 737 (1990) (discussing the historical justifications of both punitive damages and the American rule, and concluding that jurisdictions that allow punitive damages as a substitute for attorneys' fees violate the policy behind both systems).

Another argument for fully compensating plaintiffs relates to the private attorney general rationale: A fully compensated plaintiff is more likely to bring suit. Walther & Plein, *supra* note 11, at 378, 386 ("Punitive damages do provide rough compensation for the costs of litigation, and facilitate the adjudication of controversies which otherwise would be uneconomical to bring into court.").

n68 *See* Duffy, *supra* note 7, at 11 ("Assuming, for the sake of argument, that present procedural rules are incomplete in not providing for litigation expenses, the logical remedy would be to amend and improve the rules of procedure, not tamper with the compensatory function of tort damages.").

n69 *See* Hargleroad, *supra* note 43, at 129-30 ("Punitive damages, unlike compensatory damages, do not put plaintiff back in the position where he was or make him whole, but instead constitute an outright confiscation to punish the defendant for being 'bad' or 'evil.'").

n70 Note, *supra* note 26, at 1175.

n71 *See supra* note 27.

n72 Ellis, *supra* note 30, at 29.

n73 Murphy v. Hobbs, 5 P. 119, 122 (Colo. 1884) (emphasis added).

n74 Pegram v. Stortz, 6 S.E. 485, 497 (W. Va. 1888) (stating that just as criminal fines go to the state, "the fine inflicted on the offender in order to protect society, and deter the commission of like crimes, should go to the state, and not to the party against whom the wrong is committed"); Harris, *supra* note 7, at 28 ("Justice demands change to the end that exemplary damages shall inure to the public instead of the individual, who has already been compensated for loss.").

n75 *See supra* part II.B.1.b.

n76 *See infra* part III (recommending that plaintiffs' attorneys be paid a fee to argue the case for punitive damages).

n77 *See supra* part II.B.1.

n78 *See supra* part II.B.2.

n79 *See, e.g.,* GA. CODE ANN. § 51-12-5.1 (Michie 1991) (providing that a portion of punitive damages in product liability actions must be paid into the state treasury); COLO. REV. STAT. § 13-21-102 (1991) (providing that a portion of punitive damages must go into the state general fund).

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n80 English, *supra* note 4, at 76 ("The law should be drafted so that the punitive damage award would be used to deal with the harm caused by the defective product that served as the basis for the underlying action.").

n81 *See, e.g.,* IOWA CODE § 668A.1 (1991) (providing that a portion of punitive damages be paid into a "civil reparations trust fund" for the purposes of indigent civil litigation programs or insurance assistance programs); MO. REV. STAT. § 537.675 (1991) (providing that a portion of punitive damages be paid into the "Tort Victims' Compensation Fund").

n82 *See, e.g.,* DEFENSE RESEARCH INST., *supra* note 7, app. (proposing that punitive damages be paid into the state treasury and credited to the school fund).

n83 *See infra* part III.A (proposing that punitive damages liability be heard at a separate post-trial hearing).

n84 Note, *supra* note 1, at 525 ("Awarding exemplary damages to the state might permit the jury to take a more objective view of the defendant's motives and conduct, divorced from sympathy or distaste for the plaintiff.").

n85 Sensibar, *supra* note 6, at 387.

n86 Harris, *supra* note 7, at 27.

n87 *Id.*

n88 *Id.*

n89 A similar proposal was made by Justice Shores of the Supreme Court of Alabama in Fuller v. Preferred Risk Life Insurance Co., 577 So. 2d 878, 886-887 (Ala. 1991) (Shores, J., concurring). He suggested that *courts* (absent legislation) have the discretion to order the defendant "to pay part of the award either to the state general fund or to some special fund that serves a public purpose or advances the cause of justice." *Id.* at 887. He also suggested that "the plaintiff's attorney fees should be based upon the total verdict, and not the reduced amount paid to the plaintiff, since it is due to the attorney's efforts that the public interest has been served." *Id.*

This Note disagrees with Justice Shores because his proposal seems to put too much discretion with courts. Punitive damages should be *legislatively* directed to the state. Legislation has the value of public input, and it is more predictable than judicial discretion. Justice Shores' comments are interesting in that they suggest that courts currently have this discretionary power and that legislation is not needed to take punitive damages out of the hands of plaintiffs.

n90 *See* Wheeler, *supra* note 12, at 320-22.

n91 *See* James D. Ghiardi, *Punitive Damage Awards: An Expanded Judicial Role,* 39 DEF. L.J. 69, 69 (1990) ("It is the responsibility of the trial judge, in the first instance, to determine whether the case is appropriate for punitive damages, i.e. whether the question of punitive damages will be submitted to the jury.").

n92 *See generally* Owen, *supra* note 24, at 52-59 (proposing and defending a bifurcated trial for the issue of punitive damages).

n93 Because the plaintiff is not a party to the punitive damages action, forcing the plaintiff to sit through the punitive damages arguments wastes the plaintiff's time. Bifurcating the trial would avoid this waste. Perhaps bifurcation will sacrifice some *judicial* economy (because

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the trier of fact must sit through a second hearing), but little evidence needs to be duplicated in the separate hearing because the record from the underlying trial should be fully admissible and the facts are fresh in the memory of the trier of fact.

n94 *See* Johnston, *supra* note 41, at 1439 ("This argument is that the best approach to tort reform is to create two systems to separately pursue the goals of compensation and deterrence, and that punitive liability can achieve part of the deterrence goal.").

n95 I use "cost" in the economic sense. It includes a reasonable return for the attorney's efforts (the attorney's opportunity cost).

n96 If there are enough such victims of a single tort, plaintiffs' attorneys might also file a class action, even absent the potential for punitive damages.

n97 *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 6.3 (1985) (explaining the requirements for being a proper party to a lawsuit, including that the plaintiff be a real party in interest and have standing).

n98 *See, e.g.,* Clay Coalson, Note, Nabours v. Longview Savings and Loan Association: *Requiring Actual Damages as a Prerequisite to Recovery of Punitive Damages in an Equitable Action,* 24 HOUS. L. REV. 621, 621 (1987) ("[T]he Texas Supreme Court ruled that actual damages must be either recovered or proven before punitive damages can be awarded incident to a suit involving an equitable remedy.").

n99 *See* Kirk v. Denver Pub. Co., 818 P.2d 262, 265 (Colo. 1991) ("[A] claim for exemplary damages is not 'a separate and distinct cause of action,' but rather 'is auxiliary to an underlying claim for actual damages' and thus can be entered only in conjunction with an underlying and successful claim for actual damages assessed against a wrongdoer for a legal wrong to the injured party.") (citing Palmer v. A.H. Robins Co., 684 P.2d 187, 213-14 (Colo. 1984)).

n100 This assumes that the State will have no direct cause of action against defendants for punitive damages. *See* Ghiardi and Kircher's checklist, *supra* note 18. This Note so assumes.

n101 Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System?,* 140 U. PA. L. REV. 1147, 1190-96 ("[L]awyers usually do not accept a case unless they see an acceptable probability of economic success for themselves in doing so.").

n102 *See* Note, *supra* note 5, at 1909-10 (arguing that the plaintiff's windfall recovery encourages too much legal effort to be spent pursuing such actions, leading to a misallocation of legal talent and a waste of legal resources).

n103 This is unlike the decoupling proposal, *see infra* part III.B.2, which proposes that plaintiffs' attorneys be paid entirely out of punitive damages awards, with plaintiffs contributing nothing.

n104 To discourage frivolous suits -- in which both the potential compensatory and the potential punitive recoveries are small -- the fee paid to plaintiffs' attorneys by the state for arguing for punitive damages should be capped by the total amount of punitive damages. Otherwise the state would move to tap other resources to pay the attorneys' fees in cases in which those fees, less what the plaintiff pays in fees, exceed the punitive recovery.

n105 As do criminal fines, punitive damages serve the purpose of general deterrence in addition to special deterrence. When planning their conduct, potential tortfeasors must consider not only punitive damages *they* may be forced to pay, but also punitive damages similarly situated tortfeasors have paid in the past, which are a good indicator of the

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II. PUNITIVE DAMAGES SHOULD BE AWARDED TO THE STATE OR A PUBLIC FUND, NOT TO CIVIL PLAINTIFFS

"[I]t must always be remembered that punitive damages by their very nature do not serve to compensate plaintiffs. They are a pure windfall, whose only legitimate purpose is to deter truly outrageous and harmful conduct." [22] Given the noncompensatory nature of punitive damages, the question is: Why give *plaintiffs* the windfall? [23]

A. PUNITIVE DAMAGES REMAIN A FIXTURE IN CIVIL LAW

Punitive damages remain the subject of extensive debate [24] and constitutional scrutiny, [25] yet states continue to assess them against defendants for several reasons. Some authors and states view the primary **[*846]** purpose of punitive damages as compensation of plaintiffs, [26] but most consider it to be deterrence of defendants. [27] Punitive damages are meant to punish defendants who would not be adequately punished if forced to pay compensatory damages alone. [28] The theory is that if defendants are not forced to pay the full social cost imposed by their conduct, they will not discontinue that conduct, though it is inefficient and unwanted. [29] Although economists have argued that full compensation creates the **[*847]** proper incentives for defendants, thus rendering punitive damages unnecessary, [30] others have argued that even given "full" compensation, punitive damages still play an important role as a deterrent. [31]

Shifting part of the task of imposing punitive damages to the criminal law from the civil law has also been proposed, [32] but this too might prove inadequate. [33] First, not all tortious acts subject to punitive damages are criminally punishable. [34] Second, criminal sanctions may not be **[*848]** sufficiently flexible to permit assessment of fines high enough to deter efficiently. [35] Third, assessing punitive damages at the end of a civil trial seems more efficient in terms of judicial economy. [36]

In recent years, many scholars have proposed and states enacted legislation to control punitive damages. [37] Many of these proposals and enactments aim at making the assessment of punitive damages more *certain:* [38] Some proposals index punitive damages to compensatory damages [39] or costs; [40] some impose punitive damages caps; [41] and others require judges rather than juries to determine the amount of punitive **[*849]** awards. [42] Other current proposals and enactments aim at making the assessment of punitive damages more *fair:* Some increase the burden of proof to "clear and convincing evidence"; [43] some bifurcate the trial and try the issue of punitive damages apart from the underlying case; [44] some impose punitive damages only when the State has chosen not to impose criminal sanctions; [45] and others add procedural protections for defendants that would otherwise be accorded them only in criminal prosecutions. [46] Another type of proposal, not yet officially enacted by any state, aims at making the assessment of punitive damages more *efficient* by assessing punitive damages only at the appropriate level to deter wrongful conduct efficiently. [47]

[*850] Despite the debate and **reforms, punitive damages** continue to be assessed in the overwhelming majority of states, [48] and they have consistently survived constitutional scrutiny. [49] This Note assumes that punitive damages will remain a part of civil damages and that they are justified as necessary to deter outrageous and malicious tortfeasors. [50] The practice of awarding punitive damages to plaintiffs, however, should stop.

B. WHY THE STATE, NOT CIVIL PLAINTIFFS, SHOULD BE AWARDED PUNITIVE DAMAGES

1. *Plaintiffs Have No Right to Punitive Damages*

Deterrence alone does not justify paying punitive damages to civil plaintiffs rather than to someone else -- deterrence can be achieved regardless of the parties to whom punitive

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potential punitive damages awards likely to be imposed.

n106 *See supra* note 31 (discussing Prof. Cooter's "rule of reciprocal"). It should be noted that the defendants who pay the increased punitive damages might object on excessive fines grounds. Defendants might claim that they were sued the very first time they acted outrageously. Defendants might thus argue that it is unfair for them to be punished for the torts of hypothetical unprosecuted tortfeasors.

n107 Even if certain individual tortfeasors are never brought to court, some tortfeasors will be, and the ones that never are still must weigh the *chance* that they could be brought to court. If punitive penalties are set against those defendants that are brought to court at a level such that the chance (P) of being brought to court (less than 1 but greater than 0) times the amount (Q) of the penalty (correspondingly greater than the harm caused by that defendant on that specific occasion) equals the costs (D) these defendants impose on society (i.e., if $P \times Q = D$), then all tortfeasors will be properly deterred, even those not brought to court. *See supra* note 31; *infra* note 180.

n108 ABA REPORT OF THE ACTION COMMISSION, *supra* note 8, at 19.

n109 *See supra* note 10.

n110 Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (emphasis added).

n111 Fuller v. Preferred Risk Life Ins. Co., 577 So. 2d 878, 887 (Ala. 1991) (emphasis added).

n112 This Note agrees that plaintiffs who do participate, as in pro se cases, should get a portion of the punitive recovery along with the State. In most cases, though, the plaintiff does not participate, and if a separate hearing is arranged, the plaintiff need not even sit through it; the plaintiff can be dismissed after the case in chief. *See supra* part III.A. For a discussion of conceptual problems regarding who the attorney's client would be during the punitive damages hearing, see *infra* part IV.C.

n113 Note, *supra* note 5, at 1911.

n114 *Id.* at 1912.

n115 *Id.* at 1912-14.

n116 *See supra* note 40; *see also* Note, *supra* note 5, at 1914 (discussing the Connecticut rule and how decoupling is a better solution).

n117 *See supra* note 66. *Cf.* Herbert M. Kritzer, *Searching for Winners in a Loser Pays System,* A.B.A. J., Nov. 1992, at 55 (discussing the English rule, whereby the losing party pays the prevailing party's attorney's fees).

n118 The only exception would be if the attorney loses money arguing for the underlying case -- if the state wishes to encourage such suits, then it might choose to pay plaintiffs' attorneys an additional sum to cover losses. *See supra* text following note 103.

n119 *See supra* notes 66-68 and accompanying text.

n120 *See supra* text accompanying notes 100-03.

n121 *See infra* part IV.B.2.

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n122 *See* White, *supra* note 67.

n123 *See* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law,* 101 YALE L.J. 1795, 1849 (1992) ("As Congress developed new ways to control wrongful behavior, it created new institutional settings for the new powers. The authority of administrative civil sanctions almost always appears in regulatory statutes. Such sanctions, in turn, have come to be one of the main enforcement procedures of administrative agencies."); *id.* at 1863 ("It is no longer correct to say that administrative agencies only regulate action; administrative agencies also prosecute.").

n124 *See* Galligan, *supra* note 23, at 6 n.3 ("Of course a rational system might choose to use an administrative scheme to punish certain wrongdoers or at least to ensure that their conduct does not egregiously fall below certain standards.").

n125 *See* Long, *supra* note 7, at 885 ("Still another objection is that, with no meaningful standard available for assessing punitive damages, the size of the award is limited only by the passions and prejudices of the jury and the judicial philosophy of the judges.").

n126 *See* Wheeler, *supra* note 12, at 310 ("Regulatory sanctions that did not exist a century ago, such as recalls of unsafe products, may today deter undesirable conduct where the **threat** of compensatory damages suits and criminal prosecutions would not.").

n127 *See* BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 2.17 (2d ed. 1984).

n128 This is one reason to keep punitive damages as an aspect of civil damages. If regulatory agencies properly regulated all outrageous conduct, punitive damages wouldn't be needed at all, and the consensus seems to be that punitive damages still are needed. *See supra* part II.A.

n129 *See supra* note 11.

n130 *See* Jones v. Fisher, 166 N.W.2d 175, 183 (Wis. 1969) (Hansen, J., dissenting) ("[W]e do not deal with a matter of plaintiff's rights, but the question of what the public interest requires and what the public policy should permit."); Duffy, *supra* note 7, at 8 ("Courts almost universally agree that punitive damages are a windfall to the plaintiff, i.e., they are not a matter of right and are awarded or withheld at the discretion of the jury.").

n131 *See* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

n132 *Id.* at 264 (emphasis added).

n133 737 F. Supp. 1563 (M.D. Ga. 1990).

n134 *Id.* at 1565-66.

n135 GA. CODE ANN. § 51-12-5.1(e)(2), *quoted in McBride,* 737 F. Supp. at 1565.

n136 *McBride,* 737 F. Supp. at 1579.

n137 *See id.* at 1569-70, 1576-78.

n138 *Id.* at 1578.

n139 *Id.* at 1579.

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n140 *See* id. at 1577-78.

n141 *See id.*

n142 *See* O.W. HOLMES, JR., THE COMMON LAW 44 (Boston, Little, Brown & Co. 1881) ("[T]he general principles of criminal and civil liability are the same . . . .").

n143 For an argument that fines in civil actions do not invoke double jeopardy, see Southern Law Times, *supra* note 25, at 375 "(And as a civil action does not involve jeopardy, as we have seen above, in the constitutional and generally received sense of that word, there is no constitutional provision prohibiting the awarding of exemplary damages, although the act on which the civil suit is based may also be punishable by a criminal prosecution.").

n144 *See* U.S. CONST. amend. V ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . .").

n145 This Note makes no comment on whether the due process or equal protection arguments by the *McBride* court substantiate its holding.

n146 Burke v. Deere & Co., 780 F. Supp. 1225 (S.D. Iowa 1991).

n147 *Id.* at 1229.

n148 *See id.* at 1234-35.

n149 IOWA CODE § 668A.1(2)(b), *quoted in* Burke, 780 F. Supp. at 1242.

n150 *See* 780 F. Supp. at 1237-43.

n151 *Id.* at 1242.

n152 *Id.*

n153 *Id.*

n154 A counterargument is that defendants might object to paying the State rather than plaintiffs. Paying the State might carry with it more social stigma or moral approbation. If society perceives the payment to be more criminal in nature than civil, then it might hurt the defendant more to pay the State. However, this additional "hurt," if it exists, does not seem to be great enough to invoke the Excessive Fines Clause.

n155 The *McBride* court discusses the issue of quid pro quo, but only in the context of whether the defendant had standing and whether the act in question was discriminatory, not whether the act violated the Takings Clause. *See* McBride v. General Motors, 737 F. Supp. 1563, 1575-77 (M.D. Ga. 1990).

n156 585 So. 2d 1033 (Fla. Dist. Ct. App. 1991).

n157 FLA. STAT. ANN. § 768.73(2)(b) (West 1991), *quoted in* Gordon, 585 So. 2d at 1035 n.1.

n158 Gordon, 585 So. 2d at 1035.

n159 *Id.*

n160 *Id.* at 1035-36 (citations omitted).

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n161 *Id.* at 1036-37.

n162 *Id.* at 1036.

n163 *Id.* at 1037.

n164 *Id.* at 1037 n.9.

n165 Kirk v. Denver Publishing Co., 818 P.2d 262 (Colo. 1991). It is interesting to note that these cases were decided within one month of each other -- *Gordon* on August 27, 1991, and *Kirk* on September 23, 1991.

n166 COLO. REV. STAT. ANN. § 13-21-102(4) (West 1991), *quoted in* Kirk, 818 P.2d at 266.

n167 *Kirk*, 818 P.2d at 264.

n168 *Id.* at 267.

n169 *Id.* at 272.

n170 *Id.*

n171 *See supra* notes 12, 16, 51, 52, 61, 69 and accompanying text.

n172 The dissenters in *Kirk* followed the *Gordon* majority view and argued that plaintiffs do *not* have a vested right in punitive damages: "[A] claim for exemplary damages is a statutory right which may be conditioned by the legislature and thus the entire judgment never vested in the plaintiff." *Kirk*, 818 P.2d at 274 (Rovira, C.J., dissenting).

n173 Pacific Mutual Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991).

n174 Ghiardi, *supra* note 35, at 197; *see* TORT POLICY WORKING GROUP, *supra* note 22, at 82.

n175 Saks, *supra* note 101, at 1221-22.

n176 *See* Note, *supra* note 5, at 1914 (discussing a similar **settlement** incentive in the "decoupling" proposal).

n177 *See id.*

n178 *See id.* at 1915.

n179 *See supra* notes 32-36 and accompanying text.

n180 *See supra* notes 31, 107 (discussing variations of Prof. Cooter's "rule of reciprocal").

n181 *See* Sake, *supra* note 101, at 1286 ("One obvious solution would be to multiply penalties so that the cost of doing harm discounted by the probability of being held to account for that harm still amounts to a deterrent -- if you are not going to hit often, hit hard."); *supra* notes 31, 107.

n182 *See id.*

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n183 *See* Note, *supra* note 5, at 1915.

n184 *See infra* part IV.B.2.

n185 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983) ("A lawyer shall act with reasonable diligence . . . in representing a client.").

n186 *See id.* Rule 1.1 (requiring competent representation); *id.* Rule 1.2(a) ("A lawyer shall abide by a client's decision whether to accept an offer of **settlement** of a matter."); *id.* Rule 1.7(b) ("A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests . . . .").

n187 *See supra* text accompanying note 182.

n188 *But see* Riewe v. McCormick, 9 N.W. 88, 89-90 (Neb. 1881) ("If it is said that these damages are imposed as a punishment, it is a full and sufficient answer to say that the state inflicts punishment, and not individuals.").

n189 Long, *supra* note 7, at 889.

n190 Orville Richardson, ***Punitive Damages:*** *A Common Law Doctrine in Need of Legislative* ***Reform,*** 16 TRIAL, Mar. 1980, at 31.

n191 *See, e.g.,* DOBBS, *supra* note 58, § 1.1, at 1 ("There are elements of damages that are not entirely compensatory -- punitive damages for example. . . . [I]t must be recognized that the *damages remedy* is not wholly compensatory, even though compensation is professedly its main purpose.") (emphasis added).

n192 *See id.* § 3.9, at 205 ("The main theory in support of the punitive or exemplary award is that it will operate to punish and to set an example that will deter similar conduct in the future.").

n193 *See supra* part II.B.2.

n194 *See supra* part II.B.1.b.

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damages awards are payable. Although courts generally acknowledge that punitive damages "are not available as a matter of right to any plaintiff" [51] and that the trier of fact has complete discretion as to whether it will award punitive damages to the plaintiff, [52] two justifications are generally given for awarding punitive damages to plaintiffs anyway: (1) as an incentive to bring defendants to justice (the "private attorney general" rationale) [53] and (2) as compensation for otherwise uncompensable losses (the "compensation" rationale). [54] Both justifications, however, are flawed. The private attorney general rationale is one of expediency; it does not vest in plaintiffs any "right" to punitive damages. This Note proposes an alternative means to **[*851]** bring defendants to justice. [55] And the compensation rationale is inappropriate; compensation should be achieved through compensatory damages alone. If some entity must be compensated for the malicious, aggravated, or outrageous conduct of the defendant, it should be society rather than the plaintiff.

a. *The private attorney general rationale does not vest in plaintiffs any right to punitive damages:* The private attorney general rationale suggests that the "[a]vailability of punitive damages may make it worthwhile for plaintiffs to sue defendants who should be sued but who, in the absence of punitive awards, would not be, because of the trifling nature of the actual damages suffered by the plaintiff." [56] These private attorneys general bring to justice those wrongdoers who would not otherwise be prosecuted, [57] and they relieve an already overburdened criminal justice system. [58] Society pays punitive damages to plaintiffs as an incentive for them to perform this service. [59]

Therefore, plaintiffs are paid punitive damages as a matter of expediency only [60] -- not because they have an inherent right to receive such payments. [61] If society identifies a better "attorney general" [62] or decides that paying plaintiffs to perform this service is too costly, [63] then society **[*852]** would have no reason or obligation to continue paying punitive damages to plaintiffs.

b. *The compensation rationale is inappropriate:* "Compensation" has been defined as "[t]hat which is necessary to restore an injured party to his former position." [64] The compensation rationale for punitive damages is inappropriate because plaintiffs should be fully compensated for all damages, special and general, by compensatory damages alone. [65] If plaintiffs are not fully compensated (and for a variety of reasons this may be the case) [66] and it is thought that they should be, [67] then the system of **[*853]** compensatory damages should be revised: Courts should not hide this recovery in the guise of punitive damages. [68] "Punitive" damages are to punish, not to compensate. [69] "By using punitive damages to increase compensation in cases where punitive damages are otherwise unnecessary, courts would be merely awarding two categories of compensatory damages. It seems preferable to expand the law of compensatory damages . . . ." [70]

2. *Although Punitive Damages Are Assessed to Deter, The Extra Harm Inflicted by Defendants' Outrageous Conduct Is Borne by Society Generally, Not by Plaintiffs Alone*

Although deterrence appears to be the primary justification for assessing punitive damages, [71] if punitive damages were paid to the State, they would serve to compensate *society* for societal harm inflicted by defendants' outrageous conduct. "[L]osses to the public caused by breaches of the peace also may be included within the category of societal losses for which compensatory damages provide no remedy. Injuries animated by malice, and even some that result from reckless conduct, may provoke a sense of [societal] outrage . . . ." [72] "Who will undertake to give a valid reason why *plaintiff,* after being fully paid for all the injury inflicted upon his property, body, reputation, and feelings, should still be compensated, above and beyond, for a wrong committed against the public at large?" [73] If anyone has a compensatory right to punitive damages, it is society. [74]

[*854] 3. *Society Could Put Punitive Damages to Better Use*

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Assuming that plaintiffs should be compensated for their losses with only compensatory damages, [75] that defendants will still be required to pay for their outrageous conduct, [76] and that plaintiffs have no moral or legal right to punitive damages, [77] then there is no compelling reason to award punitive damages to *plaintiffs* rather than to society.

Apart from having a direct claim of right to punitive damages, [78] society could put punitive damages awards to better use than allowing individual civil plaintiffs windfall recoveries. For instance, the State could deposit the money into its general treasury. [79] The funds could then be used directly to regulate the misconduct for which the punitive damages were assessed, [80] thus more directly deterring such misconduct, or the funds could be used to relieve the tax burden on all the state's taxpayers. Alternatively, society could create a special fund for a deserving cause -- possibly a cause related to the reason punitive damages were assessed (such as a tort victims' relief fund) [81] or one otherwise needing funds (such as a school fund). [82] The state need not limit those benefiting from punitive damages to one class of citizens -- civil plaintiffs.

4. *Juries May Be More Objective*

If the issue of punitive damages is heard apart from the plaintiff's underlying claims, [83] the finder of fact can concentrate on the defendant's **[*855]** conduct without undue sympathy for or against the plaintiff. Perhaps the trier of fact will be more objective under such circumstances. [84]

Some authorities, however, come to the opposite conclusion. Perhaps the finder of fact who, under a scheme awarding punitive damages to society, has a personal stake in the punitive damages award will be *less* objective: "If jurors realized that any punitive damage award were to be returned to public use, the size of awards would not simply skyrocket. They would follow the Voyager spacecraft out of the solar system." [85]

Others have argued that such a result may be desirable -- permitting higher punitive damages awards may be good. The argument is that juries generally award insufficient punitive damages because they know the money goes to plaintiffs, and juries do not want to give plaintiffs a windfall: "[I]f the jurors know the award is in favor of the State, in the nature of a penalty for punitive conduct, they would be more likely to award exemplary damages in a deserving case." [86] Efficient deterrence requires not only that defendants not be required to pay too much, but also that defendants not be allowed to pay too little.

If the judge rather than the jury determines the amount of punitive damages, the bias arguments (whichever way they go) may have less impact because judges are practiced at being, and are required to be, unbiased. But even if juries are allowed to assess punitive damages, the harm from extravagant jury awards should not be great. States are currently allowed to sue on their own behalf in civil actions (for example, if a reckless driver runs into and damages the state capital building), and juries are allowed to assess the damages. Although allowing the judge to assess punitive damages might correct for jury bias, whether juries would be less biased, more biased, equally biased, or unbiased if punitive damages were awarded to the state is unclear. The bias arguments should not determine whether the state should receive punitive damages awards. Punitive damages should be awarded to society because (1) plaintiffs have no right to punitive damages, (2) society is directly harmed by defendants' outrageous conduct, and (3) society could put punitive damages awards to better use.

[*856] III. THE STATE SHOULD PAY PLAINTIFFS' ATTORNEYS TO ARGUE THE CASE FOR PUNITIVE DAMAGES

One significant problem remains: If plaintiffs do not receive punitive damages awards, who will argue the case for punitive damages? The answer is to pay plaintiffs' attorneys a fee or

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portion of the award to perform this function for society.

A. PLAINTIFFS' ATTORNEYS AS PUNITIVE DAMAGES ADVOCATES

Rather than awarding plaintiffs *any* portion of punitive damages awards, the State should pay plaintiffs' attorneys a fee or compensation for seeking punitive damages. This solution was proposed a decade ago by Judge Carmon C. Harris in a short article entitled *Exemplary Damages to the Public.* [87] Although Judge Harris did not discuss the administrative and constitutional problems inherent in the proposal, she suggested the following legislation:

Exemplary damages awarded to any party in a civil action shall be paid to the clerk of the Court [to be paid to the state] . . . .

The Court shall fix a reasonable attorney fee for the attorney representing the party recovering the judgment for exemplary damages, which fee shall be paid by the Court Clerk out of the amount paid in satisfaction of the judgment for exemplary damages. [88]
This Note supports Judge Harris' proposal that punitive damages should be awarded to the State (or a state-administered fund), less reasonable fees to be paid to plaintiffs' attorneys. [89]

To implement this solution, courts should bifurcate the trial. [90] The issues of liability and compensatory damages should be decided first, after which the plaintiff should be dismissed from the case. If a plaintiff **[*857]** wins on the issue of liability, then the plaintiff's attorney may move the court to schedule a hearing at which the parties can present additional evidence and argue the merits of awarding punitive damages. [91] If punitive damages are awarded, the court should award a reasonable fee to the plaintiff's attorney, and the balance should be paid into the state treasury or a special state-administered fund.

Holding a separate punitive damages hearing has several advantages. [92] First, the plaintiff is not a party to the punitive damages issue, so separating the fault and punitive damages issues sacrifices little economy. [93] Furthermore, the issue of liability for punitive damages is different and separate from the issue of compensatory damages. Not only is the standard of fault different (the plaintiff must prove outrageous or malicious behavior to get punitive damages, while proof of mere negligence is generally sufficient to establish tort liability and to get compensatory damages), but so is the measure of damages (punitive damages should be assessed to deter efficiently, while compensatory damages should be assessed to compensate fully). Requiring a separate punitive damages hearing would more clearly sever these issues. [94]

One objection to this proposal, paying plaintiffs' attorneys to argue the case for punitive damages, is that, absent the potential for punitive recovery, those plaintiffs with very low real damages will not initiate costly lawsuits against outrageous tortfeasors. The availability of contingency fee arrangements, however, may rebut this objection in some cases. For plaintiffs with minimal damages, attorneys might be willing to work on a contingency basis if a potential for punitive recovery exists, even if doing so would be uneconomical absent punitive damages. If plaintiffs can file suit without paying attorneys' fees, they might do so even for very low potential compensatory recoveries. For example, assume that **[*858]** the expected compensatory damages are $ 1500, expected punitive damages are $ 10,000, the attorney's expected costs through trial are $ 1500, and the attorney's total expected costs through a punitive damages hearing are $ 2000. If the attorney does not participate in the punitive damages hearing and has no right to a portion of the punitive damages recovery, then the attorney would take the case only on a 100% contingency basis because otherwise the expected legal costs would exceed the expected compensatory damages. Of course, very few plaintiffs would agree to such an arrangement. Assume, though, that the law allowed the plaintiff's attorney to recover a portion of the potential punitive damages award to cover costs. If the attorney took the case on a one-third contingency basis, the attorney would

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expect to be paid $ 500 out of compensatory damages (with the plaintiff retaining $ 1000) plus a portion of the punitive damages award, which would have to be at least $ 1500 in order to cover the attorney's total costs. Therefore, the plaintiff would have an incentive to file suit (to receive a net award of $ 1000), and the plaintiff's attorney would have an incentive to argue the plaintiff's case. [95] The defendant is brought to court just as if the plaintiff were paid the punitive damages, [96] yet society has a net gain of the difference between the punitive damages award and the portion of that award paid to the plaintiff's attorney. In this case, that gain is about $ 8500.

Still, some plaintiffs with *very* low real damages will not file suit if they cannot anticipate collecting punitive damages personally. Contingency fee arrangements make filing lawsuits easier for some plaintiffs who would otherwise not file, but filings are not entirely costless. Plaintiffs must still spend time and effort in discovery (such as attending depositions or medical examinations), meeting with counsel, reviewing legal documents, and attending court hearings. Even in class action suits, representative plaintiffs are required to participate. [97] Furthermore, many jurisdictions require that plaintiffs prove actual damages before punitives are allowed, [98] and when damages are very low, proving actual damages **[*859]** may be difficult. If plaintiffs do not file suit, plaintiffs' attorneys will have no forum in which to argue for punitive damages, [99] and some outrageous or malicious tortfeasors will escape without paying damages. [100] It should be noted, however, that cases of very low damages, even if widespread, may not be of the type for which juries would award punitive damages in the first place. Therefore, this problem may be insignificant.

Another issue to consider is the amount of the fee that plaintiffs' attorneys should be paid to argue the case for punitive damages. If the fee paid plaintiffs' attorneys is limited to compensation for their time and effort in arguing the issue of punitive damages, the attorney in the above hypothetical would be paid only $ 500 for the extra efforts involved in arguing the punitive damages claim. Nothing gives the attorney an incentive to accept the plaintiff's case in the first place because, again assuming a one-third contingency fee arrangement, the attorney would recover only $ 1000 after spending a total of $ 2000. If the attorney expects to lose money arguing for the underlying case (that is, if the attorney's expected fee from the plaintiff is less than expected costs through trial), the profit-maximizing attorney will not accept the case even if society offers to compensate the attorney's costs incurred in arguing for punitive damages. [101] Though the benefit of this is that fewer cases would be brought to court, thereby saving court costs, [102] the detriment is that fewer defendants would be brought to court to pay for the harm they have caused. One way to balance these considerations is to pay the plaintiff's attorney the difference between the attorney's *total* costs and the fees paid directly by the plaintiff (which, to deter abuse, might have to be set by statute, perhaps at a one-third contingency), as suggested in the above hypothetical. This scheme would enable all plaintiffs who suffer harm from outrageous conduct to afford legal fees, thus **[*860]** bringing more tortfeasors to court, yet plaintiffs would still have to contribute toward the cost of litigation. [103] Society would benefit both from the increased deterrence of outrageous conduct and from receiving more punitive damages awards. [104]

A criticism of the above approach is that it does not consider that sometimes juries (and judges) decline to award punitive damages; sometimes plaintiffs' attorneys lose at the punitive damages hearing, even if the arguments in favor of punitive damages are not frivolous. If plaintiffs' attorneys are paid only the amount of their costs and only if they win, they will argue for punitive damages only when the chance of winning is 100%. Otherwise, their expected recovery (which equals the amount of recovery (C) times the probability of recovering (P)) would be lower than their expected costs (C). In other words, if P is less than 100%, then $P \times C < C$. Because the chance of winning punitive damages is *always* less than 100% (because the issue is always subject to the discretion of the trier of fact), plaintiffs' attorneys would never argue the issue, and defendants would never have to pay punitive damages. Therefore, when society determines the amount of the plaintiff's attorney's costs in punitive damages cases, some factor must be built in to cover the cost of uncertainty (for

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example, attorneys could be awarded double costs), or society could pay plaintiff's attorneys *every* time they argue for punitive damages, whether they win or lose. To deter abuse of this latter method, the State could require plaintiffs' attorneys to get approval from the judge on motion before being allowed to argue for punitive damages. The former proposal seems more desirable because it would avoid the need for the state to tap funds from other sources to pay those plaintiffs' attorneys who lose at the punitive damages hearing. The State can set the uncertainty cost based on the incentives society wishes to give plaintiffs' attorneys. If the factor is set low, only suits with a high probability of success will be brought for punitive damages. If it is set high, then more suits will be brought. After experience under such a system, the State can change the factor and adjust the incentives.

Even if this proposal would prevent some cases from being filed that would be brought to court if plaintiffs were paid punitive damages, there **[*861]** is another way to create the proper incentives for defendants: When tortfeasors (or others like them) are finally brought to court, [105] as they probably will be if they continue to act outrageously, judges can make them pay an amount greater than they would otherwise pay if they had always been brought to court, thus creating the proper incentives. [106] The risk of being subject to additional punitive damages should counterbalance the decreased risk of being brought to court. [107] An added benefit of bringing defendants to court less often is saved litigation costs, both for the parties and for the court system. Efficient deterrence can still be achieved if courts assess punitive damages in the proper amount.

In conclusion, paying plaintiffs' attorneys a fee out of punitive damages awards to encourage them to argue for such awards is a viable solution to the problem of advocacy. Society can encourage plaintiffs and plaintiffs' attorneys to bring more or fewer defendants who are subject to punitive liability to court by adjusting the fee paid to plaintiffs' attorneys. Society will no longer have an incentive to pay plaintiffs to be our private attorneys general, and the bulk of punitive damages awards can be used to benefit society generally.

B. OTHER PROPOSALS

1. *The ABA Proposal*

The American Bar Association has proposed a compromise solution to the windfall problem: "After deducting costs and expenses, the court should determine what is a reasonable portion of the punitive damages award to compensate the plaintiff and counsel for bringing the action and prosecuting the punitive damages claim, with the balance of that award **[*862]** allocated to public purposes." [108] Such legislation has been enacted in several states. [109] The most important benefit of such **reform** is that the State gets a significant portion of **punitive damages** without any extra work.

Because plaintiffs still get part of the punitive damages award, it is clear that the ABA proposal only partially accepts the windfall theory. The windfall argument is that "[p]unitive damages are generally seen as a windfall to plaintiffs, who are entitled to receive full compensation for their injuries -- *but no more.*" [110] Assuming that plaintiffs are fully compensated (to the extent society chooses to compensate them) with compensatory damages, recovering even a portion of punitive damages is a windfall. "[I]t is due to the *attorney's* efforts that the public interest has been served" [111] -- not the plaintiff's efforts. [112] Awarding the plaintiff any part of the punitive recovery is a pure windfall, while awarding it to the plaintiff's attorney is not.

From a practical standpoint, the ABA proposal is more costly to the State than merely paying the plaintiff's attorney to argue for punitive damages, as suggested herein. Any portion of a punitive damages award that the plaintiff retains after attorney's fees directly lowers the amount retained by the state. For example, if an attorney's cost to argue for punitive damages is $ 5000, the State would have to award the plaintiff with a one-third contingency

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arrangement $ 15,000 in order to award the attorney $ 5000. Therefore, if a portion of the punitive damages award goes to the plaintiff, that portion would have to be much greater ($ 15,000) than if a portion of the award goes only to the plaintiff's attorney (where $ 5000 would be a sufficient incentive for the attorney to argue for punitive damages). A similar analysis applies if plaintiffs' attorneys are paid a flat fee or if the fee is based on the attorneys' time expended. In any event, if the plaintiff is paid the fee rather than the plaintiff's attorney, the fee will have to be higher so that the plaintiff can receive a premium after paying a portion of the award to counsel. Without the premium, plaintiffs would have no incentive to have their attorneys argue **[*863]** for punitive damages. The State would therefore save money by paying only plaintiffs' attorneys, and plaintiffs would not receive a windfall.

2. *Decoupling*

A recent *Harvard Law Review* note proposes that courts "decouple" defendants' liability from plaintiffs' awards, thereby permitting courts to attack the problems of deterring defendants and of compensating plaintiffs separately. [113] Defendants would be required to pay the same amount of punitive damages as they would under the current system, but plaintiffs would recover only compensatory damages plus the costs of litigation, with the State retaining the balance. [114] Decoupling would thus eliminate the plaintiff's windfall and the problems associated with it, and yet would allow the courts to assess a sufficiently high penalty to deter defendants adequately. [115]

This approach eliminates the plaintiff's windfall, a result with which this Note agrees, but it also seems to eliminate plaintiffs' incentive to have their attorneys argue the case for punitive damages. Plaintiffs would have no incentive to sponsor litigation that has a net return of zero. If a plaintiff would recover compensatory damages without paying counsel to argue for punitive damages or spending the time and effort involved in litigation, then that plaintiff would have no incentive to have an attorney argue for punitive damages because the attorney would recover only litigation costs. If the State pays the same amount to the attorney directly, then the attorney would have an incentive to argue for punitive damages because the attorney would recover a fee for doing so. Therefore, the better solution is to pay plaintiffs' attorneys directly.

The foregoing critique, however, assumes that only the extra litigation costs involved in arguing for punitive damages would be awarded to the plaintiff under a decoupling scheme. If *all* litigation costs would be paid under the decoupling proposal, then plaintiffs *would* have a good incentive to have their attorneys argue for punitive damages. This solution would be consistent with the "Connecticut rule," which limits the plaintiff's punitive damages recovery to the costs of litigation. [116] Yet, **[*864]** unlike the Connecticut rule, defendants would be required to pay plaintiffs punitive damages in addition to litigation costs, with the state retaining the balance. This solution, however, would be contrary to the "American rule," which requires that the parties to a lawsuit pay their own litigation costs. [117] Perhaps awarding litigation costs only when punitive liability is proven is justifiable; perhaps the American rule makes less sense when defendants act outrageously. If full compensation is the concern, however, plaintiffs should be awarded litigation costs in all suits -- whether or not punitive liability is proven.

This Note avoids the debate over the American rule by proposing that plaintiffs' attorneys be paid directly only for their costs in arguing the case for punitive damages. [118] The effort involved is that of the attorney, and the plaintiff need not participate. Whether or not plaintiffs should recover litigation costs for the underlying suit when punitive liability is proven should be the subject of further discussion, [119] the outcome of which, however, does not affect this Note's proposal.

Decoupling would also result in the State recovering a smaller share of punitive damages

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THE FEDERALIST SOCIETY: CONFERENCE: CIVIL JUSTICE AND THE LITIGATION PROCESS: DO THE MERITS AND THE SEARCH FOR TRUTH MATTER ANYMORE?: CONFERENCE DIALOGUE: DAY ONE: LUNCHEON DEBATE: CIVIL JUSTICE AND THE PLAINTIFFS' BAR

The Honorable Edward R. Becker, Moderator, * Theodore Olson ** & Philip Corboy ***

* Judge, United States Court of Appeals for the Third Circuit.

** Attorney, Litigation Department of the Washington, D.C., office of Gibson, Dunn & Crutcher. Mr. Olson is also the President of the Washington, D.C., Chapter of the Lawyers Division of the Federalist Society and a member of the legal advisory committees for the National Legal Center for the Public Interest, the Washington Legal Foundation, and the Center for Individual Rights.

*** Founding partner of Corboy & Demetrio. Mr. Corboy has served as President of the Chicago Bar Association and the Illinois Trial Lawyers Association, as well as a member of the American Bar Association's House of Delegates and Chairman of its Section of Litigation.

SUMMARY:
... THE HONORABLE EDWARD BECKER: This program confronts the overarching question of whether the **tort** system is working and whether it serves the search for truth. ... In California, the top contribution rate was $ 225,000 per year. ... However, if you do not like the civil justice system that they are supporting, and the polls tell us that up as much as seventy-five to eighty-five percent of the people in this country want a change in the **tort** system, then you need to change the current scheme. ... "Why are you still a Democrat?" ... Its membership includes the Product Liability Coordinating Policy Committee, which has a budget of $ 3 million a year for the **tort reform** debate. ... It showed that the pro-**tort reform** political action committees contributed $ 22 million to the United States Senate. ... Corporate America is doing pretty well, despite this **tort** system. ... Now there is nothing wrong with wanting more money, but the simple fact of the matter is that there is nothing wrong with the **tort** system. ... The Republican legislators in the federal government want to federalize the **tort** system, but they do not want to make a federal question out of it. ... I have a chart that shows punitive damage awards affirmed on appeal over a seven-year period, 1987 to 1993, in Georgia, Mississippi, Tennessee and Alabama. ...

TEXT:

[*431] I. OPENING

THE HONORABLE EDWARD BECKER: This program confronts the overarching question of whether the **tort** system is working and whether it serves the search for truth. This Debate, entitled "Civil Justice and the Plaintiff's Bar," should help to crystalize these issues. It will be a real treat, I promise you, for we are fortunate to have as our presenters two of America's very best lawyers, Ted Olson and Phil Corboy.

Our first speaker will be Ted Olson, a partner in the Washington office of Gibson, Dunn & Crutcher, who is unquestionably one of the nation's premier appellate litigators. During the last term of the Supreme Court, Mr. Olson argued three cases, which must be some kind of a record for a lawyer in private practice. He argued the Stacy Koon case, n1 now the leading case on review of departures under the sentencing

I have a chart that shows punitive damage awards affirmed on appeal over a seven-year period, 1987 to 1993, in Georgia, Mississippi, Tennessee and Alabama. The total amount in that period was $ 7 million in Georgia, $ 3 million in Mississippi, $ 5 million in Tennessee, and $ 101 million in Alabama. n81 I suspect that if there is a possibility for a plaintiff to bring the lawsuit in any one of the four states, the plaintiff would be crazy not to bring the case in Alabama. This is probably why the *BMW* cases n82 were being brought in Alabama and not in the neighboring states.

Again, as far as the settlement figure, it is very difficult to get empirical data. I am sure that in Barbour County, Alabama, n83 where practically everybody has either been a punitive damage plaintiff or is related to someone who has been, and where fifty-two percent of the cases brought are by the same law firm, the immense jury awards affect a settlement in every single case.

[*451] MR. CORBOY: The potential for recovery stimulates a settlement somewhere in the range of ten or fifteen percent of the time if the lawyer knows what he is doing. If the lawyer does not know what he is doing, the case is going to go to trial, and they are going to lose or have a ninety percent chance of losing. Obviously, the settlement climate or the jury verdict climate has something to do with the amount of settlements in any jurisdiction.

FOOTNOTES:

n1 *See* Koon v. United States, 116 S. Ct. 2035 (1996).

n2 *See* United States v. Virginia, 116 S. Ct. 2264 (1996).

n3 *See* Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211 (1996).

n4 *See* Theodore B. Olson, *The Parasitic Destruction of America's Civil Justice System*, 47 SMU L. REV. 359 (1994).

n5 The Tylenol litigation commenced in 1982, after seven people in the Chicago area were killed after ingesting cyanide-laced Tylenol capsules. Johnson & Johnson settled the lawsuits for an undisclosed amount in May 1991, on the day that jury selection was set to begin for trial at Cook County Circuit Court in Illinois. Philip H. Corboy was co-counsel for the families of the victims. *See* Lourdes Lee Valeriano, *Johnson & Johnson Settles Suits Tied to Tylenol Deaths*, WALL ST. J., May 14, 1991, at B6; Andrew Blum & Randall Samborn, *Tylenol Settlement Revives Secrecy War*, NAT'L L.J., May 27, 1991, at 3.

n6 *See In re* Air Crash Disaster at Sioux City, 631 N.E.2d 1302 (Ill. App. Ct. 1994).

n7 *See, e.g.*, Philip H. Corboy, *Cross-examination: Walking the Line Between Proper Prejudice and Unethical Conduct*, 10 AM. J. TRIAL ADVOC. 1 (1986); Philip H. Corboy & Susan J. Schwartz, *Going the Distance: How to Perfect the Trial Record and Win on Appeal*, A.B.A. J., Apr. 1990, at 80; Philip Corboy, *No: It's Already Covered*, A.B.A. J., Jan. 1992, at 35; Philip H. Corboy, *The Not-So-Quiet Revolution: Rebuilding Barriers to Jury Trial in the Proposed* Restatement (Third) of **Torts**: *Products Liability*, 61 TENN. L. REV. 1043 (1994); Philip H. Corboy, *Vicarious Liability for Punitive Damages: The Effort to Constitutionalize* ***"Tort Reform,"*** 2 SETON HALL CONST. L.J. 5 (1991); Philip H. Corboy, ***"Reform"*** *and Constitutional Change*, LITIG., Fall 1993, at 22.

n8 *See* Leslie Spencer, *America's Third Political Party?*, FORBES, Oct. 24, 1994, at 60.

n9 *See id.*

n10 *See id.*

n11 *See id.*

n12 *See* AMERICAN **TORT REFORM** ASS'N, CAMPAIGN CONTRIBUTIONS TO CONGRESSIONAL CANDIDATES BY PLAINTIFFS' LAWYER INDUSTRY: 1989-1994, at 2 (1995) [hereinafter 1995 ATRA REPORT] (explaining that plaintiffs' lawyers contributed $ 30,939,319 for federal races while the five largest labor unions (AFSCME, Teamsters, United Auto Workers, National Education Association, AFL-CIO) in total contributed $ 29,727,165).

n13 *See* Spencer, *supra* note 8.

n14 *See* 1995 ATRA REPORT, *supra* note 12, at 5 (listing all Democrats with the exception of Republican Sen. Charles Tanksley of Georgia).

n15 *See* AMERICAN **TORT REFORM** ASS'N, "AMERICA'S THIRD POLITICAL PARTY;" A STUDY OF POLITICAL CONTRIBUTIONS BY THE PLAINTIFF'S LAWYER INDUSTRY 10 (1994) (listing the average contribution rate of $ 147,763 for a five year period).

n16 *See id.* at 12.

n17 *See id.*

n18 *See id.* at 11 (listing the average contribution rate of $ 228,799 for a five year period).

n19 *See id.* at 13.

n20 *See id.*

n21 *See* Ruth Marcus, *Study Traces Sources of Record Fund-Raising by Clinton and Dole*, WASH. POST, Aug. 23, 1996, at A9.

n22 *See id.*

n23 Private Securities Litigation **Reform** Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (to be codified in scattered sections of 15 U.S.C.).

n24 *See id.*; *see also* Norman B. Arnoff, *The Securities Litigation **Reform** Act of 1995*, N.Y. L.J., Oct. 8, 1996, at 3.

n25 *See* Common Sense Legal Standards **Reform** Act of 1995, H.R. 956, 104th Cong. (1995); *see also* 142 CONG. REC. H4425 (daily ed. May 6, 1996) (veto message from President Clinton).

n26 *See* Brigid McMenamin, *The Best-Paid Lawyers*, FORBES, Nov. 6, 1995, at 145.

n27 *See id.* at 168.

n28 *See id.* at 162, 166 (listing Philip Corboy at number 10 and Thomas Demetrio at number 17).

n29 *See* McMenamin, *supra* note 26, at 145; Spencer, *supra* note 8, at 60.

n30 *See* McMenamin, *supra* note 26, at 165.

n31 *See id.*

n32 *See McDonald's Settles Lawsuit over Burn from Coffee*, WALL ST. J., Dec. 2, 1994, at B6.

n33 *See* Parker v. Domino's Pizza, Inc., 629 So. 2d. 1026 (Fla. Dist. Ct. App. 1993).

n34 *See* BMW of N. Am., Inc., v. Gore, 116 S. Ct. 1589 (1996).

n35 *See* JAMES KAKALIK & NICHOLAS PACE, COSTS AND COMPENSATION PAID IN **TORT** LITIGATION vii (1986) (noting that of the $ 29 to $ 36 billion in total expenditures nationwide for **tort** litigation terminated in state and federal courts of general jurisdiction in 1985, an estimated $ 16 to $ 19 billion was spent for various costs of the **tort** litigation system, not including the net compensation paid to plaintiffs).

n36 *See id.* at x fig.s.1.

n37 *See* Martha Middleton, *A Changing Landscape*, A.B.A. J., Aug. 1995, at 60 (quoting a representative of the ABA who called any federal litigation curtailing product liability "an unwise and unnecessary intrusion of massive proportions").

n38 *See* Leslie Spencer, *The **Tort** Tax*, FORBES, Feb. 17, 1992, at 40, 42.

n39 *See id.* at 40-42 (discussing the direct and indirect costs of the **tort** system).

n40 *See id.* at 40.

n41 *See Dr. Gore and Mr. Slick*, WALL ST. J., Oct. 11, 1995, at A14 (noting punitive damages of $ 409,385).

n42 *See id.* (noting punitive damages of $ 90,366,527 for the years 1989-93).

n43 *See* Brief *Amicus Curiae* in Support of Petitioner, BMW of N. Am., Inc., v. Gore, 116 S. Ct. 1589 (1996) (No. 94-896) (citing S. TURNER, WASHINGTON LEGAL FOUND., PUNITIVE DAMAGES EXPLOSION: FACT OR FICTION B-7 (1992)).

n44 *See id.*

n45 *See* George L. Priest, *Punitive Damages* ***Reform:*** *The Case of Alabama*, 56 LA. L. REV. 825, 828 (1996).

n46 *See id.* at 829.

n47 *See* Spencer Abraham & Mitch McConnell, *The Next Steps in Real* ***Tort Reform***, WASH. TIMES, May 3, 1995, at A17.

n48 *See Lawyer on the Front Lines in Battle over* ***Tort Reform***, USA TODAY, Dec. 12, 1995, at 2A.

n49 *See* Lyle Denniston, *In Attacking Lawyers, Bush and Quayle Enter Culture War*, BALTIMORE SUN, Sept. 6, 1992, at 51 (describing the Manhattan Institution for Policy Research as a vocal critic of personal injury lawsuits).

n50 For Peter Huber's participation in The Federalist Society Conference, see Peter Huber, *Whose Gore Is Stalked?*, 41 N.Y.L. SCH. L. REV. 419 (1997).

n51 *See* Denniston, *supra* note 49 (describing Mr. Huber as a critic of challenges to the **tort** system); *see also* PETER HUBER, GALLILEO'S REVENGE, JUNK SCIENCE IN THE COURTROOM (1991); PETER HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988); Peter Huber, *A Preemptive Strike Against the* ***Tort*** *Bar*, FORBES, July 6, 1992, at 104; Peter Huber, *Malpractice Law-A Defective Product*, FORBES, Apr. 16, 1990, at 154.

n52 *See* Glenn Collins, *A Tobacco Case's Legal Buccaneers*, N.Y. TIMES, Mar. 6, 1995, at D1; Marcia Coyle, *New Jury Verdict Role for Courts*, NAT'L L.J., July 8, 1996, at A22; Anthony Ramirez, *Consumer Crusader Feels a Chill in Washington*, N.Y. TIMES., Dec. 31, 1995, § 3, at 10.

n53 *See Accounts Change a Rule*, N.Y. TIMES, Jan. 16, 1992, at D6 (noting an AICPA rule change which "could make it harder to sue accountants for wrongdoing").

n54 *See* H.B. 20, P.A. 89-7, 85th Gen. Assembly, 1995 Ill. Legis. Serv. 224 (West). The Civil Justice **Reform** Amendments, which, in part, limit punitive damages to three times economic damages, create $ 500,000 caps on noneconomic damages and abolish joint liability when one or more defendants cannot pay a judgment. *See id.*

n55 *See* 1995 ATRA REPORT, *supra* note 12, at 1 (noting that "between January, 1989 and December, 1994, individual plaintiff's lawyer contributions reviewed to all Congressional candidates totaled $ 18,066,433 . . . This figure, combined with ATLA PAC receipts of $ 12,872,886 over the same period . . . comes to $ 30,939,319 in total contributions from plaintiff's lawyers for Federal races.").

n56 *See id.* at 4 (listing the "Top 50 Plaintiff's Lawyer Contributions," including $ 199,600 from the law firm of Corboy & Demetrio of Illinois).

n57 *See Federal Election Commission's Individual Contributions Report*, Aug. 2, 1996, at 1, *available in* LEXIS, Cmpgn Library, Memfin File. For the 1995-96 election cycle, as of Aug. 2, 1996, Shuster's campaign received $ 451,876 from 664 listed individuals, of which approximately 46%, or approximately 304 individuals, were from outside Shuster's home state of Pennsylvania. *See id.* The total includes some individuals who are listed twice, including two $ 1000 contributions from Theodore B. Olson. *See id.*

n58 *See id.*

n59 *See* Douglas Martin, *That Upside-Down High Will Be Only a Memory; Monkey Bars Fall to Safety*

Pressures, N.Y. TIMES, Apr. 11, 1996, at B1.

n60 *See* Fred Musante, *Liability Costs Curb Recreation*, N.Y. TIMES, Sept. 22, 1996, § 13 (Conn.), at 1.

n61 *See* Tamar Lewin, *Fears, Suits and Regulations Stall Contraceptive Advances*, N.Y. TIMES, Dec. 27, 1995, at A1.

n62 *See* Abraham & McConnell, *supra* note 47.

n63 *See generally* Joel E. Smith, Annotation, *Recovery of Exemplary or Punitive Damages From Municipal Corporation*, 1 A.L.R. 448 (4th ed. 1996) (discussing treatment in various jurisdictions and noting generally that "while courts have not favored the recovery of punitive damages against a municipal corporation" the presence of a statute expressly authorizing or denying recovery is a controlling factor).

n64 *See* Edward Felsenthal, *Punitive Awards Are Called Modest, Rare*, WALL ST. J., June 17, 1996, at B4.

n65 *See id.*

n66 *See* Center for Responsive Politics, Press Release, Liability Amendments Benefit Health Care Industries 1 (May 2, 1995) (on file with the *New York Law School Law Review*) (noting that over five years ATLA contributed $ 930,750 to Senate candidates, while interests that "would gain if amendments to the products liability bill" became law, including health care professions, institutions, service providers and pharmaceutical and medical device manufacturers contributed more than $ 11,540,688 over the same period).

n67 *See 1995 Calendar Year Summary and Index of Malpractice Trials*, COOK COUNTY JURY VERDICT REP. (1996) (on file with the *New York Law School Law Review*) (noting a defendant winning percentage of 67.3% for physicians and hospitals).

n68 *See* Diana Griego Erwin, *Life is Not Without Risks*, L.A. DAILY J., Aug. 29, 1994, at 6.

n69 *See* Robert A. Clifford, *Justice System Corrects its Outrages*, CHI. TRIB., Sept. 29, 1994, at 24; *McDonald's Makes Out-of-Court Settlement in Hot-Coffee Case*, CHI. TRIB., Dec. 2, 1994, at B1.

n70 *See* Erwin, *supra* note 68, at 6.

n71 *See* Clifford, *supra* note 69, at 24.

n72 Mr. Barry Nace is a well known plaintiffs' attorney and former president of the American Trial Lawyers Association of America. *See* Barry Nace, *Science and Civil Justice: A Recent Oxymoron*, 41 N.Y.L. SCH. L. REV. 393 (1997)

n73 *See* Neil A. Lewis, *House G.O.P. Quits* ***Tort Reform*** *Plan*, N.Y. TIMES, Mar. 7, 1996, at A1 (calling the plan "a sweeping overhaul of the nation's civil litigation system" and noting that it would, for the first time, set nationwide standards "in both state and Federal courts").

n74 *See Quotes*, A.B.A. J., Dec. 1, 1988, at 26. West Virginia Supreme Court of Appeals Justice Richard Neely was quoted: "As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families and their friends will re-elect me." *Id.*

n75 *See* BMW of N. Am., Inc., v. Gore, 116 S. Ct. 1589 (1996).

n76 *See id.* at 1593.

n77 *See* Jack Marshall, *The Lawyer's Role in the Structured Settlement Era: Duties, Rules, and Perils*, 43 FEDLAW 10 (1996) (noting that "attorneys deal in settlements; 95 percent of all cases are settled").

n78 *See* FLA. STAT. ANN. § 57.105 (West 1996) (providing for an award of attorney fees only when "the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party"); *see also* Phillip H. Snaith, *Attorney's Fees Under Florida Statute 57.105: Caselaw Development*, 10 NOVA L. REV. 156, 173 (1985) (noting that the primary purpose for the statute was to deter unfounded

litigation; however, "since it has itself presented such fertile ground for litigation, it has not yet achieved this end").

n79 *See supra* notes 41-42 and accompanying text.

n80 *See* ALA. CODE § 6-11-20 (1996) (limiting punitive damages in civil cases to wrongful death **tort** actions).

n81 *See* Life Ins. Co. of Georgia v. Johnson, 684 So. 2d 685, 714 app. A (Ala. 1996).

n82 *See* BMW of N. Am., Inc., v. Gore, 116 S. Ct. 1589 (1996).

n83 *See supra* notes 45-46 and accompanying text.

guidelines; the VMI case, n2 the male-only admissions policy case; and the Gasperini case, n3 dealing with appellate review of jury verdicts for excessiveness in diversity cases. These three cases represent only the tip of the iceberg of Mr. Olson's appellate practice. His vita contains a dazzling list of important cases, before the Supreme Court and other appellate courts, of incredible breadth.

Mr. Olson is a graduate of the law school of Boalt Hall, Berkeley, California. He served from 1981 to 1984 as the Assistant Attorney General in charge of the Office of Legal Counsel, which made him the [*432] executive branch's principal legal adviser, with a major role in formulating the branch's position on constitutional issues.

Ted Olson has also been a leader in the movement for **tort reform.** The title of his essay in the January 1994 issue of the *SMU Law Review* was, "The Parasitic Destruction of America's Civil Justice System." n4

I think it needs words like that to bring out the noted "shrinking violet," the very shy Chicago lawyer who is our other luncheon speaker, Phil Corboy. Mr. Corboy is one of America's most successful, most colorful, and if you represent an insurance company or defendant, most feared plaintiffs' trial lawyers.

Mr. Corboy is probably best known to the public for his role in representing plaintiffs in the Tylenol n5 and the Iowa DC-10 crash cases, n6 but his record of jury verdicts and out-of-court settlements is also dazzling. He has been called by a leader of the Chicago bar, the ultimate personal injury lawyer and the "best of the best" in his field. We really have two of the "best of the best" in this debate today.

Mr. Corboy is a graduate of Loyola Law School, a former head of the Litigation Section of the American Bar Association (ABA), and a former president of the Chicago Bar Association and the Illinois Trial Lawyers Association. He has written countless articles in his field n7 and is a leader in the movement opposing **tort reform.**

[*433] II. MAIN ARGUMENTS

THEODORE OLSON: We are going to talk today about the participation by lawyers, particularly plaintiffs' trial lawyers, in the political process. I would like to give you some numbers. One study, based on Federal Election Commission and state filings records, of trial lawyer political contributions for candidates for state and local offices in Texas, Alabama, and California -- three hot-bed states for the **tort** movement -- showed $ 17.3 million in contributions by trial lawyers to state and local candidates. n8 Ninety-five percent of the fund went to Democratic candidates. n9 The study also estimates that $ 60 million in contributions were made nationwide by plaintiffs' trial lawyers. n10 Compare that with $ 5 million from the AFL-CIO. n11 In fact, the plaintiffs' trial bar contributed to political candidates more than the five largest labor unions combined. n12 *Forbes* magazine referred to the plaintiffs' bar as "America's third political party." n13

The top ten federal Senate and House candidate recipients of trial lawyer money were all Democrats. n14 Of the top fifteen contributing lawyers to political candidates for Alabama state offices -- and bear in mind that in Alabama judges are political candidates -- each contributed on average $ 30,000 per year. n15 That is a lot of money per year. Within those top fifteen contributors, for a five-year period in Alabama, the top [*434] lawyer contributed $ 322,000 per year, n16 the fifteenth highest contributor gave $ 36,000. n17

In Texas, among the top fifteen contributors, the average lawyer contribution to state candidates was $ 46,000 per year. n18 In California, the top contribution rate was $ 225,000 per year. n19 These are just for the state candidates. The leader was William Lerach, who that year made $ 800,000 in campaign contributions. n20 As I said, in many of these states, the recipients of those political contributions are judges.

At the presidential level, the *Washington Post* reported earlier this year that lawyers had made more contributions to President Clinton's campaign fund than retired persons, business services, and the real estate industry combined. n21 At that time, the lawyers had contributed forty percent of the contributions received by the top ten contributing groups in the re-election campaign for President Clinton. n22

Now, I hasten to say that all of those contributions were not necessarily from plaintiffs' trial lawyers, because the collectors of those statistics did not differentiate between law firms on the defense side and law firms on the plaintiffs' side; but, obviously, lawyers have a large role in contributing to the political process.

In 1992, trial lawyers put out letters and fund-raising materials stating that if you contribute to Clinton's

campaign fund, there will be no **tort reform** at the federal level, and if a law is passed by the House and Senate, you can be assured that if you contribute to President Clinton, he will veto such legislation. President Clinton delivered on that promise this year and last year when he vetoed the Private Securities Litigation **Reform** Act, n23 which was recommended and supported by the Chairman of his [*435] own party. However, the bill passed over his veto. n24 President Clinton also vetoed the product liability bill, n25 which was not passed over his veto.

Some trial lawyer money, of course, does go to Republican candidates. That is why it was impossible to get cloture, and it was impossible to override the veto of the product liability bill.

Trial lawyers are the largest contributors to political campaigns in this country, and they usually have one objective in mind. On the other hand, other contributors to the campaign process commonly have multiple objectives. For example, corporate money may be interested in bills that have to do with the labor laws, environmental laws, or export controls and things of that nature. A corporation or corporate executive who participates in the political process has a wealth of issues on the table in which they are interested and they may come back again and again for different things; therefore, their influence is diluted. However, when trial lawyers go to a member of the Senate or the House of Representatives, that trial lawyer is able to say, "I have never asked you for anything else, just vote against this bill, don't let the **tort reform** laws be changed at the national level." That is a very, very potent message when you talk about this amount of money.

Now there is nothing inherently wrong of course with making campaign contributions; it is legal. Everybody does it to promote their own self-interest. The law allows it. Why should not plaintiffs' lawyers invest a portion of the income they derive from the system to keep the goose laying the golden eggs? After all, that system has been very good to the trial lawyers.

Forbes now publishes a list of the nation's twenty-five top earning trial lawyers. In 1994, first place was occupied by Texas lawyer Joseph Jamail, whose income for 1994 was listed at $ 90 million. n26 Michael Jordan, eat your heart out. The person who was twenty-fifth on the list of trial lawyers came in at $ 4 million. n27 Mr. Corboy and one of his partners were on that list, but I will not get into those numbers; he can if he wants to. n28

I compared the top twenty-five lawyers on the income list with the top fifty lawyers on this contribution list. You will be surprised by the results. [*436] The same people making the most amount of money are making the most contributions. n29 Mr. Lerach, for example, was number thirteen in the top twenty-five earners at $ 10 million, n30 and he also gave $ 800,000 to political candidates who oppose **tort reform.** n31 That is a pretty good return on your investment.

Now there is nothing wrong with these lawyers taking advantage of a system that promotes this sort of behavior. We have evolved a civil justice system in this country that puts enormous incentives out there for people to sue. Mr. Corboy and his colleagues would be derelict in their duty to their clients, and themselves (and their college age children), if they did not participate in this process. As long as Congress, state legislatures, and the courts encourage redistribution of wealth through the **tort** system and encourage juries to make legislative judgments by sending messages to distant corporate treasuries regarding how hot to brew coffee, n32 how fast to deliver pizza, n33 and how to paint a BMW, n34 then these cases are going to be brought. If the juries continue to bring in judgments based upon an out-of-town corporation's net worth, the punitive damages and the judgments are going to remain big, and those will be the incentives.

Statistics show that less than fifty percent of the **tort** system goes to benefit the person who may have been victimized. n35 The lion's share goes to the plaintiffs' lawyers. n36 However, to be completely fair, the plaintiffs' lawyers are not the only ones profiting from this system; there are other beneficiaries. We have a cottage industry of professional expert witnesses in this country -- I guess "mansion industry" is perhaps a better phrase -- that would not exist if we did not have this **tort** system. There are also law firms that defend these cases. My colleagues often tell me to stop attempting to **reform** the civil justice system because we are *all* [*437] making a great deal of money. Most of the lawyers are benefitting from this system. That is why, in my judgment, the American Bar Association is so opposed to virtually any kind of meaningful **tort reform.** n37 And let us not forget the insurance companies, the in-house lawyers, and so forth.

I think of it as tithing. It is not contribution to get into heaven, but a contribution to stay there. So you have to ask yourself, is it fair to criticize trial lawyers for lawfully supporting a system that is good for them and good

for the country? Perhaps not, but criticism is warranted if the system is, indeed, bad for the country.

Let me just say a few words about the system. Our **tort** system, according to most estimates, costs our economy five times what it costs Japan, Germany, or the United Kingdom. n38 The **tort** tax costs this country an estimated $ 300 billion, although some people say $ 100 billion, depending upon what you count. n39 It is difficult to get exact numbers, but we know the amount is huge. One can compare the numbers to the Gross National Product (GNP) and see that, over the past twenty or thirty years, the **tort** tax has grown at a much faster rate than the GNP. n40 For example, punitive damages in Alabama from 1974 to 1978, which were affirmed on appeal, were over $ 400,000. n41 Jump ahead fifteen years, and in a comparable four-year interval, the figure jumps to more than $ 90 million. n42 Moreover, in Texas, between 1968 and 1971, business punitive damage verdicts affirmed on appeal were $ 85,000. n43 Twenty years later, that figure jumped to $ 127 million. n44

I could go on about statistics, but let me give you a few more specific examples. Take a look at Barbour County, Alabama. Almost eighty percent of the **tort** cases filed in that county seek punitive damages. n45 Moreover, in Alabama as a whole, punitive damages affirmed by the [*438] Supreme Court of Alabama from 1987 through the first half of 1994 equalled $ 53.2 million -- thirteen dollars per capita. n46

My submission is not that there is anything wrong with the trial bar participating in the political process. Our system permits it to occur, and if you like this system, then nothing should be done about it. However, if you do not like the civil justice system that they are supporting, and the polls tell us that up as much as seventy-five to eighty-five percent of the people in this country want a change in the **tort** system, n47 then you need to change the current scheme. But, as long as the legislators are beholden to those people who ask that one request, and who may have been the largest contributor to their election, there will be no such change.

PHILIP CORBOY: Judge Becker missed something: he did not tell you that I am a Democrat. That might be surprising since I come from Cook County, Illinois. I am of that type of background where you are born a Democrat, and even if you become wealthy enough to become a Republican, you stay a Democrat.

There are people in our town who really believe that the following discussion took place between college roommates who met each other long after they got out of college. The more successful of the two, a Republican, said to his pal, "Are you still a Democrat?"

"Of course I'm a Democrat," he replied.

"Why are you still a Democrat?"

He said, "Well, my father was a Democrat, my grandfather was a Democrat, and my great-grandfather was a Democrat, and that's why I am a Democrat."

"Well, that sounds silly. If your father was a horse thief, grandfather was a horse thief, and your great-grandfather was a horse thief, would you be a horse thief?"

He said, "Of course not, I'd be a Republican."

So whenever I get into a discussion like this, I love it if the other guy tells me that I am greedy, an ambulance chaser, and a tassle-toed squeezer. I have been called all of those. I started law school fifty years ago this month, and I tried my first lawsuit on November 11, 1950. I remember that because it was Armistice Day, and I did not have to go to work, so I had another day to get ready for the trial.

I have been trying lawsuits ever since. I represent people who are quadriplegic or blind, whose spouses are dead, whose fathers are dead, and whose mothers are dead. Some of them are in vegetative states. Every one of those people has recognized the contribution that I have [*439] supplied to their wherewithal. I assure you, if there is anybody in this room who loses a wife, loses a husband, loses a leg, loses an eye, or loses a life, they are going to call me, or somebody like me, whether they are a Republican or Democrat.

I have been antagonistic to the changes sought for the simple reason that it would take away people's rights. The term **"tort reform"** is a euphemism for **tort** "deform"; it is a euphemism for "pro-defendant system." There is not one area in the anticipated **tort** legislation -- national, local, or state -- which in any way gives rights to people. They all take rights away from people; they all diminish the right to recover for pain, suffering, disability, disfigurement, et cetera.

I got a telephone message as I was leaving the office the other day. It was from a man named Mr. Nash. The call was about a *USA Today* article he received in the mail. n48 Here is what Mr. Nash said, "So pleased to hear that Mr. Corboy is continuing the fight against caps in **tort reform.** I am a former client who was badly burned and lost my wife. If it weren't for Mr. Corboy, I don't know how I would have raised my kids. Thank you." Believe me, I do not remember Mr. Nash.

It is difficult arguing with Mr. Olson. He is a decent man. It is difficult because he is courteous; it is difficult because he is gentle. But, the simple fact of the matter is he is wrong.

If you have a case, and I learned this from the first case I tried, that is tough on the law, you talk about the facts. If you have a case that is tough on the facts, you talk about the law. If you have a case that is tough on the law and the facts, you talk about the other lawyer. Now, I do not know why this is such an issue when it is conceded that lawyers of all stripes, of all branches of our system, have contributed to the present Administration. I assume that they had a lot of reasons to do it. It might be a gender thing or an age thing. This is an age where there are an awful lot of people shy of fifty who would like to see somebody shy of fifty in the presidential office. But, whatever it is, the people that are interested in **tort reform** are not Mom and Pop school-people. There are several groups labeled "coalitions" that have **tort** reformers as their primary members. One of them is the Manhattan Institution, n49 in which Peter Huber, n50 who has a tremendous ability to persuade, is very [*440] active. n51 Its membership includes the Product Liability Coordinating Policy Committee, which has a budget of $ 3 million a year for the **tort reform** debate. It has the civil justice **reform** group and membership of forty general counsel from the nation's largest corporations. One of its greatest spokesmen is our speaker today, Mr. Olson. I am not so sure he appreciates it, but Mr. Olson is defined by many articles and media people as a lobbyist for the anti-**tort** people. n52 There is also the American Institute of Certified Public Accountants, who are in the anti-**tort** business, but I do not know why. n53

Most lobbyists that I have met are very honest, very competent, and very capable. Their job is to raise money for the people they represent and to persuade legislators and sometimes members of the executive branch. What I am suggesting is that these people represent Corporate America, and Corporate America is organized money, and there is nothing wrong with money being organized. There is nothing wrong with people, whose pocketbooks might be affected, being anti-**tort.** However, that is because they have never been hurt; as soon as they are hurt, they hire people like me.

I have represented everybody in this world that you can think of, from bank presidents to prostitutes, Catholic priests to Rabbis, executives to state senators -- you name it. I have represented everyone, college professors, law professors, and doctors. However, I recently fired a client -- a Republican state senator. He came to me when he was hurt. His case, a medical malpractice case, was against the medical school where I attended law school, Loyola. I represented him because I believed he was the victim of a **tort.**

On March 9, 1995, he and all of the other Republicans in our state legislature passed -- had the Governor sign -- the most draconian **tort reform** [*441] bill in the country. n54 Name any diminution of plaintiff's rights, and we have got it: a $ 500,000 cap on compensatory damages, a $ 250,000 cap on punitive damages, joint civil liability gone, no product liability suits can be filed without an expert's expert opinion that the product is faulty, and a twelve-year statute repose. I hope that a year from now we can come back and tell you that the law has been found unconstitutional. I am certainly not sitting back and waiting; we are fighting it. So far, we have won in three trial courts, and it will probably go before the supreme court of our state very soon. Hopefully, then, it will become a federal problem again; in the meantime, we are laboring under it.

This state senator also voted for **tort reform** in a way that was only prospective. But, when he went for the bill, he did not make it at all retroactive. He made sure he was protected and then took away from the populace, from the citizenry, the opportunity to seek compensatory damages. Future damages are limited to $ 500,000, but he stands to receive $ 2 to $ 2.5 million if he wins his lawsuit.

The American **Tort Reform** Association (ATRA) showed that trial lawyers gave $ 30 million in contributions in a five year period. n55 According to ATRA, my firm gave $ 200,000. Although that sounds like a lot of money, it is over a five year period. n56 We have thirty lawyers in our firm, so that amounts to $ 500 per person, or $ 125 per year per attorney. I cannot really say that this is going to sway the President of the United States or even a state legislator.

Therefore, you are right. The ability and the responsibility of those of us who believe that you are entitled to contribute, not to personal coffers but to campaign funds, is certainly in direct relationship to how we feel. There is a spokeswoman for Philip Morris who said that we give to people who think the way we think. If this were not true, I certainly would not have given any money at all to any legislator in the country. I have even contributed to people I do not know, most of them Democrats. However, two of them were not Democrats; one was a man named John [*442] Fox of Pennsylvania, and the other was Henry Hyde, Chairman of the Judiciary Committee.

In any event, there is a fellow named Bud Shuster of the Ninth Congressional District of Pennsylvania, who in the last election received contributions totalling $ 109,250 from 205 people. n57 It does not sound like much, only $ 532 per person, but ninety-three of those people came from out of state. This is a man that is legislating in the state of Pennsylvania. One of the people that contributed $ 2000 to his campaign is a fellow by the name of Ted Olson, a lawyer from Washington, D.C. n58 I do not know how many Ted Olsons there are in Washington, D.C., but Bud Shuster is an ardent **tort** reformer who has been a legislator for twenty-four years. He is on the Infrastructure and Transportation Committee, yet he acquires money from all over the country from people who are interested in his vote for **tort reform.**

Now, I do not suggest for one moment that there is anything wrong with people supplying money to legislators who think the way they do. It is an absolute cover-up. With luck, I will continue to contribute money to Democrats for a long time.

III. REBUTTALS

MR. OLSON: Okay, it was me, but I did not contribute to Bud Shuster because of the **tort** issue. I did so because he is a good friend of mine.

We are, however, in agreement on one thing, that there is nothing wrong with making political contributions to people who support the kind of causes that you support. I am not advocating a change that would prevent people from contributing to their political candidates.

I merely think that the American people need to know how much power is being exercised by a relatively small number of people to preserve the status quo, because contrary to what Mr. Corboy says, it is not just big corporations that support **tort reform.** In fact, big corporations, although they try to get involved, are very ineffective at contributing to political candidates because the officers of big corporations have many legislative interests. Their interests are spread across the [*443] board from environmental issues, to labor issues, to taxes. The civil justice system is just one small thing.

It is very difficult to raise any money from corporate executives because they are not in the same income bracket as plaintiffs' lawyers; they do not get their names listed in *Forbes* unless they are CEOs. The important thing is that people across the country -- and I have seen what I regard as legitimate polls that say people that are liberal, conservative, old, young, Democrats, Republicans, labor, management, stockholders and so forth -- are disturbed by the civil justice system.

I would hire Mr. Corboy too if I was injured. I would hire Mr. Corboy to see how much I could get in the way of punitive damages if I spilled a cup of coffee on myself, too. Why not? That is like a ticket to the lottery.

Mr. Corboy operates from the presumption that this legislation is taking away people's rights because it affects their ability to get large punitive damages or one hundred percent liability from someone who is one percent at fault, and that the system does not have any other victims. The defendants in those cases are people, they have rights. The stockholders have rights; they innocently invest in companies and wind up paying the punitive damages. The municipalities that get sued for punitive damages, and the taxpayers who pay those punitive damage awards and excessive verdicts, have rights.

There is some room for improvement in the system to protect all of the people in this country. If you focus on one victim in one case and say he or she should get $ 70 million in order to punish the stockholders of that company, who may be school teachers or retired persons who simply invested in that corporation, it does not make any sense to me. My point here is not to criticize the trial lawyers; my point is to make sure that the people of this country know what the facts are, so that they can exercise their judgment if they believe the **tort** system in this country does not work.

The other problem not mentioned by Mr. Corboy is that our **tort** system is causing it to become difficult to get certain types of products. You do not see diving boards in municipal swimming pools anymore. It is trivial, but I think it is symptomatic, that in New York they have taken all of the jungle gyms out of the playgrounds because of **tort** claims. n59 Connecticut municipalities are closing parks and bike trails because of the liability crisis. n60 There are products that are used for implants, heart valves, and other uses that are becoming less and less available because [*444] of the **tort** crisis. One *New York Times* headline, in December 1995, reflected the fact that most of the money for research in new birth control methods is tied up because of the litigation frenzy associated with any kind of birth control. n61

Mr. Corboy immediately segued from that into an attack upon the people who oppose the **tort** system as it presently exists, instead of dealing with the fact that many people, irrespective of their point of view, believe that the **tort** system should be changed. The American people -- something like eighty-three percent according to a recent poll -- believe that our current **tort** system has major problems and needs serious improvement. n62 That is clearly a system that needs correction, and if the people of this country know who has the biggest stake in keeping it the way it is, it will help them vote or put pressure on their legislators to change it.

MR. CORBOY: I am going to ask a rhetorical question. I hope I am right. I do not know of any municipality in this country that can be sued for punitive damages. Think about that and answer it yourself. I do not know any state that can be sued for punitive damages. They are immune. n63

Let us talk about the suggestion that punitive damages are a terrible blight. Take a look at the law article in the *Wall Street Journal*, which is not exactly a plaintiff's house organ, in which they found that punitive damage awards to be modest and very rare. n64 Where did the study come from? It was from the National Center for State Courts at Cornell University. n65 They came to the conclusion that punitive damages are a very rare thing. The American **Tort Reform** Association and its siblings and offspring, the Manhattan Institute, make the studies.

Right now there is a young fellow from my firm who is running for the state legislature. The job pays $ 45,000 a year, so I do not know how he is going to live. However, the Republican Party took a poll and bragged afterwards that the people in that jurisdiction believed that a Republican should be elected. The poll question was as follows: "Would [*445] you vote for a clean-cut, nice young man whose father was a policeman who just died and who has contributed much to the community, or would you vote for an ambulance-chasing lawyer who works for one of the largest law firms in Chicago, and who does nothing but take a third of the clients' monies?"

Studies prove exactly what you want them to prove. Maybe the statistic that I am about to tell you is wrong too, but it came from the Center for Responsive Politics. It showed that the pro-**tort reform** political action committees contributed $ 22 million to the United States Senate. The American Trial Lawyers Association of America contributed $ 930,000. n66

Trial lawyers do a pretty good job for corporate America. They do a wonderful job when they are representing organized money. For example, they convinced juries in sixty-five percent of the malpractice cases in Illinois that patients should not recover from doctors. n67

Corporate America has a pretty good thing, and it is suggesting that jurors do not know what they are doing, judges do not know what they are doing, appellate court judges do not know what they are doing, supreme court judges do not know what they are doing -- everyone is wrong. Everybody is wrong except Corporate America. I looked at the stock market this morning, which is pretty high. Corporate America is doing pretty well, despite this **tort** system.

What is it that is in need of change? This need comes from Corporate America's desire for more money. They want more money for their shareholders and, therefore, for their executives. Now there is nothing wrong with wanting more money, but the simple fact of the matter is that there is nothing wrong with the **tort** system.

Every once in awhile, there is an aberrational result. Take the McDonald's case for example. n68 It is a perfect example of how the system works. The woman was found twenty percent negligent, so they [*446] cut her verdict twenty percent immediately. n69 That is a pretty good system. Why? Because she had a cup of coffee between her legs, and she opened the cup of coffee and the scalding coffee burned her. n70 I

wonder if you would suggest that third degree burns over a seventy-nine year old woman's thighs was a lottery. I do not know how much you would pay for that, but I certainly would not pay one dollar, $ 250,000, $ 500,000 or $ 2 million. The court cut the punitive damages to $ 480,000 and then Corporate America settled the case. n71 Now, they did not settle the case because they thought they were going to win on appeal. Additionally, the suit did not put McDonald's out of business; they have served another billion and a half hamburgers since then. So I respectfully suggest there is nothing wrong with the system that a little bit more understanding could not help.

I assure you again that if somebody in this room is hurt, they will go to Barry Nace, n72 and Barry Nace would do exactly what I would do for you: try to get you the most money that you are entitled to. When I say, "most money," that is a pejorative term. What I mean is to get what you are entitled to for your injuries, no more and no less, without the interference of the federal government telling you what you should do in your state.

IV. AUDIENCE DISCUSSION

JUDGE BECKER: I told you that you were in for a treat, and I was right. We will open the floor for questions to either or both of our debaters.

QUESTION: Should these questions not be properly left to the state legislatures rather than the federal government?

MR. CORBOY: Well, I am a Madisonian Federalist. I believe we should have a federal government, but one that keeps its hands off of the states' rights. Yes, I come from a state right now where, as soon as the Republican legislature was taken away by the electorate and the Chief Executive Office of our state was given to the Republicans, a **tort** system [*447] was implemented that is going to change the mores of our community. They believe that the laws of Illinois, even though they are draconian, are what the people in Illinois want. I do not have any idea what the laws in Alabama are, although I would like to have some cases down there. I have no idea what the laws of Texas are, although I just had a case in Texas. The **tort** system is indigenous to the state in which the **tort** either takes place or, because of venue laws, where a defendant can be sued.

The Republican legislators in the federal government want to federalize the **tort** system, but they do not want to make a federal question out of it. n73 You know, if you are not given the right to go to the federal court, cases will stay in the state courts but they will be saddled with federal law. Now, I do not know what the federal government's purpose is in having a federalization and still have the litigation remain in the state.

MR. OLSON: One good thing that has come from this debate over federal legislation to correct the excesses of certain aspects of the **tort** system is that we have discovered a whole new class of people that were never historically Federalists but all of a sudden have found states rights. The plaintiffs' trial bar is now a lot more interested in states rights. I think that it is important to understand, for example, that out of state corporations are regularly being punished in Alabama for doing business there. The former Chief Justice of the West Virginia Supreme Court put it well when he said, "I sleep well at night when I am able to redistribute money from an out of state corporate treasury to the citizens of my state who vote in my election." n74

What we have in the excesses of the **tort** system are efforts by one state to control its own products and how things are done in the state, distorted by what is happening someplace else. In the Supreme Court decision this last term involving BMW, n75 the state of Alabama had decided to punish BMW because it sold cars under certain legal standards that were enacted by other states. Essentially, Alabama was attempting [*448] to punish BMW for perfectly lawful conduct elsewhere. n76 The framers of our Constitution expected Congress to regulate interstate commerce to prevent the states from using their power to abuse and discriminate in just this manner.

QUESTION: I am addressing this to Mr. Corboy. I teach law at George Mason and will give you a hypothetical question. A client comes to you who has a case in which you estimate that the injuries would be worth $ 25 million if you could get a jury verdict. However, also based on your experience and your associates' research, you believe there is only a ten percent chance of winning -- a very weak case -- but, on the other hand, you are a very experienced trial lawyer with great rhetorical skills. You might be able to persuade the jury. With only a ten percent chance of winning, the economic value of the case is $ 2.5 million, and your cut is at least $ 800,000 or maybe a little less after expenses. My question is: do you take this case

and, if so, do we have a sound court system involving "loser pays" rules that would encourage attorneys to take cases with high economic values that are essentially speculative?

MR. CORBOY: Sure I would take the case. There is a person that has been injured and there is a viable defendant, whether vicariously or with money in its bank, who has to respond to the judicial system. Ninety-six percent of the cases in this country are settled, n77 and my guess is that this case would be one of them. However, if it were settled in my office, we would not charge $ 800,000. It is that simple.

Most lawyers I think, at least the ones I have come in contact with, have the responsibility of making sure that equity results. I have had exactly one case in my life that was settled for $ 25 million, and the fee was not one-third of $ 25 million, believe me. The lawyers that I know would certainly reduce the fee commensurate with what they believed an equitable percentage would be. My guess is they would charge one-half of one-third or, perhaps, twenty percent.

The reference to "loser pays" is a hot idea today, but it is dead in Florida. n78 Florida tried it, but insurance companies found that, when [*449] they won a lawsuit, they were unable to collect the legal fees back from the plaintiff. Most plaintiffs cannot afford their own lawyer, let alone pay the expenses of the insurance company's lawyer. On the other hand, when the plaintiff won the insurance companies had to pay the plaintiff's legal fees, so "loser pays" died. The legislation was taken off the books the next session. "Loser pays" does not work because plaintiffs do not have the money to pay when they lose.

MR. OLSON: I want to respond to something that Mr. Corboy said earlier about punitive damages against municipalities. The fact is that, unless I am mistaken, in most jurisdictions you can recover punitive damages from municipalities. The case that stands out most in my mind involved East St. Louis, Illinois, where an individual was drunk, put in the jail, and then injured by fellow prisoners. He won a large punitive damage verdict.

JUDGE BECKER: Why are plaintiffs' fee arrangements not disclosed to jurors and what would be the effect if you unbundled the fee from the award?

MR. OLSON: I suppose the plaintiffs' lawyers would say you should also disclose the defense lawyer's arrangements for his fees. What would happen if you unbundled and allowed the recovery of attorney's fees in these cases? I do not know what the effect would be. I suspect that it would result in smaller attorney's fees. I do not know what a jury is thinking when it awards the kind of verdicts that Mr. Corboy has been successful in recovering.

MR. CORBOY: It certainly would not be one-sided. I see no relevancy in suggesting that the jury should know that my opponent is getting $ 500 an hour. This is not a proper way to prejudice the jury. It is a function of all lawyers to prejudice the jury in their favor. Let us use whatever word we want, but that is our function. However, there are rules that you must follow. Judges do not allow you to improperly prejudice the jury, but it would seem to me that disclosing the amount of the fee would be discourteous to a defendant, and I say that in a very mild fashion.

If the plaintiff was entitled to a $ 100,000 recovery, and a twenty-five percent rule applied that was disclosed to the jury, they may add twenty-five percent to the $ 100,000. It does not seem right for the plaintiff or the defendant to characterize the fees of the lawyer as being too much, and [*450] then assert that since the defendant can afford $ 500 or $ 100 an hour, he should receive more than he is entitled. I do not think it is a relevant inquiry of the jury.

QUESTION: Would that experiment in Florida have been more successful if the plaintiff and the plaintiff's lawyer were jointly and severally liable for the attorney's fee award.

MR. CORBOY: What about the defendant's lawyer? Why discriminate against the plaintiff's lawyer? "Loser pays" means the loser pays. Why should not the defense lawyer, if your logic has any validity, also be responsible on a fee basis? I do not see the relevancy. Incidentally, ninety-six percent of the cases are settled. We are talking about four percent of the cases in which shifting of fees may be a potent way of settling more cases.

MR. OLSON: The figures that I was using excluded wrongful death cases. n79 Alabama is the only state in the United States that uses punitive damages as the method of recovery in wrongful death cases, n80 but we took those cases out of the figures.

n66 *See, e.g.,* Sharpe v. Brice, 96 Eng. Rep. 557 (C.P. 1774); Bruce v. Rawlins, 95 Eng. Rep. 934 (C.P. 1770); Beardmore v. Carrington, 95 Eng. Rep. 790 (C.P. 1764); Huckle v. Money, 95 Eng. Rep. 768 (C.P. 1763); Wilkes v. Wood, 98 Eng. Rep. 489 (C.P. 1763).

n67 *See, e.g.,* Sears v. Lyons, 171 Eng. Rep. 658 (K.B. 1818); Merest v. Harvey, 128 Eng. Rep. 761 (C.P. 1814).

n68 *See, e.g.,* Fabrigas v. Mostyn, 96 Eng. Rep. 549 (C.P. 1774).

n69 Pitt-Rivers, *Honour and Social Status,* in HONOUR AND SHAME: THE VALUES OF A MEDITERRANEAN SOCIETY 19, 21 (J. Peristiany ed. 1966).

n70 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 537 (2d ed. 1909).

n71 *Id.* at 537-38 (footnotes omitted) (emphasis in original). Although Scots law retained overt compensation for insults under the rubric of *solatium,* such compensation largely disappeared from English law during the middle ages, a phenomenon that has puzzled legal historians. Beckerman, *Adding Insult to* Injuria: *Affronts to Honor and the Origins of Trespass,* in ON THE LAWS AND CUSTOMS OF ENGLAND 159, 178-81 (M. Arnold, T. Green, S. Scully & D. White eds. 1981).

n72 95 Eng. Rep. 794 (C.P. 1764).

n73 *Id.* at 795.

n74 97 Eng. Rep. 1130 (K.B. 1766).

n75 *Id.* at 1130.

n76 95 Eng. Rep. 909 (C.P. 1769).

n77 *Id.* at 909.

n78 95 Eng. Rep. 934 (C.P. 1770).

n79 *Id.* at 934.

n80 95 Eng. Rep. 768 (C.P. 1763).

n81 *Id.* at 768.

n82 Pitt-Rivers, *supra* note 69, at 26. The role of insult also explains why breach of promise to marry was the only contract action in which punitive damages were allowed. *See* A. OGUS, *supra* note 64, at 24, 29 & n.5.

n83 171 Eng. Rep. 658 (K.B. 1818).

n84 *Id.* at 658.

n85 172 Eng. Rep. 687 (Horsham Assizes 1830).

n86 *Id.* at 687. *See also* James v. Campbell, 172 Eng. Rep. 1015, 1016 (Westminster Assizes 1832), an action for assault and battery where the jury was instructed: "If you think, . . . that the defendant struck the plaintiff, the plaintiff is entitled to your verdict, whether it was done intentionally or not. But the intention is material in considering the amount of the damages."

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Its authority does not, however, appear to be based on double-jeopardy considerations as in a criminal proceeding.

n171 *See, e.g.,* Fountila v. Carter, 571 F.2d 487, 491 (9th Cir. 1978); Simpson v. Weeks, 570 F.2d 240, 243 (8th Cir. 1978), *cert. denied,* 443 U.S. 911 (1979); Mallor & Roberts, *supra* note 8, at 641-42. *But see supra* note 6 (cases expanding scope of punitive damage liability). For examples of appellate deference to jury discretion in punitive damage cases, see Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 712-13, 60 Cal. Rptr. 398, 414-15 (1967); Durham v. Pekrul, 104 Wis. 2d 339, 349, 311 N.W.2d 615, 620 (1981). Professor Owen suggests that the "hands off" attitude toward jury discretion in awarding punitive damages in products liability cases may be changing. Owen, *supra* note 6, at 50-59.

n172 *See, e.g.,* Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 819, 174 Cal. Rptr. 348, 388 (1981). Questions of credibility and weight of the evidence are resolved in favor of upholding the jury's verdict. The modern trend, moreover, is to admit evidence making the existence of a fact more probable in any degree. *See, e.g.,* FED. R. EVID. 401 and advisory committee note, 402. *But see Grimshaw,* 119 Cal. App. 3d at 792, 174 Cal. Rptr. at 371 (exclusion of evidence proffered by defendant upheld).

n173 *See, e.g.,* Dorsey v. Honda Motor Co., 655 F.2d 650, 655-56 (5th Cir. 1981), *modified,* 670 F.2d 21 (5th Cir. 1982); Sturm, Ruger & Co. v. Day, 594 P.2d 38, 47 (Alaska 1979), *modified and remanded,* 615 P.2d 621 (Alaska 1980), *cert. denied,* 454 U.S. 894 (1981); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 823, 174 Cal. Rptr. 348, 391 (1981). As Professor Owen has pointed out, the problem is further complicated from a fairness standpoint by changes in the standards that occur over time. Owen, *supra* note 6, at 13-14. Vagueness of standards has led some courts to adopt a higher evidentiary threshold (clear and convincing) as a means of reducing jury discretion. *See, e.g.,* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 851 (2d Cir. 1967)(adopting a "clear, unequivocal and convincing" standard for punitive damage awards in strict liability cases); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 300 & n.23, 294 N.W.2d 437, 458 & n.23 (1980) (requiring "clear and convincing evidence" of "outrageous" conduct).

n174 *See supra* text accompanying notes 19-26. *But see* Sturm, Ruger & Co. v. Day, 594 P.2d 38, 46 (Alaska 1979), *modified and remanded,* 615 P.2d 621 (Alaska 1980), *cert. denied,* 454 U.S. 894 (1981) and cases cited therein, which hold that the standards "reckless indifference toward the safety of . . . customers" and "maliciously or wantonly" were sufficiently specific "to meet a void-for-vagueness challenge."

n175 One cannot expect a perfect correlation between an intended standard and its actual implementation because of the "inherent ambiguity of language and the limitations of human foresight and knowledge." Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking,* 3 J. LEGAL STUD. 257, 268 (1974).

n176 Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change,* 37 U. CINN. L. REV. 671, 694 (1968). The notion appeared in legal literature at least as early as the fifteenth century. *See* J. FORTESQUE, DE LAUDIBUS LEGUM ANGLIE 65 (S. Chimes trans. 1949). *Cf.* Ellis, Vox Populi v. Suprema Lexi: *A Comment on the Testimonial Privilege of the Fifth Amendment,* 55 IOWA L. REV. 829, 845-46 (1970) (discussing fifth amendment rationale of protecting the innocent); Wittman, *supra* note 23, at 253 (Rules of procedure and the balance between the number of innocents found guilty and the number of guilty found innocent are influenced by a concern with just punishments.). The principle of equal treatment is also offended if, as is probable, some actors receive disproportionately greater punishment than others for the same or a lesser offense. *See infra* text accompanying notes 234-36.

n177 Reducing the number of false positive decisions even at the cost of increasing the

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number of false negative decisions in criminal cases may be efficient and fair, but for reasons that are not strictly applicable in the punitive damage context. If an "innocent" person is sentenced to death or a term of imprisonment, there is a deadweight loss because society is deprived of that person's productivity. P. ARANSON, *supra* note 28, at 530-31 (1981); R. POSNER, *supra* note 3, at § 7.2, at 169. *See also* Becker, *Crime and Punishment: An Economic Approach,* in ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 24-25 (G. Becker & W. Landes eds. 1974) (imprisonment produces some social loss because society does not receive some of the "payment" made by offenders). That analysis does not, however, explain procedural biases favoring defendants where the penalty is a fine, which does not produce a deadweight loss. *See* R. POSNER, *supra* note 3, at §§ 7.2, 21.3, at 168-69, 433-34.

n178 *Cf.* Tullock, *Two Kinds of Legal Efficiency,* 8 HOFSTRA L. REV. 659, 660 (1980) (bias in favor of the impecunious person and against the party with "deep pockets," sometimes has been adopted by judges and juries in order to redistribute wealth). Any redistributional inclinations on the part of juries are likely to be exacerbated by the introduction of defendants' wealth in connection with punitive damage claims. *See infra* text accompanying notes 259-65. Plaintiffs' lawyers often take advantage of that fact. *See* Ellis, *supra* note 8, at 1061-62; Riley, *supra* note 6, at 26. *But cf.* Schwartz, *Economics, Wealth Distribution, and Justice,* 1979 WISC. L. REV. 799, 803 n.17 (even when a defendant is rich, the loss ultimately may fall on purchasers).

n179 *See* Owen, *supra* note 6, at 11; Wheeler, *Products Liability,* Nat'l L.J., Oct. 6, 1980, at 27, 30, col. 1; Harris, *Why the Pinto Jury Felt Ford Deserved $ 125 Million Penalty,* Wall St. J., Feb. 14, 1978, at 1, col. 4. *Cf.* Goldstein, *Commercial Callousness: The Ford Pinto Litigation,* 5 IOWA TR. LAW. 17, 17 (1980) (Ford's cost-benefit analysis with regard to the fuel tank placement cited as a factor influencing the jury's decision in *Grimshaw*) (Judge Goldstein presided at the *Grimshaw* trial); Kelman, *Cost-Benefit Analysis: An Ethical Critique,* REGULATION, Jan./Feb. 1981, at 33 ("In the areas of environmental, safety, and health regulation, there may be many instances where a certain decision might be right even though its benefits do not outweigh its costs.").

n180 *See* G. TULLOCK, TRIALS ON TRIAL 83-84 (1980); Jury Verdict Research, Inc., *Corporate Defendants -- Liability,* in 8 PERSONAL INJURY VALUATION HANDBOOKS 5251 (1981) (finding that juries are more likely to find defendant liable if it is a corporation); Owen, *supra* note 6, at 11 & n.56.

n181 *See Jury Says Penthouse Magazine Libeled a Former Miss Wyoming,* N.Y. Times, Feb. 21, 1981, at 18, col. 4.

n182 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("[J]uries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular view.").

n183 *See supra* notes 179-81.

n184 *Cf.* C. CLARK & H. SHULMAN, A STUDY OF LAW ADMINISTRATION IN CONNECTICUT 41 (1927) (combined study of the New Haven trial court during 1919-32 and the Waterbury trial court during 1919-28 showed that plaintiffs won 83% of cases); Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties,* 10 LAW & SOC'Y REV. 267, 287 (1976) (study of two California courts -- one rural and one urban -- concluded that in 1970 plaintiffs won 97% and 96% of the judgments respectively and 76% and 85%, respectively, of the contested cases); Owen, *supra* note 6, at 11-12 (discussing jurors' natural bias for injured individuals and against "big business").

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The possibility of error affects compensatory and punitive damages differently. There is a symmetry between the plaintiff and the defendant as to compensatory damages, in that an error in favor of one party undeservedly punishes the other -- deserving plaintiffs who are not compensated are forced to bear the loss that initially fell upon them. *See* Wittman, *supra* note 23, at 253. On the other hand, an error in the defendant's favor on the issue of punitive damages leaves plaintiffs less wealthy, but does not deprive them of deserved compensation.

n185 *Cf.* Quinton, *supra* note 17, at 62 ("[T]hat utility is the morally necessary or sufficient condition, or both, of punishment are perfectly reputable moral attitudes."); Wittman, *supra* note 23, at 250-51 ("In many cases, punishing the innocent might even increase deterrence.").

n186 *See* Ehrlich & Posner, *supra* note 175, at 264-67.

n187 *See id.* at 264.

n188 *See supra* notes 178-84 and accompanying text.

n189 In addition, as plaintiffs' lawyers are well aware, seeking punitive damages, even when unsuccessful, may increase the amount of compensatory damages awarded to the plaintiff (which will be assessed against the defendant). *See* Riley, *supra* note 6, at 26. Courts have tended to ignore this factor. *See, e.g.,* Kuper v. Chicago & N.W. Transp. Co., 290 N.W.2d 903, 909 (Iowa 1980) (rejecting argument that defendant was prejudiced on issue of liability by submission on punitive damage issue). *But cf.* Vanskike v. ACF Indus., Inc., 665 F.2d 188, 210 (8th Cir. 1981) (closing argument inviting jury to punish defendant where submission of punitive damage issue not justified by evidence resulted in excessive compensatory award, requiring reversal and remand for new trial on the issue of damages), *cert. denied,* 102 S. Ct. 1632 (1982).

n190 Landes & Posner, *Adjudication as a Private Good,* 8 J. LEGAL STUD. 235, 260, 281 (1979); Priest, *supra* note 184, at 403.

n191 Ehrlich & Posner, *supra* note 175, at 264-65; Landes & Posner, *supra* note 190, at 283.

n192 *See* Ehrlich & Posner, *supra* note 175, at 265 (increase in settlement rate should reduce the total cost of dispute resolution). *Cf.* Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses,* 1980 AM. B. FOUND. RESEARCH J. 787, 870-71 (more discovery abuses in complex cases).

n193 *Cf.* Ehrlich & Posner, *supra* note 175, at 262-64 (vague legal standards discourage socially beneficial activity that is perceived by the actor to fall within the penumbra of the standards).

n194 *Cf. id.* at 263 ("chilling" effects must be compared with reduction in socially undesirable behavior when assessing a criminal statute); Wittman, *supra* note 23, at 254 n.9 (punishing the innocent "may reduce the amount of optimal behavior").

n195 There seems to be a general consensus that most people are risk averse most of the time. *See* G. TULLOCK, *supra* note 146, at 28; Leubsdorf, *Remedies for Uncertainty,* 61 B.U.L. REV. 132, 150 (1981); Schaefer, *Uncertainty and the Law of Damages,* 19 WM. & MARY L. REV. 719, 720 & n.5 (1978). Investors and managers who make decisions for firms appear to be particularly risk averse. *See* M. BAILEY, REDUCING RISKS TO LIFE 29 (1980) (investors); Swalm, *Utility Theory -- Insights Into Risk Taking,* 44 HARV. BUS. REV., Nov.-Dec. 1966, at 123, 134 (managers). *See also* Ehrlich & Posner, *supra* note 175, at 262

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("plausible assumption" that people who engage in socially desirable activities are generally risk averse).

n196 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

n197 655 F.2d 650 (5th Cir. 1981).

n198 U.S. DEP'T OF TRANSP., NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., THE CAR BOOK 20, 23 (1980) (average fatality rate is 3.5 per 10,000 collisions for subcompact cars and 1.5 per 10,000 collisions for large cars).

n199 *See, e.g.,* Dorsey v. Honda Motor Co., 655 F.2d 650, 656 (5th Cir. 1981) (substantial evidence presented that crashability of Honda AN 600 could have been improved), *modified,* 670 F.2d 21 (5th Cir. 1982); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 775-76, 174 Cal. Rptr. 348, 360-61 (1981) (citing numerous design changes that could have been made to improve the integrity of Ford Pinto gas tanks); Owen, *supra* note 6, at 24-25 (design engineers must employ cost-benefit analysis because additional safety measures are always available).

n200 Consumers express their preferences for small cars, in the face of widespread information regarding the greater likelihood of death or serious injury associated with them. *See, e.g.,* N.Y. Times, Mar. 8, 1980, at 6, col. 1 (increasing number of traffic deaths attributed to growing number of small cars); Holsendolph, *Most Small Autos Fail U.S. Crash Test,* N.Y. Times, Aug. 20, 1980, at B8, col. 1 (ten of twelve small car models failed to protect passengers in 35 MPH crash test). *See also* Opre, *Jeeps: Drivers are the Danger,* OUTDOOR LIFE, OCT. 1981, at 30, 30 (Insurance Institute of Highway Safety conclusion that small cars fare less well in road wrecks described as "obvious" to most people).

n201 *See* Schwartz & Tullock, *supra* note 34, at 76-77.

n202 *Cf.* Landes & Posner, *supra* note 1, at 31 (discussing probability of apprehension).

n203 Design changes induced by punitive damage liability will also shift demand downward because the resulting product will be different from that for which consumers have expressed their preference.

n204 *See supra* note 200.

n205 For example, in Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979), *modified and remanded,* 615 P.2d 621 (Alaska 1980), *cert. denied,* 454 U.S. 894 (1981), a small arms manufacturer was held liable for punitive damages when the plaintiff's pistol misfired. *Id.* at 46-47. And in Rawlings Sporting Goods Co. v. Daniels, 619 S.W.2d 435 (Tex. Civ. App. 1981), a plaintiff was awarded punitive damages when a helmet manufactured by the defendant caved in during football practice, causing serious injury. *Id.* at 439-41.

n206 For example, in Pring v. Penthouse Magazine, N.Y. Times, Feb. 21, 1981, at 18, col. 4, *id.* Mar. 28, 1981, at 9, col. 2, *id.* Apr. 5, 1981, at 8E, col. 3 (D. Wyo. 1981), *rev'd,* No. 81-1480, slip op. (10th Cir. Nov. 5, 1982), a defendant was assessed $ 25 million in punitive damages by a jury (later reduced to $ 12.5 million by the trial court) for libeling a former Miss Wyoming when it published a story about a "fictional" Miss Wyoming. However, the Court of Appeals for the Tenth Circuit held, without reaching the issue of punitive damages, that liability for defamation was not warranted. Pring v. Penthouse Magazine, No. 81-1480, slip op. (10th Cir. Nov. 5, 1982).

n207 For example, in Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566 (W.D. Okla. 1979), *rev'd in part,* 667 F.2d 908 (10th Cir. 1981), a defendant was assessed $ 10 million in

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punitive damages for allowing plutonium to be stolen from its plant. The Court of Appeals for the Tenth Circuit held, however, that punitive damages could not be awarded because of federal preemption in the field of atomic energy development. 667 F.2d at 922-23.

n208 *See supra* note 164.

n209 *See* Landes & Posner, *supra* note 190, at 283.

n210 *See, e.g.,* Wangen v. Ford Motor Co., 97 Wis. 2d 260, 271, 294 N.W.2d 437, 444 (1980); RESTATEMENT (SECOND) OF TORTS § 908 & comment b (1979).

n211 *See, e.g.,* Owen, *supra* note 6, at 21; Owen, *Punitive Damages in Products Liability Litigation, supra* note 8, at 1366-69.

n212 *See* Ellis, *supra* note 8, at 1023. Professor Owen's criticisms of "outrageous" as a description of the quality of conduct meriting punitive damages are well taken. *See* Owen, *supra* note 6, at 47; Owen, *Punitive Damages in Products Liability Litigation, supra* note 8, at 1369. What is puzzling is his belief that the word "flagrant" avoids the problems. *See supra* text accompanying notes 210-11.

n213 *See supra* notes 149-66 and accompanying text.

n214 *See, e.g.,* Wangen v. Ford Motor Co., 97 Wis. 2d 260, 300 & n.23, 294 N.W.2d 437, 458 & n.23 (1980) (requiring "clear and convincing evidence" of "outrageous" conduct). An alternative approach is to allow the judge to determine whether punitive damages are appropriate, and if so, in what amount. *See, e.g.,* Owen, *supra* note 6, at 52-53. *Cf.* CONN. GEN. STAT. ANN. § 52-240b (West Supp. 1982) ("If the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such damages not to exceed an amount equal to twice the damages awarded to the plaintiff.").

n215 *Cf.* Note, *supra* note 19, at 94-95 (one factor that affects the Supreme Court's decision to invalidate or uphold a statute containing vague terms is the willingness of trial judges to control juries). *But cf.* Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979) (noting that the "actual malice" that must be present in defamation cases involving public officials or public figures warrants an inquiry into the defendant's state of mind and, therefore, may not readily lend itself to summary disposition). In Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980), the court adopted a "clear and convincing" evidentiary standard, but nevertheless remanded the case for trial. On the other hand, the difference in the appellate courts' analysis of similar evidence in Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967) (punitive assessment set aside), and Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967) (punitive assessment upheld), may be attributable in part to the different standards of proof used by the two courts. The *Roginsky* court required clear and convincing evidence, while the *Toole* court required a mere preponderance.

n216 See *supra* text accompanying notes 103-48.

n217 This, of course, assumes that the "illicit" satisfaction obtained by the wrongdoer from the act of injuring another is not counted in the efficiency calculus. *See supra* text accompanying note 146.

n218 *See supra* text accompanying notes 115-48.

n219 *Cf.* Ehrlich & Posner, *supra* note 175, at 273 ("We should expect the proportion of *overinclusive* rules to be higher in areas where either the sanction is simple damages or transaction costs are low than in areas where either the sanction is a punitive one or

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transaction costs are high, other things being equal.") (emphasis in original). Ehrlich and Posner reason that this result occurs because the social losses of overinclusiveness are lower under the former circumstances.

n220 Connecticut and Michigan are exceptions. In Connecticut, punitive damages are limited to "an amount which will serve to compensate the plaintiff to the extent of his expenses of litigation, less taxable costs." Triangle Sheet Metal Works, Inc. v. Silver, 154 Conn. 116, 127, 222 A.2d 220, 225 (1966). In Michigan, punitive damages are only awarded to compensate emotional distress or other intangible loss resulting from tortious conduct. Kewin v. Massachusetts Mut. Life Ins. Co., 409 Mich. 401, 419-21, 295 N.W.2d 50, 55 (1980).

n221 CALIFORNIA JURY INSTRUCTIONS: CIVIL § 14.71 (6th ed. 1977) (quoted in K. REDDEN, *supra* note 5, at appendix A, at § 1.4(b)(2)). Similar instructions are given in several other states. *See, e.g.,* COLORADO JURY INSTRUCTIONS 2D: CIVIL § 5.3 (1980) (jury may award "a reasonable sum"); COUNCIL OF SUPERIOR COURT JUDGES OF GEORGIA, SUGGESTED PATTERN JURY INSTRUCTIONS: CIVIL CASES 91 (1980) ("the measure of such damages is your enlightened conscience as an impartial jury"); IOWA UNIFORM JURY INSTRUCTIONS No. 3.21 (1979) ("such an amount and such only as you shall find the plaintiff entitled to receive in addition to his actual damages").

In 1981, California revised its jury instruction on punitive damages. The amount assessed is still left "to the jury's sound discretion, exercised without passion or prejudice." COMMITTEE ON STANDARD JURY INSTRUCTIONS, CIVIL, OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA, CALIFORNIA JURY INSTRUCTIONS: CIVIL § 14.71 (6th ed. 1977 & Supp. 1981). But additional guidance is now provided:

In arriving at any award of punitive damages, you are to consider the following:

(1) The reprehensibility of the conduct of the defendant,

(2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition,

(3) That the punitive damages must bear a reasonable relation to the actual damages. *Id.*

n222 ILLINOIS PATTERN JURY INSTRUCTIONS: CIVIL § 35.01 (2d ed. 1973) (quoted in K. REDDEN, *supra* note 5, at appendix A, at § 1.4(E). *Cf.* Rookes v. Barnard, [1964] 1 All E.R. 367, 411 (H.L.):

In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may of course be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then they can award some larger sum.

n223 *See, e.g.,* COMMITTEE ON STANDARD JURY INSTRUCTIONS, CIVIL, OF THE SUPERIOR COURT OF LOS ANGELES, CALIFORNIA, CALIFORNIA JURY INSTRUCTIONS: CIVIL § 14.71 (Supp. 1981).

n224 *See, e.g., id;* WISCONSIN JURY INSTRUCTIONS: CIVIL -- PART II § 1707 (1962) (quoted in K. REDDEN, *supra* note 5, at appendix A, at § 1.4(J)).

n225 There are some exceptions. For example, Georgia's pattern instructions add "compensation for the wounded feelings of the plaintiff" as a basis for a punitive damage

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award. 1 COUNCIL OF SUPERIOR COURT JUDGES OF GEORGIA, SUGGESTED PATTERN JURY INSTRUCTIONS: CIVIL 91 (1980). *See also* GA. CODE ANN. § 105-2002 (1968 & Supp. 1981) (additional damages may be awarded in cases involving aggravated circumstances "to deter the wrongdoer . . . or as compensation for the wounded feelings of the plaintiff"). California's revised jury instruction also provides additional guidance. *See supra* note 221.

n226 *But see* RESTATEMENT (SECOND) OF TORTS § 908 (1979) ("In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.").

n227 *See, e.g.,* Roginsky v. Richardson-Merrell, Inc. 378 F.2d 832, 834 n.3 (2d Cir. 1967) (citing products liability cases involving the same drug in which jury decisions ranged from verdicts for defendants to punitive damage awards for $ 500,000 and $ 850,000; in *Roginsky* the jury had assessed $ 100,000 in punitive damages). Jury Verdict Research, Inc., *Punitive Damages,* in 6 PERSONAL INJURY VALUATION HANDBOOKS 831-32 (1981).

n228 *See, e.g.,* Dorsey v. Honda Motor Co., 655 F.2d 650, 654-58 (5th Cir. 1981) ($ 5 million verdict upheld); Pring v. Penthouse Magazine, N.Y. Times, Feb. 21, 1981, at 18, col. 4, *id.* Mar. 28, 1981, at 9, col. 2, *id.* Apr. 5, 1981, at 8E, col. 3 (D. Wyo. 1981) ($ 25 million verdict), *rev'd on other grounds,* No. 81-1480, slip op. (10th Cir. Nov. 5, 1982); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 821-24, 174 Cal. Rptr. 348, 389-91 (1981) (affirming trial court decision to reduce $ 125 million verdict to $ 3.5 million). In several other cases, large punitive damage awards were set aside. *See, e.g.,* Silkwood v. Kerr-McGee Corp., 667 F.2d 908, 921-23 (10th Cir. 1981) ($ 10 million punitive damage assessment set aside on federal preemption grounds); Ashland Oil Co. v. BiPetro, Inc., Nat'l L.J., Nov. 24, 1980, at 10, col. 1 (S.D. Ill. 1980) ($ 300 million verdict set aside by trial judge).

n229 *See* K. REDDEN, *supra* note 5, at § 10.5 (Iowa may be the only state not to allow remittitur of punitive damage verdicts).

n230 *See, e.g.,* Sturm, Ruger & Co. v. Day, 594 P.2d 38, 48 (Alaska 1979), *modified and remanded,* 615 P.2d 621 (Alaska 1980), *cert. denied,* 454 U.S. 894 (1981); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 741 (Minn. 1980); Hulstein v. Meilman Food Indus. Inc., 293 N.W.2d 889, 892 (S.D. 1980).

n231 For an example of this circular reasoning, see Sturm, Ruger & Co. v. Day, 594 P.2d 38, 48-49 (Alaska 1979), *modified and remanded,* 615 P.2d 621 (Alaska 1980), *cert. denied,* 454 U.S. 894 (1981). As Professor Owen points out, it is paradoxical that the jury's "passion and prejudice" can render defective an assessment that is premised on a finding of "outrageous" behavior, which implies that the jury should be "outraged." Owen, *supra* note 6, at 47.

n232 *See, e.g.,* Sturm, Ruger & Co. v. Day, 594 P.2d 38, 50 (Alaska 1979) (Burke, J. dissenting), *modified and remanded,* 615 P.2d 621 (Alaska 1980), *cert. denied,* 454 U.S. 894 (1981) (jury's punitive damage assessment substantially reduced, although based on additional manufacturing costs of safer revolver); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 821-24 & 821 n.17, 174 Cal. Rptr. 348, 390-91 & 390 n.17 (1981) (jury's assessment of $ 125 million in punitive damages, although based on Ford's savings from adoption of less safe design, reduced by judge to $ 3.5 million). *See also* Harris, *supra* note 179, at 1, col. 4 (jury in Ford Pinto case based punitive damage award on the amount Ford saved by not installing safety features plus an increment to make the assessment punitive).

n233 *See, e.g.,* Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 741 (Minn. 1980) ($ 1 million award upheld under passion and prejudice standard), *cert. denied,* 449 U.S. 921 (1980).

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n234 *See supra* text accompanying notes 178-82. *See also* IBEW v. Foust, 442 U.S. 42, 50 n.14 (1979) ("[I]t cannot be ignored that punitive damages may be employed to punish unpopular defendants."); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974):

In most jurisdictions jury discretion over the amounts awarded [as punitive damages] is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views.

n235 *See supra* notes 19-28 and accompanying text.

n236 The analysis in the previous Section suggests that the impact is asymmetrical. *See supra* text accompanying notes 176-84. Thus more "innocent" persons are assessed excessive penalties and fewer "guilty" are underpenalized. This asymmetry may be diminished or even eliminated, however, by the willingness of courts to reduce "excessive" punitive damage assessments.

n237 Denzau, *Litigation Expenditures As Private Determinants of Judicial Decisions: A Comment,* 8 J. LEGAL STUD. 295, 297 (1979). *Cf.* Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses,* 1980 A.B. FOUND. RESEARCH J., 787, 833, 870-71 (substantially greater abuse of discovery process perceived by lawyers whose median case size was $ 1 million or more than by lawyers whose median case size was $ 25,000 or less); Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery,* 1980 A.B. FOUND. RESEARCH J. 217, 229-30 (more strategic behavior in discovery stage of larger cases); INSURANCE SERVICES OFFICE, PRODUCT LIABILITY CLOSED CLAIM SURVEY: A TECHNICAL ANALYSIS OF SURVEY RESULTS 13 (1977) (loss adjustment expense is function of size of claim and stage of legal system at which it is resolved).

n238 If insurance is available, the upper bound on an assessment becomes the defendant's net worth plus the available insurance. *See* Vilkin, *Class Certified Over Its Objection,* Nat'l L.J., Feb. 8, 1982, at 20, col. 2. In theory, the amount claimed by the plaintiff in the *ad damnum* clause of the complaint should represent an upward bound on the assessment. But that amount is entirely in the control of the plaintiff. Moreover, it does not always act as a limitation. *But see* Burk Royalty Co. v. Walls, 596 S.W.2d 932, 937-38 (Tex. Civ. App. 1980) (improper to allow plaintiff to amend complaint after jury renders verdict for primitive damages in amount claimed in *ad damnum*).

n239 *See* Lauter, *Younger v. Kansas City Bar,* Nat'l L.J., Feb. 8, 1982, at 1, col. 1 (anecdotal evidence of the attraction of specialized legal resources to cases with large punitive damage potential). The problem is exacerbated by the use of the defendant's wealth as a factor in determining the size of punitive damage assessments. *See infra* text accompanying notes 259-65.

n240 The diversion of resources from cases involving less wealthy defendants whose conduct merits punitive damages is likely to be a shortrun phenomenon, because additional resources (primarily in the form of lawyers and other experts with specialized skills in recovering punitive damages) will be attracted to the "punitive damages industry." In the long run, therefore, all defendants with sufficient wealth equal to the cost of extracting it from them through punitive damage assessments, and whose conduct arguably merits such assessments, will face punitive damage claims.

n241 *See supra* text accompanying notes 163-66.

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n242 D. DOBBS, *supra* note 10, at § 3.9, at 210-11; W. PROSSER, *supra* note 10, at § 2, at 14.

n243 *See, e.g.,* K. REDDEN, *supra* note 5, at appendix A, at § 1.4 (selected pattern jury instructions). *But see* G. DOUTHWAITE, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS 90 (1981) (recommending instruction that punitive damages "should not be totally disproportionate to the compensatory damages."). The amended California jury instruction now charges the jury to "consider," *inter alia,* "[t]hat the punitive damages must bear a reasonable relation to the actual damages." *See supra* note 221.

n244 *See, e.g.,* Ogilvie v. Fotomat Corp., 641 F.2d 581, 586-87 (8th Cir. 1981); Biundo v. Old Equity Life Ins. Co., 662 F.2d 1297, 1300 (9th Cir. 1981); Goldstein, *supra* note 179, at 17 (Judge Goldstein reduced the punitive damage award in *Grimshaw* "because it did not bear a reasonable relationship to the compensatory damages awarded.").

n245 *See, e.g., Exodus* 22:9 ("For all manner of trespass [to goods] . . . whom the judges shall condemn, he shall pay double unto his neighbor.").

n246 *See, e.g.,* 15 U.S.C. § 15 (1976) (the treble damage provision of Section 4 of the Clayton Act).

n247 *See, e.g.,* Owen, *supra* note 6, at 48 (proportionality is a control device for excessive punitive damage awards).

n248 For example, three times the special damages is often used as a rule of thumb for settling personal injury claims. *See* H. ROSS, SETTLED OUT OF COURT 108 (1970).

n249 *See* Allen, *Retribution in a Modern Penal Law: The Principle of Aggravated Harm,* 25 BUFFALO L. REV. 1, 6-8 (1975) (discussing effect of aggravated harm under New York penal law).

n250 *See, e.g.,* S. KADISH & M. PAULSON, *supra* note 19, at 326-29 (exploring theories for punishing attempts less severely than completed crimes).

n251 *See, e.g.,* H. L. A. HART, *supra* note 24, at 130-31 (the distinction in punishment between attempts and completed crimes is morally unjustified).

n252 *See supra* text accompanying notes 39-42.

n253 *See* Owen, *supra* note 6, at 54 n.268 (punitive damages are sought in almost every products liability case); Riley, *supra* note 6, at 26 ("As a general rule, whenever you have a defendant who is wealthy or has liability insurance with high limits . . . the plaintiff should ordinarily seek punitive damages.").

n254 For example, marketing an appliance capable of causing serious physical injury if it malfunctions.

n255 For example, marketing bottles of water in which, it is asserted, the feet of Christ were bathed by Mary Magdelene, at $ 10 per bottle.

n256 Amos v. Prom, Inc., 115 F. Supp. 127, 131 (N.D. Iowa 1953); Zhadan v. Downtown Los Angeles Motor Distribs., Inc., 100 Cal. App. 3d 821, 836-37, 161 Cal. Rptr. 225, 234 (1979); D. DOBBS, *supra* note 10, at § 3.9, at 211; Note, *Required Relation of Actual to Exemplary Damage,* 25 BAYLOR L. REV. 127, 129 (1973).

n257 *See, e.g.,* K. REDDEN, *supra* note 5, at § 10.3(D), at 714-16; 6 PERSONAL INJURY

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VALUATION HANDBOOKS, *supra* note 227, at 831-32. *But see* Owen, *supra* note 6, at 48 (ratio approved on appeal in serious injury or death cases rarely has exceeded 1.5:1 or 2:1).

n258 For an example, see Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979) ("The punitive damage award . . . appears to be so out of proportion to the amount of actual damages as to suggest that the jury's award was the result of passion or prejudice."), *modified and remanded,* 615 P.2d 621 (Alaska 1980), *cert. denied,* 454 U.S. 894 (1981). *See also* D. DOBBS, *supra* note 10, at § 3.9, at 211 (courts use the ratio rule as a "handy expression for the idea that a punitive award . . . is excessive."); J. GHIARDI & J. KIRCHNER, *supra* note 8, at § 5.39, at 113 ("[W]hat the reviewing court actually does is to substitute its judgment for that of the trier of fact . . . ."); W. PROSSER, *supra* note 10, at § 2, at 14 (proportionality test "has meant little more than that under the particular circumstances . . . courts do not like the size of some verdicts").

n259 D. DOBBS, *supra* note 10, at § 3.9, at 210. *See also* W. PROSSER, *supra* note 10, at § 2, at 14 (a defendant's wealth "may be received as bearing on the question of the amount which will adequately punish him for his conduct."); RESTATEMENT (SECOND) OF TORTS § 908(2) & comment e (1977) (trier of fact may consider defendant's wealth in assessing punitive damages). Some of the pattern jury instructions make specific reference to a defendant's wealth as a factor that the jury may take into account. *See, e.g.,* ARKANSAS MODEL JURY INSTRUCTION: CIVIL § 2217 (2d ed. 1974). *reprinted in* K. REDDEN, *supra* note 5, at appendix A § 1.4(A); WISCONSIN JURY INSTRUCTIONS: CIVIL -- PART II § 1707 (1962), *reprinted in* K. REDDEN, *supra* note 5, at appendix A § 1.4(J).

n260 *See* K. REDDEN, *supra* note 5, at § 3.5(c)(1); J. GHIARDI & J. KIRCHNER, *supra* note 8, at § 5.36, at 105. By a parity of reasoning, a younger defendant in a criminal case should receive a longer prison sentence than an otherwise similarly situated older defendant so as to equilibrate the disutility from losing the enjoyment of a portion of their remaining lives. *Cf.* Aranson, *The Simple Analytics of Sentencing,* in POLICY ANALYSIS AND DEDUCTIVE REASONING 33, 39-41 (G. Tullock & R. Wagner eds. 1978) (sentencing younger offenders for longer periods than older offenders may be cost-effective because of greater expected recidivism rate of the former class).

n261 Some authors have suggested that utility curves are not uniformly convex. *See, e.g.,* Friedman & Savage, *The Utility Analysis of Choices Involving Risk,* 56 J. POL. ECON. 279, 303-04 (1948).

n262 Morris, *Punitive Damages in Tort Cases,* 44 HARV. L. REV. 1173, 1191 (1931). Of course, plaintiffs can be expected to take advantage of such inclinations. For example, in Hall v. Montgomery Ward & Co., 252 N.W.2d 421 (Iowa 1977), the plaintiff's counsel stated in his closing argument: "[Y]ou are not going to find a smaller sparrow than Thomas Hall and he can come into this court house on equal footing with Montgomery Wards merchandising company with one billion six hundred ninety some million dollars worth of money . . . ." Appendix to Appellant's Brief at 32, Hall v. Montgomery Ward & Co., 252 N.W.2d 421 (Iowa 1977) (copy on file with *Southern California Law Review*). Concern about the prejudicial effect of information regarding the relative wealth of defendants has served as the principal basis for excluding evidence of whether individual defendants are insured. *See* W. PROSSER, *supra* note 10, at § 83, at 549.

n263 *See* Riley, *supra* note 6, at 26 ("evidence of the defendant's wealth should add to the size of what the actual damage would otherwise be, in addition to resulting in a separate award for punitive damages").

n264 *See supra* text accompanying notes 252-53.

n265 D. DOBBS, *supra* note 10, at § 3.9, at 218-19; J. GHIARDI & J. KIRCHNER, *supra*

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n87 *Cf.* O. W. HOLMES, THE COMMON LAW 3 (1881): "Vengeance imparts a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done. . . . [E] ven a dog distinguishes between being stumbled over and being kicked."

n88 Pitt-Rivers, *supra* note 69, at 26.

n89 *See* 2 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 416-18 (3d ed. 1923).

n90 Pitt-Rivers, *supra* note 69, at 30.

n91 *de Libellis Famosis,* 5 Co. Rep. f.125a (1607) (emphasis in original).

n92 5 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 211-12 (1924).

n93 *Id.* at 209.

n94 *Id.* at 209-10 (citation omitted).

n95 95 Eng. Rep. 794 (C.P. 1764).

n96 *Id.* at 795.

n97 *Id.*

n98 Merest v. Harvey, 128 Eng. Rep. 761, 761 (C.P. 1814).

n99 *Id.*

n100 The principal exceptions were the cases where agents of the Secretary of State were held liable for punitive damages after obeying the Secretary's instructions to carry out searches under general warrants. *See, e.g.,* Wilkes v. Wood, 98 Eng. Rep. 489, 498-99 (C.P. 1763) (discussing the power of the Secretary of State and his agents to perform searches under general warrants).

n101 Jeremy Bentham was the notable exception. *See* J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 165 (J. Burns & H.L.A. Hart eds. 1970) (objective of punishment is to prevent offenses at the least expense). *See also* Hewlett v. Crutchley, 128 Eng. Rep. 696 (K.B. 1813), an action for malicious prosecution in which plaintiff recovered £ 2000. Lord Mansfield percipiently observed in that case that the test for excessiveness was whether a rational person would place himself in plaintiff's position for such an amount. *Id.* at 698.

n102 In modern English law, a distinction is made between "aggravated" and "exemplary" damages. The former are deemed compensation for injury to plaintiff's dignity and pride; the latter are viewed as punitive in purpose. *See* Cassell & Co. Ltd. v. Broome [1972] A.C. 1027, 1029 (H.L.); Rookes v. Barnard, [1964] A.C. 1129, 1221 (H.L., per Lord Devlin). *See generally* 12 HALSBURY'S LAWS OF ENGLAND 470-71, 474-75 (4th ed. 1975) (discussing the criteria for awarding aggravated and exemplary damages).

n103 *See* D. DOBBS, *supra* note 10, at § 3.9, at 205; W. PROSSER, *supra* note 10, at § 2, at 9-10; K. REDDEN, *supra* note 5, at § 2.6.

n104 *See* W. PROSSER, *supra* note 10, at 9.

n105 *See, e.g.,* Broussard v. Southern Pac. Transp. Co., 625 F.2d 1242, 1244 (5th Cir.

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note 8, at § 5.36, at 105.

n266 Prosser asserts that the majority of states adhere to the respondeat superior rule. *See* W. PROSSER, *supra* note 10, at § 2, at 12. This statement appears to have misled some courts and scholars. *See, e.g.,* Northrup v. Miles Homes, Inc., 204 N.W.2d 850, 858 (Iowa 1973); Owen, *Punitive Damages in Products Liability Litigation, supra* note 8, at 1300-01. A count of the authorities cited by Prosser in support of his statement, however, indicates that there is an equal split among jurisdictions. *See* W. PROSSER, *supra* note 10, at § 2, at 12 nn.91 & 93; Ellis, *supra* note 8, at 1041 n.246. Nevertheless, Prosser's misleading statement may be on its way to becoming a self-fulfilling prophecy. *See* J. GHIARDI & J. KIRCHNER, *supra* note 8, at ch. 5, at 140-43 (21 states now follow respondeat superior; 19 follow "complicity rule").

n267 The term "complicity rule" apparently was coined by Professor Morris. *See* Morris, *Punitive Damages in Personal Injury Cases,* 21 OHIO ST. L.J. 216, 221 (1969). The rule is followed by the *Restatement. See* RESTATEMENT (SECOND) OF TORTS § 909 (1977). *Accord* RESTATEMENT (SECOND) OF AGENCY § 217 C (1958).

n268 *See, e.g.,* D. DOBBS, *supra* note 10, at § 3.9, at 214-15 (discussing the disagreement among courts and scholars over the fairness of assessing punitive damages against vicariously liable employers); Owen, *Punitive Damages in Products Liability Litigation, supra* note 8, at 1299-1301 ("The logic and fairness of assessing punitive damages against a corporation for the misconduct of its employees has long been questioned by both courts and theorists.").

n269 *See, e.g.,* Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 711-13, 60 Cal. Rptr. 398, 414-15 (1967) (corporation held liable for punitive damages under "complicity rule" where associate director of research in charge of defendant's Biological Science Division was wrongdoer). *See also* Pilon, *Corporations and Rights: On Treating Corporate People Justly,* 13 GA. L. REV. 1245, 1309-13 (1979) (arguing against holding corporate entities liable for the torts of corporate agents).

Courts appear to be more sensitive to the vicarious nature of punitive damage liability for acts of public officials, and more reluctant to impose it against employers who are not business corporations. *See, e.g.,* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981) ("Damages awarded for *punitive* purposes . . . are not sensibly assessed against the governmental entity itself.") (emphasis in original); IBEW v. Foust, 442 U.S. 42, 50-51 (1979) (allowing punitive damage claims against unions would hurt employees by depleting union treasuries); Shiman v. Frank, 625 F.2d 80, 103 (6th Cir. 1980) (courts should be slow to award punitive damages against union locals because union members end up paying them); Rowen v. Le Mars Mut. Ins. Co. of Iowa, 282 N.W.2d 639, 662 (Iowa 1979) (punitive damages against a mutual insurance company set aside because "[t]he loss will fall on *innocent* policyholders" (emphasis in original)). *See also* Ellis, *supra* note 8, at 1066 (describing the inequities and inconsistencies of vicarious punitive damage liability).

Where an employer *in persona* authorizes or ratifies a wrongful act or recklessly employs a wrongdoing employee, punitive damages may be imposed, not under a theory of vicarious liability, but based upon the employer's independent wrongful act.

n270 *See* P. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 255 (3d ed. 1980); W. PROSSER, *supra* note 10, at § 69, at 458.

n271 *See* Williams, *The Aims of the Law of Tort,* 4 CURRENT LEGAL PROBS., 137, 158 (1951) ("All efforts to find a satisfactory reason for vicarious liability have failed; yet, mysteriously, the principle retains its hold upon our affections." (citations omitted)). *See also* Pilon, *supra* note 269, at 1310 (*"Respondeat superior* has always been easier to live with

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than to justify." (emphasis in original) (citation omitted)).

n272 *See* T. BATY, *supra* note 10, at 146-48. *But see* P. ATIYAH, *supra* note 10, at 15-22 (some element of truth in most of the traditional justifications for vicarious liability).

n273 P. ATIYAH, *supra* note 270, at 255-57.

n274 *Id.* at 257.

n275 *See* P. ATIYAH, *supra* note 10, at 22-27; G. CALABRESI, THE COSTS OF ACCIDENTS 50-54 (1970); J. FLEMING, INTRODUCTION TO THE LAW OF TORTS 8-10 (1967); W. PROSSER, *supra* note 10, at § 69, at 459.

n276 CALIFORNIA CITIZENS COMMISSION ON TORT REFORM, RIGHTING THE LIABILITY BALANCE 27-28 (1977) (quoted in M. FRANKLIN, INJURIES AND REMEDIES: CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES 388-89 (2d ed. 1979)); W. PROSSER, *supra* note 10, at § 69, at 459.

n277 P. ATIYAH, *supra* note 270, at 254.

n278 *See supra* text accompanying notes 39-42.

n279 *See, e.g.,* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981) ("[A]n award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort.").

n280 *See supra* text accompanying notes 117-43.

n281 *See supra* text accompanying notes 259-65.

n282 *See, e.g.,* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270 (1981) ("Because evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a [vicariously liable] municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award." (citations omitted)).

n283 *See supra* text accompanying notes 109-10.

n284 *See* Pilon, *supra* note 269, at 1309.

n285 *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981).

n286 How the loss is distributed among the various groups is a function of the elasticity of demand faced by the firm, and that factor is wholly unrelated to the question of whether the owners deserve to be punished.

n287 The conventional view is that vicarious liability is morally unjustifiable when it results in punishment. P. FITZGERALD, CRIMINAL LAW AND PUNISHMENT 112 (1962). *See also* Allen, *The Morality of Means: Three Problems in Criminal Sanctions,* 42 U. PITT. L. REV. 737, 748 (1981) ("A form of criminal liability that admits the possibility of a guilt incapable of being avoided by the absence of criminal knowledge or purpose or by conscientious adherence to the most rigorous standards of diligence is, in the words of Montaigne, 'a malicious justice' . . . ."). Feinberg, *Collective Responsibility,* in DOING AND DESERVING 222, 230-31 (1970) ("The criminal punishment of superiors for actions done *entirely* on their own by subordinates . . . would be a barbarous regression in normal times." (emphasis in original)).

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n288 *Cf.* Allen, *supra* note 287, at 745 ("One of the most striking things about the history of strict and vicarious liability in American criminal law is that, despite their firm entrenchment in wide areas of our penal practice, virtually no reasoned literature has arisen in support of these doctrines." (citations omitted)). One argument that is offered to justify vicarious punitive damages is that the employer (e.g., corporate shareholders) may have benefited from the employee's wrongful act. *See* D. DOBBS, *supra* note 10, at § 3.9, at 215; Owen, *Punitive Damages in Products Liability Litigation, supra* note 8, at 1304-05. But that argument is inapplicable in situations where an employee's conduct has not benefitted or indeed has harmed the employer. It also fails to account for the possibility that any gain realized may have been capitalized and hence captured by persons who are no longer owners. *See, e.g.,* Wussow v. Commercial Mechanisms, Inc., 97 Wis. 2d 136, 154-56, 293 N.W.2d 897, 906-07 (1980) (punitive damages assessed against successor corporation for acts of dissolved corporation).

n289 Even states that, on policy grounds, do not allow punitive damages to be insured recognize an exception where vicarious liability is imposed. *See infra* text accompanying notes 307 & 327. This pattern suggests ambivalence toward the theoretical justifications offered for vicarious punitive damages.

n290 Owen, *Punitive Damages in Products Liability Litigation, supra* note 8, at 1302. *Cf.* P. FITZGERALD, *supra* note 287, at 112 ("To punish one man for another's crime is often a most powerful deterrent."); Allen, *supra* note 287, at 747 ("Ultimately, the defense of strict liability is made to rest on the argument of deterrence . . . .").

n291 *See supra* text accompanying notes 115-48.

n292 *But cf.* W. PROSSER, *supra* note 10, at § 2, at 12 & n.95 (employee's abuse of a passenger in Goddard v. Grand Trunk Ry. of Canada, 57 Me. 202, 212-13, 224 (1869), called the "classic diatribe" justifying vicarious punitive damages on deterrence grounds). Nor is it ordinarily in the interest of a business firm to employ persons who recklessly mishandle customers' property as in Western Coach Corp. v. Vaughn, 9 Ariz. App. 336, 412 P.2d 117 (1969).

n293 There are cases in which punitive damages were assessed against both the wrongdoing employee and the vicariously liable employer. *See, e.g.,* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 253 (1981) (although reversed on appeal, trial court held city and employees liable for punitive damages); Shimman v. Frank, 625 F.2d 80, 101-03 (6th Cir. 1980) (punitive damages assessed against union local and its members). Such cases are exceptions to the general practice of assessing punitive damages against employers alone. *See, e.g.,* Armstrong v. Republic Realty Mortgage Corp., 631 F.2d 1344, 1348 (8th Cir. 1980); Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 693, 60 Cal. Rptr. 398, 403 (1967); Northrup v. Miles Homes, Inc., 204 N.W.2d 850, 855 (Iowa 1973).

n294 *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 268 (1981) (indemnification against officials may be unavailable to municipalities under local law); P. ATIYAH, *supra* note 270, at 259.

n295 *See, e.g.,* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 268 (1981) (public officials are unlikely to be able to pay punitive damages imposed against a municipality); Fisher v. City of Miami, 172 So. 2d 455, 457 (Fla. 1965) (punitive damages assessed against a municipality would not deter employees, who are unlikely to be able to pay any individual judgment assessed).

n296 For example, in Armstrong v. Republic Realty Mortgages Corp., 631 F.2d 1344 (8th Cir. 1980), the wrongful act occurred in May 1975. *Id.* at 1348. Judgment was entered in

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1978 and affirmed on appeal in 1980. In the cases involving the distribution and sale of MER/29, a drug that caused its users to develop cataracts, the wrongful acts occurred from 1959 to 1961, but final determination of the punitive damage issues did not occur until 1967. *See* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 844-49 (2d Cir. 1967); Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 694, 695-701, 60 Cal. Rptr. 398, 403, 404-08 (1967).

n297 *See* W. PROSSER, *supra* note 10, at § 2, at 12; RESTATEMENT (SECOND) OF TORTS § 909 comment b (1977); Owen, *Punitive Damages in Products Liability Litigation, supra* note 8, at 1300-01.

n298 Imposing vicarious punitive damage liability for the acts of employees increases the relative cost of labor and, therefore, may change the optimum combination of capital and labor. *See generally* A. ALCHIAN & W. ALLEN, UNIVERSITY ECONOMICS 388-93 (3d ed. 1972) (discussing the infinite combinations of labor and capital that can be used to produce any good).

n299 The expansion of the doctrine of "negligent entrustment" may render this alternative less attractive. *See* Buschlen v. Ford Motor Co., 310 N.W.2d 8, 10-11 (Mich. App. 1981) (finished product manufacturer who supplies component manufacturer and who "knows or has reason to know" that equipment is being used in an unsafe manner is subject to liability), *vacated and remanded for reconsideration,* 322 N.W.2d 710 (1982).

n300 Insurance may be either self-insurance or formal insurance coverage purchased from a seller of insurance.

n301 *Cf.* Owen, *Punitive Damages in Products Liability Litigation, supra* note 8, at 1305-06 (discussing the bureaucratization of the corporate decisionmaking process).

n302 *See, e.g.,* Armstrong v. Republic Realty Mortgage Corp., 631 F.2d 1344, 1351-53 (8th Cir. 1980) (corporation assessed punitive damages for the acts of a single identified agent); Western Coach Corp. v. Vaughn, 9 Ariz. App. 336, 339, 452 P.2d 117, 120 (1969) (conduct of identified truck driver and manager showed sufficient evidence of reckless indifference to the interests of others to warrant punitive damages against corporation).

n303 For example, in the MER/29 cases, the identity of those employees whose acts formed the basis for the corporation's punitive damage liability seems to have been discovered without great difficulty. *See* Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 695-701, 60 Cal. Rptr. 398, 403-08 (1967) (researchers and developer of MER/29 readily identified).

n304 *See supra* text accompanying notes 237-40.

n305 *See* Dayton Hudson Corp. v. American Mut. Liab. Inc. Co., 621 P.2d 1155, 1157 (Okla. 1980); W. PROSSER, *supra* note 10, at § 2, at 12-13. *See generally* J. GHIARDI & J. KIRCHNER, *supra* note 8, at §§ 7.12, 7.13 (cases allowing insurance against punitive damage liability and cases denying its validity).

n306 *See, e.g.,* Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 441-42 (5th Cir. 1962) (leading case holding that punitive damages may not be insured against because a "delinquent driver must not be allowed to receive a windfall at the expense of the purchasers of insurance"); Hartford Accident & Indem. Co. v. Village of Hempstead, 48 N.Y.2d 218, 228 & n.16, 397 N.E.2d 737, 744 & n.16, 422 N.Y.S.2d 47, 53-54 & n.16 (1979) (public policy precludes insurability of punitive damages imposed under Civil Rights Act; question reserved as to other cases).

n307 Dayton Hudson Corp. v. American Mut. Liab. Ins. Co., 621 P.2d 1155, 1160 (Okla.

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1980); Owen, *Punitive Damages in Products Liability Litigation, supra* note 8, at 1313 n.276.

n308 For example, through portfolio diversification.

n309 R. KEETON, BASIC TEXT IN INSURANCE LAW 6-7 (1971); R. RIEGEL, J. MILLER & C. WILLIAMS, INSURANCE PRINCIPLES AND PRACTICES: PROPERTY AND LIABILITY 25, 28-32 (6th ed. 1976); Stellwagen, *A Rational Basis for Buying Insurance,* in AMERICAN MANAGEMENT ASSOCIATION, THE GROWING JOB OF RISK MANAGEMENT 125, 128 (1962).

n310 Hammond, *Risk-Spreading Through Underwriting and the Insurance Institution,* in SOCIETAL RISK ASSESSMENTS: HOW SAFE IS SAFE ENOUGH? 147, 149 (R. Schwing & W. Albers eds. 1980).

n311 *See* G. TULLOCK, *supra* note 146, at 111-12. *See also* J. FLEMING, *supra* note 275, at 14 ("Indemnity insurance has inevitably drained off whatever direct admonitory effect might once have attached to an adverse judgment.").

n312 R. KEETON, *supra* note 309, at 232-33. *See* M. FRANKLIN, *supra* note 276, at 727-33.

n313 C. GREGORY, *supra* note 125, at 783-85.

n314 R. KEETON, *supra* note 309, at 534-35.

n315 *See, e.g.,* Rowland v. Christian, 69 Cal. 2d 108, 112-13, 70 Cal. Rptr. 97, 100, 443 P.2d 561, 564 (1968) (en banc) (availability of insurance was one factor considered in court's departure from common law distinction between trespassers, licensees, and invitees in determining the standard of care for property owners).

n316 The shape of the curve suggests an inverse relationship between the size and number of claims. *See* ALL-INDUSTRY RESEARCH ADVISORY COMMITTEE, 2 AUTOMOBILE INJURIES AND THEIR COMPENSATION IN THE UNITED STATES 57 (1979).

n317 *See* R. KEETON, *supra* note 309, at 557. Defense costs add approximately 35% to the payment of claims for bodily injury and 48% to the payment of claims for property damage. INSURANCE SERVICES OFFICE, PRODUCT LIABILITY CLOSED CLAIM SURVEY: A TECHNICAL ANALYSIS OF SURVEY RESULTS 13 (1977).

n318 *See* Hammond, *supra* note 310, at 152 (uncertain outcomes make insurance more expensive).

n319 *Id.* at 161-62, 163-64.

n320 P. ATIYAH, *supra* note 270, at 565; J. FLEMING, *supra* note 275, at 14; Owen, *Punitive Damages in Products Liability Litigation, supra* note 8, at 1310.

n321 *See supra* text accompanying notes 109-10.

n322 Diamond, *Insurance Theoretic Aspects of Workers' Compensation,* in NATURAL RESOURCES, UNCERTAINTY, AND GENERAL EQUILIBRIUM SYSTEMS 67, 73 (A. Blinder & P. Friedman eds. 1977). *See also* G. TULLOCK, *supra* note 146, at 111-12, 127 (purchase of insurance may cause a reduction in risk avoidance activities).

n323 *See supra* notes 260-61 and accompanying text.

n324 *See, e.g.,* Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 647, 383

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S.W.2d 1, 5 (1964).

n325 Hartford Accident & Indem. Co. v. Village of Hempstead, 48 N.Y.2d 218, 228, 397 N.E.2d 737, 744, 422 N.Y.S.2d 47, 54 (1979).

n326 Harrell v. Travelers Indem. Co., 279 Or. 199, 209-10, 567 P.2d 1013, 1018 (1977).

n327 *E.g.*, Dayton Hudson Corp. v. American Mut. Liab. Ins. Co., 621 P.2d 1155, 1160 n.19 (Okla. 1980).

n328 *See, e.g.*, Price v. Hartford Accident & Indem. Co., 108 Ariz. 485, 487, 502 P.2d 522, 524 (1972); Cieslewicz v. Mutual Service Casualty Ins. Co., 84 Wis. 2d 91, 104, 267 N.W.2d 595, 601 (1978).

n329 Wrongdoing injurers will be "punished" with higher future rates only under policies providing for "experience rating," which are not universal. *See* NEW YORK INSURANCE DEPARTMENT, AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT? 48 n.96 (1970). *See also* R. KEETON, *supra* note 309, at 566 (even merit rating systems rely more on involvement than on determinations of fault).

n330 Indeed, the sum of higher future premiums is not likely to equal the amount of the assessment. Insurance premiums are based on predictions of future loss. Hence, a past damage assessment against an insured affects that insured's future premiums only insofar as it is viewed by the insurance industry as indicative of a greater likelihood of similar future assessments against that insured. A past assessment is unlikely to lead an insurance company to predict that the probability of future similar losses approaches unity. As each new policy period passes without a similar claim, the effect of a past assessment becomes even more attenuated. A large damage assessment against one insured, however, does increase the likelihood of a similar assessment against some member of the relevant class of policyholders and thus leads to an increase in the premium rate for the entire class. *See* Hammond, *supra* note 310, at 163-64. *See also* Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 442 (5th Cir. 1962) (punitive damage insurance would allow a delinquent driver to transfer his penalty to the driving public).

n331 Insurance effectively increases the wealth of the defendant and, hence, raises the upper boundary of assessments. *See supra* text accompanying note 238. It is instructive that some trial lawyers have used the presence of insurance for compensatory damages as a deterrence argument for imposing punitive damages, while others have vigorously argued in favor of allowing punitive damage insurance. *Compare* S. SPEISER, LAWSUIT 358 (1980) (plaintiff's attorneys argued that *Grimshaw* was the "clearest case for punitive damages," because Ford had insurance covering $ 200,000 for death cases and $ 67,000 for injury cases) *with* Morrissy, *Punitive Damages -- Insurability,* 1981 TRIAL LAW. GUIDE 257, 265 (criticizing an Illinois court for failing to consider that large punitive damage awards may bankrupt millions of automobile drivers if punitive damage insurance is denied) *and* Riley, *Punitive Damages: The Doctrine of Just Enrichment,* 27 DRAKE L. REV. 195, 243 (1977-78) (punitive damage insurance should only be denied in cases involving malice or an intentional harm).

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1980); Amoco Pipeline Co. v. Montgomery, 487 F. Supp. 1268, 1272 (W.D. Okla. 1980); D. DOBBS, *supra* note 10, at § 3.9, at 205; W. PROSSER, *supra* note 10, at § 2, at 9.

n106 *See, e.g.,* Holden v. Construction Mach. Co., 202 N.W.2d 348, 359 (Iowa 1972).

n107 *See, e.g.,* Boyes v. Evans, 14 Cal. App. 2d 472, 480, 58 P.2d 922, 926 (1936); CAL. CIV. CODE § 3294 (West 1970 & Supp. 1981).

n108 *See, e.g.,* Amoco Pipeline Co. v. Montgomery, 487 F. Supp. 1268, 1272 (5th Cir. 1980) (punitive damage award is within the discretion of the trier of fact); STANDARDIZED JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA § 215 (Rev. Ed. 1968) (quoted in K. REDDEN, *supra* note 5, at § A 1.4, at 736 (award of punitive damages entirely within discretion of jury); K. REDDEN, *supra* note 5, at § 3.4(A), at 56 ("It is within the discretion of the jury to refuse to award punitive damages even when fraud or malice on the part of the defendant has been shown.") (citations omitted). Pattern jury instructions generally use the verb "may" when discussing the jury's award of punitive damages. *See* G. DOUTHWAITE, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS 76 (1981); K. REDDEN, *supra* note 5, at § A1.4. But the instruction proposed in M. AVERY & D. RUDOFSKY, POLICE MISCONDUCT, LAW AND LITIGATION 13-14 (1980) (published for the National Lawyers Guild) would instruct the jury that if it finds the factual prerequisites to exist, it "*should* award punitive damages" (emphasis added).

n109 This definition accords with the lay understanding of "malice." *See, e.g.,* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1367 (P. Grove ed. 1976); WEBSTER'S NEW COLLEGIATE DICTIONARY 690 (H. Woolf ed. 1980); 6 OXFORD ENGLISH DICTIONARY 83-84 (J. Murray, H. Bradley, W. Craigie, C. Onions eds. 1933). It corresponds to the meaning originally attributed to malice by the law. *See* Ormsby, *Malice in the Law of Torts,* 8 LAW Q. REV. 140, 149 (1892). And it is also consistent with one meaning attributed to malice by modern courts. *See, e.g.,* Western Decor & Furnishings Indus., Inc. v. Bank of Am., 91 Cal. App. 3d 293, 309, 154 Cal. Rptr. 287, 296 (1979). Malice has been given a variety of other meanings by the law as well. *See infra* notes 150-54 and accompanying text.

n110 This definition is consistent with that adopted by the *Restatement (Second) of Torts,* RESTATEMENT (SECOND) OF TORTS §§ 282 comment e, 500 (1965), the *Model Penal Code,* MODEL PENAL CODE § 2.02(2)(c) (Proposed Official Draft 1962), and some statutes. *See, e.g.,* N.Y. Penal Law § 15.05(3) (McKinney 1975). *Cf.* Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940) (in which Judge Learned Hand similarly defined the term "gross negligence"), *rev'd,* 312 U.S. 492 (1941); W. PROSSER, *supra* note 10, at § 34, at 185 (defining wilfull, wanton, and reckless behavior in similar terms). As here defined, the term "reckless conduct" would be applicable to many cases decided under other rubrics, such as fraud or oppression.

n111 *See supra* notes 11-30 and accompanying text.

n112 For example, acts such as truthful but harmful disclosure of an official's misdeeds, informing on a law breaker, or initiating prosecution of a felon who has harmed the initiator, may be motivated by a desire to harm another, but the social benefits from such acts override any culpability attributable to the actor's mental state.

n113 That notice could, of course, be supplied by statute.

n114 *Cf.* O. W. HOLMES, THE COMMON LAW 107 (1881) (under a "moral standard that would take . . . personal characteristics into account," a defendant could not be held negligent if he exercised his best judgment); Edgerton, *Negligence, Inadvertence, and Indifference: The Relation of Mental States to Negligence,* 39 HARV. L. REV. 849, 857 (1926) (under law of negligence, defendants' conduct is not reasonably safe unless they act as safely as a normal person, even though they may be subnormal).

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n115 *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). *See also* Brown, *Toward an Economic Theory of Liability,* 2 J. LEGAL STUD. 323, 332-35 (1973) (discussing ambiguities in the hand formula); Posner, *A Theory of Negligence,* 1 J. LEGAL STUD. 29, 32-33 (1972) (citing Hand's formulation as a precursor to economic theories of negligence); Tullock, *supra* note 33, at 51 (1981) (discussing the choice of institutional structures that satisfy the efficiency requirements of the Hand Formula). The Hand formula produces an efficient result because it replicates the result that parties would reach in a bargain, but for the presence of prohibitive transaction costs. The acts of potential victims also affect the likelihood of injury, a factor that is taken into account by legal concepts such as consent, contributory negligence, and assumption of risk. For purposes of this analysis, it is assumed that the victim has pursued an optimum level of avoidance.

n116 *See* Shavell, *Strict Liability Versus Negligence,* 9 J. LEGAL STUD. 1, 1-6 (1980) (because of ambiguity in legal definition of negligence, strict liability may be efficient); Tullock, *supra* note 33, at 55 (discussing relative efficiency of strict liability and negligence).

n117 Some courts have assumed that, because a defendant has engaged in reckless conduct, the expectation of compensatory damages necessarily provides an insufficient level of deterrence. *See, e.g.,* Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 741 (Minn. 1980), *cert. denied,* 449 U.S. 921 (1980). But that assumption ignores the educational function served by liability determinations and attendant compensatory damage awards, especially in areas of the law in which standards of liability are changing. *Cf.* Owen, *supra* note 6, 13-14 (discussing changes in social values regarding safety and corporate responsibility).

n118 *See* Becker & Stigler, *supra* note 1, at 1.

n119 *See, e.g.,* Syester v. Banta, 257 Iowa 613, 616-17, 133 N.W.2d 666, 668-69 (1965) (68-year-old widow induced to purchase 4,057 hours of dance instruction by representations that she could become a professional dancer).

n120 For example, a financial institution may not prosecute all cases of embezzlement for fear of raising doubts as to its own security in the eyes of actual or potential customers. In addition, the elements of the offense are often difficult to prove. *See generally* S. KADISH & M. PAULSEN, *supra* note 19, at 682-703 (discussing the elements of misappropriation of property lawfully obtained).

n121 *See, e.g.,* State v. Koonce, 89 N.J. Super. 169, 172-74, 214 A.2d 428, 429-30 (App. Div. 1965).

n122 Murder is omitted from the list because, in most states, punitive damages are not available for wrongful death. *See, e.g.,* Robert v. Ford Motor Co., 73 A.D.2d 1025, 1026, 424 N.Y.S.2d 747, 749 (1980). *But see* Berenger v. Frink, 314 N.W.2d 388, 391 (Iowa 1982) (punitive damages claim survives death of injured party). According to Redden, only seven states allow punitive damages for wrongful death. K. REDDEN, *supra* note 5, at § 1.1, at 5. *But see* J. GHIARDI & J. KIRCHNER, *supra* note 8, at § 5.19, at 56 n.5 (citing 18 states where punitive damages are awarded for wrongful death).

n123 In addition, the expected damage liability may be less than the expected loss in such cases because of the perpetrator's lack of wealth and, hence, effective immunity from civil liability. *See* Landes & Posner, *supra* note 1, at 31.

n124 In cases involving violent intentional torts, however, the threat of criminal sanctions may offset any disparity between expected loss and expected liability for damages.

n125 *See, e.g.,* Dillon v. Legg, 68 Cal. 2d 728, 730-31, 69 Cal. Rptr. 72, 74, 441 P.2d 912,

914 (1968) (en banc); C. GREGORY, H. KALVEN & R. EPSTEIN, CASES AND MATERIALS ON TORTS 933-34 (3rd ed. 1977) [hereinafter cited as C. GREGORY]; W. PROSSER, *supra* note 10, at § 12; RESTATEMENT (SECOND) OF TORTS § 46 (1965).

n126 *See supra* text accompanying notes 69-99.

n127 *See, e.g.,* Kewin v. Massachusetts Mut. Life Ins. Co., 409 Mich. 401, 420, 295 N.W.2d 50, 55 (1980) (analogy drawn between mental distress damages and exemplary damages). *Cf.* Hayes-Albion Corp. v. Kuberski, 108 Mich. App. 642, 656-57, 311 N.W.2d 122, 129 (1981) (elements of damage "incapable of ascertainment" in trade secret case can be used as a "measure of exemplary damages"). In Georgia, punitive damages may be assessed either to deter wrongdoing or as compensation for a plaintiff's wounded feelings. GA. CODE ANN. § 105-2002 (1968). But they may not be assessed for both purposes in the same case. Westview Cemetary, Inc. v. Blanchard, 234 Ga. 540, 543-44, 216 S.E.2d 776, 779 (1975).

n128 *See, e.g.,* Fenslage v. Dawkins, 629 F.2d 1107, 1110 (5th Cir. 1980) (exemplary damages allowed, although plaintiff suffered only mental anguish damages); Meyer v. Nottger, 241 N.W.2d 911, 921-22 (Iowa 1976) (exemplary damages may be awarded for breach of contract resulting in mental anguish if the defendant acted with "a willful or reckless disregard of another's rights").

n129 *See, e.g.,* American Export Lines, Inc. v. Alvez, 446 U.S. 274, 284-86 (1980) (recovery for loss of consortium extended to maritime jurisprudence); Weitl v. Moes, 311 N.W.2d 259, 261-70 (Iowa 1981) (child may recover damages for loss of parental consortium if injury to parent causes "a significant disruption or dimunition of the parent-child relationship"). *See also* Bulloch v. United States, 487 F. Supp. 1078, 1087 (D.N.J. 1980) (marital relationship not prerequisite to action for loss of consortium in New Jersey). *But see* Chiesa v. Rowe, 486 F. Supp. 236, 238-39 (W.D. Mich. 1980) (marital relationship prerequisite to action for loss of consortium in Michigan).

n130 *See, e.g.,* U.S. DEP'T OF JUSTICE, JUSTICE ASSISTANCE NEWS, VOL. 2, No. 10, *Elderly Limit Activities Due to Fear of Crime,* 1, 1 (Dec. 1981/Jan. 1982) (75% of elderly people deliberately limit their activities because of fear of crime); Meislin, *Fear of Crime is Now Woven into Fabric of New York Life,* N.Y. Times, Jan. 31, 1982, § 1, at 1, col. 1 (discussing costs incurred by citizens to reduce their likelihood of being crime victims). *Cf.* R. NOZICK, *supra* note 11, at 65-71 (prohibition of certain acts is justified if those acts create fear, even in those who know they will be fully compensated for their losses).

n131 Because most criminal offenders are judgment proof, private enforcement through tort remedies is ineffective and public enforcers have a de facto monopoly. Landes & Posner, *supra* note 1, at 31.

n132 *See supra* notes 36, 87-99 and accompanying text.

n133 *Cf.* King, *The Insurability of Punitive Damages: A New Solution to an Old Problem,* 16 WAKE FOREST L. REV. 345, 354 n.39 (1980) (punitive damages as a means of avoiding extrajudicial revenge not a modern justification).

n134 *See supra* note 36 and accompanying text.

n135 *But see* Scott v. Plante, 641 F.2d 117, 135 (3d Cir. 1981) (one purpose of punitive damages is the "discouragement of private retribution"), *vacated and remanded on other grounds,* 102 S. Ct. 3474, 73 L.Ed. 2d 1362 (1982). *See also* Richardson, *Punitive Damages: A Common Law Doctrine in Need of Legislative Reform,* TRIAL, Mar. 1980, at 30:

Although violent retaliation may no longer be a significant threat in modern times where the

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offender is a corporation, it occasionally appears where an individual is responsible for an "outrageous act."

. . . We should not too readily reject the notion that court action and civil punishment supplement the criminal law in affording a peaceful method of purging angry responses to illegal harm.

n136 There are also a number of extralegal inducements not to engage in self-help, including the possibility of triggering retaliation by the original aggressor, with resulting further harm to the victim, damage to reputation, and other social sanctions.

n137 For example, prosecutors may exercise their discretion not to commence a criminal action. The objectives of prosecutors and wrongdoing state employees may be congruent and not well served by sanctions that tend to dull the zeal of law enforcement personnel. Moreover, when a civil action for (compensatory) damages is underway against an official, the prosecutor may consider a separate criminal prosecution to be a waste of judicial resources. *Cf.* Rookes v. Barnard, [1964] 1 All E.R. 367, 410 (exemplary damages available under English law for "oppressive, arbitrary or unconstitutional action by the servants of the government"); Ellis, *supra* note 8, at 1050-51 (if punitive damages are appropriate against private persons in order to effectuate goals of punishment and deterrence, they are even more appropriate against state employees, who are less likely to be criminally prosecuted).

n138 *See* R. POSNER, *supra* note 3, at § 6.12, at 143; Landes & Posner, *An Economic Theory of Intentional Torts,* 1 INT'L J.L. & ECON. 127, 135-36 (1981).

n139 For example, it is difficult to measure the losses associated with intentional infliction of emotional distress, malicious prosecution, false imprisonment, the mishandling of bodies, and offensive intrusions.

n140 *See, e.g.,* Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498, 508-09, 364 P.2d 337, 343-44, 15 Cal. Rptr. 161, 167-68 (1961) (no fixed standards for valuing nonpecuniary losses such as pain, suffering, and humiliation); C. GREGORY, *supra* note 125, at 634-71 (discussing the recoverable elements of damages). Wrongful death is an area of the law in which the measurement of loss in pecuniary terms presents intractable difficulties. *See, e.g.,* Mishan, *Evaluation of Life and Limb: A Theoretical Approach,* 79 J. POL. ECON. 687, 691-701 (1971) (constructing a theory of valuation for wrongful death based on the Pareto principle); POSNER, *supra* note 3, at § 6.14 (discussing the valuation problem in an *ex ante* context and suggesting that defendants pay a risk premium for dangerous conduct). Most jurisdictions do not allow punitive damages for wrongful death. *See supra* note 122.

n141 Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-50 (1974).

n142 C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES §§ 25-27, at 97-104 (1935).

n143 Courts today usually take the position that uncertainty in determining damages will not bar recovery once liability and injury are proven. *See. e.g.,* Godwin v. Ace Iron & Metal Co., 376 Mich. 360, 368, 137 N.W.2d 151, 156 (1965).

n144 *See* Holdaway v. Hall, 29 Utah 2d 77, 78, 505 P.2d 295, 295 (1973). Because they are awarded to the plaintiff, punitive damages assessed in such cases may in fact induce breaches of the peace. If, for example, Mal's girlfriend taunted him into hitting her, she would have a chance of recovering not only compensatory damages, but punitive damages as well. Hence, the cost to her of flaunting her infidelity is lowered.

n145 *See, e.g.,* Tiberi v. Petrella, 60 N.J. Super. 513, 516-17, 159 A.2d 439, 441 (1960).

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n146 *See* Landes & Posner, *supra* note 138, at 133. The position taken by Landes and Posner follows Stigler's division of offenses into "production" (property) and "consumption" (nonproperty) crimes. Stigler, *supra* note 1, at 529. Stigler recognizes, however, that society has branded the utility that the offender gains from an offense such as murder, rape, or arson as "illicit." *Id.* at 527. *Accord* G. TULLOCK, THE LOGIC OF THE LAW 243 (1971) ("[W]ithout some kind of interpersonal comparison of utilities, we cannot say that laws prohibiting people from using force and violence against other persons solely for the purpose of working injury are undesirable.").

n147 *Cf.* Polinsky, *supra* note 1, at 109 ("individual will engage in the activity if his realized private gain exceeds the expected fine").

n148 In cases of purposeful injury to another, there may be an alternative explanation for punitive damages that is consistent with efficiency considerations. If a victim is an unidentified member of a large group that is put at risk, the risk of loss to any one individual being quite small, each individual within the group presumably is willing to accept the risk, *ex ante,* for an amount equal to the person's expected loss (the gravity of loss times the risk). Where, however, the risk of loss, *ex ante,* is directed at a specific individual, as is usually the case in intentional torts, the victim may demand a risk premium to reflect the fact that the victim's risk of loss is quite high. This analysis is applicable in situations where the gravity of the loss is great. It has been applied thus far only in the context of risk of death. *Cf.* Schultz, *Ethics, Economics and the Value of Safety,* in SOCIETAL RISK ASSESSMENT: HOW SAFE IS SAFE ENOUGH? 217, 224 (R. Schwing & W. Albers eds. 1980) ("As the probability of death approaches unity, compensation approaches infinity."); Cohen, Toward an Economic Theory of the Measurement of Damages in a Wrongful Death Action 23-24 (1981) (unpublished manuscript) ("When the risk of death increases from 1/10,000 to 1/10, the potential victim will require considerably more than 1,000 times as great a premium to accept this risk. . . . The diminishing marginal utility of wealth is the cause of this change in the valuation of life.").

n149 *See, e.g.,* D. DOBBS, *supra* note 10, at § 3.9, at 204-07 (discussing exceptions to the rule that punitive damages are awarded because of the defendant's culpable state of mind); W. PROSSER, *supra* note 10, at § 2, at 9-10 (criticizing the "conscious disregard" standard employed in products liability cases); Owen, *supra* note 6, at 21-23 (discussing the elasticity of the mental state requirement); Owen, *Punitive Damages in Products Liability Litigation, supra* note 8, at 1283 & n.135 (discussing vagueness of punitive damages criteria).

n150 *See, e.g.,* Wanis v. Zwennes, 364 A.2d 1193, 1195 (D.C. 1976); Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J. Super. 437, 448, 358 A.2d 805, 811 (1976).

n151 *See, e.g.,* Giltner v. Stark, 219 N.W. 2d 700, 708 (Iowa 1974) (legal malice found when defendant's acts demonstrate an utter disregard for consequences); Rubeck v. Huffman, 54 Ohio St. 2d 20, 23, 374 N.E.2d 411, 413 (1978) (malice can be "inferred from conduct and surrounding circumstances"). *But see* Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 713, 60 Cal. Rptr. 398, 415 (1967) ("malice in fact . . . may be established by a showing that the defendant's wrongful conduct was wilful, intentional, and done in reckless disregard of its possible results," conflating the distinction between "actual malice" and malice "implied in law").

n152 Y.B. Pasch. 17 Edw. 4, f. 2a, pl. 2 (1477) (per Brian, C.J.).

n153 *See, e.g.,* Amos v. Prom, Inc. 115 F. Supp. 127, 136-37 (N.D. Iowa 1953) (malice can be inferred when defendant acts illegally or improperly without justification).

n154 Thus, Prosser includes within the definition of "malice" the "deliberate wrongful act known to be injurious to another," but excludes the "'legal malice' implied in such torts as

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defamation." W. PROSSER, *supra* note 10, at § 2, at 10 n.65. *See also* Ford Motor Credit Co. v. Herring, 267 Ark. 201, 207, 589 S.W.2d 584, 588 (1979) (jury instruction that punitive damages may be assessed if the defendant acted in reckless disregard of consequences from which malice may be inferred, formulated for negligence cases and not appropriate in intentional tort (conversion) cases).

n155 *See, e.g.,* Baltimore Transit Co. v. Faulkner, 179 Md. 598, 602, 20 A.2d 485, 488 (1941) (defining wanton as extreme recklessness); Mandolidis v. Elkins Indus., Inc., 246 S.E.2d 907, 913 (W. Va. 1978) (gross negligence distinguished from "willful, wanton, and reckless misconduct," which "requires a subjective realization of the risk of bodily injury created by the activity and as such does not constitute any form of negligence").

n156 *See, e.g.,* First Nat'l Bank of Des Plaines v. Amco Eng'g Co., 32 Ill. App. 3d 451, 455, 335 N.E.2d 591, 594 (1975) (defining "aggravating circumstances" to include "wilful, wanton, malicious or oppressive conduct").

n157 *See* W. PROSSER, *supra* note 10, at § 2, at 10.

n158 *See, e.g.,* Maxey v. Freightliner Corp., 665 F.2d 1367, 1378 (5th Cir. 1982) (en banc) (Texas law allows punitive damages upon a showing of gross negligence); Broussard v. Southern Pac. Transp. Co., 625 F.2d 1242, 1244 (5th Cir. 1980) (exemplary damages can be assessed in Texas if a defendant acts with "entire want of care"), *vacated,* 665 F.2d 1387 (5th Cir. 1982) (en banc); Sebastian v. Wood, 246 Iowa 94, 106-07, 66 N.W.2d 841, 848 (1954) (Iowa law allows punitive damages in cases of gross negligence or legal malice); Rawlings Sporting Goods Co. v. Daniels, 619 S.W.2d 435, 440 (Tex. Civ. App. 1981) (Texas law allows punitive damages for gross negligence or a knowledgable indifference inferred from the defendant's actions); W. PROSSER, *supra* note 10, at § 2, at 10.

n159 W. PROSSER, *supra* note 10, at § 2, at 10.

n160 Wilson v. Brett, 152 Eng. Rep. 737, 739 (Ex. Ch. 1842).

n161 "Damned negligent" is the characterization adopted by one of the leading tort casebooks. *See* C. GREGORY, *supra* note 125, at 134-35. *But see* Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940) (burden of avoidance must be so slight compared to risk that "some opprobrium or reproach attaches to" actor for act to qualify as "gross negligence"), *rev'd,* 312 U.S. 492 (1941).

n162 *See, e.g.,* Amoco Pipeline Co. v. Montgomery, 487 F. Supp. 1268, 1272 (W.D. Okla. 1980) (under Oklahoma law, gross negligence, when used as a standard for punitive damage liability, is "indicated by reckless disregard for the rights or property of others"); Colligan v. Fera, 76 Misc. 2d 22, 24, 349 N.Y.S.2d 306, 309 (N.Y. Civ. Ct. 1973) (punitive damages available in cases of "gross, willful, and wanton negligence"). *Cf.* Maxey v. Freightliner Corp., 665 F.2d 1367, 1371-74 (5th Cir. 1982) (en banc) (claims of gross negligence should be measured by "conscious indifrerence" standard); Broussard v. Southern Pac. Transp. Co., 625 F.2d 1242, 1243 (5th Cir. 1980) (evidence of slight care will not establish unavailability of gross negligence), *vacated,* 665 F.2d 1387 (5th Cir. 1982) (en banc). *But see* Lucchesi v. Kent County Road Comm'n, 109 Mich. App. 254, 259, 312 N.W.2d 86, 89 (1981) ("unfortunate use of gross negligence and wilful and wanton misconduct as synonyms").

n163 *See, e.g.,* Mandolidis v. Elkins Indus; Inc., 246 S.E.2d 907, 913-14 (W. Va. 1978) (recklessness requires knowledge and appreciation of the high degree of risk of physical harm). *See also* Rawlings Sporting Goods Co. v. Daniels, 619 S.W.2d 435, 440 (Tex. Civ. App. 1981) (gross distinguished from ordinary negligence by defendant's knowledge of peril); J. GHIARDI & J. KIRCHNER, *supra* note 8, at § 5.03, at 14 (driving while intoxicated is reckless conduct because defendant knew, or should have known, of the strong possibility

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that harm would result); Mallor & Roberts, *supra* note 8, at 652 (punitive damages properly awarded when "defendant had or should have had a subjective perception of the risks involved").

n164 *See, e.g.,* Dorsey v. Honda Motor Co., 655 F.2d 650, 657 (5th Cir. 1981), *modified,* 670 F.2d 21 (5th Cir. 1982); Sturm, Ruger & Co. v. Day, 594 P.2d 38, 46 (Alaska 1979), *modified and remanded,* 615 P.2d 621 (Alaska 1980), *cert. denied,* 454 U.S. 894 (1981); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 808, 174 Cal. Rptr. 348, 381 (1981); Rinker v. Ford Motor Co., 567 S.W.2d 655, 668 (Mo. 1978); Rawlings Sporting Goods Co. v. Daniels, 619 S.W.2d 435, 439 (Tex. Civ. App. 1981).

n165 *See, e.g.,* Sturm, Ruger & Co. v. Day, 594 P.2d 38, 46 (Alaska 1979) (rejecting defendant's argument "that punitive damages have no place in a strict liability case"), *modified and remanded,* 615 P.2d 621 (Alaska 1980), *cert. denied,* 454 U.S. 894 (1981).

n166 *See, e.g.,* Amos v. Prom, Inc., 115 F.Supp. 127, 136 (N.D. Iowa 1953) (malice may be inferred from other facts in punitive damages cases). "Aggravated circumstances" (or "circumstances of aggravation") is perhaps the least discriminating term used to designate the basis for punitive damages, since "to aggravate" means both "to exacerbate" and "to annoy."

n167 Pattern jury instructions from a number of states are included in K. REDDEN, *supra* note 5, at appendix A § 1.4. *See also* 1 COUNCIL OF SUPERIOR COURT JUDGES OF GEORGIA, SUGGESTED PATTERN JURY INSTRUCTIONS: CIVIL 90-92 (1980) (Punitive damages may be assessed "when the circumstances are such as to show an entire want of care, and an indifference to consequences."); 1 SPECIAL COMMITTEE ON UNIFORM COURT INSTRUCTIONS OF THE IOWA BAR ASSOCIATION, IOWA UNIFORM JURY INSTRUCTIONS: CIVIL NO. 3.21 (1982) (punitive damages may be awarded when a defendant acted "in such a manner and under such circumstances as to show heedlessness and an utter disregard and abandon as to what result may flow from the doing of an act or from the manner in which it is done."); Owen, *supra* note 6, at 21-22 (discussing the inadequacy of the jury instructions in *Grimshaw*).

n168 *See, e.g.,* STANDARDIZED JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA § 215 (rev. ed. 1968), *reprinted in* K. REDDEN, *supra* note 5, at appendix A § 1.4, at 736. A study of jury comprehension of judicial instructions found that lists of words having the same or similar meanings were a major obstacle. Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions,* 79 COLUM. L. REV. 1306, 1326 (1979). *See also id.* at 1366 ("Word Lists" in Table 9).

n169 California, Virginia, and Wisconsin include definitions of malice in their pattern instructions, and California defines oppression and fraud as well. *See* CALIFORNIA JURY INSTRUCTIONS: CIVIL § 14.71 (6th ed. 1977), *reprinted in* K. REDDEN, *supra* note 5, at appendix A § 1.4, at 735; VIRGINIA MODEL JURY INSTRUCTIONS: CIVIL § 13.21 (1979), *reprinted in* K. REDDEN, *supra* note 5, at appendix A § 1.4, at 740; WISCONSIN JURY INSTRUCTIONS: CIVIL-PART II § 1707 (1962), *reprinted in* K. REDDEN, *supra* note 5, at appendix A § 1.4, at 741. The "technical vocabulary of the law" was also found by the Charrow study to be a major source of juror misunderstanding. Charrow & Charrow, *supra* note 168, at 1324. *See also id.* at 1366 ("Problematic Lexical Items" in Table 9). *Cf.* Clary Ins. Agency v. Doyle, 620 P.2d 194, 202 (Alaska 1980) (after deliberating for several hours, jury requested definition of "reckless indifference" and was told: "'Recklessness' is more than ordinary negligence, more than want of ordinary care, and is a wanton or heedless indifference to consequences.").

n170 *See* W. PROSSER, *supra* note 10, at § 2, at 13. The jury's role in denying punitive damages is analogous to its role in returning a "not guilty" verdict in a criminal prosecution.

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[Tort Reform Articles] [2]

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DEVELOPMENTS IN THE LAW -- THE PATHS OF CIVIL LITIGATION III. Problems and Proposals in **Punitive Damages Reform**

SUMMARY:
... As the modern lawsuit grows more complex and as large classes of plaintiff-victims bring suits against companies and even industries, the **threat** of punitive damages looms larger over defendants. ... The idea that an injurer must have notice of its potential liability for a harmful act was the driving motivation behind the important 1996 Supreme Court decision in BMW of North America, Inc. v. Gore, which overturned a punitive award of $ 2 million as violative of the Due Process Clause. ... Finally, some states have attempted to reduce the apparent irrationality of punitive damage awards by bifurcating the litigation pro-cess into a liability stage and a damages stage. ... Thus, not only would courts have to consistently apply a multiplier to cover the current enforcement gap, legislatures would also have to allow plaintiffs acting as private attorneys general to recover for the costs to common property or future generations in order to achieve deterrence based on the full social harm the injurer causes. ... Culpability might remain a factor, however, for punitive damages against defendants - whether individuals or corporations - who were reckless or intended to cause injury. ... Currently, only a slight majority of states allow defendants to insure against the risk of punitive liability. ...

TEXT:
[*1783]

As the modern lawsuit grows more complex and as large classes of plaintiff-victims bring suits against companies and even industries, n1 the **threat** of punitive damages looms larger over defendants. Of course, punitive damages are not awarded in all cases, n2 and they are increasingly remitted by trial judges. n3 When awarded, however, they can be both spectacular and devastating - attracting popular n4 and academic n5 attention. Recent punitive jury awards include a $ 223.82 million legal malpractice award, n6 a $ 114.5 million products liability award, n7 and at least a dozen more verdicts between $ 20 million and $ 100 million. n8 These examples do not represent the ceiling for awards in unique cases: a California jury awarded a plaintiff almost $ 5 billion in a 1999 products liability case against General Motors, n9 and a Hawaii **[*1784]** jury awarded a plaintiff more than $ 20 billion. n10 Punitive damages are also unpredictable; juries sometimes award more than a plaintiff claims, and judges today adjust the size of jury verdicts more routinely than in the past. n11

In its current state, the doctrine of punitive damages has a questionable logical basis, is difficult to apply, and is unpredictable. This Part presents the irrational state of the law of **punitive damages** and suggests a modest program of **reform.** Section A describes the growing problem with **punitive damages** awards. Section B analyzes the most recent forays

Similarly, wealth considerations are inconsistent with the retributive goals of the law in other areas; criminal penalties, both monetary and non-monetary, do not increase with the defendant's wealth.

Although these suggestions promote efficiency and theoretical coherence, enhancing the rationality and symmetry of **punitive damages,** proposals for **reform** from outside the deterrence theory school augment their strength. The most obvious first step in promoting predictability and rationality is for judges instead of juries to make the primary determination of punitive awards. n117 One of the foundational inconsistencies of the doctrine of punitive damages is that punitive amounts are determined by juries while the reasons for awards are given by judges - reasons which may not be the real reasons behind the award. n118 In addition, jurors with consistent reasons or equal levels of moral condemnation may not attach consistent valuations to those reasons. n119 A judge-imposed sanction on defendants that a jury has found punitively liable would also bypass the failure of juries to take into account the necessities of corporate risk and decisionmaking. This failure manifests itself in an intuition that corporations should not "treat people like statistics" - and in the psychological bias against **[*1803]** corporations that has been documented in jury determinations of corporate culpability. n120 Accordingly, juries incentivize defendants toward an inefficient zero level of risk in their activities and products. To enhance the rationality of the judge's award, a panel of experts or even an independent agency might provide useful aid in assessing any cost-benefit analysis conducted ex ante by the defendant. n121 Judicial damages determinations may not represent a radical departure from current practice, as many awards are remitted by the trial judge or on appeal, n122 but would be an important step in shaping a more predictable and therefore a more effective deterrent standard for punitive liability. n123

The extension of this procedural concern is that, if punitive damages are to continue to have a retributive purpose, the procedures for their determination should be similar to those used in the criminal context, perhaps entrusting the decision to seek punitive damages to public prosecutors and turning over all damages to the state. n124 This proposal probably goes too far, n125 but it has two virtues. First, greater **[*1804]** procedural safeguards for punitive liability, such as a "clear and convincing" standard, n126 would curb some of the criticism that punitive damages allow criminal liability under civil standards. Second, the development of a widespread or even national punitive liability rule (for example, a stringent requirement about intent) to replace the existing system of interrelated and varying standards would alleviate both predictability concerns and the cross-jurisdictional problem. n127 Finally, acknowledging the public role and purpose of punitive damages - through state collection of punitive damages or statutory standards for judges to administer as a matter of law - would give the institution of punitive damages a clearer role in civil litigation. n128

E. Conclusion

In the short run, these changes would probably reduce the overall level of punitive awards. In a sense, this is the answer that the Supreme Court and many commentators have given to the question of how to deal with punitive damages distortions; the Gore standard, for example, created new standards under which to reduce damage awards. Removing considerations of wealth and culpability and placing punitive power in the hands of judges would probably have the effect of at least curbing the highest awards. The effect of these reforms, ideally, would be that defendants would be better able to determine the desired level of safety ex ante, avoiding some of the enforcement problems created by litigation ex post. More abstractly, these changes **[*1805]** raise the question: Is the legal community willing to sacrifice some tort enforcement for greater punitive damages rationality?

If compensatory damages - which seem easier rationally to predict than **punitive damages** n129 - can take the place of some of the enforcement lost through **punitive damages reform,** then a general reduction in the amount of **punitive damages** awarded is not

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necessarily a bad idea. Although the idea that punitive damages should fill the enforcement gap is most developed in law and economics scholarship, the rationale exists even in the case law. n130 If the litigation system itself can be structured better to fill the enforcement gap, courts might be open to phasing out large extracompensatory awards. It is worth asking, therefore, whether other techniques of litigation that are part of the new shape of lawsuits could fulfill those deterrent and punitive purposes more effectively than punitive damages.

Two potential alternatives exist that could close the enforcement gap by encouraging more awards of compensatory damages, providing deterrence without some of the troubling theoretical inconsistencies associated with punitive damages. For example, wider acceptance of a subrogation technique would allow insurers to pay victims directly for their injuries in the proper amount, then sue the defendants for the whole. This technique would place plaintiffs and defendants on a more even playing field by allowing an experienced market player to make one major investment in litigating the claims arising from a given accident. n131 A wider latitude for class action certification might also reduce the number of cases in the courts, the number of uncompensated victims, and the size of the enforcement gap. n132 In particular, institutional class representatives would have the resources to manage both common claims and differences between class members, the time differential between the appearance of various claims, and the substantive demands of mass tort litigation. Subrogation and class actions both reduce the cost per claim of litigating multi-victim accidents and allow more plaintiffs to prosecute their claims, closing the enforcement gap.

A potentially more difficult task is to find a logical and effective way to replace the retributive value of punitive damages. This approach **[*1806]** assumes that, given full deterrence and compensation for victims, further retribution would still be desirable. This proposition is questionable, n133 but some alternatives to punitive damages may yet exist in this area. For example, regulatory penalties might ultimately replace the law enforcement or deterrent aspects of punitive damages. n134 The same regulatory agencies that make enforcement decisions about safety regulations might also decide whether violations are so severe as to deserve punitive liability in addition to regulatory penalties. n135 Such a suggestion adds an element of expertise to Murphy's suggestion that a state actor have responsibility for requesting punitive liability. n136

With these more systemic long-term possibilities in view, a modest program of incremental change such as that suggested above can reduce the law's reliance on punitive damages to meet the goals of deterrence and punishment. To be most effective, however, legislative bodies in each state must define the purposes of punitive damages and the desired level of deterrence. Perhaps with centralized, national data from an expert agency, states would be able to justify their particular regimes as effective in fulfilling those purposes while minimizing distortive effects. This process of definition and justification would reduce the sometimes irrational nature of punitive damages, the Court's main target in Gore, and would also solidify the theoretical framework for punitive damages. Such a project could be accomplished in time, transforming punitive damages from one of the most vilified elements of the litigation process into a useful and rational adjunct to compensatory damages.

FOOTNOTES:

n1. See supra Part II; supra Part IV.

n2. A detailed empirical survey of punitive damage awards in 45 of the most populous U.S. counties found that punitive damages are awarded in less than 10% of jury trials. See Theodore Eisenberg, John Goerdt, Brian Ostrom, David Rottman & Martin Wells, The Predictability of Punitive Damages, 26 J. Legal Stud. 623, 632-35 (1997). The median punitive award was $ 50,000, but because of high-end awards, the mean punitive award was $ 534,000. See id. at 634 tbl.1.

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n3. See, e.g., Reductions: Verdicts Reduced After Trial, Nat'l L.J., Feb. 22, 1999, at C16. In most cases, remittitur is not a simple reduction of the award (which would substitute the discretion of the court for that of the jury), but rather a grant of a new trial if the plaintiff does not agree to accept a lower award than that determined by the jury. See generally Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1327-29 (11th Cir. 1999) (discussing this aspect of the remittitur process).

n4. A recent high-profile products liability case, for example, was brought against McDonald's by a customer who spilled her McDonald's coffee, burning herself, and received an award of $ 2.9 million. See Liebeck v. McDonald's Restaurants, P.T.S., Inc., No. CV-93-02419, 1995 WL 360309 (D.N.M. Aug. 18, 1994).

n5. See infra pp. 1785-86, 1787-88.

n6. See Reductions: Verdicts Reduced After Trial, supra note 3 (discussing Piscitelli v. Friedenberg, No. 707862 (Cal. Super. Ct., San Diego County, Jan. 14, 1998)).

n7. See Margaret Cronin Fisk, 7,600 Volts Equals $ 114M Verdict, Nat'l L.J., Nov. 22, 1999, at A10 (discussing the post-verdict **settlement** in Aultman v. Duncan Mfg., No. CV-96-077 (Ala. Cir. Ct., Hale County, Oct. 29, 1999) and describing its terms).

n8. See generally Margaret Cronin Fisk, Verdicts: The Big Numbers of 1999, Nat'l L.J., Feb. 28, 1999, at C4; Reductions: Verdicts Reduced After Trial, supra note 3.

n9. See GM's Challenge to $ 4.9 Billion Judgment Set for August 26 Hearing in California, Prod. Liab. Daily (BNA) D6 (Aug. 17, 1999), available in Westlaw, BNA-PLD File.

n10. The plaintiff in this case brought suit in Hawaii state court, claiming that the Marcos family of the Philippines imprisoned and tortured him after he discovered a cache of gold hidden by Japan in the Phillippines during World War II. See Roxas v. Marcos, 969 P.2d 1209, 1218-33 (Haw. 1998). The Hawaii Supreme Court reduced the verdict to $ 6 million, finding that the jury award was too speculative. See id. at 1275.

n11. See Reductions: Verdicts Reduced After Trial, supra note 3 ("Judges hacked away at large jury awards at an unprecedented pace in 1998.").

n12. Deterrence theory seeks to minimize social harm by deterring harmful conduct to the point at which the expected benefits lost by the prevented conduct equal the expected harm it will cause. See infra p. 1795.

n13. Commentators once criticized punitive damages for failing to fit neatly into the system of compensation represented by tort law or into the retributive purposes of criminal law. For example, the highest court of New Hampshire once called punitive damages "an unsightly and unhealthy excrescence, deforming the symmetry of the body of law." Fay v. Parker, 53 N.H. 342, 382 (1872).

n14. See, e.g., W. Kip Viscusi, The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts, 87 Geo. L.J. 285, 322-27 (1998).

n15. See, e.g., GM's Challenge to $ 4.9 Billion Judgment Set for August 26 Hearing in California, supra note 9 (quoting the plaintiff's attorney's defense of the $ 4.8 billion punitive award: "How else do you punish a huge corporation with a daily revenue of $ 440 million and cash on hand amounting to more than $ 12 billion?").

n16. Richard W. Murphy, Superbifurcation: Making Room for State Prosecution in the Punitive

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Damages Process, 76 N.C. L. Rev. 463, 468 (1998).

n17. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting). Justice O'Connor added that, in her view, "common-law procedures for awarding punitive damages fall into the latter category." Id.

n18. The word "distortion" is used here to describe any pernicious effects or unnecessary costs that the regime of punitive damages has on the legal system that might disappear if other mechanisms replaced it.

n19. See David G. Owen, A **Punitive Damages** Overview: Functions, Problems, and **Reform,** 39 Vill. L. Rev. 363, 378-79 (1994) (arguing that **punitive damages** may serve as compensation for unrecompensable injuries and litigation costs). But see Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1332 n.10 (5th Cir. 1995) (noting that few states recognize a compensatory function for punitive damages).

n20. The term "private attorney general" refers to a plaintiff who is given a cause of action by the state not primarily to enable the plaintiff to seek redress for individual injuries, but to facilitate the enforcement of public policy.

n21. See Owen, supra note 19, at 375-77.

n22. See Viscusi, supra note 14, at 322-27.

n23. See, e.g., Thomas Koenig, The Shadow Effect of Punitive Damages on **Settlements,** 1998 Wis. L. Rev. 169, 173. This perspective causes controversy not only because of its empirical claim, but also because some of its critics perceive it as serving a corporate agenda at the expense of social welfare. See Stephen Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1, 9-14 (1990) (describing the politicization of the punitive damages debate). Punitive damages usually apply only to torts that are intentional ("really mean") or grossly negligent ("really stupid"), TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 887 (W. Va. 1992), but some of the largest awards are levied against corporations for accidents that occur in the course of their business. The perceived advantage that corporate defendants enjoy in the justice system justifies this phenomenon to some. Corporate defendants, however, fight punitive damages not only in the courtroom, but also in the pages of academic journals. See, e.g., Elizabeth Amon, Exxon Bankrolls Critics of Punitives, Then It Cites the Research in Appeal of $ 5.3B Valdez Award, Nat'l L.J., May 5, 1999, at A1 (describing Exxon's sponsorship of the research of Professors Sunstein and Viscusi).

n24. See generally, e.g., Bruce Chapman & Michael Trebilcock, Punitive Damages: Divergence in Search of a Rationale, 40 Ala. L. Rev. 741 (1989); Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1 (1982); Thomas C. Galligan, Jr., Augmented Awards: The Efficient Evolution of Punitive Damages, 51 La. L. Rev. 3 (1990); A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869 (1998); infra pp. 1795-96.

n25. See, e.g., Polinsky & Shavell, supra note 24, at 878-81; Viscusi, supra note 14, at 322-27.

n26. 517 U.S. 559 (1996).

n27. See Murphy, supra note 16, at 537.

n28. See, e.g., Dorsey D. Ellis, Jr., Punitive Damages, Due Process, and the Jury, 40 Ala. L. Rev. 975, 991-99 (1989).

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n29. Compare Koenig, supra note 23, at 172 (noting that additional **settlement** pressure may exist when parties negotiate **settlements** according to their perceptions of the populist views of juries), with A. Mitchell Polinsky, Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al., 26 J. Legal Stud. 663, 665 (1997) (arguing that **settlement** amounts mirror trial awards and thus pose no greater **threat** to defendants).

n30. See Koenig, supra note 23, at 208.

n31. See Eisenberg, Goerdt, Ostrom, Rottman & Wells, supra note 2, at 625.

n32. See David Luban, A Flawed Case Against Punitive Damages, 87 Geo. L.J. 359, 365 (1998).

n33. See Eisenberg, Goerdt, Ostrom, Rottman & Wells, supra note 2, at 651-52.

n34. See Polinsky, supra note 29; see also E. Berton Spence, Punitive Damages in Alabama After BMW v. Gore: Are Outcomes Any More Predictable?, 59 Ala. Law. 314, 314-15 (1998) (finding that punitive damage awards were no more predictable after the redefinition of excessiveness review).

n35. See Cass R. Sunstein, Daniel Kahneman & David Schkade, Assessing Punitive Damages (with Notes on Cognition and Valuation in Law), 107 Yale L.J. 2071 (1998).

n36. Id. at 2074.

n37. See infra pp. 1796-97.

n38. 517 U.S. 559 (1996).

n39. In Browning-Ferris Industries. v. Kelco Disposal, Inc., 492 U.S. 257 (1989), the Court held that the Excessive Fines Clause applies only when part of a damages award is to be paid to the state. See id. at 264; see also infra note 74. Pacific Mutual Life Insurance. Co. v. Haslip, 499 U.S. 1 (1991), applied the Due Process Clause to the excessiveness review of punitive damages, upholding vicarious punitive liability for up to four times the amount of a compensatory award. See id. at 23-24. The due process inquiry depended on states' historical reliance on punitive damages, see id. at 17, and on procedural safeguards used by the state court to ensure the fairness of the award, see id. at 19-20. In TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993), the Court sustained a punitive award of $ 10 million on compensatory damages of $ 19,000, calling into question the existence of "excessiveness" standards at all. See id. at 446, 466. To add more procedural certainty to the propriety of a given award, the Court also ruled that judicial review must be available for awards of punitive damages. See Honda Motor Corp. v. Oberg, 512 U.S. 415, 435 (1994).

n40. Gore, 517 U.S. at 564.

n41. See id. at 567.

n42. Id. at 585-86.

n43. See id. at 585.

n44. See id. at 574-75.

n45. See id.

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n46. See id. at 582-83.

n47. 499 U.S. 1 (1991).

n48. 509 U.S. 443 (1993).

n49. The ratio of punitive damages to actual compensatory damages upheld in TXO was higher than 10:1, but the Court held that the relevant ratio in this case was the much lower ratio of punitive damages to potential compensatory damages. See id. at 462. On this basis, the Court noted that a ratio of up to 10:1 would not be presumptively unconstitutional. See id.

n50. See Gore, 517 U.S. at 585-86.

n51. Id. at 606 (Scalia, J., dissenting).

n52. Compare Continental Trend Resources, Inc. v. Oxy USA, Inc., 101 F.3d 634, 643 (10th Cir. 1996) (holding that courts must give plaintiffs the choice between remittitur and a new trial), and Lee v. Edwards, 101 F.3d 805, 813 (2d Cir. 1996) (same), with Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1331-32 (11th Cir. 1999) (holding that courts may simply reduce awards on constitutional grounds without giving plaintiffs a choice).

n53. 97 F.3d 914 (7th Cir. 1996).

n54. See id. at 920. Although he relied on Gore and found that the punitive award of $ 22,500 was consistent with Gore's two "numerical" guideposts (the ratio of punitive damages to compensatory damages and comparable awards for similar conduct), Judge **Posner** questioned the ratio guidepost, stating that "the smaller the compensatory damages, the higher the ratio of punitive to compensatory damages has to be in order to fulfill the objectives of awarding punitive damages." Id. at 919. **Posner's** remark echoes the deterrence theorists' concern over the enforcement gap. See infra pp. 1795-96.

n55. 101 F.3d 805 (2d Cir. 1996).

n56. See id. at 813.

n57. 101 F.3d 634 (10th Cir. 1996).

n58. See id. at 641.

n59. See Lee, 101 F.3d at 813.

n60. See Jordan v. Shaw Indus., Inc., 131 F.3d 134, 1997 WL 734029, at *5 (4th Cir. 1997).

n61. BMW of North America, Inc. v. Gore, 517 U.S. 559, 583 (1996) (quoting TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting)).

n62. Parsons v. First Investors Corp., 122 F.3d 525, 530 (8th Cir. 1997).

n63. Riley v. Kurtz, No. 98-1077, 1999 WL 801560, at *8 (6th Cir. 1999).

n64. See Gore, 517 U.S. at 574 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may

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impose.").

n65. Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc., 181 F.3d 446, 468 (3d Cir. 1999).

n66. See Owen, supra note 19, at 384-85 ("Vague standards ...provide[] ...flexibility to achieve justice on the individual facts.").

n67. Punitive damages are a state law problem insofar as the law of punitive damages is state doctrine. However, to treat the problem on a state-by-state basis ignores some of the most salient justifications for the use of punitive damages, which require national change. See infra p. 1794.

n68. For example, in Wilson v. IBP, Inc., 558 N.W.2d 132, 148 (Iowa 1996), the Iowa Supreme Court combined the various excessiveness factors of Gore, Haslip, and several state cases and balanced them against one another. In the Alabama cases of McKowan v. Bentley, No. 1971357, 1999 WL 667290, at *7 (Ala. Aug. 27, 1999), and Cherokee Electric Cooperative v. Cochran, 706 So. 2d 1188, 1194 (Ala. 1997), the Alabama Supreme Court held that the state practice of awarding punitive damages only in wrongful death actions overcame Gore's requirement that punitive damages must bear a reasonable relationship to compensatory damages "because a state can make homicide expensive." Id. at 1194. In addition, various courts have elided the due process "notice" guideposts of Gore by embracing the notion that extremely reprehensible conduct can diminish the importance of the other two factors. See, e.g., Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 52 (Tex. 1998).

n69. See, e.g., Routh Wrecker Serv., Inc. v. Washington, 980 S.W.2d 240, 244 (Ark. 1998) (explaining that the state test of excessiveness, whether the award "shocked the conscience" of the trial court, should be considered prior to the Gore guideposts and applying both the state and federal tests in turn).

n70. For example, the South Carolina Court of Appeals noted that "although punitive damages have received increasing academic criticism in recent years ...the doctrine's viability is unchallenged in South Carolina's jurisprudence." Clark v. Cantrell, 504 S.E.2d 605, 609 & n.2 (S.C. Ct. App. 1998) (citing Owen, supra note 19, and Polinsky & Shavell, supra note 24). In a few cases, however, academic discussion has reinforced state decisions. See, e.g., Jones v. Shaffer, 573 So .2d 740, 744 (Miss. 1990) (citing Steven Shavell, Economic Analysis of Accident Law (1987), to justify a compensatory use of punitive damages). The slight notice of academic theories by state courts is surprising in light of Justice Breyer's observation in Gore that a state's reliance on a "constraining "economic' theory" might be a factor favoring deference in federal court excessiveness review. BMW of North America, Inc. v. Gore, 517 U.S. 559, 594 (1996) (Breyer, J., concurring).

n71. See, e.g., N.H. Rev. Stat. Ann. 507:16 (1986). Other states prohibit punitive damages for certain types of cases. For a complete list of state statutes in effect in 1996 concerning punitive damages, see Gore, 517 U.S. at 614 (Ginsburg, J., dissenting).

n72. See, e.g., Colo. Rev. Stat. 13-21-102 (1997); Conn. Gen. Stat. 52-240b (1997).

n73. See, e.g., Ga. Code Ann. 51-12-5.1 (Supp. 1999); Kan. Stat. Ann. 60-3701 (1994). Other states use lower caps in cases in which compensatory awards are low. See, e.g., Nev. Rev. Stat. 42.005 (1999).

n74. See, e.g., Iowa Code 668A.1 (1998); Utah Code Ann. 78-18-1 (1996). Although these laws may implicate the Excessive Fines clause of the Constitution, because they involve payment to the state, several courts have upheld them against such challenges. See, e.g., Fust v. Missouri, 947 S.W.2d 424 (Mo. 1997); see also Sonja Larsen, Annotation, Validity,

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Construction, and Application of Statutes Requiring that Percentage of Punitive Damages Awards Be Paid Directly to State or Court-Administered Fund, 16 A.L.R.5th 129 (1993).

n75. People injured in states with punitive damages caps or bans further subsidize these taxpayer redistributions because they suffer from injury at the same rate as people in states that allow punitive damages, see Viscusi, supra note 14, at 288-90, but they cannot recover as much for their injuries.

n76. See, e.g., Cal. Civ. Code 3295 (West 1997); Mo. Rev. Stat. 510.263 (Supp. 1999).

n77. Murphy, supra note 16, at 472.

n78. Bifurcation is also an option in federal trials, though it is not mandatory. See Fed. R. Civ. P. 42(b).

n79. See Koenig, supra note 23, at 208.

n80. This literature is extensive, and the authors document it thoroughly. See Polinsky & Shavell, supra note 24, at 876 n.12, 877 n.14. Among the major works they cite are Darryl Biggar, A Model of Punitive Damages in Tort, 15 Int'l Rev. L. & Econ. 1 (1995); Robert D. Cooter, Punitive Damages for Deterrence: When and How Much?, 40 Ala. L. Rev. 1143 (1989); and Ellis, supra note 24.

n81. See generally Polinsky & Shavell, supra note 24.

n82. See id. at 874-75.

n83. The ideas summarized in this paragraph have been developed over the course of more than a quarter-century of law and economics scholarship. See, e.g., Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis (1970); William M. Landes & Richard A. **Posner,** The Economic Structure of Tort Law (1987); Richard A. **Posner,** Economic Analysis of Law (2d ed. 1972); Shavell, supra note 70; Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968).

n84. See Polinsky & Shavell, supra note 24, at 874.

n85. See id. at 905-10.

n86. See id. at 874-75.

n87. See id. at 874. To use their simple example, suppose an injurer causes $ 100,000 worth of harm to each of its victims, and the probability of the injurer being caught and held legally responsible is one in four. The total damages should thus be $ 400,000 to each victim who successfully sues: a punitive award of $ 300,000 in addition to the compensatory award of $ 100,000. Such an award will cause the injurer to pay for the total social injury caused, despite the existence of a 75% enforcement gap. See id. at 874-75.

n88. See id. at 905-10.

n89. For example, if a state permits compensation for emotional distress in addition to injuries, this policy represents a judgment that the conduct of the injurer was more reprehensible than conduct for which no such compensation is allowed. It might be argued that culpability should be measured by potential harm, an approach approved by the Supreme Court in TXO. See TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 462 (1993). Polinsky and Shavell reject this argument, contending that a potential defendant will structure his conduct to account for probable compensatory and punitive damages, so the ex

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post award of only actual damages has no effect on deterrence. See Polinsky & Shavell, supra note 24, at 914-17.

n90. If, for example, a doctor leaves a surgical tool inside a patient, compensatory damages will on average be quite high (because most plaintiffs will sue and win), and punitive damages are therefore unnecessary. See Polinsky and Shavell, supra note 24, at 906. The same logic, the authors claim, applies to mass torts such as the Exxon Valdez oil spill. See id. at 903-04.

n91. See id. at 910-14.

n92. Id. at 911.

n93. See id. at 933.

n94. See Viscusi, supra note 14, at 288-90.

n95. Id. at 334.

n96. See generally id. There is a flaw in Viscusi's argument caused by the cross-jurisdictional problem, see supra p. 1794, which limits the effectiveness of state reforms. Because corporations are likely to adjust their level of safety to the national average of liability instead of customizing their products and behavior for each state, there should not be variations in the accident rate between states with varying levels of liability. National corporations can minimize costs by allowing the same number of accidents in each jurisdiction (using an optimal average level of safety) and paying different amounts in different states when held liable for those accidents. See also Luban, supra note 32, at 363-64.

n97. See Viscusi, supra note 14, at 335 (noting the possibility of regulatory enforcement of corporate safety requirements).

n98. Indeed, in their empirical study, Professor Eisenberg and his colleagues found no evidence to suggest that punitive damages are awarded against corporations more frequently than against individuals. See Eisenberg, Goerdt, Ostrom, Rottman & Wells, supra note 2, at 646. They did, however, find that the amount of punitive awards is generally higher against businesses. See id. at 649.

n99. This problem, at least, is a limitation of Polinsky and Shavell's specific formulation of the model. It might be possible to construct a system in which a multiplier not only aggregated unenforced claims, but also forced injurers to internalize the entire cost of accidents; this system would, however, require extraordinary efforts at valuation by legislatures and unprecedented cooperation among judges. Even if such costs could be measured and agreed upon, the necessary systematic recalibration of measurements of individual harm by reference to social harm would be impossible. For a documentation of the practical problems of legislative valuation as a determinant of social harm, see Luban, supra note 32, at 375-77 (citing the Occupational Safety and Health Act, 29 U.S.C. 666(e) (1994), which "treats serial homicide as a misdemeanor," as an example of a law that cannot represent Congress's considered judgment about the value of deterrence).

n100. In addition, this system would create distributional problems. Because early awards are high, there is more incentive for anyone with a colorable claim of injury to sue; in turn, less "enforcement gap" damages are available to each plaintiff. These competing incentives might arrive at some equilibrium, but one in which damages to compensate plaintiffs with lower expected damages would be transferred in the form of punitive damages to those plaintiffs with higher expected damages (and therefore enough incentive to bring suit). Payment of punitive damages into state funds would exacerbate this problem by reducing the

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plaintiff's claim value, pricing more of the claimants with lower expected damages out of litigation.

n101. See, e.g., Fisk, supra note 8; Reductions: Verdicts Reduced After Trial, supra note 3; Verdicts: The Big Numbers of 1997, Nat'l L.J., Feb. 23, 1998, at C2.

n102. See, e.g., Eisenberg, Goerdt, Ostrom, Rottman & Wells, supra note 2, at 644-46 (finding that the potential for punitive liability affects **settlement** amounts).

n103. See, e.g., Fisk, supra note 8; Reductions: Verdicts Reduced After Trial, supra note 3; Verdicts: The Big Numbers of 1997, supra note 101.

n104. See Eisenberg, Goerdt, Ostrom, Rottman & Wells, supra note 2, at 644-46.

n105. See Polinsky & Shavell, supra note 24, at 903-04 (discussing the case of the Exxon Valdez).

n106. See Eisenberg, Goerdt, Ostrom, Rottman & Wells, supra note 2, at 644-46.

n107. See, e.g., GM's Challenge to $ 4.9 Billion Judgment Set for August 26 Hearing in California, supra note 9 (products liability).

n108. See, e.g., Reductions: Verdicts Reduced After Trial, supra note 3 (legal malpractice).

n109. See Polinsky & Shavell, supra note 24, at 905-10.

n110. Recklessness in such cases might be defined as the failure to perform any cost-benefit analysis at all or by creating some other standard, see infra note 127.

n111. Punitive awards in cases involving intentional injuries have generally been less controversial than in other cases. This acceptance of punitive damages may result from the fact that intentional torts look the most like "aggravated wrongs" for which the retributive function of punitive damages is most appropriate. See Owen, supra note 19, at 375-77; see also William M. Landes & Richard A. **Posner,** An Economic Theory of Intentional Torts, 1 Int'l Rev. L. & Econ. 127, 127-39 (1981) (explaining that economic analysis is relevant to deterring the intentional behavior of tortfeasors).

n112. See Robert G. Schloerb, Richard L. Blatt, Robert W. Hammesfahr & Lori S. Nu-gent, Punitive Damages: A Guide to the Insurability of Punitive Damages in the United States and its Territories 39 (1988); Polinsky & Shavell, supra note 24, at 931 & n.193.

n113. See Polinsky & Shavell, supra note 24, at 933 (noting that the fear of a large judgment is a greater deterrent to a risk-averse defendant than a stream of well-calibrated insurance premiums).

n114. This feature of insurance has a distributional benefit as well as a deterrent benefit, as it forces an entire industry that engages in a risky activity to pay for that activity, instead of placing the entire burden on the single defendant who is "struck by lightning" when a jury award is assessed. Furthermore, the distribution might be across an "industry" of risk takers comprising individuals. Shifting the burden of cost-benefit analysis to the insurance industry lessens the critique, see supra p. 1797, that some of those individuals might not be acting rationally at the time of an accident.

n115. See Polinsky & Shavell, supra note 24, at 910-14.

n116. See id. The idea that wealth need not play a part in punitive damage awards has

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into the field by the courts, and section C discusses academic reform proposals. Section D argues that deterrence theory n12 can provide a foundation for bringing more rationality and consistency to punitive damages.

A. The Problem with Punitive Damages

Criticism of punitive damages is widespread, but critics express widely divergent views on precisely what is wrong with them. Once attacked on formal grounds, n13 opponents today criticize them for failing to supplement the other elements of the civil justice system effectively. These opponents believe that punitive damages threaten productive members of society with insolvency simply to satisfy the public's indignation upon seeing the innocent harmed. n14 To advocates, punitive damages are the only way for society to express that indignation in a way that a corporation will understand: n15 by checking the power of corporate America, punitive damages prevent the public from "driving repainted, exploding Ford Pintos while washing down **[*1785]** unsafe drugs with scalding coffee." n16 Moderates see the virtues of punitive damages but also fear their misapplication. As Justice O'Connor has written: "Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm." n17

Many complaints concerning punitive damages share a common theme: because the practical and theoretical boundaries of punitive damages are undefined, especially as established by jury awards, such awards act as distortions n18 on the legal system. These distortions may exist because it is hard to identify a role that punitive damages uniquely play in the justice system. Punitive damages compensate victims for certain losses that standard compensatory awards do not cover; n19 they act as punishment for bad acts, empowering private attorneys general n20 to seek retribution where criminal sanctions prove impracticable; n21 and they supplement the important deterrent functions of both tort and criminal law. This lack of a unique role opens punitive damages to the criticism that another, perhaps existing, feature of the legal system could replace them. Developments in punitive damages in the last several years are attempts to cure some of these distortions.

Some punitive damages reformers believe that the purpose of damages is to **induce** potential defendants to take a socially optimal level of care, not to deter harmful conduct completely. Traditional tort reformers, therefore, argue that punitive damages, by painting a target on the chests of the companies with the deepest pockets, stifle innovation and harm shareholders. n22 The winners are individual plaintiffs who were "lucky" enough to be injured; the losers are defendants and **[*1786]** the general public, as defendants pass the cost of punitive liability along to consumers through higher prices for products and services. n23

Law and economics scholars and deterrence theorists espouse a related view: n24 the potential for enormous punitive awards distorts the traditional tort mechanisms of compensation (or insurance) and deterrence by introducing irrelevant factors into calculations of the cost of harmful conduct. Punitive damages make injurers pay for much more than the harm they cause, in effect overdeterring some kinds of conduct and discouraging some socially beneficial activity. n25 In other words, punitive damages make ex ante calculations of potential liability almost impossible.

The notice that is important to deterrence theorists for economic reasons is important to courts for the additional reason that predictability is an important rule of law value - sometimes elevated to the level of a due process requirement. The idea that an injurer must have notice of its potential liability for a harmful act was the driving motivation behind the important 1996 Supreme Court decision in BMW of North America, Inc. v. Gore, n26 which overturned a punitive award of $ 2 million as violative of the Due Process Clause. Punitive damages, however, are sometimes so great that potential defendants cannot anticipate

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support in the case law. In Kemezy v. Peters, 79 F.3d 33 (7th Cir. 1996), which was lost in the aftermath of Gore, Judge **Posner** found that "none of [the purposes served by awarding punitive damages] depends critically on proof that the defendant's income or wealth exceeds some specified level.... Rich people are not famous for being indifferent to money." Id. at 35. He therefore held that a plaintiff could not dispute his award of punitive damages simply because the jury failed to consider the defendant's wealth. See id. at 36.

n117. In some states, this idea is already in practice. For example, in Kansas, the jury as fact-finder decides whether punitive liability is appropriate, and then the judge determines the proper amount of punitive damages. See Kan. Stat. Ann. 60-3701 (1994). This suggestion has been made elsewhere. See Paul Mogin, Why Judges, Not Juries, Should Set Punitive Damages, 65 U. Chi. L. Rev. 179, 207-23 (1998).

n118. It is true that this situation exists in many areas of civil litigation, but if punitive damages are to have both deterrent and retributive purposes in addition to compensatory purposes, then an analogy may again be drawn to criminal law, in which a jury determines liability (guilt), but a judge conducts the sentencing. "How great were the plaintiff's injuries?" is a question of fact, and "How must the law incentivize rational behavior on the part of the defendant?" is a question of law - and in the latter area, judges have more expertise than juries.

n119. See Sunstein, Kahneman & Schkade, supra note 35, at 2074. Despite this fact, the authors argue that juries should continue to be used in assessing punitive damages, but they recommend changes that would impose some uniformity on the dollar amount that accompanies a given jury's intended level of punishment. See id. at 2121-24. They also acknowledge, however, that "if optimal deterrence is the purpose of the award of punitive damages, the jury system is an extremely bad institution." Id. at 2111.

n120. See, e.g., Viscusi, supra note 14, at 328-30. Viscusi discusses the hindsight bias that produces a "common assumption" in juries that firms "should have anticipated all possible accidents." Id. at 328. He also notes that juries may overestimate the importance of small probabilities, leading them to penalize corporations when risks, acceptable in the abstract, turn into concrete injuries. See id. at 329.

n121. It has been suggested that entrusting expert administrators to determine damages amounts can best eliminate the valuation and risk biases that jury verdicts reflect, removing judges from the equation entirely and bestowing the benefits of "bureaucratic rationality" on the system. See Sunstein, Kahneman & Schkade, supra note 35, at 2124 ("An administratively operated schedule of fines and penalties seems better than juries at producing deterrence, for such a system would reduce the costs of decision and probably reduce the cost of errors as well.").

n122. See Reductions: Verdicts Reduced After Trial, supra note 3.

n123. The bifurcation responses enacted in several states take steps toward this ideal, as the damages portion of a trial is sometimes heard only before a judge, see Conn. Gen. Stat. Ann. 52-240b (1997); Kan. Stat. Ann. 60-3702(a) (1994), and as these responses often carry other procedural safeguards such as separate discovery, see, e.g., Ala. Code 6-11-20 (1993); Cal. Civ. Code 3294(a) (1997); Mont. Code Ann. 27-1-221(5) (1999). Importantly, the bifurcated trial is a way to remove some forms of jury bias without removing the jury. Some evidence, such as corporate cost-benefit analyses, which would be relevant to a finding of negligence at the liability phase, might be seen as an indication of "heartlessness" at the damages phase and inflate an award. See Developments in the Law - The Civil Jury, 110 Harv. L. Rev. 1408, 1529-30 (1997). Bifurcation thus can be seen as another important procedural safeguard that advances the rationality goal in awarding punitive damages.

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n124. See Murphy, supra note 16, at 501-03.

n125. This scheme poses several problems, including a reduction in a plaintiff's incentive to sue and the placement of decisions that are essentially regulatory in the office of state prosecutors. A different way of placing the punitive function in state hands would be to entrust punitive enforcement to regulatory agencies, see Viscusi, supra note 14, at 317-20, although this too would essentially remove punitive liability from the realm of civil litigation altogether.

Both of these suggestions would encounter opposition not only from the plaintiff's bar, but also from academics who advocate the virtues of the private attorney general system of tort enforcement. These writers prefer the private attorney general "bounty hunter" to either the bureaucrat or the unchecked corporate sector. Luban, supra note 32, at 366. In this view, the increased incentive to sue created by punitive damages is not a distortion caused by punitive damages, but a valuable way of privately financing law enforcement. See id. at 367.

A compromise would be to divert all punitive awards to the state, encouraging private attorneys to seek punitive damages by paying them fees equal to their lost opportunity cost. This compromise would remove the incentive for plaintiffs to sue for the stars in hopes of a giant windfall, but it would also prevent a large, non-criminal enforcement burden from being placed on the shoulders of public prosecutors. Enforcement decisions, furthermore, might be made by neutral state officials, but the further punitive liability investment in a given claim would be made by the private attorneys who already have a substantial investment in the litigation.

n126. Such a standard has support in both statutory and case law. See, e.g., Watkins v. Ford Motor Co., 190 F.3d 1213, 1217 n.2 (11th Cir. 1999) (citing Ga. Code Ann. 15-12-5.1(b) (1999), which requires clear and convincing evidence of the defendant's intent before imposing punitive liability). But see Honda Motor Corp. v. Oberg, 512 U.S. 415, 433 (1994) (noting that a clear and convincing standard of liability may not be an adequate safeguard against excessive punitive awards).

n127. In a system of punitive damages based solely on deterrence, for example, such a rule might remove punitive liability for a defendant who is able to show that he conducted a cost-benefit analysis ex ante for the product or activity in question. The strictness of the desired rule could be adjusted by changing the assumptions required in performing the analysis.

n128. This public role might extend to coordinating one punitive award for the defendant's conduct across the entire state - or better yet, nation - instead of subjecting the defendant to repeated punitive awards for the same conduct in every state. See Murphy, supra note 16, at 473, 524-27.

n129. See supra pp. 1787-88.

n130. See, e.g., Nutrivida, Inc. v. Inmuno Vital, Inc., 46 F. Supp. 2d 1310, 1316-17 (S.D. Fla. 1998) (using punitive damages to deter conduct that would be undeterred by compensatory damages); cf. Wilson v. IBP, Inc., 558 N.W.2d 132, 145 (Iowa 1996) (using punitive damages to deter potential harm that might otherwise go undeterred); Bowen v. Caldor, Inc., 710 A.2d 267, 285 (Md. 1998) (same).

n131. Cf. David Rosenberg, The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System, 97 Harv. L. Rev. 849, 889-92 (1984) (describing the claim investment incentives of plaintiffs' attorneys).

n132. See infra pp. 1809-10.

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n133. It is questionable because of the problems inherent in attempting to punish a corporation for its past conduct - how do you teach a corporation "a lesson," especially when its directors or officers may not have been affiliated with the corporation when the injury occurred? In addition, the "retributive" function of punitive damages might not be necessary if there were a reliable way to fill the enforcement gap; the reason "punishment" must be an object of punitive damages may simply be that compensatory damages will inevitably fall short of the total social harm caused by the injury.

n134. See Viscusi, supra note 14, at 317-20 (describing how government regulation provides incentives for safety).

n135. Independent agencies might use promulgated regulations to adjudicate punitive liability, further enhancing predictability.

n136. See supra p. 1803.

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them, making it impossible to choose a course of action beforehand.

The power of private attorneys general to impose tort sanctions under a rationale normally protected by state discretion and criminal **[*1787]** procedural safeguards adds another layer of distortion to both the civil and criminal systems of deterrence and punishment. Punitive damages allow retribution to intrude into the realm of civil litigation, which is troubling because civil standards of proof are lower than criminal standards and the moral culpability of the defendant may be less clear. n27 If it is acknowledged that punitive damages have the purpose of retribution for bad acts, then it is unclear why overzealous and interested "prosecutors" are better suited for such a purpose than criminal prosecutors and the safeguards of the criminal law. n28

Finally, the difficulty of predicting the potential liability for a harmful act pressures defendants to settle cases - especially class actions - in which punitive awards are possible, however unlikely. Some dispute this effect for garden-variety torts, n29 but mass tort cases provide a clear example of the **settlement** leverage that the **threat** of a punitive award bestows upon plaintiffs. n30 To some, this pressure for **settlement** when the plaintiff has very little chance of winning may result in an inflated **settlement** amount n31 and the appearance of an admission of guilt. To defend the system, plaintiffs' advocates describe a system in which corporations play hardball with plaintiffs who have legitimate claims, wearing them down by threatening to drag out litigation until they settle for a fraction of their claims' worth. n32

The very existence of these problems is in dispute, and the dispute is compounded by the fact that empirical data on punitive damages that can garner the agreement of a wide cross-section of the legal community continues to prove elusive. Professor Eisenberg and his colleagues, for example, argue that not only is there a rational pattern to the award of punitive damages, but that there is also a discernible ratio of punitive to compensatory damages that makes punitive amounts predictable. n33 Professor Polinsky, however, uses this same data to support the proposition that punitive damages are irrational, **[*1788]** significant, and unpredictable. n34 Another study n35 reveals a distortion arising not from legal standards or processes, but from human psychology. This study concluded that potential jurors "have a great deal of difficulty in mapping such [moral] judgments onto an unbounded scale of dollars. Shared moral judgments but erratic, unpredictable, and arbitrary awards, possibly even meaningless awards, are a potential product of this difficulty." n36 Finally, Professor Viscusi uses data about accidents to argue that punitive damages have no effect on behavior and therefore should be abolished as superfluous. n37 Unfortunately, the empirical uncertainty surrounding **punitive damages** makes it difficult to support most **reform** proposals with convincing data.

B. Federal and State Responses to the **Punitive Damages** Problem

There have been several efforts in recent years to define the legal foundations of punitive damages and to describe ways to apply them intelligently and systematically. However, these responses have not been entirely satisfactory: the Supreme Court offered a possibility for national change that has failed in its implementation, and although states have proposed several interesting solutions, states can only partially alleviate the problem because of their limited jurisdiction.

1. The Supreme Court and BMW v. Gore. - During the 1990s the Supreme Court was quite active in the area of punitive damages, issuing five different rulings, including BMW of North America, Inc. v. Gore n38 in 1996. Most of the Court's activity early in the decade concerned how to determine whether a particular punitive award is excessive and therefore in violation of the Excessive Fines Clause of the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment. n39 Although the Supreme Court could not possibly, in a **[*1789]** handful of cases, bring order and uniformity to the various state law doctrines that allow for

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punitive damages, the Court did articulate a test that would systematically reduce some of the highest awards. The Court's rulings, however, failed to **reform punitive damages** law (or to stem the tide of criticism), and the apportionment of **punitive damages** seems no more evenhanded or principled at the end of the decade than it was at the beginning. The Court's rulings were inadequate in two significant respects: first, they failed to articulate a coherent rationale for punitive damages or describe constitutionally permissible limits on the purpose of punitive liability; and second, their standards for determining "excessiveness" are subject to almost infinite discretion and make the outcome of the individual case no more predictable than it was before.

The most important theme to emerge from the Court's recent punitive damages cases was that the Due Process Clause limits the size of punitive damages awards. The plaintiff in Gore, Dr. Ira Gore, had bought a BMW that the dealer had represented to him as new; the car had in fact been repainted and was worth $ 4000 less than Gore was led to believe. The jury awarded Gore the $ 4000 in compensatory damages, plus $ 4 million in punitive damages, which Gore had claimed "would provide an appropriate penalty for selling approximately 1000 cars for [$ 4000] more than they were worth." n40 On BMW's post-trial motion, the Alabama Supreme Court remitted the award to $ 2 million. n41

The Supreme Court struck down the award as unconstitutional, declaring it "grossly excessive" and thus a violation of the Due Process Clause. n42 The Court based its decision on rule of law values, noting that any damages would be excessive if the defendant could not have had notice of them at the time of the conduct. n43 In doing so, the Supreme Court established three "guideposts" for determining the excessiveness of punitive awards: the degree of reprehensibility of the conduct, the disparity between the actual or potential compensatory and punitive damages awarded, and the amounts of punitive awards in comparable cases. n44 Writing for the Court, Justice Stevens reasoned that such considerations would further the legitimate goals of punitive damages: adequate notice both protects the defendant from the quasi- **[*1790]** criminal, retributive aspects of punitive damages and ensures the proper working of the regime's deterrent function. n45 However, the Court declined to suggest a mathematical bright line for constitutionality, relying on the "reprehensibility" guidepost to limit or justify the fruits of the jury's imagination. n46 Pacific Mutual Life Insurance Co. v. Haslip n47 and TXO Production Corp. v. Alliance Resources Corp. n48 had upheld punitive-compensatory ratios of only 4:1 and 10:1 n49 respectively, and the Court concluded that the 500:1 ratio present in the Gore case did not survive constitutional review. n50

2. The Application of Excessiveness Review in Federal Courts. - Dissenting in Gore, Justice Scalia claimed that the "test" that the Court developed would provide no guidance at all to courts: "These crisscrossing platitudes yield no real answers in no real cases." n51 The development of punitive damages law in the federal courts has confirmed his fears. Eight circuits have applied Gore to determine the excessiveness of punitive awards, with some circuit conflict emerging over procedural aspects of the remittitur process n52 and with mixed results over the substantive meaning of the guideposts.

In most cases, the federal circuit courts' reasoning has some basis in the language of Gore, but their holdings do not necessarily follow from that decision. For example, in Cooper v. Casey, n53 Judge **Posner** of the Seventh Circuit upheld a 12:1 ratio of punitive damages to compensatory damages (higher than the potential ratio explicitly approved in TXO) because he determined that the moral culpability of the defendant was so high that that particular Gore factor should carry added weight. n54 In several other cases, courts of appeals used factors **[*1791]** external to the Gore tests to strike down punitive awards that the Supreme Court might have upheld under Gore. In Lee v. Edwards, n55 after finding that the district court's award passed the Gore test, the Second Circuit nonetheless reduced the award on the grounds that the court below had no discretion to allow such a high award. n56 Similarly, the Tenth Circuit in Continental Trend Resources, Inc. v. OXY USA, Inc. n57 found

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that the Gore guideposts supported a large punitive award, but the court nevertheless refused to uphold an award that it found to be unnecessarily large for purposes of deterrence. n58

An additional problem is that, because Gore failed to articulate a bright-line rule, courts have used precedent to expand the permissible ratio of punitive to compensatory awards far beyond those sanctioned in Haslip and TXO and even beyond the ratio struck down in Gore. The punitive award in Lee was $ 75,000, which represented a ratio of punitive to compensatory damages of 75,000:1 because the compensatory award was nominal. n59 Relying on this precedent, the Fourth Circuit upheld ratios of up to 488:1, despite the fact that the compensatory damages awarded were actual, not nominal. n60 This decision suggests that, despite the "suspicious judicial eyebrow" that the Supreme Court raised at the 500:1 ratio in Gore, n61 judges continue to use precedent to expand the outer limits of the permissible ratio.

Finally, two circuits seem to have given up trying to apply the Gore guideposts as stated and instead have glossed the Supreme Court's opinion to create a test for unconstitutional excessiveness that is easier to apply (though arguably no more determinative). The Eighth Circuit described Gore as a constitutional test to determine whether an award is so disproportionate to a state's interests in punitive damages as to be in a "zone of arbitrariness." n62 Similarly, the Sixth Circuit interpreted the Gore test as asking whether the disparity between the punitive and compensatory awards "shocks the conscience." n63

These cases suggest that the Gore standards provide little direction for litigants. The result is that meaningful notice of potential liability, **[*1792]** perhaps the key element in the due process analysis of Gore, n64 is lost among the guideposts. As the Third Circuit stated, "the Supreme Court has instructed as to the analysis but has provided nothing concrete as to the amount" that might be excessive. n65 The larger implication is that the potential for a constitutional limit on punitive awards - which could provide a foundation for reducing the pressures they place on the civil litigation system - has gone unrealized. Although a general limit on punitive damages could reduce **settlement** pressures, provide greater procedural safeguards for defendants, or approach a goal of optimal deterrence, federal punitive damages law ensures none of these things to litigants; remittitur as a matter of law is not guaranteed. Perhaps these wildly divergent applications of Gore represent a triumph of justice in the individual case. n66 However, this benefit may come at the cost of judges' abusing their discretion in contravention of the rule of law values that the Supreme Court intended that Gore protect.

3. State Responses to **Punitive Damages.** - Some of the most extensive **reforms of punitive damages** have occurred in state law, and insofar as **punitive damages** are a "state law problem," n67 these state responses represent a good start. Many recent state court cases in which the excessiveness of punitive damages has been litigated have combined the Gore standard with existing state law. This approach has led to unrecognizable permutations of Gore in a few cases, n68 but in others, courts merely applied state-law excessiveness review before conducting a Gore analysis. n69 State courts have also occasionally taken **[*1793]** notice of academic treatments of punitive damages, but these discussions have rarely had a determinative impact on the outcome of cases. n70

In most states, however, the primary locus of **punitive damages reform** is not the judiciary, but the legislature. State legislatures have attempted a variety of approaches that reduce the size of the permissible punitive award or the plaintiff's incentive to seek it. A few states have severely limited the availability of punitive damages to specific statutory circumstances. n71

Perhaps the most common response among other states is to cap each punitive award at a given dollar amount or at a fixed ratio to the compensatory award. Eleven states have

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punitive damages caps that range from one to five times the amount of compensatory damages, n72 while others provide for absolute caps, ranging from $ 300,000 to $ 5 million. n73 The effect of such requirements is to lower the incentive for plaintiffs to litigate unmeritorious claims and reduce the burden on state industry that punitive damages represent. Another, more subtle way of altering plaintiffs' incentives and rectifying distributional problems is to require the payment of punitive damages into state funds. Thirteen states now have laws allowing a percentage of many punitive awards to be paid to the state treasury or to a state-administered victims' compensation fund. n74 In doing so, the state essentially **[*1794]** redistributes punitive damages from the plaintiffs who win the punitive damages lottery to either the state taxpayers as a whole or to those victims who did not have a large enough claim to pay for litigation. n75

Finally, some states have attempted to reduce the apparent irrationality of punitive damage awards by bifurcating the litigation pro-cess into a liability stage and a damages stage. Usually upon the defendant's request, trials in twelve states n76 must be bifurcated to separate the determination whether punitive liability is appropriate from the consideration of the amount of the award. Because certain evidence concerning the extent of the injury may not be available to sway the jury's sympathies at the initial phase, a plaintiff is less able to "play the jury lottery" n77 and must invest more in litigation costs to seek a large jury verdict. n78

These reforms are a beneficial first step, and the limitation of punitive amounts in particular may help defendants take better account of potential punitive liability in **settlements** as well as in litigation. n79 However, because defendants are unlikely to customize mass-produced goods to the liability rules of different states, punitive damages are most likely to **induce** change in potential defendants' national business. This phenomenon may blunt the impact in each state of that state's individual reforms. Because national corporate defendants can cost-effectively make only limited changes in their state-to-state business, the national average level of punitive liability is probably more likely to to influence behavior than the level in any particular state. At least in cases involving national corporations, the defendant will calculate its potential liability across all relevant jurisdictions and will adjust its behavior accordingly. This cross-jurisdictional problem heightens the necessity for definitive national **reform of punitive damages.** In contrast, the system resulting from state **reforms** is ad hoc: while it may be an improvement in practice, it is not necessarily more theoretically consistent or even rational. Although the states are currently the most effective reformers of punitive damages doctrine, the concomitant problems of coordination and scope make the absence of a national statement about excessiveness even more conspicuous.

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C. Deterrence Theory and the Rational Choice Proposals

Recent academic literature concerning punitive damages falls into two categories: rational choice theory discussions of the **punitive damages** regime and empirical studies that support or refute various **reform** efforts. One provocative and ambitious solution to the **punitive damages** distortion problem comes from the field of law and economics. Professors Polinsky and Shavell build on the twenty-year-old rational choice literature on punitive damages n80 in an attempt to bring order to the field of punitive damages. n81 They define the legitimate objectives of punitive damages and radically change the calculation of punitive damages to match these objectives. Polinsky and Shavell argue that the best justification for punitive damages is to fill the enforcement gap created by the tort system through the use of an award multiplier formula that considers the likelihood that a tortfeasor will escape liability. n82

The foundation for this argument is deterrence theory, one of the pillars of the law and economics movement. The tort system, this argument begins, serves two purposes: to

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compensate victims for individual harms and to deter injurers from perpetuating social harms. In a perfectly operating system, all victims of harm would receive compensation, thus forcing injurers to internalize the costs of their actions and encouraging them to cease behavior that causes net social harm. By punishing too rarely or in insufficient amounts, damages might fail to deter socially harmful behavior. But if imposed too often or in excessive amounts, damages can overdeter by increasing the cost of net-beneficial behavior. n83 Out of this background, Polinsky and Shavell argue that the true purpose of punitive damages is to fill the enforcement gap - to serve as a proxy for the compensatory damages not awarded to victims because not all tortious acts result in judgments against injurers. n84 Punitive damages should force the full cost of tortious behavior into the injurer's calculus. "Punishment," from this perspective, **[*1796]** is irrelevant; the goal of "punishment" is merely another way to state the goal of deterrence. n85 Polinsky and Shavell recommend that, when considering awards of punitive damages, judges should derive a multiplier from the chance that the harmful conduct would not have been caught and litigated. n86 Judges should apply this multiplier to compensatory awards to determine the proper level of punitive damages. n87

Several implications flow from this analysis. First, the authors argue that the reprehensibility of the defendant's action is irrelevant to the determination of the award. n88 Instead, the reprehensibility of the injurer's conduct should be "measured" by the amount the plaintiff is allowed to recover n89 and the likelihood that the injurer will escape liability. n90 The multiplier will deter the conduct that should be deterred regardless of the defendant's moral culpability. Second, the wealth of the defendant should be irrelevant in determining a punitive award. n91 It does not matter whether a corporation is wealthy; if compensatory damages (multiplied to cover the enforcement gap) make one particular harmful activity unprofitable, the corporation will stop the activity. Consideration of wealth is no more than "a tax on corporate size and success." n92 Finally, the scope of state-recognized liability insurance may be expanded to cover punitive liability to lower the costs of paying for accidents. n93

Although acknowledging the importance of Polinsky and Shavell's work, Professor Viscusi offers an alternative solution: to abolish the institution **[*1797]** of punitive damages altogether. Based on an empirical study, Viscusi claims that states that prohibit punitive damages have no greater rate of certain kinds of toxic chemical accidents and toxic environmental releases than states that permit punitive damages. n94 Viscusi argues that punitive damages impose costs on corporate activities such as research and development; they are "a dangerous lottery for firms engaged in potentially risky lines of corporate activity." n95 These costs, passed on to the public through higher prices, are greater than the corresponding benefit of fewer accidents. n96 Viscusi proposes to eliminate punitive damages altogether and look for other sources of corporate accident deterrence. n97

The virtue of these scholars' work and of deterrence theory in general is to present a comprehensive framework within which to analyze punitive damages. Their theory takes the desperately needed steps of defining the appropriate goals of punitive damages; striking a balance between punishment, deterrence, and compensation; and providing a complete system for producing the desired results. Given that a major critique of jury verdicts is their supposed irrationality, a rational system to determine the proper size of punitive awards is attractive. Yet there are problems with their theory that cause it to fall short as a response to the problem of punitive damages distortions.

It should be noted first that this particular iteration of deterrence theory suffers from many of the same problems that affect law and economics in general. For example, it proceeds on the assumption that all potential injurers will conduct an ex ante cost-benefit analysis each time that they act. Although many of the largest awards are in cases of products liability and mass tort, in which corporations might be expected to conduct such an analysis and to account for the possibility of punitive damages, such rational calculation may not always be realistic for

an individual doctor who faces the prospect of punitive malpractice liability. n98 A second problem (shared by other rational **[*1798]** choice proposals) is the global coordination problem. Although tort law in a perfectly working market might force injurers to internalize the costs of the injuries that they cause, the internalized costs are still only those recognized by the legal system as compensable to someone. n99 Thus, not only would courts have to consistently apply a multiplier to cover the current enforcement gap, legislatures would also have to allow plaintiffs acting as private attorneys general to recover for the costs to common property or future generations in order to achieve deterrence based on the full social harm the injurer causes.

In addition to these large-scale problems, Polinsky and Shavell's proposal presents several other theoretical difficulties that prevent it from being an optimal solution to the problem of punitive damages distortions. For example, the fewer the number of plaintiffs who sue for damages in a particular case, the more damages each would receive as their share of the overall award. Plaintiffs who sue early, before many suits are brought, are therefore likely to receive higher awards. The success of early plaintiffs will raise the expected award for those potential plaintiffs who have waited to see the outcome of early cases before filing claims, but high early awards will also dry up the pool of damages from which later plaintiffs would draw upon proving their case. Thus, a multiplier calculated early will be systematically too large, and plaintiffs who sue later will either end up with nothing (because compensation for their injuries has already been paid to other plaintiffs in the form of punitive damages) or will force the defendant to pay again (which would be double counting, producing overdeterrence). n100

[*1799] Another problem is the effect of punitive damages on **settlements.** One reason that many **settlements** are large, despite a low chance of plaintiff victory, is the possibility that juries might award irrationally large punitive damages. n101 If punitive damages have an effect on **settlements,** n102 the enforcement gap theory either breaks down or becomes even more complex: **settlements** compensate for some unknown percentage of the enforcement gap. The multiplier therefore would have to take into account not only prior and prospective judgments against the injurer, but also all settled claims. Otherwise the defendant would face too much liability - paying for its action both in **settlements** and in court.

Finally, there are problems of implementation. Even assuming that damages could perfectly eliminate the enforcement gap, any such system would demand fantastic feats of prediction and calculation from judges. Determining the multiplier in each particular case would also require much more information than is probably available to assess the size of the enforcement gap and the damages necessary to close it. The empirical data concerning punitive awards and their effect on defendants are not currently sophisticated enough to support the kind of calculations necessary to put a deterrence theory regime into practice. The problems of implementation might therefore dull some of the luster of a theoretically integrated approach to punitive damages. In addition, the practical effect of Polinsky and Shavell's program would probably be greater than they imagine; although the most notorious punitive awards are extremely large, n103 punitive awards are relatively rare and often less than compensatory damages awarded in the same cases. n104 Polinsky and Shavell could achieve their goal of reducing the biggest and most publicized awards, n105 but they would explode the number of cases in which punitive damages were awarded and probably also increase the size of the awards. Perhaps this result would advance the goal of deterrence, but it is almost certainly not what most deterrence theorists envision.

D. Suggestions for **Reform of Punitive Damages**

Judicial responses to the problems posed by **punitive damages** are generally incremental but incoherent; in contrast, deterrence theorists' **[*1800]** responses are theoretically complete but too radical to be practicable. The suggestions that follow are an attempt to

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synthesize the strengths of the Gore approach and of deterrence theory into a modest proposal for the **reform of punitive damages;** this proposal reduces the distortions that **punitive damages** cause by selectively applying them where their value can be best realized. Punitive damages should promote the values of efficiency, predictability, and rationality to support goals of due process, optimal deterrence, and equitable compensation. Also, any program of reform should be adaptable to the existing litigation system to maximize the prospects for lasting, integrated change.

It is important to keep in mind the practical strength of the Supreme Court's approach: it has potential for national change within the context of the existing punitive damages doctrine. Two premises may therefore prevent us from straying too far into the theoretical realm. First, abandoning the notion that punitive damages must fill the entire enforcement gap in every case yields a much less intrusive change to the current system. Second, acknowledging that punitive damages may have a retributive purpose in addition to their deterrent purpose is more compatible with the established case law and enables us to make more rational arguments about how to fulfill this retributive purpose. These premises imply that, for now, a good first step would be to limit punitive damages to cases in which they currently apply under state law - rather than the current practice of applying them in all cases in which there is an enforcement gap. Deterrence theorists might object that such extractions water down the effectiveness of their proposals, but the alternative that they offer would require too great a paradigm shift.

These limitations suggest an initial distinction between two types of cases that currently result in punitive damages. Punitive damages are awarded most often in cases of intentional tort n106 and most notoriously in cases of products liability n107 and malpractice. n108 However, moral culpability should almost never be taken into account in the award of punitive damages n109 when the tortfeasor is a corporation (or other continuing business entity). Especially in products liability or contract cases in which the corporation may have performed a cost-benefit analysis before acting, a finding of culpability is merely an excuse to overdeter. Forcing a defendant to pay compensation for the harm it causes will fulfill the expectations that the defendant had at the time of the injury; punitive damages will only further deter harm if those **[*1801]** expectations were unrealistically low. Culpability might remain a factor, however, for punitive damages against defendants - whether individuals or corporations - who were reckless n110 or intended to cause injury. n111 Confining culpability considerations to cases in which there is a clearly culpable target and using deterrence considerations in other cases of corporate action is a rough divide; however, it brings greater consistency by matching the different rationales behind punitive damages to the cases in which those rationales apply.

A second feature of the economic model of punitive damages that the legal system should adopt is the proposition that punitive damages should be insurable. Currently, only a slight majority of states allow defendants to insure against the risk of punitive liability. n112 Allowing insurance coverage of punitive damages greatly increases the predictability of the liability costs of a given product or activity. Restricting insurability discourages risk-averse defendants from engaging in potentially beneficial activities. n113 In addition, insurability allows for greater risk management. Insurers may be in a better position than potential defendants to predict the costs of accidents and to distribute those costs across an entire industry of risk takers. n114

Finally, as Polinsky and Shavell's suggest, the wealth of a defendant should be excluded from the consideration of a punitive award. n115 Wealth considerations may serve an expressive function, sending a message to corporations that their wealth will not shield them from breaking the law. However, a defendant's wealth is irrelevant **[*1802]** to the deterrence rationale of punitive damages. n116 If an injurer has to pay more for a particular course of action than he profits from it - as he would if the amount required for deterrence is well-calculated - he will discontinue the action regardless of how much money he has in the bank.

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ARTICLE: PUNITIVE DAMAGES: AN ECONOMIC ANALYSIS

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* A. Mitchell Polinsky is the Josephine Scott Crocker Professor of Law and Economics, Stanford Law School. Steven Shavell is Professor of Law and Economics, Harvard Law School. Research for this Article was supported by Exxon Corporation. (Exxon is appealing a punitive damages judgment against it in the Exxon Valdez oil spill litigation; we have served as consultants to Exxon in connection with this litigation.) The views expressed below are our own and do not necessarily represent those of Exxon. We received helpful comments on an earlier draft of this Article from Janet Alexander, Daniel Capra, Richard Craswell, Peter Diamond, Aaron Edlin, Jill Fisch, Jesse Fried, Victor Fuchs, Robert Hall, Louis Kaplow, Daniel Klerman, Thomas Krattenmaker, Richard McAdams, Ivan Png, Kenneth Simons, and participants at seminars given at a number of law schools. We also benefited from research assistance from Jennifer Brosnahan, Patrick O'Reilly, Janine Scancarelli, Debra Volland, and Sherri Lynn Wolson.

SUMMARY:
... In this Article, Professors Polinsky and Shavell use economic reasoning to provide a relatively simple set of principles for answering these questions, given the goals of deterrence and punishment. With respect to the deterrence objective, on which their Article focuses, they argue that punitive damages ordinarily should be awarded if, and only if, an injurer has a significant chance of escaping liability for the harm he caused. ... Specifically, punitive damages should equal the harm multiplied by a factor that we will refer to as the punitive damages multiplier: the ratio of the injurer's chance of escaping liability to his chance of being found liable. ... Does it make sense in terms of deterrence to ensure that the defendant's gain is disgorged, or should damages be based solely on harm (abstracting from the issue of the chance of escaping liability)? We conclude in this section that setting damages equal to harm generally results in proper deterrence even when the harm is less than the defendant's gain; a policy of removing the defendant's gain may result in overdeterrence. ... The first is that litigation costs may cause the probability of suit to be low and thus justify a punitive damages award according to the damage formula presented earlier. ...

TEXT:
[*869] [*870]

The imposition of punitive damages is one of the more controversial features of the American

thus, the multiplier is 1/.25, or 4. Because the harm was $ 100,000, this formula will result in total damages imposed on the injurer of $ 400,000. Similarly, if the in- **[*890]** jurer would be found liable with a one-in-two chance, damages should be $ 200,000 - the $ 100,000 harm multiplied by 2 (= 1/.5). And if the chance of liability is only one in ten, damages should be $ 1,000,000 - the $ 100,000 harm multiplied by 10 (=1/.1). The application of this formula will guarantee that, on average, injurers will pay for the harm they cause, and therefore take proper precautions and appropriately participate in risky activities. [49]

It is important to stress that the level of damages given by the formula is optimal not only because this level remedies problems of underdeterrence, but also because it avoids problems of overdeterrence. The latter problems, described above, [50] would arise if damages were to exceed the optimal amount.

We will refer to the excess of total damages over compensatory damages as punitive damages. Thus, the optimal level of punitive damages from the perspective of deterrence is the level of total damages determined by the formula, less compensatory damages. If an injurer has a one-in-four chance of being found liable for causing a $ 100,000 harm, the formula implies that total damages should be $ 400,000. Because $ 100,000 of this total represents compensatory damages, the $ 300,000 remainder is the optimal amount of punitive damages.

The optimal level of punitive damages also can be described as a multiple of harm or, equivalently, a multiple of compensatory damages. Specifically, punitive damages should equal the harm multiplied by a factor that we will refer to as the punitive damages multiplier: the ratio of the injurer's chance of escaping liability to his chance of being found liable. [51] In the example in the previous paragraph, the injurer has a three-in-four chance of escaping liability and a one-in-four chance of being found liable. The punitive damages multiplier is therefore .75/.25, or 3. Because the harm was $ 100,000, punitive damages should be three times this amount, or $ 300,000.

Although we refer to the excess of total damages over compensatory damages as punitive damages, the adjective "punitive" may sometimes be misleading. This is because extracompensatory damages may **[*891]** be needed for deterrence purposes in circumstances in which the behavior of the defendant would not call for punishment. As we have explained, the deterrence goal leads us to impose such damages when injurers may escape liability. But injurers might escape liability even when their conduct is not strongly blameworthy. Suppose an injurer accidentally (perhaps even non-negligently) causes harm, but the victim does not sue, either because he is unable to trace the harm to its source or because of the cost of litigation. In other words, non-blameworthy conduct might still call for punitive damages to achieve proper deterrence. [52] Despite a certain inappropriateness, therefore, in using the label "punitive damages" to refer to extracompensatory damages needed for deterrence reasons, we will continue to employ it because it is the common term for extracompensatory damages in private civil litigation. [53]

We have several comments to make about the punitive damages formula presented in this section. First, judges and juries [54] often will be able to apply the formula without difficulty because the formula transparently (if trivially) implies that no punitive damages are needed. In other words, in many situations, it will be obvious that the injurer has virtually no chance of escaping liability - say because the harm occurred openly and the magnitude of the harm is such that the victims almost surely will bring suit. Examples of such situations are when a building collapses as a result of a plainly defective design [55] and when a supertanker runs aground and spills a large quantity of oil on the shoreline, where the oil is observed by many people. [56] In such cases, the proper total damages multiplier is one - that is, total damages should equal harm. Punitive damages are not needed for proper deterrence, and imposing them would result in the problems of overdeterrence discussed above. [57]

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Second, in other circumstances, when the chance of escaping liability is clearly positive, the probability of liability still might be relatively easily calculated. For example, suppose a firm dumps toxic waste at night along an infrequently used road, but is caught as a result of the report of a driver who happened to notice the firm's activities. In such a case, pressure-sensitive recording devices laid across the **[*892]** road could be used to determine the volume of traffic on the road at night, and the resulting data could be employed to calculate the odds that someone would drive by during a particular interval of time. The reciprocal of this probability could then be used as the total damages multiplier. [58] In general, a careful consideration of the facts in a case often will allow a jury to make a reasonable estimate of the probability of escaping liability. [59] The testimony of expert witnesses also may be helpful in calculating this probability. [60]

Third, circumstances in which the chance of escaping liability is difficult to estimate will inevitably arise. To reduce the decisionmaking burden on jurors, a judge could present them with a table with a limited number of values for the probability, such as 0.1 through 0.9 by increments of one-tenth, from which to choose. [61] Although such a simplification would not directly resolve the problem of determining the probability of detection, it may aid jurors in settling on a single number. [62] Even if jurors make significant errors in estimating the probability, such errors will not necessarily create a serious problem for achieving optimal deterrence: provided that the errors are not systematically biased upwards or downwards, a potential injurer will know that the assessment of juries will be approximately correct on average, which will **induce** the injurer to behave properly. Another **[*893]** option is for the legislature to set damages multipliers for separate categories of wrongful conduct, based on rough assessments of the different chances of escaping liability in the various settings. This approach might be desirable if one believes that jury determination of the probabilities, and therefore of the damages multipliers, would be systematically biased. (Such an approach, however, would prevent juries from making use of any information they have about particular cases. [63])

Fourth, it might seem problematic for the application of the multiplier formula that the probability of escaping liability, and thus the multiplier, may depend on the way in which an accident is categorized. For example, consider a spill of dangerous chemicals from a tanker truck on a highway. Such a spill can be categorized either relatively narrowly - one category might be a spill resulting from the rupture of the tank and another category might be a spill resulting from a slow leak of the tank - or relatively broadly - one category encompassing both types of accident. A spill obviously will be much more easily detected if it is the consequence of a rupture than of a slow leak. Thus, if a rupture-caused spill is treated as a separate category, a lower multiplier would be used than if it is treated as an instance of a broader category of spills that includes leaks. How, then, should the categorization of an accident be determined for the purpose of deterrence? Should categorization be narrow, with separate multipliers employed for different types of chemical spills, or be broad, with a single multiplier employed? The answer is, essentially, that narrow definitions of accidents and separate multipliers should be used, other things being equal. Otherwise, incentives to prevent specific types of chemical spills would tend to be distorted. This is because the multiplier used for a specific type of accident would not be tailored to it, but instead would reflect the likelihood of escaping liability for a broader category of accidents. If a single multiplier is employed for all chemical spills, then, because it would exceed one, firms would have excessive incentives to avoid chemical spills for which they would definitely be found liable; thus, they might spend excessively on reinforcing the tanks or on testing the tanks' pressure (say, every fifteen minutes rather than every trip). Further, because the multiplier would be lower than is appropriate for slow leaks that are very likely to escape notice, firms would have inadequate incentives to prevent these spills; for instance, they might not check frequently enough for cracks in difficult-to-inspect parts of the tanks. The general point, then, is that when actors **[*894]** can take precautions that are particular to a type of accident, the categorization of the accident should be narrow. [64]

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Fifth, an important question about the multiplier formula arises in cases in which the defendant is a firm: should the damages multiplier be based on the probability that the firm will be found liable, or on the generally lower likelihood that the responsible employee will be found liable? The answer is that the firm's probability is the relevant one. Consider a situation in which a firm definitely would be found liable for a harm resulting, say, from an explosion of a chemical storage tank, but the employee whose actions led to the explosion might be difficult to identify. Because the firm will have to pay for the harm for sure, punitive damages are not needed: the firm's product price and its incentives to take precautions will be correct because it will be paying for all of the harm it causes if it pays just compensatory damages. That the particular employee who caused the explosion might not be caught does not alter this point - the employee's escaping responsibility does not free the firm from liability. Were the firm to face puni- **[*895]** tive damages because of the employee's chance of escaping liability, overdeterrence would result. [65]

Sixth, it should be observed that the award of punitive damages may itself raise the probability of suit, which would reduce the probability that the defendant will escape liability. This effect, when applicable, must be taken into account and will tend to lower the appropriate level of punitive damages. Suppose, for example, that the probability of suit for a $ 100,000 harm for which a party should be liable would be one-third if damages are compensatory, but would rise to one-half if damages are twice compensatory damages, $ 200,000. Suppose also that, if a suit is brought, the plaintiff will definitely prevail. If the damages multiplier is based on the one-third probability of suit, it would call for total damages of $ 300,000. But this level of damages would be too high because the probability of suit increases to one-half (or greater) when damages are $ 300,000: expected damages would be $ 150,000 (or greater), far exceeding the harm. In fact, damages of $ 200,000 would be appropriate because the probability of suit would then be one-half and expected damages would be $ 100,000. In general, a level of damages will exist that, given the resulting probability of suit, will lead to optimal deterrence. [66] Basing punitive damages on the relatively low probability of suit that would occur if only compensatory damages were awarded, however, will tend to lead to excessive damages.

Seventh, it might seem that the analysis in this section would virtually always call for some punitive damages award, because some chance of escaping liability will almost always exist. [67] But such a conclusion ignores a factor that we have not yet mentioned, namely, the costs associated with the use of the legal system. [68] Were every case to involve the calculation of the proper multiplier of harm, a new and potentially costly-to-decide issue would be introduced into litigation. This additional cost suggests that the domain of cases in which the multiplier inquiry is made should be limited. Specifically, our formula should be applied only if the likelihood of escaping liability surpasses some threshold, for that is when the problem of dilution of deterrence **[*896]** will be significant, making it socially worthwhile to incur the additional litigation costs associated with calculating a corrective multiplier. [69]

Finally, it should be noted that we have assumed that when parties are found liable, they pay for all of the harm that they have caused. In practice, though, parties may escape having to pay for some of the harm. To the extent that this occurs, an argument can be made that the level of damages should be higher than that called for by our multiplier formula, to make up both for the chance of escaping liability altogether and for the chance of not having to pay for the full harm. The most likely circumstance in which the full harm would not be assessed against the defendant arises when a particular component of harm (say, some type of non-pecuniary loss) is excluded from compensatory damages. For reasons explained below, however, we believe that punitive damages should not be raised to make up for an excluded component of harm. [70]

C.

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Consistency of Punitive Damages Law with the Basic Theory of Deterrence

We now will relate our analysis to certain important aspects of legal doctrine concerning punitive damages, and also to legislation imposing caps on punitive damages.

As noted above, [71] one of the two main purposes of punitive damages is deterrence. The courts state, for example, that punitive damages are intended "to deter the wrongdoer and others from committing similar wrongs in the future." [72] Given that achieving proper deterrence is an avowed goal of courts, it follows from the logic of deter- **[*897]** rence theory that courts should take the punitive damages formula presented above into explicit account. Otherwise, courts cannot responsibly weigh the proper punitive damages amount for achieving deterrence against the proper amount for achieving the other main purpose of punitive damages, punishment. [73]

However, courts' determinations of punitive damages do not reflect in any clear manner the formula that achieves optimal deterrence. Although courts do consider the magnitude of harm in assessing the proper level of punitive damages, they do not use harm as the base to be multiplied by an appropriate damages multiplier. Rather, courts take harm into account in a vague way, through application of the general principle that punitive damages should bear a "reasonable relationship" to compensatory damages. [74] They do not explain what this relationship should be and, even when they identify a ratio of punitive damages to compensatory damages that they find excessive, they do not supply a basis for selecting the particular ratio identified. [75] **[*898]**

As the reader knows, our analysis implies a simple and precise relationship between punitive damages and harm: punitive damages should equal the harm multiplied by what we refer to as the punitive damages multiplier. If punitive damages are to achieve appropriate deterrence, the "reasonable relationship" criterion must be interpreted in this specific way. Any other relationship between punitive damages and compensatory damages will lead to either inadequate or excessive deterrence.

Courts also do not pay systematic attention to the probability of escaping liability, even though this probability is the central element in determining the appropriate damages multiplier for the purpose of achieving proper deterrence. Courts sometimes allude to the possibility of escaping liability, but they rarely recognize its importance with respect to deterrence. For example, in determining the level of punitive damages, courts occasionally consider whether the defendant has attempted to conceal his conduct. [76] Courts usually do so, however, in assessing the reprehensibility of the defendant's conduct; [77] they generally do not appreciate that evidence of attempted concealment should influence the calculation of the defendant's chance of escaping liability. Additionally, courts sometimes mention that the cost of litigation should be taken into account "so as to encourage plaintiffs to bring wrongdoers to trial." [78] This factor is obviously related to the injurer's chance of escaping liability because one reason an injurer might not be **[*899]** found liable is that he is not sued. [79] Thus, courts occasionally refer to considerations that bear on the probability that a defendant would have escaped liability. But they rarely explain in a direct and systematic way how this probability should be used to determine the proper level of damages for deterrence purposes. [80]

Further, courts generally pay insufficient attention to the potential problem of overdeterrence. Judicial opinions mention this issue only infrequently, [81] and none of the lists of factors used by courts in determining punitive damages includes overdeterrence as a consideration. [82] As we have emphasized, [83] however, damages that exceed the level in- **[*900]** dicated by the formula may result in wasteful precautions and the withdrawal of socially valuable products and services from the marketplace.

Not only do courts usually fail to consider correctly the factors that are relevant to proper

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deterrence, but they also err in considering a variety of factors that generally are not relevant to deterrence, including the reprehensibility of defendants' conduct and defendants' wealth. We will discuss at some length why these factors ordinarily should not be taken into account if the goal is to promote proper deterrence, [84] but the point we want to make here is that consideration of these factors in awarding punitive damages causes such damages to deviate further from the level given by our formula.

Some aspects of legislation governing punitive damages are also inconsistent with deterrence theory. Notably, many states have imposed caps of various kinds on punitive damages awards: an absolute ceiling (for example, $ 350,000 in Virginia), a maximum ratio of punitive damages to compensatory damages (for example, three times compensatory damages in Florida), or both. [85] Such caps cannot be justified on deterrence grounds because they might preclude the proper award of punitive damages. For example, suppose that the harm caused by an injurer is $ 100,000 and that he has only a one-in-ten chance of being found liable. The optimal level of punitive damages is then $ 900,000, or nine times compensatory damages (because the optimal level of total damages, including compensatory damages, is ten times the harm). This absolute amount and this ratio would exceed punitive damages caps in the majority of states that have them, [86] yet under the circumstances posited, a punitive damages award of this magnitude, and that has this relationship to compensatory damages, is needed for proper deterrence.

Our criticism of caps is not meant to deny that, if jury awards of punitive damages are thought to be systematically excessive, caps might beneficially constrain such awards. [87] But in the absence of systematic bias, caps are inappropriate. **[*901]**

D.

Punitive Damages Cases

We briefly consider here three prominent punitive damages cases in the light of the deterrence principles discussed above. Our primary objective is to state what deterrence theory suggests about the appropriate level of punitive damages in these cases, given their facts and circumstances, not to analyze the legal doctrines that were applied or developed in them. [88]

1.

BMW of North America, Inc. v. Gore. [89] -

In this case, the plaintiff, Ira Gore, Jr., purchased a new BMW sedan from an Alabama dealer. He subsequently learned that the defendant, BMW of North America, had repainted part of the car because of damage to the car before its arrival in the United States, although BMW had not disclosed this fact. The jury awarded Gore compensatory damages of $ 4000 for diminution in the value of the car, and punitive damages of $ 4 million. The Alabama Supreme Court reduced the punitive award to $ 2 million, but the United States Supreme Court held even this award to be grossly excessive. On reconsideration, the Alabama Supreme Court reduced the punitive award to $ 50,000. [90]

Consider the probability that BMW would escape liability for having sold a repainted car as new. The determination of this probability involves two factors. One is the possibility that BMW would escape notice for having repainted a car, and the other is the likelihood that a purchaser who did discover that his car had been repainted would sue. Gore drove the car for nine months without detecting any abnormalities in the paint on his car. It was only after he took his car to a detail shop that he learned that it had been repainted. It seems reasonable

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to suppose, therefore, that many purchasers of repainted cars sold as new would never discover that their cars had been repainted.

Whether an owner who did discover that his car had been repainted would sue depends on the costs to him of suit (time and out-of-pocket expense) and the amount that he could collect. If the harm is as low as the jury found in Gore, $ 4000, it would seem that many owners - or the lawyers they might hire on a contingency fee - would not have a sufficient financial incentive to sue. There may have been a significant chance, therefore, that BMW would have escaped liability if damages were merely compensatory, because of victims' inadequate motive to sue.

In Gore, information that would be useful in estimating the probability of BMW's being found liable was provided. Among the facts **[*902]** established at trial were that fourteen new BMW cars in Alabama had been repainted, including Gore's, and one prior suit had been brought against BMW by an owner of one of these cars. [91] If none of the other Alabama victims of repainting were to sue, [92] the probability of detection and liability might be thought to be two in fourteen, [93] in which case the total damages should be seven times the $ 4000 harm, or $ 28,000. [94] Of that total, $ 4000 would represent compensatory damages, and $ 24,000 would represent punitive damages. By this reasoning, the $ 2 million punitive award initially approved by the Alabama Supreme Court was grossly excessive, and the reduced award of $ 50,000 was much more reasonable. [95]

2.

Pacific Mutual Life Insurance Co. v. Haslip. [96] -

This case involved an insurance agent who misappropriated premium payments. The insurance policy in question was a group health plan sold to the municipality of Roosevelt City, Alabama. When Cleopatra Haslip, a city employee, was hospitalized, she apparently did not know that the policy had lapsed because of the agent's misappropriation. When the hospital and her physician sought payment from her, she and other Roosevelt City employees sued the agent and the Pacific Mutual Life Insurance Company for fraud. [97] The jury awarded her total damages **[*903]** of $ 1,040,000, of which $ 200,000 appears to have been assessed as compensatory damages and $ 840,000 as punitive damages. [98] The award was affirmed by the trial court, the Alabama Supreme Court, and the United States Supreme Court. [99]

The key issue relating to deterrence in this case is whether a significant chance exists that an insurance company whose agent misappropriates premiums will escape liability for coverage that individuals expected to have. (The focus should be on the company's chance of escaping liability, rather than the agent's, for the reason we explained above. [100]) Obviously, if a policy has been invalidated because of an agent's misappropriation of premium payments, the invalidation will come to the attention of a person who applies for coverage under that policy. If the insurance company does not pay the individual voluntarily, the individual probably would sue the company, provided the amount at stake is large enough.

In the present case, the compensatory damages were, as noted, $ 200,000. However, less than $ 4000 of this amount represented out-of-pocket expenditures, the rest apparently consisting of non-economic losses such as emotional distress. [101] It seems reasonable to suppose that recovery of the $ 4000 out-of-pocket loss is more probable than recovery of the $ 196,000 non-economic loss. If the likelihood of the latter recovery is sufficiently low, an individual probably would not bring a lawsuit. Conversely, if this likelihood is high, a lawsuit would be much more certain. A related consideration is that three other Roosevelt City employees joined Haslip in suing the defendants. Their awards totaled approximately $ 38,000. [102] Clearly, the prospect of obtaining this additional amount would increase the incentive to sue. On balance, therefore, although a suit seems reasonably likely in the

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circumstances of Haslip, some countervailing considerations might justify a modest punitive damages award, to offset the chance that a lawsuit would not be brought.

3.

In re The Exxon Valdez. [103] -

In this case, the defendant's supertanker, the Exxon Valdez, ran aground on a reef in Prince William Sound in Alaska, spilling 11 million gallons of oil [104] and polluting over **[*904]** 1,000 miles of Alaskan coastline. [105] The supertanker's captain, Joseph Hazelwood, had previously been treated for alcohol abuse and, in connection with the accident at issue, was found to have violated regulations governing alcohol consumption. [106] In the private civil litigation against Exxon stemming from the accident, the plaintiffs - various classes of fishermen and Alaskan natives - were awarded several hundred million dollars in compensatory damages [107] and $ 5 billion in punitive damages. [108] The punitive damages award was affirmed by the trial judge and is being appealed. [109]

It seems clear that in the circumstances of the Exxon Valdez accident, there was essentially no chance that the defendant company, Exxon Corporation, could escape liability. An accident of this magnitude obviously would have been noticed. Moreover, because the tanker was stuck on a reef, the identity of the injurer was plain. And given the substantial compensatory damages involved, in the hundreds of millions of dollars, a lawsuit certainly could be expected. Thus, according to our analysis, no punitive damages are needed, or appropriate, in the circumstances of this case because the injurer could not have escaped liability for compensatory damages. (In other contexts involving oil spills - such as the intentional dumping of small amounts of waste oil that is unlikely to be detected or traced to the spiller - some punitive damages would be appropriate. [110])

III.

Deterrence: Extensions of the Basic Theory

In this Part, we will discuss several important doctrinal and policy issues in punitive damages law from the perspective of the deterrence principles developed above. [111] Most of these topics (such as the repre- **[*905]** hensibility of the defendant's conduct) have received substantial attention in judicial opinions, others (whether the state should receive a portion of a punitive damages award) have been considered primarily in a legislative context, and still others (the status of the plaintiff as a customer or a third party) apparently have not been addressed in either setting.

A.

Reprehensibility of Conduct

The law requires that a defendant be found to have acted in a reprehensible manner - in a way that is egregious, malicious, or undertaken with reckless disregard for the rights of others - before punitive damages can be imposed on him. [112] If a defendant is found to have so acted, the degree of his reprehensibility is often treated as a key factor in determining the level of punitive damages. [113] Indeed, the United States Supreme Court in Gore observed that this factor is "perhaps [the] most important" indicium of the reasonableness of a punitive damages award. [114] The reprehensibility of the defendant's conduct was also one of the factors listed by the Court in Haslip. [115]

Should reprehensibility per se affect the imposition of punitive damages, given the goal of deterrence? [116] In this section, we explain **[*906]** that it generally should not. [117] However, an important exception to this conclusion occurs when injurers' gains do not count in social

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welfare, which we believe is often the case when injurers act maliciously. [118] This exception, we will suggest, only possibly applies to individual defendants, and not to corporate defendants.

As discussed above, [119] under standard assumptions, the imposition of damages equal to harm, appropriately multiplied to reflect the probability of escaping liability, achieves proper deterrence. That a defendant's conduct can be described as reprehensible is in itself irrelevant. Rather, the focus in determining punitive damages should be on the injurer's chance of escaping liability.

Making punitive damages depend on reprehensibility will distort deterrence in two ways. First, excessive damages may be imposed when reprehensible conduct occurs in situations in which an injurer is virtually certain to be found liable. Suppose that a surgeon, through extreme negligence, fails to remove a surgical tool from the body of a patient and that this omission leads to great pain and suffering. If a high probability exists that the surgeon will be sued and found liable because of the magnitude of the patient's harm and the unmistakable error of the surgeon, extracompensatory damages are neither necessary nor appropriate. Similarly, consider a newspaper reporter who, out of reckless disregard for the truth, confuses one firm's safe product with another firm's dangerous product, substantially damaging the former firm's business reputation and profitability. Here, too, we might expect that suit and a finding of liability would be very likely, in which case extracompensatory damages would be excessive. Thus, even for conduct that is reprehensible, if little chance of escaping liability exists, compensatory damages alone will achieve appropriate deterrence, and punitive damages will result in overdeterrence.

One might wonder, though, how overdeterrence of reprehensible acts can occur, because society evidently has an interest in deterring such acts completely. To illustrate that overdeterrence still can occur, consider the example of the surgeon. If the magnitude of damages is very high, we can imagine that, to reduce the chance of leaving a surgical tool in a patient, he might hire another medical professional to monitor his actions or he might dramatically increase the time he **[*907]** spends on each operation. Even if such responses would succeed in preventing the recurrence of this event, they may be at too great a cost, especially if the likelihood of leaving a surgical tool in a patient is very low anyway. In other words, it might not be socially worthwhile for the surgeon to take the measures needed to eliminate the possibility of his being extremely negligent. Yet a level of liability in excess of that given by the damages formula would improperly encourage him to take these measures. [120]

The problem of overdeterrence also can arise in connection with the reprehensible acts of employees of corporations. Employees obviously cannot be controlled perfectly by a corporation, even though a corporation can improve its ability to prevent employees from committing reprehensible acts by screening them before hiring them and monitoring their conduct afterwards. If damages exceed the level determined by the damages formula, however, the corporations may be led to spend excessively on screening and monitoring efforts in order to forestall reprehensible behavior. [121] This might be true of a newspaper, for instance, if it faced punitive damages for false reporting because of extreme negligence, as in our example of the reporter who confused two firms' products. In response, the newspaper might assign two reporters to every story even if doing so is not socially worthwhile given the cost of this practice and the reduction in risk of reprehensible behavior that would be accomplished.

Not only can attention to reprehensibility result in the imposition of punitive damages that are excessive, but such attention may also lead to the converse problem: the failure to employ punitive damages when they are needed for proper deterrence. This problem will occur if an individual engages in conduct that is harmful, though not reprehensible, and he is likely to escape liability. Suppose that a toxic waste disposal truck develops a leak (say, from

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rust) that results in waste spilling onto a highway at night, when no one is likely to notice it. The driver of the truck may have performed a proper inspection before de- **[*908]** parting, and the company may have reasonable maintenance policies. Although the leak is not caused by anyone's reprehensible behavior, substantial extracompensatory damages may be appropriate if the leak is discovered, to offset the significant likelihood that the injurer would not be identified and held responsible for the harm.

It is clear from the foregoing discussion that the stress courts place on reprehensibility of conduct in considering punitive damages cannot be justified on grounds of deterrence. A minor qualification of this point is that, as we observed earlier, [122] courts treat attempts by the defendant to conceal wrongdoing as a factor that enhances reprehensibility, and thus the level of punitive damages. This response makes rough sense because such behavior clearly reduces the probability of liability. But, as suggested above, the link that courts make between this behavior and punitive damages is vague in nature. [123] We believe that it would be preferable to use evidence of concealment directly to aid in the determination of the chance that the defendant might have escaped liability, rather than as a factor in determining reprehensibility.

Finally, although the reprehensibility of a defendant's conduct should not be used per se as a basis for imposing punitive damages to achieve proper deterrence, such conduct may sometimes provide useful information about the defendant's chance of escaping liability. Everything else being equal, the lower the chance of being found liable, the lower will be an individual's level of care. Therefore, a low care level may suggest a low probability of liability [124] and thus a higher level of punitive damages according to our formula.

Let us now turn to the important exception to our general conclusion about reprehensibility, which, as noted above, arises if injurers' **[*909]** gains are not counted in social welfare. Suppose that a person, out of spite, punches another individual; his purpose is to cause harm to the victim. Society might well treat the pleasure the injurer obtains from this act as socially illicit, not to be counted in social welfare. [125] If so, the act should be deterred completely because it produces no social gain, only harm. To achieve this goal, damages must exceed the injurer's utility from committing the act. Because the injurer's illicit utility could be greater than the harm suffered by the victim, the level of damages needed for proper deterrence might be in excess of harm. [126] In other words, punitive damages might be socially desirable even if there is no chance that the injurer could have escaped liability.

When are the benefits from harmful conduct likely to be considered socially illicit? We suggest that benefits tend to be treated as illicit when the injurer's utility derives from causing harm itself, as when a person punches another out of spite or defames another to see him suffer. The injurer benefits because the victim suffers harm. Situations with this characteristic fit under the general rubric of maliciousness and would be considered reprehensible. Thus, some reprehensible conduct - malicious conduct - could give rise to gains that are not counted in social welfare, in which case punitive damages may be justified even in the absence of a chance of escaping liability, for the reasons discussed in the previous paragraph.

But many acts that are reprehensible do not seem to be associated with socially illicit utility; they are not undertaken with malice. Consider a person who drives at 60 miles per hour through a residential area in order to arrive at work on time and causes a fatal accident. We would call this act reprehensible because of the driver's wanton disregard for the safety of others. Yet because the purpose of the act is not to cause harm, but rather to arrive at work on time, a perfectly legitimate objective, it does not appear that the utility from the act would be classified as socially illicit. In general, we surmise that reprehensible acts that are not undertaken with the objective of causing **[*910]** harm, but rather that happen to cause it as a highly likely byproduct, usually are not associated with socially illicit utility. Thus, for these kinds of acts, punitive damages should not be imposed unless the injurer has a

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significant chance of escaping liability - our usual conclusion. [127]

Note that because the goal of corporations is to make a profit, rather than to cause harm to others, their gains presumably do count in social welfare. Hence, by the foregoing reasoning, if a corporation engages in conduct labeled as reprehensible, this fact per se should not affect the level of its damages. Rather, its damages should be based on the harm it caused and the chance that it might have escaped liability, with punitive damages awarded only if the latter chance is significant.

In summary, we believe that the reprehensibility of a defendant's conduct generally should not be taken into account for the purpose of determining optimal damages for deterrence. The notable exception to this conclusion occurs when the defendant is an individual whose conduct is motivated by malice and whose gains consequently are not included in social welfare.

B.

Wealth of Defendants

The courts often state that a defendant's financial condition is a relevant factor in setting a punitive damages award, with the understanding that higher punitive damages may be appropriate for defendants with higher wealth. [128] Jury instructions also frequently include the defendant's wealth as a factor that jurors may take into account in determining the level of punitive damages. [129] Not surprisingly, plain- **[*911]** tiffs tend to emphasize this factor when defendants are wealthy, especially when the defendants are large corporations. [130]

Should defendants with greater wealth pay higher punitive damages? Our main conclusion in this section is that, from the perspective of achieving proper deterrence, a defendant's wealth generally should not be considered when the defendant is a corporation. We also conclude that the wealth criterion frequently should not be considered when the defendant is an individual, although we discuss certain circumstances in which an individual's wealth should be taken into account in imposing punitive damages. [131]

We explained above that, if damages equal harm multiplied by a factor reflecting the chance of escaping liability, defendants, including corporations, would be induced to take optimal precautions and to participate in risky activities to the proper extent. [132] It follows from this basic conclusion that, if damages are raised above the magnitude given by our formula when corporations are relatively wealthy, those corporations will be led to take excessive precautions, will undesirably curtail their activities, and will set prices above the proper level, chilling consumption of their products. In an extreme case, such corporations might even withdraw their products from the marketplace despite the value of the products to society.

An additional point reinforces the conclusion that corporate wealth should not influence punitive damages: imposing punitive damages on the basis of corporate wealth effectively imposes a tax on corporate size and success, thereby discouraging growth and development. This effect can be important in industries in which liability costs are a significant component of total cost (such as in the pharmaceutical and **[*912]** general aviation aircraft industries). [133] Of course, retarding the natural growth of corporations can have adverse consequences, notably, that society forgoes economies of scale in production and in research and development. It also may mean that the risk of harm increases, because small firms may not have enough at stake to make it worthwhile to them to spend a socially proper amount on precautions.

Our discussion of the inappropriateness of taking corporate wealth into account presumes

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legal system. Trial and appellate courts have struggled for many years to develop coherent principles for addressing the questions of when punitive damages should be awarded, and at what level. In this Article, Professors Polinsky and Shavell use economic reasoning to provide a relatively simple set of principles for answering these questions, given the goals of deterrence and punishment. With respect to the deterrence objective, on which their Article focuses, they argue that punitive damages ordinarily should be awarded if, and only if, an injurer has a significant chance of escaping liability for the harm he caused. When this condition holds, punitive damages are needed to offset the deterrence-diluting effect of the chance of escaping liability. (They mention as well a deterrence rationale for punitive damages that does not rest on the possibility of escape from liability - that punitive damages may be needed to deprive individuals of the socially illicit gains that they obtain from malicious acts.) Professors Polinsky and Shavell also discuss the tension between the implications of the deterrence objective and present punitive damages law, including the law's emphasis on the reprehensibility of a defendant's conduct and on a defendant's wealth. With respect to the punishment objective, Professors Polinsky and Shavell stress that the imposition of punitive damages on corporations may fail to serve its intended purpose (although the imposition of punitive damages on individual defendants accomplishes punishment in a straightforward manner). Punitive damages against corporations may be ineffective primarily because the payment of punitive damages awards by corporations often does not lead to greater punishment of culpable employees, but instead punishes the corporation's shareholders and customers.

I.

Introduction

One of the more controversial features of the American legal system is the imposition of punitive damages. Courts have struggled for years to develop a rational set of principles for the imposition of punitive damages, [1] legislative bodies have passed or considered a variety of **[*871]** statutes to remedy perceived problems with punitive damages, [2] academic commentators have debated the theory behind, and significance of, punitive damages, [3] and the press has expressed strongly divergent **[*872]** opinions about the merits of punitive damages. [4] **[*873]**

Our goal in this Article is to develop a coherent and relatively simple set of principles for determining when punitive damages should be awarded and, in circumstances in which they are appropriate, what their level should be. We separately consider two social objectives: deterrence and punishment. [5] Our methodology is economic in the sense that we organize our inquiry around an examination of how rational parties will respond to the **threat** of punitive damages, and whether their response will promote, or fail to promote, social welfare. [6]

The analysis of the deterrence objective comprises the first and major part of the Article. Our conclusions in this part flow from the basic principle that, to achieve appropriate deterrence, injurers should be made to pay for the harm their conduct generates, not less, not more. If injurers pay less than for the harm they cause, underdeterrence may result - that is, precautions may be inadequate, product prices may be too low, and risk-producing activities may be excessive. Conversely, if injurers are made to pay more than for the harm they cause, wasteful precautions may be taken, product prices may be inappropriately high, and risky but socially beneficial activities may be undesirably curtailed.

It follows from these observations that a crucial question for consideration is whether injurers sometimes escape liability for harms for **[*874]** which they are responsible. If they do, [7] the level of liability imposed on them when they are found liable needs to exceed

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that all corporations - large and small - will, if required to pay for the harms they cause, tend to balance correctly the costs of precautions against the resulting reduction in harm. An argument sometimes is made, however, that because bigger corporations are more bureaucratic, they will not adequately respond to liability risks unless the damages imposed on them are especially high. According to this argument, higher damages are needed against large corporations to attract the attention of senior management. [134] This view is mistaken, as we now discuss.

Although large corporations typically have complicated organizational structures, with senior management at some remove from the level of operations, it does not follow that large corporations will tend to be insufficiently attentive to the reduction of risk. If the cost of a precaution is less than the damages incurred by not taking it, a large firm will want someone employed by it to recognize that fact and take the precaution - because the firm's goal is to maximize profits. A large grocery chain, for example, will want some employee at each of its stores to inspect that store's floor after it is mopped in order to ensure that it is safe. The company will delegate this responsibility to an employee low in the corporate hierarchy, such as an assistant store manager. That this task does not receive the attention of top management, as it might in the case of a firm consisting of only one or two grocery stores, does not mean that the task will be neglected or attended to inadequately. As long as a corporation - large or small - expects to have to pay for the harms it causes, it will have a socially appropriate incentive to reduce the harms. [135] **[*913]**

Now consider the question of the relevance of wealth for the imposition of punitive damages on individuals. Again, the general arguments we made above imply that punitive damages should not depend on an individual's wealth; rather, punitive damages should depend only on the level of harm and the chance of escaping liability, so that, applying the damages multiplier formula, expected damages equal harm. [136] However, two qualifications to this conclusion suggest that wealth might be relevant in certain circumstances.

The first concerns risk aversion and the unavailability of insurance against punitive damages. We noted above that if potential injurers are risk averse and do not have access to liability insurance, appropriate deterrence will be accomplished with a lower level of damages than if they are risk neutral. [137] Further, the more risk averse an individual is, the lower the optimal level of damages. Assuming that poor individuals are more risk averse than rich ones, [138] the optimal level of punitive damages will be lower for poorer individuals. Equivalently, punitive damages should be higher for wealthier individuals. However, even for the wealthiest individuals, punitive damages should not exceed the level determined by our formula. [139] The relevance of these observations, we reiterate, is limited to situations in which insurance against punitive damages is not available.

The second circumstance in which the level of an individual's wealth may be relevant to the calculation of punitive damages is when the individual's gain from committing the harmful act is socially illicit. We explained above that punitive damages may be needed to offset illicit benefits. [140] To accomplish this, punitive damages generally will have to rise with the wealth of an individual, because the value of money tends to decline with wealth. [141] For example, to offset the utility a rich person would obtain from slandering someone he disliked, we might need to impose $ 10,000 in punitive damages, whereas to deter a person with only modest assets, $ 1000 in punitive damages might suffice. **[*914]**

We believe that the foregoing point underlies the common intuition that punitive damages should be linked to wealth. However, this point has a very limited scope, applying only to individuals whose benefit from causing harm is socially illicit, which we generally associate with conduct whose goal is to cause harm. Otherwise, the point of the previous paragraph does not apply to individuals. Moreover, the point does not apply to firms because firms are motivated by profits, rather than by a desire to cause harm.

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C.

Potential Harm

In reviewing the appropriateness of a punitive damages award, some courts have considered not only the harm that has actually occurred, but also the harm that might have occurred - the potential harm. [142] According to these courts, the higher the potential harm, the higher the level of punitive damages that can be justified. [143] The United States Supreme Court endorsed this idea in Haslip, as well as in TXO Production Corp. v. Alliance Resources Corp. [144] Potential harm also served as a basis for the trial court's upholding the $ 5 billion punitive damages verdict in the Exxon Valdez oil spill litigation; the court noted that, although 11 million gallons of oil spilled, another 45 million gallons in the Exxon Valdez could have spilled, making the potential harm much higher. [145]

We conclude, however, that a policy of taking potential harm into account in the determination of punitive damages is undesirable given the goal of deterrence. To explain the reasoning behind this conclusion, it will be convenient first to discuss why damages should be **[*915]** based on actual rather than potential harm when there is no chance of escaping liability and the issue of punitive damages does not arise.

Consider an example in which an injurer's act will result in either a low or high level of harm, and the injurer does not know in advance which level will occur. Let the two levels of harm be $ 1 million and $ 5 million, which occur with equal probability. This example raises the issue of potential harm because, when a $ 1 million harm occurs, the harm could have been $ 5 million. Note that the injurer's act entails an expected harm of $ 3 million (= (.5 X $ 1 million) + (.5 X $ 5 million)). To achieve proper deterrence, therefore, the injurer's expected damages should equal $ 3 million.

Given our assumption that injurers will be found liable when they cause harm, observe that deterrence will be optimal if damages are always set equal to actual harm. For when an injurer engages in the harmful activity, he will expect to have to pay $ 1 million in damages half of the time and $ 5 million in damages half of the time. Hence, his average damage payment will be $ 3 million or, stated differently, the expected value of his damage payment is $ 3 million (= (.5 X $ 1 million) + (.5 X $ 5 million)). As noted in the previous paragraph, this amount is what is needed for proper deterrence.

Nevertheless, if actual harm turns out to be low, one might wonder why basing damages on actual harm does not result in inadequate deterrence. In our example, if the harm is $ 1 million and the injurer is made to pay this amount, he will be paying relatively little compared to the $ 5 million harm that his act might have caused. (The difference between actual harm and potential harm could be much greater - indeed, a person may act very dangerously but cause no harm, and thus pay no damages, if damages are based on actual harm.) The reason that inadequate deterrence is not a problem, however, should be apparent: when a potential injurer chooses whether to engage in a harmful act, he does not know what the harm - and therefore what his damages - will be. The injurer in our example cannot predict whether his damages will be $ 1 million or $ 5 million. Consequently, he will decide whether to commit the harmful act on the basis of having to pay the average or expected damage amount, which is $ 3 million. It would be a mistake, therefore, to think that he will be inadequately deterred if the actual harm in a particular case turns out to be $ 1 million, and he has to pay only this amount. The possibility that the harm and his damages might have been $ 5 million also will influence his behavior, in an appropriate way.

Now suppose that, instead of basing damages solely on actual harm, courts take potential harm into account by raising damages when the actual harm is unusually low - because it

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could have been much higher - but do not lower damages when the actual harm is high. (Such an interpretation of how courts use the potential harm factor in practice is plausible, at least in the context of punitive dam- **[*916]** ages. [146]) The point we want to emphasize is that such a policy imparts a systematic upward bias to the level of damages and results in injurers bearing damages in excess of actual harm. Suppose that damages in the example are raised to $ 3 million when the actual harm is $ 1 million - on the ground that the former amount is the average harm - but that damages are not lowered when the actual harm is $ 5 million. Then the injurer will pay on average $ 4 million ($ 3 million half of the time and $ 5 million half of the time), even though the average harm is $ 3 million. Making injurers pay damages in excess of harm will have the undesirable consequences associated with overdeterrence that we have discussed previously.

Potential harm could be taken into account in another way, however, that would not cause damages to exceed harm systematically. Specifically, suppose that damages are set equal to the average, or expected, harm regardless of whether the actual harm is below or above this amount. Thus, in the example, damages would be set equal to $ 3 million regardless of whether the actual harm is $ 1 million or $ 5 million. In effect, this policy recognizes both that, when actual harm is low, it could have been higher, and that, when actual harm is high, it could have been lower. Such a policy would result in proper deterrence because the injurer will be paying on average for the harm he causes: each time he commits the harmful act he pays $ 3 million and causes, on average, harm of $ 3 million. Whether this policy would be employed in practice is questionable, however. One might be skeptical that, when the actual harm is high, juries and courts would reduce damages because the harm might have been lower. [147]

Even if a policy of basing damages on average or expected harm were applied consistently, a strong argument exists, based on administrative considerations, for relying solely on actual harm. For the courts to be able to calculate expected harm, they would have to determine each level of harm that could have occurred and its probability of occurrence. Such amounts ordinarily would be far more difficult to establish than the harm that actually did occur. [148] Additionally, the more open-ended scope of inquiry into expected harm seems likely to lead to more disputes between the parties, for it is easier to disagree **[*917]** about what might have happened, and the odds of it happening, than about what actually did happen. These observations suggest that the courts will bear greater administrative expense, and the parties will bear greater litigation costs, if the goal is to calculate expected harm rather than to ascertain only the actual harm in the instant case. [149]

To summarize, there are two reasons that potential harm generally should not be taken into account in determining damages. First, we envision that the potential harm factor would be used in practice to raise damages when harm is low but not to lower damages when harm is high, thus causing overdeterrence. Second, even if potential harm were considered in the theoretically correct way - by always setting damages equal to average or expected harm - such a policy would require an inquiry into what might have occurred, and is therefore likely to increase the public and private costs of resolving legal disputes. [150]

As noted at the beginning of this section, we assumed for simplicity that the injurer is definitely found liable. The arguments for basing damages on actual harm rather than on potential harm or expected harm are essentially the same if the injurer might escape liability. The discussion then would be framed in terms of a comparison between actual harm, appropriately increased to make up for the chance of escaping liability, and potential harm or expected harm, also so increased. Our point about courts' tendencies to apply the potential harm factor in a way that leads to overdeterrence still holds, as does the point about the greater administrative complexity of determining expected harm. Thus, when the injurer has a significant chance of escaping liability, and punitive damages therefore are needed to achieve proper deterrence, such damages generally should be an appropriate multiple of actual harm, not of expected harm or potential harm. In punitive damages law, potential

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harm usually should be ignored. **[*918]**

D.

Gain of Defendants

When punitive damages are imposed, their level is sometimes influenced by application of the principle that the defendant should not gain from his wrongful conduct. [151] If setting damages equal to harm would not remove the defendant's gain, the argument is that damages should include a sufficient punitive component to offset his gain. The notion that the defendant's gain should be a factor in calculating punitive damages was endorsed by the United States Supreme Court in Haslip. [152]

Does it make sense in terms of deterrence to ensure that the defendant's gain is disgorged, or should damages be based solely on harm (abstracting from the issue of the chance of escaping liability [153])? We conclude in this section that setting damages equal to harm generally results in proper deterrence even when the harm is less than the defendant's gain; a policy of removing the defendant's gain may result in overdeterrence. An exception arises, however, when the defendant's gain is socially illicit, in which case extracting the defendant's gain is desirable. [154]

The question whether punitive damages should be imposed to remove the defendant's gain arises only when his gain exceeds the victim's harm (otherwise, compensatory damages would eliminate the gain). One situation in which gain could exceed harm is when the **[*919]** level of harm is uncertain and, by chance, turns out to be low - and less than the injurer's gain. [155] Such a situation could occur even though the expected harm exceeds the gain. For example, suppose that a firm would save $ 100,000, and thus would gain that amount, by not purchasing a safety device; that the expected harm from failing to purchase the device is $ 1 million; but that only $ 10,000 in harm occurs. Here the firm's $ 100,000 gain exceeds the unusually low harm of $ 10,000.

Using this example, we first want to show that basing damages on harm will accomplish proper deterrence even though the defendant's gain exceeds the harm: at the time the firm decides whether to buy the $ 100,000 safety device, it does not know what the harm will be. If damages always are set equal to harm and the expected harm is $ 1 million, then the firm's expected damages will be $ 1 million, which of course will **induce** it to spend $ 100,000 on the safety device. It is not necessary to impose punitive damages just because the harm turns out to be unusually low and below the injurer's gain. (Note that the point of this paragraph is analogous to the point we made above about potential harm. [156])

If the standard policy of imposing damages equal to harm appropriately deters, is there a disadvantage of imposing higher damages - namely, to remove the defendant's gain - when gain turns out to exceed harm? The answer is in the affirmative because overdeterrence may result. Specifically, if damages are set equal to harm when the harm exceeds the injurer's gain, but damages are set equal to gain when gain exceeds harm, then expected damages will exceed the expected harm, resulting in the usual problems of excessive liability.

If damages are set so as to remove gains, an additional reason that overdeterrence may result is that the basis for measuring the injurer's gains might be interpreted too expansively. In the example above, the firm's gains might be construed to be its profits from the entire line of activity that gave rise to the accident (say, the profits from manufacturing automobiles at a particular plant), rather than just the saving from not taking the particular precaution (say, not purchasing a $ 100,000 instrument to test the integrity of the automobiles' brakes). If gains are erroneously measured in this way, a policy of setting

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damages equal to gain will be even more likely to result in excessive liability. **[*920]**

Another circumstance in which a defendant's gain might exceed the victim's harm is when the level of gain is uncertain [157] and, by happenstance, turns out to be high even though the expected gain is low and less than harm. [158] For example, suppose that the cost of re-engineering an assembly line to make production safer ordinarily is $ 200,000, but unforeseen complications could raise the cost to $ 800,000. If the assembly line is modified, harm of $ 500,000 will be avoided. Thus, although the expected gain from forgoing the safety improvements is less than the $ 500,000 harm, [159] the actual gain could be $ 800,000 and greater than the harm. The analysis of this situation is similar to that when the uncertainty concerned harm; again, it can be shown that setting damages equal to harm will create appropriate deterrence and that imposing punitive damages to remove injurers' gains will tend to result in overdeterrence.

Finally, consider the possibility that the injurer's gain is socially illicit, as when a person acts out of malice. We noted above that it is desirable to deter an injurer whose gain is illicit even if his gain exceeds the victim's harm, and that such a goal implies that punitive damages may be needed to offset the injurer's gain. [160] Thus, in the case of socially illicit utility, the notion of using punitive damages to ensure that the defendant's gain is removed is justifiable with respect to the goal of deterrence. As we also observed previously, this justification for removing the defendant's gain does not apply to individuals acting non-maliciously or to corporations.

In sum, then, removing the defendant's gain is potentially appropriate and necessary only when the defendant is an individual who acted maliciously and obtained a socially illicit gain. Otherwise, the usual policy of setting damages equal to harm is desirable for achieving deterrence, and imposing damages so as to remove gains will tend to cause overdeterrence. [161] **[*921]**

E.

Litigation Costs

Several courts have suggested that the plaintiff's litigation costs should be a factor in the determination of punitive damages, [162] and, as noted previously, some have stated that such costs should be included as a component of punitive damages in order to encourage victims to sue injurers. [163]

Should litigation costs bear on the calculation of punitive damages to achieve proper deterrence? Our answer in this section emphasizes two points. The first is that litigation costs may cause the probability of suit to be low and thus justify a punitive damages award according to the damage formula presented earlier. [164] The second point is that punitive damages generally should not be augmented for the purpose of inducing suits that otherwise might not be brought because of the cost of litigation. Raising the probability of suit is usually unnecessary to achieve proper deterrence, and encouraging suits has the disadvantage of increasing the litigation costs borne by society. Indeed, we argue that a policy adopted in many states of decoupling punitive damages - giving the plaintiff only a fraction of the punitive damages paid by the defendant, with the remainder going to the state - may be desirable because it can reduce the volume of litigation without compromising deterrence. [165]

The first point, that litigation costs may be relevant to the calculation of punitive damages because they influence the probability of suit, and therefore the chance of escaping liability, is one that we have made previously. [166] We observed that, if litigation costs are significant

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relative to the expected gain from suit, the probability of suit may be low, and this fact may justify imposing punitive damages on the injurer. For example, we suggested that in the circumstances of Gore, litigation costs may have led to a low likelihood of suit because the **[*922]** harm to the plaintiff was found to be only $ 4000. However, in other circumstances, like those in the Exxon Valdez case, litigation costs are likely to be insignificant in relation to the expected gain from suit, so that the probability of suit may be presumed to be very high. Then, consideration of litigation costs does not provide a basis for imposing punitive damages.

Note that when punitive damages are justified because of litigation costs, they should not necessarily be set equal to litigation costs. Proper punitive damages are determined by the multiplier formula, which calls for a level of punitive damages that generally differs from litigation costs. For instance, suppose harm is $ 10,000 and the plaintiff's litigation costs are $ 5000 and lead to a twenty-five percent likelihood of suit. Then total damages should be four times the harm, or $ 40,000, and punitive damages should be $ 30,000, not the $ 5000 amount of litigation costs.

Let us now turn to our second point. Because the punitive damages formula is designed to achieve appropriate deterrence when suit does not always occur, it is not necessary to raise punitive damages awards for the specific purpose of raising the probability of suit (provided that at least some suits are brought). [167] If suit occurs only half of the time because of the discouraging effect of litigation costs, total damages according to our formula would be twice the harm, and deterrence will be appropriate; there is no need to increase punitive damages to make suit occur more frequently. Moreover, encouraging lawsuits would increase social costs. Obviously, the greater the number of suits, the higher the legal costs borne by the parties and the administrative costs borne by the court system. [168] Raising damages to **induce** suits also will cause parties to spend more litigating each suit. [169] Thus, awarding punitive damages to spur suit is socially undesirable, other things being equal. **[*923]**

The tendency of higher damage awards to increase litigation costs lends appeal to the policy of decoupling punitive damages. As noted above, under this policy, the plaintiff is awarded only a part of the punitive damages judgment paid by the defendant, with the remainder going to the state. [170] Decoupling mitigates the propensity of punitive damages awards to encourage unnecessary litigation, but does not dilute deterrence because defendants' damage payments are unaffected. [171]

Several states have adopted statutes that decouple punitive damages. [172] For example, in Iowa, twenty-five percent of the punitive damages amount paid by the defendant in certain circumstances is given to the plaintiff, and in Kansas, fifty percent is given to the plaintiff. [173] For the reasons stated in the previous paragraph, decoupling schemes of this sort are beneficial.

In summary, the main justification for considering litigation costs is in connection with estimating the chance that a defendant might have escaped liability because he would not be sued. Punitive damages should be awarded to make up for the chance of escaping liability for this reason, but not as a general matter to encourage the bringing of lawsuits. Decoupling punitive damages may allow proper deterrence to be achieved without inducing needless litigation.

F.

Related Private Litigation

A defendant sometimes may be the subject of multiple suits because he engages in the same

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type of harmful conduct repeatedly, or because he commits a single act that injures many individuals. The circumstances of Gore exemplify the former possibility: a car manufacturer that engages in the practice of repainting damaged cars and selling them as new may be sued by different purchasers of these cars. A case involving the dumping of toxic waste that infiltrates an aquifer illustrates the latter possibility: the dumping, a single act, may give rise **[*924]** to suits by many different parties who have been harmed. When there have been prior judgments against a defendant for the same conduct, the United States Supreme Court has endorsed the notion that these judgments should be taken into account in mitigation of a punitive damages award against the defendant. [174]

In this section, we discuss the application of our punitive damages formula when multiple plaintiffs bring suits against the same defendant, and we observe that the formula's implications generally comport with the view that punitive damages should be lowered in the light of other private judgments against a defendant. We also note that multiple punitive damages claims against a defendant for the same or related conduct may result in his paying for more than the harm he caused, and we discuss a mechanism - punitive damages escrow accounts - that can be used to address this problem.

Let us first consider the proper level of punitive damages when multiple suits may be brought because of repeated harmful conduct, as in Gore. Whether prior suits have been brought may be relevant in assessing the probability of suit, and thus in determining the punitive damages multiplier. If few (or no) suits have been brought even though harm had occurred in the past, that fact suggests that the likelihood of suit is low, implying that the multiplier should be high. Conversely, if a large number of prior suits have occurred, the usual inference would be that the likelihood of suit is significant, and therefore the multiplier should be low. Note that these points mean that punitive damages in a particular case should be mitigated on the basis of the number of prior suits. [175]

That few (or no) suits have been brought prior to the instant case does not necessarily mean, however, that there will be a paucity of liti- **[*925]** gation in the future. For example, publicity about the current suit may engender future suits, or an award of punitive damages in the current suit may stimulate litigation.

Because of the difficulty of predicting the amount of future litigation, courts might mistakenly believe that relatively few suits will be brought, and therefore perceive a greater need for punitive damages than is appropriate. (Although courts also could incorrectly expect that many suits will occur in the future, this error does not give rise to the problem we are about to discuss. [176]) If such a mistake occurs, a defendant may be made to pay more than the harm that he caused. For example, in circumstances like those in Gore, suppose that the court in which the first case is filed believes that only ten percent of similarly harmed car purchasers will sue in the future. The punitive damages formula then would imply that the court should impose total damages on the manufacturer equal to ten times the current plaintiff's harm. If, however, the truth is that much more than ten percent of the other victims will eventually bring suit, the car manufacturer may ultimately pay for more than the harm that it has caused, because of the excessive initial award of punitive damages.

A way to avoid the problem of excessive damages when there are multiple suits is to use escrow accounts for punitive damages. Under this approach, the defendant would pay punitive damages into an escrow account rather than immediately to the plaintiff. [177] If, over time, more plaintiffs bring suits than the court had anticipated, the damage awards to the plaintiffs can be financed from the escrow account rather than charged to the defendant. In this way, the defendant will not be made to pay more in total damages than the harm done. If, at some natural termination date, [178] funds remain in the escrow account, they can be distributed to plaintiffs whose punitive damages awards had been placed in escrow. [179]

Finally, let us turn briefly to the situation in which multiple suits arise because the defendant

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has committed a single harmful act that injured many individuals (as in the example involving the dumping of **[*926]** toxic waste). Here, our points are analogous to those discussed above. Again, whether prior suits have been brought may be relevant to evaluating the probability of suit: a greater number of prior suits should raise the estimated likelihood of suit, reduce the punitive damages multiplier, and thereby lead a court to impose lower punitive damages. Similarly, an escrow account for punitive damages can be used to avoid imposing excessive damages on the defendant.

G.

Related Public Penalties

Another question of interest is whether public penalties that may be imposed for the type of wrongful conduct at issue in a private suit should affect the determination of punitive damages in that suit. Courts have answered this question in two ways. First, some have stated that punitive damages should be reduced to reflect any public penalties that the defendant has paid for the same conduct. [180] Second, the United States Supreme Court has argued in Gore that the level of punitive damages should reflect the level of public penalties that could be imposed for comparable misconduct - the higher the possible public sanctions, the higher punitive damages should be. [181]

How do these positions relate to our conclusions about punitive damages and deterrence? In this section we observe that the view that courts should reduce punitive damages if the defendant has already paid public sanctions has a straightforward justification. However, we **[*927]** suggest that the view taken in Gore, that potential public penalties should serve as a benchmark for punitive damages, is problematic.

To begin, there is an obvious basis for subtracting any public penalties already incurred by the defendant from the level of punitive damages that otherwise would be appropriate: such a policy is necessary to ensure that the defendant's total payment is the proper amount for the purpose of deterrence. As the reader knows, the defendant's total payment should be such that his expected payment equals the harm done. If punitive damages are not reduced from the amount implied by our formula to reflect public penalties borne by the defendant, the defendant's combined private and public payments would result in his expected payments exceeding the harm done. [182]

Now consider the use of public penalties as a benchmark for setting punitive damages, as suggested in Gore. This role for public penalties makes sense only if their level conveys information relevant to determining the proper amount of punitive damages. The question naturally arises, therefore, whether the level of public penalties implies something about, among other things, the chance of escaping liability. Ostensibly, the answer is yes. For example, suppose that significant public penalties are imposed on restaurants for food poisoning because food poisoning often will not lead to suit. A court reviewing a punitive damages judgment in a case against a restaurant for food poisoning might use this information about the likelihood of suit, inferred from the magnitude of the public penalties, to justify the award. [183]

Nevertheless, we are skeptical whether the information that generally can be inferred from public penalties will be very useful, given the information that courts already will have about a case. In the course of a trial, a court will typically obtain information particular to that case about the defendant's likelihood of escaping liability. For example, a court might learn whether it would be easy to link harm from food poisoning to the defendant's restaurant (the type of poisoning **[*928]** may or may not make identification straightforward), or whether the magnitude of the harm from the poisoning would be sufficient to **induce** suit (the

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poisoning may or may not result in expensive hospitalization and substantial lost wages). In contrast, the information implicit in public sanctions for food poisoning reflects, one presumes, only the average likelihood of liability over the range of cases of food poisoning.

Further difficulties are involved in inferring useful information from the level of public penalties. Such penalties are influenced in part by political factors - interest group pressures, logrolling, and the like. Consequently, courts would find it hard to determine in any precise way what legislators thought about the likelihood of escaping liability when they set the level of public sanctions. Another complication is that public penalties may themselves be influenced by the possibility of punitive damages awards in private suits: public penalties might be low precisely because legislators believed that punitive damages awards would create effective deterrence. If the courts then constrain such awards on the ground that public penalties for comparable conduct are low, deterrence will tend to be inadequate, because of a kind of circularity - the legislature relying on the courts and the courts relying on the legislature. [184] Because of the possibility of such circularity, the information that courts infer from the level of public penalties may be misleading.

For the foregoing reasons, we believe that courts generally should not use public sanctions as a benchmark in setting punitive damages. Such sanctions should be used, however, as an offset: any public penalties paid for the same conduct at issue in a private suit should reduce the magnitude of punitive damages calculated according to our formula.

H.

Tax Treatment of Punitive Damages

If a defendant bears punitive damages as a result of his engaging in some business or other income-earning activity, he generally can deduct such damages from taxable income, just as he can deduct compensatory damages in those circumstances. [185] But neither punitive nor compensatory damages are deductible if they are incurred as a result of the defendant's engaging in a non-business or personal activity. [186] **[*929]**

We explain here that these policies are desirable, given the goal of creating appropriate deterrence. [187] In the business context, the essence of the argument for the deductibility of punitive damages is that, were they not deductible, overdeterrence would result because the punitive damages component of liability would be more significant than it should be. Conversely, in the non-business or personal context, if punitive damages were deductible, underdeterrence would result. [188]

To see why damages should be deductible in a business context, consider a simple example in which a harm of $ 10,000 can be prevented by taking a precaution. It is socially desirable that the precaution is taken only if it costs less than $ 10,000. We first will show that if the injurer always will be sued and have to pay $ 10,000 in compensatory damages, precautions will be taken precisely when they should be if the damage payment is deductible. Suppose that the precaution costs $ 8000 and it is not taken. Then the defendant will pay damages of $ 10,000, and if these are deductible at, say, a forty percent tax rate, the defendant will bear after-tax damages of $ 6000. If the defendant does take the precaution, he pays $ 8000 for it, but because this is a deductible expense, the after-tax cost of the precaution is $ 4800. Hence, he will take the precaution. Alternatively, if the precaution costs more than $ 10,000, the defendant is better off paying damages of $ 10,000 and deducting this amount than spending more on the precaution. Thus, the defendant will act optimally.

To put the point differently, because the defendant is able to deduct all of his expenses, whether damages or precautions, he will want to act so as to minimize his after-tax costs and

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thus will choose the precaution if and only if its cost after taxes is less than the damages the defendant would bear after taxes. Because the tax rate is the same whether applied to deducting precaution costs or damages, the defendant's behavior is equivalent to his choosing the precaution if and only if its cost is less than the damages (putting tax considerations aside), which is the behavior that is desired.

If damages were not deductible, a business actor might take precautions even when they cost more than the harm. Consider a firm in a forty percent tax bracket that is deciding whether to take a precaution that costs $ 15,000 and would prevent a harm of $ 10,000. The **[*930]** firm will take the precaution if damages are not deductible: the after-tax cost of the precaution is $ 9000, which is less than the after-tax cost of non-deductible compensatory damages, $ 10,000. This decision is socially undesirable because the cost to society of the precaution is $ 15,000, while the benefit to society is $ 10,000.

The reason that the firm is led to take a socially wasteful precaution is that damages are not deductible, but the precaution cost is, so that the effective cost of the damages to the firm is heightened. Indeed, with a tax rate of forty percent, damages appear to be one-and-two-thirds as important to eliminate as they would be if they were deductible, meaning that the firm would be willing to spend up to $ 16,667 to eliminate a $ 10,000 harm. [189]

The explanation that we have provided for the desirability of allowing compensatory damages to be deducted in a business context applies equally to punitive damages. Punitive damages are just another form of damages that are intended to make the expected damages of injurers equal to the harm they cause. If punitive damages were not deductible, but precaution costs were, overdeterrence would result for essentially the same reason as that discussed above: the non-deductibility of punitive damages would make causing harm more costly to business actors than expenditures to prevent harm, so that such actors would be induced to spend too much to reduce harm. [190] **[*931]**

The importance of allowing punitive damages to be deductible in a business context may be substantial because the tax rate for corporations and other business actors is relatively high. As we noted, at a tax rate of forty percent, [191] if damages were not deductible, a potential injurer might be induced to spend up to one-and-two-thirds the harm to prevent it. [192] Thus, if the deductibility of punitive damages in a business setting were disallowed, significant overdeterrence could result.

The explanation for why punitive damages should not be deductible in a non-business or personal context is the converse of that for why they should be deductible in a business context. In a non-business or personal setting, the cost of precautions is not deductible. Hence, if punitive damages also are not deductible, a potential injurer will properly balance the cost of precautions against the reduction in harm from taking the precaution. If punitive damages were deductible, a potential injurer would not give sufficient weight to the reduction in harm from taking precautions, resulting in underdeterrence.

I.

Insurability of Punitive Damages

Policies regarding the insurability of punitive damages vary among states. Most states allow punitive damages to be covered by liability insurance, but some do not. [193] **[*932]**

Should punitive damages be insurable? The basic answer to this question is yes, although we qualify this conclusion below. The reason that it is generally desirable to allow insurance for punitive damages is best understood by recognizing that punitive damages are, according to

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compensatory damages so that, on average, they will pay for the harm that they cause. This excess liability can be labeled "punitive damages," and failure to impose it would result in inadequate deterrence. In summary, punitive damages ordinarily should be awarded if, and only if, an injurer has a chance of escaping liability for the harm he causes. [8]

This principle often will have transparent implications for the circumstances in which punitive damages should be awarded in practice. Consider a company that is responsible for trucking toxic waste to a dump site where it will be charged disposal fees. To reduce its fees, suppose the company allows some of the waste to leak onto the highway, because it knows that the leak is unlikely to be noticed and traced to its source. Under our analysis, punitive damages obviously would be called for because of the significant chance that the company will escape liability for the harm it caused. Alternatively, suppose the gross negligence of the firm that is responsible for treating the waste at the dump site leads to a substantial and highly visible spill from the firm's waste storage tanks. Punitive damages would not be appropriate because the firm is unlikely to escape detection and liability for this harm.

When an injurer has a chance of escaping liability, the proper level of total damages to impose on him, if he is found liable, is the harm caused multiplied by the reciprocal of the probability of being found liable. Thus, for example, if the harm is $ 100,000 and there is a twenty-five percent chance that the injurer will be found liable for the harm for which he is legally responsible, the harm should be multiplied by 1/.25, or 4, so total damages should be $ 400,000. Because the injurer will pay this amount every fourth time he generates harm, his average payment will be $ 100,000 (= $ 400,000/4). [9] Thus, on average, the injurer will pay for the harm he causes, and appropriate deterrence will result. Once the proper level of total damages is calculated in this way, punitive damages can be determined by subtracting compensa- **[*875]** tory damages from the total. In the example, because compensatory damages would equal the harm of $ 100,000, punitive damages would equal $ 300,000 (= $ 400,000 - $ 100,000).

If punitive damages are needed according to this theory, we believe that courts and juries often will be able to obtain enough information about the likelihood of escaping liability to apply the theory reasonably well. We will discuss how our analysis relates to several leading punitive damages cases, [10] and we will provide model jury instructions that can be used to aid jurors in applying the principles that we develop.

We also will relate our analysis of the deterrence rationale for punitive damages to the criteria commonly applied by courts in imposing such damages. Importantly, we will explain that the reprehensibility of a corporate defendant's conduct generally should not be a factor in deciding whether, and to what extent, to impose punitive damages for purposes of promoting deterrence (although the reprehensibility of the conduct of a person who is a defendant may be relevant to punitive damages and deterrence). In addition, we will argue that the wealth of a corporate defendant presumptively should not be taken into account in determining the level of punitive damages (although again the conclusion may be different in the case of a person who is a defendant). We also will consider other aspects of punitive damages policy from the perspective of deterrence, including the appropriateness of caps on punitive damages, the relevance of potential harm for punitive damages, the insurability of punitive damages, and the importance for punitive damages of the distinction between victims who are customers of an injurer and victims who are strangers to the injurer.

One further observation about our analysis of deterrence is worth noting. We ordinarily assume that the benefits that injurers derive from engaging in the conduct that gives rise to harm is included in the calculation of social welfare. We also will discuss, however, the possibility that such benefits should not be included - notably, when a wrongdoer derives pleasure from his victim's suffering. We will explain that, if the injurer's benefits are excluded from social welfare, punitive damages may be needed for proper deterrence even when there is no chance of escaping liability. [11]

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our theory, a way to make defendants pay for the harm they do when they have a chance of escaping liability. Thus, the question whether punitive damages should be insurable is essentially the same as the question whether compensatory damages should be insurable. [194]

Of course, compensatory damages are insurable, but what reason can be given for allowing them to be? Consider this question when liability is strict and harm is entirely monetary. In this case, allowing the purchase of liability insurance is socially desirable. Liability insurance raises the well-being of potential injurers, which is why they choose to buy it, and the availability of such insurance does not affect the welfare of victims, who will be fully compensated anyway. Even if the purchase of liability insurance causes injurers to take less care and thereby increases the frequency of accidents, victims will not be affected because they are fully compensated. [195]

However, if losses are nonmonetary, victims might not be fully compensated, or if the negligence rule applies, might not be compensated at all. [196] Consequently, their welfare would be adversely affected if liability insurance leads to an increase in the frequency of accidents. Nevertheless, it can be shown that such insurance often is socially desirable even then, because the value of the insurance to insureds may exceed the loss of welfare to victims. [197] Further, the victims' losses are mitigated because liability insurers have a financial incentive to structure coverage and premiums to control risks. For example, insurers may make insurance premiums depend on an in- **[*933]** sured's history of claims, may only offer partial coverage, or may require that the insured take certain steps to reduce risks. As a result, the purchase of liability insurance may not significantly reduce the insured's incentives to exercise precautions.

Moreover, if liability insurance were disallowed, not only would the well-being of potential injurers decrease, but such injurers also might forgo engaging in some socially beneficial activities that pose liability risks. For example, surgeons might refuse to perform certain operations, or general-aviation aircraft companies might cease making planes. Even when services and products continue to be offered, prices would rise to cover the liability risks that such providers would now have to bear directly, and the resulting price increase generally would exceed that which would have resulted from the purchase of liability insurance. [198] Both of these consequences of disallowing liability insurance - the possible withdrawal from certain activities and the increased price of other activities - hurt consumers of the affected products and services. This consideration lends support to the case for allowing the sale of liability insurance.

A major complication in the preceding discussion concerning the desirability of liability insurance arises from the judgment-proof problem. [199] If injurers can avoid having to pay for some of the harm they cause because their assets are limited, they will have a reduced incentive both to take precautions and to moderate their participation in risky activities. (In the extreme case, an injurer with no assets would have no liability-related incentive to reduce risks.) Depending on insurers' ability to control insureds, the sale of liability insurance could either worsen or ameliorate this problem. If insurers are substantially unable to control the risky behavior of insureds because insurers cannot easily observe insureds' risk-taking behavior and link policy features, such as premium rates, to insureds' behavior, liability insurance would tend to exacerbate the judgment-proof problem. It might then be beneficial to forbid the sale of such insurance. Conversely, if insurers can relatively easily observe and control the behavior of insureds, liability insurance could lessen the judgment-proof problem. For in- **[*934]** stance, insurers might require that a restaurant install fire extinguishers and a sprinkler system to reduce fire risks. In this case, not only might it be desirable to allow the sale of liability insurance, but it might even be beneficial to require its purchase. [200]

We have now explained that, with some qualifications, it is generally desirable to allow potential injurers to purchase liability insurance for compensatory damages. Because punitive

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damages, by our formula, substitute for compensatory damages when injurers can escape liability, essentially the same arguments support the conclusion that it is generally desirable also to allow the sale of insurance for punitive damages, as the majority of states already do.

J.

Third Party Versus Consumer Victims

Our analysis of punitive damages has assumed implicitly that the parties harmed by the injurer are "third parties" - that is, parties who have no market or contractual relationship with the defendant. Such was the case, for example, with respect to the fishermen and Alaskan natives whose livelihood was affected by the Exxon Valdez oil spill. In many situations, however, the victims are customers of the defendant, as in Gore, in which the plaintiff was a purchaser of a car made by the defendant. [201]

When determining punitive damages, courts devote little attention to whether the plaintiff was a third party or a consumer. [202] The list of factors in Haslip, for example, does not include this distinction, nor does any other similar list or authoritative source of which we are aware. [203] **[*935]**

However, the status of victims as third parties or consumers is important to consider, for when victims are consumers, the need for punitive damages is lessened. The reason is that, when individuals might be harmed by the products (or services) they buy, producers will tend to be concerned that customers may not be willing to pay as much for the products or that they may stop purchasing the products altogether. Given that producers have this market-based incentive to be attentive to the risk of harm to their customers, the need for liability in general, and for punitive damages in particular, to control their behavior is diminished. [204] Obviously, this market mechanism cannot operate if the victims are not customers of the defendant - that is, if they are third parties. [205]

The extent to which market forces reduce the need for liability as a deterrent depends on how much customers know about product or service hazards. In some circumstances, customers will not be able to discipline firms effectively because of their lack of knowledge of such risks. [206] Because travelers probably would not know much about the chance of suffering food poisoning from eating at a family-owned restaurant at a turnpike stop, the restaurant would not be likely to fear loss of clientele if food poisoning were to occur. Thus, the **threat** of liability, including punitive damages, might be desirable to **induce** the restaurant to reduce this risk. [207]

In many settings, however, consumer information about the dangers of products and services is relatively good. [208] This may be be- **[*936]** cause the risks have a fairly obvious character, because they have been publicized by the media, [209] or because the customers are repeat purchasers and have learned about them from experience. In such circumstances, the **threat** of liability would be relatively unimportant in controlling risk. Indeed, if consumer information about risk were perfect, liability to improve product safety would be unnecessary: consumers would reduce their willingness to pay for a firm's product or service by precisely the amount of the expected harm to which the product or service exposed them, which in turn would cause firms to invest in any cost-justified precautions.

Our conclusion, therefore, is that in deciding on punitive damages, courts should take into account whether the victims are third parties or customers and, if the latter, whether market forces are likely to lead sellers to reduce risk properly. A skeptical approach to imposing punitive damages should be adopted when consumers are relatively well-informed about the

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risk of the seller's product or service. [210]

K.

Breach of Contract

Although we have been discussing the imposition of punitive damages in situations governed by tort law, punitive damages sometimes can be levied in contractual disputes as well. [211] Indeed, there seems to be an increasing tendency to employ such damages in this context [212] - for example, in employment termination and insurance litigation. [213]

We will explain that the award of punitive damages sometimes can promote the interests of contracting parties - when a non-performing **[*937]** party has a chance of escaping detection and liability. However, such circumstances do not give rise to the imposition of punitive damages in contract cases in practice, with the result that the interests of contracting parties may be harmed by actual punitive damages policy. [214]

Parties would benefit from the imposition of punitive damages when such damages are necessary to **induce** the promisor to perform adequately. [215] For example, consider a company that contracts with a city to replace its burned-out streetlights. Suppose that the company would have to pay punitive damages of $ 200, in addition to compensatory damages of $ 50, if the city discovers that a light was not replaced in a timely manner (say, one week after burning out). The reason we can imagine that the parties would want punitive damages in this situation is that they both recognize that the city will not discover most of the lights that burn out and that are not repaired on a timely basis. They realize that setting total damages for breach in excess of the loss from breach will give the repair company a stronger and more appropriate motive to search for and replace burned-out streetlights than would compensatory damages alone. Because the city will be willing to pay more to the company for its better service, both parties to the contract can benefit from imposition of punitive damages. [216] **[*938]**

Note that the circumstances in this example are analogous to those in the tort settings in which we have said that punitive damages are desirable - namely, when there is a probability that a party will not be found liable if he does harm (in the present context, by committing a breach). Thus, the role of the penalty for breach in the example resembles the role of punitive damages in tort situations - to make up for the chance of escaping liability. [217]

Parties may want punitive damages to be paid for breach in two contexts in which a breaching party may escape liability. The first situation is when the breached-against party does not automatically observe whether performance has occurred, as in the streetlight example. [218] The second situation is when the breached-against party knows that performance has been deficient, but may not be able to prove this in court or lacks a financial incentive to sue. For instance, if an insurance company fabricates a reason for not paying a small claim, the insured may not sue because of the uncertainty of success and the cost of a lawsuit. But because insureds would in principle be willing to pay higher premiums if an insurance company can be deterred from acting in this way, the insurer may benefit from an agreement to pay punitive damages when it is found liable for falsely denying a small claim.

In many circumstances, however, parties will not want damages for breach of contract to exceed the compensatory level because the breach is obvious, the nature of the breach is such that it easily can be proven in court, and the amount at stake is large enough to justify suit. To the degree that courts impose punitive damages in these situa- **[*939]** tions, such damages will result in excessive and expensive performance (the analogue of overdeterrence), thereby lowering the welfare of the contracting parties.

In conclusion, courts should be cautious about awarding punitive damages for breach of

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contract. This point is worth noting because the law governing the imposition of punitive damages for breach of contract does not restrict their award to cases in which the likelihood of escaping liability for breach is substantial. [219]

L.

Components of Harm Not Included in Compensatory Damages

It is often suggested that punitive damages should be awarded to compensate plaintiffs for non-economic and other losses that would not otherwise be incorporated into compensatory damages. [220] Many courts have endorsed this justification for punitive damages. [221]

Although we recognize that awarding punitive damages as a substitute for a missing component of harm has a potential rationale in terms of assuring proper deterrence, we suggest in this section that remedies for missing components of harm would be best pursued through revision of the rules used to calculate compensatory damages.

As the reader knows, our basic analysis of deterrence implies that injurers should have to pay for the entire harm they cause, in order that injurers take appropriate precautions and that prices and participation in risky activities are proper. Thus, if there is a component of **[*940]** harm that otherwise would be omitted, a policy of including it in the form of punitive damages would seem to be beneficial. [222]

Notwithstanding this point, employing punitive damages as a substitute for missing components of compensatory damages is problematic. Namely, a component of harm might be excluded from compensatory damages because of the difficulties and expense that would be encountered in estimating it. Consider, for example, the pain and suffering experienced by the friends of a person who dies. If this category of harm were included in compensatory awards, the number of claimants in cases of wrongful death could become quite large, and the cost of litigation would also increase as a result of parties contesting the magnitude of their psychological losses. It may be best, then, for the law to exclude from compensatory damages many such speculative, difficult-to-determine elements of harm, even though these elements are real and their omission does undesirably dilute deterrence. [223]

If a component of loss is excluded from compensatory damages for these reasons, it arguably should be excluded from punitive damages as well. The disadvantages of attempting to ascertain the missing component of harm would not be lessened just because it is calculated under a different head of damages. It will be no easier to determine the pain and suffering due to the death of a friend just because this loss is imported into punitive damages. Indeed, the accuracy of measurement of this loss would be expected to be worse because the calculation of punitive damages is not disciplined by the procedures and evidentiary requirements common to the determination of compensatory damages. [224]

Of course, if a component of loss should have been included in compensatory damages despite the costs of doing so, the natural response is to rectify the mistake by incorporating it in compensatory damages. If the component of loss is instead included as part of punitive damages, not only will it be less accurately measured for the reason noted in the previous paragraph, but there will also be another problem: the component will be omitted in the large majority of cases, those in which only compensatory damages are awarded. Specifically, **[*941]** the component will be omitted in the approximately ninety-four percent of cases in which punitive damages are not awarded. [225]

M.

Economic Loss Versus Personal Injury

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Several courts have expressed the view that the level of punitive damages should depend on whether the plaintiff's harm involved personal injury or was entirely economic. [226] For example, much was made of this distinction in Gore, in which the United States Supreme Court contrasted the "purely economic" harm inflicted by the defendant with instances of "reckless disregard for the health and safety of others," implying that the latter acts should be subject to higher punitive damages. [227]

Does it make sense for punitive damages to be influenced by whether the harm consists of a personal injury, as opposed to an economic loss? The answer is basically no. If the amount that courts award as compensatory damages in personal injury cases is proper, [228] the formula that we have advanced for the determination of punitive damages should apply without modification: the level of compensatory damages for the personal injury should be multiplied by the inverse of the probability of being found liable.

We recognize, however, that the level of compensatory damages awards in personal injury cases may be too low in practice to accomplish proper deterrence. [229] For example, it has been calculated that in **[*942]** wrongful death cases, the amount that an injurer should pay is between $ 3 million and $ 6 million, [230] whereas actual awards are usually substantially lower. [231] If compensatory damages are too low in personal injury cases, they should be raised appropriately. [232] Punitive damages should not be awarded to correct for inadequate compensatory damages, for reasons analogous to those discussed in the previous section. [233]

N.

Externalization of Risk Through Independent Contractors

An effect of imposing liability that we have not yet discussed is what we will call externalization of risk. By externalization of risk, we mean the ability of potential injurers to avoid liability by hiring independent contractors to undertake risky tasks that they would otherwise perform themselves. The motive to externalize risks results to some extent from the **threat** of compensatory damages alone, but it is accentuated if punitive damages are awarded. To our knowledge, courts do not consider this factor in the determination of punitive damages. [234]

In this section, we discuss two socially undesirable consequences of externalization of risk. First, the number of accidents that occur tends to be higher because the independent contractors who are engaged generally do not operate as safely as the firms hiring them. Second, **[*943]** society sacrifices the economic benefits that would have accrued if the firms had carried out certain tasks themselves instead of having them performed by independent contractors. We conclude that when externalization of risk is a relevant factor, it argues for lower punitive damages than would otherwise be appropriate.

Let us amplify on these points. It is well recognized that firms often can avoid liability by hiring independent contractors to undertake risky tasks. [235] For example, a firm that is transporting its toxic waste in its own trucks may be able to hire another company to transport the waste and thereby avoid liability for spills. [236]

However, the incentive of a firm to transfer liability to an independent contractor is more complicated than may at first appear because, if an independent contractor assumes liability by undertaking risky tasks for a firm, the contractor will charge the firm more for performing these tasks. An independent contractor that is hired to haul a firm's toxic waste clearly will charge the firm an amount reflecting its expected damages for spillage of the waste. Thus, the firm might in the end pay for the accident risks it creates even though it hires an independent contractor. It is apparent, therefore, that the firm will want to hire an independent contractor only if the contractor would charge the firm less for assuming liability

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than the firm would have borne itself.

In fact, an independent contractor might be willing to charge a firm less. The reason is that an independent contractor might not have assets sufficient to cover the full liability it may incur, so that its effective expected damages would be lower than the firm's - assuming that the firm has sufficient assets to pay the full judgment it would have faced, or at least more assets than the contractor. For example, suppose that potential damages are $ 10 million and that the risk of an accident and liability is five percent. If a firm with assets of $ 10 million undertakes the risky task itself, its expected damages would be $ 500,000 (= 5% X $ 10 million). However, if the firm hires an independent contractor with assets of only $ 1 million, the contractor's expected damages would be $ 50,000 (= 5% X $ 1 million). Hence, the in- **[*944]** dependent contractor only needs to add $ 50,000 to the price it charges the firm to be compensated for its expected damages. Accordingly, the firm could in effect reduce its expected damages from $ 500,000 to $ 50,000 by hiring the independent contractor. [237]

We have explained that firms might benefit by externalizing their liability risks to independent contractors with assets less than the harm resulting from accidents. It should be emphasized that because firms secure an advantage by dealing with such contractors, they will seek them out and favor them over contractors with greater assets, other things being equal. [238]

The externalization of risk to potentially judgment-proof contractors has an important implication. These contractors will tend to conduct their activities with less care than will actors with more at stake. In the example above, the independent contractor with assets of only $ 1 million clearly will not have as great an incentive to invest in precautions as the firm that could pay $ 10 million. [239] Therefore, the frequency of accidents will increase as a result of the externalization of risk. [240] **[*945]**

An increase in the number of accidents is not the only socially undesirable consequence of the externalization of risk. The economic advantages firms gain by undertaking certain tasks themselves, rather than contracting with others to perform the tasks, will be lost if firms hire independent contractors to avoid liability. In our example, the advantages that the firm would lose if it hires an independent contractor might include its ability (given its superior knowledge of its own situation) to purchase the most suitable truck for transporting its waste and the opportunity to schedule waste disposal more efficiently. [241]

The two problems caused by the externalization of risk - the increased number of accidents and the loss of economic efficiencies - are exacerbated by the imposition of punitive damages, for such damages increase the desire of firms to externalize their risks. Moreover, the judicial tendency to impose higher punitive damages on wealthier firms [242] has the perverse consequence of increasing the incentive of such firms to externalize risks despite their being more likely to take appropriate precautions (because they are less likely to be judgment-proof). Our conclusion, therefore, is that the increased externalization of risk induced by punitive damages argues for a lower level of punitive damages than would otherwise be appropriate.

O.

Encouraging Market Transactions

In some circumstances a potential injurer can communicate with a potential victim before causing harm, for example, when a firm deliberately infringes on another's copyright, or when an individual regularly trespasses on someone's property. If prior communication is possible, a potential injurer could negotiate in advance with the potential victim to purchase the right to engage in the harm-creating conduct, rather than first causing the harm and then

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paying damages. The firm contemplating a copyright violation could secure a license to use the copyrighted material, or the trespasser could obtain an easement. Obviously, the greater the level of damages that would be imposed on an injurer who causes harm without having purchased the right to engage in the harm-creating conduct, the greater the incentive to purchase the right. In this sense, punitive damages can be said to encourage market **[*946]** transactions. To our knowledge, courts rarely mention this effect of imposing punitive damages. [243]

In this section, we explain that it may be desirable to impose punitive damages in order to encourage market transactions. The reason in essence is that inducing potential injurers to bargain may better lead them to take harm into account and may reduce parties' wasteful efforts to try to take and protect property. Additionally, market exchange may be cheaper than litigation. A qualification to this discussion, however, is that imposing punitive damages when the parties are not easily able to bargain may overdeter injurers. Note that the rationale for punitive damages discussed in this section does not presume that a party who causes harm is able to escape liability with positive probability. In other words, the present rationale is independent of the escaping-liability rationale for punitive damages that has been the focus of our Article. [244]

To elaborate, suppose that compensatory damages alone are employed and that they are underestimated. A potential injurer then might cause harm when doing so is socially undesirable - because the benefit to the injurer might be less than the harm done but greater than the low estimate of compensatory damages. [245] In general, as we observed above, [246] an excessive amount of harm will be caused if damages are too low.

Additional undesirable repercussions, similar to those associated with the theft of property, may arise when compensatory damages are underestimated. If injurers can take property from victims without having to pay for its full value, potential injurers will devote effort to identifying and taking such property, and potential victims will expend effort to prevent their property from being taken. Copyright violators, for example, will devote resources to copying others' protected material, and copyright owners will take steps to stop such illicit copying. Such efforts are socially wasteful. **[*947]**

The foregoing problems - an excessive amount of harm and wasteful efforts to take and protect property - can be avoided if punitive damages are imposed. If punitive damages are set so that total damages substantially exceed the value of the attractive property, a person who might otherwise simply take the property will instead bargain with its owner, because it would be cheaper to pay an agreed-on price than to pay damages. Consequently, property will be exchanged only if the buyer values it more than the property owner, and the incentive to take and protect property whose value might be underestimated by compensatory damages will be eliminated.

Another possible reason to employ punitive damages in order to encourage market transactions concerns administrative costs. If compensatory damages are used alone, exchange often will be mediated through the legal system by the bringing of a lawsuit; the cost of exchange then will be the cost of litigation (though this cost is frequently reduced because of **settlement)**. But if punitive damages are used in addition, exchange will be much more likely to occur through voluntary transactions, which may be much less costly than litigation.

The arguments that we have discussed in favor of using punitive damages to promote market exchange obviously do not apply if bargaining between parties is not possible or there are substantial impediments to bargaining. Suppose, for instance, that a hiker lost in the mountains discovers an unoccupied cabin. The benefit he would obtain from using the cabin and consuming the food in it presumably would exceed the loss borne by the cabin's owner. But because there is no opportunity for the hiker to bargain with the owner, the effect of

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punitive damages might be to discourage the hiker from using the cabin. Hence, when parties cannot bargain, it may be better to employ compensatory damages alone (despite the possibility of errors in estimation); punitive damages would tend to overdeter injurers' conduct. Moreover, even if bargaining is feasible, there may be other impediments to efficient exchange - such as bargaining failures due to strategic behavior - that also could justify relying solely on compensatory damages. [247]

We conclude that punitive damages may sometimes have appeal when it is possible for a potential injurer to communicate with a potential victim before causing harm, in order to encourage market transactions. As we noted above, this rationale for punitive damages, when applicable, is independent of the escaping-liability rationale. [248] **[*948]**

IV.

Punishment

By the punishment objective we refer to society's goal of imposing appropriate sanctions on blameworthy parties. [249] We equate blameworthiness with the reprehensibility of a party's conduct, that is, with its maliciousness or the extent to which it reflects disregard for the well-being of others. [250] We assume that the punishment objective derives ultimately from the pleasure or satisfaction people obtain from seeing blameworthy parties punished [251] (although our essential conclusions do not depend on this assumption [252]).

When the defendant is an individual, the connection between the imposition of punitive damages and the accomplishment of the punishment objective is conceptually straightforward: if, after assessing the blameworthiness of an individual's act, appropriate punitive damages are levied, the punishment objective is achieved. [253]

However, when the defendant is a firm, the relationship between punitive damages and the punishment objective is more complex. In this regard, we will develop three points. The first is that there are different ways of viewing the objective of punishment: the goal may be to punish firms as entities, that is, independently of whether blameworthy individuals within the firms are penalized; or the goal may be **[*949]** to punish firms only as a means of punishing culpable individuals in the firms. Our second point is that the imposition of punitive damages on firms may not lead to the punishment of blameworthy individuals within them; thus, the goal of punishing blameworthy employees may not be well promoted by imposing punitive damages on firms. The final point is that the imposition of punitive damages on firms often penalizes individuals who are unlikely to be considered culpable, namely, shareholders and customers. We conclude that, to the extent that the goal is to punish culpable individuals within firms, and not firms as entities, the utility of punitive damages in achieving the punishment objective is significantly attenuated.

Consider the possibility that the punishment objective might be furthered because people obtain satisfaction directly from the punishment of a blameworthy firm as an organization, without regard to whether anyone within the firm behaved inappropriately or is punished. [254] We find this conception of the punishment goal unappealing both because it requires a definition of blameworthiness of a firm that is divorced from the behavior of any individuals who are affiliated with it, and because it necessitates believing that people would, after reflecting on the matter, want to impose a penalty on what ultimately is an artificial legal construct. The notion that individuals would want to punish firms per se strikes us as not entirely different from the idea that individuals would want to punish inanimate objects for causing harm (such as trees that fall on people). [255]

Notwithstanding these reservations, it is possible that individuals do want to personify firms

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and punish them as entities, and the reader can make up his or her mind about the importance of this way of defining the punishment objective. To the extent that it is important, the **[*950]** imposition of punitive damages on a blameworthy firm directly promotes the punishment objective, much as it does when the defendant is a culpable individual. [256]

Now consider the alternative reason for punishing firms - to punish blameworthy individuals within them. Supposing that this is the purpose of punishment, we turn to our second point, about the extent to which the imposition of punitive damages on firms will actually result in the punishment of blameworthy employees. Because firms clearly have an interest in discouraging culpable conduct by their employees that could give rise to punitive damages, they can be expected to seek to control such conduct through the use of internal sanctions, such as demotion or dismissal. However, two considerations suggest that the imposition of punitive damages on firms will lead to less punishment of blameworthy employees than might at first be supposed.

First, culpable employees may not be punished by firms because the firms may have difficulty identifying them. Such individuals may be able to obfuscate their role in decisionmaking or conceal their behavior in a variety of ways. For example, an employee responsible for checking a safety valve on a tank storing dangerous chemicals that subsequently explodes because of a defective valve may claim that he performed the inspection even if he did not, and may place a false entry in his record book attesting to the inspection. A manager whose judgment is impaired by alcohol and who gives oral instructions to a subordinate that lead to an accident may deny ever having told the subordinate to do what the subordinate did. [257]

Second, even if culpable individuals within a firm can be identified and punished by the firm, imposing punitive damages on firms often will have little or no marginal effect on their punishment. That is, the internal sanction imposed on such employees may not be much (if at all) greater as a result of the firm's bearing both punitive and compensatory damages than if the firm had borne compensatory damages alone. When a firm incurs high compensatory damages because of the blameworthy conduct of an identifiable employee, it may want to levy whatever sanctions on him that it can; imposing punitive damages on **[*951]** the firm then would not result in additional punishment of the employee. [258]

The preceding discussion presupposed that there exist culpable employees in the firm. But in some situations there may not be any. If a significant delay occurs between misconduct and the manifestation of harm and litigation (as was the case, for instance, in connection with the use of asbestos in products), blameworthy individuals may have changed jobs, retired, or died. [259] Also, because decisions in firms often are made by many individuals, it may be that no one individual has the requisite knowledge of risk and of the consequences of his behavior to be considered culpable. One person may decide to put a toxic liquid in a storage tank, believing that the tank can never leak, and another person may leave the tank in a state in which a leak can occur, thinking that the liquid in the tank is not toxic, so that a leak would not cause harm. Here, each decision considered by itself may not be blameworthy because each person believes that what he is doing does not create a risk of a harmful accident. [260]

Let us now consider the third point, concerning how imposing punitive damages on firms often penalizes the firms' shareholders and customers. Shareholders, as residual claimants of a firm's profits, obviously will be made worse off when punitive damages are levied on a firm. [261] Indeed, they usually can be expected to bear a major fraction of the burden of punitive damages. [262] Given that shareholders are punished by punitive damages, the question whether they are blameworthy must be considered. If a shareholder owns a significant fraction of a firm's stock, participated actively in the firm's decisions and acted egregiously, his position would be much like that of a blamewor- **[*952]** thy employee with decisionmaking power; each would be culpable. But if a shareholder owns a minuscule

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fraction of the stock of the firm and was a passive investor with no direct involvement in the firm's decisionmaking processes, his degree of blameworthiness would be small, if not nonexistent. [263]

A firm's customers also will be made worse off as a result of the imposition of punitive damages on the firm if such damages cause the prices of the firm's products or services to rise. Firms may regard punitive damages as an additional cost of doing business - a cost that, with a positive probability, will be borne by them in addition to their ordinary costs. To cover the added cost of punitive damages, firms will tend to raise their prices, which will cause the welfare of their customers to decline. [264] Customers, however, would not ordinarily be considered blameworthy, because they do not exert direct control over the actions of firms that pose risks to other persons. [265] Consequently, to the extent that customers pay higher prices as a result of the imposition of punitive damages on firms, innocent parties are penalized. [266]

We can summarize our discussion of the punishment of firms as follows. The view that a firm should be punished per se - without reference to the punishment of individuals within it - is a possible view, but one that we find problematic. Another view is that the punishment goal is promoted only by punishing blameworthy individuals within firms. We have explained, however, that imposing punitive damages on firms often will not result in the punishment (or at least any additional punishment) of blameworthy employees, so the use of such damages might not advance the punishment goal very much. Moreover, imposing punitive damages frequently will penalize shareholders and customers, parties who are not likely to be considered blameworthy. This adverse consequence of punitive damages must be weighed against the beneficial effects of such damages in furthering the punishment goal.

Having addressed punitive damages and punishment in general terms, we now briefly consider how the reprehensibility of the defen- **[*953]** dant's conduct and the wealth of the defendant should influence punitive damages with respect to the punishment objective. [267] Regarding reprehensibility, we merely observe that the punishment objective will, by definition, be met if sanctions are imposed on those who have acted reprehensibly. Hence, determining the reprehensibility of the defendant's conduct is intrinsic to satisfaction of the punishment objective, and the law's focus on reprehensibility obviously makes sense given this objective. In the case of firms, however, the connection between reprehensibility and punishment may be attenuated for reasons discussed above - the imposition of punitive damages on a firm may not result in the punishment of individuals within the firm who acted reprehensibly.

Concerning defendants' wealth and the appropriate level of damages from the perspective of punishment, consider first the situation when defendants are individuals. In this case, the common belief that punitive damages should be higher for wealthier defendants can be justified. The punishment goal is furthered if a proper punishment is imposed on a culpable individual, which we interpret to mean reducing the individual's utility by a particular amount. To accomplish this, it is generally necessary to assess a higher penalty if the individual is wealthy than if he is poor, because money is worth less to him if he is wealthy. [268]

When the defendant is a firm, the relevance of the defendant's wealth depends on whether the punishment goal is viewed in terms of punishing the firm as an entity or punishing culpable individuals within the firm. Under the first view, the firm's wealth might be thought to be relevant to the proper level of damages for punishment purposes. [269] Under the second view, however, the firm's wealth generally would not be relevant: the level of damages needed to **induce** a firm to punish its culpable employees ordinarily would not depend on its wealth. A $ 100 million firm and a $ 10 million firm would both be expected to impose the same sanction on an employee for misconduct that resulted in a punitive damages award of a given amount. The reason is that, as we have said, rational firms will develop a policy of **[*954]** punishing employee misbehavior to lower their liability expenses. This policy should

In our discussion of the second objective of punitive damages - punishment - we focus on the assumption that the underlying goal of society is to penalize especially blameworthy individuals. Achieving this goal is reasonably straightforward if the defendant is a person who has been found to have acted culpably - after all, imposing punitive damages on that person punishes him. But if the defendant is a corporation, imposing punitive damages on it may or may not lead to **[*876]** the punishment of blameworthy individuals within the corporation, for a variety of reasons that we will discuss. To the extent that such individuals are not punished, imposing punitive damages on the corporation does not advance the punishment goal. Moreover, we will explain that much of the sting from imposing punitive damages on corporations may be borne by individuals who are usually not thought to be culpable, namely, shareholders and customers. In the light of these points, we conclude that the extent to which imposing punitive damages promotes the punishment goal may be significantly different when defendants are corporations from when they are individuals, and that the importance of punitive damages as a form of punishment may be considerably attenuated for corporate defendants.

The plan of our Article is as follows. In Part II, we review the economic theory of deterrence and develop the basic principles determining when punitive damages should be awarded, and at what level. We also apply these principles to certain aspects of punitive damages law and legislation, as well as to several prominent punitive damages cases. Part III relates the basic principles to a number of criteria that are employed by the courts to determine the appropriateness and magnitude of punitive damages awards, and also examines a variety of other factors and policies that bear on punitive damages. Part IV discusses the punishment goal of punitive damages. Part V briefly summarizes our main points. [12] An Appendix contains the model jury instructions for use in awarding punitive damages. **[*877]**

II.

Deterrence: The Basic Theory

In this Part, we summarize the basic principles of the economic theory of deterrence and explain what these principles imply for the use of punitive damages. By deterrence, we mean what is often called general deterrence, namely, the effect that the prospect of having to pay damages will have on the behavior of similarly situated parties in the future (not just on the behavior of the defendant at hand). [13]

We should add that the basic theory that we are about to review is the standard theory of deterrence, on which economically oriented scholars widely agree. [14] As noted, we will usually make the conven- **[*878]** tional assumption that the benefits that injurers obtain from engaging in the conduct that gives rise to harm are credited in social welfare. [15] Thus, for example, we will assume that the time saved by a speeding driver, or the cost saved by a company that chooses not to purchase certain pollution control equipment, constitutes a social benefit that is to be weighed against the harm from speeding or polluting. We will consider the implications for punitive damages of the alternative assumption - that the benefits from harmful conduct do not count in social welfare - when we examine the reprehensibility criterion in section III.A.

We first discuss deterrence in a very simple setting in which a party will be sanctioned whenever he causes harm. We then discuss the situation in which parties sometimes escape sanctions for harms for which they are responsible. It is in this latter case, as we indicated above, that damages exceeding harm should be imposed, and punitive damages thus used.

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depend on variables other than the firm's wealth - notably, the damages that the firm will bear as a result of employee misbehavior. [270] To the extent that the internal sanctions that firms impose on culpable employees do not depend on the firm's wealth, the punishment objective will not be advanced by making punitive damages depend on its wealth. [271]

V.

Conclusion

In this Article, we have discussed the two fundamental purposes of punitive damages - deterrence and punishment - and have come to conclusions regarding each objective that we now briefly review.

Our central conclusion about punitive damages and deterrence is conceptually simple. Punitive damages should be imposed when deterrence otherwise would be inadequate because of the possibility that injurers would escape liability. In particular, punitive damages should be set at a level such that the expected damages of defendants equal the harm they have caused, for then their damage payments will, in an average sense, equal the harm. This implies a simple formula for calculating punitive damages, according to which harm is multiplied by a factor reflecting the likelihood of escaping liability. If punitive damages are calculated according to this multiplier formula, precautions will tend to be optimal - neither inadequate nor excessive - as will product prices and the incentive to participate in risky activities. These conclusions about punitive damages, and the importance of the role of the defendant's chance of escaping liability, flow from the standard and well-accepted theory of deterrence. We also discussed a deterrence rationale for punitive damages that is not based on the possibility of escaping liability: that punitive damages may be needed to offset the socially illicit utility that individuals obtain from committing malicious acts. This rationale, as we noted, does not apply to firms.

The theory of deterrence not only yields a multiplier formula for computing punitive damages, but also provides guidance regarding a range of important doctrinal and policy issues concerning punitive damages. Notably, we discussed the point that the reprehensibility of a party's conduct generally should not be a factor in the assessment of punitive damages (except in the case of an individual's malicious act), **[*955]** as well as the point that the wealth of a defendant usually should not influence punitive damages (subject to the same exception).

A corollary of our analysis is that the imposition of punitive damages when they are not justified on deterrence grounds generally has socially detrimental consequences. These consequences can take the form of excessive precautionary measures and inappropriate discouragement of participation in socially beneficial activities. In the case of firms, the latter effect may manifest itself in the form of undesirably high prices and the withdrawal of products from markets.

With respect to the punishment objective, we observed that the connection between punitive damages and punishment is relatively straightforward if the defendant is an individual, or if the defendant is a firm and the goal is to punish firms as entities (although we found this latter goal problematic). We came to a different conclusion, however, when the defendant is a firm and the objective is to punish culpable employees. Because the imposition of punitive damages on firms may not result in the punishment of blameworthy employees, but often will penalize shareholders and customers - parties who are not likely to be blameworthy - the ability of punitive damages to advance the punishment goal in the case of firms is limited.

We have not yet commented on how the level of punitive damages should be determined when the objectives of deterrence and punishment have different implications for the proper measure of punitive damages. It is evident that the best level of punitive damages should be

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a compromise between the levels that are optimal when each objective is considered independently. [272] (The quantities of punitive damages that are separately optimal with respect to the two objectives should not be added to each other. [273]) The weights to be used in the **[*956]** determination of the compromise will reflect the relative importance accorded to the goals of deterrence and punishment.

Whatever are the weights that policymakers, judges, or juries place on these two goals, we hope that the conceptual framework developed in this Article will aid them in determining the appropriate amount of punitive damages. **[*957]**

Appendix: Model Jury Instructions

The following model jury instructions encapsulate many of the conclusions of our Article. Three sets of instructions are presented: for individuals who have not committed malicious acts; for individuals who have committed malicious acts; and for firms. With regard to the instructions for firms, we have assumed that the goal of punishment is to penalize blameworthy employees, not to punish firms as entities. (The instructions can be modified to reflect a different assumption.)

* * *

For Individuals Who Have Not Committed Malicious Acts

These instructions apply to defendants who have not committed malicious acts. An act is malicious only if it was done for the purpose of causing harm.

In considering the imposition of punitive damages on the defendant, you should determine three dollar amounts: (A) an amount to accomplish deterrence; (B) an amount to accomplish punishment; (C) a final amount - your punitive damages award - between the first two amounts.

A.

Deterrence

1. Punitive damages fulfill the deterrence objective to the extent that they serve as a message and warning to the defendant and to other similarly situated individuals to take appropriate steps in order to prevent harm in the future. But punitive damages will not fulfill the deterrence objective if they cause individuals to take wasteful steps to prevent harm or if they cause individuals to refrain from engaging in socially desirable activities.

2. Your principal task is to estimate the likelihood that the defendant might have escaped having to pay for the harm for which he or she should be responsible. Thus, for example, if the harm was noticeable and likely to lead to a lawsuit, your estimate of the likelihood of escaping liability would be relatively low. But if the harm might not have been attributed to the defendant, or if the defendant tried to conceal his or her harmful conduct, your estimate of the likelihood of escaping liability would be relatively high.

3. You should use the Table below to determine the punitive damages multiplier that corresponds to your estimated probability of escaping liability. Then multiply the

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compensatory damages amount by your punitive damages multiplier. The resulting number is the base punitive damages amount.

4. The base punitive damages amount should be lowered if the defendant has paid other private judgments or **settlements,** or public penalties, for the harm at issue in the present case. If the defendant **[*958]** has made such payments, the base punitive damages amount should be lowered by the amount of these payments.

5. The base punitive damages amount should not be adjusted because of any of the following considerations:

(a) reprehensibility of the defendant's conduct;

(b) net worth or income of the defendant;

(c) potential harm, that is, the harm that might have been caused by the defendant's conduct;

(d) gain or profit that the defendant might have obtained from his or her harmful conduct;

(e) litigation costs borne by the plaintiff;

(f) components of harm that you did not include in compensatory damages;

(g) whether the harm included personal injury.

B.

Punishment

1. Punitive damages fulfill the punishment objective to the extent that they penalize blameworthy defendants for reprehensible behavior. You should determine the amount of punitive damages that you believe will accomplish proper punishment.

2. In considering punishment, keep in mind that the defendant's payment of compensatory damages already punishes the defendant to some extent. The amount of punitive damages that you believe will accomplish proper punishment should be what you think must be added to compensatory damages to accomplish the punishment objective, if any additional damages are necessary.

C.

Determination of Punitive Damages

Punitive damages should be an amount between the amount that you found appropriate for the purpose of deterrence and the amount that you found appropriate for the purpose of punishment. If you attach greater importance to the deterrence objective, punitive damages should be closer to the amount that you found best to promote deterrence. If you attach greater importance to the punishment objective, punitive damages should be closer to the amount that you found best to promote punishment.

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For Individuals Who Have Committed Malicious Acts

These instructions apply to defendants who have committed malicious acts. An act is malicious if it was done for the purpose of causing harm.

In considering the imposition of punitive damages on the defendant, you should determine three dollar amounts: (A) an amount to ac- **[*959]** complish deterrence; (B) an amount to accomplish punishment; (C) a final amount - your punitive damages award - between the first two amounts.

A.

Deterrence

1. Punitive damages fulfill the deterrence objective to the extent that they serve as a message and warning to the defendant and to other similarly situated individuals not to commit malicious acts in the future. But punitive damages will not fulfill the deterrence objective if they cause individuals to take wasteful steps to avoid possible liability or if they cause individuals to refrain from engaging in socially desirable activities.

2. Your principal task is to estimate the likelihood that the defendant might have escaped having to pay for the harm for which he or she should be responsible. Thus, for example, if the harm was noticeable and likely to lead to a lawsuit, your estimate of the likelihood of escaping liability would be relatively low. But if the harm might not have been attributed to the defendant, or if the defendant tried to conceal his or her harmful conduct, your estimate of the likelihood of escaping liability would be relatively high.

3. You should use the Table below to determine the punitive damages multiplier that corresponds to your estimated probability of escaping liability. Then determine the amount that you believe is equivalent to the gain that the defendant obtained from his or her conduct. Multiply this amount by your punitive damages multiplier. The resulting number is the base punitive damages amount.

4. The base punitive damages amount should be lowered if the defendant has paid other private judgments or **settlements,** or public penalties, for the harm at issue in the present case. If the defendant has made such payments, the base punitive damages amount should be lowered by the amount of these payments.

5. The base punitive damages amount should not be adjusted because of any of the following considerations:

(a) potential harm, that is, the harm that might have been caused by the defendant's conduct;

(b) litigation costs borne by the plaintiff;

(c) components of harm that you did not include in compensatory damages.

B.

Punishment

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1. Punitive damages fulfill the punishment objective to the extent that they penalize blameworthy defendants for reprehensible behavior. You should determine the amount of punitive damages that you believe will accomplish proper punishment. **[*960]**

2. In considering punishment, keep in mind that the defendant's payment of compensatory damages already punishes the defendant to some extent. The amount of punitive damages that you believe will accomplish proper punishment should be what you think must be added to compensatory damages to accomplish the punishment objective, if any additional damages are necessary.

C.

Determination of Punitive Damages

Punitive damages should be an amount between the amount that you found appropriate for the purpose of deterrence and the amount that you found appropriate for the purpose of punishment. If you attach greater importance to the deterrence objective, punitive damages should be closer to the amount that you found best to promote deterrence. If you attach greater importance to the punishment objective, punitive damages should be closer to the amount that you found best to promote punishment.

For Firms

In considering the imposition of punitive damages on the defendant, you should determine three dollar amounts: (A) an amount to accomplish deterrence; (B) an amount to accomplish punishment; (C) a final amount - your punitive damages award - between the first two amounts.

A.

Deterrence

1. Punitive damages fulfill the deterrence objective to the extent that they serve as a message and warning to the defendant and to other similarly situated firms to take appropriate steps to prevent harm in the future. But punitive damages will not fulfill the deterrence objective if they cause firms to take wasteful steps to prevent harm, if they cause the prices of products and services to rise excessively, or if they cause firms to withdraw socially valuable products or services from the market.

2. To achieve the deterrence objective, your principal task is to estimate the likelihood that the defendant might have escaped having to pay for the harm for which it should be responsible. Thus, for example, if the harm was noticeable and likely to lead to a lawsuit, your estimate of the likelihood of escaping liability would be relatively low. But if the harm might not have been attributed to the defendant, or if the defendant tried to conceal its harmful conduct, your estimate of the likelihood of escaping liability would be relatively high.

3. You should use the Table below to determine the punitive damages multiplier that corresponds to your estimated probability of **[*961]** escaping liability. Then multiply the compensatory damages amount by your punitive damages multiplier. The resulting number is

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the base punitive damages amount.

4. The base punitive damages amount should be lowered if the defendant has paid other private judgments or **settlements,** or public penalties, for the harm at issue in the present case. If the defendant has made such payments, the base punitive damages amount should be lowered by the amount of these payments.

5. The base punitive damages amount also may be lowered if the plaintiff was a customer of the defendant. If the plaintiff was a customer and you believe that customers are, or will become, aware of accidents of the type at issue in this case, the base punitive damages amount should be lowered. The more knowledgeable customers are, the more the base punitive damages amount should be lowered.

6. The base punitive damages amount should not be adjusted because of any of the following considerations:

(a) reprehensibility of the defendant's conduct;

(b) net worth, revenues, or profits of the defendant;

(c) potential harm, that is, the harm that might have been caused by the defendant's conduct;

(d) gain or profit that the defendant might have obtained from its harmful conduct;

(e) litigation costs borne by the plaintiff;

(f) components of harm that you did not include in compensatory damages;

(g) whether the harm included personal injury.

B.

Punishment

1. Punitive damages fulfill the punishment objective to the extent that they cause defendants to penalize their blameworthy employees for reprehensible behavior.

2. In considering punishment, you should keep in mind that the defendant's payment of compensatory damages already may lead to the punishment of blameworthy employees to some extent.

3. In considering how well the imposition of punitive damages will fulfill the punishment objective, you should also bear the following in mind:

(a) the extent to which you believe blameworthy employees can be identified and penalized by the defendant. The easier this identification is, the higher should be the level of punitive damages.

(b) the extent to which you believe that innocent parties will suffer as a result of the imposition of punitive damages on the defendant; such parties might include shareholders as well as customers, who may have to pay higher prices for the defendant's products or services. The more likely it is that innocent parties will be punished, the lower should be the level of punitive damages. **[*962]**

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4. In the light of these considerations, you should determine the amount of punitive damages that you believe will accomplish proper punishment.

C.

Determination of Punitive Damages

Punitive damages should be an amount between the amount that you found appropriate for the purpose of deterrence and the amount that you found appropriate for the purpose of punishment. If you attach greater importance to the deterrence objective, punitive damages should be closer to the amount that you found best to promote deterrence. If you attach greater importance to the punishment objective, punitive damages should be closer to the amount that you found best to promote punishment.

[SEE TABLE IN ORIGINAL]

FOOTNOTES:

n1. The United States Supreme Court's struggle to develop coherent principles in this area is exemplified by the skeptical views expressed by various Justices on the rationality of punitive damages. Most recently, in BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996), Justice Scalia, in a pointed dissent, described the Court's guideposts for assessing punitive damages as "providing no real guidance at all." Id. at 1613 (Scalia, J., dissenting); see also TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 475 (1993) (O'Connor, J., dissenting) ("The lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury's verdict."); id. at 466-67 (Kennedy, J., concurring in part and concurring in the judgment) (arguing that the Court's vague formulation of a "reasonableness" standard for punitive damages awards is unsatisfactory and that "this type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend. Furthermore, it might give the illusion of judicial certainty where none in fact exists.") (internal quotation marks omitted); Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (Brennan, J., concurring) ("Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision."). Justice Brennan also noted that the instructions typically given to jurors, which advise them to consider the character and wealth of the defendant and the nature of the defendant's conduct, provide guidance that is "scarcely better than no guidance at all." Id.

n2. The statutes to which we are referring are generally aimed at reducing the number of punitive damages claims and the level of punitive damages awards. Notably, many states have enacted legislation imposing limits on the magnitude of **punitive damages** awards. Another type of statutory **reform** implemented by several states is the payment of a fraction of **punitive damages** to a state agency rather than to the plaintiff. Such legislation obviously reduces the incentive to bring suit for punitive damages (but does not impose a ceiling on defendants' payments). For a list of current and proposed statutes on punitive damages caps and payment of punitive damages to state agencies, see Gore, 116 S. Ct. at 1618-20 (Ginsburg, J., dissenting); Richard L. Blatt, Robert W. Hammesfahr & Lori S. Nugent, Punitive Damages: A State-By-State Guide to Law and Practice (1991). Also, one state has passed legislation requiring post-trial review of punitive damages awards. See Mont. Code Ann. 27-1-221(7)(c) (1996).

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Additionally, as part of its tort **reform** efforts, Congress has considered legislation curbing **punitive damages.** Several bills have been proposed limiting punitive damages recovery to cases in which the plaintiff can demonstrate by "clear and convincing" evidence that the defendant displayed a conscious indifference to safety. See H.R. 956, 104th Cong. 201(a) (1995); H.R. 955, 104th Cong. 8(a), (c) (1995); H.R. 917, 104th Cong. 6(c)(1) (1995). Most of the bills have proposed some sort of cap on punitive damages in civil cases, usually $ 250,000 or three times the plaintiff's economic injury, whichever is greater. See H.R. 956, 104th Cong. 201(b) (1995); H.R. 955, 104th Cong. 8(b) (1995); H.R. 917, 104th Cong. 6(c) (2) (1995); H.R. 10, 104th Cong. 103(c)(2) (1995). The proposed tort reform legislation is reviewed in Note, "Common Sense" Legislation: The Birth of Neoclassical Tort Reform, 109 Harv. L. Rev. 1765, 1769-82 (1996); see also Neil A. Lewis, Senate, 61-37, Approves Narrow Punitive-Damages Curb, N.Y. Times, May 11, 1995, at B10 (reporting that the House of Representatives voted to limit punitive damages to the greater of $ 250,000 or three times the economic damages, and that the Senate voted for a narrower proposal that would limit punitive damages only in products liability cases to $ 250,000 or twice the amount of economic damages and pain and suffering damages).

↑n3. With respect to the theory of punitive damages, commentators have disagreed, for instance, about the relevance of the wealth of the defendant. Compare, e.g., Michael Rustad & Thomas Koenig, The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers, 42 Am. U. L. Rev. 1269, 1317-18 (1993) (endorsing the scaling of punitive damages to defendants' wealth because larger sanctions are required to influence the rich than the poor), with Kenneth S. Abraham & John C. Jeffries, Jr., Punitive Damages and the Rule of Law: The Role of Defendant's Wealth, 18 J. Legal Stud. 415, 415 (1989) (concluding that a "defendant's wealth is irrelevant to the goal of deterring socially undesirable conduct and is an improper consideration in assessing the basis for retribution"), and Clarence Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1191 (1931) (noting that evidence of a defendant's wealth, "instead of aiding the jury to assess a proper verdict, may prejudice them against the defendant and prevent an impartial judgment"). Additionally, commentators emphasize different goals in their consideration of punitive damages. Compare, e.g., Thomas C. Galligan, Jr., Augmented Awards: The Efficient Evolution of Punitive Damages, 51 La. L. Rev. 3, 6-14 (1990) (proposing a system of extracompensatory damages based solely on deterrence), and Dan B. Dobbs, Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies, 40 Ala. L. Rev. 831, 853-63 (1989) (same), with Marc Galanter & David Luban, Poetic Justice: Punitive Damages and Legal Pluralism, 42 Am. U. L. Rev. 1393, 1432-40, 1447-51 (1993) (discussing both punishment and deterrence goals), and David G. Owen, The Moral Foundations of Punitive Damages, 40 Ala. L. Rev. 705, 713 (1989) (same), and Jacqueline Perczek, Note, On Efficiency, Punishment, Deterrence, and Fairness: A Survey of Punitive Damages Law and a Proposed Jury Instruction, 27 Suffolk U. L. Rev. 825, 856-64 (1993) (same).

The empirical importance of punitive damages is also the subject of dispute among academic commentators. A number of commentators suggest that punitive damages are widespread and problematic. See, e.g., Dorsey D. Ellis, Jr., Punitive Damages, Due Process, and the Jury, 40 Ala. L. Rev. 975, 975-77, 987-88 (1989) (arguing that "courts ... have continued to uphold ever larger awards in cases in which defendants' conduct falls far short of the intentionally injurious behavior that traditionally characterized punitive damages cases") (footnote omitted); Peter Huber, No-Fault Punishment, 40 Ala. L. Rev. 1037, 1037-47 (1989) ("As the new tort revolution has taken hold, courts and juries have developed an even sharper, and for plaintiffs more lucrative, sense of outrage."); John Calvin Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 139 (1986) (arguing that "punitive damages are out of control"); see also Erik Moller, Nicholas M. Pace & Stephen J. Carroll, Punitive Damages in Financial Injury Jury Verdicts 25-27 (Institute for Civil Justice, RAND Corp., No. MR-888-ICJ, 1997) (finding that, in lawsuits concerning financial injury, the percentage of verdicts in which punitive damages were awarded fell between the period 1985-1989 and the period 1990-1994, but that the average award and

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the portion of all damages represented by punitive damages rose); Mark Peterson, Syam Sarma & Michael Shanley, Punitive Damages: Empirical Findings 65 (Institute for Civil Justice, RAND Corp., No. R-3311-ICJ, 1987) (concluding that punitive damages awards for business/contract cases are increasing, while punitive damages awards for personal injury cases are stable). Others suggest that the fraction of cases in which punitive damages are awarded is not significant. See Stephen Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1, 61-62 (1990) (concluding that the magnitude of the punitive damages problem is overstated by reformers); William M. Landes & Richard A. **Posner,** New Light on Punitive Damages, Regulation, Sept.-Oct. 1986, at 33, 33 (suggesting that "the incidence of punitive-damage awards may be exaggerated"); Michael Rustad, In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data, 78 Iowa L. Rev. 1, 24 (1992) (concluding that there are very few punitive damages awards in product liability cases). These and other studies are reviewed by Marc Galanter, Real World Torts: An Antidote to Anecdote, 55 Md. L. Rev. 1093, 1126-40 (1996). The most thorough, recent empirical study of punitive damages also emphasizes this point. See Theodore Eisenberg, John Goerdt, Brian Ostrom, David Rottman & Martin T. Wells, The Predictability of Punitive Damages, 26 J. Legal Stud. 623, 623-25, 633 (1997). But see A. Mitchell Polinsky, Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al., 26 J. Legal Stud. 663, 664-71 (1997) (explaining in part that the study by Eisenberg et al. may understate the significance of punitive damages by ignoring the effects of such damages on **settlements)**.

n4. Compare Curtailing Civil Justice, N.Y. Times, Apr. 8, 1995, at 22 (noting that "punitive damages are often the best deterrent to destructive corporate behavior" and arguing against arbitrarily low limits on awards), and Editorial, St. Petersburg Times, May 23, 1996, at 14A ("Punitive damages clearly have a place in society. They are designed to punish and awaken."), and Long Shadow of the Exxon Valdez, N.Y. Times, Sept. 21, 1994, at A22 ("The jury ... clearly understood that only a sizable civil penalty would accomplish the purpose for which punitive damages are designed: to penalize flagrant wrongdoing and deter others from similar gross negligence."), with Trial Lawyers' Triumph, Wash. Post, Mar. 19, 1996, at A16 (stating that "legislation is needed because punitive damages are wildly unpredictable, so arbitrary as to be unfair"), and Sue? Just Say No, Wall St. J., Sept. 28, 1994, at A18 (noting that punitive damages suits "have widespread, silent costs in frivolous filings being "settled out' and legitimate business activities curtailed for fear of exposure to jury risk"), and No Paint, No Gain, Economist, May 25, 1996, at 67 (arguing that the current punitive damages system yields "bizarre" and excessive awards that keep useful products off the United States market and chill research and development of new products).

n5. Deterrence and punishment are traditionally said to be the goals of punitive damages. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-67 (1981) ("Punitive damages ... are ... intended to ... punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct."); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("[Punitive damages] are ... private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.").

n6. The concept of rationality in individual decisionmaking is discussed, for example, in Amartya Sen, Rational Behaviour, in 4 The New Palgrave: A Dictionary of Economics 68-76 (John Eatwell, Murray Milgate & Peter Newman eds., 1987). The notion of social welfare is reviewed, for instance, in David M. Kreps, A Course in Microeconomic Theory 149-82 (1990), and Amartya Sen, Social Choice, in 4 The New Palgrave: A Dictionary of Economics, supra, at 382-93. Social welfare is determined by the well-being of individuals. Thus, social welfare generally rises if individuals' well-being rises, and falls if individuals' well-being falls. In particular, social welfare reflects the deterrence objective of punitive damages, for the avoidance of harm preserves the well-being of persons; and social welfare reflects the punishment objective of punitive damages, for the punishment of wrongdoers may be desired by individuals. We should add that, from the viewpoint of economics, no objective basis

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exists for saying that a specific formulation of social welfare (such as utilitarianism, which defines social welfare as the sum of individuals' utilities) is correct. Any measure of social welfare can be studied to determine what social policies or legal rules are best with respect to that measure. However, certain relatively simple measures of social welfare are often investigated for analytical convenience.

n7. We discuss below several reasons that injurers might be able to escape liability: the difficulty of detecting harm, the inability to identify the injurer, problems in proving that the injurer is liable even if he can be identified, and the plaintiff's failure to sue because of the costs of litigation. See infra p. 888.

n8. We say "ordinarily" because we discuss circumstances in which it might not be desirable or necessary to impose punitive damages even if a chance exists of escaping liability (punitive damages might not be desirable when the probability of escaping liability is low, see infra pp. 895-96, and they might not be necessary when harm occurs to purchasers of products, see infra section III.J). We also discuss reasons that punitive damages might be desirable even if there is no chance of escaping liability (specifically, when the injurer's act is malicious, see infra p. 875 and section III.A).

n9. We are presuming here that the injurer engages in repetitive conduct. Our point, however, applies even if the injurer commits the harmful act only once. It is still true then that the probability-discounted or "expected" value of what he pays is $ 100,000. See infra note 46.

n10. See infra section II.D.

n11. See infra section III.A.

n12. Our article builds on many other contributions. The general point that, to achieve proper deterrence, sanctions must be inflated if injurers can escape liability dates at least from Bentham, see Jeremy Bentham, Principles of Penal Law, in 1 The Works of Jeremy Bentham 365, 401-02 (John Bowring ed., 1962) (1838-43), and has been applied to the subject of punitive damages by many commentators. The first explicit references to the factor of escaping liability as a justification for punitive damages apparently are Richard A. **Posner,** Economic Analysis of Law 77-78 (1st ed. 1972), and Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 25-26 (1982). This justification for punitive damages has been developed most thoroughly by Robert D. Cooter, Punitive Damages for Deterrence: When and How Much?, 40 Ala. L. Rev. 1143, 1149-66 (1989) [hereinafter Cooter, Deterrence].

In addition to the works cited in the previous paragraph, there are many others in which punitive damages are considered using economic analysis. Those in print include Darryl Biggar, A Model of Punitive Damages in Tort, 15 Int'l Rev. Law & Econ. 1 (1995); James Boyd & Daniel E. Ingberman, Noncompensatory Damages and Potential Insolvency, 23 J. Legal Stud. 895 (1994); Bruce Chapman & Michael Trebilcock, Punitive Damages: Divergence in Search of a Rationale, 40 Ala. L. Rev. 741 (1989); Robert D. Cooter, Economic Analysis of Punitive Damages, 56 S. Cal. L. Rev. 79 (1982) [hereinafter Cooter, Economic Analysis]; Richard Craswell, Damage Multipliers in Market Relationships, 25 J. Legal Stud. 463 (1996); Andrew F. Daughety & Jennifer F. Reinganum, Everybody Out of the Pool: Products Liability, Punitive Damages and Competition, 12 J.L. Econ. & Org. 410 (1997) [hereinafter Daughety & Reinganum, Products Liability]; David Friedman, An Economic Explanation of Punitive Damages, 40 Ala. L. Rev. 1125 (1989); Galligan, supra note 3; David D. Haddock, Fred S. McChesney & Menahem Spiegel, An Ordinary Economic Rationale for Extraordinary Legal Sanctions, 78 Cal. L. Rev. 1 (1990); Jason S. Johnston, Punitive Liability: A New Paradigm of Efficiency in Tort Law, 87 Colum. L. Rev. 1385 (1987); Marcel Kahan & Bruce Tuckman, Special Levies on Punitive Damages: Decoupling, Agency Problems, and Litigation

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A.

Optimal Damages When the Defendant Is Found Liable with Certainty

The central point that we want to explain here is that, if a defendant will definitely be found liable for the harm for which he is responsible, the proper magnitude of damages is equal to the harm the defendant has caused. [16] If damages are either lower or higher than the harm, various socially undesirable consequences will result, as described below. We first illustrate these points when liability is strict - **[*879]** an injurer is supposed to be liable for any harm caused [17] - and then when liability is fault-based (in which case our conclusions are somewhat qualified). We assume for the purpose of this discussion that harm is properly measured. [18]

There are a number of reasons why it is best for damages to equal harm under strict liability. One concerns the level of precautions taken by parties when engaging in their activities. We interpret the term "precautions" very generally. For example, it can refer to safety devices - such as valves to release excess pressure on tanks used to store dangerous chemicals - or to the actions of individuals that reduce harm - such as inspecting the brakes of trucks. Additionally, and importantly, precautions include the variety of ways in which firms monitor and screen their employees - such as an airline testing its pilots for their use of controlled substances. Any action that reduces the risk or the level of harm constitutes a precaution under our interpretation.

If damages equal harm, potential injurers will in theory have socially correct incentives to take precautions. Specifically, they will be induced to spend money on precautions if the expenditure is socially worthwhile in the sense that the expenditure reduces the harm by a greater amount. Suppose, for example, that by spending $ 50,000 on a precaution, a firm can prevent a harm of $ 100,000. It is socially desirable that such a precaution be taken. If the level of liability is equal to the harm of $ 100,000, a firm will be led to spend $ 50,000 to prevent harm. But if the level of liability is less than $ 100,000, a firm might not take precautions when it should. For instance, if the level of liability is only $ 30,000, then a firm would not take the precaution costing $ 50,000, even though this precaution is socially desirable. [19]

Conversely, if damages exceed harm, firms might be led to take socially excessive precautions. A socially excessive precaution is one that costs more than the reduction of harm produced by it. In the previous example, suppose that the precaution costs $ 250,000 instead of $ 50,000. Such a precaution would be socially excessive because it would be wasteful to spend $ 250,000 to avoid a harm of $ 100,000. Yet if damages exceed harm, a firm might be led to take the precaution. Assume, for instance, that punitive damages of $ 200,000 are added to the compensatory damages of $ 100,000, so that the firm's total damages will be $ 300,000 if it does not take the precaution. Because the **[*880]** cost of the precaution is $ 250,000, the firm will be led to take it, even though the precaution is socially wasteful.

Although the notion of excessive spending on precautions might seem counterintuitive to the reader, it is quite real, and often recognized as such. For example, commentators frequently make reference to "defensive medicine," by which is meant physicians' wasteful use of tests and diagnostic procedures in response to the **threat** of liability. [20] On reflection, it is not difficult to imagine that excessive expenditures could be made on safety precautions in almost any context. Consider, for instance, how much could be spent on cement traffic dividers for city streets (suppose that all streets had dividers), on additional personnel to monitor employees' safety practices at oil refineries (each employee at a refinery could be accompanied by another watching over his activities), or on sensors to detect switching problems on railroad tracks (a costly sensor might be installed on every switch on every

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Expenditures, 15 Int'l Rev. Law & Econ. 175 (1995); William M. Landes & Richard A. **Posner,** An Economic Theory of Intentional Torts, 1 Int'l Rev. Law & Econ. 127 (1981); George L. Priest, Insurability and Punitive Damages, 40 Ala. L. Rev. 1009 (1989) [hereinafter Priest, Insurability]; George L. Priest, Punitive Damages and Enterprise Liability, 56 S. Cal. L. Rev. 123 (1982); Paul H. Rubin, John E. Calfee & Mark F. Grady, BMW v Gore: Mitigating The Punitive Economics of Punitive Damages, 5 Sup. Ct. Econ. Rev. 179 (1997).

Recent unpublished articles include James Boyd & Daniel E. Ingberman, Do Punitive Damages Promote Deterrence? (Mar. 20, 1996) (unpublished manuscript, on file with the Harvard Law School Library); Andrew F. Daughety & Jennifer F. Reinganum, **Settlement,** Deterrence and the Economics of **Punitive Damages Reform** (Mar. 1997) (Department of Economics & Business Administration, Vanderbilt University Working Paper No. 97-W04) [hereinafter Daughety & Reinganum, **Settlement**]; Peter Diamond, Efficiency Effects of Punitive Damages (Sept. 1997) (Department of Economics, Massachusetts Institute of Technology, Working Paper No. 97-17) [hereinafter Diamond, Efficiency Effects]; Peter Diamond, Integrating Punishment and Efficiency Concerns in Punitive Damages for Reckless Disregard of Risks to Others (Oct. 1997) (Department of Economics, Massachusetts Institute of Technology, Working Paper No. 97-19) [hereinafter Diamond, Punishment and Efficiency]; Keith N. Hylton, Punitive Damages and the Economic Theory of Penalties (Dec. 1997) (unpublished manuscript, on file with the Harvard Law School Library); Alan O. Sykes, Constitutionalizing Punitive Damages (Dec. 1997) (unpublished manuscript, on file with the Harvard Law School Library).

Our treatment of deterrence and punitive damages is more comprehensive than that of these earlier economically oriented articles, and our analysis of certain issues that have been considered previously differs from what has been written. Moreover, our examination of punishment and punitive damages is substantially different from what is found in the literature on punitive damages. We discuss the relationship between our Article and some of the preceding literature in notes 14, 48, 95, 118, 131, 165, 183, 194, 205, 207, 220, 244, and 272.

↑n13. General deterrence may be contrasted with specific deterrence, which is the effect that the imposition of a sanction on a party will have on that party's future behavior. See generally Bentham, supra note 12, at 396 (contrasting particular and general deterrence); Herbert L. Packer, The Limits of the Criminal Sanction 39-48 (1968) (discussing special and general deterrence as justifications for criminal punishment).

↑n14. The theory of deterrence - the elaboration of the effect on rational actors of the possible imposition of sanctions for violations of law - was first articulated in detail by Jeremy Bentham, see Bentham, supra note 12, at 365-580, and has been developed intensively in the last several decades, stimulated largely by an important article by Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968). This literature is synthesized and surveyed in, for example, R.A. Carr-Hill & N.H. Stern, Crime, the Police and Criminal Statistics (1979); William A. Luksetich & Michael D. White, Crime and Public Policy (1982); David J. Pyle, The Economics of Crime and Law Enforcement (1983). For a collection of more recent contributions, up to 1992, see Bibliography of Law and Economics 504-26 (Boudewijn Bouckaert & Gerrit De Geest eds., 1992).

Beginning with Guido Calabresi, The Costs of Accidents (1970), many writers have applied the general theory of deterrence to the subject of tort liability. For an integrated presentation of this literature, see William M. Landes & Richard A. **Posner,** The Economic Structure of Tort Law (1987), and Steven Shavell, Economic Analysis of Accident Law (1987).

↑n15. This assumption is consistent with a standard definition of social welfare employed in deterrence theory, in which social welfare equals the benefits that parties obtain from their activities, less various costs (including the expense of precautions taken to avoid harm, the

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harm that does occur, and any costs associated with the use of the legal system).

Note that this definition of social welfare does not incorporate the compensation of victims as a social benefit, even though most individuals consider compensation to be a social goal. Accounting for the compensation goal in measuring social welfare would be relatively straightforward, but doing so is unnecessary for our purposes for several reasons. First, and most importantly, punitive damages are generally extracompensatory; thus, whether or not they are paid typically does not affect fulfillment of the compensation objective. Second, victims often have insurance - so-called "first-party" insurance - that compensates them for their losses, at least partially, so that the extent to which it is necessary to rely on the liability system to achieve the compensation goal may be limited. Third, the insurance system is generally a much less expensive way to achieve compensation than the liability system. See, e.g., Don Dewees, David Duff & Michael Trebilcock, Exploring the Domain of Accident Law: Taking the Facts Seriously 421-24 (1996) (summarizing empirical findings concerning the relative cost of the insurance system and the liability system in providing compensation to accident victims).

n16. Readers familiar with the economic logic supporting this claim may want to proceed directly to section II.B.

n17. For ease of analysis, we will presume that issues of contributory negligence do not arise.

n18. We discuss below the possibility that compensatory damages do not correctly reflect the harm that actually occurred. See infra section III.L. We also observe that the total social harm caused by an adverse event includes litigation costs. See infra note 168. For simplicity, we will not take this refinement into account in Part II.

n19. In this example, and in those in the remainder of the Article, we consider relatively simple fact situations. The principles that these examples illustrate apply to more complicated and realistic circumstances.

n20. Some studies show this to be an important phenomenon. See, e.g., Daniel Kessler & Mark McClellan, Do Doctors Practice Defensive Medicine?, 111 Q.J. Econ. 353, 386 (1996) (finding that malpractice "reforms that directly limit liability ... reduce hospital expenditures by 5 to 9 percent" with no "consequential differences in mortality or the occurrence of serious complications"); Roger A. Reynolds, John A. Rizzo & Martin L. Gonzalez, The Cost of Medical Professional Liability, 257 JAMA 2776-81 (1987) (finding that defensive medicine has generated substantial costs). Other studies, however, have not found support for the notion of defensive medicine. See, e.g., Laura-Mae Baldwin, L. Gary Hart, Michael Lloyd, Meredith Fordyce & Roger A. Rosenblatt, Defensive Medicine and Obstetrics, 274 JAMA 1606, 1609 (1995) (finding no evidence of "an association between the malpractice claims experience or exposure of individual physicians and an increase in the use of prenatal resources or cesarean deliveries for the care of low-risk obstetric patients").

n21. For example, the Federal Railroad Administration has studied proposals for sensor systems to prevent derailments on railroad bridges, but it concluded that they would cost as much as $ 40,000 per bridge to install. Overall, the cost could be billions of dollars for installation and $ 60 million more per year for operation and maintenance. See Richard Perez-Pe<tild n>a, Rail Accident Stirs Debate About Sensors, N.Y. Times, Nov. 29, 1996, at B1. The Federal Railroad Administration determined that the cost was too high because of the low frequency of railroad accidents that occur on bridges. See id.

n22. This proposition assumes that individuals are risk neutral. We discuss the meaning of this assumption, and the justification for making it below. See infra pp. 886-87.

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n23. For example, if a harm of $ 10,000 occurs with a probability of 20%, the expected harm is $ 2000 (= 20% X $ 10,000). This expected harm also can be interpreted as the average harm per instance of some conduct that, each time it occurs, has a 20% chance of causing a $ 10,000 harm. More generally, the expected harm is the sum of products of each possible magnitude of harm and its probability. Thus, if there is a 20% chance of a $ 10,000 harm, as well as a 5% chance of a $ 30,000 harm, the expected harm is $ 3500 (= (20% X $ 10,000) + (5% X $ 30,000)).

n24. An example may clarify this point. Suppose that 3% of the applicants for employment at a firm are "rotten apples" who will misbehave on the job and cause a $ 100,000 accident; that by spending $ 500 per applicant on investigating the applicant's background it is possible to detect one-third of the rotten apples; that by instead spending $ 4000 per applicant on more intensive screening, it is possible to detect two-thirds of the rotten apples; but that it is impossible to detect the remaining one-third of the rotten apples. In this example, it is socially desirable for the firm to spend $ 500 per applicant on screening. A firm spending this much would have a 1% chance of detecting a rotten apple (because one-third of the 3% of rotten apples in the applicant pool are identified) and of thereby avoiding a $ 100,000 harm. In other words, it would reduce the expected harm by $ 1000 (= 1% X $ 100,000) per applicant screened in this way. It is not socially worthwhile, however, to spend $ 4000 per applicant, because spending this higher amount would reduce the expected harm by only $ 2000 (= 2% X $ 100,000) per applicant. Significantly, whichever amount is spent, there will still be at least a 1% chance of employee misconduct.

n25. In the example in the previous footnote, the occurrence of employee misconduct does not necessarily imply that the employer's screening activity was improper because, under the best available screening process, at least 1% of the rotten apples will remain undetected.

n26. The distinction between level of activity and level of care to be explained here was first emphasized by Steven Shavell, Strict Liability Versus Negligence, 9 J. Legal Stud. 1 (1980).

n27. See, e.g., Kenneth A. Small & Camilla Kazimi, On the Costs of Air Pollution from Motor Vehicles, 29 J. Transp. Econ. & Pol'y 7, 27 (1995) (demonstrating that an additional tax of about 50% on the price of gasoline would be required to account for air pollution costs).

n28. See James J. MacKenzie, Roger C. Dower, & Donald D.T. Chen, The Going Rate: What It Really Costs To Drive 5 (1992) ("The net effect of [federal and state] policies is to make driving seem cheaper than it really is and to encourage the excessive use of automobiles and trucks.").

n29. A number of articles have discussed the withdrawal of products from the marketplace in response to actual or prospective liability costs (including liability insurance premiums). See Dewees, Duff & Trebilcock, supra note 15, at 241-42 (1996) (discussing the reduction of vaccine manufacturing because of the expansion of liability); W. Kip Viscusi, Reforming Products Liability 8 (1991) (noting product liability litigation has forced some companies to stop producing private airplanes); Louis Lasagna, The Chilling Effect of Product Liability on New Drug Development, in The Liability Maze: The Impact of Liability Law on Safety and Innovation 334, 337-41 (Peter W. Huber & Robert E. Litan eds., 1991) (describing the litigation that led to the voluntary withdrawal of the anti-morning sickness drug, Bendectin); Robert Martin, General Aviation Manufacturing: An Industry Under Siege, in The Liability Maze: The Impact of Liability Law on Safety and Innovation, supra, at 478, 478 (concluding that product liability litigation "threatens the very existence" of the corporate and private airplane industry). These discussions do not address the question whether the reduction in productive activity was due to the imposition of damages exceeding harm. However, if, as some commentators believe, product liability is socially excessive, see, e.g., Peter W. Huber, Liability: The Legal Revolution and Its Consequences 9-11 (1988) (arguing that the sharp increases in tort awards in the 1980s have led to the curtailment of socially beneficial

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activities such as vaccinations, ambulance services, and waste cleanup), such reductions in the availability of products may be partially attributable to excessive damages.

n30. See Restatement (Second) of Torts 282 (1965) ("Negligence is ... conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." (citation and internal quotation marks omitted)); Prosser and Keeton on the Law of Torts, 31, at 169 (Dan B. Dobbs, Robert E. Keeton, W. Page Keeton & David G. Owen eds., 5th ed. 1984) ("Negligence is not necessarily the absence of solicitude for those who may be adversely affected by one's actions but is instead behavior which should be recognized as involving unreasonable danger to others.").

n31. Judge Learned Hand's algebraic formula for determining the due care standard encapsulates the economic interpretation of the negligence rule. In his opinion in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947), Judge Hand said that a party is negligent if he fails to take a precaution when the burden of the precaution is less than the reduction of the expected loss occasioned by taking the precaution - in other words, if B < PL, where B is the burden of taking the precaution, P is the probability of the loss if the precaution is not taken, and L is the magnitude of the loss. See id. at 173. For further development of this idea, see, for example, John Prather Brown, Toward an Economic Theory of Liability, 2 J. Legal Stud. 323 (1973). See also William M. Landes and Richard A. **Posner,** The Positive Economic Theory of Tort Law, 15 Ga. L. Rev. 851, 892-903 (1981) (arguing that judicial practice is consistent with the economic interpretation of the negligence rule).

n32. Note that damages must be sufficiently less than the harm before the party would find it worthwhile to act negligently. If damages exceeded the $ 50,000 cost of the precaution, the party would be induced to take the precaution even if damages were less than the harm of $ 100,000.

n33. Although parties will generally reduce the chance of being found negligent by mistake by taking greater care, they will not necessarily take more care than they would if there were no mistakes in the determination of negligence. The reason is that, to the extent that there is a random component in the assessment of care, the exercise of greater care will be only partially rewarded. For instance, if half the time a party's care is not observed and courts make a guess about its level, increasing the level of care would benefit the party only half the time. The condition under which parties will take greater care is, roughly, that the assessment of care is not too imprecise. For details, see John E. Calfee & Richard Craswell, Some Effects of Uncertainty on Compliance with Legal Standards, 70 Va. L. Rev. 965 (1984), and Richard Craswell and John E. Calfee, Deterrence and Uncertain Legal Standards, 2 J.L. Econ. & Org. 279 (1986). See also Shavell, supra note 14, at 93-99 (arguing that injurers will exercise more than due care in the presence of errors in the assessment of their level of care). But see Mark F. Grady, A New Positive Economic Theory of Negligence, 92 Yale L.J. 799, 817-21 (1983) (showing that, under a different but plausible interpretation of the negligence rule, mistakes will not cause parties to take excessive care); Marcel Kahan, Causation and Incentives To Take Care Under the Negligence Rule, 18 J. Legal Stud. 427, 437-39 (1989) (same).

n34. The result that the negligence rule leads to socially excessive participation in risky activities was originally developed in Shavell, cited above in note 26. See also A. Mitchell Polinsky, Strict Liability vs. Negligence in a Market Setting, 70 Am. Econ. Rev. 363 (1980) (demonstrating the result in market settings).

n35. The point of this paragraph may be clarified by a numerical illustration. Suppose that taking proper precautions would cost an individual $ 100 each time he engages in an activity and would reduce to 1/2% the risk of an accident that would cause harm of $ 100,000. Assuming that the individual would take the precautions in order to avoid liability for negligence, he will engage in the activity whenever the benefit to him exceeds the $ 100 cost

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of precautions. However, each time he engages in the activity, he causes total social costs of $ 600: the $ 100 cost of precautions, plus the expected harm of $ 500 (= 1/2% X $ 100,000). Consequently, from society's perspective, he should engage in the activity only if his benefit exceeds $ 600. If his benefit lies between $ 100 and $ 600, however, he will engage in the activity even though doing so is socially undesirable.

n36. More precisely, expected damages could exceed harm for two reasons. First, a party who caused harm but who was not negligent might be found negligent by mistake and made to pay such a high level of damages that, on average, he will pay for more than the harm he caused. Second, a party who did not cause harm might mistakenly be found both to be the cause of harm and to be negligent. Obviously, any damages imposed on such a party are excessive and will chill participation in activities in which such mistakes occur.

n37. Some lower levels of damages also will properly **induce** parties to take precautions provided that these levels still exceed the cost of precautions. See supra note 32.

n38. This assumption is made mostly for convenience and does not affect our main point that the benchmark level of damages - the level that would be appropriate for deterrence if injurers were definitely found liable - should be inflated using a specific multiplier formula if injurers can sometimes escape liability. If the benchmark level of damages is different from harm, this benchmark quantum, whatever its magnitude, should be inflated by the multiplier we give below in order for deterrence to be appropriate when injurers can escape liability. See infra section II.B.

n39. A risk-neutral injurer would be indifferent between paying certain damages of, say, $ 10,000, and facing a risky situation in which he will have to pay either nothing or $ 20,000 with equal probability, because the risky situation involves an expected payment of $ 10,000 (= 50% X $ 20,000). See generally Robert S. Pindyck & Daniel L. Rubinfeld, Microeconomics 146 (3d ed. 1995) (discussing the concept of risk neutrality).

n40. A risk-averse injurer would prefer to pay certain damages of $ 10,000 than to face a risky situation in which he will have to pay either nothing or $ 20,000 with equal probability, even though the risky situation involves an expected payment of $ 10,000. See generally id. (discussing risk aversion).

n41. This result is demonstrated in Shavell, cited above in note 14, at 218-21, and Steven Shavell, On Liability and Insurance, 13 Bell J. Econ. 120, 124-26 (1982). The optimal level of damages depends on the degree of risk aversion of injurers and on whether victims are insured or, if not, how risk averse they are.

n42. In Part III, we will discuss two situations in which this assumption is not appropriate. One is, as we have noted, when behavior is malicious; then optimal damages may exceed harm. See infra section III.A. The second situation is when victims of harm are customers of the defendant and are relatively well informed about risk, in which case it may not be necessary to impose damages equal to harm to achieve optimal deterrence. See infra section III.J.

n43. This conclusion is formally demonstrated in Shavell, cited above in note 14, at 222-27, and Shavell, cited above in note 41, at 126-30. It should seem intuitively plausible if injurers purchase full coverage against liability, for then their risk aversion is irrelevant. If injurers do not purchase full coverage (suppose there is coinsurance or a deductible), the conclusion is not obvious because injurers do bear residual risk, but it is true nonetheless for reasons explained in the sources cited in this note.

n44. The point that diversified shareholders will want a firm to be operated in an approximately risk-neutral manner is well-accepted in the economic literature concerning

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corporate finance. See, e.g., Richard A. Brealey & Stewart C. Myers, Principles of Corporate Finance 148-49 (4th ed. 1991). The reason shareholders desire that firms operate in a risk-neutral manner is, roughly speaking, that each shareholder, holding a diversified portfolio, will not worry about the riskiness of any particular firm in which he has ownership rights; thus, he will vote to have the firm maximize its expected return. The result that the optimal level of damages equals harm when shareholders want the firm to act in a risk-neutral way follows directly from reasoning in Harry A. Newman & David W. Wright, Strict Liability in a Principal-Agent Model, 10 Int'l Rev. L. & Econ. 219 (1990). This result holds even though employees of firms will generally be risk averse and cannot be controlled perfectly by shareholders. (The point of this footnote may not apply if the wealth of the owners of a particular firm depends in a significant way on the profitability of that firm, as would often be the case for privately held firms owned by relatively few individuals.)

n45. Consider, for example, the following evidence. The likelihood of obtaining compensation for medical negligence has been found to be about 6%. See Harvard Medical Practice Study, Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York 7-1 (1990). The average probability that an oil spill in excess of 10,000 gallons will be detected and traced to its source is approximately 60%. See Mark A. Cohen, Optimal Enforcement Strategy To Prevent Oil Spills: An Application of a Principal-Agent Model with Moral Hazard, 30 J.L. & Econ. 23, 44-45 (1987). The average probability of the detection of fraud is estimated to be 30%. See Jonathan M. Karpoff & John R. Lott, Jr., The Reputational Penalty Firms Bear from Committing Criminal Fraud, 36 J.L. & Econ. 757, 789-90 (1993).

We should also note that parties may sometimes be found liable for harms for which they are not responsible. Although we do not consider this possibility in our analysis, were we to do so, it would often lower the level of damages that otherwise would be optimal.

n46. If the injurer does not engage in an activity repeatedly, but, say, only once, the injurer obviously will not pay for the harm done, even approximately: he either will pay $ 400,000 in this one instance (more than the $ 100,000 harm he caused) or will escape liability altogether. However, the injurer's expected damages - the damages he will have to pay if he is found liable, multiplied by the probability of being found liable - equal the harm of $ 100,000 (because he has a one-in-four chance of being found liable and made to pay $ 400,000).

n47. See supra section II.A.

n48. It may be helpful to state this formula algebraically. If H is the harm and P is the probability of being found liable, then the injurer should pay H X 1/P - that is, H/P - when he is found liable. Thus, the injurer's expected damages will be P X (H/P) = H. The earliest reference to this formula (although in words) apparently is in Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, in The Utilitarians 173 (1961) (1789). For other references to this formula, see Robert Cooter & Thomas Ulen, Law and Economics 391-92 (1st ed. 1988); **Posner,** cited above in note 12, at 77; and Shavell, cited above in note 14, at 148, 161-62.

n49. Two qualifications should be mentioned. First, total damages should be less than the amount given by the formula in this paragraph if injurers are risk averse and cannot obtain liability insurance. This conclusion follows from our discussion above. See supra pp. 886-87. Second, if an injurer's subjective belief about the probability of being found liable differs from the true probability, the former should in principle be used in the formula. For simplicity, we assume in this Article that parties are aware of the actual probability of being found liable.

n50. See supra section II.A.

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n51. To see that this level of damages is the correct one, recall from note 48, above, that the proper level of total damages is H/P, where H is the magnitude of harm and P is the probability that the injurer will be found liable. This amount would comprise a payment of H in compensatory damages and (H/P) - H in punitive damages. The punitive payment can be rewritten as[(1 - P)/P]H. The term in brackets is the punitive damages multiplier to which we refer in the text.

n52. We will elaborate on this point when we discuss the reprehensibility criterion in the context of deterrence. See infra section III.A.

n53. For essentially the reasons we have given, Galligan prefers the term "augmented awards" to "punitive damages." See Galligan, supra note 3, at 12-13.

n54. For simplicity, we sometimes will refer hereafter to courts, when we mean both courts and juries.

n55. Consider, for example, the collapse of two pedestrian skywalks at the Hyatt Regency Hotel in Kansas City in 1981. See In re Federal Skywalk Cases, 97 F.R.D. 380 (W.D. Mo. 1983). The defendants in that case agreed not to contest liability. See id. at 389.

n56. See infra pp. 903-04 (discussing the Exxon Valdez oil spill litigation).

n57. See supra section II.A.

n58. Some estimate also would have to be made of the probability that a driver who observed suspicious behavior would report it. Obviously, the lower this probability, the higher the proper damages multiplier. (If this consideration is ignored because of the difficulty of estimating the probability, the multiplier discussed in the text would be a lower bound for the ideal multiplier.)

n59. We discuss a number of punitive damages cases below and explain how the facts in those cases bear on determining the appropriate damages multiplier. See infra section II.D.

n60. It should be noted that juries are often required to consider and determine probabilities in contexts other than those discussed here, for example in assessing negligence. In deciding whether a person is negligent, a jury must ascertain how much an additional precaution would lower the probability of harm. If the reduction in the probability, multiplied by the harm, exceeds the cost of the precaution, it is negligent not to have taken it. See Restatement (Second) of Torts 291 (1965) ("Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done."). Thus, when a jury considers whether the failure to install a safety device was negligent, it must determine how much the device would have lowered the accident probability. No reason exists to believe that juries would have more difficulty in appraising probabilities in the context of calculating punitive damages than in the context of determining negligence, which is not thought to be especially problematic. However, some evidence suggests that individuals do have problems with estimating probabilities in many circumstances. See, e.g., Judgment Under Uncertainty: Heuristics and Biases 3-20 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982) (documenting the manner in which people rely on heuristics to facilitate the assessment of probability).

n61. Such a table is provided below. See infra Appendix.

n62. A byproduct of restricting attention to a limited number of probabilities is that this prevents the jury from picking a damages multiplier above a certain value - for example, the

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damages multiplier cannot exceed 10 if the lowest probability offered is 0.1. We discuss caps on punitive damages below and point out that they cannot be justified as a matter of principle. See infra p. 900.

n63. Juries could be given limited discretion to use such information if legislatures select a range for the punitive damages multiplier rather than a specific multiplier.

n64. If, however, all precautions are general rather than specific to a kind of accident, it does not matter whether accidents are categorized narrowly. Failing to categorize narrowly will not distort which type of precaution is taken if there are no specific types of precaution to take.

To illustrate, suppose that there is one type of precaution and two kinds of accident, A and B; that the two kinds of accident are equally likely to occur; that each would cause harm of $ 10,000; that if A occurs, no likelihood of escaping liability exists; and that if B occurs, the likelihood of escaping liability is 50%. Under these assumptions, we will show that an injurer's expected damages if an accident occurs will equal the harm of $ 10,000 regardless of whether accidents are categorized narrowly or broadly. If the categorization is narrow, the multiplier for an accident of type A will be 1, and the multiplier for an accident of type B will be 2. Thus, if an accident of type A occurs, the injurer's expected damages will be $ 10,000 because he will definitely pay $ 10,000; and if an accident of type B occurs, his expected damages will also be $ 10,000 because he will pay $ 20,000 with a probability of 50%. If the categorization is broad, including both kinds of accident, the multiplier will be 1.3333 because the probability of being found liable for an accident of some type is 75% (the average of 100% and 50%). Hence, damages when the injurer is found liable will be $ 13,333 (= 1.3333 X $ 10,000). The injurer's expected damages for an accident will again be $ 10,000, comprising a 50% chance that a type A accident will occur, in which case the injurer will definitely be found liable for $ 13,333, plus a 50% chance that a type B accident will occur, in which case the injurer will be found liable for $ 13,333 with a 50% probability (in other words, [50% X (100% X $ 13,333)] + [50% X (50% X $ 13,333)] = $ 10,000). Accordingly, whichever categorization is used to determine the multiplier, the injurer's incentives will be correct, and no issue of distortion of the types of precaution taken will arise because, by hypothesis, only one type exists.

If there were two separate types of precaution, one reducing the frequency of type A accidents and the other reducing the frequency of type B accidents, then under the broad categorization, with a multiplier of 1.3333, a potential injurer would take an excessive degree of care to reduce type A accidents and too little care to reduce type B accidents. (We note, however, that the following point can be demonstrated: if the single multiplier used under the broad categorization is always adjusted to reflect the relative likelihoods of type A and type B accidents - they would not necessarily be equally likely when there are different types of precaution - use of a single multiplier would not distort incentives to take different types of precaution. Nevertheless, making such an adjustment would be administratively difficult, to say the least.)

n65. Although punitive damages should not be imposed on the firm, the firm may want, in effect, to impose punitive internal sanctions on its employees in order to deter them from acting in ways that cause harm. Additionally, the greater the likelihood that employees would escape such sanctions, the more the firm may want to spend on its monitoring and screening efforts.

n66. To state matters formally, let D be damages and let P(D) be the probability of suit, which rises as D rises and which is less than one. The claim in the text is that there exists a D such that P(D)D = H, where H is the harm. Because the function P(D)D is continuous in D, there must exist such a D between H and H/P(H) because P(H)H < H and P(H/P(H))[H/P(H)] > P(H)[H/P(H)] = H (the asserted D is unique because P(D)D is strictly rising in D). We

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comment further on the connection between damages and the probability of suit below. See infra section III.E.

n67. See David G. Owen, Civil Punishment and the Public Good, 56 S. Cal. L. Rev. 103, 113 (1982).

n68. We discuss this consideration in more detail below. See infra section III.E.

n69. Actually, this statement oversimplifies matters. To decide when it is worthwhile to calculate a damages multiplier, one would in principle need to take into account not just the probability of escaping liability, but also the magnitude of the harm and the costs of precautions. For even if the probability of escaping liability is high, if the harm is very low or if the costs of additional precautions are very high, it may not be worthwhile to incur the additional litigation costs in order to determine the proper damages multiplier.

Additionally, if the determination of punitive damages is not done on a case-by-case basis, it might be desirable to award punitive damages even when the probability of escaping liability is low. Suppose a fixed multiplier is applied in all cases in which the probability is small but positive. Then no additional litigation costs would be associated with calculating the multiplier in each case; and if the fixed multiplier is set appropriately, incentives will be improved overall relative to what they would be if no multiplier were employed.

n70. See infra section III.L.

n71. See supra p. 873.

n72. Green Oil Co. v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989). The United States Supreme Court has endorsed the criteria for evaluating punitive damages discussed in this case. See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 20-24 (1991). For further support for the proposition that deterrence is one of the central purposes of punitive damages, see also the cases cited above in note 5. Indeed, in Maine, deterrence is the only justification for punitive damages. See Foss v. Maine Turnpike Auth., 309 A.2d 339, 345 (Me. 1973) (citing Allen v. Rossi, 146 A. 692, 694 (Me. 1929)).

n73. How the deterrence goal and the punishment goal should be reconciled when they are in conflict is discussed below. See infra Part V and Appendix.

n74. 1 Linda L. Schlueter & Kenneth R. Redden, Punitive Damages 6.1(C), at 334 (3d ed. 1995). "As a general rule, the punitive damages award must bear a reasonable relation to the amount of actual damages awarded." Id. The United States Supreme Court has endorsed the reasonable-relationship notion in its decisions. See, e.g., BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1601 (1996) (stating that "the principle that exemplary damages must bear a "reasonable relationship' to compensatory damages has a long pedigree," and citing cases dating from 1852); Haslip, 499 U.S. at 21-22 (endorsing Alabama's criteria for the post-verdict review of punitive damages, which include "whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred," and stating that the "review ensures that punitive damages awards ... have some understandable relationship to compensatory damages").

n75. The United States Supreme Court has recently presented three "guideposts" for determining whether a punitive damages award is excessive. See Gore, 116 S. Ct. at 1598. "The second [of these guideposts,] and perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." Id. at 1601. The Court, however, rejects the possibility that excessiveness can be determined by "a simple mathematical formula, even one that compares actual and

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potential damages to the punitive award." Id. at 1602 (citing TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 458 (1993)). In his concurrence in Gore, Justice Breyer points to problems with the reasonable-relationship standard, arguing that, at least as it is interpreted by the Alabama courts, it "does little to guide a determination of what counts as a "reasonable' relationship .... To find a "reasonable relationship' between purely economic harm totaling $ 56,000, without significant evidence of future repetition, and a punitive award of $ 2 million is to empty the "reasonable relationship' test of meaningful content." Id. at 1606 (Breyer, J., concurring).

Courts often make statements of the following sort: "Although there is no fixed ratio by which to determine the propriety of a punitive damage award, punitive damages should bear a reasonable relationship to the compensatory damages awarded." Little v. Stuyvesant Life Ins. Co., 136 Cal. Rptr. 653, 663 (Cal. Ct. App. 1977). The Little court followed that sentence with the observation that "here, the ratio of punitive damages to compensatory damages is in excess of 14 to 1 and in dollar amount the punitive damage award exceeds the compensatory award by almost two and a third million dollars," and the court relied on these facts, among others, in concluding that the punitive damages award in the case was excessive. Id. at 664.

In an important early article on punitive damages, Clarence Morris criticized approaches like that of the Little court:

Courts often insist that "punitive damages must bear some relation to actual damages," and attempt to test verdicts in terms of mathematical ratios. The opinions contain statements to the effect that a verdict for punitive damages x times as great as the actual damages is clearly excessive....

This test is probably more often a rationalization of results than a means of obtaining them. The proper ratio between actual damages and punitive damages is placed at a figure which supports the judge's view of the verdict ....

Clarence Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1180 (1931).

n76. See, e.g., Green Oil, 539 So. 2d at 223 (considering concealment and cover-up in determining degree of reprehensibility, which influences the level of punitive damages); Gamble v. Stevenson, 406 S.E.2d 350, 354 (S.C. 1991) (establishing "defendant's awareness or concealment" as one factor to consider in the post-trial review of jury awards of punitive damages).

n77. See, e.g., Green Oil, 539 So. 2d at 223; see also Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 909 (W. Va. 1991) (stating that, in determining the reprehensibility of defendant's conduct, the jury should consider "whether he attempted to conceal or cover up his actions or the harm caused by them").

n78. Green Oil, 539 So. 2d at 223; see also Garnes, 413 S.E.2d at 909 (instructing trial courts to consider the costs of litigation in reviewing punitive damages awards, because "we want to encourage plaintiffs to bring wrongdoers to trial"). In the same vein, a Texas Court of Appeals affirmed an award of $ 4500 in exemplary damages, in an action for invasion of privacy from telephone harassment, when actual damages were $ 2 and attorney fees were $ 4462.52. See Donnel v. Lara, 703 S.W.2d 257, 258, 262 (Tex. App. 1985), superseded by Tex. Civ. Prac. & Rem. Code Ann. 41.004 (West 1997). The court noted that the plaintiffs "had obligated themselves to pay reasonable attorney fees as a necessary prerequisite for obtaining relief through the courts," and held that "the amount exemplified an accurate application of the purposes for exemplary damages - to punish and deter similar wrongs in

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track). [21]

In our numerical examples, we have discussed precautions as if they would completely eliminate the risk of harm. However, everything we have said applies to situations in which precautions reduce, but do not eliminate, the risk of harm. In particular, the proper magnitude of damages continues to be the harm the defendant has caused. [22] This level of damages again **induces** potential injurers to take appropriate precautions, but the determination of appropriate precautions now involves a comparison of the cost of the precaution with the reduction in the expected harm that results if the precaution is **[*881]** taken, where expected harm refers to the harm multiplied by the probability of its occurrence. [23]

Note that, even when proper precautions are exercised, some accidents will occur because of residual, hard-to-eliminate risks. For example, even the safest automobile tire may blow out and cause an accident. That a blowout occurs does not necessarily mean that the manufacturer took inadequate precautions in the design and manufacture of the tire. Likewise, even if employers screen and monitor employees with appropriate vigilance, occasional employee misbehavior will still occur, possibly egregious in character. [24] It is important to stress that such misbehavior does not necessarily signal a lack of proper oversight by the employer. [25]

Let us now turn to a second reason that it is best for damages to equal harm. This reason concerns the extent to which individuals and firms participate in risky activities - what we will refer to as their level of activity. [26] A party's level of activity affects the magnitude of expected harm, whatever precautions the party takes when engaging in the activity. For example, the more miles a person drives - his level of activity - the greater the number of accidents that he is likely to cause, whatever his level of care when he drives. (Of course, the more care he takes when driving, the lower will be the expected number of accidents per mile driven.) Similarly, the more units of a risky product a firm produces and sells - its level of activity - the greater the number of accidents that will be caused by the product, whatever are its safety features. **[*882]**

If damages equal harm, potential injurers will have the socially correct incentives to engage in risky activities. In particular, they will engage in an activity if and only if the benefit they derive exceeds the additional harm caused by their decision to engage in it. If damages equal harm, an individual will tend to participate in an activity such as hunting if and only if the benefit he obtains from this activity exceeds the expected accident costs that hunting imposes on others. Likewise, a firm will produce a product if and only if the product's value, as reflected in the willingness of customers to pay for it, exceeds the full costs of its production, including accident losses. Specifically, if damages equal harm, the cost of production will include the harm. To cover its costs, a firm will have to sell its product at a higher price - a price that reflects the average harm caused per unit of output. Therefore, consumers will only buy the product if they value it more highly than its full cost of production, including the harm. Their consumption of the product will therefore be socially correct. In other words, the fact that the product price will rise in response to the firm's liability costs is desirable because, if damages equal harm, this price increase appropriately discourages consumers of the product from, in effect, causing an excessive number of accidents by consuming too much of the product.

It follows that, if damages are less than harm, parties will engage in activities to an excessive extent - that is, they will engage in activities even when the benefits are outweighed by the harms caused. Conversely, if damages exceed harm, parties may be led to curtail their activities to an inappropriate extent - to refrain from engaging in them even when the benefits exceed the harms caused. In particular, a firm might be induced to withdraw its product from the marketplace even though consumers place a higher value on the product than its full cost of production, which includes the average harm caused by the product.

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the future." Id. at 262.

n79. See supra p. 888.

n80. A few courts have explicitly recognized the importance of the defendant's chance of escaping liability. See, e.g., Kemezy v. Peters, 79 F.3d 33, 35 (7th Cir. 1996) (**Posner,** C.J.). In that case, the court noted:

When a tortious act is concealable, a judgment equal to the harm done by the act will underdeter. Suppose a person who goes around assaulting other people is caught only half the time. Then in comparing the costs, in the form of anticipated damages, of the assaults with the benefits to him, he will discount the costs (but not the benefits, because they are realized in every assault) by 50 percent, and so in deciding whether to commit the next assault he will not be confronted by the full social cost of his activity.

Id.; see also Zazu Designs v. L'Oreal, S.A., 979 F.2d 499, 508 (7th Cir. 1992) (Easterbrook, J.) ("Punitive damages are appropriate when some wrongful conduct evades detection; a multiplier then both compensates and deters.")

In FDIC v. W.R. Grace & Co., 877 F.2d 614 (7th Cir. 1989) (**Posner,** J.), the court stated:

The most straightforward rationale for punitive damages ... is that they are necessary to deter torts or crimes that are concealable. Suppose the average defrauder is brought to book only half the time. To confront him with a sanction that will make fraud worthless to him and thus deter him, it is necessary that when he is caught he be made to pay twice as much as his profits.

Id. at 623; see also BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1602 (1996) (Stevens, J.) ("A higher ratio [of punitive damages to compensatory damages] may also be justified in cases in which the injury is hard to detect ...."). Justice Breyer's concurrence in Gore mentions economic theories of punitive damages that focus on ensuring that a wrongdoer pays for the total cost of the harm caused. See id. at 1607 (Breyer, J., concurring). He correctly interprets these theories as permitting juries "to calculate punitive damages by making a rough estimate of global harm [and] dividing that estimate by a similarly rough estimate of the number of successful lawsuits that would likely be brought." Id.

n81. One exception is Justice Breyer's concurrence in Gore, in which he observes that damages greater than the total harm caused will ""over-deter' by leading potential defendants to spend more to prevent the activity that causes the economic harm, say, through employee training, than the cost of the harm itself." Gore, 116 S. Ct. at 1607-08 (Breyer, J., concurring); see also Jones v. Reagan, 696 F.2d 551, 554 (7th Cir. 1983) (**Posner,** J.) ("If considerations of deterrence are to be brought to center stage, the potential for overdeterrence must also be considered ...."); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839-41 (2d Cir. 1967) (Friendly, J.) (noting that allowing multiple punitive damages awards for negligence in the manufacture of goods gives rise to the danger of "overkill" and "needless" deterrence).

n82. For example, the Green Oil factors, which were endorsed by the United States Supreme Court in Pacific Mutual Life Insurance Co. v. Haslip, 491 U.S. 1, 21-22 (1991), fail to mention overdeterrence. See Green Oil, 539 So. 2d at 223-24. Nor do state statutes outlining the factors to be considered in awarding punitive damages include the danger of overdeterrence. See Kan. Stat. Ann. 60-3701(b) (1994); Minn. Stat. Ann. 549.20 subd. 3 (West 1988); Mont. Code Ann. 27-1-221(7)(b) (1995); Or. Rev. Stat. 30.925(2) (1995).

n83. See supra section II.A.

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n84. See infra Part III.

n85. See Gore, 116 S. Ct. at 1618-19 (Ginsburg, J., dissenting) (surveying state caps on punitive damage awards).

n86. Justice Ginsburg lists 16 states in which caps on punitive damages have been enacted or proposed. In 13 of those states (Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Maryland, Nevada, New Jersey, North Dakota, Texas, and Virginia), the award described in the text would exceed the cap. See id.

n87. See, e.g., Dan Quayle, Civil Justice Reform, 41 Am. U. L. Rev. 559, 564-65 (1992) (arguing that "the current approach to punitive damages will continue to generate disproportionately high awards in a random and capricious manner" and that one aspect of **reform** should be to limit the amount of **punitive damages** to "the full amount of compensatory damages").

n88. We have commented on the legal doctrine governing punitive damages to some degree above in section II.C and will discuss it more extensively below in Part III.

n89. 116 S. Ct. 1589 (1996).

n90. See Alabama Court Slashes Punitive Award in Case Involving Repainted BMW Car, Wall St. J., May 12, 1997, at B10.

n91. See Gore, 116 S. Ct. at 1593. The other plaintiff, Thomas Yates, was awarded $ 4600 in compensatory damages but nothing in punitive damages. See Yates v. BMW of N. Am., Inc., 642 So. 2d 937, 938 (Ala. Civ. App.), cert. quashed, 642 So. 2d 937 (Ala. 1993). It should be noted that in the entire United States, BMW had sold 983 cars as new after repainting. See Gore, 116 S. Ct. at 1593. In this example, we are restricting our attention to the subset of cars sold in Alabama because the Alabama Supreme Court, in reviewing Gore, limited consideration in this way. It essentially makes no difference whether the multiplier is calculated separately for each state or instead is calculated for the entire country (based on appropriate national statistics, such as the figure of 983 cars in Gore). Under either method, a firm's expected damage payments would equal the harm caused nationally.

n92. In fact, other suits were brought. See BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 626 n.4 (Ala. 1994) (listing the 25 cases brought by Gore's attorney against BMW for similar conduct). The assumption in the text that only two suits were brought is made for illustrative purposes.

n93. In general, the proper approach to calculating the probability of liability would be to use all available information about the likelihood of detection and suit. Such information might include, for example, information about the frequency of suit against BMW under similar circumstances in other states, the frequency with which car owners take their cars to detail shops, and the likelihood of lawyers taking cases with higher or lower stakes.

n94. In fact, the calculation of the multiplier may be more complicated because the award of punitive damages will itself affect the probability of suit. As we observed above, total damages should be such that the probability of suit induced by that award of damages results in expected damages equal to harm. See supra p. 895. Therefore, if an award of $ 28,000 would **induce** more than two plaintiffs to sue, the proper multiplier might be less than seven.

n95. For another economically oriented discussion of Gore, see Rubin, Calfee & Grady, cited above in note 12. Their discussion, however, does not emphasize the point that we make here.

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n96. 499 U.S. 1 (1991).

n97. See id. at 4-5. In fact, the insurance policy that lapsed was not Pacific Mutual Life's policy, but rather the policy of another company, Union Fidelity Life Insurance Company, which the agent was also representing. See id. However, premiums for the Union policy were collected through Pacific Mutual Life's Birmingham office. See id. at 5. Pacific Mutual Life was sued for fraud under a theory of respondeat superior. See id. at 6.

n98. Although it was not entirely clear how the jury apportioned the total award between compensatory and punitive damages, the United States Supreme Court presumed that not more than $ 200,000 of the total represented compensatory damages and not less than $ 840,000 represented punitive damages. Id. at 7 n.2.

n99. See Pacific Mutual Life Ins. Co. v. Haslip, No. CV-82-2453 (Ala. Cir. Ct. Jefferson County 1987); Pacific Mutual Life Ins. Co. v. Haslip, 553 So. 2d 537, 543 (Ala. 1989); Haslip, 499 U.S. at 24.

n100. See supra pp. 894-95.

n101. Haslip's out-of-pocket expenses were "less than $ 4,000." Id.

n102. The jury awarded compensatory damages for the other respondents in the following amounts: Hargrove $ 10,288; Craig $ 12,400; and Calhoun $ 15,290. See id. at 7.

n103. No. A89-0095-CV (D. Alaska Sept. 24, 1996).

n104. See, e.g., Charles McCoy, Exxon Corp.'s **Settlement** Gets Court Approval, Wall St. J., Oct. 9, 1991, at A3.

n105. See Fishermen Block Tankers, Wash. Post, Aug. 22, 1993, at A9 (noting that the Exxon Valdez "polluted thousands of miles of coastline").

n106. See Seth Mydans, Captain in Alaska Oil Spill Loses License for Nine Months, N.Y. Times, July 26, 1990, at A12 (noting that an administrative law judge for the Coast Guard found Hazelwood guilty of consuming alcohol within four hours of sailing and that Hazelwood had pleaded no contest to the charge); A Question Recurs: Was Hazelwood Drunk?, N.Y. Times, Feb. 25, 1990, at 29.

n107. The jury awarded $ 287 million as compensation for fishing losses. See In re The Exxon Valdez, No. A89-0095-CV, 1995 WL 527988, at *5 (D. Alaska Jan. 27, 1995). The court noted that, including other verdicts and **settlements,** the dollar amount of harm caused by the spill was between $ 288.7 million and $ 418.7 million (including the $ 287 million verdict). See id.

n108. See Caleb Solomon, Exxon Is Told To Pay $ 5 Billion for Valdez Spill, Wall St. J., Sept. 19, 1994, at A3.

n109. In June 1997, Exxon appealed the $ 5 billion punitive damages award entered against it in the Exxon Valdez case. See Exxon Corp. Submits Brief Outlining Valdez Appeal, Wall St. J., June 20, 1997, at A4.

n110. Punitive damages would be appropriate, for example, in the circumstances described in Matthew L. Wald, Royal Caribbean Cruise Line Indicted on Charges of Dumping Oil, N.Y. Times, Dec. 20, 1996, at A26 (cruise line indicted for "routinely dumping waste oil from five of its ships for years and falsifying its log books to hide its activities").

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n111. See supra Part II.

n112. See 1 Schlueter & Redden, supra note 74, at 264 ("In order to receive punitive damages, a plaintiff must show that the defendant acted with malice, either actual or legal."); see also Masaki v. General Motors Corp., 780 P.2d 566, 570 (Haw. 1989) (noting that punitive damages "are awarded only when the egregious nature of the defendant's conduct makes such a remedy appropriate"); Barnhouse v. Hawkeye State Bank, 406 N.W.2d 181, 184 (Iowa 1987) ("An award of punitive damages is appropriate when a party acts with actual or legal malice.") (citations omitted); Nappe v. Anschelewitz, Barr, Ansell & Bonello, 477 A.2d 1224, 1230 (N.J. 1984) ("To warrant a punitive award, the defendant's conduct must have been wantonly reckless or malicious.") (citations omitted); Hood v. Fulkerson, 699 P.2d 608, 611 (N.M. 1985) ("[Punitive damages] may be awarded only when the conduct of the wrongdoer may be said to be maliciously intentional, fraudulent, oppressive, or committed recklessly or with a wanton disregard to the plaintiffs' rights." (quoting Loucks v. Albuquerque Nat'l Bank, 418 P.2d 191, 199 (N.M. 1966) (internal quotation marks omitted))).

n113. See, e.g., Green Oil Co. v. Hornsby, 539 So. 2d 218, 223 (Ala. 1989) ("The degree of reprehensibility of the defendant's conduct should be considered" when "determining whether the jury award of punitive damages is excessive or inadequate"), endorsed in Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21 (1991); Neal v. Farmers Ins. Exch., 582 P.2d 980, 990 (Cal. 1978) (stating that, among factors to consider in assessing punitive damages is "the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal."); McNeill v. Allen, 534 P.2d 813, 820 (Colo. Ct. App. 1975) ("The purpose of punishment and deterrence may best be served by relatively higher or relatively lower exemplary damages according to the nature of the wrongful conduct.") (citation omitted); Ultimate Chem. Co. v. Surface Transp. Int'l, Inc., 658 P.2d 1008, 1012 (Kan. 1983) (listing among the factors to consider in assessing punitive damages "the nature, extent, and enormity of the wrong").

n114. BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1599 (1996).

n115. See supra note 113.

n116. As previously noted, we discuss below the significance of the reprehensibility criterion to the punishment goal of punitive damages. See infra pp. 952-953.

n117. For the most part, other commentators who have considered punitive damages in terms of the deterrence goal have agreed that the reprehensibility of the defendant's conduct is not a relevant factor. See, e.g., Dobbs, supra note 3, at 860-63; Galligan, supra note 3, at 62-64.

n118. In their respective discussions of punitive damages, Dorsey Ellis and Robert Cooter also find that the reprehensibility of a defendant's conduct is relevant to deterrence when injurers' gains do not count in social welfare - that is, when their gains are socially illicit. See Cooter, Economic Analysis, supra note 12, at 86-89; Ellis, supra note 12, at 31-33. For more formal treatments of illicit utility, also in the context of punitive damages, see Shavell, supra note 14, at 146, 159-61; Diamond, Efficiency Effects, supra note 12, at 8-12.

n119. See supra Part II.

n120. If, unlike in the example we have been discussing, a reprehensible act is purely intentional, overdeterrence cannot occur. Suppose a surgeon intentionally left a surgical tool in the patient. (Although this example may seem unbelievable, we use it to contrast the

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conclusion in this footnote with that in the text.) Threatening the surgeon with punitive damages in addition to compensatory damages would further discourage the surgeon from intentionally leaving the surgical tool in a patient. Overdeterrence could not occur. But if the surgeon's act was the result of his failure to take adequate precautions - that is, if his act was accidental - the imposition of punitive damages can affect the level of care he exercises. As we explained in the text, this level of care can be excessive.

n121. For example, in the illustration of a firm's screening decision in note 24, above, if damages exceed the amount determined by the damages formula, the firm might be led to spend $ 4000 per applicant on screening, which would be socially excessive given the assumed benefit from this level of screening. On the point that the imposition of punitive damages may lead corporations to spend excessively in order to forestall reprehensible behavior by their employees, see Daniel R. Fischel & Alan O. Sykes, Corporate Crime, 25 J. Legal Stud. 319, 348 (1996).

n122. See supra section II.C.

n123. See supra pp. 898-99. For example, in Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989), because reference to concealment occurs in the context of the reprehensibility criterion, see id. at 223, it is difficult to infer how such behavior should affect punitive damages. This difficulty is partially due to the Green Oil court's failure to discuss how the degree of reprehensibility should affect the level of punitive damages. See id. at 223-24. Additionally, Green Oil offers no guidance concerning how evidence of concealment should affect the degree of reprehensibility, including how much weight concealment should be given in relation to the other factors mentioned that bear on the degree of reprehensibility (such as the duration of the conduct). See id. Thus, although Green Oil suggests that concealment should be a basis for raising the level of punitive damages, the extent to which punitive damages should be raised is unclear.

n124. For example, consider a firm that believes that any pollution that it generates will be very difficult to detect. Such a firm might not invest in any pollution control equipment - and thus its conduct would be considered reprehensible. In contrast, an otherwise identical firm that believes that its pollution will be detected with a high probability would make reasonable investments in pollution control equipment - its conduct would not be reprehensible. Consequently, if a court does not have direct information about a firm's chance of escaping liability, the court might be able to infer from a firm's level of investment in pollution control equipment - that is, from whether its conduct was reprehensible or not - whether the firm faced a low or high chance of escaping liability.

n125. We believe that the notion of socially illicit utility reflects how people often would characterize the utility that individuals derive from certain reprehensible acts (such as rape). But because no theoretical basis exists for determining which categories of utility are socially illicit, we are not suggesting below that particular categories of utility are necessarily socially illicit. Which categories of utility from wrongful conduct are socially illicit is an empirical question, determined by what society wants to count in social welfare. The notion of socially illicit utility has been considered by some commentators in the context of punitive damages. See sources cited supra note 118. It also has been mentioned in the economic literature on law enforcement. See, e.g., George J. Stigler, The Optimum Enforcement of Laws, 78 J. Pol. Econ. 526, 527 (1970).

n126. For example, suppose an individual obtains a utility gain worth $ 2000 to him from maliciously hitting someone in the nose, and that the harm to the victim is equivalent to $ 500 (because $ 500 would fully compensate the victim for his pain and medical costs). Then, even if the injurer would definitely be found liable, punitive damages of at least $ 1500 would be required to deter him. (Clearly, if there is a chance that he can escape liability, the punitive damages amount would have to be higher.)

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n127. We do not mean to suggest that an injurer's gain necessarily counts in social welfare if his conduct is undertaken without malice. It may well be that the utility from certain types of non-malicious reprehensible conduct also would be treated as socially illicit. Consider, for example, a person who gets pleasure from "joyriding" on city streets (driving on them at high speed for fun). Our conclusions regarding the appropriateness of punitive damages for malicious conduct would apply to any category of conduct in which an injurer's gain does not count in social welfare.

n128. See, e.g., Green Oil, 539 So. 2d at 222 ("The defendant's financial position is ... a consideration essential to a post-judgment critique of a punitive damages award." (citation omitted)). The United States Supreme Court endorsed the Green Oil approach of including the defendant's financial position as one factor to consider in determining whether an award of punitive damages is excessive or inadequate. See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991). Other state court decisions have endorsed the consideration of wealth in punitive damages assessments. See, e.g., Neal v. Farmers Ins. Exch., 582 P.2d 980, 990 (Cal. 1978) ("Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence ... will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort."); Ultimate Chem. Co. v. Surface Transp. Int'l, Inc., 658 P.2d 1008, 1012 (Kan. 1983) (stating that among the factors to consider in assessing punitive damages is the "defendant's financial condition").

n129. See, e.g., Ark. Model Jury Instructions 2217 (West Supp. 1995); Cal. Jury Instructions: Civil 14.71 (8th ed. 1994); Wis. Jury Instructions: Civil 1707.1 (1995).

n130. For example, in the Exxon Valdez case, Exxon's wealth was "virtually the exclusive focus of plaintiffs' Phase III [punitive damages] case." In re The Exxon Valdez, No. A89-0095-CV, 1995 WL 527988, at *7 (D. Alaska Jan. 27, 1995). The evidence of Exxon's wealth introduced by the plaintiffs included Exxon's 1990 Annual Report, which claimed that "Exxon's consistently strong earnings performance has enabled the company to achieve and maintain a position of extraordinary financial strength and flexibility. For example, over the past ten years, Exxon's internal cash generation from operations amounted to more than $ 100 billion." Id. at *8 n.16.

n131. Our conclusions about punitive damages and wealth are similar to those of other economically oriented writers on punitive damages. See Abraham & Jeffries, supra note 3, at 415 ("In our view, the defendant's wealth is irrelevant to the goal of deterring socially undesirable conduct ...."); Chapman & Trebilcock, supra note 12, at 824 ("In the case of economic wrongs, the conventional economic theory of deterrence ... suggests no role for corporate wealth in structuring an optimal deterrence regime ...." (footnote omitted)); Cooter, Deterrence, supra note 12, at 1177 (stating that the total assets or wealth of the defendant "is typically inappropriate to deterrence of economically self-interested decisionmakers"); Galligan, supra note 3, at 65 ("Considering the defendant's wealth has simply no articulable efficiency justification."); Gary T. Schwartz, Deterrence and Punishment in the Common Law of Punitive Damages: A Comment, 56 S. Cal. L. Rev. 133, 140 (1982) ("The wealth of the defendant bears no obvious relationship to deterrence goals ...." (internal quotation marks omitted)).

n132. See supra Part II.

n133. See supra note 29 (describing industries in which productive activity may have declined as a result of liability costs).

n134. Sometimes this view is expressed as a need to send a message to headquarters. See, e.g., Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 261 (1989) ("Kelco's attorney urged the jury to return an award of punitive damages, asking the jurors

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to "deliver a message to Houston [BFI's headquarters].'" (quoting trial transcript)).

n135. Although we have just emphasized the point that large corporations will take appropriate steps to reduce risk through the delegation of risk-reduction responsibilities, we are not claiming that large corporations will necessarily take the same precautions that small corporations do. They may take different precautions - perhaps greater, perhaps not - as a result of their different organizational and decisionmaking structures. But the precautions taken by large corporations will still be socially appropriate because of the basic principle that parties will behave properly if they are made to pay for the harms their actions cause.

n136. See supra section II.B.

n137. See supra pp. 886-87.

n138. This proposition means, for example, that a poor person would be more averse to a 50% chance of losing $ 100 than a rich person.

n139. The explanation for this claim is that the bearing of risk by uninsured risk-averse individuals makes it socially desirable to reduce damages from the level implied by our formula. See pp. 886-87. Thus, although damages should rise with wealth for the reasons just discussed, the highest level of damages - imposed on the wealthiest individuals, who are presumed to be the least risk averse - should still not exceed the level called for by our formula.

n140. See supra section III.A.

n141. That the value of a dollar declines with the level of wealth is a standard assumption of economists, reflecting the view that individuals first fulfill their most important needs and desires, then spend on successively less important things. See, e.g., Pindyck & Rubinfeld, supra note 39, at 144-45.

n142. See, e.g., Bemer Aviation, Inc. v. Hughes Helicopter, Inc., 621 F. Supp. 290, 300 (E.D. Pa. 1985), aff'd, 802 F.2d 445 (3d Cir. 1986) (stating that, in assessing an award of punitive damages, juries may consider "the potential harm that a defendant's conduct poses"); Green Oil Co. v. Hornsby, 539 So. 2d 218, 223 (Ala. 1989); Levine v. Knowles, 197 So. 2d 329, 331 (Fla. Dist. Ct. App. 1967) ("The seriousness of the probable result of the defendant's conduct ... is the yardstick for determining the advisability of discouraging such behavior in the future, rather than the seriousness of the damage actually caused.").

n143. The first of the seven Green Oil factors for evaluating punitive damages awards states:

Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

Green Oil, 539 So. 2d at 223 (quoting Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially)).

n144. See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991) (endorsing the Green Oil factors); see also TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 460 (1993) ("It is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused ....").

n145. "The evidence established that the Exxon Valdez spilled 11,000,000 gallons of crude

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oil, approximately one-fifth of its cargo. Had the remaining 45,000,000 gallons of oil spilled, the disaster and harm would have been many times greater." In re The Exxon Valdez, No. A89-0095-CV, 1995 WL 527988, at *6 (D. Alaska Jan. 27, 1995).

n146. For example, Judge Holland observed that more oil might have spilled from the Exxon Valdez, see supra note 145, but he did not mention the possibility that less might have spilled.

n147. To illustrate, imagine the response to the Union Carbide Company if, in the Bhopal disaster in which 4,000 people were killed and thousands of others were injured, see Kenneth J. Cooper, Slums Sprawl in Shadow of Bhopal Gas Leak, Wash. Post, June 27, 1996, at A19, Union Carbide had argued that damages should be reduced because a gas leak of the kind that occurred ordinarily would be expected to kill and injure a much smaller number of people. See also supra note 146 (discussing related issues in the Exxon Valdez case).

n148. In some cases, however, it might be easier to calculate expected or average harm than the particular harm in the case at hand. For example, it might be easier to determine the average value of the contents of a house that burned down than to ascertain the actual value of the contents (because much of the contents may have been consumed in the fire).

n149. This conclusion also would apply if courts attempt to take potential harm into account in some other, less sophisticated, way than by calculating the expected harm.

n150. We have discussed what we believe to be the main arguments bearing on the desirability of taking potential harm into account in calculating damages, but there are other considerations, some of which reinforce our conclusions and some of which do not. Among these additional points, we note two. The first point, which supports our conclusion, is that if damages are based on potential harm rather than on actual harm, the incentive to limit actual harm will be dulled. For example, an oil company would have less incentive to curtail the leakage of oil from a grounded tanker if damages are based on the total amount of oil in the vessel rather than on the amount that actually leaks. The second point, which favors basing punitive damages on potential harm, is that such a policy can reduce the dilution of incentives because of the judgment-proof problem. Specifically, because consideration of potential harm in determining damages means that parties will pay larger amounts than otherwise when actual harm is low, their not being able to pay higher damages when actual harm is high (because of the judgment-proof problem) will tend to be counteracted.

n151. The third Green Oil factor states: "If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss." Green Oil Co. v. Hornsby, 539 So. 2d 218, 223 (Ala. 1989) (quoting Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring)) (internal quotation marks omitted); see also Estate of Hartz v. Nelson, 437 N.W.2d 749, 755-56 (Minn. Ct. App. 1989) (noting that, under Minn. Stat. 549.20 (1994), punitive damages should be measured, in part, by "the profitability of the misconduct to the defendant"); Tindall v. Konitz Contracting, Inc., 783 P.2d 1376, 1382-83 (Mont. 1989) (noting that, under Mont. Code Ann. 27-1-221(7)(b)(iv) (1997), the awarder of punitive damages must consider "the profitability of the defendant's wrongdoing, if applicable").

n152. See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991) (citing favorably the third Green Oil factor).

n153. The arguments that we make in this section do not depend on whether a defendant might escape liability. See infra note 161. Thus, for convenience, we assume here that defendants never escape liability.

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n154. Although there has been some scholarly discussion regarding whether to base liability on harm or gain, the points developed in this literature differ from the points that we present here. Our focus, as the reader will see, is on a measure of damages equal to the greater of gain or harm. Previous literature studies the measure of damages equal to the gain and compares it to the measure of damages equal to the harm. See Richard S. Gruner, Just Punishment and Adequate Deterrence for Organizational Misconduct: Scaling Economic Penalties Under the New Corporate Sentencing Guidelines, 66 S. Cal. L. Rev. 225, 234-66 (1992); Jeffrey S. Parker, Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties, 26 Am. Crim. L. Rev. 513, 552-81 (1989); A. Mitchell Polinsky & Steven Shavell, Should Liability Be Based on the Harm to the Victim or the Gain to the Injurer?, 10 J. L. Econ. & Org. 427 (1994); Donald Wittman, Liability for Harm or Restitution for Benefit?, 13 J. Legal Stud. 57 (1984); Donald Wittman, Should Compensation Be Based on Costs or Benefits?, 5 Int'l Rev. Law & Econ. 173 (1985).

n155. If both harm and gain were certain, it would be unlikely that the gain would exceed the harm in a punitive damages case: if the gain is known to exceed the harm, the act would likely be regarded as socially desirable, or at least not one calling for imposition of punitive damages. Hence, we here consider the possibility that harm is uncertain, and below that gain is uncertain. See infra p. 920.

n156. See supra section III.C.

n157. For simplicity, we assume now that harm is certain.

n158. If the expected gain exceeded the harm, imposition of punitive damages would be unlikely.

n159. This statement will be true if the $ 200,000 cost of re-engineering the assembly line is more likely than the $ 800,000 cost, which is what we mean by saying that the cost ordinarily is the lower amount. For then the expected cost will be less than $ 500,000, which is equivalent to saying that the expected gain from not re-engineering the assembly line is less than $ 500,000.

n160. See supra section III.A.

n161. We suggested above in note 153 that the arguments in this section apply without substantial modification to situations in which defendants might escape liability. To illustrate, consider the initial point that imposing damages equal to harm, whatever its magnitude, will cause expected damages to equal expected harm. The analogue of this point when defendants can escape liability is that imposing damages according to our multiplier formula will result in expected damages equal to expected harm, essentially for the reasons given in the text.

n162. See, e.g., Ultimate Chem. Co. v. Surface Transp. Int'l, Inc., 658 P.2d 1008, 1012 (Kan. 1983) ("A jury may also consider ... the probable litigation expenses."); Fischer v. Johns-Manville Corp., 512 A.2d 466, 482 (N.J. 1986) (explaining that "the plaintiff's litigation expenses" is a factor to be considered in determining the size of a punitive damages award).

n163. See supra note 78.

n164. See supra section II.B.

n165. A number of articles on the economics of litigation are relevant to the conclusions that we reach in this section. On the general topic of how to structure the legal system given that litigation is costly, see A. Mitchell Polinsky & Yeon-Koo Che, Decoupling Liability: Optimal Incentives for Care and Litigation, 22 RAND J. Econ. 562 (1991); A. Mitchell Polinsky &

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Daniel L. Rubinfeld, The Welfare Implications of Costly Litigation for the Level of Liability, 17 J. Legal Stud. 151 (1988); Steven Shavell, The Fundamental Divergence Between the Private and the Social Motive To Use the Legal System, 26 J. Legal Stud. 575 (1997) [hereinafter Shavell, Divergence]; Steven Shavell, The Social Versus the Private Incentive To Bring Suit in a Costly Legal System, 11 J. Legal Stud. 333 (1982). See also Friedman, supra note 12 (suggesting that punitive damages may beneficially lower litigation costs by discouraging harmful behavior); Kahan & Tuckman, supra note 12 (addressing specifically the decoupling of punitive damages).

n166. See supra section II.B.

n167. If no suits are brought, deterrence obviously cannot be achieved. But if a positive probability of suit exists, deterrence will be optimal if damages are set according to our formula. There are two reasons, however, that the probability of suit should not be too low, or equivalently, that the level of punitive damages implied by our formula should not be too high. One reason is that high damages impose risk, which lowers social welfare to the extent that parties are risk averse. See generally A. Mitchell Polinsky & Steven Shavell, The Optimal Tradeoff Between the Probability and Magnitude of Fines, 69 Am. Econ. Rev. 880, 884-85 (1979) (demonstrating that risk aversion may make moderate sanctions optimal). The other reason is that high damages might exceed the assets of injurers, rendering the damages ineffective as a deterrent. Assuming that the likelihood of suit is great enough so that neither of these reasons is important, our point is that there is no need for it to be higher in order to accomplish proper deterrence.

n168. Indeed, because litigation is costly, the full social harm due to an accident is the direct harm plus the costs associated with use of the legal system. Hence, for the injurer to have correct incentives, he should, in principle, pay damages equal to the direct harm plus these additional costs. See Shavell, Divergence, supra note 165, at 588. As noted previously, we have ignored this refinement in the text for simplicity. See supra note 18.

n169. This intuitively plausible proposition has been confirmed in research undertaken by scholars at the Institute for Civil Justice at the RAND Corporation. See James S. Kakalik, Patricia A. Ebener, William L.F. Felstiner, Gus W. Haggstrom & Michael G. Shanley, Variation in Asbestos Litigation Compensation and Expenses 86-91 (Institute for Civil Justice, RAND Corp., No. R-3132-ICJ, 1984).

n170. When we use the term "decoupling," we presume that the defendant pays more than the plaintiff receives, even though, as a logical matter, the plaintiff could be awarded more than the defendant pays.

n171. Because some of the damages paid by defendants go to the state, plaintiffs' incentives to sue will lessen. However, the punitive damages amount determined by our formula will automatically rise to reflect any decrease in the probability of suit. Thus, the expected damages borne by defendants will not decline if our formula for punitive damages is applied.

n172. See generally BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1619 app. (1996) (Ginsburg, J., dissenting) (listing state provisions that allocate a portion of punitive damages awards to state agencies). Although the statutes that describe these allocation arrangements do not use the term "decoupling," this term is employed in some of the economic literature analyzing litigation. See, e.g., Polinsky & Che, supra note 165, at 562.

n173. See Iowa Code Ann. 668A.1(2)(b) (West 1987); Kan. Stat. Ann. 60-3402(e) (1994).

n174. The seventh Green Oil factor states: "If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in

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The preceding possibilities - engaging excessively or inadequately in activities that cause harm - are realistic. For instance, some studies indicate that much of the harm from automobile pollution is not reflected in the price of gasoline or automobiles. [27] Hence, individuals will tend to drive too much. [28] Conversely, some evidence suggests that manufacturers of certain socially desirable products - for example, **[*883]** childhood vaccines - may have stopped selling their products because of the prospect of damages exceeding harm. [29]

We have now explained the fundamental reasons that damages should equal harm under strict liability. We next discuss why we assume that damages should equal harm under the negligence rule.

By definition of the negligence rule, if a potential injurer fails to take proper precautions - does not meet the negligence standard - he is said to be negligent and must pay damages. [30] The economic interpretation of the proper negligence standard involves comparing the cost of taking the precaution with the expected reduction in harm that results from taking it: if the former amount is less than the latter, the precaution should be taken and the failure to do so is negligent. [31] It would be negligent not to take a precaution costing $ 50,000 that would prevent a harm of $ 100,000. **[*884]**

Under the negligence rule, if damages equal harm, potential injurers will be led to comply with the negligence standard (assuming that it is chosen properly) and thus to take appropriate precautions. If a precaution costing $ 50,000 would prevent a harm of $ 100,000, the **threat** of having to pay damages of $ 100,000 for not taking the precaution would **induce** a party to spend $ 50,000 on the precaution. However, if damages are less than harm, the negligence standard might not be met and underdeterrence would result. In the example, if damages are only $ 40,000 (even though harm is $ 100,000), the party would not be led to take the precaution costing $ 50,000. [32] Conversely, if damages exceed harm, a potential injurer will have a stronger motive to meet the negligence standard than if damages equal harm. If damages are $ 200,000 (even though harm is $ 100,000), a party will have a greater incentive to spend $ 50,000 on the precaution than if damages are $ 100,000. But he will not take more precautions than are required to meet the negligence standard, assuming that the negligence determination is not erroneous. In the absence of errors, a party has no incentive to do more than satisfy the negligence standard, even if the damages that would be imposed if negligence is found far exceed the harm, because there is no chance that such damages will be imposed against him.

Realistically, however, errors will occur in the negligence determination, which suggests that damages exceeding harm could lead to excessive precautions. For several reasons, parties attempting to act non-negligently may be found liable under the negligence rule. Notably, they may inaccurately assess what the negligence standard is, or courts may inaccurately observe the parties' behavior and find them negligent when they were not. Because of the risk of mistakes, parties may well have an incentive to take greater precautions than they otherwise would have, in order to reduce the chance that they will incorrectly be found negligent. [33] If, as a result, they take socially excessive precau- **[*885]** tions, raising the level of damages imposed on them will only exacerbate this problem.

Next, consider the relationship between damages and the level of activity under the negligence rule. In this regard, observe that, in the absence of mistakes, the negligence rule may result in parties participating in risky activities to a socially excessive extent. [34] This excessive participation results because, once a party takes the precautions required by the negligence standard, he will not be found liable for any harms that he causes. For example, a person who drives with reasonable care will not be found negligent, and therefore will not have to pay for any harm caused by his driving; consequently, he will drive more than is socially desirable. Or a manufacturer that takes appropriate care in the design of its product

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mitigation of the punitive damages award." Green Oil Co. v. Hornsby, 539 So. 2d 218, 224 (Ala. 1989) (quoting Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially). The United States Supreme Court endorsed the Green Oil test in Haslip. See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991). This factor is echoed in the Restatement:

Another factor that may affect the amount of punitive damages is the existence of multiple claims by numerous persons affected by the wrongdoer's conduct. It seems appropriate to take into consideration both the punitive damages that have been awarded in prior suits and those that may be granted in the future, with greater weight being given to the prior awards.

Restatement (Second) of Torts 908 cmt. e (1979). However, when the harm that originates from the defendant's conduct is repetitive, as in Gore, it is not clear whether prior judgments against the defendant would be taken into account. See BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1607 (1996) (Breyer, J., concurring) (noting that the existence of prior actions was not a factor in Gore).

n175. It is not just the number of prior suits that matters to the punitive damages multiplier in a case. The magnitude of the awards in prior suits matters as well. The higher the prior awards, everything else being equal, the lower punitive damages should be in the case in question, because the goal of deterrence is to make the injurer's payments equal to the total harm.

n176. If courts overestimate the likelihood of suit in the future, punitive damages will be lower than they should be in the case at hand. This problem can be corrected, however, by raising punitive damages in future cases. See infra note 179.

n177. See Margaret I. Lyle, Note, Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy Reorganization and Legislative Compensation Versus the Common-Law Tort System, 61 Tex. L. Rev. 1297, 1349 n.250 (1983) (suggesting that a court might order "an equitable stay on collection of a punitive damage award for a number of years if it seems likely that the collection of too many of these awards early in the litigation of a mass tort might deprive later plaintiffs of compensatory damages").

n178. For example, a termination date might be the expiration of the statute of limitations period for the bringing of suits.

n179. Conversely, if the funds in the escrow account are exhausted before the termination date, a defendant could be made to pay additional punitive damages so that his total payments over time to the escrow account equal the total harm caused.

n180. The sixth Green Oil factor states: "If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award." Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989) (quoting Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially)). The United States Supreme Court has endorsed the use of this factor. See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991).

n181. In Gore, the Court expressed this as follows: "Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1603 (1996).

Lower courts have applied this standard. For example, in Lee v. Edwards, 101 F.3d 805 (2d Cir. 1996), the court found that punitive damages of $ 200,000 awarded by the jury in a

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1983 claim were excessive. See id. at 813. In reducing the award to $ 75,000 (if plaintiff agreed to remittitur), the court noted the plaintiff's assertion that the defendant's conduct "could have exposed him to a charge of making a false statement"; if convicted, the defendant "would have faced imprisonment of up to one year and/or a fine of up to $ 2,000." Id. at 811. The court noted that although imprisonment is "a serious sanction, ... the maximum fine of $ 2,000 gives little warning that the offense could entail a $ 200,000 civil award." Id. The award of $ 75,000 was justified in part because the defendant was a police officer and therefore on "notice as to the gravity of misconduct under color of his official authority." Id. Also, in Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co., 557 N.W.2d 67 (Wis. 1996), involving the unauthorized copying and use of computer software, the court reduced a punitive damages award from $ 1.75 million to $ 650,000. See id. at 83. As part of its Gore analysis, the court noted that the defendant's wrongdoing resulted in damages of $ 65,000 to the plaintiff, and that "the potential criminal penalty for copying computer programs if the damage is greater than $ 2,500 is a fine not exceeding $ 10,000." Id. at 82-83.

n182. This statement presumes for simplicity that the outcomes of the private and the public suits are identical - they either both succeed or they both fail. Otherwise, the proper adjustment of the amount implied by our formula does not necessarily involve simply subtracting the amount paid as a public penalty. To illustrate, consider the following example. Suppose that the harm suffered by the victim is $ 5000 and that the injurer has a 10% chance of being found liable as a result of a private suit. Suppose also that the government will impose a $ 1000 fine on the injurer with certainty. (It is not essential to this example that the fine is certain, only that it is imposed with a higher probability than the private plaintiff's probability of prevailing against the defendant.) Let A be the amount awarded to the private plaintiff if he prevails, with A set such that the defendant's combined expected public and private payments equal the harm caused. In other words, A is set such that $ 1000 + .1A = $ 5000. Solving for A yields $ 40,000 as the proper private award. If instead our formula were applied and the public penalty were simply subtracted from the amount implied by our formula, the private award would be $ 49,000: the $ 50,000 award implied by our formula (= $ 5000/.1), less the $ 1000 public penalty.

n183. The point of this paragraph - that public penalties can serve as useful guidelines for the setting of punitive damages - is discussed by Cooter, Deterrence, cited above in note 12, at 1179-80.

n184. A different type of circularity could result in excessive deterrence. Suppose the legislature sets public penalties at high levels because it expects inadequate use of punitive damages. If the courts then impose substantial punitive damages because public penalties are high, deterrence could be excessive.

n185. See 2 Stuart M. Speiser, Charles F. Krause & Alfred W. Gans, The American Law of Torts 8:64, at 297 (Supp. 1997); Robert W. Wood, Taxation of Damage Awards and **Settlement** Payments P 6.292, at 6-14 to 6-15 (1991 & Supp. 1996).

n186. See Wood, supra note 185, P 6.6, at 6-31.

n187. Because our focus is on properly deterring potential injurers, we do not consider the tax treatment of plaintiffs' receipts of punitive damages awards. However, whether punitive damages are taxable income to the recipient may affect a plaintiff's incentive to sue. In this indirect way, the tax treatment of the receipt of punitive damages might affect deterrence.

n188. See I.P.L. Png & Eric M. Zolt, Efficient Deterrence and the Tax Treatment of Monetary Sanctions, 9 Int'l Rev. L. & Econ. 209, 209 (1989) (noting the different possible tax treatments of monetary sanctions and arguing that, to avoid overdeterrence, monetary sanctions should be deductible or the amount of the sanction should be adjusted to account

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for the offender's tax rate); Eric M. Zolt, Deterrence Via Taxation: A Critical Analysis of Tax Penalty Provisions, 37 UCLA L. Rev. 343, 364-68 (1989) (expanding on the analysis presented in the Png & Zolt article).

n189. To demonstrate this point, let C be the cost of the precaution, H the harm, and T the tax rate. Ideally, the precaution should be taken if C < H. If both the precaution cost and damages are deductible, the firm will take the precaution if (1 - T)C < (1 - T)H, which is equivalent to C < H. But if damages are not deductible, the firm will take the precaution if (1 - T)C < H, which is equivalent to C < H/(1 - T). Thus, if H = $ 10,000 and T = .4, the firm would be willing to spend up to $ 10,000/(1 - .4) = $ 16,667 to eliminate the harm. In other words, for every dollar of harm, the firm would be induced to spend up to $ 1/(1 - .4) = $ 1.67 to eliminate it. Hence, damages appear to be one-and-two-thirds more important to eliminate than they would be if they were deductible.

Note that the logic of our discussion in the text implies that, if damages were not deductible but were reduced appropriately, the firm could be induced to take optimal precautions. If the tax rate is 40% and the harm is $ 10,000, reducing damages to $ 6000 and not allowing damages to be deductible would be equivalent to keeping damages at $ 10,000 but allowing their deductibility. Reducing damages by the precise amount that would be necessary to avoid distortions is functionally equivalent to allowing deductibility. But a policy of allowing deductibility may be preferable on administrative grounds because it obviates the need to determine the defendant's marginal tax bracket in order to calculate damages properly.

n190. For instance, in the example that we considered in which the harm is $ 10,000, suppose that the defendant is caught one time out of three, so that a third of the time he pays $ 30,000, consisting of $ 10,000 in compensatory damages and $ 20,000 in punitive damages. If the punitive damages component is not deductible and the defendant is in a 40% tax bracket, his after-tax liability cost if a judgment is rendered against him is $ 26,000 (the sum of an after-tax cost of $ 6000 associated with the compensatory damages component and an after-tax cost of $ 20,000 associated with the punitive damages component). Because there is a one-third chance that he will bear this amount, his expected after-tax liability cost is $ 8667 (that is, $ 26,000 divided by 3). Because his precaution expenditures are deductible and he is in a 40% tax bracket, he would be willing to spend up to one-and-two-thirds of this amount in order to avoid this liability cost. In other words, he would be willing to spend up to $ 14,445 (= (5/3) X $ 8667). But the harm is only $ 10,000, so many instances could arise in which he will be induced to spend substantially more than $ 10,000 in order to avoid imposing a harm of $ 10,000 - a socially wasteful outcome caused by the non-deductibility of punitive damages.

n191. Under the federal tax code, taxable corporate income in excess of $ 75,000, but not in excess of $ 10 million, is taxed at a 34% rate. See 26 U.S.C. 11(b)(1)(C) (1994). Taxable corporate income in excess of $ 10 million is taxed at a 35% rate. See id. 11(b)(1)(D). The use of a 40% tax rate as an illustration in the text is reasonable in light of the additional state income taxes that corporations often have to pay. See, e.g., Cal. Rev. & Tax. Code 23151(e) (West Supp. 1997) (8.84% of net income for 1997 and beyond); 35 Ill. Comp. Stat. 5/201(b)(7), (d) (West 1996) (7.3% of net income); N.Y. Tax Law 210.1(a) (McKinney 1986 & Supp. 1997) (9% of net income).

n192. The explanation for why the injurer would be induced to spend up to one-and-two-thirds of the harm now is complicated by the fact that the fraction of total damages that is accounted for by punitive damages - and therefore the portion of total damages that is not deductible - depends on the chance of escaping liability. In note 190, above, we showed that, if the chance of catching the injurer is one in three, he would be induced to spend $ 14,445 in order to prevent a harm of $ 10,000 - that is, 1.44 times the harm. By similar logic, it can be demonstrated that if the chance of detection is sufficiently small - so that nearly all of the damages paid by the injurer are punitive damages and not deductible - the injurer will be

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induced to spend up to 1.67 times the harm to prevent it.

n193. A majority of jurisdictions follow the approach exemplified in Lazenby v. Universal Underwriters Insurance Co., 383 S.W.2d 1 (Tenn. 1964), under which punitive damages are insurable. See id. at 5; see also Ellis, supra note 12, at 71 (noting that most, though not all, courts have held that punitive damages are insurable). In general, however, insureds cannot indemnify themselves against punitive damages assessed for intentional misconduct. See, e.g., Harrell v. Travelers Indem. Co., 567 P.2d 1013, 1017-19 (Or. 1977) (en banc). A minority of jurisdictions follow the approach taken in Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962), under which insurance coverage of punitive damages is disallowed because it would violate public policy (on the ground that such coverage would permit wrongdoers to escape punishment and also would compromise deterrence). See id. at 442. Even these jurisdictions, however, generally allow insurance coverage of punitive damages in cases of vicarious liability. See, e.g., Ohio Cas. Ins. Co. v. Welfare Fin. Co., 75 F.2d 58, 59-60 (8th Cir. 1934). For further discussion of the insurability of punitive damages, and summaries of the relevant law among the states, see generally Robert G. Schloerb, Richard L. Blatt, Robert W. Hammesfahr & Lori S. Nugent, Punitive Damages: A Guide to the Insurability of Punitive Damages in the United States and Its Territories 32-46, 61-308 (1988); 2 Schlueter & Redden, cited above in note 74, 17.2, at 233-47; 2 Speiser, Krause & Gans, cited above in note 185, 8:54, at 907.

n194. For economically oriented discussion of the question of the social desirability of liability insurance for punitive damages, see Chapman & Trebilcock, cited above in note 12, at 821-22; Cooter, Deterrence, cited above in note 12, at 1182-85; Ellis, cited above in note 12, at 71-76; and Priest, Insurability, cited above in note 12, at 1011-14.

n195. The argument in this paragraph is based on Shavell, cited above in note 41, which first formally analyzed the social desirability of liability insurance. See also Shavell, supra note 14, at 206-27 (extending the argument). These references show that, in the standard model of accidents, both injurers and victims will be made better off if the sale of liability insurance is permitted.

n196. Victims might not be fully compensated if their losses are nonmonetary because, among other reasons, full compensation may be impossible (for instance, if the loss is of a person's life). Victims may not be compensated at all under the negligence rule because the injurer may not have been negligent.

n197. See Shavell, supra note 14, at 251-52.

n198. To illustrate, suppose that a risk-averse firm with direct production costs of $ 20 per unit purchases liability insurance whose premium equals the expected damages of $ 10 per unit of the product sold. In a competitive environment, the price of the product will equal $ 30, including the $ 10 liability insurance cost. If the firm cannot purchase liability insurance, the price it charges must not only compensate it for the $ 10 in expected damages it bears directly, but also for being subject to risk - something it does not like, being risk averse. Thus, the price of the product would have to exceed $ 30 for the firm to be willing to sell it.

n199. Before discussing this complication, we want to observe that a common view is that, if there is a chance that injurers will be unable to pay for harm, liability insurance is socially desirable because it enhances the ability of victims to collect damages from injurers. We do not consider this reason for liability insurance to be a strong one; as we have noted previously, we believe that first-party insurance is a superior way to provide compensation to victims because it is administratively cheaper than the tort system. See supra note 15.

n200. The conclusions of this paragraph are based on an economic analysis of the judgment-proof problem and insurance in Steven Shavell, The Judgment Proof Problem, 6

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Int'l Rev. Law & Econ. 45 (1986), which is distilled in Shavell, cited above in note 14, at 240-43.

n201. See BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1593 (1996); see also Sears, Roebuck & Co. v. Harris, 630 So. 2d 1018, 1022 (Ala. 1994) (customer harmed from self-installed gas water heater); Moore v. Jewel Tea Co., 253 N.E.2d 636, 639 (Ill. App. Ct. 1969) (customer harmed when unopened can of drain cleaner exploded), aff'd, 263 N.E.2d 103 (Ill. 1970); Leibeck v. McDonald's Corp., No. CV-93-2419 (N.M. Dist. Ct. 1994) (customer burned by hot coffee).

n202. This difference is not emphasized, for example, in any of the major United States Supreme Court cases on punitive damages. See Gore, 116 S. Ct. at 1589; Honda Motor Co. v. Oberg, 512 U.S. 415 (1994); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989). The Gore Court, however, mentioned the market relationship between the plaintiff and the defendant as a factor that would lessen the need for affirmative disclosure requirements "because the self-interest of those involved in the automobile trade in developing and maintaining the goodwill of their customers will motivate them to make voluntary disclosures or to refrain from selling cars that do not comply with self-imposed standards." Gore, 116 S. Ct. at 1596.

n203. The Restatement (Second) of Torts does not mention this distinction explicitly, nor do commentators. See Restatement (Second) of Torts 908-909 (1977); James D. Ghiardi & John J. Kircher, Punitive Damages Law and Practice (1985), Schlueter & Redden, supra note 74. This distinction is also absent from cases that provide factors for the jury to consider in determining the amount of punitive damages. See, e.g., Estate of Hartz v. Nelson, 437 N.W.2d 749, 755-56 (Minn. Ct. App. 1989); Fischer v. Johns-Manville Corp., 512 A.2d 466, 481-82 (N.J. 1986).

n204. To the extent that liability is unnecessary to promote product safety, imposing liability would be redundant and the costs associated with litigation would be socially wasteful.

n205. Craswell discusses the role of damages multipliers in market relationships, although he does not emphasize the point that we do - that producers have a market-based incentive to be attentive to the risk of harm to their customers. See Craswell, supra note 12.

n206. For the view that consumers are not well informed about product risks, see Howard Latin, "Good" Warnings, Bad Products, and Cognitive Limitations, 41 UCLA L. Rev. 1193, 1234 (1994). Latin argues that knowledge of "the great majority of product risks cannot be available to product users." Id.

n207. Daughety and Reinganum study the role of punitive damages in reducing product risks when consumers do not have direct information about the risks. See Daughety & Reinganum, Products Liability, supra note 12; Daughety & Reinganum, **Settlement,** supra note 12.

n208. See Patricia M. Danzon, Comments on Landes and **Posner:** A Positive Economic Analysis of Products Liability, 14 J. Legal Stud. 569, 572 (1985) (arguing that the cost of obtaining information about product hazards could be low in many circumstances and that the value of such information is high for consumer goods that are purchased repeatedly, durable consumer goods, and producer goods); Alan Schwartz, Proposals for Products Liability Reform: A Theoretical Synthesis, 97 Yale L.J. 353, 380 (1988) (arguing that "evidence drawn from surveys and actual market behavior more strongly supports the view that consumers are informed than the view that they are ignorant"). Even if consumer information about the risks of products and services is not widespread, markets may work

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reasonably well if a sufficiently large fraction of the population of potential consumers is well-informed. See Alan Schwartz & Louis L. Wilde, Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis, 127 U. Pa. L. Rev. 630, 637-39 (1979).

n209. For example, we would expect problems with automobiles, as in Gore, see supra p. 901, to come to the attention of consumers through stories in newspapers, evaluations in Consumer Reports, and the like.

n210. A similar conclusion applies when the victims of accidents are employees, rather than customers. To the degree that employees are aware of workplace risks, they will insist on higher wages (or seek employment elsewhere). Thus, market forces will tend to **induce** employers to increase workplace safety even in the absence of liability.

n211. Although punitive damages traditionally are not awarded in contract cases, exceptions often are made when the wrongful conduct is also considered to be a tort. See 1 Schlueter & Redden, supra note 74, 7.2, at 371, 7.3(A), at 377.

n212. See id. 7.0, at 369 ("Over the last twenty years, the courts have broken down the traditional doctrinal barriers between contracts and torts. The result is a growing list of exceptions to the general rule and a growing recognition of punitive damages within the law of contracts."); see also Mark Pennington, Punitive Damages for Breach of Contract: A Core Sample from the Decisions of the Last Ten Years, 42 Ark. L. Rev. 31, 46-60 (1989) (noting departures from the traditional rule against awarding punitive damages for breach of contract); John A. Sebert, Jr., Punitive and Nonpecuniary Damages in Actions Based upon Contract: Toward Achieving the Objective of Full Compensation, 33 UCLA L. Rev. 1565, 1600-47 (1986) (noting a trend toward allowing punitive damages in contract cases).

n213. See 2 Schlueter & Redden, supra note 74, 13.3(B), at 118 (discussing punitive damages in the employment context); id. 17.3(A), at 247-49, 17.4(A), at 266 (discussing punitive damages in insurance cases with respect to contract theories).

n214. Several commentators have discussed the general economic role of punitive damages in breach of contract disputes. See, e.g., Daniel A. Farber, Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract, 66 Va. L. Rev. 1443 (1980); Barry Perlstein, Crossing the Contract-Tort Boundary: An Economic Argument for the Imposition of Extracompensatory Damages for Opportunistic Breach of Contract, 58 Brook. L. Rev. 877 (1992); Alan Schwartz, The Myth That Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures, 100 Yale L.J. 369, 370-72, 395-405 (1990).

n215. The argument that we are about to make, that parties might benefit from imposition of punitive damages, also means that they might benefit from including a penalty clause in their contract - that is, an extracompensatory level of damages for breach. In practice, however, provisions detailing the damages paid in the event of breach - liquidated damage clauses - are not enforced by courts if they are determined to exceed compensatory damages. See Restatement (Second) of Contracts 356 (1979) (stating that a liquidated damages clause will be enforced if the contract specifies "an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss," but "[a] term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty"); see also U.C.C. 2-718(1) (1996) (allowing for liquidated damages provisions but rendering them void if unreasonably large).

n216. To illustrate, suppose that: (a) each light will definitely fail at some time during the year; (b) the value to the city of timely repair of a light is $ 50; (c) the cost to the contractor of assuring timely repair is $ 25; (d) the cost to the contractor of less-than-timely repairs is $

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5 (the contractor does not have to check lights as frequently); (e) the likelihood that the city detects a breach (the contractor's failure to repair a light on a timely basis) is 20%; (f) the city's payment to the contractor is $ 35 per light per year; and (g) the damages for breach are compensatory, equal to $ 50 (the value of timely repair).

Note that the contractor will not be induced to spend an extra $ 20 - $ 25 instead of $ 5 - to assure timely repair, because the extra cost to assure timely repair, $ 20, exceeds the expected damages per light of $ 10 (= 20% X $ 50). Thus, the contractor's profit per light will be $ 20 - the city's payment of $ 35, less the $ 5 cost of repairs and the $ 10 expected damage payment. The city's total cost per light is $ 75 - its $ 35 payment to the contractor, plus its $ 50 loss of value as a result of the contractor's failure to repair the light on a timely basis, less the $ 10 it receives in expected damage payments.

We want to show that both parties can benefit if punitive damages of $ 200 are also imposed for breach, so that total damages now are $ 250. Given this level of total damages, the contractor will assure timely repair because the expected damages of $ 50 (= 20% X $ 250) exceed the extra cost of assuring timely repair, $ 20. Consequently, no breach will occur, and no damages will actually be paid. Because timely repair is assured, the city will be willing to pay the contractor more. Suppose the payment is raised to $ 55 per light. Then the contractor's profits per light will be $ 30 ($ 55 less the $ 25 cost of repair), so he will be better off (because his profits had been $ 20 per light). The city's cost per light now will be $ 55 (just the fee), so it will be better off too (because its cost had been $ 75).

The source of the mutual benefit for the parties is the **threat** of $ 200 in punitive damages, which **induces** the contractor to create a $ 50 benefit for the city at only an extra $ 20 cost to itself. This enables the city to make a payment sufficiently higher to make the contractor better off and still leave itself better off.

n217. We should distinguish the present discussion from that in the previous section, which concerned injured parties who were customers. There we assumed that buyers' knowledge of product risks might **induce** sellers to take appropriate precautions. Here we are not making the analogous assumption. In our present example, we did not consider the possibility that the contractor would repair street lights on a timely basis out of a concern that his business reputation might otherwise suffer. Rather, we implicitly assumed that the prospect of damages for breach of contract is needed to motivate the contractor to repair lights on a timely basis.

n218. More generally, whenever a party buys a large quantity of a product and does not inspect every unit to determine whether the product complies with the specifications in the contract, a problem of detecting a breach can arise.

n219. For example, courts have awarded punitive damages in contract cases in which there exists a "special relationship between the parties." 1 Schlueter & Redden, supra note 74, 7.3 (A), at 388 (internal quotation marks omitted). These relationships include: "bank and depositor, employer and employee, franchiser and franchisee, lawyer and client, public utility and customer, and security broker and customer." Id. 7.3(A), at 386 (footnotes omitted). The courts argue that punitive damages are appropriate because one party has greater bargaining power. See id. 7.3(A), at 385. But this superior position, in and of itself, does not suggest that the party with the upper hand will escape liability for a breach of contract.

n220. See Chapman & Trebilcock, supra note 12, at 768-69 (suggesting that punitive damages serve as a means of compensating for dignitary loss); Ellis, supra note 12, at 3 (noting that compensating victims for otherwise uncompensable losses and paying the plaintiff's legal fees are reasons often cited by legal commentators and courts for imposing punitive damages); Dorsey D. Ellis, Jr., Punitive Damages in Iowa Law: A Critical Assessment, 66 Iowa L. Rev. 1003, 1007, 1010 (1981) (noting the use of punitive damages

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as compensation for nonpecuniary harms); Galligan, supra note 3, at 40-83 (emphasizing that compensatory damages generally should be augmented to reflect otherwise missing elements of harm); David G. Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1295-96 (1976) ("Punitive damages do indeed play an important - even if usually residual - compensatory role.").

n221. See 1 Schlueter & Redden, supra note 74, 2.2, at 27. For example, in Connecticut, "exemplary damages cannot exceed plaintiff's expenses, and therefore, in fact and effect are considered compensatory." Id. 2.2, at 27 n.1 (citing Doroszka v. Lavine, 150 A. 692, 692-93 (Conn. 1930), and Craney v. Donovan, 102 A. 640, 641 (Conn. 1917)). In Michigan, "exemplary damages are granted to compensate the plaintiff and not to punish the defendant." Id. (citing Oppenhuizen v. Wennersten, 139 N.W.2d 765, 770 (Mich. Ct. App. 1966)).

n222. More precisely, the principle would be to include a multiple of the missing component, with the multiplier determined by the defendant's chance of escaping liability.

n223. The costs of estimating such elements of harm on a case-by-case basis could be largely avoided, however, if courts were to use a table listing standard values of the missing components. This method would be an inexpensive (essentially costless) way to include missing components of damages, and it would be preferable to excluding them.

n224. Juries are given broad discretion over the award of punitive damages. See 1 Ghiardi & Kircher, supra note 203, 5.38, at 132 ("It is a generally accepted rule that once a court determines that the evidence merits submission of the punitive damages issue to the jury, it is entirely within the discretion of the jury to determine whether those damages should be awarded and to determine the amount which should be awarded."); 1 Schlueter & Redden, supra note 74, 6.1(A), at 331 (referring to the jury as "less restricted in awarding punitive damages than in awarding compensatory damages").

n225. See Eisenberg, Goerdt, Ostrom, Rottman & Wells, supra note 3, at 633 (finding that punitive damages are awarded in approximately 6% of the cases in which plaintiffs prevail).

n226. See, e.g., Lightning v. Roadway Express, Inc., 60 F.3d 1551, 1559 (11th Cir. 1995) ("In determining the reasonableness of an award of punitive damages, courts should consider whether ... the misconduct caused personal injury or merely damage to property ...."); Eisert v. Greenberg Roofing & Sheet Metal Co., 314 N.W.2d 226, 229 (Minn. 1982) (stating that the nature of the plaintiff's injury "may reasonably be taken into account in deciding where punitive damages will be allowed .... Where that injury is limited to property damage, the public interest in punishment and deterrence is largely satisfied by the plaintiff's recovery of compensatory damages."); 1 Schlueter & Redden, supra note 74, 9.5(A), at 536 ("Courts distinguish between whether property damage or personal injury was the result of the defendant's wrongdoing.").

n227. BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1599 (1996).

n228. In this context, by the proper amount of compensatory damages, we mean the amount of damages that **induces** a potential injurer to take optimal precautions to prevent personal injury. This amount might not compensate the victim for an injury - indeed, such compensation might be impossible, as in the case of loss of life. Thus, the term "compensatory damages" may be a misnomer when applied to personal injuries, but we employ it because it is used to describe the usual level of damages.

n229. Notably, compensatory damages in wrongful death cases are generally calculated as a survivor's financial loss. See Charles T. McCormick, Handbook on the Law of Damages 93-106, at 335-74 (1935). This amount usually will not lead to proper deterrence. For example,

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if a child or a non-working spouse is killed, the financial loss will be low, but the event will be one for which expensive preventive measures are justified to reduce risk. Such measures may not be taken if damages are based solely on the financial loss. For discussion of this and related points about the distinction between optimal compensation for non-monetary losses and optimal deterrence, see Shavell, supra note 14, at 228-35; Philip J. Cook & Daniel A. Graham, The Demand for Insurance and Protection: The Case of Irreplaceable Commodities, 91 Q.J. Econ. 143, 144-55 (1977); and A. Michael Spence, Consumer Misperceptions, Product Failure, and Producer Liability, 64 Rev. Econ. Stud. 561, 563-71 (1977).

n230. See Viscusi, supra note 29, at 108 (using the observed risk-dollar tradeoff of blue-collar workers to calculate that the implicit value of life is between $ 3 million and $ 6 million); Michael J. Moore & W. Kip Viscusi, The Quality-Adjusted Value of Life, 26 Econ. Inquiry 369, 386 (1988) (finding an implicit value of life of $ 6 million).

n231. See, e.g., James S. Kakalik, Elizabeth M. King, Michael Trayner, Patricia A. Ebner & Larry Picus, Costs and Compensation Paid in Aviation Accident Litigation (Institute for Civil Justice, RAND Corp., No. R-3421-ICJ, 1988). In this study of 25 major airline accidents occurring between 1970 and 1984, see id. at 4, the authors calculated that the average compensation for airline accident deaths was $ 321,300 from 1970 to 1976, and $ 408,500 from 1977 to 1982 (measured in constant 1986 dollars), see id. at 20. See also Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, Valuing Life and Limb in Tort: Scheduling "Pain and Suffering", 83 Nw. U. L. Rev. 908, 920-23 (1989) (surveying Florida and Kansas City jury verdicts and finding the median loss of life award to be $ 620,000, and the mean loss of life award to be $ 1,224,000).

n232. We here presume that problems of implementation, or considerations of cost, do not subvert this recommendation. If they do, a table of standard values for different types of personal injuries could be used instead. See supra note 223.

n233. Although the conclusion of this section is that, given the goal of deterrence, the award of punitive damages should not depend on whether the plaintiff's harm involved personal injury, the conclusion might be different with respect to the punishment objective. Notably, when personal injury occurs, members of society may well experience a stronger desire to see the defendant punished than when the harm caused by the defendant is purely economic.

n234. For example, the issue of externalizing risk is not mentioned in any of the recent major Supreme Court cases discussing punitive damages. See BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589 (1996); Honda Motor Co. v. Oberg, 512 U.S. 415 (1994); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

n235. See Restatement (Second) of Torts 409 (1965) ("Employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants."); Prosser and Keeton on the Law of Torts, supra note 30, 71, at 509 ("For the torts of an independent contractor, ... it has long been said to be the general rule that there is no vicarious liability upon the employer.").

n236. However, this strategy may not always work. For example, in Kenney v. Scientific, Inc., 497 A.2d 1310 (N.J. Super. Ct. Law Div. 1985), the court held the defendant liable for an independent contractor's transportation of toxic waste. See id. at 1323-24. The court stated that "[a] company which creates the Frankenstein monster of abnormally dangerous waste should not expect to be relieved of accountability for the depredations of its creature merely because the company entrusts the monster's care to another, even an independent contractor." Id. at 1320-21. Notwithstanding such exceptions, we will address situations in which it is possible to shift liability by hiring an independent contractor.

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n237. The point of this example holds even if the firm does not have assets sufficient to pay for the full $ 10 million in damages; as long as its assets exceed those of the independent contractor, a potential gain to the firm still exists from externalizing the risk to the contractor. For instance, suppose that the firm has assets of only $ 5 million. Its expected liability would then be $ 250,000(= 5% X $ 5 million), which still exceeds the independent contractor's expected liability of $ 50,000. Thus, the firm will continue to have an incentive to externalize its risk. (The general condition for when it will be advantageous to the firm to use an independent contractor to externalize its risk is twofold: the contractor's assets must be less than the firm's, and there must exist a positive probability that the judgment will exceed the contractor's assets.)

n238. Evidence from the oil industry is consistent with the view that firms have an incentive to externalize some of their liability risks to less well-capitalized independent contractors. For example, after the Exxon Valdez oil spill, Shell shifted some responsibility for the transport of oil from its own tanker fleet to vessels owned by independent contractors. See William J. Cook, An Easy Way Out of This Mess, U.S. News & World Rep., June 25, 1990, at 15; Caleb Solomon & Joann S. Lublin, Tanker Fire Raises Serious Questions About Liabilities in Oil Spills Off U.S., Wall St. J., June 12, 1990, at A3. Such contractors, who might own just a few supertankers (or even only one), generally are vastly smaller than the major oil companies. See Eric Nalder, Oil Firms Trying to Shield Assets from Liability for Costly Spills, Seattle Times, Sept. 26, 1991, at A6 (stating that the assets of independent transporters "are about 25 times smaller than the holdings of the oil giants"). One can think of many other industries, including those involved in the transport or disposal of hazardous materials, in which risks can be externalized to independent contractors that are much smaller than the firms that hire them.

n239. For instance, consider a safety device that would reduce the magnitude of harm from an accident from $ 10 million to $ 5 million. This device would be of value to the firm if the firm is exposed to liability, because it would reduce the firm's expected damages by half; however, the device would be of no value to the independent contractor, for the contractor is only capable of paying $ 1 million. Similarly, consider a safety device that reduces the likelihood of a $ 10 million accident by 1%. This device will be worth $ 100,000 to the firm (= 1% X $ 10 million), so the firm will pay up to $ 100,000 for the device, but it will be worth only $ 10,000 to the independent contractor (= 1% X $ 1 million), so that the contractor might not buy the device when the firm would have.

n240. In the oil industry, for example, it is plausible that tankers owned by independent contractors are more prone to accidents than tankers owned by large oil companies. Compare Cook, supra note 238, at 15 (describing independent tankers as "clunkers" operating under "lax standards" with "badly trained crews"), with Daniel Southerland, Mobilizing the Fleet: Oil Giant Hopes Emphasis on Tanker Safety Also Will Produce Profits, Wash. Post, June 23, 1996, at H1 (emphasizing the high safety standards maintained by Mobil's shipping subsidiary).

n241. For a discussion of the advantages of performing tasks within a firm, rather than delegating them to independent contractors, see, for example, R.H. Coase, The Nature of the Firm, 4 Economica 386, 390-92 (1937); Oliver Hart, Firms, Contracts, and Financial Structure 1-92 (1995); and Jean Tirole, The Theory of Industrial Organization 15-60 (1988).

n242. See supra pp. 910-11.

n243. The only reference to this effect of which we are aware is in Kemezy v. Peters, 79 F.3d 33 (7th Cir. 1996), in which Chief Judge **Posner** noted in dictum that "punitive damages are necessary in some cases to make sure that people channel transactions through the market when the costs of voluntary transactions are low." Id. at 34.

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will not be liable under a negligence rule for harms that result if its product nonetheless turns out to be flawed; as a result, too much of the product will tend to be produced. [35]

However, because non-negligent parties sometimes will be found liable by mistake, they will sometimes bear damages. In principle, this erroneous imposition of liability could mitigate the problem that the negligence rule may **induce** parties to participate in risky activities to an excessive degree. However, finding parties negligent by mistake may result in their bearing damages in excess of the harm they have caused, [36] and thereby discourage their participation in the activity to an inappropriate extent. This effect, if it occurs, will be exacerbated by raising the level of damages.

This discussion of the negligence rule shows that the optimal level of damages is not as easily determined as under the strict liability rule. **[*886]** Under strict liability, we concluded that damages should equal harm. Under the negligence rule, we have observed that, in the absence of mistakes, damages equal to harm will appropriately encourage parties to take precautions, but so will higher levels of damages. [37] In the presence of mistakes, the optimal level of damages under the negligence rule is difficult to ascertain, although it is clear from what we have said that if damages are set too high, parties will tend to be induced to take excessive precautions; moreover, they will not participate in their activities to an appropriate degree. In the light of the preceding points, and recognizing that there is not a simple, theoretically correct answer to the question of what level of damages is optimal under the negligence rule, we will assume for the purpose of our analysis that optimal damages under the negligence rule equal harm. [38]

This concludes our review of the implications of deterrence theory for the optimal level of damages under the rules of strict liability and negligence when injurers will be found liable with certainty. Because damages should equal harm under the strict liability rule, and because we assume that damages should equal harm under the negligence rule for the reasons given, we generally will not distinguish between the rules in our subsequent discussion.

In passing, we want to note that the principal conclusion reached in this section - that damages should equal harm - depends on how potential injurers respond to risk. We have implicitly assumed that they are risk neutral. This means that, in considering situations of risk, parties care only about the expected value of a risky situation - that is, the magnitude of a potential loss or gain multiplied by the probability of the loss or gain occurring. [39] If injurers are risk averse (they dislike uncertainty itself) [40] and cannot purchase liability insurance, the optimal level of damages tends to be lower than the harm: setting damages below the harm reduces the imposition of risk on in- **[*887]** jurers, and damages do not need to be as great as the harm to **induce** injurers to behave appropriately. [41]

Notwithstanding this last point, we will usually assume in our subsequent analysis that, when injurers are found liable for sure, the level of damages that is optimal with respect to deterrence is equal to harm, [42] for two reasons. First, even if parties are risk averse, if they can purchase liability insurance, it can be shown that the optimal level of damages still equals harm. [43] Second, it can be demonstrated that publicly held firms should be treated as approximately risk neutral - implying that damages should equal harm - if their shareholders have well-diversified portfolios, which often, if not usually, will be the case. [44]

B.

Optimal Damages When the Defendant Can Sometimes Escape Liability

The main point that we will develop in this section is that if a defendant can sometimes escape liability for the harm for which he is responsible, the proper magnitude of damages is the harm the defendant has caused, multiplied by a factor reflecting the probability of his

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n244. The point that inducing market transactions may better lead potential injurers to take harm into account was made by Guido Calabresi and A. Douglas Melamed. See Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1115-24 (1972). This point has been developed by others. See Biggar, supra note 12; Haddock, McChesney & Spiegel, supra note 12; Louis Kaplow & Steven Shavell, Property Rules Versus Liability Rules: An Economic Analysis, 109 Harv. L. Rev. 713 (1996); Landes & **Posner,** supra note 12.

n245. In these circumstances, a potential victim would have an incentive to pay a potential injurer not to cause harm. Such a payment might not occur, however. For example, if there are many potential injurers, paying one not to cause harm would not forestall others from causing harm. See Kaplow & Shavell, supra note 244, at 722.

n246. See supra p. 879.

n247. For example, suppose a seller holds out for a high price and ultimately refuses to sell to a potential buyer who places a much greater value on the item at issue. In such circumstances, it may be better to set damages equal to harm and allow the "buyer" to take the item and pay damages than to encourage bargaining. See Calabresi & Melamed, supra note 244, at 1106-07.

n248. If there is a probability of escaping liability, the punitive damages amount that is appropriate for the purpose of encouraging market transactions should itself be inflated according to the multiplier formula that we developed above. See supra section II.B.

n249. See George P. Fletcher, Rethinking Criminal Law 6.3.2, at 417 (1978) ("The offender is duty-bound to suffer punishment, for his offense creates an imbalance of benefits and burdens in the society as a whole." (citing Herbert Morris, On Guilt and Innocence 34-36 (1976))); Walter Moberly, The Ethics of Punishment 95 (1968) (stating that, under a retributive theory, "punishment should serve both to express and to deepen the horror with which certain types of action ought to be regarded"); Herbert L. Packer, The Limits of the Criminal Sanction 37 (1968) ("The retributive view [of punishment] rests on the idea that it is right for the wicked to be punished: because man is responsible for his actions, he ought to receive his just deserts."); C.L. Ten, Crime, Guilt, and Punishment: A Philosophical Introduction 2 (1987) ("Punishment involves the infliction of some unpleasantness on the offender ...made to express disapproval or condemnation of the offender's conduct which is a breach of what is regarded as a desirable and obligatory standard of conduct.").

n250. It is not necessary for our purposes to settle on a more refined definition of blameworthiness or culpability.

n251. A formal interpretation of this assumption is that an individual's utility depends on, and increases with, the magnitude of a variable that measures the extent to which a party who committed a reprehensible act is appropriately punished. (To describe this variable - call it V - more precisely, let S denote the level of the actual sanction, let R be the reprehensibility of the act, and let S(R) represent the ideal punishment given R. Then V is higher the closer S is to S(R).) Because social welfare depends on individual welfare, social welfare is advanced by punishing reprehensible parties appropriately.

The relationship between the punishment objective and the deterrence objective is discussed below. See infra notes 272-273 and accompanying text.

n252. It will be evident that, for the most part, our arguments will also hold if the punishment objective derives its force not from individual pleasure and satisfaction at seeing blameworthy parties punished, but from an abstract philosophical principle calling for

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retribution.

n253. A qualification to this statement concerns liability insurance. If the punished party is insured, the degree to which he is punished depends on the extent to which his coverage is incomplete (because of, for example, deductibles or coinsurance) and the possibility that his premiums will rise in the future.

n254. A number of authors have discussed the punishment rationale in relation to corporations as entities. See, e.g., Albert W. Alschuler, Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand, 71 B.U. L. Rev. 307, 312 (1991) (arguing that corporate criminal responsibility is the unwise result of a "superstitious" hatred of the inanimate corporation); V.S. Khanna, Corporate Criminal Liability: What Purpose Does It Serve?, 109 Harv. L. Rev. 1477, 1494 n.91 (1996) (describing "the notion that society has a retributive need so great that it must punish nonhuman entities and label them criminal" as "implausible"); Developments in the Law - Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv. L. Rev. 1227, 1237 (1979) ("Even though deterrence clearly plays a critical role in the justification of corporate criminal sanctions, the argument that retribution cannot be involved is unconvincing."). As Christopher Stone notes:

Corporate penalties often impose losses in circumstances when no one appears blameworthy .... True, we allow some of these same innocents to suffer ... when corporate agents wrongfully break a contract or commit a tort .... But it seems one thing to make a blameless investor help absorb ordinary damages ... and quite another thing to reduce his investment further by imposing a penalty.

n255. hristopher D. Stone, The Place of Enterprise Liability in the Control of Corporate Conduct, 90 Yale L.J. 1, 27 (1980).[su' ']For a similar reaction to the idea of corporate punishment, see Alschuler, cited above in note 254, at 312-13.

n256. Because the punishment objective is, according to our approach, derived from the desire of individuals to punish culpable parties, the importance of the view that corporations per se should be punished is an empirical matter, dependent on how many individuals hold this position and how strongly. We would not be surprised to find that many individuals firmly believe that it is proper to punish corporations as entities, but we also suspect that, were these individuals to consider seriously the distinction between that goal and the goal of punishing only culpable employees, they would soften, if not reverse, their position.

n257. Although firms may have difficulty identifying culpable employees for the reasons discussed in this paragraph, imposition of punitive damages might **induce** firms to take additional steps to discover such individuals. If punitive damages have this effect, their imposition could help to satisfy the punishment objective.

n258. It may be worth elaborating on this point. If employees are risk neutral (which we assume here for simplicity), a firm would seek to make an employee pay for any damages he caused the firm to bear; such a practice would make the employee's incentives to prevent harm correct from the firm's perspective. Thus, if damages are $ 1000, the employee would pay this amount to the firm. But because an employee's assets are limited, the firm's ability to punish an employee will be exhausted as soon as the judgment against the firm exceeds the employee's assets. Thus, if the employee's assets are $ 10,000, no marginal effect of higher damages will occur once the total damages exceed $ 10,000. (The situation just described ignores other possible responses of the firm to higher damages. For example, firms might increase their efforts to detect employee misconduct and thereby increase the expected punishment of employees. But our basic point would still apply.)

n259. However, individuals who have changed jobs or retired might be subject to punishment by their former employer because the employer might be able to sue them for

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acts done when employed.

n260. Of course, some other person within the firm may have been responsible for directing the flow of information, but that person also may not have acted culpably.

n261. Other stakeholders of the firm also will suffer, such as unsecured creditors who are less likely to be repaid if the firm's assets are diminished because of the payment of punitive damages.

n262. Because blameworthy employees generally will bear only a small part of a punitive damages judgment (on account of their limited assets), shareholders and customers will suffer the major part. Under certain circumstances, moreover, customers will not bear much of the burden of punitive damages. See infra note 264.

n263. If one does believe that each shareholder is slightly blameworthy, the fact that each bears a small portion of punitive damages might be thought to be desirable.

n264. If, however, a particular firm bears punitive damages for a reason not generally applicable to other firms in its industry, these other firms would not have a reason to raise their prices. Consequently, the firm paying the punitive damages would not be able to raise the price of its products (because consumers would purchase from the other firms).

n265. However, it might be thought that customers are partially blameworthy for harms caused by firms because, in the absence of customer interest in firms' products, production and harms would not occur.

n266. For a complementary discussion of the effects of corporate sanctions on a firm's shareholders, bondholders, employees, and customers, see John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386, 401-02 (1981). Coffee observes that "the costs of [corporate] deterrence tend to spill over onto parties who cannot be characterized as culpable." Id.

n267. We will not, however, re-examine the other topics in Part III in relation to punishment. For the most part, what can be said about these topics is clear. Consider, for example, the issue of the tax deductibility of punitive damages. Allowing punitive damages to be deductible would reduce their sting, and so might be undesirable in terms of accomplishing the punishment objective. Likewise, allowing liability insurance coverage against punitive damages also might be undesirable from the perspective of punishment.

n268. We mentioned this point above. See supra note 138 and accompanying text. How much the penalty must rise will be determined by the rate at which the marginal utility of money declines with wealth for the individual. In particular, there is no reason to believe that the proper penalty for purposes of punishment would be proportional to wealth.

n269. We say "might" because the first view is not well articulated, and therefore it is unclear what this view would imply about the proper relationship between the level of punitive damages and a corporation's wealth.

n270. The reasoning behind this statement is essentially that used above when we explained that a firm's wealth will not affect its incentive to invest in safety precautions. See supra section III.B.

n271. We have not addressed in this Part the institutional question of who should determine the proper level of damages for purposes of promoting the punishment goal of punitive damages. For an interesting empirical examination and discussion of this question,

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see Cass R. Sunstein, Daniel Kahneman & David Schkade, Assessing Punitive Damages (With Notes on Cognition and Valuation in Law), 107 Yale L.J. (forthcoming May 1998).

n272. For example, suppose that the level of damages that is best with respect to deterrence is $ 1 million and that the amount that is best with respect to punishment is $ 2 million. The optimal amount, taking account of both objectives, must be between $ 1 and $ 2 million. As damages are increased from $ 1 million to $ 2 million, overdeterrence occurs, but punishment is better promoted. It is optimal to stop raising damages when the marginal social loss from overdeterrence begins to outweigh the marginal social gain from better punishment. (To complete the explanation, observe that optimal damages cannot be less than $ 1 million or more than $ 2 million: were damages less than $ 1 million, the outcome would be worse with respect to both the deterrence and the punishment goals than if damages were $ 1 million; and were damages in excess of $ 2 million, the outcome would be worse with respect to both goals than if damages were $ 2 million.) For further discussion regarding the choice of the level of punitive damages that best balances the deterrence and punishment goals, see Diamond, Punishment and Efficiency, supra note 12, at 11-14.

n273. In essence, the amounts should not be added because the punitive damages amount that is proper for the purpose of deterrence also punishes, and the punitive damages amount that is proper for the purpose of punishment also deters.

It is easy to see in the example in the preceding note that it would not be correct to add the $ 1 million amount that is best for deterrence to the $ 2 million amount that is best for punishment and impose damages of $ 3 million. To amplify on what we stated parenthetically in that note, if damages of $ 2 million are best with respect to punishment, then damages of $ 3 million would punish excessively and thus would be worse than damages of $ 2 million; that is, damages of $ 2 million are superior to $ 3 million in terms of punishment. Also, damages of $ 2 million are superior to damages of $ 3 million in terms of deterrence, for $ 3 million overdeters more than $ 2 million overdeters. Hence, damages of $ 3 million cannot be optimal: damages of $ 2 million are superior from the perspectives of both punishment and deterrence (and, as we argued in the preceding note, the optimal level of damages must be between $ 1 million and $ 2 million).

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escaping liability. As we will explain, use of such a multiplier will make defendants pay on average for harm actually done and thus will lead **[*888]** to socially desirable behavior in terms of precautions and participation in risky activities.

There are several reasons that injurers sometimes escape liability for harms for which they should be liable. First, the victim may have difficulty determining that the harm was the result of some party's act - as opposed to simply being the result of nature, of bad luck. For instance, an individual may develop a form of cancer that could have been caused by exposure to a naturally occurring carcinogen, such as radon gas, but which was in fact caused by exposure to a manmade carcinogen that was released by the injurer.

Second, even if the victim knows that he was injured by some party's conduct, he may have difficulty proving who caused the harm. The owner of a parked car that was damaged might know that it had been struck by another vehicle, but not be able to identify the injurer. Those living near a polluted lake might know both that pollution is responsible for an unusually high rate of disease in their neighborhood and who the polluters are, but not be able to establish causation in court.

Third, even if the victim knows both that he was wrongfully injured and who injured him, he might not sue the injurer. A person will tend not to bring a suit if the legal cost and the value of the time and effort he would have to devote to the suit exceed the expected gain. The decision to forgo suit will often occur when the harm the victim has suffered is relatively small or the likelihood of establishing causation is low. (Additionally, a victim might not sue if he has a distaste for the legal process.)

For one or more of the above reasons, injurers will sometimes be able to escape liability for harms for which they should be held responsible. [45] The consequences of this possibility are clear: if damages merely equal harm, injurers' incentives to take precautions will be inadequate and their incentive to participate in risky activities will be excessive. Suppose that there is only a one-in-four chance that an injurer will be found liable for a $ 100,000 harm, for which he would have to pay damages of $ 100,000. On average, then, the injurer will **[*889]** pay $ 25,000 when he causes the harm - only a fraction of the harm caused. If the harm could have been prevented each time by taking a $ 50,000 precaution, the injurer will not have an adequate incentive to take the precaution, because the precaution cost will exceed his average liability cost by a substantial margin. Moreover, because the injurer will pay only $ 25,000 on average for a $ 100,000 harm, he will engage in the risky activity to an excessive degree. If the injurer is a firm, the price of its product will rise by an amount reflecting only one-quarter of the harm caused, leading consumers of the product to buy more of it, and thereby cause more harm, than is socially desirable.

To remedy these problems of underdeterrence, damages that are imposed in those instances in which injurers are found liable should be raised sufficiently so that injurers' average damages will equal the harm they cause. In the example in the preceding paragraph, in which the chance of being found liable for having caused a $ 100,000 harm is only one in four, damages should be raised to $ 400,000. Then, on average, the injurer will pay $ 100,000 when he causes the harm - on average, every four times he causes harm, he will be found liable once for $ 400,000. Equivalently, his total damages will tend to equal the total amount of harm that he has caused. [46] As we emphasized above, [47] making injurers liable for the harm they cause will **induce** them to take proper precautions and participate appropriately in risky activities.

This discussion suggests a simple formula for assuring that injurers will pay for the harms they cause: the total damages imposed on an injurer should equal the harm multiplied by the reciprocal of the probability that the injurer will be found liable when he ought to be. [48] We will refer to this multiplier as the total damages multiplier. In the example in the preceding paragraph, the probability that the injurer would be found liable was one in four, or .25;

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*667 HOPE FOR THE TORT SYSTEM: CONGRESSIONAL PROPSALS FOR REFORM

Christopher Cox [FNa1]

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Christopher Cox

The tort system, as it operates today, envisions a trip through the supermarket or to the car dealership as a walk through a mine field, where seemingly ordinary American businessmen and women are out to kill and maim--not just inadvertently or negligently, but intentionally. It posits a rigid dichotomy between the wholly culpable and evil, on the one hand, and the literally irresponsible victims.

The result is a radically dysfunctional tort system that invites and receives public contempt. It cruelly cheats both genuine victims and innocent defendants. The Rand Corporation recently concluded, "[T]he emerging data suggest that the tort liability system serves too many people it shouldn't serve, or at least pays them too much, doesn't serve enough of the people it should serve, and doesn't serve many well enough." [FN1] Former Attorney General William P. Barr wrote in a letter to Congress last year: "Our civil justice system is slow, expensive, uncertain, and capricious." [FN2] Fifty percent of all liability expenses go to attorneys and transaction costs, not the victims. A recent study estimated that the American tort system generated $152 billion in direct--not indirect--costs in 1994 alone. [FN3]

The indirect costs are even worse. Tort liability accounts for over ninety- five percent of the cost of some childhood vaccines. [FN4] The D.C. area Girl Scouts have to sell 87,000 boxes of cookies ***668** each year to pay for the cost of their liability insurance. [FN5] And one out of every four obstetricians reduces or eliminates care to high-risk women for fear of being sued. [FN6]

The most tragic result is our loss of liberty. We are a liberty-loving people. We do not want the government to go through our papers, to kick down our front door, or to rummage through our belongings, so we have very strict rules about what the government can do in the investigation of even the most serious crimes. [FN7] In civil cases, however, the state casually delegates to individual lawyers those very powers through our discovery process. [FN8] The people wielding this power could be the business competitors or the personal enemies of the defendant. They are not prosecutors carefully selected and appointed, but nonetheless they exercise state power when they strip opposing litigants of their liberty in this most personal way.

The House of Representatives's tort reform proposals [FN9] are designed to start the process of restoring the word justice in our civil justice system. Most of our proposals are built on pure common sense. For example, in the products liability area, blameless sellers should not be held responsible for the manufacturer's conduct, and so our bill would limit the seller's liability to those cases in which the seller failed to exercise reasonable ***669** care and thereby proximately caused the harm. [FN10] Our bill would provide a defense to product liability if the claimant's drug or alcohol use was more than fifty percent responsible for the accident. [FN11] Moreover, if a jury finds a defendant one percent liable, he should not have to pay one hundred percent of the damages, and thus our bill would abolish joint and several liability in favor of a fair-share rule. [FN12] Finally, our bill would restrict somewhat the use of junk science [FN13] to bolster the causation requirement in tort law. [FN14]

Further needed reforms must await more ambitious legislative proposals. For example, even when a defendant gets to the end of what might be a five, six, or seven-year long process and is completely exonerated of liability, that

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defendant still loses because of all the transaction costs. We hope to change that eventually, but the legal reform legislation we have introduced is--after all--just a start. [FN15]

If we are to have effective tort reform, people must stop looking for a riskless society. We must accept that life involves risk and that losses should not be recoverable from a bystander on the flawed premise that "someone" must always pay, even for accidents. And we must remove the blinders that have made us treat the tort system as the best, or even the only, means to manage and compensate risk. When all one has is a hammer, every problem looks like a nail. We will be unable to reform our current system profoundly until we realize we have many tools besides the court system and tort law to deal with risk and injuries in our society. We have deformed the tort system profoundly by treating it as the sole answer to these problems. As a result, all ***670** too often the motto above the courthouse door should be the admonition from Dante's Inferno: "Abandon hope all ye who enter here." [FN16] I hope that very soon we can restore the old motto: "Equal Justice Under Law."

[FNa1]. Member, U.S. House of Representatives (R.-Cal.).

[FN1]. Metaphors, and Facts, About Litigation Trends, FACTS & TRENDS, Spring 1995, at 7.

[FN2]. 141 CONG. REC. H2873-01 (daily ed. Mar. 8, 1995) (statement of Rep. Henry Hyde (R.-Ill.) (quoting former Attorney General Barr).

[FN3]. See TILLINGHAST TOWERS PERRIN, TORT COST TRENDS: AN INTERNATIONAL PERSPECTIVE 3 (1995).

[FN4]. See Richard L. Manning, Changing Rules in Tort Law and the Market for Childhood Vaccines, 37 J.L. & ECON. 247, 273 (1994) (finding that approximately 96 percent of the wholesale price of the vaccine against diphtheria, pertussis, and tetanus goes toward litigation costs).

[FN5]. See 141 CONG. REC. H2735-04 (daily ed. Mar. 7, 1995) (statement of Rep. Good-latte).

[FN6]. See 1 INST. FOR MEDICINE, MEDICAL PROFESSIONAL LIABILITY AND THE DELIVERY OF OBSTETRICAL CARE 40, 74 (1989). An obstetrician has a 70 percent chance of being sued during his career. See id. at 2.

[FN7]. See, e.g., U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ....").

[FN8]. For example, the federal standards for discovery are remarkably broad:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1).

[FN9]. The Contract With America's Common Sense Legal Reform Act was introduced at the beginning of the 104th Congress as three separate bills. See Private Securities Litigation Reform Act of 1995, H.R. 1058, 104th Cong., 1st Sess. (1995); Attorney Accountability Act of 1995, H.R. 988, 104th Cong, 1st Sess. (1995); Common Sense Product Liability and Legal Reform Act of 1995, H.R. 956, 104th Cong., 1st Sess. (1995).

[FN10]. See Common Sense Product Liability and Legal Reform Act of 1995, supra note 9, § 103.

[FN11]. See id. § 104.

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[FN12]. See id. § 110.

[FN13]. See Attorney Accountability Act of 1995, supra note 9, § 3.

[FN14]. The above reforms were contained in the Contract legal reform legislation as originally introduced. The conference report on legal reform as finally adopted this year modified these provisions. Passed by the House on March 29, 1996 by a vote of 259-158, the conference report included both the protection for product sellers and drug-alcohol defense. It did not include provision dealing with "junk science." The report prohibits joint liability for noneconomic loss, allocating liability in direct proportion to the percentage of responsibility. These reforms apply to product liability cases, not to all tort actions. See Common Sense Product Liability and Legal Reform Act of 1995, supra note 9.

[FN15]. Under the Contract legislation, a full-recovery rule providing that a prevailing party would be reimbursed for all of his fees and expenses was adopted, but solely in diversity cases.

[FN16]. DANTE ALIGHIERI, THE DIVINE COMEDY canto III, 1. 9 (1320).

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NOTES; "COMMON SENSE" LEGISLATION: THE BIRTH OF NEOCLASSICAL **TORT REFORM**

SUMMARY:
... Recent federal and state **tort reform** resembles a political juggernaut crushing virtually all obstacles in its path. ... I. The Era of Classical **Tort Reform** ... Classical reformers wish to lower or abolish noneconomic and punitive damages, and to abolish joint and several liability. ... Tenet Nine of the Contract with America called for a variety of **tort reforms** including, inter alia, the institution of punitive damage limitations, reformation of the products liability laws, and adoption of the British rule of attorney fee-shifting. ... Common Sense **tort reform** would benefit from abandoning the classical goal of curtailing punitive damages and instead focusing on improving the current punitive damage system with the help of the insights of modernist legal scholars. ... The doctrine of joint and several liability originated in British common law and was initially applied in cases in which multiple tortfeasors committed a "shared **tort**" by breaching a common duty or injuring a plaintiff in concert. ... Classical **tort** reformers called "joint and several liability the "deep-pocket theory' because it encourages plaintiffs to seek out defendants of minimal culpability but maximum financial ability and add them to the suit to bankroll the expected judgment." ... Even during the age of classical **tort reform,** many scholars praised joint and several liability as encouraging settlement. ...

TEXT:
[*1765]

Recent federal and state **tort reform** resembles a political juggernaut crushing virtually all obstacles in its path. Notorious **tort** cases have attracted public scorn, n1 creating a political atmosphere receptive to **reform** proposals. The Republican Party has attempted to capitalize on this atmosphere at the state level and, since the 1994 elections, at the federal level as well. Its success in the states has been considerable. n2 Republican success at the federal level, however, has been more limited. Although "Common Sense" legal **reform** bills flew through the House of Representatives, the Senate amended the bills, which now face the threat of a Presidential veto. n3 The disagreement between the two chambers of Congress and the President belies the apparently strong popular consensus over the content of **tort reform.**

This Note explores the nature and source of this consensus. **Tort** law commentators have conducted the war over the nature and desirability of **tort reform** largely in economic terms. n4 Positivists such as Richard Posner contend that existing law is largely efficient, n5 while normativists such as Steven Shavell argue that changes would make the law more efficient. n6 **Tort** law scholars generally share a strong faith that their arguments will influence the national debate on **tort** [*1766] **reform.** One prominent law and economics scholar, George Priest, concludes that the force of his school's scholarship has made **tort reform** inevitable. n7

This Note argues that these scholars have overestimated the influence of legal scholarship on **tort reform.** Despite groundbreaking academic analyses of joint liability, punitive damages, and other aspects of the **tort** system, the 1995 "Common Sense" federal **tort reforms** embody essentially the changes urged by legal scholars more than twenty years ago. While academics no longer call for the wholesale eradication of noneconomic damages or joint and several liability, legislators do. Rather than speculate about the impetus behind current federal **tort reforms,** this Note attempts to show that both federal and state **tort reform** would benefit from incorporating the insights of modern legal scholars.

n32. See, e.g., Mich. Comp. Laws Ann. 600.6309 (West 1987) (allowing for automatic periodic payments when judgments exceed a fixed amount).

n33. These fee-shifting provisions allowed the judge to award fees only to the defendant in cases in which a suit was brought in bad faith or in order to harass the defendant. See, e.g., Fla. Stat. Ann. 57.105 (West 1994 & Supp. 1996); Haw. Rev. Stat. 607-14.5 (1988).

n34. See, e.g., Mich. Comp. Laws Ann. 600.4951-4969 (West 1987).

n35. See James A. Henderson, Jr. & Aaron D. Twerski, Products Liability: Problems and Process 859-62 (2d ed. 1992) (describing state **tort reform** proposals from 1986 to 1991).

n36. See Carl Tobias, Common Sense and Other Legal **Reforms,** 48 Vand. L. Rev. 699, 700 (1995).

n37. See Kramer, supra note 1, at 8.

n38. H.R. 917, 104th Cong., 1st Sess. (1995). The bill was sponsored by Representative Michael Oxley of Ohio and introduced in the House on February 13, 1995. House Bill 917 has been reported in the House, but no action has been taken on it since March 1, 1995. See 141 Cong. Rec. H2486 (daily ed. Mar. 1, 1995).

n39. H.R. 955, 104th Cong., 1st Sess. (1995). The bill was introduced on February 15, 1995, by Illinois Representative Henry Hyde. On the same day, House Bill 955 was referred to the House Judiciary Committee, where it has remained to date. See 141 Cong. Rec. H1849 (daily ed. Feb. 15, 1995).

n40. H.R. 10, 104th Cong., 1st Session (1995). The bill was introduced by Representative Henry Hyde on March 22, 1995. House Bill 10 had an impressive 150 co-sponsors when it was initially introduced. House Bill 956 now encompasses the majority of Title I of House Bill 10.

n41. H.R. 956, 104th Cong., 1st Sess. (1995). The bill was introduced by Representative Henry Hyde on February 15, 1995. See 141 Cong. Rec. H1849.

n42. H.R. 956 2(a); H.R. 955 8(A), (C); H.R. 917 6(c)(1).

n43. See H.R. 956 201(b); H.R. 10 (C), (D); H.R. 955 8(B); H.R. 917 6(c)(2).

n44. See H.R. 956 109; H.R. 10 (C), (D); see also H.R. 955 6 (eliminating such liability for damages generally); H.R. 917 5(c) (eliminating liability for noneconomic damages only).

n45. See H.R. 956 107; H.R. 917 4.

n46. See H.R. 10 103. The bills contain other miscellaneous provisions limiting defendants' liability. Some would provide manufacturers with a complete defense if the accident was more than 50% attributable to the plaintiff's use of alcohol or drugs. See H.R. 956 105; H.R. 955 5; H.R. 917 7(a). Others would create a two-year statute of limitations for most products liability actions, see H.R. 917 8(a), and bar most claims not filed within fifteen years of the delivery of a "capital good" to its first purchaser, see H.R. 956 109; H.R. 955 7; H.R. 917 8(b).

n47. See H.R. 10 202, 204 (addressing frivolous securities litigation); H.R. 917 12.

n48. See H.R. 10 101 (proposing the adoption of the English rule in federal civil diversity litigation).

The goals of reducing defendant liability and deterring frivolous litigation have been somewhat controversial in both chambers of Congress. For example, the Common Sense Legal Standards **Reform** Act of 1995 (House Resolution 956) was amended several times in the House before going to the Senate, where it was again amended numerous times. Amendments added in the Senate include the Snowe amendment to limit the amount of punitive damages that may be recovered in a health care liability action. See 141 Cong. Rec. S5940 (daily ed. May 2, 1995).

Moreover, a number of other amendments relating to the punitive damages provision were proposed but rejected by the House, including the Furse amendment, which would have stricken the clear and convincing burden of proof requirement, see 141 Cong. Rec. H2940 (daily ed. Mar. 9, 1995), the Hoke amendment, which would have required that 75% of punitive damage awards in civil cases exceeding $ 250,000 be forfeited to the treasury of the state in which the action was brought, see 141 Cong. Rec. H2951 (daily ed. Mar. 9, 1995), and a motion to raise the cap on punitive damages to $ 1 million, see 141 Cong. Rec. H3026

(daily ed. Mar. 10, 1995). The two Houses have had considerable difficulty in reconciling the differing versions of the bill. See 141 Cong. Rec. S17,674 (daily ed. Mar. 9, 1995).

n49. This section of the Note analyzes the Common Sense **tort reform** efforts at reducing defendant liability and frivolous lawsuits. See supra pp. 1769-70. In discussing **reforms** that reduce defendants' liability, this Note will focus solely on the proposals to cap punitive damages and eliminate joint and several liability, because these proposals are considered most important by commentators, see, e.g., Manzer, supra note 25, at 628, and at least the former has become an important point of contention between the President and Congress, see supra note 3.

n50. Precursors to punitive damages existed in the Code of Hammurabi as early as 2000 B.C. See James B. Sales & Kenneth B. Cole, Jr., Punitive Damages: A Relic That Has Outlived Its Origins, 37 Vand. L. Rev. 1117, 1119 (1984).

n51. See id. at 1126.

n52. See James D. Ghiardi & John J. Kircher, Punitive Damages: Law and Practice 2.02, at 4-5 (1995).

n53. See id. 2.06, at 13-14.

n54. Some commentators argue that, because the majority of jurisdictions allow manufacturers to insure against punitive damage claims, punitive damages no longer serve a significant deterrent purpose. See, e.g., Sales & Cole, supra note 50, at 1163. This view seems to overlook the possibility that insurers may (1) require manufacturers to take certain precautions in order to qualify for coverage, (2) raise premiums of manufacturers who are hit with punitive damage claims, or (3) deny coverage to manufacturers who are repetitively held liable for punitive damages.

n55. See Bruce Chapman & Michael Trebilcock, Punitive Damages: In Search of a Rationale, 40 Ala. L. Rev. 741, 742-43 (1992).

n56. See, e.g., Dorsey D. Ellis, Jr., Punitive Damages, Due Process, and the Jury, 40 Ala. L. Rev. 975, 988 (1989).

n57. See Lucian A. Bebchuk, Suing Solely to Extract a Settlement Offer, 17 J. Legal Stud. 437, 448 (1988); David Rosenberg & Steven A. Shavell, A Model in Which Suits Are Brought for Their Nuisance Value, 5 Int'l Rev. L. & Econ. 3, 3-6 (1985).

n58. See **Tort** Policy Working Group, Report of the **Tort** Policy Working Group on the Causes, Extent, and Policy Implications of the Current Crisis in Insurance Availability and Affordability 66-69 (1986).

n59. See Dickinson R. Debevoise, A Trial Judge's View of **Tort Reform,** 25 Seton Hall L. Rev. 853, 855-57 (1994) (noting anecdotal evidence that HMOs suffer large punitive damage awards).

n60. See, e.g., A. Mitchell Polinsky & Steven A. Shavell, Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?, 13 Int'l Rev. L. & Econ. 239, 240 (1993).

n61. See William M. Landes & Richard R. Posner, New Light on Punitive Damages, Register, Oct. 1986, at 33.

n62. If liability is routinely imposed for damage actually caused, the price of the product will rise to include an efficient "risk premium" that reflects the expected accident costs of the product's use. Adding liability for punitive damages will result in the inclusion of an additional (inefficient) price premium that reflects the expected cost of punitive damages. See generally A. Mitchell Polinsky, An Introduction to Law and Economics 94-104 (2d ed. 1989) (discussing how legal liability leads to product price premiums).

n63. Note that the Common Sense **reforms** do not address this critique, because they raise the scienter requirement for punitive damages to a recklessness standard. See supra p. 1769.

n64. Darryl Biggar, A Model of Punitive Damages in **Tort,** 15 Int'l Rev. L. & Econ. 1, 1 (1995).

n65. See William M. Landes & Richard R. Posner, The Economic Structure of **Tort** Law 15 (1987).

n66. See U.S. Gen. Accounting Office, Report to the Chairman, Subcomm. on Commerce, Consumer Protection, and Competitiveness, Comm. on Energy and Commerce, House of Representatives, Product

Liability, Verdicts and Case Resolution in Five States, GAO/HRD-88-89, at 2 (Sept. 1989).

n67. See Stephen Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1, 28-31 (1990).

n68. Id. at 43.

n69. Michael Rustad, In Defense of Punitive Damage Awards in Products Liability: Testing **Tort** Anecdotes with Empirical Data, 78 Iowa L. Rev. 1, 45 (1992).

n70. The Rand Corporation studied two counties in California and found that, in one county, the average punitive damage award jumped 1500% percent between 1980 and 1984. See American **Tort Reform** Ass'n, Punitive Damages Update, Relevant Studies on **Tort Reform**/Punitive Damages (Apr. 12, 1989). But a study with such a small sample size cannot overshadow the numerous larger studies revealing contradictory results.

n71. See generally Janie L. Shores, A Suggestion for Limited **Tort Reform:** Allocation of Punitive Damage Awards to Eliminate Windfalls, 44 Ala. L. Rev. 61, 87 (1992) ("Capping punitive awards at a specific monetary level is an inefficient way to deter harmful misconduct, because each defendant's economic situation is different.").

n72. See, e.g., id. at 90-92. Most scholars suggest that the state would receive the plaintiff's forfeited award. Nonetheless, nothing requires that the state be the recipient of the forfeited funds, and state-received punitive damage awards may be subject to constitutional scrutiny under the Excessive Fines Clause. See Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 264 (1989). A superior alternative has been adopted by states that "give money to such things as health plans, rehabilitation services, [and] insurance assistance programs." James A. Breslo, Comment, Taking the Punitive Damage Windfall Away from the Plaintiff: An Analysis, 86 Nw. U. L. Rev. 1130, 1139-40 (1992).

n73. See Breslo, supra note 72, at 1140.

n74. Under a forfeiture plan, plaintiffs will still have an advantage in bargaining, because defendants will have an incentive to settle to avoid possible state-sought punitive damages. See id. at 1158-66. However, this advantage will be weaker than under the current system, because plaintiffs will not be able to control the state decision whether to pursue a punitive claim.

n75. See E. Jeffrey Grube, Punitive Damages, A Misplaced Remedy, 66 S. Cal. L. Rev. 839, 856 (1993); Breslo, supra note 72, at 1148-49.

n76. See Andrew Von Hirsch, The Sentencing Commission and Its Guidelines 3-5 (1987).

n77. See Jonathan Kagan, Comment, Toward a Uniform Application of Punishment: Using the Federal Sentencing Guidelines as a Model for Punitive Damage **Reform,** 40 UCLA L. Rev. 753, 783-85 (1993).

n78. See W. Page Keeton, Prosser, Prosser and Keeton on the Law of **Torts** 52, at 351 (5th ed. 1984).

n79. For a more detailed summary of the development of joint and several liability doctrine, see John W. Wade, Should Joint and Several Liability of Multiple Tortfeasors Be Abolished?, 10 Am. J. Trial Advoc. 193, 194-98 (1986).

n80. See James J. Scheske, The **Reform** of Joint and Several Liability Theory, 54 J. Air L. & Com. 627, 631 (1988).

n81. See, e.g., American Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 904-05 (Cal. 1978).

n82. Paul Bargren, Comment, Joint and Several Liability: Protection for Plaintiffs, 1994 Wis. L. Rev. 453, 471.

n83. Id. at 456.

n84. See, e.g., Aaron D. Twerski, The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics, 22 U.C. Davis L. Rev. 1125, 1133 (1989) (complaining that shifting losses to a joint tortfeasor treats the tortfeasor as a "whipping boy").

n85. See, e.g., Scheske, supra note 80, at 650.

n86. See Basil L. Bradley, Why **Tort Reform** Was Needed in Washington, 22 Gonz. L. Rev. 3, 12 (1986).

n87. See Richard K. Willard, Troubling Trends in Our Civil Justice System and the Need for **Tort Reform,** 34 Fed. B. News & J. 116, 118 (1987).

n88. See, e.g., Frank H. Easterbrook, William M. Landes & Richard A. Posner, Contribution Among Antitrust Defendants: A Legal and Economic Analysis, 23 J.L. & Econ. 331, 358 (1980).

n89. Suppose a plaintiff suffers a $ 1000 harm that was jointly caused by two defendants and has a 50% chance of winning at trial against either defendant. In the absence of several liability, each defendant will settle for up to $ 250 (half of their share of the expected joint loss at trial). But with joint and several liability, if one defendant settles for $ 250, the remaining defendant faces a 50% chance of paying the remaining $ 750, and therefore will pay up to $ 375. Each defendant thus has an incentive to rush to settlement. See John J. Donahue III, The Effect of Joint and Several Liability on the Settlement Rate, 23 J. Legal Stud. 543, 545-46 (1994).

n90. Two of the foremost legal experts on joint and several liability note:

<BQ2>The central conclusion of our analysis is that the comparison of the settlement-inducing properties of joint-and-several liability and nonjoint liability depends critically on the correlation of the plaintiff's probabilities of success. When these probabilities are independent, joint-and-several liability unambiguously discourages settlements .... When, in contrast, these probabilities are perfectly correlated, joint-and-several liability ... encourages settlement when the litigation costs are low but may discourage settlements when these costs are high.</BQ2>Lewis A. Kornhauser & Richard L. Revesz, Evaluating the Effects of Alternative Superfund Liability Rules, in Analyzing Superfund: Economics, Science and Law 115, 130 (Richard L. Revesz & Richard Stewart eds., 1995).

n91. See id. The deterrent effect of liability rules is not always indeterminate, however. Kornhauser and Revesz note that "negligence ... does not necessarily provide the right incentives when it is coupled with nonjoint liability." Id. at 122. They also argue that both joint and nonjoint liability can lead to underdeterrence when coupled with strict liability; this claim undercuts the classical argument that joint and several liability should be eliminated in order to prevent defendants from overinvesting in care. See id. at 116.

n92. See Kathryn E. Spier, A Note on Joint and Several Liability: Insolvency, Settlement, and Incentives, 23 J. Legal Stud. 559, 560 (1994) (noting that, "while out-of-court settlement is ... desirable because it minimizes the private and public costs of litigation," it is likely that "the excessive value that the plaintiff derives from settlement will induce the defendants to overinvest in precautions ex ante").

n93. See Bargren, supra note 82, at 473-74. One Wisconsin study of 834 personal injury jury verdicts showed that joint and several liability played a role in only 1.6% of these cases. See id. at 473. That joint and several liability is not an important doctrine makes intuitive sense because joint liability only makes a practical difference if a potential defendant is insolvent or cannot be joined to the trial for some reason. See Wade, supra note 79, at 211.

n94. See Philip A. Talmadge & N. Clifford Petersen, In Search of a Proper Balance, 22 Gonz. L. Rev. 259, 264-65 (1986).

n95. Cf. Manzer, supra note 25, at 648 ("By eliminating joint and several liability, legislatures have eliminated an element of an actor's expected accident costs.").

n96. See id. at 649. There are counter-arguments to this point of view. Large corporations may fear systematic liability for the harms of numerous small, short-lived corporations and, as a result, be discouraged from engaging in socially desirable activities.

n97. Bargren, supra note 82, at 476.

n98. "In the **tort** system, there is a dollar of administrative costs" for every dollar that reaches the plaintiff. Kramer, supra note 1, at 9.

n99. Critics argue that the absence of a market for nonpecuniary loss insurance indicates that people do

not value such insurance. See George L. Priest, Can Absolute Manufacturer Liability Be Defended?, 9 Yale J. on Reg. 237, 243 (1992). However, there are other factors that may explain why such a system did not develop, such as the legal constraints and social norms against providing insurance for nonpecuniary losses. See Steven P. Croley & Jon D. Hanson, The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in **Tort** Law, 108 Harv. L. Rev. 1785, 1851-56 (1995). Another explanatory factor may be that insurers seeking to provide nonpecuniary loss insurance would face heightened dangers of moral hazard because of special information asymmetries present in this context. See id. at 1848-51.

n100. Unlike market-provided insurance, nonpecuniary loss insurance provided by the **tort** system would not violate social norms and legal constraints. See id. at 1906-14. The **tort** system's use of civil juries to evaluate plaintiff claims also alleviates the market problem of insureds who possess asymmetric information. See id. at 1900-06.

n101. Wade, supra note 79, at 198.

n102. Id.

n103. See Bebchuk, supra note 57, at 448.

n104. Gregory E. Maggs & Michael D. Weiss, Progress on Attorney's Fees: Expanding the "Loser Pays" Rule in Texas, 30 Hous. L. Rev. 1915, 1918 (1994).

n105. Originally, Rule 11 was seldom used by courts. See William W. Schwarzer, Rule 11: Entering a New Era, 28 Loy. L.A. L. Rev. 7, 7 (1994). In 1983, as a result of rising discontent over frivolous lawsuits, Rule 11 was amended to ensure that sanctions would be imposed often enough to act as a serious deterrent. Cf. Fed. R. Civ. P. 11, Proposed Amendment to the Federal Rules of Civil Procedure, Advisory Committee's Note, reprinted in 97 F.R.D. 165, 198 (1983) ("The new language is intended to reduce the reluctance of courts to impose sanctions.").

n106. See John Leubsdorf, Toward a History of the American Rule on Attorney Fee Recovery, 47 Law & Contemp. Probs. 9, 9 (1984).

n107. See H.R. 10, 104th Cong., 1st Sess. 101 (1995).

n108. See Thomas D. Rowe, Jr., The Legal Theory of Attorney Fee Shifting, 1982 Duke L.J. 651, 651.

n109. As some commentators note, the primary benefit of the British rule is that it "can discourage parties from participating in meritless lawsuits ... by increasing the cost of losing." Maggs & Weiss, supra note 104, at 1926.

n110. See id. Reformists who favor the British rule note that the rule will also solve the problem of defendants with valid defense claims being driven out of business by unmanageable insurance premiums or astronomical legal expenses. See id. at 1918.

n111. See, e.g., Richard A. Posner, Economic Analysis of Law 564-74 (4th ed. 1992); Steven A. Shavell, Suit, Settlement, and Trial, 11 J. Legal Stud. 55, 59 (1982).

n112. See Shavell, supra note 111, at 62-68.

n113. John J. Donahue III, Opting for the British Rule, 104 Harv. L. Rev. 1093, 1099 (1991).

n114. See, e.g., Thomas J. Miceli, Do Contingency Fees Promote Excessive Litigation?, 23 J. Legal Stud. 211, 213 (1994).

n115. The expected judgment increases by 0.1 x $ 5000, or $ 500.

n116. The likelihood that the plaintiff will pay the additional $ 550 decreases by the additional 10% chance that the plaintiff will prevail and be reimbursed by the defendant. Therefore, the expected cost of the additional legal fees (0.9 x $ 550) is $ 495.

n117. See Ronald Braeutigam, Bruce Owen & John Panzer, An Economic Analysis of Alternative Fee Shifting Systems, 47 Law & Contemp. Probs. 173-85 (1984).

n118. See, e.g., Linda Babcock, Henry S. Farber, Cynthia Fobian & Eldar Shafir, Forming Beliefs About Adjudicated Outcomes, 15 Int'l Rev. L. & Econ. 289, 300 (1995).

n119. See Keith N. Hylton, Fee Shifting and Incentives to Comply with the Law, 46 Vand. L. Rev. 1069, 1072 (1993).

n120. Scholars have shown that the British rule cannot be justified in terms of economic efficiency or deterrence. See Clinton F. Beckner III & Avery Katz, The Incentive Effects of Litigation Fee Shifting When Standards are Uncertain, 15 Int'l Rev. L. & Econ. 205, 207 (1995) ("Just as there is no good theoretical reason to think the British rule generally reduces litigation costs, there is also no good theoretical reason to think it promotes efficient primary behavior.").

n121. See Hylton, supra note 119, at 1089-91. Because one-way fee shifting would encourage plaintiffs to sue, it is not politically popular at present. This fact supports this Note's proposition that legal scholarship and political popularity are not in sync.

n122. Id. at 1071.

n123. Donahue, supra note 113, at 1101.

n124. See id. at 1116-18.

n125. The strength of this argument is somewhat undercut by the fact that parties in England could, but apparently do not contract to the American system. There are two possible explanations for their failure to do so. First, there may be barriers to contracting around the default fee-shifting rules in both countries, in which case the failure of Americans to include the British rule in their contracts does not necessarily show strong support for the American rule. Second, because of differences in the American and British systems, each country may already have the most efficient system for its particular circumstances. This market evidence does not, however, undermine the claim that plaintiffs would prefer a one-way fee-shifting rule in their favor, because defendants have no incentive to agree to such contracts.

Part I of this Note considers the genesis of the first **tort reform** efforts and describes the "progressive" and "classical" schools of traditional **tort reform** scholarship. Part II describes the recent history of **tort reform,** focusing on "Common Sense" **tort reform** legislation at the federal level. Part III describes the "modernist" **tort reform** movement in recent legal scholarship. This Note then argues that modernist insights could improve "Common Sense" **tort reform.**

I. The Era of Classical **Tort Reform**

The idea of fundamental **reform** of the civil justice system has roots in the Progressive Era of legal scholarship, which followed World War I. n8 **Reform**-minded commentators in the Progressive Era criticized the **tort** system for inadequately compensating plaintiffs and advocated a more insurance-minded alternative, such as workers' compensation or a no-fault regime. n9 Because "through the first half of the twentieth century, the **tort** system tended to protect the interests of defendants," n10 progressive **tort** reformers sought to enable plaintiffs to prevail more easily. n11 Progressive reformists' hallmark concern for plaintiff compensation dominated **tort reform** ideas until the late 1960s [*1767] and led to important developments, such as the growth of strict liability at the state level. n12

Subsequently, progressive **tort reform** fell into disfavor. Some scholars have suggested that this decline was the result of three separate **torts** crises. n13 The first crisis occurred in the medical industry in the late 1960s, when health care providers steeply increased premiums, ostensibly because of an increase in negligence claims brought by patients. n14 The second came in the late 1970s, when rising liability premiums led to manufacturer concern. n15 Lastly, a general **tort** crisis erupted in the 1980s when insurance companies responded to continued financial losses by cancelling or refusing to re-issue policies held by high-risk policyholders. n16 Common law **torts** attracted the lion's share of the blame for the situation, and the public began to associate lawsuits with hindering commerce. n17

Academia mirrored big business's discontent with the perceived excesses of **tort** law. Most notably, the progressive idea that **tort** law should focus on plaintiff compensation fell into disfavor, n18 as did notions that **tort** law should serve corrective justice. n19 Instead, law and economics commentators argued that the primary, if not sole, function of **tort** law was to deter undesirable behavior. n20 If a **tort** liability rule would not deter potential tortfeasors from engaging in risky activities, these commentators argued for its repeal.

"Classical" **tort reform,** as defined in this Note, sees itself as an effort to correct the excesses of Progressive Era **reform.** n21 Classical **tort** reformers call for the elimination of legal rules that are particularly expensive for defendants. In areas in which liability is perceived as levying a "**tort** tax," such as products liability and medical malpractice, classical reformers suggest increasing scienter requirements or re [*1768] pealing liability altogether. n22 Classical reformers wish to lower or abolish noneconomic and punitive damages, n23 and to abolish joint and several liability. n24 Critics could dub classical **reform** "baby-with-the-bathwater" **reform,** because it is not aimed at reforming common law rules, but at repealing them either in whole or in part. n25 Critics claim that such classical **reform** "is fueled by the economic self-interest of those who perceive themselves as adversely affected by the **tort** system." n26

Classical **tort reform** legislation reflected the crises that spawned it. In the 1970s, in response to the first **tort** crisis, at least "forty-three states and two territories legislatively modified one or more significant aspects of [their] common law" to limit the potential malpractice liability of health care providers. n27 The second wave of classical **tort reforms** sought to eliminate pro-plaintiff common law rules across the board, rather than for particular sectors and industries. n28 The most widely adopted **tort reforms** eliminated joint and several liability and imposed caps on noneconomic damages, n29 especially punitive damages. n30 Several states reestablished sovereign immunity doctrines. n31 Others allowed defendants to pay damage awards periodically, rather than in a lump sum. n32 Some states directly penalized plaintiffs that brought "frivolous" lawsuits, n33 and others mandated alternative forms of dispute resolution. n34 By 1991 nearly all fifty states had enacted some form of **tort reform.** n35 [*1769]

II. The "Common Sense" **Tort Reforms**

When the Republican Party gained control of both houses of Congress in 1994, the momentum of **tort reform** shifted from the state to the federal level. Legal **reform** was a critical component of the Contract with America, the House Republicans' 1994 platform. n36 Tenet Nine of the Contract with America called for a variety of **tort reforms** including, inter alia, the institution of punitive damage limitations, reformation of the products liability laws, and adoption of the British rule of attorney fee-shifting. n37 In the first one hundred days after the new Congress was seated, the Republicans attempted to live up to their contract by introducing four Common Sense **reform** bills designed to **reform** the legal system: the Common Sense Product Liability **Reform** Act, n38 the Common Sense Product Liability **Reform** Act of 1995, n39 the Common Sense Legal **Reforms** Act of 1995, n40 and the Common Sense Legal Standards **Reform** Act of 1995, n41 collectively referred to as the "Common Sense **reform** bills."

Broadly speaking, the **reforms** these bills propose fall into one of two categories. First, many of the bills contain provisions designed to limit or eliminate the liability of defendants in certain areas. For example, several bills would allow a plaintiff to recover punitive damages only if the plaintiff could show clear and convincing evidence that the harm was a result of conduct evincing conscious indifference to safety ("actual malice"). n42 Almost all of the bills would cap punitive damages at some level, typically at the greater of $ 250,000 or three times the plaintiff's economic injury. n43 The bills would eliminate either joint or several liability of multiple defendants. n44 If a product liability plaintiff misused the allegedly defective product, the Common Sense bills generally would reduce the liability of the manufacturer by [*1770] a proportion equal to the percentage of the harm caused by the misuse. n45 Some of the bills would set federal liability standards. n46

Second, all of the **tort reform** bills share a desire to deter frivolous litigation. Some of the bills would allow sanctions to be directly imposed on plaintiffs that file frivolous suits. n47 Others would adopt the British fee-shifting rule and routinely award fees to the prevailing party. n48

III. The Failures of Neoclassical **Tort Reform**

The Common Sense **tort reform** bills are best understood as "neoclassical." The bills share the major elements of the classical **tort reform** movement: a strong pro-defendant leaning, the goal of eliminating pro-plaintiff common law rules, and in many cases, the desire to award special protections to particular sectors of the economy. Yet in some ways, the Common Sense **reforms** have advanced beyond their classical ancestors: they urge less radical **reform** and show more sympathy for plaintiffs' rights. n49

Although the neoclassical **reforms** embodied in the Common Sense **reform** bills represent a moderate improvement over their classical pre [*1771] cursors, the bills nonetheless fail to take into account many recent advances in law and economics **tort** scholarship. The newest wave of academic reformers - modernist **tort** scholars - recognize that, although many of the pro-plaintiff common law rules adopted in the Progressive Era have defects, these rules serve important insurance and deterrence functions. Modernist **tort** scholars advocate modifying but retaining the existing rules to serve the goals of **tort** law better. To clarify the difference between neoclassical and modernist **reform,** the following sections explore both classical critiques of the **tort** system and modernist responses. The Common Sense **tort reform** bills suffer from serious defects that Congress could rectify by shifting from a neoclassical to a modernist approach to **tort reform.**

A. Punitive Damages

The practice of awarding punitive damages for **torts** has ancient origins. n50 Whatever the rationale in ancient times, punitive damages have been justified throughout American history on punishment and deterrence grounds. n51 Pre-classical **tort** doctrine held that it was just and right to impose punitive damages to "punish" guilty tortfeasors n52 and that punitive damages would teach the defendant a lesson, so that the **tort** would not be repeated in the future. n53

However, the traditional justifications for punitive damages came under rigorous attack in the years following the **tort** crises. First, for different (and even opposing) reasons, commentators argued that punitive damages either would not result in optimal deterrence or would not deter at all. n54 Some classical

reformers argued that punitive damages could not be used to create optimal deterrence because **tort** law serves a variety of disparate and often conflicting goals. n55 Different classical reformers maintained that punitive damages would lead to overdeterrence, because manufacturers act overly cautiously in the face of uncertain levels of liability. n56 Second, critics charged that punitive [*1772] damages lead to excessive litigation and windfall gains for plaintiffs, encouraging plaintiffs to pursue litigation by making settlement more likely as defendants seek to avoid the increased costs and uncertainty of trial. n57 Third, punitive damages were blamed for reducing the availability and increasing the cost of insurance. n58 Finally, many blamed punitive damages for producing unjustifiable awards and forcing otherwise viable industries out of business. n59

One of the most scathing critiques of punitive damages arose from law and economics scholars, who argued that, to reach the socially efficient level of deterrence, each tortfeasor must be held liable for a dollar amount exactly equal to the social harm caused by the **tort** - the total economic and noneconomic damages suffered by all potential plaintiffs. n60 If each potential plaintiff brings suit and receives an amount equal to the actual economic damages he or she has suffered, efficient deterrence will be obtained. On the other hand, adding punitive damages on top of actual damages will result in tortfeasors taking a supra-optimal level of care - overdeterrence - unless an insufficient number of plaintiffs bring suit or the tortfeasor escapes detection. n61 In addition to making inefficiently high investments in care, tortfeasors who manufacture products will also pass on at least some of the costs of punitive damages to consumers in the form of higher prices. n62 From these observations, it follows that neither the wealth of a corporation nor the egregiousness of corporate behavior should affect the level of punitive damages, n63 because relying on these factors divorces the level of punitive damages from the amount of harm caused by the **tort;** only if punitive damages equal social harm will optimal deterrence result. In short, "simple economic models of **tort** law [*1773] demonstrate that ordinary compensatory damages are sufficient to induce the injurer to take the socially efficient level of care." n64

The response of neoclassical reformers to these critiques of the punitive damage system is to urge its emasculation. By setting damage caps and raising plaintiffs' burden of proof with respect to damages, neoclassical reformers seek to minimize the use of punitive damages in the **tort** system. But capping punitive damages is a nonsensical response to many of the concerns that led to the **tort** crisis. Modernist law and economics scholars have developed better, less drastic solutions to the alleged punitive damages problem.

First, modern scholars question the assumption that, as an empirical matter, excessive punitive damages are a problematic facet of the **tort** system. A study by the RAND Institute for Civil Justice shows that the frequency and magnitude of punitive damage awards changed little in the period from 1962 to 1987. n65 The General Accounting Office examined data from five states in the years from 1983 to 1985 and concluded that punitive damage awards were neither frequent nor excessively large. n66 A comprehensive study by legal scholars that analyzed 25,627 civil jury verdicts in eleven states found that plaintiffs received punitive damages in only 4.9% of these verdicts n67 and that, even when punitive damages were awarded, "the amount was generally modest." n68 A fourth study, which looked at 355 punitive damage awards, further supports the finding that "median punitive damage awards ... are quite modest." n69 Although earlier studies did show slightly greater use of punitive damages, n70 the lion's share of the empirical evidence no longer supports the claim that runaway punitive damages are widespread, and may point in the opposite direction.

Even if punitive damage awards are sufficiently large or frequent to warrant legal concern, damage caps are an ineffective answer to the classical charges. For example, the cap proposed by the Common [*1774] Sense legislation - the greater of $ 250,000 or three times a plaintiff's economic damages - would not prevent runaway damage awards from forcing viable companies out of business; small businesses - perhaps the backbone of American industry - would still buckle under the weight of quarter-of-a-million-dollar damage verdicts. Furthermore, even with the damage cap, even large corporations would still face insolvency in cases in which the plaintiff's economic damages are high, such as environmental disaster or mass toxic **tort** suits. n71 To the extent that punitive damages currently correct for the **tort** system's inability to hold all tortfeasors accountable, a cap may result in underdeterrence.

Common Sense **tort reform** would benefit from abandoning the classical goal of curtailing punitive damages and instead focusing on improving the current punitive damage system with the help of the insights of modernist legal scholars. For example, recent scholarship suggests that requiring civil plaintiffs to forfeit

punitive damage awards to a third party would curtail the negative incentive effects of punitive damages. n72 Plaintiffs will be less interested in bringing punitive damage claims if they do not benefit from them. n73 Forfeiture would solve the problem of plaintiffs bringing meritless suits and receiving a windfall to which they are not entitled. n74 Because plaintiffs would have no incentive to pursue punitive damage awards, these damages would be sought by state-appointed attorneys in separate proceedings. n75 The state could pursue those claims only when punitive damages would have a beneficial effect. The state could base its decision to seek punitive damages on factors such as the likelihood that the tortfeasor would evade detection, thus allowing punitive damages to serve a beneficial deterrent purpose.

A second beneficial modernist **reform** proposal is to adopt structured guidelines for punitive damage awards. When the federal gov [*1775] ernment was concerned with ensuring consistency in punishment in the criminal justice system, it adopted the Federal Sentencing Guidelines. n76 One scholar suggests that a similar system be imposed in the **tort** context to ensure consistency in punitive damage awards. n77 To create a uniform system of guidelines, Congress would examine certain types of **torts** and decide how often defendants escape detection, plaintiffs fail to bring suit, or the **tort** causes harm not covered by compensatory damages. Congress would then establish a range of punitive damages - perhaps based on a multiplier of the plaintiff's actual harm - that a jury could impose. Punitive damage guidelines set in this way would alleviate both the problem of juries awarding excessive verdicts when the defendant has deep pockets, and the problem of potential **tort** defendants overinvesting in preventative measures in the face of uncertain liability. Punitive damage guidelines are also superior to damage caps because they are narrowly tailored to the social harm caused by particular **torts;** the guidelines are related to the defendant's conduct in a way that reflects the deterrence purposes of punitive damages - ensuring that tortfeasors are liable for the entire amount of social harm caused by the **tort.**

Tort reform that incorporated the modernist insights would not simply cap punitive damages at a set level, but rather establish guidelines to govern the use of punitive damages and require that these damages be forfeited to the state. The Common Sense **reform** bills' reliance on the old mantle of a straightforward cap reflects the modernist school's failure to influence the national debate.

B. Joint and Several Liability

The doctrine of joint and several liability originated in British common law and was initially applied in cases in which multiple tortfeasors committed a "shared **tort"** by breaching a common duty or injuring a plaintiff in concert. n78 The doctrine was adopted in America through a complex and convoluted process that stretched the doctrine far beyond its British origins. n79 Today, joint and several liability allows a plaintiff to sue a single defendant and recover full damages for harm caused by multiple tortfeasors. The Progressive Era **tort** reformers championed joint and several liability because it spread losses [*1776] among defendants rather than plaintiffs n80 and ensured that plaintiffs received full compensation for their injuries. n81 The arguments of the progressive reformers were successful; as recently as 1973, "joint and several liability was universally applied in every state." n82

As the **tort** crises waxed, scholarly scrutiny of joint and several liability increased. Classical **tort** reformers called "joint and several liability the "deep-pocket theory' because it encourages plaintiffs to seek out defendants of minimal culpability but maximum financial ability and add them to the suit to bankroll the expected judgment." n83 Classical reformers stressed that it was normatively unfair to hold a single defendant fully liable when that defendant was only remotely involved in causing the harm. n84 Other scholars argued that joint and several liability had malevolent effects on the insurance industry. n85 They claimed that, for insurance to function properly, insurers must be able to predict potential liability accurately ex ante. n86 Because joint and several liability reduced the insurer's ability to predict a policyholder's **tort** liability exposure reliably, insurance costs rose. n87

Most modernist **tort** scholarship views joint and several liability more favorably. Even during the age of classical **tort reform,** many scholars praised joint and several liability as encouraging settlement. n88 They argued that in cases in which all trial outcomes were identical, the plaintiff would settle with some defendants for less than their pro rata share, because as long as one defendant remains, the plaintiff can sue the remaining defendant for the rest of the uncompensated damages. n89 Despite this conventional wisdom, more recent modernist writers argue that the effect of joint and several liability on settlement [*1777] rates is

impossible to predict ex ante and therefore should be ignored in deciding whether to retain such liability. n90 These writers claim that the same proposition also holds true for the effect of joint and several liability on deterrence. n91 One commentator argues that, while joint and several liability increases the likelihood of settlement, it can also lead to excessive deterrence. n92 As a result, whether joint and several liability is beneficial from a societal perspective remains unclear.

Other modernist writers are more supportive of joint and several liability. First, several recent studies show that joint and several liability is seldom used and, therefore, unworthy of constant attention and criticism. n93 Further, some commentators argue that the elimination of joint and several liability would actually lead to increased insurance rates and transaction costs, because nonjoint liability necessitates the impleader of additional parties, requires more proceedings, and results in longer court delays. n94 From a deterrence perspective, modernist writers use simple economic theory to caution against eliminating joint and several liability. In the absence of joint and several liability, potential tortfeasors as a group will discount their legal liability for committing a **tort** by the probability that they will become insolvent before having to pay a judgment. n95 For example, if a firm [*1778] has a ten percent chance of becoming insolvent before the legal system forces it to pay the $ 10,000 cost of potential harm, the firm will take only liability-avoiding precautions that cost less than $ 9,000, ceteris paribus. With joint and several liability, firms must also consider the potential liability they may face for other joint tortfeasors who become insolvent. If each of several tortfeasors could cause a $ 10,000 harm and has a ten percent chance of becoming insolvent, the expected liability for each firm is $ 10,000, equal to the cost of the social harm, and optimal for deterrence purposes. Joint and several liability may roughly counterbalance the underdeterence that results from the possibility that a firm will go insolvent before paying a **tort** judgment, and may produce better deterrence. n96

New scholarship also suggests that joint and several liability can serve important insurance purposes. In the absence of joint and several liability, the plaintiff bears the risk that tortfeasors will later become insolvent. Because individuals are generally risk averse, social utility can be increased by ensuring that losses are spread throughout society, rather than left with a single victim. Joint and several liability tends to shift losses to deep-pocket defendants who "can generally spread throughout society any extra damages the joint and several liability rule requires." n97

Nonetheless, critics charge that using joint and several liability to further the insurance goal of spreading pecuniary losses involves unnecessarily high administrative costs n98 and that market sources of insurance may be cheaper for these kinds of losses. This argument does not hold true for nonpecuniary losses; **tort** liability can still serve an important insurance purpose by ensuring that plaintiffs are more fully compensated for their nonpecuniary losses and by spreading these costs throughout society. n99 Indeed, **tort** law may be uniquely suited to provide nonpecuniary loss insurance. n100 If so, eliminating joint and several liability will make achieving this objective more difficult. [*1779]

Even if joint and several liability has faults, these faults can be remedied by modifying the doctrine to make it fairer to defendants. For example, when there are multiple tortfeasors, juries could be required to find the defendants' "individual percentages of fault." n101 Each defendant would then be liable for this percentage of the harm. Moreover, one modernist scholar suggests, "if any defendant's equitable share is uncollectible, it should be divided among all the other parties at fault, whether plaintiff or defendant, according to their fault percentages." n102 This system would answer the classical claim that joint and several liability forces defendants who have committed minimal wrongs to shoulder the entire burden of the plaintiff's damages. It also requires potential joint tortfeasors as a group to internalize costs imposed by the **tort** that would otherwise have been externalized when an individual tortfeasor became insolvent.

Thus, at the very least, modernist literature cautions against repealing joint and several liability en masse and provides some affirmative support for maintaining it. Yet the Common Sense **reform** bills do not reflect the moderation of this scholarship.

C. Discouraging Frivolous Lawsuits

In the age of progressive **tort reform,** the problem of "frivolous lawsuits" did not attract much attention. Because the existing common law rules were pro-defendant, commentators felt that meritless suits were unlikely to survive pretrial screening mechanisms or lead to settlement. As **reforms** liberalized the common

law, plaintiffs were able to bring suits of more questionable merit. Classical **tort** reformers suggested that plaintiffs with no real claims were bringing suit in the hopes that the defendants would settle in order to avoid legal fees or the threat of a large damage award at the hands of an unduly plaintiff-sympathetic jury. n103 Insurance premiums, they claimed, had "consequently risen to unmanageable heights." n104 As concern over the insurance crisis grew, classical reformists urged legal **reform** to discourage or punish plaintiffs directly for bringing frivolous lawsuits. Classical reformists focused first on Rule 11 of the Federal Rules of Civil Procedure, which allows sanctions to be imposed on parties who file frivolous motions or lawsuits. n105 [*1780]

Since 1994, **tort reform** designed to minimize frivolous lawsuits has taken a slightly different - neoclassical - form. Rather than impose penalties directly on plaintiffs, the proposals would shift attorney's fees - a more reciprocal solution. Currently, most **tort** suits are governed by the American rule: each party is responsible for his or her own attorney's fees. n106 The Common Sense bills would adopt the British rule: n107 the loser in a civil lawsuit pays for part or all of the winner's attorney's fees. n108 The British rule is neither directly biased in favor of defendants nor focused on deterring frivolous lawsuits. Unlike Rule 11, the British rule requires the losing party to pay even if that party had a meritorious but unsuccessful claim. The rule is neoclassical, however, because its primary intended effect is to discourage plaintiffs from bringing claims that they are likely to lose. n109 It also decreases defendants' incentives to settle frivolous cases to avoid the costs of trial, by ensuring that these costs will be born by losing plaintiffs. n110

Although the Common Sense **reform** acts thus enjoy neoclassical support, they once again ignore the valuable insights of modernist **tort** scholars. For example, recent law and economics scholarship has shown that the British rule may actually increase the administrative costs of the judicial system. n111 A primary reason that parties settle cases is to avoid litigation and trial costs. n112 Under the British rule, when parties are optimistic about the merits of their cases, they "perceive the size of the [cost savings of settlement] to shrink because they expect to win, thereby avoiding all litigation costs." n113 When both parties are optimistic, settlement is less likely. If fewer cases settle under the British rule, society will have to pay for more trials, and the administrative costs of the **tort** system will increase.

The British rule might also increase the administrative costs of the **tort** system by encouraging overinvestment in attorneys' fees. Most legal scholars agree that, to some degree, the likelihood that a party [*1781] will prevail at trial rises with the amount and quality of the legal assistance it secures. n114 Assume, for example, that a plaintiff suffers $ 5000 worth of injuries and knows that, if she invests an extra $ 550 in legal fees, her chances of prevailing will increase by ten percent. Under the American rule, the plaintiff will not make such an investment, because the increase in legal cost, $ 550, is greater than the expected increase in the judgment, $ 500. n115 Under the British rule, the plaintiff will make the investment; the plaintiff's expected judgment is still $ 500, but the expected cost of the additional legal fees is only $ 495. n116 Attorney's fees will be higher under the British rule because in deciding how much to spend, each party will discount the expected cost of legal fees by the likelihood of prevailing at trial. n117 An additional inefficiency may stem from the fact that fee shifting increases the "stakes" of the trial for the parties. If parties are risk averse, they would prefer to have as little wealth as possible riding on the uncertain outcome of the trial. n118 By raising the stakes of the "gamble" of trial, the British rule lowers the utility of these risk-averse parties.

Some modernist scholars argue that both the British and American rules are inferior to a one-way fee shifting rule for deterrence reasons. Under the American rule, the expectation that legal fees will be substantial may dissuade plaintiffs with meritorious cases from bringing suit. A potential defendant who knows that the victim's litigation costs will exceed his or her potential recovery - the cost of the harm imposed by the defendant's actions - may confidently predict that the victim will not sue. Self-interested defendants in this position will choose to ignore potential **tort** liability and to forego precautionary measures even when their cost is less than the expected potential liability. n119 The British rule does not solve this problem, because while plaintiffs do not pay costs if victorious, a victim may still be reluctant to bring suit because the victim fears the possibility of paying a victorious defendant's legal fees. n120 A one-way fee-shifting rule in favor of [*1782] plaintiffs does not suffer from this defect. One-way fee-shifting would alleviate the problem by reducing plaintiffs' litigation costs in meritorious cases without penalizing them for unsuccessfully pursuing a legal remedy. n121 As one modernist **tort** scholar has noted, "fee shifting [solely] in favor of prevailing plaintiffs generates the greatest incentive to comply with the law." n122

Lastly, recently discovered market evidence seems to provide little empirical support for the claim that the British rule benefits all parties. Litigating parties that believe that the British rule is beneficial, "can simply agree through private contract to litigate their dispute under a fee-shifting arrangement." n123 The virtual nonexistence of such contracts n124 provides circumstantial evidence that both parties do not consider the British rule advantageous. n125

IV. Conclusion

This Note has analyzed progressive, classical, and modernist legal scholarship on **tort reform.** Analyzing recent federal **tort reform** efforts in light of these three distinct schools of thought reveals that, while the Common Sense bills receive the widespread support of big business, the proposals they embody rest on outdated and disfavored legal arguments. Common Sense **tort reform** is little more than a revived version of the classical **tort** movement of the 1970s and 1980s. That this neoclassical **reform** is couched in rhetoric that is less anti-plaintiff cannot disguise the fact that it has not advanced with the progress of legal scholarship. The **tort reform** movement as a whole, and the Common Sense **tort reform** bills in particular, would benefit from incorporating the insights of modernist **tort** scholars. These scholars have shown that wholesale elimination of all of the Progressive Era's pro-plaintiff common law **tort** rules is not necessary or desirable. Rather, these rules should be modified to alleviate the **tort** crisis without sacrificing deterrence or insurance benefits.

FOOTNOTES:

n1. National attention has recently focused on cases "such as the $ 2.7 million award to a woman injured by hot McDonald's coffee, or the $ 1 million award to a psychic who claimed a CAT scan robbed her of her ESP." Elsa F. Kramer, **Tort Reform:** Does It Make "Common Sense" for Indiana?, Res Gestae, Feb. 1995, at 8, 8.

n2. In March 1995, when Illinois enacted the Civil Justice **Reform** Act, which limits recovery for noneconomic damages and eliminates joint and several liability, it joined more than thirty states that have enacted **tort reform** legislation since the mid-1980s. See Stephen J. O'Neil, A New Day: The Civil Justice **Reform** Amendments of 1995, CBA Rec., May 1995, at 18. In the last 10 years, 33 states have abolished or modified rules on joint and several liability, and 30 states have reformed laws on punitive damages. See id.

n3. The most comprehensive of the federal **tort reform** proposals, the Common Sense Legal Standards **Reform** Act of 1995, H.R. 956, 104th Cong., 1st Sess. (1995), passed the House, an amended version passed the Senate, but the bill still awaits conference between the two Houses to resolve the differences. See 141 Cong. Rec. S17,674 (daily ed. Nov. 28, 1995) (statement of Sen. Pressler). A more limited proposal, which focuses primarily on products liability, recently passed the Senate, but President Clinton has threatened to veto the bill so long as it contains caps on punitive damages. See Senate Votes to Limit Punitive Damage Awards, St. Louis Post-Dispatch, Mar. 22, 1996, at 1A. Critics have accused the President of playing election-year politics and threatening to veto the bill in order to gain the support of trial lawyers, who oppose such damage caps. See id.

n4. One commentator argues that there have been "no articles of importance within the last five years written about modern **tort** law that have not addressed ... functional economic analysis." George L. Priest, The Inevitability of **Tort Reform,** 26 Val. U. L. Rev. 701, 704-05 (1992).

n5. See, e.g., William M. Landes & Richard A. Posner, A Positive Economic Analysis of Products Liability, 14 J. Legal Stud. 535, 535 (1985).

n6. See, e.g., Steven A. Shavell, Strict Liability Versus Negligence, 9 J. Legal Stud. 1, 23-25 (1981).

n7. See Priest, supra note 4, at 705-07. One hopes that these scholars are at least partially correct about the impact of legal scholarship on legislation passed by Congress. The alternatives to scholarship-driven legislation are often less savory: if legislation is not shaped powerfully by scholarship, special interest groups, factions, the media, or big business may fill the void.

n8. See generally Lawrence M. Friedman & Jack Ladinski, Social Change and the Law of Industrial

Accidents, 67 Colum. L. Rev. 50, 69-79 (1967) (discussing the development of worker's compensation at the height of the Progressive Era).

n9. See Robert L. Rabin, The Politics of **Tort Reform,** 26 Val. U. L. Rev. 709, 710-11 (1992).

n10. Joseph A. Page, Deforming **Tort Reform,** 78 Geo. L.J. 649, 651 (1990). Before the Progressive Era, the legal regime afforded strong protection to tortfeasors, and the "general principle of our law [was] that loss from accident must lie where it falls." Oliver W. Holmes, Jr., The Common Law 94 (Sheldon M. Novick ed., Dover Publications 1991) (1881).

n11. See Steven P. Croley & Jon D. Hanson, Rescuing the Revolution: The Revived Case for Enterprise Liability, 91 Mich. L. Rev. 683, 695-703, 706-12 (1993).

n12. See id. at 706-12.

n13. See Page, supra note 10, at 649-50.

n14. See id. at 649.

n15. See James A. Henderson, Products Liability Law: The Need for Statutory **Reform,** 56 N.C. L. Rev. 623, 624 (1978).

n16. See, e.g., U.S. Attorney Gen. Policy Working Group, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability 6-15 (1986).

n17. Some scholars suggest, however, that **tort** law was merely the scapegoat used to cover up a crisis caused by insurers' bad business decisions. Insurance companies overextended themselves by relying on high interest rate investments during the 1970s, these scholars contend, and when these rates fell in 1984, the industry was forced to raise premiums in response. See Brenda Trollin, Controlling Liability Insurance Costs, 11 State Legis. Rep., May 1986, at 1, 1, reprinted in National Conference of State Legislatures, Resolving the Liability Insurance Crisis (1986).

n18. See, e.g., Steven A. Shavell, An Economic Analysis of Accident Law 231 (1987).

n19. See Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1093-98 (1972).

n20. See, e.g., Shavell, supra note 18, at 298.

n21. See Page, supra note 10, at 654.

n22. Peter W. Huber, Liability: The Legal Revolution and Its Consequences 4, 11 (1988).

n23. See id. at 79-80.

n24. See id. at 115-16, 121-22.

n25. Classical **tort reform** also differs from progressive **reform** in that it focuses on the legislative, rather than the judicial arena. See Page, supra note 10, at 654-55. Indeed, prior to 1970, "legislatures rarely initiated major changes in **tort** law." Nancy L. Manzer, Note, **Tort Reform** Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability, 73 Cornell L. Rev. 628, 633 (1988).

n26. Page, supra note 10, at 654.

n27. Peter A. Bell, Legislative Intrusions into the Common Law of Medical Malpractice, 35 Syracuse L. Rev. 939, 943 (1984).

n28. See Manzer, supra note 25, at 633.

n29. See id. at 633-34.

n30. See, e.g., Colo. Rev. Stat. 13-21-102, -102.5 (1989); Minn. Stat. Ann. 549.191 (West 1988 & Supp. 1995).

n31. See, e.g., Okla. Stat. Ann. tit. 51, 155 (West 1988 & Supp. 1996) (immunizing state from liability for failure to provide police or fire protection).

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FRC ID:
9696

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]
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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	CLASSIFICATION	RESTRICTION(S)
005	Letter	Dear Mr. President - To: POTUS - From: Robert Byrd	2	03/15/2002		P5;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
Testimony by Ridge: [CRS Report for Congress] [Folder 1]

FRC ID:
9696

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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KAVANAUGH, BRETT

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SUBJECT FILES

TESTIMONY BY RIDGE: [CRS NEAM FOR CONGRESS]

CLOSED - PRA [Folder 2]

2014-0216-F [1]

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	CLASSIFICATION	RESTRICTION(S)
001	Letter	Dear Senator Stevens and Senator Byrd - From: Andrew H. Card, Jr.	2	03/2002		P5;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
Testimony by Ridge: |CRS Report for Congress| |Folder 2|

FRC ID:
9696

RESTRICTION CODES

Presidential Records Act - |44 U.S.C. 2204(a)|

P1 National Security Classified Information |(a)(1) of the PRA|
P2 Relating to the appointment to Federal office |(a)(2) of the PRA|
P3 Release would violate a Federal statute |(a)(3) of the PRA|
P4 Release would disclose trade secrets or confidential commercial or financial information |(a)(4) of the PRA|
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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CLOSED - PRA

SUBJECT FILES

TESTIMONY BY RIDER; TESTIMONY ON LIMITED HOUSE OFFICIALS EXECUTIVE RIDER

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2014-0216-F [1]

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	CLASSIFICATION	RESTRICTION(S)
001	Memorandum	Immunity to Congressional Subpoena - To: Wendy Grubbs, Julie Nichols - From: Edward E. McNally	1	02/27/2002		P5;
002	Memorandum	Dear Mr. President - To: POTUS	7	09/16/1999		P5;
003	Memorandum	Dear Mr. President - To: POTUS	7	09/16/1999		P5;
004	Email	Ridge subpoena matter - To: Brett M. Kavanaugh - From: Paul P. Colborn	2	03/18/2002		P5;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
Testimony by Ridge: Testimony on White House Officials Governor Ridge

FRC ID:
9696

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	CLASSIFICATION	RESTRICTION(S)
005	Talking Points	Talking Points - Request for Governor Ridge to Testify	2	N.D.		P5;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
Testimony by Ridge: Testimony on White House Officials Governor Ridge

FRC ID:
9696

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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JL003 (CRIME)

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	CLASSIFICATION	RESTRICTION(S)
001b	Memorandum	[Memorandum] - To: POTUS - From: John Gordon	3	07/11/2003	Secret	P1/b1;
001e	Routing Memo	Federal Preparedness for Anthrax Attack - To: VPOTUS, et al - From: Staff Secretary	1	07/07/2003		P5;
001f	Memorandum	[Memorandum] - To: POTUS - From: John Gordon	3	07/08/2003	Unmarked	P1/b1; P5;

COLLECTION TITLE:
Records Management, White House Office of

SERIES:
Confidential Files - JL003 (Crime)

FOLDER TITLE:
551292

FRC ID:
39313

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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This document was prepared on Thursday, July 19, 2018

REV_00262172

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

[Tort Reform Articles] [3]

OA/NARA#: 1646/1514
9597

Box 59
Folder 1

REV_00262173

Source: Legal > Secondary Legal > Law Reviews & Journals > **Law Reviews, Combined** ⓘ
Terms: **"mass torts" and ("punitive damages" /5 "jury trial" and "seventh amendment")** (Edit Search)

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*95 Colum. L. Rev. 1343, **

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October, 1995

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LENGTH: 80245 words

ARTICLE: CLASS WARS: THE DILEMMA OF THE **MASS TORT** CLASS ACTION

John C. Coffee, Jr. *

* Adolf A. Berle Professor of Law at Columbia University School of Law. The author testified as an expert witness for objectors at the settlement hearings in Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994), the largest of the **mass tort** asbestos class actions, but did so on a pro bono basis, declining all fees. Much of the information in this Article comes from interviews with plaintiffs' attorneys or objectors. The author has not received any remuneration in connection with any of the cases (or from any of the participants therein) discussed in this Article. This may seem an overly long disclaimer, but as the author will discuss elsewhere, others writing in this area have provided far too little disclosure of their very substantial entanglements with the parties.

SUMMARY:
... Recent developments in class action practice bear witness to this phenomenon: during the 1990s, evolution has given way to mutation. ... Starting with the admitted fact that the Ness, Motley firm (one of the two firms serving as lead counsel in the class action) settled its client cases for $ 138,077,100, the objectors computed that if the clients in these inventory settlements had recovered the maximum average payment that a similarly situated class member would receive under the Georgine class action, they would have received only $ 89,660,000. ... Unlike corporations that have opted for bankruptcy when faced with a **mass tort** class action, Dow Corning seemed intent on preserving the **mass tort** class action settlement; indeed, its tactical aim seems in part to have been to lock claimants within it by eliminating any incentive to opt out. ... Although the class was initially certified as an opt out settlement class, the settling parties reconsidered their position once Georgine, Ahearn, and other recent cases had shown them the feasibility of resolving personal injury claims through the vehicle of a **mass tort** class action. ...

TEXT:
[*1343] [*1344]

Introduction

Legal change - like organic evolution - can occur at varying paces. [1] Long periods of gradual evolution are sometimes punctuated by brief moments of rapid, irregular change. Recent

3. Concentration and Collusion. - A characteristic style of **mass tort** litigation also developed during the 1980s. An important aspect of this style was the high level of concentration within the plaintiffs' bar specializing in these cases. Less than fifty law firms appear to specialize in asbestos litigation, and a handful dominate the field. [73] Some thirty firms represented the majority of the Dalkon Shield claimants. [74] A closer look at the Dalkon Shield litigation reveals still another facet of this picture: individual attorneys acquire large case inventories. Of the approximately 44,000 most seriously injured victims of the Dalkon Shield (a defective intrauterine birth control device which was implanted in approximately 2.2 million American women), [75] one survey found the following levels of client concentration: some six attorneys represented 8039 claimants (or on average 1340 each), [76] and another forty-three attorneys represented some 13,174 claimants (with each attorney handling between 100 and 1000 cases - or, on average, over 300 cases each). [77] As one expert in asbestos litigation has generalized, "typically an extremely small number of firms represents massive numbers of plaintiffs; it would not be unusual for a single lawyer with four associates to represent over a thousand clients." [78]

To sum up, attorneys specializing in the **mass tort** field tend to accumulate a large inventory of clients with similar claims; they do so partly by direct advertising and partly through referrals from other attorneys. **[*1365]** More importantly, they also tend to deal in inventories, settling their cases not on an individual basis, but on an inventory-wide basis with a particular defendant. [79] Here, different styles exist, with some plaintiffs' law firms being characterized as "boutique firms" that screen clients carefully and bring actions only on behalf of severely injured claimants for high damages, and other firms being known as "wholesalers" who seek to represent a large number of claimants but invest little in individual case preparation. [80] In either case, however, litigation decisions are made by attorneys in terms of their impact on the entire portfolio of claims in the firm's inventory. [81] After all, even a boutique firm may invest heavily in scientific evidence for an individual case and take it to trial largely to establish the market value of other cases in its inventory.

The concentration within the plaintiffs' bar is more than matched on the defendants' side. In early cases, a defective product or toxic substance was typically produced by a single manufacturer (for example, A.H. Robins Co. made the Dalkon Shield; Richardson-Merrell manufactured Bendectin; and Dow Corning was the first and by far the largest manufacturer of silicone breast implants. n82) Even in the case of asbestos, where an industry of about thirty firms manufactured asbestos products, the producer of the asbestos products used at a particular site could usually be identified. Thus, litigation could focus on a principal defendat - and negotiations would be with a single defense counsel. As asbestos litigation developed during the 1980s, asbestos-producing defendants organized into a consortium to pursue common defense and settlement strategies, united behind a single counsel. [83] In practice, therefore, **mass tort** litigation is reduced to battles between repeat players who have litigated and negotiated settlements in similar cases many times in the past.

During the 1980s, this concentration and familiarity among the litigants was for the first time matched by a corresponding consolidation at the judicial level, as **mass tort** cases came to be transferred (at least for **[*1366]** discovery purposes) before a single judge. Either as a result of bankruptcy proceedings (which act as a stay of pending litigation against the insolvent firm) or a transfer order by the Judicial Panel on Multidistrict Litigation (JPML), huge numbers of related **mass tort** claims came under the control of individual judges. For example, Judge Robert Merhige of the Eastern District of Virginia oversaw the resolution of some 195,000 Dalkon Shield claims, [84] and Judge Jack Weinstein of the Eastern District of New York handled proceedings which resolved over 240,000 Agent Orange claims. [85] In 1991, when the JPML transferred all pending asbestos claims in federal court to Judge Charles Wiener, some 27,000 actions, many of which had been litigated elsewhere for years, were transferred overnight to the Eastern District of Pennsylvania. [86] This pattern of universal transfer contrasts sharply with the pattern in securities or antitrust litigation. There, although a trial judge may have substantial experience with a particular cause of action, no court has

plaintiffs in its hand.

n385. 417 U.S. 156, 17778 (1974).

n386. See, e.g., In re Copley Pharmaceutical, Inc., "Albuterol" Prods. Liab. Litig., 161 F.R.D. 456, 460 (D. Wyo. 1995) (finding that consideration of merits of plaintiffs' claims is "expressly prohibited" when deciding whether to decertify class).

n387. Eisen, 417 U.S. at 177.

n388. See supra text accompanying notes 52, 5862.

n389. Indeed, this is the most common type of **mass tort** class action that has been actually certified. See, e.g., In re School Asbestos Litig., 789 F.2d 996, 1008 (3d Cir.) (certifying limited class action that contemplated "individual damages suits"), cert. denied, 479 U.S. 852 (1986); Castano v. American Tobacco Co., No. 94-1044, 1995 U.S. Dist. LEXIS 2005, at *41 (E.D. La. Feb. 17, 1995) (partial class certified with court specifically excluding individualized issues of injury-in-fact, proximate cause, reliance, affirmative defenses, and compensatory damages as unsuitable for class treatment); Copley Pharmaceutical, "Albuterol" Products Liab. Litig., 161 F.R.D. at 458 (partial class action with court excluding issues of causation, injury, and damages as not suitable for class treatment); Jenkins v. Raymark Industries, Inc., 109 F.R.D. 269, 27980 (E.D. Tex. 1985) (certifying a limited class action on liability and related issues, but excluding all individualized issues in the case, such as exposure, causation, injury and compensatory damages, which would instead be tried later), aff'd, 782 F.2d 468, 47072 (5th Cir. 1986); Delgazzo v. Kenny, 628 A.2d 1080, 1091 (N.J. Super. Ct. App. Div. 1991) (certifying limited class, but excluding issues of failure to cure, reliance, and damages). In contrast, very few decisions have certified a nationwide class of personal injury claims for all purposes. The leading example (and arguably the only non-bankruptcy example in which appellate courts have not reversed certification) is In re "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718 (E.D.N.Y. 1983), mandamus denied sub nom. In re Diamond Shamrock Chems. Co., 725 F.2d 858 (2d Cir.), cert. denied, 465 U.S. 1067 (1984). A unique fact about the Agent Orange class action was the existence of a common defense to all individual or class claims (the military contractor defense). See In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 166 (2d Cir. 1987) (quoting Diamond Shamrock, 725 F.2d at 860 and citing the existence of this defense as the "cardinal fact" about the case), cert. denied, 484 U.S. 1004 (1988).

n390. See In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995).

n391. See Arthur Young & Co. v. United States Dist. Court, 549 F.2d 686 (9th Cir.), cert. denied, 434 U.S. 298 (1977). In some limited circumstances, the **Seventh Amendment** has been held to require trial of all issues before a single jury. See Gasoline Prods. v. Champlin Refining Co., 283 U.S. 494 (1931). The right to a unitary jury trial is not, however, an absolute one and truly applies only when the issues proposed to be bifurcated are "so interwoven ... that the [one] cannot be submitted to the jury independently of the [other] without confusion and uncertainty which would amount to a denial of a fair trial." Arthur Young, 549 F.2d at 693 (citing United Air Lines v. Wiener, 286 F.2d 302, 306 (9th Cir.), cert. denied, 366 U.S. 924 (1961)). Later cases have upheld the power of a trial judge to certify the class only with respect to certain issues, reserving the other issues for a separate determination. See In re United States Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979).

n392. This could either benefit or hurt the individual plaintiff. It would mean that artificial occupational exposure standards (such as a 10-year exposure rule) could not bar the plaintiff from proving individual causation, but it would also allow defendants to demonstrate that subsequent scientific discoveries disproved that, for example, silicone gel breast implants were related to specific illnesses. In effect, the policy here is not to blind the court with out-

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of-date scientific assumptions.

n393. By one estimate, plaintiffs actually receive only 39% of every dollar expended on asbestos litigation, with the remainder being consumed by the transaction costs of both sides. See supra note 15.

n394. In August 1995, New York Life Insurance Company reached a class action settlement with its policyholders that was uniquely structured to provide both class relief and individualized damages for those class members who wished to opt to pursue a special ADR alternative before an arbitration forum established pursuant to the settlement. See Notice of Class Action, Proposed Settlement, Settlement Hearing, and Right to Appear at 48, Willson v. New York Life Ins. Co., No. 94/127804 (N.Y. Sup. Ct., N.Y. County Aug. 1995) (on file with the Columbia Law Review); Michael Quint, New York Life in Accord on Class Action Settlement, N.Y. Times, Aug. 15, 1995, at D2. All class members will be entitled to certain class relief (basically low-interest rate loans), but those class members who were dissatisfied with this relief could either opt out of the class action during an initial opt out period and sue individually or pursue an arbitration remedy that was elaborately designed by the settlement agreement and that provides for the award of monetary damages within specified ranges according to defined criteria. The New York Life settlement does not involve a future claimant class and does place clear boundaries on the damages that can be awarded (unlike the structure here proposed), but it is an innovative, thoughtful model.

n395. This Article, however, does argue that the current adequacy of representation standard should bar an attorney from serving as class counsel where he or she has reached roughly contemporaneous inventory settlements with the defendants or certain other settlements that are linked to his or her prospective service as class counsel. See infra notes 401403 and accompanying text.

n396. See Deborah L. Rhode, Class Conflicts in Class Actions, 34 Stan. L. Rev. 1183, 1183 (1982).

n397. See supra text accompanying notes 108113, 172214.

n398. See Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 31819 (E.D. Pa. 1994). Georgine relies on a labor law decision in which a labor union was permitted to represent the whole class, and subclassing was rejected. See Clark Equip. Co. v. International Union, Allied Indus. Workers, 803 F.2d 878, 880 (6th Cir. 1986), cert. denied, 480 U.S. 934 (1987). Suffice it to say that this is a very different context.

The Supreme Court has held "the burden of constructing subclasses ... is upon the [party seeking class certification] and it is he who is required to submit proposals to the court." United States Parole Comm'n v. Geraghty, 445 U.S. 388, 408 (1980).

n399. In re Corrugated Container Antitrust Litig., 643 F.2d 195, 211 n.25 (5th Cir. 1981).

n400. See In re Chicken Antitrust Litig., 669 F.2d 228, 23638 (5th Cir. Unit B 1982) (upholding interclass sharing with a subclass of plaintiffs who lacked standing where each subclass had adequate representation).

n401. Fed. R. Civ. P. 23(a)(4).

n402. Obviously, such an overbroad rule would disqualify any attorney experienced in the field. In the context of a settlement class action, however, it is critical to bar the defendants from selecting such an attorney as the plaintiffs' representative with whom to negotiate the settlement.

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n403. In Georgine v. Amchem Prods., Inc. 157 F.R.D. 246, 298 (E.D. Pa. 1994), the settling parties took the position that future claimants were not similarly situated to present claimants and thus that they need not receive similar compensation. Their ethics expert, Professor John P. Freeman, argued (and the court explicitly agreed) that the fact that many claimants had received cash compensation under the inventory settlements whereas persons with similar injuries would not receive cash compensation under the class action, did not create a conflict of interest for the plaintiffs' attorneys representing both because the two classes of clients had "different expectations." Specifically, the present claimants had "a realistic expectation" that their cases would be resolved within the tort system and future claimants did not. Id. at 298. In truth, it seems hopelessly metaphysical to talk of the expectations of future claimants when most do not know that they have been injured. However, to the extent that future claimants have lesser expectations, this defines the problem, rather than solves it, because they are accurately expecting inferior treatment under the class action. In contrast, future claimants in individual actions will predictably do better than present claimants because the one clear pattern is that recoveries in **mass tort** cases rise steadily over time.

n404. See id. at 318.

n405. See In re Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721, 745 (2d Cir. 1992), modified sub nom. In re Findley, 993 F.2d 7 (2d Cir. 1993).

n406. See, e.g., In re "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425, 1435 (2d Cir. 1993) (noting that providing an opt out right to a person "unaware of an injury would probably do no good"), cert. denied, 114 S. Ct. 1125 (1994).

n407. See Arthur R. Miller & David Crump, Jurisdiction and Choice of Law In Multistate Class Actions After Phillips Petroleum Co. v. Shutts, 96 Yale L.J. 1, 39 (1986).

n408. 472 U.S. 797 (1985).

n409. Agent Orange, 996 F.2d at 1435 (quoting 1 Newberg & Conte, supra note 96, 1.23, at 1-56).

n410. The decision describes the benefits from the right to opt out as "conjectural at best." Id.

n411. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992), cert. dismissed, 114 S. Ct. 1359 (1994). For an overview, see Miller & Crump, supra note 407, at 3857.

n412. See, e.g., Thomas D. Rowe, Jr., Jurisdiction and Transfer Proposals for Complex Litigation, 10 Rev. Litig. 325, 360 n.141 (1991) (asserting that Shutts mandates a right to opt out only for "known plaintiffs" who lack minimum contacts with the forum).

n413. See Trangsrud, Mass Trials, supra note 4, at 7476.

n414. See American Bar Ass'n Section of Litig., Report and Recommendations of the Special Committee on Class Action Improvements, 110 F.R.D. 195, 202 (1986); Baughman, supra note 2, at 23941; Friedman, supra note 6, at 745.

n415. See supra text accompanying notes 254264.

n416. Relatively few such litigants succeed in being able to transfer back to the original jurisdiction in which they filed the action. See supra note 183.

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n417. Professor Trangsrud has made the case for consolidation in preference to a class action, and this position closely resembles an opt in system. See Trangsrud, Joinder Alternatives, supra note 4, at 83149.

n418. See Friedman, supra note 6, at 751.

n419. See id.; see also John E. Kennedy, Class Actions: The Right to Opt Out, 25 Ariz. L. Rev. 3, 72 (1983) (citing studies showing failure of significant numbers of plaintiffs to opt out of Rule 23(b)(3) actions).

n420. 143 F.R.D. 141 (S.D. Ohio 1992), appeal dismissed, 995 F.2d 1066 (6th Cir. 1993).

n421. See id. at 147.

n422. Id. at 150.

n423. See id.

n424. In addition, certain class members who qualified for valve replacement surgery but declined it were also permitted to sue on a delayed basis for emotional injury. See id.

n425. In re A.H. Robins Co., 880 F.2d 709, 745 (4th Cir.), cert. denied, 493 U.S. 959 (1989).

n426. Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 320 (1985); see also Mathews v. Eldridge, 424 U.S. 319, 34344 (1976) (noting that due process is flexible and calling for those procedural protections demanded by the particular situation).

n427. See Walters, 473 U.S. at 32021.

n428. See supra text accompanying notes 108113.

n429. There is, of course, a **Seventh Amendment** objection to limiting the opting out plaintiff to an arbitration remedy and thus precluding any right to a jury trial. Here the doctrinal answer might be that because there is no recognized constitutional right to a delayed opt out right, there is also no constitutional right to a jury trial at this stage. In effect, the class member is simply being accorded a privilege to seek a better award in arbitration, and the court is relying upon that privilege to find that the proposed class action satisfies the "superiority" standard applicable to a Rule 23(b)(3) class action.

n430. An obvious analogy exists to another area of group decisionmaking: namely, the supermajority requirement for fundamental changes (such as mergers, liquidations and related events) in the corporation codes of many states. Although today only a minority of the states (including New York, see N. Y. Bus. Corp. Law 903(a)(2) (Consol. 1983)) still require a supermajority approval, it used to be a universal requirement. See Ronald J. Gilson & Bernard S. Black, The Law and Finance of Corporate Acquisitions 64243 (2d ed. 1995). For a history of the shift from the unanimous shareholder consent rule of the 19th century to the rule in force in most jurisdictions today (and the efficiency implications of different voting rules), see William Carney, Fundamental Corporate Changes, Minority Shareholders and Business Purposes, 1980 Am. B. Found. Res. J. 69.

n431. In terms of its incentive effects, a delayed right to opt out should encourage defendants to (1) insert more cells into a settlement grid, thereby increasing the differentiation among class memebers; and (2) tilt the monetary relief toward the more seriously injured claimants. These conclusions follow because small claimants (i.e. those with lesser injuries) have less incentive to opt out because they (and their attorneys) face high

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transaction costs and considerable docket delay in pursuing individual cases. For example, assume in an asbestos class action that the ratio of asbestosis victims (i.e., a lesser injury) to lung cancer victims is 10:1. In the absence of a delayed right to opt out, the settlement grid might provide that the former cases would receive $ 10,000 each and the latter $ 100,000. Under a delayed opt out system, it would instead be in the interest of the defendants to move to a settlement grid that awarded the former claimants only $ 5000 and the latter $ 150,000; under both formulas, defendants make the same aggregate payouts, but there is a reduced risk that "high stakes" claims will opt out under the second formula. Also, defendants might seek to differentiate asbestosis claimants into multiple categories, awarding some only $ 4000 or $ 3000 and others $ 6000 or $ 7000 - again to deter opting out by those with stronger claims. Normatively, this implication that the worst injured will receive higher awards (at the expense of the less injured) seems desirable. Of course, the more that claims are differentiated in this fashion, the greater the need becomes for subclasses and separate representation.

n432. 472 U.S. 797 (1985).

n433. Id. at 811 n.3 (emphasis added).

n434. 996 F.2d 1425 (2d Cir. 1993), cert. denied, 114 S. Ct. 1125 (1994).

n435. Id. at 1435.

n436. Id. at 1437.

n437. For the argument that notice and a right to opt out should be constitutionally required when present and future claimants are disparately treated or when prospects for success are stronger, see Koniak, supra note 4 (manuscript at 14669, 17683).

n438. See supra notes 115 and 300 and accompanying text.

n439. Such a proposal has been made by the Manhattan Institute. See Peter Passell, Windfall Fees in Injury Cases Under Assault, N.Y. Times, Feb. 11, 1994, at A1, B18. For a critique, see John C. Coffee, Jr., Regulating Plaintiffs' Attorneys, N.Y. L.J., Sept. 22, 1994, at 5, 6.

n440. The danger that unofficial preliminary negotiations could degenerate into lawyer-shopping has long been understood by appellate courts, even if they have done little to prevent it. See Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 33 (3d Cir. 1971) (quoted supra at note 128).

n441. For this observation, see In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 790 n.10 (3d Cir. 1995); see also Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47, 48 (1971) (dismissing action for lack of Art. III case or controversy where both parties sought to uphold constitutionality of anti-busing law); United States v. Johnson, 319 U.S. 302, 305 (1943) (dismissing action where plaintiff instituted a "friendly suit" at defendant's request); Teamsters Local 513 v. Wojcik, 325 F. Supp. 989, 99192 (E.D. Pa. 1971) (denying declaratory relief for lack of actual controversy where both parties sought the same determination and where no specific conclusive relief existed).

n442. See In re Ford Motor Co. Bronco II Prods. Liab. Litig., No. CA MDL-991, 1995 U.S. Dist. LEXIS 3507, at *31 (E.D. La. Mar. 20, 1995).

n443. See General Motors, 55 F.3d at 81819; Bloyed v. General Motors Corp., 881 S.W.2d 422, 433 (Tex. Ct. App. 1994).

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n444. See supra note 286 and accompanying text.

n445. The court could, for example, advertise the position by requesting applications to be filed with it. Judge Vaughan Walker has used this procedure in conducting auctions for the position of lead counsel. See In re Oracle Sec. Litig., 131 F.R.D. 688, 697 (N.D. Cal. 1990). Although auctions pose additional issues, there seems no inherent reason why an attorney must have already filed an action to be chosen lead counsel in a class action.

n446. See supra text accompanying notes 248249.

n447. See supra text accompanying notes 192214.

n448. For example, ATLA had a Breast Implants Litigation Group (BILG) that began to meet shortly after the FDA's 1992 decision to impose a moratorium on the cosmetic use of implants. In October 1993, over 300 attorneys belonging to BILG met to discuss developments in the class action and whether to recommend that clients opt out from it. See Andrew Blum, Some Grumble Over Implant Pact, But Approval is Expected, Nat'l L.J., Oct. 18, 1993, at 3, 52. Meetings on such a scale suggest at least that active monitoring is feasible.

n449. See Georgine v. Amchem Prods., Inc., 160 F.R.D. 478, 518 (E.D. Pa. 1995).

n450. In the Silicone Gel litigation, Judge Pointer circulated a comment form to class members in 1994. He reported that "less than 1/3 of 1% of those to whom notices were sent and only slightly more than 1% of those who have already registered under the settlement" voiced negative comments. In re Silicone Gel Breast Implant Prods. Liab. Litig., No. CV-92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at *14 (N.D. Ala. Sept. 1, 1994). In absolute terms, some 7800 persons in the United States and 6500 persons outside the United States opted out as of the initial opt out period, but this came to less than 5% of putative class members. See id. at *16. In general, the rate of opting out tends to be low. See Willging et al., supra note 14, at 5051 (finding in their survey of two federal districts that not more than one to two percent of class members appeared to opt out in any case in their survey).

n451. This is particularly true in those circuits (most notably the Seventh Circuit) where recent precedents suggest that a **mass tort** class action for personal injuries may not be certified. See In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 12961304 (7th Cir. 1995); Malcolm v. National Gypsum Co., 995 F.2d 346, 350 (2d Cir. 1993).

n452. See 2 Newberg & Conte, supra note 96, 11.27, at 11-53 ("There is no doubt that the use of a temporary settlement class tends to short-circuit the class certification process if the class settlement is approved.").

n453. See, e.g., Bowling v. Pfizer, Inc., 143 F.R.D. 141, 160 (S.D. Ohio 1992) (noting "egalitarian" nature of distributing costs among those who share same risk of injury), appeal dismissed, 995 F.2d 1066 (6th Cir. 1993).

n454. See In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 792800 (3d Cir. 1995).

n455. Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994).

n456. The analogy in the corporate setting would be if an acquiring firm could negotiate a merger with a minority of the board of directors after the majority had turned it down.

n457. My colleague, Professor Mark Roe, has detailed a variety of ways in which overhanging contingent tort liabilities can bring about the firm's operational collapse. See

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Mark J. Roe, Bankruptcy and **Mass Tort,** 84 Colum. L. Rev. 846, 85662 (1984). He focuses in particular upon: (1) blocked access to the capital markets; (2) the slow liquidation of the firm; (3) the incentive to undertake high risk, negative present value investments; (4) the barrier to efficient mergers; and (5) the diversion of managerial time.

n458. See supra notes 254264 and accompanying text.

n459. For a representative example of this mode of analysis, see Christopher F. Edley, Jr. & Paul C. Weiler, Asbestos: A Multi-Billion-Dollar Crisis, 30 Harv. J. on Legis. 383, 396 (1993). For a critique of this view, see Siliciano, supra note 18 (manuscript at 1316).

n460. See Roe, supra note 457, at 85064; Smith, supra note 61, at 37278. Interestingly, the best documented criticism of Chapter 11 is that it provides too much protection to corporate debtors, allowing them to remain in reorganization for too long and thus delay their creditors. See Lynn M. LoPucki, The Trouble with Chapter 11, 1993 Wis. L. Rev. 729, 74549. While this may reduce the value of the recovery to tort creditors, it reduces the injury and disruption to other constituencies and certainly does not support the claim that bankruptcy means operational cessation.

n461. See Roe, supra note 457, at 85051. For a fuller discussion of the normative foundations of bankruptcy law, see Thomas H. Jackson, Bankruptcy, Non-Bankruptcy Entitlements and the Creditors' Bargain, 91 Yale L.J. 857 (1982). The absolute priority rule is today reflected in the Bankruptcy Code's requirements for confirmation of a plan of reorganization. See 11 U.S.C. 1129(b)(2) (1994). These provisions prohibit confirmation of a plan that permits a junior class to participate in the distribution unless the claims of all senior classes are paid in full.

n462. For the sharp increase in Fibreboard's stock price on the announcement of its settlement, see supra notes 231233 and accompanying text. In Hayden, the primary defendant also claimed to be on the edge of insolvency. See supra note 272.

n463. The direct costs of corporate reorganization have been estimated at 2.8% of the issuer's assets. See Lawrence A. Weiss, Bankruptcy Resolution: Direct Costs and Violation of Priority of Claims, 27 J. Fin. Econ. 285, 289 (1990). For the typical costs in **mass tort** litigation, see supra note 15.

n464. The contrast alluded to in the text is that between the Johns-Manville re-organization and the Ahearn settlement. For a fuller discussion of the Johns-Manville experience, see Harvey J. Kesner, Future Asbestos Related Litigants as Holders of Statutory Claims under Chapter 11 of the Bankruptcy Code and Their Place in the Johns-Manville Reorganization, 62 Am. Bankr. L.J. 69 (1988).

n465. See supra text accompanying notes 187214.

n466. The Third Circuit has acknowledged this inherent danger in the use of settlement classes. See In re General Motors Pick-up Truck Fuel Tanks Prods. Liab. Litig., 55 F.3d 768, 787 (3d Cir. 1995).

n467. For this conclusion, see Georgene M. Vairo, The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?, 61 Fordham L. Rev. 617, 65160 (1992).

n468. For this assessment, see Siliciano, supra note 18 (manuscript at 1415). In terms of its capacity for debtor rehabilitation, the bankruptcy reorganization has distinct advantages: First, the corporation can obtain low-cost, federally-guaranteed debtor-in-possession financing in bankruptcy, but not in a class action. Second, the reorganization plan need not involve any cash payment to the tort creditors, but can (as in Johns-Manville) transfer a

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majority block of its stock to a settlement fund (to be sold or managed by the fund's trustees for the benefit of the tort creditors). Thus, bankruptcy reorganizations need not involve any drain on the firm's cash flow. Third, management is not automatically removed under Chapter 11. Rather, the presumption is the reverse: namely, that Chapter 11 allows the debtor-in-possession to retain management and control of the debtor's business operations unless a party can prove that appointment of a trustee is warranted. See In re Ionosphere Clubs, Inc., 113 B.R. 164, 167 (Bankr. S.D.N.Y. 1990). Chapter 11 does, however, threaten the incumbent management that has proved inferior, and this may be the real reason for its unpopularity. See Lynn M. LoPucki & William C. Whitford, Patterns in the Bankruptcy Reorganization of Large, Publicly Held Companies, 78 Cornell L. Rev. 597, 61011 (1993) (in 70% of the large reorganization cases studied, there was a change of CEO during the pendency of the Chapter 11 proceeding).

n469. Bankruptcy fee awards tend to be lower than in class actions, in part because there is less contingency risk. In turn, this means that more can go to the creditors. One of the motivating factors that induced Johns-Manville to elect Chapter 11 was its sense "that too little was going to the victims." Kesner, supra note 464, at 72 n.10. It believed that the bankruptcy court or the settlement trust could more easily restrict excessive contingency fees. Of course, class action courts have also attempted to do this - but with the negative consequence of encouraging opt outs. See supra note 300. To state the obvious, plaintiffs' attorneys cannot opt out of bankruptcy proceedings.

n470. Fed. R. Civ. P. 23(b)(3).

n471. Many today would doubt that corporations should receive greater limited liability. See, e.g., Henry Hansmann & Reinier Kraakman, Toward Unlimited Shareholder Liability for Corporate Torts, 100 Yale L.J. 1879 (1991) (favoring unlimited shareholder liability for corporate torts); Christopher D. Stone, The Place of Enterprise Liability in the Control of Corporate Conduct, 90 Yale L.J. 1, 65 (1980) (limited liability for involuntary debts undermines deterrence).

n472. See, e.g., Mullenix, supra note 11; Rosenberg, supra note 8; Sherman, supra note 11.

n473. See, e.g., Baughman, supra note 2, at 23241; Friedman, supra note 6, at 75663; see also Bruce H. Nielson, Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in **Mass Tort** Litigation, 25 Harv. J. on Legis. 461, 490 (1988) (proposing an amendment to Rule 23(b)(1) requiring mandatory classes "when the court deems class action treatment necessary to protect the rights of potential claimants").

n474. See Koniak, supra note 4 (manuscript at 10405). I should indicate that I believe Professor Koniak's outrage to be justified and eloquent. This still leaves open, however, the question of what reforms will work.

n475. See supra notes 283289 and accompanying text.

n476. In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1304 (7th Cir. 1995).

n477. See Koniak, supra note 4 (manuscript at 10846, 190202).

n478. Such proposals are now being considered. See Bone, supra note 24, at 8386.

n479. Cases, such as In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995), provide some basis for optimism, particularly in the Third Circuit panel's clear recognition of the powerful "hydraulic pressures confronted by courts

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adjudicating very large and complex actions" that can "erode the protections afforded by [Rule 23] almost entirely." Id. at 799.

n480. This Article has argued that the litigant autonomy interest most deserving protection is the right of the "high stakes" plaintiff to secure an individualized damages determination. This could be realized by "limited" class actions in which the individualized determination was made by a state court or an arbitration forum or through delayed opt out rights (in the case of future claimant classes). Conversely, the litigant autonomy interests least capable of protection and most susceptible to constraint are the individual litigant's desire to receive **punitive damages** and to obtain an individual **jury trial.**

n481. Legal rules that more equitably allocate cases hold particular promise. When the JPML decided to transfer all pending asbestos personal injury litigation to a single forum, it chose the Eastern District of Pennsylvania in part because "more asbestos personal injury or wrongful death actions [were] pending in that district than any other." In re Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 42223 (J.P.M.L. 1991). This may be the most perverse and counterproductive criterion to use (if one is concerned about the danger of non-adversarial settlements) because it ensures that the settlement process will be supervised by a judge who is under more pressure than any other to achieve a settlement at all costs.

n482. Independent of their impact on average settlement values, reforms that increase litigant autonomy can be defended on grounds of natural justice. This topic is beyond the scope of this Article.

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ever had all pending securities or antitrust actions consolidated before it.

Nor would any trial court have the same incentive to achieve a global resolution of all pending securities or antitrust actions. Around 300 securities class actions have been filed annually in federal court over recent years. Although often criticized as "strike suits" or "frivolous," such actions do not amount to a significant burden on the federal docket and amount to approximately ten percent of the class actions filed in federal court each year. [87] In contrast, **mass tort** filings impose a far larger burden, and, as discussed later, decisions made by the JPML to consolidate all such pending actions before a single judge were clearly made with the hope of inducing a global resolution.

These circumstances supply the preconditions for collusion between defendants and a favored plaintiffs' counsel: repeat players, a single fo **[*1367]** rum in which the court is eager to achieve a global settlement, and "passive" future claimants. But how is collusion actually implemented? Here, it is critical to distinguish between the traditional techniques (which have long been observed in corporate and securities litigation) and the new techniques that have developed in **mass tort** litigation.

C. The "Old" Collusion

Collusion within the class action context essentially requires an agreement - actual or implicit - by which the defendants receive a "cheaper" than arm's length settlement and the plaintiffs' attorneys receive in some form an above-market attorneys' fee. The mechanics of such an agreement varies with the litigation context. In the corporate and securities litigation settings, the standard means has been the nonpecuniary settlement: the plaintiff sues for money damages, but the final settlement awards only therapeutic relief - new bylaws, additional disclosure to shareholders, and other frequently cosmetic changes. [88] In return for this bloodless settlement, defendants either pay the plaintiffs' attorneys' fees themselves or agree not to contest the plaintiffs' attorneys' application for court-awarded fees from the corporation. [89] In the latter case, the plaintiff shareholder class suffers twice: first, by the abandonment of their claim for money damages, and second, by the payment of a fee by their corporation to a plaintiffs' attorney who has not performed any valuable service.

In the **mass tort** and antitrust contexts, a variation on the nonpecuniary settlement (known informally as a "scrip settlement") has become popular, involving discount coupons or certificates granting the injured class the right to buy the defendant's product at a discount. [90] Often, the discount is no greater than what an individual plaintiff could receive for a volume purchase, or for a cash sale, or for using a particular credit card, **[*1368]** and typically restrictions are placed on its transferability. In the General Motors "side-saddle" fuel tank case (a **mass tort** product liability case), the Third Circuit remanded a settlement under which the plaintiff class would receive a scrip certificate in the face amount of $ 1000, which would be redeemable against a purchase of a GM light duty truck (worth possibly $ 20,000 at retail - or a five percent discount). [91] The Third Circuit panel was concerned not only with the low percentage value of the coupon (i.e., five percent), but also with the restrictions on its transfer, the infrequency of pickup truck purchases by most class members, and the possibility of an inequitable distribution that primarily benefitted major car fleet owners. [92] But such a settlement is predictable, because it maximizes the interests of the defendants, the plaintiffs' attorneys, and the few class members (i.e., the car fleet owners) with sufficiently large economic interests to undertake to monitor the litigation and protest. Ultimately, if the GM settlement had passed judicial scrutiny, the plaintiffs' attorneys would have been able to multiply the $ 1000 certificate received by each class member by the 5.7 million customers in the class (who had previously purchased GM trucks with "side-saddle"

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tanks that were alleged to explode on minor collisions) and claim that they had thereby created a $ 5.7 billion benefit for the class (upon which "fund" their attorneys' fees could be based). [93]

Another recent variation, known as a "cy pres settlement," involves making a payment in kind of goods or services, not to the plaintiff class but to a third party (often a charity) for the indirect benefit of the class. A 1994 case, In re Matzo Food Products Litigation, [94] illustrates this pattern. Convicted under the Sherman Antitrust Act for fixing the prices of matzo and matzo products, B. Manischewitz Co. was sued in a class action brought by several grocery stores on behalf of all retail stores. Under a quickly negotiated settlement agreement, Manischewitz agreed (1) to create a "Food Products Fund," consisting of matzo products that would be distributed to specific charities for a four-year period; and (2) to pay plaintiffs' attorneys between $ 450,000 and $ 500,000. [95] The cynically disposed might see this settlement as an excellent way of simultaneously disposing of both stale matzos and a difficult litigation.

[*1369] Although the Matzo Food Products court was unable to swallow this settlement, other courts have regularly accepted similar cy pres settlements. [96] It may at first seem puzzling that they do so, but several linked factors probably explain this pattern. First, judicial time is a scarce commodity, which courts struggle to allocate sensibly to high priority matters. "Small claimant" class actions are seldom regarded by courts as among their priorities. Securities class actions, for example, almost never get to trial. One important reason for this phenomenon is that trial judges refuse to give them priority on their trial calendar. Yet, unless the "small claimant" class action can somehow be resolved, it will drag on, consuming scarce judicial time. Indeed, such actions can be prolific generators of motions and discovery disputes (whether because plaintiffs sometimes exploit their "nuisance value" or because defendants with deeper financial pockets sometimes believe they can exhaust the plaintiffs' attorneys' financial resources and force a cheap settlement). As a result, courts are eager to see such cases settled and may tend not to examine the basis for settlement with the same skepticism they might bring to cases or matters they deem more important.

Second, most of the cases in which dubious nonpecuniary consideration has been the primary basis for settlement have been "small claimant" class actions. Even if the plaintiffs received a monetary recovery, that recovery would be spread so thinly over a broad plaintiffs' class as to produce little or no meaningful benefit to any individual class member. Usually, these cases have involved either property damage (not personal injuries) or antitrust violations causing small losses to a nationwide class of victims.

Third, the trial court has a limited range of options: basically, it can reject the settlement, or it can approve the settlement but then award only very modest attorneys' fees, thereby signaling its lack of confidence in the outcome. [97] Because the action will still linger on if the settlement **[*1370]** is rejected, the second option imposes less of a burden on the court. But, over time, a small fee award may in turn only encourage underinvestment by plaintiffs' attorneys in such cases. That is, the low cost plaintiffs' attorney (whom defendants scorn as a "strike suiter") may still be able to earn a positive economic return on such cases - but only if the attorney radically reduces the investment in the case and offers defendants a low cost settlement, which is cheaper to them than further litigation.

In any event, the best and bottom line generalization here is not that courts are incapable of detecting the signs of collusion, but that they will not invest scarce judicial time in monitoring "small claimant" class actions; thus they approve some dubious settlements as the lesser evil when dismissal on the merits is not possible. [98]

One "old" form of collusion is not limited to the "small claimant" class action. It involves what this Article will call a "reverse auction," namely a jurisdictional competition among different teams of plaintiffs' attorneys in different actions that involve the same underlying allegations.

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The first team to settle with the defendants in effect precludes the others (who may have originated the action and litigated it with sufficient skill and zeal that the defendants were eager to settle with someone else). A recent recurring scenario involves an inactively litigated action in state court being brought and settled so as to preclude a decision in a more aggressively litigated federal action. Indeed, several recent cases have upheld releases granted in connection with settlements in state courts as a bar to a federal class action - even where the federal action raised principally federal law claims, which the state court lacked subject matter jurisdiction to adjudicate. [99] Conversely, an important new Ninth Circuit decision has taken the opposite position and refused to grant preclusive effect to such a state court settlement where the federal claims were clearly independent and unrelated to the state claims. [100]

For the moment, the doctrinal tension among these cases is less important than understanding the transactional pattern. Assume a meritorious class action raising federal claims (for example, securities fraud) is brought in federal court and plaintiffs decline to settle it on terms that are attractive to the defendants. At this point, a parallel or "shadow" ac **[*1371]** tion parroting some of the factual allegations in the federal action may be filed in a state court. Because federal courts have exclusive jurisdiction over the Securities Exchange Act of 1934, [101] a state court cannot adjudicate the federal law issues. Although claim preclusion of the federal claims is thus not possible, issue preclusion poses a grayer question. In principle, issue preclusion applies only to those issues that could have been litigated in the action, but an adverse judgment in the state court on claims that were essentially counterparts to the federal claims would probably bar federal adjudication of claims over which a federal court had exclusive jurisdiction. [102] Thus, if the collusive plaintiff were to draft a complaint that simply parrots the disclosure issues in an earlier filed federal action and were to file this copycat action in state court, the settlement of the state action would seemingly have preclusive effect on the previously filed federal action, notwithstanding exclusive federal jurisdiction over securities fraud claims, at least when the state court had subject matter jurisdiction over a corresponding state cause of action that relied on the same operative facts.

Now comes the final twist: assume that incident to the state court settlement, the class representative in the state class action grants a release covering all possible claims that the class members then hold against the defendants. The Third and First Circuits have recently said that the effect of such a release is broader than an adverse judgment in the state action. [103] Such a release, they have said, can bar all claims that the plaintiff could have asserted against the defendants in any forum (at least if the state court settlement does not violate the Due Process Clause).

The practical impact of this approach is that it allows the defendants to pick and choose the plaintiff team with which they will deal. Indeed, it signals to the unscrupulous plaintiffs' attorney that by filing a parallel, shadow action in state court, it can underbid the original plaintiffs' attorney team that researched, prepared and filed the action. [104] The net re **[*1372]** sult is that defendants can seek the lowest bidder from among these rival groups and negotiate with each simultaneously. Much in this scenario resembles game theory's classic "prisoner's dilemma," where the theoretical outcome is that the two prisoners, unable to agree upon a binding deal between themselves, will reach a suboptimal outcome. [105]

In overview, the critical factor essential to collusion is competition among teams of plaintiffs' attorneys that the defendants can exploit. Here, it happens because the parallel action in state court cannot be consolidated by the JPML with the federal action or actions. Once rival plaintiff teams are in competition with each other, and each is able to agree to a binding settlement of a nationwide class action, [106] the "reverse auction" can begin. No explicit agreement among the participants is needed; all that is necessary is that each team of plaintiffs' attorneys sees that it can be divested of any participation in the action unless it reaches a settlement with the defendants first. Already, there have been indications that

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such an auction, once unique to the corporate and securities arena, is developing in **mass tort** cases as well. [107] Such "reverse auctions" **[*1373]** can occur in other ways, but examining these techniques requires that we first focus on the special dynamics of **mass tort** litigation.

D. The "New" Collusion

1. Inventory Settlements. - At least potentially, courts can respond to signs of collusion (or, more precisely, "non-adversarial" settlements) by reducing the plaintiffs' attorneys' fee award (which in virtually every jurisdiction must be approved by the court in the case of a class action). But in the **mass tort** context, this may be a particularly ineffective weapon.

To understand its ineffectiveness, one must remember that the **mass tort** plaintiffs' attorney typically has an inventory of cases that the attorney represents on an individual basis. Often, the inventory may exceed several thousand cases. Normally, the individual cases in this inventory will move slowly through the litigation pipeline and settle only once a trial date has been set. [108] Thus, the plaintiffs' attorney's tactical goal is to expedite cases, pushing them through the pipeline to the eve of trial (and predictable settlement). Conversely, defendants in the **mass tort** setting are concerned less about existing cases than future claimants, who may dwarf the number of present claimants because of the long latency period associated with **mass torts.**

Given these different concerns, the possibilities for a deal between the two sides should become evident at this point: both sides have an incentive to trade a settlement of the plaintiffs' attorney's entire inventory (on terms favorable to the attorney) for a global settlement in a class action of all future claims (on terms favorable to the defendants). The advantages to the plaintiffs' attorney of such a trade are several: First, because plaintiffs' attorneys are almost invariably compensated on a contingency basis by their individual clients, the plaintiffs' attorney can expect to receive a substantial fraction (usually around thirty percent but sometimes more) out of the aggregate amount received by the clients from such an inventory settlement. [109] Second, the inventory settlement telescopes into one year payments that might be delayed for many years. Thus, it gains the attorney the time value of money over this period. Third, some cases that go to trial might lose, and other cases might be too weak on the merits to justify a settlement offer or to dare to take to trial (and thereby risk the attorney's credibility with the court). However, such cases can be included within the inventory settlement (which will typically encompass even unfiled cases so long as some medical evidence supporting the condition exists).

In return for the inventory settlement, the plaintiffs' attorney will be expected to serve as class counsel in a class action brought as a "settlement class" against the same defendants. By definition, a settlement class **[*1374]** "action" cannot go to trial, and thus defendants need not fear litigation in the event that the two sides have a subsequent falling out. The critical step in this trade requires a special definition of the class: it must consist only of future claimants. Otherwise, if the proposed class covered present claimants, it would look suspicious that the attorneys representing the class had just settled similarly situated cases on a superior basis. This incongruity is avoided by defining the class as consisting of those persons having claims against the defendants with respect to the particular product, process, accident or incident at issue who have not filed suit prior to the date the class action is filed. [110] Under this approach, the inventory settlements can be effected shortly before the class action is filed.

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To ensure that the plaintiffs' attorneys do not "welch" on their deal by settling their inventory cases and then refusing to file the "future claims" class action, the defendants may also require the plaintiffs' attorneys to sign an agreement that they will not in the future represent claimants against the defendants with regard to the same **mass tort.** Such an agreement (which raises serious ethical problems) [111] is, however, probably not essential. Because the plaintiffs' attorneys are disposing of all their existing clients in the inventory settlements, they have no other current clients to represent and thus have every incentive to serve as class counsel in the proposed "future claims" class action because it holds out the promise of an additional fee award (as class counsel). On self-interested economic grounds, plaintiffs' attorneys would decline such a trade of the class counsel position for an agreement not to sue the same defendants in the future only if they believed they could solicit new clients and earn contingency fees from such cases greater than the joint payoff from the class action and the inventory settlement. But in "mature" **mass tort** cases, the competition for clients may be stiff, thus making such a trade preferable. [112]

If one accepts the premise that an inventory settlement can be used as an inducement to the plaintiffs' attorney to enter into a non-adversarial settlement of a class action that disadvantages the class members, it follows logically that the person most susceptible to such an inducement will be the plaintiffs' attorney with the largest inventory of present claimants. Indeed, the more the plaintiffs' attorney maintains a high volume, low quality inventory of cases, the more the attorney may welcome a non-adversarial resolution of cases. In actual practice, defendants do seem to **[*1375]** have targeted plaintiffs' attorneys who fit this profile of high volume "wholesalers." [113]

2. Double-Dipping. - Even in the absence of a separate inventory settlement, a plaintiffs' attorney can favor a **mass tort** class action for self-interested reasons when the clients' interests would be better served by opting out. This is because one perverse and important characteristic of the **mass tort** class action is that it permits the attorney to receive two fees: one as class counsel and another as the legal representative of individuals filing claims under it. This feature is in sharp contrast to securities and antitrust class actions, where plaintiffs' counsel has very few (if any) individual clients. The initial fee will be the class action fee award, which will be set by the court. It will generally be equal to a percentage of the recovery that is reasonably predictable in advance. [114] To be sure, if the court doubts the value of the settlement, it may reduce the fee award. However, the second fee, which is paid by the individual client, is not generally controlled by the court and may be grossly disproportionate to the services actually rendered by the attorney at this stage. [115] Individual tort victims tend not to be legally sophisticated and may often sign standard contingency fee contracts that award the attorney as much as forty per **[*1376]** cent of the recovery received by the victim. Once liability has been established by the class action settlement, the individual attorney often has little more to do than to file a claim establishing the client's eligibility. Typically, this filing can be done by a paralegal in a few hours. In this setting, commentators have argued that contingency fees are unjustified because the attorney is no longer exposed to any contingency or risk in the case. [116]

In some recent **mass tort** class actions in which there was no separate inventory settlement, the attorneys' fees that individual law firms expected to receive from their clients alone approached the size of the largest class action fee awards. [117] The size of such contingency fees seems unconscionable in light of the limited work to be performed once liability has been established. Generally, the **mass tort** class action will establish an independent "claims resolution facility" which requires only that individuals or their representatives present the necessary medical documentation and evidence of work history to receive compensation. [118]

The **mass tort** claims resolution facility itself presents still another area where the plaintiffs'

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attorney may have a sharp conflict of interest. Traditionally, defendants and their counsel have not been involved in the claim allocation process and have been largely indifferent as to how a settlement was distributed so long as they received a release from further liability. [119] For plaintiffs and their attorneys, however, the issues associated with the design of such claims facilities are often fundamental. Should the settlement fund be distributed on a first-come, first-served basis? Or should payments be prorated or otherwise paid in deferred installments to ensure that the fund remains adequate to compensate future claimants? From a self-interested perspective, plaintiffs' attorneys have little reason to hold back settlement funds for future claimants and considerable reason to prefer a first-come, first-served approach. The latter approach affords them early payment both for existing clients and new clients that they are well positioned to solicit because of their role as class counsel. As a result, this desire for an early payout heightens the possibility that the settlement fund will be exhausted before future claimants are compensated.

3. Eligibility Restrictions and Illusory Benefits. - Even if a self-interested plaintiffs' attorney is willing to enter into a "cheap" settlement, a problem **[*1377]** remains: the court must approve the proposed settlement. In a **mass tort** case involving serious physical injuries or illness, this can be a significant hurdle. Few, if any, courts would approve a settlement that accorded desperately ill plaintiffs only nominal consideration. For example, if the sole producer of a carcinogenic product offered only $ 5000 compensation to plaintiffs suffering from a form of cancer likely to have been caused by its product, there would likely be a public outcry (and an appeal) if the court accepted such a settlement that seemingly placed a $ 5000 price tag on human life.

Accordingly, in order to structure a "cheap" settlement in a **mass tort** case, the parties must do more than simply agree on compensation levels below the amount that parties at arm's length would negotiate. Various tactics to this end are possible. One is to impose rigorous eligibility criteria that would disqualify many or most within the plaintiff class - but in a manner that is not self-evident to the court or to other third parties. For example, severely restrictive eligibility criteria can be imposed [120] (i.e., a ten-year occupational exposure, without an employment break, to asbestos). Or, in a **mass tort** property damage case, various losses that might have been caused by factors other than the defective product can be broadly and generically excluded from the settlement's coverage. [121] In classes likely to be dominated by future claimants, another approach is to provide for a very low inflation factor. [122] Thus, as illnesses and injuries inevitably arise over a thirty-year (or longer) period, the later claimants will find their claims being released for compensation that is clearly inadequate by then-prevailing standards. Finally, the parties can simply underestimate the number and character of the claims likely to be filed against the settlement fund. Given the multi-decade latency periods of many **mass torts,** this is easy to do even with the best of intentions, but in the common case where the defendants agree only to make a lump-sum settlement, the result of such underestimation is to reduce radically the benefits that future claimants will receive. Because projections of future claims are both expensive to prepare and susceptible to manipulation, **[*1378]** plaintiffs' attorneys will be inclined to rely on data prepared by defendants and thus need not engage in anything resembling active collusion. As a result, acquiesence by plaintiffs' attorneys in an underfunded settlement may be the gravest danger that future claimants face.

There are no doubt justifications for some occupational exposure criteria and for some exclusions from coverage, and by definition projections will sometimes miss the mark. The critical point, however, is that these are issues that the parties uniquely understand, but which the court approving the settlement may only dimly perceive. Put more simply, complex damages, eligibility, and causation issues tend to arise more commonly and in more complex variations in **mass tort** cases than they do in ordinary commercial class action litigation. As a result, when the plaintiffs' attorney is subject to a conflict of interest, the parties may find

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it easier to blind even a well-motivated court to their proposed settlement's impact because a higher level of expertise is necessary to evaluate the settlement.

4. Settlement Classes. - Nothing better facilitates collusion than the ability on the part of the defendants to choose the counsel who will represent the plaintiff class. To be sure, even if so chosen, plaintiffs' counsel could behave responsibly. But the dynamics for collusion are set in motion when such a selection process is possible.

Surprisingly, this practice is today not only possible but rapidly becoming common. [123] The new procedure involves negotiations between defendants and plaintiffs' attorneys prior to certification of the class action [124] - and, in some particularly dramatic cases, prior even to the filing of the class action. [125] Obviously, this approach allows the defendants to test out settlement terms (potentially with several teams of plaintiffs' attorneys) before any action is filed. Then, when and if an agreement is reached, the action will be filed as a "settlement class." Originally, the term "settlement class" seems to have meant only that in certifying the class "for settlement purposes," the court would defer any decision as to whether the proposed class actually satisfied Rule 23's certification criteria until after negotiations produced (or failed to produce) a settle **[*1379]** ment. [126] Under this approach, defendants waived no rights and could still object if the negotiations failed. Some recent decisions and the developing practice seem, however, to conflate the issue of class certification with that of settlement adequacy: if the settlement seems fair, then the court assumes that the class can be certified (on the apparent theory that the predominant common issue for purposes of Rule 23 is the fairness of the settlement). [127]

From the defendants' perspective, any attempt to reach an agreement by means of a settlement class is a "no lose" proposition: if defendants can obtain agreement from plaintiffs' attorneys and the court to a favorable settlement, the technique advances their interests; if they cannot, they are no worse off and can still object to any attempt by plaintiffs to obtain final class certification. More importantly, at least at the pre-filing stage, the plaintiffs' attorneys with whom the defendants are negotiating are always aware that if they do not reach agreement, the defense attorneys can move on and try their luck with a new team of plaintiffs' attorneys. Indeed, this is the critical difference between the evolving "settlement class action" procedure and negotiations between the parties in a conventional class action. In the latter context, if the defendants rebuff plaintiffs' counsel, the plaintiffs' team can litigate to a judgment. In the settlement class action, however, the plaintiffs' attorney has only a commission to settle and not to litigate. Such a plaintiffs' attorney has little more than a right of first refusal on the terms offered by the defendants. As this attorney must be painfully aware, a failure to exercise that option implies only that the option may pass to whomever is next in line. Thus, the bottom line is that the availability of the settlement class action tends to reduce the plaintiffs' attorney's negotiating leverage.

Courts have long been aware of the potential for lawyer-shopping that exists in informal settlement negotiations. [128] The original Manual **[*1380]** for Complex Litigation strongly discouraged the use of a settlement class action, pointing to the dangers that plaintiffs' counsel would not be able to live up to its fiduciary responsibility in such a conflict-laden context. [129] During the 1980s, however, courts gradually retreated from the Manual's original per se rule. In Weinberger v. Kendrick, [130] Judge Henry Friendly acknowledged the dangers latent in any settlement reached before the class was certified, but reasoned that the court could "scrutinize the fairness of the settlement with even more than usual care." [131]

Recognizing these dangers, some decisions accepted the settlement class only when all class members were treated identically and the prospects for conflicts among them seemed minimal. [132] This is clearly not the case in the **mass tort** context. Here, substantial variation in the type and severity of injury is the norm, not the exception. In part for this reason, some

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courts of appeals in the early to mid-1980s reversed certifications of **mass tort** settlement class actions. [133]

The major turning point in judicial attitudes toward the settlement class action came in 1989 in the Dalkon Shield **mass tort** litigation. Rather than viewing a settlement class as presumptively suspicious, the Fourth Circuit instead saw the existence of a tentative settlement as a positive factor: "If not a ground for certification per se, certainly settlement should be a factor, and an important factor, to be considered when determining certification." [134]

In force until this year, the Manual for Complex Litigation (Second) still urged "great caution" in certifying a settlement class action. [135] It explained:

In such situations, the fairness of the settlement may be very difficult to assess. No one may know how many members are in the class, how large their potential claims are, what the strength and **[*1381]** weakness of the parties' positions are, or how much the class members will benefit under the settlement. Lacking this information, the court should be wary of presenting the settlement to the class. [136]

These words are particularly true in the case of **mass torts,** where the future claimants' problem dwarfs the problem of evaluating fairness in ordinary class actions. Nonetheless, the new Manual for Complex Litigation (Third) relaxes standards still further by first noting that cost and time savings have lead courts to "permit the use of settlement classes and the negotiation of settlement before class certification," and then expressing the mild caution that "settlements involving settlement classes ... [require] closer judicial scrutiny than approval of settlements where class certification has been litigated." [137] In short, the progression from the first to the third Manual reveals a dilution in the tenor of its warnings about settlement classes, which is concomitant with the growing percentage of the federal civil docket that **mass torts** represent.

When courts first accepted settlement class actions, the normal pattern was that parties litigated actively for a period of months or longer, sparring over discovery and related motions - until reaching a tentative agreement on a settlement. In contrast, the newer pattern has involved a settlement reached after little or no active litigation (and sometimes before the complaint is filed). [138]

Judicial attitudes toward the settlement class action have divided in one important respect. Some courts have found it necessary only to determine that the settlement is fair and adequate, dispensing with, or relaxing the standard for, the specific findings required by Rule 23. [139] Conversely, the Third Circuit has insisted upon the same findings in a settlement class action as in one certified for trial. [140] This relaxed atti **[*1382]** tude of some courts toward settlement classes contrasts with their generally harsher attitude toward certification of **mass tort** class actions when the defendant objects. [141] For plaintiffs, this disparity increases the pressure to settle. For defendants, the current state of the law represents the best of both worlds: uncertainty as to whether a "hostile" class action can be certified, but receptivity toward settlement classes.

5. Restricting Opt Outs: Mandatory Classes and the Limited Fund Theory. - Probably the most aggressive tactic that has been attempted recently in connection with a "friendly" **mass tort** settlement is the certification of a "mandatory" class action from which class members may not opt out. Normally, a class action seeking money damages must be certified pursuant to Federal Rule of Civil Procedure 23(b)(3), [142] and in such a case, class members have an

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express right to opt out. [143]

Because "small claimants" have little incentive to opt out and because future claimants have little ability to do so, a "mandatory" class action principally impacts "high stakes" present claimants who would otherwise pursue individual actions. In reality, certification of a Rule 23 (b)(1)(B) mandatory class is a protection for defendants against the "danger" that high stakes individual claimants, dissatisfied with the terms of the settlement class, will opt out. If this were to happen, defendants would lose the benefit of the settlement because they might have to pay twice: once to the claims resolution facility established by the settlement, and again to individual claimants who opt out. [144] Yet, the existence of **[*1383]** substantial opt outs may be the best evidence that the original settlement was inadequate (and possibly collusive).

Attempts to obtain certification of a mandatory class action under Rule 23(b)(1)(B) usually seek to rely on the justification that, absent pooling and proration among all claimants, the defendant's limited assets soon will be exhausted to the prejudice of future claimants, who will not receive compensation. There are at least two short answers to this justification: First, bankruptcy handles this pooling function much better, and with superior safeguards and procedures, than does the class action. [145] In particular, claimants in bankruptcy are protected by the "absolute priority" rule, which precludes the debtor's shareholders from participating in the reorganized company until all creditors have been paid in full. [146] Second, the prediction that one's assets are insufficient to handle future claims is easily made, particularly by self-interested defendants. When the court accepts this claim, the defendant may be able to escape with a settlement that scales back its tort liability, whereas in bankruptcy, it would be forced to transfer virtually all its equity to its creditors. [147] Until recently, possibly for these reasons in part, attempts to certify a "limited fund" class action have generally been reversed on appeal. [148]

Other techniques for restricting opt outs also have been used recently. If a large number of class members do opt out, defendants may claim that the objectors to the settlement misinformed them about the litigation and request the court to invalidate all existing requests to opt out from the class. If they are successful, a second notice and opt out period will be provided, but the impact may be to exhaust and demoralize the objecting attorneys who labored to canvass their individual clients. In addition, the court can require that a disclosure statement be circulated informing the class members that in the determination of the court they have been misinformed by materially misleading communications earlier provided to them. For example, in Georgine v. Amchem Products, **[*1384]** Inc., [149] Judge Reed both invalidated some 236,323 individual opt outs and refused to permit plaintiffs' attorneys to execute forms on behalf of their individual clients.

Although plaintiffs' attorneys specializing in individual trial work have self-interested reasons to advise their clients to opt out, the better remedy might be to permit the settling parties to try to lure these opt outs to opt back in. [150] Otherwise, the draconian remedy of en masse invalidation seems capable of confusing clients and exhausting individual plaintiffs' attorneys.

6. Initial Summary. - Part I has made a depressingly simple point: conflicts of interest permeate the **mass tort** field. These conflicts are not only between attorney and client, but between present claimants and future claimants. Because of the inevitable heterogeneity among class members in personal injury class actions and also because of the uniquely exposed position of future claimants, the conflict problem is probably more intense and aggravated in **mass torts** than in other areas of class action or high volume litigation. Yet these conflicts largely have been ignored in the recent commentary on **mass torts,** obscured behind a mist of rhetoric about public law approaches and the need to protect the federal

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developments in class action practice bear witness to this phenomenon: during the 1990s, evolution has given way to mutation. At least with respect to **mass torts,** the development of the class action had been slow and halting. Well into the 1980s, federal courts uniformly resisted attempts to certify such **mass tort** class actions, largely out of concern that the interests of the individual litigant would be submerged within any large-scale proceeding. [2] By the **[*1345]** end of the 1980s, however, the tide began to turn in favor of class certification, as the advocates of aggregative techniques increasingly gained the upper hand over the defenders of individual litigant autonomy. Already, some have described this transition as a paradigm shift, signaling a fundamental movement away from the traditional bipolar organization of litigation to a new, more collectivized structure. [3]

While acknowledging this transition, others have expressed normative reservations about it. [4] Their concerns have focused largely on "process values": in particular, whether the shift from an intellectual rationale based on "individual rights" to one focused on "group interests" abandons the "deep-rooted historic tradition that everyone should have his own day in court." [5] So framed, the debate may seem to pose the usual **[*1346]** clash between efficiency and fairness, between those concerned with the high public and private costs of duplicative litigation and those committed to an individual's right to control litigation involving important personal interests. [6]

The problem with this supposed tradeoff is that it distorts the "real world" of **mass tort** litigation by making unwarranted assumptions. In fact, the dilemma in **mass tort** reform arises precisely because neither efficiency nor fairness, taken alone, is easily realizable. On the one hand, the efficiency claims made for the **mass tort** class action are problematic because, as this Article will argue, claim aggregation through class actions systematically tends to disfavor certain identifiable, but underrepresented, classes of tort victims. On the other hand, litigant autonomy in the **mass tort** context may be an illusory goal. Without discounting the urgency or uniqueness of the ethical issues that arise in **mass tort** class actions, [7] this Article recognizes that individual plaintiffs have weak to nonexistent control over their attorneys across the **mass tort** context for reasons that are inherent to the economics of **mass tort** litigation. Accordingly, proposals for the return to a traditional system of individual case litigation are apt to be as quixotic as they are costly.

All that is certain about **mass tort** litigation is that it places a heavy burden on the federal courts, while producing often modest and delayed benefits to plaintiffs. As a result, "a consensus has now emerged calling for substantial modifications in traditional court processes to improve the efficiency and equity of the mass claims resolution process." [8] This consensus, however, unites strange bedfellows. For some academics, the seductive appeal of a "public law" vision of litigation, stressing communitarian values and alternative modes of dispute resolution, has led them to reject the traditional bipolar model of litigation in favor of a more bureaucratic, problem-solving model in which courts negotiate and impose a solution. [9] For "law and economics"-oriented academics, aggregation **[*1347]** makes sense because of the high costs of individual civil litigation. [10] Proceduralists and judges in turn often favor consolidation and class resolution of **mass torts** over the "old" individual case system because of the growing burden on the federal judiciary. [11] The one common denominator in this new genre is that the vast majority of commentators agree that there is a crisis, one characterized by high costs and unjustified fees, threatening recurrent corporate bankruptcies, and requiring some form of radical remedy or another. [12]

Unfortunately, this consensus frames the **mass tort** dilemma, rather than resolves it. Easy as it is to point out that **mass tort** litigation involves high transaction costs, one must move on to the inevitable next question: "compared to what?" Here, the costs (both private and public) of alternative approaches must be evaluated in terms of their likely actual operation, not their utopian potential. To date, few have done so. In the race to a new system of group litigation in which lawyers represent "interests," rather than individuals, few in particular have looked for the perverse incentives that almost inevitably arise at such junctures when

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docket from inundation.

Even if courts wanted to monitor these conflicts closely, it is doubtful that they currently have the tools to do so. Attempts to estimate the impact of inflation a half-century away or to project the number of future claims likely to arise are little more than a stab in the dark. Yet, as will be seen next, there is very little evidence that courts want to engage in such monitoring.

II. Case Studies in **Mass Tort** Class Actions

Context counts. Critics invariably overgeneralize by treating all **mass tort** cases alike. Not only does the behavior of the parties differ from context to context, but judicial behavior in particular seems to change, depending in large measure on the degree of pressure that a generic type of litigation places on the court. This section will focus on three distinct subcontexts: (1) asbestos litigation; (2) silicone gel breast implants; (3) mass disaster litigation; and (4) **mass tort** property damage litigation.

A. Asbestos Litigation

1. Background. - Although, like a massive, unending river, asbestos litigation has flowed through the courts, it at least had a definable start **[*1385]** ing point: the Fifth Circuit's holding in 1973 that asbestos manufacturers could be held strictly liable for injuries resulting from asbestos exposure. [151] By 1992, less than twenty years later, an estimated 200,000 personal injury claims, each typically naming multiple defendants, had been filed or were pending nationwide. [152] Yet, even this number may represent only the tip of the proverbial iceberg. By some estimates, upwards of twenty-one million Americans have been exposed to asbestos in a manner that risks serious health problems, [153] and estimates as high as an additional 250,000 to 500,000 deaths from asbestos exposure have been responsibly made. [154] Nor has the pace of case filings begun to slacken. By 1990, the rate of case filings was increasing at an exponential pace. [155]

Because asbestos cases tended to be geographically concentrated (basically in eastern and Gulf coastal areas where shipyards, which once used asbestos abundantly, were located), federal courts there first began to experiment with aggregative processing techniques in asbestos litigation. The most innovative and successful experiment was that employed by Judge Robert Parker of the Eastern District of Texas. Faced with over 2000 aggregated claims, Judge Parker selected 160 representative cases and tried them in three phased stages before three juries. [156] In Phase I, the first jury ruled basically on the question of liability; in Phase II, two new juries were presented evidence on plaintiffs' exposure to defendants' products. Finally, in Phase III, the same two juries considered contributory negligence issues [157] and then, sitting separately, awarded damages for two different groups of claimants. The actual individual plaintiffs received the verdict that the jury awarded them, but the awards in these representative cases were then averaged and the other claimants, whose cases were not tried, received the average amount for their subgroup. The result conserved both judicial time and the notoriously expensive **[*1386]** transaction costs of asbestos litigation. [158] All this was accomplished through consolidation of cases and without

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the use of the class action format.

Subsequently, Judge Parker's consolidation and sampling approach was replicated on an even larger scale in a Baltimore trial that covered some 8500 cases. [159] Although commentators applauded this consolidation approach for its ability to distinguish among categories of injury (and thus avoid the gross distortions when inventories of cases are settled based on often arbitrary allocation formulas), [160] neither defendants nor **mass tort** practitioners have shown any enthusiasm for this approach. [161] Trial lawyers prefer to pursue punitive damages in individual actions, and the defendants (who appealed Judge Parker's decision to use sampling techniques) appear to prefer the delay and negotiating leverage that a congested docket affords them. [162]

2. The Bankruptcy Alternative. - Beginning in the early 1980s, a number of asbestos producers, including Johns-Manville Corporation, the industry's largest firm, sought the protection of bankruptcy to obtain relief from cascading asbestos claims. [163] According to the Ad Hoc Committee on Asbestos Litigation appointed by Chief Justice Rehnquist, eleven out of the twenty-five major asbestos manufacturers had sought bankruptcy protection by 1991. [164] At the time, these bankruptcies were controversial within the bankruptcy bar because of their "novel premise that the corporation was entitled to bankruptcy protection not because it was insolvent, but because continuing trends in asbestos litigation made a bankruptcy reorganization the best way to manage the payment of present and future claims." [165] That asbestos producers sought bankruptcy reorganization should not have been surprising. Facing a future of seem **[*1387]** ingly endless, repetitive, and expensive individual cases, these defendants understandably wanted a quick fix that would resolve all asbestos liabilities in one proceeding. The hope was that a transfer of assets could be made to a **mass tort** bankruptcy trust, which could then use low-cost arbitration procedures to resolve eligibility and damage issues among the claimants. In addition, asbestos defendants undoubtedly hoped that under this arrangement their shareholders could retain a significant share of their equity, because that had become the standard outcome in other bankruptcy reorganizations. [166]

That bankruptcy reorganization would prove more advantageous to defendants than litigation quickly proved an unfounded hope. Johns-Manville Corporation transferred eighty percent of its ownership to its bankruptcy trust. [167] Yet, even this contribution proved inadequate. Funded with nearly $ 5 billion in assets, the Manville Personal Injury Settlement Trust opened in 1988. Two years later, it was effectively insolvent. [168] Although it had been estimated that some 83,000 to 100,000 claims would be filed during the life of the Trust (extending well into the twenty-first century), 240,000 claims were in fact filed by the end of 1994, and several hundred thousand more claims were expected to be filed. [169]

From a public policy perspective, the principal lesson from the Manville reorganization is that, unless restricted, present claimants will deplete virtually any settlement fund in short order, leaving future claimants empty-handed. Yet, ironically, future claimants receive both more substantive protection (i.e., the absolute priority rule) and considerably more procedural protection in bankruptcy than they enjoy today in class action settlements. [170] Thus, although the bankruptcy experience under **[*1388]** lines the vulnerability of future claimants, it also suggests that a bankruptcy proceeding may be a superior alternative to a class action.

For defendants, the practical lesson from the Johns-Manville experience with **mass tort** bankruptcy is that it is neither cheap nor final. When the Manville Trust became insolvent, Judge Jack Weinstein engineered a class action to restructure and increase the payments to the Manville Trust from the newly organized Manville Corporation. [171] Absent finality, the attractions of **mass tort** bankruptcy thus looked minimal to the corporate planner, and so the search turned to other alternatives.

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3. The Return of the Asbestos Class Action. - During the mid-1980s, the asbestos industry pinned its hopes primarily on alternative modes of dispute resolution. The Asbestos Claims Facility, an industry-wide consortium, and its descendant, the Center for Claims Resolution (CCR), [172] sought during this period to encourage expeditious resolutions of claims in order to avoid the expense of litigation. Its premise was that because over sixty percent of asbestos-related expenses went to attorneys' fees and costs, early settlement could economize on this component. [173] Yet, the more claims they settled, the more plaintiffs' attorneys invested in search activities to discover new claimants. From the defendants' perspective, informal resolution also brought about a deterioration in the quality of claims, as individuals without visible symptoms or incapacity, but with a telltale pleural thickening on their pulmonary walls, increasingly predominated within the claimant population. [174] Attempts by defendants to establish "pleural registries," which deferred payment to unimpaired asbestos claimants while preserving their tort claims if their **[*1389]** injuries worsened, proved unsuccessful. [175] Not surprisingly, few asbestos victims preferred deferral to an immediate cash payment (with the right in most jurisdictions to bring a later suit if their condition deteriorated).

Meanwhile, pressure for change was building within the judiciary. In 1990, an informal network of ten federal district judges attempted to establish an "ad hoc nationwide coordinating committee" to resolve the asbestos case load crisis through case consolidation and management. [176] Although the Sixth Circuit refused to accept this unauthorized innovation, [177] the judges' joint action led to further developments. In March 1991, the Ad Hoc Committee on Asbestos Litigation, appointed by Chief Justice Rehnquist in 1990, released its report, which concluded that "this litigation impasse cannot be broken except by aggregate or class proceedings." [178] It recommended that Congress create "a national system for resolving asbestos claims which at the very least permits consolidating all asbestos claims in a single forum." [179]

Based on this hint that nationwide consolidation was now appropriate, eight federal district judges with heavy asbestos caseloads petitioned the JPML in 1991 to consolidate all asbestos personal injury cases in the federal system in a single forum. [180] Despite having refused a similar request on five previous occasions, [181] the JPML decided now to go with the flow, curiously emphasizing the risk of further bankruptcies if it did not do so. [182]

By an order dated July 29, 1991, the JPML transferred all pending personal injury asbestos cases to Judge Charles R. Weiner of the Eastern District of Pennsylvania. [183] Two days later, on August 1, 1991, Judge **[*1390]** Robert Parker, Chair of the Judicial Conference's subcommittee with responsibility for asbestos litigation and a former member of the Ad Hoc Committee appointed by Chief Justice Rehnquist, [184] wrote to Judge Weiner and, in the course of a generally hortatory letter, outlined the task before him:

We now have an opportunity to prove that the federal courts are not impotent. It is incumbent upon us to establish that we are viable as an institution and that we can provide modern solutions for modern problems. If we fail to rise to the task, I fear far reaching consequences.

I deeply believe we are not irrelevant - that we do have a role in our society that is greater than refereeing one-on-one litigation in an expensive and cumbersome manner ....

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I view your role as one of the commanding generals. You are the Eisenhower of this D-Day operation. The rest of us are colonels prepared to take orders in this joint effort.... The magnitude of this assignment is unprecedented in federal court history.

I would encourage you to at all times maintain a focus on the problem as a whole and not let the lawyers mire you into individual or small group considerations. If you let them, they can dominate your time to the point of rendering the transferee judge ineffective as far as the overall solution is concerned. Case management as applied to individual cases or consolidated groups simply will not work on this problem.

I would encourage you to be reluctant to grant exemptions to transfer. The fact that some judge may have X number of cases scheduled to go to trial two months or six months from now and on that basis (contrary to the MDL Order) gains an exemption from this process, in my judgment, is counterproductive. I think we have to continually focus on the larger problem. This focus will produce dynamics that should work toward the larger solution. [185]

[*1391] Clearly, this letter contemplated that Judge Weiner would stay all pending asbestos litigation, granting very few "special hardship" transfers back to the court from which individual cases were transferred. In blunt terms, Judge Parker advised that pressure must be kept on one side (the plaintiffs' attorneys) to induce a global settlement. So admonished, Judge Weiner did indeed slow the pace of asbestos litigation in the federal courts - to the point that fewer than one dozen asbestos cases in federal court appear to have been tried to a verdict or fully settled between the July 29, 1991 transfer date and July 1992. [186]

More importantly, the Parker/Weiner correspondence indicates that asbestos litigation had transcended the usual bilateral context of private litigation and had become a public policy concern in which the judiciary was determined to play a proactive role. The consolidation of asbestos litigation was then the culmination of a coordinated campaign by federal district judges to pressure plaintiffs (and their attorneys) to enter into global settlement discussions with defendants. In short order, nationwide defendants' and plaintiffs' asbestos steering committees were formed, and, throughout the remainder of 1991, exploratory talks continued between the two sides.

Contemporaneously with these developments, defendants' behavior toward pending asbestos cases changed sharply. Because without Judge Weiner's consent plaintiffs could no longer proceed to trial in federal court, defendants (and particularly the largest industry consortium - the CCR) began to stonewall, resisting any individual settlements. Despite repeated requests from plaintiffs' attorneys to allow a transfer of their cases back to their original jurisdictions, Judge Weiner remained adamant. Gradually, his message became clear: no individual settlements would occur outside a global resolution of all asbestos claims. Because many asbestos victims were desperately ill and dying, this tactic greatly increased the pressure on the plaintiffs' steering committee. Nonetheless, in November 1991, the plaintiffs' steering committee rejected the defendants' steering committee's offer of a global settlement. In truth, this rejection should not have been surprising. With respect to asbestos litigation, the plaintiffs' bar has always been split between "litigators" and "settlers" - those attorneys with a "high quality" clientele having serious injuries and those with a massive, but diverse, inventory of cases. Divisions on the plaintiffs' steering committee appear to have mirrored those within the plaintiffs' bar.

What happened next, however, was surprising. Recognizing that the plaintiffs' steering committee had been split over whether to accept their proposals, the CCR decided to approach the two co-Chairmen of the **[*1392]** plaintiffs' steering committee, Gene Locks

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and Ron Motley, [187] and attempt to negotiate a separate settlement with their firms covering all future personal injury claimants in the United States who had been exposed to asbestos. Although it is speculative to guess why the CCR targeted these two law firms, both controlled large inventories of asbestos cases and would benefit greatly from an inventory settlement of them. [188] In any event, the CCR, which had previously indicated its unwillingness to settle inventories with plaintiffs' firms in light of Judge Weiner's stay order, entered into negotiations with these two law firms to settle their entire inventory of asbestos cases. Ultimately, these inventory negotiations resulted in the CCR defendants agreeing to settle claims held by the 14,000 clients of these two firms for a total of just over $ 215 million. [189] Because the court never permitted discovery of either attorney, the contingent fees that both firms stood to receive is not known, but on the standard assumption of a one-third contingency fee, the participating law firms would have received over $ 71 million. Nor would this be their only benefit from the litigation. The CCR also agreed to pay any attorneys' fees that the court decided to award to class counsel. [190] In return, Messrs. Locks and Motley agreed that even if the class action settlement fell through, they would not file new claims against the CCR defendants that did not meet the highly restrictive medical criteria for compensation included in the proposed class action settlement. [191]

[*1393] 4. The Georgine Class Action. [192] - The next step was even more extraordinary: On January 15, 1993, the two sides simultaneously filed the complaint, the answer, a joint motion for class certification, and the 106-page Stipulation of Settlement in Georgine v. Amchem Products, Inc. in federal district court in Philadelphia. Uniquely, the case was over before it had begun - a comprehensive settlement without discovery, motions, or preliminary litigation of any kind. As might be expected under such circumstances, the parties jointly moved the court "for conditional certification of a class action for the purposes of settlement." [193]

The parties' speed was matched by that of the court. On February 1, 1993, two weeks after the complaint's filing, Judge Weiner conditionally certified the proposed class - without bothering to hold a hearing, hear evidence, or require notice to class members. [194] At the same time, Judge Weiner did, however, appoint another judge, District Judge Lowell A. Reed Jr., to conduct hearings on the fairness of the proposed settlement. [195]

After extensive hearings and much discovery (but not of the two lead counsel), Judge Reed issued an order in August 1994 that both certified the class action under Federal Rule of Civil Procedure 23(b)(3) and approved the proposed settlement as fair and adequate. [196] In addition, the court enjoined all class members from "initiating or maintaining any asbestos-related personal injury or death claim(s) or lawsuit(s) against any CCR defendant" in any court, state or federal, except as expressly permitted by the Stipulation of Settlement. [197]

The substantive terms of the Georgine settlement are as surprising as the process by which it was reached. The settlement was carefully framed to catch only future claimants, but to catch all of them. Specifically, the class was defined to include

all persons ... who have been exposed in the United States or its territories ..., either occupationally or through occupational exposure of a spouse or household member, to asbestos ... for which one or more of the defendants may bear legal liability and who ... have not, as of January 15, 1993, filed a lawsuit for **[*1394]** asbestos-related personal injury or damage ... against the defendant(s)." [198]

This definition obligingly allowed the asbestos plaintiffs' bar to continue to litigate or to settle their existing cases and thereby predictably minimized opposition to the settlement among

them. By and large, this strategy worked, as the plaintiffs' bar protested, but only a few plaintiffs' firms undertook the substantial costs of objecting to the settlement. Faced with the federal court's stay order and sensing the strong desire of the court to approve the settlement, most saw little alternative (even if the settlement were rejected) and so grudgingly settled their inventory of cases with the CCR defendants.

Nonetheless, grounds for objections to the settlement are glaringly obvious. First, the substantive terms of the class action settlement clash sharply with the contemporaneous inventory settlements reached by the same plaintiffs' attorneys. Under the inventory settlements, all claimants received compensation (even in the case of lesser injuries), but under the class action only the most seriously injured of asbestos victims will receive compensation - and only then under constraints that could delay actual receipt indefinitely. Essentially, the class action settlement created an insurance system covering all future claims, but provided compensation only for those claims that matured into incapacitating illnesses. Moreover, the settlement processed all future claims through a claim review process managed directly by the CCR defendants, in which the claimants would have to prove both a specific medical condition that was compensable under the settlement and occupational exposure to the asbestos products of a member of the CCR, based on criteria far stricter than that required by tort law. For example, in the case of lung cancer, occupational exposure to asbestos of between eight and fifteen years (depending on the victim's job classification) would be required and such exposure must have occurred "at least twelve ... years prior to manifestation of the lung cancer." [199] Clearly, either lesser periods of exposure or a more recent commencement of exposure would ordinarily suffice in the normal tort system if the claimant were suffering from any of the various cancers or pleural illnesses normally associated with asbestos. In fact, objectors to the settlement presented medical testimony that approximately half the claims that are filed in the tort system, and paid by the CCR in the tort system, would not qualify for payment under the exposure and medical criteria set forth in the Stipulation of Settlement. [200] Dr. Christine Oliver of the Harvard Medical School also testified that up to **[*1395]** fifty percent of the victims that she diagnoses with asbestos-related lung cancer would not satisfy the settlement's medical criteria. [201]

As with other **mass tort** settlements, Georgine worked off a grid system, which specified a limited range of damages that the CCR would award for the various asbestos diseases recognized by the Stipulation of Settlement: [202]

[See table in original]

The key figure here is the floor on the average range; although actual awards could go higher or lower, CCR was not obligated to pay more than this lower figure on average to victims who satisfied the medical and exposure criteria (i.e., $ 5800 to a person with confirmed asbestosis that reduced his lung capacity by, hypothetically, seventy percent). [203]

The limited compensation payable under Georgine comes into clearer focus when its settlement grid is contrasted with the Johns-Manville settlement approved by United States District Court Judge Jack Weinstein: [204] **[*1396]**

[See table in original]

In sharp contrast to Georgine (which justifies the lack of compensation to victims without cancer or disabling asbestosis on the ground that they have sustained only minor injuries), the Johns-Manville settlement recognizes the reality of asbestosis disease and permits a maximum recovery for it of $ 300,000, which amount exceeds the highest recovery possible for a malignant cancer (i.e., $ 200,000) under Georgine. Comparing the two tables, one sees that, in the ordinary case, a disabled victim of asbestosis will receive $ 50,000 under the

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Johns-Manville settlement but only between $ 5800 and $ 7500 under Georgine.

Of course, any contrast between the Georgine and Johns-Manville settlement values must acknowledge that Johns-Manville was a much larger defendant than any of the CCR members and probably represented a greater share of the asbestos industry than they did in the aggregate. Unlike the twenty CCR defendants, however, Johns-Manville was bankrupt and needed to repay financial and trade creditors as well as tort victims. In this light, the contrast between a **mass tort** class action (Georgine) and **mass tort** bankruptcy (Johns-Manville) provides a roadmap for the solvent corporation that suggests that the class action route will enable it to escape much of its tort liability without risking the loss of corporate control that is often incident to a bankruptcy reorganization.

The Georgine settlement also imposed strict limitations on the number of qualifying claims that may be paid in any year. [205] Known as "case flow maximums," these limitations were specified for individual disease categories. Thus, in year one, the CCR defendants were required to pay no more than 700 lung cancer cases, 700 mesothelioma cases, and 200 "other cancer" cases. [206] If more qualifying claims are filed, a queue results, and claimants may be required to wait for years (and possibly **[*1397]** never be paid). For example, between 1989 and 1993, CCR appears to have in fact paid about 25,000 claims a year. [207] If this rate were to continue, a substantial backlog of cases would soon result. Faced with indefinite delays, some victims might soon be forced to accept private settlements well below even the judicially approved levels.

To sum up, the Georgine settlement first screens out most persons who would normally receive compensation in the tort system (and who did in fact receive compensation under the inventory settlements paid by the same defendants), and then, for those who do qualify for compensation, it imposes "case flow maximums" under which plaintiff victims could face a long and uncertain wait; finally, the compensation offered falls well below the typical recoveries in the tort system. The contrast between the recoveries afforded present claimants in the tort system and those offered future claimants under the Georgine settlement is dramatically illustrated by evidence that the objectors to the settlement presented at the fairness hearing. [208] Starting with the admitted fact that the Ness, Motley firm (one of the two firms serving as lead counsel in the class action) settled its client cases for $ 138,077,100, [209] the objectors computed that if the clients in these inventory settlements had recovered the maximum average payment that a similarly situated class member would receive under the Georgine class action, they would have received only $ 89,660,000. So viewed, the difference of $ 48,417,100 represents a fifty-four percent premium that the individual clients in the inventory settlements received over the maximum average payment under the class action. [210]

This disparity between the inventory settlements and the class action settlements pales, however, in comparison to the disparity between claim **[*1398]** ants with malignant conditions and those without. Ultimately, class counsel in Georgine simply waived compensation for most class members with non-malignant conditions in return for cash payments to those class members with serious malignant conditions. The rationale for this extraordinary act of waiving the rights of some clients to benefit other clients was that "exposed" class members could not predict their future injuries and would prefer to waive compensation for "minor" injuries and reserve it for major life-threatening illnesses. But is this true? Would an individual with a normally compensable injury waive compensation in order to receive greater compensation in the possible (but unlikely) event that the condition would worsen into a very serious or fatal injury? Economically, the assumption that individuals would voluntarily make such a choice is the equivalent of predicting that individuals would insure only for catastrophic illness and would waive any compensatory recovery for lesser injuries in favor of an exclusive focus on death and disability. As an empirical matter, this seems a very shaky prediction. [211]

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Normatively, it is even more suspect. Although a legislature or some politically accountable body might decide to provide compensation to only the worst off on paternalistic grounds, a private attorney, acting as class counsel, seemingly has no entitlement to abandon the interests of one group of clients to benefit another. Indeed, the very fact that such trade-offs could be reached highlights the need for subclasses and separate representation of different categories of claimants. Determined not to impede a global resolution, however, the district court rationalized each of these conflicts: subclasses were not needed, the non-malignant future claimants were dealt with fairly because they might receive cash compensation if their injuries worsened, and the differential between the amounts paid in inventory settlements and the class members was irrelevant. [212]

[*1399] Finally, in terms of its discrimination against future claimants, the most revealing deficiency in the Georgine settlement was its failure to contain any adjustment for inflation. Under the settlement, the amounts to be received by future claimants are fixed for the first ten years, regardless of increases in the cost of living. Thereafter, payment ranges may be increased in the eleventh year, up to twenty percent, but only if the parties negotiate new values (or if binding arbitration establishes new values in the event that the parties cannot agree). Historically, however, consumer prices have increased at a much faster rate. [213] Even the Georgine court conceded that the CCR defendants had failed to produce evidence that rebutted the objectors on this point. [214]

In overview, Georgine's failure to deal responsibly with the issue of inflation reminds us that the interests of future claimants are not homogenous. Some will become ill early; others only after a long latency period. If adjustments are not made for inflation, future claimants will be treated very differently under a settlement that purports to make equal payments to each. In addition, the late-maturing claimant also bears the considerable risk that the number of claims made will exceed that projected, with the result that the case flow maximums in the Georgine settlement will have been exceeded in the interim.

5. Ahearn v. Fibreboard. - Georgine might be dismissed as an aberration - if it were not swiftly followed by other class actions that replicated its techniques. Ahearn v. Fibreboard Corp., [215] filed months after Georgine but negotiated contemporaneously with it, was also designed as a future claims class action with the class again being defined to exclude all persons with pending claims against Fibreboard.

Ahearn is both similar to and different from Georgine in important ways that require a closer analysis. Long a wholly-owned subsidiary of the **[*1400]** Louisiana Pacific Corporation, Fibreboard was spun off by its parent as an independent publicly owned company in 1988 at a point when its potential insolvency as the result of asbestos liabilities was already a clear and present danger. [216] By that time, over 50,000 asbestos-related actions had been filed against Fibreboard and the number has since soared to approximately 200,000. [217] Following the transfer by the JPML of all asbestos-related personal injury litigation to Judge Weiner in 1991, [218] Fibreboard, like the CCR defendants, unsuccessfully sought to negotiate a global settlement of all its asbestos-related cases with the nationwide plaintiffs' steering committee. [219]

For Fibreboard, a global settlement was particularly urgent, because already it had unpaid obligations in excess of $ 1 billion for asbestos cases that it had settled earlier, and it was experiencing difficulty in convincing its insurers to pay these claims. Faced with asbestos liabilities well in excess of its net worth, Fibreboard began a complex three-party negotiation with its insurers and several selected plaintiffs' attorneys. With the collapse in the spring of 1992 of efforts by all asbestos defendants to reach a global settlement with the plaintiffs' steering committee, Fibreboard began negotiations with the Ness, Motley firm to reach a settlement covering simply itself. By December 1992, Fibreboard and Ness, Motley reached

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an inventory settlement covering "approximately 20,000 existing asbestos personal injury claims." [220] Pursuant to this agreement, Ness, Motley agreed to recommend the settlement provisions to future claimants that it represented. [221] Eventually, by August 6, 1993, this settlement agreement was extended to cover some 45,000 pending asbestos-related personal injury claims against Fibreboard. [222]

On August 9, 1993, at the same time that this massive inventory settlement was reached, United States District Judge Robert Parker, the same judge who earlier had recommended to Judge Weiner that he force a global settlement on plaintiffs in Georgine, [223] appointed the Ness, Motley firm along with two other attorneys "to act as negotiating counsel **[*1401]** on behalf of ... a class of future claimants." [224] Less than three weeks later, on August 27, 1993, Fibreboard and these newly-appointed class counsel informed the court that they had reached an agreement in principle covering all future claims. The actual class action was filed on September 9, 1993, and on that same date, Judge Parker certified, for settlement purposes only, a future class of persons with asbestos-related personal injuries who had not asserted such claims against Fibreboard prior to August 27, 1993 (the date the agreement in principle was reached). [225]

In short, as in Georgine, the same plaintiffs' law firm simultaneously represented both present claimants in an inventory settlement and future claimants in a class action. The official class action notice estimated that the total number of present claimants represented by Ness, Motley in the inventory settlement "may exceed 50,000," in which case, it said, the aggregate amount of the present claims represented by Ness, Motley would approximate $ 500 million. [226] This notice also estimated that plaintiffs' counsel would receive on average contingent fees equal to "approximately one-third of the payout to such present claimants," thus implying that plaintiffs' counsel stood to receive approximately $ 167 million under these settlements. [227] More importantly, most of these inventory settlements were effectively made contingent upon the approval of the class action settlement. [228] As a result, class counsel had a strong interest in approval of the class action settlement, even if it was not in the best interests of the future claimants.

In fairness, the Ahearn settlement received close judicial supervision and did not involve the same glaring disparities as in Georgine between the terms received by the present claimants and those applicable to future claimants. [229] Nevertheless, the substantive terms of the Ahearn settle **[*1402]** ment were extraordinary for the limited cash contribution they required of Fibreboard. Under the settlement, Fibreboard's two principal insurers will deposit $ 1.525 billion into a trust fund for future claimants, to which Fibreboard will add a mere $ 10 million. This token contribution might be understandable if Fibreboard were otherwise insolvent, but, apart from its asbestos liabilities, Fibreboard appears to be a thriving company. The guardian ad litem appointed by the court to protect the future claimants concluded that Fibreboard's value (once its asbestos liabilities were stripped away) might be as high as $ 250 to $ 300 million, and other expert testimony placed it in the range of $ 230 to $ 240 million. [230] If we assume Fibreboard has a net worth of $ 250 million, then its $ 10 million contribution represents only four percent of this net worth.

Probably the most dramatic evidence of the impact of this settlement on Fibreboard was the reaction of its stock price to its announcement. During 1992, Fibreboard's common stock fluctuated from a low of 2 1/8 per share to a high of 9 3/8. [231] This depressed value no doubt reflected the overhang of asbestos liabilities. But as the possibility of a settlement increased, Fibreboard's stock price climbed, and, during the month the settlement was announced, it soared, running up from 11 7/8 to a high of 22 7/8. [232] By the end of the year, Fibreboard's stock price reached a high of 35 5/8 - nearly three hundred percent above its highest closing price in the month before the settlement. [233]

Such a dramatic stock price movement suggests that there has been a wealth transfer: Fibreboard's shareholders have gained, and its tort creditors (and insurers) have lost. More

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importantly, this stock price reaction contrasts sharply with what would have happened in a **mass tort** bankruptcy, where tort claimants sometimes receive eighty to ninety percent of the stock of the reorganized entity. [234] Instead, Fibreboard and its **[*1403]** shareholders escaped with only a $ 10 million contribution to the class action settlement.

The even more controversial aspect of Ahearn was, however, Judge Parker's decision to certify the class as a mandatory class under Rule 23(b)(1)(B). [235] Finding that defendant's insurance proceeds (which were obtained in a much-contested parallel settlement with Fibreboard's insurers) constituted a "limited fund," which would be exhausted before all individual claimants could be satisfied, the court certified the action as a mandatory class, which has the practical effect of denying class members the right to opt out. [236] Although it remains an unresolved question whether the right to opt out from a class action that primarily seeks a money judgment can be effectively extinguished in this fashion, [237] the curious and unique feature of Ahearn is that the company itself remained highly solvent and yet contributed only a trivial proportion of its own assets to the settlement fund. [238]

Effectively, Ahearn reveals the settlement technique in Georgine pushed one critical step further so that a not-yet bankrupt corporation can limit its liabilities to its insurance policies (at least with the help of cooperative plaintiffs' attorneys). Although pooling a defendant's assets when they are inadequate to satisfy all its creditors makes sense, Ahearn permits the defendant to limit tort creditors to an asset pool to which it makes virtually no contribution. In turn, a consequence of deeming the corporation's insurance policies to create a "limited fund" is that it creates a perverse incentive to underinsure. That is, under Ahearn's rule, a defendant may choose to purchase less liability insurance than it otherwise would, because there is an advantage to inadequate insurance reserves: namely that they can constitute a "limited fund" and justify a mandatory, non-opt out class action. In allowing Fibreboard to escape **[*1404]** with only a $ 10 million contribution to the class action settlement, the Ahearn court effectively placed Fibreboard's shareholders ahead of its tort creditors - a result altogether different than the result in **mass tort** bankruptcies (such as Johns-Manville) where the tort creditors received the vast majority of the corporation's equity value. [239]

In fairness, the non-opt out provision in the Ahearn settlement probably was demanded by Fibreboard's insurers, who seemed to have been unwilling to settle absent some mechanism for achieving global peace. Understandably, their fear was that they could be held liable twice (i.e., once to class members and then again to opt outs). But the insurers' fears hardly justified granting Fibreboard equivalent immunity from future claimants, particularly when the Ahearn settlement fund may well be inadequate to cover all future claimants. [240] Paradoxically, while the Ahearn settlement grants certainty and repose to the shareholders of the corporate defendant, it imposes risk and uncertainty on its tort creditors, who are exposed to cutbacks and potentially lengthy queues depending upon the number of future claims. In this light, in marked contrast to **mass tort** bankruptcies, the **mass tort** class action can be used to reverse the historic legal relationship between debt and equity - perversely shifting risk from diversified and logically risk neutral shareholders to non-diversified and normally risk averse tort creditors.

B. Silicone Gel Breast Implants Litigation

The Silicone Gel breast implants litigation [241] stands in sharp contrast to asbestos **mass tort** litigation in several respects. Unlike asbestos (the oldest and most "mature" of **mass torts)**, breast implant litigation was a new form of tort litigation, in which outcomes and settlement values were not yet easily predicted. From a procedural perspective, the settlement process in the Silicone Gel litigation provides a commendable example of a **mass tort** litigation that

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client control over attorneys is weakened. No opening generalization about the modern class action is sounder than the assertion that it has long been a context in which opportunistic behavior has been common and high agency costs have prevailed. [13] If not actually collusive, non-adversarial **[*1348]** settlements have all too frequently advanced only the interests of plaintiffs' attorneys, not those of the class members. A second generalization may be more controversial but also rests on an empirical foundation: courts have little ability or incentive to resist the settlements that the parties in class action litigation reach. [14] Thus, if the court's most powerful sword (namely, its authority to reject the settlement in a class action) will typically remain in its scabbard, the quest for accountability must look to other weapons and remedies.

Still, the possibility of opportunistic behavior and collusive settlements is not, standing alone, a sufficient basis for rejecting **mass tort** class actions. In truth, individual tort litigation is notoriously expensive [15] and **[*1349]** arguably threatens to inundate the federal docket. [16] **Mass tort** class actions could then be a more effective system, at least viewed in terms of their ability to deliver compensation to victims, even if they are characterized by much self-interested attorney behavior and a resulting high rate of suspicious settlements.

Against this backdrop, this Article does not propose to eliminate **mass tort** class actions, but rather to restructure them by placing prudential limits on the problems that courts can competently handle. A balance must be struck between pragmatism and idealism, and, to do so, this Article will offer what it terms a "constrained autonomy" model for reconciling group litigation with individual rights. It does so because, whatever the plight of **mass tort** victims, there is today more reason to believe that group litigation and a public law approach aggravates, rather than alleviates, their problems. [17] The **mass tort** class action occupies a polar position at the extreme end of the continuum in terms of its relative vulnerability to abuse and exploitation. Although agency costs are inevitably high in all class actions, the **mass tort** class action is uniquely vulnerable to the danger of collusion and thus needs special safeguards. Increasingly, defense counsel have come to understand that the **mass tort** class action can be utilized to obtain cheap settlements that pay little attention to the interests of certain structurally underrepresented classes of claimants.

Other scholars have begun to note this dark underside to the **mass tort** class action, [18] but none has yet placed it in its fuller context. Originally, the class action was viewed by both sides as the plaintiffs' weapon, a technique for extorting settlements even in non-meritorious cases. [19] Throughout the 1980s, corporate defendants vigorously resisted the use of the **mass tort** class action, preferring even the alternative of a bank **[*1350]** ruptcy reorganization. [20] But with the 1990s, their perception of the class action has changed dramatically. Defendants have not only adopted the class action as their preferred means of resolving their **mass tort** liabilities, but have also actually begun to solicit plaintiffs' attorneys to bring such class actions (as a condition of settling other pending litigation between them). [21] Behind this transition lies defendants' discovery of a variety of procedures for minimizing their tort liabilities. Collectively, these amount to a new legal technology, the impact of which uniquely disadvantages future claimants. Most importantly, these techniques can be implemented only through the use of a **mass tort** class action.

In overview, this transformation is of historic significance: once a sword for plaintiffs, the modern class action is in some contexts increasingly becoming a shield for defendants. [22] Rather than serving as a vehicle by which small claimants can aggregate their claims in order to make litigation economically feasible (and thereby also gain negotiating leverage vis-a-vis defendants), the **mass tort** class action now often provides a means by which unsuspecting future claimants suffer the extinction of their claims even before they learn of their injury.

Why is this happening? The one safe generalization about **mass tort** class actions is that the traditional safeguards used by courts to guard against collusive settlements have little value or relevance here. Three basic factors explain the unique vulnerability of the **mass tort** class

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was structured reasonably and supervised intensively by the federal court. Settled at approximately $ 4.23 billion, the settlement hardly seems collusive; indeed, it is the "man bites dog" story that **[*1405]** shows that **mass tort** class actions need not necessarily result in non-adversarial, low cost settlements. [242] Yet ultimately, the Silicone Gel experience teaches pessimism, not optimism, because it provides an object lesson in the fragility of **mass tort** settlements - at least when present claimants are able to opt out. Finally, from a judicial management perspective, the breast implant litigation is a prime example of an "immature" **mass tort,** one that lacks an extensive history of outcomes in individual cases. In part for this reason, the parties cannot reliably estimate even the number of present claimants, much less anticipate future claims. The result has been a disaster for all sides, which underscores the dangers of certifying an "immature" **mass tort** class action. [243]

Breast implant litigation is a recent phenomenon, which increased dramatically in volume following the Food and Drug Administration's (FDA) January 5, 1992 ruling that placed a temporary moratorium on the use of breast implants for cosmetic purposes. [244] As in other **mass tort** areas, a bitter conflict rapidly developed between the personal injury trial bar and the class action specialists who quickly appeared on the scene. Within weeks of the FDA's ruling, Stanley Chesley of Cincinnati, a well-known but controversial class action plaintiffs' attorney, filed a nationwide negligence class action in his home jurisdiction (the Southern District of Ohio), which was quickly certified as a class action by the district court without a hearing. [245] Rival plaintiffs' attorneys specializing in individual trial work publicly predicted an impending sellout. [246]

But one did not materialize. Although the rival factions of plaintiffs' attorneys each asked the JPML to consolidate all breast implant litigation in a forum favorable to their side (Ohio or California), the Panel declined. Instead, realizing the level of acrimony within the plaintiffs' bar, the Panel consolidated all breast implant actions in a neutral forum that **[*1406]** no litigant had suggested (the Northern District of Alabama) before Judge Sam Pointer, who was widely recognized as a leading expert among trial judges on class action procedures. [247]

Judge Pointer wisely decided to appoint a seventeen-member plaintiffs' steering committee to direct all pre-trial activity. Carefully balancing the membership on this committee to reflect all the principal factions (who had already engaged in a heated public debate), Judge Pointer appointed three co-chairmen, diplomatically dividing power between Stanley Chesley and representatives of the personal injury trial bar. [248] In addition, procedural safeguards not present in other recent **mass tort** litigation were followed: special guardians for subclasses were appointed, special opt out and late entry provisions were accepted, and the plaintiffs' steering committee met regularly to monitor the negotiations. [249]

Compared with other **mass tort** settlements, the breast implant settlement was negotiated in a virtual fishbowl of public disclosure and debate. Once a tentative settlement had been negotiated, a "Statement of Principles," which outlined the proposed settlement, was widely distributed by the plaintiffs' negotiating committee among plaintiffs' lawyers, victims' groups, and potential class members. Victims' groups were also invited by the court to a preliminary hearing on the settlement. [250] When the dust finally settled, a complicated settlement, involving forty different benefit levels, had been negotiated, requiring the defendants to contribute a record total of approximately $ 4.23 billion over a multi-year period. [251]

This contrast between the "cheap" settlements in Georgine and Ahearn and the record settlement in Silicone Gel seemingly suggests that the legal rules and procedures governing the settlement process may matter - and **[*1407]** greatly. For example, had there been only a two- or three-member team of plaintiffs' attorneys appointed to control the case in Silicone Gel (as in Georgine and Ahearn), the possibility of collusion would have been considerably stronger, and certainly the process of reaching a non-adversarial settlement would have been simpler. Of course, other factors may also help explain the Silicone Gel settlement. For example, because the class was defined to include both present claimants

and future claimants (unlike Georgine and Ahearn), highly motivated class members existed to monitor the appointed attorneys. Networks of injured victims also developed to oversee the settlement process and communicate with class members, which is likely to happen only when the class is defined to include "high stakes" plaintiffs with present claims.

Curiously, the plaintiffs' substantive case in Silicone Gel may have been substantially weaker than in the asbestos litigation, because of the absence of clear scientific evidence of the causal relationship between breast implants and specific injuries. [252] That a record settlement resulted against such a backdrop strongly suggests that process differences are a powerful explanatory variable. [253] But this interpretation, although plausible, may be too glib because there is an alternative, darker interpretation of the Silicone Gel settlement.

If the Silicone Gel settlement represents a fair and uncorrupted outcome, it has also proven a fragile and unstable one. In any lump sum settlement, the amount that individual claimants will receive necessarily depends on the number and type of the claims that are filed. When the global settlement was first announced in September 1993, class members were initially informed that they would receive between $ 200,000 and $ 2 million (depending on their generic type of injury and other individual **[*1408]** factors). [254] Later, these estimates were scaled down to a floor of $ 105,000 and a ceiling of $ 1.4 million, [255] but even these estimates depended on the number of claims actually filed. Thus, to protect class members, an important provision in the settlement agreement specified that class members would receive an additional opportunity to opt out if a higher than anticipated rate of claim filings forced the benefits to be scaled back from these estimated levels.

Sensible as this delayed opt out right was in the case of an "immature" **mass tort** where predictions of claim filings were necessarily more speculative, it created a material risk for defendants that from the outset placed the settlement under stress. Having agreed to contribute approximately $ 4.23 billion, defendants still faced additional liability in individual actions brought by opt outs. For defendants, this implied that any underestimation of the likely number of claims could set off a chain reaction under which benefits would be scaled down and class members would in consequence opt out in substantial numbers to bring individual actions.

Exactly this scenario appears to have happened. As of the spring of 1995, some 435,000 claimants had filed for eligibility to receive benefits under the settlement, [256] while only 7800 domestic class members and 6500 foreign claimants had opted out. [257] The filing of over 400,000 claims clearly exceeded defendants' expectations and implied that a scaling down of the promised individual benefits would be necessary unless defendants agreed to increase their contributions. In early May 1995, Judge Pointer announced that these claims appeared likely to "substantially exceed" the funds committed by the defendants and asked the parties to negotiate a revised or enriched settlement. [258] Later that summer, the full extent of the necessary scaling back became evident: at best, class members would receive only twelve to sixteen percent of their scheduled benefits, at worst, less than five percent. [259]

For defendants, this development posed a hard choice: if they did not contribute more funds, an unknown, but probably substantial, number of claimants would predictably opt out and commence individual **[*1409]** actions. Even if they did increase their contribution, some scaling back of benefits might still be necessary if new claims materialized, and any such reduction would predictably trigger opt outs. As a result, defendants had clearly failed to achieve a global peace. Worse yet, preliminary analyses estimated that as much as an additional $ 24 billion contribution would be necessary merely to pay the present claimants. [260]

In response, the principal defendant - Dow Corning - filed for bankruptcy reorganization on May 15, 1995. [261] Although Dow Corning followed in the path of other manufacturers that have elected bankruptcy reorganization to resolve **mass tort** liabilities, its incentives for

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electing bankruptcy appear to have been substantially different and novel. Unlike corporations that have opted for bankruptcy when faced with a **mass tort** class action, Dow Corning seemed intent on preserving the **mass tort** class action settlement; indeed, its tactical aim seems in part to have been to lock claimants within it by eliminating any incentive to opt out. Because the filing of a bankruptcy petition automatically stays tort litigation against the debtor, [262] opting out gains a claimant little and costs the claimant the right to participate in the settlement (if it remains intact). Once claimants were frozen into the class action, benefits could then be reduced without triggering a major increase in opt outs and hence individual litigation against it. [263] Those who had already opted out would be compensated eventually through the bankruptcy action (possibly with Dow Corning stock), but at the point Dow Corning elected bankruptcy this number seemed insufficient to shift control of Dow Corning away from its parents. [264]

[*1410] Outside bankruptcy, Dow Corning faced the worst of both worlds: a large class settlement plus individual litigation brought by a substantial, but indeterminate, number of opt outs. Within bankruptcy, Dow Corning was protected from opt outs and could resist pressure to make additional contributions to the class action settlement. More importantly, by combining a class action with a bankruptcy filing, Dow Corning's management achieved objectives that would be impossible under either technique alone. Standing alone, bankruptcy could enable Dow Corning's management to achieve a complete global resolution of its liabilities, but at the possible cost of its management losing control of the company (as Johns-Manville had illustrated). Standing alone, a class action could enable Dow Corning to achieve a cheaper settlement (as Georgine illustrated), but at the cost of remaining vulnerable to opt outs, particularly if benefits were scaled back. Used together, the combination of bankruptcy and a class action effectively converted a standard Rule 23(b)(3) opt out class action into a de facto mandatory class action. Moreover, because few claimants under the class action would thereafter opt out (at least to sue Dow Corning), the bankruptcy reorganization need not shift control of the firm (as prior **mass tort** bankruptcies have done).

C. Mass Disaster Litigation

The asbestos, Agent Orange, Dalkon Shield, and breast implant litigations were all national events, covered by the media, watched by other judges concerned about their own dockets, and closely followed by several hundred attorneys. Ordinary mass disaster cases occur and are litigated on a much smaller scale. [265] Nonetheless, the concentrated character of the **mass tort** bar has meant that new techniques learned in the national context have quickly been re-applied in more localized **mass tort** litigation.

[*1411] A good illustration is supplied by the 1995 settlement of a mass disaster class action, Hayden v. Atochem North America, Inc. [266] The undisputed facts showed egregious environmental violations: basically, an agrichemical plant in Bryan, Texas had exposed the local community to arsenic contamination since the early 1970s, polluting the air, soil, surface water and groundwater. [267] In 1992, a class action seeking only property damages was filed against the current and former owners of the plant as a Rule 23(b)(3) opt out class action. [268] Although the class was initially certified as an opt out settlement class, the settling parties reconsidered their position once Georgine, Ahearn, and other recent cases had shown them the feasibility of resolving personal injury claims through the vehicle of a **mass tort** class action. In April 1995, the parties reached a revised settlement that converted the case from an opt out class action under Rule 23(b)(3) into a non-opt out class action under Rule 23(b)(2) and extended the settlement to cover personal injuries, including both present and future claims, as well as property damages. [269] To accomplish this critical conversion to a

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Rule 23(b)(2) class action, [270] the parties used a technique that was novel to **mass tort** cases but well known in labor litigation: they inserted a provision for injunctive relief into the proposed settlement in order to fall outside Rule 23(b)(3). [271] Specifically, the de **[*1412]** fendants agreed to be enjoined from using the Bryan plant to produce, use, or handle arsenic. [272]

Given that the continued release of arsenic into the surrounding atmosphere almost certainly would violate a variety of federal environmental statutes carrying criminal penalties, this concession amounted to little and ordinarily would not have worked to convert a class action that was predominantly for money damages into a Rule 23(b)(2) class action (from which opting out is not permitted). Most courts have long used a "predominance" test that looks to the primary relief sought in distinguishing Rule 23(b)(2) from Rule 23(b)(3) class actions. [273] Still, plaintiffs characterized their class action as one for medical monitoring (arguably a form of equitable relief) and in fact settled for relatively modest monetary relief: namely, a $ 55 million settlement fund, [274] which amount will in theory both support a medical monitoring program and compensate class members for both property damage and present and future personal injury claims, as well as pay plaintiffs' unusually high attorneys fees. [275] Despite these suspicious signs, the settlement nonetheless received preliminary judicial approval. [276]

[*1413] What makes the Hayden litigation truly shocking, however, is less its attempt to bar opt outs than its willful indifference to future claimants. Although the settlement carefully divided the settlement fund between property claims and personal injury claims, [277] it left the allocation between future and present claimants entirely to the future discretion of a special master. By the settlement's terms, most of the settlement fund will be allocated to a "Personal Injury Fund" that will primarily compensate all class members for the increased risk of injury as a result of their exposure. [278] However, because the latency period for arsenic exposure is up to forty years, [279] and an estimated 26,000 class members are covered by the settlement, [280] it is inevitable that some future claimants will incur actual arsenic-related illnesses in the remote future. Such claims for actual personal injury are defined as "extraordinary claims" by the settlement, and the special master is given substantial discretion in processing and recognizing them. No funds are specifically allocated for future claimants, but the special master is instructed to "make an initial evaluation of all extraordinary claims submitted during the first nine months [of the settlement] and ... create a reserve from the Personal Injury Fund for the payment of extraordinary claims based on extraordinary claim awards." [281] Predictably, the settlement provides that if the fund for personal injury claimants proves inadequate, claims will be scaled back and defendants will have no additional liability. [282]

In overview, such an undefined allocation procedure simply sweeps the difficult problem of future claims estimation under the rug, postponing it until after judicial approval has been secured. If the estimation of future claims is implausibly low, no one is in a position to object (and present claimants receive a higher payment); in contrast, if it is too high, present claimants have a strong incentive to protest. The consequence is **[*1414]** that substantial corporations escape with a modest lump sum settlement from which class members cannot opt out, while future claimants are left to gamble on the adequacy of a settlement fund that does not even reserve specific amounts for them. Ultimately, the Hayden outcome reflects not only the triumph of defendants over plaintiffs, but also that of present claimants over unrepresented and still unknown future claimants.

D. **Mass Tort** Product Liability Cases

An instructive contrast to the foregoing **mass tort** personal injury cases is supplied by the

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recent experience in **mass tort** product liability cases. As a generalization, such cases involve the same operative facts as in a personal injury class action, except that they are inherently "small claimant" cases. The class members in such cases have either suffered a decline in the value of a defective product that they purchased or have experienced other property damage because of the product's malfunction. In the typical case, an automobile model is alleged to have a safety defect that resulted in both personal injuries and property damage. Although class actions for personal injuries in such cases are still rare to non-existent, [283] a property damage class action makes comparatively good sense because the interests of the class members are relatively homogenous. Each has suffered relatively equivalent property damages, and use of the class action would obviously economize on costly duplicative litigation.

The irony, however, is that it is in this property loss context that courts have recently been the most vigilant. Within the last year alone, courts have rejected proposed nationwide class action settlements in cases involving the Ford Bronco II, [284] a General Motors pickup truck with "side-saddle" gas tanks that allegedly exploded in minor collisions, [285] and a defective polybutylene (PB) plumbing system that had been installed in several million American homes. [286]

[*1415] What explains the relatively close scrutiny given these settlements? Possibly their facts were more egregious, [287] but the same pattern of settlement classes and separate inventory settlements was present in both contexts. Thus, plaintiffs' attorneys in these settlements do not appear to **[*1416]** have been more subject to conflicts of interest than those attorneys representing the class in recent asbestos class actions. In this light, the distinctive feature of property damage class actions was that rejection of the settlement imposed little cost on the court. Little impact on the federal docket was likely if the settlements were disapproved. After all, few individual plaintiffs would bear the litigation costs of suing for the decline in the value of their car or pickup truck because of a safety defect. In contrast, asbestos, breast implant, and Agent Orange cases did have the potential to swamp the federal docket because individual plaintiffs possessed "high stakes" claims and could obtain representation on a contingency fee basis.

Other factors may also explain the difference in judicial reaction. Chief among these factors is the lack of urgency surrounding property damage settlements. In some of these cases, rejection of the settlement has simply led to its renegotiation and enhancement. [288] But even if not, no class member is left impoverished. In the personal injury context, **[*1417]** however, courts are impelled by the perception that compensation must be expedited to the seriously injured and dying. [289]

Nonetheless, all these factors point toward a common conclusion: In dealing with **mass tort** personal injury class actions, courts are both more conflicted and pressured. Remove these pressures, and they become more skeptical of class action settlements, which, both procedurally and substantively, seem to be not very different from those that they have approved.

E. A Preliminary Evaluation

What are the early lessons of the recent experience with **mass tort** class actions? First, recent cases underscore the difficulties inherent in dealing with future claimants. The destabilizing force that caused the Silicone Gel global settlement to unravel was the failure of the parties to estimate accurately the number of claims that would be filed. Given that an estimated 650,000 to 1,000,000 women received silicone implants during the 1970s and

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1980s, [290] it may have understandably surprised defendants that 440,000 claimants (or well over forty percent) filed within months of the settlement's approval. [291] Defendants had estimated that $ 1.2 billion would be sufficient to cover the first round of payments to present claimants, but wound up raising this estimate to $ 24 billion. [292] Moreover, this underestimation could only grow as additional women would predictably file claims in the future upon discovery of illness. Arguably, the inaccuracy of these predictions may have been the consequence of the "immature" status of breast implant litigation. Only seventy-eight identifiable breast implant cases were pending in the federal courts (plus an estimated two hundred "related" actions) at the time the JPML consolidated all breast implant litigation in 1992 before Judge Pointer. [293] Such a limited experience provided insufficient information to estimate the number and types of claims likely to be asserted. [294]

Still, there may be a more basic reason why the parties grossly underestimated the claims likely to be filed: it was in their mutual self-interest to do so. Some $ 1 billion of the $ 4.23 billion Silicone Gel class action was **[*1418]** reserved for attorneys' fees and expenses, and this fund was to be "divided among a core group of 21 lawyers and thousands of referring attorneys." [295] Receipt of these fees required that the settlement hold together, and this incentive could have induced plaintiffs' attorneys to accept a low estimate of likely claims as to which a more disinterested person would have been more skeptical. [296] To be sure, Silicone Gel is the almost unique case in which there was no hint of impropriety surrounding the settlement process. But for precisely this reason, it suggests that the contingent nature of the plaintiffs' attorneys' fees may leave them without an adequate incentive to contest an underestimate by defendants of likely future claims. Both sides then have reasons to suppress their misgivings about the adequacy of the settlement fund.

For defendants, the practical lesson from the Silicone Gel experience may be a perverse one from a public policy perspective: i.e., never grant a delayed opt out right, because it can expose defendants to double liability under both the class action and individual actions. Indeed, the Silicone Gel experience may confirm defendants in their recent practice of seeking to define the class to include only future claimants (who predictably will not seek to opt out during a brief initial opt out period ending well before their symptoms manifest themselves). To curtail claimant eligibility, defendants may increasingly negotiate individual defendant-by-defendant settlements, rather than industry-wide settlements. [297] Defendants will, however, likely persist in seeking an early resolution of future claims before the typical settlement price spiral that accompanies the evolution of a **mass tort.** [298] As a result, a dangerous combination seems likely to recur: early certification of a nationwide class action before there has been sufficient experience in individual cases to establish market values coupled with increasing restrictions on the plaintiffs' right to opt out.

[*1419] The Dow Corning bankruptcy also underscores for defendants the potential attractions of bankruptcy and a class action, used in combination, to deter opting out. If employed early enough before a substantial volume of individual litigation has begun outside the class action, bankruptcy need not threaten corporate control. [299]

Another perverse effect of Silicone Gel may be to discourage judicial attempts to limit plaintiffs' attorneys' fees. The settlement approved by Judge Pointer placed an outer twenty-four percent ceiling on legal and administrative costs and suggested that individual contingency fees might be restricted to this same ceiling. [300] The sensible premise to this policy was that because liability had been established under the settlement, the individual attorney should not receive a greater contingency fee. [301] Unconscionable as it may seem that an attorney should receive one-third or more of this riskless recovery under a retainer agreement with the client, the impact of this apparent ceiling may have been to encourage opportunistic opting out by self-interested plaintiffs' attorneys. That is, a plaintiffs' attorney representing an individual client entitled to $ 1,000,000 under the settlement could anticipate a fee of only $ 240,000 under the Silicone Gel settlement's presumed ceiling (assuming a private retainer agreement between the attorney and client under which the attorney was

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authorized to charge more). If, however, the attorney induced the client to opt out and maintain an individual action, and if that action resulted **[*1420]** in a verdict or settlement for the same $ 1,000,000, the attorney would now earn $ 400,000 (or perhaps more, depending upon the private retainer agreement between the client and the attorney, which today often provides a forty percent contingent fee). Indeed, the attorney could still do better even if the client did worse (for example, forty percent of an $ 800,000 outcome would be $ 320,000). Unfortunately, sensible fee reform may encourage socially undesirable and inefficient opting out that advances the attorney's interests rather than the client's.

Conspicuously absent in all these cases has been any effort to deal seriously with the problems of future claimants. Across the board, the issue of inflation has been quietly and uniformly repressed, and the settling parties in recent class actions have not attempted to project the number of future claims (and types of claims) with anything approaching the seriousness of the effort made in recent **mass tort** bankruptcy cases. [302] Only Ahearn gave any recognition to the special position of future claimants by appointing a guardian ad litem. Still, it is clearly an inadequate response to appoint a special representative after the settlement agreement has been struck.

Beyond the absence of procedural protections for future claimants, the larger question involves what future claimants conceivably gain from these settlements. Ahearn here supplies the best illustration. As with other **mass tort** class actions, its settlement essentially established an insurance fund to cover future claimants whose injuries mature into a compensable form over a multi-decade period. In Ahearn, this insurance fund consisted of the company's insurance resources (made available after a clearly intense and negotiated settlement with Fibreboard's two principal insurers) plus a trivial $ 10 million contribution by Fibreboard. In return, Fibreboard received future immunity from all asbestos claims. Had the class action settlement not been reached, the same insurance resources would have been potentially available (although Fibreboard might again have had to sue and settle with its insurance carriers to obtain payment) and the future claimants would have also had access to the full economic resources of Fibreboard. Thus, the class members appear to have traded Fibreboard's liability for nothing to which they did not already have a right. The only benefit to class members in this setting is the reduced possibility that the company's insurance resources would have been exhausted by the time their claims matured. That is, "early" future claimants might have depleted these resources to the detriment of "later" future claimants. Although this is not a trivial problem, it could potentially be solved by injunctive relief restricting the payout of insurance resources to early claimants (and thus does not justify a complete release to **[*1421]** Fibreboard itself in return for a token $ 10 million contribution). Put differently, no reason seems apparent why all future claimants should absolve Fibreboard from liability simply because early future claimants might otherwise exhaust the insurance fund.

In rebuttal, some may argue that a rash of sudden claims in a particular period could have forced Fibreboard into bankruptcy. Bad as bankruptcy might seem for shareholders, Fibreboard's tort creditors would likely have emerged better off from it. Based on the experience in the asbestos bankruptcies, most of the debtors' value in bankruptcy would have been contributed to a **mass tort** settlement fund. [303] Nor should it be assumed that bankruptcy would have necessarily resulted, as management might have found additional financial resources with which to pay claims. Bankruptcy is easy to threaten, but management will be predictably slow to make good on this threat because bankruptcy also jeopardizes their own continued employment. [304]

Part III. The Search for Remedies

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Potentially, there are a variety of levers by which courts could seek to discourage collusive settlements and protect the underrepresented in **mass tort** class actions. These range from strict constitutional standards to more modest adjustments in federal rules and certification procedures. What is clear, however, is that the traditional levers used by courts to align the interests of plaintiffs' attorneys and class members work poorly in the **mass tort** context. For example, the court's primary regulatory tool in the class action context has been its ability to adjust its fee award to reflect the plaintiffs' attorney's success (or lack thereof). [305] But in the **mass tort** context, the popularity of inventory settlements undercuts this judicial lever and permits potentially corrupting side payments. Moreover, **mass tort** class actions now produce recoveries exceeding the billion-dollar level. In such a context, even a modest percentage of the recovery may result in a fee award of such a magnitude that it brings the declining marginal utility of money into play. That is, the defendants' willingness to agree to a fee award of, say, $ 80 million (in return for a less than fully adversarial settlement) cannot be as easily overcome by the prospect of an even larger fee recovery if the case were more aggressively litigated.

This Part is organized sequentially. First, it assesses those standards and doctrines that might prevent or discourage a court from certifying a future claims class action. Second, it considers possible standards to govern class certification and the selection of lead counsel. Third, it exam **[*1422]** ines techniques that would effectively enable class members to opt out of the class action. Fourth, it proposes standards for the "settlement class action." Finally, it discusses the relative merits of bankruptcy and the **mass tort** class action.

The common premise to this analysis is not that each plaintiff should receive his or her "day in court" in the form of an individual trial. Rather, recognizing that idealism and pragmatism must be balanced, this Part begins from the premise that judicial competence is limited. Because courts cannot anticipate developments over a multi-decade period, judicial attempts to create an insurance system through a class action settlement are likely to go awry, with the result that at least the more distant future claimants will be undercompensated. Some measure of litigant autonomy is thus desirable not only for its own sake, but because group litigation will predictably shortchange future claimants.

To a degree, this may state a justification for benign neglect, for allowing the ordinary litigation system to muddle through imperfectly, but with some cases ending up in a **mass tort** bankruptcy (where the claimants have greater substantive and procedural rights). However, that option is both politically infeasible and certain to encounter judicial hostility. Thus, this Part proposes a means by which the class action can be combined with arbitration to reduce the logistical burden on courts. Under such a "constrained autonomy" model, the majority of claims are resolved through group litigation, but the "high stakes" claimant and the future claimant are provided with an escape hatch by which to assert their individual claims (albeit in a restricted forum).

A. The Justiciability of Future Claims

The utility of the **mass tort** class action to the defendant today probably hinges on its ability to resolve future claims. [306] The attractions of the class action over a bankruptcy reorganization to the defendant are obvious: (1) defendants can reach a settlement before the action is filed, whereas in bankruptcy there will typically be uncertainty as of the filing date as to what percentage of the firm's value must be given to the settlement trust set up to benefit victims; (2) the debtor corporation can escape the absolute priority rule and special class voting rules of bankruptcy; [307] (3) bankruptcy courts may reopen the proceeding

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and demand additional allocations from the reorganized corporation when the trust fund approaches insolvency; [308] and (4) the legal status of future **[*1423]** claims in bankruptcy remains unresolved, with some decisions implying that some future claims cannot be discharged by the bankruptcy court. [309]

Understandable as it is that defendants want litigation closure from the typically spiralling costs of future claims, constitutional limits may constrain the ability of a federal court to provide it. The primary doctrinal obstacle is Article III, Section 2 of the U.S. Constitution, which permits federal courts to exercise jurisdiction only over "cases" and "controversies." Traditionally, this constitutional barrier has been employed to deny subject matter jurisdiction in two quite distinct contexts, both of which have applicability to the **mass tort** class action. First, numerous cases have held that federal courts may not hear "friendly," "feigned," or collusive lawsuits, in which there is no legitimate dispute between the parties. [310] Such actions both misuse judicial authority (because the court's perception of the facts and legal arguments is distorted by the absence of true adversaries), and confuse judicial decisionmaking. [311] Settlement class actions may sometimes present precisely this form of feigned litigation that violates this norm, but discussion of this issue will be deferred until a later section. [312]

Second, the deeper policy rationale for the "case or controversy" requirement is to preserve the separation of powers by limiting the matters that the judicial branch may address. [313] The traditional rhetoric of the case law says that federal courts may not decide "abstract or hypothetical **[*1424]** questions." [314] At bottom, this limitation prevents activist judges from making essentially legislative policy judgments as to which they typically have neither expertise nor legitimacy. Accordingly, a plaintiff must have more than an ideological interest in a dispute to have standing, [315] but rather must have a " "personal stake in the outcome of the controversy.' " [316] The Supreme Court has framed a tripartite test for determining when this requisite personal stake exists, which requires that (1) the plaintiff have suffered a concrete injury in fact; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable decision. [317]

Do future claimants have the requisite "injury-in-fact" to give them standing? In Lujan v. Defenders of Wildlife, [318] the Court said that an injury in fact had to be "(a) concrete and particularized ... and (b) "actual or imminent, not "conjectural" or "hypothetical." ' " [319] Obviously, one can assert that highly contingent and delayed future claims in **mass tort** cases are not sufficiently "actual or imminent" to meet this standard. Here, however, it is necessary to refine and break down the somewhat overbroad concept of future claims. [320] In overview, future claimants can be subdivided into three distinct subcategories: (1) persons who have suffered a legally cognizable injury but (for whatever reason) have not yet filed suit; (2) persons who have been exposed to the toxic or defective substance, drug, or product but have not yet manifested injury; [321] and (3) persons who have not yet been exposed or injured but who will be in the future as a result of conduct by the defendants that has already occurred. [322] This last category arises typically when the product or sub **[*1425]** stance remains in use (contrary to the fact patterns in the asbestos or silicone gel breast implants cases where the product had been withdrawn from the market); this category will predictably loom larger in future cases involving alleged tobacco addiction and injuries from secondary exposure to tobacco smoke. As discussed below, this third category is the one that can be most clearly excluded under a constitutional analysis.

As a practical matter, however, the critical category is the second one: the "exposure only" victims who lack symptoms at the time of the settlement. Defendants have zealously sought to cover such "exposure only" plaintiffs in recent settlement class actions, and indeed probably would not have settled had this category been excluded. For example, in Georgine, the complaint expressly asserted that the "exposure only" plaintiffs had sustained no physical harm as a result of their exposure to asbestos, but sought relief instead for (1) their increased risk of developing asbestos-related disease; (2) their fear and mental anguish at

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the prospect of developing asbestos-related disease; and (3) their need for medical monitoring and surveillance to detect asbestos-related illness at an early stage. [323] If intangible and contingent injuries such as these, which essentially spring from an increased base expectancy rate of future illness, amount to a concrete injury-in-fact sufficient to confer standing, then it would seem that few meaningful barriers remain. Indeed, on this basis, a settlement class action today might also resolve, consistent with Article III, the future claims of all citizens in the United States who have been exposed to secondary tobacco smoke.

But what practical lines can be drawn that would find such claims to be non-justiciable? Probably the simplest "bright line" standard would be to look to state law and assert that if a claim, as pleaded, was not cognizable under state law, then it also should not be a sufficient "injury-in-fact" for purposes of Article III. Today, in most state jurisdictions, exposure alone to toxic substances does not give rise to a legally cognizable injury for fear or emotional distress. [324] These decisions have generally held that increased risk of future injury, or fear of such injury, does not constitute an independent ground for the recovery of damages, absent some "direct **[*1426]** physical injury or impact." [325] Some cases have said that even a "subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action." [326]

Ironically, the same district court that decided Georgine had earlier found that "exposure only" plaintiffs lacked Article III standing in the absence of an actual asbestos-related injury. [327] Yet, when faced with the Georgine settlement class, the court reversed its prior position. Noting that in Association of Data Processing Service Organizations, Inc. v. Camp, [328] the Supreme Court had liberalized its test for Article III standing, abandoning its former "legal interest" test, which required an examination of the legal merits of plaintiffs' claim in favor of an "injury-in-fact" test, the Georgine district court concluded that the newer "injury-in-fact" test could be satisfied simply by the fact of exposure. [329]

Although the Data Processing decision may well have liberalized the "injury-in-fact" test, it does not follow that mere exposure alone is always sufficient. In particular, the authority relied upon in Georgine can be easily distinguished. Those cases that have found mere exposure sufficient to confer Article III standing have largely arisen in two very different contexts: injunctive actions and bankruptcy proceedings. The leading example of the former context is Duke Power Co. v. Carolina Environmental Study Group, Inc., [330] in which the Court did find that exposure to a toxin could confer standing to sue to enjoin enforcement of a federal statute. [331] It **[*1427]** noted that "the emission of non-natural radiation into appellees' environment would also seem a direct and present injury." [332] But injunctive actions stand apart from actions for money judgments because most injunctive actions will unavoidably affect unrepresented future claimants. Thus, for example, an injunction redrawing school boundaries in a desegregation case necessarily and inevitably affects future claimants, many of whom have not yet even been exposed to the unlawful condition or danger. Given that such future claimants will inevitably be affected, it may be appropriate to recognize their standing and unnecessary to provide them a right to opt out. Precisely for this reason, Rule 23 permits non-opt out class actions when the plaintiff seeks relief that will necessarily affect absent parties. [333]

The bankruptcy context is even more distinguishable, for several reasons. First, the Bankruptcy Clause of the U.S. Constitution vests Congress with broad power "to establish ... uniform Laws on the subject of Bankruptcies throughout the United States." [334] Congress thus has broader power here than elsewhere, [335] although the Fifth Amendment imposes some due process limitations even in this context. [336] Despite the differences in congressional authority (and the critical fact that Congress has acted by passing the Bankruptcy Code), the irony is that future claimants currently receive more protection in bankruptcy than in a class action. Today, in bankruptcy, the majority of recent cases have found that a legally cognizable claim in bankruptcy does not arise simply because negligent or reckless conduct by the defendant occurred prior to the time of the filing of the bankruptcy petition. Rather,

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action:

First, courts themselves are "conflicted" because of the threat of docket inundation from individual **mass tort** cases, and thus they may be more willing to countenance doubtful settlements that they probably would not otherwise accept. [23] Indeed, the case studies on which this **[*1351]** Article will concentrate are ones in which activist judges became deeply involved in the negotiation of the settlement - with disastrous consequences for plaintiffs.

Second, the court's primary tool for regulating plaintiffs' attorneys in class actions - judicial control over plaintiffs' attorneys' fees - is less effective in the **mass tort** context because defendants can (and do) offer inducements to settle that are largely beyond the court's control.

Third, even when individual class members hold legally meritorious claims for significant damages, client passivity may remain the norm because many (and sometimes virtually all) class members are "future claimants" - that is, persons who have not yet experienced any symptomatic illness or disease, but rather share only a statistically enhanced risk of future illness or injury because of their exposure to a toxic product or process. To the extent that future claimants will remain rationally apathetic about a legal proceeding brought in their name (because they may have a low probability on an individual basis of experiencing actual, compensable injury), defendants have a strong interest in resolving such an action at an early stage well before any such class members experience injury and thus have an incentive to monitor their attorneys' conduct.

One other preliminary distinction needs to be understood about class actions. Although there are gray areas at the margin, class actions divide economically into "small claimant" classes and "large claimant" classes. In the former context, individual claimants lack legal claims that would be economically viable if asserted on an individual basis, while in the latter context most class members can attract competent counsel to represent them in individual actions on a contingency basis. Securities and antitrust class actions in particular tend to be thought of as "small **[*1352]** claimant" classes, [24] whose members cannot afford to opt out and pursue individual claims. [25] Personal injury class actions, however, are populated by many class members with large individual claims. This distinction between "small claimant" and "large claimant" class actions helps to explain one other initially puzzling feature of class action practice and behavior: sometimes corporate defendants resist class certification vehemently, and sometimes they rush to embrace it (even soliciting the action). Under closer examination, defendants' behavior is consistent and rational. In "small claimant" class actions, defendants tend to resist class certification (because plaintiffs have no realistic alternative), whereas in "large claimant" classes, defendants increasingly prefer class certification for a variety of reasons, including both their desire to avoid repetitive awards of punitive damages and their hope to reach a "reasonable" global settlement with cooperative plaintiffs' attorneys. [26]

[*1353] Against this backdrop, a roadmap of this Article is now in order. Part I initially will examine the development of, and dynamics within, the **mass tort** class action and then focus on the new technology for collusion that it has fostered. Three techniques - inventory settlements, settlement classes, and the deliberate definition of the class to cover only future claimants - have become standard and deserve special attention. An additional but still doctrinally uncertain tactic is the certification of a mandatory or "non-opt out" class action in an action that is primarily for monetary damages. [27] Use of this technique would be greatly expanded in a new version of Rule 23 that is now before the Advisory Committee on Civil Rules. [28]

Because the case for reform depends on first recognizing how exposed the position of the future claimant is in a **mass tort** class action, Part II will examine in detail several recent **mass tort** class actions involving asbestos, breast implants, mass disasters, and defective

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these decisions have held that there must be some pre-petition relationship between the future claimants and the bankrupt entity in order for the future claimants to **[*1428]** have standing. [337] Some of these decisions also require that the claim was within the "fair contemplation of the parties" at the time of the bankruptcy filing. [338] When the claim was not within the parties' "fair contemplation," they have said, the bankruptcy reorganization will not act as a bar and the future claimant can still sue the reorganized entity years later when the claimant's injury first manifests itself. [339]

To be sure, not all courts have agreed, and some decisions have been more liberal [340] and still others more conservative [341] in defining when a claim arises under the Bankruptcy Code. Nonetheless, this intermediate standard, which requires both the existence of a pre-petition relationship and that the claim be within the parties' "fair contemplation," makes good sense and could easily be applied to govern justiciability in the class action context as well. From a policy perspective, the **mass tort** class ac **[*1429]** tion and the **mass tort** bankruptcy contexts are functional substitutes, and the same limitations should apply in both contexts. [342]

At first glance, the relationship test announced in these bankruptcy cases may seem to impose only modest restrictions. Indeed, cases applying this relationship standard have suggested in dicta that exposure will suffice to establish the requisite relationship. [343] But this does not mean that any form of exposure need suffice. Once one recognizes that a relationship must exist between plaintiff and defendant at the time of the action to satisfy Article III, it follows that not all forms of exposure will suffice to establish this element.

Some distinctions seem obvious. Consider, for example, how the Silicone Gel litigation might have been analyzed under such a standard. A recipient of breast implants has obviously been "exposed" in an intrusive and intimate way through a surgical procedure. This fact should satisfy both the pre-petition relationship standard and the "fair contemplation" standard (particularly in the latter case given the substantial publicity surrounding the health hazards associated with breast implants before the time at which litigation was settled). [344] Similarly, recent **mass tort** episodes involving the Dalkon Shield or defective heart valves would also meet this standard. [345]

In contrast, in a hypothetical case involving secondary exposure to tobacco smoke or to a toxic pesticide through its release into the air, the same relationship should not be found to exist because those exposed would include not only employees and purchasers of the product, but the potentially limitless class of anyone coincidentally located in the vicinity of the release. [346] The status of asbestos cases under this standard is more **[*1430]** questionable. On the one hand, because the occupational exposure of many workers was long and sustained, the requisite relationship could be found to exist in their case. On the other hand, virtually every U.S. citizen has been exposed to asbestos. [347] A relationship that every U.S. citizen shares with the defendant is hardly a meaningful relationship, and, if exposure alone gave rise to the requisite Article III "injury-in-fact," there would be universal standing. Such a result - universal standing in all U.S. citizens - seems starkly at odds with the traditional prudential limitation on standing under which federal courts " "limit access to the federal courts to those litigants best suited to assert a particular claim.' " [348]

This Article's contention that Article III should require a significant pre-settlement relationship between the future claimants who will be bound by the settlement and the defendant faces one significant doctrinal obstacle. In In re "Agent Orange" Product Liability Litigation, [349] the Second Circuit rebuffed the attempts of Vietnam veterans who sought to attack collaterally an earlier massive class action settlement of claims relating to "Agent Orange," a toxic defoliant used in the Vietnam War. The veterans claimed that they could not be bound by the earlier settlement, both because they had not received constitutionally adequate notice of the settlement and because they lacked a justiciable claim at the time of the settlement insofar as they had not then manifested any symptoms from their exposure

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(and thus arguably lacked the requisite "injury-in-fact" necessary to have their claims adjudicated). [350] The Second Circuit rejected these claims, relying in part on Duke Power Co. v. Carolina Environmental Study Group, Inc., [351] for its conclusion that the veterans had sustained the necessary "injury-in-fact." Other decisions, however, have been more skeptical as to whether future claimants should be included within a proposed class. [352]

[*1431] So where are we left? On the policy level, the preferable rule may be the more conservative one stated in those bankruptcy decisions that find only claims that have accrued under state law to be cognizable under Article III. [353] In most state jurisdictions, this standard would require some present and recognized injury, thereby excluding the bulk of future claimants. Although this rule has been criticized in the bankruptcy context because it may deny the court the power to reorganize a company that is subject to contingent future claims, this critique has less applicability to the **mass tort** context, because, as this Article later argues, [354] this is precisely the function that a class action is least capable of successfully performing. Still, on the practical level, the case law on justiciability in class actions may have already gone beyond this point, so that only the Supreme Court would impose such an "accrued state claim" gloss on Article III. Nonetheless, at least outside the Second Circuit, federal courts could and should still look to the broader line of bankruptcy decisions that require both a significant, pre-filing relationship between the parties and that the future injury be then within the plaintiffs' "fair contemplation." Even within the Second Circuit, the degree of exposure remains relevant, and a secondary tobacco smoke or pesticide exposure case is not necessarily controlled by the Agent Orange precedent, which on its facts probably involved a more sustained exposure with clearer recognition by the class members of the possibility of injury. Finally, even Agent Orange does not confer Article III standing on class members who have not yet been exposed at the time of the action's filing.

Still, Georgine and Agent Orange suggest that federal courts will resist any effort at curtailing the justiciability of future claims in **mass tort** class actions when to do so threatens their ability to control their dockets. Symptomatically, the more restrictive bankruptcy cases arose in a context where courts had greater constitutional authority to define the standard, but less caseload pressure inducing them to be all inclusive. [355] At least **[*1432]** on policy grounds, there are persuasive reasons why those circuit courts that have not yet faced the issue should apply the bankruptcy standards to the class action context in order to restrict future claims class actions:

First, future claims classes lack the " "concrete adverseness which sharpens the presentation of issues.' " [356] That is, because such a class is inchoate and without existing members having a strong personal stake in the outcome, there will seldom be class members able or willing to monitor their attorneys. Future claims class actions present, then, the extreme example of lawyers operating without clients.

Second, doctrinally, Article III justiciability requires that plaintiffs show "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." [357] Here, a fundamental problem with "exposure only" classes is that appropriate compensation for the injury of exposure is an elusive concept. Any current cash award will inevitably overcompensate those who do not develop more severe subsequent illness and undercompensate those who do. [358] All that reasonably can be done is to establish an insurance fund, but this requires courts to engage in precisely the kind of predictive decisionmaking that strains and usually exceeds their competence. Judge Posner made precisely this point in declining to permit future claimants to participate in a **mass tort** bankruptcy proceeding, stating that it arguably "would be a quixotic undertaking far beyond the realistic boundaries of judicial competence to make sufficiently generous provision for upwards of a hundred thousand unidentified claimants to justify extinguishing their claims involuntarily." [359] Put simply, to give adequate redress in a future claims class action, the court must both estimate the number and character of the claims that will be received and the likely inflation rate applicable to the future period. Recent experience suggests that

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courts have limited ability to perform this task. [360] Bad as the performance of **[*1433]** courts in asbestos cases has been, these cases are the paradigm of a "mature" **mass tort** case in which courts have some idea about the likely future filing rate and the value of claims in the legal marketplace. The unravelling of the Silicone Gel settlement shows that in the case of an "immature" **mass tort,** neither the parties nor the court can predict even the rate of case filings during the first year of the settlement. [361] Were the court instead facing a class action dealing with a new carcinogen or a drug with toxic side effects, it would lack any basis upon which to estimate the number of future claimants.

B. Class Certification and the Future Claimant

Constitutional contentions may be more persuasive when repackaged more narrowly as arguments about the certifiability of a class action under Rule 23. Clearly, **mass tort** class actions have strained the boundaries of Rule 23, and there are a variety of ways that courts could draw those boundaries more conservatively, in part to avoid constitutional confrontations. Several different theories need to be considered under this heading: (1) that a future claimants class action should not be certified under the language of Rule 23; (2) that a future claimants class action should be certified only when the court finds a probability of success on the merits; and (3) that only a "limited" class action should be certified on the issue of liability, but typically not on the issues of causation or damages. Ultimately, this Article endorses a variant on the third of these options as the approach most likely to protect the future claimant without inundating the federal courts.

1. The Authority of the Class Representative. - Black letter law holds that the named plaintiff in a class action "cannot represent a class of whom they are not a part." [362] This means that the class representative can represent the class "only to the extent of the interests they possess in **[*1434]** common with members of the class." [363] In short, only a "typical" representative [364] can serve as an adequate representative. [365]

In this light, who constitutes a "typical" and "adequate" representative for a class of future claimants? In Georgine, the complaint listed several "exposure only" plaintiffs and asserted that, although they had suffered no physical harm at that point from their exposure to asbestos, they were entitled to relief for their fear and mental anguish at the prospect of future illness and for their special needs for medical monitoring and surveillance. [366] These allegations would probably be sufficient if the class as a whole were seeking relief only for these psychic injuries. In reality, however, relief is invariably also sought for more serious injuries (lung cancer, asbestosis) that only a portion of the class will later develop.

Thus, the underlying issue surfaces: can the class representative represent a class of future claimants and settle their claims for serious (but future) injuries from which the class representative does not suffer (and probably will not suffer)? The problem here is not simply one of "typicality," but of the necessary limits on the authority of the class representative. Read closely, Judge Friendly's decision in National Super Spuds v. New York Mercantile Exchange [367] suggests that the agent's authority is necessarily bounded by the pleadings. Accordingly, if the pleadings allege that the class representative was injured in one transaction involving a specific set of facts, the class representative lacks authority to settle or compromise claims involving another set of facts. [368] In **mass tort** cases, as noted above, the pleadings typically allege that the representative of the future claimants is subject to fear, anguish, and an increased risk of illness, but they do not (and cannot) allege that the representative will suffer from more serious illness and disease in the future. Arguably then,

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the class **[*1435]** representative cannot settle claims based on predicate facts that are not alleged (i.e., the claimants' future illness).

Judge Friendly's view in National Super Spuds that an atypical plaintiff cannot meet the "adequacy of representation" standard in Rule 23(a) [369] rests on a sound perception of the conflicts of interest that arise under any contrary rule. In the **mass tort** context, real conflicts are easy to visualize between a named plaintiff (who may or may not become seriously ill in the future) and those future claimants who do incur serious disease. For example, a class representative who has been exposed to a toxic product but who has only a five percent base expectancy rate of lung cancer as a result may logically prefer a settlement that emphasizes current cash compensation or medical monitoring for all claimants over a substantial cash award to only those who do become seriously ill. Precisely to this degree, such a plaintiff is not an adequate representative for those who do become seriously ill. Inherently, there is a considerable difference between the status of a person exposed to a risk and that of one who has had the risk actually materialize. To ignore this difference is to equate the holder of a lottery ticket with the winner of a lottery.

Of course, much depends here on whether one takes an ex ante or an ex post perspective. From the former perspective, the class members are similarly situated in that they are equally exposed to the risk, and the named plaintiff arguably might be described as an adequate representative. From the ex post perspective, however, the named plaintiff is hardly "typical" of the persons who later become seriously ill. In this context, the problem with the ex ante perspective is that it proves too much. Logically, from an ex ante perspective, the plaintiff need not even have yet been exposed to the toxic substance or defective product. After all, all citizens stand in risk of future exposure to many toxic products (such as asbestos or tobacco smoke), and the fact of exposure may only marginally increase the base expectancy rate of illness for those so exposed (say, from one percent to five percent). The case for an ex post perspective rests on the need for named plaintiffs who have an identity of interests with each major outcome group. [370] At least in a class action that is primarily for monetary relief, a close nexus should be required between the injuries sustained by at least one subclass of named plaintiffs and those to be sustained by the worst-off members of the future claimant class before the named plaintiff is deemed to be an adequate representative under Rule 23(a)(4).

[*1436] Admittedly, this argument that a person subject only to a risk of injury cannot be an adequate or typical representative for the future claimants who in fact suffer severe injuries conflicts with some decisions that have been more permissive on this issue. [371] But these decisions tend to be institutional reform cases seeking primary injunctive relief. Ultimately, **mass tort** actions for monetary relief are both very different and more problematic in their value for plaintiffs. A person who is an adequate representative for an injunctive action may not be so for a money damages suit. [372] Why? Simply put, injunctive actions do not create the same difficult allocation problems in terms of how the settlement fund is to be distributed.

Although a purist might argue that no named plaintiff can be an adequate representative for at least remote future claimants, a reasonable solution would be to insist on classes having distinct subclasses for present and future claimants. This accomplishes several objectives: (1) current claimants, who typically have high stakes claims, are not likely to be as passive as future claimants and may monitor the negotiations actively; [373] (2) multiple counsel with responsibilities for distinct subclasses may impede collusion; and (3) the future claimants, if properly represented, will have an interest in a serious attempt to estimate the number and character of future claims and the impact of inflation.

2. "Superiority". - Under the language of Rule 23, the most obvious argument by which to

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restrict the scope of a future claims class action involves the "superiority" test of Rule 23(b)(3), which requires that the court find before certifying the class that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." [374] In evaluating this standard, Rule 23 further instructs the court to consider "the interests of members of the class in individually controlling the prosecution or defense of separate actions" and "the difficulties likely to be encountered in the management of a class action." [375] As discussed above, these difficulties are likely to be overpowering when **mass tort** injuries have long latency periods. A rational future claimant would prefer an individual action if it will likely pay him or her more than the class relief. Thus, where the class relief appears to be below the going **[*1437]** rate in individual actions (as in Georgine), it is difficult to understand why a class member would prefer less to more. In addition, the settlement fund is an inviting target for a host of present claimants and their attorneys, who on a piecemeal basis have repeatedly "raided" such funds in the asbestos context and driven them into insolvency. [376]

When should a class action resolution be seen as "superior to other available methods" for the resolution of a **mass tort** episode? One requirement should be that the settlement establish an actuarially reliable insurance fund, which is adequately funded. Here, the first problem is that experts themselves do not agree on the likely number of future claims in most **mass torts** cases. Even in the case of the "mature" field of asbestos litigation, recent "estimates for mesothelioma deaths range from 15,500 to 300,000, while the estimates of deaths from asbestos-related lung cancer range from 30,758 to 1,440,000." [377] In such an environment, a lump sum settlement under which the defendant deposits a fixed and limited amount based on an estimate of the likely future claims should not be approved. Rather, the settlement should be either open-ended or should at the least provide a continuing opportunity for class members to opt out and sue in individual actions in the event that benefits need to be scaled back. [378]

Next, to determine that an action is "superior to other available methods," the court should be able to find that the individual class members will do at least as well on a net basis as if they pursued individual actions. Here, the fact that the settlement will pay less than individual claimants have historically received should normally preclude a finding of "superiority." [379] Finding that a settlement is "fair and adequate" cannot be a substitute for finding that it is "superior" to other alternatives.

When, then, is the class action likely to satisfy the "superiority" requirement? First, by focusing on the net recovery to class members, the court is entitled to deduct the typically greater contingency fees that attorneys will require in individual actions from the typically greater recovery. Under these circumstances, even a smaller gross recovery in the class **[*1438]** action can be superior. [380] Second, where there are small claimants, the court arguably can give some weight to their more exposed status insofar as they may be unable to find representation outside the class action. [381] Third, evidence that insurance resources may be exhausted by individual claims, thereby leaving later claimants unpaid, can be relevant, because a class action allows the court to pool limited insurance resources and apply them equitably over the projected period during which future claims will arise. [382] Corporate solvency is much less likely to be an argument favoring the use of the class action, however, because the corporation (and its creditors) always retain the option of using the bankruptcy process to pool limited assets.

3. Probability of Success. - Judge Posner's decision for the Seventh Circuit in In re Rhone-Poulenc Rorer Inc. [383] can be read to imply that a **mass tort** class action should not be certified in the absence of a finding that the action has a probability of success on the merits. Indeed, a close reading suggests that Judge Posner might expect the trial court to balance the class action's merit against the impact of its pendency on the defendants. Judge Posner's

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concern was that even though the defendants in Rhone-Poulenc Rorer had won 92.3% of the previous trials (thirteen out of fourteen), a class action could force them to settle because the jury would "hold the fate of an industry in the palm of its hand." [384]

Existing case law, however, poses a serious doctrinal obstacle to this approach. Under Eisen v. Carlisle & Jacquelin, [385] any consideration of the merits may be prohibited in deciding whether to certify a class. [386] Arguably, Eisen can be distinguished because the Court's real concern in that case was that the trial court had used its merits finding as a substitute for Rule 23's express criteria. To do so, the Court said, "contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class **[*1439]** action without first satisfying the requirements for it." [387] Clearly, this was not what Judge Posner intended; his approach would seemingly use a merits review as an additional condition, not a sufficient one.

Even if Rule 23 does not today permit such an inquiry, the policy justifications for Judge Posner's approach as an additional condition seem strong. Interestingly, such a test effectively distinguishes between "mature" **mass torts** and "immature" ones, because early in their evolutionary cycle, new **mass torts** usually have only limited settlement value and a substantial prospect of defeat at trial. [388] However, in the case of a "mature" **mass tort** (such as asbestos), the prospect of success has increased to the point of near certainty, and at that point class certification would logically follow. From a policy perspective, this approach makes sense because the consequences of an adverse decision on the liability issue in the case of an "immature" **mass tort** would be highly unfortunate. Imagine that a trial on the central issue of liability is held in a nationwide class action of a new "immature" **mass tort,** and defendants win on their claim that there is no causal relationship between their product and the plaintiffs' injuries. A year later, new scientific evidence is discovered which establishes a causal connection. Unfortunately, the adverse decision may preclude the plaintiffs (who include future claimants) from bringing litigation for decades to come. Delaying the certification of the class action until the scientific evidence clearly supports plaintiffs (if indeed that is the outcome) thus may benefit future claimants over the long run.

4. Limited Class Actions. - Any serious effort at a balanced solution to the **mass tort** crisis must recognize that federal courts can no longer afford every litigant in **mass torts** cases an individual trial. Yet, **mass tort** class actions seem systematically to disfavor the plaintiffs, particularly future claimants. Given this statement of the dilemma, the search for reform must seek ways to divert cases out of the federal courts, but in ways that do not penalize tort victims.

One means to this end involves combining the class action with arbitration (and/or other alternative dispute resolution techniques) on the limited issues of damages and individual causation. A series of recent **mass tort** cases have certified a limited class action for purposes of determining liability, but not for purposes of determining causation or damages. [389] Conversely, in his Rhone-Poulenc Rorer decision, Judge Posner re **[*1440]** jected this approach, in part because such a bifurcated trial approach, he said, infringed the defendant's **Seventh Amendment** right to a jury trial. [390] This **Seventh Amendment** objection seems a weak argument, as a series of circuit court decisions have approved the use of successive juries to determine different questions, [391] and Rule 23(c)(4)(A) explicitly contemplates use of such a procedure. If a limited class were certified for purposes only of liability determination after a probability of success finding, it seems doubtful that even the Seventh Circuit would find a **Seventh Amendment** violation.

As contemplated, the class action would resolve only the issues of liability and generic causation. Each plaintiff would still be required to prove in a separate trial the facts demonstrating individual causation in that plaintiff's case (for example, that the plaintiff was

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occupationally exposed to asbestos for a sufficient period to cause the claimed injury or illness). Neither damages nor damage ranges would be established by the original verdict or by any settlement. In effect, although there could be a "settlement class" action, it could only establish liability, not the range within which recoveries would be allowed. Effectively, this protects future claimants from settlements that expose them to the ravages of inflation and from disproportionate allocation of the settlement fund to **[*1441]** other subclasses. Thus, if the settlement were reached in 1995, and a future claimant first became ill in 2010, such claimant would not be limited to a recovery in 1995 dollars, but could establish damages under the social and economic conditions prevailing in 2010. In addition, individual causation should be determined under the scientific standards applicable at the time of the damage determination. [392]

Advantageous as this proposal may be to courts and to plaintiffs, it may seem doubtful that a defendant would ever willingly accept such an open-ended settlement, which would deny it the right to know at the outset its total liability. Defendants, however, would receive two significant advantages: First, punitive damages could be eliminated as part of the settlement (or they could be fixed at an amount specified in the settlement). Second, and more importantly, the settlement could provide that the damages determination be allocated to an arbitration panel. The arbitration panel would neither be chosen by the defendants nor would it be limited in the amount it could award as compensatory damages; rather, it would apply the contemporary standards at the time of its determination. For the defendant, this approach would result in significant economies in transaction costs, because today transaction costs and legal fees appear to account for more of defendants' total expenditures than do payments to victims. [393] Because arbitration is significantly less costly than civil litigation, defendants would have a substantial incentive to accept such an open-ended procedure (subject, of course, to a right to seek a re-organization in bankruptcy if it proved too costly). Interestingly, sophisticated defendants have recently negotiated substantially this form of settlement to resolve a major nationwide class action with potentially thousands of class members. [394]

[*1442] This proposal does not contemplate that either legislation or the court would require the class representative to accept arbitration. Instead, the **Seventh Amendment** right of the class members to a jury trial would be voluntarily surrendered by the class representative as part of the settlement, and class counsel accepting such a settlement would have to pass the same basic standards as to the adequacy of its representation as apply today. [395]

Above all, such a compromise makes political sense. Today, **mass tort** class actions ally the court and the defendants against the plaintiffs (with the plaintiffs' attorney often being an only equivocal champion of the interests of the class) in order to minimize duplicative **mass tort** trials. This proposal reverses the coalition by showing the court a manageable way to resolve the **mass tort** dilemma without sacrificing the interests of the future claimant or accepting the inevitability of endlessly repetitive individual trials. Litigant autonomy is retained in its most critical aspect, because the "high stakes" plaintiff is not submerged within the class. To implement this approach, a trial court would need only to signal that it would not certify any large class action under Rule 23(b)(3) unless it could be assured that a fair remedy would be available to individual claimants and that remedy would not prove unmanageable at the damage determination stage. Relatively quickly, both sides would learn (and the court could hint) that settlements incorporating second stage arbitration over the issue of damages would have a much greater likelihood of obtaining certification. Both sides would still have the same self-interested reasons for preferring a class action resolution, but the damages determination would be delayed in each individual case until the time that individual claimants discovered their injuries.

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C. Class Certification and the Adequacy of Representation Standard

Class actions have long been plagued by conflict of interests problems, [396] but the **mass tort** context exacerbates these conflicts to a unique degree. In particular, two types of conflicts stand out:

First, there are conflicts between the attorney's inventory of individual clients and the class members that the attorney wishes to represent in the class action. The inventory settlements in the asbestos cases present the most obvious illustration of this first type of conflict, because defend **[*1443]** ants tied the inventory settlements to agreements to accept the proposed settlement of the class action (on terms far less favorable to most class members). [397]

Second, there are multiple conflicts within the class itself: between present claimants and future claimants, between those with serious injuries and those with only "subclinical" injuries, between those with manifested illnesses and those without. The interests of class members also conflict depending upon the state law applicable to their claims: some class members may be entitled to recovery (and punitive damages) under the law of their jurisdiction; others similarly situated, except for a difference in state jurisdictions, may not. Almost inevitably, the settlement transfers wealth between these subclasses.

On an ethical level, probably the most disquieting phenomenon about recent **mass tort** settlements has been the acceptance of a single attorney acting as the representative of multiple subclasses of plaintiffs. Not only have the interests of these subclasses clearly conflicted, but the class counsel has explicitly traded off the interests of subclasses against each other, obtaining substantial compensation for one subclass in return for a waiver of cash compensation by another. In such multiparty negotiations between the defendants and different subclasses of plaintiffs, even the well-meaning plaintiffs' attorney shifts inevitably from the role of an advocate and adviser for clients to the role of a philosopher king, dispensing largess among his client subjects. In the asbestos cases, the pattern has been the starkest, with the "less" severely injured claimants typically having cash compensation waived on their behalf in order that those more severely injured (usually cancer victims) receive substantial cash compensation. These intra-class trade-offs are, however, an endemic problem that transcends the asbestos context. Any settlement that awards compensation by disease or injury classification creates potential allocation issues: should the compensation for one subclass be raised and correspondingly that for another lowered?

Nonetheless, courts approving **mass tort** settlements have resisted subclassing, arguing that the use of subclasses is left to the discretion of the trial court and should not be encouraged. [398] Of course, if courts are primarily motivated by the desire to facilitate expeditious settlements (particularly in the **mass torts** field), this resistance to subclassing should not be surprising, as any competent counsel for a subclass would probably **[*1444]** object to any wealth transfer that stripped his or her class of compensation in order to benefit another. But a principled defense of current procedures simply has not been made.

Proponents of **mass tort** class actions can reply that settlements would become impossible if all trade-offs within the plaintiff class became suspect. Still, outside the **mass tort** context, two general principles have been recognized: (1) The overall adequacy of the settlement cannot "ordinarily redeem a settlement that was bargained by a party who was in a conflict position"; [399] and (2) trade-offs, and even gratuitous transfers from one subclass to another, will not be overturned if each subclass has received adequate representation by an attorney who acts with undivided interests. [400] In short, substantive review has been mild and permissive, provided that each subclass has its own impartial representative.

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What practical rules, then, should govern **mass tort** class actions? Two distinct types of rules seem most important. Today, in certifying a class under Rule 23, the court must find that "the representative parties will fairly and adequately protect the interests of the class." [401] Adequate representation seems doubtful when the plaintiffs' attorney has entered into an inventory settlement that is in any way contingent upon the attorney's participation in the class action or that otherwise restricts the attorney's discretion to represent other clients in other actions against the same defendants. Even in the absence of an explicit linkage, inventory settlements between the defendants and the plaintiffs' attorney create a danger of collusion because the payout under the inventory settlement may be delayed or subject in some continuing respect to the defendants' control.

This conclusion does not mean that an attorney who has recently settled cases with the defendants should be barred from representing the class. [402] But how broadly should the disqualification be framed? One possibility would be to disqualify an attorney from acting as class counsel only when the inventory settlements appear to be more favorable than the class action's proposed terms; such a disparity would give rise to a presumption that the class has been "sold out." [403]

[*1445] Still, the problem with this narrower approach involves timing. If one waits until the class action settlement has been negotiated and presented to the court for approval to ascertain whether the class can be certified and whether the plaintiffs' attorneys who negotiated the settlement can represent the class, momentum will have already begun to gather behind the settlement. Eager for a docket-clearing settlement, trial courts face a temptation to close their eyes to conflicts and improprieties that they would not tolerate in other contexts. Rather than force the court to choose between sacrificing a possibly adequate settlement and tolerating a conflict of interest, it thus seems preferable to adopt a mildly prophylactic rule that disqualifies any attorney from serving as a lead counsel (for the class or any subclass) if the attorney has negotiated an inventory settlement with the same defendants. The **mass tort** bar is large and expanding, and it would be a gross overstatement to suggest that such a rule would disqualify all experienced plaintiffs' attorneys.

A second necessary procedural innovation is to require subclasses with separate representation for present and future claimants. Those opposed to subclassing have raised dubious arguments against it. The Georgine court argued that because illness is often progressive (with victims moving from asbestosis to lung cancer), subclassing was unnecessary. [404] In effect, because ex ante future claimants do not know what the severity of their illnesses will be, it argued that they all have a common interest and can be grouped in a single class. Unfortunately, this is no answer to the serious conflicts of interest that can arise between present and future claimants, because the former have every incentive to deplete the trust fund (which is often administered by their own attorneys).

A second unsatisfactory argument against subclasses was suggested by the Second Circuit in the Johns-Manville litigation: subclassing is less important in opt out class actions under Rule 23(b)(3), the court reasoned, presumably because dissatisfied class members are free to exclude themselves from the class. [405] Yet, as the same Second Circuit has emphasized in other decisions, the right to opt out means little in the case of future **[*1446]** claimants. [406] A procedural protection has little value to those who do not yet know that they will become ill or that they are even within the class of future claimants.

Moreover, the conflicts between subclasses go well beyond their respective entitlements to cash compensation and extend to most other issues as well: the case flow limitations, processing rules, and other payment terms that might enable present claimants to seize a disproportionate share of the settlement fund before future claims fully mature. Recent experience shows that present claimants and their counsel have both the incentive and the ability to understate the number and severity of future claims that will arise in order to justify

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a higher payment to present claimants. Nor is a guardian ad litem for future claimants an adequate substitute, because a guardian is not in a position to negotiate the settlement's terms. Arm's length negotiation between counsel for present and future claimants is essential to achieve a fair and realistic allocation of the settlement.

These two proposals - inventory settlements as a disqualifying factor for lead counsel and subclasses with separate counsel for present and future claimants - may lengthen settlement negotiations (as well they should have been lengthened in some recent cases), but they will not bar or seriously discourage settlements. Rather, they will simply give future claimants their vicarious day in court.

D. Redefining the Right to Opt Out

Beyond question, a future claims class action trivializes the right to opt out. But, in turn, an absolute right to opt out invalidates the idea of a mandatory class action. [407] Most commentators doubt that the Supreme Court meant to go this far when it recognized the presumptive right of a class member to opt out as an aspect of due process in Phillips Petroleum Co. v. Shutts. [408] Thus, on the doctrinal level, some compromise seems necessary.

On the policy level, analysis needs to begin with the recognition that persons who have been exposed to a toxic substance, but who have not yet manifested injury, will have little incentive to opt out from a class action that is allegedly brought on their behalf. Ironically, the Second Circuit conceded this point in the Agent Orange case, arguing that the right to opt out meant little in such a context and so could be sacrificed:

In the instant case, society's interest in the efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights, whose benefits here are conjec **[*1447]** tural at best .... Providing individual notice and opt-out rights to persons who are unaware of an injury would probably do little good. Their rights are better served, we think, by requiring that "fair and just recovery procedures be made available to these claimants," and by ensuring that they receive vigorous and faithful vicarious representation. [409]

The problem with this statement is that it defines the issue too narrowly. Correct as it is that the right to opt out will mean little in a future claims class action, [410] this observation really suggests that the right needs to be redefined, not abandoned. If we assume that the right to opt out is of constitutional magnitude, [411] but also not an absolute right, [412] this implies that the right can be balanced against other considerations. In **mass tort** cases involving substantial personal injuries to the plaintiffs, litigant autonomy seems a value normally deserving considerable constitutional weight. [413]

Efforts to strike a balance, however, are not easy. Some have suggested that before a plaintiff can opt out of a federal class action, there should be a good cause hearing at which the court would balance the interest of the litigant in seeking to exit the class against those of the class members who would thereby be injured. [414] Unfortunately, the asbestos experience suggests that such a right would be both administratively burdensome and subject to low visibility abuse. Courts would regularly be warned by defendants that if plaintiffs opted out, it would jeopardize the finality of a long-negotiated settlement. The Silicone Gel experience suggests that such threats are not without some basis in fact. [415] The

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products. From these case studies, an attempt will be made to generalize the procedural tactics that facilitate non-adversarial settlements that disadvantage class members.

Part III will turn to the search for remedies. Clearly, the most vulnerable and least protected litigant in **mass tort** litigation is the future claimant. How should such persons be protected? Arguably, federal courts simply lack jurisdiction over such an "exposure only" class because no justiciable "case and controversy" exists for purposes of Article III. Similar arguments have been made under the Bankruptcy Code as to when future claims are dischargeable in bankruptcy, and Part III suggests that a synthesis is necessary to treat future claims similarly in these related contexts. Part III also explores the non-constitutional limitations on the authority of the class representative to settle future claims and suggests that these limitations may preclude the certification of an exclusively future claimant class action. [29]

The future claimant's greatest problem is that the recovery in a **mass tort** class action can be easily eroded by the impact of inflation and by the **[*1354]** possibility that the actual number of claims made against the settlement fund exceeds that projected. Although courts to date have given little attention to these problems, Part III argues that the "superiority" requirement of Rule 23(b)(3) requires the court to find that a proposed settlement adequately protects the future claimant against those dangers. Such a finding will be difficult to make in lump sum settlements (where the defendant is not responsible if the actual rate of claims exceeds that projected) unless the settlement permits the future claimant to opt out as of the time of the discovery by the claimant of the injury or illness if the real economic benefits will be less than that originally projected. As one means of satisfying the "superiority" requirement, this Article proposes a "limited" class action that combines a mandatory class at the liability stage with an individualized damages determination. However, this right to individualization at the damages stage could be conditioned on restrictions (including the use of an arbitration forum) that save congested federal district courts from inundation. This compromise accomplishes two important things at once: (1) it protects the future claimant; and (2) it spares the courts from endlessly repetitive **mass tort** trials.

Part III also seeks to redefine the future claimant's right to opt out. Here, a lively debate has begun to surface. Those most anxious to shrink the size of the federal docket have begun to question whether there need be any such right at all. In contrast, Part III will argue that the right to opt out has to be specifically redefined for the **mass tort** context where long latency periods trivialize the existing right. In the case of future claims, the right should be reformulated as a deferred right, which is triggered by the discovery of the injury. Both the limited class action and the deferred opt out are examples of what this Article will call a "constrained autonomy" model of litigation, which seeks to steer a middle course between the advocates of group litigation and those of individual autonomy. A premise of this approach is that reform must prioritize litigant autonomy interests, protecting those that are most important and compromising those that are not. [30]

The most ethically disturbing problem with the **mass tort** class action may be its tendency toward "structural collusion." Even in the absence of bad faith, suspect settlements result in large measure because of the defendants' ability to shop for favorable settlement terms, either by contacting multiple plaintiffs' attorneys or by inducing them to compete against each other. At its worst, this process can develop into a reverse auction, with the low bidder among the plaintiffs' attorneys winning the right to settle with the defendant. Here, it is necessary to confront the comparatively new institution of the "settlement" class action. Part III will thus **[*1355]** consider various approaches that can prevent defendants from choosing plaintiffs' counsel.

Finally, Part III faces the obligation to compare alternatives, rather than simply report imperfections, and contrasts the **mass tort** class action with the **mass tort** bankruptcy. In terms of both its fairness to creditors and its ability to rehabilitate a financially strained

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likely result might be that plaintiffs seeking to opt out would experience the same low success rates as plaintiffs seeking to escape the transferee court following a consolidation order by the JPML. [416] At the other extreme, individual plaintiffs' attorneys may wish to argue that, at least in the case of personal injury litigation, the opt out system should be replaced by a **[*1448]** system for opting in. [417] Here, the argument would be that in high stakes actions for personal injuries, the class action is presumptively inappropriate and should only be used when individual class members consent. In fact, between 1938 and 1966, the Federal Rules of Civil Procedure effectively implemented such a system, because plaintiffs could only become class members in suits now falling within the Rule 23(b)(3) category (i.e., most actions for money judgments) by affirmatively electing to join the suit. [418] But the experience with this approach does not counsel its adoption. Commentators argue that many eligible class members simply would not, for whatever reason, take the affirmative step necessary to opt in. [419]

If so, a more promising option might be to permit opting out, but also to restrict the choice of forum that the exiting plaintiff could elect. At the same time, such a reform could also recognize a delayed right to opt out, which would accrue only once the individual became aware (or, at most, should have become aware) of a serious compensable injury. Under this compromise, even if the class action settlement were approved in 1995, "exposure only" class members who manifested injury in 2010 or 2015 could opt out at that point and pursue individual remedies.

Before such a delayed right is rejected as unacceptable to defendants, it is interesting to note that a delayed right to opt out has actually been structured into some recent **mass tort** settlements. In Bowling v. Pfizer, Inc., [420] the court approved a class action settlement in a products liability case involving the defective Bjork-Shiley convex/concave heart valve, which had a tendency to fracture while in the recipient because of design and manufacturing defects. Between 50,000 and 100,000 patients had received this heart valve, and some 300 deaths had resulted because of fractures. [421] Given the unique risk of future fracture coupled with the emotional stress from exposure to such a risk, the Bowling settlement provided for a two-stage recovery: First, it gave a modest cash award to all class members for their claims for emotional stress, and, second, it established an "optional guaranteed compensation program." [422] Basically, in the event of a valve fracture, the victim would receive somewhere between $ 500,000 and $ 2,000,000, according to a formula that reflected age, income, and family status. [423] However, class members retained the right to **[*1449]** reject this formula payment and sue for damages in court or to opt for binding arbitration to determine fair compensatory damages (in which even the defendant would waive all defenses to liability). In short, to the extent that the settlement covered future claimants, it effectively provided for delayed opt outs (either to sue in court or to accept binding arbitration). [424]

The attraction of this approach is that it effectively converts a "future claims" class into an option. Transposed to the asbestos context, it might imply that plaintiffs, on incurring lung cancer a decade into the settlement agreement's life, would have a choice between a specific payment (or a range of payments) and a right to sue in a civil proceeding (or to elect arbitration). Similarly, in a breast implants settlement, a subsequent leakage victim would have a similar choice. In fact, in the A.H. Robins case, the court effectively provided a delayed opt out for the victims of the Dalkon Shield. Every Class A member who was dissatisfied with the settlement offer made to her by the Settlement Trust was given "the right to elect to have her claim settled in a trial with all the procedural rights normally attaching to a **jury trial"** - minus any right to **punitive damages.** [425]

Of course, many practices are common and desirable that are not constitutionally required. Yet, as the Supreme Court loves to say, " "due process' is a flexible concept." [426] In any specific context, the process that is due depends on a variety of factors; typically, courts balance the marginal gains from a procedural safeguard against its societal cost. [427] In the **mass tort** context, the value of the right to opt out and obtain one's day in court may seem

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both illusory, in a world where individual trial attorneys deal not in cases, but in inventories, [428] and expensive, in terms of its impact on the federal docket. However, the impact on the federal docket is a highly variable consideration. In a litigation context, where the docket burden is substantial (for example, asbestos), the court might limit the right to opt out to: (1) federal districts not experiencing a backlog; (2) state courts; or (3) arbitration panels under procedures by which the opting out litigant has an equal voice in the selection of the panel members. [429]

[*1450] These procedures, however, still do not answer the defendants' fundamental objection: the value of the settlement to them is undercut if it does not ensure global peace. Clearly, settlements on the current basis will be chilled if plaintiffs with cases having above average value can opt out to pursue individual remedies in any forum. But it is more debatable whether this consequence represents a vice or a virtue. The modern value of the right to opt out may lie more in its utility as a checking mechanism than in its ability to protect litigant autonomy. When sufficient numbers of plaintiffs opt out, the defendants will be exposed to a two-front war (as in the Silicone Gel litigation) and will seek to cancel the settlement.

Given the predictable passivity of most class members, minority vetoes may make sense. [430] In light of them, defendants will predictably learn to write into the settlement agreement a provision allowing them to terminate the settlement if a specified percentage or number of plaintiffs opt out. This in turn gives the plaintiff class a desirable chance to vote with their feet by opting out. The practical net effect might be to torpedo the dubious settlement or force its renegotiation. Although a delayed right to opt out, maturing as of the time of injury recognition, will not produce the same immediate referendum, it poses an even greater economic threat because the defendant cannot back out years after the settlement has become final. In response, defendants will need to structure settlement grids to differentiate more effectively in terms of the legal quality of the claims settled in order to induce those class members with higher value claims not to opt out. [431]

[*1451] Still, is such a desirable right constitutionally necessary? Phillips Petroleum Co. v. Shutts [432] found that due process entitled class members to a right to opt out from the class, but there a nationwide class action had been filed in state court. Shutts's applicability to actions filed in federal courts is less clear, and by its terms the decision's scope may be "limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments." [433] Thus, the still unresolved issue is whether Shutts applies to a class action covering unknown future victims (such as those occupationally exposed to asbestos). The Second Circuit has recently answered this question with a highly equivocal "not necessarily." In In re "Agent Orange" Product Liability Litigation, [434] the Second Circuit "declined to extend the Shutts holding into situations" where notice could not reasonably have been given, but it defined this context carefully and narrowly. [435] On the facts of the Agent Orange case, the Second Circuit said due process was not offended for two relatively unique reasons: (1) "the even-handed treatment of both identified and unidentified legitimate claimants in the Agent Orange I settlement;" and (2) their "dim prospects of success." [436] Neither factor is present in the recent asbestos decisions, where present and future claimants were treated very disparately and where liability was never seriously contested. [437]

Even from the defendants' perspective, a delayed right to opt out could be a substitute for fully adequate notice in those cases where notice may be expensive or infeasible. Arguably, Agent Orange only waives the right to opt out in a case involving unknown future victims. In many **mass tort** class actions, the future claimants come from a large pool of individuals who could (at some expense) be identified and to whom notice could feasibly be given (for example, recipients of breast implants or defective heart valves). Within this context where notice is possible, the right to opt out is in fact often exercised, and due process under Shutts probably requires both notice and a right to opt out. To sum up, of recent **mass tort** cases,

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only the asbestos and Agent Orange cases have truly involved **[*1452]** large classes of unknown and unknowable future victims. Although the Second Circuit has rationalized why a right to opt out need not have been accorded in Agent Orange, this rationale cannot be easily stretched to apply to most other **mass torts,** including asbestos.

From a policy perspective, the practical problem with a delayed right to opt out involves the issue of whether we wish to encourage greater discrimination among class members based on the strength of their litigation claims. Predictably, defendants will reduce their settlement offers under a system in which future claimants can opt out. They will anticipate that seriously injured plaintiffs, who expected recoveries in individual actions above the average recovery for their disease category under the settlement, would normally opt out. Because claimants with "low quality" cases would disproportionately remain in the class, rational defendants would respond either by lowering the per claimant ceilings on their proposed settlements or by insisting upon more detailed settlement grids with more precise differentiation in order to prevent individuals with lesser injuries from receiving an average value that was computed with more seriously injured victims in mind.

In this light, for a delayed opt out right to be feasible, there must be some disincentive to discourage excessive, "opportunistic" opting out. Often, the plaintiffs' attorney has an incentive to opt out in order to obtain a higher contingent fee than the same attorney would receive under the settlement. For example, in a controversial, but justified step, Judge Pointer approved a settlement agreement that, in effect, limited contingent fees in the Silicone Gel case to twenty-four percent of the recovery. [438] Unfortunately, this creates a perverse incentive to opt out because attorneys for class members who opt out may receive one-third or higher contingencies - and thus do better financially themselves while their clients may do worse. A first step toward chilling opting out motivated only by the attorney's self-interest would be to limit contingent fees payable by opt outs to the same or lesser percentage received by the class attorneys. Whether federal courts possess authority to regulate the relationship between class members who opt out and their attorneys remains, however, uncertain.

As a legislative matter, the most logical disincentive to discourage opportunistic opting out by plaintiffs' attorneys would be to base the fee award on the amount by which the exiting plaintiff exceeded the class action recovery. Thus, if the class action provided for an award of $ 50,000 for each class member, and the plaintiff who opted out won $ 100,000 at trial, the attorney's fee would be some one third portion of $ 50,000 (or $ 16,667). A more punitive alternative would be to tax some portion of the defendants' costs to a plaintiffs' attorney who failed to ex **[*1453]** ceed the class action recovery. [439] The real gain here is that such a fee disincentive saves the court's time and thus minimizes social costs by reducing any excessive private incentive to opt out. The plaintiffs' attorney would gain from opting out only if the attorney substantially outperformed the settlement.

E. Settlement Class Actions

The settlement class action is susceptible to at least three distinct problems: (1) defendants may effectively be able to choose the plaintiffs' attorney (or at the least, to avoid negotiating with those plaintiffs' attorneys whom they consider to be intransigent and unreasonable - in short, the persons that plaintiffs, themselves, would be most likely to choose to represent their interests); (2) however chosen, the plaintiffs' attorneys have a limited franchise, cannot threaten credibly to go to trial if a deal is not struck, and thus are effectively negotiating with one arm tied behind their back; [440] and (3) when a settlement is reached prior to the filing of the action, the entire process seems to present a paradigm of the "friendly" or feigned suit

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that the "case or controversy" requirement has traditionally denied federal courts the power to hear. [441] If the "settlement class" procedure could be applied to labor negotiations, one suspects that the 19941995 baseball strike would have been concluded in a few days. But the results of such a settlement might have been as one-sided as they seem in the asbestos cases.

These objections to settlement class actions have long been understood and seem so powerful and obvious that one wonders why a court would accept a settlement negotiated in such a suspect fashion. Of course, a partial answer is that courts have frequently not accepted proposed settlements so reached. During the last year alone, for example, the Ford Bronco II settlement, [442] two separate settlements involving **[*1454]** General Motors pickup trucks (with explosive side-saddle gas tanks), [443] and the polybutylene settlement [444] were rejected by state and federal courts. Only in the asbestos and breast implants areas - where the threat of seemingly unending personal injury litigation overhung the courtroom and was unmistakably on the court's mind - have such settlements been approved (and frankly encouraged).

Although strong arguments against any provisional certification "for purposes of settlement only" can certainly be made, it seems prudent to ask first if there are reforms that could minimize the potential for collusion. Three seem plausible. First, if settlement classes are to be tolerated, a minimal reform would require the court to oversee the selection of the plaintiffs' counsel, after adequate notice was first given to the specialized bar handling the specific **mass tort** that certification of a settlement class was contemplated. [445] In short, before the parties could link arms and jointly approach the court with a seductive settlement, the court must formally select the counsel with whom defendants are permitted to conduct preliminary negotiations. As discussed earlier, plaintiffs' attorneys who had entered into inventory settlements or similar understandings with defendants would be disqualified. The key to this proposal would be that the settling parties could not approach the court with a proposed settlement and ask to have the plaintiff's attorney named class counsel. Rather, as a means of alternative dispute resolution, defendants could ask the court for a limited period to engage in settlement negotiations with a plaintiffs' attorney to be designated by the court (during which period all related actions might be stayed).

Realistically, however, such a reform, standing alone, could be abused. The trial court bent on settlement (as was the court in Georgine) would know with whom the defendants wanted to negotiate. Attorneys with a reputation for a tough bargaining style would be less likely to be selected. Indeed, under this proposed rule, it is entirely possible that the Georgine court would have deliberately chosen the same lead counsel, precisely in order to ensure a quick settlement.

Thus, a second and supplementary reform involves the use of broad and representative steering committees, deliberately chosen to mirror the composition of the plaintiffs' bar. This approach was more or less followed in the Silicone Gel litigation. [446] Under such an approach, plaintiffs' counsel would be denied authority to present any settlement to the court **[*1455]** for its approval until it had first received a ratification vote from the broad-based steering committee. Such an approach might prevent some settlements (as in Georgine, where a nationwide plaintiffs' steering committee had earlier refused to approve the settlement offer proposed by the CCR defendants). [447] But that is the point of the reform.

How should the court staff such a steering committee? Most areas of **mass tort** practice have specialized American Bar Association or American Trial Lawyers Association (ATLA) committees or other ad hoc informal organizations. [448] The problem lies not in identifying a representative committee, but in accepting the risk of paralysis if the steering committee deadlocks. Trial specialists who believe (in good faith and possibly with some justification) that the class action was not designed to handle personal injury tort litigation will predictably oppose class certification. Yet, deadlock is not inevitable, as the Silicone Gel settlement

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demonstrated. Moreover, if individual actions have been stayed pending a resolution of the class action (as they were in Georgine), the pressure to settle will in time become irresistible. The danger is not that the courts have too little power to induce settlement, but rather that they will use their very considerable powers in a one-sided fashion to pressure only plaintiffs.

A third proposal might be to preclude certification of a class defined exclusively in terms of future claimants. By definition, future claimants are silent and passive, and thus they cannot monitor their attorneys. Sometimes, however, present claimants can, and in the personal injury context they have a strong incentive to do so. Again, the Silicone Gel litigation provides the better model, because it included both present and future claimants. Of course, present claimants can normally opt out of the action, but this should be a telltale sign. Whereas Judge Reed invalidated several hundred thousand opt outs in Georgine, [449] Judge Pointer encountered no similar problem (at least on any similar scale) in the Silicone Gel litigation, suggesting strongly that the proposed settlement in the latter was perceived to be fairer than in the former. [450]

[*1456] Ultimately, these proposed reforms still dodge the central issue: is the concept of a class certified only for settlement purposes valid? Or does such a limited certification inherently produce weak and one-sided settlements because the plaintiffs forego their right to trial? At the heart of this problem is the anomaly that a class certified by consent for settlement purposes might not be certifiable for litigation purposes. [451] If this is the case, the plaintiffs' attorneys will know (or at least suspect) that they lack negotiating leverage and may accept recoveries far below what the plaintiffs could receive in individual actions. From this diagnosis follows a clear prescription: eliminate the anomaly by not allowing a settlement class to be certified when a "litigation" class action could not be certified. In short, the same certification standards should apply to both settlement class actions and "litigation" class actions.

This reform would not require legislation or rulemaking, but it would restrict a rapidly developing practice. Today, there is a tendency for courts facing a proposed settlement in a settlement class action to ignore the specific criteria specified in Rule 23(a) - i.e., numerosity, typicality, commonality, and adequacy of representation - and to focus instead only on the fairness of the settlement. [452] Some decisions approving pre-certification settlements in settlement class actions have simply identified the "questions of law or fact common to the class" as the adequacy of the settlement. [453] Put simply, this is bootstrapping, because it trivializes the requirements of Rule 23(a) by reading the commonality and typicality requirements out of the Rule.

The better approach would be to apply the requirements of Rule 23(a) consistently in both settlement and litigation class actions. Exactly this approach has been taken this year by the Third Circuit in the General Motors Pick-up Truck Fuel Tank litigation. [454] Although such a requirement may invalidate some settlements, an insistence that the trial court find that the individual elements of Rule 23(a) - numerosity, commonality, typicality, and adequacy of representation - are each satisfied, and a refusal to deem the attractiveness of the settlement as dispositive of these issues will preserve the negotiating leverage of plaintiffs because they will **[*1457]** be able to reach sustainable settlements only in cases when they had the right to proceed to trial. Under these circumstances where plaintiffs have both options (settlement and trial) open, the parties at least may be truly bargaining in the shadow of the law by discounting the likely results at trial.

Realistically, the Third Circuit's requirements in General Motors will not significantly change current practices. Writing for the Third Circuit in another decision in 1995, Judge Becker (the author of the General Motors decision) found that the commonality requirement in Rule 23(a) would be "satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." [455] This is not an onerous requirement. In this light,

General Motors may be more important for its recognition that collusion is a danger than for its substantive holding. A practical response to the settlement class action therefore requires not simply that the doctrinal requirements be the same for both "settlement" and "litigation" classes, but that courts insist that a representatively selected steering committee choose the lead counsel that negotiates with the defendants and ratifies the proposed settlement. The telltale clue that something would go wrong in Georgine came early on when defendants were able to approach the minority faction of the plaintiffs steering committee, after the majority had rejected its proposals. [456]

Ideally, the settlement class action should become a temporary form of alternative dispute resolution with clear time limits. If the parties cannot reach an agreement within, say, a year after judicial selection of lead counsel and a steering committee for plaintiffs, the same action should go forward as a "litigation" class action. Defendants could, of course, then move to dismiss on the grounds that the proposed class flunks the standards of Rule 23(a) or (b), but an objector to the settlement should have the same ability to raise these same issues when the parties seek to certify the settlement class. Only when the rules of the game are the same for both types of class actions can we expect the settlement process to fairly approximate and discount the likely outcome at trial.

F. Bankruptcy Versus the **Mass Tort** Class Action

The reforms discussed in this Part - in particular, delayed opt outs and restrictions on the certification of future claimant classes - carry potential costs: First, the inability of corporations to resolve their contingent tort liabilities could cripple some firms and lead to their operational collapse. [457] Second, if early resolution of all tort claims is prevented, **[*1458]** then later plaintiffs may sometimes find that they hold only paper claims against an insolvent firm. For both these reasons, claim pooling and an early resolution can be desirable for both plaintiffs and defendants. Yet, as the Silicone Gel experience underlines, [458] corporate defendants may be reluctant to enter into global settlements that are effectively open-ended because of the possibility of delayed opt outs by future claimants.

Still, if early resolution of **mass tort** liabilities is desirable, it does not follow that it should be purchased at any price. The real question becomes: What alternative means to this end are feasible? Here, a comparison is necessary between the utility of the **mass tort** class action and a bankruptcy reorganization. Unfortunately, many commentators have simply taken it as self-evident that corporate bankruptcy carries unacceptably high costs, both for the class members themselves, and other constituencies (such as employees and local communities). [459] Underlying this approach is probably an anthropomorphic fallacy: Bankruptcy tends to be equated with corporate death. In fact, however, Chapter 11 may be a far more flexible instrument by which to rehabilitate a financially strained firm. [460]

Both substantively and procedurally, bankruptcy reorganization has comparative advantages over a **mass tort** class action as a means of achieving an equitable resolution of **mass tort** liabilities that is fair to tort creditors. Substantively, bankruptcy reorganizations have long been guided by two basic principles: (1) absolute priority; and (2) temporal equality. [461] The first principle seeks to ensure that creditors are compensated in full (and according to their level of seniority) before stockholders share in the firm's value; the second principle requires that creditors within the same class be treated equally, regardless of when their claims mature. Thus, in the typical bankruptcy, all bondholders of the same level of sen **[*1459]** iority will receive the same prorated amount, whether their claims matured the day before insolvency, the month after, or are scheduled to mature in a decade.

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Although in practice bankruptcy reorganizations may not always fully comply with these two normative principles, **mass tort** class action settlements violate both principles openly and egregiously. Absolute priority is not even recognized as a relevant goal in class action settlements. For example, the claim that a "limited fund" justifies a mandatory, non-opt out class action is essentially a claim that the firm is insolvent and cannot fully pay its tort creditors. In the bankruptcy context, the principle of absolute priority would require that tort claimants receive full payment of their provable claims before stockholders could share in the firm's value. But, as the Ahearn and Hayden cases show, the reverse happens in class action settlements: stock values soar, while tort creditors are either scaled back or forced to rely on thinly funded or unspecified settlement funds. [462] Although both class actions and Chapter 11 are costly, [463] the bottom line difference between them is that a corporation filing for a Chapter 11 reorganization can anticipate having to surrender the majority of its equity to a settlement trust and has no hope of escaping with only an assignment of its insurance policies. [464]

The goal of temporal equality is even more systematically violated by **mass tort** class action settlements. When present claimants receive more in inventory settlements than will future claimants (as happened in Georgine n465), the principle of equality within the class has been breached. Worse, distat future claimants may receive far less in **mass tort** settlements than those tort claimants whose claims mature earlier, both because inflation may erode their recovery and because the settlement fund may be depleted if the eventual number of claims exceeds those predicted. While the date of maturity does not count in bankruptcy, it will often be critical in class actions resolved through settlement funds.

Procedurally, bankruptcy reorganizations are governed by well-known and largely settled legal rules that give creditors specific voting rights and that recognize distinct subclasses. In contrast, a principal attraction of the **mass tort** class action is that it permits an end run around **[*1460]** this known legal regime. Instead, the settling parties can ask the court to serve as a mediation forum where virtually anything goes and formal legal constraints are lacking. [466]

Perhaps the most important advantage of the bankruptcy forum is that it tends to alleviate the conflict of interest overhanging plaintiffs' counsel in a class action. First, the corporation filing for reorganization cannot select the counsel for the various classes of its creditors in bankruptcy (as defendants may be able to do in some "settlement class" actions). Second, while the plaintiffs' attorneys' fee award in a "settlement class" action is subject to the major contingency that the two sides must reach a settlement, this contingency largely vanishes in the case of a bankruptcy reorganization, because once the bankruptcy petition is filed, it becomes a virtual certainty that the reorganization will proceed to some final resolution. The elimination of this contingency is critical, because for plaintiffs' attorneys, the failure to reach a settlement in a **mass tort** class action spells financial disaster. In bankruptcy, however, this risk is minimized, and as a result the possibility decreases of a collusive deal in which the plaintiffs' attorney trades a reduced settlement for a higher fee award.

Ultimately, the proof is in the pudding. Some **mass tort** bankruptcies have worked well [467] and have shown that Chapter 11 enables a sophisticated court to preserve the economic viability of a financially strained firm. [468] In addition, bankruptcy courts may find it easier to monitor fees and to restrict the percentage of the award that goes to plaintiffs' attorneys, thus ensuring a greater net recovery to the victims. [469] **[*1461]** In contrast, no major **mass tort** class action appears yet to have played to favorable reviews.

This evaluation leads to three definite conclusions: First, the rationale that the corporation's funds are limited should not justify the certification of a non-opt out class action because such a class action appears at present to be an inferior substitute for a bankruptcy reorganization. Second, that delayed opt outs and any procedural tightening of the rules applicable to the **mass tort** class action may chill some global settlements is an acceptable

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cost and may even be desirable to the extent that it induces some firms to use instead the superior alternative of a bankruptcy reorganization. Third, the appropriate role of the **mass tort** class action should be to resolve the tort liabilities of the solvent firm. As long as solvency is assured, the fact that a delayed opt out right may make the settlement potentially open-ended will neither foreclose the corporation's access to the capital markets nor, as a practical matter, result in any other significant inefficiency. In any event, the corporation whose financial situation does worsen can always resort to the bankruptcy alternative.

In sum, given the long latency periods associated with **mass torts** and the shot-in-the-dark character of contemporary efforts at epidemiological prediction, open-ended settlements should be a necessary condition before a **mass tort** class action can truly be found to be "superior to other available methods for the fair and efficient adjudication of the controversy." [470]

Conclusion: Toward Constrained Autonomy

Class action developments have given rise to a new legal technology that threatens to strip tort victims of their legal claims, sometimes decades before they even mature. Effectively, this technology has created a jury-rigged substitute for corporate reorganization, but without the safeguards attending that statutory proceeding. If fully exploited, these techniques - particularly the use of mandatory classes, settlement classes and future claimant classes - could create a new, even more protective form of limited liability for corporations. [471] But, curiously, this legal transition has been entirely procedural (that is, the substantive law of torts has **[*1462]** changed little over the same period), and the entire process has been engineered by courts, not legislatures.

To explain and address this phenomenon, one needs to consider its political context. On the simplest level, recent developments can be viewed as a consequence of changing perceptions of the class action. As individual **mass tort** cases mounted and the burden on the docket grew, an increasing number of civil procedure scholars began to discover the utility of the **mass tort** class action. [472] Law review notes, in turn, began to suggest limitations on the right to opt out. [473] Partly in response, judicial attitudes changed. Now with the 1990s, the legal community is witnessing the actual reality of **mass tort** class actions. Some already find the results sordid. [474] Thus, some will be tempted to urge a return to litigant autonomy and the traditional bipolar model of individual litigation. From this Article's perspective, however, any such return to a traditional model is unlikely because of the impact of **mass tort** cases on the federal docket.

Politically, **mass tort** procedural law is the product of the collision of three sets of interests: (1) **mass tort** victims (and their attorneys, whose interests can admittedly deviate markedly from those of their clients); (2) defendants, who fear exposure to liability and their own legal fees almost equally; and (3) trial courts, for whom the prospect of an unending stream of individual actions clogging their dockets has proved unacceptable. The fairest generalization about recent developments in the **mass tort** field is that the last two parties in this triad have increasingly, but tentatively, reached a de facto coalition that has protected their own interests at the expense of tort victims.

More generally, the performance of courts in handling **mass tort** class actions appears to have varied in direct proportion to the amount of docket pressure under which the trial court has perceived itself to be. Faced with suspicious settlements, federal and state courts have rejected doubtful settlements in property damage cases, [475] but, in the far more sensitive

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mass tort personal injury context, courts have accepted far more suspicious signs of collusion: inventory settlements, settlements classes reached not only before certification but before case filing, classes narrowly defined to include only future claimants, and chilling restrictions on opting out. The generalization that best summarizes these cases is **[*1463]** that provided by Judge Posner in Rhone-Poulenc Rorer: "The number of asbestos cases was so great as to exert a well-nigh irresistible pressure to bend the normal rules." [476] Once bent, legal rules tend to stay bent, and legal rationalizations tailor-made for the asbestos context will inevitably be cited and, to a considerable extent, followed in other **mass tort** cases as well.

As a result, although others have principally focused on the alleged ethical violations of the settling parties, [477] this Article's contention is that the fact of judicial self-interest must be placed at center stage. Its centrality leads to three distinct policy conclusions: First, the least acceptable reform proposals are those that simply increase the discretion of the trial judge. [478] Given such discretion, the right to opt out would soon wither, and litigant autonomy might increasingly become a nostalgic memory.

Second, reformers are best advised to address their proposals to appellate courts and place little hope in legislative reform. In any lobbying contest before the legislature, corporate defendants are far better positioned and equipped to do battle than are public interest representatives on behalf of inchoate future claimants. In contrast, appellate courts are less directly affected by docket congestion and fear less the prospect of mind-numbing tedium from repetitive tort cases. [479]

Third, reformers must recognize the necessity of constraining litigant autonomy. The issue is not whether, but how. Unrestrained advocacy of each citizen's "day in court" is exploited by **mass tort** defendants to justify settlement practices that would have been unthinkable just decades ago. The more prudent line of defense lies in the proposition that constraints on litigant autonomy should observe the principle of least drastic means. That is, because fundamental due process rights are implicated by attempts to draft the individual litigant to serve as a faceless soldier in group litigation, the least restrictive alternative should be preferred that can realize the social goals sought. [480]

[*1464] To the extent that litigant autonomy can be made to co-exist with reforms that control the growth of the federal docket, [481] federal courts can be expected to preserve and protect the individual litigant's desire to seek an individual recovery. Defendants will predictably resist, but at this point a very different political coalition may form.

Attempts to balance litigant autonomy and group litigation must inevitably face some problematic trade-offs. One such trade-off is the possibility that recognizing a right to exit for litigants with cases of above average litigation strength will reduce the settlement that defendants offer to the remaining class members. In principle, this seems the logical outcome, but there is a countervailing consideration: the right to exit (through delayed opt outs and the ability to contest damages on a de novo basis in some forum) may serve a checking function that deters collusive settlements. Today, the average claimant may lose more in settlement value because the settling parties can engage in various forms of structural collusion than such claimant would lose in settlement value under a legal regime in which claimants with above average cases exercise a right to opt out. [482]

Based on this premise that real reform will require securing the compliance of trial judges who today feel threatened by **mass tort** individual actions, this Article has proposed three fundamental principles on which procedural reforms should be based.

1. Settlement class actions must be monitored by the only participants with the appropriate incentives to monitor: namely, other plaintiffs' attorneys. Although the first step toward reform is the recognition of the same standards for class certification in the "settlement"

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class context as in "litigation" class actions, the more important and second step is to deny the defendant the ability to select the plaintiffs' counsel. The use of representative steering committees may be the simplest means by which to minimize the opportunistic discretion of the individual plaintiffs' attorney.

2. Future claimants are uniquely exposed in class actions. Time and time again, they have lost not only to defendants, but also to present claimants (and their attorneys). On balance, they appear to fare marginally better in bankruptcy proceedings, whereas the corporation's share **[*1465]** holders fare significantly better in **mass tort** class actions. Given the limited judicial ability to project either the number and character of future claimants in **mass tort** cases or the rate of inflation in the distant future, lump sum settlements should be accompanied by a safety valve: some right on the part of the individual litigant to opt out if actual economic benefits are less than projected. In general, open-ended settlements should be preferred, both because the lump sum alternative essentially shifts residual risk from the firm to its tort creditors and because the bankruptcy process performs marginally better when a definitive resolution of the firm's tort liabilities is necessary for its survival.

3. The right to opt out needs to be modified and updated to the extent that "future claims" classes are permitted. A delayed right to opt out, triggered by the discovery of a previously latent **mass tort** injury or illness, would solve many of the problems of both future claimants and settlement classes.

To sum up, judicial competence is limited. Attempts to peer decades into the future have uniformly failed. In that light, a cautious and conservative definition of what courts can do will protect both tort victims and, in the long run, courts themselves.

FOOTNOTES:

n1. Modern evolutionary theory sees evolution as characterized by "punctuated equilibria": long periods of stasis interrupted by events causing rapid change. See Niles Eldredge & Stephen J. Gould, Punctuated Equilibria: An Alternative to Phyletic Gradualism, in Models In Paleobiology 82, 82115 (Thomas J.M. Schopf ed., 1972); Stephen J. Gould, The Panda's Thumb: More Reflections in Natural History 17985 (1980).

n2. See Steve Baughman, Note, Class Actions in the Asbestos Context: Balancing the Due Process Considerations Implicated by the Right to Opt Out, 70 Tex. L. Rev. 211, 21213 (1991) (discussing cases). For a fuller discussion of the case law up to the 1990s, see infra text accompanying notes 3751. Today, however, federal courts appear to be moving from hostility to receptivity, at least with regard to proposed settlements of **mass tort** class actions. For examples of recent decisions in which courts have certified a **mass tort** class action for personal injuries, see Ahearn v. Fibreboard Corp., No. 6:93cv526, 1995 U.S. Dist. LEXIS 11062, at *5 (E.D. Tex. July 27, 1995) (approving settlement of asbestos-related claims under Rule 23(b)(1)(B)); In re Copley Pharmaceutical, Inc., "Albuterol" Prods. Liab. Litig., 161 F.R.D. 456 (D. Wyo. 1995) (denying motion to decertify Rule 23(b)(3) nationwide personal injury class action for drug contamination with unknown effects); Castano v. American Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995) (certifying Rule 23(b)(3) nationwide class action for tobacco-related illnesses); In re Silicone Gel Breast Implant Prods. Liab. Litig., No. CV-92-P-10000-S, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994) (certifying class of breast implant recipients); Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994) (approving settlement of asbestos class action); In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 911 (E. & S.D.N.Y. 1991) (certifying class of beneficiaries of asbestos settlement trust pursuant to Rule 23(b)(1)(B)), vacated on other grounds, 982 F.2d 721 (2d Cir. 1992), modified sub nom. In re Findley, 993 F.2d 7 (2d Cir. 1993). The leading decisions upholding personal injury **mass tort** class actions when the class members were exposed and/or injured at widely varying times and under widely varying circumstances are In re A.H. Robins Co., 880 F.2d 709 (4th Cir.), cert. denied, 493 U.S. 959 (1989), and In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 16367 (2d Cir. 1987), cert. denied, 484 U.S.

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debtor, the latter wins on all counts - except its ability to preserve management in control.

I. A Profile of the **Mass Tort** Class Action

At the outset, one obvious and inescapable fact about **mass tort** litigation must be placed at center stage in any public policy analysis: **mass tort** litigation typically involves seriously injured persons who lack insurance or substantial financial resources. Immediately, this distinguishes **mass tort** litigation from most other class action contexts-such as securities or antitrust class actions - where the class members tend to be diversified shareholders or substantial economic entities whose injuries are more modest in proportion to their net worth. In these other contexts, commentators largely have agreed that deterrence, not compensation, should be the rationale of the class action, [31] and they have doubted that compensation is likely to be achieved. [32] Insurance and indemnification statutes, they argue, imply a basic circularity, with shareholders paying the cost of insurance against litigation victories by other shareholders. [33]

In the **mass tort** context, however, the participants at least perceive compensation to be the primary objective. Not only are the victims often seriously injured (as, for example, in asbestos litigation) and financially dependent on a litigation-funded recovery, but deterrence is a much more problematic objective. Because of the long latency periods associated with most **mass tort** injuries, the defective or toxic product may well have been removed from the market long before the class action is ever brought. [34] As a result, some commentators have argued that neither the goals of deterrence nor corrective justice are realizable in the **mass tort** **[*1356]** setting. [35] Others warn that deterrence is a blunt sword and fear that what may in fact be deterred is innovation generally. [36] In any event, the focus of both the courts and the litigants in **mass tort** cases has been almost wholly preoccupied with victim compensation: how to fund at least minimal recovery for desperately injured individuals. But, as will be seen, it is precisely within these terms that they have been least successful.

A. The Institutional Backdrop

Mass tort actions matured during the 1980s. Tabulating the actions brought during that decade, two respected commentators have noted: "Hundreds of thousands of people sued scores of corporations for losses due to injuries or diseases that they attributed to catastrophic events, pharmaceutical products, medical devices or toxic substances." [37] Those who have sought to explain this phenomenon of mass "claiming" have identified cultural and social factors that may be more important than any legal developments over this period. [38] Whatever the reason, the most important **mass torts** that arose during this decade - asbestos, Agent Orange, and the Dalkon Shield - each involved nearly 200,000 or more claimants, and collectively they remade both bankruptcy law and the class action. At the beginning of the decade, the **mass tort** class action was uniformly rejected by appellate courts. By the end of the decade, it was at least provisionally embraced by many.

Some of the reasons for the initial judicial skepticism of the **mass tort** class action were obvious. First, the Advisory Committee that drafted Rule 23 of the Federal Rules of Civil Procedure had suggested that a " "mass accident' ... is ordinarily not appropriate for a class action" be **[*1357]** cause of the presence in such cases of significant issues (including causation and possible defenses) that would impact upon the individual class members

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1004 (1988). Nonetheless, federal courts remain largely unreceptive to **mass tort** class actions that are not presented to them as pre-arranged settlements in the form of "settlement classes." Attempts to certify a **mass tort** class action over the objections of defendants still regularly fail. See In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995) (granting mandamus and reversing certification of nationwide class action of hemophiliacs infected by the AIDS virus); Joint E. & S. Dist. Asbestos Litig., 982 F.2d at 721 (modifying district court's certification of asbestos litigation trust claimants); In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990) (granting mandamus and reversing certification of class of individuals exposed to asbestos); Kurczi v. Eli Lilly & Co., 160 F.R.D. 667 (E.D. Ohio 1995) (declining to certify class composed of women exposed to DES).

As a definitional matter, personal injury **mass tort** class actions need to be distinguished from property damage class actions. The latter have been more frequently certified and inherently tend to involve both greater homogeneity among class members and greater commonality in their factual issues. See, e.g., Central Wesleyan College v. W.R. Grace & Co., 143 F.R.D. 628 (D.S.C. 1992) (conditionally certifying class of some 480 potential class members with friable asbestos in their buildings on eight common issues), aff'd, 6 F.3d 177 (4th Cir. 1993).

n3. See Judith Resnik, From "Cases" to "Litigation," 54 Law & Contemp. Probs., Summer 1991, at 5; Jeffrey W. Stempel, New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform, 59 Brook. L. Rev. 659 (1994). For a general overview of the modern development of the class action, see Arthur R. Miller, Comment, Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem," 92 Harv. L. Rev. 664 (1979).

n4. See Robert G. Bone, Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation, 70 B.U. L. Rev. 213, 287304 (1990) (reviewing Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action (1987)); Susan P. Koniak, Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc., 80 Cornell L. Rev. (forthcoming 1995) (manuscript at 10405, on file with the Columbia Law Review); Roger H. Trangsrud, Joinder Alternatives in **Mass Tort** Litigation, 70 Cornell L. Rev. 779, 82022 (1985) [hereinafter Trangsrud, Joinder Alternatives]; Roger H. Trangsrud, Mass Trials in **Mass Tort** Cases: A Dissent, 1989 U. Ill. L. Rev. 69 [hereinafter Trangsrud, Mass Trials]; Stephen C. Yeazell, Collective Litigation as Collective Action, 1989 U. Ill. L. Rev. 43, 44; see also Richard A. Epstein, The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal, 10 J.L. & Com. 1 (1990) (criticizing ALI proposals for consolidation and claim aggregation).

n5. Martin v. Wilks, 490 U.S. 755, 762 (1989) (quoting 18 Charles A. Wright et al., Federal Practice & Procedure 4449, at 417 (1981)).

n6. Indeed, some have framed the debate in exactly these terms. See Mark W. Friedman, Note, Constrained Individualism in Group Litigation: Requiring Class Members to Make a Good Cause Showing Before Opting Out of a Federal Class Action, 100 Yale L.J. 745, 75961 (1990). Others define the current debate as between "reformers" and "preservationists." See Stempel, supra note 3, at 688. This seems essentially the same debate.

n7. For the best statement of these issues, see Jack B. Weinstein, Ethical Dilemmas in **Mass Tort** Litigation, 88 Nw. U. L. Rev. 469 (1994).

n8. Deborah R. Hensler, Resolving Mass Toxic Torts: Myths and Realities, 1989 U. Ill. L. Rev. 89, 8990; see also David Rosenberg, The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System, 97 Harv. L. Rev. 851, 854 (1984) (advocating a model for handling **mass torts** that would rely on class actions, use probabilistic determinations of causation, allocate liability proportionately among defendants, and award

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scheduled damages to class members).

n9. For the fullest and best statement of this vision, see Rosenberg, supra note 8; see also David Rosenberg, Class Actions for **Mass Torts:** Doing Individual Justice by Collective Means, 62 Ind. L.J. 561, 56974 (1987) (advocating "public law" tort model); Leon E. Trakman, David Meets Goliath: Consumers Unite Against Big Business, 25 Seton Hall L. Rev. 617, 62840 (1994) (favoring mandatory class actions).

n10. See, e.g., Peter H. Schuck, Agent Orange on Trial 57 (1986); Kenneth S. Abraham, Individual Action and Collective Responsibility: The Dilemma of **Mass Tort** Reform, 73 Va. L. Rev. 845, 884 (1987); Rosenberg, supra note 9, at 563, passim; see also Robert L. Rabin, Tort System on Trial: The Burden of Mass Toxics Litigation, 98 Yale L.J. 813, 814, 82022 (1989) (book review) (noting the "intolerable consequences of relying on the tort system in mass toxic disaster cases"). Professor Rabin is, however, equally skeptical of the class action as an alternative and prefers non-tort alternatives such as administrative compensation schemes. See id. at 82426. Social insurance systems are beyond the scope of this Article (although bankruptcy proceedings, which are discussed, do represent a non-tort alternative).

n11. See, e.g., Linda S. Mullenix, Class Resolution of the **Mass-Tort** Case: A Proposed Federal Procedure Act, 64 Tex. L. Rev. 1039 (1986) (recommending statutory change to increase use of **mass tort** class actions); Jon O. Newman, Comment, Rethinking Fairness: Perspectives on the Litigation Process, 94 Yale L.J. 1643, 164446 (1985) (advocating reforms of litigation system to reduce costs and delay); Alvin B. Rubin, **Mass Torts** and Litigation Disasters, 20 Ga. L. Rev. 429, 43435 (1986) (describing litigation crisis imposed by **mass tort** cases and impact on the tort system); Edward F. Sherman, Class Actions and Duplicative Litigation, 62 Ind. L.J. 507, 507 (1987) (advocating use of injunctions against duplicative litigation and restrictions on opt out rights to increase efficiency of class action).

n12. For examples of this genre, see Rabin, supra note 10, at 82022; Rubin, supra note 11, at 43438, 441; Paul C. Weiler & Christopher F. Edley, Jr., Asbestos: A Multi-Billion Dollar Crisis, 30 Harv. J. on Legis. 383, 39295 (1993).

n13. For discussion of the agency costs in class action litigation, see John C. Coffee, Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877, 88389 (1987) [hereinafter Coffee, The Regulation of Entrepreneurial Litigation]; John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 70120 (1986) [hereinafter Coffee, Understanding the Plaintiff's Attorney]; Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1, 1227 (1991).

n14. Few in-depth studies have examined the process by which the fairness and adequacy of a class action settlement is reviewed by the court. However, one recent study by staff members of the Research Division of the Federal Judicial Center provides some revealing insights. Studying all class actions closed between July 1, 1992 and June 30, 1994 in two federal district courts, these researchers found that the rate of settlement approval was very high. In one of the two studied courts (the Eastern District of Pennsylvania), preliminary data indicate that approximately 34 out of 38 proposed class action settlements (or 89%) were approved without changes (and two others were approved with changes); in the other district court (the Northern District of California), 26 out of 30 class actions (87%) were approved without changes, and the remaining four were approved with changes. See Thomas E. Willging et al., Federal Judicial Center, Preliminary Empirical Data on Class Action Activity in the Eastern District of Pennsylvania and the Northern District of California in Cases Closed Between July 1, 1992 and June 30, 1994 at 5758 (Apr. 1995) (unpublished manuscript on file

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with the Columbia Law Review). Standing alone, these data could be consistent with either the conclusion that most settlements are fair and reasonable or the conclusion that courts are passive and accepting. Two other preliminary findings in their study, however, point to the latter conclusion. In the cases for which information was available (12 in the Eastern District of Pennsylvania and 5 in the Northern District of California), the median length of the fairness hearing on the class action settlement was 38 minutes in the first district and 40 minutes in the second district. See id. at 57. Such expedition seems inconsistent with careful judicial scrutiny of the settlement's fairness. Similarly, in approximately 83 to 84% of the cases studied in the two districts, the court awarded the exact amount of attorneys' fees requested by the plaintiffs' attorneys. See id. at 7982. Again, because such deference in turn invites attorneys to make excessive demands, this finding in particular suggests a pattern of judicial passivity at the settlement stage.

n15. One much cited estimate, based on asbestos litigation, is that transaction costs consume $ .61 of each asbestos litigation dollar (of which $ .37 is attributable to defendants' litigation costs). The plaintiffs therefore receive only $ .39 from each litigation dollar, and plaintiffs' attorneys only $ .24. See Cimino v. Raymark Indus., 751 F. Supp. 649, 651 (E.D. Tex. 1990); see also Rubin, supra note 11, at 434 (citing Rand study and other studies showing that majority of payments made in product liability cases are for legal services). Even if these factual assumptions are correct, they imply that defendants' litigation expenses ($ .37) exceed plaintiffs' expenses ($ .24) by slightly more than 50%. The impact of these data on the case for **mass tort** actions is problematic, because "reform" may produce a wealth transfer from plaintiffs to defendants. It cannot safely be assumed that reducing defendants' litigation costs will increase the recoveries to plaintiffs (although it will reduce the deterrent impact, if any, of **mass tort** litigation). Nor, if corrective justice considerations are taken into account, is it clear that plaintiffs should lose their opportunity to receive individualized damages because of the costs to defendants.

Mass tort litigation is, however, considerably less expensive when sampling techniques and consolidated trials are used, and in such cases there may not be the same reduction in settlement value that seems to accompany the **mass tort** class action. See infra text accompanying notes 156162.

n16. For data on the impact of **mass torts** on federal and state dockets, see infra notes 6372 and accompanying text.

n17. Some recent academic voices have also seen the problems with a "public law" vision. See, e.g., Linda S. Mullenix, **Mass Tort** As Public Law Litigation: Paradigm Misplaced, 88 Nw. U. L. Rev. 579, 58082 (1994).

n18. See Koniak, supra note 4 (manuscript at 104); Mullenix, supra note 17, at 580; John A. Siciliano, **Mass Torts:** The Case Against a Special Case, 80 Cornell L. Rev. (forthcoming 1995) (manuscript at 1720, on file with the Columbia Law Review).

n19. For the classic statement of this view, see Milton Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits - The Twenty-Third Annual Antitrust Review, 71 Colum. L. Rev. 1, 89 (1971). This same suspicion of an extortionate motive clearly runs through Judge Posner's decision in In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 12971300 (7th Cir. 1995).

n20. See infra text accompanying notes 163171.

n21. That some defendants today seek class certification, preferring class resolution to repetitive individual litigation, is beyond dispute. See David Crump, What Really Happens During Class Certification? A Primer for the First-Time Defense Attorney, 10 Rev. Litig. 1, 89 (1990). Defendants also regularly seek to extend the scope of the class action filed by

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plaintiffs. A good example is the class action filed over the defective Bjork-Shiley heart valve. Brought as a nationwide class action, defendants insisted that it be extended to a global class action. See Bowling v. Pfizer, Inc., 143 F.R.D. 141, 15455 (S.D. Ohio 1992), appeal dismissed, 995 F.2d 1066 (6th Cir. 1993); Michael Schachner, Global Settlements Draw Praise, Scorn, Bus. Ins., Oct. 10, 1994, at 1, 35. Ordinarily, a defendant has no desire to be sued by additional plaintiffs and fights to define the class narrowly.

n22. This Article will argue that the **mass tort** context is the leading such example, but is not the only one. Employment discrimination also represents an area in which individual claims for substantial damages are economically viable, but defendants increasingly prefer a class resolution. See J. Spencer Schuster, Precertification Settlement of Class Actions: Will California Follow the Federal Lead?, 40 Hastings L.J. 863, 865 (1989) (noting trend toward settlement class actions in variety of litigation contexts).

n23. For discussion of the impact of **mass tort** actions on the federal docket, see infra text accompanying notes 6372. Two distinct claims, however, need to be separated here at the outset.

First, there is the strong possibility that judges frame legal standards with their own self-interest in mind. Several recent procedural commentators have either made or conceded this observation as a starting point for analysis of procedural rules. Compare Jonathan R. Macey, Judicial Preferences, Public Choice, and the Rules of Procedure, 23 J. Legal Stud. 627, 629 (1994) (asserting that judicial behavior in procedural matters is likely to conform to judges' rational self-interest rather than to economic efficiency) with Janet C. Alexander, Judges' Self-Interest and Procedural Rules: Comment on Macey, 23 J. Legal Stud. 647, 64748 (1994) (arguing that although judges' self-interest does play some role, this is not contrary to the public interest). Some judges have come perilously close to admitting that the **mass tort** litigation crisis is primarily a crisis of mind-numbing boredom, which requires appellate courts to approve the certification of **mass tort** class actions in order to relieve trial judges of "litigation "re-runs' for those who face a series of identical pending cases." See Spencer Williams, **Mass Tort** Class Actions: Going, Going, Gone?, 98 F.R.D. 323, 328 (1983).

Second, there is the tougher empirical question of whether courts are in fact being overwhelmed. Although this Article accepts the proposition that no reform will be accepted with regard to **mass tort** litigation unless it curbs the exponential growth in case filings, there remains some basis for skepticism about this constantly reiterated claim that courts are about to be overwhelmed by **mass torts.** The judicial system - state and federal - annually disposes of approximately 500,000 automobile accident cases each year, a number exceeding the claimants in any **mass tort** case, and does so without any seeming sense of crisis. See James S. Kakalik & Nicholas M. Pace, Costs and Compensation Paid in Tort Litigation 14 (1986). However, it is true that **mass tort** cases tend to be concentrated in specific areas (e.g., along the Eastern seaboard in the case of asbestos litigation), thus maximizing their congestive impact. See infra note 71.

n24. See Robert G. Bone, Rule 23 Redux: Empowering the Federal Class Action, 14 Rev. Litig. 79, 99 (1994).

n25. See Macey & Miller, supra note 13, at 28. This generalization is no longer invariably true given the predominance today of institutional investors (who may hold sizeable stakes). See Elliott J. Weiss & John S. Beckerman, Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions, 104 Yale L.J. 2053, 208893 (1995). Nonetheless, in my view, institutional investors are likely to continue to prefer passivity (while allowing others to bring and maintain the class action) for extrinsic and reputational reasons. That is, because most institutional investors wish to remain in contact with corporate managements (to receive earnings forecasts and other "soft" information), and some (particularly private pension funds) are deeply conflicted about shareholder

activism, the majority will prefer to free ride on the efforts of professional plaintiffs and specialized class action counsel and will not themselves initiate class actions.

n26. Defendants also resist class certification in cases where plaintiffs have not been able consistently to win individual actions. Two examples illustrate this tendency. First, in In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995), the Seventh Circuit granted defendants' application for a writ of mandamus, overruling the district court's certification of a nationwide class of hemophiliacs infected by the HIV virus that causes AIDS. The decision seems to have been motivated chiefly by the circuit court's belief that class certification would give the plaintiffs an unjustified leverage over the defendants, chiefly because the plaintiffs were asserting a novel legal theory that had been generally unsuccessful in individual cases; in fact, plaintiffs had lost 13 out of the 14 individual cases that had gone to trial earlier. See id. at 1296. Such a weak track record gave defendants little reason to favor a global settlement.

A second example is furnished by defendants' intense resistance to the certification of a nationwide class action for smoking-related illnesses. See, e.g., Castano v. American Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995); see also Andrew Reidy & Robert Carter, Tobacco Litigation: Looking for Cover, Legal Times (Washington), Mar. 6, 1995, at S37, S38 (discussing efforts by tobacco industry to avoid the potentially vast liability arising from the Castano decision). To date, the only significant award in smoking-related litigation came in Cipollone v. Liggett Group, Inc., 893 F.2d 541 (3d Cir. 1990), aff'd in part, rev'd in part, 505 U.S. 504 (1992), which the Supreme Court reversed and remanded for trial. See Gary T. Schwartz, Tobacco Liability in the Courts, in Smoking Policy: Law, Politics, & Culture 131, 133, 13640, 14445, 15053 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

n27. A non-opt out class action may be certifiable under Rule 23(b)(1)(B) if there is a "limited fund." To exploit this technique, defendants have attempted to structure such a "limited fund" by focusing on the insurance policies covering the defendant. See infra notes 142150 and accompanying text.

n28. See Bone, supra note 24, at 8086. The proposed revision of Rule 23 greatly increases the discretion of the trial judge by eliminating the separate class certification categories of Rule 23 in favor of a unitary standard. Today, considerably more rigorous requirements apply in the case of a class action brought under Rule 23(b)(3) to seek a monetary judgment than in the case of actions brought under Rule 23(b)(1) or (b)(2). As a practical matter, the proposed unitary standard will grant discretion to the trial judge to relax the notice requirements and to deny any right to opt out in the case of a class action for a money judgment. For the text of the proposed Rule, see id. at 10912.

n29. As suggested later, an exclusively future claimant class is more likely to be passive than one which includes "high stake" present claimants. Thus, from a policy perspective, requiring the class to consist of present claimants as well as future claimants increases the possibility that some class members will be in a position to monitor their attorneys actively.

n30. Elsewhere, I have argued that the damage determination phase triggers a more important litigant autonomy interest than the liability stage because an opt out right at this stage protects the "high stakes" plaintiff from a settlement that pays such claimant only the median value of all claims. See Coffee, The Regulation of Entrepreneurial Litigation, supra note 13, at 92530.

n31. See Reinier Kraakman et al., When Are Shareholder Suits in Shareholder Interests?, 82 Geo. L.J. 1733, 173941 (1994).

n32. See Roberta Romano, The Shareholder Suit: Litigation Without Foundation?, 7 J. L. Econ. & Organization 55, 84 (1991) (noting that in most shareholder suits, "settlements

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provide minimal compensation").

n33. See Dale A. Oesterle, Limits on a Corporation's Protection of its Directors and Officers from Personal Liability, 1983 Wis. L. Rev. 513, 57073.

n34. This was the case in the asbestos, silicone breast implants, and Dalkon Shield class action cases - to give only the examples of the best known recent **mass tort** class actions. Agent Orange was also infrequently used after the Vietnam War. In the case of asbestos, federal law sharply restricted its use in any products after 1970. See Federal Occupational Safety and Health Act of 1970, 29 U.S.C. 651678 (1988 & Supp. V 1993). Yet the first important case establishing liability was not until 1973. See Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).

n35. See Robert L. Rabin, Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme, 52 Md. L. Rev. 951, 962 (1993) ("A system designed to achieve corrective justice goals in two-party accidental harm cases simply cannot be accommodated effectively to the demands of **mass tort** cases [involving] ... long-latent toxic disorder."); see also Glen O. Robinson, Probabilistic Causation and Compensation for Tortious Risk, 14 J. Leg. Stud. 779, 785 (1985) ("The deterrent value of legal penalties for managerial error depends heavily on the proximity of the penalties to the actions for which they are assessed.").

n36. See Peter Huber, Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 Colum. L. Rev. 277, 30520 (1985); see also Peter Huber, Liability: The Legal Revolution and Its Consequences 11 (1988) (claiming that costs associated with legal liability are substantial component of prices paid by consumers for goods and services). But see Mark M. Hager, Civil Compensation and Its Discontents: A Response to Huber, 42 Stan. L. Rev. 539, 54751 (1990) (disputing methodology employed by Peter Huber to reach his estimate of $ 300 billion as annual cost of civil litigation to the U.S. economy).

n37. Deborah R. Hensler & Mark A. Peterson, Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis, 59 Brook. L. Rev. 961, 961 (1993). In truth, the process began before 1980. Between 1961 and 1984, federal court tort filings nearly doubled. See John G. Fleming, The American Tort Process 34 (1988).

n38. See Hensler & Peterson, supra note 37, at 101926 (discussing impact of mass media, social networks, physician contacts, and availability of plaintiff law firms on "claiming" behavior of ordinary citizens).

n39. Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 103 (1966). The Rule appears to have been chiefly drafted by Professor Benjamin Kaplan, who has explained his reasoning. See Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 386, 39193 (1967). Others have suggested that Professor Kaplan's reasoning may not have reflected that of the Advisory Committee as a whole. See Resnik, supra note 3, at 1415.

n40. See, e.g., Harrigan v. United States, 63 F.R.D. 402, 407 (E.D. Pa. 1974) (rejecting class certification for class consisting of all paralyzed veterans injured by negligent urological surgery at Veterans Administration hospitals).

n41. See Baughman, supra note 2, at 213 ("Appellate courts have almost uniformly rejected this approach.").

n42. See In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 521 F. Supp. 1188 (N.D. Cal.), modified, 526 F. Supp. 887 (N.D. Cal. 1981), vacated, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983).

n43. See In re Federal Skywalk Cases, 93 F.R.D. 415 (W.D. Mo.), rev'd, 680 F.2d 1175 (8th Cir.), cert. denied, 459 U.S. 988 (1982).

n44. See generally Richard A. Chesley & Kathleen W. Kolodgy, Note, Mass Exposure Torts: An Efficient Solution to a Complex Problem, 54 U. Cin. L. Rev. 467, 48590 (1985) (summarizing decisions).

n45. See Scott O. Wright & Joseph A. Coluss, The Successful Use of the Class Action Device in the Management of the Skywalks **Mass Tort** Litigation, 52 UMKC L. Rev. 141, 142 (1984).

n46. 782 F.2d 468 (5th Cir. 1986).

n47. Id. at 473.

n48. See In re School Asbestos Litig., 104 F.R.D. 422 (E.D. Pa. 1984), aff'd in part, 789 F.2d 996 (3d Cir.) (reversing non-opt out provision, but allowing a permissive certification of a class action for property damages), cert. denied, 479 U.S. 852 and 479 U.S. 915 (1986).

n49. See In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988).

n50. See In re A.H. Robins Co., 880 F.2d 709 (4th Cir.), cert. denied, 493 U.S. 959 (1989).

n51. Francis E. McGovern, Resolving Mature **Mass Tort** Litigation, 69 B.U. L. Rev. 659, 660 (1989); see also infra note 71 (discussing concentration of asbestos cases in certain federal districts).

n52. Francis E. McGovern, Toward a Functional Approach for Managing Complex Litigation, 53 U. Chi. L. Rev. 440, 482 (1986) (analyzing the normal cyclical evolution of a **mass tort** litigation); see generally McGovern, supra note 51 (analyzing and discussing procedural problems peculiar to "mature" **mass tort** litigation).

n53. The International Sheet Metal Workers Association, a union whose president, Edward Carlough, was originally the lead plaintiff in Carlough v. Amchem Prods., Inc., 10 F.3d 189 (3d Cir. 1993) (later restyled Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994), after his ouster as union president), conducted regular x-ray screening of its members for asbestos and related diseases during the late 1980s and early 1990s. For representative examples, see Chris Green, Mobile Unit to Test Workers for Asbestos, State J.-Reg. (Springfield, Ill.), Nov. 20, 1993, at 11, available in Westlaw, STJNLRSI Database; John J. Monahan, Asbestos-test Results Awaited: Older Sheet Metal Workers Screened, Sunday Telegram (Worcester, Mass.), May 16, 1993, at A16, available in Westlaw, ALLNEWS Database; Union Offering Asbestos Tests, Las Vegas Rev.-J., Nov. 12, 1993, at 7B, available in Westlaw, LVRJ Database.

A more extreme example of entrepreneurial litigation is furnished by two Texas plaintiffs' attorneys, who founded the National Texas Workers Litigation Project and equipped vans with x-ray machines and traveled to various plants of one major asbestos producer (Raymark) in order to screen workers. Hiring three doctors to conduct x-ray screening for them, they identified some 6000 plaintiffs in this nationwide solicitation effort - and also incurred considerable judicial displeasure. See Milo Geyelin & Michael J. McCarthy, Judge Chides Lawyers in Asbestos Claims, Wall St. J., June 7, 1990, at B10.

n54. See Hensler & Peterson, supra note 37, at 96769.

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n55. Several reasons explain why recoveries in standard tort cases tend not to be interdependent. Most importantly, the issues in such two-party cases tend to be extremely fact-specific (e.g., the defendant driver was driving too fast, was drunk, or had worn out brakes). Unless there is a claim that the vehicle was inherently defective (as in the classic example of the Ford Pinto), the imposition of liability will have little impact on other automobile cases involving, say, injuries to pedestrians. **Mass tort** cases, in contrast, tend to turn on scientific issues of causation, which are common to a broad range of cases. In addition, the parties in standard tort cases are not repeat players, whereas both corporate defendants and plaintiffs' attorneys are in **mass tort** cases. Information also travels quickly within the small and highly specialized **mass tort** plaintiffs' bar.

n56. See Hensler & Peterson, supra note 37, at 966.

n57. As a practical matter, this process generally involves seeking referrals from local personal injury lawyers who turn over their own clients under some fee-splitting arrangement. In some **mass torts,** direct advertising for injured victims is used. Plaintiffs' attorneys also develop referral networks with doctors and clinics. Eventually, an informal underground railroad develops to refer victims to specific firms.

n58. Attempts to predict the likely number of future asbestos claims against the entire industry have produced widely varying estimates. The one common denominator is that most projections have already proven too low. In 1982, Corning & Company predicted that between 68,000 and 158,000 asbestos-related personal injury claims would be filed from 1983 forward. By 1993, over 200,000 claims had been filed against the Manville Trust alone. In 1992, another expert estimated 210,000 as the most likely number of claims that would be thereafter filed against the Manville Trust, with a range of between 125,000 and 250,000. Subsequently, one team of experts appointed by U.S. District Judge Jack Weinstein to estimate future claims against the Manville Trust predicted that 560,000 claims would be filed from 1990 forward. In 1994, National Economic Research Associates projected 306,000 claims on the same basis. See Frederick C. Dunbar & Denise A. Neumann, National Economic Research Assoc., Inc., Estimating Future Asbestos Claims: Lessons from the National Gypsum Litigation 3334 (1993) (on file with the Columbia Law Review). In any lump sum settlement, the amount actually received by future claimants depends chiefly on the number of claims made. Thus, if 100,000 claims are projected and 200,000 actually materialize, benefits will likely be reduced by half. Worse, because the underestimation of future claims will not be evident at the outset, early claimants may be paid in full, thus depleting the settlement fund and necessitating an even greater reduction in the payments to later claimants. On this basis, the foregoing wide ranges in estimates of total claims indicate that at least the earlier projections would result in settlements that would drastically undercompensate future claimants.

n59. An expert panel, which was appointed by U.S. District Judge Jack Weinstein (pursuant to Rule 706 of the Federal Rules of Evidence) to evaluate the Manville Trust, has estimated that as many as 450,000 future claimants with asbestos injuries may be expected between 1990 and 2049. See Hensler & Peterson, supra note 37, at 1005 n.239. Note that this estimate is lower than another projection by the same expert panel, see supra note 58, which difference is apparently the result of different drafts of the experts' report. This panel cautioned, however, that their projection was subject to a 50% margin of error for total claims over this period. See Eric Stallard & Kenneth G. Manton, Projections of Asbestos-Related Personal Injury Claims Against the Manville Personal Injury Settlement Trust, Males 19902049, by Occupation, Date of First Exposure, and Type of Claim 3 (Mar. 8, 1994) (unpublished manuscript, on file with author). After hearing a variety of predictions over the years, Judge Weinstein has been willing to make only the broadest estimates: "My own best estimate of future claims at the moment is somewhere between 300,000 and 600,000 claims into the mid-twenty-first century." See Weinstein, supra note 7, at 510 n.164. Others have

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noted that in some cases the more complex the projection technique used, the greater the margin for error that must accompany the projection. See Michael A. Stoto, The Accuracy of Population Projections, 78 J. Am. Stat. Ass'n 13, 13, 18 (1983).

n60. In marked contrast to the serious efforts made to estimate future claimants in the Johns-Manville and National Gypsum bankruptcies, no effort was made to develop any actuarial estimate of future claims in the recent asbestos class actions. In Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994), which was an exclusively future claims class action, this deficiency seems particularly glaring because the settlement itself imposed "case flow maximums" on the number of claims that would be paid in any year, and these case flow maximums were already "less than the annual new case filings against the CCR defendants." Id. at 280. Indeed, the only finding made by the court with regard to the likely number of future claims for specific disease categories was a vague (and questionable) finding "that claims for asbestos-related lung cancer should be on the decline due to the diminished levels of asbestos exposure to the class members in the past few decades." Id. This casual disdain for the number of claims likely to be filed again underscores the vulnerability of future claimants in **mass tort** class actions.

n61. See Thomas A. Smith, A Capital Markets Approach to **Mass Tort** Bankruptcy, 104 Yale L.J. 367, 38289 (1994) (discussing underestimation of claims in **mass tort** bankruptcies).

n62. Decisionmakers tend, social psychologists have found, to give excessive weight to concrete and vivid information relative to more abstract information. See Richard Nisbett & Lee Ross, Human Inference: Strategies and Shortcomings of Social Judgment 5961 (1980); Smith, supra note 61, at 38384. Present claimants may present such vivid information, while future claimants (even though actuarially inevitable) may not. The result is to distort the allocation of funds between present and future claimants.

n63. See Deborah R. Hensler et al., Asbestos in the Courts: The Challenge of Mass Toxic Torts 2429 (1985).

n64. See Hensler & Peterson, supra note 37, at 961.

n65. See Deborah R. Hensler, Reading the Tort Litigation Tea Leaves: What's Going on in the Civil Liability System?, 16 Just. Sys. J. 139, 147 (1993). By 1991, however, the rate of case filings fell to 57% of new products liability cases. See id.

n66. See Baughman, supra note 2, at 211, 21112 n.4 (citing 100,000 Asbestos Cases Ordered Consolidated, L.A. Times, July 17, 1990, at D2).

n67. See Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 265 (E.D. Pa. 1994) (citing report prepared by Ad Hoc Committee on Asbestos Litigation appointed by Chief Justice Rehnquist).

n68. The frustrations faced by trial courts in the face of a growing asbestos docket are exemplified by Cimino v. Raymark Indus., 751 F. Supp. 649, 652 (E.D. Tex. 1990). There, Chief Judge Robert Parker observed that if his district court tried asbestos cases at the rate of 30 cases per month, it would take six and one-half years to try all asbestos cases on the existing docket, and at that point the court could anticipate that 5000 new cases would have been filed during the interim. For a very similar estimate in a non-asbestos **mass torts** case, see In re Bendectin Prods. Liab. Litig., 102 F.R.D. 239, 240 & n.3 (S.D. Ohio) ("disposition of the present Bendectin cases at the trial level alone might require 21,000 trial days or the equivalent of 105 Judge years, i.e., one Judge for 105 years or 105 Judges for one year"), mandamus to vacate certification, 749 F.2d 300 (6th Cir. 1984).

n69. The leading example in this still-expanding genre was the Judicial Conference's Ad Hoc

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Committee on Asbestos Litigation, which was established by Chief Justice Rehnquist in September 1990 to search for solutions to the asbestos litigation crisis. It found that "what has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively." Judicial Conference of the United States, Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 2 (Mar. 1991) [hereinafter Asbestos Ad Hoc Committee Report] (unpublished manuscript, on file with the Columbia Law Review), reprinted in Asbestos Litig. Rep., Mar. 14, 1991, at 22698, 22699. Based on this perception of an imminent crisis, the 1991 report recommended a "national asbestos dispute resolution scheme that permits consolidation of all asbestos claims in a single forum." Id. at 3, reprinted in Asbestos Litig. Rep. at 22700. Months after the release of this report, the Judicial Panel on Multidistrict Litigation transferred all pending asbestos personal injury litigation to a single forum. See In re Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991).

n70. See infra text accompanying notes 128137.

n71. For example, one study in the mid-1980s found that 40% of all federal asbestos filings in the late 1970s and early 1980s occurred in the districts of Massachusetts, Eastern Texas, and Southern Mississippi. In terms of circuits, the district courts in the First and Fifth Circuits accounted for 52% of all asbestos disease case filings. See Thomas E. Willging, Federal Judicial Center, Trends in Asbestos Litigation 15 (1987).

n72. See supra notes 51 and 71 and accompanying text. The Georgine class action, discussed infra at text accompanying notes 192214, was consolidated in the federal district with the highest concentration of asbestos cases in the country. See infra note 481.

n73. See Hensler & Peterson, supra note 37, at 966.

n74. See id.

n75. See Morton Mintz, At Any Cost: Corporate Greed, Women, and the Dalkon Shield 4 (1985).

n76. See Georgene M. Vairo, Reinventing Civil Procedure: Will the New Procedural Regime Help Resolve **Mass Torts?**, 59 Brook. L. Rev. 1065, 1075 n.47 (1993).

n77. See id. There were also 11,443 unrepresented claimants, but only a small minority of the claimants (7101 out of over 44,000) were represented by an attorney having fewer than ten Dalkon Shield claimants.

n78. McGovern, supra note 52, at 479.

n79. This practice of mass settlement of individual cases often results in controversy and may violate ethical norms. See Peter Passell, Challenge to Multimillion-Dollar Settlement Threatens Top Texas Lawyers, N.Y. Times, Mar. 24, 1995, at B6 (discussing evidence, including work sheets, showing that aggregate settlements were negotiated, despite compromise of individual claims and possible ethical violations as a result thereof).

n80. See Hensler & Peterson, supra note 37, at 104243.

n81. There is also a tendency for plaintiffs' attorneys to file as much of their inventory as possible in the same court. This may clog judicial arteries and slow the progression of the individual case to trial, but it maximizes the plaintiffs' attorney's leverage with the court and certainly inclines the court to favor an aggregate resolution.

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differently. [39] Individual issues and defenses, it was felt, would likely overwhelm the common questions, and eventually disaggregation would become inevitable. Judicial decisions following the 1966 revisions of Rule 23 were quick to take this hint to decline class certification in **mass tort** cases. [40]

Even when trial courts did certify a **mass tort** class, they were usually reversed. [41] In 1981, Judge Spencer Williams certified the first Dalkon Shield class action, but in 1982 the Ninth Circuit reversed him. [42] Also in 1981, after the collapse of two skywalks at the Hyatt Regency Hotel in Kansas City, Missouri, the victims were certified as a class, but again a year later the Eighth Circuit reversed. [43] Other cases at the time encountered a similar fate. [44] In a little noted development, however, the Hyatt Skywalk cases were subsequently settled by means of a non-mandatory settlement class action. [45] In short, the practical message was that a class action could not be certified over the defendants' objections, but it could be utilized with their consent - that is, if a defendant's self-interest lead it to prefer a class action resolution over repetitive individual litigation.

The breakthrough in the attitude of appellate courts to the certification of **mass tort** class actions came first with asbestos. In 1986, in affirming class certification in an asbestos **mass tort** case, Jenkins v. Raymark Industries, [46] the Fifth Circuit was explicit about its motivation: "The courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters." [47] **[*1358]** That same year, the Third Circuit also partially upheld a similar certification in another asbestos class action. [48] A year later, the Second Circuit upheld Judge Weinstein's certification of the Agent Orange class action. [49] Finally, in 1989, in the most emphatic victory for **mass tort** class certification, the Fourth Circuit approved class action treatment for the Dalkon Shield litigation. [50]

What explains this reversal in judicial attitude? A strong hint is supplied by a curious fact: in the early 1980s, the federal courts first refused to certify class actions in simple "mass accident" cases (like the Skywalk collapse), but several years later certified class actions in far more complicated "mass exposure" cases. By any doctrinal test, class certification is easier to justify in the mass accident setting than in the mass exposure context. In the former context, there is little variation in terms of legal claims among those injured (thus making class treatment more appropriate), while in the latter "mass exposure" cases both the facts and the applicable law vary greatly from case to case. Unlike a single accident (such as a plane crash or a building collapse), mass exposure to a toxic product (such as asbestos, the Dalkon Shield, or Agent Orange) implicates the law of multiple jurisdictions. In a nationwide class, it may involve most state jurisdictions and most major participants in the industry. The hypothesis that best explains this puzzling inconsistency is that the burden on the courts from a failure to certify was far greater in the latter context where individual actions would otherwise proliferate. For example, Jenkins, the first asbestos **mass tort** class action to be certified, arose in East Texas, an area that one commentator has called "the fertile crescent of asbestos litigation." [51] Put differently, asbestos cases had a characteristic that a mass accident class action did not: unless resolved on a class basis, they threatened to flood the docket within that district.

B. The Dynamics of **Mass Tort** Litigation

Every litigation context has its own distinctive traits. **Mass tort** litigation is characterized by several unique features: (1) a predictable evolutionary cycle during which the value and volume of individual claims starts low and then spirals upward; (2) high case interdependency so that litigated outcomes in any **mass tort** area quickly impact on the

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n82. See Alison Frankel, From Pioneers to Profits, Am. Law., June 1992, at 82, 84.

n83. Originally, this group was known as the Asbestos Claims Facility. See Harry H. Wellington, Asbestos: The Private Management of a Public Problem, 33 Clev. St. L. Rev. 375, 38789 (198485). Later, after the bankruptcy of some of its members, a smaller organization, known as the Center for Claims Resolution (CCR) replaced it. The CCR represents 21 firms that are the principal asbestos manufacturers not in bankruptcy. See Lawrence Fitzpatrick, The Center for Claims Resolution, 53 Law & Contemp. Probs., Autumn 1990, at 13, 17.

n84. See Richard B. Sobol, Bending the Law 106 (1991).

n85. See Schuck, supra note 10, at 205.

n86. See In re Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 416 (J.P.M.L. 1991).

n87. See Private Securities Litigation: Staff Report Prepared at the Direction of Sen. Christopher J. Dodd, Chairman, Senate Subcomm. on Securities of the Comm. on Banking, Housing and Urban Affairs 64, in Hearings on Abandonment of the Private Right of Action for Aiding and Abetting Securities Fraud/Staff Report on Private Securities Litigation Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs, 103d Cong., 2d Sess. 166, 234 (1994) (reporting that 315, 299, and 268 securities class actions were filed in 1990, 1991, and 1992, respectively, and that these numbers reflected about 10% of all class actions annually filed). According to the Administrative Office of the U.S. Courts, 290 securities class actions were filed nationwide in 1994 and 298 in 1993. See Legislation on Securities Fraud Litigation, 1995: Hearings on H.R. 10 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce, 104th Cong., 1st Sess., Federal News Service, Jan. 19, 1995 (prepared testimony of William S. Lerach), available in LEXIS, News Library, FEDNEW File. Even these figures may overstate the actual number of securities class actions because of the existence of multiple actions against the same defendant. Mr. Lerach further estimated that only 125 corporations have been sued annually over the last several years - "out of over 14,000 public corporations reporting to the SEC." Id.

n88. See John C. Coffee, Jr., The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation, 48 Law & Contemp. Probs., Summer 1985, at 5, 24.

n89. If the plaintiff's action has conferred a "substantial benefit" on the corporation, the traditional corporate law rule is that the plaintiff is entitled to an award of reasonable attorneys' fees. See Bosch v. Meeker Coop. Light & Power Ass'n, 101 N.W.2d 423, 426 (Minn. 1960). Nonpecuniary benefits can be recognized as conferring such a benefit. See, e.g., Fischman v. Wexler, 309 F. Supp. 976, 97879 (D. Del. 1970) ("corporate therapeutics" found to confer such a benefit).

n90. Probably the first case in which this technique was used was In re Cuisinart Food Processor Antitrust Litig., 38 Fed. R. Serv. 2d (Callaghan) 446, 449 (D. Conn. 1983), in which class members received a coupon valued at 50% of a product's list price to purchase one of defendant's products costing up to $ 300. In subsequent cases, the percentage value of the coupon in relation to the product quickly declined. See In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 308 (N.D. Ga. 1993) (coupon between $ 10 and $ 200 for flights costing between $ 50 and $ 1500); New York v. Nintendo of Am., Inc., 775 F. Supp. 676, 681 (S.D.N.Y. 1991) ($ 5 coupon for video game costing $ 100); see also Barry Meier, Fistfuls of Coupons, N.Y. Times, May 26, 1995, at D1 (describing scrip certificates in class action settlements for a $ 25 rebate in airfares, a $ 400 credit toward a car purchase, and, amazingly, a "free box of Cheerios").

n91. See In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d

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768, 78081 (3d Cir. 1995). For another recent decision rejecting a "scrip settlement," see Buchet v. ITT Consumer Fin. Corp., 845 F. Supp. 684, 697 (D. Minn. 1994).

n92. See General Motors Corp., 55 F.3d at 80610.

n93. See id. at 822.

n94. 156 F.R.D. 600 (D.N.J. 1994).

n95. See id. at 60203. The settlement required Manischewitz to contribute $ 1,800,000 of its food products valued at their retail value to the settlement fund. The court was skeptical, however, of the defendant's valuation because it valued their products at three times their cost to the defendant. Thus, on a cost valuation basis, the charitable contribution would cost Manischewitz only $ 600,000 (before any tax deduction) and yet would yield the plaintiff's attorneys not less than $ 450,000. See id. at 60304.

n96. Indeed, the Matzo Food Products court, itself, noted that cy pres settlements "are, in fact, routinely approved by courts." Id. at 605; see also Superior Beverage Co. v. Owens-Illinois, Inc., 827 F. Supp. 477, 47879 (N.D. Ill. 1993) (noting increased judicial flexibility in awarding cy pres settlements); Pray v. Lockheed Aircraft Corp., 644 F. Supp. 1289, 1303 (D.D.C. 1986) (discussing judicial discretion to apply cy press doctrine); 2 Herbert B. Newberg & Alba Conte, Newberg on Class Actions 10.17, at 10-40 to 10-46 (3d ed. 1992) (discussing cy pres settlements and citing cases). Where cy pres settlements result because funds are not claimed by unidentifiable class members (which is the most common fact pattern), the obvious alternative is to increase the recovery to those class members who do appear (and who seldom receive full compensation in any settlement). See id. 10.17, at 10-40 to 10-41.

n97. The Delaware Chancery Court has recently followed the second approach in several cases, approving the settlement but refusing any fee award or radically reducing the fee award sought. See De Angelis v. Salton/Maxim Housewares, Inc., 641 A.2d 834, 836 (Del. Ch. 1993) (approving settlement but denying any fee award), rev'd sub nom. Prezant v. De Angelis, 636 A.2d 915 (Del. 1994); In re MCA, Inc. Shareholders Litig., [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) 97,749, at 97,57778 (Del. Ch. Feb. 12, 1993) (reducing fee award sharply).

n98. Dismissal of the class action would have been hard to justify in the Matzo Food Products case because the defendant had already been criminally convicted of price fixing. See Matzo Food Prods., 156 F.R.D. at 601.

n99. See, e.g., Grimes v. Vitalink Communications Corp., 17 F.3d 1553 (3d Cir.), cert. denied, 115 S. Ct. 480 (1994); Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29 (1st Cir. 1991); Lowenschuss v. Resorts Int'l, Inc., No. 89-1071, 1989 U.S. Dist. LEXIS 7407 (E.D. Pa. June 29, 1989), aff'd without opinion, 947 F.2d 936 (3d Cir. 1991).

n100. See Epstein v. MCA, Inc., 50 F.3d 644 (9th Cir.), cert. granted in part, 115 S. Ct. 2576 (1995). Epstein can be distinguished from Grimes and Nottingham Partners on a variety of grounds, including the important fact that in both the latter decisions the plaintiffs appeared in state court to assert their positions. The Ninth Circuit also did not reach a second claim raised by plaintiffs: that the Delaware settlement violated due process because of inadequate representation by the principal class representative.

n101. Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78aa (1994), gives U.S. district courts "exclusive jurisdiction" over suits based on the Securities Exchange Act, or the rules and regulations thereunder (including Rule 10b-5, 17 C.F.R. 240.10b-5 (1994)).

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n102. See Epstein, 50 F.3d at 66364; National Super Spuds, Inc. v. New York Mercantile Exch., 660 F.2d 9, 1718 (2d Cir. 1981).

n103. See supra note 99.

n104. A leading Delaware case, Prezant v. De Angelis, 636 A.2d 915 (Del. 1994) illustrates the basic pattern of a reverse auction. Following the initial public offering of Salton/Maxim Housewares, Inc., certain plaintiffs brought suit in federal court in Illinois for alleged violations of the federal securities laws. Approximately one month later, plaintiff De Angelis filed a federal securities class action in Pennsylvania and, on learning of the pending Illinois action and apparently fearing that his own action would be transferred to the Illinois court, he sought its voluntary dismissal. See id. at 918. Shortly thereafter, the same plaintiff's attorney filed a derivative action in Delaware alleging only state law fraud claims. Meanwhile, negotiations in the Illinois action had broken down after plaintiffs had rejected defendants' settlement offer of $ 1.2 million. See id. Within two weeks of filing the Delaware action, the plaintiff entered into settlement negotiations with the defendants. Without plaintiff seeking discovery or defendants filing a responsive pleading, the action was quickly settled for the comparatively modest sum of $ 1,225,000 (essentially the same offer that the plaintiffs in the Illinois action had refused). After the stipulation of settlement was signed, the complaint was amended to assert federal securities law claims as well in order even more clearly to bar the Illinois action. See id. at 919. Although the Chancery Court approved the settlement, the Delaware Supreme Court rejected it, finding that the plaintiffs were not adequate representatives and that specific findings must be made as to their adequacy. See id. at 925. It also noted that the Delaware plaintiff "could not realistically have hoped to try this case, but only to settle it with the further hope of receiving a fee award." Id. at 919.

This same pattern seems to have recurred in Delaware, but with a different result, in the earlier-discussed MCA litigation. The Delaware Chancery Court approved a settlement, but awarded a minimal attorney's fee because of its clear skepticism about the action's benefit to the corporation. See In re MCA, Inc. Shareholders Litig., [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) 97,749, 97,57778 (Del. Ch. Feb. 12, 1993). The federal district court found that the settlement of the Delaware action barred a federal securities class action, but the Ninth Circuit reversed, and the entire question is now before the Supreme Court. See Epstein, 50 F.3d at 666.

n105. In the standard example, two individuals, who are factually guilty of a felony, are interrogated by a prosecutor who seeks a confession from each. If neither confesses, the prosecutor will be unable to obtain more than a misdemeanor confession that would result in a one-year sentence for each. If only one confesses, the prosecutor will reward that individual with a plea bargain resulting in a six-month sentence, but the other defendant will receive a ten-year sentence. If both confess, they will each be convicted of a felony and receive five years each. See R. Duncan Luce & Howard Raiffa, Games and Decisions: Introduction and Critical Survey 9497 (1957). Under this structure, it is logical for both prisoners to confess and receive five years each, even though if they both held out they would receive only one-year sentences. Thus, the outcome is Pareto-inferior.

n106. In principle, a nationwide class action can be brought in a state court, although special notice standards and a right to opt out must be recognized. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

n107. See infra text accompanying notes 123141.

n108. See McGovern, supra note 51, at 663.

n109. See, e.g., Passell, supra note 79, at B6 (describing an inventory settlement of $ 190 million in which one plaintiffs' attorney firm received $ 65 million).

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n110. For an example of such a class definition that excludes all but future claimants, see Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 319 (E.D. Pa. 1994).

n111. See Koniak, supra note 4 (manuscript at 19295). It should also be emphasized that such an agreement implies that the plaintiffs' attorney cannot reach an objective, disinterested decision as to whether class resolution or individual case-by-case resolution is more in the interest of the class members (because they could not serve as individual counsel).

n112. It should be remembered that there are many asbestos defendants, and the agreement not to sue applies only to the defendants in the particular action. Hence, plaintiffs' attorneys are not truly liquidating their human capital in the field.

n113. See infra text accompanying notes 187191.

n114. Different formulas exist for computing the fee award, but the outcomes under these formulas appear in the main to be similar regardless of the formula used. See William J. Lynk, The Courts and the Plaintiffs' Bar: Awarding the Attorney's Fee in Class-Action Litigation, 23 J. Legal Stud. 185, 209 (1994). In securities class actions, the fee award will vary somewhat among the circuits, but will generally be between 20% and 30% of the recovery. See Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 273 (9th Cir. 1989) (25% benchmark fee should normally be followed); In re Oracle Sys. Sec. Litig., 852 F. Supp. 1437, 1451 (N.D. Cal. 1994) (surveying recent studies and finding 30% appropriate); In re Activision Sec. Litig., 723 F. Supp. 1373, 1378 (N.D. Cal. 1989) (benchmark fee award near 30%); In re Warner Communications Sec. Litig., 618 F. Supp. 735, 750 (S.D.N.Y. 1985) (25% fee award is norm); 1 Alba Conte, Attorney Fee Awards 2.08, at 5152 (1993).

n115. See Lester Brickman, Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?, 37 UCLA L. Rev. 29, 3132 (1989). In the Silicone Gel breast implants class action the settlement agreement provided that administrative costs and legal fees could not exceed 24% of the total settlement fund. See Tessie Bordon, Settlement Funds Go to Pay Administrative Tab, Houston Post, Nov. 1, 1994, at A11. This settlement was approved with some minor modifications by Judge Sam Pointer. See In re Silicone Gel Breast Implant Prods. Liab. Litig., No. CV-92-P-10000-S, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994). Although Judge Pointer did not expressly limit the contingency fees that individual attorneys could charge their clients, the existence of the 24% ceiling coupled with extensive administrative costs for notice and fund management plus the necessity of some separate fee award to class counsel made it mathematically inevitable that contingency fees would have to be reduced (at least if most claimants had secured their own counsel). The settlement also provided that the court could "make appropriate reductions" in contingency fee arrangements, and many plaintiffs' attorneys interpreted this statement to mean that a de facto ceiling would apply. See Mike McKee, Sparring Over $ 1 Billion Pot: Breast-Implant Fund Spawns Angling, Anxiety, Legal Times (Washington), May 9, 1994, at 4. Although this approach was commendable in intent, it may have resulted in a counterproductive incentive for plaintiffs' attorneys to advise their clients to opt out from the class action. See infra note 300 and accompanying text.

n116. See Brickman, supra note 115, at 78.

n117. In March 1995, the author was told by an attorney who requested anonymity but who was participating in the Silicone Gel litigation, see infra text accompanying notes 241264, that some firms in that case had large enough client inventories that they expected to receive upwards of $ 50 million simply from their clients without regard to any court-awarded fee to class counsel.

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n118. See Francis E. McGovern, Forward, Claims Resolution Facilities and the Settlement of **Mass Torts,** 53 Law & Contemp. Probs., Autumn 1990, at 1, 1. Typically, defendants negotiate a lump sum settlement and thus have no further liability even if the claims actually filed dwarf all projections and require a scaling back of the benefits.

n119. See id. at 4.

n120. For precisely this example, see infra note 286.

n121. Again, for such an example, see infra note 286.

n122. This was a major issue in Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 278 (E.D. Pa. 1994); see also infra notes 213214 and accompanying text (discussing impact of inflation on Georgine settlement). The appropriate inflation factor to use in determining the payments to future claimants is an extremely sensitive determination. In the National Gypsum **mass tort** bankruptcy, "the court adopted a three to four percent annual inflation rate for future settlement values," rejecting the rate of six to eight percent sought by future claimants. Dunbar & Neumann, supra note 58, at 31. Although the higher rate may better reflect recent national experience, even it probably serves as a poor proxy for determining the increased medical costs that the future claimant will face on becoming ill after a long latency period. The rate of increase in medical costs has recently exceeded the overall inflation rate by a considerable margin. See Mike Causey, HMOs May Be Best Route, Wash. Post, Aug. 18, 1995, at B2 (noting "medical cost increases that typically are double or triple the inflation rate"). A low inflation rate leaves the claimant with an inadequate settlement to pay those costs.

n123. Settlement class actions are not only common, but in some district courts appear to constitute the majority of certified class actions. Preliminary data collected by Federal Judicial Center researchers investigating class action activity in two selected district courts indicated that out of 63 motions for class certification in the Northern District of California during a two-year period, approximately 19 (or 30%) were certified for settlement purposes only; correspondingly, out of 97 motions for class certification in the Eastern District of Pennsylvania, approximately 13 (or 13%) resulted in certification for settlement purposes only. See Willging et al., supra note 14, at 2324. Viewed in terms of the total classes that were certified, this data translates into a finding that roughly 54% of N.D. California certified class actions and 26% of E.D. Pennsylvania certified class actions were certified as settlement classes.

n124. See Bowling v. Pfizer, Inc., 143 F.R.D. 141, 160 (S.D. Ohio 1992) (upholding pre-certification settlement), appeal dismissed, 995 F.2d 1066 (6th Cir. 1993).

n125. See Georgine, 157 F.R.D. at 26768 (describing negotiation of settlement prior to filing of the class action); infra text accompanying notes 187191.

n126. See Girsh v. Jepson, 521 F.2d 153, 155 n.3 (3d Cir. 1975); Greenfield v. Villager Indus., 483 F.2d 824, 826, 83233 (3d Cir. 1973).

n127. This interpretation, however, plainly misreads Federal Rule of Civil Procedure 23. Rule 23(a)(2) requires that for a class to be certified there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). If the class is to be certified under Rule 23(b)(3) (as most actions for money damages must be), then these common issues must also "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Also, Rule 23(b)(3) requires the court to determine that a "class action is superior to other available methods for the fair and efficient adjudication of the controversy." Id. By focusing only on the settlement's fairness, a few courts have found the fact of a settlement largely resolves these latter issues of "predominance" and "superiority." See Georgine, 157

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F.R.D. at 316; Bowling, 143 F.R.D. at 160. But see In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995), discussed infra note 285 and accompanying text.

n128. Consider, for example, the following judicial statement:

[A] person who unofficially represents the class during settlement negotiations may be under strong pressure to conform to the defendants' wishes. This is so because such an individual, lacking official status, knows that a negotiating defendant may not like his "attitude" and may try to reach a settlement with another member of the class.... Consequently, when the settlement is not negotiated by a court designated class representative the court must be doubly careful in evaluating the fairness of the settlement to plaintiff's class.

Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 33 (3d Cir. 1971).

n129. See Manual for Complex Litigation 1.46, at 6061 (5th ed. 1982).

n130. 698 F.2d 61 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983). For similar statements, see also Mars Steel v. Continental Ill. Nat'l Bank & Trust, 834 F.2d 677, 681 (7th Cir. 1987) (finding settlement substantively and procedurally fair because the plaintiffs' class would receive the expected value of its claim and notice was adequate); In re Beef Antitrust Litig., 607 F.2d 167, 17477 (5th Cir. 1979) (holding partial settlement fair and reasonable because it was necessary, included all defendants, and reduced the burden on settling plaintiffs), cert. denied, 452 U.S. 905 (1981).

n131. Weinberger, 698 F.2d at 73.

n132. See In re Baldwin-United Corp., 105 F.R.D. 475, 48081 (S.D.N.Y. 1984).

n133. See, e.g., In re Bendectin Prods. Liab. Litig., 749 F.2d 300 (6th Cir. 1984), rev'g 102 F.R.D. 239, 241 (S.D. Ohio 1984). As of 1986, Professor Linda Mullenix observed that "scant authority supports the proposition that a class can be certified for settlement purposes only." Mullenix, supra note 11, at 1039.

n134. In re A.H. Robins Co., 880 F.2d 709, 740 (4th Cir.), cert. denied, 493 U.S. 959 (1989).

n135. Manual for Complex Litigation (Second) 30.45, at 243 (1985).

n136. Id.

n137. Manual for Complex Litigation (Third) 30.45, at 243 (1995).

n138. See Carlough v. Amchem Prods., Inc., 5 F.3d 707, 711 (3d Cir. 1993); In re Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721, 728 (2d Cir. 1992), modified sub nom. In re Findley, 993 F.2d 7 (2d Cir. 1993); see generally 2 Newberg & Conte, supra note 96, 11.27 (discussing temporary settlement classes).

n139. See In re Silicone Gel Breast Implant Prods. Liab. Litig., No. CV-92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at *76*77 (N.D. Ala. Sept. 1, 1994); see also Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 316 (E.D. Pa 1994) (finding that the fairness and adequacy of the settlement is a "predominant issue for purposes of Rule 23(b)(3)"); Bowling v. Pfizer, 143 F.R.D. 141, 160 (S.D. Ohio 1992) (approving settlement, noting "egalitarian fairness" in treating class members alike), appeal dismissed, 995 F.2d 1066 (6th Cir. 1993). In effect, this approach means that if the court believes the settlement is fair, it can also thereby find that the "predominance" and "superiority" requirements of a Rule 23(b)(3) class action are

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also satisfied; these requirements are the principal doctrinal hurdles for certification of a class action seeking money damages. See infra note 142.

n140. See In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 778 (3d Cir. 1995). Rule 23(a) requires findings of numerosity, typicality, commonality, and adequacy of representation, and Rule 23(b)(3) requires additional findings of superiority and predominance as to class actions certified under Rule 23(b)(3). See Fed. R. Civ. P. 23(a), (b)(3).

n141. See In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995).

n142. Rule 23(b)(3) provides that a class action may be certified if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available means for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23 (b)(3). In shorthand, these are known as the "predominance" and "superiority" requirements.

n143. Rule 23(c)(2) provides that in any class action maintained under subdivision (b)(3), the court shall "advise each member that ... the court will exclude the member from the class if the member so requests by a specified date." Fed. R. Civ. P. 23(c)(2). The right to opt out is also protected by the Due Process Clause, but only to an uncertain degree. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985); Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992), cert. dismissed, 114 S. Ct. 1359 (1994); infra notes 407439 and accompanying text.

n144. Of course, defendants can (and do) protect themselves against this danger by including a provision in the settlement agreement entitling them to back out if a specific percentage or number of class members chooses to opt out. See Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 325 (E.D. Pa. 1994) (noting that defendants had chosen not to exercise this right). The Silicone Gel settlement also contained such a provision, and the district court noted, even as of 1994, that the number of opt outs "raises the specter that one or more defendants may elect to withdraw from the settlement in view of the risks and costs of potential litigation with these claimants." In re Silicone Gel Breast Implant Prods. Liab. Litig., No. CV-92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at *17, *23, and *65 (N.D. Ala. Sept. 1, 1994). Such a withdrawal or "walkaway" provision is analogous to the common provision in a merger agreement permitting the acquiring firm to elect to cancel the merger if more than a specified percentage of the stockholders of the acquired firm elect to exercise their statutory right of appraisal.

n145. See infra text accompanying notes 457470.

n146. In principle, the Bankruptcy Code prohibits confirmation of a plan of reorganization that permits a junior class to participate in the distribution unless the claims of all senior classes are paid or satisfied in full. See 11 U.S.C. 1129(b)(2) (1994). In reality, shareholders do obtain a modest share in the reorganized company alongside the former creditors. See Lynn M. LoPucki & William C. Whitford, Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies, 139 U. Pa. L. Rev. 125, 181 (1990). Still, even if the equity receives 10 to 15% of the reorganized company because of its nuisance value, this pattern contrasts sharply with the Ahearn v. Fibreboard class action, see infra text accompanying notes 215240, where stockholders made no more than a nominal contribution to the class action settlement.

n147. See infra text accompanying notes 163171.

n148. See In re School Asbestos Litig., 789 F.2d 996, 1011 (3d Cir. 1986); In re N. Dist. of

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Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 857 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983). But see Ahearn v. Fibreboard Corp., No. 6:93cv526, 1995 U.S. Dist. LEXIS 11062 (E.D. Tex. July 27, 1995) (discussed infra text accompanying notes 215240).

n149. 160 F.R.D. 478, 500-02 (E.D. Pa. 1995).

n150. That is, after the court approved a revised disclosure document, defendants could circulate it to the class members who had previously opted out and request them to cancel their earlier opt out decision. Silence by the class members would leave them in the position of having opted out. This approach divides the logistical burden of canvassing the class members between the two sides.

n151. See Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).

n152. See Hensler & Peterson, supra note 37, at 1004.

n153. See In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 736 (E. & S.D.N.Y. 1991), vacated on other grounds, 982 F.2d 721 (2d Cir. 1992), modified sub nom. In re Findley, 993 F.2d 7 (2d Cir. 1993).

n154. See id. at 746; see also Steven L. Schultz, Note, In re Joint Eastern & Southern District Asbestos Litigation: Bankrupt and Backlogged - A Proposal for Use of Federal Common Law in **Mass Tort** Class Actions, 58 Brook. L. Rev. 553, 560 n.39 (1992) (citing estimate of 500,000 likely deaths).

n155. Between 1989 and 1990, the number of asbestos-related personal injury case filings in federal court increased by 66%, from 8230 in 1989 to 13,687 in 1990. See Schultz, supra note 154, at 555 n.9.

n156. See Cimino v. Raymark Indus., Inc., 751 F. Supp. 649 (E.D. Tex. 1990) (consolidating asbestos cases for trial on common issues).

n157. See Michael J. Saks & Peter D. Blanck, Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of **Mass Torts,** 44 Stan. L. Rev. 815, 822 (1992); see also Trangsrud, Mass Trials, supra note 4, at 8082 (criticizing use of multiple phases in **mass tort** actions).

n158. See supra note 15.

n159. See Hensler & Peterson, supra note 37, at 1004 n.235, 1054.

n160. See Saks & Blanck, supra note 157, at 82641.

n161. See Hensler & Peterson, supra note 37, at 1054.

n162. In addition, as discussed infra at notes 183191 and accompanying text, defendants benefitted from the decision to consolidate and stay all pending federal asbestos cases in 1990.

n163. At least fifteen major asbestos producers filed for bankruptcy reorganization during this period, beginning with Unarco Industries in July 1982 and Johns-Manville Corporation in August 1982. For a partial list, see Notice of Class Action, Global Settlement and Third-Party Claimant Class Settlement and Hearing at 17, Ahearn v. Fibreboard Corp., No. 6:93cv526, 1995 U.S. Dist. LEXIS 11062 (E.D. Tex. July 27, 1995) [hereinafter Ahearn Class Action Notice] (on file with the Columbia Law Review). For representative decisions, see In re

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Johns-Manville Corp., 36 B.R. 743 (Bankr. S.D.N.Y.), mandamus denied, 749 F.2d 3 (2d Cir. 1984); In re Amatex Corp., 30 B.R. 309 (Bankr. E.D. Pa. 1983), rev'd, 755 F.2d 1034 (3d Cir. 1985); In re UNR Indus., Inc., 29 B.R. 741 (Bankr. N.D. Ill. 1983), appeal dismissed, 725 F.2d 1111 (7th Cir. 1984).

n164. See Asbestos Ad Hoc Committee Report, supra note 69, at 14, reprinted in Asbestos Litig. Rep. at 22705.

n165. Smith, supra note 61, at 373; see also Frank R. Kennedy, Creative Bankruptcy? Use and Abuse of the Bankruptcy Law - Reflection on Some Recent Cases, 71 Iowa L. Rev. 199, 20210 (1985) (discussing Johns-Manville bankruptcy).

n166. Although the "absolute priority" rule in bankruptcy entitles creditors to be paid in full before shareholders retain any share in the bankrupt entity, the empirical reality is that shareholders possess a nuisance value which they can exploit to obtain participation in the 10 to 15% range in corporate reorganizations. See LoPucki & Whitford, supra note 146, at 17990.

n167. See In re Joint E. & S. Dist. Asbestos Litig., 878 F. Supp. 473, 485 (E. & S.D.N.Y. 1995).

n168. See Smith, supra note 61, at 36869.

n169. See Joint E. & S. Dist. Asbestos Litig., 878 F. Supp. at 48586.

n170. For example, while subclasses in a class action are largely discretionary with the trial court, bankruptcy gives far more formal procedural protection to classes of creditors (including the right to a class vote). When a class of creditors votes against a plan of reorganization, the plan may only be approved under the so-called "cram down" provisions of Chapter 11, which basically require the court to find that the absolute priority rule has been complied with and that all members of the dissenting class have been paid in full. See 11 U.S.C. 1129(b) (1994). In contrast, Rule 23 requires neither approval by the class members nor satisfaction of absolute priority. The relatively open-textured liberality of Rule 23 has recently caused it to be viewed as an alternative mechanism by which even corporate bondholders might be forced to accept a reorganization plan that would not satisfy the absolute priority rule. See Richard L. Epling, Are Rule 23 Class Actions A Viable Alternative to the Bankruptcy Code?, 23 Seton Hall L. Rev. 1555, 156869 (1993).

Two recent asbestos **mass tort** proceedings, one resolved in bankruptcy, the other in a class action, provide a useful contrast. In In re Johns-Manville Corp., 36 B.R. 743, 759 (Bankr. S.D.N.Y.), mandamus denied, 749 F.2d 3 (2d Cir. 1984), the court appointed a special representative for future claimants. In contrast, in Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 31719 (E.D. Pa. 1994), the court found it unnecessary to recognize special subclasses or even to appoint a guardian ad litem. Even if subclasses are recognized, however, there is no provision for a class vote, and the reaction of class members to the settlement is generally discounted by the court.

n171. See In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710 (E. & S.D.N.Y. 1991), vacated on other grounds, 982 F.2d 721 (2d Cir. 1992), modified sub nom. In re Findley, 993 F.2d 7 (2d Cir. 1993).

n172. See supra note 83. The CCR was formed in 1988 when the asbestos-related bankruptcy of some major participants in the Asbestos Claims Facility forced the Facility's dissolution. In addition, philosophical differences arose among its members, some of whom wished to take a harder, more adversarial stance toward plaintiffs. See Deborah R. Hensler, A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass

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Personal Injury Litigation, 73 Tex. L. Rev. 1587, 160809 (1995).

n173. For this 60%+ estimate, see supra note 15. In the Johns-Manville bankruptcy, the court estimated the amount of compensation received by victims to be even lower (namely, only 30 cents out of every dollar expended). See Joint E. & S. Dist. Asbestos Litig., 129 B.R. at 749.

n174. Known as "pleural plaques," such pulmonary calcification or thickening is generally believed to be caused by exposure to asbestos, and may foretell more serious future illness (including cancer), but is not by itself incapacitating. See id. at 73941.

n175. See Hensler, supra note 172, at 1608; see also Fitzpatrick, supra note 83, at 1315.

n176. See Stephen Labaton, 10 Federal Judges Agree on Plan to Consolidate Asbestos Lawsuits, N.Y. Times, Aug. 11, 1990, at 1.

n177. See In re Allied-Signal, Inc., 915 F.2d 190, 191 (6th Cir. 1990).

n178. Asbestos Ad Hoc Committee Report, supra note 69, at 19, reprinted in Asbestos Litig. Rep. at 22708.

n179. Id. at 30, reprinted in Asbestos Litig. Rep. at 22713.

n180. See In re Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp 415 (J.P.M.L. 1991).

n181. See id. at 417.

n182. See id. at 42122. As discussed infra, bankruptcy may be a much better system for dealing with future claims. The JPML also, however, appropriately stressed the absurdity of multiple awards of punitive damages to present claimants, which can work to deny recovery to future claimants.

n183. Revealingly, Philadelphia was also the federal district court with the most asbestos cases (5703) then pending on its civil docket. See Lisa Gibbs, Strategy Changes in Asbestos Cases, Miami Rev., Sept. 12, 1991, at 1, available in LEXIS, News Library, ARCNWS File. Thus, the Eastern District of Pennsylvania appears to have been the district court under the greatest pressure to achieve a global settlement. The transfer to the Eastern District of Pennsylvania was pursuant to 28 U.S.C. 1407(a) (1988), which permits transfer for pretrial purposes, such as discovery and pretrial motions. In reality, however, it is well understood that relatively few cases are remanded to the transferor court, but are usually settled or resolved by the transferee court. See Chesley & Kolodgy, supra note 44, at 50910 (citing data).

n184. See supra notes 69 and 164 and accompanying text.

n185. Letter from The Honorable Robert M. Parker, Chief Judge, United States District Court, Eastern District of Texas, to The Honorable Charles R. Weiner, United States District Court, Eastern District of Pennsylvania 12 (Aug. 1, 1991) (on file with the Columbia Law Review). This letter was also circulated to a number of other federal judges prominent in **mass torts** litigation, including Judge Jack Weinstein, who filed it with the clerk of the district court for the Eastern District of New York. Both Judges Parker and Weiner had earlier been active in calling for concerted judicial action to resolve the asbestos litigation crisis. See In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 74649 (E. & S.D.N.Y. 1991) (citing both judges as taking leading roles), vacated on other grounds, 982 F.2d 721 (2d Cir. 1992), modified sub nom. In re Findley, 993 F.2d 7 (2d Cir. 1993). Hence, the JPML was referring all asbestos personal injury cases to a known participant in the prior debate. In quoting this

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settlement value of other pending cases in that same field; (3) a highly concentrated **[*1359]** plaintiffs' bar, in which individual practitioners control exceptionally large inventories of cases, sometimes totaling in the tens of thousands; and (4) a capacity to place logistical pressure on individual courts that is simply unequalled by any other form of civil litigation. As discussed below, each of these factors tends to undercut the traditional ideal of litigant autonomy.

1. The **Mass Tort** Evolutionary Cycle. - For understandable economic reasons, **mass torts** (other than mass disaster cases) do not appear overnight, but rather evolve in a predictable cyclical fashion that often involves first slow and then later exponential growth in case volume. Early in the cycle, defendants are more likely to win "because of strategic and informational superiority." [52] Later, however, the odds will shift in the plaintiffs' direction, and eventually a stable equilibrium may be reached. Predictably, as a **mass tort** begins to "mature" into a recognized legal specialization (as asbestos did in the 1980s), individual plaintiffs' attorneys, who have necessarily invested and developed context-specific human capital in this field, will seek to exploit their expertise by searching nationwide for individual claimants to represent. Sometimes this search process can become extraordinarily institutionalized (as, for example, during the 1980s when asbestos plaintiffs' attorneys arranged with labor unions for portable x-ray trucks to screen union workers for telltale lung scars suggesting asbestos). [53]

Both because **mass tort** cases involve a high commonality of issues and because the **mass tort** bar is highly concentrated, monetary recoveries tend to be interdependent. [54] Here, the contrast between **mass tort** litigation and other forms of high volume litigation is important. For **[*1360]** example, a victory at trial in an automobile accident case does not significantly affect the negotiations in other pending auto accident cases, [55] whereas a litigated victory in a **mass tort** case, in contrast, markedly affects all other cases involving the same product. Thus, if plaintiffs can develop evidence to demonstrate a causal link between exposure to a particular product and a particular illness in one case, all similar cases will acquire an enhanced settlement value.

Another factor contributing to a high growth rate is the tendency for **mass tort** injuries to involve long latency periods (sometimes twenty-five years or more) before victims who have been exposed to a toxic product or substance exhibit symptoms or learn that they have been injured. From the defendants' perspective, this tendency means that, even after a dangerous product has been withdrawn from the market, the defendant will likely still face decades of continuing claims as new victims predictably develop illnesses. For plaintiffs' attorneys, this means that an annual crop of new clients is obtainable if they search diligently. Plaintiffs' firms specializing in the field also have a special incentive to search for claimants in order to realize continuing returns from their investment in human capital. The asbestos litigation illustrates this tendency. It has been estimated that fifty or fewer plaintiffs' firms specialize in asbestos litigation, but that they have represented hundreds of thousands of claimants in individual actions in state and federal courts. [56] Hence, the more success these firms have, the greater their incentive to invest in search costs to identify new claimants. [57]

The blunt implication for defendants of these linked factors - the commonality of the issues in **mass tort** cases, the interdependence of monetary recoveries, and the long latency periods associated with many **mass torts** - is that they should seek to reach a global settlement of any new **mass tort** as early as possible in its predictable developmental cycle. Assume, for example, that a new drug is thought to be responsible for a rare form of cancer and plaintiffs' attorneys have finally been able to develop sufficient evidence of causation to win their first litigated judgment **[*1361]** (for $ 500,000) in an individual case. At this point, few other victims have been identified and a lump-sum settlement of $ 50,000,000 (deposited with a newly established **mass tort** claims facility) might seem sufficient to provide for the

letter, there is no intent to suggest any breach of judicial ethics or other impropriety; the point is rather the degree to which it shows that the bench has come to self-consciously see itself as an interest group, which needs to act (and bargain) collectively.

n186. See Andrew Blum, Asbestos Group Asks for Halt to MDL, Nat'l L.J., July 13, 1992, at 7 (reporting that a majority of the 13-member plaintiffs' steering committee appointed by Judge Weiner had filed a motion with the JPML asking that the MDL proceeding be dissolved, citing in part the alleged fact that fewer than a dozen federal cases had been fully resolved in the interim).

n187. In his deposition in Georgine, Mr. Lawrence Fitzpatrick, Chief Executive Officer of the CCR, testified that: "We decided to target two law firms for our initial settlement discussions. Those firms were the firms of Ness, Motley and Greitzer & Locks." Deposition of Lawrence Fitzpatrick, Chief Executive Officer of CCR, in Joint Appendix at 119194, Georgine v. Amchem Prods., Inc., No. 94-1925 (3d Cir. Feb. 6, 1995) [hereinafter Joint Appendix] (on file with author).

n188. Mr. Fitzpatrick testified at his deposition in response to a question as to why CCR had targeted these two firms that "Ness Motley had probably the most number of cases" Id. at 1192. Other attorneys active in **mass tort** litigation have commented to the author that the firm of Ness, Motley, Loadholt, Richardson & Poole is generally recognized as the largest firm (in terms of cases handled) in the asbestos field and is also active in much other **mass tort** litigation. Mr. Gene Locks of Greitzer & Locks has described his firm to the author as having the largest inventory of cases in the Philadelphia region.

n189. The Ness, Motley firm (on behalf of itself and other firms that had referred asbestos cases to it) was to receive $ 138,077,100 for its clients, and the Greitzer & Locks firm was to receive $ 77,417,000 for its clients. See Exhibit SP303, Total Settlement Amounts Payable to Ness, Motley and Affiliated Counsel and to Greitzer and Locks, in Joint Appendix, supra note 187, at 1399.

n190. See Stipulation of Settlement Between the Class of Claimants and the Defendants Represented By the Center for Claims Resolution, in Joint Appendix, supra note 187, at 324, 421.

n191. See Deposition of Michael Rooney, President of CCR, in Joint Appendix, supra note 187, at 119798. For the district court's description of this "futures provision," see Georgine v. Amchem Prods., Inc, 157 F.R.D. 246, 299301 (E.D. Pa. 1994). There is a substantial question, nonetheless, whether this agreement violated ABA Model Rules of Professional Conduct Rule 5.6(b) (1992) ("A lawyer shall not participate in offering or making ... an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties."). See Koniak, supra note 4 (manuscript at 142 nn.174 & 175, 19293) (analyzing this issue).

n192. In discussing this action (in which the author appeared as a pro bono expert witness), the author is deliberately refraining from commenting on the specific conduct of the settling parties or the legal ethics of any attorney. The focus is instead on those issues that have recurring significance. Others have examined the ethical issues in considerable detail. See Koniak, supra note 4. For the fullest journalistic account of Georgine, see Roger Parloff, The Tort that Ate the Constitution, Am. Law., JulyAugust 1994, at 75.

n193. Joint Motion of Plaintiffs and CCR Members for Conditional Class Certification, in Joint Appendix, supra note 187, at 302, 303.

n194. See Order No. 11, Granting Joint Motion for Class Certification, in Joint Appendix, supra note 187, at 112.

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n195. See Order No. 12, in Joint Appendix, supra note 187, at 113.

n196. See Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 33738 (E.D. Pa. 1994).

n197. Preliminary Injunction, in Joint Appendix, supra note 187, at 1049, 1050.

n198. Georgine, 157 F.R.D. at 319.

n199. Stipulation of Settlement Between the Class of Claimants and Defendants Represented by the Center for Claims Resolution, in Joint Appendix, supra note 187, at 324, 35556.

n200. See Testimony of Dr. Victor Roggli, in Joint Appendix, supra note 187, at 1363 (stating that claims for pleural disease that would fail the settlement's criteria constitute at least a plurality, and probably a majority, of all asbestos-related diseases).

n201. See Testimony of Dr. Christine Oliver, in Joint Appendix, supra note 187, at 1379.

n202. See Exhibit B to Stipulation of Settlement Between the Class of Claimants and Defendants Represented by the Center for Claims Resolution, in Joint Appendix, supra note 187, at 438. This exhibit is reproduced in the court's opinion. See Georgine, 157 F.R.D. at 337. Victims who were found by the CCR to have "extraordinary" claims could be awarded more than the "maximum" value specified above, but only a limited number of claims (no more than 3% of compensable cancer claims and no more than 1% of compensable asbestos claims) could be found to be "extraordinary" in any one year. See Stipulation of Settlement Between the Class of Claimants and Defendants Represented by the Center for Claims Resolution, in Joint Appendix, supra note 187, at 324, 39293. Nor, of course, was there any obligation on CCR to consider any claim "extraordinary."

n203. A claimant who is dissatisfied with the settlement offered by CCR can reject the offer and pursue an individual action in the tort system - but this right to exit the settlement is limited to 2% of the lung cancer victims, 1% of the "other cancer" victims, and .5% of the "non-malignant" victims in any particular year. If more seek to exit the settlement, the excess above these levels must wait in line, possibly for years. See Amendment to the Stipulation of Settlement of January 15, 1993 Between the Class of Claimants and Defendants Represented by the Center for Claims Resolution, in Joint Appendix, supra note 187, at 511, 51618.

n204. See In re Joint E. & S. Dist. Asbestos Litig., 878 F. Supp. 473, 49596 (E. & S.D.N.Y. 1995). This decision notes that the settling parties "expect that most claimants will settle their claims at scheduled values." Id. at 495. Johns-Manville was responsible for a larger market share than any individual CCR defendant (and possibly than the aggregate of all CCR defendants), but it was bankrupt, while all CCR defendants remained highly solvent.

n205. See Stipulation of Settlement Between the Class of Claimants and Defendants Represented by the Center for Claims Resolution, in Joint Appendix, supra note 187, at 324, 382; Exhibit A to Stipulation of Settlement Between the Class of Claimants and Defendants Represented by the Center for Claims Resolution, in Joint Appendix, supra note 187, at 43637.

n206. These figures are the limitations on these specific categories. In addition, the CCR defendants were required to make additional, but smaller, payments to a residual category of "other" claimants. See Exhibit A to Stipulation of Settlement Between the Class of Claimants and Defendants Represented by the Center for Claims Resolution, in Joint Appendix, supra note 187, at 43637. Cumulatively, the CCR defendants could not be required to pay more

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than 5755 mesothelioma cases, 4185 lung cancers, and 1445 "other cancers" over the first few years of the settlement (which could only be extended beyond that point with defendants' consent). See id.

n207. See Center for Claims Resolution: All Filings By Calender Year By Disease, in Joint Appendix, supra note 187, at 140001. The district court itself acknowledged that the CCR defendants had settled 128,000 claims from 19891993 and could expect to pay 225,000 claims over the next ten years. See Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 279 (E.D. Pa. 1994). These figures may understate the actual figures because much of the five-year prior period overlapped with the period of the federal court stay on asbestos litigation, during which the CCR defendants resisted settlements.

n208. See Exhibit 0-170, Comparison of Greitzer & Locks Inventory Settlements with Georgine Negotiated Average Value Range and Comparison of Ness Motley Inventory Settlements with Georgine Negotiated Average Value Range, Georgine v. Amchem Prods. Inc., 157 F.R.D. 246 (E.D. Pa. 1994) (No. 93-0215) (on file with the Columbia Law Review). The author helped prepare this exhibit and testified at the settlement hearing with respect to it. For a fuller analysis of this point, see Koniak, supra note 4 (manuscript at 12237). The Georgine court found, however, that Exhibit 0-170 did not provide "sufficient information." Georgine, 157 F.R.D. at 310.

n209. See supra note 189.

n210. Even this comparison understates the disparity because an unknown percentage of the class members would be disqualified under the strict medical and exposure criteria applicable to the settlement. For example, most persons with non-malignant conditions receive no cash compensation under the settlement, while a substantial percentage of the inventory settlements fall into this category and were compensated.

n211. To believe that individuals would willingly trade compensation for severe and often disabling illnesses for greater compensation to be received only in the case of usually fatal illnesses (i.e., mesothelioma and lung cancer) requires that we believe that they would display an extreme level of risk aversion and ignore the equivalent impact on their dependents of their long-term disability. Even if some individuals would behave in this fashion, it is unlikely that all or most would. The more logical premise is that, in making insurance decisions, class members who had been occupationally exposed to asbestos would consider the financial impact on their families if they were unable to work (and, even worse, the negative cash flow their long-term disability would represent).

n212. The district court found that "the fact that non-impaired pleural claimants in the inventory settlements received immediate cash compensation where similarly situated claimants under Georgine would receive a different bundle of rights, with no immediate cash payment, was not evidence that class counsel were burdened by an impermissible conflict of interest." Georgine, 157 F.R.D at 298. To justify this disparity, the court asserted that the present claimants had gone to class counsel with a " "realistic expectation that their cases were going to be resolved in the tort system,' " while future claimants had not. Id. (quoting testimony of Professor John P. Freeman). This statement leaves unanswered the critical question: why would future claimants ever want their claims to be settled at lower values outside the tort system (at least when the defendants were highly solvent, as the CCR defendants were agreed to be)?

n213. During the 1970s, the Consumer Price Index for urban consumers (CPI-U) increased 103.4%, and during the 1980s, this same rate of increase was 64.4%. See Request by White Lung Association, et al. To Take Judicial Notice of Consumer Price Index Statistics and Explanation of Relevance of Those Statistics at 56, Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994) (No. 93-0215) (on file with the Columbia Law Review)

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(memorandum filed by Public Citizen Litigation Group in Georgine). To understand the impact of this minimal 20% adjustment, it means that in year 20 (i.e., 2014) the maximum negotiated average value that could be paid to lung cancer victims would be $ 36,000. If, however, the inflation rate over the next 19 years were 100%, it would take $ 60,000 to hold constant the real dollar award of $ 30,000, which the same claimant would receive today. See id. at 8. Moreover, the 20% figure in the settlement is only a ceiling on what might be negotiated (or arbitrated) and not a guarantee. Finally, the cost of medical expenses has increased at an even faster rate than consumer prices, see Causey, supra note 122, at B2, and asbestos victims are uniquely exposed to increases in medical expenses. In short, Georgine presents a vivid illustration of the subtle ways in which **mass tort** settlements discriminate against future claimants.

n214. See Georgine, 157 F.R.D. at 278. Nonetheless, the court added that the settlement did not have to be perfect to be approved.

n215. No. 6:93cv526, 1995 U.S. Dist. LEXIS 11062 (E.D. Tex. July 27, 1995).

n216. See Report of the Guardian Ad Litem, Eric D. Green at 68, Ahearn (No. 6:93cv526) [hereinafter Report of the Guardian Ad Litem] (on file with the Columbia Law Review).

n217. See Ahearn Class Action Notice, supra note 163, at 16. Some 17,200 new actions were filed against Fibreboard in 1988 alone, the year it was spun off. See id.

n218. See supra text accompanying note 183.

n219. See Ahearn, 1995 U.S. Dist. LEXIS 11062, at *10.

n220. Ahearn Class Action Notice, supra note 163, at 23.

n221. See id.

n222. This revised agreement was expressly made subject to approval by the federal court as fair and reasonable. See id. at 24.

n223. See supra text accompanying note 185. Like Philadelphia (the forum for Georgine), the Eastern District of Texas was a district inundated with asbestos litigation. See supra note 71. Judge Parker had previously tried Cimino v. Raymark, Indus., Inc., 751 F. Supp. 649 (E.D. Tex. 1990), an innovative approach to consolidating asbestos cases. See supra text accompanying notes 156158.

n224. Ahearn Class Action Notice, supra note 163, at 24.

n225. See id. at 27.

n226. Id. at 30.

n227. Id. It should be emphasized that this entire amount would not go to one firm because Ness, Motley handled cases on referral from over 100 co-counsel in Ahearn. See id.

n228. Alternatively, the inventory settlements became operative on a favorable outcome in an action that Fibreboard had filed against its insurance carriers. Still, the bottom line here is, as the Ahearn Class Action Notice states, "approval of the Global Settlement Agreement will operate to trigger payouts in excess of $ 300 million to present claimant clients of Global Health Claimant Class Counsel." Id. at 30.

n229. Judge Parker had had extensive experience in asbestos litigation and had been a

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member of the Ad Hoc Commission appointed by Chief Justice Rehnquist. See supra text accompanying notes 156158 and 184186. Parker also appointed Judge Patrick Higginbotham of the United States Court of Appeals for the Fifth Circuit to act as Settlement Facilitator. See Ahearn Class Action Notice, supra note 163, at 23. Judge Higginbotham recommended a mandatory class action covering future claimants. See id. at 24. Unlike Georgine, the Ahearn Trust will base compensation at least in part on historical settlement values for the category of injury, see id. at 40, and will not exclude lesser injuries (including pleural plaques). See id. at 39. Claimants who reject the compensation offered by the trust are permitted to sue the trust (but only after an extended mediation process and non-binding arbitration). In the event a litigant rejects the trust's offer and sues, damages are capped at $ 500,000 per claimant and punitive damages are disallowed. See id. at 4143.

n230. See Report of the Guardian Ad Litem, supra note 216, at 6869.

n231. See id. at 68.

n232. See Standard & Poor's, Daily Stock Price Record: American Stock Exchange 53 (3d Qtr. 1993). On the date of the settlement's announcement, August 30, 1993, Fibreboard's stock gained $ 4.75 to close at $ 20.25 in heavy trading on the American Stock Exchange. Correspondingly, the stock of its principle insurers - Chubb and CNA - declined on the New York Stock Exchange. See Fibreboard Settles Asbestos Claims with Insurers, UPI, Aug. 30, 1993, available in LEXIS, News Library, UPI File; see also Peter Kerr, 2 Insurers Settle on Asbestos, N.Y. Times, Aug. 31, 1993, at D1, D2 (reporting that Chubb and CNA agreed to pay Fibreboard $ 3 billion to cover individual asbestos claims). This one-day trading gain of over 25% probably understates the total gain to Fibreboard's shareholders because the settlement was actually struck on August 27 and the deal had been in active negotiations for weeks.

n233. Fibreboard's high and low stock prices for July of 1993 had been 13 and 11 1/2, respectively. The settlement was announced to the market on August 30, and Fibreboard's low price in that month had been 11 7/8. See Standard & Poor's, supra note 232, at 53.

n234. See supra text accompanying notes 163171 (discussing Johns-Manville).

n235. Federal Rule of Civil Procedure 23(b)(1)(B) permits a mandatory class action to be certified where "the prosecution of separate actions ... would create a risk of ... adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(c)(2)(A).

n236. Federal Rule of Civil Procedure 23(c)(2)(A) provides that class members may choose to opt out of a Rule 23(b)(3) class action. No similar right to exit exists with regard to any other class action.

n237. The answer depends ultimately on how the Supreme Court chooses to interpret its decision in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); see also Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992) (holding that allowing res judicata to bar plaintiff's claims for monetary damages would be a violation of due process because plaintiff had not had the opportunity to opt out of the settlement reached in an earlier class action), cert. dismissed, 114 S. Ct. 1359 (1994). For discussion of the right to opt out, see infra text accompanying notes 407439.

n238. Absent insurance coverage, Fibreboard's assets would have been clearly insufficient to pay all asbestos claims that it faced. But as discussed above, the Fibreboard settlement was virtually limited to its insurance policies with Fibreboard contributing an additional

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amount ($ 10 million) that represented about 4% of its net worth. See supra text accompanying note 230.

n239. See supra text accompanying notes 146, 166167.

n240. See Report of the Guardian Ad Litem, supra note 216, at 40 (concluding that "the rights of some victims to full historic compensation are likely to be impaired, as the Trust attempts to respond to the claims of others"). The settlement itself contains "spendthrift" provisions that limit the proportion of trust assets that can be paid in any one year (to protect future claimants). See Ahearn v. Fibreboard Corp., No. 6:93cv526, 1995 U.S. Dist. LEXIS 11532, at *142*43 (E.D. Tex. July 27, 1995). As in Georgine, the impact of these provisions is to subordinate the less severely injured to those with more serious injuries in the event that funds are insufficient to pay all claimants. See id. at *143. Again, this raises the issue of how a single plaintiff's attorney can prefer one client's interests to those of another client.

n241. For the decision approving the settlement of this class action, see In re Silicone Gel Breast Implants Prods. Liab. Litig., No. CV-92-P-10000-S, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994). For earlier decisions, see 837 F. Supp. 1128 (N.D. Ala. 1993); 793 F. Supp. 1098 (J.P.M.L. 1992).

n242. Under the settlement, claimants stood to receive between $ 105,000 and $ 1.4 million each, despite relatively little consensus as to the causal linkages between breast implants and disease. See David R. Olmos & Henry Weinstein, Breast Implant Settlement in Peril, L.A. Times, May 5, 1995, at A1.

n243. For the sensible distinction of "immature" from "mature" **mass torts** (and the suggestion that only the latter be resolved in class actions), see McGovern, supra note 51, at 659, 69094. Interestingly, the Seventh Circuit's recent mandamus decision in In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995), which reversed the certification of a **mass tort** class action, occurred in the context of an obviously immature **mass tort.** There, a class action was asserted on behalf of hemophiliacs infected by the AIDS virus as a consequence of using defendant's products. Yet, only 13 individual actions raising similar claims had reached trial, and defendants had won 12 of these. See id. at 1296. The Seventh Circuit panel justified its decision in terms of the "extortionate" leverage such a class action unjustifiably gave plaintiffs, see id. at 129899, but this factor may be present in many (and even most) **mass tort** class actions. A narrower rationale might have been its immaturity.

n244. See Daniel Wise, Bar Besieged with Queries on Breast Implant Claims, N.Y. L.J., Jan. 30, 1992, at 1.

n245. See Frankel, supra note 82, at 82.

n246. See id. at 82, 90.

n247. See In re Silicone Gel Breast Implants Prods. Liab. Litig., 793 F. Supp. 1098, 1101 (J.P.M.L. 1992). Judge Pointer was also a member of the Ad Hoc Committee on Asbestos Litigation appointed in 1990 by Chief Justice Rehnquist. See supra note 69.

n248. See Andrew Blum, Committee Named, Nat'l L.J., Aug. 3, 1992, at 2.

n249. For descriptions of the settlement negotiations, see Frankel, supra note 82, at 9091; Henry Weinstein, When Law, Tragedy Intersect, L.A. Times, Mar. 26, 1994, at A1; Benjamin Weiser, Feud in Breast Implant Cases Stirs Debate on Tactics, Wash. Post, May 11, 1994, at D1.

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n250. See Alan B. Morrison & Brian Wolfman, Representing the Unrepresented in Class Actions Seeking Monetary Relief 6162 (March 1995) (unpublished manuscript, on file with the Columbia Law Review).

n251. The court describes the $ 4,225,070,000 settlement as "reputed to be the largest such settlement ever." In re Silicone Gel Breast Implants Prods. Liab. Litig., No. CV-92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at *1 (N.D. Ala. Sept. 1, 1994). The defendants are obligated to contribute approximately $ 4.23 billion over a 30-year period, of which amount $ 1.2 billion must be paid into the Current Disease Compensation Program. See id. at *21*22. Dow Corning was scheduled to contribute approximately $ 2 billion. See id. at *79; Judge Asks Lawyers to Renegotiate Breast Implant Suit, N.Y. Times, Aug. 2, 1995, at A14. From the outset, however, there were doubts about Dow Corning's financial ability to meet its commitment, as neither its insurance carriers nor its two parents had agreed to contribute or guarantee its contribution.

n252. Several epidemiological studies have failed to find a causal connection between breast implants and any specific illness, and an FDA Advisory Panel recommended in 1991 that implants should remain on the market. See Gina Kolata, Legal System and Science Come to Differing Conclusions on Silicone, N.Y. Times, May 16, 1995, at D6. The most recent of these studies, conducted by physicians at the Harvard Medical School, finds no association between implants and illness. See Gina Kolata, New Study Finds No Link Between Implants and Illness, N.Y. Times, June 22, 1995, at A18. It should be understood, however, that plaintiffs' legal theories were not limited to claims that breast implants caused illness, but also that they masked detection of other illnesses, such as breast cancer, by preventing detection through mammography. See Statement by David A. Kessler, Commissioner, Food and Drug Administration and D. Bruce Burlington, Director, Center for Devices and Radiological Health, Public Health Service, Department of Health and Human Services, Before the Subcomm. on Human Resources and Intergovernmental Relations, Comm. on Government Reform and Oversight, 104th Cong., 1st Sess., Federal Document Clearing House, Aug. 1, 1995, available in LEXIS, News Library, CURNWS File.

n253. To be sure, the settlement's size may also provide support for Judge Posner's thesis that **mass tort** class actions generate extortionate leverage. See In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 129899 (7th Cir. 1995). Another explanation is that the courts themselves were not under the same pressure to reach a global settlement (at any cost) in the Silicone Gel litigation as they were in asbestos cases, because individual suits were less likely to have a material impact on the federal docket. This forms the alternative hypothesis: that pressure on the judicial system yields poor settlements for victims.

n254. See Thomas M. Burton, Breast-Implant Claims Fund May Need $ 3 Billion More, Preliminary Study Says, Wall St. J., May 17, 1995, at A4.

n255. See Silicone Gel, 1994 U.S. Dist. LEXIS 12521, at *5, *20; Olmos & Weinstein, supra note 242, at A1.

n256. See Barnaby J. Feder, Dow Corning's Bankruptcy: The Impact on Implant Suits, N.Y. Times, May 21, 1995, at F9. Of these approximately 400,000 claimants, some 137,000 claimed to have already experienced compensable illness. See Olmos & Weinstein, supra note 242, at A13.

n257. See Silicone Gel, 1994 U.S. Dist. LEXIS 12521, at *17.

n258. See David S. Hilzenrath, Renegotiation Order May Undo $ 4 Billion Implant Settlement, Wash. Post, May 5, 1995, at F1.

n259. Thus, those expecting to receive the maximum ($ 1.4 million) or the minimum ($

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105,000) would now expect $ 70,000 or $ 5250, respectively. See Michael Unger, Breast Implant Claim Fund Falls Far Short, N.Y. Newsday, June 17, 1995, at A6.

n260. See Court Analysis: $ 4.25 Billion Inadequate for Implant Claims, Sacramento Bee, June 17, 1995, at A14 [hereinafter Court Analysis: $ 4.25 Billion Inadequate]. A month earlier, the additional contribution had been estimated at $ 3 billion. See Burton, supra note 254, at A4.

n261. See Barnaby J. Feder, Dow Corning in Bankruptcy Over Lawsuits, N.Y. Times, May 16, 1995, at A1.

n262. See 11 U.S.C. 362 (1994).

n263. Class members can, of course, opt out to file against co-defendants, but Dow Corning has long been the largest producer of silicone breast implants. See Feder, supra note 261, at A1.

n264. Just prior to its bankruptcy filing, Dow Corning estimated that there were 1500 individual actions pending against it by women who had opted out of the settlements. See Thomas M. Burton, Dow Corning Considers Filing for Chapter 11, Wall St. J., May 5, 1995, at A3, A4. Large as this number may seem, it pales in comparison to the number of asbestos actions pending against the CCR defendants (who did not elect to file for bankruptcy protection). Moreover, many of these implant cases probably had weak litigation merits. Judge Pointer found in approving the settlement that some 14,300 persons had opted out, of whom 6500 were outside the United States. See In re Silicone Gel Breast Implants Prods. Liab. Litig., No. CV-92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at *17 (N.D. Ala. Sept. 1, 1994). Such foreign claimants have little chance at a substantial recovery if foreign law is applicable to their claim. Hence, only the 7800 domestic opt outs could bring a viable action (if they became ill with a silicone-related illness). In short, the domestic opt outs were small in proportion to those who might opt out. The critical point is that if Dow Corning had delayed its bankruptcy petition until after benefits were scaled back or after it had become obvious that the class action settlement was about to "crater," then a much larger number of claimants would have opted out at that point and been swept into the bankruptcy reorganization process; this could have shifted control of Dow Corning away from its two parents if these tort claims were settled for stock (pursuant to the usual procedures in **mass tort** bankruptcies by which settlement trusts are created). See supra text accompanying notes 165166.

n265. Mass disaster class actions involving a single discrete explosion, crash or accident have in the past been more common than mass exposure class actions. Because a single accident usually involves greater homogeneity among the victims and is less likely to involve latency periods and future claimants, it is more susceptible to class treatment. For an example of a mass accident class action, see In re Shell Oil Refinery, 155 F.R.D. 552 (E.D. La. 1993) (settlement of $ 170 million approved for personal injury and property claims). A key reason that defendants prefer a class action in this context is that they can seek a mandatory, non-opt out class for punitive damages. For a recent example, see Notice of Class Action and Proposed Settlement, In Re GCC Richmond Works Cases, Judicial Council Coordination Proceeding No. 2906 (Cal. Super. Ct., Contra Costa County, Aug. 15, 1993) (on file with the Columbia Law Review) (certifying "Mandatory Punitive Damage Class" with regard to release of sulphuric gas by chemical plant).

n266. The facts discussed in the text are taken from the Notice of Pendency of Class Action, Proposed Settlement of Class Action, and Fairness Hearing, Hayden v. Atochem N. Am., Inc. (In re Bryan, Tex., Chem. Exposure Litig.), No. H-92-1054 (S.D. Tex. April 10, 1995) [hereinafter Hayden, Notice of Pendency] (on file with the Columbia Law Review). This litigation has been the subject of some press attention, largely because of the decision of

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Trial Lawyers for Public Justice, a public interest law firm, to oppose the proposed settlement. See Wade Lambert, Public-Interest Law Group Fights Some Class Settlements as Unfair, Wall St. J., Aug. 17, 1995, at B4.

n267. The class periods for personal injuries, wrongful death and medical monitoring claims ran from January 1, 1973 to April 10, 1995. See Hayden, Notice of Pendency, supra note 266, at 1.

n268. See id. at 2. Trial Lawyers for Public Justice, the principal objector to the proposed settlement, pointed out in its amicus curiae brief that the First, Second, Third and Fourth Amended Complaints in Hayden sought class certification under Rule 23(b)(3) and did not include personal injury claims. Only the Fifth Amended Complaint, filed in 1995, alleged personal injuries. See Brief of Amicus Curiae Trial Lawyers For Public Justice In Opposition to the Proposed Class Settlement at 4 & n.4, Hayden (No. H-92-1054) [hereinafter Amicus Curiae Brief] (on file with the Columbia Law Review).

n269. See Amicus Curiae Brief, supra note 268, at 56. The class action was certified as a settlement class action under Rule 23(b)(2) on April 10, 1995. See Hayden, Notice of Pendency, supra note 266, at 3.

n270. The basic significance of a Rule 23(b)(2) class action is that there is no right to opt out (which exists only in the case of a Rule 23(b)(3) class action). Rule 23(b)(2) requires the parties seeking class certification to show that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

n271. For an early decision finding in the context of a labor and antitrust dispute that courts should prefer certification under Rule 23(b)(1) when injunctive relief is sought, see Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 903 (S.D.N.Y. 1975) (when a choice exists, court should certify class of present and future NBA basketball players under Rule 23(b)(1), and not Rule 23(b)(3), in order to ensure that there is no right to opt out), aff'd 556 F.2d 682 (2d Cir. 1977).

n272. See Stipulation of Settlement at 2223, Hayden (No. H-92-1054) (on file with the Columbia Law Review). Defendants also claimed that the principal defendant was on the brink of insolvency. This argument was highly debatable because an economist testified that the defendant (Elf Atochem North America, Inc.) had a net shareholder investment of $ 529 million, but it supplied the basis for a "limited fund" argument which, as in Ahearn, might independently support a mandatory class action. See Amicus Curiae Brief, supra note 268, at 78.

n273. See Lawrence J. Restieri, Jr., Note, The Class Action Dilemma: The Certification of Classes Seeking Equitable Relief and Monetary Damages After Ticor Title Insurance Co. v. Brown, 63 Fordham L. Rev. 1745, 1747 (1995). For decisions employing this predominance test, see Probe v. State Teachers' Retirement System, 780 F.2d 776, 780 (9th Cir.) (action should be certified under Rule 23(b)(2) where primary relief sought was injunctive even though money damages also sought), cert. denied, 476 U.S. 1170 (1986); Duran v. Credit Bureau of Yuma, Inc., 93 F.R.D. 607, 609 (D. Ariz. 1982) (certifying action under Rule 23(b)(3) where primary motive was recovery of damages); see also 1 Newberg & Conte, supra note 96, 4.14, at 4-48 to 4-49 (discussing test).

n274. See Hayden, Notice of Pendency, supra note 266, at 1 (cash payments in settlement total $ 55,070,000 plus "possible additional funds derived from pending litigation against third parties"). The "possible additional funds" depend on the outcome of litigation brought against the defendants' insurance carriers. However, the settlement also provides that

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Atochem will keep 48 3/4% out of the first $ 90 million received from insurance carriers, even though future claimants may not have received anything. See id. at 4. Thus, it is possible that Atochem will be reimbursed nearly in full from its insurance while some claimants with "extraordinary claims" will receive nothing.

n275. Class counsel will seek attorneys' fees from the settlement fund in an amount not to exceed $ 18,358,333 and actual expenses in an amount not to exceed $ 3.25 million. See id. at 6. These two amounts, if received, would amount to slightly more than 39.7% of the $ 55,070,000 settlement fund.

n276. On April 10, 1995, United States District Court Judge Calvin Botley certified the class action under Fed. R. Civ. P. 23(b)(2) for settlement purposes. A fairness hearing was held on June 8, 1995, but no final decision had been rendered as of September 1, 1995. See id. at 3.

n277. Thirty percent of the settlement fund (after deduction of attorneys' fees and expenses) is allocated to a property damage fund. This amount cannot be reallocated to future personal injury if the personal injury settlement fund proves inadequate. See Exhibit A, Protocol for Distribution of the Settlement Fund at 5, in Hayden, Notice of Pendency, supra note 266.

n278. Section XII of the Protocol for Distribution of the Settlement Fund sets forth an elaborate formula to quantify the risk to present claimants based on the duration of their exposure and their relative proximity to the plant. See id. at 89. Actual injuries or illnesses resulting from arsenic exposure are treated as "extraordinary claims" by Section XIII and their handling is largely entrusted to the discretion of the special master. See id. at 11.

n279. See Amicus Curiae Brief, supra note 268, at 6 (citing affidavit of plaintiff's own expert Dr. Stuart Lloyd Shalat).

n280. See id. at 5 (citing plaintiffs' counsel's estimate than the class "has approximately 26,000 residents and somewhere around 5,300 residential properties and perhaps three thousand to thirty-five hundred other types of properties").

n281. Exhibit A, Protocol for Distribution of the Settlement Fund at 12, in Hayden, Notice of Pendency, supra note 266.

n282. See id.

n283. This is probably because such a class action would have great difficulty satisfying the "commonality" requirement of Rule 23(a)(2) or the "superiority" requirement of Rule 23(b)(3). See infra text accompanying notes 362382.

n284. See In re Ford Motor Co. Bronco II Prods. Liab. Litig., No. CA MDL-991, 1995 U.S. Dist. LEXIS 3507 (E.D. La. Mar. 20, 1995).

n285. See In re General Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768 (3d Cir. 1995) (overturning settlement approved by the district court). Earlier, a Texas appellate court rejected a parallel settlement involving only Texas residents who purchased GM pickup trucks. See Bloyed v. General Motors Corp., 881 S.W.2d 422 (Tex. Ct. App. 1994).

n286. See Settlement Agreement, Beeman v. Shell Oil Co., No. 93-47363 (Tex. Dist. Ct., Harris County 1994) [hereinafter Beeman Settlement Agreement] (undated draft, on file with the Columbia Law Review). Filed as a nationwide class action in a Texas state court in September 1993, this action was brought against Shell Oil, DuPont, and Hoechst, who were

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unknown number of future claimants. If, however, a global settlement is not reached at this point, the magnitude of the individual recovery and the estimates of future claimants may soon grow.

Early in the "maturation" of a **mass tort,** defendants can economize on settlement costs by offering a reduced amount per known claim and by seeking to underestimate the number of future claimants expected to develop injuries and thus achieve a low-cost global settlement. Although actuarial techniques for estimation of future claimants exist and have been used in **mass tort** bankruptcies, different experts have produced widely varying estimates, [58] and even the projections of the most reliable experts come with a fifty percent margin of error. [59] Finally, the parties **[*1362]** have little incentive to use such techniques if they know that their use will only reveal underfunding of that portion of the settlement reserved for future claimants. [60] Both in the bankruptcy and class action contexts, this same tendency for underestimation (and hence undercompensation) of future claimants has been evident. [61]

Other reasons also make early settlements desirable for defendants. At an early stage in the development of a **mass tort,** the plaintiffs' bar may not have developed the expertise or financial resources that they will later assemble and hence will be at a greater disadvantage vis-a-vis defendants. The first litigated victories may be for amounts well below that which will be recovered once more evidence is uncovered (particularly if there is evidence that the defendants suppressed data and knew the risks). Psychological evidence also suggests that courts and fact-finders will feel comfortable in awarding far less in a lump-sum settlement to a "hypothetical" class of future claimants than they would award to actually injured victims appearing before them in individual cases. This phenomenon is known as the "vividness effect." [62] Finally, because only a relatively small percentage of individuals exposed to most toxic substances will actually develop compensable physical injuries, members of the future claimant class can be expected to be rationally apathetic about their future legal rights - until the point at which they themselves develop injuries. Put differently, a rational individual with less than a one percent risk of developing lung cancer from exposure to tobacco products, asbestos, or some other toxic product will understandably invest very little time, attention, or money to protect legal rights that he or she does not expect (or want) **[*1363]** to exercise. In any event, the early experience in both bankruptcy cases and class actions has been that future claimants do far less well than present claimants in terms of the per claimant recovery.

2. The Impact on the Judiciary. - The concentrated logistical impact of **mass torts** on the judiciary may be the most important factor in understanding the landscape of **mass torts.** During the mid- to late 1980s, the perception grew that, unless checked, **mass tort** cases would soon inundate the federal docket. [63] In some courts, **mass tort** claims accounted for over twenty-five percent of the entire civil caseload. [64] By 1990, asbestos litigation represented seventy-five percent of all new federal product liability filings [65] and had become the largest single category of personal injury litigation. [66] Little reason existed to believe that the rate of filings would decline substantially in the foreseeable future; rather, by 1990, two new asbestos cases were filed each year for every one case resolved. [67] A sense of crisis clearly pervaded the federal judiciary, [68] as multiple commissions and study groups warned of dire consequences unless the **mass tort** case explosion could be brought under control. [69] In such an envi **[*1364]** ronment, some judges and academics came to believe that emergency conditions justified an emergency solution - in short, that the end of saving the federal docket justified means that otherwise might seem improper. [70] In truth, the impact of asbestos litigation was highly uneven and localized. [71] But the decisions legitimizing the **mass tort** class action came from precisely those courts most under stress. [72]

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the principal makers of polybutylene plastic pipe, which had been installed in over six million American homes. See Adam Bryant, Plastic Pipe Makers Plan to Settle Lawsuit, N.Y. Times, Oct. 25, 1994, at D4. The action resulted in a settlement class and a proposed settlement under which the defendants would be obligated to pay eligible claims (if made) of up to $ 750 million. If claims exceed this amount, defendants could elect to pay additional claims, or, if they refuse, plaintiffs could sue in state court under a tolled statute of limitations. See Beeman Settlement Agreement, supra, at 1213, 1617. The actual payment by defendants would, of course, depend on the extent of the claims made, but the parties described this settlement as the largest property damage class action settlement in U.S. history. See Bryant, supra, at D4. Nonetheless, both the settlement agreement and the negotiation process leading up to it revealed some of the same suspicious features that have characterized **mass tort** personal injury class actions: namely, inventory settlements and severe eligibility restrictions. For example, the objectors to the Beeman settlement alleged that since January 1994, the defendants had paid "approximately $ 88 million to proposed plaintiff's counsel" with regard to the latter's individual cases, resulting in estimated contingency "fees of approximately $ 40 million" (in addition to the proposed class action attorney fee award of $ 24.25 million). Letter from Robert B. Gerard, Esq., Counsel to the Objectors in Beeman, to John C. Coffee, Jr. (Dec. 20, 1994) (on file with the Columbia Law Review). Allegedly, these inventory settlements were reached only with "proposed class counsel that support Beeman." Id. In addition, the settlement agreement, itself, contained a variety of technical exclusions that would disqualify an indeterminate number of potential class members from eligibility for full replumbing. For example, because polybutylene pipe is heat sensitive, it often fails near water heaters, but any failure within a specified distance of a water heater was expressly excluded by the settlement agreement from receiving full replumbing. See Beeman Settlement Agreement, supra, at 18. Objectors estimated that less than 17% of the individual clients that they represented would qualify under the "quirky" terms of the Beeman settlement agreement. See Letter from Robert B. Gerard, Esq., Counsel to the Objectors in Beeman, to John C. Coffee, Jr. (Dec. 22, 1994) (on file with the Columbia Law Review). Ultimately, after the usual war of recriminations between the opposing camps of plaintiffs' counsel, the court declined to approve the settlement in February 1995 (but did not write an opinion). See Maryann Haggerty, Settlement is Thrown Out in Suit Over Plastic Pipes, Wash. Post, Feb. 22, 1995, at F1.

n287. The Ford Bronco II litigation may represent the extreme example of a settlement offering only illusory benefits to class members. At issue was the alleged tendency of the utility vehicle "to roll over completely at relatively moderate speeds." Milo Geyelin & Neal Templin, Ford Attorneys Played Unusually Large Role in Bronco II's Launch, Wall St. J., Jan. 5, 1993, at 1. Under the proposed settlement, the class members would receive a "Utility Vehicle Package," consisting of (1) a video describing the vehicle and how it should be driven; (2) a sun-visor sticker that warned the driver how to operate the vehicle; and (3) an owner's guide supplement - and no cash. See Ford Bronco II, 1995 U.S. Dist. LEXIS 3507, at *2. In addition, each member of the settlement class was invited to receive a free inspection, but repairs were at the customer's expense. These "benefits" seem largely intended to give rise to an "assumption of risk" or contributory negligence defense in any subsequent personal injury litigation against Ford if the driver arguably failed to comply with the manufacturer's instructions.

Although the Ford Bronco II settlement was rejected, similar attempts persist to certify **mass tort** property damage class actions involving little or no discernible monetary benefit for class members. See Nichole M. Christian, Chrysler Pact Could Block Minivan Suits, Wall St. J., Sept. 28, 1995, at B3 (discussing proposed class action settlement that would require Chrysler to replace faulty door latch handles, as Chrysler had already ageed to do in voluntary settlement with a federal agency, but would not provide cash compensation, except for $ 5 million in requested plaintiffs' attorneys' fees).

n288. In the Beeman polybutylene litigation, discussed supra at note 286, the Texas court's

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rejection of the settlement led to the filing of a nationwide federal class action, which the plaintiffs claimed could result in an estimated $ 7 billion in damages. See Jenny Luesby, Shell & Hoechst to be Sued in U.S. Over House Pipes, Fin. Times, July 7, 1995, at 4. DuPont, which was scheduled to pay an estimated $ 70 million under the rejected settlement, quickly agreed to contribute up to $ 120 million to the revised settlement. See Peter Fairley, DuPont Gets Conditional Okay for Polybutylene Settlement, Chemical Wk., June 7, 1995, at 13. Such a $ 50 million increase within several months of the original settlement's rejection may suggest that the original settlement was cheap. Then, in August 1995, Hoechst Celanese and Shell Oil agreed to a class action settlement under which they agreed, apparently on terms similar to those of the earlier settlement, to pay eligible claims (if made) of up to $ 850 million. This settlement, in conjunction with the DuPont recovery, would imply a $ 970 million total settlement, or a seeming $ 220 million improvement in less than a year. See David Rotman, Hoechst Celanese, Shell Agree to $ 850-Million Pipe Settlement, Chemical Wk., Aug. 9, 1995, at 13.

Assesments of the polybutylene litigation are complicated, however, by the fierce battle among the defendants. At the time that DuPont agreed to a revised $ 120 million settlement in Alabama state court, it also received as a condition of its settlement immunity from cross-claims by the other defendants. On this basis, objectors to this revised settlement argued that DuPont had effectively "capped" its liability at 8% of the cost of plumbing repairs and was liable for that amount only if the other defendants contributed the remaining 92%. See Letter from Arthur H. Bryant, Executive Director, Trial Lawyers for Public Justice, to John C. Coffee, Jr. 4 (Sept. 20, 1995) (on file with author). On this basis, DuPont would not have increased its contribution, but only reduced its maximum exposure, and class members would have gained little from this revised settlement.

This Article does not attempt to resolve the charges and countercharges among the parties in Beeman, but their disputes once again point out both the difficulties that courts face in monitoring **mass tort** settlements (where the parties alone possess the critical information) and the possibility of reverse auctions by which defendants may reach non-adversarial settlements with a "friendly" or dissident plaintiffs' attorney. Here, it is at least arguable that DuPont has cut a favorable deal with a cooperative plaintiffs' attorney that makes both class members and other defendants worse off.

n289. For a representative decision, expressing exactly this theme, see In re Joint E. & S. Dist. Asbestos Litig., 878 F. Supp. 473 (E. & S.D.N.Y. 1995).

n290. See Feder, supra note 256, at F9.

n291. Of the 440,000 women who registered under the settlement, some 70,000 of them appeared "to qualify for immediate compensation, far beyond the 6,000 originally anticipated." Linda Himelstein et al., A Breast-Implant Deal Comes Down to the Wire, Bus. Wk., Sept. 4, 1995, at 88, 88. Thus, present claimants exceeded projections by more than tenfold and the number of eventual future claimants necessarily remains uncertain.

n292. See Court Analysis: $ 4.25 Billion Inadequate, supra note 260, at A14.

n293. See In re Silicone Gel Breast Implants Prods. Liab. Litig., 793 F. Supp. 1098, 1098 n.1 (J.P.M.L. 1992).

n294. Interestingly, it was possibly easier to estimate the likely number of claims in Silicone Gel than in a mass exposure case (such as asbestos) because the approximate number of implants sold was known. See Morrison & Wolfman, supra note 250, at 28.

n295. Gina Kolata, A Case of Justice, or a Total Travesty?: How the Battle Over Breast Implants Took Dow Corning to Chapter 11, N.Y. Times, June 13, 1995, at D1.

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n296. Current estimates suggest that benefits under the settlement will be cut back so that class members will receive at most 12% to 16% and at worst less than 5% of the scheduled efforts. See Unger, supra note 259, at A6. Errors of this magnitude are difficult to attribute solely to negligence or poor judgment. Defendants may have been content to create an inadequate settlement fund, which terminated their liability, and plaintiffs' attorneys had only limited incentives to contest this inadequacy.

n297. As of early September 1995, the Silicone Gel settlement appeared to be headed in this direction as some corporate defendants had begun separate negotiations with the plaintiffs' attorneys. See Barry Meier, Risks in Separate Deals on Breast-Implant Suits, N.Y. Times, Sept. 1, 1995, at D3. For claimants, this involves two distinct risks. First, many may be unable to identify the maker of the implant they received, and thus individual defendant settlements effectively translate into increased eligibility requirements. Second, there is increased risk that an individual settlement fund may prove inadequate. In effect, industry-wide pooling protects claimants against disparities in outcomes because of the differing claims experiences of individual defendants. See infra note 299.

n298. See supra text accompanying notes 5862.

n299. The Silicone Gel experience may also teach defendants to arrange for "settlement class" actions to be filed against them alone and not against their entire industry. Both Georgine and Silicone Gel were industry-wide class actions, and in that context it is far less credible to claim that the entire industry's insurance resources constitute a "limited fund." In contrast, Ahearn may teach defendants to seek individual class settlements and then ask the court to certify the class as a mandatory class based on the individual corporation's "limited" assets. In addition, such individual settlements inherently tighten eligibility requirements as each claimant must prove that he or she purchased from that defendant. See supra note 297.

n300. The Silicone Gel breast implant settlement provided that no more than 24% of the total fund, or $ 1.01 billion, could be spent on administrative or legal costs. See Bordon, supra note 115, at A11. Uniquely, this provision required that all legal fees, including individual contingency fees, come from the separate fund, and not from individual clients. See McKee, supra note 115, at 4. In turn, this implied that, as the administrative costs of sending notice to class members or administering the settlement fund rose, fee awards to plaintiffs' attorneys would have to fall. See Bordon, supra note 115, at A11. Although the 24% ceiling applied to aggregate expenses only and Judge Pointer pledged himself to seek to honor private contingency contracts between attorney and client, the combination of high administrative costs plus the need to award a separate fee to class counsel (from this same fund) made some reduction in contingency fees likely. Indeed, the settlement agreement provided that the judge could "make appropriate reductions" in privately negotiated contingency fees in order to stay within the ceiling. See McKee, supra note 115, at 4. Plaintiffs' attorneys in the Silicone Gel case read the settlement as intending to limit most contingency fees to 24% (or less). As an inevitable result, an incentive arose for plaintiffs' attorneys to advise their clients to opt out from the class action in order to escape the settlement's 24% ceiling, even if the client would fare better under the class action.

n301. See Brickman, supra note 115, at 113.

n302. See supra notes 5859 and accompanying text (discussing Johns-Manville and National Gypsum **mass tort** reorganization proceedings). In part, this difference may reflect the bankruptcy courts' lesser concern with the status of the federal civil docket. Even more likely, it reflects the fact that future claimants must contend with other creditor classes in bankruptcy proceedings for shares of the same economic pie.

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n303. See supra text accompanying notes 163171.

n304. See infra note 468 and accompanying text.

n305. Commentators have long viewed the fee award standard as the court's primary weapon by which to regulate the private attorney general. See Coffee, Understanding the Plaintiff's Attorney, supra note 13, at 69092; John Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 Yale L.J. 473, 47374 (1981).

n306. Part II of this Article has hopefully illustrated this point. Both Georgine and Ahearn were framed as exclusively "future claims" class actions. See supra text accompanying notes 192204, 215240.

n307. See supra notes 145147, 163171 and accompanying text.

n308. The most recent example is National Gypsum Co., which emerged from an asbestos-related bankruptcy in July 1993. By the fall of 1994, the settlement trust created to resolve asbestos claims was asserting that its assets fell $ 160 million short of the level necessary to fund expected claims; its trustees are now seeking this amount from National Gypsum. See Martha Brannigan, National Gypsum Makes An Unlikely Takeover Target, Wall St. J., Mar. 6, 1995, at B4; see also In re Joint E. & S. Dist. Asbestos Litig., 878 F. Supp. 473, 48587 (E. & S.D.N.Y. 1995) (discussing insolvency of Johns-Manville Settlement Trust).

n309. There appears to be a conflict among the circuits on this point. See infra notes 337341 and accompanying text. At least in some circuits, only claims that have accrued under state or federal law are cognizable claims that may be discharged in a bankruptcy reorganization. See Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 94142 (3d Cir. 1985) (holding that since plaintiffs' injuries were not manifest until after the bankruptcy, their claims had not "accrued" under federal law and therefore could not be discharged); In re M. Frenville Co., 744 F.2d 332, 337 (3d Cir. 1984) (only claims that have accrued under state law may be discharged in bankruptcy), cert. denied, 469 U.S. 1160 (1985).

n310. See, e.g., Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47, 48 (1971); Flast v. Cohen, 392 U.S. 83, 95 (1968); United States v. Johnson, 319 U.S. 302, 305 (1943); Muskrat v. United States, 219 U.S. 346, 361 (1911); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 290 (E.D. Pa. 1972); Teamsters Local 513 v. Wojcik, 325 F. Supp. 989, 99192 (E.D. Pa. 1971).

n311. " "Concrete adverseness,' " the Court has said in this regard, " "sharpens the presentation of issues.' " Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804 (1985) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

n312. See In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 790 n.10 (3d Cir. 1995) ("some courts have even expressed concern that ... [settlement class action] cases do not present a case or controversy for Article III purposes."); infra note 441 and accompanying text.

n313. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 55960 (1992); Flast, 392 U.S. at 95 (case or controversy requirement assures that "federal courts will not intrude into areas committed to the other branches of government").

n314. New Jersey, Dep't of Envt'l Protection & Energy v. Heldor Indus., Inc., 989 F.2d 702, 707 nn.67 (3d Cir. 1993).

n315. See Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 54142 (1986).

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n316. Warth v. Seldin, 422 U.S. 490, 498 (1975) (quoting Baker, 369 U.S. at 204).

n317. See Allen v. Wright, 468 U.S. 737, 751 (1984).

n318. 504 U.S. 555 (1992); see also United States v. Hays, 115 S. Ct. 2431, 2435 (1995) (discussing Lujan standing doctrine).

n319. Lujan, 504 U.S. at 560.

n320. There is no standard definition of this term. Two recent commentators defined a future claim as "a claim against a debtor for an injury or disease that has not yet become manifest at the time the debtor has filed for bankruptcy, but is based upon the occurrence, prior to the bankruptcy, of one or more material events, acts, or failures to act." Ralph R. Mabey & Jamie A. Gavrin, Constitutional Limitations on the Discharge of Future Claims in Bankruptcy, 44 S.C. L. Rev. 745, 750 (1993). As discussed, some courts would not accept this definition.

n321. This category could be further subdivided into those who have suffered an injury, which is detectable (such as pleural plaques in the case of asbestos victims), but have no awareness of it, and those whose injuries are not yet detectable at all (but who simply have a statistically higher risk of future injury because of their exposure).

n322. This fact pattern arises inevitably in cases involving environmental contamination or latent property damage. If a community has been exposed to a contaminant involving a long-term risk (i.e., a pesticide or air pollution containing a toxic chemical), defendants may seek to structure a settlement that will apply to future homeowners as well who thereafter acquire property or move into homes within the affected location. In this author's view, such a future claim clearly flunks any acceptable Article III test.

n323. See Class Action Complaint, in Joint Appendix, supra note 187, at 267, 285.

n324. Generally, these cases require that there must be some physical injury to justify an award of damages for emotional distress. See Ball v. Joy Technologies, Inc., 958 F.2d 36, 3839 (4th Cir. 1991), cert. denied, 502 U.S. 1033 (1992); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 120506 (6th Cir. 1988); Adams v. Johns-Manville Sales Corp., 783 F.2d 589, 593 (5th Cir. 1986); Werlein v. United States, 746 F. Supp. 887, 906 (D. Minn. 1990), vacated, 793 F. Supp. 898 (D. Minn. 1992); Maddy v. Vulcan Materials Co., 737 F. Supp. 1528, 1534 (D. Kan. 1990); In re Hawaii Fed. Asbestos Cases, 734 F. Supp. 1563, 1569 (D. Haw. 1990). On the other hand, some decisions dealing with insurance issues recognize that "the body incurs microscopic injury as asbestos fibers become lodged in the lungs and as surrounding tissue reacts to the fibers thereafter." Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1042 (D.C. Cir. 1981).

n325. 38 Am. Jur. 2d Fright, Shock and Mental Disturbance 55 (1968).

n326. Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 942 (3d Cir. 1985); see also Zulkowski v. Consolidated Rail Corp., 852 F.2d 73, 76 (3d Cir. 1988) (recognizing that Schweitzer held that a "manifest injury is a prerequisite for a FELA action for an asbestos-related injury"); Deleski v. Raymark Indus., 819 F.2d 377, 38081 (3d Cir. 1987) (noting that under New Jersey and Pennsylvania law neither the enhanced risk of disease nor the fear and emotional distress resulting therefrom are compensable unless accompanied by present physical symptoms of illness or injury).

n327. See Robinson v. Vaughn, No. 91-7646, 1992 U.S. Dist. LEXIS 19518, at *4*5 (E.D. Pa. Dec. 2, 1992); Alim v. Vaughn, No. 91-4348, 1992 U.S. Dist. LEXIS 12503, at *4 (E.D. Pa. Aug. 18, 1992); Hannibal v. Lyons, No. 89-5845, 1990 U.S. Dist. LEXIS 8261, at *2 (E.D.

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Pa. July 2, 1990).

n328. 397 U.S. 150 (1970); see also Allen v. Wright, 468 U.S. 737, 751 (1984) (noting that in order to confer standing, the injury must be "distinct and palpable" and not abstract, conjectural, or hypothetical). Data Processing is, of course, a decision primarily concerned with judicial review of federal administrative action, a context far removed from civil litigation for money damages.

n329. See Carlough v. Amchem Prods., Inc., 834 F. Supp. 1437, 144748, 1454 (E.D. Pa. 1993).

n330. 438 U.S. 59, 74 (1978). Another example of such an injunctive action is Helling v. McKinney, 113 S. Ct. 2475, 248081 (1993), where a prisoner successfully alleged that exposure to second-hand tobacco smoke amounted to an "injury-in-fact" for purposes of a cruel and unusual punishment claim.

n331. The statute (the Price-Anderson Act) limited the liability of a plant owner in the event of a nuclear accident, and, after addressing standing, the Court upheld the Act against all asserted constitutional infirmities. Addressing the standing issue, the Court said that "certainly the environmental and aesthetic consequences of the thermal pollution of the two lakes in the vicinity of the disputed power plants is the type of harmful effect which ... [satisfies] the "injury in fact' standard." Duke Power Co., 438 U.S. at 7374.

n332. Id. at 74.

n333. See Fed. R. Civ. P. 23(b)(1)(B), (b)(2), (c)(3). Nonetheless, some argue that future claimants should not even be included in Rule 23(b)(2) class actions. See Elizabeth R. Kaczynski, Note, The Inclusion of Future Members in Rule 23(b)(2) Class Actions, 85 Colum. L. Rev. 397, 403 (1985).

n334. U.S. Const. art. I, 8, cl. 4.

n335. See Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 192 (1902).

n336. See Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589 (1935). There has been a lively debate on the nature and stringency of these Fifth Amendment limitations. Compare Anne Hardiman, Toxic Torts and Chapter 11 Reorganization: The Problem of Future Claims, 38 Vand. L. Rev. 1369, 137780, 139293 (1985) (characterizing constitutional difficulties facing use of representatives for future claimants in the bankruptcy context as "significant but not insurmountable") and Mabey & Gavrin, supra note 320, at 77184 (concluding that Fifth Amendment's substantive and procedural due process standards do not prohibit discharge of future claims) with Gregory A. Bibler, The Status of Unaccrued Tort Claims in Chapter 11 Bankruptcy Proceedings, 61 Am. Bankr. L.J. 145, 16875 (1987) (noting that "practical difficulties of identifying and giving constitutionally adequate notice to thousands of contingent future claimants are almost certainly insurmountable").

n337. See, e.g., Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1277 (5th Cir. 1994); In re Chateaugay Corp., 944 F.2d 997, 1003 (2d Cir. 1991); In re Piper Aircraft Corp., 168 B.R. 434, 43940 (S.D. Fla. 1994). But see In re Jensen, 995 F.2d 925, 93031 (9th Cir. 1993) (rejecting Chateaugay Corp.'s "relationship" approach in favor of a "fair contemplation" test).

n338. See Jensen, 995 F.2d at 93031; Chateaugay Corp., 944 F.2d at 1005.

n339. In Chateaugay Corp., the Second Circuit reasoned that if the future claimant there (the EPA) could succeed in keeping its "claim outside of bankruptcy," it could thereafter

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present the same claim "against the reorganized company that it anticipates will emerge from bankruptcy." Chateaugay Corp., 944 F.2d at 1005. For the argument that "forseeability" is the appropriate standard for bankruptcy, see Kevin J. Saville, Note, Discharging CERCLA Liability in Bankruptcy: When Does A Claim Arise?, 76 Minn. L. Rev. 327 (1991).

n340. A few decisions have adopted a "conduct" test that looks to the date of the misconduct. Under this standard, it would be enough that the defective or toxic product was produced prior to the time of the bankruptcy filing. See, e.g., Grady v. A.H. Robins Co., 839 F.2d 198, 199 (4th Cir.) (Dalkon Shield claims found cognizable because produced prior to filing), cert. dismissed, 487 U.S. 1260 (1988); In re Edge, 60 B.R. 690, 699 (Bankr. M.D. Tenn. 1986) (negligent dental treatment claims found cognizable because they arose at the "earliest point" in the relationship between the parties); In re Johns-Manville Corp, 36 B.R. 743, 750 (Bankr. S.D.N.Y.) (asbestos claims found cognizable on the basis of exposure alone), mandamus denied, 749 F.2d 3 (2d Cir. 1984). These decisions precede those employing the relationship test and have not been followed recently.

n341. A few (much criticized) decisions have used the point at which a claim would accrue under state law and thus typically require that some damage or injury have occurred to the victim. See, e.g., Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 94142 (3d Cir. 1985) (holding that because plaintiffs' injuries were not manifest until after the bankruptcy, their claims had not "accrued" under federal law and therefore could not be discharged); In re M. Frenville Co., 744 F.2d 332, 337 (3d Cir. 1984) (only claims that have accrued under state law may be discharged in bankruptcy). This standard does interfere with the power of a bankruptcy court to deal with contingent claims, but would make relatively greater sense when applied to the class action context. As noted earlier, Article III's standards can be interpreted more liberally in bankruptcy because it is specifically addressed by the Constitution. See supra text accompanying notes 334335.

n342. Given that the bankruptcy decisions do ultimately rest on constitutional concerns about the dischargeability of future claims, they should not be dismissed as mere statutory decisions. Most commentators have recognized the constitutional foundation of these decisions. See, e.g., Mabey & Gavrin, supra note 320, at 76089.

n343. See In re Piper Aircraft Corp., 168 B.R. 434, 43940 (S.D. Fla. 1994); see also Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 127576 (5th Cir. 1994) (dictum).

n344. A timing issue surrounds the point at which the relationship must be found to exist. If the law looked to the moment of the settlement's approval, this would permit consideration of publicity and other efforts at notice mandated by the court.

n345. In In re A.H. Robins Co., 880 F.2d 694 (4th Cir.), cert. denied, 493 U.S. 959 (1989), future claimants injured by the Dalkon Shield were found to be barred by the bankruptcy automatic stay. Although the case does not emphasize the nature of the relationship, it seems likely that the degree of exposure involved in this case would satisfy both the prior relationship and "fair contemplation" standards emphasized in Piper Aircraft, Lemelle, and Jensen. See supra notes 337338. Similarly, in Bowling v. Pfizer, 143 F.R.D. 141, 147 (S.D. Ohio 1992), appeal dismissed, 995 F.2d 1066 (6th Cir. 1993), the injured class members in that **mass tort** class action had received defective heart valves. A more substantial personal intrusion is difficult to imagine. Thus, the facts of many **mass tort** cases in which standing has been recognized in future claimants are consistent with this proposed standard.

n346. Besides employees who are occupationally exposed, immediate neighbors of a factory releasing a toxic emission or leaking toxic chemicals might also satisfy the requisite relationship test. The critical element would be that the possibility of injury from the release or emission be within their "fair contemplation." Secondary exposure to tobacco smoke presents a similar but even more extreme example in which exposure alone should not

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satisfy a "relationship" test.

n347. The objectors in Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994), cited studies concluding that "probably everyone in the world" has been exposed to asbestos. Reply Brief of Appellants at 17, Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa. 1994) (No. 93-CV-0215).

n348. Wheeler v. Travelers Ins. Co., 22 F.3d 534, 538 (3d Cir. 1994) (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804 (1985)).

n349. 996 F.2d 1425 (2d Cir. 1993), cert. denied, 114 S. Ct. 1125 (1994).

n350. See id. at 143435.

n351. 438 U.S. 59 (1978); see also supra notes 330332 and accompanying text (discussing Duke Power Co.).

n352. Some of these decisions declining to include future claimants raise due process concerns, while others rely more on prudential grounds for denying inclusion in the class to future claimants. See, e.g., Scott v. University of Delaware, 601 F.2d 76, 89 (3d Cir.) ("We do not think that future faculty members, whose possible claims are only speculative and can only be formulated in a highly abstract and conclusory fashion, should provide, and possibly be prejudiced by, membership in the class . ..."), cert. denied, 444 U.S. 931 (1979); Foster v. Bechtel Power Corp., 89 F.R.D. 624, 62627 (E.D. Ark. 1981) (noting that due process considerations preclude inclusion of future claimants in the class); Moore v. Western Pa. Water Co., 73 F.R.D. 450, 453 (W.D. Pa. 1977) (describing future claimants as "an amorphous, phantom group, incapable of identification" and declining to include them within class) (citation omitted); Freeman v. Motor Convoy, Inc., 68 F.R.D. 196, 200 (N.D. Ga. 1974) (refusing to include future claimants on fairness grounds); see also Kaczynski, supra note 333, at 398 n.7 (future claimants not includable in a Rule 23(b)(3) class action).

n353. See cases cited supra at note 341. As noted in the discussion at supra text accompanying notes 335336, Congress has power to define standing more broadly in the bankruptcy context. Hence, the more restrictive "accrued state claim" standard could apply only outside bankruptcy, with bankruptcy courts left free to use a more liberal standard under which to reorganize companies.

n354. See infra text accompanying notes 457470.

n355. The rhetorical differences between the bankruptcy decisions and the class action cases are also revealing. Consider the following language from Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 944 (3d Cir. 1985):

If contingent claims were held to include possible future tort claims, then every hypothetical chain of future events leading to liability, regardless of how likely or unlikely, might be the basis for a contingent claim .... Thus, in our case, every employee who had worked near asbestos and whose address was known would be a known creditor .... We believe that our interpretation, which avoids such thorny constitutional issues, is the proper view of Congressional intent.

n356. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804 (1985) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

n357. Allen v. Wright, 468 U.S. 737, 751 (1984) (citation omitted).

n358. Nonetheless, some **mass tort** class actions have sought primarily to compensate

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class members for the risk to which they were exposed. See supra notes 266282 and accompanying text. This may again show the bias of plaintiffs' attorneys in favor of present claimants over future claimants.

n359. In re UNR Indus., Inc., 725 F.2d 1111, 1120 (7th Cir. 1984). Judge Posner further noted that the rights of future claimants would be better protected if they were able to bring individual actions represented by "the very active plaintiffs' asbestosis bar." Id. at 1117.

n360. For example, when the Manville Personal Injury Settlement Trust was confirmed in 1986, it was estimated that the Trust would receive approximately 83,000 to 100,000 claims during the course of its lifetime (which was expected to extend well into the next century). See In re Joint E. & S. Dist. Asbestos Litig., 878 F. Supp. 473, 479 (E. & S.D.N.Y. 1995). However, by early 1994, some 240,000 claims had already been filed, and several hundred thousand more were expected. See id. Yet, more care was taken in this case to estimate future claimants than in any other asbestos case. For further evidence of the limited capacity of epidemiological studies to predict accurately, see supra notes 5860 and accompanying text.

n361. Moreover, in Silicone Gel the estimation problems were simpler than in most **mass tort** cases because the number of women with breast implants was known and fixed.

n362. Bailey v. Patterson, 369 U.S. 31, 3233 (1962) (citations omitted).

n363. National Super Spuds, Inc. v. New York Mercantile Exch., 660 F.2d 9, 17 (2d Cir. 1981).

n364. This "typicality" requirement is set forth explicitly in Federal Rule of Civil Procedure 23(a)(3), which requires the court to find that "the claims ... of the representative parties are typical of the claims ... of the class." Some commentators, of course, view the class representative as a mere figurehead. See, e.g., Jean W. Burns, Decorative Figureheads: Eliminating Class Representatives in Class Actions, 42 Hastings L.J. 165 (1990). Conversely, others view the class representative as having a close relationship to the adequacy of representation issue. See, e.g., Howard M. Downs, Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) and the Impact of General Telephone v. Falcon, 54 Ohio St. L.J. 607 (1993).

n365. The "adequacy" criterion is set forth in Rule 23(a)(4). In National Super Spuds, Judge Henry Friendly found that the two requirements overlapped. See National Super Spuds, 660 F.2d at 17 n.6.

n366. See supra note 323 and accompanying text.

n367. 660 F.2d at 1618.

n368. The class representative can, however, settle claims based on legal theories not pled in the complaint (and over which the court would even lack subject matter jurisdiction) if they arise out of the same predicate facts. See TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 460 (2d Cir. 1982).

n369. See National Super Spuds, 660 F.2d at 17 n.6.

n370. Although the case law has been fairly tolerant on the issue of typicality, even the most tolerant cases have required that "the interests of the class representative and the class are commonly held for purposes of receiving similar or overlapping benefits from a settlement." 2 Newberg & Conte, supra note 96, 11.28 at 11-58.

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The issue of typicality tends to overlap heavily with the issue of adequacy of representation. For the view that an "atypical" named plaintiff cannot be an adequate representative, see National Super Spuds, 660 F.2d at 17 n.6.

n371. See, e.g., Baby Neal v. Casey, 43 F.3d 48, 61 (3d Cir. 1994) (finding that "differing degree and nature" of plaintiffs' injuries does not undermine class certification); Hassine v. Jeffes, 846 F.2d 169, 17677 (3d Cir. 1988) (finding that named plaintiff may share common harm with class by virtue of personally facing "threat of injury").

n372. Indeed, exactly this point was made by the Third Circuit panel in the Baby Neal case, which noted that "the individual differences in the children's circumstances might indeed militate against certification if the action sought certification under 23(b)(3) because a court would need to evaluate those differences in the event that the plaintiffs prevailed and were entitled to monetary damages." Baby Neal, 43 F.3d at 63.

n373. The Silicone Gel present claimants provide such an example. See supra text accompanying notes 249251.

n374. Fed. R. Civ. P. 23(b)(3).

n375. Id. 23(b)(3)(A), (D).

n376. See supra notes 208210 and accompanying text.

n377. Dunbar & Neumann, supra note 58, at 1.

n378. Precisely this protection in the form of a continuing right to opt out if benefits were reduced was provided in the Silicone Gel settlement, where the court was clearly aware that the fund might be inadequate. See In re Silicone Gel Breast Implant Prods. Liab. Litig., No. CV-92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at *22*23 (N.D. Ala. Sept. 1, 1994).

n379. On this issue, the Georgine court sidestepped the problem by finding that even though claimants in individual actions would receive cash compensation when class members would not, this was not a barrier because future claimants had "different expectations" about their rights. See Georgine v. Amchem Prods., Inc. 157 F.R.D. 246, 298 (E.D. Pa. 1994). Finally, the Georgine court deemed the "superiority" requirement to be satisfied by its finding that the settlement provided class members with fair compensation. See id. at 316.

n380. The time delay pending recovery is a more problematic factor. Although it was heavily emphasized in Georgine, see id. at 310311, 316, 322, it seems a bootstrap argument in that case when the delay in getting to trial within the tort system was largely due to the federal stay order that enjoined all asbestos-related personal injury litigation in federal court. See supra note 185 and accompanying text.

n381. Ironically, in Georgine, the reverse was true: small claimants with pleural plaques received no cash compensation under the class action settlement, but would normally receive a cash payment in individual actions. See Georgine, 157 F.R.D. at 27273, 29192. Thus, the interests of small claimants can point in either direction.

n382. Again, insurance was not an issue in Georgine where the CCR defendants were all highly solvent. The court specifically found that the CCR defendants could meet their obligations under the settlement. See id. at 291.

n383. 51 F.3d 1293 (7th Cir. 1995).

n384. Id. at 1300. Of course, by the same token, the jury could also hold the fate of the

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ARTICLE: PUNITIVE DAMAGES IN MASS TORT LITIGATION: ADDRESSING THE PROBLEMS OF FAIRNESS, EFFICIENCY AND CONTROL.

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SUMMARY:
... MASS tort litigation in the 1980's has reached unprecedented levels. ... Some commentators have assailed the doctrinal inconsistency of permitting a punitive damages claim (which must be based on the wrongful conduct of defendant) in an action based upon strict products liability (which focuses on the product itself). ... Of the three punitive damage awards, the award in *Roginsky* was reversed and the other two were significantly reduced. ... Another proposal would permit recovery only of the amount by which a punitive damages award exceeds the largest previous award against the defendant arising out of the same mass tort. ... In appropriate circumstances, a class action may provide the best means of resolving the problems presented by punitive damages in mass tort litigation. ... The brisk pace at which cases were being settled prior to the certification order was halted by the certification of the punitive damages class action. ... Certification by one court of a mandatory punitive damages class action will necessarily affect cases in other jurisdictions. ... The benefits of classwide adjudication of punitive damages claims may be outweighed, as they were in the *Skywalk* and *Dalkon Shield* cases, by the detrimental impact that certification would have on the overall management of the litigation, including settlements of the underlying personal injury claims. ...

TEXT:

[*37] Introduction

MASS tort litigation in the 1980's has reached unprecedented levels. Thousands of personal injury lawsuits have been filed against manufacturers of such mass-marketed products as asbestos, [1] formaldehyde, [2] diethylstilbestrol (DES), [3] Agent Orange, [4] automobiles, [5] **[*38]** tampons [6] and intrauterine contraceptive devices (IUD's). [7] Many plaintiffs seek recovery of

1. Certification by the District Courts

Although different kinds of mass torts were involved -- a single disastrous occurrence in the *Skywalk* cases and the failure of a mass-marketed product in the *Dalkon Shield* cases -- the considerations that led each district court to certify a punitive damages class action [180] were much the same. Each court determined that individual recoveries of punitive damages by the first successful plaintiffs would either reduce or totally eliminate the funds available for recovery of damages by later plaintiffs, [181] and concluded that this constituted a limited **[*73]** fund which permitted certification of a class of plaintiffs under Rule 23(b)(1)(B). [182] The funds available for payment of punitive damages claims might be limited in one of two ways: (1) the financial resources of the defendants might simply be inadequate to satisfy all the claims; [183] or (2) if resources were adequate, the law would imply some limit on the extent to which a defendant can be punished for the same wrongful conduct. [184] In either situation, full punitive damages recoveries **[*74]** would be distributed only to the first plaintiffs who received favorable verdicts. Subsequent plaintiffs would recover little or no punitive damages. Each district court considered this unfair to those later plaintiffs and determined that equitable distribution to all deserving plaintiffs could be attained only through a mandatory class action in which all plaintiffs were represented, and in which none could choose to pursue claims individually. [185]

In each case, certification was opposed by an overwhelming majority of plaintiffs. [186] Several plaintiffs in the *Skywalk* cases argued that a class action was unnecessary and counterproductive in view of the rapid pace at which cases were being settled through the efforts of the state court. [187] Plaintiffs in the *Dalkon Shield* class action cited several **[*75]** reasons for opposing the action, including the impropriety of certification on the court's own initiative, [188] the lack of personal jurisdiction **[*76]** over non-California plaintiffs, [189] and the diversity of legal and factual questions presented by the multistate claims. [190]

[*77] 2. Reversals by the Courts of Appeals

Both certification orders were reviewed in interlocutory appeals. [191] In a two-to-one decision, the Eighth Circuit held that certification of a mandatory class of punitive damages claimants in the *Skywalk* case violated the Anti-Injunction Act. [192] A unanimous panel of the Ninth Circuit held that the *Dalkon Shield* class action failed to satisfy the general prerequisites of Rule 23(a) [193] and, in any event, did not involve circumstances which would permit certification pursuant to Rule 23(b)(1)(B). [194] Although each court ostensibly relied upon different grounds, the fundamental rationale for each decision was the rejection of the lower court's conclusion that plaintiffs' recovery of **[*78]** punitive damages was jeopardized by either a lack of funds or an implied-in-law limit on aggregate punitive damages awards. [195]

a. *The Eighth Circuit Decision*

Surprisingly, the Eighth Circuit eschewed standard class action analysis and based its decision on the Anti-Injunction Act, [196] which, with certain exceptions, prohibits federal courts from enjoining proceedings pending in state courts. [197] Because the mandatory class certification had been ordered by the federal district court after lawsuits had been initiated in state court, the court of appeals reasoned that the order effectively enjoined the state court from continuing to adjudicate the punitive damages claims. [198] The court rejected the argument that this situation came within the Act's exception for injunctions "necessary in aid of [the federal court's] jurisdiction" because of the adverse effect independently pursued punitive damages claims might have on remaining claims. According to the majority, at this point there was no limited fund, but only "an uncertain claim for punitive damages against defendants who have not conceded liability." [199] Having so easily disposed of the lower court's primary basis for certification, the court of appeals held that the situation merely involved simultaneous in personam actions in state and federal courts regarding the same

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subject matter, a practice permitted under the dual federal-state system. [200]

This rigid construction of the Anti-Injunction Act creates a potential barrier to class certification in mass tort cases. The Eighth Circuit, **[*79]** by holding the Anti-Injunction Act paramount, may effectively prevent certification of a Rule 23 mandatory class action whenever even a single case involving the same subject matter has been initiated previously in state court. [201]

b. *The Ninth Circuit Decision*

The Ninth Circuit's analysis of the Rule 23(a) criteria was essentially a prelude to its more definitive holding under Rule 23(b)(1)(B). Although the court held that the class action failed to satisfy the Rule 23(a) prerequisites of commonality, [202] typicality [203] and adequacy of representation, [204] the basis of this holding appeared to be the court's **[*80]** concern with the problem of managing a class action involving multistate claims of persons vehemently opposed to their forced membership in a class. [205] These management problems, however, are more appropriately analyzed in terms of the superiority of the class action to individual litigation. [206]

The more significant aspect of the Ninth Circuit's decision was its conclusion that the circumstances relied upon by the lower court did not constitute the kind of limited fund envisioned under Rule 23(b)(1)(B). [207] The court of appeals rejected both grounds for the lower court's finding of a limited fund -- the inability of defendants to satisfy potential judgments and the implied-in-law ceiling on punitive damages recoveries -- because the record did not establish that separate punitive damages awards would "inescapably" or "necessarily" affect later claims. [208] According to the court, the theoretical possibility that later plaintiffs' recoveries would be diminished or eliminated by earlier recoveries did not satisfy the requirements of Rule 23(b)(1)(B). [209] The court noted, however, that "[t]he detrimental effect of earlier claims upon later claims commends itself . . . as worthy of future judicial and legislative consideration." [210]

3. A Critical Analysis: Appellate Overkill

The problem with the appellate opinions in the *Skywalk* and *Dalkon Shield* cases is not that they were wrongly decided, but rather **[*81]** that they went too far. In each case, the assertion of a limited fund was rejected as speculative. [211] Although both courts limited their holdings to the cases' factual circumstances, the likelihood in future cases that a similar assertion will be speculative renders these decisions broadly applicable. Therefore, punitive damages class actions may be precluded even when class actions provide the best means of adjudicating the claims.

This unsatisfactory result is due in part to the structure of Rule 23 itself, which by its terms does not permit a trial court or a court of review to consider whether a mandatory class action is the best means of adjudication in the particular circumstances. Only in Rule 23(b)(3) common question class actions are courts permitted to consider the relative superiority of the class action device to individual litigation. [212] The inquiry under Rule 23(b)(1)(B) is essentially confined to whether individual adjudications would somehow prejudice the rights of other members of the prospective class. [213] The district courts in the *Skywalk* and *Dalkon Shield* cases correctly held that some class members would be prejudiced, [214] because it was clear that funds for payment of punitive damages would become more limited with each ensuing award, if for no other reason than the implicit limits on permissible aggregate punitive damages recoveries. The Eighth and Ninth Circuits, however, would require more concrete evidence before recognizing such a limited fund.

The chilling effect of the *Skywalk* and *Dalkon Shield* appellate decisions could be avoided by introducing qualitative criteria into the certification process in cases involving multiple

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punitive damages claims. Unlike the traditional Rule 23(b)(1)(B) situations, which always require classwide adjudication, multiple punitive damages claims should result in certification of a class action only when the benefits of the device outweigh the problems it would cause. Recognition of these claims as a hybrid of subsections (b)(1)(B) and (b)(3) would provide a way to distinguish those mass tort cases in which the punitive damages claims should be adjudicated in a single classwide proceeding from those not appropriate for class treatment. [215] Beyond **[*82]** the usual inquiry into the general class action prerequisites, courts faced with the question of certifying a punitive damages class action should be permitted to decide whether it is the best way under the circumstances to adjudicate the punitive damages claims.

The use of this qualitative analysis in the *Skywalk* and *Dalkon Shield* cases would have led to either the denial of certification by the district courts or the decertification of such actions by the courts of appeals without establishing barriers to future class actions. The unilateral usurpation of authority by each district court over the many cases pending outside its jurisdiction was unwarranted. In the *Skywalk* cases, most of the lawsuits were filed in the state court, which had administered the litigation, coordinated discovery and encouraged settlements. [216] The brisk pace at which cases were being settled prior to the certification order was halted by the certification of the punitive damages class action. [217] The anomalous result was that a class action aimed at expediting resolution of punitive damages claims actually delayed recovery of compensation for injuries. Compensation of the victims of a disaster should not be secondary to punitive damages claims. [218] A qualitative assessment of the foreseeable impact on the settlement process would certainly have led to denial of certification.

In the *Dalkon Shield* cases, the order certifying a nationwide punitive damages class amounted to a unilateral assumption of authority over thousands of cases pending in other jurisdictions. The fact that the court ordering certification had previously dismissed the punitive damages claims in a Dalkon Shield trial, [219] and that the defendant strongly supported the class action while all plaintiffs opposed it, gave **[*83]** the impression of unfairness to the plaintiff class. [220] The prospect of a nationwide class of unwilling plaintiffs bound by the result obtained by an attorney whom they did not trust provided a compelling reason for decertification.

IV. RECOMMENDED GUIDELINES FOR ADJUDICATING MASS TORT PUNITIVE DAMAGES CLAIMS

A. *Class Actions*

Courts should have the discretion to adjudicate all mass tort punitive damages claims in a single, classwide proceeding when a class action is superior to individual litigation. If class action treatment is otherwise appropriate in connection with these claims, certification should be granted under Rule 23(b)(1)(B), which precludes individual claimants from opting out. [221] This approach permits distribution of punitive damages far more equitably than the present system, which rewards plaintiffs on a first-come, first-served basis. All mass tort cases with multiple claims for punitive damages present a potential Rule 23(b)(1)(B) limited fund situation; early awards may affect later claims because of either the defendant's inability to pay or the implied-in-law limit on total awards.

Courts considering certification of punitive damages claims should initially focus on whether the Rule 23(a) general class action prerequisites are satisfied and, if they are, whether a mandatory class action is superior to individual adjudication under the circumstances. Because **[*84]** the Rule 23(a) prerequisites will be met in most mass tort situations, [222] the primary focus usually will be on the question of superiority. [223]

Courts should then focus on qualitative criteria in connection with the certification of punitive

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damages class actions under Rule 23(b)(1)(B), including (1) the pendency of punitive damages claims in other jurisdictions, (2) the foreseeable effect of a class action on the settlement process, and (3) the degree to which the prospective class members support or oppose the class action. These factors differ somewhat from the factors enumerated in Rule 23(b)(3) for common question class actions. [224]

1. Pendency of Punitive Damages Claims in Other Jurisdictions

Mass tort litigation often takes place in more than one jurisdiction. Lawsuits based upon a defect in a mass-produced product, for example, are likely to be filed in each state where the injuries occur. A single disaster, such as the crash of a commercial airliner, will often spawn multistate and multidistrict litigation. [225] Certification by one court of a mandatory punitive damages class action will necessarily affect cases in other jurisdictions. While some intrusion upon the authority of other states and courts [226] is tolerable in the interests of justice and economy, there are limits that a court should not unilaterally exceed.

[*85] A court considering certification in these circumstances should first investigate the factual and evidentiary bases for the punitive damages claims to determine whether they would likely be submitted to a jury. If it appears probable that the court would eventually dismiss the punitive damages claims upon a motion for summary judgment or a directed verdict, the court should deny class certification without further inquiry. The decision on the merits of the claims would thus remain with the other courts in which the claims are pending. Otherwise, a mandatory certification order might effectively wrest jurisdiction of the punitive claims from other courts only to result eventually in their dismissal on the merits. This was a legitimate concern in the *Dalkon Shield* litigation because of the district court's dismissal of the punitive damage claims in an earlier trial. [227]

When a federal district court, however, concludes that the multistate punitive damages claims would probably reach the jury and that a class action is the best way to adjudicate them, [228] it should refer the **[*86]** case to the Judicial Panel for Multidistrict Litigation. The Judicial Panel is not empowered to decide the issue of class certification, but it can select an appropriate forum in which to consolidate all related actions pending in federal district courts. [229] This would provide an opportunity for all parties in those actions to support or oppose certification in a single proceeding. Ultimately, the court selected by the Judicial Panel would decide whether to certify the class. [230] This procedure would avoid the kind of forum-shopping, or at least the appearance of it, which became an issue in the *Dalkon Shield* case. [231] Even more important, reference to the Judicial Panel would prevent unwarranted unilateral intrusions by one court on other courts that are actively conducting the litigation. [232]

2. Effect on the Settlement Process

The primary goal in adjudicating mass tort cases should be to compensate deserving plaintiffs for their injuries as fairly and efficiently as possible. This is often achieved by settlements before trial.

[*87] Even when all other factors point toward a class action, certification should be denied when the court finds after a hearing that it would significantly impede or delay the resolution of the underlying disputes. [233] In those circumstances the benefits of resolving the punitive damages claims in one proceeding are outweighed by the adverse effect on the timely resolution of other proceedings concerned with compensatory claims for injuries or deaths. [234]

In any event, the impact of a mandatory class certification order on the settlement process and on punitive damages claims pending in other jurisdictions warrants adoption of a speedy interlocutory appellate procedure. Under current practice, such an order is reviewable on an interlocutory basis only when the district court specifically designates it for immediate

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appeal, [235] when the order is construed as an injunction of pending cases, [236] or upon a petition for a writ of mandamus alleging an abuse of judicial discretion. [237] The certification order should always be construed as an injunction of pending cases, ensuring the availability of interlocutory review. [238]

[*88] 3. Degree of Support for or Opposition to the Class

While not controlling, the degree to which members of the class support or oppose class certification is a relevant consideration in the certification decision. Overwhelming opposition by the potential class, such as in the *Dalkon Shield* and *Skywalk* cases, [239] can result in a series of disputes as well as an appearance of unfairness or bias. [240] A procedural device aimed at streamlining litigation should not be used if it causes even more chaos. If all other factors, however, indicate that a class action is the best way to adjudicate the punitive damages claims, the opposition of the litigants should not be dispositive. This is particularly true when the opposition is based on the loss of fees that plaintiffs' attorneys hoped to recover by individual pursuit of the punitive damages claims. Courts considering certification should analyze the nature of the opposition after a full hearing. If the class action is well-founded and opponents understand the court's reasons for certification, continuing opposition can be reduced, especially when an immediate appeal is permitted and the class certification is upheld.

B. *Bifurcated Trials and Increased Judicial Control*

Although class actions provide the best way to adjudicate mass tort punitive damages claims in some circumstances, there are many instances **[*89]** in which the device is not superior to individual adjudication. Furthermore, consideration of the factors discussed earlier may reveal that one or more of the Rule 23(a) prerequisites are not met. In these circumstances, courts must be able to administer the individual claims so that appropriate punitive damages are assessed but overkill is avoided.

The proposals for accomplishing this that have received the most support include fixing limits on awards for a single wrong and removing the assessment function from the jury. [241] Despite support for these measures, arbitrary limits on aggregate awards based on dollar amounts and percentages of net worth should be rejected as needlessly inflexible and potentially overprotective of large corporations. [242] Moreover, removal of the jury's assessment function to prevent punitive damages overkill unnecessarily eliminates the jury's important role as the conscience of the community. [243]

The problems presented by multiple punitive damages claims in mass tort actions can be resolved by applying procedures already available without changing the jury's functions. Through early dismissal of unsupported claims, bifurcation of trials and close scrutiny of amounts awarded, courts can ensure the fair and effective punishment of outrageous conduct which results in mass injuries.

1. Dismissal of Unsupported Claims

As soon as possible after discovery has been completed, courts should rule on whether there is sufficient evidence to establish a prima facie case for punitive damages. [244] If the claim survives a motion for summary judgment, the court should carefully assess the evidence presented at trial. If the evidence is insufficient to justify a punitive award, the court should direct a verdict on the issue. [245] This will ensure that only serious punitive damages claims will be considered by juries.

2. Bifurcation of Trials

Under procedures already available in federal courts [246] and in most states, [247] the trial judge

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may order separate trials of claims or issues **[*90]** when necessary to avoid confusion, prejudice or delay. A bifurcated trial procedure in cases involving punitive damages claims would permit a jury to receive all relevant evidence bearing on the amount of punishment without prejudicing the defendant on other issues in dispute. [248] In the first trial, the parties would present evidence relating to liability for compensatory damages. [249] The jury would be reconvened for a second trial only if it found the defendant liable for both compensatory and punitive damages. The second proceeding would be limited to evidence bearing on the proper amount of punitive damages, including other claims and awards arising out of the same mass tort and the financial condition of the defendant. The trial judge and appellate courts would continue to review these awards.

Although in certain situations this procedure would be more time consuming than a single trial, in other circumstances it would actually save time. For example, a second trial would be necessary only if (1) **[*91]** the trial judge found that sufficient evidence had been presented to submit the punitive damages issue to the jury, (2) the jury found the defendant liable for compensatory damages and (3) the jury determined that punitive damages should be awarded. Moreover, in view of the historically large number of mass tort cases settled before trial, [250] the additional burden imposed by the bifurcation procedure on the judicial system would actually be quite small.

3. Close Scrutiny of Punitive Awards

Despite the existing procedural safeguards, a jury might occasionally return an exorbitant or vindictive punitive damages verdict in a mass tort case. Continuing the trend of active review of punitive awards, [251] trial and appellate courts can and should reduce or vacate such excessive penalties. Trial courts should be granted discretion to determine whether previous awards based on the same tortious conduct have reached a level at which any additional punishment is excessive.

CONCLUSION

The wave of mass tort litigation in the 1980's has again raised the spectre of repeated and excessive punitive damages awards for a single course of tortious conduct. Unless methods are found to adjudicate these claims fairly, efficiently and with proper controls, the doctrine of punitive damages stands to be weakened considerably by "reform" legislation. Proposals currently being considered would establish arbitrary limits on total awards and remove from the jury its traditional function of assessing the amount of punishment. These changes, however, would decrease the deterrent effect of punitive damages and might render civil punishment ineffectual.

The procedures recommended in this Article offer practical alternatives to current proposals for reform and are available under existing procedural rules. One procedure, attempted unsuccessfully in the *Skywalk* and *Dalkon Shield* cases, combines all punitive damages awards arising out of the same tortious conduct into a single class action. Unlike other procedural devices, a mandatory class action can both control the amount of punishment and provide for distribution of **[*92]** the amount awarded among the insured plaintiffs on an equitable basis. While the limited fund provisions of Rule 23 provide a vehicle for such class actions, certification should not be granted automatically. The benefits of classwide adjudication of punitive damages claims may be outweighed, as they were in the *Skywalk* and *Dalkon Shield* cases, by the detrimental impact that certification would have on the overall management of the litigation, including settlements of the underlying personal injury claims.

When class actions are inappropriate, the problem of punitive damages overkill can still be avoided through other procedural devices available in the federal and most state courts. Early dismissal of unsupported claims will save time and ensure that a jury considers punitive

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damages only when there is sufficient evidence of blatant misconduct. Bifurcation of trials will permit a jury to hear evidence bearing solely on the amount of punishment only after it first finds against a defendant on liability for compensatory and punitive damages. This procedure will eliminate the danger that such evidence might prejudice the jury with respect to other issues in the trial. Finally, close scrutiny by trial judges and appellate courts of punitive damages awards can prevent excessive punishment by a single jury or, in the aggregate, by several juries.

Existing rules of civil procedure are flexible enough to accommodate punitive damages claims in mass tort cases. Under these rules, juries can still express society's outrage at egregious conduct without being permitted to destroy an otherwise worthy business entity for a single disastrous mistake.

FOOTNOTES:

n1 There have been approximately 20,000 personal injury lawsuits filed by workers in connection with exposure to asbestos. *Congress Grapples with Toxic Torts*, Nat'l L.J., Jan. 31, 1983, at 30, col. 1. Additionally, there are approximately 13,000 administrative claims pending against the federal government and 1,000 lawsuits brought under the Federal Tort Claims Act. *Id.* A recent study commissioned by the United States Department of Labor estimates that "there are presently more than 21 million American workers . . . who, in the past forty years, were significantly exposed to asbestos." Selikoff, Report to the U.S. Dep't of Labor, Disability Compensation for Asbestos-associated Disease in The United States 4 (1982). Asbestos has been linked to three diseases that become manifest only after periods of 10 to 40 years. They are: (1) asbestosis (non-malignant fibrous tissue growth in the lungs); (2) lung cancer; and (3) mesothelioma (diffuse cancer that spreads over the surface of either the lungs or the stomach lining). U.S. Att'y Gen., Asbestos Liability Report, 97th Cong., 1st Sess. 19-33 (Comm. Print 1981). Mortality estimates range from 8,200 to 9,700 deaths in workers from asbestos-related cancers in each of the next 20 years, aggregating over 200,000 deaths by the end of the century. Selikoff, *supra*, at 4. These projections do not include deaths from asbestosis. *Id.*

n2 It has been estimated that there are between 400 and 700 pending lawsuits involving exposure to formaldehyde. Ranii, *Punitive Damages Given In Formaldehyde Verdict*, Nat'l L.J., Sept. 20, 1982, at 7, col. 1. Formaldehyde foam insulation, now banned in conventional homes by the United States Product Safety Commission, is suspected of causing a variety of ailments, including respiratory problems, headaches and nausea. *Id.*

n3 In early 1981, there were an estimated 1,000 lawsuits pending against pharmaceutical manufacturers arising out of problems caused by prenatal exposure to DES. Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 Harv. L. Rev. 668, 669 (1981). Diethylstilbestrol is a synthetic estrogen which was approved in 1947 by the Food and Drug Administration (FDA) for the prevention of miscarriages. *Id.* Several million women used DES before the FDA reversed itself in 1971 by banning the drug for the treatment of pregnancy problems. *Id.* The drug has been linked in prenatally exposed female offspring to a previously rare form of cancer known as clear-cell adenocarcinoma of the vagina and cervix. Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 577, 436 N.E.2d 182, 184, 450 N.Y.S.2d 776, 778 (1982).

n4 The principal litigation involving Agent Orange is a class action against the manufacturer, limited to common liability issues, brought on behalf of thousands of exposed veterans of the war in Vietnam. *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980). Between 1965 and 1970, United States Army planes sprayed approximately 10.65 million gallons of the defoliant Agent Orange on the jungles of Vietnam. *Agent Orange: A problem of exposure*, 117 Sci. News 55, 59 (1980). Dioxin, a poisonous contaminant of Agent Orange, has been tentatively linked to a wide range of conditions including chloracne, liver damage, muscular weakness, testicular cancer, numbness, loss of sex drive, wide swings in mood, headaches, nervous disorders, and birth defects in children. *Search for an*

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Orange Thread, Newsweek, June 16, 1980, at 56.

n5 Approximately 700 lawsuits have been filed against Ford Motor Company arising out of an alleged defect in the transmissions of Ford cars and trucks manufactured between 1966 and 1980. Sylvester, *$ 280M Legal Bill for a 'Better Idea"?*, Nat'l L.J., Sept. 27, 1982, at 18, col. 2. The Center for Auto Safety has predicted that Ford may eventually spend $ 280 million paying claims for damages resulting from this transmission defect. *Id.*; L.A. Daily J., Oct. 15, 1982, at 5, col. 2. The Center's Director, Clarence Ditlow, has called this problem "the most devastating auto defect I have ever seen." Branan, *Running in Reverse*, Mother Jones, June 1980, at 41, 42. Nearly 200 lawsuits have been filed arising out of a design defect in Jeeps that allegedly renders them prone to rolling over. Granelli, *Settling for Secrecy*?, Nat'l L.J., May 24, 1982, at 1, col. 1, 27, col. 3.

n6 Hundreds of women have filed claims against manufacturers of tampons that allegedly caused toxic-shock syndrome (TSS). Ranii, *Male Files Suit Over Toxic Shock*, Nat'l L.J., July 4, 1983, at 47, col. 3. TSS is a bacterial infection that can result in fever, vomiting, diarrhea, and shock. Center for Disease Control, U.S. Dep't of Health & Human Services, *Follow-up on Toxic-Shock Syndrome -- United States*, 29 Morbidity & Mortality Weekly Rep. 297, 297 (1980). In some instances, TSS has resulted in death. Ranii, *supra*, at 3, col. 2.

n7 A.H. Robins, the manufacturer of the Dalkon Shield IUD, reported that a total of 3,258 lawsuits had been filed against it in connection with the Dalkon Shield; 1,685 of these had been resolved, most by settlement, several by dismissal and only nine by trial, of which seven resulted in judgments for the defendant and two resulted in judgments for the plaintiff. Affidavit of R.P. Wolf, Secretary and Assistant General Counsel of A.H. Robins Co., *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). As of May, 1981, an additional 2,309 claims had been brought against Robins, of which 2,003 had been resolved by settlement or abandonment. *Id.* Claims continued to be made and lawsuits to be filed at a high rate after that date. Affidavit of Robert G. Watts, Executive Vice President of A.H. Robins Co., *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). Between 1970 and 1974 approximately 2.2 million American women used the Dalkon Shield. 526 F. Supp. at 892-93. It was removed from the market due to numerous reports of untoward side effects and adverse reactions including infections, pregnancies, uterine perforations, spontaneous abortions and fetal injuries. *Id.* at 893.

n8 See *infra* notes 9-13 and accompanying text.

n9 *See* Wehrwein, *Dalkon Case Nets $ 1.75M*, Nat'l L.J., June 20, 1983, at 4, col. 2 (reporting two punitive damages awards totaling $ 7.7 million).

n10 See *supra* note 7.

n11 These awards were against Johns-Manville Corporation, the world's largest manufacturer of asbestos, and totaled over $ 3 million. *See* Moran v. Johns-Manville Sales Corp., 691 F.2d 811 (6th Cir. 1982) ($ 500,000 upheld on appeal); Bunch v. Johns-Manville Corp. (D. Tenn.) ($ 220,000), *discussed in* 1982 Asbestos Litig. Rep. 4749; Hansen v. Johns-Manville Corp., No. G-79-124 (S.D. Tex.) ($ 1,000,000), *discussed in* 1982 Asbestos Litig. Rep. 4795; Noecker v. Johns-Manville Corp., No. 366 [118] (Pa. C.P.) ($ 50,000), *discussed in* 1982 Asbestos Litig. Rep. 4915; Dorell v. Johns-Manville Corp., No. C.A. 7809-88-123-18 (Pa. C.P.) ($ 1,000,000), *discussed in* 1982 Asbestos Litig. Rep. 4910. In Neal v. Carey Can. Mines, Ltd., 548 F. Supp. 357 (E.D. Pa. 1982), ten successful claimants were awarded a total of $ 343,000 in punitive damages against Johns-Manville and eight were awarded $ 95,000 against Celotex, another asbestos manufacturer. *See id.* at 366 n.4.

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n12 *See* Parnell, *Asbestos Bankruptcies: Are They the Answer?*, The Brief, Feb. 1983, at 5 (manufacturers filing for bankruptcy are Johns-Manville Corp., UNR Industries, Inc., and Amatex Corp.). The Manville bankruptcy was unusual because at the time of the filing the corporation was solvent with a net worth of $ 1.1 billion. *See* Granelli, *Manville Bankruptcy: The Battle Is Beginning*, Nat'l L.J., Sept. 6, 1982, at 5, col. 1. Manville, however, projected its potential liability at $ 2 billion based on an estimated 52,000 asbestos-related lawsuits at an average cost of $ 40,000. L.A. Daily J., Sept. 1, 1982, at 1, col. 6. Manville's president commented: "This is not a financial failure . . . . It is rather a failure of our court and legislative systems to provide an orderly way to compensate victims of an unexpected occupational health catastrophe." Granelli, *supra*, at 5, col. 1.

n13 *See, e.g.*, Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) ($ 3.5 million punitive damages award arising out of Pinto fuel system design defect upheld on appeal); Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981) ($ 1.1 million punitive damages award arising out of Jeep design defect upheld on appeal); Ford Motor Co. v. Nowak, 638 S.W.2d 582 (Tex. Civ. App. 1982) ($ 4 million punitive damages award arising out of transmission design defect upheld on appeal).

n14 See *supra* notes 2-6 and accompanying text.

n15 *See In re* Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 342 (1983). On July 17, 1981, 114 persons were killed and hundreds were injured by the collapse of the two skywalks. *Id.* at 1177. Approximately 140 personal injury and wrongful death lawsuits seeking recovery of both compensatory and punitive damages were filed against various defendants in federal and state courts. *Id.* at 1177 n.5.

n16 The fire on November 21, 1980 killed 85 people and resulted in over 500 suits for damages. These lawsuits were consolidated in the United States District Court for Nevada. L.A. Daily J., Jan. 5, 1983, at 5, col. 3. In January 1983, the hotel reached a tentative settlement of 450 of these suits with the Plaintiff's Legal Committee requiring the eventual payment of $ 75 million.*Id.*

n17 W. Prosser, Handbook of the Law of Torts § 2, at 13 (4th ed. 1971); *see* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838-39 (2d Cir. 1967) (discussing the difficulty of awarding punitive damages in a mass tort setting).

n18 W. Prosser, *supra* note 17, at 13 (These questions "might well lead to a re-examination of the whole basis and policy of awarding punitive damages.").

n19 *See* Szuch & Shelley, *Time to Eliminate Punitive Damages?*, Nat'l L.J., Feb. 28, 1983, at 13, col. 1 (compensatory damages sufficient to serve deterrence purpose in mass tort cases); Comment, *Punitive Damages, the Common Question Class Action, and the Concept of Overkill*, 13 Pac. L.J. 1273 (1982) (common question class actions on liability for mass torts serve purposes of punitive damages).

n20 See *infra* note 36.

n21 Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 48 & n.227 (1982) [hereinafter cited as Owen I]; Riley, *Punitive Damages: The Doctrine of Just Enrichment*, 27 Drake L. Rev. 195, 252 (1978); Comment, *Mass Liability and Punitive Damages Overkill*, 30 Hastings L.J. 1797, 1800-08 (1979) [hereinafter cited as *Punitive Damages Overkill*].

n22 *See* DuBois, *Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Cases: Bonanza or Disaster*, 43 Ins. Couns. J. 344, 352-53 (1976); Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L.J. 639, 663-66

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(1980); Owen I, *supra* note 21, at 52-53. One state has already enacted legislation incorporating this type of proposal for products liability cases. *See* Conn. Gen. Stat. Ann. § 52-240b (West Supp. 1982) ("If the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such damages not to exceed an amount equal to twice the damages awarded to the plaintiff."). A similar bill is pending in Congress. *See* S. 44, 98th Cong., 1st Sess. (Comm. Print 1983).

n23 See *infra* pt. IV(B).

n24 *In re* Federal Skywalk Cases, 93 F.R.D. 415, 419 (W.D.Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982). To compel resolution of all claims in one proceeding, the district court certified two classes under provisions that precluded members from opting out. One was a Fed. R. Civ. P. 23(b)(1)(A) class action on the issue of liability for both compensatory and punitive damages. The other was a Rule 23(b)(1)(B) class action on the issues of liability for and amount of punitive damages. *Id.*

n25 *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 897 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). The court certified a mandatory nationwide punitive damages class to resolve the thousands of punitive damages claims pending against the manufacturer. *Id.* The court certified the issues of liability for and amount of punitive damages pursuant to Rule 23(b)(1)(B). *Id.* at 895-96. The court also certified a statewide class limited to liability for punitive damages pursuant to Rule 23(b)(3), which permits unwilling plaintiffs to opt out and pursue their claims individually. *Id.* at 903.

n26 *In re* Federal Skywalk Cases, 93 F.R.D. 415, 419 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 897 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

n27 93 F.R.D. at 424-25; 526 F. Supp. at 897-98.

n28 *In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983); *In re* Federal Skywalk Cases 680, F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982).

n29 See *infra* pt. III(C).

n30 Punitive damages are often referred to as "exemplary damages." In addition, they have been called "smart money," "punitory," "additional," and "aggravated" damages. *See* Freifield, *The Rationale of Punitive Damages*, 1 Ohio St. L.J. 5, 5 (1935); Mallor & Roberts, *supra* note 22, at 639 n.1.

n31 Restatement (Second) of Torts § 908(1) (1979); Owen I, *supra* note 21, at 7-8.

n32 Restatement (Second) of Torts § 908(1) & comment a (1979); Owen I, *supra* note 21, at 7-8. Although punishment and deterrence are the primary functions of punitive damages, several other purposes are also served. First, punitive damages encourage plaintiffs to press their claims and enforce the law by providing an incentive for bringing wrongdoers to justice. Second, punitive damages compensate plaintiffs for actual losses not ordinarily recoverable under law, such as the expense of bringing a suit. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1278, 1287-99 (1976) [hereinafter cited as Owen II]. Finally, punitive damages placate plaintiffs' desire for retribution and deter them from engaging in vengeful, illegal acts against defendants. Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. Rev. 1, 5 (1980).

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punitive as well as compensatory **[*39]** damages, alleging gross misconduct by manufacturers. [8] Defendants in such cases face the unnerving prospect of repeated punishment for a design error, recurrent manufacturing mistake or inadequate warning. The manufacturer of the Dalkon Shield IUD, for example, has already been assessed over seven million dollars in punitive damages, [9] and thousands of additional claims are still pending in lawsuits throughout the country. [10] One asbestos manufacturer has been held liable for punitive damages to at least fifteen different plaintiffs. [11] That manufacturer and two others have sought protection under the bankruptcy laws as an alternative to defending thousands of pending claims for compensatory and punitive damages arising out of exposure to asbestos. [12]

The problem is not limited to manufacturers of asbestos and IUD's. Other manufacturers have been jolted by substantial punitive damages verdicts arising out of design errors in mass-marketed products. [13] They, too, face the threat of additional punishment in hundreds of **[*40]** other lawsuits arising out of the same defects. [14] Nor is the problem limited to products liability litigation. Disastrous occurrences other than product failures have also resulted in multiple punitive damages claims. Recent examples include the collapse of two skywalks in the lobby of the Hyatt Regency Hotel in Kansas City, Missouri, [15] and the fire at the MGM Grand Hotel in Las Vegas, Nevada. [16]

Punitive damages claims on this scale are a recent phenomenon. [17] Typically, punitive damages claims arose from a single incident involving only two parties, making it possible for a jury to determine an appropriate award without considering the possibility of additional awards by other juries. In modern mass tort cases, however, the responsibility for punishing a defendant is not limited to a single jury. Such decentralization raises important issues including the extent to which a defendant may be punished for a single course of tortious conduct, what the jury should be told about previous awards by other juries or about other punitive damages claims against the same defendant, and how awards should be distributed among the plaintiffs. [18]

Predictably, proposals have been made to abolish punitive damages in mass tort litigation. [19] Having withstood years of criticism aimed at the essence of the doctrine, [20] however, it is unlikely to be abandoned because a defendant's wrongful conduct injuries a large number of people instead of one or two. Proposals for changing the method of awarding punitive damages in mass tort litigation are now being given more serious consideration. These include establishing a ceiling on punitive damages awards against a defendant for a single course of **[*41]** conduct [21] and eliminating the jury's role in determining the amount of punitive damages. [22]

While adoption of these proposals might reduce the danger of excessive punishment, other procedures could be utilized without such wholesale changes in the way punitive damages are awarded. [23] One alternative is dismissal by the trial court of punitive damages claims not supported by solid evidence. Another is a bifurcated trial procedure in which the jury would be reconvened to consider evidence bearing on the proper amount of punishment only if it decided in the first trial that the defendant's conduct warranted imposition of punitive damages. A third procedure permits closer scrutiny of jury awards by trial judges and appellate courts. Implementation of these procedures would assure that juries have a continuing voice in the amount of punishment while providing the safeguards necessary to prevent unfairness to defendants.

Alternatively, to avoid the difficulties inherent in adjudicating multiple punitive damages claims on a case-by-case basis, a class action could be instituted. Two federal district courts recently tried this approach in litigation surrounding the Skywalk collapse in Kansas City [24] and the Dalkon Shield design defect. [25] These courts determined **[*42]** that a class action was the best method by which the hundreds of punitive damages claims could be adjudicated both fairly and expeditiously. [26] Any other approach might result in the recovery of punitive

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n33 A longstanding criticism of this doctrine has been that its purposes are inconsistent with those of traditional civil remedies. Justice Forter, sitting on the New Hampshire Supreme Court in 1873, wrote:

What is a civil remedy but . . . compensation for damage sustained by the plaintiff? . . . Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.
Fay v. Parker, 53 N.H. 342, 382 (1873). *See* Defense Research Inst., Inc., The Case Against Punitive Damages 9 (1969); W. Prosser, *supra* note 17, § 2, at 9; Ghiardi, *Should Punitive Damages be Abolished? -- A Statement for the Affirmative*, 1965 A.B.A. Sec. Ins. Negl. & Comp. L. Proc. 282; Long, *Punitive Damages: An Unsettled Doctrine*, 25 Drake L. Rev. 870, 888 (1976). The doctrine has also been criticized for permitting successful plaintiffs to receive a windfall. *See* Walker v. Sheldon, 10 N.Y.2d 401, 409, 179 N.E.2d 497, 501, 223 N.Y.S.2d 488, 494 (1961) (Van Voorhis, J., dissenting); Kink v. Combs, 28 Wis. 2d 65, 80, 135 N.W.2d 789, 797 (1965); Hodgin & Veitch, *Punitive Damages -- Reassessed*, 21 Int'l & Comp. L.Q. 119, 132 (1972); Long, *supra*, at 886.

n34 K. Redden, Punitive Damages § 2.4, at 33-34 (1980); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 524 (1957) [hereinafter cited as *Exemplary Damages*]; Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. Chi. L. Rev. 408, 412 (1967).

n35 *See* Wangen v. Ford Motor Co., 97 Wis. 2d 260, 331, 294 N.W.2d 437, 472 (1980) (Coffey, J., dissenting) ("The implications for the free enterprise system, and therefore the structure of our economy, are too disturbing to leave a decision of this magnitude to five jurists."); K. Redden, *supra* note 34, § 2.4, at 34 ("As the award is determined by a jury who arrive at a set figure by subjective rather than objective calculation, the amount of punishment is often not correlated with the amount of culpability exhibited.").

n36 K. Redden, *supra* note 34, § 2.4, at 33. The earliest recorded debate regarding the validity of the doctrine of punitive damages was between Greenleaf and Sedgwick. *Compare* 2 S. Greenleaf, The Law of Evidence § 253, at 240 n.2 (16th ed. 1899) (doctrine should be limited) *with* 1 T. Sedgwick, Measure of Damages § 354 (9th ed. 1912) (doctrine should be supported). *See* Walther & Plein, *Punitive Damages: A Critical Analysis*: Kink v. Combs, 49 Marq. L. Rev. 369, 379-80 (1965) (discussing the Greenleaf-Sedgwick debate over punitive damages). The debate continues today. *Compare* Ghiardi, *supra* note 33, at 284 (punitive damages should be judicially abolished), *with* Belli, *supra* note 32, at 23 (punitive damages perhaps more important in modern times).

n37 Multiple damages, punitive in nature, have been documented in the Babylonian Code of Hammurabi of 2000 B.C., G. Driver & J. Miles, The Babylonian Laws 500 (1952), in Hittite law dating from approximately 1400 B.C., 4 M. Belli, Modern Trials § 26, at 75 (1959), and in Hindu law of circa 200 B.C., *id.* at 84.

n38 Punitive damages existed in medieval English statutes, 2 F. Pollack & F. Maitland, The History of the English Law 522 & n.1 (2d ed. 1959), and at common law as a means of justifying excessive compensatory damages awards or to provide damages not otherwise compensable under the common law, J. Ghiardi & J. Kircher, Punitive Damages Law and Practice § 1.02, at 3-5 (1981). In 1964, the House of Lords restricted the scope of actual punitive damages awards by limiting such awards to cases involving oppressive, arbitrary or unconstitutional acts of government servants, in which the tortfeasor sought to profit from the tort and for which punitive damages awards are expressly permitted by statute. Rookes v. Barnard, 1964 A.C. 1129, 1226-27. The practical effect of the decision is limited, however,

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because English courts still permit "aggravated damages," which are difficult to distinguish from exemplary damages in that they allow a jury awarding compensatory damages to consider conduct that is malicious, spiteful or injurious to a plaintiff's dignity. *See* J. Fleming, The Law of Torts 584-85 (5th ed. 1977); J. Ghiardi & J. Kircher, *supra*, § 1.03, at 7-8.

American law incorporated the doctrine not only to punish and deter, but also to satisfy the desire for revenge, promote necessary litigation when compensatory damages are small and provide relief for emotional injuries incapable of meansurment. *See Exemplary Damages, supra* note 34, at 520-22; Comment, *Punitive Damages Awards in Strict Product Liability Litigation: The Doctrine, The Debate, The Defenses*, 42 Ohio St. L.J. 771, 772 (1981). By the middle of the 19th century, acceptance of the doctrine in the United States was such that the Supreme Court could state that the propriety of awarding punitive damages "will not admit of argument." Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851) (dictum).

n39 *See* J. Ghiardi and J. Kircher, *supra* note 38, § 401. The states that prohibit punitive damages are: (1) Louisiana, Ricard v. State, 390 so. 2d 882, 884 (La. 1980); J. Ghiardi & J. Kircher, *supra* note 38, § 409; (2) Massachusetts, Caperci v. Huntoon, 397 F.2d 799, 801 (1st Cir.) (dictum), *cert. denied*, 393 U.S. 940 (1968); J. Ghiardi & J. Kircher, *supra* note 38, § 410; (3) Nebraska, Prather v. Eisenmann, 200 Neb. 1, 11, 261 N.W.2d 766, 772 (1978); J. Ghiardi & J. Kircher, *supra* note 38, § 411; and (4) Washington, Kammerer v. Western Gear Corp., 27 Wash. App. 512, 521-22, 618 P.2d 1330, 1337 (1980), *aff'd*, 96 Wash. 2d 416, 635 P.2d 708 (1981). At least two of these jurisdictions, however, permit punitive damages if they are explicitly provided for by statute. J. Ghiardi & J. Kircher, *supra* note 38, § 409 (Lousiana); *id*. § 410 (Massachusetts).

Most states retain punitive damages as part of their common law, J. Ghiardi and J. Kircher, *supra* note 38, table 4-1, but some codify the remedy by statute in appropriate tort cases. *See, e.g.*, Cal. Civ. Code § 3294 (West Supp. 1983); Colo. Rev. Stat. § 13-21-102 (1973); Ga. Code Ann. § 51-12-5 (1982); Nev. Rev. Stat. § 42.010 (1965); N.D. Cent. Code § 32-03-07 (Supp. 1981); Okla. Stat. Ann. tit. 23, § 9 (West 1955); S.D. Codified Laws Ann. § 21-3-2 (1979). See *infra* note 40.

n40 *See, e.g.*, Cal. Civ. Code § 3340 (West 1970) (exemplary damages may be awarded for wrongful injuries to animals); Iowa Code Ann. § 639.14 (West 1950) (punitive damages may be awarded for malicious attachment); S.C. Code Ann. § 39-5-140 (Law. Co-op. 1977) (treble damages may be awarded for unfair or deceptive trade practices); Tex. Rev. Civ. Stat. Ann. art. 8306, § 5 (Vernon 1967) (exemplary damages may be awarded for wrongful death of worker); Utah Code Ann. § 76-6-412 (1978) (treble damages may be awarded for receiving certain stolen property); Va. Code § 8.01-40 (1977) (punitive damages may be awarded for knowingly making unauthorized use of another's picture).

n41 *See, e.g.*, Clayton Act § 4, 15. U.S.C. § 15 (1976) (treble damages may be awarded for injuries resulting from violation of antitrust laws); Fair Credit Reporting Act § 616, 15 U.S.C. § 1681(n) (1976) (punitive damages may be awarded for wilful noncompliance with Fair Credit Reporting Act); Omnibus Crime Control and Safe Streets Act of 1968 § 802, 18 U.S.C. § 2520(b) (1976) (punitive damages may be awarded for interception of wire or oral communications); Civil Rights Acts of 1968 § 812, 42 U.S.C. §3612(c) (1976) (punitive damages not in excess of $ 1,000 may be awarded for violation of fair housing laws).

n42 *See* J. Ghiardi & J. Kircher, *supra* note 38, §5.01, at 5-3 to 5-11 (1981); C. McCormick, Handbook on the Law of Damages § 79, at 280-82 (1935).

n43 Restatement (Second) of Contracts § 355, at 154 (1981) ("Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."); *See* 5 A. Corbin, Contracts § 1077, at 437 (1964); J. Ghiardi & J. Kircher, *supra* note 38, § 5.16, at 48; K. Redden, *supra* note 34, §

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2.5, at 41. There are exceptions to the general rule prohibiting punitive damages in contract actions:

[P]unitive damages may be awarded upon proof of the requisite wantonness of behavior in the following types of cases: fraud; breach of promise of marriage; breach of contract of service by a public utility or common carrier; wrongful failure by a bank to honor a depositor's check; breach of contract of employment; breach of fiduciary duty; interference with contractual relations of others; and breach of contract amounting to or accompanied by an independent tort.
Owen II, *supra* note 32, at 1272;*see, e.g.*, Rosener v. Sears, Roebuck & Co., 110 Cal. App.3d 740, 757, 168 Cal. Rptr. 237, 247 (1980) (punitive damages appropriate when breach of contract amounts to fraud); Jones v. Abriani, 169 Ind. App. 556, 580, 350 N.E.2d 635, 650 (1976) ("[P]unitive damages are particularly appropriate in proper cases involving consumer fraud."); Fletcher v. Aetna Casualty & Sur. Co., 80 Mich. App. 439, 444, 264 N.W.2d 19, 21 (1978) (Exemplary damages may be recovered from one who breaches a contract that concerns "matters of mental concern and solicitude.") (quoting Stewart v. Rudner, 349 Mich. 459, 471, 84 N.W.2d 816, 824 (1957)), (quoting Steart V. Rudener, 349 Mich. 459, 471, 84 Mich 1, 294 N.W. 2d 816, 824 (1957)), *aff'd sub nom.* Bradley v. Mid-Century Ins. Co., 409 Mich. 1, 294 N.W.2d 141 (1980).

n44 Eighteen states currently permit punitive damages for wrongful death while 31 states do not. K. Redden, *supra* note 34, § 4.2(A)(3), at 87. Jurisdictions that do not allow recovery of punitive damages rely on a narrow judicial construction of the state's wrongful death statute.*Id.* Other courts have construed such statutes to provide for punitive damages, and may jurisdictions have passed statutes specifically allowing punitive damages in wrongful death actions. *Id.* An excellent case in point is Robert v. Ford Motor Co., 100 Misc. 2d 646, 417 N.Y.S.2d 595 (1979), *rev'd*, 73 A.D.2d 1025, 424 N.Y.S.2d 747 (1980), in which a New York trial court held that denial of punitive damages in wrongful death actions, when they were available in other personal injury claims, was contrary to the state constitution. *Id.* at 655, 417 N.Y.S.2d at 601-02. Soon after this decision was reversed by the appellate division, the New York State Law Revision Commission proposed legislation specifically providing for punitive damages in wrongful death actions. New York Law Revision Commission, Memorandum Relating to the Assessment of Punitive Damages in Wrongful Death Actions or in Personal Injury Actions After the Death of the Victim, Leg. Doc. No. 65 [G] (1982). Subsequently, the state legislature enacted legislation permitting punitive damages in wrongful death actions. 1982 N.Y. Laws 100 (codified at N.Y. Est. Powers & Trusts Law § 11-3.2(b) (McKinney Supp. 1982-1983)). *See generally* McClelland, *Survival of Punitive Damages in Wrongful Death Cases*, 8 U.S.F.L. Rev. 585 (1974) (discussion of punitive damages in wrongful death actions); Note, *Punitive Damages and Wrongful Death*, 8 Cum. L. Rev. 567, 574077 (1978) (discussion and nationwide survey of punitive damages in wrongful death actions).

n45 The vast majority of states prohibit an award of punitive damages against a governmental body or agency, either by statute or by judicial interpretation of sovereign immunity. J. Ghiardi & J. Kircher, *supra* note 38, § 5.13, at 39. The Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1976 & Supp. V 1981), similarly prohibits assessment of punitive damages against the United States. *Id.* § 2674; *See* Hartz v. United States, 415 F.2d 259, 264 (5th Cir. 1969). Punitive damages are also precluded by federal statute in suits against foreign states. 28 U.S.C. § 1606 (1976). A minority of jurisdictions, however, has held or indicated that a governmental entity can be liable for punitive damages. Young v. City of Des Moines, 262 N.W.2d 612, 620-22 (Iowa 1978) (punitive damages recoverable against governmental subdivision, although not against the state); City of Covington v. Faulhaber, 177 Ky. 623, 625, 197 S.W. 1065, 1066 (1927) (punitive damages might be awarded in a proper case against the city); Ray v. City of Detroit Dep't of St. Rys., 67 Mich. App. 702, 707, 242 N.W.2d 494, 496 (1976) (punitive damages are compensatory, not penal, and may therefore be assessed against municipal corporation); Lochhaas v. State, 64 A.D.2d 816,

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817, 407 N.Y.S.2d 298, 299 (1978) (punitive damages might be awarded in appropriate case against the state); Gigler v. City of Klamath Falls, 21 Or. App. 753, 763-64, 537 P.2d 121, 126 (1975) (punitive damages could be awarded in proper case against the city). In Vermont, damages, including punitive damages, may be assessed against the state within statutory limits. Vt. Stat. Ann. tit. 12, § 5601 (1973).

n46 *See* J. Ghiardi & J. Kircher, *supra* note 38, § 5.38, at 110, 111 n.1 (procedure with regard to punitive damages liability generally accepted).

n47 *Id.*; K. Redden, *supra* note 34, § 3.4, at 56.

n48 As used in this article, the word "jury" includes the court in a bench trial in its role as finder of fact.

n49 Restatement (Second) of Torts § 908 comment d (1979); J. Ghiardi & J. Kircher, *supra* note 38, § 5.38, at 110-11; W. Prosser, *supra* note 17, § 2, at 13; K. Redden, *supra* note 34, § 3.4(A), at 56. *But see* Conn. Gen. Stat. Ann. § 52-240b (West Supp. 1983).

n50 *E.g.*, Central Armature Works, Inc. v. American Motorists Ins. Co., 520 F.Supp. 283, 296 (D.D.C. 1980); Loch Ridge Constr. Co. v. Barra, 291 Ala. 312, 320, 280 So. 2d 745, 751 (1973); Riegel v. Aastad, 272 A.2d 715, 718 (Del. 1970); *see* J. Ghiardi & J. Kircher, *supra* note 38, § 5.38, at 111.

n51 *E.g.*, Loch Ridge Constr. Co. v. Barra, 291 Ala. 312, 320, 280 So. 2d 745, 751 (1973); Ayers v. Christiansen, 222 Kan. 225, 229, 564 P.2d 458, 461 (1977); First Sec. Bank & Trust Co. v. Roach, 493 S.W.2d 612, 619 (Tex. Civ. App. 1973); *see* J. Ghiardi & J. Kircher, *supra* note 38, § 5.38, at 111.

n52 *See, e.g.*, Sherrod v. Piedmont Aviation, 516 F.Supp. 46, 52-53 (E.D. Tenn. 1978); Wisner v. S.S. Kresge Co., 465 S.W.2d 666, 669 (Mo. App. 1971); First Sec. Bank & Trust Co. v. Roach, 493 S.W.2d 612, 619 (Tex. Civ. App. 1973).

n53 J. Ghiardi & J. Kircher, *supra* note 38, § 5.36 ,at 105; *see* Restatement (Second) of Torts § 908(2) & comment e (1979); W. Prosser, *supra* note 17, § 2, at 14; K. Redden, *supra* note 34, § 3.5(C), at 61. The financial condition of a defendant should be considered because the same monetary punishment may be severe to a relatively poor defendant but only a slap on the wrist to a rich one. Nevertheless, discovery and disclosure at trial of evidence concerning a defendant's financial status have been among the most controversial aspects of punitive damages law. *See* Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1191 (1931); *Exemplary Damages, supra* note 34, at 528. While a few states have enacted statutes that require a preliminary finding that punitive damages will probably be awarded before permitting discovery of a defendant's financial status, *see* Cal. Civ. Code § 3295(c) (West Supp. 1982); Wis. Stat. § 804.01 (1977), many states have left the issue to judicial decision, *see* J. Ghiardi & J. Kircher, *supra* note 38, § 9.11, at 34-35.

n54 *See* K. Redden, *supra* note 34, § 3.6(c), at 63-64. As a practical matter, the reasonable relation rule has not been rigidly followed even by those jurisdictions which recognize it. *See* Pinckard v. Dunnavant, 281 Ala. 533, 538, 206 So. 2d 340, 344 (1968); Sturm, Ruger & Co. v. Day, 594 P.2d 38, 48 (Alaska 1979), *cert. denied*, 454 U.S. 894 (1981); H.J. Miller v. Carnation Co., 39 Colo. App. 1, 6-7, 564 P.2d 127, 131 (1977).

n55 See *supra* note 49 and accompanying text.

n56 Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 38-39 (1982); *see* Restatement (Second) of Torts § 908 comment d (1979); J. Ghiardi & J. Kircher, *supra* note 38, § 5.39; K. Redden, *supra* note 34, § 3.6(A), at 62.

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n57 Restatement (Second) of Torts § 908 comment d (1979).

n58 The first reported instance of a punitive damages award sustained in a products liability case is Fleet v. Hollenkemp, 52 Ky. 175, 13 B. Mon. 219 (1852), in which a pharmacist's error led to the plaintiff's ingestion of traces of poison mixed with his medicine. The court held that awarding punitive damages should not depend on the form of action, but on the nature of the harm and the conduct which caused it. *Id.* at 180, 13 B. Mon. at 225-26.

n59 Products Liability suits filed in federal district courts increased by 134% between 1974 and 1976. 3 Research Group, Inc., Interagency Task Force on Product Liab., Product Liability: Final Report of the Legal Study 9 (1977).

n60 Ford Motor Company, for example, reported that less than 0.5% of the products liability complaints filed against it prior to 1970 contained claims for punitive damages, while 27.1% of all such complaints in 1980 sought punitive awards. *See* Owen I, *supra* note 21, at 54 n.258. If only personal injury lawsuits are considered, the 1980 percentage is higher. *Id.* One commentator notes that "whereas 25 years ago, the punitive damage case was a rarity, today it is an anomaly when one sees a complaint which does not seek punitive damages." Levit, *Punitive Damages: Yesterday, Today and Tomorrow*, 1980 Ins. L.J. 257, 259 (emphasis in original).

n61 Haskell, *The Aircraft Manufacturer's Liability for Design and Punitive Damages -- The Insurance Policy and the Public Policy*, 40 J. Air L. & Com. 595, 620 (1974) ("When a plaintiff relies on a strict liability theory, logic compels the conclusion that punitive damages are inappropriate."); Tozer, *Punitive Damages and Products Liability*, 39 Ins. Couns. J. 300, 301 (1972) ("Strict liability and punitive damages will not mix. In strict liability the character of the defendant's act is of no consequence; in the punitive danages claim the character of the act is paramount."); *see* Wangen v. Ford Motor Co., 97 Wis. 2d 260, 322, 294 N.W. 2d 437, 468 (1980) (Coffey, J., dissenting); Ghiardi & Koehn, *Punitive Damages in Strict Liability Cases*, 61 Marq. L. Rev. 245, 251 (1977).

n62 *See e.g.*, Drake v. Wham-O Mfg. Co., 373 F. Supp. 608, 611 (E.D. Wis. 1974); Fleet v. Hollenkemp, 52 Ky. 175, 179-81, 13 B. Mon. 219, 225-26 (1852); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 275, 294 N.W. 2d 437, 446 (1980).

n63 *See, e.g.*, Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 775, 174 Cal. Rptr. 348, 360 (1981) (Pinto fuel tank vulnerable to crash); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 729 (Minn.) (pajamas catching on fire), *cert. denied*, 101 S.Ct. 320 (1980); Wangen .v Ford Motor Co., 97 Wis.2d 260, 263, 294 N.W.2d 437 447 (1980) (rupture of car fuel tank). Punitive damages have also been permitted in other types of strict liability actions. *See, e.g.*, Reynolds v. Pegler, 123 F. Supp. 36, 37 (S.D.N.Y. 223 F.2d 429 (2d Cir.), *cert. denied*, 350 U.S. 846 (1955); Milford v. Tidwell, 276 Ala. 110, 112, 159 So. 2d 621, 623 (1963) (trespass to land and liability for ultra-hazardous activities); Nevada Cement Co. v. Lemler, 89 Nev. 447, 448-49, 514 P.2d 1180, 1181 (1973) (nuisance).

n64 *See, e.g.*, Kappinger v. Cullen-Schlitz & Assocs., 513 F.2d 901, 906 (8th Cir. 1975) (defendants liable based on res ipsa loquitur for injuries and death resulting from gas explosion); Moore v. Jewel Tea Co., 116 Ill. App. 2d. 109 132 253 N.E.2d 636 647-48 (1969) (Drano manufacturer liable based on res ipsa loquitur for injuries resulting from explosion of Drano) *aff'd* 46 Ill. 2d 288, 263 N.E.2d 103 (1970); Rinker v. Ford Motor Co., 567 S.W.2d 655, 667-68 (Mo. App. 1978) (negligent failure to warn).

n65 *See, e.g.*, Gillham v. Admiral, 523 F.2d 102, 107 (6th Cir. 1975) (defendant misrepresented safety of television), *cert. denied*, 424 U.S. 913 (1976); Campus Sweater & Sportswear Co v. M.B. Kahn Constr. Co., 515 F. Supp. 64, 97 (D.S.C. 1979) (defendant

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misrepresented usable life of roofing), *aff'd*, 644 F.2d 877 (4th Cir. 1981); Standard Oil Co. v. Gunn, 234 Ala. 598, 600, 176 So. 332, 333 (1937) (defendant liable for agent's deceitful sale of adulterated motor oil). Punitive damages have not been permitted, however, in actions for breach of express or implied warranties because of the longstanding general prohibition against the remedy in actions based on contracts. *See* Restatement (Second) of Contracts § 355 (1981); A. Corbin, *supra* note 43, § 1077. Describing warranty actions in products cases as "a synthesis of both tort law and the contract law of sales," Professor Owen argues that punitive damages should not be available in non-commercial actions for product injuries under any legal theory. Owen II, *supra* note 32, at 1274.

n66 *See* Owen I, *supra* note 21, at 20.

n67 *See id.* at 10-11; Henderson, *Judicial Review of Manufacturer's Conscious Design Choices: The Limits of Adjudication*, 73 Colum. L. Rev. 1531 (1973) (courts are unsuited to implement standards for complex product liability issues); Twerski, Weinstein, Donaher & Piehler, *Shifting Perspectives in Products Liability: From Quality to Process Standards*, 55 N.Y.U.L. Rev. 347 (1980) (same).

n68 *See* Owen I, *supra* note 21, at 15.

Final "decisions" concerning a complex product are often the result of a splintered, bureaucratic process involving a complicated combination of human judgments made by scores of persons at different levels in the hierarchy who pass on different aspects of the problem at different times. Various engineers may have to rely upon the work of research chemists, physicists, and other scientists; input from the financial and marketing arms of the enterprise must be factored in along the way. The entire process may take years. *Id.*

n69 Corporate wealth, as a factor in the amount of punitive damages assessed, is usually proven by net worth. *See, e.g.*, Richards Co. v. Harrison, 262 So. 2d 258, 264 (Fla. Dist. Ct. App. 1972); Nevada Cement Co. v. Lemler, 89 Nev. 447, 453, 514 P.2d 1180, 1183 (1973); *cf.* Parrott v. Bank of Am. Nat'l Trust & Sav. Ass'n, 97 Cal. App. 2d 14, 25, 217 P.2d 89, 96 (1950) (capital surplus and undivided profits). Professor Owen suggests that in the case of large corporate defendants, a typical jury would "be receptive to an argument that anything less than $ 1 million would be but a drop in the bucket." Owen I, *supra* note 21, at 20.

n70 *See* DuBois, *supra* note 22, at 352-53; Mallor & Roberts, *supra* note 22, at 663-66; Owen I, *supra* note 21, at 52; Owen II, *supra* note 32, at 1320; Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U.L. Rev. 1158, 1171 (1966) [hereinafter cited as *Reappraisal of Punitive Damages*].

n71 See *supra* note 22.

n72 *See* Conn. Gen. Stat. Ann. § 52-240b (West Supp. 1983).

n73 Owen II, *supra* note 32, at 1320; *see Reappraisal of Punitive Damages, supra* note 70, at 1171. This is consistent with the argument that other complex litigation should be removed from the jury system, an issue which has recently received a great deal of attention. *See, e.g.*, Arnold, *A Historical Inquiry Into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. Pa. L. Rev. 829 (1980); Edquist, *The Use of Juries in Complex Cases*, 3 Corp. L. Rev. 277 (1980); Jorde, *The Seventh Amendment Right to Jury Trial Antitrust Issues*, 69 Calif. L. Rev. 1 (1981); Note, *The Right to a Jury Trial in Complex Civil Litigation*, 32 Stan. L. Rev. 99 (1979); Note, *Complex Civil Litigation: Reconciling the Demands of Due Process with the Right to Trial by Jury*, 42 U. Pitt. L. Rev. 693 (1981); Annot., 54 A.L.R. Fed. 733 (1981).

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n74 *See, e.g.*, Johnson v. Husky Indus., 536 F.2d 645, 651 (6th Cir. 1976); Forrest City Mach. Works, Inc. v. Aderhold, 273 Ark. 33, 46, 616 S.W.2d 720, 726 (1981); Jones v. Fischer, 42 Wis. 2d 209, 224-27, 166 N.W.2d 175, 183-84 (1969); *see also* Restatement (Second) of Torts § 908 comment f (1979) ("In many states there has been a tightening of control by the appellate courts over [the] discretion of the trier of fact."); Owen I, *supra* note 21, at 44 ("In practice . . . especially in cases against institutional defendants, there appears to be a growing trend to subject such awards to greater judicial scrutiny.").

n75 See *supra* notes 1-7 and accompanying text. The possibility of multiple punitive damages claims exists in other types of personal injury suits as well. The Skywalk collapse and MGM Grand fire are but two recent examples. See *supra* notes 15-16. Commercial airliner crashes are another. *See In re* Paris Air Crash of March 3, 1974, 427 F. Supp. 701 (C.D. Cal. 1977), *rev'd* 622 F.2d 1315 (9th Cir.), *cert. denied*, 101 S. Ct. 387 (1980).

n76 Although insurance coverage might theoretically reduce the danger of financial disaster, the issue whether punitive damages may be insured against has not been resolved uniformly. *See*, K. Redden, *supra*, note 34, at 679. The approximately 36 jurisdictions that have considered the question are nearly evenly split. Annot., 16 A.L.R.4th 14-47 (1982). *Compare* Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 441 (5th Cir. 1962) ("[T]here are especially strong public policy reasons for not allowing socially irresponsible automobile drivers to escape the element of personal punishment in punitive damages.") *with* Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 647, 383 S.W.2d 1, 5 (1964) (It is not contrary to public policy to hold that a private contract of insurance protects an insured against punitive damages.). Most of the jurisdictions that prohibit insurance coverage of punitive damages on public policy grounds provide an exception when the insured is vicariously liable. J. Ghiardi & J. Kircher, *supra* note 38, § 7.15 (1981). Alternatively, many of the jurisdictions that allow insurance against punitive damages have refused to allow coverage when the insured's conduct is intentional. K. Redden, *supra* note 34, § 9.5, at 703; *see* Long, *supra* note 33 (discussing both the vicarious liability exception and the alternative intentional tort exception); Sprentall, *Insurance Coverage of Punitive Damages*, 84 Dick. L. Rev. 221 (1979-1980) (same); Note, *An Overview of the Insurability of Punitive Damages Under General Liability Policies*, 33 Baylor L. Rev. 203 (1981) (same); Note, *Punitive Damages and Liability Insurance: Theory, Reality and Practicality*, 9 Cum. L. Rev. 487 (1978) (same); Note, *Insurance Coverage of Punitive Damages*, 10 Idaho L. Rev. 263 (1974) (same).

n77 *See* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967). The drug was developed and tested by th William S. Merrell Company, a Cincinnati-based subsidiary of Richardson-Merrelol, Inc. of New York. *See* Rheingold, *The MER/29 Story -- An Instance of Successful Mass Disaster Litigation*, 56 Calif. L. Rev. 116, 117 (1968). MER/29 was approved for prescription sales by the FDA based on test data submitted by the manufacturers indicating that the drug was relatively nontoxic in animals and without serious side effects in humans. *Id.*

n78 Paul Rheingold, who conducted most of plaintiffs' discovery in the litigation, described the promotion as follows:

The initial advertising campaign for doctors included distribution of 100,000 copies of a Western Union manual about MER/29, publication of an eight-page advertisement in leading medical journals, and a series of monthly ads and direct-mail pieces. In true Madison Avenue form, all this material had one simple message: MER/29 had been proved safe, nontoxic and free of side effects. Salesmen on the routes and even a free handout movie repeated the message.
Rheingold, *supra* note 77, at 145.

n79 *See* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 836 (2d Cir. 1967); Toole v.

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Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 701, 60 Cal. Rptr. 398, 408 (1967). It has been estimated that over 5,000 people were injured by the drug. Rheingold, *supra* note 77, at 121.

n80 Rheingold, *supra* note 77, at 121. In addition, hundreds of claims were settled without lawsuits being filed. *Id.*

n81 Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 & n.9 (2d Cir. 1967). The company apparently concealed reports of side effects in humans from inquiring physicians as well as the FDA and continued to promote the drug as entirely safe even after strong evidence that it was not became available. *See* Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 695-701, 60 Cal. Rptr. 398, 404-08 (1967); Rheingold, *supra* note 77, at 119. The Second Circuit held, however, that management's conduct did not amount to "deliberate disregard." 378 F.2d at 844-50. Prompted by charges that the company had submitted fraudulent test data to the FDA, the Department of Justice launched an investigation of all test data and reports of toxicity and side effects known to Richardson-Merrell. Rheingold, *supra* note 77, at 120. Indictments were returned by a Washington, D.C. grand jury in December, 1963, formally charging Richardson-Merrell, its subsidiary, Willaims S. Merrell, and three of the subsidairy's chemists withe submitting false test data to the FDA and withholding otehf test date and reports which diclosed toxicity and side effects. *Id.* at 120-21. After pleading *nolo contendere* in a prior criminal proceeding, the two corporate defendants were fined a total of $ 80,000. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 n.8 (2d Cir. 1967).

n82 254 F. Supp. 430 (S.D.N.Y. 1966), *rev'd in part*, 378 F.2d 832 (2d Cir. 1967). Plaintiff alleged that he suffered skin disorders, hair loss and eventually developed cataracts from his use of the drug in 1961.378 F.2d at 836. His case was the first to be tried of 75 MER/29 cases then pending in the Southern District of New York. *Id.* at 834.

n83 378 F.2d at 834.

n84 *Id.* at 835.

n85 *Id.* at 840-41.

n86 *Id.* at 850. The court noted instances in the record demonstrating falsification and fraudulent omissions by chemists, but it did not find sufficient evidence of recklessness on the part of high level management to hold the corporation accountable for punitive damages. Purporting to follow New York's complicity rule, which holds the corporate master liable for punitive damages "only when superior officers either order, participate in or ratify outrageous misconduct," *id.* at 842 (quoting Morris, *Punitive Damages in Personal Injury Cases*, 21 Ohio St. L.J. 216, 221 (1960)), the court held that the executives were not aware of the danger of MER/29, *id.* at 850. In Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967), however, the court reviewed a punitive damage verdict based on essentially the same evidence, applied the complicity rule, and concluded that there was "evidence from which the jury could conclude that [Richardson-Merrell] brought its drug to market, and maintained it on the market, in reckless disregard of the possibility that it would visit serious injury upon persons using it." *Id.* at 714, 60 Cal. Rptr. at 416. The careful scrutiny which was given to the evidence in *Roginsky* is closer than *Toole* to the approach of Professor Owen, who advocates tighter judicial control over punitive damages awards in products liability cases. Professor Owen would require clear and convincing evidence of "flagrant indifference to the public safety." Owen II, *supra* note 32, at 1368; *see* Owen I, *supra* note 21, at 59.

n87 *E.g.*, Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 817 (6th Cir. 1982); Neal v. Carey Can. Mines, Ltd., 548 F. Supp. 357, 376 (E.D. Pa. 1982); Froud v. Celotex Corp., 107 Ill. App. 3d 654, 660, 437 N.E.2d 910, 914-15 (1982) (Sullivan, J., concurring).

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n88 Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967). Judge Friendly also expressed alarm at the impact that one mistake could have on an entire corporation, stating that a "sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin." *Id.* at 841.

Having identified the problem, the court considered three alternatives for resolving it, ultimately rejecting each as unworkable. The first alternative was an instruction to the jury, like that given by the trial judge, to consider the effect of other similar lawsuits pending against the defendant throughout the country. *Id.* at 839. The court concluded that such an instruction was so vague and uncertain that as a practical matter it could not be followed. *Id.* at 839. The court also expressed concern that local juries might demand that plaintiffs in their district receive awards comparable to those received by plaintiffs in other communities. *Id.* at 840. The second alternative was to place an arbitrary ceiling on punitive awards in mass tort cases. This, too, was dismissed as impracticable because there was no assurance that other states would follow suit. *Id.* at 840. Finally, the court mentioned the benefits of consolidating all pending cases in a single court and allowing a jury to make one award which would then be held for distribution to all successful plaintiffs. This solution was also rejected, however, because of the inability of a federal court or any state court to consolidate all of the cases filed in different states. *Id.* at 839-40 n.ll. Much earlier, Richardson-Merrell had proposed that the Coordinating Committee for Multiple Litigation of the United States District Courts (predecessor to today's Judicial Panel on Multidistrict Litigation) assume control over all pretrial phases of the MER/29 litigation. Rheingold, *supra* note 77, at 126.The request was denied, presumably because the majority of the cases had been filed in state courts, and the federal courts therefore had no power to order consolidation. *Id.* at 126.

n89 Rheingold, *supra* note 77, at 137. All settlements were designated as payments for compensatory damages only, *id.* at 138-39, although some undoubtedly included payments beyond what would have been included in the absence of punitive damages claims.

n90 *Id.* at 133, 136.

n91 Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 851 (2d Cir. 1967).

n92 Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 717, 60 Cal. Rptr. 398, 418 (1967) (trial judge reduced punitive damages from $ 500,000 to $ 250,000); Ostopowitz v. Wm. S. Merrell Co., No. 5879-1963 (N.Y. Sup. Ct.) (trial judge reduced punitive damages from $ 850,000 to $ 100,000), *reported in* N.Y.L.J., Jan. ll, 1967, at 21, col. 3.

n93 Owen II, *supra* note 32, at 1324-25. Professor Owen observed:

[I]f this is an example of the most crushing punishment that will befall a manufacturer guilty of flagrant marketing misbehavior -- and it is difficult to imagine a more extreme case of such misbehavior than that of Richardson-Merrell in marketing MER/29 -- then the threat of bankrupting a manufacturer with punitive damages awards in mass disaster litigation appears to be more theoretical than real.
Id. A federal district court reached the same conclusion in 1979 in a commercial products liability case involving two sizeable punitive damages verdicts against a supplier of roofing materials: "Twelve years have now passed, and many of the fears expressed by Judge Friendly have simply not been realized . . . . This court is unconvinced that the 'specter of overkill' is anything more than just that -- an unrealized phantom or mental image." Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co., 515 F. Supp. 64, 109 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (4th Cir. 1981).

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n94 See *supra* notes 9, 11, 13 and accompanying text.

n95 See *supra* note 12 and accompanying text.

n96 *See, e.g.*, Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 852 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983); deHaas v. Empire Petroleum Co., 435 F.2d 1223, 1231 (10th Cir. 1970); Globus v. Law Research Serv., Inc., 418 F.2d 1276, 1285 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967); Maxey v. Freightliner Corp., 450 F. Supp. 955, 962 (N.D. Tex. 1978), *aff'd in part, vacated in part on other grounds*, 665 F.2d 1367 (5th Cir. 1980); Vollert v. Summa Corp., 389 F. Supp. 1348, 1351 (D. Hawaii 1975); Delos v. Farmer Ins. Group, 93 Cal. App. 3d 642, 667, 155 Cal. Rptr, 843, 859 (1979); Unified School Dist. No. 490 v. Celotex Corp., 6 Kan. App. 2d 346, 355, 629 P.2d 196, 206 (1981); State *ex rel.* Young v. Crookham, 618 P.2d 1268, 1274 (Or. 1980); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 291-92, 294 N.W. 2d 437, 454 (1980); *see also* Morris, *supra* note 53, at 1194-95 & n.39; Owen II, *supra* note 32, at 1325; *Punitive Damages Overkill, supra* note 21, at 1805.

n97 *See In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 899 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 297-98, 294 N.W.2d 437, 457 (1980); J. Ghiardi & J. Kircher, *supra* note 38, § 6.09, at 31.

n98 See *infra* notes 104-10 and accompanying text.

n99 See *infra* notes 111-14 and accompanying text.

n100 See *infra* notes 115-19 and accompanying text.

n101 See *infra* notes 120-27 and accompanying text.

n102 See *infra* notes 129-30 and accompanying text.

n103 See *infra* pt. III.

n104 Owen I, *supra* note 21, at 49 n.227. A similar approach was proposed in Riley, *supra* note 21, at 252.

n105 In *Roginsky*, Judge Friendly discussed setting a limit of $ 5,000-$ 10,000 in each individual case. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 840 (2d Cir. 1967). One obvious problem with this approach is that it leaves open the possibility of an aggregate award that could destroy a smaller enterprise. Moreover, dollar limits are inherently inflexible and may often be unfair.

n106 Juries may find this argument particularly persuasive. See Owen I, *supra* note 21, at 51 n.243. In Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981), for example, the jury awarded $ 125 million in punitive damages based largely on plaintiffs' evidence that Ford had saved $ 100 million by not adopting a safer design for the Pinto fuel system. Wall St. J., Feb. 14, 1978, at 1, col. 4. The Wall Street Journal reported that the jury foreman "recalls bringing up the $ 125 million figure himself. He reasoned that if Ford had saved $ 100 million by not installing safe tanks, an award matching that wouldn't really be punitive. So he added $ 25 million." *Id.* at 17, col. 1. The trial judge reduced the award to $ 3.5 million. 119 Cal. App. 3d at 772, 174 Cal. Rptr. at 358.

n107 *See* Mallor & Roberts, *supra* note 22, at 669; Owen II, *supra* note 32, at 1325; *Punitive Damages Overkill, supra* note 21, at 1811-12 (1979).

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damages by only a few of many plaintiffs. [27]

In the face of overwhelming opposition to the class actions by the plaintiffs, however, both class actions were decertified on appeal. [28] The appellate decisions are particularly significant because the rationales espoused by the courts are capable of wide application. Therefore, they may inhibit the use of class actions even in circumstances in which they would provide the most practicable way to adjudicate multiple punitive damages claims. [29]

This Article delineates those circumstances in which punitive damages class actions should be certified and recommends other adjudicatory procedures that may be used when class actions are inappropriate. Part I traces the development of the punitive damages doctrine and reviews its growth in products liability litigation. Part II discusses the present state of the law regarding multiple punitive damages claims and examines proposals for legislative and judicial reform. Part III reviews class action procedures, discusses their applicability in mass tort litigation and provides a detailed examination of the *Dalkon Shield* and *Skywalk* class actions. Finally, Part IV recommends adjudicatory procedures that provide for the equitable distribution of punitive damages awards and retain the doctrine's deterrent impact without destroying ongoing business enterprises.

I. PUNITIVE DAMAGES: GENERAL PRINCIPLES AND RECENT DEVELOPMENTS

A. *The Procedural Framework*

The doctrine of punitive damages [30] permits a plaintiff in a civil lawsuit to recover a sum of money in addition to compensatory damages when the defendant's tortious conduct is determined to have been **[*43]** particularly outrageous. [31] These awards are not really damages at all. Rather, they are quasi-criminal sanctions imposed to punish defendants and to deter repetition of the offensive conduct by the defendant and other potential wrongdoers. [32] Unlike criminal fines and penalties, however, punitive damages are awarded directly to a successful plaintiff in a civil lawsuit [33] and are assessed without the procedural safeguards granted to criminal defendants. [34] These features, together with the unpredictability of punitive damages awards, [35] have sparked **[*44]** much criticism and debate. [36] The survival of the doctrine in modern tort litigation despite these recurring attacks is testimony to its four thousand years of historical precedent. [37]

Inherited by American courts from the English common law, [38] the doctrine of punitive damages is generally accepted in all but four states [39] and is specifically provided for in many state [40] and federal [41] **[*45]** statutes. In most jurisdictions, punitive damages may be assessed for conduct that is malicious, reckless, willful, wanton or in conscious disregard of the consequences. [42] They are generally unavailable in breach of contract actions, [43] wrongful death actions [44] and actions against governmental entities. [45]

[*46] The procedural framework for applying the doctrine is substantially the same in all jurisdictions. [46] First, the trial judge must make a **[*47]** preliminary determination that there is sufficient evidence of aggravated conduct to justify the imposition of punitive damages. [47] Then the jury [48] has discretion to make an award and to determine an amount. [49] In assessing the amount, the jury is usually instructed by the trial judge to consider the purpose of punitive damages, [50] the culpability of the defendant's conduct, [51] the nature and extent of the plaintiff's injuries [52] and the wealth of the defendant. [53] Several states also require that the punitive damages award bear a reasonable relationship to the compensatory damages award. [54] Although the jury may choose not to award punitive damages, [55] any award it does make **[*48]** is subject to review by both the trial judge and the appellate courts. [56] Excessive verdicts may be reduced or may provide grounds for reversal, a new trial or the exercise of remittitur. [57]

B. *Application in Products Liability Litigation*

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n108 See *infra* note 183.

n109. Owen I, *supra* note 21, at 49 n.227; Riley, *supra* note 21, at 252.

n110. H.R. 5214, 97th Cong., 1st Sess. (1981) was substantially identical to Professor Owen's aggregate cap proposeal. *compare id.* § 11(d)-(e) (punitive damages limited to $ 1 million for each claimant; if aggregate sum of previous awards equal to lesser of $ 5 million of rive percent of net worth, punitive damages limited to lesser of litigation expenses or $ 1 million) *with* Owen I, *supra* note 21, at 48 & n.227 (punitive damages limited to $ 1 million for each claimant; if aggregate sum of previous awards equal to lesser of $ 5 million or five percent of net worth, punitive damages limited to litigation expenses). This bill, introduced by Rep. Norman D. Shumway (R. Cal.), was referred to teCommittee on Enerby and Commerce, 127 Cong. Rec. H 9529 (daily ed. Dec. 14, 1981), but was not reported out for consideration by the House of Representatives during the 97th Congress.

n111 *Punitive Damages Overkill, supra* note 21, at 1801.

n112 *Id.*

n113 Only the first plaintiff to secure a judicially-approved award would be assured of recovery. Smaller future awards, even if justified, would result in no recovery.

n114 The author of the "add-on" proposal suggests that enactment could be made under the power of Congress to regulate interstate commerce, U.S. Const., art. I, § 8, cl. 3. *See Punitive Damages Overkill, supra* note 21, at 1801.

n115 374 F. Supp. 850 (M.D. Pa. 1974).

n116 *Id.* at 857.

n117 *Id.* In rejecting plaintiff's argument that the jury should consider the impact of Aralen on the whole of society, the court stated:

Applying the plaintiff's rationale, each injured consumer of Aralen, using identical evidence regarding testing, notice, etc., could individually recover on behalf of "society" to punish the affront. Such a result would be ludicrous. Instead, we view the law to be that each Aralen consumer showing a bona fide injury may, if the evidence warrants, collect his reasonable proportion of the punitive damages the defendant owes to "society."
Id.

n118 *Id.* Professor Owen agrees with the court's view that the punitive damages verdict must be a reasonable sum in relation to the defendant's conduct vis-a-vis the plaintiff: "This view probably is correct in that it relates the punitive award to the plaintiff's injury consistent with traditional doctrine, reduces substantially the incentive to race to the courthouse, and anticipates a multiplicity of similar actions that together will result in many smaller 'stings' to the manufacturer." Owen I, *supra* note 21, at 51 n.243.

n119 *See* Restatement (Second) of Torts § 908 comment e (1979).

n120 *Id.*

n121 Unified School Dist. No. 490 v. Celotex Corp., 6 Kan. App. 2d 346, 355, 629 P.2d 196, 206 (1981); State *ex rel.* Young v. Crookham, 618 P.2d 1268, 1273 (Or. 1980); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 304, 294 N.W.2d 437, 459-60 (1980). *Contra* Lemer v. Boise Cascade, Inc., 107 Cal. App. 3d 1, 9-11, 165 Cal. Rptr. 555, 560-61 (1980). In Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967), Judge Friendly

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commended the trial court for instructing the jury to consider the effect of other cases and potential cases against the defendant, but expressed uncertainty about the effect of such an instruction: "[I]t is hard to see what even the most intelligent jury would do with this, being inherently unable to know what punitive damages, if any, other juries in other states may award other plaintiffs in actions yet untried." *Id.* The court noted that the trial judge in Ostopowitz v. Wm. S. Merrell Co., No. 5879-1963 (N.Y. Sup. Ct.), *reported in* N.Y.L.J., Jan. 11, 1967, at 21, col. 3, refused to admit the same evidence. *Id.*

n122 *See* Minn. Stat. Ann. § 549.20(3) (West Supp. 1981); Or. Rev. Stat. § 30.925 (1979).

n123 *See* Morris, *supra* note 53, at 1195; Owen II, *supra* note 32, at 1319; Riley, *supra* note 21, at 213.

n124 There is a split of authority regarding the admissibility of criminal sanctions arising out of the same conduct. *Compare* Browand v. Scott Lumber Co., 125 Cal. App. 2d 68, 74-75, 269 P.2d 891, 896 (1954) (assault and battery conviction properly considered in civil action based on the altercation) *and* Wirsing v. Smith, 222 Pa. 8, 16, 70 A. 906, 909 (1908) (conviction admissible in aggravated assault and battery suit arising out of the same incident) *with* Irby v. Wilde, 155 Ala. 388, 391, 46 So. 454, 454 (1908) (not proper to introduce assault conviction in mitigation of punitive damages in civil trial) *and* C. McCormick, *supra* note 42, at § 82 (generally not proper to introduce evidence of criminal punishment in mitigation of punitive damages). *See generally* Annot., 98 A.L.R.3d 870 (1980) (criminal liability barring or mitigating recovery of punitive damages).

n125 *See* Wangen v. Ford Motor Co., 97 Wis. 2d 260, 304-05, 294 N.W.2d 437, 459-60 (1980). There is, however, no unanimity on this point. Some contend that the difficulties of keeping abreast of every case and of predicting the outcome of future cases, including claims not yet filed, make this proposal impracticable to administer. *See* Wangen v. Ford Motor Co., 97 Wis. 2d 260, 325, 294 N.W.2d 437, 469 (1980) (Coffey, J., dissenting) ("Are the Wisconsin courts to monitor the courts of the other 49 states so as to insure that a Wisconsin court's award of punitive damages does not place an undue burden on the manufacturer and his employees?"); *Punitive Damages Overkill, supra* note 21, at 1806 (jury would be forced to predict outcome of subsequent actions as well as consider those being adjudicated or already adjudicated).

n126 *See* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 840 (2d Cir. 1967); *Punitive Damages Overkill, supra* note 21, at 1806-07. Professor Morris recommended that the jury be apprised of such evidence, but cautioned:

This would not be without its dangers, for juries might assume that since the defendant has once been found guilty, their verdict must necessarily be against him. They might also fail to see that the defendant has already been punished in part, and might feel it their duty to punish him more severely because of the injury to others than the plaintiff.In other words, this evidence which is given to the jury on the theory that the defendant should have a comparatively lenient admonition, if any, might prejudice them in such a way that the defendant would be held liable regardless of a failure of the plaintiff to prove his case, and be given more severe admonition than he would receive without its admission.
Morris, *supra* note 53, at 1195 n.40.

n127 This seems particularly true in a close case when the question of a product's defectiveness is seriously disputed. Plaintiffs' attorneys might welcome this evidence to tip the scales on a complicated issue of liability. The fact that other juries have found the defendant's conduct in marketing the product outrageous in addition to finding the product defective might be an important consideration in the jury room. *See* J. Ghiardi & J. Kircher, *supra* note 38, § 5.40, at 125-26; Mallor & Roberts, *supra* note 22, at 665.

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n128. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedure*, 69 Va. L. Rev. 269, 295 (1983). Evidence of other punitive damages claims might otherwise be inadmissible. *Id.* The prejudicial character of prior judgments against the defendant may be exacerbated by the fact that different standards of proof obtained in the previous trial. J. Ghiardi & J. Kircher, *supra* note 38, § 5.42, at 129.

n129 See *supra* notes 22, 71 and accompanying text.

n130 See *supra* text accompanying notes 50-53.

n131 See *supra* note 66.

n132 *See* Taylor v. Louisiana, 419 U.S. 522, 530 (1975); Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

n133 Morris, *supra* note 53, at 1195.

n134 *Id.* Professor Morris, however, was discussing a situation like that presented by the twin cases of Luther v. Shaw, 157 Wis. 231, 147 N.W. 17 (1914), and Luther v. Shaw, 157 Wis. 234, 147 N.W. 18 (1914). In thosae cases, a man who failed to fulfil a promise of marriage was held liable for punitive damages both to the jilted woman for breach of promise, 157 Wis. at 233, 147 N.W. at 17, and to her father for "seduction" of his daughter, 157 Wis. at 235, 147 N.W. at 18. Professor Morris specifically limited his proposal to these and similar facts: "Such practice might not be advisable when it would result in the presentation to a court of evidence of a highly disparate mass of losses only tied together by the common factor of being caused by a single act." Morris, *supra* note 53, at 1195.

n135 Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839-40 n.11 (2d Cir. 1967). The court ultimately rejected this procedure because it considered federal legislation the only practicable means of implementation: "[W]e perceive no way of accomplishing that except by legislation requiring all claims in respect of drugs supervised by the FDA tobe asserted in the Federal courts -- hardly a desirable course." *Id*

n136 *See, e.g.*, Fed. R. Civ. P. 20(a) (joinder); Fed. R. Civ. P. 22 (interpleader); Fed. R. Civ. P. 24 (intervention); Fed. R. Civ. P. 42(a) (consolidation).

n137 *See* F. James & G. Hazard, Civil Procedure § 12.10 (2d ed. 1977) (federal process can generally only be served within territorial limits of a state in which a court is sitting); C. Wright, Federal Courts 420-21 (4th 3d. 1983) (same).

n138 *See* C. Wright, *supra* note 137, at 420-21. See *supra* note 88.

n139 The Judicial Panel consists of seven circuit and district judges designated by the Chief Justice of the United States. 28 U.S.C. § 1407(d) (1976).

n140 *Id.* § 1407. The Judicial Panel, upon its own initiative or motion of a party, may order cases from various districts transferred to a convenient forum for pre-trial purposes. *Id.* § 1407(c). This procedure has been invoked in many instances of mass tort litigation. *See, e.g., In re* Cutter Labs., Inc. "Braunwald-Cutter" Aortic Heart Valve Prods. Liab. Litig., 465 F. Supp. 1295 (J.P.M.D.L. 1979); *In re* Multi-Piece Rim Prods. Liab. Litig., 464 F.Supp. 969 (J.P.M.D.L. 1979); *In re* Air Crash Disaster at Taipei Int'l Airport on July 31, 1975, 433 F. Supp. 1120 (J.P.M.D.L. 1977); *In re* Air Crash Disaster at Fla. Everglades on Dec. 29, 1972, 360 F. Supp. 1394 (J.P.M.D.L. 1973). Cases involving the Dalkon Shield IUD were transferred by the Judicial Panel in 1975 to the United States District Court for the District of Kansas for co-ordinated pre-trial proceedings. *See In re* A.H. Robins Co., "Dalkon Shield" IUD Prods.

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Liab. Litig., 406 F. Supp. 540 (J.P.M.D.L. 1975).

n141 *See* 28 U.S.C. § 1407(a) (1976). Another limitation on the Judicial Panel is its inability to consolidate cases pending in both state and federal courts. In addition, even in the unlikely event that all mass tort law suits were brought in federal courts, consolidation within a single district could be achieved only with respect to the cases already pending. Therefore, when claims arise over an extended period of time, as do many that arise from a single design defect in a mass-produced product, consolidation would not prevent multiple punitive damages awards. *See* J. Ghiardi & J. Kircher, *supra* note 38, § 5.42, at 128.

n142 28 U.S.C. § 1404(a) (1976); *see In re* Multidistrict Civil Actions Involving Air Crash Disaster near Hanover, N.H. on Oct. 25, 1968, 342 F. Supp. 907, 910 (D.N.H. 1971).

n143 *See* 7 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1751 (1972 & Supp. 1980).

n144 See *infra* notes 216-20 and accompanying text.

n145 See *infra* pt. IV (A).

n146 For a detailed history of equitable class actions and their eventual application in damages cases, see Foster, The Status of Class Action Litigation, Research Contributions of the American Bar Foundation (No. 4 1974).

n147 The full text of original Rule 23 and advisory committee notes are reprinted in 3B J. Moore & J. Kennedy, Moore's Federal Practice P 23.01 [1.-1], [2] (2d ed. 1982). Most states have some form of class action statute, several of them similar to Rule 23. Note, *State Class Action Statutes: A Comparative Analysis*, 60 Iowa L. Rev. 93, 102 (1974); Comment, *Federal and State Class Actions: Developments and Opportunities*, 46 Miss. L.J. 39, 74-76, 78-82 (1975); *see* Unif. Class Actions [Act] [Rule], 12 U.L.A. 21 (Supp. 1983) (act similar to Fed. R. Civ. P. 23).

n148 Original Rule 23 reflected Professor Moore's terminology and distinction between "true," "hybrid," and "suprious" class suits. It provided in relevant part:[One or more persons may bring suit on behalf of a class] when the character of the right sought to be enforced is

(1) joint, or common . . .

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.
3B J. Moore & J. Kennedy, *supra* note 147, at P 23.01 [1.-1], at 23-14. Criticism focused on the inability to comprehend the criteria. *See* note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 Colum. L. Rev. 818, 822 (1946) ("The federal courts have, in general, uncritically accepted Professor Moore's terminology and the analysis of representative actions in terms of jural relationships and joinder, to their own confusion and the frustration of the purpose of representative actions.").

n149 Rule 23(a), as amended, provides:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of th eclaims or defenses of the

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class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual memebers of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against the members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Action.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favourable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied

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accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such a manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.
Fe. R, Civ. P. 23.

n150 *See* Walker v. Jim Dandy Co., 638 F.2d 1330, 1334 (5th Cir. 1981); Shapiro v. Midwest Rubber Reclaiming Co., 626 F.2d 63, 71 (8th Cir. 1980), *cert. denied*, 101 S. Ct. 860 (1981); Rex v. Owens *ex rel.* State of Okla., 585 F.2d 432, 435-36 (10th Cir. 1978).

n151 *See* A. Miller, An Overview of Federal Class Actions: Past, Present, and Future 22-31 (1977). There are two additional general prerequisites which have been implied by the courts: that there be an actual identifiable class, 7 C. Wright, A. Miller & M. Kane, *supra* note 143, § 1760, and that a class representative be a member of that class. *Id.* § 1761.

n152 Fed. R. Civ. P. 23(b). Rule 23(b)(2), which applies to actions in which the appropriate remedy is either injunctive or declaratory relief, is not generally pertinent to a discussion of mass tort litigation.

n153 The term "party opposing the class," although ambiguous, is construed to mean the party opposing the claims of the class, rather than a party opposing maintenance of the case as a class action. 3B J. Moore & J. Kennedy, *supra* note 147, P23.35[1], at 23-266 n.5.

n154 *See* Dale Elec., Inc. v. R.C.L. Elec., Inc., 53 F.R.D. 531 (D.N.H. 1971) (patent infringment action against infringing class).

n155 The advisory committee note to the 1966 amendment of Rule 23(b)(1)(B) states:

In various situations and adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuits. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem.
Fed. R. Civ. P. 23 advisory committee note to 1966 amendment.

n156 Although Rule 23 only provides for notice in Rule 23(b)(3) class actions, the modern trend is to require notice in subsection (b)(1) mandatory actions as well. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564-65 (2d Cir. 1968); Richmond Black Police Officers Ass'n v. City of Richmond, 386 F. Supp. 151, 158 (E.D. Va. 1974); Bormann v. Long Island Press

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Publishing Co., 379 F. Supp. 951, 954 (E.D.N.Y. 1974); Lopez v. Wyman, 329 F. Supp. 483, 486 (W.D.N.Y. 1971), *aff'd mem.*, 404 U.S. 1055 (1972).

n157 3B J. Moore & J. Kennedy, *supra* note 147, P 23.45[1], at 23-316.

n158 A Miller, *supra* note 151, at 40. Another distinguishing characteristic of Rule 23(b)(3) class actions is that they are not mandatory. Concerned about binding absent class members, the drafters of the 1966 amendments provided in Rule 23(c)(2) that the best practicable notice be given to all Rule 23(b)(3) class members informing them of their right to opt out of the class if they do not wish to be bound by the result.

n159 This goes well beyond the commonality prerequisite in Rule 23(a), which merely requires the existence of common questions of law or fact. Predominance, however, does not mean that every issue need be common to all class members. *See* Bryan v. Amrep Corp., 429 F. Supp. 313, 317 (S.D.N.Y. 1977); Contract Buyers League v. F & F Inv., 48 F.R.D. 7, 11 (N.D. Ill. 1969); 7A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1778 (1972 & Supp. 1982).

n160 The determination of superiority requires a qualitative analysis based on the factors enumerated in Rule 23(b)(3), including the interest in individual control of the litigation, the extent and nature of cases already pending, the desirability of litigating, in the particular forum, and the difficulty of managing a class action.

n161 The 1938 predecessor of Rule 23(b)(3) was nothing more than a permissive joinder device by which similarly situated claimants meeting the prerequisites could opt into the class. *See* 3B J. Moore & J. Kennedy, *supra* note 147, P23.45[1], at 23-314. The 1966 amendments changed the procedure so that all class members receiving adequate notice are bound unless they opt out. See *supra* note 149.

n162 Simon, *Class Actions -- Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 377 (1972); *see* Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 Harv. L. Rev. 664, 670 (1979). Professor Miller, however, argues that although the shift from an opt in to an opt out procedure made class actions more available in many cases, the large increase in consumer, antitrust, securities and environmental litigation would have occurred in any event because of the consumer and environmental movements, new legislation expanding private rights and remedies, and a growing pool of attorneys looking for new avenues of litigation. Miller, *supra*, at 669-76.

n163 Miller, *supra* note 162, at 665-66. "[Critics] also have charged widespread abuse of the rule by lawyers and litigants on both sides of the 'v.,' including unprofessional practices relating to attorneys' fees, 'sweetheart' settlement deals, dilatory motion practice, harassing discovery, and misrepresentation to judges." *Id. see* Federal Judicial Center, Manual for Complex Litigation § 1.41 (4th ed. 1977); DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience* (pts. 1 & 2), 1976 Am. B. Found. Research J. 1021, 1273; Franks, *Rule 23 -- Don Quixote Has a Field Day: Some Ethical Ramifications of Securities Fraud Class Actions*, 46 Chi.[-]Kent L. Rev. 1 (1969); Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits -- The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 9 (1971); Kirkham, *Complex Civil Litigation -- Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 203 (1976); Simon, *supra* note 162, at 377.

n164 *See In re* Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974); La Mar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973); Miller, *supra* note 162, at 679.

n165 *See* Miller, *supra* note 162, at 679.

n166 *Id.*

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n167 Zahn v. International Paper Co., 414 U.S. 291, 301 (1973); Snyder v. Harris, 394 U.S. 332, 339-40 (1969).

n168 Eisen v. Carlisle & Jaquelin, 417 U.S. 156, 177 (1974).

n169 Miller, *supra* note 162, at 680.

n170 3B J. Moore & J. Kennedy, *supra* note 147, P23.45[3], at 23-353 n.40 states:

[C]onsidering the wide-spread experience courts are gaining in the use of separate trials for the class issues of liability and individual issues of damage, a mass accident appears peculiarly appropriate for class treatment. Indeed, the question of liability to all those injured in a plane or train crash is more likely to be uniform than that of liability for manipulation of the price of securities; with the introduction of such large-scale public transportation facilities as the "jumbo jets," the ability to determine liability for an accident in one proceeding will be even more desirable.

n171 7A C. Wright, A. Miller & M. Kane, *supra* note 159, § 1783, at 116-17 states:

The central issue of liability . . . may be a difficult one that occasionally will require lengthy expert testimony, perhaps concerning the physical condition of a vehicle or the state of a technological art in a particular field of transportation or manufacturing. If the various tort claims were tried individually, the evidence would have to be repeated time and time again. . . . Absent other considerations, it seems wasteful to relitigate the same liability issue in different actions and before different courts. The argument for class action treatment is particularly strong in cases arising out of mass disasters such as an airplane crash in which there is little chance of individual defenses being presented.

n172 Fed. R. Civ. P. 23 advisory committee note to 1966 amendment. In a subsequent article, the reporter for the committee wrote that the committee's argument against mass accident class actions was not based on the presence of individual damage questions, a common situation in Rule 23(b)(3) class actions, but was based on the fact that often "the class [action] procedure is not 'superior' to more commonplace devices." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 393 (1967); *see* Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L. Rev. 433, 438-46 (1960) (joinder, interpleader, intervention, consolidation, joint trials and stays are alternative mechanisms for handling mass accident litigation). The committee's reasoning is inapplicable to single event disasters such as commercial airline accidents or building collapses. The issues of liability and defenses to liability would always be common in such cases and a class action would therefore be the superior form of adjudication.

n173 Class actions have been rejected in the following personal injury cases:

(1) Involving the drug DES: Ryan v. Eli Lilly & Co., 84 F.R.D. 230 (D.S.C. 1979); Morrissy v. Eli Lilly & Co., 76 Ill. App. 3d 753, 394 N.E.2d 1369 (1979); Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 420 A.2d 1305 (Law Div. 1980).

(2) Involving the Dalkon Shield intrauterine device: *In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir.) (certification reversed on appeal), *cert. denied*, 103 S. Ct. 817 (1983); Rosenfeld v. A.H. Robins Co., 63 A.D.2d 11, 407 N.Y.S.2d 196, *appeal dismissed*, 46 N.Y.2d 731, 385 N.E.2d 1301, 413 N.Y.S.2d Harville v. Johns-Manville Prods. Corp., No. 78-642 (S.D. Ala. Nov. 21, 1979); Yandle v. PPG Indus., Inc., 65 F.R.D. 566 (E.D. Tex. 1974).

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(4) Mass disaster/single occurence: *In re* Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.) (hotel skywalk collapse; certification reversed on appeal), *cert. denied*, 103 S. Ct. 342 (1982); McDonnel Douglas Corp. v. United States Dist. Court, 523 F.2d 1083 (9th Cir. 1975) (air crash; certification reversed on appeal), *cert. denied*, 425 U.S. 911 (1976); Marchesi v. Eastern Airlines, Inc., 68 F.R.D. 500 (E.D.N.Y. 1975) (air crash); Causy v. Pan Am. World Airways, Inc., 66 F.R.D. 392 (E.D. Va. 1975) (air crash); Daye v. Pennsylvania, 334 F.Supp. 1337 (E.D. Pa. 1972) (bus accident), *aff'd on other grounds*, 483 F.2d 294 (3d Cir. 1973), *cert. denied*, 416 U.S. 946 (1974); Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76 (E.D. Pa. 1970) (air crash).

(5) Other: *In re* Three Mile Island Litig., 87 F.R.D. 433 (M.D. Pa. 1980) (Three Mile Island incident); Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970) (prisoner injuries resulting from constitutional violations), *aff'd in part, rev'd in part on other grounds*, 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972); City of San Jose v. Superior Ct., 12 Cal. 3d 447, 525 P.2d 701, 115 Cal. Rptr. 797 (1974) (noise pollution from airport); D'Amico v. Sitmar Cruises, Inc., 109 Cal. App. 3d 323, 167 Cal. Rptr. 254 (1980) (food contamination on cruise ship); Snyder v. Hooker Chems. & Plastics Corp., 104 Misc. 2d 735, 429 N.Y.S.2d 153 (Sup. Ct. 1980) (toxic wastes).

n174 *See, e.g., In re* Northern Dist. of Cal., Dalkon Shield Prods. Liab. Litig., 693 F.2d 847, 850, 855 (9th Cir. 1982) (divergent legal standards; diverse proximate cause issues), *cert. denied*, 103 S. Ct. 817 (1983); Yandle v. PPG Indus., Inc., 65 F.R.D. 566, 570-71 (E.D. Tex. 1974) (diverse proximate cause issues); Daye v. Pennsylvania, 344 F. Supp. 1337, 1342-43 (E.D. Pa. 1972) (interest in individual control), *aff'd on other grounds*, 483 F.2d 294 (3d Cir. 1973), *cert. denied*, 416 U.S. 946 (1974); Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76, 78-79 (E.D. Pa. 1970) (divergent legal standards; interest in individual control); Rosenfeld v. A.H. Robins Co., 63 A.D.2d 11, 16-17, 407 N.Y.S.2d 196, 199 (diverse proximate cause issues), *appeal dismissed*, 46 N.Y.2d 731, 385 N.E.2d 1301, 413 N.Y.S.2d 374 (1978); *see also* Comment, *Mass Accident Class Actions*, 60 U. Cal. L. Rev. 1615, 1638 (1972) ("[T]he three potential obstacles to a mass accident class action are the applicability of differing laws to individual class members, a strong individual interest in controlling separate actions, and the lack of a proper court in which to concentrate the litigation.") [hereinafter cited as *Mass Accident Class Actions*].

n175 Class actions are viewed more favorably when mass tort claims involve only economic losses, or when personal injuries are part of larger economic loss claims. *Compare* Ouellette v. International Paper Co., 86 F.R.D. 476 (D. Vt. 1980) (diminished property value and enjoyment of use caused by discharge of waste products into Lake Champlain) *and* Pruit v. Allied Chem. Corp., 85 F.R.D. 100 (E.D. Va. 1980) (commercial losses caused by discharge of toxic chemical into the James River) *and* American Trading & Prod. Corp. v. Fischbach & Moore, Inc., 47 F.R.D. 155 (N.D. Ill. 1969) (commercial losses to exhibition resulting from convention center fire) *and* Anthony v. General Motors Corp., 33 Cal. App. 3d 699, 109 Cal. Rptr. 254 (1973) (reversing denial of certification for owners of GM trucks or campers equipped with defective wheels) *and* State *ex rel.* Anaconda Aluminum Co. v. District Ct., 158 Mont. 228, 490 P.2d 351 (1971) (tree damage caused by floride plant emissions) *and* Hurt v. Midrex Div. of Midland Ross Corp., 276 Or. 925, 556 P.2d 1337 (1976) (denial of class action reversed as to plaintiffs whose automobiles suffered paint damage from particulates emitted from defendant's plants) *with* cases cited *infra* note 176.

n176 *See, e.g., In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980) (Agent Orange exposure); Payton v. Abbott Labs., 83 F.R.D. 382 (D. Mass. 1979) (DES); Coburn v. 4-R Corp., 77 F.R.D. 43 (E.D. Ky. 1977) (fire at supper club); Bentkowski v. Marfuerza Compania Maritima, S.A., 70 F.R.D. 401 (E.D. Pa. 1976) (contaminated provisions served to cruise ship passengers); Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558 (S.D. Fla. 1973) (same), *aff'd*, 507 F.2d 1278 (5th Cir. 1975); Stewart v. North Am. Asbestos Corp., No. 78-L201 (McClean Co., Ill. Cir. Ct. 1982) (asbestos-related illness). See *infra* note

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234 for a discussion of Skywalk state and federal class actions certified after the court of appeals reversed a previous federal certification.

n177 A few classes have been mistakenly certified under Rule 23(b)(1)(A), based on the possibility that individual litigation could result in inconsistent verdicts on the issue of liability for compensatory damages. *E.g., In re* Federal Skywalk Cases, 93 F.R.D. 415, 423-24 (W.D. Mo.), *rev'd on other grounds*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); Coburn v. 4-R Corp., 77 F.R.D. 43, 46 (E.D. Ky. 1977); Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558, 561 (S.D. Fla. 1973), *aff'd*, 507 F.2d 1278 (5th Cir. 1975); *see In re* Gabel, 350 F. Supp. 624, 630 (C.D. Cal. 1972), *vacated sub nom.* McDonnell Douglas Corp. v. United States Dist. Ct., 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). Under the better and majority view, the possibility of inconsistent verdicts on liability in actions for personal injuries does not mean a defendant is faced with incompatible standards of conduct within the meaning of Rule 23(b)(1)(A). No inconsistent standards result from the fact that a defendant may win some of the cases and lose others. *See In re* Federal Skywalk Cases, 680 F.2d 1175, 1187 n.8 (8th Cir.) (Heaney, J., dissenting), *cert. denied*, 103 S.Ct. 342 (1982); McDonnell Douglas Corp. v. United States Dist. "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 789 (E.D.N.Y. 1980); Payton v. Abbott Labs, Inc., 83 F.R.D. 382, 389 (D. Mass. 1979); Causey v. Pan Am. World Airways, Inc., 66 F.R.D. 392, 398 (E.D. Va. 1975); *Mass Accident Class Actions, supra* note 174, at 1620.

n178 *See, e.g., In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 790 (E.D.N.Y. 1980); Payton v. Abbott Labs., Inc., 83 F.R.D. 382, 386-87 (D. Mass. 1979); Bentkowski v. Marfuerza Compania Maritima, S.A., 70 F.R.D. 401, 404 (E.D. Pa. 1976); Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558, 561 (S.D. Fla. 1973), *aff'd*, 507 F.2d 1278 (5th Cir. 1975). The extent and severity of injuries are also significant. Bentkowski v. Marfuerza Compania Maritima, S.A., 70 F.R.D. 401, 404 (E.D. Pa. 1976).

n179 *See In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 899 (N.D. Cal. 1981) ("Punitive damages are, to a large degree, a windfall to a plaintiff . . . exacted for the benefit of society . . . ."), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983); D. Dobbs, Handbook on the Law of Remedies § 3.9, at 204 ("Punitive damages are not given as of right in any state . . . .").

n180 Each district court also certified classes concerning liability for compensatory damages. *In re* Federal Skywalk Cases, 93 F.R.D. 415, 419 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 903 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). These certifications were based on considerations different from those that supported adjudicating all the punitive damage claims in a single proceeding. *Compare* 93 F.R.D. at 422-24 (compensatory damages) *with id.* at 424-25 (punitive damages), and *compare* 526 F. Supp. at 894-96 (compensatory damages) *with id.* at 896-900 (punitive damages).

n181 *See In re* Federal Skywalk Cases, 93 F.R.D. 415, 424 (W.D. Mo.) ("[M]embers of the class face a very real risk that the winner of the race to the courthouse might be awarded all of the monies available."), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 898 (N.D. Cal. 1981) ("It is almost certain that an award of punitive damages to a plaintiff in one case will alter the potential recovery of a plaintiff in a later filed suit."), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

n182 93 F.R.D. at 424-25; 526 F. Supp. at 897-98.

n183 The *Skywalk* court stated: "Those persons who have filed lawsuits presently seek compensatory damage awards in excess of one billion dollars and punitive damage awards in

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Punitive damages have been awarded in products liability actions for over one hundred years. [58] A recent dramatic increase in both the number of cases [59] and the propensity of plaintiffs' lawyers to seek punitive awards, [60] however, has generated a new wave of criticism. Some commentators have assailed the doctrinal inconsistency of permitting a punitive damages claim (which must be based on the wrongful conduct of defendant) in an action based upon strict products liability (which focuses on the product itself). [61] Many courts have held, however, that the evidence necessary to justify a punitive damages award need not parallel that required to establish liability for **[*49]** compensatory damages. [62] Accordingly, verdicts assessing punitive damages have been upheld in products liability actions grounded in strict liability [63] as well as in negligence [64] and fraud and deceit. [65]

A more troublesome criticism is that juries in products liability cases are ill-equipped to mete out fair and effective punishment to large corporate defendants. [66] The complexity of product design cases, [67] the difficulty of discerning the "wrongfulness" of a corporate decision-making process [68] and the problem of ascertaining the real wealth of a **[*50]** modern corporation [69] are all factors that distinguish products liability cases from single-incident torts cases. A growing number of commentators [70] and members of Congress [71] and at least one state legislature [72] have taken the position that after a jury decides punitive damages should be imposed, the trial judge should assess the amount. Supporters of this position argue that the determination of appropriate punishment in these cases requires expertise and sophisticated insight into social policy more likely to be possessed by a dispassionate judge than by a jury. [73] While the jury's role in assessing punitive damages in products liability litigation has survived so far, there is a trend toward tighter judicial control over punitive awards. [74]

[*51] C. *Mass Tort Punitive Damages Awards -- The MER/29 Cases*

The emergence of modern mass tort litigation has caused special problems in assessing and controlling punitive damages awards. A single design error, inadequate warning or recurrent manufacturing mistake can permeate an entire product line, resulting in tens, hundreds or thousands of personal injury lawsuits with accompanying punitive damages claims. [75] Individual awards that appear reasonable can aggregate to threaten the very survival of a business entity. [76]

The first mass tort litigation that presented this problem involved an anti-cholestrol drug sold under the trade name MER/29. [77] Promoted as a safe way to prevent heart attacks, [78] the drug was used by **[*52]** about 400,000 persons before the manufacturer removed it from the market in response to reports of injurious side effects. [79] Between 1961 and 1967, more than 1500 personal injury lawsuits were filed against the manufacturer in state and federal courts. [80] Many of these actions included claims for punitive damages based upon allegations of fraud in connection with test data submitted by the manufacturer to the Food and Drug Administration. [81]

In *Roginsky v. Richardson-Merrell, Inc.*, [82] the plaintiff was awarded $ 17,500 in compensatory damages and $ 100,000 in punitive damages after a lengthy jury trial. [83] The Second Circuit affirmed the compensatory damages award but reversed the punitive damages award on the ground that the issue of punitive damages should not have been submitted to the jury. [84] Although the court recognized that **[*53]** more than one recovery of punitive damages against a tortfeasor is permissible, [85] it held that the evidence of high-level complicity in the fraudulent conduct was insufficient to justify such an award. [86] The appellate opinion has been cited frequently [87] for the dicta in which Judge Friendly warned of the danger of punitive damages "overkill" in mass tort cases: "The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering . . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overskill." [88]

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excess of 500 million dollars." *In re* Federal Skywalk Cases, 93 F.R.D. 415, 419 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982). The court observed that while the defendants' assets and liability insurance would be adequate to pay the compensatory damages claims, their ability to pay punitive damages awards was questionable, particularly if Missouri law permitted more than one award. *Id.* at 424. Even if Missouri law were construed to permit only one award of punitive damages, the court reasoned that a limited fund would still exist because all but the first successful plaintiff would be precluded from recovery. *Id.* at 425. Finally, the court noted the potential conflict of interest faced by attorneys representing more than one plaintiff if the cases were permitted to proceed individually. A victory by the plaintiff whose case was ready for trial first might preclude the attorney's other clients from recovering punitive damages. *Id.* at 425. The *Dalkon Shield* court noted:

At the present time, some 1,573 suits involving claims for compensatory damages well over $ 500 million and claimed punitive damages in excess of $ 2.3 billion, are pending against A.H. Robins. The potential for the constructive bankruptcy of A.H. Robins, a company whose net worth is $ 280,394,000.00, raises the unconscionable possibility that large numbers of plaintiffs who are not first in line at the courthouse door will be deprived of a practical means of redress.
In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 893 (N.D. Cal. 1981) (footnote omitted), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

n184 *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 898 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). The *Dalkon Shield* court reasoned that at some point overlapping punitive damages awards "violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process." *Id.* at 899. In those circumstances, the court observed:
If plaintiff No. 1 recovers one million dollars in punitive damages, plaintiff No. 2 runs a serious risk of being told that the amount awarded in the first suit represented an implied finding of the maximum amount the defendant should be punished. Obviously, the greater the number of plaintiffs, the more serious the risk becomes that the late plaintiff will find her demand for punitive damages dismissed. At the very least, the trial court may admit evidence as to the payment of prior awards working to the detriment of a party seeking additional punishment for the same misconduct.
Id. at 898 (footnotes omitted).

n185 *In re* Federal Skywalk Cases, 93 F.R.D. 415, 424-25 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *In re* Nothern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 897-98 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). According to the district court in the *Dalkon Shield* case, the representative parties would first present their compensatory damages cases and then proceed with the punitive damages phase of the trial. 526 F. Supp. at 920. If the jury determined that the defendant was liable to the nationwide class for punitive damages, it would be instructed to assess an amount which would punish the defendant once for all potential claimants. *Id.* The court suggested two alternative pro-rata distribution schemes -- one based on the total number of claimants, and the other based on the amount of compensatory damages awards. *Id.* at 920 n.183. Although beyond the scope of this Article, it is assumed that the proceeds of any classwide punitive damages recovery would be distributed in some equitable manner along the lines suggested by the district court.

n186 *See In re* Nothern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 849-50 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983); *In re* Federal skywalk cases, 680 F.2d 1175, 1178 (8th Cir), *cert denied*, 103 S. Ct. 342 (1982).

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n187 The state court, in which all but 18 of the approximately 140 Skywalk lawsuits were filed, 680 F.2d at 1177 n.5, invested considerable time in the settlement process with remarkable success. Prior to the certification order of January 25, 1982, 121 injury and death claims had been settled for a total of more than $ 18.6 million. This represented 41% of the death claims, 35% of the minor personal injury claims and 26% of the injury claims by persons requiring hospitalization. *See* Petitioners' Reply to Class Counsel's Brief in Opposition to Petition for Mandamus at 13, *In re* Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982). In the order certifying the class, the district court expressly prohibited any further settlements of punitive damages claims while settlements of compensatory damages claims were permitted to continue. 93 F.R.D. at 428. The effect of this order was to halt the fast pace of settlements. Petitioners' Reply to Class Counsel's Brief in Opposition to Petition for Mandamus at 14, *In re* Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982). Defendants were understandably unwilling to settle just the compensatory damages claims while leaving unresolved the punitive damages claims. Brief of Appellant Jacqueline N. Rau at 36, *In re* Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982). The situation was aggravated when the lead counsel appointed for the class filed a motion to prohibit any action upon the announced intention of certain defendants to offer to settle with plaintiffs in return for full release of both compensatory and punitive damages claims. *Id.* at 18. Class counsel were concerned that additional settlements, should the jury be advised of them, might reduce the ultimate punitive damage award in the class action trial and result in "unfairness" to class counsel in connection with the fees to be awarded. Memorandum in Support of Plaintiff's Motion in Limine at 14 n.7, *In re* Federal Skywalk Cases, 93 F.R.D. 415 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982), *cited in* Brief of Appellant Jacqueline N. Rau at 36, *In re* Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982). The result was that counsel for the class, apparently in the interest of preserving a large fee, opposed the expeditous payment of claims of the class members it was appointed to represent. *Id.* at 38. One of the appellants' briefs put the situation in somewhat earthier terms:

> The various cases arising out of the skywalk collapse were proceeding expeditiously and efficiently, under the auspices of plaintiffs' and defendants' coordinating committees, in the Circuit Court for Jackson County, Missouri, well before the institution of the class action in federal court. That entire process is now disrupted. The punitive damage "tail" is wagging the compensatory damage "dog," and lawyers from the East with dollar signs in their eyes have hold of the leash.
> *Id.* at 43-44.

n188 Opening Brief for Appellant at 11-14, *In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982), *vacated*, 103 S. Ct. 817 (1983). Although the court officially granted the defendant's motion for certification of the class, the facts indicated that as a practical matter the court acted *sua sponte*. Indeed the district court expressly held that it was proper for it to have done so. *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 894 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). The Ninth Circuit, in reversing, did not address plaintiffs' argument that a *sua sponte* order was inconsistent with the traditionally passive role of the court. *Compare* *In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983) *with* Opening Brief of Appellant at 11-14, *In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). *See also* Wilson v. Zarhadnick, 534 F.2d 55, 57 (5th Cir. 1976) ("The grant, *sua sponte*, of class action relief when it is neither requested nor specified, is an obvious error."); La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 463-64 (9th Cir. 1973) (judiciary has "fundamentally passive" role in class action litigation).

A court apparently may grant class certification *sua sponte* as part of its responsibility to

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administer litigation in a fair and efficient manner. Although the Federal Rules of Civil Procedure neither authorize nor preclude *sua sponte* class certification, such orders have been used in analogous contexts. *See, e.g.*, Lead Indus. Ass'n v. Occupational Safety & Health Admin., 610 F.2d 70, 79 n.17 (2d Cir. 1979) (transfer pursuant to 28 U.S.C. § 1404 (a) (1976)); Cass v. Sonnenblick-Goldman Corp., 287 F. Supp. 815, 819 (E.D. Pa. 1968) (consolidation under Fed. R. Civ. P. 41(a)). Additionally, it has been held that when an action is brought as a class, a court need not wait for a motion by the parties before making the determination of certification. *See* Walker v. World Tire Corp., 563 F.2d 918, 921 (8th Cir. 1977); Senter v. General Motors Corp., 532 F.2d 511, 521-22 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976).

n189 *See* Opening Brief of Appellant at 14-18, *In re* Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). The Ninth Circuit, however, denied class certification on other grounds and did not address this issue. There was no apparent jurisdictional bar to class certification in this case. Federal courts have indicated that jurisdiction can be exercised over both defendant and plaintiff nonresident class members, albeit in limited fact situations, without meeting the minimum contacts requirements set forth in International Shoe Co. v. Washington, 326 U.S. 310 (1945), provided due process is satisfied through notice and adequate representation. *In re* Gap Stores Sec. Litig., 79 F.R.D. 283, 291-92 (N.D. Cal. 1978); United States v. Trucking Employers, Inc., 72 F.R.D. 98, 99-100 (D.D.C. 1976).

While this approach to jurisdiction may be accepted in federal court, there is less agreement over whether a state court can exercise jurisdiction over absentee class members due to territorial limitations on its power. While some state courts have followed the federal approach by requiring notice and adequate representation, *see* Shutts v. Phillips Petroleum Co., 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978); Schlosser v. Allis-Chalmers Corp., 86 Wis. 2d 226, 271 N.W. 2d 879 (1978), others have held that traditional minimum contacts analysis must be applied. *See* Miner v. Gillette Co., 89 Ill. App. 3d 315, 411 N.E.2d 1092 (1980), *modified*, 87 Ill. 2d 7 (1981), *cert. dismissed*, 103 S. Ct. 484 (1983); Spirek v. State Farm Mut. Auto Ins. Co., 65 Ill. App. 3d 440, 382 N.E.2d 111 (1978); Feldman v. Bates Mfg. Co., 143 N.J. Super. 84, 362 A.2d 1177 (App. Div. 1976); Klemow v. Time, Inc., 466 Pa. 189, 352 A.2d 12, *cert. denied*, 429 U.S. 828 (1976). For further analysis of this issue, see Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 Harv. L. Rev. 718 (1979); Note, *Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction*, 25 Hastings L.J. 1411 (1974); Note, *Toward a Policy-Based Theory of State Court Jurisdiction over Class Actions*, 56 Tex. L. Rev. 1033 (1978); Comment, *Civil Procedure: In Personam Jurisdiction over Nonresident Plaintiffs in Multistate Class Actions*, 17 Washburn L.J. 382 (1978).

n190 *See* Brief of the Oregon Appellants at 15, *In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). Such differences, however, can generally be handled in a class action by the use of subclasses, as provided for in Rule 23(c)(4), if there are not so many subclasses that the jury would be unduly confused.

The plaintiffs also argued that a nationwide punitive damages class action raised insurmountable choice of law problems because each state in which cases were pending would apply its own standards for punitive damages. Brief of the Oregon Appellants at 8-13, *In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). California law, for example, requires that the evidence establish at a minimum that the defendant was reckless. *See* Taylor v. Superior Court, 24 Cal. 3d 890, 894-95, 598 P.2d 854, 856, 157 Cal. Rptr. 693, 696 (1979); G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22, 32, 122 Cal. Rptr. 218, 225 (1975); Cal. Civ. Code § 3294 (West Supp. 1983). Several other jurisdictions sanction punitive damages awards upon a finding of recklessness or gross negligence. *See, e.g.*, Sturm, Ruger & Co. v.

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Day, 594 P.2d 38, 47 (Alaska 1979), *modified on other grounds*, 615 P.2d 621 (1980), *cert. denied*, 454 U.S. 894 (1981); Smith v. Chapmin, 115 Ariz. 211, 214-15, 564 P.2d 900, 903-04 (1977); Kang v. Harrington, 59 Hawaii 652, 663, 587 P.2d 285, 293 (1978); Jolley v. Puregro Co., 94 Idaho 702, 708, 496 P.2d 939, 945 (1972); Lindquist v. Ayerst Labs., Inc., 227 Kan. 308, 316, 607 P.2d 1339, 1347 (1980); Butcher v. Petranek 181 Mont. 358, 361-62, 593 P.2d 743, 745 91979); Samedan Oil Corp. v. Neeld, 91 N.M. 599, 601, 577 P.2d 1245, 1247 91978); Pennsylvania Glass Sand Corp. v. Ozment, 434 P.2d 893, 898 (Okla. 1967). The resolution of these choice of law problems in connection with multistate claims for punitive damages is discussed *infra* note 226.

n191 The district court in the *Dalkon Shield* case requested interlocutory review pursuant to 28 U.S.C. § 1292(b) (1976). *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 919 (N.D. Cal. 1981), *vacated* 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). In the *Skywalk* case, the Eighth Circuit agreed to hear the plaintiffs' appeal on the ground that the order was an injunction within the meaning of 28 U.S.C. § 1292(a)(1) (1976), which provides in pertinent part: "the courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions . . . ." *In re* Federal Skywalk Cases, 680 F.2d 1175, 1180 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982). Certain plaintiffs also sought review of the district court's order on a petition for mandamus, asserting an abuse of judicial discretion. *Id.* at 1177. The court of appeals did not discuss the propriety of review on that basis.

n192 *In re* Federal Skywalk Cases, 680 F.2d 1175, 1183 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982) (construing the Anti-Injunction Act, 28 U.S.C. § 2283 (1976)). The majority opinion did not distinguish between the subsection (b)(1)(A) class, which was certified on the issues of liability for compensatory and punitive damages, and the subsection (b)(1)(B) class, which was certified on the issues of liability for and amount of punitive damages. The dissent, however, correctly stated that the subsection (b)(1)(A) class was improper because the rule was not meant to require certification to avoid the possibility of inconsistent damages verdicts. *Id.* at 1187 n.8 (Heaney, J., dissenting). See *supra* note 177.

n193 *In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 851 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

n194 *Id.* at 852. The Ninth Circuit also decertified the statewide subsection (b)(3) class for compensatory damages because it failed to meet the typicality requirement of Rule 23(a) as well as the superiority requirement of subsection (b)(3). *Id.* at 854-56. This is consistent with the trend of cases in the Ninth Circuit and throughout the country concerning common question class actions on mass tort liability issues. See *supra* note 173.

n195 *See In re* Federal Skywalk Cases, 680 F.2d 1175, 1182 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 851-52 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

n196 28 U.S.C. § 2283 (1976). The Act provides that a "court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." *Id.*

n197 *Id.*

n198 *In re* Federal Skywalk Cases, 680 F.2d 1175, 1180 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982).

n199 *Id.* at 1182. In a strong dissent, Judge Heaney wrote that because the inevitable

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effect of a Rule 23(b)(1)(B) certification order is to preclude independent litigation in all other courts, it "seems self-evident that an injunction to protect the ordinary scope of a mandatory class action is 'necessary in aid of' the federal jurisdiction over such a class." *Id.* at 1191-92 (Heaney, J., dissenting).

n200 *Id.* at 1182-83. The court cited Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977), and Kline v. Burke Constr. Co., 260 U.S. 226 (1922), as support. Neither *Vendo* nor *Kline*, however, involved a class action, let alone a mandatory action grounded on the need to protect claimants to a limited fund.

n201 *In re* Federal Skywalk Cases, 680 F.2d 1175, 1193 (8th Cir.) (Heaney, J., dissenting), *cert. denied*, 103 S. Ct. 342 (1982).

n202 *In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 850, *cert. denied*, 103 S. Ct. 817 (1983). The court of appeals determined that the factual and legal issues in the punitive damages claims were "not entirely common" to all plaintiffs. *Id.* With respect to various plaintiffs who began using the product at different times, the court was concerned that the culpability of Robins might vary depending on the information it had concerning side effects, its concealment of that information, and its advertising and promotion. *Id.* One who suffered injuries in 1974 might have an altogether different punitive damage case than one who was injured in 1970. The court also suggested that the legal standards to be applied in determing whether and to what extent punitive damages should be awarded might well differ among individual plaintiffs. 693 F.2d at 850. See *supra* note 190. The court's analysis of this issue, however, was inappropriate. The fact that some issues are not common does not mean that the commonality requirement is not met. *See* Moseley v. General Motors Corp., 497 F.2d 1330, 1334 (8th Cir. 1974). The inquiry under Rule 23(a) is whether there are questions of law and fact common to the class, not whether such questions predominate. Predomination is only required in connection with a Rule 23(b)(3) common question class action. The court essentially conceded this point by stating: "If commonality were the only problem in this case, it might be possible to sustain some kind of a punitive damage class." *In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 850 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

n203 *In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 850 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). The court noted in cursory fashion that no plaintiffs sought or accepted the role of representative parties and stated: "Typicality, while it may not be insurmountable, remains a significant problem." *Id.*

n204 *Id.* at 851. Opposition to the punitive damages class action was so vehement that some plaintiffs' attorneys threatened legal action against the firm appointed as lead counsel. Not only did that firm subsequently resign as lead counsel for the punitive damages class, but no other plaintiffs' attorneys expressed a willingness to serve as lead counsel. Interview with Rodney Klein, original lead counsel for punitive damages class, in Sacramento, California (June 14, 1982). Although the district court eventually appointed an attorney not previously connected with the *Dalkon Shield* litigation, who accepted the lead counsel position, the court of appeals was obviously troubled by the plaintiffs' hostility to a class action. *See In re* Northern Dist. of Cal., Dalkon Shield Prods. Liab. Litig., 693 F.2d 847, 851 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

n205 *See* 693 F.2d at 850-51. The court stated: "We are not necessarily ruling out the class action tool as a means for expediting multi-party product liability actions in appropriate cases, but the combined difficulties overlapping from each of the elements of Rule 23(a) preclude certification in this case." *Id.* at 851.

n206 See *infra* pt. III(C)(2)(c).

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n207 *In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 851-52 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

n208 *Id.* at 851-52. While the likelihood of insufficient funds to pay all claims is a recognized ground for Rule 23(b)(1)(B) certification, *see* Coburn v. 4-R Corp., 77 F.R.D. 43 (E.D. Ky. 1977); Fed. R. Civ. P. 23 advisory committee note to 1966 amendment, the factual basis for such a finding was challenged by the plaintiffs. *See* Opening Brief for Appellant at 9-10, *In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). The Ninth Circuit was critical of the district court's denial of plaintiffs' motion to conduct limited discovery on the issue of Robins' ability to pay all claims in the litigation: "Rule 23(b)(1)(B) certification is proper only when separate punitive damages claims necessarily will affect later claims. The district court erred by ordering certification without sufficient evidence of, or even a preliminary fact-finding inquiry concerning Robins' actual assets, insurance, settlement experience and continuing exposure." *In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 852 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

n209 693 F.2d at 851-52.

n210 *Id.* at 851.

n211 *See In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 851-52 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983); *In re* Federal Skywalk Cases, 680 F.2d 1175, 1182 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982).

n212 See *supra* note 149.

n213 *Id.*

n214 *In re* Federal Skywalk Cases, 93 F.R.D. 415, 424-25 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S.Ct. 342 (1982); *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 898 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

n215 If the limited fund concept of Rule 23(b)(1)(B) were extended to cover class actions for punitive damages in products liability cases, a trial court considering certification under Rule 23(b)(1)(B) could properly imply a superiority requirement or otherwise consider superiority in addition to the Rule 23(a) prerequisites. In practice, reviewing courts have found an abuse of discretion only when the trial court incorrectly applied the specific criteria of Rule 23. *See, e.g.*, Walker v. Jim Dandy Co., 638 F.2d 1330, 1335-36 (5th Cir. 1981) (numerosity and commonality); Livesay v. Punta Gorda Isles, Inc., 550 F.2d 1106, 1110 (8th Cir. 1977) (inadequate representation), *rev'd on other grounds sub nom.* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); Gay v. Waiters' & Dairy Lunchmen's Union, 549 F.2d 1330, 1332-33 (9th Cir. 1977) (numerosity); Carey v. Greyhound Bus Co., 500 F.2d 1372, 1380-81 (5th Cir. 1974) (numerosity and superiority).

n216 See *supra* note 187.

n217 *Id.*

n218 *See* Brief of Appellant Jaqueline N. Rau at 43-44, *In re* Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982).

n219 Opening Brief of Appellant at 7, *In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982) (citing Breyer v. A.H. Robins Co., No. 75-1459 (N.D. Cal. 1980), which ruled as a matter of law that there was insufficient evidence to

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submit the issue of punitive damages to the jury), *cert. denied*, 103 S.Ct. 817 (1983).

n220 These circumstances provided the basis for plaintiffs' argument that Robins had "forum shopped" for an anti-punitive damages court in which to dispose of all the punitive damages claims. *Id.* at 8.

n221 Another approach that might achieve the same result was recommended in Putz & Astiz, *Punitive Damage Claims of Class Members Who Opt Out: Should They Survive*?, 16 U.S.F.L. Rev. 1 (1981). The authors suggest that when a common question class action includes claims for punitive damages, those who opt out of the class should be precluded from recovering punitive damages. *Id.* at 27. Although the authors do not specifically address the problem of mass tort personal injury litigation, this approach could be used in those mass torts which are certifiable under Rule 23(b)(3). One problem, however, is that relatively few mass injury cases have been held to qualify for certification under the common question subsection. See *supra* note 173. Other problems are the statutory notice and opt out provisions of subsection (c)(2) which are specifically applicable to all Rule 23(b)(3) class actions. Punitive damages class actions pursuant to Rule 23(b)(1)(B), however, do not depend on the maintenance of a class action on the liability issues in the underlying personal injury cases. Therefore, the issue of punitive damages liability could be adjudicated in a single proceeding even if the other issues in the litigation are not appropriate for class action treatment. Moreover, the provisions prohibiting opting out of a Rule 23(b)(1)(B) class action are already in place. There is no need to revise statutory requirements in order to adjudicate all the claims in a single proceeding.

n222 Probably the most troublesome of the Rule 23(a) prerequisites in mass tort cases is "typicality." Plaintiffs will sometimes have claims against defendants not named by other plaintiffs. In the analogous case of LaMar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973), involving actions based on violations of the Truth in Lending Act, 15 U.S.C. §§ 1601-1677 (1976), the Ninth Circuit held that a class representative who was not injured by some of the defendants could not sue on behalf of persons with claims against those defendants, even though the representative had suffered identical injuries at the hands of other parties. *Id.* at 466.

n223 See *supra* note 215.

n224 See *supra* note 149.

n225 *See* S. Speiser, Lawsuit 450-51 (1980); Speiser, *Resolving Foreign Air Crashes in the American Court System*, Nat'l L.J., Oct 11, 1982, at 24, col. 1.

n226 Choice of law problems should not generally prevent certification if sensible procedures are utilized. A federal court in a diversity case must apply the choice of law rule of the forum. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); Strussberg v. New England Mut. Life Ins. Co., 575 F.2d 1262 (9th Cir. 1978). There are several different approaches to tort choice of law, and few judicial opinions that provide clear guidelines. Some states still follow the traditional rule, which applies the law of the place of injury. E. Scoles & P. Hay, Conflict of Laws § 17.7, at 560-61 (1982). Many jurisdictions, however, prefer more analytical choice of law methods such as "interest analysis," *see id.* §§ 17.11 to .17, the "better law" approach, *see id.* §§ 17.18 to .20, or the "most-significant-relationship test, *see id.* §§ 17.21 to .25; Restatement (Second) of Conflict of Laws § 145 (1971). These approaches require essentially that the forum court determine initially whether there is a true conflict between the substantive rules of two or more of the interested states, and, if there is such a conflict, to apply the rule of the state whose policy would be more adversely affected by the application of the other state's rule. *See* Bradley, *After Hurtado and Bernhard: Interest Analysis and the Search for a Consistent Theory for Choice of Law Cases*, 29 Stan. L. Rev. 127, 150 (1976).

When the conflict questions are merely procedural or involve only the standard of culpability for punitive damages liability, there either is no true conflict or the forum state has as much governmental interest in the application of its standard as does any other state. *See In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 916-17 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). In the *Dalkon Shield* case, defendant A.H. Robins went out of its way to avoid a true conflict situation by indicating that it might stipulate to the most "liberal" standard of punitive damages. *Id.* at 917. The situation is different if the law of another state with a significant interest does not permit punitive damages. *See In re* Air Crash Disaster Near Chicago, Ill., 644 F.2d 594, 605 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981) (state in which disaster occurred had the most "legitimate interest" in litigation; law barring punitive damages in wrongful death actions prevailed); Sibley v. KLM-Royal Dutch Airlines, 454 F. Supp. 425, 427 (S.D.N.Y. 1978) (applying Dutch law barring punitive damages to claims of Massachusetts residents killed in air crash in Canary Islands).

n227 See *supra* note 219. The Supreme Court has precluded inquiry into the merits of a class action by a district court seeking to shift the cost of notice to the defendant. Eisen v. Carlisle & Jaquelin, 417 U.S. 156, 177-79 (1974). "[T]he plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit. *Id.* at 179. This should not bar a preliminary assessment of the potential success of a class action by a district court seeking to avoid unnecessary intrusions on the jurisdiction of state courts. *Cf.* Toucey v. New York Life Ins. Co., 314 U.S. 118, 135 (1941) (The anti-injunction statute "expresses the desire of Congress to avoid friction between the federal government and the states resulting from the intrusion of federal authority into the orderly functioning of a state's judicial process.").

n228 Punitive damages claims arising out of product-related injuries will sometimes involve such divergent factual issues that trying them all in one proceeding would be unduly chaotic, even with the utilization of subclasses permitted by Rule 23(c)(4).

n229 28 U.S.C. § 1407(a) (1976) ("Such transfers shall be made by the judicial panel . . . upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will *promote the just and efficient conduct of such actions*." (emphasis added)).

n230 *See In re* Bristol Bay, Alaska, Salmon Fishery Antitrust Litig., 424 F. Supp. 504, 507 (J.P.M.D.L. 1976); *In re* Plumbing Fixture Cases, 298 F. Supp. 484, 494-95 (J.P.M.D.L. 1968). The transferee court would have the power to vacate or modify a class action determination made previously by any of the transferor courts. *Cf. In re* Plumbing Fixture Cases, 298 F. Supp. at 489 ("The pretrial powers of the transferee court include the powers to modify, expand, or vacate earlier discovery orders.").

n231 See *supra* note 220. All parties must be notified of hearings on the issue of transfer and allowed to offer evidence on that issue. 28 U.S.C. § 1407(c) (1976). Furthermore, the Judicial Panel, not the parties, decides which court controls the class action proceedings. *Id.* § 1407(a). Therefore, no party will be able to choose a forum court because they believe the court may be predisposed to decide in their favor.The Judicial Panel, however, has authority to consolidate only cases pending in federal district courts. *See* 28 U.S.C. § 1407 (1976). The problem of forum-shopping may still exist when a class is certified by a state court.

n232 Certification by a federal district court, if viewed as enjoining actions initiated by class members in other courts, may present difficulties under the federal anti-injunction statute, 28 U.S.C. § 2283 (1976). See *supra* pt. III(B)(2)(a). The use of the recommended three-step procedure (transferor court -- Judicial Panel -- transferee court) should minimize the potential for unwarranted intrusions and help to ensure that certification will only be granted when it is "necessary in aid of [the district court's] jurisdiction." 28 U.S.C. § 2283 (1976). By

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contrast, certification by a state court would not be considered an intrusion on the jurisdiction of other courts. *See* Cole v. Cunningham, 133 U.S. 107, 121 (1980).

n233 To some extent, a temporary delay in settlements will be a natural byproduct of any certification of a mandatory class action for punitive damages arising out of a mass tort, particularly during the uncertain period while the order is appealed. Once the class action is approved on appeal, however, it should be settled or tried quickly. Settlements of compensatory damages claims should continue because the defendants will not have to fear the return of individual claimants for recovery of punitive damages.

n234 A Rule 23(b)(3) class action may actually encourage settlements. Following the reversal of the original class certification in the Skywalk cases, class actions were certified by both the federal district and state courts. Lauter, *Hyatt Litigation Could Set Pattern for Disaster Cases*, Nat'l L.J., Jan 24, 1983, at 3, col. 2, 26, col. 2. Settlement negotiations then resumed in full force and left only a few cases to be resolved by trial. *Id.* at 26, col. 3. The state court settlement package included a $ 20 million fund for "supplementary" payments, which have been viewed as "a form of a sub rosa punitive damages payment." *Id.* The federal court settlement package included a $ 3.5 million fund for attorneys' fees and similar "supplementary" payments, as well as a $ 6.5 million payment to a group of charities as a "healing gesture." *Id.*

n235 28 U.S.C. § 1292(b) (1976). The court of appeals may, in its discretion, entertain an interlocutory appeal "[w]hen a district judge . . . shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. *Id.* This was the procedure employed in the *Dalkon Shield* class certification appeal. *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 919 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

n236 *In re* Federal Skywalk Cases, 680 F.2d 1175, 1180 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *see* 28 U.S.C. § 1292(a)(1) (1976).

n237 *See In re* Federal Skywalk Cases, 680 F.2d 1175, 1177 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982).

n238 *See* 28 U.S.C. § 1292(a)(1) (1976). In the *Skywalk* appeal, the Eighth Circuit assumed jurisdiction on the basis that the certification order effectively enjoined claims for punitive damages which were already pending in state court. *In re* Federal Skywalk Cases, 680 F.2d 1175, 1180 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982). See *supra* note 191. These grounds for interlocutory appeal should be expanded in mandatory mass tort class actions so that certification orders can be reviewed on an interlocutory basis even if there are no pending claims in state courts. The fact that the claims could be made in state court or other federal district courts should be enough because the mandatory certification would preclude the litigation of these claims in all courts except the one which certified the class.

n239 See *supra* note 204.

n240 *Id.* In the *Skywalk* case, the appointment of Irving Younger as one of the lead counsel was particularly grating to other plaintiffs' attorneys because the client he represented, unlike other plaintiffs did not have significant injuries. Brief of Appellant Jacqueline N. Rau at 37, *In re* Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982). The resentment of plaintiffs' attorneys was compounded when the court permitted Younger to remain as lead counsel, *see id.* at 22-25, even when it became apparent that Younger's client could not qualify as class representative because she lacked diversity from all defendants. 680 F.2d at 1178-79. The district court's conduct resulted in a motion for disqualification

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based on demonstrated partiality and bias. Although the court's denial of the motion for disqualification was upheld on appeal, the court of appeals indicated that it did not condone the lower court's ex parte communications in search of a class representative. *Id.* at 1184. Attorneys representing clients with substantial compensatory damages claims may have had reason to doubt the adequacy of representation, given lead counsel's predominant concern with the punitive damages issue. See *supra* note 187. Lead counsel should scrupulously avoid giving even the appearance of placing the interest of his own client or his fees above the best interests of the class members.

n241 See *supra* pt. II.

n242 See *supra* note 106 and accompanying text.

n243 See *supra* note 132 and accompanying text.

n244 *See* Owen I, *supra* note 21, at 57.

n245 *See* Knippen v. Ford Motor Co., 546 F.2d 993, 1003 (D.C. Cir. 1976) (affirming directed verdict on issue of punitive damages); Turney v. Ford Motor Co., 94 Ill. App. 3d 678, 686, 418 N.E.2d 1079, 1085 (1981) (affirming trial court's decision to strike punitive damages claim at conclusion of plaintiff's case).

n246 Fed. R. Civ. P. 42(b) provides, in relevant part: "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim . . . or of any separate issue or of any number of claims . . . always preserving inviolate the right of trial by jury . . ." Although no court has considered the type of bifurcation recommended in this Article, a more disruptive and time-consuming type of bifurcation has been employed. *See* Holben v. Midwest Emery Freight Sys., 525 F. Supp. 1224 (W.D. Pa. 1981) (separate trials ordered for underlying personal injury claims and punitive damages claims for negligent entrustment of truck to employee). *But see* United Air Lines, Inc. v. Weiner, 286 F.2d 302 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961) (reversal of trial court's decision to bifurcate issue of punitive damages in personal injury suit arising out of plane crash because of overlapping proof of underlying liability and punitive damages claims). Bifurcation of the punitive damages issue in mass tort litigation, however, is well within the discretion of trial courts pursuant to Rule 42(b) because it involves no duplication of evidence and no time-consuming impanelling of a second jury. See *infra* text accompanying note 249.

n247 J. Ghiardi & J. Kircher, *supra* note 38, § 12.05, at 15 & n.1 (listing state statutes "identical or substantially similar to Federal Rule 42(b)"). Some states only allow bifurcation of separate claims, not separate issues. *Id.* at 15 & n.2. Punitive damages in these jurisdictions, however, may be considered "separate but dependent" claims and, therefore, subject to bifurcation. *Id* § 12.07, at 20. Only four states have no statutes dealing with bifurcation. *Id* § 12.05, at 15, 16 n.3 (Mississippi, Nebraska, New Hampshire, South Carolina). Bifurcation in these jurisdictions depends on a trial judge's inherent power, a question on which the authorities are split. *Id.*§ 12.08.

n248 *Cf.* Rupert v. Sellers, 48 A.D.2d 265, 272, 368 N.Y.S.2d 904, 912 (1975) (a defendant's wealth should not be discoverable until after a jury has found the defendant liable for compensatory and punitive damages in the first proceeding). The *Rupert* approach seems overly protective of a defendant's right to privacy. A better view would permit such discovery before trial upon some showing of support for the claim. *See* Cal. Civ. Code § 3295 (West Supp. 1983); J. Ghiardi & J. Kircher, *supra* note 38, § 12.10, at 26-31.

n249 This is a simpler and more time-saving procedure than that suggested by one commentator, who would require a separate trial on all punitive damages issues. *See* Fulton,

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[*54] Ultimately, no punitive damages overkill occurred in the MER/29 litigation; between 1962 and 1967 over ninety-five percent of the claims were settled. [89] In the eleven cases in which jury verdicts were returned there were four defense verdicts, four plaintiffs' verdicts for compensatory damages only, and three plaintiffs' verdicts that included punitive damages. [90] Of the three punitive damage awards, the award in *Roginsky* was reversed [91] and the other two were significantly reduced. [92] The fact that a manufacturer apparently guilty of criminal misconduct dodged the punitive damages bullet in all but two of over 1500 cases has led to speculation that the overkill threat is "more theoretical than real." [93]

The recent unprecedented number of multiple punitive damages verdicts in mass tort cases has raised again the spectre of overkill recognized by Judge Friendly in *Roginsky*. [94] Because of the threat to **[*55]** the continued economic viability of some defendants posed by these multiple punitive damages awards, [95] several proposals have been set forth to modify the structure and procedure for awarding punitive damages in mass tort litigation.

II. MULTIPLE PUNITIVE DAMAGES CLAIMS: PROPOSALS FOR REFORM

The courts that have considered the legality of multiple awards have generally acknowledged that a single punitive damages award against a defendant does not necessarily preclude additional awards based on the same outrageous conduct. [96] The aggregate amount of multiple awards, however, can reach a level so fundamentally unfair and destructive that any additional awards above that level should not be permitted. [97] At some point, justifiable punishment ends and overkill begins. Several proposals have been introduced to reform existing procedures to prevent such overkill, including an aggregate cap on awards, [98] and add-on system for distributing awards, [99] a limitation of punishment in each case to the wrong inflicted upon each plaintiff, [100] admission into evidence of other awards, [101] removal of the assessment function from the jury, [102] and litigation of all punitive damages claims in a single proceeding. [103]

A. *Aggregate Cap Proposals*

Professor David Owen has proposed that mass tort plaintiffs be permitted to recover punitive damages up to an aggregate amount, the lesser of either five million dollars or five percent of a defendant's **[*56]** net worth, after which punitive awards would be limited to an amount equal to attorney fees and other litigation costs. [104] While this approach is more flexible than a strict dollar limit, [105] it has disadvantages. First, five million dollars may not be enough to deter large corporations from profitable misconduct. [106] Indeed, the five million dollar limit benefits only those corporations that need protection the least because a company's net worth must exceed $ 100 million for the five million dollar limit to be less than five percent of its net worth. If there must be some arbitrary limit, it should be the same percentage of net worth for a large corporation as for a smaller business enterprise.

Second, the aggregate cap would reward those plaintiffs fortunate enough to get to trial early, undoubtedly encouraging a flood of early trial requests. It has been argued that the diligence of these earlybird plaintiffs should be rewarded because of the greater expenditures required to prove the initial punitive damages claims, which often benefit later plaintiffs by making it easier to establish subsequent claims. [107] It seems unfair, however, to permit a handful of plaintiffs and their attorneys to obtain substantial recoveries merely because they are in a position to finance the litigation, leaving subsequent plaintiffs with little or nothing. Moreover, when attorneys represent more than one plaintiff, as they often do in mass tort litigation, they may face the ethical dilemma of selecting which client's case to litigate first, possibly precluding their other clients from sharing in punitive damages awards. [108]

Finally, there is the problem of implementing the aggregate cap system. Federal legislation is one possibility, [109] but such proposals **[*57]** have not fared well in Congress. [110] Legislative

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Punitive Damages in Products Liability Cases, 15 Forum 117, 129-30 (1979).

n250 See *supra* notes 7, 89 and accompanying text.

n251 *E.g.*, Johnson v. Husky Indus., 536 F.2d 645, 651 (6th Cir. 1976) (reversing punitive damages award); Sturm, Ruger & Co. v. Day, 594 P.2d 38, 48-49 (Alaska 1979) (reducing amount of punitive damages award), *modified on other grounds*, 615 P.2d 621 (1980), *cert. denied*, 454 U.S. 894 (1981); Ellis v. Golconda Corp., 352 So. 2d 1221, 1225, 1228 (Fla. Dist. Ct. App. 1977) (reversing punitive damages award); Moore v. Remington Arms Co., 100 Ill. App. 3d 1102, 1113-17, 427 N.E.2d 608, 616-19 (1981) (same); *see* Owen 11, *supra* note 32, at 1321.

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or judicial action on a state-by-state basis would solve the problem only if all states adopted a uniform cap system.

B. *Add-on Awards*

Another proposal would permit recovery only of the amount by which a punitive damages award exceeds the largest previous award against the defendant arising out of the same mass tort. [111] The first award sets the figure that subsequent awards must exceed for future plaintiffs to recover any punitive damages. All awards would also have to withstand the usual judicial scrutiny for fairness. [112]

This proposal improves only slightly upon present procedures for awarding punitive damages. Although the defendant would be protected from duplicative punitive damages assessments, the earliest plaintiffs would have even more of an advantage than under Professor Owen's proposal. This would result inevitably in a competitive race to trial. [113] Additionally, because enforcement in fewer than all states would destroy its effectiveness, implementation of this proposal, like other uniform solutions, would require federal legislation. [114]

C. *Assessment of Award Vis-A-Vis One Plaintiff*

A third approach to the problem of overkill is to limit the punishment in each case to the wrong inflicted on the particular plaintiff. In *Hoffman v. Sterling Drug, Inc.*, [115] for example, the court issued pretrial rulings which excluded evidence of other persons similarly injured by the drug "Aralen," and also excluded evidence of the defendant's **[*58]** net worth. [116] In addition, the court barred the plaintiff from arguing that the jury should render an award that punishes the defendant for its conduct toward all injured plaintiffs. [117] The court stated that these rulings were mandated by Pennsylvania law which requires that any punitive damages award must bear a reasonable relationship to the compensatory damages award. [118]

This approach, however laudable in its objectives, prevents the jury's consideration of some of the essential criteria upon which punitive damages awards should be based. The moral turpitude of conduct should be judged, at least in part, by the extent of the harm that it causes. [119] A jury could not properly award a plaintiff's proportionate share of these punitive damages without first determining the aggregate award to all injured persons. To make this determination, the very evidence excluded by the court in *Hoffman* would have to be introduced. Moreover, refusing to admit evidence of a defendant's net worth precludes a jury from considering a key factor in determining when even an individual award would exceed the amount necessary to punish and deter. If every court adjudicating these multiple claims adopted this practice, the result might be a classic case of overkill.

D. *Evidence of Other Punitive Damages Claims*

Another way to prevent punitive damages overkill is to inform each jury of other punitive damages awards already imposed or that may be imposed in the future upon a mass tort defendant. This is the position taken by the Restatement, [120] several courts, [121] at least two **[*59]** state legislatures [122] and several commentators. [123] By considering other punishment for the same conduct, [124] along with evidence of the defendant's current financial status, a jury should be able to make a more informed judgment of the amount necessary for punishment and deterrence. [125]

Conversely, this same evidence could backfire against a defendant. A jury may be influenced unfairly by prior verdicts against the defendant; it may believe that previous awards of punitive damages justify a similar award in the case before it [126] and may even rely on **[*60]** such awards in determining the defendant's compensatory damages liability. [127] Such knowledge on the part of the jury might therefore be highly prejudicial to defendants, [128] who would probably prefer to take their chances with juries that are uninformed about other

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litigation arising out of the same conduct.

E. Removal of the Assessment Function from the Jury

Many of the problems generated by multiple punitive damages claims might be avoided by authorizing the trial judge, rather than the jury, to determine the amount of punitive damages. [129] Under this approach, the jury would still decide whether punitive damages should be assessed without being apprised of either the findings of other juries or the defendant's net worth. If the jury determined that punitive damages should be awarded, the court would assess an appropriate award based on all the usual considerations, including evidence of other punitive damages claims and awards and evidence of the defendant's financial condition. [130] This approach is consistent with the view that judges will award punitive damages based on a more sophisticated understanding of the proper punishment for corporate defendants' misconduct. [131] It eliminates, however, the important function of the jury as the conscience of the community in assessing an **[*61]** amount of punitive damages that reflects the degree of the defendant's culpability. [132]

III. PUNITIVE DAMAGES AND CLASS ACTIONS

The problematic alternations in the mechanism for assessing punitive damages outlined above are not necessary to prevent punitive damages overkill. In appropriate circumstances, a class action may provide the best means of resolving the problems presented by punitive damages in mass tort litigation.

The idea of litigation all punitive damages claims in a single proceeding is not new. In a superb article published over fifty years ago, Professor Morris proposed that when there are multiple claims any assessment of punitive damages should be withheld until all compensatory damages claims are resolved. [133] Joinder of the punitive damages claims would then be appropriate. [134] In the *Roginsky* opinion discussed above, Judge Friendly envisioned a procedure by which "it might be possible for a jury to make one award to be held for appropriate distribution among all successful plaintiffs." [135]

While these approaches provide a theoretical basis for the resolution of many of the punitive damages problems, only class actions provide a practical means for doing so. The other procedural devices for consolidating multiple lawsuits [136] generally do not provide for a single trial on the punitive damages issue because they cannot affect actions **[*62]** pending in other jurisdictions. [137] For example, a state court in which a Dalkon Shield claim is pending could not consolidate cases pendin in federal courts or in the courts of sister states. Similarly, a federal district court could not unilaterally consolidate Dalkon Shield cases pending in state courts or other federal courts. [138]

The Judicial Panel on Multidistrict Litigation [139] has the authority to transfer mass tort cases pending in various federal districts to a single federal district court, but these transfers are available only for the purpose of coordinating and economizing the discovery process and other pre-trial procedures. [140] When discovery and other pre-trial proceedings have been completed, the actions are generally remanded to the transferor courts for trial. [141]

Federal change of venue provisions provide a mechanism for transfer of cases between federal districts for trial, but only to a district where the action might originally have been brought. [142] This could result in a single punitive damages trial only in the unlikely event that all the cases were filed in federal courts and all the district courts in which the actions were brought agreed to the transfer.

In view of the problems associated with other procedural devices for combining multiple lawsuits, it was logical for the federal district **[*63]** courts in the *Skywalk* and *Dalkon Shield* cases to use the class action as a means of adjudicating the punitive damages

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claims.By using representative parties, a class action can cut across jurisdictional lines and determine the rights of a large group of similarly interested claimants in a single proceeding. [143] Overkill would be avoided because the defendant's entire punitive damages liability would be determined in a single action. The amount awarded in a single trial could be distributed among claimants on a basis far more equitable than approaches that reward only the first few successful plaintiffs.

The particular circumstances in the *Skywalk* and *Dalkon Shield* cases, however, rendered them inappropriate for class certification. [144] Nevertheless, the cases presented the courts of appeals with an opportunity to offer guidelines on the appropriate use of class actions in connection with multiple punitive damages claims. The Eighth and Ninth Circuits instead severely restricted the circumstances in which a class action would be considered appropriate, thereby effectively discarding a procedural device that under certain conditions provides the best solution to the mass tort punitive damages problem. [145]

A. *Federal Class Action Procedures*

Tracing its origins to English equity practice, [146] federal class action procedure was codified in 1938 in Rule 23 of the Federal Rules of Civil Procedure. [147] Rule 23 was substantially revised in 1966 because of general confusion and dissatisfaction with the criteria for determining which cases were appropriate for class action treatment. [148] The 1966 **[*64]** amendments changed the structure of the rule and provided clearer guidelines for the certification and administration of class actions. [149]

[*65] The question of certification is addressed to the discretion of the district court, which must determine whether the provisions of Rule 23 have been met. [150] The four general prerequisites to any class action have come to be known as "numerosity" of class members, "commonality" of legal and factual questions, "typicality" of claims and defenses of the class representative and "adequacy of representation." [151] **[*66]** If these prerequisites are satisfied, the court's focus turns to whether the circumstances fit within a category of permissible class actions specified in Rule 23(b). [152]

Rule 23(b)(1) categories involve situations in which class actions are necessary to avoid prejudice that might otherwise result if the lawsuits were permitted to proceed individually. Rule 23(b)(1)(A) authorizes class actions to protect the party opposing the class [153] from the application of incompatible standards of conduct with respect to different members of the class. [154] Rule 23(b)(1)(B) specifically protects members of the class when individual litigation of some claims might substantially impair the ability of others to recover, such as when there is a limited fund. [155] These class actions are "mandatory" in the sense that once the class is certified, all class members are bound by the eventual result, whether or not individual members of the class object to being included, and often, whether or not they are even aware of the proceedings. [156]

Rule 23(b)(3), the "common question" class action, unlike its subsection (b)(1) and (b)(2) counterparts, does not require that the class **[*67]** comprise "all those who will share in or be directly affected by the grant or denial of relief." [157] The nexus between the class members may be simply that they claim to have been injured by the defendant in similar ways. [158] Because many litigants may have such a nexus, Rule 23(b)(3) imposes the additional prerequisites, absent from the "necessity" class action sections, that common questions of law or fact "predominate" over individual issues, [159] and that a class action be the "superior" method of handling the litigation. [160]

Rule 23(b)(3) not only involves the most substantive change from the old rule, [161] but was also responsible for most of the controversy following the 1966 amendments. Critics complained that the new common question class actions precipitated a burdensome increase in the volume of federal litigation [162] and resulted in many ethical abuses by attorneys. [163]

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[*68] By the early 1970's, the controversial nature of common question class actions began to take its toll. Courts became more prone to deny class certification, [164] petitions for attorney fees were subjected to greater scrutiny [165] and defendants were often permitted discovery on the issue of unprofessional conduct by class counsel in soliciting representative parties. [166] Finally, the Supreme Court significantly reduced the attractiveness of many class actions, particularly those of smallclaim consumers, by holding that each class representative must satisfy the amount in controversy requirement [167] and that the plaintiff must bear the expense of notice to the class in a suit for damages. [168]

Within the past few years, the class action pendulum appears to have returned to center. Plaintiffs' attorneys have generally been more selective in seeking class relief, defendants less intransigent in opposing class certification, and judges more adept at administering class litigation, particularly in the use of subclasses and certification limited to certain issues as provided in Rule 23(c). [169]

B. *Mass Tort Class Actions*

From their inception, the amendments to Rule 23 have provoked a split between leading commentators and the Advisory Committee concerning the propriety of certifying mass tort cases as class actions. Professors Moore, Kennedy, [170] Wright, Miller and Kane [171] view common **[*69]** question class actions as the most expeditious means of adjudicating the common liability issues in many mass tort personal injury situations, particularly those that arise out of a single disaster. Under Rule 23(c)(4), certification can be limited to those issues common to the entire class or common to subclasses. Individual compensatory damages claims, as well as non-common liability issues, can therefore be resolved individually outside the scope of the class action.

The Advisory Committee has taken a contrary position, stating:

A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. [172]
Most courts have concurred with the Advisory Committee and denied certification of mass tort personal injury cases brought as class actions. [173] Denials generally have been based on the strong interest of **[*70]** individual litigation in controlling their own litigation, the diversity of issues of proximate causation (particularly in products liability cases), and the divergence of legal standards in cases arising in different jurisdictions. [174]

A minority of courts has certified mass tort personal injury cases [175] as class actions based on issues concerning liability for compensatory **[*71]** damages. [176] Federal class actions in which Rule 23(b)(3) certification [177] has been granted have largely consisted of cases in which the classes were limited to carefully defined liability issues. [178]

[*72] C. *The Skywalk and Dalkon Shield Class Actions*

Most of the reasons for rejecting class actions in mass tort cases are absent when certification is limited to claims for punitive damages. Because plaintiffs have no right to recover punitive damages, [179] they lack the strong interest that they may have in pursuing their compensatory damages claims individually. Moreover, evidence of the aggravated nature of the defendant's conduct will generally not vary from victim to victim. Thus, the class certifications in the *Skywalk* and *Dalkon Shield* cases represent a a significant new approach to solving the problems presented by punitive damages claims in a mass tort context.

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ARTICLE: REINING IN **PUNITIVE DAMAGES** "RUN WILD": PROPOSALS FOR **REFORM** BY COURTS AND LEGISLATURES*

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SUMMARY:
... [1] The Court has provided some general controls, holding that the Due Process Clause of the Fourteenth Amendment imposes both substantive limits on the size of punitive damages awards [2] and procedural limits on when and how punitive damages may be awarded. ... [7] Courts and commentators alike have emphasized the "potentially devastating" ramifications of a punitive damages award on a civil defendant's character, reputation, business, and good will. ... The unpredictability of a prospective punitive damage award contributes significantly

did not constitute an unfair trade practice.

The Alabama jury awarded Dr. Gore $ 4,000 as compensatory damages for the difference in the value of the car he "bargained for" and the car he received. [96] The jury also awarded $ 4 million in punitive damages, which the jury apparently calculated by multiplying Dr. Gore's damage estimate ($ 4,000) by 1,000, the number of cars BMW allegedly sold throughout the country under its nondisclosure policy. [97]

On appeal to the Alabama Supreme Court, BMW contended, among other things, that its out-of-state conduct was permissible under the disclosure statutes of other states and, therefore, could not serve to augment a punitive damages **[*1025]** award. The Alabama Supreme Court agreed, holding that the jury should not have been permitted to consider sales by BMW outside of Alabama. [98] Having found the verdict tainted, the court reduced the punitive damages award to $ 2 million, believing that this amount was "a constitutionally reasonable" punishment for BMW's conduct in Alabama. [99]

Ultimately, the United States Supreme Court decided that the $ 2 million award still left a punishment that exceeded Alabama's legitimate interests in protecting the rights of its citizens and was, therefore, unconstitutionally excessive. [100]

Before tackling the "excessiveness" issue, however, the Court commented at length on constitutional principles that are involved when a state attempts to punish out-of-state conduct, observing that the Constitution has a "special concern both with the maintenance of a national economic union unfettered by stateimposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." [101] The Court outlined the following three basic principles.

Interstate Commerce: The Court noted that a defendant's participation in the "national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce." [102] Congress is permitted to make nationwide rules involving interstate commerce, but "it is clear that no single State can do so, or even impose its policy choice on neighboring States." [103]

State Sovereignty and Comity: Next, the Court noted that "one State's power to impose burdens on interstate commerce is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States." [104] The Court made the critical admonition that: "Principles of state sovereignty and comity demand that a State may not impose economic sanctions on **[*1026]**

violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." [105]

Due Process: Finally, the Court suggested that punishing a defendant for lawful extraterritorial conduct would violate due process. The Court stated:

Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions. [106]

Applying these fundamental principles, the Court approvingly concluded that the Alabama Supreme Court "properly eschewed reliance on BMW's out-of-state conduct and based its remitted award solely on conduct that occurred within Alabama." [107]

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Although BMW involved conduct (i.e., failure to disclose minor refinishing) that was permissible outside Alabama under the disclosure statutes of other states, the Supreme Court was careful to explain that its holding was not limited to instances of state legislation, but applied broadly to any form in which state power is exercised-specifically including state court decisions. The Court said: "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." [108] Elsewhere in the opinion, the **[*1027]** Court again emphasized that "the economic penalties that a State . . . inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy." [109]

Indeed, as a tort policy matter, a state court judgment that a defendant's conduct is not tortious provides a signal that the defendant's conduct does not justify the imposition of punitive damages in that state. Such a finding should be given equal (and perhaps greater) legal weight than a statutory "safe harbor," such as the disclosure laws at issue in BMW. The reason is that, in most jurisdictions, conduct comporting with a legislative or regulatory standard may still be found tortious by a jury asked to determine whether the defendant met applicable standards of care. [110] On the other hand, a finding of "no liability" in a tort action suggests strongly that, in that jurisdiction, the defendant's conduct was lawful. BMW says that it is unconstitutional for a jury in a forum state to consider lawful conduct in other states when deciding punitive damages issues. [111]

Precluding evidence of the defendant's out-of-state activity would prevent such due process violations. It also would prevent the possibility of due process violations that could arise if the forum state were examining conduct that occurred in jurisdictions that had not yet determined for themselves whether the defendant's conduct should subject it to liability. Tort law varies widely between states and one state cannot assume what the legislature or citizens (jurors) of other states may decide. [112] In that regard, if the forum state's court "guessed **[*1028]** wrong" and concluded that another state ("State X") would find the defendant's conduct to be unlawful, but State X later decides either through legislation or judicial decision that the conduct is lawful, the forum state's ruling would be violative of the principles set forth in BMW. [113]

Finally, it is important to note that precluding evidence of a defendant's conduct outside the forum state would not result in culpable defendants "escaping" appropriate punishment because those other states would be free to impose punishment on behalf of their own citizens if it was determined that the defendant's conduct should subject it to liability.

G. Compliance with FDA Pre-Market Approval Standards Defense

Punitive damages should not be permitted in cases alleging harms caused by FDA pre-market approved pharmaceuticals, vaccines, or medical devices, unless the approval was obtained through fraud or bribery. The public policy reason for this type of rule is that society should encourage companies to invest in and develop new and useful life-prolonging and life-saving products. This reform, which is already law in several states, [114] received strong support in a compre **[*1029]** hensive study of the civil justice system by the American Law Institute. The study's authors concluded:

We believe that the risk of overdeterrence of socially valuable activities through the imposition of tort liability on regulated products and activities merits more widespread recognition of a regulatory compliance defense.

. . . .

The strongest case for a regulatory compliance defense arises when punitive damages are sought. If a defendant has fully complied with a regulatory requirement and fully disclosed all

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material information relating to risk and its control, it is hard to justify the jury's freedom to award punitive damages. [115]

If implemented, a compliance with FDA pre-market approval standards defense against punitive damages would provide a strong incentive for the innovation of products that may otherwise be withheld because of concerns about uncertain and arbitrary liability. At the same time, such a defense could punish manufacturers who intentionally withhold material information from the FDA by subjecting such manufacturers to **punitive damages** liability.

H. Limiting Multiple **Punitive Damages** Awards

The **reforms** that have been discussed in this Article could be accomplished at the state or federal level; many could be (and have been) accomplished by judicial decision. Because of the limits on the ability of individual states to control conduct in other states, however, and the United States Supreme Court's past unwillingness to clarify due process limits on multiple punitive damages awards, Congress should enact legislation making clear that defendants are not to be punished ad infinitum for a single act or course of conduct. **[*1030]**

1. Problems Caused by Multiple Punitive Damages

As a result of the expansion of punitive damages beyond the traditional intentional torts, courts in the 1970s began to apply punitive damages more than once against the same defendant, for example, in the developing field of products liability. As a result, defendants began to be punished over and over again for what was essentially a single act or course of conduct. [116]

Multiple punitive damages awards present significant problems for plaintiffs and defendants. For instance, multiple "windfall" recoveries of punitive damages can deplete a defendant's limited resources, endangering the ability of future claimants to recover even basic out-of-pocket expenses and damages for their pain and suffering. [117]

Moreover, excessive imposition of awards may drive a company out of business. [118] When this occurs, the devastating "ripple" effect can extend far beyond the defendant company to injured persons who are thereafter unable to recover compensation for their injuries. There are concomitant losses suffered by the company's employees, who may lose their jobs, as well as by those other businesses that rely on the company or its employees for income. Economic harm to the company also affects shareholders, such as pension funds and ordinary citizens, and other investors who face the loss of their savings.

The detrimental impact of multiple punitive damages exists even in cases which are settled, rather than tried. A federal appellate judge astutely recognized this problem when he wrote: **[*1031]**

The potential for punitive awards is a weighty factor in **settlement** negotiations and inevitably results in a larger **settlement** agreement than would ordinarily be obtained. To the extent that this premium exceeds what would otherwise be a fair and reasonable **settlement** for compensatory damages, assets that could be available for satisfaction of future compensatory claims are dissipated. [119]

Multiple imposition of punitive damages also poses a significant obstacle to global **settlement** negotiations in repetitive litigation and blocks the ability of claimants to recover quickly for their injuries or the loss of loved ones. As one federal district judge wrote:

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"Barring successive punitive damages awards against a defendant for the same conduct would remove the major obstacle to **settlement** of mass tort litigation and open the way for the prompt resolution of the damage claims of many thousands of injured plaintiffs." [120]

Furthermore, federal and state courts have expressed strong concerns that multiple punitive damages awards may

violate constitutionally protected due process rights. [121] Com **[*1032]** mentators in the field have expressed the same concerns. [122]

Lastly, multiple punitive damages awards undermine the integrity of the justice system by transforming it into a lottery where a few people collect arbitrary "wins" at the expense of everyone else-the company, its employees, its shareholders, and ordinary consumers. With the exception of those lawyers who reap windfalls from repetitive punitive damages, nobody can seriously argue that repeatedly punishing anyone for a single act makes sense or benefits society.

2. Uniform, National Legislative Action Is Needed

"Unquestionably, a national solution is needed" to the problem of multiple punitive damages awards. [123] The individual states are powerless to provide a comprehensive remedy because one state cannot dictate judicial or legislative policies to another state. [124] Thus, even though a state may act to con **[*1033]** trol the problems of multiple punitive damages awards within its borders, it cannot control the imposition of punitive damages awards in other jurisdictions. [125]

The clearest evidence of this weakness was described in an opinion written by former United States District Judge H. Lee Sarokin. In Juzwin v. Amtorg Trading Corp., [126] involving claims against an asbestos manufacturer, Judge Sarokin vacated an earlier order striking plaintiffs' punitive damages claims on the ground that multiple imposition of punitive damages imposed without guidelines violated due process, in part, because he believed that he was powerless to limit other courts from imposing punitive damages awards against the same defendant. [127]

Unfortunately, the United States Supreme Court has proven unwilling to solve the problem of multiple punitive damages and appears unlikely to do so at any time soon. [128] Indeed, the **[*1034]** Florida Supreme Court has asserted that "any realistic solution to the problems caused by [multiple punitive damages awards] in the United States . . . can only be effected by federal legislation." [129]

Congressional action is needed to "disallow[] the repeated sanction of punitive damages against the same defendant for one act." [130] This would "protect[] the due process rights of corporate defendants as well as the rights of injured plaintiffs to be compensated, rather than see money which is rightfully theirs be distributed as a windfall." [131]

Conclusion

Larger and larger punitive damages verdicts are being rendered based on weak burdens of proof, irrelevant and even prejudicial evidence, and often multiple times against the same defendant for the same activity. This has led the United States Supreme Court to express serious concern that punitive damages awards in this country have "run wild." [132]

The civil justice system should not be a "litigation lottery" characterized by excessiveness and arbitrariness. **Punitive damages reform** is needed to restore balance, fairness, and predictability to the law. We recommend a number of reforms. While all of these could be achieved through legislation, many could be accomplished by courts through the

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development of the common law; only one would require federal action. Specifically, we recommend:

(1) Establishing a liability "trigger" that reflects the intentional tort origins and quasi-criminal nature of punitive dam **[*1035]** ages awards-"clear and convincing evidence" of "actual malice."

(2) Requiring proportionality in punitive damages so that the punishment fits the offense.

(3) Permitting a defendant to request "bifurcation" of a punitive damages trial so that the proceedings on punitive damages would be separate from and subsequent to the proceedings on compensatory damages. The same jury would hear both phases of the case. This would prevent evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by jurors and improperly considered when they are determining basic liability.

(4) Precluding plaintiffs from introducing prejudicial net worth evidence.

(5) Precluding evidence of a defendant's out-of-state conduct to award and calculate punitive damages.

(6) Encouraging the development and marketing of lifesaving and life-enhancing pharmaceuticals, vaccines, and medical devices by creating a defense to punitive damages based on compliance with FDA pre-market approval standards, except in cases where the approval was obtained through fraud or bribery.

(7) Federal legislation to address the special problem of multiple punitive damages awards; this would protect against unfair overkill, guard against possible due process violations, and help preserve the ability of future claimants to recover basic out-ofpocket expenses and damages for their pain and suffering.

FOOTNOTES:

n1 Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

n2 See BMW of North Am., Inc. v. Gore, 517 U.S. 559, 585-86 (1996); see also TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 458 (1993); Pacific Mutual, 499 U.S. at 23-24; cf. Pulla v. Amoco Oil Co., 72 F.3d 648, 661 (8th Cir. 1995) (opinion by retired Supreme Court Justice Byron White) (striking down punitive damages award as "excessive, unreasonable and violative of due process").

n3 See Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994).

n4 See **Punitive Damages** Tort **Reform:** Hearing Before the Senate Comm. on the Judiciary, 104th Cong. (Apr. 4, 1995) (testimony of Theodore Olson, former Assistant United States Attorney for the Office of Legal Counsel); Special Report, The Top Ten Verdicts of 1999, Law. Wkly. USA, Jan. 10, 2000, at 2000 LWUSA 25.

n5 Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 297 (1989) (O'Connor, J., concurring in part and dissenting in part) (quoting Banker's Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring in part and concurring in judgment)). All jurisdictions, except Louisiana, Nebraska, Massachusetts, Michigan and Washington state, permit the award of punitive damages. Michigan permits "exemplary" damages as compensation for mental suffering consisting of a sense of insult, indignity, humiliation, or injury to feelings, but does not permit punitive damages for purposes of punishment. See Product Liability Desk Reference-A Fifty State Compendium (Morton Daller ed., 2000).

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n6 City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270 (1981) (Brennan, J., dissenting).

n7 Addington v. Texas, 441 U.S. 418, 426 (1979).

n8 Browning-Ferris, 492 U.S. at 281 (Brennan and Marshall, J.J., concurring); see also International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 50 (1979) ("The impact of [a punitive damages award] is unpredictable and potentially substantial."); Comment, Criminal Safeguards and the Punitive Damages Defendant, 34 U. Chi. L. Rev. 408, 417 (1967) (Punitive damages awards have "'momentous and serious' . . . consequences" for civil defendants.) (citation omitted).

n9 See generally Victor E. Schwartz & Mark A. Behrens, **Punitive Damages Reform**-State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in Haslip, 42 Am. U. L. Rev. 1365 (1993).

n10 See James B. Sales & Kenneth B. Cole, Jr., Punitive Damages: A Relic That Has Outlived Its Origins, 37 Vand. L. Rev. 1117 (1984); see also Beardmore v. Carrington, 95 Eng. Rep. 790 (C.P. 1764) (illegal search and seizure); Bruce v. Rawlins, 95 Eng. Rep. 934 (C.P. 1770) (same); Sharpe v. Brice, 96 Eng. Rep. 557 (C.P. 1774) (same).

n11 95 Eng. Rep. 768 (C.P. 1763).

n12 98 Eng. Rep. 489 (C.P. 1763).

n13 Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. Rev. 1, 14 (1982). In Wilkes, Lord Chief Justice Pratt announced: "A jury shall have it in their power to give damages for more than the injury received . . . as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." Wilkes, 98 Eng. Rep. at 498-99; see also Calvin R. Massey, The Excessive Fines Clause and Punitive Damages: Some Lessons From History, 40 Vand. L. Rev. 1233 (1987).

n14 See, e.g., Grey v. Grant, 95 Eng. Rep. 794 (C.P. 1764); Benson v. Frederick, 97 Eng. Rep. 1130 (K.B. 1766).

n15 See, e.g., Hewlett v. Cruchley, 128 Eng. Rep. 696 (C.P. 1813); Leith v. Pope, 96 Eng. Rep. 777 (C.P. 1779).

n16 See, e.g., Fabrigas v. Mostyn, 96 Eng. Rep. 549 (C.P. 1774).

n17 See, e.g., Merest v. Harvey, 128 Eng. Rep. 761 (C.P. 1814); Sears v. Lyons, 171 Eng. Rep. 658 (K.B. 1818). Punitive damages also were allowed for seduction. See, e.g., Tullidge v. Wade, 95 Eng. Rep. 909 (C.P. 1769). In addition, for a period, English courts permitted an award of punitive damages for criminal conversation (i.e., adultery). See Duberly v. Gunning, 100 Eng. Rep. 1226 (K.B. 1792).

n18 James B. Sales, The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on The Citadel, 14 St. Mary's L.J. 351, 355 (1983).

n19 The use of "private attorneys general" to sanction antisocial conduct unregulated by the criminal law reached America in 1784. See Genay v. Norris, 1 S.C. 6 (1784); see also David G. Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1263, 1287-88 (1976).

n20 See, e.g., Ward v. Blackwood, 41 Ark. 295 (1883); Lyon v. Hancock, 35 Cal. 372

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(1868); Corwin v. Walton, 18 Mo. 71 (1853); Trogden v. Terry, 172 N.C. 540 (1916); Porter v. Seiler, 23 Pa. 424 (1854).

n21 See, e.g., Sheik v. Hobson, 64 Iowa 146 (1884); Louisville & Nashville R.R. Co. v. Ballard, 85 Ky. 307 (1887); Vanch v. Hall, 3 N.J.L. 814 (Sup. Ct. 1811).

n22 See, e.g., Brown v. McBride, 24 Misc. 235, 52 N.Y.S. 620 (Sup. Ct. Queens County 1898).

n23 See, e.g., Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101 (1893); Green v. Southern Express Co., 41 Ga. 515 (1871); Schlencker v. Risley, 4 Ill. 483 (1842); Taber v. Hutson, 5 Ind. 322 (1854); Jackson v. American Tel. & Tel. Co., 51 S.E. 1015 (N.C. 1905); Parsons v. Harper, 57 Va. 64 (1860); Hamlin v. Spaulding, 27 Wis. 360 (1870).

n24 See, e.g., Dorsey v. Manlove, 14 Cal. 553 (1860); Treat v. Barber, 7 Conn. 274 (1828); Singer Mfg. Co. v. Holdfodt, 86 Ill. 455 (1877); Taylor v. Giger, 3 Ky. 586 (1808); Schindel v. Schindel, 12 Md. 108 (1858); Huling v. Henderson, 161 Pa. 553 (1894); Bradshaw v. Buchanan, 50 Tex. 492 (1878).

n25 See, e.g., Yazoo & Miss. Valley R.R. Co. v. Sanders, 87 Miss. 607 (1905); Schumacher v. Shawhan Distillery Co., 178 Mo. App. 361 (1914).

n26 See, e.g., Linsley v. Bushnell, 15 Conn. 225 (1842); Whipple v. Walpole, 10 N.H. 130 (1839); Pickett v. Crook, 20 Wis. 358 (1866). As in England, punitive damages were also awarded in cases involving seduction. See, e.g., Reutkemeier v. Nolte, 179 Iowa 342 (1917); Coryell v. Colbaugh, 1 N.J. 77 (1791).

n27 Ellis, supra note 13, at 2.

n28 See, e.g., Southern Kan. Ry. v. Rice, 38 Kan. 398 (1888) ($ 35 costs and fees, $ 10 injury to feelings, $ 71.75 punitive); Fay v. Parker, 53 N.H. 342 (1872) ($ 150 actual, $ 331.67 exemplary); Woodman v. Nottingham, 49 N.H. 387 (1870) ($ 578 actual, $ 100 exemplary); Taylor v. Grand Trunk Ry. Co., 48 N.H. 304 (1869) ($ 500 actual damages, $ 858.50 exemplary).

n29 In 1967, a California court of appeals held for the first time that punitive damages were recoverable in a strict products liability action. See Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689 (Cal. Ct. App. 1967).

n30 "Mass tort" litigation began in the late 1960s with cases involving the sale of the anti-cholesterol drug MER/29. See Paul D. Rheingold, The MER/29 Story-An Instance of Successful Mass Disaster Litigation, 56 Cal. L. Rev. 116 (1968); Roginsky v. RichardsonMerrell, Inc., 378 F.2d 832 (2d Cir. 1967). See generally Richard A. Seltzer, Punitive Damages In Mass Tort Litigation: Addressing The Problems of Fairness, Efficiency And Control, 52 Fordham L. Rev. 37 (1983).

n31 See Victor E. Schwartz et al., Multiple Imposition Of **Punitive Damages:** The Case For **Reform,** Critical Legal Issues: Working Paper Series (Wash. Legal Found. Mar. 1995).

n32 See, e.g., Utah Code Ann. § 78-18-1(1)(a) (West 1992) (malice or fraud or reckless indifference toward, and a disregard of, the rights of others).

n33 See e.g., Wisker v. Hart, 766 P.2d 168 (Kan. 1988) ("gross negligence").

n34 See Gillham v. Admiral Corp., 523 F.2d 102 (6th Cir. 1975) ($ 125,000 compensatory damages, $ 50,000 attorneys' fees, $ 100,000 punitive damages); Toole v. Richardson-

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Merrell, Inc., 251 Cal. App. 2d 689 (Cal. Ct. App. 1967) ($ 175,000 compensatory, $ 250,000 punitive damages); Moore v. Jewel Tea Co., 253 N.E.2d 636 (Ill. App. 1969) ($ 920,000 compensatory damages, $ 10,000 punitive damages), aff'd, 263 N.E.2d 103 (Ill. 1970).

n35 George L. Priest, Punitive Damages and Enterprise Liability, 56 S. Cal. L. Rev. 123, 123 (1982).

n36 John Calvin Jeffries, Jr., A Comment on The Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 142 (1986); see also Peter W. Huber, The Legal Revolution and its Consequences (1988); Walter K. Olson, The Litigation Explosion (1991).

n37 Malcolm Wheeler, A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation, 40 Ala. L. Rev. 919 (1989).

n38 512 U.S. 415 (1994).

n39 Id. at 432. Honda Motor involved an all terrain vehicle that flipped over when an inebriated plaintiff tried to drive it up a hill. See id. at 418. The Court struck down a punitive damages award on the ground that Oregon law violated due process because it did not provide an opportunity for meaningful appellate review of the size of punitive damages awards. See id. at 432. One year earlier, in TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993), Justice O'Connor observed:

Corporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy. Moreover, they often represent a large accumulation of productive resources: jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth. Finally, juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from "wealthy" corporations to comparatively needier plaintiffs.

Id. at 491 (O'Connor, J., dissenting) (citation omitted).

n40 See generally Bruce N. Kuhlik & Richard F. Kingham, The Adverse Effects of Standardless Punitive Damage Awards on Pharmaceutical Development and Availability, 45 Food Drug Cosm. L.J. 693, 693 (1990) ("There is a growing body of evidence that the **threat** of punitive damages deters the development and marketing of beneficial products.").

n41 See, e.g., Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311 (9th Cir. 1995); Turpin v. Merrell Dow Pharm., Inc., 736 F. Supp. 737 (E.D. Ky. 1990), aff'd, 959 F.2d 1349 (6th Cir. 1992).

n42 See, e.g., Ealy v. Richardson-Merrell, Inc., 897 F.2d 1159 (D.C. Cir. 1990) (overturning $ 75 million punitive damages award).

n43 See S. Rep. No. 105-32, at 41-42 (1997) (Senate Commerce Committee Report on Product Liability **Reform** Act of 1997).

n44 See Michael Rustad, Demystifying **Punitive Damages** in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts (Roscoe Pound Found. 1991).

n45 Professor Rustad said in his report: "The actual number of punitive damages awards in product liability litigation is unknown and possibly unknowable because no comprehensive recording system exists." Id. at 2 (emphasis added).

n46 See Brian J. Ostrom & Neal B. Kauder, Examining the Work of State Courts, 1993: A National Perspective from the Court Statistics Project 24 (State Justice Inst. 1993).

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n47 See Stephen Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1, 28 (1990) (noting that "jury verdicts in the minority of matters actually adjudicated play an important role in determining the worth, or **settlement** value, or civil matters filed but not tried").

n48 George L. Priest, **Punitive Damages Reform:** The Case of Alabama, 56 La. L. Rev. 825, 830 (1996).

n49 Steven Hayward, The Role of Punitive Damages in Civil Litigation: New Evidence from Lawsuit Filings 8 (Pacific Research Inst. Public Pol'y Feb. 1996).

n50 Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

n51 Actual malice is required in Maryland and the District of Columbia. See Owens-Illinois v. Zenobia, 601 A.2d 633 (Md. 1992), Jonathan Woodner, Co. v. Breeden, 665 A.2d 929 (D.C. 1995).

n52 See Malcolm E. Wheeler, The Constitutional Case for Reforming Punitive Damage Procedures, 69 Va. L. Rev. 269, 298 (1983).

n53 See Ala. Code § 6-11-20 (1993); Alaska Stat. § 09.17.020 (1998); Cal. Civ. Code § 3294(a) (West 1997); Fla. Stat. Ann. § 768.73 (West 1997); Ga. Code Ann. § 51-12-5.1 (1999); Iowa Code Ann. § 668A.1 (1998); Kan. Stat. Ann. § 60-3701(c) (1998); Ky. Rev. Stat. Ann. § 411.184(2) (Michie/Bobbs-Merrill 1998); Minn. Stat. Ann. § 549.20 (West Supp. 1998); Miss. Code Ann. § 11-1-65(1)(a) (Supp. 1998); Mont. Code Ann. § 27-1-221(5) (1998); N.J. Stat. Ann. § 2A:15-5.12 (1999); Nev. Rev. Stat. Ann. § 42-005(1) (1998); N.C. Gen. Stat. 10-15(b) (1999); N.D. Cent. Code § 32-03.2-11 (Supp. 1999); Ohio Rev. Code Ann. § 2307.80(A) (Anderson 1999); Okla. Stat. Ann. tit. 23, § 9.1 (West Supp. 1998); Or. Rev. Stat. § 18.537 (1997); S.C. Code Ann. § 15-33-135 (Law. Co-op. Supp. 1998); S.D. Codified Laws Ann. § 21-1-4.1 (1999); Tex. Civ. Prac. & Rem. Code § 41.003 (1999); Utah Code Ann. § 78-18-1 (1999); Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675 (Ariz. 1986); Jonathan Woodner Co. v. Breeden, 665 A.2d 929 (D.C. App. 1995); Masaki v. General Motors Corp., 780 P.2d 566 (Haw. 1989); Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349 (Ind. 1982); Tuttel v. Raymond, 494 A.2d 1353 (Me. 1985); Owens-Illinois v. Zenobia, 601 A.2d 633 (Md. 1992); Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104 (Mo. 1996); Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992); Wangen v. Ford Motor Co., 294 N.W.2d 437 (Wis. 1980). One state, Colorado, requires proof "beyond a reasonable doubt" in punitive damages cases. See Colo. Rev. Stat. § 13-25-127(2) (1987).

n54 See Punitive Damages: A Constructive Examination, 1986 A.B.A. Sec. Litig. Special Comm. on Punitive Damages 19 [hereinafter ABA Report]; Report on Punitive Damages of the Comm. on Special Problems in the Administration of Justice, Am. College of Trial Law. 15-16 (1989) [hereinafter ACTL Report]; Uniform Law Commissioners' Model Punitive Damages Act § 5 (approved July 18, 1996) [hereinafter Model Punitive Damages Act]; see also 2 Enterprise Responsibility for Personal Injury-Reporters' Study 248-49 (1991) [hereinafter ALI Reporters' Study].

n55 See Pacific Mutual, 499 U.S. at 23 n.11 (stating that "there is much to be said in favor of a State's requiring, as many do, . . . a standard of 'clear and convincing evidence'"). Congress has responded to the Court's observation by requiring plaintiffs to prove "clear and convincing evidence" of punitive damages liability before punitive damages can be imposed against volunteers of nonprofit organizations. See Volunteer Protection Act of 1997, Pub. L. No. 105-19, 111 Stat. 218.

n56 See Lane v. Hughes Aircraft Co., 993 P.2d 388 (Cal. 2000) (Brown, J., concurring).

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n57 See Solem v. Helm, 463 U.S. 277, 284 (1983) ("The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence."); Weems v. United States, 217 U.S. 349, 366-67 (1910) (It is "a precept of the fundamental law" as well as "a precept of justice that punishment for crime should be graduated and proportioned to the offense.").

n58 Some examples of federal criminal fines, even for particularly egregious crimes, do not exceed $ 250,000 and include: (1) tampering with consumer products ($ 250,000, if death results); (2) assault on the President ($ 30,000); (3) bank robbery ($ 75,000); (4) sexual exploitation of children ($ 100,000); and (5) treason ($ 10,000). See Federal Sentencing Guidelines § § 2N1.1, 5E1.2, 2A6.1, 2B3.1, 2G2.1, 2M1.1 (Phylis Skloot Bamberger & David J. Gottlieb eds., 3d ed. Supp. 1999).

n59 Lewis Powell, The "Bizarre" Results of Punitive Damages, Wall St. J., Mar. 8, 1995, at A21.

n60 See Ala. Code § 6-11-21 (1993); Alaska Stat. § 9.17.020(f)-(h) (1998); Colo. Rev. Stat. § 13-21-102(1)(a)(1998); Conn. Gen. Stat. § 52240b (1999); Fla. Stat. Ann. § 768.73 (1)(b) (West 1997); Ind. Code Ann. § 34-51-3-4 (1999); Kan. Stat. Ann. § 60-3701 (1998); N.J. Stat. Ann. § 2A:15-5.14 (West 1999); N.C. Gen. Stat. § 1D-25 (1999); N.D. Cent. Code § 32.03.2-11(4) (1999); 23 Okl. St. § 9.1 (1998); Tex. Civ. Prac. & Rem. Code Ann. § 41.008 (West 1999); Va. Code Ann. § 8.01-38.1 (1999).

n61 See generally ACTL Report, supra note 54, at 15 (proposing that punitive damages be awarded up to two times a plaintiff's compensatory damages or $ 250,000, whichever is greater); ABA Report, supra note 54, at 64-66 (recommending that punitive damages awards in excess of three-to-one ratio to compensatory damages be considered presumptively "excessive"); ALI Reporters' Study, supra note 54, at 258-59 (endorsing concept of ratio coupled with alternative monetary ceiling).

n62 At the federal level, Congress included a cap on punitive damages for individuals and small businesses in the Year 2000 Readiness and Responsibility Act, Pub. L. 106-37, 113 Stat. 135 [hereinafter Y2K Act]. The Y2K Act established procedures and legal standards for lawsuits stemming from Year 2000 date-related computer failures. A bill to cap punitive damages for individuals and small businesses in all civil actions was reported out of the House Judiciary Committee in February of 2000 by voice vote. See H.R. Rep. No. 106-494 (2000). The House passed the bill on February 16, 2000.

n63 Thomas Jefferson, A Bill for Proportioning Crimes and Punishment in Cases Heretofore Capital (1779), in Papers of Thomas Jefferson 2:492, 493 (Julian P. Boyd ed., 1950).

n64 For example, in a 1999 products liability case arising out of an automobile accident involving a drunk driver, a California court left untouched a jury award of $ 107 million in compensatory damages; the court approved punitive damages in the case totaling $ 1.09 billion. See Frederic M. Biddle, GM Verdict Cut $ 3.8 Billion in Suit Over Explosion, Wall St. J., Aug. 27, 1999, at B5. In a 1996 case, an Alabama jury awarded $ 50 million in compensatory damages and $ 100 million in punitive damages. The automobile's manufacturer argued that the plaintiff had been intoxicated and lost control of his car after falling asleep at the wheel. See Hardy v. General Motors Corp., CV-93-56 (Ala. Cir. Ct. Lowndes County verdict June 3, 1996).

n65 See Edward Felsenthal, Punitive Awards Are Called Modest, Rare, Wall St. J., June 17, 1996, at B4.

n66 See W. Kip Viscusi, The Social Costs of Punitive Damages Against Corporations In

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to the uncertainty (and therefore the risk) of a court trial outcome. ... [62] This recommendation reflects the practical reality that a punitive damages award exceeding $ 250,000 would bankrupt most individuals and small businesses. ... [98] Having found the verdict tainted, the court reduced the punitive damages award to $ 2 million, believing that this amount was "a constitutionally reasonable" punishment for BMW's conduct in Alabama. ...

TEXT:
[*1003]

Introduction

The United States Supreme Court has expressed serious concern in recent years that punitive damages awards in this country have "run wild," jeopardizing fundamental constitutional rights. [1] The Court has provided some general controls, holding that the Due Process Clause of the Fourteenth Amendment imposes both substantive limits on the size of punitive damages awards [2] and procedural limits on when and how **[*1004]** punitive damages may be awarded. [3] Yet, excessive **punitive damages** awards continue to be a major problem in many states. [4] **Reform** is urgently needed to restore balance, fairness, and predictability to the law. Jackpot justice should not be permitted to replace fairness and rationality in punitive damages law.

Punitive damages are not normal civil or tort law damages. They are not awarded to compensate for a harm; that purpose is accomplished by compensatory damages, which provide compensation for both economic losses (e.g., lost wages, medical expenses, and substitute domestic services) and noneconomic losses (e.g., "pain and suffering"). Punitive damages are awarded "to further the aims of the criminal law: 'to punish reprehensible conduct and to deter its future occurrence.'" [5] They provide a "windfall recovery" for plaintiffs. [6]

Punitive damages, like many forms of punishment, are by their nature, designed to "engender adverse social consequences," including in many instances, debilitating stigma. [7] Courts and commentators alike have emphasized the "potentially devastating" ramifications of a punitive damages award on a civil defendant's character, reputation, business, and good will. [8] The problems created by this stigma are amplified by **[*1005]** the way the media reports on punitive damages awards. While a large initial punitive damages verdict may frequently make front page national news, an appellate decision reducing or reversing the award several years later usually gets little coverage, if it is reported at all. The truth often fails to catch up with the perception created about the defendant.

This Article traces the history of punitive damages awards from their early limited inception to the modern expansive trend. It will then describe the problems of runaway and unpredictable awards. Finally, the article will provide background and support for a number of needed **reforms** to our nation's **punitive damages** jurisprudence. Nearly all of these **reforms** could be accomplished both by courts through the development of the common law and by legislatures; a few would require legislation; one calls for congressional action. [9]

By way of summary, we propose establishing a "trigger," or standard, for punitive damages liability that reflects the intentional tort roots of punitive damages awards. We believe that punitive damages should only be awarded if there is "clear and convincing evidence" that the defendant acted with "actual malice" toward the claimant. We also propose limits on punitive damages awards so that the punishment fits the offense. This would help prevent due process violations and promote **settlements.**

We also call for a number of procedural and evidentiary changes in punitive damages law to safeguard fundamental due process rights. We believe that, at a defendant's request, a trial

Environmental and Safety Torts, 87 Geo. L.J. 285, 294 (1998).

n67 See Troy L. Cady, Disadvantaging the Disadvantaged: The Discriminatory Effect of Punitive Damage Caps, 25 Hofstra L. Rev. 1005 (1997).

n68 See U.S. Small Bus. Admin. (visited Mar. 7, 2000) <http://www.sba.gov/womeninbusiness>.

n69 See U.S. Small Bus. Admin., Minorities in Business iii (Office of Advocacy 1999).

n70 See id.

n71 See Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992); Transportation Ins. Co. v. Moriel, 879 S.W.2d 10 (Tex. 1994).

n72 See, e.g., Cal. Civ. Code § 3295(d) (West Supp. 1999); Minn. Stat. Ann. § 549.20 (West Supp. 1999); Miss Code Ann. § 11-1-65(1)(a) (Supp. 1999).

n73 See ABA Report, supra note 54, at 19; ACTL Report, supra note 54, at 18-19; Model Punitive Damages Act, supra note 54, § 11; ALI Reporters' Study, supra note 54, at 255 n.41.

n74 Strickland v. Owens Corning, 142 F.3d 353, 359 (6th Cir. 1998) (citations omitted). As one leading commentator noted:

Juries have a natural sympathy for injured persons and not infrequently a corresponding hostility to "big business." The notion that juror consideration of the multimillion, often multibillion, dollar figures on a corporate balance sheet would operate to protect such defendants against excessive liability is, in context, almost laughable.

John Calvin Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 146-47 (1986) (citations omitted).

n75 Defendants, however, should be able to introduce net worth evidence to mitigate damages. When introduced for this purpose, net worth evidence is not likely to produce a verdict based on bias or prejudice.

n76 499 U.S. 1 (1991).

n77 Id. at 22.

n78 Id.

n79 509 U.S. 443 (1993).

n80 Id. at 464. The Court did not rule on this potential due process violation because TXO had not preserved the issue for appeal. See id.

n81 517 U.S. 559 (1996).

n82 Id. at 574. In BMW, the United States Supreme Court established three guideposts to determine when a punitive award is excessive and violates due process. See infra Part III.F. Significantly, the Court did not even discuss wealth as a factor in developing its guideposts. That fact has led Judge Easterbrook to conclude that such evidence is irrelevant and inadmissible. See Pivot Point Int'l v. Charlene Prods., Inc., 932 F. Supp. 220 (N.D. Ill. 1996) (Easterbrook, J., sitting by designation).

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n83 BMW, 517 U.S. at 585; see also Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . . .").

n84 Dissenting in TXO, Justice O'Connor stated:

Corporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy. Moreover, they often represent a large accumulation of productive resources; jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth. Finally, juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from "wealthy" corporations to comparatively needier plaintiffs.

TXO, 509 U.S. at 491 (O'Connor, J., dissenting). Justice O'Connor dissented because she believed that TXO had preserved the "wealth issue" for appeal. She would have overturned the punitive damages award on the ground that the jury was "unduly influenced by the fact that TXO was a very large, out-of-state corporation." Id. at 489; see also Dick Thornburgh, No End in Sight as Punitive Damages Go Up, Up, Up, Wall St. J., Mar. 13, 2000, at A47.

n85 ALI Reporters' Study, supra note 54, at 254-55 (stating that "in determining the size of the award that is sufficient for deterrence, what is relevant is not the defendant's overall wealth, but rather the profit it realized from the particular tortious activity in question . . . . Use of evidence of the defendant's wealth in calculating punitive damages against organizational defendants therefore cannot be justified even by the rationale of economic deterrence, let alone of retributive punishment.") (second emphasis added); see also Victor Schwartz & Mark Behrens, The American Law Institute's Reporters' Study On Enterprise Responsibility For Personal Injury: A Timely Call For **Punitive Damages Reform,** 30 San Diego L. Rev. 263, 271-72 (1993) ("The Reporters' recommendation to exclude evidence of a defendant's total wealth represents sound public policy. When a jury is allowed to focus on a defendant's wealth, the jury is free to disregard what is really at issue in the case: whether and to what extent the defendant's conduct was wrongful.").

n86 Zazu Designs v. L'Oreal, S.A., 979 F.2d 499, 508 (7th Cir. 1992) (Easterbrook, J.).

n87 See ALI Reporters' Study, supra note 54, at 255 n.40. The ALI Reporters also pointed to another reason that a defendant's assets are irrelevant to the issue of punitive damages:

The actual burden of imposing a higher legal penalty on account of size cannot be borne by the formal corporate entity and will rarely be borne by the officials actually responsible; instead, the burden ultimately falls on the shareholder, customer, or worker constituencies of the firm, who often are not especially wealthy.

ALI Reporters' Study, supra note 54, at 255.

n88 See Kemezy v. Peters, 79 F.3d 33, 35 (7th Cir. 1996) (**Posner,** J.) (The idea that a larger punishment is needed to deter a rich person than a person of modest means "does not apply to institutions as distinct from natural persons."). As Judge Easterbrook has explained:

Corporations . . . are not wealthy in the sense that persons are. Corporations are abstractions; investors own the net worth of the business. These investors pay any punitive awards (the value of their shares decreases), and they may be of average wealth. Pension trusts and mutual funds, aggregating the investments of millions of average persons, own the bulk of many large corporations. Seeing the corporation as wealthy is an illusion, which like other mirages frequently leads people astray.

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Zazu Designs, 979 F.2d at 508.

n89 Kenneth S. Abraham & John Calvin Jeffries, Jr., Punitive Damages and the Rule of Law: The Role of Defendant's Wealth, 18 J. Legal. Stud. 415, 417 (1989) (emphasis added).

n90 517 U.S. 559 (1996).

n91 Id. at 585.

n92 Id. at 563.

n93 Id. at 565.

n94 See id. at 563-64.

n95 See BMW, 517 U.S. at 565.

n96 Id.

n97 See id. at 567.

n98 See id.

n99 Id.

n100 See BMW, 517 U.S. at 585-86.

n101 Id. at 571-72 (quoting Healy v. Beer Inst., 491 U.S. 324, 335-36 (1989)).

n102 Id. at 585.

n103 Id. at 571.

n104 Id. (citation omitted).

n105 BMW, 517 U.S. at 572; see also Bigelow v. Virginia, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."); New York Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914) ("It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called into question and hence authorities directly dealing with it do not abound."); Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction . . . . Each State is independent of all the others in this particular.").

n106 BMW, 517 U.S. at 572-73; see also Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.").

n107 BMW, 517 U.S. at 573-74.

n108 Id. at 572 n.17; see also Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521 (1992) (holding that state regulation for preemption purposes can be as effectively exerted through

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an award of tort damages as through state administrative or legislative lawmaking processes); New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959) ("Regulation can be as effectively exerted through an award of damages as through some form of preventative relief.").

n109 BMW, 517 U.S. at 572.

n110 See generally Restatement (Third) Of The Law Of Torts: Products Liability § 4(b) (1998) (evidence of product's compliance with safety statutes or regulations "does not preclude as a matter of law a finding of product defect").

n111 See BMW, 517 U.S. at 572.

n112 See In re American Med. Sys., Inc., 75 F.3d 1069, 1085 (6th Cir. 1996) (decertifying class action, in part, because the trial court judge failed to consider how negligence law differed from jurisdiction to jurisdiction); Castano v. American Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996) (multistate class action decertified, because trial court failed to consider how variations in state law would affect federal rule requirements regarding class actions); In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300 (7th Cir. 1995) (**Posner**, J.) (comparing differing state pattern instructions on negligence and differing formulations on the meaning of negligence).

n113 See Margaret Meriwether Cordray, The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards, 78 Or. L. Rev. 275, 309 (1999) ("Constitutional principles of sovereignty and federalism thus forbid a state from imposing punitive damages based on the defendant's out-of-state conduct, regardless of whether the defendant's conduct was lawful or unlawful where it occurred. To allow an individual state to impose punitive damages based on conduct, lawful or unlawful, having no significant contacts with that state would indeed, 'throw down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.'" (quoting New York Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914)).

n114 See Ariz. Rev. Stat. Ann. § 12-701 (West 1999); Mich. Stat. Ann. § 600.2946(5) (1999); N.J. Stat. Ann. § 2A:58C-5(c) (West 1999); Ohio Rev. Code Ann. § 2307.801(c) (West 1999); Or. Rev. Stat. § 30.927(1) (1998); Utah Code Ann. § 78-18-2 (1999); see also Colo. Rev. Stat. § 1321-403(1)(b) (1999) (rebuttable presumption that product was not defective if it complied with federal or state standards); N.D. Cent. Code § 28-01.402 (1)(a) (1999) (same).

n115 ALI Reporters' Study, supra note 54, at 95, 101.

n116 See Victor E. Schwartz & Liberty Magarian, Multiple Punitive Damage Awards in Mass Disaster and Product Liability Litigation: An Assault on Due Process, 8 Adelphia L.J. 101 (1992).

n117 See Edwards v. Armstrong World Indus., Inc., 911 F.2d 1151, 1155 (5th Cir. 1990) ("If no change occurs in our tort or constitutional law, the time will arrive when [a defendant's] liability for punitive damages imperils its ability to pay compensatory claims . . . ."); Bishop v. General Motors Corp., 925 F. Supp. 294, 298 (D.N.J. 1996) ("Indeed, one of the many cogent criticisms of punitive damages is that multiple punitive damage liability can both bankrupt a defendant and preclude recovery for tardy plaintiffs.").

n118 See generally Froud v. Celotex Corp., 437 N.E.2d 910, 914 (Ill. 1982) (Sullivan, J.,

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concurring) ("It cannot be denied that the spectre of the destruction of companies, and even individuals, as a result of punitive damage awards is a threatening, present reality.").

n119 Dunn v. Hovic, 1 F.3d 1371, 1398 (3d Cir. 1993) (Weis, J., dissenting), modified in part, 13 F.3d 58 (3d Cir. 1993).

n120 William Schwartzer, Punishment Ad Absurdum, 11 Cal. Law. 116 (Oct. 1991).

n121 See Racich v. Celotex Corp., 887 F.2d 393, 398 (2d Cir. 1989) ("We agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle."); Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1064 (D.N.J. 1989) ("The court holds that due process places a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct. Regardless of whether a sanction is labelled 'civil' or 'criminal' in nature, it cannot be tolerated under the requirements of due process if it amounts to unrestricted punishment."), vacated, 718 F. Supp. 1233 (D.N.J. 1989), rev'd on other grounds sub nom., Juzwin v. Asbestos Corp., 900 F.2d 686 (3d Cir. 1990); In re Northern Dist. of Calif. "Dalkon Shield" IUD Prod. Liab. Litig., 526 F. Supp. 887, 899 (N.D. Cal. 1981) ("A defendant has a due process right to be protected against unlimited multiple punishment for the same act."), vacated and remanded on other grounds, 693 F.2d 847 (9th Cir. 1982); see also King v. Armstrong World Indus., Inc., 906 F.2d 1022, 1031 (5th Cir. 1990) ("It must be said that a strong arguable basis exists for applying the due process clause . . . to a jury's award of punitive damages in a mass tort context."), reh'g denied, 914 F.2d 251 (5th Cir. 1990); In re Federal Skywalk Cases, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J., dissenting) (Unlimited punishment for one course of conduct "would violate the sense of 'fundamental fairness' that is essential to constitutional due process."); Morse v. Southern Union Co., 38 F. Supp. 2d 1120, 1126 n.12 (W.D. Mo. 1998) ("While the Missouri courts seem not to have considered whether the likelihood of multiple claims should limit punitive damages recovery, I believe such a factor may be required by Due Process."); McBride v. General Motors Corp., 737 F. Supp. 1563, 1570 (M.D. Ga. 1990) ("Due process may place a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct."); Magallanes v. Superior Ct., 167 Cal. App. 3d 878, 888, (Cal. Ct. App. 1985) ("It is also fair to ask whether a defendant who has been punished with punitive damages when the case is first tried should be punished again when the second, or the tenth, or the hundredth case is tried.").

n122 See Dan D. Dobbs, Law of Remedies § 3.11(8) (2d ed. 1993) ("If the first verdict for punitive damages . . . represents the appropriate level of punishment, it may be seriously unfair to inflict additional punishment in all subsequent cases. Besides the unfairness, such awards may destroy a valuable business and may exhaust its assets so that later victims of the same tort collect nothing at all."); John Calvin Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139 (1986); Dennis Jones et al., Multiple Punitive Damages Awards For A Single Course of Wrongful Conduct: The Need For A National Policy To Protect Due Process, 40 Ala. L. Rev. 1 (1991).

n123 Dunn v. Hovic, 1 F.3d 1371, 1399 (3d Cir. 1993) (Weis, J., dissenting); see also Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 415 (5th Cir. 1986) (en banc) (Clark, C.J., dissenting) ("The court is frustrated by the lack of congressional action [to solve the multiple punitive damages problem]. Clearly the powers of Congress to tax and regulate give that forum the interstate reach and flexibility needed to allocate the relatively scarce resources that must be available to present and future claimants to achieve the greatest good for society.").

n124 This problem was described by the ALI:

Single-state action . . . is an ineffectual response to the problem, because one state cannot

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control what happens in other jurisdictions. In fact, the state that acts alone may simply provide some relief to out-of-state manufacturers at the expense of its own citizen-victims, a situation that hardly provides much law reform incentive for state legislators.

ALI Reporters' Study, supra note 54, at 261. Recognizing that a uniform remedy can only be achieved at the federal level, the ALI Reporters' Study recommended Congressional action. See ALI Reporters' Study, supra note 54, at 261.

n125 Florida does not permit punitive damages to be awarded more than once for the same act or course of conduct unless the court determines by clear and convincing evidence that the amount of punitive damages previously awarded was insufficient to punish the defendant. In that situation, the court may permit a jury to consider an award of subsequent punitive damages. Any subsequent awards must be reduced by the amount of any earlier punitive damages awards. See Fla. Stat. Ann. § 768.73(2) (West 1997). Missouri passed a statute, applicable in most tort actions, that allows a defendant to file a post-trial motion requesting a credit for prior awards arising out of the same conduct. See Mo. Ann. Stat. § 510.263.4 (1999). A Georgia statute limiting punitive damages in product liability cases to a single award, see Ga. Code Ann. § 51-125.1(e) (1999), was declared unconstitutional. See McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990).

n126 718 F. Supp. 1233 (D.N.J. 1989), rev'd on other grounds sub nom., Juzwin v. Asbestos Corp., 900 F.2d 686 (3d Cir. 1990).

n127 See id. at 1235 ("This court does not have the power or the authority to prohibit subsequent awards in other courts, notwithstanding its opinion that such subsequent awards violate the due process rights of the defendants . . . . Until there is uniformity either through Supreme Court decision or national legislation, this court is powerless to fashion a remedy which will protect the due process rights of this defendant or other defendants similarly situated."); see also Davis v. Celotex Corp., 420 S.E.2d 557, 566 (W. Va. 1992) (noting that, because punitive damages can be awarded "nationwide, it is doubtful that one state's ruling would necessarily bind other jurisdictions"); Fischer v. Johns-Manville Corp., 512 A.2d 466, 480 (N.J. 1986) ("At the state court level we are powerless to implement solutions to the nationwide problems created by [multiple punitive damages awards]."). See generally David Lafferty, Note, Juzwin v. Amtorg Trading Corp.: Multiple Assessments of Punitive Damages In Toxic Tort Litigation, 8 Pace Envtl. L. Rev. 647, 665 (1991) (concluding that the problem of multiple punitive damages awards "cries out for congressional action").

n128 See generally TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 472 (1993) (Scalia and Thomas, J.J., concurring in the judgment) (indicating a belief that "any perceived 'unfairness' in the common-law punitive damages regime" should be fixed by legislatures).

n129 W.R. Grace & Co.-Conn. v. Waters, 638 So. 2d 502, 505 (Fla. 1994); see also Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 865-66 (Iowa 1994) ("We do not disagree that the problem of successive punitive damages awards in mass tort cases arising from the same conduct is a serious one . . . . We believe neither our action nor legislative action in Iowa will curb the problem of multiple punitive damage awards in mass tort litigation.").

n130 140 Cong. Rec. S14835-6 (daily ed. Oct. 7, 1994) (statement of Sen. Danforth).

n131 Id.

n132 Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

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involving a punitive damages claim should be "bifurcated" so that the proceedings on punitive damages are separate from and subsequent to the proceedings on compensatory damages before the same jury. This would prevent evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by the jurors and improperly considered when they are determining basic liability. We also suggest that **[*1006]** evidence of a defendant's net worth should be excluded from consideration at trial. Further, we explain that evidence of a defendant's out-of-state activity should not be considered when determining an award of punitive damages.

Next, to encourage the innovation and distribution of lifesaving and life-enhancing products that are socially beneficial to society, we recommend that punitive damages should not be permitted in cases alleging harms caused by FDA pre-market approved pharmaceuticals, vaccines, or medical devices, unless the approval was obtained through fraud or bribery.

Finally, we argue for federal legislation to address the special problem of multiple punitive damages awards for a single act or course of conduct. Repetitive punishment is not only unfair overkill, but it can strip a company of assets and endanger the ability of future claimants to recover even basic out-of-pocket expenses and damages for their pain and suffering.

I. Background: The Development of Punitive Damages Law

A. The First 200 Years

Punitive, or exemplary, damages first received explicit recognition by the English common law in 1763 in two cases involving illegal searches and seizures by officers of the Crown. [10] In Huckle v. Money, [11] the first case to use the term "exemplary damages," and its companion case, Wilkes v. Wood, [12] English courts for the first time expressed that "the punitive and deterrent purposes of damage awards could be separated from their compensatory function." [13] **[*1007]**

Huckle and Wilkes were followed by cases approving punitive damages awards in a narrow category of torts involving conscious and intentional harm inflicted by one person on another. These "intentional torts" included assault and battery, [14] malicious prosecution, [15] false imprisonment, [16] and trespass. [17] Punitive damages were allowed in these cases as an auxiliary, or "helper," to the criminal law system, which in eighteenth century England "punished more severely for infractions involving property damage than for invasions of personal rights." [18]

As in England, punitive damages in colonial America (and through the nineteenth and well into the twentieth centuries) were available only in a comparatively small class of torts-"the traditional intentional torts." [19] These included: assault and battery, [20] libel and slander, [21] malicious prosecution, [22] false imprisonment, [23] and intentional interferences with property **[*1008]** such as trespass and conversion, malicious attachment, or destruction of property, [24] private nuisance, [25] and similar wrongful conduct. [26] In general, punitive damages "merited scant attention," because they "were rarely assessed and likely to be small in amount." [27] Typically, punitive damages awards only slightly exceeded compensatory damages awards, if at all. [28]

B. The Modern Era

Beginning in the late 1960s, American courts began to depart radically from the historical "intentional tort" moorings of punitive damages. [29] The advent of "mass tort" litigation resulted in an increase of punitive damages claims against manufacturers, [30] including the possibility of repeated imposition of punitive damages for an alleged risk in a single product line or a single decision. [31] **[*1009]**

"Reckless disregard" became a popular standard for punitive damages liability. [32] A number of states utilize a triple "trigger"-punitive damages can be awarded if the defendant engaged in either willful, wanton, or gross misconduct. The triple trigger approach gives plaintiffs three separate paths to obtain punitive damages. In some states, "gross negligence" can support a punitive damages award. [33]

Changes in punitive damages law and practice also impacted both the frequency and size of punitive damages awards. For example, until 1976, there were only three reported appellate court decisions upholding awards of punitive damages in product liability cases, and the punitive damages award in each case was modest in proportion to the compensatory damages awarded. [34] Then, in the late 1970s and 1980s, the size of punitive damages awards "increased dramatically" [35] and "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface." [36] "Today," as one respected commentator in the field has noted, "hardly a month goes by without a multi-million dollar punitive damages verdict in a product liability case." [37]

This phenomenon is fueled in part by evidentiary rules that permit a contingency fee plaintiff's lawyer to tell the jury not only about the profit the defendant made on a product, but also the general wealth of the corporation as a whole. Plaintiffs' lawyers argue to juries that large, wealthy corporations will "get the message" only if punitive damages are sub **[*1010]** stantial. As the United States Supreme Court noted in Honda Motor Co., Ltd. v. Oberg, [38] a products liability punitive damages case, "The presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." [39]

II. **Punitive Damages Reform** Is Needed

A. The Problem with Runaway **Punitive Damages**

Reform is needed to address the chilling effect that the **threat** of runaway **punitive damages** can have on job-creators and the general public, who are denied socially beneficial products. **Reform** also would help prevent due process violations.

The chilling effect of **punitive damages** is illustrated by the litigation involving the drug Bendectin, an anti-nausea morning sickness drug once marketed by Merrell Dow Pharmaceuticals, Inc. [40] Although the drug had been and still is approved by the Food and Drug Administration and is widely acclaimed by health care professionals worldwide, Merrell Dow withdrew Bendectin from the market in 1983, in part **[*1011]** from concerns about punitive damages liability. Merrell Dow has never lost a final judgment in any Bendectin case in the twenty-year history of the litigation; trial judges often dismiss these cases prior to trial. [41] The lack of any meaningful standards, however, has resulted in some substantial punitive damages verdicts, which eventually have been overturned by trial courts or on appeal. [42]

The sheer unpredictability of the current system has also resulted in overdeterrence. A Conference Board Study of corporate executives found that fear of liability suits had prompted thirtysix percent of the firms to discontinue a product and thirty percent to decide against introducing a new product. [43]

B. "Data Wars" and the In Terrorem Effect of **Punitive Damages**

Opponents of **punitive damages reform** have argued that changes in the law are not needed, because headline-grabbing awards are often reduced on appeal. For example, one study funded by plaintiffs' lawyers has suggested that there were only 355 punitive damages awards in products liability cases from 1965 to 1990. [44] While the author of this study has

conceded that this number was only a "guesstimate," [45] the study also overlooked the practical reality that actual punitive awards represent just the tip of the iceberg in regard to their impact. They are dwarfed by the amounts paid out in **settlements** due to the in terrorem effect of punitive damages.

On average, over ninety percent of cases are settled out of court or otherwise disposed of without trial. [46] In many of **[*1012]** these cases, the **threat** of punitive damages may be abused as a "wild card" to force higher **settlements.** [47] As Yale law professor George Priest has observed:

The availability of unlimited punitive damages affects the 95% to 98% of cases that settle out of court prior to trial. It is obvious and indisputable that a punitive damages claim increases the magnitude of the ultimate **settlement** and, indeed, affects the entire **settlement** process, increasing the likelihood of litigation. [48]

Professor Priest's observation is supported by the findings of a 1996 Pacific Research Institute for Public Policy study, which concluded:

1. The unpredictability of a prospective punitive damage award contributes significantly to the uncertainty (and therefore the risk) of a court trial outcome.

2. Both the uncertainty posed by the prospect of unlimited punitive damages, combined with the relative probability of a punitive damage award if a case goes to jury trial, provide litigants who demand punitive damages with potent leverage against risk-averse defendants, and tip the balance in **settlement** bargains in favor of litigants with weak or frivolous cases. [49]

III. Proposals For **Punitive Damages Reform**

In order to address the United States Supreme Court's concern that **punitive damages** awards in this country have "run wild," [50] clear, rational rules are needed to protect fundamental constitutional rights, remove barriers to interstate commerce, and promote economic growth and innovation, while at the same time providing incentives for responsible business practices. Below, we discuss a number of proposals that find strong support in both the law and sound public policy. **[*1013]**

A. Actual Malice "Trigger"

Punitive damages should only be awarded if the defendant's conduct exhibited actual malice. This "trigger" reflects the roots of punitive damages law. At the time the Founding Fathers ratified the Constitution and until relatively recent times, punitive damages were reserved for clearly intentional torts such as assault, battery, trespass, and false imprisonment. While the actual malice standard is more conservative than the current law in most states, [51] we believe it is preferable to other standards, such as the "triple trigger" approach, because it would help separate conduct that is particularly reprehensible and worthy of punishment from that which is not.

B. "Clear and Convincing Evidence" Burden of Proof

A claimant should be required to establish proof of punitive damages liability by "clear and convincing evidence." The "clear and convincing evidence" burden of proof standard reflects the quasi-criminal nature of punitive damages; it takes a middle ground between the burden

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of proof standard ordinarily used in civil cases (i.e., proof by a "preponderance of the evidence") and the criminal law standard (i.e., proof "beyond a reasonable doubt"). [52] The standard is now law in twenty-nine states and the District of Columbia, [53] and has been recom **[*1014]** mended by each of the principal academic groups to analyze the law of punitive damages over the past decade, including the American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws. [54] The United States Supreme Court has specifically endorsed the "clear and convincing evidence" burden of proof standard in punitive damages cases. [55]

C. Proportionality: Making the Punishment Fit the "Offense"

1. A Proposal for **Reform**

Reasonable parameters should be put on **punitive damages** awards to make the punishment fit the offense. [56] Proportionality has been an important part of the United States Supreme Court's consideration of the validity of criminal punishment. [57] Even very serious crimes such as larceny, robbery, and arson **[*1015]** have sentences defined by a statutory maximum. [58] As former Supreme Court Justice Lewis Powell wrote: "It is long past time to bring the law of punitive damages into conformity with our notions of just punishment." [59]

A number of states have enacted statutes to address excessiveness in punitive damages awards. [60] We support permitting punitive damages awards against larger businesses up to two times the amount awarded to the claimant for economic and noneconomic losses, or $ 250,000, whichever is greater. [61] This flexible approach accomplishes punishment and deterrence in the unusual situation where there is serious misconduct and relatively minor actual damages. We also support limiting the maximum single punishment against an individual or small business to two times the amount awarded to the claimant for economic and noneconomic losses, or $ 250,000, whichever is less (i.e., $ 250,000 would be the maximum). [62] **[*1016]** This recommendation reflects the practical reality that a punitive damages award exceeding $ 250,000 would bankrupt most individuals and small businesses.

2. Arguments Challenging Proportionality Are Unsupported

It has been argued that proportionality may result in inadequate deterrence. As Thomas Jefferson noted, however, "if the punishment were only proportional to the injury, men would feel that their inclination as well as their duty to see the laws observed." [63] Indeed, federal antitrust laws have worked well for decades with punishment set in proportion to actual losses.

Furthermore, it should be remembered that there is no limit on the number of times a business can be punished and that when a business engages in wrongful conduct it does not know how many people will be hurt and how much harm might occur. There is simply no way for a company to predetermine the actual damages of all persons who may be injured by its conduct. One also must remember that compensatory damages themselves can run very high, so they can definitely have a deterrent effect on wrongful behavior as well. [64]

The argument that proportionality may somehow result in inadequate deterrence has been rebutted by empirical fact. A study by two Cornell University Law School professors and the National Center for State Courts found that awards in product liability punitive damages cases, after all appeals were exhausted, have almost always been within two times compensatory damages. [65] **[*1017]**

We have been asked, in light of this report, why a so-called "cap" on punitive damages is needed. The answer is that the present system is time consuming and wasteful. It may take months or years until the final "appeal" is determined. It is our judgment that having a firm outer limit on punitive damages will reduce appeals and legal costs without sacrificing

deterrence. This should benefit both plaintiffs and defendants.

In addition, it has been argued that totally unlimited punitive damages are needed to police corporate wrongdoing. This assertion is not supported by fact. There is no credible evidence that the behavior of businesses is less safe in either those states that have set limits on punitive damages or in the states that do not permit punitive damages at all. [66] Furthermore, plaintiffs in these states have no more difficulty obtaining legal representation than in those states where the "sky is the limit."

Finally, it has been suggested that a proportionality requirement for punitive damages could be unfair to women and other minority groups that tend to recover less in compensatory damages than other groups, because it may reduce the amount such individuals could recover in punitive damages. [67] First, this argument totally misapprehends the basic premise that punitive damages have absolutely nothing to do with compensating an individual for a loss; they are purely a "windfall" to the claimant.

Second, the argument ignores the needs of women and minority groups in business, particularly small businesses, who face **threats** to their enterprises as a result of unlimited punitive damages. The U.S. Small Business Administration's Office of Women's Business Ownership has reported that there are 8 million women-owned businesses in the United States. [68] In addition, the U.S. Small Business Administration's Office of Advocacy has reported that, by 1997, there were an estimated 3.25 million minority-owned businesses in the United States, **[*1018]** generating $ 495 billion in revenues, and employing nearly 4 million workers. [69] From 1987 to 1997, the number of minority-owned businesses increased 168%, while revenues grew twice as fast-343%. [70] **Punitive damages reform** would benefit these businesses greatly.

D. Bifurcation

At a defendant's request, a trial involving a punitive damages claim should be divided so that the proceedings on punitive damages are separate from and subsequent to the proceedings on compensatory damages. Judicial economy would be achieved by having the same jury determine both compensatory damages and punitive damages issues.

Bifurcated trials are equitable, because they prevent evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by jurors and improperly considered when they are determining basic liability. For example, plaintiffs' lawyers like to introduce evidence of a company's net worth. Although a jury is often instructed to ignore such evidence unless it decides to punish the defendant, it is difficult, as a practical matter, for jurors to do so. The net result may be that jurors overlook key issues regarding whether a defendant is liable for compensatory damages; they may make an award simply because they believe that the defendant "can afford it." Bifurcation would help prevent that unfair result because evidence of the defendant's net worth would be inadmissible in the first part (i.e., compensatory damages phase) of the case.

Bifurcation also helps jurors "compartmentalize" a trial, allowing them to more easily separate the burden of proof that is required for compensatory damage awards (i.e., proof by a preponderance of the evidence) from a higher burden of proof for punitive damages (i.e., proof by clear and convincing evidence).

Recognizing the benefit of bifurcation, some courts have adopted the procedure as a matter of common law reform. [71] **[*1019]** Other states have made changes through court rules or legislation. [72] Bifurcation of punitive damages trials is supported by the American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws, among other well-known organizations. [73]

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E. Excluding Evidence of a Defendant's Net Worth by Plaintiffs

Evidence of a defendant's net worth can lead to a punitive damages award based on bias, prejudice, or passion. Introduction of such evidence by plaintiffs is, at bottom, "an improper 'appeal to class prejudice and pandering to the perception that corporations wield disparate power,'" generally made for no reason "'other than to prejudice . . . the jury's sworn duty to reach a fair, honest and just verdict.'" [74] To reduce the possibility that quasi-criminal punishment could be meted out for improper purposes, plaintiffs should be precluded from making such "deep pockets" arguments. [75]

1. The United States Supreme Court Speaks and Leading Academics Agree

The United States Supreme Court has indicated that overreliance upon a corporate defendant's financial condition may violate due process. For example, one of the reasons the **[*1020]** Court gave for upholding Alabama's punitive damages scheme in Pacific Mutual Life Insurance Co. v. Haslip [76] was the fact that Alabama does not permit introduction of the defendant's financial condition, and its juries therefore "must be guided by more than the defendant's net worth." [77] The Court stated: "Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." [78]

Subsequently, the Court said in TXO Production Corp. v. Alliance Resources Corp. [79] that "the emphasis on the wealth of the wrongdoer increased the risk that the [punitive damages] award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident." [80] Most recently, in BMW of North America, Inc. v. Gore [81] the Court expressed its strongest reservations about the use of wealth evidence in punitive damages cases. The Court stated that "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." [82]

The defendant's right to notice would be a "phantom" right if a punitive damages award could be based on a defendant's net worth at the time of trial. Indeed, in BMW, the Supreme Court was careful to emphasize that "the fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business." [83] **[*1021]**

The risk of a punitive damages award reflecting jury bias is particularly great where the defendant is a large corporation. [84] For precisely this reason, a report prepared by tort scholars for the prestigious American Law Institute recommended that evidence of a corporation's net worth should "no longer be admissible in assessing punitive damages." [85] After all, as one respected federal appellate judge has noted, "having a large net worth [is not] the wrong to be deterred!" [86]

Furthermore, consideration of a corporate defendant's net wealth can lead to arbitrary awards. Corporations can incur proportionately more instances of punishment simply because of their greater volume of business. For example, in a given period there might be fifty punitive damages awards against a larger company and only five against a smaller company. If each punitive damages assessment is one percent of the **[*1022]** defendant's assets, the large company will have lost half its assets after this period. The smaller company, which behaved in exactly the same way, would still have ninety-five percent of its assets. [87]

2. Arguments for Net Worth Evidence Admissibility Are Ill-Considered

Plaintiffs generally argue that evidence of a defendant's overall financial condition is rationally related to the goals of punishment and deterrence, on the theory that the wealthier the defendant, the higher the financial penalty must be in order to give a culpable defendant

both the punishment it deserves and the economic incentive not to repeat its wrongdoing.

While this may be true in the case of individual defendants acting personally out of malicious or spiteful motives-i.e., it may take a larger punishment to deter a millionaire from punching someone in the nose than to deter a person of modest means-it has no applicability to corporate behavior, which is almost invariably motivated by economics. [88] As two noted scholars on punitive damages awards have explained: **[*1023]**

Deterrence theory is based on the (usually and to one or another extent plausible) assumption that actors weigh the expected costs and benefits of their future actions. Specifically, a potentially liable defendant will compare the benefits it will derive from an action that risks tort liability against the discounted present expected value of the liability that will be imposed if the risk occurs. Whether a defendant is wealthy or poor, this cost-benefit calculation is the same. If, as is likely, a wealthy defendant derives no greater benefit from a given action than a poor defendant, then both will be equally deterred (or equally undeterred) by the **threat** of tort liability. A defendant's existing assets do not increase the expected value of a given future action. Therefore they do not require any adjustment in the level of sanction needed to offset that expected value. The defendant's wealth or lack of it is thus irrelevant to the deterrence of socially undesirable conduct. [89]

F. Excluding Evidence of Extraterritorial Conduct

Evidence of a defendant's out-of-state activity to award and calculate punitive damages can violate constitutional principals of interstate commerce, state sovereignty, comity, and due process. Plaintiffs should be precluded from admitting such evidence.

This issue was a principal focus of the Supreme Court's opinion in BMW of North America, Inc. v. Gore. [90] In BMW, the Court indicated that the Commerce and Due Process Clauses of the United States Constitution prohibit state courts from using the punitive damages mechanism as a means of regulating conduct in other states. In a crucial sentence, the Court said: "While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation." [91]

Months after purchasing a new BMW sedan from an Alabama dealer, and without noticing any flaws in its appearance, Dr. Gore took his vehicle to a "detailer"-someone who would thoroughly clean the car inside and out to make it look "snazz **[*1024]** ier than it normally would appear." [92] The detailer noted that portions of Dr. Gore's car had been repainted and brought this to the doctor's attention. Dr. Gore sued the American distributor of BMW automobiles seeking both compensatory and punitive damages on the theory that BMW's failure to disclose the repainting constituted "gross, oppressive or malicious" fraud under Alabama law. [93]

At trial, BMW acknowledged that it had a national policy of repairing cars that were damaged in the course of manufacture or during shipment. If the cost of a repair exceeded 3% of the car's suggested retail price, it was placed in company service for a period of time and then sold as used. If the repair was less than 3% of the purchase price, however, BMW sold the car as "new" without advising the dealer or the customer that any repairs had been made. [94]

Because the cost of repainting Dr. Gore's car was only about 1.5% of the car's suggested retail price, BMW did not disclose its repair to the Alabama dealer or to Dr. Gore. BMW's nondisclosure policy was consistent with the statutory laws of approximately twenty-five states which define disclosure obligations of automobile manufacturers, distributors, and retailers. [95] Under these state laws, BMW's failure to disclose minor refinishing was lawful and

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ARTICLE: JURIES, JUDGES, AND PUNITIVE DAMAGES: AN EMPIRICAL STUDY

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SUMMARY:
... Concerns about juries dominate **punitive damages reform** debates. ... The data about each case include the subject matter, locale, prevailing party, type of litigants, and compensatory and punitive damage award levels. ... The explanatory variables of particular interest are a jury trial dummy variable, which assesses whether juries are more likely than judges to award punitive damages, and an interaction term consisting of the product of the jury trial dummy variable and the compensatory award. ... For example, Table 3 shows that the odds multiplier for motor vehicle tort cases (0.131) is substantially less than 1.0 and thus that, compared to the reference category (products liability), motor vehicle cases are much less likely to end with a punitive award. ... An interaction term between the jury trial dummy variable and the compensatory award (log) assesses whether the slope of the punitive-compensatory line changes in jury trials compared to judge trials. ... As was the case for the 1991-92 CTCN data, the compensatory award is the most powerful predictor of the punitive award. ... Table 5's third model changes the dependent variable from the punitive award (log) to the ratio of the punitive and compensatory award (logs), as described in Table 2 and Figure 2. ...

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Introduction

Concerns about juries dominate **punitive damages reform** debates. Some observers

before judges in their strongest cases on the merits.n82 Similarly, the plaintiff with a strong punitive damages case may opt for a judge trial to avoid the less reliable jury because the jury might refuse to grant a punitive award in a case that merits an award. If such routing occurs, then one might observe judges awarding punitive damages at a greater rate than juries and defendants opting for jury trials when the case for punitive damages is weakest. Absent some affirmative evidence of such routing, we are skeptical that it systematically occurs. Perceptions that juries are more likely to award punitive damages, and more likely to award more in punitive damages, are widespread.n83 Indeed, until the CTCN data were gathered, the surprisingly prominent role of judges in the punitive damages area was, we suspect, unknown. Systematically seeking the reliable judge to obtain a punitive damages award, when judges are not perceived as even awarding punitive damages, seems an unlikely effect. But we cannot eliminate this effect based on our data, and it could mask real judge-jury differences.

2. Selection Attributable to Case **Settlement**

Because juries are believed to be more unpredictable than judges, especially in high-award cases,n84 defendants may choose to settle cases that have high probabilities of large punitive awards. It is more difficult to account for this aspect of case selection.n85 Trials in cases in which jurors' propensity to award punitive damages is strongest may never be observed. Juries are viewed as so much wilder than judges that they only rarely get to act in those cases in which their behavior would be expected to be wildest.n86

[*768] The CTCN data's pattern should partially alleviate this concern. That judges award punitive damages as frequently as juries is surprising and has implications for the dogma of juror bias. Because judges award punitive damages at rates similar to juries, the simplest description of the data, admittedly ignoring case routing, is that juries and judges behave similarly, as Kalven and Zeisel found.n87 Even if they do not behave similarly, jurors' shadow effect on **settlements** cannot be based on the observed pattern of judge and jury trial outcomes. The presumed **settlement** behavior may be based on misperception.n88

Second, available data suggest that there is no hidden mountain of **settlements** involving punitive damages masking the ability of trial studies to detect punitive damages' true effects. Karpoff and Lott studied eleven years (1985-96) of lawsuits in which plaintiffs sought punitive damages from publicly traded businesses.n89 They found that **settlement** amounts (including both punitive and nonpunitive damages) constituted a near-trivial portion of awards paid, and that trial verdicts dwarfed **settlements** in both number and amount.n90 They also found no statistically significant abnormal stock returns and concluded that "the data from our sample do not support" the hypothesis that **settlements** shaped by punitive damages comprise the main effect of punitive damages.n91

The CTCN data allow further study of the **settlement** effect, albeit not as directly as the Karpoff-Lott study. The existence of statutory caps on punitive damages in several states allows for an empirical test of the **settlement** aspect of case selection. In states that cap punitive **[*769]** awards, plaintiffs' **threat** to go to the jury should not intimidate defendants into settling nearly as much as in states that do not cap awards. If defendants are only gambling against a punitive award of two or three times the compensatory award - the typical cap - the pressure to avoid the jury substantially diminishes. Therefore, in states that cap punitive awards we might expect defendants to press to jury trial potential punitive cases that they would settle in states without caps. The percentage of jury trials ending in punitive awards increases, but defendants know that the punitive award is substantially less likely to bankrupt them because of the caps. If defendants settle enough cases to call into question the implications of studies limited to trials, this effect should be substantial.n92

To explore this possibility, we introduce a dummy variable equal to one in states that cap punitive awards. The CTCN sample includes counties in twenty-one states, and several of

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these states cap punitive awards.n93 Connecticut, Florida, Georgia, Illinois, Indiana, Texas, and Virginia did so for all or part of the period covered by the CTCN **[*770]** sample.n94 We set the dummy variable equal to one for cases decided at a time when state law imposed caps on punitive awards.

Strong **settlement** selection effects may exist if this dummy variable correlates with punitive damages award frequency in jury trials. Table 4, however, shows that this is not the case. Limiting the sample to jury trials won by plaintiffs, Table 4 shows that the punitive award rate was lower in states with caps than in states without caps. If one includes jury trials won by defendants, the rates of punitive awards in capping states remain lower. Regression analysis of jury trial punitive awards using models similar to those in Table 3 yields insignificant results for the capping dummy variable. We thus find no evidence that caps which reduce the risk of ruinous punitive damages liability affect the rate of punitive awards in jury-tried cases.n95

There are, of course, other possible explanations for the absence of effect. Capping and noncapping states might differ in ways that our models do not capture. Studying punitive award patterns within capping states before and after enactment of punitive award caps might be revealing.n96

[*771]

[SEE TABLE IN ORIGINAL]

III

The Relation Between Punitive Damages and Compensatory Damages

This Part shifts the focus from the decision to award punitive damages and studies instead the level of punitive damages, given a punitive award. All studies confirm that juries' punitive damages awards correlate strongly with compensatory awards.n97 We now further assess Figure 1's indication that a similar relation exists in cases tried by judges, and Figure 2's and Table 2's indications that the punitive-compensatory ratio does not vary between judge and jury trials.

A. Modeling the Level of Punitive Damages Awards

Given a decision to award punitive damages, what should determine their level? Previous work outlines a model in which the most important influences on the punitive award level are the harm caused, the egregiousness of the misbehavior, and the amount needed to accomplish the goals of punishment or deterrence.n98 We therefore discuss the model only briefly here.

The punishment meted out in a punitive award ought to relate to the harm the defendant caused. We tend to regard behavior as worse when it causes more damage. The compensatory component of the damages award is a measure of the harm the defendant has caused. Thus, punitive damages ought to correlate positively with compensatory damages.n99 We therefore include the compensatory award level (log) in our model of punitive damages.

The punishment-deterrent rationale underlying punitive awards suggests that the level of punitive award ought to relate to the defendant's **[*772]** financial circumstances,n100 though the theoretical soundness of considering defendants' wealth is debated in the law and economics literature. We found evidence of this effect in the 1991-92 CTCN data.n101 We therefore include dummy variables representing the litigant pairs summarized in Table 1 in the punitive damages model.

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Independent of the harm caused, the defendant's degree of misbehavior ought to influence the punitive award level. Table 3 shows that case categories are useful proxies for punishable behavior. Fraud and intentional tort, which correlate positively with the decision to award punitive damages, represent intentional misbehavior. Given a decision to award punitive damages, however, a case's subject area should become less relevant to the award level.n102 "Intentional or egregious wrongdoers are more serious wrongdoers whether they produce products, publish newspapers, harm patients, or defraud contractual partners. They are united more by the nature of their wrongdoing than by the subject area of their wrong."n103 We thus expect, as found in the 1991-92 CTCN data, the subject matter of a case to play less of a role in explaining the size of punitive damages awards than it plays in explaining the decision to award punitive damages.

To these previously studied influences on punitive awards, we add variables to represent the adjudicator. As in our decision-to-award models, a jury trial dummy variable assesses whether the intercept for punitive awards changes in jury trials compared to judge trials. An interaction term between the jury trial dummy variable and the compensatory award (log) assesses whether the slope of the punitive-compensatory line changes in jury trials compared to judge trials. The direction and significance of the coefficients for these variables are of primary interest here.

B. Results

Table 5's first numerical column reports the results of the above model, in which the punitive award (log) is the dependent variable in a sample of 171 cases in which plaintiffs won a nonzero punitive award at trial.n104 This model includes all the variables and shows a strong, significant correlation between the compensatory award and the punitive **[*773]** award. As was the case for the 1991-92 CTCN data,n105 the compensatory award is the most powerful predictor of the punitive award. The compensatory award alone explains about half the variance in the punitive award. If the compensatory award is a rational measure of harm caused - and evidence exists to suggest that it isn106 - one can also use the compensatory award to partly control for differences across judge-jury cases, especially the greater tendency of higher stakes cases to go to juries.n107

Table 5's third model changes the dependent variable from the punitive award (log) to the ratio of the punitive and compensatory award (logs), as described in Table 2 and Figure 2. From one perspective, this is the variable of primary interest. Holding other factors constant, do judges and juries differ in the amount of punitive damages awarded per unit of compensatory damages? Except for the change in the dependent variable, the third model is the same as the first model. The litigant pair categories and case categories, reported in the Appendix,n108 behave about the same as in the first model. The model's explanatory power is substantially lower because the punitive-compensatory ratio is so unvarying.n109

The two jury trial variables are not statistically significant. In the first model, the jury trial dummy variable is negative and statistically insignificant.n110 The interaction term is positive but also statistically insignificant.n111 None of the models support the hypothesis that **[*774]**

[SEE TABLE IN ORIGINAL]

judges and juries differ in the way they set levels of punitive awards or in the amount of punitive damages awarded per unit of compensatory damages. The other variables in the fuller model - compensatory award, case category dummies, and litigant pair dummies - provide substantial control for the known principal differences between cases routed to juries and judges. That is, judges and juries are known to see cases with different stakes and with different distributions of case categories.n112 The insignificance of the judge-jury differences

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survives when we account for selectivity and is not sensitive to inclusion of Harris County, Texas.n113

C. The Greater Spread in the Jury Regression Models

The preceding section addresses the question whether there is a mean effect between judges and juries. The regressions assume that **[*775]** the variability in the judge and jury regression models is the same. This section considers how juries and judges differ not in their mean behavior, but in their variability.

We study variability by analyzing the residuals of Table 5's two full regression models, those reported in the table's first and third numerical columns. Experimental research suggests that the regression models should be less able to explain jury awards than judge awards.n114 This weaker explanatory power should manifest itself in greater departures from the predicted regression values. Residuals measure the difference between predicted values and observed values of a regression model, and should be higher in jury-tried cases. Because we are interested in both larger positive and larger negative residuals, and residuals have a mean equal to zero, we analyze the absolute value of the residuals.

Table 6 presents the results. For Table 5's first model, the residuals in jury-tried cases are substantially and significantly higher than the residuals in judge-tried cases. This is consistent with Figure 1's scatterplot, which shows more jury-tried cases than judge-tried cases are distant from the best-fitting regression line, and which explains more of the variance in judge-tried cases than jury-tried cases.n115 It is also consistent with studies finding greater variability in jury awards.n116 But the significance of the difference in residuals is sensitive to the inclusion of Harris County, Texas, the county with the least complete sample of trials.n117 Excluding that county leaves the mean and median differences in judge-jury residuals far from significant.n118 In Table 5's third model, which uses the punitive-compensatory ratio as the dependent variable, differences between judge and jury residuals are at most marginally significant, even with the inclusion of Harris County. The statistically insignificant, or marginally significant, spread is consistent with Figure 2 and Table 2's analysis of the punitive-compensatory ratio. Jury punitive-compensatory ratios are more spread out than judge ratios but not dramatically so.

Because the hypothesis we explore is the absence of meaningful judge-jury differences, conservative data analysis counsels us to emphasize the model that maximizes the differences. That is, to include **[*776]**

[SEE TABLE IN ORIGINAL]

Harris County and to use the model with punitive damages (log) as the dependent variable instead of the ratio-based model. In addition to analyzing judge-jury differences using residuals, one can explore how many jury trial punitive damages awards are beyond what judges might have awarded. Jury trials within the expected range of judge awards cannot be viewed as serious impediments to financial planning. If judges gave all punitive awards, defendants would still have to plan on awards in this range.

How many jury punitive awards could be considered, with traditional statistical certainty, to be beyond the range of likely awards in judge-tried cases? To answer this question we calculate how many jury awards fall within the 95% prediction band of the judge awards. Figure 3 explores this topic through the same scatterplot as Figure 1, but with two new lines superimposed on the data. The central line in the figure is the regression line that best fits the data in judge-tried cases. The lines above and below that line, labeled "Upper 95% prediction line" and "Lower 95% prediction line," respectively, are the upper and lower 95% prediction lines for judge-tried cases. These lines provide a way to identify punitive awards by juries or judges that bear an extreme relation to compensatory awards.n119 Scatterplot

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points above the upper 95% line are extreme in the sense that they represent punitive awards that are above the judge-tried case upper 95% prediction line. Scatterplot points below the lower 95% line are extreme in the sense that they represent punitive awards that are below the judge-tried case lower 95% prediction line.

[*777]

[SEE FIGURE IN ORIGINAL]

Figure 3. Punitive and compensatory damages by judge or trial status. The scatterplot reproduces the scatterplot in Figure 1. The lines summarize the relation between punitive and compensatory damages in judge trials. The top and bottom lines represent the upper and lower 95 percent prediction bands for the relation between punitive and compensatory awards in judge trials only. The center line represents the best-fitting regression line for judge trials only.

The figure shows seven cases above the upper 95% prediction line. Six of those cases are jury trials and one is a judge trial.n120 The figure also shows that seven awards are extremely low in that they fall below the lower 95% prediction line. Five of these are jury trials and two are judge trials. We combine the high and low outlying groups to consider whether jury trials are more likely than judge trials to produce extremely high or low awards. Three of 53 judge awards are either high or low compared to 11 of 118 jury awards. This difference is not statistically significant.n121 We cannot reject the hypothesis that jury-tried cases are no more likely than judge-tried cases to lead to an extreme award, as measured by the mass of judge-tried cases.

But even these differences in award patterns overstate the difference between judge and jury awards that one should expect to survive appeal. All but one of the cases that fall above the upper 95% prediction line have punitive awards that exceed ten times the compensatory award. Most such awards are known to have been justifiable or reduced.n122 **[*778]** A study that successfully explains appellate outcomes in punitive award cases shows that such awards are unlikely to survive appellate review.n123 After the appellate process, we would expect not more than about one or two awards above the upper 95% prediction line to survive.

So in one year of data covering a substantial fraction of the nation's litigation, in the model that most emphasizes judge-jury difference, we find trivially few cases with punitive-compensatory ratios greater than ten, and some of these are not extreme given their facts.n124 We expect a small handful of juries' punitive awards to survive appeal that exceed the range of what judges might have awarded. The greater spread in jury awards thus produces few outcomes that are beyond what one expects had all cases been tried to judges. Substantial reform to ameliorate such awards may be a solution in search of a problem. To the extent there is a problem, a cap on punitive damages of ten times the compensatory award would solve it.n125

D. Selection Effect Considerations

Accounting for what we know about case selection suggests even greater similarity in judge-jury decisionmaking. Case routing between judges and juries based on expected compensatory award size almost certainly exists.n126 Juries tend to see high-award cases, and the greater award potential of these cases creates greater potential variance. Thus, greater variability in the jury punitive-compensatory relation is to be expected. The difference in spread may result from differences **[*779]** in the cases judges and juries decide and not from differences in their treatment of those cases. If litigants select juries for higher stakes cases, our results may overstate judge-jury differences. Judges might appear to behave even more like juries if they were seeing the same cases as juries.n127

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Furthermore, real cases introduce variability that further suggests actual differences between judges and juries may be smaller than observed differences. Some extreme punitive awards may result from defendants' strategic choices. Defendants vigorously contest liability for punitive damages. But defendants often fail to introduce evidence to try to minimize the amount of punitive damages before juries,n128 leaving plaintiffs in control of the damage guidance presented to juries. People understandably tend to "anchor" on numbers presented to them.n129 If plaintiffs present large numbers and defendants present no numbers relating to award level, juries that apply the only numbers presented to them, as in the multibillion dollar punitive award in the Texaco-Pennzoil case,n130 should not necessarily be viewed as rendering highly variable awards.

Conclusion

Evidence from one year of trials suggests that substantial change in punitive award patterns would not result from shifting greater responsibility to judges. Juries and judges award punitive damages at about the same rate, and their punitive awards bear about the same relation to their compensatory awards. Jury punitive awards have a bit more spread than judge awards, but the effect is not robust and leads to few jury punitive awards outside the range of what judges are expected to award.

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Appendix Table 1: Trial Wins and Punitive Damages Awards by County and Trial Mode

[SEE TABLE IN ORIGINAL]
[*781]

Appendix Table 2: Regression Models of Punitive Damages Levels

[SEE TABLE IN ORIGINAL] **[*782]**

[SEE TABLE IN ORIGINAL]

FOOTNOTES:

n1. See Reid Hastie & W. Kip Viscusi, What Juries Can't Do Well: The Jury's Performance as a Risk Manager, 40 Ariz. L. Rev. 901, 916 (1998); Paul Mogin, Why Judges, Not Juries, Should Set Punitive Damages, 65 U. Chi. L. Rev. 179 (1998); David Schkade et al., Deliberating About Dollars: The Severity Shift, 100 Colum. L. Rev. 1139, 1173 (2000); Cass R. Sunstein et al., Assessing Punitive Damages (with Notes on Cognition and Valuation in Law), 107 Yale L.J. 2071, 2078 (1998).

n2. See Marc Galanter & David Luban, Poetic Justice: Punitive Damages and Legal Pluralism, 42 Am. U. L. Rev. 1393, 1439 (1993); Richard Lempert, Juries, Hindsight, and Punitive Damage Awards: Failures of a Social Science Case for Change, 48 DePaul L. Rev. 867 (1999); cf. Michael L. Rustad, How the Common Good is Served by the Remedy of Punitive Damages, 64 Tenn. L. Rev. 793, 844-45 (1997) (arguing that punitive damages are not random or arbitrary, but predictable).

n3. See Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 Cornell L. Rev. 1124, 1151-56 (1992); Chris Guthrie et al., Inside the Judicial

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Mind, 86 Cornell L. Rev. 777, 827 (2001) (finding that "judicial decision making ... is influenced by ... cognitive illusions"); Neil Vidmar, The Performance of the American Civil Jury: An Empirical Perspective, 40 Ariz. L. Rev. 849, 868-70, 884-85 (1998); Neil Vidmar & Jeffrey J. Rice, Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals, 78 Iowa L. Rev. 883, 896 (1993); Roselle L. Wissler et al., Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers, 98 Mich. L. Rev. 751, 812 (1999); cf. Richard A. **Posner,** An Economic Approach to the Law of Evidence, 51 Stan. L. Rev. 1477, 1500-02 (1999) (asserting that there is only slight evidence of differences).

n4. See Kevin M. Clermont & Theodore Eisenberg, Appeal from Jury or Judge Trial: Defendants' Advantage, 3 Am. L. & Econ. Rev. 125 (2001) [hereinafter Clermont & Eisenberg, Appeals I]; Kevin M. Clermont & Theodore Eisenberg, Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments, 2002 U. Ill. L. Rev. (forthcoming April) [hereinafter Clermont & Eisenberg, Appeals II]; Clermont & Eisenberg, supra note 3.

n5. E.g., Thomas A. Eaton et al., Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s, 34 Ga. L. Rev. 1049, 1094 (2000) (finding that "punitive damages currently are not a significant factor in personal injury litigation in Georgia"); Theodore Eisenberg et al., The Predictability of Punitive Damages, 26 J. Legal Stud. 623, 633-37 (1997) (summarizing studies on the decision to award punitive damages); Neil Vidmar & Mary R. Rose, Punitive Damages by Juries in Florida: In Terrorem and in Reality, 38 Harv. J. on Legis. 487, 487 (2001) (reporting that, in Florida, the "frequency of punitive damages was strikingly low").

n6. E.g., Eisenberg et al., supra note 5, at 635-37 (summarizing studies of jury trial outcomes in these case categories); Deborah Jones Merritt & Kathryn Ann Barry, Is the Tort System in Crisis? New Empirical Evidence, 60 Ohio St. L.J. 315, 388 (1999) (finding no punitive awards in medical malpractice or products liability cases in a twelve-year period in Franklin County, Ohio); Vidmar & Rose, supra note 5, at 487 (reporting in a Florida study that, "with the exception of asbestos cases, punitive damages were almost never given in products liability cases"); J. Clark Kelso & Kari C. Kelso, An Analysis of Punitive Damages in California Courts, 1991-2000, at 8 tbl.3 (reporting eleven products liability punitive damages awards in ten years of California litigation), available at http://12.2.169.205/government law and policy/publications/ccglp pubs punitive damages report.pdf (last visited Jan. 22, 2002). Kelso and Kelso do not separately report on medical malpractice claims, perhaps because there were too few punitive awards to warrant separate reporting of that case category.

n7. See Rustad, supra note 2, at 809.

n8. Eisenberg et al., supra note 5, at 637-39, 647-52; Theodore Eisenberg & Martin T. Wells, The Predictability of Punitive Damages Awards in Published Opinions, the Impact of BMW v. Gore on Punitive Damages Awards, and Forecasting Which Punitive Awards Will Be Reduced, 7 Sup. Ct. Econ. Rev. 59 (1999) [hereinafter Eisenberg & Wells, Predictability on Appeal]; Theodore Eisenberg & Martin T. Wells, Punitive Awards After BMW, a New Capping System,

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and the Reported Opinion Bias, 1998 Wis. L. Rev. 387, 388-89 [hereinafter Eisenberg & Wells, Reported Opinions]; Jonathan M. Karpoff & John R. Lott, Jr., On the Determinants and Importance of Punitive Damage Awards, 42 J.L. & Econ. 527, 543 (1999); Erik K. Moller et al., Punitive Damages in Financial Injury Jury Verdicts, 28 J. Legal Stud. 283, 300 n.52 (1999); Vidmar & Rose, supra note 5, at 501 tbl.3 (finding that twelve years of Florida jury punitive awards had a median punitive-compensatory ratio of 0.7 to 1). Even Alabama's much-maligned system of punitive damages awards is less extreme than is widely believed. See Moller et al., supra, at 333-34 (finding that Alabama juries in financial injury cases award punitive damages in amounts smaller than and at rates similar to other states in study, but that punitive awards constitute a high proportion of amounts awarded and are a high multiple of compensatory damages).

Schkade et al., supra note 1, at 1142 n.12, report an unpublished study "finding that compensatory and punitive damage awards are random in sexual harassment cases." The Columbia Law Review kindly furnished us with the manuscript on which this claim is based, and which provides citations to the cases involved in the study. Cass R. Sunstein & Judy M. Shih, Damage Awards in Sexual Harassment Cases (June 23, 1998) (unpublished manuscript, on file with authors). The randomness claim appears to depend on the extreme influence of a handful of observations. The mass of cases in the study show a statistically significant relation between punitive (log) and compensatory (log) awards. In addition, the study used published opinions, which tend to overstate punitive award levels and the ratio of punitive awards to compensatory awards, see Eisenberg & Wells, Reported Opinions, supra, at 413.

n9. See Schkade et al., supra note 1, at 1167-73; Sunstein et al., supra note 1, at 2142-45.

n10. W. Kip Viscusi, Why There Is No Defense of Punitive Damages, 87 Geo. L.J. 381, 395 (1998).

n11. See, e.g., Daniel Kahneman et al., Shared Outrage and Erratic Awards: The Psychology of Punitive Damages, 16 J. Risk & Uncertainty 49 (1998); Mogin, supra note 1; A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869 (1998); Schkade et al., supra note 1; Sunstein et al., supra note 1.

n12. For a summary of the data and methodology, see Bureau of Justice Statistics, U.S. Dep't of Justice, Bulletin No. NCJ-173426, Civil Trial Cases and Verdicts in Large Counties, 1996, at 1 (Sept. 1999) [hereinafter BJS 1996]. For a more complete description of the data from the related 1992 study, see Bureau of Justice Statistics, U.S. Dep't of Justice, Special Report No. NCJ-153177, Tort Cases in Large Counties 1, 6 (Apr. 1995). The BJS used a two-stage stratified sampling technique described in the 1992 special report. See id.

n13. See BJS 1996, supra note 12, app. B, at 20 (showing sampled counties' 1996 populations); Theodore Eisenberg et al., Litigation Outcomes in State and Federal Courts: A Statistical Portrait, 19 Seattle U. L. Rev. 433, 434 (1996).

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n14. See Bureau of Justice Statistics, U.S. Dep't of Justice, Civil Justice Survey of State Courts, 1992 (Inter-Univ. Consortium for Political and Soc. Research No. 6587, 3d ed. 2001).

n15. See BJS 1996, supra note 12, at 17. For sampling purposes, the seventy-five counties were divided into four strata. See id. The 1996 data are from Bureau of Justice Statistics, U.S. Dep't of Justice, Civil Justice Survey of State Courts, 1996 (Inter-Univ. Consortium for Political and Soc. Research No. 2993, 2d ed. 2001) [hereinafter 1996 Survey], available at http://www.icpsr.umich.edu.

n16. See BJS 1996, supra note 12.

n17. See Eisenberg et al., supra note 5, at 641 n.53; Merritt & Barry, supra note 6, at 324-26 (finding serious bias in commercial verdict reporter samples); Moller et al., supra note 8, app. at 335 (reporting reasonable levels of confidence in the jury verdict reporters used but acknowledging some possible bias).

n18. For a description of the sampling used, see BJS 1996, supra note 12, at 17-18. The statements in text are based on the authors' analysis of the data.

n19. In Harris County, sampling may have led to an extraordinary proportion of judge-tried punitive damages cases. See BJS 1996, supra note 12, app. E, at 23 (reporting sixty-seven bench trials with punitive awards, which exceeds the sum of bench trial punitive awards in all other counties in the sample). The sixty-seven trials reported reflect the county-level sampling. Twelve actual punitive awards were found in Harris County.

n20. Unless otherwise noted, simple descriptive tables use unweighted data. In regression analyses, unless otherwise noted, data are weighted to reflect the sampling in nine counties, and standard errors and significance levels are adjusted to reflect the stratified nature of the sample and the clustering of data at the county level. Our regression analyses account for the weighted sampling design in the data collection as well as the county-level clustering and stratification based on sampling patterns.

n21. See Clermont & Eisenberg, supra note 3, at 1177 app. B; Theodore Eisenberg & Kevin M. Clermont, Trial by Jury or Judge: Which Is Speedier?, 79 Judicature 176, 180 (1996).

n22. See Clermont & Eisenberg, supra note 3, at 1141 tbl.4; Eisenberg et al., supra note 13, at 443 tbl.4. Panel C's last two columns show that only three percent of medical malpractice trials were before judges.

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n23. This finding is consistent with federal court data in products liability and medical malpractice cases, Clermont & Eisenberg, supra note 3, app. A, at 1175, but is more broad based in these state court cases. Panel C shows that in nearly all tort categories - including motor vehicle tort, premises liability, intentional tort, medical malpractice, professional malpractice, slander/libel, other negligence, and fraud - plaintiffs prevailed at a higher rate in judge trials than in jury trials. Either judges are more sympathetic to plaintiffs than juries or plaintiffs route their weaker cases to juries, probably based on the belief that juries will be biased toward harmed plaintiffs. When that belief turns out to be a misperception, the observed pattern of win rates results. Id. at 1174.

n24. BJS 1996, supra note 12, at 3 n.3.

n25. By statistical convention, the hypothesis being tested is called the null hypothesis. George W. Snedecor & William G. Cochran, Statistical Methods 64 (8th ed. 1989). Significance levels (also called p-values) are the probability of rejecting the null hypothesis when it is true. That is, the significance levels provide an inverse measure of the likelihood that the difference in punitive damages award rates shows a real difference rather than mere random variation. The smaller the significance level, the more surprised one would be to observe the difference if the tested hypothesis were true. See id. at 64-66. By arbitrary convention, results that are significant at or below the 0.05 level are described as statistically significant. See The Evolving Role of Statistical Assessments as Evidence in the Courts app. A, at 196-97 (Stephen E. Fienberg ed., 1988). Throughout this Article, we use the term significant in the statistical sense of significance level. For "individual only vs. individual only," the judge-jury punitive award rate difference is significant at the 0.126 level. For "individual only vs. corporation," the judge-jury punitive award rate difference is significant at the 0.175 level. The insignificance of these p-values (both being noticeably higher than 0.05) does not depend on the inclusion of Harris County, Texas. See supra note 19.

n26. Vidmar and Rose report similar results for Florida jury trials, except they find that motor vehicle cases involving impaired or reckless drivers constitute the leading source of punitive awards. Vidmar & Rose, supra note 5, at 494, 495 tbl.2. For evidence of the dominance of employment cases as a source of punitive damages in Florida federal court, see id. at 491 n.14.

n27. Combining the two employment categories yields a difference in judge-jury punitive award rates that is significant at the 0.062 level. See supra note 25.

n28. Eisenberg et al., supra note 5, at 640-41; accord Stephen Daniels & Joanne Martin, Civil Juries and the Politics of Reform 69-72 (1995); Erik Moller, Trends in Civil Jury Verdicts Since 1985, at 33 (1996).

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suggest that allowing judges, not juries, to set punitive award levels will improve civil justice.n1 Others regard the juror's role as a strength of the system or question reducing jurors' power without evidence of judges' superiority.n2 Judge-jury differences, however, often are illusory or exaggerated - a fact that might give pause to juries' critics.n3 Misperceptions about juries help explain trial win rates and appellate outcome patterns.n4

[*745] Misperceptions about juries and punitive damages are especially strong. Contrary to popular belief, juries rarely award such damages,n5 and award them especially rarely in products liability and medical malpractice cases.n6 Rather, juries tend to award punitive damages in intentional misconduct cases.n7 When juries do award punitive damages, they do so in ways that relate strongly to compensatory awards.n8

[*746] Substantial evidence about juries' punitive damages performance has led some critics to shift from criticizing the absolute nature of juries' performance to arguing that, however well juries perform, judges will perform better.n9 Evaluating the propriety of reduced jury authority requires knowledge of judges' performance in punitive damages cases. Unstudied axioms relevant to a shift toward judges are that judges and juries systematically differ in (1) their inclinations to award punitive damages and (2) the levels of awards.

This Article explores these axioms with actual case data. Data covering one year of judge and jury trial outcomes from forty-five large trial courts, comprising nearly nine thousand trials, yield no evidence that judges and juries differ significantly in their rates of awarding punitive damages, or in the relation between the size of punitive and compensatory awards. Our primary results are descriptive and our primary claim is a negative one - the absence of evidence that judges and juries behave substantially differently. While it is tempting to make the positive assertion that judges and juries behave similarly, they do not see the same streams of cases and we cannot be sure how they would behave if they did. Nevertheless, the absence of a significant difference in the cases is noteworthy. Conventional wisdom about judges and juries - especially the claim that juries systematically impose punitive damages "in a random and capricious manner"n10 - would find more support if substantial differences emerged.

The issues addressed here transcend the usual debate about optimizing rules of civil adjudication. In academia, criticizing punitive damages has become the civil justice cause of recent years.n11 Outside academia, **punitive damages reform** is one of the main battlegrounds in the larger tort **reform** struggles.

Part I of this Article describes the data and reports descriptive statistics about punitive damages award frequencies and levels. Part II describes a model of the decision to award punitive damages and reports empirical results of tests of the model - tests that find no meaningful judge-jury differences. This Part also discusses the implications of case routing and case selection for interpreting the empirical results. Part III addresses the relation between punitive and compensatory damages awards and again finds no substantial difference between judge and jury adjudication.

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I

Background and Descriptive Data

The Civil Trial Court Network (CTCN), a project of the National Center for State Courts and the U.S. Bureau of Justice Statistics (BJS), obtains data directly from state court clerks' offices. It covers state courts of general jurisdiction in a random sample consisting of forty-five of the seventy-five most populous counties in the United States.n12 The seventy-five

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n29. BJS 1996, supra note 12, app. E, at 23; infra Appendix Table 1.

n30. The common method for testing such a hypothesis is to calculate the significance level of the common odds ratio. See Douglas G. Altman, Practical Statistics for Medical Research 270-71 (1991). The test for a common odds ratio across counties gives an exact p-value of p=0.331. For each county, we construct a table with two rows and two columns. The rows consist of judge and jury trials. The columns represent cases in which no punitive award was given and cases in which a punitive award was given. This yields forty-five 2 X 2 tables, one for each county, the entries of which can be computed from the Appendix Tables. One can think of each county's 2 X 2 table as exploring the difference between judge and jury punitive award rates within the county, a question we explore for all counties combined in the regression models that follow. We test whether the odds ratio for these forty-five 2 X 2 tables is equal across the forty-five counties. Rather than using the Mantel-Haenszel procedure, see id., we apply a test based on the conditional maximum likelihood estimate of the common odds ratio. A problem in directly applying the test is that many of the 2 X 2 tables are sparse (i.e., have cell counts of zero or one) and the asymptotic p-values may not be reliable. However, we use the results of Robert L. Strawderman & Martin T. Wells, Approximately Exact Inference for the Common Odds Ratio in Several 2 X 2 Tables, 93 J. Am. Stat. Ass'n 1294 (1998), to compute the exact p-value, thereby eliminating the sparseness problem.

n31. The figures reported in Table 1 yield slightly different results due to rounding. For judges, (2,295 trials) X (0.618 proportion won by plaintiffs) X (0.039 proportion plaintiff wins with punitive award) = 55.3. For juries, (6,429 trials) X (0.473 proportion won by plaintiffs) X (0.040 proportion plaintiff wins with punitive award) = 121.6.

n32. The 31.3% judge-trial share may understate the prominence of judge-awarded punitive damages. Accounting for the sampling methods used, the proportion of punitive awards that are made by judges is 44%, and judges award punitive damages in about 5.5% of successful trials compared to 4.4% for juries. But excluding Harris County, Texas, see supra note 19, gives judge trials a 25.7% share of all punitive damages awards, with judges giving punitive awards in 3.2% of plaintiff wins and juries giving punitive awards in 4.0% of plaintiff wins.

n33. Eaton et al., supra note 5, at 1094 (finding that judges awarded punitive damages more frequently than juries).

n34. For discussion of the need for logarithmic scales in other sets of punitive damages awards, see, for example, Eisenberg et al., supra note 5, at 638 figs.2-3, app. at 661 figs.A1-A2.

n35. Simple regression models of punitive damages (log) as the dependent variable and compensatory damages (log) as the explanatory variable, when run separately for judge and jury trials, yield the following results (the intercepts are not statistically significant in either equation):

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[tdi2m,m'Judge trials',ql [tcgp1,m'(log) coefficient',qc [tcgp1,m'Standard',qc [tcgp1,m'Intercept',qc [tcgp1,m'R-squared',qc [tcgp1,m'000',qc] [tu3;6] Compensatory (log) coefficient Standard error Intercept r-squared N [tu3;6] Judge trials.883.099-.155.67454 Jury trials.930.130-.395.459119 These models account for the sample stratification, weighting, and clustering by county. Models that combine the trial modes and use more explanatory variables are described in Table 3 infra. The greater dispersion around the regression line in jury trials, as evidenced by Figure 1 and the lower r-squared for jury trials, is discussed in Part III.C infra.

n36. E.g., Eisenberg, et al., supra note 5, at 638 fig.3; Moller et al., supra note 8, at 300 n.52.

n37. A test of the hypothesis that jury trial punitive awards (log) are normally distributed with the observed sample mean and standard deviation yields p=0.418. The same test of judge trial punitive awards (log) yields p=0.140. Thus, for both judges and juries, one cannot reject the hypothesis that punitive awards are log-normally distributed. In cases that yield positive punitive awards, a test of the hypothesis that jury trial compensatory awards (log) are normally distributed with the observed sample mean and standard deviation yields p=0.986. The same test of judge trial compensatory awards (log) yields p=0.093. See Eisenberg et al., supra note 5, at 638 figs.2-3 (indicating that the logarithm of punitive damages awards is close to being normally distributed, and showing the relationship between compensatory and punitive damages). In addition, one can firmly reject the hypotheses that the untransformed punitive and compensatory awards are normally distributed. A scatterplot of punitive awards in judge trials against compensatory awards without the log transformation is uninformative, as is a plot of untransformed punitive awards against the log of compensatory awards.

Implicitly we are assuming that the punitive damages are distributed as a log-normal distribution. A random variable has a log-normal distribution if its natural logarithm has a normal distribution. The log-normal distribution is common in financial modeling. For instance, the celebrated Black-Scholes pricing formula assumes that the evolution of the price stochastic process follows a geometric Brownian motion. Hence the individual prices are log-normally distributed. See Fischer Black & Myron Scholes, The Pricing of Options and Corporate Liabilities, 81 J. Pol. Econ. 637, 644 (1973).

n38. See Brief of Certain Leading Business Corporations as Amici Curiae in Support of Petitioner at 11 n.14, Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) (No. 99-2035); Schkade et al., supra note 1, at 1146 n.31; Sunstein et al., supra note 1, at 2076 n.21; Viscusi, supra note 10, at 386.

n39. The significance level is p=0.508.

n40. The significance level is p=0.924. A significance test of the entire untransformed ratio distributions yields p=0.425. The untransformed median ratio allows for comparison with

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Moller et al., supra note 8. In a study of financial injury cases, the Moller study reports a median punitive-compensatory ratio in jury trials of 1.4. Id. at 303 tbl.5. The 1991-92 CTCN data, limited to jury trials, have an untransformed punitive-compensatory ratio of 0.757. The substantially higher median in the Moller study may be a consequence of sample bias in jury verdict reporters. See supra notes 17-18 and accompanying text. The Moller study also shows some stability in the untransformed punitive-compensatory ratio. Its median does not vary in a statistically significant manner across jurisdictions in insurance cases or real property cases, or across plaintiff types in insurance cases. Id. at 310 tbl.9, 313 tbl.11, 318 tbl.16. The median punitive-compensatory ratio is significantly different across jurisdictions in employment cases, id. at 315 tbl.13, and across party types in a residual category of contract cases; id. at 324 tbl.21. It is marginally significantly different across jurisdictions in a residual category of contract cases. Id. at 322 tbl.19.

The absence of statistically significant effects is probably not a consequence of sample size. Perfectly executed studies may fail to reveal socially important differences "simply because the sample sizes are too small to give the procedure enough power to detect the effect." Stanton A. Glantz, Primer of Biostatistics 178 (4th ed. 1997). The power of a test refers to its likelihood of detecting an effect of a specified size at a specified significance level. Id. at 177-78. If a test is not very powerful, the likelihood of detecting the effect is small. A power calculation shows that to be 80% confident of detecting a 10% difference in the ratios' means, at a significance level of 0.05, requires 104 jury trials and 48 judge trials. The sample size exceeds these numbers. This power calculation employs the standard deviations observed in Table 2 and hypothesizes means that are 0.9 and 1.0. The sample is also large enough to detect a statistically significant difference in means of about 0.07 with 70% confidence.

n41. Three cases (one judge-tried and two jury-tried) involved zero compensatory awards so the punitive-compensatory ratio is not amenable to numerical analysis. See infra note 104.

n42. Margaret Zack, Man Awarded $ 2.6 Million for Coach's Abuse, but Probably Won't Receive Much, Star Trib. (Minneapolis-St. Paul), May 15, 1996, at B1.

n43. Draeger Martinez, Gamel, Firm Ordered to Pay "Lemon" Damages, Fresno Bee, Oct. 22, 1996, at B1.

n44. Verdict Reduced, Nat'l L.J., Apr. 8, 1996, at A11 (punitive award reduced from $ 138 million to $ 64.8 million, against three gas company defendants in an explosion case involving twenty plaintiffs).

n45. E-mail from Neil LaFountain to Theodore Eisenberg (Aug. 2, 2001, 09:27:34 EST) (on file with Theodore Eisenberg).

n46. Figure 2 employs what are known as kernel density estimates to portray the ratios' distributions. The more traditional way of portraying univariate statistical distributions, the

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histogram, can be thought of as a kind of kernel density estimator. Kernel density estimates have the advantages of being smooth (they do not require the box-like bins of histograms) and of being independent of bin location, a choice that can profoundly shape the appearance of a histogram. For discussion of kernel density estimation, see B.W. Silverman, Density Estimation for Statistics and Data Analysis 34-94 (1986).

n47. Moller et al., supra note 8, at 284.

n48. Multivariate regression is a statistical technique that quantifies the influence of each of several factors (independent variables) on the phenomenon being studied (dependent variable). See generally Michael O. Finkelstein & Bruce Levin, Statistics for Lawyers 323-467 (1990) (discussing regression models); David W. Hosmer & Stanley Lemeshow, Applied Logistic Regression 31-90 (2d ed. 2000) (describing and applying logistic regression models). Because the dependent variable is dichotomous (because punitive damages either are or are not awarded), we use logistic regression. See Finkelstein & Levin, supra, at 447-52.

n49. Professor Viscusi's effort to detect interstate differences in accident deterrence based on whether states allow punitive damages was limited by, inter alia, sample size (the number of states). See Theodore Eisenberg, Measuring the Deterrent Effect of Punitive Damages, 87 Geo. L.J. 347, 349 (1998). Viscusi acknowledges this limitation. Viscusi, supra note 10, at 390. However, erroneous characterization of states' punitive damages rules also compromised the effort. Eisenberg, supra, at 348-49; Eisenberg & Wells, Predictability on Appeal, supra note 8, at 73 n.45. Viscusi notes that he relied on published sources. Viscusi, supra note 10, at 391.

n50. See supra note 40.

n51. Eisenberg et al., supra note 5, at 644-47.

n52. See id. at 645 tbl.4.

n53. E.g., Jeffrey S. Parker & Raymond A. Atkins, Did the Corporate Criminal Sentencing Guidelines Matter? Some Preliminary Empirical Observations, 42 J.L. & Econ. 423, 448-49 (1999).

n54. E.g., Valerie P. Hans & William S. Lofquist, Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate, 26 Law & Soc'y Rev. 85 (1992); Robert J. MacCoun, Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep-Pockets" Hypothesis, 30 Law & Soc'y Rev. 121, 140 (1996). But this difference does not necessarily translate into juror hostility toward corporations. See

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Richard Lempert, Why Do Juries Get a Bum Rap? Reflections on the Work of Valerie Hans, 48 DePaul L. Rev. 453, 455 (1998). Jurors may react especially negatively to misbehavior by insurance companies. See Eisenberg & Wells, Predictability on Appeal, supra note 8, at 67, app. at 85 tbl.1 (showing that the median of punitive-compensatory damages ratios are highest in insurer misbehavior cases); Valerie P. Hans & Nicole Vadino, Whipped by Whiplash? The Challenges of Jury Communication in Lawsuits Involving Connective Tissue Injury, 67 Tenn. L. Rev. 569, 580-82 (2000). But juries generally are skeptical about plaintiffs' claims. See id. at 572-77.

n55. A fixed-effects model does not yield materially different results, but we had to drop several hundred observations due to lack of within-site variation.

n56. See supra note 48.

n57. In multivariate logistic regression, each estimated coefficient provides an estimate of the corresponding variable's effect on the logarithm of the odds of the dependent variable, adjusting for all other variables included in the model. The odds multiplier is obtained by taking the anti-log of the regression coefficient. Hosmer & Lemeshow, supra note 48, at 50; J. Scott Long, Regression Models for Categorical and Limited Dependent Variables 79-82 (1997).

n58. This description of the marginal effect of case category is slightly oversimplified. In the logistic model, the effect of a change in one variable on the dependent variable depends on the values of the other variables. Long, supra note 57, at 82. For a set of "average" values for the other variables, the presence of an intentional tort increases the probability of a punitive damages award by 0.082.

n59. The special sampling characteristics of Harris County, Texas, supra note 19, led us to run Table 3's full model with dummy variables for Harris County judge and jury trials. Each of the dummy variables is positive and significant, indicating that both Harris County judges and juries are more likely to award punitive damages than the reference category, which consists of judge trials in other counties. Harris County judges are significantly more likely to award punitive damages than Harris County juries. In this model, both the interaction term and the jury trial dummy variable become significant, but in opposite directions. The jury trial dummy variable's coefficient is 1.002 and the jury trial dummy compensatory damages interaction term's coefficient is -0.154. This suggests that juries are more likely to award punitive damages at the low end of compensatory awards, up through about $ 670,000, at which point judges become more likely to award punitive damages. In a model that excludes the interaction term, the jury trial dummy variable is positive, but not statistically significant.

n60. Eisenberg et al., supra note 5, at 645 tbl.4. The low rate of punitive awards in cases involving government defendants is consistent with the common rule that punitive damages cannot be awarded against the government. See, e.g., Ariz. Rev. Stat. Ann. 12-820.04 (West 1992) (no punitive damages against public entity or employee); Fla. Stat. Ann. 768.28(5)

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(West Supp. 2002) (government immune from punitive damages); Haw. Rev. Stat. Ann. 662-2 (Michie 1995) (same); Ind. Code Ann. 34-13-3-4 (Michie 1998) (same); Minn. Stat. Ann. 3.736(3) (West 1997) (same); id. 466.04(1)(b) (West 2001) (no punitive damages against municipalities); Mo. Rev. Stat. 537.610(3) (2000) (no punitive damages against state and its public entities); Wis. Stat. Ann. 893.80(3) (West Supp. 2001) (same). The data include some cases in which the government is a defendant, presumably because other parties also are defendants.

n61. Coefficient = -1.182; p = 0.011. The coefficient is -0.905 (corresponding to an odds multiplier of less than 1.0) and the significance level is 0.050 in a model that includes dummy variables for Harris County, Texas judge and jury trials. See supra note 19.

n62. Schkade et al., supra note 1, at 1141; cf. Wissler et al., supra note 3, at 815 (concluding that, although high unpredictability exists when examining award patterns of individual jurors, jurors as a group "produce considerably more stable and predictable outcomes").

n63. Schkade et al., supra note 1, at 1152 & tbl.3.

n64. See Michelle Chernikoff Anderson & Robert J. MacCoun, Goal Conflict in Juror Assessments of Compensatory and Punitive Damages, 23 Law & Hum. Behav. 313, 326-28 (1999). But see Reid Hastie et al., Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards, 23 Law & Hum. Behav. 445 (1999) (finding that mock jurors award punitive damages when courts found them unwarranted).

n65. Guthrie et al., supra note 3, at 821; cf. Richard A. **Posner,** What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does), 3 Sup. Ct. Econ. Rev. 1, 4 (1993) ("By treating judges and Justices as ordinary people, my approach makes them fit subjects for economic analysis; for economists have no theories of genius." (footnote omitted)).

n66. Hastie & Viscusi, supra note 1, at 916; see also Viscusi, supra note 10, at 387-88 (finding that judges "perform better than jurors with respect to hindsight bias").

n67. W. Kip Viscusi, Jurors, Judges, and the Mistreatment of Risk by the Courts, 30 J. Legal Stud. 107, 115 (2001) (comparing Hastie & Viscusi's mock jurors with judges).

n68. Harry Kalven, Jr. & Hans Zeisel, The American Jury 63-64 (Univ. of Chi. Press 1971) (1966).

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n69. Id. at 64. The jury but not the judge found for the plaintiff in 12% of the cases, while the jury but not the judge found for the defendant in 10% of the cases. See also Hans Zeisel, The American Jury, in The American Jury System (Final Report) 65, 69-70 (Annual Chief Justice Earl Warren Conference on Advocacy in the United States ed., 1977) (discussing analysis of judge and jury disagreement); Marc Galanter, The Civil Jury as Regulator of the Litigation Process, 1990 U. Chi. Legal F. 201, 204-05 (reporting more recent polls supporting similar results).

n70. As previous research has concluded:

When compared to other human decisionmakers, the rate of agreement is more impressive than it first appears. This 78% agreement rate is better than the rate of agreement between scientists doing peer review, employment interviewers ranking applicants, and psychiatrists and physicians diagnosing patients, and almost as good as the 79% or 80% rate of agreement between judges making sentencing decisions in an experimental setting.

Clermont & Eisenberg, supra note 3, at 1153; see also Wissler et al, supra note 3, at 814 tbl.5 (comparing reliability of various decisionmakers).

n71. See supra note 68 and accompanying text.

n72. See supra notes 66-67 and accompanying text.

n73. See Viscusi, supra note 67, at 113 tbl.4, 114 (comparing judges' and juries' results).

n74. "Considerable research indicates that juries are not substantially different from judges." Clermont & Eisenberg, Appeals I, supra note 4, at 145; see also supra note 3 (citing examples of such research). Indeed, "virtually no evidence exists to support the prevailing ingrained intuitions about juries"; instead "the evidence, such as it is, consistently supports a view of the jury as generally unbiased and competent." Clermont & Eisenberg, supra note 3, at 1151-52.

n75. Nevertheless the newer work would represent a useful addition to the study of differences between judges and juries. Comments about why their findings differ from findings of adjudicator similarity may be helpful. First, the experiments may elicit greater punitive damages rates from jurors because the experimenters offer jurors only punitive damages as a remedy. E.g., Hastie & Viscusi, supra note 1, at 905. A punitive award is the

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only way for the jurors to express disapproval of behavior. Judges would more likely understand that the existence of a compensatory award already expresses disapproval of the behavior.

Second, the experimental scenarios yielding massive judge-jury differences in willingness to award punitive damages do not represent real-world punitive damages cases. In cases before both judges and juries, over 50% of punitive awards are in cases involving fraud, intentional tort, or employment matters. Products liability cases, which seem to be most analogous to the airplane scenario, constitute a trivially small fraction of punitive awards. See supra Table 1 and note 6. Railroad crossing cases are not numerous enough to be accounted for in the CTCN data. See supra Table 1.

Third, the sample of judges used in the experiments is not representative. The judges were attendees at a law and economics program. Viscusi, supra note 67, at 109. Such a group of judges seems more likely to respond based on economic efficiency than a random sample of judges, especially to questions whose "right" answers depend on the ability and willingness to engage in cost-benefit analysis. See Guthrie et al., supra note 3, at 818 n.201 (noting problems with the sample in the Hastie and Viscusi studies).

n76. See James S. Kakalik et al., Costs and Compensation Paid in Aviation Accident Litigation 27 (1988) ("Punitive damages were not paid on any of the 2,198 closed [aviation accident] cases in our study; in two cases, they were awarded in trial but reversed on appeal.").

n77. E.g., Kevin M. Clermont & Theodore Eisenberg, Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction, 83 Cornell L. Rev. 581, 588-91 (1998).

n78. Clermont & Eisenberg, supra note 3, at 1162-65. Conditional on plaintiff winning at trial, separate logistic regressions of the mode of trial (jury or judge) for each case category yield positive coefficients on the compensatory award (log) level. The other explanatory variables used are dummy variables for the litigant characteristics.

n79. Kelso & Kelso, supra note 6, at 21; Eric Helland & Alexander Tabarrok, Runaway Judges? Selection Effects and the Jury, 16 J.L. Econ. & Org. 306, 323-24 (2000).

n80. Cf. Helland & Tabarrok, supra note 79, at 325-27 & tbl.4, app. A, at 330 (finding differences in samples of cases routed to judges and juries).

n81. Separate logistic regression of judge-tried cases and jury-tried cases confirm this finding. The coefficient for compensatory damages (log) is noticeably higher in the judge-tried cases' regression.

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n82. See supra note 23. This effect, applied symmetrically to plaintiffs and defendants, should lead to all trials being jury trials because the party with the weaker case should opt for the adjudicator perceived to be less reliable. Yet we observe many judge trials, perhaps because parties differ in their evaluation of the merits of the same case.

n83. Clermont & Eisenberg, supra note 3, at 1127-28.

n84. See Helland & Tabarrok, supra note 79, at 306-08.

n85. See Thomas Koenig, The Shadow Effect of Punitive Damages on **Settlements,** 1998 Wis. L. Rev. 169, 171-72 (noting that debate has shifted to this "shadow effect," and finding that fear of runaway damages is exaggerated); Herbert M. Kritzer & Frances Kahn Zemans, The Shadow of Punitives: An Unsuccessful Effort to Bring It into View, 1998 Wis. L. Rev. 157, 157-59.

n86. See, e.g., David Segal, Tag-Team Lawyers Make Businesses Blink, Wash. Post, Nov. 12, 1999, at A1. Studies funded by industry or tort **reform** groups, which find evidence that **punitive damages** are often requested, conclude that the frequency of such requests poses a serious problem. See Kelso & Kelso, supra note 6, at 5 n.3; John H. Sullivan, New State Data Confirms [sic] Runaway Abuse of Punitive Damages (surveying incidence of punitive damage demands in various jurisdictions), http://www.cjac.org/research/punitivedamages.pdf (last visited Jan. 22, 2002). A study that followed up on the tallying of claims for punitive damages by studying whether awards were in fact obtained suggests the need for caution in interpreting the effect of punitive damages claim rates. The study found that 3,763 of 25,561 (14.7%) tort cases filed in Georgia state courts from 1994 to 1997 involved claims for punitive damages. These 3,763 cases yielded 15 punitive damages awards, with judges disproportionately making the awards, not juries. Eaton et al., supra note 5, at 1060, 1094. Sullivan, for example, reports high rates of claims for punitive damages but does not report the resulting yield in actual punitive awards. See Sullivan, supra.

n87. See Kalven & Zeisel, supra note 68, at 63-64.

n88. If defendants are rational economic actors, knowledge of the sober pattern of punitive awards should lead them to be less averse to pressing potentially damaging cases to trial. Punitive awards are rare; "bet-the-company" cases are also rare. The **settlement** selection effect could affect some potentially large cases, but might not be expected to influence the pattern observed in the mass of cases. Furthermore, plaintiffs may play on defendants' fears of juries to increase their **settlement** demands to the point where defendants must strongly consider taking a chance on trial.

n89. Karpoff & Lott, supra note 8, at 534-35.

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n90. See id. at 537.

n91. Id. at 562. But serious doubts exist about the representativeness of the Karpoff-Lott sample, and further study of this issue is warranted. Their data show 94 **settlements** and 1,595 plaintiff verdicts. Id. at 538 tbl.2. This **settlement**-verdict ratio suggests that the vast majority of plaintiff recoveries are via verdicts rather than **settlements,** which seems to contradict virtually every other study of civil litigation. In addition, their finding that 310 of 352 products liability verdicts were for plaintiffs, see id., contradicts all other studies of products liability litigation, as does their report that, across all lawsuit types, plaintiff verdicts were 85% of all verdicts. See id. Either suits seeking punitive damages against publicly traded corporations are shockingly different from other lawsuits or some further explanation of their data is needed.

n92. For a model of the effect of caps on awards on **settlement** rates, see Linda Babcock & Greg Pogarsky, Damage Caps and **Settlement:** A Behavioral Approach, 28 J. Legal Stud. 341, 368 (1999). The authors report experimental evidence that a cap on damages has a positive and marginally significant effect on **settlement** rates. Id. The caps they assess differ from punitive damages caps because punitive damages caps do not cap the total award. The compensatory award is still unlimited in most states in most classes of cases. The risk averseness of defendants who settle rather than take a chance before a jury without a cap on punitive awards suggests that imposing a punitive cap could promote trial rather than **settlement** of cases with large potential punitive awards. One study reports experimental evidence that capping punitive damages awards causes jurors to inflate compensatory awards and summarizes other studies on the subject. Edith Greene et al., The Effects of Limiting Punitive Damage Awards, 25 Law & Hum. Behav. 217 (2001).

n93. E.g., Conn. Gen. Stat. Ann. 52-240b (West 1991) (capping punitive damages at twice compensatory damages in products liability cases); Fla. Stat. Ann. 768.73(1) (West Supp. 2001) (generally capping punitive damages at three times compensatory damages); Ga. Code Ann. 51-12-5.1(g) (2000) (capping punitive damages at $ 250,000 in some tort actions); Ind. Code Ann. 34-51-3-4 (Michie 1998) (capping punitive damages at the greater of three times the amount of compensatory damages or $ 50,000); N.J. Stat. Ann. 2A:15-5.14 (West 2000) (capping punitive damages at five times the amount of compensatory damages or $ 350,000, whichever is greater); Tex. Civ. Prac. & Rem. Code Ann. 41.008 (Vernon 1997) (capping punitive damages at two times the amount of economic damages plus the greater of either $ 200,000 or an amount equal to any noneconomic damages found by the jury, not to exceed $ 750,000); Va. Code Ann. 8.01-38.1 (Michie 2000) (capping punitive damages at $ 350,000).

Illinois capped punitive damages at three times compensatory for other than "healing art or legal malpractice cases." 735 Ill. Comp. Stat. Ann. 5/2-1115.05(a) (West Supp. 2001). But the provision, which was effective March 9, 1995, was invalidated when the entire act of which it was a part was struck down on state constitutional grounds in Best v. Taylor Machine Works, 689 N.E.2d 1057 (Ill. 1997). Ohio capped punitive damages as of January 27, 1997, but the provision was struck down by the Ohio Supreme Court. State ex rel. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1090-91 (Ohio 1999).

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counties include approximately 33% of the 1990 U.S. population and the forty-five counties actually sampled account for about 20% of the population.n13 The first CTCN trial data were limited to jury trials and covered fiscal year 1991-92.n14 New data, using the same stratified sampling methodology, cover judge and jury trials in calendar year 1996.n15 The 1996 data's inclusion of judge trials allows study of differences between judge and jury trial characteristics. The data about each case include the subject matter, locale, prevailing party, type of litigants, and compensatory and punitive damage award levels.n16

The CTCN data are the most representative sample of state court trials in the United States. With direct access to court clerks' offices and approximately one hundred trained coders recording the data, the information gathered does not depend on litigants or third parties to report and code cases. Such self-reporting in jury verdict reporters can lead to sample bias that overstates plaintiff win rates and award levels.n17 In several counties, CTCN case lists obtained from clerks' offices were compared with local jury verdict reporters. The **[*748]** jury verdict reporters sometimes failed to include approximately half the cases the CTCN found.

The CTCN data include all completed trials in thirty-six counties and a random sample of trials in nine counties.n18 In eight of the sampled counties, well over half the 1996 trials are included in the data. Appendix Table 1 lists summary statistics by county. In Harris County, Texas, which includes Houston, 352 judge and jury trials were randomly sampled out of approximately 1,500 trials, with jury trials somewhat more heavily sampled than judge trials. This is the only county in which sampling might distort the actual number of punitive awards in judge and jury trials.n19 The analyses reported here include Harris County, but we report throughout the Article whether inclusion of Harris County materially affects results.n20

A. Trial Outcomes Generally

Table 1 presents summary statistics of the variables in this study. Panel A's two rows show, for both compensatory and punitive damages, the mean and median awards in thousands of dollars and the number of plaintiff awards, all reported separately for jury and judge trials. Panel A's first row shows that the mean compensatory award in jury trials with an award is $ 1.047 million and the mean compensatory award in judge trials with an award is $ 152,000. The medians are also substantially different; the jury trial median is $ 45,000 while the judge trial median is $ 25,000. For both compensatory and punitive awards, panel A confirms the conventional wisdom that jury awards are higher than judge awards. But substantial non-random case routing occurs. Amounts plaintiffs demand in jury-tried cases are significantly higher than those they demand in judge-tried cases.n21 In addition, tort trials tend to be routed to juriesn22 while judges tend to adjudicate contract **[*749]**

[SEE TABLE IN ORIGINAL] **[*750]** cases. Plaintiffs tend to prevail in judge-tried cases significantly more often than in jury-tried cases. Table 1's "Totals" row shows that plaintiffs have an overall win rate of 62% in judge trials and 47% in jury trials.n23

Panel B reports award frequencies for each litigant pair; panel C does the same for each case category. Every case, regardless of the number of plaintiff or defendant types, is assigned one of four plaintiff and defendant designations: hospital, corporation, government, or individual. For cases involving more than one plaintiff or defendant type, the case is assigned to the type appearing first in the above listing. For example, a case with a hospital defendant is characterized as a hospital defendant case even if the case also included business, individual, and government defendants.n24 The litigant characterization hierarchy tries to capture the most salient characteristic of the litigants, though the hierarchy cannot assure capture of the most salient litigant characteristic in each case. We further refine litigant pair categories to identify cases in which only individuals sued other individuals and cases in which only individuals sued corporations, and we also create some smaller related categories.

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n94. Connecticut, Georgia, Indiana, and Virginia capped punitive damages throughout the period covered by the CTCN sample. See supra note 93. Texas enacted meaningful caps during the period, see supra note 93, so not all Texas sample cases are subject to caps. Texas earlier capped punitive damages at the greater of four times the compensatory award or $ 200,000, but excepted intentional torts and malicious behavior. 1987 Tex. Gen. Laws ch. 2, 2.12. This earlier cap affected one Harris County, Texas jury trial in our sample, see Verdict Reduced, supra note 44, but the uncapped amount is used in the data. Florida changed the way it capped during the sample period. We have repeated our analysis excluding Florida cases with no material change in results. New Jersey enacted caps effective for cases filed after October 27, 1995, see supra note 93, too late in the CTCN period to materially affect results. Illinois imposed caps early in 1995 but they were invalidated in 1997, see supra note 93, and defendants might not yet have come to rely on them to a degree sufficient to affect results. We have repeated the analysis treating Illinois as an uncapped state without material effect on the results.

n95. We do find a positive, significant correlation between the existence of caps and punitive awards in judge-tried cases. However, this effect is not robust to the exclusion of Harris County, Texas. See supra note 19. The insignificance of the jury trial effect is not sensitive to inclusion of Harris County. The increasing use of statutory caps on punitive damages awards raises the question whether a variable should account for the existence of caps. Except for an earlier capping statute that later affected a Texas award, see supra notes 44, 94, all of the capping systems in the states studied here either took effect after the decisions were rendered or imposed limits that were not reached in any case subject to them. Thus, the caps did not directly affect punitive award levels even if they might have affected **settlement** behavior. Knowledge of a cap, however, might affect an adjudicator who knows of its existence even if an award does not exceed the cap. See Greene et al., supra note 92; Hastie et al., supra note 64.

n96. See Albert Yoon, Damage Caps and Civil Litigation: An Empirical Study of Medical Malpractice Litigation in the South, 3 Am. L. & Econ. Rev. 199 (2001) (studying the effect of Alabama's cap on medical malpractice awards).

n97. See Eisenberg et al., supra note 5, at 650-51.

n98. See id. at 637-40.

n99. This harm-measuring use of compensatory damages in setting a punitive award is distinct from the use of compensatory damages to compensate victims. Id. at 639.

n100. See id. at 639-40.

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n101. See id. at 648 tbl.5.

n102. Id. at 630.

n103. Id.

n104. Table 5 excludes three punitive damages cases in which the compensatory award was zero. For discussion of punitive awards in cases with zero or nominal damages awards, see Eisenberg et al., supra note 5, at 629-30. For a notable such case, see Tronzo v. Biomet, Inc., 236 F.3d 1342 (Fed. Cir. 2001), a patent infringement case that, after a remand and partial reversal on appeal, resulted in a $ 20 million punitive award and a $ 526 compensatory award.

n105. Eisenberg et al., supra note 5, at 648 tbl.5.

n106. See Merritt & Barry, supra note 6, at 364-65; Frank A. Sloan & Chee Ruey Hsieh, Variability in Medical Malpractice Payments: Is the Compensation Fair?, 24 Law & Soc'y Rev. 997, 1025 (1990); Vidmar, supra note 3, at 868-70.

n107. Other variables, reported in Appendix Table 2, yield results generally similar to those in the 1991-92 data but with some differences worth noting. The coefficient on the dummy variable "individual only vs. corporation" is positive, as was the most analogous variable in the 1991-92 data, and their 95% confidence intervals overlap. Eisenberg et al., supra note 5, at 648 tbl.5. But the effect is statistically significant in the 1991-92 data and is not statistically significant in the 1996 data.

Case category effects initially appear to be stronger in the 1996 data than in the 1991-92 data, as evidenced by significant differences between the reference case category, products liability, and many other case categories. But using products liability as the reference category tends to overstate the importance of case category effects because it has only one punitive award, and that award is relatively high. Using motor vehicle tort, a more middle-of-the-road case category with respect to punitive award levels, shows that only products liability cases, which are higher, and slander/libel cases, which are lower, differ at the 0.05 level from motor vehicle cases. A Bonferroni correction to the test of the hypothesis that all case category coefficients are jointly zero yields p=0.175. See Jason C. Hsu, Multiple Comparisons: Theory and Methods 175-80 (1996) (discussing abuses in multiple comparisons). Case category remains a weak force in explaining the level of punitive awards.

n108. See infra Appendix Table 2.

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n109. See supra Table 2.

n110. p=0.726.

n111. p=0.918.

n112. See supra notes 21-23, 51-52 and accompanying text.

n113. See supra note 19 and accompanying text. We accounted for selectivity by using two Heckman models in which the decision to award punitive damages is estimated jointly with the level of damages for those cases in which punitive damages are awarded. In both models the selection equation included the jury trial dummy variable, the compensatory award, the litigant pair dummy variables, and the case category dummy variables. In both models we accounted for county-level clustering and for the sampling pattern used. In one model, the punitive award level equation used the jury trial dummy variable, the interaction term, the compensatory award, and the litigant pair dummy variables. In the second model, the punitive award level equation included the case category dummy variables instead of the litigant pair dummy variables.

n114. See Wissler et al., supra note 3, at 783-87.

n115. See supra note 35.

n116. Wissler et al., supra note 3, at 783-87. For debate and evidence about whether the group deliberating process of juries will increase or decrease awards, and increase or decrease their variability, see Shari Seidman Diamond et al., Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency, 48 DePaul L. Rev. 301 (1998); Guthrie et al., supra note 3, at 827; Stephan Landsman et al., Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages, 1998 Wis. L. Rev. 297, 322-23; Schkade et al., supra note 1; and Wissler et al., supra note 3, at 801-04.

n117. See supra note 19 and accompanying text.

n118. p=0.567 (mean) and p=0.355 (median).

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n119. See Eisenberg & Wells, Predictability on Appeal, supra note 8, at 61, 81.

n120. Note that three of the high punitive awards occupy the extremely low end of the compensatory award range. One does not expect a strong correlation between punitive and compensatory awards in that range. Supra note 104.

n121. p=0.553.

n122. Supra notes 42-45 and accompanying text.

n123. Eisenberg & Wells, Predictability on Appeal, supra note 8, at 80-83. More generally, appellate courts are especially likely to reverse jury trial verdicts for plaintiffs. See Clermont & Eisenberg, Appeals I, supra note 4, at 141-44; Clermont & Eisenberg, Appeals II, supra note 4, at 2.

n124. See, e.g., supra note 42 and accompanying text.

n125. Jury critics fail to address another method to reduce variance in punitive awards. Floors as well as caps reduce variability. With respect to low-end punitive-compensatory ratios, a system of minimum punitive damages awards would decrease variability. For example, a system that requires punitive awards to at least equal compensatory awards would reduce the variance in punitive award patterns. Critics' failure to propose floors suggests that reducing variability may be less of a goal than reducing high awards. Imposing a system of floors has a cost, namely, the loss of the ability to show mercy in punishing by imposing a low punitive award. This practice may be expected when the wrongdoer is in a precarious financial condition. The level of corporate criminal fines is significantly and negatively correlated with corporate-defendant bankruptcy. Cindy R. Alexander et al., Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms, 42 J.L. & Econ. 393, 412 tbl.5 (1999). We may have to tolerate a tradeoff between allowing mercy and increased variability. See Stephen P. Garvey, "As the Gentle Rain from Heaven": Mercy in Capital Sentencing, 81 Cornell L. Rev. 989, 991-92 (1996).

n126. See supra Part II.D. Such routing is consistent with the finding that high-stakes cases tend to go to juries. Clermont & Eisenberg, supra note 3, at 1164-65; Helland & Tabarrok, supra note 79, at 323-25.

n127. To the extent caps on punitive awards lead to trial of high-risk cases for defendants (cases that would likely settle in states without caps), we might expect to see a positive

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correlation between the capping dummy variable and the size of the punitive award. In models that include the capping variable, the variable is insignificant.

n128. See Andrew L. Frey & Evan M. Tager, Punitive Damages, in 3 Business and Commercial Litigation in Federal Courts 40.2(g) (Robert L. Haig ed., 1998); Joseph Sanders, From Science to Evidence: The Testimony on Causation in the Bendectin Cases, 46 Stan. L. Rev. 1, 55-56 (1993).

n129. E.g., Hastie et al., supra note 64, at 449.

n130. Thomas Petzinger, Jr., Oil & Honor: The Texaco-Pennzoil Wars 403-04 (1987); Theodore Eisenberg, Damage Awards in Perspective: Behind the Headline-Grabbing Awards in Exxon Valdez and Engle, 36 Wake Forest L. Rev. 1129, 1153-54 (2001) (noting possible effect of defense trial strategy on punitive award levels).

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B. Punitive Damages Award Patterns

Given a plaintiff victory at trial, punitive award decisionmaking can be divided into two separate decisions: the decision to award punitive damages, and the decision setting the level of the punitive award.

1. Frequency of Punitive Awards

With respect to punitive damages award frequency, Table 1's two largest litigant pair categories - "individual only vs. individual only" and "individual only vs. corporation" (reported in panel B's first and third rows) - account for over 75% of the trial outcomes. Both categories show a higher rate of punitive damages awards in judge trials than in jury trials. Panel B's fifth and sixth numerical columns show that when individuals sue individuals, punitive damages are awarded in 3.5% of the jury trials won by plaintiffs and in 5.3% of the judge trials won by plaintiffs. However, the difference is not statistically significant.n25 **[*751]** The single highest rate of punitive damages awards occurs when individuals sue corporations in judge trials; punitive damages awards occur in 6.7% of the successful plaintiff cases in this category. These simple descriptive statistics provide no evidence that juries are more inclined than judges to award punitive damages.

Panel C also shows that punitive damages award rates vary more across case categories than they do across litigant pairs. Intentional tort, fraud, and employment casesn26 are sizeable case categories in which punitive award rates are much higher than the four percent average for all plaintiff trial wins. Fraud and intentional tort cases yield punitive awards at a high rate regardless of whether the adjudicator is judge or jury, and together they account for about one-third of all punitive awards. Employment cases show a noticeably higher rate of punitive awards before juries than before judges.n27

Prior CTCN data and other data confirm geographical variation in award frequencies.n28 The new CTCN data replicate this finding with substantial intercounty differences in punitive award rates.n29 These differences exist whether one considers only judge-tried cases or only jury-tried cases. But we are interested in the relation between the frequency of punitive awards and the mode of trial - judge or jury. Even if judges and juries award punitive damages at different rates, one still wants to know whether that difference varies across the forty- **[*752]** five different counties observed in the study. Statistical analysis reveals that one cannot reject the hypothesis of no county-level effect on the relation between frequency of punitive damages awards and mode of trial.n30

The numbers in Table 1 allow us to calculate the percent of punitive award cases decided by judges. Judges gave 55 of the 176 (31.3%) punitive damages awards.n31 Given the overwhelming focus on jury punitive awards in the literature and policy debate, this share is surprisingly high.n32 A detailed study of Georgia tort cases confirms the surprisingly high fraction of punitive awards made by judges.n33

2. The Relation Between Punitive and Compensatory Awards

With respect to punitive award levels, Figure 1 shows the relation between punitive and compensatory awards in cases with punitive awards. Figure 1 is a scatterplot of punitive damages (log) and compensatory damages (log), with judge (bench) and jury trials separately indicated by "B" and "J," respectively. The logarithmic scales are used because, as is often the case with award amounts, linear scales do not **[*753]** reveal the relation between the variables.n34 Figure 1 also shows the best-fitting simple linear regression lines for judge and jury trials.n35 The lines, which best describe the relation between compensatory and punitive awards, are similar in slope and intercept. We defer detailed statistical analysis of judge-jury differences to Parts II and III. The punitive-compensatory

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patterns in Figure 1 are similar to those in earlier studies,n36 and the pattern in judge-tried cases is consistent with the pattern in jury-tried cases.

Figure 1. Punitive and compensatory damages by judge or jury trial status. The figure displays both a scatterplot and the best fitting regression lines.

[SEE FIGURE IN ORIGINAL]

Figure 1 shows that the simple log transformation that describes the relation between punitive and compensatory jury awards also describes judge awards. Both compensatory and punitive awards are approximately log-normally distributed for judges and juries.n37 This result addresses a concern about jury punitive awards - that a logarithmic **[*754]** scale is needed to reveal the relation between punitive and compensatory awards, and that the scale understates variation in punitive awards.n38 The same logarithmic transformation illuminates the relation between punitive and compensatory awards in judge trials.

3. The Punitive-Compensatory Ratio

Figure 1 shows no judge-jury difference in the relation between punitive and compensatory awards. To summarize that relation in a single number to facilitate further comparison, we use punitive damages (log) divided by compensatory damages (log) to construct the ratio of the two damages measures.

Table 2 reports statistics summarizing the punitive-compensatory ratio in judge and jury trials. The table's last row shows that the means, medians, and standard deviations do not differ significantly across trial modes. A statistical test of the difference between the entire distributions does not allow us to reject the hypothesis that they are the same.n39 The 95% confidence intervals for the means of the ratios are narrow for both judge and jury trials. For judge trials the interval ranges from 0.882 to 0.981. For jury trials, the interval ranges **[*755]** from 0.907 to 0.983, slightly narrower than the judge trial range, presumably because of the greater number of jury trials. Surprisingly, the median punitive-compensatory ratio without transforming to logs is higher in judge trials than in jury trials. This ratio also does not significantly differ between judge and jury trials.n40

[SEE TABLE IN ORIGINAL]

The untransformed mean ratio is greater in jury trials. But this statistically insignificant difference is a consequence of a handful of awards, most of which are known to have been reduced or are justifiable. Follow-up study of the most extreme punitive-compensatory ratiosn41 **[*756]** suggests the distortion introduced by relying on extreme awards without further inquiry. Five of seven cases with punitive-compensatory ratios greater than ten were clearly justifiable or later resulted in a reduced punitive award. One case with an extreme ratio involved sexual abuse of a child by a sports coach and led to a $ 2.6 million punitive damages award that no one expected to actually be paid.n42 Another extreme case involved a $ 300,000 punitive award against a wealthy car dealer who had failed to disclose a vehicle's history of defects and had rolled back a car's odometer by nearly 40,000 miles.n43 The largest award was substantially reduced due to a then-existing cap on punitive damages.n44 One case with an extreme ratio is known to have been reduced but the amount of reduction is not known, and another case's punitive award was reduced by 90% to reflect that the plaintiff was 90% at fault.n45 No information was found on two of the cases.

Figure 2 presents the distributions of the punitive-compensatory ratio for judge trials and for jury trials.n46 Although Table 2 shows that the differences between the distributions are not statistically significant, the jury trial punitive-compensatory ratios are more "spread" than the judge trial punitive-compensatory ratios. Both the left and right tails of the jury trial distribution are larger than those of the judge trial distribution. We address this greater

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spread in Part III.C.

Figure 2. Kernel density estimates of the ratio of punitive and compensatory damages in cases containing both kinds of awards, by judge or jury trial status. Jury trials show greater "spread" than judge trials.

[SEE FIGURE IN ORIGINAL]

Together, Table 1's descriptive statistics, Figure 1, and Table 2's and Figure 2's analyses of punitive-compensatory ratios show that judge-jury rates of awards do not differ substantially and that their levels of punitive awards bear a similar relation to levels of compensatory awards. The remainder of this Article employs more comprehensive statistical methods to further probe the absence of evidence of judge-jury differences. **[*757]**

II

The Decision to Award Punitive Damages

Differences in types of cases routed to judges and juries suggest the need for analysis beyond Table 1's simple comparison of punitive award rates. It may be that cases with punitive damages potential tend to be routed to one decisionmaker. For example, punitive damages tend to be awarded more frequently in financial injury cases,n47 which judges tend to receive more often than juries. Such case routing may mask a judge-jury difference, rendering Table 1's similar rates of awarding punitive damages misleading. A more detailed analysis should help account for routing of cases by subject area and other factors. Multivariate regression works to segregate the effects of various factors, such as case category.n48

[*758] Preliminarily, one must consider whether the sample is large enough to detect meaningful differences between judge and jury punitive award rates, even if they do exist.n49 Specifying what degree of difference is meaningful is a subjective judgment. Suppose one accepts that a meaningful difference is a 3% punitive award rate in plaintiff victories in judge trials compared to a 5% punitive award rate in plaintiff victories in jury trials. Both assumed rates are reasonably close to Table 1's observed rate of punitive awards in about 4% of plaintiff trial wins. Using these rates, there is almost a 90% chance of detecting such a difference, or a larger difference, at a statistically significant level.n50

A. Modeling the Decision to Award Punitive Damages

According to a simple model of the decision to award punitive damages presented in our earlier work, the decision is linked to the nature of the defendant's behavior.n51 The best available proxy for such behavior is the type of case. On average, for example, one expects defendant behavior to have been worse in an intentional tort case than in a case involving mere negligence. Table 1 and prior empirical work confirm this pattern.n52 Therefore, in modeling the decision to award punitive damages, we include dummy variables (variables equal to zero or one) for each case category and expect case categories involving intentional misbehavior to yield the highest punitive award rates, as Table 1 suggests. This also helps control for the routing of cases between judges and juries based on subject areas.

A second behavior-related measure is the level of the compensatory award. Other things being equal, we regard behavior that causes more harm as worse than behavior that causes less harm and as deserving of more severe punishment.n53 We use the compensatory damages awarded in each case to approximate the degree of harm caused.

[*759] Evidence exists that jurors react differently to corporate and individual defendants.n54 Table 1 reports summary statistics for several litigant pairs, including two of

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particular interest: actions by individuals only versus individuals only, and actions by individuals only versus corporations. We include dummy variables for these and for Table 1's other litigant pairings. We use statistical models that account for the clustering of the sample at the county level.n55

B. Empirical Results

Because the decision to award punitive damages is dichotomous, we employ logistic regression analysis.n56 The dependent variable is whether the plaintiff received a punitive damages award. The sample consists of over 4,300 trials with plaintiff victories. The explanatory variables include dummy variables for case categories and litigant characteristics, and a continuous variable for the size of the compensatory award (log). The explanatory variables of particular interest are a jury trial dummy variable, which assesses whether juries are more likely than judges to award punitive damages, and an interaction term consisting of the product of the jury trial dummy variable and the compensatory award. The interaction term monitors whether, as compensatory awards increase, juries are more likely than judges to award punitive damages.

Table 3 reports two models. The first includes the above-described explanatory variables. The second limits the explanatory variables to three: the compensatory award, the jury trial dummy variable, and the interaction term.

The first and third numerical columns show a variable's "odds ratio" or "odds multiplier," a way of expressing the size of a variable's influence on whether punitive damages were awarded.n57 For the case **[*760]**

[SEE TABLE IN ORIGINAL] **[*761]** category variables and the litigant pair variables, the odds multiplier is the amount by which the odds of a case having a punitive damages award should be multiplied compared to a reference category, holding all other variables constant. For the case categories, Table 3 shows that "products liability" is the reference category. An odds multiplier of 1.0 for a case category (the "other contract" category, for example, has an odds multiplier close to 1.0) indicates that, compared to products liability cases, the case category does not change the odds of receiving a punitive award. An odds multiplier greater than 1.0 indicates case categories with chances of a punitive award that are greater than the chances in products liability cases. An odds multiplier of less than 1.0 indicates case categories with chances of a punitive award that are less than the chances in products liability cases. For example, Table 3 shows that the odds multiplier for motor vehicle tort cases (0.131) is substantially less than 1.0 and thus that, compared to the reference category (products liability), motor vehicle cases are much less likely to end with a punitive award. Similarly, the large odds ratio for intentional tort cases (5.130) indicates that they are unusually likely to have a punitive award.

The odds of a punitive damages award should be distinguished from the probability of a punitive damages award, even though the terms "odds" and "probability" are often used interchangeably in informal conversation. For example, Table 3 shows that the intentional tort case category has an odds multiplier of 5.130. Assume that the odds of a punitive damages award (based on all of the other factors about a case) are 1:1, corresponding to a 50% probability of a punitive award. The odds multiplier of 5.130 means that the classification of the case as one of intentional tort changes the odds of a punitive damages award from 1:1 to 5.130:1, corresponding to a probability of punitive damages award of approximately 84%.n58

The interpretation of the compensatory damages variable, which is continuous, differs from the interpretation of the case category and litigant pair variables, which are dichotomous. For the compensatory damages variable, the odds multiplier represents the effect of a unit increase in the variable. For example, an increase in the compensatory award (log) from 1.0

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to 2.0 would require multiplying the odds of a punitive award by 1.37. The second and fourth columns in Table 3 **[*762]** show significance levels for each odds multiplier: the probability that the observed result would occur by chance.

In the full model, the jury trial dummy variable's odds multiplier is greater than one, but is not statistically significant. The effect changes direction (from greater than one to less than one) in the simpler of the two models. One cannot reject the hypothesis that juries are no more likely than judges to award punitive damages. The odds multiplier on the interaction term, consisting of the jury trial dummy variable and the compensatory award, is less than one and is statistically significant in one model and of borderline statistical significance in the simpler model. Thus, judges, more than juries, display a tendency to award punitive damages as the stakes increase.n59

Table 3 confirms Table 1's evidence that certain classes of tried cases - intentional tort, fraud, and employment cases - are more likely than other classes of tried cases to lead to punitive awards. The odds multipliers for these variables are all large and statistically significant. These results are similar to findings from the 1991-92 CTCN data.n60

Another noteworthy result in Table 3 is the absence of support for the belief that adjudicators are more likely to award punitive damages against corporate defendants. The odds multiplier for the "individual only vs. corporation" dummy variable is less than 1.0. Compared to the reference category of cases involving "individuals only vs. individuals only," plaintiffs are more likely to obtain punitive awards against individual defendants than against corporate defendants, **[*763]** though the effect is not statistically significant. Because businesses' concern focuses especially on juries' tendency to award punitive damages, we have run a model similar to the large model in Table 3, but adding an interaction term to explore the differences between judges and juries. That model, not reported here, includes an interaction term equal to the product of the jury trial dummy variable and the individual only vs. corporation dummy variable. The odds multiplier for the interaction term is less than one and is statistically significant.n61 Thus, compared to judges, our models suggest that, conditional on a case being tried, juries are significantly less likely than judges to award punitive damages in cases involving individual plaintiffs and corporate defendants.

C. Interpreting the Results in Light of Other Recent Studies

The absence of significant difference between judge and jury decisions to award punitive damages is consistent with experimental evidence comparing groups of adjudicators. Researchers report finding "a remarkable consensus in the judgments of individual jurors, made on a rating scale, about a series of personal injury cases."n62 They also report strong agreement among sets of juries when judging punishmentn63 and a strong correlation between the egregiousness of behavior and the decision to award punitive damages.n64 These experiments do not involve judges. But judges, like jurors, are people responding to stimuli. If many individual judgments reflect a "remarkable consensus," some of that consensus ought to survive when the individual judgments are those of judges. As Guthrie, Rachlinski, and Wistrich state, "Judges, it seems, are human."n65

Our results are less consistent with judge-jury punitive damages experiments of Hastie and Viscusi. They report that mock jurors were much more likely than judges to impose punitive sanctions in a hypothetical **[*764]** railroad accident case.n66 Similarly, in experiments involving airplane repair scenarios, Viscusi reports evidence that "judges are much more willing than jurors ... to refrain from imposing punitive damages."n67

Unlike the classic Kalven and Zeisel judge-jury study, these researchers did not study actual judges and juries. Kalven and Zeisel's questionnaires to presiding judges in about 4,000 actual civil jury trials in the 1950's yielded data showing a 78% agreement between judge and jury on liability.n68 In the cases of disagreement, there was a very small tendency of

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juries to favor plaintiffs.n69 And the rate of agreement, although not 100%, is high compared to other human endeavors.n70

The vast difference between experimental punitive damages results and real case evidence of absence of disagreement between judges and juries is worth addressing. It is theoretically possible that real-world judges and juries could so substantially agree on liability, as Kalven and Zeisel found,n71 and yet, as the recent experimental evidence might suggest, so massively disagree on the decision to award punitive damages.n72 But experiments searching for substantial disagreement between judges and juries on punitive damages might try to replicate the real world rate of agreement between judges and juries about liability. Otherwise, a risk exists that the experiments' judge-jury difference in awarding punitive damages results from an experimental design that artificially inflates the differences.

[*765] Unlike Kalven and Zeisel's experiments, the recent experiments do not achieve substantial judge-jury agreement on liability. In an airplane accident scenario, judges and mock jurors were asked whether a firm should undertake a repair that was constructed to be economically inefficient. Judges and experimental jurors disagreed massively on this basic liability question, with nearly 90% of the jurors requiring repair of the plane compared to less than 50% of the judges.n73 The vast judge-jury difference on liability in the new studies calls into question the experimental designs' ability to detect socially meaningful punitive damages differences between judges and juries. If the Kalven and Zeisel and other resultsn74 are valid, the new experiments may employ scenarios and assumptions that occur too rarely to be of social significance.n75 The airplane scenarios seem especially questionable as evidence exists that punitive awards are unusually rare in such accidents.n76

[*766]

D. Selection Effect Considerations

A remaining issue is the need to account for the nonrandom routing of cases between judges and juries. Interpreting empirical legal findings requires caution about accepting results at face value where strong selection effects may be at work.n77 Table 1 suggests that juries tend to adjudicate large-stakes cases, as measured by both compensatory and punitive damages. Federal data confirm this,n78 as do studies using jury verdict reporter data.n79 This skewed routing of cases to juries cannot conclusively be proven from our data, which lack the ex ante characteristics of the cases. But given perceptions about jurors' greater inclination to award punitive damages, one expects juries to see a sample of cases biased in favor of strong candidates for punitive awards.n80 Looked at differently, a study in which the higher-stakes cases that are more prone to punitive damages are in fact being routed to judges would be more remarkable than any of our findings.

1. Selection Attributable to Case Routing Between Judge and Jury

The most realistic assumption is that what are perceived as high-stakes cases with punitive damages potential are more likely to be routed to juries than judges. If plaintiffs select juries for cases with high probabilities of punitive awards, Table 3 may overstate the differences between judges' and juries' tendencies to award punitive damages and could be interpreted as precluding rejection of the hypothesis that judges are more likely than juries to award punitive damages. If judges saw the same group of high-punitive-probability cases that we believe juries see, a model similar to that depicted in Table 3 might reveal a greater tendency by judges to award punitive damages. Table 3's interaction term already suggests that judges are more likely than juries to award punitive damages as compensatory awards increase.n81

Another possible routing effect relates to the perceived greater reliability of judges compared to juries. Plaintiffs may regard judges **[*767]** as more reliable, and thereby opt for trial

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SYMPOSIUM: PUNITIVE DAMAGES: ARTICLE: FAIRNESS AND EFFICIENCY IN THE LAW OF PUNITIVE DAMAGES.

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SUMMARY:
... Reparative (or compensatory) damages assessed against wrongdoers in private civil suits complement public enforcement measures. ... Restricting punitive damage assessments to cases in which an injury was purposefully caused, or in which the aggregate expected loss from the conduct was greater than the expected compensatory damage recovery, would limit punitive damages to situations where they are supported by considerations of fairness and efficiency. ... Furthermore, without certain standards for determining the magnitude of an assessment, the defendant's wealth provides the only effective upper limit on punitive damage awards, and there is some probability that any amount up to that limit will be assessed. ... Nor does vicarious punitive damage liability seem appropriate in the second situation -- where expected damages are less than expected loss. ... Vicarious punitive damage liability thus attracts resources, not to cases in which an egregious act was committed, but to those where an injury was caused by an employee or agent, under circumstances making vicarious liability potentially available. ... In summary, vicarious punitive damage liability cannot be justified as deserved punishment. ... Thus, from the fairness standpoint, insurability is inconsistent with the goals of punitive damage liability because it reduces the punishment of the wrongdoer and imposes it on all other policyholders through higher premiums. ...

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recklessness will be unlikely to command anything approaching unanimity **[*23]** unless reckless conduct is narrowly defined to exclude reasonable disagreement over the relative danger and utility of an act and to limit it to acts committed with subjective awareness of the consequences.

B. EFFICIENCY

When appraising malicious and reckless conduct from the standpoint of efficiency, we confront quite different issues. Efficiency analysis should begin with the assumption that compensatory damages ordinarily will produce efficient results. Under Judge Hand's formula, equilibrium will be achieved when the expected loss (probability of occurrence times cost) equals the cost of loss avoidance. [115] Figure 1 illustrates this point.

In Figure 1, expected loss is plotted on the vertical axis; cost of avoidance on the horizontal. Assume that a person (Malficio) is engaged in an activity (driving an automobile) that creates an expected **[*24]** loss *PL* (the probability of a pedestrian being injured times the cost of the injury). Assume also that the expected loss can be reduced by additional preventative measures (driving more slowly) with a cost, *C.* The ray, *e,* locates the equilibrium at which the expected loss, *PL,* equals the cost of avoidance, *C.* If, as illustrated in panel A of Figure 1, an injury caused by Mal had a probability *P*[1] of producing loss *L*[1], and could have been avoided by additional precautions costing *C*[1], liability for compensatory damages will be imposed under Hand's negligence theory. Since the expected damages exceed the cost of avoiding them, Mal (and others engaged in the activity) will have an incentive to undertake additional precautions up to the equilibrium. On the other hand, if, as illustrated in panel B, the injury caused by the activity had a probability *P*[2] of producing loss *L*[2], which could be avoided only by precautions with a cost of C[2], liability for compensatory damages may be imposed under strict liability rules, but will not provide an incentive to avoid the loss because the cost of avoidance, *C*[2], exceeds the expected cost of the injury, *P*[2]*L*[2]. [116]

Malice and reckless conduct, as defined in this Section, are represented in Figure 2 where the expected loss exceeds the cost of avoidance by a substantial margin. Malice produces this state of affairs because it is characterized by a purposefully injurious act, which implies that the probability of harm, *P,* is much greater than in the case of an unintentional act. If the magnitude of the harm caused, *L,* is held constant, and if the cost of avoidance, *C,* is low relative to the extent of the harm (for reasons that will be considered below), then a relationship such as that shown on Figure 2 will result from malice. The same relationship results from reckless conduct, because by definition the expected loss substantially outweighs the utility of the act. Here again, Mal's liability for compensatory damages would appear to provide ample incentive for avoiding the loss; doing so would leave him considerably better off. How, then, could efficiency require punitive damages in addition to the compensatory damages? [117]

[*25] There are three situations in which punitive damages might produce efficient outcomes: (1) when the *ex ante* probability of Mal being held liable for the loss is less than the actual probability of the harm; (2) when the compensatory damages for which Mal is held liable are less than the actual amount of the loss; and (3) when the subjective cost of avoidance (the cost as Mal appraises it) is greater than the cost recognized by the law. Situations (1) and (2) would cause Mal's expected liability to be less than the expected loss. In either situation, Mal would not have adequate incentive to avoid the loss, even though the expected loss actually exceeded the cost of avoidance. In situation (3), expected liability equals the expected loss, but is less than Mal's subjective assessment of the cost of avoidance, again producing insufficient avoidance incentives.

The following subsections compare seriatim the foregoing situations with the legal concepts of malice and reckless conduct as defined above. They indicate that there is some correlation, but that it is far from perfect.

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1. *Probability of Liability Less Than Probability of Loss*

The first situation, in which the probability of liability *P*[m] is less than the probability of loss *P* (see Figure 2), explains why punitive damages may be assessed for some types of conduct that fall within the definitions of malice or reckless conduct. [118] Fraud provides a good example. Even where it is uncovered, its elements, especially scienter, are difficult **[*26]** to prove and victims may be reluctant to sue and thereby disclose to the world that they were successfully duped. [119] Embezzlement presents similar problems. [120] Oppression may also fit within this situation because the propriety of acts by public officials often must be proven by evidence that depends on the relative credibility of conflicting testimony. [121] If, for example, police officers were more successful at defeating valid damage claims by lying than plaintiffs were in prosecuting false claims by the same means, then the probability of loss caused by official misconduct, *P,* would exceed the probability of liability, *P*[m]. Other intentional torts involving actual malice or reckless indifference to the victim's interests, such as robbery, conversion, and rape, [122] present difficulties in identifying and apprehending the perpetrator. [123] Without a punitive damage assessment, the expected liability in such cases (*PmL* in Figure 2) would be less than the expected loss, *PL.* In situations where *PmL* is less than the cost of avoidance (*C* in Figure 2), Mal would have no incentive to avoid expected loss *PL,* even though it would be efficient for him to do so. [124]

2. *Damages Less Than Loss*

In the second situation, the probability of loss and the probability of Mal being held liable are the same, but the damages assessed are systematically less than the value of the loss. In this situation, Mal again would be given insufficient incentive to avoid the injury (*PDm* in Figure 3). **[*27]** This state of affairs may result from one of three causes: either (a) the law does not recognize and provide a remedy for the loss; (b) part of the loss falls on persons other than the immediate victim; or (c) the value of the loss is difficult to translate into monetary terms. These causes are discussed in sequence below.

a. *No legal remedy:* The absence of a legal remedy was once more important than it is now. Only recently has the law recognized emotional distress as a compensable injury. [125] As we have seen, emotional distress associated with insult played a major role in the origin of punitive damages. [126] The association of punitive damages with emotional distress continued to be a close one thereafter, and still survives in the law of some states. [127] Today, however, compensatory damages for emotional distress may be recovered in most states, especially if the emotional distress was intentionally inflicted, and punitive damages may be assessed in addition to the compensatory award if the requisite **[*28]** punitive damage criteria are met. [128]

b. *Losses falling on persons other than the victim:* The second source, losses falling on persons other than the immediate victim, also is generally of less importance than it once was. Increasingly, spouses, children, and parents are allowed to recover damages for intangible losses under the rubrics of loss of consortium, loss of parentage, loss of society, and loss of companionship. [129] In specific cases, there may still be losses to others (siblings, more distant relatives, friends, colleagues, employers) that remain uncompensated under present damage rules. Derivative losses such as these, however, are functions of factors such as the nature and extent of the resulting injury and the status of the relationships to the immediate victim. There is no apparent correlation between these derivative losses and the presence of malice or reckless conduct.

There are two types of losses to others that are not redressed by compensatory damages and that may be associated with malice or reckless conduct. First, injurious acts animated by malice or resulting from reckless conduct may contribute to a sense of unease or insecurity in society generally, with a resulting diminution in social welfare. The existence and cause of

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such losses are difficult to identify and impossible to value in monetary terms. Without better empirical evidence, I would conjecture that they are real losses, and that they predominantly result from public perceptions of "street crime," [130] which can be included within the definitions of malice and reckless conduct set forth above. But these social losses are rarely the object of punitive damage **[*29]** assessments. [131]

Second, losses to the public caused by breaches of the peace also may be included within the category of societal losses for which compensatory damages provide no remedy. Injuries animated by malice, and even some that result from reckless conduct, may provoke a sense of outrage and induce victims or others to seek revenge against the malefactor if not requited by legal institutions. [132] Again, this problem is less important than it may have been at one time. Dueling is no longer a fashionable response to insult, [133] although the "tavern brawl" may be an alternative in some communities. But punitive damage assessments are not the only, nor indeed the primary, means of discouraging violent self-help. To the extent that self-help is motivated by the victim's desire for vindication or vengeance, [134] the criminal law's sanctions against wrongdoers and civil suits for compensatory damages provide alternatives. [135] Moreover, the combined threat of compensatory damage liability and criminal law sanctions against self-helping victims tends to dissuade those who might otherwise resort to self-help. [136] A compelling case for punitive damages as an efficient means of preserving the peace, that their marginal contribution to that goal equals their cost. The one situation where that calculus may be plausible is when a wrongful act is committed by a government official whose conduct may be viewed by those controlling the invocation of the criminal law as the result of an excusable excess of zeal. [137]

[*30] c. *The loss cannot be translated into monetary terms:* The third situation in which compensatory damages may provide inadequate compensation is when the loss suffered cannot be accurately quantified. [138] Emotional distress produced by the insult of malicious injury is one example. Other examples include some losses associated with reckless conduct. [139] But the difficulty of valuing intangible losses such as pain and suffering, enjoyment of life, sex, society, and companionship, is endemic to negligence and strict liability cases as well. [140] Similar arguments also can be made with regard to losses resulting from defamation, where punitive damages are available only if the defamatory statement was made with knowledge of its falsity or with reckless disregard for the truth. [141] Difficulty in measuring losses, therefore, is not an effective means of discriminating between the cases in which punitive damages are available, and the cases in which they are not.

The implicit assumption of the argument that punitive damages are necessary to an efficient outcome when a loss cannot be accurately measured, is that inaccuracy in measurement produces a downward bias. The argument assumes that compensatory damage awards systematically undervalue actual losses, and hence, that expected liability is lower than expected loss. Historically, there may have been a basis for this argument; the law formerly placed a greater burden on plaintiffs **[*31]** to prove damages with certainty than it does today. [142] But the very factor that produces the uncertainty -- the absence of a market -- makes it impossible to resolve this issue. But unless difficulties in loss measurement produce a net downward bias, they cannot support an efficiency argument for punitive damages. [143]

Moreover, the argument that efficient deterrence requires punitive damage assessments because losses cannot be accurately measured is logically defective. If the absence of a market makes it impossible for courts to determine the value of a loss, it likewise makes it impossible for them to determine the amount of punitive damages that would produce an efficient level of deterrence by inducing avoidance up to, but not beyond, the magnitude of the expected loss.

3. *Subjective cost of avoidance greater than cost recognized by law*

The third situation in which punitive damages may be thought to promote efficiency assumes

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that the expected loss and the expected liability are identical, but that the real cost to the actor of avoiding the injury, *Cm,* is greater than the cost recognized by the law, *C,* as shown in Figure 4. A two stage analysis is necessary in this situation. First, one must make a normative determination of the legitimacy of the satisfaction the actor derives from the act and must forego to avoid the expected loss. Second, one must compare the expected loss, *PL,* to the legally recognized "legitimate" cost of avoidance.

[*32] This situation describes many of the punitive damage cases falling within the malice and reckless conduct categories and suggests an answer to the otherwise perplexing question of why Mal would act in a manner that results in an expected loss far exceeding the cost of avoidance. If, for example, Mal broke into his girlfriend's home and deliberately injured her after learning that she was having an affair with another man, [144] or battered a friend with a piece of pipe after learning that he was pursuing an adulterous affair with Mal's wife, [145] it could be argued that the cost of avoiding such injuries was low relative to the expected loss, or even negative, because some real resources were consumed in effecting the injury. [146] That argument, however, ignores the satisfaction Mal anticipated from inflicting the injury. That Mal himself valued the satisfaction (and therefore the cost of foregoing the act) higher than the expected loss is indicated, though not conclusively, by the fact that he inflicted the injury. Only by ignoring Mal's satisfaction, or refusing to recognize its legitimacy, could a court arrive at the conclusion that the expected loss far exceeded the burden of avoidance. Of course, Mal is not bound by society's appraisal of his satisfaction. Therefore, if only compensatory damages were assessed, he would not be induced to avoid the loss. [147] In order to persuade him to avoid the loss and forego the satisfaction from the act, his expected liability must be raised to a level that exceeds his own valuation of the cost of avoidance, *Cm.* Thus, it is a normative decision -- the refusal to count as a cost of avoidance the foregone satisfaction that one person obtains from injuring another -- that explains the otherwise inexplicable: why punitive damages are necessary to obtain the desired level of deterrence when the expected loss greatly exceeds the cost of avoidance. [148]

[*33]

To summarize, if the concepts of malice and reckless conduct are narrowly and consistently defined, as stipulated at the beginning of this Section, assessing punitive damages in cases where they are present may be viewed as deserved or fair retribution. Moreover, punitive damages may also promote efficiency in at least some cases that fall within those concepts: cases where expected liability is less than expected loss. Cases involving fraud, embezzlement, oppression, and conversion are prime examples. In such cases, the probability of an actor being held liable for causing an injury is less than the probability of an injury actually occurring. There also may be a few situations involving malicious or reckless conduct where compensatory damages would be less than the actual loss. These situations are limited to cases where failure to assess more than compensatory damages would lead either to a general sense of insecurity or to breaches of the peace. Finally, in cases where a malicious actor's subjective cost of avoidance exceeds the cost of avoidance recognized by the law, punitive damages appear to promote an efficient level of deterrence. A positive analysis alone, however, does not lead to that conclusion. One must first stipulate that the satisfaction the actor obtains from injuring another is not to be counted in comparing the cost of avoidance with the expected loss. Given that stipulation, the expected loss may exceed the legitimate cost of avoidance. Punitive damages further the goal of efficiently deterring malicious and reckless conduct by raising expected damage liability above the actor's subjective, but illegitimate, appraisal of the cost of avoidance.

IV. UNCERTAINTY IN THE CRITERIA FOR THE ASSESSMENT OF PUNITIVE DAMAGES

In the preceding Section, punitive damages were analyzed under the **[*34]** assumption that the circumstances in which they are appropriate could be defined with reasonable precision and consistency. In reality, however, the criteria for assessing punitive damages

are imprecise. In this Section, therefore, the highly artificial assumption of precision is discarded, and the sources and effects of uncertainty are considered. First, this Section discusses the variety and vagueness of the terminology adopted by courts to describe circumstances in which punitive damages are appropriate. The broad discretion accorded to the jury or other factfinder is then considered as a second source of uncertainty. The remainder of the Section analyzes the effects of uncertainty from the standpoints of fairness and efficiency.

A. VAGUENESS OF STANDARDS

One source of tort law's enduring vitality and resilience is the use of terminology possessing great elasticity. Ineffably vague terms such as negligence, duty, and the reasonable person, serve to minimize or at least to mask the inevitable tension between the often conflicting objectives the law seeks to further. The punitive damages area, as a number of commentators have observed, [149] exhibits this characteristic to a heightened degree. Malice, for example, not only carries the meaning attributed to it in the preceding Section (a meaning that at least is close to the lay understanding), sometimes distinguished as "express" or "actual" malice, [150] but also carries the Pickwickian meaning of "implied" or "legal" malice. [151] Implied malice may be either "implied in fact" or "implied in law." The former is similar to express or actual malice. Malice "implied in fact" assumes that "the devil himself knoweth not the thought of man," [152] and hence, allows inferences drawn from the **[*35]** actor's conduct as proof of a requisite state of mind. [153] Malice "implied in law," on the other hand, has nothing to do with the actor's mental state. It is synonymous with "legal malice" and is simply a legal characterization of the conduct itself. [154] That the defendant's thoughts may have been as innocent as those of the aboriginal parents before the fall provides no defense to the doctrine of legal malice.

Terms such as "willful," "wanton," "conscious indifference," "reckless disregard," and "recklessness" are overlapping and to a substantial extent redundant. Accordingly, they will be referred to collectively as the recklessness group. They may denote a mental state accompanying a defendant's act, but that mental state is different from that of actual malice. They do not suggest that the actor was motivated by a desire to harm anyone; in the usual case falling within the recklessness group, it is not the actor's objective that is questioned, but the means of achieving it. Moreover, in contrast with most cases involving express malice, the identity of the actual victim often will have been unknown to the defendant in advance of the injury. At times the notion conveyed by the recklessness group is similar to that attributed to reckless conduct in Section III: the actor knew or should have known that the contemplated conduct endangered a class of persons that included the actual victim and the burden of avoiding the harm was slight in comparison to the expected loss. On the other hand, some of the terms in the recklessness group may carry subtly different connotations regarding the actor's state of mind. For example, "conscious indifference" suggests actual knowledge of the risk at the time the act was committed. "Reckless disregard" connotes the existence of facts that should have alerted the actor to the risks the act entailed, whether or not the actor was consciously aware of the risks. It suggests that an act was committed by a person who was oblivious to the risks. "Recklessness" subsumes both reckless disregard and conscious indifference, while "wantonness" seems to connote extreme recklessness. [155] To compound **[*36]** the confusion further, the combination of "willful and wanton" in a single category is not uncommon, and the terms "malice" or "aggravated circumstances" frequently are used to encompass this entire set of connotations. [156]

Conventionally, courts have viewed negligence, or "mere negligence," as an insufficient basis for awarding punitive damages. [157] But in some states, if a defendant's conduct can be characterized as "gross negligence," punitive damages may be assessed. [158] If this "unhappy term of ill-defined content" [159] represents something other than negligence "with the addition of a vituperative epithet," [160] it suggests that the foreseeable risk of harm exceeded the cost of avoidance by a greater margin than that which defines negligence, but by less than that

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which defines recklessness. [161] Alternatively, some courts use gross negligence, at least in the context of punitive damages, as a synonym for terms in the recklessness group. [162] Gross negligence thus embodies two sources **[*37]** of uncertainty: whether it is synonomous with other terms in the recklessness group; and, if not, whether it can be distinguished from ordinary negligence.

Finally, the recklessness group also may be used to denote only the actor's state of mind or awareness, without regard to any disproportion-ality that may exist between the expected harm and the cost of avoidance. Conduct that otherwise might be negligent at worst, may be characterized as reckless, grossly negligent, or as accompanied by malice, based solely upon a finding that the actor was or ought to have been aware of the resulting risk of harm. [163] "Recklessness," defined as an awareness that there is some risk of harm, appears with increasing frequency as a standard for punitive damage liability in cases where the defendant would not necessarily have been found negligent in the absence of such awareness. This is particularly true of products liability cases [164] where liability for compensatory damages is based on a theory of strict liability for defective products. [165] This single-dimension interpretation of the recklessness group may be encompassed within the terms "legal malice" [166] or "aggravated circumstances."

B. JURY DISCRETION

The variety and vagueness of the terms used to characterize the criteria for punitive damage liability would create confusion and uncertainty if used by judges alone. Judges do communicate with one another, however, both within and across jurisdictional boundaries. Hence, over **[*38]** time one might expect that uncertainty and inconsistency would diminish. But judges are not the only nor even the primary decisionmakers who must apply these terms. The initial, and most important, decision is usually made by a jury, an ad hoc body whose knowledge of the applicable legal standards is limited to that which is communicated during a trial. Judges communicate authoritative information regarding applicable legal standards through jury instructions. But jury instructions on the standards for assessing punitive damages are unilluminating. [167] Typically, the jury is told that they may assess punitive damages if the defendant's conduct was "malicious," "willful," "wanton," or "in reckless disregard of the plaintiff's rights." [168] With few exceptions, those terms are not defined by the court. [169] Thus, the jury effectively is given a dual role: it must determine on an ad hoc basis the content of the standard to be applied; and it must decide whether the specific conduct at issue falls within that standard. As a result, juries have broad de facto discretion in deciding whether to assess punitive damages.

Juries are accorded substantial be jure discretion as well. Jury **[*39]** decisions are subject to review and may be set aside by a trial judge or an appellate court. But judicial review is less of a constraint on jury discretion in the punitive damages area than in other areas for two reasons. First, a decision not to assess punitive damages is entirely within the discretion of the jury. [170] Second, although courts still sometimes state that punitive damages are disfavored by the law, appellate courts tend to defer to jury discretion in reviewing punitive damage assessments. [171] To reverse a jury decision assessing punitive damages, the reviewing court must conclude that, viewing the evidence in the light most favorable to the decision, [172] a reasonable person could not have found that the defendant's conduct fell within the applicable standard. [173] Since the standards themselves are vague, this threshold is difficult to overcome.

C. FAIRNESS

When viewed from the standpoint of fairness, the combination of vague terminology and jury discretion has several ramifications. There is little assurance that those upon whom punitive damages are assessed **[*40]** committed a wrongful act, or that those not assessed therein did not, however "wrongful act" may be defined. Those who are punished do not receive

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effective notice that an act is wrongful and that punishment may follow its commission. [174] These effects are illustrated in Figure 5. The horizontal axis represents degrees of culpability increasing from the origin. The vertical axis represents the probability of punitive damages being assessed. Cases falling in the shaded area to the right of X^* in panel A are those in which the defendant deserves to be punished beyond the punishment that is a byproduct of compensatory damage assessments. Panel B contains a distribution of punishments that realistically might be achieved through a retributive scheme, under which few persons who deserve punishment escape it (represented by the unshaded area to the right of X^*) and few who do not deserve punishment are punished (represented by the shaded area to the left of X^*). [175] Uncertainty over the location of the standard, X^*, increases the chance of erroneous verdicts. Panel C depicts symmetrical uncertainty. The extent of error is greater than in panel B; more "guilty" persons are not punished and more "innocent" persons are punished.

Uncertainty over the legal standard of punitive damage liability thus should trouble rational retributionists, even if erroneous results were symmetrically distributed, that is, if false positive decisions were offset by an equal number of false negative decisions. Prevailing **[*42]** principles of public morality assert that it is morally desirable to reduce the number of "innocent" persons punished even at the cost of allowing more "guilty" persons to escape punishment. [176] This principle explains the procedural protections governing criminal prosecutions. [177] The distribution morally preferable to that of panel C would look something like panel D of Figure 5. It is unlikely, however, that the distribution of punitive damage assessments displays the characteristics of panel D. In the emotionally charged context of a civil trial, which lacks the procedural safeguards of a criminal proceeding, where the jury is invited to assess punitive damages with little guidance and less constraint, decisions will be affected by latent biases or redistributional inclinations. [178] If juries dislike or do not understand cost-benefit analyses, [179] distrust corporations, [180] or are offended by some publications, [181] **[*43]** those factors are likely to bias their decisions. [182] Since those factors more often weigh against defendants, [183] a greater number of false positive than false negative outcomes is predictable. [184] Thus, more "innocent" persons will be punished than "guilty" persons not punished, reversing the conventional adage. This situation is depicted in panel E of Figure 5.

D. EFFICIENCY

Although the outcome depicted in panel E of Figure 5 may be offensive from a fairness perspective, it nevertheless may be tolerable if there are offsetting benefits such as efficiency gains. [185] But the uncertain application of nebulous punitive damage standards proves equally disturbing from an efficiency standpoint. The allocative effects will be analyzed in two areas: (1) the resources consumed in punitive damage litigation; and (2) the incentive effects that result. [186]

1. *Effects on Litigation Costs*

The effects on litigation costs are depicted in Figure 6. The vertical **[*44]** axis again represents the probability of punitive damages being assessed. The egregiousness of the acts of defendants is measured on the horizontal axis, increasing from the origin. We assume that punitive damages are appropriate in cases where a defendant deserves to be punished and where punishment will promote an efficient level of deterrence.

If X^* is assumed to be a proper standard for imposing punitive damages, then conduct for which punitive damages are appropriate falls to the right of X^*. When uncertainty exists as to the proper location of X^*, however, the defendants upon whom punitive damages are actually assessed will be those who fall in the shaded area to the right of a line $YX[1]$. [187] As uncertainty increases, *ceteris paribus* so also does the probability of error, with the result that $X[1]$ moves to the left and the slope of line $YX[1]$ becomes more horizontal. It is

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apparent from Figure 6 that resources are consumed by plaintiffs in seeking, defendants in avoiding, and the judicial system in imposing punitive damages upon defendants falling within the area *X**, *X*[1], *a,* with no resulting social benefit. This would be true even under the assumption that deserved punishment ipso facto confers a benefit on society. These resources are offset by the resources saved in not imposing punitive damages on those defendants within the area *a, c, Y.* It seems likely, however, that the area *X**, *X*[1], *a,* exceeds that of *a, c, Y,* because of the probable jury **[*45]** biases discussed above. [188] Any offset, therefore, is likely to be incomplete.

Moreover, punitive damages are not assessed against all defendants from whom they are sought. If defendants to the right of the line *YX*[2] are those from whom punitive damages are sought in litigation, then the resources consumed in the process of assessing punitive damages also include those expended by plaintiffs in seeking, defendants in avoiding, and the courts in deciding not to assess them against defendants falling within the area *Y, X*[1], *X* [2]. [189] Again, as uncertainty increases, the slope of line *YX*[2] will become more horizontal, as *X*[2] moves further to the left. The resources consumed in proceedings involving defendants against whom punitive damages should not be assessed, represented by the area *X**, *X*[2], *b,* is unlikely to be offset by those saved by not assessing punitive damages against wrongdoers who deserve to incur them, represented by area *Y, b, c.* The increase in real costs represented by *X**, *X*[2], *b,* is likely to exceed the avoided costs represented by *Y, b, c,* due to jury bias. Furthermore, this disparity can be expected to increase as the uncertainty of the legal standard increases.

The analysis up to this point indicates that uncertainty over the legal standard for assessing punitive damages increases litigation costs, even assuming that the cost per case is unaffected. These cost increases are compounded by another factor: the effect of uncertainty on the costs of individual cases. Whether a case will be settled, litigated to judgment, or the judgment appealed, is a function of the distance between each party's subjective evaluation of the probability of a favorable outcome. [190] As legal rules become more uncertain, there is more room for divergence in the parties' expectations. Thus, as uncertainty over legal standards increases, so also does the likelihood that cases will not be settled without litigation and appeal, [191] thereby increasing **[*46]** the amount of resources consumed in resolving the dispute. [192]

Uncertainty over the standards for assessing punitive damages thus results in an increase in the resources consumed in litigation on two different levels. First, plaintiffs, defendants, and the judiciary incur costs in determining whether to impose punitive damages on defendants against whom they should not be assessed, and in determining not to impose them on some defendants against whom they should be assessed. Second, uncertainty permits greater divergence in subjective estimations of the probability of a favorable outcome and, therefore, provides an incentive to litigate cases and to appeal judgments. These increases in litigation costs do not provide conclusive proof, however, that allowing punitive damages to be assessed under uncertain standards necessarily results in inefficiency. That conclusion depends upon whether the resulting social benefits are greater than the litigation costs incurred, and whether those costs could be reduced without an equivalent reduction in benefits.

2. *Effects on Incentives*

An evaluation of the social benefits of punitive damages requires an analysis of the second category of allocative effects, namely, incentive effects on persons within society. Net social benefits are the gross benefits to society resulting from changes in behavior less the real costs incurred. Two types of social benefits may accrue from punitive damages: those that result from a reduction in wrongful acts and those that result from a reduction in harmful acts. These categories are not mutually exclusive. In theory at least, society may be better off if people are persuaded not to commit wrongful acts for which they would deserve

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punishment; a less sinful society is arguably a better one. For want of a reliable means of valuing such benefits, however, the following analysis passes over the possibility that moral benefits may outweigh the cost of achieving them. It is limited instead to an examination of whether the benefits stemming from a reduction in harmful acts outweigh the costs of imposing punitive damages.

Figure 6 again is helpful. Assume that acts committed by defendants to the right of *X** are harmful. A reduction in their incidence, therefore, would confer benefits on society by increasing aggregate welfare. **[*47]** Assume also that the threat of punitive damages would deter the commission of harmful acts. As the location of *X** becomes less certain because of indeterminate criteria for the assessment of punitive damages, the threat of punitive damage liability is reduced, fewer harmful acts are deterred, and gains to aggregate welfare become correspondingly lower. [193]

Moreover, uncertainty causes direct as well as indirect social losses. Since punitive damages threaten to reduce the wealth of those upon whom they may be assessed, potential defendants will undertake costly efforts to reduce uncertainty, perhaps by obtaining more legal advice. A rational wealth-maximizer will seek to ascertain, not the location of *X**, but the location of lines *YX*[1] and *YX*[2]. The verbal camouflage that obfuscates judicial decisions will be disregarded and efforts will be directed to predicting the actual outcomes of proceedings. As the contours of de facto liability are discerned by potential defendants, the threat of punitive damage claims will provide incentives for altering behavior. To the extent that these adjustments produce a reduction in conduct to the right of *X**, benefits to society will offset the costs incurred in reducing uncertainty; to the extent that they cause a reduction in conduct to the left of *X**, the effect on aggregate welfare will be adverse. [194]

The adverse effects on aggregate welfare result from the deterrence of socially beneficial acts that fall within the area *X**, *X*[2], *b,* in Figure 6. Moreover, since the exact locations of the lines *YX*[1] and *YX*[2] are uncertain, risk aversion on the part of potentially affected persons [195] may cause the deterrence of acts that fall in the area left of the line *bX*[2]. For example, an auto manufacturer observing decisions such as *Grimshaw v. Ford Motor Co.,* [196] and *Dorsey v. Honda Motor Co.,* [197] may conclude **[*48]** that the production of small, light, fuel-efficient, aesthetically attractive, inexpensive cars increases its exposure to punitive damage liability. Passengers in such cars are twice as likely to be killed in a crash as they are in a larger car. [198] It is, therefore, probable that more lawsuits per car will result from smaller cars than from larger ones. It is also probable that evidence will be available to show that, using present technology, any car, but especially small cars, could be made safer for occupants. [199] Although the production of small cars confers benefits on society when measured by consumer preference, [200] cases such as *Grimshaw* and *Dorsey* increase the probability that a court will find that small car production falls to the right of the line *YX*[1]. These cases also increase the probability that occupants injured in a crash will place small car production to the right of the line *YX*[2]. Since a manufacturer's expected punitive damage liability is a function of the number of personal injury lawsuits and of the technological feasibility of making safer cars, reducing small car production will reduce the probability of punitive damage assessments.

An automobile manufacturer, therefore, must include the expected value of punitive damage claims, including the expected litigation costs of defending against them, as a private cost of producing small, light, fuel-efficient, inexpensive cars. [201] But the private cost of punitive damages cause manufacturers to internalize the social costs of producing such cars only if producing them is conduct that falls to the right of *X**; that is, only if a manufacturer in comparing the costs and benefits of producing such cars in the absence of expected punitive damage liability, **[*49]** would, for one of the reasons discussed in Section III, undervalue expected injuries to occupants. The existence of such undervaluation by automobile manufacturers is not obvious. This is not a situation such as fraud -- where the probability of liability is significantly less than the probability of loss. The fact of injury in an automobile

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crash is patent and the identity of the manufacturer is known. [202] The primary losses -- personal injuries -- are tangible and not uniquely difficult to value; derivative losses in automobile cases are no more difficult to recover than in other personal injury cases; and breach of the peace is hardly a serious threat. Finally, it is doubtful that automobile manufacturers derive illicit satisfaction from contemplating the casualties caused by their design decisions.

Although expected punitive damage liability may not reflect the social cost of producing small cars, manufacturers must include such potential liability as a production cost, attempt to minimize it, and recover the residue from purchasers. Minimization may entail producing cars that are larger, heavier, less fuel-efficient, and less aesthetically attractive, in order to make them safer. Thus, more resources will be consumed in automobile manufacturing, and the price of cars will be increased to cover these additional costs and the residual cost of expected punitive damage liability. [203] Purchasers will get safer cars, but not by choice. Many automobile purchasers have regularly revealed their preference for small, light, fuel-efficient, aesthetically pleasing, lower-priced, less safe cars. [204] Punitive damage liability will result in more resources being consumed to produce and operate fewer small cars. Prices will be higher, consumers will be limited to purchasing cars that are safer than they desire, net revenues to manufacturers will be lower, and capital will be diverted to other activities. As a consequence, aggregate welfare will be reduced.

Manufacturers of other products that carry some risk of physical harm, [205] as well as writers and publishers of realistic fiction, [206] and **[*50]** others engaged in activities where punitive damages are assessed under the prevailing nebulous criteria, will face similar predicaments. [207] Uncertain standards increase the probability that, sometime in the future, a court will assess punitive damages against such persons. Accordingly, they must take into account as a cost of their activities their subjective estimates of that probability. As in the automobile example, prices will increase and resources will be diverted to the production of other products. The result will not necessarily be an improvement in resource allocation.

Basing punitive damage liability on the defendant's knowledge of the probability of loss and on the technological availability of means to reduce expected loss -- as a number of cases do [208] -- has a perverse effect on incentives for yet another reason: it reduces the marginal product of resources committed to ascertaining the relative harm that would result from alternative product designs and to exploring means of reducing expected loss. Punitive damages thus deter the very activities that efficient liability rules promote.

Uncertain standards for assessing punitive damages, therefore, cause more resources to be consumed by the litigation process and by persons who must adjust to resulting incentives. Some of these activities fall to the left of X^* in Figure 6; by definition they should not trigger punitive damage assessments. One might argue, however, that no misallocation results because changes in the law to reduce uncertainty would result in even greater social loss. That would occur if more certain standards would entail greater litigation costs or would cause losses to society through reduced deterrence of harmful acts, and if these increased costs taken together would exceed the costs of the present system. There is good reason to believe, however, that that is not the case.

[*51] If the applicable legal standard for assessing punitive damages were more certain, subjective predictions of the outcome of litigation would be closer, settlement would be more likely, [209] and litigation costs would decline. The question, then, is whether greater certainty can be achieved without an unacceptable reduction in deterrence. Several proposals for reducing uncertainty have been made in the legal literature. Some have suggested, for example, that another term, such as "outrageous" [210] or "flagrant" [211] conduct should be substituted for the plethora of vague and overlapping terms currently used. Although I have previously subscribed to this approach, [212] I am now persuaded that the proposed terms possess as much potential elasticity as those presently in use. [213] Accordingly, their adoption

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TEXT:

[*1] Economists have debated the relative merits of private and public law enforcement. [1] They have used economic models to investigate whether, under strong assumptions regarding the certainty and consistency of legal rules, [2] the substitution of private for public law enforcement can produce efficient levels of compliance. Reparative (or compensatory) damages assessed against wrongdoers in private civil suits complement public enforcement measures. [3] In some instances, however, courts have concluded that even the combination of criminal prosecution and civil damage liability produces a suboptimal level of enforcement [4] and have assessed punitive (or exemplary) damages in **[*2]** addition to compensatory damages.

The concept of punitive damages lies in the borderland that both bridges and separates criminal law and torts. Even the few torts books that devote significant attention to the subject of damages in general, [5] relegate punitive damages to a footnote. Perhaps in the past the issue merited scant attention. Punitive damages were rarely assessed and likely to be small in amount. But today punitive damage liability can no longer be dismissed as a curious artifact of the common origins of tort and criminal law. Punitive damages are being sought and awarded in a growing number of cases, [6] often for substantial amounts. [7] Only recently, however, have legal commentators addressed the causes and **[*3]** implications of the substantial increase in the number and magnitude of punitive damage awards. [8] This Article furthers that inquiry by addressing two questions: whether the law of punitive damages in its current form accords with intuitive notions of fairness, and whether it promotes allocative efficiency. [9]

Section I analyzes the legal theories that have been offered to support imposing punitive damage liability. In Section II, these theories are tested against the cases out of which the doctrine of punitive damages arose. Section III analyzes the criteria currently used by courts in assessing punitive damages in light of the legal theories examined in Section I. The analysis in Section III assumes that the criteria used by courts are sufficiently precise to identify discrete classes of conduct. That assumption is relaxed in Section IV, which considers how uncertainty affects the meaning and scope of the criteria governing punitive damage liability. Section V examines the factors that are considered relevant in determining the size of punitive damage assessments. Finally, the effects of vicarious liability and insurance are assessed in Sections VI and VII, respectively.

I. LEGAL THEORIES

At least seven purposes for imposing punitive damages can be gleaned from judicial opinions and the writings of commentators: (1) punishing the defendant; (2) deterring the defendant from repeating the offense; (3) deterring others from committing an offense; (4) preserving the peace; (5) inducing private law enforcement; (6) compensating victims for otherwise uncompensable losses; and (7) paying the plaintiff's attorneys' fees. [10] Each of these purposes will be analyzed in turn.

[*4] A. PUNISHMENT

The use of the term "punishment" to denote imposing a detriment upon someone implies a retributive aim and, therefore, a notion of desert. [11] When a detriment is deserved, the imposition of the detriment is itself the "good" being sought, and it is not necessary that any other good consequences result. Desert is necessary and sufficient, and provides a complete answer to the question, "Why should *X* be punished?" [12] Since the answer to that question depends upon a moral theory, it cannot be tested empirically, although there may be relevant intermediate questions that can be. [13] To explicate the concept of desert and its implications one must construct a comprehensive moral theory, a task not to be undertaken here. [14] For the purposes of this Article, it is sufficient if we can agree on the minimum content of the principle of desert currently prevailing in society. We need only agree that

would not produce, *ipso facto,* a significant increase in certainty. Moreover, the effectiveness of procedural changes, such as adopting a higher evidentiary standard, [214] depends upon whether courts would interpret them as a mandate to dispose more freely of marginal punitive damage claims through summary judgment, dismissal, or directed verdicts. [215] If the criteria for assessing punitive damages remain as vacuous as they are **[*52]** now, such procedural changes are unlikely to improve the situation significantly.

The meaningful specification of the situations in which punitive damage assessments will promote efficiency is possible. If coupled with a judicial reining-in of the jury's discretion to decide whether to assess punitive damages, the clearer specification of criteria could lead to greater certainty in result. As discussed in Section III, [216] there are two types of cases in which punitive damages may be necessary to achieve optimal deterrence: (1) those in which the harm is purposefully caused; [217] and (2) those in which compensatory damage recoveries are significantly less than the losses caused by the defendant's conduct. The first category of cases would require proof of what the criminal law refers to as "specific intent" and would encompass most of the traditional intentional torts such as assault, battery, and deceit. The second category would encompass wrongful acts such as fraud, where the elements of the offense are difficult to prove, or where the identity and apprehension of the offender is problematic. Injurious acts committed by government agents might be added to the second category because criminal law sanctions may be invoked against law-breaking officials less often than against private individuals. A number of cases would fall within both categories. The cases that would not fall within either of the two suggested categories include many of those now included within the "recklessness" group. As shown in Section III, [218] however, those are cases in which punitive damages are not necessary to achieve efficient levels of deterrence. If the expected loss greatly exceeds the cost of avoidance, compensatory damages alone will provide sufficient deterrence. If the expected loss slightly exceeds or is less than the cost of avoidance, imposing punitive damages would produce excessive deterrence. [219]

In summary, the law of punitive damages is characterized by a **[*53]** high degree of uncertainty that stems from the use of a multiplicity of vague, overlapping terms and the extraordinary deference accorded to juries who receive little meaningful guidance. As a result, the biases and inclinations toward wealth redistribution exhibited by triers of fact are permitted to influence decisions on punitive damage issues. Accordingly, there is little reason to believe that only deserving defendants are punished, or that fair notice of punishable conduct is provided.

Rather than furthering efficient deterrence, current punitive damage law produces additional litigation costs and inefficient incentives. But this situation need not prevail. Restricting punitive damage assessments to cases in which an injury was purposefully caused, or in which the aggregate expected loss from the conduct was greater than the expected compensatory damage recovery, would limit punitive damages to situations where they are supported by considerations of fairness and efficiency.

V. AMOUNTS OF PUNITIVE DAMAGE ASSESSMENTS

In the preceding Section, the effects of uncertain criteria for assessing punitive damages were scrutinized. This Section considers the determination of the amounts of punitive damage assessments, once it has been decided to assess some amount. The determination of the magnitude of awards is another aspect of the law governing punitive damages that is plagued by uncertain standards. [220]

A. UNCERTAINTY

Jury instructions on the permissible magnitude of punitive damage assessments generally provide even less guidance than do those that purport to explain the bases of punitive

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damage liability. At the time of the *Grimshaw* decision, California's pattern instruction was among the more general: it stated simply that "[t]he law provides no fixed standard as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice." [221] Pattern instructions in some states at least direct the **[*54]** jury's attention to the purposes of punitive damages, by requiring "an amount which will serve to punish the defendant and to deter others from the commission of like offenses." [222] But none of the pattern instructions reviewed for this Article remind the jury that compensatory damages themselves have retributive and deterrent effects. Some specifically state that actual or compensatory damages are a prerequisite to punitive damages. [223] Others expressly refer to the financial condition of the defendant as a circumstance that the jury may consider. [224] But with few exceptions, [225] no further guidance is given. [226] Thus, juries not only have great discretion in determining the standard of liability for **[*55]** punitive damages, but also in determining the amount to be assessed. The predictable result of this discretion has been a wide variance in the magnitude of punitive damage awards. [227] Indeed, some awards have reached surprisingly high levels. [228]

There is one difference, however, between the effective discretion given to juries in deciding punitive damage liability and the discretion given to juries in determining punitive damage amounts: trial judges and appellate courts have been more willing to exercise *ex post* constraints, using remittitur to reduce assessments that are "excessive." [229] Without agreed standards to guide judges as to the appropriate magnitude of assessments, however, judicial decisions reducing large awards make little contribution to consistency and certainty; they merely reduce the probability that very large awards will be upheld. Some courts have stated that assessments will be reduced if they appear to have been influenced by the jury's "passion and prejudice." [230] But that criterion is tautological at best because it relies on the size of the assessment to provide primary evidence of the influence of jury bias. [231] Moreover, courts have reduced assessments that were arrived at through unquestionably rational means, [232] and upheld awards that had **[*56]** no apparent basis. [233]

From a fairness perspective, uncertain criteria for determining the magnitude of punitive damage assessments exacerbates the problems caused by vague liability standards. Juries are free to base their decisions on preexisting biases or redistributional inclinations, [234] subject only to the uncertain constraint of judicial review. Such ad hoc decisionmaking invariably results in the disparate treatment of similarly situated defendants, thereby frustrating the goals of equal treatment, proportionality, and fair notice. [235] Consequently, some morally "innocent" defendants are assessed large amounts, while some "guilty" defendants are assessed little. [236]

The effects on efficiency are similar to those associated with uncertain liability rules. Litigation costs are higher because the differences in the parties' subjective predictions of the outcome of a case are increased, making settlement less feasible. In addition, litigation costs increase with the amount at stake. [237] As the stakes in a lawsuit rise, the **[*57]** marginal product of resources invested in litigation also increases. Furthermore, without certain standards for determining the magnitude of an assessment, the defendant's wealth provides the only effective upper limit on punitive damage awards, [238] and there is some probability that any amount up to that limit will be assessed. That probability is unknowable, however, so expenditures made by each party will be a function of their respective subjective estimations. Litigation resources will be attracted to cases involving wealthy defendants [239] and, in the short run, away from cases involving less wealthy defendants who, on the basis of desert or expected harm, should be assessed larger amounts. [240]

Uncertainty as to the amount of punitive damages that may be assessed also has incentive effects on the behavior of potential defendants. Some will overestimate not only the likelihood but also the amount of potential punitive damage assessments, and incur excessive avoidance costs; others will underestimate potential liability and under-invest in the avoidance of conduct that merits punitive damage liability. Because of their greater

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exposure, wealthier persons or firms are more likely to overinvest. Moreover, if knowledge of some likelihood of harm is equated with recklessness [241] by triers of fact, greater knowledge may be viewed as meriting more severe punishment, thereby increasing disincentives to ascertain the relative harm that may result from various contemplated activities.

[*58] B. REASONABLE RELATIONSHIP TO COMPENSATORY AWARD

Some jurisdictions attempt to reduce uncertainty about the amount of punitive damages that may be assessed by requiring that assessments bear a "reasonable relationship" to the compensatory damages awarded. [242] This principle is not expressed in any of the pattern jury instructions surveyed for this Article, [243] but is used by trial and appellate judges in their review of jury verdicts and is sometimes offered as an explanation for reducing jury assessments. [244] The principle has historical antecedents [245] and contemporary statutory parallels. [246] It has been commended by some scholars troubled by the effects of standardless decisionmaking in this area. [247]

The "reasonable relationship" principle does appear to offer some guidance to decisionmakers and to enhance predictability. [248] But from the standpoint of fairness, the adverse effects of this approach outweigh its advantages. The actual harm that occurred is at best a crude measure of the moral egregiousness of a defendant's conduct and, hence, of the punishment deserved. If degrees of egregiousness were ranked along a scale ranging from accidental "acts of God" through negligence to deliberately injurious acts, one would not expect to find any correlation between egregiousness and the gravity of the injury sustained by an individual plaintiff. Death, disabling physical injury, or substantial economic loss may result from acts that fall at any point on the egregiousness scale. The same is true for minor physical or psychic injury and petty economic loss. Nevertheless, the criminal law recognizes the **[*59]** principle of "aggravated harm," [249] under which the punishment prescribed by statutes and imposed by courts is often a function of the resulting harm as well as the nature of the act causing it. For example, attempts typically are punished less severely than successfully completed acts. [250] But scholars have been unable to reconcile the disparate treatment of attempts and completed acts with principles of retribution and moral desert. [251]

Making the size of punitive damage assessments a function of the compensatory damages also has adverse effects on the objective of promoting allocative efficiency, because it substitutes the harm that occurred in one case for expected harm as the independent variable. If cases in which large compensatory awards are expected are also those in which large punitive assessments are also expected, the costs of litigating "big cases" will increase. Additional resources will be attracted to cases where the injury to a particular plaintiff is substantial and the magnitude of the detriment to the defendant from large compensatory damages is correspondingly great, even when the aggregate social loss is small because the probability of the harm occurring is small. Those resources will be attracted away from cases where the harm to a particular plaintiff is small (and the corresponding detriment and deterrence produced by compensatory damages are small) although the aggregate social loss is great because the probability of the harm is high. Instead of inducing plaintiffs to engage in private law enforcement by bringing suit when their expected recovery of compensatory damages alone is too small to cover litigation expenses, [252] the reasonable relationship principle induces plaintiffs to increase the stakes in cases that would have been litigated anyway. [253]

This principle also has adverse effects on the goal of efficient deterrence. Persons whose acts carry a risk of harm, the gravity of which is substantial but the probability of which is low, are induced to overinvest in harm avoidance. On the other hand, persons whose activities **[*60]** carry a risk of harm, the gravity of which is low but the probability of which is high, receive insufficient incentive to avoid it. To illustrate, assume Mal's activities [254] created an expected loss of $ 1.00, where $P[a] = 0.000001$ and $L[a] = \$ 1{,}000{,}000$. Assume Deceiver's activities [255] created an expected loss of $ 10, where $P[b] = 1.0$ and $L[b] = \$ 10$. Assume

further that the relevant jurisdiction has in force a reasonable relationship rule under which punitive damages are always twice the actual damages. Mal would be induced to spend up to $ 3 per unit of activity in loss avoidance, although by doing so he would avoid only $ 1 of harm. Mal would do so because, for each 1,000,000 units of activity, he would expect to be assessed $ 1,000,000 in actual and $ 2,000,000 in punitive damages. Deceiver's incentives depend upon the suits successfully brought per unit of activity. Unlike Mal, Deceiver will not expect a law suit to be brought for each injury, since the costs to each victim of prosecuting a suit would exceed their expected recovery. If Deceiver expected less than one suit per three units of activity, she would not be deterred from continuing to engage in harmful conduct.

The foregoing discussion assumes that the reasonable relationship principle provides a standard for determining the amount of punitive damages. In fact, it neither provides meaningful guidance to decisionmakers nor increases certainty. This is so because the principle does not imply a "mathematical ratio." [256] As a result, there are enormous variations in the ratio of punitive to compensatory damages. [257] The "principle" thus is vacuous. It provides no rational basis for deciding whether the size of a punitive damage assessment is appropriate. Rather, it serves to disguise the bases on which decisions by reviewing courts are reached. [258]

[*61] C. DEFENDANT'S WEALTH AS A FACTOR

The defendant's wealth is a factor that juries and reviewing courts consider in deciding on an appropriate punitive damage assessment. The wealthier the defendant, the larger the permissable assessment. [259] This approach appears to make punishment depend on status: the wealthy are punished more severely than the poor. So viewed, it cannot be reconciled with principles of fairness, especially equal treatment and proportionality. However, this approach is premised on the declining marginal utility of money: the disutility caused by the loss of $ 1 is assumed to be less for a wealthy defendant than for a poor one. [260] If the validity of the assumption is accepted, [261] then taking the defendant's wealth into account is theoretically consistent with principles of fairness in that it seeks to equilibrate -- however crudely -- the amount of disutility imposed.

Whether or not using wealth as a factor in determining the size of punitive damage assessment is theoretically justifiable, its practical effects are objectionable. It invites otherwise unguided juries to indulge any redistributive inclinations they may have. [262] It also produces inefficient **[*62]** incentives. Plaintiffs are given an incentive to claim punitive damages in cases where the return is greater, that is, cases against wealthier defendants. [263] Because of the increased expectation of larger assessments against wealthy defendants, the resources consumed by both parties in such cases increase. [264] Some are consumed directly in proving defendants' wealth; most courts allow the introduction of such evidence. [265] If the defendant is relatively wealthy, the plaintiff has an incentive to seek and introduce evidence of that fact; if the defendant is relatively poor, the plaintiff has no such incentive. Although poorer defendants may introduce evidence of their poverty, they may be tactically constrained from doing so, as evidence of wealth is relevant only to the magnitude of a punitive damage assessment. Defendant's introduction of evidence of its wealth may be seen as a concession that some assessment is appropriate.

Finally, relating the magnitude of punitive damage awards to defendants' wealth sends erroneous signals to other actors. Relatively wealthy potential defendants will be induced by their greater exposure to overinvest in avoidance; poorer potential defendants will be induced to underinvest.

To summarize, the lack of functional criteria for determining the appropriate size of punitive damage assessments compounds the effects of uncertain standards of liability. Juries are given no effective guidance and are constrained only by the possibility that a reviewing court

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will exercise its discretion to reduce an excessive verdict. As a result, there is wide variance in the magnitude of assessments, with no apparent correlation between the amounts assessed and defendants' desert. Uncertainty also increases litigation costs and provides undesirable incentives.

The admonition that punitive damages must bear a reasonable relationship to actual damages is not supported by considerations of either desert or efficiency and may have perverse effects on the latter. **[*63]** Moreover, the principle itself is vacuous and serves only to obfuscate the actual bases for judicial decisions.

Theoretically, relating the size of assessments to a defendant's wealth may be reconcilable with fairness. But in operation, it invites juries to engage in wealth redistribution and exacerbates the perverse incentives already created by uncertain standards of punitive damage liability and the lack of functional criteria for the magnitude of assessments.

VI. VICARIOUS LIABILITY

Punitive damage liability is not limited to those who commit wrongful or harmful acts. Under the doctrine of vicarious liability, principals and employers may be liable for punitive damages as a result of acts committed by their agents or employees. The courts are almost evenly divided over the proper basis for vicarious punitive damage liability. Half follow the respondeat superior rule and hold that an employer may be liable for punitive damages for wrongful acts committed by employees in the course of their employment. [266] The other half follow the "complicity rule" and limit vicarious punitive damage liability to those situations where wrongful acts were committed or specifically authorized or ratified by a managerial agent, or were committed by an unfit employee who was recklessly employed or retained. [267] Legal scholars also disagree as to the appropriate rule. [268]

The difference between the two approaches is one of degree only; both rules authorize vicarious punitive damage liability on the basis of **[*64]** conduct by persons who are not the employer *in persona,* but who are employees. [269] Under the complicity rule, they must be managerial level employees, but this category may encompass persons as far down the managerial ladder as the shop foreman. Hence, for the purpose of analyzing the fairness and efficiency of vicarious punitive damage liability in this Section, no distinction is made between the two approaches.

Vicarious liability for compensatory damages has existed for centuries, [270] but it remains a rule in search of a rationale. [271] A variety of justifications have been offered, but each has proven inadequate upon close scrutiny. [272] The most influential factor in the expansion of vicarious liability appears to have been the desire to insure that victims of tortious injury can reach a defendant with sufficient wealth to provide adequate compensation. [273] Courts have assumed that employers generally have a "deeper pocket" and that, with more potential defendants available to an injured plaintiff, the probability increases that one **[*65]** among them will have the wealth to provide compensation. [274] An additional factor has been the desire to locate someone who can spread the loss, through insurance or otherwise. [275] Other justifications include the internalization of the costs of injuries associated with the activities of an enterprise [276] and concern that a victim might be unable to identify the specific person or persons who committed the act that caused the injury and therefore left without a remedy. [277]

Each of these justifications is subject to criticism in the context of compensatory damages. Whatever their merit, however, they offer little or no support for vicarious punitive damage liability. Those that are grounded in concerns about the possibility of uncompensated victims obviously do not apply, as punitive damages are not intended to perform direct compensatory functions. [278] The loss-spreading rationale contradicts the underlying theory of punitive damages. By definition, it would spread punishment among large numbers of

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nonwrongdoers who do not deserve punishment [279] and weaken the deterrent effect of damage assessments. The cost internalization argument, to the extent that it operates on valid assumptions, is applicable only in those situations where punitive damages are assessed because the expected liability for compensatory damages is less than the expected loss. [280] Even in those situations, however, cost internalization cannot entirely explain vicarious punitive damage liability. An employer or principal is vicariously liable only for the amount of compensatory damages for which the employee or agent is primarily liable. But as noted in the preceding Section, [281] the wealth of the defendant is a major factor in determining the size of punitive damage assessments. It is the wealth of the vicariously liable employer or principal, not the wealth of the wrongdoing employee or agent, that is determinative. [282] Vicarious liability thus increases **[*66]** the upper boundary of potential assessments.

The arguments used to justify vicarious compensatory damages are, therefore, inapplicable or lamentably weak when applied to vicarious punitive damage liability. But the question remains whether the justifications for primary punitive damage liability are applicable to vicarious liability. In analyzing this question, it is useful to assume once again that punitive damages are assessed only in cases where an employee acted either maliciously or recklessly, and that "malice" and "reckless conduct" are narrowly defined, as they were in Section III. [283] If the arguments for vicarious punitive damages are not compelling under these assumptions, their weaknesses will be exacerbated by the uncertainty that characterizes the current law.

A. FAIRNESS

Vicarious liability is strict liability; no wrongdoing or shortcoming on the part of the vicarious defendant need be shown. Indeed, the employer may have taken every reasonable step to avoid the harm and nevertheless be held liable for compensatory and punitive damages. Although vicarious defendants are often artificial persons such as municipalities or business corporations, that serves only to disguise the fact that the punishment ultimately falls upon natural persons who have not committed wrongful or harmful acts. [284] In the case of municipalities, the loss falls upon taxpayers, employees, and consumers of the goods and services the city dispenses. [285] In the case of business corporations, punishment falls upon stockholders, creditors, employees, suppliers, sellers of complementary products, consumers of goods and services, and taxpayers. [286] None of these persons meet the first requirement of deserved punishment: the commission of a wrongful act. It is not surprising, therefore, that proponents of vicarious punitive damage liability have difficulty arguing that employers deserve to be punished for the wrongful acts of their employees. [287] Rarely does one see a positive **[*67]** assertion to that effect. [288]

Moreover, vicarious punitive damage liability imposes retribution *ex ante* on innocent employers of innocent employees, employers whose employees have committed no wrongful or harmful acts. Employers cannot perfectly forecast and prevent acts by employees that may result in punitive damages. Anticipating that such acts may occur, they must incur costs to reduce the likelihood and to insure against the possibility of having to pay punitive assessments. [289] While these costs lack the stigma of punitive damage assessments, they are nonetheless detriments imposed upon persons who have not been found to be deserving of punishment.

B. EFFICIENCY

The major justification offered for vicarious punitive damage liability is its deterrent effect. [290] In appraising this argument, it is necessary to recall the situations in which efficient levels of deterrence will be promoted by imposing punitive damages: where the injury is purposefully done or where the expected compensatory damage liability is less than **[*68]** the expected loss caused by the activity. [291]

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The first situation, injury purposefully inflicted, is included as a separate category to encompass situations where the actor obtains "illicit" satisfaction from injuring another. But presumably employers derive no vicarious satisfaction from the wrongful acts of their employees. Indeed, employers may suffer psychic and business losses as a result of such acts. There is no reason to assume, therefore, that compensatory damages alone -- for which employers are *ex hypothese* vicariously liable -- provide insufficient incentives for employers to undertake efficient safeguards in selecting, monitoring, and disciplining employees.

Nor does vicarious punitive damage liability seem appropriate in the second situation -- where expected damages are less than expected loss. The cases that typically fall within this category involve offenses, such as fraud and intentional torts, that cause employers to suffer losses beyond potential legal damages. For example, it is not ordinarily in the self-interest of a profit-maximizing firm to employ persons who abuse customers. [292] And in cases where an employee acts "recklessly," vicarious liability for compensatory damages ordinarily will provide an adequate incentive for employers to undertake efficient levels of prevention.

Even assuming, however, that punitive damage liability promotes efficient levels of harm avoidance, the question arises whether it is more efficient to assess them against employers rather than employees. Vicarious liability is usually in lieu of, rather than in addition to, assessments against employees. [293] As a matter of law, a vicariously liable employer ordinarily has the right of indemnity from an employeewrongdoer. But indemnity is almost never sought nor obtained, even **[*69]** for compensatory damage assessments. [294] Where the magnitude of a punitive damage assessment is based upon the wealth of an employer, it is unrealistic to expect that reimbursement will occur. [295] As a result, vicarious punitive damages do not directly deter potential wrongdoers. Other disciplinary measures are available to the vicariously liable employer, but there are constraints on the employer's ability to invoke them. Ordinarily, an employer's vicarious punitive damage liability is determined through litigation, the outcome of which may not be known until years after an employee's wrongful act. [296] By that time, the wrongdoing employee may no longer be employed. Moreover, even if the likelihood of vicarious punitive damage liability could be foreseen earlier, employers may wish to avoid alienating employees whose evidence might directly affect the probability and amount of any assessment.

The principal deterrence argument for vicarious punitive damage liability, however, is not that it will cause employers to discipline employees after they commit wrongful acts, but that it will encourage employers to improve their selection and monitoring procedures, and thereby reduce the incidence of harmful acts. [297] Employers can also reduce the likelihood of vicarious liability by substituting capital for labor, [298] employing independent contractors, [299] insuring, [300] or ceasing **[*70]** business. Employers will choose from among these alternatives based on estimates of their cost effectiveness. Whether the added cost will be offset by a reduction in affected injury costs is indeterminate. It seems intuitively unlikely, however, that the aggregate cost increase for all employers will be offset. That conclusion is reinforced by the use of wealth as a factor in determining the size of punitive damage awards, with the result that wealthier employers are induced to invest in greater avoidance than less wealthy employers whose activities may be more harmful.

It seems more likely that efficient levels of deterrence would be achieved by imposing punitive damages on employees alone. The threat of punitive damages would then operate directly on those who know of their own potential for committing harmful acts and who control their own actions. Almost invariably, employers are in a worse position to anticipate which employee will commit an act for which punitive damages may be assessed and to prevent its occurrence.

The primary argument against limiting punitive damage liability to employees is that it may be costly for the plaintiff to identify the particular individual who committed a harmful act,

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especially in large, bureaucratic entities where many individuals may have participated in a decision that resulted in harm. [301] But vicarious punitive damage liability has not been limited to such situations. [302] Moreover, the costs of identifying responsible individuals may well be exaggerated. [303] If courts limited vicarious liability for punitive damages to situations where wrongdoers were difficult to identify, then employers, who presumably have a cost advantage in identifying the responsible individuals, would have an incentive to obtain and disclose that information.

Vicarious punitive damage liability also increases litigation costs **[*71]** by injecting an additional issue into the dispute: whether the act was committed by an employee acting in the course of employment or, alternatively, whether the elements of the "complicity rule" were present. Ordinarily, increased litigation costs would decrease the plaintiff's incentive to seek vicarious punitive damages. But vicarious liability also increases the potential magnitude of punitive damage assessments by providing wealthier defendants, thereby providing sufficient incentive for plaintiffs and employers to incur higher litigation costs. [304] Vicarious punitive damage liability thus attracts resources, not to cases in which an egregious act was committed, but to those where an injury was caused by an employee or agent, under circumstances making vicarious liability potentially available.

In summary, vicarious punitive damage liability cannot be justified as deserved punishment. Indeed, it is usually conceded to be unfair. Deterrence alone is thus relied upon to justify it. The foregoing analysis indicates, however, that efficient levels of deterrence are unlikely to be promoted by vicarious punitive damage liability, even assuming that the criteria for assessing punitive damages can be made certain and predictable. When that assumption is dropped, it becomes apparent that the combination of vicarious liability with the prevailing uncertain criteria for determining liability and magnitude serves to diminish rather than to increase aggregate welfare.

VII. INSURABILITY

The courts are split over whether punitive damages are insurable, although a majority have concluded that they are. [305] Courts that deny insurability do so on the public policy ground that it defeats the purposes of punitive damages. [306] Almost all courts, however, permit insurance for vicarious punitive damage liability. [307]

[*72] Liability insurance serves two functions. First, it allows the insured to substitute a present, certain payment for the risk of large future losses that are contingent on claims by other persons. While there are numerous means of achieving that result, [308] the specific issue considered here is the availability of formal insurance through the purchase of a policy from an underwriter, which spreads the expected cost of future losses through the payment of premiums by a large number of persons. [309] For insurance to operate efficiently, there must be (1) a large number of more or less homogeneous participants; (2) losses that have a definite time and place of occurrence; (3) losses that are accidental in that they are beyond the control of the insured and their occurrence is not highly probable; and (4) a minimal hazard of catastrophe. [310] The cost of insurance against any given risk depends upon the expected number and magnitude of losses sustained by policyholders. Insurance influences the conduct of policyholders by reducing the cost to them of the risk of future loss, thereby reducing incentives to take steps to avoid such loss. [311]

The second function of liability insurance, and one that has become an increasingly important public policy concern, is to assure that funds will be available to provide compensation when a person is injured under circumstances that make another party liable. [312] Thus, in many states, motorists are required by law to carry liability insurance as a prerequisite to operating an automobile. [313] Plaintiffs are sometimes allowed to bring suits directly against defendants' insurance companies. [314] And decisions on liability rules often are influenced by the presence of insurance. [315]

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[*73] As should be apparent from their descriptions, the two functions of liability insurance are inharmonious with punitive damages: the first is inconsistent with the objectives of punitive assessments; the second is irrelevant.

Figure 7 depicts a hypothetical distribution of payments made by an insurer during one time period. The horizontal axis represents the number of claims paid; the vertical axis maps the dollar value of each claim. Point *f* on the vertical axis indicates the face amount of a hypothetical policy, that is, the maximum amount the insurer has agreed to pay for each occurrence. The curve labelled *CC* represents amounts actually paid out. [316] It extends above point *f* on the vertical axis because, in addition to agreeing to pay the damages for which the insured may become liable, liability insurance policies also commit the insurer to defend any claim against the insured. Litigation defense costs, therefore, must be added to the face amount of any policy. The insurer must set premiums at a level that allows it to recover the losses represented by *CC,* together with its cost of capital and operating expenses. [317]

[*74] Insurability of punitive damages increases the expected losses. This increase is represented by curve *PP* in Figure 7, which is shifted to the right to reflect increased underwriting costs, both from increased payments and the increased expenses associated with litigating punitive damage claims. The shift is larger than it might otherwise be, because the nebulous criteria for the assessment of punitive damages and the enormous variation in the amounts awarded make the underwriting process highly uncertain. Where claim distributions are characterized by large variances and instability over time, underwriting uncertainty is increased, the possibility of underwriting error is magnified, and premiums must be set at a sufficiently high level to offset potential error. [318] A large single claim or some other dramatic event can trigger a general rate increase within a line of risks. [319] Such increases result in higher premiums for all policyholders. Thus, from the fairness standpoint, insurability is inconsistent with the goals of punitive damage liability because it reduces the punishment of the wrongdoer and imposes it on all other policyholders through higher premiums.

Insurability of punitive damages also conflicts with the goal of efficient deterrence. Insurance reduces incentives to engage in loss avoidance [320] and, in the case of wrongs falling within the categories of malice and reckless conduct as defined in Section III, [321] increases moral hazard. [322] These effects, together with the uncertain criteria for assessing punitive damages and the absence of consistent standards for determining an appropriate punitive amount, increase insurance costs for all purchasers. Such costs increase the private costs of engaging in socially beneficial activities that carry some risk of harm. Moreover, to the extent that there is justification for considering a defendant's wealth in determining the magnitude of punitive damage assessments, [323] the availability of insurance undermines that justification. The degree of **[*75]** disutility incurred by individuals possessing the same wealth who are assessed identical amounts of punitive damages will vary with the extent to which the assessment is covered by insurance.

Recognizing that insurance is inconsistent with the goals of punitive damage liability, some courts have nonetheless upheld insurability because of doubts about the effectiveness of punitive damages as a deterrent under present law. [324] But, as the Court of Appeals of New York has observed, that argument "essentially address[es] not whether there should be coverage but whether there should be punitive damages at all." [325] Other courts have manifested concern about the crushing effects of punitive damage assessments "upon business and professional persons, firms and corporations, as well as upon ordinary persons when engaged in a wide variety of activities." [326] Similarly, in vicarious liability cases, courts have reasoned that "innocently condemned" persons should not be prevented from shifting liability through insurance. [327] Again these arguments attack punitive damages, not insurance, because they imply that punitive damages are unfairly assessed in excessive amounts against underserving defendants.

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Some courts have upheld the insurability of punitive damages on the theory that the person against whom they are assessed will experience higher rates in the future and thereby be punished and deterred. [328] That assumption, however, is not an affirmative argument for insurability, but a partial rejoinder to the arguments against it. Moreover, even if it were valid to assume that wrongdoers will be "punished" by higher future rates, [329] the present value of such rates invariably will be less than the amount assessed as punitive damages. [330] To achieve a **[*76]** given level of punishment or deterrence, therefore, it will be necessary to assess larger punitive damage amounts. Thus, insurability will tend to increase the magnitude of punitive damage awards [331] and thereby increase the costs of both litigation and insurance.

VIII. CONCLUSION

The case for punitive damages is a limited one. Although a number of objectives have been suggested for punitive damages, only two survive scrutiny: retribution and deterrence. Retribution implies desert, which is controlled by the broader principle of fairness. Deterrence seeks to provide a better state of the world through efficient means.

Principles of fairness justify punitive damages only when a wrongful act has been committed with the objective of harming another or when the utility of an act was unequivocally known by the actor to fall far short of the danger created. The vagueness of the criteria for determining punitive damage liability and the attendant discretion accorded to juries extend liability far beyond that justified by fairness. Notice of activities that will be punished is obscured, and juries are left free to exercise biases and indulge in wealth redistribution. Rather than foregoing the punishment of some guilty persons to avoid punishing the innocent, punishment is imposed on more of the latter group.

These effects are exacerbated by the lack of coherent standards for determining the size of punitive damage assessments. Because courts **[*77]** have recognized the defendant's wealth as a proper factor for jury consideration, that becomes the effective upper boundary of punitive damage awards. Redistributional tendencies thus are reinforced, biases countenanced, and disproportional punishments encouraged. The principle that punitive damages should bear some relationship to the harm actually caused cannot be reconciled with the fairness principle that the punishment should be proportional to the egregiousness of the act. Moreover, the "reasonable relationship" principle is meaningless, because any relationship may be held reasonable. It serves at most to transfer unconstrained discretion from juries to reviewing judges and to disguise the actual bases for decisions.

Vicarious liability and insurability of punitive damages cause detriments to be imposed on unarguably innocent people, in amounts that far exceed, at least in the aggregate, the amount that the guilty actors could have been assessed.

Without better empirical evidence, it is impossible definitively to establish that the present law of punitive damages does not promote efficiency. The most that can be said is that there is no empirical basis for believing that it does and that the intuitive arguments supporting the proposition are weaker than those against it. Punitive damages can be shown to promote efficient levels of deterrence only in those cases where expected liability for compensatory damages is less than expected harm to society or where harm is deliberately caused and the satisfaction obtained by the actor is "illicit." Present punitive damage law extends far beyond these categories, however, and imposes additional costs on society. The uncertainty of the criteria, the lack of standards for determining the magnitude of damage assessments, the use of the defendant's wealth as a variable, the principle that punitive damages must bear a reasonable relationship to the actual harm caused, vicarious liability, and insurability each result in increased litigation costs. Uncertainty causes litigants and courts to consume additional resources. These resources are expended both in cases where punitive damages

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there are notions of public morality that are widely shared in late twentieth **[*5]** century America and that these notions justify punishment. [15]

While the public morality prevailing at other times or in other places might support the idea that one deserves to be punished because of race, beliefs, status, [16] physical attributes, or any number of things, the dominant view in contemporary western society is that the only justification for imposing punishment is that one has unjustifiably or inexcusably committed a wrongful act. [17] Other reasons may support requiring a person to internalize the cost of an activity, to compensate another for a loss, to pay a fine, to pay taxes, or otherwise to incur a detriment. [18] But when the object of imposing the detriment is to punish the recipient, only the commission of a wrongful act will support the notion of desert.

The difficult task of defining a morally wrongful act can be avoided for present purposes because of the principle that one does not deserve to be punished for an act unless it has been authoritatively declared to be wrongful before its commission or unless the actor has otherwise been given prior notice that the act is wrong. [19] This principle relates to the equally important precept that an offender must have **[*6]** chosen to commit the prohibited act to be deserving of punishment. [20] This in turn requires the offender to have had and exercised some meaningful choice, a requirement that is fulfilled if the offender willed the result or if it was the natural and probable outcome of the act and the offender was aware of that probability. [21]

The principle of desert requires that the punishment be proportional to the wrong in an absolute sense, that is, that "the punishment fit the crime." [22] Punishment that is excessive is not deserved. [23] Desert requires proportionality of punishment in a relative sense as well: greater wrongs should be punished more severely than lesser transgressions. [24] But attempts to determine objectively the severity of punishment that particular wrongs merit present questions over which philosophers, politicians, and jurists cannot agree. [25] Efforts to give substance to the abstract principles of absolute and relative proportionality **[*7]** have been unavailing in all but the easiest cases. We have resorted, therefore, to a second-best principle, that of specifying in advance the punishment or range of punishments to be imposed for a particular wrong. [26]

Desert is part of the broader principle of fairness, and as such it is constrained by other aspects of fairness. For example, the fairness principle of equal treatment implies that, *ceteris paribus,* one person does not deserve greater (or lesser) punishment than another for the same wrong. [27] Similarly, the principle of fair procedure requires that the guilt of the offender be established by procedures that reduce "false positive" outcomes -- punishing the innocent -- to a tolerable level. [28]

The foregoing effort at outlining the minimum content of desert purposely is cast at a high level of generality. The principles of desert are notoriously open-textured; even if agreement is reached as to their identity, ample opportunity remains for disagreement over their interpretation and application. Moreover, there are numerous instances in which the principles themselves conflict. For example, expansive interpretation of the principle of fair procedure may constrict the application of the principles of proportionality and equal treatment. [29] Such shortcomings, however, do not pose insuperable obstacles to an appraisal of the law of punitive damages from the standpoint of desert. Obviously the stated principles underlying desert are not uniformly adhered to. But if they approximate a statement of the common understanding of the notion of desert, then deviations are vulnerable to criticism unless justified by other principles. [30]

[*8] Punishment in the form of retribution thus implies desert, which in turn requires that the person being punished must, by a fair procedure, be found to have chosen to commit an act that has been authoritatively declared wrongful. Punishment of proportionally appropriate severity must be prescribed beforehand and applied on an equal basis to all offenders.

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are appropriate and in cases where they are not. The other factors mentioned increase the stakes at risk and, therefore, also increase litigation costs. In tandem, their adverse effects on litigation costs are compounded. Litigation resources are attracted to cases involving large actual damages and wealthy, insured, vicarious defendants.

The same factors have adverse effects on efficient harm avoidance as well. Uncertainty as to the actual liability standard causes some actors **[*78]** to overinvest and others to underinvest in injury avoidance. The use of knowledge of the potential harm as a basis for punitive damage liability creates a disincentive to investigate the relative harm-creating potential of other products or activities. The lack of coherent standards for determining the magnitude of assessments and the use of defendants' wealth as a factor induce wealthier defendants to overinvest in harm avoidance. The reasonable relationship principle induces overinvestment in avoiding harms that are substantial when they occur, but low in probability. Vicarious liability reduces the deterrent effect of punitive damages on persons who may commit harmful acts and induces employers to incur greater costs in selecting, monitoring, and disciplining employees or to substitute other factors of production for labor. Insurability reduces the deterrent effect of potential liability while spreading the costs of wrongdoing to persons engaged in socially beneficial acts. All of these effects combine to increase the costs of socially beneficial activities.

Not surprisingly, there is substantial concurrence between the arguments from fairness and the efficiency analysis as to acts that should result in punitive damage liability and those that should not. Acts that are inefficient and hence wasteful are likely to be viewed as wrongful and deserving of punishment. Conversely, when there is substantial consensus within a community over what conduct is wrongful, predictability and efficiency goals are enhanced. The weaknesses of the fairness and efficiency arguments supporting the present direction of the law, combined with the strengths of the arguments against it, demonstrate that the current expansive judicial attitude toward punitive damages is decidedly misguided.

GRAPHIC:
FIGURES 1 through 7, no caption

FOOTNOTES:
n1 *See, e.g.,* Becker & Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers,* 3 J. LEGAL STUD. 1 (1974); Landes & Posner, *The Private Enforcement of Law,* 4 J. LEGAL STUD. 1 (1975); Polinsky, *Private Versus Public Enforcement of Fines,* 9 J. LEGAL STUD. 105 (1980). *See also* K. ELZINGA & W. BREIT, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS 81-96, 112-38 (1976) (treble damages and fines as law enforcement devices); *Private Alternatives to the Judicial Process,* 8 J. LEGAL STUD. 231 (1979) (symposium on private alternatives to adjudication with principal paper by Landes & Posner); Stigler, *The Optimum Enforcement of Laws,* 78 J. POL. ECON. 526 (1970) (discussing enforcement theory).

n2 *See, e.g.,* Landes & Posner, *supra* note 1, at 26-29 (discussing errors in enforcement as a possible source of uncertainty over legal rules).

n3 R. POSNER, ECONOMIC ANALYSIS OF LAW 122-24, 142-43 (2d ed. 1977).

n4 *See, e.g.,* Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 820, 174 Cal. Rptr. 348, 389 (1981), where the court stated: "It is precisely because monetary penalties under government regulations prescribing business standards or the criminal law are so inadequate and ineffective as deterrents against a manufacturer and distributor of mass produced defective products that punitive damages must be of sufficient amount to discourage such practices." *See also* Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 186, 384 N.E.2d 353, 359 (1979) (where criminal sanctions "would do little to discourage the practice of retaliatory discharge," punitive damages are appropriate). *Cf.* Taylor v. Superior Court of Los Angeles, 24 Cal. 3d

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890, 897, 157 Cal. Rptr. 693, 697, 598 P.2d 854, 857 (1979) (seriousness of the drunk driving problem supports the use of punitive damages as another means of deterrence).

n5 *See* K. REDDEN, PUNITIVE DAMAGES § 1.1, at 1 (1980) (discussing the neglect of damages in legal scholarship).

n6 *More Punitive Damage Awards,* BUS. WK., Jan. 12, 1981, at 86; *Rand Corp. Units's 'Startling' Find,* Nat'l; Underwriter (Prop. & Cas.), Mar. 6, 1981, at 2, col. 1, 6, col. 1; *'Large-Loss' Claims up 68% Since '75,* Nat'l Underwriter (Prop. & Cas.), Sept. 26, 1980.

Reliable empirical data in this area are presently unavailable, although George Priest's study of Chicago verdicts for the Rand Corporation may generate useful data in the near future. A preliminary analysis of that data shows a sharp rise in numbers of punitive damage awards since 1976. Indirect evidence of the rising number of punitive damage awards is provided by the increased incidence of the terms "punitive" and "exemplary" damages in Lexis files. The terms appeared in 0.007% of all civil cases in 1960; 0.011% in 1970; and 0.19% in 1980.

See also In re Merry Shipping, Inc., 650 F.2d 622, 624-26 (5th Cir. 1981) (following the trend in other circuits, punitive damages may be recovered under maritime law in the Fifth Circuit); Baptiste v. Superior Court, 106 Cal. App. 3d 87, 97, 100-02, 164 Cal. Rptr. 789, 794, 795-97 (1980) (recognizing that substantial inroads had been made upon the prior reluctance to impose punitive damages in admiralty cases), *cert. denied,* 449 U.S. 1124 (1981); Rinker v. Ford Motor Co., 567 S.W.2d 655, 669 (Mo. Ct. App. 1978) (acknowledging trend toward allowing punitive damages in products liability cases); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products,* 49 U. CHI. L. REV. 1, 3-7 (1982) (discussing the increased availability of punitive damages in products liability cases); Riley, *Punitive Damages: When and When Not to Claim,* 1 TRIAL DIPL. J. 26, 26 (1978) (suggesting that punitive damages should be sought ordinarily "whenever you have a defendant who is wealthy or has a liability insurance policy with high limits . . . .").

n7 *See e.g.,* Ashland Oil Co. v. Bi Petro, Inc., Nat'l L.J., Nov. 24, 1980, at 10, col. 1 (S.D. Ill. 1980) (jury assessment of $ 300 million in punitive damages set aside by the trial judge); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 821-24, 174 Cal. Rptr. 348, 389-91 (1981) (affirming trial judge's reduction of jury awarded punitive damages from $ 125 million to $ 3.5 million; Pring v. Penthouse Magazine, N.Y. Times, Feb. 21, 1981, at 18, col. 4, *id.* Mar. 28, 1981, at 9, col. 2, *id.* Apr. 5, 1981, at 8E, col. 3 (D. Wyo. 1981) (jury award of $ 25 million in punitive damages reduced by the trial judge to $ 12.5 million), *rev'd on other grounds,* No. 81-1480, slip op. (10th Cir. Nov. 5, 1982).

n8 *See* K. REDDEN, *supra* note 5, at 15; Ellis, *Punitive Damages in Iowa Law: A Critical Assessment,* 66 IOWA L. REV. 1005, 1005-06 (1981); Mallor & Roberts, *Punitive Damages: Toward A Principled Approach,* 31 HASTINGS L.J. 639, 640-42 (1980); Owen, *Punitive Damages in Products Liability Litigation,* 74 MICH. L. REV. 1257, 1261 (1976); Owen, *supra* note 6, at 6-7. *See also* J. GHIARDI & J. KIRCHNER, PUNITIVE DAMAGES LAW AND PRACTICE (1981) (a volume devoted almost exclusively to punitive damages).

n9 This Article assumes that punitive damages, being a detriment imposed on an individual by an agency of the state, require justification. *Cf.* Mundle, *Punishment and Desert,* in THE PHILOSOPHY OF PUNISHMENT 65, 68 (H. Acton ed. 1969) ("the reason why moralists have felt that punishment requires to be justified . . . [is] that punishment may be said to involve 'deliberate infliction of pain.'"). Hence, this Article also assumes that the burden of persuasion lies with the proponents of imposing punitive damages; if the question of whether imposing punitive damages promotes valid objectives cannot be persuasively answered in the affirmative, the damages are not justifiable and should not be imposed.

n10 *See* D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES § 3.9, at 205 (1973); W.

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PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 9 (4th ed. 1971); K. REDDEN, *supra* note 5, at 26-32; RESTATEMENT (SECOND) OF TORTS § 908 (1977); Ellis, *supra* note 8, at 1006-13; Owen, *supra* note 6, at 7-10; Owen, *Punitive Damages in Products Liability Litigation, supra* note 8, at 1287-97. *Cf.* T. BATY, VICARIOUS LIABILITY 148 (1916) (any legal doctrine accounted for on numerous grounds "may reasonably be suspected of resting on no very firm basis in policy"). *But cf.* P. ATIYAH, VICARIOUS LIABILITY IN THE LAW OF TORTS 15 (1967) (the combined effect of numerous justifications may be "overwhelming," even when no single justification by itself, is adequate). An additional purpose of punitive damages suggested by one commentator is revenge. Note, *Exemplary Damages in the Law of Torts,* 70 HARV. L. REV. 517, 521-22 (1957).

n11 Lewis, *The Humanitarian Theory of Punishment,* 6 RES JUDICATAE 224, 225 (1952) ("[T]he concept of Desert is the only connecting link between punishment and justice."). *See also* Rawls, *Two Concepts of Rules,* 1 PHIL. REV. 3, 4 (1955) ("What we may call the retributive view is that punishment is justified on the grounds that wrongdoing merits punishment."). There has been a recent resurgence of philosophical interest in constructing deontological (nonconsequential) theories of rights, reminiscent of the natural rights theories of the Enlightenment. *See, e.g.,* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); C. FRIED, RIGHT AND WRONG (1978); A. GEWIRTH, REASON AND MORALITY (1978); R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974); J. RAWLS, A THEORY OF JUSTICE (1971); *Perspectives on Rights,* 13 GA. L. REV. 1117 (1979). There has been a corresponding shift in theories of punishment, favoring retribution and de-emphasizing rehabilitation. F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1981); N. MORRIS, THE FUTURE OF IMPRISONMENT 14 (1974); Cederblom, *Introduction* to JUSTICE AND PUNISHMENT at 1 (J. Cedarblom & W. Blizek eds. 1977).

n12 Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 741 (Minn. 1980) (punitive damages imposed even though manufacturer had ceased production of dangerous product, in order to deter future misconduct and "to punish past misconduct"), *cert. denied,* 449 U.S. 921 (1980); Wussow v. Commercial Mechanisms, Inc., 97 Wis. 2d 136, 155-56, 293 N.W.2d 897, 907 (1980) (punishment of past conduct is a sufficient basis for assessing punitive damages).

n13 For example, one can empirically determine on whom a sanction would ultimately fall and the fundamental nature of conventional morality.

n14 When constructing a comprehensive moral theory, one must confront such philosophically important questions as whether moral precepts are absolute or dependent on circumstance, whether they are theologically based, innate in nature or intuitive, and whether they are ultimately founded on perceptions of long-term consequences. For an analysis of anthropological evidence supporting a social basis for retribution, see Posner, *Retribution and Related Concepts of Punishment,* 9 J. LEGAL STUD. 71 (1980).

n15 The approach taken here is similar to that taken by Professor Greenawalt in analyzing the moral context of the "right of silence." *See* Greenawalt, *Silence as a Moral and Constitutional Right,* 23 WM. & MARY L. REV. 15, 18-19 (1981). *See also* Barry, Book Review, 88 YALE L.J. 629, 656 (1979) ("the value of fairness calls for doing good to others insofar as there exists widely practiced social norms that one should do that kind of good"). *But cf.* Allen, *The Law as a Path to the World,* 77 MICH. L. REV. 157, 163 (1978) (cautioning that "ambiguity, contradiction, conflict of social purpose, compromise, and incoherence" inherently characterize modern day discussions of moral culpability).

n16 *See, e.g.,* Robinson v. California, 370 U.S. 660, 666 (1962) (California statutory offense of being a narcotics addict held to be a status offense in violation of the eighth amendment).

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n17 Mundle, *supra* note 9, at 65, 71 (a moral offense is an essential element of retributive theory); Quinton, *On Punishment,* in THE PHILOSOPHY OF PUNISHMENT 56, 58 (H. Acton ed. 1969) (retributivist thesis is that only the guilty may be punished).

n18 The furtherance of such social objectives as minimizing costs, avoiding free riding or spreading losses may entail imposing a detriment on some or all members of a society, but the resulting detriments would not be punishments.

n19 This notion is captured by the maxim, *nullum crimen, nulla poena, sine lege,* "without a law, there is no crime and no punishment," also known as the "principle of legality." *See* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 27-55 (2d ed. 1960); S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 167-201 (3d ed. 1975 & Supp. 1979). *See also* Mabbot, *Punishment,* in THE PHILOSOPHY OF PUNISHMENT 39, 49 (H. Acton ed. 1969) ("[p]unishment is a corollary of law-breaking"); Mundle, *supra* note 9, at 78-79 (punishment is justified only if the law is broken). The principle has been given constitutional status under the "void for vagueness" principle. *See, e.g.,* Bouie v. City of Columbia, 378 U.S. 347, 362-63 (1964). *But see* Nash v. United States, 229 U.S. 373, 376-78 (1912) (upholding the Sherman Act prohibitions against conspiracies in restraint of trade and conspiracies to monopolize trade). *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960) (discussing the use of vagueness as a vehicle for achieving other judicial ends). *Cf.* Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 188-89, 384 N.E.2d 353, 360 (1979) (overturning punitive damage award in case recognizing a novel cause of action, where defendant had no reason to believe such conduct was actionable).

n20 Allen, *supra* note 15, at 161; Kneale, *The Responsibility of Criminals,* in THE PHILOSOPHY OF PUNISHMENT 172, 185 (H. Acton ed. 1969). *See also* O.W. HOLMES, THE COMMON LAW 107-10 (1881) (no liability under tort law for unintentional, unforseeable injury).

n21 *See, e.g.,* MODEL PENAL CODE § 2.02(2)-(3) (Proposed Official Draft 1962) (unless otherwise specified, culpability requires that a person act purposely, knowingly, or recklessly; recklessly defined as "consciously disregard[ing] a substantial and unjustifiable risk").

n22 *Cf.* W. GILBERT, *The Mikado or The Town of Titipu,* in THE MIKADO AND OTHER PLAYS 42 (1917):

My object all sublime --
I shall achieve in time --
To let the punishment fit the crime

n23 *See* N. MORRIS, *supra* note 11, at 59-61. Morris argues for a "principle of parsimony," under which "the least restrictive (punitive) sanction necessary to achieve defined social purposes should be imposed." *Id.* at 59. He contends that this principle "is utilitarian and humanitarian . . . since any punitive suffering beyond societal need is . . . what defines cruelty." *Id.* at 61. *See also* Mundle, *supra* note 9, at 71, 72 (suffering imposed ought to be proportionate to offense); Wittman, *Two Views of Procedure,* 3 J. LEGAL STUD. 249, 252 (1974) (the law reflects commonly held attitudes toward punishment deserved for offenses of differing gravity). *See generally* S. KADISH & M. PAULSEN, *supra* note 19, at 155-67 (cases and authorities discussing the proportionality requirement). Excessive punishment may also be "cruel and unusual" and thereby offend the eighth amendment. U.S. CONST. amend. VIII.

n24 A. EWING, THE MORALITY OF PUNISHMENT 41 (1929) ("If we are sure that a crime deserves a punishment just because it is a crime, we are equally sure that a decidedly worse crime deserves a severer punishment just because it is worse."); Wittman, *supra* note 23, at 254 ("The more serious the crime, the greater the deserved punishment."). H.L.A. Hart

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refers to this principle as "retribution in distribution." H.L.A. HART, punishment and responsibility/ 9, 25 (1968).

n25 *See generally* S. KADISH & M. PAULSEN, *supra* note 19, at 155-67 (discussion of the justifications for making the degree of punishment fit the crime); A. EWING, *supra* note 24, at 15 (discussing Kant's answer to the proportionality problem); Mabbot, *supra* note 23, at 50 (crimes and punishment can be graded on a rough scale).

n26 *But see* Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 810, 174 Cal. Rptr. 348, 382-83 (1981); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 186-87, 384 N.E.2d 353, 359 (1979). In both cases, courts held that low penalties prescribed by the legislatures for safety statute violations necessitated additional penalties in the form of punitive damages.

n27 Constitutional recognition of this principle can be found in the equal protection clause of the fourteenth amendment. U.S. CONST. amend. XIV. Some retributivists have argued, however, in the face of uneven application of the death penalty, that "it is better that some receive their just deserts . . . than that none do." Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment,* 79 MICH. L. REV. 1177, 1178-79 (1981). *See also* M. FRANKEL, CRIMINAL SENTENCES *passim* (1973) (criticism of the criminal justice system for the broad discretion allowed in sentencing).

n28 *See, e.g.,* U.S. CONST. amends. V, XIV. *Cf.* P. ARANSON, AMERICAN GOVERNMENT: STRATEGY AND CHOICE 530-31 (1981) (procedural protections in criminal cases reflect concern over deadweight losses resulting from imprisonment); R. POSNER, *supra* note 2, at 333-34 (economic justification for procedural safeguards).

n29 Thus, application of the exclusionary rule in criminal cases satisfies the principle of fair procedure at the expense of proportionality and equal treatment.

n30 The most commonly adopted alternative principle is deterrence. *See, e.g.,* United States v. Park, 421 U.S. 658, 670-73 (1975) (corporate officers may be held criminally liable under some circumstances without proof of conscious wrongdoing); Morissette v. United States, 342 U.S. 246, 259-60 (1952) (recognizing the constitutionality of crimes without intent where they "serve as an effective means of regulation"); Allen, *The Morality of Means: Three Problems in Criminal Sanctions,* 42 U. PITT. L. REV. 737, 747 (1981) ("the defense of strict liability is made to rest on the argument of deterrence"). *See also* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 518 F.2d 990, 1000-11 (5th Cir. 1975) ("civil penalty" assessed by administrative agency did not require the procedural protections required in criminal prosecutions), *aff'd on other grounds,* 430 U.S. 442 (1977); N. MORRIS & C. HOWARD, STUDIES IN CRIMINAL LAW 197, 198-99 (1964) (strict criminal responsibility is based on the need for "the highest degree of care to be exercised by those who follow certain pursuits").

n31 I pass over the possibility that society may be attempting to deter wrongdoing without regard to the effects of the wrongdoing, that is, deterring wrongdoing for its own sake.

n32 "[I]t is never worth spending more on enforcement than the benefits from deterrence . . . ." Polinsky, *supra* note 1, at 112. *See also* Mundle, *supra* note 9, at 68 (under utilitarian principles, justification of punishment depends on the net value of all consequences); Quinton, *supra* note 17, at 61 ("[u]tilitarialism holds that punishment must always be justified by the value of its consequences").

n33 The efficiency criterion used here is that adopted by Posner: "'Efficiency' . . . means exploiting economic resources in such a way that human satisfaction as measured by aggregate consumer willingness to pay for goods and services is maximized." R. POSNER, *supra* note 3, at 4. *See also* Brown, *Toward an Economic Theory of Liability,* 2 J. LEGAL

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STUD. 323, 325 (1974) (defining social optimum as the combination of avoidance measures which minimizes the cost of controls and the cost of accidents); Tullock, *Negligence Again,* 1 INT'L REV. L. & ECON. 51, 51 (1981) (pareto optimality occurs when resources invested in prevention and cost of accidents are minimized). In making an efficiency calculation, it is also necessary to include the procedural costs of imposing a detriment on defendants. *See* Stigler, *supra* note 1, at 531-32.

n34 This proposition, however, assumes that the probability of damages being assessed is unity. In the real world it is invariably less. In the ordinary case, the principal reason it is less is that victims incur costs in recovering damages. *See* Schwartz & Tullock, *The Costs of a Legal System,* 4 J. LEGAL STUD. 75, 78-79 (1972) (discussing fixed enforcement costs, monitoring costs, and communication costs). But costs are imposed on defendants as well, including such nonlitigation costs as loss of goodwill from attendant undesirable publicity. Therefore, it seems reasonable to assume that the difference between the actual probability of damages being assessed (<1.0) and the ideal probability (=1.0) is offset in the typical case by the defendant's detriment being greater than the amount of damages assessed. *Cf. id.* at 77 (expected costs to defendant of proceedings determining liability act as a deterrent); Landes & Posner, *supra* note 1, at 31 (probability of "apprehension and conviction" approaches unity in typical tort cases).

n35 The effort to maintain peace played a major role in the development of legal institutions. Holdsworth characterized the suppression of self-help as "[t]he first business of the law, and more especially of the law of crime and tort." 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 278 (1923). Pound observed that in early law a defendant who injured a plaintiff "aroused in the injured person a desire for vengeance which would lead to private war and disturbance of the peace of society. One who thus endangered the general security [had to] buy off the desire for vengeance he had awakened." R. POUND, JUSTICE ACCORDING TO LAW 10 (1951). Discouragement of private enforcement occasionally has been cited as an express objective of punitive damages. *See, e.g.,* Scott v. Plante, 641 F.2d 117, 135 (3d Cir. 1981), *vacated and remanded on other grounds,* 102 S. Ct. 3474, 73 L.Ed. 2d 1362 (1982). *See also* A. EWING, *supra* note 24, at 71 ("[Vindictive] desires . . . ought to be satisfied to some extent by State punishment, not because the vindictive pleasure is an end-in-itself, but in order to avert the satisfaction of these desires by illegal means in the absence of legal.").

n36 "Bribery" in this context is nonpejorative. *See, e.g.,* G. CALABRESI, THE COSTS OF ACCIDENTS 135 n.2 (1970) (incentive effect of liability is a bribe in the sense that it provides a "legitimate inducement"); Landes & Posner, *supra* note 1, at 43 (tort settlement is "perfectly lawful bribery").

n37 The law rewards those who engage in private law enforcement by offering a legitimate "bribe." *See supra* note 36.

n38 *Cf.* Landes & Posner, *supra* note 1, at 31, 42 (concluding that public enforcement may produce a more efficient outcome than private enforcement in situations where the wrongdoer lacks resources).

n39 Two states, Connecticut and Michigan, regard compensation for otherwise uncompensable losses or attorneys' fees as the primary objective of punitive damages. Triangle Sheet Metal Works, Inc. v. Silver, 154 Conn. 116, 127, 222 A.2d 220, 225 (1966); Peisner v. Detroit Free Press, 68 Mich. App. 360, 371, 242 N.W.2d 775, 780 (1976). Georgia treats "compensation for wounded feelings of the plaintiff" as one of its objectives. GA. CODE ANN. § 105-2002 (1968). New Hampshire does not allow punitive damages per se but does allow compensatory damages to be increased to reflect aggravating circumstances. Vratsenes v. N.H. Auto, Inc., 112 N.H. 71, 72-73, 289 A.2d 66, 67-68 (1972).

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n40 *See, e.g.,* Katko v. Briney, 183 N.W.2d 657, 662 (Iowa 1971) (plaintiff injured by spring gun while breaking into defendants' premises with intent to steal was not barred from recovering punitive damages from defendants).

n41 *Cf.* Becker & Stigler, *supra* note 1, at 13-16 (concluding that, with proper economic inducements, private law enforcement can produce optimal results); Landes & Posner, *supra* note 1, at 23 (use of "bounty" to induce efficient private enforcement). *But cf.* Polinsky, *supra* note 1, at 107 (public enforcement of fines leads to the socially optimal result).

n42 This appears to be the role of attorneys' fees in Connecticut and uncompensable losses in Michigan. *See* Triangle Sheet Metal Works, Inc. v. Silver, 154 Conn. 116, 127, 222 A.2d 220, 225 (1966); Hayes-Albion Corp. v. Kuberski, 108 Mich. App. 642, 656-57, 311 N.W.2d 122, 129 (1981). *But see* Connecticut Products Liability Act, 1979 Conn. Acts 483 § 8 (Reg. Sess.) (punitive damages may be awarded up to "an amount equal to twice the [compensatory] damages awarded to plaintiff" if injury resulted from "seller's reckless disregard for the safety of product users").

n43 *See, e.g.,* Rookes v. Barnard, [1964] A.C. 1129, 1221; 1 T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES §§ 348-352 (9th ed. 1912); Ellis, *supra* note 8, at 1006-07; Friedman, *Punitive Damages in Tort,* 48 CANADIAN B. REV. 373, 374-78 (1970); Rice, *Exemplary Damages in Private Consumer Actions,* 55 IOWA L. REV. 307, 308-12 (1969); Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change,* 61 MINN. L. REV. 207, 208-14 (1977); Note, *Exemplary Damages in the Law of Torts,* 70 HARV. L. REV. 517, 518-20 (1957).

n44 Earlier examples can be found in the Old Testament and in Roman Law. *See* K. REDDEN, *supra* note 5, § 2.2, at 24-25.

n45 Jury misconduct previously had been dealt with through the process of attaint, whereby a second jury was convened to inquire into the conduct of the first. If it found the original verdict improper, it could set aside the verdict and fine the members of the original jury. By the seventeenth century, however, this cumbersome procedure had fallen into disuse. *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 1-31 (5th ed. 1956); Washington, *Damages in Contract at Common Law,* 47 LAW Q. REV. 345, 349-50 (1931). The system of attaint ceased to make sense when jurors ceased to be witnesses of fact and became evaluators of evidence. *See* S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 366 (1969); 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 341-42 (3d ed. 1922).

n46 Hawkins v. Sciet, 81 Eng. Rep. 1099, 1099 (K.B. 1622).

n47 *Id.* In Bonham v. Sturton, 73 Eng. Rep. 230, 230 (K.B. 1554), the court denied that it had the authority to "mitigate" damages in an action for slander in which the jury had awarded 500 marks to plaintiff.

n48 82 Eng. Rep. 867, 867 (Banc. Sup. 1655).

n49 Townsend v. Hughes, 86 Eng. Rep. 994, 994-95 (C.P. 1649).

n50 Ash v. Ash, 90 Eng. Rep. 526, 526 (K.B. 1701).

n51 *See, e.g.,* Chambers v. Robinson, 93 Eng. Rep. 787, 788 (K.B. 1726) (asserting power to order new trial where damages excessive); Beardmore v. Carrington, 95 Eng. Rep. 790, 793 (C.P. 1764) (*Chambers* criticized; power to order new trial doubted unless damages "monstrous and enormous"); Fabrigas v. Mostyn, 96 Eng. Rep. 549, 549 (C.P. 1773) (because damages are difficult to measure, deference to jury unless award is monstrous and

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excessive); Ducker v. Wood, 99 Eng. Rep. 1092, 1092 (K.B. 1786) (court may grant new trial in any case where damages are excessive); Duberley v. Gunning, 100 Eng. Rep. 1226, 1226 (K.B. 1792) (courts have general power to order new trial if damages are excessive, but ought not to exercise it where there are no "criteria by which the propriety of the damages given may be estimated").

n52 Sharpe v. Brice, 96 Eng. Rep. 557, 557 (C.P. 1774).

n53 Pleydell v. Earl of Dorchester, 101 Eng. Rep. 1115, 1115 (K.B. 1798).

n54 *Cf.* Bonham v. Sturton, 73 Eng. Rep. 230, 230 (K.B. 1554) (court may not disturb verdict for slander on grounds of excessiveness; cases involving mayhem distinguished because wound "was a matter apparent to the Court, and the offense and trespass was carried about with the person"); Beardmore v. Carrington, 95 Eng. Rep. 790, 792 (K.B. 1764) (damages may be lessened or increased "upon view of plaintiff's mayhem").

n55 *See, e.g.,* Duberley v. Gunning, 100 Eng. Rep. 1226, 1228 (K.B. 1792) (Chief Justice Kenyan left undisturbed a jury award he thought excessive so as not to substitute his opinion for that of the jury). *See also* Sullivan, *supra* note 43, at 214:

The early decisions show that the acceptance of punitive damages in English law was not the product of any deliberate judicial design. Some courts simply observed that in tort actions large verdicts would be sustained because the character of tort rules allowed greater jury discretion. Only in the later cases such as [Merest v. Harvey, 128 Eng. Rep. 761 (C.P. 1814)] did courts begin to justify large tort awards which had no pecuniary basis by reference to the defendant's egregious conduct or the principle that such judgments might serve as warning symbols to potential tortfeasors. (citations omitted).
See also 1 T. SEDGWICK, *supra* note 43, at § 350, at 689 ("[N]othing was further from the idea of the judges than that they were establishing a new doctrine . . . .").

n56 98 Eng. Rep. 489 (C.P. 1763).

n57 *Id.* at 498-99.

n58 *Id.* at 499.

n59 95 Eng. Rep. 768 (C.P. 1763).

n60 *Id.* at 769. This appears to be the first judicial use of the term "exemplary damages."

n61 *See, e.g.,* Wood v. Gunston, 82 Eng. Rep. 867 (Banc. Sup. 1655); Townsend v. Hughes, 86 Eng. Rep. 994 (C.P. 1677).

n62 *See, e.g.,* Tullidge v. Wade, 95 Eng. Rep. 909 (C.P. 1769).

n63 *See, e.g.,* Benson v. Frederick, 97 Eng. Rep. 1130 (K.B. 1766); Ash v. Ash, 90 Eng. Rep. 526 (K.B. 1701); Grey v. Grant, 95 Eng. Rep. 794 (C.P. 1764).

n64 *See, e.g.,* Duberley v. Gunning, 100 Eng. Rep. 1226 (K.B. 1792). Subsequently, the English courts decided that punitive damages were not available in actions for adultery (criminal conversation). Butterworth v. Butterworth & Englefield, 1920 P. 126; A. OGUS, THE LAW OF DAMAGES 29 n.6 (1973).

n65 *See, e.g.,* Hewlett v. Cruchley, 128 Eng. Rep. 696 (K.B. 1813); Leith v. Pope, 96 Eng. Rep. 777 (C.P. 1780); Chambers v. Robinson, 93 Eng. Rep. 787 (K.B. 1726).

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Retribution is backward-looking *(ex post)* and provides a complete reason for imposing a detriment.

B. DETERRENCE AND OTHER INSTRUMENTAL OBJECTIVES

The next four stated objects of punitive damages -- deterring the defendant, deterring others, preserving the peace, and inducing private law enforcement -- are all instrumental; the good sought is separate from the detriment imposed on the defendant. The answer they provide (or seem to provide) to the question, "Why should *X* be punished?" is that a better world will be brought about. [31] They are forward looking *(ex ante)* and, therefore, require us to address questions not about desert, but about effectiveness. They form hypotheses that can be empirically tested.

If the purpose of punitive damages is to bring about a better world by punishing defendants, one must consider the costs of imposing that punishment. Hence, instrumental objectives require an assessment of the state of the world that will result net of the costs of imposing punishment [32] and of the detrimental incentives it creates. The first two instrumental objectives, deterring the defendant and deterring others, require an assessment of whether the costs incurred by imposing a detriment on a defendant will be offset by a reduction in the expected losses to society from future harmful acts. In other words, does imposing **[*9]** a detriment on the defendant promote the efficient use of society's resources? [33] Compensatory damages ordinarily would appear to be sufficient to promote efficient levels of deterrence. [34] Accordingly, deterrence objectives justify imposing punitive damages only in cases where compensatory damages alone produce less than optimal deterrence.

The third instrumental objective -- preserving the peace -- raises a similar but narrower issue: whether imposing a detriment on defendants, by channelling more disputes into the courts, [35] will result in a reduction in the social costs ("breach of the peace") associated with self-help. The outcome of this inquiry depends in part on whether victims are induced to forego private vengeance by the satisfaction they gain from (1) the official declaration that they were wronged by the defendant (vindication); (2) the knowledge that the defendant has been made to suffer a detriment (vengeance); or (3) the wealth that is transferred **[*10]** to them (bribery). [36]

The fourth instrumental objective -- inducing private law enforcement -- is premised on the wealth incentive alone. [37] It provides an argument for rewarding plaintiffs, but it provides no justification for imposing a detriment on defendants. It cannot alone answer the question, "Why should *X* be punished?" Inducing private law enforcement is thus a dependent purpose at best. It presupposes that imposing a detriment on defendants is warranted by desert, deterrence, or some other consideration. It does raise a question that lies below the surface of all the other arguments offered in favor of punitive damages: whether assessing punitive damages against a defendant and awarding them to a plaintiff in a private action is the most efficacious strategy for achieving the objective sought, be it retribution, deterrence, preserving the peace, or something else. It would not be surprising, of course, if we arrived at different answers depending on the circumstances of any particular case. [38]

C. INCOMPLETE JUSTIFICATIONS

The two remaining justifications -- compensating victims for otherwise uncompensated injuries and paying plaintiffs' attorneys' fees -- likewise cannot answer the question "Why should *X* be punished?" [39] Of course, the presence of losses not compensable by reparative damages may explain why reparative damages alone do not achieve optimal levels of deterrence, and the prospect of recovering attorneys' fees may induce plaintiffs to undertake private law enforcement. These justifications might be answers to the question, "Why should *Y* be benefitted?" but they do not tell us why one plaintiff should receive compensation **[*11]** for otherwise uncompensable losses or reimbursement of attorneys' fees and

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another plaintiff should not. The answer to that question requires either an inquiry into the relative entitlements of plaintiffs (a subject usually deemed not material to punitive damage assessments), [40] an inquiry into the nature and extent of the harm that a defendant has done (which resurrects the issues of desert and deterrence), or an instrumental analysis of whether benefiting plaintiffs would induce them to engage in private law enforcement. [41] Alternatively, compensating some plaintiffs for otherwise uncompensable losses or attorneys' fees may be viewed, not as justification for, but as a byproduct of punitive damages. If wealth is taken from a defendant to achieve retribution or deterrence or for other reasons, we must do something with the money. It could be destroyed as is often done with confiscated contraband, deposited in the public treasury as are fines, donated to an object of our benevolence, or randomly distributed. That none of these uses has been chosen may reflect society's decision that the best use of the wealth acquired through punitive damages -- the use that will result in the greatest increase in welfare, utility, or happiness -- is to compensate plaintiffs for losses or attorneys' fees. On the other hand, the compensation of otherwise uncompensable losses and the payment of attorneys' fees may be measures for calculating the size of punitive damage awards, once it has been determined (based on other factors) that some award is appropriate. [42]

The preceding discussion implies that the seven justifications offered for punitive damages can be reduced to two: (1) that wrongdoers deserve punishment, beyond that provided by reparative damages; and (2) that imposing a detriment on defendants promotes efficiency by deterring loss-creating conduct. Three of the stated justifications -- inducing private enforcement, compensating victims for uncompensable losses, and compensating plaintiffs for attorneys' fees -- provide incomplete **[*12]** explanations for punitive damages. They are either premised on one of the two primary justifications or they perform alternative functions such as providing "just compensation," establishing a basis for the distribution of wealth extracted from defendants, or supplying a measure for calculating damage assessments.

II. HISTORICAL BACKGROUND

The origin of punitive damages in Anglo-American law is well documented. [43] It is worth repeating, however, to determine whether the underlying justifications for punitive damages set forth in the preceding Section can explain their origin.

The common law authority for courts to award punitive damages originated in eighteenth-century England, [44] in cases in which defendants challenged and sought to have set aside large, arguably excessive, jury verdicts. [45] The first reported case in which a court implicitly recognized the power to set aside a jury verdict occurred in 1622 when counsel for a losing defendant in an action for slander nearly persuaded the Court of King's Bench to reduce a jury verdict. [46] Upon reflection, however, the court let the verdict stand on the ground that the jury knew better *("mieux conusant")* the quality and estates of the parties and the damage that the plaintiff had sustained from the defendant's disgraceful act. [47] In 1655, the "Supreme Bench," which replaced the King's Bench during the Interregnum, acceded to the apparently novel suggestion that an excessive jury verdict should be set **[*13]** aside and a new trial ordered in *Wood v. Gunston,* [48] another slander suit. After the Restoration, however, courts were slow to accept the authority to override jury discretion, and in a subsequent slander case in which a jury had awarded a plaintiff £ 4,000, Chief Justice North of the Court of Common Pleas held that a court could not interfere with a jury's power to determine damage awards. [49] But before the end of the century, the Court of King's Bench set aside a £ 2,000 verdict in favor of a daughter against her mother, on the curious ground that the "jury were very shy of giving a reason of their verdict." [50]

Throughout the eighteenth century and into the nineteenth, the English courts continued to debate whether they had the authority to interfere with a jury's verdict and whether it was appropriate to do so when a plaintiff's losses were not readily calculable. [51] The cases in

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which defendants sought to set aside large verdicts -- and there were increasing numbers of them -- are important in two respects. First, they bring to light the types of cases in which juries most frequently awarded amounts unrelated to tangible losses. Second, they compelled courts, once they had accepted the notion that it was within their power to question jury decisions, to consider and articulate the bases for upholding or setting aside such verdicts. The Court of Common Pleas observed in 1780 that the measure of damages in contract cases is generally a matter of account that could be reviewed and verified. [52] Similarly, tort cases involving only the destruction of property presented few difficulties because the deterioration of the property itself provided a workable measure of damages. [53] Even cases of mayhem provided sensorily observable evidence and thus gave the appearance of being susceptible to objective monetary valuation. [54]

[*14] The valuing of intangible losses, on the other hand, presented perplexing difficulties, which some judges sought to avoid by simply deferring to jury discretion. [55] Judicial deference, however, gradually gave way under the persistent importunities from defendants' counsel to set aside allegedly excessive damage awards. This inexorable pressure to find some rational basis for awards of hundreds or thousands of pounds in cases in which no tangible loss had occurred resulted in judicial recognition that damage awards not only compensate the injured but also punish wrongdoers and deter wrongdoing.

The suggestion that the punitive and deterrent purposes of damage awards could be separated from their compensatory function first received judicial expression in two cases where damages were sought against agents of the Secretary of State for illegal searches and seizures under general warrants. In *Wilkes v. Wood,* [56] Lord Chief Justice Pratt announced his view that:

[A] jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself. [57]

The jury awarded the plaintiff £ 1,000. [58] In *Huckle v. Money,* [59] a related case in which a £ 300 verdict was unsuccessfully challenged as excessive, Chief Justice Pratt stated that "the jury have done right in giving exemplary damages." [60]

The reported cases from roughly the first quarter of the seventeenth century through the first quarter of the nineteenth century, in **[*15]** which juries awarded damages in large amounts unrelated to tangible loss, fell into a variety of legal categories. They included cases of slander, [61] seduction, [62] assault and battery in humiliating circumstances, [63] criminal conversation, [64] malicious prosecution, [65] illegal intrusion into private dwellings and seizure of private papers, [66] trespass onto private land in an offensive manner, [67] and false imprisonment. [68] Diverse as they may have been, all of these cases share one common attribute: they involved acts that resulted in affronts to the honor of the victims. The defendants' acts were insults that were likely to provoke reactions of outrage.

Insult provided a sufficient basis for awarding exemplary damages for two reasons. First, affronts to honor cause a loss of welfare on the part of the dishonored. "Honour is the value of a person in his own eyes," as well as "in the eyes of his society." [69] Honor may be less highly esteemed in contemporary western society, but it was of compelling importance in the status-oriented society that typified England well into the nineteenth century. Hence, as Maitland observed of the thirteenth century, "shame was keenly felt." [70] Not surprisingly, therefore, from a very early date plaintiffs demanded and courts awarded "compensation, not only for the damages *(damnum)* but also for the shame *(huntage, hontage, dedecus, pudor, vituperium)* that [had] been done." [71]

[*16] Many of the judicial opinions out of which the concept of exemplary or punitive

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damages arose explicitly reflect the belief that the welfare losses in insult cases must be redressed if plaintiffs are to be fully compensated and defendants are to bear the social costs of their acts. For example, in *Grey v. Grant,* [72] the Court of Common Pleas upheld a £ 200 jury verdict for a battery that caused no apparent physical harm, because "the plaintiff [had] been used unlike a gentleman by the defendant in striking him, withholding his property and insisting upon his privilege." [73] An unlawful whipping administered to a militiaman justified a £ 150 verdict in *Benson v. Frederick,* [74] where "the man, though not much hurt indeed, was scandalized and disgraced by such a punishment." [75] The seduction of a plaintiff's daughter was held to merit a £ 50 award in *Tullidge v. Wade,* [76] because the plaintiff had "received this insult in his own house." [77] And the illegal search of a plaintiff's house by customs officers, who "did little or no damage," was nevertheless found to justify a £ 100 damage award in *Bruce v. Rawlins,* [78] because "suspicion of having run-goods in his house [was] very injurious" to the plaintiff. [79]

The recognition of insult as a compensable injury led courts to consider the personal characteristics of the parties. In *Huckle v. Money,* [80] the court observed that, "in cases of criminal conversation, battery, imprisonment, slander, malicious prosecutions &c. the state, degree, quality, trade or profession of the party injured, as well as of the person who did the injury, must be and generally are, considered by a jury in giving damages." [81] Insult also explains the importance given to intent and motive in cases involving intangible loss. "[I] ntention is a necessary component of the competition for honour expressed in the challenge; the essence of an affront is that another should dare to affront one." [82] Thus, in *Sears v. Lyons,* [83] a case in which the defendant had scattered poisoned barley on his own land and the plaintiff's adjoining **[*17]** land (with the consequent death of some of the plaintiff's poultry), the jury was instructed that it "might consider not only the mere pecuniary damage sustained by the plaintiff, but also the intention with which the fact had been done, whether for insult or injury." [84] Similarly, a jury was instructed in a later case, *Forde v. Skinner,* [85] that cutting off the hair of female paupers in a poor house against their will constituted a trespass under any circumstances; but if done, not for hygienic purposes, but "with the malicious intent imputed [by the evidence] of 'taking down their pride,' . . . that will be an aggravation and ought to increase the damages." [86]

The second characteristic of insult cases that makes exemplary damages seem appropriate is that they evoke a compelling desire for redress or satisfaction on the part of the victim, a desire often lacking in cases of physical -- even disabling -- injury not associated with insult. [87] Indeed, this vindictive reaction may be endemic to the notion of honor, for an "affront is a dishonour . . . [that] creates a situation in which the honour of the affronted person is in jeopardy and requires 'satisfaction' if it is to return to its normal condition." [88]

The desire for revenge or satisfaction leads to disorder if the victim resorts to self-help rather than to the judicial process. Avoidance of the social disorder caused by duels, feuds, and the more extreme forms of self-help that historians denominated "bastard feudalism," [89] was a major influence in the establishment and maintenance of an effective judicial mechanism and a motivating force behind the continuing efforts of the Crown to channel disputes into officially countenanced processes. Reactions to affronts proved especially intractable when victims perceived that "to have recourse to justice was to abnegate one's claim to settle one's debts of honour for oneself, the only way in which they can **[*18]** be settled. . . ." [90] Thus, Coke argued early in the seventeenth century that libel against a private person

deserves a severe *punishment,* for although the libel be made against one, yet it incites all those of the same family, kindred, or society to revenge, and so tends *per consequens* to quarrels and breach of the peace, and it may be the cause of shedding of blood, and of great inconvenience. . . . [91]

Holdsworth found that in cases of defamation against private persons, the Court of Star Chamber not only punished defendants, but often gave large damage awards to victims in

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contrast to their practice regarding other offenses. [92] Punishing personal defamation was justified on the ground that libels "tended to provoke breaches of the peace." [93] "Indeed," Holdsworth concluded, "it was clearly necessary for the Star Chamber thus to punish libels against private persons, if it was to succeed in its attempt to put down duelling." [94]

Similar concerns are echoed in eighteenth and early nineteenth century cases in which courts assessed large damage awards for insulting acts. In *Grey v. Grant,* [95] the court observed that "when a blow is given by one gentleman to another, a challenge and death may ensue, and therefore the jury have done right in giving exemplary damages" for a battery that caused no physical injury. [96] The court added that insulting acts tend "to provoke [the victim] to seek his revenge in another way than by law, and therefore we think the [£ 200] damages are not excessive." [97] In a later case, a £ 500 verdict was upheld when an inebriated defendant, disregarding "every principle which actuates the conduct of a gentleman," forced himself on plaintiff's hunting party. [98] The court concluded, "It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages." [99]

The justifications for punitive damages set forth in Section I are consistent with the factual setting of the cases out of which the doctrine arose. With few exceptions, [100] the question whether a defendant deserved **[*19]** punishment under the prevailing standards of desert was settled once the factual issues were resolved. Almost all of the early cases involved acts that were not only wrong but likely to be adjudged "outrageous" by social consensus. That consensus provided sufficient notice to potential offenders, at least according to the public morality of the period, to support a conclusion that the actor chose to commit a wrongful act, for which punishment likely would follow. That conclusion was reinforced by the intentional nature of the defendants' acts.

The more interesting question is whether the objective of achieving an efficient level of deterrence was promoted in the early cases. Although the lawyers, judges, and jurors of the period did not speak or necessarily think in terms of efficiency, [101] they recognized that damage awards simultaneously compensate the injured and punish the defendant, and that the anticipated detriment provided a disincentive to other wrongdoers. They also recognized that if the prevailing legal standards for measuring damages -- which did not ordinarily include compensation for wounded feelings -- were applied in cases involving insult, the victim's recovery would be less than the total loss sustained. Furthermore, they recognized that compensatory damages would not redress losses, such as breach of the peace, that are sustained by persons other than the immediate victim. Thus, they intuitively recognized that optimum deterrence would not be achieved if the damages assessed against the defendant were less than the sum of the losses caused by the defendant's wrongful act. That outcome was especially likely when the act was done for the purpose of insulting or otherwise intangibly injuring the victim (that is, with "malice").

The courts had three alternatives for achieving a more efficient level of deterrence: to invoke the criminal law; to change the rules for awarding compensatory damages; or to assess some amount in addition to the allowable compensatory damages in the form of punitive, exemplary, or vindictive damages. Each of these approaches has been adopted, [102] but it is the continued use of the punitive damage approach **[*20]** that the remainder of this Article will discuss.

III. CRITERIA FOR THE ASSESSMENT OF PUNITIVE DAMAGES

Punitive damages may be assessed when the defendant acted out of malice, willfully, wantonly, recklessly, or with conscious disregard or indifference toward the interests of others. [103] Other terms, such as aggravated circumstances, [104] are sometimes used as surrogates for one or more of these characteristics, and gross negligence, [105] fraud, [106] and oppression [107] may be added to the list. All of these terms attempt to express the conditions necessary for an injured plaintiff to receive an award of punitive damages and necessary and

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sufficient for a judge or jury to assess them against a defendant. Even when one of the listed conditions is found to be present, however, punitive damages are not mandatory, and the factfinder retains unconstrained discretion to assess them or not. [108]

The various terms used to denominate the conditions that determine the appropriateness *vel non* of punitive damages present two sets of issues. First, assuming that the terms provide cogent and discriminating criteria for imposing punitive damage liability and that they are **[*21]** capable of being consistently applied, do they provide a fairness basis for assessing punitive damages, and will such assessments promote an efficient allocation of resources? Second, relaxing the consistency assumption, are the conclusions reached under the assumption of consistency affected by the vagueness and variety of the criteria for assessment and by the discretion accorded to finders of fact? The first set of issues is discussed in this Section. The latter issues are addressed in the succeeding Section.

For present purposes, assume that punitive damages may be assessed if and only if one person injures another with "malice" or as a result of "reckless conduct." Further assume that malice and reckless conduct are defined as follows:

malice: a state of mind; the desire to harm another that accompanies and provides a reason for an intentional act; [109] *reckless conduct:* conduct involving a conscious choice of a course of action entailing a disproportionately great risk of harm to another relative to the utility of the conduct, and undertaken with knowledge of the danger or of facts that would disclose the danger to a reasonable person. [110]

A. FAIRNESS

Applying the concept of desert specified in Section I, [111] we can locate malice on a scale of culpability that probably would accord with the moral intuitions of most reflective retributionists. At least in the absence of some overriding principle or policy, [112] most would view one **[*22]** who purposefully injures another as having committed a wrongful act with a culpable mental state and, therefore, as deserving punishment. Moreover, if most members of society agree that the deliberate infliction of harm should be punished, it seems likely that offenders will have notice of that fact. Other elements of desert -- proportionality, prior notice of the magnitude of the penalty, and equal treatment -- are supplied by the malice criterion only under heroic assumptions regarding the actor's state of mind, the susceptibility of degrees of malice to consistent evaluation, and the existence of a social consensus as to the punishment merited by various malicious acts. Such difficulties, however, may be regarded as peripheral to the primary issue of the use of malice as a criterion for punitive damage liability.

On the other hand, disagreements are likely to exist that go to the very core of using reckless conduct as a measure for punitive damage liability. The definition of reckless conduct requires a weighing of matters that may be incommensurable, such as the risk of harm and the utility of dangerous conduct. The definition of reckless conduct also entails an objective standard of awareness: knowledge of facts that would have communicated potential danger to a reasonable person. If there is good faith disagreement over the relative danger and utility of an action, the fairness requirement of adequate notice of wrongfulness may not be satisfied. [113] If an actor lacks subjective awareness of the disproportionate danger accompanying an act, the requirement of meaningful choice may be unfulfilled. In the latter case, punitive damages punish actors for not having the percipience of the objective reasonable person, a shortcoming in mental attributes rather than a wrongful act, and a condition or status that may not be regarded universally as deserving of punishment. [114]

Thus, even assuming that the conditions for assessing punitive damages can be tightly and consistently defined, once we move away from purposeful harm we encounter problems in justifying their imposition from the standpoint of desert. Deserved punishment for

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ARTICLE: Confronting The Consolidation Conundrum

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SUMMARY:
... At least it has become considerably more important in recent years as courts have increasingly sought to use the power to consolidate and sever to design cures for the stresses of modern multiple litigation. ... Part IV also evaluates both the Project's reliance on a newly created Complex Litigation Panel to make the initial decision whether to consolidate, and its propulsion toward fragmenting cases by severance. ... Nevertheless, the court held that consolidation was an abuse of discretion, reasoning that the varied work histories of the plaintiffs had presented the jury with a "dizzying amount" of evidence and that the case was therefore distinguishable from the 1992 case quoted above, which upheld the judgment of a consolidated trial of asbestos claims for workers at a shipyard. ... In sum, as others have noted, consolidation can leave claimants with as little control over their cases as unnamed class members in a class action. ... As in Bendectin, consolidation and bifurcation may undermine that tradition. ... But that prong of section 3.01 also omits an important directive that the Reporters included in Appendix B - that consolidation of the cases be "superior to their separate adjudication." ... A transferee judge may similarly approach the transfer/consolidation question with indifference to party interests. ... Without any further action by Congress, as we have seen, transfer and consolidation decisions are repeatedly and increasingly made, and related severance orders are often entered. ...

TEXT:
[*879]

I. Introduction

The Project's varied standards apply to different circumstances in which the Project proposes to authorize consolidation. The general standard for cases pending in federal court is embodied in section3.01, which is a watered down version of Rule 23(b)(3). In contrast, the standard found in Reporters' Study in Appendix B, for consolidation pursuant to the novel proposed interstate compact, is a relatively direct adoption of the Rule 23(b)(3) standard for class certification. In between, section5.01 articulates the standard for removal and adds a "same transaction" test to the common question standard that is embodied in section3.01. [119] These differences are justified on **[*904]** the ground that jurisdiction and other factors extrinsic to the pure consolidation decision mandate different treatment. [120] Without focusing on the justifications offered for different treatment, this Article questions the departures from the Rule 23(b)(3) model on the grounds (1) that the class action standard is sufficiently flexible for consolidation, and (2) that lowering the threshold below that standard would be unwise.

Rule 23(b)(3) directs the court to certify a class only if it finds that common questions predominate and that a class action would be superior to other modes of adjudication. Certainly the same basic approach could be utilized to bring consolidation into parallel treatment with class actions. As the Reporters of the Project recognized in emulating Rule 23 (b)(3) in Appendix B, however, the class certification standard "is more demanding than that set forth in 28 U.S.C. 1407 and proposed [in section3.01 of the Project] for the consolidation and transfer of lawsuits within the federal system." [121] Section3.01 requires only that there be one common question of fact and that transfer "promote the just, efficient and fair conduct of the actions." [122] Yet the commentary to section3.01 begins with the following explanation:

> The underlying premise of the consolidation standard set forth in this section is that a series of related claims will not be transferred for consolidated treatment unless the parties **[*905]** and the judicial system will realize a significant savings in time and resources ... and those savings can be achieved in a manner that is fair to the litigants. [123]

In terms of both sensitivity and selectivity, the adoption of a full-fledged Rule 23(b)(3) standard for consolidation by the Reporters in Appendix B better serves these goals than the watered-down version in section3.01.

1. Predominance of common questions

The Reporters label Rule 23(b)(3)'s requirement that common questions predominate a "super-commonality" criterion that is "more demanding" than the requirement of section3.01 that there be a common question of fact. [124] But the Reporters also recognize that predominance is "fairly specific and objective," [125] and make forceful arguments in commentary to Appendix B that underscore the usefulness of the predominance requirement in achieving the goals they set for section3.01. [126] Looking beyond the Project, it is useful to recall what the Reporters say in their treatise on federal practice about the Rule 23(b)(3) predominance requirement:

> The predominance test really involves an attempt to achieve a balance between the value of allowing individual actions to be instituted so that each person can protect his own interests and the economy that can be achieved by allowing a multiple party dispute to be resolved on a class action basis. [127]

[*906] This sounds almost exactly like the goal the Reporters set for section 3.01. [128] Moreover, there is some language in the commentary to section 3.01 itself that suggests that

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even under the proposed formulation of section 3.01, predominance should be important. [129] Indeed, the recently released Manual for Complex Litigation, Third, cautions that "unless common evidence predominates, consolidated trials may lead to jury confusion while failing to improve efficiency." [130]

The sticking point, it seems, is the one the Reporters make in Appendix B - that the predominance standard is fairly specific and objective. [131] Much as that might seem a selling point to one concerned about controlling use of consolidation, the commentary to section3.01 emphasizes that for cases in federal court section 3.01 allows "maximum discretion" to consolidate and thereby makes the commonality standard "so minimal" that it "rarely will be dispositive." [132] The Reporters reason that a predominance requirement would create a risk that the standard would err on the side of specificity and unduly diminish sensitivity, precluding consolidation in some cases where it should be employed. [133] But experience under Rule 23 suggests that its predominance requirement has not hamstrung courts; there the courts have treated the predominance standard as satisfied if the common questions "represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." [134] They have not automatically interpreted "predominance" to mean "determinative" or even "significant." [135] Even the Multidistrict Litigation Panel, op- **[*907]** erating under a statute with a minimal commonality requirement, has sometimes used predominance as a criterion for transfer, [136] and predominance has also been invoked in Rule 42 consolidation decisions. [137]

Other cases handled by the Multidistrict Litigation Panel provide grounds for uneasiness about a minimalist approach to commonality. That Panel rarely makes the common question requirement determinative, [138] but "simply identifies the common questions that exist and orders transfer without analyzing their relation to the overall litigation to any great degree." [139] At least in some cases, the commonality found sufficient seems **[*908]** almost nonexistent. For example, in In re Aviation Products Liability Litigation [140] the Panel was presented with a series of cases pending in districts in seven states and involving malfunctioning helicopter engines. The helicopters in question were made by two different manufacturers, and the claims were quite disparate. A number of the cases presented claims by corporate helicopter owners for damages to the helicopters and their businesses due to malfunctioning of the engines. Other cases involved personal injury claims by people injured in helicopter crashes. Still other cases involved claims that the helicopter frames had been improperly designed and that certain helicopters had not been properly maintained. The only link among the cases was that each helicopter had the same make of engine, although different components of that engine were cited as responsible for different incidents. Despite vigorous opposition from many parties, the Panel ordered transfer, reasoning that "although the specific defects alleged in each separate case may not be identical they are all interwoven so as to cover the engine's general condition and airworthiness." [141]

It may be that the Panel's action in Aviation Products was appropriate since the consolidation there was purely pretrial. But if the ALI Project's goal in requiring only minimal commonality is to facilitate consolidation in cases like Aviation Products, [142] the predominance requirement seems an important **[*909]** limitation. [143] In essence, the Project's rejoinder appears to be that the primary protection against improper consolidation in section 3.01 is provided by the other element of its test, which directs that consolidation be ordered only where it "will promote the just, efficient, and fair conduct of the actions." [144] But that prong of section 3.01 also omits an important directive that the Reporters included in Appendix B - that consolidation of the cases be "superior to their separate adjudication." [145]

2. Superiority

The superiority requirement also comes from Rule 23(b)(3) and also appears well-crafted to ensure that consolidation is used only when it is appropriate. Here again, the difference between section3.01 and Appendix B appears to be designed to emphasize the Project's resolve that a more demanding standard be met before consolidation is effected only in

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situations governed by Appendix B. [146] This has resulted in an unnecessary watering down of the standard for consolidation within the federal system. Rule 23(b)(3)'s superiority requirement does not impose undue burdens. Instead, the requirement only directs the court to verify that a class action would be "sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court." [147] The commentary on section 3.01 suggests that section 3.01 is designed to ensure that courts follow the same analysis before approving consolidation, [148] and it may be essential to upgrade the black letter of section3.01 to avoid making the consolidation standard spineless.

As Professor Brunet has cogently noted, there is a pervasive tendency for efficiency to trump competing policies in aggregation decisions, [149] and a spineless consolidation standard **[*910]** enables judges to succumb to that tendency. The experience of the current Multidistrict Litigation Panel provides substantial evidence to support this concern and should give Congress pause when it evaluates section3.01. As originally proposed to Congress by the judiciary, the multidistrict transfer statute did not even call for attention to party interests in the decision whether to transfer, but Congress inserted party interests as a criterion under the Act. [150] Nevertheless, it seems to be generally recognized that party interests have not been given significant weight by the current Panel, [151] and one commentator has accused the Panel of "failure to heed this congressional admonishment." [152]

Whatever the propriety of disregarding party interests when transfer is ostensibly for pretrial purposes only, the practice seems contrary to what the Project says it is doing in creating authority for the new Complex Litigation Panel to consolidate for trial. The factors that govern transfer under section3.01 clearly include party interests, [153] and the Project's commentary takes account of such interests as well. [154] In order **[*911]** to put teeth into the commitment to party interests, a superiority requirement is preferable. Whether a superiority requirement would be sufficient remains debatable. Although the Project does recognize party interests, it also emphasizes in the commentary to section3.01 that "the decision whether to transfer and consolidate remains discretionary," [155] using language virtually identical to the commentary to Appendix B, [156] which does require a finding of superiority. Ultimately some discretion seems inevitable for, as Professor Brunet has noted, both fairness and efficiency are multifaceted concepts. [157] But if Appendix B really is to be as elastic as section3.01, there is reason to suspect that it is not sufficiently strict.

One step toward confining the latitude is, as mentioned above, to require predominance of common questions as a prerequisite to consolidation. Additionally insisting on a finding of superiority, and treating that as a serious requisite, appears a further positive step. In essence the superiority reasoning calls for the court to examine the pros and cons of consolidating the cases or leaving them to proceed separately. Although by no means a straightjacket, the balancing can be considerably more than a meaningless exercise. Consolidation need not be denied merely because the consolidated action would be ungainly or hard to manage, but consolidation must be justified by findings based on an actual comparison between consolidated and individual handling of the litigation. Such a comparison gives effect to the Project's objective that consolidation only occur when it actually is preferable to individual litigation. More precise requirements on the superiority prong are probably undesirable. The Project itself examines a variety of considerations, and there will be instances in which some of these favor consolidation while others do not. In such circumstances, it will be up **[*912]** to the Panel to balance the various factors and decide whether to consolidate.

3. Same transaction

The Project's consolidation standard offers yet another wrinkle in section 5.01, which proposes a new removal jurisdiction that would allow the Panel to combine cases pending in

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state court with cases pending in federal court. Besides invoking the standard of section3.01 and requiring "consideration of whether removal will unduly disrupt or impinge upon state court or regulatory proceedings," section 5.01 removal is available only if the state cases "arise from the same transaction, occurrence, or series of transactions or occurrences" as the cases pending in federal court. [158] It appears that the same transaction provision, which is similar to that in Federal Rule 20(a), was added because there is a jurisdictional aspect to section 5.01. [159] But the operation of the Rule 20 provision tends to devolve into a variant of the commonality principle. [160] Although consolidation based on common question is said to be broader than joinder under Rule 20, [161] and the commentary to the Project strives valiantly to show that the same transaction test is an important addition to section5.01, [162] the Reporters' Notes acknowledge that situations will rarely satisfy the commonality prong but fail to satisfy the same transaction test as well. [163] **[*913]**

4. A reprise on the standard

Despite endorsing full-fledged invocation of both the predominance and superiority standards borrowed from Rule 23(b)(3), this section should end with a recognition of the importance of the Project's contribution to resolving the consolidation conundrum. In an aggressively standardless area, the Project has provided an analytical format that identifies and is sensitive to the competing considerations. In order to ensure that the overall standard in fact constrains consolidation decisions, it would be better to fortify it to equal the one in Appendix B. But any sensible standard will have significant flexibility. The recommended one would be neither self-executing nor scalpel-like.

B. The Panel as Implementor

Besides articulating a standard for consolidation, the Project seeks to regulate its use by assigning primary, or at least initial, authority for the consolidation decision to the Complex Litigation Panel it proposes to establish. [164] This sort of expanded authority to consolidate for trial has been proposed in the past for the current Multidistrict Litigation Panel, [165] and it seems clearly preferable to the alternatives of conferring the authority entirely on the transferor or transferee judge, or leaving it to the parties' preferences. [166] Placing consolidation authority in the Complex Litigation Panel would mark a change from the current arrangement in which transferee judges often exercise such authority under the guise of 28 U.S.C. 1404(a). Reliance on the Panel would foster consistency in handling consolidation and ensure that judges fully familiar with the Project's textured consolidation standard would, at least initially, make the decision whether that standard is satisfied. [167] **[*914]**

Sensible though it is, relying on the Panel to decide consolidation issues is not a cure-all for the difficulties that attend consolidation. To begin with, timing creates a serious problem for the Panel. For good reasons, the Panel's decision whether to consolidate should ordinarily be made as early as possible. [168] But at that time there may be significant uncertainty about critical aspects of the litigation that bear on the wisdom of consolidation, so that the Panel will have to rely on an informed guess. The Project's commentary suggests that the Panel can delegate fact-gathering responsibility to a "special master" if it does not know enough about the cases, [169] but this option would rarely be helpful since it would only delay matters. At least one piece of information that is often important - the law to be applied - will by definition be unavailable to the Panel when its consolidation decision must be made. The Project authorizes the transferee judge to select governing principles of law in some circumstances, [170] but of necessity that decision can only be made after transfer. The choice of law decision could, however, have a significant bearing on whether there are common questions, and whether those predominate. More generally, owing to the need to adjust the nature of consolidation in the face of later developments, or to undo consolidation entirely, the transferee judge has authority to reconsider or revise a consolidation order of the Panel. [171] Hence, although the Panel should be a better arbiter, it cannot be a final arbiter, and

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considerable power must continue to reside in the transferee judge.

In addition, there is room for skepticism about the enthusiasm the Panel will bring to some of the consolidation criteria, particularly those that deal with fairness and litigant interests. As noted above, the current Multidistrict Panel has been notably indifferent to Congress' insistence that litigants' interests be a coequal factor in making transfer decision for pretrial purposes. [172] Perhaps there is something in the implicit mission **[*915]** statement for the Panel that accelerates the tendency Professor Brunet notes to exalt efficiency over litigant interests and other considerations. [173] A Chief Justice may be expected to select judges for such a Panel who support the idea of aggregated treatment, or at least to pass over judges who are distinctly skeptical about it (if any still exist). The dynamics of the Panel itself may tend to reinforce this likely initial preference for aggregation. Hence, although the Panel would have a "national focus and overview" that would put it in an "optimal position to consider the interests of the entire judicial system," [174] it is less clear that the Panel would be "relatively neutral in making the transfer for consolidation decision." [175] To the contrary, although the Panel might be expected to approach the selection of a transferee district neutrally, it would probably have a distinct bent in favor of transfer. A transferee judge may similarly approach the transfer/consolidation question with indifference to party interests. [176]

In sum, the fact that consolidation decisions are initially to be made by the Complex Litigation Panel does not substantially lessen the need to fortify the standard for consolidation, as urged above. Particularly given the experience under the current Multidistrict Litigation Panel, a clear declaration of the prerequisites to transfer is in order.

C. Fragmentation of Cases

The natural tendency of consolidation toward bifurcation, trifurcation, and beyond would be further fueled were the Project's proposals adopted. The Project's black letter suggests that the transferee judge consider "structuring of the litigation by separating the issues into those common questions that should be treated on a consolidated basis and those individual questions that should not." [177] The Project further directs that **[*916]** the transferee judge prepare a plan for the disposition of the litigation that "shall specify whether the entire action or only specified issues shall be determined in the transferee district and also shall provide for the disposition of the issues not to be determined in the transferee court." [178] To implement this trial plan, the judge has "broad discretion" to return "individual issues" to the court from which the case originated or to transfer them to yet another transferee district. [179] When cases are removed from state court pursuant to the Project's new removal jurisdiction, this power to decide which issues will be consolidated for trial could lead to issues in the same case being resolved in different court systems. [180] As we have seen, such fragmented litigation is not cost free. [181] But since bifurcation is more a by-product than the primary goal of the Project, it will not be examined in detail here.

The starting point in assessing the bifurcation issue is to recognize that, despite the rather longstanding debate about the desirability of bifurcation under Rule 42(b), there has been rather little direction on when bifurcation should be employed. [182] The Project does not stop at creating expanded authority to fragment cases, however; it also provides a detailed analysis of the issues bearing on the use of the severance power that is unequalled in any similar source. The commentary identifies and addresses several important problems and supplies guidance on dealing with these issues even for those who disagree with the Project's position on some of the problems. Although the best way to obtain insight into the severance issues addressed is to read the pertinent portions of the Project, a canvass here identifies the matters covered.

First, the Project categorizes and chronicles the types of issues that might usefully be severed according to case type. For example, it identifies four determinations that need to be made in

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"antitrust, securities, products liability and mass disaster litigation," suggesting that general causation and liabili- **[*917]** ty can often be separated from specific causation and damages. [183] It offers similar analyses of copyright, patent and contract litigation [184] and supports consolidation of punitive damages. [185] It also offers guidance on whether the transferee court should retain or transfer individual issues after severing them. [186]

Second, the Project recognizes that severance conflicts with the tradition of a unitary trial and insists that this consequence of severance be considered before the procedure is employed. [187] But it properly goes on to note that the principal problem area for severance is in personal injury litigation and that "issue severance has operated without any real problem or challenge in the securities and antitrust fields." [188] In the same vein, the Project identifies the prodefendant shift in results that seems to attend bifurcation between liability and damages in personal injury cases [189] and recognizes that there is an "important philosophical issue" [190] about whether the breed of jury nullification of liability rules that seems to occur in unitary trials should be fostered. The Reporters' Notes suggest that, at least in complex litigation, there is no alternative to severance despite the nullification effect. [191]

Third, the Project identifies the sterile trial problem and explores the Sixth Circuit's grappling with that problem. [192] It suggests that allowing plaintiffs to introduce some evidence of their injuries during the liability portion of the trial could ameliorate the sterile trial problem, although this strategy will not entirely eliminate the problem. [193] Conceding that the cure is **[*918]** incomplete, the Project nevertheless recommends bifurcation because the advantages are likely to outweigh the disadvantages, and because "judicious use of separate trials is essential to the effective functioning of the jury system." [194] But it cautions that "trifurcation is more questionable than bifurcation." [195]

Fourth, it argues that severance will actually improve the fairness of consolidated proceedings by preserving the plaintiffs' control over litigation of individual issues. [196] Of course, severance does involve the left hand giving back some of what the right hand took away, since consolidation caused the loss of control in the first place. Moreover, this restoration of control may be less significant than the Project suggests unless accompanied by a return of the case to the original court, where the lawyers initially retained by the plaintiffs can more conveniently participate.

Fifth, the Project offers some commonsense tips on employing severance. Thus, it suggests that putting simple issues first may avoid undue expense if more cumbersome issues can thereby be avoided. [197] It also suggests that the "judge may empanel multiple juries to see whether" they reach conflicting outcomes in order to protect against the possibility of an anomalous verdict. [198]

Finally, the Project proposes to create special appellate avenues to provide early review of certain aspects of severed proceedings, recognizing that special treatment should be accorded severance orders. It would authorize the Complex Litigation Panel to review the transferee judge's orders to transfer issues. [199] Although the Panel's authority does not extend to all severance decisions made by the transferee judge, [200] the very existence of review authority recognizes the special impact that **[*919]** severance decisions can have on cases. [201] In addition to Panel review of certain severance orders, the Project would authorize immediate review of liability determinations by an appellate court when the question of liability has been separately adjudicated, even though damages issues remain to be determined. [202]

Perhaps other, more precise guidelines for severance might be proposed. [203] Certainly transferee judges will have significant latitude in shaping cases, and the Project's overall orientation is sympathetic to the use of transferee discretion. But the commentary does catalogue and take seriously the potential drawbacks, as well as offering some particulars such as the comment that trifurcation is more dubious than bifurcation. [204] One idea that might help in the decision to bifurcate, as with the initial decision to consolidate, [205] is

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superiority; the black letter could direct that bifurcation only be used if superior to unitary trial. In a consolidation situation, however, a superiority requirement in the bifurcation analysis would seem to add little to the superiority requisite in the consolidation itself, were that vigorously applied. Neither in Rule 42(b) nor elsewhere in procedural law is there a source for borrowing guidelines on fragmentation as there is in Rule 23(b)(3) for the question of consolidation. [206] Accordingly, despite concern about over-fragmen- **[*920]** tation of cases, this Article does not propose fortifying the Project's provisions on bifurcation as it does urge for the consolidation standard.

D. The Question Before Congress

By assessing the value of consolidation in dealing with complex litigation, this Article illuminates whether Congress should embrace the Project's effort to facilitate consolidation. Although it urges fortifying the standard for consolidation by making that standard more directly parallel to the handling of class actions under Rule 23(b)(3), on balance the Article finds that the Project provides a thorough and balanced examination of the consolidation conundrum. Does that mean that Congress should embrace the Project's central goal of facilitating consolidation?

The answer is uncertain. For one thing, there are a variety of federalism and other objections to the Project's proposals that other scholars have addressed. Beyond that, there is what might be called empirical uncertainty about consolidation itself. This Article has approached the question almost entirely on the doctrinal level. The issues raised by consolidation that were identified in Part III, [207] however, really cannot be quantified in a way susceptible to doctrinal prescription. [208] The Project's approach is to identify the issues and propose consideration of them by the Panel and later by the transferee judge. Judges have an experiential basis for such determinations, but one might conclude that their information base is too limited, or that they are too likely to be seduced into disregarding any counterbalances against consolidation in their quest for efficiency and broad-gauge disposition of litigation. **[*921]**

Under these circumstances, it may not be enough to point out that the Project's effort to overcome the obstacles to consolidation "hardly reflects focused consideration of the desirable scope of possible consolidation." [209] Even arbitrary limits can look attractive when they confine a disquieting, unknown force. The Project has not dispelled all misgivings about aggressive use of consolidation and severance of issues. Indeed, to a substantial extent the Project seems tempted to fall back on the argument not that consolidation is desirable, but that it is the only stopgap available to prevent chaos. [210] That is hardly a positive argument for consolidation and may be insufficient to carry the day for the Project's aggressive reforms designed to make consolidation more readily available.

V. The Role of the Project's Consolidation Provisions, Assuming Congress Does Not Act

The ALI has not had great success in the past in prodding Congress into action. Its 1969 Study of the Division of Jurisdiction Between State and Federal Courts proposed a number of statutory changes, but none were enacted until the Federal Courts Study Committee recommended some of them in 1990. [211] Assuming that Congress responds to the Project as it did to the Study, one would not expect to see the jurisdictional and other innovations recommended by the Project enacted in the near future. These striking ideas about jurisdiction and choice of law will (as did the 1969 Study) serve principally as fodder for law school classes. Some, therefore, criticize the Project because it is directed only at Congress. [212]

Relegation to law school curriculum need not be the fate of the Project's analysis of consolidation, however. Without any **[*922]** further action by Congress, as we have seen, [213] transfer and consolidation decisions are repeatedly and increasingly made, and related severance orders are often entered. That is the reason why the Federal Courts Study

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Committee also recommended in 1990 that guidelines for consolidation and bifurcation be promulgated. [214] Perhaps the Project can be used as a source of the kind of guidance for judges that the Committee desired.

The ALI's work product has proved much more influential with judges than with Congress. Its restatements have proved enormously successful in influencing the law, [215] sometimes too much so in the view of some critics. [216] The restatements have become almost an art form that can serve as a vehicle for all purposes. [217] Like the restatements, the Project may influence judges confronting consolidation decisions even though its jurisdictional and choice of law proposals have not been enacted. [218] One important influence would be on the members of the current Multidistrict Litigation Panel; in making their transfer decisions under the current statute they could find much of use in the Project's discussion of transfer and consolidation. Similarly, transferee judges could find in the Project exactly the sort of blueprint for handling consolidation and severance decisions that the Federal Courts Study Committee urged. Outside the transfer context altogether, the growing importance of con- **[*923]** solidation and severance of issues provides a ready market for the learning offered by the Project. Unlike the 1969 study of federal jurisdiction, then, the Project may become a vital part of the litigation scene.

Given this prospect, the diversity of consolidation standards contained in the Project is particularly unfortunate. For one thing, the existence of three standards is simply confusing. [219] More significant, however, is the fact that the Project principally relies on a watered-down shadow of Rule 23(b)(3)'s requirements. At least one may hope that judges will, as recommended in this Article, actually embrace the more vigorous requirements of Appendix B when confronted with the question whether to consolidate cases for purposes of adjudication.

VI. Conclusion

Complex litigation sometimes does seem to resemble Wonderland, but consolidation pursuant to Federal Rule 42 presents many more challenges than Wonderland's Rule 42. This Article has tried to demonstrate that the ALI Complex Litigation Project contains important insights on the proper use of consolidation while also criticizing the Project's unwillingness to tighten up the test for consolidation. Given the limited probability that Congress will soon undertake the reforms the Project proposes to foster consolidation, we may hope that the ALI's work in directly confronting the consolidation conundrum will nevertheless serve to improve and focus the judiciary's use of consolidation in the future.

To best fulfill that objective, however, the judiciary should embrace the more forceful provisions of Appendix B rather than the open-textured directives of section3.01. Whether judges might do so is, at best, uncertain. Not only does adherence to Appendix B exalt the commentary over the black letter, it also cuts against the judicial tendency to maximize the courts' discretion. This temptation to expand discretion may even lead to relaxation of the provisions of Rule 23, from which this Article has borrowed to fortify the Project's proposals. The Advisory Committee on the Civil Rules has for several years been considering changes in the class action rule that would make it more open-textured. [220] If the committee's class action initiatives her- **[*924]** ald a general trend to relax constraints on aggregation, the prognosis for the Project as a device for confining and focusing the use of consolidation is poor indeed. We may hope that another course will prevail with regard to both class actions and consolidation.

FOOTNOTES:

n1. Lewis Carroll, Alice in Wonderland 132 (1986).

n2. "Due largely to caseload pressures, the federal courts are consolidating increasing

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numbers of cases...." Joan Steinman, The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be, Part I: Justiciability and Jurisdiction (Original and Appellate), 42 UCLA L. Rev. 717, 718 (1995). Unfortunately, exact figures are not available. "The Administrative Office of the United States Courts has not gathered statistics on the number of cases consolidated pursuant to [Rule 42]." Id. at 718 n.1.

n3. See American Law Institute, Complex Litigation: Statutory Recommendations and Analysis 24-26 (1994) [hereinafter Complex Litigation Proposal].

n4. See id. at 26-27.

n5. See id. at 27-34.

n6. See id. at 34-35.

n7. See id. at 35-36.

n8. Linda S. Mullinex, Unfinished Symphony: The Complex Litigation Project Rests, 54 La. L. Rev. 977, 979 (1994).

n9. Gene R. Shreve, Reform Aspirations of the Complex Litigation Project, 54 La. L. Rev. 1139, 1143-44 (1994).

n10. See H.R. 3406, 101st Cong., 1st Sess. (1989); H.R. 4807, 100th Cong., 2d Sess. (1988); H.R. 3152, 100th Cong., 1st Sess. (1987); H.R. 4315, 99th Cong., 2d Sess. (1986); H.R. 3690, 98th Cong., 1st Sess. (1983). H.R. 3406 passed the House of Representatives without opposition, but the Senate did not act on it. For a review of the legislative process of these proposals, including analysis of the fate of H.R. 3406 and attention to the role of academic commentary, see Charles G. Geyh, Complex-Litigation Reform and the Legislative Process, 10 Rev. Litig. 401 (1991).

n11. Consolidation pursuant to Rule 42 can be solely for pretrial purposes and, pursuant to 28 U.S.C. 1407 (1988), transfer and consolidation are supposed to be limited to such purposes. The reality, however, is that consolidation that is initially designated "pretrial" is often never unscrambled because there is a global settlement, because the consolidated cases are resolved by pretrial motion, or because the cases are later formally consolidated for trial. For a thorough exploration of these realities and their ramifications, see Steinman, supra note 2.

Whatever the present reality, it is evident that the thrust of the ALI Project is to facilitate consolidation for disposition of the actions, whether by settlement, pretrial ruling, or trial. A by-product of this effort may be severance of cases into constituent parts, such as liability and damages, and resolution of only some issues on a consolidated basis. See infra text accompanying notes 68-83, 177-206. But that does not change the basic thrust toward consolidated resolution. Some are quite overt about this objective:

As somebody who has been involved in these mass torts over the last twelve years on a regular basis, I want to make an additional point. What is the single most important feature of these mass torts in terms of getting them resolved? What ultimate issue holds the key to the resolution of these claims in an efficient way? The answer is aggregation. Aggregation. You must get all of the cases in one forum. Until you do that, any piecemeal solution, however beneficial it may be, does not offer either the plaintiff or the defendant global peace.

Kenneth R. Feinberg, Response to Deborah Hensler, A Glass Half Full, a Glass Half Empty:

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The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation, 73 Tex. L. Rev. 1647, 1648 (1995).

Consolidation for trial or other resolution is therefore the focus of this Article. Accordingly, the cautions about consolidation in this Article may not apply to coordinating discovery to avoid duplication of effort.

n12. See Steinman, supra note 2, at 720 & n.10; see also Joan Steinman, The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be, Part II: Non-Jurisdictional Matters, 42 UCLA L. Rev. 967 (1995).

n13. See Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 292 (1892) (explaining that Lord Mansfield introduced the consolidation rule to "avoid the expense and delay attending the trial of a multiplicity of actions upon the same question").

n14. Act of July 22, 1813 3, 3 Stat. ch. 14. The statute provided in pertinent part:

Whenever causes of like nature, or relative to the same question shall be pending before a court of the United States or of the territories thereof, it shall be lawful for the court to make such orders and rules concerning proceedings therein as may be conformable to the principles and usages belonging to courts for avoiding unnecessary costs or delay in the administration of justice, and accordingly causes may be consolidated as to the court shall appear reasonable.

This statute, and its successors, remained on the books until 1948, although effectively superseded by Rule 42 in 1938. See Gregory R. Harris, Note, Consolidation and Transfer in the Federal Courts: 28 U.S.C. Section 1407 Viewed in Light of Rule 42(a) and Section 1404 (a), 22 Hastings L.J. 1289, 1290 n.6 (1971).

n15. Daniel J. Meador, Inherent Judicial Authority in the Conduct of Civil Litigation, 73 Tex. L. Rev. 1805, 1807 (1995).

n16. See generally Robert Bone, Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules, 89 Colum. L. Rev. 1 (1989) (cautioning against the assumption that 19th century proceduralists embraced the same attitude toward joinder as the Federal Rules of Civil Procedure).

n17. 145 U.S. 285 (1892).

n18. Hillmon probably appears as a principal case in every American evidence casebook. When the Federal Rules of Evidence were adopted in 1974, it was so widely recognized that the Advisory Committee Notes to Rule 803(3) satisfied themselves with the comment that "the rule of Mutual Life Ins. Co. v. Hillmon allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed." Fed. R. Evid. 803(3) advisory committee's note.

n19. Hillmon, 145 U.S. at 285-86.

n20. Id. at 286.

n21. Id. at 289-92. The Court went on to reverse the judgment for plaintiff due to the trial judge's limitation on defendant's peremptory challenges, and then volunteered its answer to the evidence question that has transfixed evidence scholars by holding that the insurance companies should be allowed to offer letters written by another man in support of their claim that the dead body that had been found was really his. The letters indicated that their author

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"Rule Forty-two. All persons more than a mile high to leave the court."

"I'm not a mile high," said Alice.

"You are," said the King.

"Nearly two miles high," added the Queen.

"Well, I shan't go, at any rate," said Alice; "besides, that's not a regular rule; you've invented it just now."

"It's the oldest rule in the book," said the King.

"Then it ought to be Number One," said Alice. [1]

Perhaps Rule 42 of the Federal Rules of Civil Procedure - dealing with consolidation of cases and severance of issues for trial - should be number one. At least it has become considerably more important in recent years as courts have increasingly sought to use the power to consolidate and sever to design cures for the stresses of modern multiple litigation. [2] There can be no doubt that the American Law Institute's Complex Litigation Project has thrust consolidation **[*880]** center stage. Although it canvassed a variety of procedural devices for dealing with the challenges of complex litigation, including party joinder under Rules 19 and 20, [3] intervention pursuant to Rule 24, [4] class actions, [5] interpleader, [6] and bankruptcy, [7] the Project's principal thrust was to remove obstacles to consolidation.

For the ALI Project, consolidation is Rule 1, although it is hard to predict the impact of the Project's proposals on the law. The Project has already been criticized by academics for trying to do too much and for failing to do enough. One professor has lambasted it because it "fails to deal in a holistic fashion with the interrelated consequences of complex cases," thus leaving too much undone. [8] Another reacts that the framers of the Project sought to "use the occasion of complex litigation reform to overhaul as much of the law of American civil procedure as possible," and describes a number of the Project's proposals as "sweeping" and "radical." [9]

Under these circumstances, the prospects for quick adoption by Congress of the Project's statutory proposals appear small. Indeed, much less ambitious statutory initiatives have been introduced in Congress, but have not been adopted. [10] Logically, if not politically, a central concern for Congress should be the Project's treatment of consolidation; unless consolidation is suited to the task of harnessing complex litigation, there would seem to be little reason to embrace other procedural reforms - be they aggressive or incomplete - to increase opportunities for consolidation. **[*881]**

This Article therefore focuses on consolidation itself, emphasizing the use of consolidation for combined disposition, which is a principal objective of the Project. [11] The Article builds on Professor Steinman's recent and very substantial work on the implications of consolidation and examines the standards and methods for deciding whether cases should be consolidated, a topic which she did not address. [12] As Professor Steinman's work has revealed, consolidation presents a conundrum which surfaces in a number of jurisdictional and jurisdiction-related procedural puzzles. Whether consolidation should be employed in complex litigation seems the central question, but it has been little examined in the literature. The Complex Litigation Project provides a careful examination of the propriety and methods of consolidation. Evaluating the adequacy of this treatment thus provides the means through which this Article **[*882]** will address the question whether consolidation should be used in complex litigation.

To put the question in context, the Article begins in Part II with a review of the evolution of consolidation, stressing its increasing importance. Part III identifies the sometimes troubling

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intended to accompany plaintiff's alleged decedent on the trip that allegedly led to his death. Plaintiff had objected to introduction of these letters on hearsay grounds, but the Court held that they could nevertheless be admitted to prove that the author acted as the letters said he intended to act. Id. at 295-300.

n22. Johnson v. Manhattan Ry., 289 U.S. 479, 496 (1933). In Johnson, the Court said that the consolidation of cases does not "merge the suits into a single cause." Id. at 496-97; see also Steinman, supra notes 2 and 12 (discussing these issues in more detail). The statement caused much uncertainty that remains unresolved.

In reality, the situation in Johnson was so peculiar that it does not seem to justify generalization. The problem in Johnson seems to have developed from a disagreement between Judge Martin Manton of the Second Circuit and the judges of the Southern District of New York about which trust company to appoint in receivership situations. Relying on a statute that allowed the senior circuit judge to assign a judge to serve on a district court, Judge Manton assigned himself to sit on the district court, had an action involving the Manhattan Railway Co. filed before him, and promptly appointed a trustee. Johnson later filed a second action, which was assigned to a district judge in the normal course. The district judge appointed a different trustee and invalidated Judge Manton's order of appointment, declaring that he was consolidating the two cases. The Supreme Court held the district judge's order invalid because the district judge did not acquire authority over Judge Manton's case by declaring it consolidated with the case the judge was presiding over. The basic difficulty was thus a problem of case assignment, not consolidation; had Judge Manton's case been assigned to the district judge he could have revoked the earlier order whether or not the two cases were consolidated.

n23. See Fed. R. Civ. P. 42 advisory committee's notes (stating that the rule's provisions are comparable to those adopted in Arkansas, California, New Mexico, and New York).

n24. "It would be a mistake to assume that the standard for consolidation is the same as that governing the original joinder of parties or claims." 9 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure 2382, at 432 (2d ed. 1994).

n25. For example, in Clark v. Elgin, 25 F.R.D. 248 (N.D. Ohio 1960), four suits arising from a single auto accident were consolidated, but the court declined to combine them with a fifth arising out of the same accident because it involved an issue of contributory negligence. Under Rule 20, joinder of these claims in a single suit would of course have been permissible since all arose out of the same occurrence.

n26. See Proceedings of the Seminar on Protracted Cases for United States Circuit and District Judges Held at N.Y.U. Law Center, Aug. 26-30, 1957, 21 F.R.D. 395; Proceedings on the Seminar on Protracted Cases for United States Judges Held at Stan. L. Sch., Aug. 25-30, 1958, 23 F.R.D. 319.

n27. 28 U.S.C. 1407(a).

n28. John F. Cooney, Comment, The Experience of Transferee Courts Under the Multidistrict Litigation Act, 39 U. Chi. L. Rev. 588, 589 (1972) ("Transfer for the limited purpose of pretrial proceedings has become functionally equivalent to transfer for all purposes, including trial on substantive legal issues."). This does not mean that transfer for pretrial purposes could not have such effects absent a later follow-up transfer under 1404(a). Section 1407 only requires re-transfer for trial, and most cases (including those transferred pursuant to 1407) don't reach trial. Thus, many cases would be concluded by settlement or dispositive pretrial motions after a 1407 transfer even without the subsequent 1404(a) transfer.

n29. Comment, Consolidation in Mass Tort Litigation, 30 U. Chi. L. Rev. 373 (1963).

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n30. See Samuel Issacharoff, Administering Damage Awards in Mass-Tort Litigation, 10 Rev. Litig. 463, 493 (1991) (referring to "the mass-tort litigation that has placed the courts under siege").

n31. See generally Richard L. Marcus, They Can't Do That, Can They? Tort Reform Via Rule 23, 80 Cornell L. Rev. 858 (1995).

n32. Mining the interaction between class actions and consolidations, courts can use consolidation to capture the claims of class members who opt out of Rule 23(b)(3) class actions. See, e.g., In re Corrugated Container Antitrust Litigation, 659 F.2d 1341, 1349 (5th Cir. 1981) ("The district judge ... was, and perhaps still is, contemplating consolidation of all the opt-out cases for trial...."); Lailhengue v. Mobil Oil Corp., 775 F. Supp. 908, 914 n.8 (E.D. La. 1991) ("Any opt-out plaintiffs would be consolidated with the class under Federal Rule of Civil Procedure Rule 42(a) for trial on punitive damages."); Eastern Brewing Corp. v. Owens-Illinois, Inc., 1989 WL 158752 (N.D. Ill. 1989) (class action and four similar actions brought by opt-out plaintiffs consolidated); Manual for Complex Litigation, Second, 21.631 (1985) ("Class actions may be consolidated with cases instituted by opt-outs or others.") [hereinafter Manual, Second]; William W Schwarzer, Managing Antitrust and Other Complex Litigation 183 (1982) ("Individual actions ancillary to the class action should be managed so as to minimize duplication of activity. Consolidating them with the main action for pretrial and trial reduces such duplication of effort.").

The Manual for Complex Litigation, Third, continues to recognize the power to consolidate the cases of opt-out plaintiffs, but cautions:

Care should be taken in such situations to ensure that counsel for the parties in the nonclass actions are given a fair opportunity to participate in the presentation of evidence and arguments at trial, particularly when their clients are particularly affected.

Manual for Complex Litigation, Third, 21.631 (1995) [hereinafter Manual, Third].

n33. Linda S. Mullenix, Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation, 32 Wm. & Mary L. Rev. 475, 504 (1991); see also id. at 489 (reporting that earlier Judge Parker had "believed he had reached the maximum consolidation feasible" with consolidated trials of 30 plaintiffs).

n34. In re Asbestos Prod. Liab. Litig. (No. VI), 771 F. Supp. 415, 418 (J.P.M.L. 1991). The Panel had previously refused to transfer asbestos cases on the ground that they did not present common questions. In re Asbestos & Asbestos Insulation Material Prod. Liab. Litig., 431 F. Supp. 906 (J.P.M.L. 1977). In 1991, it explained that developments since 1977 promoted the difference in outcome: "We are persuaded that this litigation has reached a magnitude, not contemplated in the record before us in 1977, that threatens the administration of justice...." 771 F. Supp. at 418. Recognizing the potential drawbacks of consolidation, however, it assured claimants that the transfer would not "result in their actions entering some black hole, never to be seen again." Id. at 423 n.10.

n35. Judith Resnik, From "Cases" to "Litigation", 54 Law & Contemp. Probs., Summer 1991, at 5, 22; see also Charles Silver, Comparing Class Actions and Consolidations, 10 Rev. Litig. 495 (1991).

n36. As Professor Steinman explains:

Even persons who are well educated in the law and have years of experience are largely

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oblivious to the effects of consolidation upon the procedural rights of litigants. The general belief seems to be that consolidation does not affect litigants' procedural rights. Invariably, when I told friends - law professors, practitioners, magistrate judges - what I was writing about, their response was, "Can you give me an example?"

Steinman, supra note 2, at 721 n.11.

n37. In re Brooklyn Navy Yard Asbestos Litig., 971 F.2d 831, 853 (2d Cir. 1992) (citations omitted).

n38. Malcolm v. National Gypsum Co., 995 F.2d 346, 348 (2d Cir. 1993).

n39. Id. at 350.

n40. Id. at 349, 353 (citing In re Brooklyn Navy Yard Asbestos Litig., 971 F.2d 831 (2d Cir. 1992), quoted in text accompanying note 37 supra). In Malcolm, the Second Circuit said Brooklyn Navy Yard was different due to the similarity of experience of those workers because the employer there was the military, and "uniformity is a way of life with the military." Malcolm, 995 F.2d at 353.

n41. Malcolm, 995 F.2d at 354-55 (Walker, J., dissenting).

The Second Circuit is not oblivious to those concerns. Thus, in Consorti v. Armstrong World Indus., Inc., 64 F.3d 781, 785 (2d Cir. 1995), it emphasized that "consolidation is a valuable and important tool of judicial administration," and that "without consolidation the courts are simply incapable of handling of such volume" as the 200,000 asbestosis cases filed in state and federal courts. The district judge there had consolidated four separate asbestosis claims for trial, and defendant appealed from the verdict in favor of one plaintiff on the ground that Malcom announced a "strong anti-consolidation bias." Citing the ALI Project, id. at 786, the court affirmed. It explained the outcome in Malcom as due to "factors unique to that case." Id. at 785. In particular, it turned out at trial in Malcom that the district court was wrong in believing that all plaintiffs had spent most of their work history at power plant work sites, and there were also serious problems caused by the addition on the eve of trial of over 200 companies as third-party defendants. Id. at 786-87. Because the district judge in the case before it took pains to distinguish the various consolidated cases for the benefit of the jury, the court concluded that the combination might have improved the quality of the decision in the case. Id.

n42. In re Repetitive Stress Injury Litig., 11 F.3d 368 (2d Cir. 1993).

n43. Id. at 371, 373-74.

n44. In re Repetitive Stress Injury Prod. Liab. Litig., 1992 WL 403023 (J.P.M.L. 1992).

n45. Repetitive Stress Injury, 11 F.3d at 373 (alteration in original).

n46. For a similar examination, see William W Schwarzer et al., Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts, 73 Tex. L. Rev. 1529, 1546-50 (1995).

n47. 5 James W. Moore, Moore's Federal Practice P42.02[5], at 42-36-37 to 42-37 (2d ed. 1995).

n48. Id. at 42-37, citing Farber v. Riker-Maxson Corp., 442 F.2d 457 (2d Cir. 1971) (refusing to consider a motion for summary judgment filed by nonlead counsel).

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n49. Manning v. Mercantile Trust Co., 57 N.Y.S. 467, 468 (1899).

n50. Thus, an experienced antitrust lawyer summarized the situation on the defense side of antitrust class actions as follows:

> Even where the court does not formally appoint liaison counsel or lead counsel, everything in an antitrust class action is handled by committee anyway. Those of you who have participated in meetings of counsel in such cases know that your experience in the courtroom does you precious little good; what you would need, ideally, is experience in a state legislature. In fact, it is often the best trial lawyers who have the hardest time adapting to what have become the accepted procedures for handling antitrust class actions. A good trial lawyer's tenacious pursuit of his own theory of the case and his unwillingness to compromise his client's interest in the slightest respect for the good of the majority are almost immediately taken as signs of pigheadedness on the part of his fellow counsel. The result is that he is quickly ostracized from the decision-making inner circle of lawyers on his side of the case, thereby further diminishing his ability to influence the course of the proceedings.

Dando Cellini, An Overview of Antitrust Class Actions, 49 Antitrust L.J. 1501, 1505 (1980).

n51. The Manual for Complex Litigation, Third includes a sample order designating lead counsel to determine the position of the plaintiffs on all matters arising in the cases, to coordinate the discovery, to conduct settlement negotiations, and to delegate responsibilities to other lawyers whom lead counsel is to "monitor." Manual, Third, supra note 32, 41.31. The Manual, Second, further urged that counsel seek accord, but added that if consensus could not be achieved, "and if a single position need not be taken by all members of the group, members may proceed on that matter individually or by sub-groups." Manual, Second, supra note 32, 20.222 (emphasis added). The Manual, Third, softens this provision, saying that if consensus is not achieved "members of the group may have to proceed on the matter individually or by subgroups." Manual, Third, supra note 32, 20.222.

n52. See Vincent v. Hughes Air West, Inc., 557 F.2d 759 (9th Cir. 1977); see also supra note 48.

n53. See, e.g., Katz v. Realty Equities Corp., 521 F.2d 1354, 1361 (2d Cir. 1975) (noting that defendants who were "actors on the periphery" found themselves potentially facing expanded claims under consolidated complaint); Waldman v. Electrospace Corp., 68 F.R.D. 281, 284 n.4 (S.D.N.Y. 1975) (finding that plaintiffs are more likely to add defendants in consolidated complaint); see also Diana E. Murphy, Unified and Consolidated Complaints in Multidistrict Litigation, 132 F.R.D. 597, 598 (1991) ("Despite the procedural label, a decision regarding the use of a unified or consolidated complaint may well have implications for other aspects of the case, such as class certification and choice of law questions.").

n54. As Judge Murphy noted in her article on consolidated complaints:

> Plaintiffs traditionally seek to maintain the maximum degree of control over their cases, and multidistrict cases produce more than the usual amount of tension among counsel regarding case management issues.... [A] court order requiring the filing of a unified complaint, even one limited to pretrial proceedings, may be viewed by counsel as an intrusion on their right to conduct their case as they see fit.

Murphy, supra note 53, at 601-02. See also Steinman, supra note 12, at 973-76.

n55. See In re Storage Tech. Corp. Sec. Litig., 630 F. Supp. 1072, 1074 (D. Colo. 1986).

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n56. See In re Wirebound Boxes Antitrust Litig., 128 F.R.D. 262, 264-65 (D. Minn. 1989) (including additional defendants in consolidated complaint over objection of some plaintiffs). But cf. Garber v. Randell, 477 F.2d 711, 716 (2d Cir. 1973) (holding that consolidated complaint including law firm as a defendant is inappropriate because all plaintiffs but one disavowed claim against law firm and that one plaintiff appeared to lack standing to sue firm).

n57. In Katz v. Realty Equities Corp., 521 F.2d 1354 (2d Cir. 1975), the district judge said that the use of a consolidated complaint during pretrial "could be without prejudice to unfurling the separate flags at trial." Id. at 1358.

n58. See, e.g., Roger H. Trangsrud, Joinder Alternatives in Mass Tort Litigation, 70 Cornell L. Rev. 779, 816-24 (1985); Joan Steinman, Reverse Removal, 78 Iowa L. Rev. 1029, 1042 (1993) ("After consolidation, the procedural safeguards that due process and codified rules demand in class actions of similar magnitude often do not counterbalance the litigant's loss of control."); cf. Silver, supra note 35, at 497-98 (arguing that consolidations are unlike class actions because they are not representational actions, and "parties and lawyers who stand at the head of a consolidation lead not as a dictator leads a people, but as an explorer leads a group of settlers into a new land - by going first").

n59. See Roger H. Trangsrud, Mass Trials in Mass Tort Cases: A Dissent, 1989 U. Ill. L. Rev. 69, 70-76.

n60. See Deborah R. Hensler, Resolving Mass Toxic Torts: Myths and Realities, 1989 U. Ill. L. Rev. 89.

n61. Cf. Spencer Williams, Mass Tort Class Actions: Going, Going, Gone? 98 F.R.D. 323, 329-30 (1983) (criticizing plaintiff lawyers' opposition to class certification in mass tort cases as self-interested).

n62. See Hensler, supra note 60, at 104 ("Faced with the realities of modern mass tort litigation, courts - and legal scholars - should be open to the possibility that expanding the use of formal aggregative procedures may provide more litigant control over the litigation process, more opportunity for litigant participation in the process, and a better match between victims' losses and compensation in those cases."); see also E. Allan Lind et al., The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration and Judicial Settlement Conferences 79-80 (1989) (reporting that litigants surveyed preferred arbitration to court-promoted settlements because they felt more involved in the former).

n63. "Courts' attempts to manage mass torts efficiently often further increase the commonality among mass tort claims." Deborah R. Hensler & Mark A. Peterson, Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis, 59 Brook. L. Rev. 961, 967 (1993).

n64. See generally David F. Herr, Multidistrict Litigation 9.7.3 at 204-07 (1986) (focusing on common discovery with special provision for individual issues). This orientation lies behind the effort to separate the common issues for initial decision that the Project seeks to promote. See Complex Litigation Proposal, supra note 3, 112-16.

n65. See, e.g., Windham v. American Brands, Inc., 565 F.2d 59, 65-72 (4th Cir. 1977), cert. denied, 435 U.S. 968 (1978) (holding that need for individualized proof of impact and damages doomed antitrust class action).

n66. See, e.g., Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976) (employing fraud on the market theory in a securities fraud class action to obviate individualized proof of reliance). Related but more difficult issues arise when state-law claims

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are within the supplemental jurisdiction of the court, and the court seeks to blend the provisions of the law of several states, or to focus on the law of a single state, to facilitate aggregated resolution of cases using a class action or other procedural devices. For discussion of these problems, see Complex Litigation Proposal, supra note 3, at 347-49.

n67. See Hensler, supra note 60, at 100-03. To a substantial extent this batching may result from the practices of plaintiffs' counsel. At least in asbestos personal injury litigation, some plaintiff lawyers carry large "portfolios" of litigation and some seek what are called "inventory settlements" applying to large numbers of clients. See, e.g., Georgine v. Amchen Prod., Inc., 157 F.R.D. 246, 294 (E.D. Pa. 1994). More generally, in mass tort litigation there have emerged two categories of attorneys known as the "wholesalers" and the "retailers," indentified by their preference for either individual litigation or group resolution of claims. See Richard Sobol, Bending the Law: The Story of the Dalkon Shield Bankruptcy 73 (1991) (describing emergence of two groups of plaintiff lawyers representing women claiming injury due to Dalkon Shield).

n68. 9 Wright & Miller, supra note 24, 2381, at 427.

n69. Louis Harris & Assoc., Inc., Judges' Opinions on Procedural Issues 58-65 (1987) (study No. 87017).

n70. E.g., Symbolic Control, Inc. v. International Business Mach. Corp., 643 F.2d 1339 (9th Cir. 1980) (reversing the judgment for the defendant in an antitrust case because the district court, as a result of its bifurcation order, improperly truncated the causation inquiry).

n71. In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1302 (7th Cir. 1995).

n72. For a more detailed examination of the arguments related to issue separation, see James A. Henderson et al., Optimal Issue Separation in Modern Products Liability Litigation, 73 Tex. L. Rev. 1653, 1675-94 (1995).

n73. 857 F.2d 290 (6th Cir. 1988).

n74. The plaintiffs had consented to be bound by Ohio law, thus eliminating the possibility that different legal rules would preclude presentation of a single, common issue.

n75. In re Bendectin Litig., 857 F.2d at 315.

n76. Id. (quoting In re Beverly Hills Fire Litig., 695 F.2d 207, 217 (6th Cir. 1982)).

n77. Id. at 316 (quoting 9 Charles A. Wright et al., Federal Practice & Procedure 2387, at 278 (1st ed. 1971)).

n78. Id.

n79. Id. at 328 (Jones, J., concurring in part and dissenting in part). Judge Jones explained his concerns with the district judge's order regarding the manner of trial as follows:

Although each distinct event involved the ingesting of the same drug, it is hard to believe that all eight hundred plus claims can be tied neatly into one package and satisfactorily resolved by the answering of one question, i.e., did Bendectin cause the relevant birth defects? In tying all of these claims together, an argument could certainly be made as to prejudice. That is, by not allowing the plaintiffs to present evidence as to how they were individually affected by the drug, [the court's order] could have resulted in prejudice to them in their attempt to establish the required elements of their case.

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Id. at 327.

n80. Id. On the factual basis for the claims, see Joseph Sanders, The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts, 43 Hastings L.J. 301, 347 (1992) ("The scientific community seems to have reached something close to a consensus concerning the drug. While no study can remove all residual uncertainty regarding Bendectin's safety, if the drug is a teratogen, it is a relatively mild one....").

n81. See Kenneth S. Bordens & Irwin A. Horowitz, Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions, 73 Judicature 22 (1989).

Unitary trial juries do tend to ... utilize all the trial evidence while deciding each individual trial issue. Indeed, the initial analysis of the deliberations indicates that unitary trial juries often do not decide liability or causation until they hear evidence concerning damages.

Juries in separated trials appear to employ other, perhaps less sophisticated, heuristics to decide the issues. These latter juries tend to use more extreme heuristics: corporate-capitalist versus the little guy; good guy versus bad guy rhetoric dominates these deliberations. The bifurcation of general causation in the separated trial condition produces greater disbelief about causation yielding fewer verdicts for the plaintiffs. It may be that only more extreme pro-plaintiff juries who appeal to the good guy-bad guy [sic] rhetoric remain in the separated trial condition to vote for the plaintiffs.

Id. at 27.

n82. Maurice Rosenberg, Court Congestion: Status, Causes and Proposed Remedies, in Harry W. Jones, The Courts, the Public, and the Law Explosion 48 (1965).

n83. 9 Wright & Miller, supra note 24, 2390, at 508.

n84. Other procedural devices may produce similar overload problems. See Edward J. Brunet, A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria, 12 Ga. L. Rev. 701, 710-20 (1978) (exploring ways in which increased intervention may lower the quality of judicial action by overloading the courts).

n85. Zechariah Chafee, Jr., Bills of Peace With Multiple Parties, 45 Harv. L. Rev. 1297, 1297 (1932).

n86. Harris, supra note 14, at 1292 ("The criteria for granting consolidation set forth in rule 42(a) have been the subject of little controversy."); Gaylord A. Virden, Consolidation Under Rule 42 of the Federal Rules of Civil Procedure: The U.S. Courts of Appeals Disagree on Whether Consolidation Merges the Separate Cases and Whether the Cases Remain Separately Final for Purposes of Appeal, 141 F.R.D. 169, 169 (1991) ("The law in this area is now largely settled.").

n87. See, e.g., 18 Francis A. Darnieder, Hughes Federal Practice 255 (1940) ("It is evident that the court must be given extensive discretionary powers in order to expedite a determination of the issues and avoid delay and inconvenience."); Alexander Holtzoff, New Federal Procedure and the Courts 116 (1940) ("In the interest of expediting and simplifying trials, the court is given broad authority, on the one hand, to consolidate cases for trial and, on the other hand, to order separation of different issues in the same case."); W.S. Simkins, Federal Practice 70 (Alfred Schweppe ed. 1934) (Consolidation "is entirely within the

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discretionary power of the court.").

n88. See Memorandum from Richard L. Marcus to Workload Subcommittee, Federal Courts Study Committee re guidelines for consolidation and severance procedures (Oct. 16, 1989) in 1 Federal Courts Study Committee, Working Papers and Subcommittee Reports (1990) [hereinafter Marcus Memorandum]. This memorandum raises several of the concerns mentioned in the text.

n89. Report of the Federal Courts Study Committee 45 (April 2, 1990).

n90. The Manual, Third, supra note 32, 21.631, provides some general guidelines regarding consolidation, but it does not come close to the Project in its attention to the subject.

n91. It should be noted that the then-current draft of the Complex Litigation Proposal was brought to the attention of the Federal Courts Study Committee in connection with its recommendation. See Marcus Memorandum, supra note 88, at 10-12.

n92. Comment, supra note 29, at 381, states:

It is neither possible nor desirable for courts to treat motions under 42(a) with the cold logic Alice displayed in dealing with Rule Forty-Two in Wonderland. What is required is a constant sensitivity to the equities of individual cases in conjunction with the experience courts have gained in handling juries and in administrating the cases on their dockets.

Id.

n93. See Herr, supra note 64, 5.1, at 71 (stating 1407 criteria are merely thresholds, and the statute "is of limited value in determining whether transfer is appropriate in a particular case").

n94. Complex Litigation Proposal, supra note 3, 3.02, at 62-70.

n95. See, e.g., H.R. 3406, 101st Cong., 1st Sess. (1991).

n96. Complex Litigation Proposal, supra note 3, 5.01-5.03, at 220-62.

n97. Id. 6.01-6.08, at 321-436. These sections have drawn the most fire from academic commentators. See, e.g., Linda S. Mullenix, Federalizing Choice of Law for Mass-Tort Litigation, 70 Tex. L. Rev. 1623 (1992).

n98. Complex Litigation Proposal, supra note 3, 5.04 at 263-75.

n99. Id. 5.05, at 275-303.

n100. Id. 4.01, at 177-201.

n101. Id. 4.02, at 201-16, app. B.

n102. Steinman, supra note 58, at 1038-39 (footnote omitted).

n103. In 1991, the Commissioners on Uniform State Laws endorsed a Uniform Transfer of Litigation Act, but it has yet to be used. For discussion of that proposal, see Edward H. Cooper, Interstate Consolidation: A Comparison of the ALI Project With the Uniform Transfer of Litigation Act, 54 La. L. Rev. 897 (1994).

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n104. Richard Epstein, The Consolidation of Complex Litigation: A Critical Evaluation, 10 J.L. & Com. 1, 61-62 (1990).

n105. "Jurisdictional and transfer proposals to facilitate consolidation, then, can proceed from a relatively agnostic position about how worthy consolidated treatment is in various situations...." Thomas D. Rowe, Jr., Jurisdiction and Transfer Proposals for Complex Litigation, 10 Rev. Litig. 325, 326-27 (1991).

n106. Before it embarked on the actual Project, the ALI did a study of complex litigation that explained in its introduction that "this Preliminary Study is inspired by the intuition that the common transaction, series of transactions, or course of conduct from which these complex cases arise should provide a basis for some form of consolidated or coordinated treatment of all of the resulting litigation." American Law Institute, Preliminary Study of Complex Litigation 5 (1987).

n107. See supra text accompanying notes 47-84.

n108. Thomas D. Rowe, Jr. & Kenneth D. Sibley, Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction, 135 U. Pa. L. Rev. 7, 17 (1986).

n109. Complex Litigation Proposal, supra note 3, at 467.

n110. Thus, Professor Rowe and Mr. Sibley suggested that expanded federal jurisdiction for complex cases could be limited to cases involving at least 25 victims. See Rowe & Sibley, supra note 108, at 33, and Congress has considered statutes incorporating similar numerical limitations; see H.R. 3406, 101st Cong., 2d Sess. 2(a) (requiring that at least 25 natural persons be injured, each with damages in excess of $ 50,000).

n111. See ALI Finishes Complex Litigation Project, Makes Progress on Various Restatements, 61 U.S.L.W. 2709, 2710 (1993).

n112. See Fed. R. Civ. P. 23(a)(1) (allowing class actions only if class members are too numerous to be joined).

n113. See 7A Charles A. Wright et al., Federal Practice & Procedure, 1762 (1986) (citing cases allowing class status with classes of 25, 35, 40 and 50 members, but also citing cases that deny class certification on numerosity grounds for classes as large as 350).

n114. The ALI Project reports that the Judicial Panel on Multidistrict Litigation has almost always found the benefits of transfer were satisfied if there are more than five actions involved. Complex Litigation Proposal, supra note 3, at 52; see also Note, The Judicial Panel and the Conduct of Multidistrict Litigation, 87 Harv. L. Rev. 1001, 1009-10 (1974) (noting transfer is "almost certain ... if more than five actions are involved").

n115. The Project explains in commentary that "exact dimensional criteria" were rejected in part because even when there are very few parties or cases, consolidation may be warranted due to complexity of the issues or volume of discovery, or to "avoid significant duplication of effort [for a] defendant." Complex Litigation Proposal, supra note 3, at 52-53.

n116. See supra text accompanying notes 32-38.

n117. Edward F. Sherman, Aggregate Disposition of Related Cases: The Policy Issues, 10 Rev. Litig. 231, 256 (1991).

n118. E.g., Complex Litigation Proposal, supra note 3, at 49 ("A similar test is applied under Fed. R. Civ. P. 23(b)(3)...."); id. at 117 ("The procedure for the severance of issues under Rule 23(c)(4) is similar to that under Rule 42(b)."); id. at 461 ("This standard is analogous to

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the criteria applied for class certification under Federal Rule 23(b)(3)...").

n119. This description for the various consolidation criteria may prove confusing to some readers, so it seems wise to provide a schematic summary of the criteria employed in each of the three formats provided in the Project. As used below, "minimum commonality" means that the consolidation provision only requires that there be some common question. Similarly, "minimum superiority" means that the consolidation provision only requires that consolidation "promote the just, efficient, and fair conduct of the actions," rather than directing that consolidation be ordered only if it would be superior to individual litigation in terms of those criteria.

[SEE TABLE IN ORIGINAL]

n120. Thus, 5.01's addition of the same transaction requirement is justified on the ground that "this section acts as a jurisdiction, as well as a consolidation, mechanism." Complex Litigation Proposal, supra note 3, at 225. Similarly, the more stringent requirements of Appendix B are justified on the ground that combining cases from different state courts is more intrusive.

n121. Id. at 461.

n122. Id. at 37.

n123. Id. at 38-39.

n124. Id. at 463.

n125. Id. at 462.

n126. In explaining their use of the predominance standard in Appendix B, the Reporters state:

[A] high threshold ensures a substantial overlap of claims or issues so that the costs to the system and the parties of consolidation and management will not outweigh the costs of allowing the cases to remain dispersed.... The requirement that common questions predominate serves as a fairness safeguard, ensuring that claims or issues bearing no relation to each other will not be gathered together. Treating dissimilar cases alike would be as unfair as treating similar cases differently.

Id. at 463-64.

n127. 7A Wright et al., supra note 113, 1777, at 518-19. Two of the authors of this treatise, Arthur R. Miller and Mary Kay Kane, were, respectively, Reporter and Associate Reporter of the Complex Litigation Proposal.

n128. See supra text accompanying note 123.

n129. "For example, the predominance of individual issues may suggest that consolidation will not promote justice or efficiency." Complex Litigation Proposal, supra note 3, at 45. Note that this commentary is directed toward the second criterion of 3.01, discussed infra in text accompanying notes 141-52.

n130. Manual, Third, supra note 32, 21.631.

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implications consolidation has for the parties and the court, finding reason for the Federal Courts Study Committee's 1990 call for more detailed guidelines for the use of this technique. Part IV then forms the heart of the analysis by examining the Project's treatment of consolidation criteria, concluding that the Project impressively illuminates the issues but should be fortified by adoption of standards for consolidation that fully parallel those for common question class actions. Part IV also evaluates both the Project's reliance on a newly created Complex Litigation Panel to make the initial decision whether to consolidate, and its propulsion toward fragmenting cases by severance. Finally, Part IV reflects on the questions that will be before Congress should the Project's proposals be introduced there. The Article then turns in Part V to brief reflections on ways the Project's treatment of consolidation could be employed by courts under current statutory arrangements. It concludes with the hope that the Project's work on consolidation will be used by courts even if the proposal's menu of jurisdictional and choice of law changes fostering consolidation languishes unenacted.

II. Consolidation As A Sleeping Giant

Consolidation has been around for a long time. Introduced in England in the eighteenth century by Lord Mansfield, [13] it was first authorized in the federal courts in this country by a statute adopted in 1813. [14] According to Professor Meador, **[*883]** consolidation for trial was "one of the earliest examples of case management based on inherent authority," and it was viewed in American jurisprudence as "an inseparable aspect of the powers possessed by common-law and equity courts." [15]

Mindful of the risks of comparing joinder attitudes of the 19th century with those of the present, [16] one can comfortably conclude that consolidation initially served largely as an antidote to strict limitations on joinder that precluded combination in a single suit even of closely related claims. One example is the Supreme Court's 1892 decision in Mutual Life Insurance Co. v. Hillmon, [17] a case familiar to generations of law students for its rule on hearsay evidence, [18] which involved separate suits against three insurance companies based on separate life insurance policies issued on the life of the same man. [19] Each insurance company denied that the man was dead, and the trial court consolidated the three cases for trial of that question even though plaintiff could not have joined all companies in a single suit under prevailing joinder rules. [20] Under current joinder notions, of course, the combination of these three claims in a single lawsuit would be unexceptional. Defendants contended on appeal that the combination of the cases was improper because the actions did not relate to the same question, but the Court refused to interfere with the trial judge's conclusion that a combined trial would avoid unnecessary delay and expense. [21] In a 1933 case, the Court **[*884]** added that "consolidation is permitted as a matter of convenience and economy in administration." [22]

Rule 42 carried forward this flexible approach to joinder, building in part on experience in some state court systems. [23] Rule 42 is said to go beyond even the broad initial party joinder opportunities afforded by Rule 20. [24] The courts, however, have sometimes been circumspect in taking advantage of Rule 42's potentially wide scope of combination. [25] For some time, **[*885]** consolidation was only a sporadic event, and not a device the courts viewed as useful in combating caseload pressures. Thus, when conferences were convened in the 1950s to examine ways to deal with protracted litigation, [26] no substantial consideration was given to consolidation as such a technique. But the problem of the repetitious suit was not far off.

By the 1960s consolidation began to play a more prominent role in some types of cases. Confronted with some 2,000 private actions nationwide resulting from the electrical equipment price-fixing conspiracy, Chief Justice Warren appointed an ad hoc committee of judges to provide consistent treatment of discovery in these cases. Although not precisely consolidation, this was a move in that direction. The experience was sufficiently successful to prompt Congress in 1968 to create the Judicial Panel on Multidistrict Litigation. Congress

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n131. See supra text accompanying note 121.

n132. Complex Litigation Proposal, supra note 3, at 43.

n133. The commentary explains:

A more restrictive standard, such as "predominance of common questions," is less desirable because situations might arise in which substantial benefits could be gained by transfer for consolidation even when only a single common factual question is present because it would avoid the duplication of effort that otherwise would result in resolving that issue in separate suits.

Id.

n134. 7A Wright et al., supra note 113, 1778, at 528.

n135. Id. at 528-29.

n136. See, e.g., In re Eli Lilly & Co. Oraflex Prod. Liab. Litig., 578 F. Supp. 422, 423 (J.P.M.L. 1984) ("Although we recognize that the actions in this litigation involve some common questions of fact, we are not persuaded that these common questions of fact will, in the future course of this litigation, predominate over individual questions of fact...."); In re Sears, Roebuck & Co. Employment Practices Litig., 487 F. Supp. 1362, 1364 (J.P.M.L. 1980) ("Individual rather than common factual questions predominate regarding the liability aspects of the five actions before us," and the common factual questions do not "overcome the overall predominance of individual factual questions...."); In re Airline "Age of Employee" Employment Practices Litig., 483 F. Supp. 814, 814 (J.P.M.L. 1980) (denying transfer after district court rejected motion to consolidate under Rule 42 because common questions do not predominate); In re Westinghouse Elec. Corp. Employment Discrim. Litig., 438 F. Supp. 937, 939 (J.P.M.L. 1977) ("Individual rather than common factual questions predominate in this litigation."); In re Asbestos and Asbestos Insulation Material Prod. Liab. Litig., 431 F. Supp. 906, 910 (J.P.M.L. 1977) ("Many factual questions unique to each action or to a group of actions already pending in a single district clearly predominate, and therefore transfer is unwarranted."); In re King Resources Co. Sec. Litig., 342 F. Supp. 1179, 1183 (J.P.M.L. 1972) (noting that parties have argued convincingly that common issues do not predominate); see also In re "The Exorcist" Copyright Infringement Litig., 411 F. Supp. 793, 793-94 (J.P.M.L. 1976) (rejecting argument that common questions do not predominate).

n137. See Close v. American Honda Motor Co., Inc., 1994 WL 761957, at *3 (D.N.H. 1994) ("On the basis of the record before it, the court finds that the plaintiffs have not met their burden of showing that a Rule 42(a) consolidation is appropriate here.... Because individual issues in the civil actions predominate over common issues, separate depositions, interrogatories, and requests for documents will be more beneficial to plaintiffs than consolidated discovery."); Scardino v. Amalgamated Bank, 1994 WL 408180, at *2 (E.D. Pa. 1994) ("Although there are common questions of law or fact in both actions as to the validity of the note and mortgage, these questions are not sufficiently predominant in this action to warrant consolidation."); Maruzen Int'l Co., Ltd. v. Bridgeport Merchandise, Inc., 1991 WL 130170, at *1 (S.D.N.Y. 1991) (ordering consolidation because common questions predominate); Henderson v. National R.R. Passenger Corp. 118 F.R.D. 440, 441 (N.D. Ill. 1987) ("Although certain common issues of fact may exist in both actions, the variety of individual issues predominate.").

n138. But see cases cited supra note 136.

n139. 15 Wright et al., Federal Practice & Procedure, 3863, at 515 (2d ed. 1986).

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n140. 347 F. Supp. 1401 (J.P.M.L. 1972).

n141. Id. at 1402.

n142. This case was not unique in the annals of the Panel. In In re Multi-piece Rim Products Liability Litigation, 464 F. Supp. 969 (J.P.M.L. 1979), the Panel transferred 19 actions brought in 14 different districts to recover for injuries related to the failure of multipiece truck wheels. These products were manufactured by four different companies, at least one of which was sued in each case, and 21 other defendants were named in the actions, but 19 of these were named in only one case. Id. at 971. Opponents to the transfer, including plaintiffs in five of the actions and all defendants but one, emphasized that each case involved unique facts. The Panel nevertheless ordered transfer based on the parties' theory that all of the products were "essentially the same, for purposes of this litigation, because they all operate on the same engineering principle." Id. at 974.

Similarly, in In re Multidistrict Commodity Credit Corp. Litig. Involving Grain Shipments, 300 F. Supp. 1402 (J.P.M.L. 1969), 32 separate claims were made against a variety of railroad companies for alleged losses of grain during shipment. Different kinds of grain were involved in different shipments, but all were in covered hopper cars. Although each claim would turn on the individual circumstances involved in that shipment, the Panel found common questions regarding "general standards for loading and unloading hopper cars, general standards for weighing hopper cars, the integrity of the hopper cars by design and manufacture and the amount of shrinkage or loss of moisture which normally occurs in these grains." Id. at 1404.

n143. Cf. Note, supra note 114, at 1016 (characterizing Aviation Products as a questionable use of the Panel's transfer power).

n144. Complex Litigation Proposal, supra note 3, 3.01(a)(2), at 37.

n145. Id., app. B, 1(a)(2).

n146. Thus the Reporters are able to note in Appendix B that "the inclusion of a superiority requirement is more demanding than the standard proposed for federal intrasystem consolidation. Compare 3.01(a)(2)." Id. at 464.

n147. 7A Wright et al., supra note 113, 1779, at 552.

n148. See supra text accompanying note 123.

n149. See Edward Brunet, The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies, 10 Rev. Litig. 273 (1991).

n150. See 28 U.S.C. 1407(a) (1988) (allowing transfer if it "will be for the convenience of parties and witnesses").

n151. Wilson W. Herndon & Ernest R. Higginbotham, Complex Multidistrict Litigation - An Overview of 28 U.S.C.A. 1407, 31 Baylor L. Rev. 33, 43 (1979) ("The Panel has largely eliminated this guideline as a determinative standard."); Note, supra note 114, at 1001, 1003 (1974) ("Once a threshold level of potential savings [of time and effort for judges] is found, however, transfer is almost inevitable.").

n152. Blake M. Rhodes, Comment, The Judicial Panel on Multidistrict Litigation: Time for Rethinking, 140 U. Pa. L. Rev. 711, 720 (1991).

n153. Section3.01(b)(2) says one factor "to be considered" is whether "consolidation can be

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accomplished in a way that is fair to the parties and does not result in undue inconvenience to them and the witnesses." Complex Litigation Proposal, supra note 3, 3.01(b)(2), at 38.

n154. E.g., Complex Litigation Proposal, supra note 3, at 44. According to that commentary:

The just and fair resolution of the actions requires a recognition that intrusion on party autonomy and control can be justified only when there is some reason to treat the underlying cases in a coordinated fashion.... Consolidation may be ordered only if it will serve fairness and efficiency goals better than allowing the cases to remain dispersed. A party's desire to exercise individual control over the prosecution or defense of a lawsuit, for instance, is a long recognized, but intangible, interest.

Id. at 51.

Because the proposed standard promotes consolidation for trial as well as pretrial, the convenience of the parties and the witnesses must be accorded more careful consideration than would be the case if transfer and consolidation were limited to the pretrial proceedings.

Id. at 51.

n155. Id. at 52.

n156. See id. at 469.

n157. Brunet, supra note 149, at 275-76 (footnote omitted). A tension between efficiency and fairness clearly exists, but the precise nature of that tension defies a simple, satisfactory definition because both terms incorporate many concepts. Efficiency is a vague idea having numerous meanings both generally and as applied to complex litigation. Similarly, the meaning of fairness may range from an autonomous right to a single trial without cooperating with any co-parties to a seemingly contradictory right to intervene in a complex case initiated by another in order to protect one's interests. Id.

n158. Complex Litigation Proposal, supra note 3, 5.01(a), at 220-21.

n159. See id. at 225.

n160. Thus, an oft-cited formulation of the Rule 20 same transaction inquiry is Judge Aldrich's explanation in Eastern Fireproofing Co. v. U.S. Gypsum Co., 160 F. Supp. 580, 581 (D. Mass. 1958): "There can be no hard and fast rule, and ... the approach must be the general one of whether there are enough ultimate factual concurrences that it would be fair to the parties to require them to defend jointly [the several claims] against them...."

n161. See 9 Wright & Miller, supra note 24, 2382, at 432-33.

n162. See Complex Litigation Proposal, supra note 3, at 225-27. For example, the commentary cites Stanford v. Tennessee Valley Auth., 18 F.R.D. 152 (M.D. Tenn. 1955), seemingly as an example of a case involving what the Project views as "distinct occurrences" that would not satisfy the same transaction test even though they involve common fact issues. Id. at 226. It is true that the court so ruled in that case, but in his treatise on federal practice Professor Miller, one of the Reporters on the Complex Litigation Proposal, says of this case that "the holding that joinder was improper seems quite doubtful." 9 Wright & Miller, supra note 24, 2382, at 433 n.14. Thus the Reporters' own example reinforces the conclusion

that the same transaction test really adds nothing.

n163. Complex Litigation Proposal, supra note 3, at 228.

n164. For consolidation pursuant to Appendix B, the Reporters propose creation of an Interstate Complex Litigation Panel of state judges. See Complex Litigation Project, supra note 3, app. B, 2(a). Although this would be a different entity, the nature of the constraint provided by centralization of authority would be similar. Accordingly, this wrinkle is not treated separately in the text.

n165. See Rhodes, supra note 152, at 712; Cooney, supra note 28, at 611.

n166. See Complex Litigation Proposal, supra note 3, at 64-66.

n167. See id. at 63 (stating that the Panel would develop "a unique competence" to make this decision, and its involvement would promote predictability).

n168. Id. 3.03(a) (stating that the panel should decide on consolidation "as soon as possible" so that parties and court know whether it will occur).

n169. Id. at 68.

n170. See id. 6.01-.08, at 321-436.

n171. Id. at 108. Whether a transferee judge could use 1404(a) to effect consolidation for trial where the Panel had determined that such consolidation should not occur presents a nice question. It is not clear that such an order would be subject to review by the Panel under section3.07(b).

n172. See supra text accompanying notes 151-52.

n173. See supra text accompanying note 149.

n174. Complex Litigation Proposal, supra note 3, at 62.

n175. Id.

n176. "The concept of "convenience of parties and witnesses' takes on an entirely different meaning when a 1404(a) motion, encompassing tens or hundreds of cases, is brought before a 1407 transferee court. In such a setting, the interests of the individual litigants are subordinated to the collective good." Rhodes, supra note 152, at 741.

n177. Complex Litigation Proposal, supra note 3, 3.06(a), at 106. Comparable authority is proposed in the Reporters' Appendix B for the transferee state judge who receives cases transferred by the Interstate Complex Litigation Panel. See id. app. B, 6(a).

n178. Id. 3.06(b), at 106.

n179. Id. 3.06(c), at 106.

n180. "Section 5.01(c) ... contemplates intersystem rather than intrasystem bifurcation of a single case before one court." Id. at 237.

n181. See supra text accompanying notes 47-84.

n182. See Henderson et al., supra note 72, at 1684 ("Only very vague standards exist for determining the appropriateness of a judge's decision to hold a bifurcated trial.").

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n183. Complex Litigation Proposal, supra note 3, at 114.

n184. Id. at 114-15.

n185. Id. at 115. The justification for this position seems essentially substantive - to avoid crippling multiple punitive damage awards against defendants.

n186. Id. at 126. For example, it observes that "damage issues that are linked inextricably to factual determinations already made in the magnet court sometimes may benefit from being handled by the transferee judge." Id.

n187. "Issue severance ... must be undertaken with great care in recognition that it alters the tradition of how cases are decided. Before a court adopts the procedure in a particular case, the possible effects severance may have on the proceedings must be considered." Id. at 119-20. For a discussion of these issues, see Richard L. Marcus, Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure, 50 U. Pitt. L. Rev. 725 (1989).

n188. Complex Litigation Proposal, supra note 3, at 120.

n189. Id. at 120-21; see supra text accompanying note 82.

n190. Complex Litigation Proposal, supra note 3, at 120.

n191. Id. at 125.

n192. Id. at 121-23; see supra text accompanying notes 73-81.

n193. Complex Litigation Proposal, supra note 3, at 122.

n194. Id. at 123.

n195. Id. at 122.

n196. See id. at 109 ("Allowing for consolidation of issues rather than entire claims increases the possibility that the individual litigant will be represented adequately ... without sacrificing the ability of individual parties to control the litigation of unique issues.").

n197. Id. at 111.

n198. Id. at 123.

n199. Id. 3.07(b), at 129. The Panel would have discretion not to undertake such review.

n200. See id. at 137 ("It does not embrace questions regarding possible prejudice or inefficiencies surrounding a decision to have a consolidated trial on a particular issue or to sever certain issues for individual treatment.").

n201. As the commentary explains:

The potential impact of those decisions warrants an opportunity for discretionary review even though modification is possible. For example, plaintiffs erroneously forced to remain for a consolidated trial in a distant forum may face prohibitive litigation costs, subordination of their individual claims or defenses, or undue delay.... Not only would increased costs pose a

hardship to plaintiffs, but also they might affect the outcome of the litigation. Plaintiffs unable to bear the financial burden might feel obliged to settle for less than they otherwise might have secured.

Id. at 136.

n202. Id. 3.07(c), at 130.

n203. Henderson et al., supra note 72, at 1694-95, propose that in mass tort cases bifurcation only be allowed when two conditions are satisfied: "First, any issue to be tried separately must be common to all of the claims. Second, the relevant societal interests must clearly outweigh the interests of individual claimants in ... a single, unified proceeding." But this constraint on judicial decision-making does not seem particularly stronger than the prescription of the Project.

n204. See Complex Litigation Proposal, supra note 3, at 122 ("Trifurcation is more questionable than bifurcation.").

n205. See supra text accompanying notes 146-57.

n206. Indeed, the Rule 23 analogy tends, if anything, to undercut the constraints this Article urges for consolidation and bifurcation. Rule 23(c)(4)(A) allows the court to certify a class only "with respect to particular issues," implicitly bifurcating the claims of all class members thereby. Although this issue certification power seems to erode the predominance requirement of Rule 23(b)(3) by allowing the judge to excise and disregard noncommon issues, we are told that certification of specific issues can be used even if there is only one common issue, and that it should be used in such a circumstance rather than deny class certification. See 7B Wright et al., supra note 113, 1790, at 271, 276. The Project notes the similarity of issue severance under Rules 23(c)(4) and 42(b). See Complex Litigation Proposal, supra note 3, at 117. Were the attitude of severance rather than denial of aggregation borrowed for consolidation, the consequence might be a stronger push toward bifurcation than the Project endorses.

n207. See supra text accompanying notes 36-91.

n208. Compare quantifiable factors such as the amount in controversy in diversity cases. See 28 U.S.C. 1332(a) (discussing situations "where the matter in controversy exceeds the sum or value of $ 50,000").

n209. Rowe, supra note 105, at 327.

n210. E.g., Sherman, supra note 117, at 236-37 ("If plaintiffs cannot get their individual cases tried, aggregation may offer the only realistic opportunity for judicial resolution short of settlement.").

n211. The Federal Courts Study Committee recommended that Congress amend the general venue statute, 28 U.S.C. 1391, (a) to place the then-current authorization of venue in the district "in which the claim arose" with language suggested by the ALI study and (b) to eliminate the disparities then allowed between federal cases based soley on diversity and other federal cases. See Report of the Federal Courts Study Committee, supra note 89, at 94. Congress so amended 1391 in 1990.

n212. "The Project ... really poses a working agenda for only one group - Congress." Shreve, supra note 9, at 1144.

n213. See supra Part II.

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n214. See supra text accompanying notes 88-89.

n215. "As of March 1994, the ALI counted over 125,000 court citations to the restatements. United States Supreme Court Justices invoked the restatements in nine cases during the 1993-94 term. Judges in all fifty states have looked to them." Justice Shirley S. Abrahamson, Refreshing Institutional Memories: Wisconsin and the American Law Institute, Address at the University of Wisconsin Law School (Oct. 28, 1994), in 1995 Wis. L. Rev. 1, 4-5 (footnote omitted).

n216. See, e.g., George L. Priest, The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law, 14 J. Legal Stud. 461, 511-18 (1985) (arguing that 402A of the Restatement (Second) of Torts - dealing with strict products liability - was insinuated into the restatement by a cabal of law professors); Paul A. Simmons, Government by an Unaccountable Private Non Profit Corporation, 10 N.Y.L. Sch. J. Hum. Rts. 67, 97 (1992) (urging that "ALI publications should not be given precedential effect in any court proceeding unless or until the ALI has been democratized").

n217. See, e.g., Gretchen Craft Rubin & Jamie G. Heller, Note, Restatement of Love (Tentative Draft), 104 Yale L.J. 707 (1994).

n218. "Even if Congress does not enact it, the Proposed Final Draft will undoubtedly influence judicial opinion for many years to come." Symeon C. Symeonides, The ALI's Complex Litigation Project: Commencing the National Debate, 54 La. L. Rev. 843, 844-45 (1994).

n219. See supra note 119 (summarizing the differences in standard between 3.01, 5.01, and app. B of the Project).

n220. For the text of one such proposal, and a critical analysis, see Robert G. Bone, Rule 23 Redux: Empowering the Federal Class Action, 14 Rev. Litig. 79, 109-112 (1994).

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granted the panel newly created authority to transfer cases pending in a variety of federal courts for coordinated or consolidated pretrial treatment. [27]

Within a few years, it became widely recognized that even though this type of transfer was supposed to be limited to pretrial handling of cases, it usually shifted final responsibility for the cases to the court presiding over the consolidated proceedings, in part because transferee judges frequently used 28 U.S.C. 1404(a) to obtain authority to transfer for all purposes, including trial. [28] Widespread use of transfer provisions thus paved the way for consolidated treatment of significant numbers of antitrust and securities fraud suits.

It has been in tort litigation, however, that consolidation has played its most prominent role in recent years. As early as 1963, a prescient student comment focused on the role of **[*886]** consolidation in mass tort cases. [29] Under the Multidistrict Litigation Act, transfer and consolidation were often used in mass disaster cases arising out of airplane crashes and hotel fires, and these techniques have also become popular in more dispersed tort cases involving exposure to allegedly toxic substances. The popularity of transfer and consolidation in mass tort cases has, in part, been due to the siege mentality that has gained currency in the judiciary. [30] As judges chafed at some of the prerequisites and limitations of class actions in mass tort cases, [31] the consolidation avenue became more attractive. [32] For example, District Judge Robert Parker of Texas, who had a large docket of asbestos cases, experimented with both consolidation and class action treatment in handling this docket. Eventually, as reported by Professor Mullenix, he became "indifferent as to whether to conduct [his pending asbestos cases] as a Rule 42 consolidation or as a Rule 23 class action." [33] Probably the most aggressive use of the **[*887]** consolidation power occurred in 1991, when the Multidistrict Litigation Panel transferred over 26,000 asbestos personal injury cases to a single district judge in hopes he could apply "a new, streamlined approach" to them. [34] Recognizing the increased use of consolidation, Professor Resnik, in her comprehensive 1991 study of tendencies toward aggregation of litigation, concluded that "class actions are a visible but probably not dominant form of aggregation." [35]

III. Misgivings About Consolidation

Consolidation holds out a bland, somewhat technocratic, uncontroversial face to the world. Thus, as she worked on her study of procedural implications of consolidation, Professor Steinman was struck by the widespread belief of legal professionals that consolidation would not affect the rights of litigants. [36] But courts are beginning to notice that the reality of consolidation, particularly in mass tort cases, sometimes has very substantial effects on those rights. As the Second Circuit cautioned in upholding a consolidation order in 1992, "The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's - and defendant's - cause **[*888]** not be lost in the shadow of a towering mass litigation." [37] There is a price to be paid for the bounty of consolidation that needs to be taken into account.

Recognizing these concerns, the appellate courts have not allowed district judges carte blanche to consolidate, even in mass tort cases. In 1993, for example, the Second Circuit overturned two efforts to consolidate mass tort claims. In one, it reversed a judgment for plaintiffs that resulted from a consolidated trial of 600 asbestos cases. [38] The appellate court noted the "herculean task" of coping with mass torts and acknowledged that "pre-trial consolidation for the purposes of discovery, the appointment of special masters to expedite the settlement, and, especially, the liberal use of consolidated trials have ameliorated what might otherwise be a sclerotic backlog of cases." [39] Nevertheless, the court held that consolidation was an abuse of discretion, reasoning that the varied work histories of the plaintiffs had presented the jury with a "dizzying amount" of evidence and that the case was therefore distinguishable from the 1992 case quoted above, which upheld the judgment of a consolidated trial of asbestos claims for workers at a shipyard. [40] One judge dissented, arguing that the majority's view "would likely compel the post-trial reversal of most large-scale consolidated trials of product liability claims" even though "consolidated trials are an

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indispensable means of resolving the thousands of asbestos claims flooding our state and federal courts, as well as claims arising from other types of mass torts." [41] **[*889]**

In another 1993 case, the Second Circuit granted a writ of mandamus to overturn the consolidation of 44 cases involving repetitive stress injury (RSI) allegedly caused by various types of keyboard office equipment. [42] The court emphasized that this alleged condition encompasses a wide variety of problems, that these problems may result from individual-specific conditions such as obesity and high blood cholesterol levels, and that the cases involved a wide variety of office equipment (from cash registers to computers). [43] Moreover, the Judicial Panel on Multidistrict Litigation had earlier refused to consolidate all RSI cases on the ground that there was not sufficient commonality. [44] The Second Circuit concluded that "the district court substituted a discussion of so-called mass torts for precise findings as to what are the "common questions of law or fact' justifying consolidation pursuant to Fed.R.Civ.P. 42." [45]

These appellate setbacks for consolidation of mass tort cases emphasize the contemporary importance of consolidation, and also that consolidation can substantially affect the rights and interests of parties. Some of the impetus to submerge the individual features of claims results uniquely from consolidation, while other tendencies in this direction are only compounded by it. In any event, it is important to canvass the sorts of effects consolidation can produce to appreciate consolidation's importance. [46] **[*890]**

A. Loss of Control

Consolidation is not supposed to diminish a party's control over its case. Professor Moore's treatise thus continues to assure its readers that after consolidation "each party remains free to control its own case and conduct trial procedures." [47] But the reality is often otherwise, and even Professor Moore follows his assurance with a citation to a case that undermines that assurance. [48] A principal impetus behind this loss of control is the need to organize and discipline the numerous parties in a consolidated proceeding. As a New York state court recognized in 1899:

> There can be but one master of a litigation on the side of the plaintiffs. It is also plain that it would be as easy to drive a span of horses pulling in diverging directions, as to conduct a litigation by separate, independent action of various plaintiffs, acting without concert, and with possible discord. [49]

To a substantial extent, this loss of control occurs without consolidation when numerous parties are joined in a litigation, and the loss may be felt by both plaintiffs and defendants. [50]

Courts can and do take actions that magnify loss of control, however. The most important is appointment of lead counsel, **[*891]** which ordinarily involves circumscribing the latitude of other lawyers in the case. [51] Courts have upheld orders that forbid nonlead counsel from filing motions or undertaking discovery without permission from lead counsel. [52] Beyond appointment of lead counsel, the court may direct that the original pleadings be superseded by a consolidated complaint in order to avoid the confusion that would result from conducting combined litigation with reference to a large number of pleadings. Such consolidated complaints, typically drafted by a committee of lawyers, may have an "everything but the kitchen sink" air that disturbs defendants who find themselves confronting new or expanded charges as a result of the rewriting. [53] The consolidation of the complaint can be disturbing to plaintiffs as well, for it takes control over the content of the complaint away from the individual claimants. [54] Although a court may allow dissenting plaintiffs to abjure certain

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claims, [55] plaintiffs may be compelled **[*892]** to pursue claims they prefer not to assert. [56] Assurances that the various cases will be unbundled for trial and the original complaints reinstated [57] seem inherently unreliable since discovery, decisions on motions, and other pretrial orders all focus on the consolidated complaint.

In sum, as others have noted, consolidation can leave claimants with as little control over their cases as unnamed class members in a class action. [58] Of course, the loss of control may be viewed as a matter of only moderate concern depending on the size and nature of the claims involved. With personal injury claims, however, there is a deep tradition of individual autonomy. [59] But even in personal injury claims, empirical research suggests that tort claimants often do not have a strong sense of control over the cases when handled in the normal manner, [60] and opposition to combined treatment may be due more to the reaction of lawyers than to that of parties. [61] Indeed, although it seems undeniable that claimants like personal involvement in their cases, it may be that alternatives to traditional litigation could offer more promise of actual involvement for most claimants. [62] **[*893]**

B. The Blending Effect

Combining cases because of their similarities stresses the factors of similarity and can consequently deflect attention from features that distinguish cases from one another. [63] One symptom of this blending effect is the tendency in multidistrict proceedings to defer discovery or other action on unique aspects of cases and instead to focus the consolidated proceedings on common issues. [64] Natural and expedient though this may be, it also bespeaks a shift in emphasis that may prejudice parties on one side or the other, or both.

From the defendants' perspective, the concern is that individualized grounds of defense may be submerged or obscured due to preoccupation with common issues. The marginalization of individual defenses has been a frequent complaint in class actions, and has sometimes caused courts to refuse to allow class treatment. [65] But other courts have solved such problems and facilitated class treatment by streamlining the application of substantive law to shave away elements that would require consideration of individual circumstances. [66] Much as there may be good reason for such refinement in the grounds for liability, **[*894]** it seems difficult to deny that a prime impetus for the shift has been the judicial desire to handle cases in gross.

From the plaintiffs' perspective, the homogenizing effect of combined litigation is a mixed blessing, depending on the individual circumstances of a given plaintiff. There is already something of a shift toward the mean in individual litigation that leaves claimants with the largest and strongest claims receiving less complete compensation than those with small claims. [67] Consolidation may accelerate this tendency, benefitting plaintiffs with weak claims, while harming plaintiffs with stronger claims.

C. Magnifying the Urge to Sever Issues

Although bifurcation is said to be a "wholly different" procedure from consolidation, [68] it is not an accident that the two are combined in Rule 42. A court may find it desirable to separate issues for trial in order to expedite or simplify the resolution of a case between two parties. Indeed, a 1987 survey of state and federal judges indicated that they "overwhelmingly" supported bifurcation of issues "in appropriate cases." [69] But even in a case with only two parties, the task of segregating certain issues for separate trial may prove daunting. [70] As Judge Posner recently put it, a district judge who orders bifurcation "must carve at the joint." [71] When separate cases are consolidated but still involve unique issues, the urge to consolidate and to extract the common issues for trial, deferring the others **[*895]** for later action, follows rather naturally. That practice may be troublesome, however, for at least two related reasons. [72]

The first can be called the sterile trial problem. The paradigm recent example was In re

Bendectin Litigation, [73] in which the Sixth Circuit affirmed a defense verdict despite serious misgivings about the district court's order that the issues be trifurcated for trial. Owing to transfer by the Judicial Panel on Multidistrict Litigation and removal from state court, the district court had before it over 800 cases involving claims of over 1,100 plaintiffs for birth defects allegedly resulting from exposure in utero to defendant's antinausea drug. To expedite the handling of these cases, the district court eventually trifurcated the issues, leading to an initial trial on the question of whether the drug is a proximate cause of birth defects. [74] In addition, the district judge directed that all visibly deformed plaintiffs be excluded from the courtroom during the trial. The appellate court recognized that the judge's order "could possibly prevent the plaintiffs from exercising their right to present to the jury the full atmosphere of their cause of action, including the reality of injury," [75] and that the severance created the risk that the trial would have "a sterile or laboratory atmosphere." [76] Although it found this the "most troubling" aspect of the case, the appellate court affirmed because Rule 42 gives the district court ""virtually unlimited freedom to try the issues in whatever way trial convenience requires.'" [77] Moreover, it noted that individual trial of all these cases could have occupied 182 district judges for a year. [78] A concurring judge criticized the district judge's handling of the case, noting that "the typical procedure in litigation does not involve the splitting up of a case, element by element, and trying each point to the jury separately," [79] but he found no prejudice in this case because **[*896]** plaintiffs had presented no evidence of any link between the drug and birth defects. [80] The Anglo-American tradition has relied on a complete in-court trial in which the litigant may participate. As in Bendectin, consolidation and bifurcation may undermine that tradition. Separation of issues may also truncate the ability of a jury to assess the case. [81] Thus, the sterile trial risk raises basic concerns.

The urge to extract common issues also leads to a second concern - a pro-defendant shift in results. Thirty years ago it was reported that defendants in personal injury cases won forty-two percent of those cases in which liability and damages were tried together, but seventy-nine percent of those in which liability was tried separately. [82] This difference might indicate **[*897]** that courts sever more often when the case for liability appears weak, but "when it is seen that the split trial reduces by more than half the cases in which personal injury plaintiffs are successful, it is apparent that bifurcation makes a substantial change in the nature of the jury trial itself." [83]

D. Judicial Burden

Finally, the assumption that consolidation invariably reduces the burden on judges, though popular, seems open to question. Some proponents of broad consolidation seem to act as if the law of diminishing returns has been repealed. But the combination of cases may create an ungainly single litigation in place of a series of commonplace cases. [84] Discovery incentives on both sides may be substantially altered by consolidation, as may the incentives to dispute other matters. A joint trial may be dispositive only if favorable to defendants, and otherwise lead to individualized further proceedings in which the results of the joint trial must be given effect. Thus, even the most forceful justification for consolidation - judicial economy - may, upon examination, prove to be an ambivalent one.

E. The Need for Clearer Guidelines

Over 60 years ago, Professor Chafee intoned that "in matters of justice, ... the benefactor is he who makes one lawsuit grow where two grew before." [85] More recently, however, we have seen reasons for skepticism about consolidation of cases. The foregoing litany of concerns overstates the negative potential of consolidation, but does point up serious grounds for anxiety about when and how consolidation is ordered. Although some conclude that Rule 42 provides adequate guidance on those questions, [86] the reality is that the sole direction in the **[*898]** Rule is that the trial judge has broad discretion. That orientation was certainly the view when Rule 42 was originally adopted, [87] but given the increased importance of consolidation and the attendant concerns sketched above, that orientation bears

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reexamination. Confronted with such concerns as those addressed above, [88] the Federal Courts Study Committee recommended in 1990 that either the Federal Rules of Civil Procedure or the Manual for Complex Litigation should include guidelines for consolidation and severance. [89] Neither the newly minted Manual for Complex Litigation, Third, nor the Federal Rules incorporates such specifics, [90] but the ALI Project may be a substitute source for such guidance. [91]

IV. The ALI Project's Guidance on Consolidation

Rule 42 in Alice in Wonderland had the advantage of providing a precise standard for its application - persons more than a mile high were banned from the court. Although there might be debates on whether the rule applied to a given person - witness Alice's protest that she is not a mile high - it did afford a relatively precise linear measure. The emphasis on discretion lying behind Rule 42 of the Federal Rules of Civil **[*899]** Procedure precludes similar precision, perhaps for good reason. [92] The Multidistrict Litigation Act similarly lacks hard guidance. [93] But given the centrality of consolidation to the ALI Project, a more focused or confining regime seems in order.

To put this point in context, it is worthwhile to catalogue the array of striking innovations the Project proposes in order to facilitate consolidation. It recommends substituting a Complex Litigation Panel for the current Judicial Panel on Multidistrict Litigation and vesting that body with authority to transfer cases pending in federal court for trial as well as for pretrial purposes. [94] This sort of revision has already been proposed in Congress. [95] The Project goes beyond, however, and proposes authorizing the Panel to order the removal for consolidated treatment of otherwise nonremovable cases pending in state court. [96] It also prescribes controversial approaches to choice of law questions to remove the obstacles to consolidation that could result from having different substantive law apply to different cases. [97] To avoid disruption of the consolidated litigation in the target court, the Project would additionally authorize the transferee court to enjoin "transactionally related proceedings" in state and federal courts [98] and to enter an order that invites nonparties to intervene and binds them by its determinations whether or not they accept the invitation. [99] Moving further beyond current law, the Project would authorize the Panel to direct transfer of cases filed in federal court to a state transferee court under certain circumstances, [100] and it **[*900]** recommends the adoption of an Interstate Complex Litigation Compact to effect concentration of cases in courts of different states. [101]

This is heady stuff. The proposed authority to shift cases properly filed in federal court to a state court, for example, "would create a system that differs in material respects from anything in our two centuries of constitutional and procedural history." [102] Although the proposed interstate compact has a distant and thus-far unutilized actual analogy, [103] it would also break new ground. Whether or not the Project's proposals would, if adopted, cause "a complete revolution in the way in which mass tort cases are decided today," [104] it is clear that the goal of the Project goes well beyond time-saving and facilitation of litigation. Building on past experience with consolidation, the Project seeks very significantly to enhance the power to consolidate by removing longstanding obstacles that presently prevent or impede consolidation.

It is certainly possible to assess the Project's proposals without focusing on whether increased consolidation itself is a good thing. [105] The Project itself was based on a preliminary study that embraced an "intuition" that consolidation would provide important advantages. [106] But as we have already seen, there can be real costs to consolidation. [107] Before embracing these dramatic changes one would logically move beyond intuition and scrutinize the means adopted to avoid or minimize these costs. The Project basically seeks to channel the power to **[*901]** consolidate in two ways: by articulating a standard for consolidation and by delegating prime responsibility for the decision whether to consolidate to the Panel that it seeks to create. In addition, the Project provides some guidance on severance. We turn to these proposals now.

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A. The Standard for Consolidation

Until now, consolidation has operated without any carefully articulated statutory or rule-based standards, relying instead on ad hoc judgments by individual judges or by the Judicial Panel on Multidistrict Litigation. But ever since discussion of expanding consolidation began a decade ago, proponents of reform have recognized that they do not want to create "a legal vacuum cleaner to suck all parties into a single federal court regardless of the consequences." [108]

The problem lies in providing sensible constraints. Buried in Appendix B of the ALI Project, which contains a Reporters' Study outlining a proposed interstate compact for consolidation of cases pending in the courts of various states, is an elegant comment that captures the difficulty confronting one who would fashion such constraints:

Statisticians and epidemiologists describe and evaluate a test with reference to its "sensitivity" and "specificity." The probability that a positive test result will indicate the presence of the characteristic being tested for is its sensitivity. Conversely, the probability that a negative test will indicate the absence of the characteristic being tested for is the test's specificity. The sensitivity and specificity of a test are a function of the threshold for a positive test result. When that threshold is raised, there will be an increase in specificity and a decrease in sensitivity. Thus, by increasing the threshold for eligibility for consolidation, it is more likely that the cases that are selected for consolidation will be best suited for unitary treatment (an increase in specificity). At the same time, some cases that may have benefitted from unitary treatment will not be eligible for consolidation (a decrease in sensitivity). [109]

The problem confronting the framers of the Project was to find the best balance between sensitivity and specificity. **[*902]**

One approach might be to adopt precise standards like Rule 42 in Wonderland. Other proposals to expand consolidation have relied on precise limits on the number of claimants or the dollar amount involved to provide a definite prerequisite for consolidation. [110] On the floor of the American Law Institute as the Project came up for its final vote, Judge Jack Weinstein proposed that its provisions be conditioned on a similar prerequisite of 5,000 claimants with claims aggregating at least $ 100 million, but this proposal was defeated. [111] The omission of such a numerical prerequisite for consolidation is warranted. A predicate as high as the one proposed by Judge Weinstein could only rarely be satisfied, leaving the entire work product of the Project to sit on the shelf in all but the most extraordinary cases, and even then to come into play only after a great deal of other litigation activity. Even with class actions, which do have a numerosity prerequisite, [112] the actual number necessary for class certification is uncertain and vastly below the number proposed by Judge Weinstein. [113] To adopt a numerical prerequisite closer to the current multidistrict experience [114] would mean that the numerical requirement would be so easily satisfied **[*903]** that it would place no significant restraint on consolidation. [115] Effective limitations must be sought elsewhere.

The ALI Project goes well beyond any other codified set of consolidation guidelines in attempting to provide such limitations. Although this Article criticizes the vigor with which the Project constrains consolidation in its central provisions, it should acknowledge that the Project's basic scheme appears wise and that the debate is about matters of implementation. The starting point is to recognize, as noted above, [116] that consolidation and class action treatment "have increasingly been regarded as alternative, indeed possibly fungible, mechanisms for accomplishing aggregation." [117] The Project thus borrows overtly from Rule 23, the class action rule, [118] but it also invokes the same transaction standard that is articulated in Rule 20 for permissive joinder of parties.

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*269 FEDERALISM AND FEDERAL LIABILITY REFORM: THE UNITED STATES CONSTITUTION SUPPORTS REFORM

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Three recent Supreme Court decisions have bolstered the arguments and efforts of opponents of federal tort reform initiatives. This Article contends that these decisions do not stand in the way of liability reform at the federal level. The authors maintain that courts in the modern era have reviewed economic legislation with great deference and should continue to do so. Accordingly, neither the Commerce Clause nor the Tenth Amendment impose limitations on Congress's ability to enact tort reform measures.

Virtually every American has heard the conservative call to protect "states' rights." It is a political staple of conservative causes. [FN1] Ironically, however, in recent debates about federal tort reform legislation, the call to respect states' rights has been trumpeted by some very unlikely sources-- liberal members of Congress [FN2] and consumer advocates who have traditionally supported ***270** federal regulation of everything from food package labeling [FN3] to local activities like used car sales [FN4] and funeral home practices. [FN5] Both Presidents Ronald Reagan and George Bush, on the other hand, supported federal product liability reform legislation, notwithstanding their ideological preference for an expanded role for state governments. [FN6]

Civil justice reform has turned the world of states' rights upside down. A basic explanation for this phenomenon is political. Opponents of federal liability reform legislation enjoy pointing out an apparent inconsistency in conservative philosophy. [FN7] They can show that the ascent to power of the Republican-controlled Congress early in 1995 was based, in part, on a pledge that members would reduce the role of the federal government and give more policymaking authority to the states. [FN8] Various federal initiatives sought to "devolve power to the states in areas such as welfare, school lunch programs, legal services for the poor, speed limits on interstate highways, and other spheres in which the federal government had played a dominant role for decades." [FN9] Federal civil justice reform was and continues to be an exception to this pattern.

***271** Another explanation for the prominence of federalism in arguments against federal liability reform is more pragmatic. Opponents of reform know that if their political arguments fail to carry the day and such legislation is enacted, the U.S. Constitution may provide the only mechanism to nullify the law. Our experience in working on tort reform at the state level has taught us that, once legislation is enacted, it is likely to be challenged on constitutional grounds by the Association of Trial Lawyers of America ("ATLA") and the political allies of the organized plaintiffs' bar. [FN10]

We believe that there are certain rational goals of civil justice reform that, as a practical matter, can only be accomplished at the federal level. [FN11] The fact that tort law has long been the province of the states does not mean that it should be off-limits to any reform at the federal level. Federal legislation can provide an effective means of addressing liability problems that are rooted in interstate commerce and national in scope.

For example, Congress is uniquely suited to enact a national solution to provide predictability in the product liability system. [FN12] Predictability reduces unnecessary legal costs and allows consumers to know their rights; it also allows manufacturers to understand their obligations. State product liability legislation, as a practical matter, cannot achieve this goal on a national level. [FN13] For that reason, the National Governors' Association ("NGA") has adopted resolutions on several different occasions calling for Congress to enact federal product liability

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Process Clause of the Fifth Amendment, because it abrogated common law causes of action against program participants. [FN169] The court held, however, that plaintiff had "no vested interest in any rule of the common ***293** law." [FN170] Moreover, while a replacement or substitution of remedies was "perhaps not technically necessary for due process," Congress did provide "an alternative, efficacious remedy against the United States." [FN171] The court noted that federal statutes similar to the Swine Flu Act had "always been found to be constitutional when challenged," including the Drivers Act upon which the Swine Flu Act was modeled. [FN172]

Plaintiff also alleged an equal protection violation. [FN173] The court noted, however, that "such routine equal protection considerations as 'compelling governmental interest' or 'suspect' classifications or 'fundamental' interests [were] simply not involved" in challenges to economic legislation. [FN174] Thus, the court dismissed plaintiff's challenge. [FN175]

Finally, the court addressed plaintiff's argument that the Swine Flu Act violated the Tenth Amendment. [FN176] The court pointed out that plaintiff's argument rested "mainly upon cases declaring early pieces of New Deal legislation to be unconstitutional ... [and that] the spirit if not the letter of those cases ha[d] been overruled in subsequent decisions." [FN177] The court stated that the Swine Flu Act simply allowed the federal government to work with the states and imposed no coercion on them. [FN178]

Sparks was influential in leading other courts to reject similar constitutional challenges to the Swine Flu Act. In Wolfe v. Merrill National Laboratories, Inc., [FN179] plaintiff's "unarticulated major premise" was that the Swine Flu Act unconstitutionally compelled her participation in the program, causing her to suffer serious injury. [FN180] The court easily dismissed plaintiff's claim, ***294** noting that she voluntarily chose to accept the benefit of the federally administered vaccine. [FN181] The court also discussed plaintiff's allegation that the Swine Flu Act violated the Tenth Amendment. [FN182] The court stated that, as a grant program, the Swine Flu Act fell within the power of Congress to spend funds for the "general welfare." [FN183] Accordingly, "Congress acted within its constitutionally ordained powers in passing the Act." [FN184]

8. Atomic Weapons Testing Liability Act

In Hammond v. United States, [FN185] the First Circuit upheld the constitutionality of the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985 ("Atomic Weapons Testing Liability Act") [FN186] against a challenge brought by a widow for the death of her husband, a civilian employee of the Department of Defense and observer at several atomic weapons tests, from radiation poisoning. The Atomic Weapons Testing Liability Act created a cause of action against the United States for radiation injuries arising from federal atomic weapons testing programs, retroactively abolished private tort actions against government contractors for such injuries, and made the Federal Tort Claims Act the sole remedy for those injuries. [FN187]

The First Circuit noted that Congress had previously passed laws (the Drivers Act and the Swine Flu Act) that substituted the federal government as the defendant for particular types of tort suits and required plaintiffs to seek relief through the Federal Tort Claims Act. [FN188] The court also noted that when those statutes had been challenged for alleged due process violations, they were consistently evaluated under the rational basis test and declared constitutional. [FN189] The court then evaluated the Atomic Weapons Testing Liability Act under a rational basis standard and concluded that Congress's desire to shield government contractors ***295** from public embarrassment arising from litigation was rationally related to its decision to abolish common law tort claims against the contractors. [FN190] In addition, the court reasoned that, since the government was required to pay the judgments obtained against the contractors, it was neither irrational nor arbitrary for Congress to subject all potential plaintiffs uniformly to Federal Tort Claims Act limitations. [FN191] Accordingly, the court held that the Atomic Weapons Testing Liability Act did not violate the Due Process Clause. [FN192]

The court also rejected plaintiff's Tenth Amendment challenge to the Act. [FN193] Plaintiff relied on National League of Cities v. Usery [FN194] to argue that, by abolishing the state common law actions against government contractors, Congress "invaded rights reserved to the states." [FN195] The court, however, determined that plaintiff's argument was without merit, because National League of Cities had been overruled. [FN196]

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The Ninth Circuit Court of Appeals dismissed additional constitutional challenges to the Atomic Weapons Testing Liability Act in In re Consolidated United States Atmospheric Testing Litigation. [FN197] Plaintiffs, military and civilian participants in the United States atmospheric nuclear weapons testing program and their families, alleged that the Act constituted a "taking" for purposes of the Fifth Amendment, because it substituted a remedy against the government under the Federal Tort Claims Act for state tort law causes of action against government contractors who participated in the federal weapons testing program. [FN198] In addition, plaintiffs alleged that the Act violated the Due Process ***296** Clause of the Fifth Amendment and the separation of powers doctrine. [FN199]

The court began its takings analysis by noting that courts had found it "well settled" that a "plaintiff has no vested right in any tort claim for damages under state law." [FN200] Accordingly, denial of plaintiffs' state tort law cause of action did "not translate into a cognizable taking claim." [FN201] The court also pointed out that the Act did not abrogate claims arising from atomic weapons tests, but instead subjected claimants to a statutory procedure that plaintiffs could reasonably expect to apply to them. [FN202]

Next, the court held that, because Congress had acted within its war powers and Commerce Clause authority, and no fundamental right or suspect classification was involved, the rational basis standard of due process review applied to plaintiffs' due process claim. Under that standard, the court held, plaintiffs had not met their burden of proving that the Act was "wholly arbitrary and irrational in purpose and effect, i.e., not reasonably related to a legitimate congressional purpose." [FN203] According to the court, the weapons testing program had been a crucial government function from its inception, and Congress reasonably believed that relieving contractors of liability would encourage their participation in the program. [FN204]

Finally, the court rejected plaintiffs' separation of powers claim. The court said that legislation does not run afoul of the separation of powers doctrine unless Congress "presumes to dictate 'how the Court should decide an issue of fact (under threat of loss of jurisdiction)' and purports to 'bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds." [FN205] Those limitations did not exist with respect to the Atomic Weapons Testing Liability Act, because Congress did not direct courts to make certain findings or fact or require them to apply an unconstitutional law. [FN206]

***297** 9. National Childhood Vaccine Injury Act of 1986

The National Childhood Vaccine Injury Act of 1986 [FN207] was enacted to address manufacturers' liability concerns relating to the distribution of vaccines and to minimize the public health dangers posed by low vaccine supplies. [FN208] The Act created a no-fault compensation program for childhood vaccine-injury victims to be funded by an excise tax on each dose of vaccine. As a predicate to receiving compensation under the Act, injured persons are required to file a petition in the United States Court of Federal Claims demonstrating, among other things, harm including "unreimbursable expenses ... in an amount greater than $1,000." [FN209]

In Black v. Secretary of Health and Human Services, [FN210] plaintiffs challenged the constitutionality of the $1,000 threshold requirement on Fifth Amendment equal protection grounds. They argued that by making eligibility for the program turn on incurring $1,000 of unreimbursable expenses, Congress made it more difficult for indigent persons to qualify for compensation, because indigents often have their medical expenses defrayed by government programs such as Medicaid. [FN211] The court held, however, that the Act's eligibility requirement "was not designed to disadvantage poor persons, and the fact that it may dispropor-tionately disqualify certain groups, including indigents and persons who enjoy the benefits of other medical programs, d[id] not give rise to an equal protection violation." [FN212]

The court explained that drawing lines to create distinctions for eligibility in social programs was "peculiarly a legislative task" that "may be rational even if it does not do a perfect job of selecting those cases that appear to be appropriate subjects of congressional concern." [FN213] The court then held that "it was rational for Congress to conclude, that as a general matter, those ***298** who incur only modest expenses or whose expenses are reimbursed from other sources present less compelling cases for compensation than those who incur large, unreimbursed expenses." [FN214] Thus, there was no constitutional flaw in the $1,000 threshold requirement, "particularly in light of the 'strong presumption of constitutionality' that attaches to legislation conferring monetary benefits." [FN215]

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10. Price-Anderson Act Amendments of 1988

The 1988 Amendments to the Price-Anderson Act ("1988 Amendments") [FN216] created a federal cause of action for nuclear accident claims and provided that public liability actions filed in state courts were retroactively subject to removal. [FN217] After the 1979 Three Mile Island incident near Harrisburg, Pennsylvania, plaintiffs who wished to have their tort claims remain in state court challenged the jurisdictional and removal provisions of the 1988 Amendments in In re TMI Litigation Cases Consolidated II. [FN218] They argued that the legislation violated Article III of the Constitution [FN219] because the public liability actions subject to the Act did not "arise under" the laws of the United States. [FN220]

The Third Circuit began its analysis with a close examination of the scope of Congress's power to authorize federal courts to decide nondiversity cases turning on state law rules of decision. The court noted that the Supreme Court had distinguished between "pure jurisdictional statutes" and those mixing elements of federal and state law. [FN221] The central teaching of those cases, the Third Circuit said, was that a nondiversity case "cannot be said to arise under a federal statute where that statute is nothing more than a jurisdictional grant." [FN222] On the other hand, courts evaluating mixed federal and state schemes have focused upon ***299** congressional intent and have formulated their decisions with flexibility "in order to honor the presumption in favor of a statute's constitutionality." [FN223]

Turning to the 1988 Amendments at issue, the Third Circuit examined the legislative history and held that Congress had clearly expressed its intention that state law provide the content of and operate as federal law governing public liability cases resulting from nuclear incidents. [FN224] By federalizing state substantive law, Congress established the constitutional foundation for the Act's jurisdictional and removal provisions. The court then said that it would have reached the same conclusion even if state law itself, rather than state law operating as federal law, formed the basis for decision, because the level of federal involvement in the field of nuclear energy and the need for "uniformity, equity, and efficiency in the disposition of public liability claims" provided sufficient "federal elements" to support the legislation. [FN225]

The Third Circuit then turned to plaintiffs' collateral constitutional arguments that the retroactive application of the 1988 Amendments to cases already pending in state court violated principles of "federalism, state sovereignty, due process, and equal protection." [FN226] The Third Circuit's survey of relevant law led it to conclude that the legislation survived each of these challenges, because the provision for retroactivity was rationally related to Congress's desire to avoid inefficiencies and inconsistent outcomes in claims resulting from a single nuclear incident. [FN227]

11. Federal Employees Liability Reform and Tort Compensation Act

The Federal Employees Liability Reform and Tort Compensation Act of 1988 ("the Westfall Act") [FN228] amended the Federal Tort Claims Act to provide for the substitution of the United States as ***300** a defendant in any action where one of its employees is sued for damages as a result of an alleged common law tort committed by the employee within the scope of his or her employment. Congress enacted the Westfall Act to respond to the United States Supreme Court's decision in Westfall v. Erwin, [FN229] which limited a federal official's absolute immunity from tort claims to situations where the official's actions were "within the outer perimeter of an official's duties and discretionary in nature." [FN230] Congress saw the Westfall decision as an erosion of the common law tort immunity formerly available to federal employees. [FN231]

The Westfall Act was challenged in Sowell v. American Cyanamid Co., [FN232] involving a government employee who was seriously injured at work and sought to bring a negligence action against his co-employees. The Eleventh Circuit held that "the great weight of authority" supported the constitutionality of the statute. [FN233] The court also held that the statute's retroactive application did not render it unconstitutional, because "a legal claim affords no definite enforceable property right until reduced to a final judgment." [FN234] The court concluded that Congress's desire to preserve employee morale, maintain federal agencies' ability to carry out their missions, and sustain the vitality of the Federal Tort Claims Act provided a rational basis for the Westfall Act. [FN235]

12. General Aviation Revitalization Act of 1994

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The General Aviation Revitalization Act of 1994 ("GARA"), [FN236] which created an eighteen-year statute of repose for general aviation aircraft, is the most recent congressional tort policy statute to withstand constitutional scrutiny. At least three courts have declared GARA to be constitutional "economic legislation." [FN237]

*301 B. Federal Tort Laws Should Be Upheld: The Mistake of Lochner Should Not Be Repeated

It is important for courts to follow the significant body of case law discussed above supporting the authority of Congress to enact laws setting national tort policy objectives. Any new decision overturning federal liability legislation would create a precedent that courts in the future could utilize to nullify a wide array of federal legislation, even outside the context of tort reform.

It may be unnecessary to raise this point in light of the very strong record of success that federal liability statutes have had against constitutional challenges. Lest anyone forget, however, it is worth reflecting on a highly discredited period in the Supreme Court's history that began around the turn of the century and ended in the mid-1930s. During this period, known as the "Lochner era" (after the unsound constitutional law decision, Lochner v. New York [FN238]), the Court nullified state and federal legislation that it disagreed with as a matter of public policy, using the Constitution as a cloak to cover its highly personalized decisions. [FN239]

Just as plaintiffs during the Lochner era implored the Supreme Court to utilize an expansive view of the Constitution to override legislation, claimants in the future may seek to convince courts to utilize an expansive view of the Constitution to impose their economic policy views upon the nation. Courts should reject this invitation, as they have done for almost a century in the field of federal tort law.

*302 The need for courts to respect Congress's authority to enact legislation setting tort policy rules is reinforced by the doctrine of stare decisis, and by the importance of the statutes themselves. For example, because of the National Childhood Vaccine Injury Act, diseases which once threatened to end the lives of American infants prematurely are now prevented with a routine series of childhood vaccinations. [FN240] Without the Price-Anderson Act, the private nuclear power industry in the United States might not have developed. [FN241] The General Aviation Revitalization Act of 1994 breathed life back into an important American industry. Instead of continuing on the path toward extinction, the general aviation industry is now booming. [FN242] The Biomaterials Access Assurance Act of 1998 will help ensure the availability of lifesaving and life-enhancing implantable medical devices, such as pacemakers, heart valves, artificial blood vessels, and hip and knee joints, that are needed by millions of people each year. [FN243]

C. The Supremacy Clause Requires States to Enforce Federal Liability Reform Legislation

Once Congress enacts legislation pursuant to the Constitution, the Supremacy Clause [FN244] prohibits the states from enforcing any local laws that conflict with the statute. To the extent the various states have liability laws that interfere with, or are contrary to, federal laws enacted by Congress, the state laws are preempted. [FN245] As Chief Justice Marshall explained:

> [T]o such acts of the State Legislatures as do not transcend their powers, but ... interfere with, or are contrary to the law of Congress, made in pursuance of the Constitution, ... *303 [i]n every such case, the act of Congress ... is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it. [FN246]

The Supremacy Clause also requires state courts to enforce federal laws, even though that requirement is in a sense a federal command requiring state court action. [FN247] In Testa v. Katt, [FN248] the Supreme Court addressed the Rhode Island Supreme Court's refusal to enforce the federal Emergency Price Control Act of 1942. [FN249] The Act provided a treble-damages remedy for persons who bought goods for more than the amount of the federal ceiling price and gave jurisdiction over claims under the Act to state as well as federal courts. The Supreme Court upheld the federal program, stating that the position of the Rhode Island Supreme Court "fl[ew] in the face of the fact that the States of the Union constitute a nation" and "disregard[ed] the purpose and effect" of the Supremacy Clause.

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[FN250] State courts were directed to heed the federal Act as "the prevailing policy in every state." [FN251] More specifically, the Court explained:

[T]his Court took occasion in 1876 to review the phase of the controversy concerning the relationship of state courts to the Federal Government. Claflin v. Houseman, 93 U.S. 130. The opinion of a unanimous court in that case was strongly buttressed by historic references and persuasive reasoning. It repudiated the assumption that federal laws can be considered by the States as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon States, courts, and the people, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." It asserted that the obligation of States to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide.... [FN252]

*304 III. RECENT TENTH AMENDMENT DECISIONS DO NOT UNDERMINE CONGRESSIONAL AUTHORITY TO ENACT TORT POLICY LEGISLATION

The United States Constitution grants certain powers to the Federal Government. Where federal legislation is authorized by one of those powers, "Congress may impose its will on the States." [FN253] All other powers are reserved for the States under the Tenth Amendment, which provides that:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. [FN254]

A. The Traditional View: Judicial Deference to Congressional Authority

Historically, the Supreme Court has recognized Congress's "extraordinary power" to enact legislation and has been reluctant to invoke the Tenth Amendment to limit that authority. [FN255] Maryland v. Wirtz [FN256] is the archetypal case adopting the traditional view that courts should not apply substantive limits on federal authority under the Tenth Amendment if Congress is exercising one of its enumerated powers and has a rational basis to do so. In Wirtz, the Court upheld the constitutionality of amendments to the Fair Labor Standards Act ("FLSA") [FN257] that required the states to adopt federal minimum wage and overtime standards for state employees of hospitals, institutions, and schools. [FN258] The Court refused to distinguish economic activity engaged in by *305 private persons from that engaged in by states, [FN259] and declared that courts should not use the Tenth Amendment to "carve up the commerce power to protect enterprises ... simply because those enterprises happen to be run by the States." [FN260]

In 1976, the Court departed briefly from its longstanding reluctance to invoke the Tenth Amendment and attempted to devise affirmative limits on Congress's Article I powers. In National League of Cities v. Usery, [FN261] the Court declared that the Tenth Amendment prohibited Congress from interfering with the core sovereign functions of the states, even where those functions affected interstate commerce. [FN262] That case challenged the validity of the 1974 amendments to the FLSA. The Court held that, insofar as the amendments operated directly to displace the states' ability to structure "integral operations" in areas of "traditional government functions" (i.e., employee-employer relationships in areas such as fire prevention, police protection, sanitation, public health, and parks and recreation), they were not within Congress's Article I authority. [FN263]

Nine years later, however, the Court overruled the National League of Cities case in Garcia v. San Antonio Metropolitan Transit Authority. [FN264] The Garcia case and a 1988 case, South Carolina v. Baker, [FN265] showed the Court's return to its previous position on the Tenth Amendment. [FN266]

1. Garcia v. San Antonio Metropolitan Transit Authority

In Garcia v. San Antonio Metropolitan Transit Authority, [FN267] the Court revisited the question of whether the Commerce Clause empowered Congress to enforce the federal wage and overtime *306 requirements in the 1974 amendments to the FLSA against the states in areas of "traditional governmental functions." [FN268] The San Antonio Metropolitan Transit Authority ("SAMTA") challenged the Act's validity after "the Department of Labor formally amended its [FLSA] interpretive regulations to provide that publicly-owned mass-transit systems were not entitled to immunity under National League of Cities." [FN269]

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The Court began its analysis by restating the well-settled principle that Congress's Commerce Clause authority extends to intrastate economic activities that affect interstate commerce. [FN270] The Court noted that, were SAMTA privately owned, it would unquestionably be obligated to follow FLSA's requirements. [FN271] Therefore, any constitutional exemption SAMTA could obtain from FLSA's requirements had to rest on its status as a governmental entity rather than on the nature of its operations. [FN272]

The Court went on to outline the prerequisites for governmental immunity set forth in National League of Cities, focusing in particular on the exception for "traditional governmental functions." [FN273] The Court said that its own attempts to articulate affirmative limits on congressional authority had failed to establish a workable standard for defining "traditional governmental functions." [FN274] Moreover, attempts by federal and state courts to distinguish "traditional" functions from "nontraditional" functions had proven to be "impracticable and doctrinally barren." [FN275] The Court also expressed skepticism that a case-by-case approach would eventually establish a workable standard, citing its own poor experience in the related field of state immunity from federal taxation. [FN276]

Next, the Court explored alternative ways to define state immunity, but rejected those as unmanageable as well. It conceded that making immunity turn on a "traditional" standard would prevent courts from accommodating changes in the historical functions of states. [FN277] In addition, the Court said that it had previously ***307** rejected the idea of determining a nonhistorical standard for immunity based on the identification of "uniquely" governmental functions. [FN278]

The Court also expressed concern that any rule that would establish judicially imposed definitions of "traditional," "integral," or "necessary" state governmental functions would "inevitably invite[] an unelected federal judiciary to make decisions about which state policy it favors and which ones it dislikes." [FN279] Accordingly, the Court held:

We, therefore now reject, as unsound in principle and unworkable in practice, a rule for state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it disserves principles because it is divorced from those principles. [FN280]

The Court then turned to the underlying issue that confronted it in National League of Cities--the manner in which the Constitution insulates states from the reach of Congress's power under the Commerce Clause. The Court said that it had "no license to employ freestanding conceptions of state sovereignty" [FN281] in deciding when the Constitution protects "the States as States," [FN282] because the Framers had chosen to ensure a role for the states in the federal system through the structure of the federal government itself. [FN283] The Court stated:

[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the political process ***308** rather than to dictate a "sacred province of state autonomy." [FN284]

The Court reinforced its conclusion that the federal political process effectively preserves the interests of the states by pointing out the high level of funding that states receive from the federal government in the form of general and program specific grants in aid. [FN285]

The Court then held that the federal wage and overtime requirements in the FLSA, as applied to SAMTA, were not "destructive of state sovereignty or violative of any constitutional provision." [FN286] SAMTA was simply being placed in the same position as other employers. The Court also pointed out that, while the FLSA would raise costs for mass-transit systems, Congress had provided countervailing financial assistance--thus reinforcing the Court's "conviction that the national political process systematically protects States from the risk of having their functions in [the area of mass-transit] handicapped by Commerce Clause regulation." [FN287]

2. South Carolina v. Baker

In South Carolina v. Baker, [FN288] the Court was asked to decide the constitutionality of the Tax Equity and Fiscal Responsibility Act of 1982 ("Tax Act"). [FN289] The Tax Act removed the federal income tax exemption for interest earned on publicly offered long-term bonds issued by state and local governments unless those bonds were

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issued in registered form. [FN290] Congress believed that ***309** the registration requirement would prevent tax evasion that was being facilitated through the exchange of unregistered bearer bonds. [FN291] South Carolina, joined by the National Governors' Association as intervenor, challenged the Tax Act, contending that it violated the Tenth Amendment because it compelled States to issue bonds in registered form. [FN292]

The Court began its analysis by restating its holding in Garcia that the Tenth Amendment provides structural rather than substantive limits on Congress's legislative authority--i.e., that states must find their protection from overreaching congressional acts through elected Members of Congress. [FN293] The Court acknowledged that Garcia left open the possibility that the Tenth Amendment could be invoked to invalidate congressional regulation of state activities where there were "extraordinary defects in the national political process," but held that those defects did not exist with respect to the Tax Act. [FN294] South Carolina, the Court said, did not "even allege[[] that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." [FN295]

The Court then addressed the states' contention that the Tax Act coerced them into enacting legislation permitting bond registration and into administering the registration scheme. [FN296] In support of their contention, the states cited FERC v. Mississippi, [FN297] which left open the possibility that the Tenth Amendment might limit Congress's power to compel states to regulate on behalf of federal interests. [FN298]

In FERC, the Court had upheld a federal statute requiring state utility commissions to: (1) adjudicate and enforce federal standards; (2) either consider adopting certain federal standards or cease regulating public utilities; and (3) follow certain federally ***310** mandated procedures. [FN299] The Court had concluded that, whatever constitutional limitations might exist on the federal power to compel state regulatory activity, Congress had the power to require state utility regulatory commissions to adjudicate federal issues and to require that states regulating in a field open to preemption consider suggested federal standards and follow federally mandated procedures. [FN300]

The Court in Baker did not accept South Carolina's invitation to define whether the Tenth Amendment claim left open in FERC survived Garcia or posed constitutional limitations independent of those discussed in Garcia. It was able to avoid the issue by finding that the Tax Act presented the same type of legislation that was upheld in FERC: both statutes regulated state activities, neither sought to control or influence the manner in which states regulated private parties. [FN301]

The Baker Court concluded its Tenth Amendment analysis by rejecting the states' contention that the Tax Act impermissibly commandeered the state legislative and administrative process by requiring many state legislatures to amend their statutes in order to issue registered bonds, and state officials to devote substantial effort to determine how best to implement a registered bond system. The Court observed that being compelled to take administrative and legislative actions to comply with federal law was a common and often inevitable consequence faced by states wishing to engage in activities subject to federal regulation. [FN302] Furthermore, the Court bluntly pointed out that the states' theory of commandeering would "not only render Garcia a nullity, but would also restrict congressional regulation of state activities even more tightly than it was restricted under the now overruled National League of Cities line of cases." [FN303]

B. Judicially Imposed Limitations on Congressional Authority

The Supreme Court has signaled in two recent cases that the Tenth Amendment may once again return from its basic dormancy. ***311** In those decisions-- New York v. United States [FN304] and Printz v. United States [FN305] --the Court addressed the federal government's ability to force states to implement or administer federal regulatory schemes.

1. New York v. United States

New York v. United States [FN306] involved a challenge to the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("Waste Policy Act"). [FN307] That Act sought to address a looming national shortage of disposal sites for low-level radioactive waste by directing each state to assume responsibility "for providing, either by itself or in

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cooperation with other States, for the disposal of ... low-level radioactive waste generated within the State" within seven years. [FN308] The State of New York and two counties in which disposal facilities were planned in the state sought a declaratory judgment that the Waste Policy Act was inconsistent with the Tenth Amendment. [FN309]

Petitioners' challenge focused on three sets of "incentives" that Congress included in the Act to encourage states to comply with their statutory obligation to attain local or regional self-sufficiency in the disposal of low- level radioactive waste. [FN310] Monetary incentives allowed states with disposal sites to impose a surcharge on radioactive waste received from other states. The Waste Policy Act also established an escrow account from which the Secretary of Energy allocated a portion of the monies generated by this surcharge to states that complied with the federal timetable. [FN311] Next, access incentives allowed states with disposal sites to increase the cost of access to the sites substantially, and then to deny access altogether, to radioactive waste generated in states that failed to meet the federal timetable. [FN312] Finally, the most severe incentive, the "take title" provision, required states ***312** that failed to make arrangements for radioactive waste disposal to take title and possession of waste generated within their borders and to accept liability for all damages directly or indirectly incurred by waste generators as a consequence of the state's failure to make arrangements by the federal deadline. [FN313]

The Court began its discussion by noting that the powers conferred in the Constitution "were phrased in language broad enough to allow for the expansion of the Federal Government's role," [FN314] and that allows for enormous changes in the "scope of the federal government's authority with respect to the States." [FN315] The Court cited its "broad construction" of the Commerce and Spending Clauses, along with the Necessary and Proper Clause and the Supremacy Clause, as particularly important. [FN316] Nevertheless, the Court held, Congress is subject to the limitations contained in the Constitution. Those limitations, the Court explained, are "not derived from the text of the Tenth Amendment itself," but are found elsewhere in the Constitution (i.e., in Article I). [FN317]

The Court then distinguished the Waste Policy Act from statutes at issue in recently decided cases that involved the authority of Congress to subject state governments to generally applicable laws (e.g., Garcia). [FN318] Unlike the statutes at issue in those cases, the Court held, the Waste Policy Act did not seek to subject a state to the same legislation applicable to private parties, but instead attempted to "direct or otherwise motivate the States to regulate in a particular field or a particular way." [FN319]

The Court observed that, while it had "never sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations," [FN320] the "question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers." [FN321] The Court noted that the Constitutional Convention was convened, in part, because the Articles of Confederation did not give Congress the authority in most respects to govern the ***313** people directly. [FN322] The Convention generated many proposals for the structure of the new government, "but two quickly took centerstage." [FN323] One plan, the "Virginia Plan," allowed Congress to regulate individuals "without employing the States as intermediaries." [FN324] The "New Jersey Plan," on the other hand, continued to require Congress to obtain the approval of the states to legislate, as had the Articles of Confederation. [FN325] This plan was criticized, however, because it "might require the Federal Government to coerce the States into implementing legislation." [FN326] Ultimately, the Framers opted to provide for a central government in which Congress "would exercise its legislative authority directly over individuals rather than over States." [FN327] The Court concluded, therefore, that "where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." [FN328]

On the other hand, the Court explained that, while Congress cannot compel state regulation, it is not prohibited from encouraging a state to regulate in a particular way or attempting to influence a state's policy choices through noncoercive incentives. [FN329] The Court identified two tangible methods by which Congress "may urge a State to adopt a legislative program consistent with federal interests." [FN330] First, under its spending power, Congress can attach conditions on the receipt of federal funds as a means of influencing a state's policy. [FN331] Second, Congress can establish a "program of cooperative federalism" in which states may choose to regulate an activity according to federal standards or to have state law preempted by federal regulation. [FN332]

Under these noncoercive approaches to achieving state regulation, the Court pointed out, state governments can

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remain responsive to the local electorate's policy preferences and accountable to the people. [FN333] In contrast, if the federal government ***314** were able to compel states to regulate, political accountability would be diminished. For instance, if members of Congress could impose unpopular policy decisions on state legislators, the state officials would "bear the brunt of public disapproval," while the federal officials who devised the program would "remain insulated from the electoral ramifications of their decision." [FN334]

The Court then proceeded to determine whether the Waste Policy Act's monetary, access, and take-title incentives impermissibly commandeered the states' legislative processes. The Court held that the monetary incentives included in the Act, in which Congress conditioned grants to the states upon the states' attainment of certain milestones, fell "well within the authority of Congress under the Commerce and Spending Clauses." [FN335] The Court also held that the access incentives in the Act, which ultimately authorized states to deny access to low-level radioactive waste generated in other states, represented a permissible exercise of Congress's commerce power. [FN336] Because both sets of incentives were supported by affirmative constitutional grants of power to Congress, neither was inconsistent with the Tenth Amendment. [FN337]

The Court found the Waste Policy Act's "take title" provision to be of a "different character" than the monetary and access incentives. [FN338] The "take title" provision offered states a "choice" of either regulating according to Congress's instructions or accepting ownership of waste and becoming liable for all damages waste generators suffered as a result of failure to meet the federal timetable. [FN339] The Court characterized the forced transfer component, standing alone, as no different than a congressionally compelled subsidy from state governments to radioactive waste producers. [FN340] Likewise, the requirement that states assume the liabilities of waste generators within their borders unconstitutionally directed the states to assume the liabilities of certain state residents. [FN341] Both types of federal actions commandeered the states for federal regulatory purposes and were inconsistent ***315** with the Constitution's division of authority between federal and state governments. [FN342]

Significantly, the Court drew a sharp distinction between permissible federal legislation that directs state courts to enforce federal laws and unconstitutional legislation, such as the Waste Policy Act, that directs state officials to create and enforce a congressionally mandated regulatory scheme. [FN343] The Court wrote:

> Some of [the cases cited by the United States in favor of the Waste Policy Act] discuss the well established power of Congress to pass laws enforceable in state courts. See Testa v. Katt, 330 U.S. 386 (1947); Palmore v. United States, 411 U.S. 389, 402 (1973); see also Second Employer's Liability Cases, 223 U.S. 1, 57 (1912); Claflin v. Houseman, 93 U.S. 130, 136-37 (1876). These cases involve no more than an application of the Supremacy Clause's provision that federal law "shall be the Supreme Law of the Land," enforceable in every State. More to the point, all involve congressional regulation of individuals, not congressional requirements that States regulate. Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal "direction" of state judges is mandated by the text of the Supremacy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to legislate. [FN344]

The Court's clarification is particularly relevant to the constitutionality of federal liability reform legislation, because these reform proposals have frequently called upon state courts to enforce federal law. Recently, some opponents of federal tort reform legislation have expansively interpreted the Court's general holding in New York that Congress cannot compel state legislation to suggest that Congress may lack the power to direct state judges to enforce federal liability reform legislation. [FN345] As the Court's opinion in New York demonstrates, however, federal liability reform legislation that compels state court enforcement of federal law is not in violation of the Tenth Amendment. It is ***316** constitutionally permissible. This is how FELA has worked for almost a hundred years. Congress's power to act in this regard is still intact.

The concerns the Court had with the Waste Policy Act's "take title" provision in New York simply do not exist with respect to federal liability reform legislation. Most importantly, federal liability reform efforts seek to "exercise ... legislative authority directly over individuals rather than over States." [FN346] Like the legislation upheld in Garcia, and unlike the Waste Policy Act's take title provision that was struck down in New York, federal liability reform bills have been "generally applicable laws." [FN347] They have never compelled state legislation or required state legislatures to enact legislation limiting tort liability.

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In addition, when Congress enacts federal tort policy legislation, there is no potential for a breakdown in the national political process due to a lack of accountability. Clearly, if Congress enacts tort reform legislation, "it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." [FN348] This fact strongly supports the constitutionality of federal liability reform legislation.

2. Printz v. United States

Printz v. United States [FN349] involved a challenge to the 1993 Brady Handgun Violence Prevention Act amendments to the Gun Control Act of 1968 ("Brady Act"). [FN350] The Brady Act required the Attorney General to establish a national system for instant background checks on prospective handgun purchasers and commanded the "chief law enforcement officer" ("CLEO") of each local jurisdiction to conduct the background checks and perform related tasks until the national system became operative. [FN351] The CLEOs for counties in Arizona and Montana objected to being "pressed into federal service" and contended that ***317** the Act impermissibly compelled them to execute a federal law. [FN352]

The Court opened its opinion by noting that no constitutional text directly addressed the extent to which Congress may force state officials to execute a federal law. [FN353] Accordingly, the Court concluded that the answer to the CLEOs' challenge would have to come from historical understanding and practice, the structure of the Constitution, and the Court's jurisprudence. [FN354]

In support of the Brady Act's validity, the Government cited acts of Congress which required state courts to record applications for citizenship, transmit naturalization records, order deportations, and perform other miscellaneous duties. [FN355] The Court held that Congress's power to compel enforcement of federal law by state judges was well settled, but only "establish[ed] ... that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." [FN356] The Court explained:

It is understandable why courts should be viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time.... The Constitution itself, in the Full Faith and Credit Clause, Art. IV, § 1, generally required such enforcement with respect to obligations arising in other States. [FN357]

The Court then said that its acceptance of statutes imposing obligations on state courts did not imply that Congress could impose obligations on state executives. [FN358] Moreover, the Court observed that the "utter lack of statutes" imposing obligations on state executives suggested that Congress assumed it did not have the authority to compel state executive officers to carry out federal laws. [FN359] To complete the historical record, the Court acknowledged that "a number of federal statutes enacted within the past few decades [require] the participation of state and local officials," but that the persuasive force of these recent statutes ***318** was far outweighed by the almost 200 years of congressional avoidance of the practice. [FN360]

Next, the Court turned to the structure of the Constitution. Pointing to its detailed discussion of the Constitutional Convention in New York, [FN361] the Court reinforced its earlier conclusion that, "[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." [FN362] The Printz Court further concluded that, with respect to the Brady Act, the "power of the Federal Government would be augmented immeasurably if it were able to impress into its service--and at no cost to itself--the police officers of the 50 States." [FN363]

The Court also evaluated whether the Brady Act violated the separation of powers doctrine. [FN364] The Court noted that, under Article II, Section 3, the responsibility for administering federal laws rests with the Executive Branch of the federal government. [FN365] The Court declared that the Brady Act effectively transferred this function to thousands of state CLEOs by requiring them to administer the federally mandated background checks "without meaningful Presidential control." [FN366] The Court viewed Congress's transfer of the federal executive power to state officials as a constitutionally impermissible reduction of the Executive Branch's power by another co-equal branch of the federal government. [FN367] The Court indicated that allowing such a transfer would shatter the unity of the federal executive envisioned by the Framers, because "Congress could act as effectively without the

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legislation. ***272** [FN14] The American Legislative Exchange Council, a bipartisan organization of more than 3000 state legislators from all fifty states formed in principal part to protect states' rights, also supports the enactment of federal product liability reform legislation. [FN15]

Further, as we argue in this Article, federal liability reform has ample basis for support in the Constitution. We address arguments to the contrary [FN16] based on three recent decisions by the Supreme Court--New York v. United States, [FN17] United States v. Lopez, [FN18] and Printz v. United States. [FN19] While these decisions provide limits on the federal government's power over the states, they do not preclude the enactment of civil justice reform at the federal level.

This Article does not advocate any particular bill in the matrix of federal tort reform legislation. Rather, it responds to questions that may be raised in general about whether civil justice reform is constitutional and comports with basic principles of federalism. By focusing on such general principles, this Article is intended to have a long "shelf life" that can contribute to constitutional debates and legal challenges in the courts for many years to come.

Part I of this Article argues that Congress has the power under the Commerce Clause of the Constitution to enact federal liability reform legislation and that state courts are bound to enforce ***273** that law under the Supremacy Clause. Part II shows that, for almost a century, Congress has enacted legislation altering state tort law, and that these laws have been held constitutional time after time. Finally, Part III maintains that state court enforcement of federal liability reform legislation would not encroach upon any powers specifically reserved for the States and, therefore, is not inconsistent with the Tenth Amendment.

I. THE COMMERCE CLAUSE EMPOWERS CONGRESS TO ENACT FEDERAL LIABILITY REFORM LEGISLATION

A. The Commerce Clause

The Commerce Clause of the Constitution gives Congress the power to regulate commerce. [FN20] As the Supreme Court has said, "This power, like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." [FN21]

The Supreme Court has identified "three broad categories of activity" [FN22] that Congress may regulate pursuant to its Commerce Clause authority: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce or persons or things in interstate commerce; and (3) activities having a substantial relation to interstate commerce, regardless of whether the activity is local or extends across state boundaries. [FN23]

The Supreme Court has ruled that, while local activity may not have a substantial effect on interstate commerce when considered in isolation, it may have a substantial effect on interstate commerce when considered in the aggregate. In Wickard v. Filburn, [FN24] for example, the Court upheld Congress's regulation of ***274** the consumption of homegrown wheat because of its aggregate economic effect on the interstate wheat market. The Court explained that, "even if [the] activity [is] local and though it may not be regarded as commerce, it may still ... be reached by Congress if it exerts a substantial economic effect on interstate commerce." [FN25] The Court also concluded that Congress may regulate activity "irrespective of whether [the] effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" [FN26]

B. Federal Tort Laws

Consistent with its power to regulate commerce pursuant to the Commerce Clause, Congress has enacted a number of laws that preempt state tort law. [FN27]

1. The Early Laws

As far back as 1908, Congress enacted a "tort substitute" for workers' compensation in the railroad field. The Federal Employers' Liability Act ("FELA"), [FN28] a misleadingly named federal statute that defines rights and duties in personal injury cases brought by railroad workers against their employers, was upheld by the Supreme

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President as with him, by simply requiring state officers to execute its laws." [FN368]

Finally, the Court turned to its prior decisions on the ability of the Federal Government to commandeer state governments to administer federal laws. In Hodel v. Virginia Surface Mining & Reclamation Association, Inc. [FN369] and FERC v. Mississippi, [FN370] the ***319** Court held, it sustained statutes against constitutional challenge only after establishing that they did not require the states to enforce federal law. Accordingly, the Court held, its decision in New York [FN371] striking down a provision of the Waste Policy Act that "unambiguously required the States to enact or administer a federal regulatory program ... should have come as no surprise." [FN372] After rejecting the Government's attempts to distinguish the New York decision, the Court wrote:

We held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty. [FN373]

The Printz decision does not provide a constitutional basis to nullify federal liability reform legislation. The decision makes clear that Congress cannot compel state legislatures or executives to participate in a federal regulatory or administrative scheme, [FN374] but it suggests no constitutional prohibition against legislation that asks state courts to enforce a federal liability law. [FN375] To the contrary, state courts have always been and continue to be obligated to honor such legislation. That role is entirely consistent with the Tenth Amendment and the constitutional mandate found in the Supremacy Clause.

*320 3. Driver's Privacy Protection Act Cases

Recent federal appellate and district court decisions striking down a federal law regulating the disclosure of information contained in motor vehicle registration records have been heavily influenced by the Printz and New York decisions.

In Condon v. Reno, [FN376] the Fourth Circuit permanently enjoined federal enforcement of the Driver's Privacy Protection Act of 1994 ("DPPA"). [FN377] The DPPA restricted the states' dissemination and use of personal information contained in state motor vehicle records and imposed criminal and civil liability on state officials who failed to comply with the federal restrictions. [FN378] The court concluded that the DPPA exclusively regulated the disclosure of information contained in state motor vehicle records, and therefore could not be categorized as a law of general applicability permissible under Garcia. [FN379] Instead, the DPPA violated the Supreme Court's holding in New York that the federal government cannot compel state executives to administer a federal regulatory program. [FN380]

Similarly, in Oklahoma v. United States, [FN381] the court enjoined federal enforcement of the DPPA on Tenth Amendment grounds. Contrary to the provisions of the federal DPPA, Oklahoma law made motor vehicle records a matter of public record. [FN382] Relying primarily on New York and Printz, the court held that the DPPA impermissibly sought to "treat the Oklahoma Department of Public Safety as a subdivision of the United States" by requiring the Department to "create and maintain systems" to enforce the DPPA's provisions. [FN383]

***321** Like the New York and Printz cases, the reach of the DPPA cases is limited to situations where state executives (as opposed to state courts) are forced to implement federal policy or where Congress escapes political accountability by forcing state legislators to enact a regulatory scheme. They have no bearing, directly or indirectly, on congressional enactment of a tort law that would be applicable in both federal and state court proceedings.

CONCLUSION

For almost a century, Congress has enacted legislation setting national tort policy rules, and these laws have been declared constitutional time and time again as legitimate exercises of Congress's Commerce Clause authority. Future challenges to federal tort legislation are bound to fail as well, unless courts unwisely choose to abandon that substantial body of well-reasoned precedent. The United States Supreme Court's decisions in New York, Lopez, and

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Printz do not change this conclusion.

The Lopez opinion discussed the Commerce Clause, but it is not truly a Commerce Clause case. As the Court explained, the Gun-Free School Zones Act at issue was a criminal statute that regulated handgun possession. "[B]y its terms," the statute "ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however, broadly one might define those terms." [FN384] The Lopez decision is distinguishable both legally and factually from those cases upholding regulation of activities that arise out of or are connected with commercial transactions, which viewed in the aggregate, substantially effect interstate commerce--cases that directly support Congress's Commerce Clause authority over liability law.

The New York and Printz decisions provide limits on the federal government's power over the states, but they do not preclude the enactment of civil justice reform at the federal level. In fact, the opinions make clear that state court enforcement of federal liability reform legislation would not encroach upon any powers specifically reserved for the states. They expressly distinguish state court enforcement of federal laws from federal laws commanding state legislatures to legislate or requiring state ***322** executive officials to administer a federal regulatory scheme. While the former is clearly constitutional and, indeed, mandated by the Supremacy Clause, the latter are not.

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[FN1]. See Erwin Chemerinsky, The Values of Federalism, 47 FLA. L. REV. 499 (1995).

[FN2]. See H.R. REP. NO. 105-702, at 25-28 (1998) (minority views in House Judiciary Committee Report on Class Action Jurisdiction Act of 1998); S. REP. NO. 105-32, at 64, 78-80 (1997) (minority views in Senate Commerce Committee Report on Product Liability Reform Act of 1997); S. REP. NO. 104-69, at 64-66 (1995) (minority views in Senate Commerce Committee Report on Product Liability Fairness Act); H.R. REP. NO. 104-63, at 27 (1995) (minority views in House Commerce Committee Report on Common Sense Product Liability Reform Act); H.R. REP. NO. 104-64, at 35-36, 40-41 (1995) (minority views in House Judiciary Committee Report on Common Sense Legal Standards Reform Act of 1995).

[FN3]. See 21 C.F.R. § 101 (1995) (requiring uniform labeling of all packaged food products with ingredients and specific nutritional information).

[FN4]. See Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. § 455 (1995) (prohibiting misrepresentation of the mechanical condition of a used vehicle and requiring used car salesmen to disclose warranty information to consumers prior to sale); Odometer Disclosure Requirement, 49 C.F.R. § 580 (1995) (requiring transferor of motor vehicle to provide a written disclosure of odometer mileage and its accuracy to protect purchasers who rely on odometer readings in selecting used cars).

[FN5]. See Funeral Industries Practice Rule, 16 C.F.R. § 453 (1995).

[FN6]. See C. Boyden Gray, Regulation and Federalism, 1 YALE J. ON REG. 93, 96-98 (1983) (explaining the

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Reagan administration's reasons for supporting national product liability legislation); Joe Davidson, Bill to Limit Product Liability Lawsuits by Consumers Fails in Senate, But Barely, WALL ST. J., Sept. 11, 1992, at C13 (stating that "President Bush strongly supported [federal product liability reform legislation] and made it a hot campaign topic with a comment at the Republican convention").

[FN7]. See supra note 2 and accompanying text. Conservatives also enjoy pointing out an apparent inconsistency in liberal philosophy. The same members who have expressed a resounding "no" to federal civil justice and liability reform legislation strongly support the Consumer Products Safety Commission, in part because products flow in interstate commerce. See Victor E. Schwartz & Mark A. Behrens, Federal Product Liability Reform in 1997: History And Public Policy Support Its Enactment Now, 64 TENN. L. REV. 595, 605-06 (1997).

[FN8]. See H.R. Rep. No. 104-63, at 27 (1995) (minority views in House Commerce Committee Report on Common Sense Product Liability Reform Act).

[FN9]. Robert M. Ackerman, Tort Law and Federalism: Whatever Happened to Devolution?, 14 YALE J. REG. 429, 329 (1996) (describing the public policy and constitutional bases for federal involvement in tort law). See also Thomas A. Eaton & Susette M. Talarico, Testing Two Assumptions About Federalism and Tort Reform, 14 YALE J. REG. 371 (1996) (characterizing Republican support for federal tort reform as an exception to the desire to shift policymaking authority from the federal government to the states); Robert L. Rabin, Federalism And The Tort System, 50 RUTGERS L. REV. 1 (1997) (characterizing 1996 federal product liability reform legislation as part of a recent series of efforts to achieve liability reform at the federal level); Nim M. Razook, Jr., Legal And Extralegal Barriers To Federal Product Liability Reform, 32 AM. BUS. L.J. 541 (1995) (suggesting federal liabilty reform is inconsistent with states' rights).

[FN10]. See Victor E. Schwartz, Mark A. Behrens, & Mark D. Taylor, Stamping Out Tort Reform: State Courts Lack Proper Respect for Legislative Judgments, LEGAL TIMES, Feb. 10, 1997, at S34 (discussing judicial nullification of state tort statutes); Victor E. Schwartz, Mark A. Behrens, & Mark D. Taylor, Who Should Make America's Tort Law: Courts or Legislators? (Wash. Legal Found. Feb. 1997) (asserting that legislatures and courts share a role in deciding tort law rules).

[FN11]. See Schwartz & Behrens, supra note 7.

[FN12]. See Victor E. Schwartz & Mark A. Behrens, The Road To Federal Product Liability Reform, 55 MD. L. REV. 1363 (1996); Sherman Joyce, Product Liability Law In The Federal Arena, 19 SEATTLE U. L. REV. 421 (1996).

[FN13]. See U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS COMMODITY TRANSPORTATION SURVEY 1-7, tbl. 1 (1977) (indicating that, on average, over 70% of goods manufactured in the United States are shipped out of state and sold).

[FN14]. The NGA's most recent resolution stated in part:

> The National Governors' Association recognizes that the current patchwork of U.S. product liability laws is too costly, time-consuming, unpredictable, and counterproductive, resulting in a severely adverse effect on American consumers, workers, competitiveness, innovation and commerce.... Clearly, a national product liability code would greatly enhance the effectiveness of interstate commerce. The Governors urge Congress to adopt a federal uniform product liability code.

S. REP. NO. 105-32, at 14 (1997) (quoting NGA policy statement).

[FN15]. See id. at 15.

[FN16]. See Jeffrey White, Does Products Bill Collide with Tenth Amendment?, TRIAL, Nov. 1997, at 30; Cynthia C. Lebow, Federalism And Federal Product Liability Reform: A Warning Not Heeded, 64 TENN. L. REV. 665 (1997); Jerry J. Phillips, Hoist by One's Own Petard: When a Conservative Commerce Clause Interpretation Meets Conservative Tort Reform, 64 TENN. L. REV. 647 (1997); Andrew F. Popper, A Federal Tort Law Is Still a Bad

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Idea: A Comment on Senate Bill 687, 16 J. PRODS. & TOXICS LIAB. 105 (1994); Beth Rogers, Note, Legal Reform--At the Expense of Federalism? House Bill 956, Common Sense Civil Justice Reform Act and Senate Bill 565, Product Liability Reform Act, 21 U. DAYTON L. REV. 513 (1996).

[FN17]. 505 U.S. 144 (1992) (discussing the Low-Level Radioactive Waste Policy Amendments Act).

[FN18]. 514 U.S. 549 (1995) (discussing the Gun Free Zones Act).

[FN19]. 521 U.S. 898 (1997) (discussing the Brady Handgun Violence Prevention Act).

[FN20]. See U.S. Const. art. I, § 8, cl. 3.

[FN21]. United States v. Lopez, 514 U.S. 549, 553 (1995) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824)) (reaffirming that, although the Commerce Clause represents a broad grant of federal authority, that authority is not plenary, but subject to outer limits).

[FN22]. Lopez, 514 U.S. at 558.

[FN23]. See id. at 558-59. See also United States v. Darby, 312 U.S. 100, 118 (1941) ("The power of Congress over interstate commerce ... extends to those activities intrastate which so affect interstate commerce ... as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.").

[FN24]. 317 U.S. 111 (1942).

[FN25]. Id. at 125.

[FN26]. Id. See also Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 277 (1981) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States ....").

[FN27]. Maritime law, though beyond the scope of this Article, is another field in which Congress has been active in setting tort policy rules. See generally GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY ch. VI (2d ed. 1975).

[FN28]. Federal Employers' Liability Act, ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51-60 (1994)).

[FN29]. See infra notes 78-82 and accompanying text.

[FN30]. 33 U.S.C. §§ 901-944 (1994).

[FN31]. See generally Kane v. United States, 43 F.3d 1446, 1449 (Fed. Cir. 1994) (describing workers' compensation acts).

[FN32]. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046, 1051 (5th Cir. 1983) (holding that, although the LHWCA was enacted to help injured employees, the Act was not intended to provide compensation to injured employees for expenses that are the direct result of the employee's own post- injury misconduct).

[FN33]. Smither & Co., Inc. v. Coles, 242 F.2d 220, 222 (D.C. Cir. 1957) (citing Bradford Electric Co. v. Clapper, 286 U.S. 145, 159 (1932)) (describing the compromises made by both employees and employers through the enactment of statutes like the LHWCA).

[FN34]. See infra notes 93-103 and accompanying text.

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[FN35]. Numerous other congressional tort policy enactments that have been declared constitutional are described later in this Article. See discussion infra Part II.

[FN36]. Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101). See generally David Moffitt, Note, The Implications of Tort Reform For General Aviation: The General Aviation Revitalization Act of 1994, 1 SYRACUSE J. LEGIS. & POL'Y 215 (1995).

[FN37]. GARA did not provide any new basis for federal court jurisdiction; cases that would have been decided by a state court before GARA became effective on August 17, 1994, remain in state court today, subject to the application of the federal "ceiling" on tort liability. GARA also did not preempt shorter state statutes of repose that may apply to bar a tort claim.

[FN38]. See S. REP. NO. 105-32, at 41-42 (1997) (Senate Commerce Committee Report on Product Liability Reform Act of 1997). See generally Geoffrey A. Campbell, Study: Business Booms After Tort Reform Enacted, A.B.A. J., at 28 (Jan. 1996) ("The light aircraft industry is taking off as reduced liability encourages technological innovation.").

[FN39]. See S. REP. NO. 105-32, at 41.

[FN40]. See id.

[FN41]. See id.

[FN42]. See id.

[FN43]. See id. at 42.

[FN44]. See id.

[FN45]. See id.

[FN46]. See id.

[FN47]. 26 U.S.C. § 104 (Supp. II 1996).

[FN48]. 42 U.S.C. §§ 201, 233 (Supp. II 1996).

[FN49]. 49 U.S.C. § 1136 (Supp. II 1996).

[FN50]. 42 U.S.C. § 1791 (Supp. II 1996).

[FN51]. 15 U.S.C. § 77 (Supp. II 1996) (enacted over the veto of President Clinton).

[FN52]. A product liability reform bill cleared both the House and Senate in the 104th Congress, but was vetoed by President Clinton. That legislation, among other reforms, capped punitive damage awards at the greater of two times the plaintiff's compensatory damages award or $250,000; abolished joint liability for noneconomic damages; limited the liability of product sellers to their own negligence or failure to comply with an express warranty; established a complete defense to liability if the principal cause of an accident was the claimant's abuse of alcohol or illicit drugs; reduced a defendant's liability to the extent the plaintiff's harm was due to the misuse or alteration of a product; and set a 15-year statute of repose on litigation involving workplace durable goods (e.g., machine tools). See H.R. CONF. REP. NO. 104-481 (1996). President Clinton vetoed the bill on May 2, 1996. See John F. Harris, Clinton Vetoes Product Liability Measure, WASH. POST, May 3, 1996, at A14.

[FN53]. 42 U.S.C.S. § 14503 (Law. Co-op. 1998).

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[FN54]. 49 U.S.C.S. § 28103 (Law. Co-op. 1998).

[FN55]. 21 U.S.C.S. § 1605 (Law. Co-op. 1998).

[FN56]. Pub. L. No. 105-271, 112 Stat. 2386, 2389 (1998) (to be codified at 15 U.S.C. § 78a).

[FN57]. 15 U.S.C.S. §§ 77-78 (Law. Co-op. 1998).

[FN58]. See supra text accompanying note 51.

[FN59]. See S. REP. NO. 105-182, at 3 (1998); H.R. REP. NO. 105-640, at 8 (1998); H.R. REP. NO. 105-803, at 13 (1998).

[FN60]. 514 U.S. 549 (1995). See, e.g., Phillips, supra note 16.

[FN61]. Pub. L. No. 101-647, § 1702(b), 104 Stat. 4789, 4844 (1990) (current version at 18 U.S.C. § 922(q)(2)(A) (1998)).

[FN62]. Lopez, 514 U.S. at 551. See also Brzonkala v. Virginia Polytechnic Inst. and State Univ., 1999 WL 111891, at *10 (4th Cir. Mar. 5, 1999) (holding that the Violence Against Women Act, which created a civil cause of action against private parties who commit acts of gender-motivated violence, exceeded Congress's Commerce Clause authority because the activity Congress sought to regulate--violent crime motivated by gender animus--was "not itself even arguably commercial or economic," and it "lack[ed] a meaningful connection with any particular, identifiable economic enterprise or transaction"). See generally Herbert Hovenkamp, Judicial Restraint And Constitutional Federalism: The Supreme Court's Lopez And Seminole Tribe Decisions, 96 COLUM. L. REV. 2213 (1996); Symposium, The New Federalism After United States v. Lopez, 46 CASE W. RES. L. REV. 633 (1996); Symposium, Reflections on United States v. Lopez, 94 MICH. L. REV. 533 (1995).

[FN63]. Lopez, 514 U.S. at 561.

[FN64]. Id. at 567.

[FN65]. See supra notes 22-26 and accompanying text. See also Patrick Hoopes, Tort Reform In the Wake of United States v. Lopez, 24 HASTINGS CONST. L.Q. 785 (1997) (discussing how the Lopez decision represented a retreat from the Supreme Court's traditionally expansive interpretation of Congress's authority under the Commerce Clause).

[FN66]. See Lopez, 514 U.S. at 563 (indicating that Congress has the power to enact legislation regulating firearms possession explicitly connected with or having an effect on interstate commerce). See also Scott M. Richmond, Note, Printz v. United States: If Congress Cannot Force State Legislatures to Implement Federal Policy, Why Should It Be Able to Force State Executives?, 7 WIDENER J. PUB. L. 325, 371 (1998) ("Congress has the power, under the Commerce Clause, to regulate handgun sales involved in interstate commerce.").

[FN67]. 46 U.S.C.A. §§ 181-196 (1994).

[FN68]. 46 U.S.C.A. § 182.

[FN69]. 46 U.S.C.A. § 183.

[FN70]. 109 U.S. 578 (1883).

[FN71]. See id. at 579-80.

[FN72]. Id. at 589.

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[FN73]. 88 U.S. (21 Wall.) 558 (1874) (addressing Congress's power to make changes to maritime law).

[FN74]. Providence, 109 U.S. at 589 (quoting The Lottawana, 88 U.S. at 577).

[FN75]. Id. at 590 (quoting The Lottawana, 88 U.S. at 577).

[FN76]. Id.

[FN77]. See id. at 587.

[FN78]. 223 U.S. 1 (1912).

[FN79]. 45 U.S.C. §§ 51-60 (1994).

[FN80]. See supra note 28 and accompanying text. In Howard v. Illinois Central Railroad Co. (the Employers' Liability Cases), 207 U.S. 463, 496-97 (1908), the Court struck down a 1906 version of FELA, finding that the 1906 Act exceeded Congress's Commerce Clause authority because it "embrace[d] ... matters and things domestic [or intrastate] in their character."

[FN81]. See 45 U.S.C. § 56. The Jones Act, 46 U.S.C.A. § 688 (1994), a FELA-like statute that permits seamen injured in the course of employment to maintain an action for damages at law, also has been interpreted to provide federal and state courts with concurrent jurisdiction to decide Jones Act cases. See Engel v. Davenport, 271 U.S. 33 (1926).

[FN82]. Mondou, 223 U.S. at 50 (emphasis added) (quoting Munn v. Illinois, 94 U.S. 113, 134 (1876)).

[FN83]. Id. at 51.

[FN84]. The Court assumed the clause to be the equivalent of the Equal Protection Clause of the Fourteenth Amendment. See id. at 53.

[FN85]. Id.

[FN86]. See Mondou, 223 U.S. at 53.

[FN87]. Id.

[FN88]. Id.

[FN89]. See id. at 54-55.

[FN90]. Id. at 55.

[FN91]. Id. at 56-57.

[FN92]. Id. at 58-59.

[FN93]. 285 U.S. 22 (1932).

[FN94]. 33 U.S.C. §§ 901-950 (1994) (originally entitled "Longshoremen's and Harbor Worker's Act").

[FN95]. See supra notes 30-33 and accompanying text.

[FN96]. See Crowell, 285 U.S. at 39.

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[FN97]. See id. at 41.

[FN98]. See id.

[FN99]. See id.

[FN100]. See id. at 42.

[FN101]. See id. at 42-45 (detailing the significant amount of discretion granted to a single deputy commissioner under the Act).

[FN102]. Id. at 47.

[FN103]. See id. at 54 (holding that the LHWCA's reservation of the judiciary's power to deal with matters of law appropriately preserved the exercise of the judicial function).

[FN104]. 28 U.S.C. § 2679(b)-(e) (1994).

[FN105]. See Carr v. United States, 422 F.2d 1007, 1009 (4th Cir. 1970).

[FN106]. Id. at 1012.

[FN107]. See 28 U.S.C. § 2679(b), (d) (1994).

[FN108]. 225 F. Supp. 881 (W.D. Mo. 1963).

[FN109]. See id. at 881.

[FN110]. See id. at 882. Plaintiffs also argued that the Act violated the Seventh Amendment and the jury trial provision of the Missouri Constitution. See id. The court quickly disposed of plaintiff's Seventh Amendment challenge, holding that "the guarantees of the Seventh Amendment do not apply" to statutory causes of action against the federal government. See id. See also Gustafson v. Peck, 216 F. Supp. 370, 371 (N.D. Iowa 1963) (holding that the Seventh Amendment does not guarantee a right to a trial by jury in a state court); Adams v. Jackel, 220 F. Supp. 764, 765 (E.D.N.Y. 1963) (Seventh Amendment does not guarantee a right to a trial by jury in a claim for restitution against a collector of internal revenue). The court dismissed the plaintiff's argument that the Drivers Act violated the Missouri Constitution's jury trial guarantee, noting that the argument was without merit in light of the Supremacy Clause of the United States Constitution. See Nistendirk, 225 F. Supp. at 882.

[FN111]. See Nistendirk, 225 F. Supp. at 882.

[FN112]. 280 U.S. 117 (1929).

[FN113]. Nistendirk, 225 F. Supp. at 882 (quoting Silver, 280 U.S. at 122).

[FN114]. See id.

[FN115]. 5 U.S.C. §§ 8101-8193 (1994).

[FN116]. See Noga v. United States, 411 F.2d 943, 944 (9th Cir. 1969).

[FN117]. Carr, 422 F.2d at 1010.

[FN118]. See Vantrease v. United States, 400 F.2d 853 (6th Cir. 1968); Noga, 411 F.2d at 943; Van Houten v. Ralls, 411 F.2d 940 (9th Cir.); Beechwood v. United States, 264 F. Supp. 926 (D. Mont. 1967).

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[FN119]. 422 F.2d 1007 (4th Cir. 1970).

[FN120]. See id. at 1010.

[FN121]. See id. at 1011.

[FN122]. See id. at 1010 (noting the Court's rejection of the argument's premise in Silver).

[FN123]. Carr, 422 F.2d at 1011.

[FN124]. See id.

[FN125]. Id. at 1012.

[FN126]. Id.

[FN127]. 539 F.2d 955 (3d Cir. 1976).

[FN128]. In Feres v. United States, 340 U.S. 135 (1950), the Supreme Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Id. at 146.

[FN129]. See Thomason, 539 F.2d at 956.

[FN130]. Id. at 957.

[FN131]. See id. at 958.

[FN132]. See id. at 959-60.

[FN133]. See supra notes 123-126 and accompanying text.

[FN134]. See Thomason, 539 F.2d at 959-60.

[FN135]. 428 U.S. 1 (1976).

[FN136]. 30 U.S.C. §§ 901-962 (1994). See generally Allen R. Prunty & Mark E. Solomons, The Federal Black Lung Benefits Program: Its Evolution and Current Issues, 91 W. VA. L. REV. 665 (1989).

[FN137]. See 30 U.S.C. § 901 (1994).

[FN138]. Usery, 428 U.S. at 18.

[FN139]. Id. at 15.

[FN140]. See id at 16.

[FN141]. Id. at 19.

[FN142]. See id. at 20.

[FN143]. Id. at 29.

[FN144]. See id. at 31.

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[FN145]. Id. at 31-32.

[FN146]. Id. at 32.

[FN147]. Id. at 34 (quoting S. REP. NO. 92-743, at 11 (1972), reprinted in 1972 U.S.C.C.A.N. 2305, 2315).

[FN148]. 42 U.S.C. § 2210 (1994).

[FN149]. See Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 65 n.5 (1978). "The defenses of negligence, contributory negligence, charitable or governmental immunity and assumption of the risk are all waived in the event of an extraordinary nuclear occurrence." Id.

[FN150]. See id. at 64.

[FN151]. Id.

[FN152]. 438 U.S. 59 (1978).

[FN153]. See id. at 67.

[FN154]. See id. at 81.

[FN155]. See id. at 84.

[FN156]. Id. at 83.

[FN157]. See id. at 84. Cf. Indemnity Ins. Co. of N. Am. v. Pan Am. Airways, 58 F. Supp. 338, 340 (S.D.N.Y. 1944) (upholding against a due process attack the Warsaw Convention, a treaty which limited the liability of airlines for injuries or deaths to aircraft passengers).

[FN158]. Duke Power, 438 U.S. at 86.

[FN159]. See id. at 88.

[FN160]. Id. at 88 n.32 (quoting Mondou, 223 U.S. at 50 (quoting Munn, 94 U.S. at 134)).

[FN161]. Id. (quoting Silver, 280 U.S. at 122).

[FN162]. Id. at 93.

[FN163]. Id. at 93-94.

[FN164]. Act of Aug. 12, 1976, 90 Stat. 1113 (repealed 1978). See generally Colleen Courtade, et al., 57A Am. Jur. 2d Negligence § 540 (1989).

[FN165]. See Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968) (holding a polio vaccine manufacturer strictly liable for failure to warn individuals receiving the vaccine); Reyes v. Wyeth Laboratories, Inc., 498 F.2d 1264 (5th Cir.) (same).

[FN166]. See Sparks v. Wyeth Laboratories, Inc., 431 F. Supp. 411, 415 (W.D. Okla. 1977) (detailing the Swine Flu Act's legislative history to explain why it was enacted in haste).

[FN167]. See Act of Aug. 12, 1976, 90 Stat. 1113, 1114 (repealed 1978).

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Court as a constitutional exercise of congressional power. [FN29]

Similarly, in 1927, Congress enacted the Longshore and Harbor Workers' Compensation Act ("LHWCA"), [FN30] a FELA-like statute that provides fixed awards to employees or their dependents in cases of employment-related injuries or deaths occurring upon the navigable waters of the United States. [FN31] Congress enacted LHWCA both to provide injured employees with more ***275** immediate and less expensive relief than that available in a common law tort action [FN32] and to provide employers with liability that was "limited and determinative." [FN33] Again, the Supreme Court held that Congress had the constitutional power to enact this piece of federal tort legislation. [FN34] These are just two examples among many that illustrate Congress's active, longstanding participation in setting national tort liability rules. [FN35]

2. Recent Laws Setting National Tort Policy Rules: 1993-1998

Almost nine decades after the enactment FELA, the 103d Congress enacted the General Aviation Revitalization Act of 1994 ("GARA"), [FN36] which established an eighteen-year statute of repose, or outer time limit on bringing litigation, for accidents involving general aviation aircraft. [FN37] GARA was predicated on Congress's power to regulate interstate commerce. Enough time has passed to conclude that GARA has been successful in its goal of revitalizing the light aircraft industry, which could not have been accomplished by state action alone.

A March 1997 hearing of the Consumer Affairs Subcommittee of the Senate Commerce Committee explored GARA's effects. [FN38] John Moore, senior vice president of Human Resources for Cessna Aircraft Company, testified that Cessna withdrew from the single engine aircraft market in 1986, but as a result of ***276** GARA, is now back in the single engine aircraft business. [FN39] At the time of the subcommittee's hearing, Cessna's small aircraft division had more than 650 employees and had plans to double employment in 1998. [FN40] John Peterson of the Montgomery County Action Council of Coffeyville, Kansas-- the home of Cessna's new small aircraft plant--testified that, prior to 1995, Montgomery County ranked ninety-eighth out of 105 Kansas counties in economic indicators. [FN41] The county's population was dropping, employment was on the decline, per capita income was down, and property values were depressed. [FN42] After GARA, new housing starts were up 260%, the value of new homes doubled, retail sales were up five percent, per capita income nearly doubled, and nearly 500 people per year were moving into the county. [FN43]

Similarly, Paul Newman, Chief Financial Officer of the New Piper Aircraft Corporation, testified that GARA permitted New Piper to emerge from a Chapter 11 bankruptcy that had idled 1000 workers. [FN44] Likewise, John S. Yodice, General Counsel of the Aircraft Owners and Pilots Association ("AOPA"), testified that his members supported GARA, even though it limited their right to sue. [FN45] AOPA members realized that they were paying an extraordinary amount for new aircraft due to manufacturers' "long tail" liability exposure for very old planes--aircraft that had flown safely for more than two decades. [FN46]

The 104th Congress enacted a number of other tort and civil justice reform measures:

The Small Business Job Protection Act of 1996 [FN47] included a provision that: (1) holds punitive damages received in personal injury suits subject to federal income tax by eliminating the possibility for an exclusion from taxable gross income; (2) eliminates the possibility of an exclusion for personal injury damages in cases that do not involve physical injury or illness; and (3) provides that emotional distress is not by itself a physical injury or sickness;

***277** The Federally Supported Health Centers Assistance Act of 1995 [FN48] extended Federal Tort Claims Act coverage to community, migrant, and homeless health centers;

The Aviation Disaster Family Assistance Act of 1996 [FN49] limited unsolicited contacts from lawyers and insurance company representatives with airline crash victims or their families;

The Bill Emerson Good Samaritan Food Donation Act of 1996 [FN50] provided limited tort immunity to encourage the donation of food and grocery products to nonprofit organizations for distribution to needy individuals; and

The PrivateSecurities Litigation Reform Act of 1995 [FN51] placed limits on the conduct of private lawsuits under the Securities Act of 1933 and the Securities Exchange Act of 1934. [FN52]

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[FN168]. 431 F. Supp. 411 (W.D. Okla. 1977).

[FN169]. See id. at 416.

[FN170]. Id.

[FN171]. Id.

[FN172]. Id.

[FN173]. See id. at 417.

[FN174]. Id. at 418.

[FN175]. See id. See also DiPappa v. United States, 687 F.2d 14 (3d Cir. 1982) (holding that Swine Flu Act did not violate the Due Process Clause of the Fifth Amendment). The court also rejected a Seventh Amendment challenge raised by plaintiff, stating that the right to jury trial guarantee is inapplicable where a sovereign waives its immunity and noting that the Seventh Amendment had never been held to apply against the States under the Fourteenth Amendment. See Sparks, 431 F. Supp. at 418-19. See also Ducharme v. Merrill-Nat'l Laboratories, 574 F.2d 1307 (5th Cir. 1978) (holding that Swine Flu Act did not violate Seventh Amendment).

[FN176]. See Sparks, 431 F. Supp. at 418.

[FN177]. Id.

[FN178]. See id. at 420.

[FN179]. 433 F. Supp. 231, 236 (M.D. Tenn. 1977).

[FN180]. Id. at 237.

[FN181]. See id. at 238.

[FN182]. See id.

[FN183]. Id.

[FN184]. Id.

[FN185]. 786 F.2d 8 (1st Cir. 1986).

[FN186]. 42 U.S.C. § 2212 (1988) (repealed 1990).

[FN187]. See id.; Hammond, 786 F.2d at 9.

[FN188]. See Hammond, 786 F.2d at 12-13.

[FN189]. See id. at 13.

[FN190]. See id. at 13-14.

[FN191]. See id.

[FN192]. See id. The court also held that the Atomic Weapons Testing Liability Act did not violate equal protection

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for the same reasons. See id. at 15.

[FN193]. For further discussion of Tenth Amendment challenges to federal tort reform legislation, see infra notes 253-382 and accompanying text.

[FN194]. 426 U.S. 833 (1976), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). See infra notes 267-287 and accompanying text.

[FN195]. Hammond, 786 F.2d at 15.

[FN196]. See id. at 15 (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)). The court also rejected a claim that the Act violated the prohibition against ex post facto laws, noting that the prohibition applies only to criminal or penal statutes. The court also held that the Act was not punitive, so it did not constitute a bill of attainder. Finally, the court refused to apply the Contracts Clause to the federal government. See id. at 16.

[FN197]. 820 F.2d 982 (9th Cir. 1987).

[FN198]. See id. at 988.

[FN199]. See id. at 989-92.

[FN200]. Id. At 988.

[FN201]. Id.

[FN202]. See id.

[FN203]. Id. at 990 (quoting Hammond, 786 F.2d at 8).

[FN204]. See id. at 991.

[FN205]. Id. at 992 (citations omitted).

[FN206]. See id. The court also held that the Act did not violate the Seventh Amendment, because "[t]here is no right to jury trial against the sovereign." Id.

[FN207]. 42 U.S.C. §§ 300aa-1 to 300aa-34 (1994).

[FN208]. See generally Victor E. Schwartz & Liberty Mahshigian, National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future, 48 OHIO ST. L.J. 387 (1987); Daniel A. Cantor, Note, Striking A Balance Between Product Availability and Product Safety: Lessons from the Vaccine Act, 44 AM. U. L. REV. 1853 (1995).

[FN209]. 42 U.S.C. § 300aa-11(c)(1)(D)(i).

[FN210]. 93 F.3d 781 (Fed. Cir. 1996).

[FN211]. See id. at 787.

[FN212]. Id.

[FN213]. Id. at 788.

[FN214]. Id.

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[FN215]. Id. (quoting Mathews v. De Castro, 429 U.S. 181, 185 (1976)).

[FN216]. 42 U.S.C. §§ 2014, 2210 (1994).

[FN217]. See id.

[FN218]. 940 F.2d 832 (3d Cir. 1991).

[FN219]. See U.S. Const., Art. III, § 2, cl. 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.").

[FN220]. See In re TMI Litig., 940 F.2d at 835.

[FN221]. See id. at 849-51 (discussing Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983); and Mesa v. California, 489 U.S. 121 (1989)).

[FN222]. Id. at 849.

[FN223]. Id. at 855.

[FN224]. See id. at 855-56.

[FN225]. See id. at 856-57.

[FN226]. Id. at 860.

[FN227]. See id. at 861. See also In re TMI, 89 F.3d 1106 (3d Cir. 1996) (holding that retroactive application of the 1988 Amendments did not violate due process); O'Connor v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994) (upholding constitutionality of the 1988 amendments against an Article III challenge).

[FN228]. 28 U.S.C. § 2679 (1994).

[FN229]. 484 U.S. 292 (1988).

[FN230]. Id. at 300.

[FN231]. See generally Daniel A. Morris, Federal Employees' Liability Since The Federal Employees Liability Reform & Tort Compensation Act of 1988 (The Westfall Act), 25 CREIGHTON L. REV. 73 (1991).

[FN232]. 888 F.2d 802 (11th Cir. 1989).

[FN233]. Id. at 805. See also Connell v. United States, 737 F. Supp. 61 (S.D. Iowa 1990) (holding that retroactive application of the Westfall Act was not unconstitutional).

[FN234]. Sowell, 888 F.2d at 805.

[FN235]. See id. See also Salmon v. Schwarz, 948 F.2d 1131 (10th Cir. 1991) (holding that the Westfall Act did not violate the Seventh Amendment).

[FN236]. Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101) (1994).

[FN237]. See Rixon v. Smith, No. 96-714 (W.D. Pa. Jan. 6, 1997) (holding that GARA can be constitutionally applied retroactively); Pollack v. Agusta, S.P.A., Nos. 94-7769, 94-7770 (C.D. Cal. Dec. 6., 1995) (GARA did not

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violate due process or deprive plaintiffs of a property right); Schneider v. Cessna Aircraft Co., No. 542343 (Super. Ct. Sacramento Cty., Cal. July 29, 1996) (GARA does not violate due process).

[FN238]. 198 U.S. 45 (1905). In Lochner, the Court invalidated a New York law that limited the number of hours bakers could work. Justice Holmes argued in his dissent that courts should respect economic legislation that is rationally related to a legitimate policy goal. He wrote:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law.

Id. at 75 (emphasis added).

[FN239]. See LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-2 to 8-7 (2d. ed. 1988).

[FN240]. See Denis J. Hauptley & Mary Mason, The National Childhood Vaccine Injury Act, 37 FED. B. NEWS & J. 452 (1990) (stating that the Act effectively controlled liability costs for vaccine manufacturers, prevented the withdrawal of crucial vaccines from the market, and averted epidemics of certain childhood illnesses in the United States.)

[FN241]. See Duke Power, 438 U.S. at 64 (discussing congressional passage of the Price-Anderson Act in response to concerns that the private sector would be forced to withdraw from nuclear power production).

[FN242]. See supra notes 38-43 and accompanying text.

[FN243]. See H.R. REP. NO. 105-549, pts. 1 and 2 (1998) (reports from the House Committee on the Judiciary and the Committee on Commerce regarding the Biomaterials Act).

[FN244]. U.S. Const. art. VI, § 2.

[FN245]. See, e.g., Southland Corp. v. Keating, 465 U.S. 1 (1984) (holding California's Franchise Investment Law unconstitutional because it directly conflicted with federal legislation).

[FN246]. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824).

[FN247]. See New York, 505 U.S. at 178-79 (noting that the Supremacy Clause directs state courts to take action to enforce federal law, but that no comparable constitutional provision allows Congress to force state legislators to act); Mondou, 223 U.S. at 57-58 (1912) (stating that, in some instances, action must be taken by state courts to enforce a federally established penalty).

[FN248]. 330 U.S. 386 (1947).

[FN249]. Ch. 26, 56 Stat. 23 (codified at 50 U.S.C. app. § 107 (1976)) (repealed 1947).

[FN250]. Testa, 330 U.S. at 389.

[FN251]. Id. at 393.

[FN252]. Id. at 390-91 (emphasis added).

[FN253]. Gregory v. Ashcroft, 501 U.S. 452, 460 (1990) (discussing how the Supremacy Clause is the textual authority granting the federal government power over the states in the U.S. system of federalism).

[FN254]. U.S. Const. amend. X. See also The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution ... are few and defined. Those which are to remain in the

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State governments are numerous and indefinite.").

[FN255]. See Gregory, 501 U.S. at 460 ("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly."). See also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5-20 (2d. ed. 1988).

[FN256]. 392 U.S. 183 (1968).

[FN257]. 29 U.S.C. §§ 203-218 (1994).

[FN258]. See 29 U.S.C. § 203(d).

[FN259]. See Wirtz, 392 U.S. at 197.

[FN260]. Id. at 198-99.

[FN261]. 426 U.S. 833 (1976), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[FN262]. See National League of Cities, 426 U.S. at 840-52.

[FN263]. Id. at 852.

[FN264]. 469 U.S. 528 (1985). See generally Martha A. Field, Comment, Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine, 99 Harv. L. Rev. 84 (1985) (arguing against the concept of the Supreme Court granting the states constitutional immunities as a constraint on Congress's use of its delegated powers).

[FN265]. 485 U.S. 505 (1988).

[FN266]. See also Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 289-90 (1981) (holding that the Tenth Amendment does not prohibit Congress from passing laws that preempt state regulations); FERC v. Mississippi, 456 U.S. 742, 764 (1982) (same).

[FN267]. 469 U.S. 528 (1985).

[FN268]. Id. at 530.

[FN269]. Id. at 534-35.

[FN270]. See id. at 537.

[FN271]. See id.

[FN272]. See id.

[FN273]. See id. at 537-38.

[FN274]. See id. at 539.

[FN275]. Id. at 557.

[FN276]. See id. at 540.

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[FN277]. See id. at 543.

[FN278]. See Garcia, 469 U.S. at 545.

[FN279]. Id. at 546.

[FN280]. Id. at 547.

[FN281]. Id. at 550.

[FN282]. Id. at 554.

[FN283]. The Court pointed out that "the composition of the Federal Government was designed in large part to protect States from overreaching by Congress." Id. at 550-51. The Framers thus gave the states a role in selecting the executive and legislative branches, provided for the equal representation of states in the Senate, and prohibited any constitutional amendment divesting a state of equal representation in the Senate without the state's consent. See id. at 551.

[FN284]. Id. at 554 (quoting EEOC v. Wyoming, 460 U.S. 226, 236 (1983)). See also Thomas H. Odom, The Tenth Amendment After Garcia: Process- Based Procedural Protections, 135 U. PA. L. REV. 1657, 1666 (1987) (indicating that Garcia is significant because it "calls for the development of new theories of federalism-based limitations on the commerce power").

[FN285]. Garcia, 469 U.S. at 552-553. See also John E. DuMont, Comment, State Immunity From Federal Regulation--Before and After Garcia: How Accurate Was the Supreme Court's Prediction in Garcia v. SAMTA that the Political Process Inherent in Our System of Federalism Was Capable of Protecting the States Against Unduly Burdensome Federal Regulation?, 31 DUQ. L. REV. 391 (1993) (arguing that the political process has protected the states against unduly burdensome federal regulation).

[FN286]. Garcia, 469 U.S. at 554.

[FN287]. Id. at 555. See also William A. Isaacson, Garcia v. San Antonio Metropolitan Transit Authority: Antifederalism Revisited, 21 U. TOL. L. REV. 147 (1989) (providing historical account of the Constitutional Convention and arguing in support of the holding in Garcia).

[FN288]. 485 U.S. 505 (1988).

[FN289]. 26 U.S.C. § 103(j)(1) (1982).

[FN290]. See id.

[FN291]. Ownership of a registered bond is recorded on a central list, and a transfer of record ownership requires entering the change on that list. Bearer bonds, on the other hand, leave no paper trail. Congress believed that bearer bonds facilitated tax evasion, because they could be used to avoid estate and gift taxes and as a medium of exchange in the illegal sector. See Baker, 485 U.S. at 508-509.

[FN292]. The Court treated the Tax Act as banning the issuance of bearer bonds, because it would force States to increase the interest paid on bearer bonds to exceptionally high rates. Moreover, since the Act became effective, no State had issued a bearer bond. See id. at 511.

[FN293]. See id. at 512.

[FN294]. Id. at 512-13.

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[FN295]. Id.

[FN296]. See id at 513.

[FN297]. 465 U.S. 742 (1982).

[FN298]. See id. at 761-64.

[FN299]. See Public Utility Regulatory Policies Act of 1978, 15 U.S.C. § 3201, 16 U.S.C. § 2611 (1994).

[FN300]. See FERC, 456 U.S. a 759-67.

[FN301]. See Baker, 485 U.S. at 514.

[FN302]. See id. at 514-15.

[FN303]. Id. at 515.

[FN304]. 505 U.S. 144 (1991).

[FN305]. 521 U.S. 898 (1997).

[FN306]. 505 U.S. 144 (1991).

[FN307]. 42 U.S.C. § 2021b-j (1994).

[FN308]. 42 U.S.C. § 2021c(a)(1)(A) (1994).

[FN309]. See New York, 505 U.S. at 154. Petitioners also charged that the Act violated the Guarantee Clause of the Constitution, which directs the United States to "guarantee to every State in this Union a Republican Form of Government." U.S. Const. art. IV., § 4. The Court easily dismissed this claim. See id. at 183-86.

[FN310]. See New York, 505 U.S. at 152-54.

[FN311]. See id. at 152-53.

[FN312]. See id. at 153.

[FN313]. New York, 505 U.S. at 153-54.

[FN314]. Id. at 157.

[FN315]. Id. at 159.

[FN316]. Id. at 158.

[FN317]. Id. at 156.

[FN318]. See id. at 160-61.

[FN319]. Id. at 161.

[FN320]. Id. (quoting FERC, 456 U.S. at 761-62).

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[FN321]. Id. at 163.

[FN322]. See New York, 505 U.S. at 163.

[FN323]. Id. at 164.

[FN324]. Id.

[FN325]. See id.

[FN326]. Id.

[FN327]. Id. at 165.

[FN328]. Id. at 166.

[FN329]. See id.

[FN330]. Id. at 166.

[FN331]. See id. at 167.

[FN332]. Id.

[FN333]. See id. at 168.

[FN334]. New York, 505 U.S. at 169.

[FN335]. Id. at 173.

[FN336]. See id.

[FN337]. See id. at 173-74.

[FN338]. Id. at 174.

[FN339]. See id. 174-75.

[FN340]. See id. at 175.

[FN341]. See id.

[FN342]. See id. at 177. See generally Evan H. Caminker, State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?, 95 COLUM. L. REV. 1001 (1995); H. Jefferson Powell, The Oldest Question of Constitutional Law, 79 VA. L. REV. 633 (1993); Saikrishna B. Prakash, Field Office Federalism, 79 VA. L. REV. 1957 (1993); Martin H. Redish, Doing It with Mirrors: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation, 21 HASTINGS CONST. L.Q. 593 (1994).

[FN343]. See New York, 505 U.S. at 178-79.

[FN344]. Id. (emphasis added).

[FN345]. See White, supra note 16, at 34; Lebow, supra note 16, at 690.

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[FN346]. New York, 505 U.S. at 165.

[FN347]. Id. at 177.

[FN348]. Id. at 168.

[FN349]. 521 U.S. 898 (1997).

[FN350]. 18 U.S.C. §§ 921-925A (1994).

[FN351]. See id.

[FN352]. See Printz, 521 U.S. at 904-05.

[FN353]. See id. at 905.

[FN354]. See id.

[FN355]. See id. at 905-10 (citations omitted).

[FN356]. Id. at 907 (emphasis in original).

[FN357]. Id. (citations omitted).

[FN358]. See id.

[FN359]. Id. at 907-08.

[FN360]. Id. at 917-18.

[FN361]. 505 U.S. 144 (1991).

[FN362]. New York, 505 U.S. at 166.

[FN363]. Printz, 521 U.S. at 922.

[FN364]. See id.

[FN365]. See id.

[FN366]. Id.

[FN367]. See id.

[FN368]. Id. at 923.

[FN369]. 452 U.S. 264 (1981).

[FN370]. 456 U.S. 742 (1982).

[FN371]. 505 U.S. 144 (1991).

[FN372]. Printz, 521 U.S. at 926.

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[FN373]. Id. at 935.

[FN374]. See Shawn E. Tuma, Note, Preserving Liberty: United States v. Printz and the Vigilant Defense of Federalism, 10 REGENT U. L. REV. 193 (1998) (discussing the federalism doctrine as a safeguard of individual liberties).

[FN375]. See Vicki C. Jackson, Federalism and the Uses and Limits of Law: Printz and Principle? 111 HARV. L. REV. 2180, 2185-86 (1998) (indicating that the Printz and New York decisions set forth a "clear-cut rule against federal 'commandeering' of state legislative or executive officials," but do not alter the responsibility of state courts to enforce federal laws).

[FN376]. 155 F.3d 453 (4th Cir. 1998). See also Travis v. Reno, 12 F. Supp. 2d 921 (W.D. Wis. 1998), rev'd, 163 F.3d 1000 (7th Cir. 1998) (holding that the Driver's Privacy Protection Act violated the Tenth Amendment because it forced state officials and state employees to administer and enforce a federal regulatory scheme). But see Pryor v. Reno, 998 F. Supp. 1317 (M.D. Ala. 1998) (ruling that the Driver's Privacy Protection Act was authorized pursuant to Congress' Commerce Clause authority and did not violate the Tenth Amendment because, rather than requiring the state to enforce a federal regulatory scheme preventing the disclosure of driver records, the Act merely prohibited the state from releasing such records for impermissible purposes).

[FN377]. 18 U.S.C. §§ 2721-2725 (1994).

[FN378]. See id.

[FN379]. See Condon, 155 F.3d at 463.

[FN380]. See id. at 459.

[FN381]. 994 F. Supp. 1358 (W.D. Okla. 1997).

[FN382]. See id. at 1360.

[FN383]. Id. at 1363.

[FN384]. Lopez, 514 U.S. at 561.

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The 105th Congress continued the trend toward greater federal involvement in deciding liability rules by enacting several other tort reform laws:

The Volunteer Protection Act of 1997 [FN53] provided limited immunity for volunteers acting on behalf of a nonprofit organization, creating a national standard of punitive damages liability for volunteers, and abolishing joint liability for noneconomic damages in tort actions involving volunteers;

The Amtrak Reform and Accountability Act of 1997 [FN54] created a federal standard for punitive damages awards in tort cases brought against Amtrak by its passengers and capped Amtrak's tort liability at $200 million for each rail accident;

***278** The Biomaterials Access Assurance Act of 1998 [FN55] provided suppliers of the raw materials and component parts used to make implantable medical devices with a mechanism to obtain dismissal, without extensive discovery or other legal costs, in certain tort suits in which plaintiffs allege harm from a finished medical implant;

The Year 2000 Information and Readiness Disclosure Act [FN56] banned, with a few exceptions, the use of "Year 2000 readiness disclosure" statements by plaintiffs as evidence in court to prove the truth or accuracy of a company's assertions about dealing with the Year 2000 computer problem and protects companies from liability for Year 2000 statements they made that are alleged to be false, inaccurate, or misleading unless it is proven that the company knew the statement was false, inaccurate, or misleading and made it with an intent to deceive or mislead; and

The Securities Litigation Uniform Standards Act of 1998 [FN57] made federal courts the sole venue for most securities class action fraud lawsuits involving fifty or more parties. The law was enacted to close a loophole in the Private Securities Litigation Reform Act of 1995. [FN58] That law raised the standard for filing such suits in federal courts, but was undermined when lawyers shifted their filings to state courts. [FN59]

C. The Lopez Decision Does Not Undermine the Authority of Congress to Enact Liability Reform Legislation

Despite the long history of congressional involvement in matters having an effect on interstate commerce, opponents of federal liability reform have questioned whether Congress has the authority to enact liability reform legislation in light of the holding of United States v. Lopez. [FN60]

In Lopez, the Court considered whether Congress's enactment of the Gun- Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to ***279** believe, is a school zone," [FN61] was a proper exercise of Congress's Commerce Clause power. The Court held that it was not, because "[t]he Act neither regulate[d] a commercial activity nor contain [[ed] a requirement that the possession be connected in any way to interstate commerce." [FN62]

Conceptually, Lopez was not a Commerce Clause case. Congress was not regulating the firearms market or any other economic activity. As the Court explained, the Gun-Free School Zones Act was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." [FN63] Moreover, "respondent was a local student at a local school; there [was] no indication that he had recently moved in interstate commerce, and there [was] no requirement that his possession of the firearm ha[d] any concrete tie to interstate commerce." [FN64]

The Lopez decision is distinguishable both legally and factually from those cases upholding regulation of activities that arise out of or are connected with commercial transactions, which viewed in the aggregate, substantially effect interstate commerce. These cases directly support Congress's Commerce Clause authority over liability law. [FN65] In fact, rather than limiting Congress's Commerce Clause authority, the Lopez decision can be read to support legislation that would regulate the firearms industry in a manner more explicitly connected with interstate commerce, such as a limit on the liability of gun manufacturers in order to promote the development of the firearms industry or ***280** an imposition of requirements on gun manufacturers to promote firearms safety. [FN66]

II. FEDERAL TORT LAWS HAVE BEEN AND SHOULD BE DECLARED CONSTITUTIONAL

A. Courts Have Respected the Role of Congress in the Development Of Tort Law

For almost a century, the Supreme Court and the lower courts have upheld numerous federal tort law statutes

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against constitutional challenges. The courts have uniformly held that such economic legislation comes clothed with a presumption of constitutionality that is subject to a highly deferential rational basis standard of review. In every modern case, the legislation has been found to pass constitutional muster.

1. Limitation of Shipowners' Liability Act

The Limitation of Vessel Shipowners' Liability Act and the Harter Act (collectively "the LSLA") [FN67] were the first major federal tort policy statutes to be challenged in the Supreme Court. The LSLA, enacted to promote commercial shipping, exempted ship owners from liability for any loss or damage to goods on board ship resulting from fire, unless the fire was caused by the design or neglect of the ship owner. [FN68] In addition, the LSLA limited ship owners' liability for any loss or destruction of goods aboard their ships. [FN69]

The Supreme Court upheld the constitutionality of the LSLA in Providence & New York Steamship Co. v. Hill Manufacturing Co. [FN70] The case arose when the Providence Company, a defendant in state tort suits filed by the Hill Company to recover damages ***281** arising from a fire aboard one of Providence's ships, sought to limit its liability and suspend the state suits in accordance with the LSLA. [FN71]

The Supreme Court held that there was "no doubt that Congress had [the] power to pass the [LSLA]." [FN72] Quoting from an earlier decision, The Lottawana, [FN73] the Court reaffirmed Congress's "authority under the commercial power ... to introduce such changes [in maritime law] as are likely to be needed," [FN74] and indicated that it "perceive[d] no reason for entertaining any serious doubt" that Congress's power under the Commerce Clause "may be extended to the securing and protection of the rights and title of all persons dealing [in shipping]." [FN75] The Court added that because Congress acted within its lawful authority to regulate interstate commerce, the LSLA was "binding on all courts and jurisdictions throughout the United States." [FN76] The Court went on to hold that the purpose of the LSLA would be frustrated unless the institution of proceedings in a federal district court superseded the prosecution of claims for the same losses and injuries in other courts. [FN77]

2. Federal Employers' Liability Act of 1908

In Mondou v. New York, New Haven & Hartford Railroad Co., [FN78] the Supreme Court upheld the constitutionality of the Federal Employers' Liability Act of 1908 ("FELA"), [FN79] which established rules governing personal injury and wrongful death actions brought by railroad workers and their families against railroads engaged in interstate commerce. [FN80] Federal and state courts were given concurrent jurisdiction to decide FELA cases. [FN81]

***282** In Mondou, railroads unsuccessfully challenged the constitutionality of the legislation on several grounds. The Court in Mondou held that Congress had not exceeded its Commerce Clause authority by enacting tort rules which deviated from the common law. In an oft-quoted passage, the Court held that:

A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will ... of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. [FN82]

The Court also noted that despite the fact that employer liability had traditionally been a matter of state law, Congress had a legitimate interest in replacing the patchwork of state laws with uniform, national legislation "to promote the safety of the [railroad] employees and to advance the commerce in which they are engaged." [FN83]

Furthermore, the Court held that the "classification" created by FELA (i.e., the distinction it makes between interstate railroad carriers, which are subject to liability, and all other parties, which are not) did not doom the statute under the Due Process Clause of the Fifth Amendment, [FN84] even though it could "occasion some inequalities." [FN85] The Court held that tort law classifications are constitutionally permissible under the Fifth Amendment as long as the classification has a rational basis. [FN86] Tested by that standard, the Court held, FELA was "not objectionable." [FN87] The Court pointed out that it had repeatedly sustained "[l]ike classifications of railroad

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carriers and employees for like purposes" ***283** under the Equal Protection Clause of the Fourteenth Amendment. [FN88]

After resolving FELA's constitutionality, the Court moved to settle FELA's preemptive effect over state laws covering railroad employer liability. The Court explained that although Congress had chosen not to regulate the field of railroad carrier liability in the past, and although the subject fell within the police power of the states in the absence of congressional action, Congress was not therefore precluded from acting. [FN89] To the contrary, once Congress acted, "the laws of the states, in so far as they cover the same field, [were] superseded, for necessarily that which is not supreme must yield to that which is." [FN90]

The Court went on to explain that FELA did not present federalism problems because Congress was not setting state policy. Rather, Congress was establishing federal policy to be implemented by the states in accordance with the Supremacy Clause. The Court held:

[W]e deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure. [FN91]

The Court added that it did not perceive that FELA would cause any appreciable inconvenience or confusion for state courts, and that in any case, such inconvenience or confusion would not change its holding:

We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules ***284** of law to different situations and subjects, even although possessing some elements of similarity, as where the liability of a public carrier for personal injuries turns upon whether the injured person was a passenger, an employee, or a stranger. [FN92]

3. The Longshore and Harbor Workers' Compensation Act

In Crowell v. Benson, [FN93] the Supreme Court was asked to decide the constitutionality of the Longshore and Harbor Workers' Compensation Act ("LHWCA"). [FN94] The LHWCA created a nofault compensation scheme that provided fixed awards to employees injured upon the navigable waters of the United States. [FN95]

The Court began by holding that the federal power to alter, amend, or revise the maritime law gave Congress the authority to define the substantive rights of employees under the LHWCA (in this case, by providing for recovery in the absence of fault, establishing classifications based on type of injury, fixing the range of compensation for disability or death, and designating the classes of beneficiaries). [FN96]

Next, the Court addressed whether the substantive rights created by the LHWCA violated the Due Process Clause of the Fifth Amendment. [FN97] The Court, applying a deferential rational basis test, held that neither the classifications created by the statute nor the extent of compensation provided were unreasonable. [FN98] In light of the difficulties associated with determining actual damages in maritime cases, the Court held, Congress was justified in providing for the payment of damages in amounts that would reasonably approximate a claimant's probable damages. [FN99] The Court also noted that the plaintiff's Fifth Amendment objections were substantially similar to those which the Court had rejected in challenges to state workers' compensation laws under the Due Process Clause of the Fourteenth Amendment. [FN100]

***285** After upholding the constitutionality of the LHWCA's substantive provisions, the Court turned to the LHWCA's procedural requirements. The plaintiff's procedural objections to the LHWCA focused on the administrative authority conferred by the Act. [FN101] The Court held that the use of the administrative method to assess the cause, character, and effect of claimants' injuries fell "easily within the principle of the decisions sustaining similar procedure against objections under the due process clauses of the Fifth and Fourteenth

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Amendments," [FN102] and did not constitute an unconstitutional invasion of judicial power. [FN103]

4. The Drivers Act

In 1961, Congress enacted the Drivers Act [FN104] to relieve government drivers from the burden of personal liability for claims arising from vehicular accidents occurring in the course of their employment. Unlike many employers, the United States neither maintained liability insurance to protect its employees nor assisted them in paying for their own insurance against on-the- job accidents. [FN105] "[M]oved by the fact that automobile accident insurance placed such a heavy financial burden on government drivers that it was adversely affecting morale and making it difficult for the government to attract competent drivers into its employ," [FN106] Congress decided to forbid suits against federal drivers, but to permit suits against the United States for tort liability arising out of accidents caused by a driver's negligence. [FN107]

a. Private citizen and federal driver. The Drivers Act was challenged on constitutional grounds in Nistendirk v. McGee, [FN108] a personal injury action arising out of an automobile accident between a private citizen and a federal employee (in this instance, a rural mail carrier). The plaintiff initially brought a negligence action against the mail carrier in Missouri state court. The ***286** United States removed the case to federal court and was substituted as the defendant pursuant to the Drivers Act. [FN109] The plaintiff, seeking to obtain full damages and wanting to avoid trying the case under the Federal Tort Claims Act, moved to remand the case to state court on the ground that the Drivers Act violated the Fourteenth Amendment of the United States Constitution. [FN110]

The court rejected plaintiff's argument that the Drivers Act violated the Fourteenth Amendment by replacing a common law remedy with a statutory one. [FN111] The court noted that, in Silver v. Silver, [FN112] the Supreme Court, in sustaining the abolition of a nonpaying passenger's right to sue his host for negligence, had held that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." [FN113] The court concluded that because Congress had a legitimate interest in insulating federal drivers from liability, the Drivers Act constituted a valid exercise of legislative power under the Necessary and Proper Clause of Article I. [FN114]

b. Federal employee and federal driver cases. Most of the litigation involving the Drivers Act has involved claims by federal employees injured by government drivers, since prior to passage of the Act, civilian government workers injured in the course of employment as a result of the negligence of a fellow-employee were not limited to claims against the United States under the Federal Employees' Compensation Act ("FECA"). [FN115] They also had the right to bring a common law tort action ***287** against the negligent co- worker. [FN116] Congress, however, did not "specifically consider whether or not this cause of action against a fellow government employee should survive" passage of the Drivers Act. [FN117] That issue was addressed by a number of courts, which uniformly held that the Drivers Act abrogated the traditional common law rule. [FN118] Those decisions, in turn, produced litigation challenging Congress's authority to do so.

The Fourth Circuit addressed the constitutionality of the Drivers Act in Carr v. United States. [FN119] The plaintiff, a government employee injured by a federal driver, argued that the abrogation of a government employee's common law action against a fellow employee for negligence violated the Due Process Clause of the Fifth Amendment, because the Drivers Act did not create a new benefit as a quid pro quo. [FN120] Furthermore, the plaintiff argued, the Drivers Act violated the Equal Protection Clause of the Fifth Amendment, because it created an impermissible distinction between federal employees injured in vehicular accidents caused by fellow employees and federal workers injured in other job-related activities. Only Drivers Act plaintiffs were specifically barred from bringing tort actions against negligent co- employees. [FN121]

The Fourth Circuit rejected the plaintiff's due process argument, noting that it had already been rejected by the Supreme Court. [FN122] Moreover, even though a common law action could no longer be brought against the United States, the Fourth Circuit said, the Drivers Act itself provided an adequate quid pro quo, because it provided plaintiff with "valuable protection against personal liability for on-the-job automobile accidents for which he might have been responsible." [FN123]

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The court rejected the plaintiff's equal protection challenge on the ground that the classification created by the Drivers Act did not penalize the exercise of any constitutional right. [FN124] Therefore, ***288** the court held, the statutory classification did not have to be justified by a compelling governmental interest. Rather, it came "clothed with a presumption of constitutionality" and would be upheld as long as Congress had a rational basis for enacting the legislation. [FN125] The court concluded that "the magnitude of the automobile insurance problem justified Congress's separate treatment of this specific problem." [FN126]

The Third Circuit reached a similar conclusion in Thomason v. Sanchez. [FN127] The plaintiff, a serviceman, was injured when he was struck by an automobile operated by another serviceman. He had no remedy at all against the United States, because of the so-called "Feres doctrine," [FN128] and thus presented a highly compelling appeal. [FN129] The plaintiff in Thomason argued that he should be allowed to proceed against the defendant and the defendant's automobile insurer. [FN130]

The Third Circuit, however, rejected the plaintiff's argument that common law tort actions against fellow government employees had survived passage of the Drivers Act. [FN131] The Third Circuit also rejected the plaintiff's argument that the Drivers Act, as applied to him, deprived him of all remedies at law and, therefore, constituted a denial of due process under the Fifth Amendment. [FN132] Adopting the reasoning of the Fourth Circuit in Carr, [FN133] the Third Circuit held that Congress was justified in passing the Drivers Act to relieve the heavy automobile insurance burden on federal drivers. [FN134]

5. Black Lung Benefits Act of 1972

In Usery v. Turner Elkhorn Mining Co., [FN135] the Supreme Court upheld the constitutionality of Title IV of the Federal Coal Mine ***289** Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972. [FN136] The black lung benefits provisions established a compensation scheme for coal miners allegedly suffering from "black lung disease" (pneumoconiosis) and the survivors of miners who died from or were "totally disabled" by the disease. [FN137] Coal mine operators challenged a number of the black lung benefit provisions as unconstitutional.

First, the operators contended that the Black Lung Benefits Act violated the Fifth Amendment Due Process Clause by requiring them to compensate former miners who terminated their work in the industry before the Act passed. The operators argued that "the Act spreads costs in an arbitrary manner by basing liability upon past employment relationships, rather than taxing all coal mine operators presently in business." [FN138]

The Court made it clear that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality." [FN139] It then held that Congress was justified in its decision to provide for the retroactive application of liability under the Black Lung Benefits Act. [FN140] The Court stated that, whether it would have been wiser for Congress to have chosen a cost-spreading scheme that was broader or more practical under the circumstances was "not a question of constitutional dimension." [FN141]

Second, the coal mine operators challenged the two alternative methods set forth by Congress for proving "total disability" due to black lung disease, a prerequisite for compensation under the Act. [FN142] The Court held, however, that the standards adopted by Congress could not be deemed to be "purely arbitrary" and, thus, were constitutionally valid. [FN143]

Third, the operators argued that a provision of the Act which provided that no claim for benefits could be defeated based solely on the results of a chest x-ray violated due process. The operators argued that x-ray evidence was frequently the only ***290** evidence that they could put forth to rebut a black lung claim. [FN144] The Court noted, however, that Congress was presented with "significant evidence" that x-ray testing was not an accurate indicator of the absence of disease. [FN145] Thus, "Congress was faced with the problem of determining which side should bear the burden of the unreliability." [FN146] The Court held that the fact that "Congress ultimately determined 'to resolve doubts in favor of the disabled miner' [did] not render the enactment arbitrary under the standard of rationality appropriate to th[e] legislation." [FN147]

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6. The Price-Anderson Act

The Price-Anderson Act, [FN148] as amended in 1975, limited the aggregate liability for a single nuclear incident to $560 million to be paid from contributions from nuclear power plant operators, private insurance, and the federal government. In addition, the amended Act required operators to waive certain legal defenses in the event of an extraordinary nuclear incident. [FN149]

The Price-Anderson Act was critical to the development of the private nuclear power industry in the United States. [FN150] Congress appreciated that, even though the risk of a major nuclear accident was extremely remote, "the potential liability dwarfed the ability of the nuclear power industry and private insurance companies to absorb the risk." [FN151] Without reasonable and defined limits on liability, there might not be a nuclear power industry as we know it today.

In Duke Power Co. v. Carolina Environmental Study Group, Inc., [FN152] individuals who lived close to proposed nuclear power plants and two organizations sought to prevent construction of the planned facilities by obtaining a declaration that the Price-***291** Anderson Act was unconstitutional. [FN153] After deciding that plaintiffs had standing to challenge the Act, [FN154] the Supreme Court addressed plaintiffs' argument that the Act violated the Due Process Clause, because of the alleged arbitrariness of the $560 million statutory ceiling on liability. [FN155]

The Court rejected plaintiffs' contention that the Act should be subjected to an intermediate standard of review, holding that the Price- Anderson Act was a "classic example of an economic regulation" that could only be overcome by a showing that Congress acted in an "arbitrary and irrational way." [FN156] In light of this standard, the Court held that the Act passed constitutional muster because the liability cap bore a rational relationship to Congress's desire to stimulate the private sector's involvement in nuclear power. [FN157] Importantly, the Court stated that, while any cap could be characterized as arbitrary in some sense, the decision to fix a $560 million ceiling was not the "kind of arbitrariness" that would flaw an otherwise constitutional law. [FN158]

Plaintiffs' remaining due process objection was that the liability limitation failed to provide a satisfactory quid pro quo for the common law rights of recovery that the Act abrogated. The Court, however, expressed doubt whether the Due Process Clause requires that a statutory compensation scheme either duplicate the recovery available at common law or provide a reasonable substitute. [FN159] The Court cited earlier decisions which "clearly established" that "[a] person has ... no vested interest in any rule of the common law." [FN160] It also cited an earlier decision that held that the "Constitution does not forbid the ... abolition of old [rights] recognized by the common law, to attain a permissible legislative object." [FN161] The Court went on to hold that, even if there were a quid pro quo requirement, the assurance of a ***292** $560 million fund provided a "just substitute" for the common law rights replaced by the Act. [FN162]

Finally, the Court held that the Price-Anderson Act did not violate the Equal Protection Clause because the "general rationality" of the Act's liability ceiling provided "ample justification for the difference in treatment between those injured in nuclear incidents and those whose injuries are derived from other causes." [FN163]

7. Swine Flu Act

The National Swine Flu Immunization Program of 1976 ("Swine Flu Act") [FN164] was enacted to deal with the collapse of the commercial liability insurance market for vaccine manufacturers and distributors following judicial decisions holding polio vaccine manufacturers strictly liable for vaccine- related injuries. [FN165] In addition, Congress was concerned about the devastating economic impact that would occur due to lost wages if the population were not inoculated before the start of the flu season. [FN166] Modeled after the Drivers Act, the Swine Flu Act barred common law tort actions against swine flu vaccine manufacturers and providers and created a Federal Tort Claims Act remedy against the United States as the exclusive means of recovery for swine flu-related injuries. [FN167]

The constitutionality of the Swine Flu Act was first addressed in Sparks v. Wyeth Laboratories, Inc. [FN168] Plaintiff, who had suffered serious injuries following a swine flu immunization, alleged that the Act violated the Due

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ARTICLE: WHO IS WINNING THE **COLLATERAL SOURCE RULE** WAR? THE BATTLEGROUND IN THE SIXTH CIRCUIT STATES

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SUMMARY:
... HYPO: Imagine a freight train carrying iron ore traveling from Michigan's Upper Peninsula to Nashville, Tennessee. ... [16] A few years later, in 1868, Michigan adopted the common law **collateral source rule** in Perrott v. Shearer. ... [20] After Perrott, the common law **collateral source rule** was the law of the land, at least in Michigan. ... [35] Bucking the trend, Wisconsin has held the line by retaining the common law **collateral source rule.** ... " [60] Consequently, Kentucky is left in the same position as Wisconsin - albeit by default - retaining the common law **collateral source rule.** ... [92] Then, in 1986, Michigan enacted Michigan Compiled Laws Annotated section 600.6303, which abrogated the common law **collateral source rule.** ...

"Those plaintiffs receiving collateral source payments cannot have their tort remedy denied as punishment for their prudence in obtaining insurance coverage to assist them in the event of a catastrophe, and their misfortune compounded by making them appear to seek damages for which they have no need." [1]

TEXT:

[*425] I. Introduction

HYPO: Imagine a freight train carrying iron ore traveling from Michigan's Upper Peninsula to Nashville, Tennessee. The train's route is through Wisconsin, Illinois, Ohio, and Kentucky, and the train unloads ore in each state. Further imagine that as the train unloads ore, a "spark" ignites a piece of property in each respective unloading site, causing personal injury and property damage to a homeowner. If each homeowner carries homeowner's insurance covering personal injury and property damages, and if each property owner brings suit in their home state's federal district court to recover for damages, an important question is raised - which portion of the insurance benefits paid to each plaintiff-homeowner can the defendant-train company claim as an "offset" to reduce the personal injury and property

accurate, and in one sense inflammatory. **[*447]** Juries may not hear evidence that defendants are insured, [133] but may learn of the exact same evidence regarding plaintiffs. As such, even in Kentucky, the playing field inevitably tilts in favor of defendants and defendants' insurance companies. [134] In this sense, perhaps Wisconsin, holding the line from the beginning, is still at the forefront of equality and consistency within the Sixth Circuit.

V. Conclusion

One thing is certain: under the current state of affairs, similarly situated plaintiffs, wrongdoers, and collateral source providers - mostly insurance companies - receive vastly different treatment in Sixth Circuit states. This discrepancy raises not only technical concerns, such as choice of law issues in federal courts, but also raises fundamental policy questions about which party ought to be served by any kind of **collateral source rule.** Whether the modern changes to the **collateral source rule** serve any useful purpose, whether the future is better served by going back to the past formulations of the rule, or whether a different approach altogether is necessary to accomplish a consistent treatment among all parties involved depends on which player ought, as a matter of policy, to benefit from the rule.

Nevertheless, the modern trend clearly favors defendant-tortfeasors and their insurance companies. Perhaps we are satisfied with the current winner of the war on the **collateral source rule.** If, on the other hand, we are not, then the time has come to decide whether we are satisfied with the rules of engagement, and whether by changing the rules we can affect a more consistent outcome in favor of a more deserving one.

FOOTNOTES:

n1. O'Bryan v. Hedgespeth, 892 S.W.2d 571, 578 (Ky. 1995).

n2. This hypothetical is generally based on the facts of Perrott v. Shearer, 17 Mich. 48 (Mich. 1868).

n3. See id. at 55. See also discussion infra section II(A).

n4. Scholars generally attribute common law **collateral source rule** origins to the U.S. Supreme Court opinion The Propeller Monticello v. Mollison, 58 U.S. (17 How.) 152 (1854). See Victor E. Schwartz, Tort Reform: Strict Liability and the **Collateral Source Rule** Do Not Mix, 39 Vand. L. Rev. 569, 570 & n.4 (1986). Even that attribution, however, is not without its challengers. See, e.g., Joel K. Jacobsen, The **Collateral Source Rule** and the Role of the Jury, 70 Or. L. Rev. 523, 526-27 (1991).

n5. See Jacobsen, supra note 4, at 525; O'Bryan, 892 S.W.2d at 576.

n6. See Restatement (Second) of Torts 920(A)(2) (1979) ("Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.").

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n7. See Michael F. Flynn, Private Medical Insurance and the **Collateral Source Rule:** A Good Bet?, 22 U. Tol. L. Rev. 39, 42 & n.24 (1990) (citing S. Spieser et al., The American Law of Torts (1985)); Jacobsen, supra note 4, at 527-28; Tiffany Gulley Becker, Note, The **Collateral Source Rule** in Missouri: Questioning the "Double Recovery" Doctrine, 61 Mo. L. Rev. 633, 637-38 (1996). See also Thomas A. Moore, The **Collateral Source Rule,** N.Y.L.J., Dec. 3, 1991, at 107.

n8. Indeed, one study reported that 21 states had altered the common law **collateral source rule.** Mark Thompson, Letting the Air out of Tort Reform, A.B.A. J., May 1997, at 65.

n9. See infra note 29 and accompanying text. Some examples of unsuccessful attempts to abrogate the rule include the following statutes: Ky. Rev. Stat. Ann. 411.188 (Banks-Baldwin 1988); Ohio Rev. Code Ann. 2317.45 (Anderson 1996). Perhaps the most striking example of unsuccessful attempts to abrogate the **collateral source rule** is in Kansas, where state courts have struck down as unconstitutional Kansas' statutes abrogating the rule three times in eight years. See also Christopher J. Eaton, Comment, The Kansas Legislature's Attempt to Abrogate the **Collateral Source Rule:** Three Strikes and They're Out?, 42 U. Kan. L. Rev. 913 (1994).

n10. See, e.g., Colo. Rev. Stat. 13-21-111.6 (1987) (requiring courts to reduce verdict amounts by that amount one "has been or will be wholly or partially indemnified or compensated for his loss by any other person, corporation, insurance company, or fund," except when indemnity or compensation is paid as a result of "a contract entered into and paid for by or on behalf of such person"); Mich. Comp. Laws Ann. 600.6303 (West 1986) (personal injury cases); Ohio Rev. Code Ann. 2317.45 (Anderson 1996) (tort actions); Tenn. Code Ann. 20-26-119 (1975) (medical malpractice actions).

n11. See Mich. Comp. Laws Ann. 600.6303 (West 1986).

n12. See Jacobsen, supra note 4, at 527-28; Becker, supra note 7, at 637-38.

n13. Currently, of the five states encompassed within the Sixth Circuit, three states retain the common law **collateral source rule** (two by default), one state abrogated the rule in medical malpractice claims, while another abrogated the rule in personal injury claims only. See infra notes 33-35.

n14. See discussion infra section III. Although the common law **collateral source rule** is still alive in Ohio and Kentucky, it is only due to the states' respective statutes abrogating the rule having been struck down as unconstitutional. See O'Bryan v. Hedgespeth, 892 S.W.2d 571, 578 (Ky. 1995); State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d

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1062, 1111 (Ohio 1999); Sorrell v. Thevenir, 633 N.E.2d 504, 513 (Ohio 1994).

n15. The Ohio Supreme Court has held twice within the last six years that an Ohio statute abolishing the common law **collateral source rule** was unconstitutional. See Sheward, 715 N.E.2d at 1111; Sorrell v. Thevenir, 633 N.E.2d 504, 510 (Ohio 1994). In Michigan, three cases involving the **collateral source rule** arose in 1996, one involving a direct attack on the statute itself and all involving various aspects of the rule with varying reference to the statute. See Heinz v. Chicago Rd. Inv. Co., 549 N.W.2d 47 (Mich. 1996) (per curium) (direct attack on the statute); Corl v. Huron Castings, Inc., 544 N.W.2d 278, 286 (Mich. 1996) (refusing to extend the **collateral source rule** to common law contract cases); Citizens Ins. Co. of America v. Buck, 548 N.W.2d 680, 685 (Mich. Ct. App. 1996) (concerning subrogation claims).

n16. See supra note 4 and accompanying text (citing the U.S. Supreme Court opinion of The Propeller Monticello v. Mollison, 58 U.S. (17 How.) 152 (1854)). In Mollison, a steamship collided with a schooner in Lake Huron, causing the insured schooner to sink. The insured subsequently accepted a pay-off from the insurer. In the tort action that ensued based on the collision, the steamship owner argued that the insurance pay-off released it from liability. The Court disagreed, however, holding that a defendant has "no concern" with any insurance contract that a plaintiff may have secured. See id. at 155.

n17. 17 Mich. 48 (Mich. 1868). Chief Judge Cooley further stated that the defendant "has no concern with any contract the plaintiff may have with any other party in regard to the goods, and his rights or liabilities can neither be increased nor diminished by the fact that such a contract exists." Id. at 56.

n18. See id. at 55.

n19. See id. at 56.

n20. See id.

n21. See Becker, supra note 7, at 638. See also Helfend v. Southern Cal. Rapid Transit Dist., 465 P.2d 61, 66-67 (Cal. 1970). Under this argument, it is claimed that allowing an offset from insurance benefits is a disincentive to gain insurance, and prevents plaintiffs from receiving the fruits of plaintiff's foresight. See Becker, supra note 7, at 638. See also Perrott, 17 Mich. at 56; Overton v. United States, 619 F.2d 1299, 1306-07 (8th Cir. 1980). In Overton, the court stated that a plaintiff "deserves any additional compensation he may receive because he has "contracted' for it, because it is in the nature of insurance. "One can justify a double recovery where the original source was supplied by the plaintiff, himself, out of resources that would otherwise have been available to him for other purposes.'" Id. at 1306 (quoting Smith v. United States, 587 F.2d 1013, 1015 (3d Cir. 1978)).

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n22. 465 P.2d at 61.

n23. Id. at 66. Further, this theory recognizes that the end result avoids a double recovery by an injured tort victim because of subrogation rights. See O'Bryan v. Hedgespeth, 892 S.W.2d 571, 576 (Ky. 1995).

n24. See Roth v. Chatlos, 116 A. 332, 334 (Conn. 1922)); Jacobsen, supra note 4, at 528-29; Becker, supra note 7, at 638 (citing Hubbard Broad., Inc. v. Loescher, 291 N.W.2d 216, 222 (Minn. 1980). This argument opines that any resulting windfall should fall to the plaintiff, and not the tortfeasor. See Grayson v. Williams, 256 F.2d 61, 65 (10th Cir. 1958); Hudson v. Lazarus, 217 F.2d 344, 346 (D.C. Cir. 1954). However, this theory has been strongly questioned when one considers the goal of tort recovery - to compensate victims, and not to punish tortfeasors. See David Fellman, Unreason in the Law of Damages: The **Collateral Source Rule,** 77 Harv. L. Rev. 741, 748 (1964).

n25. Hubbard Broad., 291 N.W.2d at 222.

n26. See Burke Enters., Inc. v. Mitchell, 700 S.W.2d 789, 796 (Ky. 1984) (stating that "to depart from the **collateral source rule** would provide the tortfeasor a "windfall' to the substantial detriment of the injured party"); Davidson v. Vogler, 507 S.W.2d 160, 164 (Ky. 1974).

n27. O'Bryan, 892 S.W.2d at 576. See also Hamlin v. Charter Township of Flint, 165 F.3d 426, 433 (6th Cir. 1999) (ruling that pension payments from a collateral source are not to be deducted from an Age Discrimination in Employment Act award because "the victim rather than the perpetrator of discrimination should profit").

n28. See Tort Policy Working Group, Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability 70 (1986) (recommending among other ideas, to eliminate the common law **collateral source rule** as part of tort reform stating that "as to publicly provided collateral sources of compensation, there is no justification for not taking such sources into account in determining plaintiff's ultimate damages").

n29. See Robert A. Henderson & Patrick F. Maroney, Collateral Sources of Indemnity, 21 Fla. St. U. L. Rev. 571, 571-72 & n.5 (1993) (citing Insurance Info. Inst., Insurance Facts, 1987-88 Property/Casualty Fact Book 60 (1987-88)); Thompson, supra note 8, at 64; Eaton, supra note 9, at 916 & n.30 (stating that Kansas legislature enacted statutes abrogating the **collateral source rule** in response to "a perceived medical malpractice crisis" (citing Bryan W. Smith, Note, The Medical Malpractice Insurance "Crisis": Did Kansas Tort Reform Really Work?, 31 Washburn L.J. 106, 108-09 (1991)); Kamrin Evans, Comment, Settlements with

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Nonparties: A Closer Look at Colorado's Collateral Source and Contribution Statutes, 66 U. Colo. L. Rev. 195, 195-96 (1995); Daena A. Goldsmith, Comment, A Survey of the **Collateral Source Rule:** The Effects of Tort Reform and Impact on Multistate Litigation, 53 J. Air L. & Com. 799, 827-29 (1988); Julie A. Schafer, Comment, The Constitutionality of Offsetting Collateral Benefits under Ohio Revised Code Section 2317.45, 53 Ohio St. L.J. 587, 599-600 (1992).

n30. See Henderson & Maroney, supra note 29, at 572; Thompson, supra note 8, at 65; Becker, supra note 7, at 633 ("Commentators consistently criticize the [**collateral source] rule** for providing plaintiffs with the windfall of a double recovery."); Eaton, supra note 9, at 913-14; Evans, supra note 29, at 195. See also Thomas A. Moore, The **Collateral Source Rule,** An Update, N.Y.L.J., Mar. 5, 1996, at 3. For a general discussion regarding the varying degrees of success of the statutes, see generally Eaton, supra note 9 (stating that three different collateral source statutes were struck down as unconstitutional within a span of eight years).

n31. See Thompson, supra note 8, at 64. See also Douglas Hill Schwartz, Comment, The Tortured Path of Ohio's **Collateral Source Rule,** 65 U. Cin. L. Rev. 643, 644 (1997) (stating the following as reasons for this attack: an alleged insurance crisis, unreasonably high jury awards, liability insurance premiums rising) (citing Schafer, supra note 29, at 587)).

n32. Within the Sixth Circuit, the statues have had mixed success. See discussion infra sections III(A)-(E), explaining how, within the Sixth Circuit, three different statutes that abrogated the **collateral source rule** were each declared unconstitutional. In Kansas, statutes abrogating the **collateral source rule** were struck down three separate times as unconstitutional. See Thompson v. KFB Ins. Co., 850 P.2d 773, 777-79 (Kan. 1993); Farley v. Engelken, 740 P.2d 1058, 1068 (Kan. 1987); Wentling v. Medical Anesthesia Servs., 701 P.2d 939, 951 (Kan. 1985). See also Eaton, supra note 9, at 913. However, some statutes have been upheld. See, e.g., Reid v. Williams, 964 P.2d 453, 458, 460 (Alaska 1998) (holding that Alaska Statute section 09.55.548(b), which abrogated the **collateral source rule** in medical malpractice actions, is constitutional against equal protection and due process challenges).

n33. See, e.g., Lambert v. Wrensch, 399 N.W.2d 369, 376 (Wis. 1987). By default, Kentucky and Ohio each retain the **collateral source rule** after their respective statutes were declared unconstitutional. See O'Bryan v. Hedgespeth, 892 S.W.2d 571, 578 (Ky. 1995); State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1111 (Ohio 1999); Sorrell v. Thevenir, 633 N.E.2d 504, 513 (Ohio 1994).

n34. See Mich. Comp. Laws Ann. 600.6303 (West 1987) (personal injury actions); Tenn. Code Ann. 20-26-119 (1980) (applying only to medical malpractice actions). Ohio has tried twice to abrogate the rule. See Ohio Rev. Code Ann. 2317.45 (Anderson 1994) (all tort actions); Ohio Rev. Code Ann. 2317.45 (Anderson 2000) (amended by 1996 H.350). However, these attempts were unsuccessful. See discussion infra section III(D).

n35. See Ky. Rev. Stat. Ann. 411.188 (Michie 1992) (struck down as violative of Kentucky Constitution in O'Bryan v. Hedgespeth, 892 S.W.2d 571 (1995)). See also discussion infra section III(C).

n36. See Lambert, 399 N.W.2d at 376 ("The **collateral source rule** has not been abandoned in Wisconsin."); Rixmann v. Somerset Pub. Sch., 266 N.W.2d 326, 330 (Wis. 1978).

n37. 512 N.W.2d 749, 751-52 (Wis. 1994).

n38. Id. at 751-52. See also Milwaukee Mut. Ins. Co. v. State Farm Mut. Auto Ins. Co., 600 N.W.2d 55 (Wis. Ct. App. 1999) (reaffirming Wisconsin's retention of the **collateral source rule**).

n39. Voge, 512 N.W.2d at 752.

n40. Id. See also Thoreson v. Milwaukee & Suburban Transp. Co., 201 N.W.2d 745, 752 (Wis. 1972) (stating that the **collateral source rule** has a "penal effect on a tortfeasor"). But see Helfend v. Southern Cal. Rapid Transit Dist., 465 P.2d 61, 69 (Cal. 1970) (stating the rule is not punitive because it applies in all tort cases).

n41. Tennessee Code section 29-26-119 provides:

In a malpractice action in which liability is admitted or established, the damages awarded may include (in addition to other elements of damages authorized by law) actual economic losses suffered by the claimant by reason of the personal injury, including, but not limited to cost of reasonable and necessary medical care, rehabilitation services, and custodial care, loss of services and loss of earned income, but only to the extent that such costs are not paid or payable and such losses are not replaced, or indemnified in whole or in part, by insurance provided by an employer either governmental or private, by social security benefits, service benefit programs, unemployment benefits, or any other source except the assets of the claimants or of the members of the claimants' immediate family and insurance purchases in whole or in part, privately or individually.

Tenn. Code Ann. 29-26-119 (1980) (emphasis added).

n42. 616 F. Supp. 330 (M.D. Tenn. 1985).

n43. Id. at 331 n.2; U.S. Const. amend. XIV, 1 ("No state shall ... deny to any person

within its jurisdiction the equal protection of the laws.").

n44. See Baker, 616 F. Supp. at 331.

n45. See id. at 332.

n46. See id. In so holding, the court stated that "the Court simply does not believe that a medical malpractice litigant's right to receive payment for the same economic injuries from an insurance carrier as compared with litigants in other types of tort claims rises to the level of an "important' interest of constitutional magnitude." Id. at 332 & n.3.

n47. See id. at 332. Under a rational basis test, a statute will be upheld if it is rationally related to a legitimate governmental objective. See id.

n48. Id.

n49. See id. See also Hughlett v. Shelby County Health Care Corp., 940 S.W.2d 571, 575 (Tenn. Ct. App. 1996) (holding that a medical malpractice claimant may recover from a defendant health care provider the amount of the claimant's medical expenses paid by the Tennessee Medicaid program, which is part of the federal Social Security program); Steele v. Ft. Sanders Anesthesia Group, 897 S.W.2d 270, 281-82 (Tenn. Ct. App. 1994) (holding that Tennessee section 29-26-119 was inapplicable in medical malpractice claims when portions of insurance premiums were paid by plaintiff); Newton v. Cox, No. 95025-3, 1992 WL 220189, at 3 (Tenn. Ct. App. 1992) (stating that Tennessee's Medical Malpractice Statute was "intended to contain the cost of medical malpractice litigation"); Nance v. Westside Hosp., 750 S.W.2d 740, 743 (Tenn. 1988) (finding that although worker's compensation benefits are not specifically provided for in section 29-26-119, such benefits are within the general wording "any other source" because worker's compensation benefits are within the same class of benefits for which the statute covers).

n50. See Baker, 616 F. Supp. at 333.

n51. Ky. Rev. Stat. Ann. 411.188 (Michie 1992), which provided in pertinent part:

(1) This section shall apply to all actions for damages, whether in contract or tort, commenced after July 15, 1988.

(2) At the commencement of an action seeking to recover damages, it shall be the duty of the plaintiff or his attorney to notify, by certified mail, those parties believed by him to hold

subrogation rights to any award received by the plaintiff as a result of the action. The notification shall state that a failure to assert subrogation rights by intervention, pursuant to Kentucky Civil Rule 24, will result in a loss of those rights with respect to any final award received by the plaintiff as a result of the action.

(3) Collateral source payments, except life insurance, the value of any premiums paid by or on behalf of the plaintiff for same, and known subrogation rights shall be an admissible fact in any civil trial.

Id. See also Craig Farrish, Note, Restoration of the **Collateral Source Rule** in Kentucky: A Review of O'Bryan v. Hedgespeth, 23 N. Ky. L. Rev. 357, 357-58 (1996).

n52. 892 S.W.2d 571 (Ky. 1995).

n53. See id. at 578.

n54. Id. at 573.

n55. See id. Specifically, the trial court stated the following in rejecting plaintiff's motion in limine: "your objection is on the record and I'll overrule it for the record. We'll go by the statute." Id.

n56. Plaintiff's primary assertion of error on appeal was that section 411.188 was unconstitutional as in violation of the separation of powers doctrine in the Kentucky Constitution, which states the following: ""the powers of the government [are divided] into three distinct departments, each ... a separate body of magistracy,'" and continue to state that no ""persons, being of one of those departments, shall exercise any power properly belonging to either of the others.'" See id. at 576 (quoting Kentucky Constitution sections 27-28). As a corollary, Kentucky Constitution section 116 provides the Supreme Court with exclusive jurisdiction to create ""rules of practice and procedure for the Court of Justice.'" See id. at 576 (quoting Kentucky Constitution section 116).

n57. See id. at 578. See also Farrish, supra note 51, at 363 (discussing the impact the O'Bryan decision had on Kentucky law).

n58. O'Bryan, 892 S.W.2d at 576.

n59. See id. Another aspect of the court's holding was that the Kentucky legislature violated section 54 of the Kentucky Constitution, which provides that the legislature ""shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.'" See id. at 578 (quoting Kentucky Constitution section 54). Because

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section 411.188 denied damages to plaintiffs for medical expenses, section 411.188 violated section 54. See id.

n60. Id. at 576. Another important note is that Kentucky enacted a task force later to investigate any perceived liability insurance crisis. The results of this task force, however, indicated "no evidence of a litigation explosion in Kentucky." Farrish, supra note 51, at 373 & n.146.

n61. 263 N.E.2d 235 (Ohio 1970). See also Sorrell v. Thevenir, 633 N.E.2d 504, 509-10 (Ohio 1994) (quoting the syllabus of Pryor). Pryor stated, in pertinent part:

1. In a tort action the measure of damages is that which will compensate and make the plaintiff whole.

2. The **collateral source rule** is an exception to the general rule of compensatory damages in a tort action, and evidence of compensation from collateral sources is not admissible to diminish the damages for which a tortfeasor must for his negligent act.

3. Under the **collateral source rule,** benefits in the form of diminished wages, received by a plaintiff from his employer during the period he is not able to work because of a tortfeasor's negligent act, are collateral benefits and are not admissible on the issue of damages.

Sorrell, 633 N.E.2d at 510 n.2 (quoting Pryor v. Webber, 263 N.E.2d 235 (syllabus) (Ohio 1970)).

n62. Section 2317.45 of the Ohio Revised Code provides in pertinent part:

(A)(1) As used in this section:

(a) "Collateral benefits' means benefits that a plaintiff has received, or may be entitled to receive, within the next sixty months after the entry of judgment, as a result of an injury, death, or loss to person or property that is subject to a tort action, from any of the following:

(i) The government of the United States, or any state or any political subdivision of any state, under a program that provides medical, hospital, sickness, dental, or other health benefits, including, but not limited to, social security, medicare, and medicaid;

(ii) A federal, state, or political subdivision of a state disability income or workers' compensation program, or a wage continuation program, of an employer;

(iii) A medical, hospital, sickness, dental, or other health insurance program;

(iv) An accident insurance program that provides medical, hospital, sickness, dental, or other health benefits;

(v) A contract or agreement under which medical, hospital, sickness, dental, or other health services are provided or under which the costs of those services are paid for or reimbursed.

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(b) "Rights of Recoupment' means rights or recoupment through subrogation, trust agreement, contract, lien, operation of law, or otherwise.

(c) "Tort action' means a civil action for damages for injury, death, or loss to person or property. "Tort action' includes a product liability claim that is subject to sections 2307.71-2307.80 of the Ohio Revised Code, but does not include a civil action for damages for a breach of contract or another agreement between persons.

(d) "Trier of Fact' means the jury or, in a nonjury action, the court.

(B)(1) Except as provided in division (C) of this section, if a plaintiff in a tort action is entitled to an award of compensatory damages, that plaintiff shall disclose to the court after such entitlement is determined all relevant collateral benefits, all rights of recoupment relative to the disclosed collateral benefits, and the costs, premiums, or charges for any of the disclosed collateral benefits paid or contributed within the three-year period immediately preceding the accrual of the cause of action, by the plaintiff, any member of his immediate family or, in a wrongful death action, the decedent, any beneficiary of the action ... or the employer of any member of the immediate family of the decedent of any such beneficiary.

(2) Upon disclosure required by (B)(1) of this section, the court shall do the following:

(a) Determine whether both of the following are satisfied in relation to any of the disclosed collateral benefits:

(i) The plaintiff has received the disclosed collateral benefit or is reasonably certain to receive it within the next six months after the entry of the judgment

(ii) There are no rights of recoupment respecting the disclosed collateral benefit.

(b) As to any disclosed collateral benefits in relation to which both requirements of (B)(2)(a) of this section are satisfied, determine the total costs, premiums, or charges for such benefits paid or contributed within the three-year period immediately preceding the accrual of the cause of action, by the plaintiff, any member of his immediate family, ... [or] the employer of the plaintiff or any member of his immediate family ...;

(c) Prior to entering the judgment for the plaintiff, do both of the following:

(i) Subtract from the compensatory damages that the plaintiff otherwise would be awarded the amount of any disclosed collateral benefits in relation to which both requirements of division (B)(2)(a) of this section are satisfied;

(ii) Subject to the limitation specified in this division, add to the balance derived under division (B)(2)(c)(i) of this section the total of any costs, premiums, and charges described in division (B)(2)(b) of this section. The amount of these costs, premiums, and charges that is added to that balance shall not exceed any amount subtracted pursuant to division (B)(2)(c)(i) of this section from the compensatory damages that the plaintiff would otherwise be awarded.

(3) Except as provided in division (B)(1) of this section, in another section of the Revised Code, or in the Rules of Evidence, evidence of collateral benefits is not admissible in a tort action and shall not be submitted to or considered by the trier of fact in determining whether to award compensatory damages to a plaintiff in a tort action or in determining the amount of any such damages.

(C) This section does not apply as follows:

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damage portions of the damage award? Or, put another way, which plaintiff-homeowner can recover both the insurance benefits for the personal injuries and property damage which he or she suffered, and in addition recover damages from the defendant-train company for the losses covered by plaintiffs' insurance? [2]

In the Sixth Circuit, the answer depends on the state. Some plaintiffs will have their damage awards offset by any collateral source benefits received. Other plaintiffs can avoid any offset sought by the defendant. For example, regarding the Michigan homeowner, the railroad's liability would be most limited. This brings to light Justice Cooley's major concern - that a plaintiff should not be deprived the benefit of his or her bargain that is collateral to the transaction that the defendant has caused to be litigated. [3]

The **collateral source rule** has been firmly entrenched in the American jurisprudence of the law of damages for over a century. [4] The rule, considered to be **[*426]** both a rule of evidence and a rule of law, [5] bars the introduction of evidence that a plaintiff has received support from a source collateral to the defendant-wrongdoer, which reduced an element of loss. The rule also prohibits the wrongdoer from reducing his or her liability by denying an offset for the support that the plaintiff has received from the collateral source. [6]

While adhered to without much exception for decades, scholars have debated the common law **collateral source rule** for years. [7] In the past fifteen years, courts and legislatures have given heed to arguments from the rule's challengers and detractors. Consequently, the **collateral source rule** no longer enjoys consistent treatment throughout the country. [8] In the name of "tort reform," there has been a steady attempt to avoid what many consider to be the rule's greatest evil: a windfall to the plaintiff by allowing double recovery for loss from both the collateral source and the wrongdoer. Many jurisdictions have abandoned the rule completely, [9] others have modified its application in particular contexts by allowing offsetting of certain kinds of collateral source benefits, or by limiting application of the rule in particular causes of action. [10] Further, some jurisdictions now allow introduction of collateral source evidence, while others have developed post-verdict procedures that enable the trial court judge to reduce the jury award in light of collateral source benefits. [11] The wisdom of these changes, and the issues raised by the inconsistent approach to **[*427]** the rule nationwide is continually debated. [12] It is thus fair to describe the current jurisprudence regarding the **collateral source rule** as being in total disarray. [13]

One example of the different approaches to the **collateral source rule** is particularly telling. Among the states that comprise the United States Sixth Judicial Circuit - Michigan, Ohio, Kentucky, Tennessee, and Wisconsin - only Wisconsin has held steadfast to the rule in its original form. [14] In the other four states, legislation has altered the rule to one degree or another, and judicial challenges to the statutes have been ongoing. [15] As will be seen, the inconsistency of the legislative and judicial approaches among the sister states creates more problems than it solves. The most basic question which lingers unresolved in the Sixth Circuit, as in others, is that given the purpose(s) underlying the **collateral source rule** as it has historically been applied, who benefits from the rule in its current versions? Or, perhaps more important, who suffers from the current, inconsistent formulations of the rule?

This article examines the common law **collateral source rule's** history, policy justifications, and benefactors. Next, the article examines recent challenges to the common law **collateral source rule** within the Sixth Circuit states, and the rationales behind such challenges. Further, the article analyzes the current state of the law in the Sixth Circuit states, whose courts have been unusually active in the recent past. Finally, this article makes recommendations for where to go from here, given the inconsistencies that will be exposed in the Sixth Circuit states regarding the collateral source.

II. Background

A. History of the **Collateral Source Rule**

(1) In tort actions against the state in the court of claims or in tort actions against political subdivisions of this state that are commenced under or are subject to Chapter 2744 of the Revised Code;

(2) To any medical claim, as defined in section 2305.11 of the Revised Code.

Ohio Rev. Code Ann. 2317.45 (Anderson 1988).

n63. See Schwartz, supra note 31, at 643 & nn.77 & 78 (citing James P. Nolan II, Note, The **Collateral Source Rule** in Ohio, 16 U. Dayton L. Rev. 413, 422 (1991), and listing Ohio statutes pertaining to specific legal claims).

n64. See Sorrell, 633 N.E.2d at 427. See also Depew v. Ogella, 635 N.E.2d 310 (Ohio 1994) (reversing, based on Sorrell, lower court decision that upheld the constitutionality of Ohio Revised Code section 2317.45); May v. Tandy Corp., 633 N.E.2d 504 (Ohio 1994) (same).

n65. 633 N.E.2d at 506 (syllabus). In Sorrell, plaintiff commenced a battery action against defendant, requested a jury trial, and claimed damages for physical injury, emotional distress, loss of income, and loss of consortium. The jury returned a verdict for plaintiff, awarding more than $ 10,000 damages in compensatory damages and $ 5,000 for pain and suffering. The jury declined, however, to award any damages for future pain and suffering, and likewise rejected plaintiff's spouse's claim for loss of consortium. See id. Under Ohio Revised Code section 2317.45, the trial court then held a post verdict hearing at which time plaintiff disclosed that she had received collateral benefits. In response, defendant asserted that under Ohio Revised Code section 2317.45(B)(2), he is entitled to a setoff of the entire jury verdict because plaintiff received over $ 14,000 in worker's compensation benefits. See id.

n66. Id.

n67. Id.

n68. See id.

n69. See id. at 513 (holding in a 5-2 decision that the statute was unconstitutional). More specifically, the court stated that the statute violates the Ohio constitutional rights to due process, remedy, open courts, equal protection, and jury trial. See id. at 513. The court found difficulty with the fact that the statute required trial judges to reduce from a plaintiff's jury award collateral benefits which have either already been received or will be received, regardless of whether the benefits actually matched the jury's verdict. The court further stated that this requirement violates a plaintiff's right to have the jury determine all of the facts at issue. See id. at 510.

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n70. See id. at 504. The court actually held that Ohio Revised Code section 2317.45 was unconstitutional on five grounds: due process, right to a remedy, right to open courts, equal protection, and right to a jury trial. However, only due process, equal protection, and the fundamental right to a jury trial are discussed in this article.

n71. See Sorrell v. Thevenir, 633 N.E.2d 504, 510 (Ohio 1994) ("The statute does not require that damages be allocated between economic or noneconomic damages or even past or future economic damages. The statute merely directs the trial court to deduct the amount of the collateral benefit from the total award."). This is problematic to the court because courts may enter a judgment disregarding the jury's verdict, thus in violation of plaintiff's right to "have all facts determined by the jury, including damages." Id.

n72. See id. Significantly, the court stated that the following: "Plaintiff Sorrell ... has not been fully compensated for her injuries because the specific jury award for her pain and suffering is totally eliminated by her receipt of workers' compensation benefits, even though workers' compensation allows no compensation whatsoever for pain and suffering." Id.

n73. Id. at 511 ("Every person who sustains a legal injury "shall have remedy by due course of law.'"). The Ohio due process provision is equivalent to the due process provision in the Fourteenth Amendment of the U.S. Constitution. See id. at 510-11 (citing Direct Plumbing Supply Co. v. Dayton, 38 N.E.2d 70, 72 (Ohio 1941)).

n74. See id. at 511 ("Governmental action which limits the exercise of fundamental constitutional rights is subject to the highest level of judicial scrutiny."). In Sorrell, the court used strict scrutiny because the statute at issue afflicted the fundamental right to a jury trial in negligence and personal injury actions. See id. Thus, strict scrutiny requires that the statute be struck down unless the statute was necessary to promote a compelling governmental interest. See id. (citing Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Primes v. Tyler, 331 N.E.2d 723, 726 (Ohio 1975)).

n75. Sorrell, 633 N.E.2d at 511 (citing Mominee v. Scherbeth, 503 N.E.2d 717 (Ohio 1986)). Further, the court stated that the interest in avoiding double recoveries by plaintiffs is applied arbitrarily because the statute does not restrict the court in only deducting from the jury award those collateral benefits for which plaintiff has received. See id.

n76. Id. Moreover, the court stated that the "means employed in the statute to attain the goal are both irrational and arbitrary" because the collateral benefits received may not be part of the damages awarded. Id.

n77. See id. at 512. The Ohio Constitution regarding equal protection is "nearly identical" to the U.S. Constitution's Equal Protection Clause. Id. (citing Kinney v. Kaiser Aluminum &

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Chem. Corp., 322 N.E.2d 880, 882 (Ohio 1975)).

n78. Ohio Rev. Code Ann. 2305.27 (Anderson 1988).

n79. Ohio Rev. Code Ann. 2317.45 (Anderson 1996).

n80. See Sorrell, 633 N.E.2d at 512.

n81. See Sorrell v. Thevenir, 633 N.E.2d 504, 512 (Ohio 1994). For example, Ohio Revised Code section 2305.27 does not mandate that collateral benefits from insurance proceeds are reduced from an award when the plaintiff or plaintiff's employer pays the premiums. See id. Further, two Ohio courts have held that section 2315.27 does not reduce a jury award when the benefits received are workers' compensation, social security, or Medicare benefits. See id. (citing Savage v. Correlated Health Serv., Ltd., 591 N.E.2d 1216 (Ohio 1992); Hodge v. Middletown Hosp. Ass'n, 581 N.E.2d 529 (Ohio 1991)). Conversely, section 2317.45 requires that those benefits are reduced from all non-medical malpractice tort awards. See id.

n82. See Sorrell, 633 N.E.2d at 512. Quoting from an amicus curiae:

"If there was an insurance crisis, it would be a crisis affecting all tort defendants. There is no rational reason for distinguishing between medical malpractice tort defendants and all other tort defendants. This disparate treatment can result in vastly different results involving the same injury. For example, two tort victims suffer the identical injury, the laceration of an artery resulting in death. One tort victim is injured by a piece of broken glass while driving a company truck within the scope of employment. The other tort victim is injured by the medical negligence of a physician who lacerates an artery during an elective surgery procedure. Both tort victims remain in the hospital for ten days before their death. Due to the difference in the collateral source statutes, these two identical injuries may result in vastly different compensation for the victim. The Equal Protection Clause mandates that those similarly situated be similarly treated."

Id. at 512 (quoting Brief of Amicus Curiae Ohio Academy of Trial Lawyers).

n83. See Schwartz, supra note 31, at 663.

n84. Ohio Rev. Code Ann. 2317.45 (Anderson 1996). The revised section 2317.45 was passed in late 1996, signed into law by the governor of Ohio on October 28, 1996, and took effect on January 27, 1997. State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1067, 1068 n.2 (Ohio 1999) (syllabus). The revised section provided, in pertinent part:

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(A)As used in this section:

(1) "Collateral benefits" means benefits that are paid by any source, including workers' compensation benefits, to or on behalf of the plaintiff as a result of an injury or loss to person or property, regardless of whether there is an obligation to pay back the money or other benefits, in whole or in part, upon recovery in a tort action. "Collateral benefits" does not include life insurance proceeds.

(2) "Tort Action" means a civil action for damages for injury, death, or loss to person or property. "Tort action" includes a product liability claim but does not include a civil action for damages for a breach of contract or another agreement between persons.

....

(B) In determining the amount of the compensatory damages that are recoverable by the plaintiff in a tort action, the trier of fact shall consider, if presented in the tort action, relevant collateral benefits that have been paid, or that the source of the benefits has acknowledged are payable, from insurance other than insurance for which the plaintiff, spouse of the plaintiff, or parent of the plaintiff if the plaintiff is a minor, has paid a premium, insurance that is subject to a right of subrogation, workers' compensation benefits that are subject to a right of subrogation, or insurance that has any other obligation of repayment, including, but not limited to, evidence of the amount of the collateral benefit and of the costs, premiums, or charges for the collateral benefits.

Ohio Rev. Code Ann. 2317.45 (Anderson 1996). Thus, in essence, the following changes were made in the revised section 2317.45: (1) the legislation provides that only the jury is to be the final decider of compensation awards for plaintiffs; (2) the trial judge does not have the obligation to modify or alter the jury's award of damages; and (3) the two classifications of tort victims have been eliminated after the legislatures repealed the medical malpractice statute which provided disparate treatment to medical malpractice tort victims. Id.

n85. Sheward, 715 N.E.2d at 1101. The named respondents were Court of Common Pleas judges of the following counties: Franklin, Montgomery, and Cuyahoga. Id. at 1068 n.1 (syllabus).

n86. Plaintiffs raised several arguments claiming that the statute was unconstitutional, including arguments regarding separation of powers, one-subject rule, right of trial by jury, right to remedy, and equal protection. Id. at 1069 (syllabus). The breath of Ohio Revised Code section 2317.45 is realized in that it "amends, enacts, or repeals over one hundred sections of the Ohio Revised Code "relative to changes in the laws pertaining to tort and other civil actions.'" Id. at 1073 n.6. Further, the bill "affected eighteen different titles, thirty-eight different chapters, and over one hundred different sections of the Revised Code as well as procedural and evidentiary rules." Id. at 1099. For example, besides changing the **collateral source rule,** the changes included statutes of repose, liability of liquor permit holders, liability of athletic coaches and officials, actions by a roller skater, and wrongful deaths. See id. at 1073.

n87. See id. at 1101. The court ruled 4-3 that the bill was unconstitutional. See id. at 1062.

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n88. See id. at 1101. Specifically, the court struck down the bill based on separation of powers principles, and under the One-Subject Rule of the Ohio Constitution. See id. at 1105, 1101. The one-subject rule provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title." Ohio Const. art. II, 15(D). According to the court, "the various provisions in this bill are so blatantly unrelated that, if allowed to stand as a single subject, this court would be forever left with no basis upon which to invalidate any bill, no matter how flawed." Id. at 1100.

n89. Id. at 1089-90. The court conceded that the revised statute does not require a deduction after the verdict, but stated that the revised statute still authorizes a preverdict setoff, which "triggers the constitutional requirement that those payments match the items or categories of damages actually awarded." Id. at 1089 (citing Sorrell v. Thevenir, 633 N.E.2d 504, 511-12 (1994)). Thus, the court stressed the need to ascertain whether the collateral source payments actually have actually been included within the jury's verdict. See id.

n90. Id. at 1090. The dissent argued that the One-Subject Rule of the Ohio Constitution does not preclude multiple topics that have a common purpose or relationship. According to the dissent, Ohio Revised Code section 2317.45 is not violative of that provision because the bill merely addresses the single subject of tort actions, and tort reform issues, collectively and instead of having "piecemeal" legislation. Id. at 1125.

n91. See Perrott v. Shearer, 17 Mich. 48 (1868).

n92. See, e.g., Kurta v. Probelske, 36 N.W.2d 889, 893 (Mich. 1949); Bartels v. Ford Motor Co., 289 N.W. 322, 324 (Mich. 1939); Cawood v. Earl Paige & Co., 214 N.W. 402, 403 (Mich. 1927) (stating that "defendant's counsel had no right to inquire whether plaintiff was carrying accident insurance"); Wood v. Vroman, 184 N.W. 520, 525 (Mich. 1921) (citing Perrott v. Shearer, 17 Mich. 48 (1868)); Hagen v. Chicago, D & C Grand Trunk Junction R.R. Co., 49 N.W. 509, 510 (Mich. 1891). Additionally, the common law **collateral source rule** withstood the evolution of Michigan's no-fault automobile insurance statute. See Nasser v. Auto Club Ins. Ass'n, 457 N.W.2d 637, 649 (Mich. 1990) ("The **collateral source rule** bars evidence of other insurance coverage when introduced for the purpose of mitigating damages.").

n93. Michigan Compiled Laws Annotated section 600.6303 provides:

(1) In a personal injury action in which the plaintiff seeks to recover for the expense of medical care, rehabilitation services, loss of earnings, loss of earning capacity, or other economic loss, evidence to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source shall be admissible to the court in which the action was brought after a verdict for the plaintiff and before a judgment is entered on the verdict. Subject to subsection (5), if the court determines that all or part of the plaintiff's expense or loss has been paid or is payable by a collateral source, the court shall reduce that portion of

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the judgment which represents damages paid or payable by a collateral source by an amount equal to the sum determined pursuant to subsection (2). This reduction shall not exceed the amount of the judgment for economic loss or that portion of the verdict that represents damages paid or payable by a collateral source.

(2) The court shall determine the amount of the plaintiff's expense or loss which has been paid or is payable by a collateral source. Except for premiums on insurance which is required by law, that amount shall then be reduced by a sum equal to the premiums, or that portion of the premiums paid for the particular benefit by the plaintiff or the plaintiff's family or incurred by the plaintiff's employer on behalf of the plaintiff in securing the benefits received or receivable from the collateral source.

(3) Within 10 days after a verdict for the plaintiff, plaintiff's attorney shall send notice of the verdict by registered mail to all persons entitled by contract to a lien against the proceeds of plaintiff's recovery. If a contractual lien holder does not exercise the lien holder's right of subrogation within 20 days after receipt of the notice of the verdict, the lien holder shall lose the right of subrogation. This subsection shall only apply to contracts executed or renewed on or after the effective date of this section.

(4) As used in this section, "collateral source" means benefits received or receivable from an insurance policy; benefits payable pursuant to a contract with a health care corporation, dental care corporation, or health maintenance organization; employee benefits; social security benefits; worker's compensation benefits; or medicare benefits. Collateral source does not include life insurance benefits or benefits paid by a person, partnership, association, corporation, or other legal entity entitled by law to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages. Collateral source does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3).

(5) For purposes of this section, benefits from a collateral source shall not be considered payable or receivable unless the court makes a determination that there is a previously existing contractual or statutory obligation on the part of the collateral source to pay the benefits.

Mich. Comp. Laws Ann. 600.6303 (West 1986).

n94. See Mich. Comp. Laws Ann. 600.6303(1) (West 1986). This evidence was only admissible after the verdict but before judgment was entered. See id.

n95. See, e.g., Corl v. Huron Castings, Inc., 544 N.W.2d 278 (Mich. 1996); RCO Eng'g, Inc., v. ACR Indus., Inc., 597 N.W.2d 534 (Mich. Ct. App. 1999); Citizens Ins. Co. of America v. Buck, 548 N.W.2d 680 (Mich. Ct. App. 1996); Haberkorn v. Chrysler Corp., 533 N.W.2d 373 (Mich. Ct. App. 1995).

n96. 549 N.W.2d 47 (Mich. Ct. App. 1996) (per curiam). See also M. Bryan Schneider & Jody L. Sturtz, Annual Survey of Michigan Law June 1, 1995-May 31, 1996: Civil Procedure, 43 Wayne L. Rev. 439, 587-88 (1997) (summarizing Heinz v. Chicago Rd. Inv. Co.).

n97. See Heinz, 549 N.W.2d at 50.

n98. See id. The plaintiff also received over $ 80,000 in exchange for redeeming all other worker's compensation claims arising out of the slip and fall. As part of this agreement, the plaintiff's worker's compensation provider waived all rights to a lien on any future recovery by the plaintiff against the building owner. See id.

n99. See id.

n100. See id. The defendant then sought to reduce the award by the amount of workers' compensation benefits that the plaintiff received. See id. The court granted the defendant's request, but did not offset the $ 80,000 that the plaintiff received because the court could not determine what the amount represented, that is, future and past medical expenses, future and past wage loss, etc. See id.

n101. See id. at 51-52. The plaintiff also raised other arguments not pertinent to this article, including due process challenges, taking of property without just compensation. See id. at 51-54.

n102. See id. at 55. In fact, the court went one step further and also allowed the defendant to setoff the $ 80,000 worker's compensation benefits that the plaintiff received under his redemption agreement. See id. Judge Neff respectfully dissented in this aspect of the holding, despite recognizing the possibility of a double recovery for the plaintiff if the court refused to allow the redemption amount to be offset from the plaintiff's recovery. See id. at 55 (concurring in all other aspects). Notwithstanding, Judge Neff stated that "there is no way to determine what the redemption payment covered or in what proportion," and thus, he would not allow the offset. Id. at 56.

n103. Id. at 52 (stating that the plaintiff "received the full amount of the damages that the jury determined proper, the source of payment of that amount merely was split between the defendant and the worker's compensation provider").

n104. See Mich. Const. of 1963, art. 1, 2; U.S. Const. amend. XIV.

n105. See Heinz, 549 N.W.2d at 53 (citing Bissel v. Kommareddi, 509 N.W.2d 542, 543 (1993)).

n106. Heinz v. Chicago Rd. Inv. Co., 549 N.W.2d 47, 53 (Mich. Ct. App. 1996). However, the plaintiffs conceded that the exact legislative intent behind the statute was not clear

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because no statutory history behind the statute's enactment exists. See id. In support of the plaintiff's argument, plaintiff cited caselaw from other jurisdictions, as well as legal scholars. See id.

n107. Id.

n108. See id. The plaintiff argued that the statute must fail - even under a rational basis test - because the statute creates unjustified class distinctions between personal injury plaintiffs and all other tort plaintiffs. See id. But the court stated that the classification was rationally related because "the Legislature is not required to enact laws affecting all equally, but may "direct its legislation against what it deems an existing evil without covering the whole field of possible abuses.'" Id. Lastly, the court summarily rejected the plaintiff's due process argument because it found that the plaintiff did not have a protectable property right. See id. at 52. See generally Detroit v. Walker, 520 N.W.2d 135 (Mich. 1994) (determining plaintiffs failed to prove they had a protectable property right). Specifically, plaintiff argued that the protectable property interest was the jury verdict. However, in rejecting this argument, the court stated that "[a] jury verdict ... does not become enforceable until the court enters a judgment on that verdict." Id.

n109. U.S. Const. amend. XIV, 1.

n110. Heinz, 567 N.W.2d at 259. Justices Cavanagh and Kelly would have granted leave to appeal.

n111. 544 N.W.2d 278, 281 (Mich. 1996) (Cavanagh, Levin, Boyle, JJ., dissenting).

n112. Id. at 281. In so deciding, the court overruled Pennington v. Whiting Tubular Prods., Inc., 122 N.W.2d 692 (Mich. 1963) (holding that the **collateral source rule** does apply to breach of contract actions).

n113. See John G. Fleming, The **Collateral Source Rule** and Contract Damages, 71 Cal. L. Rev. 56, 58 (1983) (discussing the **collateral source rule's** widespread application to breach of contract claims). See also Seibel v. Liberty Homes, Inc., 752 P.2d 291, 299 (Or. 1988) (holding that in breach of contract action, employer was not entitled to deduct from damage award owed any amount of social security benefits received by employee).

n114. See Perrott v. Shearer, 17 Mich. 48 (Mich. 1868). See also discussion infra section II (A).

n115. The authors are assuming that personal jurisdiction is proper in each state because of defendant-train company's systematic and continuous business transactions. See Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 415 (1984); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945). It is further assumed that venue is proper where defendant-train company does business.

n116. See Lambert v. Wrensch, 399 N.W.2d 369, 376 (Wis. 1987) (finding jury instructions regarding the **collateral source rule** inapplicable where subrogation rights exist).

n117. See Farrish, supra note 51, at 374. Thus, any collateral source issue may be rendered moot. In this sense, Tennessee may have the best idea. See discussion supra section III(B).

n118. O'Bryan v. Hedgespeth, 892 S.W.2d 571, 576 (Ky. 1995). Another important note is that Kentucky later enacted a task force to investigate any perceived liability insurance crisis. However, the results of this task force indicated "no evidence of a litigation explosion in Kentucky." Farrish, supra note 51, at 373 & n.146.

n119. See O'Bryan, 892 N.W.2d at 576 ("There is no legal reason why the tortfeasor or his liability insurance company should receive a "windfall' for benefits to which the plaintiff may be entitled by reason of his own foresight in paying the premium or as part of what he has earned in his employment, and benefits received are usually subject to subrogation so there is no "double recovery' by any stretch of the imagination.").

n120. See Tort Policy Working Group, supra note 28, at 70 (recognizing that where an insurer is subrogated to a claim by a plaintiff, "the **collateral source rule** may not in fact result in any double recovery"). See also Lambert, 399 N.W.2d at 376 (stating that where subrogation rights exist, the **collateral source rule** is in applicable).

n121. See Helfend v. Southern Cal. Rapid Transit Dist., 465 P.2d 61, 66 (Cal. 1970); O'Bryan, 892 S.W.2d at 576; Sorrell v. Thevenir, 633 N.E.2d 504, 511 (Ohio 1994).

n122. See discussion supra section III(A)-(E).

n123. Notwithstanding, most plaintiffs' attorneys work on contingency fees of about <fr13>% of the total damage award. See Farrish, supra note 51, at 373-74. Taking both propositions together, a plaintiff is usually left to receive a lower amount than the jury renders. See id.

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n124. See Helfend, 465 P.2d at 66-67; Perrott v. Shearer, 17 Mich. 48, 55-56 (Mich. 1868). Many claim that allowing an offset from insurance benefit is a disincentive to gain insurance, and prevents plaintiffs from receiving the fruits of plaintiff's foresight. See Becker, supra note 9, at 638.

n125. Heinz v. Chicago Rd. Inv. Co., 549 N.W.2d 47 (Mich. Ct. App. 1996).

n126. State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1111 (Ohio 1999); Sorrell v. Thevenir, 633 N.E.2d 504, 513 (Ohio 1994).

n127. See Heinz, 549 N.W.2d at 53; Sheward, 715 N.E.2d at 1089-90; Sorrell, 633 N.E.2d at 506 (syllabus).

n128. See supra section III(D)-(E), explaining how each statute faired under a rational basis test. Concededly, the Ohio court in Sorrell struck down the statute using a strict scrutiny standard. Sorrell, 633 N.E.2d at 511. However, it should be pointed out that the Sorrell court stated that the statute would fail under even a rational basis test because the statute "does not bear a real and substantial relationship to the health, safety, morals or general welfare, and it is unreasonable and arbitrary." Id. (citing Mominee v. Scherbeth, 503 N.E.2d 717 (Ohio 1986)).

n129. See Farrish, supra note 51, at 373 & n.146 (citing Legislative Research Comm'n, Report of the Kentucky Insurance and Liability Task Force, Research Report 232, at 15 (1988)).

n130. Sorrell, 633 N.E.2d at 511.

n131. See Mich. Comp. Laws Ann. 600.6303 (West 1986) (abrogating the **collateral source rule** in personal injury actions).

n132. See Farrish, supra note 51, at 374.

n133. See Fed. R. Evid. 411 ("Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.").

n134. See generally Wallace v. Leedhanachoke, 949 S.W.2d 624 (Ky. Ct. App. 1996)

As previously stated, the **collateral source rule** arguably was adopted in the United States in the 1854 case of The Propeller Monticello v. Mollison. [16] A few years later, **[*428]** in 1868, Michigan adopted the common law **collateral source rule** in Perrott v. Shearer. [17] In Perrott, plaintiff sued defendant for the full value of goods lost in a fire. Defendant argued that plaintiff's damages should be reduced because plaintiff had an insurance policy covering the goods. [18] Chief Judge Thomas McIntyre Cooley held, however, that the defendant was not entitled to an offset. [19] The court reasoned that the plaintiff did not give away his right to recover for the lost value of the goods merely by purchasing insurance. [20] After Perrott, the common law **collateral source rule** was the law of the land, at least in Michigan. Thus, tortfeasors were not allowed to deduct damages owed to a plaintiff merely because plaintiff received compensation from a collateral source.

Opinions upholding the **collateral source rule** stress different rationales. Some claim that plaintiffs ought to realize the "benefit of the bargain" which he or she made. [21] In Helfend v. Southern California Rapid Transit District, [22] the California Supreme Court stated the following in justifying the rule:

[The rule] embodies the venerable concept that a person who has invested years of insurance premiums to assure his medical care should receive the benefits of his thrift. The tortfeasor should not garner the benefits of his victim's providence .... If we were to permit a tortfeasor to mitigate damages with payments from plaintiff's insurance, plaintiff would be in a position inferior to that of having bought no insurance, because his payment of premiums would have earned no benefit. [23]

Similarly, some opinions rationalize that a defendant should pay for the complete damages caused by the defendant-tortfeasor. [24] To that end, one state supreme court **[*429]** described one purpose of the **collateral source rule** as "punitive" in that "although the wronged party may be overcompensated, the **collateral source rule** requires that a wrongdoer pay for the full extent of damages he or she has caused." [25]

Other courts have cited relevance as a justification for the **collateral source rule,** or more specifically, irrelevance. For example, one court held evidence that a plaintiff received payments from a collateral source was irrelevant to the issue of damages incurred by that plaintiff, and therefore was entitled to recover from the defendant-tortfeasor. [26]

Further, proponents of the rule argue that if one party inevitably receives a "windfall," that party should be the plaintiff, not the defendant-tortfeasor. To that end, one state supreme court stated:

There is no legal reason why the tortfeasor or his liability insurance company should receive a "windfall' for benefits to which the plaintiff may be entitled by reason of his own foresight in paying the premium or as part of what he has earned in his employment, and benefits received are usually subject to subrogation so there is no "double recovery' by any stretch of the imagination. [27]

B. Recent Changes and Troubling Examples

Notwithstanding the widespread, long-standing support for the **collateral source rule,** it eventually became a target of state legislatures. Despite the rule's long history in the United States, critics strongly lobbied for its abrogation. [28] The rationale behind this movement was

(applying Fed. R. Evid. 411 to preclude discussion of whether the defendants possessed liability insurance); O'Bryan v. Hedgespeth, 892 S.W.2d 571, 573 (Ky. 1995) (where the trial court rejected plaintiff's attempt to exclude evidence that it was insured).

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to help curb increased insurance costs, litigation costs, and increasingly high jury awards. [29] Further, many sought to eliminate the **[*430]** common law rule to limit any possible "windfall" to plaintiffs. [30] As a result of this strong, influential lobby, many states enacted statutes abrogating the **collateral source rule.** [31] As we shall see, however, this tort reform had recurring problems. Time and again state statutes abrogating, in whole or in part, the common law **collateral source rule** were struck down as unconstitutional. [32] This was no less true within the Sixth Circuit states.

III. Current State of the Law in Sixth Circuit States

A. Wisconsin

The Sixth Circuit's treatment of the **collateral source rule** spans the entire spectrum. Some courts retain the rule in its common law form. [33] Other state courts have modified the rule in part, [34] while still others have eliminated the rule entirely. [35] **[*431]** Bucking the trend, Wisconsin has held the line by retaining the common law **collateral source rule.** [36] Thus, in Wisconsin, tortfeasors may not introduce evidence that a plaintiff has received compensation from collateral sources. In Voge v. Anderson, [37] the Wisconsin Supreme Court reiterated its belief in the **collateral source rule.** [38] In Voge, an injured motorist sued the tortfeasor and the tortfeasor's automobile insurance company in a personal injury action. After the jury found for the injured motorist, the tortfeasor and insurance company appealed, arguing that the damages awarded to the plaintiff should be reduced by the amount of underinsured motorist benefits and no-fault medical payments made to the plaintiff by his underinsurance carrier.

The court held that the **collateral source rule** applied; therefore, the defendants were not entitled to a reduction in the judgment for the UIM benefits that plaintiff received. In the opinion, the court recognized that "the results in this case allow the injured party a double recovery," but went on to state that "a contrary conclusion would result in giving the tortfeasor a windfall: the tortfeasor would not have to pay the full amount of damages he would owe even after taking into account the amount of contributory negligence." [39] In Wisconsin, the better result is to deny tortfeasors an offset because "any windfall in benefits should inure to the injured party, not to the tortfeasor." [40] Moreover, the fact remains that a subrogation clause remains the best protection insurance companies have to protect against "windfalls" to plaintiffs. Absent a subrogation clause, however, Wisconsin clearly maintains the common law **collateral source rule,** yet is the only state to hold the line from the beginning.

B. Tennessee

Contrary to Wisconsin, Tennessee has taken actions to abrogate the **collateral source rule,** at least regarding medical malpractice actions. In 1980, Tennessee passed Tennessee statute section 29-26-119. [41] The statute's main thrust was to **[*432]** abrogate the common law **collateral source rule** in Tennessee malpractice claims in so far as a plaintiff's employer provides the collateral source benefits. However, as to gratuitously provided benefit situations or self-insured plaintiffs, the common law **collateral source rule** seems to still apply.

In 1985, the constitutionality of this statute was contested in Baker v. Vanderbilt University. [42] In Baker, plaintiffs challenged section 29-26-119, claiming the statute was violative of the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment. [43] In particular, the plaintiffs claimed that the statute denied equal protection to victims of medical malpractice, as compared to victims of other torts. [44]

The U.S. District Court for the Middle District of Tennessee held that the statute does not violate equal protection. [45] First, the court stated that because the regulation was essentially economic in nature, [46] the appropriate level of scrutiny is rational basis. [47] After determining the appropriate level of scrutiny, the court had "little trouble in upholding the statute." [48]

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Specifically, the court found that reducing medical malpractice insurance premiums and health care costs is a legitimate governmental objective that is furthered by the distinction between malpractice plaintiffs and other plaintiffs. [49] The Tennessee statute was thus upheld as consistent **[*433]** with the U.S. Constitution's Equal Protection Clause, and remains the law in Tennessee today. [50]

C. Kentucky

Kentucky provides an interesting example of two points: it is one of many states that took action to abrogate the **collateral source rule;** and it is one of many states that had its statute declared unconstitutional. In 1988, Kentucky enacted section 411.188, [51] which stated that collateral source payments are admissible in any civil trial. The statute, however, did not specify how the jury was to apply evidence of collateral source payments when deciding the amount of damages to award a plaintiff. Nevertheless, this law remained on the books until 1995, when the Kentucky Supreme Court ruled in O'Bryan v. Hedgespeth [52] that section 411.188 was unconstitutional because it violated the separation of powers principles in the Kentucky Constitution. [53]

In O'Bryan, plaintiff and defendant were involved in an automobile accident. [54] Just before trial, the plaintiff made a motion in limine to exclude evidence that plaintiff received collateral source payments. The trial court overruled the motion, forcing the plaintiff to admit evidence of his medical bills, including the amount of collateral source payments received, along with evidence of his personal out-of-pocket expenses. [55] After the jury awarded the plaintiff zero damages for medical expenses for which he received collateral source payments, the plaintiff appealed. [56]

[*434] The Kentucky Supreme Court held that section 411.188 unconstitutionally violated the state's separation of powers doctrine. [57] First, the court stated that the "responsibility for deciding when evidence is relevant to an issue of fact ... must be judicially determined." [58] In promulgating section 411.188, however, it was the Kentucky Legislature, not the Kentucky Judiciary, that determined the admissibility of such evidence. [59] The statute thus violated separation of powers principles.

Also significant to the court's holding was its recognition that damages recovered by a plaintiff normally are subject to subrogation rights. More specifically, the court recognized that because subrogation rights are often present when a plaintiff recovers damages, "there is no "double recovery' by any stretch of the imagination." [60] Consequently, Kentucky is left in the same position as Wisconsin - albeit by default - retaining the common law **collateral source rule.**

D. Ohio

Another state that attempted to abrogate the **collateral source rule,** with mixed success, is Ohio. As we shall see, however, Ohio has shown serious resiliency. After one of its statutes abrogating the **collateral source rule** was declared unconstitutional, Ohio bounced back, passing another statute eliminating the **collateral source rule.** Once again, however, this statute did not pass muster. The **collateral source rule** has thus led a storied path in Ohio.

The history of the **collateral source rule** in Ohio began in 1970, when the state adopted the common law **collateral source rule** in Pryor v. Webber. [61] This rule of **[*435]** law, however, was short-lived, In 1988, the Ohio legislature enacted Revised Code section 2317.45, [62] which abolished the **collateral source rule** for **[*436]** tort actions, including medical malpractice actions. [63] Nevertheless, in 1994, the Ohio Supreme Court reinstated the common law **collateral source rule** for cases involving general negligence claims by declaring that the earlier attempt to abrogate the common law **collateral source rule** in section 2317.45 violated the Ohio State Constitution. [64]

In Sorrell v. Thevenir, [65] the trial court declared that section 2317.45 unconstitutionally violated plaintiffs' fundamental rights to a jury trial, and rights to a remedy under the Ohio State Constitution. [66] According to the trial court, the statute failed under the strict scrutiny test because although ""the statute was enacted to cure a supposed "insurance crisis,'" the court stated that ""there is no demonstrated evidence from which to conclude that a "crisis" ever existed or that cured this "crisis.'" [67] Consequently, the court found that there was no compelling reason to "trample plaintiff's constitutional rights to relieve a particular industry of liability." Accordingly, the trial court awarded the plaintiff the entire amount that the jury found applicable to plaintiff, without reducing the amount by the amount of workers' compensation benefits that the plaintiff received. [68]

On appeal to the Supreme Court of Ohio, the court held that section 2317.45 was unconstitutional in toto. [69] The court's analysis involved three significant aspects. [70] **[*437]** First, it considered whether the statute violated a plaintiff's fundamental right to a trial by jury. In deciding affirmatively, the court reasoned that the statute impermissibly required trial courts to deduct collateral source benefits received by a plaintiff from a jury award in favor of a plaintiff, regardless of whether the collateral benefits were actually duplicated in the jury's verdict. [71] Thus, while the legislature's goal eliminating plaintiff double recovery was not arbitrary or unreasonable, the statute essentially failed to consider whether the collateral benefits to be deducted were actually within the damages actually found by the jury, especially in general verdict situations. [72]

Second, the Sorrell court decided whether the statute violated the principles of due process. [73] Because the statute afflicted (numerous) fundamental rights, the court used the strict scrutiny standard to determine the statute's validity. [74] Although the court struck down the statute under this standard, it stated that the statute would not even be able to withstand rational basis scrutiny because the statute "does not bear a real and substantial relationship to the health, safety, morals or general welfare, and it is unreasonable and arbitrary." [75] Most foul to the court was the "paucity of credible empirical evidence that a crisis existed, or that there is a relationship **[*438]** between tort reform legislation and the availability or affordability of insurance." [76] The court thus struck down the statute on due process grounds as well.

Third, the court decided whether the statute violated equal protection provisions of the Ohio Constitution. Because the statute classification affected a fundamental right, the court again analyzed the statute under the strict scrutiny standard. [77] In striking down the statute on equal protection grounds, the court noted that Revised Code sections 2305.27 [78] and 2317.45 [79] classify tort victims as "medical malpractice tort victims and all other tort victims." [80] Under section 2305.27, however, medical malpractice plaintiffs are not subject to the same rule regarding collateral source benefits as are all other tort plaintiffs. [81] Unable to find a justification for this statutory classification, the court stated that the statute must fail because the classification is arbitrary and illogical. [82]

Notwithstanding the Sorrell decision, the Ohio General Assembly thereafter worked to enact legislation that again abrogated the common law **collateral source rule** adopted in Pryor and reaffirmed in Sorrell. [83] In 1996, Ohio passed a new version of section 2317.45. [84] Less than three years later, however, the Ohio **[*439]** Supreme Court once again struck down this statute in State ex rel. Ohio Academy of Trial Lawyers v. Sheward. [85]

In Sheward, the Ohio Academy of Trial Lawyers generally challenged the constitutionality of House Bill 350, which included the revised section 2317.45. [86] In a narrow decision, [87] the court held that the entire bill, including the collateral source statute therein, was unconstitutional in toto. [88] Regarding the revised **[*440]** collateral source statute, the court stated that section 2317.45 "still fails to take into account whether the collateral benefits held against the general verdict are within the damages actually found by the jury." [89] In its analysis, the court, applying the rational basis test, stated that the relationship between the purported goal of eliminating double recovery and the means employed under section

2317.45 "is so attenuated that one could conclude that the primary goal of [] 2317.45 is simply to reduce damages generally." Therefore, the court concluded that the revised statute's attempt to "sidestep Sorrell" must fail. [90]

E. Michigan

As previously noted, the earliest Sixth Circuit state to follow the **collateral source rule** was Michigan. [91] For an uninterrupted period of time, this rule was applied across a wide span of claims. [92] Then, in 1986, Michigan enacted Michigan Compiled Laws Annotated section 600.6303, which abrogated the common law **collateral source rule.** [93] Essentially, the Michigan statute provided that in a personal **[*441]** injury action, evidence that an expense or loss for which plaintiff was seeking was admissible. [94] The Michigan statute's early existence was quiet; however, this tranquility did not remain. [95]

The most significant challenge to the Michigan statute came in 1996, when the Michigan Court of Appeals upheld the validity of section 600.6303 in Heinz v. Chicago Road Investment Co. [96] Here, the plaintiff was injured in a slip and fall accident while leaving his employer's business. [97] As a result, the plaintiff collected workers' compensation benefits totaling $ 19,824.25 for medical expenses, and $ 38,106.21 for lost wages. [98] He then sued the defendant, owner of the building, for negligence. [99] At trial, the jury awarded the plaintiff the following damages: $ 20,000 for medical expenses; $ 128,000 for lost wages, $ 40,000 in general **[*442]** damages; and $ 10,000 for loss of consortium. [100] After the court reduced plaintiff's damages award, he appealed, claiming that section 600.6303 violated his right to a jury trial, and the Equal Protection Clause of the Michigan Constitution. [101]

On appeal, the Michigan Court of Appeals, in summary fashion, rejected all of plaintiff's arguments, thus upholding the statute as constitutional. [102] Regarding plaintiff's claim that the statute denied him the right to a trial by jury, the court stated that the statute "does not alter the jury's assessment of the damages," rather, it "merely recognized that plaintiffs were already compensated, in part, for these damages." [103] Thus, the court stated that this argument was meritless.

Next, the court rejected the plaintiff's equal protection argument. [104] Initially, the court stated that the proper scrutiny level to decide the issue is the rational basis test because section 600.6303 addresses an economic matter. [105] As to whether section 600.6303 addressed a legitimate governmental purpose, the plaintiff argued that "the justification for enacting tort reform, an alleged crisis in the insurance industry, is a mere fantasy concocted by the insurance industry to ensure greater profits." [106] The court disregarded this argument, however, finding a legitimate governmental objective existed because the legislature's intent in enacting section 600.6303 was "to promote fairness, i.e., to prevent personal injury plaintiffs from being compensated twice for the same injury." [107] Then, without much explanation, the court found the classification between personal injury plaintiffs and all other tort plaintiffs rationally related to the above legitimate objective. [108]

[*443] Interestingly, the Heinz court never mentioned the Sorrell decision, despite its temporal, logical, and geographical proximity. Indeed, plaintiffs in both Sorrell and Heinz raised similar arguments in asserting a violation of the fundamental right to a trial by jury, and that the respective state statutes violated Equal Protection and Due Process Clauses. [109] Because the Michigan Supreme Court denied leave to appeal in Heinz, no meaningful examination was ever conducted. [110]

Adding to the confusion in Michigan is the decision in Corl v. Huron Castings, Inc. [111] Not content to leave well enough alone, the Michigan Supreme Court got into the fray from another angle by declining review of the collateral source statute. In Corl, the court overruled a fifty-year precedent by holding, without discussion, that the **collateral source rule** does not apply to contract actions. [112] This holding stands against the great weight of authority. [113]

IV. Analysis and Recommendation

The Sixth Circuit states treat the **collateral source rule** significantly different. Determining which state, if any, represents the most practical and efficient treatment of the **collateral source rule** depends to some extent on one's priorities and values. Additionally, the determination lies in the importance one places on consistency. For example, if one desires to prevent plaintiffs from receiving a double recovery by abrogating the **collateral source rule,** in hopes of limiting the increase in insurance costs, litigation costs, and jury awards, then perhaps the idea of abrogating the **collateral source rule** seems best. Upon further examination, however, this approach is superficial, unnecessary, and inconsistent. Looking at states that have abrogated the **collateral source rule,** it seems clear that plaintiffs are treated not only inconsistently within those states, but also unfairly, because of the prevalence of insurance and subrogation rights.

Widespread disparity within the Sixth Circuit states is problematic for many reasons. The problematic nature can best be exemplified by looking back at the hypothetical in the introduction of this article. If each plaintiff-homeowner sued for damages, then plaintiffs in Wisconsin, Kentucky, and Ohio would be able to avoid an offset. Further, plaintiffs in Tennessee would also be able to avoid **[*444]** an offset because the personal injury did not arise out of malpractice. In Michigan, however, the defendant would be able to offset the personal injury damage award, but not the property damage award.

To illustrate the disparate treatment to a greater degree, let us assume a further complication to our hypothetical. Assume the "incidents" in each state caused delays in the railroad's shipment schedule, causing iron ore purchasers with whom the railroad contracted to sue the railroad for breach of contract. If each of those purchasers possessed business disruption insurance, and if each purchaser sued the railroad to recover lost profits (assuming those profits would have been recoverable under the shipment contracts), to whom is the defendant liable?

Regarding the Michigan purchaser, the railroad's liability would be most limited; yet that is not true for the other purchasers. Further, since business disruption insurance premiums require a much larger financial investment than the average homeowners' policy, Justice Cooley's concern - that a plaintiff should not be deprived the benefit of his or her bargain that is collateral to the transaction that the defendant has caused to be litigated [114] - takes on an even greater force in this scenario. As such, Michigan has really taken an unusual attitude toward the **collateral source rule.**

This disparate treatment encourages forum-shopping because a plaintiff has incentive to sue in Wisconsin federal court, or likewise, a defendant has incentive to remove to allow some state's rules allowing defendants' offsets to apply. [115] In short, the disparity causes more problems than it solves.

Moreover, it must be stated that subrogation is the best method to avoid much of this debate. Quite simply, where subrogation rights exist, the **collateral source rule** does not apply. [116] If most defendants are insured, then elimination of the **collateral source rule** serves no real purpose because of subrogation rights. Further, when considering the **collateral source rule** and subrogation rights in the medical malpractice context, it seems much more likely that subrogation rights exist against any damage award that a plaintiff may receive. [117] Thus, to a large extent, abrogating the **collateral source rule** is not necessary to eliminate plaintiffs' receipt of double recoveries.

In fact, significant in the Kentucky Supreme Court's holding in O'Bryan v. Hedgespeth was the court's recognition that damages recovered by a plaintiff are normally subject to subrogation rights. More specifically, the court recognized that because subrogation rights are so often present when a plaintiff recovers damages, **[*445]** "there is no "double recovery'

by any stretch of the imagination." [118] Thus, it is the insurance companies who are in the best position to protect themselves by adding subrogation rights into insurance policies.

Is abrogating the **collateral source rule** necessary to prevent a "windfall" to plaintiffs? Clearly the answer is "no." If one assumes that one party will inevitably receive a "windfall," and powerful insurance companies are in the best position to help themselves through subrogation clauses, perhaps this is more of a reason to err on the side of allowing any "windfall" to accrue to plaintiffs. Currently, many plaintiffs are punished for exercising the foresight to purchase insurance, at least in those states that have currently abrogated the **collateral source rule** to one extent or another - Tennessee and Michigan. [119] It seems inappropriate to punish individual plaintiffs for purchasing insurance, while rewarding insurance companies for failing to exercise foresight in implementing subrogation clauses.

If a "windfall" is inevitable on behalf of one party, either plaintiff or defendant, then a value judgment must be made. Choosing to avoid plaintiffs' receipt of "windfalls" may appear helpful to insurance companies. If, however, insurance companies are the party to be protected, certainly there are steps that companies may take to protect themselves. More specifically, insurance companies are in the best position to place subrogation clauses within insurance contracts. This, in turn, would prevent any double recovery on behalf of plaintiffs. [120]

On the other hand, it is becoming more obvious that plaintiffs really do not receive any alleged "windfall" at all. [121] While the statutes abrogating the rule consider past costs of premiums, none consider the impact of future risk assessments. [122] After a plaintiff makes a claim, that plaintiff's insurance rate most certainly rises. Conceding that a plaintiff is already undercompensated after receiving his or her damage award, the fact that his or her premium rates increase is another reason that plaintiff is far from receiving his benefit of the bargain. [123] Indeed, nearly all proponents and opponents of the **collateral source rule** seek to ensure that plaintiffs receive the benefit of their bargain. With many holes left open, **[*446]** however, many plaintiffs, in all reality, are not realizing the benefit of their bargain. [124]

Moreover, there is one ironic area left unsettled by the states that have abrogated the **collateral source rule.** No provision is included that would require plaintiffs' recovery to be offset by gratuitous benefits. If the goal is to prevent double recovery by plaintiffs, it seems illogical not to offset gratuitous benefits received by a plaintiff. Most statutes, however, are silent on this issue.

Is there any way to reconcile the decisions of Heinz [125] in Michigan and Sheward and Sorrell in Ohio? [126] The concept of a liability insurance crisis was at the root of all of the cases, purportedly the justification for the respective statutes. [127] Despite both courts' use of the rational basis standard to test the constitutionality of the respective statutes, Michigan's statute was upheld, while the Ohio Supreme Court struck down its respective statute. [128]

Perhaps the decisions cannot be reconciled given the lack of evidence upon which any asserted liability crisis argument is based. A task force in Kentucky investigated any perceived liability insurance crisis. This group's results, however, indicated that there was "no evidence of a litigation explosion in Kentucky. [129] Likewise, the Ohio Supreme Court in Sorrell stated that one basis for its holding was the "paucity of credible empirical evidence that a crisis existed, or that there is a relationship between tort reform legislation and the availability or affordability of insurance." [130] Thus, as compared to the Sorrell and Sheward majority decisions, the Heinz majority seemed cursory, ignoring the arbitrary and illogical classification that the Michigan statute creates, [131] and the lack of any justifiable basis upon which to conclude that there is an insurance crisis justifying the statute.

Even if Michigan's statute appears constitutional, compared to Ohio and Kentucky's statutes, is it the best alternative? Kentucky's decision striking down the collateral source statute has been described as "reestablishing a level playing field at trial." [132] This, however, is not quite

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ARTICLE: Compulsory Joinder of Compensating Insurers: Federal Rule of Civil Procedure 19 and the Role of Substantive Law

June F. Entman *

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SUMMARY:
... The plaintiff's insurance company has partially compensated the plaintiff for that loss and, consequently, the insurer has acquired a right to reimbursement from damages recoverable from the defendant. ... Although the compensating insurer is entitled to reimbursement from the insured's recovery, the insurer does not have an enforceable claim against the third party. ... The Aetna Court gave no further explanation of why the insured and the insurer were necessary parties. ... In Childers v. Eastern Foam Products, Inc., the court required joinder of a partially subrogated insurer on the basis of subdivision (a)(2)(ii). ... The Childers court might have found, as part of its initial inquiry into whether the plaintiff insured was a real party in interest, that the insured was entitled to sue only upon joinder of the insurer. ... For example, in Hancotte v. Sears, Roebuck & Co., the court denied the defendant's motion for compulsory joinder of the plaintiff's insurer, reasoning that the insurer's execution of a "ratification agreement," in which it had agreed to be bound by the results of the insured's action and to waive any right to pursue its subrogation rights outside of that action, eliminated "any danger of the defendant being subjected to multiple or inconsistent obligations." ...

TEXT:
[*1] I. Introduction

The question seems to be a simple one: The plaintiff claims to have suffered a loss through the fault of the defendant. The plaintiff's insurance company has partially compensated the plaintiff for that loss and, consequently, the insurer has acquired a right to reimbursement from damages recoverable from the defendant. If the plaintiff sues the defendant for the loss, may the defendant successfully require joinder of the plaintiff's insurer as a party plaintiff?

substantive," and therefore not applicable in a federal court. [122]

The Hunt court's conclusion that the Kansas rule was merely procedural is not borne out by an examination of the Kansas authorities. The Kansas rule had been announced in City of New York Insurance Co. v. Tice, [123] a case cited but badly misunderstood by the Tenth Circuit in Hunt. In Tice, the Kansas Supreme Court
[*31] stated that in a case of partial compensation,

The action should be brought by the property owner, who will hold as trustee for the insurer in respect to such part of the amount recovered as the insurer has been compelled to pay under the policy. If, in such a situation, the property owner refuses to bring action, justice requires that the insurer be permitted to bring action. [124]

On its face, the Kansas rule limited the right of the insurer to bring an action to enforce its interest. When the insured sued for the entire claim, the insurer was limited to the role of beneficiary; it was entitled to bring an action to enforce its claim against the wrongdoer only if the insured did not.

Moreover, the Tice court's rationale for this rule was that "the wrongdoer should not be compelled to defend two actions for the same wrong." [125] The rule concerned more than "the person in whose name the action may be prosecuted," as the Tenth Circuit characterized it. [126] The rule was a substantive limitation on the insurer's right to sue, designed for the protection of the accused tortfeasor. [127] Nonetheless, the Hunt court decided that the Kansas rule was procedural and that the insurer was a real party in interest.

In contrast to the Hunt case, a number of lower federal court decisions have followed state law in deciding that compensating insurers were not real parties in interest with regard to claims asserted by insureds. For example, denying the defendant's motion to join a workers' compensation insurer as a party plaintiff in Pyle v. Kansas Gas & Electric Co., [128] the court first stated that the insurer's right to recover from the defendant was controlled by
[*32] Kansas law. [129] Then, after examining the Kansas workers' compensation statute, the court concluded that because the employee had brought suit, the insurer was only entitled to a lien on the employee's recovery and therefore was not subrogated. [130] Several other post-Aetna decisions involving workers' compensation carriers have carefully examined the underlying substantive law and have concluded correctly that the insurers were not real parties in interest when the applicable statutes gave the insurers only a right to reimbursement and not a right to sue the third party. [131]

It is really not surprising to find more accurate assessments of insurers' substantive rights in the workers' compensation cases. Federal courts in those cases often have the benefit of statutes that explicitly address the insurer's right to bring an action against the third party. When a statute creates the right of the insurer to compensation, it is not difficult for the court to ascertain that right and also to appreciate that the state rule is substantive. In cases such as Hunt, on the other hand, the federal court is faced with deciphering state court decisions to determine the right of a compensating insurer to state a claim against a third party. In many instances, it may be considerably more difficult than it was in Hunt to determine the correct answer. [132] Outside of the workers' compensation area, therefore, one more frequently finds federal courts simply concluding that a state rule is procedural, or ignoring state law altogether, and applying the Aetna assumption that insurers are subrogated. [133]
[*33]

2. The Jurisprudence of Labels

Aetna's other legacy is the use of labels to determine compulsory joinder, in particular the

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label that partially compensating insurers are necessary parties. For example, in Gas Service Co. v. Hunt, [134] after mischaracterizing Kansas law as procedural and deciding that the insurer was a subrogee and a real party in interest, [135] the court quickly resolved the joinder issue. Relying solely upon the Aetna dicta, and without citing Rule 19, the court stated that when either the insured or the subrogated insurer brings suit, the other should be joined upon timely motion of the alleged wrongdoer. [136] Thus, the Hunt court required joinder of an insurer that did not even have a claim for relief against the third party.

In Wright v. Schebler Co., [137] on the other hand, the district
[*34] court had also decided incorrectly that the insurer was subrogated, [138] but it nonetheless declined to order the insurer's joinder. Unlike the Hunt court, the court in Wright distinguished Aetna and relied upon the text of Rule 19. [139] Reading the criterion of subparts (a) and (b) of Rule 19 to be cumulative, the Wright court first found that the insurer had a "joint interest" with the plaintiff, as specified in subpart (a). [140] In light of the insurer's limited interest under the Illinois workers' compensation act, that conclusion was debatable. The court found, however, that the criterion of subpart (b) was not met. [141] Subpart (b) provided that joinder was necessary "if complete relief is to be accorded between those already parties." [142] The court found that complete relief could be granted between those already parties, the insured and the tortfeasor, without joinder of the insurer. [143]

Apparently attempting to cover all bases, the Wright court further stated that an "underlying objective" of Rule 19 is to "avoid multiple suits, and generally promote the economy and efficiency of judicial action." [144] In the situation before it, the court explained, there was no possibility of multiple suits because "there can be but one recovery under Illinois law." [145] Although the court cited no authority for this statement about Illinois law, it was undoubtedly correct. Under the express language of the act, the insurer had no right to sue once the insured had sued. [146]

In Wright, the court escaped an erroneous decision requiring joinder as a plaintiff of an insurer that was not subrogated. The court, moreover, eschewed the jurisprudence of labels and attempt **[*35]** ed to apply the text of Rule 19. Its statement, however, of a broad purpose in Rule 19 to avoid multiple litigation typifies an unfortunate judicial tendency that has continued even after the 1966 revision of Rule 19. Had the Aetna court provided more accurate guidance in the application of Rule 19, perhaps this trend would not have begun and future courts would have had a clearer idea of federal compulsory joinder doctrine.

V. The Impact of Amended Rule 19

A. The 1966 Amendment

In 1966, Rule 19 was completely rewritten and the labels discarded. The Advisory Committee's aim was to replace "abstract classifications" with "pragmatic considerations" as the correct basis of decision with regard to compulsory joinder. [147] The new rule entirely eliminated the terms "necessary" and "joint" and "united" interests; "indispensable" was retained, but not as a classification. "Indispensable" was instead used as a conclusion to describe the consequence of analysis. [148] The rule spelled out the factors to be considered both in requiring joinder and in deciding whether to proceed in the absence of a party who should be joined. The rule adopted in 1966 provided: [149]

Joinder of Persons Needed for Just Adjudication.

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be

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joined as a party in the action if (1) in his [the person's] absence complete relief cannot be accorded among those already parties, or (2) he [the person] claims an interest relating to the subject of the action and

[*36]

is so situated that the disposition of the action in his [the person's] absence may (i) as a practical matter impair or impede his [the person's] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his the claimed interest. If he [the person] has not been so joined, the court shall order that he [the person] be made a party. If he [the person] should join as a plaintiff but refuses to do so, he [the person] may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder [of that party] would render the venue of the action improper, he [that party] shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him [the person] or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In Provident Tradesmens Bank & Trust Co. v. Patterson, [150] the United States Supreme Court addressed the significance of the 1966 amendment. The court of appeals reversed plaintiffs' verdicts in a declaratory judgment action brought to determine whether the driver of a vehicle involved in a fatal accident had been using the car with the permission of the owner, Dutcher, who was not a defendant in the suit. [151] The defendants were Dutcher's liability insurer and the estate of the driver, against which one of the plaintiffs had an unsatisfied consent judgment. The court of appeals re **[*37]** versed on the grounds that Dutcher was an indispensable party. [152] Reversing, the Supreme Court criticized the court of appeals for its failure to base its decision on the new rule's "stated pragmatic considerations." [153] The Court admonished that the inflexible approach adopted by the court of appeals "exemplifies the kind of reasoning that the Rule was designed to avoid." [154] Focusing primarily upon the "equity and good conscience" test of Rule 19(b), the Court concluded that the trial court's judgment should have been permitted to stand in spite of Dutcher's absence. [155]

The 1966 amendment of Rule 19 has not significantly improved the quality of federal decisions with regard to joinder of compensating insurers. As the Supreme Court discovered in the Provident Tradesmens case, improving the text of Rule 19 does not automatically improve judicial understanding of compulsory joinder doctrine. The Aetna legacies have continued to influence analysis, or a lack thereof, in federal decisions concerning compensating insurers. The first Aetna legacy--assuming without sufficient attention to the substantive law that both insured and insurer are real parties in interest entitled to sue--has not been avoided by Rule 19's clearer articulation of compulsory joinder doctrine. As the decisions discussed below illustrate, federal courts have continued to give insufficient attention to the substantive rights of insured and insurer under the applicable law of subrogation.

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The second Aetna legacy--failing to understand and to apply compulsory joinder doctrine properly--has also continued unabated, although it has taken various forms. First, some federal courts, despite the admonitions of Provident Tradesmens, [156] have ignored the criteria of Rule 19 altogether and have relied upon Aetna dicta [157] and other outdated precedent. Second, many courts, applying either the "complete relief" language of Rule 19(a)(1) or the "multiple or otherwise inconsistent obligations" language of Rule
[*38] 19(a)(2)(ii), have read Rule 19 incorrectly as a broad prohibition against multiple lawsuits from one transaction. [158]

B. Aetna's Continuing Legacy: Ignoring Rule 19(a)

Illustrative of unquestioning reliance on pre-1966 precedent in requiring joinder of a compensating insurer is the Tenth Circuit opinion in Public Service Co. v. Black & Veatch. [159] In Public Service Co., the court declined to overrule its 1950 holding in Gas Service Co. v. Hunt [160] that a compensating insurer should be joined as a party plaintiff upon motion of a defendant tortfeasor. [161] In calling for the overruling of Hunt, both the plaintiff [162] and the district court [163] focused their concern on jury prejudice, a concern that failed to move the Tenth Circuit. [164] The district court reasoned also that Hunt should not be followed when "the insured brings the action for the entire loss and a rule prohibits another suit by anyone having an interest in the Plaintiff's cause of action." [165] Unfortunately, the lower court failed to explain fully the significance of the Oklahoma rule: because the insurer had no right to enforce its claim, there was no reason for requiring its joinder. [166]

The Tenth Circuit in Public Service Co. merely reaffirmed the rule in Aetna and Hunt that "where the owner has been reimbursed for only a part of his loss, both the insured and the insurer own
[*39] portions of the substantive right against the wrongdoer and should appear in litigation in their own names." [167] The court again failed to recognize the need to refer first to the substantive law to determine the rights of insured and insurer before proceeding to the joinder issue. Furthermore, it appears that neither the plaintiff nor either of the courts in Public Service Co. took note of the 1966 amendment of Rule 19. Had they done so, they might have seen the necessity for re-evaluating both Hunt and Aetna, and the new rule may have helped to focus the inquiry on the rights of the parties. [168] Instead, the Tenth Circuit merely reiterated that Hunt was consistent with Aetna and other authorities, [169] most of which predated the 1966 amendment. [170]

One year later, another circuit court of appeals took up the issue, this time taking note of the 1966 amendment. The result, however, fell far short of the careful analysis that the Supreme Court called for in Provident Tradesmens. [171] In Virginia Electric & Power Co. v. Westinghouse Electric Corp., [172] the Fourth Circuit granted an interlocutory appeal from the denial of a motion to
[*40] dismiss on the grounds that the plaintiff's insurer was a real party in interest and an indispensable party. [173] The insurer in Virginia Electric, unlike the plaintiff insured, shared the citizenship of the defendant, and thus its joinder would have defeated federal diversity jurisdiction. [174] In Virginia Electric, Circuit Judge Craven first determined that under Rule 17 (a) and applicable Virginia law, both the insured and the partially subrogated insurer were real parties in interest. [175] In this case, however, the conclusion that the insured was a real party in interest entitled to sue was in conflict with a cooperation agreement between the insured and the insurer in which the insured agreed "that the conduct of the continuing action to recover . . . for such claims shall be under the exclusive direction and control of the Insurer," and a subrogation instrument providing that the insured "subrogates the Insurer to all of its remaining rights of recovery." [176] Pursuant to this agreement, the insured apparently had conveyed to the insurer all rights to enforce the claim against the defendant. [177] The insured, therefore, had no claim to enforce against the defendant.

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Because the insured in Virginia Electric was not, therefore, a proper plaintiff, the suit simply should have been dismissed for lack of diversity jurisdiction, or on proper motion, via summary judgment. Believing that both insured and insurer were proper plaintiffs, however, Judge Craven then turned to Rule 19. His entire analysis under subdivision (a) consisted of only a citation to Aetna and the conclusion that "it is clear that a partial subrogee is a person to be joined if feasible under Fed.R.Civ.P. 19(a)." [178] Thus, once again, the pre-amendment dicta of Aetna, and not the specific criteria of Rule 19(a), prevailed. [179]

It may be that Judge Craven devoted so little attention to applying Rule 19(a) because he had determined that in any case this was a suit that, under Rule 19(b), should be permitted to proceed in spite of the insurer's absence as a party. [180] In other words,
[*41] Judge Craven may have reasoned in a somewhat backwards fashion: The insurer cannot be joined because its presence would defeat jurisdiction. The ultimate question, therefore, is whether the suit may proceed without the insurer. Applying the criteria specified in Rule 19(b), the suit may so proceed. Thus, it matters little whether joinder of the insurer would be required if it were feasible.

Deciding that the insurer was not indispensable under Rule 19(b) led to the same result in Virginia Electric as the court would have reached had it determined that joinder of the insurer was not required by Rule 19(a). The insured was permitted to sue alone for the entire loss. It is unfortunate, however, for a court, especially a court of appeals, to treat the subdivision (a) analysis as merely academic. This methodology creates a body of precedent that, when applied in a case in which joinder is feasible, supports much broader joinder than may be warranted by a careful application of subdivision (a). In Virginia Electric, the court's simple reliance on Aetna and its apparently backwards application of Rule 19 created an influential precedent that leads to misapplication of Rule 19. [181]

Several federal courts have adopted the approach, in cases in which joinder of the absentee is not feasible, of analyzing whether to proceed or dismiss under subdivision (b) without analyzing whether joinder would be required under subdivision (a). [182] Other
[*42] federal courts have criticized this approach. [183] Under some circumstances it may be justifiable for a trial court, presented with a motion to dismiss because joinder of an absentee is not feasible, to engage in only the subdivision (b) inquiry. If the court decides to proceed without the absentee as a result of a subdivision (b) analysis, there is no harm done by the court's making the assumption that the absentee is "a person as described in subdivision (a)." [184] If the court is clear that it is operating only upon an assumption, and not a finding, with regard to subdivision (a), the approach will have saved the court unnecessary effort and will not create careless precedent. When the trial court's conclusion, however, is that under subdivision (b) it should not proceed without the absentee, the subdivision (a) application is unavoidable because a suit should be dismissed only if the absentee is "a person as described in subdivision (a)." [185]

The reasons given by Judge Craven for concluding that the insurer was not indispensable under subdivision (b) highlight the inadequacy of his conclusion that the insurer was a person whose joinder was required under subdivision (a). Judge Craven explained that the insurer was not indispensable because a judgment in the
[*43] insurer's absence would be "fully adequate to protect both INA [the insurer] and the parties and the public interest in the termination of disputes." [186] Specifically, because of INA's control of the litigation, it would have been bound by any judgment in favor of the defendants. [187] An examination, however, of the subdivision (a) criteria for determining if a person must be joined if feasible reveals that the very reasons Judge Craven cited for finding the insurer not indispensable under subdivision (b) indicate that INA's joinder would not be required under subdivision (a). If INA controlled the litigation and would be bound by a judgment, the factors listed in subdivision (a) did not require joinder. Complete relief could be afforded; INA's interests were protected; and there was no risk of multiple or inconsistent obligations. INA was not, therefore, a "person to be joined if feasible" within the meaning of Rule 19(a).

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Had Judge Craven more carefully considered subdivision (a) of Rule 19, rather than relying exclusively upon the Aetna dicta, [188] he may well have reached the same result without ever having had to consider the problem of indispensability under subdivision (b). Of course, had Judge Craven first reached the conclusion, as he should have, that under the circumstances of this case the insured had no claim and only the insurer was entitled to sue, he would have reached an entirely different result, dismissing the case for lack of diversity of citizenship between the insurer and the defendant. [189] As it was, however, Virginia Electric authorized a fiction in the naming of the plaintiff that not only permitted the exercise of federal jurisdiction where none in fact existed, [190] but that also permitted the insurer to escape the responsibilities it should have borne as the party in control of the litigation. [191] Virginia Electric, therefore, in effect, allowed a type of "use plaintiff." [192]
[*44]

C. Misapplying Rule 19(a)(1)

Other courts have concluded that compensating insurers whose joinder is feasible must be joined under Rule 19(a), but, in contrast to the reliance on outdated precedent found in Public Service Co. and Virginia Electric, have done so by applying the post-1966 language of the rule. These courts have generally found that Rule 19 is designed to prevent multiple litigation and that such a danger exists if an insured is permitted to sue alone to recover a claim that is partially subrogated.

In Potomac Electric Power Co. v. Babcock & Wilcox Co. [193] defendants moved to dismiss the suit on the grounds that the plaintiff's insurers were real parties in interest under Rule 17(a) and indispensable parties under Rule 19(b). [194] The court first determined that the insurers were real parties in interest. [195] One of the insurers, Royal Indemnity Company, had paid part of the insured's loss under a loan receipt agreement. [196] The agreement provided that Royal would have "exclusive direction and control" of any suit to recover for the loss. In addition, officers of Royal were appointed as agents and attorneys in fact "with irrevocable power" to collect any claim resulting from the loss. [197] The court found that the arrangement was not a bona fide loan and did not avoid the conclusion that the insurer was subrogated and was, therefore, a real party in interest in the suit. [198]

In light of the insurer's exclusive control of the claim, the court might have concluded that Royal alone was the real party in interest, thus obviating any issue of Rule 19 in the case. The suit could have been dismissed on the ground that the plaintiff insured had no claim to enforce and that substitution of the insurer, Royal, would defeat subject matter jurisdiction because of loss of diverse
[*45] citizenship. Moreover, the court noted in passing that a Maryland rule of procedure required that the insurers be named as parties plaintiff. [199] Had the court examined the Maryland rule and found it to reflect a substantive state policy, the court might have found it controlling. [200] Under either rationale, there was sufficient basis in the substantive law for the court's ultimate decision to dismiss the case for lack of diversity, without applying Rule 19. Not appreciating these potential solutions to its case, however, the Potomac Electric court turned to compulsory joinder under Federal Rule 19.

The court first noted the plaintiff's heavy reliance on the Aetna dicta that neither the insured nor the insurer would be indispensable. [201] The court rejected that authority both because the statement was dicta and because "that case was decided in 1949, long before Rule 19 was amended and put in its present form emphasizing that pragmatic considerations should be controlling." [202] The court then applied amended Rule 19 by finding initially that the insurer was a party whose joinder was required if feasible under subdivision (a)(1). Reasoning that the insurer might be entitled to bring a subsequent action against the defendant if the insurer were dissatisfied with the outcome of the suit brought by its insured, the court found that complete relief would not be "accorded the other parties" in the insurer's absence. [203] The

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court quoted the Advisory Committee Note to Rule 19, which stated that "the interests that are being furthered [by subdivision (a)(1)] are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter." [204] Next applying subdivision (b), the court decided that the insurers were indispensable, and, therefore, it dismissed the suit. [205]
[*46]

The Potomac Electric court's interpretation of Rule 19(a)(1) is one that has been rejected by most authorities, including a number of well-reasoned federal court opinions. In finding that Rule 19(a)(1) identified the insurer as a person to be joined if feasible, the court ignored the plain and specific language of Rule 19(a)(1), which is that absence of the non-party will prevent "complete relief among those already parties." The Potomac Electric court's concern about a subsequent lawsuit prosecuted by the non-party insurer against the defendant is not relevant to the question of complete relief between those already parties--the insured and the defendant. The specific language of subdivision (a)(1) does not encompass consideration of all claims of all persons, parties and non-parties, that may have arisen from the events being litigated. The word "already" in the rule excludes consideration of affording complete relief among parties and those not "already" parties. The Advisory Committee's comment, cited by the Potomac Electric court, about the public interest "in avoiding repeated lawsuits on the same essential subject matter," was made solely in the context of clause (1), which is concerned only with those already parties. [206] The comment, therefore, should only be taken to mean that Rule 19(a)(1)'s purpose is to avoid repeated lawsuits on the same transaction among those who are already parties to the action.

To construe Rule 19(a)(1) as did the court in Potomac Electric would be, in effect, to swallow up a major portion of Rule 20, which provides for permissive joinder of parties plaintiff and defendant. Rule 20 provides for permissive joinder of parties if the claims asserted by or against them arise out of the same transaction or occurrence and if any common question of law or fact will arise in the action. [207] To read Rule 19, as did the Potomac Elec **[*47]** tric court, to require joinder of a nonparty merely because that person has a claim arising from the same "essential subject matter" [208] is to make Rule 19 compulsory joinder coterminous with Rule 20 permissive joinder.

Prior to 1990, a similar failure to appreciate the interrelationship between Rules 19 and 20 had arisen in the context of defendants' Rule 19 motions to require plaintiffs to join potential joint tortfeasors as defendants. Although the well-established rule has long been that joinder of all joint tortfeasors is not required, [209] some recent decisions, in flagrant opposition to the Advisory Committee's Note to amended Rule 19, [210] had held that Rule 19(a)(1) should be construed to require the joinder of potential joint tortfeasors. [211] In Temple v. Synthes Corp., [212] however,
[*48] the Supreme Court firmly established that Rule 19 embodies the traditional rule against compulsory joinder of all joint tortfeasors. The Court acknowledged that the Provident Tradesmens [213] opinion had identified the public interest in limiting multiple litigation as a focus of Rule 19, but it further noted that the Court's recognition of that interest in Provident Tradesmens arose in the context of a subdivision (b) analysis. [214] Regarding the joint tortfeasor situation, the Court in Temple explained that, "here, no inquiry under Rule 19(b) is necessary, because the threshold requirements of Rule 19(a) have not been satisfied." [215] The Court then reached a correct conclusion under subdivision (a), but did so unfortunately in the old language of labels, without explaining the result in terms of the rule itself. The Court simply stated that "as potential joint tortfeasors with Synthes, Dr. LaRocca and the hospital were merely permissive parties." [216] Other courts reaching the same result have been more fastidious in pointing out that Rule 19(a)(1) refers only to complete relief among those who are already parties, and that it does not protect defendants from the necessity of pursuing their contribution or indemnity claims in a separate lawsuit. [217]

Because it was concerned with compulsory joinder of plaintiffs, the Third Circuit opinion in Field v. Volkswagenwerk AG, [218] is even more to the point. Ivana Field was injured in a single

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car accident while driving a Volkswagen van. Ivana's husband, Arthur, was killed, and her stepson, Michael, injured. Ivana filed suit against Volkswagenwerk AG (VWAG) individually for her own injuries and also in her capacity as administratrix of her husband's estate. In addition, Michael Field's guardian, his mother, asserted a claim as a co-plaintiff seeking to recover for Michael's injuries. After the suit was filed, it was learned that diversity jurisdiction was lacking because of Ivana's Czechoslovakian citizenship. In response to the defendant VWAG's motion to dismiss, Ivana
[*49] sought a voluntary dismissal of her individual claim. She also took the necessary steps under New York law to have Michael's mother substituted as administratrix of Arthur Field's estate. [219]

Defendant VWAG took the position, and the district court agreed, that the entire suit must be dismissed because Ivana Field was an indispensable party to the suit by her stepson and the estate of her husband. [220] The district court apparently based its decision on the assumption that Ivana's negligence was an issue in the case and that without Ivana as a party, VWAG would "be unable to assert Ivana's negligence against the claims of the remaining parties." [221]

In a carefully reasoned opinion, the Third Circuit held that Ivana was not a party whose joinder was required under the criteria of Rule 19(a). [222] With regard to Ivana's role as a co-plaintiff, the court explained that Ivana's absence as a party did not preclude the court from according "complete relief among the parties," as contemplated by subdivision (a)(1), simply because VWAG might later have to defend against a separate action brought by Ivana in her individual capacity. The court explained that if Ivana's joinder were required, "the distinction between Rules 20 and 19 would be rendered practically meaningless. For in just about every case of permissive joinder under Rule 20 the proper party in question, if not joined, would be able to assert rights against the defendant in a separate action." [223] Because Ivana was not even a party to be
[*50] joined if feasible, the lawsuit could proceed in her absence and there was no reason to deny her motion to dismiss her claim.

Rule 19(a)(1) is not a broad prohibition against multiple litigation. Even if both insured and insurer have separate claims under the substantive law, Rule 19(a)(1), properly understood, does not provide the defendant a remedy for nonjoinder of the absent insurer. [224] Although the remedy, if there is to be one, [225] may be found in other rules, [226] some federal courts have sought a basis for requiring joinder of compensating insurers in another sub-division of Rule 19.

D. Misapplying Rule 19(a)(2)(ii)

Other courts have required joinder of subrogated insurers out of a concern for preventing multiple litigation, but have relied upon subdivision (a)(2)(ii) of Rule 19(a). This subdivision requires joinder, if feasible, of a person who "claims an interest relating to the subject of the action, and is so situated that the disposition of the action in the person's absence may . . . leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." [227]

In Childers v. Eastern Foam Products, Inc., [228] the court required joinder of a partially subrogated insurer on the basis of subdivision (a)(2)(ii). The court in Childers began by examining the substantive rights of the compensating insurer to determine
[*51] whether it was a real party in interest. [229] The court found that the absentee insurer was a subrogee and real party in interest on the basis of a Georgia appellate court holding that insured and partially compensating insurer each own part of the claim and "'each owner of a part of the claim has a cause of action and may sue by joining the other part owner.'" [230]

Without further mention of the Georgia rule mandating joinder, the court then turned to Federal Rule 19(a)(2)(ii). The court expressed its concern that because the insurer was not a party, the defendant would be faced with the "substantial risk" of defending against the insurer should the defendant prevail or the plaintiff insureds recover only part of their claim. [231]

The Childers court acknowledged that many cases had held joinder of the insurer-subrogee not required under Rule 19(a), some relying upon the assumption that a non-party who controls litigation is bound by the outcome. [232] Nonetheless, the court concluded that, as joinder was feasible, it was "desirable," because joinder would eliminate any uncertainty about the insurer's subsequent rights against the defendant. [233]

Childers illustrates, once again, a court reading Rule 19(a) so broadly that it is indistinguishable from permissive joinder under Rule 20. "Desirable" joinder should not be equated with compulsory joinder. [234] Rule 19(a)(2)(ii) speaks of protecting the parties from "multiple, or otherwise inconsistent obligations." The rule does not speak of preventing multiple litigation or even of preventing inconsistent judgments, although some courts have read the rule in such a fashion. For example, in Whyham v. Piper Aircraft
[*52] Corp., [235] a Pennsylvania federal district court found that joint tortfeasors were parties who must be joined under subdivision (a)(2)(ii) because the defendant had a right of contribution that would have to be adjudicated "in an unnecessary second suit." [236] The Whyham court also reasoned that two trials might result in different or contradictory findings of the tortfeasors' proportion of liability, which would result in "inconsistent obligations." [237]

This misreading of Rule 19(a)(2)(ii) was rejected by an Ohio federal district court in Bedel v. Thompson, [238] in which the defendant Jones & Co. argued that a bankrupt corporation, D.H. Baldwin Co., was an indispensable party because of Jones's right of contribution or indemnification against Baldwin. The court explained that the defendant Jones was not subject to inconsistent obligations within the meaning of subdivision (a)(2)(ii) merely because of the possible inconsistent results that would occur if Jones were found liable to the plaintiff and, in another action, Baldwin found not liable to Jones. [239] The Childers court was concerned with a risk of multiple litigation if the defendant prevailed or the insured recovered only a part of his claim. [240] But as the Bedel court pointed out, Rule 19(a)(2)(ii) is designed to prevent multiple or inconsistent obligations, not to prevent multiple or inconsistent litigation or results. [241]
[*53]

What the Childers court failed to appreciate was that its concern with preventing multiple litigation had been addressed, not by federal Rule 19, but by the Georgia law of subrogation that should have been followed by the federal court. In defining the rights of insured and insurer in the circumstance of partial compensation, the Georgia court had held that the right of each to sue was conditioned upon joinder of the other as plaintiff. [242] The Childers court might have found, as part of its initial inquiry into whether the plaintiff insured was a real party in interest, that the insured was entitled to sue only upon joinder of the insurer. Requiring joinder on that basis would have generated the same result without an expansive and incorrect reading of Rule 19.

A few cases have noted, however, a more genuine danger of multiple obligations when the insured alone sues to recover a claim that is partially subrogated. If a successful plaintiff-insured fails to reimburse his insurer, and the insurer is then permitted to assert its subrogation claim against the defendant, the defendant may be obliged to pay twice for the same injury.

In some of the decisions holding that Rule 19(a) does not require joinder of the subrogated insurer, courts have recognized this problem, but have concluded that it can be remedied by means short of requiring joinder. For example, in O'Brien v. Tri-State Oil

[*54] Tool Industries, [243] the defendant moved the court to join as a party plaintiff a workers' compensation insurer that had a statutory subrogation lien on the plaintiff's recovery. The defendant contended that without joinder, it would be subject to multiple or inconsistent obligations as described in Rule 19(a)(2)(ii). [244] The defendant's argument in O'Brien presupposed that the insurer would be entitled to bring an action against the defendant to enforce its right to reimbursement. This supposition was not acknowledged or examined by the court in O'Brien, but in most workers' compensation schemes, the insurer would not have such a right, particularly after the employee had filed suit. [245] Both by contract and under the general law of subrogation, an insurer's exclusive remedy when its insured recovers from a third party but neglects to reimburse the insurer is directly against the insured. [246] In any event, the court in O'Brien did not find joinder of the insurer under Rule 19(a) necessary in order to protect the defendant from the plaintiff's failure to reimburse the insurer. Rather, the court suggested that it would entertain a motion that if the plaintiff obtained a verdict, the judgment order would require the parties to satisfy the judgment in a fashion consistent with the insurer's lien interest under the workers' compensation law. [247] The court explained that such a procedure would provide the protection Rule 19(a) was designed to afford while avoiding the addition of another party at a late stage in the litigation. [248] Like the O'Brien court, other courts have concluded that the risk of multiple obligations can be prevented without joinder simply by protecting the insurer's
[*55] pecuniary interest in any judgment obtained by the insured. [249]
[*56]

VI. Reasons for Requiring Joinder of Subrogated Insurers

A. The Problem of Multiple Litigation

Although Rule 19 properly applied does not provide a solution, preventing multiple litigation is a particularly compelling goal in the context of insurance subrogation. Regardless of whether broad joinder of plaintiffs should be generally required for the purpose of efficiency in litigation, [250] insurance subrogation presents particular reasons for requiring joinder. Ordinarily, when several claimants are injured in the same transaction and their claims thus depend largely upon common questions of law or fact, the claimants nonetheless possess distinct claims, which may be subject to distinct defenses. A compensating insurer's subrogation claim, on the other hand, is entirely derivative of the insured's claim. The only issue unique to the insurer's claim is its right to subrogation. [251]

More importantly, subrogation may give more than one person the right to assert the identical claim. Multiple claimants injured by the same transaction are not entitled to assert each other's claims and, therefore, the defendant in such a case does not face the possibility of defending the identical claim twice--only the prospect of defending two suits arising from the same transaction. If the substantive law of subrogation, on the other hand, permits an insurer to state a claim for relief for its portion of the loss after the insured has unsuccessfully prosecuted the entire claim, a defendant is faced with twice defending the identical claim. Even if the insured is entitled to assert only its own portion of the claim, while the insurer is entitled to assert the subrogated portion, the defendant is still placed in the position of twice defending against what was, at
[*57] the time it originally occurred, a single claim.

Some federal courts have suggested that doctrines other than compulsory joinder--res judicata and ratification--provide defendants with sufficient protection from multiple litigation. Neither of these other doctrines, however, offers a sufficient remedy to problems of multiple litigation left by Rule 19. For reasons set forth below, [252] res judicata does not provide a fully adequate remedy. Ratification, on the other hand, would seem to cure the problem of multiple litigation, but its use as a device for preventing further litigation brought by a previously unnamed insurer may not be authorized by the federal rules and may also

Since adoption of the Federal Rules of Civil Procedure in 1938, federal courts have looked for the answer to this question in Rule 17(a), the real party in interest rule, [1] in Rule 19, the compulsory joinder rule, [2] and sometimes in both rules. [3] State courts with
[*3] similar or identical rules of civil procedure have engaged in the same inquiry. [4]

The search for an answer in the rules of civil procedure has not led to uniformity of either result or analysis. Even among the courts that have found an answer in the rules, there is remarkable diversity in their reasons for either requiring joinder or declining to do so. Some have held that Rule 17(a) requires the insurer's joinder. Others have held that Rule 17(a) does not require joinder, but that Rule 19 does. Still others have held that neither rule requires joinder of the insurer. Why has a seemingly simple issue generated not only opposite results, but also divergent and complex analyses? Why have so many spent so much effort litigating and legislating the issue?

The answer to the latter question is perceived jury prejudice: parties are eager to exploit or to avoid the prejudice that many believe will result when a jury is aware that part of the recovery it awards will go to reimburse an insurance company for payments made to the plaintiff under an insurance policy. A few judicial opinions have cited jury prejudice in holding that a compensated insured may appear as the sole plaintiff, [5] but in most decisions this consideration remains unarticulated.

A rationale more frequently expressed by courts and defendants to support requiring a compensating insurer to appear as a party plaintiff is the prevention of multiple litigation. Defendants
[*4] often assert that a lawsuit prosecuted in the name of the insured alone will leave them subject to a subsequent action by the compensating insurer. [6] Sensitive to growing judicial workloads, courts have shown an increasing willingness to read Rules 17(a) and 19 as requiring broad joinder for the purpose of preventing multiple litigation. [7]

The primary reason that there is such variety in judicial applications of Rules 17(a) and 19 is that these two rules simply are not well understood. Both rules embody doctrines that evolved long before the merger of law and equity and have not adapted well to modern litigation. Poor drafting of the rules themselves, along with inadequate judicial understanding of them, has given us results that are chaotic at best. In particular, federal courts have failed to appreciate the role that the substantive law of insurance should play in applying Rules 17 (a) and 19. Federal courts frequently declare that joinder issues are governed by federal rules of procedure and have proceeded to apply those rules without careful analysis of the substantive rights of the parties, sometimes brushing aside applicable state law as merely procedural. [8]

Complicating matters is the fact that the substantive law governing the rights of a compensating insurer varies considerably from state to state. All situations in which an insurer has acquired an interest in its insured's claim are not the same in terms of whether the substantive law entitles the insured or the insurer, or both, to bring and control an action against the third party. [9] If properly applied, Rule 17(a), the real party in interest rule, should direct the court to ascertain and enforce the substantive law's choice as to whether the insured or the insurer has the right to control the asserted claim. Similarly, in determining whether an insurer's joinder is required under Rule 19, the court should consider, along with the policies of Rule 19, what rights the insured
[*5] and the insurer have, or do not have, under the substantive law. [10] All too often, however, courts assume without inquiry that both the insured and the compensating insurer are entitled to control actions against third parties who have caused the loss. [11]

Procedure ought to be the servant of substance, enabling rights to be articulated in litigation. The procedural doctrines of real party in interest and compulsory party joinder have not been very good servants. In an earlier article, I used the compensating insurer problem to

interfere with other important policies that depend upon the proper naming of parties. [253]

1. Res Judicata as a Remedy

A few federal courts that have assumed, as did the courts in Potomac Electric [254] and Childers, [255] that Rule 19 is designed to prevent multiple litigation, have concluded, nonetheless, that compulsory joinder of the subrogated insurer is unnecessary and not required by the rule. These decisions have reasoned that the nonjoined insurer will, under principles of res judicata, be bound by a judgment in the insured's suit. Thus, these courts have concluded, none of the Rule 19(a) criteria, including the perceived goal of obviating multiple litigation, requires joinder. [256]
[*58]

The reasons given by these courts, however, for finding that the nonjoined insurer will be bound by the insured's judgment are not entirely satisfactory. It may be true that a judgment for the insured for the entire claim with a trust in favor of the insurer would provide a quick and sufficient basis for disposing of a second lawsuit simply because the insurer's claim is subject to the defense of accord and satisfaction. But what if the judgment is for the defendant, or if the judgment is in an amount that is not satisfactory to the insurer? Courts citing the res judicata solution typically do not fully examine the adequacy of that doctrine as a protection for the defendant. For example, in Prudential Lines, Inc. v. General Tire International Co., [257] the court reached the conclusion that the non-party insurer would be bound because the insurer was "in privity with the plaintiff since it authorized plaintiff to prosecute this action." [258] The court did not explain, however, what acts by the insurer had authorized the plaintiff to bring the action. In Tucson Electric Power Co. v. Bailey Controls Co., [259] the court stated that the insurer "as a nonparty in control of the litigation, will be precluded from relitigating [its insured's] claims." [260]
[*59]

These courts may indeed be correct in their predictions that the insurer will be bound, either because of the insurer's control of the insured's action, [261] or because the insurer is deemed to have been represented in the litigation by the plaintiff insured. [262] What these courts fail to appreciate, however, is that without joinder of the insurer, the defendant may be required to litigate the res judicata issue in a subsequent suit brought by the insurer under circumstances that pose considerable risk. As at least one court has observed, a court rendering judgment in a suit brought only in the name of the insured cannot conclusively determine the res judicata effect of that judgment in a subsequent action brought by the insurer in its own name, and it may be unfair to require the defendant to rely upon a future determination of the res judicata effect of the judgment. [263] To prevail in establishing the res judicata de **[*60]** fense, the defendant may be required to carry the burden of proving in subsequent litigation what role the insurer actually played in the prior suit. [264] That may be an unreasonable burden, considering that most of the relevant evidence will be under the control of the insured and the insurer. In light of the defendant's legitimate interest in being protected from having to defend against the insured and the subrogated insurer in separate actions, decisions such as Prudential Lines and Tucson Electric appear to be too cavalier in concluding that the defendant will have such protection without joinder of the insurer as a party plaintiff. [265]

2. Ratification as a Remedy

Other federal courts have approved of the device of ratification pursuant to Rule 17(a) [266] as an alternative to what they perceive to be Rule 19's mandate that compensating insurers must be joined as party plaintiffs to prevent multiple litigation. [267] For example, in

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[*61] Hancotte v. Sears, Roebuck & Co., [268] the court denied the defendant's motion for compulsory joinder of the plaintiff's insurer, reasoning that the insurer's execution of a "ratification agreement," in which it had agreed to be bound by the results of the insured's action and to waive any right to pursue its subrogation rights outside of that action, [269] eliminated "any danger of the defendant being subjected to multiple or inconsistent obligations." [270]

There are several problems, both historical and practical, with using the ratification language of Rule 17(a) to solve the problem of multiple litigation. First, ratification can be a solution only if the court has some authority to order dismissal of an action brought in the name of the insured alone. The sole authorization for ratification in the federal rules is the provision in Rule 17(a) for ratification as an alternative to dismissal for failure to name the real party in interest. [271] If the court has no authority to dismiss, it has no authority to require the insurer's ratification as an alternative. When the substantive law permits the insured to sue in his own name, the court has no basis for requiring the insurer to ratify, even if the insurer is also entitled to prosecute an action as subrogee. When the court does have authority to dismiss, [272] however, ratification still is not an appropriate alternative to the naming of the **[*62]** insurer as a party plaintiff because Rule 17(a) does not authorize ratification in cases of deliberate nonjoinder of the proper plaintiff.

Ratification is an anomaly that slipped into Rule 17(a) in 1966 when admiralty actions were brought under the Federal Rules of Civil Procedure. [273] Prior to the 1966 amendments, courts exercising admiralty jurisdiction had taken a lax approach to the naming of parties plaintiff because of the difficulty of identifying, at least prior to the expiration of applicable statutes of limitation, the numerous parties who may have enforceable claims arising from the loss of a ship's cargo. [274] According to a leading treatise, even a simple volunteer might institute suit in admiralty against a carrier to recover for loss or damage to cargo. [275] So long as the proper plaintiff or plaintiffs ratified the action before judgment, the action could be saved and judgment entered in the name of the plaintiff on the basis of the unnamed parties' claims. [276] In effect, admiralty had no real party in interest rule.

In 1964 the Advisory Committee on Admiralty Rules proposed the merger of civil and admiralty practice under the Federal Rules of Civil Procedure. The Committee, with the approval of the Advisory Committee on Civil Rules, recommended several amendments to the Federal Rules of Civil Procedure to preserve, after the merger, certain distinct admiralty practices. [277] Among the recommendations by the committee was an amendment to Rule 17 (a) that would have preserved the practice of relation-back of claims through the formerly unnamed parties' "ratification, joinder or substitution." [278] The Committee on Civil Rules then embraced the
[*63] idea and modified the proposed amendment so as to make it applicable to all civil actions. [279]

What apparently passed unnoticed, however, was that the provision for ratification, as an alternative to joinder or substitution, introduced into Rule 17(a) a practice that was fundamentally at odds with the rule's basic proposition that every action shall be prosecuted in the name of the real party in interest. [280] The device of ratification reintroduces "use" practice--suit in the name of a nominal party for the use or benefit of the person who actually controls the litigation, and who even may be the only one to bene **[*64]** fit from it. [281] This was the very practice, however, that the real party in interest rule was intended to abolish. [282]

Even though the provision for ratification appears on its face to authorize a form of use practice, [283] the legislative history of the 1966 amendment strongly suggests that the drafters did not intend to sanction deliberate nonjoinder of a person who should be named as a party plaintiff. [284] The Advisory Committee's Note states that the provision "should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made." [285]

Recent decisions, however, allowing parties to use the ratification device deliberately to avoid naming an insurance company as a plaintiff [286] are inconsistent with the expressed legisla
[*65] tive intent that the 1966 amendment be available only in cases of mistake.

Use of ratification outside the intended scope of Rule 17(a), as an alternative to otherwise-required joinder or substitution, is illadvised. The ratification device is inconsistent with federal policies of diversity jurisdiction, which depend upon meaningful naming of parties, [287] and with the assumption in the Federal Rules of Civil Procedure that the party plaintiff is the person in control of the action and thus has certain rights and responsibilities in the litigation. [288] Nowhere do the federal rules define the status of a ratifier in such a way that ratification can be considered the functional equivalent of party status. Nothing in Rule 17(a) itself or its legislative history explains the relationship between ratification and diversity jurisdiction or between ratification and other provisions of the rules, most likely because the rules drafters did not contemplate general use of the device to permit a person to avoid party status. [289]

Some courts have dealt with ratification's lack of definition by requiring that in order to avoid joinder or dismissal, the ratifier must agree to accept various burdens, but there is no consistency in what the courts have required. [290] Ratification may indeed solve the problem of multiple litigation when a subrogated insurer does not appear as a party plaintiff in a lawsuit brought in the name of the insured. Without a satisfactory definition, however, ratification may mean a return to use practice and the undermining of important policies that depend upon the proper naming of parties in
[*66] federal litigation.

B. The Problem of Non-Parties in Control of Litigation

The primary reason for requiring joinder or substitution of subrogated insurers, rather than merely ratification by them, is that one in control of litigation, as subrogated insurers so often are, should bear the responsibilities of party status. [291] The matter of who is named as a party plaintiff is important because the federal procedural system is premised upon the assumption that those named as parties have rights and duties in the conduct of the litigation. For example, the Federal Rules of Civil Procedure, [292] as well as various federal statutes, [293] provide for assessment of costs and sanctions against a "party." Federal Rule 16 authorizes the court to direct the "attorneys for the parties and any unrepresented parties" to appear at pretrial and settlement conferences. [294] Simi **[*67]** larly, some of the discovery procedures of the Federal Rules of Civil Procedure may be used only against parties to the litigation [295] and the scope of an injunction may depend upon party status. [296] Thus, failure to name the proper party plaintiff can circumvent, or at least unduly complicate, a procedural rule that by its terms applies only to a person with the status of a "party." [297]

In addition, federal subject matter jurisdiction based upon diversity of citizenship, including the right of a defendant to remove a case from state court, will often depend upon a proper identification of parties to the lawsuit. [298] The jurisprudence of diversity jurisdiction does not tolerate manipulative naming of parties for the purpose of either creating or defeating diversity of citizenship. [299] Diversity generally is determined by the citizenship of the person who is in actual control of the litigation, not by the citizenship of those who are only beneficially interested in the lawsuit. [300]
[*68]

If a subrogated insurer is in actual control of a lawsuit, but not named as a party, and consequently, its citizenship is ignored for diversity purposes, the requirements for diversity jurisdiction are circumvented. [301] The subrogor-insured who is named as the sole party plaintiff may have some beneficial interest in the suit and may be denominated a "trustee" for the insurer's reimbursement interest, but if the insurer has exclusive actual control of the suit, the insured is in reality merely a nominal or formal party whose citizenship should be

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ignored for diversity purposes. [302] Cases such as Virginia Electric & Power Co. v. Westinghouse Electric Corp., [303] in which the non-diverse subrogated insurer in complete control of the litigation effectively was permitted to sue in the name of its diverse insured, allow the parties to evade the requirement of complete diversity and thus contravene the principle that the federal courts are courts of limited jurisdiction. [304]

In addition, it would seem that the naming of the insured as the sole plaintiff in such a case constitutes a violation of 28 U.S.C. section 1359, which provides that "a district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." [305] Section 1359 admittedly has not traditionally been given a vigorous interpretation. [306] Nonetheless, when a subrogation agreement gives a non-diverse insurer complete control of an action and the right to bring suit in the diverse insured's name, and the court finds that the motivation for the agreement is to create diversity jurisdiction, the court should find that the agreement violates section 1359. [307]
[*69]

C. The Non-Problem of Jury Prejudice

Courts sometimes acknowledge that their decisions about compulsory joinder of compensating insurers are influenced by their belief that a jury's objectivity is adversely affected when an insurance company appears as a party plaintiff. [308] In so doing, they are simply invoking a widely accepted assumption about juries. [309]
[*70] Many courts and writers, however, have either questioned or rejected the assumption that juries are less likely to render a fair verdict when they have direct knowledge of an insurer's interest in the litigation. [310] At least one writer has questioned in particular the relevance of the assumption when the insurer's interest is that of a plaintiff. [311]

Whether the concern with jury prejudice is or is not wellfounded, the concern should not be a factor in implementing the federal rule of compulsory joinder. In cases in which the insured has fully subrogated his claim to his insurers, federal courts have not found concern with jury prejudice sufficient to override the rule that the insurer is the sole proper plaintiff. [312] A case of partial subrogation, in which the insured may properly be named as a co-plaintiff along with the insurance company, should present even less cause for concern because it is not necessary for the jury to know of the insurer's presence merely because the insurer is named in the pleadings. In addition, federal courts commonly deal with such problems with cautionary instructions. [313] The problem of ju **[*71]** ry prejudice, if there is one, should be dealt with as a matter of trial practice and evidence, and should not be permitted to eclipse the important policies implicated by the naming of parties to a lawsuit. [314]

VII. How to Require Joinder When It Ought to be Required: The Proper Application of Substantive Law

To prevent multiple litigation, joinder of subrogated insurers--those entitled by the substantive law to assert a claim against the third party--ought to be required. [315] Joinder or substitution of subrogated insurers in actual control of litigation should also be required to assure that the party in control is subject to the responsibilities of a party and is properly considered for purposes of diversity jurisdiction in federal court. [316]

Some federal decisions are contrary to these conclusions. [317] Other decisions have achieved these results, but only through erroneous interpretations of Rules 17(a) and 19. [318] Still other federal courts have reached the wrong result in the opposite direction. In some federal decisions, compensating insurers that are neither sub **[*72]** rogated nor in control of the litigation have been required to join as plaintiffs. [319]

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This unsatisfactory situation arises in large part because federal courts do not permit the substantive law of subrogation, often that of a state, to play its rightful role in determining the parties to the suit. Federal courts have largely ignored or refused to apply various provisions in the law of subrogation that are designed specifically to prevent multiple litigation. State law frequently is brushed aside with the shibboleth that matters of joinder are procedural and, therefore, governed by federal law. [320] Careful analysis reveals, however, that the issue is not that simple and that there are some situations in which federal courts are required to give effect to state law joinder provisions. Doing so, moreover, will solve the problems of multiple litigation that are not remedied by Federal Rule 19 and will facilitate federal policies regarding the naming of parties.

For example, some state law provides that an insured may not sue without joinder of its subrogated insurer. Such a state rule may reflect a policy of protecting the defendant from multiple litigation by conferring a right of action upon two parties that is not enforceable by one alone. In Glacier General Assurance Co. v. G. Gordon Symons Co., [321] the applicable Montana law provided that if an action were instituted by either the insured or the insurer alone, the defendant could compel joinder of the other. [322] The
[*73] Ninth Circuit found, however, that "this aspect of Montana law does not bind us. The ability to force joinder of a nonparty in a diversity action is a matter of federal law governed by Fed. R. Civ. P. 19." [323] Then, in a brief Rule 19 application, the court concluded that joinder of the plaintiff's compensating insurers was not required. [324] Unfortunately, the court did not examine underlying state policies to determine the basis for the Montana rule.

When, however, state law provides that a partially compensated insured may sue only if he joins the insurer as a party plaintiff, a finding that the purpose of that rule is to protect a defendant from multiple litigation would justify the conclusion that the state rule is substantive and should be applied by the federal court without reference to Rule 19. As Judge Wyzanski explained in Stevens v. Loomis: [325]

If, as a matter of substantive law, a state does not recognize that a plaintiff has a particular right of action unless he joins with him certain others, then, under Erie R.R. v. Tompkins, the federal diversity court is precluded from giving a plaintiff who fails to join those others an opportunity to proceed as though alone he had a substantive right. [326]

[*74] This principle was applied by the Sixth Circuit Court of Appeals in Jamison v. Memphis Transit Management Co., [327] an action brought by a father to recover for the death of a child. The court dismissed the action because the child's mother could not be joined as a plaintiff without destroying complete diversity. [328] The court explained that the Tennessee wrongful death act vested the right of action in both parents and the defendant "could not obtain complete exoneration from its liability except by payment to both parents or the execution of a release by both the father and mother." [329]

In the subrogation context, Federal Rule 19 should not be permitted to undermine a state's decision to give both the insured and the compensating insurer the right to sue the third party directly, but then to balance that right with the third party's right to insist that only one lawsuit be prosecuted. [330] Courts can not properly apply the rule simply by declaring the preeminence of federal procedure. They must address the substance of the state rule and the policies it is intended to effectuate.

When state law permits the insured to sue alone, it is more difficult to resolve whether a federal court should follow the state rule. The state rule may reflect its policy that in order to protect
[*75] the defendant from multiple litigation, only the insured has a claim for relief. [331] It is often the case, however, that such a state rule reflects only the policy of preventing juries

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from knowledge of an insurer's interest, and the state law in fact gives the insurer control of the litigation in the insured's name. [332]

When the state non-joinder rule is designed to protect the defendant from multiple litigation, the federal court should not compel the insurer's joinder. In Gas Service Co. v. Hunt, [333] the Tenth Circuit required joinder of a compensating insurer in spite of the Kansas rule that only the insured was entitled to sue. [334] The Kansas rule was designed to implement an articulated state policy that the wrongdoer "not be compelled to defend two actions for the same wrong." [335] The Hunt court's joinder order did nothing to undermine, or to enhance, the state's goal of protecting the defendant from more than one lawsuit, but it was an unnecessary order because the defendant was protected by the state's determination that the insurer was not entitled to bring its own action. The federal court's order did, however, unnecessarily subject the insurer to the burdens of party status in spite of the fact that the insurer was not even a proper party. [336]
[*76]

A state rule permitting the suit to be brought by the insured alone may not reflect any substantive state policies. The latter conclusion should be reached when state law gives the insurer the actual right to control the litigation but permits the insurer to sue in the name of the insured as the party plaintiff. The apparent state policy for such a rule would be nothing more than a judgment on an evidentiary question--that the jury could not be trusted to decide the case on the merits if it were aware that an insurance company was the actual beneficiary of the suit. The question is simply one of how to achieve accurate adjudication.

In Traveler's Insurance Co. v. Riggs [337] the Fourth Circuit was faced with such a rule in Virginia code provisions that allowed an insurer to sue its in own name or its insured's and prohibited involuntary joinder of the insurer. [338] In opposition to the Virginia rule was the position of the Fourth Circuit in the earlier case of Virginia Electric & Power Co. v. Westinghouse Electric Corp., [339] that a partially subrogated insurer may be involuntarily joined as a party plaintiff upon motion of the defendant.

Analyzing the conflict as a "'relatively unguided Erie choice'," [340] the Riggs court found that it was not bound to follow the Virginia statutes. First evaluating the policy behind the state rule, the court explained: "The policy concern that undoubtedly underlies the Virginia rule--to avoid the prejudice that in conventional wisdom is assumed to afflict all insurance companies in jury trials--is clearly a legitimate one. But it has only to do with the conduct of litigation." [341] With regard to the countervailing federal policies, [342] the court found "an approach which abjures concealed
[*77] or fictional issues and parties in interest." [343] As discussed above, there are very strong federal policy reasons for insisting that a lawsuit be brought in the name of the person who is in control of the action, [344] and the Riggs court was correct in declining to follow the Virginia rule that permitted the insurer to sue in the name of the insured.

Once the federal court determines that a state law provision permitting enforcement of a subrogated claim in the name of the insured alone is procedural, as many are, [345] the next step should not be to proceed directly to Federal Rule 19. Rather, the court should determine who--insured, insurer, or both--is entitled by the applicable substantive law to assert and control the claim. Making this determination often will be difficult. So long as states permit parties to assert subrogated claims in the name of the insured alone regardless of actual control, insurers will do so, and federal courts will have difficulty locating state court decisions directly addressing the parties' substantive rights in the claim. [346] When insurers invariably bring suit in the name of the insured, there may be no
[*78] judicial decisions analyzing whether an insurer may enforce its claim directly against a third party. [347] Similarly, unless some conflict between insured and insurer has been litigated, there might be no decisions discussing whether the insured may enforce the entire claim. [348]

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In many situations, however, the answer will be more accessible. A workers' compensation act, for example, may expressly provide that the insurer has exclusive control of the claim although it is permitted to sue in the name of the insured. [349] The right to control also may be vested in the insurer by a subrogation clause in the policy [350] or by a subrogation agreement between the insured and the insurer. [351] When the federal court finds that an in **[*79]** surer, pursuant to its right under the substantive law, is in actual control of a suit brought in the name of the insured, the court should require substitution of the insurer as the named plaintiff pursuant to Rule 12(b)(6) or Rule 17(a), the real party in interest rule. [352]

In some situations, the federal court may find that the substantive law in fact permits splitting--that it gives the insured and the insurer the right to control their own portions of the claim and that joinder is not required. [353] In such a situation, a suit brought only in the name of the insured for the entire claim still should not be permitted, not on the basis of federal compulsory joinder, but on the basis that the insured has failed to state a claim for relief with regard to that portion of the ad damnum clause in excess of the insured's interest. [354] The insured and the insurer then, of course,
[*80] may choose to join as plaintiffs to pursue the claim in one lawsuit.

They may, however, choose to pursue separate actions. If only one of the actions is brought in a federal court, and it is brought prior to a judgment in the other party's action, [355] the question becomes whether the federal court is required to give effect to the state policy permitting separate lawsuits. It would seem that the state's decision to permit each party to control its own portion of the claim would not be impeded by a decision that the parties must do so in one action. If there were some federal rule that required compulsory joinder in this situation, the federal goal of avoiding multiple litigation would permit application of that rule despite a state procedural rule eschewing compulsory joinder. Because of Rule 19's limited scope, however, there is no such federal rule.

Happily, state law rarely creates this situation. In almost all cases, state law of subrogation permits only one lawsuit, either by requiring joinder or by vesting the right to control the entire claim in only one of the parties. If federal courts give effect to that state law, they will enforce the substantive law's policy intended to prevent multiple litigation and, at the same time, will further the important federal policies that require the party in control to appear as the named plaintiff.

In most instances, therefore, it is not necessary to broaden Rule 19 in order to achieve the goal of preventing multiple litigation in the insurance subrogation context. [356] State law designed for this
[*81] purpose should be given effect in federal courts. Applying these principles to joinder of compensating insurers is not necessarily an easy task, but it achieves better results and is probably no more difficult than the task that federal courts have been performing of applying Rule 19 without regard to state law.

FOOTNOTES:

n1 See generally June F. Entman, More Reasons for Abolishing Federal Rule of Civil Procedure 17(a): The Problem of the Proper Plaintiff and Insurance Subrogation, 68 N.C. L. Rev. 893 (1990); V. Woerner, Annotation, Proper Party Plaintiff, Under Real Party in Interest Statute, to Action Against Tortfeasor for Damage to Insured Property Where Insured Has Paid Part of Loss, 13 A.L.R.3d 140 (1967).

n2 See Jean F. Rydstrom, Annotation, Who Must Be Joined in Action as Person "Needed for Just Adjudication" Under Rule 19(a), Federal Rules of Civil Procedure, 22 A.L.R. Fed. 765, 809-11 (1975) (listing decisions requiring joinder of insurer under Rule 19); see infra parts IV.B.2, V.C-D.

n3 See, e.g., Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 84-85

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(4th Cir. 1973) (finding an "overlap" between Rules 17(a) and 19), cert. denied, 415 U.S. 935 (1974); Carpetland, U.S.A. v. J.L. Adler Roofing, Inc., 107 F.R.D. 357, 359-60 (N.D. Ill. 1985) (holding that Rule 17(a) is "an independent authority for compulsory joinder" in addition to Rule 19(a)). The issue is presented in several ways: a defendant's motion either to dismiss for failure to name the real party in interest under Rule 17(a), or for failure to join an indispensable party under Rule 19, or a motion to compel joinder under Rule 19.

n4 See, e.g., Capitol Fuels, Inc. v. Clark Equip. Co., 342 S.E.2d 245, 251 (W. Va. 1986) (holding that joinder of a partially subrogated insurer as a real party in interest under Rule 17 (a) in a suit brought by the insured for the total loss may not be compelled under Rule 19(a) of the West Virginia Rules of Civil Procedure). In many states, however, the issue has been resolved by specific provisions in statutes or rules of civil procedure. See Ala. R. Civ. P. 17 (a); Ind. R. Trial P. 19(e)(3); La. Code Civ. Proc. Ann. art. 697 (West 1960); Me. R. Civ. P. 17; Mass. R. Civ. P. 17(a); Miss. R. Civ. P. 17(b); N.Y. Civ. Prac. L. & R. 1004 (McKinney 1976); Ohio R. Civ. P. 19(A)(3); Pa. R. Civ. P. 2002(d); R.I. R. Civ. P. 17(a); Tenn. R. Civ. P. 17.01; Vt. R. Civ. P. 17(a); Va. Code Ann. section 38.2-207 (Michie 1994); Wis. R. Civ. P. 803.03(2).

n5 See infra note 308.

n6 See, e.g., Potomac Elec. Power Co. v. Babcock & Wilcox Co., 54 F.R.D. 486, 492 (D. Md. 1972) (defendants argued that only through joinder of the insurer could defendants be assured that principles of res judicata would operate to protect them from a subsequent suit by the insurer on the same claim).

n7 See, e.g., Prestenback v. Employers' Ins. Co., 47 F.R.D. 163, 165 (E.D. La. 1969) ("In these days of exploding dockets, we welcome the opportunity to explore the pragmatical aspects of joinder problems as dictated by amended F.R.C.P. 19."); infra parts V.C-D.

n8 See, e.g., Gas Serv. Co. v. Hunt, 183 F.2d 417, 419 (10th Cir. 1950) (finding joinder a procedural issue governed by the Federal Rules of Civil Procedure); see infra part VII.

n9 See infra part II.

n10 See infra part VII.

n11 See infra part IV.B.1.

n12 Entman, supra note 1.

n13 See Geoffrey C. Hazard, Jr., Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Colum. L. Rev. 1254, 1289 (1961) (arguing that the indefensible result of the indispensable party rule is to deprive plaintiff of a perfectly valid remedy).

n14 338 U.S. 366 (1949).

n15 See Robert G. Bone, Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules, 89 Colum. L. Rev. 1, 114 (1989) (concluding that the historic function of compulsory joinder has been lost); Richard D. Freer, Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit, 50 U. Pitt. L. Rev. 809, 813 (1989) [hereinafter Freer, Avoiding Duplicative Litigation] (advocating expanding the federal courts' power to order joinder for the express purpose of avoiding duplicative litigation); Richard D. Freer, Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19, 60 N.Y.U. L. Rev. 1061, 1064 (1985) [hereinafter Freer, Rethinking Compulsory Joinder] (proposing statutory authorization of minimal diversity, nationwide service of process and relaxed venue restrictions for compulsory joinder of some absentees); Carl Tobias, Rule 19 and the Public Rights Exception

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to Party Joinder, 65 N.C. L. Rev. 745, 747 (1987) (arguing that there should be no absolute "public rights" exception to compulsory joinder).

n16 See Strate v. Niagara Mach. & Tool Works, 160 F. Supp. 296, 299 (S.D. Ind. 1958) (holding that because insurer has no right of action against third party, it is not subrogated, although it has a lien on insured's recovery).

n17 Robert E. Keeton & Alan I. Widiss, Insurance Law section 3.10(a) (1988); see Entman, supra note 1, at 908-11 ("An insurer's subrogation rights may be judicially created, may derive from the insurance policy or a settlement with the insured, or may be provided by legislation."); Spencer L. Kimball & Don A. Davis, The Extension of Insurance Subrogation, 60 Mich. L. Rev. 841, 844 (1962) (discussing "where the law draws the line between policies to which legal subrogation applies and those to which it does not").

n18 See, e.g., Cleaves v. DeLauder, 302 F. Supp. 36, 38 (N.D. W. Va. 1969) (finding that under West Virginia law, partially compensating automobile collision insurer's right is only a contingent interest in the litigation; insurer could not maintain an action in its own name); Farmers Ins. Co. v. Effertz, 795 S.W.2d 424, 426 (Mo. Ct. App. 1990) (if insurer's rights arise by operation of law, without assignment from the insured, "legal title remains in the insured and he retains the exclusive right to bring the suit" (quoting State Farm Mut. Ins. Co. v. Jessee, 523 S.W.2d 832, 834 (Mo. Ct. App. 1975))); 2A Arthur Larson, The Law of Workmen's Compensation section 74.14 (1993) (identifying workers' compensation schemes in which the employee has the exclusive right to bring suit for a specified period of time).

When the insured otherwise has control of the claim, but fails or refuses to assert it, some jurisdictions then permit the insurer to bring the claim. See, e.g., City of New York Ins. Co. v. Tice, 152 P.2d 836, 842 (Kan. 1944) (insured should sue for itself and as trustee for the insurer, but if the insured refuses to sue, "justice requires that the insurer be permitted to bring action"). There do not appear to be any situations in which an insured who has received total compensation retains control of the claim.

n19 The insurer may be entitled to a lien on the insured's recovery or to intervene in the action to protect its interest in any judgment awarded. See, e.g., Wright v. Schebler Co., 37 F.R.D. 319, 321 (S.D. Iowa 1965) (stating that employer becomes statutory lienholder to the extent of its claim in employee's recovery); see also infra note 249 (discussing subject matter jurisdiction limitations upon insurer's intervention).

n20 See 2A Larson, supra note 18, sections 74.14-74.15 (identifying workers' compensation acts that establish a sequence in which either the employee or the insurer first has the exclusive right to bring suit against a third party, and then, after a specified time, the other has the exclusive right). Subrogation clauses in insurance policies typically confer upon the insurer the right to control the claim. For example, the "Business Auto Coverage Form (1985)" provides:

5. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

If any person or organization to or for whom we make payment under this Coverage Form has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after "accident" or "loss" to impair them.

Keeton & Widiss, supra note 17, app. G at 1113. See also Tucson Elec. Power Co. v. Bailey Controls Co., 145 F.R.D. 102, 103 (D. Ariz. 1992) (loan receipt agreement provided that litigation against third party was to be brought in insured's name and maintained "at the expense of and under the exclusive direction and control of" the insurance company).

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When the insurer, however, because of a conflict of interest, is not likely to protect the insured's interest, a court may permit the insured to bring and control his own suit. See, e.g., Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525, 532 (1956) (subrogated insurer was also defendant's liability insurer). But see Rodriguez v. Compass Shipping Co., 451 U.S. 596, 603 (1981) (holding that injured longshoremen, who offered no excuse for their delay, could not prosecute personal injury action against third party after right to recover had been assigned to employer by terms of Longshore Act, and it was not material that employers failed to pursue the assigned claims).

n21 See, e.g., Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of New York, 762 F.2d 205, 209 (2d Cir. 1985) (determining that claim by insured for its deductible amount and claim by insurer for amount paid to insured are "separate and distinct, and do not constitute unlawful splitting under New York law"); 2A Larson, supra note 18, section 74.13 (discussing cases where insurer's action against tortfeasor was determined independent of insured's action). Larson discusses cases construing workers' compensation statutes to "give a right to the employer [or its insurer] without taking anything away from the employee, with the result that the subrogation or assignment has the effect of creating parallel rights of action which may be asserted by either employer or employee." 2B Arthur Larson, The Law of Workmen's Compensation section 75.42, at 14-699 (1994).

n22 See, e.g., Miss. R. Civ. P. 17(b) ("If the subrogor still has a pecuniary interest in the claim the action shall be brought in the names of the subrogor and the subrogee."); Lindsey v. Samoluk, 219 S.E.2d 464, 466 (Ga. Ct. App. 1975) (insured and partially compensating insurer each "has a cause of action and may sue by joining the other part owner"), rev'd on other grounds, 223 S.E.2d 147 (Ga. 1976); 2B Larson, supra note 21, section 75.42, at 14-699 n.21.

n23 See, e.g., Joyner v. F & B Enters., Inc., 448 F.2d 1185, 1187-88 (D.C. Cir. 1971) (noting that under the Longshore Act, a consequence of the employee's bringing suit is that the compensating insurer has no substantive right against the tortfeasor); Klick v. American Mut. Ins. Co., 80 F.R.D. 711, 712 (E.D. Wis. 1978) (describing Wisconsin workers' compensation act, which provided that when either the employee or the insurer brings suit alone, the other is bound by the judgment if given notice of the action).

n24 33 U.S.C. section 933(h) (1988).

n25 See Holland v. Sea-Land Serv. Inc., 655 F.2d 556, 558-59 (4th Cir. 1981) (concluding that although worker was engaged in maritime employment for purposes of compensation under the Longshore Act, his claim against third party arose under state law), cert. denied, 455 U.S. 919 (1982); Ward v. Norfolk Shipbuilding & Drydock Corp., 770 F. Supp. 1118, 1121 (E.D. Va. 1991) (finding that when employee covered by Longshore Act was injured on navigable waters, his claim against third party arose from federal maritime law, not from either state law or the Longshore Act). See also Cook v. Stuples, 74 F.R.D. 370, 371-72 (W.D. Okla. 1976) (noting that in plaintiff's diversity action for negligence of defendant in automobile accident, the Medical Care Recovery Act, 42 U.S.C. section 2651, governed recovery by the United States for medical care it furnished the plaintiff).

n26 See, e.g., Koepp v. Northwest Freight Lines, 10 F.R.D. 524, 526 (D. Minn. 1950) (holding that the Wisconsin employee, injured in Minnesota, has the right to recover against the tortfeasor under Minnesota law, but that the Wisconsin insurer's right to be joined as party plaintiff was determined by Wisconsin law).

n27 Fed. R. Civ. P. 17(a) provides:

Every action shall be prosecuted in the name of the real party in interest. An executor,

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illustrate how Rule 17(a) has been widely misunderstood and misapplied, and why that rule should be abolished. [12] Part II of this article summarizes the variety found in the substantive law of subrogation and how Rule 17(a) has failed as a mechanism for enforcing that law. Similarly, from its very beginnings compulsory party joinder doctrine has been ill-conceived and frequently has obscured and frustrated, rather than supported, the substantive law. [13] The problems are well-illustrated by examining the forms that compulsory joinder rules have taken over time and how each of these forms has been applied to the issue of the proper party plaintiff in cases involving compensating insurers.

Part III describes the two different practices governing the naming of subrogated insurers as parties that applied in law and equity prior to merger, and the difficulties with the assimilation of these doctrines into the Federal Rules of Civil Procedure. The law courts adopted "use practice," the naming of only the insured as the plaintiff in all cases. "Use practice" was an acknowledged fiction that served little purpose except to provide an easy answer and to protect insurance companies, in every case, from having their presence disclosed to the trier of fact. Pre-merger equity, on the other hand, applied its compulsory joinder doctrines of "necessary" and "indispensable" parties, which formed the basis for the original version of Federal Rule of Civil Procedure 19, to determine whether compensating insurers must be named as plaintiffs.

Part IV describes how the labelling of insurers as "necessary" parties became fixed in federal practice in the United States Supreme Court's 1949 opinion in United States v. Aetna Casualty &
[*6] Surety Co., [14] and how the legacy of Aetna has been a widespread failure of federal courts to give proper effect to the substantive law of subrogation. Part V describes the 1966 amendment of Rule 19, which was intended to free compulsory joinder doctrine from the jurisprudence of labels and to redirect judicial attention to basing compulsory joinder upon the substantive rights of the parties. The amended rule, however, has also failed in this endeavor. While some federal courts have continued to follow the Aetna opinion after the 1966 amendment, others have misconstrued amended Rule 19 in a variety of ways and continue to treat all compensating insurers alike without regard to their actual relation to the lawsuit.

When Rule 19 is properly understood, it does not mandate joinder of compensating insurers, even those that are partially subrogated to the plaintiff's claim. Whether Rule 19 or some other rule should require joinder, is the subject of Part VI, which examines the problem of multiple litigation, the more significant problem of non-parties in control of lawsuits, and whether the problem of jury prejudice nonetheless militates against joinder.

Several commentators have identified weaknesses in Rule 19 and modern compulsory party joinder doctrine and have proposed improvements in drafting and interpretation designed to broaden the rule's effect. [15] Part VII concludes, however, that there is no need in many cases to involve federal compulsory party joinder doctrines to achieve joinder of compensating insurers when that joinder should be required. The problems that federal courts have sought to solve through Rule 19 have been, for the most part, adequately addressed in the substantive law of insurance. If the courts would simply give that law its proper application, fair results would be achieved and the debate over the meaning of Rule 19 could be
[*7] ended, at least in the context of compensating insurers.

II. The Relationship Between Insurance Subrogation and the Federal Rules of Civil Procedure

When an insurer has the right to bring and control a claim against a third party who has caused some payment by the insurer to the insured, the insurer is said to be subrogated to the insured's claim. Compensating insurers may be entitled, however, only to reimbursement from proceeds the insured recovers from third parties. When the insurer has only a claim

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administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

n28 See Charles E. Clark, Handbook of the Law of Code Pleading section 22, at 160 (2d ed. 1947) (defining the real party in interest as he who by substantive law has the right of action); 6A Charles A. Wright et al., Federal Practice and Procedure section 1543, at 334 (2d ed. 1990) (defining real party in interest as the "person who, according to the governing substantive law, is entitled to enforce the right"); John E. Kennedy, Federal Rule 17(a): Will the Real Party in Interest Please Stand?, 51 Minn. L. Rev. 675, 678 (1967) ("Thus the real party is the one with legal power to control the lawsuit and may be different from the person who will ultimately be benefited if the suit is successful."); Lewis M. Simes, The Real Party in Interest, 10 Ky. L.J. 60, 61 (1921) ("The real party in interest is the one to whom the substantive law of the case gives the right to bring and control the action."). See also Entman, supra note 1, at 898-902 (discussing origins of real party in interest rule).

n29 See Entman, supra note 1, at 900-01 & n.41 (defining the real party in interest as determined by who has the right to assert and control the claim).

n30 Fed. R. Civ. P. 12(b)(6) provides in pertinent part:

Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.

n31 The function of Rule 17(a) is virtually identical to the function of a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted. Both rules require that the federal court apply state law when, as is often the case, state law governs the right of the compensated insured and the compensating insurer to bring and control an action against a third party. See Entman, supra note 1, at 901 (comparing Rule 12(b)(6) with Rule 17(a)).

n32 This result has widely, but not universally, been obtained in cases of full subrogation, in which the insured does not retain even a pecuniary interest in the claim. See United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 380-81 (1949) (stating that subrogee who has paid entire loss suffered is the only real party in interest); V. Woerner, Annotation, Proper Party Plaintiff, Under Real Party in Interest Statute, to Action Against Tortfeasor for Damage to Insured Property Where Loss is Entirely Covered by Insurance, 13 A.L.R.3d 229 (1967).

n33 See Entman, supra note 1, at 913-22 (discussing misapplication of real party in interest rule).

n34 See, e.g., Public Serv. Co. of Okla. v. Black & Veatch, 467 F.2d 1143 (10th Cir. 1972) (discussed infra part V.B.); Blacks v. Mosley Mach. Co., 57 F.R.D. 503, 506 (E.D. Pa. 1972)

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(discussed infra note 208).

n35 See U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1038 (9th Cir. 1986) ("Although the parties have addressed this problem solely in the context of Fed. R. Civ. P. 17, we also must consider Fed. R. Civ. P. 19 . . . . Fed. R. Civ. P. 17 governs only the right of plaintiff to bring the suit. It is Fed. R. Civ. P. 19 that tells us whether the appropriate parties are before the court."); Tucson Elec. Power Co. v. Bailey Controls Co., 145 F.R.D. 102, 104 (D. Ariz. 1992) (following U-Haul); Whitcomb v. Ford Motor Co., 79 F.R.D. 244, 245 (M.D. Pa. 1978) (holding that Rule 19 analysis, not Rule 17(a), should be used to decide joinder issue); Kint v. Terrain King Corp., 79 F.R.D. 10, 11 n.2 (M.D. Pa. 1977) (construing motion as one under Rule 19 notwithstanding defendant's ostensible reliance upon Rule 17, and declining to reach any Rule 17 issues). See also 6A Wright et al., supra note 28, section 1543, at 339-40 ("The question of who should or may be joined in the action must be determined under Rule 19 and Rule 20 rather than Rule 17(a)."); Kennedy, supra note 28, at 680 ("Rule 17(a) should not be construed to compel joinder without reference to Rule 19.").

n36 See infra text accompanying note 149.

n37 See, e.g., Public Serv. Co., 467 F.2d at 1143 (discussed infra text accompanying notes 159-70).

n38 See discussion infra parts VI.B & VII.

n39 338 U.S. 366 (1949) (discussed infra part IV.A).

n40 See infra part III.A.

n41 See infra part III.B.

n42 Walter W. Cook, Alienability of Choses in Action, 29 Harv. L. Rev. 816, 830 (1916).

n43 Subrogation originated in equity from principles of unjust enrichment, I George E. Palmer, The Law of Restitution section 1.5(b) (1978); see also 2 John N. Pomeroy, Jr., Equitable Remedies sections 921-22 (1905) (discussing parties entitled to subrogation and stating that "subrogation is purely an equitable right") (citation omitted).

n44 Mobile & Montgomery Ry. v. Jurey, 111 U.S. 584, 594 (1884) (holding that insurer's payment for a total loss works as an equitable assignment); Charles E. Clark & Robert M. Hutchins, The Real Party in Interest, 34 Yale L.J. 259, 270 n.79 (1925) (stating that subrogation may be called an equitable assignment). At one time it was common for there to be an actual assignment to the insurer upon its payment to the insured, so that it made little difference whether the insured's rights were considered from the standpoint of assignment or subrogation. Thomas E. Atkinson, The Real Party in Interest Rule: A Plea for Its Abolition, 32 N.Y.U. L. Rev. 926, 943 (1957).

n45 See Mandeville v. Welch, 18 U.S. (5 Wheat.) 277, 283 (1820) (discussing assignment); Hart v. Western R.R., 54 Mass. (13 Met.) 99, 107 (1847) (discussing subrogation).

n46 Hart, 54 Mass. (13 Met.) at 108 ("A recovery against the underwriter is no bar to a suit by the assured against the party primarily liable[.]"). The principle that a personal injury claimant's recovery is not reduced by the amount of compensation received from sources independent of the tortfeasor came to be known as the "**collateral source rule.**" See Rixmann v. Somerset Pub. Sch., 266 N.W.2d 326, 329-32 (Wis. 1978) (discussing the relationship between **subrogation and the collateral source rule)**.

n47 See, e.g., Peoria Marine & Fire Ins. Co. v. Frost, 37 Ill. 333, 336 (1865). The court stated:

When an injury is done to property, the remedy must be sought in the courts of common law, by some person who has an estate in the property, legal or equitable, which the law recognizes. But the insurance company had no estate or ownership in this property of any kind whatever.

See also Pittsburgh, C.C. & St. L. Ry. v. Home Ins. Co., 108 N.E. 525, 529 (1915). This court stated:

Common-law pleading looked to the entire legal interest, and did not directly recognize the beneficial interest or equitable right . . . . In the view of common-law procedure, he who was clothed with this legal title had the exclusive right of action, although the entire beneficial interest, with the equitable title, was in someone else.

See generally Bone, supra note 15, at 25 (discussing how common law procedure was an obstacle to common law courts' attempts to enforce rights formerly recognized only in equity).

n48 Aetna Ins. Co. v. Hannibal & St. J.R., 1 F. Cas. 207, 208 (C.C.E.D. Mo. 1874) (No. 96) ("The wrongful act was single and indivisible, and gives rise to but one liability.").

n49 Mandeville, 18 U.S. (5 Wheat.) at 288-89 (discussing partial assignments). In Peoria Marine, 37 Ill. at 337, the court stated:

It very often happens that valuable property is insured in several companies at the same time. If the property is burned through the carelessness of some third person, can such person be liable to as many suits as there are insurances? Is there more than one cause of action against him? And can that be indefinitely divided? . . . It is still [the defendant's] right to have that loss adjusted in a single suit.

n50 Hall & Long v. Railroad Cos., 80 U.S. (13 Wall.) 367, 370 (1871) ("It has often been ruled that an insurer, who has paid a loss, may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss."); Mandeville, 18 U.S. (5 Wheat.) at 285 (determining that assignee can sue only in the name of assignor); Hannibal & St. J.R., 1 F. Cas. at 208 ("The suit, though for the use of the insurer, must be in the name of the person whose property was destroyed."); Hart, 54 Mass. (13 Met.) at 108 (stating that insurer can sue in the name of the insured); Clark, supra note 28, section 21, at 157 (stating that one having an equitable interest could sue only in the name of the person having legal title).

n51 Bone, supra note 15, at 20 n.41 (describing how common law judges adopted fictions to assimilate new disputes into the existing, seemingly inflexible, forms of action).

n52 See, e.g., Peoria Marine, 37 Ill. at 338 ("The insurance company will, however, be at liberty to bring a suit in the name of [the insured], to its use, indemnifying them, if they require it, against the costs, and this suit will be under the control of the company."); Benjamin J. Shipman, Handbook of Common Law Pleading, sections 27-29 (2d ed. 1895) (stating that use plaintiff must give indemnity for costs to holder of legal interest in whose name action must be brought).

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n53 See, e.g., Rockingham Mut. Fire Ins. Co. v. Bosher, 39 Me. 253, 255 (1855) (finding that the owner, having recovered payment from the underwriter, stands as trustee); Hart, 54 Mass. (13 Met.) at 108 ("After a payment by the insurer . . . the assured becomes trustee for the insurer[.]"); Gales v. Hailman, 11 Pa. 515, 521 (1849) ("The shipper has sued on the contract of bailment, not only in his own right for the unpaid balance due to himself, but as a trustee for what has been paid by the insurer in ease of the carrier[.]").

n54 In Hart, 54 Mass. (13 Met.) at 107, the court said that "if the trust consists in an equitable liability to pay money, it will be recognized and enforced in a suit at law."

n55 Restatement (Second) of Trusts sections 82, 192 (1959) (trustee has sole responsibility for determining whether to sue, to settle, etc.); 4 Austin W. Scott, Law of Trusts section 282, at 25-29 (4th ed. 1989) (commenting that in most cases trustee has exclusive authority to sue third parties who injure the beneficiary's interest in the trust). Nonetheless, the notion of insured-subrogor as trustee--and, therefore, that the insured is the only proper plaintiff in a suit to recover a subrogated claim--has continued to reverberate in judicial and legislative treatment of the problem. See Atkinson, supra note 44, at 946 (criticizing New York legislative treatment of a subrogor in same category as a trustee). For a description and criticism of modern decisions that use the trustee analogy to hold that joinder of a subrogated insurer, otherwise required, is excused by Rule 17(a)'s provision that trustees may sue in their own names without joining beneficial parties, see Entman, supra note 1, at 940-42.

n56 See Gales, 11 Pa. at 520-22. The court held:

The insurer, who in this case bore a part of [the loss] for [the carrier], has a right to be reimbursed, and there must be a remedy of some sort to enforce it . . . . In this case, the insurer and the shipper could not sever; and the action was well brought, respectively for the use of each, in the name of him who had the legal title.

See also Mobile & Montgomery Ry. v. Jurey, 111 U.S. 584, 594-95 (1884) (holding that the use of only the insured's name in the complaint was sufficient) (citing Gales, 11 Pa. 515 and Hall & Long v. Railroad Cos., 80 U.S. (13 Wall.) 367 (1871)); Hall & Long, 80 U.S. (13 Wall.) at 371, 373 (holding that an insurer may file suit in the name of the insured against a carrier who was responsible for the loss) (citing Gales, 11 Pa. at 515). See generally, G.J. Couch, Annotation, Proper Party Plaintiff to Action Against Tort-Feasor for Damage to Insured Property Where Insurer is Entitled to Subrogation to Extent of Loss Paid by It, 96 A.L.R. 864, 865-73 (1935) (noting both federal and state cases).

n57 See Clark, supra note 28, section 24, at 174-79 (criticizing the continuation of use practice as inconsistent with the codes' real party in interest rule). Under code pleading, courts continued to use the trustee analogy as a rationale for suit in the name of the insured alone, noting that the real party in interest rule permitted the trustee of an express trust to sue alone without joining the beneficiaries. The analogy, however, was often inconsistent with the reality of the relationship between the insured and the insurer. For example, in Peoples Oil & Fertilizer Co. v. Charleston & W.C. Ry., 83 S.C. 530 (1909), the partially compensated insured gave each of three compensating insurers a subrogation receipt that assigned its right of action, to the extent of payment received, to the insurer and authorized the insurer "to sue, compromise or settle in our names, or otherwise . . . ." Id. at 535. The court held that "notwithstanding the words of assignment . . . plaintiff [the insured] still has legal title to the cause of action, subject to the equitable right of subrogation" and can sue alone as trustee of an express trust. Id. at 536. But see Pratt v. Radford, 8 N.W. 606, 607 (Wis. 1881) (arguing that the trust created by subrogation arises by implication of law and is, therefore, not an express trust within the meaning of the real party in interest rule).

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n58 See, e.g., Van Wie v. United States, 77 F. Supp. 22, 33 (N.D. Iowa 1948) ("In cases of partial subrogation the action could be maintained by the insured in his own name for the entire loss."); Grace v. United States, 76 F. Supp. 174, 178 (D. Md. 1948) ("In general . . . where the insurer has paid less than the whole loss the suit must be brought in the name of the person who has sustained the damage but with the notation that suit is also for the use and benefit of the insurer."); Gray v. United States, 77 F. Supp. 869, 871 (D. Mass. 1948) (holding that insurer-subrogee may not sue tortfeasor in its own name but that insured is entitled to sue for entire loss and holds sum paid to him by the insurer as trustee), rev'd sub nom. State Farm Mut. Liab. Ins. Co. v. United States, 172 F.2d 737 (1st Cir. 1949); Dayton Veneer & Lumber Mills v. Cincinnati, N.O. & T.P. Ry., 1 F.R.D. 444, 445 (E.D. Tenn. 1940) (denying motion to dismiss suit by property owner although he had collected insurance for the damage). See generally, M.L.C., Annotation, Proper Party Plaintiff to Action Against Tort-Feasor for Damage to Insured Property Where Insurer is Entitled to Subrogation to Extent of Loss Paid by It, 157 A.L.R. 1242 (1945) [hereinafter Annotation, Proper Party Plaintiffs] (noting both federal and state cases).

n59 In Firemen's Ins. Co. v. Bremner, 25 F.2d 75 (8th Cir. 1928), separate suits were filed, one by the insured for his personal injuries and unreimbursed property damages, the other by the insurer for its subrogation interest. Holding that a judgment against the defendant in the insured's action barred the suit by the insurer, the court stated that "the right of action remains in the insured for the entire loss, the insured becoming a trustee for the insurer . . . . . " Id. at 76. In Subscribers at Casualty Reciprocal Exch. v. Kansas City Pub. Serv. Co., 91 S.W.2d 227 (Mo. Ct. App. 1936), overruled by Farm Bureau Mut. Ins. Co. v. Anderson, 360 S.W.2d 314, 321 (Mo. Ct. App. 1962), an insurer, pursuant to an insurance policy with a $ 50 deductible, paid its insured $ 567.55 for damage to the insured's automobile and notified the defendant of its claim for subrogation. The insured, however, gave the tortfeasor a release of all claims in exchange for $ 50. The court affirmed dismissal of the insurer's suit against the tortfeasor, citing the rule that where subrogation is partial, only the insured may sue. Subscribers at Casualty Reciprocal Exch., 91 S.W.2d at 231. But see Hart v. Western R.R., 54 Mass. (13 Met.) 99, 108 (1847) (refusing to permit the insured's release of the defendant to defeat the insurer's right to reimbursement).

n60 In Kennebec Coal & Ice Co. v. Wilmington & N.R.R., 2 Chester County Rep. 29 (Pa. C.P. 1883), for example, an insured ice company, whose premises had been destroyed by fire, refused to sue or to authorize its compensating insurers to sue in its name, apparently because the company was dependent upon the defendant railroad company for its supplies of ice. The court held that under such circumstances the insurers have a right to institute suit in the name of the insured without its consent. Id. at 31-32. See also Fire Ass'n of Philadelphia v. Wells, 94 A. 619, 620 (N.J. 1915) (holding that partially subrogated insurer may sue in insured's name even without insured's consent when insured has given release to defendant; insured's release to defendant is no defense to insurer's claim); Hart, 54 Mass. (13 Met.) at 108 (holding same as Wells, 94 A. at 620).

n61 See Bone, supra note 15, at 22 ("The common law's restrictive party and cause of action joinder rules, for example, stood as obstacles to the adjudication of all pieces of a complex dispute in one proceeding when consolidated adjudication was necessary in order to fashion the best remedy.").

n62 United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 371-72 & n.8, 381 (1949) (noting, in particular, Rule 17(a)); see infra part IV.

n63 See infra part VI.A.2. See also Entman, supra note 1, at 905-08, 942-46 (discussing judicial use of ratification in Rule 17(a) analysis); Steven D. Plissey, Note, Compulsory Joinder of Partial Subrogees: Implications of the Alaska Rule, 1 Alaska L. Rev. 171, 177 (1984) ("The amended version of Rule 17 contains a provision for ratification that actually encourages the device of use plaintiffs.").

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n64 See Ind. R. Trial P. 19(e)(3); Me. R. Civ. P. 17(c); Mass. R. Civ. P. 17(a); N.Y. Civ. Prac. L. & R. 1004 (McKinney 1976); Pa. R. Civ. P. 2002(d); R.I. R. Civ. P. 17(a); Tenn. R. Civ. P. 17.01; Vt. R. Civ. P. 17(a); Va. Code Ann. section 38.2-207 (Michie 1994); Catalfano v. Higgins, 188 A.2d 357 (Del. 1962); Holyoke Mut. Ins. Co. v. Concrete Equip., 394 So.2d 193 (Fla. Dist. Ct. App. 1981); Montello Shoe Co. v. Suncook Indus., 26 A.2d 676 (N.H. 1942). Provisions permitting the insurer to control the action but to sue in the name of the insured also appear in some workers' compensation statutes. See, e.g., Ill. Ann. Stat. ch. 820, para. 305/5(b) (Smith-Hurd 1993). Some states permit suit in the name of the insured alone when there has been partial, but not total, subrogation. See, e.g., Scheibel v. Groeteka, 538 N.E.2d 1236, 1253 (Ill. App. Ct. 1989) ("If an insured plaintiff has even a de minimis pecuniary interest in the lawsuit, that interest is sufficient to allow a subrogation action to be maintained in plaintiff's name.") (citation omitted). In addition, other states permit insurers to use loan receipt agreements to avoid suing in their own names while in fact controlling the litigation. See Entman, supra note 1, at 925-31 (discussing the use of loan receipts by insurers to control litigation); E. Michael Johnson, Note, The Real Party Under Rule 17(a): The Loan Receipt and Insurers' Subrogation Revisited, 74 Minn. L. Rev. 1107 (1990); V. Woerner, Annotation, Insurance: Validity and Effect of Loan Receipt or Agreement Between Insured and Insurer for a Loan Repayable to Extent of Insured's Recovery from Another, 13 A.L.R.3d 42 (1967).

n65 See generally Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909, 922 (1987) ("The underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than common law.").

n66 Equity courts permitted assignees and subrogees, even those not entitled to the entire claim, to sue in their own names. Saint Louis Ry. v. Commercial Union Ins. Co., 139 U.S. 223, 235 (1891). This equity practice came to be known as the "real party in interest rule," in contrast to the law courts' essentially fictitious "use" or "name" practice. Atkinson, supra note 44, at 927; Entman, supra note 1, at 899-901. Equity went so far as to find the interest of the assignor or subrogor of a fully assigned claim so nebulous that only the assignee or subrogee could enforce the claim. Clark & Hutchins, supra note 44, at 260.

n67 Clark, supra note 28, section 56, at 348-50 (discussing the limits the common law placed on joinder of parties, as in contract and property damage cases); Bone, supra note 15, at 7 (describing common-law procedure as "rights-centered," assuming that a lawsuit involved only one right or obligation).

n68 Clark, supra note 28, section 56, at 353-57 (discussing compulsory joinder, permissive joinder, nonjoinder and misjoinder in equity); Bone, supra note 15, at 34 (discussing Pomeroy's justification of equity jurisdiction to "render a decree ideally suited to the dispute as a whole").

n69 Hazard, supra note 13, at 1255; Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 359 (1967) (emphasizing, however, that complete joinder was not an absolute rule; courts would proceed with a case if it were impossible or impractical to join an "interested party"); John W. Reed, Compulsory Joiner of Parties in Civil Actions, 55 Mich. L. Rev. 327, 331-32 (1957).

n70 David W. Louisell et al., Cases and Materials on Pleading and Procedure 737 (6th ed. 1989); Charles A. Wright, The Law of Federal Courts section 70 (4th ed. 1983); Bone, supra note 15, at 62-66 (discussing the desire to protect absent parties); Kaplan, supra note 69, at 365 (discussing possibility of prejudice to absent parties as well as the exposure of defendants to "double" liability); Reed, supra note 69, at 330; Note, Indispensable Parties in the Federal Courts, 65 Harv. L. Rev. 1050 (1952).

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n71 Bone, supra note 15, at 63; Hazard, supra note 13, at 1254-55; Kaplan, supra note 69, at 358-59.

n72 Hazard, supra note 13, at 1254-56 (discussing development of indispensable party concept). See generally Bone, supra note 15, at 62-66 (outlining development of equity joinder rules).

The nomenclature used to describe the two classes of parties--those who should be joined but whose joinder can be excused, and those without whom the court cannot proceed--has not been uniform and, consequently, has generated considerable confusion. See Bone, supra note 15, at 62 ("Semantic confusion contributed to the opacity of equity party doctrine."); Reed, supra note 69, at 328-30 (discussing the role of semantics in "diversity of results in factually similar cases"). Sometimes the terms "conditionally necessary" and "contingently necessary" are used. Howard P. Fink, Indispensable Parties and the Proposed Amendment to Federal Rule 19, 74 Yale L.J. 403, 422-25 (1965) (describing the evolution of the terms and their usage); Note, Developments in the Law--Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 879 n.16 (1958) [hereinafter Note, Multiparty Litigation] (stating that "necessary" has been used to refer to both the "indispensable" and the "conditionally necessary" classifications).

n73 Wright, supra note 70, section 70 at 458. See also Jack H. Friedenthal et al., Civil Procedure section 6.5, at 335-36 (1985) (describing the difficulty of the distinction between "indispensable" and "necessary" parties).

n74 58 U.S. (17 How.) 130 (1854).

n75 Id. at 139. There are three classes of parties to a bill in equity:

1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

Id.

n76 The Code of Civil Procedure in New York, passed in 1848, is commonly "referred to as the 'Field Code' for David Dudley Field (1805-94), the renowned New York practitioner who spearheaded the reform effort to abolish[] the existing forms of action and mandate[] that there be 'but one form of action'." Richard L. Marcus et al., Civil Procedure: A Modern Approach 113 (1989). Field was the principal drafter of the First Report of New York Commissioners on Practice and Pleading, from which the 1848 New York Code of Civil Procedure was derived. More than half of the states eventually adopted codes of civil procedure based on the Field Code. Clark, supra note 28, at 22, 24.

n77 First Report of New York Commissioners on Practice and Pleadings section 99 (1848). According to Clark, from this provision, "it is evident that the codes thus adopt the equity rule that all whose interests would be directly affected by the decree are necessary parties, and such is the result of the decisions." Clark, supra note 28, at 358-59. Field Code section 99 provided in full:

Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one, who should have been joined as plaintiff, cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint.

First Report of New York Commissioners on Practice and Pleadings, supra. See Hazard, supra note 13, at 1279 (tracing the use of the term "united in interest" to describe parties whose joinder is required back to Joy v. Wirtz, 13 F. Cas. 1172 (C.C.D. Pa. 1806) (No. 7553)).

As amended in 1849, section 122 (formerly section 102) of the Field Code also provided:

The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court may order them to be brought in.

An Act to Amend the Code of Procedure, 1849 N.Y. Laws 613, 640. In the amended code, the text of former section 99 appears in section 119. Id. at 639.

n78 Rules of Practice for the Courts of Equity of the United States, Rule 37, reprinted in 226 U.S. 627, 659 (1912):

Parties Generally--Intervention. Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when anyone refuses to join, he may for such reason be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.

n79 Rule 19, entitled "Necessary Joinder of Parties," provided:

(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

(b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it, but the judgment rendered therein does not affect the rights or liabilities of absent persons.

Fed. R. Civ. P. 19, reprinted in 39 F.R.D. 69, 87-88 (1966). With regard to the "involuntary plaintiff doctrine," reflected in the second sentence of subsection (a), and also included in the rule as amended in 1966, see infra note 108 and accompanying text.

n80 Professor Wright concludes that the rule was unsatisfactory, "not because it necessarily led to bad results but because it did not point to the factors properly relevant to decision." Wright, supra note 70, section 70, at 459. In a recent article, Professor Bone discusses the decision by the 1938 rules drafters to eschew a pragmatic approach and to include in Rule 19 the "conceptual baggage" of the late 19th century. Bone, supra note 15, at 110.

n81 The syntax of Rule 19 led to additional confusion. See Fed. R. Civ. P. 19 advisory committee's notes (1966) (discussing the textual defects in the original version of Rule 19). Subdivision (a) appeared to define necessary parties as those with joint interests; however, subdivision (b) stated that the court shall summon persons who are not indispensable, but "who ought to be parties if complete relief is to be accorded between those already parties." See supra note 79 (text of 1938 version of Rule 19). The two criteria apparently were derived from separate sections of the Field Code. See supra note 77. The rule thus appeared to give two different criteria of "necessary" and it provided no basis for distinguishing the "necessary" from the "indispensable," placing this distinction in the court's discretion. Wright, supra note 70, section 70, at 459-61 (discussing the judiciary's discretionary application of Rule 19); Kaplan, supra note 69, at 363-64 (evaluating the ambiguous language of the original Rule 19). Professor Bone has concluded that the rules drafters composed a confusing rule because they were confused themselves. Bone, supra note 15, at 113. Even a defender of the rule noted that the rule was not well understood and that it could be construed properly only if its derivations were considered. See Fink, supra note 72, at 410-11 (arguing that Rule 19 has been misunderstood by those who have failed to appreciate how the rule encompasses its derivations). Professor Wright, commenting on the original Rule 19, said, "and so you had to read into it a very heavy gloss of court decisions and of the writings of the commentators to understand when parties fell under the time-honored labels of indispensable, necessary, or proper." Charles A. Wright, Proceedings of the Twenty-Ninth Annual Judicial Conference, Third Judicial Circuit of the United States, 42 F.R.D. 437, 561 (1966).

n82 Reed, supra note 69, at 345-46.

n83 Id. at 346. Kaplan describes this phenomenon as "naive self-delusion in the reliance on disembodied categories." Kaplan, supra note 69, at 359. Professor Chafee, discussing classifications of class action lawsuits, wrote, "I often have as much perplexity in telling a 'common' right from a 'several' right as in deciding whether some ties and dresses are green or blue." Zechariah Chafee, Jr., Some Problems of Equity 257 (1950).

n84 Kaplan, supra note 69, at 362 & n.24 (citing as an example the proposition derived from Shields "that in actions to rescind a transaction or cancel an instrument all original parties are indispensable."). For other slogans, or "rubrics," see, e.g., 2 James W. Moore &

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Joseph Friedman, Moore's Federal Practice section 19.03 (1st ed. 1938); Note, Multiparty Litigation, supra note 72, at 880 (describing the development of the rules as a response to deeper policies, but then acquiring "a force of their own").

n85 Under the Conformity Act that governed procedure in federal courts prior to adoption of the federal rules in 1938, joinder in actions at law was determined by the law of the state in which the federal court sat. In many cases, this meant code pleading. Joinder in suits in equity was governed by the federal equity rules. Wright, supra note 70, at section 61.

n86 See, e.g., National Garment Co. v. New York, C. & St. L. R.R., 173 F.2d 32, 35 (8th Cir. 1949) (finding both insured and insurer real parties in interest even though insured was satisfied with payment from insurer because such payment may not have satisfied all claims with the tortfeasor); State Farm Mut. Liab. Ins. Co. v. United States, 172 F.2d 737, 739 (1st Cir. 1949) (stating that insured, as a partial subrogee, is a necessary party); Simpson v. Hartranft, 283 N.Y.S. 754, 757 (App. Div. 1935) (recognizing insurer as a necessary party and granting plaintiff's request to join insurer as party defendant); Verdier v. Marshallville Equity Co., 46 N.E.2d 636, 638-39 (Ohio Ct. App. 1940) ("[Insurer] was united in interest with the plaintiff in a single and indivisible claim against the defendant" and therefore the trial court erred in refusing "to accord to the defendant the right to have the insurance company made a participating party in the litigation before verdict."); Pratt v. Radford, 8 N.W. 606, 607 (Wis. 1881) (stating that the insured and insurers "have a united interest in the cause of action" and insurers must be joined as plaintiffs with insured); Clark, supra note 28, at 177 & n.89 (citing cases and adding that "many of these cases describe insurer and insured as 'joint owners of the cause of action.'"); 2 Moore & Friedman, supra note 84, section 17.08, at 2057 (stating that partial subrogee retains part of his substantive right as a real party in interest); Annotation, Proper Party Plaintiffs, supra note 58, at 1253-55 (detailing both state and federal cases).

n87 See, e.g., Van Wie v. United States, 77 F. Supp. 22, 33 (N.D. Iowa 1948) (stating that despite partial subrogation, right of action for the entire loss remains with insured). Judge Clark was critical of courts that continued to permit or require suit in the name of the insured alone, attributing the practice to a failure to appreciate the real party in interest rule and the advantages of compulsory joinder. Clark, supra note 28, at 177-79. Suit by the insured alone often was rationalized on the theory that the insured was a trustee for the insurer and that the real party in interest rule, Rule 17(a), authorized the insurer's nonjoinder regardless of the requirements of compulsory joinder. Gray v. United States, 77 F. Supp. 869, 871 (D. Mass. 1948) (entitling insurer to sue for entire loss and holding sum paid to him by the insurer as trustee), rev'd sub nom. State Farm Mut. Liab. Ins. Co. v. United States, 172 F.2d 737 (1st Cir. 1949); see supra note 53 (insured as trustee). A procedural rule that treats an insured as a trustee and an insurer as a beneficiary in all cases, however, is as guilty as the necessary parties slogan of ignoring the substantive law of subrogation, which is not uniform with regard to the relative rights of the insured and insurer. See Entman, supra note 1, at 940-42 (discussing the use of the trustee/beneficiary concept in the misapplication of the real party in interest rule).

n88 For example, the holding in Insurance Co. of N. Am. v. United States, 76 F. Supp. 951, 954 (E.D. Va. 1948), appeared to approve both use practice and joinder simultaneously: "The pleadings should be made to reveal and assert the actual interest of the claimant. The insured and insurer can be compelled to join, and the action brought in the name of the insured for the use of himself and of his insurer . . . to meet the requirements of Rule 17(a)."

n89 338 U.S. 366 (1949).

n90 Id. at 368-69.

n91 28 U.S.C. section 931 (1940) (current version at 28 U.S.C. section 2674 (1988)).

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against its insured for reimbursement, and not a claim directly against the third party, the insurer is not considered to be subrogated. [16]

The rights of a compensating insurer depend upon the applicable law of insurance subrogation, the type of insurance involved, and the terms of the particular insurance contract. [17] In some circumstances, the exclusive right to control any claim against a third party remains in the insured. [18] Although the compensating insurer is entitled to reimbursement from the insured's recovery, the insurer does not have an enforceable claim against the third party. [19] In
[*8] other circumstances, the insurer entitled to reimbursement is further entitled to assert and control the claim against the third party. [20] Finally, the insured and insurer sometimes each have separate claims against the third party. [21] In the latter situation, however, the law of subrogation usually further provides that either joinder of both insured and insurer is required [22] or the filing of suit by
[*9] one precludes enforcement of the claim by the other. [23]

Either state or federal law may govern the insurance relationship and, therefore, determine the insurer's right to reimbursement or subrogation and the consequences to the insured of accepting compensation from its insurer. In some cases, the source of the applicable insurance law may differ from the source of law that governs the underlying claim against the third party. For example, the subrogation rights of one who pays workers' compensation benefits to a longshoreman are governed by the federal Longshore and Harbor Workers' Compensation Act, [24] although the tort claim against the third party may arise under either federal or state law. [25] Similarly, the law of one state may determine the injured party's right to recover against the tortfeasor, while the law of another state may determine whether an insurer is subrogated to the injured party's claim. [26]

The function of Federal Rule of Civil Procedure 17(a), [27] the
[*10] real party in interest rule, is to require that the plaintiff be the person who, under the substantive law, has the right to bring and control the action. [28] When an injured party has been compensated by his insurer, therefore, Rule 17(a) means that the court should require the naming of the party plaintiff to conform to the answer found in the law of subrogation to the question of who has the right to sue. [29]

If Rule 17(a) were properly understood and applied, it alone (or better yet, Rule 12(b)(6) [30] alone) would be sufficient in many cases to resolve the question of whether an insurer must be joined as a plaintiff when its compensated insured brings an action against a third party. [31] If, for example, the applicable subrogation law denies the insured's right to assert the claim that once was his, the insured should not be permitted to proceed as the party plaintiff.

[*11] The insurer that has acquired through subrogation the right to assert the claim, and who is in actual control of the lawsuit that has been brought, is the only proper plaintiff. [32] There is no joinder issue, only a real party in interest, or Rule 12(b)(6), issue.

Unfortunately, Rule 17(a) rarely has been construed in the subrogation context to resolve party plaintiff issues in so straightforward a fashion. Rule 17(a) has been misapplied in a number of ways that have resulted in decisions either to require or not to require joinder of insurers without careful reference to the underlying substantive law. The frequent result is that federal courts fail to enforce the substantive law of subrogation, often the law of a state, that ought to control whether the insured or the insurer is named as the plaintiff. [33] In addition, by concluding erroneously that both the insured and the insurer are entitled to assert a claim against the third party, the federal courts create an unnecessary issue of compulsory joinder. [34]

The problem is only compounded when federal courts apply Rule 19 in response to a defendant's motion to require naming of a compensating insurer as a party plaintiff. [35] Rule 19 requires joinder on the basis of the nonparty's relationship to the claims

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n92 Aetna, 338 U.S. at 368-69.

n93 31 U.S.C. section 203 (1951) (current version at 31 U.S.C. section 3727 (1988)).

n94 In one of the cases, the plaintiff insurance company was the workers' compensation carrier of the injured party's employer. Having paid the injured person's claim under the New York Workmen's Compensation Law, the insurance company's rights were created by the New York law, which provided that if the injured person failed to commence an action within one year after the accident, his inaction operated as an assignment to the insurer of his cause of action. Aetna, 338 U.S. at 368. In the other three cases, the insureds had suffered property damages and the Court's opinion did not discuss what substantive law, if any, gave the insurance companies rights of subrogation. Id. at 369.

n95 Id. at 368.

n96 Id. at 373-80.

n97 Id. at 380.

n98 Id. at 381.

n99 In one of the cases before the Court, the Second Circuit specifically had found that, under the New York workers' compensation statute, the plaintiff insurer, which had paid only partial compensation, was the only real party in interest. The employee's failure to sue within a year operated as an assignment of the claim to the carrier, who then had to share with the employee any recovery in excess of the amount of compensation paid. Aetna, 338 U.S. at 368 n.3.

For a more detailed criticism of the Aetna court's misunderstanding of the real party in interest rule, see Entman, supra note 1, at 913-16.

n100 Even if the court had concluded correctly that the insured was not entitled to sue and was not, therefore, a real party in interest, the joinder issue would not be entirely foreclosed. There was nothing in the text of Rule 19 at the time, or even now, requiring that a party joined under that rule necessarily qualify as a real party in interest. See Farrell Constr. Co. v. Jefferson Parish, La., 896 F.2d 136, 140 (5th Cir. 1990) ("Even if a party is not the real party in interest, Rule 19 requires that party's joinder if it is 'necessary for a just adjudication' of the action."); Burger King Corp. v. American Nat'l Bank & Trust Co., 119 F.R.D. 672, 676 (N.D. Ill. 1988) ("[Rule 19(a)] does not state that the absent party must have an interest in the action; instead, it requires only that he have an interest 'relating to the subject matter of the action'."); Tobias, supra note 15, at 774-76 (discussing how courts should evaluate the absentee's "interest" under Rule 19(a)(2)(i)). But see Kennedy, supra note 28, 679-80 & n.23 (stating that the relationship between Rules 17(a) and 19 "has not been fully developed," but quoting Koepp v. Northwest Freight Lines, 10 F.R.D. 524, 527 (D. Minn. 1950), for the proposition that "Rule 19(a) necessarily assumes that the parties who may be joined under it as plaintiffs are real parties in interest."). On the other hand, determining whether a party qualifies for compulsory joinder under Rule 19 does require accurate understanding of that party's legal relationship to the dispute.

n101 In case no. 36, both insured and insurer had sued to recover their respective interests. In case nos. 35, 37 and 38, the insurers alone had sued to recover the amounts paid to their insureds. Aetna, 338 U.S. at 368-69.

n102 Id. at 371-72, 381.

n103 Id. at 381. The Court's quotation marks around the word "own" signal, at least to this reader, the Court's tentativeness about its own understanding of the substantive rights of the

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parties and the real party in interest doctrine.

n104 Id. at 381-82. The Court also cited Delaware County v. Diebold Safe & Lock Co., 133 U.S. 473, 488 (1890), but noted that this was a case applying a state code under the Conformity Act. Aetna, 388 U.S. at 381-82. The Delaware County case, moreover, involved suit by an assignee of a construction contract, and did not involve subrogation. Delaware County, 133 U.S. at 473.

n105 Aetna, 338 U.S. at 382.

n106 See infra part V.C.

n107 Aetna, 338 U.S. at 382 n.19. The Court's statement brings to mind Gegan's law and its corollary: "Gegan's Law: The tendency for any conclusion to be called clear is in inverse ratio to the reasons available to support it. Corollary: Clarity tends to obscure and absolute clarity obscures absolutely." Bernard E. Gegan, Constructive Trusts: A New Basis for Tracing Equities, 53 St. John's L. Rev. 593, 602 n.34 (1979).

n108 Aetna, 338 U.S. at 382. Insofar as this statement by the Court refers to a lack of personal jurisdiction over the absentee, it assumes that the doctrine of the involuntary plaintiff would not apply to permit joinder of the absentee. The doctrine is expressed in the provision of Rule 19(a) that, "if the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff." Fed. R. Civ. P. 19(a). It is generally agreed that this provision, derived from Independent Wireless Tel. Co. v. Radio Corp. of Am., 269 U.S. 459 (1926), permits involuntary joinder as a plaintiff of a party over whom there otherwise is no personal jurisdiction, and further means that the party so joined will be bound by res judicata. For the most part, the doctrine has been applied only in cases, such as patent claims brought by a licensee, in which the absentee (owner of the patent) has a duty to join in the suit or to permit use of his name. 3A James W. Moore et al., Moore's Federal Practice paragraph 19.06 (2d ed. 1994); Jean F. Rydstrom, Annotation, What Constitutes "Proper Case" Within Meaning of Provision of Rule 19(a) of Federal Rules of Civil Procedure That When Person Who Should Join as Plaintiff Refuses to Do So, He May Be Made Involuntary Plaintiff "In a Proper Case," 20 A.L.R. Fed. 193 (1974).

The involuntary plaintiff doctrine is not often implicated in the issue of compulsory joinder of subrogated insurers because lack of personal jurisdiction over the insurer generally is not a problem. If there is any jurisdictional problem, it is that the insurer's joinder would defeat diversity jurisdiction. If the absentee insurer is subject to personal jurisdiction, therefore, the involuntary plaintiff doctrine does not apply. The correct procedure is to bring the insurer into the lawsuit by service as a defendant and then to realign the insurer to reflect its position as a plaintiff and to ascertain diversity. See 3A Moore, et al., supra note 84, paragraph 19.06, at 19-86 to 19-87 (explaining applicability of "involuntary plaintiff" doctrine); 7 Charles A. Wright et al., Federal Practice and Procedure sections 1605-1606 (2d ed. 1986) (discussing joinder of absentees as defendants and involuntary plaintiffs). In most judicial decisions and, consequently, in this article, however, the procedure is simply referred to as joining the insurer as a party plaintiff. But see Blacks v. Mosley Mach. Co., 57 F.R.D. 503, 505-06 (E.D. Pa. 1972) (stating, incorrectly, that ordering joinder of the compensating insurer was an extension of the involuntary plaintiff doctrine).

n109 58 U.S. (17 How.) 130 (1854).

n110 Aetna, 338 U.S. at 382 n.19 (quoting Shields, 58 U.S. at 139).

n111 Id. at 381-82 (citing "3 Moore, Federal Practice (2d ed.)").

n112 3A Moore, et al., supra note 108, paragraph 17.09 [2.-1]. Although the 1948 edition is continuously updated, the section cited here, [2.-1], begins with the following notation:

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"The discussion in this subhead was approved by the Supreme Court in United States v. Aetna Casualty & Surety Co. . . . discussed in subhead [2.-2], infra." Id. at 17-77 n.1.

n113 Clark, supra note 28, section 24, at 177-79.

n114 3A Moore et al., supra note 108, paragraph 17.09 [2.-1], at 17-78 to 17-79.

n115 Moore's treatise states:

If the insurer satisfies his liability to the insured, but the insured sues and recovers his entire original loss, the recovery is impressed with a trust for the insurer up to the amount to which he was entitled by principles of subrogation. The insurer, therefore, owned that portion of the substantive right, and the insured owned the remainder. There are two real parties in interest and either or both may sue, although as in the case of partial assignments, if the defendant makes a timely objection, the joinder of insurer and insured should be compelled.

Id.

n116 Professor Bone refers to Professor Moore's treatment of compulsory joinder as "unusually superficial." Bone, supra note 15, at 112. Bone states that "the bulk of Moore's discussion of Rule 19 in his 1938 treatise consists of a lengthy summary of existing precedent defining necessary and indispensable parties in different types of cases without any clear account of the purpose the Rule was supposed to serve." Id. at 111.

Professor Moore's treatise now includes in the section on Rule 19 a discussion of the overlap between Rules 17(a) and 19, in which the writer suggests that the matter is best treated under Rule 19 and that, applying the criteria of Rule 19(a), joinder of the insurer should not be required. 3A Moore et al., supra note 108, paragraph 19.07--1 [2.-2], at 19-113 to 19-116. As this discussion is based upon the requirements of Rule 19 as amended in 1966, however, it would not have been part of the 1948 treatise. Moreover, Moore's comments favoring joinder continue to appear in his chapter on Rule 17(a) and to be cited for that approach, without reference to his discussion to the contrary in the section on Rule 19. See Truckweld Equip. Co. v. Swenson Trucking & Excavating, Inc., 649 P.2d 234, 237 (Alaska 1982) (citing Moore's treatise discussion on Rule 17(a) favoring joinder).

n117 See infra parts IV.B.2, V.B.

n118 Entman, supra note 1, at 916-31.

n119 183 F.2d 417 (10th Cir. 1950).

n120 Id. at 419.

n121 Id.

n122 Id.

n123 152 P.2d 836 (Kan. 1944).

n124 Id. at 842. The second sentence describes the actual holding in Tice. The insurer had brought suit in its own name after the insured settled with the tortfeasor for her $ 50 deductible and indicated her reluctance to participate in the action. Id. at 837-38.

n125 Id. at 840.

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n126 Gas Serv. Co. v. Hunt, 183 F.2d 417, 419 (10th Cir. 1950).

n127 In fairness, the Tenth Circuit may have been misled by the Tice court's statement that both insured and insurer were real parties in interest, 152 P.2d at 842, a statement that is incorrect with regard to an insurer who is not entitled to sue. On the other hand, the Hunt case may illustrate how federal circuit courts of appeals are less capable of appreciating and applying state law than are the federal district judges in those states. But see Salve Regina College v. Russell, 499 U.S. 225, 238 (1991) (rejecting argument that "a district judge is better positioned to determine an issue of state law than are the judges on the court of appeals").

n128 23 F.R.D. 148 (D. Kan. 1959).

n129 Id. at 149.

n130 Id. at 150-51.

n131 See Entman, supra note 1, at 918-19 (discussing other federal decisions correctly construing workers' compensation acts that did not give insurers subrogation rights). A number of other federal decisions, however, have concluded erroneously that insurers were subrogated when the workers' compensation statutes gave the insurer a pecuniary interest in the employee's recovery, but not a claim against the third party. See, e.g., Wright v. Schebler Co., 37 F.R.D. 319, 321 (S.D. Iowa 1965) (stating that workers' compensation insurer was a real party in interest because, under the applicable Illinois compensation act, the insurer was a statutory lienholder); Entman, supra note 1, at 916-18 (discussing Wright and other similar cases). Federal courts have also misunderstood applicable substantive law and found that insureds were real parties in interest even though the insurer had the exclusive right to assert any claim against the third party. See id. at 919-22 (discussing cases in which substantive law was misapplied).

n132 See Entman, supra note 1, at 923-25 (discussing the difficulty of distinguishing between substantive and procedural state law and the difficulty of finding state law addressing insurers' right to sue).

n133 Both sides of the coin are illustrated in Cook v. Stuples, 74 F.R.D. 370 (W.D. Okla. 1976), in which the court correctly analyzed the substantive subrogation rights of the United States for medical expense compensation under a federal statute. Id. at 371-72. With regard to the plaintiff's partially compensated property damage, however, the court engaged in no such analysis. The court simply stated that the insurer "by virtue of its payment . . . possesses substantive rights in this litigation . . . in accordance with Gas Service Co. v. Hunt." Id. at 372.

Courts sometimes pay lip service to the role of the substantive law, but then reveal that they do not really understand the concept. In Brocklesby Transp. v. Eastern States Escort Serv., 904 F.2d 131, 133 (2d Cir. 1990), the court stated that "federal law governs the issue of in whose name a lawsuit must be brought, even though state law controls the underlying substantive right of an insured to recovery." Then, however, with no inquiry into the state law of subrogation, the court stated that "under federal law . . . if the insured is only partially compensated by the insurer, both the insurer and the insured are real parties-in-interest." Id. (citing United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 380-82 (1949) and 3A James W. Moore et al., Moore's Federal Practice, paragraph 17.09 [2.-04] (2d ed. 1989)).

n134 183 F.2d 417 (10th Cir. 1950).

n135 See supra text accompanying notes 119-27.

n136 Hunt, 183 F.2d at 419-20. Also requiring joinder of purported insurer-subrogees on

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the basis of Aetna: Maryland v. Baltimore Transit Co., 37 F.R.D. 34, 36 (D. Md. 1965); Brown v. Fisher Skylights, Inc., 31 F.R.D. 532, 532-33 (E.D.N.Y. 1962); Poleski v. Moore-McCormack Lines, 21 F.R.D. 579, 581 (D. Md. 1958) (citing Aetna, 338 U.S. at 381, for the proposition that the insurer "is a necessary party, and may be brought in on motion of the defendant"); Carlson v. Consumers Power Co., 164 F. Supp. 692, 695 (W.D. Mich. 1957) (Stewart, Potter, Cir. J.) (noting that Aetna was not "controlling on the facts," but finding it to be "strong support" for compulsory joinder). See also Continental Bus Sys., Inc. v. Rohwer, 172 F. Supp. 487, 490 (D. Colo. 1959) (following Hunt, 183 F.2d 417, and further holding that although the share of the partial subrogee insurer in the total claim was less than the jurisdictional amount, joinder did not defeat jurisdiction because the plaintiffs are enforcing "a single title or right, in which they have a common and undivided interest") (citation omitted); Kennedy, supra note 28, at 693-94 (discussing other cases construing Aetna to require joinder of the insurer). For later decisions requiring joinder on the basis of Aetna, even after the 1966 amendment of Rule 19, see infra part V.B.

n137 37 F.R.D. 319 (S.D. Iowa 1965).

n138 The insurer in Wright was a workers' compensation carrier that had a lien interest in the employee's recovery, but no right to assert a claim against the third party. See supra note 131.

n139 For the full text of Rule 19 as it read at the time of Wright, see supra note 79.

n140 Wright, 37 F.R.D. at 322.

n141 Id.

n142 See supra note 79 (text of Rule 19(b)).

n143 Wright, 37 F.R.D. at 322. See infra part V.C for a discussion of this same criteria in Rule 19(a) as amended in 1966.

n144 Wright, 37 F.R.D. at 322.

n145 Id. The Wright court also distinguished Aetna on the ground that the defendants in Aetna were faced with the "possibility of multiple suits or 'split causes of action.'" Id. See also Braniff Airways v. Falkingham, 20 F.R.D. 141, 144 (D. Minn. 1957) (also distinguishing Aetna on the grounds that there is no risk of multiple litigation when the insured sues to recover the entire claim), cited by Wright, 37 F.R.D. at 322.

n146 See Pyle v. Kansas Gas & Elec. Co., 23 F.R.D. 148, 150-51 (D. Kan. 1959) (reading the language of the Kansas workmen's compensation statute to expressly preclude insurer from bringing suit once the insured had initiated suit against tortfeasor).

n147 Fed. R. Civ. P. 19 advisory committee's note (1966).

n148 Id. Old terminology and its confusion refuses to die, however. See, e.g., Glacier Gen. Assurance Co. v. G. Gordon Symons Co., 631 F.2d 131, 134 (9th Cir. 1980) (after quoting amended Rule 19(a), the court held "that the reinsurers are not necessary parties under this standard"); Landon v. Lief Hoegh & Co., 521 F.2d 756, 761 (2d Cir. 1975) (referring to "an indispensable party under Rule 19(a)" and "a necessary party under 19(b)"), cert. denied, 96 S. Ct. 783 (1976).

n149 Fed. R. Civ. P. 19, reprinted in 39 F.R.D. 88-89 (1966) (parts 19(c) & (d) omitted). In 1987, the rule was amended for the purpose of "gender-neutralization." The words deleted in 1987 are underlined and the words added are in brackets. See Fed. R. Civ. P. 19.

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n150 390 U.S. 102 (1968).

n151 Id. at 106.

n152 Id.

n153 Id. at 106-07.

n154 Id. at 107. The Court also rejected the court of appeals' conclusion that "the 19th century joinder cases in this Court created a federal, common-law, substantive right in a certain class of persons to be joined in the corresponding lawsuits." Id. at 119. Rather, the Court explained, joinder was a federal procedural question, although state law questions might arise in determining what interest the outsider actually had. Id. at 116-25, 119 n.22.

n155 Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 109 (1968).

n156 Id. at 102.

n157 See supra part IV.A.

n158 See generally Rydstrom, supra note 2. Professor Bone observes that amended Rule 19, like its predecessor, is not a rule requiring broad joinder of parties and is largely redundant of impleader, interpleader, and intervention. He explains that while the original rules drafters generally favored broad permissive joinder for purposes of trial convenience, they took a very narrow approach to compulsory joinder, giving the plaintiff wide latitude in structuring his lawsuit. He concludes that, "the historic function of compulsory joinder has been lost to modern procedural law and with it much of the sense of Rule 19." Bone, supra note 15, at 108-14.

n159 467 F.2d 1143 (10th Cir. 1972).

n160 183 F.2d 417 (10th Cir. 1950) (discussed supra text accompanying notes 119-27, 134-36).

n161 Public Serv. Co., 467 F.2d at 1143.

n162 Id. at 1144.

n163 Public Serv. Co. v. Crane Co., 48 F.R.D. 424, 425 (N.D. Okla. 1969).

n164 Public Serv. Co., 467 F.2d at 1144.

n165 Public Serv. Co. v. Crane Co., 48 F.R.D. at 425.

n166 See Cleaves v. DeLauder, 302 F. Supp. 36, 37-38 (N.D. W. Va. 1969) (finding that under West Virginia law insurer has no right to sue third party and, therefore, joinder of insurer not required by Rule 19). See also Farrell Constr. Co. v. Jefferson Parish, 896 F.2d 136, 141-43 (5th Cir. 1990) (holding that subcontractor, who had no right to sue owner under Louisiana law, was not a person whose joinder was required by Rule 19 in contractor's suit against owner).

n167 Public Serv. Co., at 467 F.2d at 1144. The Tenth Circuit quoted a passage from 6 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure section 1546, at 659-60 (1971), which stated in part that "the insurer who pays a part of the loss is only partially subrogated to the rights of the insured . . . . Either the insured or the insurer may sue in his own name." 467 F.2d at 1145. The passage, currently found at 6A Wright et al., supra note 28, section 1546, at 360, certainly gives the unfortunate impression that the rights of the

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insured and insurer to sue in a case of partial compensation are procedural issues that do not require reference to the substantive law.

n168 See Landon v. Lief Hoegh & Co., 521 F.2d 756, 761 (2d Cir. 1975) (compensating employer under Longshore and Harbor Workers' Compensation Act is not a party whose joinder is required by Rule 19 because the employer has no claim until the plaintiff has recovered against the ship), cert. denied, 96 S. Ct. 783 (1976).

n169 Public Serv. Co. v. Black & Veatch, 467 F.2d 1143, 1144-45 (10th Cir. 1972).

n170 Also relying upon Aetna without reference to the 1966 amendment of Rule 19: Wright v. Albuquerque Auto-Truck Stop Plaza, 591 F.2d 585, 586-87 (10th Cir. 1979) (ordering insurer's joinder on the basis of Public Service Co. and Aetna); Wadsworth v. United States Postal Serv., 511 F.2d 64, 66-67 (7th Cir. 1975) (stating, erroneously, that the holding in Aetna was that a partially subrogated insurer should be joined); City Stores Co. v. Lerner Shops, 410 F.2d 1010, 1012 (D.C. Cir. 1969); Wattles v. Sears, Roebuck & Co., 82 F.R.D. 446, 448-49 (D. Neb. 1979); Cook v. Stuples, 74 F.R.D. 370 (W.D. Okla. 1976) (discussed supra note 133); Chaplin v. Bruce, 57 F.R.D. 487, 488 (W.D. Okla. 1972) (relying on Hunt); Ward v. Franklin Equip. Co., 50 F.R.D. 93, 94-95 (E.D. Va. 1970); Neal v. Trim Master Corp., 48 F.R.D. 390, 394 (N.D. Miss. 1969); Cross v. Harrington, 294 F. Supp. 1340, 1341-42 (N.D. Miss. 1969). For pre-1966 cases that relied upon Aetna in requiring joinder of insurers, see supra note 136.

n171 Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968) (discussed supra text accompanying notes 150-53).

n172 485 F.2d 78 (4th Cir. 1973), cert. denied, 415 U.S. 935 (1974).

n173 Id. at 81.

n174 Id.

n175 Id. at 83-84.

n176 Id. at 82 nn.1-2. For criticism of the interpretation and application of Rule 17(a) in Virginia Electric, see Entman, supra note 1, at 920-22, 931-32, 947-48.

n177 Virginia Elec., 485 F.2d at 82, 86.

n178 Id. at 85.

n179 See supra note 170.

n180 See Virginia Elec., 485 F.2d at 86 (discussing why insurer's presence as party was not necessary).

n181 See, e.g., Travelers Ins. Co. v. Riggs, 671 F.2d 810, 813 (4th Cir. 1982) (relying upon Virginia Electric in requiring insurer's joinder); Lightner v. Duke Power Co., 719 F. Supp. 1310, 1317 (E.D. Va. 1989) (following Virginia Electric and ordering joinder of workers' compensation insurer with no discussion of insurer's rights under substantive law); Edwards, Inc. v. Arlen Realty & Dev. Corp., 466 F. Supp. 505, 514 (D.S.C. 1978) (reluctantly following Virginia Electric and ordering joinder).

See also Jefferson v. Ametek, Inc., 86 F.R.D. 425, 429-30 (D. Md. 1980), in which the court followed Virginia Electric and stated that "the question remains whether it [the insurer] must be joined as a named plaintiff because it is an indispensable party." This statement is nonsense, of course, because by definition an indispensable party may never be joined. The

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statement illustrates, however, the confusion caused by failing to carefully separate the issues resolved under each of the subdivisions of Rule 19.

n182 See, e.g., Gonzalez v. Cruz, 926 F.2d 1, 5-7 (1st Cir. 1991) (analyzing dismissal under subdivision (b) and altogether ignoring subdivision (a)); Dayton Indep. Sch. Dist. v. U.S. Mineral Prod., 906 F.2d 1059, 1067-68 (5th Cir. 1990) (using subdivision (b) analysis without considering subdivision (a)); Schutten v. Shell Oil Co., 421 F.2d 869, 874 (5th Cir. 1970) ("Under subdivision (a) the Levee Board is clearly a party 'to be joined if feasible.'"). This trend may have begun with Provident Tradesmens. Stating that "we may assume, at the outset, that Dutcher falls within the category of persons who, under section (a), should be 'joined if feasible,'" the Court gave a very cursory, three-sentence analysis in support of this assumption before proceeding to its much more thorough subdivision (b) analysis. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 108 (1968).

n183 See, e.g., Field v. Volkswagenwerk AG, 626 F.2d 293, 300 (3d Cir. 1980). In Volkswagonwerk AG, the court stated:

Rule 19(b) itself is applicable only if a person who should be joined under the provisions of Rule 19(a) cannot be made a party for some reason. 'By proceeding in this orderly fashion the court will be able to avoid grappling with the difficult question of indispensability whenever it initially decides that the absentee's interest is not sufficient to warrant compelling his joinder.'

(quoting 7 Wright et al., supra note 108, section 1604, at 39-40). See also Bates v. Cekada, 130 F.R.D. 52, 57 (E.D. Va. 1990) ("Rule 19 requires the Court to make a two-part inquiry. The first part of the inquiry is governed by Rule 19(a) . . . . "); Burger King Corp. v. American Nat'l Bank & Trust Co., 119 F.R.D. 672, 676 (N.D. Ill. 1988) (criticizing courts for avoiding the Rule 19(a)(2) problem by "assuming arguendo that the absent person is necessary and moving directly to the 'indispensability' test. "); Edwards, 466 F. Supp. at 512 (criticizing Virginia Electric for "bypassing the analysis provided for in Rule 19(a)"). See generally Tobias, supra note 15, at 773-74 (explaining the relationship between subdivision (a) analysis and subdivision (b) analysis).

n184 Fed. R. Civ. P. 19(b).

n185 Id. See Sindia Expedition, Inc. v. Wrecked & Abandoned Vessel, 895 F.2d 116, 121 (3d Cir. 1990) ("If a district court failed to make an explicit 19(a) determination but dismissed an action on 19(b) grounds, the appellate court must independently analyze whether an absent party was required to be joined under 19(a)."). Especially in light of a judicial tendency to readily dismiss under subdivision (b) whenever an alternative forum is available, see infra note 205, a mere assumption that an absentee is a person whose joinder is required under subdivision (a) would lead to unjustified loss of a federal forum for many plaintiffs.

n186 Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 86 (4th Cir. 1973), cert. denied, 415 U.S. 935 (1974).

n187 Id.

n188 See supra text accompanying note 178.

n189 Compare Virginia Elec., 485 F.2d 78 with State Sec. Ins. Co. v. Frank B. Hall & Co., 109 F.R.D. 99, 101 (N.D. Ill. 1986) (finding that Illinois law did not permit the partially compensated insured to sue for the entire claim and, therefore, dismissing suit because of insurer's non-diverse citizenship).

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n190 See infra part VI.B. Cf. Potomac Elec. Power Co. v. Babcock & Wilcox Co., 54 F.R.D. 486, 492 (D. Md. 1972) ("If indispensability is a benefit which can be waived by a party for the purpose of securing diversity jurisdiction, federal courts would lose control over their jurisdictional boundaries.").

n191 See infra part VI.B.

n192 See also Garcia v. Hall, 624 F.2d 150, 152 (10th Cir. 1980) (holding that suit may proceed in the name of the insured alone where the partially subrogated insurer is non-diverse and "has instituted this suit in the name of the insured for the entire loss and will be bound by the judgment").

n193 54 F.R.D. 486 (D. Md. 1972).

n194 Id. at 487. The plaintiff insured had originally brought the suit in its own name "to its own use and to the use of" its two compensating insurers. Upon the defendants' motion to dismiss for lack of diversity jurisdiction between the defendants and the insurers, the plaintiff moved to drop the nondiverse "use plaintiffs." The defendants opposed the motion on the grounds that the insurers were indispensable under Rule 19. Id.

n195 Id. at 489.

n196 See Entman, supra note 1, at 925-31 (discussing loan receipt agreements).

n197 Potomac Elec., 54 F.R.D. at 489.

n198 Id.

n199 Id. at 492 n.8.

n200 See infra part VII.

n201 United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 382 n.19 (1949).

n202 Potomac Elec., 54 F.R.D. at 493. A number of other courts have declined to rely upon Aetna for the same reasons. See, e.g., Dudley v. Smith, 504 F.2d 979, 983 (5th Cir. 1974) (distinguishing Aetna on the facts); Kint v. Terrain King Corp., 79 F.R.D. 10, 11 n.3 (M.D. Pa. 1977) (stating that "detailed step-by-step analysis is necessary notwithstanding the dicta in . . . Aetna . . . where . . . the Court stated that partially subrogated insurers are necessary parties under Rule 19").

n203 Potomac Elec., 54 F.R.D. at 490.

n204 Id.

n205 Id. at 491. The court explained that the subdivision (b) factor that it considered most determinative was that an alternative forum--a state court--was available in which all parties could be joined. Id. The court also noted its concern with the possibility that the nonjoined insurers would be entitled to relitigate the case, or at least to force the defendants to prove in another court that principles of res judicata or collateral estoppel would bar such relitigation. Nonetheless, the court stated that if no alternative forum were available, it would have no hesitation in concluding that the suit should proceed without the insurers. Id. at 492. See also Reliance Ins. Co. v. Wisconsin Natural Gas Co., 60 F.R.D. 429, 431 (E.D. Wis. 1973) (holding that the insured was an indispensable party under Rule 19(b)); Freer, Rethinking Compulsory Joinder, supra note 15, at 1077-78 (noting that federal courts have elevated the alternative forum question to primary importance in Rule 19(b) analysis).

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n206 Fed. R. Civ. P. 19 advisory committee's note to 1966 amendment.

n207 Fed. R. Civ. P. 20 provides in pertinent part:

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

n208 Potomac Elec. Power Co. v. Babcock & Wilcox Co., 54 F.R.D. 486, 490 (D. Md. 1972). See also Blacks v. Mosley Mach. Co., 57 F.R.D. 503, 506 (E.D. Pa. 1972) (ordering an insurance carrier with a workers' compensation lien joined as a plaintiff under Rule 19(a), even though the insurer did not institute the proceedings or control the litigation, because "its interests are the same as plaintiff's"). Two years later, the author of the Blacks opinion, Judge Newcomer, held that joinder of a subrogated insurer was not required by Rule 19, in part because any judgment in the insured's action would be binding on the insurer because of the insurer's control of the action. White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1207 (E.D. Pa. 1974), aff'd mem., 578 F.2d 1377 (3d Cir. 1978) and aff'd mem. sub nom. Quaglia v. Profexray Div. of Litton Indus., 578 F.2d 1375 (3d Cir. 1978). Judge Newcomer got it exactly backwards. The insurer in Blacks should not have been joined because it had no right to sue, while the insurer in White Hall should have been the sole plaintiff.

n209 Temple v. Synthes Corp., 498 U.S. 5, 7 (1990).

n210 The Advisory Committee's Note to 1966 amendment reads:

The description [of persons to be joined if feasible under rule 19(a)] is not at variance with the settled authorities holding that a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability . . . . Joinder of these tortfeasors continues to be regulated by Rule 20; compare Rule 14 on third-party practice.

n211 See, e.g., Whyham v. Piper Aircraft Corp., 96 F.R.D. 557, 560 (M.D. Pa. 1982) (finding that joint tortfeasors were "necessary" parties because all three criteria of subdivision (a) were satisfied and stating that "the goal of Rule 19(a)(1) is to protect the interests of the parties by affording complete adjudication of the dispute"); see also Wisconisco Creek Watershed v. Kocher Coal Co., 641 F. Supp. 712, 715-16 (M.D. Pa. 1986) (following Whyham).

n212 498 U.S. 5 (1990).

n213 Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).

n214 Temple, 498 U.S. at 7-8.

n215 Id. at 8.

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[*12] asserted in the lawsuit. [36] If the court fails to determine correctly the nonparty insurer's rights with regard to the insured's claim, its application of Rule 19's criteria may yield a result that is inconsistent with the substantive law. [37]

The practice of ignoring substantive law in designating the proper plaintiff to a claim did not originate, however, with the Federal Rules of Civil Procedure. Even prior to the enactment of the federal rules, federal courts encountered considerable difficulty in determining the proper party plaintiff in a suit to enforce a claim that had been compensated by insurance. The decision has been a difficult one to make because it implicates a number of important substantive and procedural policies. [38]

III. Compulsory Joinder of Compensating Insurers: Pre-Aetna

Prior to the 1949 United States Supreme Court decision in United States v. Aetna Casualty & Surety Co., [39] federal and state courts followed one of two different doctrines for identifying the proper party plaintiff in a case involving insurance subrogation. One approach, which originated in the law courts prior to merger and adoption of the real party in interest rule, was "use practice," under which the suit would be brought in the name of the insured alone "for the use" of the insurer to the extent of its subrogation interest. [40] The other approach was to apply the compulsory joinder doctrines of "necessary" and "indispensable" parties, which had originated in courts of equity. [41]

A. Use Practice and the Rule That Only the Insured May Sue

Common-law courts initially were hostile to assignments and considered choses in action to be unassignable. [42] Nor were they receptive to subrogation, which was a creation of equity [43] some **[*13]** times described as an equitable assignment. [44] In the nineteenth century, however, the law courts began to recognize the right of an assignee or subrogee to reimbursement, at least when the assignee or subrogee had acquired the entire claim. [45] Law courts accepted the substance of subrogation to the extent of refusing to permit a defendant to defeat an insured's claim on the grounds that the insured, having been compensated by insurance, had suffered no loss. [46]

The law courts were never fully comfortable, however, with the idea that a subrogee, having only an equitable interest, could directly enforce its claim against a third party. [47] Many courts also expressed the view that the insured's cause of action was "indivisible" [48] and that permitting a subrogee to prosecute its claim would
[*14] result in multiple lawsuits when there was more than one subrogee or when subrogation was partial. [49] An assignee or subrogee, therefore, was allowed to sue only in the name of the assignor or subrogor. [50]

Use practice was a typical common-law fiction. [51] When the claim was fully subrogated, the subrogee controlled the suit and was liable for costs. [52] Many decisions described the insured-subrogor as a trustee, [53] an analogy that perhaps helped to explain how the equitable right of subrogation could be enforced in a law court. [54] But it was an odd trusteeship indeed when, in a case of full subrogation, the insured-trustee was only a nominal plaintiff
[*15] and the insurer-beneficiary had actual control of the action. [55]

Eventually, common-law courts adopted use practice to allow actions to be brought in the name of the insured in cases of partial, as well as complete, subrogation. [56] Use practice, or at least a simple rule that suits must be in the name of the insured alone, continued to be followed in many code states with merged systems of law and equity, [57] and in a number of federal courts following

n216 Id.

n217 See, e.g., Field v. Volkswagenwerk AG, 626 F.2d 293, 298 (3d Cir. 1980) (pointing out that Rule 19(a) does not protect defendant from having to pursue independent indemnity claim); Bedel v. Thompson, 103 F.R.D. 78, 80-81 (S.D. Ohio 1984) ("The 'complete relief' provision of Rule 19 relates to those persons already parties and does not concern any subsequent relief via contribution or indemnification for which the absent party might later be responsible.").

n218 626 F.2d 293 (3d Cir. 1980).

n219 Id. at 295.

n220 Id. at 296.

n221 Id. at 297-98.

n222 Id. at 302. In contrast to some courts' backwards approach to subdivisions (a) and (b) of Rule 19, see supra notes 181-85 and accompanying text, the court in Field noted the importance of analyzing subdivision (a) first. Field, 626 F.2d at 300.

Discussing the argument that Ivana's negligence rendered her a joint tortfeasor who must be joined as a defendant, the court noted that VWAG would suffer no prejudice from the dismissal of Ivana as a party. If VWAG wished to assert a right of contribution or indemnity against Ivana, it would be able to do so by bringing a third-party claim against Ivana pursuant to Fed. R. Civ. P. 14. Id. at 298.

n223 Field, 626 F.2d at 301. The court also quoted Moore's Federal Practice for the proposition that "mere theoretical considerations of disposing of the whole controversy should not be employed to dismiss an action where it appears unlikely that absent persons could be adversely affected." Id. (quoting 3A Moore et al., supra note 108, paragraph 19.071[1], at 19-93 to 19-97). See also Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of New York, 762 F.2d 205 (2d Cir. 1985), in which the subrogated insurers alone brought suit and the defendant moved to dismiss on the ground that the non-diverse insured, which retained a $ 100,000 deductible interest, was an indispensable party. The Second Circuit affirmed the district court's denial of the motion, explaining that Rule 19(a)(1) refers only to complete relief among those already parties. Citing Aetna, the court further noted: "The fact that the defendants may be required to defend more than one action arising from the same tort is not grounds for finding the insured an indispensable party to its insurer's partial subrogation action." Id. at 209.

n224 It may seem curious that the rules drafters created a rule with so unambitious a reach. Professor Bone suggests that the rules drafters have never had a clear idea of what "complete relief" means. Bone, supra note 15, at 112. Professor Bone further noted, however, that modern concern with efficiency may "breathe new life" into subdivision (a)(1). Id. at 77 n.249. Cases such as Potomac Electric would seem to prove his point. Professor Freer at one time suggested elimination of subdivision (a)(1), reasoning that, "because most courts do interpret Rule 19(a)(1) correctly, very few invoke it . . . . Thus, Rule 19(a)(1) has had minimal impact on the compulsory joinder doctrine." Freer, Rethinking Compulsory Joinder, supra note 15, at 1081-82. Later, however, Professor Freer proposed that subdivision (a)(1) be "redrafted and invigorated to allow the court to consider whether failing to join the absentee creates a manifest risk of multiplicity." Freer, Avoiding Duplicative Litigation, supra note 15, at 844.

n225 See infra part VII.

n226 See infra part VI.A.

n227 Fed. R. Civ. P. 19(a)(2)(ii).

n228 94 F.R.D. 53 (N.D. Ga. 1982).

n229 Id. at 55-57. This inquiry was particularly complicated in Childers by the fact that the insurer had made part of its payments to the insured through a loan receipt agreement. With regard to loan receipts and subrogation, see Entman, supra note 1, at 925-31.

n230 94 F.R.D. at 57 (citing Lindsey v. Samoluk, 219 S.E.2d 464, 464 (1975), rev'd on other grounds, 223 S.E.2d 147 (1976)).

n231 Id.

n232 Id. See infra part VI.A.1.

n233 Childers, 94 F.R.D. at 58. See also Reliance Ins. Co. v. Wisconsin Natural Gas Corp., 60 F.R.D. 429, 431 (E.D. Wis. 1973) (holding the insured indispensable in a suit by the subrogated insurer, the court stated without explanation that the defendant "may be subject to inconsistent obligations").

n234 The Childers court's use of this term may be attributable to the Advisory Committee's statement that, "new subdivision (a) defines the persons whose joinder in the action is desirable." Fed. R. Civ. P. 19 advisory committee's note to the 1966 amendment.

n235 96 F.R.D. 557 (M.D. Pa. 1982).

n236 Id. at 561.

n237 Id. See also Wisconisco Creek Watershed v. Kocher Coal Co., 641 F. Supp. 712, 715-16 (M.D. Pa. 1986) (following Whyham).

n238 103 F.R.D. 78 (S.D. Ohio 1984).

n239 Id. at 81 (citing 3A Moore et al., supra note 108, paragraph 19.07-1[2-2]). See also Boone v. General Motors Acceptance Corp., 682 F.2d 552, 554 (5th Cir. 1982) (holding that the threat of inconsistent obligations, not the possibility of multiple litigation, determines Rule 19 considerations); Field v. Volkswagenwerk AG, 626 F.2d 293, 298 (3d Cir. 1980) (holding that failure to join all possible defendants does not necessarily lead to inconsistent results, although it may lead to subsequent litigation). For situations that present an actual threat of inconsistent obligations, not merely inconsistent results, see Shimkus v. Gersten Co., 816 F.2d 1318 (9th Cir. 1987) (holding in housing discrimination suit by class of black persons against property management business that non-black minorities must be joined as plaintiffs because obligations to give preferential treatment will at some point become inconsistent); Helzberg's Diamond Shops v. Valley W. Des Moines Shopping Ctr., 564 F.2d 816 (8th Cir. 1977) (finding absentee a party to be joined if feasible because of risk of subjecting defendant to inconsistent contractual obligations, but concluding that the absentee was not indispensable); Freer, Rethinking Compulsory Joinder, supra note 15, at 1090-96 (discussing protecting the defendant in compulsory joinder cases).

n240 Childers v. Eastern Foam Prod., 94 F.R.D. 53, 57 (N.D. Ga. 1982).

n241 This is not to say that avoidance of multiple litigation is not at all a concern of Rule 19. The societal interest in the efficient administration of justice has been, from the beginning, a concern underlying the development of rules of compulsory joinder. See supra part III.B. Rule 19(a), however, is not broad enough to incorporate that interest as a reason

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for requiring joinder, except with regard to subsequent litigation between those already parties. See Bone, supra note 15, at 110-14 (stating that compulsory joinder does not reach as far as permissive joinder because the 1938 rules drafters did not believe that concerns for efficiency ought to limit the autonomy of the litigants); supra text accompanying note 206.

On the other hand, the Supreme Court has found that avoidance of multiple litigation is to be taken into account in determining, under Rule 19(b), whether the suit should be dismissed or allowed to proceed without the absentee who cannot be joined. In Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111 (1968), the Court stated:

Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. We read the Rule's [19(b)'s] third criterion, whether the judgment issued in the absence of the nonjoined person will be 'adequate,' to refer to this public stake in settling disputes by wholes, whenever possible . . . .

See Temple v. Synthes Corp., 498 U.S. 5, 7-8 (1990) (noting that Provident Tradesmens' discussion of the public interest in limiting multiple litigation is in the context of subdivision (b), not subdivision (a)); Tobias, supra note 15, at 777.

n242 See supra note 230 and accompanying text.

n243 566 F. Supp. 1119 (S.D. W. Va. 1983).

n244 Id. at 1124.

n245 See supra part II.

n246 The defendant is also protected from multiple obligations in the event of a settlement with the insured because the substantive law of subrogation generally provides that an insured's release of a tortfeasor bars the insurer from asserting its subrogation claim, unless the tortfeasor had knowledge of the insurer's interest. The insurer's remedy for a release that impairs its subrogation interest is against the insured, not against the defendant who accepted the release in good faith. See Entman, supra note 1, at 909 n.102.

These protections also explain why reference to subdivision (a)(2)(i) is largely absent from judicial decisions about joinder of compensating insurers. Subdivision (a)(2)(i) is designed to protect the absentee when disposition of the action without him may impair his ability to protect his interest. See generally Tobias, supra note 15. When suit is brought by the insured, however, the absentee insurer is protected by its agreement with its insured. The insurer, moreover, may be in actual control of the litigation, and generally is resisting the joinder.

n247 O'Brien, 566 F. Supp. at 1124.

n248 Id.

n249 See Dudley v. Smith, 504 F.2d 979, 983 (5th Cir. 1974) ("Any multiplicity of suit risk can be obviated by final judgment of the district court at the request of appellant."); Clark v. Hutchison, 161 F. Supp. 35, 39 (D.C.Z. 1957) (denying compulsory joinder of insurers, but responding to the defendant's concern about further litigation should the plaintiff fail to reimburse the subrogees, the court stated that it would "entertain a motion to make them parties for the purpose of precluding double recovery and directing that they receive their proportionate share of the judgment rendered"); Braniff Airways v. Falkingham, 20 F.R.D. 141, 144-45 (D. Minn. 1957) (stating that insured's "recovery may be impressed with a trust in favor of the party claiming the right to subrogation").

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Occasionally an insurer that is not entitled to assert a claim directly against the defendant will seek to intervene for the limited purpose of protecting its lien or interest in the plaintiff's judgment. In Strate v. Niagara Mach. & Tool Works, 160 F. Supp. 296 (S.D. Ind. 1958), the federal court granted a workers' compensation insurer's motion for limited intervention, enforcing an Indiana statute granting the insurer a right to intervene to protect its statutory lien. A federal court will not be able to permit the insurer's intervention, however, if joinder of the insurer will defeat complete diversity of citizenship upon which the court's subject matter jurisdiction depends. The subject matter jurisdiction limitation is more likely to bar intervention since the 1990 enactment of the supplemental jurisdiction statute, 28 U.S.C. section 1367. The statute provides that federal courts shall not have supplemental jurisdiction over "claims by plaintiffs against persons made parties under Rule . . . 24 of the Federal Rules of Civil Procedure, or over claims by persons . . . seeking to intervene as plaintiffs under Rule 24 . . . when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332." 28 U.S.C. section 1367 (b) (1990); see Larry L. Teply & Ralph U. Whitten, Civil Procedure 670-79 (1994) (discussing interpretations and effect of 28 U.S.C. section 1367(b) with regard to intervention).

Illustrative of the problem is Krueger v. Cartwright, 996 F.2d 928 (7th Cir. 1993), in which an insurer that had paid $ 19,268.25 in economic losses to its insured sought to participate in the insured's diversity action against a tortfeasor. The insurer sought either to assert its statutory lien on a proposed $ 75,000 settlement or, in the alternative, to assert its subrogation claim against the defendant. The trial court adjudicated the issue of the insurer's lien, determining that the settlement did not include economic losses, and then dismissed the insurer's claim against the defendant for want of jurisdiction, apparently because the insurer and the defendant were not of diverse citizenship. Although the court of appeals did state at one point that the trial court had granted the insurer's "motion to intervene," id. at 930, the insurer had moved to "be joined as a party plaintiff under Rule 19(a)." Id. at 932. The court of appeals analyzed the issue as one of whether the insurer was a party that could be joined without defeating the court's jurisdiction within the meaning of Rule 19(a). Having concluded that the district court lacked supplemental jurisdiction and that joinder would in fact defeat diversity, the court of appeals then concluded that the insurer was not a party whose presence was indispensable under the 19(b) criteria and that the insurer was thus improperly joined as a party-plaintiff. Id. at 934.

If the question in Krueger is viewed solely as one of compulsory joinder, the court of appeals' analysis may have been correct. Had the court of appeals, however, analyzed the issue simply as one of intervention under Rule 24(a), as the trial court apparently did, it might have affirmed the trial court's holding and result. With regard to its asserted lien, the insurer was not seeking to intervene as a plaintiff. Rather the insurer was asserting a claim adverse to the plaintiff, which was not excluded by the provisions of section 1367(b). Consequently, the insurer's claim of a lien on the plaintiff's settlement was within the court's supplemental jurisdiction, although there was no independent or supplemental basis for jurisdiction over the insurer's claim against the defendant.

n250 See Freer, Avoiding Duplicative Litigation, supra note 15, at 844 (advocating broadening compulsory joinder to avoid the risk of multiple litigation, especially to force joinder of plaintiffs in "transactionally related tort cases").

n251 See Edwards, Inc. v. Arlen Realty & Dev. Corp., 466 F. Supp. 505, 513 (D.S.C. 1978):

The insurance company's claim is by way of contractual or common-law subrogation and is therefore purely derivative of the insured's claim. The insurance company's claim rises and falls on the same facts, is subject to the same prima facie burdens of proof, and same defenses as if the claim had never been assigned and the insured never indemnified.

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n252 See infra part VI.A.1.

n253 See infra part VI.A.2.

n254 Potomac Elec. Power Co. v. Babcock & Wilcox Co., 54 F.R.D. 486 (D. Md. 1972) (discussed supra part V.C).

n255 Childers v. Eastern Foam Prods., Inc., 94 F.R.D. 53 (N.D. Ga. 1982) (discussed supra part V.D).

n256 See Glacier Gen. Assurance Co. v. G. Gordon Symons Co., 631 F.2d 131, 134 (9th Cir. 1980) (stating that joinder of reinsurers is not required under Rule 19(a) because defendants "are protected from future actions by the reinsurers"); Dudley v. Smith, 504 F.2d 979, 983 (5th Cir. 1974) (finding Rule 19(a) requires joinder when there is a substantial risk of "multiplicity of suits," but requirement of 19(a) not met when insured sues for the full amount of the loss); Tucson Elec. Power Co. v. Bailey Controls Co., 145 F.R.D. 102, 105 (D. Ariz. 1992) (finding criteria of Rule 19(a) do not reach insurer); Prudential Lines v. General Tire Int'l Co., 74 F.R.D. 474, 475 (S.D.N.Y. 1977) ("res judicata would protect the defendant from another suit"); White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1206 (E.D. Pa. 1974) (finding nonparty is bound by a judgment "if he had a sufficient interest in the suit and participated in and controlled the litigation;" therefore, Rule 19 does not require joinder of insurers), aff'd mem., 578 F.2d 1377 (3d Cir. 1978) and aff'd mem. sub nom. Quaglia v. Profexray Div. of Litton Indus., 578 F.2d 1375 (3d Cir. 1978). These cases also are notable for their rejection of pre-1966 precedent, including Aetna, in favor of performing the flexible analysis under amended Rule 19 that the Supreme Court called for in Provident Tradesmens. In Dudley v. Smith, the Fifth Circuit distinguished Aetna and other contrary authority by pointing out that these cases had not been reasoned in terms of the Rule 19 criteria. 504 F.2d at 983. Courts also have distinguished Aetna on the ground that Aetna did not involve a question of compulsory joinder of an insurer and, thus, its pronouncement that the insurers were "necessary" parties was dicta. White Hall Bldg. Corp., 387 F. Supp. at 1207; Prudential Lines, 74 F.R.D. at 475.

n257 74 F.R.D. 474 (S.D.N.Y. 1977).

n258 Id. at 476.

n259 145 F.R.D. 102 (D. Ariz. 1992).

n260 Id. at 105. See Glacier General, 631 F.2d at 134 (stating that the defendants "are protected from future actions by the insurers") (citing Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 84 & n.15. (4th Cir. 1973), cert. denied, 415 U.S. 935 (1974)). The citation to Virginia Electric is apparently to that court's assertion that, "even without joinder the partial subrogee is generally precluded from bringing a subsequent action . . . where a judgment has been rendered in a suit by the subrogor for the entire loss." 485 F.2d at 84. The Ninth Circuit gave no reason, other than the Fourth Circuit's statement about what is "generally" true, in support of its conclusion that the non-party insurers would be bound by its decision in the case before it. In Virginia Electric, moreover, the insurer had agreed to be bound by any judgment, id. at 83 n.3, but there is no indication of such an agreement in Glacier General.

See also the court's observation in Celanese Corp. v. John Clark Indus., 214 F.2d 551, 556 (5th Cir. 1954):

It was understood by all that the counsel for the insurance companies were in active conduct of the suit and the judgment entered would have barred them whether or not they were actually in the cause, so that defendant was at no time concerned with the question of lack of finality of the judgment or the possibility of its being again sued.

See also Acro Automation Sys. v. Iscont Shipping Ltd., 706 F. Supp. 413, 422 (D. Md. 1989) (stating that the insurer's "complete control over the present litigation will preclude it from relitigating any of the issues which will be litigated in this action"); White Hall Bldg. Corp., 387 F. Supp. at 1207 (stating that insurers will be bound "even though they are not parties of record, because of their interest in and control of plaintiff's case") (discussed supra note 208).

n261 See Montana v. United States, 440 U.S. 147, 155-58 (1979) (holding that although United States was not a party to prior litigation, it had exercised sufficient control to be bound by principles of res judicata); Restatement (First) of the Law of Judgments section 84 (1942):

A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; if the other party has notice of his participation, the other party is equally bound.

See also Restatement (Second) of the Law of Judgments section 39 (1982) ("A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party."). As comment b to section 39 states: "The rule stated in the Section applies to issue preclusion, and not to claim preclusion, because the person controlling the litigation, as a non-party, is by definition asserting or defending a claim other than one he himself may have." Id.

n262 See Restatement (Second) of the Law of Judgments section 41 (1982). There is also no risk of multiple litigation, of course, if the insurer has no right of subrogation following an action by the insured. See Cleaves v. DeLauder, 302 F. Supp. 36, 38 (N.D. W. Va. 1969) (finding no risk of multiple litigation because partially compensating insurer under West Virginia law has no claim against tortfeasor); Entman, supra note 1, at 911 & n.106 (discussing when suit instigated by either employee or insurer precludes other from also filing suit).

n263 Potomac Elec. Power Co. v. Babcock & Wilcox Co., 54 F.R.D. 486, 492 (D. Md. 1972) (discussed supra part V.C). Cf. Klick v. American Mut. Ins. Co., 80 F.R.D. 711, 713 (E.D. Wis. 1978) (holding that joinder of insurer not required by Rule 19 because Wisconsin workers' compensation statute provided that insurer is bound by the judgment if it has notice of the insured's action against third party).

n264 Fed. R. Civ. P. 8(c) places upon the defendant the burden of pleading res judicata.

n265 See supra notes 257-60 and accompanying text.

n266 Fed. R. Civ. P. 17(a) provides, in pertinent part:

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of

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commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

n267 United Coal Cos. v. Powell Constr. Co., 839 F.2d 958, 960 (3d Cir. 1988) (trial court took no action on defendant's motion to add subrogated insurers because the insurers executed ratification agreements); Sovereign Chem. & Petroleum Prods. Inc. v. Ameropan Oil Corp., 148 F.R.D. 208, 210 (N.D. Ill. 1992) (holding partially subrogated insurer not indispensable because it had ratified action brought in name of insured, which had assigned to insurer right to sue in insured's name); Prosperity Realty v. Haco-Canon, 724 F. Supp. 254, 258 (S.D.N.Y. 1989) (finding that insurer's substitution as plaintiff is not required where insurer has filed affidavit ratifying suit and agreeing to be bound by decision); Acme Mkts. v. Shaffer Trucking, 102 F.R.D. 216, 218 (E.D. Pa. 1984) (explaining ratification as an alternative to joinder); Stouffer Corp. v. Dow Chem. Co., 88 F.R.D. 336, 338 (E.D. Pa. 1980) (finding ratification agreement protected party against multiple litigation); Whitcomb v. Ford Motor Co., 79 F.R.D. 244, 245 (M.D. Pa. 1978) ("Compulsory joinder is not appropriate where, as here, the partially subrogated insurers have authorized plaintiffs insureds to prosecute the action for them and have agreed to be bound by the results of the action."); Kint v. Terrain King Corp., 79 F.R.D. 10, 11 (M.D. Pa. 1977) (describing situation where subrogated insurer filed a "certificate authorizing plaintiff insured to prosecute the action 'for its benefit' and agreeing to be bound by the results of the litigation;" consequently, insurer is not a party to be joined under Rule 19(a)).

Some federal courts have ordered that insurers file ratifications of the insureds' actions in order to avoid the defendants' objections to nonjoinder of the insurers. See, e.g., In re Wuttke, 2 B.R. 362, 364 (Bankr. D.N.J. 1980); Lister v. Plunk, 77 F.R.D. 359, 360 (N.D. Miss. 1977); James v. Nashville Bridge Co., 74 F.R.D. 595, 597 (N.D. Miss. 1977); Pace v. General Elec. Co., 55 F.R.D. 215, 219 (W.D. Pa. 1972). The ratification solution was also suggested by Edwards, Inc. v. Arlen Realty & Dev. Corp., 466 F. Supp. 505, 512-13 (D.S.C. 1978), in which the court lamented that it was bound to require joinder by the Fourth Circuit decision in Virginia Electric.

n268 93 F.R.D. 845 (E.D. Pa. 1982).

n269 Id. at 846. Ratification should be distinguished from waiver. If the insurer has actually waived all its rights against the third party and is not in control of the insured's action, there is no substantive basis for the insurer's presence as a party plaintiff, Lister v. Marangoni Meccanica S.P.A., 133 F.R.D. 177, 179 (C.D. Utah 1990), and ratification of the insured's action is simply irrelevant.

n270 Hancotte, 93 F.R.D. at 847.

n271 See supra note 266.

n272 See Fed. R. Civ. P. 12(b)(6), 17(a). When the plaintiff-insured is not a proper party under the substantive law, the court has authority to dismiss the action for failure to state a claim upon which relief may be granted or to order substitution of the insurer. In addition, as argued below, infra part VII, federal courts sometimes have authority to find the insurer's joinder required on the basis of state substantive law.

n273 See Entman, supra note 1, at 906-08 (discussing the provision for ratification and the resulting reintroduction of "use" practice).

n274 Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, Part I - Amendments to Effect Unification of Civil and Admiralty

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Procedure, Rule 17(a) Advisory Committee's Note, reprinted in, 34 F.R.D. 325, 341-42 (1964) [hereinafter Preliminary Draft]; see Saint Paul Marine Transp. Corp. v. Cerro Sales Corp., 505 F.2d 1115, 1118 (9th Cir. 1974) (noting admiralty practice to allow owners to sue on behalf of master and crew).

n275 2A Ellen Flynn & Gina A. Raduazzo, Benedict on Admiralty section 53, at 6-10 (7th ed. 1992).

n276 Id. section 53, at 6-11 to 6-13.

n277 Preliminary Draft, supra note 274, 34 F.R.D. at 331-36.

n278 The Committee proposed that the following concluding sentence be added to rule 17 (a):

No action for loss or misdelivery of, or damage to, maritime cargo, or for general average contribution to such cargo, or for salvage, and no action for personal injury or death governed by section 33 of the Longshoremen's and Harborworkers' Compensation Act, as amended . . . shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action has been commenced in the name of the real party in interest.

Id. at 341.

n279 The Reporter later explained that the relation-back effect of the amendment would:

prevent failure of actions for reasons not going to the merits when the defendant had been informed through the institution of the action against him that rights were being asserted . . . . So sound did this proposed amendment of the rule seem that when it reached the Court it had been enlarged to cover all civil cases, not merely the particular maritime actions, and in that form it was approved.

Kaplan, supra note 69, at 411.

It is at least arguable that an amendment to Rule 17(a) was not necessary to achieve this purpose because a 1966 amendment of Fed. R. Civ. P. 15(c) provided for relation back under the same circumstances, although the latter rule did not explicitly apply to parties plaintiff. Entman, supra note 1, at 904-05.

n280 The failure to realize the conflict between the real party in interest rule and admiralty's ratification practice is evident in the Reporter's comment that, "Apparently something on the order of a real party in interest doctrine applied in admiralty." Kaplan, supra note 69, at 411 n.209. An admiralty authority, however, does seem to have appreciated the conflict, remarking:

The admiralty principles discussed hereinabove in this chapter [see supra notes 273-76 and accompanying text (regarding proper parties and ratification in admiralty)] have been established by the decisions of the courts over many years. The application of Rule 17(a) of the Rules of Civil Procedure to admiralty cases is bound to affect the principles discussed but the extent of the impact remains for future decisions. Certainly, when possible, the plaintiff

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named in a complaint should be the party who has suffered the loss. However, it is sometimes impossible to ascertain what party has legally suffered loss of cargo until after the time for suit will have expired and, in such cases, suit in the name of the shipper from whom title has passed or in the name of a volunteer, may be the only practical course to follow.

Flynn & Raduazzo, supra note 275, section 54, at 6-14. It appears, ironically, that admiralty has had more of an impact on civil procedure than vice versa.

n281 With regard to use practice, see supra part III.A.

n282 See Entman, supra note 1, at 899-900. Professor Atkinson stated that abolition of use practice was "the real party in interest statute's only real accomplishment." Atkinson, supra note 44, at 946; see also United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 381 (1949) ("Under the Federal Rules, the 'use' practice is obviously unnecessary, as has long been true in equity . . . .").

n283 See Plissey, supra note 63, at 177-78 (stating that the provision in Rule 17(a) for ratification "actually encourages the device of use plaintiffs").

n284 See 6A Wright et al., supra note 28, section 1555, at 417-18. Wright, Miller, and Kane explain:

The reference to "ratification" in Rule 17(a) seems to be a carryover from the original draft of the sentence added in 1966, which was to apply only to certain maritime proceedings, and probably was intended to adopt the procedure in salvage actions by which nonparties seek their share of the recovered property. Nonetheless, some federal courts have interpreted the word to validate an arrangement by which the real party in interest authorizes the continuation of an action brought by another and agrees to be bound by its result, thereby eliminating any risk of multiple liability.

n285 Fed. R. Civ. P. 17 Advisory Committee's Note (1966); see also Clarkson Co. v. Rockwell Int'l Corp., 441 F. Supp. 792, 797-98 (N.D. Cal. 1977) (finding ratification justified on grounds of difficulty of determining proper plaintiffs); Hobbs v. Police Jury of Morehouse Parish, 49 F.R.D. 176, 180 (W.D. La. 1970) (explaining that when determination of the proper party to bring the action was not difficult and when no excusable mistake had been made, the last sentence of Rule 17(a) is inapplicable and the action should be dismissed); Friedenthal et al., supra note 73, at 322 n.28 (stating that the key factors to be considered in permitting the amendment are whether the delay will prejudice the defendant and whether the plaintiff has some reasonable excuse for the error as to the real party in interest); 6A Wright et al., supra note 28, section 1555, at 415 ("A literal interpretation of the last sentence of Rule 17(a) would make it applicable to every case in which an inappropriate plaintiff has been named. However, the rule should be applied only to cases in which substitution of the real party in interest is necessary to avoid injustice.").

n286 See supra note 267.

n287 See infra part VI.B.

n288 See infra part VI.B.

n289 Cf. Mansfield v. Paxon, 899 F.2d 649, 651 (7th Cir. 1990) (denying compensation insurer's motion to intervene as a "silent party plaintiff" because no such status is sanctioned by federal rules).

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n290 Compare ICON Group, Inc. v. Mahogany Run Dev. Corp., 829 F.2d 473, 478 (3d Cir. 1987) (stating that "proper ratification" requires that the ratifying party authorize the action and agree to be bound by its result, but assumption of financial obligations was unnecessary in light of the interest and solvency of the named plaintiff) with Clarkson Co. Ltd. v. Rockwell Int'l Corp., 441 F. Supp. 792, 797 (N.D. Cal. 1977) (ratifying entities agreed "to be bound by the Federal Rules of Civil Procedure for purposes of discovery in the action") and with Municipality of Anchorage v. Baugh Constr. & Eng'g Co., 722 P.2d 919, 924-26 (Alaska 1986) ("Under Alaska Civil Rule 17(a) . . . the ratifying party is subject to any orders the court may make concerning discovery or attorney's fees . . . . Ratification assures that all interested parties bear the burdens of claims litigated on their behalf."). Cf. United Coal Cos. v. Powell Constr. Co., 839 F.2d 958, 965 (3d Cir. 1988) (ratifying subrogated insurers were "co-plaintiffs" for purposes of attorney-client privilege, and apparently all other purposes).

n291 Others have been much more sanguine about nonparty insurers controlling litigation. In Prosperity Realty v. Haco-Canon, 724 F. Supp. 254 (S.D.N.Y. 1989), the court declined, because of a ratification agreement, to order joinder of the subrogated insurer. The defendant argued that the insurer should be named because it was controlling the litigation. The court responded: "That argument is not persuasive. 'As a practical matter, . . . the insurance company will control the prosecution no matter in whose name it is brought.'" Id. at 258 (quoting 6 Wright & Miller, supra note 167, section 1546, at 656). The substance of the quotation is currently found at 6A Wright et al., supra note 28, section 1546, at 354. See also Albert E. Jenner, Jr. & Philip W. Tone, Pleading, Parties and Trial Practice, 50 Nw. U. L. Rev. 612, 612 (1955) ("An insured under an automobile collision policy who has collected for property damage under the policy ordinarily has no control over a subrogation action brought subsequently in his name by the insurer under the subrogation provision of the policy.").

n292 Fed. R. Civ. P. 11 (authorizing sanctions against represented parties for violations of the rule's requirements for pleadings, motions, and papers), 16(f) (authorizing sanctions against parties for violations of the rule's requirements for scheduling and pretrial orders and conferences), 37 (applying sanctions for failure to comply with court order), 54(d) (allowing prevailing party to recover costs) & 68 (requiring offeree to pay costs if judgment is not more favorable than offer).

n293 See Independent Fed. of Flight Attendants v. Zipes, 491 U.S. 754, 761 (1989) (holding that district court may award Title VII attorney's fees against party intervenor not charged with Title VII violation, but only if intervenor's action is frivolous, unreasonable, or without foundation); Truckweld Equip. Co. v. Swenson Trucking & Excavating Co., 649 P.2d 234, 238 (Alaska 1982) (stating that joinder of insurer should be required because of Alaska's "broad costs and attorney's fees provisions . . . . Where a party's claim is directly litigated before the courts of this state, we believe that party should bear the burdens as well as the benefits of the litigation."). See also New York News, Inc. v. Kheel, 972 F.2d 482 (2d Cir. 1992) (holding aggrieved non-party who is target of baseless allegations in a complaint does not have standing to move for Rule 11 sanctions).

n294 See G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 650 n.1 (7th Cir. 1989) (en banc) (stating that Fed. R. Civ. P. Rule 16 does not limit district court's inherent authority to require party represented by counsel to attend pretrial settlement conference). In a case that illustrates the problem of nonparties in control of litigation, the Eleventh Circuit held that district courts have no authority, either inherent or under Rule 16, to order the appearance at a settlement conference of an employee of the defendant's liability insurer, even though only the employee, and not the defendant or his attorney, had settlement authority. In re Novak, 932 F.2d 1397, 1403-08 (11th Cir. 1991).

n295 See, e.g., Fed. R. Civ. P. 30 (duty to appear at deposition); 33 (interrogatories to a party); 35 (physical or mental examination of a party or person under control of a party); 36 (requests for admissions).

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[*16] adoption of the Federal Rules of Civil Procedure. [58]

While use practice or suit in the name of the insured alone may have appeared to be a workable solution to the problem of the proper plaintiff when there had been partial subrogation, it really did no more than mask the underlying problem, which was how to recognize the rights of both insured and insurer without creating a risk of multiple litigation. If the rule were to have achieved its goal, it would have required that the insurer be bound by the judgment in any action brought in the name of the insured to recover the subrogated claim. But in a case of partial subrogation, if the rule really meant that only the insured, like a trustee, was entitled to control an action against the third party, then the rule effectively reduced the insurer's subrogation right to a claim for reimbursement. [59]

Some courts, therefore, while generally following the rule that
[*17] the insured alone is the only proper plaintiff, carved out exceptions to protect the interests of the partially subrogated insurer. For example, some courts permitted the insurer to prosecute an action in the name of the insured when the insured declined to bring the claim. [60] Carving out exceptions, however, did not adequately deal with the problems caused by the rule that the insured was the only proper named plaintiff in a subrogation action. Such a rule is simply not a satisfactory way of dealing with the complexity that subrogation introduces into litigation. [61] It merely simplifies the question of whom to name as the plaintiff by rendering the name meaningless, and defers resolution of problems to other stages in the litigation.

The United States Supreme Court appeared to announce the demise of use practice when it stated in 1949 that the practice was "obviously unnecessary" under modern rules of civil procedure. [62] Use practice, nevertheless, has not disappeared. It has found a new incarnation in the device of ratification under the 1966 amendment to Rule 17(a). [63] As of 1992, moreover, twelve states explicitly permitted suit in the name of the insured alone even with total subrogation. [64]
[*18]

B. Necessary Parties

The other pre-merger approach to resolving questions of proper parties and insurance subrogation was to apply doctrines of compulsory joinder that originated in equity and were ultimately incorporated into the Federal Rules of Civil Procedure. [65] Courts of equity, of course, had no difficulty in accepting a subrogee as a party plaintiff on the basis of its equitable and beneficial right to recovery. [66] With both subrogor and subrogee permitted to enforce a claim, however, the issue then arose whether both must appear as plaintiffs when one chose to bring suit.

Joinder of parties in law courts had been quite limited: plaintiffs were compelled to join when their rights were "joint," and no other joinder was permitted. [67] In equity, on the other hand, joinder of all interested parties was encouraged to prevent a multiplicity of suits. [68] In the seventeenth and eighteenth centuries, equity's per **[*19]** missive attitude toward joinder was combined with the idea that equity should do complete justice by requiring the joinder of all persons, known as "necessary parties," having an interest in the subject matter of the litigation, thus leading to a rule of compulsory joinder. [69] Authorities generally agree that compulsory joinder of "necessary" parties was motivated by three purposes: 1) to protect absentees whose out-of-court situations might be adversely affected by the litigation; 2) to protect the defendant from subsequent litigation reaching inconsistent results; 3) to protect both the parties and society from unnecessary multiplicity of litigation. [70]

At first, courts excused joinder of necessary parties when joinder was impossible, impractical or unduly complicated. [71] Later, however, the doctrine of indispensability emerged. According to this doctrine, there are "indispensable" parties whose relationship to the controversy is so

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n296 See Fed. R. Civ. P. 65(d) (binding only parties to the action and certain others to court orders granting injunction or restraining order).

n297 See also United States v. City of Oakland, 958 F.2d 300, 301 (9th Cir. 1992) ("Federal Rules of Appellate Procedure 3 and 4 clearly contemplate that only parties may file a notice of appeal.").

n298 See Entman, supra note 1, at 946-49 (discussing the relationship between diversity jurisdiction and the real party in interest rule).

n299 See generally 14 Charles A. Wright et al., Federal Practice and Procedure section 3637 (devices to create diversity jurisdiction), section 3638 (change of state citizenship), section 3639 (assignments), section 3640 (appointments), section 3641 (devices to defeat diversity jurisdiction), section 3642 (utilization of John Doe defendants) (1985).

n300 See Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 464-66 (1980) (holding that individual trustees of a Massachusetts business trust may invoke diversity jurisdiction on the basis of their own citizenship, regardless of the citizenships of the trust beneficiaries because the trustees, and not the beneficiaries, exercised control of the litigation); 3A Moore et al., supra note 108, paragraph 17.04, at 17-14; 13B Charles A. Wright et al., Federal Practice and Procedure section 3606, at 418-19 (1984).

There are exceptions to the general rule. 28 U.S.C.A. section 1332(c)(2) (West Supp. 1993) states:

The legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

Similarly, in a direct action against an insurer, the insurer is deemed a citizen of the state of which the insured is a citizen, as well as the insurer's state of incorporation and principal place of business. Id. section 1332(c)(1).

n301 See Entman, supra note 1, at 946-49 (discussing misapplication of Rule 17(a) and analyzing the adverse effect on the principles of diversity jurisdiction).

n302 See 13B Wright et al., supra note 300, section 3606, at 418 (discussing the principle that diversity jurisdiction should be based on the citizenship of the parties in actual control of the litigation, not on that of a nominal representative).

n303 485 F.2d 78 (4th Cir. 1973), cert. denied, 415 U.S. 935 (1974).

n304 See Entman, supra note 1, at 920-22, 947-48; supra notes 172-92 and accompanying text (discussing Virginia Electric); see also Garcia v. Hall, 624 F.2d 150, 152 (10th Cir. 1980) (holding that suit may proceed in the name of the insured alone where the partially subrogated insurer is non-diverse and "has instituted this suit in the name of the insured for the entire loss and will be bound by the judgment").

n305 28 U.S.C. section 1359 (1988).

n306 See 14 Wright et al., supra note 299, sections 3637-42 (showing that section 1359 has not been aggressively applied by federal courts until recently).

n307 See Pratt v. First Hays Banshares, Inc., 682 F. Supp. 1177, 1180-82 (D. Kan. 1988)

(dismissing suit pursuant to 28 U.S.C. section 1359; diverse party had shown no reason unrelated to diversity jurisdiction for turning over all rights except his name in settlement agreement, when full assignment would have destroyed diversity). In Unigard Sec. Ins. Co. v. M.W. Carlson Assocs., 657 F. Supp. 1146 (N.D. Ill. 1987), the court held that an insured's assignment to its insurer of its entire interest in the lawsuit against the defendant for $ 100, the amount of its deductible, violated 28 U.S.C. section 1359. Id. at 1147-48. Prior to the assignment, the court had held that because of the insured's pecuniary interest, the insured was an indispensable party plaintiff. Unigard Sec. Ins. Co. v. M.W. Carlson Assocs., No. 86 C 6898, 1987 WL 6623, at *1 - *2 (N.D. Ill. Feb. 9, 1987). Unfortunately, Unigard may be a case in which the section 1359 ruling was both unfortunate and ultimately unfair. Had the court appreciated that the insured was not an indispensable, or even proper, plaintiff merely because it had a pecuniary interest, the court might have found that there was complete diversity and it would not have been faced with the insurer's attempt to reach that result through the assignment.

n308 See, e.g., Celanese Corp. of Am. v. John Clark Indus., Inc., 214 F.2d 551, 556-57 (5th Cir. 1954) (suggesting that the defendant's reason for attempting to join the plaintiff's insurance companies was to inform the jury that the plaintiff was insured, and thereby potentially prejudice the plaintiff's case); Acro Automation Sys. v. Iscont Shipping, Ltd., 706 F. Supp. 413, 421 (D. Md. 1989) ("[The defendants] would consider it a strategic advantage to have the jury know that a plaintiff has another source of recovery other than from them."); Stouffer Corp. v. Dow Chem. Co., 88 F.R.D. 336, 338 (E.D. Pa. 1980) ("There is a substantial risk of prejudice to an insurer which is forced to join as a plaintiff, as the presence of an insurer may affect a jury's decision on the merits."); Kint v. Terrain King Corp., 79 F.R.D. 10, 12 n.4 (M.D. Pa. 1977) (citing prejudice to the plaintiff as one factor supporting a decision denying a motion under Rule 19 to join the plaintiff's insurance companies); Public Serv. Co. v. Crane Co., 48 F.R.D. 424, 425 (N.D. Okla. 1969) (indicating a "strong possibility" that presence of an insurance company as a party "will generate prejudice or favoritism in the jury process"), aff'd, 467 F.2d 1143 (10th Cir. 1972); Thrasher v. United States Liab. Ins. Co., 225 N.E.2d 503, 507 (N.Y. 1967) ("The law maintains the fiction that the insured is the real party in interest at the trial of the underlying negligence action in order to protect the insurance company against overly sympathetic juries."). But see Tucson Elec. Power Co. v. Bailey Controls Co., 145 F.R.D. 102, 104 (D. Ariz. 1992) (asserting that concern about jury prejudice is irrelevant to Rule 19 motion).

n309 See, e.g., Rozark Farms, Inc. v. Ozark Border Elec. Coop., 849 F.2d 306, 308-09 (8th Cir. 1988) (holding that it is prejudicial error to admit irrelevant evidence of insurance coverage); Adams Lab., Inc. v. Jacobs Eng'g Co., 761 F.2d 1218, 1226 (7th Cir. 1985) (stating that references to opposing party's insurance coverage may be prejudicial error if made intentionally and designed to prejudice the jury); City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 758 (6th Cir. 1980) (indicating that an attorney runs the risk of a mistrial by raising the issue of insurance improperly); Dow Chem. Corp. v. Weevil-Cide Co., 630 F. Supp. 125, 128-29 (D. Kan. 1986) (holding that application of Wisconsin direct action statute would violate Kansas public policy of avoiding the potential prejudice caused by a jury's knowledge of a defendant's liability insurance); Larsen v. Powell, 16 F.R.D. 322, 324 (D. Colo. 1954) (stating that knowledge of insurance might prejudice the jury).

n310 See, e.g., Pace v. General Elec. Co., 55 F.R.D. 215, 218 (W.D. Pa. 1972) ("We feel compelled to say a good word for juries . . . . With the universality of insurance covering so many aspects of their lives, they show no prejudice against the organization providing this service . . . ."); Truckweld Equip. Co. v. Swenson Trucking & Excavating, Inc., 649 P.2d 234, 238 n.4 (Alaska 1982) ("We are not impressed by abstract claims of prejudice resulting from the jury's knowledge of partial coverage. Insurance is a widely accepted fact of life."); 2A Larson, supra note 18, section 74.41(c), at 14-627 (referring to the concern about jury prejudice as a "bugaboo"). See also Atkinson, supra note 44, at 944 ("It may well be that the best solution of the problem, regardless of whether an insurer is a party or not is that the court should caution the jurors that either party or both may be protected by insurance with

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which the jury has nothing to do, and that their job is to determine the defendant's liability upon the basis of fault."); Kennedy, supra note 28, at 715 (concluding that regardless of joinder, the judge "ought to inform the jury fully as to any subrogation interests in the plaintiff's claim" because "frank disclosure to the jury of the real interests involved is the only way to elicit good verdicts").

n311 Johnson, supra note 64, at 1133-35 (observing that jury prejudice may be more relevant when the insurance company is a defendant because a jury may assess damages on a deep-pocket theory). Contra Alan Calnan, The Insurance Exclusionary Rule Revisited: Are Reports of Its Demise Exaggerated?, 52 Ohio St. L.J. 1177, 1203 (1991) (describing empirical evidence that jurors are affected by knowledge of plaintiff's insurance coverage).

n312 See, e.g., United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 380-81 (1949) ("If the subrogee has paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name.").

n313 See Fed. R. Evid. 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party of for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."); see generally Jeanean Kirk, Comment, Instructing the Jury on the Irrelevancy of Insurance Coverage, 20 Ariz. St. L.J. 1069 (1988) (discussing cautionary jury instructions on disclosure of insurance coverage).

n314 See Travelers Ins. Co. v. Riggs, 671 F.2d 810, 814 (4th Cir. 1982) (noting that federal policy "abjures concealed or fictional issues and parties in interest and attempts to avoid unfair prejudice by jury voir dire, cautionary instructions, and other corrective measures rather than by a concealment of interests that is likely to be ineffectual in any event").

n315 See supra part VI.A.

n316 See supra part VI.B.

n317 See, e.g., Glacier Gen. Assurance Co. v. G. Gordon Symons Co., 631 F.2d 131 (9th Cir. 1980) (discussed supra note 260 and infra text accompanying notes 321-23); Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78 (4th Cir. 1973) (discussed supra part V.B), cert. denied, 415 U.S. 935 (1974); Tucson Elec. Power Co. v. Bailey Controls Co., 145 F.R.D. 102 (D. Ariz. 1992) (denying defendant's motion to join compensating insurer who was in exclusive control of litigation); White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202 (E.D. Pa. 1974) (discussed supra notes 208, 260 and accompanying text), aff'd mem., 578 F.2d 1377 (3d Cir. 1978) and aff'd mem. sub nom. Quaglia v. Profexray Div. of Litton Indus., 578 F.2d 1375 (3d Cir. 1978).

n318 See, e.g., Potomac Elec. Power Co. v. Babcock & Wilcox Co., 54 F.R.D. 486 (D. Md. 1972) (discussed supra text accompanying notes 193-208); Ward v. Franklin Equip. Co., 50 F.R.D. 93, 95 (E.D. Va. 1970) ("Although this action is instituted in the name of the insured, it is clear the insurer is in control of the litigation and caused it to be filed . . . . Pursuant to the provisions of Rule 19(a) . . . it is ordered that the insurer be joined as a party plaintiff . . . .").

n319 See, e.g., Public Serv. Co. of Okla. v. Black & Veatch, 467 F.2d 1143 (10th Cir. 1972) (discussed supra notes 159-70 and accompanying text).

n320 See, e.g., Gas Serv. Co. v. Hunt, 183 F.2d 417, 419 (10th Cir. 1950) (discussed supra notes 119-27, 134-36 and accompanying text); Jefferson v. Ametek, Inc., 86 F.R.D. 425, 427 n.2 (D. Md. 1980) (noting that federal, not state, rules control determination of the proper parties in a federal court); Cross v. Harrington, 294 F. Supp. 1340, 1341 (N.D. Miss. 1969) (holding that compulsory joinder is governed by federal law because it is a procedural aspect

of a case); Wright v. Schebler Co., 37 F.R.D. 319, 321 (S.D. Iowa 1965) ("Whether or not a defendant can compel a compensation carrier to be joined as a party is a procedural problem. The Illinois rule thereon is not binding upon this Court; the federal rule governs.") (discussed supra notes 137-43 and accompanying text); Braniff Airways v. Falkingham, 20 F.R.D. 141, 143 (D. Minn. 1957) (holding that while state law is used to determine substantive rights, the issue of whether a party is "necessary" is procedural, governed by federal rules). See also Wadsworth v. United States Postal Serv., 511 F.2d 64, 66 (7th Cir. 1975) (stating that plaintiff's attorney was incorrect in following Illinois practice rather than Aetna, which requires insurer's joinder); Childers v. Eastern Foam Prods., Inc., 94 F.R.D. 53, 57-58 (N.D. Ga. 1982) (noting a Georgia appellate decision requiring joinder, but ordering joinder pursuant to Federal Rule 19) (discussed supra part V.D); Potomac Elec., 54 F.R.D. at 492 (noting, but otherwise ignoring, a Maryland rule requiring joinder) (discussed supra notes 193-208 and accompanying text).

n321 631 F.2d 131 (9th Cir. 1980).

n322 Id. at 134 (citing State ex rel. Slovak v. District Court, 534 P.2d 850, 852 (Mont. 1975)).

n323 Id.

n324 Id.; see also supra note 260. But see Travelers Indem. Co. v. Westinghouse Elec. Corp., 429 F.2d 77, 79-80 (5th Cir. 1970) (dismissing suit by partially subrogated insurer because of absence of nondiverse insured and other nondiverse insurer, relying upon both Louisiana statute and Rule 19).

n325 223 F. Supp. 534 (D. Mass. 1963), aff'd, 334 F.2d 775 (1st Cir. 1964).

n326 Id. at 536 (citation omitted). See also Kroese v. General Steel Castings Corp., 179 F.2d 760, 761 n.1 (3d Cir. 1950) ("3 Moore's Federal Practice 2153, under Par. 19.07 (2d ed. 1948), states flatly that whether parties are indispensable should be determined in federal court by federal rather than state rules. We think this statement cannot apply where the question of the indispensability of a party depends upon substantive law which in the diversity case, is a matter of the law of the state."); John W. Reed, Compulsory Joinder of Parties in Civil Actions (continuation), 55 Mich. L. Rev. 483, 517 (1983):

In diversity cases the question of indispensability well may be decided upon the basis of state rules. To the extent that required joinder is determined by reference to the character of the parties' rights or interests the problem is essentially substantive and must be settled by reference to the governing law-usually state, under Erie R.R. v. Tompkins, but sometimes federal, as, for example, where copyrights and patents are involved.

(footnotes omitted).

The mandate of Erie applies, of course, not only to the "federal diversity court," but any time a federal court adjudicates a claim for which state law provides the rule of decision, regardless of the basis for federal subject matter jurisdiction. See Henry J. Friendly, In Praise of Erie--And of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 408 n.122 (1964).

Although Judge Wyzanski relied upon the Erie doctrine, the reasoning and result in Stevens would also be called for by Rules 12(b)(6) and 17(a), each of which requires that the plaintiff be entitled under the substantive law to enforce the claim asserted. See supra notes 27-31 and accompanying text.

n327 381 F.2d 670 (6th Cir. 1967).

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n328 Id. at 677.

n329 Id. at 676. Similarly, in Kuchenig v. California Co., 350 F.2d 551, 557 (5th Cir. 1965), cert. denied, 382 U.S. 985 (1966), the court held that the plaintiff's demand for a declaration of ownership of certain land must be dismissed because Louisiana law required the presence as a defendant of the adverse claimant's lessor, who could not be joined.

n330 In Kuchenig, 350 F.2d 551, Judge Wisdom discussed the effect of the then-recent decision in Hanna v. Plumer, 380 U.S. 460, 472 (1965), in which the Court announced that federal courts should follow federal rules of civil procedure, rather than state law, on "matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." Kuchenig, 350 F.2d at 553-55. Judge Wisdom concluded that notwithstanding Hanna, the issue of indispensability should be treated as "a run-of-the-mine Erie problem, requiring the usual balancing of substantive and procedural elements." Id. at 555. See also Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119 (1968) ("Rule 19 does not prevent the assertion of compelling substantive interests; it merely commands the courts to examine each controversy to make certain that the interests really exist.").

n331 See, e.g., Cleaves v. DeLauder, 302 F. Supp. 36, 38 (N.D. W. Va. 1969) (stating that West Virginia follows "what is said to be the majority rule" that only the insured may sue because of "'the right of the wrongdoer not to have the cause of action against him split up so that he is compelled to defend two actions for the same wrong'" (citation omitted)).

n332 Cf. Kuchenig, 350 F.2d at 556-57:

The mere fact that state law labels a missing person "indispensable" may not always be controlling in federal court. If, for instance, a state indispensability rule were based purely on some administrative or procedural consideration, conceivably that rule might not conclude a federal diversity action. The nature and purpose of the state rule must be determined in each case.

n333 183 F.2d 417 (10th Cir. 1950).

n334 Id. at 419.

n335 City of New York Ins. Co. v. Tice, 152 P.2d 836, 840 (Kan. 1944); see discussion of Hunt, 183 F.2d 417, and Tice, supra notes 119-27 and accompanying text. See also Public Serv. Co. v. Black & Veatch, 467 F.2d 1143 (10th Cir. 1972) (discussed supra notes 159-70 and accompanying text).

n336 Cf. Cleaves v. DeLauder, 302 F. Supp. 36, 38 (N.D. W. Va. 1969) (the insurer "could not maintain an action in its own name in a state court and under the dictates of Erie R.R., this Court may not elevate the partial subrogee's interest above that given by state law") (citation omitted). In Lister v. Marangoni Meccanica S.P.A., 133 F.R.D. 177, 179 (D. Utah 1990), the court distinguished Hunt, 183 F.2d 417, reasoning that the subrogated Workers Compensation Fund was not a real party in interest, and need not be joined, because of its ratification of the employee's action and waiver of its right under Utah law to sue the third party. Lister's analysis is sound, so long as the Fund was not, in spite of its waiver, in actual control of the litigation.

n337 671 F.2d 810 (4th Cir. 1982).

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n338 Id. at 813.

n339 485 F.2d 78 (4th Cir. 1973), cert. denied, 415 U.S. 935 (1974) (discussed supra notes 172-92 and accompanying text).

n340 Riggs, 671 F.2d at 813 (quoting Hanna v. Plumer, 380 U.S. 460, 471 (1965)). Apparently, it was not clear to the Riggs court whether the Virginia Electric rule was derived from Rule 19 and, therefore, required to be applied under the Hanna decision. The Riggs court avoided having to decide that issue by finding the federal rule applicable in any event under Erie.

n341 Id. The court also found that choice of a contrary federal rule would not be outcome-determinative in the sense of Guaranty Trust Co. v. York, 326 U.S. 99 (1945), because "any encouragement it lends to the limited forum shopping that is possible for defendants is simply of the kind that attends any federal rule of procedure thought by litigants to provide tactical advantage." Riggs, 671 F.2d at 814.

n342 Riggs, 671 F.2d at 814 (citing Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958)).

n343 Id. In support of this proposition, the court quoted the following passage from United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 382 (1949): "The pleadings should be made to reveal and assert the actual interest of the plaintiff, and to indicate the interests of any others in the claim." The Riggs court may have been reading a bit too much into that particular passage, which may have referred only to the Rule 19 requirement that the pleadings set forth the names of persons who ought to be parties, but who are not joined, and account for their nonjoinder. Fed. R. Civ. P. 19(c).

There are other bases for the Riggs court's assertion that are not cited in the opinion. See, e.g., Fed. R. Civ. P. 10(a) (requiring that "in the complaint the title of the action shall include the names of all the parties); Doe v. Frank, 951 F.2d 320, 322-24 (11th Cir. 1992) (indicating that only in exceptional cases may a plaintiff proceed under a fictitious name); National Commodity & Barter Ass'n v. Gibbs, 886 F.2d 1240, 1244-45 (10th Cir. 1989) (citing Rule 10(a), the court sua sponte dismissed the claims of unnamed plaintiffs who had not sought permission to proceed anonymously, and stated that "the federal courts lack jurisdiction over the unnamed parties, as a case has not been commenced with respect to them").

n344 See supra part VI.B. Requiring the insurer to be a party plaintiff in Riggs was correct, not because its joinder was required under Rule 19(a) as the Virginia Electric court suggested, but because it was undisputed that the insurer had commenced the action, as it was entitled to do by Virginia law. Riggs, 671 F.2d at 812-13.

n345 See, e.g., Tenn. R. Civ. P. 17.01 ("A party to whose rights another is subrogated . . . may sue in his own name without joining with him the party for whose benefit the action is brought . . . ."). Similarly, some states permit insurers to use loan receipt agreements to avoid appearing as the party plaintiff in lawsuits that they in fact control. See Entman, supra note 1, at 925-31 (discussing loan receipt agreements, where the insurer makes a loan to the insured equal to the amount of the claim, with an agreement that the insured repay the insurer only if the insured recovers from a third party).

n346 See Entman, supra note 1, at 923-25.

n347 One unusual case is United Sec. Ins. Co. v. Johnson, 278 N.W.2d 29 (Iowa 1979), in which the partially compensating insurer, entitled under state law to bring suit in the name of the insured, brought suit in its own name, apparently because the insured was barred from suing by spousal immunity. The court held that the insurer was not a real party in interest

entitled to maintain the action because of the Iowa rule that stated:

The right of action remains in the insured for the entire loss, the insured becoming a trustee for the insurer (to the extent of the loss paid by the insurer) in the recovery secured by it; that the right of action for the entire loss is single and cannot be split and separately maintained by the owner and the various insurers who have paid parts of the loss.

Id. at 31 (quoting Firemen's Ins. Co. v. Bremmer, 25 F.2d 75, 76 (8th Cir. 1928)).

n348 In White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202 (E.D. Pa. 1974), aff'd mem., 578 F.2d 1377 (3d Cir. 1978) and aff'd mem. sub nom. Quaglia v. Profexray Div. of Litton Indus., 578 F.2d 1375 (3d Cir. 1978), the court, attempting to identify the proper plaintiff under Rule 17(a) when a loan receipt had been used, observed:

Not surprisingly, this Court's research reveals no Pennsylvania case on point. Under the terms of the loan receipt method of transaction, the insured rather than the insurer initiates any court action brought against a third party and thus neither Pennsylvania's nor other courts would likely encounter the issue of whether the insurer itself could bring the action. It thus becomes necessary to attempt to ascertain what Pennsylvania's courts would do if such issue were in fact raised.

Id. at 1204.

n349 See, e.g., Ill. Ann. Stat. 820, para. 305/5 (Smith-Hurd 1993):

In the event the employee or his personal representative fails to institute a proceeding against such third person at any time prior to 3 months before such action would be barred, the employer may in his own name or in the name of the employee, or his personal representative, commence a proceeding against such other person for the recovery of damages on account of such injury or death to the employee . . . .

n350 See supra note 20.

n351 See, e.g., Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 82 (4th Cir. 1973) (discussed supra notes 172-92 and accompanying text), cert. denied, 415 U.S. 935 (1974); Tucson Elec. Power Co. v. Bailey Controls Co., 145 F.R.D. 102, 103 (D. Ariz. 1992) (noting that the loan receipt agreement provided that litigation against third party was to be brought in insured's name and maintained "at the expense of and under the exclusive direction and control of" the insurance company).

n352 In K-B Trucking Co. v. Riss Int'l Corp., 763 F.2d 1148 (10th Cir. 1985), the court explained:

The forum state's procedural statute or rule defining the real party in interest concept is not applicable, however, because it only governs who may sue in the state courts; under Rule 17 (a), the federal courts are concerned only with that portion of state law from which the specific right being sued upon stems.

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Id. at 1153 (footnote omitted) (quoting 6 Wright & Miller, supra note 167, at 647-48).

n353 See Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of New York, 762 F.2d 205, 209 (2d Cir. 1985) (stating that claim by insured for its deductible amount and claim by insurer for amount paid to insured are "separate and distinct, and do not constitute unlawful splitting under New York law"); Blatz v. City of Rock Falls, 434 N.E.2d 807, 808 (Ill. App. Ct. 1982) (holding that, under Illinois statute, insured and insurer each may prosecute an action to enforce their beneficial interest). See also Ill. Ann. Stat. ch. 735, para. 5/2-403 (Smith-Hurd 1993) ("A judgment in an action brought and conducted by a subrogee . . . whether in the name of the subrogor or otherwise, is not a bar or a determination on the merits of the case or any aspect thereof in an action by the subrogor to recover upon any other cause of action arising out of the same transaction or series of transactions."); Jenner & Tone, supra note 291, at 613 (explaining that the drafters of the original version of Ill. Ann. Stat. ch 735, para. 5/2-403 recognized the "undesirable effect" of requiring the defendant to litigate the same issues twice, but concluded "that this factor was overbalanced by considerations of fairness to the subrogor who had not had his day in court" in the subrogee's action).

n354 See Wadsworth v. United States Postal Serv., 511 F.2d 64, 66 (7th Cir. 1975), in which the district court had granted the defendant's Rule 17(a) motion to reduce the plaintiff insured's ad damnum to $ 60, the amount of the insured's uncompensated loss. The court of appeals, however, held that under United States v. Aetna Casualty & Sur. Co., 338 U.S. 366 (1949), the district court should have required joinder of the insurer upon a proper motion by the defendant. Wadsworth, 511 F.2d at 67. In Executive Jet Aviation, Inc. v. United States, 507 F.2d 508, 514 (6th Cir. 1974), the defendant argued for a "pro tanto dismissal" of the plaintiff insured's action to the extent of the insurers' claims. The court held that the insurers, who had used a loan receipt agreement to avoid having to sue in their own names, should be given an opportunity to join in the action as plaintiffs. Id. at 515. Because the insurers, under the loan receipt agreement, were to bear the expense and to assume direction and control of the litigation, id. at 510, the court probably should have required substitution of the insurer as the sole party plaintiff. Regarding loan receipts, see Entman, supra note 1, at 925-31.

n355 If both actions are brought in federal court, the court may be able to consolidate them. Fed. R. Civ. P. 42(a). If the first action is resolved in a state court prior to the filing of the federal action, the federal court will not be able to bar the second action because 28 U.S.C. section 1738 requires the federal court to give the state court judgment the same effect that it would be given by the state's courts. 28 U.S.C. section 1738 (1988). In that circumstance, however, the federal court will not be subjected to trying more than one lawsuit.

n356 Cf. Freer, Avoiding Duplicative Litigation, supra note 15, at 844 (advocating broadening compulsory joinder to avoid the risk of multiple litigation, especially to force joinder of plaintiffs in "transactionally related tort cases").

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substantial that not only should they be joined, but in their absence the court cannot proceed and the action must be dismissed altogether. [72]
[*20]

In the second half of the nineteenth century, equity's flexible principles of compulsory joinder calcified into what came to be known as a "jurisprudence of labels." [73] In the much-quoted and highly influential case of Shields v. Barrow, [74] the Supreme Court described equity's compulsory joinder doctrines in terms of classifications of parties in which "necessary" parties are those "having an interest" in the controversy, but whose "interests are separable from those of the parties before the court," while "indispensable" parties are those whose interests are not separable. [75] Rules of procedure provided similar disembodied abstractions for identifying necessary and indispensable parties. The Field Code [76] provided that "of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants." [77] Federal Equity Rule
[*21] 37 spoke in terms of "persons having a united interest." [78] Federal Rule of Civil Procedure 19, as adopted in 1938, [79] retained the
[*22] labels "necessary" and "indispensable" [80] and mandated joinder of persons having "a joint interest." [81]

Compulsory joinder decisions under these rules, including the Shields decision itself, have been widely criticized for employing abstractions and labels rather than applying the underlying purposes of compulsory joinder to the facts of the case at hand. [82] As Professor Reed described the problem, "Judges, with human preference for the simplicity and apparent certainty of pat concepts and rules of thumb, tend to lapse into the terminology of joint rights, inseparable rights, and the like, instead of striving (through factual analysis) for a balance of equity and convenience." [83] Similarly, the
[*23] Shields formulation has been accused of resulting in "classification of cases by a kind of sloganeering process in which important factual detail was overlooked." [84]

One such slogan widely, though not unanimously, adopted by both state and federal courts [85] was that partially compensated insureds and their compensating insurers were necessary parties when either brought suit. [86] Many courts, on the other hand, held that the insurer was not a necessary party and continued the older practice of suit in the name of the insured alone, at least when subrogation was only partial. [87] Still other courts simply were con
[*24] fused by the whole business. [88] In this sloganeering process, however, the courts overlooked the substantive law of insurance subrogation and the underlying purposes of compulsory joinder. And there was no more guilty party than the United States Supreme Court, which in 1949 put its stamp of approval on one of the slogans in a case that vividly illustrates how the jurisprudence of labels diverts attention from the underlying substantive law.

IV. The Aetna Decision and Its Legacy

A. United States v. Aetna Casualty & Surety Co.

In the four cases consolidated for appeal in United States v. Aetna Casualty & Surety Co., [89] an insured allegedly had been injured by the negligence of a federal government employee. [90] The injured parties' insurers had brought suit against the United States pursuant to the Federal Tort Claims Act [91] to recover the amounts they had paid in compensating the injured parties. [92] The issue before the Court was whether an insurer's subrogation claim against the United States was prohibited by the Anti-Assignment Statute, which barred "transfers and assignments" of claims against the United States. [93]

Without discussing whether the compensating insurers were, in

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[*25] fact, subrogated under the substantive law of insurance that applied to each claim, [94] the Court framed the issue before it as whether an insurance company may "bring suit in its own name against the United States upon a claim to which it has become subrogated by payment to an insured who would have been able to bring such an action[.]" [95] The Court concluded that the Anti-Assignment Statute did not bar assignments by operation of law, such as subrogation. [96] Consequently, the right of a subrogee to bring suit against the government under the Tort Claims Act was the same as the subrogee's right to bring suit against a private person. [97]

In concluding its decision, the Aetna Court briefly discussed the proper parties to a suit seeking to recover damages that have been compensated by insurance. Having already assumed that the compensating insurers were subrogees, the Court announced that, under Rule 17(a), a subrogee that has paid an entire loss must sue in its own name alone, while in a case of partial compensation, "both the insured and insurer (and other insurers, if any, who have also paid portions of the loss) have substantive rights against the tortfeasor which qualify them as real parties in interest." [98] Like the Court's facile assumption that a compensating insurer is necessarily subrogated and entitled to enforce a claim, the Court erroneously assumed that the insured's remaining pecuniary interest rendered it a "real party in interest" also entitled to sue. [99]

The Court next discussed the joinder issue. [100] Addressing
[*26] whether the insurer might sue alone, [101] or whether the suit must be in the name of the insured for the use of the insurer, or whether all parties in interest must join in the action, the Court first rejected the notion of "use" practice as "obviously unnecessary" under Federal Rule 17(a). [102] The Court added that "no reason appears why such a practice should now be required in cases of partial subrogation, since both insured and insurer 'own' portions of the substantive right and should appear in the litigation in their own names." [103]

The Court then turned to compulsory joinder under Rule 19. In a classic example of labelling, the Court stated that:

Although either party may sue, the United States, upon timely motion, may compel their joinder . . . . 3 Moore, Federal Practice (2d ed.) p. 1348. Both are "necessary" parties. Rule 19 (b), Federal Rules of Civil Procedure. The pleadings should be made to reveal and assert the actual interest of the plaintiff, and to indicate the interests of any others in the claim. [104]

[*27]

The Aetna Court gave no further explanation of why the insured and the insurer were necessary parties. The Court did not even cite Rule 19(a), which defined "necessary" parties as those with joint interests. Perhaps the Court considered the insured and the insurer to be "necessary" simply because of their "joint" interests, but this reasoning was not in the opinion. Rather, the Court cited subdivision (b), which provided for compulsory joinder of persons who are not "indispensable," but "who ought to be parties if complete relief is to be accorded between those already parties." [105] The Court did not explain why the presence of either the insured or the insurer would be needed to provide complete relief between those already parties. In fact, it would seem that the opposite is true--that a court could resolve the dispute between either insured or insurer and the alleged tortfeasor without the presence of the other party interested in the claim. [106]

The Aetna Court also noted that although it considered both the insured and the insurer to be "necessary" parties, they "clearly" would not be "indispensable" under Rule 19. [107] Thus, the Court suggested that if the party who is not joined is beyond the jurisdiction of the court, the suit may nevertheless proceed without him under Rule 19(b) and the defendant may have to defend two or more actions on the same tort. [108] Again, the Court did not ex **[*28]** plain its

conclusion. The Court stated simply that neither absent party would meet the Shields v. Barrow [109] test that indispensable parties are those with "'an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.'" [110]

The Aetna decision created an unfortunate, although highly influential, precedent for compelling joinder of a compensating insurer under Rule 19 without regard to either the substantive law or any policies of compulsory joinder. Moreover, the Court's broad statement that the defendant may compel joinder of either insurer or insured was dicta with regard to joinder of the insurer. In each of the cases before the Court, the insurer had brought suit. The Court's failure to analyze the application of Rule 19 or its underlying policies make it difficult to assess the proper precedential value of its dicta. Had the Court at least explained why the insureds were necessary, but not indispensable, it might be possible to determine whether the same reasoning should apply to the insurer, or whether there is any distinction between insured and insurer in this situation that would call for a different result.

The Court's failure to justify its joinder pronouncements in the Aetna opinion is probably attributable to its heavy reliance on Moore's Federal Practice, which had recently been published in second edition. [111] In the 1948 version of the second edition, Pro **[*29]** fessor Moore described principles for joinder of compensating insurers in his discussion of Rule 17 (a). [112] He echoed Clark's preference [113] for the analogy to partial assignment--that in a case of partial subrogation, either subrogor or subrogee may sue, but that upon defendant's objection, joinder of the other should be compelled. [114] The Moore treatise and the Aetna decision both imply that the role of the substantive law ends with the conclusion that the insurer is entitled to reimbursement. Whether the insured or the insurer each may assert and control a claim against the third party, and whether joinder of the other is required or may be dispensed with, are all treated as matters of federal procedure. [115] And even as to matters of federal procedure, both Moore and Aetna reinforce a jurisprudence of labels, oblivious to underlying policies of compulsory joinder. [116] This approach, in turn, was reflected for many years in lower court decisions, even after the
[*30] 1966 amendment to Rule 19 should have settled that the scope of federal compulsory joinder is much narrower and depends upon careful analysis of the substantive rights of the parties. [117]

B. Aetna's Legacy

1. Finding the Real Party in Interest Without Understanding the Substantive Law

One legacy of the Aetna opinion, explored in some detail elsewhere, [118] was a large number of lower court decisions finding that insurers and insureds were both real parties in interest in spite of substantive law to the contrary. The importance of this legacy for present purposes is that an incorrect determination that both insured and insurer are entitled to state a claim for relief against the third party creates an unnecessary joinder issue and, in some cases, an erroneous decision to require joinder.

An illustrative case is Gas Service Co. v. Hunt, [119] decided by the Tenth Circuit one year after the Aetna decision. In Hunt, the circuit court assigned error to the trial court's denial of a defendant's motion to require joinder of subrogated insurers as plaintiffs in an action brought by the insured. The Tenth Circuit reversed and required joinder. [120] The Hunt court first stated that under Kansas law both the insured and the partially compensating insurer were real parties in interest with the substantive right to sue the wrongdoer for their respective shares of the claim. [121] Acknowledging that Kansas permitted the insured to sue alone for the entire claim, the Tenth Circuit concluded that this rule was "procedural rather than

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ARTICLE: PRIVATE INSURANCE, SOCIAL INSURANCE, AND TORT REFORM: TOWARD A NEW VISION OF COMPENSATION FOR ILLNESS AND INJURY.

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* Kenneth S. Abraham is Class of 1962 Professor of Law, University of Virginia School of Law. Lance Liebman is Dean and Professor of Law, Columbia Law School. This Article had its origins in a series of background papers and chapters that the authors prepared for the American Law Institute, Reporters' Study, Enterprise Responsibility for Personal Injury (1991). We are grateful to our colleagues on that project and to the Institute for their support and assistance. In addition, we thank Lynn Baker, Saul Levmore, William Stuntz, and participants in workshops at Columbia Law School and the University of Pennsylvania Law School for their comments on an earlier draft.

SUMMARY:
... The United States does not have a *system* for compensating the victims of illness and injury; it has a set of different institutions that provide compensation. ... But unlike many of those programs, in our view, tort law is not a very sensible system of victims' insurance: it makes compensation available only when the injurer's fault can be demonstrated; it reduces compensation to the extent that the victim was at fault; its transactions costs are high; it covers pain and suffering in unlimited amounts even though many victims would wish limited or no such coverage *ex ante;* and in providing first-dollar coverage without explicit deductibles or coinsurance, it makes itself vulnerable to *ex post* moral hazard. ... Conversely, the proponents of health and disability insurance reform usually talk of reform without referring at all to the relation between these fields and the tort, workers' compensation, and other no-fault systems. ... In connection with illness and injury, the major additional changes required would be the provision of catastrophic health insurance to the thirty million or more individuals who are now uninsured and the roughly similar number who have limited health insurance, and the expansion of total disability insurance to assure that persons suffering such disability were assured of subsistence-level income in the event of their inability to work. ...

TEXT:
[*75] The United States does not have a *system* for compensating the victims of illness

corrective justice and deterrence unless premiums (or taxes) financing the system were calibrated to responsibility for the losses covered by the system and paid by potential injurers, who might in some cases be potential victims themselves. For instance, oil companies, automobile manufacturers, and smokers would have to be charged higher taxes to finance a national health insurance program than pillow manufacturers and nonsmokers. In effect, financing would have to be cause-based even while the right to compensation was loss-based. Such an approach is theoretically possible, but it would pose enormous administrative difficulties. For this reason, it is unsurprising to see that no existing compensation system falls in the top right cell of the matrix, although private loss-insurance programs seek modestly to achieve deterrence by charging risk-classified premiums and employing other cost-containment measures.

Similarly, it would be extremely difficult to use a fault-based system to achieve wealth redistribution from those with high incomes to those with low incomes. [59] If poor people do not suffer a disproportionately **[*92]** high (or low) share of the injuries resulting from malpractice or defective products, then an expansive (or restrictive) right to recover in tort for such injuries will not benefit the poor disproportionately. And even if tort law could be shaped so as to benefit poor plaintiffs disproportionately, one would have to take into account the impact of imposing liability on particular categories of defendants and the resulting effect on their employees and customers before one could be certain that a particular rule had a net redistributional effect. Consequently, there is no form of tort liability for personal injury whose main goal is income redistribution, and the bottom left cell of the matrix is empty.

What the matrix does not reveal, however, is why the remaining cells are filled the way they are. Some of the possible explanations make sense, but some require closer analysis. For example, because both fault- and cause-based systems of compensation have the potential to promote deterrence, a nondeterrence explanation for the allocation of some compensation functions to the tort system and others to cause-based systems is desirable. The differences between the capacity of these systems to achieve corrective justice is one possibility. As we noted earlier, [60] however, although the fault system takes the *form* of a corrective justice system, the widespread incidence of liability insurance limits the degree of correction that flows directly from the defendant to the plaintiff. Moreover, some cause-based systems preserve an attenuated sort of corrective justice by employing a financing mechanism that charges the parties associated with injury-causing activities the cost of compensating for these injuries. On the other hand, some cause-based systems -- most notably auto no-fault -- have no capacity to promote even this attenuated form of corrective justice, because they are financed through premiums paid by potential victims, not by potential injurers. Thus, it may be that the *appearance* of corrective justice influences the choice between fault- and cause-based systems.

Overall, however, the allocation of functions between fault- and cause-based systems may be determined as much by practical considerations as by reasons of principle or appearance. First, the kinds of personal injuries that have been carved out of the tort system and transferred to cause-based systems often are those believed (sometimes correctly and sometimes not) to be technically susceptible to treatment on a causal basis. Work- and auto-related injuries, vaccine side effects, black lung disease, and birth-related neurological defects are thought to be both easily discernible and in the main distinguishable from other **[*93]** kinds of injuries or diseases with other causes. [61] The development of broad-based medical, products, or environmental injury compensation systems based on causal responsibility has not yet been possible, however, precisely because of the difficulty of defining a conceptually sound and easily applied compensable event in these fields -- a difficulty that has long been recognized. [62]

Second, as a matter of practical politics, it is almost always easier to adopt a cause-based system if its cost is no greater than the cost of the component of the tort system it replaces. [63] Thus one characteristic of cause-based systems that recommends them is that they generally pay beneficiaries their economic losses only, and often only partial economic losses

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at that. The tort system, in contrast, purports to pay both economic and noneconomic losses in full. But when the number of injuries resulting from fault is small in comparison to the number caused without fault by the activity in question, even restricting payment to economic losses alone may not be sufficient. Because compensating the economic losses of all eligible claimants might cost more than the component of the tort system a proposed cause-based system would replace, employing cause-based systems runs into political obstacles.

Similarly, the decision to retain fault-based and cause-based systems at all when they overlap with loss-based systems is easy enough to explain, but not always as easy to justify in principle. Even when it would be feasible to employ broader-based loss insurance systems exclusively, **[*94]** we have retained tort liability, workers' compensation, and auto no-fault, for example, because of our unwillingness to surrender entirely the possibility of achieving corrective justice and deterrence in the classes of cases that these systems cover. But these systems' capacity to achieve corrective justice and deterrence is inherently limited. Some of the well over $ 100 billion per year spent by these systems -- especially a portion of their transactions costs -- might be better spent compensating the losses of those who suffer illness and injury but are ineligible for recovery in tort or from any cause-based system and are not covered by private or social loss insurance. Proponents of fundamental reform of the tort system commonly make this suggestion, [64] though sometimes without a sufficient appreciation for the difficulties of expanding our various systems of loss insurance. Conversely, the proponents of health and disability insurance reform [65] usually talk of reform without referring at all to the relation between these fields and the tort, workers' compensation, and other no-fault systems. To get a sense of the possibilities, in the next section we examine how these relationships actually operate and then turn in Part III to several visions of the future.

B. *Coordination of Benefits*

The different programs for compensating the victims of injury and illness analyzed thus far relate to each other not only conceptually; in actual operation the coverage provided by the different programs sometimes overlaps. Examining the methods these programs employ -- or fail to employ -- in coordinating coverage in the event of such duplication is yet another way of understanding the American compensation "system."

Focusing first on the relationship between the tort system and the different cause-based compensation programs, it is apparent that in many instances there is no duplication. For example, workers' compensation is almost always an exclusive remedy against a claimant's employer; a claimant under the Florida and Virginia birth-injury programs generally has no cause of action in tort, [66] and an auto no-fault policyholder whose claim falls below the statutory tort "threshold" may not bring an action alleging negligence by the driver who injured her. In these instances a shift from the emphasis on corrective justice that is **[*95]** the hallmark of tort law toward forced insurance -- a characteristic goal of cause-based programs -- has been decisively made.

In other situations, however, neither tort law nor a cause-based program is the exclusive vehicle of recovery. Under such circumstances, each system has essentially three options: (1) to allow duplicate (or overlapping) compensation; (2) to allocate primary coverage responsibility to the tort system; or (3) to allocate primary coverage responsibility to a cause-based system. Although cause-based systems occasionally employ the first approach, for the most part they adopt either the second or third. For example, workers' compensation takes the second approach. When an employee who has been paid workers' compensation brings a suit against a third party (for example, the maker of a product that caused the employee's injuries), the employer or its insurer has a right to indemnification out of any tort recovery received by the employee from the third party. The ostensible effect of this arrangement is that the product maker, not the employer, bears the full cost of the loss. Although in the long run the purchase price of the product may be adjusted to take account

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of this effect, the message clearly reflected in this arrangement is that the goals of tort law are of greater importance than the goals of workers' compensation. In auto no-fault, by contrast, the third option is employed. Here, the tortfeasor is relieved of a portion of his or her liability, because auto no-fault benefits typically are offset against any tort recovery obtained by a no-fault policyholder. The message of this approach is that the goals of the no-fault program take precedence over the goals of the tort system. While there may be political explanations for this inconsistency, we can see no persuasive basis for it in principle.

Loss-based systems also tend to interact quite inconsistently with both fault- and cause-based systems. For example, until recently the principle of coordination that applied when loss-based and other systems overlapped was similar to the principle by which tort and workers' compensation recoveries currently are coordinated. In tort law, the **collateral source rule** allowed the plaintiff to recover from the defendant sums already paid to the plaintiff by loss-based systems of compensation. Loss-based systems could be reimbursed out of these recoveries pursuant to contractual or statutory rights of **subrogation.** [67] As a result, at least in theory, loss-based systems did not compensate for losses paid by the tort system. [68] Similarly, as between cause- and loss-based compensation systems, the former shouldered ultimate coverage responsibility. For example, Social Security Disability benefits were, and still are, reduced by sums paid or payable by workers' compensation. [69] **[*96]** In short, loss-based insurance did not compensate for losses paid by fault- or caused-based compensation programs.

Thus, coverage priority ran from fault-, to cause-, and finally to loss-based compensation systems. The importance of corrective justice and deterrence seemed to explain these priorities. When both fault- and loss-based compensation were available, corrective justice and deterrence suggested that the tortfeasor or its liability insurer should bear primary responsibility for compensating the victim. When both cause- and loss-based compensation were available, concern for the promotion of deterrence through cost-internalization required allocating primary coverage responsibility to the cause-based system. In both situations, loss-based systems served as secondary sources of compensation and the other systems were primary sources.

This overall consistency has recently been shattered, however, by changes in the collateral source rule in tort law and by the development of analogous changes within some of the newer cause-based systems. The collateral source rule was partially or completely abolished by legislation in more than a dozen jurisdictions during the last decade. [70] As a consequence, in these jurisdictions most loss-based systems of private and social insurance bear primary responsibility for losses that would otherwise be compensable in tort. To complicate matters further, even where this new scheme is applicable, it is subject to an exception for Medicare and Medicaid benefits. State rules governing coordination between these benefits and other sources of compensation are preempted by provisions in the federal statutes creating Medicare and Medicaid, under which the programs bear only secondary or tertiary coverage responsibility. [71] Similarly, several of the new cause-based compensation schemes that have been carved out of the tort system reverse the traditional coverage priorities described above. For example, in many states, auto no-fault benefits are payable only to the extent that workers' compensation and loss-based sources of compensation are not available; [72] and the Florida and Virginia birth-related neurological defect funds pay medical expenses only to the extent that such benefits are not payable by health insurance. [73]

[*97] One motive for these changes has almost certainly been the desire to reduce the costs of the system that is made a secondary source of compensation for the loss in question. Whatever else might be said in favor of this motive, at the level of principle it is nearly empty, since the change merely shifts costs from one system to another without reducing them overall. Indeed, to the extent that the older fault-over-cause-over-loss approach to coverage priorities could be justified on deterrence grounds, the recent reversal of priorities is likely to increase marginally rather than decrease costs overall, because of the loss of deterrence resulting from the reversal.

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A very different justification for these changes, however, may well have an arguable basis in principle. Under the traditional collateral source rule, loss-based compensation rights were seen as assets of the tort plaintiff -- assets from which the defendant should not benefit and which therefore were not offset against the plaintiff's recovery in tort. For the same reason, payments from loss-based systems did not reduce cause-based recoveries. It might now be argued that the recent reversals of these traditional coverage priorities reflect the fact that cause- and loss-based sources of compensation have proliferated. Employer-provided health and disability insurance and Social Security Disability benefits, for example, are so widespread that they no longer need be considered uniquely individual assets. Rather, according to this argument, the implicit assumption underlying the new priorities is that nearly everyone has such insurance. Since no one has made a conscious decision to purchase these forms of insurance instead of consuming other goods, rules denying the parties responsible for payment under fault- or cause-based systems the benefit of the existence of loss-based compensation have become unnecessary. The fact that the new rules do not apply to life insurance -- which remains largely a personal consumption item purchased in varying amounts by different individuals -- supports this thesis.

The assumption upon which this interpretation is based, however, is inaccurate. Although private and social loss insurance is much more widespread than it was even several decades ago, such coverage is not as pervasive as the assumption suggests. As we noted in Part I, [74] thirty million people have no health insurance, approximately 78% of the workforce has no private insurance against long-term disability, and the maximum Social Security Disability benefit covers only a portion of the income lost from permanent total disability. Medicaid and SSI are also incomplete programs of coverage. Thus, while there has been a trend towards greater protection, substantial gaps in the fabric of private and social insurance remain. Moreover, the reversal of coverage priorities that makes loss insurance primary has been incomplete in two ways. First, while some states have revised the traditional collateral source **[*98]** rule, others have not. Even in those states that have revised the rule, the shift in priorities has been limited by the federal preemption in the Medicare and Medicaid statutes. Second, workers' compensation has retained the traditional priorities, while several but not all of the newer cause-based systems have reversed them.

All this makes the effort to discern any principle or principles in the American system of compensating for illness and injury extremely difficult. The system is a patchwork of different programs that are loosely and inconsistently coordinated. That condition is perhaps only natural for a set of programs that did not grow up as a system and that are only now being perceived as potentially systematic. For those whose proposals for reform anticipate the development of a genuine "system" of compensation, the challenge is to understand the obstacles that stand in the path of such development and to devise ways of overcoming them.

III. TOWARD A COHERENT SYSTEM OF COMPENSATION

If the different American compensation programs are to be woven into a coherent and coordinated system, then greater attention will have to be paid both to the scope of the individual programs and to the relationships among them. We shall offer three different models of more expansive, more coherent systems. These include: (1) a tort system oriented mainly to achieving corrective justice and deterrence combined with greater private and social insurance protection -- a model we call "broader categorical subsistence"; (2) a scheme embodying a similarly limited tort system but more systematic private and social insurance protection, which we call "full subsistence"; and (3) a scheme with a very limited tort system and private and social insurance against virtually all the economic losses suffered by individuals as a result of illness and injury, which we call "full welfare."

Our aim is not to recommend one approach over others, although it is obvious that, because any actual expansion will likely be incremental, a "broader categorical subsistence" approach

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is in reality more likely to be adopted than the other two more expansive approaches. Rather, we want to analyze the obstacles that would impede a commitment to any one of these intellectually valid approaches, and sketch the contours of each approach, outlining the three different models toward which the current system might evolve.

A. *Obstacles to Expansion*

Expanding the current patchwork of compensation programs would generate considerable, but not insurmountable problems. In what follows we discuss separately the difficulties that would be encountered in expanding health and disability insurance, for the two forms of coverage face different challenges.

[*99] 1. *Health Insurance.* -- The insurance system has shown itself quite capable of providing adequate health insurance to the vast majority of the American middle class, although without more adequate cost controls it is uncertain whether that system will be able to continue in its present form. Largely for reasons of cost, the system has not provided health insurance to the working poor. The Pepper Commission estimated that the additional federal cost (in 1990 dollars) of providing adequate health insurance and long-term care to the entire population would be $ 66 billion per year, about two-thirds of which would be net new spending. [75] In one sense, this may be a low estimate, since without more effective cost controls, the addition of this much demand is likely to push health care costs even higher, with corresponding subsequent increases in the cost of the new programs. But it seems highly likely that any major health insurance initiative will not only focus on the financing of additional care, but include far-reaching cost-containment measures as well. These measures might counteract cost increases that could otherwise be anticipated.

Moreover, in several other ways the Pepper Commission's estimate of the cost of providing universal health care coverage may be misleadingly high. First, certain overhead cost savings could be expected from a universal health care program even if it retained reliance on the private market to supply the lion's share of coverage. For example, if legislation prescribed several different model forms of coverage that the private market would be permitted to offer, the costs of determining eligibility, complying with insurers' different documentation requirements, and processing claims would decline. [76]

Second, it is possible that with the advent of universal health insurance, reducing the scope of tort liability would find more political favor than at present, and that the savings from this reform could be used to help finance the health insurance system. For example, a significant portion of the tort system's dollars are spent processing and litigating auto-accident claims -- yet auto liability ranks low in its capacity to achieve either corrective justice or deterrence. Similarly, a portion of tort dollars is spent on the kind of long-latency disease claims that we argued earlier also have a limited capacity to achieve corrective justice or deterrence. [77] If automobile and long-latency tort liability were reformed, the resulting savings could help offset the cost of universal health insurance. Indeed, although major stand-alone tort reform is **[*100]** politically improbable at present, legislation enacting health insurance reform is a promising vehicle for accomplishing a trade-off between health insurance expansion and the reduction of tort liability. [78]

Third, the American health insurance system is only at the beginning of an era in which preventive care, designed to minimize the incidence of illness and injury, and "managed care" measures, directed at deterring excessive and unnecessary treatment, are being employed. Moreover, in the case of any partial substitution of health insurance for tort liability, preventive and managed care might well accomplish certain forms of deterrence at which tort law and many cause-based systems have been less successful because they tend to pay compensation without using explicit deductibles, coinsurance, or other cost-minimizing devices. The cost sacrifice that results from reduced deterrence of injurers may thus be at least partially offset by the cost savings generated by devices that focus on post-accident victim deterrence, albeit by reducing actual compensation somewhat.

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Finally, a considerable portion of the cost of a universal health care program would not constitute "new," but rather shifted costs. Admittedly, some portion of the Pepper Commission's estimated costs of such a program would appear to be entirely new; that is, they would be costs that previously were not incurred, because some patients receiving care under the new program would not have received such care in the past. But the remainder of the cost of the program would be for care that has been provided in some other way in the past -- free of charge by a public hospital, private hospital, or physician and either charged off as a bad debt or recovered from an insurer as overhead reimbursement. Under the new system, the cost of this previously provided care would be a saving to insureds, providers, and insurers that should be offset against the gross cost of the new program in order to calculate its net cost. [79]

In addition, there is a strong argument that in calculating the net cost of a universal health insurance program, two other kinds of savings should also be offset against even the entirely new cost of such a program: (1) the savings in future health care costs resulting from increased preventive care under the program; and (2) the increased social productivity that additional health care would generate. Although the magnitude of these potential savings is not easy to estimate, the savings would undoubtedly have a measurable effect on the net cost of universal health insurance.

In short, in an era of economic and budgetary hard times, the $ 66 billion price tag on universal health and long-term care insurance poses a daunting obstacle to the adoption of such a system. But that is a **[*101]** gross-cost estimate, against which it is reasonable to offset unquantifiable but probably substantial savings that would result from the enactment of such a program.

2. *Disability Insurance.* -- In contrast to health insurance, which is provided on a widespread basis to the middle class, the failure of the American compensation system to provide adequate long-term disability insurance even to the American middle class has no immediately obvious explanation. Why does private disability insurance play so small a role in the American system of compensation for the consequences of illness and injury? Of course, one possible answer is that the potential beneficiaries of such compensation simply do not want it. We believe that this explanation is both inaccurate and simplistic, however, for it ignores the factors that inhibit the development of a robust market in disability insurance on both the supply and the demand sides of this market.

a. *The Nature of the Problem.* -- The history of private disability insurance is mainly the story of a series of lessons learned by the insurance industry and of the progressive sophistication of the instruments used to provide disability insurance coverage in response. Two periods are particularly noteworthy. First, after the Great Depression, it became clear that there was a strong linkage between economic conditions and the frequency and severity of claims. [80] Second, the extension of SSD to virtually all Social Security participants after 1956, the growth of some state disability protection programs, and the indexing of SSD benefits in 1972 essentially have made the lower-income market an unlikely source of private disability insurance policyholders. [81] Insurers have recognized that disability insurance is a specialty line, requiring a fund of experience and an operation designed to confront and neutralize the factors that render the line volatile. Disability insurance **[*102]** is not regarded as a ready source of easy profit. On the contrary, because insurers are wary about disability insurance, it is not widely marketed on an individual basis, and competition in the line does not appear to be intense.

If the history of disability insurance were all there were to explain this state of affairs, it would be reasonable to wonder why the insurance industry's entrepreneurial incentives had not created a more active market by now. With its hard-won sophistication, the industry would be able to place appropriate limits on its exposure through underwriting prudence and carefully drafted policy provisions, tap the reservoir of demand for disability protection, and

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write vastly expanded amounts of coverage. Unfortunately, more than mere caution born of the history of this line of insurance stands in the way of such an expansion. Two separate obstacles afflicting the supply side of the market place severe and probably inescapable limits on the potential scope of the private disability insurance market.

First, the threat of adverse selection limits the supply of disability insurance. [82] The consequence of adverse selection, of course, is higher premium charges for standard and low-risk policyholders. In the absence of adverse selection, premiums for these individuals would be lower; more would apply for coverage, and those who insure notwithstanding the higher rates would purchase more coverage than under the present regime. The magnitude of the impact of adverse selection on disability premiums is difficult to estimate, but the problem undoubtedly **[*103]** is partly responsible for the inactivity of the market. [83]

Second, the problem of moral hazard so afflicts the entire market that there are effective limits on the form and amount of disability insurance that insurers can safely sell. Moral hazard is the tendency of an insured party to exercise less care to minimize losses than he would exercise if he were uninsured. [84] In disability insurance, moral hazard is present both *ex ante* and *ex post.* That is, the insured individual is more likely than the uninsured individual to become disabled, to recover from a disability more slowly, and never to recover from a disability. [85] Disability insurers try to combat the different forms of moral hazard that afflict disability insurance by providing the insured with incentives to remain healthy and to recover as quickly as possible from any disability that is suffered. For example, disability insurance usually is written to cover no more than roughly 60% of the potential after-tax income loss that would be caused by a disability, and insurers attempt to coordinate coverage so that this ceiling is not exceeded even when the insured is entitled to disability payments from other sources, such as SSD or workers' compensation. Even this ceiling, however, may not be sufficient to combat moral hazard completely. [86] And the obvious consequence **[*104]** of this device is that those who are genuinely disabled may be unable to maintain their previous standard of living because their losses are only partially insured.

Finally, psychological factors may affect the market for disability insurance. Potential policyholders may misperceive the risk of suffering a disability, and this inadequate knowledge of or concern about the prospect of disability may thereby limit the demand for disability insurance. [87] We would not be at all comfortable relying exclusively on this **[*105]** psychological factor to explain the small role played by private, voluntarily-purchased disability insurance in the United States. This explanation, however, may help to round out the picture of a market in which the supply of coverage is seriously limited by the need to combat adverse selection and moral hazard, and in which demand is unduly low because of misperception of the risk of suffering an uninsured disability. In any event, the prospect for the development of a more robust voluntary private market for disability insurance is extremely weak.

b. *Filling the Gap.* -- In light of the foregoing analysis, disability insurance poses a challenge very different from the health insurance problem. In the health insurance context, the key question is *how* to fill the gap in coverage that afflicts a minority of the population. In the disability insurance context, however, the threshold question is *whether* the gap affecting the majority of the population should be filled. Given the impact of adverse selection on the voluntary market for disability insurance, mandated private coverage or expanded provision by the government are probably the only feasible approaches. Yet this could entail considerable cost.

Estimating the cost of a mandatory universal total disability insurance system is difficult for both conceptual and practical reasons. Social consensus as to what events are appropriate reasons for not being at work is continually evolving. The current controversy over "family leave" is an excellent example. [88] Estimating the costs of long-term disability compensation, moreover, requires decisions about which reductions in earning ability -- some of which are predictable results of aging, for example -- should count as "disabilities" for purposes of

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measurement.

Even setting aside these important conceptual questions and using definitions of disability adopted by existing studies of the issue, [89] estimating costs poses practical problems. Nonetheless, an estimate of the order of magnitude of the costs involved is possible. We calculate that public and private insurance benefits for disability under six months **[*106]** duration probably now total about $ 20 billion of the roughly $ 55 billion in income lost each year from such disability, leaving a shortfall of about $ 35 billion. [90] Estimating the shortfall for disability exceeding six months is more difficult, because there are no comparable figures regarding total income lost from such disability. Assuming that the ratio of benefits paid to total income lost is roughly the same for short-term and long-term disability, [91] then the approximately $ 60 billion in current public and private long-term disability benefits paid falls short of providing full compensation by about $ 100 billion per year. Putting these very rough estimates of the compensation shortfalls in disability protection together, the total compensation shortfall is in the neighborhood of $ 130 billion. [92] An efficient system of compensation, however, would not provide full payment for all these losses. A 30 to 40% deductible or coinsurance feature for disability insurance would be sensible, in order to combat moral hazard and create appropriate incentives against overconsumption of benefits. Taking these features into account, the additional cost of a system that adequately compensated the disabled for the economic consequences of both short- and long-term disability would probably be in the range of $ 100 billion per year.

As in the case of health insurance, a portion of this additional cost of universal disability insurance would probably not be "new," but rather, shifted cost. Those who now lose wages because of uninsured disability bear this cost themselves; a universal disability insurance program would remove these costs from the uninsured and channel them through the new program. In contrast to the healt insurance example, however, a higher portion of the cost of universal disability insurance would in fact be truly new cost. Under universal disability insurance, both *ex ante* and *ex post* moral hazard would be likely to increase the frequency and extent of disability; and there would be fewer offsetting savings from such measures as preventive and managed care because these measures are far less developed in the disability field than in the health insurance field.

3. *The Public-Private Issue.* -- It is commonplace to regard reliance on the private market for the provision of even mandatory insurance (for example, auto liability insurance) as preferable to governmentally provided coverage. Competition among private insurers is thought to **[*107]** preserve the virtues of efficiency and autonomous choice that are widely valued in our society. Aside from the obstacles to expanding health and disability insurance, the question whether such expansion should rely on the private market or occur through the development of social insurance therefore must also be addressed.

In our view, the choice between the private and social insurance alternatives is both more problematic and, in certain respects, less important than the prevailing view suggests. First, at least in some respects, a universal social insurance system could capture economies of scale and uniformity that the private market now lacks. For example, the administrative costs of our decentralized private health insurance system may account for more than half the difference in cost between the Canadian and American systems. [93] Such savings could go a long way toward offsetting the decreased efficiency that could result from the absence of a competitive insurance environment. Clearly this issue is far from settled; our point is simply that the private insurance market is subject to its own inefficiencies and that these must be compared to the inefficiencies of social insurance in choosing between the two.

Second, the differences between private and social insurance are less important when both approaches have mixed goals, combining limited deterrence and modest income redistribution with the predominant goal of forced insurance. Whether the evolution is from the direction of the tort system, in which the deterrence goal predominates, or from traditional social insurance, in which income redistribution is primary, the expanded

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programs of health and disability insurance that we describe in the next section would lie midway between these extremes. Whether private or governmentally operated, universal health insurance would employ preventive and managed care measures, risk classification, deductibles, and coinsurance features to deter unnecessary cost; perhaps universal disability insurance would develop analogous devices that are only modestly used at present. At the same time, charges to those capable of paying for coverage ("premiums" if the programs were private, "taxes" if they were not) could be set with an eye toward financing the provision of coverage for those incapable of paying for it, either through private insurance pools, governmentally provided coverage, or some combination of the two. In short, many of the concerns we have been analyzing could be effectively addressed by either alternative.

B. *Models of Expansion*

The United States does not have a complete explanation for the scope and character of the liability and insurance programs that currently **[*108]** compensate the victims of illness and injury. [94] Available explanations -- including forced insurance and income redistribution -- would suggest expanding current programs. Indeed, one of the best arguments for expanding the system is that current programs can only be explained by principles that suggest expansion. European countries and Japan provide such expanded protection. [95] The United States has developed some, arguably even most, of the technology and devices necessary to provide it.

Partly out of default, the tort system is now performing certain aspects of the task of compensating the victims of illness and injury. Yet for reasons elaborated above, tort law is a highly unsatisfactory system of compensation. [96] Random victims are protected at giant overhead costs. Large sums go to lawyers rather than to compensating victims or funding additional accident reduction. Thus it seems sensible to consider adjusting private and social insurance programs to perform the compensation function that is needed, while pursuing the legitimate goals of tort law -- corrective justice and deterrence -- in different ways. Adapting existing programs to attain new goals is hardly unknown; workers' compensation and auto no-fault are the product of just this sort of approach, the first now more than seventy-five years old and even the second quite mature intellectually. Other recently adopted cause-based systems have begun to follow suit. [97]

Any expansion of individual insurance programs should be combined with the institution of a coherent system to govern interaction among the programs. Three models of expanded compensation for illness and injury are plausible: broader categorical subsistence protection, full subsistence protection, and full welfare protection. Each of these loss-based models also carries with it implications for existing and potential fault- and cause-based systems. Hence, we focus our analysis not only on the scope of individual new or expanded programs, but also on the relationships among the different components of the three models.

The compensation system currently in force in this country can be most accurately described as a collection of categorical subsistence programs. Compensation is categorical in the sense that it is provided to a victim of illness or injury only if the victim fits within the category covered by a particular program. And with the exception of the tort system, which at least in theory compensates all the losses victims have **[*109]** suffered, virtually all compensation programs provide what amounts to subsistence-level protection against the economic consequences of illness and injury. Small losses tend to be generously compensated, but catastrophic losses receive only partial compensation.

The major gaps in this categorical subsistence protection result from both of its features. Because the protection is categorical, a major portion of the population -- the working poor -- does not have health insurance. Moreover, individuals with even comparatively generous health insurance are likely not to be fully insured against catastrophic losses because of monetary ceilings on and exclusions from coverage. Because most sources of disability insurance assure beneficiaries of only subsistence, rarely is full income replaced in the event

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of disability.

Fault- and cause-based compensation schemes exhibit a kind of ambivalence toward these gaps. On the one hand, these compensation schemes have expanded, in part to fill the gaps in the system of loss insurance. As we argued in Part II, [98] in certain ways tort law has moved beyond assuring corrective justice and deterrence in order to provide compensation that would otherwise be unavailable or incompletely available to the victims of severe injury and disease. Partly in reaction to these expansions of the fault system, cause-based compensation programs have been developed to deal with particular classes of illness or injury as these expansions of the fault system have become objectionable. For example, a rise in obstetrical malpractice claims brought about the enactment of birth-related neurological defect compensation funds in two states, [99] and the threatened disappearance of childhood vaccines prompted the enactment of a federal vaccine side-effect compensation program. [100] On the other hand, the recent reversals of coverage priorities (through modification of the collateral source rule) that render loss-based insurance the primary source of coverage over fault- and cause-based compensation serve to contract the scope of the latter systems.

Thus, fault and causal systems appear to expand when loss insurance is incompletely available and to contract when such insurance is available. The extent of the expansion and contraction, however, varies from state to state and with the type of fault- or cause-based compensation involved. The challenge posed for our first model for change is how to bring greater principle and consistency into this system. The challenge posed for any efforts that would go beyond this model is how to build on the principle and consistency toward which the first model would move.

1. *Model I: Broader Categorical Subsistence.* -- Our first model would restrict the expansion of tort law so that corrective justice and deterrence **[*110]** remain its predominant goals, and would regularize the expansion of the current categorical subsistence approach. The model would eliminate ad hoc expansions and contractions of fault- and cause-based compensation and set priorities for expansion. We believe that provision of subsistence-level health care protection to the working poor should be a high priority. This would extend protection to the individuals who comprise the bulk of the thirty million people without health insurance. [101] Assuring basic health care insurance at affordable rates to everyone in the United States would thus be a principal task of Model I.

Potential expansions of disability insurance programs might assume any of four forms: protection against partial disability; protection for the dependents of the disabled; protection for those whose disability is partly the product of advancing age; and protection against temporary disability.

a. *Partial Disability.* -- By imposing the requirement of total disability, SSD and most private disability insurance programs do not provide compensation for partial disabilities -- those that prevent a person from engaging in a prior occupation but do not completely eliminate that person's ability to work. This requirement makes eligibility a yes-no question, with a claimant being found completely ineligible or fully eligible. A substantial percentage of all applicants are near the borderline of eligibility: something is wrong with them, perhaps they could work with difficulty or pain, and while it is reasonable for society to exempt them from further employment, others with similar difficulties continue to work.

The requirement of total disability is a major cause of the dissatisfaction with the outcomes of the vast adjudication system that labors to make SSD eligibility decisions. Because an individual's application requires such a subjective determination, and because so many of the cases are near the yes-no line, every student of the system concludes that outcomes depend on which decisionmaker sees a case, where in the country an application is filed, and what words a physician may have chosen to describe a condition. [102]

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and injury; it has a set of different institutions that provide compensation. We rely on both tort law and giant programs of public and private insurance to compensate the victims of illness and injury. These institutions perform related functions, but the relationships among them are far from coherent. Indeed, the institutions sometimes work at cross-purposes, compensating some victims excessively and others not at all.

The absence of a coherent system of compensation is reflected even in suggested reforms of existing institutions. Proposals to reform tort law [1] often do not recognize the role played by public and private **[*76]** insurance programs in compensating for health care expenses and lost income, even though insurance programs dwarf tort law as a system of reimbursement. [2] Similarly, those who offer proposals for altered private or public insurance protection -- and many put changes in the nation's system of health insurance at the top of the domestic agenda [3] -- usually ignore the connections between a family's insurance protection (whether provided by government, by an employer, or by first-party purchase) and the ill or injured victim's claims against a tortfeasor. Moreover, insurance reform proposals often ignore a fundamental insight of modern tort theory: when a system provides compensation for expenses not previously reimbursed, the entire cost of this new compensation is not an added social cost. The added cost of a new program may, in the broader social context, merely be shifted from victims or another program. The blindnesses of these proposals to their institutional "neighbors" are easy to explain. Because of academic and practice specialization, many of the persons most knowledgeable and creative about tort law know little about private and social insurance, while insurance and social-welfare experts often know little about tort law.

In contrast, other countries have articulated the principles that underlie **[*77]** their systems of injury and illness compensation. [4] Developing a clearer sense of the principles animating the institutional arrangements for compensation in the United States is an essential prerequisite to creating a more coherent system of protection and to assigning proper roles to tort law, private insurance and social insurance. [5]

The goal of this Article is to take the first step in this direction. The Article seeks to expose the existing relationships among tort law and the private and social insurance systems; to identify the gaps and overlaps in the existing network of compensation institutions; to analyze the obstacles to the achievement of a different regime; and to indicate the choices that must be made in constructing a coherent compensation system. Our angle of attack is more analytical than programmatic. Part I describes the "system" of compensation now in place in the United States. Part II analyzes relationships among different existing institutions, isolating points of tension and inconsistencies **[*78]** of principle. Part III seeks to confront the problems ignored by most current proposals for compensation reform -- the obstacles to expansion of the current compensation web. Part III also offers several models designed to guide thinking about the relationships among private insurance, social insurance, and tort.

I. THE EXISTING FABRIC OF PROTECTION

The United States has no "system" of compensation for the victims of illness and injury and has not adopted the principle that all such victims should receive full compensation. Consequently, we have a collection of different compensation programs, with gaps between and overlaps among them, leaving many victims undercompensated and some actually overcompensated. These different institutions employ different criteria for determining whether the victim of illness or injury receives benefits. Responsibility for compensation is based sometimes on fault, sometimes on cause, and sometimes on loss. For example, tort liability for accidental injury is generally imposed only upon proof of the defendant's fault; workers' compensation and similar no-fault systems pay compensation upon the occurrence of an illness or injury that can be ascribed to a particular cause, regardless of fault; and first-party private and social insurance cover particular occasions of loss, regardless of fault or cause.

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A partial disability insurance system might alleviate some of the difficulties associated with the SSD total-disability approach. Certainly, the importance of decisions involving claimants on the borderline between total and partial disability would diminish under such a system. However, a partial disability insurance system would face the daunting administrative task of determining degrees of disability. In addition, the cost of such a system is uncertain. As we noted above, the bulk of **[*111]** workers' compensation payments are made to compensate permanent partial disabilities. It is likely that a program to compensate for non-work-related permanent partial disabilities would be correspondingly expensive, at least in part because of the various moral hazards associated with disability insurance of any sort.

b. *Compensation for Minor Dependents of the Disabled.* -- In a sense, existing disability insurance programs already provide compensation to all the minor dependents of the disabled by replacing a portion of the income lost by those who had supported the dependents in the past. It would be a relatively simple matter to adapt the current Social Security Survivors program to replace more of the lost earnings of deceased providers. [103] It would be much more difficult, however, to expand it into, or to add, a program providing replacement income for children when a parent remains alive but disabled in some way that reduces the support available to the child. Providing adequate support for the child in such a situation would almost certainly require transferring funds to the parent directly. Yet at that point it would be hard to see the program as anything other than a minimum income for the young (or, in European parlance, a "children's allowance"), but without a rationale for the provision of such an allowance only to children of the disabled rather than to all children in need.

c. *Disability Resulting from Advancing Age.* -- The magnitude of the problem of disability resulting from advanced age has been a major force behind the decisions in both the United States and Europe to **[*112]** limit public disability benefits to only the most compelling claimants. [104] As a general matter, it is immensely difficult to apply the concept of a disabling illness or injury to individuals who are declining in capacity and energy, especially when the workplace is changing because of new technology and the capacities of younger workers. Some individuals beyond age fifty also have difficulty adapting to new types of work and being selected for vacant positions. Any compensation initiative directed at this phenomenon would have to separate those to whom something compensable has occurred from those who are merely tired or not as able as they were formerly. [105] A disability insurance program directed at those suffering disabling illness and injury would therefore have implications for society's policy toward those whose jobs disappear. [106]

[*113] d. *Temporary Disability.* -- In five states, government programs pay benefits to persons medically disabled for a temporary period. [107] In addition, sick leave is a largely unregulated system of temporary disability insurance, subject to the discretion of employers and, where applicable, collective bargaining. It would be possible to expand these programs into a general compensation scheme offering payments to all who do not work for a period of time and whose nonwork is socially approved. [108] Such a program might compensate those medically unable to work; those who lost jobs under circumstances not regarded as their "fault" and who do not have new jobs; and those not working because of pregnancy or the need to care for elderly parents ("family leave" [109]).

Our own view is that from an insurance standpoint, such a program should receive relatively low priority among the alternatives that might be adopted. [110] Temporary disabilities are by definition less catastrophic than permanent disabilities and therefore less sensible to insure against than the latter. Indeed, the absence of such coverage can be considered a kind of deductible or self-insurance requirement of existing permanent disability compensation devices. Sick leave is a popular fringe benefit, perhaps in part because it is the kind of insurance which many, rather than just a few beneficiaries, actually recover. But this is precisely the reason that this form of coverage should be a low priority for inclusion in a universal disability insurance program -- short-term disability is less a risk than an expected and fairly predictable loss.

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The advantage of a temporary disability compensation program, however, would be its capacity partially to fill certain gaps now plugged by the tort and cause-based systems of compensation. The new program would identify those out of work for less than six months, select those among them who should be barred from receiving benefits (for example, those whose behavior at work was egregious), and compensate all others to an appropriate extent. The cost could be met either by a payroll tax or by mandated benefits from employers. The major **[*114]** issues in designing the new program would include how to relate the compensation level to prior income; how to supervise work searches, and what standards to adopt for reviewing refusals of work; how to establish a benefit structure that would provide economic incentives to take a job; and whether payments should be made only for an arbitrarily fixed period, as is the case under the current unemployment insurance program. But the fundamental and most difficult question would be whether only sub-groups of those in need should be compensated. If individuals who worked and lost their jobs due to injury, illness, or reduced demand for their kind of labor are eligible, why not include those who have never been lucky enough to have a job?

2. *Model II: Full Subsistence.* -- A second model would expand loss insurance beyond the broader categorical subsistence described above by assuring full subsistence protection to the entire American population. In connection with illness and injury, the major additional changes required would be the provision of catastrophic health insurance to the thirty million or more individuals who are now uninsured and the roughly similar number who have limited health insurance, and the expansion of total disability insurance to assure that persons suffering such disability were assured of subsistence-level income in the event of their inability to work. This is a simple enough expansion to describe, although as we indicated earlier, it would be politically and economically difficult to implement. Setting aside these difficulties, however, some of the most interesting issues this model poses involve the roles that would be played by fault- and cause-based compensation systems.

The first issue would be whether use of fault- and cause-based systems for corrective justice and deterrence purposes should continue. On the one hand, nothing in a societal decision to assure that the victims of illness and injury receive subsistence-level protection would preclude the effort to achieve either of these other goals through fault- and cause-based systems. On the other hand, the requirements of these goals might change as universal loss insurance lost its initial status as a newly acquired individual asset and evolved into a characteristic of residency in the United States. For example, we might cease to consider the negligent infliction of the economic costs of illness and injury (such as health care expenses or lost wages) to be a wrong requiring corrective justice through the imposition of tort liability, since such costs would be automatically insured. In effect, these expenses would no longer be considered personal losses, because they would be automatically reimbursed. This change in attitude might suggest complete repeal of the collateral source rule in tort law as it applies to subsistence-level loss insurance, [111] though the rule might be retained as applied **[*115]** to voluntarily purchased private insurance against losses above subsistence level.

From a deterrence perspective, however, the issue would be more complicated. Because the economic costs of accidents are real even when they are fully insured, it would be rational to deter those accidents worth deterring even under a full-subsistence system. Retention of this goal would require application of the traditional collateral source rule in tort law and its analogues in cause-based systems. Otherwise, the parties paying the claims under these systems would not be held responsible for the full cost of the losses they had caused. Interestingly, then, although corrective justice concerns might become weak enough to permit the partial withering away of the fault- and cause-based systems under a full-subsistence model, deterrence concerns might require these systems to continue in the same forms they have taken in the past. And since a compensation gap with respect to above-subsistence losses would remain, the current tendency to employ fault- and cause-based systems to fill part of this gap would probably persist.

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3. *Model III: Full Welfare.* -- Our vision of a full-welfare system of compensation for the consequences of illness and injury consists of full-subsistence protection plus one other component: relatively "full" insurance against economic loss resulting from both total and partial disability, up to a fairly high ceiling -- for example, insurance that would fully replace the lost income of all but the top 10% of American wage earners, subject to a coinsurance provision designed to mitigate moral hazard. In describing this model as a "welfare" scheme, we do not mean to suggest that it would be governmentally operated, that the health and disability benefits provided to the middle and upper classes should not be financed entirely by these classes, or that the financing scheme should not be income-redistributional. On the contrary, we expect that the political and economic conditions that would make any such scheme possible would require self-financing by these classes and include a heavy element of redistribution to those with lower incomes.

The major implication for the fault- and cause-based systems of the adoption of a full welfare system would be the elimination of virtually all need to employ these systems in order to fill compensation gaps. Full-welfare loss insurance would assure nearly full compensation for the consequences of illness and injury. In turn, fault- and cause-based systems would be designed exclusively to promote corrective justice and deterrence, but only to the extent that these goals persisted and only to the extent that these systems could be effectively used to promote these goals.

Since most economic losses would be covered by a combination of private and social insurance, tort liability might be imposed only in cases of severe wrongdoing or in the limited number of situations in which noneconomic losses cried out for compensation. In effect, there **[*116]** would be high thresholds of harm and blame below which causes of action in tort would normally be abolished. With occasional exceptions, it might then be preferable to pursue deterrence of recurring injury or illness through more easily administrable cause-based compensation systems, financed by the parties largely responsible for these losses. The reason for imposing fault- or cause-based liability, then, would ordinarily have little to do with the provision of compensation for economic loss, since loss insurance would already be available to perform this function. Rather, the fault- and cause-based systems would exist almost exclusively to right severe wrongs and to influence future behavior. Therefore, as in the full-subsistence system we described above, [112] in order to perform these functions, each fault- and cause-based system would have to be a primary source of coverage whenever its jurisdiction was triggered. A version of the traditional collateral source rule in tort and its equivalent in the causal systems would be applied, [113] and responsible parties would be directly liable to the loss insurance system for all losses paid or payable to the victim by that system.

Interestingly, this approach might begin the transformation of the fault and causal systems into little more than cost-accounting mechanisms. Concern for administrative efficiency would dictate that the loss insurance system bundle its claims for economic losses against tortfeasors and process them collectively against these parties' liability insurers, except in cases in which detailed fact-finding was necessary. Processing of claims compensable in the causal systems would be even more collective and clerical, for disputes over coverage and the need for fact-finding would be even rarer here than in the case of claims compensable in tort. Only in cases in which an individual was entitled to pursue a claim for compensable pain and suffering might tort claims continue to exist.

In short, under a full-welfare system, conventional tort liability would not be abolished. But it might slowly wither away, as the demands of corrective justice declined in the face of socially provided insurance against the economic consequences of injury and disease. The liability that remained would be imposed almost exclusively for the purposes of deterrence, under circumstances that would resemble the allocation of expenses among different components of a conglomerate business, not the adjudication of civil liability.

CONCLUSION

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It is time for the United States to develop a coherent system for compensating the victims of illness and injury. This system need not be based exclusively on principle; cost is certainly an appropriate concern, **[*117]** as is the difficulty of making the transition from the series of categorical compensation programs that have grown up independently. But as the boundaries of these programs have reached toward and actually overlapped each other, the justifications for their independence have weakened. The programs are no longer normatively or even logically independent, since many of the arguments for the very existence and character of any particular program depend on the existence and character of the others.

In our view, the necessary first step is to assure basic health care insurance to the entire population. It is difficult to justify a set of programs that assures the middle class and the very poor basic health care and compensates the victims of tortious, work-related, and auto accidents for their health care expenses, but denies the working poor full access to health care unless their needs fall fortuitously into one of the foregoing categories. Although providing such insurance will not be inexpensive, some of the additional cost will be more apparent than real. The uninsured currently receive some care from public and non-profit hospitals. Some savings could be generated by incorporating more effective measures to contain the cost of health care provided to the already-insured population, and the extension of preventive care to those who are now uninsured could result in long-run savings in health care costs and increased national productivity.

A second step would require addressing the disability insurance gap. This is admittedly a more substantial challenge, because adverse selection, moral hazard, and other factors that impede the effective functioning of disability insurance cannot be completely combatted. The rationale for a program providing compensation for disability-related losses but not for other misfortunes is also open to question. Are the disabled any more deserving of compensation than, for example, those who have become homeless because of unemployment? As a "system" for compensating the victims of illness and injury in this country emerges, therefore, it will have to be harmonized with broader policies toward social welfare in general. Nonetheless, if for no other reason than the high priority we almost automatically accord to relieving physical suffering, compensation of the disabled for the losses consequent to their disability should follow the provision of basic health care to the American population.

Once a system containing these elements of compensation is developed, the role of the tort system in compensating the victims of illness and injury could be de-emphasized. Because compensation for health care expenses and lost income would already be assured independently of the tort system, the desirability of providing compensation for these losses through tort recoveries would substantially decline. Tort law could return to its traditional role of assuring corrective justice and deterrence, and what corrective justice required by way of compensation might even decline, since compensation for out-of-pocket health care **[*118]** expenses and wage losses would already be provided to all who incurred those costs, regardless of their cause. Tort law would thus become an even more ancillary feature of the constellation of American compensation programs than it is at present.

Although we are not sanguine about the immediate prospects for the emergence of a full-blown compensation "system" in this country, the recent presidential campaign debate about health insurance provides considerable evidence that a new era may be beginning, in which the scope of previously obscure compensation programs is a continuing political issue, and the unsystematic character of these programs a matter of public concern. Public recognition of these issues may not be a sufficient condition for change to occur, but it certainly is a necessary condition. With the additional ingredient of informed analysis from a variety of quarters, we may find it possible to move toward a new vision of compensation for illness and injury in the United States.

FOOTNOTES:

n1 Some reform advocates would do away with tort law and replace it with insurance. See,

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e.g., Peter W. Huber, Liability: The Legal Revolution and Its Consequences 193-206 (1988) (advocating replacement of tort by direct insurance, contract, and agency regulation of large-scale societal risks); Stephen D. Sugarman, Doing Away with Personal Injury Law: New Compensation Mechanisms for Victims, Consumers, and Business 127-48 (1989) (arguing for replacing tort system with social insurance system and new regulatory scheme to prevent accidents). Some would extend the reach of tort law. See, e.g., Glen O. Robinson, Probabilistic Causation and Compensation for Tortious Risk, 14 J. Legal Stud. 779, 781-83 (1985) (advocating tort liability for creation of risk of harm); David Rosenberg, The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System, 97 Harv. L. Rev. 849, 866-68, 881-87 (1984) (arguing for proportionality approach to proof of causation in mass tort litigation). Some would reorder tort law by transferring many of its compensation and deterrence functions to other institutions and strengthening the tort law that would remain. See, e.g., George L. Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521, 1587-90 (1987) (calling for removal of insurance function of tort law, leaving deterrence function only); Richard B. Stewart, Crisis in Tort Law? The Institutional Perspective, 54 U. Chi. L. Rev. 184, 190-95, 198 (1987) (suggesting changes in allocation of functions among existing compensation institutions). Finally, some would create methods by which victims and injurers could elect alternatives to tort law. See, e.g., Jeffrey O'Connell, Neo-No-Fault: A Fair-Exchange Proposal for Tort Reform, *in* New Directions in Liability Law 186, 190-94 (Walter Olson ed., 1988) (advocating legislation allowing defendant to offer plaintiff mandatory settlement limited to value of economic loss).

n2 Although more than forty states adopted tort reform legislation of some kind during the last decade, on the whole this legislation has merely tinkered with tort law doctrine and cannot be seen as fundamental change. The most common reforms include placing ceilings on the amount of pain and suffering damages recoverable, modifying the collateral source rule, and restricting the scope of joint and several liability. For a catalogue of the measures enacted, see Joseph Sanders & Craig Joyce, "Off to the Races": The 1980s Tort Crisis and the Law Reform Process, 27 Hous. L. Rev. 207, 217-23 (1990).

n3 The prominence of the health care issue in the recent presidential election is particularly notable. Comprehensive health care proposals have been on the U.S. political agenda for fifty years. Currently discussed reforms range from the Republican proposal to create tax incentives for the purchase of health insurance and to support the creation of health insurance pools for small businesses, to proposals for Canadian-style "national" health insurance, see U.S. Gen. Accounting Office, Canadian Health Insurance: Lessons for the United States (1991) [hereinafter Canadian Health Insurance], to the Pepper Commission's recommendations for the institution of "universal" health and long-term care insurance for all Americans, see U.S. Bipartisan Comm'n on Comprehensive Health Care, 101st Cong., 2d Sess., Recommendations to the Congress: Access to Health Care and Long-Term Care for All Americans 1-3 (1990) [hereinafter Pepper Recommendations]. In between lie a variety of proposals for the provision of health insurance through employers or other groups, including "play or pay" proposals that would permit employers to provide such coverage ("play") or "pay" a tax to finance a publicly-operated insurance pool covering the residual population of uninsured persons. See Alain C. Enthoven, Managed Competition: An Agenda for Action, Health Aff., Summer 1988, at 25, 45; see also Alain C. Enthoven & Richard Kronick, A Consumer-Choice Health Plan for the 1990s: Universal Health Insurance in a System Designed to Promote Quality and Economy, 320 New Eng. J. Med. 29, 32 (1989) (advocating "pay or play" as part of a broader scheme to provide universal health insurance).

n4 For discussions of the health insurance systems of other industrialized countries, see generally Canadian Health Insurance, supra note 3 (1991); U.S. Gen. Accounting Office, Health Care Spending Control: The Experience of France, Germany, and Japan (1991). For a comparative discussion of disability and other protections, see P. R. Kaim-Caudle, Comparative Social Policy and Social Security: A Ten-Country Study 290-312 (1973). For a similar analysis of civil liability schemes, see Werner Pfennigstorf & Donald G. Gifford, A Comparative Study of Liability Law and Compensation Schemes in Ten Countries and the

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United States (1991).

n5 Numerous scholars have explored the principles underlying existing institutions, contributing to the quest for a more principled and coherent system. Charles Reich saw that for contemporary citizens health, retirement, and disability benefits play the role that land performed in early modern times. See Charles A. Reich, The New Property, 73 Yale L.J. 733, 733 (1964). Others have extended the metaphor of estates in land to positions in the modern welfare state. See Lance Liebman, The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates, 89 Harv. L. Rev. 833, 864-67 (1976).

Today, some scholars press for a comprehensive benefit system, pursuing horizontal equity for those placed in need by harsh events. See Eli P. Bernzweig, By Accident Not Design: The Case for Comprehensive Injury Reparations 157-62 (1980) (proposing a statutory social insurance scheme premised on the notion of social responsibility to accident victims). Among the most inventive in suggesting devices for allowing individuals to protect themselves against economic loss is Jeffrey O'Connell. See Jeffrey O'Connell, Expanding No-Fault Beyond Auto Insurance: Some Proposals, 59 Va. L. Rev. 749, 773-75 (1973) (arguing for enterprise liability for injury resulting from typical risks inherent in the enterprise's activity). All of these studies look with interest at the comprehensive system in place in New Zealand. For a description of the New Zealand model, see Report of the Royal Commission of Inquiry, Compensation for Personal Injury in New Zealand 177-88 (1967); Geoffrey Palmer, Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia 222-30 (1979).

Other scholars, however, are much more skeptical. They see diverse functions, especially deterrence, being performed by the current mix of programs and worry that a comprehensive social welfare alternative to current arrangements will generate large costs in reduced deterrence of those who could take precautions to avoid illness and injury. See, e.g., Michael J. Trebilcock, Incentive Issues in the Design of "No-Fault" Compensation Systems, 39 U. Toronto L.J. 19, 20 (1989).

n6 See Jeffrey O'Connell & James Guinivan, An Irrational Combination: The Relative Expansion of Liability Insurance and Contraction of Loss Insurance, 49 Ohio St. L.J. 757, 759 (1988).

n7 See id.

n8 See 1 Arthur Larson, The Law of Workmen's Compensation § 5.30, at 39 (1992).

n9 See Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 368 (1991) [hereinafter Statistical Abstract].

n10 See William J. Nelson, Jr., Workers' Compensation: 1980-84 Benchmark Revisions, Soc. Security Bull., July 1988, at 4, 9 (figures cited are for 1982).

n11 See Josephine Y. King, No Fault Automobile Accident Law 7-14 (1987); O'Connell & Guinivan, supra note 6, at 767 n.2.

n12 See Fla. Stat. Ann. §§ 766.301-766.316 (West Supp. 1992); Va. Code Ann. §§ 38.2-5000-38.2-5021 (Michie 1990 & Supp. 1992).

n13 See Statistical Abstract, supra note 9, at 369.

n14 See 42 U.S.C. § 300aa-15(j) (1988).

n15 See Statistical Abstract, supra note 9, at 93, 360.

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n16 See American Council of Life Ins., Life Insurance Fact Book Update 17 (1991) [hereinafter Fact Book] ($ 24.5 billion in life insurance benefits paid in 1990); Health Ins. Ass'n of Am., Source Book of Health Insurance Data 7 (1991) [hereinafter 1991 Source Book] ($ 185 billion in health insurance benefits paid in 1989); Health Ins. Ass'n of Am., 1988 Update: Source Book of Health Insurance Data 9 (1988) [hereinafter 1988 Update] ($ 5.6 billion in disability insurance benefits paid in 1986). Although classifying this coverage as "private" is a useful way to distinguish it from insurance provided through "on-budget" governmental expenditures, in some respects the classification is problematic. Most health and disability insurance, for example, is group coverage provided (or offered for purchase) as a fringe benefit of employment. The terms of coverage are regulated by a federal statute (Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1988)) as well as by state statutes and regulations. The fact that such heavily regulated coverage has become so common for middle-class wage earners and their families has important implications for the direction in which expansions might occur. See infra part III. Thus, it is also worth recognizing the tripartite distinction among individually purchased private insurance; heavily regulated, "private" employer-provided insurance; and governmentally operated "social" insurance.

n17 See 1991 Source Book, supra note 16, at 7.

n18 See id.

n19 Congressional Research Serv., 100th Cong., 2d Sess., Health Insurance and the Uninsured: Background Data and Analysis 93 (Comm. Print 1988).

n20 See id. at 3-4.

n21 See id. In 1988, Congress attempted to address part of this problem by enacting "catastrophic" coverage for the elderly. See Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, 102 Stat. 683. The costs were to be borne by a tax on relatively well-off older beneficiaries. But when the tax was imposed, taxpayers protested, and in 1989 the program was repealed. See Medicare Catastrophic Coverage Repeal Act of 1989, Pub. L. No. 101-234, 103 Stat. 1979 (1989).

n22 The extent of this cost-shifting is a matter of some debate, and it varies from state to state. See Jack A. Meyer, Financing Uncompensated Care with All-Payer Rate Regulation, *in* Uncompensated Hospital Care 167, 167-68 (Frank A. Sloan et al. eds., 1986).

n23 See Joel Weissman & Arnold M. Epstein, Case Mix and Resource Utilization by Uninsured Hospital Patients in the Boston Metropolitan Area, 261 JAMA 3572, 3575-76 (1989) (analysis indicating shorter lengths of stay and fewer procedures for uninsured patients); Steffie Woolhandler & David U. Himmelstein, Reverse Targeting of Preventive Care Due to Lack of Health Insurance, 259 JAMA 2872, 2873-74 (1988) (lack of insurance is strongest predictor of failure of women to receive screening tests).

n24 See 1988 Update, supra note 16, at 7 (statistics are for 1984 and 1986 respectively).

n25 See id. at 9. By contrast, annual disability benefits paid by public programs and workers' compensation are ten times as large: over $ 60 billion in 1988. See Statistical Abstract, supra note 9, at 360.

n26 See Fact Book, supra note 16.

n27 See id. at 4.

n28 See id.

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n29 See id. at 7 (1990 statistics).

n30 See id.

n31 There are, of course, other social insurance programs based mainly on economic need, but typically these do not provide compensation for losses expressly associated with illness or injury. Programs such as Aid to Families with Dependent Children and General Relief, while "categorical" (eligibility may require, for example, being a single parent and engaging in efforts to find work), fall into this category. See infra note 42 and accompanying text. Workers' compensation, which we regard as the paradigmatic example of cause-based protection, is sometimes described as social insurance in that government mandates and regulates such employer-paid insurance. And unemployment insurance is in a sense triggered by limited forms of fault or cause as well as by loss, since those out of work after they quit or are fired for cause are ineligible. No easy conceptual taxonomy organizes these large programs, because they were invented at different times to respond to different problems, and to reflect different social judgments.

n32 Medicare and Medicaid were created by Congress in 1965. See Health Insurance for the Aged Act, Pub. L. No. 89-97, 79 Stat. 290 (1965) (codified as amended at 42 U.S.C. § 1395 (1988)); Grants to States for Medical Assistance Programs Act, Pub. L. No. 89-97, 79 Stat. 343 (1965) (codified as amended at 42 U.S.C. § 1396 (1988)).

n33 Medicare pays approximately $ 94 billion of this sum, and Medicaid pays the remaining $ 65 billion. See 1991 Source Book, supra note 16, at 38-39.

n34 See id. at 40-41.

n35 See 42 U.S.C. §§ 1395c, 1395o (1988).

n36 See id. § 1396 (1988).

n37 SSD was created by Congress in 1956. See Social Security Amendments of 1956, Pub. L. No. 84-880, 70 Stat. 807 (codified as amended at 42 U.S.C. § 401 (1988)). SSI was created sixteen years later. See Supplemental Security Income for the Aged, Blind and Disabled Act, Pub. L. No. 92-603, 86 Stat. 1465 (1972) (codified as amended at 42 U.S.C. §§ 1381-1383d (1988)).

n38 In 1988, SSD paid benefits of approximately $ 24 billion; SSI paid approximately $ 11 billion. See Statistical Abstract, supra note 9, at 360.

n39 See 42 U.S.C. §§ 423(c)-(d) (1988).

n40 Id. §§ 423(d)(1)(A), (d)(2)(A) (1988).

n41 See Jerry L. Mashaw, Bureaucratic Justice: Managing Social Security Disability Claims 108-21 (1983).

n42 See Aid to Families with Dependent Children Act, 42 U.S.C. §§ 601-687 (1988). Although AFDC is America's chief minimum income program, benefits are available only for families with children, and in no state do benefits place families at or above the so-called poverty line. $ 29 billion was spent on this program in 1988. See Statistical Abstract, supra note 9, at 358.

n43 42 U.S.C. § 1382c(a)(3)(A) (1988).

n44 Some proposals call for a less rigorous standard of disability in SSI than that used in

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SSD, premised on the idea that a minimum income at the SSI level should be available to anyone who is not in good health and cannot in fact find work. See Sheila R. Zedlewski & Jack A. Meyer, Toward Ending Poverty Among the Elderly and Disabled Through SSI Reform 47-70 (1989).

n45 In 1989, for example, these programs paid out $ 2.7 billion. See Soc. Security Bull., Spring 1992, at 124. The five states are California, New Jersey, New York, Hawaii, and Rhode Island. See id.

n46 See 1 American Law Inst., Reporters' Study, Enterprise Responsibility for Personal Injury 24-33 (1991) (noting this argument and its proponents).

n47 See Kenneth S. Abraham, Distributing Risk: Insurance, Legal Theory, and Public Policy 64-83 (1986).

n48 See Donald N. Dewees, Economic Incentives for Controlling Industrial Disease: The Asbestos Case, 15 J. Legal Stud. 289, 317-19 (1986) (arguing that in asbestos context, the presence or absence of tort liability has little effect on a firm's incentives to reduce worker exposure).

n49 See Ronald H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 6-8 (1960).

n50 See George L. Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521, 1550-63 (1987) (discussing failure of tort law as an insurance mechanism).

n51 In contrast, the federal Black Lung Benefits Program, financed largely by the coal industry, is less a forced insurance scheme *among* victims than a redistributive program *for* them. See Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1988).

n52 See Health Ins. Ass'n of Am., Source Book of Health Insurance Data 5 (1989) (health insurance); Health Ins. Ass'n of Am., Source Book of Health Insurance Data 16 (1984-85) [hereinafter 1984-85 Source Book] (disability insurance).

n53 But see Haw. Rev. Stat. §§ 392, 393 (1988) (requiring employers to provide temporary disability and health care benefits for employees). Steps toward mandatory health insurance have been taken in Massachusetts, Oregon, and Vermont.

n54 Of course, efforts at cost containment can raise profound questions of fairness. See, e.g., McGann v. H&H Music, 946 F.2d 401, 404-08 (5th Cir. 1991) (holding that an employer may impose a low dollar limit on medical reimbursement for AIDS treatment after an employee has tested HIV-positive), cert. denied, 60 U.S.L.W. 3582 (U.S. Nov. 9, 1992) (No. 91-1283).

n55 This characterization is a bit oversimplified. SSD can be regarded as somewhat progressive because the benefit formula is skewed toward low-wage workers. Medicare can be regarded as somewhat regressive because richer people live longer and consume greater amounts of expensive medical care.

n56 See Bernzweig, supra note 5, at 33.

n57 See Marilyn E. Manser, Historical and Political Issues in Social Security Financing, *in* Social Security Financing 21, 35 (Felicity Skidmore ed., 1981).

n58 See supra notes 35-36, 42-44 and accompanying text.

n59 In fact, it probably is true that in certain respects the wealthy are treated better by the tort system than the poor. For example, in all likelihood the wealthy have disproportionately

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greater access to the tort system than the poor for two reasons. The first is cultural -- the wealthy may be more likely than the poor to feel comfortable with and be willing to use the legal system for redress. The second is a function of the recoverability of full damages for wages lost as a proximate result of tortious action. Because the wealthy are likely to suffer more lost wages from any given injury than the poor, attorneys are more likely to be willing to represent them on a contingent-fee basis. Moreover, whenever liability is imposed on a party in a direct or indirect contractual relationship with the plaintiff, full recovery of lost wages in tort has a regressive income redistributional effect, since all purchasers pay the same "premium" for tort liability "insurance" as part of the price of a product or service, regardless of the magnitude of the income they can expect to lose if they are the victim of tortious action for which a seller is responsible. See Priest, supra note 50, at 1559. Placing a ceiling on the amount of lost wages recoverable in tort (whatever else one thinks of the idea) would tend to reduce this income-regressive effect.

n60 See supra notes 46-47 and accompanying text.

n61 Part of the explanation for the current troubles facing workers' compensation, however, may well lie in the new difficulty of drawing the work-/nonwork-relatedness distinction. When workers' compensation was created to deal mainly with injury, it was clear that a broken leg on the job was work-related. But with the advent of disease claims that may or may not be work-related (for example, asbestosis, stress, heart attacks), the work exposure allegedly responsible for the loss may have occurred decades earlier, cigarette smoking by the employee may have magnified the probability of loss by ten, and other factors may have intervened to render the work-relatedness determination highly difficult and more costly to make.

n62 See, e.g., Clark C. Havighurst & Lawrence R. Tancredi, "Medical Adversity Insurance" -- A No-Fault Approach to Medical Malpractice and Quality Assurance, 51 Milbank Memorial Fund Q. 125 (1973) (proposing no-fault medical adversity insurance); James Henderson, The Boundary Problems of Enterprise Liability, 41 Md. L. Rev. 659, 662-76 (1982) (calling for concrete lists of events triggering liability, yet admitting that "techniques for avoiding errors of inclusion and exclusion have obvious limits").

n63 This insight can be traced back in the academic literature at least as far as Walter J. Blum & Harry Kalven, Jr., Ceilings, Costs, and Compulsion in Auto Compensation Legislation, 1973 Utah L. Rev. 341, 342-43. Of course, this political fact of life may rest as much on oversimplification as on accurate cost accounting. Some apparently "new" costs may merely be shifted from one source to another rather than newly incurred. The point holds not only for cause-based but also for loss-based programs. Expanded health insurance costs more if more people get care, but if they are getting it already, then the political debate about "increased" costs may merely misread or misreport which current costs are being replaced. The point holds for cost "cutting" as well. Medicaid can be "cut" by pushing the working poor into hospital charity and then letting the cost of charity be passed to Blue Cross.

n64 See, e.g., Huber, supra note 1 (arguing that incentives to assess and avoid risk are best promoted through *ex ante* private contract and private insurance); Sugarman, supra note 1 (arguing for the replacement of personal injury law with a generous system of social insurance).

n65 See, e.g., Enthoven, supra note 3 (proposing a system of managed competition); Enthoven & Kronick, supra note 3 (same).

n66 See Fla. Stat. Ann. §§ 766.301-766.306 (West Supp. 1992); Va. Code Ann. §§ 38.2-5000-38.2-5021 (Michie 1990 & Supp. 1992).

n67 The exception was and is life insurance, which in general is not subject to rights of subrogation or reimbursement.

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A. *Fault-Based Compensation*

Although certain tort law doctrines impose true strict liability, most tort liability for illness or injury is predicated on some form of fault on the part of the defendant. Despite the considerable attention devoted to the subject, tort recovery is a modest compensation program in the context of the other systems of compensation available in the United States for the consequences of illness and injury. For example, in 1984, tort recoveries totaled $ 39 billion -- something over $ 50 billion in current dollars. [6] But this sum comprised only one-tenth of the total paid by all systems. Moreover, this comparison ignores federal and state income maintenance programs. [7] If the sums paid by these programs are included, the quantitative significance of tort is even smaller. It would be foolhardy, therefore, to assess possible changes in tort law without considering the scope of these other programs and the obstacles that stand in the way of their expansion.

B. *Cause-Based Compensation*

In contrast to the tort system, which pays compensation after a determination **[*79]** of fault, cause-based compensation programs pay as long as a loss arises out of or is caused by a particular activity or exposure. Workers' compensation is the most widespread of these programs, having been adopted in all fifty states. [8] It provides roughly $ 30 billion in benefits per year to workers who suffer illness or injury as a consequence of employment. [9] Benefits include full payment of medical costs and a percentage of lost wages up to a specified ceiling. In addition, workers' compensation makes lump-sum payments for designated injuries (for example, loss of a limb) under the infamous "meat chart," and pays survivors' benefits. Wage-loss and lump-sum payments comprise about 60% of the program's expenditures.

Unlike the loss-based insurance programs discussed below, which disburse only long-term benefits for total disability, workers' compensation pays benefits for both temporary total and permanent partial disability. About three-fourths of all workers' compensation cases involve payments for temporary total disability, but these comprise only 18% of all the money paid as benefits. In contrast, about one-fourth of the cases are permanent partial disability claims, which account for about 70% of all benefit payments. [10]

In addition to workers' compensation, a number of other cause-based compensation programs have been adopted in recent years. The most prominent of these are the auto no-fault plans, adopted in fourteen states, which pay over $ 2 billion annually. [11] Two states have also recently adopted cause-based programs to compensate the victims of birth-related neurological injury. [12] At the federal level, the Black Lung Benefits Program pays approximately $ 1.5 billion per year, [13] the National Vaccine Injury Compensation Program is projected to pay $ 80 million per year, [14] and Veterans' benefits for military service-related health care and disability total over $ 21 billion per year. [15]

Although these different cause-based programs have no particular relation to each other, and although Veterans' benefits are partly "welfare" rather than injury or illness compensation, it is nonetheless useful for comparative purposes to note that the total compensation that cause-based programs pay, approximately $ 55 billion, is roughly equal to the $ 50 billion paid by the tort system to its beneficiaries.

[*80] C. *Loss-Based Compensation*

Two basic forms of loss insurance provide compensation for the economic consequences of illness and injury: private insurance and social insurance. Together the sums paid by these two sources dwarf those paid by both the fault-based and cause-based systems of compensation.

1. *Private Insurance.* -- The principal forms of private loss insurance provide coverage for health care expenses, income lost because of disability, and loss of life or limb. Each form of

n68 In practice, however, double compensation of certain losses probably occurred because insurers did not exercise their rights of subrogation or reimbursement out of policyholders' tort recoveries. See 2 American Law Inst., supra note 46, at 170-71.

n69 See 42 U.S.C. § 424a (1988).

n70 For a catalogue of these and other tort reforms of the past decade, see Sanders & Joyce, supra note 2, at 255-58.

n71 See 42 U.S.C. § 1396b(o) (1988); see also Rubin v. Sullivan, 720 F. Supp. 840, 844-46 (D. Haw. 1989) (holding that Hawaii no-fault insurance statute exempting Medicaid recipients from coverage was preempted by federal statute); Abrams v. Heckler, 582 F. Supp. 1155, 1163-65 (S.D.N.Y. 1984) (upholding federal regulation prohibiting Medicare payments where state law's no-fault insurance benefits are secondary to Medicare).

n72 This allocation is subject to the exception for Medicare and Medicaid described supra note 71 and accompanying text.

n73 See Fla. Stat. Ann. § 766.31(a) (West Supp. 1992); Va. Code Ann. § 38.2-5009(1) (1990).

n74 See supra notes 19, 24, 41-42 and accompanying text.

n75 See Pepper Recommendations, supra note 3, at 21. Of the $ 23 billion of this sum that would be devoted to health insurance, about $ 12 billion would be net new spending, since $ 11 billion would be offset by savings to employers and the states. See U.S. Bipartisan Comm'n on Comprehensive Health Care, A Call For Action 67 (1990) (Final Report) [hereinafter A Call for Action].

n76 One recent study suggests that there could be considerable savings from such a move. See Canadian Health Insurance, supra note 3, at 62-70.

n77 See supra note 48 and accompanying text.

n78 The Pepper Commission itself estimated that approximately $ 1.5 billion could be saved through imposition of a cap on liabilities. See A Call For Action, supra note 75, at 66.

n79 The Commission estimated this savings at $ 9.5 billion in 1990 dollars. See id.

n80 Prior to World War I, disability insurance was available but uncommon. Between 1918 and 1929, however, the industry grew significantly and coverage was more widely purchased. See Charles E. Soule, Disability Income Insurance: The Unique Risk 4 (1989). When the depression of 1929 struck, disability insurers experienced for the first time the special problems with which they continue to struggle today. As unemployment increased, both the number of disability insurance claims and the average period of disability grew with it. In addition, the policyholder's will to work influenced his or her likelihood and rate of recovery. At this point, many of the insurers then writing disability coverage recognized that this line of insurance is much more volatile and requires very different underwriting and claims management skills than does life insurance. They tended to withdraw from the market, leaving it largely to specialty carriers, who revised their policies in an attempt to guard against the claims incentives they had created. This state of affairs continued for roughly the next 25 years. After several decades of stability, however, many companies entered the market during the 1960s. In addition, recognizing that the professional and the self-employed markets were potentially highly profitable, insurers increased maximum benefit levels available under disability insurance policies. By the early 1970s, benefits of $ 3500 per month were common. See id. at 10.

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n81 See id. at 11-13.

n82 All voluntary insurance is afflicted to some extent by adverse selection, the disproportionate tendency of those who are more likely to suffer losses to seek insurance against those losses. Disability insurance is especially susceptible to adverse selection, however, because the application-screening and risk-classification processes that can be used to neutralize this problem tend to be least effective in the disability insurance context. The effectiveness of each method depends on the insurer's ability to determine the probability that an applicant will suffer a disability. If insurers can identify high-risk applicants, either their applications can be declined or they can be charged appropriately higher premiums than standard risks.

Information about these probabilities is likely to be less available in disability insurance, however, than in many other lines. One reason is that morbidity data is neither as available nor as reliable as, for example, mortality data. During the past twenty years more reliable information has been developed on both the frequency of disability claims and the rate of recovery. But the persistent lack of reliable data has contributed to adverse selection problems, which in turn have limited the market for coverage and prevented the accumulation of reliable data. The problem has thus to some extent been self-perpetuating. See id. at 16. A second reason the problem of adverse selection is especially severe in disability insurance derives from the nature of the insured event itself. Disability is not merely an objective phenomenon like injury or death; it also is a subjective product of illness, injury, or disease. Insurers can of course estimate the probability that an individual will be injured or become sick. But the probability that the injury or sickness will disable any given individual depends in part on his or her personality and character, both of which are likely to be more difficult to assess. Both the underwriting and risk-classification decisions in disability insurance are therefore unusually subjective and may fail to neutralize adverse selection.

n83 For technical discussions of the nature and magnitude of the effect of adverse selection in insurance markets, see Michael Rothschild & Joseph Stiglitz, Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information, 90 Q.J. Econ. 629, 634-38 (1976); Charles Wilson, A Model of Insurance Markets with Incomplete Information, 16 J. Econ. Theory 167, 187-202 (1977).

n84 See Abraham, supra note 47, at 14-16.

n85 Moral hazard troubles most forms of insurance, but like adverse selection, it is especially severe in disability insurance. Admittedly, the most blatant form of *ex ante* moral hazard -- intentionally suffering a loss -- is likely to be minimal because of the insured party's self-interest in avoiding injury or disease, although perhaps for some people the prospect of even disabled leisure may be more attractive than working in good health. But undoubtedly the greater *ex ante* moral hazard in disability insurance is the possibility of "false positives" -- claims of disability when none exists. Some of these may border on fraud; others are likely to be the product of economic conditions that reduce the job prospects of the marginally able and in effect push them into the disabled category. Because the very concept of disability and its corresponding definition in disability policies is partially subjective in the ways we noted above, see supra notes 40-41 and accompanying text, such ineligible claims are difficult to detect, and some are paid. Moreover, the cost of detection and the percentage of contested claims are comparatively high.

False positive disability insurance claims are a potential problem not only *ex ante,* but also *ex post.* Even after a genuine disability, the prospect of continued subsidized leisure is likely to be more attractive for some people than returning to work; and because of economic conditions, claimants who become marginally able to work may remain "disabled" because they cannot find a job.

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n86 The existence of a variety of government benefits, for example, sometimes makes the calculation of this ceiling difficult for private insurers. Of course they could operate their payment schedule so as to pay only in addition to what any government program pays and only a total that is, for example, 80% of pre-disability earnings. But government program rules sometimes prohibit offsets and reductions (this is a complicated issue in various programs, with interesting recent law), and even when permitted, it may be expensive and intrusive for the insurer to discover a policyholder's other sources of income (for example, from part-time or unreported work). Thus, there are real world situations in which continued disability actually pays more than returning to work (especially on an after-tax and after-work-expenses basis), making moral hazard a continued threat.

n87 There are two reasons why, in theory, potential purchasers of private disability insurance may be "underconsuming" this product. First, psychological studies of decision-making under uncertainty suggest that people typically underestimate the risk of low-probability, unpleasant events. See Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 Econometrica 263, 275, 282-83 (1979). For a theoretical application of this literature to disability insurance purchases, see Samuel A. Rea, Jr., Disability Insurance and Public Policy 28-35 (1981). Below a certain threshold level of probability, such risks are ignored. If total disability is perceived as a low-probability event, then this perception may partly explain the comparatively limited individual demand for disability insurance. Second, potential purchasers may assume that the forms of insurance that already cover them against certain kinds of disability -- workers' compensation and social security -- provide broader or more generous coverage than in fact they do.

Some corroboration of this "underconsumption" theory can be found in the actual pattern of disability insurance purchases. Counting paid sick leave as short-term disability insurance, more than twice as many people are covered by short-term than by long-term disability insurance. See 1984-85 Source Book, supra note 52, at 16. Long-term total disability obviously is a much lower probability event than short-term disability, and many people may simply ignore this risk, even though it is potentially more devastating. A perfectly rational insurance consumer might be better advised to bear a greater portion of the short-term disability risk herself and insure more of the long-term risk.

How much influence these two possible risk misperceptions may have on the demand for coverage is hard to say, in part because there is no objectively correct insurance level against which to compare the levels actually purchased. The very notion that the demand for disability insurance is "low" is therefore problematic. There is no objective way to determine the "proper" amount of insurance for any individual. Insurance consumption decisions are affected by the price of the product, funds available for purchase, and the degree of risk aversion associated with the risk to be insured. An effort to determine whether aggregate demand for disability insurance is adequate in any ultimate sense therefore would not be sensible.

Nonetheless some insight into the nature of the demand for disability insurance can be gained by comparing the risk of suffering a disability, the risk of dying, and the amount of disability and life insurance purchased nationwide. At any given age the risk of being disabled for more than six months is about equal to the risk of dying within a year. See Soc'y of Actuaries, Part 6 Study Notes: Group Long-Term Disability Coverages 2 (1976). Yet the nation spends considerably more on life insurance than on long-term disability insurance. See Statistical Abstract, supra note 9, at 360, 519-20. Moreover, only a small portion of the total expenditure on disability insurance is for voluntary private (individual or group) coverage; the bulk is for social insurance that is either publicly funded and mandatory (SSD) or privately financed and effectively mandatory (workers' compensation). In contrast, most life insurance is voluntarily and privately purchased in the commercial market. Of course, the comparison is not entirely fair since disability is merely a risk, while death at some point is certain. But many people do not buy "permanent" life insurance; they purchase term insurance or forms of whole life insurance that has coverage that terminates or can be

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transferred into accumulated cash-value. Consequently, although the comparison is not entirely fair, it is revealing. Given the apparent contrast in demand for insurance against the roughly equivalent statistical risks of annual long-term disability and death within a year, the risk misperception hypothesis is at least plausible.

n88 The Family Leave Act, S.5, 102d Cong., 1st Sess. (1991), was vetoed by President Bush. The veto was overridden in the Senate but not the House. See Kenneth J. Cooper, House Fails to Override Bush Veto of Family Leave, Wash. Post, Oct. 1, 1992, at A7.

n89 See Daniel N. Price, Cash Benefits for Short-Term Sickness: Thirty-Five Years of Data, 1948-83, 49 Soc. Security Bull., May 1986, at 5.

n90 For the 1983 estimates on which this very crude projection is based, see id.

n91 This assumption itself may be somewhat suspect, since major federal benefit programs (most notably SSD) compensate some long-term disability but little or no short-term disability. See supra note 40 and accompanying text.

n92 Rough confirmation that at least the order of magnitude of this estimate is accurate is provided by a recent study conducted by the RAND Institute for Civil Justice. That study found a wage-loss compensation shortfall for the victims of nonfatal accidents (that is, the estimate excluded wages lost because of fatal accidents and all illness, but included income loss from both short- and long-term disability) of approximately $ 51 billion per year. See Deborah R. Hensler et al., Compensation for Accidental Injuries in the United States 85 (1991).

n93 See Steffie Woolhandler & David U. Himmelstein, The Deteriorating Administrative Efficiency of the U.S. Health Care System, 324 New Eng. J. Med. 1253 (1991).

n94 For an argument that there is a rationale for the patchwork of social insurance programs that evolved from the Social Security Act of 1935 -- programs that form a part, but only a part, of the entire picture, see Theodore R. Marmor et al., America's Misunderstood Welfare State (1990).

n95 See supra note 4.

n96 See supra notes 46-50 and accompanying text.

n97 See the Black Lung Benefits Program, 30 U.S.C. §§ 901-945 (1988), and Veterans' Benefits, 38 U.S.C. §§ 101-5228 (1988).

n98 See supra notes 46-50 and accompanying text.

n99 See supra note 12.

n100 See supra note 14.

n101 See Congressional Research Serv., supra note 19, at 94.

n102 For analyses of issues concerning the Social Security Disability program, see Edward D. Berkowitz, Disabled Policy: America's Programs for the Handicapped 79-104 (1987); Mashaw, supra note 41, at 21-46; Deborah A. Stone, The Disabled State 3-14 (1984); Liebman, supra note 5, at 836-55 (1976).

n103 In marked contrast to other developed nations, the United States has no program that provides a minimum income to each child. The most important program providing income to dependents that currently exists in the United States is represented by the "S" in OASDHI

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(Social Security). See 42 U.S.C. §§ 401-433 (1988). It makes income-support payments to "survivors" of a deceased person who had achieved eligibility. See id. § 402. The payments are based on the earnings of the late worker (normally a parent or a spouse), and are made until a minor survivor reaches age 18. See id. § 402(d). The program pays over $ 35 billion in benefits each year. See Statistical Abstract, supra note 9, at 360.

Because survivor benefits, like OASDHI payments to the aged and the disabled, are determined by a progressive formula (replacing a large percentage of smaller incomes and a smaller percentage of larger incomes) and because there are no benefits for wages above the maximum ($ 51,000 in 1990), this program is relatively adequate wage-loss replacement for spouses and children of those with low incomes and a much less complete replacement for dependents of those earning more. For discussion of this program and of policy issues concerning benefit levels and taxes, see Martha Derthick, Policymaking for Social Security (1979); Theodore R. Marmor & Jerry L. Mashaw, Social Security: Beyond the Rhetoric of Crisis (1988); Alicia H. Munnell, The Future of Social Security (1977). Concerning the benefits provided through the Social Security system to surviving children, see Stephen D. Sugarman, Children's Benefits in Social Security, 65 Cornell L. Rev. 836 (1980). Because of its relevance to issues of gender fairness, there has been more literature about "derivative" Social Security benefits for surviving spouses. See, e.g., Grace G. Blumberg, Adult Derivative Benefits in Social Security, 32 Stan. L. Rev. 233, 233-92 (1980); Peter W. Martin, Social Security Benefits for Spouses, 63 Cornell L. Rev. 789, 789-840 (1978).

n104 For good historical accounts of the attitudes of those who added disability protection to the U.S. Social Security system in the 1950s, the growth in the number of recipients to levels beyond those predicted, the legislative effort by the Carter administration to remove from the rolls those no longer eligible, and the political firestorm that erupted when the Reagan administration sought to implement the 1980 statutory amendments, see Berkowitz, supra note 102, at 61-78, 106-43; Lance Liebman & Richard B. Stewart, Bureaucratic Vision, 96 Harv. L. Rev. 1952, 1955-56 (1983) (reviewing Jerry L. Mashaw, Bureaucratic Justice (1983)).

Of course, there is already in place a very substantial income maintenance program for the elderly. The "OA" (for "old age") in OASDHI is a vast program making $ 157 billion in payments each year to retired persons. See Statistical Abstract, supra note 9, at 360. Benefits are a formulaic replacement keyed to covered wages during the final years of work. See 42 U.S.C. § 402(a) (1988). In addition, the old-age segment of the Supplemental Security Income program provides a minimum income to the elderly poor; to be eligible an individual must have very little income and few assets. This program pays approximately $ 3 billion per year. See Committee on Ways and Means, 102d Cong., 2d Sess., Overview of Entitlement Programs (1992 Green Book) 823 (1992).

n105 This is the reason for the dramatic growth since World War II, in the United States and Europe, in the percentages of persons above age 50 leaving the workforce and seeking disability benefits. Given improving levels of health, the growth of disability claimants is anomalous. Explanations include the availability of income transfer benefits, evolving social norms (how much pain should an individual bear, for example), and rapidly changing technology.

n106 See Virginia P. Reno & Daniel N. Price, Relationship Between the Retirement, Disability, and Unemployment Insurance Programs: The U.S. Experience, Soc. Security Bull., May 1985, at 24. Pursuant to a federal statute, all states administer Unemployment Insurance programs. See id. at 26. These provide roughly $ 15 billion per year in income replacement benefits, paid as a percentage of prior salary up to a maximum, to individuals who have become involuntarily unemployed after establishing eligibility by an adequate period of covered employment. In all states eligibility is for 26 weeks and in some states it continues for 39 weeks. See id. at 27. To maintain eligibility, an individual must be available for work and accept a suitable job if one is offered.

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States vary widely in their evaluations of reasons for leaving work. In some states, good personal reasons -- a sick relative, the desire to follow a friend to another city -- make a departure involuntary. In other states, resigning rather than being dismissed usually results in ineligibility for Unemployment Insurance benefits. See Saul J. Blaustein, Job and Income Security for Unemployed Workers (1981) (discussing and evaluating state programs); Paul L. Burgess & Jerry L. Kingston, An Incentives Approach to Improving the Unemployment Compensation System (1987) (same); Walter Corson et al., Nonmonetary Eligibility in State Unemployment Insurance Programs: Law and Practice 1-10 (1986) (same).

n107 See supra note 45 and accompanying text.

n108 See Stephen D. Sugarman, Short Term Paid Leave: A New Approach to Social Insurance and Employee Benefits, 75 Cal. L. Rev. 465, 465-66 (1987) (offering the outlines of such a program, with benefits of one day of sick leave for every eight days of work). Currently, about two-thirds of American medium- and large-size firms offer sick leave. See Statistical Abstract, supra note 9, at 420.

n109 See supra note 88 and accompanying text.

n110 We set aside here the separate question whether, for reasons of gender equity or other social policies, compensation for pregnancy or family leave should receive a higher priority than we would accord it for purely insurance purposes.

n111 See supra text accompanying note 67.

n112 See supra part III.B.2.

n113 See supra text accompanying note 67.

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coverage is first-party insurance or victim's coverage, as distinguished from third-party or liability insurance which covers a party's liability as an injurer. Private first-party health, disability, and life insurance pay approximately $ 220 billion annually. [16]

a. *Health Insurance.* -- Health care costs in the United States exceed $ 800 billion per year, and have been growing annually at a rate of 10%. [17] Basic private health insurance, including Blue Cross and Blue Shield and coverage provided by commercial carriers, covers various combinations of physician's services, hospitalization, rehabilitation, and nursing care. In addition, Major Medical insurance covers certain costs above the specified limits of coverage under primary policies. Together these sources of coverage pay roughly $ 185 billion in insurance benefits each year. [18]

Sizable as these benefits are in absolute terms, more than thirty million Americans have no private or socially provided health insurance, [19] and about one-quarter of those who are covered by health insurance of some sort have inadequate coverage. For example, in 1987, **[*81]** an estimated 15.3% of all insured families incurred health care costs greater than 5% of their income, and 3.7% of all insured families incurred costs greater than 25% of their income. [20] These costs included policyholder/beneficiary contributions in the form of deductibles and coinsurance payments and costs for services not covered under the policies or subject to lifetime benefit limitations. [21]

While these estimates provide a useful reference point, it is important to recognize that people who have no health insurance are not necessarily denied health care. Many of the uninsured are treated at public and nonprofit hospitals, which do not collect most of the charges billed to uninsured patients. Such hospitals then often include a portion of these unrecovered costs in the sums for which they are reimbursed by private health and social insurance. [22] In effect, insured patients provide partial insurance to uninsured patients; the "owners" of public and nonprofit hospitals then absorb the remaining cost of treating the uninsured. This system of "insuring" the uninsured, however, is far from ideal. Public and nonprofit hospitals have an incentive either not to treat or to under-treat the uninsured, and this incentive has its effects: people without health insurance receive less primary and preventive care than those who are insured. [23]

b. *Disability Insurance.* -- Disability insurance protects the insured party against income lost as a result of physical or mental inability to perform his current or, in the case of some coverage, any occupation. This form of coverage usually insures against losses caused by total disability, although some policies also cover partial disability, often simply by providing short-term coverage for occupational disability and long-term coverage for general disability.

Disability insurance is the least prevalent form of private loss insurance. About 60 million people (roughly 55% of the workforce) are covered by private short-term disability insurance, defined as coverage against disability lasting for less than two years; but only about 24 million **[*82]** people (roughly 22% of the workforce) are covered by long-term disability insurance. [24] Private disability insurance pays only about $ 6 billion in benefits annually. [25]

c. *Life Insurance.* -- General-purpose life insurance, whether whole-life or term, covers death resulting from any cause; special-purpose accidental death and dismemberment policies or endorsements to general-purpose policies (for example, providing "double indemnity") cover death or grievous bodily harm resulting from accidents. However, special-purpose policies and endorsements appear to provide so small a percentage of total life insurance payments that they are not even separately reported in the industry's own statistical summaries. [26]

The gross amounts of life insurance in force and paid in benefits annually are substantial. Life insurance payments to beneficiaries, as distinguished from payments to policyholders and annuitants as some form of return on savings, totalled $ 24.5 billion in 1990. [27] In the same year over $ 9 trillion in life insurance was in force, providing an average of $ 121,000 in life insurance per insured household in the United States. [28] Although the size of this average

death benefit is more than nominal, much of the population probably has only modest coverage at most. On the one hand, roughly 80% of all policies, providing 64% of all coverage, insure persons with incomes of less than $ 50,000 per year. [29] But on the other hand, 47% of all policies provide 72% of all coverage. [30] It seems fairly clear, therefore, that slightly less than half of the population is protected by the vast majority of life insurance that is in force in the United States. The other half of the population is far less well protected.

2. *Social Insurance.* -- Most governmentally provided "social" insurance against illness and injury in this country is loss-based; that is, benefits are payable upon the occurrence of a specified form of economic loss regardless of fault or cause. [31] Each American social insurance **[*83]** program was designed individually to meet particular needs. As a result, the programs taken as a whole do not reflect a clear vision of communal responsibility for an identifiable subset of the economic risks of modern life.

a. *Health Insurance.* -- Medicare and Medicaid provide the lion's share of federally supported health care insurance. [32] In the aggregate, these two programs pay roughly $ 159 billion per year for health care provided to the elderly and the poor. [33] Other federal and state health care insurance and similar programs pay roughly $ 40 billion in benefits annually. [34]

Medicare provides reimbursement for hospital costs and physicians' services for individuals who are eligible for the Social Security old age and disability insurance programs, for nearly all elderly individuals not eligible for Social Security, and for persons with end stage renal disease. [35] The hospital-cost insurance program known as Part A is provided free of charge; under Part B, eligible individuals must pay premiums to obtain insurance for the costs of physicians' services. Medicaid is the federal program that matches the states' provision of health care assistance to low-income individuals regardless of age. [36] The amount of assistance provided varies considerably from state to state.

b. *Disability Insurance.* -- Two large federal programs, Social Security Disability (SSD) and Supplemental Security Income (SSI), provide benefits to persons who are permanently and totally disabled. [37] Together these programs pay annual benefits of approximately $ 35 billion. [38]

Most workers who become permanently disabled are eligible for SSD benefits, which are monthly payments calculated in virtually the **[*84]** same manner as Social Security retirement benefits. Eligibility requires that a claimant (1) have worked at covered employment for the requisite number of quarters; (2) suffer from an inability to work that is "medical" in nature; and (3) be permanently and totally disabled. [39] "Permanently" is defined as suffering from an affliction likely to last for one year or more, and "totally" as being unable to perform "any other kind of substantial gainful work which exists in the national economy." [40]

The second eligibility condition, that a claimant's inability to work be "medically determinable," excludes from coverage workers whose unemployment is caused by declines in capacity or willingness to work that cannot be explained medically. This requirement, which results in major dispute-resolution difficulties over such issues as eligibility for individuals affected by alcoholism and drug addiction, is central to the political and moral judgments that underlie the program. Congress has chosen to compensate some individuals for the unfortunate things that happen to them, but not to compensate others who are in economic need. In part, the distinction attempts to separate those whose own choices and decisions brought about their inability to work from those whose behavior is socially unobjectionable but who have been victimized by a medical event.

In fact, of course, the social judgment embodied in the program is imperfectly captured by the line between medical and nonmedical disabilities. Millions of people have shortcomings that result at least partially from injury, disease, or physical or mental decline and that restrict their employment opportunities. The real issue in determining whether they should

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qualify for benefits is not whether their disability can be diagnosed as medical. Rather, the thousands of cases that have been decided by written opinions show administrative and judicial decision-makers analyzing a complex series of factors, including the claimant's physical and mental abilities, age, sex, level of education and skills, as well as the structure of the relevant labor market. [41]

SSD is in a sense a supplement to the permanent total disability component of workers' compensation described earlier. Whereas workers' compensation covers only work-related disability, SSD is available whether or not a person's handicapping illness or injury was caused by employment. But SSD uses the same benefit formula as the Social Security retirement program, and therefore replaces only a small percentage of wages for all but the lowest-income workers. Thus most workers with a non-work-related disability will suffer a substantial income loss unless they have bought disability insurance on their own, their employers have provided it, or they have a cause of action in tort.

[*85] Another federal program paying benefits to the totally disabled that resembles insurance, SSI, makes means-tested payments to persons who are medically unfit for labor but either did not work enough to achieve Social Security eligibility or receive some Social Security payments but have so little income and assets as to be eligible for SSI supplementation. Included in this category are persons who are born with a disability, those disabled during childhood, and those disabled as adults before achieving sufficient participation in the labor force. Unlike Aid to Families with Dependent Children (AFDC) [42] or general relief arrangements, SSI benefits are not conditioned on a work search or acceptance of "improvement" services. Like SSD, however, SSI claimants must also satisfy the statutory disability standard of being "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" [43] likely to result in death or to extend for twelve months. [44]

Finally, five states and Puerto Rico operate short-term disability programs that pay over $ 2 billion in benefits per year. [45] These programs impose taxes on employers or employees and create funds from which payments are made to persons who become totally disabled for a period of months.

II. RELATIONSHIPS AMONG COMPENSATION PROGRAMS

The most striking feature of the "system" of compensation that we have just described is that it is not systematic at all. The United States lacks an intellectual structure to undergird its web of programs compensating the victims of illness and injury. In attempting to understand the different principles that underlie the current system and the directions that future development might take, two issues merit particular attention: (1) the goals of current compensation programs and (2) the methods by which they coordinate the benefits they pay. Analysis of each of these issues helps to uncover the relationships among American compensation programs and sets the stage for our discussion of the possibilities for expanding and restructuring the system in Part III.

[*86] A. *The Goals of Existing Programs*

In Part I, we isolated the three bases upon which American compensation programs pay the victims of illness and injury: fault, cause, and loss. These programs can serve one or more of four principal goals: corrective justice, deterrence, forced insurance, and income redistribution. It is possible at least in theory to envision at one extreme a program concerned exclusively with corrective justice and deterrence -- a system of civil liability for blameworthy behavior. At the other extreme would lie programs concerned exclusively with the redistribution of income to those suffering illness and injury. In between would lie programs of forced insurance, which, through various methods of pricing and risk classification, would combine elements of deterrence with elements of income redistribution.

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While existing programs serve a mixture of these goals, typically one of the goals predominates. The dominant goal of each existing program can be discerned by examining the sources of funds used to pay claims, the nature of the events that are compensable, and the measure of compensation employed by the program.

1. *Fault-Based Systems.* -- The tort system is the primary fault-based system for compensating victims of personal injury. Under the tort system, the injurer is the source of payment. Compensation is paid for full out-of-pocket loss and pain and suffering, except when the victim was also at fault, in which case damages are reduced (or denied entirely, in the few states which still adhere to contributory negligence) in proportion to the negligence attributable to the victim. Corrective justice and optimal deterrence are the conventionally understood goals of this arrangement. But in several respects the matter is more complicated than this simple analysis suggests. First, as many commentators have noted, the existence of liability insurance tends to undermine both the corrective justice and deterrence rationales for the imposition of tort liability. [46] An insured defendant does not personally correct the injustice done in causing injury to the plaintiff; rather, the defendant's liability insurer performs this correction. When the magnitude of the defendant's insurance premiums is not closely related to the magnitude of the defendant's liabilities, the defendant does not even perform this correction indirectly. Under these circumstances, the threat of tort liability may not only fail to achieve corrective justice, but may also fall short of promoting optimal deterrence, because a defendant can externalize the risk of liability through the purchase of liability insurance. [47]

Second, even aside from the impact of liability insurance, the imposition of liability in the long-latency toxic tort cases that have increasingly **[*87]** become the focus of controversy within the tort system is unlikely to achieve the goals of corrective justice and optimal deterrence. In such cases the management and shareholders at the time a wrongful act is committed are unlikely to be those who, decades later, sustain the cost of any liability that is imposed for the consequences of the act of a defendant corporation. Consequently, the parties who are wrongdoers or benefit from wrongdoing do not correct the injustice suffered by the victims of long-latency torts. Rather, that injustice is corrected later by others, assuming that the party or parties held liable are solvent. On occasion, the price of shares in a business incorporates a discount for an already-identified probability that the business will be held liable for some past conduct. In such instances, those responsible for the conduct may well bear the cost of its predicted consequences. But when a particular risk of future harm has not yet been recognized nor potential liability for the risk accurately gauged, no such specific discount occurs. Thus, unless the risks associated with a particular pattern of conduct are recognized at the time the conduct takes place, the threat of tort liability for its consequences is unlikely to have the optimizing effect on risk at the core of the deterrence rationale. [48]

Third, in a large group of tort cases, the plaintiff and the defendant are not strangers, but stand in a direct or indirect contractual relationship with each other. Patients and their physicians fall into this category, as do product purchasers and sellers. Economic theory predicts that in efficiently operating markets these parties will contract for the mix of safety, liability, and compensation they prefer, [49] and so satisfy their desire for corrective justice and optimal deterrence. Yet, in prescribing a particular mix of liability and compensation and in making most forms of tort liability for personal injury nondisclaimable, tort law precludes such contractual arrangements. One perfectly plausible explanation for this blanket no-disclaimer rule is that, on balance, the markets for health care services and consumer products are not sufficiently efficient to permit contract to displace tort, and case-by-case inquiry regarding whether the requisite conditions for permitting displacement had existed would be prohibitively expensive. A complementary explanation is that the no-disclaimer rule has a paternalistic motive: to force potential victims to insure themselves against personal injury. If tort liability could be disclaimed, potential victims might not use the resulting price savings to insure themselves against the risk that they would be injured by the health care or the products they purchased. The no-disclaimer rule assures that victims are "insured"

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[*88] against losses caused by tortious action, with the likely consequence that potential injurers will charge potential victims at least part of the cost of this "insurance" through increased charges for health care or consumer products.

Finally, even when the threat of tort liability does have a deterrent effect on potential injurers, it may fail to create optimal incentives for potential victims to avoid injury and to reduce their losses after injury. The effects of the doctrine of comparative negligence on victim behavior are uncertain. Moreover, the recoverability of compensation in tort that is not subject to monetary deductibles or coinsurance creates *ex post* moral hazard: victims sure of recovery in tort are more likely to consume excessive medical care and not to return to work after injury than are victims without any prospect of recovery in tort.

In short, the conventional picture of the tort system as a corrective justice and deterrence regime is overly simple. Tort liability is also a forced-insurance arrangement, under which potential victims are required to insure themselves against the risk of suffering injury from the provision of health care or the sale of a product. In this respect, at least, tort law constitutes a disguised insurance program that resembles some of the programs that more explicitly perform this function. But unlike many of those programs, in our view, tort law is not a very sensible system of victims' insurance: it makes compensation available only when the injurer's fault can be demonstrated; it reduces compensation to the extent that the victim was at fault; its transactions costs are high; it covers pain and suffering in unlimited amounts even though many victims would wish limited or no such coverage *ex ante;* and in providing first-dollar coverage without explicit deductibles or coinsurance, it makes itself vulnerable to *ex post* moral hazard. [50]

2. *Cause-Based Systems.* -- Certain of the cause-based programs perform the forced-insurance function much more effectively. In fact, each major non-means-tested cause-based program incorporates a forced-insurance feature. For example, workers' compensation, a cause-based system of nearly absolute liability for work-related personal injury, is obviously much less concerned with corrective justice than tort law and relatively more concerned with assuring compensation for those suffering such injury. Like the nondisclaimability of tort liability, the mandatory character of workers' compensation can be viewed as a reflection of this aim. At least part of the cost of the employer's liability is financed indirectly by employees, who in effect pay a mandatory premium (through wages that are lower than they would otherwise be) for the insurance protection they receive through workers' compensation. The other major cause-based system of compensation, auto no-fault, quite transparently incorporates a forced-insurance **[*89]** feature, since it requires potential victims themselves to purchase insurance protection. [51]

Because workers' compensation and auto no-fault are cause-based systems, however, they retain some capacity to promote deterrence. And because they employ less than perfectly-refined risk classification, they also embody some income redistribution from potential to actual victims of work- and auto-related injury and illness. In effect, these are intermediate, mixed programs whose main goal appears to be forced insurance, but that incorporate deterrence and income redistribution as subsidiary goals.

3. *Loss-Based Systems.* -- The structure and financing of the non-means-tested loss-based insurance programs reveal that forced insurance is also one of their major goals. Over 80% of private health and disability insurance is purchased on a group basis, generally as a fringe-benefit of employment. [52] In most states, the provision of this coverage is not legally mandatory, [53] but health insurance and short-term disability coverage have become such ordinary benefits of employment by medium-size and large firms that their existence reflects a social precommitment to insurance in these settings, reinforced by the income tax subsidy provided such benefits. Many employment-based private loss insurance programs, however, also use reasonably refined risk classification and managed-care features that are likely to have at least mild deterrence effects. [54]

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Similarly, because the two major non-means-tested social insurance programs, SSD and Medicare, are both partially financed by potential beneficiaries and are mandatory, they contain a strong forced-insurance component. They respectively help to assure that virtually all disabled citizens have minimum insurance against loss of income resulting from disability and that the elderly have minimum insurance against the cost of hospitalization. Given the demands that would be placed on the public fisc in the absence of this component of SSD and Medicare, the method of financing these two programs can be regarded in part as a nonprogressive [55] tax that avoids the income redistribution to the disabled **[*90]** and the elderly that might otherwise occur. But SSD is financed by a wage tax that is paid half by employers and half by employees, [56] and Medicare is financed partly by the same type of wage tax and partly from general federal revenues. [57] This component of SSD and Medicare financing makes them more purposefully redistributional.

Income redistribution, however, clearly is the major function of the two principal means-tested loss-based insurance programs: Medicaid, which provides health care assistance to the poor, and SSI, which provides income support to the disabled who are not eligible for SSD. Both programs are noncontributory, and both insure only those with very low or no income. [58] But this is income redistribution on a fairly limited basis. Many of the working poor are ineligible for SSI because they have been forced to insure themselves under SSD; and the same individuals are ineligible for Medicaid in many states even if they have no other health insurance, as is likely to be the case.

All of these loss-based programs, like the cause-based ones discussed above, contrast sharply with the tort system in one salient respect. To varying degrees, these programs employ techniques designed to manage or contain the incentives of insured victims to consume a greater than optimal quantity of medical care or disability protection. These techniques for dealing with *ex post* moral hazard -- deductibles, coinsurance, managed care, ceilings on coverage, waiting periods -- vary from program to program, but each is directed at the kind of post-accident "victim deterrence" that is notably missing from the tort system, which in effect fully "insures" the victims it compensates.

4. *A Comparison of the Systems and Their Goals.* -- Arraying the bases upon which American compensation programs make payment and the programs' varied goals along two different axes reveals the following structure:

	FAULT	CAUSE	LOSS
CORRECTIVE JUSTICE/ DETERRENCE	Tort among strangers	Traditional strict liability	
	Medical malpractice	Workers' compensation	SSD
FORCED INSURANCE	Products liability	Auto no-fault	Medicare
		Birth-Injury funds	Private insurance
		Vaccine Fund	
INCOME REDISTRIBUTION		Black Lung Benefits Program	Medicaid
			SSI

[*91] In light of the preceding discussion of the mixed goals of these programs, we have obviously oversimplified by suggesting in the matrix that each program serves only one goal. But the matrix is nonetheless revealing. The empty cells at the top right and bottom left demonstrate that certain goals cannot easily predominate within certain kinds of programs. For example, a loss-based compensation system could not achieve precise and focused

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COLLATERAL SOURCES OF INDEMNITY

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SUMMARY:
... However, where there are multiple payers for the same injury, the questionarises as to how one provider of benefits obtains reimbursement from the others. ... As defined by one court, "under the collateral source rule,' benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer." ... In Matthews, the court addressed whether section 627.7372, which prohibited double recovery by an insured tort victim in a motor vehicle accident, also prohibited recoupment by the health insurer from the tortfeasor. ... As part of their review, the task force examined the general **collateral source rule** and the auto rule, and discussed the elimination of the right of **subrogation** by the first-party insurer. ... III. 1993 Revisions to Florida's Collateral Source Laws ... The law also expands the exception to the collateral source offset for which a right of subrogation exists to sources which have a right of reimbursement. ... Further, a provider will have no right of subrogation or reimbursement for collateral source payments made after the date of waiver, settlement or judgment. ... Finally, a collateral source provider claiming a right of subrogation or reimbursement must cooperate with the claimant. ...

TEXT:
[*571]

MEMBERS of our society strive to financially protect themselves from unforeseen circumstances causing illness or injury through the purchase of adequate insurance coverage. However, where there are multiple payers for the same injury, the questionarises as to how one provider of benefits obtains reimbursement from the others. This issue of payments from, and reimbursement by, collateral source providers was addressed by the 1993 Regular Session of the Florida Legislature. After review and analysis, the Legislaturechose to revise one and repeal another of Florida's laws addressingcollateral sources of indemnity. [1] Committee Substitute for House Bill 975 repealed section 627.7372, Florida Statutes, which

higher costs of establishing third party liability have been determined. Id.

n58. Id. at 76. The task force also found that if first party insurers do not consistently exercise their right of subrogation in actions in which damages are awarded, the plaintiff will receive a windfall. Any moneys not recovered by the first party insurer are costs incurred by such provider. Id. at 75.

n59. Id. at 76.

n60. Id. Again, the task force operated from a lack of empirical data as to which approach would hold down the cost of liability insurance. Id.

n61. Id.

n62. Id.

n63. Id. at 76-77.

n64. Id. at 77. The Motor Vehicle Insurance Task Force of 1989 shared this concern with the task force. See Motor Vehicle Insurance Task Force of 1989, Report 35 (Mar. 30, 1990).

n65. While it can be argued that a jury, unaware of the collateral sources paid to a claimant, is more inclined to return a higher verdict than one aware of such collateral sources, such a result will not necessarily occur. An empirical study that used mock juries tested the hypothesis that jury verdicts would be reduced if juries were instructed not to award for, or to decrease the judgment by, collateral sources of recovery. Some believe that juries will reduce the overall amount awarded just because they are aware that the plaintiff has already received compensation for out-of-pocket expenses. The study found that juries did not respond to changes in the treatment of collateral source recovery by the plaintiff in the manner anticipated. The hypotheses that informing the jury of the plaintiff's recovery from collateral sources and instructing it to deduct that recovery from the award would result in lower jury verdicts was not supported by the data. However, the degree of injury and the amounts of collateral sources provided may have affected the result. Patrick F. Maroney, Jack M. Nelson & Pamela L. Perrewe, Modification of the Collateral Source Rule, 8 J. Ins. Reg. 408, 415-21 (June 1990).

n66. Academic Task Force, supra note 53, at 77.

n67. Ch. 93-245, 1, 1993 Fla. Laws 2436, 2436 (amending Fla. Stat. 768.76). Committee Substitute for House Bill 975 amended section 768.76, Florida Statutes, which applied to collateral sources of indemnity in situations other than motor vehicle accidents. However, it would appear that effective October 1, 1993, this general collateral source rule will apply to collateral sources in motor vehicle accident situations as well. The statutory law for PIP benefits, section 627.736(3), Florida Statutes, will continue to apply as well since it was not addressed by the Legislature in 1993.

n68. Id. (amending Fla. Stat. 768.76(2)(a)1.).

n69. Id.

n70. Id. (amending Fla. Stat. 768.76(2)(b)).

n71. Id. (amending Fla. Stat. 768.76(1), (4)). Committee Substitute for House Bill 975 also amended section 641.31, pertaining to health maintenance contracts. The bill provided that a health maintenance organization providing benefits or payments to a subscriber who suffers illness or injury by virtue of the negligent act of a third party is entitled to reimbursement from the subscriber in accordance with section 768.76(4). Id. 2, 1993 Fla. Laws at 2438

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(amending Fla. Stat. 641.31(8)).

n72. Id. 1, 1993 Fla. Laws at 2436 (amending Fla. Stat. 768.76(4)).

n73. Id. (amending Fla. Stat. 768.76, to be codified at Fla. Stat. 768.76(5)).

n74. Id.

n75. Id. (amending Fla. Stat. 768.76, to be codified at Fla. Stat. 768.76(6)). If suit has been filed by the claimant at the time notice is sent, a copy of the complaint against the tortfeasor must be sent with the notice. Id.

n76. Id.

n77. Id. (amending Fla. Stat. 768.76, to be codified at Fla. Stat. 768.76(8)).

n78. Id. (amending Fla. Stat. 768.76, to be codified at Fla. Stat. 768.76(9)). Such cooperation includes producing information necessary for the claimant to prove the nature and extent of the value of the collateral sources provided.

n79. Id.

n80. Dem., Wilton Manors.

n81. See Fla. H.R. Jour. 89 (Reg. Sess. Feb. 9, 1993).

n82. Id.

n83. Fla. Legis., Final Legislative Bill Information, 1993 Regular Session, History of House Bills at 236, CS for HB 975 [hereinafter History of House Bills].

n84. Id.

n85. Staff of Fla. H.R. Comm. on Judiciary, CS for HB 975 (1993) Staff Analysis 5 (final June 8, 1993) (on file with comm.).

n86. History of House Bills, supra note 83, at 236.

n87. Fla. H.R. Jour. 307 (Reg. Sess. Mar. 2, 1993).

n88. Id. at 993 (Reg. Sess. Mar. 30, 1993).

n89. Id. at 994.

n90. Fla. S. Jour. 943 (Reg. Sess. Apr. 1, 1993).

n91. Id. at 1119 (Reg. Sess. Apr. 2, 1993).

n92. Id. Senator John Grant, Republican, Tampa, offered the amendment. Id.

n93. Id.

n94. History of House Bills, supra note 83, at 236.

n95. Ch. 93-245, 4, 1993 Fla. Laws 2436, 2439.

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applied to actions arising out of the operation of a motor vehicle. [2] Section 768.76, Florida Statutes, which applies to non-motor vehicle actions arising from tort or contract, was also revised by the same act. [3] In this Article, the authors trace the history of Florida's collateral source laws and discuss the latest enactment.

I. Origin Of The Collateral Source Doctrine

At common law, the collateral source rule prevented the defendant from introducing into evidence other sources from which the plaintiff had received reimbursement. As defined by one court, "under the collateral source rule,' benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer." [4] The common law doctrine was codified in several states as a byproduct of the "tort reform" of the 1980s. [5] **[*572]**

Prior to October 1, 1993, Florida had three distinct statutory provisions that each constituted a collateral source rule. [6] Two of the laws addressed causes of action stemming from motor vehicle accidents, [7] while the third statute applied to other actions for damages arising from tort or contract. [8]

The Florida statutory scheme is somewhat complex and will be examined by reviewing these three distinct statutory provisions that apply to collateral sources of indemnity.

II. Florida's Collateral Sources of Indemnity Laws

A. The Collateral Source Provisions Applicable to Personal Injury Protection Benefits

Under Florida's Motor Vehicle No-Fault Law, any owner or operator of a motor vehicle must obtain Personal Injury Protection [PIP] coverage up to $ 10,000 for losses sustained as a result of bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle. [9] A person injured as a result of a motor vehicle accident is entitled to eight percent of all reasonable expenses for medical bills, sixty percent of any loss of gross income and earning capacity, and death benefits of $ 5,000. [10] An injured party who is entitled to bring suit under the No-Fault Law is not entitled to recover any damages for which PIP benefits are paid or payable. [11] Thus, the statute provides that the plaintiff may prove all of his special damages notwithstanding this limitation, but, if such damages are introduced into evidence, the trier of fact, whether judge or jury, cannot award damages for PIP benefits paid or payable. [12] In all cases in which a jury is required to determine the existence of damages, the court must instruct the jury that the plaintiff cannot recover special damages for which PIP benefits have been paid or are payable. [13] This provision, section 627.736(3), Florida Statutes, which provides that **[*573]** PIP benefits cannot be included in an award for negligence, was not amended by the 1993 Legislature.

B. Collateral Sources of Indemnity Applicable to Motor Vehicle Accidents Other Than PIP Situations

The second collateral source provision applicable to motor vehicle accidents was found in section 627.7372, Florida Statutes. This provision will be referred to hereinafter as the auto rule. Originally enacted in 1977, this collateral sources of indemnity law provided that all specified collateral sources paid to the claimant before trial were admissible into evidence in automobile tort actions. [14]

When enacted, the auto rule provided: "In any action for personal injury or wrongful death arising out of the ownership, operation, use or maintenance of a motor vehicle, the court shall admit into evidence the total amount of all collateral sources which have been paid to the claimant prior to the commencement of the trial." [15] Any amounts paid by the claimant to secure the collateral source were also admissible. [16] Collateral sources were defined as any payments made to the claimant, or on his behalf, pursuant to the United States Social

Security Act, any federal, state, or local income disability act, and any other public programs providing medical expenses, disability payments, or other similar benefits. [17] Collateral sources also included any health, sickness or income disability insurance, automobile accident insurance that provided health or disability benefits, except life insurance, any contract of any group or organization to pay for the costs of any health care services, and any contractual or voluntary wage contribution plan provided by employers which provided wages to the claimant during a period of disability. [18]

The auto rule was expanded the following year to require the court to instruct the jury to deduct from its verdict the value of all benefits received by the claimant from any collateral source. [19] This broadening of the law required the court to admit into evidence the total amount of all collateral sources paid to the claimant prior to the commencement of trial. [20] The Legislature also removed the requirement that the **[*574]** court admit into evidence any amount paid by the claimant to secure the collateral sources. [21]

In 1979, the definition of a collateral source was amended to exclude any benefits received under the Workers' Compensation Act. [22] The effect of the change was to ensure that the claimant would receive full workers' compensation benefits in addition to any amounts recovered from the tortfeasor or his insurer.

While addressing Florida's mandatory PIP requirement, the 1985 Legislature revised the definition of a motor vehicle to exclude any type of vehicle used as a taxicab or limousine. [23] Owners of these types of vehicles would not be required to maintain PIP coverage. [24] However, the previous all-inclusive definition of a motor vehicle (including taxicabs and limousines) would still be applicable for actions subject to the collateral source rule. [25] Thus, any first-party benefits (other than PIP coverage) provided under an insurance policy covering the occupants of a taxicab or limousine would still be deemed collateral sources for purposes of section 627.7372.

In 1986, the Legislature again revised the definition of collateral sources to specifically exclude benefits received under the Medicaid program of Title XIX of the Social Security Act. [26] Any benefits received from any medical services program administered by the Department of Health and Rehabilitative Services were also carved out of the definition. [27] These changes comported with the 1979 revision excluding workers' compensation benefits from any collateral source offset. The net effect of restricting the collateral source definition was to ensure that those claimants who are entitled to certain first-party governmental health benefits based on their income still would be allowed to collect their full benefits from the government as well as the total amount of damages from the tortfeasor.

The law was next revised in 1989 when the Legislature further amended the definition of collateral sources to exclude benefits received by the claimant under Medicare or any other federal program that provided for a federal government lien on the plaintiff's recov **[*575]** ery. [28] Any benefits received under such a program would not be admitted into evidence to reduce the jury awards.

In 1993, the Legislature repealed the auto rule, effective October 1, 1993. [29] After that date, section 768.76, Florida Statutes , will be the only collateral source rule in effect besides the provision specific to PIP benefits.

C. Collateral Sources of Indemnity Applicable to Tort and Contract Actions

Section 768.76 was enacted as part of the Tort Reform and Insurance Act of 1986. [30] This collateral source law applies to any action for damages, whether in tort or contract, arising on or after July 1, 1986. [31] However, to the extent it conflicts with any other provision of the Florida Statutes (e.g., the PIP collateral source rule), the other law applies. [32] This rule will be referred to hereinafter as the general collateral source rule.

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The general collateral source rule was similar to the auto rule in that collateral source payments were to be considered in any action in which damages were awarded in determining the total amount awarded to the claimant. However, whereas the auto rule required the court to instruct the jury to deduct from its verdict the value of all collateral source benefits received by the claimant, under the general rule, the court is to reduce the award by the total amount of the collateral source payments. [33]

The effect of the first-party payor's right to subrogation for any benefits provided to the claimant also differentiates the two rules. The general rule does not allow the claimant's award to be reduced based upon amounts recovered from collateral sources for which a right of subrogation exists. [34] However, the auto rule provided that the proceeds from the collateral source offset the claimant's damages regardless of the existence of the first-party payor's right of subrogation. [35] **[*576]**

After reducing the award by any collateral source benefits received, the general rule applies an offset to the extent of any amount paid, contributed or forfeited by the claimant or a member of the immediate family to secure the right to any collateral source benefit received. [36] The general rule defines collateral sources as any payments made to the claimant pursuant to the Social Security Act, any federal, state, or local income disability act, any health, sickness or income disability insurance, except life insurance benefits, any contract to provide health care services, and any employee wage continuation plan. [37] The general rule also provides that benefits received under the Medicaid program of Title XIX of the Social Security Act, or from any medical services program administered by the Florida Department of Health and Rehabilitative Services, are not considered a collateral source. [38]

Under the general rule, a claimant's attorney's contingent fee is based on the net amount of the award reduced by the amount of any money received from collateral sources. [39] Additionally, a provider of collateral sources that has a right of subrogation will have a right to be reimbursed by a claimant to whom collateral sources were provided, if the claimant recovered all or part of the collateral sources from a tortfeasor. [40] The provider's right of reimbursement is limited to its pro rata share of collateral sources provided, minus the pro rata share of costs and attorneys' fees incurred by the claimant in recovering amounts from the tortfeasor. [41] In determining the provider's pro rata share of costs and attorneys' fees, the provider must deduct from its recovery that percentage that constitutes the percentage of judgment or settlement for costs and the attorneys' fees. [42]

When the Florida Legislature enacted section 768.76 in 1986, it was aware that a case was pending before the Florida Supreme Court concerning the constitutionality of section 627.7372. In Blue Cross & Blue Shield v. Matthews, the plaintiff sued a tortfeasor alleging that the tortfeasor's negligent operation of his vehicle seriously injured the plaintiff. [43] Blue Cross sought to intervene in the suit to recover over $ 18,000 it had paid for health care. The trial court denied intervention **[*577]** on the basis that, since section 627.7372 barred the plaintiff from recovering these collateral source payments, Blue Cross was also precluded from recovering such amounts. [44] The district court affirmed the trial court, finding that the statute did not deny equal protection and was not preempted by the Employment Retirement Income Security Act. [45]

On appeal, the Florida Supreme Court reversed, holding that the statute did not bar the subrogation rights of the health care insurer. [46] Therefore, the constitutional and preemption issues were obviated.

In Matthews, the court addressed whether section 627.7372, which prohibited double recovery by an insured tort victim in a motor vehicle accident, also prohibited recoupment by the health insurer from the tortfeasor. [47] The court found that section 627.7372 did not bar a cause of action by an insured or his insurer. [48] The court also distinguished the effects of the No-Fault Law on liability insurers from the effects on health insurers. The court wrote that liability insurers receive both benefits and detriments:

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In other words, losing the right to sue other motor vehicle insurers is washed out by gaining the right not to be sued by other such insurers. This equitable arrangement breaks down, however, if the other insurer is a health insurer. The arrangement becomes a one-way transaction with the health insurers always transferring money to the vehicle insurers. The motor vehicle insurance industry would benefit from transferring part of its claims cost to the health insurance industry which might, conceivably, result in lower vehicle insurance rates. However concerned it was with high motor vehicle insurance rates, we do not believe the legislature intended to disguise the costs of such insurance by transferring part of the burden to the health insurance industry and its customers. [49]

Thus, the court held that section 627.7372 did not bar the health insurer from recovering from the tortfeasor the costs of benefits paid to the insured. [50]

As part of a major legislative enactment on insurance reform, a five-member task force was created in 1986 to study Florida's tort and insurance laws. [51] The Academic Task Force for Review of the Insur **[*578]** ance and Tort Systems was charged with examining Florida law and the possible impact of the tort and insurance law changes contained in the 1986 Act. [52] The task force consisted of the presidents of both state universities that have law schools, the president of a private university that has schools of law and medicine, plus two other members appointed by these three. [53] As part of their review, the task force examined the general **collateral source rule** and the auto rule, and discussed the elimination of the right of **subrogation** by the first-party insurer. [54]

The task force found that **subrogation** by a first-party provider should keep down the cost of first-party insurance. [55] While elimination of the right of subrogation might reduce the cost of liability insurance, such a reduction in third-party coverage would occur only at the expense of increasing first-party coverage. [56] Thus, consumers would realize no additional savings in the cost of insurance if subrogation rights were abolished, except for the elimination of transaction costs incurred in obtaining subrogation. [57]

Based on the above reasoning, the value of subrogation was found to be the equitable reassignment of costs between payers of first-party insurance and payers of liability insurance. [58] Consequently, the task force recommended that the right of subrogation be retained. [59]

The task force also examined whether the collateral source offset calculation should be performed by the judge or jury. [60] In making its decision, the task force referred to a survey of attorneys in which forty-eight percent of those responding thought it made no difference. [61] Upon reviewing responses from defense attorneys, forty per **[*579]** cent thought that having juries make the offset would reduce costs, while thirty-eight percent thought that having judges make the offset would reduce costs. [62] As to plaintiffs' attorneys, four times as many respondents thought that having judges make the offset would reduce costs. [63]

The task force noted that having a uniform procedure for both the general and auto collateral source statutes would reduce the number of jury instructions and thus the possibility for confusion and mistake. [64] However, since the statutes employed different procedures, a comparative study may be helpful to determine the optimum approach. [65]

The task force concluded that neither the auto collateral source rule nor the general collateral source rule should be changed as to who ultimately should make the offset of collateral source payments. [66]

III. 1993 Revisions to Florida's Collateral Source Laws

The most recent revision to the general collateral source rule occurred in 1993 when the Legislature restricted the type of payments that qualify as collateral sources, expanded the

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exemption for calculating the offset, and established requirements for recovering benefits paid by a collateral source provider. [67] **[*580]**

Benefits paid pursuant to Title XVIII and Title XIX of the Social Security Act are excluded from the statutory definition and are not deemed to be collateral sources. [68] Payments prohibited by federal law and those expressly excluded by law as collateral sources are also not included in the definition. [69] Additionally, benefits received under Medicare, or any other federal program providing for a federal government lien on the plaintiff's recovery, as well as the workers' compensation law, are not considered collateral sources. [70]

The law also expands the exception to the collateral source offset for which a right of subrogation exists to sources which have a right of reimbursement. [71] Additionally, the provider's right of reimbursement will be limited to the actual amount of collateral sources recovered by the claimant, less its pro rata share of costs and attorney's fees incurred by the claimant in recovering damages from the tortfeasor. [72] Any disputes between the claimant and the provider as to amounts recovered by the claimant from the tortfeasor will be subject to court determination. [73] In determining the amount of collateral sources recovered by the claimant, the court must consider offsetting the amount of settlement or judgment for any comparative negligence of the claimant, amount of liability insurance available to the tortfeasor, or any other factors which the court deems appropriate. [74]

The law imposes new requirements on both parties regarding the collection of benefits from the claimant by the collateral source provider. First, the claimant must send the collateral source provider, by certified or registered mail, notification of the claimant's intent to claim damages from the tortfeasor. [75] Additionally, the notice must include a statement that the provider of collateral source benefits will waive any right to subrogation or reimbursement unless it provides a statement, in which it asserts payment of benefits and right of subro **[*581]** gation, within thirty days following receipt of the claimant's notice. [76] Further, a provider will have no right of subrogation or reimbursement for collateral source payments made after the date of waiver, settlement or judgment. [77]

Finally, a collateral source provider claiming a right of subrogation or reimbursement must cooperate with the claimant. [78] A court may consider failure to cooperate in determining the right to, or amount of, reimbursement. [79]

IV. Legislative History of the 1993 Law

House Bill 975 was sponsored by Representative Tracy Stafford [80] and introduced in the Florida House of Representatives on February 9, 1993. [81] Upon introduction, the bill was referred to the Committees on Judiciary and Appropriations. [82] On February 11, 1993, the bill was referred to the Subcommittee on Court Systems, Probate and Consumer Law where it was placed on the Subcommittee's agenda for February 15, 1993. [83] At the Subcommittee meeting, the bill was favorably reported and was placed on the February 17, 1993, agenda of the House Committee on Judiciary. [84]

At the meeting of the Committee on Judiciary, the bill was amended to remove the provision that insurers and health maintenance organizations have no right to subrogation or reimbursement unless they can establish that monetary returns on subrogation claims have been factored into the insurance premiums charged. [85] Following the adoption of the amendment, the Committee adopted a Committee Substitute for House Bill 975. [86] Committee Substitute for House Bill 975 was then placed on the House Calendar and read for the first time on March 2, 1993. [87] The bill was read on the House floor a second **[*582]** time on March 30, 1993, where it was amended to require that any notice from the claimant to the collateral source provider of the claimant's intent to seek damages from the tortfeasor must include a statement that the provider will waive any right to subrogation, unless it provides the claimant with a statement asserting payment of benefits and the right of subrogation within thirty days. [88] The same day, the bill passed the House by a vote of

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eighty-three to thirty-two and was sent to the Florida Senate. [89] In the Senate, Committee Substitute for House Bill 975 was referred to the Committees on Judiciary, Health Care and Commerce. [90] On April 2, 1993, the bill was withdrawn from all three committees, and substituted for Committee Substitute for Senate Bill 1590. [91] At that time, on the Senate floor, an amendment was offered to the House bill to expand the definition of collateral sources to include uninsured motorist benefits. [92] The amendment failed and Committee Substitute for House Bill 975 passed the Senate by a vote of thirty-three to zero. [93] On April 29, 1993, the bill was signed by the Senate President and the Speaker of the House and presented to the Governor. [94] The Governor allowed the bill to become law on May 15, 1993, without his signature. [95]

V. Conclusion

Florida's new collateral source law will have a widespread effect on all actions involving damages recovered by a claimant who is entitled to multiple sources of benefits. Providers of collateral sources must carefully adhere to procedural deadlines or waive their right to subrogation or reimbursement. Additionally, except where PIP benefits apply, causes of action stemming from motor vehicle accidents will no longer be treated differently than any other tort or contract matter involving a collateral source provider. Thus, the rule now provides that when a collateral source carrier has a right of subrogation or reimbursement, the judge will not reduce the amount of the award by the total amount that was paid for the benefit of the claimant from collateral sources.

Although one uniform law may simplify compliance with the statutory requirements for seeking recovery of amounts paid to a claimant **[*583]** for damages caused by a third party, it will be interesting to examine the future effect of the new collateral source law on the cost of motor vehicle and health insurance in Florida.

FOOTNOTES:

n1. Ch. 93-245, 1993 Fla. Laws 2436.

n2. Id. 3, 1993 Fla. Laws at 2439 (repealing Fla. Stat. 627.7372).

n3. Id. 1, 1993 Fla. Laws at 2436 (amending Fla. Stat. 768.76 (1991)).

n4. Farley v. Engelken, 740 P.2d 1058, 1059 (Kan. 1987).

n5. Specifically, Alabama, Alaska, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New York, North Dakota, Oregon, Rhode Island and Tennessee enacted tort reform measures during the last decade that addressed issues involving the doctrine of collateral sources. See Insurance Info. Inst., Insurance Facts, 1987-88 Property/Casualty Fact Book 60 (1987-88).

n6. Fla. Stat. 627.736(3), .7372, 768.76 (1991 & Supp. 1992).

n7. Id. 627.736(3), .7372 (1991 & Supp. 1992).

n8. Id. 768.76 (1991).

n9. Id. 627.736(1) (Supp. 1992).

n10. Id. 627.736(1)(a)-(c).

n11. Further, no insurer shall have a lien on any recovery in tort by judgment, settlement, or otherwise for PIP benefits, regardless of whether suit has been filed or settlement has been reached by the parties. Id. 627.736(3).

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n12. Id.

n13. Id. Allowing the jury to deduct the amount of the award by the amount of PIP benefits paid would serve as a disincentive for the claimant to obtain the required amount of coverage pursuant to the Florida Motor Vehicle No-Fault Law.

n14. Ch. 77-468, 34, 1977 Fla. Laws 2057, 2081 (codified at Fla. Stat. 627.7372 (1977)).

n15. Id. (codified at Fla. Stat. 627.7372(1) (1977)).

n16. Id.

n17. Id. (codified at Fla. Stat . 627.7372(2) (1977)).

n18. Id.

n19. Ch. 78-374, 5, 1978 Fla. Laws 1041, 1043 (amending Fla. Stat. 627.7372(1)).

n20. Id. The legislative staff advised that this expansion of the collateral source rule should assist in the reduction of the amount of final verdicts. However, an exact economic impact was not determined as the ultimate savings depended upon the reported frequency and severity of projected accidents. Staff of Fla. S. Comm. on Com., CS for SB 1308 (1978) Staff Analysis 2 (final June 1, 1978) (on file with comm.).

n21. Ch. 78-374, 5, 1978 Fla. Laws 1041, 1043 (amending Fla. Stat. 627.7372(1)).

n22. Ch. 79-40, 115, 1979 Fla. Laws 215, 301 (codified at Fla. Stat. 627.7372(3) (1979)).

n23. Ch. 85-320, 1, 1985 Fla. Laws 1937, 1937 (amending Fla. Stat. 627.732(1)(b)).

n24. At the time, common carriers from South Florida contended that the legislation was necessary because private passenger PIP insurers had subrogation rights against the owner or insurer of commercial vehicles, yet the owner or insurer of commercial motor vehicles did not have subrogation rights against insurers of private passenger vehicles. Staff of Fla. S. Comm. on Com., CS for SB 713 (1985) Staff Analysis 3 (rev. June 19, 1985) (on file with comm.).

n25. Ch. 85-320, 1, 1985 Fla. Laws 1937, 1937 (amending Fla. Stat. 627.732(1)(b)).

n26. Ch. 86-220, 70, 1986 Fla. Laws 1603, 1660 (amending Fla. Stat. 627.7372(3)).

n27. Id.

n28. Ch. 89-203, 1, 1989 Fla. Laws 839, 839 (amending Fla. Stat. 627.7372(3)).

n29. Ch. 93-245, 3, 1993 Fla. Laws 2436, 2439 (repealing Fla. Stat. 627.7372).

n30. Ch. 86-160, 55, 1986 Fla. Laws 695, 751 (codified at Fla. Stat. 768.76 (Supp. 1986)).

n31. Fla. Stat. 768.76 (Supp. 1986).

n32. Id.

n33. The primary distinction between the provisions of the general collateral source rule and the auto rule is that under the general rule, the jury is not informed of payments to the plaintiff from collateral sources and is not instructed to deduct from its verdict (or, alternatively, not award) the value of collateral source benefits received or payable. Under

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the statutory scheme envisioned by the general rule, the court rather than the jury reduces the verdict by the amounts of collateral sources paid or available, and juries are unaware of the receipt of collateral sources.

n34. Fla. Stat. 768.76(1) (Supp. 1986).

n35. Id. 627.7372(1) (1991).

n36. Id. 768.76(1) (Supp. 1986).

n37. Id. 768.76(2).

n38. Id.

n39. Id. 768.76(3).

n40. Id. 768.76(4).

n41. Id.

n42. Id.

n43. 498 So. 2d 421 (Fla. 1986).

n44. Id. at 422.

n45. Id.

n46. Id.

n47. Id.

n48. Id. The court also stated: "We see no reason in law or equity why a health insurer should not be entitled to a single recovery of costs caused by the tortfeasor." Id. at 423.

n49. Id.

n50. Id.

n51. Ch. 86-160, 63, 1986 Fla. Laws 695, 756-59.

n52. Id.

n53. Id. The Task Force members consisted of Marshall Criser, President of the University of Florida; Bernard Sliger, President of the Florida State University; Edward Foote II, President of the University of Miami; Preston Haskell; and P. Scott Linder. See Academic Task Force for Review of the Insurance and Tort Systems, Final Recommendations (Mar. 1, 1988) [hereinafter Academic Task Force].

n54. Academic Task Force, supra note 53, at 74.

n55. Id. at 75.

n56. Id.

n57. Id. The task force concluded that such transaction costs would be insignificant compared to overall system costs because the right of subrogation is perfected only after the

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NOTE: Preserving the Collateral Source Rule: Modern Theories of Tort Law and a Proposal for Practical Application

Christian D. Saine

SUMMARY:
... The collateral source rule has long been a mainstay of Amer- ican tort law. ... Specifically, the collateral source rule has been criticized by commentators and scholars for conflict- ing with modern purposes of tort liability and the tort system in general. ... Another argument against the collateral source rule is that it is too rooted in a punitive or deterrence theory of tort liability. ... Although the argument is a potentially serious consideration for the debate over whether to retain tort law liability at all, it does not damage the allocative argument to retain the collateral source rule in our current tort liability system. ... Extensive use of subroga- tion by insurers, along with continued operation of the **collateral source rule,** would solve the double-recovery problem and still pro- mote the allocative and deterrence purposes of tort liability. ... In addi- tion, an insurer's **subrogation** rights will prevent inappropriate incentives for the insured to cause or fabricate losses to effect a double recovery. ... If **subrogation** can be utilized to its full potential, then the **collateral source rule** can survive tort reform and the benefits of placing full tort liability on the parties that cause injuries can be retained.

TEXT:
[*1075]

Introduction

The collateral source rule [1] has long been a mainstay of Amer- ican tort law. Recently, however, the traditional tort system has undergone tremendous scrutiny. Specifically, the collateral source rule has been criticized by commentators and scholars for conflict- ing with modern purposes of tort liability and the tort system in general. [2] This criticism prompted many state legislatures to change the rule. In Ohio, for example, the Supreme Court recently struck down the Legislature's attempt to do away with the rule. [3] Based on the criticism the rule has received and the fervor with which tort plaintiffs and their attorneys cling to the traditional rule, it is clear that the rule has important implications for all parties partici- pating in the tort system and for those attempting to redesign it.

This Note concludes that the collateral source rule should be retained. The history and traditional justifications of the collateral source rule are reviewed in Part I. More recent criticism of the traditional rule from scholars and commentators who disagree about the relative importance of these justifications, as well as the result- ing legislative and judicial activity, [4] are discussed in Part II. Parts III-V discuss three separate justifications of the tort

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appealing. As this section will show, however, it may have limited applicability in some cases.

The double recovery argument applies most strongly to a case in which an injured person receives compensation for damages without paying premiums for the contractual right to receive the compensation. The double recovery argument would also be strengthened if this gratuitous compensation returns the injured person to the precise condition before the accident occurred. In such a case, the additional recovery from the tortfeasor would be a windfall to the injured person. There is no doubt that he has recov- ered twice for his injuries and has actually reaped a profit from becoming injured. If the only purpose of imposing liability on the tortfeasor was to fairly compensate injured parties, then additional compensation in such a limited case would be an inefficiency in **[*1098]** the tort system. However, as this Note proposes, the allocative and deterrent purposes of the tort system must be considered when assessing the overall impact of this inefficiency argument in light of the collateral source rule debate. [118] It is possible that the inef- ficiency of a plaintiff's double recovery is met or exceeded by the benefits of the allocative and deterrent impact of imposing tort liability on the injurer. If so, then retaining the **collateral source rule** would be beneficial, even though it produces some compensa- tion inefficiencies.

In addition, the increased use of **subrogation** or reimbursement rights by first-party insurers against tortfeasors, with a concerted effort to reduce the transaction costs of these arrangements, will significantly decrease the inefficiencies of double or multiple recov- ery by the plaintiff. [119]

Before subrogation is considered, this Part will focus on two factors that mitigate the double recovery inefficiency and decrease the likelihood of the existence of a perfectly and freely compensat- ed plaintiff who has received a double recovery. These factors may help tip the balance so that the allocative and deterrent purposes of tort law outweigh the compensation inefficiencies. These factors are the nature of the insured's contract with the insurer and the extent to which tort damages can truly compensate for tort injuries.

A. Benefit of the Bargain

Critics of the collateral source rule contend that the rule turns the insurance contract into a wager of the premium for a chance at double recovery. [120] If an insured acted out of prudence and fore- sight in obtaining the insurance, then the only reasonable expecta- tion would be to receive the insurance benefits and no more. The collateral source rule, however, allows insureds to add a tort judg- ment to their insurance benefits.

The main opposition to the wager-for-double-recovery argu- ment is that the plaintiff's contract with the insurer is just that, a contract. [121] Since the private contract with the insurer is separate **[*1099]** and distinct from the plaintiff's tort relationship with the tortfeasor, the plaintiff's right to recover damages from the tortfeasor via the legal process should not be disturbed by a collateral source setoff statute. [122] Of course, the plaintiff can also contract not to receive both the insurance proceeds and damages from the defendant via a subrogation or reimbursement clause in the insurance contract. [123] Since many insurers do include these types of clauses in their policies, it may seem a moot argument for the victim to assert the contractual right to receive both the insurance proceeds and damage awards. However, insureds prefer insurance contracts with subroga- tion costs due to lower premiums. [124] Therefore, the insured's right to choose which type of policy to enter into, to the extent that this is possible, is the right that is protected when the collater- al source rule is retained.

Additionally, the insurer has already been paid, ex ante, by the plaintiff to provide benefits in case of injury. [125] If the defendant also has a liability insurer who will pay the damages to the plain- tiff, then this insurer also has already been pre-paid. These insureds have both paid a premium equivalent to the amount the insurers must pay to the insureds, discounted by the

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risk of the loss occur- ring. This shifts the loss to the insurers. Insurance companies do business by assuming many risks of loss, with the knowledge that a majority of them will not materialize. Paying benefits to an in- sured when a loss occurs is simply a cost of doing this business. A collateral source setoff statute operates to relieve the defendant's insurer from paying the plaintiff's damages and the insurer is re- lieved of the duty of paying benefits for which the insurer has already been compensated and has previously contracted to pay. **[*1100]** The operation of a new collateral benefit setoff rule clearly gives the defendant's liability insurer a windfall that it did not expect when it wrote the defendant's liability insurance policy.

As mentioned earlier, [126] opponents of the collateral source rule contend that the insured is wagering with the pre-paid contract that he will be injured by a solvent tortfeasor, thus giving the insured a double recovery. Under the indemnity theory of insurance law, [127] insurance benefits should only compensate for the loss suffered by the insured. If an injured person has a claim against the tortfeasor for his loss, then the indemnity theory would hold that there were actually no losses for which the insurer should pay benefits. The indemnity theory arose with clear policy consider- ations against using insurance contracts as wagers since this would create an "evil" incentive to destroy property or lives in order to recover insurance benefits. [128]

Under this pure indemnity theory of insurance, in a system where the collateral source rule operates to give a double recovery for injuries, there is no doubt that an insured is wagering so he can receive both insurance benefits and damages from a tortfeasor. He would be foolish not to make this wager since there is always the possibility of being injured by an insolvent tortfeasor or in a true accident. Those opposed to the collateral source rule contend that insureds wager with insurance policies in order to receive double recoveries. This contention is not persuasive because it is a financial necessity to provide oneself and one's family with insur- ance coverage.

In addition, if an insured is said to be wagering with an insur- ance contract that the loss will occur, then it can also be said that the insurance company is wagering that the loss will not occur. Although both parties hope that the accident will not occur, only the insurance company is doing so through purely monetary objec- tives, [129] since a non-occurring loss is one less income statement debit entry for the company. In that sense, as between the two parties, the insurance company's wager is even more tainted than the insured's wager. The insured may be wagering on the contract, **[*1101]** but he is also buying security against monetary loss by shifting the risk of a loss to a party that is less risk-averse. [130]

B. Ability of Tort Damages to Compensate

As has already been conceded, [131] if collateral benefits re- ceived by a victim fully compensate for damages, then the double recovery argument is fairly strong. The conditional assumption that the benefits were fully compensatory, however, is as strong and misleading. It is true that the pecuniary damages incurred, such as medical costs and lost earnings, can be fairly compensated through collateral sources. If a jury awards damages solely on the belief that the plaintiff suffered only previously compensated pecuniary damages, then the double recovery argument, in its strong form, would justify offsetting this award with collateral benefits received by the victim. The array of alternative damages potentially avail- able to a plaintiff, [132] however, shows that the tort system recog- nizes that many other types of injuries can be incurred that are not traditionally covered by insurance benefits. [133]

In a case where the jury knew the exact cost of insured medi- cal expenses incurred and provided a categorized award, it would be easy to determine the jury's intent and compute a setoff. The Sorrell case, however, is an excellent example of a setoff provision frustrating the intent of the jury. Ms. Sorrell was awarded damages for medical expenses, lost wages, and pain and suffering. [134] The **[*1102]** sum of these damages was actually less than the amount of worker's compensation benefits she and her medical provider had received for her

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pecuniary losses only. It is difficult to understand how the jury handled Ms. Sorrell's pecuniary damages. If it is assumed, however, that they were not aware of the worker's compensation benefits she received, due to the inadmissibility of collat- eral benefits evidence, their low estimate of the cost of medical care is understandable. The jury's intent was clear, however, in that they wanted to award Ms. Sorrell $ 5,000 for pain and suffer- ing. [135] The effect of the Ohio setoff statute in this case would have totally setoff the sum of Ms. Sorrell's pecuniary and non- pecuniary jury awarded damages. This is true since the statute does not differentiate between or attempt to align the setoff between similar collateral insurance benefits and jury awards. The jury's pain and suffering award could have been nullified by the statute. Indeed, the plaintiff in Sorrell argued that the benefits should cor- respond to the jury awards that are being reduced. [136]

If a solution to the double recovery problem is still called for, a better setoff statute would more clearly align the insurance bene- fits received with the corresponding component of the jury award. If medical expenses or lost wages were paid by collateral sources, then the setoff for these benefits should only apply to a jury award that specifies these two types of damages. As the statute in Ohio was originally crafted, total collateral benefits are subtracted from total compensatory damages. [137] Since this could interfere with a jury's award of non-economic damages such as for pain and suffer- ing, simply limiting the setoff to identifiable economic damage awards would solve the problem. [138] In the Sorrell case, if this limitation were imposed, the jury's pain and suffering award would have been left intact. Ms. Sorrell's $ 15,000 of worker's compensa- tion benefits would have only offset the jury award for medical expenses and lost wages and she would have received the $ 5,000 in pain and suffering damages that the jury deemed that she had incurred. Unless an economic-award-only setoff provision is incor- **[*1103]** porated into these setoff statutes, the value of jury compensation for non-economic damages will be seriously compromised.

VI. **Subrogation** & Efficiency Proposals

A. **Subrogation**--Background

Subrogation has been recommended as a solution to the dou- ble recovery problem that arises under the operation of the tradi- tional **collateral source rule.** [139] **Subrogation** is the legal or con- tractual right of an insurer to substitute itself in place of its insured in regard to some or all of the insured's rights to recover damages from the defendant. [140] In a case such as Sorrell, if the insurer providing benefits was subrogated to the plaintiff's right of recovery, the insurer could bring suit on its own behalf, or on behalf of the plaintiff, in order to recover damages from the defendant. The defendant would pay the benefits directly to the insurer as reim- bursement for the insurance benefits paid to the plaintiff. [141] Hence, there would be no double recovery by the plaintiff and the insurance industry would have only paid one set of benefits to the victim. Specifically, the defendant's liability insurer would pay the tort judgment to the plaintiff's insurer. Extensive use of subroga- tion by insurers, along with continued operation of the **collateral source rule,** would solve the double-recovery problem and still pro- mote the allocative and deterrence purposes of tort liability.

There are, however, a few difficulties with **subrogation** that result in it not being used without exception in insurance contracts. Traditionally subrogation has been limited to property insurance policies and has had limited application in personal medical bene- **[*1104]** fits policies. [142] **Subrogation** procedures are also extremely expen- sive in relation to the benefit they give to insurers. [143]

In spite of these problems, both supporters [144] and oppo- nents [145] of the **collateral source rule** have offered **subrogation** as a solution to the double recovery problem. In light of the allocative and deterrent benefits presented in this Note that favor the contin- ued use of the **collateral source rule,** the increased use of subroga- tion in conjunction with the **collateral source rule** would limit the double-recovery problem as well as preserve the benefits of the rule. Schwartz's call to investigate the feasibility of **subrogation** should be pursued in order

to determine if the benefits of the **collateral source rule** justify retaining the rule. [146] This Note pro- poses that **subrogation** can be beneficial to insurers, insureds, and society as a whole due to the allocative and deterrence effects of full tort liability. **[*1105]**

On a theoretical level, the argument that subrogation is benefi- cial is well supported. Posner contends that insurers should be able to contract for the right to be reimbursed for benefit payments made to their insureds when the insured has recoverable rights against a third party. [147] In addition, the insurers could demand that the insured assign her legal rights against the tortfeasor to the insurer. [148]

Shavell agrees and, in fact, contends that both insurers and insureds will prefer insurance contracts giving subrogation rights to the insurer. [149] This is so because the existence of subrogation rights in insurance policies is socially optimal. Insureds as a group will gain more utility from lower premiums than from a few possi- ble double recoveries from defendants and insurers will be able to recover portions of the judgment from the defendant. [150] In addi- tion, an insurer's subrogation rights will prevent inappropriate incentives for the insured to cause or fabricate losses to effect a double recovery. [151] Shavell recognizes the limitations of legal re- straints on subrogation, the doubt that it actually lowers premiums, and the increased transaction costs due to a rise in subrogation litigation. He argues, however, that these constraints work against both the insured and insurer. [152] In light of the efficiency gains of subrogation to both parties that Shavell discusses, both parties have incentives to overcome these limitations.

The general legal constraints against subrogation in health and medical insurance policies are eroding. [153] Clauses granting such rights to insurers are becoming more and more common in other types of insurance policies. In fact, there is even some support for allowing **subrogation** to life insurers, [154] an area that has tradition- **[*1106]** ally disallowed **subrogation.** [155] The increased use of **subrogation** clauses would obviate the need for collateral source setoff statutes and allow for free operation of the **collateral source rule** without the maligned double-recovery problem.

Given the support of economic theory and relaxation of subro- gation's legal constraints, the problem on a more practical level is how to promote the efficient use of **subrogation.** If the costs of subrogation are too high, or if its use is limited, then the benefits of imposing full liability on tortfeasors and their insurers will be outweighed by the costs of **subrogation** and the continued ineffi- ciency of double recovery. If Professor Schwartz' mandate to in- vestigate the costs and benefits of **subrogation** before completely eviscerating the **collateral source rule** is to be followed, [156] then serious attempts to install a cost-effective and pervasive **subrogation** program should be undertaken. This Note proposes that a statutory solution can address the inefficiencies of tort compensation through enforcement of **subrogation** rights. Without statutory impetus, or at least a consideration of the policies underlying such a proposal, insurers will not have the incentive to push subrogation as a solu- tion to the double-recovery problem. Instead, insurers will rely on the expensive and spotty process that is now in place. Pointing to the "evils" of double recovery and the costs of the current subroga- tion practice, insurers instead will continue pushing for statutory revision of the **collateral source rule** and other tort reform mea- sures.

Set out below are the various issues to be considered and addressed by a statutory reform of **subrogation** procedures. [157] The main topics to be addressed include coordination between plaintiff and defendant's insurers, allocation of subrogation recovery be- tween plaintiff and his insurer, attorney's fees, mandatory arbitra- tion, and possible procedural changes to combine arbitration with speedier subrogation recovery by first-party insurers. **[*1107]**

B. Coordination of Tort Judgment or Settlement

Before an injured insured even enters the tort system, the inefficiencies of compensation have already been encountered. In many cases, a victim may be over-compensated by

excess insur- ance coverage or by insuring with more than one insurer. [158] The multiple-compensation problem is mostly addressed by insurers' increased use of "Other Insurance" clauses. Until multiple recover- ies from different insurers are eliminated, however, the insurance industry can hardly complain of the tort system's double-recovery problems.

Insurer's attempts to coordinate insurance benefits can easily be adapted and applied to the enforcement of subrogation agree- ments by the insurer against other insurers. [159] The legal mecha- nisms that promote the coordination of insurance benefits and con- tractually limit coverage for the benefit of the insurer can similarly be used to give the insurer the contractual right to recover part of the tort judgment. These mechanisms are already in place in insur- ance policies that include subrogation clauses. However, the prob- lem of promoting the information exchange and extending the use of these provisions remains.

An objection to relying on subrogation as a remedy for double recovery, even when it is permitted by law and included in the insurance contract, is that monitoring lawsuits and securing reim- bursement at their conclusion is too expensive. This precludes **[*1108]** enforcement in cases involving small sums. [160] As inefficient as small-claims enforcement may be, it does not change the fact that the mechanisms that monitor and prevent double insurance cover- age could just as easily be used for subrogation monitoring purpos- es as well. The costs involved in monitoring tort suits would seem to parallel, and not exceed, the monitoring costs for double insur- ance coverage. The cost/benefit ratio of enforcing subrogation rights for small sums would probably be similar to enforcing "Oth- er Insurance" clauses; this is something that the industry seems perfectly willing to do.

If the goal of increased subrogation is to decrease double recovery costs to the industry, then defendants' liability insurers, who often also write first-party coverage, will have an economic incentive to cooperate and ensure that the plaintiff's insurer is reimbursed. Offsetting this cooperative incentive is a collusive incentive between the defendant's insurer and the plaintiff to preclude the plaintiff's insurer's subrogation rights by entering a secret settlement. By not notifying the plaintiff's insurer of the settlement, the two parties could divide the subrogation recovery among themselves. The defendant's insurer would pay out less and the plaintiff would receive more under this secret settlement.

In order to promote the reimbursement of the plaintiff's insur- er and to avoid this type of collusion, a statutory escrow or trust arrangement could be utilized. [161] The liability insurer would hold the portion of the judgment or settlement corresponding to the benefits paid by the insurer. [162] In addition to the overall econom- ic incentives of full reimbursement, statutorily requiring a liability insurer to hold that portion of the judgment deemed pecuniary would give the liability insurer the incentive to investigate any pending subrogation rights. This investigation would not necessarily be extensive, and placing the burden of a reasonable inquest on the escrow agent would avoid any possibility of collusion. **[*1109]**

If the defendant's insurer does not fulfill this imposed duty, the plaintiff's insurer's remedy would be full reimbursement from the defendant's insurer regardless of whether the plaintiff had re- ceived funds nominally representing the plaintiff's insurer's subro- gation fund. This remedy is consistent with placing the investigato- ry and escrow burden on the defendant's insurer. Before entering into a settlement with the plaintiff, the specter of paying twice for the compensatory damages, once to the plaintiff and again to the plaintiff's insurer, will cause the defendant's insurer to investigate the existence of subrogation rights of the plaintiff's insurer.

C. Allocation of Tort Judgment or Settlement

Once the industry has protected itself against multiple pay- ments through a pervasive coordination of benefits program, and the subrogation funds are held in escrow, the question will remain as to how to allocate these funds among the insurer, the insured, and the insured's attorney.

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Of course, the first-party insurer will have an interest in re- covering the full amount of medical expenses or lost wages paid. This may not be a problem in jury trials where these items are often presented to the jury for easy inclusion in a special jury verdict. The more difficult problem is in the settlement arena where the negotiations often involve total dollars and not categori- cal damages. [163] In that case, if a settlement is reached for less than the plaintiff's claimed total damages, including pain and suf- fering, then reimbursing the insurer for total benefits paid would leave the plaintiff's pain and suffering damages less than fully compensated. Conversely, reimbursing the insurer with only a por- tion of total benefits paid would not give full effect to the subro- gation agreement. [164] In the interest of facilitating administration and predictability, these types of allocation conflicts should be resolved either by the insurance contract subrogation agreement or by statute. **[*1110]**

There are three basic methods for allocating recovery when the total settlement fund is not sufficient to reimburse the insurer and fully compensate the plaintiff: (1) insurer reimbursement first; (2) proration of third party recovery between insurer and insured in proportion to percentage of total original loss compensated by the insurer; and (3) insured reimbursement for total loss first. [165] A simple example should illustrate these methods more clearly. As a result of a third-party's negligence, a victim incurred $ 10,000 of insured medical expenses and $ 20,000 in pain and suffering. If the plaintiff settled the claim for a flat $ 20,000, then under the first allocation option the insurer would be fully reimbursed and the victim would be undercompensated by $ 10,000. The second option, proration of the $ 20,000 settlement fund, would give one-third to the insurer and two-thirds to the victim. [166] Under the third op- tion, the victim would be fully compensated, but the recovery fund would be fully depleted, barring the insurer's recovery.

None of these solutions is satisfactory in light of the conflict between full compensation and subrogation recovery mentioned above. The second option, proration, may intuitively be the best solution since in the absence of an express contract provision it would be the most likely result of an arm's-length negotiation between the parties. [167] A problem arises, however, due to the dif- ficulty in measuring the relative value of the insured's pain and suffering damages at the settlement stage without the jury's ver- dict. [168] As a result of this difficulty, the plaintiff will have an in- centive to overstate a claim for these damages to obtain a greater share of a proration allocation.

In order to avoid the inevitable conflicts of interest and dis- putes between insurer and insured over the intangible damages, the first allocation method, fully reimbursing the insurer first, should be used. Not only does this eliminate any possible conflicts and provide full subrogation recovery, it also recognizes that medical costs are much more definite and predictable than pain and suffer- ing damages. These damages may turn on the whim of a jury or **[*1111]** the settlement negotiation prowess of the plaintiff's attorney. Statu- torily providing for this option will further streamline the subroga- tion process from a dispute standpoint and create foreseeable and certain results.

D. Attorney Fees

Another problem that will arise when an insurer seeks reim- bursement from a tort judgment or settlement relates to the exact amount that the insurer should expect to receive. The insurer will claim the full amount of the benefits it paid to the insured. If the plaintiff's attorney has done all of the work in obtaining the award, however, he will certainly demand a reasonable fee. If this fee demand is paid, it will most likely decrease the insurer's recovery. This creates a conflict between the basic goal of fully reimbursing the insurer from the tort judgment and giving the plaintiff, or more likely his attorney, the incentive to essentially do the insurer's job of subrogation recovery.

These opposing goals are difficult to balance. If the insurer is fully reimbursed, then it has received a windfall from the plaintiff's attorney's hard work. This is a windfall because the

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insurer would have expended its own legal costs to obtain the subrogation recov- ery if the insured had not retained his own attorney. In the interest of the overall goal of streamlining the process of subrogation, there is no reason that this problem has to be left to hardball negotia- tions between the insurer and the plaintiff's attorney. The fee rate for subrogation recovery to be paid by the insurer can be set out in the subrogation clause of the insurance contract or it can be statutorily mandated. [169] The fee for this type of arrangement could be set at a "reasonable" level to correlate with the level of the plaintiff's attorney's fees in that case. On the other hand, in the interest of providing fuller reimbursement, the rate could be a lower set rate, ranging from ten to twenty percent. It may seem like the plaintiff's attorney is unjustly benefiting from any added fee, but if it is realized that the insurer would have to expend **[*1112]** similar amounts to recover on its own, then the fee-shifting onto the insurer is just.

E. Arbitration

The discussion to this point has assumed that the insurer is not actively involved in the plaintiff's lawsuit. This may not be very realistic since in a limited number of cases with large subro- gation recoveries at stake the insurer will be directly involved with the litigation or settlement process to protect its own interests. [170] This scenario may create many problems including conflicts of interest between the insurer and insured. However, the problem to be addressed is containing subrogation costs. With the addition of the insurer/subrogee, these costs now include direct litigation costs. These costs are a burden on the insurer and should only be viewed as a detriment to the subrogation process. It may seem that since the insurer is enforcing its right to recover sums from the defen- dant, the insurer should bear the burden of finding ways to limit these costs or to more economically make the decision whether to become involved in the litigation. [171] The goal, however, is to en- courage more subrogation through more efficient processes. If the insurer needs to be involved in the litigation, then faster, more effi- cient methods should be used so as to decrease the total subroga- tion costs.

Arbitration and other forms of alternate dispute resolution are commonly used in insurance litigation. [172] Arbitration agreements between insurers provide many benefits including quicker resolution of conflicts, lower costs than standard trials leading to lower insur- ance premiums, more informal settings that provide a more con- ducive atmosphere to conflict resolution, and an easing of the **[*1113]** caseloads of overburdened courts. [173] Clearly, arbitration of dis- putes involving subrogation recoveries by insurers has benefits in excess of simply reduced litigation costs. Arbitration is not cost- free, however, and these costs must be taken into account when making the subrogation cost/benefit analysis.

Arbitration between insurers can be statutorily mandated. [174] When arbitration is required, whether in all cases or under a threshold-type statute such as New York's, insurers will have more incentive to efficiently utilize the process to their advantage. As repeat players in such an informal setting, with the added possi- bility that the same insurer may have both subrogation payouts and recoveries in the same venue, the arbitration option is ideal for encouraging the intra-industry cooperation needed to reduce subro- gation costs.

F. Arbitration Plus Allocation of Tort Judgment or Settlement

As discussed earlier, the allocation of an award between in- sured and an insurer with subrogation rights can be fraught with difficulties. [175] The case becomes even more complicated when the insurer is a party to the litigation. Whether in early negotiation, arbitration, or even at trial, the insurer's interests may conflict with those of the insured. Depending on the method of recovery alloca- tion used, the insurer may be more or less willing to settle than the insured. [176] This conflict is especially acute when the plaintiff is seeking large pain and suffering damages from the defendant. The plaintiff is less concerned about the subrogation recovery since that money will be paid to the insurer in either case. [177] If the **[*1114]** plaintiff seeks pain and suffering damages, and the insurer reim-

bursement, then the plaintiff's interests could be compromised. This may happen if the insurer's attorney was also representing the plaintiff, or if the insurer's attorney was controlling the case.

In this scenario, it makes sense to bifurcate the proceeding into a insurer's cause of action for subrogation recovery and a plaintiff's cause of action for pain and suffering damages. The insurer's action would be statutorily limited to mandatory, non- binding arbitration. [178] The plaintiff would have the option of uti- lizing the same arbitration proceeding, a separate arbitration panel, or resorting to a traditional trial resolution. [179]

1. Benefits of Arbitration and Bifurcated Proceedings

The benefits of bifurcating the proceedings and more fully utilizing arbitration would include the possibility of full and speedy subrogation reimbursement. It would be simple for the insurer to prove the amount of benefits paid to the insured. In the arbitration setting, in addition to the normal arbitration savings, procedural relaxations would reduce evidentiary proof to the simple introduc- tion and verification of the insurer's benefit payments. Since the insured is not involved in this proceeding, except possibly as a witness, the conflict of interest consideration would not come into play. There would be no award allocation problems since the insur- er would directly receive reimbursement for benefits paid. Also, the insurer would not have to pay the insured's attorney fees for ob- taining the recovery. Undoubtedly, the insurer will have its own legal fees; however, in-house counsel would surely cost the insurer less than the plaintiff's attorney.

The plaintiff would also benefit from this arrangement. First, the potential absence of the insurer from whatever option the plain- tiff chooses would eliminate the conflict of interest problems for the plaintiff as well. The plaintiff and his attorney would be free to **[*1115]** determine the viability of the suit without outside pressure from the insurer.

Second, the plaintiff could also benefit from the parallel pro- ceeding in his own arbitration or trial. The plaintiff's compensatory damages would have already been established in the insurer's arbi- tration. The plaintiff could use the already proven damages at the later trial to help establish the underlying basis for his nonpecuni- ary damages. As a result of the bifurcated causes of action, the plaintiff would be barred from recovering these compensatory dam- ages. [180] In addition, since the arbitration proceeding would pre- sumably have included a fault determination by the arbitrators, this determination could potentially be introduced as evidence at the jury trial. [181] With both compensatory damages and fault estab- lished, the plaintiff's proceeding would be even more streamlined and consist mainly of a trial for nonpecuniary damages.

Third, not losing sight of the larger picture, if subrogation is streamlined by this procedural bifurcation, all insureds should theo- retically benefit from lower premiums. This is simply a corollary benefit from the increased efficiency of arbitration. [182]

2. Problems with Arbitration and Bifurcated Proceedings

Bifurcated proceedings and additional arbitration would surely have their difficulties. Obviously, adding another layer of litigation seems counter-intuitive to the goal of reducing costs and streamlin- ing the subrogation process. However, this may only apply to the overall cost of litigating the entire dispute. The costs relating to the actual insurance subrogation will be greatly reduced by limiting it to early arbitration. The cost to the plaintiff of independently mounting an additional lawsuit may add another layer with some duplicative costs. But if the plaintiff can utilize the compensatory damage and fault findings from the earlier arbitration hearing, [183] **[*1116]** not all the costs will be duplicative. In addition, without the pres- ence of his insurer and the possible conflicts of interest, it will be easier for the plaintiff to decide whether to further pursue the defendant.

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As the plaintiff attempts to utilize findings from the prior proceedings in his own trial, the procedural hurdle to overcome is collateral estoppel. [184] An underlying policy of collateral estoppel is to reduce litigation costs by preventing multiple litigation on the same issue. Generally, collateral estoppel would work to the benefit of the plaintiff in this type of case. The plaintiff would offensively assert collateral estoppel to prevent relitigation of the issues deter- mined in the arbitration. [185] Precluding relitigation of these issues would clearly fulfill the primary policy of collateral estoppel: re- ducing litigation costs and increasing subrogation efficiency.

Before the plaintiff can successfully assert collateral estoppel, a number of aspects of the proposed bifurcated proceeding, which cut against allowing collateral estoppel, must be addressed. First, in order to preclude the liability insurer from relitigating the fault issues, the burden of proof and the rigidity with which factual findings are made must be the same between the two proceed- ings. [186] Clearly this requirement is not satisfied as between a tra- ditional arbitration hearing and a full jury trial. An arbitration hear- ing has more relaxed evidentiary procedures, and the arbitrators tend to make compromised determinations that blur factual determi- **[*1117]** nations. [187] A full jury trial, on the other hand, consists of the fa- miliar onerous evidentiary procedures. However, the distinctions be- tween the two types of proceedings can be decreased by requiring the arbitrator to make more rigid evidentiary findings and to clear- ly state the basis for those findings.

Second, under the collateral estoppel doctrine of mutuality, only parties involved in the prior proceeding may take advantage of its determinations. [188] Since the plaintiff was not a party to the arbitration, this would seem to allow the liability insurer and the defendant to relitigate the issues of fault and even damages. How- ever, adherence to the doctrine of mutuality has been eroding steadily as many courts have expanded the notion of privity to enable a greater binding effect of the prior determination. [189] Par- ties are deemed to be in a privity relationship when they have interests which are so intertwined that a decision involving one should necessarily bind or benefit the other. [190] This enhanced view of privity requires an analysis into whether the non-party's interests were fully represented in the prior proceeding. [191] In the proposed bifurcation, the likely similarity of interests (both parties have similar interests in damages and fault) indicates that plaintiff and the plaintiff's insurer should have privity. [192] The plaintiff will be able to take advantage of the prior damage and fault deter- minations by offensively asserting collateral estoppel against the defendant and the defendant's insurer.

Identity of interests between plaintiff and insurer does not fully satisfy a proposal to grant privity to the plaintiff in order to utilize the previous findings. Arbitration is significantly different from litigation in that the fact-finding process can vary widely and the arbitrator's findings are often "unexplained and difficult to **[*1118]** interpret." [193] The defendant and liability insurer will certainly ob- ject to the use of these findings in a later proceeding where they can present the same evidence to a jury and subject it to more rigorous screening processes. These are important differences and ideally the gap between the two processes should not be so wide. However, the policy considerations of decreasing litigation costs and determining these issues early [194] outweigh any prejudice to the defendant.

In addition, the policies that support utilizing arbitration to reduce subrogation costs also clearly support precluding costly relitigation on the same issues in a later trial. The defendant's insurer may argue that he is prejudiced by this preclusion. How- ever, if the cooperative interests in seeing subrogation costs re- duced are recognized, then the defendant's insurer will also want to conclude the issue as early as possible through collateral estoppel issue preclusion. [195]

Since the insurer's sole subrogation remedy of arbitration has already been established, there are few other substantial statutory provisions required to effectuate this bifurcation. The plaintiff's right to continue on his own behalf is well-settled, and the proce- dural issues of collateral estoppel are best left to judicial determi- nation and party negotiation as outlined

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above.

Since entering the subrogation process in the first place is discretionary in cases where the insurer determines it would be uneconomical to recover small amounts or where the defendant's fault was in serious doubt, the insured's claim against the defen- dant for insured compensatory damages would be valid until the insurer's **subrogation** rights had been settled by arbitration. This will return the proposal to the traditional starting point: the plaintiff **[*1119]** will be able to bring suit for full pecuniary and nonpecuniary dam- ages, just as with the traditional **collateral source rule.**

Conclusion

This Note discusses whether the collateral source rule is justi- fied in light of modern theories of tort law. In recent years the rule has received much attention from commentators since it seemed antiquated and at odds with the evolving theory of tort law. In addition, the insurance industry has lobbied the state legislatures to ease the burden on the industry and help control runaway liability insurance premiums. The collateral source rule was an easy target for these initiatives. Moreover, the public perception that plaintiffs were receiving exorbitant damages awards, due in part to the rule, led to the passage of many tort reform packages that eliminated the collateral source rule. The rule was replaced with setoff provisions by which defendants could reduce their liability by the amount of insurance received by the plaintiff.

The collateral source rule debate is hardly over. Many states have not changed the traditional rule and some that have changed it have had the statute overturned by state supreme courts. Parties to this debate should take a more careful look at the purposes of the tort system and the large impact a change in the collateral source rule will have.

This Note presented three main areas of consideration in sup- port of retaining the rule. First, if the collateral source rule is changed, the ability of society to effect, via price mechanisms, the correct levels of safe or valuable behavior will be impaired. Sec- ond, the notion that the deterrent impact of tort liability is out- dated and serves no purpose in modern society is no longer uncon- tested in the current literature. Empirical evidence, while still hotly debated, shows that the deterrent impact of tort liability still has a place in the modern tort system. Third, a collateral source setoff provision can seriously impair the rights of injured parties to enjoy the contractual benefits of insurance as well as their rights to be compensated completely and effectively by the tort liability system.

In recognition of the conflict between the benefits of the col- lateral source rule and the drain on the insurance industry caused by overcompensated plaintiffs, this Note proposes a pervasive pro- gram of increased use of **subrogation. Subrogation** is currently used by insurers to reduce their costs, and its efficiency can also be used to reduce the costs of overcompensation. If **subrogation** can **[*1120]** be utilized to its full potential, then the **collateral source rule** can survive tort reform and the benefits of placing full tort liability on the parties that cause injuries can be retained.

FOOTNOTES:

n1 Generally, the collateral source rule allows an insured tort plaintiff to retain both insurance benefits from an insurer and full damages from the defendant. See infra notes 5-8 and accompanying text.

n2 See infra notes 23-35 and accompanying text.

n3 See infra notes 36-53 and accompanying text.

n4 Ohio is used as an example of this activity. The experience in Ohio is fairly rep- resentative of the legislative reforms and litigation regarding the statutory changes that have

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system that **[*1076]** support retaining the rule. These justifications include proper allocation of tort-caused losses, deterrence of risky behavior, and com- pensation for injuries. This Note argues that taken together these analyses will support retaining the rule.

While allowing a plaintiff to retain both insurance benefits and tort damages may produce inefficiencies of double payment, this Note proposes, in conjunction with retaining the traditional collater- al source rule, that the practice of subrogation or reimbursement of the insurer out of the tort damages should be used more often and more efficiently as a method of decreasing any duplicitous recovery by the injured plaintiff. After discussing broad proposals for in- creasing the use and efficiency of **subrogation/**reimbursement prac- tices in Part VI, this Note concludes that the **collateral source rule** can still be an important part of the tort recovery system.

I. Background

The **collateral source rule** provides that "if an injured person receives compensation for his injuries from a source wholly inde- pendent collateral of the tort-feasor, the payment should not be deducted from the damages which he would otherwise collect from the tort-feasor." [5] In other words, an injured plaintiff in a tort ac- tion can recover twice, from his own insurance policy and from the defendant. The rule has both damages and evidentiary aspects. First, as noted above, the damages aspect is that benefits received by the plaintiff from other sources are not credited or set-off against the tortfeasor's liability. [6] Second, since "the receipt of col- lateral benefits is deemed irrelevant and immaterial on the issue of damages, it follows, as a necessary concomitant . . . that the re- ceipt of such benefits is not to be admitted in evidence, or other- wise disclosed to the jury." [7] The jury is not permitted to hear this information in order to foreclose any improper inferences as to the amount of damages or the liability of the defendant. [8] **[*1077]**

The history of the collateral source rule in the United States is often traced to The Propeller Monticello v. Mollison. [9] Monticello was a Supreme Court admiralty case in which the defendant-steam- ship raised as a defense that the plaintiff-schooner, rammed and sunk by the steamship, had been insured and fully compensated. [10] The Court, effectively espousing the collateral source rule, affirmed the circuit court's holding denying this defense and stated that the defendant cannot avail himself of the benefit of the plaintiff's insurance "wager." [11] The Court explained that it was merely stat- ing a rule that was well established at common law. [12]

The rule's vitality continued in the United States and has been established in almost every state. [13] In Ohio, the leading case is Pryor v. Webber. [14] In Pryor, the defendant attempted to introduce into evidence wages received by the plaintiff from her employer while she was injured. [15] The court reaffirmed Ohio's adherence to the collateral source rule and held that the evidence was inadmissi- ble. [16]

Although the collateral source rule may have originated as an evidentiary or damages rule, other justifications have been offered by modern courts and scholars to explain its continued use. First, the wrong-doing tortfeasor should not be allowed to benefit, or be relieved of liability, due to the plaintiff's foresight in obtaining insurance. [17] If the defendant is found liable to the plaintiff for damages, then offsetting the insurance benefits against the damages is a boon to the defendant.

Second, if a tort recovery made after insurance benefits are received is considered a windfall to the plaintiff, it is preferable to **[*1078]** giving the defendant a windfall by relieving him of liability. [18] Since the tortfeasor is the more culpable party and was merely lucky to injure an insured victim, the windfall should not go to the tortfeasor.

Third, permitting recovery from both the plaintiff's insurer and the defendant is favored since money cannot truly compensate for physical injuries or pain incurred. [19] Since the injured

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been occurring throughout the United States and should give the reader a flavor for the controversy.

n5 Black's Law Dictionary 262 (6th ed. 1990).

n6 See Restatement (Second) of Torts § 920A(2) (1977).

n7 Pryor v. Webber, 263 N.E.2d 235, 239 (Ohio 1970). But see Joel K. Jacobsen, The Collateral Source Rule and the Role of the Jury, 70 Or. L. Rev. 523, 525-26 (1991) (arguing that rote categorization of the rule as both a damages and evidence rule is un- necessary and confusing and that evidence of collateral benefits should be admissible when offered for purposes other than reducing damages).

n8 See Pryor, 263 N.E.2d at 239.

n9 58 U.S. (17 How.) 152 (1854).

n10 See id. at 154.

n11 See id. at 155.

n12 See id.

n13 See Linda J. Gobis, Note, Lambert v. Wrensch: Another Step Toward Abrogation of the Collateral Source Rule in Wisconsin, 1988 Wis. L. Rev. 857, 860.

n14 263 N.E.2d 235 (Ohio 1970).

n15 See id. at 238 (explaining that the defendant's relevance theory was that the plain- tiff had lied about her true damages since she was "compensated" for her injuries by her disability wages).

n16 See id. at 243.

n17 See Gobis, supra note 13, at 862. But see Lawrence P. Wilkins, A Multi-Perspec- tive Critique of Indiana's Legislative Abrogation of the Collateral Source Rule, 20 Ind. L. Rev. 399, 401-02 (1987) (arguing that there is no logical reason that a third-party cannot benefit from the plaintiff's insurance contract and only a court's moral opposition to giv- ing a benefit to a wrong-doer prevents such a result).

n18 See Christopher J. Eaton, Comment, The Kansas Legislature's Attempt to Abrogate the Collateral Source Rule: Three Strikes and They're Out?, 42 U. Kan. L. Rev. 913, 920 (1994).

n19 See id.; Hudson v. Lazarus, 217 F.2d 344, 346 (D.C. Cir. 1954) (stating that com- pensatory damages do not really compensate since a person would not be willing to sell a body part). But see Richard A. Posner, Economic Analysis of Law §§ 6.11-.12 (3d ed. 1986) (discussing the need to estimate damages and stating that all damages are mea- surable in an economic sense).

n20 See Jacobsen, supra note 7, at 531-32 (expressing this argument as the benefit-of-the-bargain rationale). The agreement between the insurer and the insured may also have provided the insurer with subrogation rights to the plaintiff's claim against the defendant, in which case the insurer would have priority to the damages received from the defen- dant. **Subrogation** is discussed more fully at infra notes 139-195 and accompanying text and is proposed as part of the solution to the **collateral source rule** debate.

n21 See Restatement (Second) of Torts § 901(c) (1977) (stating that one of the purposes

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of tort damages is to "punish wrongdoers and deter wrongful conduct").

n22 See Eaton, supra note 18, at 920 (stating that to allow evidence of collateral bene- fits to reduce a tortfeasor's liability would lessen the deterrent effect that civil liability offers).

n23 See Julie A. Schafer, Note, The Constitutionality of Offsetting Collateral Benefits Under Ohio Revised Code Section 2317.45, 53 Ohio St. L.J. 587, 589 (1992) (arguing that the compensation and deterrence goals of tort law are irreconcilable).

n24 See John G. Fleming, The Collateral Source Rule and Loss Allocation in Tort Law, 54 Cal. L. Rev. 1478, 1478 (1966).

n25 See Schafer, supra note 23, at 590.

n26 See Restatement (Second) of Torts § 901(a) (1977) (stating that tort damages exist "to give compensation, indemnity, or restitution for harms").

n27 See Schafer, supra note 23, at 590.

n28 See Robert E. Keeton & Alan I. Widiss, Insurance Law: A Guide to Fun- damental Principles, Legal Doctrines and Commercial Practices § 3.1(c) (Practi- tioner's ed. 1988) (describing that if an insured could realize a net gain from insurance, it would encourage using insurance as a way of wagering).

n29 See Eaton, supra note 18, at 922 (stating that tort law should focus on the injury and not on deterring unsafe behavior).

n30 See Gary T. Schwartz, Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?, 42 UCLA L. Rev. 377, 381-387 (1994) (providing a comprehensive list of recent authors who doubt the deterrent effect of tort liability and the factors they suggest mitigate deterrence).

n31 See Eaton, supra note 18, at 922; Gobis, supra note 13, at 885 (stating that the deterrent effect of the collateral source rule is "speculative" and "unrealistic").

n32 See Schwartz, supra note 30, at 381-87; see also infra notes 84-92 and accompa- nying text.

n33 See Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability 1, 4, 70, 80 (Feb. 1986) (recommending that the collateral source rule be abolished). But see Leonard W. Schroeter & William J. Rutzick, "Tort Reform"--Being an Insurance Company Means Never Having to Say You're Sorry, 22 Gonz. L. Rev. 31 (1987) (providing an impassioned rebuttal of the actual existence of an insurance crisis in this country and accusing the insurance industry of perpetrating a fraud on the public in order to persuade legislative officials to pass beneficial tort reform legislation and justify large premium increases). Determining whether a crisis existed in the insurance industry during the 1980s is beyond the scope of this Note and may be impossible in any case. There are persuasive arguments and statistics on each side. Regardless of the outcome of this debate, basing statutory reforms on controversial and inconsistent data is questionable at best, and partisan politicizing at worst. A more rational and conservative approach, with deference to common law traditions and in conjunction with more efficient loss cost re- covery as this Note suggests, is a better policy.

n34 It is important to note that the traditional collateral source rule only provides a double recovery for the economic damages portion of the award. First-party medical insur- ance does not cover non-economic damages such as pain and suffering and punitive dam- ages. Since the plaintiff would retain these types of damages from a jury verdict if there was no collateral

source rule, the double recovery argument should be separated from the recoil against high punitive or intangible damage awards. It is true, however, that the collateral source rule could provide multiple recoveries of economic damages if the victim was insured by more than one insurer for the same injury. This is a coordination of benefits problem with the insurance policies which would occur even if the victim did not enter the tort system. This problem would occur, for example, if the victim had both medical insurance and a personal injury rider on his automobile insurance policy. See Keeton & Widiss, supra note 28, at § 3.11 (d) (indicating that many health insurance policies do not limit coverage based on excess insurance carried by the insured).

n35 See Cal. Civ. Code § 3333.1 (West Supp. 1996); Fla. Stat. Ann. § 768.76 (West Supp. 1996); see also 4 Fowler V. Harper et al., The Law of Torts 219-22 (2d ed., 1996 Cum. Supp. No. 1, 1986) (providing a more complete summary of states with statutorily modified collateral source rules); Schafer, supra note 23, at 608 n.99.

n36 Am. Sub. H.B. 1, 117 G.A., Reg. Sess. (Ohio 1987-88).

n37 Id.

n38 See Ohio Rev. Code Ann. § 2317.45 (Banks-Baldwin 1994). The pertinent text of § 2317.45(B)(2)(c) is as follows:

(c) Prior to entering judgment for the plaintiff, [the court shall] do both of the following:

(i) Subtract from the compensatory damages that the plaintiff otherwise would be awarded the amount of any disclosed collateral benefits. . . .

§ 2317.45(B)(2)(c).

n39 See § 2317.45(B)(2)(c). Placing the hearing at the conclusion of the trial makes a concession to the evidentiary concerns created if the defendant was allowed to present evidence of the plaintiff's collateral benefits to the jury. See § 2317.45(B)(3) (stating that evidence of collateral benefits is not admissible before the trier of fact). Also, the statute recognized that the plaintiff may have paid for the collateral benefits and allowed for a reduction in the offsets for premiums paid for the insurance coverage. See § 2317.45(B)(2)(c)(ii). The setoff statute does not apply to collateral benefits which are subject to "rights of recoupment" or subrogation claims by an insurer. See § 2317.45(B)(2)(a)(ii) & (B)(2)(b). This would allow an insurer to recover the benefits it had paid to the insured. See also infra notes 139-157 and accompanying text (discussing subrogation).

n40 See Stanton G. Darling II, Ohio Civil Justice Reform Act 131 (1987) (pro- viding interpretations and legislative history commentary on the entire tort reform act). Darling served as special advisor on tort and civil justice matters to the Office of the Speaker of the House in 1987 and drafted much of House Bill 1.

n41 See Schafer, supra note 23, at 597-607 (describing Ohio cases dealing with these new statutes).

n42 See Sorrell v. Thevenir, 633 N.E.2d 504 (Ohio 1994).

n43 See Sorrell v. Thevenir, No. 91 CA 4, 1992 Ohio App. LEXIS 5098, at *2 (Gallia Cty. Sept. 30, 1992).

n44 See id.

n45 See id.

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n46 See id. at *2-*3.

n47 In fact, the defendant, only partially in jest, suggested that Ms. Sorrell owed him and his attorneys the difference between the judgment and her worker's compensation benefits. See Brief of Plaintiffs-Appellants at 1-2, Sorrell v. Thevenir, 633 N.E.2d 504 (Ohio 1994) (No. 91-CA-04).

n48 See Sorrell v. Thevenir, No. 91 CA 4, 1992 Ohio App. LEXIS 5098, at *3 (Gallia Cty. Sept. 30, 1992).

n49 See id.

n50 See id. at *10. The Court of Appeals emphasized that they were not passing on the legislative wisdom of the statute, but rather relying on Supreme Court precedent ap- proving a similar collateral source setoff statute for medical malpractice claims. See id. (citing Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991) (upholding R.C. § 2305.27 under state constitutional equal protection and due process attack)). The court also welcomed Supreme Court review of the issue in this case. See id.

n51 See Sorrell v. Thevenir, 633 N.E.2d 504, 510-513 (Ohio 1994) (R.C. § 2317.45 restricts the right to a jury trial, does not provide due process of law to tort victims, is constitutionally infirm on equal protection grounds, and hinders the plaintiff's rights to a remedy and to an open court). Other state courts have also declared collateral source setoff statutes to be unconstitutional on similar grounds. See, e.g., Denton v. Con-Way S. Express, Inc., 402 S.E.2d 269 (Ga. 1991) (striking down Ga. Code Ann. § 51-12-1 (1987), an evidentiary abolition of the collateral source rule, as violating the Georgia Constitution's impartial and complete protection of person and property). But see Fein v. Permanente Medical Group, 695 P.2d 665 (Cal.) (upholding Cal. Civ. Code § 3333.1 (Michie Supp. 1995) as not violating medical malpractice plaintiff's due process or equal protection rights), appeal dismissed, 474 U.S. 982 (1985).

n52 See Sorrell, 633 N.E.2d at 508 (stating that the Court's duty is merely to deter- mine the constitutionality of the statute as an exercise of legislative power).

n53 The plaintiff may not be fully compensated if required to offset the verdict with collateral benefits. See id. at 510. The tortfeasor is granted a windfall if he does not have to pay for the damages he caused. See id. The collateral source setoff statute may or may not ease the liability insurance crisis. See id. at 511. The statute prevents the plaintiff from receiving a double recovery. See id. The plaintiff has a right to both the insurance proceeds and the verdict damages since the insurance benefits were previously bargained for. See id. at 511-12. The dissenting judge argued that this holding ignores the underly- ing purpose of the tort system to only compensate the victim for the amount of damages or the amount the jury deems a just and appropriate reward. See id. at 513 (Moyer, C.J., dissenting).

n54 In Ohio, the State House of Representatives revised the setoff statute as part of the 1995 Tort Reform Package. H.B. 350, (A) § 2317.45 (Ohio 1995). The much abbreviated provision simply allows both plaintiff and defendant to present evidence to the jury of premiums paid to and benefits received from a collateral source. See § 2317.45. The House intended to do away with the common law rule and address the Sorrell court's constitutional objections to the previous setoff statute. See comments to H.B. 350 at (E). The new version did not survive the committee hearings and the House eventually passed a bill that only allows the defendant to introduce evidence of insurance benefits for which the plaintiff did not pay a premium. See Am. Sub. H.B. 350, (A) § 2317.45; Catherine Candisky, House Passes Measure: Tort Reform, The Columbus Dispatch, Feb. 8, 1996, at 1C. The bill was finally sent to Governor George Voinovich, who indicated he would sign it, on September 26, 1996. See Thomas Suddes, House OK's Bill to Cap Personal- Injury Awards, The Plain Dealer (Cleveland), Sept. 27, 1996, at 5B.

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n55 See Schroeter & Rutzick, supra note 33 (describing previous instances of insurance crises which prompted insurance companies' efforts at tort reform).

n56 The party becomes more complicated when insurers, attorneys, lobbyists, legislators, and activist courts are added.

n57 See supra notes 17-35 and accompanying text (discussing the standard arguments for and against the collateral source rule).

n58 See Kenneth S. Abraham, What is a Tort Claim? An Interpretation of Contempo- rary Tort Reform, 51 Md. L. Rev. 172, 192-93 (1992) (hypothesizing that the rule origi- nated when insurance was an uncommon phenomenon in order to ensure those prudent enough to purchase insurance the receipt of their benefits, but also stating that increased insurance coverage may have changed the need for the rule).

n59 The question may be posed this way: if there were no collateral source rule, given the current state of the tort system and the goals which it achieves or we wish it could achieve, would we create a rule similar to the common law rule to enhance the purposes of the tort system?

n60 See Restatement (Second) of Torts § 901A (1977) (listing "deterrence of tortfeasor" as one purpose of the tort system).

n61 See infra Section IV, notes 77-116 and accompanying text.

n62 Guido Calabresi calls these different aspects specific deterrence and general deter- rence respectively. See Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis 131-97 (1970) [hereinafter Calabresi, The Costs of Accidents].

n63 See William M. Landes & Richard A. Posner, The Economic Structure of Tort Law 13 (1987).

n64 See Guido Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499, 502 (1961) [hereinafter Calabresi, Thoughts on Risk Distribution]; see also Stanley Ingber, Rethinking Intangible Injuries: A Focus on Remedy, 73 Cal. L. Rev. 772, 793-819 (1985) (quoting extensively from Calabresi's works and applying the theory to his discussion on the tort system's mechanisms for dealing with intangible or non-pecu- niary injuries).

n65 See Calabresi, Thoughts on Risk Distribution, supra note 64, at 502.

n66 See id.

n67 This above- or below-optimal purchasing is an inefficiency introduced by the exter- nalization of the cost of the damages from the producer to the consumers. See Calabresi, The Cost of Accidents, supra note 62, at 70.

n68 See Steven Shavell, Economic Analysis of Accident Law 21-32 (1987). Actually, in the absence of liability, the injurer will engage in an activity up to the point where additional activity is actually a burden on the injurer. See id. at 22 n.29. Shavell's level of activity analysis is similar to the situation where a firm engages in the produc- tion of goods and is sensitive to consumer demand based on price levels. See id. at 49.

n69 In the case of a firm producing a level of goods in response to consumer demand, the firm could still produce goods without giving thought to the injuries or damages caused up to the point where the supply of the good is still met by consumer demand.

n70 A no-fault automobile insurance plan, see generally Robert E. Keeton & Jeffrey O'Connell, Basic Protection for the Traffic Victim (1965) (describing the objec- tives of the automobile claims system), allocates the cost of the activity without using fault as a criterion for the allocation of damages. See Calabresi, The Cost of Acci- dents, supra note 62, at 7-10. However, no-fault insurance is designed to provide first- party compensation in accidents where both parties are usually involved in the same activ- ity. In that special case, the allocation of damages is de facto placed correctly on the injury causing activity, driving. In a more general tort case, however, if the victim was not also participating in the same activity as the injurer, or was simply a consumer of goods, then allocating damage costs to a victim under a no-fault type compensation plan would not correctly allocate the costs to the activity that caused the damages.

n71 In the simplest case, with the plaintiff incurring only medical costs and lost wages, a collateral benefit setoff rule would result in a 100% setoff of tortfeasor liability because of benefits received by the plaintiff. The effect of the rule, then, is no liability.

n72 See, e.g., Stephen D. Sugarman, Doing Away With Tort Law, 73 Cal. L. Rev. 555, 613-16 (1985) (arguing additionally that the allocation of resources argument may be confused with other justifications for tort liability; that it may not fully consider the prop- er allocation of damages from accidents which are truly nobody's fault; that its purpose may be defeated by the self-externalizing function of insurance premiums; and that the inherent inefficiency of tort damages in correctly allocating costs may destroy any allocative benefits from assigning tort liability).

n73 See id. at 615.

n74 See Richard S. Markovits, Monopoly and the Allocative Inefficiency of First-Best-Allocatively-Efficient Tort Law in Our Worse-Than-Second-Best World: Some Whys and Some Therefores, 46 Case W. Res. L. Rev. 313, 316-17 (1996) (defining the "second best" theory).

n75 See id.

n76 If drastic changes were made, such as a conversion to an all-encompassing govern- ment social insurance for accidents or to an entirely no-fault based system for all tort accidents, the collateral source rule would almost by definition be unnecessary or unwork- able.

n77 See Eaton, supra note 18, at 922 (stating that none of the mainstream theories of human behavior support the likelihood that tort sanctions appropriately deter unsafe behav- ior); Gobis, supra note 13, at 885 (explaining that increased defendant liability is a specu- lative deterrent).

n78 See infra notes 80-116 and accompanying text (discussing both theoretical and empirical arguments in support of the law and economics inspired resurgence of the deter- rence purpose of tort liability).

n79 See infra notes 80-92 and accompanying text (discussing the theoretical arguments); notes 93-116 and accompanying text (discussing the empirical findings).

n80 See Posner, supra note 19, § 6.14; Restatement (Second) of Torts § 901 (1979) (stating that deterrence of wrongful conduct is accorded at least equal importance to compensation of harms caused as a purpose of tort law).

n81 See Posner, supra note 19, § 6.13.

n82 See id.

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n83 See Schwartz, supra note 30, at 378 (coining the weak/moderate/strong nomenclature: the weak view is that held by collateral source rule opponents and tort law critics; the moderate view is that the deterrent effect, while still an important aspect of tort liabil- ity, is somewhat mitigated by other factors). Shavell also supports the deterrent impact of liability in the strong form. His determination of the effects of different liability schemes rests on a measurement of total social welfare or utility that includes the full measure or costs of liability on the decision whether to engage in risky behavior. Shavell, supra note 68, at 5-46 (equating total social welfare to utility from engaging in behavior less costs of taking care not to cause accidents less costs of accidents (tort liability)).

n84 See Schwartz, supra note 30, at 382-83.

n85 See Sugarman, supra note 72, at 561-64 (concluding that there would be a gap between how people would act under only these constraints and what is socially desirable, but arguing that tort law fails to fill in the remaining deterrent incentive).

n86 See Schwartz, supra note 30, at 384.

n87 See Sugarman, supra note 72, at 573 (explaining that complete liability insurance protection shifts the direct economic insurance pressure of tort law from the tortfeasor to the insurance companies).

n88 See Schwartz, supra note 30, at 385 (noting that insurance premiums rise for those who drive negligently). But see Sugarman, supra note 72, at 577-81 (arguing that despite the potential deterrence-inducing mechanisms available to insurers, their actual use and resulting impact on risky behavior is minimal).

n89 See Schwartz, supra note 30, at 383, 385-86.

n90 See id. at 386.

n91 See id. at 386-87; see also Sugarman, supra note 72, at 569-73 (suggesting that many firms and individuals intentionally discount the risks of tort liability due to the inability of the tort system to assess the correct penalties; the fact that the potential gains from acting dangerously may outweigh the risks; and the small percentage impact even large tort liability may have on large corporations).

n92 See Schwartz, supra note 30, at 387.

n93 See infra notes 95-100 and accompanying text.

n94 See infra notes 102-116 and accompanying text.

n95 See generally Schwartz, supra note 30, at 397-404.

n96 See Helling v. Carey, 519 P.2d 981, 983 (Wash. 1974) (holding doctors liable for malpractice as a matter of law for not testing for glaucoma during a routine eye examination).

n97 See Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976) (re- quiring therapists to warn potential victims of patients' intent to harm them).

n98 See Canterbury v. Spence, 464 F.2d 772, 781-92 (D.C. Cir. 1972) (discussing the evolution of the physician's duty to adequately inform his patient).

n99 See Schwartz, supra note 30, at 399.

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n100 See id. at 402 (quoting significantly from Paul C. Weiler, et al., A Measure of Malpractice 733 (1993) (indicating that liability, along with continuing medical edu- cation, peer review, and practice guidelines, is a factor in determining a doctor's standard of care)). There is no doubt that potential liability has greatly increased the practice of defensive medicine and added to skyrocketing health care costs. See id. at 402. This prob- lem is, however, beyond the scope of this Note. The focus is rather on the ability of potential liability to encourage doctors to take these precautions at all in the light of the counter-argument that liability insurance dampens the deterrent effect of tort liability.

n101 The elimination of the collateral source rule can be compared to the elimination of tort liability generally. Although the use of a setoff rule for collateral benefits would only reduce a defendant's liability to the extent of the benefits received by the plaintiff, the reduction of the deterrent effect would be similar. The magnitude of the reduction may be smaller, but it would be a reduction nonetheless.

n102 Elisabeth M. Landes, Insurance, Liability, and Accidents: A Theoretical and Empiri- cal Investigation of the Effects of No-Fault Accidents, 25 J.L. & Econ. 49, 62 (1982) [hereinafter Landes, The Effects of No-Fault].

n103 See id. at 59. Landes' calculations accounted for such variables as population, population density, variances in medical costs across states, each state's dollar threshold to bar tort recovery, age, sex, race, and the dramatic effect on the amount of driving due to gasoline price changes in the early 1970s. See id.

n104 See Jeffrey O'Connell & Saul Levmore, A Reply to Landes: A Faulty Study of No-Fault's Effect on Fault?, 48 Mo. L. Rev. 649 (1983).

n105 See id. at 650-52 (stating that since fatal accidents produce tort claims in all no- fault plans, the study should have concentrated on injury causing accidents where the boundaries of no-fault may encompass the claims; that such a hypothetical driver is tech- nically inconsistent; and that omitted variables included weather, police enforcement, road quality, and medical care). Landes' stated reason for using fatalities is that the data is much more reliable. See Landes, The Effects of No-Fault, supra note 102, at 57-58 & 58 n.10. See also Sugarman, supra note 72, at 588-89 (partially rejecting O'Connell and Levmore's criticisms of Landes' study and offering as an alternative conclusion that in- stead of driving less carefully in no-fault states, drivers are simply driving more in the absence of liability).

n106 Paul Zador & Adrian Lund, Re-Analyses of the Effects of No-Fault Auto Insurance on Fatal Crashes, 53 J. Risk & Ins. 226, 234 (1986) (including data collected through 1980 and criticizing the statistical methodology of Landes' study, not her choice of vari- ables).

n107 See Frank A. Sloan et al., Tort Liability versus Other Approaches for Deterring Careless Driving, 14 Int'l Rev. L. Econ. 53, 66 (1994). Sloan concludes that overall, tort liability has a deterrent effect on careless driving. See id. at 68. However, he conced- ed that the United States "is not the ideal location to study the effects of no-fault laws." Id. at 69.

n108 It is interesting to note that at the time her study was published, Landes was associated with the University of Chicago. See Sugarman, supra note 72, at 588 n.147. The law and economics school of thought, centered at the University of Chicago with Richard Posner and William Landes, clearly supports tort law as a deterrent. Additionally, the Zador-Lund study was supported by the Insurance Institute for Highway Safety, a group that would probably support no-fault insurance.

n109 See supra note 107.

n110 See Schwartz, supra note 30, at 395.

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n111 Marc Gaudry, Measuring the Effects of the 1978 Quebec Automobile Insurance Act with the DRAG Model, in Contributions to Insurance Economics 471, 491 (Georges Dionne ed. 1992) (indicating that other mitigating factors such as increased reporting prac- tices under no-fault insurance and adverse risk selection by forcing young drivers to in- sure and therefore drive more may mitigate these increases).

n112 Rose Anne Devlin, Liability versus No-Fault Automobile Insurance Regimes: An Analysis of the Experience in Quebec, in Contributions to Insurance Economics 499, 513-14 (Georges Dionne ed. 1992) (concluding that "a no-fault system . . . severs the link between compensation for an accident and amount of driving care").

n113 Rose Anne Devlin, Some Welfare Implications of No-Fault Automobile Insurance, 10 Int'l Rev. L. Econ. 193 (1990).

n114 See id. at 198-99. These computations were based on Gaudry's results in his study on the increase in accidents, see supra note 111 and accompanying text, but could equal- ly apply to Devlin's own results.

n115 See Posner, supra note 19, § 6.14.

n116 See supra note 101 (comparing the creation of a collateral source setoff statute to the removal of tort liability as in the case of no-fault insurance plans).

n117 See supra notes 25-28 and accompanying text.

n118 See supra notes 60-76 and accompanying text (discussing the allocation of resourc- es purpose of tort liability); see also supra notes 77-116 and accompanying text (discuss- ing the deterrence purpose of tort liability).

n119 See infra notes 158-195 and accompanying text (discussing improvements to subro- gation and reimbursement procedures).

n120 See Brief of Amicus Curiae Defendant-Appellee at 22, Sorrell v. Thevenir, 633 N.E.2d 504 (Ohio 1994).

n121 See Jacobsen, supra note 7, at 531-32 (pointing out that the plaintiff receives the insurance benefits not because of the injury-causing accident, but because of the contract, paid for by the insurance premiums, which entitles him to the right to receive the bene- fits).

n122 See John Barrow, The Contracts Clause and the Collateral Source Rule, Trial, July 1988, at 33, 36 (arguing that if the plaintiff's benefits are paid under a nonsubrogated insurance contract that was entered into before the statutory elimination of the collateral source rule, denying the plaintiff full damages would impair the plaintiff's vested property rights obtained when the insurance contract was executed). The flaw in this argument is that a setoff statute would not disturb the plaintiff's contractual right to receive insurance benefits, it would only disturb the plaintiff's tort rights.

n123 See infra notes 139-157 and accompanying text (discussing subrogation). In fact, Shavell contends that both the insurer and insured will prefer insurance contracts with subrogation rights. See infra notes 149-152 and accompanying text.

n124 See Shavell, supra note 68, at 235-40.

n125 See Landes & Posner, supra note 63, at 252-53; Posner, supra note 19, § 6.14.

n126 See supra note 120 and accompanying text.

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n127 See Keeton & Widiss, supra note 28, § 3.1(c).

n128 See id.

n129 Even if the insured is wagering, he probably is not hoping to be injured due to a fear of pain and the inconvenience of recuperation.

n130 See Shavell, supra note 68, at 186-205 (discussing the allocation of risk and the theory of insurance).

n131 See supra, Section V, para. 2.

n132 Such alternatives include damages for pain and suffering, loss of future earning capacity, loss of consortium by the family, and punitive damages. See Restatement (Second) of Torts §§ 905(b) and comment, 906(c), & 908.

n133 These losses are very difficult to measure. See Posner, supra note 19, §§ 6.11-.12 (discussing damages for loss of earning capacity and for pain and suffering); Shavell, supra note 68, at 134 (discussing the difficulty of estimating nonpecuniary losses). The question of what value to place on human life or pain and suffering is a difficult one. It can be given to a jury to draw on its collective life experiences. See Ingber, supra note 64, at 778 & n.26 (stating that courts rely on juries to quantify such intangible injuries using their "enlightened conscience" and their "good sense and good judgment as men and women of affairs"). In contrast, this question can be totally ignored by the court and nothing is awarded. See Posner, supra note 19, §§ 6.11-.12 (explaining the difficulty of valuing the loss of future enjoyment of life, or hedonic damages, and loss of future earn- ings of children). It is clear though, that allowing juries to award nonpecuniary damage awards, even high awards, is a valued and traditional part of our tort system.

n134 See Sorrell v. Thevenir, No. 91 CA 4, 1992 Ohio App. LEXIS 5098, at *2 (Gallia Cty. Sept. 30, 1992).

n135 See id.

n136 See Brief of Plaintiff-Appellant at 11-15, Sorrell v. Thevenir, 633 N.E.2d 504 (Ohio 1994).

n137 See Ohio Rev. Code Ann. § 2317.45(B)(2)(c)(i) (Banks-Baldwin 1995).

n138 See Conn. Gen. Stat. Ann. § 52-225a (West 1991) (limiting the collateral source setoff to economic damages).

n139 See Gary T. Schwartz, A National Health Care Program: What Its Effect Would Be On American Tort Law and Malpractice Law, 79 Cornell L. Rev. 1339, 1347 (1994) (presenting variations on the collateral source rule under possible future tort law regimes).

n140 See Keeton & Widiss, supra note 28, § 3.10(a)(1); see also Spencer L. Kimball & Don A. Davis, The Extension of Insurance Subrogation, 60 Mich. L. Rev. 841 (1962).

n141 See Keeton & Widiss, supra note 28, §§ 3.10(b)(1), 3.10(c)(1) (discussing an insurer's right and ability to bring suit on its own or on the insured's behalf and various methods of allocating tort judgments to insured and insurer under a subrogation agreement).

n142 See id. at § 3.10(a)(7) (explaining that subrogation rights were denied due to rules against the assignability of causes of action for injury to another person); see also Kimball & Davis, supra note 140, at 860-61 (explaining that the traditional objection to legal

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party's dam- ages are only a guess by the insurance company or jury, additional recovery protects against low estimates.

Fourth, the insurance company and the plaintiff previously contracted for the payment of these benefits. The insurer has a duty to pay the benefits and the plaintiff has a right to the benefits regardless of the plaintiff's ability to recover from a third-party tortfeasor. [20] Since the insurance company has already been paid premiums to bear an actuarial risk, the benefit payments it must make are simply a cost of doing business that has already been contracted and paid for by the plaintiff.

Lastly, unless the defendant is made to pay for the damages caused, the deterrent purposes of tort liability [21] will be under- mined. [22]

II. Recent History

Despite its deeply ingrained roots in American common law, the collateral source rule has been criticized by commentators and **[*1079]** scholars. The rule is said to have evolved from opposing theories of tort law, [23] and has been called a high-ranking oddity of acci- dent law. [24] One of the most frequent objections to the collateral source rule is that the plaintiff should not receive a fortuitous double-recovery simply for being the victim of tortious conduct and receiving insurance benefits at the same time. [25] Since an im- portant purpose of tort compensation is to indemnify only the harm suffered by the victim, [26] this double-recovery would overcompen- sate the plaintiff and put him in a better position than before the tort occurred. [27] A serious implication of a double-recovery for the plaintiff is that it could produce a moral hazard. [28] If the plaintiff were to receive a double-recovery, the plaintiff would have incen- tive to become a tort victim; certainly this is an incentive society would not want to promote.

Another argument against the collateral source rule is that it is too rooted in a punitive or deterrence theory of tort liability. [29] The importance and efficacy of the deterrent impact of tort liability has been hotly debated for many years. [30] Relying on the argument that tort liability does not affect human behavior and deter unsafe conduct, opponents of the collateral source rule consider deterrence a weak justification. [31] In addition, mitigating factors such as lia- bility insurance and the inability of tort liability to deter inadver- tent conduct, may dull the deterrent impact of tort liability. [32] **[*1080]**

These theoretical arguments pale in comparison to the argu- ments of the insurance industry. Industry analysts argued that the collateral source rule's double recovery for plaintiffs was a contrib- uting factor to the liability insurance availability and affordability crises in this country in the early to mid-1980s. [33] The collateral source rule is an easy target for insurance company lobbyists due to the windfall nature of a double recovery and increasing public indignation of highly-publicized jury verdicts. [34] Based on the per- ceived need for a solution to this crisis, many state legislatures passed comprehensive tort reform packages in the latter half of the 1980s. Statutory elimination of the collateral source rule in some form was a common factor among these different packages. [35] **[*1081]**

The Ohio Legislature passed a comprehensive tort reform bill in 1987. [36] The purpose of the bill was "to make changes in civil justice and insurance law, thereby reducing the causes of the cur- rent insurance crisis and preventing future crises." [37] This Bill changed Ohio's common law collateral source rule; it required courts to subtract collateral benefits received by the plaintiff from compensatory damages awarded by the jury. [38] The new law re- quired the plaintiffs to disclose collateral benefits to the court at the conclusion of the trial. Such benefits were then subtracted from the compensatory damage verdict. [39]

In addition to helping solve the liability insurance crisis, the change in the common law collateral source rule was "designed to prevent double recovery" by a plaintiff. [40] Not surprisingly, with potentially large verdicts and attorney fees at stake, this new rule

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subrogation in medical benefit cases is that, absent an express contract provision, insurance of a personal nature cannot be subject to subrogation by the insurer). But see Smith v. Travelers Ins. Co., 362 N.E.2d 264, 265-66 (Ohio 1977) (holding that a subroga- tion clause is enforceable in a medical benefits case, and reflecting the trend towards allowing subrogation in these insurance contracts). Smith is representative of the trend towards including subrogation provisions in many medical insurance policies, including Blue Cross and Blue Shield plans. See Keeton & Widiss, supra note 28, § 3.10(a)(7).

n143 See Wilbur C. Leatherberry, No-Fault Automobile Insurance: Will the Poor Pay More Again?, 26 Case W. Res. L. Rev. 101, 150 (1975); see also Jeffrey O'Connell, A Proposal to Abolish Contributory and Comparative Fault, With Compensatory Savings by also Abolishing the **Collateral Source Rule,** 1979 U. Ill. L.F. 591, 604-05 (supplying selected **subrogation** cost statistics, showing the minute percentage of losses **subrogation** actually recovers for the insurer, and arguing for the elimination of **subrogation** due to the expense of the process).

n144 See Schwartz, supra note 139, at 1347 (calling for further investigation into the costs and application of subrogation rights).

n145 See Gobis, supra note 13, at 890; Schafer, supra note 23, at 590. In fact, Ohio R.C. § 2317.45 provides exemption from the setoff statute to plaintiff's insurers who have legal or contractual "rights of recoupment" from the defendant. Ohio Rev. Code Ann. § 2317.45(B)(2)(a)-(b) (Banks Baldwin 1995). This preserves the subrogation rights of the insurer and recognizes the ability of these rights to limit the double recovery. But see 2 ALI Reporters' Study, Enterprise Responsibility for Personal Injury 170-71, 177- 82 (1991) (arguing that the use of **subrogation,** with or without a traditional **collateral source rule,** is prohibitively expensive and difficult to enforce due to legal and practical restraints).

n146 See Schwartz, supra note 139, at 1348-49 (criticizing the ALI Reporters' Study, supra note 145, as "premature in writing off . . . subrogation" and inviting regulators and scholars to continue a cost/benefits analysis of subrogation).

n147 Posner, supra note 19, at § 6.13 (arguing that premiums would be less where the insured would be required to assign any legal rights from the injury to the insurer).

n148 See id.

n149 See Shavell, supra note 68, at 235-40.

n150 See id. at 236.

n151 See id. at 237.

n152 See id. at 237-38 (arguing that the increased cost of litigation and transaction costs due to subrogation litigation is a problem that may be difficult to resolve, but that these are not inherent problems of subrogation; rather, they are a reflection of the justice sys- tem as a whole).

n153 See supra note 142.

n154 See George S. Swan, Subrogation in Life Insurance: Now is the Time, 48 Ins. Counsel J. 634 (1981).

n155 See Keeton & Widiss, supra note 28, § 310(a)(6).

n156 Supra note 146 and accompanying text.

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n157 This proposal only generally addresses these issues. Different insurance programs such as worker's compensation, social security, Medicare/Medicaid, automobile, medical and health, malpractice, and general liability may require individualized analysis.

n158 See Keeton & Widiss, supra note 28, § 3.11(d) (discussing the reluctance of courts to deny insureds multiple coverage and basing this tendency on policy borrowed from the traditional collateral source rule). However, the trend is increasingly towards enforcing insurers' "Other Insurance" clauses which serve to limit multiple coverage. See id. § 3.11(a)(1) & (d); see also Kenneth S. Abraham & Lance Liebman, Private Insur- ance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury, 93 Colum. L. Rev. 75, 94-98 (1993) (describing the United States system as a web of various compensation schemes, including both cause- and fault-based systems, with a complex coordination of benefits between the different systems based on these types of clauses).

n159 See Abraham & Liebman, supra note 158, at 116 (linking the loss compensation system to a cost-accounting mechanism which simply bundles its claims for reimbursement against liability insurers for more efficient loss-cost transfer). The proposal to more closely enforce subrogation rights just as multiple insurance provisions are enforced may have limited applicability where the insurer is actually involved in the tort dispute. In that case the resolution of fault issues will force the insurer to incur litigation costs that probably exceed those found in "Other Insurance" clause disputes. However, multiple insurance disputes which require dispute resolution are also common. See Keeton & Widiss, supra note 28, § 3.11(d).

n160 See 2 ALI Reporters' Study, supra note 145, at 170.

n161 See id. at 178-80 (questioning the desirability of this arrangement due to possible conflicts of interest among the parties). But if the industry-wide interest in promoting subrogation is considered, the defendant's insurer will be more likely to participate in this type of arrangement on a reciprocal basis among all insurers.

n162 In order for the escrow agent to be able to retain the judgment or settlement proceeds for the first-party insurer's recovery, the judgment or settlement would have to resemble a jury special verdict form. The award would have to be specifically segregated into pecuniary (reimbursable) and nonpecuniary damages.

n163 See 2 ALI Reporters' Study, supra note 145, at 180 (discussing the settlement with subrogation conflict and suggesting that there is no suitable solution); see also Keeton & Widiss, supra note 28, § 3.10(b)(1)-(4) (outlining three main subrogation allocation methods, suggesting that not one of the three is used predominately, and indi- cating that the result reached is often a compromise between the insurer and insured).

n164 See 2 ALI Reporters' Study, supra note 145, at 180.

n165 See Keeton & Widiss, supra note 28, § 3.10(b)(1).

n166 The one-third/two-thirds proration results from the original ratio of benefits received to total injury (20,000/30,000).

n167 See Keeton & Widiss, supra note 28, § 3.10(b)(1).

n168 See supra note 162 and accompanying text (discussing the necessity of jury special verdicts specifically segregating the award into pecuniary and non-pecuniary damages).

n169 See, e.g., Va. Code Ann. § 65.2-311 (Michie 1995). This Virginia Worker's Compensation statute provides that the attorney's fees for subrogation recovery by the plaintiff on behalf of the insurance carrier are to "be apportioned pro rata between the employer insurer

and the employee." § 65.2-311. If a plaintiff's attorney's standard fee is one-third of the recovery, then the insurer's subrogation recovery is decreased by one-third.

n170 "Asserting a subrogation right is usually viewed as 'standing in the shoes' of the insured so that the insurer's rights are equal to, but no greater than, those of the in- sured." Keeton & Widiss, supra note 28, § 3.10(a)(1).

n171 In the litigation setting, the plaintiff's insurer may be at the mercy of the defendant's insurer in terms of limiting costs and speeding up the process. However, intra-industry cooperation via information exchange and statutory escrow agents, and the realization that the insurers are repeat players in this context should lead to a more efficient process. See supra notes 158-162 and accompanying text.

n172 See William K. Jones, Strict Liability for Hazardous Enterprise, 92 Colum. L. Rev. 1705, 1732 n.135 (1992) (indicating that informal inter-company settlement proce- dures are used extensively in automobile collision litigation); Schwartz, supra note 139, at 1348 (stating that major Southern California auto insurers have entered into an "intercom- pany arbitration agreement" to keep down costs on subrogation claims).

n173 See Gerald Asken, Arbitration of Automobile Accident Cases, 1 Conn. L. Rev. 70, 71, 76-78 (1968); see also Arbitration: Commercial Disputes, Insurance, and Tort Claims 215-341 (Alan Widiss ed. 1979) (discussing both policy and practical consider- ations of arbitration for various types of insurance and tort disputes).

n174 See, e.g., N.Y. Ins. Law § 5105 (McKinney 1985) (including a section of the motor vehicle insurance statute entitled "Settlement between Insurers" and providing arbi- tration as the sole subrogation recovery remedy for the payer of first-party benefits against the insurer of the third-party tortfeasor). This New York statute also implements a thresh- old where arbitration is only available if the defendant was driving a truck over 6500 pounds or a bus. See § 5105.

n175 See supra notes 163-169 and accompanying text.

n176 If insurer first, then the insurer will quickly settle. If insured first, then the insurer will press the litigation on until it reaches full compensation.

n177 The plaintiff would be concerned if an insurer-first or proration-allocation method was being used and the judgment or verdict possibilities seemed below actual damages because the plaintiff would be undercompensated in those cases.

n178 See supra notes 172-74.

n179 This option prevents violating the plaintiff's constitutional right to a jury trial or equal protection rights. See, e.g., U.S. Const. amend. VII; Ohio Const. art. I, § 5. Al- though mandatory, non-binding arbitration has been found to be constitutional, requiring only the insurer to submit to arbitration sufficiently addresses the need to reduce subroga- tion costs. See, e.g., Beatty v. Akron City Hosp., 424 N.E.2d 586 (Ohio 1981) (holding Ohio's medical malpractice mandatory arbitration statute, Ohio Rev. Code Ann. § 2711.21 (Baldwin 1981) (amended to non-mandatory in 1987), constitutional against due process and equal protection challenges).

n180 It may be beneficial to allow the plaintiff to present the compensatory damages as if the plaintiff were trying to recover them. This recognizes the evidentiary concerns raised in traditional collateral source rule operations. See supra notes 7-8 and accompany- ing text. If successful, the plaintiff would simply deduct this amount from the verdict before the defendant paid the award.

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n181 It is also possible that the issue of fault could be conclusively determined at the arbitration. The plaintiff would not have to reprove the issue; the defendant could simply stipulate to the earlier finding. See infra notes 184-195 and accompany text (discussing collateral estoppel concerns).

n182 See supra note 173 and accompanying text.

n183 See supra note 181 and accompanying text.

n184 The law of collateral estoppel precludes the relitigation of matters that have already been determined in order to preserve judicial resources, foster reliance on the finality of judicial decisions, and reduce the possibility of inconsistent decision. See Jack H. Friedenthal et al., Civil Procedure § 14.9 & n.2 (2d ed. 1993) (quoting Montana v. U.S., 440 U.S. 147 (1979)). There may be a question of whether a non-judicial proceed- ing such as arbitration is subject to collateral estoppel. Arbitration findings, however, have often been subject to the doctrine. See G. Richard Shell, Res Judicata and Collateral Estoppel Effects of Commercial Arbitration, 35 UCLA L. Rev. 623, 649 (1988).

n185 In a bifurcated proceeding such as the one proposed, if the defendant's liability insurer received an unfavorable fault determination in the arbitration proceeding, he would attempt to relitigate the issue of fault before the jury in the later proceeding. The offen- sive use of collateral estoppel by the plaintiff, however, would prevent the defendant and the defendant's insurer from relitigating an issue that had already been determined. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-32 (1979) (distinguishing offensive and defensive collateral estoppel, promoting the use of offensive collateral estoppel when judi- cial efficiency was not harmed, but warning of possible abuse by plaintiffs who vexatious- ly increase litigation via the use of collateral estoppel).

n186 See Friedenthal, supra note 184, § 14.10.

n187 See Shell, supra note 184, at 632-33.

n188 See Friedenthal, supra note 184, § 14.14. Collateral estoppel can benefit parties (such as the plaintiff in this case) or it can bind a party to a previously adverse finding (such as the defendant here). The defendant cannot assert that he cannot be bound be- cause he is a party to both proceedings. The defendant can only assert that the plaintiff should not benefit since the plaintiff was not involved in the prior proceedings.

n189 See id; see also Parklane Hosiery, 439 U.S. at 328 (approving the use of collateral estoppel in case where strict mutuality requirements are not met).

n190 See Friedenthal, supra note 184, § 14.13.

n191 See id. § 14.13-.14.

n192 An insured will not want privity with the insurer when the arbitration findings are adverse since the plaintiff will be bound by the findings. However, the plaintiff should not be able to choose when he is or is not bound by the arbitration proceedings.

n193 Shell, supra note 184, at 659.

n194 See id. at 660 (explaining that these fundamental interests are shared by both the arbitration and litigation systems).

n195 Arbitration is essentially a contractual issue even if mandated by statute. See id. at 661-63. The defendant's and plaintiff's insurers will have an interest in agreeing on the extent to which each side will be bound in the later proceedings. Recognition of these

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contract principles provides great flexibility to a court to delve into the intent of the par- ties as to whether certain issues would be precluded by the arbitration. Since, theoreti- cally, both parties to the arbitration are interested in reducing the total costs of subroga- tion, this flexibility will be utilized by the parties to achieve this cost reduction by limit- ing issue relitigation as much as possible. See id.

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generated much litigation in Ohio courts. [41] Although the state courts of appeal consistently held R.C. Section 2317.45 to be con- stitutional, the Ohio Supreme Court agreed to grant review to such a case in 1994. [42] **[*1082]**

In Sorrell, the plaintiff suffered back injuries when the defen- dant jokingly grabbed her from behind while she was bent over sweeping dirt into a dust pan. [43] The plaintiff had re- ceived $ 14,335 in worker's compensation benefits as a result of her injury. [44] At trial the plaintiff was awarded $ 1,700 for lost wages, $ 3,428 for medical expenses, and $ 5,000 for pain and suffering. [45] Following the trial, the court held a hearing to determine the amount of collateral benefits to be used to offset the jury award. [46] Theoretically, the jury verdict would have been totally offset by the worker's compensation benefits which were higher than the verdict; Ms. Sorrell would have received nothing. [47] At the hearing, the plaintiff argued that the collateral source setoff was unconstitution- al. [48] The trial court agreed and declared the statute unconstitu- tional. [49]

The Court of Appeals reversed. [50] The Supreme Court, in turn, reversed the Court of Appeals and declared the statute uncon- stitutional on a number of grounds. [51] It is interesting that the **[*1083]** Court vowed to ignore policy implications of the statute and to refrain from debating the wisdom of the legislature's action. [52] In fact, the Court's opinion is scattered with references to policy justifications for and against the collateral source rule. [53] The Court simply ignored its own limitation, and proceeded to base its decision on policy grounds. Whether or not the Sorrell court im- properly invaded a legislative policy-making domain is an impor- tant question, however, its answer is beyond the scope of this Note.

This type of judicial opposition to changes in the traditional rule shows that the debate is still open at the state level. If state legislatures pursue this type of tort reform measure, they must decide whether or not to redraft a change to the common law rule that will satisfy the court's constitutional requirements. Although legislative activity on this count has been minimal, [54] it is quite possible that the liability insurance industry, given its cyclical nature, [55] will find itself in another investment return/premium competition squeeze. When that happens, industry lobbyists will **[*1084]** surely knock down state house doors across the country clamoring for relief just as they did in the 1980s. It is likely that changes to the traditional collateral source rule will be part of the relief mea- sures offered if the rule has not yet been modified.

If a state legislature considers a collateral source setoff statute, more careful thought should be given to the justifications for and against the traditional rule than has been given in the past. Clearly, the current collateral source rule debate is too simple, short-sighted, and partisan. The opposing sides, divided right down plaintiff-de- fendant party lines, [56] either favor the traditional rule or condemn it with wholly self-interested views. [57] The plaintiffs want what they think is rightfully theirs, and the defendants want to avoid paying damages to a previously compensated plaintiff. The debate has lost sight of the reasons why the traditional rule developed--to foster and enhance the purpose of the tort system as it existed at the time of the development of the common law rule. [58] In order to reach a resolution, it must be determined whether the collateral source rule performs or does not perform a similar function under our current tort system. [59]

This Note extends the debate past the narrow party-minded arguments toward a more positive analysis of whether the rule is supported by modern theories of tort law and whether the rule has a place in the tort system. Three major justifications of the tort system found in the recent literature define the analysis: (1) risk allocation/loss-spreading; (2) deterrence; and (3) compensation.

A conclusion that the collateral rule does not magically fit all of the justifications given for tort liability does not require that it be dismissed as out-dated. It must be determined whether the costs **[*1085]** associated with the traditional collateral source rule are outweighed by the benefits.

III. Risk Allocation & Scale of Activity

Many justifications for the tort system focus on the actions of the tortfeasor and the deterrent effect of tort liability. [60] The most common concept of deterrence is whether the threat of liability prevents an individual or firm from engaging in risky behavior. [61] This section of the Note will discuss a less common concept termed "scale of activity" deterrence. [62] It is clear that a goal of tort liability is to optimize, not eliminate, risky behavior. [63] Some risky behavior is considered valuable by our society even if it results in damages. The difficulty lies in determining what level of risky behavior is socially optimal. The amount or level of risky behavior being measured is called the scale of an activity.

Many law and economics scholars believe that an optimal scale of activity can be more closely attained by the use of tort liability. Guido Calabresi terms the determination of the optimal level of risky behavior the "allocation of resources" justification of tort liability. [64] His thought was that if society wants certain goods, then obstacles to production should be overcome, and the goods should be produced. [65] To enable society to make the opti- mal choice between the desirable goods or activities and the risks associated with them, the full cost of producing the good or engag- ing in the activity must be included in the price society pays for that good or activity. These costs include the normal cost of inputs such as labor and materials, as well as the damages caused by **[*1086]** producing the good or engaging in the activity. If the value to society of a particular good or activity is equal to or more than the cost of production, then production or activity will increase and society will pay for it. If the value to society is less that the cost of production, including damages, then production or activity will decrease. This function of price, reflecting full cost, is an important component of society's choice of whether to buy the good or en- gage in the activity. [66]

Clearly, the only way that the full cost can be reflected in the price is if the producer must pay for damages caused by the pro- duction of the good or activity. If the producer is monetarily liable, then the price charged to consumers will reflect this liability so that the producer can cover the costs of production. If the price of the good does not reflect damages caused, as would be the case if the producer is not monetarily liable for damages caused, then society will buy more of a good or engage in more of an activi- ty. [67] Since society's demand for a good or activity has increased due to the lower than optimal price, the producer will respond by increasing the supply of the good or activity above the socially optimal level.

More recently, Steven Shavell has shown that if an injurer is not liable for the damages he causes, he will over-engage in an activity. [68] Since the injurer, in the absence of liability, does not have to pay for the damages caused or expend his own resources to try to prevent accidents from occurring, theoretically, he could engage in a dangerous activity without thinking about its conse- quences. [69]

The traditional collateral source rule correctly places the mone- tary liability for damages caused due to wrongful behavior on the injuring party. [70] According to Calabresi and Shavell, if the full **[*1087]** cost of the damages caused by the activity or production of goods is not reflected in the price or borne by the injuring party, then too much activity will be engaged in or too many goods will be pro- duced. The collateral source rule places the cost of damages on the injuring party so that it is reflected in the cost of the good. If the collateral source rule did not apply in tort liability cases, then the injuring party would not be fully liable for the damages. [71] There would then be no reason for the monetary liability to be reflected in the cost of the good produced.

The scale of activity or allocation of resources argument for imposing tort liability on the injurer is not without its critics. [72] Stephen Sugarman argues that these theories are not strong enough to justify retaining tort liability. His most compelling objection is that simply internalizing the costs of torts may not lead to a more efficient allocation of resources. [73] This uncertainty stems from the economic theory of "second-best." [74] As applied to the allocation

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of tort liability, this theory suggests that simply making one alloca- tion of cost, based on fault or damage causation, has an unpredict- able effect on the optimal level of production due to the many other economic factors that are simultaneously affecting the level **[*1088]** of production. Changing one factor in the mix in an attempt to improve the situation may actually worsen it, since the interplay of other factors with the changed factor is not known. [75]

Although the argument is a potentially serious consideration for the debate over whether to retain tort law liability at all, it does not damage the allocative argument to retain the collateral source rule in our current tort liability system. That is so since the collateral source rule debate is practicably limited to the world where no drastic or overwhelming changes will be made in the fault-based system through which tort victims are compensated. Since that system is unlikely to change, [76] the allocative argument for retaining the rule operates within the framework of the current fault-based system. Sugarman's "second-best" theory on tort liabil- ity does not extend to this framework; it is limited to the broader question of whether tort liability should be retained.

Within a fault-based framework, the "second-best" theory does not indicate that the collateral source rule distorts the level of production. Keeping the cost of accidents on the injurer via the collateral source rule will not result in a more drastic distortion in the allocation of resources than those distortions that already occur in the tort liability system. In fact, in choosing between placing full liability on the injurer under the traditional rule or in reducing liability under a setoff statute, the theory of "second-best" would imply that it would be difficult to determine which allocation is more efficient. It is possible that reducing tort liability to the ex- tent of collateral benefits may distort the allocation to the same extent as imposing full liability.

For the scale of activity rationale to be effective in helping society choose the optimal level of goods to produce or activity to engage in, the traditional collateral source rule should be retained. Without the collateral source rule, injuring parties and producers of goods will engage in too much dangerous activity or produce too many dangerous goods. In turn, this would increase the injuries and damages beyond the optimal level that society, if given the **[*1089]** choice, would select through pricing and supply/demand mecha- nisms.

IV. Deterrence of Unsafe Behavior

Many commentators contend that because the deterrence pur- pose of tort liability has faded in importance, it is also no longer a supportable justification for the continued use of the collateral source rule. [77] The deterrence justification for tort liability has been revived recently, however, through the law and economic positivist analysis. [78] For this reason, it is difficult for these com- mentators and litigants to continue to maintain that deterrence has no scholarly support as a purpose of the tort system or the collat- eral source rule.

The difficulty in determining whether the deterrence theory is a valid justification is that there are persuasive theoretical argu- ments both for and against the efficacy of this theory. Additionally, the actual deterrent impact of tort liability is difficult to measure in any satisfactory empirical fashion. Early attempts at empiricism were often apocryphal investigations into the impact of a few cele- brated cases. The later attempts at investigating the impact of lia- bility have been more structured and scientific, but even these studies have been criticized. [79] Even so, if it is accepted that deter- rence still plays a role in the tort system, then abolishing the col- lateral source rule will certainly decrease the deterrent impact of tort liability and lead to a higher than optimal level of risky behav- ior. As explained below, the setoff of liability by collateral benefits will fully or partially reduce the deterrent effect of tort liability. Deterrence of risky behavior may not by itself justify preserving the traditional rule. As this Note argues, however, in combination with the allocation of resources and compensation arguments, plus more efficient subrogation, an increase in the deterrence of risky **[*1090]** behavior will swing the balance towards retaining the traditional rule.

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A. Deterrence--Theoretical Arguments

Posner states that the major economic function of tort law and the imposition of liability on tortfeasors is not compensation, but rather the deterrence of inefficient accidents. [80] Allowing the defen- dant in an accident liability case to use the victim's insurance as an offset to the defendant's liability would decrease the deterrent effect of liability on the defendant. [81] For instance, if a defendant were liable for $ 10,000 in damages, but the liability was offset by the collateral benefits received by the plaintiff, then the defendant's incentive to spend up to $ 10,000, discounted for the probability of the accident occurring, would be reduced by this discounted val- ue. [82] The view that tort law deters unsafe behavior to the full economic extent of the tort liability can be called the "strong" form of the deterrence argument. [83]

The critics of the strong form offer realistic objections to the deterrent impact of liability. Such objections include: the deterrent effect of other behavior controls besides tort liability, the diluting effect of liability insurance on deterrence, the inability of liability to deter unintentional behavior, and the psychological limitation of individuals to properly perceive and respond to risks. [84]

The first objection, the existence of other behavior controls, may raise the question of whether tort liability can be partially or wholly supplanted as a deterrent. Parties who engage in unsafe behavior may be deterred by other incentives such as moral obliga- **[*1091]** tions not to injure or by self-serving interests in personal safety. [85] An example of the latter would be personal safety concerns that prevent driving at excessive speeds when the risk to self is possi- bly greater that the risk to others. These other incentives, in and of themselves, probably cannot prevent people from engaging in risky behavior. They can, however, supplement the efficacy of tort liabil- ity. [86]

The remaining objections to the deterrent effect of tort liability reflect more on its effectiveness, when it is imposed, at deterring unsafe conduct. Liability insurance may create a buffer between the defendant and his tort liability obligations by shifting Posner's full economic deterrent pressure from the tortfeasor to the liability insurer. [87] If a defendant simply relies on an insurer to fulfill the liability, then the defendant has not faced any of the monetary penalties imposed by the jury that supposedly create a deterrent effect. The actual functioning of liability insurance coverage, how- ever, may offset this shifting effect through the operation of de- ductibles, caps, and experience rating pricing mechanisms which shift the costs of tort liability back to the tortfeasor. [88] While lia- bility insurance probably does reduce the full impact of tort liabili- ty for defendants, thereby eroding Posner's "strong" deterrent theo- ry, the threat of increasing rates and incurring fixed and unavoid- able costs certainly has an important impact on activities.

Since negligent torts are by definition committed unintentional- ly, it is argued that mental awareness of tort liability cannot deter someone from unintentionally causing an accident. [89] Inadvertent behavior, however, can be somewhat modified by certain precau- tionary choices: fixing a broken stairway in the case of homeowner negligence, engaging in proactive informed consent in medical malpractice, or improving compliance with manufacturing safety **[*1092]** regulations in product defect cases. [90] These actions may not pre- vent accidents, but they will help prevent the portion of accidents that has an inherent element of preventability.

In addition, although some individuals may be aware of tort liability possibilities and may even affirmatively attempt to reduce risky behavior, they are unable to perceive the true risk level and cannot take the optimal level of precautionary measures. [91] Again, this mitigating factor is probably subject to offsetting considerations that will retain some of the deterrent impact of liability. In fact, the inability to assess risks properly may lead to an equal amount of overestimation or underestimation. However, if there is an awareness of the possibility of liability, there may be incentives to become educated about the risk levels. These incentives

include the liability if risks are underestimated and the waste of resources if risks are overestimated. [92]

B. Deterrence--Empirical Evidence

The question of whether tort liability deters socially unaccept- able risky behavior is also an empirical one. Although this is a difficult measurement to make, attempts have been made to mea- sure the decrease in accidents due to the imposition of liability. [93] More interesting, though, are studies that show increased accidents when liability is partially removed. Such is the case when no-fault automobile insurance regimes are instituted. [94] As mentioned earli- er, empirical studies in this area are scarce, the results subject to heavy criticism, and the conclusions perhaps unpersuasive. This difficulty of proof, however, may not be fatal to the argument to preserve the collateral source rule.

An example of whether the imposition of liability changes behavior is the extent to which physicians have gone in order to reduce medical malpractice liability. [95] If the argument is that tort **[*1093]** law does not deter tortious behavior due to the buffer of liability insurance, then it would follow that physicians would not undertake precautions to prevent malpractice. Schwartz provides many exam- ples of how liability pressures have increased activity by the medi- cal profession to reduce accidents. Some examples include in- creased under-age-forty glaucoma testing, [96] increased awareness of requirements to notify potential victims of dangerous patients, [97] increased efforts to improve patient informed consent procedures and standardize physician utilization of the process, [98] and in- creased awareness of surgical tools left in patients. [99] These are specific examples of heightened awareness due to publicized cases. Data also exists showing general attempts to improve the standard of care prompted by the increasing threat of liability and rising malpractice insurance premiums. [100] These procedural changes sup- port the moderate deterrent effect argument. The specter of tort liability has helped increase the awareness and prevention of unsafe activity in medical procedures.

The second and more interesting type of empirical measure- ment that highlights the deterrent effect is whether there is an increase in risky behavior when tort liability is removed. [101] A common area of study on this issue is whether the imposition of no-fault automobile insurance causes an increase in accidents or fatalities. Either the strong or moderate form of deterrence would, **[*1094]** in theory, indicate that moving from a fault-based system of acci- dent liability to a no-fault system would result in reduced safety precautions by drivers and an increase in accidents. This would result from decreased incentives to drive carefully in the absence of liability.

This theory has generally held true. In a study that is often quoted, Elisabeth Landes showed that a $ 1,500 liability threshold, below which claims for damages must enter the no-fault first party insurance compensation scheme, "implies an increase in fatal acci- dents of more than 10 percent!" [102] Landes performed a regression analysis on fatal accident rates for the period 1967-76 in states that enacted no-fault automobile insurance. [103] The study's intent was to isolate the effect on fatal accident rates due solely to the advent of no-fault insurance. If the ten percent figure is accurate, then aside from the serious policy implications on no-fault plans, the study supports a more general theory that in the absence of tort liability, more accidents occur due to the decreased deterrent effect of that liability.

Landes' study, however, has been criticized. Jeffrey O'Connell and Saul Levmore criticized Landes for her methodology. [104] They faulted her use of fatal accidents instead of injuries from accidents as a focus of study, her hypothetical driver who "superrationally" discounts his own injuries while being fooled by liability thresholds into driving less carefully, and her omission of many other impor- tant variables. [105] **[*1095]**

Since Landes' study, other economists and statisticians have attempted to prove or disprove similar hypotheses with mixed results. A 1986 study by Paul Zador and Adrian Lund,

sponsored by the Insurance Institute for Highway Safety, directly attacked Landes' methodology and came to the conclusion that "multiple regression analyses . . . provides no support for the claim that the adoption of no-fault laws that restrict the liability for pain and suffering increased the frequency of fatal motor vehicle crash- es." [106] However, a 1994 study by Frank Sloan found that barring twenty-five percent of tort liability claims through a no-fault pro- gram increases the fatality rate by eighteen percent. [107] Although Landes' results may have been reincarnated by Sloan's studies, the empirical side of the deterrence question is not satisfactorily an- swered by these studies. [108]

As Sloan indicated, the United States may not be the ideal case study for the no-fault question. [109] The 1978 implementation of a no-fault insurance plan in Quebec may provide better data for such a study since that plan provides for unlimited out-of-pocket losses and entirely does away with tort liability for personal inju- ries. [110] Statistical studies of the Quebec plan will thereby avoid the threshold problem in United States studies where tort liability is retained above a certain nominal dollar amount. The studies on the Quebec plan more conclusively show that the removal of the deterrent of tort liability increased the accident rate. **[*1096]**

In his study of the Quebec plan, Marc Gaudry found that fatal accidents increased by seven percent, injury-only accidents in- creased by twenty-six percent, and property damage-only accidents by eleven percent. [111] Rose Anne Devlin was even more conclu- sive than Gaudry. She argued that regardless of an accident report- ing effect, fatal accidents, which cannot be falsified or avoided, in- creased by almost ten percent in Quebec after the passage of the no-fault insurance regime in 1978. [112] Devlin has also published a report that attaches dollar values to the added accidents and com- pares them to the administrative savings from the additions of no- fault in Quebec. [113] She concluded that the increase in accidents under no-fault cost $ 247 million as compared to administrative cost savings of $ 94 million. [114]

These somewhat surprising statistics highlight one of the much-criticized features of no-fault insurance plans. No-fault insur- ance plans wholly ignored the deterrent impact of tort liability, attempted to decrease the overall costs of the accident compensa- tion system by reducing transaction costs, and focused on increas- ing the availability and affordability of insurance. [115] The plans may have made insurance more available and affordable, but if the statistics cited above are believed, then the plans failed in even maintaining the level of accidents. If the increased accident costs were lower than the decreased transactions costs combined with the benefits of improved coverage, then the no-fault plans may have been justified. However, as the broad cost-benefit analysis of the fault to no-fault shift in Quebec shows, that was not the case. **[*1097]**

The arguments in favor of retaining the collateral source rule surely benefit from these studies. [116] If a setoff statute were used, then the deterrent effect of tort liability would be reduced by the extent of the setoff. A setoff statute of that type would, in effect, create a no-fault regime for tortfeasors who are lucky enough to injure insured victims.

This may seem like a return to the "whose windfall is prefera- ble" refrain, but it is not. The deterrent impact of tort liability will support placing liability on the tortfeasor in order to reduce the level of risky behavior and thereby reduce the cost of accidents. Although the mitigating factors, especially the dampening effect of liability insurance, may refute the strong theory of deterrence, there is no reason to believe that the moderate form of deterrence is harmed. A moderate form of deterrence may not alone be enough to support tort liability and the collateral source rule in the face of critics. It is, however, an additional factor that can help swing the balance in favor of retaining the collateral source rule.

V. Compensation for Injuries

Probably the most persuasive argument against the collateral source rule is that it overcompensates the plaintiff by creating a double recovery. [117] Admittedly, this argument is

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NOTE: THE COLLATERAL SOURCE RULE AND STATE-PROVIDED SPECIAL EDUCATION AND THERAPY

Richard C. Witzel Jr.

SUMMARY:
... A portion of the damages the Does seek from the doctor are to cover the expenses associated with providing their child with the special education and therapy that he will require throughout his school-age years. ... As part of the substantive law of damages, the collateral source rule dictates that compensation received from a source wholly independent from the tortfeasor will not be deducted from the plaintiff's recovery from the tortfeasor. ... In Enson v. Wilson, the Supreme Court of Alabama also addressed the application of the collateral source rule to state- provided special education and therapy. ... The Alabama Supreme Court, in Williston v. Ard, recently reaffirmed its decision regarding the application of the collateral source rule to stateprovided special education and therapy. ... In this regard, the application of the collateral source rule to free, state-provided special education and therapy injects a societal cost into personal injury awards that far outweighs any possible deterrent effect the rule may have in the modern tort system. ... An approach which prevents the summary reduction of a plaintiff's damage award to account for the existence of free, state-provided special education and therapy promotes a judicial system which avoids arbitrary results. ...

TEXT:
[*697]

I.

Introduction

Two years ago, Jane and John Doe had a child [1] who suffered from oxygen deprivation during childbirth. [2] The lack of oxygen at this critical time caused the child to suffer severe mental retardation and cerebral palsy. [3] Jane and John have filed a medical malpractice action against the doctor who delivered their child. [4] The Does' complaint alleges that the doctor negligently failed to diagnose and treat their child's fetal distress. A portion of the damages the Does seek from the doctor are to cover the expenses associated with providing their child with the special education and therapy that he will require throughout his school-age years.

Assuming the Does are successful in their malpractice claim, under the traditional application of the collateral source rule [5] they will be entitled to recover damages for the cost of special

answers the problems inherent in awarding damages to a plaintiff in need of special education and therapy. This approach protects the plaintiff from arbitrary results while addressing the concerns of society and fostering the goals of the judicial system. Therefore, in keeping with this approach, courts and legislatures should follow the lead of the Florida and Missouri courts recognizing that the traditional application of the collateral source rule cannot be applied soundly to state-provided special education and therapy. [140] By preventing summary reduction and promoting full introduction of evidence, courts and legislatures will find a workable solution to awarding damages in cases which involve a plaintiff in need of special education and therapy.

FOOTNOTES:

n1. Courts have considered the applicability of the collateral source rule to free, state-provided special education and therapy in seven cases. See infra notes 74-114. This hypothetical is based on a compilation of facts from five of the seven cases. The remaining two cases considering the collateral source rule in this context involved injuries to young children. The age of these plaintiffs and the enormous cost of providing them with special education until they reach adulthood make the application of the collateral source rule to free, state-provided special education and therapy a crucial factor in determining the amount of the plaintiff's recovery for economic damages.

n2. Commonly referred to as oxygen deprivation, fetal anoxia or intrauterine asphyxia may result from a "prolapse of the [umbilical] cord, placenta abruption, [or] compression of the umbilical vein." Agnes C. Frenay & Rose M. Mahoney, Understanding Medical Terminology, 298 (9th ed. 1993).

n3. A full discussion of the link between oxygen deprivation, mental retardation and cerebral palsy is beyond the scope of this Note. For purposes of this hypothetical, the traditional view that such a causal link exists is presumed. For an opposing view, see David G. Duff, Compensation for Neurologically Impaired Infants: Medical No Fault in Virginia, 27 Harv. J. on Legis. 391, 395 (1990) (noting that a "reassessment" of the traditional view is necessary in light of recent medical research).

n4. This hypothetical assumes that the state where the Does live has not adopted a no-fault system of compensation for neurologically impaired infants suffering severe mental injuries during childbirth. Several states, including Virginia have adopted such a system. For a discussion of the Virginia approach, see id.

n5. The traditional approach has been followed by five of the seven jurisdictions considering the application of the collateral source rule to free, state-provided special education and therapy. See infra notes 74-102 and accompanying text.

n6. The right of a child with disabilities to receive free, state-provided special education and therapy is mandated by federal statute. See 20 U.S.C. 1412 (1990). The statute provides that to receive federal funding, states must assure "all children with disabilities the right to a free appropriate public education ... available for all children with disabilities between the ages of three and twenty-one ... regardless of the severity of their disability ...." Id.

In accord with federal law, most states also have laws guaranteeing children with disabilities free, state-provided special education and therapy. For an example of one of these statutes, see infranote 86.

n7. See infra notes 17-18 and accompanying text.

n8. See infra note 76 and accompanying text.

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n9. See infra note 82 and accompanying text.

n10. Hubbarb Broadcasting, Inc. v. Loescher, 291 N.W.2d 216, 222 (Minn. 1980).

n11. Restatement (Second) of Torts 920A(2) (1977); See also Kistler v. Halsey, 481 P.2d 722, 724 (Colo. 1971) ("Compensation or indemnity received by an injured party from a collateral source, wholly independent of the wrongdoer ... will not diminish the damages otherwise recoverable from the wrongdoer.").

n12. See, e.g., Richard C. Maxwell, The Collateral Source Rule in the American Law of Damages, 46 Minn. L. Rev. 669, 675 (1962); Robert A. Sedler, The Collateral Source Rule and Personal Injury Damages: The Irrelevant Principle and the Functional Approach, 58 Ky. L.J. 36, 41 (1969). But see, Joel K. Jacobsen, The Collateral Source Rule and the Role of the Jury, 70 Or. L. Rev. 523, 525-526 (1991). Jacobsen eschews as "hermaphroditic" the traditional notion that the collateral source rule is both part of the substantive law of damages and a rule of evidence. Id. Instead, Jacobsen argues that "properly analyzed, the collateral source rule is a substantive rule of damages and not a rule of evidence." Id.

n13. See Jacobsen, supra note 12, at 525 (noting that classification of the collateral source rule as a rule of evidence would appear to make the collateral source rule "an exception to Federal Rule of Evidence 101 ... and the Erie doctrine" which mandates "that federal law govern[ ] evidentiary questions in federal courts").

n14. Although most jurisdictions apply the rule in its traditional form, incorporating both the substantive and evidentiary components, some jurisdictions have retained the substantive aspect of the rule - prohibiting the outright deduction of collateral source benefits while abandoning the rule's evidentiary component. In these jurisdictions, the defendant is entitled to introduce evidence that all or a portion of the plaintiff's damages were paid by a collateral source. The plaintiff is then entitled to introduce evidence about the cost to obtain the collateral source benefit (in most situations this evidence will be of paid insurance premiums). The fact finder is then entitled to consider this evidence in calculating the plaintiff's damages, but is not required to summarily reduce the plaintiff's award by the amount of the collateral benefits. This approach to the collateral source rule typically applies when a plaintiff seeks damages for medical or hospital expenses. See, for example, Ala. Code 12-21-45 (1995), which provides:

(a) In all civil actions where damages for any medical or hospital expenses are claimed and are legally recoverable for personal injury or death, evidence that the plaintiff's medical or hospital expenses have been or will be paid or reimbursed shall be admissible as competent evidence. In such actions upon admission of evidence respecting reimbursement or payment of medical or hospital expenses, the plaintiff shall be entitled to introduce evidence of the cost of obtaining reimbursement or payment of medical or hospital expenses.

Id.

n15. The collateral source rule only applies if the source of the benefit is wholly independent of the tortfeasor. The rule has no application if the tortfeasor or a person acting on behalf of the tortfeasor makes payments to the plaintiff to compensate him for the injuries he sustained. In this situation, the tortfeasor is entitled to a pro tanto reduction of the plaintiff's damage award. See, e.g., Restatement (Second) of Torts 920A(1) (1977) ("A payment made by a tortfeasor or by a person acting for him to a person whom he has injured is credited against his tort liability, as are payments made by another who is, or believes he is, subject to the same tort liability.").

n16. For example, in a case where the plaintiff recovers $ 100 from the tortfeasor for

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injuries sustained as a result of the tortfeasor's negligence, the tortfeasor is not entitled to have the judgment reduced to $ 75 where the plaintiff's medical insurer paid medical bills of $ 25. Rather, under the traditional application of the collateral source rule, the plaintiff is entitled to recover the full $ 100 from the tortfeasor.

n17. The evidentiary component of the collateral source rule only precludes a plaintiff from offering evidence of collateral source benefits to mitigate the amount of damages the plaintiff suffered. The collateral source rule does not preclude the defendant from offering evidence that the plaintiff received collateral source benefits when this evidence is offered for purposes other than to mitigate the amount of damages the plaintiff suffered. For example, in Moore v. Missouri Pacific R.R. Co., 825 S.W.2d 839, 842-843 (Mo. 1992), the court allowed the defendant to introduce evidence of collateral benefits received to rebut the plaintiff's contention that the defendant's conduct caused the plaintiff to suffer financial distress which precluded him from continuing medical treatment. The court held "the raising of plaintiff's financial condition ... permits the opposing party to attack [the plaintiff's] claims of financial distress by showing that other financial assistance was available." Id. at 843. Similarly, where the plaintiff is seeking damages for lost wages and there is evidence that the plaintiff has been malingering in (i.e., not returning to work because of payments from collateral sources such as unemployment compensation and social security benefits), evidence of the collateral payments is admissible. See, e.g., Corsetti v. Stone Co., 483 N.E.2d 793, 802 (Mass. 1985).

n18. Although this evidentiary component may appear similar to the substantive law of damages component discussed above, a closer examination reveals a significant difference. While the substantive component of the collateral source rule precludes an outright deduction of the amounts received from the collateral source, the evidentiary component of the collateral source rule precludes the defendant from offering evidence that the plaintiff has received a benefit from a collateral source - evidence that could mitigate the amount of damages that the plaintiff has suffered. Thus, the collateral source rule effectively precludes a defendant from offering evidence that the plaintiff never really suffered the damages claimed because those damages were reimbursed by a collateral source. At least one commentator has focused on this component of the collateral source rule as an invasion of the province of the jury and its fact finding role. SeeJacobsen, supranote 12 at 541.

n19. The term "collateral" was first used to describe the benefit conferred upon the plaintiff by a third party in Harding v. Town of Townsend, 43 Vt. 536, 538 (1871) (holding proceeds of plaintiff's liability insurance should not reduce the amount of damages the plaintiff was entitled to recover from the defendant). See Albert Averbach, The Collateral Source Rule, 21 Ohio St. L.J. 231, 233 (1960).

n20. 58 U.S. (17 How.) 153 (1854). The Propeller Monticello arose from a collision on Lake Huron between the propeller and a schooner - both carrying cargo. The schooner, which sank, was insured. The insurer accepted the abandonment of the schooner and paid its owners for the loss. Id. at 153-156. In a subsequent tort action brought by the schooner's owner, the steamship owner argued that an insurance pay-off released it from liability. Id. The Supreme Court disagreed:

The contract with the insurer is in the nature of a wager between third parties, with which the trespasser has no concern. The insurer does not stand in the relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others.

Id. at 157-60; see, e.g., Deana A. Goldsmith, A Survey of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multistate Litigation, 53 J. Air L. & Com. 799 (1988); Maxwell, supra note 12, at 671 n.6. But see, Jacobsen, supra note 12, at 527. Jacobsen argues that scholars tracing the collateral source rule to The Propeller Monticello are

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incorrect. Id. Rather, Jacobsen maintains that The Propeller Monticello simply abolished the common-law rule that releasing one tortfeasor from liability was a bar against seeking recovery from a joint-tortfeasor. Id. Jacobsen points out that the defendant in The Propeller Monticello "did not raise the issue of insurance proceeds as mitigation, but rather as a total defense." Id.; cf. O'Connor, "Collateral Source" Rule and Full Special Damages, 1957 Trial & Tort Trends, 642, 645 (suggesting that Althorf v. Wolfe, 22 N.Y. 355 (1860), was the first American case to apply the collateral source rule).

n21. Even though the collateral source rule has been the subject of abundant criticism from academics and students alike, see, e.g., Charles W. Peckinpaugh, Jr., An Analysis of the Collateral Source Rule, 1966 Ins. L.J. 545; Note, Unreason and the Law of Damages, 77 Harv. L. Rev. 741 (1964) (frequently cited student piece critical of the collateral source rule), its proponents are no less passionate in their defense of the rule; see Thomas F. Lambert, Jr., The Case for the Collateral Source Rule, 1966 Ins. L.J. 531 (arguing that the collateral source rule "must be protected not only against frontal assault but against the erosions of side-door evasions and back-door intrusions"); see also Maxwell, supra note 12, at 695 ("At its best, in some cases, [the collateral source rule] operates as an instrument of what most of us would be willing to call justice.".) There is no doubt that intense passion on both sides has forced even legislatures hostile to the collateral source rule to modify or abrogate the rule only in specific types of actions or for specific types of damages. For a discussion of the various approaches taken by state legislatures in statutes abolishing or modifying the collateral source rule, see Michael Flynn, Private Medical Insurance and the Collateral Source Rule: A Good Bet?, 22 U. Tol. L. Rev. 39, 49-64 (1990).

n22. Traditionally the tort system was thought of as having two primary goals: 1) just and fair compensation of the injured party and 2) deterrence of wrongful or negligent conduct. The continued validity of these goals has been the subject of debate in light of the rise in the availability of liability insurance and social welfare programs. See infra notes 63-65 and accompanying text.

n23. See James D. Ghiardi, The Collateral Source Rule: Multiple Recovery in Personal Injury Actions, 1967 Ins. L.J. 457, 458. An example of a typical collateral source problem faced by nineteenth century courts was as follows:

The plaintiff, an elderly woman of modest means, was injured by the clear negligence of defendant's servant. It is probable that the defendant did not carry liability insurance ... The plaintiff needed medical and nursing care as a result of her injuries, so her two sons came from out of state to care for her. Their services were performed gratuitously. At the trial, the tortfeasor asked the court to not allow the jury to award the plaintiff the "reasonable compensation for nurse hire and attendance" since she had received these services for free from her sons.

Banks McDowell, The Collateral Source Rule - The American Medical Association and Tort Reform, 24 Washburn L.J. 205, 207 (1985) (footnote omitted). The trial court was then faced with the choice of denying the plaintiff a significant portion of her damages or making the tortfeasor answer for the injuries his servant caused. Given this choice, the decision was relatively easy. Id. at 207-08.

n24. Sedler, supranote 12, at 39.

n25. Id. In the latter part of the nineteenth century, a tortfeasor would only be liable if found negligent "under the rather strict concepts of negligence that existed ... and if the plaintiff was not barred by contributory negligence, assumption of the risk, the fellow-servant rule, or one of the other liability-limiting devices developed ... to protect the new industrial enterprises." Id. Moreover, the general unavailability of liability insurance meant the

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deterrent goal of the tort system would be furthered as the defendant who was forced to pay the full amount of the plaintiff's damages, even though a portion of those damages were offset by a collateral source, quickly realized the negative consequences of her actions. Id.

n26. Grayon v. Williams, 256 F.2d 61, 65 (10th Cir. 1958) (holding that the plaintiff could recover the reasonable value of medical and hospital expenses plus charges of special nurses, even though the special nurses were paid for by a hospital association to which plaintiff contributed).

n27. While the application of the collateral source rule most commonly arises in the context of a plaintiff who has brought a tort action against the defendant, the rule has also been employed in breach of contract cases, see John G. Fleming, The Collateral Source Rule and Contract Damages, 71 Cal. L. Rev. 56 (1983) (arguing that the difference in policies underlying contract and tort does not by itself justify the reluctance to use the collateral source rule in contract cases), civil rights actions brought under section 1983, see Linda L. House, Section 1983 and the Collateral Source Rule, 40 Clev. St. L. Rev. 101 (1992) (discussing the different treatments the collateral source rule receives in various state and federal courts considering the application of the rule in civil rights actions), and employment discrimination actions brought under Title VII of the Civil Rights Act of 1964, see Thomas W. Lee, Deducting Unemployment Compensation and Ending Employment Discrimination: Continuing Conflict, 43 Emory L.J. 325 (1994) (examining whether unemployment compensation is truly collateral to the defendant employer in an employment discrimination case where the employer has made payments to the unemployment compensation fund).

n28. Although the collateral source rule expanded into other areas, payments by the plaintiff's insurer to the plaintiff that cover a portion of her damages, most commonly medical expenses, still represent the most common situation in which the application of the collateral source rule arises. This fact has made abolishing or modifying the collateral source rule an important goal of those seeking to reform the U.S. health care system. See infranote 49.

n29. The issue of collateral source benefits arises in the context of employment benefits when an employer continues to make payments to an employee who has been injured by the conduct of a third party and is unable to work. Typical of these types of employer provided collateral benefits are paid vacation and paid sick-days. Many cases address the collateral source rule in these contexts. See, e.g., Lewis v. County of Contra Costa, 278 P.2d 756 (Cal. Ct. App. 1955) (sick leave); Hawthorne v. Southeastern Fid. Ins. Co., 387 So. 2d 26 (La. Ct. App. 1980) (vacation time); McCary v. Caperton, 601 So. 2d 866 (Miss. 1992) (sick leave); Amiker v. Brakefield, 473 So. 2d 939 (Miss. 1985); Ellard v. Harvey 231 S.E.2d 339 (W. Va. 1976) (sick leave); Fisher v. Thompson, 275 S.E.2d 507 (N.C. Ct. App. 1981) (sick leave).

n30. When the collateral source rule is applied to gratuitous services, the plaintiff is usually permitted to recover the reasonable value of the services rendered even though she incurred no cost. See Cates v. Wilson, 361 S.E.2d 734, 739 (N.C. 1987) (plaintiff entitled to recover value of medical services provided for free by family member); Scott v. Southern Ry. Co., 97 S.E.2d 73, 76 (S.C. 1957) (automobile furnished to plaintiff for free while his vehicle was repaired); Degen v. Outboard Marine Corp., 241 N.W.2d 703, 708 (S.D. 1976) (plaintiff entitled to recover for medical bills even though his parents paid the bills).

n31. As divorced from modern concepts as this may appear, defendants in earlier times attempted to argue that a widow's remarriage to a wealthier husband reduced the amount of damages she was entitled to recover for the death of her husband. This argument was universally rejected by the courts. See, e.g., Bunda v. Hardwick, 138 N.W.2d 305, 308 (Mich. 1965); Moore v. Ready Mixed Concrete Co., 329 S.W.2d 14, 21 (Mo. 1959).

n32. One commentator has called this a "very important" but "indirect" application of the **collateral source rule.** See Lee R. West, The **Collateral Source Rule** Sans **Subrogation:** A Plaintiff's Windfall, 16 Okla. L. Rev. 395, 405 (1963). In this situation the **collateral source**

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rule operates in the following manner: Under section 104(a)(2) of the Internal Revenue Code, damages for personal injuries, even damages for lost wages are tax free. 26 U.S.C. 104(a)(2) (1994). Thus, defendants sought to have a plaintiff's award of damages for lost wages reduced to reflect what the plaintiff would have received had the money been earned and hence subject to income tax. The majority of courts addressing this issue have held that the plaintiff's award should not be reduced. See, e.g., Mitchell v. Emblade, 298 P.2d 1034, 1037 (Ariz. 1956); Hall v. Chicago & N.W. Ry. Co., 125 N.E.2d 77, 85 (Ill. 1955).

n33. The collateral source rule has been applied to benefits received by plaintiffs from various governmental agencies and social programs including: Social Security, see, e.g., Allen v. Louisiana, 535 So. 2d 903, 913 (La. Ct. App. 1988); Pacesetter Corp. v. Barrickmen, 885 S.W.2d 256, 260 (Tex. Ct. App. 1994); Medicaid and Medicare, see, e.g., Williamson v. St. Francis Medical Center, Inc., 559 So. 2d 929, 934 (La. Ct. App. 1990); Badgett v. Davis, 411 S.E.2d 200, 202 (N.C. Ct. App. 1991); and veteran's benefits, see, e.g., Hudson v. Lazurus, 217 F.2d 344, 347 (D.C. Cir. 1954) (collateral source rule applied to plaintiff's treatment at a Veteran's hospital). See also Restatement (Second) of Torts 920A cmt. (4)(c) (1977) ("Social legislation benefits, welfare payments, pensions under special retirement acts, all are subject to the collateral-source rule.").

n34. See supra notes 28-33 and accompanying text.

n35. For a discussion of the reform-minded state legislatures' goals and the various steps undertaken to achieve those goals, see Eleanor D. Kinney, Malpractice Reforms in the 1990's: Past Disappointments, Future Successes?, 20 J. Health Pol. Pol'y & L. 99 (1995).

n36. See Flynn, supra note 21, at 49-64. Flynn classifies legislative actions attempting to reform the operation of the collateral source rule into four categories: 1) statutes which provide that the plaintiff's recovery from the defendant must be reduced by the amount of the collateral source benefits; 2) statutes that permit the admission of facts that the plaintiff has received collateral source benefits to mitigate the amount of damages the plaintiff has suffered into evidence; 3) statutes which narrow the description of recoverable damages to those damages not payable by a collateral source; and 4) the use of automobile no-fault insurance systems which specifically provide for the "admission and use of collateral source benefits to reduce any tort recovery by an injured party." Id. at 64.

n37. A number of the state statutes modifying or abrogating the collateral source rule have encountered serious constitutional obstacles. See generally, Faye L. Ferguson, Note, Equal Protection Challenges to Legislative Abrogation of the Collateral Source Rule, 44 Wash. & Lee L. Rev. 1303 (1987). The bulk of these challenges were based on the argument that abolishing or modifying the operation of the collateral source rule for only a particular class of plaintiffs or defendants violated the Equal Protection Clause of the Fourteenth Amendment Id. at 1306-07. Ferguson noted that the constitutionality of the statutes depended on the level of scrutiny the particular court chose to use. Id. at 1330; see also Christopher J. Eaton, Comment, The Kansas Legislature's Attempt to Abrogate the Collateral Source Rule: Three Strikes and They're Out?, 42 Kan. L. Rev. 913 (1994) (discussing three separate occasions when the Kansas Supreme Court declared the Kansas statute unconstitutional); Julie A. Schafer, Note, The Constitutionality of Offsetting Collateral Benefits Under Ohio Revised Code Section 2317.45, 53 Ohio St. L.J. 587 (1992); Calvin R. Wright, Note, The Collateral Source Rule in Georgia: A New Method of Equal Protection Analysis Brings a Return to the Old Common Law Rule, 8 Ga. St. U. L. Rev. 835 (1992).

n38. See Martha Middleton, A Changing Landscape, 81 A.B.A. J. 56 (1995) (discussing proposed federal reforms of the tort system and noting that since 1986 eight states have focused on the abolition or modification of the collateral source rule as a key reform).

n39. Abolition of the collateral source rule is seen by many as a key ingredient in containing health care costs in the United States. Many reformers believe the collateral source rule

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causes an upward pressure on medical malpractice premiums which in turn causes an increase in health care costs. For a discussion of the various legal reforms linked to health care reforms, see Christopher S. Kozak, A Review of Federal Medical Malpractice Tort Reform Alternatives, 19 Seton Hall Legis. J. 599 (1995). The Health Security Act, proposed by the Clinton presidency in 1993, contained provisions to reform medical malpractice - including the abolition of the collateral source rule. See S. 1757, 103rd Cong. (1993).

n40. See infra notes 42-73 and accompanying text.

n41. See infra notes 42-73 and accompanying text.

n42. See, e.g., Rexroad v. Kansas Power & Light Co., 388 P.2d 832, 842 (Kan. 1964) ("The reasons generally given for the rule are that the contract of insurance and the subsequent conduct of the insurer and insured in relation thereto are matters with which the wrongdoer has no concern and which do not affect the measure of his liability.") (citation omitted).

n43. The desire to protect the benefit of the plaintiff's bargain with an insurance company has led one commentator to classify this rationale as the "foresight theory." See West, supra note 32, at 413. Under this theory, the plaintiff should not be punished for his "foresight" in obtaining insurance to protect himself by the reduction of his award from the tortfeasor to account for the proceeds of the insurance policy. Id. Closely related to the "foresight theory" is the notion that the collateral source rule encourages the socially useful practice of individuals maintaining private insurance policies. See, e.g., Helfend v. Southern Cal. Rapid Transit Dist., 465 P.2d 61, 66 (Cal. 1970) (en banc) ("The collateral source rule expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities.").

n44. See Jacobsen, supra note 12, at 523. While voicing his own criticisms of the collateral source rule, Jacobsen acknowledges that critics who base their attacks solely upon the grounds that the plaintiff's recovery is more than his out-of-pocket expenses overlook the "[collateral source] rule's legitimate function of protecting the plaintiff's investment in insurance." Id. The same logic that is used in the benefit of the bargain rationale is similar to the reasoning that allows for the application of the collateral source rule to benefits rendered to the plaintiff gratuitously with a slightly different twist. In cases of services or benefits rendered gratuitously, the justification for applying the collateral source rule is that to do otherwise would not only deprive the plaintiff of an intended gift, but also frustrate the intent of the donee who intended to confer the gift on the plaintiff and not upon the tortfeasor. See Lambert, supra note 21, at 543.

n45. See Note, supra note 21, at 751. The author asserts that in purchasing insurance, the plaintiff purchased the security of "prompt and sure payments without the necessity of litigation and without regard to the liability and financial resources of prospective defendants." Id. Therefore, the author reasons that the application of the **collateral source rule** to insurance proceeds in cases where the defendant is capable of paying the judgment provides the plaintiff with more than he bargained for in purchasing insurance. Id.

n46. Id.

n47. Black's Law Dictionary defines **subrogation** as "the substitution of one person in the place of another with reference to a lawful claim, demand or right ...." Black's Law Dictionary 1427 (6th ed. 1990).

n48. In the context of the **collateral source rule, subrogation** would work as follows: A injures B. B's insurer, C, pays B for the losses he sustains. **Subrogation** would give C the legal right to recover the costs of B's injuries from A. This would prevent B from obtaining a windfall, while at the same time providing B and all insureds with reduced premiums because a portion of an insurance company's payouts would be recoverable. Moreover, in paying C, A

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would still be responsible for the full amount of the damages he caused B to suffer. For an article proposing the use of **subrogation** to alleviate the problems associated with the **collateral source rule,** see West, supra note 32, at 398. West's proposal is not limited to cases involving insurance. Rather, West argues that even providers of gratuitous benefits to the plaintiff receive a right of **subrogation.** Id. at 419. See also Ghiardi, supra note 23, at 463 ("If **subrogation** is employed, a plaintiff receives compensation once and not twice. And only one insurer pays the loss rather than two, as is the case when the **collateral source rule** is employed.").

However, the use of **subrogation** to alleviate some of the perceived problems with the **collateral source rule** has met with some sharp criticism. See McDowell, supra note 23, at 217-19. The notion that **subrogation** benefits everyone because it lowers insurance rates has also been the subject of debate. See Flynn, supra note 21, at 50 (arguing that empirical evidence suggests that in states were **subrogation** has been utilized, there has not been a decrease in insurance premiums).

n49. This approach to modifying the **collateral source rule** has been embraced by many state legislatures searching for a way to reform the **collateral source rule.** Statutes generally abrogating the rule, but allowing the plaintiff to recover the cost of obtaining the collateral benefit, most typically insurance premiums, have been enacted in several states. See, e.g., Fla. Stat. Ann. 768.76(1) (1996). The statute provides:

In any action to which this part applies in which liability is admitted or is determined by the trier of fact and in which damages are awarded to compensate the claimant for losses sustained, the court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to him, from all collateral sources .... Such reduction shall be offset to the extent of any amount which has been paid, contributed, or forfeited by, or on behalf of, the claimant or members of his immediate family to secure his right to any collateral source benefit which he is receiving as a result of his injury.

Id.

n50. See Fleming, supra note 27, at 58 ("benefits from a public source cannot be attributed either to the plaintiff's thrift or prescience..."); James A. Lorentzen & Ronald M. Rankin, The Collateral Source Issue: Forging a Middle Ground, 35 Fed'n of Ins. Couns. Q. 3, 21-22 (1984) ("A plaintiff receiving medicare or some other form of government assistance has not paid for the coverage as in the case of accident and health insurance."). Taking a slightly different perspective on the application of the collateral source rule, Richard Maxwell rejects the argument that the collateral source rule should not apply to benefits from social programs because the tortfeasor has contributed to those programs with his taxes making them not "wholly independent" sources. See Maxwell, supra note 12, at 689. He concluded that "only in the most indirect sense can the benefits be said to have been provided by the wrongdoer." Id.

n51. 217 F.2d 344, 346 (D.C. Cir. 1954).

n52. Id.; see also Lambert, supra note 21, at 542. In his argument in support of the collateral source rule, Lambert notes: "Litigation at its best is inconvenient and at its worst, an ordeal, facts which should be considered when pondering the rejection of the collateral source rule. The conventional rules of damages allow no compensation for such inconvenience." Id. For Lambert and other proponents of the collateral source rule, one of the ways to compensate the plaintiff for this inconvenience is to follow the traditional application of the collateral source rule.

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n53. See Lorentzen & Rankin, supranote 50, at 11. The authors argue that "the plaintiff is more likely to settle [for a smaller sum with the application of the collateral source rule because she knows] that she has collateral sources from which to gain a full and complete recovery." Id. The authors conclude, however, that this argument, despite an element of truth, "hardly seems the proper foundation for the wide-ranging and pervasive way in which the collateral source rule has been applied." Id.

n54. See, e.g., McDowell, supranote 23, at 213. In criticizing the collateral source rule, McDowell labeled the under compensation/under payment of legal fees rationale as the only possible justification that can be advanced in light of the dramatic changes that the tort system has seen since the rule was originally developed. Id. McDowell then concludes that the application of the collateral source rule actually does not improve the position of the plaintiff, but instead forces her to pay more in legal fees. Id. at 213-15.

n55. See Peckinpaugh, supra note 21, at 552. Peckinpaugh also contends that even as a device to account for the alleged undercompensation of plaintiffs the collateral source rule is a failure as the amount received from the collateral source rule is "fortuitous" and bears no relation to the actual amount a particular plaintiff is undercompensated. Id. Moreover, Peckinpaugh is quick to point out that the collateral source rule provides no assistance to a plaintiff who is undercompensated by our present system yet has no collateral source from which to recoup this loss. Id.; see also Ghiardi, supra note 23, at 461. In rejecting the collateral source rule, Ghiardi argues in similar terms that "if we accept the premise that plaintiffs never are fully compensated, we should change the system to assure adequate compensation and not perpetuate a rule which overcompensates some and undercompensates others." Id.

n56. Under the so-called "American rule" each party to the litigation is responsible for its own legal fees. In contrast, under the "English rule" the losing party in the litigation is charged with the responsibility of paying not only its own legal fees and costs, but also the legal fees and costs of the prevailing party. The abolition of the "American rule" in favor of the "English rule" has been the subject of intense debate among those seeking to reform the U.S. tort system. For a discussion of this issue, see Herbert M. Kritzer, The English Rule, 78 A.B.A. J. 54 (1992).

n57. See, e.g., Jacobsen, supranote 12, at 534. These critics point out that this argument in favor of the collateral source rule is really an attack on the "American rule" and argue that if the abolition of the "American rule" is necessary to reform the tort system, it should be openly abolished rather than "by subterfuge under the cover of collateral source rule." Id.

n58. See, Note, supra note 21, at 750. The author argues that juries recognize that plaintiffs must pay legal fees and use awards of damages for pain and suffering to compensate plaintiffs for these added fees and costs. Id.

n59. John G. Flemming, The Collateral Source Rule and Loss Allocation in Tort Law, 54 Cal. L. Rev. 1478, 1483 (1966) (noting the common argument in favor of the collateral source rule is that "the defendant is a wrongdoer who should not be >let off' from any portion of what is his due ...") (emphasis added).

n60. See Lambert, supranote 21, at 544. A staunch supporter of the collateral source rule, Lambert argues that "if civil liability is a deterrent to accidents, then undiminished and unabated damages for wrongdoing should exert an even more admonitory pressure towards accident prevention." Id.

n61. See supra note 51 and accompanying text; see also Flynn, supra note 21, at 67. In arguing for the continued application of the collateral source rule to medical insurance payments, Flynn claims that "absent the Collateral Source Rule the insured who receives medical benefits, the >winnings' from payment of insurance premiums, loses his legal right

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to full compensation from a guilty tortfeasor." Id. (emphasis added).

n62. See West, supranote 32, at 412. West claims that the punitive aspect of the collateral source rule is a "historical hangover from the days when torts and crimes were administered by the same court and in the same action." Id.

n63. See Lorentzen & Rankin, supra note 50, at 6 (arguing that "in today's complex litigation - where manufacturers can be found liable without proof of fault and where culpable plaintiffs can collect under comparative negligence ... the concept that defendants deserve to pay because they are at fault in causing injury is fallacious in many cases").

n64. See, Flemming, supra note 59, at 1547-48; see also Sedler, supra note 12, at 46. Sedler argues that wrongdoers today do not act morally wrong, but rather the basis of modern liability "is really that it is an efficient loss distributor." Id. Proponents of this view note that by focusing on "loss distribution" the modern tort system recognizes the impact liability insurance has had in diminishing the ability to deter conduct with monetary damages. These authors point out that individual tortfeasors shift the major burden of the loss to their liability insurance carriers. While the tortfeasor may realize a slight increase in insurance premiums, the "real cost will be spread out to all insureds of the defendant's class." See Flynn, supra note 21, at 48-49; see also McDowell, supra note 23, at 210.

n65. The principle of mitigation is clearly embodied in the Restatement (Second) of Torts 920 (1977) which states:

When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

n66. The prospect of a "windfall" or "double-recovery" for the plaintiff led one critic to argue that the collateral source rule should be named the "double-recovery rule." See Ghiardi, supra note 23, at 457 (arguing that "the collateral source rule exists as an anomaly in the law of personal injury reparations which should be excised").

n67. See supra notes 17-18 and accompanying text.

n68. See Peckinpaugh, supranote 21, at 551. This argument is presumably based on the assumption that the jury would consider the evidence of the collateral source payments as an indication that the plaintiff did not suffer the full amount of the damages claimed. The jury would likely use this information to reduce the amount of the plaintiff's recovery in violation of the collateral source rule. Id.

n69. Id.at 554 (discussing the argument that the jury will be confused by the introduction of evidence of collateral source benefits and the tax free status of compensatory damages); see also supra note 32. The notion that the jury may become confused if exposed to evidence of collateral sources is applicable to any item of damages involving uncertainty to future collateral benefits. Several courts addressing the issue of the applicability of the collateral source rule to free, state- provided special education and therapy have focused on this argument in their decisions to apply the rule. See infra note 95 and accompanying text.

n70. See Jacobsen, supra note 12, at 523.

n71. See Lorentzen & Rankin, supra note 50, at 7. In analyzing this aspect of the collateral source rule, the author states that "the public at large must feel or believe that the collateral source rule is unjustified; otherwise there would be no concern about keeping collateral source information away from the jury." Id.; see also Peckinpaugh, supranote 21, at 551.

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education and therapy - despite the fact that their state of residence provides, as a matter of right, free special **[*698]** education and therapy to all disabled children. [6] Moreover, under the traditional application of the collateral source rule, no evidence relating to the existence of the free, state-provided services will be admissible at trial if it is offered to mitigate the damages suffered by the Does. [7] Rather, the only evidence the jury may consider when computing the damages will be the expenses associated with providing special education and therapy for the child in a private educational institution for children with disabilities. [8] Furthermore, under the collateral source rule, the Does will be entitled to recover the reasonable cost of providing special education and therapy for their child even if they intend to avail themselves of the special education and therapy the state will provide to their child at no cost. [9]

This Note offers a critical analysis of the collateral source rule as it is applied to free, state-provided special education and therapy. Part II of this Note briefly introduces the collateral source rule and its application in a modern court. Part III provides a brief history of the collateral source rule and its development since its inception in the mid-nineteenth century. Part IV examines the various justifications and critiques offered for the collateral source rule. Part V discusses the few occasions that courts have examined the application of the collateral source rule to state-provided special education and therapy. Part VI presents a critical analysis of the application of the collateral source rule to state-provided special education and therapy. Finally, Part VII offers a proposal for dealing with the existence of free, state-provided services in cases where the plaintiff seeks an award of damages for the cost of special education and therapy.

II.

Definition and Operation of the Collateral Source Rule

In its most basic form, the "collateral source rule provides in general that compensation received from a third party will not diminish the recovery **[*699]** against a wrongdoer." [10] Section 920A(2) of the Restatement (Second) of Torts states the rule in similar terms: "Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable." [11]

No matter what precise language is used to define the rule, most courts and commentators characterize the collateral source rule as functioning both as part of the substantive law of damages and as a "rule" of evidence. [12] Although this characterization has caused some confusion, [13] it is nevertheless an accurate description of the role the collateral source rule plays in most jurisdictions which apply the rule. [14] **[*700]**

As part of the substantive law of damages, the collateral source rule dictates that compensation received from a source wholly independent from the tortfeasor [15] will not be deducted from the plaintiff's recovery from the tortfeasor. [16] In furtherance of this objective, the collateral source rule also incorporates an evidentiary component, which precludes the introduction of evidence relating to any benefits the plaintiff may have received from a collateral source, when offered by the tortfeasor to mitigate [17] the amount of damages suffered. [18] **[*701]**

III.

History and Development of the Collateral Source Rule

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n72. See Sedler, supra note 12, at 43 ("The plaintiff must recover all damages, past and prospective, in a single action, and we are making no more than a guess - only to some extent, an educated guess - as to what they are.").

n73. Critics point out that juries are already required to decide the outcome of very complex issues whose resolution often depends on evidence with which the jury is wholly unfamiliar. See, Peckinpaugh, supra note 21, at 554. These types of situations often arise in complex cases such as medical malpractice or toxic tort actions. Id. Moreover, the estimation of future losses is simply a product of our jury system which requires that all damages be reduced to their present value. Id. Indeed, concerns of the jury speculating about future benefits "form a weak foundation for the law of damages." See Jacobsen, supranote 12, at 536. One critic has even suggested that the exclusion of collateral source benefits works to the detriment of plaintiffs who are not the beneficiaries of collateral source payments because the jury assumes that most people have insurance and adjust the amount of the award accordingly. See McDowell, supra note 23, at 215.

n74. 378 A.2d 540 (Conn. 1977).

n75. The defendants' truck collided with the plaintiffs' car. The plaintiffs' seven and one-half year old son flew from the car. The boy sustained brain damage and suffered from epilepsy after the accident. Id. at 542-43.

n76. Id. at 546.

n77. Id. At the time of the appeal, the boy "was receiving special education at no cost through a public school program provided by the town of Newtown." Id.

n78. Id. The court specifically held that "proof as to whether or not [the municipality] would continue its special education program in its public school system was not relevant under the collateral source rule." Id.

n79. 481 N.E.2d 957, 960 (Ill. App. Ct. 1985).

n80. The defendant was a doctor who admitted liability for negligently failing to diagnose and treat the meningitis and ventriculitis the plaintiff developed shortly after birth. Id. at 959.

n81. Id. at 960.

n82. Id. The court offered no other rationale for its decision, and it did not consider how the future availability of state-provided services supported the exclusion of evidence or that prior to trial, the plaintiff was receiving free, state- provided special education and therapy. By the time the case reached the appellate court, the plaintiff had availed himself of several years of free, state-provided "physical, occupational, speech and music therapy, adaptive physical education and special transportation." Id. at 959.

n83. 519 So. 2d 1244 (Ala. 1978).

n84. Id. at 1246-50.

n85. Id. at 1266.

n86. The defendants were referring to the Alabama Exceptional Child Education Act, Ala. Code 16-39-3 (1975). The statute provides:

Each school board shall provide not less than 12 consecutive years of appropriate instruction and special services for exceptional children, beginning with those six years of age, in

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accordance with the provisions of this chapter. Such public school instruction and special services shall be made available at public expense for each school year .... No matriculation or tuition fees or other fees or charges shall be required or asked of exceptional children or their parents or guardians, except such fees or charges as may be charged uniformly of all public school pupils.

Id.

n87. See supra note 6.

n88. Ensor, 519 So. 2d at 1266.

n89. Id. at 1266-67. The court stated the general proposition that evidence of benefits conferred on the plaintiff from collateral sources "is not relevant, its existence renders neither more probable nor less probable any material fact in the case ...." Id. at 1266 (quoting 22 Am. Jur. 2d Damages 206 (1988)).

n90. 611 So. 2d 274 (Ala. 1992).

n91. The defendant was a doctor sued for negligently causing a child to suffer severe brain damage during the course of a "routine appendectomy." Id. at 276.

n92. Id. at 278.

n93. Id. The court stated: "an amount of damages is not decreased by the benefits received by a plaintiff from a source wholly collateral to and independent of the wrongdoer, including services provided by the state at government expense or decreased by institutionalization at government expense." Id.

n94. 361 S.E.2d 734 (N.C. 1987).

n95. Id. at 737-39. Cates was a medical malpractice action brought on behalf of a child who suffered brain damage and cerebral palsy during birth due to the defendant doctor's alleged negligence. Id. at 736.

n96. Id. at 737.

n97. Id. (referring to Pub. Law No. 94-142).

n98. Id.

n99. Id. at 738. In making this assertion, the court felt the plaintiff should not be denied the opportunity of utilizing private care and cited Sedler for the proposition that

the plaintiff should be able to recover the cost of future medical services, since he is likely to prefer private care, and it is his "right" to have it. It may be that he will employ the free care for which he is eligible ... but ... at the time of suit there is no way of knowing what he will choose to do.

Id. (quoting Sedler, supra note 12, at 186).

n100. Cates, 361 S.E.2d at 738-39. The court was concerned that public benefits could not be counted on to exist throughout the plaintiff's lifetime, especially in light of the increasing

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budget constraints that both federal and state governments face. Id. Other judges have also found the uncertainty of continued funding to be a significant factor behind their support of the application of the collateral source rule to state-provided special education and therapy. See Florida Physician's Ins. Reciprocal v. Stanley, 452 So. 2d 514, 516-17 (Fla. 1984).

n101. The court noted that the collateral source rule should apply to future public benefits because the utilization of these benefits hinges on the plaintiff's continued indigence. Cates, 361 S.E.2d at 739. However, the court observed that under North Carolina law access to special education did not hinge on financial status. Id. Most likely, the court discussed this rationale in reference to the other public services, such as Medicaid and Aid to Families with Dependent Children, whose availability does depend on financial need.

n102. Id.

n103. Physician's, 452 So. 2d at 515. Like most of the cases considering the collateral source rule in the context of state-provided special education and therapy, this action was brought on behalf of a child who claimed that the doctor's negligence during delivery caused his mental retardation and cerebral palsy. Id. at 514.

n104. In Physician's three justices concurred with the majority's written opinion, while three justices offered a vigorous dissent.

n105. Physician's, 452 So. 2d at 515.

n106. Id. In taking this approach, the Florida court cited with approval Peterson v. Lou Bachrodt Chevrolet Co., 392 N.E.2d 1, 5 (Ill. 1979). In Peterson, the Illinois Supreme Court refused to apply the collateral source rule to gratuitous medical services. Physician's, 452 So. 2d at 516. The dissent in Physician's was quick to point out the factual dissimilarities between the case it was considering and Peterson. Id. at 516-17 (Shaw, J., dissenting). In particular, the dissent focused on the fact that in Peterson, the plaintiff voluntarily applied for and received free medical services at the Shriner's Hospital prior to seeking compensation for the same services from the tortfeasor. The dissent in Physician's interpreted Peterson to mean that "an individual is not entitled to recover for the value of previously rendered free services he has voluntarily obtained." Id. at 516 (Shaw, J., dissenting). Moreover, the majority apparently took no notice of the fact that the Illinois Court of Appeals specifically rejected the application of Peterson's approach to state provided special education in Northern Trust.

n107. Id. at 517 (Shaw, J., dissenting).

n108. Id. (Shaw, J., dissenting). The dissent was unwilling to allow taxpayer contributions to "become a device for reducing the legal liability of a tortfeasor." Id. (Shaw, J., dissenting).

n109. 897 S.W.2d 611 (Mo. 1995).

n110. Id. at 615.

n111. The court considered and rejected the following: the benefit of the bargain rationale; the punishment rationale; the windfall for the plaintiff rationale; the argument that the rule is necessary to protect the injured plaintiff from the uncertainty of continued funding and availability of public benefits; and the argument that the collateral source rule is needed to compensate the plaintiff for the costs incurred in the form of legal fees and expenses. Id. at 619.

n112. Id. at 621.

n113. The court also indicated in dicta that an additional justification for allowing this mitigation evidence was the fact that the plaintiff "opened the door to this issue by injecting

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testimony of [the plaintiff's] financial condition into the case." Id. This is consistent with the approach taken by other courts, see supra note 17.

n114. Barnes, 897 S.W.2d. at 621.

n115. A "fundamental" tenant of jurisprudence is that a principle of law cannot be applied once courts have strayed from the foundation upon which the principle is based. See Victor E. Schwartz, Tort Law Reform: Strict Liability and the Collateral Source Rule Do Not Mix, 39 Vand. L. Rev. 569, 573 (1986) (arguing that if the defendant is found liable under strict liability, the courts are no longer applying the collateral source rule as originally intended or justified).

n116. For a discussion of this rationale, see supranotes 42-44 and accompanying text.

n117. A taxpayer's contribution to the state special education system may take a variety of different forms, but a common method of funding special education and therapy is through a property tax. See, e.g., Mo. Ann. Stat. 162.920 (Vernon 1995).

n118. See supra notes 50, 105 and accompanying text.

n119. For a discussion of this rationale, see supra note 43 and accompanying text.

n120. For a discussion of this argument in favor of the collateral source rule, see supra notes 59-61 and accompanying text.

n121. See supra notes 23-25 and accompanying text.

n122. For a discussion of the changes in the tort system, see supra notes 62-63 and accompanying text.

n123. See supra note 64 and accompanying text.

n124. See supra note 64 and accompanying text for a discussion of the way tortfeasors and insurance companies shift the burden for damage awards to consumers in the form of increased prices and premiums. Under this system of loss redistribution, the application of the collateral source rule to state-provided special education and therapy increases the amount of loss that a tortfeasor must redistribute. The application of the collateral source rule to state-provided special education increases the amount of damages for special education and therapy recoverable by an injured plaintiff. This increased amount of damages for education and therapy increases the total amount of damages, which in turn increases the total amount of damages that must be redistributed.

n125. See supra notes 61-64 and accompanying text for an examination of the modern tort system's decreased deterrent ability.

n126. For a discussion of this argument in favor of the collateral source rule, see supranotes 67-69 and accompanying text.

n127. See supranote 73 and accompanying text.

n128. For a discussion of this rationale, see supranotes 51-53 and accompanying text.

n129. See supra note 72 and accompanying text.

n130. See supra note 54.

n131. See supra Part VI for an analysis of the application of the collateral source rule to

state-provided special education and therapy in light of the traditional justifications for the rule.

n132. For an explanation of substantive and evidentiary components of the collateral source rule, see supra notes 12-18 and accompanying text.

n133. See supra notes 15-16 and accompanying text.

n134. In the absence of the rule's substantive component, the plaintiff's award of damages would be reduced by the amount of the collateral source benefit. In the context of state-provided special education and therapy, the absence of the rule's substantive component would allow for the reduction of the plaintiff's damage award to reflect the value of the free, state-provided services. Such a reduction would effectively preclude the plaintiff from choosing to receive special education and therapy from a private provider because her damage award would not provide funds for private services. The failure to adhere to the substantive component of the rule would be extremely harsh to a plaintiff whose special education and therapy needs could not be adequately met by the state-provided services.

n135. In this context, the plaintiff may seek to introduce a wide variety of information. Perhaps most importantly, the plaintiff would introduce any evidence that would tend to show that the state-provided services would fail to meet her special education needs. For example, the plaintiff may introduce evidence that she requires a particular service which can be more readily obtained at a private institution. The plaintiff would also introduce any evidence to support the notion that the continued existence of free, state-provided services was uncertain. The plaintiff also would offer evidence relating to the proximity of state-provided services compared to private services and any other evidence indicating that private services would better meet her special education and therapy needs.

n136. See supra note 134 for an explanation of how the absence of the substantive component of the collateral source rule could force the plaintiff to utilize state-provided services.

n137. See supra notes 62-64 and accompanying text.

n138. See supra note 117 and accompanying text for an explanation of how various taxes are used to fund state-provided special education and therapy.

n139. See supranote 64 and accompanying text for an explanation of the way consumers pay for increased jury awards in the form of higher prices and increased insurance premiums. For a discussion of how members of society can actually pay twice for the cost of providing an injured plaintiff with special education and therapy, see supra notes 124-25 and accompanying text.

n140. See supra notes 103-14 and accompanying text.

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Most commentators agree that the collateral source rule [19] traces its roots to an 1854 Supreme Court case, The Propeller Monticello v. Mollison. [20] The date of this decision is important for two reasons. First, the date provides the collateral source rule with almost one hundred and fifty years of precedental value - a factor that has made abolition or even modification of the rule a difficult process. [21] Second, the date of the decision provides the context for understanding a rule which, at first glance, appears to be far removed from modern notions of the proper functioning of the tort system. [22] **[*702]**

The collateral source rule developed at a time when the various collateral sources available to assist today's plaintiff were almost completely unknown. [23] "People paid their medical bills out of private funds or savings, or a member of the family paid for them.... Those who were unable to pay were treated in the 'poor ward' of a hospital or at a "charity' hospital....'" [24] Moreover, the existing theories of recovery upon which an injured plaintiff could base her claim for damages made it clear that the tortfeasor was thought of as a "wrongdoer" deserving to pay for the harm that she caused. [25]

From a plaintiff's perspective, the attractiveness of such a rule was readily apparent. The collateral source rule has been articulated as follows:

> Where a part of the wrongdoer's liability is discharged by payment from a collateral source ... the question arises who shall benefit therefrom, the wrongdoer or the injured person. No reason in law, equity or good conscience can be advanced why a wrongdoer should benefit from part payment from a collateral source of damages caused by his wrongful act. [26]

[*703] There can be no doubt that this articulation, as well as the ability to provide compensation to injured plaintiffs, led to a rapidly expanding application of the collateral source rule. [27] Courts applied the collateral source rule to the following: payments to the plaintiff by insurers, [28] benefits provided by employers, [29] gratuitous services, [30] damages due regardless of a widow's remarriage to a wealthier husband, [31] savings from the tax- free status of compensatory damages, [32] and various services provided by governmental **[*704]** agencies. [33]

While the early and middle part of this century saw the judicial application of the collateral source rule expand, [34] beginning in the 1970s the collateral source rule became the prime target of state legislatures looking for a way to check the rising costs of medical malpractice insurance. [35] Numerous states enacted statutes eliminating or qualifying the collateral source rule. [36] Although these legislative attempts to encroach upon the collateral source rule have not met with complete success, [37] the abolition or modification of the **[*705]** collateral source rule remains a central focus of those seeking to reform not only the tort system, [38] but also the health insurance system in the United States. [39]

IV.

Justifications And Criticisms of the Collateral Source Rule

Courts and commentators have generally advanced four justifications or rationales for the collateral source rule. [40] Each of these justifications has been the subject of vigorous attacks by opponents of the rule. [41]

A. Benefit of the Bargain Rationale

One of the most common arguments in support of the collateral source rule is that the plaintiff should not be denied the benefit of contractual arrangements he has made with third parties for compensation in the event of a loss. [42] This rationale for the rule frequently arises where the plaintiff has purchased some form of an insurance policy. [43] Proponents of the

collateral **[*706]** source rule argue that allowing the defendant to offset the amount that the plaintiff has received from these sources would "deny" the plaintiff the benefit of the bargain for which he contracted. [44]

Critics of the collateral source rule have attempted to undermine the benefit of the bargain rationale by pointing out its inherent weaknesses. One commentator has noted that in purchasing insurance purchasers contract for the security that insurance provides in the event that their injuries are otherwise uncompensable. [45] Purchasers are not wagering on the possibility that they might realize a double recovery through the application of the **collateral source rule.** [46] Moreover, while some commentators recognize the legitimate end of protecting the plaintiff's investment in insurance, they point out that providing the plaintiff's insurer with a right of **subrogation** [47] would both protect this investment in insurance and avoid the taboo of a "double-recovery" for the plaintiff. [48] Others advocate abrogating the **collateral source [*707] rule,** but in a manner which allows the plaintiff to recover from the tortfeasor the cost of obtaining the collateral benefit. [49] Still others assert that the benefit of the bargain rationale is inappropriate for some collateral sources - most notably government assistance and social programs. [50]

B. Legal Compensation Does Not Adequately Compensate the Plaintiff

Another argument commonly advanced in support of the collateral source rule is that legal compensation does not adequately compensate the plaintiff. This rationale was most clearly stated in Hudson v. Lazarus: [51]

Legal "compensation" for personal injuries does not actually compensate. Not many people would sell an arm for the average or even the maximum amount that juries award for loss of an arm. **[*708]** Moreover the injured person seldom gets the compensation he "recovers", [sic] for a substantial attorney's fee usually comes out of it. There is a limit to what a negligent wrongdoer can fairly, i.e., consistently with the balance of individual and social interests, be required to pay. But it is not necessarily reduced by the injured person's getting money or care from a collateral source. [52]

Moreover, some proponents of the collateral source rule contend that in its attempt to assist plaintiffs obtain complete recovery, the rule actually encourages plaintiffs to forgo litigation and settle for less. [53]

The notion that applying the collateral source rule is justified because it helps the plaintiff obtain a full and complete recovery has been the subject of intense criticism. [54] Charles Peckinpaugh claims that this argument "is actually a criticism of our system of litigation, and more particularly [relies on the assumption] that a jury is incapable of performing its proper function of awarding full compensation to an injured plaintiff." [55] In a similar manner, opponents of the rule assert that this argument is really nothing more than an **[*709]** unprincipled critique of the "American rule" [56] and hence an inappropriate justification for the collateral source rule. [57] Other critics attack this justification of the collateral source rule by arguing that juries recognize that the plaintiff must pay her legal fees and adjust the amount of the verdict accordingly. [58]

C. The Wrongdoer Deserves to Pay/Any Windfall Should Go to the Plaintiff

A third common argument in support of the collateral source rule is the contention that as the wrongdoer, the defendant deserves to pay. [59] Proponents of the collateral source rule taking this position contend that forcing defendants to bear the full cost of the damages they cause, furthers the tort system's goal of deterrence. [60] Recognizing that application of the collateral source rule will often provide the plaintiff with what critics call a windfall (i.e., recovery for damages already reimbursed or provided for by a collateral source), some supporters of the

rule maintain that if there is any "windfall," it is better that it be bestowed upon the "innocent" plaintiff rather than the "guilty" defendant. [61] **[*710]**

Critics of the collateral source rule attack this justification of the rule as being far detached from modern concepts of the proper functioning of the tort system. [62] They contend that the tort system has evolved in such a way to prevent defendants, even defendants who have been found civilly liable, from being considered "guilty" or "wrongdoers." [63] Many commentators also contend that the increasing use and availability of liability insurance, coupled with the rise of the modern welfare state, has shifted the primary focus of the tort system away from deterrence and towards compensation. [64] These commentators argue that a key component of a system that strives for fair and just compensation is the mitigation of damages, [65] which the collateral source rule fundamentally undermines by allowing the plaintiff to recover for damages he really never suffered. [66]

D. Evidence of Collateral Source Benefits Will Prejudice and Confuse the Jury

The collateral source rule generally precludes the introduction of evidence relating to payments or services provided to the plaintiff by collateral **[*711]** sources. [67] This prohibition on the introduction of collateral source evidence is thought to protect the plaintiff in two ways. Most importantly, the prohibition aims to prevent the jury from using the collateral source evidence to reduce the amount of the plaintiff's award. [68] Additionally, particularly in regard to future and continuing collateral source benefits, the prohibition on the introduction of evidence relating to collateral source payments is designed to prevent jury confusion. [69]

Joel Jacobsen, one of the staunchest critics of evidence exclusion relating to collateral source benefits, maintains that the collateral source rule has a "tendency to diminish the jury's fact-finding role by concealing facts relevant to the calculation of damages." [70] Other commentators have interpreted the evidentiary exclusion as evincing a lack of public support for the collateral source rule. [71] Moreover, critics of the collateral source point out that the introduction of future or contingent collateral source benefits is simply the product of a system in which all damages must be sought in one action. [72] They further contend that such evidence is no more confusing to a jury than other types of complicated evidence which the jury is already forced to consider. [73] **[*712]**

V.

Courts Considering the Application of the Collateral Source Rule to State- Provided Special Education and Therapy

A. Majority Approach

In Healy v. White, the Supreme Court of Connecticut was the first to address the application of the collateral source rule to state-provided special education and therapy. [74] In Healy, the plaintiffs sought recovery for injuries their son sustained as a result of the defendant's negligence. [75] At trial, the plaintiffs introduced evidence that the child would require special education at a private school that would cost between $ 8,000 and $ 16,000 annually. [76] On appeal following a verdict in favor of the plaintiffs, the defendant argued that the plaintiffs' might not incur the full amount of the damages because all or part of the special education services would be provided by the municipality. [77] The Connecticut Supreme Court held that such evidence "would not be relevant because Connecticut follows the majority rule in this country regarding collateral sources." [78]

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The application of the collateral source rule to state- provided special education and therapy was next addressed in Northern Trust Co. v. County of Cook. [79] In Northern Trust, the defendant [80] appealed the trial court's refusal to admit evidence of the availability of free, state-provided services for handicapped children. [81] Noting the uncertainty of the future availability of state-provided services, the court of appeals affirmed the trial court's decision **[*713]** to exclude as evidence the existence of free, state-provided special education and therapy. [82]

In Enson v. Wilson, the Supreme Court of Alabama also addressed the application of the collateral source rule to state- provided special education and therapy. [83] The parents of a premature child who suffered a degree of brain damage and retardation brought a medical malpractice action against the delivering obstetrician. [84] The court granted the plaintiffs' motion in limine "to preclude any reference by defendants to the special education and therapy available to [the child] from governmental sources." [85] On appeal, the defendants challenged the motion in limine contending that they were entitled to introduce evidence that Alabama [86] and federal laws [87] conferred an absolute right on the child to receive special education and related services, thus reducing the child's future financial needs. [88] In affirming the trial court's exclusion of the evidence, the Alabama Supreme Court relied in part on Healy and found "no reason" to distinguish special education and therapy from other government services that courts had found were covered by the collateral source rule. [89]

The Alabama Supreme Court, in Williston v. Ard, recently reaffirmed its decision regarding the application of the collateral source rule to state- **[*714]** provided special education and therapy. [90] In Williston, the defendant [91] sought to introduce testimony from the local special education coordinator about the availability of programs in the county school for multihandicapped children like the plaintiff. [92] The trial court had excluded the evidence under the collateral source rule. On appeal, the Alabama Supreme Court reaffirmed its decision in Ensor and upheld the trial court's refusal of the special education coordinator's testimony. [93]

The Supreme Court of North Carolina, in Cates v. Wilson, adopted a similar application of the collateral source rule to state-provided special education and therapy. [94] In Cates, the North Carolina Supreme Court affirmed the reversal of a trial court's decision to allow testimony about the existence of state-provided special education and therapy in a medical malpractice action. [95] During the trial, the defendant's expert testified that the plaintiff's local public school "provided excellent training for mentally and physically handicapped persons until age 22." [96] The defendant's expert also testified that under North Carolina law, [97] special education was available to all, regardless of their financial status, and that while there could be no guarantee of continued availability, public funding for special education had been "reliable." [98]

In finding that the trial court committed prejudicial error in admitting the expert's testimony, the North Carolina Supreme Court identified several reasons for applying the collateral source rule to state-provided special education and therapy. First, the court stated that if the collateral source rule were not applied to special education, the "compensatory goal underlying our tort system" would be thwarted because the plaintiff would be forced "to **[*715]** depend on public coffers." [99] The court then reasoned that the lack of certainty to the future availability of public resources made mitigating damages premised on the continued existence of public benefits unwise. [100] Finally, [101] the court concluded "as between defendants who tortiously inflict injury and innocent taxpayers who fund [these special education programs] ... we think it better that the loss fall on the tortfeasor." [102]

B. Minority Approach

Taking a strikingly different approach than the majority of jurisdictions, in Florida Physician's Insurance Reciprocal v. Stanley the Supreme Court of Florida held that the collateral source rule did not preclude the introduction of evidence relating to the availability of state-provided

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special education. [103] In so holding, the court reversed the appellate court which found error in the trial court's decision to allow the defendant to cross-examine the plaintiff's expert about the existence of state - provided special education and therapy. The four person majority [104] of the Florida Supreme Court reasoned that the "collateral source rule should be limited to those benefits earned in some way **[*716]** by the plaintiff." [105] Building on this reasoning, the court found that "governmental or charitable benefits available to all citizens, regardless of wealth or status, should be admissible for the jury to consider in determining the reasonable cost of necessary future care." [106]

Three dissenting justices voiced concern about the "speculative value of future public assistance." [107] The dissent further reasoned that "by denying the victim full compensation for the cost of future care, the majority opinion transfers the responsibility for the tort from the tortfeasor, where it legally and morally belongs, to the victim and the community." [108]

Recently, the Missouri Supreme Court, in Washington v. Barnes Hospital, unanimously followed the approach taken by the Florida Supreme Court. [109] In Barnes, the plaintiff brought a medical malpractice suit against defendant doctors and hospital for failure to diagnose her placental abruption which caused permanent brain damage to the fetus. At trial, the court denied the defendants' request to introduce evidence about the availability of free, public special education and therapies. [110] On appeal, the Missouri Supreme Court examined the various rationales advanced in support of the collateral source rule. [111] Finding these rationales inapplicable in the context of free, state-provided special education and therapy, the Missouri Supreme Court reversed the decision of the trial judge and held that the collateral source rule did not **[*717]** preclude introducing evidence of the availability of free, state-provided education and therapy offered to mitigate the plaintiff's damages. [112] Rather, the court held that the evidence was admissible [113] and that, at retrial, the plaintiffs would be entitled to "respond to this evidence with arguments of [the state-provided services'] inadequacy, the risk of its continued availability, etc." [114]

VI.

Analysis of the Justifications for the Application of the Collateral Source Rule to Free, State-Provided Special Education and Therapy

A rule of law is only valid to the extent that the application of the rule furthers the substantive polices which the rule embodies. [115] The simple fact that a common-law rule is firmly entrenched in our system cannot justify the application of that rule in situations where it loses touch with its traditional justifications. The application of the collateral source rule to prevent the admission of evidence of free, state-provided special education and therapy is a clear example of a situation in which a rule of law has been applied without regard to its origins and policies.

The benefit of the bargain rationale traditionally advanced in support of the collateral source rule [116] does not sustain the application of the rule to state-provided special education and therapy. Individuals do not contract with the state to provide special education and therapy in the event that such services become necessary. At most, a potential plaintiff may have contributed to the state special education system by paying taxes. [117] This form of indirect payment does not establish the same type of indemnity policy as the payment **[*718]** of medical or life insurance premiums. [118] Indeed, any payment of taxes in support of the state special education system does not raise the same concerns about protecting a plaintiff who has had the independent foresight to obtain some form of indemnity insurance in the event of tragedy. Thus, the failure to extend the collateral source rule to state-provided special education and therapy does not undermine the socially beneficial goal of individually maintained private insurance policies. [119]

Similarly, the deterrence/windfall justification [120] for the collateral source rule offers no support for the application to state-provided special education and therapy. While the

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deterrent/windfall argument may have originally offered sound footing for the collateral source rule, [121] the tort system has undergone profound changes since the rule's inception. [122] The increase of liability insurance has decreased the importance of the deterrent goal of the tort system and given rise to a system that focuses on loss allocation. [123] When viewed from this perspective, the application of the collateral source rule to state-provided special education and therapy places an extremely heavy burden on society. Under the modern tort system, a strong argument can be made that the collateral source rule's exclusion of evidence relating to the availability of free, state-provided special education and therapy results in higher costs to consumers. [124] Furthermore, the application of the collateral source rule to state-provided special education and therapy may cause members of society to suffer yet an additional blow: even though the rule may allow an injured plaintiff to recover the full cost of his special education and therapy needs, members of society still may be forced to bear the cost of providing the injured plaintiff with special education and therapy if the **[*719]** plaintiff chooses to utilize the state-provided special education system. In this regard, the application of the collateral source rule to free, state-provided special education and therapy injects a societal cost into personal injury awards that far outweighs any possible deterrent effect the rule may have in the modern tort system. [125]

Contending that juries will be confused by the introduction of state-provided special education and therapy evidence does not support arguments against the application of the rule. [126] Juries are already entrusted with the responsibility of considering extremely difficult and foreign evidence to reach their verdicts in a variety of complex cases. [127] The introduction of state- provided special education and therapy evidence would certainly not be any more confusing. Indeed, it could be argued that nothing could be more confusing than the approach under the traditional application of the collateral source rule because jurors know from their own life experience that the state provides free special education services - often services of considerable quantity and quality - to handicapped children and yet are not instructed how to deal with that knowledge in reaching the amount of their verdict.

Moreover, the contention that under our tort system a plaintiff never fully recovers for his injuries [128] also falls short of offering a sound justification for applying the collateral source rule to state-provided special education and therapy. Certainly no amount of money can truly compensate a person for the loss of their mental or physical abilities, but that is just one of many harsh facts inherent in our tort system. It is a reflection of the limitations of a system in which the best that can be done is make a rough estimate of the plaintiff's injury and reduce that estimation to a money judgment. [129] Indeed, if no amount of money will ever compensate an injured plaintiff for the loss of mental or physical capacity, it is certainly difficult to quantify the degree to which the additional dollars provided by applying the collateral source rule assist in compensating an injured plaintiff. Thus, while perhaps offering the most emotionally appealing argument in favor of applying the collateral source rule to state-provided special education and therapy, the notion that an **[*720]** injured plaintiff is never fully compensated for his injuries fails to offer a principled basis for the rule's application. [130]

VII.

Proposal

None of the arguments commonly offered to justify the application of the collateral source rule supports the traditional application of the rule to free, state-provided special education and therapy. [131] While these arguments fail to support the traditional application of the collateral source rule, [132] the substantive component of the rule continues to have merit. The substantive component reflects a principle which should be maintained when considering the award of damages to a plaintiff requiring special education and therapy (i.e., a defendant should never be allowed to summarily deduct from the plaintiff's damages the amount that the plaintiff receives in compensation for her injuries from outside sources). [133] In light of the importance of this principle, an approach which precludes the summary reduction of the

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plaintiff's damages based on the availability of free, state-provided special education and therapy yet allows for the introduction of evidence relating to both the existence and quality of the state-provided services, not only meets the needs of an injured plaintiff, but also addresses the concerns of a society and a judicial system attempting to reach a just award of damages for a plaintiff in need of special education and therapy.

In terms of educational expenditures, a severely injured plaintiff requires an award of damages which allows her to obtain the special education and therapy that she requires. An approach to state-provided special education and therapy which prevents the summary reduction from the plaintiff's damages to account for the availability of free, state-provided special education and therapy, yet allows for the introduction of evidence relating to the existence and quality of the state-provided services, ensures that this need is fulfilled. The prohibition against the summary reduction of the plaintiff's damage award prevents forcing the plaintiff to use the state-provided services if those services will not satisfy her needs. [134] In a similar fashion, under this approach, **[*721]** the plaintiff will provide the jury with a range of evidence relating to the state-provided services, including any evidence that these services will not fulfill her needs. [135] All of the information that the plaintiff provides to the jury will assist the plaintiff to obtain an award which accurately assesses her special education needs.

In the context of a plaintiff in need of special education and therapy, society is primarily concerned with providing her with appropriate services at an appropriate overall cost. An approach which prevents a summary deduction from the plaintiff's damage award, yet allows for the full and complete introduction of evidence relating to state-provided services, fosters this goal. First, the prohibition against summary reduction prevents a plaintiff from being denied access to appropriate services. [136] Second, if the jury concludes that the state-provided services meet the plaintiff's needs, then the plaintiff's damage award could be adjusted accordingly. Under modern theories of loss shifting, [137] reducing the plaintiff's award would prevent society from paying twice for the special education services it provides: once in the form of taxes [138] and again in the form of higher consumer prices. [139] Thus, society is able to fulfill efficiently the plaintiff's special education **[*722]** needs while avoiding duplicate costs.

Similarly, the judicial system's goal of accurately assessing the injured plaintiff's special education needs to establish just and fair compensation is satisfied by an approach that bars summary reduction of the plaintiff's damages and encourages introducing a range of state-provided services evidence. An approach which prevents the summary reduction of a plaintiff's damage award to account for the existence of free, state-provided special education and therapy promotes a judicial system which avoids arbitrary results. Indeed, under this approach, instead of automatically deducting the value of the state-provided services from the plaintiff's damage award, the court considers a range of evidence relating to the state-provided services and is able to make an informed decision. The ability to make an informed decision in light of all relevant evidence, including evidence of free, state-provided services, enables the court to make an accurate assessment of the plaintiff's true special education needs. The ability to make an accurate assessment of the plaintiff's needs avoids overcompensation and assists the court in establishing a just and fair result.

VIII.

Conclusion

In its traditional form, the collateral source rule should not be applied to free, state-provided special education and therapy. However, an approach which preserves the substantive component of the rule - preventing the summary reduction of the plaintiff's damage award, but also promoting the full introduction of evidence relating to the state-provided services -

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NOTE: The Constitutionality of Offsetting Collateral Benefits Under Ohio Revised Code Section 2317.45.

Julie A. Schafer

SUMMARY:
... Beginning in the early 1980s a number of state legislatures, having perceived a "crisis" in the insurance industry, enacted statutes that limited the amount of damages a plaintiff could recover in a tort action. ... Although an insurance crisis certainly was a motivating force, at least in Ohio there was a concern over the plaintiffs who, under the collateral source rule, were receiving a double recovery. ... The fact that the source of the collateral benefit in this case was workers' compensation buttressed the court's statement that "[p]ayments made under Ohio Workers' Compensation Program are not, and were never meant to be complete compensation for an injured employee. ... Attention must also be paid to the trend in most states toward limiting tort liability, either through damage caps or through abrogation of the collateral source rule. ... The most compelling argument made by the common pleas court in Cook is that workers' compensation did not adequately compensate the victim for his injury. ... The prevalence of statutes limiting liability in all types of tort actions indicates that the abrogation of the collateral source rule will continue. ... If the goal of tort law is primarily to compensate the injured victim, then the elimination of the collateral source rule may serve this purpose more effectively than damage caps. ...

TEXT:

[*587] I. INTRODUCTION

Beginning in the early 1980s a number of state legislatures, having perceived a "crisis" in the insurance industry, enacted statutes that limited the amount of damages a plaintiff could recover in a tort action. [1] These statutes took a number of forms, including caps on noneconomic damages, the elimination of joint and several liability, and the elimination of the collateral source rule. [2]

The primary focus of this Note is upon the theories that underlie the abrogation of the collateral source rule. This analysis will center upon a critique of Ohio's statutory elimination of the collateral source rule, as well as the various legislative modifications of the collateral source rule undertaken in other states.

Part II discusses the general theories behind liability caps. Part III analyzes the history of the

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The court also held that the post-verdict proceeding to determine collateral benefits controls the amount that should be offset. According to the court, "it does not matter whether the jury was aware of the medical expenses in order **[*606]** for them to be deductible. . . . [T]he collateral benefits adjustment is a post verdict adjustment. It is a proceeding wherein additional evidence can be taken, but wherein a jury is not involved." [85]

4. Sorrell v. Thevenir

In January 1991, the Ohio Court of Common Please for Gallia County held that section 2317.45 was unconstitutional. [86] The case currently is on appeal before the Ohio Court of Appeals for the Fourth District. [87] The lower court, concluded that "it is absurd to finance the tortious conduct of the defendant by appropriations from the Workers' Compensation system. Plaintiff's employer did not cause her injury but yet it is his premium that may be increased because of defendant's conduct." [88] The lower court held that section 2317.45 was unconstitutional because it violates the right to a jury trial, the right to a remedy found in the Ohio Constitution, and the right to due process under the Fourteenth Amendment and under the Ohio Constitution. [89]

The facts of Sorrell illustrate the hardship that section 2317.45 can cause; whether that hardship justifies a finding of unconstitutionality is another issue entirely. In Sorrell, the plaintiff, a convenience store employee, successfully sued a customer who allegedly injured her during one of his frequent visits to the store. [90] The jury awarded the plaintiff $ 10,128.26 in damages, $ 5,128.26 allocated to lost wages and medical benefits, and $ 5,000 for pain and suffering. [91] The plaintiff had received $ 10,906.96 of workers' compensation benefits, and an additional $ 3,428.26 paid by the workers' compensation fund to the plaintiff's doctor. [92] The defendant argued that this amount should be offset from the jury award, thereby leaving the plaintiff with no recovery from the defendant. [93]

[*607] On appeal, both the plaintiff and the defendant essentially put forth the arguments presented in the Cook case. [94] Hopefully, the court of appeals will reverse the lower court's decision in Sorrell just as the court of appeals did in Cook.

C. Analysis

The court of common pleas in Cook identified a number of inconsistencies in the collateral benefits statute; none of these inconsistencies alone, however, justified holding section 2317.45 unconstitutional. By stretching each inconsistency to its extreme, the lower court found no reasonable basis for the statute. The court of appeals properly reversed the lower court's decision. Hopefully, courts in other districts will follow the lead established in Cook.

The court of appeals decision in Cook was correct for a number of reasons. First, although there may be some evidence that the insurance industry concocted an insurance crisis in order to push H.B. 1 through the Ohio legislature, there is an abundance of evidence that such a crisis did indeed exist. [95] In addition, there is strong evidence that a primary purpose of the statute is to prevent the plaintiff from receiving a double recovery. [96] This interest is independent of the insurance issue, and may instead suggest that the legislature is more concerned about other aspects of tort liability. According to one commentator,

Tort scholars suggest that three of the tort system's primary objectives are promoting justice, deterring potentially injurious activities, and compensating accident victims. Although the justice and deterrence objectives often require the same outcomes, the compensation objective may require an outcome inconsistent with the other two goals. This potential inconsistency, coupled with the tort system's poor design for adequately compensating victims, suggests that compensation is at most a subsidiary goal of tort law, and perhaps is merely a means of fulfilling the justice and deterrence objectives. [97]

Consequently, even though some evidence may arguably suggest that the insurance situation

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in Ohio was not of crisis proportions, other legitimate reasons remain for eliminating the collateral source rule. [98]

[*608] Attention must also be paid to the trend in most states toward limiting tort liability, either through damage caps or through abrogation of the collateral source rule. This reform is not limited to the medical malpractice area. By 1990, as many as ten states had altered the traditional collateral source rule. [99]

Neither court in Cook mentioned another Ohio statute that provides for the offsetting of collateral benefits against a political subdivision. This statute, Ohio Revised Code section 2744.05, provides that "[i]f a claimant receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against a political subdivision recovered by that claimant." [100]

The Ohio Supreme Court has held that this statute is constitutional. [101] The court rejected an equal protection challenge, and applied rational basis review. [102] Given that the two other Ohio statutes that provide for a deduction of collateral benefits have survived equal protection scrutiny, it is likely that the third statute will be upheld as well.

The most compelling argument made by the common pleas court in Cook is that workers' compensation did not adequately compensate the victim for his injury. This argument parallels the earlier discussion concerning whether workers' compensation benefits could legitimately be deducted from an award for emotional pain and suffering. Although this argument may be persuasive in the appropriate case, the jury verdict in Cook illustrates that this is not a concern here. The jury verdict form is reproduced below:

(A) State the total amount of compensatory damages, past and future, to the Plaintiffs.

STATE YOUR ANSWERS IN FIGURES IN INK $ 400,000.00

(B) What portion of your answer to Interrogatory (A) is past damages, if any, to the Plaintiffs?

STATE YOUR ANSWERS IN FIGURES IN INK $ 34,000.00

(C) What portion of your answer to Interrogatory (A) is future damages, if any, to the Plaintiffs?

STATE YOUR ANSWERS IN FIGURES IN INK $ 366,000.00

IF YOU FIND THAT THERE ARE FUTURE DAMAGES, MOVE TO INTERROGATORY (D). IF YOU FIND THAT THERE ARE NO **[*609]** FUTURE DAMAGES, DO NOT ANSWER THE REMAINING QUESTIONS

(D) What are the portions of the future damages shown in your answer to Interrogatory (C) that fall into the following:

(1) Future economic loss $ 366,000.00

(2) Future noneconomic loss

THE TOTAL OF THESE TWO AMOUNTS MUST EQUAL YOUR ANSWER TO INTERROGATORY (C)

(E) What are the portions, if any, of future economic loss shown in your answer to Interrogatory (D)(1), if any, that fall into the following:

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(1) Wages, salaries or other lost compensation (earning capacity) (fringe benefits) $ 300,000.00

(2) (Expenditures) (expenses) (costs) for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations $ 66,000.00

(3) Any other (expenditures) (expenses) (costs) brought on by injury to person

THE TOTAL OF FUTURE ECONOMIC LOSS MUST EQUAL YOUR ANSWER TO INTERROGATORY (D)(1). [103]

As the jury verdict form shows under (E)(1), the amount of wages, salaries, or other lost compensation totaled $ 300,000, and the costs for medical care or treatment totaled $ 66,000. The workers' compensation benefits in this case compensated the victim for precisely the type of harm that the jury deemed should be compensated. Therefore, the common pleas court's comments concerning inadequate compensation of an injured party who receives workers' compensation are inapplicable to the present case. [104]

V. CONCLUSION

The prevalence of statutes limiting liability in all types of tort actions indicates that the abrogation of the collateral source rule will continue. At least ten states have modified the collateral source rule either for medical malpractice actions or for personal injury actions. [105] Despite the argument that these statutes deprive a plaintiff of a full recovery while granting the defendant a windfall, these statutes allow a jury to determine the total compensation to which the plaintiff is entitled. The plaintiff then receives this amount -- although he may not receive the entire amount from the defendant -- and he may receive **[*610]** the amount over a period of years, but the plaintiff does receive the amount his injury is deemed to be worth. Damage caps, on the other hand, limit compensation to the statutory amount, regardless of the "true" value of the injury. If the goal of tort law is primarily to compensate the injured victim, then the elimination of the collateral source rule may serve this purpose more effectively than damage caps.

Ohio's latest modification of the collateral source rule, when considered with its provisions for medical malpractice actions and actions against political subdivisions, essentially abolishes the collateral source rule. Section 2317.45 is quite thorough in defining what types of benefits qualify as offsetting collateral benefits. The statute is much less clear concerning the procedures to enforce and review the disclosures made by the plaintiff. Section 2317.45, unlike some other statutes, defines the time period in which collateral benefits must be disclosed. Given the long time span covered by the statute, defendants need an opportunity to verify the accuracy of the collateral benefits, and to obtain review during the five-year period following the entry of judgment.

The injustice of offsetting workers' compensation benefits, thereby creating a windfall for a defendant, could be remedied by explicitly excluding workers' compensation benefits from the provisions of the statute, or by providing a statutory right of subrogation for workers' compensation benefits.

The Ohio legislature may wish to avoid the problem of attorneys' fees by amending the statute to include terms similar to Alaska's statute, [106] requiring the court to award costs and attorneys' fees before evidence of collateral benefits may be introduced. This would eliminate one of the strong incentives parties may have to continue litigating.

Until the Ohio Supreme Court decides the constitutionality of section 2317.45, the statute likely will be challenged throughout the state. Given the earlier decisions by the supreme court, which permit the offsetting of collateral benefits in medical malpractice actions, it seems unlikely that the court would not permit offsetting of collateral benefits in other

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actions. The supreme court may be concerned that an injured plaintiff in a workers' compensation case could be denied a pain and suffering recovery. Rather than strike the entire statute, the court could require that, in order for the statute to apply, the jury's verdict must be divided into separate damage amounts. In that way, it would be clear whether the plaintiff was receiving a double recovery.

As a whole, section 2317.45 is a reasonable statute. Those who oppose the statute argue that the insurance crisis is a result not entirely of large verdicts, but of attorneys and insurance companies. [107] Even if this is true, this does not justify overturning section 2317.45. Instead, other statutes should be passed to deal with all of the forces that push insurance rates unreasonably high. The **[*611]** workers' compensation bureau and other administrative agencies that also battle rising costs can remedy the perceived unfairness of section 2317.45 by providing for subrogation rights. By doing so, these agencies would fall outside of the statute. Rather than overrule one important attempt to contain rising insurance costs, the courts and the legislature should resolve some of the finer details of section 2317.45, and concentrate upon containing costs in other areas.

FOOTNOTES:

n1 See Ruth Gastel, The Civil Justice System, INSURANCE INFORMATION INSTITUTE (Feb. 1991); Linda J. Gobis, Note, Lambert V. Wrensch: Another Step Toward Abrogation of the Collateral Source Rule in Wisconsin, 1988 WIS. L. REV. 857 (1988); Amanda E. Haiduc, Note, The Tale of Three Damage Caps: Too Much Too Little and Finally Just Right, 40 CASE W. RES. L. REV. 825 (1990); L. Timothy Perrin, Comment, The Collateral Source Rule in Texas: Its Impending Demise and a Proposed Modification, 18 TEX. TECH L. REV. 961 (1987); see generally Ralph D. Gaines Jr. & William K. Hancock, Tort Reform in Alabama: A Proponent's Perspective, 18 CUMB. L. REV. 649 (1988); Perry Pazer & Tim Hogan, The New Collateral Source Rule: Is It Constitutional?, 18 TRIAL L. Q. 9 (1987).

n2 See sources cited supra note 1.

n3 Haiduc, supra note 1, at 825. See generally Ruth Gastel, Medical Malpractice, INSURANCE INFORMATION INSTITUTE (Feb. 1991).

n4 See Haiduc, supra note 1, at 825; Gastel, supra note 3.

n5 OHIO REV. CODE ANN. § 2307.43 (Baldwin 1990). In August, 1991, the Ohio Supreme Court held that section 2307.43 was unconstitutional. Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991).

n6 Nancy L. Manzer, Note, 1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability, 73 CORNELL L. REV. 628, 628 (1988). Some writers blame attorneys for the rising costs of insurance. See Dennis McLellan, Surfeit of Civil Suits is a Crime, Advocate of Tort Reform Says, L.A. TIMES, Aug. 15, 1990, at E1 (Orange County ed.). In this article, McLellan discusses a recent book by Robert V. Wills, entitled "Why Lawyers are Killing America." Id. Wills blames the rise in litigation for the spiraling costs of liability insurance. Id. Another author writes that "[t]he courts, insurance carriers and defense lawyers are the three main culprits in rising insurance defense costs," which translates into higher overall insurance rates. Defense Lawyer Fingers Culprits in Cost Spiral, THE NATIONAL UNDERWRITER COMPANY PROPERTY & CASUALTY/EMPLOYEE BENEFITS Edition 26 (Nov. 19, 1990).

n7 OHIO REV. CODE ANN. §§ 2305.27, 2743.02, 2317.45 (Baldwin 1990).

n8 STANTON DARLING, OHIO CIVIL JUSTICE REFORM ACT (1987). The Sixth Circuit agreed that the state legislature intended to prevent double recoveries with section 2317.45.

The purpose of the Ohio law . . . seems to be to prevent injured plaintiffs from receiving a

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windfall due to their injury. The statute requires that damage awards be adjusted for collateral benefits received as a result of . . . the injury so that a plaintiff will receive, in total, only the amount that a jury has determined to be adequate compensation for the particular injury.

Baker v. Goldblatt, No. 91-3508, 1992 WL 12679, at *5 (6th Cir. Jan. 30, 1992).

n9 DARLING, supra note 8, at 3.

n10 Id.

n11 Perrin, supra note 1, at 961.

n12 Id. at 966.

n13 Id. at 983.

n14 Joseph F. Cunningham, Collateral Source: Double Judgment or Double Trouble, 9 DISTRICT LAW 34, 35 (1985).

n15 Gobis, supra note 1, at 860-61.

n16 263 N.E.2d 235 (Ohio 1970).

n17 Id. at 239.

n18 Id.

n19 OHIO REV. CODE ANN. § 2317.45 (Baldwin 1990).

n20 OHIO REV. CODE ANN. § 2317.45(B)(1). The relevant sections of the statute are reproduced below:

(A)(1) As used in this section:

(a) "Collateral benefits" means benefits that a plaintiff has received, or may be entitled to receive within the next sixty months after the entry of judgment, as a result of an injury, death, or loss to person or property that is a subject of a tort action, from any of the following:

(i) The government of the United States, or any state or any political subdivision of any state, under a program that provides medical, hospital, sickness, dental, or other health benefits, including, but not limited to, social security, medicare, or medicaid;

(ii) A federal, state, or political subdivision of a state disability income or workers' compensation program, or a wage continuation program of an employer;

(iii) A medical, hospital, sickness, dental, or other health insurance program;

(iv) An accident insurance program that provides medical, hospital, sickness, dental, or other health benefits;

(v) A contract or agreement under which medical, hospital, sickness, dental, or other health services are provided or under which the cost of those services are paid for or reimbursed.

(b) "Rights of recoupment" means rights or [sic] recoupment through subrogation, trust agreement, contract, lien, operation of law, or otherwise.

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(c) "Tort action" means a civil action for damages for injury, death, or loss to person or property. "Tort action" includes a product liability claim that is subject to sections 2307.71 to 2307.80 of the Revised Code, but does not include a civil action for damages for a breach of contract or another agreement between persons.

(d) "Trier of fact" means the jury or, in a nonjury action, the court.

(2) As used in this division and divisions (B)(2)(a) and (c)(i) of this section, "plaintiff" includes, in a wrongful death action, the decedent and all beneficiaries of the action.

(B)(1) Except as provided in division (C) of this section, if a plaintiff in a tort action is entitled to an award of compensatory damages, that plaintiff shall disclose to the court after such entitlement is determined all relevant collateral benefits, all rights of recoupment relative to the disclosed collateral benefits, and the costs, premiums, or charges for any of the disclosed collateral benefits paid or contributed within the three-year period immediately preceding the accrual of the cause of action, by the plaintiff, any member of his immediate family, or the employer of the plaintiff or any member of his immediate family or, in a wrongful death action, the decedent, any beneficiary of the action, the employer of the decedent or any beneficiary of the action, any member of the immediate family of the decedent or any such beneficiary, or the employer of any member of the immediate family of the decedent or any such beneficiary.

n21 OHIO REV. CODE ANN. § 2317.45(B)(2). The full text of this subsection reads as follows:

(B)(2) Upon the disclosure required by division (B)(1) of this section, the court shall do all of the following:

(a) Determine whether both of the following are satisfied in relation to any of the disclosed collateral benefits:

(i) The plaintiff has received the disclosed collateral benefit or is reasonably certain to receive it within the next sixty months after the entry of judgment;

(ii) There are no rights of recoupment respecting the disclosed collateral benefit.

n22 OHIO REV. CODE ANN. § 2317.45(B)(2)(b). The full text of this subsection reads as follows:

(b) As to any disclosed collateral benefits in relation to which both requirements of division (B)(2)(a) of this section are satisfied, determine the total of the costs, premiums, or charges for such benefits paid or contributed within the three-year period immediately preceding the accrual of the cause of action, by the plaintiff, any member of his immediate family, or the employer of the plaintiff or any member of his immediate family or, in a wrongful death action, the decedent, any beneficiary of the action, the employer of the decedent or any beneficiary of the action, any member of the immediate family of the decedent or any such beneficiary, or the employer of any member of the immediate family of the decedent or any such beneficiary[.]

Two federal courts recently interpreted this subsection. In Deaton v. Dreis and Krump Manufacturing Co., 134 F.R.D. 219 (N.D. Ohio 1991), the district court held that in determining the amount of workers' compensation premiums paid by the employer that will be added back to the jury award, the employer's contribution is not limited to the amount paid on behalf of the particular employee. Id. at 225. That is, although the employer had paid only $ 5.27 in workers' compensation premiums for the plaintiff-employee, the court added back to the plaintiff's award the total amount of workers' compensation benefits the employer

paid during the three years prior to the plaintiff's injury. Id. In this case, the employee had received $ 11,618.64 in workers' compensation, and the employer had paid $ 15,624 in premiums. Id. at 225. Therefore, the court concluded that the plaintiff's workers' compensation "which the statute requires be deducted from the verdict, is entirely offset by his employer's contribution." Id.

The Sixth Circuit disagreed with this interpretation in Baker v. Goldblatt, No. 91-3508, 1992 WL 12679 (6th Cir. Jan. 30, 1992). According to the court, "collateral benefits received by a plaintiff should be adjusted only by that portion of en employer's workers' compensation premiums directly related to the employment fo the particular plaintiff." Id. at *4.

n23 OHIO REV. CODE ANN. § 2317.45(B)(2)(c). The full text of this subsection reads as follows:

(c) Prior to entering judgment for the plaintiff, do both of the following:

(i) Subtract from the compensatory damages that the plaintiff otherwise would be awarded the amount of any disclosed collateral benefits in relation to which both requirements of division (B)(2)(a) of this section are satisfied;

(ii) Subject to the limitation specified in this division, add to the balance derived under division (B)(2)(c)(i) of this section the total of any costs, premiums, and charges described in division (B)(2)(b) of this section. The amount of those costs, premiums, and charges that is added to that balance shall not exceed any amount subtracted pursuant to division (B)(2)(c)(i) of this section from the compensatory damages that the plaintiff otherwise would be awarded.

An example of how this would operate is as follows: Suppose that the jury renders a verdict for the plaintiff for compensatory damages in the amount of $ 10,000.00. Based upon evidence presented by the defendant, the judge determines that the plaintiff is entitled to collateral benefits from her insurance company of $ 6,000.00. The judge then subtracts the $ 6,000.00 of collateral benefits from the jury award for compensatory damages, which leaves the plaintiff with a $ 4,000.00 recovery. However, because the plaintiff paid $ 1,000.00 in premiums for the insurance coverage she received, the court adds this $ 1,000.00 to the $ 4,000.00 recovery. The result is that the plaintiff is entitled to receive $ 5,000.00 from the defendant.

n24 OHIO REV. CODE ANN. § 2317.45(B)(3). The full text of this subsection reads as follows:

(3) Except as provided in division (B)(1) of this section, in another section of the Revised Code, or in the Rules of Evidence, evidence of collateral benefits is not admissible in a tort action and shall not be submitted to or considered by the trier of fact in determining whether to award compensatory damages to a plaintiff in a tort action or in determining the amount of any such damages.

n25 OHIO REV. CODE ANN. § 2317.45(B)(1), (B)(2). Ohio's statute is unique with respect to the duration of its disclosure requirements. See, e.g., CONN. GEN. STAT. ANN. § 52-225a (West 1990) (providing that benefits up to the date of judgment may be deducted). See also MICH. COMP. LAWS ANN. § 600.6303 (West 1990) (Court must first determine that there is a previously existing contractual or statutory obligation on the part of the collateral source to pay the benefits before they may be deducted).

n26 OHIO REV. CODE ANN. § 2317.45(B)(2)(a)(i).

n27 22 AM. JUR. 2D Damages § 23 (1988). Black's Law Dictionary defines compensatory damages as "such as will compensate the injured party for the injury sustained, and nothing

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more; such as will simply make good or replace the loss caused by the wrong or injury." BLACK'S LAW DICTIONARY 390 (6th ed. 1990). Dan Dobbs writes that "[t]he damages award is substitutionary relief, that is, it gives the plaintiff money mainly by way of compensation, to make up for some loss that was not, originally, a money loss, but one that ordinarily may be measured in money." DAN DOBBS, REMEDIES 135 (1973).

n28 In Ohio, workers' compensation legislation became effective in 1913. See OHIO REV. CODE ANN. §§ 4123.01-4123.99 (Baldwin 1990). The Ohio Constitution mandates the establishment of workers' compensation by employers. OHIO CONST. art. II, § 35. There is no right of subrogation included in the workers' compensation statutes, which means that an employee who receives workers' compensation benefits will fall within the scope of § 2317.45.

n29 81 AM. JUR. 2D Workmen's Compensation §§ 1-3 (1976).

n30 Id. at § 2.

n31 Ohio Manufacturers' Association, THE FACTS ABOUT WHY OHIO NEEDS TOTAL REFORM FOR WORKERS' COMPENSATION 7 (Fall/1985 Reform Proposal).

Workers' Compensation rests upon the economic principle that those persons who enjoy the product of a business -- whether it be in the form of goods or services -- should ultimately bear the cost of the injuries or deaths that are incident to the manufacture, preparation and distribution of the product. . . . If the cost is a predictable incident of the operation, sound business judgment demands that it be included as an element of the price.

WEX S. MALONE, ET. AL., CASES AND MATERIALS ON WORKERS' COMPENSATION AND EMPLOYMENT RIGHTS 39 (1980).

n32 See OHIO REV. CODE ANN. §§ 2317.45(B)(1), (B)(2)(c)(i).

n33 ALASKA STAT. § 09.17.070 (1990).

n34 See supra note 31.

n35 Perrin, supra note 1, at 991. Subrogation is "the substitution of one person in the place of another with reference to a lawful claim or right. . . . It is the machinery by which the equities of one man are worked out through the legal rights of another." 73 AM. JUR. 2D § 1 (1974). Conceptually, subrogation resembles other equitable doctrines which are designed to prevent unjust enrichment. "[Subrogation] is not an absolute right, but one which depends on the equities and attending facts and circumstances of each case." Id. at § 11. The factors to consider when determining whether a right of subrogation exists include: the secondary liability of the person claiming subrogation rights, or "the necessity of acting to protect his own interests, or . . . an agreement that he is to have security." Id.

n36 Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991).

n37 Id. at 772.

n38 Id.

n39 Id. at 773.

n40 Cook v. Wineberry Deli, Inc., No. 14841, 1991 WL 131485 (Ohio Ct. App., Summit Cty. July 17, 1991).

n41 Id. at *1.

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n42 Id.

n43 Cook v. Wineberry Deli, Inc., No. CV88 08 2737, 1990 Ohio Misc. LEXIS 6, at *5. (Summit Cty. Oct. 8, 1990). Although the analysis of section 2317.45 is quite extensive, it is important to note that the judge adopted plaintiffs' brief, and incorporated it, verbatim, as the opinion of the court.

n44 Id. at *6. Although the research in the plaintiff's brief cites research to the contrary, there is an abundance of literature which cites a litigation explosion as a primary cause of rising insurance rates. See sources cited supra note 1.

n45 1990 Ohio Misc. LEXIS 6, at *6.

n46 Id.

n47 Id. at *6-7.

n48 Id. at *8-9. What is noticeably absent from the court's opinion is a discussion of the legislature's response to the insurance crisis in Ohio. Also absent from the court's analysis was a discussion of the widespread trends in other states which limited recoveries in tort actions. See supra notes 1-6.

n49 Cook v. Wineberry Deli, Inc., 1991 WL 131485, at *4 (Ohio Ct. App Summit Cty. July 17, 1991).

n50 1990 Ohio Misc. LEXIS 6, at *11. See OHIO CONST. art. I, § 5.

n51 1990 Ohio Misc. LEXIS 6, at *11.

n52 Id. at *13.

n53 Id. at *13-14. Although this analogy has some merit, arguably the true effect of the statute is to achieve an equitable apportionment of damages; this is the crucial difference between remittitur and section 2317.45. Remittitur occurs "[i]f money damages awarded by a jury are grossly excessive as a matter of law, [whereupon] the judge may order the plaintiff to remit a portion of the award." BLACK'S LAW DICTIONARY 1295 (6th ed. 1990). In contrast, the judge's deduction of collateral benefits under section 2317.45 is not based upon the assumption that the jury's award was excessive. Instead, the deduction is based upon the realization that the plaintiff's recovery was excessive. Under section 2317.45, the injured party still receives the compensation awarded by the jury. If remittitur were applied, the total recovery to which the injured party is deemed entitled would be reduced.

n54 1990 Ohio Misc. LEXIS 6, at *15.

n55 Id.

n56 Id. at *16.

n57 Id. at *16-17. This particular comment suggests that because the benefits are deducted from what a defendant otherwise would pay, justice was not achieved. Such a position ignores one of the primary goals of tort law: to compensate the injured party. This argument perhaps would be more persuasive in the criminal context where there are multiple purposes to be served by the judicial system. See generally SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES (1989).

n58 Cook v. Wineberry Deli, Inc., No. 14841, 1991 WL 131485, *5 (Ohio Ct. App. Summit

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Cty. July 17, 1991).

n59 OHIO CONST. art. 1, § 16.

n60 1990 Ohio Misc. LEXIS 6, at *20.

n61 1991 WL 131485 at *5-6.

n62 Cook v. Wineberry Deli, Inc., No. CV88 08 2737, 1990 Ohio Misc. LEXIS 6, at *24 (Summit Cty. Oct. 8, 1990).

n63 The statute violated due process under both the Ohio Constitution and the United States Constitution. U.S. CONST. amend. XIV., OHIO CONST. art. I, § 16.

n64 1990 Ohio Misc. LEXIS 6, at *33.

n65 Id.

n66 Id. at *34-35.

n67 Cook v. Wineberry Deli, Inc., No. 14841, 1991 WL 131485 at *7 (Ohio Ct. App. Summit Cty. July 17, 1991).

n68 Id.

n69 1990 Ohio Misc. LEXIS 6, at *42-43.

n70 Id. at *43. According to the court, "heightened rational basis" could be applied to the statute if an "important" rather than a "fundamental" right is infringed. Id. at *46-47.

n71 Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991).

n72 Id. at 772.

n73 Id.

n74 Jeffers v. Phillips Ready Mix, No. 90 CA 0057, 1991 Ohio App. LEXIS 50 (Greene Cty. Jan 8, 1991). The court makes no reference to the Cook decision. It appears that the constitutionality of section 2317.45 was not challenged.

n75 Id. at *1.

n76 Id.

n77 Id.

n78 Id. These collateral benefits were from workers' compensation. Id. This case is similar to Cook in that the plaintiffs received workers' compensation even though the employer had no responsibility for plaintiffs' injuries, yet the plaintiffs also received jury awards from defendants.

n79 Id. at *3.

n80 Id. at *4-5. Essentially, plaintiff is arguing that workers' compensation did not compensate him for this future pain and suffering, and therefore that this amount should not be deducted. See supra notes 28-32 and accompanying text.

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collateral source rule, and Part IV examines the statutory elimination of the collateral source rule in Ohio and the accompanying case law. Part V suggests some improvements to the current Ohio statute.

II. PURPOSE OF LIABILITY CAPS

Much of the motivating force behind the enactment of liability caps came from a dramatic increase in medical malpractice litigation across several states. [3] Studies in these states concluded that because of the high dollar recoveries by plaintiffs in medical malpractice actions, insurance coverage was growing prohibitively expensive for a large portion of the population. [4] Consequently, **[*588]** state legislatures enacted laws to limit plaintiffs' recovery of damages, particularly punitive damages. Ohio is among those states. [5]

While much of the emphasis in tort reform was upon controlling the rising cost of medical insurance, in large part due to high malpractice verdicts, there also was a concern about rising insurance rates in other highly litigious areas. One commentator suggested that in addition to rising insurance costs, state legislatures increasingly believed that the judicial system was not working efficiently and therefore that some sort of statutory damage limitation was necessary. "Although the 'insurance crisis' was the most widely publicized factor that led states to adopt tort reform measures, the state legislatures also were responding to scholarship indicating that the tort system failed to achieve its compensatory objectives and therefore should be substantially modified or even eliminated." [6]

This perceived crisis in insurance led many states, including Ohio, to abolish the collateral source rule altogether. Ohio enacted statutes to eliminate the collateral source rule first for medical malpractice claims and for claims regarding political subdivision immunity, and then for general negligence claims. [7] Although an insurance crisis certainly was a motivating force, at least in Ohio there was a concern over the plaintiffs who, under the collateral source rule, were receiving a double recovery. [8] According to the author of Ohio's **[*589]** most recent statute abolishing the collateral source rule, the primary purpose of the statute is to prevent an injured party from receiving a double recovery. [9] The author noted previous legislative attempts to reduce awards by collateral benefits, including Ohio Revised Code section 2305.27, which applies to medical malpractice actions. [10]

III. HISTORY OF THE COLLATERAL SOURCE RULE

Before addressing the specifics of the statutory modifications of the collateral source rule, it first seems appropriate to consider the rule's long history. The rule has both an evidentiary and a damage component. As one commentator explains, "[a]s a rule of evidence, it precludes introduction into evidence of any benefits the plaintiff obtained from sources collateral to the defendant. As a rule of damages, it forces the defendant to pay for the entire loss he caused despite independent recoveries by the plaintiff for the same loss." [11]

One popular justification for the collateral source rule is that the defendant should not benefit from his wrongful conduct. [12] Other justifications are that "the plaintiff should retain any benefit he obtained on his own or which was intended for him alone, and . . . the defendant should not benefit from plaintiff's receipt of compensation from sources independent of the defendant." [13]

Another commentator stated that "[i]t is considered better that an injured party receive double recovery than that a wrongdoer be relieved of liability for damages, especially since one purpose of accessing [sic] damages is to deter negligent conduct and encourage due care in the future." [14] However, another writer recognized that:

The collateral source rule has evolved from opposing principles of tort law. First, the rule conflicts with the compensatory function of tort law. Full compensation is provided when the plaintiff is restored to the position he or she occupied before the tort occurred. If a plaintiff

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n81 1991 Ohio App. LEXIS 50, at *6. This argument actually presents the opposite of what is discussed earlier. See supra notes 25-26 and accompanying text. That is, it seemed that one of the problems with section 2317.45 is that the defendant would have to rely upon the plaintiff's disclosure of collateral benefits. In this case, however, the plaintiff did not inform the jury of all his medical expenses, and the defendant had evidence of benefits which exceed these disclosed expenses. In other words, the plaintiff has to be careful to inform the jury of all expenses, because he will be held accountable for all of the benefits, even if the jury was underinformed.

n82 1991 Ohio App. LEXIS 50, at *4.

n83 Id.

n84 Id. at *5. By holding this way, the court does overlook one of the purposes of section 2317.45: to prevent a double recovery.

n85 Id. at *6. Although the court does not explicitly say so, it appears that plaintiffs' argument in Cook that section 2317.45 deprived them of a jury trial had little merit in this court. See supra notes 50-58 and accompanying text.

n86 Sorrell v. Thevenir, slip op., No. 89 CL 121 (Ohio Ct. C.P. Gallia County Jan. 14, 1991).

n87 See Defendant's Notice of Appeal in the appendix to Defendant-Appellant's Brief at i, Sorrell (No. 91-CA04).

n88 Sorrell, slip. op. No. 89 CL 121, at 9.

n89 Id. at 5-12.

n90 Id. at 1.

n91 Id. at 2.

n92 Defendant-Appellant's Brief at 1-2, Sorrell (No. 91-CA-4).

n93 Id. at 2.

n94 See Defendant-Appellant's Brief, Sorrell (No. 91-CA04); Plaintiffs-Appellees Brief, Sorrell (No. 91-CA-4). See also supra notes 40-70 and accompanying text.

n95 See supra notes 8-9 and accompanying text. See generally PETER W. HUBER, LIABILITY (1988). Huber writes eloquently of the insurance crisis that spread across the United States over the past two decades.

n96 See supra note 8 and accompanying text.

n97 Id.

n98 See supra notes 96-97 and accompanying text.

n99 See ALASKÅ STAT. §§ 09.17.070 (1989), 09.55.548 (Supp. 1986); ARIZ. REV. STAT. ANN. § 12-565 (1989); CAL. CIV. CODE § 333.1 (West 1990); CONN. GEN. STAT. ANN. § 52-225a (West 1990); FLA. STAT. ANN. § 768.76 (West 1990); IND. CODE ANN. § 34-4-36-2 (West 1990); MICH. COMP. LAWS ANN. § 600.6303 (West 1990); MINN. STAT. § 548.36 (1990); OR. REV. STAT. § 18.580 (1989); UTAH CODE ANN. § 78-14-4.5 (1990).

n100 OHIO REV. CODE ANN. § 2744.05 (Baldwin 1990).

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n101 Menefee v. Queen City Metro, 550 N.E.2d 181 (Ohio 1990).

n102 See id.

n103 Cook v. Wineberry Deli, Inc., No. CV88 08 2737, 1990 Ohio Misc. LEXIS 6, at *55-56 (Summit Cty. Oct. 8, 1990).

n104 See supra notes 55-56 and accompanying text. The court in Jeffers alluded to the potential unfairness of deducting benefits that had not already compensated the injured party. See supra note 84 and accompanying text.

n105 See supra note 99 and accompanying text.

n106 See supra note 33 and accompanying text.

n107 See supra notes 46-48 and accompanying text.

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receives compensation from a third party not connected to the defendant, receipt of these benefits should in theory be used to reduce the tortfeasor's total damages. However, the collateral source rule requires the tortfeasor to pay the judgment even though the plaintiff has already been partly or completely compensated for the injuries suffered. **[*590]** Thus, double recovery is possible and the plaintiff can be put in a better position than before the tort occurred. The collateral source rule also conflicts with the damage mitigation principle . . . because receipt of benefits from a collateral source does not act to mitigate damages. [15]

The leading Ohio case on the collateral source rule is Pryor v. Webber. [16] In Pryor the plaintiff brought a negligence action and argued that evidence of diminished wages paid by her employer should not have been admitted. The Ohio Supreme Court agreed. In construing the collateral source rule, the court held that "the receipt of collateral benefits is deemed irrelevant and immaterial on the issue of damages." [17] Because the court held that the benefits were irrelevant, the jury should not hear evidence concerning plaintiff's receipt of employer benefits, nor should the court deduct the benefits.

The court stated that "[t]he entire theory of the collateral source rule is to keep the jury from learning anything about the collateral income so that it will not influence the decision of the jury." [18] The jury may decide in a plaintiff's favor regardless of whether the evidence of collateral benefits is introduced; however, the jury could deduct from its award an amount equal to, or greater than, the admitted benefits. Such an outcome could not be controlled or predicted by the trial judge.

IV. ABROGATION OF THE COLLATERAL SOURCE RULE

The Ohio legislature eliminated the collateral source rule by enacting Ohio Revised Code section 2317.45 (also referred to as H.B. 1), effective in 1988. [19] The scope of the statute is extremely broad. The statute provides:

[I]f a plaintiff in a tort action is entitled to an award of compensatory damages, that plaintiff shall disclose to the court after such entitlement is determined all collateral benefits, all rights of recoupment relative to the disclosed collateral benefits, and the costs, premiums, or charges for any of the disclosed collateral benefits paid or contributed within the three-year period immediately preceding the accrual of the cause of action. [20]

[*591] Once disclosure is made by the plaintiff, the court must determine whether "[t]he plaintiff has received the disclosed collateral benefit or is reasonably certain to receive it within the next sixty months after the entry of judgment" and that "[t]here are no rights of recoupment respecting the disclosed collateral **[*592]** benefit." [21] Following this determination, the court must calculate the costs of premiums paid for the collateral benefit. [22] Then, the court must, "prior to entering judgment for the plaintiff . . . subtract from the compensatory damages that the plaintiff otherwise would be awarded the amount of any disclosed collateral benefits . . . [and] add to the balance derived . . . the total of any costs, premiums, and charges." [23]

[*593] According to the statute, the court makes all determinations concerning the offset of the collateral benefits, and "evidence of collateral benefits is not admissible in a tort action and shall not be submitted to or considered by the trier of fact in determining whether to award compensatory damages to a plaintiff . . . or in determining the amount of any such damages." [24]

A. Analysis

Certainly one of the most problematic aspects of Ohio's collateral benefits statute is the time frame during which benefits must be disclosed. The plaintiff **[*594]** is required to disclose all collateral benefits which meet the definitions in subsection (A)(1) and which were received three years prior to the accrual of the cause of action or which may be received up to five

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years following judgment. [25] According to subsection (B)(1), the plaintiff would wait until he or she is awarded damages before informing the court of any collateral benefits. If this is the case, not only will it be difficult for a plaintiff to collect and report all the benefits received, but it will be equally, if not more difficult, for the defendant to determine the accuracy and completeness of the plaintiff's disclosures. For example, if the judgment is entered three years after the cause of action accrued, the plaintiff must account for payments made up to six years earlier. In addition, the plaintiff must predict five years into the future what benefits will be received, and the defendant must rely upon this prediction. The statute does not provide for any special policing mechanism. If the plaintiff is "reasonably certain" to receive a benefit within five years, the court will consider it. [26] Although it is conceivable that the plaintiff will receive unanticipated benefits, the statute does not provide for a re-evaluation or opportunity for another hearing during the five-year period.

Another potential problem area concerns the meaning of "compensatory" damages as used in the statute. In general, compensatory damages are defined as:

[D]amages in satisfaction of, or in recompense for, loss or injury sustained. They compensate a plaintiff for actual injury or loss resulting, for instance, from bodily injury or property damage. The term covers all loss recoverable as a matter of right and includes all damages (beyond nominal damages) other than punitive or exemplary damages. [27]

The meaning of compensatory damages in the context of section 2317.45 becomes important when considering an offset of workers' compensation **[*595]** benefits. [28] Workers' compensation is awarded upon a scale based upon the type of injury sustained, and its purpose is to prevent the hardship to an employee of proving employer negligence. [29] Workers' compensation essentially operates so that "a right to compensation is given for all injuries incident to the employment . . . the amount of which is limited and determined in accordance with a definite schedule." [30]

There are many theories underlying workers' compensation. According to the Ohio Manufacturers' Association:

The fundamental principle of the [Workers' Compensation Act] was the establishment of a balance between the interests of labor in receiving fair compensation for injured members of the work force, and the interests of industry in being able to anticipate the costs of compensation as a portion of its overall cost of doing business. Concessions were made on both sides in the attempt to balance these interests. Injured workers gave up the right to sue their employers by agreeing that their sole remedy would be compensation through a newly created state insurance fund. In return, employers agreed to prompt payment of compensation regardless of fault. [31]

The issue with respect to workers' compensation and the operation of section 2317.45 is the following: Suppose that a plaintiff has received workers' compensation benefits, and receives a special jury verdict that includes damages for emotional pain and suffering. Theoretically, it is unclear whether the workers' compensation benefits should be deducted from the plaintiff's **[*596]** recovery, since workers' compensation benefits are not intended to compensate the plaintiff for emotional pain and suffering.

Thus, in the case of the plaintiff/employee who receives a large jury award for emotional pain and suffering, there is a strong argument that this plaintiff was never compensated by workers' compensation, and that, therefore, there should be no offset, particularly when the purported interest in enacting the statute was to prevent a double recovery. If a plaintiff was never compensated for pain and suffering, then there hardly could be a double recovery.

Although this is a theoretically sound argument, the legislature explicitly refers to the term "compensatory" throughout the text of section 2317.45. [32] If the legislature's ultimate goal was to limit judgment amounts as much as possible, then compensatory damages clearly

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would include traditional compensatory damages. Most likely the legislature's concern was upon limiting the final dollar amount of a plaintiff's recovery, as is the case with damage caps, rather than upon a direct correlation between the type of collateral benefit received and the particular type of damages awarded.

Yet another problematic area involves the awarding of attorneys' fees. In the typical case the jury most likely will render a verdict far enough in excess of the collateral benefits received that the attorney will be able to recover a fee from the excess. However, it is possible to imagine a situation in which, for example, over the course of several years the plaintiff has received, and spent, $ 20,000 in collateral benefits. After years of litigation, the plaintiff finally receives a jury verdict in an amount that is $ 20,000 or less. Because the collateral benefits are deducted before the defendant pays the judgment, there is no money available for the attorney. This poses several interesting issues.

First, this could deter a plaintiff's attorney from handling a case he otherwise might have because of a fear that no money will remain to pay his fee. Second, rather than discourage costly litigation, the statute encourages it. When faced with little or no recovery, both the plaintiff and the plaintiff's attorney have increased incentive to fight over the deduction of benefits. Third, an offset of nearly all of the judgment would result in an extremely dissatisfied plaintiff. An individual who was injured two or three years earlier, and who received benefits during those years, may have received only $ 200 or $ 300 per week, which probably was spent as it was received. After going through the time and expense of a trial, and after being awarded damages, the plaintiff still receives nothing. Such a result could encourage both the plaintiff and the plaintiff's attorney to settle for an amount below which the plaintiff may otherwise be willing to settle.

Alaska has solved the dilemma of recovering attorneys' fees by providing in its collateral benefits statute:

[*597] [A]fter the fact finder has rendered an award to a claimant, and after the court has awarded costs and attorneys fees, a defendant may introduce evidence of amounts received or to be received by the claimant as compensation for the same injury from collateral sources that do not have a right of **subrogation** by law or contract. [33]

There remains the troubling issue that was the root of the **collateral source rule:** Should the defendant benefit from his wrong? When the collateral benefits consist of workers' compensation benefits, it appears even more unjust that the defendant should escape financial responsibility for his wrong while the state workers' compensation bureau does not.

On the other hand, if the view of the Ohio Manufacturers' Association is accepted, then workers' compensation should absorb a loss which is an "incident" of employment. [34] While it seems unfair for the plaintiff to receive a double recovery, it also may seem unfair for workers' compensation to pay the defendant's bill. Perhaps the appropriate response to this issue would be to expand those programs that have subrogation rights. [35] Then, the defendant would be required to pay the amount of the judgment, the plaintiff would not receive a double recovery, and workers' compensation funds would be replaced. Rather than repeal the statute or declare it unconstitutional because of this discrepancy, those institutions that regularly pay such types of benefits could adopt subrogation rights.

B. Ohio Case Law

Relatively little litigation has arisen concerning the application and constitutionality of section 2317.45. The Ohio Supreme Court has not directly addressed the statute; however, given the split of opinion that is developing in the lower courts, it is likely that the supreme court will need to resolve the constitutionality of section 2317.45.

[*598] 1. Morris v. Savoy

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In August, 1991, the Ohio Supreme Court held that the Ohio statute that placed a cap upon medical malpractice recoveries was unconstitutional. [36] Interestingly, however, the court held that section 2305.27, which abrogated the collateral source rule for medical malpractice claims, was constitutional. The court made a number of statements regarding the ability of the state legislature to modify the collateral source rule that indicate that, should the constitutionality of section 2317.45 be challenged, the court would hold it constitutional.

According to the court, the legislature's intent in enacting section 2305.27 was to prevent particular kinds of double recoveries, "specifically those which would duplicate recovery from funds that are directly, or indirectly, supported by the general public or the business community, e.g., public welfare or workers' compensation. . . ." [37]

The court distinguished the unconstitutional damages cap from section 2305.27: "Such a setoff may inure to the benefit of the tortfeasor, but it does not do so to the detriment of the victim as does the damage cap of R.C. 2307.43. . . ." [38] The court also permitted a setoff of plaintiff's future workers' compensation payments "to the extent they can be determined with a reasonable degree of certainty." [39]

2. Cook v. Wineberry Deli

In July 1991, the Court of Appeals for Summit County reversed a common pleas court decision holding section 2317.45 unconstitutional. [40] Because this case provides the most comprehensive analysis of section 2317.45 to date, the arguments provided by the lower court, and rejected by the court of appeals, will be discussed in detail. The arguments addressed in these two decisions comprise the major arguments in opposition to the constitutionality of section 2317.45.

After bringing a personal injury and loss of consortium action against defendant Wineberry Deli, the plaintiffs, Timothy and Karen Cook, received a jury award of $ 400,000 in compensatory damages. [41] Defendant moved to apply section 2317.45 to the $ 33,646.97 of workers' compensation benefits **[*599]** plaintiff received. [42] The common pleas court denied this motion and held that section 2317.45 unconstitutionally deprived plaintiffs of "their right to a jury trial, their right to an open court and a remedy, their right to due process, and their right to equal protection under the law." [43]

Before analyzing the constitutional issues posed by the collateral benefits statute, the common pleas court reviewed some of the legislative history presented by plaintiffs. The court noted that the Ohio Alliance for Civil Justice "supported [the statute], originally citing a 'litigation explosion' as the root cause of unaffordable or unavailable liability insurance. It was also claimed that high jury awards caused liability insurance premiums to rise, making it impossible for business to operate with a safety net of insurance, consequently having a detrimental effect on investment and production." [44] The court also noted that the Ohio Alliance for Civil Justice received its support primarily from business and insurance companies. [45]

One group opposing the passage of section 2317.45 was the Ohio Public Interest Campaign. The group argued that "the insurance industry had contrived the insurance crisis solely for the purpose of promoting and protecting 'organized price gouging' by underwriters." [46]

Relying upon several studies, the common pleas court discussed evidence that

[I]nsurance industry profits had actually increased by 505% since 1985. Furthermore, the insurance industry enjoyed net gains of approximately 75 billion dollars between 1976 and 1985. A National Association of Attorneys General Report states that since 1975 the property/casualty stock index has risen more than 500%. This rise was five times the increase in the Dow Jones Industrial Average. [47]

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The court concluded that:

[T]he purpose of [the statute] was not to end the insurance crisis that was contrived by businesses and insurance companies. . . . [The statute] did not seek fairness for all; it favored businesses and insurance companies. . . . [It] **[*600]** was enacted as neither a means of ensuring the availability of insurance coverage, as set out in the bill's preamble, nor as a measure of fairness to all Ohio citizens, as stated by its backers. Rather, it was enacted in response to an 'insurance crisis' contrived by the insurance industry to promote and protect price gouging by underwriters, a basis having no relationship to its stated purpose. [48]

The court of appeals did not address this lengthy legislative history. Instead the court noted:

[I]n enacting R.C. 2317.45, the Ohio Legislature was responding to what it perceived as a crisis in the insurance industry due to rising costs and premiums. To relieve this crisis, the legislature determined that the common law collateral source rule should be partly abrogated, thus relieving the insurance industry -- and, ultimately, the public -- of the burden of paying compensation in excess of that required to make injured parties whole. [49]

a. Right to a Jury Trial

According to the common pleas court, section 2317.45 violates article 1, section 5 of the Ohio Constitution because it "plainly violates a negligently injured person's right to have all the facts in her or his case determined by a jury." [50] The court based its conclusion upon its perception that "the General Assembly has empowered the judiciary to 'materially change' and limit the right to have a jury determine the amount of any damages to be awarded in tort cases." [51]

The common pleas court advanced two additional reasons that section 2317.45 violated the right to a jury trial. First, the court stated that "[t]he effect of the statute is closely akin to that of an automatic remittitur, a court determined reduction of the damages awarded by a jury because the court considers them excessive, even though they are not the result of passion or prejudice." [52] The court then noted that "[r]emittitur is looked on with disfavor **[*601]** in the Ohio courts, and historically, it may be done only with the consent of the plaintiff." [53]

Second, the court disregarded the argument advanced by the defendant that the statute is designed to "prevent[] a double recovery by the plaintiff." [54] The court regarded this argument as "fallacious" and stated that it "presumes that the collateral benefit has completely compensated the tort victim." [55] The fact that the source of the collateral benefit in this case was workers' compensation buttressed the court's statement that "[p]ayments made under Ohio Workers' Compensation Program are not, and were never meant to be complete compensation for an injured employee. Consequently, it is wholly inappropriate to subtract Workers' Compensation benefits from [plaintiffs'] compensatory award." [56]

The lower court also stated that even if it were to accept defendant's argument that plaintiffs would be receiving a double recovery, "[t]he wrong done to plaintiff by the defendant is not diminished in any way by the plaintiff's receipt of collateral benefits." [57] The plaintiff was held to be the party most entitled to benefit from the defendant's wrong.

The court of appeals rejected the lower court's reasoning. According to the court:

R.C. 2317.45 specifically preserves the inadmissibility of evidence of collateral benefits at trial, and therefore does not in any way invade the province of the jury in its determination of the central issues of liability and the damages suffered by the plaintiff. The true significance of R.C. 2317.45 does not come into operation until after trial and after the jury's verdict. Cook's argument **[*602]** ignores the obvious -- that the issue of collateral benefits was

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never before the jury under the collateral source rule, and this situation is not altered under R.C. 2317.45. Therefore, R.C. 2317.45 neither removes nor adds to any issues before the jury, nor does it alter the trial proceedings in any manner. [58]

b. Open Courts and Right to a Remedy

The common pleas court held that section 2317.45 violated Ohio Constitution article I, section 16, which provides that "all courts shall be open, and every person, for an injury done to him in his lands, goods, person or reputation, shall have remedy by due course of law." [59] The court reasoned that the plaintiff is denied a remedy when the jury renders a verdict for compensatory damages and the judge then deducts from that verdict. The court stated:

The parties are being told by the legislature that, regardless of what the finder of fact has determined, the defendant will not be held responsible for the full extent of plaintiff's resulting injuries. . . . The statute] strips a jury verdict of its purpose and significance. It is rendered a sterile, meaningless gesture and a mockery of what is supposed to be a meaningful remedy. [60]

The court of appeals strongly disagreed with this argument. The court of appeals stated:

[I]n Cook's view, a meaningful remedy can be had only by holding the negligent tortfeasor responsible to the full extent of injuries suffered, regardless of the extent to which the plaintiff may already have been made whole through other sources of compensation. . . . By enacting R.C. 2317.45, the legislature has now shifted the emphasis in tort actions away from punishing the merely negligent tortfeasor, and toward ensuring that the plaintiff is fully compensated and made whole, regardless of the sources of compensation. Such a decision was properly within the province of the legislature to make. [61]

c. Due Process

Because the right to a jury trial and to a remedy are considered fundamental, the common pleas court held that the state must demonstrate that **[*603]** the statute furthered a "compelling" state interest in order to comply with the requirement of due process of law. [62]

The lower court found a number of flaws in the statute, each of which it held violated due process. [63] One problem which the court found particularly troublesome was the possibility of a "double deduction." [64] That is, even though the jury will not be informed of a plaintiff's receipt of collateral benefits, "there is no procedural safeguard for plaintiffs to prevent the jury from discounting the verdict to reflect their own sensibilities regarding collateral benefits and 'double recoveries.'" [65]

The common pleas court was troubled by the fact that the defendant, and the defendant's insurance company would "reap the benefits of plaintiff's Workers' Compensation benefits. . . . Consequently, the injured party is saddled with the additional burden of supporting the liability insurance industry, rather than that burden properly being upon the defendant." [66]

The court of appeals dispensed with this line of argument rather quickly. Treating both the due process and equal protection claims together, the court of appeals applied rational basis review because section 2317.45 "neither implicates any fundamental or substantive rights, nor creates any suspect classifications. . . ." [67] With respect to Cook's contention that the insurance crisis was a "hoax," the court of appeals responded by stating that the

[A]rguments, both pro and con, were thoroughly presented to and considered by the legislature when it deliberated the enactment of R.C. 2317.45. Even a cursory review of these arguments makes it clear that, at the very least, there were legitimate, debatable questions of whether an insurance crisis existed, and whether the remedy undertaken by the legislature was appropriate. [68]

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d. Equal Protection

Relying upon article I, section 2 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution, the common pleas court held that section 2317.45 violates equal protection because "it treats tort victims who are injured at work or who are entitled to certain government **[*604]** benefits differently from tort victims who receive benefits from a private insurer, therefore, requiring different treatment of those within the classification." [69] The court also regarded the classification as unconstitutional because it separates victims of medical malpractice from the victims of other forms of negligence. Therefore, the court applied strict scrutiny. [70]

Although the court of appeals rejected the lower court's equal protection argument, the court of appeals did not provide any substantive analysis to guide future cases. In this respect the recent Ohio Supreme Court decision in Morris v. Savoy [71] may be helpful. In Morris the supreme court considered, and rejected, the argument that the collateral benefits statute for medical malpractice claims violated equal protection. [72] According to the supreme court, "a line is drawn -- the statute covers only a 'medical claim' -- but does not make any internal distinctions among class members. All plaintiffs in medical malpractice must confront the same setoff of benefits from collateral sources." [73] The same is true for section 2317.45 -- all plaintiffs face the same setoff.

3. Jeffers v. Phillips Ready Mix

In January, 1991, the Ohio Court of Appeals for the Second District upheld section 2317.45, and applied the statute in order to deduct workers' compensation benefits from plaintiff-appellant's jury award. [74] In this case, plaintiff-appellant Jeffers (hereinafter referred to as plaintiff) sued the defendant, a third party, for injuries plaintiff suffered while working for Sowder Concrete Corporation. [75] Both the plaintiff and the defendant were found negligent. [76] The jury awarded the plaintiff $ 39,500 in damages, and then reduced this amount by 40% due to plaintiff's negligence. [77] The net amount of damages totaled $ 23,700. However, the plaintiff also received collateral benefits totaling $ 22,403.14. [78] The plaintiff appealed the trial court's deduction of these benefits from the $ 23,700 jury award.

[*605] The plaintiff made three arguments relevant to this Note. First, the plaintiff argued that "the collateral benefits should be subtracted from the damages assessed by the jury before factoring in [plaintiff's] comparative negligence." [79] Second, the plaintiff argued that because the jury awarded $ 14,000 for future pain and suffering although he would not have future medical expenses, this amount should not be offset. [80] Third, the plaintiff argued that the jury received evidence of $ 10,292.36 in medical bills as proof of the plaintiff's injury, but that the judge deducted $ 22,403.14 of collateral benefits. [81]

The court systematically and straightforwardly overruled each of the plaintiff's objections to the operation of section 2317.45. The court held that collateral benefits are to be deducted from the jury award, reduced by the plaintiff's negligence. [82] The court reasoned that "[t]he answer is found in R.C. 2317.45 (B)(2)(c)(i), the operative portion of which reads . . . 'compensatory damages that the plaintiff otherwise would be awarded.'" [83] The plaintiff, but for the collateral benefits, would receive $ 23,700. Therefore, that is the amount from which the benefits should be deducted.

The court also rejected the plaintiff's future pain and suffering argument. The court did not consider whether in fact the plaintiff would receive a double recovery. Instead, the court held that "[t]he way the statute is written, compensatory damages includes all damages except punitive damages. While future pain and suffering is not something for which collateral benefits are received, it is not the province of the court to revise plain legislative enactments." [84]

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NOTE: RESTORATION OF THE COLLATERAL SOURCE RULE IN KENTUCKY:A REVIEW OF O'BRYAN V. HEDGESPETH

by Craig L. Farrish

SUMMARY:
... In 1988, in response to the perceived crisis, the Kentucky General Assembly passed House Bill 551, An Act Relating to Civil Actions (Act). ... The Rule has both an evidentiary and a damage component. ... The second major issue discussed by the court of appeals was whether KRS section 411.188 violated section 116 of the Kentucky Constitu- tion. ... First, the abrogation of the collateral source rule by KRS section section 411.188 was unconstitutional. ... The court overruled Edwards and declared KRS section 411.188 unconstitutional on the grounds that "all evidence of collateral source payment was constitutionally impermis- sible, and prejudicial to the jury's consideration of damages." ... The O'Bryan opinion then addressed the principle holding in Edwards v. Land, that KRS section 411.188 should be embraced in lieu of the collateral source rule under the principle of comity. ... The two main holdings of O'Bryan are: (i) a rejected motion in limine is sufficient to preserve the right to appeal, despite the presentation of adverse evidence at trial, and (ii) KRS section 411.188 was an unconsti- tutional abrogation of the collateral source rule. ...

TEXT:
[*357]

I. INTRODUCTION

During the mid-1980's, in response to what was deemed a liability insurance crisis, state legislatures throughout the nation enacted a variety of tort reform measures designed to address the perceived crisis. [1] In 1988, in response to the perceived crisis, the Kentucky General Assembly passed House Bill 551, An Act Relating to Civil Actions (Act). [2] This legislation consisted of twenty-six sections addressing a wide range of legal issues including apportionment of damages, municipal corporation immunity, punitive damages, personal liability of corporate officers and directors, and the collateral source rule. [3]

Section four of the Act, which was codified as KRS section 411.188, abrogated the collateral source rule. [4] The collateral source rule is a com- mon law rule which provides that if an injured person receives compensa- tion for his injuries from a third party independent of the tort-feasor, the amount of that compensation should not be deducted from any award obtained from the tort-feasor. [5]

The primary issue raised on appeal in O'Bryan v. Hedgespeth was the constitutionality of the General Assembly's action in abrogating the col- lateral source rule. [6] A secondary issue

reestablish or affirm the Rule. [157] In the past two **[*375]** years, twenty-six state supreme courts have heard cases which addressed the Rule, and in the overwhelming number of those cases, twenty, the courts have decided in favor of the Rule. [158] Given this strong trend in support of the Rule, it seems very unlikely that the abrogation of the Rule will be included in future attempts of civil litigation reform by the legislature.

V. CONCLUSION

O'Bryan impacts two important aspects of Kentucky civil litigation. First, the decision reestablished the common law collateral source rule. As noted by the court, "the right of every individual in society to ac- cess a system of justice to redress wrongs is basic and fundamental to our common law heritage." [159] The rule prevents a defendant from reducing his liability and, thereby, receiving a windfall based on the plaintiff's private contractual relationships. This decision restored a plaintiff's right to recover the entire amount of expenses incurred as a result of a defendant's wrongful actions.

The second important aspect of the decision is that it clarified the use of motions in limine, with respect to preserving an objection for appeal. The result is that a plaintiff's presentation of evidence adverse to itself at trial pre-empts the defense from later raising unflattering inferences as to the plaintiff through its introduction of the same evidence, without waiv- ing the right to appeal the decision of the trial court on a motion in limi- ne to exclude the evidence.

Together, the two holdings in O'Bryan reestablish a level playing field at trial. First, a plaintiff is now able to exclude prejudicial evidence relating to third party payments. Second, trial counsel may use a wider range of tactical options in presenting evidence, secure in the knowledge that they are not waving a right to appeal the admission of the evidence.

FOOTNOTES:

n1 See e.g., Robert R. Sparks, A Survey of Kentucky Tort Reform, 17 N. Ky. L. Rev. 473 (1990); See also, W. Kip Viscusi and Patricia Born, The National Implications of Liability Reforms for General Liability and Medical Malpractice Insurance, 24 Seton Hall L. Rev. 1743 (1994); Julie A. Schafer, Note, The Constitutionality of Offsetting Collateral Benefits under Ohio Revised Code Section 2317.45, 53, Ohio St. L.J. 587 (1992).

n2 An Act relating to civil actions, ch. 224, 1988 Ky. Acts 557.

n3 Sparks, supra note 1, at 474.

n4 An Act relating to civil actions, ch. 224, 1988 Ky. Acts 557.

n5 Black's Law Dictionary 262 (6th ed. 1990).

n6 O'Bryan v. Hedgespeth, 892 S.W.2d 571 (Ky. 1995).

n7 Id. at 574.

n8 Nancy L. Manzer, Note, 1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability, 73 Cornell L. Rev. 628, 629 (1988).

n9 Viscusi & Born, supra note 1, at 1744.

n10 Id.

n11 Manzer, supra note 8, at 629.

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n12 Viscusi, supra note 1, at 1744.

n13 Id.

n14 Id.

n15 Lisa Genasci, Product-Liability Suits Dropping; Sexual-Harassment Filings Rise, Louisville Courier-J., Oct. 9, 1994, at E3.

n16 Sparks, supra note 1, at 473.

n17 Legislative Research Commission, Report of the Kentucky Insurance and Liability Task Force, Research Report No. 232, 1-2 (1988) [hereinafter Commission]. The Task Force was comprised of attorneys, state legislators, county and municipal officials, members from groups ranging from the Kentucky Medical Association to the United Mine Works Union.

n18 Id.

n19 Sparks, supra note 1, at 473.

n20 Commission, supra note 17, at 15.

n21 Sparks, supra note 1, at 474.

n22 Dag E. Ytreberg, Annotation, Collateral Source Rule: Injured Person's Hospitalization or Medical Insurance As Affecting Damages Recoverable, 77 A.L.R.3d 415, 419 (1977).

n23 Id.

n24 Id.

n25 Schafer, supra note 1, at 589.

n26 Id.

n27 Id.

n28 See generally Kenneth S. Abraham, What is a Tort Claim? An Interpretation of Contemporary Tort Reform, 51 Md. L. Rev. 172, 190 (1992).

n29 Id.

n30 Id.

n31 Id. at 192. Medicare and Medicaid programs do the same in the public arena.

n32 An Act relating to civil actions, ch. 224, 1988 Ky. Acts 557.

n33 Sparks, supra note 1, at 473.

n34 Ky. Rev. Stat. Ann. section 411.188 (Baldwin 1995). The statute provides in its entirety:

(1) This section shall apply to all actions for damages, whether in contract or tort, commenced after July 15, 1988.

(2) At the commencement of an action seeking to recover damages, it shall be the duty of

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the plaintiff or his attorney to notify, by certified mail, those parties believed by him to hold subrogation rights to any award received by the plaintiff as a result of the action. The notification shall state that a failure to assert subrogation rights by inter- vention, pursuant to Kentucky Civil Rule 24, will result in a loss of those rights with respect to any final award received by the plaintiff as a result of the action.

(3) Collateral source payments, except life insurance, the value of any premiums paid by or on behalf of the plaintiff for same, and known subrogation rights shall be an admis- sible fact in any civil trial.

(4) A certified list of the parties notified pursuant to subsection (2) of this section shall also be filed with the clerk of the court at the commencement of the action.

n35 Id.

n36 Id.

n37 Id.

n38 851 S.W.2d 484 (Ky. Ct. App. 1992), review denied, 858 S.W.2d 698 (Ky. 1993), overruled by O'Bryan v. Hedgespeth, 892 S.W.2d 571 (1995).

n39 858 S.W.2d 798 (Ky. 1993); see O'Bryan, 892 S.W.2d at 575.

n40 Edwards, 851 S.W.2d at 484.

n41 O'Bryan, 892 S.W.2d at 573.

n42 Id. at 578.

n43 Edwards, 851 S.W.2d at 484.

n44 The title of the Act is "An Act relating to civil actions."

n45 Edwards, 851 S.W.2d at 484.

n46 Ky. Const. section 51.

n47 Edwards, 851 S.W.2d at 486.

n48 Id. at 487.

n49 Id.

n50 Id. (citing Farris v. Shopper's Village Liquors, Inc., 669 S.W.2d 213, 214 (Ky. 1984)).

n51 Id.

n52 Id. (citing Owsley v. Commonwealth, S.W.2d 408, 410 (Ky. Ct. App. 1988)).

n53 Id.

n54 Id.

n55 Id. at 488.

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n56 Ky. Const. section 116.

n57 Edwards, 851 S.W.2d at 488.

n58 Id. (citing Commonwealth v. Reneer, 734 S.W.2d 794, 797 (Ky. 1987)) (emphasis added).

n59 See generally Black's Law Dictionary 267 (6th ed. 1990). The Kentucky Supreme Court's formulation of comity can be found in Ex Parte Farley, 570 S.W.2d 617, 624 (Ky. 1978). The Supreme Court held:

It is not our disposition to be jealous or hypertechnical over the boundaries that separate our domain from that of the legislature. Where statutes do not interfere or threaten to interfere with the orderly administration of justice, what boots it to quibble over which branch of government has rightful authority? We respect the legislative branch, and in the name of comity and common sense are glad to accept without cavil the application of its statutes pertaining to judicial matters.

Id. at 624.

n60 Ex parte Auditor of Public Accounts, 609 S.W.2d 682, 688 (Ky. 1980).

n61 Id.

n62 Id.

n63 Ky. Const. section 54.

n64 Edwards v. Land, 851 S.W.2d 484, 488 (Ky. Ct. App. 1992).

n65 Id.

n66 Id.

n67 Id.

n68 Id.

n69 O'Bryan v. Hedgespeth, 892 S.W.2d 571, 574 (Ky. 1995).

n70 Id. at 573.

n71 Id.

n72 Id. The evidence presented by the appellant, Richard O'Bryan was his medical bills which totaled $ 48,068.04. The bills were divided into his out-of-pocket expenses of $ 18,390.08 and the collateral source payments he had received of $ 30,000. Id.

n73 Id. at 573-74.

n74 Id.

n75 Id.

n76 Id.

n77 Id.

n78 Id.

n79 Id.

n80 Id. at 574-78.

n81 Id. at 574.

n82 Id.

n83 Id.

n84 Id. (emphasis added).

n85 Ky. R. Evid. 103(d) (Baldwin). Rule 103(d) provides, in pertinent part: "a party may move the court for a ruling in advance of trial on the admission or exclusion of evi- dence . . . . A motion in limine resolved by order of record is sufficient to preserve error for appellate review." Id.

n86 O'Bryan v. Hedgespeth, 892 S.W.2d 571, 575 (Ky. 1995).

n87 Id.

n88 Id.

n89 Id.

n90 Id.

n91 Ky. Const. section 51.

n92 O'Bryan, 892 S.W.2d at 576.

n93 Id.

n94 Id.

n95 Id.

n96 Ky. Const. sections 27, 28.

n97 Ky. Const. section 116.

n98 Ky. R. Evid. 401. Rule 401 defines relevant evidence as evidence having any tenden- cy to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Id.

n99 0571*000576 O'Bryan, 892 S.W.2d at 576.

n100 Id.

n101 Id.

n102 Id.

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n103 See, e.g., Davidson v. Vogler, 507 S.W.2d 160, 164 (Ky. 1974).

n104 Burke Enter., Inc. v. Mitchell, 700 S.W.2d 789, 796 (Ky. 1985).

n105 O'Bryan, 892 S.W.2d at 576.

n106 Id.

n107 See, e.g., Abraham, supra note 28, at 190. See also Sparks, supra note 1, at 489.

n108 O'Bryan, 892 S.W.2d at 576.

n109 Id.

n110 Id.

n111 736 S.W.2d 294 (Ky. 1987). The statute attempted to define a common term in broad form deeds.

n112 860 S.W.2d 280, 283 (Ky. 1993).

n113 O'Bryan, 892 S.W.2d at 577, 578.

n114 Id. at 577.

n115 Id. (citing Black's Law Dictionary 242 (5th ed. 1979)).

n116 Ky. Sup. Ct. R. 1.010, 1.020(1)(a).

n117 O'Bryan, 892 S.W.2d at 577.

n118 Id.

n119 Id.

n120 Id.

n121 734 S.W.2d 794 (Ky. 1987). This case was cited in Edwards v. Land by the court of appeals as authority to uphold KRS 411.188 under the doctrine of comity. The case dealt with sentencing procedure.

n122 00892000571*000577 O'Bryan, 892 S.W.2d at 577.

n123 Id.

n124 Id. at 578.

n125 Id.

n126 Id.

n127 Id.

n128 Catherine Murr Young, Should A Motion In Limine Or Similar Preliminary Motion Made In The Federal Court System Preserve Error on Appeal Without a Contemporaneous Objection?, 79 Ky. L.J. 177, 179 (Fall 1990).

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n129 Edward J. Imwinkelried, The Pretrial Importance and Adaptation of the "Trial" Evidence Rules, 25 Loy. L.A. L. Rev. 965, 977 (April 1992).

n130 Id.

n131 Id.

n132 See generally John B. Trawick, Motions in Limine Preserving Error on Appeal When a Party Loses a Motion in Limine, 18 Am. J. Trial Advoc. 485, 486 (Fa ll 1994). See also Colleen R. Courtade, Annotation, Sufficiency in Federal Court of Motion in Limine To Preserve for Appeal Objection to Evidence Absent Contemporary Objection at Trial, 76 A.L.R. Fed. 619, 622 (1986).

n133 See Courtade, supra note 135, at 623.

n134 See generally Courtade, supra note 135, at 623. See also Young, supra note 128, at 180.

n135 Courtade, supra note 135, at 623.

n136 See Trawick, supra note 135, at 486.

n137 Young, supra note 131, at 178.

n138 Id. at 179.

n139 Id. at 179.

n140 Id.

n141 O'Bryan v. Hedgespeth, 892 S.W.2d 571, 574 (Ky. 1995).

n142 Id.

n143 See, e.g., Tungate v. Commonwealth, No. 93- CA-001765-MR, 1995 WL 10696 (Ky. Ct. App. Jan. 13, 1995), aff'd, 901 S.W.2d 41 (Ky. 1995).

n144 1818000892000571*000575 O'Bryan, 892 S.W.2d at 575.

n145 Sparks, supra note 1, at 490.

n146 Id. at 473 (citing Legislative Research Commission, Report of the Kentucky Insurance and Liability Task Force, Research Report 232, at 15 (1988)).

n147 Id. at 490.

n148 Id.

n149 Id.

n150 O'Bryan v. Hedgespeth, 892 S.W.2d 571, 576 (Ky. 1995).

n151 Id.

n152 See, e.g., Edwards v. Land, 851 S.W.2d 484, 488 (Ky. Ct. App. 1992), review denied, 858 S.W.2d 698 (Ky. 1993), overruled by O'Bryan v. Hedgespeth, 892 S.W.2d 571 (1995). See also O'Bryan v. Hedgespeth, 892 S.W.2d at 575.

n153 O'Bryan, 892 S.W.2d at 576.

n154 Id. at 577.

n155 Id.

n156 Id.

n157 Since 1993, twenty-six state supreme courts have addressed the issue of the collateral source rule. Twenty states, including Kentucky, have either reestablished or affirmed the rule. Peters v. Pierce, 858 S.W.2d 680 (Ark. 1993); Smith v. Zufelt, 880 P.2d 1178 (Colo. 1994); Fleming v. Garnett, 646 A.2d 1308 (Conn. 1994); The Medical Ctr. of Delaware, Inc. v. Mullins, 637 A.2d 6 (Del. 1994); Safeway Stores, Inc. v. Buckmon, 652 A.2d 597 (D.C. App. 1994); Amalgamated Transit Union Local 1324 v. Roberts, 434 S.E.2d 450 (Ga. 1993); Sato v. Tawata, 897 P.2d 941 (Haw. 1995); Thompson v. KFB Ins. Co., 850 P.2d 773 (Kan. 1993); O'Bryan v. Hedgespeth, 892 S.W.2d 571 (Ky. 1995); Potvin v. Seven Elms, Inc., 628 A.2d 115 (Me. 1993); Washington v. Barnes Hosp., 897 S.W.2d 611 (Mo. 1995); Cyr v. J.I. Case Co., 652 A.2d 685 (N.H. 1994); Sanchez v. Clayton, 877 P.2d 567 (N.M. 1994); Baxley v. Nationwide Mut. Ins. Co., 430 S.E.2d 895 (N.C. 1993); 04*000504 Sorrell v. Thevenir, 633 N.E.2d 504 (Ohio 1994); Moniz v. Providence Chain Co., 618 A.2d 1270 (R.I. 1993); Otis Elevator, Inc. v. Hardin Const. Co. Group, Inc., 450 S.E.2d 41 (S.C. 1994); Wheeler v. Catholic Archdiocese of Seattle, 880 P.2d 29 (Wash. 1994); Johnson v. General Motors Corp., 438 S.E.2d 28 (W. Va. 1993); and Voge v. Anderson, 512 N.W.2d 749 (Wis. 1994).

Five states have affirmed or upheld the abrogation of the rule. Senn v. Alabama Gas Corp., 619 So. 2d 1320 (Ala. 1993); Jackson v. Farm Bureau Mut. Ins. Co., 528 N.W.2d 516 (Iowa 1995); Kiss v. Jacob, 650 A.2d 336 (N.J. 1994); Greco v. United States, 893 P.2d 345 (Nev. 1995); and Dewitz v. Emery, 508 N.W.2d 334 (N.D. 1993). One state, Montana, in Knutson v. Barbour, 879 P.2d 696 (Mont. 1994), refused to address the issue because it was not properly before the court, but suggested it would reestablish the rule if properly presented.

n158 Id.

n159 O'Bryan v. Hedgespeth, 892 S.W.2d 571, 578 (Ky. 1995).

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addressed by O'Bryan was wheth- er a denied motion in limine preserves the right to appeal without offer- ing a second objection during trial. [7] **[*358]**

This note first discusses the legislative and judicial background affect- ing the court's decision in O'Bryan. Also, the note provides a brief over- view of the collateral source rule. Following the background material, this note reviews the court's reasoning in O'Bryan and then concludes with a discussion of O'Bryan's impact on Kentucky law.

II. BACKGROUND

A. Overview of the Liability Insurance Crisis

During the early 1980's, the insurance industry was faced with mount- ing financial losses. In response, the industry raised premiums, canceled or refused to renew existing policies, and refused to issue certain high- risk policies. [8] Companies unable to obtain liability insurance were forced to limit services or to drop business lines. [9] For example, the Coney Is- land Cyclone ride was closed temporarily, municipal parks closed play- grounds, motels removed diving boards from their swimming pools, the private aircraft industry in the United States virtually shut down altogeth- er, almost all pharmaceutical manufacturers abandoned the production of vaccines, and U.S. contraceptive research came to a halt. [10] This inability of businesses and municipalities to obtain reasonably priced insurance is what became commonly known as the liability insurance crisis. [11]

An illustration of the evidence cited to support the claim of a liability insurance crisis was the level of insurance premiums firms paid for liabil- ity insurance coverage. [12] For example, general liability insurance pre- miums increased nearly 300 percent from a national aggregate of $ 6.5 billion in 1984, to $ 19.4 billion in 1986. [13] Indeed, much of the impetus for the tort liability reform efforts came from a perception that the insur- ance markets were in a state of crisis during this period. [14] During the 1980's, a concerted and largely successful effort, led by large corpora- tions and the insurance industry, was made to convince the public that the reason for the liability insurance crisis was an out-of-control civil justice system and that legal reforms were required. [15] **[*359]**

B. Kentucky's Response to the Liability Insurance Crisis

In response to the liability insurance crisis, the Kentucky General Assembly formed the Kentucky Insurance and Liability Task Force (Task Force). [16] The Task Force was composed of a variety of private groups and public officials. [17] It was formed to examine the liability insurance crisis, report on its causes, and to review legislation from other states that had been enacted to address the liability insurance crisis. [18]

The Act was essentially the Kentucky General Assembly's adoption of the Task Force recommendations for reform of the civil justice system. [19] It is interesting to note that the Task Force specifically found no evidence that a litigation explosion was responsible for causing the liability insur- ance crisis in Kentucky. [20] However, the Task Force justified its pro- posed reforms by concluding that they were required in order to improve the efficiency, predictability, and cost-effectiveness of the civil justice system. [21]

C. Overview of the Collateral Source Rule

One of the Task Force recommendations which was adopted by the General Assembly was to abrogate the collateral source rule. The col- lateral source rule (Rule), which originated as early as 1823 in England and was first adopted in this country in 1854, expresses a two fold public policy judgment. [22] First, the Rule encourages citizens to purchase and maintain insurance for personal injuries and for other eventualities. [23] Second, the Rule prevents tort- feasors from being able to avoid liability for the full amount of damages caused by their actions. [24]

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The Rule has both an evidentiary and a damage component. [25] As a **[*360]** rule of evidence, it precludes introduction into evidence of any benefits the plaintiff obtained from collateral sources. [26] The Rule affects the de- termination of damages by forcing the defendant to pay for the entire loss he caused despite independent recoveries by the plaintiff for the same loss. [27]

The main criticism of the Rule is that it permits double payment of damages to a plaintiff for the same injury. [28] Double payment can occur in cases where a plaintiff has not suffered out-of-pocket expenses as a result of reimbursement received from third party payor sources, such as insurance companies, and liability is imposed on a defendant for the en- tire amount of costs incurred by the plaintiff, without subtracting com- pensation received by the plaintiff from third party sources. [29]

The main arguments in support of the Rule are: (i) the damages in- curred by the plaintiff are real, even if the cost is borne by a third party; (ii) plaintiff is not always compensated for all of their costs, therefore duplicate recovery of one expense may compensate for other unrecovered costs; (iii) plaintiffs should not be denied the benefit of their foresight in purchasing insurance; and (iv) double compensation of the plaintiff can be avoided by permitting the plaintiff's insurer to have the right of subro- gation. [30] Since insurance companies generally provide in their policies for **subrogation** rights against tort-feasors, the plaintiff does not, in fact, realize a double payment for the same injury. [31]

D. Abrogation of the **Collateral Source Rule** in Kentucky

1. Legislative Action

As discussed above, the Kentucky General Assembly passed the Act [32] in response to a perceived liability insurance crisis. [33] Section four of the Act, which was codified as KRS section 411.188, abrogates the **collateral source rule.** [34] The statute abrogates the **collateral source rule** by requir- **[*361]** ing "collateral source payments . . . to be an admissible fact in any civil trial." [35] It further requires that parties holding **subrogation** rights to any portion of the award the plaintiff seeks to recover be listed and noti- fied. [36] The law requires that the notification to third parties state that a failure to assert subrogation rights by intervention, pursuant to Kentucky Civil Rule 24, will result in a loss of those rights with respect to any final award received by the plaintiff. [37]

2. Judicial Development

The constitutionality of the statute was first addressed in 1992, by the Kentucky Court of Appeals, in Edwards v. Land. [38] T he Kentucky Su- preme Court denied discretionary review of the Edwards decision. [39]

One possible explanation for denying discretionary review in Edwards and granting it in O'Bryan is the procedural posture of the two cases. Edwards was on appeal from the Boyle County Circuit Court, which granted a motion in limine finding the Act, and consequently KRS section 411.188, unconstitutional. [40] O'Bryan, in contrast, was appealed after a full trial, where the final damages awarded were less than the special damages presented by the plaintiff at trial. [41]

In declaring KRS section 411.188 unconstitutional, the Kentucky Su- preme Court specifically overruled the decision in Edwards. [42] In order to place the holding of O'Bryan in proper context, a brief review of the **[*362]** rationale and holding in Edwards is required.

a. Edwards v. Land

The court of appeals reversed the Boyle County Circuit Court's finding that the Act and KRS

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section 411.188 were unconstitutional as a matter of law. [43] The Boyle County Circuit Court determined that the Act ad- dressed a plurality of subjects, only some of which relate to civil ac- tions, [44] in contravention of section 51 of the Kentucky Constitution. [45] Section 51 provides, in pertinent part, that "no law enacted by the Gener- al Assembly shall relate to more than one subject, and that shall be ex- pressed in the title." [46]

The court of appeals noted that the Boyle Circuit Court found KRS section 411.188 "does fit within the title," but declared that the Act's violation of section 51 of the Kentucky Constitution rendered the whole act unconstitutional. [47] The statute, as one component of the Act, was consequently declared unconstitutional despite the fact that the statute was within the legitimate ambit of the Act's title. [48]

The court of appeals addressed several issues in its decision. However, only three major issues were specifically discussed by the Kentucky Supreme Court in O'Bryan. First, the court of appeals held that the lower court's determination that the Act violated section 51 of the Kentucky Constitution was incorrect as a matter of law. [49] In addition, the court of appeals stated that "it has long been the rule in Kentucky that when a subject foreign to the title of an act is introduced . . . that subject or those subjects may be omitted from the act, and the subjects conforming to the title retained, thereby rendering the act, thus distilled, constitution- al." [50] Further, the court noted that Kentucky recognizes the general principle of jurisprudence that a court should refrain from addressing issues not before it. [51]

The court of appeals summarized the previous two points by stating that "we have demonstrated an unwillingness to excise sections from acts **[*363]** which do not appear to conform to the title, when the court is being called upon to adjudge the constitutionality of only a certain section or certain sections within the act." [52] Accordingly, the court of appeals spe- cifically held, for the two reasons stated above, that as a matter of law, the trial court erred in determining the Act to be unconstitutional in its entirety and that the trial court erred by not restricting its analysis to the conformity of KRS section 411.188. [53] The court of appeals concluded its holding on this issue by noting that the trial court was "clearly correct" in finding KRS section 411.188 to be constitutional with respect to sec- tion 51 of the Kentucky Constitution because the statute addressed an issue relating to civil actions. [54]

The second major issue discussed by the court of appeals was whether KRS section 411.188 violated section 116 of the Kentucky Constitu- tion. [55] Section 116 grants the Kentucky Supreme Court the authority to promulgate rules of practice and procedure in the courts of Kentucky. [56] The court of appeals stated that the constitutional grant of power to the judiciary is "by no means an inflexibly exclusive authority." [57] The court of appeals quoted the Kentucky Supreme Court's decision in Common- wealth v. Reneer, in which the court held that even if a statute constitutes "an encroachment by the General Assembly upon the prerogatives of the judiciary, it is, nevertheless, not an unreasonable encroachment if it can be accepted under the principles of comity." [58]

Comity is generally defined as the principle by which courts will give effect to legislative acts, not as a matter of obligation, but out of defer- ence and respect. [59] The test employed by the Kentucky Supreme Court **[*364]** to determine when the principle of comity may be applied is whether an act constitutes an unreasonable interference with the functioning of the courts. [60] Although the court of appeals conceded that KRS section 411.188 does encroach upon the authority granted to the judiciary, the court ruled that the encroachment was reasonable and, therefore permissi- ble under the principles of comity. [61]

The third major point discussed by the court of appeals was whether KRS section 411.188 violated section 54 of the Kentucky Constitution. [62] Section 54 of the Kentucky Constitution provides that "the General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property." [63] Land, the appellee, argued that by repealing the collateral source rule, the legislature effectively limited the amount a plaintiff could recover. [64] Further, the appellee contended that allowing evidence of

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collateral source payments would obviously invite a jury to reduce an award of damages. [65]

The court of appeals fundamentally disagreed with the appellee's con- tention. [66] Justice Leibson stated that "nowhere in KRS section 411.188 is any sort of cap set on the recovery available in a civil action for injury or death. The statute makes no mention at all of limiting damages." [67] Although the court of appeals upheld that statute, it acknowledged that "the statute may serve to reduce the level of recovery awarded in some civil actions" but concluded that "no limitation on recovery is to be found in the statute." [68]

b. O'Bryan v. Hedgespeth

Because the Kentucky Supreme Court denied discretionary review of th e Edwards decision, Edwards was controlling authority when O'Bryan reached the appellate level. [69] Prior to trial, O'Bryan, the plaintiff, made a motion in limine to exclude evidence of collateral source payments and objecting to any mention of collateral source payments during the course **[*365]** of this trial. [70] The trial judge rejected the motion and stated that "your objection is on the record and I'll overrule it for the record. We'll go by the statute." [71] At trial, O'Bryan introduced evidence of his medical bills, indicating the amount of his out-of-pocket expenses as well as collateral source payments. [72]

Three arguments were presented by O'Bryan in the Kentucky Supreme Court against the trial court's decision, affirmed by the court of appeals, to reject his motion in limine. First, the abrogation of the collateral source rule by KRS section section 411.188 was unconstitutional. [73] Sec- ond, regardless of the constitutionality of the statute, the trial court should have excluded evidence regarding the portion of collateral source payments which constituted payment of no-fault benefits. [74] Finally, fail- ure to award damages for permanent impairment of earning power was inadequate as a matter of law. [75]

The Kentucky Supreme Court granted discretionary review only to consider the question of whether KRS section 411.188 was unconstitu- tional. [76] Justice Leibson's rationale was that the constitutionality of KRS section 411.188 was an issue "of institutional importance because the statute impacts the trial of a great many civil actions." [77] The court did not address the question of the classification of no-fault benefits as collat- eral source payment because it was not properly raised on appeal. [78] As to the third issue raised, the court held that "we would not second-guess the court of appeals' decision affirming the jury award of zero dollars for permanent impairment of earning power." [79]

In its opinion, the O'Bryan court first strongly rejected a threshold challenge by Hedgespeth, the defendant, that O'Bryan's motion in limine, when denied, failed to preserve his objection to evidence of collateral source payments. The court then discussed four arguments against the constitutionality of KRS section 411.188. [80] The court overruled Edwards **[*366]** and declared KRS section 411.188 unconstitutional on the grounds that "all evidence of collateral source payment was constitutionally impermis- sible, and prejudicial to the jury's consideration of damag es." [81]

III. THE COURT'S REASONING

As discussed in the previous section, the Kentucky Supreme Court's opinion addressed two main issues: (i) wavier of the right to appeal the introduction of collateral payment evidence at trial and (ii) the constitu- tionality of KRS section 411.188. This section will first review the court's analysis of the waiver issue, followed by a discussion of each of the four main points addressed by the court in deciding the constitutionality of KRS 411.188.

A. Waiver

The court flatly rejected Hedgespeth's claim that O'Bryan's motion in limine, when denied, failed to preserve the right to object to evidence of collateral source payments. [82] The court

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took note that O'Bryan elected to go forward with the evidence of collateral source payments once his motion in limine was overruled, rather than leaving it to Hedgespeth to present the evidence. Justice Leibson reasoned that leaving the evidence of collateral source payments to be presented by Hedgespeth, after O'Bryan had concluded his case, would have given the appearance that O'Bryan had attempted to conceal the evidence, which "would have been even more devastating, adding insult to injury." [83] Hedgespeth's counter argument, that the court should not assume that the defendant would have presented evidence of collateral source payments, was rejected by the court. The court responded by holding that "the likelihood the defen- dant would not present this evidence after prevailing against the motion in limine borders on absurdity." [84]

Justice Leibson then addressed the broader issue of the operation of motions in limine under Kentucky law. In practice, the court noted, the effect of motions in limine on the presentation of evidence and the right to subsequent appeal was "somewhat uncertain" until it was codified in the Kentucky Rules of Evidence section 103(d). [85] The court held that **[*367]** "the only reasonable interpretation of KRE 103(d) is that, as a general rule, once a motion in limine to exclude evidence has been overruled, a party may go forward with adverse evidence to avoid the appearance of concealment and still 'preserve error for appellate review.'" [86] In support of its holding, the court concluded that "to construe a motion in limine as waived in present circumstances would defeat the purpose of KRE 103(d) and destroy the value of having such a rule." [87]

B. Constitutionality of KRS section 411.188

The issue of the constitutionality of K RS section 411.188 was one of first impression for the Kentucky Supreme Court. [88] The court noted that the main arguments raised against the constitutionality of KRS section 411.188 are similar to arguments rejected by the court of appeals in Ed- wards v. Land. [89] Edwards was followed by the court in deciding the appeal in this case. [90]

1. Section 51 Subject/Title

The first point addressed by the court related to section 51 of the Kentucky Constitution, the "subject/title" clause, which provides, in pertinent part, that "no law enacted by the General Assembly shall re- late to more than one subject, and that shall be expressed in the title." [91] The court rejected section 51 as a reason to declare the present statute unconstitutional. [92] The court agreed with the Edwards v. Land analysis of section 51 which held that the subject of the section of the Act, which was codified as KRS section 411.188, was within the ambit of the title of the Act and therefore did not violate section 51 of the Kentucky Constitution. [93]

2. Separation of Powers Doctrine **[*368]**

The next argument, which formed the basis of the court's holding, centers on the separation of powers doctrine. [94] The argument was based on sections 27, 28 and 116 of the Kentucky Constitution. [95] Sections 27 and 28 divide "the powers of the government . . . into three distinct departments, each . . . a separate body of magistracy" and further speci- fy that no persons, "being of one of those departments, shall exercise any power properly belonging to either of the others." [96] Section 116 of the Kentucky Constitution vests exclusive jurisdiction in the Kentucky Su- preme Court to prescribe "rules of practice and procedure for the Court of Justice." [97]

The issue of which branch of government is responsible for determin- ing what evidence is relevant is at the heart of the court's holding in O'Bryan. [98] The Kentucky Supreme Court held that the "responsibility for deciding when evidence is relevant to an issue of fact . . . must be judicially determined." [99] Justice Leibson stated that the critical facts in the case were those facts which relate to the expenses incurred by O'Bryan. [100] In addition, the court stated that medical expenses incurred for treatment of personal injuries would fall "squarely within the

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parame- ters of 'practice and procedure' assigned to the judicial branch by the separation of powers doctrine and section 116." [101]

Justice Leibson observed that, prior to the enactment of KRS section 411.188, the collateral source rule excluded evidence of payments to the plaintiff from medical or disability insurers as irrelevant. [102] The control- ling authority in Kentucky case law held that such payments had no bearing on the issue of damages the plaintiff had incurred and would be entitled to recover from the wrongdoer. [103] Citing its holding in Burke Enterprises, Inc. v. Mitchell, [104] the court stated that "to depart from the collateral source rule would provide the tort-feasor a 'windfall' to the **[*369]** substantial detriment of the injured party." [105] In dicta, Justice Leibson stated "there is no legal reason why the tortfeasor or his liability insur- ance company should receive a 'windfall' for benefits to which the plain- tiff may be entitled." [106] The opinion also dismissed the principle criti- cism of the **collateral source rule,** double recovery by the plaintiff, [107] by holding that any damages recovered by the plaintiff are ordinarily subject to **subrogation,** as a result "there is no 'double recovery' by any stretch of the imagination." [108]

Justice Leibson noted that collateral source payments should have no bearing on the plaintiff's right to recover damages from the defen- dant. [109] It was the opinion of the court that KRS section 411.188 en- courages juries to disregard the plaintiff's evidence as to the medical bills incurred and to temper their verdict with the irrelevant consideration of collateral source payments. [110]

The court cited Akers v. Baldwin, in which the Kentucky Supreme Court declared a statute that transgressed the court's fact-finding function unconstitutional. [111] The O'Bryan court also cited its recent decision in Ward v. Harding, [112] which reiterated the separation of powers principle that the legislature must not intrude by statute into the judicial preroga- tive. Justice Leibson then concluded that, as a rule of practice and proce- dure, KRS section 411.188 is constitutionally defective under the separa- tion of powers doctrine. [113]

3. Comity $ T The O'Bryan opinion then addressed the principle holding in Edwards v. Land, that KRS section 411.188 should be embraced in lieu of the collateral source rule under the principle of comity. [114] The court defined comity as the judicial adoption of a statute or rule unconstitutionally enacted by the legislature "not as a matter of obligation, but out of defer- ence and respect." [115] Citing Supreme Court Rules, [116] the court de- **[*370]** clared that the court of appeals had overstepped its authority by utilizing comity as the basis for upholding KRS section 411.188, holding that the decision to accept an otherwise unconstitutional act under the doctrine of comity is reserved to the Supreme Court. [117] Justice Leibson concluded by stating that "once having determined the collateral source payment statute violated the separation of powers doctrine, the Court of Appeals should have ruled the statute unconstitutional." [118]

4. Vagueness

The court also criticized KRS section 411.188 as too vague to be applied fairly. [119] Drawing on the facts of the case, the court provided the following example of the vagaries of KRS section 411.188:

When evidence of collateral source payments totaling $ 30,000 is admitted at trial, and the verdict reduced accordingly because the jury assumes the plaintiff will get the sum awarded, who gets the award? If the plaintiff gets it, the entities who paid collateral source benefits are cut off from their subrogation rights contrary to the statute. On the other hand, if the subrogees now get the $ 18,000 awarded, does the plaintiff who is out-of- pocket $ 18,000 then recover nothing? In this scenario, even if the plaintiff gets nothing and the entities paying collateral source benefits get the $ 18,000 to which they are subrogated, these entities are still out-of-pocket $ 12,000, the difference between $ 30,000 and $ 18,000. [120]

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To further illustrate the point that KRS section 411.188 was vague, the court distinguished KRS section 411.188 from the statute addressed in Commonwealth v. Reneer. [121] Justice Leibson noted that the statute did nothing to enhance the jury's fact-finding function nor did it provide a framework for the jury to relate the evidence received to the amount of damages the plaintiff was entitled to recover. [122] He concluded that the statute only confused the jury with respect to the amount of damages to be awarded to the plaintiff. [123] **[*371]**

Justice Leibson quickly dismissed the remaining argument which cen- tered on equal protection and due process guarantees found in the Ken- tucky Constitution, sections 2, 59 and 60. [124] The court held that since the statute violates the separation of powers sections of the Kentucky Constitution, it was unnecessary to address the further argument based the equal protection and due process clauses of the Kentucky Constitu- tion. [125]

In summary, the court concluded that KRS section 411.118 was uncon- stitutional and that Edwards v. Land should be overruled. [126] The court ruled that the statute is a violation of the Kentucky constitutional mandate of the separation of powers in state government. [127]

IV. ANALYSIS

The two main holdings of O'Bryan are: (i) a rejected motion in limine is sufficient to preserve the right to appeal, despite the presentation of adverse evidence at trial, and (ii) KRS section 411.188 was an unconsti- tutional abrogation of the collateral source rule. Both holdings establish significant precedent in Kentucky law. The first holding, relating to the practice and procedure of motions in limine, resolves a procedural para- dox in Kentucky civil practice. The second holding restores the tradition- al, common law collateral source rule. The significance of each holding is discussed in detail below.

A. Motion In Limine

A motion in limine is made by a party in an effort to exclude prejudi- cial evidence from being presented at trial. [128] As recently as fifty years ago, the use of motions in limine was not common. [129] However, since the 1980's its use has been reinvigorated, [130] both in civil and criminal cases. [131]

Currently, jurisdictions on both the state and federal level are split on **[*372]** the requirements needed to preserve an appeal from an adverse ruling on a motion in limine. [132] The majority of jurisdictions take the position advanced by Hedgespeth in the subject case, that a party's pre-trial objec- tion to evidence is waived if that party presents the evidence at trial. [133]

The Kentucky Supreme Court's decision places Kentucky with a mi- nority of states and federal circuits that have adopted the contrary posi- tion. [134] The minority position acknowledges the practical dynamics of a jury trial. [135] Recognizing the precarious position that denial of the mo- tion in limine creates for the movant, minority jurisdictions hold that the movant's right to appeal the denial of his motion is not affected when he introduces the evidence that he previously sought to exclude. [136]

Once a motion in limine is denied, the movant typically wishes to preserve the error for appeal. [137] The general belief is that once evidence is heard by the jury during a trial, the damage is done. [138] The simple fact being, that it is difficult for a jury to ignore what it has already heard, despite instructions by the court to the contrary. [139] In fact, objec- tions to evidence in front of the jury may only tend to focus their atten- tion on it. [140]

As demonstrated in O'Bryan, pre-trial rulings on the admissibility of evidence can drastically alter a party's trial strategy. After having a motion in limine denied by the trial court, O'Bryan

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was faced with the dilemma of having Hedgespeth present evidence of collateral source payments received by O'Bryan or present the potentially prejudicial evi- dence himself. [141] The risk in allowing Hedgespeth to present the evi- dence, as noted by the court, was that it might appear to the jury that O'Bryan was attempting to hide the payments. [142]

The Kentucky General Assembly enacted KRE 103(d) and the Ken- **[*373]** tucky Supreme Court adopted it in 1990 to codify Kentucky's common law. [143] The court's interpretation of KRE 103(d) resolved the trial strat- egy dilemma discussed above. As the court concluded in O'Bryan, "To construe a motion in limine as waived in present circumstances would defeat the purpose of KRE 103(d) and destroy the value of having such a rule." [144]

B. Collateral Source Rule

The main point addressed in O'Bryan was the constitutionality of the statutory abrogation of the collateral source rule by KRS section 411.188. The General Assembly's promulgation of KRS section 411.188 was viewed as a "restrained response" to the perceived liability insurance crisis. [145] It is interesting to note that the Kentucky Insurance and Liabil- ity Task Force, formed by the General Assembly to find solutions to the perceived crisis, specifically found no evidence of a litigation explosion in Kentucky. [146] Absent a pressing need to reform the civil justice sys- tem in Kentucky, at least for the stated reason, KRS section 411.188 lacked a compelling reason to justify the abrogation of the Rule.

Several aspects of the statute were deemed beneficial or "restrained" in relation to statutes enacted in other states. The primary benefit of KRS section 411.188 was that it only required that collateral source payment evidence be presented to the jury for consideration. [147] The statute did not require the jury to automatically reduce an award by the amount of payments received from third party sources. [148] However, as demonstrat- ed by O'Bryan, in practice, KRS section 411.188 caused most juries to automatically reduce an award by the amount of collateral benefits re- ceived, thereby defeating its purported benefit.

Another perceived benefit of KRS section 411.188 was that it reduced the risk of "double recovery." [149] In practice, the risk of double recov- ery is extremely low. Given that plaintiffs' attorneys typically receive contingent fees equal to one third of the damages awarded, and that **[*374]** insurance companies ordinarily have subrogation rights against the amount awarded to the plaintiff, the net position of the typical plaintiff is less than the amount awarded by the jury. Justice Leibson referred to the reduction in liability for a defendant as a "windfall" [150] and concluded that "there is no 'double recovery' by any stretch of the imagination." [151]

O'Bryan reaffirmed the findings of the court of appeals in both Ed- wards and O'Bryan, [152] that KRS section 411.188 violated the separation of powers doctrine expressed in sections 27, 28, and 116 of the Kentucky Constitution. [153] As discussed above, absent a compelling reason to em- brace the legislative intrusion into an area of judicial authority, O'Bryan strongly rejected the statute on the grounds of judicial comity. [154] The court also pre-empted the use of the doctrine of comity by the lower courts when deciding const itutional issues. [155] Justice Leibson firmly held the following:

The decision whether to give life through comity to a statute otherwise unconstitutional because it violates separation of powers doctrine is one of institutional policy reserved for the Supreme Court level. The responsibili- ty of lower courts, including the Court of Appeals, is to follow the law, which includes constitutional separation of powers doctrine, and to correct error accordingly, even if to do so means declaring a legislative enactment unconstitutional. [156]

The court's decision in O'Bryan is consistent with a recent trend among the states to

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ARTICLE: Subrogation and Insolvency

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SUMMARY:
... If the insured has already received money from the injurer, the insured may hold such funds in "constructive trust" for the insurer because of the insurer's subrogation rights. ... But it does not follow that such harms should be or are insurable or that the rules of subrogation ought to shift to an insurer the risk that an insured may be unable to collect these awards from a partially solvent injurer. ... The increase in the marginal utility of money caused by the accident increases the amount of insurance coverage that the insured would like to carry to an amount in excess of the pecuniary loss. ... When such underinsurance is coupled with a partially solvent injurer, we again confront the question of whether the insurer or the insured should take first from the injurer's assets. ... Where underinsurance arises for the purpose of reducing moral hazard, we again confront the question of whether the insurer or the insured should take first from the assets of a partially solvent injurer. ... When an accident occurs, the probability that an injurer is liable is [alpha], and the probability that no injurer is liable is (1 - [alpha]). ... In each of the cases considered save one, the optimal insurance contract requires that the insurer be made whole from the assets of the partially solvent injurer before the insured receives anything. ...

ABSTRACT

When tort judgments exceed the assets of tortfeasors and the tort victim has first-party insurance for a portion of the loss suffered, the question arises as to how the recovery from the tortfeasor should be divided between' the tort victim on the one hand and the insurer via its rights of subrogation on the other. A common view among the courts and legal commentators is that the insured should be made whole before the insurer recovers subrogation. This paper employs simple models of optimal insurance contracts to show that the opposite rule will often be optimal. Accordingly, there is little basis for judicial interference with freedom of contract when the insurance agreement provides that the insurer must be made whole before the insured receives any portion of the recovery. The

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Substitute the first constraint into the objective function and formulate the Lagrangean:

L = (1 - p)u[n](z - p[1]C[1] - p[2]C[2]) + p[1]u[a](z - p[1]C[1] - p[2]C[2] - L + C[1] + D) + p[2]u[a](z - p[1]C[1] - p[2]C[2] - L + C[2]) + [lambda][1](L - C[1]) + [lambda][2](L - C[2]).

The Kuhn-Tucker necessary (and sufficient [22] in this case) conditions for an optimum can then be written as

[SEE FORMULA IN ORIGINAL] . (A1)

[SEE FORMULA IN ORIGINAL] (A2)

[*397] [SEE FORMULA IN ORIGINAL] (A3)

[SEE FORMULA IN ORIGINAL] (A4)

L - C[i] >/= 0, [lambda][i] >/= 0, [lambda][i](L - C[i]) = 0. (A5)

Conjecture that the solution is interior. With both coverage levels positive, conditions (A1) and (A3) hold with equality. An interior solution implies further that the [lambda][i] terms equal zero. Divide p[1] out of condition (A1) and p[2] out of condition (A3), then subtract (A3) from (A1) to establish that u'[a](z - [pi] - L + C[1] + D) = u'[a](z - [pi] - L + C[2]). Substituting this result back into condition (A1) further implies

u'[n](z - [pi]) = u'[a](z - [pi] - L + C[1] + D) = u'[a](z - [pi] - L + C[2]). (A6)

In words, if the solution is interior, then the marginal utility of money must be equalized across all states of nature. Were it otherwise, the insured could profit by shifting money from a low marginal utility state to a high marginal utility state through adjustments in coverage levels.

Furthermore, condition (A6) establishes that C*[1] = C*[2] - D. In words, the optimal amount for the insurer to receive through subrogation is *D*, the amount of damages collected from the injurer. This will be true regardless of the value of *D*--that is, regardless of the degree to which the injurer is insolvent.

Although we have characterized an interior solution, we have not established that the interior solution is feasible (recall that any solution satisfying the necessary conditions is indeed an optimum because the necessary conditions are here sufficient). Its feasibility will depend on the relation between u[n](w) and u[a](w), as well as on the magnitude of *D*.

1. Suppose that u'[n](w) [identical to] u'[a](w). The optimal contract provides C*[2] = L and C*[1] = max [L - D, 0].

Proof. Condition (A6) implies C*[2] = L (full coverage against pecuniary loss) and C*[1] = L - D. For this solution to satisfy nonnegativity, we must in turn have *D* </= *L*--the collectable damages are less than the pecuniary loss. When collectable damages exceed the pecuniary loss *L*, the optimum becomes C*[1] = 0 (this follows from the fact that condition (A1) is negative evaluated at C[1] = 0 and from the nonnegativity constraint). Q.E.D.

2. Suppose that u'[n](w) > u'[a](w), for all *w*. The optimal contract here provides C*[2] < L and C*[1] = max [C*[2] - D, 0]. It is possible that C*[2] = C*[1] = 0.

Proof. Conjecture once again that an interior solution arises. Condition (A6) again implies that C*[1] = C*[2] - D. It further implies that C*[2] < L because utility is strictly concave. If this solution is to be the optimum, the marginal utility of coverage C[2] must be positive at C

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[2] = 0: from condition (A3), one can deduce that u'[n](z) > u'[a](z - L) is necessary. Were it otherwise, the purchase of insurance would transfer wealth from a high marginal utility state to a low marginal utility state. Assuming that C*[2] > 0 (subrogation is uninteresting unless some insurance is purchased), then a contract in which C*[1] = C*[2] - D will be feasible if D < C*[2]. Otherwise, C*[1] = 0 for the same reason as before. Q.E.D.

3. Suppose that u'[n](w) < u'[a](w), for all *w*. The optimal contract requires C*[2] = L and $ y [ILLEGIBLE TEXT].

Proof. Condition (A6) now requires $ y [ILLEGIBLE TEXT], which is impermissible, so C*[2] = L and [lambda][2] > 0. Conditions (A1) and (A3) now imply **[*398]** C*[1] > L - D or conceivably C*[1] = L, depending on the degree to which the marginal utility of money in the accident states exceeds the marginal utility of money in the no-accident state. But if the recovery from the injurer exceeds *L* by a sufficient amount, it is still possible to have C*[1] = 0. Q.E.D.

II. ACTUARIALLY UNFAIR PREMIUMS

The optimal contract in this model will provide that C*[2] < L and C*[1] = max [C*[2] - D, 0].

Proof (Sketch). The solution procedure is as before. Using the analogs to conditions (A1) and (A3) above (the necessary conditions are once again sufficient), one can derive that, for an interior solution, u'(z - [pi] - L + C[1] + D) = u'(z - [pi] - L + C[2]) or that C*[1] = C*[2] - D. This interior solution will be feasible as long as C*[2] - D >/= 0. Intuitively, the insured once again equalizes the marginal utility of money in the accident states if it is possible to do so--the optimality of doing so follows from the fact that the markup per dollar of coverage is the same in both states.

Substituting this result into the analog to condition (A1) and rearranging terms yields, for an interior solution,

u'(z - [pi] - L + C[2])/u'(z - [pi]) = (1 - p + [tau] - p [tau])/(1 - p - p [tau]) > 1.

From the concavity of *u(w)*, it follows that C*[2] < L at the optimum. We already know that C*[1] = C*[2] - D as long as the nonnegativity constraint is satisfied. It is trivial to show that C*[1] = 0 otherwise. Q.E.D.

III. MORAL HAZARD

The optimal contract in this model will provide that C*[2] < L and C*[1] = max [C*[2] - D, 0].

Proof. The Kuhn-Tucker sufficiency theorem is not in general satisfied for this problem, but I will assume that the first-order conditions have a unique solution. Substitute the first constraint into the objective function and formulate the Lagrangean:

L = [1 - p(x)]u[z - [alpha] p(x)C[1] - (1 - [alpha])p(x)C[2] + [alpha] p(x)u[z - [alpha] p(x)C[1] - (1 - [alpha])p(x)C[2] - L + C[1] + D] + (1 - [alpha])p(x)u[z - [alpha] p(x)C[1] - (1 - [alpha])p(x)C[2] - L + C[1] + D] - m(x) + [lambda] [[alpha] p'u[z - [alpha] p(x)C[1] - (1 - [alpha])p(x)C[2] - L + C[1] + D] + (1 - [alpha])p'u[z - [alpha] p(x)C[1] - (1 - [alpha])p(x)C[2] - L + C[1] + D] - p'u[z - [alpha] p(x)C[1] - (1 - [alpha])p(x)C[2]] - m'].

It will suffice to write the analogs to conditions (A1) and (A3) above (replacing the expression for [pi] for notational simplicity):

[SEE FORMULA IN ORIGINAL] (A1')

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[*399] and

[SEE FORMULA IN ORIGINAL] (A3')

Conjecture an interior solution. Divide (A1') by *[alpha] p* and (A3') by (1 - [alpha])p, then subtract (A3') from (A1'). After considerable algebra, one obtains

[u'(z - [pi] - L + C[1] + D) - u'(z - [pi] - L + C[2])][1 + [lambda] p'/p] = 0,

which implies u'(z - [pi] - L + C[1] + D) = u'(z - [pi] - L + C[2]). Again, unless the non-negativity constraint on C[1] prevents it, the insured will want to equalize marginal utility across the accident states, and C*[1] = C*[2] - D.

Substituting this result into (A1') yields, again after considerable algebra,

(1 - p)[u'(z - [pi] - L + C[1] + D) - u'(z - [pi])] + ([lambda] p'/[alpha] p)[(1 - p)[[alpha] (1 - [alpha])]u'(z - [pi] - L + C[1] + D) + [alpha] pu'(z - [pi] - L - C[2])] = 0.

The second term is negative, implying that the first term is positive and, hence,

u'(z - [pi] - L + C[1] + D) > u'(z - [pi]).

In words, the marginal utility of money in the accident state in which an injurer is liable (equal to the marginal utility in the other accident state for an interior solution) must exceed the marginal utility of money in the no-accident state. Using the concavity of *u(w)*, we can deduce that the wealth of the insured is lower in the accident states. Thus, for the interior solution, we have C*[1] + D = C*[2] < L.

This contract is feasible as long as it obeys the nonnegativity constraint on C[1]. Otherwise (and I omit the details of the derivation), we have C*[1] = 0. Q.E.D.

FOOTNOTES:

n1 Black's Law Dictionary 1595 (4th ed. 1968).

n2 See John F. Dobbyn, Insurance Law in a Nutshell 285-90 (3d ed. 1996). The common-law logic in providing or denying subrogation for different types of policies is interesting in its own right and raises puzzles that are beyond the scope of the analysis here. Life insurers are not entitled to subrogation, for example, on the rather artificial theory that they contract not to cover the economic losses of the insured but rather to pay a stipulated sum in the event of the insured's death--their contract is more of an investment than an insurance contract, it is often said. *Id.* at 285-86.

n3 *Id.* at 284.

n4 The issues are addressed in a fine student note, Jeffrey A. Greenblatt, Insurance and Subrogation: Where the Pie Isn't Big Enough, Who Eats Last? 64 U. Chi. L. Rev. 1337 (1997). Greenblatt does not employ the tools of insurance economics used here, however, and thus his analysis is quite different from the analysis in this paper.

n5 Dobbyn, *supra* note 2, at 293.

n6 See Garrity v. Rural Mutual Insurance Co., 77 Wis. 2d 537, 253 N.W.2d 512 (1977); Rimes v. State Farm Mutual Automobile Insurance Co., 106 Wis. 2d 263, 316 N.W.2d 348 (1982); Higgin-botham v. Arkansas Blue Cross and Blue Shield, 312 Ark. 199, 849 S.W.2d 464 (1993); Powell v. Blue Cross and Blue Shield of Alabama, 581 S.2d 772 (Ala. 1990). In *Powell*, for example, the policy provided that "separate from and in addition to the

Administrator's right of subrogation . . . the right to reimbursement of the Administrator comes first even if a Member is not paid for all of his claim for damages." 581 S.2d at 774.

n7 See Gibson v. Country Mutual Insurance Co., 193 Ill. App. 3d 87, 549 N.E.2d 23 (1990).

n8 See Magsipoc v. Larsen, 639 S.2d 1038 (Fla. Dist. Ct. App. 1994).

n9 Kenneth S. Abraham, Distributing Risk: Insurance, Legal Theory and Public Policy 155 (1986).

n10 See Rimes v. State Farm Mutual Automobile Insurance Co.; Higginbotham v. Arkansas Blue Cross and Blue Shield.

n11 Classic treatments of insurance economics may be found in Kenneth J. Arrow, Essays in the Theory of Risk Bearing (1974); Karl H. Borch, Economics of Insurance (1990).

n12 The point has been made by others, including Steven Shavell, Economic Analysis of Accident Law 233-34 (1987). Shavell also notes that there may be a divergence between the optimal damages award for insurance purposes and the optimal award for deterrence purposes. Where, for example, insureds would not desire insurance against nonpecuniary losses, the optimal award for insurance purposes would not include them. Yet because nonpecuniary losses are a real cost of accidents, optimal deterrence may require that injurers bear those costs. There may then arise a case for "decoupling" damages paid from damages received or for using fines paid to the state in lieu of some of the damages paid to victims, particularly if the liability rule is strict liability rather than negligence (the issue does not arise in negligence models for the most part because no one is ever rationally negligent in equilibrium). See *id.* at 247-54. The results here are very much related to Shavell's on these points.

n13 For an extensive discussion of whether consumers desire to purchase pain and suffering insurance and whether the market is capable of supplying it, see Steven P. Croley & Jon D. Hanson, The Non-pecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law, 108 Harv. L. Rev. 1785 (1995).

n14 Thus, my model can be seen as one concerning the optimal level of reimbursement rather than subrogation, but the two are analytically equivalent. The insured can typically collect from both the insurer and the injurer in practice, by the way, because of the "**collateral source rule,**" which holds that an injured party's first-party insurance recovery does not reduce the liability of a tortfeasor.

n15 Some readers may note a connection between this result and the considerable literature on the difference between damages that provide optimal deterrence and damages that provide optimal insurance. Perhaps the leading paper is Steven Shavell, On Liability and Insurance, 13 Bell J. Econ. 120 (1982). Where damages that are optimal for deterrence purposes must exceed damages that are optimal for insurance purposes, some "decoupling" between damages paid by injurers and damages received by victims may be desirable. Litigation costs also factor into such analyses. See, for example, A. Mitchell Polinsky & Yeon-Koo Che, Decoupling Liability: Optimal Incentives for Care and Litigation, 22 Rand J. Econ. 562 (1991).

n16 This point can be found in numerous standard microeconomics textbooks. See, for example, David M. Kreps, A Course on Microeconomic Theory 91-93 (1990); Hal R. Varian, Microeconomic Analysis 180-81 (3d ed. 1992).

n17 Thus, I assume that insurance is actuarially unfair at the margin. By contrast, if actuarial unfairness arose entirely as a fixed cost per policy that did not vary with the amount of coverage purchased, one can readily show that rational insureds would still purchase full

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coverage if they bought insurance at all. Then, the underinsurance problem essential to the tension between subrogation and insolvency would not arise. The assumption that insurance premia are actuarially unfair at the margin is a realistic one, I believe. As coverage increases, various costs of claims processing seem likely to increase, such as the costs of investigating the validity of claimed casualty losses and valuing them, the costs of processing claims for medical care, and so on.

n18 A further implicit assumption of the model warrants brief discussion. Note that the markup [tau] is assumed to be the same for coverage in both states in which loss occurs. One could imagine that administrative costs for the insurance company might be higher in the state in which an injurer is liable, however, because of the costs of pursuing subrogation. The markup in that state, therefore, might be assumed to be higher. I do not treat this case in detail here, but it is worth noting that if the markup for coverage in the state in which an injurer is liable exceeds the markup in the other state, the result that the insurer should be made whole before the insured is strengthened. The intuition is that if the marginal price of coverage when an injurer is liable is greater than the marginal price when no injurer is liable, the amount of coverage that an insured will purchase for the state in which the injurer is liable declines relative to the amount the insured will purchase for the state in which no injurer is liable.

n19 On the moral hazard problem generally and some of the devices for dealing with it, see generally Bengt Holmstrom, Moral Hazard and Observability, 10 Bell J. Econ. (1979); Mark V. Pauley, The Economics of Moral Hazard: Comment, 58 Am. Econ. Rev. 531 (1968); Stephen A. Ross, The Economic Theory of Agency: The Principal's Problem, 63 Am. Econ. Rev. 134 (Papers & Proc. 1973); Steven Shavell, On Moral Hazard and Insurance, 93 Q. J. Econ. 541 (1979); Richard Zeck-hauser, Medical Insurance: A Case Study of the Tradeoff between Risk-Spreading and Appropriate Incentives, 2 J. Econ. Theory 10 (1970).

n20 More precisely, the market may have "unraveled" because of insurers' prior experience, which led to losses, premium increases, and the further exodus of low-risk insureds. The classic exposition is Michael Rothschild & Joseph Stiglitz, Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information, 90 Q. J. Econ. 629 (1976). Of course, market solutions to the adverse-selection problem can and do emerge.

n21 This scenario is easy to formalize as well. I will supply the details to any interested readers.

n22 The objective function is strictly concave in the choice variables, and the constraints are linear, so the problem satisfies the Kuhn-Tucker sufficiency theorem. See, for example, Alpha C. Chiang, Fundamental Methods of Mathematical Economics 722 (2d ed. 1974).

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analysis also provides some support for allowing the insurer to take first as a default rule at common law.

TEXT:

[*383] "SUBROGATION" is "the substitution of one person in place of another with reference to a lawful claim." [1] For example, if Blue Cross/Blue Shield pays the medical expenses of a policyholder who has been injured by a negligent driver, Blue Cross/Blue Shield may then have the right to recover those expenses from the negligent party in a subrogation action. If the insured has already received money from the injurer, the insured may hold such funds in "constructive trust" for the insurer because of the insurer's subrogation rights. An action by the insurer against the insured to recover such funds is often termed an action for "reimbursement."

Subrogation rights are common in insurance relationships and may arise by contract or at common law. In most jurisdictions, the common law provides a subrogation right to insurers under property, liability, and some casualty policies. Although subrogation was not generally available at common law in health and medical policies, most such policies now include subrogation **[*384]** clauses expressly. [2]

When injurers are fully solvent--able to pay damages judgments against them in full--subrogation (or reimbursement) prevents the injured party from achieving a double recovery (one from the insurer and one from the injurer). The public policy against such "windfalls" is an oft-stated rationale for subrogation. [3] An economist might rephrase the policy concern as one for excessive moral hazard that might arise if injured parties actually came out ahead after an accident, as well as one for suboptimal risk bearing that would arise if risk-averse insureds were more than made whole after covered losses. For these reasons, the insurer's right of subrogation is clearly part of the optimal insurance contract when injurers are fully solvent. Similarly, if all of the insured's losses are covered by first-party insurance, subrogation is also plainly optimal (whether or not the injurer is fully solvent) because the insured is made whole by first-party coverage. Any recovery by the insured from the injurer under these circumstances would again be a "double recovery."

The more difficult case--and the case that has been the subject of considerable litigation--arises when the injurer is not fully solvent and the insured's losses are not fully covered by first-party insurance. If the injurer has no assets at all, of course, the nature of subrogation rights is of no consequence. But suppose that an injurer has some assets, though less than the insured's total loss (I will term such injurers "partially solvent"), and that the insured has been made partially whole by first-party insurance benefits. How should the injurer's limited assets be divided between the insurer and the insured? To make it concrete, suppose that an insured has been injured by a negligent driver and a first-party insurer has paid medical bills in the amount of $ 200,000. The insured has no other applicable insurance coverage. The insured obtains a judgment against the negligent driver in the amount of $ 500,000, reflecting the $ 200,000 in medical bills, $ 100,000 in lost wages, and $ 200,000 in pain and suffering. The tortfeasor has assets of $ 200,000. Claiming subrogation rights, the insurer then insists that it is entitled to this $ 200,000. Should such a claim be allowed? At common law? If the insurance contract provides for it? To my knowledge, these issues have not been addressed in the law and economics literature. [4]

The courts have been forced to address them, however, and have come to **[*385]** no consensus. According to John Dobbyn, "In the absence of stipulations to the contrary in the insurance contract, the majority of courts direct that the insured is to be compensated first . . . to the extent to which his loss exceeds the insurance proceeds." [5] This rule is sometimes called the "made-whole doctrine"--the insured must be made whole before the insurer can recover anything. Dobbyn's statement of the made-whole doctrine suggests that parties to an insurance contract can readily agree to alternative arrangements, but in fact a number of courts insist that the insured be made whole before the insurer receives anything despite a seemingly clear provision to the contrary in the contract. [6] Other courts do allow the insurer

to recover first if the contract so provides. [7] Still others have applied a sharing rule that divides the recovery in proportion to the losses borne by the insurer and the insured. [8]

Which of these approaches, if any, is the best? A naive response rests on the simple observation that the insured is risk averse and the insurer is approximately risk neutral. Therefore, one might suggest, optimal risk sharing requires that the insurer recover nothing until the insured has been made whole. Some commentators, including Kenneth Abraham in his well-known insurance treatise, argue from this intuition against any subrogation recovery by the insurer that would impair the insured's ability to obtain full indemnity. [9]

This line of thinking is mistaken, however, for it ignores the question of why the insured was underinsured in the first place. One reason for underinsurance is that risk-averse individuals do not desire insurance against all legally compensable losses--only those losses that cause the marginal utility of money to increase relative to other states of nature. Another reason for underinsurance relates to the fact that the price of insurance often is not "actuarially fair." Underinsurance may also arise because devices such as coinsurance and deductibles are valuable for controlling moral hazard. This paper explores these possibilities with the aid of simple formal models and sets out the optimal subrogation rule for each case.

The analysis suggests that it is optimal under a wide range of circumstances for insurers to be reimbursed in full before insureds receive anything from the partially solvent injurer, even though the consequence is that the insured is not made whole. The details depend on the reason why the insured lacks **[*386]** full coverage for losses, but the general intuition may be expressed as follows: from the standpoint of optimal risk allocation, the fortuitous presence of an injurer who is liable for the insured's losses does not affect the risk that the insured should optimally bear. Thus, if it is optimal for the insured to bear the risk of uncovered losses associated with accidents in which no injurer is liable, the insured should bear the same risk in accidents in which an injurer is liable. Accordingly, no violence is done to optimal risk sharing if the insurer is reimbursed first by the partially insolvent injurer. The caveats all relate to the possibility that underinsurance is not optimal for the insured, presumably because of some market failure (at least relative to the first best).

The analysis is the same whether the case against the injurer is litigated to conclusion or is settled. I mention the latter group of cases only because they present a special problem for the made-whole doctrine: when an insured settles with a partially solvent injurer, the insured can credibly argue that the settlement amount is less than the amount that a court would have awarded at the conclusion of litigation (because the settlement negotiations took into account the injurer's limited assets) and thus that the settlement is not enough to make the insured whole. Yet because of the settlement, the amount required to make the insured whole will not be independently determined by a court as part of the action against the injurer. As a result, some courts considering reimbursement claims have required a "minitrial" under the made-whole doctrine to determine the insured's loss. [10] If the made-whole doctrine is a mistake, however, such actions are unnecessary.

I will proceed by considering in turn various explanations for the insured's lack of complete coverage against loss. A concluding section gathers the results and summarizes their implications for the law.

I. NONPECUNIARY LOSSES

Insurance markets arise because it is valuable for individuals to shift money from "states of nature" in which the marginal utility of money is low (ordinary situations in which the insured pays premiums) to states in which the marginal utility of money is high (situations in which a covered loss has occurred and the insured receives a positive net payment from the insurance company). Conventional insurance economics further posits that the marginal utility of money is diminishing for individuals and, hence, that the states in which the marginal utility of money is high will ordinarily be the states in which the insured's wealth has suffered a

significant decline. [11]

In personal injury cases, however, substantial damages are regularly awarded for nonpecuniary losses, such as pain and suffering. Such awards are defensible **[*387]** on optimal deterrence grounds, as the social cost of accidents assuredly includes these nonmonetary harms. But it does not follow that such harms should be or are insurable or that the rules of subrogation ought to shift to an insurer the risk that an insured may be unable to collect these awards from a partially solvent injurer.

Indeed, we do not observe pain and suffering insurance in the marketplace, for at least two reasons. First, the monetary value of pain and suffering is not readily ascertainable, and pain is often difficult to verify. Pain and suffering insurance might then create significant moral hazards, at least for certain types of accidents. Second, and perhaps more fundamental, it is hardly clear that the marginal utility of money is higher for people in states of the world in which they experience pain and suffering. If their economic losses (such as medical expenses) in those states are covered by insurance, the marginal utility of additional dollars may well be lower rather than higher in comparison to other states of the world because a person suffering pain may be less able to enjoy consumption expenditures. [12] And if that is the case, it will be irrational for them to reduce their wealth (by paying insurance premiums) in states in which the marginal utility of money is higher in order to receive money in states in which it is lower. A fortiori, the made-whole doctrine will be undesirable at least to the extent that it requires the insurer to forfeit subrogation rights until the insured has been fully compensated for pain and suffering.

This proposition can be illustrated and elaborated using a simple model. Consider an insured who maximizes expected utility. The insured's (Von Neumann-Morgenstern) utility function is u[n](w) in the "no-accident" state of nature and u[a](w) in an "accident" state, where *w* denotes wealth. The difference in utility across the no-accident and accident states reflects the nonpecuniary loss attributable to the accident. Thus, we imagine that u[n](w) > u[a](w) at every wealth level.

I make the conventional assumption that utility is increasing in wealth but that marginal utility is decreasing in wealth (the utility functions are upward sloping and strictly concave). Let *p* denote the probability of an accident. If an accident occurs, the probability that an injurer will be held liable is p[1]. The probability that no injurer will be held liable is p[2] (perhaps the injurer **[*388]** cannot be found, the injurer is not negligent, or the accident is caused by the insured). Thus, p = p[1] + p[2].

In the event of an accident, the insured suffers a pecuniary loss equal to *L*. The initial wealth of the insured is *z*. The insured can purchase insurance coverage, and the amount of coverage can depend on whether an injurer is liable for the accident or not. Let C[1] be the amount of coverage when an injurer is liable for the accident, and let C[2] be the amount of coverage when no injurer is liable. In this model, I assume that the price of insurance is actuarially fair (that the expected value of the insurance policy net of premiums paid is zero) and will denote the insurance premium by [pi]. I will further assume that the insured cannot purchase coverage in excess of the pecuniary loss *L*, an assumption that accords with the fact that we do not observe insurers offering "pain and suffering" insurance in practice. [13]

In the state in which an injurer is liable for an accident, the judgment against the injurer entered by a court is *J*. The judgment presumably exceeds the pecuniary loss *L* because it contains an element of compensation for the nonpecuniary loss. The injurer may be only partially solvent, however, so the amount collectable from the injurer is only *D </= J*. Without loss of generality, I assume that these damages are collected by the insured [14] and that the insurer's "share" in accordance with its subrogation right appears as a reduction in C [1]. Thus, we can interpret C[1] as net coverage, equal to C[2] less the amount received by the insurer in accordance with its subrogation rights when an injurer is liable. By allowing the insured to select C[1] and C[2] freely, I am implicitly assuming that freedom of contract

prevails and that the parties to the insurance contract can choose the optimal amount for the insurer to receive through subrogation.

The insured's optimization problem is then to select coverage levels C[1] and C[2] to maximize expected utility, subject to several constraints. This problem can be written as

[SEE FORMULA IN ORIGINAL]

subject to [pi] = p[1]C[1] + p[2]C[2],

C[1], C[2] </= L,

C[1], C[2] >/= 0.

[*389] The first constraint states that the insurance premium is actuarially fair (equal to expected payments by the insurer under the policy), so the insurer breaks even on the contract. The second set of constraints states that coverage cannot exceed the pecuniary loss. The third set of constraints states that coverage is nonnegative.

The problem is a nonlinear programming problem. I give the solution in some detail in the Appendix and simply provide a verbal summary of the key results here. The results turn on how the nonpecuniary loss affects the marginal utility of money. Although those effects might be complex in practice, I will consider three simple cases--where the marginal utility of money remains the same, where it falls uniformly, and where it increases uniformly. Optimal values of the choice variables are denoted with an asterisk.

1. Suppose first that u'[n](w) [identical to] u'[a](w). That is, suppose the nonpecuniary loss takes the form of some fixed disutility that does not affect the marginal utility of money. (This is true if we can write u[n](w) = u[a](w) + K, where *K* is a constant.)

In this case, the optimal insurance policy provides full coverage against the pecuniary loss (C*[2] = L). Although I assume that insurance in excess of this amount is unavailable, the insured would not wish to purchase it anyway because coverage equal to the pecuniary loss is sufficient to equalize the marginal utility of money across the no-accident and accident states of nature. Furthermore, the optimal policy requires that any money collected from the injurer be paid to the insurer as reimbursement up to the amount of the pecuniary loss. Any excess over that amount goes to the insured. This leaves the insured with the same marginal utility whether or not an injurer is liable for the accident, except where the amount collected from the injurer exceeds the pecuniary loss. In that event, the insured has a lower marginal utility of money when an injurer is liable, but such a situation is optimal given the nonnegativity constraint on coverage (C[1] >/= 0). [15]

2. Now suppose that the marginal utility of money in the no-accident state exceeds the marginal utility of money in the accident states for given wealth: u'[n](w) > u'[a](w), for all *w*. Intuitively, we might imagine that the accident renders the insured less able to enjoy consumption expenditures (holding wealth constant).

In this case, optimal insurance coverage will be less than the full amount of the pecuniary loss and may be zero. The reason is that the reduction in **[*390]** the marginal utility of money caused by the accident makes it optimal for the insured to consume more wealth in the no-accident state. Where insurance coverage is positive, the optimal amount for the insurer to receive through subrogation is again equal to the collectable damages or the amount of coverage payable when no injurer is liable, whichever is less--this again equalizes the marginal utility of money across the accident states if possible (subject to the nonnegativity constraint). Thus, as in case 1, the optimal contract requires the insurer to be reimbursed fully for its outlays from the recovery against the injurer before the insured receives anything from the injurer. The made-whole doctrine, which imposes the opposite

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rule, is clearly suboptimal.

3. Finally, suppose that the nonpecuniary loss increases the marginal utility of money, holding wealth constant: u'[n](w) < u'[a](w), for all *w*. Perhaps the accident leaves the insured less able to enjoy inexpensive activities such as walking and bicycling, and enjoyment must be found in more costly pursuits.

The increase in the marginal utility of money caused by the accident increases the amount of insurance coverage that the insured would like to carry to an amount in excess of the pecuniary loss. On the assumption that the market will not sell such coverage, the insured will do as well as possible by buying coverage equal to the pecuniary loss. In the accident state in which an injurer is liable, the optimal amount payable to the insurer through subrogation may now be less than before--in effect, if the contract allows the insured to keep some of the collectable damages before the insurer is reimbursed, it may partially overcome the problem caused by the refusal of insurers to sell the insured as much insurance as the insured wishes to purchase.

The difference between this case and the prior two is driven by my assumption that the market will not sell coverage exceeding pecuniary losses, even though such coverage is optimal in a first-best sense. Nothing in the model explains the market's resistance to selling such coverage, but factors outside the model may arise in practice to make coverage for nonpecuniary losses unavailable. Within the model, this problem can be partly overcome as noted by modifying the subrogation provision to allow the insured to obtain more coverage than would otherwise be available in the state in which an injurer is liable.

But this result should not be taken too seriously. First, it is unclear how often the phenomenon that necessitates it--an increase in the marginal utility of money because of an accident--will occur. Second, just as factors outside the model must explain why insurers are unwilling to sell coverage in excess of pecuniary losses, so might they argue against allowing the insured to obtain such coverage in a roundabout fashion through a modification of the subrogation rule. Certainly one can wonder whether a court can do better than the parties to the insurance contract in designing the optimal subrogation **[*391]** arrangement for these cases. Notwithstanding the result here, therefore, I do not regard it as an argument for judicial interference with freedom of contract (more on this issue in the concluding section). The results as a whole for the nonpecuniary loss model suggest that a rule under which the insurer takes first from any damages collected from the injurer--the rule seemingly written into many insurance contracts in practice--may well be optimal much of the time.

II. ACTUARIALLY "UNFAIR" PREMIUMS

When insurance is actuarially fair, a risk-averse insured will prefer to purchase full coverage against pecuniary losses. The reason relates to the fact that regardless of the amount of coverage purchased, the insured's expected wealth will be the same (the insurance policy has a net expected value of zero). Hence, the risk-averse insured can eliminate all risk, and maintain the same expected wealth, by purchasing full coverage--the insured will surely wish to do so because the elimination of risk, holding expected wealth constant, always raises expected utility for the risk averse.

In reality, of course, the expected value of insurance policies must be negative on average. Insurers have administrative expenses that must be covered, and their shareholders wish to earn a reasonable rate of return on investment. Insurance premiums may also exceed actuarially fair levels because insureds are not perfectly separated by risk category, so at times relatively low risk insureds will be pooled with relatively high risk insureds.

When insurance premiums exceed the expected value of payments to the insured under the policy, insureds may rationally purchase less than full coverage against pecuniary losses. [16] When such underinsurance is coupled with a partially solvent injurer, we again confront the

question of whether the insurer or the insured should take first from the injurer's assets.

The formal treatment of this case is much the same as in the last section but simpler, and the notation will remain the same except for the following changes: we no longer need to consider nonpecuniary losses, so the utility function is simply *u(w)*. Furthermore, in the absence of nonpecuniary losses, it is unnecessary to distinguish the judgment from the size of the pecuniary loss. I thus assume that the judgment is now *L*, the value of the pecuniary loss, and that the amount of damages collectable from the injurer is *D </= L*.

To capture the notion that insurance premiums exceed the actuarially fair level, I will assume that the premium for each dollar of coverage in each **[*392]** state carries a "markup" of [tau]. [17] The constraints C[1], C[2] </= L can also be dropped, as they will be seen to be nonbinding at the optimum.

The insured's optimization problem is now

[SEE FORMULA IN ORIGINAL]

subject to [pi] = p[1](1 + [tau])C[1] + p[2](1 + [tau])C[2],

C[1], C[2] >/= 0.

I again sketch the details of the solution in the Appendix. In words, the insured purchases less than full coverage against pecuniary loss in this model. Consequently, the insured will not equalize the marginal utility of wealth across all states of nature but will have a higher marginal utility of wealth in the accident states. The reason is that reductions in risk are accompanied by reductions in expected wealth, and the insured must strike a trade-off between the two. At the optimum, the insured will accept some reduction in expected wealth to reduce risk but does not eliminate risk altogether because it is too costly.

The optimal amount for the insurer to receive through subrogation will equal the damages collectable from the injurer or the total amount of first-party coverage payable for the accident, whichever is less (in other words, the optimal contract will call for the insurer to be made whole before the insured). [18] Intuitively, it makes no sense to purchase more net coverage when the injurer is liable than when no injurer is liable. Instead, subject to the constraint that net coverage can never be negative, it is best to equalize the marginal utility of money across the accident states by ensuring that the insured's net wealth is the same in each.

[*393] III. MORAL HAZARD

When insurers cannot observe the precautionary behavior of their insureds or when courts cannot verify precautionary behavior after the fact, it becomes impossible for insurers and insureds to contract for jointly optimal precautions against loss. And when insurance coverage cannot be conditioned on proper precautions against loss, an externality arises (from the insured's perspective) owing to the existence of insurance--the insured (typically) bears the costs of precautions against loss, but the benefits of those precautions are realized by the insurance company to the degree that the loss is insured. The result is an insufficient incentive for the insured to take precautions, known as "moral hazard."

Various responses to the moral hazard problem can be imagined. In some cases, the insurer could bear the cost of the precautions. In others, some observable and verifiable datum may exist (other than information on the loss itself) that is imperfectly correlated with precautionary behavior, on which coverage can be conditioned in whole or in part. Another response (perhaps in conjunction with those above) is to leave some of the loss on the insured to provide some incentive for the insured to take precautions against loss. [19] Where underinsurance arises for the purpose of reducing moral hazard, we again confront the

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question of whether the insurer or the insured should take first from the assets of a partially solvent injurer. A variant of the model developed above will allow us to address the issue.

I will assume that utility takes the form $v(w, x) = u(w) - m(x)$, where $u(w)$ is a strictly concave function of wealth as before, x is a nonmonetary precautionary action that is continuously measurable, and $m(x)$ is the utility equivalent of that action. The probability of an accident is now $p(x)$, a decreasing, convex function (additional precautions reduce the probability of an accident, but at a decreasing rate). The accident causes a pecuniary loss of L, as before. When an accident occurs, the probability that an injurer is liable is [alpha], and the probability that no injurer is liable is (1 - [alpha]). The damages collectable from the injurer are again $D <= L$. In this model, I assume that insurance premiums are actuarially fair.

The insured will select coverage levels C[1] and C[2] and the precaution level x to maximize expected utility. The "first-best" insurance contract would simply maximize expected utility subject to the constraints that premiums be actuarially fair and that coverages be nonnegative. This first-best optimum **[*394]** is unattainable in practice, however, because the insured cannot be required by contract to choose the first-best level of precautions. Instead, in choosing precautions, the insured will take the level of coverage and the associated insurance premium as parameters and choose a precaution level that is privately optimal. The fact that the insured will behave "selfishly" in this way adds an additional constraint to the problem, which may now be written

[SEE FORMULA IN ORIGINAL]

subject to [pi] = [alpha] p(x)C[1] + (1 - [alpha])p(x)C[2],

C[1], C[2] >/= 0,

[SEE FORMULA IN ORIGINAL]

The first constraint states that the insurance premium is actuarially fair. The second constraints are the familiar nonnegativity restrictions on the level of coverage. The third constraint states that the precaution level x must be "incentive compatible"; that is, it must maximize the insured's expected utility taking the level of coverage and the insurance premium as parameters. For simplicity, I assume that the solution entails an "interior" value of x, so additional constraints on its magnitude are unnecessary. I also omit the constraints C [1], C[2] </= L because they will be seen to be nonbinding at the optimum.

Although it is more complicated to derive (see the Appendix), the solution here is almost identical for present purposes to the solution for the model with actuarially unfair premiums. Because of moral hazard, full coverage against pecuniary loss is undesirable. Instead, the insured will bear some loss to induce greater care. The amount of the loss borne by the insured should be the same whether or not an injurer is liable (subject to the nonnegativity constraint on net coverage) to equalize the marginal utility of money to the insured in the accident states. Thus, except where the recovery from the injurer exceeds the amount paid out by the insurer, the amount recovered from the injurer should be paid to the insurer rather than the insured. In all events, the insurer will be made whole before the insured receives any portion of the recovery.

IV. CONCLUSION AND EXTENSIONS

In each of the cases considered save one, the optimal insurance contract requires that the insurer be made whole from the assets of the partially solvent **[*395]** injurer before the insured receives anything. Such a requirement, of course, is the precise opposite of the made-whole doctrine so prevalent in U.S. courts. All of the results are driven by the fact that the optimal amount of loss for the insured to bear does not vary according to whether an

injurer happens to be liable for harms to the insured. Thus, if it were optimal for the insured to collect from the injurer and thereby receive more than the insured's first-party insurance benefits when an injurer is liable, it would also be optimal for the insured to have bought more insurance against the contingency that the same injury would occur under circumstances in which no injurer is liable (or has assets to satisfy a judgment).

The one exception considered in the formal analysis arose in the case in which nonpecuniary losses from the injury increased the marginal utility of money, thereby leading the insured to desire coverage in excess of pecuniary losses, but the insurance market was assumed to be unwilling to sell the insured an amount of coverage that exceeds pecuniary losses. Then, if the insured can collect from the partially solvent injurer before the insurer, the insured can in effect increase coverage in some states of nature toward the level that the insured desires but that the market will not supply.

This last result is generalizable to other circumstances in which the market will not supply the "first-best" amount of coverage. For example, imagine a small company with one or two workers. Perhaps the workers would like to obtain disability insurance against the possibility that an injury will leave them unable to work. Yet it is conceivable that disability insurers will not accept business from such small firms (I have no idea whether this is true in practice) because of the adverse-selection problem--they may be afraid that anyone who applies for insurance will represent an exceptionally high risk. [20] Here again, by allowing the insured to collect from the partially solvent injurer ahead of (say) the insured's health insurer, that insurer in effect sells some of the desired disability insurance that the market will not otherwise supply. [21]

In these types of cases, courts could in theory make insureds better off by allowing them to take first from the assets of a partially solvent injurer. Insurance companies would presumably charge them for the privilege through higher premiums, of course, but by hypothesis insureds are willing to pay a competitive price for such coverage and simply cannot obtain it. Furthermore, the problem is one that, by definition, is unlikely to be susceptible to a contractual solution. Insurers will no more make exceptions to their usual **[*396]** subrogation provisions to make up for their unwillingness to supply more coverage than they will sell the desired coverage in the first place.

To say that courts can improve matters in theory, however, hardly establishes that they can do so in practice. Most fundamental, how can a court identify insureds who should be able to buy more coverage when insurers are unable to identify them? The same information problems that impede insurers must also afflict courts, and indeed courts may be at an added disadvantage because they lack the actuarial experience and savvy of insurers. If subtle subrogation rules might in theory be used to ameliorate a "market failure" elsewhere, therefore, that failure seems to be one that courts cannot hope to fix in practice.

Furthermore, with reference to the existing state of the law, the made-whole doctrine seems seriously at odds with sound policy. The analysis here suggests that the opposite rule--that the insurer should be made whole first--will be best for insureds except when the insured is unable to purchase efficient amounts of insurance coverage. I can imagine no basis for thinking that that situation is the rule rather than the exception.

These conclusions hold whether the subrogation rights in question arise by operation of contract or at common law. Accordingly, it provides support for a default rule at common law that allows insurers to be made whole first, as well as for the enforcement of express contractual provisions that provide for that arrangement.

APPENDIX

I. NONPECUNIARY LOSSES

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COMMENTARY: JUDICIAL AVOIDANCE OF JURIES IN **MASS TORT** LITIGATION

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SUMMARY:
... The jury casts an immense shadow over **mass tort** litigation. ... Nevertheless, most defendants in **mass tort** cases are as eager to avoid a **jury trial** as plaintiffs say they are to have one. ... **Punitive damages,** which vastly increase the stakes in the outcome and thus prod risk-averse parties - especially defendants - toward settlement, are possible in **mass tort** cases, if only because discovery may support an inference that defendants knew (or had reason to know) about the serious risks that they were creating for a large number of people, or even that they actively concealed these risks. ... Because of the long and variable latency periods associated with many mass toxic torts, it is also hard to predict when the future claims will be filed, when the manifestation of injury will transform those future claims into current claims for actual physical harms, and which harms those transformed claims will allege. ... Judges in **mass tort** litigation have learned how to exploit these and other sources of uncertainty strategically in order to encourage settlements. ... Only this kind of comprehensive or "global" class action can enable **mass tort** defendants to resolve these claims finally, completely, and (relatively) swiftly through dismissal, summary judgment, or settlement. ...

TEXT:
[*479]

The jury casts an immense shadow over **mass tort** litigation. On this point, at least, all of the participants - plaintiffs' and defendants' lawyers, their clients, jurors, judges, and commentators - seem to agree. [1]

Plaintiffs and their lawyers are probably the most ardent advocates of the jury trial, at least in their public statements. They ostentatiously maintain that they have total confidence in juries and want nothing more than to get their cases before them. If they can only do so, they assert, the jury will find the plaintiffs' grievous sufferings to be compelling, their claims meritorious, and their corporate opponents culpable, if not criminal. Plaintiffs' lawyers especially value juries in **mass tort** litigation where, almost by definition, the compensatory

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effectuation of settlements. [92] This is especially true of asbestos and other **mass tort** litigation in which the claims' heterogeneity would otherwise generally preclude them from satisfying the commonality and certain other requirements of Rule 23 [93] and its state law counterparts. But what is perhaps more interesting and disturbing to the Supreme Court and some lower appellate courts, [94] as well as to some commentators, [95] is the possibility that class actions are sufficient to induce settlements because of the irresistible incentives that they create for both sides to avoid trial. Plaintiffs' lawyers may be under great presssure to compromise the interests of some members of the class in order to benefit other members - and themselves - through negotiated or court- awarded counsel fees. [96] As we have seen, **mass tort** defendants who might be bankrupted by an adverse decision in the class action may have little choice but to settle, almost without regard to the claims' merits, precisely because they fear the pervasive uncertainty and the variability of jury decisions in such cases. [97] For these reasons, as well as for the more conventional doctrinal reasons for doubting that Rule **[*498]** 23 applies to most mass toxic torts, [98] some appellate courts have limited, and sometimes overruled, trial courts' determination to avoid jury trials through class action settlements. [99]

D. Categorical Exclusions of Evidence

A fourth technique by which courts avoid jury trials in **mass tort** litigation is their growing willingness to exclude certain types of plaintiffs' evidence from reaching the jury under the Federal Rules of Evidence and in states that have adopted the gatekeeping approach required by the Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc. [100]

The problem arises primarily in the case of claims in which the plaintiff complains of a "non-signature" disease like lung cancer that could have more than one possible cause. Such diseases characterize almost all **mass tort** injuries; the major apparent exceptions are asbestosis and mesothelioma, which seem unique to asbestos exposure, and the vaginal carcinoma that seems distinctive to DES exposure. In the more common instance of a non-signature injury, the courts have struggled to identify the appropriate scientific methodologies for assuring that any admissible evidence will be sufficiently reliable to support findings on the issues of general and specific causation. These struggles have produced some blanket exclusions of evidentiary categories, which can then justify courts in using directed verdicts or motions for summary judgment in favor of defendants in order to avoid jury trials. [101]

The courts have taken a number of approaches to the question of admissibility on the issue of causation, particularly general causation. Sometimes flatly inconsistent, sometimes not, these approaches have the effect of establishing that some **mass tort** cases will not reach the jury because plaintiffs lack the kind of scientific evidence that can satisfy the court's categorical standards of admissibility in such cases. Most courts favor epidemiological evidence. [102] Because it involves **[*499]** human populations, it does not suffer from many of the well-known methodological limitations of animal studies, [103] and unlike clinical evidence, which ordinarily cannot distinguish among the various possible causes of a non-signature disease, epidemiological evidence can (at least in principle) isolate the causal contributions of those possible causes by comparing the experiences of large, differentially exposed populations, subject to appropriate controls.

Some courts, such as Judge Weinstein in his decision granting defendants summary judgment in the Agent Orange opt-out cases, [104] have ruled that only epidemiological evidence can prove causation in such cases, which effectively denies many plaintiffs access to a jury. In his view, "all the other data supplied by the parties rests on surmise and inapposite extrapolations from animal studies and industrial accidents" [105] or on clinical evidence that, although identifying the patient's condition, could not demonstrate which of the possible causal agents was responsible for it. [106] For the same reason, the appellate courts in the later, decisive stages of the Bendectin litigation also ruled for defendants, holding that only

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epidemiological evidence could prove general causation in such cases. [107] More recently, some other courts have taken similar positions categorically excluding non- epidemiological evidence. [108]

[*500]

IV. Complexity Exception to the Right to Jury Trial?

The technical character of much contemporary litigation has led some commentators to call for the recognition of a complexity exception to the **Seventh Amendment** right to jury trial in certain types of civil cases in which ordinary lay jurors, selected in the customary manner, are deemed not competent to decide some of the factual issues presented to them. [109] Although a number of courts have rejected this argument, [110] one circuit court has suggested that such an exception may derive from the Due Process Clause, not the **Seventh Amendment.** [111] The Supreme Court, however, has not accepted this suggestion. Were the Court to recognize such an exception, [112] it could conceivably apply it to **mass tort** litigation, given the centrality of complex, controversial scientific evidence to the resolution of causation, market share liability, and other issues.

I do not propose to take any position here on the desirability, much less the constitutionality, of a complexity exception in general or on the appropriateness of applying this exception (were the Court to recognize one) to **mass torts** in particular. For now, I am agnostic on both questions. Nevertheless, I confess to a certain initial skepticism about the wisdom of such a reform, even before considering the implementing detail that might enable one to assess how such an exception would actually work in practice. At this point, I simply want to raise briefly some questions that ought be be asked (and hopefully answered) before one takes a position on the merits of this question.

[*501] First, are mass toxic torts any more complex than many other kinds of litigation that are tried to juries? Antitrust litigation, for example, involves evidence concerning market definition, market shares, and a host of other highly technical questions of economic theory and effects on competition and prices. Securities litigation often involves a long chain of intricate commercial and financial transactions, comprehension of which requires immersion in arcane terminology, practices, and concepts. The same is true of some white collar crime prosecutions under RICO. Patent litigation is also technically demanding, [113] as are medical malpractice cases and litigation involving engineering issues. In short, it is not at all clear that the kind of evidence with which juries must grapple in **mass tort** cases is any more daunting than the kinds of evidence presented in these other areas of litigation in which juries are routinely used.

Second, how does the growing corpus of empirical research on jury comprehension - much of it conducted by participants in this symposium - bear on this question? The type of litigation studied in this literature that seems most analogous to **mass tort** cases is probably medical malpractice, which often involves conflicting evidence by scientists, some of it quite technical and statistical. Work by Neil Vidmar, Valerie Hans, and other researchers, however, suggests a high degree of juror comprehension of the evidence in such cases. [114] On the other hand, the evidence in malpractice cases may be more easily understood than in **mass tort** cases because jurors can often look to testimony on standard medical practice as a kind of benchmark against which the defendant's conduct can be evaluated, whereas such benchmarks may be less readily available to prove product defect in **mass tort** cases. Even the scientific evidence bearing on causation may be more accessible in malpractice cases, as it too is likely to depend on clinical testimony of a more familiar kind.

A third question concerns the extent to which scientific evidence can be made more comprehensible to jurors through reforms in the trial process. Reformers have long recommended certain adjustments in traditional trial practice designed to facilitate juror

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comprehension, especially in long trials. Some of these proposed changes would permit jurors to take notes, bring them home with them, and put questions to the lawyers (through the judge). Others would allow the **[*502]** judge to instruct the jury on general rules of law at the outset of the case and not just at the end, provide the instructions in writing, display documents in evidence on a computer screen or overhead that the jury can view and retrieve, and so forth. Studies are needed of the effects of such innovations on jury comprehension.

Fourth, can trial lawyers acquire - or do many of them already possess - the forensic skills to humanize and simplify even the most technical scientific evidence so as to make it intelligible to the lay juror? If so, special juries are unnecessary. After all, bringing evidence down to the jurors' level is preeminently the trial lawyer's job; it is what they are trained to do effectively. Some lawyers are better at this than others, of course, but that kind of skill inequality also affects many other aspects of lawyers' performance in all kinds of cases; it is not peculiar to the task of presenting complex evidence.

Finally, which fact-finder would replace the lay jury under a complexity exception for **mass tort** cases, how would it be selected, and would it be superior to the jury? These are difficult questions, especially since any new fact-finding institution will probably entail some characteristic disadvantages as well as advantages. Consider, for example, replacing the jury with a single judge who, although probably scientifically untrained, might be more sophisticated in the evaluation of expert testimony because the judge is more familiar with it. On the other hand, however, the variance around a "true" finding of fact is likely to be greater for a single judge than for a jury of twelve (or even six) individuals, whose biases would tend to balance and neutralize each other. [115] By the same token, a blue-ribbon jury of technically trained experts, which some commentators have proposed, [116] would surely exhibit their own kinds of "trained incapacities." [117] I am not suggesting that no improvements over the lay jury as fact-finder in **mass tort** cases are possible, [118] but only that assessing whether a particular change does indeed constitute an improvement may ultimately be as much a normative question (deciding which of the alternative sets of tradeoffs is best on balance) as it is an empirical one that "legal science" can answer.

FOOTNOTES:

n1. Peter H. Schuck, **Mass Torts:** An Institutional Evolutionist Perspective, 80 Cornell L. Rev. 941, 977 (1995) (stating that trial lawyers, judges, and litigants tend to respect juror fact-finding, which carries enormous normative force in American legal and political culture).

n2. Michael L. Rustad, Unraveling Punitive Damages: Current Data and Further Inquiry, 1998 Wis. L. Rev. 15.

n3. Although good data on this question are lacking, defendants appear to be successful in many, possibly even most, of the **mass tort** cases that go to trial. In this respect, asbestos cases in recent years constitute an exception. Plaintiffs, of course, have won victories at trial in many other **mass tort** cases, especially those involving defective products such as DES, thalidomide, and heart valves.

n4. For a useful, but tendentious, explanation of this phenomenon, see Peter Huber, Junk Science and the Jury, 1990 U. Chi. Legal F. 273.

n5. This is primarily due to the intangible component of both compensatory and punitive damages and the lack of meaningful legal guidance or constraint for juries in assessing either type - other than the prospect of post-trial remittitur or court-reduced judgments, procedures of which jurors are presumably ignorant. See Kenneth S. Abraham, What is a Tort Claim?: An Intepretation of Contemporary Tort Reform, 51 Mo. L. Rev. 172, 177-78 (1992)

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(noting that a successful tort claimant is entitled to recover unlimited damages).

n6. As Judge Richard Posner put it in rejecting a class certification:

They [defendants in **mass tort** cases] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.... Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action blackmail settlements.

In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995).

Posner's observation seems correct; it is difficult to find any other explanation for the willingness of defendants to pay enormous sums - the breast implant and tobacco litigation are only the most recent and dramatic examples - to settle claims with little scientific basis or subject to strong legal defenses. The same can be said of the Agent Orange class action settlement to which the defendant chemical companies agreed despite the court's findings, affirmed in this respect by the appellate court, that both their factual defenses (on causation) and their legal defenses (e.g., the government contract defense) were not merely strong but dispositive. See Peter H. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts (enlarged ed., 1987). Although the $ 180 million settlement amount, approved in 1984, seems trifling compared to the settlement amounts proposed in recent years, it was the largest **mass tort** settlement up to that time.

n7. Shari S. Diamond, What Jurors Think, in Verdict: Assessing the Civil Jury System 282, 285-86 (Robert E. Litan ed., 1993) (discussing studies that indicate jurors report a favorable attitude toward jury duty after serving).

n8. Dan Drazen, The Case for Special Juries in Toxic Tort Litigation, 72 Judicature 292, 294 (1989) (arguing that toxic tort litigation is too complex for lay jurors); see The Jury's Capacity to Decide Complex Civil Cases, 110 Harv. L. Rev. 1489 (1997).

n9. E.g., Paula L. Hannaford et al., How Judges View Civil Juries, 48 DePaul L. Rev. 247, 248- 52 (1999). Thomas Munsterman and Nancy King noted at the Clifford Symposium many judges' markedly paternalistic attitudes toward "their" juries.

My own impression, formed through confidential conversations with **mass tort** judges, is that their private views of juries are often more critical than they are prepared to state publicly. This impression may or may not be inconsistent with the upbeat survey data, depending on whether judges responding to surveys consider their responses "public" in a sense, even when they will be treated as anonymous.

n10. The Agent Orange litigation vividly illustrates all of these difficulties. See Schuck, supra note 6.

n11. In doing so, of course, they are in a sense pushing against an open door, given the incentives of both plaintiffs' and defendants' lawyers to settle cases before trial. See infra text accompanying notes 20-35.

n12. Schuck, supra note 6.

n13. Michael D. Green, Bendectin and Birth Defects: The Challenges of Mass Toxic Substances Litigation (1996).

n14. Richard B. Sobol, Bending the Law: The Story of the Dalkon Shield Bankruptcy (1991).

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n15. Kai Erikson, Everything In Its Path: Destruction of Community in the Buffalo Creek Flood (1976); Gerald M. Stern, The Buffalo Creek Disaster (1976).

n16. Jonathan Harr, A Civil Action (1995).

n17. According to a communication with the author from Deborah Hensler, Director of the Institute for Civil Justice, RAND, in May 1998, it appears that there are no data on the proportion of **mass tort** cases, as distinct from other kinds of cases, that go to trial.

n18. Marc Galanter & Mia Cahill, Most Cases Settle: Judicial Promotion and Regulation of Settlement, 46 Stan. L. Rev. 1339, 1340 (1994) (citing Herbert Kritzer, Adjudication to Settlement: Shading in the Gray, 70 Judicature 161, 163-64 (1986)) (stating that in an analysis of 1,649 cases in five federal circuits and seven state courts, only 7% of cases went to trial and reached a jury verdict or court decision); see Michael Saks, Do We Know Anything About the Behavior of the Litigation System and Why Not?, 140 U. Pa. L. Rev. 1147 (1992).

n19. See Schuck, supra note 1, at 987.

n20. See supra text accompanying notes 3-6.

n21. E.g., James S. Kakalik et al., Variations in Asbestos Litigation Compensation and Expenses (Institute for Civil Justice, RAND Corp., No. R-3132-ICJ, 1984).

n22. Francis E. McGovern, Resolving Mature **Mass Tort** Litigation, 69 B.U. L. Rev. 659 (1989); Schuck, supra note 1, at 948-62.

n23. This was the pattern of tobacco litigation until 1997 when the unprecedented and unexpected agreement between the industry, states, and plaintiffs' lawyers dramatically altered the situation. Gary T. Schwartz, Tobacco Liability in the Courts, in Smoking Policy: Law, Politics and Culture 131 (Robert L. Rabin & Stephen D. Sugarman eds., 1993). In the wake of the collapse of that agreement and some new legal and political developments favorable to the industry's position, the states' claims were settled on terms much more favorable to the industry.

n24. For example, this was the pattern of the Bendectin and silicone gel breast implant litigations.

n25. Geressy v. Digital Equip. Corp., 980 F. Supp. 640, 660-74 (E.D.N.Y. 1997).

n26. Id. at 664-74.

n27. Shari S. Diamond et al., Juror Judgments about Liability Damages: Sources of Variability and Ways to Increase Consistency, 48 DePaul L. Rev. 301 (1999).

n28. See, e.g., Ealy v. Richardson-Merrell, Inc., 897 F.2d 1159 (D.C. Cir. 1990) (reversing $ 95,000,000 verdict); Richardson v. Richardson-Merrell, Inc., 857 F.2d 823 (D.C. Cir. 1988) (affirming district court's grant of j.n.o.v. on $ 1,000,000 verdict); Merrell Dow Pharm., Inc., v. Havner, 953 S.W.2d 706 (Tex. 1997) (reversing $ 33,750,000 verdict); Blum v. Merrell Dow Pharm., Inc., 560 A.2d 212 (Pa. Super. Ct. 1989) (affirming $ 19,200,000 verdict), aff'd, 626 A.2d 537 (Pa. 1993); Oxendine v. Merrell Dow Pharm., Inc., 506 A.2d 1100 (D.C. App. Ct. 1986) (reversing trial court's grant of j.n.o.v. on $ 750,000 verdict).

n29. See, e.g., Dow Chem. Co. v. Mahlum, Civ. No. 28,600 (2d Dist. Nev. Nov. 7, 1995) (returning a verdict of $ 12 million); Gina Kolata, Panel Can't Link Breast Implants to Any Diseases, N.Y. Times, Dec. 2, 1998, at A1.

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n30. Statistically, such a situation exists when the mean outcome promises to be far higher than the median one.

n31. This, of course, is precisely the kind of situation to which Judge Posner refers in the passage cited earlier. See Abraham, supra note 5.

n32. Michael D. Green, The Inability of Offensive Collateral Estoppel to Fulfill its Promise: An Examination of Estoppel in Asbestos Litigation, 70 Iowa L. Rev. 141 (1994).

n33. I do not mean to suggest that this financial self-interest is the only, or even the primary, motive animating defense lawyers, who are presumably as scrupulous about their duties toward their clients (and to the court) as any fiduciaries confronted with such conflicts.

n34. See George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1 (1984). This important article has spawned a significant, often critical literature. See, e.g., Orley Ashenfelter et al., Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes, 24 J. Legal Stud. 257 (1995); Theodore Eisenberg, Testing the Selection Effect: A New Theoretical Framework with Empirical Tests, 19 J. Legal Stud. 337 (1990).

n35. See, e.g., Peter H. Schuck, The Role of Judges in Settling Complex Cases: The Agent Orange Example, 53 U. Chi. L. Rev. 337 (1986) (analyzing the judge's role in settling complex civil cases like Agent Orange cases).

n36. Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073 (1984) (arguing that because consent is often coerced and bargaining is done without authority, settlement is a highly problematic technique for streamlining dockets, which often results in injustice).

n37. Schuck, supra note 1, at 961.

n38. Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996); In re American Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996).

n39. E.g., Amchen Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997); In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 818-19 (3d Cir. 1995).

n40. Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach, 118 S. Ct. 956 (1998).

n41. I say "complicated" rather than "blocked" because while these decisions ostensibly make global settlements more difficult, the decisions may in other respects tend to encourage settlements, and it is not at all clear how settlement on balance will be affected.

n42. See, e.g., William W. Schwarzer, Settlement of **Mass Tort** Class Actions: Order Out of Chaos, 80 Cornell L. Rev. 837 (1995).

n43. Civil Justice Reform Act of 1990, 28 U.S.C. 471-82 (1997).

n44. This is especially likely after the Supreme Court's decision in Amchen Products, 117 S. Ct. 2231, but it was true even before Amchen Products. See, e.g., In re Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721, 739-45 (2d Cir. 1992).

n45. Green, supra note 32, at 197.

n46. This encourages them to render what Chief Judge Richard Posner has called a "kind of

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Esperanto instruction" to the jury. In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995).

n47. The asbestos litigation helped precipitate some bankruptcies among many manufacturers. See Peter H. Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 Harv. J.L. & Pub. Pol'y 541, 555 (1992). A.H. Robins Co. filed for bankruptcy in the Dalkon Shield litigation. See Sobol, supra note 14. Dow Corning filed for bankruptcy in the silicone gel breast implant litigation. In re Dow Corning Corp., No. 95-20512, 1995 WL 49597, at *3 (Bankr. E.D. Mich. Aug. 9, 1995).

n48. E.g., Wayne D. Brazil, Special Masters in Complex Cases: Extending the Judiciary or Reshaping Litigation, 53 U. Chi. L. Rev. 394, 394-98 (1986).

n49. In re Agent Orange Prod. Liab. Litig., 611 F. Supp. 1223, 1260 (E.D.N.Y. 1985), aff'd on other grounds, 818 F.2d 187 (2d Cir. 1987).

n50. Turpin v. Merrell Dow Pharm., Inc., 959 F.2d 1349, 1361 (6th Cir. 1992); Christopher v. Allied-Signal Corp., 902 F.2d 362, 368 (5th Cir. 1990).

n51. E.g., Peter Huber, Galileo's Revenge: Junk Science in the Courtroom (1991); David E. Bernstein, Junk Science in the United States and the Commonwealth, 21 Yale J. Int'l L. 123 (1996).

n52. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993).

n53. General Elec. Co. v. Joiner, 118 S. Ct. 512, 514 (1997).

n54. The Supreme Court has pressed the lower courts to grant summary judgment more liberally, including in **mass tort** cases. See Celotex Corp. v. Carrett, 477 U.S. 317 (1986).

n55. The canonical article is Judith Resnik, Managerial Judging, 96 Harv. L. Rev. 376 (1982). For subsequent evolution in this area, see Judith Resnik, From "Cases" to "Litigation," Law & Contemp. Probs., Summer 1991, at 5.

n56. Schuck, supra note 1, at 956-58.

n57. See, e.g., In re Bendectin Litig., 857 F.2d 290, 307 (6th Cir. 1988) (trifurcation); see Kenneth S. Bordens & Irwin A. Horowitz, **Mass Tort** Civil Litigation: The Impact of Procedural Changes on Jury Decisions, 73 Judicature 22 (1989).

n58. Robert G. Bone, Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity, 46 Vand. L. Rev. 561, 563 (1993).

n59. Schuck, supra note 1, at 958-60.

n60. See Green, supra note 32.

n61. Judge Weinstein jolted the lawyers with an early trial date in the Agent Orange litigation, Schuck, supra note 6, at 113, 118-19, but its effects on settlement negotiations in all cases are well-understood by even novice trial judges.

n62. The greater prominence of federal judges than their state court counterparts is by no means limited to **mass tort** litigation. However, it is regrettable and especially misleading in this area where most cases - more than two-thirds of the asbestos cases, for example - are litigated in the state courts, the administrative resources available to the state judges are invariably more limited, and the state law rules - on class actions and damages, for example

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- often differ significantly from the federal rules.

n63. The judicial resources required by the Agent Orange litigation, the first of its kind, were staggering, Schuck, supra note 6, at 4-5, but it was ultimately litigated and settled largely as a single, consolidated case. Partly for this reason, the fragmented asbestos litigation has demanded far more of the courts. This was readily apparent early on. Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (Mar. 1991).

n64. Brazil, supra note 48, at 396-97.

n65. Schuck, supra note 6, at 5.

n66. For example, special masters have sometimes been used to determine defendants' solvency, which helped to guide the judges' decisions about whether the preconditions for the use of a mandatory class action were satisfied. Marvin Frankel, a former federal judge, performed this function for Judge Weinstein in the asbestos litigation.

n67. The most prominent practitioners of these arts are Francis McGovern and Kenneth Feinberg, who have performed as special masters in many of the leading **mass tort** litigations.

n68. Sobol, supra note 14.

n69. Schuck, supra note 6.

n70. Harr, supra note 16.

n71. Disputes between corporate defendants and their insurance carriers over liability coverage of **mass tort** claims have been common and protracted in the asbestos and silicone gel breast implant litigations, among others. Green, supra note 32, at 160.

n72. Liability insurance policies usually do not cover punitive damages.

n73. Such knowledge and concealment have been alleged in the tobacco, asbestos, and silicone gel breast implant litigations, among others.

n74. See Special Issue: The Future of Punitive Damages, 1998 Wis. L. Rev. 1.

n75. This tendency may be increased by recent amendments to the Internal Revenue Code that make punitive damage awards in personal injury cases taxable to the recipient as income while compensatory damages are not taxable. I.R.C. 104 (1998).

n76. Judge Jack R. Weinstein suggested during his remarks entitled The Future of Class Actions in **Mass Tort** Cases: A Roundtable, presented at Fordham Law School on September 25, 1997, that courts can use Rule 706(b) panels to help them estimate the parameters of future claims.

n77. See Schuck, supra note 6, at 205-06. In the tobacco and breast implant litigations, this underestimation was so large that it helped to undo the original global settlements. In global settlements such as the one in the asbestos litigation invalidated in Amchen Products, Inc. v. Windsor, 117 S. Ct. 2231, 2251 (1997), defendants therefore insist on provisions enabling them to opt-out in the event that the number of future claims exceeds certain levels. See Schuck, supra note 1, at 967-68.

n78. Priest & Klein, supra note 34, at 4.

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n79. Schuck, supra note 35, at 343.

n80. See discussion and examples in Helen E. Freedman, Class Actions for **Mass Torts** in State Courts: A State Court Judge's Response to Professor Vairo, N.Y. Litigator, May 1998, at 13.

n81. 117 S. Ct. 2231. The Supreme Court recently heard oral arguments in another case challenging the certification of an asbestos class action. Ortiz v. Firbreboard Corp., 118 S. Ct. 2339 (1998).

n82. See, e.g., Richard Nagareda, In the Aftermath of the **Mass Tort** Class Action, 85 Geo. L.J. 295, 301-09 (1996) (noting that before Amchen Products that de-certifications had already been ordered in litigation involving tobacco, prosthetic devices, and blood products). For other decertifications, see Freedman, supra note 80.

n83. Amchen Prods., Inc., 117 S. Ct. at 2251-52. After Amchen Products, some federal trial courts took the initiative to decertify classes that they had previously certified and to refuse to certify classes. See, e.g., Walker v. Liggett Group, Inc., 175 F.R.D. 226, 233 (S.D. W. Va. 1997); Georgene M. Vairo, Amchen Products, Inc. v. Windsor: Where Will the **Mass Tort** Class Actions Go?, N.Y. Litigator, May 1998, at 6. Federal courts of appeals decertified many of those that remained. Id. at 8 n.37. In the Ortiz case, now pending in the Supreme Court, the Fifth Circuit reaffirmed its class certification. In re Asbestos Litig., 134 F.3d 668 (5th Cir. 1998).

n84. For dissenting views, see Richard A. Epstein, The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal, 10 J.L. & Com. 1 (1990); Roger H. Transgrud, Mass Trials in **Mass Tort** Cases: A Dissent, 1989 U. Ill. L. Rev. 69.

n85. See supra note 6.

n86. I use the qualifier "often" because a **mass tort** defendant's calculation of whether it would be better off defending in a class action (which of course can take a variety of quite different forms, even within a particular Rule 23 type) instead of in a large number of individual actions, or in some non-class form that aggregates claims, is a complicated one that depends on a variety of factors often cutting in different directions. The decision by a plaintiffs' lawyer as to whether to seek class certification, and if so in which form, is similarly complicated.

n87. In the case of settlement class actions, of course, the settlement occurs simultaneously with the certification, not later. The viability of settlement class actions, however, has been called into question by the Amchen Products decision, at least in the circumstances presented there.

n88. When Congress in 1995 amended the Securities Act, 15 U.S.C. 77z-1 (1995), to impose a variety of new obstacles to maintaining securities class actions in the federal courts, the plaintiffs' lawyers responded by filing their cases in state courts, where such limitations did not apply. As a result, Congress recently enacted legislation that seeks to overcome these strategies by imposing similar restrictions on such class actions in state courts. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227.

n89. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

n90. Matsushita Elec. Ind. Co. v. Epstein, 516 U.S. 367 (1996).

n91. For a discussion of New York's more conservative approach to class actions, see Freedman, supra note 80, at 14.

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n92. Nagareda, supra note 82, at 309.

n93. Fed. R. Civ. P. 23.

n94. In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 784 (3d Cir. 1995); Nagareda, supra note 82, at 308.

n95. See, e.g., Paul D. Carrington & Derek P. Apanovitch, The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of **Mass-Tort** Settlements Negotiated Under Federal Rule 23, 39 Ariz. L. Rev. 461 (1997); John C. Coffee, Jr., Class Wars: The Dilemma of the **Mass Tort** Class Action, 95 Colum. L. Rev. 1343 (1995).

n96. See, e.g., Amchen Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2251 (1997); Coffee, supra note 95, at 1384.

n97. See In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299 (7th Cir. 1995).

n98. See, e.g., Castano v. American Tobacco Co., 84 F.3d 734, 740-52 (5th Cir. 1996); In re American Med. Prods., 75 F.3d 1069, 1078-83 (6th Cir. 1996). In contrast, mass accident cases such as airline disasters or fires can more easily satisfy Rule 23's requirements.

n99. See Amchen Prods., Inc., 117 S. Ct. at 2252; General Motors, 55 F.3d at 818-19; Nagareda, supra note 82. But see In re Asbestos Litig., 134 F.3d 668 (5th Cir. 1998).

n100. 509 U.S. 579, 592-95 (1993).

n101. In theory, a court in a **mass tort** case could grant a dispositive motion in favor of the plaintiff, but I am unaware of any such case. Even with a signature disease like mesothelioma, other issues such as product identification, adequate warning, or comparative fault are likely to remain for the jury to decide.

n102. In order for the epidemiological evidence to be admissible, of course, it is not sufficient that the particular evidence be of the categorically favored type. In addition, it must satisfy the other judicial criteria of relevance, probity, and reliability that normally apply to such evidence. See, e.g., Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1398 (D. Or. 1996) (requiring epidemiological evidence, but also requiring, as courts typically do, that such evidence demonstrate at least a doubling of the background risk before it can be admitted to prove general causation under the conventional preponderance of the evidence standard); see Lopez v. Wyeth- Ayerst Labs, No. 97-15143, 1998 WL 81296, at *2 (9th Cir. 1998) (finding analytical gap between epidemiological and other studies and conclusions).

n103. As is equally well known, of course, epidemiological studies suffer from their own distinctive limitations, especially the notorious difficulties of cost, of obtaining accurate exposure data, and of controlling for all of the variables other than exposure to the agent in question that might have affected the observed condition in the exposed population.

n104. In re Agent Orange Prod. Liab. Litig., 611 F. Supp. 1223, 1264 (D.C.N.Y. 1985).

n105. Id. at 1231. For a partial critique of Judge Weinstein's approach to this issue, see Schuck, supra note 6, at 234-44.

n106. Agent Orange, 611 F. Supp. at 1231-35.

n107. In the Bendectin litigation, this evidence failed to demonstrate general causation. See Ealy v. Richardson-Merrell, Inc., 897 F.2d 1159, 1160-62 (D.C. Cir. 1990); Richardson v.

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damages may be quite large. Although punitive damages are rare, [2] especially in **mass torts,** they are always an alluring possibility to plaintiffs' lawyers, especially where incriminating corporate documents can be unearthed and paraded before the jury. In a single stroke, then, the **mass tort** jury can render justice to the plaintiffs and enrich their lawyers.

Regardless of what plaintiffs' lawyers say in public, however, most would strongly prefer to settle. After all, even the credible threat of a jury trial can induce **mass tort** defendants to settle before trial, thereby enabling plaintiffs to gain their judgments and the lawyers to obtain their fees (and also to burnish their reputations in ways that translate into greater bargaining power with future clients and defendants) without incurring the high costs of trial and the substantial risks of defendant verdicts or reversal on appeal. [3]

[*480] Defendants' lawyers also praise the institution of the civil jury. Most defendants, one suspects, genuinely believe in the correctness of their legal arguments and respect the intelligence and fairness of jurors as factfinders. Moreover, they often succeed in persuading juries. Nevertheless, most defendants in **mass tort** cases are as eager to avoid a jury trial as plaintiffs say they are to have one. The reason is that these defendants confront the overriding, remorseless logic of the law of small numbers. Even those that feel confident that juries will support their positions actually experience relatively few trials. As a result, the variability in trial outcomes - even assuming that the underlying facts are identical - may be significant. [4] And because this variability is linked to a tort system in which juries may award virtually unlimited damages, [5] most **mass tort** defendants can successfully defeat almost every claim, yet still be threatened with bankruptcy if even a single adverse jury decides to impose ruinous liability. [6]

Jurors are seldom heard from on the issue of how well they think juries perform - or indeed on any other subject relating to their service. Studies confirm what common experience teaches - that jurors **[*481]** overwhelmingly take pride and satisfaction in the experience. [7] Even so, **mass tort** trials tend to be very protracted, tedious, and technical, and it would therefore be surprising indeed if jurors in many cases did not share the view of some legal commentators that lay juries cannot comprehend such cases, much less fairly and reasonably decide them. [8] The fact that other fact-finding entities may be no better at the task, of course, does not necessarily mean that these doubts about jury competence are unfounded.

Judges, when asked publicly for their assessment, almost invariably extol the virtues of juries. [9] Nevertheless, judges admit to deep concerns about the long delays, crowded dockets, and high transaction costs of **mass tort** litigation. They are also concerned about the problems for courts and litigants occasioned by the large number of related claims in **mass torts** - the inconsistent verdicts; the first-come, first-served distribution of the often inadequate resources available for compensation; the legal uncertainties; the daunting procedural requirements; the compromise of individual rights; the unfairness of bundling together strong, weak, and frivolous claims; and the unusual administrative demands that they impose. [10]

However genuine the judicial assurances of confidence in the civil jury system may be, a more striking fact is that they have devised remarkably effective ways to keep **mass tort** cases away from juries. [11] My comments will elaborate on this theme of judicial jury avoidance. Specifically, I wish to touch on four aspects of this phenomenon: (1) the infrequency of jury trials; (2) the judicial motives for jury avoidance; (3) the judicial techniques of jury avoidance; and (4) the possi **[*482]** bility of a "complexity exception" to the right to a jury trial in **mass tort** cases. Needless to say, there is a great deal more to be said on each of these points than I can discuss in these brief comments.

Before turning to this discussion, however, let me frame it with a few preliminary observations designed to narrow somewhat the focus on **mass torts.** First, it is important for some purposes to distinguish three types of **mass tort** cases: accidents (e.g., airline

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Richardson-Merrell, Inc., 649 F. Supp. 799, 803 (D.C. Cir. 1986), aff'd, 857 F.2d 823, 831-32 (D.C. Cir. 1988).

n108. See, e.g., In re Joint E. & S. Dist. Asbestos Litig., 52 F.3d 1124, 1137 (2d Cir. 1995); Grimes v. Hoffman-LaRoche, Inc., 907 F. Supp. 33 (D.N.H. 1995); Ambrosini v. Upjohn Co., 1995 WL 637650, at *8 (D.D.C. 1995); cf. Sanderson v. International Flavors & Fragrances, Inc., 950 F. Supp. 981, 1002 (C.D. Cal. 1996); Mascarenas v. Miles, 968 F. Supp. 582 (W.D. Mo. 1997); Nelson v. American Sterilizer Co., 566 N.W.2d 671, 673-76 (Mich. Ct. App. 1997).

On the other hand, some courts have seemed to reject this categorical evidentiary rule, admitting non-epidemiological evidence, at least in situations in which no epidemiological studies were available. E.g., Zuchowitz v. United States, 140 F.3d 381, 387 (2d Cir. 1998); Ambrosini v. Labarraque, 101 F.3d 129, 141 (D.C. Cir. 1996); Graham v. Playtex Prods., Inc., 993 F. Supp. 127, 131-32 (N.D.N.Y. 1998); Lakie v. Smithkline Beecham, 965 F. Supp. 49, 56-58 (D.D.C. 1997). In the same spirit, other courts have declined to accord any special preference to, much less require, epidemiological evidence. E.g., Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378, 1384-85 (4th Cir. 1995); National Bank of Commerce v. Dow Chem. Co., 965 F. Supp. 1490, 1493-97 (E.D. Ark. 1996); Casey v. Ohio Med. Prods., 877 F. Supp. 1380, 1385 (N.D. Cal. 1995); Bowers v. Northern Telecom, Inc., 905 F. Supp. 1004, 1010-13 (N.D. Fla. 1995); Pick v. American Med. Sys., Inc., 958 F. Supp. 1151, 1158 (E.D. La. 1997); Vice v. Northern Telecom, Inc., Civ. No. 94-1235, 1996 WL 200281, at *7 (E.D. La. 1996); Valentine v. Pioneer Chlor Alkali Co., 921 F. Supp. 666, 673 (D. Nev. 1996); Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 860 (Mo. 1993).

n109. See, e.g., Note, The Right to a Jury Trial in Complex Civil Litigation, 92 Harv. L. Rev. 898, 900-04 (1979). Lord Devlin has shown that especially complex cases were sometimes retained by the Chancellor in equity. Patrick Devlin, Jury Trial of Complex Cases: English Practice at the Time of the **Seventh Amendment,** 80 Colum. L. Rev. 43, 63 (1980).

n110. E.g., SRI Int'l v. Matsushita Elec. Corp. of America, 775 F.2d 1107, 1117 (Fed. Cir. 1985); In re United States Fin. Sec. Litig., 609 F.2d 411, 424-31 (9th Cir. 1979).

n111. In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1084 (3d Cir. 1980).

n112. The Court recently had an opportunity to do so in Markman v. Westview Instruments, Inc., 116 S. Ct. 1384, 1389-92 (1996), a patent case, but the Court there did not discuss the complexity exception issue.

n113. See, e.g., id. at 1393-96 (discussing cognate issue).

n114. Joe S. Cecil et al., Citizen Comprehension of Difficult Issues: Lessons from Civil Jury, 40 Am. U. L. Rev. 727, 752-56 (1991); Neil Vidmar, Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data From Medical Malpractice, 43 Emory L.J. 885, 896-99 (1994).

n115. For example, jury simulations indicate that the variability of outcome is greater among individual jurors than among juries as a whole. See Diamond et al., supra note 27.

n116. See, e.g., Dan Drazen, The Case for Special Juries in Toxic Tort Litigation, 72 Judicature 292, 297 (1989); Note, The Case for Special Juries in Complex Litigation, 89 Yale L.J. 1155, 1172-76 (1980).

n117. Philip Selznick, TVA and the Grass Roots: A Study in the Sociology of Formal Organization 250-61 (1949).

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n118. See Hannaford et al., supra note 9, at 259-63.

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crashes); product-related injuries (e.g., silicone gel breast implants); and toxic substance-related injuries (e.g., asbestos). I am concerned here with the second and third types, which sometimes overlap as when the toxic substance is contained in a consumer or industrial product - for example, asbestos in automobile brake linings. Second, I am primarily concerned here with the issues of general and specific causation. Although **mass tort** disputes usually involve many other complex legal and factual issues as well, such as product identification, determining causation is the problem that most strongly impels the courts' jury avoidance efforts. Finally, the discussion is necessarily speculative and impressionistic. I am unaware of any rigorous studies of a significant sample of **mass tort** cases, as distinguished from the few detailed case studies that have been published on particular **mass tort** disputes such as Agent Orange, [12] Bendectin, [13] Dalkon Shield, [14] Buffalo Creek, [15] and the Woburn toxic dump [16] cases. Asbestos, the **mass tort** in which the largest number of individual claims have actually gone to trial, is probably the most jurisdictionally fragmented, fact-specific, and differentially lawyered of them all, making it also the one that is most resistant to systematic analysis and generalization.

I. The Infrequency of **Mass Tort** Jury Trials

The vast majority of **mass tort** claims never reach a jury, as they are either dropped or settled. [17] This is hardly surprising; approximately 95% of all tort cases are resolved short of trial. [18] If anything, **mass [*483] tort** claims probably result in some payment to plaintiffs more often than in other tort cases because of the relatively comprehensive ("global") nature of the settlements reached in some of the most important **mass tort** litigations. [19]

Whatever the militant public rhetoric deployed by **mass tort** litigants might suggest, their lawyers are seldom eager to go to trial, as noted earlier. [20] It is easy to understand why. Trying a **mass tort** case is notoriously costly, especially in the early stages of the tort's evolution. [21] Unless and until the tort "matures," the essential facts underlying the complex questions of general causation, liability, and damages are not firmly established, the most important legal issues have not been authoritatively resolved by the appellate courts, the lawyers have neither tested their mettle nor routinized the litigation, and thus claim values are still unsettled. [22]

In addition to the costs of trying such cases, the stakes for both sides are likely to be high. The defendants not only face a large number of current claims for already manifested injuries. Defendants may also be vulnerable to a flood of future claims for injuries that are not yet manifest, depending on the product distribution and consumer exposure patterns, latency periods, plaintiffs' bar aggressiveness, and other factors. If defendants can avoid a decisive defeat in the early cases, they can hope to dig in for a long, costly war of attrition that will discourage the plaintiffs' lawyers, induce settlement of current claims, and stave off the filing and prosecution of new ones. [23] If instead they go to trial in an early case and lose, they will almost certainly be deluged with a flood of new claims generated by plaintiffs' lawyers drawn by the smell of blood. [24] By the same token, and for much the same **[*484]** reason, plaintiffs' lawyers are reluctant to precipitate an early test of strength that they might lose, although a trial - with all of the attendant risks - is sometimes the only way in which they can hope to weaken defendants' future litigation prospects and bring them to the bargaining table.

The parties' difficulties in making these calculations are compounded by the high variability of outcomes in many **mass tort** jury trials. In the Brooklyn Navy Yard asbestos cases, for example, Judge Jack Weinstein noted a great deal of variation among the damage awards received by different plaintiffs with similar injuries and demographic characteristics. Judge Weinstein also found unwarranted variability in the outcomes of some of his repetitive stress keyboard cases, [25] although his sample was of course very small relative to that in the asbestos litigation. Indeed, so troubled was he by this variability that he developed a grid to guide future juries. [26]

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Conceivably, much or all of this variation (or some substantial fraction of it) might be due to factual differences in the claims - for example, the circumstances surrounding the injury - that a jury may legitimately consider in assessing culpability and damages. Empirical studies of jury performance in more conventional litigation suggest that most of the variation can indeed be explained in this way. [27] It is much harder, however, to justify variable outcomes in cases where the identical factual issue-lack of general causation - is (or at least should be) dispositive of all of them, yet **mass tort** cases often violate the basic principles of system rationality and horizontal equity. In the Bendectin litigation, for example, a series of directed verdicts for defendants based on lack of general causation was both bracketed and interrupted by several large plaintiffs' verdicts. [28] Similarly, in the silicone gel breast implant litigation, where the evidence on general causation of immunological disorders was always weak and became progressively weaker over time, most of the juries rendered defend **[*485]** ants' verdicts, but some of them awarded large damages to plaintiffs, even after a string of defendant victories. [29]

This variability in outcomes for cases that appear similar on their facts or that implicate identical dispositive legal principles or facts should trouble any system of justice that aspires to rationality, fairness, and predictability. It is especially regrettable when the different outcomes appear to reflect differences in the lawyer's skill, or in the location of the court, which is common in tort law generally. This variability also engenders great uncertainty for the parties, but especially for defendants. Whether or not the variation is warranted by different underlying facts, a defendant facing the risk not merely of an adverse outcome, but of a truly catastrophic one, [30] is likely to be highly risk averse, [31] preferring even a bad settlement to a precedent- setting trial unless it is almost certain that it can prevail at trial. Yet, such confidence is impossible given this variability, whatever its source.

If the plaintiffs' lawyers feel confident of a favorable jury verdict, of course, they will not acquiesce in the defendants' risk-averse strategy. This confidence may be justified or may instead be born of myopia and wishful thinking. But even if the plaintiffs' lawyers are less confident than this, they are more likely than defendants to press for trial. They usually have less to lose from a defeat in an early case than defendants do; unlike defendants, plaintiffs' lawyers can usually keep bringing new cases until they win one, as collateral estoppel has little application in such cases. [32] Moreover, their power to extract a favorable settlement from defendants may depend not only on the strength of their underlying case but also on whether their threat to go to trial is credible. Unless they are well-financed (and perhaps even then), plaintiffs' lawyers are usually under severe economic pressures to resolve cases quickly.

These incentives contrast sharply with those of defendants, who tend to benefit from delay, for at least three reasons. They continue to enjoy the investment value of the money during the period that they retain it. They hope to wear down the other side by exploiting its **[*486]** need for immediate cash. Finally, they hope that new scientific evidence will over time weaken plaintiffs' causation claims, as has been the pattern with a number of **mass torts** including Agent Orange, Bendectin, breast implants, asbestos in buildings, and perhaps repetitive stress keyboard injuries. Defendants' optimal strategy, then, is to communicate an adamant unwillingness to settle, at least until they are "on the courthouse steps" where so many disputes are ultimately resolved.

Defendants' incentives often diverge from those of their outside counsel, who have traditionally billed their clients by the hour and thus tend to benefit financially from protracted litigation rather than early settlement. [33] Many corporate clients, increasingly conscious of and concerned about these conflicts of interest and about their ability to monitor their lawyers effectively, have begun to adopt more stringent controls and more efficient incentives, including greater use of in- house counsel and alternative forms of compensation for their outside lawyers. Moreover, judges have devised techniques for circumventing the

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lawyers and communicating directly with the clients and their insurers-for example, inviting them to attend the trial and speaking to them in chambers about how they view the dispute. The parties' lawyers are sometimes present when these communications occur, sometimes not (although the court will almost surely inform them about what transpired).

For these reasons (and perhaps others), the well-known Priest-Klein model of litgation behavior, [34] which predicts that the cases in which outcomes are most uncertain are precisely the ones most likely to go to trial rather than settle, seems inaccurate as a general account of **mass tort** litigation. The asymmetric incentives and the risk aversion exhibited by **mass tort** plaintiffs (and their lawyers) and by **mass tort** defendants evidently exert a powerful gravitational pull away from trials and toward settlement despite - or perhaps because of - the enormous legal, factual, and procedural uncertainties surrounding these **[*487]** cases. Many judges both exploit and magnify this incentive-driven tendency toward settlement. [35]

II. The Judicial Motives for Avoiding Jury Trials

In a sense, there is little to explain about judges' desires to avoid **mass tort** trials. They almost always seek to avoid trials, whether **mass tort** or not, by encouraging settlements, and their reasons for doing so apply at least as strongly to **mass tort** cases as to other kinds of litigation. I shall not enter into the largely academic debate over whether genuinely consensual settlements of large-scale litigation are socially desirable or whether - as my colleague Owen Fiss believes, [36] and I do not [37] - the social interest in elaborating public values makes even consensual settlements undesirable. Suffice it to say that trial judges behave as if they were convinced that settlement in **mass tort** cases is generally not only desirable but imperative.

As I discuss below, recent decisions by the Supreme Court and the federal appellate courts limiting certain uses of some claims aggregation techniques, particularly litigation class actions, [38] settlement class actions, [39] and multi-district litigation ("MDL"), [40] have complicated trial courts' efforts to settle **mass tort** litigation. [41] In this section, then, I shall focus on the distinctive features of **mass torts** that reinforce this already powerful judicial inclination to settle such cases short of trial.

Beyond judges' concerns about the frequent irrationality and disparity of **mass tort** verdicts discussed above, the most important reason why they prefer to settle cases is their growing concern over lengthening court dockets. [42] Naturally enough, judges wish to conserve their scarce trial time for those cases that simply cannot be settled. For this reason alone, they view with some alarm the prospect of **[*488]** trying any case that may take months or even years to try, consuming much of the court's administrative resources in the process as well. Obviously, this implies an even greater concern about **mass tort** litigation, which has particularly large docket-clogging implications. This motive to conserve resources increasingly coincides with a bureaucratic one. **Mass torts** began to strain judicial dockets during the late 1970s and early 1980s when asbestos claims proliferated, and they have accelerated ever since. At the same time a combination of appellate court superiors, legislative directives, and court administrators pressed judges to process and complete more cases more quickly. Congress institutionalized this pressure at the federal level by enacting the Civil Justice Reform Act of 1990, [43] requiring the courts to develop procedures for expeditiously resolving cases. **Mass torts** were the 800- pound gorillas that demanded immediate attention, for they threatened to wreak havoc not only on court dockets but also on the judges' own performance ratings.

Mass tort litigation is also notoriously difficult to organize for trial. Jurors must be found who can serve through what may be a very protracted proceeding, which means that these jurors are often demographically atypical. Where multiple defendants are involved, as is often the case in **mass torts,** the sheer number of lawyers whose activities must be accommodated and coordinated can be daunting. Because of the many novel legal issues, opportunities for

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judicial error abound and interlocutory appeals can cause further delay and confusion. The economic stakes to lawyers in managing **mass tort** litigation are so high that the court must constantly supervise and control their famously aggressive conduct. In class or consolidated actions, choice of law issues and other differences among the plaintiffs concerning the level of their exposures and the timing and nature of their claims may necessitate the establishment of subclasses. [44] Such differences also limit the court's ability to use collateral estoppel and issue preclusion to reduce the number of trials. [45] In federal court diversity cases, judges must often apply unfamiliar and dynamic state tort doctrines. [46] The prospect of bankruptcies, which have been common among **mass [*489] tort** defendants, [47] further complicate both the legal issues and the litigation process. Because massive documentation and complex scientific evidence are endemic in **mass tort** cases, courts must often appoint special masters to supervise their production. [48] Other unusual measures are also necessary to enable the jurors to retrieve and comprehend the evidence.

Fairly early in the evolution of **mass tort** litigation, some controversial judicial decisions reinforced the willingness and authority of trial courts to avoid jury trials despite the existence of what many observers viewed as material issues of fact. In the Agent Orange opt-out cases, Judge Weinstein granted summary judgment for the defendants on the general causation issue despite the proffer by plaintiffs of testimony purporting to support their factual claims, a ruling that was affirmed by the Second Circuit on other grounds. [49] Similarly, in several early Bendectin cases, appellate courts nipped the litigation in the bud by dismissing plaintiffs' general causation arguments as a matter of law. [50] Such decisions were designed not only to facilitate the dismissal of existing claims but also to foreclose the flood of marginal or spurious new claims that often follow in the wake of class certifications, plaintiffs' verdicts, and favorable settlements. They surely emboldened subsequent courts to be more aggressive in preventing what they regarded as weak cases from proceeding to trial.

This judicial aggressiveness in policing doubtful claims was reinforced by the increasingly strident denunciations by a number of commentators of "junk science in the courtroom." These critiques became commonplace by 1990 [51] and seemed only to increase the courts' skepticism about plaintiffs' scientific claims. Growing concerns about the quality of the scientific evidence that typically underlies **mass tort** cases surely help to explain the Supreme Court's recent insistence that **[*490]** the trial courts function as more demanding gatekeepers in reviewing this evidence [52] and that the appellate courts broadly defer to those gatekeeping decisions. [53] These rulings tend to favor **mass tort** defendants.

III. The Techniques of Jury Avoidance

Courts avoid jury trials in **mass tort** cases in two standard ways. They decide dispositive motions (i.e., motions to dismiss, for summary judgment, and for directed verdict) in favor of defendants, [54] and they facilitate or approve negotiated settlements. (I know of no **mass tort** case in which plaintiffs chose a bench trial). The techniques through which they produce these outcomes, however, are more varied and to some extent overlapping. I shall briefly discuss four of them: forceful judicial management of litigation, exploitation of uncertainty, decisions on class action issues, and categorical exclusions of certain kinds of scientific evidence.

A. Judicial Management

In no area of litigation is managerial judging [55] more obvious and central than in **mass torts.** [56] Judges can shape the sequence and character of the discovery process in order to identify and focus certain issues that might be dispositive before trial, such as general causation, statute of limitations, or the government contractor defense. They can "polyfurcate" and sequence the trial so that certain issues will be resolved before others, which can confer on one party or another a tactical advantage that may help to induce settlement. [57] Judges can

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also nudge the parties into settlement discussions by signaling how the court is inclined to decide crucial issues (e.g., choice of law, punitive damages, market share liability, insurer good faith), or by organizing the litigation so as to help clarify claims values at a relatively early stage through the use of representative plaintiffs, bellwether cases, mini-trials, or other forms of what Professor Robert Bone has called **[*491]** "statistical adjudication," [58] methods that lend themselves to extrapolating values from a small number of claims to a much larger set. [59] In this way, one or a few early jury trials may obviate the need for others, even given the limited applicability of collateral estoppel in **mass torts.** [60] By all accounts, however, the most effective way for judges to accelerate settlement discussions is to set an early trial date and then doggedly adhere to it, a tactic that sharply focuses the parties' minds, clarifies their stakes, and makes lawyers' delaying tactics both less credible and more costly. [61]

Not surprisingly, **mass torts** have attracted a number of unusually strong-willed state and federal judges. Although **mass torts** are predominantly a state court phenomenon, certain federal trial judges - for example, Jack Weinstein, Robert Merhige, Tom Lambros, Sam Pointer, Carl Rubin, and Robert Parker - are the jurists most strongly associated with these disputes. [62] These judges have dominated the field almost since its inception, often jockeying to gain control of the most challenging and notorious cases. Each of them has employed a broad range of managerial tactics in order to shape the litigation so as to discourage weak claims, avoid jury trials, and forge settlements.

The use of special masters in **mass tort** litigation must be viewed in this light. The enormous size and complexity of these cases impose substantial resource demands on the courts. [63] Most trial judges have responded by appointing special masters who can provide them with procedural flexibility, multiple channels of communication with the parties, and other administrative resources that can be used to expedite the litigation, clarify issues and claim values, and facilitate settle **[*492]** ment negotiations. [64] Indeed, Judge Weinstein actually used six special masters in the Agent Orange case, four or five of them simultaneously. [65] Courts use special masters, among other things, to coordinate and manage discovery, investigate special facts relevant to a judge's decision, [66] mediate among the lawyers, broker settlement negotiations, determine attorneys fee awards and costs, and design and administer techniques to process and evaluate claims and to distribute settlement funds. [67]

Artfully deploying their special masters, **mass tort** judges have sometimes used what might be called strong-arm tactics in order to pressure lawyers into reaching agreement in cases that might otherwise have gone to trial. This was apparently true, for example, of Judge Merhige in the Dalkon Shield litigation, [68] Judge Weinstein in the Agent Orange case, [69] and Judge Samuel Skinner in the Woburn toxic dump case. [70]

B. Uncertainty

Even more than other areas of litigation, **mass torts** are pervaded by uncertainty. This uncertainty reflects a number of factors. A relatively new genre of litigation, it involves many novel and complex questions of fact, substantive law, procedure, remedies, evidence, insurance, legal ethics, and other diverse fields that are difficult for the courts and counsel to master and effectively integrate. As we have seen, the great variability in jury verdicts in **mass tort** cases compounds the other risks of proceeding to trial, while the prospect of uncontrollable transaction costs magnifies the uncertainty not only for the immediate parties and their lawyers but also for insurers, who have greater incentives to deny liability under existing policies when **mass tort** defendants demand that the carriers undertake their defense. [71]

[*493] The two most significant wild cards in **mass torts,** however, are punitive damages and future claims. Punitive damages, which vastly increase the stakes in the outcome and thus prod risk-averse parties - especially defendants - toward settlement, are possible in

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mass tort cases, [72] if only because discovery may support an inference that defendants knew (or had reason to know) about the serious risks that they were creating for a large number of people, or even that they actively concealed these risks. [73] Together with the law's inadequate guidance and constraint of the juries that may assess punitive damages, these factors magnify the unpredictability of outcomes and hence the attractiveness of settlements.

Still, it is easy to exaggerate the actual significance of punitive damages. [74] In fact, they are only rarely imposed, and even then they are often reduced by trial judges or appellate courts. In the end, moreover, many punitive damage awards do not actually get paid. For this reason, courts sometimes sever the punitive damages portion of the case and defer it indefinitely, by which time the dispute may be settled or the punitive damages issue dropped. This does not mean that punitive damages are irrelevant, but only that they are bargaining chips that affect the settlement negotiations. [75]

Future claims, which are of course far more common than punitive damages, introduce immense uncertainties. It is simply impossible for the parties, insurers, or the court to accurately predict how many future claims will be filed; [76] the number of future claims has often exceeded the expectations of even the plaintiffs' lawyers. [77] Because of the long and variable latency periods associated with many mass toxic torts, it is also hard to predict when the future claims will be filed, when the manifestation of injury will transform those future claims into current claims for actual physical harms, and which harms those **[*494]** transformed claims will allege. Such uncertainties are perhaps greatest in the tobacco litigation because unlike almost all other **mass torts,** cigarettes continue to be a legally sanctioned product. These claims, therefore, may be filed not only by those who have been exposed but are not yet manifesting illness; they may also be filed by those who have not even been exposed yet but who will be exposed in the future when they take up smoking.

The uncertainty surrounding future claims, however, is by no means limited to the issues of the number, timing, and nature of such claims. Predicting the strength, and hence the litigation value, of those claims is also problematic. As a practical matter, all that the parties can do is to extrapolate from current claims. This extrapolation, of course, assumes that the pattern of future claims will mimic that of current claims. For a number of reasons, however, future claims may be quite different. Changes may occur in exposure patterns, the law, the science, the known facts about defendants' conduct, claimant's expectations, and other litigation variables. If so, the decisions of juries will also change, thereby affecting the lawyers' expectations and settlement demands.

Judges in **mass tort** litigation have learned how to exploit these and other sources of uncertainty strategically in order to encourage settlements. By selectively deploying information and intimations about the risks to each party's position that a jury trial would present, and by making its own decisions tentative and contingent, the court can hope to bring the parties closer together. In these ways, it may succeed in using uncertainty, which some models of litigation view as an obstacle to settlement, [78] as a goad to settlement. Although such strategic judicial behavior is not easy to document, I have shown how Judge Weinstein exhibited this pattern in fashioning a settlement in the Agent Orange litigation. [79] There is every reason to believe that other judges, equally eager to avoid a long jury trial, behave similarly.

C. Class Actions

Trial courts have often certified **mass tort** cases as class actions. [80] Even before Amchen Products, [81] however, appellate courts as often **[*495]** vacated or significantly modified these certifications. [82] In doing so, they reaffirmed the strong misgivings about personal injury class actions originally expressed by the framers of Rule 23, misgivings that the Supreme Court has now authoritatively embraced as doctrinal orthodoxy, at least in litigation

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as "sprawling" and heterogeneous as asbestos. [83]

The eagerness of trial courts to certify class actions is not at all difficult to understand; it reflects the same reasons that incline them to avoid juries and settle cases. Class actions minimize the risk of inconsistent jury verdicts. They are easier to organize (and, if necessary, try) than a comparable number of claims litigated in individual actions. [84] Perhaps most important, they are easier to settle than a multitude of individual cases because class actions can bring all current and future claims and all defendants before the court at one time and place. Only this kind of comprehensive or "global" class action can enable **mass tort** defendants to resolve these claims finally, completely, and (relatively) swiftly through dismissal, summary judgment, or settlement. It alone can secure for them the certainty and peace for which they seem willing to pay large premiums - even as to claims to which they believe they have strong defenses. [85] In this respect, the parties often [86] view the class action not merely as a desirable mechanism for settling **mass tort** claims, but as an indispensable one.

A trial court's jury avoidance strategy, then, is likely to center on certifying **mass tort** claims as class actions in order to facilitate a set **[*496]** tlement that they will later [87] help to fashion. Because this inclination is sure to survive Amchen Products, plaintiffs' lawyers may simply decide to file their class actions in state courts instead. [88] After all, some state jurisdictions are now more receptive to **mass tort** class actions than are the federal courts. State court actions, moreover, are likely to exhibit fewer problems of choice of law and heterogeneity than are federal courts. Finally, the Supreme Court's decisions in Phillips Petroleum [89] and Matsushita [90] have accorded state courts considerable latitude under the Due Process and Full Faith and Credit clauses to adjudicate and settle class actions under their own rules. [91]

Whichever system entertains a class action, trial courts often go beyond class certification to determine how the class action will be managed and hence who will be the key stakeholders and decisionmakers on the plaintiffs' side. A judge's power to design the structure of the plaintiffs' management group and designate its membership significantly shapes the future course of a class action. Courts can exercise much greater influence over this group than it generally exerts over trial lawyers in non-class action cases. The courts' enhanced influence arises both because class action judges usually assume a special trustee-like responsibility to monitor the lawyers' performance on behalf of the class members (who at this stage are largely anonymous and even at later stages tend to be passive spectators), and because the judges ultimately determine the amount of the counsel fees and reimbursable costs, and their distribution among the plaintiffs' lawyers.

Accordingly, the leading plaintiffs' lawyers compete fiercely to persuade the court to appoint them to the management group whose members will eventually receive the great bulk of the fees. In selecting this group, the court must often choose between two types of lawyers who tend to differ both in temperament and in their patterns of **[*497]** legal practice. Trial specialists are eager to conduct discovery and go before a jury to try the case if necessary. In contrast, class action specialists' main skills tend to lie elsewhere: in advertising to and assembling a class, maximizing its size, deciding on subclasses, designing effective class notice, supplying or obtaining the necessary financing, working with local counsel, spinning the media, and negotiating settlements with the defendants and their insurers. While courts often place members from both camps on the management committee, they seem to prefer the latter - in part, one supposes, because the court thinks that they are more likely to reach a settlement that can avoid a protracted jury trial, with all of its attendant costs and uncertainties for the parties, their lawyers, and the system.

If class actions are not, strictly speaking, a necessary condition of settlement of **mass tort** claims, the profusion of settlement class actions prior to Amchen Products nonetheless strongly suggests that both sides find them highly conducive to the negotiation and

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INITIAL ISSUE: Whether to have a freestanding bill or amendment to the Defense Production Act.

[SEC. 101. The Defense Production Act of 1950 (50 U.S.C. App 2061) is amended by adding at the end the following:]

TITLE VIII – COMPENSATION FOR INSURED LOSSES FROM ACTS OF TERRORISM

SEC. 801. SHORT TITLE.

This title may be cited as the "Terrorism Risk Insurance Act of 2001."

SEC. 802. CONGRESSIONAL FINDINGS AND PURPOSE

(a) **FINDINGS.** The Congress finds that:

(1) The September 11 terrorist attacks on the World Trade Center and the Pentagon have created widespread market uncertainties with regard to the risk of losses arising from future terrorist attacks.
(2) These market uncertainties have disrupted the current ability of private insurance companies to price property and casualty insurance coverage for losses resulting from future attacks, thereby threatening the continued availability of affordable insurance for such losses.
(3) Property and casualty insurance is a crucial financial service that has played an important role in the recovery from the September 11 attacks.
(4) The continued availability of property and casualty insurance is essential to economic growth and development, particularly in areas at high risk for future potential terrorist attacks.
(5) The unavailability of affordable property and casualty insurance for terrorist acts threatens the growth and stability of the U.S. economy, including impeding the ability of financial services providers to finance commercial and residential property acquisitions and new construction. This will ultimately lead to increased consumer costs, particularly in the transportation, energy and real estate sectors.
(6) In the past, the private insurance markets have shown an ability to expand their capacity in response to changed circumstances. However, the nation's property and casualty insurance industry has had limited actuarial basis for pricing and providing coverage for terrorism risk and is not prepared, in the short term, to provide adequate affordable coverage for undefined parameters of this new risk.
(7) In as much as terrorism is a national concern and terrorist attacks are attacks on the government and people of the United States, the federal government should provide financial assistance to limit immediate market disruptions, encourage economic stabilization and facilitate a transition to a viable market for private terrorism risk insurance.

assigned by the Judicial Panel on Multidistrict Litigation shall be deemed to sit in all judicial districts in the United States.

(b) TRANSFER OF CASES FILED IN OTHER FEDERAL COURTS. Any civil action for property damage, personal injury, or death arising out of or resulting from an act of terrorism that is filed in a federal district court other than the federal district court assigned by the Judicial Panel on Multidistrict Litigation shall be transferred to the federal district court assigned by the Judicial Panel on Multidistrict Litigation.

(c) REMOVAL OF CASES FILED IN STATE COURTS. Any civil action for property damage, personal injury, or death arising out of or resulting from an act of terrorism that is filed in a state court shall be removable to the federal district court assigned by the Judicial Panel on Multidistrict Litigation.

(d) FEDERAL CAUSE OF ACTION. There shall exist a federal cause of action for property damage, personal injury, or death arising out of or resulting from an act of terrorism. This cause of action shall be the exclusive cause of action and remedy for claims for property damage, personal injury, or death arising out of or resulting from an act of terrorism. This section preempts all state causes of action of any kind otherwise available arising out of or resulting from an act of terrorism.

(e) PUNITIVE DAMAGES. Punitive damages, exemplary damages, and other damages not intended to compensate the plaintiff for actual losses shall not be available in any civil action subject to this section.

(f) OFFSET. In determining the amount of any money damages available under this section, the court shall offset any compensation or benefits received or entitled to be received by the plaintiff or plaintiffs from any collateral source, including the United States or any federal agency thereof, in response to or as a result of the act of terrorism.

(g) NON-ECONOMIC DAMAGES. Each defendant shall be liable only for the amount of non-economic damages allocated to the defendant in direct proportion to the percentage of responsibility of the defendant for the harm to the claimant. No plaintiff may recover non-economic damages unless the plaintiff or [decedent] suffered physical harm.

(h) SUBSTANTIVE LAW. The standard of care for the federal cause of action in subsection (d) of this section shall be gross negligence. Unless otherwise specified in this title, the district court shall derive other substantive principles of liability for the federal cause of action from the principles of the common law.

(i) STATUTE OF LIMITATIONS. Any claim for property damage, personal injury, or death arising out of or resulting from an act of terrorism shall be filed within one year. This period shall be computed from the date of discovery of the injury by the plaintiff or the date such injury should have been discovered by the plaintiff through the exercise of reasonable diligence, whichever is earlier.

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(j) CLAIMS AGAINST TERRORISTS. Nothing in this section shall in any way limit the ability of any plaintiff to seek any form of recovery from any person, government or other entity that was a participant in, or aider and abettor of, any act of terrorism.

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(b) **PURPOSE.** The purpose of this Act is to establish a temporary federal program that provides for a transparent system of shared public and private compensation for insured losses resulting from future acts of terrorism in order to:

(1) Protect consumers by addressing current market disruptions and ensure the continued widespread availability and affordability of property and casualty insurance for terrorism risk; and
(2) Allow for a transitional period for the private markets to stabilize, resume pricing of such insurance and build capacity to absorb futures losses, while preserving state insurance regulation and consumer protections.

SEC. 803. DEFINITIONS AND CERTIFICATION

For purposes of this Act –

(a) ACT OF TERRORISM –
The term "act of terrorism" means any act, certified by the Secretary in concurrence with the Secretary of State and the Attorney General, as a violent act or act dangerous to human life, property or infrastructure, within the United States, that is committed by an individual or individuals **acting on behalf of foreign agents or foreign interests** as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the U. S. government by coercion. No act shall be certified as an act of terrorism if (1) the act is committed in the course of a war declared by the Congress of the United States **[Option: or (2) if property damage resulting from the act does not exceed $25 million.]** Any certification, or determination not to certify, under this subsection shall be final and shall not be subject to judicial review.

(b) INSURANCE COMPANY –
The term "insurance company" means any primary insurance company, **including its subsidiaries and other affiliates, licensed or admitted to engage in the business of insurance in any state, or a nonadmitted eligible surplus line carrier listed on the National Association of Insurance Commissioners' "Quarterly Listing of Alien Insurers,"** that has issued a policy covering an insured loss from an act of terrorism and that meets any other criteria the Secretary may prescribe. The term "insurance company" shall not include a reinsurer or provider of retrocessional insurance.

(c) INSURED LOSS –
The term "insured loss" means –
(1) any loss in the United States, and
(2) any loss to an air carrier (as defined in section 40102 of title 49, United States Code) no matter where it occurs
covered by any type of property and casualty insurance policy or endorsement for commercial property, commercial liability, commercial automobile, workers' compensation, private passenger automobile and homeowners insurance.

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☐ **Option A.** The term "insured loss" does not include any loss covered by any type of business interruption or life or health insurance policy.

☐ **Option B.** The term "insured loss" includes up to six months of business interruption coverage. The term insured loss does not include any loss covered by any type of life or health insurance policy. **[Explanatory note: Business interruption coverage is subject to extensive terms, conditions and limitations in standard property and casualty policies. Treasury staff recommend against trying to create a de novo definition that could create ambiguity with regard to limitations that have already been built into business interruption coverage. Instead of trying to redefine business interruption coverage, if limitations on current industry coverage are desired, we recommend limiting coverage to six months (the typical term is 12 months) or excluding lost profits.]**

☐ **Option C. The term "insured loss" includes business interruption coverage, excluding lost profits.** The term "insured loss" does not include any loss covered by any type of life of health insurance policy. **[See explanation above].**

☐ **Option D. Include as "insured loss" business interruption coverage only for small businesses, with reference to the Small Business Act of 1958, Section 3 of Pub. Law 85-536.**

(d) NON-ECONOMIC DAMAGES –
The term "non-economic damages" means damages for losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, hedonic damages, injury to reputation, and all other non-pecuniary losses of any kind or nature.

(e) PERSON –
The term "person" means any individual or business or non-profit entity (including a partnership, limited liability company, corporation or association) or a trust or estate or a state or political subdivision of a state or other governmental unit.

(f) PROGRAM –
The term "Program" means the Terrorism Insured Loss Shared Compensation Program established by this Act.

(g) PROPERTY DAMAGE –
The term "property damage" means physical injury to or destruction of tangible or intangible property, or loss of tangible or intangible property that has not been physically injured or destroyed but has been evacuated, withdrawn from, or otherwise rendered inaccessible.

(h) SECRETARY –
The term "Secretary" means the Secretary of the Treasury.

(i) STATE –

The term "state" means any State of the United States and the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or any of the U.S. Virgin Islands.

(j) UNITED STATES –
The term "United States" means all States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam and the U. S. Virgin Islands.

SEC. 804. TERRORISM INSURED LOSS SHARED COMPENSATION PROGRAM

(a) IN GENERAL. There is hereby established a Terrorism Insured Loss Shared Compensation Program in accordance with this Act. Notwithstanding any other provision of state or federal law, the Secretary is authorized to pay compensation in accordance with this Act to any person or persons for insured losses resulting from an act of terrorism.

(b) CONDITIONS FOR FEDERAL PAYMENT. Conditions for compensation under this Program for insured losses arising from an act of terrorism are as follows:

(1) the insurance company must offer property and casualty insurance for acts of terrorism for insured losses covered by this Program and a person's insurance coverage for acts of terrorism shall not be materially different from the terms, amounts, and other coverage limitations in the person's policy that apply to insured losses arising from non-terrorist acts;
(2) a person that suffers an insured loss as a result of an act of terrorism, or a person acting on behalf of that person, must file a claim with the person's insurance company;
(3) at the time of offer, purchase and renewal of each policy, the insurance company must provide clear and conspicuous disclosure in the policy to the policy holder of the premium charged for insured losses covered by the Program and the federal government's share of compensation payments for insured losses under the Program;
(4) the insurance company must process the claim according to its standard business practices and any procedures that the Secretary may prescribe; and
(5) the insurance company must pay the portion of the losses not covered by the Program under the schedule established in subsection (c) and must submit verification and certification of that payment and verification of the underlying claim, and must certify compliance with the conditions of this subsection, at the time the company files a claim with the Secretary.

(c) SHARED INSURED LOSS COVERAGE.
(1) The Secretary shall pay compensation for insured losses that result from any **act or acts** of terrorism, in accordance with the following schedule and limitations:

☐ **1st year Option A**

for acts of terrorism occurring on the date of enactment of this Act through December 31, 2002, 90 percent of insured losses in excess of $10 billion;

☐ **1st year Option B**

for acts of terrorism occurring on the date of enactment of this Act through December 31, 2002, 80 percent of insured losses in excess of $10 billion;

☐ **1st year Option C**

for acts of terrorism occurring on the date of enactment of this Act through December 31, 2002, 50 percent of insured losses between $10 billion and $20 billion and 90 percent of insured losses in excess of $20 billion;

☐ **2nd year Option A (if $10 billion deductible)**

☐ **Suboption 1.** for acts of terrorism occurring on January 1, 2003 through December 31, 2003, 90 percent of insured losses in excess of $10 billion;

☐ **Suboption 2.** for acts of terrorism occurring on January 1, 2003 through December 31, 2003, 80 percent of insured losses in excess of $10 billion;

☐ **Suboption 3.** for acts of terrorism occurring on January 1, 2003 through December 31, 2003, 50 percent of the insured losses between $10 billion and $20 billion and 90 percent of insured losses in excess of $20 billion;

☐ **2nd year Option B ($20 billion deductible)**

☐ **Suboption 1.** for acts of terrorism occurring on January 1, 2003 through December 31, 2003, 90 percent of insured losses in excess of $20 billion;

☐ **Suboption 2.** for acts of terrorism occurring on January 1, 2003 through December 31, 2003, 80 percent of insured losses in excess of $20 billion;

☐ **Suboption 3.** for acts of terrorism occurring on January 1, 2003 through December 31, 2003, 50 percent of the insured losses between $20 billion and $40 billion and 90 percent of insured losses in excess of $40 billion;

and, if the Program is extended to a third year by the Secretary pursuant to Section 808,

☐ **3rd year Option A (if $10 billion selected for 2nd year)**

☐ **Suboption 1.** for acts of terrorism occurring on January 1, 2004 through December 31, 2004, 90 percent of insured losses in excess of $20 billion;

☐ **Suboption 2.** for acts of terrorism occurring on January 1, 2004 through December 31, 2004, 80 percent of insured losses in excess of $20 billion;

☐ **Suboption 3.** for acts of terrorism occurring on January 1, 2004 through December 31, 2004, 50 percent of insured losses between $20 billion and $40 billion and 90 percent of insured losses in excess of $40 billion.

☐ **3rd year Option B (if $20 billion selected for 2nd year)**

☐ **Suboption 1.** for acts of terrorism occurring on January 1, 2004 through December 31, 2004, 90 percent of insured losses in excess of $30 billion;

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☐ **Suboption 2.** for acts of terrorism occurring on January 1, 2004 through December 31, 2004, 80 percent of insured losses in excess of $30 billion;

☐ **Suboption 3.** for acts of terrorism occurring on January 1, 2004 through December 31, 2004, 50 percent of insured losses between $30 billion and $60 billion and 90 percent of insured losses in excess of $60 billion.

(2) The Secretary shall announce the applicable percentage of insured losses to be paid by insurance companies, and may adjust as appropriate the applicable percentages, in accordance with the schedule and limitations contained in paragraph (1).

(3) If claims for insured losses from acts of terrorism exceed any of the threshold levels contained in paragraph (1), the Secretary shall reimburse or seek repayment from, on a pro rata basis, insurance companies that have submitted claims for insured losses on behalf of policy holders to ensure that, as of the end of each applicable time period referenced in paragraph (1), each such insurance company pays the applicable percentage of insured loss incurred during the applicable time period, in accordance with the schedule and limitations contained in paragraph (1) of this subsection.

(4) The Secretary, in his sole discretion, may determine the timing of any final netting of payments for insured losses under the Program, including payments due to the Secretary and to any insurance company, to effect the insured loss sharing established by this subsection.

(5) Any determination of the Secretary under this subsection shall be final and not subject to judicial review.

(d) CAP ON ANNUAL LIABILITY. Notwithstanding section 804(c) of this Act or any other provision of federal or state law -

☐ **Option A. ($100 billion total cap in each year of Program)**

(1) the Secretary shall not pay compensation under this Act in excess of $__ billion for insured losses arising from any act of terrorism occurring on the date of enactment through December 31, 2002; $__ billion for insured losses arising from any act of terrorism occurring in 2003, and, if the Program is extended to a third year pursuant to section 808, $__ billion for insured losses arising from any act of terrorism occurring in 2004; **[dollar amount depends on choices in subsection (c)]**

☐ **Option B. (no caps for the Government or for industry)**

☐ **Option C. ($100 billion cap on the Government and industry in 1st year only)**

(1) The Secretary shall not pay compensation under this Act in excess of $___ for insured losses arising from any act of terrorism occurring on the date of enactment through December 31, 2002 and no insurance company or companies shall be liable for more than $__ billion of insured losses arising from any act of terrorism occurring on the date of enactment through December 31, 2002. [dollar amounts depend on choices in (c).]

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☐ **NEW OPTION (no caps on the Government; 1st year cap on individual company losses)**

(1) no individual insurance company shall be liable for more than 10 percent of gross premiums collected by that company on all commercial property and casualty lines of coverage for commercial insured losses during the 12 months prior to the act of terrorism and 10 percent of gross premiums collected for all residential property and casualty lines of coverage for residential insured losses during the 12 months prior to the act of terrorism. [**Explanatory note for Option C: Arguments for a per company cap: a) the cap would be during the first year of the program only and would limit industry losses on an aggregate basis to about $30 billion. (Premiums collected by the property and casualty industry last year totalled over $300 billion.); b) the cap would respond to concerns by all insurers – large and small – and echoed by the Consumer Federation of America and National Association of Insurance Commissioners, that some per company limit is necessary to help them manage risk exposure at least in the first year; c) per company cap would help insurers manage risk and therefore underwrite at reasonable rates coverage for high risk properties, and thus is responsive to concerns raised by Sen. Schumer and others who represent concentrated urban areas; and d) a cap would provide some incentives to keep premiums down because the higher the premium, the higher the cap. Arguments against a per company cap: a) it is possible that some insurers may qualify for government payments before aggregate industry losses reach $10 billion and b) there may be lack of incentives to mitigate claims once the cap is hit – a problem with any industry-only cap.]**

[If Option A selected, then (2)]

(2) no insurance company or companies shall be liable for more than $__ billion of insured losses arising from any act of terrorism occurring on the date of enactment through December 31, 2002; $__ billion for insured losses arising from any act of terrorism occurring in 2003, and, if the Program is extended pursuant to section 808, $__ billion for insured losses arising from any act of terrorism occurring in 2004. [**dollar amounts depend on choices in subsection (c).**]

(3) the Secretary shall notify Congress if claims under the Program exceed the Secretary's authority to pay and Congress shall determine the procedures for and source of any such excess payments; and

(e) FUNDING –

(1) PAYMENT AUTHORITY. – This title constitutes payment authority in advance of appropriation Acts and represents the obligation of the federal government to provide for the amounts for compensation under this Program.

(2) AUTHORIZATION OF APPROPRIATIONS. There is authorized to be appropriated to the Secretary such sums as may be necessary to pay the administrative expenses of this Program.

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SEC. 805. ADMINISTRATION OF CLAIMS FOR FEDERAL INSURED LOSS COMPENSATION UNDER PROGRAM

(a) GENERAL AUTHORITY. The Secretary shall have the powers and authorities necessary to carry out this Program, including authority to prescribe regulations and procedures establishing the manner in which insurance companies may file and certify claims for insured losses; to investigate, audit, adjust or settle claims under the Program and otherwise to implement the Program.

(b) SUBROGATION RIGHTS. The U.S. government shall have the right of subrogation or salvage at law or in equity to any payment made by the United States in connection with this Program.

(c) CONTRACT FOR SERVICES. The Secretary may employ persons or contract for services with third parties, as may be necessary to implement the Program.

(d) CIVIL PENALTIES. [The Secretary may assess civil money penalties for violations of this Act in the same manner as an appropriate federal banking agency may assess civil money penalties under section 8 of the Federal Deposit Insurance Act, 12 U.S.C. 1818 et seq.]

SEC. 806. RELATIONSHIP OF INSURANCE PROGRAM WITH OTHER LAWS

(a) EXCLUSIVE DEFINITION FOR ACT OF TERRORISM. The definition of "act of terrorism" contained in section 803 of this Act shall be the exclusive definition for purposes of compensation for insured losses under this Act and shall preempt any inconsistent state law to the extent such law applies to any insurance policy relating to terrorism risk in the United States.

(b) NO STATE PREAPPROVAL OF RATES. Rates for terrorism risk insurance covered by this [Act/title] and filed with any state shall not be subject to prior approval or a waiting period, provided that nothing in this [title /Act] shall affect the ability of a state to deny a rate as excessive, inadequate or unfairly discriminatory.

SEC. 807. DISCRETIONARY EXTENSION; TERMINATION OF FEDERAL TERRORISM LOSS COMPENSATION

(a) DISCRETIONARY EXTENSION. This Act shall terminate on December 31, 2003, unless the Secretary, determines, after considering the Report and Findings described in this section, that the Program should be extended for one additional calendar year, until December 31, 2004, and promptly notifies the Congress of his determination and the

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reasons therefore. The Secretary's determination shall be final and not subject to judicial review.

(b) REPORT TO CONGRESS. Not later than 18 months after the date of enactment of this Act, the Secretary shall submit a report to the Congress regarding the availability of insurance coverage for acts of terrorism, the affordability of such coverage including the effect of such coverage on premiums, and the capacity of the insurance industry to absorb future losses resulting from acts of terrorism. The report shall consider the impact of the Program on each of these factors, the probable impact on these factors should the Program terminate on December 31, 2003, and shall consider whether the Program should be expanded to include life and health insurance coverage.

(c) FINDING REQUIRED. In making the determination required by subsection (a), the Secretary must find that--

(1) widespread market uncertainties continue to disrupt the ability of insurance companies to price insurance coverage for losses resulting from acts of terrorism, thereby resulting in the continuing unavailability of affordable insurance for consumers, and

(2) extending the Program for an additional year would likely encourage economic stabilization and facilitate a transition to a viable market for private terrorism risk insurance.

(d) CONTINUING AUTHORITY TO PAY OR ADJUST COMPENSATION. Notwithstanding the date on which the Program terminates under subsection (a), the Secretary may take any actions necessary to ensure payment, reimbursement, or adjustment of compensation for insured losses arising out of any act of terrorism occurring within the time periods referenced in section 804(c) of this Act.

SECTION 808. SENSE OF THE CONGRESS

It is the sense of the Congress that the insurance industry should build capacity and aggregate risk to provide affordable property and casualty coverage for terrorism risk.

SEC 809. PROCEDURES FOR CIVIL ACTIONS.

(a) SUBJECT MATTER JURISDICTION. Notwithstanding any other law, within 90 days of an act of terrorism the Judicial Panel on Multidistrict Litigation shall assign a single federal district court to conduct pre-trial and trial proceedings in all pending and future civil actions for property damage, personal injury, or death arising out of or resulting from a single act of terrorism and shall transfer all such pending civil actions to that district court. The Judicial Panel on Multidistrict Litigation shall select and assign the district court based on the convenience of the parties and the just and efficient conduct of the proceedings. The district court assigned by the Judicial Panel on Multidistrict Litigation shall have original and exclusive jurisdiction over all such actions. For purposes of personal jurisdiction, the district court

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ARTICLE: Why Judges, Not Juries, Should Set Punitive Damages

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SUMMARY:
... The Supreme Court has never decided whether the **Seventh Amendment,** which preserves the right to a jury trial in civil cases brought in federal court, confers a right to have **punitive damages** set by a jury. ... In several cases, the Supreme Court has applied a two-pronged test in deciding whether a party is entitled to a jury trial on a cause of action unknown to the English common law: the first prong compares the new cause of action with actions brought in eighteenth century England and asks whether similar causes of action were tried to a jury; the second prong examines the nature of the remedy sought. ... Not only has the Supreme Court never held that the **Seventh Amendment** guarantees a right to a **jury trial** on the amount of **punitive damages,** but in its 1987 decision in Tull v United States, the Court ruled that the **Seventh Amendment** does not entitle a defendant to have a jury determine the amount of a civil penalty. ... Since the existence of a right to have a jury set **punitive damages** is an open question under Supreme Court precedent, the critical questions are whether jury determination of the amount of punitive damages was within "the 'substance of the common law right of trial by jury,'" and was one of the "most fundamental elements" of the jury-trial system in eighteenth century England. ...

TEXT:
[*179]

In March 1989, the Exxon Valdez ran aground and spilled millions of gallons of oil into Prince William Sound. The trial court phase of the private civil suit concerning that accident culminated in 1996 in a $ 5.057 billion judgment against Exxon. [1] Almost the entire judgment was based on a jury's award of $ 5 billion in punitive damages [2] --the largest monetary penalty ever imposed in an American court.

If Exxon had been convicted of a crime, a judge would have determined its sentence. [3] If Exxon had been found liable for a civil penalty under the Clean Water Act, a judge would have set the amount of its penalty. [4] Punitive damages "share key characteristics of criminal sanctions" [5] and are also similar to civil statutory penalties. [6] But because Exxon's penalty was in the form of **[*180]** punitive damages, a jury determined how much Exxon should pay.

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large awards of punitive damages. [131] The Court surely would have been aware of the potential implications of its decision for punitive damages; indeed, its broad language questioning whether the right to jury trial extends to the determination of remedies at all [132] may well have been included for the very purpose of inviting a rethinking of the treatment of **punitive damages.** In light of Tull, as well as the recent statement of three Justices that "the level of **punitive damages** is not really a 'fact' 'tried' by the jury," [133] whether a party has a right under the **Seventh Amendment** to have a jury set **punitive damages** is very much an open question. [134] **[*200]**

IV. **Punitive Damages** in Eighteenth Century England

Since the existence of a right to have a jury set **punitive damages** is an open question under Supreme Court precedent, the critical questions are whether jury determination of the amount of punitive damages was within "the 'substance of the common law right of trial by jury,'" [135] and was one of the "most fundamental elements" [136] of the jury-trial system in eighteenth century England. While the vagueness of these formulations means that their application to specific issues will almost always be debatable, they would appear to indicate that there is no right under the **Seventh Amendment** to have a jury set **punitive damages.**

A. Absence of Right to Have a Jury Determine Damages

In his opinion for the Court in Tull, Justice Brennan strongly questioned whether the **Seventh Amendment** was intended to guarantee a right to a jury in "the remedy phase of a civil trial," [137] but failed to cite any authority suggesting that the Jury Trial Clause was not intended to apply to determinations of remedy. Perhaps because of the terseness of the Court's discussion, this part of Tull has not been accorded much significance in subsequent cases in the lower federal courts or in state courts concerning the existence of a right to have a jury set **punitive damages.** [138]

The distinction suggested in Tull does in fact find support in the English common law. The common-law allocation of responsibility to determine damages calls into question whether the **Seventh Amendment** even guarantees the right to have a jury set compensatory damages, let alone **punitive damages. [*201]**

In **jury trials** at common law, the jury could award damages. [139] When it did so, the amount of its award was subject to only limited review. [140] But there was no right to have damages determined in a trial by jury.

Damages were frequently assessed in a separate proceeding conducted by a sheriff rather than in a trial by jury. This separate proceeding was held when a plaintiff obtained an interlocutory judgment by confession, default, or the overruling of a demurrer. [141] Following the interlocutory judgment, damages were determined pursuant to a writ of inquiry. [142] A writ of inquiry was issued by the court in which the action was pending and was executed by the sheriff. It stated that "the plaintiff ought to recover his damages . . . . But because it is unknown what damages he hath sustained . . . , the sheriff is commanded, that by the oath of twelve honest and lawful men of his county, he diligently inquire the same; and return the inquisition into court." [143] The inquest jury sometimes had more than twelve members. [144]

When a writ of inquiry was executed, the inquiry into damages was conducted before the sheriff or an undersheriff. [145] According to one estimate, in the seventeenth century there were five times as many inquiries into damages before sheriffs as there were trials involving damages before nisi prius judges. [146]

The English courts recognized that there was "a difference between a principal verdict of a jury, and a writ of inquiry of **[*202]** damages; the latter being only an inquest of office to

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inform the conscience of the Court, and which they might have assessed themselves without any inquest at all." [147] It was recognized that courts, "if they please, may themselves assess the damages." [148] Although courts seldom set aside a verdict returned pursuant to a writ of inquiry, [149] their power to assess damages themselves without an inquest was not questioned. [150]

At common law, when a defendant contested liability but did not file a demurrer, damages as well as liability were decided in a jury trial. [151] But the practice following default, confession of judgment, and overruling of a demurrer suggests that in other cases damages were decided by a jury as a matter of convenience, rather than because a party was deemed to have a right to have a jury assess them. [152]

The case law in this country concerning defaults supports this interpretation. In 1797, in a case in which a federal trial **[*203]** court assessed damages itself after a default, the Supreme Court affirmed the judgment, [153] necessarily rejecting the defendant's claim that damages should have been assessed by the jury. [154] The defendant had relied upon the provision of the Judiciary Act of 1789 requiring that all issues of fact be decided by a jury.

[155] Similarly, the lower federal courts have almost uniformly held that the Seventh Amendment does not confer a right to have a jury determine damages after a default. [156] The rule that there is no right to a jury trial after a default has been applied not just against defaulting defendants, but against plaintiffs seeking a jury trial on damages after a defendant's default. [157] These decisions thus cannot be attributed to an unstated doctrine of waiver or forfeiture; they instead are a latter-day reflection of the absence at common law of a right to a **jury trial** on damages.

B. Considerations Peculiar to **Punitive Damages**

The absence at common law of a right to have the amount of damages decided by a jury suggests that it might even be consistent with the **Seventh Amendment** for federal judges to determine the amount of compensatory damages. [158] But whether or not **[*204]** such a practice would be permissible, there are considerations peculiar to **punitive damages** that confirm that the **Seventh Amendment** should not be interpreted to require that **punitive damages** be set by juries.

First, the English cases prior to 1791 that endorsed **punitive damages** (which were then referred to as exemplary damages) spoke of the power of the jury to award such damages, not of any right of a party to have a jury set them. For example, in Wilkes v Wood, [159] the Court of King's Bench stated that "a jury have it in their power to give damages for more than the injury received." Moreover, **punitive damages** were not restricted to **jury trials.** In Benson v Frederick, [160] one of the early decisions upholding a damage award in excess of the plaintiff's loss, the damages had been determined not in a trial by jury but in an inquest before a jury pursuant to a writ of inquiry.

The absence of English authority recognizing a right to have a jury determine the amount of punitive damages is not surprising in light of the English practice in criminal cases. Judges, not juries, determined sentences (though juries sometimes refused to find the defendant guilty because of concern about the harsh punishment he could face if convicted). [161] Since there was no right to have a jury determine the degree of punishment in criminal cases--where a defendant's life or liberty was at stake--it would have been anomalous to recognize a right to have a monetary punishment fixed by a jury.

Second, although the common law had developed over several centuries, punitive damages were first recognized in 1763. [162] The awards of **punitive damages** returned in **jury trials** in a number of cases between 1763 and 1791 hardly made jury determination of such damages one of the most fundamental elements of the jury-trial system. [163] **[*205]**

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As the Supreme Court stressed in Galloway v United States, the rules of the common law "were constantly changing and developing during the late eighteenth and early nineteenth centuries." [164] Because capacity for change was an inherent part of the common law, the common law of England in 1791 possessed the capacity to adopt changes in the procedures for resolving particular issues, including punitive damages. Since punitive damages were only a recent arrival on the legal scene, had not been awarded exclusively in jury trials, and had not been declared to be triable to a jury as of right, [165] it is not reasonable to interpret a constitutional amendment preserving the right of trial by jury in suits "at common law" as forever requiring that juries set such damages.

Third, there are important differences between punitive damages under modern American law and punitive damages under eighteenth century English law. As Professor Charles McCormick noted, "it is only in America that the cases clearly have separated exemplary from compensatory damages." [166] In this country punitive damages are the subject of separate instructions, and in nearly all states the jury, if it chooses to award such damages, identifies in its verdict separate sums for compensatory and punitive damages. In contrast, in eighteenth century England, punitive damages typically were not a separate element of recovery. In Huckle v Money, [167] one of the first cases to recognize such damages, the jury returned an undifferentiated verdict of <Sterling>300. Lord Camden had instructed the jurors that "they were not bound to any certain damages"; [168] there was no instruction to consider separately what damages the jurors might deem appropri- **[*206]** ate as punishment. Similarly, the report of Wilkes v Wood, a related case in which the jury awarded <Sterling>1000, indicates that Lord Pratt gave instructions to the jury to the effect that

a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself. [169]

This instruction identified punishment as an additional purpose of damages, but did not ask the jury to return a separate award of punitive damages.

In several of the pre-1791 English cases that endorsed punitive damages, not only were such damages not a distinct element of recovery, but the rationale of punishment or setting an example was blended with the compensatory rationale of remedying an insult to the plaintiff. For example, in Tullidge v Wade, [170] the court upheld a jury's verdict of <Sterling>50 against a defendant who "got [the plaintiff's daughter] with child." Again there is no indication that the jury was instructed to consider what sum should be awarded as **punitive damages** or as punishment. And two of the three judges stressed the insult to the plaintiff in concluding that the verdict should stand. [171]

C. Criminal Cases

A comparison to criminal cases is also instructive. Just as the **Seventh Amendment** preserves the right to jury trial in civil cases, both the Sixth Amendment and Article III, Section 2, guarantee the right to jury trial in criminal cases. Indeed, the Supreme Court has called the Sixth Amendment right to jury **[*207]** trial "fundamental to the American scheme of justice" and has held that that right--unlike the Seventh Amendment right to jury trial--must be honored in state as well as federal court. [172]

But the Court also has held that the Sixth Amendment does not give a criminal defendant a right to have a jury determine his sentence. [173] Even in a capital case, it is permissible to assign full responsibility for deciding the defendant's sentence to the judge. [174] If a citizen whose life or liberty is at stake does not have a right to have a jury determine his punishment, it is difficult to fathom why a citizen seeking **punitive damages** or seeking to

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avoid their imposition should have a right to have a jury determine the amount.

V. The Reasons Why Judges Rather than Juries Should Set **Punitive Damages**

If the Seventh Amendment does not dictate that juries set **punitive damages,** then the allocation of power to set such damages, in cases brought in federal court, is a matter of policy. This Part first will examine several considerations supporting allocation of this power to trial judges, and then show that the general justifications for jury trials in civil cases do not outweigh those considerations.

A. Policies Supporting Assessment of Punitive Damages by Judges

More than a century ago, the Supreme Court of Texas observed:

A power such as may be exercised by juries in awarding exemplary damages is liable to great abuse,--may often lead to great oppression. . . . In cases based on facts which merit condemnation, or even punishment, though not by law constituting crime, juries, under commendable impulses, but with judgment warped by passion, no doubt often render excessive verdicts. [175]

[*208] This observation was made in support of the need to exercise, "firmly and fearlessly," the power to grant a new trial when a jury's punitive damages award is excessive, [176] but it also points to a reason that judges are better equipped than juries to set punitive damages in the first place. Just as the Supreme Court has held that judges are better suited than juries to construe patents, [177] judges are also better suited to mete out punishment. They are more likely to be able to base the severity of the penalty on a rational assessment of the facts, rather than an emotional reaction to the defendant's misconduct. As was said in an analysis of the allocation of power to determine sentences in criminal cases, "juries are more easily influenced by emotional factors than judges, who, due to their experience, are better able to make an objective determination of the penalty to be inflicted." [178]

It might be objected that the argument proves too much, for emotional factors also may influence jury awards of compensatory damages, yet juries are nevertheless asked to set compensatory damages. But assigning the determination of punitive damages to an emotion-prone decisionmaker is much more troubling than assigning the determination of compensatory damages to such a decisionmaker. In the words of the Supreme Court, punitive damages are "private fines." [179] But unlike criminal fines and civil statutory penalties, they are generally not subject to any cap. [180] The criteria that govern the determination of the amount of punitive damages confer enormous discretion. [181] Yet punitive damages **[*209]** are awarded without the necessity for proof beyond a reasonable doubt and without many of the other protections afforded in criminal cases to minimize the risk of punishing the innocent. It is extremely problematic to give a broad power to punish to a decisionmaker that is particularly susceptible to passion and emotion, in a proceeding that lacks many of the safeguards that usually precede the meting out of punishment. [182]

A related consideration that favors having judges set punitive damages derives from the role that the defendant's wealth plays in setting punitive damages. In most civil cases, evidence of a party's wealth is inadmissible. [183] "The underlying reason for the rule is that such evidence tends to inject into the case a foreign, diverting, and distracting issue which may effectuate prejudicial results." [184] But when the amount of punitive damages is at issue, a plaintiff is allowed to introduce evidence of the defendant's finances, [185] on the theory that "the degree of punishment or deterrence resulting from a judgment is to some extent in proportion to **[*210]** the means of the guilty person." [186] Whatever the merits of the theory, [187] evidence that a defendant has a huge net worth often contributes to a staggering verdict.

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The Supreme Court recognized this problem in Honda Motor Co v Oberg, [188] in which it held that a state violates due process by letting juries set punitive damages but not permitting review by a trial or appellate court for excessiveness. The Court stressed that "the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." [189] Unless the amount of punitive damages is determined in a separate phase of the trial, it seems clear that admission of evidence of wealth also may skew the jury's assessment of liability for compensatory and punitive damages and of the amount of compensatory damages. The significant increase in income inequality among Americans since the 1960s [190] has likely exacerbated the risk created by admission of evidence of wealth.

Judges are better suited than juries to give appropriate weight to a defendant's finances. They are less likely to be swayed by arguments that seek to base the calculation of punitive damages on a percentage of the defendant's net wealth or income.

Because of their responsibility for sentencing in criminal cases and for imposing civil statutory penalties, judges ordinarily have much more experience than jurors in determining punishments and far more familiarity with the sanctions imposed for **[*211]** various types of misconduct. [191] Referring to Alabama's procedures for setting punitive damages, Justice Powell once observed in a draft opinion that "the jurors who pass sentence on tort defendants according to these procedures probably have never decided a punitive damages case before. Thus, they have no basis for de- **[*212]** termining what penalties are common in particular kinds of cases." [192]

Because judges are in a better position to impose a punishment that is in line with the punishments imposed for similar misconduct, determination of the amount of punitive damages by judges would promote the interest in treating like cases alike. [193] As Professor Colleen Murphy has written, "with professional and ongoing experience in matters of public policy, the judge presumably effectuates public policy goals with greater consistency than the one-time jury." [194]

Whereas jury verdicts awarding punitive damages simply indicate a dollar amount, a judge could be required to state the reasons for the amount of punitive damages awarded. [195] This would greatly facilitate appellate review. [196] Under the current procedure, one can only speculate as to what led the jury to award punitive damages in the amount it chose. It may have relied upon an improper premise or one unsupported by the record, but the error may never be known. A requirement that a judge state the reasons for a punitive damages award would reduce the risk of undisclosed error.

Although trial judges' statements of reasons would reveal some errors that might go uncorrected on appeal if made by a jury, in general shifting to judges the responsibility to set punitive damages would have the salutary effect of reducing the role of appellate courts in setting punitive damages. [197] Under the ex- **[*213]** isting system of jury awards of punitive damages, the real determination of punitive damages often takes place on appeal. [198] In countless cases, appellate courts have drastically reduced awards of punitive damages. [199] Appellate courts have taken such action despite the vagueness of the criteria governing the determination of the amount of punitive damages. [200] **[*214]**

If trial judges were responsible for awarding punitive damages, there would likely be fewer enormous awards. The occasions for appellate intervention would be fewer, and appellate courts could be expected to heed more closely precedents that ostensibly limit appellate review of the amount of damages awarded. [201] The result of having trial judges set punitive damages would be to reduce the frequency with which punitive damages are effectively set on a cold record by judges who heard none of the testimony presented at trial. [202]

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Judges are also better equipped than juries to give proper weight to other sanctions that have been imposed on the defendant for the same conduct. Under the law of many states, prior fines, civil penalties, or awards of punitive damages militate in favor of a lower punitive award. [203] As a practical matter, however, to require a defendant to present such proof to a jury is virtually to eliminate prior punishment as a mitigating factor. As Judge Sarokin observed with respect to evidence of prior punitive awards, "to require a defendant to present such prejudicial evidence to a jury as its only alternative is to place it between Scylla and Charybdis." [204] Evidence that another jury, court, or agency **[*215]** has sanctioned the defendant is at least as likely to lead a jury to increase its award as it is to lead it to reduce the award.

If judges set punitive damages, cases in which such damages were found to be warranted also could be resolved more quickly and with less expense. Today it is not unusual for a jury's punitive damages award to be followed by further proceedings at the trial court level that may stretch out over several months. In addition to memoranda of law supporting and opposing a remittitur, evidence not before the jury is often tendered and considered. [205] If the trial judge grants a remittitur which the plaintiff accepts, the defendant may still appeal. Vesting in judges the authority to set punitive damages would significantly shorten the process.

B. The Insufficient Advantages of Assessment by Juries

The foregoing considerations strongly support shifting to judges the responsibility to decide the amount of punitive damages. They are not outweighed by the interests that might be served by leaving that responsibility with juries.

The Supreme Court has said that the purpose of jury trials in civil cases is "to assure a fair and equitable resolution of factual issues." [206] Although other interests are served by civil jury trials, the notion that a jury has a superior ability to decide issues of credibility and other factual issues is plainly one of the principal justifications for civil jury trials.

This justification provides little support for asking juries to set punitive damages. No doubt the parties may dispute some facts relevant to the amount of punitive damages. In general, however, fact resolution is likely to be less significant than the exercise of judgment as to how large an award is warranted to serve the purposes of punitive damages. [207] When the amount of punitive damages is considered, ordinarily the jury already will have found that the defendant committed a wrong that caused injury to the plaintiff, determined the extent of the plaintiff's injuries (economic and noneconomic), and determined that the defendant acted with the degree of culpability necessary to permit an award of punitive damages. Factual disputes certainly can remain, just as in a criminal case there can be factual disputes relating to sentencing. But in most cases the determination of the **[*216]** amount of punitive damages is driven not by factual questions but by a subjective judgment as to the amount that will serve the purposes of punitive damages (typically, punishing the defendant and deterring both the defendant and others from similar conduct in the future [208]). As Professor Ellis has observed, determining the amount of punitive damages "does not require answering a 'what happened' question. Rather, it embodies the question, 'what ought to happen' to the defendant." [209]

Jury determination of the amount of punitive damages also might be deemed preferable because a jury's verdict reflects the judgment of all the jurors, whereas a judge's determination is the judgment of one man or woman. [210]

A nineteenth century Supreme Court decision, Railroad Co v Stout, [211] though not involving punitive damages, endorsed the wisdom-of-many justification for jury trials. Stout, a six-year old, seriously injured a foot while playing on an unguarded railroad turntable located near a public road. The facts were not in dispute. The jury returned a verdict of $ 7,500 against the

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railroad. **[*217]** In the Supreme Court the railroad argued that, since the facts were undisputed, the issue of its negligence should have been decided by the judge as a matter of law. [212] The Court rejected the argument, explaining that in most cases of alleged negligence,

upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. . . . Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge. [213]

Today civil juries in federal court generally have only six or eight members rather than twelve. More importantly, however, the nature of the decision involved in awarding punitive damages suggests that the wisdom of a judge is preferable in this instance to the collective wisdom of a jury. Choosing an amount of punitive damages differs fundamentally from the determination of whether a party was negligent and from other applications of law to fact that are submitted to the jury even when the facts are undisputed (if reasonable persons could disagree about the outcome). The determination of whether a party was negligent, though certainly subjective in part, is guided by consideration of what a reasonable person in the defendant's shoes would have done. For most other issues decided by a jury there are similar objective criteria. The choice of the amount of punitive damages is not guided in any comparable way that makes the jury's knowledge of "the common affairs of life" [214] particularly useful. **[*218]**

Another justification often advanced for jury trials in civil cases is the risk of judicial bias. This justification was advanced by the Anti-Federalists, [215] who in urging a jury-trial guarantee for civil cases quoted the following statement by Blackstone:

The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity; it is not to be expected from human nature that the few should be always attentive to the interests and good of the many. [216]

In Pennsylvania, the Anti-Federalists cited an outrageous search by a constable that had resulted in an award of damages by a jury, and predicted that a "lordly court of justice" sitting without a jury would be "ready to protect the officers of government against the weak and helpless citizens." [217]

It cannot be denied that in some instances bias could infect determinations of punitive damages by federal judges. But this possibility does not provide a good reason for continuing to leave those determinations in the hands of juries in all cases. First, a check against the operation of judicial bias would be provided by the fact that the amount of punitive damages would not be decided by the judge unless the jury first determined that the defendant was liable for punitive damages. Second, the strong tradition of independence and professionalism that has developed in the federal judiciary reduces the risk of judicial bias. [218] Third, the **[*219]** risk of judicial bias could be further reduced by having juries continue

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to set punitive damages in cases involving alleged abuses of government power, in which a judge's status as part of the government might be a source of bias. [219]

It has been suggested that juries should set punitive damages because juries better represent the values of the community. [220] One of the functions of the jury system undoubtedly is to permit the ideals and beliefs of ordinary citizens to influence the administration of the law. [221] This function of jury trials provides little justification, however, for having juries set punitive damages.

Any allocation of decisionmaking authority to judges could be said to reduce the influence that community values exert through jury verdicts, but the law entrusts many important decisions to **[*220]** judges, such as sentencing, imposition of civil penalties, and grant or denial of injunctions and declaratory judgments. Moreover, as Judge Kozinski has noted recently, whereas "legislators are popularly elected and represent a variety of geographic and other interests . . . [,] any group of six or 12 individuals may have views wholly unrepresentative of the community at large." [222] The reduction in the size of civil juries in federal cases makes particularly suspect the notion that a jury is a reliable barometer of community values. When the issue of the proper amount of punitive damages arises, the defendant already has been found, ordinarily by a jury, to have engaged in culpable conduct. Particularly given the other considerations suggesting that judges are better equipped than jurors to set punitive damages, it seems better to bypass this one opportunity for the expression of community values through juries, and to rely on judges to be guided by established norms of which they will be well aware (such as the need to respect persons and property).

Jury trials also afford citizens an opportunity to participate in government. As one AntiFederalist tract argued,

The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature, are those fortunate inventions which have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community. Their situation, as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of the society; and to come forward, in turn, as the centinels and guardians of each other. [223]

The participatory function of jury trials is important, but it does not deserve great weight with respect to the allocation of power under consideration here. To assign judges the power to set punitive damages would merely confer on judges the power to decide one aspect (the determination of amount) of one remedy (punitive damages). It would not substantially reduce the opportunity for public participation in government through jury service. [224]
[*221]

It has been argued that juries should set punitive damages because "the right to trial by jury lends credence to the decisions of our courts and engenders public confidence in the legal system," and "any efforts on behalf of the judiciary to substantially detract from that right . . . will weaken the confidence of the people in the courts." [225] Although it is true that jury trials traditionally have been thought to be important in maintaining confidence in the legal system, the reality is that awards of punitive damages returned by juries are set aside altogether or reduced in an extraordinarily high percentage of cases. [226] If anything, taking determinations of the amount of punitive damages away from juries might well increase public confidence in the judicial system, because it would end a type of jury verdict that is partially or entirely overturned with exceptional frequency--perhaps more often than any other type of jury verdict. Moreover, the suggested change would merely take from the jury one part of one issue; juries would still determine liability for compensatory damages, amount of compensatory damages, and liability for punitive damages.

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C. Summary

In cases brought in federal court, the responsibility to set punitive damages should rest with the trial judge (except in cases involving alleged abuses of governmental power). [227] The jury could be asked to return an advisory verdict on the amount of punitive damages; Federal Rule of Civil Procedure 39(c) expressly authorizes the use of advisory juries. [228] Ultimately, however, the power to determine the proper amount of punitive damages should rest with the trial judge, subject to appellate review. [229]

VI. Implementing the Change

It might be questioned whether federal courts, even if disposed to do so, can implement the change recommended here on their own, or whether they must await a statute or an amend- **[*222]** ment to the Federal Rules of Civil Procedure. No statute or amendment to the Rules is necessary.

In Colgrove, [230] the Supreme Court upheld a local federal court rule providing that juries in civil cases would consist of six persons. Not only was there no statute or Federal Rule of Civil Procedure authorizing six-person juries, but at that time Rule 48 provided that "the parties may stipulate that the jury shall consist of any number less than twelve" [231] and thus contemplated a twelve-person jury absent such a stipulation. The Court held that Rule 48 was no obstacle to the local rule, because it was drafted in light of the assumption, held in Colgrove to be incorrect, that a trial by jury meant a trial by a jury of twelve persons. [232] Since no provision of the Federal Rules of Civil Procedure even reflects the assumption that juries are to set punitive damages, under Colgrove federal courts are free to adopt local rules providing for judicial determination of the amount of punitive damages. Even absent a local rule, an individual judge presumably may consider providing in a pretrial order that the amount of punitive damages will be set by the court if liability for such damages is found by the jury. [233]

Conclusion

An award of punitive damages is a "windfall" to the plaintiff. [234] As one court put it, the plaintiff "is the fortuitous beneficiary of such an award simply because there is no one else to receive it." [235] It would be anomalous if the fortuitous beneficiary of a windfall had a constitutional right to choose the decisionmaker who determines the amount of the windfall. It would also be anomalous if defendants in civil cases had a constitutional right **[*223]** to have **punitive damages** set by a jury, whereas in criminal cases judges determine sentences of imprisonment (and in some cases even death [236]). Because the **Seventh Amendment** need not and should not be interpreted to entitle either plaintiffs or defendants to have a jury fix **punitive damages,** judicial assessment of **punitive damages** merits much more consideration than it has received, as an alternative to caps and other reforms designed to curb excessive awards.

FOOTNOTES:

n1 In re Exxon Valdez, No A-89-0095-CV (D Alaska, Sept 24, 1996), appeal pending.

n2 In re Exxon Valdez, No A-89-0095-CV, 1995 US Dist LEXIS 12952, *12 (D Alaska).

n3 In criminal cases (other than capital cases) sentences are determined by judges in both federal court and the courts of all but eight states. By statute, defendants in six states have a right, in cases triable to a jury, to have a jury fix their punishment, within the limits established by statute. Ark Code Ann <sect> 5-4-103 (Michie 1993); Ky Rev Stat Ann <sect> 532.055(2) (Baldwin 1990 & Supp 1997); Miss Code <sect><sect> 97-3-67, 97-3-

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71 (1994) (granting this right only for crimes of rape and statutory rape); 57 Okla Stat Ann <sect> 353 (West 1991); Tex Crim Proc Code Ann Art 37.07 <sect> 2(b)(2) (Vernon 1981 & Supp 1997) (giving defendant right to choose judge or jury); Va Code <sect> 19.2-295 (1995 & Supp 1997). In Tennessee, defendants have such a right in misdemeanor cases. Tenn Code Ann <sect> 40-20-104 (Michie 1990). In Missouri, a trial judge can impose a sentence less than or equal to the sentence chosen by the jury. Mo Ann Stat <sect> 557.036 (3) (Vernon 1979 & Supp 1997).

Pursuant to a court-approved settlement with the state and federal governments, Exxon had pled guilty in 1991 to four misdemeanors, paid a $ 25 million fine (remitted from $ 150 million because Exxon had spent $ 2.5 billion in cleanup costs), and agreed to pay $ 900 million in additional cleanup costs. Judge Endorses $ 1 Billion Exxon Valdez Settlement, Wash Post A4 (Oct 9, 1991); Tom Kenworthy and Hal Bernton, $ 1 Billion-Plus Accord Reached in Exxon Spill, Wash Post A6 (Oct 1, 1991).

n4 See 33 USC <sect> 1319(d) (1994); Tull v United States, 481 US 412, 426-27 (1987).

n5 Landgraf v USI Film Products, 511 US 244, 281 (1994) (holding that the punitive damages provision of Section 102(b)(1) of the Civil Rights Act of 1991 cannot be applied to conduct that occurred before the law was enacted).

n6 Tull, 481 US at 422 n 7.

n7 Juries set punitive damages in the first instance in federal court and in the courts of nearly every state that permits the recovery of such damages. The exceptions are the Kansas courts and, in certain actions, the Connecticut courts. Kan Stat Ann <sect> 60-3701(a) (Supp 1992); Gen Stat Conn <sect><sect> 31-290a(b), 35-53(b), 36a-618, 42-110g(a), 46a-98(d), 52240b (1997).

n8 Atlas Food Systems & Services v Crane National Vendors, 99 F3d 587, 594-95 (4th Cir 1996).

n9 The Fourth Circuit acknowledged that juries are well suited to determine facts relevant to the amount of punitive damages, but stressed that "other policy-related elements--e.g., the likelihood that an award will deter the defendant or others from engaging in similar conduct--are not factual questions and, therefore, are more appropriately decided by the trial judge." Id at 594. The Fourth Circuit concluded that "when reviewing the amount of a jury's punitive award under Federal Rule of Civil Procedure 59, the district court has a participatory decisionmaking role that it does not have when reviewing a jury's findings based solely on facts." Id. "While a district court must give due respect to a jury's comparative advantages in initially deciding upon the amount of punitive damages to award, the court may depart from that award to the extent that it concludes that its own comparative advantages warrant such a departure. . . . The court's review of the amount of a punitive damage award should involve comparison of the court's independent judgment on the appropriate amount with the jury's award to determine whether the jury's award is so excessive as to work an injustice." Id at 595.

n10 See S 5, 105th Cong, 1st Sess <sect> 108 (Jan 21, 1997); S 648, 105th Cong, 1st Sess <sect> 108 (Jan 21, 1997). In March 1996, Congress passed a bill containing similar provisions, but President Clinton vetoed it. Common Sense Product Liability Reform Act of 1996, introduced as Common Sense Product Liability Reform Act of 1995, HR 956, 104th Cong, 2d Sess (Feb 15, 1995), in 141 Cong Rec H 1849 (Feb 15 1995). On May 6, 1996, the House failed to override the veto.

n11 In 1991, President Bush's Council on Competitiveness advocated shifting the power to assess punitive damages from juries to judges. See A Report from the President's Council on

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The Exxon Valdez litigation epitomizes a disparity in the allocation of penalty-setting power that exists both in federal court and in nearly all state courts. [7] Noting this disparity, the Fourth Circuit recently adopted a new and more stringent standard for post-trial review of jury awards of punitive damages. [8] It concluded that, to the extent that a punitive damages award rests on a policy judgment (as opposed to a determination of the facts), a trial judge deciding a motion for remittitur may independently assess how much the defendant should be punished. [9]

Similarly, bills concerning product liability cases introduced in Congress in recent years would have given both federal and state trial judges a greater role in awarding punitive damages. In general, the bills would cap punitive damages at the greater of $ 250,000 or two times compensatory damages, and a jury's award exceeding the cap could stand only if the trial judge determined in a separate proceeding that the jury's award was warranted. [10]

This Article considers whether, as to cases brought in federal court, the courts can and should go further than either the Fourth Circuit or the recent bills, and squarely place all of the **[*181]** power to decide the amount of **punitive damages** with trial judges. [11] The Supreme Court has never decided whether the **Seventh Amendment,** which preserves the right to a jury trial in civil cases brought in federal court, [12] confers a right to have **punitive damages** set by a jury. [13] Three Justices recently implied that the Amendment confers no such right, observing, in Gasperini v Center for Humanities, Inc, [14] that "the level of **punitive damages** is not really a 'fact' 'tried' by the jury." **[*182]**

The Supreme Court's 1987 decision in Tull v United States [15] also indicates that the **Seventh Amendment** may not require jury assessment of the amount of **punitive damages.** Tull held that a citizen sued by the United States for a penalty under the Clean Water Act had a right to have a jury determine his liability for a penalty, but not its amount. The Court broadly stated that "nothing in the Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial," [16] and that it had seen "no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial." [17]

It is time to recognize that, at least in federal court, asking juries to set **punitive damages** is neither constitutionally required nor sound policy. The responsibility to decide the amount of **punitive damages,** if the jury finds the defendant liable for such damages, should rest with the trial judge.

Part I of this Article discusses the origins of the **Seventh Amendment** and the basic principles reflected in the Supreme Court decisions interpreting it. Special attention is given to the Supreme Court decisions establishing that the Seventh Amend- **[*183]** ment preserves only the substance of the right of trial by jury that was recognized by the English common law in the eighteenth century.

Part II examines certain Supreme Court decisions that some courts and commentators have read as establishing a **Seventh Amendment** right to a jury determination of the amount of **punitive damages.** This Part concludes that the decisions do not establish the existence of such a right.

Part III analyzes the Supreme Court's decision in Tull.

Part IV demonstrates that having juries fix punitive damages is not necessary to preserve the substance of the common-law right to trial by jury. Under the English common law, there was no right to a trial by jury on the issue of damages. In some cases damages were determined in a trial by jury before a judge, but often they were set by an inquest jury in a proceeding before a sheriff pursuant to a writ of inquiry. Such an inquest was intended to inform the conscience of the court, which could instead assess damages itself. Moreover, the

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Competitiveness, Agenda for Civil Justice Reform in America 22 (1991). A Senate committee has done likewise. See S 44, 98th Cong, 2d Sess <sect> 12(c) (1984) (proposed law providing for judicial assessment of punitive damages in product liability cases in federal court), discussed in Product Liability Act, S Rep No 476, 98th Cong, 2d Sess 59 (1984) (committee report accompanying S 44). See also S 100, 99th Cong, 1st Sess <sect> 12(c) (1985) (bill containing similar provision); HR 5214, 98th Cong, 2d Sess <sect> 11(b), (c) (1984) (providing for judicial determination of both liability for, and amount of, punitive damages); S 2631, 97th Cong, 2d Sess <sect>13(c) (1982) (same). Many commentators agree. See, for example, Lisa M. Sharkey, Comment, Judge or Jury: Who Should Assess Punitive Damages?, 64 U Cin L Rev 1089, 1128-29 (1996); David G. Owen, Comment, Civil Punishment and the Public Good, 56 S Cal L Rev 103, 120 (1992); Dorsey H. Ellis, Jr., Punitive Damages, Due Process, and the Jury, 40 Ala L Rev 975, 1005-07 (1989); Richard C. Ausness, Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation, 74 Ky L J 1, 124 (1985); James B. Sales and Kenneth B. Cole, Jr., Punitive Damages: A Relic That Has Outlived Its Origins, 37 Vand L Rev 1117, 1167-68 (1984); Jane Mallor and Barry Roberts, Punitive Damages: Toward a Principled Approach, 31 Hastings L J 639, 664 (1980). Judge Kozinski also has questioned the assignment to juries of the power to set punitive damages. See Alex Kozinski, The Case of Punitive Damages vs. Democracy, Ind Law 12 (Oct 30-Nov 12, 1996).

n12 "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." US Const, Amend VII.

n13 Unlike nearly all of the other protections of the Bill of Rights, the guarantees of the Seventh Amendment have not been held to apply to the states through the Fourteenth Amendment. "The Seventh Amendment . . . governs proceedings in federal court, but not in state court." Gasperini v Center for Humanities, Inc, 116 S Ct 2211, 2222 (1996) (footnote omitted). See Walker v Sauvinet, 92 US 90, 92 (1875) (Seventh Amendment is not a "privilege or immunity . . . which the states are forbidden by the Fourteenth Amendment to abridge."). The Seventh Amendment governs the right to jury trial in diversity as well as federal question cases. Simler v Conner, 372 US 221, 222 (1963).

n14 116 S Ct 2211, 2235 (1996) (Scalia, joined by Rehnquist and Thomas, dissenting). Justice Scalia was quoting the Re-examination Clause of the Seventh Amendment, which provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." US Const, Amend VII. The issue in Gasperini, which involved an award of compensatory damages, was whether the Re-examination Clause precludes appellate review when a trial court denies a motion seeking a new trial because the jury's verdict was excessive. The Court held that the Re-examination Clause does not preclude such review. 116 S Ct at 2223-24. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, would have held that the Re-examination Clause prohibits appellate review of awards of compensatory damages, but apparently would have reached a different conclusion as to punitive damages because the amount of punitive damages is not a "fact" tried by a jury. Id at 2231-36.

Whether state jury-trial guarantees entitle a party to have a jury set punitive damages is similarly an open question in most states. Forty-seven state constitutions protect the right to jury trial in civil cases in state court. See Ala Const, Art I, <sect> 11; Alaska Const, Art I, <sect> 16; Ariz Const, Art II, <sect> 23; Ark Const, Art II, <sect> 7; Cal Const, Art I, <sect> 16; Conn Const, Art I, <sect> 19; Del Const, Art 1, <sect> 4; Fla Const, Art I, <sect> 22; Ga Const, Art I, <sect> 1, <para> 11; Hawaii Const, Art I, <sect> 13; Idaho Const, Art I, <sect> 7; Ill Const, Art I, <sect> 13; Ind Const, Art I, <sect> 20; Iowa Const, Art I, <sect> 9; Kan Const, Bill of Rights <sect> 5; Ky Const, Bill of Rights <sect> 7; Me Const, Art I, <sect> 20; Md Const, Declaration of Rights, Art 23; Mass Const, pt I, Art 15;

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Mich Const, Art I, <sect> 14; Minn Const, Art I, <sect> 4; Miss Const, Art III, <sect> 31; Mo Const, Art 1, <sect> 22(a); Mont Const, Art II, <sect> 26; Neb Const, Art I, <sect> 6; Nev Const, Art I, <sect> 3; NH Const, pt I, Art 20; NJ Const, Art I, <para> 9; NM Const, Art II, <sect> 12; NY Const, Art I, <sect> 2; NC Const, Art I, <sect> 25 (limiting preservation of civil jury trial to "all controversies at law respecting property"); ND Const, Art I, <sect> 13; Ohio Const, Art I, <sect> 5; Okla Const, Art II, <sect> 19; Or Const, Art VII, <sect> 3; Pa Const, Art I, <sect> 6; RI Const, Art I, <sect> 15; SC Const, Art I, <sect> 14; SD Const, Art VI, <sect> 6; Tenn Const, Art I, <sect> 6; Tex Const, Art I, <sect> 15; Utah Const, Art I, <sect> 10 (held to protect civil jury right in International Harvester Credit Corp v Pioneer Tractor and Implement, Inc, 626 P2d 418, 421 (Utah 1981)); Vt Const, ch I, Art 12; Va Const, Art I, <sect> 11; Wash Const, Art I, <sect> 21; W Va Const, Art III, <sect> 13; Wis Const, Art I, <sect> 5. Compare Smith v Printup, 254 Kan 315, 866 P2d 985, 994 (1993) (holding that there is no right to have a jury set punitive damages), with Zoppo v Homestead Insurance Co, 71 Ohio St 3d 552, 644 NE2d 397, 401 (Ohio 1994), cert denied, 116 S Ct 56 (1995) (voiding statute that permitted court to set punitive damages), and Henderson By Hartsfield v Alabama Power Co, 627 S2d 878, 885-86, 893-94 (Ala 1993) (striking down legislative cap on punitive damages as violating the right to trial by jury).

n15 481 US 412, 426-27 (1987).

n16 Id at 426 n 9.

n17 Id. The Fourth Circuit relied upon Tull in its recent decision endorsing more stringent review of jury awards of punitive damages. Atlas, 99 F3d at 595.

n18 See Wilkes v Wood, Lofft 1, 98 Eng Rep 489, 498-99 (CP 1763); Huckle v Money, 2 Wils KB 205, 95 Eng Rep 768, 769 (KB 1763).

n19 See Benson v Frederick, 3 Burr 1845, 97 Eng Rep 1130, 1130 (KB 1766).

n20 US Const, Art IV, <sect> 2, cl 3.

n21 See Edith Guild Henderson, The Background of the Seventh Amendment, 80 Harv L Rev 289, 295 (1966).

n22 Jonathan Elliot, 3 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution 658 (2d ed 1836) ("Elliot's Debates").

n23 1 Elliot's Debates at 328-29.

n24 Ralph Ketcham, ed, The Anti-Federalist Papers and the Constitutional Convention Debates 219 (Mentor 1986); 1 Elliot's Debates at 326.

n25 See, for example, Federalist 83 (Hamilton), in Clinton Rossiter, ed, The Federalist Papers 495, 498-99 (Mentor 1961).

n26 See Charles W. Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn L Rev 639, 666 (1973).

n27 See, for example, 3 Elliot's Debates at 579, 651-52.

n28 US Const, Amend VII.

n29 1 Stat 98 (1789).

n30 See Wolfram, 57 Minn L Rev at 730 (cited in note 26) (reviewing the constitutional

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history of the Seventh Amendment).

n31 The Seventh Amendment has generated extensive scholarly commentary. Some of the leading articles are Wolfram, 57 Minn L Rev 639 (cited in note 26); Martin H. Redish, Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making, 70 Nw U L Rev 486 (1975) (arguing that the Supreme Court should take account of social conditions when interpreting the Seventh Amendment); Harold Chesnin and Geoffrey C. Hazard, Jr., Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791, 83 Yale L J 999 (1974) (showing that jury practice was in transition in England during the 1790s, and suggesting that Seventh Amendment interpretation is more complex than previously thought); Henderson, 80 Harv L Rev 289 (cited in note 21) (arguing that the Seventh Amendment was not intended to codify existing jury practice because there was no consistent practice in 1791); and Austin Wakeman Scott, Trial by Jury and the Reform of Civil Procedure, 31 Harv L Rev 669 (1918) (discussing historical features of trial by jury and examining methods for controlling jury power).

n32 Compare, for example, Dimick v Schiedt, 293 US 474, 487 (1935) ("Here, we are dealing with a constitutional provision which has in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791."), with Gasperini v Center for Humanities, Inc, 116 S Ct 2211, 2224 n 20 (1996) (noting that the meaning of the Seventh Amendment was not fixed as of 1791). See also notes 60, 75-76, and accompanying text.

n33 Markman v Westview Instruments, Inc, 116 S Ct 1384, 1389 (1996); Baltimore & Carolina Line, Inc v Redman, 295 US 654, 657 (1935); Dimick, 293 US at 476-77; Thompson v Utah, 170 US 343, 350 (1898), overruled on other grounds by Collins v Youngblood, 497 US 37 (1989). See United States v Wonson, 28 F Cases 745, 750 (Cir Ct D Mass 1812) (opinion by Story). Compare Markman, 116 S Ct at 1389 n 3 ("Our formulations of the historical test do not deal with the possibility of conflict between actual English common law practice and American assumptions about what that practice was, or between English and American practices at the relevant time.").

n34 See notes 45-68, 76-77, and accompanying text.

n35 See, for example, Markman, 116 S Ct at 1389-93.

n36 Parsons v Bedford, 28 US (3 Pet) 433, 447 (1830).

n37 See Wooddell v International Brotherhood of Electrical Workers, 502 US 93, 97-98 (1991); Chauffeurs, Teamsters and Helpers Local 391 v Terry, 494 US 558, 565 (1990) (plurality opinion); Granfinanciera, SA v Nordberg, 492 US 33, 42 (1989); Tull, 481 US at 417-18. In its recent decision in Markman, where it was undisputed that the cause of action at issue triggered a right to jury trial on some issues, the Court applied the first prong of this test but not the second. 116 S Ct at 1389-92. Earlier cases had treated the second prong as more important. See Terry, 494 US at 565 (plurality opinion); Granfinanciera, 492 US at 42; Tull, 481 US at 421. See also Curtis v Loether, 415 US 189, 194 (1974) (implying that "the relief sought here" prong is "more important" than analogous common law actions).

At least two cases applying the two-pronged test treated the presence of a claim for money damages as a factor strongly indicating that a particular cause of action triggered a right to a jury trial. See Terry, 494 US at 570; Curtis, 415 US at 196-97.

In dicta in a 1970 decision, the Court identified a third factor bearing on whether an issue is triable as of right to a jury: "the practical abilities and limitations of juries." Ross v Bernhard, 396 US 531, 538 n 10 (1970). Most of the Court's Seventh Amendment decisions since Ross have ignored this factor. See, for example, Terry, 494 US at 565 (using two-prong test); Granfinanciera, 492 US at 42 (same). Part of the Markman opinion can be read as reviving it

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as a significant consideration when history does not supply a clear answer. 116 S Ct at 1395.

n38 Markman, 116 S Ct at 1389-90; Tull, 481 US at 427.

n39 116 S Ct 1384 (1996).

n40 Id at 1389.

n41 See, for example, Columbus Mills, Inc v Freeland, 918 F2d 1575, 1578 (11th Cir 1990); Pan Am World Airways, Inc v Ramos, 357 F2d 341, 342 (1st Cir 1966); Swofford v B & W, Inc, 336 F2d 406, 413 (5th Cir 1964).

n42 Markman, 116 S Ct at 1389; Colgrove v Battin, 413 US 149, 156-57 (1973); Baltimore & Carolina Line, Inc v Redman, 295 US 654, 657 (1935). See Capital Traction Co v Hof, 174 US 1, 23 (1899) ("It is not 'trial by jury,' but 'the right of trial by jury,' which the Amendment declares 'shall be preserved.'").

n43 Galloway v United States, 319 US 372, 392 (1943).

n44 Tull, 481 US at 426, quoting Colgrove, 413 US at 156 n 11 (quoting Scott, 31 Harv L Rev at 671 (cited in note 31)); Markman, 116 S Ct at 1389.

n45 See Baylis v Travellers' Insurance Co, 113 US 316, 320-21 (1885); Oscanyan v Arms Co, 103 US 261, 266-67 (1880); Pleasants v Fant, 89 US (22 Wall) 116, 120-21 (1874); Parks v Ross, 52 US (11 How) 362, 372-73 (1850).

n46 Fidelity & Deposit Co v United States, 187 US 315, 319-21 (1902).

n47 165 US 593, 594-95 (1897).

n48 Id at 596-97.

n49 Id at 596.

n50 253 US 300, 310 (1920).

n51 Id at 307-08.

n52 Id at 309-10.

n53 283 US 494, 500 (1931).

n54 See id at 497.

n55 319 US 372, 404-05 (1943).

n56 Id at 390-92 (footnotes omitted).

n57 413 US 149, 157, 160 (1973).

n58 Compare Richard Arnold, Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials, 22 Hofstra L Rev 1 (1993) (criticizing Colgrove).

n59 See Colgrove, 413 US at 176-77 (Marshall dissenting); Arnold, 22 Hofstra L Rev at 8.

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n60 See Slocum v New York Life Insurance Co, 228 US 364, 397 (1913); Maxwell v Dow, 176 US 581, 586 (1900) (criminal case noting that Seventh Amendment right "implies that there shall be an unanimous verdict of twelve jurors"); Capital Traction Co, 174 US at 13. Several other cases assume twelve-person juries, without discussing the Seventh Amendment. See Crowell v Benson, 285 US 22, 61 (1932); Herron v Southern Pacific Co, 283 US 91, 95 (1931); Railroad Co v Stout, 84 US (17 Wall) 657, 664 (1873).

n61 Colgrove, 413 US at 155.

n62 Id at 155-56 (footnotes omitted).

n63 Id at 157.

n64 Id.

n65 439 US 322 (1979).

n66 Id at 324-25.

n67 Id at 337.

n68 See id at 335-37.

n69 116 S Ct at 1389, 1396.

n70 Id at 1389.

n71 Id at 1390.

n72 Id (citations omitted).

n73 See 116 S Ct at 2222.

n74 Id at 2216-17. The verdict in Gasperini was for compensatory damages only.

n75 See, for example, Lincoln v Power, 151 US 436, 437-38 (1894); Railroad Co v Fraloff, 100 US 24, 31-32 (1879).

n76 116 S Ct at 2223.

n77 Id at 2224 n 20 (citations omitted). See also id at 2225-30 (Stevens dissenting) (disagreeing with the majority on another issue, but agreeing that the Seventh Amendment did not bar appellate review and stating that "there is nothing in its history or language to suggest that the Amendment had any purpose but to preserve the essentials of the jury trial as it was known to the common law before the adoption of the Constitution," quoting Dimick, 293 US at 490 (Stone dissenting)). "Judgment as a matter of law" is the term added to FRCP 50 in 1991, replacing the terms "directed verdict" and "judgment notwithstanding the verdict" in federal practice. 28 USCA Rule 50 (1992 & Supp 1997) (Advisory Committee notes).

n78 116 US 550 (1886).

n79 See, for example, Henderson By Hartsfield v Alabama Power Co, 627 S2d 878, 888-91 (Ala 1993).

n80 See Barry, 116 US at 565.

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n81 Id at 558.

n82 Id at 562.

n83 Id.

n84 Id at 565 (latter emphasis added), quoting Whipple v Cumberland Manufacturing Co, 29 F Cases 934, 937-38, 2 Story 661, 670 (Cir Ct D Me 1843).

n85 Barry, 116 US at 562 ("It is equally clear . . . that the plaintiff is not limited in his recovery to the mere value of the property taken," and may "be entitled to exemplary damages.").

n86 Id at 566 ("The dignity and value of the rights assailed, and the power and authority of the source from which the assault proceeds, are elements to be considered in the computation of damages, not only compensation for the direct loss inflicted, but a remedy and prevention for the greater wrong and injury involved in the apprehension of its repetition.").

n87 Id at 565.

n88 See id at 558.

n89 See id.

n90 Id at 565.

n91 In Defender Industries, Inc v Northwestern Mutual Life Insurance Co, 938 F2d 502 (4th Cir 1991) (en banc), the Fourth Circuit cited Kennon v Gilmer, 131 US 22 (1889), to support its conclusion that the **Seventh Amendment** right to **jury trial** extends to the amount of **punitive damages.** 938 F2d at 506. In Kennon, a jury awarded compensatory damages of $ 20,750. On appeal, the territorial supreme court held that the damages were excessive and reduced the judgment to $ 10,750, without allowing the plaintiff to choose a new trial instead. 131 US at 24. The United States Supreme Court held that this reduction violated the **Seventh Amendment.** 131 US at 27-30. For two reasons, Kennon does not indicate that the **Seventh Amendment** entitles a party to a jury determination of the amount of **punitive damages.** First, there is no indication that the case involved an award of **punitive damages.** Second, what issues were triable to a jury was not in question; the issue of damages had been submitted to the jury. The Supreme Court's decision was based on the appellate court's action in substituting its estimate of the damages for the jury's and not affording the plaintiff the opportunity for a new trial if he found unacceptable whatever remittitur the court ordered. See 131 US at 29-30. Kennon is properly understood as a decision based on the Re-examination Clause rather than the Jury Trial Clause.

n92 415 US 189, 189-90 (1974).

n93 42 USC <sect> 3604(a) (1994).

n94 415 US at 190 & n 1.

n95 Id at 190-91.

n96 Id at 191.

n97 Id at 194.

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n98 Id at 195.

n99 Id.

n100 Id at 196 (footnote omitted).

n101 Id at 197 (footnote omitted).

n102 See id at 191.

n103 See id at 198.

n104 See id at 190 n 1.

n105 Id.

n106 See id at 196 & n 13. In 1991, Title VII was amended to permit recovery of compensatory and **punitive damages,** and to afford a right to a **jury trial** when damages are sought. Civil Rights Act of 1991, Pub L No 102-166, <sect> 102, 105 Stat 1071 (1991), codified at 42 USC <sect> 1981a (1994).

n107 Curtis, 415 US at 197.

n108 See, for example, Restatement (Second) of Torts <sect> 908 comment d (1979); Shepherd Components, Inc v Brice Petrides-Donohue & Associates, Inc, 473 NW2d 612, 619 (Iowa 1991) ("We have stated that punitive damages are not allowed as a matter of right and are discretionary."); Alabama Power Co v Rembert, 282 Ala 5, 208 S2d 205, 206 (1968) ("Punitive damages are not recoverable as a matter of right except as provided by statute.").

n109 Curtis, 415 US at 196.

n110 336 F2d 406, 414 (5th Cir 1964). The other cases cited were Mitchell v De Mario Jewelry, Inc, 361 US 288 (1960), and Porter v Warner Holding Co, 328 US 395 (1946).

n111 359 US 500 (1959).

n112 369 US 469 (1962).

n113 Swofford, 336 F2d at 414.

n114 Id at 413 (emphasis added). Swofford involved a claim of patent infringement, but the court's holding that there was no right to a jury trial on exemplary damages was based on the nature of that remedy, not on the nature of the claim; the court specifically noted that "a claim for damages based upon a charge of infringement of patent is plainly a 'legal' claim." Id at 410 n 5. The opinion in Swofford was written by Judge Rives and joined by Chief Judge Tuttle and Judge Wisdom.

n115 See Curtis, 415 US at 190 n 1.

n116 481 US at 426-27.

n117 33 USC <sect> 1319(d) (1994). See Tull, 481 US at 414.

n118 Tull, 481 US at 415.

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n119 Id.

n120 Id at 424-25.

n121 Id at 425-27.

n122 Id at 426-27.

n123 Id at 425-26 (footnotes omitted), quoting Colgrove, 413 US at 157.

n124 481 US at 426 n 9.

n125 Id.

n126 Id at 426 (citations omitted).

n127 Id at 427.

n128 Id, citing Albemarle Paper Co v Moody, 422 US 405, 442-43 (1975) (Rehnquist concurring). In his concurring opinion in Albemarle, Justice Rehnquist suggested that if backpay were routinely awarded under Title VII upon a finding of discrimination, rather than on a case-by-case basis in the discretion of the court, the right to a jury trial would be triggered. 422 US at 443. (In 1991, Congress amended Title VII to provide a right to a jury trial whenever damages are sought. See note 106.)

n129 481 US at 422 n 7. See also id at 422 (describing punitive damages as an example of a remedy "intended to punish culpable individuals" that was "issued by courts of law, not courts of equity"); Minneapolis and St Louis Railway Co v Beckwith, 129 US 26, 36 (1889) (describing punitive damages as "one mode of imposing a penalty for the violation of duty"). The statements in Tull about punitive damages appear in the part of the opinion holding that the defendant had a right to have a jury decide his liability for a penalty. 481 US at 422-25.

n130 See 481 US at 428 (Scalia, joined by Stevens, concurring in part and dissenting in part) ("I can recall no precedent for judgment of civil liability by jury but assessment of amount by the court. Even punitive damages are assessed by the jury when liability is determined in that fashion.").

n131 Three weeks before Tull was decided, the Court decided a case involving what was then the largest punitive damages award ever, a $ 3 billion award against Texaco. See Pennzoil Co v Texaco, Inc, 481 US 1, 4 (1987). See also Bankers Life & Casualty Co v Crenshaw, 480 US 915 (1987) (noting probable jurisdiction in case involving constitutional challenges to $ 1.6 million punitive award), decided on other grounds, 486 US 71, 80 (1988); Aetna Life Insurance Co v Lavoie, 475 US 813, 816 (1986) (involving a $ 3.5 million punitive award).

n132 See Tull, 481 US at 425-26.

n133 Gasperini, 116 S Ct at 2235 (Scalia, joined by Rehnquist and Thomas, dissenting).

n134 See Colleen P. Murphy, Integrating the Constitutional Authority of Civil and Criminal Juries, 61 Geo Wash L Rev 723, 803 (1993) (arguing that the **Seventh Amendment** does not require that a jury determine the amount of **punitive damages)**. In 1989, two years after Tull, a panel of the Fourth Circuit held, in Shamblin's Ready Mix, Inc v Eaton Corp, 873 F2d 736, 742 (4th Cir 1989) (opinion by Butzner), that there is no right to a **jury trial** on the amount of **punitive damages.** In 1991, the Fourth Circuit, sitting en banc, overruled

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Shamblin's. Defender Industries, Inc v Northwestern Mutual Life Insurance Co, 938 F2d 502, 507 (4th Cir 1991). In Defender Industries, the trial court, upon finding the jury's punitive damages award to be grossly excessive, had not followed the familiar procedure of ordering a new trial unless the plaintiff accepted a remittitur, but instead had ordered that judgment be entered in a reduced amount. Id at 505. Because the jury had been asked to return a verdict assessing punitive damages, with no suggestion that the verdict would be simply advisory, the Fourth Circuit could have overturned the trial court's ruling solely on the basis of the Re-examination Clause. Compare Browning-Ferris Industries of Vermont, Inc v Kelco Disposal, Inc, 492 US 257, 280 & n 26 (1989) (relying in part on **Seventh Amendment** in according considerable deference to trial court's denial of new trial motion in case involving large **punitive damages** award). But the Fourth Circuit went further, concluding that "assessment by a jury of the amount of punitive damages is an inherent and fundamental element of the common-law right to trial by jury." 938 F2d at 507. See also Johnson v Hugo's Skateway, 974 F2d 1408, 1416 (4th Cir 1992) (en banc); Mattison v Dallas Carrier Corp, 947 F2d 95, 107-08 (4th Cir 1991).

More recently, a Fourth Circuit panel has relied upon Tull, notwithstanding Defender Industries, in adopting a novel and more demanding standard to govern post-trial review of punitive damages awards. Atlas Food Systems and Services v Crane National Vendors, 99 F3d 587, 594-95 (4th Cir 1996) (discussed in note 9).

n135 Tull, 481 US at 426, quoting Colgrove, 413 US at 157.

n136 Galloway, 319 US at 392.

n137 481 US at 426 n 9.

n138 See, for example, Defender Industries, 938 F2d at 506 (noting that "Tull does contain some rather broad language," but concluding that Tull "cannot stand for the proposition that a plaintiff bringing a state common-law cause of action does not have a right to a jury determination of the amount of punitive damages").

n139 See, for example, Grey v Grant, 2 Wils KB 251, 95 Eng Rep 794, 795 (KB 1764).

n140 See Sharpe v Brice, 2 Black W 942, 96 Eng Rep 557, 557 (CP 1774); Beardmore v Carrington, 2 Wils KB 244, 95 Eng Rep 790, 793 (KB 1764).

n141 See Clinton W. Francis, The Structure of Judicial Administration and the Development of Contract Law in Seventeenth Century England, 83 Colum L Rev 35, 64 & n 139 (1983); Thomas Chitty, 2 Archibold's Practice of the Courts of Queen's Bench in Personal Actions and Ejectment 930, 982-86 (H. Sweet 11th ed 1862). If, however, issues of fact were tried to a jury before the argument on a demurrer and resolved in the plaintiff's favor, the jury trying such issues would also assess damages. James Stephen, Lush's Practice of the Superior Courts of Common Law at Westminster 596 (C. Reader 2d ed 1856).

n142 See William Blackstone, 3 Commentaries on the Laws of England 397-98 (Chicago 1979); Francis, 83 Colum L Rev at 64. An exception developed in the eighteenth century for actions in which the damages could be calculated with certainty. Damages in such cases were calculated by a court officer. See Clinton W. Francis, Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740-1840, 80 Nw U L Rev 807, 815 n 20 (1986); Chitty, 2 Archibold's Practice at 983-84.

n143 William Tidd, 1 The Practice of the Courts of King's Bench and Common Pleas 573 (Robert E. Small 4th ed 1856).

n144 See, for example, Proceedings on a Writ of Inquiry of Damages between His Royal

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Highness James Duke of York, in an Action upon the Statute de Scandalis Magnatum, and Titus Oates, 3 St Trials 987, 987 (KB 1684) (inquest jury comprised of fifteen men).

n145 See Francis, 83 Colum L Rev at 64; Chitty, 2 Archibold's Practice at 987.

n146 See Francis, 83 Colum L Rev at 64.

n147 Beardmore, 95 Eng Rep at 792. See also Bruce v Rawlins, 3 Wils KB 61, 95 Eng Rep 934, 934 (KB 1770); Hewit v Mantel, 2 Wils KB 372, 95 Eng Rep 868, 870 (KB 1768).

n148 Bruce, 95 Eng Rep at 934. See Hewit, 95 Eng Rep at 870; Beardmore, 95 Eng Rep at 792; Chitty, 2 Archibold's Practice at 992-93 (cited in note 141). See also Welch v Tennessee Valley Authority, 108 F2d 95, 99 (6th Cir 1939) ("Courts of England, at the time of the adoption of the Constitution, did not lack the power to fix damages in many cases at common law. They frequently fixed the amount on judgment by default and on demurrer."); Editorial, Assessment of Damages Upon Default, 7 Yale L J 311, 311 (1898) ("At common law, upon a default, the assessment of damages, whether liquidated or unliquidated, was never referable of right to a jury.").

n149 See Francis, 83 Colum L Rev at 90-91 (cited in note 141). See also Burges v Nightingale, Barnes 230, 94 Eng Rep 890, 890 (CP 1736) ("Where the jury find any damages, the inquisition must stand.").

n150 In Dimick v Schiedt, 293 US 474 (1935), Justice Sutherland's opinion for the Court discussed writs of inquiry as follows:

The power of the court to increase or diminish damages assessed upon a writ of inquiry was likewise upheld; but this upon the ground that the justices might themselves have awarded damages without the writ, and the inquisition, therefore, was nothing more than an inquest for their information. But even this rule seems long since to have fallen into disuse, the more modern practice being to award a new writ of inquiry in all cases in which the court would award a new trial.

Id at 478-79 (citations omitted). The Court did not suggest that as of 1791 any question had been raised as to the power of English judges to assess damages themselves without a writ of inquiry, or that the English courts had recognized a right to have damages assessed in a jury trial rather than pursuant to a writ of inquiry.

n151 See Tullidge v Wade, 3 Wils KB 18, 95 Eng Rep 909, 909 (KB 1769).

n152 See Raymond v Danbury & NR Co, 20 F Cases 332, 333 (Cir Ct D Conn 1877) ("The assessment of damages by a jury, in actions, of tort, was . . . a matter of practice, and not of right."); Pierre v Eastern Air Lines, Inc, 152 F Supp 486, 488 (D NJ 1957) ("At common law the assessment of damages in a default, in tort and in contract, was not considered a function of the jury and stood upon a different footing from the trial of issues of fact. The measuring of damages by a jury, therefore, would seem to be a matter of practice rather than of right.").

n153 See Brown v Van Braam, 3 US (3 Dall) 344, 356 (1797).

n154 See id at 347-48 (stating defendant's claim).

n155 See id at 352, citing An Act to regulate Processes in the Courts of the United States, <sect> 34, 1 Stat 92 (1789).

n156 See Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v Medfit International, Inc,

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common law developed for centuries before 1791, but punitive damages were not recognized until 1763. [18] In one of the early cases allowing damages in excess of the plaintiff's injury, damages were decided by a jury pursuant to a writ of inquiry. [19] Punitive damages today also differ significantly from punitive damages in eighteenth century England.

Part V argues that, as a matter of policy, the power to set punitive damages in federal court should rest with trial judges, subject to appellate review, rather than with juries. Judges are less susceptible to emotional factors, less likely to be unduly influenced by a defendant's wealth, more experienced in imposing punishment, and more knowledgeable of the punishment imposed in other cases.

Finally, Part VI shows that neither a new statute nor an amendment to the Federal Rules of Civil Procedure is necessary to permit federal trial judges to determine the amount of **punitive damages.**

I. History of the **Seventh Amendment** and Its Interpretation

The Constitution approved in September 1787 by the Constitutional Convention in Philadelphia guaranteed the right to a **[*184]** jury trial in criminal cases, [20] but it said nothing of the right to a jury trial in civil cases. It also lacked a bill of rights. The proposed Constitution became the focus of a vigorous debate throughout the country, with the Anti-Federalists vociferously attacking it and the Federalists defending it. The Anti-Federalists objected most strongly to the lack of a bill of rights, the Supreme Court's appellate jurisdiction as to law and fact, and the absence of a civil jury-trial guarantee. [21]

In several states, the Anti-Federalists succeeded in obtaining support for proposed amendments protecting the right to jury trial in civil cases. The Virginia Ratifying Convention urged the adoption of an amendment providing that, "in controversies respecting property, and in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and is to remain sacred and inviolable." [22] New York's convention proposed essentially the same amendment. [23] The Massachusetts and New Hampshire conventions proposed an amendment stating that "in civil actions between Citizens of different States every issue of fact arising in Actions at common law shall be tried by a Jury, if the parties, or either of them, request it." [24]

In response, the Federalists denied that the Constitution was intended to limit jury trials in civil cases, [25] and they promised to enact legislation to protect the right to a jury trial in such cases. [26] The Anti-Federalists insisted, however, on a constitutional guarantee. [27] Their efforts led to the inclusion in the Bill of Rights of what became the Seventh Amendment, guaranteeing a jury trial in suits at common law and restricting re-examination of jury verdicts:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be pre- **[*185]** served, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law. [28]

The Bill of Rights was approved by Congress in September 1789, [29] and obtained the required approval of three-fourths of the states in late 1791. [30]

Although the general words of the Seventh Amendment were sufficient to secure agreement in 1791, their meaning has been sharply disputed many times in the two centuries since. [31] The Supreme Court has interpreted the Seventh Amendment in dozens of decisions, not all of them consistent with each other. [32]

Despite the controversy and uncertainty that have surrounded the Seventh Amendment,

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982 F2d 686, 692 n 15 (1st Cir 1993); Adriana International Corp v Thoeren, 913 F2d 1406, 1414 (9th Cir 1990); Eisler v Strizler, 535 F2d 148, 153 (1st Cir 1976); Henry v Sneiders, 490 F2d 315, 318 (9th Cir 1974); Midland Contracting Co v Toledo Foundry & Machine Co, 154 F 797, 799-800 (7th Cir 1907) (discussing Seventh Amendment rights, although deciding case on state-law grounds); Frankart Distributors, Inc v Levitz, 796 F Supp 75, 76 (E D NY 1992); Kormes v Weis, Voisin & Co, Inc, 61 FRD 608, 609 (E D Pa 1974); Gill v Stolow, 18 FRD 508, 510 (S D NY 1955), revd on other grounds, 240 F2d 669, 670 (2d Cir 1957). See FRCP 55(b)(2) (providing for jury trial on the issue of damages after a default only when required by a federal statute). But see Byrd v Keene Corp, 104 FRD 10, 12 (E D Pa 1984) (noting that although the decision whether to enter a default judgment is left to the court's discretion, the "parties may exercise their statutory and constitutional right to jury trial at that hearing").

n157 See Benz v Skiba, Skiba & Glomski, 164 FRD 115, 116 (D Me 1995); Johnson v Bridgeport Deoxidized Bronze & Metal Co, 125 F 631, 632 (Cir Ct D Conn 1903); Raymond, 20 F Cases at 333-34. See In re Dierschke, 975 F2d 181, 185 (5th Cir 1992) ("It is also 'clear . . . that in a default case neither the plaintiff nor the defendant has a constitutional right to jury trial on the issue of damages,'" quoting James W. Moore, 5 Moore's Federal Practice <sect> 38.19[3] (Matthew Bender 1996)).

n158 In Dimick v Schiedt, 293 US 474 (1935), however, which held that additur violates the Re-examination Clause, the five-Justice majority stated that, when a verdict is excessive or inadequate, "both parties remain entitled as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages." Id at 486 (emphasis added). (Dimick did not involve an award of punitive damages.) In 1791, compensation was also a basic and long-established purpose of common law causes of action. See, for example, Anonymous, YB 6 Edw 4, fol 7, pl 18 (KB 1466). A powerful argument can be made that the jury's role would be impermissibly trivialized if even compensatory damages were determined by the judge.

n159 Lofft 1, 98 Eng Rep 489, 498 (CP 1763).

n160 3 Burr 1845, 97 Eng Rep 1130, 1130 (KB 1766).

n161 See Leon Radzinowicz, 1 A History of English Criminal Law and its Administration from 1750 93-95 (Stevens 1948) (discussing acquittals in cases involving small offenses punishable by death).

n162 See Wilkes, 98 Eng Rep at 498; Huckle v Money, 2 Wils KB 205, 95 Eng Rep 768, 769 (KB 1763).

n163 In Defender Industries, Inc v Northwestern Mutual Life Insurance Co, 938 F2d 502, 507 (4th Cir 1991) (en banc), the Fourth Circuit cited, as support for its conclusion that the **Seventh Amendment** confers a right to have a jury set **punitive damages,** the Supreme Court's statement in Pacific Mutual Life Insurance Co v Haslip, 499 US 1, 15 (1991), that "under the traditional common-law approach, the amount of the punitive award is initially determined by a jury." In context, however, it is apparent that the Court's statement in Haslip--which involved a challenge under the Due Process Clause of the Fourteenth Amendment to a **punitive damages** award in a trial in state court not subject to the **Seventh Amendment**--was not directed to the English common law, but to the common law in the United States prior to the adoption of the Fourteenth Amendment in 1868. The Court had no reason to consider, and there is no indication that it did consider, whether jury determination of the amount of punitive damages was a significant part (if it was any part at all) of the right to jury trial in eighteenth century England.

n164 319 US at 391 (footnote omitted). See also Gasperini, 116 S Ct at 2224 n 20

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(meaning of the Seventh Amendment not fixed as of 1791); Wolfram, 57 Minn L Rev at 736-37 (cited in note 26) (arguing that the understanding in 1791 of "common law" involved "flexibility and capacity for growth in order to respond to changing social pressures").

n165 See text accompanying notes 139-53 and 159-64.

n166 Charles T. McCormick, Handbook on the Law of Damages 278 (West 1935).

n167 2 Wils KB 205, 95 Eng Rep 768 (KB 1763).

n168 Id at 769.

n169 98 Eng Rep at 498-99.

n170 3 Wils KB 18, 95 Eng Rep 909, 909 (KB 1769).

n171 See id at 909 (opinion by Wilmot) ("the plaintiff having received this insult in his own house"), 910 (opinion by Bathurst) ("In actions of this nature, and of assaults, the circumstances of time and place, when and where the insult is given, require different damages."). See also Benson, 97 Eng Rep at 1130 (opinion by Lord Mansfield) (arguing that the plaintiff, "though not much hurt indeed, was scandalized and disgraced"); Grey, 95 Eng Rep at 795 ("The plaintiff has been used unlike a gentleman by the defendant."). In 1935, Professor McCormick wrote that "in England . . . it is still not entirely clear whether the accepted theory [of punitive damages] is that they are a distinct and strictly punitive element of the recovery, or they are merely a swollen or 'aggravated' allowance of compensatory damages permitted in cases of outrage." McCormick, Handbook at 278 (cited in note 166) (footnote omitted).

n172 Duncan v Louisiana, 391 US 145, 149 (1968).

n173 See Walton v Arizona, 497 US 639, 647-49 (1990); Hildwin v Florida, 490 US 638, 640-41 (1989) (per curiam); McMillan v Pennsylvania, 477 US 79, 93 (1986); Spaziano v Florida, 468 US 447, 459 (1984).

n174 Walton, 497 US at 647-49; Hildwin, 490 US at 640-41.

n175 Tynberg v Cohen, 76 Tex 409, 13 SW 315, 317 (1890).

n176 Id ("There is no class of cases in which the conservatism of the judge should more frequently find field for action.").

n177 See Markman, 116 S Ct at 1395 (holding that judges rather than juries should construe patents in part because "a jury's capability to evaluate demeanor, to sense the 'mainsprings of human conduct,' or to reflect community standards, are much less significant than a trained ability to evaluate the testimony in relation to the overall structure of the patent") (citations omitted).

n178 Comment, Consideration of Punishment by Juries, 17 U Chi L Rev 400, 406 (1950). See also Moreno v Consolidated Rail Corp, 99 F3d 782, 792 (6th Cir 1996) (en banc) (declining to hold that punitive damages are available under the Rehabilitation Act of 1973, 29 USC <sect> 794 (1985 & Supp 1997), in part because "the whole issue of punitive damages is becoming an increasingly problematic one, of course, as a sort of game-show mentality leads some contemporary juries to award punitive damages in amounts that seem utterly capricious").

n179 Gertz v Robert Welch, Inc, 418 US 323, 350 (1974).

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n180 A minority of jurisdictions have statutory caps on punitive damages in some or all actions. See, for example, Fla Stat Ann <sect> 768.73 (West 1997); Tex Civ Pract & Rem Code Ann <sect> 41.008 (Vernon 1997).

n181 See, for example, Guzman v Western State Bank of Devils Lake, 540 F2d 948, 954 (8th Cir 1976) ("In reviewing an award of punitive damages there is no basis from which an appellate court may measure damage."); Rowlett v Anheuser-Busch, Inc, 832 F2d 194, 207 (1st Cir 1987) (same).

n182 The National Law Journal's annual surveys of large jury verdicts, while perhaps not complete, suggest the frequency with which juries return enormous awards of punitive damages. The 1993 survey reported four punitive damages awards of $ 250 million or more, three awards of approximately $ 100 million, ten awards of between $ 20 million and $ 100 million, and ten awards of between $ 5 million and $ 20 million. Despite Tort Reform, Huge Verdicts Continue Climbing, Natl L J S2-S12, S14, S16-S17 (Jan 17, 1994). The 1994 survey reported the $ 5 billion award in the Exxon Valdez case, a $ 1.2 billion award in a suit for human rights abuses brought against the estate of Ferdinand Marcos, an award of $ 173 million, sixteen awards of between $ 20 million and $ 100 million, and thirteen more awards of between $ 5 million and $ 20 million. Verdicts: The Big Numbers of 1994, Natl L J C2-C16 (Feb 6, 1995). The 1995 survey reported a $ 400 million award, two $ 300 million awards, a $ 175 million award, six awards of between $ 50 million and $ 70 million, seven awards of between $ 20 million and $ 25 million, and seven awards of between $ 7 million and $ 19 million. Verdicts: The Big Numbers of 1995, Natl L J C2-C15 (Feb 5, 1996). The 1996 survey reported a $ 386 million award, a $ 210 million award, a $ 200 million award, six awards of between $ 100 million and $ 150 million, seven awards of between $ 23 million and $ 60 million, seven awards of between $ 12 million and $ 18 million, and three awards of approximately $ 10 million. Verdicts: The Big Numbers of 1996, Natl L J C2-C10, C12, C14 (Feb 10, 1997).

A study of jury awards in state courts of general jurisdiction in the seventy-five largest counties in cases involving tort, contract, and real property claims, for the year ended June 30, 1992, identified 364 awards of punitive damages; the mean award was $ 735,000 and the median award $ 50,000. Bureau of Justice Statistics Special Report: Civil Jury Cases and Verdicts in Large Counties 1, 8 (DOJ 1995).

n183 See, for example, Geddes, PMC v United Financial Group, 559 F2d 557, 560 (9th Cir 1977); Eisenhauer v Burger, 431 F2d 833, 837 (6th Cir 1970); Blankenship v Rowntree, 219 F2d 597, 598 (10th Cir 1955). See also Parkins v Brown, 241 F2d 367, 368 n 2 (5th Cir 1957) (allowing evidence of wealth "only if the evidence develops a case warranting the jury in awarding punitive or exemplary damages").

n184 Blankenship, 219 F2d at 598.

n185 See Gerald W. Boston, Punitive Damages in Tort Law <sect> 32:1 at 2-3 (Clark, Boardman 1993).

n186 Restatement (Second) of Torts <sect> 908 comment e (1977).

n187 In the case of organizational defendants, the theory has been sharply criticized on the ground that profit-maximizing organizations are interested in the marginal (not the total) costs of activities relative to the marginal benefits. The total wealth of the organization generally has little to do with the expected marginal costs or benefits of actions. It has been argued that, by linking punitive damages to wealth, the law creates too much deterrence for large corporations and too little for small ones. See Robert D. Cooter, Punitive Damages for Deterrence: When and How Much?, 40 Ala L Rev 1143, 1176-77 (1989); Malcolm E. Wheeler,

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A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation, 40 Ala L Rev 919, 950-51 (1989); Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S Cal L Rev 1, 62 (1982). See also Zazu Designs v L'Oreal, SA, 979 F2d 499, 508 (7th Cir 1992); Thomas v E.J. Korvette, Inc, 329 F Supp 1163, 1170 (E D Pa 1971), revd on other grounds, 476 F2d 471 (3d Cir 1973) ("It is probably safe to assume that any substantial amount of punitive damages would have deterrent effect, irrespective of the size of the corporation.").

n188 512 US 415, 432 (1994).

n189 Id.

n190 See Daniel A. Weinberg, A Brief Look at Postwar U.S. Income Inequality, Current Population Reports P60-191 (Census Bureau June 1996) (finding 22.4 percent increase in income inequality from 1968 to 1994, using the Gini index of income concentration).

n191 See Atlas Food Systems and Services, Inc v Crane National Vendors, Inc, 99 F3d 587, 594 (4th Cir 1996):

Policy-related elements--e.g., the likelihood that an award will deter the defendant or others from engaging in similar conduct--are not factual questions and, therefore, are more appropriately decided by the trial judge. The judge's unique vantage point and dayto-day experience with such matters lend expertise and consistency. . . . The district courts . . . themselves are required frequently to impose penalties for punishment and deterrence in a wide array of circumstances, both in civil and in criminal contexts. Indeed, in criminal cases, our system gives juries virtually no input, except in capital cases, to determine the amount of penalties.

See also Gilbert v St. Louis-San Francisco Railroad Co, 514 F2d 1277, 1280-81 (5th Cir 1975) (stressing that compensatory and punitive damages "are not administrable in the same fashion," and upholding remittitur of award from $ 225,000 to $ 60,000 because trial judge "could not justify, on principles of legal policy, a jury award in this case which so vastly exceeded an earlier award in a stronger case"); Owen, Comment, 56 S Cal L Rev at 120 (cited in note 11) ("Judges have more familiarity than do juries with distinguishing 'wrong' from 'very wrong' behavior (and fixing the appropriate level of punishment therefor) upon a formal social scale . . . ."); Zoppo v Homestead Insurance Co, 71 Ohio St 3d 552, 644 NE2d 397, 404 (1994) (Wright, joined by Moyer, dissenting):

In order to reach a fair punishment, the decision-maker must be able to compare the wrongful conduct in this case against similar conduct in other cases. Additionally, such a broad perspective is essential in order to set a level of damages which, while fair, will adequately deter such wrongful conduct in the future. This broad perspective, which is necessary to give effect to the purposes of punitive damages, makes the judge and not the jury the appropriate decision-maker. The knowledge and experience necessary to set punitive damages effectively are unique to the judge alone.

The Zoppo majority held that a statute ordering judicial assessment of **punitive damages** violated the right to **jury trial** protected by the Ohio Constitution, id at 401, and did not address whether, as a matter of policy, judges or juries are better suited to assess punitive damages. Compare Torres v North American Van Lines, Inc, 135 Ariz 35, 658 P2d 835, 841 (Ariz App 1982) (relying in part on trial judge's experience in personal injury lawsuits in affirming remittitur that cut punitive damages award by 75 percent). Since they took effect in 1987, the Federal Sentencing Guidelines have been interpreted by many courts to limit significantly the ability of federal judges to tailor sentences to the facts of the case. In Koon v United States, 116 S Ct 2035 (1996), however, the Supreme Court emphasized the importance of taking into account individual circumstances in sentencing under the

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Guidelines. Id at 2053 ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue."); see also id at 2044 (noting that Congress "acknowledged the wisdom, even the necessity, of sentencing procedures that take into account individual circumstances"). Even when a court does not depart from the Guidelines range deemed to be applicable, it must exercise discretion in choosing a sentence within the range.

n192 Aetna Life Insurance Co v Lavoie, 475 US 813 (1986) (draft opinion of Powell), excerpted in Lewis Powell, The 'Bizarre Results' of Punitive Damages, Wall St J A21 (Mar 8, 1995).

n193 Compare Markman, 116 S Ct at 1396 (holding that judges rather than juries should construe patents in part because of "the importance of uniformity in the treatment of a given patent").

n194 Murphy, 61 Geo Wash L Rev at 739-40 (cited in note 134) (footnotes omitted).

n195 Some state appellate courts have imposed similar requirements with respect to trial court rulings on post-trial motions challenging a jury's punitive damages award as excessive. See, for example, VF Corp v Wrexham Aviation Corp, 112 Md App 703, 686 A2d 647, 660 (1996), cert granted, 346 Md 28, 686 A2d 647 (1997); Hodges v S.C. Toof & Co, 833 SW2d 896, 902 (Tenn 1992).

n196 See Redish, 70 Nw U L Rev at 504 n 75 (cited in note 31) (noting that factual findings by district judges "must be made explicitly, and are subject to appellate review," but "fact findings by juries . . . usually come in the form of an enigmatic general verdict, and are less susceptible to appellate review"). See also Charles E. Wyzanski, Jr., A Trial Judge's Freedom and Responsibility, 65 Harv L Rev 1281, 1292-93 (1952) (arguing that judges should state the reasons for sentences in criminal cases, as a safeguard against "emotion or other transient factors").

n197 See generally Charles Alan Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn L Rev 751, 752-58 (1957).

n198 A study of punitive damage awards returned in product liability cases between 1965 and 1990 found that roughly 55 percent were affirmed; the remainder were reversed or reduced. Michael Rustadt, Demystifying Punitive Damages in Product Liability Cases: A Survey of a Quarter Century of Trial Verdicts 31-32 (Roscoe Pound Foundation 1991).

n199 See, for example, Lee v Edwards, 101 F3d 805, 812-13 (2d Cir 1996) (reducing jury's $ 200,000 punitive damages award to $ 75,000); Continental Trend Resources, Inc v OXY USA, Inc, 101 F3d 634, 643 (10th Cir 1996), cert denied, 117 S Ct 1846 (1997) (reducing $ 30 million punitive damages award to $ 6 million); Vasbinder v Scott, 976 F2d 118, 121-22 (2d Cir 1992) (reducing two $ 150,000 punitive damages awards to $ 20,000 and $ 30,000); Mason v Texaco, Inc, 948 F2d 1546, 1561 (10th Cir 1991) (halving $ 25 million punitive damages award); Rowlett v Anheuser-Busch, Inc, 832 F2d 194, 206-07 (1st Cir 1987) (reducing punitive damages award from $ 3 million to $ 300,000); Hollins v Powell, 773 F2d 191, 194, 198 (8th Cir 1985) (reducing $ 500,000 punitive damages award to $ 2,000); Ramsey v American Air Filter Co, 772 F2d 1303, 1314 (7th Cir 1985) (reducing $ 150,000 punitive damages award to $ 20,000); Morrill v Becton, Dickinson and Co, 747 F2d 1217, 1225 (8th Cir 1984) (reducing $ 20 million punitive damages award to $ 3 million); Bell v City of Milwaukee, 746 F2d 1205, 1267 (7th Cir 1984) (reducing $ 350,000 punitive damages award to $ 50,000). See generally Eric Schnapper, Judges Against Juries--Appellate Review of Federal Civil Jury Verdicts, 1989 Wis L Rev 237, 334-36. For similar state decisions, see, for example, Texaco, Inc v Pennzoil Co, 729 SW2d 768, 784, 865-66 (Tex App 1987)

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(reducing $ 3 billion punitive damages award to $ 1 billion); Faulk v Aware, Inc, 244 NYS2d 259, 266 (NY App Div 1963) (reducing two $ 1.25 million punitive damages awards to $ 50,000 and $ 100,000), affd, 14 NY2d 899, 200 NE2d 778 (1964); Miller v Schnitzer, 78 Nev 301, 371 P2d 824, 829, 831 n 3 (1962) (reducing $ 50,000 punitive damages award to $ 5,000).

n200 Judge Lee Sarokin described judicial intervention with respect to punitive damages as follows:

With the vague guidance given to juries as to the means for calculating punitive damages, it is difficult to justify judicial intercession on the basis that the amount of the award is invalid as a matter of law. What occurs in reality is an independent factual finding by the court simply that the penalty is too great.

Juzwin v Amtorg Trading Corp, 705 F Supp 1053, 1057 (D NJ 1989), modified on other grounds, 718 F Supp 1233 (D NJ 1989). Although it is submitted that Judge Sarokin was incorrect in using the term "factual finding" to describe the determination of the proper amount of punitive damages, he shrewdly looked behind the rhetoric of deference that often obscures a de novo judicial assessment of how severe the penalty should be. See also Miller, 371 P2d at 829 (citations omitted):

One cannot avoid thinking that the general rules offered to explain the reviewing court's decision are tailored to fit its feeling about the particular case before it. If that court does not approve the verdict it will state that the jury was motivated by passion or prejudice or that a "reasonable relationship" between the punitive and compensatory awards does not exist; or that the amount of the award is "enormous." On the other hand, the reviewing court in affirming the award may rely upon the converse of the reasons just mentioned, or upon a strong presumption in favor of the verdict as confirmed by the trial judge in refusing a new trial, or some other equally plausible statement.

Under traditional doctrine, a plaintiff may decline a remittitur and insist upon a new trial. See, for example, Vasbinder, 976 F2d at 122-23. With respect to punitive awards, some appellate decisions have departed from this principle, remanding with instructions to enter judgment in a reduced amount, rather than affording the plaintiff the option of a new trial. See, for example, Rowlett, 832 F2d at 207; Guzman, 540 F2d at 954.

n201 See, for example, Browning-Ferris Industries of Vermont, Inc v Kelco Disposal, Inc, 492 US 257, 279 (1989) (holding that trial court's ruling on motion for remittitur is reviewable "under an abuse-of-discretion standard") (footnote omitted). In BMW of North America, Inc v Gore, 116 S Ct 1589, 1598-1604 (1996), the Supreme Court identified three "guideposts" that led it to conclude that an award of punitive damages was so excessive as to violate the Due Process Clause of the Fourteenth Amendment. The application of the due process limitation established in BMW may not be subject to the abuse-of-discretion standard.

n202 On a related point, see Patrick E. Higginbotham, Juries and the Death Penalty, 41 Case W Res L Rev 1047, 1065 (1991) ("We should submit the capital sentencing decision either to the judge or to the jury but not to both, and we should not permit it to be made independently by an appellate court.").

n203 See, for example, Green Oil Co v Hornsby, 539 S2d 218, 224 (Ala 1989). See generally Restatement (Second) of Torts <sect> 908 comment e (1977) ("Another factor that may affect the amount of punitive damages is the existence of multiple claims by numerous persons affected by the wrongdoer's conduct.").

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n204 Juzwin, 705 F Supp at 1056, modified on other grounds, 718 F Supp 1233 (D NJ 1989). See also Garnes v Fleming Landfill, Inc, 186 W Va 656, 413 SE2d 897, 909 (1991) (Judge rather than jury should consider prior criminal sanctions or civil awards.); Model Punitive Damages Act <sect> 10(a), 14 ULA 63 (Cum Ann Pkt Pt 1997) (Court may reduce punitive damages award if defendant was previously found liable for punitive damages under a final judgment arising from the same course of conduct, and the second award would be unfairly duplicative.).

n205 See, for example, Dunn v HOVIC, 1 F3d 1371, 1389-91 (3d Cir 1993) (en banc).

n206 Colgrove, 413 US at 157, citing Gasoline Products Co v Champlin Co, 283 US 494, 498 (1931).

n207 Compare Markman, 116 S Ct at 1395.

n208 See Boston, Punitive Damages at <sect><sect> 2:6-2:7 (cited in note 185).

n209 Ellis, 40 Ala L Rev at 1004 (cited in note 11). See Murphy, 61 Geo Wash L Rev at 802 (cited in note 134) ("Even if some factors are questions of pure fact--for example, the profitability of defendant's misconduct--the calculation of punitive damages cannot be said to be fact-dependent . . . .") (footnote omitted). See also Gasperini, 116 S Ct at 2235 (Scalia dissenting) ("The level of punitive damages is not really a 'fact' 'tried' by the jury."). The distinctive character of punitive damages determinations was aptly described by a Justice of the Supreme Court of Oregon:

In the trial of a criminal case the jury finds the facts and two days thereafter the judge imposes sentence. I have never heard it suggested that the judge in so doing is finding the facts. He is exercising a purely discretionary power to impose punishment, a power which is limited by the statutory maximum sentence which may be imposed. In the same manner the jury, in determining whether to assess punitive damages and in what amount, exercises a purely discretionary power based upon the facts which it has already found, a power which resembles that of the trial judge, except for the fact that his discretion is limited by statute whereas theirs is without limit unless the court imposes one.

Van Lom v Schneiderman, 17 Or 89, 210 P2d 461, 475-76 (1949) (Brand concurring in part and dissenting in part). See also Prince v Peterson, 538 P2d 1325, 1329 (Utah 1975) (noting that in awarding punitive damages "the jury exercises a quasi-judicial function") (footnote omitted).

That setting punitive damages may involve some factual questions does not suggest that judges are incapable of setting such damages. "Courts pass upon a vast number of questions of fact. . . . There is not, and never was, any such thing in jury trials as an allotment of all questions of fact to the jury. The jury simply decides some questions of fact." James Thayer, A Preliminary Treatise on Evidence at the Common Law 185 (Kelley 1969) (originally published 1898).

n210 See Charles Jared Knight, Note, State-Law **Punitive Damage** Schemes and the **Seventh Amendment** Right to **Jury Trial** in the Federal Courts, 14 Rev Litig 657, 683 (1995).

n211 84 US (17 Wall) 657, 663-64 (1873).

n212 Id at 659.

n213 Id at 663-64. See Bailey v Central Vermont Railway, Inc, 319 US 350, 353 (1943)

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("The fact that fair-minded men might reach different conclusions, emphasizes the appropriateness of leaving the question to the jury."); Orkin Exterminating Co v Truly Nolen, Inc, 117 S2d 419, 423 (Fla Dist Ct App 1960).

n214 Stout, 84 US at 664.

n215 See Centinel, in Herbert J. Storing, ed, 2 The Complete Anti-Federalist 143, 149 (Chicago 1981).

n216 Blackstone, 3 Commentaries on the Laws of England at 379 (cited in note 142) (emphasis added).

n217 Pennsylvania Packet (Oct 23, 1787), in John Bach McMaster and Frederick D. Stone, eds, Pennsylvania and the Federal Constitution 154 (Hist Soc Penn 1888). The author went on to say that if federal officers "commit similar or greater indignities, in such cases a trial by jury would be our safest resource, heavy damages would at once punish the offender and deter others from committing the same." Id. See also Essays by a Farmer, Maryland Gaz (Feb 15, 1788), in Storing, ed, 5 The Complete Anti-Federalist at 14.

n218 See Redish, 70 Nw U L Rev at 504 n 75 (cited in note 31) ("Because of the generally careful selection process, federal judges are likely to be highly experienced, intelligent individuals steeped in traditions of the law. Thus, it is probable that at least in most cases judges will be better able to control their prejudices than will jurors.").

n219 Punitive damages were first recognized by English courts in cases in which official power had been abused and juries returned awards far in excess of the plaintiffs' actual loss. See Wilkes, 98 Eng Rep at 498-99; Huckle, 95 Eng Rep at 768-69.

If further protection against judicial bias in the award of punitive damages were deemed important, a proposal made years ago by the late Judge Edward J. Devitt could be adopted in part. Although Judge Devitt advocated amending the Constitution to eliminate the right to a jury trial in civil cases, he also suggested that, short of such an amendment, the statute permitting a party to seek disqualification of a judge based on bias or prejudice, 28 USC <sect> 144, be amended "to provide a peremptory challenge when counsel questioned the fairness of the assigned judge," so that more litigants would be willing to waive a jury trial. Edward J. Devitt, Federal Civil Jury Trials Should Be Abolished, 60 ABA J 570, 572 (1974). Such a peremptory challenge could be provided in cases in which punitive damages are sought. In 1997, bills were introduced in Congress that would have given each side in a case in federal court one opportunity to request reassignment of the case to a different judge. HR 520, 105th Cong, 1st Sess <sect> 2 (1997) (civil and criminal cases); HR 1252, 105th Cong, 1st Sess <sect> 6 (1997) (civil cases only).

The Anti-Federalists also touted jury trials in civil cases as a safeguard against corruption, on the ground that it is more difficult to bribe jurors than judges because "it is not, generally, known till the hour the cause comes on for trial, what persons are to form the jury." Federal Farmer 15 (Jan 18, 1788), in Storing, ed, 2 The Complete Anti-Federalist at 321 (cited in note 215). See also Federalist 83 (Hamilton), in Rossiter, ed, The Federalist Papers at 500 (cited in note 25) ("there is always more time and better opportunity to tamper with a standing body of magistrates than with a jury summoned for the occasion"). The extended length of many modern jury trials would seem to make the lack of pretrial knowledge of the jurors' identity a poor safeguard against bribery. Moreover, bribery of judges has been an extremely rare occurrence in the federal judicial system.

n220 See Alan Howard Scheiner, Note, Judicial Assessment of **Punitive Damages, the Seventh Amendment,** and the Politics of Jury Power, 91 Colum L Rev 142, 188-89, 196-97 (1991). See also Knecht v Radiac Abrasives, Inc, 219 Ill App 3d 379, 579 NE2d 1248, 1251

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(1991) ("The jury, with its unique ability to articulate community values, should decide whether punitive damages should be imposed.").

n221 See, for example, Markman, 116 S Ct at 1395 (referring to jury's ability "to reflect community standards"); Oliver Wendell Holmes, Law in Science and Science in Law, 12 Harv L Rev 443, 459-60 (1899) (citing the jury's role in keeping the law in accord with community values as a function served by entrusting determinations of negligence to the jury).

n222 Kozinski, Ind Law at 12 (cited in note 11). See also Martin A. Kotler, Reappraising the Jury's Role as Finder of Fact, 20 Ga L Rev 123, 171-72 (1985) (arguing that juries are not "representative of the same group of persons as the legislature").

n223 Federal Farmer 4 (Oct 12, 1787), in Storing, ed, 2 The Complete Anti-Federalist at 249-50 (cited in note 215). See Scheiner, Note, 91 Colum L Rev at 195 (cited in note 220) ("Jury participation in the assessment of damages is a living form of direct democracy.").

n224 See, for example, Comment, Criminal Safeguards and the Punitive Damages Defendant, 34 U Chi L Rev 408, 421 (1967) ("Democracy will not falter if a jury does not participate in every proceeding.").

n225 Knight, Note, 14 Rev Litig at 683-84 (cited in note 210).

n226 See notes 198-99.

n227 See text accompanying notes 218-20.

n228 See generally Note, Practice and Potential of the Advisory Jury, 100 Harv L Rev 1363, 1364-67 (1987).

n229 Where not precluded by a jury-trial guarantee of the applicable state constitution, the proposal advanced here may also merit consideration in state court systems with a strong tradition of a professional and independent judiciary.

n230 413 US at 163-64.

n231 See id at 185 (Marshall dissenting).

n232 See id at 163-64. Rule 48 was amended in 1991 to direct trial courts to seat juries of not fewer than six and not more than twelve members. 28 USCA Rule 48 (1992).

n233 In diversity cases, a state practice of asking juries to fix punitive damages need not be followed unless it is bound up with state-created rights and obligations. The allocation of power between judges and juries is ordinarily a matter of federal procedural law, not an issue on which state law must be followed under the Erie doctrine. See Byrd v Blue Ridge Rural Electric Cooperative, 356 US 525, 535-40 (1958); Meyers v Selznick Co, 373 F2d 218, 222 n 1 (2d Cir 1966). Compare Tingley Systems, Inc v Norse Systems, Inc, 49 F3d 93, 96 (2d Cir 1994) (provision of Connecticut Unfair Trade Practices Act assigning determination of punitive damages to judge would have justified a new trial in case brought in federal court, where the district court has submitted the issue of punitive damages to the jury).

n234 City of Newport v Fact Concerts, Inc, 453 US 247, 267 (1981).

n235 Katko v Briney, 183 NW2d 657, 662 (Iowa 1971).

n236 See Ala Code <sect> 13A-5-47(e) (Michie 1994); Fla Stat Ann <sect> 921.141(3) (West 1996).

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several pertinent principles concerning its scope are reasonably well established. The Supreme Court has held that the "common law" referred to in the Seventh Amendment is the common law of England, [33] though not all aspects of the English jury-trial system that existed in 1791 **[*186]** are preserved against change. [34] As a result, opinions interpreting the Amendment have often included attempts to delve into the law of eighteenth century England. [35] The Court has also held that the Jury Trial Clause and the Re-examination Clause are independent. [36] Thus, even if a matter is not triable of right to a jury under the Jury Trial Clause, if it is so tried the Re-examination Clause limits post-trial and appellate review of the jury's verdict.

Although the Jury Trial Clause refers to "Suits at common law," it has been interpreted to guarantee a jury trial not only on causes of action that existed under the English common law, but also on many causes of action not recognized until long after 1791. In several cases, the Supreme Court has applied a two-pronged test in deciding whether a party is entitled to a jury trial on a cause of action unknown to the English common law: the first prong compares the new cause of action with actions brought in eighteenth century England and asks whether similar causes of action were tried to a jury; the second prong examines the nature of the remedy sought. [37]

It is well-settled that, even if a given cause of action triggers a right to a jury trial, that right does not necessarily encompass all issues relating to that cause of action. [38] In its most recent discussion of this aspect of Seventh Amendment doctrine, the Supreme Court explained in Markman v Westview Instruments, **[*187]** Inc [39] that, "if the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common law right as it existed in 1791." [40] For example, even if a statutory cause of action triggers the right to a jury trial under the Seventh Amendment, a discretionary award of attorney's fees under the statute may be determined by the trial court, not by a jury. [41]

The statement from Markman just quoted also embodies another established--but far from precise--principle of Seventh Amendment jurisprudence: the principle that the Amendment preserves only "the substance of the common law right" of trial by jury. [42] The Supreme Court has declared that "the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements," [43] and that "only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature." [44]

A series of nineteenth century Supreme Court decisions applying this fundamental-elements principle approved the directed verdict without pointing to any clear precedent for it in eighteenth century English law. [45] Similarly, early in this century the Court held that the Seventh Amendment does not prohibit summary judgment, a procedural device that was unknown in England in 1791. [46]

The fundamental-elements principle also was reflected in the Court's 1897 decision in Walker v New Mexico & Pacific Railroad Co, [47] where a jury's answers to special interrogatories were inconsistent with its general verdict. The issue was whether the trial court could enter judgment based on the answers to the special **[*188]** interrogatories or could only grant a new trial. The Supreme Court did not cite any precedent in the English common law for entering a judgment contrary to the jury's general verdict. [48] But it held that the Seventh Amendment posed no obstacle to entry of such a judgment, because the purpose of the Amendment "is not to preserve mere matters of form and procedure but substance of right." [49]

Numerous decisions in this century reflect the continuing importance of the fundamentalelements principle. In 1920, the Supreme Court held in Ex parte Peterson [50] that the Seventh Amendment was not violated by the appointment of an auditor to make a

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preliminary investigation, hear witnesses, examine financial records, and prepare a report to be admitted at trial as prima facie evidence. The Court acknowledged that "there did not exist in England, or so far as appears in any of the colonies, any officer, permanent or temporary, who, in connection with trials by jury, exercised the powers of an auditor above described." [51] The Court nonetheless found no constitutional violation, because "new devices may be used to adapt the ancient institution [of jury trial] to present needs and to make of it an efficient instrument in the administration of justice." [52]

In 1931, the Court held in Gasoline Products Co v Champlin Refining Co [53] that when a new trial is granted because of an error relating to one issue, the retrial may be limited to that issue, provided that "the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." The Court so held despite the settled rule of the English common law that a retrial had to be of the entire case. [54]

In the 1943 case Galloway v United States, [55] Justice Black, joined in dissent by Justices Douglas and Murphy, attacked as violative of the Seventh Amendment the expanded use of the directed verdict that had been approved in a series of Supreme Court decisions between 1871 and 1929. In response, a six-Justice majority emphasized that the Constitution preserved only the most fundamental elements of the English jury-trial system: **[*189]**

The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common law system of pleading or the specific rules of evidence then prevailing. Nor were "the rules of the common law" then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries. In 1791 this process already had resulted in widely divergent common-law rules on procedural matters among the states, and between them and England. And none of the contemporaneous rules regarding judicial control of the evidence going to juries or its sufficiency to support a verdict had reached any precise, much less final, form. In addition, the passage of time has obscured much of the procedure which then may have had more or less definite form, even for historical purposes.

. . .

The Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions. [56]

In its 1973 decision in Colgrove v Battin, [57] a sharply divided Court relied upon the fundamental-elements doctrine in holding that the "jury trial," as guaranteed by the Seventh Amendment, may be a trial before a jury of only six persons. [58] The Court so held despite the tradition of twelve-person juries dating back at least to the fourteenth century, [59] and despite the fact that many of the Court's own decisions had assumed that the Seventh Amendment requires a twelve-person jury. [60] In an opinion by **[*190]** Justice Brennan, the Court explained that the divergence of state practices in 1791 had meant that the civil jury-trial provision of the Bill of Rights "would necessarily have to be general," and that in fact "the right was limited in general words to 'suits at common law.'" [61] The Court could "only conclude . . . that by referring to the 'common law,' the Framers of the Seventh Amendment were concerned with preserving the right of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury." [62] The Court framed the question as "whether a jury of 12 is of the substance of the common-law right of trial by jury," [63] and concluded that it was not. [64]

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In its 1979 decision in Parklane Hosiery Co v Shore, [65] the Court again relied upon the fundamental-elements principle. The Securities and Exchange Commission ("SEC") had brought an equitable action in which it had secured a declaratory judgment against a corporation for issuing a false and misleading proxy statement. [66] The Court held that the Seventh Amendment posed no obstacle to applying the doctrine of collateral estoppel against the corporation in a subsequent legal action by a class of stockholders, thus precluding the corporation from denying that the proxy statement was false and misleading. [67] The Court so ruled even though at common law mutuality of parties was required before a party could be bound by a prior judgment, and the stockholders had not been parties to the SEC action. [68]

In its 1996 decision in Markman, the Court held that the Seventh Amendment right to a jury trial, though applicable to patent-infringement actions, does not confer a right to have a patent construed by a jury. [69] The critical question, the Court said, was "whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." [70] To answer the question, the Court explained, "the sounder course, when available, is to classify a mongrel practice . . . by using the historical method, much as we do in charac- **[*191]** terizing the suits and actions within which they arise." [71] If an "exact antecedent" is lacking, "the best hope lies in comparing the modern practice to earlier ones whose allocation to court or jury we do know, . . . seeking the best analogy we can between an old and the new." [72]

Gasperini, the Court's most recent Seventh Amendment decision, is also instructive, although it involved the Reexamination Clause rather than the Jury Trial Clause. [73] At issue was the permissibility of appellate review of the denial of a motion to set aside a jury verdict as excessive. [74] In several opinions from the late nineteenth and early twentieth centuries, the Court had interpreted the Seventh Amendment to bar such review. [75] In Gasperini, however, the Court held such review to be "reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice." [76] The Court cited no precedent for the practice in eighteenth century English law. Instead, the Court indicated that the meaning of the Seventh Amendment was not frozen in 1791:

If the meaning of the Seventh Amendment were fixed at 1791, our civil juries would remain, as they unquestionably were at common law, 'twelve good men and true' . . . . But see Colgrove v. Battin (six-member jury for civil trial satisfies Seventh Amendment's guarantee). Procedures we have regarded as compatible with the Seventh Amendment, although not in conformity with practice at common law when the Amendment was adopted, include new trials restricted to the determination of damages, and Federal Rule of Civil Procedure 50(b)'s motion for judgment as a matter of law. [77]

[*192]

The principle that the Seventh Amendment preserves only the most fundamental incidents of the English jury-trial system has greatly restricted the reach of the Amendment. The impact of the fundamental-elements principle can be seen today in matters as basic as the number of jurors in the jury box; motions made before, during, and after trial; and the scope of appellate review.

II. Supreme Court Cases Purportedly Establishing the Right to Have a Jury Set **Punitive Damages**

Some courts and commentators have suggested that certain decisions of the Supreme Court involving awards of damages establish that the **Seventh Amendment** right to **jury trial** extends to determining the amount of **punitive damages.** This Part shows why those cases do not resolve this issue.

A. Barry v Edmunds

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The Supreme Court's 1886 decision in Barry v Edmunds [78] has been cited as authority that the **Seventh Amendment** confers a right to have a jury set **punitive damages.** [79] The Court held that an action for trespass should not have been dismissed by the trial court for failure to satisfy the federal amount-in-controversy requirement, which at that time was $ 500. [80] The trial court had explained that "if the jury should render a verdict for ($ 500) five hundred dollars damages such verdict would be excessive, and the court would feel compelled to set it aside." [81] The Supreme Court concluded that, to the contrary, a jury could award more than $ 500, because the value of the horse forcibly taken from the plaintiff by the defendant ($ 100) "would not necessarily cover [the plaintiff's] actual, direct, and immediate pecuniary loss," [82] and because the jury could award punitive damages. [83]

Of particular pertinence is the following passage in the Supreme Court's opinion:

There was clear error in the Circuit Court in its ruling, as matter of law, that there could be no lawful recovery . . . of an amount equal to that which is necessary to support the **[*193]** jurisdiction of the court. The same error was repeated in acting upon the statement, that a verdict, if rendered for that amount, would be excessive and set aside for that reason--a statement which could not, at any rate, be judicially made before such a verdict was in fact rendered. It adds, indeed, to the principal error, if any distinction can be made, that which consists in encroaching upon the province of the jury. . . . In such cases as the present, and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict. . . . A verdict will not be set aside in a case of tort for excessive damages "unless the court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated"--that is, "unless the verdict is so excessive or outrageous," with reference to all the circumstances of the case, "as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them." In no case is it permissible for the court to substitute itself for the jury, and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice, which the jury itself is the appointed constitutional tribunal to award. [84]

It is clear from the parts of the opinion immediately preceding [85] and following this passage [86] that the "damages" referred to included punitive as well as compensatory damages. Therefore, the Court's statement that "the jury itself is the appointed constitutional tribunal to award" damages [87] could be read to mean that the Jury Trial Clause entitles a party to have a jury determine the amount of punitive damages. **[*194]**

But, considered in its entirety, Barry does not so hold. Whether compensatory damages or punitive damages were to be determined by a jury if the case proceeded to trial was not at issue; the trial court had explicitly assumed that damages would be for the jury to assess if the case were tried. [88] The trial court had nevertheless dismissed the action because it had concluded that any jury verdict of more than $ 500 would have been excessive. [89] The Court's statement that "the jury itself is the appointed constitutional tribunal to award" damages followed a discussion that focused on the limitations of a court's power to set aside as excessive a jury's verdict in a tort action. [90] The statement thus appears to have been made with reference to the Re-examination Clause rather than the Jury Trial Clause. The Court also spoke generally of damages in tort, and did not specifically address punitive damages. [91]

B. Curtis v Loether

Eighty-eight years after Barry, the Court addressed the right to a jury trial in another case involving a prayer for punitive damages. But, again, it did not hold that there was a right to

have the jury set those damages.

In Curtis v Loether, [92] an African-American woman alleged that two white men had refused to rent her an apartment because of her race, in violation of Title VIII of the Civil Rights Act of 1968. [93] Her complaint sought injunctive relief and punitive **[*195]** damages (which the statute permitted in the amount of $ 1,000 or less). The prayer for injunctive relief was decided before trial, and at trial the plaintiff sought to recover compensatory as well as punitive damages. [94] The trial court refused the defendants' request for a jury trial. [95] After a bench trial, it found no actual damages but awarded $ 250 in **punitive damages.** [96]

The Supreme Court held that the defendants should have been afforded a jury trial. "The **Seventh Amendment** does apply," the Court declared, "to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." [97]

The Court concluded that the action was one to enforce "legal rights." [98] First, "a damages action under the statute sounds basically in tort--the statute merely defines a new legal duty," and the cause of action is "analogous to a number of tort actions recognized at common law." [99] Second, and according to the Court more important, "the relief sought here--actual and punitive damages--is the traditional form of relief offered in the courts of law." [100] The Court also commented that, whatever might be the merit of circuit court decisions that had characterized backpay awarded in Title VII employment discrimination cases as "equitable," "there is surely no basis for characterizing the award of compensatory and **punitive damages** here as equitable relief." [101]

Like Barry, Curtis does not establish that the **Seventh Amendment** entitles a party to have a jury set **punitive damages.** In Curtis the trial court had decided all issues without a jury--including whether the defendants had discriminated against the plaintiff because of her race, whether she had suffered actual damages, whether punitive damages were warranted, and if so what the amount of punitive damages should be. [102] In holding that the defendants had been improperly denied a jury trial, the Supreme Court did not specify whether a judge or a jury should determine the amount of punitive damages. [103] **[*196]**

In defending the denial of a jury trial, the plaintiff had stressed in the Supreme Court that the only damages she sought in her complaint were punitive damages. [104] Significantly, the Court did not state that it made no difference whether only punitive damages were sought, but instead noted that the plaintiff "later sought to recover actual damages as well," that the pretrial order listed actual damages as an issue to be tried, and that at trial the plaintiff unsuccessfully attempted to prove such damages. [105]

In distinguishing fair housing actions under Title VIII from employment actions for reinstatement and backpay under Title VII (which several courts of appeals had held did not trigger the right to a jury trial), [106] the Curtis Court stressed that "the decision whether to award backpay is committed to the discretion of the trial judge," whereas "there is no comparable discretion [under Title VIII]: if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount." [107] The Court's distinction depended on the presence of a claim for actual damages. Furthermore, in this respect punitive damages are similar to backpay under Title VII, not to actual damages under Title VIII. Punitive damages are awarded as a matter of discretion; there is no entitlement to them. [108]

The Court also stated that "we need not, and do not, go so far as to say that any award of monetary relief must necessarily be 'legal' relief." [109] Immediately following that statement, the Court cited two of its prior decisions and, in a footnote, page 414 of the Fifth Circuit's decision in Swofford v B & W, Inc. [110] The Fifth Circuit stated there that the Supreme Court's decisions in Beacon Theatres, Inc v Westover [111] and Dairy Queen, Inc v Wood [112] **[*197]**

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had not "converted typical non-jury claims, or remedies, into jury ones" and had not "suddenly converted any money request into a money claim triable by jury." [113] Moreover, the Swofford court had made those statements in support of its conclusion that "exemplary damages and attorneys' fees are not money claims triable by jury, although they are awarded in a 'legal' action." [114]

The Supreme Court's citation of Swofford, together with the care the Court took to point out that the issue of actual damages had been tried, [115] suggests that the Court did not intend to decide whether there is a right to have a jury set **punitive damages.**

III. Tull v United States

Not only has the Supreme Court never held that the **Seventh Amendment** guarantees a right to a **jury trial** on the amount of **punitive damages,** but in its 1987 decision in Tull v United States, the Court ruled that the **Seventh Amendment** does not entitle a defendant to have a jury determine the amount of a civil penalty. [116]

Tull involved an action by the federal government against a real estate developer, Edward Tull, for a civil penalty under the Clean Water Act ("CWA"). [117] The government sought a penalty of nearly $ 23 million. [118] The trial court denied Tull's demand for a jury trial and, after a bench trial, held him liable and assessed a penalty of $ 325,000. [119]

In an opinion by Justice Brennan, the Supreme Court held that Tull had a right to a jury trial on his liability for a penalty, [120] but not on the amount of the penalty. [121] It was permissible, the Court ruled, for Congress to vest trial judges with the power to set the amount of penalties under the CWA. [122] The Court explained that having the jury "determine the remedy in a trial in **[*198]** which it must determine liability" is not "necessary" "to preserve the 'substance of the common law right of trial by jury.'" [123] In a footnote, the Court added the very broad statement that "nothing in the Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial." [124] The Court said it had been "presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial." [125]

The Court went on to explain:

> The assessment of a civil penalty is not one of the "most fundamental elements." Congress' authority to fix the penalty by statute has not been questioned, and it was also the British practice. In the United States, the action to recover civil penalties usually seeks the amount fixed by Congress. The assessment of civil penalties thus cannot be said to involve the "substance of a common-law right to a trial by jury," nor a "fundamental element of a jury trial." [126]

The Court added two other justifications for its conclusion that Tull had no right to have a jury determine his penalty. First, "since Congress itself may fix the civil penalties, it may delegate that determination to trial judges." [127] Second, "in this case, highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act. These are the kinds of calculations traditionally performed by judges." [128]

Although Tull involved a statutory civil penalty rather than punitive damages, the Court's opinion specifically notes that "the remedy of civil penalties is similar to the remedy of punitive damages, another legal remedy that is not a fixed fine." [129] More- **[*199]** over, while two dissenting Justices argued that the decision was inconsistent with the traditional treatment of punitive damages, [130] the majority did not distinguish punitive damages or indicate that its decision would have no impact on claims for punitive damages. When Tull was decided, the Supreme Court had begun to devote increasing attention to cases involving

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PUBLIC POLICY: VALUING LIFE AND LIMB IN TORT: SCHEDULING "PAIN AND SUFFERING".

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SUMMARY:
... Tort law's traditional methods of computing damages for personal injury and death are under attack -- and understandably so. ... Some reformers, however, would go even further, barring pain and suffering altogether as an element of personal injury awards. ... When it comes to actually computing a damage award, however, the substantive law of personal injury gives only very general, qualitative guidelines, with no meaningful quantitative guidance. ... Pain and suffering may be used as a catch-all category for the jury's consideration of all nonpecuniary losses in a case of nonfatal injury, subsuming other qualitative categories, like mental anguish or humiliation. ... This Section presents data that our project compiled on jury findings in Florida and Kansas City personal injury cases from 1973-87. ... In this vein, we present three alternative scheduling models: (1) a system of standardized awards set according to a matrix of dollar values based on victim age and injury severity; (2) a scenario-based system that employs descriptions of prototypical injuries with corresponding award values designed to be given to juries as guides to valuation; or (3) a system of flexible ranges of award floors and caps that reflect the various categories of injury severity. ...

TEXT:

damages for personal injury and death. Other tort reforms are already widespread, and political willingness to consider change remains high. [107] So the precedent exists for legislative action to curb jury discretion and modify judicial practice, and improvements in the valuation of damages seem quite timely and valuable.

II. THE LURE OF COMPREHENSIVE "SCHEDULING" FOR DAMAGE AWARDS

A. A New Liability System with Comprehensive Scheduling

Having identified the problems of variability and high cost in the existing liability system, it is tempting to replace the present system and "schedule" all tort damages -- economic and non-economic -- to make determinations simpler, less expensive, and more predictable. [108] A similar approach is taken by workers' compensation programs and disability plans, which make award determinations in an administrative or insurance forum and pay only limited wage losses and medical benefits. [109] But these approaches are mainly calculated to change the forum of claim resolution and to de-emphasize non-economic damages, not to codify or simplify damage law.

Many observers would prefer a uniform compensation system for all **[*929]** accidents. Such a system could be achieved through a strict or enterprise liability regime, [110] financed by third-party liability insurance. Alternatively, a no-fault compensation system could operate through mandatory first-party coverage (like no-fault auto insurance), [111] or a social insurance scheme (like New Zealand's). [112] These comprehensive systems have attractive characteristics. They reduce compensation per paid claim and make administration less expensive per dollar delivered, but increase the total number of claims compensated. [113] Such systems also offer far more compensation in total than today's fault-based regime, and may even maintain an element of deterrence (for instance, through experience rating [114] of premiums). Given the number of reasonable alternatives to the existing tort liability scheme, a legislature or study commission charged with making a social accommodation could readily do so, so long as there was sufficient political will supporting change.

We do not, however, recommend that the existing tort recovery system be completely scrapped and replaced with a new system of comprehensive and uniform scheduling. First, the creation of a system that essentially expands social funding seems politically -- and perhaps economically -- infeasible at this time. Such a system would expand the amount of total compensation paid and thus would be very expensive because many claims would be filed that are not now brought, at least among easily identified injuries. Second, current understanding of award variability is inadequate. Some of the variation we are unable to explain may be legitimate, particularly in economic damages, so the elimination of the compensation system's responsiveness to real differences between claimants would be unsound. Third, some types of injury may not be readily identified as compensable. Mass toxic torts and medical care mistakes, for example, would be much more difficult to discover and compensate without the inducement of large recoveries (and corresponding attorneys' fees) to reward those who ferret out the source of harm. [115]

[*930] B. The Current Liability System with Comprehensive Scheduling

Other observers advocate comprehensive scheduling of all damage awards even within the fault-based liability system, [116] perhaps with a change in forum. [117] We disagree. Such scheduling would cut payment levels (especially for intangible damages), and thus undercut the deterrence function of the present fault-based system. Society already accepts considerable limits on injured parties' right to recover damages (for example, liability rules, burdens of proof, and the high cost of prosecuting claims) in order to promote the appropriate (i.e., efficient) level of precaution. Effective deterrence, in turn, demands a level of awards that recognizes the full range of socially-incurred losses, not merely those losses that are insurable. A reduction in total awards to injured parties would promote under-precaution by potential tortfeasors, since the costs of protecting against nonpecuniary

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injuries might well exceed the costs of compensating injured parties under the schedule. Essentially, the argument turns on one's opinion of the validity and fairness of non-economic damages, a fundamental topic warranting longer discussion below. [118]

Another reason for not adopting comprehensive scheduling for all damages is that many elements of damage -- for example, economic loss (especially past economic loss) -- are very idiosyncratic and relatively easy to observe and tabulate. A schedule or formula for total awards could only very roughly match payments to need, and a "one size fits all" damage schedule would inevitably be unfair both to claimants having greater pecuniary losses and defendants causing lesser pecuniary harm. Overall, the performance of the existing tort liability system in matching damages to severity of injury is much better than its reputation. [119] We conclude that the system's central tendencies are reasonable and should be reinforced through reforms, rather than repudiated by a damage matrix or algorithm for calculating total awards.

[*931] III. THE CASE FOR IMPROVING, NOT ABANDONING, NON-ECONOMIC DAMAGES

A. The Arguments Against Awards for Pain, Suffering and Other Intangible Damages

Many legal commentators and some courts have cited shortcomings in the law of non-economic damages. As one court put it:

Thoughtful jurists and legal scholars have for some time raised serious questions as to the wisdom of awarding damages for pain and suffering in any negligence case, noting, inter alia, the inherent difficulties in placing a monetary value on such losses, the fact that money damages are at best only imperfect compensation for such intangible injuries and that such damages are generally passed on to, and borne by, innocent consumers. [120]

Some legal commentators have accordingly called for the abolition of recovery for non-economic damages, [121] often in exchange for easing recovery of other damages, by law [122] or by contract. [123]

Some economists have likewise argued for limiting non-economic damages, albeit from a different perspective. [124] Their main argument is that neither private health or life insurance nor public programs that pay **[*932]** for disability and loss of life countenance awards for pain and suffering. [125] Thus, if people do not choose to purchase such compensatory policies on their own or through social programs, they should not be forced to "buy" these elements of damage through the liability system. [126]

Economic theory is also cited to explain why a fully informed individual may not purchase insurance for pain and suffering. [127] Insurance functions to transfer resources from the healthy to the injured state. [128] Money cannot directly replace nonpecuniary loss resulting from injury. According to the theory used by economists to analyze uncertain situations, in deciding how much insurance coverage to purchase, the individual compares the marginal utility of wealth in the healthy state with the marginal utility of wealth in the injured state. [129] Coverage will exceed pecuniary loss if, after replacing pecuniary loss, the marginal utility of wealth is increased by the accident (that is, coverage for non-economic loss will be bought); conversely, if the marginal utility of wealth falls after an accident, optimal coverage will be less than pecuniary loss. One recent empirical study found that injury reduces the marginal utility of wealth. [130]

B. The Validity of Pain, Suffering and Other Intangible Damages

In the final analysis, the case against non-economic damages is **[*933]** weak. First, it does not follow that the private market's failure to provide insurance coverage for pain and suffering means that the tort system should not pay for intangible losses either. There are good reasons for buyers not to buy and sellers not to sell such insurance -- other than its

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allegedly low value.

From the potential buyers' perspective, informed consumers know that pain and suffering is compensable in tort cases; they are already covered when someone else is to blame for their injury. Given that they thus have a limited need for such coverage, its absence is not proof of its lack of value. Moreover, potential victims of negligence may feel that, ethically, it is not their responsibility to pay for pain and suffering inflicted upon them by others. All that can be legitimately inferred from the seeming lack of demand for pain and suffering coverage is that people seem willing to assume the risk of such losses where others are not legally responsible. This is not evidence that pain and suffering lack importance in the context of tortious injury.

From the potential sellers' perspective, offering coverage for intangible losses is a practical impossibility. Any insurance company that offered more than economic damages under a disability or injury policy would suffer significant "adverse selection" -- that is, the policy would disproportionately attract people having a higher risk of loss and slower rate of recovery. [131] Similarly, policies covering non-economic loss would face significant "moral hazard" -- that is, the natural tendency of policy-holders to overstate their losses and seek higher recoveries than they would if they had to pay out of their own pocket. [132] In the case of coverage for non-economic loss, the insured harms of pain, suffering, and other intangibles would be extremely difficult to monitor. If insurers attempted to control for such moral hazard while paying for non-economic damages, they would face the same problems that a court does in the liability context -- how to determine precisely what non-economic damages are appropriate and what constitutes undue reward for malingering and fraud. This would at a minimum increase the administrative cost of first-party insurance, driving it to levels similar to that of third-party liability coverage. [133] Insurers almost uniformly respond to moral hazard **[*934]** problems by paying less than full economic damages, [134] and sometimes imposing waiting periods prior to payment. In short, a private insurance market for pain and suffering probably cannot function. Presently, injured persons should consider themselves lucky to recover even most of their economic damages from private insurance. Publicly administered social disability and life insurance programs are even less generous than their private counterparts, [135] as taxpayer reluctance to redistribute resources adds to the fear of moral hazard as a constraint.

Second, the practice of private and public compensatory programs should not necessarily govern tort law, in which a key goal is deterrence, and even a modicum of vengeance to inhibit private efforts at self-help. [136] If the legal and liability insurance systems acted as merely compensation systems like first-party insurance, we would have junked them long ago. [137] Tort law does not seek to compensate all injuries; rather, it focuses on those injuries caused through the fault of others or otherwise judged worthy and capable of being deterred. From this perspective, it makes theoretical and practical sense to assess liability for more than economic loss, so that careless behavior is sufficiently deterred. [138] To consider only economic loss places at particular risk persons with little or no earnings, such as homemakers, children, and retirees. [139]

Not only is the case against awarding damages for intangible losses weak, but strong arguments exist in favor of such awards. First, from an economic perspective, there is good evidence that people value their own lives and health at considerably higher levels than is reflected by merely measuring "pure" economic loss. [140] People place value on the loss of life and limb in addition to the compensation they know they will receive through such programs as workers' compensation and health, life, and **[*935]** disability insurance. The observed values, then, are even farther above economic loss than first appears. The "value of life" work and other studies using different methodologies [141] document the economic value of "intangible" losses, further justifying their inclusion in tort law.

Second, from a legal perspective, intangible damages have clearly won a place in legal theory and practice. Modern jurisprudence has generally expanded the recovery for non-economic

damages in tort. [142] The common law tradition and the increasing willingness of legislatures to waive sovereign immunity indicate a social desire for at least some non-economic damages to be considered "real" and compensable in cases of faulty injury. Moreover, as a practical matter, it can also be remarked **[*936]** that the considerable expense of individually adjudicating liability and determining damages must somehow be paid. A tacit role of awards for non-economic damages is to help pay a plaintiff's legal expenses without cutting into the economic recovery needed to meet actual, out-of-pocket losses caused by the injury. [143] The problem with non-economic damages is, in sum, not that they are inappropriate or unreal, but rather that they are extremely difficult to consistently monetize in the absence of quantitative standards. This difficulty is, of course, exacerbated by a sort of sympathetic moral hazard that juries face when making awards on an ad hoc basis and spending money that is not their own.

C. The Need to Reform the Law of Non-Economic Damages

Although non-economic damages are real and should be compensable in a fault-based system, this conclusion does not support totally unstructured decisionmaking about the appropriate levels of awards. All of the previously reviewed arguments concerning vague legal standards and the resulting variability, unfairness, and high expense still hold. In fact, as one might expect of the least well-specified of all elements of damage, non-pecuniary awards show an even greater variability than do total valuations. Table 3 presents the range of values for awards for pain and suffering. [144] Table 3 is based on empirical analysis of the same Florida and Kansas City jury verdicts used to describe total valuations in Table 2 above, [145] but with fewer observations included. [146] The distribution of awards for non-economic loss shows even wider dispersion than the distribution for total awards shown in Table 2. Additionally, the award levels for extreme outliers [147] exceed the means by even more when analysis is restricted to the non-economic component of awards. Thus, awards **[*938]** for pain and suffering and other intangible losses may be unreasonably inconsistent within the relatively discrete and unambiguous categories for injury severity.

[*937]

TABLE 3

JURY VALUATIONS a OF NON-ECONOMIC LOSS b VARY EVEN MORE WIDELY: DISTRIBUTION BY SEVERITY OF INJURY

(in thousands of 1987 dollars)

	Severity Level c		Number of Cases d	2.5% Critical Value e	25th Percentile	Median
1		(emot.)	1	--	--	25
2			69	0	0	2
3			106	0	0	9
4		(temp.)	16	0	4	36
5			104	0	3	46
6			29	0	9	292
7		(perm.)	15	0	336	1,642
8			5	0	778	1,832
9		(death)	15	0	260	545
		Total	366	0	1	21

a. Valuation = amount of jury award, adjusted for comparative negligence, if any.

b. Non-economic loss calculated as valuation less reported economic loss; negative values

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are reported as Zero.

c. See Table 1 for severity levels.

d. Six cases missing data on severity are included in the total; cases of no liability and those missing data on economic loss are omitted from the table.

e. For severities with fewer than 40 observations, the 2.5% critical value (or 97.5% critical value) is equivalent to the minimum (or maximum) value.

Severity Level c		Mean	75th Percentile	97.5% Critical Value e	Standard Deviation
1	(emot.)	25	--	--	--
2		10	7	93	37
3		53	56	403	98
4	(temp.)	62	60	284	85
5		160	152	1,507	345
6		386	598	1,564	467
7	(perm.)	2,309	3,466	8,970	2,429
8		4,252	8,936	14,207	5,715
9	(death)	1,242	1,247	10,759	2,668
	Total	301	135	1,642	1,171

c. See Table 1 for severity levels.

e. For severities with fewer than 40 observations, the 2.5% critical value (or 97.5% critical value) is equivalent to the minimum (or maximum) value.

Nonetheless, just as for total valuations, both legitimate and illegitimate factors may help explain the variations. Moreover, as for awards in general, although individual cases vary enormously, the medians and means show an upward progression across severity levels that one would expect, again with a drop-off for death cases. Reform is therefore in order -- but to improve, rather than abandon, the tort liability system.

IV. THREE TYPES OF SCHEDULING REFORMS FOR NON-ECONOMIC DAMAGES

This Section proposes three alternative ways to "schedule" amounts allowable for pain and suffering and other non-economic damages. Scheduling can provide rational standards -- heretofore unavailable -- for valuation, thus improving the tort system's current approach, rather than abolishing or arbitrarily limiting nonpecuniary damages. We propose that these models be legislatively implemented, [148] although some change might be accomplished by the judiciary alone, perhaps through a state's judicial conference. Dollar values for the schedules could be based on past jury awards, or possibly on findings of the "value of life" research, with legislative or judicial adjustments to either.

The three scheduling models discussed here are designed for ordinary cases of bodily harm and mental distress. [149] The first reform model [150] creates a matrix of values that would award fixed damage amounts according to the severity of injury and age of the injured party. However contructed, the matrix's values would be binding of jury findings of nonpecuniary damages, although the possibility of unusually severe or minor cases may call for ranges of values within the matrix, or some other provision permitting special attention to "outliers." The second proposal [151] also gives juries systematic information on appropriate awards based on past experience. However, rather than a binding matrix of awards, it provides a small set

of paradigmatic injury "scenarios," with associated dollar values. These values would serve as nonbinding benchmarks for assessing the case at trial. A jury would be free to award any amount, but the benchmarks would serve to guide their award and **[*939]** review by trial and appellate judges. The third approach [152] mandates fixed limits on awards of non-economic damages, as many state legislatures have already done. But we suggest replacing today's dominant approach of placing a single arbitrary cap on all non-pecuniary awards with a system of flexible floors and ceilings that vary with injury severity and victim age. [153] Table 4 summarizes the three approaches and the choices that must be made to implement any of them.

TABLE 4: THREE WAYS TO SCHEDULE NON-ECONOMIC LOSSES: MATRIX, SCENARIOS, AND RANGES

	Reform Model	Basic Approach	Main Source of Scale, Values
A.	Award Matrix	Relative value scale, plus dollar numeraire	1. Past awards, scaled by severity of injury & age of injured person or 2. Value of life findings, plus relative injury scales (in either approach, dollar values modified during implementation)
B.	Injury Scenarios	Listing of prototypical injuries and approved accompanying values	Descriptions of cases from legislature or judiciary, values from past awards, as judgmentally adjusted
C.	Flexible Ranges of Awards	Caps and floors on awards by severity level	Value of limits set to exclude extreme outliers (e.g., top and bottom 5%, outside two standard deviations)

	Reform Model	Model-Specific Choices of Implementation	General Implementation Choices [applicable to all models]
A.	Award Matrix	Suggest using 9 severity levels, 6 age groupings (could be more or fewer) Suggest values be binding	Suggest new reporting system for awards as source of benchmarks Suggest special verdicts in

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		on fact finder (could be advisory) Suggest "point value" for each cell of matrix (could be range) Suggest applying to both injuries and deaths (could leave out deaths, now subject to different valuation rules)	all cases (could be left to general verdicts) Suggest establishment of "outlier" system for small number of cases Suggest that all valuations be made by jury Need ultimately to consider how to treat derivative claims -- could be kept within schedules or handled outside scheduled amounts .
		Suggest using past awards to guide most values, value of life findings for death cases	
Injury	Suggest providing small Scenarios	Suggest that all values number of scenarios (each representing a paradigm case) for each of 6 age groups of injured persons (could use fewer scenarios for all ages, or let judge select)	be based on past experience, but adjusted by legislative judgment, with judicial input (could be mechanistically calculated, without change) Suggest that all personal injuries be included (not malpractice only)
		Suggest scenarios be binding only as boundary lines, so awards can be at any reviewable for reasonableness	dollar level, yet
C.	Flexible Ranges of Awards	Suggest mandatory application (could be voluntary, e.g., standards for additur and remittitur by trial judge)	Suggest that all values be increased for inflation annually, periodically recalibrated as to relativities

A. Creating an Award Matrix for Non-Economic Damages

We suggest developing a relatively simple matrix for juries to compute non-economic loss, using the severity of injury and age of the injured person as objective, classifying factors for determining damage awards. It is important that classification be objective so that the system can achieve similar results in similar cases and be seen clearly to do so. We prefer

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that valuations for the scheduling matrix be based on past jury verdicts, although we also believe that the "value of life" research could serve as a supplementary source. In either case, constructing a matrix requires policymakers to decide the categories of injury to use, the "worth" of the categories relative to one another, and the general dollar level of recoveries desirable.

1. The Basic Matrix Approach. -- Award levels should be based on objective factors reasonably related to non-economic loss. The most appealing three measures now obtainable for classifying purposes are the severity of injury, the injured person's age, and the body part affected. The resulting categories can then be arrayed in a matrix with values given to each cell of that matrix.

With regard to severity of injury, intuition suggests that higher severity should mean higher non-economic damages, although awards would not necessarily progress upward in a linear fashion. Permanent injuries are bound to cause greater pain and suffering than temporary ones; similarly, major injuries are expected to cause greater emotional trauma than **[*941]** minor ones. Age is another objective indicator, and one expects different age groups to react differently to injury. For temporary injuries, a younger person should recover more quickly from psychic harm than an older one, just as their bodies recover more quickly from physical injury. For permanent injuries, however, a younger person can be expected to endure the attendant intangible effects across a greater life expectancy. [154] One would also expect to find a relationship between the body part injured and the level of nonpecuniary harm. [155]

We investigated the influence of these and other factors empirically for their influence on past patterns of awards for non-economic loss. The influence of severity alone, uncontrolled for other factors, was presented in Table 3. Our findings are based on regression analysis that controls for the influence of various factors, including jurisdiction. [156] This analysis shows that the severity of injury is the strongest correlate of amount, with the age of the victim next. Body part alone is not as predictive of non-economic damages as injury severity. Moreover, it is not possible to use body part in the same regression as severity because it is too closely correlated with the nine-point severity scale. [157]

We are thus encouraged to use age and severity as the classifying variables; beyond their statistical suitability, they are also objective measures easily applied in practice. Using nine injury-severity classifications **[*942]** and six age groups yields a matrix of fifty-four cells. [158] This would allow a wide range of specific values and considerable differentiation by type of case without becoming unmanageably complex. Moreover, boundary disputes should be uncommon. Age is, of course, completely objective. The nine severity categories are also relatively objective and mutually exclusive, thus permitting little upward "creep" into higher severity levels, despite claimant motivation to seek higher rankings once severity categories are linked to payment amounts. With regard to duration of injury, one might like to better adjust for the precise length of suffering, but the severity categories already do that in a rough way (temporary versus permanent), [159] and greater precision would perhaps create considerable moral hazard.

2. Sample Matrix with Values Based on Past Awards. -- We suggest basing matrix values on the awards for nonpecuniary injury of past juries, preferably as adjusted by the trial and appellate courts. This Section presents a sample matrix and explains its development and proposed use. We offer this matrix solely as an example and to begin serious debate on this type of reform. We do not suggest that these particular values are somehow "correct" for all injuries, in all jurisdictions, or that it is ready for implementation. Better reporting of damage awards [160] and a review of past experience within each jurisdiction [161] are needed before any reform is implemented.

Table 5 presents the sample award matrix for non-economic damages that results from our empirically based estimates of jury valuations for one important jurisdiction, the state of Florida, for which we have analyzed considerable data. [162] Recall that award levels vary

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considerably **[*943]** across jurisdictions, [163] and that these values are derived from estimates of juries' nonpecuniary awards at verdict, not at final settlement or after judgment on appeal. Our nine categories of injury severity are collapsed into seven in the sample matrix because two categories had too few observations involving non-economic damages; a more complete data set would allow the full nine severity categories. We grouped victim ages into six discrete categories. Table 5 is a good sample of what is possible using analytic techniques, even without the support of a fully reliable underlying data system.

The values in Table 5 consist of relative weightings, not absolute dollar amounts. A value of 100 is assigned to the amount of non-economic harm caused by the death of a statistically average person aged 65 or over. The other values are set relative to this standard amount, in each case using regression analysis to hold more tangential factors constant. The result is a "relative value" matrix similar to the relative value scales used for pricing of such diverse items as physicians' services and auto repairs. The matrix amounts must be multiplied by a dollar "numeraire" to derive the actual dollar amounts that would be awarded under the matrix. [164]

Table 5 simply charts the past central tendencies of jury valuations, with no "second guessing" of the rules of law that were applied or the correctness of outcomes. Results from all types of past lawsuits are averaged together on the assumption that the law of damages is the same for all, although evidence reveals that recoveries presently differ by case type. Injuries resulting from medical malpractice are "worth? the most, and those due to auto accidents the least, controlling for age, severity, and other observed factors known to influence recoveries. [165] Depending on one's view of the reasons for past differences in result, it may not be appropriate to treat all awards as if they were founded on the same legal theory and otherwise the same. [166] Blending the award experience of all **[*944]** types of cases into a single matrix has the practical effect of raising awards in auto cases somewhat, and considerably lowering those for malpractice and products liability. Note also that all personal characteristics of plaintiffs (other than age) and defendants are irrelevant to levels of non-economic damage under the matrix; sex, race, occupation, and income are ignored as classifying factors regardless of their current impact in the "real world." [167]

TABLE 5

A POTENTIAL INJURY MATRIX FOR NON-ECONOMIC LOSS:
ONE JURISDICTION'S RELATIVE VALUES,
BY AGE AND SEVERITY OF INJURY a
(using age 65 and over and death = 100)

		Age in Years					
Severity Level		10 & under	11-17	18-35	35-50	51-64	65 & over
1,2 b		2	4	5	3	6	2
3	(temp.)	4	9	10	7	12	5
4		5	9	11	7	13	5
5		7	14	16	11	20	8
6	(perm.)	30	61	68	48	88	35
7,8 b		199	401	448	317	574	228
9	(death)	87	176	197	139	252	100

a. This index is based on regression results with positive non-economic loss only; observations = 284. See also notes to Tables 2 and 3.

b. Categories combined because of low number of valuations.

Source: Calculated from unpublished jury verdict data, 1973-87, compiled by Urban Institute/Vanderbilt University project.

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The matrix gives a single, fixed "relative value" for each possible combination of age and injury severity. Thus, a permanent, significant injury (level 6) to a 30-year-old plaintiff would result in an award roughly two-thirds the size of that awarded for the death of a plaintiff aged 65 or older. In general, as noted previously, higher injury severities have higher values, with a major jump from level 5 to level 6 and from level 6 to levels 7 and 8. [168] Deaths, however, are valued at relatively lesser amounts, reflecting not only common sensibilities that some fates are worse than death, but also relatively restrictive legal rules regarding non-economic losses in death cases. [169] Nonetheless, the derived values for **[*945]** non-economic damages in death cases are higher than one might expect, given that the main recovery in a survival action is probably for conscious pain and suffering prior to death. Values might be considerably lower in jurisdictions with less generous juries or more restrictive legal rules.

Importantly, in states that now award relatively lower amounts in death cases, it might be inappropriate to scale the award matrix around death cases. It is better to choose an intermediate value around which to scale the others -- that is, to fix as 100 on the matrix. If possible, the chosen intermediate value should be in a particularly clear and discrete category in order to anchor the matrix and facilitate policy discussion of the values.

Valuations in Table 5 also rise with age, and more smoothly than for severity, although with an odd dip for the 35-50 category and an expected drop for those aged 65 and over. Given this matrix of values, the lowest awards for nonpecuniary harm would be for insignificant-temporary injuries to children under 10; the highest awards would go to 51-64 year olds with major and grave permanent injuries.

The final step in creating this type of schedule is to choose a particular "numeraire," or dollar multiplier, to use with the relative value matrix. This fixed value numeraire is multiplied by the relative value indicated by the matrix for the victim's age and injury severity to calculate theactual award for non-economic damages in a given case. The observed numeraire from the statistical analysis of Florida cases was almost $ 6,500 (in 1987 dollars), so that the death of a 65-year-old -- the anchor category in the sample matrix -- was "worth" about $ 650,000 as a jury finding of non-economic damages. Other jurisdictions would differ; additionally, the use of an even more complete data set might well change results. Like the accompanying relative values, the dollar multiplier simply embodies the central tendencies of past jury valuations without considering post-trial adjustments. [170] Before embracing any such statistically calculated valuation, policymakers should decide whether the derived dollar amounts are in some sense "too much" (or "too little"), thereby fine tuning the matrix to conform with ideas of fairness and political judgment.

3. Implementation and Outliers. -- The sample matrix presented by Table 5 offers sufficient complexity to reflect a wide range of pain, suffering, loss of enjoyment, and other elements of non-economic loss in individual circumstances, but is sufficiently simple to understand and administer that it should result in greater predictability and cost-savings in dispute resolution. Severity and age as classifying measures are intuitively **[*946]** and empirically related to the subjective assessments of the extent of pain and suffering likely to have been experienced, yet they are sufficiently objective to facilitate their application in particular cases and to avoid "gaming" by the parties.

Given these attributes, the matrix's fixed values as adopted by any jurisdiction would be mandatorily applied. Juries would be instructed that, given liability, they should award exactly the indicated amount, adjusted only for comparative negligence. [171] Before verdict or on appeal, parties would be free to compromise on different amounts, just as now. Juries, however, would not have the freedom to compromise awards, something that is theoretically prohibited, but not practically enforceable. [172] Under a scheduling approach, non-economic awards should be based on a relatively small set of objective standards that accomplish much greater predictability and consistency -- and at a lower cost, so that jury discretion should be correspondingly limited. Additionally, a mandatory matrix gives the parties specific guidance

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[*908] Tort law's traditional methods of computing damages for personal injury and death are under attack -- and understandably so. Legal reformers have long argued that present law, when combined with jury discretion, inflates damage awards and creates problematic outcome variability. [1] The open-ended and unpredictable nature of tort exposure has, in turn, threatened the liability insurance system that funds most tort compensation. Determination of awards on an ad hoc and unpredictable basis, especially for "non-economic" losses, [2] also tends to subvert the credibility of awards and hinder the efficient operation of the tort law's deterrence function. Moreover, award levels differ considerably by type of legal action, with claims sounding in medical malpractice and products liability theories resulting in greater compensation than claims arising from automobile accidents for similar injuries. [3]

Legislatures have characteristically responded by enacting tort reforms, initially limiting the scope to medical malpractice, where crisis first provoked reform in the mid-1970s, but more recently with the promulgation of "generic" reforms in the wake of the general liability crisis that arose in the 1980s. [4] Many of these reforms significantly curtail **[*909]** plaintiffs' prerogatives and limit juries' discretion to award damages, most notably for non-economic harm. [5] Some reformers, however, would go even further, barring pain and suffering altogether as an element of personal injury awards. [6] Nonetheless, empirical findings tend to support the importance of non-economic losses, even showing that prevailing damage valuations may in fact be too low. [7] When people contemplate taking a dangerous job or investing in safety precautions, they value their own lives and health well beyond the potential medical costs and loss of earnings that could be caused by an accident. Use of these findings as a new kind of evidence in liability cases might further unsettle the insurance markets by considerably increasing the size and variability of damage awards. [8]

This Article proposes three alternative frameworks to perfect the valuation of non-economic damages in the current liability system. Each of these proposed models would constrain the operation of vague and open-ended legal rules and the wide latitude of discretion heretofore given legal decisionmakers. Increasingly sophisticated knowledge about the values that people place on the nonpecuniary aspects of life offers a good opportunity to reconsider the ad hoc valuation methods of today's personal injury law.

By focusing on the issue of non-economic damages, this Article addresses the least well-defined and most variable component of damage awards. Suggestions are aimed at all cases of personal injury and death. Given that much past analysis and legislation have focused on medical malpractice litigation, though, our examples are often drawn from this area. We suggest a variety of methods that could be used to guide juries and trial judges in their valuations of injury. The main goals of our proposals are common to each of these methods, however: to improve the accuracy and fairness of awards for non-economic damages, and to control the rate of growth over time, thus making litigation over damages less expensive and more predictable. Clearer signals of likely outcomes should promote earlier settlement of cases, inspire greater confidence in the fairness and predictability of the tort recovery system (thereby helping to maintain the efficient operation of the deterrent function of tort law), and make legal liability a more insurable event.

I. REASONS TO REFORM THE VALUATION OF DAMAGES

A. The Vagueness of the Law of Damages for Personal Injury

There is universal agreement that the compensatory goal of tort law **[*910]** requires making the successful plaintiff "whole," [9] a reasonably precise objective. The substantive law attempts to achieve this objective by compensating for many categories of economic expense and nonpecuniary loss. [10] When it comes to actually computing a damage award, however, the substantive law of personal injury gives only very general, qualitative guidelines, with no meaningful quantitative guidance. Hornbooks and jury instructions alike offer only generalities, [11] and some judges almost delight in opining that there are no objective standards. [12]

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for settlement negotiation; a looser or more discretionary matrix would not have similar effects. [173]

One complaint concerning matrices like that in Table 5 -- that is, ones comprised of discrete "point values" -- is predictable: despite a large number of valuation "cells," there will remain legitimate variation in nonpecuniary injuries within each of the proposed categories that fixed values suppress, along with illegitimate variation. For example, one may contend that the pain and suffering attending deaths of people aged 65 and over vary too much to limit awards to a single amount; rather, even more individualized processes and rules are needed. [174] It is a truism that **[*947]** not all cases, even within a narrow category, can be "average"; there is inevitably variation.

One response to allegations that the two-variable matrix is too imprecise, is that accepting some imprecision in some individual cases is the cost of achieving greater precision across cases, of simplifying litigation, and of assuring all litigants that their awards are relatively fair compared with others similarly situated. Moreover, it can be seen as a strength, not a weakness, that the matrix mandates similar awards regardless of many factors that might influence a jury -- including the race, sex, and social status of the litigants. Additionally, any unacceptable imprecision in the two-variable matrix can be perhaps remedied by including more classifying factors to reflect other legitimate sources of variation. Proponents of greater precision should indicate the additional objective factors that should be considered (e.g., body part affected and duration of injury). [175] At some point, however, it should be realized that a multivariable classifying scheme becomes too complex to be administrable and credible.

A second level of complaint is that some relevant factors are inherently subjective and cannot be objectified or quantified in advance. [176] One example of such a subjective factor might be protracted agony at the time an injury is incurred. [177] Likewise, plaintiffs claiming unusual sensitivity to pain or humiliation (a claim that, of course, can be raised by anyone after the fact) might argue that the two-variable, point-value matrix fails to appreciate their peculiar circumstances.

Such subjective and case-specific matters cannot be accommodated within a point-value matrix, which accepts some degree of "leveling" of potentially legitimate variation in order to achieve simplicity, ease of administration, and consistency of results. Moreover, the present system -- with ad hoc decisionmaking and unpredictable results -- makes no promises of accurately reflecting legitimate variation across cases. The enormous range of awards within categories that is found in our data suggests that current results include both overcompensation and undercompensation. A point-value matrix eliminates the extremes and implicitly ensures that the ordinary victim [178] is appropriately compensated for such factors as agony and sensitivity to pain. Ultimately, however, the extent to which nonpecuniary damages should attempt to individualize **[*948]** valuations according to wholly subjective factors is a matter of judgment.

For those states that like the matrix approach, but still want to allow more flexibility to accommodate unusual subjective factors, we briefly outline two alternatives. The first modifies the matrix by adopting ranges of values, rather than point values, for each cell. Within each range, juries would retain their traditional discretion to individualize nonpecuniary awards. Under this approach, Table 5's cells would each contain two values -- a low end and a high end. [179] The point value now shown in each cell would be the center of a range, with boundaries between adjacent cells in a row being set at some point between the two center values. [180] Consider the top line of Table 5 -- the category combining severity level 1 and 2 injuries. As shown, the age 11-17 group is allotted a relative value of 4. As a range, this could be set as 3 to 4.5 -- exactly halfway toward its neighboring cells on either side. These values, again, are given merely as examples. [181]

A second way to change the matrix approach is to create a separate, post-trial administrative

process for considering unusual, outlier cases. A plaintiff dissatisfied with the amount awarded through application of the matrix would be permitted to apply to a single statewide agency empowered to make supplementary awards. [182] A single reviewer for each state would maintain consistency of approach and result. We suggest an administrative agency because the courts have not normally played such a role; an administrative approach also seems appropriate where funds must be managed and disbursed across multiple cases.

If this modification to the pure matrix approach is made, an annual or biannual amount of money should be designated as available for additional distribution to outlier plaintiffs. Such funds could be accumulated by withholding a certain percentage of each court-ordered judgment in personal injury cases. [183] This fund would then be used to pay successful **[*949]** applicants during the budgeted period. The agency would have to make preliminary findings throughout the period, then make end-of-period adjustments if funds were insufficient, potentially seeking new and higher funding for future periods. Some method is also needed to discourage most litigants from seeking extra awards, as the matrix is designed to fairly compensate the ordinary range of cases. Losing applicants could, for example, be assessed the agency's (and perhaps the defendants') costs. A complete proposal would, of course, need to cover this and other details of operation.

4. Judgmental Adjustments and Other Policy Choices. -- A scheduling matrix similar to Table 5 could be constructed for any jurisdiction or combination of jurisdictions for any time period, given sufficient data. [184] Award levels can be adjusted over time to reflect changing legal rules, economic conditions, social attitudes and other factors. The matrix values could be computed mechanistically, with each category assigned the precise relative value indicated by analysis of past awards, including post-trial modifications.

Nonetheless, we recommend critical review by policymakers prior to final implementation. [185] Matrix values derived directly from statistics may be deemed arbitrary or otherwise "wrong." It is not obvious, for example, that the law should accept the lower values for the 35-50 age category that Table 5 shows. The set of relative values generated statistically should be tempered in accordance with common sense notions of reasonableness to eliminate or moderate incongruities.

Moreover, before accepting any statistically calculated amount, legislators or judges need to decide whether that value is in some sense "too much" or "too little." Common sense, interest group presentations, and possibly new research might also guide such normative choices. Policy-makers might decide to skew matrix-based awards toward the low or high end of present awards, rather than toward today's average awards (represented in Table 5), for example. General issues that concern this and the other possible scheduling approaches are discussed in more detail below. [186]

5. The Relevance of "Value of Life" Research. -- Ted Miller argues that value of life findings can help guide the determination of damage awards, especially for nonpecuniary elements of loss. [187] His findings are highly relevant to the law's substantive approach to damages in death **[*950]** cases and form a very instructive adjunct to the scheduling approaches discussed in this Article. However, such research fails to create a practicable schedule for non-economic damages. From a scheduling perspective, the key problems are that there is no consensus on the best estimate of the basic value of a lost life (or life year) [188] and that relevant factors needed to individualize values are insufficiently objective.

a. Death Values and Legal Rules. -- The traditional law of wrongful death and survival tends to undervalue death losses from the perspective of deterrence. [189] Legal commentators have long noted the irony that tortfeasors could be better off killing people than injuring them, [190] controverting common-sense intuitions that death is usually a less desirable result than injury. In particular, the absence of nonpecuniary damages in a death case greatly undervalues the actual loss from deaths, as the value of life research confirms. The creation of a schedule for nonpecuniary damages offers an opportunity to expand recoverability in

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death cases. Such an extension of the law would not only benefit decedents' survivors, but also promote more efficient deterrence. Whereas the adoption of any matrix would lead to more consistent calculation of nonpecuniary damages, use of a schedule for these purposes would effect a substantive legal change.

Much of the traditional reluctance to allow higher recoveries in death cases comes from fear of unlimited awards and a sense that paying for non-economic loss cannot compensate the decedent, but rather constitutes a pure windfall to survivors or heirs. [191] Scheduling, however, controls the overall size of death awards, preventing defendants from facing open-ended liability. Moreover, a recovery model can be designed to avoid unjust windfalls without fully barring assessments for very real nonpecuniary losses. For example, tortfeasors could be required to pay the full non-economic loss indicated by the schedule, but not pay the full amount to survivors and heirs. Instead, a large share (perhaps, fifty percent) of the non-economic component of awards in death cases (net of lawyers' fees) could be placed in a public fund of some kind.

Of course, some reasonable share must go to plaintiffs, or there will be too little incentive to bring suit -- and thereby promote deterrence. [192] Evenly **[*951]** splitting the award balances the need for appropriate deterrence with the need to avoid windfalls. Courts could administer the fund, using proceeds to pay for the data reporting system proposed here. [193] Alternatively, the money could be used to pay for unusually high, outlier cases that exceed matrix-based amounts. [194] The substantive and procedural change in the law of death damages is also appealing from the perspective of blunting political and constitutional challenge; unlike most past "tort reform," it gives a clear new benefit to claimants rather than simply curtailing traditional prerogatives. [195]

How would one set award values for death cases? Past jury awards reflect legal restrictions on nonpecuniary recoveries and, therefore, offer little guidance for a new approach. Here, a legislature might well weigh the value of life evidence might be weighed, despite the defects that make it unwise to use only such evidence for creating damages schedules. [196] The value of life approach seems stronger when tempered by common sense adjustments, such as a legislature might make in adopting a matrix or other schedule for death cases. One could also use the age categories of the valuation matrix (Table 5), applying those relative weightings to the dollar numeraire set by the best estimate of the value of life research.

b. Injury Cases. -- The value of life findings give only a death-related numeraire; [197] to apply the research in such a way as to place values on nonfatal injuries, supplemental evidence is necessary to scale such injuries **[*952]** relative to death. Most such scales, however, rely on either expert assessment of disability and pain or the self-reported ability of the injured party to conduct normal activities. Used this way, value of life research becomes simply an adjunct to a system based on jury awards, rather than an independent source of values.

Overall, the approach of combining a dollar value for life with a scale of relative values has more conceptual than practical appeal, on at least four grounds. First, as noted before, the basic value of a life lost in the value of life literature is insufficiently determinate. [198] Second, there is no agreed methodology for determining relative values, nor a research or practical consensus on what whose relativities are. Thus, it is more plausible to expect such valuation to find acceptance in the regulatory framework where rough, average valuations of injuries are sufficient for ex ante regulatory decisionmaking than to expect state legislatures to accept similar imprecision in ex post valuation of individual injuries in tort litigation. Moreover, considerable methodological sophistication is needed to tease out values, making it hard to explain to laypeople and undercutting the attractiveness of the approach in political settings. [199]

Third, applying such scales in a liability case would require expert testimony concerning relevant relativities and the plaintiff's precise rank on the scoring system. This complex undertaking is more likely to lead to battles of the experts than simplification of damage

computations and more predictable results. Fourth, the categories within the relative-value scales are extremely subjective and open to moral hazard. Most depend entirely too much on truthful self-reporting, which is put to a stern test when considerable money rides on whether claimants report that they are "anxious or depressed" as opposed to "happy and relaxed," "able to sleep normally" versus having "considerable difficulty in sleeping," or relatively "capable of activities of daily life" rather than "incapable" of normal functioning. [200] Moral hazard in the form of injury exaggeration already exists in the current system; [201] making a particular disability **[*953]** score the basis for a fixed award of non-economic damages would only make matters worse.

B. Valuation "Scenarios" to Assist Juries

1. The General Approach. -- Instead of a numerical matrix, a second form of damages scheduling might be to give juries a limited number of standardized injury "scenarios," with associated dollar values of non-economic loss for each. These descriptions of prototypical circumstances of injury would help jurors assess the non-economic damages in a given case, relative to the approved values in the scenarios. For each lawsuit, a relevant spectrum of scenarios would be provided, ranging from less severe to more severe injury. In effect, a set of scenarios would constitute a relative-value scale in readily grasped, qualitative terms. These scenarios would be best promulgated by legislatures or judiciaries, based upon the types of data reviewed for Table 5, with appropriate normative adjustments.

The scenarios would resemble the legal "hypotheticals" so beloved by law professors, but would focus on the circumstances of injury, rather than on the law. A small number of them, perhaps up to ten, would be included as jury instructions, preferably given in writing and allowed into the jury room. The jury would be instructed that no single scenario is expected to fit their own case perfectly, but that the scenario values are approved benchmarks by which to assess their case. They should decide which scenarios most nearly resemble the injury in the case they are deciding, then make the appropriate level of award somewhere near those values. The scenario values would thus be advisory rather than mandatory. [202] Even so, while juries would retain discretion to choose intermediate amounts between the scenario levels, their choices would be subject to more active judicial review to maintain consistency of valuation across cases.

The scenario approach reflects the normal mental response of people to difficult valuation problems outside the jury room -- that is, making comparisons to other cases. A person looking to buy or sell a house wants to know the selling price of other three-bedroom, two-bath houses in the neighborhood. Certainly, every house is unique, and small variations in location or features make a difference. Nonetheless, having a quantitative benchmark is essential to reasonable valuation -- and it also helps buyer and seller agree more rapidly than they otherwise might. Similarly, when psychological researchers have asked people to consider how they value certain states of injury, it has proven helpful to present **[*954]** scenarios about the extent of disability and pain. [203] Moreover, trial and appellate judges use a very similar approach when reviewing a jury award for excessiveness or inadequacy -- that is, they consider prior awards, drawing upon their personal experience, relying on the parties' briefs, or consulting published listings of awards. In contrast, adoption of the scenario approach would require a legislature to review and incorporate a complete body of information into the standardized scenarios and their valuations.

2. Scenario Content. -- Valuation scenarios must offer descriptions that are vivid enough to be comprehensible and offer a practical guide. They must not, however, consist of cases that are memorable for being unusual, but rather ones truly typical of each level of injury represented. As with any scheduling approach, it is vital to keep matters simple. The most important factors to reflect in a scenario are the physical severity of the injury, the victim's age or life expectancy, the extent of pain endured, the extent of incapacity to engage in normal activities, and the duration of each factor. Physical injury and age are relatively unambiguous and so help "anchor" the scenario objectively. The importance of duration

(even if only given as temporary versus permanent) is obvious. These objective factors alone considerably help distinguish among injuries, as shown by the sample matrix and supporting data discussed previously.

Pain and inability to function, though highly subjective, are also intuitively important. Moreover, they correspond to the two main types of intangible harm previously noted -- newly imposed suffering and loss of former enjoyment of life. For them, one might use fairly simple descriptors, such as the strength of drug needed to control pain and the type of activities curtailed. [204] These are subjective measures, so plaintiffs will tend to exaggerate their suffering while defendants try to minimize it; but the situation will be no worse than at present. [205]

In general, the scenarios should describe only circumstances of injury relative to damages, not to responsibility or causation. The degree of "color" to provide in a scenario must still be determined. One could give only neutral descriptors, as in the nine-point severity scale; alternatively, the scenarios could offer more engrossing depictions of the injury. Particularized details make a scenario seem more real, but may also make it overly case-specific and difficult to generalize to other cases. A typical neutral scenario might read:

Permanent minor injury (level 5). Life expectancy 25 years. Mild persistent **[*955]** pain, usually controllable with aspirin. Unable to engage in more than light housework.

A more colorful version might explain:

Plaintiff Peters has completely and permanently lost the use of her left arm. Her life expectancy is 25 years, according to standard life insurance tables. Her arm throbs painfully most of the time, but the pain can usually be controlled with aspirin. She cannot do more than light housework.

Another issue is the handling of death cases. One could maintain the traditional restrictive approach to nonpecuniary losses, limiting the description to conscious pain and suffering endured by the decedent. Alternatively, in the interest of greater deterrence, one could describe the emotional losses of survivors and perhaps also the enjoyment of life lost by the decedent. This choice is a matter of substantive law, however, and not strictly a problem of constructing scenarios.

3. Creating Scenarios. -- How many scenarios would be needed to represent the spectrum of non-economic damages fairly? To an observer steeped in courtroom process, the answer might well be "an infinite number," for the types and degrees of suffering and loss of life's enjoyment are indeed infinite. [206] Nonetheless, a fixed number of guideposts can cover the spectrum; a relatively small number of scenarios applicable to any given case would suffice, and, once the law approves a set number of qualitative descriptions, future advocates are left to argue the appropriate placement of their cases among these scenarios. In any event, it does not seem feasible to expect a jury to cope with a large number of qualitative scenarios at once. The capacity (and patience) of juries is limited, and ten scenarios for each case may be the outside limit. [207]

The simplest approach would base nine scenarios on the nine levels of the severity scale, [208] but would give a much more thorough description of prototypical injury for each level. A reasonable objection to this approach is that there would be too great a difference between adjacent injury values. Nine widely-spaced scenarios provide far more information than jury instructions now provide, but admittedly one might still prefer a more finely differentiated approach. Even so, the number of scenarios actually supplied a jury in a given case must be kept manageable.

One way to utilize more scenarios without overburdening juries **[*956]** would be to create a large inventory of scenarios describing a full universe of injuries, but use only a small

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number of relevant ones in a given case. For example, one could have a six-scenario spectrum for each severity category on the nine-point scale. The number actually given the jury could be kept to a manageable size in several ways. First, the whole inventory of scenarios could be treated as part of the pattern jury instructions, with each side advocating particular sets to be submitted and the judge deciding which is appropriate. Alternatively, the judge could independently rule on the severity category of the case (for example, whether the evidence supported a category 7 or 8 injury), then direct the jury to consider the dozen or so scenarios associated with those two categories. The key problem with these judge-based approaches is that they arguably shift at least part of the jury's fact-finding function to the judge. A third approach would cluster the scenarios around a preliminary finding of one totally objective consideration -- the injured party's age, perhaps in the same six or seven classes used for the matrix -- so that the judge's determination would be uncontroversial. A fourth, and preferable, approach would give the jury instructions sequentially: once the jury reached a decision on liability and the appropriate category of injury, it would request the associated scenarios to determine nonpecuniary damages. [209]

The scenario descriptions and associated dollar values could be developed from a variety of sources of inspiration -- the severity-scale categories, cases in jury verdict reporters, appellate court decisions, and value of life research scenarios. Dollar valuations could draw on the same sources as matrix scheduling -- reported past awards held not excessive or inadequate, value of life findings, and decisionmakers' own judgment and experience. These choices could be made by a state legislature, perhaps with guidance from a study commission. Many states have adopted a process for developing pattern jury instructions; this same process could also be used to create valuation scenarios. Alternatively, a state's judiciary could take the lead. The national, state, and local bar associations would no doubt be heard in any process.

C. Flexible Ranges in Lieu of Caps for Non-Economic Damages

1. The Present "Flat" Caps. -- Since 1975 legislatures have addressed concerns about the open-endedness of liability by enacting "caps" on some or all the damages awardable in personal injury cases. [210] By the end of 1988, most states had capped awards in some fashion. Most **[*957]** 1980s caps are applied broadly, rather than being limited to malpractice cases. [211] Most caps limit only the non-economic components of awards, presumably reflecting a general feeling that it is unfair to cap awards for economic losses, given the potential for very large medical and other bills. [212]

The caps almost always limit recovery for non-economic damages in all suits at a fixed amount, most commonly $ 250,000 or $ 500,000, but ranging from a low of $ 150,000 to a high of $ 1,000,000. [213] The caps prevent juries from awarding large amounts beyond provable economic losses as a form of quasi-punitive damages. Reformers also promote caps as necessary to keep insurance affordable, and the caps have been found to reduce liability insurance payments and premiums. [214] Nonetheless, flat caps are troubling, especially on issues of basic fairness, because the **[*958]** arbitrary limits come into play only in the most severe cases. [215] Moreover, caps are designed to address only potential jury overvaluation, and only in those cases with the very highest awards. They fail to address any undervaluation or overvaluation below the ceiling.

Thus, despite their popularity, caps are inferior to matrices or scenarios as a means of structuring nonpecuniary awards. A better system of limits could be developed.

2. An Improved, Flexible Range: Floors and Caps. -- Should states still prefer to set ceilings rather than adopt matrices or scenarios, they should address four key weaknesses of flat caps. First, they should hesitate to single out medical malpractice or other single areas for special treatment, given the similarity of the law of damages for all personal injuries. Second, recognizing that some injuries are much more severe than others, states should not apply a single, flat cap to all awards. [216]

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Third, states should avoid the arbitrariness of today's caps, whose levels bear no particular relation to the expected savings in liability insurance premiums (the generally stated rationale for enactment) nor any relationship to the correction of possible errors in jury valuation (this Article's primary concern). Even if a cap of, say, $ 250,000 is somehow "correct" when enacted, it is unlikely to remain so when unadjusted over time. [217] A more rational cap would somehow define unduly high awards, perhaps targeting the top 5% as unreasonable outliers. [218]

[*959] Fourth, states should not so readily assume that some awards are "too high," but that no award is too low -- an implicit assumption of flat caps. Proponents of caps seem to have articulated no basis for this assumption. The best rationale would seem to be that caps correct for an inherent asymmetry of the law -- defendants are liable for unlimited amounts, but plaintiffs can do no worse than zero recovery. [219] However, if mistakes occur at the high end of damage awards, perhaps because of an unusually sympathetic plaintiff, presumably they occur at the low end of awards as well, perhaps because of an unusually sympathetic defendant.

Flat caps have the virtue of leaving most assessments unaffected, but also the accompanying vice of giving no guidance to juries in most cases. We prefer matrices or scenarios as a means to improve valuation in all cases, but offer the following suggestions for states wanting to leave most jury verdicts unaffected. Instead of a single, arbitrary cap, we propose a set of varying floors and ceilings bounding jury awards at both the high and low ends of valuation. These limits should be tailored to reflect severity of injury or, better yet, severity and age combined. A minimum improvement would create a sliding scale of caps with award limits for the different categories of injury on the nine-point severity scale. This would allow higher recoveries than past caps in the most severe cases and decrease the maximum allowable award for less severe injuries. A further improvement would mandate minimum recoveries for injuries at each severity level. [220] Finally, the floors and ceilings could employ both injury severity and age as classifying factors, as in the matrix and scenario approaches.

A flexible set of floors and caps that accounts for injury severity could readily be created from the distribution of past jury findings -- for instance, setting the limits to invalidate the estimated top and bottom five percent of each group. [221] Because these are boundaries, affecting only far outliers, and not schedules to be applied to all cases, juries would still be free to tailor awards to fit precise circumstances, but would not be able to abuse their discretion by going too high or too low. Like current caps, juries might or might not be told about the existence of the flexible range. [222]

Flexible ranges aimed only at extreme outliers would presumably **[*960]** still leave considerable unexplained variability across jury valuations, even allowing larger awards to less severely injured plaintiffs than more severely injured ones. This effect distinguishes ranges set by flexible floors and ceilings from the matrix approach, even when the matrix's values consist of ranges rather than point values. [223] Floors and caps do not attempt to encourage equal results in equal cases, but rather only to correct errors of inadequacy and excessiveness. In this way, a system of flexible floors and caps is analogous to formalized standards of additur and remittitur.

D. Cross-Cutting Issues of Implementation

Regardless of the scheduling approach preferred by a particular jurisdiction, a number of practical issues common to all three models should be addressed. Underlying each of the proposals are concerns involving the data to be used as a foundation for scheduled award values, particularly the accumulation of a reliable data base and the weight to be given prior jury awards. There are additional procedural matters, such as the respective roles of judge and jury and employment of special verdicts as a procedural check on any tendency to pad awards. Finally, residual issues remain that must be considered -- namely, providing for

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changes in value over time and the treatment of less meritorious suits. [224]

1. Accumulating a Data Base: A New Reporting System. -- A major strength of our proposed reforms is the use of actual past awards in scheduling award values. No entirely reliable and comprehensive compilation of jury awards is now available. [225] At least one court has remarked that awards in analogous cases would be helpful in providing "some sense of a reasonable range in awards" on review. [226] We propose that all states maintain reporting systems for damage awards, in a standard format, and corrected for subsequent judicial proceedings. [227]

[*961] Some time would elapse before any significant data could accumulate for any jurisdiction. Before then, general consideration of the matrix, scenario, and flexible-range reforms could begin. Less quantitative information is needed for scenarios and ranges than for matrices, so a legislative committee, judicial conference, or other policy body could use information from jury verdict reporters or other unofficial sources, with due regard to the need for informed judgment to correct for shortcomings of these reporters. Moreover, a jurisdiction could draw on better-documented experience in another state deemed comparable. Once a good reporting system is in place, superior information will be useful not only for initial construction of a scheduling model, but also for keeping current over time and shifting approaches in response to observed outcomes.

2. The Weight To Be Given Prior Jury Findings. -- Another matter for policymakers to resolve in scheduling valuations is the way in which prior jury valuations should be used. A premise of this Article is that the aggregate wisdom of prior findings of nonpecuniary damages should be codified in some fashion, and our three scheduling approaches offer different ways of doing so. In each case, we propose assigning dollar values to categories of injury severity based on prior jury findings. Arguably, the distribution of prior awards for non-economic damages is not an absolutely reliable basis for scheduling future awards. After all, it is the very lack of guidelines for awards that is the impetus for our proposed reforms, and one cannot fully and accurately assess what portions of past awards have been economic versus non-economic, especially in the absence of special verdicts and standardized reporting. Nonetheless, the use of the aggregate wisdom of past practice is quite reasonable -- certainly more so than reinventing dollar values in each case.

As already indicated, better data on the non-economic portions of awards would be helpful, and some judgmental adjustment may also be needed. Legislatures (or judiciaries) are free to add a normative dimension to the empirical analysis of past valuations in the course of promulgating a scheduling system. They can readily smooth the irregularities of past award distributions or choose different levels for floors and caps. [228] They, of course, might even depart from historical patterns altogether, although it would be difficult to defend such an action from a charge of arbitrariness. Linkage to past awards, in short, provides a helpful empirical foundation upon which to base -- and justify -- policy judgment.

[*962] 3. The Roles of Juries and Judges. -- The proposed schedules should generally be applied by juries rather than judges, for the schedules have been conceived as an improvement on the currently vague law of nonpecuniary damages, and valuing such damage is a traditional jury function. If juries cannot be trusted with making valuations under the scheduling models, then the entire validity of trial by jury seems dubious. [229] The trial judge has the power of remittitur and additur, adequate safeguards for reasonable use of the schedules, assuming that special verdicts are in place. [230] The trial judge's decisions are further subject to appellate review for reasonableness, an additional protection. Moreover, the very existence of new, quantitative standards for nonpecuniary damages greatly facilitates the review of awards, correcting the existing problem caused by the lack of good benchmarks against which to judge adequacy and excessiveness.

4. The Need for Special Verdicts. -- Regardless of the approach preferred, successful application of scheduling requires that juries specify their nonpecuniary awards through

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special verdicts. [231] The need for separate information on awards for non-economic damages is two-fold: (1) to develop an accurate reporting system, and (2) to make awards reviewable by trial and appellate judges under the new scheduling rules.

Once special rules apply to non-economic damages, more careful specification of economic damages is also in order. It is not enough that juries merely report separate conclusions on economic and non-economic injury. Dollars are fungible, so a jury -- wanting to achieve a certain overall dollar result [232] and aware of a cap or other special rule on non-economic damages that constrains its discretion -- can simply alter its findings on economic damages to achieve its desired "bottom line." Legislatures and courts are aware of this potential. It explains the typical rule that trial judges are not to tell the jury of a cap on non-economic loss, but instead apply it themselves after a special verdict. [233]

Thus, economic calculations need to be justified so that they can be reviewed for reasonableness and to ensure adherence to the scheduling **[*963]** provisions. Otherwise, the supposedly separate total for non-economic damages will be equally unreviewable, at least in a meaningful manner. At a minimum, juries should disclose their findings on past and future allowances for wage loss and medical expenses, plus the inflation and discount rates used. The reasonableness of both economic and non-economic awards could then be reviewed using more objective standards than are now available. [234]

5. Changes in Values Over Time. -- Policymakers should also consider the importance of increasing matrix award levels (or scenario values or ceiling and floor amounts) over time. Common sense suggests that values should increase over time -- just to keep pace with inflation. [235] This issue is of extreme interest to liability insurers and reinsurers, as stability is vital to projecting their future claims expense. A schedule need not change the general level of awards immediately to have a large impact on the projected claims history of an insurance policy sold today; many injuries arising now will only be resolved some time in the future.

Increases in scheduled values could be formulated in a variety of ways. For example, one could project scheduled values forward at the rate of past growth, as plotted over a number of years. More likely, though, a legislature would choose an index related to inflation in consumer prices or periodically update the values judgmentally. Finally, policymakers should periodically re-examine not only the absolute values of the schedules, but also the relativities among categories in the matrix, scenarios, or sliding-scale ranges.

6. Dealing with Less Meritorious Suits. -- The prospect of more certain recovery for nonpecuniary loss under the proposed scheduling reforms may well induce more people to seek jury trial, especially those with relatively uncertain cases on liability grounds. To varying degrees, the scheduling approaches also undercut a jury's traditional, if covert, ability to compromise damages in a relatively weak case on liability. Hence, under a scheduling regime, particular attention must be paid to the problem of less meritorious claims. This problem is best addressed through ancillary measures of judicial administration. Past statutory tort reforms have ranged from certification of meritorious suits [236] to imposition of costs, including legal fees, on the losing party. [237] Other measures may also be appropriate.

[*964] E. Pros and Cons of the Forms of Scheduling

Which type of scheduling model should a jurisdiction prefer? Policy decisions will be influenced by policymakers' judgments along many dimensions, but their answers to two questions are central. First, to what extent do legitimate factors not captured by objective analysis cause the observed variation in awards in the existing tort regime? Those who believe that most of the current variability in awards is legitimate will seek to maintain maximum jury discretion -- if they support reform at all -- by supporting such proposals as floors and caps to deal with extreme outliers, perhaps advisory scenarios as aids to juries, and possibly matrices containing ranges of values. Those who see award variability as caused mostly by illegitimate factors or random jury error are more likely to support the more

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standardizing approaches, like point-value matrices and more rigorous scenarios.

A second significant policy decision is the relative importance of doing justice in individual cases versus arriving at fair results across cases. The strongest attribute of a matrix-based regime is the ability to achieve equal dollar results in equal cases of all types and severities, especially when the point-value format is used. A point-value matrix may, however, insufficiently respond to unusually worthy (and unworthy) cases, a weakness that may necessitate the adoption of a process to handle outliers. In sharp contrast, a flexible range of floors and caps addresses only the outliers, maintaining jury discretion in the vast majority of cases, but also likely maintaining the current wide, inconsistent, and unexplained disparity among cases. Any individual method, while arguably meant to achieve fairness in each case, will most likely fail to achieve fairness across cases -- continuing past failures in this regard. The ability to discriminate can readily yield inconsistent and inappropriate results, whether or not intended by a particular jury. The scenario approach lies between that of matrices and sliding-scales of ranges -- giving considerable quantitative guidance to jury valuation of small and large cases alike, **[*965]** yet leaving broad discretion to a jury's idiosyncratic views of particular circumstances. Scenarios would not, however, greatly simplify the process of jury valuation, and awards based on scenarios may be more difficult to review than determinations under the other proposals.

As an aid to policy discussion, Table 6 provides a summary of the relative strengths and weaknesses of the three proposed models of scheduling.

TABLE 6: STRENGTHS AND WEAKNESSES OF SCHEDULING APPROACHES: MATRIX, SCENARIOS, AND RANGES

	Reform Model	Strengths
A.	Award Matrix	All cases covered in evenhanded manner, should make results very comparable in comparable cases A wide range of valuations provided, in well differentiated categories (e.g., 54-cell matrix) Classifying factors objective, well related to loss intuitively and according to past jury findings, so overall fairness of system apparent Appropriate valuations very clearly established, jury awards easy to review If desired, "point values" can be replaced with range of values in each cell of matrix, further tempered by "outlier" system
B	Injury Scenarios	All cases covered in evenhanded manner Entire range of awards covered Great flexibility in tailoring awards to circumstances Readily assimilable by jury, not

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Computation of "special" damages -- items of economic expense that plaintiffs must specifically plead and prove, like medical bills or wage loss -- seems relatively straightforward and amenable to common-sense resolution without detailed jury instructions. At least this is generally **[*911]** the case for losses incurred up to the date of settlement. [13] For future losses, however, substantive law varies considerably. Although at one time many courts denied recovery for future losses on the grounds that such estimates were too speculative and uncertain, the general rule now is that "reasonable certainty" of loss is sufficient to support an award. [14] Still, no general agreement exists for discounting future losses to present values. [15] Experience shows that there can be enormous differences of opinion. [16] Future economic losses in death cases are subject to separate, more restrictive rules; the approach used most often permits recovery of lost future earnings only net of the decedent's own expected future consumption. [17]

"Pain and suffering" and other intangible or non-economic losses are even more problematic. Physical pain and attendant suffering have for centuries been recognized as legitimate elements of damages, [18] and "modern" tort law has seen a marked expansion of the rights to recover for forms of mental anguish. [19] Some courts have even permitted recovery for emotional trauma unaccompanied by physical injury, [20] including derivative losses stemming from injuries to family members. [21] The precise elements of compensable non-economic loss vary by jurisdiction. Pain **[*912]** and suffering may be used as a catch-all category for the jury's consideration of all nonpecuniary losses in a case of nonfatal injury, subsuming other qualitative categories, like mental anguish or humiliation. [22] More commonly, though, other non-economic elements -- such as "loss of enjoyment of life" -- are accorded independent standing and separate jury instructions. [23]

In cases of death, the common law completely denied the right to sue, and even under wrongful death and survival statutes, rules on nonpecuniary damages have traditionally been les generous than for injury cases. [24] Generally, a decedent's conscious pain and suffering are compensable, but not the loss of enjoyment of their foregone lifespan nor the mental anguish of survivors. [25] Nonpecuniary damages payable in death cases are more restricted than those in injury cases mainly on the theory that the decedent is beyond awareness of suffering and that any award for nonpecuniary losses would be an overcompensatory windfall to heirs or survivors. [26]

Whatever the categories of non-economic damages allowed in a given jurisdiction, the law provides no objective benchmarks for valuing them. As one commentator notes, "Courts have usually been content to say that pain and suffering damages should amount to 'fair compensation' or a 'reasonable amount,' without any more definite guide." [27] Jurors are not to apply a kind of compensatory "golden rule" and ask what **[*913]** they themselves would want in compensation if they were in the shoes of the plaintiff; [28] nor are they to measure what amount a volunteer might demand to undergo equivalent suffering, for there is no market in pain. [29] By contrast, recent empirical research forcefully concludes that intangible harms like the loss of enjoyment of life are economic losses, [30] and proponents apply a disarmingly straightforward calculus to compute the monetary value of such losses. [31] Courts also differ about such relatively objective matters as whether awards for future pain and suffering should be discounted to present value. [32] But for intangible losses as for overall damages, conventional wisdom seems almost to revel in the imprecision of valuation. [33] Appellate judges consequently struggle to supply some reasoned basis for their review of pain and suffering awards. [34] The law is imprecise even within a single jurisdiction; if one considers cross-jurisdictional variation, the discrepancies are substantially magnified. [35]

This imprecision in the substantive law forces the jury to rely on the **[*914]** presentations of the parties when computing losses. The parties are typically free to provide detailed evidence, not only on every possible facet of harm in the particular circumstances of an injury, but also in suggesting a theory of how the jury should compute the value of the losses. Each jury dealing with future losses, for instance, must separately determine many

		highly technical Continues traditional trust in jury decisions, but with jury awards easier to review
C.	Flexible	Closest to current system, including enacted caps
	Ranges	Tailored to hit extreme outliers only, high and low Shares burden of cuts across severity levels, balances with increases in "floors" Affects large share of dollars in system, because distribution so skewed to high awards Reasonable statistical rationale exists for levels chosen, modifiable by legislature

	Reform Model	**Weaknesses**
A.	Award	May raise lower awards more than it reduces upper ones,
	Matrix	depending on values ultimately chosen for matrix May bring more cases into the system, as plaintiffs "guaranteed" certain recovery if of certain severity System quite inflexible, may not account for subtle variation in nature of injuries in a single cell of matrix, at least where only "point values" given In "point value" form, may seem to intrude on jury, replacing informed human judgment with "damages by computer"
B.	Injury	Probably will have less practical effect on variation across cases
	Scenarios	than matrix Hard to create truly paradigmatic injury descriptions that will help guide all cases May offer fewer guidelines of value than matrix May increase lower cases as much or more as it lowers upper ones

C.	Flexible legislature, court	Caps often successfully opposed in Precise levels of ranges' "ceilings" and "floors" still somewhat arbitrary Does not improve predictability of 95% of cases May eventually promote "creep" of lower awards toward ceilings

V. POLITICAL AND CONSTITUTIONAL ISSUES

A. Legislative and Judicial Roles in Reform

Tort law is state law, and state legislatures are the natural locus of tort reform. Almost all American tort reform has occurred by statute. [238] Of course, most developments in tort law occur on a common-law basis by judicial decision, and there is Canadian precedent for a common-law cap on awards for pain and suffering. [239] However, the changes we propose are more complex than the single, arbitrary dollar cap imposed in Canada, [240] and we instead follow the California Supreme Court in suggesting that rules for pain and suffering awards should be revised by legislative action rather than judicial decision. [241]

There is no "gold standard" by which to judge the specific dollar levels or overall appropriateness of the award-scheduling matrices, scenarios, or floors and caps proposed here. Deciding upon such values is ultimately a matter of social choice that requires the balancing of many competing interests, with results bearing not merely upon the resolution of disputes over individual injuries, but also upon general public health, **[*967]** insurance policy, and redistribution of income. [242] The entity with the greatest social legitimacy in making such broad trade-offs is the state legislature. [243] Furthermore, our proposals are best accomplished by building upon the accumulated experience of prior awards and new research such as the value of life findings, requiring the collection of considerable background information. [244] This is more in the style of legislative investigation than judicial dispute resolution.

Unquestionably, however, experienced judges could contribute to the design of better valuation methods and help identify potential problems of courtroom application to be avoided in advance. [245] In a more administrative mode, the judiciary could readily oversee the design of a set of injury scenarios or adopt a relatively simple set of floors and ceilings for nonpecuniary awards. A more sophisticated matrix with empirically derived dollar values might be more difficult, although, as already noted, a judicial conference might undertake such reforms, perhaps aided by a special committee of the bar.

Perhaps the ultimate dividing line between the state legislature and **[*968]** judiciary is budgetary, however. Regardless of issues like social legitimacy and the capability to form policy, legislation would be needed to fund any new data collection system or systematic study of past results. Thus, legislative action would seem a prerequisite to the adoption of any of our proposed reforms.

B. Policy Context: Distinguishing Scheduling From Prior Reforms

Past tort reforms have been attacked in legislatures, in print, and in court on similar grounds. Opponents have attacked past reforms on a number of grounds, arguing among other things that: (1) the alleged insurance crisis is a mere pretext for pro-defense, special-interest legislation; (2) it is unfair to take away traditional, common law prerogatives of plaintiffs

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without a compensatory quid pro quo being given in return; (3) malpractice-only reforms (once very popular) unfairly single out medical practitioners for protections, to the detriment of malpractice plaintiffs who face corresponding cutbacks in remedies; (4) flat caps unfairly single out the most severely injured people to bear the cost of reform; and (5) reforms abrogate the sanctity of trial by jury. [246]

Very little in these attacks is directly relevant to the scheduling reforms proposed here, however, because the goals, means chosen, and likely effects of scheduling are quite different from those of prior tort reforms. This creates a very different policy context within which to counter political and constitutional attacks. Nevertheless, opponents are likely to characterize scheduling as yet another tort reform, subject to attack on the same grounds as previous reforms. So we pause to highlight the relevant differences.

Scheduling aims primarily to promote the integrity of the judicial system in the valuing of nonpecuniary damages -- not to help the insurance industry, doctors, manufacturers, or any other special interest. In contrast, most prior reforms were enacted under pressure from defendants and insurers, at times even under the threat of a physicians' strike. [247] Our scheduling proposals are designed to apply across the spectrum of personal injury suits, not merely to malpractice, products liability, or some other select class of personal injury litigation.

The rationales underlying the scheduling models are not merely hollow justifications of preconceived changes in traditional tort prerogatives of plaintiffs. Rather, the design of our proposed scheduling models derives directly from careful analysis of past problems of jury valuation. The specific schedule categories themselves are based largely on injury severity and age and are, thus, related closely to expected losses -- both **[*969]** intuitively and empirically. Scheduling is even-handed not only across the variety of case types (malpractice, products, auto), but also with regard to case size (big or small); matrices and scenarios would apply to all cases, and caps and floors would impact both high and low value awards in parallel fashion.

Furthermore, the schedules are not mere "take-aways" of plaintiffs' prerogatives. Instead, our scheduling proposals are designed to be eminently fair and balanced. Under the award matrix and scenario approaches, all plaintiffs receive a standard measure of adequate compensation; the sliding-scale approach, alternatively, balances award caps with corresponding floors. In short, there is a quid pro quo for alleged losses. Some plaintiffs will receive more than they might otherwise, while others receive less. Finally, all litigants will likely benefit from lower litigation costs and greater ease of settlement.

The dollar amounts suggested quite reasonably derive from the award histories of past juries, with perhaps some judgmental adjustment. Unlike past caps, the values are not arbitrarily selected. In operation, the schedules would directly and immediately achieve their main goal -- bringing standards to a previously standardless area of law and consistency to previously inconsistent judicial outcomes. Well-designed scheduling approaches have the potential to improve both equity (fair valuation of each case and consistent valuations across cases) and efficiency (enhanced predictability that simplifies proof, facilitates settlements, and eases insurance rating). [248]

C. Constitutional Considerations [249]

1. Equal Protection and Due Process. -- The constitutional validity of the three scheduling proposals would almost certainly be sustained against federal equal protection and due process challenges. Review under federal equal protection [250] and due process analysis would most **[*970]** likely proceed under the traditional rationality standard that applies to economic and social welfare legislation. [251] In such circumstances, a law need only be rationally related to a legitimate state interest to be constitutionally valid. [252]

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This somewhat mechanistic and toothless standard does not require courts to investigate the weightiness of the governmental interest asserted and does not typically require a close fit between the means chosen to effectuate the goal and the goal itself. For example, it would be "rational" in this sense to burn down a barn to kill a rat. Further, courts will not allow an empirically based challenge to undo a legislative classification. Even if dubious on empirical grounds, the legislation will be sustained if the legislative judgment was logically plausible. [253] It is therefore unsurprising that nearly all legislative classifications have been sustained when courts apply this standard. [254] Thus, the scheduling reforms proposed here would most likely pass muster [255] under this traditional form of constitutional review.

At the state level, the federal approach to equal protection and due process generally prevails, but there have been some successful challenges to past efforts at tort reform. [256] Decisions striking down medical malpractice reforms in North Dakota [257] and New Hampshire [258] are well known, but the durability of tort reforms against state constitutional attack exceeds their general reputation. [259] In California and Indiana, the **[*971]** two "strongest" examples of malpractice reform have been upheld, [260] and reviewing courts have generally been quite deferential to legislative reforms, typically applying the federal rational basis test of validity. [261] Indeed, more recent state court decisions show a clear trend away from intensified scrutiny of state tort reform legislation, [262] with two of the more aggressive states, Kansas and Montana, backing away from earlier decisions in their most recent pronouncements. [263]

To the extent that state equal protection and due process analysis accords with the permissive federal standard, [264] the reforms proposed in this Article will likely be found constitutional. Moreover, our proposals would also likely pass constitutional muster even in those jurisdictions that apply a more rigorous and searching degree of scrutiny. More searching review can require an examination of the weightiness of the interest being promoted and a tighter fit between the goals and the means adopted in furtherance of those goals. In either case, [265] our proposals are appropriate.

[*972] First, with respect to the importance of the interest promoted, the proposed reforms address the fundamental integrity of the judicial process -- the desirability of achieving fairness among litigants by assuring that similarly situated plaintiffs receive comparable damage awards for pain and suffering. They are also designed to facilitate the smooth functioning of the insurance market, a fundamental component of the current liability-compensation system. These reasons are surely sufficiently weighty to justify legislative action, even under heightened judicial scrutiny.

Second, the fit between the proposed policy approach and the underlying policy objective is quite close and should pass any reasonable standard requiring such a fit. The proposals are designed to deal directly with the fairness and efficiency of judicial administration of personal injury awards, especially for nonpecuniary damages, which now lack any systematic standards and show considerable variability in ostensibly similar cases. Moreover, the proposals accomplish their objectives without unduly burdening any class of litigant, since each of the reforms acts to prevent undervaluation as well as overvaluation.

2. Jury Trial. -- Damage caps have recently been challenged in federal and state courts on right-to-jury-trial grounds. The argument is that legislatively set caps impinge upon jury prerogatives in the award of damages. Both the Third [266] and Fourth [267] Circuits have recently rejected such challenges under the Seventh Amendment. Damage caps have been invalidated, however, in a few state supreme courts on the basis of jury trial provisions in state constitutions. [268] Nonetheless, these attacks have not had uniform success; at least one state supreme court has upheld a flat cap against a jury trial challenge. [269]

Courts that have invalidated damage caps on jury trial grounds have worried that the province of the jury is impermissibly invaded by legislative countermanding of jury verdicts. Believing that the jury's role extends to the remedies phase of litigation, [270] the Washington

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Supreme Court in Sofie v. Fibreboard Corp. [271] found that, without a change in underlying substantive law, a damage cap impermissibly deprives the **[*973]** jury of its role in setting damages. Under the typical cap, a jury decides the amount of damages in accordance with existing principles of substantive law, and then the court imposes the legislatively determined cap to reduce the jury award. From a formalistic viewpoint, the jury's determination appears to be countermanded.

In our view, the Washington court's equation of the power of the jury to determine damages and the power of the jury to award an amount of damages beyond a legislatively established maximum is unsatisfying. It leads us to probe more deeply to understand the concerns of the Sofie majority. Our conclusion is that the issue is a matter of characterization. If one thinks of the damage cap as a matter of substantive law, [272] then it is appropriate to respect the legislative determination of remedial bounds. The legislature is viewed as merely establishing the parameters within which a jury's factfinding deliberations proceed. [273]

The Washington Supreme Court expressed concern that a jury's findings of fact "go unheeded" when a court, applying a statutory cap, adjusts the jury's award. [274] Such an approach, it said, only "pays lip service to the form of the jury but robs the institution of its function." [275] The court seemed troubled by the failure of the legislature to directly alter the underlying principles of law that govern tort litigation. Non-economic damages were permitted (as before), and juries were permitted to determine the amount of nonpecuniary loss actually incurred (as before), but the statute operated to reduce the amount of damages actually awarded if the jury's determination exceeded that permitted by the statute's formula. [276] Thus, the Washington court viewed the cap not as a **[*974]** change in substantive law, but rather as legislative second-guessing of a factual determination entrusted to the jury.

The concerns of the Sofie majority can be addressed by drawing an analogy to the area of procedural due process. There, a successful plaintiff must show the deprivation of a liberty or property interest protected by the fifth and fourteenth amendments. [277] If an interest is protected under state law, the procedures required when that interest is impaired must pass constitutional scrutiny. The adequacy of state procedures of redress is subject to scrutiny under federal due process standards. [278] Thus, while states can modify the substantive law and thereby modify the scope of the "property" interest, they are bound by the federal due process clause once that entitlement exists. [279]

The procedural due process analogy would seem to capture the concerns of the Sofie majority. Once specific damage determinations are left up to the jury, then the legislature must allow the jury's determination to stand. If the legislature wishes to change the rules for assessing damages, however, it can circumscribe the jury's discretion and establish new standards. In the latter situation, there would be no after-the-fact, legislative countermanding of actual jury findings. Rather, the reform would fall within the legislature's inherent and legitimate power to declare rules prospectively -- that is, to legislate.

Our three alternative proposals for scheduling awards for non-economic damages thus appear to satisfy the concerns voiced in Sofie. They do not leave intact existing standards for the determination of awards for pain and suffering, but instead establish a new basis for the assessment of non-economic damages. There is no jury determination that is countermanded by judicial implementation of a legislatively-enacted cap nor is there any inference that the jury's calculation of loss is untrustworthy. Rather, the jury is relied upon to categorize the level of injury severity in its factfinding capacity, under a new legislatively-mandated method of determining damages.

In sum, the proposals quite clearly change the substance of the law of non-economic damages. They are not merely arbitrary restraints upon a jury's power to award a large amount of damages. For these reasons, our proposals satisfy even the interpretation of jury trial requirements enunciated by the high courts of Washington and Kansas.

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[*975] VI. CONCLUSION

This Article proposes to reform the calculation of "pain and suffering" and other non-economic damages, the least well-defined and most variable element of recovery for personal injuries. We suggest limiting the currently open-ended liability by replacing a system reliant on broad jury discretion with a system of quantitative "scheduling" of awards for nonpecuniary loss. In this vein, we present three alternative scheduling models: (1) a system of standardized awards set according to a matrix of dollar values based on victim age and injury severity; (2) a scenario-based system that employs descriptions of prototypical injuries with corresponding award values designed to be given to juries as guides to valuation; or (3) a system of flexible ranges of award floors and caps that reflect the various categories of injury severity.

We prefer matrices or scenarios to a system of floors and caps, primarily because they more comprehensively address the problems of variability and predictability in damage awards. Floors and caps, alternatively, deal only with the problem of extreme outliers, thus preventing excessive over- and under-valuation, but maintaining broad jury discretion (and variability in outcomes) for awards within the range. Whether matrices or scenarios are preferred depends primarily on how much one thinks non-economic damages should be individualized, how much one trusts juries to exercise discretion, and the importance one attaches to achieving similar results in similar cases.

Regardless of the scheduling model adopted, the relative levels and absolute sizes of allowances should be based on past award history, as modified and promulgated by state legislatures and, possibly, judiciaries. (We also suggest a substantive change to provide for non-economic loss in wrongful death.) The increase in values over time should be controlled, so that longer-term predictability is maintained. Our proposals are all fairer and more consistent with past results than the arbitrary flat caps now frequently enacted by legislatures -- but not infrequently invalidated by the courts. Scheduling-oriented reforms promise to increase the consistency of awards across cases, as similar cases would achieve more similar results. These are important goals in their own right. Moreover, the enhanced predictability of awards would promote settlement and make tort liability a more readily insurable event.

Most tort reform debate has pitted the advocates of defendants against those for plaintiffs in an adversary political process that mirrors the courtroom. As in the courtroom, the drama is played as a zero-sum game -- plaintiffs lose exactly what defendants win, and vice versa. From collateral source offset to various sorts of caps on awards, every dollar saved for defendants (or their insurers) is a dollar taken directly from plaintiffs (or their attorneys). Very few reforms allow both sides to gain. However, by improving accuracy and predictability, the scheduling of non-economic loss promises to help both sets of advocates. And, not **[*976]** insignificantly, the proposed reforms would promote confidence in the fairness of the legal system.

FOOTNOTES:

n1 See infra notes 56-85 and accompanying text.

n2 We follow conventional usage in referring to pain, suffering, and other nonpecuniary or intangible losses as "non-economic," even though they have a demonstrable value in the marketplace. See infra notes 101-02 and accompanying text.

n3 See infra note 165 and accompanying text.

n4 See Bovbjerg, Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card, 22 U.C. DAVIS L. REV. 499 (1989).

n5 See infra notes 210-15 and accompanying text.

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n6 See infra notes 120-23 and accompanying text.

n7 See infra notes 105-06 and accompanying text.

n8 See infra notes 100-04 and accompanying text.

n9 See, e.g., RESTATEMENT (SECOND) OF TORTS § 901 (1965) (the purposes for which actions in tort are maintainable: "(a) to give compensation, indemnity or restitution for harms; (b) to determine rights; (c) to punish wrongdoers and deter wrongful conduct; and (d) to vindicate parties and deter retaliation or violent and unlawful self-help"). For a broader view emphasizing the social role of accident prevention, see G. CALABRESI, THE COSTS OF ACCIDENTS (1970). Tort actions can also be justified by the need for social fairness in distributing innumerable liability insurance payments. For a discussion of numerous goals attributed to personal injury law, see ABA SPECIAL COMMITTEE ON THE TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW, 4-1 to 4-225 (1984) [hereinafter ABA COMM. REPORT]. The appropriate level of awards may vary according to whether the focus is on individual compensation or general deterrence.

n10 Punitive damages may also be available where a defendant's conduct is egregious. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 9-15, 213 (5th ed. 1984) [hereinafter PROSSER & KEETON]. This Article does not deal with punitive damages, which call for a different analysis. In any event, they are granted in a low percentage of cases. See Daniels, Punitive Damages: The Real Story, A.B.A. J., Aug. 1, 1986, at 60. Our jury verdict research, described infra at notes 144-46, also found very few cases in which punitive damages have been awarded.

n11 See, e.g., D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES (1973); C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES (1935). For a standard judicial charge to a jury, see 8 AMERICAN JURISPRUDENCE PLEADING & PRACTICE FORMS (1982):

In determining the amount of plaintiff's damages, if any, you may take into consideration the following elements as shown by the evidence: 1. The [plaintiff's] pain and suffering, disabilities or disfigurement, and any accompanying mental anguish. . . . 2. The reasonable and necessary medical expenses incurred or paid. . . . 3. The loss of time or earnings. . . . In arriving at the amount of your award, you will take into consideration the nature, extent, and duration of the plaintiff's injuries, if any, his age, and his general health and condition both before and after the occurrence of the injuries complained of.

Id. at 274.

n12 See, e.g., The "City of Panama," 101 U.S. 453, 464 (1879) ("[T]here cannot be any fixed measure of compensation for the pain and anguish of body and mind, . . . but the result must be left to turn mainly upon the good sense and judgment of the tribunal assigned by law to ascertain what is a just compensation for the injuries inflicted."); Beagle v. Vasold, 65 Cal. 2d 166, 172, 417 P.2d 673, 675, 53 Cal. Rptr. 129, 131 (1966) ("No method is available to the jury by which it can objectively evaluate [nonpecuniary] damages, and no witness may express his subjective opinion on the matter."); Botta v. Brunner, 26 N.J. 82, 92-93, 138 A.2d 713, 718 (1958) ("There is and there can be no fixed basis, table, standard, or mathematical rule which will serve as an accurate index and guide to the establishment of damage awards for personal injuries.").

n13 There can, however, be considerable disputes in some cases. For example, the parties may disagree about the degree of causation and fault, the necessity of certain medical expenses and other services, the duty of the plaintiff to mitigate losses, and the appropriate rate (if any) of prejudgment interest.

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n14 See D. DOBBS, supra note 11, §§ 3.2-.4; 4 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 25.3 (2d ed. 1986); Schaefer, Uncertainty and the Law of Damages, 19 WM. & MARY L. REV. 719 (1978).

n15 There are at least three approved approaches: exact offset of inflation against discount rate, yielding a zero rate (so the jury is to use nominal current dollars); partial offset to achieve one discount rate (e.g., to one to three percent, a "real interest rate"); or separate calculation of inflation and discount rates, to be applied jointly. See 22 AM. JUR. 2D Damages §§ 143-50 (1988).

n16 Many variables are involved in projecting future losses, even before applying various discount rates. See generally M. BROOKSHIRE, ECONOMIC DAMAGES: THE HANDBOOK FOR PLAINTIFF AND DEFENSE ATTORNEYS (1987).

n17 See, e.g., PROSSER & KEETON, supra note 10, at 949-51.

n18 See D. DOBBS, supra note 11, § 3.1, at 135-38. The first award for pain and suffering seems to date from 1763. U.S. DEPT. OF TRANSP., AUTOMOBILE INSURANCE AND COMPENSATION STUDY: MOTOR VEHICLE CRASHES AND THEIR COMPENSATION IN THE UNITED STATES 35 (1971).

n19 Compare Goodrich, Emotional Disturbance as Legal Damage, 20 MICH. L. REV. 497 (1922) (noting the common law requirement that mental anguish be accompanied by some physical injury for recovery) with Bell, The Bell Tolls: Toward Full Recovery for Psychic Injury, 36 U. FLA. L. REV. 333 (1984) (arguing in favor of liability for negligently caused emotional distress, even absent physical harm).

n20 See, e.g., Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970). See generally Miller, The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime," 1 U. HAW. L. REV. 1 (1979).

n21 E.g., Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981) (loss of society and companionship of parent); see also Leibson, Recovery of Damages for Emotional Distress Caused by Physical Injury to Another, 15 J. FAM. L. 163 (1977); Love, Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship, 51 IND. L.J. 590 (1976).

n22 See, e.g., Capelouto v. Kaiser Found. Hosps., 7 Cal. 3d 889, 892-93, 500 P.2d 880, 883, 103 Cal. Rptr. 856, 859 (1972) ("pain and suffering" a "unitary concept" that "has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal").

n23 D. DOBBS, supra note 11, at 548-49 n.59; see also Cramer, Loss of Enjoyment of Life as a Separate Element of Damages, 12 PAC. L.J. 965 (1981). It is logical to consider new, negative harms caused by an injury (e.g., pain, distress) separately from the loss of previously enjoyed, positive benefits of uninjured existence (e.g., loss of enjoyment of life, loss of consortium), although the legal issues do not seem to be framed in just these terms. This distinction normally makes little practical difference, for loss of enjoyment typically accompanies conscious pain; it matters greatly, however, in cases of death, shortened life expectancy, or permanent coma where there is arguably no conscious suffering. Compare Flannery v. United States, 718 F.2d 108 (4th Cir. 1983) (no award under Federal Tort Claims Act for loss of enjoyment of life when claimant is permanently comatose and cannot benefit personally from the use of money), cert. denied, 467 U.S. 1226 (1984) with Flannery v. United States, 297 S.E.2d 433 (W. Va. 1982) (as a question of state law, certified from the United States Court of Appeals for the Fourth Circuit, recovery for the lost enjoyment of life

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was allowable) and Shaw v. United States, 741 F.2d 1202 (9th Cir. 1984) (recovery for lost enjoyment of life allowed where child was severely injured, but partially conscious).

n24 See generally D. DOBBS, supra note 11, at 557-62; PROSSER & KEETON, supra note 10, at 949-54; S. SPEISER, RECOVERY FOR WRONGFUL DEATH AND INJURY (3d ed. 1988).

n25 See PROSSER & KEETON, supra note 10, at 949-54. Even so, the survivors' loss of society and comfort and the pecuniary value of lost services may be recoverable. Id. at 951.

n26 Historically, legislatures have also simply feared extravagant awards. See PROSSER & KEETON, supra note 10, at 951.

n27 D. DOBBS, supra note 11, at 545.

n28 Id.; Dunlap v. Lee, 257 N.C. 447, 450-52, 126 S.E.2d 62, 65-66 (1962).

n29 See Botta v. Brunner, 26 N.J. 82, 93, 138 A.2d 713, 718 (1958) ("No market place exists at which . . . malaise is bought and sold. A person can sell quantities of his blood, but there is no mart where the price of a voluntary subjection of oneself to pain and suffering is or can be fixed."); see also 8 AMERICAN JURISPRUDENCE PLEADING & PRACTICE FORMS 278 (1982) (standard jury instruction stating that "[p]ain and suffering have no market value; they are not capable of being exactly and accurately determined; and there is no fixed rule or standard whereby such damages can be measured").

n30 See Miller, Willingness to Pay Comes of Age: Will the System Survive?, 83 NW. U.L. REV. 876 (1989); Viscusi, Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?, 8 INT'L REV. L. & ECON. 203 (1988).

n31 The dollar value of nonpecuniary los is equivalent to the difference between what people are willing to pay to avoid a particular risk or injury or death and the solely financial component -- medical expenses, lost earnings -- associated with that risk. For example, even someone fully insured against economic losses is nonetheless willing to pay for some safety measures and will require a wage premium to run risks at work. Such behavior shows the economic value of "non-economic" losses. See generally Miller, supra note 30; Viscusi, supra note 30. See also infra notes 100-05 and accompanying text.

n32 Compare Chiarello v. Domenico Bus Serv., 542 F.2d 883, 886 (2d Cir. 1976) (discount) with Ball v. Burlington N. Ry., 672 S.W.2d 358, 361 (Mo. App. 1984) (no discount). See generally D. DOBBS, supra note 11, § 8.8, at 574.

n33 See supra notes 12 and 29; see also McDonald v. Union Pac. Ry., 42 F. 579 (C.C.D. Colo. 1890), aff'd, 152 U.S. 262 (1894) ("[T]here is no price-list, there is no price-current, for pain, for human suffering. . . . The value that shall be put upon pain and suffering is left to [the jury and its] own good common sense and experience. . . ."). One standard jury instruction nearly apes the language affirmed by the Supreme Court in McDonald, telling the jury "that the law cannot give you a precise formula or yardstick . . ., but the law contemplates that twelve intelligent jurors, exercising common sense and calling upon their experiences in life, can satisfactorily fix and determine a proper award of money. . . ." 8 AMERICAN JURISPRUDENCE PLEADING & PRACTICE FORMS 278 (1982).

n34 See Zelermyer, Damages for Pain and Suffering, 6 SYRACUSE L. REV. 27 (1954).

n35 In the aftermath of a 1979 airplane crash, one expert estimated that the likely awards for the deaths of people of identical age and background ranged from a low of $ 10,000 to a high of $ 2 million, depending on the varying legal rules in different states. Warren, How Much is a Human Life Worth?, Chicago Sun-Times, May 25, 1980, at 5, col. 1 (cited in ABA COMM. REPORT, supra note 9, at 2-26).

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n36 See generally M. BROOKSHIRE, supra note 16. Most large awards involve very substantial amounts for future economic and non-economic losses. Juries have discretion concerning the discount rate to apply in the face of conflicting expert testimony. When calculating losses over a plaintiff's expected lifetime (at the extreme, perhaps 75 years for a child injured at birth), the present value depends greatly on whether the discount rate net of inflation is, say, 2% or 4% -- either of which could be justified depending upon different assumptions about appropriate rates or future developments.

n37 See 5 M. BELLI, MODERN TRIALS §§ 64.1-65.0 (2d ed. 1982). Mr. Belli claims to have devised the "dollar a day pain and suffering" rule. Id. § 64.1, at 3.

n38 Most courts allow the use of such a mathematical formula, although a few do not, fearing that it lends an inappropriate aura of precision. D. DOBBS, supra note 11, at 545-48.

n39 PROSSER & KEETON, supra note 10, at 469-75.

n40 Id. at 475-77. Statutory modification of the traditional joint and several rule of liability has been a popular tort reform, especially in the 1980s. Id. at 475 nn.59-60; see also Bovbjerg, supra note 4, at 526-27, 539.

n41 C. MCCORMICK, supra note 11, § 16, at 64 (jurors are not permitted to compromise among themselves nor agree on a "quotient" process -- i.e., to average the damage assessments of the 12 jurors); accord 8 AMERICAN JURISPRUDENCE PLEADING & PRACTICE FORMS 267 (1982) (Form 137: "In arriving at your verdict you must not make a compromise between the question of liability and the amount of damages, if any.").

n42 See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 256 n.12 (1981) ("Ordinarily, an error in the charge is difficult, if not impossible, to correct without retrial, in light of the jury's general verdict.").

n43 See C. MCCORMICK, supra note 11, § 16 (noting that courts protect jury verdicts from attack by making it hard for jurors to impeach their own verdicts later and limiting appellate review of a trial court's refusal to grant a new trial); see also District of Columbia v. Woodbury, 136 U.S. 450 (1890) (amount of damages is a jury question, to be determined in view of the circumstances of each particular case).

n44 C. MCCORMICK, supra note 11, § 19.

n45 Id. §§ 16-19. One classic formulation would allow remittitur only where damages are "flagrantly outrageous" or "extravagant," showing the jury to have acted from "passion, partiality, prejudice, or corruption." 22 AM. JUR. 2D Damages § 1022 (1988).

n46 Judges do have the benefit of some level of experience with prior cases, through, and may hear post-verdict argument regarding the results in similar cases.

n47 Not all appeals filed result in appellate decisions, of course; rather, most are settled or dropped. According to a major systematic study, post-trial adjustments are made to 20% of all jury verdicts (including defense verdicts) and 25% of plaintiff verdicts; almost all adjustments are reductions. M. SHANLEY & M. PETERSON, POSTTRIAL ADJUSTMENTS TO JURY AWARDS 26-27 (Rand Corp. No. R-3511-ICJ, 1987) (based on random sample of verdicts from Chicago, San Francisco, and selected California counties). Of the reductions, 62% result from private settlement, 23% from court action, and 13% from collection problems; of the court actions, most occurred on motion to the trial court, rather than through the appeals process. Id. at 45-46. Shanley and Peterson do not report what proportion of verdicts are appealed. Among closed malpractice claims from Florida (1985-88), 4,759 closed after suit but before verdict, 696 closed at verdict, and 66 closed on appeal.

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general issues, including the inflation rates expected in different sectors of the economy, the rates of productivity growth, and the applicable discount rate, if any.

With regard to economic damages, parties in each case are able to argue for and against various methods of projecting losses, and of discounting them to present value. [36] With regard to non-economic damages, it is commonplace for attorneys to present a variety of wholly subjective ways for juries to compute awards for pain and suffering. For example, some suggest that the jury award the plaintiff a small amount per period of time (such as a day); when this seemingly small amount is multiplied by the plaintiff's life expectancy, however, it results in a large total dollar award. [37] Under this "per diem" or "unit of time" approach to valuation, [38] seemingly inconsequential differences in values per unit of time lead to very large differences in awards.

Other factors may also influence variation in awards. The same injury should, of course, be compensated differently when comparative negligence applies, [39] or when suit is brought against only one of multiple tortfeasors and that defendant is not jointly liable for the harm caused by the others. [40] Damage awards, however, are meant to compensate the plaintiff for harm suffered, and not to be influenced by the degree of culpability of a particular defendant (except in cases of comparative negligence). Defendant culpability is a matter for punitive awards. Nor are juries supposed to compromise damage awards to reflect uncertain liability, causation or credibility of proof. [41] Nonetheless, award variation **[*915]** predicated on such factors is nearly impossible to observe or control directly.

The wide latitude that the substantive law gives juries is matched by the procedural discretion also conferred, as juries have traditionally operated through general verdicts -- single findings of liability with an associated award of all damages. Thus, the key decisionmakers need not explain their rationale or methods for arriving at a particular award figure, and their findings are difficult to review. [42] Judicial oversight only marginally curbs jury discretion. [43] Trial judges have long enjoyed the power to alter a jury verdict -- by decreasing it (remittitur) or raising it (additur), by entering judgment notwithstanding the verdict, or by ordering a new trial (in the case of an obviously compromised verdict, for instance). [44] But such changes occur infrequently; the law disfavors judicial intervention and calls for change only in cases of egregious error. [45] Moreover, trial judges, like juries, lack objective standards for deciding when to apply these powers or what award levels to deem adequate and not excessive. [46] Appeals are commonly taken, adding another level of potential oversight; [47] but appellate judges are also required to defer to damage findings below [48] and lack objective standards for altering **[*916]** awards. [49] Most post-verdict changes in jury awards occur by virtue of settlement, just as far more cases are settled prior to verdict than are decided by a jury. [50]

Damage awards in tort cases thus emerge from an intensive investigation of very particularized circumstances -- an investigation that is evaluated under only the most general of guidelines. Moreover, no reservoir of experience accumulates to guide juries and judges. There is simply no judicial analogue to the guidance of common law and the role of precedent when judges and juries turn to the quantification of damages; reported decisions discuss only general approaches. Not surprisingly, this system causes considerable variation in awards. Some experienced observers go so far as to characterize the entire legal process as a "lottery," which plaintiffs are enticed to play through the (uncertain) prospect of a "jackpot" recovery. [51] The general perception of what juries do and how awards are determined is very important; although most cases are settled through an insurance process, [52] the parties' predictions of a jury's decision influences their decisions about whether to drop a case, settle it (and for how much), or continue toward trial and verdict.

Why does the law countenance such imprecision? Lawyers, after all, generally pride themselves on promoting standards and accountability. For one thing, the current law of damages focuses on fairly resolving disputes between specific parties -- not on achieving consistency across the vast spectrum of cases. [53] It seeks to achieve retail justice for the

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Sloan & Hsieh, Variability in Medical Malpractice Payment: Is the Compensation Fair?, Table 2 (forthcoming).

n48 Appellate courts generally will not intervene in a trial court's decision unless there is "clear abuse" of discretion, e.g., Bingaman v. Grays Harbor Community Hosp., 103 Wash. 2d 831, 699 P.2d 1230 (1985), and are to view the evidence in a light favorable to upholding the judgment of the trial court, e.g., Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498, 507, 364 P.2d 337, 342, 15 Cal. Rptr. 161, 166 (1961).

n49 See Zelermyer, supra note 34, at 27-30. On review, appellate courts may consider the size of awards in similar cases. See, e.g., Precopio v. Detroit Dep't of Transp., 415 Mich. 457, 473-81 & nn.29-30, 330 N.W.2d 802, 809-13 & nn.29-30 (1982); Gaspard v. LeMaire, 245 La. 239, 257-59, 158 So. 2d 149, 155-56 (1963). On rehearing in Gaspard, however, the Louisiana Supreme Court disavowed the value of comparing awards in analogous cases. Id. at 264-72, 158 So.2d at 158-60; see also infra note 155.

n50 See M. SHANLEY & M. PETERSON, supra note 47, at 45-46.

n51 E.g., J. O'CONNELL, THE LAWSUIT LOTTERY 8-9 (1979).

n52 According to a recent nationwide survey, about 90% of malpractice claims were closed prior to verdict. U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE: CHARACTERISTICS OF CLAIMS CLOSED IN 1984 37, Table 2.20 (1987) [hereinafter GAO STUDY].

n53 The ABA Special Committee on the Tort Liability System found it "lamentable that the system yields dissimilarities in treatment of cases which appear to be the same." ABA COMM. REPORT, supra note 9, at 4-143. See also generally W. BLUM & H. KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM (1965) (addressing the variety of approaches proposed to handle auto accident injuries and compensation).

n54 The ABA Committee Report, in addressing concerns about unequal damage awards for similar injuries, focused on the use of legal theories (e.g., strict liability versus negligence). ABA COMM. REPORT, supra note 9, at 4-140 to 4-145. Recognizing the tension between the axiomatic command to treat like cases alike and the system's failure to achieve such outcome uniformity, the committee "rational"-ized this phenomenon by concluding that the process as a whole worked to permit courts to "confront[ ] social and technological change . . . in . . . diverse factual situations." Id. at 4-143.

n55 Id. In 1986, the property/casualty insurance industry collected $ 176.5 billion in premiums. INSURANCE INFORMATION INST., INSURANCE FACTS: 1987-88 PROPERTY/CASUALTY FACT BOOK 16 (1987).

n56 see, e.g., P. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988). Much is made of the argument that the open-ended threat of very high awards hurts defendants in negotiation, but this effect is easily exaggerated. Equally overemphasized are the anecdotal reports of seemingly frivolous cases that result in large jury awards or settlements. See, e.g., Sorry, Your Policy Is Canceled, TIME, Mar. 24, 1986, at 16.

n57 There is relatively little dispute about the generally arising frequency of insurance claims and litigation through the mid-1980s. See, e.g., Danzon, The Frequency and Severity of Medical Malpractice Claims: New Evidence, 49 LAW & CONTEMP. PROBS. 57 (Spring 1986); Priest, The Current Insurance Crisis and Modern Tort Law, 96 YALE L.J. 1521 (1987). However, the precise reasons people bring liability claims are unclear, at least for medical malpractice. Numerous factors other than the injury seem to affect the probability of a claim being made. See Zuckerman, Koller & Bovbjerg, Information on Malpractice: A Review of Empirical Research on Major Policy Issues, 49 LAW & CONTEMP. PROBS. 85, 94-97 (Spring

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1986). And the frequency of insurance claims has fallen as unexpectedly as it has risen -- notably, in the aftermath of the publicity and legal reforms generated by the 1970s malpractice crisis and the 1980s general liability crisis. See Bovbjerg, supra note 4, at 510-11, 551-52; Schiffman, Medical-Malpractice Insurance Rates Fall: Drop in Number of Claims Cuts Insurers' Costs, Wall St. J., Apr. 28, 1989, at B1, col. 3; Malpractice: The Tide Recedes, THE ECONOMIST, June 24, 1989, at 29.

n58 Both sides, of course, must bear the costs of litigation, which affect total losses and gains, but neither insured defendants nor plaintiffs represented on a contingent-fee basis bear many of those costs directly.

n59 See J. O'CONNELL, supra note 51, at 18-19, 28. Professor O'Connell recounts numerous examples of the dynamics of settlement negotiations, including a malpractice case involving an infant in which the defendant hospital raised its settlement offer from $ 85,000 (made after the claim was filed) to $ 425,000 (after ten days of trial). Both figures were rejected. While the jury was out, the defendant agreed to a compromise figure of $ 500,000, only to learn that the jury was about to exonerate the hospital. Id. at 3-4.

n60 Discussion often highlights million dollar awards. See, e.g., M. SHANLEY & M. PETERSON, COMPARATIVE JUSTICE: CIVIL JURY VERDICTS IN SAN FRANCISCO AND COOK COUNTIES, 1959-1980, at 27-29 & Fig. 9 (Rand Corp. No. R-3006-ICJ, 1983). This and other Rand research on jury verdicts note that million dollar verdicts were almost nonexistent in these two jurisdictions in the early 1960s, but account for most of the dollars awarded by juries today. Id.; see also M. PETERSON & G. PRIEST, THE CIVIL JURY: TRENDS IN TRIALS AND VERDICTS, COOK COUNTY, ILLINOIS, 1960-1979 20-29 (Rand Corp. No. R-2881-ICJ, 1982); M. PETERSON, CIVIL JURIES IN THE 1980s: TRENDS IN JURY TRIALS AND VERDICTS IN CALIFORNIA AND COOK COUNTY, ILLINOIS 33, 37, 52-53 (Rand Corp. No. R-3466-ICJ, 1987). These are high-award jurisdictions, and amounts paid in settlement (pre- or post-verdict) are typically less.

n61 See supra notes 25-26 and accompanying text. Some legislatures initially even set low ceilings on recovery for wrongful death. D. DOBBS, supra note 11, § 8.5. In the era of the original statutes, death was the common catastrophic injury. Modern medical care, however, has created the truly catastrophic event -- survival from injury in debilitated condition and in need of continuing, expensive medical attention. These injuries claim the highest recoveries. See infra Table 2; GAO STUDY, supra note 52, at 41, Table 3.3.

n62 See, e.g., P. HUBER, supra note 56; 4 WORLD & I (1989) (symposium on the tort crisis published by the Washington Times); Sorry, Your Policy Is Canceled, supra note 56.

n63 See, e.g., U.S. TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS 34-41 (1987) (assembling data compiled by Rand Corp. and Jury Verdict Research, Inc.); M. SHANLEY & M. PETERSON, supra note 60, at 26-36.

n64 The mid-1970s crisis in medical malpractice coverage and the mid-1980s general liability upheaval have been thoroughly chronicled. See generally P. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY (1985); S. LAW & S. POLAN, PAIN AND PROFIT: THE POLITICS OF MALPRACTICE (1978); Bovbjerg, supra note 4, at 501-10; Harrington & Litan, Causes of the Liability Insurance Crisis, 239 SCIENCE 737 (1988); Priest, supra note 57; Robinson, The Medical Malpractice Crisis of the 1970's: A Retrospective, 49 LAW & CONTEMP. PROBS. 5 (Spring 1986). For a review of empirical evidence on the existence of a crisis, see generally F. SLOAN & R. BOVBJERG, MEDICAL MALPRACTICE: CRISES, RESPONSE, AND EFFECTS ON HEALTH CARE & COVERAGE (1989) (Research Bulletin from the Health Insurance Association of America).

n65 One study of cases in Chicago and parts of California found that jury awards were altered after tiral, typically by a reduction, in about 20% of cases. Very large awards were

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even more likely to be reduced. As a result, payments averaged only 71% of the initial jury award. M. SHANLEY & M. PETERSON, supra note 47, at 27-47.

n66 See infra notes 82-85 and accompanying text.

n67 It seems clear that the severity of insurance claims, that is, the average payment per claim, has risen rather steadily for some time. See Danzon, supra note 57. But the cost of living has also grown, and the injury severity, that is, the extent of real damage done, has also been subject to change. Controlling for inflation and injury severity, there are indications that the growth in awards has not been extensive, at least for medical malpractice. Sloan & Hsieh, supra note 47.

n68 See infra notes 100-06 and accompanying text.

n69 According to common wisdom, pain and suffering damages are perceived to comprise a high proportion of large awards. Trebilcock, The Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis, 24 SAN DIEGO L. REV. 929, 964 (1987). There is some evidence to the contrary. See NAT'L ASSOC. OF INS. COMM'RS, MALPRACTICE CLAIMS: FINAL COMPILATION 48-66 (M. Sowka ed. 1980) [hereinafter NAIC STUDY]; accord Sloan & Hsieh, supra note 47 (malpractice indemnity payments in Florida rise by less than a dollar for every additional dollar of economic loss, implying that large awards have smaller non-economic component).

n70 The Rand Corporation's Institute for Civil Justice abstracted personal injury cases from jury verdict reporters covering Chicago, San Francisco, and some other parts of California. See, e.g., M. PETERSON, supra note 60; see also M. PETERSON & G. PRIEST, supra note 60; M. SHANLEY & M. PETERSON, supra note 60. In cooperation with Rand, we used a similar data collection format to abstract jury verdict data for Florida and Kansas City. We, but not Rand, used the nine-point injury severity scale described in Table 1, infra. Rand used a five-point scale and a severity of injury index. Because we prefer the nine-point scale, we have limited our empirical analysis in this Article to data from the Florida and Kansas City reporters; because we are presenting scheduling reforms for jurisdiction-by-jurisdiction adoption, the text is limited to analysis of our larger jurisdiction, Florida.

n71 A national 1977 product liability database has been used in several studies by Duke University economist W. Kip Viscusi. See, e.g., Viscusi, supra note 30. Two national databases covering malpractice settlements are also available. See NAIC STUDY, supra note 69 (data on claims closed between 1975 and 1978); GAO STUDY, supra note 52 (data on claims closed in 1984). Some states also require insurers to report medical malpractice claims to their respective state departments of insurance. See, e.g., CAL. BUS. & PROF. CODE § 801(b) (West Supp. 1989); IND. CODE ANN. § 16-9.5-6-1 (West 1984 & Supp. 1989). We have analyzed data from 1976-88 on closed malpractice claims in Florida. See Sloan & Hsieh, supra note 47.

n72 So as to increase the number of observations for empirical analysis, we also merged Florida and Kansas City compilations. The results were not materially different and are not presented here.

n73 See, Sloan & Hsieh, supra note 47.

n74 See NAIC STUDY, supra note 69, at 10.

n75 For temporary injuries, the duration of injury is the major classification factor. The terms "recovery delayed" and "no delay" reflect the scale's origins in medical malpractice, in which patients already under medical care claim further injury due to alleged negligence by their health care provider.

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n76 This category is least satisfactory because it encompasses an extremely wide range of harm. Unlike the categories of physical injury, the "fright" category lumps together temporary, minor distress (e.g., a relative's fainting in the hospital at the sight of blood) with much more serious, long-term psychological damage (such as that likely caused a patient raped by a medical provider).

n77 E.g., GAO STUDY, supra note 52; Sloan & Hsieh, supra note 47.

n78 Data came from two Florida jury verdict reporters (covering the entire state) and from a Kansas City reporter (covering the two-state metropolitan area); both state and federal court verdicts are included. About two-thirds of the cases come from the larger jurisdiction, Florida; the Kansas City data is included to create a larger pool of observations for statistical examination. Our regression analysis is controlled for the jurisdictional effect on valuation. Cases included auto injuries, medical malpractice, products liability, and all suits against governmental defendants. We coded the data using modified versions of the latest Rand Corporation forms and coding instructions. For a description of verdict reporters and the coding process, see M. PETERSON & G. PRIEST, supra note 60, at 61-69. All jury determinations are stated as full damage awards, adjusted for findings of comparative negligence. Note that this is not the same as actual payment made in the cases. See supra note 65 and accompanying text. All amounts are expressed as thousands of 1987 dollars (brought to current value by the Consumer Price Index).

n79 Only one case involved emotional injury that was unaccompanied by physical harm; thus, the "emotional only" category cannot be separately considered in our analysis of jury awards. For malpractice insurance payments, however, category 1 injuries generally result in higher payment than those in category 2. Sloan & Hsieh, supra note 47.

n80 One significant factor is jurisdiction. In our data base, award values in Florida cases alone are higher than those presented in Table 2, which combines data from Florida and Kansas City to increase the statistical reliability. For instance, the mean for all Florida awards is $ 552,000 rather than the $ 490,000 reported in Table 2. On other influential factors, see infra notes 84-85.

n81 For the regression analysis supporting this statement, see Bovbjerg, Githens & Sloan (forthcoming). A similar analysis using only malpractice data, but also including settlements, appears in Sloan & Hsieh, supra note 47.

n82 The variation coefficient is quite large for settlements within any given severity category, and the coefficients are similar for available data on jury verdicts and on settlements. See id.

n83 To avoid giving the extreme awards undue statistical prominence, Table 2 omits the 5% of values farthest from the median. Part of the extremely wide variation in these severity level distributions is due to combining relatively higher Florida valuations with relatively lower Kansas City ones. Another factor may be selective reporting of jury awards in the verdict reporters; plausibly, plaintiff attorneys are likely to overreport large awards, while the defense overreports small ones. Similar variations, however, exist in the Florida malpractice closed claim data base, see Sloan & Hsieh, supra note 47, which includes all insurance payments in the state. Moreover, Kansas City awards are consistently lower than Florida ones, although only urban courts are in the former area and many rural ones are in the latter. Subsequent regression results, see infra note 156, control for jurisdiction.

n84 Injury severity, age, economic loss, and other objective factors used in our analysis mainly relate to the outcome of an injury and the prognosis for the future (e.g., lifetime care). By hypothesis, these factors should be reasonably accurate predictors of the economic consequences of an injury. But suffering and other nonpecuniary damages may also arguably relate to the process of injury. For instance, one may reasonably suppose that more short-run

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suffering occurs when an injured person is trapped in wreckage for many hours after an auto accident than when the identical injury occurs under general anesthesia in the course of surgery. This argument, however, is less persuasive with regard to injuries involving ongoing suffering.

n85 A large part of the observed variation in awards, however, plausibly reflects errors in awards, that is discrepancies between the amount awarded and the plaintiff's actual losses, or at least what a more typical jury would have awarded. Of course, juries cannot presently be told what other juries have awarded in similar cases.

n86 There is no mechanism for even monitoring, much less assuring, horizontal equity across cases. Cf. D. DOBBS, supra note 11, at 550 (wide variations in awards for pain and suffering raise "substantial doubts whether the law is evenhanded in the administration of damage awards"). Where outcome variation is too extreme, it may be unconstitutional, as small criminal juries have been held to be. See Ballew v. Georgia, 435 U.S. 223, 235 (1978) (holding five-member criminal jury to be unconstitutional denial of sixth and fourteenth amendment right to jury trial, after reviewing social science research raising "significant doubts about the consistency and reliability of the decisions of smaller juries").

n87 See generally Mistretta v. United States, 109 S. Ct. 647 (1989) (upholding constitutionality of federal sentencing guidelines); Prisons: There Must Be a Better Way, THE ECONOMIST, Apr. 22, 1989, at 29-30 (general overview).

n88 See G. CALABRESI, supra note 9.

n89 This argument assumes, plausibly, that physicians and other defendants are risk averse; if they were not, they would not buy insurance. It may also explain physicians' apparent belief in the need for defensive medicine. See Danzon, The Medical Malpractice System: Facts and Reforms, in THE EFFECTS OF LITIGATION ON HEALTH CARE COSTS 28, 29-30 (1985).

n90 See Priest, supra note 57, at 1568; Steptoe, Dispirited Doctors: Hassles and Red Tape Destroy Joy of the Job for Many Physicians, Wall St. J., Apr. 10, 1987, at 1, col. 1. Not all changes in medical practice result from liability fears, however. See F. SLOAN & R. BOVBJERG, supra note 64, at 24-37.

n91 See Ulen, The Economics of the Tort Liability Crisis, 4 WORLD & I 507, 507-08 (1989).

n92 Trial results may be more predictable, however, than the variation shown in Table 2 indicates. The table does to some degree reflect true differences in losses among cases -- difference known to the parties, but unobservable through analysis of the jury verdict reporters. Nonetheless, to the extent that part of the award variation reflects errors in valuation, such errors impede settlement because the resulting unpredictability makes it more difficult for the parties to agree on damages. The more similar their pretrial expectations, the more likely the parties are to settle -- and, at far less cost to themselves and the system. Were there more general agreement on the rules and likely amount of damages in particular cases, one major element of the system's expense could be considerably reduced. See Wittman, Dispute Resolution, Bargaining, and the Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data, 17 J. LEGAL STUD. 313 (1988).

Of course, unpredictable results may make risk-averse parties more willing to settle, thereby saving litigation costs. See Fournier & Zuehlke, Litigation and Settlement: An Empirical Approach, 71 REV. ECON. & STATISTICS 189 (1989). Fournier and Zuehlke suggest that defendants are more risk-averse than plaintiffs. Id. at 193. In one sense, this result is plausible. Some defendants -- physicians in medical malpractice cases and firms in product liability cases, for example -- may have much to lose in terms of damaged reputations. In

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Viscusi's analysis of risk aversion in the contest of product liability, however, the firm is risk neutral and the plaintiff is assumed to be risk averse. Viscusi, Product Liability Litigation with Risk Aversion, 17 J. LEGAL STUD. 101 (1988). One could also argue that some plaintiffs' lawyers have a stake in establishing a reputation by winning big, while corporate defendants keep their reputations relatively unsullied by staying out of the newspaper. Clearly, there is room for much more empirical analysis of these issues.

n93 See J. KAKALIK & N. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 74 (Rand Corp. No. R-3391-ICJ, 1986) (net compensation paid claimants is 52% of total litigation expense for auto torts, 43% for other torts). Unsubstantiated claims exist that up to four times as much is spent on litigation as on compensating injured victims or their survivors. E.g., Grad, Medical Malpractice and the Crisis of Insurance Availability: The Waning Options, 36 CASE W. RES. L. REV. 1058, 1088 (1986).

n94 The "allocated loss expense" (i.e., administrative cost) of malpractice insurers averaged 25.18% of total losses (indemnity plus allocated loss expense) during 1977-86; for commercial auto physical damages, 10.27%; for workers' compensation, 11.11%; and for health insurers, an average of only 3.9% (but 4.9% in 1986). See A.M. BEST CO., BEST'S AGGREGATES & AVERAGES, PROPERTY/CASUALTY 88-91 (1987). Public health care programs, whose administration is even more straightforward, typically cost even less to administer -- for Medicare and Medicaid, less than 5% of total spending. See HEALTH CARE FINANCING ADMINISTRATION, MEDICARE AND MEDICAID DATA BOOK (1986).

n95 "Shocks" resulting from unanticipated large awards would be especially difficult for small insurers (and self-insurers) to absorb. For an interesting analysis linking fluctuations in losses to cycles in the availability and price of liability insurance, see Winter, The Liability Crisis and the Dynamics of Competitive Insurance Markets, 5 YALE J. ON REG. 455 (1988).

n96 See U.S. TORT POLICY WORKING GROUP, supra note 63, at 22-31.

n97 See GAO STUDY, supra note 52, at 19 (payments of $ 250,000 and more accounted for only nine percent of paid malpractice claims in 1984, but fully 61% of total indemnity paid).

n98 Traditionally, primary insurers seek "reinsurance" for large losses. Kramer, The Nature of Reinsurance, in REINSURANCE 1, 5-7 (R. W. Strain ed. 1980). Because there is literally no upper bound to damage awards, reinsurers are extremely concerned about participating to the high levels Purpose of Reinsurance, in REINSURANCE, supra, at 33, 41-42 (explaining the limitations of reinsurance). This may help explain the reduced availability of coverage for medical malpractice in the mid-1970s, and for all liability coverage in the mid-1980s.

n99 See R. MEHR & E. CAMMACK, PRINCIPLES OF INSURANCE 30-32 (1980) (pooling of risks to take advantage of "law of large numbers").

n100 See Miller, supra note 30, at 906-07.

n101 For an early symposium on this topic, see Valuing Lives, 40 LAW & CONTEMP. PROBS. 1 (Autumn 1976); for contemporary summaries, see W. VISCUSI, RISK BY CHOICE 93-113 (1983); Miller, supra note 30.

n102 See Sherrod v. Berry, 629 F. Supp. 159, 162-63 (N.D. Ill. 1985) (ruling that evidence on the "hedonic" value of life is admissible), rev'd, 856 F.2d 802 (7th Cir. 1988); see also Barrett, New Legal Theorists Attach a Dollar Value to the Joys of Living, Wall St. J., Dec. 12, 1988, at A1, col. 1.

n103 E.g., Sherrod, 629 F. Supp. 159 (N.D. Ill. 1985).

n104 E.g., Leiker v. Gafford, 978 P.2d 823 (Kan. 1989) (loss of enjoyment of life is not a

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separate element of damages); Nussbaum v. Gibstein, 73 N.Y.2d 912, 536 N.E.2d 618, 539 N.Y.S.2d 289 (1989) (same); Singleton v. Shur, No. 100,462 (Ohio App., May 18, 1989) (1989 WESTLAW 54383) (disallowing evidence of loss of enjoyment of life in wrongful death action).

n105 Miller, supra note 30, at 893.

n106 Because Table 2's values are derived predominantly from Florida, a high-award jurisdiction, the impact of recognizing value of life evidence would be even greater in most jurisdictions.

n107 Past enactments have generally addressed damage awards rather than standards for liability. Little attention has been paid to making the system more accurate, more predictable, or less expensive to administer. Some reforms have, however, addressed the high cost of administration. See Bovbjerg, supra note 4, at 531.

n108 See Danzon, Medical Malpractice Liability in LIABILITY: PERSPECTIVE AND POLICY 101, 118-19, 122 (R. E. Litan & C. Winston ed. 1988) (arguing that tort rules of damages are economically "inefficient" because they result in greater compensation than other compensation systems, and suggesting that malpractice damages be scheduled by age and severity of injury).

n109 See generally A. LARSON, WORKMEN'S COMPENSATION (rev. ed. 1989) (leading workers' compensation treatise).

n110 Cf. 4 F. HARPER, F. JAMES & O. GRAY, supra note 14, at 495 (asserting that society is moving toward a system of enterprise liability without fault, and with lower damages, in view of the speculative nature of many nonpecuniary items).

n111 The seminal book on this topic is R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965).

n112 The New Zealand Accident Compensation Act of 1972 created a nearly comprehensive no-fault system for compensating most injuries. See Accident Compensation Act, No. 181 (N.Z. 1982).

n113 In the medical malpractice arena, a similar trade occurred in the recent "no fault" statutes enacted by Virginia and Florida for the compensation of certain severely deformed newborns. See FLA. STAT. ANN. § 766.301-.316 (West Supp. 1989); VA. CODE ANN. § 38.2-5000 to -5021 (1950 & Supp. 1989). In some jurisdictions, an increase in the number of claims paid may be a necessary quid pro quo for the constitutional validity of reforms that limit damages awardable or plaintiffs' prerogatives. See infra note 264.

n114 Experience rating is simply the insurance practice of raising or lowering premiums to reflect the number and amount of claims paid (and projected to be paid) over the life of a policy.

n115 Cf. Keeton, Compensation for Medical Accidents, 121 U. PA. L. REV. 590, 614-15 (1973) (arguing that uncertain causation makes medical malpractice inappropriate for no-fault reform).

n116 E.g., Danzon, supra note 108, at 122-23.

n117 The American Medical Association has proposed a fault-based administrative payment scheme with partially scheduled damages that has been introduced in some state legislatures. See AMERICAN MEDICAL SOC'Y, MODEL MEDICAL LIABILITY AND PRACTICE REFORM ACT (1989); AMERICAN MEDICAL SOC'Y, A PROPOSED ALTERNATIVE TO THE CIVIL

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JUSTICE SYSTEM FOR RESOLVING MEDICAL LIABILITY DISPUTES: A FAULT-BASED, ADMINISTRATIVE SYSTEM (1988).

n118 See infra notes 120-43 and accompanying text.

n119 This is demonstrated by Table 2, supra.

n120 Fein v. Permanente Medical Group, 38 Cal. 3d 137, 159, 695 P.2d 665, 680-81, 211 Cal. Rptr. 368, 383-84, appeal dismissed, 474 U.S. 892 (1985). It may also be argued that non-economic losses are not "real" damages and that many damage actions do not allow recovery for intangible losses. For example, mental suffering can attend breach of contract, yet is not generally compensable. There is much mental anguish occasioned by others that the law does not attempt to "monetize" and assign to its cause.

n121 E.g., J. O'CONNELL, supra note 115. Other commentators have also been critical of the present method of awarding non-economic damages, but have stopped short of calling for outright abolition. See Jaffe, Damages for Personal Injury: The Impact of Insurance, 18 LAW & CONTEMP. PROBS. 219 (1953) (disapproving of current method of computing damages); James, Some Reflections on the Bases of Strict Liability, 18 LA. L. REV. 293, 297 (1958) (opposing awards for pain and suffering when the cost is ultimately passed on to the innocent beneficiaries of the wrongdoer's enterprise); Morris, Liability for Pain and Suffering, 59 COLUM. L. REV. 476, 495 (1959) (foreshadowing pressure by the insurance industry on legislatures to limit awards for pain and suffering); Plant, Damages for Pain and Suffering, 19 OHIO ST. L.J. 200, 210-11 (1958) (proposing ceiling on non-economic damages as a way of achieving greater award predictability); Seavey, Torts and Atoms, 46 CALIF. L. REV. 3, 11-12 (1958) (limit pain and suffering to cases of conscious wrongdoing and wrongful acts).

n122 Workers' compensation is the archetype for statutorily limiting non-economic recoveries in exchange for guaranteed recovery of economic losses. See 1 A. LARSON, supra note 109, § 1, at 1-4. "No-fault" automobile insurance is another example. See, e.g., Compulsory Motor Vehicle Liability Insurance, MASS. ANN. LAWS ch. 90, § 34A (Law. Co-op. 1985) (first-in-nation provision originally enacted Aug. 13, 1970); see also R. KEETON & J. O'CONNELL, supra note 111.

n123 See O'Connell, Neo-No-Fault Remedies for Medical Injuries: Coordinated Statutory and Contractual Alternatives, 49 LAW & CONTEMP. PROBS. 125, 131-34 (Spring 1986); O'Connell, Offers That Can't Be Refused: Foreclosure of Personal Injury Claims by Defendants' Prompt Tender of Claimants' Net Economic Losses, 77 NW. U.L. REV. 589 (1982). Professor O'Connell has also proposed that plaintiffs forgo awards for pain and suffering in exchange for guaranteed payment of attorneys' fees. O'Connell, Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees, 1981 U. ILL. L. REV. 333.

n124 E.g., P. DANZON, supra note 64, at 153, 160, 171.

n125 No health coverage, public or private, explicitly pays for non-economic damages; indeed, group health plans "coordinate benefits" where two or more plans are involved, to assure that they do not pay in excess of actual medical costs. See HEALTH INS. OF AM., GROUP HEALTH INSURANCE 51-52, 224-25 (1976). Private disability coverage typically pays less than actual wages lost, in recognition of taxes avoided and to encourage an early return to work and discourage malingering. Public disability programs not only pay small amounts but also impose significant "waiting periods" during which the injured party receives no support -- five months for Disability Income under Social Security. See HOUSE COMM. ON WAYS & MEANS, 101ST CONG., 1ST SESS., BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 42 (Comm. Print 1989) [hereinafter WAYS & MEANS REPORT]. Note, however, that coordination of benefits rarely reaches the proceeds of individual health insurance coverage, and people

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often buy policies that advertise that benefits are "paid directly to you, not the hospital," thus recovering more than economic losses.

n126 Cf. P. HUBER, supra note 56, at 3-17 (unfairness of involuntary "tort tax").

n127 E.g., Danzon, supra note 108, at 114-16.

n128 This economic explanation of insurance essentially embodies a thought experiment. In buying coverage, an individual or household decides to pay a certain amount in the present to receive a right to payment following the uncertain contingency of a particular future loss. Thus, the policyholder moves wealth from the immediate world of today to a hypothetical world in which some calamity has occurred. The theory addresses the decision of how much to transfer from the "normal" world of no injury to the imagined postinjury state of affairs.

n129 See S. SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 245-47 (1987).

n130 Viscusi & Evans, Utility Functions That Are Dependent on One's Health Status: Estimates and Economic Implications, AM. ECON. REV. (forthcoming). It remains hypothetically plausible, however, that some injuries result in increased marginal utility of wealth relative to the uninjured state. For example, a quadriplegic may desire to have special care and may need specialized, expensive equipment merely to engage in commonplace activities such as typing or watching television.

n131 If insurance companies could accurately assess these characteristics, they might respond simply by charging higher premiums, but such assessment is generally seen as too costly or even impossible. Generally, insurers have trouble distinguishing among persons based on probability of loss prior to the sale of coverage. See Hosios & Peters, Repeated Insurance Contracts with Adverse Selection and Limited Commitment, 104 Q.J. ECON. 229 (1989).

n132 Such behavior is not necessarily immoral, just normal self-interest. People naturally want more when someone else is paying. Cf. R. MEHR & E. CAMMACK, PRINCIPLES OF INSURANCE 20-21 (1980) (BOTH DISHONESTY AND INDIFFERENCE TO LOSS ARE FORMS OF MORAL HAZARD).

n133 After the fact insurance valuation of non-economic damages might not be possible at all, for private insurers cannot impose their findings on policyholders in the same way a court can. To help control moral hazard, however, private insurers could "schedule" (ex ante, and as part of the policy) fixed amounts of compensation. See O'Connell, Harnessing the Liability Lottery: Elective First-Party No-Fault Insurance Financed by Third-Party Tort Claims, 1978 WASH. U.L.Q. 693, 698 n.27. Scheduled payments for non-economic loss would still invite exaggeration by claimants in order to move to a higher category of injury (and compensation), however.

n134 By way of deductibles and copayment requirements, for example.

n135 See WAYS & MEANS REPORT, supra note 125, at 40-44.

n136 See RESTATEMENT (SECOND) OF TORTS § 901 (1965).

n137 The best justification for our elaborate liability systems is its deterrent effect. As merely a system for compensating injured parties, it pays too few claimants after too long a delay and at a very high administrative cost. Cf. Bovjerg, Medical Malpractice on Trial: Quality of Care Is the Important Standard, 49 LAW & CONTEMP. PROBS. 321, 328-35 (Spring 1986) (same point in medical malpractice context).

n138 See Fisher, Chestnut & Violette, The Value of Reducing Risks of Death: A Note on New

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Evidence, 8 J. POL'Y ANALYSIS & MGMT. 88 (1989); V. K. Smith, Public Choices and Private Risks: The Role of Economic Analysis 13-14, Benjamin H. Hibbard Memorial Lecture Series, University of Wisconsin-Madison (Oct. 21, 1988).

n139 To a certain extent, developments in damage law have already helped homemakers by allowing recovery for the loss of services, with evidence taken on the market cost of replacing household help. See, e.g., Rindahl v. National Farmers Union Ins. Cos., 352 N.W.2d 837 (Minn. Ct. App. 1984); Garza v. Berlanga, 598 S.W.2d 377 (Tex. Civ. App. 1980).

n140 See Miller, supra note 30, at 881-83.

n141 One survey asked persons to place a dollar value on different body parts lost in an accident. The values were amounts the respondents would have considered adequate compensation from an insurer. Responses varied widely according to the type of respondent. For example, daytime university students valued the loss of an eye, hand, or leg at a median of $ 50,000 (1971 dollars); the same body parts were valued at $ 500,000 by evening university students. Estimates by other groups were well below these figures. For instance, geriatric women valued the loss of a finger at a mere $ 75, and a leg at only $ 500. Plutchik, Conte & Weiner, Studies of Body Image II: Dollar Values of Body Parts, 28 J. GERONTOLOGY 89 (1973). Note, however, that many of these values (even the very low ones) might far exceed economic loss.

Another approach has been to apply statistical analysis to data on jury awards to measure pain and suffering. See Cohen, Pain, Suffering and Jury Awards: A Study of the Cost of Crime to Victims, 22 LAW & SOC'Y REV. 537 (1988). Cohen used data from Jury Verdict Research, Inc., to measure pain and suffering stemming from various criminally inflicted injuries. He appears to have subtracted the amount of economic loss from the total award. Then he regressed the estimated payment for "pain and suffering" on medical plus wage loss for various types of injuries. The regression for gunshot victims was:

pain and suffering = $ 17,957 + [$ 5.20 X (medical + wage loss)]

Id. at 542. The R<2> and standard errors of estimates were not presented, but the R<2> was said to be nearly one. Cohen used regression results and other data to estimate the mean value for pain and suffering associated with various kinds of injuries. In the examples provided, average pain and suffering loss far exceeded economic loss. For example, for gunshot wounds, the mean medical cost and lost wages was $ 3,844, compared to $ 59,344 for pain and suffering. Broken bones or teeth caused $ 1,700 in economic loss, but $ 15,273 in non-economic damage.

W. Kip Viscusi analyzed payments for pain and suffering using data from the Insurance Services Office (ISO) Product Liability Closed Claim Survey, containing data on all claims closed by 23 insurance companies during 1976-77. Viscusi, supra note 30, at 205. To obtain a measure of pain and suffering payment, Viscusi subtracted estimated economic loss from the total payment. When economic loss exceeded the total payment, he set the value of pain and suffering payment at zero. He estimated two equations -- a probit equation with the dependent variable set equal to one if payment was made for pain and suffering, and a tobit equation with the dependent variable defined as the natural logarithm of $ 1 + pain and suffering award. He added $ 1 to the payment because one cannot take the logarithm of a zero value. He included variables for causes of the loss (e.g., laceration, cancer, brain damage), financial loss, and legal theory used in the case, in addition to distinguishing characteristics of the claimant as explanatory variables. He found that payments for pain and suffering in product liability cases are not random, but are also not a constant mark-up of financial losses. Id. at 213. Rather, payments vary most systematically according to injury type (a proxy for severity of injury). Id. Pain and suffering payments were also higher for younger claimants and those who were married or had dependents. Id. at 212. These personal characteristics are likely to increase economic damages, too.

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immediate parties, offering elaborate procedural fairness and minute investigation of the individual circumstances of an injury and the resulting economic and other losses. It virtually ignores larger questions of fairness in valuation [54] and the place of individual cases in a large liability **[*917]** and insurance system. [55] The fundamental, practical problem is that the law lacks objective standards to guide juries and to assess the reasonableness of their awards on review, whether by the trial judge or an appeal.

B. High Awards and Open-Ended Liability

One result of broad jury discretion and the absence of clear standards is freedom to make very large awards. It is frequently argued that the civil liability system is out of control, compensating claims far too generously, [56] especially given the increasing frequency of lawsuits for personal injury and death. [57] A particular focus of complaint is tort law's ever-increasing willingness to countenance "pain and suffering" and other such "intangible" or "non-economic" damages on an open-ended basis. There is virtually no upper bound to defendants' potential liability, while plaintiffs have an inherent and fixed lower bound of zero. [58]

More and more plaintiffs and their contingent fee attorneys are tempted to "hold out" for the change of a "jackpot" recovery, according to this line of thinking. Moreover, even the slim possibility of an enormous verdict may lead defendants to settle non-meritorious cases. [59] Such **[*918]** attacks embody a common-sense judgment that jury awards, settlements in expectation of jury awards, and the resulting insurance premiums have simply grown "too high." [60] Some discussion harks back to the traditional reluctance to allow excessive recoveries, notably in death cases. [61] The "system gone bad" argument often proceeds on anecdotal grounds. [62] Past levels of recovery -- which are said to have been lower -- tend to be used as yardsticks for comparison. [63] The main spur to public action, however, has come not from consideration of damage awards, but rather from the recent "crises" in liability insurance, marked by steep rises in premiums and, sometimes, by the unavailability of coverage at any price. [64]

We do not purport in this Article to assess the appropriateness of present award levels in bodily injury and death cases. To do so correctly would require agreement on the appropriate standards of recovery (now lacking) and detailed examination of a large body of cases (information that is also lacking). Certainly, some awards are very high, especially jury verdicts (which are often publicized before reduction by remittitur **[*919]** or on appeal), [65] but some are extremely low as well. [66] Moreover, it is not clear whether -- and, if so, to what degree -- damage awards have risen much faster than inflation, especially given the severity of claimed injuries. [67]

The "value of life" literature, which for death cases in particular urges considerably higher damage awards than those found in the tort and insurance system, provides an emerging "yardstick" for measuring the appropriateness of awards. [68] At root, one's attitude about the liability system generally, and damage awards specifically, seems to depend a great deal on one's attitude concerning non-economic damages, the main focus of this Article. Our view, discussed at greater length below, is that non-economic damages are real and compensable. It is true, better standards are needed to guide recovery. [69] But the problem of the absolute size of awards seems ambiguous and much less pressing than a somewhat different issue -- the variability and unpredictability of awards, to which we turn next.

C. Variability and Unpredictability of Awards

Fortunately, more than anecdotal evidence is available on jury awards in personal injury cases [70] and insurance settlements in medical **[*920]** malpractice and product liability cases. [71] This Section presents data that our project compiled on jury findings in Florida and Kansas City personal injury cases from 1973-87. [72]

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n142 See PROSSER & KEETON, supra note 10, at 19, 54-66, 359-67.

n143 D. DOBBS, supra note 11, at 550.

n144 Values are calculated by subtracting known economic losses from jury findings of total loss, adjusted for comparative negligence. Some variation may result from this technique, given that the jury verdict reporters do not give uniform data on economic loss and may or may not give present values. Moreover, some cases are lost to analysis altogether because they do not report whether there was any economic loss. We have located two other studies that similarly examine the extent of nonpecuniary damages using multiple regression analysis and similar data bases, although variability is not their focus. See Cohen, supra note 141; Viscusi, supra note 30.

n145 Again here, we combined data from multiple jurisdictions to increase the number of observations and improve statistical confidence in analytic results. However, simple tabulations are not tremendously different for the jurisdictions considered separately, and the patterns are similar, even though Florida awards are systematically higher than those in Kansas City. Consider, for example, that valuations for level 3 injuries in Table 3 vary from less than $ 500 to over $ 56,000 between the bottom and top 25% of awards. Considering cases from Florida alone, the range is more limited, but still extremely large: from $ 20,000 to $ 158,000 for level 3 injuries, and from $ 29,000 to $ 220,000 for level 5 injuries. These categories have enough cases to be statistically credible.

n146 Where a jury verdict reporter contained no statement about economic loss, the case was omitted from the analysis. See supra note 144.

n147 Cases falling two standard deviations from the mean, or at the 2.5% and 97.5% critical values.

n148 See infra notes 238-45 and accompanying text.

n149 Claims that are derivative to the principal bodily injury may call for a distinct variation in the suggested approaches. See infra note 236. In some special cases, an altogether different measure of damages may be appropriate. One such case is "wrongful birth" -- in which the measure of damages is intrinsically different from conventional injuries. Other possibilities include claims primarily vindicating a legal right rather than making a claimant whole and deterring physical injury, such as medical "informed consent" cases.

n150 See infra notes 154-201 and accompanying text.

n151 See infra notes 202-210 and accompanying text.

n152 See infra notes 211-223 and accompanying text.

n153 We do not discuss an obvious, but less appropriate, form of "scheduling" -- setting the non-economic award as a mark-up over economic losses, a more documentable amount. A standard negotiating ploy for personal injury lawyers is to seek as "general," or non-economic, damages some multiple of "special," or economic, damages. See H. ROSS, SETTLED OUT OF COURT (1970). Cohen and Viscusi have independently assessed the relationship between economic loss and payment for non-economic loss. See supra note 141; see also NAIC STUDY, supra note 69, at 48-51, Table 2.6 (non-economic "mark-up" over economic loss decreases for larger and more severe cases, with very large cases and severity level 8 victims actually settling for less than economic loss). Obviously, no simple, fixed multiplier would be acceptable. Moreover, even a variable set of multipliers would fail to be acceptable. First, such a variable set of multipliers would assume that pain, suffering, and loss of enjoyment of life are higher for higher-income people (whose wage loss and medical

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bills, other things being equal, would be higher than for lower income people). Second, it would provide too great an incentive for malingering and other forms of moral hazard which would increase economic harm, and therefore potential economic and non-economic damage awards.

n154 For permanent injuries that shorten life expectancy, age may relate less well to duration of suffering. American courts have not traditionally allowed damages for lost expectation of life as such. See D. DOBBS, supra note 11, at 549.

n155 Many current award listings are arranged solely by body part. See, e.g., 5 M. BELLI, supra note 37, §§ 67.1-.10 (a leading plaintiff attorney's handbook for his brethren); Special Project, A Quantum Study of Pain and Suffering Awards for Personal Injuries in the Louisiana Appellate Courts (1983-85) 31 LOY. L. REV. 889 (1986) (a survey of Louisiana appellate court holdings for pain and suffering awards); 22 AM. JUR. 2D Damages §§ 293-397 (1988) (encyclopedic listing).

n156 We based the regression analysis on jury verdict reporter data from Florida and Kansas City. See supra note 78. In addition to age and severity level, defined as sets of binary variables (zero-one variables), we included explanatory variables for: type of defendant (pure government, government and other, other only); type of case (product liability, auto, medical malpractice, other); and jurisdiction (Florida; Kansas City, Missouri; Kansas City, Kansas). We also included binary variables indicating whether or not the injury aggravated a pre-existing medical condition, where the case was tried (federal versus state court), and whether the case involved loss of consortium (including any similar derivative claims). The dependent variable, payment for non-economic loss, was defined as in Viscusi, supra note 30.

These are the key findings: The equation explains 62% of the variation in payment for non-economic loss (58% when the R<2> is adjusted for degrees of freedom). Valuations are highest for persons having level 7 and 8 injuries (see Table 1 for definitions), and lowest for those in the severity 1 and 2 categories. The relationship between age and payment for non-economic loss is roughly an inverted U. Medical malpractice cases result in the highest awards, on average; the lowest awards come from auto liability cases. Payments are much higher in Florida than in the two Kansas City jurisdictions. Cases in which loss of consortium is claimed result in higher payment for non-economic loss. See also Bovbjerg, Githens & Sloan, supra note 81 (more detailed analysis across five jurisdictions, using Rand data from Chicago and California as well).

n157 If body part were to be used as a classifying variable, greater attention would need to be given to the number and definition of categories, as borderline cases would be more of a danger.

n158 We suggest a fifty-four cell matrix only for discussion purposes. One might well vary the nine-point injury severity scale, creating ten severity levels by distinguishing between short- and long-term "emotional only" injuries, for example. See supra note 76 and accompanying text. Similarly, a distinction could be drawn between permanent injuries limited to disfigurement and those causing functional impairment. See infra note 205.

The number of age categories could also be expanded. In fact, we would prefer to add a seventh age classification for newborns under six months or a year old. Injuries to newborns are an important area of litigation, especially for medical malpractice, but our small data base made separate analysis of this area impracticable.

n159 Arguably, the severity categories also implicitly distinguish between short- and long-duration temporary injuries, as some severe, temporary injuries will inherently involve longer recovery periods than relatively minor, temporary injuries.

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n160 Current jury verdict reporters, used in our research, are insufficient as now organized. A particular failing is the lack of information on post-verdict proceedings. We recommend creating a systematic public reporting system to compile this data. See infra notes 225-27 and accompanying text; see also Bovbjerg, Sloan & Blumstein, Two New Approaches for Assessing Tort Damages for Personal Injuries (submitted for publication).

n161 We suggest that state legislatures perform the sort of policy-minded review we have in mind. See infra notes 238-45 and accompanying text.

n162 The underlying empirical analysis uses data from both Florida and Kansas City, but we estimate values only for Florida. To construct Table 5 from our regression results, we multiplied the coefficients on the case type variables by their respective means and set variables for Kansas city (Florida is the omitted reference category), pre-existing condition, loss of consortium, and federal court (state court is the omitted reference category) equal to zero.

n163 From the regression analysis, it is evident thay jury awards are significantly lower in the Kansas City metropolitan area than in Florida. Awards are about the same in Chicago and a variety of California jurisdictions. See Bovbjerg, Githens & Sloan, supra note 81.

n164 See infra note 170 and accompanying text.

n165 See, e.g., M. SHANLEY & M. PETERSON, supra note 60, at xiii-xv, 30-32; Bovbjerg, Githens & Sloan, supra note 81.

n166 In brief, the extent to which past award differences are legitimate or illegitimate is not clear. One hypothesis is that observed differences in valuation result from pretrial selection -- that malpractice and product liability cases tried to verdict are somehow more severe than auto cases, for instance, in ways not captured by the nine-point severity scale and other objective measures of injury. A competing explanation is that jury sympathies are different in different types of cases, impacting recoveries at all levels of injury. See generally Bovbjerg, Githens & Sloan, supra note 81. To the extent that the former is true, adjustments to past results seem in order for any damages matrix to be employed in the future.

n167 Rand analyses of jury verdicts have found a racial effect, e.g., M. PETERSON, supra note 60, at 2-3. The persuasiveness of one's lawyer would also play a lesser role in influencing damages in a matrix scheduling regime than in a system in which attorneys document injury and losses.

n168 The latter categories are combined in Table 5 because, if taken separately, the number of observations in our data would be too small for statistical confidence.

n169 See supra notes 24-26 and accompanying text.

n170 Most post-trial adjustment is downward, so the total award values (relative values multiplied by the numeraire) are somewhat inflated. See M. SHANLEY & M. PETERSON, supra note 47, at viii, 16-17, 26-28.

n171 Awards might also be adjusted to account for other factors, particularly timing of payment. Even awards for non-economic damages are appropriately brought to present value. A state might also reduce scheduled values under other circumstances where not all the damages are attributable to the actions of the defendant, including revisions to the doctrine of joint and several liability making particular defendants liable for less than 100% of damage, a common tort reform. See Bovbjerg, supra note 4, at 526-27, 541. Regardless of current practice, states might consider reductions for claimants whose injury aggravated a pre-existing condition, for malpractice claimants who allege failure to diagnose a disease (for instance, cancer that progresses due to delayed treatment), and other areas in which there is

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joint causation or the defendant's action deprives the claimant of only a chance at being "whole," but not the reality of a normal life. See generally King, Causation, Valuation, and Chance in Personal Injury Torts Involving Pre-existing Conditions and Future Consequences, 90 YALE L.J. 1353 (1981) (proposing solutions to the "loss of change" dilemma in personal injury litigation).

n172 See supra note 41 and accompanying text.

n173 It seems undesirable, though technically feasible, to create a different payment schedule for pre-verdict settlements. The appropriate extent of compromise would vary widely by party assessments of liability issues, and by precisely when settlement occurred. Private negotiation is better suited to resolve such concerns than statistical analysis.

n174 This contention would be part of an equal protection attack on a point-value matrix. See infra notes 250-65 and accompanying text.

n175 Suggested factors should be suitable for use in scheduling -- objective, verifiable, and so forth.

n176 Although juries must ultimately quantify all factors, objective and subjective, used to make awards, they have the advantage of operating after the fact and presently need not explain how they arrive at a given award value.

n177 The relative influence of this factor may well diminish as injuries become more severe. No matter how arduous the circumstances under which one incurs an injury, presumably these circumstances pale beside the enduring suffering accompanying such injuries as those resulting in lifetime quadriplegia.

n178 By "ordinary victim," we mean the victim whose sum total of subjective factors is within a normal range for people suffering similar injuries (e.g., experiences a normal amount of pain and suffering, possesses neither abnormal sensitivity or insensitivity to pain).

n179 This alternative to the point-value matrix is closely akin to adopting a sliding scale of ceilings and floors for awards. See infra notes 211-23 and accompanying text.

n180 Since the outlier theory recognizes that recoveries can be below or above average, one should also allow amounts below the minimum and above the maximum values shown in Table 5. How far below and above is a matter of judgment. Halfway to the next cell does not work, for there is no next cell at the margins. Perhaps the increment should be scaled to the other differences between adjacent cells in that severity category.

n181 If a state should balk at the concept of specifying jury assessments either as point values or as relatively narrow ranges, an alternative would be to use the ranges as a means of providing information about previous awards to the jury or constraining their discretion. For example, awards within the approved range could be considered presumptively valid; awards outside the matrix-suggested range could require support by evidence showing the case to be atypical. This approach is analogous to establishing guidelines for judicial additur and remittitur.

n182 Logically, matrix-based awards could exceed the justifiable award level for low outlier cases. Thus, a state must decide whether to allow the reduction of awards in addition to increases.

n183 It does not seem feasible or desirable to require settlements to contribute to the pool. This approach to funding would also reward the parties for settling.

n184 For our proposal to create an ongoing data system, see infra notes 225-27 and

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accompanying text; see also Bovbjerg, Sloan & Blumstein, supra note 160.

n185 Either legislators or judges could take the lead in developing a matrix-based system of damage awards. For the roles of legislatures and courts, see infra notes 238-45 and accompanying text.

n186 See infra notes 224-37 and accompanying text.

n187 Miller, supra note 30.

n188 Miller estimates that the value of a lost life is between $ 1,000,000 and $ 3,000,000. Id. at 881-83. Adjustments to find the best value for legitimate nonpecuniary damages make the amount even more indeterminate. Overall, the studies range at least as widely as jury awards, with less variation in what they purport to measure. See also infra notes 198-201 and accompanying text.

n189 See W. LANDES & R. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 186-87 (1987).

n190 See PROSSER & KEETON, supra note 10, at 942 n.24.

n191 See supra notes 25-26 and accompanying text.

n192 If some allowance is not made for rewarding plaintiffs and their attorneys, no cases will be brought and no valuable deterrence achieved. See S. SHAVELL, supra note 129, at 265-70. Similar suggestions have been made for punitive damages, whose raison d'etre is deterrence. See P. DANZON, supra note 64, at 171 & n.26. Some states already mandate that part of any punitive damage award be placed in a fund. E.g., COLO. REV. STAT. § 13-21-102(4) (1987) (one-third of punitive damages payable to state general fund); IOWA CODE ANN. § 668A.1 (West 1987)(75% of punitive award payable to fund unless trier of fact finds willful and wanton act directed specifically at plaintiff).

n193 See infra notes 225-27 and accompanying text.

n194 See supra notes 182-83 and accompanying text.

n195 See infra notes 211-15 and accompanying text; see also infra note 264. Moreover, as a practical legal matter, the maturing of the value of life literature may raise death awards anyway, perhaps in the form of allowing recovery for "economic" value of loss of enjoyment of life, sometimes called "hedonic" damages. But see supra note 104.

n196 The value of life literature should not be read as suggesting a single lump payment for any life lost. Uniform awards for all death cases (say, $ 2,000,000) are unacceptably crude, even accepting a given value as the "best estimate" of the statistically average life. Ted Miller's suggestion that life-year values be used, Miller, supra note 30, at 895, is sensible. However, considerable assumptions are needed to recompute the loss per life-year lost (e.g., making allowance for the age and possibly other demographic characteristics of the people at risk in the studies).

Moreover, adding a possible allowance for pain and suffering, id. at 894, would be problematic. When applying values so derived, one must further calculate precise years of life expectancy lost on an individual basis before finally making an award. This process can be accomplished with expert testimony, but as of now it remains a matter of jury factfinding, not a truly objective scheduling of values.

n197 "Value of life" studies are not "value of injury" studies. The better studies do separately estimate the values of injuries, but they do not sufficiently differentiate degrees of

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injury as a schedule does. See, e.g., Viscusi, Occupational Safety and Health Regulation: Its Impact and Policy Alternatives, in 2 RESEARCH IN PUBLIC POLICY ANALYSIS AND MANAGEMENT 281, 285 (J. Crecine ed. 1981) (value of a "typical job injury" is in the $ 20,000 to $ 30,000 range).

n198 See supra notes 105 and 108 and accompanying text. Despite this shortcoming, policymakers could decide to anoint a particular value as "correct" in a particular state.

n199 Cf. Miller, supra note 30. A seldom addressed additional complication comes from the assumption that an observed value of avoiding a risk of death can be divided by that risk to give the value of an entire life. In fact, valuations probably vary considerably by level of risk faced. See W. LANDES & R. POSNER, supra note 189, at 187-89.

n200 See M. DRUMMOND, G. STODDART & G. TORRANCE, METHODS FOR THE ECONOMIC EVALUATION OF HEALTH CARE PROGRAMMES 115-17, 122-23 (1987); Miller, Narrowing the Plausible Range Around the Value of Life (forthcoming 1990).

n201 See, e.g., Crane, Is That Malpractice Victim Faking It?, MED. ECON., June 5, 1989, at 40 (insurers and defense attorneys estimate that only five percent or less of malpractice claims are "greatly exaggerated or outright phonies"). Crane recounts numerous incidents of exaggeration and even fraud by malpractice claimants, such as a plaintiff who claimed to be "unable to work, drive a car, or engage in sex or any strenuous physical activity," but was filmed hiking, swimming, and playing tennis. Id. at 40, 42-43.

n202 If mandatory, the scenario approach would work as a point-value matrix of as few as ten values. A predictable objection to mandatory application of such an approach is that ten values offer too little variation to adequately fit the award to circumstances. Hence, scenarios should operate as guideposts. Far more than ten may be created, but a smaller number would go to the jury in any given case. See infra notes 208-09 and accompanying text.

n203 See Miller, supra note 30, at 898.

n204 Id. at 898-99.

n205 Nondisabling disfigurement is difficult to accommodate within this or any other system because it is qualitatively different from literal pain and affects enjoyment of life in a mental rather than physical way. It may be that a separate set of scenarios is needed for such cases, and they are extremely difficult to categorize. The same point holds true for the other scheduling approaches.

n206 See McCORMICK, supra note 11, § 88, at 316 ("The various forms of mental suffering are as numberless as the capacities of the human soul for torturing itself.").

n207 Currently, juries must work from the relatively few "benchmarks" supplied by parties' arguments at trial. Such benchmarks include arguments that pain is worth a certain number of dollars per day. See supra notes 37-38 and accompanying text. Alternatively, parties employ expert doctors to testify that the plaintiff is, for example, 90% disabled or that his impairment is worse than that of three-quarters of the patients seen by the expert.

n208 For the standard severity scale, see supra Table 1. One might prefer 10 levels, providing different categories for permanent and temporary "emotional only" injuries. See supra note 76. Additional levels might be provided for disfiguring, but not disabling, injuries. See supra note 205.

n209 Sequential jury instructions would be easy to employ given the adoption of special verdicts as we recommend. See infra notes 231-34 and accompanying text. All evidence regarding liability and damages would be presented as part of this unitary proceeding.

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n210 See, e.g., CAL. CIV. CODE § 3333.2 (West Supp. 1989) ("noneconomic" loss cap of $ 250,000 in malpractice cases); OHIO REV. CODE ANN. § 2307.43 (Baldwin 1989) (cap on general damages in medical claims not involving death). The Ohio statute was held unconstitutional in Duren v. Suburban Community Hosp., 24 Ohio Misc. 2d 25, 495 N.E.2d 51 (1985).

n211 See Bovbjerg, supra note 4, at 525 nn. 115-17, 543 nn. 188-90. A recent malpractice task force report for the Department of Health and Human Services also recommended not a cap on all damages -- like that applicable in then-Secretary Bowen's home state of Indiana -- but rather a cap on non-economic damages only. U.S. DEP'T OF HEALTH & HUMAN SERVICES, REPORT OF THE TASK FORCE ON MEDICAL LIABILITY AND MALPRACTICE 130-32 (1987); see also U.S. TORT POLICY WORKING GROUP, supra note 63, at 80 (recommending $ 200,000 cap on non-economic damages). Note that as Governor of Indiana, Secretary Bowen had been a major supporter of that state's cap on overall malpractice awards, yet in his federal role recommended that states enact caps only on pain and suffering.

n212 Ohio's cap on "general damages" was declared unconstitutional because the cap limited economic damages and therefore violated due process and equal protection principles. Duren v. Suburban Community Hosp., 24 Ohio Misc. 25, 27-29, 495 N.E.2d 51, 55-56 (1985). But see Etheridge v. Medical Center Hosps., 237 Va. 87, 376 S.E.2d 525 (1989) (upholding total damages cap of $ 750,000).

n213 Of the 23 state enactments through calendar year 1987, four set a $ 250,000 cap and four others $ 500,000. See Bovbjerg, supra note 4, at 543 & n.18; see also Boyd v. Bulala, 647 F. Supp. 781, 785 n.2 (W.D. Va. 1986) (listing states upholding and overturning all types of damage caps). The range of caps is quite broad. See, e.g., CAL. CIV. CODE § 3333.2 (Deering 1989) (1975 cap of $ 250,000 subsequently held constitutional in Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, appeal dismissed, 474 U.S. 892 (1985)); S.D. CODIFIED LAWS ANN. § 21-3-11 (1988) ("total damages" cap of $ 1,000,000 in malpractice cases); TEX. REV. CIV. STAT. ANN. art. 4590i, § 1103 (Vernon 1987) (1977 statute providing for cap of $ 150,000 on non-economic damages in malpractice cases to become effective if preferred $ 500,000 cap on total damages in § 11.02 were held unconstitutional); WIS. STAT. § 893.55 (1985-86) ($ 1,000,000 cap on non-economic damages in malpractice cases). The Texas Supreme Court has held unconstitutional both the $ 500,000 cap on total damages and the fallback provision capping non-economic damages at $ 150,000. Lucas v. United States, 757 S.W.2d 687 (Tex. 1988).

Some state legislatures have had the foresight to "index" their damage caps for inflation. See, e.g., MICH. COMP. LAWS ANN. § 600.1483(4) (West 1989); MO. REV. STAT. § 538.210 (1988).

n214 See generally F. SLOAN & R. BOVBJERG, supra note 64, at 18-24. Caps do not, however, guarantee reductions in overall awards. A ceiling may become a target or even a floor; in New Zealand, for example, a cap on non-economic damages quickly became the standard payment, perhaps in part because it was set quite low, at least by American standards. See generally G. PALMER, COMPENSATION FOR INCAPACITY: A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA 227 (1979). Moreover, caps can be circumvented because all damages are subject to wide variation in reasonable ranges and because the dollar-denominated components of awards are fungible. A jury (or judge) facing a cap on non-economic damages could readily increase the award amount for economic loss to make up the difference. See Green v. Franklin, 190 Cal. App. 3d 93, 103-04, 235 Cal. Rptr. 312, 322-23 (1987); Kalven, The Jury, the Law, and the Personal Injury Damage Award, 19 OHIO ST. L.J. 158, 161 (1958).

n215 Because of this unfair impact against the most severely injured plaintiffs, some reviewing courts have held flat caps to be unconstitutional, generally on equal protection

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grounds. Some courts have similarly been troubled by the application of caps to malpractice cases only. See infra notes 257-60 and accompanying text.

n216 There is to date one example of a flexible cap with varied limits for non-economic awards. See WASH. REV. CODE § 4.56.250 (1988) (held unconstitutional in Sofie v. Fibreboard Corp., 112 Wash. 2d 636, 771 P.2d 711 (1989), because of the statute's abridgment of the right to trial by jury). Washington's statute uniquely provided that claimants could not recover for non-economic damages in excess of a formula: 43% of the average annual wage in the state multiplied by the life expectancy of the injured person, counted as not less than fifteen years. According to one report, the resulting maximums ranged in 1986 from $ 117,000 to $ 573,000. AMERICAN MED. ASS'N, DEP'T OF STATE LEGISLATION, DIV. OF LEGISLATIVE ACTIVITIES, LIMITS ON RECOVERY (1987). This approach, however, relies too much on one factor, life expectancy, which is not even unambiguous in its expected impact on intangible losses. See Table 5, supra, and accompanying text. The relevant life expectancy under the statute was apparently that of a normal person, not that of the particular plaintiff, however enfeebled as a result of the injury or damage. It also took no account of the severity of the plaintiff's injury, the single most important variable.

n217 Most caps are not adjusted to account for changes in economic conditions over time, like inflation. But see MICH. COMP. LAWS ANN. § 600.1483(4) (West 1989); MO. REV. STAT. § 538.210 (1988).

n218 Apparently, drafters of the California cap thought their $ 250,000 level would affect 5% of cases -- in 1976. See Fein v. Permanente Medical Group, 38 Cal. 3d 137, 172, 695 P.2d 665, 690, 211 Cal. Rptr. 368, 393, appeal dismissed, 474 U.S. 892 (1985).

n219 Expenses of litigation yield a negative recovery in losing cases, but this risk is borne by contingent-fee attorneys in 85-98% of cases. J. KAKALIK & N. PACE, supra note 93, at 37.

n220 There is precedent for a floor for nonpecuniary damages. As a general rule, where special damages have been shown, general damages should also be awarded. 22 AM. JUR. 2D Damages § 42 (1988). A jury should be so instructed when a request is made, Wheeler v. Huston, 288 Or. 468, 480-81, 605 P.2d 1339, 1346 (1980), and verdicts have been overturned for failure to include awards for pain and suffering in such cases. See, e.g., Webster v. City of Colfax, 250 Iowa 181, 93 N.W.2d 91 (1958).

n221 Legislators could, of course, opt for some other percentile.

n222 Applied by trial judges, sliding-scale caps and floors would closely resemble the traditional judicial process of reviewing a jury award for excessiveness or inadequacy. Indeed, legislatures would do well to pose the sliding scale in these familiar terms.

n223 The matrix, of course, aims to create less variable results in all cases, rather than merely cutting off the extremes.

n224 In addition to these practical concerns shared by all the proposed scheduling models, there are political and constitutional concerns that are addressed later in this Article. See infra notes 238-79 and accompanying text.

n225 Existing jury verdict reporters do not include information on all cases, nor are data verified and kept in a consistent format. Moreover, post-trial alterations are not included. Finally, and fundamentally, not all jurisdictions are even covered by existing reporters.

n226 Precopio v. Detroit Dep't of Transp., 415 Mich. 457, 471-72, 330 N.W.2d 802, 808-09 (1982).

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n227 For a detailed exposition of this proposal, see Bovbjerg, Sloan & Blumstein, supra note 160.

States might also consider including information on settlements. Our proposal, however, focuses scheduling on the publicly determined valuations made by juries and judges. Those values are the only "official" determinations of the liability system, even though 90% or more of personal injury claims are settled, and expectations of the results of adjudication heavily influence settlements. So we recommend against including such data. Moreover, it is difficult to obtain accurate data and because too many external factors influence settlement amounts, including compromises on liability. According to research on malpractice claims, preverdict settlements pay less for all severity categories than do jury awards -- though a higher proportion of malpractice claims settle than other types of claims. See Sloan & Hsieh, supra note 47.

n228 See supra text accompanying notes 185 and 221.

n229 For a longer exposition of this view, see Bovbjerg, Sloan & Blumstein, supra note 160.

n230 See infra notes 231-34 and accompanying text on special verdicts. Additor would appear to be unavailable in federal courts because of the seventh amendment. See Dimick v. Scheidt, 293 U.S. 474 (1935).

n231 Some tort reform statutes already mandate special verdicts. See, e.g., CAL. CIV. CODE § 3333.2 (West Supp. 1989); N.Y. CIV. PRAC. L. & R. 4111(d) (McKinney Supp. 1988).

n232 There is evidence that jury decisionmaking focuses more on reaching a single "bottom line" than on adding up separately calculated elements of damages. Kalven, supra note 214, at 161 (juries seldom make awards on an item-by-item basis, but rather usually arrive at a single dollar amount without detailed analysis).

n233 See Green v. Franklin, 190 Cal. App. 3d 93, 103-04, 235 Cal. Rptr. 312, 322-23 (1987) ("an instruction [on a damage cap] would only serve to increase the possibility that a jury may simply label damages that otherwise would have been denominated noneconomic as economic losses").

n234 Side-stepping of schedules by juries might also be minimized (though probably not eliminated) simply by instructing jurors that the schedules fairly and equally treat parties in similar circumstances and that the values have been derived from the hard work of prior jurors like themselves.

n235 Policymakers may also wish to modify schedule values to reflect other economic or social circumstances.

n236 See, e.g., CONN. GEN. STAT. ANN. § 52-190a (West Supp. 1989).

n237 See, e.g., MINN. STAT. § 549.21 (1988) (nonmeritorious claims only); FLA. STAT. § 768.56 (1981) (all losing suits). The Florida statute was upheld in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), but repealed by the state legislature in 1986.

Another cross-cutting issue, not considered in detail here, is how scheduling should deal with derivative claims, including suits for loss of consortium, support and so forth. Such claimants have not suffered actual bodily injury and hence cannot themselves be readily classified as to severity of injury. Most current award caps appear to cover all claims together, e.g., WASH.

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REV. CODE § 4.56.250(1)(B) (1988) ("loss of consortium . . . and all other derivative claims . . . are to be included"), and some judicial authority supports this approach, e.g., Yates v. Pollack, 194 Cal. App. 3d 190, 239 Cal. Rptr. 387 (1987) (applying single cap to all claims by multiple survivors), although such consolidation has been questioned. See Jordan v. Long Beach Community Hosp., 201 Cal. App. 3d 1402, 248 Cal. Rptr. 651 (1988) (opinion decertified for publication) (under state's cap on non-economic damages, limit applies to each separate and distinct cause of action). Obvious options include scheduling only one amount for nonpecuniary loss without regard to derivative claims, scheduling derivative claims separately, or allowing some percentage add-on for derivative claims. This Article takes no position on these issues, which call for more investigation.

n238 One exception is the regulation of lawyers' contingency fees, in which both judiciaries and legislatures have been active, the former under their power to control the bar. See, e.g., Florida Bar re Amendment to the Code of Professional Responsibility, 494 So. 2d 960 (Fla. 1986); FLA. STAT. ANN. § 766.109 (West Supp. 1989).

n239 See Andrews v. Grand & Toy Alberta, Ltd., [1978] 2 S.C.R. 229 (Can.); Thornton v. Board of School Trustees, [1978] 2 S.C.R. 267 (Can.); Arnold v. Teno, [1978] 2 S.C.R. 287 (Can.).

n240 Many policy choices must be made to implement a scheduling reform. Each jurisdiction must decide the general scheduling approach to adopt and make numerous specific design choices. For example, implementing a matrix-based reform requires agreement on at least the following: (a) that using age and injury severity as the only classifying variables is reasonable; (b) that the chosen categories for age and severity are appropriate; (c) that the aggregate wisdom of past awards is reasonable and should thus be institutionalized; (d) that the relative values computed from past jury findings are intuitively reasonable; (e) normative or other adjustments are needed to relativities; and (f) the dollar numeraire to apply in a given year. It is certainly conceivable that a state supreme court could "legislate" a scheduled approach to damages for pain and suffering, if only as a guide to additur and remittitur. A complex schedule seems more plausible as a matter of judicial administration, however, than as a decision in a single lawsuit.

n241 Fein v. Permanente Medical Group, 38 Cal. 3d 137, 158-60 n. 16, 695 P.2d 665, 680-81 n. 16, 211 Cal. Rptr. 365, 384 n. 16, appeal dismissed, 474 U.S. 892 (1985). The California Supreme Court cited with approval the dissent by Justice Traynor in Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498, 511, 364 P.2d 337, 345, 15 Cal. rptr. 161, 169 (1961) (questioning the desirability of pain and suffering awards, but deferring to legislative judgment).

n242 A number of legitimate state interests underlie the scheduling proposals. The major policy concern is the fairness and efficiency of judicial administration of personal injury awards. The integrity of the judicial process itself may also be at risk in the absence of assurance that similar cases will receive similar results and undue variability in results may have a constitutional dimension.

A subsidiary public concern is the smooth functioning of liability insurance, traditionally a state-regulated industry. Without insurance, today's liability-compensation system could not function, and many businesses would not accept the legal risks of operating. Long-run legal predictability is desirable, especially to facilitate reinsurance of "long tail," high-dollar risks like medical malpractice and toxic torts. When awards change markedly without warning, as they can under the present, open-ended system, then long-run predictability is undermined. Improved legal stability will not necessarily end periodic short-term "crises" in insurance markets, however, and doing so is not the rationale of the proposals.

The fairness of compensation to injured parties also affects the public health, though less directly, as accident victims should be assured access to sufficient compensation for their

Jury findings of damage vary considerably. Nonetheless, some scenarios are more likely than others to yield high awards. The best available single predictor of award amount is the severity of injury, [73] as measured on the nine-point scale conventionally used for evaluating malpractice insurance cases. [74] Table 1 presents this ranking system, with level 1 (fright) indicating the least severe type of injury and level 9 (death) the most severe.

TABLE 1

SEVERITY OF INJURY SCALE

Severity of Injury	Examples
1. Emotional only	Fright, no physical damage.
2. Temporary insignificant	Lacerations, contusions, minor scars, rash. No delay.
3. Temporary minor	Infections, misset fracture, fall in hospital. Recovery delayed.
4. Temporary major	Burns, surgical material left, drug side-effect, brain damage. Recovery delayed.
5. Permanent minor	Loss of fingers, loss or damage to organs. Include non-disabling injuries.
6. Permanent significant	Deafness, loss of limb, loss of eye, loss of one kidney or lung.
7. Permanent major	Paraplegia, blindness, loss of two limbs, brain damage.
8. Permanent Grave	Quadriplegia, severe brain damage, lifelong care or fatal prognosis.
9. Death	

Source: National Association of Insurance Commissioners, supra note 69, at 10.

Boundaries between severity levels are relatively well-defined, with successively higher categories on the index indicating increasingly severe injuries. Death cases (level 9) are unambiguous, although the legal consequences may vary according to how many survivors, if any, bring suit in addition to the estate. Physical injuries (levels 2-8) are reasonably divided into groupings for temporary and permanent damage (levels 2-4 for temporary, 5-8 for permanent). Further distinctions create gradations within the discrete subcategories. [75] These categories are intuitively appealing -- with the possible exception of the "fright" or "emotional only" category (level 1) [76] -- and the scale works well in practice. It has been adopted for official insurance reporting of closed malpractice claims in Florida and New York, and has been used as a tool for injury research. [77]

Table 2 shows a sample distribution of jury awards in personal injury cases by severity category. [78] These data area for verdicts only, and **[*921]** include any reported additur or remittitur, but not any changes on appeal.

TABLE 2

JURY VALUATIONS a OF PERSONAL INJURY VARY WIDELY: DISTRIBUTION BY SEVERITY OF INJURY

(in thousands of 1987 dollars)

Severity Level	Number of Cases c	2.5% Critical Value	25th Percentile	Median
1 (emot.)	1	--	--	37

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losses. The public health is also affected by the ability of the tort system to maintain appropriate levels of deterrence to prevent injury in the first place. These concerns, of course, are best served by ensuring adequate, but not excessive, levels of compensation, both in individual cases and in the aggregate.

n243 It has been argued that federal action is necessary. Cf. Smith, Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws, 38 OKLA. L. REV. 195, 229 (1985) ("vulnerability" of state tort reforms to state court constitutional attacks "suggests the wisdom of federal tort reform legislation"). Nonetheless, tort law is traditionally a state concern, and healthy federalism calls for keeping it so. See Blumstein, Medical Malpractice: Thinking About the Federal Role, 12 J. OF HEALTH & HUMAN RESOURCES ADMIN. 149 (Summer 1989). Moreover, we believe that our proposals would in fact pass state constitutional muster. See infra notes 250-79 and accompanying text.

n244 Moreover, substantial state legislative hearings might add to the political legitimacy of a system of scheduled nonpecuniary damages.

n245 In many states, one could expect joint legislative-judicial efforts. A legislature could enlist assistance from the state's judiciary through an advisory commission of sitting or recently retired judges. Legislative committees could also seek the advice of their state judiciaries acting in their administrative capacity. A hybrid legislative-judicial model of implementation is provided by the history of criminal sentencing guidelines, which addressed a similar problem of undue variation in legal results. See Mistretta v. United States, 109 S. Ct. 647 (1989).

n246 For examples of political and academic attacks, see Goddard, The American Medical Association Is Wrong: There Is No Malpractice Insurance Crisis, L.A. Daily J., May 17, 1985, at 97, col. 1; Cunningham & Lane, Malpractice -- The Illusory Crisis, 54 FLA. B.J. 114 (1980).

n247 See F. SLOAN & R. BOVBJERG, supra note 64, at 1.

n248 Other advantages of our proposals for scheduling reform are institutional and practical. For example, we envision the seeds of some reform being nurtured in the judiciary, a notable change from past reliance on legislation alone. Coordinated reform benefits from both enhanced legitimacy and an increased likelihood of political viability and longevity, as demonstrated by the criminal sentencing guidelines.

The probability of long-term survival for our proposals is also enhanced by mechanisms that allow the scheduling reforms to respond to changes over time. Unlike most flat caps, which remain static and unaltered, we propose a system that not only provides for such basic things as inflationary adjustment, see supra note 235 and accompanying text, but also promotes monitoring and feedback by developing a comprehensive data base for information on awards. See supra notes 225-27 and accompanying text.

n249 A comprehensive analysis of constitutional issues is beyond the scope of this Article. As part of a discussion of implementation issues, however, a brief consideration of potential constitutional matters is important and appropriate. For more detail on constitutional principles applied to tort reforms, see Blumstein & Smith, Constitutional Attacks on Medical Malpractice Laws, in LEGAL LIABILITY AND QUALITY ASSURANCE IN NEWBORN SCREENING 167 (L. Andrews ed. 1985).

n250 The identification and establishment of an allegedly discriminatory set of classifications is a fundamental threshold requirement for a party to mount an equal protection challenge. This is not a trivial issue because our proposals do not single out for separate treatment any particular class of claimants, as happens under malpractice-only reforms and flat caps on damages.

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Even so, plaintiffs presumably would assert that the categories set forth in a matrix or set of scenarios improperly classify the amount of damages allocable for pain and suffering. A complainant could argue that there is considerable overlap across categories that the schedules overlook, and that the use of age and injury severity as measures of pain and suffering is the use of an improper proxy for case-by-case damages assessment.

n251 See Boyd v. Bulala, 877 F.2d 1191, 1196 (4th Cir. 1989) ("a limitation on a common law measure of recovery does not violate a fundamental right or create a suspect classification"). It is extremely doubtful that any form of heightened scrutiny or even rationality review with bite would be applied. See Davis v. Omitowoju, 883 F.2d 1155, 1158-59 (3d Cir. 1989); Lucas v. United States, 807 F.2d 414, 421-22 (5th Cir. 1986); Hoffman v. United States, 767 F.2d 1431, 1435-37 (9th Cir. 1985); Continental Ins. Co. v. Illinois Dep't of Transp., 709 F.2d 471, 475 (7th Cir. 1983).

n252 See Dandridge v. Williams, 397 U.S. 471 (1970).

n253 See Minnesota v. Clover Leaf Creamery, 449 U.S. 456, reh'g denied, 450 U.S. 1027 (1981).

n254 There are some rare exceptions. See, e.g., Allegheny Pittsburgh Coal Co. v. County Comm'n, 109 S. Ct. 633 (1989) (invalidating a crazy quilt pattern of differential property taxation); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (holding illegitimate state's asserted purpose in differentially taxing in-state and out-of-state insurance companies).

n255 See Davis v. Omitowoju, 883 F.2d 1155 (3d Cir. 1989); Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989).

n256 See generally Blumstein & Smith, supra note 249 (more detailed analysis of state constitutional challenges to past tort reforms).

n257 Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978).

n258 Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980).

n259 See Bovbjerg, supra note 4, at 548.

n260 Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, appeal dismissed, 474 U.S. 892 (1985); Johnson v. St. Vincent Hosp., 273 Ind. 374, 404 N.E.2d 585 (1980).

n261 See, e.g., State ex rel. Strykowski v. Wilkie, 81 Wis. 2d 491, 507-10, 261 N.W.2d 434, 442-43 (1978).

n262 See, e.g., Hoffman v. Powell, S.C. , 380 S.E.2d 821 (1989); Etheridge v. Medical Center Hosps., 237 Va. 87, 376 S.E.2d 525 (1989).

n263 Compare Leiker v. Gafford, Kan. , 778 P.2d 823 (1989) and Samsel v. Wheeler Transp. Servs., Inc., 244 Kan. 726, 771 P.2d 71 (1989) with Farley v. Engelken, 241 Kan. 663, 740 P.2d 1058 (1987); see also Meech v. Hillhaven West, Inc., Mont. , 776 P.2d 488 (1989) (overruling prior cases).

n264 Several jurisdictions have applied due-process-like principles under state constitutional open courts provisions to invalidate damage caps. See, e.g., Smith v. Department of Ins., 507 So. 2d 1080 (Fla. 1987); Kansas Malpractice Victims Coalition v. Bell, 243 Kan. 333, 757 P.2d 251 (1988); Lucas v. United States, 757 S.W.2d 687 (Tex.

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1988). Under these cases, "when a common-law remedy is modified or abolished, an adequate substitute remedy must be provided to replace it." Kansas Malpractice Victims Coalition, 243 Kan. at , 757 P.2d at 260. These courts substantively evaluate the fairness of the restriction, requiring that a cut-back in a common-law right be accompanied by a provision of a "reasonable alternative remedy or commensurate benefit." Smith, 507 So. 2d at 1088. Only if the state can show that there is an "overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity" can the lack of a substantive quid pro quo be justified. Id.

Unlike the damages caps held invalid in Florida, Kansas, and Texas, our proposals are not takeaways, nor do they redistribute benefits from any burdened group or shift them to any subclass of potential beneficiaries. The proposals are designed to compensate all victims for non-economic losses fairly and in accordance with the severity of the injury adjusted for age. All three approaches work to counteract undervaluation of damages in addition to overvaluation. Moreover, under the matrix and scenario proposals, all plaintiffs will benefit to the extent that increased predictability promotes settlement and lowers litigation costs. There is, therefore, a mutual shared advantage without clearly identifiable winners or losers. No substantive common-law right is infringed or abolished, and the proposed alternatives to the existing system enhance overall fairness and predictability without disadvantaging, in the name of the common weal, any discrete and clearly identifiable group. For these reasons, our proposals would satisfy any quid pro quo requirements applied by the states.

n265 Compare Craig v. Boren, 429 U.S. 190 (1976) with Pickett v. Brown, 462 U.S. 1 (1983).

n266 Davis v. Omitowoju, 883 F.2d 1155 (3d Cir. 1989).

n267 Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989).

n268 See, e.g., Kansas Malpractice Victims Coalition v. Bell, 243 Kan. 333, 757 P.2d 251 (1988); Sofie v. Fibreboard Corp., 112 Wash. 2d 636, 771 P.2d 711 (1989).

n269 See Etheridge v. Medical Center Hosps., 237 Va. 87, 376 S.E.2d 525 (1989) (upholding against jury trial challenge a total damage cap of $ 750,000 for malpractice cases).

n270 This is apparently contrary to the United States Supreme Court's interpretation of the Seventh Amendment. See Tull v. United States, 481 U.S. 412, 426 n.9 (1987) (Nothing in the [Seventh] Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial. . . . We have been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial.")

n271 112 Wash. 2d 636, 771 P.2d 711 (1989).

n272 The Virginia Supreme Court viewed damage caps precisely in this way -- as a matter of substantive law -- in Etheridge v. Medical Center Hosps., 237 Va. 87, 376 S.E.2d 525 (1989).

n273 The Virginia Supreme Court reasoned that since the legislatively mandated damages cap "does nothing more than establish the outer limits of a remedy provided by the [legislature]," and since "[a] remedy is a matter of law, not a matter of fact," a legislatively established cap on damages "does not infringe upon the right to a jury trial because [it] does not apply until after a jury has completed its assigned function in the judicial process." Id. at 270, 376 S.E.2d at 529. In sum, even if the right to a jury trial includes the right to have a jury assess damages -- a position apparently at odds with the United States Supreme Court's interpretation of the seventh amendment's jury trial provision, see supra note 270 -- that right does not include the right "to have a jury dictate through an award the legal

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consequences of its assessment." Id. at , 376 S.E.2d at 529. In the context of a damage cap, the jury resolves the disputed facts and assesses damages. If the assessment of damages exceeds that which is authorized by law, then the judge must reduce the amount of the award to bring it into conformity with the provisions of the statutory maximum.

n274 Sofie v. Fibreboard Corp., 112 Wash. 2d 636, , 771 P.2d 711, 721 (1989).

n275 Id. at , 771 P.2d at 721.

n276 The Washington Supreme Court opined that, since the legislature had not done away with a cause of action or with the right of civil trial, it could not "deny[] litigants an essential function of the jury." Id. at , 771 P.2d at 719. The statute in question in Sofie had the effect of "directly chang[ing] the outcome of a jury determination. The statute operates by taking a jury's finding of fact and altering it by a predetermined formula." Id. at , 771 P.2d at 720. The consequence was to disregard the jury's deliberations, an unconstitutional encroachment of the powers and prerogatives of the jury.

n277 See Board of Regents v. Roth, 408 U.S. 564 (1972).

n278 See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (rejecting the so-called "bitter-with-the-sweet" doctrine that allowed states to condition conferral of a "property" interest on acceptance of a specified procedure).

n279 Cf. Tull v. United States, 481 U.S. 412, 427 (1987) (Scalia, J., concurring and dissenting) (acknowledging a similar principle in the jury context: Congress can prescribe a fixed statutory amount of damages, but if it chooses not to set the specific amount, then the determination will be within the domain of the jury).

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2		113	1	3	7
3	(temp.)	221	1	8	26
4		48	3	42	82
5		283	3	35	106
6	(perm.)	67	13	156	438
7		45	31	523	1,422
8		16	d 147	2,118	4,214
9	(death)	95	19	239	622
	Total	898	1	17	82

a. Valuation = amount of jury award, adjusted for comparative negligence, if any.

c. Nine cases for which no indication of severity was available are included in the total; all verdicts finding no liability are omitted from the table.

d. Because category has fewer than 40 observations, the critical values are the minimum and the maximum.

Severity Level		Mean	75th Percentile	97.5% Critical Value	Standard Deviation
1	(emot.)	37	--	--	--
2		22	24	104	46
3	(temp.)	69	95	320	98
4		204	263	971	362
5		245	250	1,296	427
6	(perm.)	639	985	2,022	652
7		2,087	2,732	8,827	2,174
8		5,068	6,611	d 18,106	4,503
9	(death)	1,224	1,422	7,777	1,879
	Total	490	328	3,570	1,317

d. Because category has fewer than 40 observations, the critical values are the minimum and the maximum.

Source: Calculated from unpublished jury verdict data, 1973-87, compiled by Urban Institute/Vanderbilt University project.

Two phenomena are most striking in Table 2. First, severity directly influences the level of damages, as one would expect. In general, more severe injuries result in larger recoveries, and there is an upward progression as severity increases, at least within the categories of physical injury. [79] The median value (50th percentile) rises steadily from $ 7,000 for level 2 injuries to $ 4.2 million for level 8 injuries; not surprisingly, the values jump greatly at the level of permanent significant injuries (four time higher for level 6 than for level 5), but fall for death cases (level 9) **[*923]** to "only" $ 620,000 for the median case. The pattern for the mean (arithmetic average) is similar, but with higher dollar values for each level of severity. All the information in Table 2 comes from simple tabulation of data coded directly from the reporters (with correction for comparative negligence); no allowances are made for other factors that may influence particular awards. [80] We have also used multiple regression analysis to examine the influence of other factors that one would logically expect to affect jury awards. All together, observed factors explain about three-fifths of the aggregate variation in jury valuations. [81] Severity of injury alone explains about two-fifths of the

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variation.

Second, the table reveals that the variation in awards is enormous. [82] Within an individual severity level, the highest valuation can be scores of times larger than the lowest. Awards for the most serious permanent injuries (level 8, the most costly injury) range in value from a low of $ 147,000 to a high of $ 18,100,000. Even considering only the spread between the top and bottom quartiles, the range is great. All the awards in the top 25% of level 6 cases, for example, are at least six times larger than any of the bottom 25%; the ranges are even larger for lower severity cases. Very large awards are also disproportionately present; the distributions skew to the high end of values, as mean values always far exceed the medians. [83] Much of this variation may legitimately reflect claimants' precise individual circumstances, as the tort system intends. Table 2 does not, for instance, control for the age of the claimant, a factor that strongly influences duration of permanent injury. Nor does it control for pre-injury earnings, or the amount of medical care received. Including many other factors in a multiple regression analysis in addition to severity as valuation predictors helps explain some of the differences in awards within individual severity categories. It is not possible to fully and objectively adjust for other circumstances that plausibly influence a jury's valuation, **[*924]** such as the subjective nature of how an injury occurred. [84] No amount of adjusting, however, is likely to fully account for the extreme values. For example, a range of $ 147,000 to $ 18,100,000 for awards in compensation for quadriplegia and other injuries requiring lifelong care (level 8 injuries) is inexplicably wide by any standard. [85]

Table 2 documents that the current system works rationally and fairly in an aggregate sense. "Vertical" equity, the fairness between separate categories of injury, is rather good. The main problem is the absence of "horizontal" equity -- the extent of variation within a single category. Although the median, and even mean, awards in a given category may be considered relatively reasonable, the seemingly uncontrolled variability of awards is cause for concern -- similar to anxiety about drowning in a pool averaging only two feet in depth.

D. Resulting Problems of Variability

Why is variability a problem? There are important values served by improving the accuracy and predictability of damage awards. First, fundamental fairness requires similarly situated parties to be treated in a similar fashion by the legal system. It comforts parties little that jury valuations are reasonable in the aggregate when the award in their particular case varies greatly from the norm for the type and severity of the injury suffered. Rather, they are left to accept on faith alone that the discrepancy is warranted. [86]

Second, the inability to achieve sufficiently similar results in similar cases tends to erode general confidence in justice and the integrity of what has become a very large system for personal injury compensation. Harmonizing results across cases, is important as individual tort actions, especially **[*925]** in the aggregate, have great social impact (e.g., on insurance, product costs, availability of medical care). Similar concerns about variations in criminal sentencing, a process once left almost wholly to the discretion of trial judges, have led to mandatory minimum sentences and sentencing guidelines to assure comparable results by category. [87]

Third, highly variable, unpredictable valuations undercut the deterrence function of tort law. Where liability costs are relatively predictable, they can be avoided (where it is efficient to do so) or "built in" to the costs of goods and services. This is how deterrence is supposed to make the world safer. [88] But errors in valuation may cause overdeterrence -- the taking of too many costly precautions, or withdrawal from risky activity altogether. [89] For example, during the liability insurance crisis of the 1980s, many obstetricians reportedly stopped delivering babies, [90] and some manufacturers ceased development or production of certain drugs and goods. [91] Systematic "risk management" of personal injuries is implausible when potential defendants lack confidence in the predictability and stability of awards. To send more effective -- and efficient -- deterrent signals to defendants, the system should focus primarily

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on consistency, predictability, and prompt settlement.

Fourth, today's very particularized (yet standardless) system of valuation is very expensive to run. Each case must start "from scratch" with a fresh and uninitiated jury having no awareness of prior awards. Parties find it more difficult to reach settlement where results at trial are unpredictable. [92] The "handling" expense of delivering compensation through **[*926]** the liability system is high, amounting to about fifty cents on the dollar, [93] far more than that of many other systems. [94] Some of this administrative expense derives from having to make difficult liability decisions, but some also arises from the difficulty inherent in the present method of determining damages. Any reduction in this latter difficulty would lower such expenses by reducing the needlessly spent time of judges and jurors, and by prodding parties toward earlier settlement.

Finally, high payment variability, especially at the upper end of the scale, together with the prospect of further unpredictable changes over time, may affect the very availability of liability insurance. Without the liability insurance system, tort law could not effectively function as a compensation and deterrence system. [95] Recent developments in damage awards have made the insurance markets extremely "skittish." [96] The few very large cases that account for a very large proportion of total dollars involved [97] are a special cause for concern. [98] Insurers normally **[*927]** make risk predictable by diversification -- that is, by pooling together large numbers of similar insureds so that unexpected losses are offset by unexpected gains. [99] Non-random fluctuation, however, cannot be diversified away, and the possibility that the tort system will convulsively increase available damages is not a random risk. Rather, such a systematic increase in available awards would affect the coverage of all the insureds of a liability insurer, thus threatening another liability crisis.

E. Timely Reform and the Potential Impact of "Value of Life" Findings

Given these problems, reform seems desirable, especially reform undertaken in a measured, principled fashion, before the political maelstrom of the next liability insurance crisis. Early action might also help forestall a further unpredictable jump in the level of awards and a widening in the variance among awards that could well follow the entry of "value of life" testimony into courtrooms. [100]

Evidence on the "value of life" comes from accumulating findings about how people value risks of injury and death, both on the job and at home. [101] Several studies justify a very expansive approach to valuing life, including its positive, intangible aspects like the pleasure of living, sometimes called the "hedonic" value of life. [102] Such studies are already an established part of regulatory decisionmaking, and they could soon influence everyday suits for tortious injury and death because of the methodological and regulatory foundation laid. Testimony on the "hedonic" value of life has already been heard in some cases, [103] although it has been rejected in others. [104] The most obvious application of this expertise is in lawsuits for wrongful death and survival actions, but it would also be relevant to pain and suffering, loss of pleasure of life, and other new notions of intangible loss in personal injury cases. These losses would be newly supportable as "economic" elements of loss, and would **[*928]** have corresponding and specific dollar values, not merely vague verbal descriptions.

The "value of life" studies suggest that a typical life is worth one to three million dollars [105] -- an amount above the average recovery for death cases shown in Table 2, and well above the median. [106] This body of work documents the financial value of "intangible" losses, further justifying their inclusion in tort law. It also promises to substantially increase damage awards, at least for death cases, and, if applied in an ad hoc fashion by various juries, would greatly exacerbate the problem of award variability. Such developments would further threaten the viability of liability insurance and undermine the interest of fairness.

Now is a good time to seek fundamental reform of the way the liability system computes

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EMPIRICAL EVIDENCE ON THE DEEP POCKETS HYPOTHESIS: JURY AWARDS FOR PAIN AND SUFFERING IN MEDICAL MALPRACTICE CASES

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SUMMARY:
... The jury system seems to show a desire for punitive action and retribution above and beyond the degree of injury--"let's get the rich doctor." ... In the context of medical malpractice, four overlapping empir- ical assertions have been made: (1) juries give larger awards in malpractice cases than in other types of cases, particularly automo- bile negligence cases, even when injuries are objectively simi- lar--the deep pockets hypothesis; (2) the rates of plaintiff victories in malpractice cases have increased in recent years; (3) the sizes of awards have increased; and (4) the awards for non-economic dam- ages such as pain and suffering in particular are out of control. ... Most of the concern with the deep pockets effect and other factors relating to juror damage awards centers on the non-eco- nomic components of damages, particularly pain and suffering. ... The facts that the mean and median awards were actually slightly larger for single defendants when liability for the injury was ascribed to automobile as opposed to medical negligence and that the overall mean award was slightly larger for medical negli- gence can be ascribed to chance fluctuations in the data. ...

TEXT:
The jury system seems to show a desire for punitive action and retribution above and beyond the degree of injury--"let's get the rich doctor." [1]

A final piece of contrary evidence is more indirect. Danzon's California study, [100] the Rand studies, [101] and subsequent studies comparing jury verdicts with the seriousness of plaintiffs' alleged injuries [102] have consistently concluded that the best predictor of the size of the award is the severity of the injury. [103] If the deep pockets effect is real, these later findings suggest, it must have an effect over and above injury severity, or at least an effect that combines with severity in some unspecified way.

E. Conclusion: Little Evidence One Way or the Other

Influential authors and organizations have made claims about the deep pockets hypothesis. These claims are widely disseminated to the public, legislators and other policymakers, judges, the busi- ness community, and the legal and scientific communities. They play a major role in debates about the tort system. My detailed critique, however, makes it clear that the empirical evidence sup- porting the claim is at best flimsy, and at worst non-existent. On the other hand, my critique does not allow the conclusion that the deep pockets hypothesis is wrong. It simply points out that we cannot say, one way or the other, whether it is wrong on the basis of available data. Aggregate statistics on jury verdicts are not capable of providing the crucial evidence because they cannot rule **[*240]** out a host of plausible alternative explanations. Clearly, then, some other types of data are necessary to test the deep pockets hypoth- esis. One approach is through a controlled experiment.

II. An Experiment and the Results

A. Overview

My students and I conducted an experiment to test the deep pockets hypothesis without the confounding of other variables that occurs in studies of aggregate verdict statistics. The experiment also provided an opportunity to get a direct glimpse of the atti- tudes and beliefs of prospective jurors. A sample of 147 veniremen was asked to award damages for pain and suffering in a case in- volving a young woman who suffered a broken leg and resultant complications. For some jurors, negligence was ascribed to health care providers: either one doctor, two doctors, or a hospital. For other jurors, the cause was ascribed to negligence involving the operation of a motor vehicle and, in parallel fashion to the medi- cal negligence cases, involved either one defendant, two defen- dants, or a business corporation.

B. Rationale

The research strategy was to vary two factors most central to the deep pockets hypothesis while keeping all of the other vari- ables constant. The first factor was the cause of the accident. For approximately half of the subjects, the injury was caused by medi- cal negligence, and the defendants were health care providers. For the remaining jurors, the injury was described as caused by an automobile accident. An auto injury was chosen as the comparison case since most critics have used it as the baseline against which malpractice cases are judged. [104]

The second factor was the number or type of defendants. We hypothesized that one crucial distinction between automobile injury cases and medical malpractice cases was that the former frequently have a single defendant, whereas the latter typically have multiple defendants. As I will discuss in more detail below, a new, although still not well understood, body of research evidence suggests that juries may assess responsibility and damages differently for corpo- **[*241]** rate acts than for acts by single individuals. [105] Consequently, of the jurors who were told that medical negligence caused the inju- ry, some had a version in which the negligence was ascribed to a single physician, some had a version with two physicians, and some had a version in which the hospital was the defendant. Jurors who received the auto accident version of the case had parallel con- ditions of one defendant, two defendants, or a business corpora- tion.

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Thus, the study can be described as a 2x3 factorial experi- ment, yielding six conditions: a malpractice case involving three types of defendants and a motor vehicle case involving three types of defendants. To control for differences in liability, the case mate- rials presented to the jurors asserted that the defendant had been found legally negligent and that the jurors' only task was to assess the amount of damages.

Most of the concern with the deep pockets effect and other factors relating to juror damage awards centers on the non-eco- nomic components of damages, particularly pain and suffering. The apparent assumption is that assessment of this component is so subjective that any juror biases can find free expression. For in- stance, Weiler stated that "the most troublesome feature of large tort verdicts is the amount of damages awarded for pain and suf- fering, not for direct medical costs." [106] As a consequence, we de- signed the case materials so that the defendant(s) stipulated medi- cal expenses; the jurors were asked only to determine the amount of damages for pain and suffering.

As discussed earlier, assertions about the deep pockets effect are usually accompanied by speculation about the psychological attitudes of the jurors who produce those awards. Hammitt, Carroll, and Relles speculated that jurors may balance "the benefit of greater compensation for the plaintiff against the harm to the defendant;" that jurors may believe that doctors are heavily in- sured; and that jurors' sensibilities are insulted by the breach of special trust a patient places in his doctor. [107] Huber asserted that the public has come to view accidents as "malign and calculated intrusions on the settled order of things" with the consequence that hospitals and surgeons are viewed as thick-skinned, well-in- **[*242]** sured, callous, and unwilling to take measures to prevent acci- dents. [108] None of these assertions about juror attitudes can be assessed from jury verdict reporters, but our experiment allowed us to study juror attitudes on these matters in the context of the specific case to which they were exposed.

C. Juror Sample and Research Procedure

The sample of jurors consisted of 147 veniremen waiting to be called for jury selection in the Wake County (Raleigh), North Carolina state court. They were told that the researchers were studying juror decisionmaking and were asked to volunteer; they also were told that participation was not part of their jury service and that their answers would be anonymous. The sample consisted of equal numbers of women and men. Their average age was 42, their average education level was high school graduate with some post-high school work, and they lived in households with yearly incomes that averaged $ 42,800. We did not inquire about race on the questionnaires, but blacks appeared to participate in numbers proportionate to their representation in the jury pool. The sample appears to approximately mirror the demographic characteristics of the jury pool.

The case materials were randomly ordered so that jurors were randomly assigned to one of the six experimental conditions. A few jurors did not complete the study after volunteering, resulting in an uneven number of jurors per condition. Although the statisti- cal tests that we applied to the data take unequal numbers into account and weight the data accordingly, the numbers of jurors per condition are as follows:

Condition Number of Jurors

(1) medical negligence, 1 defendant 21 jurors

(2) medical negligence, 2 defendants 26 jurors

(3) medical negligence, hospital 23 jurors

(4) auto negligence, 1 defendant 25 jurors

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(5) auto negligence, 2 defendants 26 jurors

(6) auto negligence, corporate defendant 26 jurors

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D. Case Materials

Each juror was given a packet of materials consisting of back- ground facts, results of a prior judicial proceeding establishing defendant liability, excerpts of the plaintiff's testimony about her pain and suffering, three photographs of the plaintiff demonstrat- ing the injury, and legal arguments from attorneys for both sides. Instructions from the judge stipulated economic (medical expenses and wages) damages of $ 34,268 and provided standard guidance on awards for pain and suffering. Following these materials, the jurors received a verdict sheet, the questionnaire on juror perceptions and attitudes, and seven questions pertaining to the jurors' demo- graphic characteristics.

1. Medical Negligence, One Defendant. The plaintiff was described as a seventeen-year-old female who elected surgery under general anesthesia to have a benign cyst removed from her back. She was given a sedative prior to general anesthesia and brought into the operating room. When the anesthesiologist negli- gently moved away from the disoriented patient, she fell off the operating table. She was placed back on the table and the opera- tion was completed, but when she awoke in the recovery room with excruciating pain in her leg, doctors discovered that she had a broken femur. The leg was set in a plaster cast, and the patient was discharged the next day. However, she required pain medica- tion for two weeks, and when the cast was removed in two months, it was discovered that the fracture had not healed proper- ly, resulting in a two-inch shortening of her leg. The result was determined not to be the fault of the doctor who set the leg. During the next six months, the plaintiff was unable to attend school or participate in normal physical activities and had to un- dergo four separate corrective surgeries: an osteotomy to lengthen the leg bone; osteosynthesis to attach a metal plate to the leg; surgery to remove the metal plate; and plastic surgery to cosmetic- ally disguise the scars. During part of this time, the evidence (illus- trated by a photograph) showed that she was on crutches with an exterior metal plate on her leg. Testimony indicated that she also underwent intense and painful physical therapy.

The ultimate result was a good one: she recovered fully, and plastic surgery successfully corrected the surgical scars. However, she sued the anesthesiologist for medical expenses and her pain and suffering over the lengthy period of her recovery. The lawyer **[*244]** for the defendant did not dispute liability and conceded the eco- nomic damages of $ 34,268, but he argued that the amount for past pain and suffering should be $ 30,000. The lawyer for the plaintiff argued that compensation for pain and suffering should be be- tween $ 180,000 and $ 220,000. [109]

2. Medical Negligence, Two Defendants. The facts of the case were identical except that in this instance, the surgeon began the operation before the patient was fully anesthetized, causing her to kick and fall off the table. Prior judicial proceedings ascertained that both doctors were liable because the anesthesiologist is re- quired to ensure that the patient is anesthetized and the surgeon is required to check with the anesthesiologist before beginning sur- gery.

3. Medical Negligence, Hospital Defendant. The facts of this case were identical except that hospital orderlies negligently dropped the patient when transferring her from the operating ta- ble, causing the broken femur.

4. Auto Injury Negligence, One Defendant. In contrast to the medical negligence conditions, the broken femur resulted from a driver who negligently caused his vehicle to swerve into an on- coming lane of traffic, striking the plaintiff's vehicle. All of the other facts about the

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plaintiff and her recovery remained identical.

5. Auto Injury Negligence, Two Defendants. In this condi- tion, two drivers were responsible for the plaintiff's broken leg. One driver was distracted while talking on his cellular phone, and the other impatiently attempted to pass him near a curve. The startled first driver swerved, forcing the second into the path of the plaintiff's vehicle.

6. Auto Injury Negligence, Corporate Defendant. This ver- sion was similar to the single driver version, except that the driver was an employee of the Allied Products Company; under the **[*245]** doctrine of respondeat superior, the corporation was held liable for the accident.

E. Dependent Measures

Regardless of condition, each juror was instructed to award $ 34, 268 for medical bills and affix a sum for past pain and suffer- ing under the following instructions:

Damages should include such amount as you find, by the greater weight of the evidence, is fair compensation for the actual physi- cal pain and mental suffering which were the immediate and necessary consequences of the accident. There is no fixed formu- la for evaluating pain and suffering. You will determine what is fair compensation by applying logic and common sense to the evidence.

Following their verdict on damages, jurors were asked to explain in their own words what factors were important or unimportant in their decisions and why.

Next, they were asked to respond to thirteen questions, each accompanied by a ten-point scale. These questions were intended to assess juror attitudes and perceptions about the plaintiff's suffer- ing, degrees of legal and moral responsibility for the accident, the reasonableness of the amounts suggested by the attorneys, the risks a person assumes in driving a car or undertaking a medical procedure, and attitudes about litigation. [110] **[*246]**

Four additional questions ascertained the juror's gender, age, education, and household income. Three final questions asked whether the juror or members of his family had ever been injured by a health care provider, injured in a car accident, or caused an auto accident in which someone had been injured.

F. Results

1. Awards. The mean (average) pain and suffering award and the standard deviation, a measure of the variability of awards, [111] for each of the six conditions, plus aggregate statistics, are presented in Table 1. Consider the aggregate statistics first. The bottom right-hand figure, $ 89,908, is the mean award summed over all conditions. The two figures immediately above it report the mean awards for all jurors for whom the cause of the accident was medical negligence ($ 93,999) and for auto negligence ($ 87,783). Overall, the mean malpractice award was $ 6216 more than the mean auto negligence award. The bottom row of three figures ($ 102,506, $ 75,682, and $ 94,484) are the mean awards, summed across the causes of injury for one defendant, two defen- dants, and hospital/corporation defendants, respectively. **[*247]** $ SE

Before attempting to put any substantive meaning to these figures, consider the results of a statistical test, called analysis of variance, that we applied to the data. The purpose of the test was to ascertain whether these differences were meaningful in a statis- tical sense or, alternatively, whether they could be ascribed to chance variation. [112] The analysis of variance

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indicated that nei- ther the $ 6216 difference between the medical and auto negligence causes of the injury nor the difference between the defendant con- ditions was statistically significant, although there was a "cause by defendant" interaction effect. [113] Put in layperson's terms, the test indicates several things. First, there is no support for the hypothesis that jurors would be prejudiced against medical providers in comparison to motor vehicle operators or to corporations who are legally responsible for them. Second, there was no general support for the hypothesis that the number or type of defendants makes a **[*248]** difference, despite the fact that the mean for the two-defendant conditions ($ 75,682) appears substantially lower than the means for the one defendant ($ 102,506) and corporation conditions ($ 94,484). There is support for the hypothesis that the cause of the injury and number of defendants interact with one another. However, further statistical analyses [114] indicated that this interaction effect was due solely to the fact that the mean award was lower in the condition involving two defendants who were medically negligent ($ 67,709); the award in the two-defendant motor negligence condi- tion ($ 83,655) was not statistically different from the other condi- tions.

These findings may be better understood by first examining the standard deviations, which are reported in parentheses for each condition in Table 1. The standard deviation is a statistical mea- sure of how much awards varied from the average. [115] The table shows that in each condition, there was considerable variability. Consider the one-defendant conditions. The standard deviation of $ 60,482 in the medical negligence condition indicates that two-thirds of the awards ranged from $ 39,468 to $ 160,432. (i.e., the mean of $ 99,950 +/- $ 60,482). In the motor vehicle condition, two- thirds of awards ranged from $ 35,592 to $ 174,534. (i.e., $ 105,063 +/- $ 69,471). With this kind of variability in awards, it is not surprising that although the mean award in the motor vehicle negligence condition was $ 5113 larger than the medical negligence condition, the difference was probably due to chance fluctuation. The same reasoning can be applied to comparisons between the other condi- tions.

Another way to understand these data is to look at the medi- an awards, which are the midpoint of the award distribution. The medians are reported in Table 2. These medians of the award dis- tributions are somewhat lower than the means and reflect the fact that in each condition a few high awards (i.e., $ 180,000 to $ 220,000) raised the mean. Note that the patterns of medians in Table 2 is similar to the pattern of means in Table 1. A statistical test of these alternative summary statistics yielded a result similar **[*249]** to the means: medical negligence was not treated differently than motor vehicle negligence with respect to the size of awards. The number and type of defendants did not produce statistically meaningful results either.

To avoid any misinterpretation, let me repeat the conclusion to be drawn from these findings about the pain and suffering awards. The facts that the mean and median awards were actually slightly larger for single defendants when liability for the injury was ascribed to automobile as opposed to medical negligence and that the overall mean award was slightly larger for medical negli- gence can be ascribed to chance fluctuations in the data. Statistical tests of the data lend no support for the hypothesis that jurors would treat medical and automobile negligence cases differently.
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2. Perceptions and Attitudes. Jurors were asked a series of thirteen questions about their perceptions and attitudes toward the case. [116] These answers were analyzed to determine if there were any meaningful differences between conditions. There were only a few statistically significant effects. The malpractice cause of the accident was seen as more avoidable than the automobile accident (Question 3). [117] There was a small but statistically significant difference on Question 4, suggesting that the jurors perceived the plaintiff as bearing more of the responsibility for the accident when it resulted from motor vehicle negligence. [118] Mirroring **[*250]** Question 4, the jurors saw both single and multiple defendants as more

negligent when medical negligence caused the injury (Ques- tion 5). [119] Question 11 asked about the degree to which people assume some of the risk for an accident that happens to them during surgery; those jurors assigned to the medical negligence conditions were more inclined to disagree about patient responsi- bility than in the auto injury conditions. [120] These effects suggest that despite the fact that liability was stipulated in the same way in all conditions, jurors did tend to perceive the plaintiff as less responsible for the injury when it was ascribed to medical negli- gence. [121]

3. Correlations Among Perceptions, Demographics, and Awards. We also attempted to ascertain the degree to which the amounts of individual jurors' awards could be predicted from their perceptions and attitudes, as measured by the thirteen questions, and their demographic characteristics. There were positive correla- tions between the degree to which a juror perceived the plaintiff's suffering as severe [122] and the extent to which the juror believed that it might have a negative effect on the plainitff's life, [123] and between perceived severity and the amount of the award that the juror gave. Perceptions that the defendant had moral, as opposed to legal, responsibility also were directly related to the amount that jurors awarded. [124] It was not surprising that the more jurors saw the plaintiff's demand as reasonable [125] and the less they saw the defendant's offer as reasonable, [126] the greater their award was. The more that a juror disagreed that patients assume some **[*251]** degree of risk for surgery, the greater was the amount of the award. [127] Finally, the juror's gender, age, and household income were not related to the size of the award. Those jurors who were better educated, however, tended to give smaller awards. [128]

It is noteworthy that although jurors varied in the extent to which they endorsed the beliefs that "too many people file law- suits in the hope of making a fast buck" and that "medical doctors are sued too often," these litigation attitudes were not related to the size of awards.

4. Juror Explanations of Their Awards. The jurors also were asked to comment in their own words about their reasons for giving the award. The responses were quite varied, but they pro- vide important insights about jurors' reasoning processes.

Some jurors focused on responsibility. A juror in the single- physician condition wrote, "I think a 46 year old Dr. should have the expertise not to make careless mistakes on human life. That his job is to see that people are helped and treated with care" (awarded $ 220,000). Another juror in the same condition stated, "The doctor had major responsibility for the care and safety of his patient. Undue stress placed on the patient for an incident not even related to her original condition warrants such an amount" (awarded $ 127,000). A juror in the two-physician condition wrote, "The doctors allowing her to fall off the operating table is unpar-donable. She suffered 20 times the pain which her cyst removal should have caused" (awarded $ 30,000). Another, also in the con- dition with two physician defendants, commented, "We depend on doctors not to be careless. We are leaving our lives in their hands. Basically, I feel that doctors should not make these kinds of mis- takes" (awarded $ 100,000). Still another said, "It is my belief that in a job situation such as surgery or any medical area that each step should be double check sic to prevent unnecessary or previ- ous incorrect performance of that job" (awarded $ 100,000).

The above examples indicate that some jurors did focus on the role and responsibilities of physicians. However, jurors ex- pressed parallel attitudes about responsibility in the motor vehicle negligence conditions: "The man's total carelessness should be thoroughly punished" (awarded $ 200,000); "Accident was **[*252]** avoidable . . . . Terrible ordeal because of carelessness with his car" (awarded $ 165,732); " The driver should pay attention to the highway because you have to drive for yourself and other people too" (awarded $ 10,000).

In both the medical and vehicle negligence conditions, some jurors commented on what they perceived to be the defendant's acceptance of responsibility: "The doctors' attitudes about accept- ing responsibility was sic important" (awarded $ 50,000); "The fact that the hospital

accepted responsibility was also important al- though I thought that the amount they were willing to pay for pain and suffering was not adequate" (awarded $ 80,000); "The willingness of the negligent corporate vehicle defendant to accept responsibility limited amount of pain and suffering' award" (awarded $ 100,000); "Important: Defendant motor vehicle negli- gence admitted his negligence--honesty" (awarded $ 30,000); "Time--it is now 5 years later and the hospital is stalling" (award- ed $ 75,000).

These examples indicate that despite the fact that the jurors' task was defined solely as assessing the amount of damages, their attitudes about defendant responsibility frequently appeared to affect their decisions. It is noteworthy, however, that in both the hospital and the parallel corporate responsibility conditions, there were many fewer comments about responsibility than in the condi- tions in which the defendants were individuals. We will return to this point later. [129]

The responses commenting on the plaintiff's pain and suffering showed wide variation. Some jurors made much of the fact that a 17-year-old girl had a very traumatic experience: " T ime lost early in life may never be regained" (awarded $ 50,000); "She trusted the doctors and now she will always be afraid of hospitals and doctors" (awarded $ 100,000); " eight months of life taken from her . . . . The Dr. was distracted from his job. One second is all it took to destroy her" (awarded $ 200,000). Several jurors mused about future events, contrary to judicial instructions and the evi- dence that was presented: " Alluding to potential problems with early arthritis or with child bearing" (awarded $ 150,000); " T his situation could trigger psychological problems later" (awarded $ 125,000); "I think events at that age will be carried into adult- **[*253]** hood" (awarded $ 220,000). Others, however, minimized the trauma or took the position that sometimes pain must just be borne: "She had pain and suffering. But these things don't last long and you can learn how to get around the way you are" (awarded $ 220,000); " She lost a year. However, it is quite possible to carry on in a cast--personal experience" (awarded $ 30,000); "Pain is a part of life and money will not remove the pain. Mistakes occur daily by all people no matter what their occupation. We are all human, this action mistake by doctors was not negligence, it was an oversight (mistake) . . . . Life goes on" (awarded $ 30,000); "We all go through hardships in life . . . . I do not feel anyone is deserving of massive amounts for an incident in her life that she has totally re- covered from except for memory" (awarded $ 30,000).

Concerns about getting something for nothing and the impacts of awards on society were also prominent in some jurors' respons- es: "The legal system has gotten out of hand in its pursuit of financial rewards due to damages through litigation that apparently does not apply in this case, but an award should be what is fair and right for both sides" (awarded $ 150,000); "I have a hard time giving enormous amounts of $ to victims even though I acknowl- edge her right to receive something" (awarded $ 50,000); "Acci- dents happen; no perm anent damage. I can't believe in lawsuits for excessive amounts" (awarded $ 0); "Personally, I think financial judgments in general are too high and accordingly went with the lowest figure mentioned" (awarded $ 30,000); "I do not think she should get rich because of this accident, and accidents do happen and both doctors admitted that it did happen" (awarded $ 50,000); "I tried to balance award . . . keeping in mind very large awards may encourage other lawsuits for the sake of potential large set- tlements" (awarded $ 75,000).

It is also clear that jurors uniformly commented on the diffi- culty of putting a price on pain and suffering and used different methods of calculating the awards. [130] Some roughly split the dif- ference between the defendant's and the plaintiff's suggested fig- ures. One juror doubled what the defendant said was fair, and another said it should be three times medical expenses. One juror said, " Eight months of pain and suffering missing out of her teen years. She should receive no more than what most people make in a year" (awarded $ 50,000). A number of jurors assessed pain and **[*254]** suffering on a per month basis, such as $ 4000 or $ 5000 and multi- plied by the eight months that the plaintiff was incapacitated. Other jurors indicated that they just came up with a figure that they thought was fair.

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Of the 147 jurors, only one mentioned that the ability of the defendants to pay was a consideration and that juror was in the two-defendant vehicle negligence condition: "Not knowing the ability of the defendants to pay an exorbitant amount and consid- ering an average salary to be $ 35,000 per year, I feel both men could pay $ 70,000 together."

These explanations in the jurors' own words show highly var- ied responses to the case. Some expressed punitiveness and a desire to blame, but these responses were offset by those of the majority of jurors, who attempted to come up with what they thought was a fair award. Further, it appears that punitiveness and blame was not disproportionately applied to cases of medical negli- gence; motor vehicle negligence evoked similar responses in jurors.

G. Summary of Findings

This experiment yielded no support for the deep pockets hypothesis or the psychological dynamics that are posited to be behind it. Whether medical or automobile negligence caused the accident made no difference in the amounts of awards. There were some small differences in juror perceptions consistent with the view that plaintiff responsibility may be perceived to be less in medical negligence accidents, although these differences were not reflected in awards. Jurors' explanations of their reasoning demon- strated widely varying approaches to whether and under what conditions awards for pain and suffering were appropriate. [131]

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III. Further Perspectives on the Deep Pockets Phenomenon

A. Corporate Responsibility

The claims about jurors' propensities toward deep pockets defendants have not been confined to medical malpractice cases. It is alleged that the phenomenon extends to many areas in which large corporations are defendants. [132] The small but important body of empirical literature that has recently developed on the topic of attitudes toward corporations provides additional insights about the results of the experiment reported in Part II and the other empirical literature bearing on the deep pockets hypothesis in medical negligence cases.

Consistent with the conceptual analysis presented in this Arti- cle, Valerie Hans has argued that the deep pockets hypothesis posits that if all other factors in the case were the same--that is, if corporations engaged in the same behavior and caused the same harm as individuals--jurors would assess larger awards against corporate defendants than individual defendants. [133] She has pro- posed three potential explanations as to why juries treat corporate defendants differently. [134] One, the primary claim of jury critics, is that juries make their decisions solely on the basis of the defendant's ability to pay. [135] The second is that juror attitudes about business might be negative or that businesses might be held to a higher standard of appropriate behavior than individuals. A third explanation involves structural differences between individuals and corporations. For example, because corporations are composed of many individuals, it may be that people perceive them as hav- ing greater capacity to foresee and control negative events associ- **[*256]** ated with their behavior. [136] Hans observes, however, that it may be more difficult to ascribe responsibility for negative outcomes of group activity because it is difficult to identify individual decisionmakers or the process of decisionmaking. Her research program has attempted to tease out these factors.

In a first study, Valerie Hans and David Ermann varied the defendant's identity in a personal injury lawsuit involving workers who were harmed by toxic waste but kept every other aspect of the case the same. [137] Half of the simulating jurors in the experi- ment learned that Mr. Jones had hired the workers, and the other half learned that the Jones Corporation had done so. The jurors tended to hold the corporate defendant more morally and legally responsible

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for the injuries, saw it as more reckless and blamewor- thy, and awarded significantly higher levels of compensation against it. [138] Further analyses, however, indicated that the amount of the award was more strongly related to perceptions of the corporation's recklessness, not its perceived financial re- sources. [139] In short, the larger awards in the corporation condi- tion appeared to be tied more to the fact that corporations were held to higher standards of behavior than to their perceived finan- cial resources.

In a second study, Valerie Hans and William Lofquist inter- viewed 141 jurors who had recently decided actual cases involving corporate defendants. [140] Most of these jurors said that they treat- ed corporations the same as individuals. They ascribed this behav- ior to the fact that the lawyers had admonished them in voir dire and closing statements and that the judge had instructed them to do so. They further indicated that during deliberations, they re- minded one another of their legal responsibilities to treat the corporation like they would an individual. Some jurors did indicate that the fact that the defendant was a corporation made a differ- ence but suggested that a corporation should be held to higher standards of responsibility because of the number of persons available to solve problems and its greater potential to cause harm **[*257]** to many persons; ability to pay, however, was not a frequently stated consideration.

In a third study, 450 randomly selected Delaware residents were asked in a telephone survey to respond to scenarios that varied the defendant as either a corporation, a non-profit business, or a for-profit business. [141] Within each of these conditions, the survey respondents were told either that the defendant had assets less than $ 100,000, over $ 1 million, or were told nothing about assets. Participants judged for-profit business defendants as more negligent and reckless than individuals and assessed higher awards against them. Contrary to the deep pockets hypothesis, however, awards against defendants did not vary as a function of their fi- nancial assets. In independent experimental research, Robert MacCoun also found that whether the defendant was an individual or corporation affected how people judged cases but the defendant's wealth did not. [142]

B. Responsibility Components of Medical Negligence

The research on judgments of corporate behavior raises an attributional issue about medical negligence that was given only passing attention in Part I. Medical providers are in professional and fiduciary relationships with their patients; the patients place themselves in the hands of the professionals with trust that the professionals will not be negligent in performing those services. Like their apparent response to corporate defendants, jurors may hold doctors to a higher standard of care. This response could help explain Chin and Peterson's finding that jurors assessed high- er awards against both doctors and hospitals when they were de- fendants in malpractice than when they were defendants in other personal injury suits. [143] It is also consistent with the written com- ments of some of the jurors who participated in the present exper- iment [144] and with the other findings that the injury was seen as more avoidable and the defendants as more negligent in malprac- **[*258]** tice than in motor vehicle cases. [145] One reason why these effects may not have translated into differences in awards was the fact that in our experiment, both the medical and motor vehicle negli- gence cases stipulated defendant liability. [146] The corporate re- sponsibility research indicated that jurors may have a hard time assessing responsibility for corporate behavior. This finding might help account for Sloan and Hsieh's finding that jurors assessed lower awards against hospital defendants than against individual doctor defendants. [147] **[*259]**

These hypotheses should be viewed as complementary to the other selection, structural, and process dimensions that distinguish malpractice from motor vehicle cases. Also, they should be treated as descriptive, rather than prescriptive, hypotheses; we leave to others the question of whether it is appropriate for jurors to hold physicians to a higher standard.

C. Comparative Perspective on Pain and Suffering

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Although our research found no evidence to support the deep pockets hypothesis, a question may arise about the average award of $ 98,908. [148] Weiler and others have raised concerns about the magnitude of pain and suffering awards. [149] One can ask whether the awards to the teenage plaintiff were appropriate for an injury that was only a temporary interlude in her life.

As Harry Kalven and Hans Zeisel observed in their classic research on juries, judgments about the quality of jury decisions have to be made in comparison to the possible alternatives: for example, a professional decisionmaker such as a judge or arbitra- tor. [150] With respect to the issue of damages, some authors assert that professionals can do a better job than jurors because their legal training makes them less susceptible to legally irrelevant emotional factors and because their experience and knowledge with regard to other cases gives them a more realistic perspective on the monetary worth of particular cases. [151]

In contrast to this reasoning, Kevin Clermont and Theodore Eisenberg found that in a large sample of cases filed in federal courts, judges gave larger awards than juries. [152] In an experimen- tal study, Jeffrey Rice and I found no difference between the average awards for pain and suffering and disfigurement rendered **[*260]** by jurors and senior attorneys, including former trial court judg- es. [153] Furthermore, in direct contradiction of the "professionals are superior" claim, we found evidence that jurors are likely to exhibit less variability in their awards than single judges or arbi- trators. [154]

We obtained data similar to the **Vidmar** and Rice study to provide a comparative perspective on the juror awards in the present experiment. Fifty-six senior North Carolina attorneys, representing both plaintiffs and defense bars, were given the same case materials that the jurors had been provided in four of the six conditions in the experiment and asked to render an award. [155] Summed over the four conditions, the average award was $ 100,821. The comparable figure for jurors in the same four conditions was $ 98,594. The difference was not statistically significant. [156] Howev- er, the variability of the attorneys, as determined by the standard deviations of their awards, was more than twice as large as the variability that I estimate twelve-person juries would exhibit. [157] In summary, jurors and legal professionals responding to the same case facts, on average, rendered essentially the same awards, but it is likely that juries would produce more reliable estimates of dam- ages for pain and suffering.

D. Generalizability of the Experimental Research

Invariably, criticisms are raised about the generalizability of experimental research, particularly when it contradicts widely held views. Although we studied real jurors, the task was artificial; for example, the jurors did not deliberate.

The response to this criticism is that when different studies using different methodologies all point in the same direction, we **[*261]** gain confidence about the generalizability of the experimental re- sults. The present experiment seems generally consistent with the research on corporate responsibility. The data also are congruent with the findings from jury verdict statistics that contradict the deep pockets hypothesis. The explanations jurors gave in our experiments are similar in many respects to those the jurors who had decided real cases in the Hans and Lofquist study offered [158] and with interviews obtained from jurors who decided real malpractice and motor vehicle negligence cases in North Carolina. [159] North Carolina jurors who made awards against doctors indicated that they were worried about the doctor's ability to pay and the effect on the doctor and his practice but, following the judge's instruc- tions, attempted to set their concerns aside and decide the case on the merits. [160] Conversely, jurors who rendered a $ 205,000 award against a tow truck operator and his employer in a wrongful death trial arising out of motor vehicle negligence explained afterward that they worried about the financial impact on the defendants. They ultimately concluded that if the defendants did not have liability insurance, it was their own misfortune because the concern

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In real life, any theory will do as long as it gets the case to the jury, whose natural sympathies will usually produce a large judg- ment without much concern for the legal technicalities. [2]

[*218]

J urors have become accustomed to huge award requests, and they are more willing to reach into the deep pockets of mal- practice insurers to compensate the victims generously--more willing than when they encounter the victims of automobile acci- dents, for in these cases the insurance premiums at risk are paid directly by jurors themselves. [3]

Introduction

The role of the jury in medical negligence cases ranks among the most contentious issues in contemporary debate about the merits of the tort system. [4] As the above quotations demonstrate, a common complaint from all sides of the political spectrum is that jurors are biased against doctors and hospitals because they be- lieve that someone ought to pay when a serious medical injury oc- curs and that doctors and hospitals have the "deep pockets" to provide the compensation. In this Article, I first review these claims and critique the prior empirical research alleged to support them. I then describe a controlled experiment that tested the hy- pothesis that jurors are prone to award excessive amounts for pain and suffering when the defendants are doctors or hospitals. Nei- ther the prior research nor the experiment's results support the deep pockets hypothesis. The final Parts of the Article discuss these findings in the context of other research as well as the de- bate about medical negligence and the tort system.

I. The Claims and the Evidence: A Critique

A. The Claims

The three prefatory assertions about juries do not stand alone. Physicians, liability insurers, and commentators critical of the American tort system frequently raise the argument that juries are biased against doctors and hospitals. In a 1988 proposal advocating **[*219]** a fault-based administrative system for medical malpractice as an alternative to the tort system, the American Medical Association (AMA) declared,

In the medical liability context, a source of at least some of the problem sic for physicians and other health care providers with the existing system appears to many to be the jury . . . . Prob- lems with the jury include decisions that are not based on a thorough understanding of medical facts and awards that increase at an alarming rate and in a fashion that seems uniquely to dis- advantage physicians as compared with other individuals who are found to have acted negligently . . . .

What makes the damage awards in professional liability lawsuits particularly disconcerting is the fact that identical injuries will command much higher recoveries in malpractice cases than in other tort suits, such as automobile accidents. [5]

The North Carolina Hospital Association claimed,

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should be with fairly compensating the heirs to the estate, as the judge had instructed them to do. [161] In short, the findings of the present study have substantial plausibility.

IV. Conclusion

A careful analysis of the research findings on which propo- nents of the deep pockets hypothesis in medical negligence cases have relied is methodologically flawed beyond redemption--the findings do not justify a conclusion that there is a deep pockets effect. Our experimental research, which controlled for alternative hypotheses, yields no support for the deep pockets effect and is corroborated by other research findings.

Unfortunately, we still do not have a clear understanding of precisely how jurors respond to medical negligence cases, particu- **[*262]** larly, how judgments of liability influence damage awards. We also do not have reliable data on what **percentage** of jury awards can be ascribed to **non-economic damages,** but it is clear that the widely reported claim that they average up to fifty percent or more of total awards [162] is without foundation.

It is intriguing to question why belief in the deep pockets effect and the excessiveness of non-economic damages are so wide- spread and why many authors and policymakers have failed to recognize the flimsy or contrary evidence documented in this Arti- cle. Let me offer some hypotheses that bear on the answer to these questions. First, the deep pockets hypothesis could be ex- plaining real phenomena that persons intimate with the legal sys- tem--e.g., judges, defense lawyers--have apprehended; the meth- odological shortcomings of prior studies have just failed to un- equivocally demonstrate their existence. This remains a viable explanation, except that the present experiment and other data de- scribed in this Article appear to contradict it. Second, although the deep pockets effect may not exist in malpractice cases, it may occur in other types of cases, such as products liability. There is only a small amount of evidence to support the deep pockets effect in any context, [163] but even if it does exist, generalizations may be improperly made to malpractice cases. A third explanation is that belief in the deep pockets effect is consistent with intu- itive--but incorrect--assumptions about how jurors behave. From its modern inception as a factfinder in seventeenth-century Eng- land to the present day, the jury has had its critics. Some legal professionals have questioned how a group of laypersons can make intelligent and unbiased judgments in tasks to which professionals devote years of education and their entire careers. [164] At the same time, doctors and their professional organizations have ques- tioned whether any group of persons other than physicians can make judgments about medical negligence because of the difficult and complex technical medical questions that they allege are in- volved in malpractice disputes. [165] For any legal or medical pro- **[*263]** fessional holding such views, there is no reason to closely examine statistics that "confirm" things that "everybody already knows anyway." A fourth explanation is that the methodological and other data limitations of the empirical studies that I have identi- fied in this Article are not obvious ones that laypersons can identi- fy. I include lawyers and doctors in the definition of laypersons; most have not been trained in analysis of the types of data sets or statistical techniques used in the verdict outcome studies that I have critiqued in this Article.

It is not so clear to me, however, why the social scientists who conducted the studies have ignored such major methodologi- cal shortcomings, since many of the problems are common to social science research, are well-known, and have been extensively discussed in the academic literature. [166] I can suggest three factors that may have contributed to the problem. The first can be la- belled, awkwardly, the "seduction of large data sets." Although some authors appear to have been unaware of the methodological problems of looking only at verdicts, others have acknowledged some of them, particularly the selection problem, but have subse- quently ignored or minimized them when drawing substantive con- clusions. [167] Verdict report data chronicle real jury decisions and involve hundreds or thousands of cases that on their face, promise to tell judges, policymakers, and social scientists about the role of juries in the legal system. They also entail substantial financial investment to code and analyze. In this context, it is perhaps not surprising that researchers would be inclined to

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rationalize away methodological problems and emphasize possible substantive con- clusions.

Simultaneously, difficulties may also occur from the possibility that researchers were focused on prior assumptions and the regres- sion models under which the data were analyzed, rather than on the potential problems involved in the data sets themselves. Being trained in econometric and regression analysis, unfortunately, does not ensure careful attention to the limitations of the databases on **[*264]** which models are tested. Yet, as my critique of some of the stud- ies has shown, to ignore or underestimate the conceptual and methodological problems in these data sets is to build on a ques- tionable foundation.

Another source of the problem derives from the fact that a number, although not all, of the studies supporting the deep pock- ets effect were published without going through independent peer review. Rather, they were published as technical reports, policy pa- pers, or in law reviews. [168] The peer review process prevalent in science and social science journals requires other experts in the field to undertake independent and usually blind reviews of articles to assess methodological and conceptual shortcomings. Peer review is far from a perfect process, but it does serve to weed out many inadequate studies or at least to require the author to attend to methodological problems and unequivocally state any limita- tions. If it is not apparent from my critique in Part I, I submit that a number of the empirical studies would likely have failed peer review.

A final explanation has been explored by Stephen Daniels, Robert Hayden, Michael Saks, and Kenneth Chesebro. [169] They have separately documented the fact that powerful interest groups have exploited and misrepresented findings about jury malfeasance in order to further agendas of tort reform. [170] Because the civil jury plays a prominent role in the legal system, it has been used as a symbol of "the litigation crisis." [171] Non-representative data, misleading data, and horrific anecdotes of a jury system out of control have been presented at legislative hearings and portrayed **[*265]** in stories and advertisements in the mass media. This propaganda creates and reinforces beliefs about the deep pockets effect not only in the general public [172] but in the legal, medical, and legis- lative communities as well. Propagandists have no interest in meth- odological confounds when the statistics appear consistent with their goals.

There are, then, multiple and overlapping explanations for the widespread belief in the deep pockets hypothesis. In fact, the issue deserves more extensive treatment that I have given it here, but some mention of it is appropriate in the conclusion of this Article.

Finally, I want to enter the caveat that this Article does not attempt to address the much broader controversy about medical negligence and the tort system. [173] However, because the deep pockets hypothesis and jury behavior in general play such a central role in claims about the failures of the tort system, [174] the Article raises serious problems for critics. More research may modify or contradict these findings, but in the meantime, we may conclude that on present evidence, the jury's reputation for reaching into the perceived deep pockets of health care providers and giving excessive awards for pain and suffering is not warranted.

FOOTNOTES:

n1 U.S. General Accounting Office, Medical Malpractice: Case Study in North Carolina 20 (1986) hereinafter N.C. Case Study (alteration in original).

n2 T.R.B., The Tort Explosion, The New Republic, Nov. 18, 1985, at 4. The article further stated that "high settlements lead to skyrocketing insurance rates. And soon so much cost is being absorbed that the activity in question, be it practicing gynecology or manufacturing a vaccine or being on the city council, is no longer economically practica- ble." Id.

n3 Paul C. Weiler, Medical Malpractice on Trial 48 (1991).

n4 See, e.g., Marc Galanter, The Civil Jury as Regulator of the Litigation Process, 1990 U.

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Chi. Legal F. 201 hereinafter Galanter, The Civil Jury ; Marc Galanter, Read- ing the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4 (1983); Mi- chael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System--And Why Not?, 140 U. Pa. L. Rev. 1147 (1992); Neil **Vidmar,** The Unfair Criti- cism of Medical Malpractice Juries, 76 Judicature 118 (1992).

n5 American Medical Association Specialty Society Medical Liability Project, A Proposed Alternative to the Civil Justice System for Resolving Medical Liability Disputes: A Fault-Based, Administrative System 7-8, 9-10 (1988) hereinafter, AMA Proposed Alternative Report . This report was rewritten to appear as a law review article. See Kirk Johnson et al., A Fault-Based Administrative Alternative for Resolving Medical Malpractice Claims, 42 Vand. L. Rev. 1365 (1989).

n6 N.C. Case Study, supra note 1, at 21-22.

n7 Physician Payment Review Commission, Annual Report to Con- gress--(1991) (citing Patricia Danzon, Medical Malpractice 53-56 (1985)). Danzon reported data from Cook County, Illinois compiled in Rand Corporation reports authored by Mark Peterson, George Priest, and Michael G. Shanley. See Mark A. Peterson & George L. Priest, The Rand Corporation, The Civil Jury: Trends in Trials and Verdicts, Cook County, Illinois, 1960-1979 (1982); Michael G. Shanley & Mark A. Peterson, The Rand Corporation, Comparative Justice: Civil Jury Verdicts in San Francisco and Cook County, 1959-1980, (1983). I will address and critique these studies in Section I(B).

n8 Liability: Injustice for All (Manhattan Institute for Policy Research 1992).

n9 Peter Huber, Liability: The Legal Revolution and Its Consequences 12 (1989).

n10 Id. at 185.

n11 See, e.g., Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1265 (Ill. 1977) (Ryon, J., dissenting) (arguing that "sympathetic juries and an increasingly efficient plaintiff's bar have managed to inflate the size of verdicts" and commenting on the "deep pockets" phenomenon); Albert W. Alschuler, Mediation with a Mugger: The Shortage of Adjudica- tive Services and the Need for a Two-Tier Trial System in Civil Cases, 99 Harv. L. Rev. 1808 (1986); Dorsey D. Ellis, Punitive Damages, Due Process, and the Jury, 40 Ala. L. Rev. 975 (1989); Kirk B. Johnson, Beyond Tort Reform, 257 JAMA 827 (1987); Richard E. Leahy, Rational Health Policy and the Legal Standard of Care: A Call for Judicial Deference to Medical Malpractice Guidelines, 77 Cal. L. Rev. 1483 (1989); Richard J. Mahoney & Stephen E. Littlejohn, Innovation on Trial: Punitive Damages Versus New Products, 246 Science 1395 (1989). Clark Havighurst asserts,

Although it is customary in our adversary system to regard a jury trial as a "black box" the outcomes of which (on nonlegal questions) are granted a pow- erful presumption of legitimacy, realism compels recognition that juries are often poorly positioned to choose reliably between the well argued, but often highly confusing, theories of the two sides' experts. As a result, they often fall back on such irrelevancies as the witnesses' demeanor and style of presentation or sympathy for the plaintiffs' plight or the defendants' reputation.

Clark C. Havighurst, Health Care Law and Policy 778 (1988).

n12 Weiler, supra note 3, at 54.

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n13 AMA Proposed Alternative Report, supra note 5, at 9 (citing Danzon, supra note 7). See also Johnson et al., supra note 5, at 1369 ("Because large portions of the awards depend upon subjective and emotional considerations, some injured patients recover nothing, some receive less than fair compensation, and others recover amounts far in excess of their losses, both economic and noneconomic.") (footnotes omitted). For a discussion of Danzon's research, see infra subsection I(C)(3).

n14 Physician Payment Review Commission, Annual Report to Congress 201 (1992) (citation omitted). In Medical Economics, James D. Griffith, an attorney specializ- ing in the defense of malpractice cases, argued that "there's no limit on what jurors can award for pain and suffering so too often they act like Santa Claus, handing out millions of dollars in cases involving comparably minor injuries." James D. Griffith, What Will It Take to Resolve the Malpractice Crisis, Medical Econ., Sept. 27, 1982, at 195. In 1991, the centerpiece of President Bush's draft proposal on health care was a proposal to limit the amounts that malpractice victims can collect for pain and suffering. Philip J. Hilts, Bush Enters Malpractice Debate with Plan to Limit Court Awards, N.Y. Times, May 31, 1991, at A1.

n15 Patricia Danzon, Report on Awards for Noneconomic Loss, in Florida Medical Malpractice Policy Guidebook 132 (Henry G. Manne ed., 1985).

n16 See infra subsection I(C)(3).

n17 Weiler, supra note 3, at 55 (citing Danzon, supra note 15, at 128-42); see id. at 55 n.36. Weiler's other sources were a study by Viscusi that attempted to eliminate pain and suffering awards in products liability cases, id. at 55 (applying W. Kip Viscusi, Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?, 8 Int'l Rev. L. & Econ. 203, 205-19 (1988)), and an unsupported allusion to the " w idespread sentiment that pain and suffering awards were out of control that inspired many states in the eighties to establish caps solely on this type of damages," id.

Weiler evidently determined that awards for non-economic damages were too high because state legislatures acted on the belief that they were too high. This is a dangerous predicate for empirical assumptions because legislative tort reform efforts are frequently based on erroneous assertions. See, e.g., Neil **Vidmar** et al., An Empirical Examina- tion of a Legislated Procedural Reform: Court-Based Management of Medi- cal Malpractice Litigation 84-88 (1992) (discussing North Carolina reforms); Joseph Sanders & Craig Joyce, "Off to the Races": The 1980s Tort Crisis and the Law Reform Process, 27 Hous. L. Rev. 207, 276-80 (1990) (discussing Texas reforms).

n18 AMA Proposed Alternative Report, supra note 5, at 9.

n19 Id. (citing Danzon, supra note 15). This claim was not included in the Johnson article which was based on the AMA report. See Johnson et al., supra note 5.

n20 Danzon, supra note 15, at 133.

n21 Patricia M. Danzon, The "Crisis" in Medical Malpractice: A Comparison of Trends in the United States, Canada, the United Kingdom, and Australia, 18 Law, Med. & Health Care 48, 49 (1990).

n22 See infra subsection I(C)(3).

n23 Weiler, supra note 3, at 48.

n24 Huber supra note 9, at 186; see also Frederick D. Watkins, Social Inflation: Our Next Trial, 77 Insurance Mag. 42, 44-45 (1976) (arguing that juries routinely perceive corporate

defendants as being better able to "foot the bill" for injuries than plaintiffs).

n25 13 Barb. 9 (N.Y. App. Div. 1852). This case and related history are reviewed in Stephan Landsman, The Civil Jury in America: Scenes from an Unappreciated History, 44 Hastings L.J. 579 (1993).

n26 Haring, 13 Barb. at 15-16.

n27 See Audrey Chin & Mark A. Peterson, The Rand Corporation, Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials (1985). The Chin and Peterson study builds upon two earlier reports. See Peterson & Priest, supra note 7; Mark A. Peterson, The Rand Corporation, Compensation of Injuries: Civil Jury Verdicts in Cook County (1984).

n28 Verdict reporters are compilations of jury verdicts and other data bearing on jury outcomes in specific jurisdictions. They are primarily subscription services for lawyers, judges, insurance companies, businesses, and local government bodies. See, e.g., Chin & Peterson, supra note 27, at 63-91; Stephen Daniels & Joanne Martin, Jury Verdicts and the "Crisis" in Civil Justice, 11 Just. Sys. J. 321, 328 (1986); Stephen Daniels, Civil Ju- ries, Jury Verdict Reporters, and the Going Rate, Paper Presented at the Annual Meet- ing of the Law & Society Association (May 29-June 1, 1986) (on file with author).

n29 Chin & Peterson, supra note 27, at vii.

n30 Id.

n31 James K. Hammitt et al., Tort Standards and Jury Decisions, 14 J. Legal Stud. 751 (1985).

n32 Id. at 754-55.

n33 Id. at 756.

n34 Daniels & Martin, supra note 28, at 321; see also Stephen Daniels, Tracing the Shadow of the Law: Jury Verdicts in Medical Malpractice Cases, 14 Just. Sys. J. 4 (1990).

n35 Id. at 339.

n36 Id. at 343.

n37 Id. at 326-27.

n38 Id. at 325.

n39 Randall R. Bovbjerg et al., Juries and Justice: Are Malpractice and Other Person- al Injuries Created Equal? 54 Law & Contemp. Probs., Winter 1991, at 5. The five other jurisdictions were Kansas City, Missouri, Kansas City, Kansas, San Francisco and several other counties in California, and Cook County, Illinois. Id. app. 1.

n40 See id. at 31.

n41 Id. at 35-36.

n42 Id. The selection hypothesis will be considered in more detail in subsection I(C)(1).

n43 Mark A. Peterson, The Rand Corporation, Civil Juries in the 1980s: Trends in Jury Trials and Verdicts in California and Cook County, Illinois (1987).

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n44 Id. at 17.

n45 Id. at 22. Between 1960 and 1964, the median award was $ 35,000. Between 1980 and 1984 it was $ 121,000. Differences in the mean or average amounts, which are inflat- ed by extreme amounts, were even more dramatic: from $ 52,000 in 1960-1964 to $ 1,179,000 in 1980-1984. The findings for San Francisco were similar. See A. Russell Localio, Variations on $ 962,258: The Misuse of Data on Medical Malpractice, 13 Law, Med. & Health Care 126 (1985) (discussing issues relating to the interpretation of means and medians).

n46 See, e.g., Saks, supra note 4, at 1212-13, 1226 (reporting that 10% of medical malpractice cases proceed to trial).

n47 For an extensive discussion of this matter, see Theodore Eisenberg, Testing the Selection Effect: A New Theoretical Framework with Empirical Tests, 19 J. Legal Stud. 337 (1990); Samuel R. Gross & Kent D. Syverud, Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial, 90 Mich. L. Rev. 319 (1991); Saks, supra note 4.

n48 See Neil **Vidmar,** Making Inferences About Jury Behavior From Jury Verdict Statistics: Cautions About the Lorelei's Lied (1993) (unpublished manuscript, on file with author); see also Saks, supra note 4, at 1244. Saks points out that complications go be- yond cases that are filed. Different types of cases may have different rates of injury incidence, numbers of claims arising out of incidents, and pre-litigation settlement rates. This fact further complicates attempts to compare jury verdicts across different types of cases. Id.

n49 See, e.g., Hammitt et al., supra note 31. Interestingly, although the other Rand researchers consistently recognized the selection problem at various places in their re- ports, they continued to make conclusions that the changes in win ratios and awards over time constituted or implied changes in jury behavior. For instance, Peterson stated that "there may have been differences over time or across jurisdictions," Peterson, supra note 43, at xii, but stated that the data showed that "plaintiffs are increasingly advan- taged in jury trials," id. at ix, and "Cook County jury verdicts were increasingly favorable to plaintiffs . . . ," id. at vii.

n50 We can push the example still further in any number of ways. Suppose that between Years 1 and 5, more Type B cases were filed and went to trial so that at Year 5, juries were deciding ten Type A cases and twenty Type B cases. In this instance, the average award would be $ 70,000. Alternatively, consider an example in which only half of the Type A cases are diverted to alternative dispute resolution. We also can vary the example using liability, rather than damages, e.g., defendants start settling cases in which they have a low chance of prevailing at trial. Equally important, we also can concoct statistical scenarios in which juries actually do become more generous toward plaintiffs (as to liability or damages, or both) between Year 1 and Year 5, but simultaneous changes in the mix of cases going to trial yield results that reflect no change in plaintiff win ratios or damage awards. In the most extreme example, suppose that at Year 5, juries become really perverse and award ten Type A cases $ 100,000 each and ten Type B cases only $ 10,000 each; despite this stunning change in behavior, the average award would be the same as Year 1: $ 100,000.

n51 Peterson, supra note 43, at 11. These are the data that show plaintiff win ratios increasing from one in four to two in four, id. at 17, and the median award increasing from $ 35,000 to $ 121,000, id. at 22.

n52 Id. at 7-9. I want to emphasize again that although Peterson clearly recognized these and other methodological confounds throughout the report, he nevertheless was tempted to ignore them and draw the unqualified conclusion in the executive summary that "plaintiffs are increasingly advantaged in jury trials:" Id. at ix. I want to acknowl- edge that the hypothesis could be correct; the point, however, is that Peterson's conclu- sion is not

scientifically valid given the data he explored.

n53 Id. at 11. In the 1960-1964 period, there were 56 cases. In the 1980-1984 period, there were 162. Id.

n54 Id. at 13.

n55 See Galanter, The Civil Jury, supra note 4, at 210; David B. Rottman, Tort Liti- gation in the State Courts: Evidence from the Trial Court Information Network, St. Ct. J., Fall 1990, at 4; Saks, supra note 4, at 1228; see also Danzon, supra note 7, at 56 (" L awsuits are filed in only 20 percent of automobile claims, and only 1 percent are litigated to verdict, whereas suits are filed in 58 percent of malpractice cases and 7 per- cent are litigated to verdict."). Indeed, Gross and Syverud report data showing that the percentage of auto injury cases going to trial was only 0.9% in 1988-1989, whereas other personal injury suits proceeded to trial at a rate of 2.4%. See Gross & Syverud, supra note 47, at 360 n.95.

n56 I reached this conclusion following discussions with plaintiffs' attorneys in North Carolina. Weiler also draws this conclusion. See Weiler, supra note 3, at 48; cf. Gross & Syverud, supra note 47, at 349-52, 360-62.

n57 Bovbjerg et al., supra note 39, at 35-36.

n58 See, e.g., Chin & Peterson, supra note 27, at 50 (reporting win rates of 53% for auto and 33% for malpractice); Peterson, supra note 43, at 17 (finding that in 1980-1984, the win rate in auto accidents was 70% in San Francisco and 64% in Cook County; in contrast, the win rates in malpractice cases tried in those cities were 53% and 49%, respectively); Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 Cornell L. Rev. 1124, 1175 (1992) (finding that the win rate was 60% for motor vehicle plaintiffs and 30% for medical malpractice); Henry S. Farber & Michelle J. White, Medical Malpractice: An Empirical Examination of the Liti- gation Process, 22 Rand J. Econ. 199, 203 (1991) (reporting that in a sample of 326 cases against a single large hospital between 1977 and 1989, only 13, or 5.2%, were tried to verdict and all were decided in the defendant's favor).

n59 See, e.g., Chin & Peterson, supra note 27, at 49-56.

n60 In North Carolina, the average malpractice case filed between 1984 and 1987 had 3.2 defendants. Less than one-third of the cases initially had only a single defendant; the number of defendants ranged as high as 21. (unpublished data, on file with the author). One reason for multiple defendants is the fact that increasingly, health care is highly spe- cialized; a team of health care providers share responsibility for the patient's welfare. Furthermore, a "manager" organization may be responsible for delivery of these services. For further discussion, see The Institute For Civil Justice, The Rand Corpora- tion, Health Care Delivery and Tort 18-23 (Elizabeth Rolph ed., 1992) herein- after Health Care Delivery .

n61 Chin & Peterson, supra note 27, at 56; Weiler, supra note 3, at 46; Bovbjerg et al., supra note 39, at 33 n.108.

n62 See, e.g., Health Care Delivery, supra note 60, at 17-28; Chin & Peterson, supra note 27, at 49-51.

n63 Bovbjerg et al., supra note 39, at 33 n.108.

n64 See, e.g., Dale W. Broeder, The University of Chicago Jury Project, 38 Neb. L. Rev. 744, 756-60 (1959); Edith Greene, On Juries and Damage Awards: The Process of Decisionmaking, 52 Law & Contemp. Probs., Autumn 1989, at 225, 229; Harry Kalven, Jr., The Jury, the Law, and the Personal Injury Damage Award, 19 Ohio St. L.J. 158, 167-68

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(1958).

n65 There are some exceptions to zero percent patient responsibility: cases in which the defendants argue that the patient was told of risks of a procedure and gave informed consent; cases in which the patient did not follow physician instructions during or after treatment; and cases in which the illness leading to the treatment contributed to the ef- fects of the negligent injury.

n66 See Gross & Syverud, supra note 47, at 356-66. In auto injury cases, 85% of plaintiffs had an offer of settlement prior to trial, but only 40% of malpractice plaintiffs had similar offers. Id. at 346. My interviews with attorneys suggest that this result is also likely to be found in North Carolina, but, unlike the malpractice cases, I have no system- atic data on auto negligence cases.

n67 This conclusion was derived from interviews with both plaintiff and defense mal- practice attorneys in North Carolina as part of a larger study of medical malpractice litigation. See **Vidmar,** supra note 4, at 124; **Vidmar** et al., supra note 17. My conclu- sions from the interview data were supported by a survey of 25 cases filed in North Carolina that went to trial between July 1987 and December 1989. In 16 cases, the plain- tiff called expert testimony on damages and the defense called no evidence; in five cases, both plaintiff and defendant had expert evidence on damages; in four cases, neither side called experts on the issue of damages. This difference is statistically significant. A Chi- square test yields a value of 10.68, which is significant at the .01 level of confidence.

n68 Weiler, supra note 3, at 48.

n69 Id. For a general discussion of day-in-the-life evidence, see, for example, J. Ric Gass, Defending Against Day-in-the-Life Videos, 34 For Def., July 1992, at 8.

n70 See Weiler, supra note 3, at 19-26; Robert C. Clark, Why Does Health Care Regulation Fail?, 41 Md. L. Rev. 1, 5-8 (1981); Eleanor D. Kinney & Marilyn M. Wild- er, Medical Standard Setting in the Current Malpractice Environment: Problems and Pos- sibilities, 22 U.C. Davis L. Rev. 421, 440-42 (1989).

n71 See Danzon, supra note 15.

n72 AMA Proposed Alternative Report, supra note 5, at 9.

n73 Weiler, supra note 3, at 55 n.36.

n74 Danzon, supra note 21, at 49.

n75 Danzon supra note 15, at 132. Danzon arrives at this estimate of the number of 1984 cases by projecting from 1983 claims in Florida and the 1980 National Association of Insurance Commissioners report, cf. National Association of Insurance Commis- sioners, Malpractice Claims (M. Patricia Sowka ed., 1980). In using this latter study, Danzon implicitly assumed that the trial rate in Florida was the same as nationwide averages and, further her study is contaminated by cases that might have been settled at trial, decided in a bench trial, or by some other disposition. Danzon's description of how the figure of 322 potential jury cases was arrived at is as follows:

A total of 2,539 malpractice claims were closed in Florida 1983. Since unpublished St. Paul data show no increase in frequency in 1984, the same number is used for 1984 claims. On average, 87.3 percent of malpractice claims are dropped or settled out of court; the remaining 12.7 percent of claims go to trial and are resolved either by final judgment by jury

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or judge, by dismissal, or by other disposition. These numbers imply a total of 322 court dispositions in Florida in 1984.

Danzon supra note 15, at 132 (citations omitted). In an article published in 1986, Danzon observed that other data showed "significant differences in claim frequency for 1983, by type of insurer." Patricia M. Danzon, The Frequency and Severity of Medical Malpractice Claims: New Evidence, 49 Law & Contemp. Probs., Spring 1986, at 57, 61 n.15. Danzon continued to cite results from the Florida study in her 1990 article accompanied by a footnote indicating some of the sources of possible error in generalizing from her data, but she did not address the confounds that are discussed in this Article. See Danzon, supra note 21, at 49 & n.9.

n76 Danzon, supra note 15, at 132.

n77 Id.

n78 Id. at 133.

n79 Id.

n80 Id.

n81 Id. at 134.

n82 Id.

n83 Id. at 136. These "not implausible" conclusions were repealed in a subsequent ar- ticle by Danzon with some qualifications in a footnote. See Danzon, supra note 21, at 49 & n.9.

n84 Nevertheless, at least a lengthy footnote should call attention to another matter. I am concerned about the databases used to estimate non-economic damages and the meaning that should be ascribed to the estimates. The concern applies not only to the Danzon study in question but to other researchers' attempts to calculate non-economic damages, particularly pain and suffering, from verdict reporters and closed-claim files. For a more extensive discussion of the problems with verdict reporter data, see **Vidmar,** supra note 48; see also Peterson, supra note 27, at 8-9 (researchers estimated disabili- ties from plaintiffs' injuries); Bovbjerg et al., supra note 39; Frank A. Sloan & Chee R. Hsieh, Variability in Medical Malpractice Payments: Is the Compensation Fair?, 24 Law & Soc'y Rev. 997 (1990); Viscusi supra note 17. To calculate non-economic damages, the known special damages are subtracted from the total verdict (less punitive damages, if any); the residual is the figure used for non-economic damages. Usually researchers label the residual simply "pain and suffering."

There are several major reasons to be concerned about the use of these figures. First, the databases are often missing extensive information. In Medical Malpractice, Danzon used closed-claims insurance files. She stated that these data "only report the insurance company's estimate of economic loss" and concluded that "the data on earnings were particularly poor." Danzon, supra note 7, at 40. Peterson, using verdict reporters, stated that " o ccasionally the Reporter included a plaintiff's income and the length of time that his or her income was lost because of an injury," and presumably for similar reasons, Peterson did not report information about future medical expenses or future lost income. Peterson, supra note 27, at 9. Viscusi similarly conceded problems with making estimates of pain and suffering from closed-claim files.

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The loss figures . . . are reported losses, not actual losses. The amount of the loss is recorded in the data set by the insurance company. To the extent that this variable reflects the insurance company's loss estimate, the financial loss will be understated . . . . B ias may also vary with the loss level. Very large loss claims with substantial long-term medical costs may have a very wide possi- ble variance, so that the propensity for underestimation by the insurance com- pany and overestimation by the claimant will be especially great.

Viscusi, supra note 17, at 206; see also Sloan & Hsieh, supra, at 1012-13, 1019. The truth of the matter is that in these data sets, economic data are frequently missing to an ex- tensive degree. In fact, I have reviewed convenience samples of closed-claim files from three different professional liability insurers in North Carolina. Sometimes, the financial estimates are presented only in the most general terms; much of the time, they are missing altogether.

The second problem is vaguely identified in the Peterson study, see Peterson, supra note 27, and by Viscusi, see Viscusi, supra note 17, at 206, but needs to be made explicit. Both economic and non-economic damages have many potential components, and there is often no bright line dividing the two. Economic damages may consist not only of past and present medical expenses and lost wages but also future medical expenses, fu- ture lost income, future housekeeping expenses (including modifications to homes and automobiles), and when dependent children are involved, future costs for education. Any observer of trials or settlement negotiations will quickly agree that the assumption that special damages can be "easily ascertained" and "usually . . . documented by routine business records," Peterson, supra note 27, at 9, is facile, since bitter disputes over past lost income occur on a regular basis. Furthermore, disagreement over future income and medical costs, reduced to present value, may exceed past economic losses by at least several points on a Richter scale. Indeed, even experts arrive at wildly varying figures. For instance, one case in the Duke Medical Malpractice Project study involved a severe birth injury in which the biggest point of contention regarded future medical and associat- ed costs. See **Vidmar,** supra note 4, at 122. The plaintiff's expert produced a plausible case for an award exceeding $ 6 million. The defendant had obtained estimates from three separate experts; these ranged from $ 2.1 million to $ 4.3 million. See id. What, then, was the correct figure, and what does this example say about the ease with which economic damages are calculated? How reliable are the accounts of economic damages in closed- claim files and in verdict reporters, and how are they computed?

When we turn to non-economic damages, the problem becomes even more difficult. There should be no debate that past and future pain and suffering is a non-economic loss. Possibly, we could reach agreement that loss of consortium, nurturance for depen- dents, and loss of enjoyment of life's amenities are also non-economic losses. Does severe disfigurement constitute an economic or a non-economic loss? It might affect a person's self-esteem and happiness, but it might also affect earning capacity. Is it reasonable to label the difference between economic and total damages "pain and suffering" when it may contain some or all of the above components?

Still further problems can be identified from discrepancies in figures contained in published reports about unreliability of damage awards. See, e.g., Randall R. Bovbjerg et al., Valuing Life and Limb in Tort: Scheduling "Pain and Suffering," 83 Nw. U. L. Rev. 908 (1989). I compared figures for median "total awards," id. at 922, and "non-economic" awards, id. at 937, and found: (a) that in one instance the "non-economic award" exceed- ed the total award (median total award in cases of permanent major injury was $ 1,422,000, whereas the median non-economic award in such cases was $ 1,642,000, or 115% of the total); and (b) that the reported median non-economic award for various injury levels ranged between 29% and 115%, but the median non-economic award for the total data set was reported as only 26%. Both of these findings are not logically possible. The discrepancies may accrue in part

Often awards have little relationship to the seriousness of the injury. There is no way to predict how a jury will rule on a par- ticular set of facts. Often awards bear no relationship to econom- ic losses . . . . Today, juries often make awards regardless of the "fault" of anyone--out of sympathy for an injured person. More and more the public attitude is that insurance will compensate the injured party and the defendant will not sustain any loss . . . . Too often, juries appear to award on the basis of emotion as opposed to facts and/or realistic evaluation of case circumstances. [6]

In its annual report to Congress in 1991, the Physician Payment Review Commission stated,

Malpractice injuries seem to be compensated more than are com- parable injuries arising from nonmedical settings. For example, researchers estimated that median awards for a leg amputation were $ 199, 999 in an automobile accident case, $ 330,000 in a pri- vate property owner case, $ 687,000 in a product liability case, **[*220]** $ 754,000 in a medical malpractice case against a physician, and $ 761,000 in a Workmen's compensation case. The disparities may be due to jurors' knowledge that physicians are heavily insured or that the claimant's legal fees must be taken out of the judg- ment. This does not indicate which is the appropriate level of compensation, only that payments are inconsistent across con- texts. [7]

In a twenty-minute videotape produced in 1992 by The Manhattan Institute for Policy Research, C. Everett Koop, former Surgeon General of the United States, relates a hypothetical situation in which a child is born with cerebral palsy. Although the doctor has no control over the condition, the family seeks to blame him. Dr. Koop goes on to say that "if they attempt to sue their physician they're very likely to find a sympathetic jury that will award some- thing to that family not necessarily because they think the doctor is guilty of negligence or malpractice but because their sympathy for the family dictates it." [8]

Claims about the deep pockets effect also extend to products liability, government defendants, and other types of cases in which critics assert that jury sympathies lie with injured parties and against defendants who have the ability to pay large sums. In Liability: The Legal Revolution and Its Consequences, popular writer and critic of the tort liability system, Peter Huber, wrote of legal outcomes in the 1970s and 1980s that "judges and juries were, for the most part, committed to running a generous sort of charity. If the new tort system cannot find a careless defendant after an accident, it will often settle for a merely wealthy one." [9] Huber also offered an explanation: "The only human reaction to the individual tragedy, viewed close up, is unbounded generosity, which any large corporation or insurer can surely afford to under- **[*221]** write." [10] Judicial opinions, law reviews, and scientific journals ex- press similar opinions. [11]

In the context of medical malpractice, four overlapping empir- ical assertions have been made: (1) juries give larger awards in malpractice cases than in other types of cases, particularly automo- bile negligence cases, even when injuries are objectively simi- lar--the deep pockets hypothesis; (2) the rates of plaintiff victories in malpractice cases have increased in recent years; (3) the sizes of awards have increased; and (4) the awards for non-economic dam- ages such as pain and suffering in particular are out of control.

With respect to this last assertion, Weiler writes, " T he most troublesome feature of large tort verdicts is the amount of damag- es awarded for pain and suffering, not for direct medical costs." [12] The AMA Proposed Alternative Report, drawing on a study by Patricia Danzon, asserted that "for larger claims . . . non-economic injury is often the largest

from the fact that the cases from which the non- economic data were taken constituted a subsample of the total sample from which the total awards were derived, but the fact of the discrepancies itself raises serious questions about the reliability of the estimates set forth in this study.

Finally, the above insights about the difficulty and unreliability of estimating both economic and non-economic damages lend an alternative explanation to the conclusion of Bovbjerg's study that the wide variation in jury awards, even within categories of injury severity, is due primarily to the unreliability of juries. Id. at 923-26. The conclusion is predicated on the assumptions that: (a) economic losses for different plaintiffs do not vary greatly; (b) the parties, or outside observers, will agree as to what those losses are; and (c) stable estimates were placed into evidence before the juries. To the extent that these assumptions are not warranted, and the above analysis suggests that they likely are not, ascribing the variation in damages to jury caprice or incompetence is not valid. I do not suggest that there is no unreliability in jury awards. The data from the experiment de- scribed infra Part II and previous research by Neil **Vidmar** and Jeffrey Rice indicate some unreliability does exist. See Neil **Vidmar** & Jeffrey J. Rice, Assessments of Non- economic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals, 78 Iowa L. Rev. 883 (1993); see also Greene, supra note 64 (finding that the decisionmaking process of jurors depends on the complexity of the case). My point, however, is that substantial variation also can be ascribed to prior variation in the stan- dards by which earlier researchers have judged verdicts and that these researchers have not given adequate recognition to the problem. .

In summary, all of the published empirical studies of pain and suffering awards should be viewed with great suspicion as to their reliability, validity, and meaning.

n85 See supra text accompanying note 3.

n86 See supra text accompanying notes 8-10.

n87 Bovbjerg et al., supra note 39, at 35-36. I want to be fair: Bovbjorg's group of researchers, in contrast to the other authors, stated the matter only as a hypothesis. Id.

n88 Subsequent to the publication of the above articles speculating on jury motives, a 1993 issue of The National Law Journal reported the results of a survey of 783 former jurors with the following headline: "Many Jurors Consider Deep Pockets and Ignore Presumption of Innocence." Although reporting that " m ore than a third of all civil ju- rors thought that members of their jury took into account the defendant's ability to pay damages," the headline distorted the finding that " f ifty-three percent said they didn't consider a defendant's finances" and that some of the jury experts who commented on the survey results offered alternative explanations for the findings. Many Jurors Consider Deep Pockets and Ignore Presumption of Innocence, Nat'l L.J., Feb. 22, 1993, at S12. Moreover, the survey suffers from methodological weaknesses; the answers were retro- spective and the question, as reported in the article itself, asked the respondents to spec- ulate about the minds of other jurors, rather than asking them whether they themselves took a defendant's finances into account when reaching their verdict.

n89 E.g., Chin & Peterson, supra note 27, at vii.

n90 Danzon, supra note 15, at 132-33.

n91 Danzon, supra note 7, at 38.

n92 **Vidmar,** supra note 4, at 118, 119.

n93 E.g., Clermont & Eisenberg, supra note 58, at 1162 (finding 30% plaintiff win rates for product liability and medical malpractice trials, 60% for others); Gross & Syverud, supra note

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47, at 334 (finding 29.2% plaintiff win rate in medical malpractice trials); see also Bovbjerg et al., supra note 39, at 22 (finding 30% plaintiff win rate in malpractice trials). Also, although their data set included settlements as well as jury ver- dicts, Sloan and Hsieh concluded that " c ontrary to the notion that payment is higher when the defendant has deep pockets . . . cases involving hospitals as named defendants resulted in lower rather than higher payments" compared to physician-only malpractice cases. Sloan & Hsieh, supra note 84, at 1024.

n94 See supra text accompanying note 58; see also Peterson & Priest, supra note 20, at 19 (reporting that the average plaintiff win rate for medical malpractice between 1960 and 1979 was 33% and that the plaintiff win rate for auto accidents was 53%).

n95 See supra subsection I(C)(1).

n96 Danzon draws a similar conclusion. "The data on the issue of liability are . . . limited, but clearly refute the extreme charge that juries compensate without regard to fault in cases of severe injury." Danzon, supra note 7, at 50.

n97 Mark I. Taragin et al., The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims, 117 Annals Internal Med. 780 (1992). Taragin also found that verdicts on liability were positively correlated with judg- ments of negligence made by reviewing physicians acting in a neutral capacity. Id at 781.

n98 See Chin & Peterson, supra note 27, at 54-56.

n99 Unless, of course, jurors are aware of liability insurance coverage and assume the limits are higher in malpractice cases than in auto injury or slip-and-fall cases, or if, as Weiler implies, jurors distinguish between awards they perceive may affect their own in- surance rates and those that will not while calculating damages. Weiler, supra note 3, at 48.

n100 Danzon, supra note 7, at 50 ("Damage awards are strongly influenced by the plaintiff's economic loss and by the law defining and sometimes limiting compensable damages.").

n101 Chin & Peterson, supra note 27; Peterson, supra note 27.

n102 E.g., Bovbjerg et al., supra note 84; Taragin et al., supra note 97.

n103 Severity of injury accounts for about 50% of the variability in these studies, leaving the possibility that some proportion of the remaining variability is due to the deep pockets effect, but this possibility has yet to be demonstrated, as the present cri- tique shows. Additionally, keep in mind my severe critique of these studies. See supra Section I(C).

n104 See supra Part I.

n105 See infra Section III(A).

n106 Weiler, supra note 3, at 54.

n107 Hammitt et al., supra note 31, at 756.

n108 Huber, supra note 9, at 120.

n109 These figures were derived from comparable injuries listed in the Personal Injury Valuation Handbook: Case Evaluation Manual III L-Z (1993), and would be within the range of what a plaintiff's attorney might demand in such a case.

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n110 The thirteen items were as follows:

1. How severe do you think Katherine Link's pain and suffering was in the months following the accident?;

2. To what extent do you believe that the accident and the medical compli- cations that followed will have a negative, or bad, effect on the rest of Katherine's life?;

3. To what extent do you believe that the accident was avoidable?;

4. To what extent do you believe that the plaintiff, Katherine Link, bears some responsibility for the accident?;

5. To what extent do you believe that the defendant was negligent in Katherine's accident?;

6. To what extent do you believe that the defendant should be held morally responsible for the accident?;

7. To what extent do you believe that the defendant should be held legally responsible for Katherine's accident?;

8. To what extent do you believe the lawyer for the plaintiff was reasonable or unreasonable in suggesting that Katherine should receive $ 220,000 for the accident?;

9. To what extent do you believe that the defense lawyer was reasonable or unreasonable in suggesting that Katherine should receive $ 65, 268 for the accident?;

10. Some people say that when you drive a car you should assume some of the risk for any accident that happens. To what extent do you agree or disagree with this view?;

11. Some people say that if you go to a hospital for surgery you have to as- sume some of the risk for any medical accident that happens. To what extent do you agree or disagree with this view?;

12. Some people say that today too many people file lawsuits in hope of making a fast buck. Do you feel that too many people file lawsuits for that purpose?;

13. Some people say that today medical doctors and hospitals are sued too often. To what extent do you agree that they are sued too often?

n111 See, e.g., Quinn McNemar, Psychological Statistics 20-25 (1962).

n112 Id. at 252-373.

n113 The F value for the cause factor was 0.29, df=1,138, and probability was not statistically significant. The F value for number/type of defendants was 2.70, df=2,138, and probability was not significant. The F value for cause by defendant interaction was 3.06 with df=2,138; the probability was less than .05, a statistically significant result.

n114 These analyses compared the individual conditions against one another to deter- mine which, if any, are statistically significant. None of the individual conditions was significant except for the two-defendant medical negligence condition, which differed from all other conditions.

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n115 See McNemar, supra note 111.

n116 For a list of these questions, see supra note 110.

n117 The mean for medical negligence was 9.2 on the 10-point scale and for vehicle negligence it was 8.0. F value was 7.31, df=1,141, p< .01.

n118 The mean for medical negligence was 1.2 and for vehicle negligence it was 1.5. F=4.75, df=1,142, p< .05.

n119 The means for medical and vehicle negligence were 2.4 and 3.6, respectively. F=5.56, df=1,143, p< .05.

n120 The means for medical and vehicle negligence were 2.4 and 3.7, respectively. F=7.36, df=1,142, p< .01.

n121 The analyses of variance also revealed interactions among three of the questions: Question 2, the degree to which the injury had a bad effect on the plaintiff; Question 9, whether the defendant's offer was reasonable; and Question 10, the extent to which a driver assumes risk in operating a motor vehicle. However, the data did not yield inter- pretable patterns of data, and the effects were small. They are ignored in the remainder of this Article.

n122 Question 1, r=.29, p< .001.

n123 Question 2, r=.49, p< .001.

n124 Question 6, r=.21, p< .01.

n125 Question 8, r=.75, p< .001.

n126 Question 9, r=.42, p< .001.

n127 Question 11, r=.22, p< .01.

n128 r= -.20, p< .01.

n129 See infra Section III(A).

n130 For a similar observation, see Greene, supra note 64, at 225.

n131 One interesting finding was that jurors who made strong statements about the ir- responsibility of the defendant(s) and those who expressed sympathies for the plaintiff did not necessarily give the highest awards. This lack of correlation between juror reac- tions and size of awards leads to the hypothesis that even if the juror were inclined to punish the defendant or give the plaintiff a windfall, the actual amount judged appropri- ate to accomplish the goal differed. Thus, one juror might deem a $ 40,000 award big punishment of the defendant, whereas another juror who does not wish to punish might consider $ 100,000 fair compensation for the pain and suffering. Our data do not allow further exploration of this hypothesis.

n132 Chin & Peterson, supra note 27, at 3; Huber, supra note 9. For further dis- cussion, see Mahoney & Littlejohn, supra note 11, at 1397; Valerie P. Hans & William S. Lofquist, Jurors' Judgments of Business Liability in Tort Cases: Implications for the Lit- igation Explosion Debate, 26 Law & Soc'y Rev. 85, 86 (1992).

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n133 Valerie Hans, Factors Affecting Lay Judgments of Corporate Wrongdoing, Paper Presented at Third European Conference of Law and Psychology, Oxford, England, Sept. 19, 1992, at 3 (on file with author).

n134 Id. at 4.

n135 Id. at 5. This, of course, constitutes the primary claim against medical negligence juries. See supra Section I(A). Hans also correctly observes that the phenomenon, if it exists, could as likely be labelled the "empty pockets" phenomenon if jurors undercompensate when defendants are individuals. Hans, supra note 133, at 5. This possi- bility raises the issue of what standards are to be used to determine if an award is "ap- propriate."

n136 Conversely, it may be that it is easier to empathize with the plight of individual defendants. Id. at 6.

n137 Valerie P. Hans & M. David Ermann, Responses to Corporate Versus Individual Wrongdoing, 13 Law & Hum. Behav. 151, 155-56 (1989).

n138 Id.

n139 Id.

n140 Hans & Lofquist, supra note 132, at 90.

n141 Hans, supra note 133, at 6.

n142 Robert MacCoun, Deep Pockets or Corporate Identity: Understanding the Effects of Defendant Identity on Civil Jury Verdicts, Paper Presented at the Annual Meeting of the Law and Society Association (June 28, 1991) (on file with author).

n143 Chin & Peterson, supra note 27, at 54.

n144 See supra subsection II(F)(4).

n145 See supra text accompanying note 65.

n146 Research and theory in other contexts indicates that people in positions of au- thority or who possess special expertise are held more accountable and responsible for their actions. See V. Lee Hamilton & Joseph Sanders, Everyday Justice (1992); Stephen M. Rosoff, Physicians as Criminal Defendants: Specialty, Sanctions, and Status Liability, 13 Law & Hum. Behav. 231, 234-35 (1989) (finding that physicians in high- status areas of medical practice are held more accountable for criminal actions than phy- sicians in lower-status areas of practice).

As the present Article was being written, the author learned of an unpublished experiment by Bourgeois and Horowitz that bears directly on the responsibility hypothe- sis. Martin J. Bourgeois & Irwin Horowitz, Summary of Damage Award Study (study summary on file with the author and reported with permission of Professor Horowitz). In the simulation, jurors were instructed to award damages in a wrongful death suit in which defendant liability had previously been established and pain and suffering was not at issue because the plaintiff had died instantly. Half of the jurors were told that the cause of death was a surgical mishap, and half were told the plaintiff's death was due to an automobile accident. In each of these two conditions, the defendant was either a doctor (who committed a surgical error or who drove the automobile that caused the death) or a hospital that either was liable for the surgical error or that owned the vehi- cle the physician was driving. The average awards in the four conditions were as follows: doctor/malpractice = $ 1,387,600; doctor/automobile = $ 463,812; hospital/malpractice = $ 1,640,062; hospital/automobile = $ 1,309,267. The

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results may lend partial support for the deep pockets hypothesis in that the hospital defendant paid almost three times more than the physician defendant in the automobile negligence condition, although an alternative interpretation is that the jurors discounted the award for the physician automobile negli- gence defendant rather than increased it for the hospital. See Hans & Lofquist, supra note 132, at 102-04 (using similar reasoning). For our purposes, however, the more in- teresting finding is the comparison of jurors' assessments of responsibility in the doc- tor/malpractice and in the doctor/auto negligence conditions. Although the award was greater when the doctor caused the death through malpractice, rather than through negli- gent driving, the jurors also ascribed significantly greater responsibility to the doctor in the former condition than in the latter. This result is consistent with the responsibility findings in our own experiment, with our analyses of differences in contributory negli- gence between malpractice and auto negligence cases, see supra Section II(F), and with Hans's analysis, see Hans, supra note 133.

n147 Sloan & Hsieh, supra note 84, at 1024. Obviously, in light of the methodological problems in verdict and closed-claim data already discussed, we must consider other possibilities as well, e.g., different types of evidence, different theories of liability, and differ- ing abilities of plaintiffs' and defense attorneys. See supra text accompanying notes 68-69.

n148 See supra Table 1.

n149 Weiler, supra note 3, at 54-61; AMA Proposed Alternative Report, supra note 5, at 9; Bovbjerg et al., supra note 84, at 911-13; Griffith, supra note 14, at 195.

n150 Harry Kalven & Hans Zeisel, The American Jury 9 (1966); Harry Kalven, Jr., The Dignity of the Civil Jury, 50 Va. L. Rev. 1055, 1063 (1964); see also Valerie Hans & Neil **Vidmar,** Judging the Jury 114-15 (1984).

n151 For a review of this literature, see Bovbjerg et al., supra note 84; **Vidmar** & Rice, supra note 84, at 884-89.

n152 Clermont & Eisenberg, supra note 57, at 1126. The authors took note that much of the difference may be due to the fact that judges and juries get different types of cas- es. Id. Samuel Gross argues that almost all of the differences in Clermont and Eisenberg's data can be ascribed to case selection. Samuel R. Gross, Settling For a Judge: A Comment on Clermont and Eisenberg, 77 Cornell L. Rev. 1178 (1992).

n153 **Vidmar** & Rice, supra note 84, at 892-93.

n154 Id. at 897. The awards of legal professionals had a standard deviation of $ 16,730 in contrast to an estimated standard deviation of $ 10,970 for twelve-person juries.

n155 The four conditions were as follows: malpractice case with individual defendant; malpractice case with hospital defendant; auto negligence case with individual defendant; auto negligence with corporate defendant. A more detailed account of the attorney data will be reported in a subsequent article.

n156 A t test yielded a value of 0.25, with 149 degrees of freedom; this difference is not statistically significant.

n157 The standard deviation for the experienced attorneys was $ 46,452, and that for twelve-person juries was $ 22,893. These data will be reported in more detail in a subsequent report.

n158 Hans & Lofquist, supra note 132.

n159 See **Vidmar,** supra note 4; see also Neil **Vidmar** & Jeffrey Rice, Jury-Determined

Settlements and Summary Jury Trials: Observations About Alternative Dispute Resolution in an Adversary Culture, 19 Fla. St. U. L. Rev. 89 (1991). Reports of these interviews are on file with the author.

n160 See **Vidmar,** supra note 4, at 120.

n161 For a synopsis of this case, see **Vidmar** & Rice, supra note 159, at 100 n.51.

n162 See supra notes 15-21.

n163 See Hans & Lofquist, supra note 132, at 106-07; Hans, supra note 133, at 5, 11.

n164 See generally Hans & **Vidmar,** supra note 150, at 113-16; Johnson et al., supra note 5, at 1371 ("Even under the best of circumstances, juries can never be as effective as specialized triers of fact at deciding malpractice cases . . . ."); Landsman, supra note 25.

n165 See AMA Proposed Alternative Report, supra note 5, at 7-8; Johnson et al., supra note 5, at 1370-71.

n166 See, e.g., Earl R. Babbie, The Practice of Social Research (3d ed. 1983); Donald T. Campbell & Julian C. Stanley, Experimental and Quasi-Experimen- tal Designs for Research (1963); Thomas D. Cook & Donald T. Campbell, Quasi-Experimentation: Design & Analysis Issues for Field Settings (1979); Hans Zeisel, Say It With Figures (6th ed. 1985).

n167 See **Vidmar,** supra note 48; Section (I)(C).

n168 For example the Danzon study, see Danzon, supra note 15, was part of a policy report. The Bovbjerg study, see Bovbjerg et al., supra note 39, was published in a law review with student editors, and such editors infrequently possess sophistication or experi- ence in data analysis. The Rand Studies, see, e.g., Peterson, supra note 27; Chin & Peterson, supra note 27; Peterson & Priest, supra note 7, were published by the Rand Corporation itself. Although it is my understanding that the Rand reports do un- dergo in-house peer review, the process is not the same as would occur in a social sci- ence or science journal.

n169 See Kenneth Chesebro, Galileo's Retort: Peter Huber's Junk Scholarship, 42 Am. U. L. Rev. 1637 (1993); Daniels, supra note 28; Robert M. Hayden, Neocontract Polemics and Unconscionable Scholarship, 24 Law & Soc'y Rev. 863 (1990); Saks, supra note 4.

n170 See id.; Hayden, supra note 169; Saks, supra note 4, at 1156-66.

n171 Marc Galanter, Jury Shadows: Reflections on the Civil Jury and the "Litigation Explosion," in The 1986 Chief Justice Earl Warren Conference on Advocacy: The American Civil Jury 15 (The Roscoe Pound-American Trial Lawyers Foundation ed., 1987); Galanter, The Civil Jury, supra note 4.

n172 See, e.g., Hans, supra note 133; Edith Greene et al., Jurors' Attitudes About Civil Litigation and the Size of Damage Awards, 40 Am. U. L. Rev. 805 (1991).

n173. See, e.g., WEILER, supra note 3; HEALTH CARE DELIVERY, supra note 60.

n174. See, e.g., AMA PROPOSED ALTERNATIVE REPORT, supra note 5; Kenneth S. Abraham, Medical Liablity Reform: A Conceptual Framework, 260 JAMA 68, 70 (1988) ("The chief characteristic of the American jury system that impinges on the medical liability proble is the use of lay jurors."); Arnold S. Relman, Changing the Malpractice Liability System, 322 NEW ENG. J. MED. 626, 626 (1990) (arguing that measures "to fundamentally flawed assumptions on which the system rests--namely, that trial by jury is and accompanying text; see also Stephen Daniels, The Question of Jury Competence and the Politics of Civil Justice

Reform; Symbols, Rhetoric, and Agenda-Building, 52 LAW & CONTEMP. PROBS., Autumn 1989, at 269; Saks, supra note 4, at 1274-77.

Source: All Sources > Secondary Legal > **Law Reviews, Combined**
Terms: **vidmar and ("non-economic damages" /25 percentage)** (Edit Search)
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component of the award." [13] The 1992 Annual Report to Congress of the Physician Payment Review Commission states,

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Much of the unpredictability and inconsistency of malpractice awards is due to non-economic damages (i.e., pain and suffering), which constitute about half of total payments . . . . Such damages are highly subjective. Reducing this unpredictability and removing the open-ended nature of these damages would probably improve decisionmaking during the course of a lawsuit. [14]

The evidentiary base for the AMA's and Weiler's conclusion that the problem of awards for pain and suffering is particularly acute is rather scanty. The assertion is apparently derived from a study by Danzon. [15] Danzon's study combined databases from sev- eral sources and attempted to estimate the components of awards that can be ascribed to pain and suffering. [16] It is important to note, however, that Weiler's claim, citing Danzon, that "damages for pain and suffering, broadly defined, now make up nearly 50 percent of total tort damages paid for medical cases, with the largest awards taking the lion's share of this money," cannot be found in the Danzon study. [17] Similarly, the AMA Proposed Al- ternative Report's claim that Danzon's study found that "the pain **[*223]** and suffering portion of awards in excess of $ 100,000 accounts for 80 percent of the total verdict in such cases" [18] also cannot be found in that source. [19] Danzon did conclude that of those plain- tiffs who won a verdict in large damage award cases, 51% received a pain and suffering award in excess of $ 100,000. [20] Even these figures, however, must be interpreted in relation to the total amount of the awards. In a subsequent interpretation of her study's findings, Danzon stated that " p ayments in excess of $ 100,000 for pain and suffering on malpractice cases increased from 1.8 percent to 12.8 percent of total payments to plaintiffs on all tort cases." [21] There are some very serious problems of inter- pretation and communication in the Danzon report, as I will dem- onstrate below, [22] but it is clear that neither the 50% nor the 80% estimates for pain and suffering were made by Danzon. In the way I was taught mathematics 12.8% cannot easily be rounded to "nearly 50%," let alone to "80%."

The deep pockets hypothesis rests on three interrelated psy- chological assumptions about medical negligence costs. Unreason- able awards are purported to result from: (1) jurors' tendency in medical negligence cases to focus on plaintiff needs rather than liability; (2) jurors' belief in health provider defendants' capacity to pay; and (3) jurors' failure to perceive a connection between an award and its potential effect on their own lives or on society. Weiler claims that in contrast to jurors in medical negligence cases, jurors in automobile accident cases consider the impact of large awards on their own lives because "the insurance premiums at risk are paid directly by the jurors themselves." [23] Huber expounds a parallel thesis: "The layperson votes in favor of expansive liability out of compassion when sitting in the jury box but votes over- whelmingly in favor of limiting liability when the legal rules are put to public referendum." [24] **[*224]**

It is worth observing that assertions that sympathy for plain- tiffs drives jurors' decisions date back at least 140 years. Indeed, Judge Barculo's opinion in Haring v. New-York and Erie Railroad Co. [25] has a very contemporary ring:

We can not shut our eyes to the fact that in certain controversies between the weak and the strong--between a humble individual and a gigantic corporation, the sympathies of the human mind naturally, honestly and generously, run to the assistance and support of the feeble, and apparently oppressed; and that com- passion will sometimes exercise over the deliberations of a jury, an influence which, however honorable to them as philanthro- pists, is

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wholly inconsistent with the principles of law and the ends of justice. [26]

B. The Evidence

Although the deep pockets hypothesis is an integral part of American legal folklore, examination of the text and footnotes of the writings of contemporary jury critics indicates that recent claims about the deep pockets hypothesis emanate from several empirical studies. Audrey Chin and Mark Peterson, two research- ers with the Rand Corporation's Institute for Civil Justice, com- pared the outcomes of over 1000 civil trials that took place in Cook County, Illinois between 1959 and 1979. [27] The data were derived from verdict reporters, [28] comprehensive accounts of all trials within the county that provide basic data about the case, **[*225]** such as the nature of the claim, the seriousness of the alleged in- jury, and estimates of the amount of economic losses, as well as the outcome of the trial. After controlling for severity of injury, Chin and Peterson concluded that in cases in which the plaintiff was not severely injured, corporate and health care provider de- fendants paid approximately thirty percent more than other defen- dants paid for similar injuries. When plaintiffs were severely in- jured, however, corporate and health care provider defendants had to pay up to more than four times the amount assessed against individual defendants in similar cases. [29] Additionally, Chin and Peterson concluded that even when the seriousness of injury was similar, doctors and hospitals who were defendants in ordinary lawsuits, such as slip-and-fall cases, paid substantially less than when they were defendants in malpractice cases. [30]

Working from some of the same data, James Hammitt, Ste- phen Carroll, and Daniel Relles, three other Rand researchers, specifically examined doctors and hospitals as defendants. [31] They concluded that "medical malpractice awards against doctors are almost 2.5 times as great as awards against other individuals in average case types, and awards against hospitals are 85 percent larger." [32] These authors offered several possible explanations for this finding. First, jurors may balance the plaintiff's financial needs against the financial harm to the defendant. Second, jurors may act on their beliefs that doctors and hospitals are heavily insured or wealthy. Third, jurors may feel that these types of harm carry a special "insult" because of the trust a patient places in the doctor and that larger awards are therefore appropriate. [33]

Two other studies have found the same pattern of data as that found in the Hammitt, Carroll, and Relles study. In one, Ste- phen Daniels and Joanne Martin examined over 23,000 jury ver- dicts from forty-three counties in ten states. [34] They concluded that awards in medical malpractice and product liability cases were **[*226]** "generally much higher than those in other legal areas." [35] Howev- er, Daniels and Martin cautioned that these cases may have in- volved more serious injuries than other types of personal injury cases. [36] They also questioned the representativeness of the data Chin and Peterson used [37] and concluded that there is "little sys- tematic evidence concerning actual jury verdicts." [38] In the other study, Randall Bovbjerg, Frank Sloan, Avi Dor, and Chee Ruey Hsieh analyzed verdicts from the Rand database together with verdicts from five other jurisdictions to determine whether mal- practice cases yield different verdicts than cases involving automo- bile injuries, product liability, or government defendants. [39] Using multiple regression analysis to statistically control for a number of variables (such as injury severity), they concluded that the expect- ed value of malpractice verdicts was larger than for other types of cases, particularly automobile injuries. In a subsample of cases in which the injuries resulted in death, the amount of the awards for malpractice cases was, on average, more than twice the amount for injuries resulting from automobile accidents. [40] The researchers suggested, however, that much of the difference may be due to the fact that the malpractice and auto injury cases that actually make it to trial have different kinds of plaintiffs; malpractice attorneys specifically select for trial cases in which plaintiffs appeal to jurors' sympathies. [41] According to this explanation, it may not be deep pockets, but rather case selection, that causes the observed

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differ- ence. [42]

In another Rand study, Mark Peterson compared jury verdicts in Cook County, Illinois and San Francisco County, California from 1960 to 1984. [43] In both jurisdictions, the probability of **[*227]** plaintiff verdicts in medical negligence trials increased from about one chance in four to one chance in two. [44] The amounts awarded to prevailing plaintiffs also increased dramatically; in Cook County, for example, the median award more than tripled. [45]

C. Problems with the Evidence

Taken at face value, the above studies appear to support the notion of a deep pockets effect. Examined more closely, however, none can support the conclusions that have been drawn from them, and for a very compelling reason: they are methodologically flawed to the point that very plausible alternative explanations of the data cannot be discarded. Moreover, on the issue of liability, the data appear contrary to the deep pockets hypothesis; so do some of the data regarding amounts awarded as damages. Finally, there are no data at all to support the contentions that jurors are psychologically motivated by uncontrolled sympathy for plaintiffs and a belief that the rich ought to pay.

1. The Case Selection Problem. The databases for the em- pirical studies on which proponents of the deep pockets hypothesis rely are limited to cases that went to trial. They provide no infor- mation about the lawsuits that were settled, dropped, or disposed of through judicial rulings. Sources tell us that depending on the type of case, only 2 to 12% of lawsuits culminate in a jury trial. [46] Moreover, the numbers and types of cases that proceed to trial vary over time and between jurisdictions. [47] The thrust of this in- sight is that different mixes of cases in each category may reach **[*228]** trial; juries may be deciding very different proportions and types of cases, rather than deciding similar cases differently. [48]

Since this elementary fact seems to have escaped some experi- enced researchers and was conveniently forgotten by others, [49] an elementary example is not out of order. Assume that in a particu- lar jurisdiction, the only cases that go before juries are ones in which defendants are found liable and that the only task of the jury is to decide damages. Assume further that at Year 1, two types of cases are selected for jury trial: Type A cases are worth $ 10,000, and Type B cases are worth $ 100,000. During Year 1, ten Type A cases and ten Type B cases are tried. The juries are reli- able, so that on average, Type A plaintiffs each receive $ 10,000, and Type B plaintiffs each receive $ 100,000. If we calculate the average jury award for the year, it is: ((10 trials x $ 10,000) + (10 trials x $ 100,000)) divided by 20 trials = $ 55,000. Assume now that between Year 1 and Year 5, the state introduces an alternative dispute resolution program for cases worth $ 10,000 or less and that it is so successful that all Type A cases are settled in Year 5. Only Type B cases are left, of which there are still 10 per year, to go to trial. Each type B case still receives $ 100,000. The average award at Year 5 is: (10 trials x $ 100,000) divided by 10 = $ 100,000. Thus, the average jury award has increased $ 45,000 (from $ 55,000 to $ 100,000), or 82%, between Year 1 and Year 5. Can we conclude that juries have become more magnanimous over the five-year period? Of course not; the change in the types of cases going to trial caused the change in the average award. Similarly, we would not be justi- fied in concluding that juries had become less generous if, for some reason, Type B cases settled and only Type A cases went to **[*229]** trial. [50] Without knowing about the base of cases from which trials were selected and about any changes in that base, we can con- clude nothing about changes in jury behavior from verdict reports.

The jury verdict data in the Rand studies do not provide direct information on changes in case selection, but they do strongly suggest that such factors may have been operating. For example, in San Francisco, the annual number of malpractice jury trials decreased by almost half between the 1960-1964 period and the 1980-1984 period, from 95 trials to 55. [51] Unless one assumes that the number of malpractice suits also declined by half--a most unlikely hypothesis--we must infer that cases were being settled differently. In fact, the Rand report notes that in California a vigorous alternative dispute resolution program was instituted in the

courts in the 1980s. [52] It is highly probable, therefore, that in 1984, juries were deciding a different mix of cases than in 1960.

The case selection problem also plagues attempts to compare jury verdicts across jurisdictions because of possible differences in "legal cultures." For example, although Peterson's data show that the number of malpractice cases going to trial in San Francisco between 1960 and 1984 was almost halved, the number of cases in Cook County, Illinois almost tripled. [53] Peterson recognized this **[*230]** difference and speculated that there were more Chicago lawyers willing to try small stakes cases and that Chicago courts might make less aggressive use of alternative dispute resolution tech- niques. [54] Despite similarities in plaintiff win ratios and award trends in these two counties, absent information on how cases were selected for trial, one cannot conclude that juries were be- having the same way--or differently.

Finally, the case selection problem also confounds facile at- tempts to compare verdicts across types of cases. There is, for example, evidence that smaller percentages of automobile negli- gence lawsuits go to trial than malpractice lawsuits. [55] There is also evidence that at the front end of the litigation process, mal- practice attorneys select their cases differently than do auto negli- gence attorneys. [56] Bovbjerg speculated that because of the costs and risks of malpractice litigation, attorneys select cases whose plaintiffs are likely to appeal to the sympathies of the jury. [57] We also know from other recent empirical studies that although the plaintiff win rate in malpractice jury trials hovers around 30%, the plaintiff win rate for automobile negligence trials is around 60 to 70%. [58] As I have just illustrated in my example using Type A **[*231]** and Type B cases, the fact that these differences exist proves noth- ing absent other data about the cases, but it still raises serious questions about whether juries are deciding cases that are inher- ently different because of case-selection processes.

To sum up, because jury verdict data do not provide informa- tion about the proportions of cases selected for trial or the various dimensions along which cases may differ as a result of different selection processes, it is not possible to determine from such data what changes may be occurring in jury behavior. It is not neces- sary to specify the exact nature or extent of these confounding variables to challenge the validity of previous authors' conclusions about the meaning of trends over time, across jurisdictions, or between different types of cases if they raise the possibility of plausible alternative explanations.

2. Multiple Dimensions: The Apples and Oranges Prob- lem. Even if the differential case selection problem did not exist, it would still be difficult to compare verdicts in malpractice cases with verdicts in auto injury cases and to ascribe any differences to the deep pockets effect. The two types of cases differ on many dimensions other than the fact that defendants in the former may be seen as having a greater ability to pay large damage awards. Consider a partial listing of the differences.

Auto injury cases typically involve a single defendant, the driver of the automobile, but sometimes they involve multiple plaintiffs, e.g., several persons riding in the car that was hit. [59] In contrast, malpractice cases typically involve a single plaintiff, the injured patient, but frequently involve multiple defendants, e.g., two or more doctors, and perhaps the hospital, who acted as a team in the patient's medical treatment. [60] Many, perhaps most, auto injuries arise between persons with no prior relationship, **[*232]** whereas malpractice suits arise out of a professional and financial relationship between patient and physician. [61] Furthermore, auto injuries typically involve a single theory of liability; malpractice cases often involve multiple theories of causation and liability. [62] In auto negligence cases, the jurors may perceive the plaintiff as having contributed to the accident, whereas most often the medical accident plaintiff was a passive, if not completely anesthetized, party during the events that led to the injury. [63]

This last difference alone could have a major impact on ver- dicts because most jurisdictions today apply comparative negligence standards. It has long been thought that even in

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jurisdictions with contributory negligence laws, juries frequently adjust their awards with their own rough comparative negligence standards. [64] Thus, in auto negligence cases, the jurors can almost always conceive of ways that the plaintiff shares some responsibility for the accident, e.g., she should have practiced better defensive driving. In contrast, jurors would not typically perceive the medical negligence plaintiff as having contributed to the injurious event, since she trusted the health care providers' professional judgments and skills. [65] In short, discounting under comparative negligence standards, whether by law or by de facto jury equity, might explain why automobile injury awards are lower than medical negligence awards.

The trial itself also may be different. Research by Samuel Gross and Kent Syverud indicates that a high proportion of mal- practice cases that went to trial appeared to be contested solely on the issue of liability, whereas this pattern was much less likely to occur in motor vehicle suits. [66] In North Carolina, malpractice de- **[*233]** fense lawyers have expressed a reluctance to dispute the amount of damages or present expert evidence on damages on the theory that the mere mention of damages would cause the jury to assume liability. [67] This assumption may be less operative in auto injury cases, particularly if they are taken to the jury in a dispute that is primarily about damages. In addition, it is often asserted that malpractice cases are litigated by attorneys who specialize in mal- practice, whereas generalist lawyers may be more likely to litigate auto injury cases; [68] specialists have become very sophisticated in presenting day-in-the-life evidence and introducing expert evidence on economic and non-economic damages, such as pain and suffer- ing. [69]

Finally, the decision rule that juries are required to apply differs in the two types of cases. In automobile cases, as in almost all other areas of torts, the negligence rules are based on the rea- sonable man standard. In contrast, in medical malpractice cases, the rule is whether the health care provider's treatment violated professionally accepted standards of practice in his area of spe- cialization, in that community, and during that period of time. [70]

To the extent that these other dimensions distinguish malprac- tice cases from other types of cases and have an impact on jurors, they provide additional alternative explanations for the data seem- ing to support the deep pockets hypothesis. **[*234]**

3. Tenuous Findings About Non-Economic Damag- es. Danzon's study on **non-economic damages,** [71] which the AMA [72] and Weiler [73] cited to support their claims that jurors are overly generous with pain and suffering awards, and which Danzon cited in a subsequent article claiming that the **percentage** of pain and suffering awards is growing, [74] has methodological problems that most social scientists would consider grave. Danzon's primary data were based on Florida malpractice claims closed in 1984. Of a projected total of 322 cases that went to jury trial, some of the cases may have been tried to the judge or dismissed by the court. [75] From this contaminated sample, Danzon estimated that 84 cases resulted in a plaintiff verdict but conceded that "the pre- cise number could be as low as 45 or as high at sic 132." [76] She conceded that these data were subject to "great sampling variabili- ty" [77] and were discrepant from other, more comprehensive data showing substantially lower plaintiff win rates in Florida. She then went on to estimate from this unreliable sample that of plaintiffs **[*235]** who won a verdict, 51% received a pain and suffering award in excess of $ 100,000. However, she conceded that the figure could easily be "as low as 23 or as high as 67." [78] In fact, the 51% fig- ure was not based on Florida data, but rather on estimates from the Cook County, Illinois data in the Rand studies. [79] Danzon merged these data sets, concluding that " t he Cook County expe- rience is therefore reasonably representative for Florida as a whole." [80] She also included decade-old data from a nationwide survey of closed claims that included settled cases as well as jury verdicts, [81] which Danzon conceded was not representative of mal- practice cases. After merging these data sets, she concluded that the "data imply that 2.7 percent of all claims or 5.6 percent of paid claims receive compensation for pain and suffering in excess of $ 100,000." [82] The report continued with more acknowledge- ments of bias in the data and concessions of "best estimate s ," but regardless of these major deficiencies, Danzon asserted that her conclusions

were "not implausible." [83] Although much more could be said about the flaws in the Danzon study, this incomplete recitation is sufficient to show that its method and conclusions are, to say the least, seriously compromised. [84] **[*236]**

4. Missing Evidence on Juror Motives. As noted above, the claims about the deep pockets hypothesis typically involve asser- tions about the attitudes, perceptions, and motivations that lead jurors to malfeasance. Weiler, for example, speculated that jurors worry about the size of awards when they perceive awards as affecting their car insurance rates but ignore such factors in mal- practice cases. [85] Koop and Huber argued that jurors ignore the question of negligence out of sympathy for injured plaintiffs and levy awards based on their beliefs that deep pocket defendants can and should pay. [86] The Bovbjerg group speculated that in compari- son to other tort cases, malpractice attorneys select cases that in- volve plaintiffs who are most likely to appeal to the sympathies of **[*237]** the jurors, presumably leading to larger awards for medical negli- gence. [87]

Verdict reporters and closed-claim files do not contain inter- views with jurors or psychological profiles of jurors in the cases that were decided. Similarly, neither the Rand studies nor the Bovbjerg study presented any evidence of jurors' mindset. The authors who have made these claims report no studies of post-trial juror interviews. [88] In short, the evidence to support the claims about juror attitudes and beliefs is pure, unsubstantiated conjec- ture.

D. Contrary Evidence

Several findings provide evidence that appears to be contrary to the deep pockets hypothesis. In the various Rand studies, plain- tiff win rates never exceeded 50%; in fact, the best estimate from the various reports was that plaintiffs prevailed on the issue of lia- bility in less than one-third of the trials. [89] Danzon reported that in Florida, plaintiffs won only 13.8% of cases taken to trial; [90] in another Danzon study of malpractice cases in California in 1974 and 1976, plaintiffs won only 28% of cases tried to verdict. [91] In North Carolina, the win rate was about 20%. [92] Other researchers have reported figures in the vicinity of 30%. [93] In contrast, plain- **[*238]** tiff win rates for other types of tort cases, as noted earlier, are substantially higher, sometimes approaching 70%. [94] As discussed previously, the ways in which cases are chosen for trial substantial- ly influence plaintiff win ratios; [95] however, the consistent findings of low win ratios in malpractice cases clearly suggest that juries do not automatically give plaintiffs the benefit of the doubt over doc- tors and hospitals. Otherwise, plaintiff win ratios would be much higher. [96]

A recent study by Mark Taragin and his co-researchers, in- volving over 8000 malpractice cases in New Jersey, concluded that the probability of the plaintiff prevailing on the issue of liability at trial was not correlated with the severity of the plaintiff's injury. [97] If juror sympathy for plaintiffs were a significant factor, we should have expected a positive correlation in which more severely in- jured plaintiffs would win more cases.

Perhaps, however, the deep pockets effect applies only after liability has been determined. None of the authors or organizations making claims about the deep pockets effect has articulated a two- stage hypothesis, but we should be willing to entertain one and focus attention on the question of whether the deep pockets phe- nomenon applies only to damage awards after liability has been found.

Chin and Peterson's finding that doctors and hospitals paid lower awards when they were found liable in non-malpractice cases than when they were found liable in malpractice cases would **[*239]** seem contrary to the deep pockets hypothesis. [98] The health care providers' perceived ability to pay should not vary by the type of case. [99] This finding suggests that one of the other factors distin- guishing medical and other tort negligence, discussed above, may account for the difference.

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SYMPOSIUM: REFORMING PUNITIVE DAMAGES: The Punitive Damage Debate

Robert A. Klinck

SUMMARY:
... Although punitive damages are awarded in only two to four percent of the civil cases in which plaintiffs prevail, they are an oft-maligned part of the American judicial system. ... The $ 2.9 million punitive damage award rendered to a woman who was injured by spilling hot McDonald's coffee on herself, for example, became a "rallying cry" for tort reformers. In addition to disturbing many American citizens, these high **punitive damage** awards have led many legal commentators to call for **reform.** ... BACKGROUND: THE **PUNITIVE DAMAGE** DEBATE ... Finally, there is significant policy disagreement about whether **punitive damage** law should be reformed. ... Many critics advocate for caps upon **punitive damage** awards, and such caps have become a prominent **reform** enacted by state legislatures. ... Congressman Barr urged the passage of tort **reform** to limit the occurrence of **punitive damage** awards. ... She is the author of *Injured Women Before Common Law Courts, 1860-1930*. ... Professor Schkade argued that in order to overcome the anchoring problem, the decision-maker should consider past cases in determining the punitive damage award. ... The instructions and facts presented to the jurors provided a specific range of appropriate values for the punitive damage award. ... Professor Bogus concluded that we should not remove the democratic element from punitive damage awards. ...

On March 13, 2001, the Harvard Journal on Legislation *held a public symposium addressing the debate surrounding proposals to* ***reform punitive damages,*** *both at the state and national levels. This piece discusses the primary areas of disagreement with respect to punitive damages, followed by a brief summary of the opening remarks of each panelist at the symposium. **

* The symposium was made possible, in part, with assistance from the following sponsors: The Center for Legal Policy at the Manhattan Institute; Exxon Mobil Corp.; Lexis Publishing; Ropes & Gray LLP; and Barbri, Inc.

TEXT:
[*469] Although punitive damages are awarded in only two to four percent of the civil cases in which plaintiffs prevail, [1] they are an oft-maligned part of the American judicial system. In recent years, the seemingly exorbitant and unjust nature of many punitive damage awards has raised the ire of the American public. [2] The $ 2.9 million punitive damage award rendered to a woman who was injured by spilling hot McDonald's coffee on

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frequently argued, however, that punitive damages do not actually deter. *See, e.g.*, E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053, 1057-58 (1989) (arguing that the unpredictability of punitive damages makes them an inefficient means of deterring corporate conduct).

n11 *See, e.g.*, Luban, *supra* note 1, at 378-79.

n12 *See, e.g.*, Galanter & Luban, *supra* note 7, at 1432 (arguing that retribution theory calls for a scaling of punitive damages to the heinousness of the behavior). *But see infra* note 69 (citing arguments in opposition to redistribution as a justification).

n13 Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1320-21 (1993) (quoting Note, *Punitive Damages and Libel Law*, 98 HARV. L. REV. 847, 851 (1985)).

n14 *See, e.g.*, Sebert, *supra* note 9, at 1570; *see also* Rustad & Koenig, *supra* note 13, at 1321-22 (asserting that some jurisdictions view compensation as yet another goal of punitive damages).

n15 *See* Sebert, *supra* note 9 (discussing how the legal rules of contract systematically under-compensate plaintiffs); Rustad & Koenig, *supra* note 13, at 1321-22.

n16 Partlett, *supra* note 5, at 793-95.

n17 Lynda A. Sloane, Note, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. U. L. REV. 473, 488 (1993) (summarizing the findings of the RAND study).

n18 *See, e.g.*, W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 333 (1998); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System--And Why Not?*, 140 U. PA. L. REV. 1147, 1254 (1992) (quoting Vice President Dan Quayle's claim of "arbitrary, even freakish application" of punitive damages).

n19 Ostrom, *supra* note 2, at 238.

n20 Eisenberg & Wells, *infra* note 21, at 393-94 (explaining that about half of the variance in punitive damage awards can be explained by the compensatory damage award and that once the outer five percent of awards are excluded, there are hardly any extreme awards); *see also* Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 50 (1992) (indicating that punitive damage awards in products liability cases are generally proportional to the actual damages).

n21 Theodore Eisenberg & Martin T. Wells, *Punitive Awards After* BMW, *A New Capping System, and the Reported Opinion Bias*, 1998 WIS. L. REV. 387, 388-89; *see also* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 4 (1990) (arguing that critics' empirical "propositions are based on scanty empirical data and highly questionable interpretations of those data").

n22 Sebert, *supra* note 9, at 1656-57. It is important to note, however, that the author makes this suggestion even though punitive damage awards are already most prevalent in contract cases. *See* Ostrom, Rottman & Goerdt, *supra* note 2, at 238-39 (asserting that the vast majority of punitive damage awards occur in contract cases and that the dollar value of punitive damages in contract cases exceeds the dollar value in tort cases).

n23 Sebert, *supra* note 9, at 1566-67.

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n24 *Id.* at 1566-69.

n25 *Id.* at 1570. The proposed expansion of punitive damages in contract cases may be coming to fruition. Galanter & Luban, *supra* note 7, at 1415-16 (indicating that punitive damage awards are on the rise in contract cases).

n26 *See, e.g.*, Eisenberg & Wells, *supra* note 21, at 406-07 (urging a cap of ten times the compensatory award); Linda Babcock & Greg Pogarsky, *Damage Caps and* ***Settlement:*** *A Behavioral Approach*, 28 J. LEGAL STUD. 341, 343-44 (1999) (indicating that one of Vice President Dan Quayle's major **reform** proposals was a cap on **punitive damages)**.

n27 *See, e.g.*, GA. CODE ANN. § 51-12-5.1(g) (1998) (limiting punitive damages to $ 250,000, except for product liability cases); VA. CODE ANN. § 8.01-38.1 (2000) (capping punitive damages at $ 350,000).

n28 *See, e.g.*, CONN. GEN. STAT. ANN. § 52-240b (1991) (limiting punitive awards in product liability cases to twice the compensatory award); FLA. STAT. ANN. § 768.73(1)(a) (West Supp. 2001) (capping punitive damages at three times the amount of the compensatory award or $ 500,000, whichever is greater).

n29 *See, e.g.*, KAN. STAT. ANN. § 60-3701(e)-(f) (Supp. 2000) (providing that punitive damages are generally limited to lesser of the defendant's highest annual income in the last five years or $ 5 million).

n30 *See, e.g.*, NEV. REV. STAT. ANN. § 42.005 (Supp. 1999) (capping punitive damages at three times the compensatory damages if those damages are above $ 100,000, and limiting punitive damages to $ 300,000 if the compensatory award is less than $ 100,000); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (Vernon 1997) (limiting punitive damages to the greater of two times economic harm plus the non-economic harm or $ 200,000, unless the defendant's conduct was particularly egregious).

n31 *See, e.g.*, Crump, *supra* note 6, at 223-24 (arguing that caps might be irrational and that, if they are to be imposed, they should be set high enough to preserve the deterrence goal of punitive damages); Thomas M. Melsheimer & Steven H. Stodghill, *Due Process and Punitive Damages: Providing Meaningful Guidance to the Jury*, 47 SMU L. REV. 329, 347-48 (1994) (discussing various shortcomings of punitive damage caps); Partlett, *supra* note 5, at 824 (stating that imposing damage caps is contrary to the purpose of punitive damages); Sandra N. Hurd & Frances E. Zollers, *State Punitive Damages Statutes: A Proposed Alternative*, 20 J. LEGIS. 191, 199 (1994) (arguing that limiting punitive damages could undermine the deterrent purpose of punitive damages); Galanter & Luban, *supra* note 7, at 1432 (arguing that to achieve the goals of retribution, punitive damages should be scaled to the heinousness of the defendant's behavior rather than to the resulting harm).

n32 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES--EQUITY--RESTITUTION § 3.11 (2d ed. 1993) (indicating that as a general rule punitive damages are set exclusively by juries and that judges only play a role in limiting damages).

n33 *See, e.g.*, Cass Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages*, 107 YALE L.J. 2071, 2076 (1998). These critics follow in the long line of commentators who have asserted that juries are often not competent to decide the complex issues raised in civil litigation. *See, e.g.*, Joe S. Cecil, Valerie P. Hans & Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons From Civil Jury Trials*, 40 AM. U. L. REV. 727, 733-44 (1991) (discussing various attacks on jury competence but asserting that these attacks stand in contrast to the empirical research of legal scholars). Some have observed, for example, that while judges and juries often agree on punitive damage liability, they

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frequently differ with regard to the amount. *Id.* at 745-46.

n34 *See, e.g.*, Viscusi, *infra* note 79, at 589-90 (arguing that juries do not properly consider cost-benefit analyses and thus the responsibility of evaluating the reprehensibility of corporate behavior should be shifted to administrative agencies).

n35 Sunstein, Kahneman & Schkade, *supra* note 33, at 2120 (comparing their proposal to criminal sentencing in which the jury decides liability but the judge sets the punishment); *see also* Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 948 (1989) (arguing that the jury should determine the values relevant to the law and economics deterrence formula through use of a special verdict form, and the judge should then calculate an acceptable range of values for punitive damages from which the jury may choose a final dollar amount).

n36 Sunstein, Kahneman & Schkade, *supra* note 33, at 2108; *see also* David Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1320 (1976).

n37 *See* Sunstein, Kahneman, & Schkade, *supra* note 33, at 2111-15 (arguing that judges taking the decision of the dollar value away from juries will minimize unpredictability in punitive awards, which the authors view as the major problem with punitive damages).

n38 CONN. GEN. STAT. ANN. § 52-240b (1991) (stating that in products liability cases the court shall set punitive awards).

n39 Hurd & Zollers, *supra* note 31, at 201. There is some debate about whether to require clear and convincing evidence or proof beyond a reasonable doubt. *Compare* Dick Thornburgh, *America's Civil Justice Dilemma: The Prospects for Reform*, 55 MD. L. REV. 1074, 1086 (1996) (urging the use of a clear and convincing evidence standard) *with* COLO. REV. STAT. ANN. § 13-25-127 (2000) (requiring proof beyond a reasonable doubt).

n40 Hurd & Zollers, *supra* note 31, at 201; *see also* Wheeler, *supra* note 35, at 953-54 (arguing that there should be a presumption that punitive damages greater than twice the compensatory awards are excessive and that judges should impose a clear and convincing evidence standard).

n41 Melsheimer & Stodghill, *supra* note 31, at 346-47.

n42 These states usually require that the facts justifying punitive damages be proven by clear and convincing evidence. *See* ALA. CODE § 6-11-20 (Supp. 2000); ALASKA STAT. § 09.17.020 (Supp. 1999); GA. CODE ANN. § 51-12-5.1 (1999); IND. CODE § 34-51-3-2 (Supp. 2000); KAN. STAT. ANN. § 60-3701(c) (Supp. 1999); KY. REV. STAT. ANN. § 411.184 (Michie Supp. 2000); MINN. STAT. § 549.20(1) (2000); MONT. CODE ANN. § 27-1-221 (1999); OHIO REV. CODE ANN. § 2315.21 (West 2000); UTAH CODE ANN. § 78-18-1 (Supp. 2000). Colorado, however, has gone so far as to require proof beyond a reasonable doubt. COLO. REV. STAT. ANN. § 13-25-127 (2000).

n43 *See, e.g.*, Wheeler, *supra* note 35, at 947; Melsheimer & Stodghill, *supra* note 31, at 348-49.

n44 *See* Melsheimer & Stodghill, *supra* note 31, at 348-49 (arguing that bifurcation would eliminate the fear that the jury will consider the defendant's wealth in determining liability).

n45 Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims For Punitive Damages*, 1998 WIS. L. REV. 297, 316 (reporting research results indicating that juries hearing evidence relevant to punitive damages during a

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combined trial are more likely to find a defendant liable).

n46 *Id.* at 325.

n47 *See* Melsheimer & Stodghill, *supra* note 31, at 330. Other critics more skeptically assert that jury instructions are altogether ineffective. *See, e.g.*, Sunstein, Kahneman & Schkade, *supra* note 33, at 2111; alan Calnan, *Ending the Punitive Damage Debate*, 45 DePAUL L. REV. 101, 102-03 (1995) (arguing that reformers often incorrectly claim that lack of guidance leads to exorbitant awards); Robert D. Cooter, *Punitive Damages, Social Norms, and Economic Analysis*, LAW & CONTEMP. PROBS., Summer 1997, at 73, 75-76.

n48 *See, e.g.*, Wheeler, *supra* note 35, at 947-48 (arguing that juries should be instructed that the purpose of punitive damages is to deter wrongful conduct, and that the jury should only award sufficient punitive damages to provide deterrence).

n49 *See supra* notes 5-16 and accompanying text.

n50 *See* Wheeler, *supra* note 35, at 947-48 (arguing that juries should not be instructed that punitive damages are intended to punish because adding the punishment language will confuse the jury).

n51 *See* Sunstein, Kahneman & Schkade, *supra* note 33, at 2117 (arguing that a jury should be provided with comparison factual scenarios and asked to decide which case most closely matches the egregiousness of a defendant's actions).

n52 *Id.* at 2118-19.

n53 *See* Crump, *supra* note 6, at 217. There is evidence indicating that the wealth of a defendant will affect the dollar amount of punitive awards. *See, e.g.*, Sunstein, Kahneman & Schkade, *supra* note 33, at 2105.

n54 *See, e.g.*, Crump, *supra* note 6, at 217.

n55 *See, e.g.*, Life Ins. Co. of Ga. v. Johnson, 684 So. 2d 685, 701-02 (Ala. 1996), *vacated on other grounds*, 117 S. Ct. 288 (1996); Wayte v. Rollins Int'l, Inc., 215 Cal. Rptr. 59, 72 (Cal. Ct. App. 1985); Lunsford v. Morris, 746 S.W.2d 471, 476 (Tex. 1988).

n56 For a sample of Professor Hay's contribution to the legal literature, see Bruce L. Hay, *The Theory of Fee Regulation in Class Action* ***Settlements***, 46 AM. U. L. REV. 1429 (1997); Bruce Hay, *Optimal Contingent Fees in a World of* ***Settlement***, 26 J. LEGAL STUD. 259 (1997).

n57 For a sample of Congressman Barr's contribution to the legal literature, see Bob Barr, *High Crimes and Misdemeanors: The Clinton-Gore Scandals and the Question of Impeachment*, 2 TEX. REV. L. & POL. 1 (1997).

n58 For a sample of Professor Chamallas's contribution to the legal literature on the tort system, see Martha Chamallas, *The Disappearing Consumer, Cognitive Bias and Tort Law*, 6 ROGER WILLIAMS U. L. REV. 9 (2000); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998).

n59 For a sample of Professor Galanter's contribution to the literature on punitive damages, see Galanter & Luban, *supra* note 7; Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993); Marc Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 WIS. L. REV. 1.

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n60 For a sample of Professor Hanson's contribution to the literature on punitive damages, see Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-And-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785 (1995); Steven P. Croley & Jon D. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REG. 1 (1991).

n61 For a sample of Walter Olson's contribution to the legal literature see Walter Olson, *Tortification of Contract Law: Displacing Consent and Agreement*, 77 CORNELL L. REV. 1043 (1992).

n62 For a sample of Mr. Sobol's contribution to the literature on punitive damages, see Elizabeth J. Cabraser & Thomas M. Sobol, *Equity for the Victims, Equity for the Transgressor: The Classwide Treatment of Punitive Damage Claims*, 74 TUL. L. REV. 2005 (2000).

n63 For a sample of Dr. Tuerck's contribution to the legal literature, see DAVID TUERCK & IN-MEE BAEK, AN ECONOMIC MODEL OF MASSACHUSETTS TAX POLICY (1994); DAVID TUERCK & WILLIAM F. O'BRIEN, JR., THE COMPASSION TAX CREDIT: A FAMILY ADVOCATE PILOT PROGRAM (1996).

n64 This summary is based on the author's recollection of the panelists' presentations.

n65 In 1996, Congress passed the Commonsense Legal **Reform** Act, which included a $ 250,000 cap on **punitive damage** awards; President Clinton vetoed the bill. *See* Babcock & Pogarsky, *supra* note 26, at 344.

n66 During the discussion portion, Congressman Barr acknowledged that the clear and convincing evidence standard might not have an enormous effect upon juries, but he maintained that it would symbolize the country's distaste of punitive damages.

n67 For a fuller explication of the history of punitive damages see Alan Calnan, *Ending the Punitive Damage Debate*, 45 DePAUL L. REV. 101, 104-09 (1995) (discussing the historical roots of punitive damages in ancient cultures, the English common law, and early America); *see also* Partlett, *supra* note 5, at 783-87.

n68 Her explanation of the compensatory purpose of punitive damages is similar to that in Parlett, *supra* note 6, at 793-95. Interestingly, however, Partlett contends that non-pecuniary damages other than punitive damages might be sufficient. *Id.*

n69 For a fuller exposition of these points see Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1126-40 (1996).

n70 This argument follows a line of literature focussing on the impropriety of using punitive damages to achieve the goal of punishment, which, it is argued, should be the exclusive domain of the criminal system. *See, e.g.*, David L. Walther & Thomas A. Plein, *Punitive Damages: A Critical Analysis:* Kink v. Combs, 49 MARQ. L. REV. 369 (1965); Jeffery W. Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L.Q. 241, 314 (1985) (asserting that punitive damages are penal in nature and thus the government should not be allowed to pass the role off onto civil plaintiffs); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 412-30 (1967); *see also* Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting). *But see* Galanter & Luban, *supra* note 7, at 1456-60 (arguing that there is no need for defendants in actions for punitive damages to receive these protections, because the litigation is not between the state and an individual).

n71 *See generally* Cabraser & Sobol, *supra* note 62.

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n72 *See* Polinsky & Shavell, *supra* note 6, at 887-90 (arguing that punitive damages are appropriate when there is less than a one hundred percent chance of liability).

n73 21 HARV. WOMEN'S L.J. 79 (1998).

n74 For a sample of Professor Bogus's contribution to the literature on punitive damages and the tort system, see Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1 (1995).

n75 For a sample of Dr. Calfee's contribution to the literature on punitive damages, see Paul H. Rubin, John E. Calfee & Mark F. Grady, BMW v. Gore: *Mitigating the Punitive Economics of Punitive Damages*, 5 SUP. CT. ECON. REV. 179 (1997).

n76 For a sample of Dr. Rose's contribution to the literature on the tort system, see Neil Vidmar, Felicia Gross & Mary Rose, *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DePAUL L. REV. 265 (1998).

n77 For a sample of Professor Schkade's contribution to the literature on punitive damages, see Schkade, Sunstein & Kahneman, *supra* note 4; Sunstein, Schkade, & Kahneman, *supra* note 6, and Sunstein, Kahneman & Schkade, *supra* note 33. Professor Schkade is also authoring an article that will appear in the next issue of the *Harvard Journal on Legislation*.

n78 For a sample of Professor Vidmar's contribution to the legal literature on torts and punitive damages, see Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998); Neil Vidmar, *Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System*, 28 SUFFOLK U. L. REV. 1205 (1994).

n79 For a sample of Professor Viscusi's contribution to the legal literature on punitive damages, see W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547 (2000). Professor Viscusi is also authoring an article that will appear in the next issue of the *Harvard Journal on Legislation*.

n80 This summary is based on the author's recollection of the panelists' presentations.

n81 Neil Vidmar & Mary Rose, *Punitive Damages by Juries in Florida: In Terrorum and in Reality*, 38 HARV. J. LEGIS. 487 (2001).

n82 For a discussion of why uncertainty undermines the deterrence rationale for punitive damages, see Wheeler, *supra* note 35.

n83 All scholars do not agree with the assertion that punitive damages are erratic. One study, for example, found that punitive damages occur most frequently in cases "where breach of a legal duty suggests intentional or morally flawed behavior," and they are highly correlated with compensatory damage awards. Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 637 (1997); *cf.* Rustad, *supra* note 20, at 73 (arguing that punitive damages are generally awarded in cases where defendants knew of a product's risks and failed to remedy them or to warn consumers).

n84 Professor Schkade has made this proposal in previous articles. *See, e.g.*, Cass Sunstein, Daniel Kahneman & David Schkade, *supra* note 33, at 2114-26.

n85 *Cf.* Sunstein, Kahneman & Schkade, *supra* note 33, at 2111 (indicating skepticism about the ability of jury instructions to produce damage awards based on principles of deterrence).

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n86 *See also* Galanter & Luban, *supra* note 7, at 1408-09.

n87 This conclusion is supported in the literature. *See* Rustad, *supra* note 20, at 51-59 (indicating that judges frequently decrease runaway punitive damage awards).

n88 For a brief history of the breast implant litigation, see *In re* Dow Corning Corp., 1995 WL 495978 (Bankr. E.D. Mich. Aug. 5, 1995).

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herself, for example, became a "rallying cry" for tort reformers. [3] In addition to disturbing many American citizens, these high **punitive damage** awards have led many legal commentators to call for **reform.** [4] In light of the controversy surrounding **punitive damages,** the *Harvard Journal on Legislation* held a symposium entitled "Reforming Punitive Damages," **[*470]** which included two panel discussions: "The Future of Punitive Damages" and "How Should We Decide Punitive Damages?"

BACKGROUND: THE PUNITIVE DAMAGE DEBATE

Punitive damages have led to disagreements at every level. First, scholars debate the theoretical purpose that punitive damages should serve. Second, scholars disagree about the empirical evidence regarding the pervasiveness of punitive damage awards. Finally, there is significant policy disagreement about whether punitive damage law should be reformed.

There are three prominent rationales for imposing punitive damages: deterrence, retribution, and compensation. [5] Deterrence is the most generally accepted theoretical justification for punitive damages. [6] According to this theory, punitive damages should be awarded in cases in which compensatory damages are insufficient to deter behavior that society deems illicit. [7] Compensatory damages alone may not sufficiently deter conduct for a number of reasons. First, because defendants are not always held liable for their actions, they are not required to internalize the costs of all the injuries they cause. [8] Additionally, certain legal rules inherently lead to less than complete recovery for plaintiffs. [9] As a result, punitive damages are necessary to force defendants to fully internalize the harms they cause. [10] Some proponents of punitive damages dispute the focus on deterrence, **[*471]** arguing instead that punitive damages serve a retributive purpose. [11] According to retributive theory, punitive damages should be imposed if a defendant's actions are particularly heinous. [12] The purpose of imposing punitive damages under this rationale is to "vent the indignation of the victimized." [13] Under this theory, punitive damages should be imposed to punish the defendant regardless of whether they serve a deterrence function. Other authors assert that punitive damages are necessary to fully compensate plaintiffs. [14] Punitive damages are called upon to make up for the limitations that legal rules place on recovery, [15] including intangible damages that otherwise would go uncompensated. [16]

In addition to the theoretical disagreement about the purpose of punitive damages, there is significant disagreement about the empirical evidence regarding their prevalence. In one study, the RAND Corporation Institute for Civil Justice found that there had been a dramatic increase in punitive damage awards between 1960 and 1984. [17] Similarly, many critics have claimed that juries award punitive damages erratically and that these awards have gotten out of control. [18] Proponents of the continued vitality of punitive damages point to data indicating that the majority of punitive damage awards are for small sums [19] and are strongly correlated to the compensatory awards granted in the cases. [20] Theodore Eisenberg and Martin T. Wells argue that "the available data suggest that businesses, **[*472]** insurance companies, and defense lawyers cannot support the claim that punitive awards are frequent, or that they follow a crazy pattern with little or no relation to compensatory awards. . . . The mass of punitive awards satisfy a surprisingly regular pattern." [21]

Finally, there is what might be termed "the policy debate" about whether punitive damages should be reformed. In many ways, the theoretical and empirical disagreements outlined above have fed into these policy discussions. The proposed **reforms** are most easily organized as those that would expand **punitive damage** awards and those that would contract these awards.

There is some support for the notion that punitive damages do not play a prominent enough role in American law. John A. Sebert, Jr., for example, argues that punitive damages should be expanded in contract cases because compensatory damages do not fully compensate plaintiffs for losses caused by contract breaches. [22] He asserts that the applicable legal rules

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lead to systematic under-compensation of plaintiffs in contract suits. [23] These rules include the requirements of certainty of damages, the refusal to require payment of interest, and the American rule for legal fees. [24] To overcome this problem, Sebert concludes that courts should extend the availability of punitive or super-compensatory damages in contract cases. [25]

The more prominent view, however, appears to be that **punitive damages** need to be limited. Proponents of this view have suggested numerous **reforms,** including capping **punitive damages,** taking **punitive damage** decisions away from juries, imposing more stringent burdens of proof for punitive liability, bifurcating trials so that punitive damages are considered only after the jury finds the defendant liable, and giving juries more specific instructions to aid them in setting punitive damages.

Many critics advocate for caps upon **punitive damage** awards, [26] and such caps have become a prominent **reform** enacted by state legislatures. **[*473]** Some states have placed a dollar amount limitation upon punitive awards; [27] some states have limited punitive damages to a given multiple of compensatory damages; [28] some states have limited punitive damages to a percent of the defendant's profits; [29] and still other states have utilized a combination of these approaches. [30] These caps, however, have been criticized as irrational and contrary to the goals of punitive damages. [31]

Others have argued that punitive damage liability should be decided by judges rather than by juries. Traditionally, juries are charged with determining whether punitive damages will be imposed and with setting the level of those damages. [32] This system has come under attack, however, because of the alleged capricious nature of punitive damage awards. [33] Some critics argue that if punitive damages are to be awarded, they should be imposed by judges because juries are not competent to decide **[*474]** whether punitive damages are appropriate. [34] Others have more modestly proposed that juries should decide whether punitive damages are to be imposed and should give the judge an indication of the level of outrage engendered by the defendant's behavior, but that the judge should be charged with actually setting the dollar award. [35] These critics assert that allowing the judge to set the dollar value would lead to greater predictability in awards. [36] This increased certainty would in turn further the deterrence rationale for punitive damages. [37] At least one state has adopted this approach in some cases, requiring that judges--not juries--set the punitive award. [38]

Some critics would also alter how the decision-maker sets the punitive award. First, some argue that the burden of proof should be heightened for purposes of determining punitive damages. [39] These critics reason that because punitive damages are intended in some respect to punish wrongdoers, more proof of culpability is required. [40] Though some scholars criticize this approach as irrational, [41] several states have already adopted a heightened standard of review. [42]

[*475] Reformers have also proposed that trials involving punitive damage claims be bifurcated so that juries do not hear evidence regarding punitive damages until after they have found the defendant liable for the harm suffered. [43] These authors fear that evidence relevant only to determining punitive damages--such as a defendant's assets--will skew the jury findings of liability. [44] At least one empirical study confirms this fear. [45] At the same time, however, evidence indicates that bifurcating these trials might lead to higher average punitive damage awards. [46] Thus, bifurcation might come as a mixed blessing for defendants.

Other reformers suggest an alteration of punitive damage jury instructions. Some authors assert that juries are not given enough guidance for determining punitive damage awards. [47] They argue that juries are left with little understanding of the purposes of punitive damages, leading to awards that are nothing more than shots in the dark. [48] Given the disagreement

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about the purpose of punitive damages, [49] it is difficult to imagine what instructions should be given. [50] In addition, if punitive damages are meant to achieve all three goals discussed above, the legal system must determine how much weight each goal should be given. Ultimately, it is unclear what additional instructions, if any, judges could or should provide to juries.

Finally, there is sharp disagreement over what evidence should be put before the decision-maker. Some critics assert that the fact finder should consider punitive damage awards from similar cases because it would lead to increased certainty in awards. [51] The current consensus **[*476]** among states, however, is that juries should not be allowed to consider past awards. [52] Critics also argue that juries should not be allowed to consider the wealth of the defendant, [53] because it is not relevant to the magnitude of award necessary to deter the conduct. [54] Many states do allow the admission of evidence of a defendant's wealth. [55]

The preceding pages have presented some of the major debates among scholars of punitive damages. These authors disagree at all levels: theoretical, empirical, and policy. The Symposium was held to provide a forum to examine these and other arguments.

PANEL ONE: THE FUTURE OF PUNITIVE DAMAGES

MODERATOR:

Bruce Hay is professor of law at Harvard Law School, where he teaches civil procedure, professional responsibility, corporations, and environmental law. His research interests include legal procedure, legal ethics, and the economics of litigation. He has published articles on various issues relating to litigation. [56] Professor Hay received his B.A. from the University of Wisconsin at Madison and his J.D. from Harvard Law School.

PANELISTS:

Congressman Robert Barr (R-Ga.) is the United States Representative for the Seventh District of Georgia and is Chairman of the Judiciary Subcommittee on Commercial and Administrative Law. He also serves on the Government Reform Committee, on the Financial Services Committee, and as Assistant Majority Whip for the Republican Party. From 1986 to 1990 he was United States Attorney for the Northern District of Georgia. Congressman Barr received his B.A. from the University **[*477]** of Southern California, his M.A. from George Washington University, and his J.D. from Georgetown University. [57]

Martha Chamallas is professor of law at the University of Pittsburgh Law School, where she teaches torts, employment discrimination, and feminist legal theory. Her work on tort law has focused on emotional injuries and the effects of race and gender bias in computing damages. Professor Chamallas received her B.A. from Tufts University and her J.D. from Louisiana State University. [58]

Marc Galanter is the John and Rylla Bosshard Professor of Law and South Asian Studies at the University of Wisconsin at Madison and the LSE Centennial Professor at the London School of Economics. He serves as chairman of Wisconsin's Institute for Legal Studies, one of the leading centers for empirical study of the legal system, as well as director of the Institute's Dispute Processing Research Program. Professor Galanter received his B.A., M.A., and J.D. from the University of Chicago. [59]

Jon Hanson is professor of law at Harvard Law School, where he teaches courses in torts, corporations, products liability theory, and law and behavioralism. Professor Hanson has testified before Congress on the issue of tobacco regulation, and has served as an expert witness in several of the tobacco lawsuits brought by the state attorneys general. Professor Hanson received his B.A. from Rice University and his J.D. from Yale Law School. [60]

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Walter Olson is a senior fellow at the Manhattan Institute. He has written extensively on reforming the American legal system, and his commentaries frequently appear in national publications such as the *Wall Street Journal*, the *New York Times*, and the *National Review*. In 1991, Mr. Olson authored *The Litigation Explosion: What Happened When America Unleashed the Lawsuit*, and in 1999 he launched the Web site Overlawyered.com. Mr. Olson received his B.A. from Yale University. [61]

[*478] Thomas M. Sobol is a partner with the law offices of Lieff, Cabraser, Heimann & Bernstein, LLP. His primary focus is on major class action litigation, and he is currently involved in class actions filed against the tobacco, gun, asbestos, healthcare, pharmaceutical, and industrial agriculture industries. He also assisted in antitrust litigation against Microsoft. Mr. Sobol received his B.A. from Clark University and his J.D. from Boston University School of Law. [62]

David Tuerck is the executive director of the Beacon Hill Institute at Suffolk University, where he also serves as chairman of the Department of Economics. His specialties include state tax policy, welfare reform, and the economics of regulation. Dr. Tuerck received his A.B. and A.M. from George Washington University, and his Ph.D. in economics from the University of Virginia. [63]

SUMMARY OF OPENING REMARKS: [64]

Congressman Robert Barr began the discussion by describing the current political climate toward punitive damages at the federal level. He argued that the election of President George W. Bush has greatly increased the chances of passing a comprehensive tort **reform** bill. [65] He indicated that he would favor a bill that included caps on **punitive damage** awards, and also suggested mandating that punitive damages be proven by clear and convincing evidence, rather than by a preponderance of the evidence. [66] Congressman Barr urged the passage of tort **reform** to limit the occurrence of **punitive damage** awards.

Professor Martha Chamallas advocated the continued use of punitive damages. Her argument began from the premise that general deterrence theory is not the only justification for punitive damages; punitive damages also serve a compensatory purpose. They were originally used in cases involving an affront to a person's honor. [67] In such cases, compensatory **[*479]** damages were presumed to be insufficient to fully compensate plaintiffs for their injuries. The contemporary analogue to such cases is discrimination. An individual denied the opportunity to rent an apartment because of her race, for example, is not likely to be made whole by compensatory damages. Punitive damages, then, may serve an important compensatory role in this type of case. [68]

Professor Marc Galanter followed Professor Chamallas by describing some of the emerging empirical data regarding punitive damages. He indicated that we are just now beginning to understand punitive damages. They are most common in cases involving financial damages resulting from intentional torts and are more common in the South. Professor Galanter remarked that although there is a "folklore" that punitive damages are common and are awarded casually, in fact they are awarded infrequently. Despite this data, he observed that corporate decision-makers continue to overestimate the likelihood of punitive damage awards. [69]

Professor Jon Hanson presented his opinion that the scholarship calling for reform is flawed. First, he argued that this literature is based upon conventional law and economics without reference to attribution theory, which posits that harmed individuals do care about a person's motives. Professor Hanson gave the example of a waiter spilling a glass of tea on a patron. That patron might ask for a wide range of compensation. He might simply ask for an apology, or he might ask that the restaurant pay for his dry-cleaning, or he might ask that the waiter

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be fired. Professor Hanson argued that in deciding what compensation to ask for, the patron would care about why the waiter spilled the tea on him. Was it because the patron was African American? Was it an accident? The patron might also care about whether the waiter had spilled tea on anyone else before. The literature discussing punitive damage awards treats all spilled tea the same without regard to the details. Professor Hanson argued that this is a major shortcoming. The second problem that he articulated is the effect of money on the law and economics literature, a factor that is not considered by the academic literature itself. Professor Hanson observed that many of these articles are funded either directly or indirectly by business interests, and recommended that commentators engage in a more critical inquiry into the effects that this money might have on the literature as a whole.

Walter Olson next compared punitive damages to criminal sanctions. The distinction is that when the government attempts to impose criminal sanctions, it must provide certain procedural protections to the defendant. **[*480]** Defendants are not given such protections in civil actions when they are sued by plaintiffs seeking punitive damages. Mr. Olson argued that the most controversial punitive damage awards are generally those in which some of the protections that a criminal defendant would have received were notably absent and impacted the course of the trial. [70] These include cases in which there was forum-shopping, the law was not clearly defined in advance, or there was a **threat** that the defendant would have to pay for the same conduct more than once. Cases in which the procedural protections would not have aided the defendant do not generally raise the ire of the public.

Thomas Sobol then provided the perspective of a practicing plaintiffs' attorney. He started by observing that the increase in the dollar value of punitive damages over the last decade is not surprising given the exponential growth of business enterprises. He suggested that one of the main problems with punitive damages is that some future plaintiffs may not be able to recover compensatory awards if large punitive damages awarded to other plaintiffs have exhausted the defendant's funds. To alleviate these distributive concerns, Mr. Sobol suggested joining punitive damage cases into class actions. [71]

David Tuerck began by defending the law and economics literature. He asserted that the authors of the seminal law and economics literature--Richard **Posner,** Steven Shavell, and Learned Hand--are hardly "lackeys" of the business community. Shavell, for example, argues that there are cases in which punitive damages are appropriate. [72] Nonetheless, these authors do believe that punitive damages should not be imposed when they might lead to overly cautious behavior. The primary problem that Dr. Tuerck sees with punitive damages is that they lead to uncertainty, which disturbs the presumptions underlying the economic model.

[*481] PANEL TWO: HOW SHOULD WE DECIDE PUNITIVE DAMAGES?

MODERATOR:

Margo Schlanger is assistant professor at Harvard Law School, where she teaches constitutional law, torts, and civil rights law. Her research interests include constitutional torts and the reformation of government institutions through litigation. She is the author of *Injured Women Before Common Law Courts, 1860-1930.* [73] Professor Schlanger received her B.A. from Yale University and her J.D. from Yale Law School.

PANELISTS:

Carl T. Bogus is associate professor at the Roger Williams University School of Law, where he teaches courses in torts, products liability, administrative law, and evidence. He has written widely about products liability and tort reform, and his most recent work is *Why Lawsuits are Good for America: Disciplined Democracy, Big Business and the Common Law,* to be published in July of 2001. Professor Bogus received his B.A. and J.D. from Syracuse

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University. [74]

John E. Calfee is a resident scholar at the American Enterprise Institute. He has served in the Bureau of Economics at the Federal Trade Commission, and has taught courses on marketing and consumer behavior at the business schools of the University of Maryland and Boston University. Dr. Calfee's research has focused on the economics of tort liability. Dr. Calfee received his B.A. from Rice University, his M.A. from the University of Chicago, and his Ph.D. in economics from the University of California at Berkeley. [75]

Mary Rose is a research fellow at the American Bar Foundation, an institute devoted to the study of law and social science. Her research has focused on jury selection, jury decision-making, and the effect of jury reforms. She also has studied popular views on fair procedures and fair outcomes in legal and non-legal settings. Dr. Rose received her B.A. from Stanford University and her Ph.D. in social psychology from Duke University. [76]

[*482] David A. Schkade is the Herbert D. Kelleher/MCorp Regents Professor of Business at the University of Texas at Austin, where he teaches negotiation, the psychology of decision-making, and research methods. His recent work has focussed on the psychology of well-being, environmental resource valuation, jury decision-making, and decision support systems. Professor Schkade received his B.A. and M.B.A. from the University of Texas at Austin and his M.S. and Ph.D. in organizational psychology from Carnegie Mellon University. [77]

Neil Vidmar is the Russell M. Robinson II Professor of Law at Duke Law School. He also holds an appointment in the Duke Psychology Department. His research interests include civil jury performance. He has testified, consulted, and drafted amicus briefs as an expert on jury behavior for trials in the United States and abroad. Professor Vidmar received his B.A. from MacMurray College, and his M.A. and Ph.D. in social psychology from the University of Illinois. [78]

W. Kip Viscusi is the John F. Cogan, Jr. Professor of Law and Economics and the director of the Program on Empirical Legal Studies at Harvard Law School. His research has focused on individual and societal responses to risk and uncertainty, and he has published seventeen books and over 200 articles. Professor Viscusi is also the founding editor of the *Journal of Risk and Uncertainty* and has served on the editorial boards of eleven other journals, including the *American Economic Review* and the *Review of Economics and Statistics*. Professor Viscusi received his B.A. from Harvard College and his M.A., M.P.P., and Ph.D. in economics from Harvard University. [79]

SUMMARY OF OPENING REMARKS: [80]

The panel began with Dr. Mary Rose presenting a paper she coauthored with Professor Neil Vidmar. [81] Professor Vidmar and Dr. Rose evaluated many empirical claims that are made about punitive damages **[*483]** by examining Florida cases reported in Westlaw's jury verdict database between 1988 and 2000. During the relevant time period there were, on average, twenty-two punitive damage awards per year in Florida. Excluding asbestos cases and the recent tobacco verdict, punitive damages were awarded in only one products liability case. Juries, the survey found, are unlikely to award punitive damages in premises liability cases. In non-products liability cases, punitive damages were most frequent in cases involving drunk driving, financial disputes, and assaults. The authors concluded that the Florida cases do not support the claim that there are significant problems with the current punitive damages system.

Professor David Schkade articulated what he considers the major shortcoming of punitive damages: their unpredictability. [82] Punitive damage awards are consistently erratic. [83] Jurors are given little guidance, largely because policymakers do not know what guidance to give.

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Professor Schkade indicated that one of the main causes of the unpredictability of jury awards is that different jurors use different "anchors." Anchors are the starting points that individual jurors use as their frames of reference. If, for example, two individuals are presented with identical facts but with two different anchors--one sees a plaintiff demand one million dollars in punitive damages while the other sees a plaintiff demand ten million dollars--the individuals come to different conclusions. Professor Schkade argued that in order to overcome the anchoring problem, the decision-maker should consider past cases in determining the punitive damage award. [84]

Professor Kip Viscusi discussed his recent research on jury competence. In one experiment, he tested jury responses to a defendant company's use of cost-benefit analysis. The use of cost-benefit analysis angered many of the jurors. When the hypothetical was changed by asserting that the company had placed a higher value on human life, this only increased the damage award. Professor Viscusi concluded that this was a result of the anchoring effect. He also tested the use of jury instructions based on the law and economics justification for punitive damages. The instructions and facts presented to the jurors provided a specific range of appropriate values for the punitive damage award. The jurors, however, generally failed to render judgments within the given ranges. This effect **[*484]** was exacerbated when the jurors were given anchors outside of the appropriate range. This led Professor Viscusi to the conclusion that juries are not necessarily competent to render punitive damages. [85]

Professor Carl Bogus presented a response to the criticism of juries. He started by pointing out that seventy-five to eighty percent of punitive damage awards are eliminated by judges. [86] This leads to two conclusions: (1) judges and jurors both play a role in determining punitive damages; [87] and (2) punitive damages are not as significant as a consideration of jury verdicts prior to remittitur might indicate. Professor Bogus also justified the failure of jurors to follow the instructions in experiments such as the one performed by Professor Viscusi. He asserted that jurors may understand that there is more to punitive damages than the factors contained in the jury instructions. For example, jurors may think that the focus of economists on the concept of the defendant's proper level of care is misapplied in cases in which the defendant holds other people's lives in its hands. Professor Bogus concluded that we should not remove the democratic element from punitive damage awards.

Dr. John Calfee joined other panelists in attacking the unpredictability of punitive damage awards. He offered the breast implant litigation as a paradigmatic example. [88] In that case, the defendant offered a four billion dollar **settlement** to all plaintiffs, from which thousands of plaintiffs opted out. Faced with the prospect of large jury verdicts, the company declared bankruptcy, despite the fact that some compensatory awards were later overturned. Dr. Calfee asserted that the defendant was fearful of punitive damages in the future. Because companies are unable to accurately assess either the risk of punitive damages or the likely magnitude of those damages, they are unable to make rational decisions. Dr. Calfee argued that supplying the decision-maker with a formula to determine punitive damages would avoid this unpredictability.

CONCLUSION

Overall, the Symposium provided a forum for scholars to debate the continued efficacy of punitive damages--a topic of particular significance given the recent criticism of **punitive damages** and accompanying pushes for **reform.** Critics have asserted that these super-compensatory awards are out of control and are not achieving the goals **[*485]** for which they were designed. The policy debate being fought in the legislatures and legal literature are symptoms of deeper empirical and theoretical disagreements. Until those disagreements are reconciled, the policy debate will likely continue.

FOOTNOTES:

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n1 David Luban, *A Flawed Case Against Punitive Damages*, 87 GEO. L.J. 359, 360 (1998); *see also* Marc Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 WIS. L. REV. 1, 2 (indicating that punitive damages are awarded in three percent of jury verdicts).

n2 *See, e.g.*, Gregory Nathan Hoole, Note, *In the Wake of Seemingly Exorbitant Punitive Damage Awards America Demands Caps on Punitive Damages--Are We Barking Up the Wrong Tree?*, 22 J. CONTEMP. L. 459, 459-60 (1996). The large sum of **punitive damage** awards may feed into the **reform** movement as well. In 1992, for example, the seventy-five most populous counties in the United States awarded a total of $ 327,300,000 in punitive damages. Brian J. Ostrom, David B. Rottman & John A. Goerdt, *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233, 239 (1996).

n3 This occurred even though the judge decreased the award significantly. Susanah Mead, *Punitive Damages and the Spill Felt Round the World: A U.S. Perspective*, 17 LOY. L.A. INT'L & COMP. L.J. 829, 830 (1995); *see also* Valerie P. Hans, *The Contested Role of the Civil Jury in Business Litigation*, 79 JUDICATURE 242, 242 (1996) (indicating that the McDonald's coffee verdict was the "natural vehicle" for the Republican Party to use in its tort reform efforts).

n4 *See, e.g.*, David Schkade, Cass R. Sunstein & Daniel Kahneman, *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139, 1144 (2000); *see also* Jonathan Hadley Koenig, Note, *Punitive Damage "Overkill" After* TXO Production Corp. v. Alliance Resources: *The Need for a Congressional Solution*, 36 WM. & MARY L. REV. 751, 751-52 (1995) (arguing that the "highly-publicized and seemingly unjust nature" of punitive damages made them an issue in the 1992 presidential elections). *But see* Luban, *supra* note 1, at 361-62 (arguing that punitive damages are generally modest and that only a few outlier juries award exorbitant sums).

n5 David F. Partlett, *Punitive Damages: Legal Hot Zones*, 56 LA. L. REV. 781, 792 (1996).

n6 *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 908(1) (1979); David Crump, *Evidence, Economics, and Ethics: What Information Should Jurors Be Given to Determine the Amount of a Punitive-Damage Award?*, 57 MD. L. REV. 174, 182 (1998); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873-74 (1998); Cass R. Sunstein, David Schkade & Daniel Kahneman, *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237, 237-38 (2000).

n7 Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1426-27 (1993) (indicating that the imposition of punitive damages can offset weak administrative remedies and alter corporate behavior).

n8 *See* Polinsky & Shavell, *supra* note 6, at 874; Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 52 (1982).

n9 The most important of these rules are the payment of attorney's fees by each party to its own counsel and the requirement in contract cases of certainty of damages before they are awarded. John A. Sebert, Jr., *Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. REV. 1565, 1659-62 (1986). Although Sebert claims that he is concentrating upon full compensation as the justification for punitive damages, he also asserts that full compensation, including punitive damages, is necessary in order to ensure that parties only breach when it is efficient to do so. *Id.*

n10 Polinsky and Shavell present the classic economic model, arguing that when there is less than a 100% chance that defendants will be held liable, punitive damages should be used to offset the chance of non-detection. Polinsky & Shavell, *supra* note 6, at 887-90. It is

REV_00262942

American Insurance Association

FAX

TO:	Brett Kavanaugh	**FROM:**	Craig Berrington
COMPANY:	White House Counsel's Office	**COMPANY:**	American Insurance Association
FAX#:	202-456-5104	**FAX#:**	202-828-7117
PHONE#:		**PHONE#:**	202-828-7156
DATE:	October 3, 2002	**PAGES:**	03(Including cover)

Comments:

Brett, per your conversation with Leigh Ann, I am enclosing a slightly marked-up version of yesterday's offer. The first change is to merely have paragraphs (a)(1) and(a)(2) in accord with paragraph (a)(4). I made the change in (a)(1) and (a)(2) so their jurisdictional language would be identical to the language in (a)(4). The second change is to paragraph (a)(5), "Limits on Damages." That change would add another very narrowly tailored condition under which punitive damages could be had, specifically, where the defendant's act was in willful disregard of a statutory obligation and that willful act significantly contributed to the act of terrorism. This would be a very difficult standard to prove (especially using a "clear and convincing" evidentiary test), but if proved in a federal court (or to a federal judge selected by the multidistrict panel) would be a situation where a strong case could be made for punitives. I think it would also respond to the types of fact patterns that have been described to us by Senate Democratic staff. Hope this helps a bit. Please give me a call if you would like to discuss (202-828-7156). You can also email me at cberrington@aiadc.org. Thanks.

Craig Berrington Craig

If there are any problems with this fax transmission please call 202-828-7152

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Sheila.Bair@do.treas.gov
11/02/2001 09:44:36 AM

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To: See the distribution list at the bottom of this message

cc:
Subject: FW: draft bill

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fyi
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[mailto:Sarah_Kline@banking.senate.gov]
Sent: Friday, November 02, 2001 9:26 AM
To: Sheila.Bair@do.treas.gov; Martha.Ellett@do.treas.gov;
Roberta.McInerney@do.treas.gov
Subject: draft bill

Attached is the most current version of the bill. The tort language is
still
being worked on, as you know, but I wanted to make sure everyone was working
off
the same draft.

Thanks,

-Sarah

- AYO01_A30.pdf

Message Sent To:

D. Marcus Sumerlin/OPD/EOP
Kristen Silverberg/WHO/EOP
Randall S. Kroszner/CEA/EOP
Brett M. Kavanaugh/WHO/EOP
Matthew Kirk/WHO/EOP

107TH CONGRESS
1ST SESSION

S. _____

IN THE SENATE OF THE UNITED STATES

_____ introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To promote the stabilization of the economy by encouraging financial institutions to continue to support economic development, including development in urban areas, through the provision of affordable insurance coverage against acts of terrorism, and for other purposes.

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

(b) CONDITIONS FOR FEDERAL PAYMENTS.—No payment may be made by the Secretary under subsection (c), unless—

(1) a policyholder that suffers an insured loss, or a person acting on behalf of that policyholder, files a claim with a participating insurance company;

(2) at the time of offer, purchase, and renewal of each policy covering an insured loss, the participating insurance company provides clear and conspicuous disclosure in the policy to the policyholder of the premium charged for insured losses covered by the Program and the Federal share of compensation for insured losses under the Program;

(3) the participating insurance company processes the claim for the insured loss in accordance with its standard business practices, and any procedures that the Secretary may reasonably prescribe; and

(4) the participating insurance company submits to the Secretary, in accordance with such procedures as the Secretary may establish—

(A) a claim for payment of the Federal share of compensation for insured losses under the Program;

(B) written verification and certification—

(i) of the underlying claim; and

(ii) of all payments made to policyholders for insured losses; and

(C) certification of its compliance with the provisions of this subsection.

(c) SHARED INSURANCE LOSS COVERAGE.—

(1) FEDERAL SHARE.—Subject to the limitations in paragraph (2), the Federal share of compensation under the Program, to be paid by the Secretary, shall be—

(A) for insured losses resulting from an act of terrorism occurring during the period beginning on the date of enactment of this Act and ending on December 31, 2002, 90 percent of the aggregate amount of all such losses in excess of $10,000,000,000;

(B) for insured losses resulting from an act of terrorism occurring during the period beginning on January 1, 2003 and ending on December 31, 2003, 90 percent of the aggregate amount of all such losses in excess of $10,000,000,000; and

(C) if the Program is extended in accordance with section 6, for insured losses resulting from an act of terrorism occurring during the

period beginning on January 1, 2004 and ending on December 31, 2004, 90 percent of the aggregate amount of all such losses in excess of $20,000,000,000.

(2) CAP ON ANNUAL LIABILITY.—Notwithstanding paragraph (1), or any other provision of Federal or State law, if the aggregate insured losses exceed $100,000,000,000 during any period referred to in subparagraphs (A) and (B) of paragraph (1) (or the period referred to in subparagraph (C) of paragraph (1) if the Program is extended in accordance with section 6)—

(A) the Secretary shall not make any payment under this Act for any portion of the amount of such losses that exceeds $100,000,000,000; and

(B) participating insurance companies shall not be liable for the payment of any portion of the amount that exceeds $100,000,000,000.

(3) NOTICE TO CONGRESS.—The Secretary shall notify the Congress if estimated or actual aggregate insured losses exceed $100,000,000,000 in any period described in paragraph (1), and the Con-

gress shall determine the procedures for and the source of any such excess payments.

(4) FINAL NETTING.—The Secretary shall have sole discretion to determine the time at which claims relating to any insured loss or act of terrorism shall become final.

(5) DETERMINATIONS FINAL.—Any determination of the Secretary under this subsection shall be final, and shall not be subject to judicial review.

(d) FUNDING.—

(1) PAYMENT AUTHORITY.—This Act constitutes payment authority in advance of appropriation Acts and represents the obligation of the Federal Government to provide for the Federal share of compensation for insured losses under the Program.

(2) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Secretary such sums as may be necessary to pay the administrative expenses of the Program.

SEC. 5. GENERAL AUTHORITY AND ADMINISTRATION OF CLAIMS.

(a) GENERAL AUTHORITY.—The Secretary shall have the powers and authorities necessary to carry out the Program, including authority—

(1) to investigate and audit all claims under the Program; and

(2) to prescribe regulations and procedures to implement the Program.

(b) INTERIM RULES AND PROCEDURES.—The Secretary shall issue interim final rules or procedures specifying the manner in which—

(1) participating insurance companies may file, verify, and certify claims under the Program;

(2) the Secretary shall publish or otherwise publicly announce the applicable percentage of insured losses to be paid by participating insurance companies and the Federal share of compensation for insured losses under the Program;

(3) the Federal share of compensation for insured losses will be paid under the Program, including payments based on estimates of or actual aggregate insured losses;

(4) the Secretary may, at any time, seek repayment from or reimburse any participating insurance company, based on estimates of insured losses under the Program, to effectuate the insured loss sharing schedule and limitations contained in section 4;

(5) participating insurance companies that incur insured losses shall pay their pro rata share of

insured losses in accordance with the schedule and limitations contained in section 4; and

(6) the Secretary will determine any final netting of payments for actual insured losses under the Program, including payments owed to the Federal Government from any participating insurance company and any Federal share of compensation for insured losses owed to any participating insurance company, to effectuate the insured loss sharing schedule and limitations contained in section 4.

(c) CONTRACTS FOR SERVICES.—The Secretary may employ persons or contract for services as may be necessary to implement the Program.

(d) CIVIL PENALTIES.—The Secretary may assess civil money penalties for violations of this Act or any rule, regulation, or order issued by the Secretary under this Act relating to the submission of false or misleading information for purposes of the Program, or any failure to repay any amount required to be reimbursed under regulations or procedures described in section 5(b)(5).

SEC. 6. TERMINATION OF PROGRAM; DISCRETIONARY EXTENSION.

(a) TERMINATION OF PROGRAM.—

(1) IN GENERAL.—This Act is repealed, and the Program shall terminate, on December 31, 2003, unless the Secretary—

(A) determines, after considering the report and finding required by this section, that the Program should be extended for one additional year, until December 31, 2004; and

(B) promptly notifies the Congress of such determination and the reasons therefore.

(2) DETERMINATION FINAL.—The determination of the Secretary under paragraph (1) shall be final, and shall not be subject to judicial review.

(3) TERMINATION AFTER EXTENSION.—If the Program is extended under paragraph (1), this Act is repealed, and the Program shall terminate, on December 31, 2004.

(b) REPORT TO CONGRESS.—Not later than 18 months after the date of enactment of this Act, the Secretary shall submit a report to Congress—

(1) regarding—

(A) the availability of insurance coverage for acts of terrorism;

(B) the affordability of such coverage, including the effect of such coverage on premiums; and

(C) the capacity of the insurance industry to absorb future losses resulting from acts of terrorism, taking into account the profitability of the insurance industry; and

(2) that considers—

(A) the impact of the Program on each of the factors described in paragraph (1); and

(B) the probable impact on such factors and on the United States economy if the Program terminates on December 31, 2003.

(c) FINDING REQUIRED.—A determination under subsection (a) to extend the Program shall be based on a finding by the Secretary that—

(1) widespread market uncertainties continue to disrupt the ability of insurance companies to price insurance coverage for losses resulting from acts of terrorism, thereby resulting in the continuing unavailability of affordable insurance for consumers; and

(2) extending the Program for an additional year would likely encourage economic stabilization and facilitate a transition to a viable market for private terrorism risk insurance.

(d) CONTINUING AUTHORITY TO PAY OR ADJUST COMPENSATION.—Notwithstanding the date on which the

Program terminates under subsection (a), the Secretary may take any actions necessary to ensure payment, reimbursement, or adjustment of compensation for insured losses arising out of any act of terrorism occurring during the period during which the Program is in effect under this Act.

(e) STUDY AND REPORT ON SCOPE OF THE PROGRAM.—

(1) STUDY.—The Secretary, after consultation with the National Association of Insurance Commissioners, representatives of the insurance industry, and other experts in the insurance field, shall conduct a study of the potential effects of acts of terrorism on the availability of life insurance and other lines of insurance coverage.

(2) REPORT.—Not later than 1 year after the date of enactment of this Act, the Secretary shall submit a report to the Congress on the results of the study conducted under paragraph (1).

SEC. 7 PRESERVATION OF STATE LAW.

Nothing in this Act shall affect the jurisdiction or regulatory authority of the insurance commissioner (or any agency or office performing like functions) of any State over any participating insurance company or other person—

(1) except as specifically provided in this Act; and

(2) except that—

(A) the definition of the term "act of terrorism" in section 3 shall be the exclusive definition for purposes of compensation for insured losses under this Act, and shall preempt any provision of State law that is inconsistent with that definition, to the extent that such provision of law would otherwise apply to any insurance policy relating to terrorism risk in the United States; and

(B) during the period beginning on the date of enactment of this Act and ending on December 31, 2002, rates for terrorism risk insurance covered by this Act and filed with any State shall not be subject to prior approval or a waiting period, under any law of a State that would otherwise be applicable, provided that nothing in this Act affects the ability of any State to invalidate a rate as excessive, inadequate, or unfairly discriminatory.

SEC. 8. SENSE OF THE CONGRESS.

It is the sense of the Congress that the insurance industry should build capacity and aggregate risk to provide

SECTION. 1. SHORT TITLE.

This Act may be cited as the "Terrorism Risk Insurance Act of 2001".

SEC. 2. CONGRESSIONAL FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds that—

(1) property and casualty insurance firms are important financial institutions, the products of which allow mutualization of risk and the efficient use of financial resources and enhance the ability of the economy to maintain stability, while responding to a variety of economic, political, environmental, and other risks with a minimum of disruption;

(2) the ability of businesses and individuals to obtain property and casualty insurance at reasonable and predictable prices, in order to spread the risk of both routine and catastrophic loss, is critical to economic growth, urban development, and the construction and maintenance of public and private housing, as well as to the promotion of United States exports and foreign trade in an increasingly interconnected world;

(3) the ability of the insurance industry to cover the unprecedented financial risks presented by potential acts of terrorism in the United States can be a major factor in the recovery from terrorist at-

affordable property and casualty coverage for terrorism risk.

SEC. 9. PROCEDURES FOR CIVIL ACTIONS.

(a) FEDERAL CAUSE OF ACTION.—There shall exist a Federal cause of action for property damage, personal injury, or death arising out of or resulting from an act of terrorism, which shall be the exclusive cause of action and remedy for claims for property damage, personal injury, or death arising out of or resulting from an act of terrorism. All State causes of action of any kind for property damage, personal injury, or death otherwise available arising out of or resulting from an act of terrorism, are hereby preempted, except as provided in subsection (f).

(b) GOVERNING LAW.—The substantive law for decision in an action for property damage, personal injury, or death arising out of or resulting from an act of terrorism under this section shall be derived from the law, including applicable choice of law principles, of the [State, or States determined to be required by the district court assigned under subsection (c), unless such law is inconsistent with or otherwise preempted by Federal law.]

(c) FEDERAL JURISDICTION.—

(1) IN GENERAL.—Notwithstanding any other provision of law, not later than 90 days after the occurrence of an act of terrorism, the Judicial Panel

on Multidistrict Litigation shall assign a single Federal district court to conduct pretrial and trial proceedings in all pending and future civil actions for property damage, personal injury, or death arising out of or resulting from that act of terrorism.

(2) SELECTION CRITERIA.—The Judicial Panel on Multidistrict Litigation shall select and assign the district court under paragraph (1) based on the convenience of the parties and the just and efficient conduct of the proceedings.

(3) JURISDICTION.—The district court assigned by the Judicial Panel on Multidistrict Litigation shall have original and exclusive jurisdiction over all actions under paragraph (1). For purposes of personal jurisdiction, the district court assigned by the Judicial Panel on Multidistrict Litigation shall be deemed to sit in all judicial districts in the United States.

(4) TRANSFER OF CASES FILED IN OTHER FEDERAL COURTS.—Any civil action for property damage, personal injury, or death arising out of or resulting from an act of terrorism that is filed in a Federal district court other than the Federal district court assigned by the Judicial Panel on Multidistrict

Litigation under paragraph (1) shall be transferred to the Federal district court so assigned.

(5) REMOVAL OF CASES FILED IN STATE COURTS.—Any civil action for property damage, personal injury, or death arising out of or resulting from an act of terrorism that is filed in a State court shall be removable to the Federal district court assigned by the Judicial Panel on Multidistrict Litigation under paragraph (1).

[(d) APPROVAL OF SETTLEMENTS.—Any settlement between the parties of a civil action described in this section for property damage, personal injury, or death arising out of or resulting from an act of terrorism shall be subject to prior approval by the Secretary.]

(e) LIMITATION ON DAMAGES.—Punitive or exemplary damages shall not be available in any civil action subject to this section.

(f) CLAIMS AGAINST TERRORISTS.—Nothing in this section shall in any way limit the ability of any plaintiff to seek any form of recovery from any person, government or other entity that was a participant in, or aider and abettor of, any act of terrorism.

(g) EFFECTIVE PERIOD.—This section shall apply only to actions for property damage, personal injury, or death arising out of or resulting from acts of terrorism

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that occur during the effective period of the Program, including, if applicable, any extension period under section 6.

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tacks, while maintaining the stability of the economy;

(4) widespread financial market uncertainties have arisen following the terrorist attacks of September 11, 2001, including the absence of information from which financial institutions can make statistically valid estimates of the probability and size of future terrorist events, and therefore the size, funding, and allocation of the risk of loss caused by such acts of terrorism;

(5) a decision by property and casualty insurers to deal with such uncertainties, either by terminating property and casualty coverage for losses arising from terrorist events, or by radically escalating premium coverage to compensate for risks of loss that are not readily predictable, could seriously hamper ongoing and planned construction, property acquisition, and other business projects, generate a dramatic increase in rents, and otherwise suppress economic activity; and

(6) the United States Government should provide temporary financial assistance to insured parties, contributing to the stabilization of the United States economy in a time of national crisis, while the financial services industry develops the systems,

mechanisms, products, and programs necessary to create a viable financial services market for private terrorism risk insurance.

(b) PURPOSE.—The purpose of this Act is to establish a temporary Federal program that provides for a transparent system of shared public and private compensation for insured losses resulting from acts of terrorism in order to—

(1) protect consumers by addressing market disruptions and ensure the continued widespread availability and affordability of property and casualty insurance for terrorism risk; and

(2) allow for a transitional period for the private markets to stabilize, resume pricing of such insurance, and build capacity to absorb any future losses, while preserving State insurance regulation and consumer protections.

SEC. 3. DEFINITIONS.

In this Act, the following definitions shall apply:

(1) ACT OF TERRORISM.—

(A) CERTIFICATION.—The term "act of terrorism" means any act that is certified by the Secretary, in concurrence with the Secretary of State, and the Attorney General of the United States—

(i) to be a violent act or an act that is dangerous to—

(I) human life;

(II) property; or

(III) infrastructure;

(ii) to have resulted in damage within the United States, or outside of the United States in the case of an air carrier described in paragraph (3)(A)(ii); and

(iii) to have been committed by an individual or individuals acting on behalf of any foreign person or foreign interest, as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

(B) LIMITATION.—No act or event shall be certified by the Secretary as an act of terrorism if—

(i) the act or event is committed in the course of a war declared by the Congress; or

(ii) losses resulting from the act or event, in the aggregate, do not exceed $5,000,000.

(C) DETERMINATIONS FINAL.—Any certification of, or determination not to certify, an act or event as an act of terrorism under this paragraph shall be final, and shall not be subject to judicial review.

(2) BUSINESS INTERRUPTION COVERAGE.—The term "business interruption coverage"—

(A) means coverage of losses for temporary relocation expenses and ongoing expenses, including ordinary wages, where—

(i) there is physical damage to the business premises of such magnitude that the business cannot open for business;

(ii) there is physical damage to other property that totally prevents customers or employees from gaining access to the business premises; or

(iii) the Federal, State, or local government shuts down an area due to physical or environmental damage, thereby preventing customers or employees from gaining access to the business premises; and

(B) does not include lost profits, other than in the case of a small business concern (as defined in section 3 of the Small Business Act

(15 U.S.C. 632) and applicable regulations thereunder) in any case described in clause (i), (ii), or (iii) of subparagraph (A).

(3) INSURED LOSS.—The term "insured loss"—

(A) means any loss resulting from an act of terrorism that is covered by any type of commercial or personal property and casualty insurance policy or endorsement, including business interruption coverage, issued by a participating insurance company—

(i) if such loss occurs within the United States; and

(ii) to an air carrier (as defined in section 40102 of title 49, United States Code), regardless of where the loss occurs; and

(B) does not include any loss covered by any type of life or health insurance policy.

(4) PARTICIPATING INSURANCE COMPANY.—The term "participating insurance company" means any insurance company, including any subsidiary or affiliate thereof—

(A) that—

(i) is licensed or admitted to engage in the business of providing primary insurance in any State; or

(ii) is not so licensed or admitted, if it is an eligible surplus line carrier listed on the Quarterly Listing of Alien Insurers of the National Association of Insurance Commissioners, or any successor thereto;

(B) that offers in all of its property and casualty insurance policies, coverage for insured losses;

(C) that offers property and casualty insurance coverage for insured losses that does not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of terrorism; and

(D) that meets any other criteria that the Secretary may reasonably prescribe.

(6) PERSON.—The term "person" means any individual, business, or nonprofit entity (including a partnership, limited liability company, corporation, or association), trust or estate, or a State or political subdivision of a State or other governmental unit.

(7) PROGRAM.—The term "Program" means the Terrorism Insured Loss Shared Compensation Program established by this Act.

(8) SECRETARY.—The term "Secretary" means the Secretary of the Treasury.

(9) STATE.—The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, and each of the United States Virgin Islands.

(10) UNITED STATES.—The term "United States" means all States of the United States.

SEC. 4. TERRORISM INSURED LOSS SHARED COMPENSATION PROGRAM.

(a) ESTABLISHMENT OF PROGRAM.—

(1) IN GENERAL.—There is established in the Department of the Treasury the Terrorism Insured Loss Shared Compensation Program.

(2) AUTHORITY OF THE SECRETARY.—Notwithstanding any other provision of State or Federal law, the Secretary shall administer the Program, and shall pay the Federal share of compensation for insured losses in accordance with subsection (c).

REV_00262960

THE WHITE HOUSE

WASHINGTON

OFFICE OF THE COUNSEL TO THE PRESIDENT

Facsimile
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Phone: (202) 456-7900
Fax: (202) 456-1647

Date: _____
Time: _____

To: Matt Kirk

Fax: _____

From: _____

Number of Pages: _____

Message:

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Talking Points re Punitive Damages Language of H.R.1

Punitive Damages Language from H.R. 1

"Punitive damages may not be awarded against a teacher in an action brought for harm based on the act or omission of a teacher acting within the scope of the teacher's employment or responsibilities to a school or governmental entity unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an act or omission of such teacher that constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed."

Problems with Language

Background

- If punitive damages were available, one award in one case could wipe out the resources of any liable defendants, leaving some plaintiffs without compensation. This will both prevent full and equitable compensation for the injured victims and deplete the assets of the business in question, harming victims, shareholders, and workers.

- The mere threat of punitive damages after a terrorist act will lead to far higher settlements, thereby leading legitimate businesses to seek bankruptcy protection so as to avoid predatory lawsuits. The ripple effects on the economy in the wake of a major terrorist attack could be enormous.

- On a forward-looking basis, the mere availability of punitive damages means that businesses will be uninsured against such damages and exposed to huge damages awards. This will make lenders less likely to lend to a company that cannot ensure repayment in the event of a terrorist attack.

Points

- The language in H.R. 1 is far too elastic and is the rough equivalent of recklessness. Any good plaintiff's lawyer can turn even simple negligence into a plausible case of recklessness, which is little protection at all. (What is more, the phrase "willful misconduct" is especially loose and could be interpreted as negligence.) As the courts and commentators have recognized, "terms such as willful, wanton, conscious indifference, reckless disregard, and recklessness are overlapping and to a substantial extent redundant [and are referenced as] the recklessness group." Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1 (1982).

- These standards "may denote a mental state accompanying a defendant's act, but that mental state is different from that of actual malice." *Id.*

- This is not the type of conduct that should subject a victim of terrorism to additional punitive damages. Such a standard leaves defendants exposed to the threat of an enormous, unfair award, causing all of the same problems noted above. Given the enormous stakes in the mass tort context, the standard must ensure that punitive damages are reserved for those who have engaged in serious wrongdoing – deliberate harm or intentional disregard for the safety of the victim.

To: K. Rove
M. Kirk
B. Conklin
K. Silverberg
K. Warsh
K. Hennessey
B. Kavanaugh
R. Krozner

From: Kirk

Re: Daschle letter to donors from June.

Thomas A. Daschle

I am pleased to report that yesterday, at long last, the Senate broke a filibuster of the terrorism reinsurance legislation led by Trent Lott and Phil Gramm and passed the bill. My conversations with you and others reinforced my view of the importance of enacting this bill as quickly as possible, and I am hopeful that this long overdue vote will pave the way for constructive negotiations with the House that will produce a consensus reinsurance bill.

As you know, we still face two significant differences with the House – on the formula for coverage and tort reform language. Under the Senate bill, the government will pay 80% of losses resulting from a terrorist attack up to $10 billion and 90% of losses after that. The House bill provides mainly for long-term low interest loans to help insurers cope with claims from a major attack. The White House, I should add, strongly supports the Senate approach.

I believe that a consensus package that will ensure that terrorism coverage is widely available at affordable prices, and that property owners who bear no blame for a terrorist attack will not be liable for punitive damages, can – indeed – must be reached. But, as we discussed, to get this accomplished quickly all parties must put aside secondary agendas and concentrate on these two primary objectives. We can debate our differences in other forums.

Senate Democrats have demonstrated their commitment to our overarching goal. Only one Democrat voted against breaking the filibuster, and no Democrat voted against final passage of the bill. In contrast, 30 Republicans voted for continuing the filibuster of this vital legislation, and 14 Republicans voted against the bill.

I report these facts not to score partisan points, but rather to emphasize the importance of setting aside other agendas and concentrating on our primary mission. Let's enact a workable terrorism reinsurance bill and fight out secondary issues in separate legislation. Any help you might offer in impressing this message on our Republican friends in Congress would be welcome.

Again, [redacted] I appreciate how strongly you feel about this issue and have benefited from your input on it. Please don't hesitate to give me a call if you have any questions or suggestions as the debate continues.

Sincerely,

Tom Daschle

TALKING POINTS IN RESPONSE

"The Senate bill protects the taxpayer from punitive damages because it provides that punitives are not 'insured losses' for purposes of this program."

- Even with the Senate provision, taxpayers will end up paying for punitive damages because many, if not most, of these cases will be resolved with settlements. If a plaintiff has sued for large amounts of punitive damages, the settlement will be higher because of the risk of a punitive award from the jury, but the settlement will not specify that it includes amounts for punitives. The settlement costs will be picked up by the taxpayer through this program.
- Further, the punitive provision is important for reasons other than protecting taxpayer funds. Punitive damages are not designed to compensate the plaintiff; the plaintiff is fully compensated through economic and non-economic damages. If punitives are available, one award can wipe out the resources of any liable defendants, leaving some plaintiffs without compensation.
- No one should profit off an act of terrorism by obtaining punitive damages (which, by definition, are beyond what is necessary to compensate the victims) against third parties who did not commit or aid the act of terrorism.
- In some states, punitives are available even for unintentional conduct (such as gross negligence or recklessness). This is not the type of conduct that should subject a victim of terrorism to additional damage. And even a high standard leaves defendants exposed to the threat of an enormous, unfair award, which makes them more liable to settle the case for a high amount even if the claim is meritless. So, a higher standard will not fix the problem unless it's connected to something concrete like a criminal conviction.

NOTE: They may float the idea of making punitives uninsurable under federal law. The arguments above apply. In addition:

- Pre-empting state law on the insurability of punitives is the worst case scenario because it saddles American companies with the full risk of any terrorist attack. This does nothing to provide predictability and stability for American businesses or to encourage lenders to participate in construction projects. This is a windfall for the insurance industry on the backs of American workers because, at the same industry retention level, part of their exposure is eliminated.

- Although some states explicitly prohibit insuring punitive damages and some states prohibit ensuring certain kinds of willful conduct, punitives may be insurable when they are assessed for less egregious conduct.

"Why shouldn't a tortfeasor who is grossly negligent be liable for punitive damages."

- Gross negligence is actually quite a low standard for punitives, which are designed for criminal-like conduct. Anyone can plead gross negligence for virtually any behavior and either make it to a jury or extort a high settlement.
- If there are American businesses who deserve punishment following an attack, the federal and state governments can fine or prosecute them. We shouldn't cripple the economy to preserve the right to collect damages that exceed the harm caused to the plaintiff.
- The one plaintiff who receives that punitive award may deprive other plaintiffs of any compensation.

"Federal courts rarely assess punitive damages"

- Even though both bills create a federal cause of action, the substantive rules are derived from state law in the state where the acts took place. The courts will award punitives if they are available under state law, which can be quite often.
- Federal courts do not award punitives frequently today because mass torts are typically tried in state court.

"Liability provisions are not essential to the real estate and insurance industries"

- Show letters from industry.
- They are reacting to their belief that even modest, time-limited liability rules may hold up the bill. They will compromise to get federal backstop.
- Other industries, such as transportation, are heavily burdened by third-party liability premiums and won't be helped without a liability fix.

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VIA FACSIMILE

April 15, 2002

The Honorable Tom Daschle
Senate Majority Leader
5221 Capitol Building
Washington, DC 20510

The Honorable Dennis Hastert
Speaker of the House of Representatives
H232 Capitol Building
Washington, DC 20515

The Honorable Trent Lott
Senate Republican Leader
S-230 Capitol Building
Washington, DC 20510

The Honorable Richard Gephardt
House Democrat Leader
H-204 Capitol Building
Washington, DC 20515

Dear Congressional Leaders:

As a result of the events of September 11th, the nation's property and casualty insurance companies have or will pay out losses that will exceed $35 billion dollars. Since the first of January, many insurance companies, self-insurers and states have been faced with a situation where they are unable to spread the risk that they insure because of the unavailability of reinsurance protection. In the event of another major attack, some companies or perhaps a segment of the industry would face insolvency. While most states have approved a limited exclusion for terrorism with a $25 million deductible, exclusions for workers' compensation coverage are not permitted by statute in any state. The present situation poses a grave risk to the solvency of the insurance industry, state insurance facilities, economic development initiatives, and the ability of our states to recover from impacts of the September 11th attacks.

In the months after the attack on our nation, legislation passed in the House and was introduced in the Senate to create a backstop for the insurance industry so they could continue to provide protection to their customers. The Administration has also supported this concept. Currently, there is broad bi-partisan agreement for providing an insurance backstop. Governors believe this is an important goal that should not be inhibited by other issues.

Since late December, the lack of a financial backstop has started to ripple through the economy and will continue to do so. This will further impact the ability of the economy to recover from the current recession.

As Governors, we are facing many critical issues resulting from the September 11th crisis. The emerging problem in insurance coverage only serves to exacerbate our recovery efforts. In view of this, we, the undersigned Governors, respectfully urge the Congress to quickly complete its work on the terrorism reinsurance legislation in order to return stability to U.S. insurance markets.

Sincerely,

Sincerely,

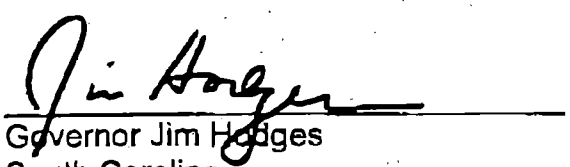

Governor Jim Hodges
South Carolina

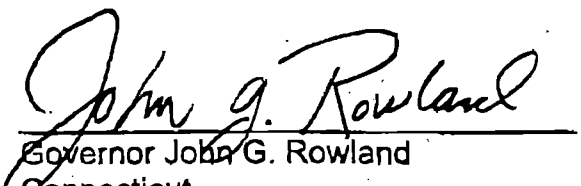

Governor John G. Rowland
Connecticut



Governor Mike Johanns
Nebraska

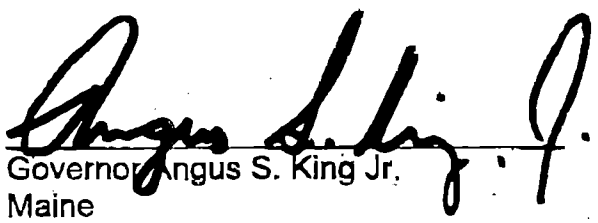

Governor Angus S. King Jr.
Maine

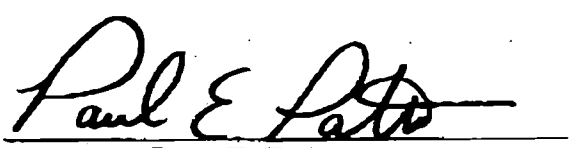

Governor Paul E. Patton
Kentucky

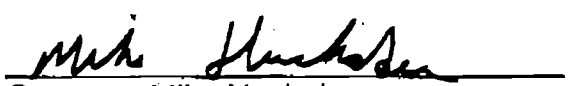

Governor Mike Huckabee
Arkansas



Governor Judy Martz
Montana

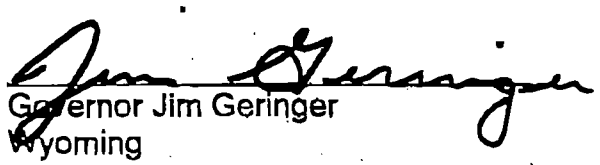

Governor Jim Geringer
Wyoming

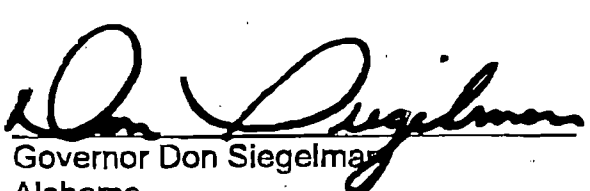

Governor Don Siegelman
Alabama

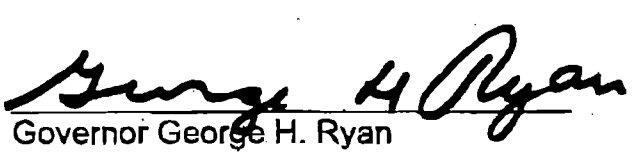

Governor George H. Ryan
Illinois



Governor Bob Holden
Missouri

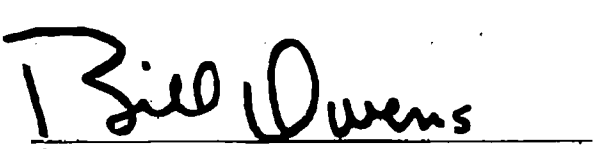

Governor Bill Owens
Colorado

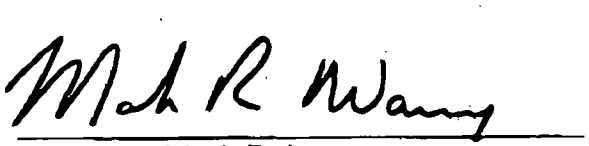

Governor Mark R. Warner
Virginia

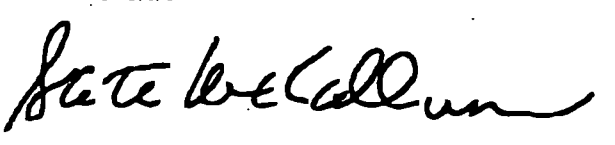

Governor Scott McCallum
Wisconsin

Governor Jeb Bush
Florida

Governor Jane Swift
Massachusetts

Governor Frank O'Bannon
Indiana

Governor Bob Taft
Ohio

Matt Kirk

Dear Senator Dodd:

As you prepare to take up a terrorism insurance bill this session, I am writing to express the Administration's strong opposition to certain aspects of section 15 of the Terrorism Risk Protection Act (H.R. 3210), in particular, subsection 15(e).

Section 15 establishes a new federal cause of action for claims related to certified terrorist acts and limits damages and attorneys fees recoverable from defendants other than the perpetrators of the acts and their co-conspirators. Section 15(e) permits judgment holders to satisfy their judgments with the blocked assets of the responsible terrorist party, or an agency or instrumentality of that party.

To the extent that it relates to compensation for acts of international terrorism, section 15 impinges on Congress' recent directive to the Administration to submit "a legislative proposal to establish a comprehensive program to ensure fair, equitable, and prompt compensation for all United States victims of international terrorism." See Section 626 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 2002 (Pub. Law 107-77). The State Department, together with other agencies, is in the process of developing just such a program.

The Honorable
Christopher Dodd

By contrast, subsection 15(e) would stimulate a race to the courthouse among the attorneys for the victims who qualify, and since there are limited assets, only a handful of victims would be compensated under this system. It reflects an unfair and unseemly approach to compensation based on the unpredictability and vagaries of litigation rather than a systematic and equitable approach to providing relief to all victims of terrorism and their families, not just those who can pursue litigation.

Also, by making blocked assets of states available to fund terrorist victims' compensation, section 15(e) would impair the President's ability to use blocked assets to best meet U.S. foreign policy and national security interests. This is no abstract argument. For example, leverage from blocked Vietnamese assets was critical in getting Vietnam to address our concerns about MIA's and POW's and to take responsibility for over $200 million in outstanding U.S. claims. More recently, the return of the blocked assets of Afghanistan's central bank and the shoring up of Afghanistan's Interim Authority would not have been possible if those assets had instead been used to pay claims. These examples underscore the importance of maintaining blocked assets in order to support friendly successor governments that may emerge in formerly hostile states, and to reduce the amount of direct assistance that would otherwise be needed.

Moreover, section 15(e) permits the liquidation of all types of blocked assets of terrorist list states, including diplomatic and consular property. The provision's Presidential waiver, which would apply only to diplomatic and consular property, is insufficient to cover all property with respect to which the United States has obligations under the Vienna Conventions for Diplomatic and Consular Relations. This provision therefore would cause us to violate our international legal obligations. It also could set a precedent for foreign governments seizing U.S. government assets abroad.

In sum, as Congress directed in section 626 of Public Law 107-77, a comprehensive, fair, and rational system of compensation for victims of international terrorism is urgently needed. Parts of section 15 would overlap with the system that the Administration is in the process of developing, and subsection 15(e) would raise precisely the

types of fairness and foreign policy concerns that the Administration is seeking to address.

Accordingly, we ask that you give us a chance to meet Congress' request to submit an appropriate compensation program in relation to acts of international terrorism. We look forward to working with you to ensure that such a program is enacted as soon as possible.

Sincerely,

Paul V. Kelly
Assistant Secretary
Legislative Affairs

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Citation: **96 Yale L.J. 1521,AT 1552**

*96 Yale L.J. 1521, **

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Yale Law Journal

June, 1987

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LENGTH: 40193 words

ARTICLE: The Current Insurance Crisis and Modern Tort Law.

George L. Priest +

+ John M. Olin Professor of Law and Economics, Yale Law School. I am very grateful to Rachel Eisner, Elliot G. Freier, David Leifer and J. Hoult Verkerke for research assistance; to Kenneth S. Abraham, William H. Adams III, Armen Alchian, Susan J. Bennett, Owen M. Fiss, Victor P. Goldberg, Henry B. Hansmann, Howard Kunreuther, Burke Marshall, A. Mitchell Polinsky, Roberta Romano, Ralph Saul, Gary T. Schwartz, Peter H. Schuck, Kate Stith, Ralph A. Winter, and especially Michael J. Trebilcock, for comments on earlier drafts; and to the Program in Civil Liability, Yale Law School, for support. I have benefited from discussions of this Article with groups of executives at the CIGNA Corporation, with participants at the University of Houston Conference on Environmental Liability, and with members of faculty workshops at Yale and Vermont Law Schools. I am solely responsible for the contents.

SUMMARY:
... In still other cases -- intrauterine devices, wine tasting, and day care, -- insurers had refused to offer coverage at any premium, forcing these products and services to be withdrawn from the market. ... A third theory, most prominently espoused by the Justice Department, attributes the crisis to modern tort law's expansion of corporate liability exposure, which has necessitated insurance premium increases. ... In essence, the insurers are competing over the relatively low-risk insureds of any risk pool, who are likely to select that insurer most precisely able to price the risk the insured brings to the pool. ... An increase of 64% to 134% in the level of insurance coverage under tort law will not operate as a scalar, but will increase consumer risk pool variance and will lead to the unraveling of consumer risk pools. ... These exclusions maximize the availability of insurance because it is the cities that are without dump sites and the directors of firms not involved in tender offers that would drop out of the risk pool in order to self-insure if the insurance premium were increased to provide coverage for cities or directors exposed to these claims. ... The policy premium converges with the level of aggregate coverage, of course, because low-risk members have dropped out of the risk pool, despite the efforts of the insurer to narrow the range of risks. ...

TEXT:
[*1521] This paper is an effort to understand the source of the crisis in insurance that has

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Regardless of context, the accident prevention question is whether it was cost-effective for the provider or for the consumer to have made greater investments to prevent the loss. If the finder of fact determines that neither party could have prevented the loss in a cost-effective manner, then the resolution of the dispute in favor of the plaintiff or the defendant serves only to determine which party is to be the insurer for the loss, that is, where the loss should lie, given that the loss could not have been efficiently prevented.

Some courts and agencies appear to believe that increasing the obligation of providers to compensate victims will always increase these providers' investments in safety. Where damage measures are compensatory, however, there is a very definite ceiling to the accident prevention investments that any provider will make. [92] Providers will make investments to reduce the accident rate only to the extent that such investments are cost-effective -- that is, that the marginal costs of preventive investments are less than the marginal gain in expected accident cost reduction. Beyond that **[*1538]** point, it is less costly to pay damage claims or judgments than to prevent accidents from occurring. Thus, extending liability beyond that point will not affect the level of safety investments.

There are insurance implications, however, of every liability decision. If a liability standard were set only to require cost-effective preventive investments by a provider, some losses would still occur. [93] Victims would bear these losses, and thus would bear the obligation to obtain insurance for them through some first-party insurance mechanism. In contrast, if a provider were held liable for losses which the provider could not cost-effectively have prevented, the provider would bear the obligation to provide insurance. Either through self-insurance or some form of third-party insurance, the provider insures victims for losses that cannot efficiently be prevented.

The economic effects of steadily increasing provider liability thus are quite simple in structure. A liability rule can compel providers of products and services to make investments that reduce the accident rate up to the level of optimal (cost-effective) investments. [94] After providers have invested optimally in prevention, however, any further assignment of liability affects only the provision of insurance. More extensive provider liability will generate more extensive provider insurance and nothing more.

The expansion of liability under modern tort law has obviously increased the provision of provider insurance. Any standard beyond a bare cost-benefit test (often identified with negligence) [95] will provide an insurance effect. Courts, of course, have extended liability far beyond the simple cost-benefit standard. Thus, modern tort law compels a very substantial level of provider insurance.

More precisely, modern tort law has broadly shifted the insurance obligation from first-party insurance to third-party or self-insurance by providers. Even a bare-bones cost-benefit standard has insurance consequences: Such a standard creates an obligation of potential victims to obtain market insurance or to self-insure for unpreventable losses. Modern tort law has shifted that obligation to providers, requiring providers either to obtain third-party market insurance or to self-insure for the losses suffered by consumers of their products or services. The expansion of tort liability since the mid-1960's has expanded the range of contexts in which provider insurance must be offered. Courts understand this point **[*1539]** perfectly. Much of the modern extension of tort liability has been expressly justified by the salutary insurance consequences that are supposed to result. [96] Thus it is a paradox that the modern regime somehow has led to the reduction of insurance availability. The next Section examines more closely the operation of insurance markets in an attempt to resolve the paradox.

III. HOW INSURANCE OPERATES

This Section discusses some straightforward principles of the operation of insurance markets.

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It describes how insurance benefits consumers and thus what types of losses consumers will want to insure, the role of insurance companies in creating viable insurance pools, the determinants of insurance premiums, the different economic effects of differently defined risk pools, the limitations on the survivability of such pools, and the necessary conditions for expanding the availability of insurance within the society. The insurance principles discussed here are quite general. They apply to all insurance contexts and are not specific to the American economy. Nevertheless, they provide a basis for understanding the specific ways in which recent changes in American tort law have contributed to our current insurance crisis.

Insurance provides a method for individuals to equalize the amount of money available to them over diverse states of the world -- states in which losses occur and those in which there are no losses. Most commonly, it is a method of equalizing money available over time. The insured pays a premium, reducing his or her current wealth, in return for the insurer's agreement to pay some monetary amount to the insured should a loss occur. Insurance is different from savings because the amount paid out by the insurer is not (and may never be) absolutely equal to the amount paid in by the insured, obviously, for example, when the loss occurs in an early insurance period. [97]

The insurance function, instead, requires that the losses have some probabilistic character. If it were certain that a person would suffer a particular loss in some particular period, insurance would be without purpose; the problem would be one of either accumulating savings before the loss occurs or trying to restore the previous economic position after the loss is suffered. Insurance, in contrast, requires that the loss be probabilistic, **[*1540]** either as to whether or not it occurs at all (for example, whether one's house burns down) or as to when the loss occurs (for example, whether one dies before or after full life expectancy). The insurance premium is set equal to the value of the *expected* loss for the period, plus a share of the costs of administering the system, called loading costs.

The insurer's function is to aggregate uncorrelated (that is, independent) risks and segregate these risks into separate risk pools. The uncorrelated character of the risks distinguishes insurance from savings. Risks that are uncorrelated are risks of which the incidence of loss is spread out, either in terms of time or in terms of the individuals suffering the loss. As long as the risks of pool members are uncorrelated, that is, statistically independent, [98] the insurer can accumulate small premiums from each insured and still have funds sufficient in any period to pay those losses that actually occur. In contrast, if risks were highly correlated, there would be no advantage to aggregating them. Thus, losses from nuclear war are uninsurable.

The insurer's aggregation function derives from operation of the law of large numbers -- the empirical phenomenon according to which the probability density function of average loss tends to become concentrated around the mean as the sample number increases. [99] Applied to insurance, the law of large numbers means that as one increases the number of insured persons possessing independent and identically-valued risks, one increases the accuracy of prediction of expected loss for each individual. As should be obvious, increasing predictive accuracy reduces the effective risk faced by the insurer, since the level of aggregate risk is a function of the variance of expected outcomes. [100] Described more precisely, then, the role of the insurer is to identify risks that are independent (uncorrelated) and equally valued, and to aggregate them in order to reduce the total risk of the set. [101]

This general statement of the insurance purpose refers to risks being equally valued. Of course, no two individuals bring exactly the same risk level into an insurance pool. Nevertheless, it is crucial to the insurance enterprise to segregate uncorrelated risks, as much as possible, into separate, narrowly-defined risk pools in order to control adverse selection. Adverse **[*1541]** selection is commonly described as the tendency of persons with relatively greater exposure to risk to seek insurance protection. [102] But the problem is broader. Adverse selection is a problem central to every insurance context, and it dominates

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the insurance function. An insurer must collect into a risk pool individuals with a sufficiently narrow range of exposure to risk for the insurance to remain financially attractive to each member of the pool. The insurance premium for the pool must be set according to the average level of risk brought to the pool. The wider the range between high-risk and low-risk pool members, the greater the difference between the average risk and the risk of low-risk members. Low-risk members pay a premium that, because it is based on an average which includes high-risk members, is more than they would have to pay if they could be segregated into a risk pool of their own.

If the disparity between the premium and the risks added by low-risk members becomes too substantial, low-risk members may drop out of the pool because they find alternative means of protection cheaper than market insurance. This is the most difficult problem faced by any insurance pool. Most individuals may be risk-averse; that is, they may be willing to pay an amount somewhat greater than their actual expected loss in order to avoid suffering the loss. But risk aversion is never infinite, and the costs of alternatives to market insurance, such as investments to reduce the likelihood of the loss or to reduce financial exposure to the loss, are never infinite. Obviously, as low-risk members drop out, a pool will consist more predominantly of high-risk members, requiring the premium to be raised and placing greater pressure on the remaining low-risk members of the pool.

Narrowing the range of risks within a pool increases the attractiveness of insurance to low-risk members. Obviously, as mentioned above, the less the average risk brought to the pool by other members exceeds the risk brought by a given insured, the less the premium for the pool will exceed the given insured's expected loss, and the more advantageous market insurance will appear to the insured.

The range of risks brought to an insurance pool also affects the premium for the pool in a second way, beyond its influence on average risk. Risk pools may differ in degrees of variance (coefficients of variation), even if the average risks of the pools are the same. [103] An insurer, however, **[*1542]** cannot be indifferent to the degree of variance of a risk pool. A pool incorporating greater variance of the risk distribution is a pool for which the potential range of aggregate losses is greater -- even if the average expected loss is the same.

Essentially, an insurer is an agent for the diversification of risks. [104] The insurer diversifies risks by accumulating insurance contracts for uncorrelated risks, and then by investing premiums in common stock or other assets whose investment risks are uncorrelated, or by reinsuring (hiring other insurers to perform the diversification function). Diversification investments are costly. As with more typical production functions, the greater the risks that must be diversified, the more costly the diversification investments become. Thus, as the variance of a risk pool increases, the cost of insuring the pool increases, and the premium increases. [105] Insurers are often accused, in obvious irony, of being extremely risk-averse; insurers as individuals are said frequently to hate taking risks. Even if accurately described, such personal characteristics are not clearly relevant to the problem. The point is that the costs of diversification to an insurer (or to anyone else) increase as the risks that must be diversified increase.

Thus, it is essential to the insurance function to define risk pools as narrowly as possible so that the premium for the pool is as close as possible to the expected loss of low-risk members of the pool. Narrowing risk pools reduces the adverse selection problem by reducing the incentives for low-risk members to drop out of insurance pools. If differences among the risk levels of pool members are too broad, the pool will unravel as low-risk members successively drop out. [106] The principal reason risks are uninsurable is that insurers are unable to narrow the assortment of risks within a pool.

One can now see the similarity in effect of the aggregation and segregation functions of the insurer: both reduce risk variance and thus serve to reduce the costs of insurance. By

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identifying independent risks and aggregating them into a risk pool, the insurer increases predictive accuracy by exploiting the law of large numbers. Increasing predictive accuracy reduces the risk level of the pool, even if it does not affect in any way the frequency of losses that actually occur. [107] In contrast, if the risks faced by **[*1543]** members of the pool are not independent, then the law of large numbers does not apply. Aggregating such risks would be unproductive because the reserves the insurer would have to maintain would equal or, perhaps, exceed the reserves individuals would have to maintain if uninsured. [108] Again, this is why society-wide calamities, such as nuclear war, are uninsurable.

Segregation of risks into separate pools according to levels of expected risk serves a complementary function. Like the law of large numbers, segregation according to risk level concentrates a probability density function of loss around its mean. It improves an insurer's ability to predict expected loss, making possible greater predictive accuracy even with fewer insureds in the pool. Thus, segregation reduces both pool riskiness and insurance costs. In addition, segregation into narrow risk pools [109] reduces adverse selection, because it makes insurance more attractive to the low-risk members of the risk pool.

It is commonly believed that there is a tension between the advantages of segregating insureds into particularized risk categories and the advantages of spreading risks broadly over some set of the population. Many seem to think that the more individualized the risk calculation, the lower the extent of risk spreading. [110] This view, however, derives from an incomplete understanding of the concept of risk spreading. Putting aside distributional preferences, [111] risk spreading is achieved by the aggregation of independent risks. If risks are uncorrelated and probabilistic in nature (which is what is meant by their being independent), then their aggregation is all that is necessary to achieve spreading. Insureds gain from such transactions because aggregation of the risks lowers the effective risk to each member of the pool. Even if the premium charged to each member of the pool is slightly greater than true expected loss, it is still less than the cost of self-insurance, because self-insurance necessarily requires taking into account a greater range of possible outcomes. Risk-spreading efficiency should be defined in terms of reduction in the coefficient of variation of the probability density function of average loss. Thus, if risk pools have been carefully segregated, risks can be spread efficiently over very small numbers of the population.

[*1544] Much of the insurance business involves literally individual assessment and pricing of risks. The insurance I have described to this point is called "class underwriting." "Special risk underwriting," in contrast -- which is more predominant in some of the commercial casualty lines affected by the insurance crisis -- involves risk estimates by the insurer on an individual risk-by-risk basis, with the premium (rather than a rate) set with the particular characteristics of the insured in mind.

Special risk underwriting, however, is only a particular case of the aggregation and risk spreading described above. There is no insurance advantage to underwriting only a single special risk, or even a set of special risks which are highly correlated, because the insurer would have no comparative advantage to the insured. Instead, an insurer will achieve the risk spreading and predictive accuracy objectives by underwriting a group of special risks for which risks are mutually independent, or a group whose risks are independent of other risks underwritten by the insurer. The insurer will bring to bear information that it has gathered and its experience in estimating the expected loss of each special risk. This estimation, obviously, will incorporate some variance in outcomes which will require the premium to be set above the mean of the probability density function of loss. As long as the risks brought by the insureds are independent, however, the insurer can realize advantages from aggregation that resemble the advantage that the operation of the law of large numbers gives to class underwriting.

As an example, imagine an insurer asked to write a products liability policy for a single

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manufacturer of a unique product. Putting aside other insurer skills, the insurer has no comparative advantage to a single manufacturer in establishing reserves against future expected losses. [112] If the insurer, however, can also write products liability policies for other manufacturers of unique products, the insurer can create an effect similar to that of the law of large numbers. As long as the risks of the individual manufacturers are independent, the level of total risk will be less than the sum of the individual risks. Thus, the risk that all products will be designed defectively is less than the sum of the risks that any one product will be designed defectively. If the risks faced by the insurer, however, are highly correlated and not independent -- such as the "socio-legal risk" that the legal standard for proving defective design will be relaxed -- the benefits from aggregation are defeated. Total risk will equal the sum of the individual risks, [113] and the insurer has no comparative advantage to the insureds themselves.

[*1545] It is a well-established implication of this approach that the more narrowly risk pools can be defined, the more broadly insurance can be offered in the society. [114] A legislature or court that wanted to maximize the availability of insurance within the society would adopt policies that facilitated the segregation of risks into the narrowest possible pools. Competition among insurers serves this objective. Insurers try to lure an insured away from competitors by offering membership in a pool for which the premium is closer to the insured's expected loss, because of the more discrete definition of the pool. In essence, the insurers are competing over the relatively low-risk insureds of any risk pool, who are likely to select that insurer most precisely able to price the risk the insured brings to the pool. Such competition increases total insurance availability. Unfortunately, much of modern insurance regulation is designed to thwart such efforts. [115] As we shall see, much of modern tort law (and, incidentally, much of the modern judicial approach toward the interpretation of insurance contracts) also impairs the ability of insurers to define narrow risk pools in order to extend insurance availability.

Most of us are familiar with a wide variety of methods insurers employ in first-party insurance contexts to narrow risk pools. Distinctions in casualty policies, for example, among homes with or without smoke alarms or homes closer to or farther from fire hydrants, reduce differences in risk among insureds within a pool. The different premiums that auto insurers charge to teen-age drivers or to owners of cars with collision-resistant bumpers relate, obviously, to the risk that each insured brings to the pool. All forms of experience rating serve the same end. Distinguishing in these various ways among insureds increases the availability of insurance because it makes market insurance more attractive to relatively low-risk individuals. [116]

An additional way that risk pools are segregated in virtually every first-party context is by the level of insurance protection desired. Insurers, obviously, charge different premiums to those who want larger amounts of life insurance coverage than to those who want smaller amounts. Similarly, the fire or casualty insurance premium is different for those that live in expensive houses than for those that live more modestly. It is clearer in **[*1546]** these contexts, perhaps, to see how narrowing risk pools increases the availability of insurance. If all homeowners were charged the same casualty premium regardless of home value, or if, say, all apartment dwellers were charged the same premium for contents coverage without regard to furniture value, the attractiveness of market insurance would decline. Those possessing less expensive homes or furniture -- the low-risk members of the pool -- would have to be exceptionally risk-averse to find the uniform premium worth its cost. Such individuals would be more likely to purchase market insurance if the casualty premium corresponded more closely to the level of risk they brought to the pool.

This example also shows how constraints on risk segregation redistribute wealth. A single uniform premium for apartment contents coverage, set equal to average expected loss of all apartment dwellers, will be lower than the expected losses of those who possess antiques, and higher than the expected losses of those who possess hand-me-downs. Similarly, a

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uniform premium for an employment disability policy will be lower than the expected loss to high-income workers, and higher than the expected loss to low-income workers. Where the risk level is related to wealth or income, a uniform premium compels those with less wealth or income to subsidize those with more. In such contexts, individuals with lower levels of wealth and income will prefer to drop out of the insurance market, if they are able to do so, in order to preserve the limited resources they have. [117]

I mentioned earlier that insurance provides a method to equalize available amounts of money over states of the world. More specifically, insurance is a method of equalizing the utility gained from money over states of the world. [118] The purpose of insurance is tied to the use of money because insurers can provide us only with dollars should a loss occur. Individuals, as a consequence, do not voluntarily insure for non-pecuniary losses. Parents, for example, do not typically purchase insurance on the life of a minor child, [119] not because the parents would not suffer severely if the child were to die, but because the child's death will not affect the flow of money into the family. More precisely, there is no advantage to a family in suffering a financial sacrifice by paying insurance premiums while the child is alive in order to increase the family budget after the child dies. In **[*1547]** contrast, if instead of a minor, the child is an adult providing financial support to the parents, the concerns are reversed. It may very well make sense to reduce the monetary amounts available for use today (to the parents or to the child purchasing life or disability insurance on the child) in order to guarantee a steady flow of resources later if the child-provider were to die.

A similar reason might explain why we never observe individuals purchasing insurance for pain and suffering or other emotional losses. However severe the pain, a larger bank account is an imperfect anesthetic. As a consequence, there is no market for pain and suffering insurance in any society in the world. Indeed, if the pain is especially severe, individuals may prefer a form of reverse or anti-insurance: more assets available to enjoy before the accident than after. Of course, there are very limited situations in which anti-insurance of this nature can be arranged. [120]

The lack of consumer demand for insurance for pain and suffering losses is certainly also a consequence of adverse selection problems. Individuals may differ substantially in the level of pain and suffering that they experience or can tolerate. If so, offering coverage for pain and suffering will increase the variance of risks brought to an insurance pool. [121] As before, if the variance in expected risks is sufficiently great, the risks will be uninsurable because the low-risk members will successively drop out of the pool.

Pain and suffering may also involve moral hazard, although the problem of moral hazard extends far more broadly. Moral hazard refers to the effect of the existence of insurance itself on the level of insurance claims made by the insured. Moral hazard can occur either *ex ante* or *ex post* the occurrence of the loss. *Ex ante* moral hazard is the reduction in precautions taken by the insured to prevent the loss, because of the existence of insurance. *Ex post* moral hazard is the increase in claims against the insurance policy beyond the services the claimant would purchase if not insured. In the context of medical insurance, for example, *ex post* moral hazard includes excessive (at full-price) visits to doctors, longer hospital stays, and more elaborate and expensive methods of treatment. In this context, a person who might, *ex ante,* choose one level of care, may *ex post,* choose more care, because the costs of the care are paid by the insurer. Full insurance reduces the price of future purchases of medical care **[*1548]** to zero, and so a person is likely to choose a greater level of care than he or she would choose if charged for the care at marginal cost. [122]

Moral hazard, in part, is a particular source of the adverse selection problem. Where insureds, *ex post,* can affect the level of claimed losses, the variance in expected risks increases. Those individuals who are less likely to gain from exaggerated visits to doctors or from more extensive hospitalization will drop out of the pool if full coverage is offered. [123]

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For these reasons, market insurance universally incorporates deductibles and coinsurance where the extent of the loss can be influenced by insureds' *ex ante* or *ex post* decisions. A deductible is a condition in an insurance contract that requires an insured filing an insurance claim to pay a fixed sum unrelated to the magnitude of the claim. Coinsurance requires the insured to pay some fraction of the amount of each claim. [124] Deductibles and coinsurance reduce indifference to preventive investments, and they reduce the incentive to consume what, from an *ex ante* view, are excessive levels of the service for which insurance has been purchased. They reduce differences in risks brought to insurance pools.

The discussion to this point has addressed only first-party insurance. Tort law, of course, provides insurance through a third-party mechanism: the insurer pays money to the victim through the medium of the product or service provider who purchases the insurance policy. Although third-party institutional arrangements are somewhat more complex than first-party arrangements, the determinants of the insurance function are the same.

In third-party insurance, there are two sets of risk pools. Consumers of products or services comprise one set of risk pools. To consumers, the insurance policy and the premium are tied to the sale of the product. It is advantageous to define risk pools narrowly for consumers in third-party contexts for exactly the same reasons that it is advantageous to define risk pools narrowly in typical first-party insurance contexts. Defining consumer risk pools narrowly increases product sales, because the premium added to the price of the product more closely approximates the consumer's expected loss.

Manufacturers, for example, will attempt to segregate consumers into **[*1549]** risk pools by product design and by advertising and marketing techniques. A chain-saw manufacturer, for example, may design one model appropriate for industrial use and a second model appropriate for occasional gathering of firewood. Of course, such design differences may also be related to different consumer preferences for product features -- in this example, features related to safety. But the point is that, if the demand for chain saw injury insurance coverage differs between the professional and the weekender, both consumers and the manufacturer will gain if the manufacturer can design products that differentiate the two markets. In this example, market differentiation would reduce one very broad risk pool into two more narrow risk pools. Narrowing the pools allows the manufacturer to charge different insurance premiums to the two markets and to increase product sales.

Similarly, the accident insurance premium added to the price of an airline ticket from the United States to Europe will be greater on, say, the Concorde than on low-budget or charter lines. [125] The risk of an accident among the various airlines may be the same, but the accident payout risks brought into the pool by passengers on the Concorde are likely to be much greater than the risks brought by charter passengers, if only because of their greater expected future income. The third-party insurance premium must be adjusted in response. In this respect, the qualitative differences between the Concorde and the charters in terms of accident insurance are no different than qualitative differences in meals, time of transit, or other amenities. Indeed, much of the attraction of the charters derives exactly from the ability of these firms to narrow the pool of consumers of their product. Those passengers who travel on low-fare flights are those who prefer or are willing to tolerate lower levels of amenities in return for a lower ticket price.

The second set of risk pools within third-party insurance contexts includes the service and product providers themselves. Providers of products and services purchase market insurance for the same purposes as any first-party insured: to equalize monetary returns over time in the face of some probabilistic chance of loss. Providers will choose market insurance if its costs are lower than the costs of alternatives. [126]

[*1550] The costs a provider faces by deciding not to purchase insurance depend upon diversification within the provider firm or the provider's ability to diversify risk by other

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means. [127] As suggested above, marketing different models of a product is a form of diversification, if the risks of loss attending sales of the respective models are uncorrelated. Of course, organization in the conglomerate form or investing retained earnings in diversified assets are other ways in which providers can self-insure. [128]

Insurance companies, however, can (and do) compete for the custom of providers by trying to define narrow risk pools that make market insurance more attractive than self-insurance alternatives. Insurers attempt to aggregate within a pool a set of providers whose risks are uncorrelated, and will set individual premiums for the firms according to the risk each brings to the pool. The insurer's diversification of risk, again, can be achieved either by aggregating a very disparate pool, by holding other assets whose riskiness is uncorrelated, or by reinsuring -- hiring another insurer to provide meta-diversification.

These simple insurance principles seem very general, but they provide an explanation for the insurance crisis we are currently observing. The next Section attempts to apply these principles to the changes in tort law discussed in Section II, in order to predict the effects of modern law on insurance availability.

IV. HOW CONTEMPORARY TORT LAW AFFECTS INSURANCE MARKETS

As discussed earlier, [129] over the past two decades, courts have expanded corporate liability in order to provide compensation insurance to injured persons through tort recoveries. This Section illustrates how the expansion of corporate liability has progressively undermined the insurance function by increasing the variance (coefficient of variation) of existing insurance risk pools. As described in the preceding Section, increasing the variance of a risk pool endangers the pool because it increases the likelihood that the pool will unravel as low-risk members drop out, either by self-insuring or by ceasing to engage in the potentially injury-related activity. This Section shows these effects in both consumer and provider risk pools. Thus, it shows that contemporary tort law has restricted rather than expanded insurance availability. The parties that have been most adversely **[*1551]** affected are the low-income and poor who, in terms of tort recoveries, are the low-risk members of the consuming population.

It is helpful at the outset to describe forms of expanding liability that will not affect insurance markets. The Justice Department has argued that the insurance crisis is the result of increases in the level of damage judgments over the past ten years, emphasizing increases in average tort judgments in medical malpractice and products liability cases, in particular. [130] Earlier, I challenged the Department's empirical substantiation of its claim (as have many others), [131] but a stronger criticism should be made. Other things equal, a scalar (proportionately equal) increase in the level of tort judgments and settlements will not affect the degree of insurability of any risk. A scalar increase in tort payouts, other things equal, does not affect the marginal benefit of insurance to any insured because it will not change the ratio of the premium to an insured's expected loss. [132] The premium set equal to the average risk brought to the pool will increase by exactly the same proportion as will the expected loss to the insured. [133]

Of course, modern tort law has changed in dimensions beyond the average damage judgment. I have described how modern tort law has expanded the range of plaintiffs to whom corporate enterprises are liable, the range of provider defendants against whom injured persons may bring suit, and the range of activities for which corporate enterprises have become subject to liability, [134] changes which, obviously, expand commercial liability risk pools. The Justice Department, in addition, has suggested that increases in tort filings and in million dollar judgments have contributed to the crisis. [135] I believe that these developments, in fact, have undermined commercial casualty insurance markets. But the exact mechanism that generates the effect is not immediately obvious. As a consequence, simple proposals, such as those of the Justice Department, to no more than retrench

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corporate liability are not immediately compelling. Increased corporate liability may surely increase corporate insurance costs, but why does it lead to a breakdown of the insurance function?

The question is especially puzzling because of the curious empirical context of the recent crisis. Two phenomena, in particular, are important **[*1552]** here. First, to repeat, there is no evidence of increase in the rate or severity of accidents for the principal set of activities affected by the crisis. Of course, in recent years some products have been newly discovered to be harmful (for example, the Dalkon Shield), generating substantial liability. But the insurance crisis has not been dominated by products of this nature; there have been no claims of previously unknown toxic damage from diving boards or slides in public parks.

Moreover, the extension of tort liability on insurance grounds has not generated totally new insurance coverage. Today, the vast majority of Americans possess health, disability, and life insurance coverage, either through private first-party sources or through government supported Medicaid, Medicare, Veterans' Benefits, and the like. [136] Here, too, there are exceptions: chiefly occasional workers, such as migrant laborers, actors, artists; and the marginally poor, those who remain above the social service qualifying level while healthy and injured, but who are likely to qualify for social service "insurance" after they suffer an injury. [137] Yet, again, no one claims that the insurance crisis has been generated by tort recoveries of occasional workers and the marginally poor. These individuals consume less and thus are less likely to be involved in product- or service-related injuries. More importantly, because these individuals have low levels of both current and prospective income, the damage judgments they recover are typically insubstantial. It follows that both past increases in tort judgments and expected future increases in tort judgments derive, in the largest part, from the claims of individuals already possessing first-party insurance coverage.

These facts redefine the issue to be analyzed. If there has been no increase in the accident rate and if the largest majority of tort law claimants already possess first-party insurance, then the expansion of corporate legal liability has chiefly shifted coverage from (private and government) first-party sources to corporate defendant third-party sources. The question, then, is why the shift from first- to third-party insurance sources has led to a breakdown in insurance markets?

I believe that there are very clear insurance reasons why the shift towards third-party coverage has undermined the commercial casualty insurance industry, generating the crisis. In comparison to first-party insurance, third-party tort law insurance provides coverage in excessive amounts, in a manner that substantially restricts risk segregation, and at **[*1553]** costs that far exceed the costs of first-party insurance. For both consumer and provider risk pools, these differences will increase the correlation of risks within existing pools and, as a consequence, increase the extent of adverse selection, leading to the breakdown of the pools.

A. *Why Consumer Risk Pools Have Unraveled*

Provider tort law insurance coverage differs substantially from first-party insurance coverage. One of the objectives of the tort system is to create incentives for appropriate investments in preventing injury. To obtain optimal incentives for injury prevention, a party that has violated a legal standard must pay full losses to the victim, including both pecuniary and non-pecuniary losses.

The award of both pecuniary and non-pecuniary losses, however, is inappropriate for providing optimal insurance for unpreventable losses. The effort to extend insurance coverage through modern tort law represents a confusion of incentive objectives with insurance objectives. [138] Third-party insurance payments administered through the tort system differ from first-party insurance payments in two ways. First, as described in Section

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III, no first-party insurance market provides coverage of non-pecuniary losses. [139] Non-pecuniary losses do not affect the marginal value of wealth across states of the world. In addition, moral hazard and adverse selection problems make coverage of these losses exceedingly costly. Losses representing pain and suffering or other emotional effects of an injury, therefore, are never insured in first-party markets because it is not worthwhile for consumers to pay the premiums necessary to support coverage of them.

Secondly, deductibles and co-insurance are features of every first-party insurance contract. Third-party insurance through the tort system, in contrast, never incorporates deductibles or co-insurance to control victim moral hazard. Yet victim moral hazard is as serious a problem in a third-party context as in a first-party context. Preferences for extra visits to a doctor, prolonged hospitalization, or more advanced forms of medical treatment do not diminish because the source of the injury is a third-party defendant.

These two differences mean that, for the same injury, first-party insurance coverage -- which corresponds to what consumers are willing to purchase -- is substantially different in magnitude than the third-party insurance coverage provided through tort law. First, awards for pain and suffering and other non-pecuniary losses are known to comprise a large **[*1554]** portion of tort damages: the most commonly mentioned figure is 25% to 50%. [140] More detailed empirical studies of trial awards -- studies of awards in Cook County, Illinois -- show that non-pecuniary losses comprise 47.2% of total tort damages. [141] Thus, to approximate, out of the median products liability judgment of $ 187,000 in Cook County (1980-84), [142] $ 88,264 represents pain and suffering against which the typical consumer would not choose to insure.

The remaining portion of the average damage judgment represents compensation for pecuniary losses, chiefly lost income and medical expenses. Recoveries for these losses in an active first-party insurance market, however, are also likely to be significantly more modest than under third-party tort law insurance. For example, virtually all United States workers are covered by state workers' compensation plans that provide coverage for lost wages subject to a strict income ceiling. In Illinois, for example, the maximum weekly benefit is $ 376.33 [143] (for fifty-two weeks, $ 19,569), which corresponds to a $ 30,000 annual income. Even for workers with incomes equal to or below $ 30,000, the precise coinsurance level is difficult to determine since workers' compensation benefits (like the lost income component of tort judgments) are net of income taxes. Workers' compensation plans also provide for lump-sum payments for different forms of permanent disability. In sum, the best recent estimate is that net workers' compensation benefits provide .835 income replacement. [144] Lost income, on average, constitutes slightly over half of pecuniary damages. [145] The lost income component of the median Cook County product liability judgment, then, would be roughly $ 49,368 of which the victim, under workers' compensation, would receive $ 41,222 and suffer individually $ 8,146.

Similarly, with respect to medical expenses, the typical Blue Cross-Blue Shield policies provide an average deductible of $ 1000 (per member) and coverage of 80% of service costs. [146] Similarly, the typical Blue Cross major **[*1555]** medical plan covers only 80% of charges. Thus, under a typical first-party medical plan the victim would be reimbursed $ 38,694 of the approximate $ 49,368 medical expense component of the median Cook County product liability judgment and would pay $ 10,674. [147]

Even this crude estimate of the value of deductibles and co-insurance, however, fails to measure the effect of these payments on the level and character of medical care chosen by insureds. All first-party medical plans incorporate detailed limitations on the nature of available care and on the extent of specific forms of care. Blue Cross-Blue Shield plans, for example, limit coverage to semi-private room accommodations, limit coverage of hospitalization or of skilled nursing facility care to 120 days, and exclude coverage altogether of services such as "custodial care designed to assist an individual in meeting activities of

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recently disrupted product and service markets in the United States. From press accounts, the crisis seemed to peak in the early months of 1986, when reports became common of extraordinary changes in commercial casualty insurance markets. Insurers had increased premiums drastically for an unusual set of products, such as vaccines, [1] general aircraft, [2] and sports equipment, [3] and for an equally diverse set of services, such as obstetrics, [4] ski lifts, [5] and commercial trucking. [6] In still other cases -- intrauterine devices, [7] wine tasting, [8] and day care, [9] -- insurers had refused to offer coverage at any premium, forcing these products and services to be withdrawn from the market.

The crisis extended beyond commercial enterprises. Municipalities and other governmental entities faced similarly extreme premium increases or the unavailability of market insurance coverage altogether. Some cities closed jails and suspended police patrols until insurance coverage was obtained. [10] **[*1522]** Parks and forest preserves were closed. [11] Fourth of July celebrations were cancelled because of concerns over uninsured liability. [12]

Over time, product manufacturers and service providers adjusted to these insurance difficulties. Recently, some commentators have interpreted the decline in the volume of complaints as evidence that the insurance crisis has subsided. [13] But this is an incomplete and unrealistic view of the problem. Although there has allegedly been some increase in insurance availability, the huge premium increases of early 1986 are largely intact, [14] necessitating sustained price increases and reducing demand for affected products and services. Moreover, many of the effects of the crisis have become permanent. A recent Conference Board study of liability problems of the country's largest corporations -- those whose size and self-insurance capability make them least vulnerable to changes in commercial insurance markets -- reports that twenty-five percent had removed products or withdrawn services from the market. [15] The effect on national income of increased prices and the withdrawal of products and services is obvious.

Similarly, there have been long-term effects of the insurance crisis on municipalities and government entities. Many municipalities have responded to the crisis by altering the array of public services, sometimes radically. Some cities have removed all playground equipment from their public parks. [16] Diving boards have been removed from school swimming pools. [17] Many municipalities denied market insurance (as well as some commercial entities) have continued operations after joining mutual insurance groups. [18] As we shall see, the actual insurance protection provided by industry-wide or municipal mutual insurance pools may largely be illusory, only postponing the effects of expected liability for some uncertain period. [19] At the least, the sudden growth in the frequency of mutual insurance is reflective of the extremely fragile character of today's commercial casualty insurance industry.

[*1523] Three sets of theories have been put forth to explain the insurance crisis and to propose its cure. The first set views the crisis as collusively engineered by insurance companies, either by explicit price-fixing or by financial manipulation of insurance reserve accounts. [20] A second set of theories explains the crisis with reference to the cyclical effect of changes in interest rates on investment returns and, thus, on insurance premiums. According to this theory, the crisis is the direct result of recent declines in interest rates which have forced insurance premiums to increase. [21] In a slightly different version, the crisis is attributed to an earlier period of high interest rates during which insurers, shortsightedly, underpriced risks to gain premiums for investment, risks which must be recalculated at higher premiums today. [22] The collusion and the insurance cycle theories both imply that these insurance problems will disappear in time, either through the breakdown of the cartel (or by antitrust enforcement or regulation), [23] through the cyclical return of higher interest rates, or through the more accurate evaluation of risks by chastened insurers.

A third theory, most prominently espoused by the Justice Department, attributes the crisis to modern tort law's expansion of corporate liability exposure, which has necessitated insurance premium increases. [24] According to the Justice Department, only wide-ranging tort law

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daily life." [148] Of course all consumers would prefer more coverage to less, but these limitations -- though they force consumers sometimes to make difficult decisions about medical treatment -- represent the best accommodation with the insurance premiums consumers are willing to pay. Because of moral hazard, additional medical services would require increases in insurance premiums beyond their value to consumers.

In contrast, under third-party insurance provided through tort law, there is little reason for the beneficiary of the insurance -- the tort plaintiff -- to engage in difficult decisions about appropriate levels of medical treatment. Both because of the specific policy care limitations and because every first-party insurance claimant must pay a not-insubstantial portion of medical costs, he or she must consider very carefully which medical procedures will be most effective as well as whether, and the extent to which, extended care is needed. The tort plaintiff, on the other hand, loses nothing by requesting (or asserting as essential) all available advanced methods of medical treatment regardless of cost.

The shift from first-party to third-party insurance sources, thus, will prompt greater expenditures for advanced medical care, as well as more extended and elaborate hospitalization and subsequent care. For example, holding severity of injury constant, the frequency of claims for twenty-four hour nursing care is likely to be substantially higher under third-party tort law insurance than under first-party insurance. [149]

Though rough, these estimates show substantial differences between insurance **[*1556]** coverage in first-party markets and third-party insurance coverage provided through tort law. For the injury represented in the median Cook County judgment, the victim would have received first-party compensation of $ 41,222 for lost income and $ 38,694 for medical expenses. This coverage, $ 79,916, is the amount for which the victim *ex ante* was willing to pay. In contrast, third-party tort insurance provided $ 187,000 coverage which is 2.34 times greater than the first-party amount.

Tort law claimants do encounter costs not faced by first-party insurance claimants, though estimating their magnitude is difficult. Tort law claimants must pay attorneys' fees. In addition, in the vast majority of cases, tort claimants settle prior to trial for amounts less than the highest possible judgment. Regardless of settlement, some tort judgments are reduced under comparative negligence standards. There are analogues to these costs, however, under first-party insurance coverage. If the first-party insurer contests the claim, the first-party claimant must pay attorneys' fees. Similarly, many first-party claims involve negotiation and settlement at some figure less than the full amount demanded by the claimant.

To my knowledge, there are no studies attempting to measure differences between first-party and tort law insurance claims in these areas. Even if tort law insurance claims were reduced by 30% -- which is probably a high estimate (the standard contingent fee for a case expected to be litigated is 33%) -- the tort judgment in the Cook County example would still be 1.64 times the comparable first-party insurance award. Estimated conservatively, then, tort law insurance coverage levels are in the range of 64% to 134% greater than first-party coverage levels.

Some might regard the additional level of insurance coverage provided by tort law to be beneficial to consumers because it affords them greater compensation for the injuries they suffer. But this view misunderstands the consumer interest in insurance. Of course, after an injury has been suffered, the victim would prefer a greater to a lesser award. But the *ex ante* interest of the victim is an award tied to the victim's pecuniary losses, not an award greater than these losses. Where the victim is the product or service purchaser, the victim must pay for the insurance in advance. To compel insurance greater than the amount demanded by the purchaser reduces, rather than increases, his or her welfare. To illustrate: if my $ 100,000 home burns down, I of course would be happier if my insurer gave me $ 234,000 rather than

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the $ 100,000 of coverage I purchased. But, I would object strongly if I were compelled in advance of the fire to purchase $ 234,000 coverage since I could replace the home in its entirety for an amount in the range of $ 100,000. A similar concern for optimal insurance extends to contexts involving pure third-party injuries -- for example, when bystanders are harmed by the product or service use of **[*1557]** others. In modern society, all of us are at once product and service purchasers and bystanders of products and services used by others. Again, in terms solely of insurance, each of us *ex ante* prefers that the optimal level of insurance be provided by tort law, the level that optimizes insurance coverage subject to insurance costs. [150]

The provision of insurance coverage through tort law in amounts greater than consumers would willingly purchase has additional effects that implicate the recent crisis. An increase of 64% to 134% in the level of insurance coverage under tort law will not operate as a scalar, but will increase consumer risk pool variance and will lead to the unraveling of consumer risk pools.

The increase in the level of insurance coverage from the shift to the third-party tort mechanism is not likely to be uniform over all cases. The empirical observation that pain and suffering awards constitute 47% of total damages is an average figure. Pain and suffering and other non-pecuniary amounts comprise a much higher proportion of large damage judgments. For this reason, risk pool variance is likely to be greater under third-party tort insurance than under first-party insurance. [151]

More importantly, segregating risks into narrow risk pools is substantially more difficult in third-party than in first-party insurance contexts. First-party insurers, by using insurance applications, can distinguish insureds by age, income, occupation, the level of coverage desired, and other personal characteristics related to levels of risk brought to the insurance pool. Moreover, the administration of first-party insurance allows the insurer to distinguish insureds by past loss experience. The collection of these data allows a first-party insurer to define risk pools of very narrow scope, increasing the likelihood that low-risk individuals will find insurance attractive. Narrow risk differentiation maximizes the availability of insurance.

Very little information about individual risks, however, is available to third-party insurers. A product manufacturer, for example, may design and market a product with reference to characteristics of discrete sets of average consumers. But the manufacturer must sell the product on equivalent terms to all who wish to buy it, and cannot distinguish among **[*1558]** consumers with respect to the insurance policy provided in the product price.

Some products, of course, will attract relatively homogeneous sets of consumers. A very wide range of products, however, are accessible to and are purchased by consumers of different income levels. Studies of consumers of individual products show that, for virtually all products, the income levels and personal characteristics of consumers of the product differ widely. [152]

The difficulty of segregating risk pools in third-party contexts means that third-party tort insurance pools are likely to be substantially broader than first-party pools even without the effects, described above, of levels of coverage. Compare, for example, the risks of non-preventable injuries from auto use. [153] The first-party insurer can create separate driver pools for teenagers and other age groups; it can segregate insureds by levels of driving, total mileage, distance from home to office, and car type; and it can rate the policies by accident experience and by moving violations within previous time periods. It can allow the insured to choose whether to purchase medical expense and disability coverage in the auto policy or to rely on separate medical and disability policy coverage set according to the deductible the insured prefers and according to the insured's income level. Each of these techniques helps keep premiums low for the low-risk drivers of the consuming population -- those who drive little, are very skilled or careful, or generate small claims because of low expected income

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losses.

In contrast, the auto manufacturer -- that must buy third-party liability insurance for all those injured in its cars and pass on the premiums in vehicle prices -- can implement none of these distinctions. Some auto models may be more or less attractive to commuters, to teenagers, or to the very wealthy, but, except for these crude distinctions, the auto manufacturer must provide insurance to all who buy the model, high-risk and low-risk alike. Consequently, the variance in the insurance pool is vastly greater in the third-party context, and the premium is commensurately higher -- even if the same level of coverage is offered. Of course, given the greater amount of coverage provided under a third-party policy, the variance and the premium are higher yet.

One of the most seriously deleterious effects of lumping consumers into undifferentiated third-party risk pools is glaringly inconsistent with the judicial objective of aiding the poor. That is the regressive redistributional effect of third-party insurance. The largest items of damages in most **[*1559]** third-party personal injury contexts, especially those involving permanent disability, are lost income and pain and suffering, which are highly correlated with individuals' expected future income streams. As a consequence, these damage elements constitute the largest component of the third-party insurance premium tied to the sale of any product or service.

The third-party premium is set with reference to *average* expected loss. Thus, the high correlation of total awards with income means that premiums reflect the average income of the population of consumers. The implication of charging each consumer a premium related to average income is that consumers with high incomes are charged a premium lower than their expected loss, and consumers with low incomes are charged a premium higher than their expected loss. Third-party insurance thus requires low-income consumers to subsidize high-income consumers.

Moreover, third-party insurance requires low-income individuals to subsidize both pecuniary and non-pecuniary losses of high-income individuals. Compare the insurance premium that a low-income consumer would pay in a first-party auto, product, or disability policy to the premium tied to the product or service in a third-party provider policy that includes coverage to the high-income consumer. The auto or product manufacturer cannot charge the low-income consumer a lower price based on the lower dollar risk the consumer brings to the risk pool. The first-party casualty or disability carrier can do so, and thus can increase the availability of insurance.

As a consequence, the disadvantages of third-party insurance coverage are substantial. Courts justified third-party insurance coverage based on how easy it seemed to be for manufacturers or service providers to aggregate risks by adding an insurance premium to the price of the product or service. [154] Whatever comparative advantage providers enjoy in risk aggregation, however, is overwhelmed by the disadvantages of excessive coverage, the inability to segregate risks in third-party contexts, and regressive distributive effects.

How do the differences between first-party and third-party tort insurance mechanisms affect the behavior of consumers? The shift towards greater corporate-provided tort law insurance will lead low-risk consumers to reduce consumption of products whose prices incorporate high tort insurance premiums. For low-risk consumers, especially low-income consumers, the tort law insurance premium tied to the product or service price may be much greater than the benefit the insurance provides. As a **[*1560]** consequence, though the effect may be subtle, these consumers will drop out of the market. [155]

The delivery of insurance through tort law exacerbates this effect for a reason unrelated to the maintenance of insurance risk pools. The administrative costs of insurance delivered through tort law are vastly greater than the administrative costs of any first-party insurance

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regime. Blue Cross-Blue Shield first-party health insurance administrative costs are 10% of benefits; SSI disability insurance administrative costs are 8% of benefits; Workers' Compensation disability insurance administrative costs are (a much-criticized) 21% of benefits. [156] In contrast, tort law administrative costs are estimated to be 53% of net plaintiff benefits. [157]

The relatively greater administrative costs of the tort system must be averaged over the sale of all products and services. [158] As a consequence, they operate in the manner of a sales tax on product and service delivery. Like a sales tax, their incidence has a regressive redistributional effect: They represent a greater proportion of the resources of the poor than of the moderate- or high-income population. Thus, low-income persons are harmed doubly by the delivery of compensation insurance through tort law: They pay premiums greater than their expected return, and they pay a fixed-rate levy that affects them more severely than those consumers possessing greater resources.

B. *Why Provider Risk Pools Have Unraveled*

The shift from first-party to third-party insurance coverage also influences market insurance consumption by providers of products and services. Provider risk pools unravel because providers are more likely to self-insure under a third-party than under a first-party tort insurance regime. This result stems from the process and determinants of corporate self-insurance.

It is not obvious why corporations buy market insurance in any form. Corporations are far more able than individuals to diversify their assets to reduce the risk of unfavorable outcomes. Moreover, corporate shareholders **[*1561]** can diversify cheaply. [159] What are the justifications for further diversification through market insurance?

In fact, a very large majority of corporations purchase commercial casualty insurance. A *Fortune* survey in 1973 showed that 86% of its top 500 industrial corporations purchased insurance against an aggregate 75% of their perceived loss exposure. [160] Some of this insurance undoubtedly represents the purchase of risk monitoring or claims administration services from commercial casualty insurers. [161] There are also tax advantages to market insurance. [162] Insurance purchased for these reasons, however, is not likely to be affected in the current insurance crisis. [163]

There are several reasons, however, for corporations to purchase commercial casualty insurance to protect against potential legal liability. [164] Market insurance reduces the risk of variance in the asset level of the firm. Insurance, thus, protects the position of corporate bondholders, and may be demanded in order to generate bond investment. Moreover, a corporation incurs very real costs when it must adjust its activities to dispose of assets in order to fulfill liability obligations. An extreme example is the risk of bankruptcy and the consequent change in the value of corporate assets upon reorganization. Corporations will purchase market insurance when market insurance premiums are less than the expected value of these real costs. In contrast, when market insurance premiums exceed these costs, firms will self-insure by maintaining reserves or by anticipating partial (or in the extreme case, total) liquidation of assets to meet liability claims.

How is the shift to third-party tort insurance likely to affect the corporate demand for commercial casualty insurance? As described earlier, the increase in corporate tort liability has increased the variance in risk pools comprising consumers of corporate products and services. This increased variance, of course, increases the individual riskiness of each corporate provider, requiring an increase in the corporate casualty premium. The value of a corporation's assets, however, is never infinite. At the limit, corporations will never purchase market insurance if the insurance premium is greater than the costs of liquidation, discounted by the likelihood **[*1562]** of its occurrence. As corporate liability exposure

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increases, the gap between market insurance premiums and discounted liquidation costs diminishes.

The increase in corporate riskiness affects the commercial casualty insurance market in an additional way. The effect of the expansion of corporate liability varies for different companies, depending upon the risk characteristics both of a company's product or service and of its consumers. The shift to greater third-party tort insurance coverage increases these differences among firms.

If commercial casualty insurers are able to predict how firms differ in riskiness, then they can tailor an insurance premium appropriately for the risk that underwriting the particular corporation adds to the insurer's portfolio. The sale and purchase of commercial casualty insurance, however, requires a convergence of risk estimates by the insurer and the corporation. When the insurer believes that the risk level of a firm is greater than the firm believes it to be, the firm is likely to find self-insurance more attractive than market insurance. Obviously, when the insurer believes the risk level of a firm is lower than the firm believes it to be, the firm will prefer market insurance. If firms have better knowledge of their underlying level of riskiness than insurers, these differences in expectations will lead relatively low-risk firms to drop out of the insurance pool and relatively high-risk firms to stay in the insurance pool. This is adverse selection in the commercial casualty market.

The shift to corporate tort liability increases the extent of adverse selection. Individual firm riskiness and the variance of individual riskiness among firms both increase as the scope of liability expands. These increases in the range of potential liability outcomes across firms increase the likelihood of differences in insurer and corporate estimates of underlying corporate riskiness. As a consequence, adverse selection is likely to increase. Low-risk firms are increasingly likely to withdraw from the commercial casualty market, leading to an increase in premiums and an increase in the likelihood that the commercial casualty pool will unravel.

The increase in corporate liability exposure on the commercial casualty market will also affect insurance supply. As described earlier, the insurance function is achieved by the pooling of independent risks. Whether in the context of class underwriting or special risk underwriting, the efficiencies of insurance are obtained by the aggregation of independent risks in ways that reduce the underlying magnitude of each risk. It is crucial for this function, however, that the risks be independent. If the risks are correlated, then aggregating them may increase, rather than reduce, total riskiness.

All corporations offering products and services that might lead to personal **[*1563]** injury are subject to tort liability. The increase in corporate tort liability exposure, therefore, increases the correlation (the covariance) of these corporate risks. Increasing tort liability reduces the independence of risks within commercial casualty lines and imperils the insurance function. The reduction in independence of risks is the direct consequence of the shift to third-party tort insurance. Complaints, heard commonly, about the increased uncertainty of modern tort law and the difficulties this uncertainty places upon insurers can be best understood in these terms. [165]

The business of insurance is to deal with uncertainty. If the expansion of modern tort law had increased uncertainty in an unbiased fashion, it might have expanded, rather than contracted, commercial insurance markets. The increase in uncertainty, however, has not been unbiased: Uncertainty has increased only over the extent of worst-case tort outcomes, which is to say, the potential downside risks of corporate liability are far greater than they were two decades ago. And these downside risks are greater for most classes of corporate product and service providers. Thus, it is not uncertainty *per se,* but the increased correlation of corporate liability risks that has disrupted commercial casualty lines.

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Most important in my analysis, however, is the effect of the increase in the correlation of corporate liability risks on adverse selection. As explained earlier, [166] as risks become more correlated, premiums must increase, because the insurer's costs of diversification increase. The dramatic hikes in commercial casualty premiums, of course, reflect this effect, and it has been noted by other commentators. [167] Yet most commentators have ignored how the increasing correlation of risks exacerbates adverse selection. Increases in risk correlation alone do not explain why insurers have reduced levels of insurance coverage including the refusal to offer coverage at any premium in some commercial casualty lines. Similarly, increases in insurance premiums cannot fully explain why providers have removed products and services from the market. As we shall see in the next Section, adverse selection in both consumer and provider insurance pools does explain these and other phenomena of the insurance crisis.

V. THE INSURANCE CRISIS OBSERVED

This Section demonstrates how the shift to third-party tort insurance coverage and the consequent increase in risk pool variance has weakened existing insurance markets and led to the unraveling of existing insurance risk pools. The Section examines first how consumer pools and second **[*1564]** how provider pools have been affected by the expansion of corporate tort liability and the shift from first- to third-party insurance sources. It shows why providers have changed the nature of their product and service mix, including ceasing production altogether; why insurers have changed the terms of insurance policies to reduce coverage levels; why insurers have refused coverage on any terms in some commercial lines; and why still other providers have been forced to form industry-wide mutuals.

A. *The Effect of Increased Variance on Consumer Risk Pools*

The previous Section showed that the shift to third-party insurance sources increases the variance of consumer risk pools. An increase in risk pool variance obviously leads to an increase in real insurance costs. A firm subject to competition must add these costs to the product or service price.

Adverse selection in consumer risk pools occurs when some group of consumers chooses not to pay increased prices that include the higher level of third-party insurance. These consumers decline to purchase the product or service and, thus, drop out of the existing risk pool. The consumers most likely to drop out are the low-risk within the pool. In general, within any pool there will be two low-risk sets: those systematically less likely to suffer injuries at all and those whose injuries systematically generate lower real costs.

Consumers who systematically face a lower injury probability are likely to find the insurance provided with the product or service not worth its added premium. Many commentators have tended to view product- or service-related injuries as occurring randomly, [168] generating an equal injury probability to each consumer. Many product- and service-related injuries, however, are systematically associated with particular product uses. Most modern products can be employed in a wide range of diverse activities. Those consumers who use products in typically less, rather than more, risky ways are likely to drop out of the consumer pool if tort law requires the manufacturer to insure all consumer uses. These consumers will shift to alternative products or services that cannot be used in equally risky ways -- products which, as a consequence, will be cheaper because of the lower attendant insurance premiums.

A familiar modern example is consumers of four-wheel drive vehicles. In recent years, the liability of manufacturers of such vehicles has been expanded under design defect and warning law and, more generally, as courts have limited the defenses of contributory negligence, misuse, and **[*1565]** assumption of risk. [169] Manufacturers have been held liable, for example, for injuries suffered when these vehicles have rolled or flipped in contexts of extreme mountain driving on grounds that the manufacturer could either design the

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product to better protect the consumer or insure the consumer for the loss. [170]

Manufacturers must respond to this increased liability either by changing product design to protect drivers in extreme conditions or by increasing insurance coverage for the consumer set as a whole. Whether the manufacturer changes the design or merely increases insurance coverage, product costs will increase and the product price will increase. The price increase, of course, may seem desirable for consumers who drive in extreme backroad conditions. But consumers who purchase four-wheel drive vehicles for other purposes -- say, easier driving on snowy or muddy roads -- may not find the increased price worthwhile. These consumers could be lured away if they were offered a four-wheel drive vehicle suitable for snow and mud, but not for extreme grades which, if only because of the lower attendant insurance premium, could be offered at a lower price. It is not surprising that many manufacturers have begun offering van and station wagon models with a four-wheel drive option.

This process is adverse selection in the product market. Prior to the expansion of manufacturer liability, the vehicle was sold without insurance for losses resulting from flips or rolls. Consumers who enjoyed backcountry travel insured themselves for such losses in first-party insurance markets. The expansion of manufacturer liability shifted the insurance source to the third-party mechanism. Because the manufacturer was prohibited by product liability law from making this additional insurance optional, [171] low-risk consumers within the pool -- those not intending to expose themselves to backcountry risks -- dropped out of the pool, either by shifting to domestic four-wheels, or by declining to buy the product at all. When low-risk consumers drop out, the insurance premium added to the price of backcountry four-wheels must be increased by an ever greater amount.

The second set of low-risk consumers affected by the expansion of provider liability are the low-income or poor, who bring low risks to a liability insurance pool because of the lower damages they will receive because of their lower income and poorer future employment prospects. As the insurance premiums tied to products and services increase, these consumers also drop out because the price they must pay is increasingly greater **[*1566]** than the value received. Such consumers will shift to substitute products for which the consumer set is more homogeneous in terms of income or for which the underlying risk level is lower. Of course, an income effect is also likely to be important here: Such consumers will discontinue buying products with large insurance premiums because, given their available resources, they cannot continue to afford them. Again, as this set of low-risk consumers drops out, the attendant insurance premiums must be commensurately increased.

Adverse selection in consumer risk pools explains why the increase in insurance premiums has been extreme for products and services in recent years. It also provides the only explanation of why increases in corporate tort liability compel providers to withdraw products and services from markets altogether. Again, if there were no adverse selection, increases in insurance premiums or self-insurance costs could largely be passed on to consumers. Sales may decline, as must be expected from any price increase, but there would be no reason to withdraw products from the market. There is a different effect, however, where a price increase derives from increasing risk pool variance. Increasing variance generates adverse selection by low-risk consumers who successively drop out of the pool. The pool, as a consequence, unravels. At some point, demand for the product sold with the necessary insurance premium simply disappears. There remains no set of identifiable consumers to whom the product or service is worth its price.

There is substantial evidence of these phenomena in the recent insurance crisis. Increases in insurance premiums, sometimes extraordinary increases, have been reported. [172] In many cases, providers have been able to pass on these premium increases to consumers. Some ski areas have increased lift tickets by $ 2 to $ 3 per day. [173] Insurance costs now add $ 80,000 to each Beech aircraft [174] and $ 75,000 to each Piper aircraft. [175]

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Many firms, however, have had difficulty passing on increases in premiums or self-insurance costs. Some firms have made greater investments in product or model differentiation in order to attempt to segregate low-risk from high-risk consumers, such as in the differentiation of domestic from backcountry four-wheel drive vehicles, described above. It is difficult for others than industry experts to distinguish insurance from consumer preference grounds for product differentiation, but there is some strong evidence of this trend at least with respect to more extreme risks. Some **[*1567]** bus companies, for example, are reported to have terminated charter transit to ski areas because of the relatively higher risks of icy roads. [176] In addition, as noted earlier, one New York vineyard has terminated or severely curtailed wine-tasting from fear of host liability for alcohol-related injuries. [177] Public parks that have removed playground equipment or school districts that have removed diving boards from swimming pools are other examples of the effect. [178] By excluding such services, these entities reduce the variance of risks related to the services they continue to provide.

The large number of products and services that have been totally withdrawn from markets demonstrate the severity of the effects of contemporary tort law's shift to the third-party insurance mechanism. Except for a few particularly notorious examples, product and service withdrawal tends to be effected silently, ignored as consumers shift to alternative sources that are higher priced or less convenient for their needs. It was recently reported, however, that vaccines and pharmaceuticals have been withdrawn, despite prior FDA approval. [179] Cessna Aircraft terminated several small plane models because insurance costs (estimated at $ 75,000 per plane) had pushed prices beyond the reach of its consumers. [180] Similarly, the G.D. Searle Co. recently terminated sales of intrauterine devices in U.S. markets. Searle's annual sales volume for the devices was $ 11 million, but it spent $ 375,000 defending each product liability action brought by users of the IUDs. [181] Litigation costs of this dimension are not likely to persist once the novel liability issues with respect to the product are resolved. But even a dramatic reduction in litigation costs per case may not make the intrauterine device price-competitive with other means of birth control.

Product and service withdrawal, however, has extended far beyond the limited examples reported in the press. Very recently, a Conference Board survey of the nation's 500 largest corporations showed that twenty-five percent had removed products or services from markets. [182] Oddly, this datum was reported amidst the author's conclusion that the deleterious impact of the insurance crisis was exaggerated because firms were still profiting from sales of products they had not been forced to withdraw. The author confuses the existence of corporate profits with consumer welfare. **[*1568]** Consumers do not benefit from having fewer products and service choices (any more, from a broader view, than do corporations), even if quarterly corporate earnings exceed zero. Of course, it is even more difficult to estimate the extent to which new products and services were never introduced because of the expansion of liability.

Other markets have suffered similar insurance-related dislocations. Many commentators, for example, have been puzzled by the large reduction in the availability of some medical and health care services, obstetrics in particular. A 1983 survey reported that 34.6% of doctors nationwide refused to accept certain types of cases because of increased liability. [183] *Time* reports that nearly one-eighth of American obstetricians have abandoned the specialty. [184] This is puzzling because, given the absence of available substitutes, the demand for obstetrical services is likely to remain relatively firm over time. It ought to be easy, therefore, for obstetricians to pass along malpractice premium increases to their patients. [185]

Blue Cross-Blue Shield and other medical insurers, however, in efforts to control costs to make health insurance more attractive to low-risk consumers, have imposed strict price restrictions on certain medical procedures, including child delivery. Recently, a group of doctors in Springfield, Massachusetts refused to perform deliveries for Blue Shield insureds because of low reimbursement rates. According to the report, Blue Shield will not pay more than $ 670 for a normal delivery in the area; Medicare pays $ 507. The doctors claimed that

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the average fee to private patients, a fee set partly with respect to rising malpractice premiums, was $ 1200. [186] The malpractice premium is extremely high for obstetricians because of the extraordinary variance that results from the attribution of subsequent physical or emotional ailments to problems at delivery. If the payments for obstetrical services by the first-party insurers discussed here are representative nationally, however, it is not surprising that obstetricians, despite investments in developing their special skills, have shifted to the practice of other medical specialties for which the returns on their investments will be greater.

The conflict between containing costs to reduce health insurance premiums and sustaining an optimal level of services pervades the health care industry. [187] The conflict is especially severe when the malpractice-induced **[*1569]** injuries can become manifest after some long delay (the liability tail problem) and where the medical procedure is standardized (like a normal delivery) so a fixed reimbursement fee can be easily administered. Thus, physicians providing standardized medical procedures with long tail liability implications are more likely to shift to other medical specialties until the large health insurers change their reimbursement policies or courts learn that imposing liability on insurance grounds for losses of this nature is counterproductive. [188]

It is important to distinguish, at least analytically, between products and services withdrawn for insurance reasons and for deterrence or incentive reasons. Some products or services may simply generate so many injuries that continued production is infeasible. A legal standard that attached liability where the marginal expected injury costs exceeded the marginal costs of preventing the injury (here, the bare cost of production) would be sufficient to drive such products and services from the market and, thus, increase social welfare.

In contrast, the product and service withdrawal that harms consumers and reduces social welfare derives from the expansion of liability on insurance grounds, where the shift from first- to third-party insurance increases the variance or reduces the independence of risks enough to cause the risk pool to unravel. For example, many vaccines are known to be beneficial to large majorities who receive them, but to cause adverse reactions in some small number of individuals. If the adverse reactions truly cannot be prevented, and if the benefits of the vaccine exceed production and injury costs, then liability for adverse reactions is solely an insurance question. The important issue, however, is whether it is cheaper to insure for these reactions through either a first-party or third-party mechanism. As shown above, first-party mechanisms are typically superior in defining the level of insurance coverage and in segregating consumers according to levels of coverage appropriate to their income. The shift from first- to third-party insurance recovery can lead to the unraveling of the pool and the withdrawal of the vaccine from the market.

The point is that, for some products and services, insurance pools could be maintained on a first-party basis that could not be maintained on a third-party basis because of adverse selection. It is for these products and services that the expansion of tort liability on insurance grounds -- beyond that level set to create optimal safety incentives -- is most harmful. In contrast, **[*1570]** products too risky or injurious to produce at all could not support either first- or third-party insurance markets. Asbestos may be such a product. Obviously, asbestos production in the United States has stopped entirely because of the substantial third-party manufacturer liability. Quite possibly, asbestos-related injuries could not be insured in first-party markets either. Diseases without probabilistic features -- inevitable diseases -- are uninsurable because risks are not uncorrelated. It is difficult to believe that park slides, diving boards, vaccines, and other products and services recently withdrawn share this feature.

B. *The Effect of Increased Variance on Provider Risk Pools*

The increase in the variance of consumer risk pools from the shift toward greater third-party

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insurance delivery, of course, increases the risk of each individual provider. Section IV showed how this effect enhanced adverse selection and how the concomitant increase in correlation of corporate risks aggravated the problem. Adverse selection in provider risk pools consists of the relatively low-risk providers dropping out of the pool to self-insure. [189]

What are the forms of self-insurance that low-risk providers have selected? There has been a massive shift in recent years toward self-insurance through the formation of captive insurance subsidiaries off-shore in the Caribbean. [190] Apparently, the subsidiary form assures deductibility of reserves; off-shore jurisdictions are attractive because of liberalized reserve requirements. [191] A slightly different form of self-insurance in response to the crisis has been the formation of industry-wide mutuals, such as by doctors and surgeons, who believe they are better able to judge their exposure (or control their exposure) than insurers believe. [192] Although the extent to which low-risk providers have recently shifted toward self-insurance is poorly documented, it is known that self-insurance rather than market-insurance constitutes a very substantial share of many specific commercial insurance lines. [193]

[*1571] The shift of the low-risk toward self-insurance, of course, places substantial pressure on the market insurance function: at the extreme, the pool unravels and the affected commercial risks become uninsurable. Insurers have strong interests in preventing this course of development. Since the early 1980's, insurers have been progressively changing the terms of the basic commercial insurance policy in order to make market insurance more attractive to low-risk providers in order to keep them in market insurance pools. These changes in basic levels of coverage have been accelerated since 1986.

Insurers have changed coverage terms in commercial policies in three separate ways: increasing deductible and coinsurance levels, lowering aggregate policy limits, and expanding coverage exclusions. As we shall see, each of these changes reflects an effort to make the commercial policy more attractive to the relatively low-risk within provider pools. In effect, these changes reduce the level of commercial coverage offered to providers. Yet, despite the effective reduction -- in many cases, the sharp reduction -- in the level of commercial insurance coverage, insurers have simultaneously been forced to raise commercial premiums substantially and in some markets ultimately to refuse to offer coverage altogether. Most commentators have focused on the increase in premiums and the refusal to offer coverage as characteristic of the crisis. [194] The premium increases and coverage withdrawals, however, are only more prominent than the other fundamental changes in commercial casualty policies; each is a symptom of the progressive unraveling of provider pools. Each reflects an effort by insurers to fight off modern tort law's stimulus of adverse selection in order to try to maintain a commercial insurance market.

Insurers have increased policy deductibles in a wide range of commercial markets. The insurance deductible for the city of Baton Rouge, Louisiana, for example, increased from $ 100,000 in 1984 to $ 500,000 in 1985. [195] The Kennestone Hospital in Marietta, Georgia faced an increase in deductible from $ 1 million to $ 2 million. [196] Deductibles, as described earlier, provide financial incentives to insureds to reduce the risk of loss. As changes in liability rules and the shift to third-party coverage increase risk levels, the marginal benefit from risk reduction also increases. Thus, it is not surprising that insurers have increased incentives to insureds to reduce risks.

Increasing deductible and coinsurance levels, however, serves an insurance purpose beyond heightened incentives. Deductibles and coinsurance **[*1572]** narrow the level of risks brought to an insurance pool by discriminating against high-risk in favor of low-risk members of a pool. The identical deductible will be less costly to an insured who can control the probability of loss than to an insured who cannot. The incentives created by deductibles and coinsurance transform those members who are relatively more able to control losses into low-risk insureds, and those members relatively less able, into high-risk insureds. Put slightly differently, the recent increases in deductible and coinsurance levels increase the effective

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reform can cure the crisis. Within the past eighteen months, on the basis of the Department's and other attributions of the crisis to tort law, forty-two states have enacted tort reform or insurance legislation. [25] Although there are differences among the states, the general similarity in approach and the sudden spontaneity of the response represent the most extraordinary state law development having national impact since the states' unanimous **[*1524]** adoption of the Uniform Commercial Code. [26] Indeed, the Justice Department now claims that this legislation -- though in effect only for scant months -- has largely cured the insurance problem. [27]

None of these three theories, however, fully or adequately explains the phenomena of the recent insurance crisis. Virtually all commentators, in characterizing the crisis, have focused solely on the sudden increases in insurance premiums and the occasional withdrawal of insurance coverage during early 1986. The crisis, however, has been attended by a much broader group of related phenomena, which must be addressed by any comprehensive explanation. For example, long before 1986, there began to occur increasing shifts toward corporate self-insurance for expected tort liability. In addition, in recent months, while simultaneously increasing premiums, insurers have fundamentally redrafted the basic commercial insurance policy -- raising deductibles, lowering levels of aggregate coverage, and revising specific policy exclusions. A comprehensive theory of the crisis must account for all of these phenomena, and must explain their peculiar concentration within commercial casualty lines only, rather than across the broad range of insurance offerings. None of the three existing theories of the insurance crisis can do so.

This paper provides a different theory of the crisis. It attributes these changes in insurance coverage to modern tort law, but by a mechanism much different from that suggested by the Justice Department. In my view, it is simplistic to no more than assert a connection between expanding tort liability and the disruption of insurance coverage. The relationship between legal liability and the insurance function obviously is more complicated: The demand for commercial insurance coverage derives from tort liability. The expansion of tort liability might well create opportunity, rather than crisis, for the insurance industry.

This paper argues that the characteristic of contemporary tort law most crucial to understanding the current crisis is the judicial compulsion of greater and greater levels of provider third-party insurance for victims. The progressive shift to third-party corporate insurance coverage, since its beginnings in the mid-1960's, has systematically undermined insurance markets. The decline in interest rates within the past two years has led the most fragile of these markets -- those for which third-party coverage is least supportable -- to collapse. The collapse is signalled by the accelerating conversion to self-insurance. This conversion, in turn, forces insurers to exact drastic premium increases, as well as to restructure the terms of **[*1525]** the basic insurance policy, in order to salvage a market among remaining insureds. Where these salvage efforts have proven unsuccessful, insurers have refused to offer coverage altogether.

This explanation of the crisis uncovers what I believe to be a tragic paradox of our modern civil liability regime. The expansion of liability since the mid-1960's has been chiefly motivated by the concern of our courts to provide insurance to victims who have suffered personal injury. [28] The most fundamental of the conceptual foundations of our modern law is that the expansion of tort liability will lead to the provision of insurance along with the sale of the product or service itself, with a portion of the insurance premium passed along in the product or service price. Expanded tort liability, thus, is a method of providing insurance to individuals, especially the poor, who have not purchased or cannot purchase insurance themselves. This insurance rationale suffuses our modern civil law, and must be acknowledged as one of the great humanitarian expressions of our time.

The paradox exposed by my theory is that the expansion of tort liability has had exactly the opposite effect. The insurance crisis demonstrates graphicly that continued expansion of tort

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insurance costs paid by high-risk members (because they must pay the premium plus the increased deductible or retention) while constraining the effective insurance costs paid by the low-risk members. They are a way to keep low-risk members in an insurance pool. [197]

Increasing deductibles, in fact, is only one of the techniques insurers have adopted recently to differentiate low-risk members of pools with respect to probability of loss. The day-care industry, for example, has been heavily affected by the insurance crisis, apparently because of the many recent incidents of child sexual abuse, which are certain to generate civil claims. Virtually all insurers have excluded coverage for sexual abuse liability from their policies. [198]

Those insurers still writing day-care policies, however, have taken still other measures. Day-care insurers reportedly now make unannounced inspections to monitor day-care centers' operations. [199] One large firm, Kinder-Care, has voluntarily installed large windows at its centers. [200] Each of these more specific responses, like a deductible or coinsurance, reduces the risk level brought by the firm to the insurance pool. Those day-care centers better able to control their employees (and thus, from the standpoint of the insurer, at relatively low risk of liability for sexual **[*1573]** abuse) can tolerate unannounced inspections and the installation of windows.

The second way insurers have responded to the threatened departure of low-risk carriers is the widespread lowering of aggregate insurance coverage. The city of Mississauga, Ontario, for example, recently suffered a doubling of its premium along with a reduction of its coverage from $ 15 million to $ 7 million. [201] Insurers recently cut coverage for the city of Hartford, Connecticut from $ 31 million to $ 4 million. [202] Other insurers have effectively lowered aggregate coverage by amending policies to charge legal expenses in defending claims against the policy limit. [203] Of course, more specific exclusions of coverage, discussed next, serve to reduce aggregate coverage as well.

Like increased deductibles, the reduction of aggregate policy coverage also narrows risk pools by making insurance more attractive to parties that bring lower aggregate risks to the pool. Lowering aggregate insurance limits resembles an increase in deductibles, although it serves to enhance insurance availability for a different set of low-risk members than the set affected by changes in deductibles. The reduction of a basic policy limit from $ 15 to $ 7 million, as above, makes the municipal insurance policy more attractive to cities that face a greater likelihood of losses in the range of $ 7 million, than to cities that face higher probable losses. [204] The charge of legal expenses against the aggregate limit, similarly, will be differentially attractive to firms or cities according to the level of legal expenses they expect to face.

Reducing aggregate policy limits is another way of segregating those insureds with low levels of exposure from those with high levels of exposure. The low exposure insureds are charged a premium appropriate to their risk level. The high exposure insureds obtain equivalent coverage, and then must go elsewhere -- into a different risk pool -- to obtain either excess insurance or to self-insure for their remaining risks. The reduction in aggregate insurance limits, therefore, resembles the "no frills" products and services that are differentially attractive to some sets of consumers. The reduction in aggregate limits, by differentiating among insureds, extends insurance availability to the low-risk of the insured population, who **[*1574]** may not have purchased market insurance had they not been segregated from the higher risks.

Charging legal expenses against the policy limit may also serve an incentive purpose, like the deductible or coinsurance. An insured that knows that its liability coverage will be reduced by the amount of the insurer's legal expenses may itself strive to reduce those expenses, by handling more case management tasks within the firm (much like the expansion of corporate counsel) or, of course, by reducing the incidence of litigation-generating activity. Again, firms or municipalities able to achieve such economies (and thus reduce the risks they bring to the pool) will find the new policy definition more attractive than firms unable to control legal

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expenses.

The third principal modification in insurance coverage adopted to restrain adverse selection is the introduction of multiple specific coverage exclusions in insurance policies. Municipal liability policies, for example, have been redrafted to routinely exclude coverage for pollution [205] and for employment discrimination claims. [206] Directors' and officers' policies have been modified, variously, to exclude coverage of claims related to mergers, acquisitions and tender offers, illegal payments, joint ventures, outside directorships, professional errors and omissions, [207] and even for SEC liability. [208] Many directors' and officers' policies have been redrafted to exclude coverage of liability from pending or prior litigation, [209] an exclusion resembling the widespread adoption of claims-made policies across commercial insurance contexts. [210]

Each of these coverage exclusions represents an effort to narrow risk pools and make them attractive to low-risk members. Those members of the pool who are less vulnerable to the respective sources of loss face fewer incentives to drop out of the pool, because the premiums they pay will diverge less drastically from the risk they bring to the pool. The exclusion from municipality policies of claims relating to pollution narrows the risk pool to those cities whose managers have never authorized, regulated, or otherwise monitored hazardous waste sites or waste disposal. Similarly, the exclusion of coverage for claims relating to mergers, acquisitions and tender offers in a directors' and officers' policy narrows the risk pool to treat equally directors whose firms are and are not active in the market for corporate control. These exclusions maximize the availability of insurance **[*1575]** because it is the cities that are without dump sites and the directors of firms not involved in tender offers that would drop out of the risk pool in order to self-insure if the insurance premium were increased to provide coverage for cities or directors exposed to these claims.

Similarly, the adoption of a claims-made policy narrows the risk pool by excluding coverage of the long tails of liability exposure that are increasingly common in chemical, pharmaceutical, and hazardous waste industries. A claims-made provision limits coverage to claims filed during the policy term alone. Thus, the provision cuts off insurance for losses resulting from the current activities of the insured that become manifest at some later period, after the insurance policy has expired. The basic claims-made policy provides coverage for current claims from past activities of the insured, although it is often attended by a separate "retro-date" provision, which cuts off coverage of losses occurring prior to some specified date in the past. The retro-date provision is crucial to a claims-made policy in order to avoid the adverse selection incentives of firms that, knowing or suspecting claims to be imminent, purchase substantial amounts of claims-made coverage. [211]

The adoption of claims-made policies and retro-date provisions are responses, in part, to the substantial disagreement and continuing uncertainty among United States jurisdictions with respect to whether a provider's liability dates from the occurrence of the injury or its manifestation. In contexts of cumulative disease, the determination of the "occurrence" of the injury is inherently difficult, and has itself generated substantial litigation among insurers. Moreover, some courts have refused to choose between occurrence and manifestation theories in favor of holding insurers, however related to the loss, liable for coverage. [212] These various approaches all increase the variance of risk and severely threaten the survivability of risk pools. Several insurers, heavily involved in asbestos coverage, have been overwhelmed by the increase in risk and have been bankrupted.

The adoption of claims-made policies is a way to salvage some form of insurance availability in the face of extreme uncertainty over risks of this nature. [213] The insurance industry seems to be evolving three basic forms of claims-made policies -- called the "maxi," "midi," and "mini" -- which illustrate the struggle of insurers to search out some particular set of low-risk **[*1576]** insureds who can support a risk pool. [214] The "maxi-tail" claims-made policy guarantees supplemental five-year coverage for claims and occurrences after the end of the

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policy period. The "midi-tail" claims-made policy provides coverage if the occurrences (but not claims) are reported to the insurer within sixty days after policy termination. The "mini-tail" claims-made policy offers the supplemental sixty-day coverage only for claims, after which coverage terminates. [215] These various versions of the claims-made policy, like the more specific exclusions of insurance coverage, represent efforts to locate a set of insureds that will sustain a risk pool.

Each of these major changes in insurance availability, then, is a method to narrow insurance risk pools in the face of the increasing legal risk generated by modern tort law. Specifically, these contractual devices reduce variance in risk for the purpose of making insurance available to low-risk parties in the population of insureds. They are efforts to reduce adverse selection, and thus to prevent the unraveling of insurance markets that would occur if low-risk members of insurance pools were to exit.

The unraveling process would consist of the lowest-risk members of the pool dropping out, which, in turn, would necessitate premium increases. The premium increases would be followed by a new set of lowest-risk members dropping out; then, further increases in premiums; and so on, in successive episodes of withdrawals and premium rises. Of course, as low-risk members withdraw, the constituency of the pool becomes further concentrated among high-risk members.

There is substantial evidence from the current crisis of the unraveling process at work. Reports from a variety of insurance markets show the progressive convergence of insurance premiums towards the level of aggregate insurance coverage offered by the policies. Professional malpractice premiums, for example, have increased from $ 44,000 for $ 1 million aggregate coverage (premium-to-coverage ratio of 0.044) to $ 50,000 for $ 500,000 coverage (premium-to-coverage ratio of 0.1). [216] W.H. Brine Co., a manufacturer of sports equipment, was offered a premium of $ 200,000 for $ 1 million coverage (premium-to-coverage ratio of 0.2), up from $ 8,000 for $ 25 million (premium-to-coverage ratio of 0.00032) a year earlier. [217] **[*1577]** Mississauga, Ontario is charged a premium of $ 1.6 million for its $ 7 million aggregate coverage (premium-to-coverage ratio of 0.23). [218] In some markets the premium-to-coverage ratio is even greater. The city of Hartford, Connecticut pays $ 1.8 million for $ 4 million aggregate coverage (premium-to-coverage ratio of 0.45). [219] *Business Insurance* reports that one municipality is paying a premium of $ 695,000 for $ 1 million coverage (premium-to-coverage ratio of 0.695). [220] Perhaps most incredibly, Specialty Systems, Inc., an asbestos removal firm, is charged a liability premium of $ 460,000 for $ 500,000 coverage (premium-to-coverage ratio of 0.92). [221]

A convergence of the policy premium to the policy coverage limit provides strong proof that low-risk members are departing from the insurance pool and that the pool is about to unravel completely. Indeed, in the case of Specialty Systems, the premium-to-coverage ratio of 0.92 indicates that the insurance function has essentially ceased altogether; the premium payment is a form of savings in which the insurer is promising eight percent interest for what both parties must believe is a certain loss. [222]

Yet even these barely viable risk pools do not include the highest-risk members of the population. The examples above represent premium-to-coverage ratios for insurance policies written after deductibles have been increased, aggregate limits lowered (as in the professional malpractice and municipal coverage examples above), [223] and specific coverage exclusions expanded. Thus, the largest number of high-risk members have already been excluded from these pools.

The policy premium converges with the level of aggregate coverage, of course, because low-risk members have dropped out of the risk pool, despite the efforts of the insurer to narrow the range of risks. The W.H. Brine Co., for example, refused to pay the $ 200,000 premium for the offered $ 1 million coverage, in favor of self-insurance. [224] Brine obviously believed

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that the premium it was charged was greater than the expected risk it was adding to the pool.

Virtually all commentators have been puzzled by the extraordinary increases in insurance premiums that were instituted within a very few months in late 1985 and early 1986. These unusual premium increases **[*1578]** constitute the best evidence in favor of the (otherwise implausible) collusion and financial manipulation theories of the crisis. In addition, these premium increases are the most damaging evidence to the Justice Department's effort to link the crisis to tort law, since there is no conceivable correspondence between changes in past tort judgments (and little correspondence to plausible future judgments) and premium increases of multiples of four, ten, twenty and more.

Comparing percentage changes in premiums to percentage increases in past or in future expected claims, however, rests on an unsupportable empirical presumption. Percentage changes in premiums will correspond to percentage changes in past or future claims only if the set of insureds remains constant over the compared periods. If, instead, there is a reconstitution of the insurance risk pool, the premium will change even if past or future claims remain constant.

The extraordinary increases in premiums within an exceptionally short period are the best evidence of the effect of expanding tort law on the constitution of commercial casualty insurance pools. The most plausible explanation for these unusual increases is the rapid departure of low-risk insureds from commercial casualty pools. As the low-risk members drop out, the unraveling process begins. Premiums skyrocket.

At a point after some number of low-risk members have fled the risk pool, the pool cannot survive. The risks become uninsurable. The multiple recent instances of the withdrawal of insurance coverage altogether are examples of the effect. The refusal of some insurers to offer coverage at all for day care, municipal, and directors' and officers' liability, among others, is conclusive evidence of the breakdown of the insurance function. [225]

When market insurers refuse coverage, a provider is left with little choice: it can discontinue provision of the product or service -- as some providers have, described above [226] -- or it can continue self-insured. For a relatively high-risk provider, self-insurance is very costly: the costs include the (not heavily) discounted risk of bankruptcy. Yet it may still be sensible for providers to run these risks, especially where they have made substantial non-salvageable investments in human or other forms of capital.

Since 1986, in many commercial lines denied market coverage, providers have joined together to form industry-wide mutual insurance groups. The mutual groups of the relatively high-risk, which have been denied **[*1579]** market insurance coverage, are to be distinguished from mutuals formed by relatively low-risk insureds, described above, [227] who have dropped out of the commercial risk pools generating the initial unraveling. Low-risk mutual groups are formed because their members find being pooled with the high-risk more costly than it is worth. High-risk mutuals, in contrast, are formed as basically the last option prior to termination of the activity. High-risk mutuals have been formed in the drug, chemical, railroad, utility, hazardous waste, banking and thrift industries. [228] Mutual groups of this nature have been formed by municipalities and other governmental entities. [229] And they have been formed in several unique specialty occupations denied market insurance, such as nurse midwives, [230] and other high-risk specialties. [231]

Mutuals are insurance companies owned by the insureds themselves. The most prominent of scholarly descriptions of the mutual form derives from studies of the large life insurance mutuals, in which the insureds receive dividends according to the loss experience of the firm for the year, and thus share downside insurer risks to the extent of the premiums they pay. [232] The industry-wide mutuals formed recently in response to the denial of market insurance

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coverage share much greater downside risks. These mutuals, typically, incorporate assessment provisions according to which the insureds are obliged, in addition to premiums, to contribute towards the payment of subsequent claims for which the existing assets of the mutual are insufficient. Industry-wide mutuals thus are a way of distributing the risks of a single firm across the set of the firm's competitors. The mutual form provides that an adverse loss experience by a single firm is inflicted on the industry as a whole, but does not upset competitive balance within the industry. [233]

In my view, the recent increase in adoption of the mutual form derives from the different way mutuals diversify risks, and illustrates again how modern tort law has impaired the insurance function. Recall that the aggregation **[*1580]** of uncorrelated risks exploits the law of large numbers to concentrate the probability density function of loss around its mean, reducing effective risk and permitting more accurate prediction of expected loss. Industry-wide mutuals also aggregate risks, but in an *ex post* fashion. Mutuals wait for losses actually to occur and then set an effective premium to cover them. If the risks brought by members of the mutual are uncorrelated, a similar aggregation function is achieved. The effective premiums paid by members of the mutual (after dividends or assessments) will equal the loss of each insured. As a general matter, therefore, the chief difference between common stock and mutual insurance companies is that common stock companies charge premiums according to expected loss and mutuals according to actual loss. [234] As long as the risks brought by insureds are uncorrelated, the premiums will be identical.

Why have so many industries adopted the mutual form in recent years? As tort liability has expanded, risks have become increasingly correlated both within and across industries. If the risks of firms within an industry become highly correlated, a market insurer has no comparative advantage in aggregating them. The level of aggregated risks will equal or may even exceed the sum of the individual risks. The insurer may still achieve some gains by aggregating risks of one industry with risks of another industry. But if risks become highly correlated across industries -- as they will where the legal liability of all corporate providers is expanded -- the market insurer has no comparative aggregation advantage at all. Members of the industry are just as well off self-insuring. Indeed, adoption of the mutual form allows firms to continue operation until judgments are rendered bankrupting the industry, instead of paying debilitating premiums *ex ante* set equal to expected loss.

Here again, the contrast between the insurance effects of first- and third-party sources is stark. Providing insurance through the third-party tort law mechanism, because it correlates risks, has the effect of threatening industries with bankruptcy. Bankruptcy results in the denial of insurance coverage to victims with claims. [235] If the insurance were provided through a first-party mechanism, however, the risks of the victims could easily be made uncorrelated. [236] The insurance function, as a consequence, could be maintained. The expansion of legal liability, thus, impairs the insurance function.

In commercial insurance lines, the shift toward the mutual form has **[*1581]** been concentrated in industries facing long tails of liability. Large numbers of government entities, however, have also joined together to form assessible mutuals. Municipalities in metropolitan Toronto have established a mutual self-insurance pool. [237] Sheriffs in five counties of Missouri recently were forced to close their jails for several weeks until a mutual self-insurance pool was established. [238] A group of municipal mutual pools in California has enrolled 350 of the state's 444 cities. [239]

An individual government entity, such as a city, operates in the mutual form in a way slightly different from a private corporation. Some commentators seem shocked that many municipal entities are "going bare:" providing public services without any form of market or overt mutual insurance. [240] But a governmental entity can use its taxing authority as a way to act as a mutual insurer over time. Many governmental entities can diversify risks seemingly more cheaply than can private corporations because they possess populations of taxpayers,

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more immobile than consumers, who can be levied to satisfy large liability judgments, either directly or through revenue bonds. The citizenry may well approve of this form of mutual insurance. Voters in Blue Island, Illinois, for example, recently turned down a proposed 30 percent increase in property taxes, levied to collect funds to pay market insurance premiums. [241] The defeat of the proposal represents the (presumably informed) decision of voters to self-insure in the mutual form. Of course, hinging a government entity's tax needs to the accident rate introduces greater risk to property ownership and thus increases its costs. The advantages of the mutual form described above, however, may make government self-insurance cheaper than market insurance. Obviously, entities with larger tax bases will find this form of self-insurance relatively more attractive. [242] Cities with relatively smaller tax bases are more likely to join the mutual pools described above.

Many governmental entities have one further advantage over private corporations in coping with the increase in the variance of risk generated by modern tort law. Governmental entities seem more able to persuade legislatures to grant them exemptions from the effects of tort law, perhaps because the specific beneficiaries of limiting municipal liability -- city voters -- are more highly concentrated politically than consumers of any single product. Several state legislatures, for example, have recently enacted **[*1582]** statutes changing liability standards and damage measures for actions brought against public entities. [243]

There is no clear conceptual justification to judge against different standards torts committed by government versus private employees. Indeed, as suggested by the apparent greater frequence of adoption of the mutual form, governments seem more able to tolerate heavy liabilities through self-insurance than do companies. The point, rather, is that both corporate and governmental insurance liability are inferior to first-party insurance liability. Municipalities, because of their superior political influence, especially in times of independent political pressure to tighten budgets, are more able than corporate providers to obtain legislation shifting the insurance burdens of modern tort law back to first-party sources.

VI. THE INSURANCE CRISIS: ITS CAUSE AND CURE

A. *Cause and Effects*

By my count, the industries that have been most seriously affected by the current insurance crisis are those dealing with hazardous materials, including toxic wastes, asbestos, and chemicals; manufacturers of pharmaceuticals and related products; hospitals, physicians in certain specialties such as obstetrics and anesthetics, and related practitioners such as nurse midwives; municipalities and other governmental entities; assorted general and machine manufacturers; general aircraft manufacturers; ski lift operators; day care centers; corporate directors and officers; liquor establishments; and publishers. There are vast lines of insurance that have been totally untouched by the crisis. All first-party insurance lines -- auto, health, life, disability -- have been largely unaffected. Even some third-party liability lines, such as auto and workers' compensation have been unaffected. Can these different industry experiences be explained by the progressive shift from first-party toward third-party tort law insurance?

Obviously, the absence of crisis in first-party insurance lines is consistent with the theory. The other phenomena are also consistent. The industries most seriously affected by the crisis are those for which the risks have become essentially uninsurable. The risks of tort liability are uninsurable for two separate reasons. One set of firms affected by the crisis have been made subject to tort liability for claims that do not result from probabilistic causes. I have mentioned earlier that insurance is only feasible where a loss has a probabilistic character. Put simply, insurers have no comparative advantage in providing coverage for non-probabilistic losses; there are no efficiencies gained from aggregating that nature of claims. The inability **[*1583]** to insure tort claims against day care centers for injuries suffered from sex abuse has already been explained in these terms. Other industries in the list,

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however, suffer similar problems. The liability of liquor establishments for injuries from drunken behavior, in particular drunk driving, raises severe insurability problems. The frequency of harm-causing intoxication is most directly influenced by those to whom the insured taverns serve liquor. Although there may be some random component with respect to the extent of damage caused, the randomness may easily be swamped by the effect of the specific decisions of tavern clients. [244] Directors' and officers' insurance and publishers' defamation insurance is of the same nature. While there is some random component to such claims and to the vulnerability of the insured to such claims, there is also heavy influence of the intentional actions of the insured itself.

The second principal reason that tort liability is uninsurable for the industries listed above is that the variance of risks has been so expanded by tort liability that the risk pools are unsupportable. Many of the industries most severely affected by the insurance crisis are those subject to tails of liability extending over long periods of time, thus incorporating an extraordinarily wide range of potential outcomes. The liability of asbestos manufacturers for injuries from asbestos ingestion exemplifies the problem. Obviously, no real insurance against asbestos tort liability is being written today. [245] Chemical manufacturers, pharmaceuticals, and the various medical specialties all face similar tails of liability. These industries, of course, have been the first into which the claims-made policy has been introduced, cutting off the liability tail. In contrast, there is no need for such policies in third-party auto, domestic casualty, or even workers' compensation insurance because there is no tail of liability following an auto collision, a slip and fall, or even most workplace injuries. [246]

Municipalities and governmental entities face closely related problems. Except for claims related to the supervision of hazardous waste disposal, there is no long tail of municipal liability extending over time. As liability for governmental supervisory behavior has been expanded, however, **[*1584]** something resembling a liability tail has been created. Governmental entities supervise, in one form or another, virtually all activities of the society. Insuring governmental entities requires the prediction of the range of potential plaintiffs who might successfully bring suit. The problem of prediction is made more acute where the combination of the doctrines of joint and several liability and pure comparative negligence expose the governmental entity to full liability though the entity's role in, say, the design of a road, the purchase of playground equipment, or the operation of its police force contributed in only a minor way to the injury.

To an insurer, the existence of a broad and indefinite range of potential plaintiffs is no different from a long tail of injuries extending over time. The expansion of governmental liability makes the range of potential outcomes extremely broad, requiring exaction of a very high premium. At some point, there is no advantage to a single municipality in paying this risk premium *ex ante,* in contrast to *ex post* self-insurance or operation with others in the mutual form. [247] Of course, those municipalities facing lower risks -- which may be those whose size allows them to serve the insurance function internally [248] -- will be the first to drop out of the market insurance pool, forcing premiums up and initiating the unraveling process.

The miscellaneous set of other industries -- machine manufacturers, ski lift operators, general aircraft -- are not subject to long tails of tort liability, but they are similarly subject to vastly expanded risk pools as a result of increased tort liability. Here another insurance effect is likely to be at work. Within these industries the smaller, rather than the larger, firms have been most seriously affected. It is more difficult for insurers to underwrite the risks of smaller than of larger firms, because the insured itself, given its small set of consumers, provides little of the pooling function. [249] As a consequence, the insurer must identify other firms or industries whose liability risks are uncorrelated in order to gain the pooling efficiencies of insurance. The expansion of modern tort law, as described earlier, greatly hampers this insurance effort because it affects all corporate operations and, thus, correlates (reduces the independence of) risks even within different industries.

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The example of the smaller firms and industries, however, suggests that the insurance crisis is a far broader phenomenon than might even be suspected from the reporting of the loudest complaints. Again, I measure the **[*1585]** "crisis" by those loss-generating activities which cannot be insured by means of third-party tort law insurance, but which could support first-party victim insurance. It is my view that commercial casualty markets in their entirety have been made fragile by the expansion of modern tort law. The firms most seriously affected in late 1985 and early 1986, as interest rates dipped slightly, were those whose activities generated long tails of liability or whose small size required a greater insurer role. If these explanations are accurate, however, the scope of the crisis can easily extend more broadly throughout commercial casualty fields. As interest rates dip further, or as corporate tort liability is further expanded, the crisis is likely to extend to firms of larger size or firms with shorter tails of liability.

Who has suffered most from these developments? It is clear in my mind that the greatest harm from the expansion of tort liability and the consequent shift from first- to third-party tort insurance coverage has been suffered by the poor and low-income within the consuming population. The increase in market insurance and self-insurance costs leads to increases in the price level of virtually all commodities. In some cases, these increases will effectively price low-income consumers out of the market for the product altogether. Increases in product prices shrink the purchasing dollar and, in proportionate terms, shrink it more severely for the poor.

The increase in insurance costs reduces the availability of products or services for the poor in still more ways. The unwillingness of obstetricians to perform normal deliveries for less than $ 1200, noted earlier, more severely affects those individuals for whose deliveries Medicare will pay $ 507 than those consumers able to pay the full cost by private negotiation with the doctor. Similarly, the termination of midwife services because of the absence of insurance is relatively less troublesome to those who can afford to substitute licensed physicians or full-priced obstetricians.

More generally, even if the low-income are able to continue to pay the insurance-enhanced prices of products, they are harmed. The poor and low-income are much more likely to be paying a premium that exceeds the risk they bring to the pool under third-party than under first-party insurance coverage, because of the difficulty providers face in segregating risk pools. No one today would seriously propose that all citizens pay an identical life insurance premium where some of the beneficiaries -- the high-income -- would receive greater total benefits. No one would urge that all individuals pay the same disability premium regardless of expected income. No one would seriously propose that all homeowners pay the same fire premium regardless of home value, or that all drivers pay the same auto premium regardless of car value. Yet this is exactly the regime of life and disability insurance provided by modern tort law. Modern **[*1586]** tort law forces all consumers to pay the same third-party insurance premium for product- and service-related coverage for losses leading to injury, disability and death.

Wealthy and high-income members of the consuming population are also harmed by the shift to third-party coverage. Admittedly, in individual instances, relatively high-income members may gain from paying a premium averaged for a pool containing some relatively low-income members. More generally, however, the broadening of risk pools characteristic of the shift to third-party coverage harms the high-risk of the insured population as well, because it reduces the availability of insurance in all contexts. The high-income do not benefit when jails and parks are closed or, for that matter, when relatively low-cost products and services, such as vaccines, are withdrawn from the product market.

Nevertheless, it is the poor who are most severely harmed. It is not surprising that the crisis has heavily disrupted the provision of municipal and other governmental services. Because

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such services are generally provided without charge, it is impossible directly to pass on to users the costs of increased insurance premiums. Yet it is also because municipal services are provided without charge that they are of particular importance to the lives of the poor.

The motivation for the judicial expansion of third-party liability during the early 1960's was to protect the poor within the consuming population by providing them with a form of insurance that they might not otherwise obtain. [250] At the time of the first adoption of the strict liability standard, however, our society had not introduced the array of social insurance programs available today, and the courts may not have perceived the wide range of privately available first-party health and disability coverage. Today, the number failing to possess basic health coverage is very small. [251] Our society covers the poorest of the poor through Medicaid, Medicare for the aged, and General Assistance. Although it is estimated that 18 million individuals totally lack health care insurance, [252] it is unknown how many fail to qualify for Medicaid while healthy and able to maintain employment, but would qualify if, through injury or illness, their employment were to cease. This group is uninsured only formally: They are uninsured until they need health insurance, at which time they become insured. [253] A more precise 1982 telephone survey of families found only 1.5 **[*1587]** percent in which any family member had been denied health care for financial reasons. [254] Disability coverage in the U.S. appears more spotty, at least for non-job related injuries. But there are no studies indicating the number of individuals failing to possess private disability coverage who would not be covered by government disability programs. It is a crucially important empirical question exactly how many in our society remain unprotected for basic health and disability losses, although the number appears to be quite small and the definition of the set quite peculiar. [255] It is at the least unusual to believe that an effective and comprehensive way to provide care to such individuals is through tort system recoveries for injuries from products or services. [256]

B. *Cure*

Within the past eighteen months, forty-two state legislatures have enacted some form of tort reform legislation. A detailed discussion of this legislation is beyond the scope of this paper, although I will briefly review the effects of these reforms on insurance markets. The most significant changes in the law are (1) monetary caps on non-economic damages, [257] (2) caps or other limitations on punitive damages, [258] (3) abrogation of **[*1588]** joint and several liability, [259] (4) elimination of the collateral source rule, [260] and (5) amendments to substantive liability standards for specific activities such as municipal operations, dramshops, or non-profit organizations. [261] If the source of the crisis is the shift from first- to third-party tort law insurance sources, how effective will these reforms be?

The various tort reform statutes have been supported by a coalition of business and insurance interests, chiefly on the simple ground that modern tort liability is excessive and unfair. [262] Observers have not generally appreciated, however, that each of these reform provisions will affect insurance markets in a similar way: they reduce the variance in insurance risk pools. Obviously, caps on non-economic and punitive damages reduce the range of potential liability outcomes. Similarly, abrogation of the doctrine of joint and several liability in favor of strict comparative fault reduces the risk that any one of a group of joint defendants will ultimately be required to satisfy the entire judgment. Deducting first-party insurance benefits from tort judgments will also reduce risk pool variance. More generally, of course, altering liability standards to make recovery more difficult for plaintiffs will diminish expected liability. To the extent that variance in risk pools is reduced, third-party tort law insurance becomes more supportable.

These reforms, while helpful, constitute only partial contributions toward solution of the problems caused by modern tort law. The provision of insurance through tort law has undermined insurance markets. In my view, these markets will not be fully restored until these insurance issues are dealt with more systematically. The insurance function must be

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excised **[*1589]** from tort law altogether. None of the recent statutory reforms achieves that effect.

A cap on non-economic damages, for example, does shift tort damage awards to more closely resemble levels of insurance purchased in first-party markets. In first-party markets, however, no one purchases any coverage of non-economic losses. Thus, even if non-economic damages in tort law are capped at $ 450,000 or $ 250,000, tort law continues to provide a very substantial level of excess insurance coverage.

Similarly, limitations on punitive damages may reduce risk pool variance to some extent. In my view, however, it is appropriate not only to restrain, but to prohibit, punitive damage awards in product liability and other tort contexts. Punitive damage awards can be justified only where there is some likelihood (1) that normal damage measures cannot measure loss accurately -- such as in defamation cases; [263] (2) where there is substantial difficulty in detecting the existence of the injury -- such as in fraud or, perhaps, some antitrust actions; or (3) where other incentives are needed to stimulate litigation. [264] For cases in which manufacturers or other providers have deliberately misrepresented product safety or effectiveness -- such as the MER-29 cases -- punitive damages should be awarded on grounds of the fraudulent behavior itself, not on grounds of the defective character of the product. There is no further need to award punitive damages in typical products and service liability contexts. In this respect, a legislative maximum on punitive damage awards or limitations on the conditions under which punitive awards may be made, constitutes only a partial solution.

The source of the insurability crisis is not the level of damages alone. Rather, the diffuse and indiscriminate expansion of substantive tort liability has led to the unraveling of insurance markets in an increasing number of contexts. This unraveling can be arrested only if substantive standards of liability are redefined to focus exclusively on the accident reduction goal. In my view, modern tort law provides inadequate controls on the accident rate and simultaneously creates a tort law insurance regime that disrupts insurance markets and harms the poor. The objectives of tort law reform are uncontroversial: to reduce the accident rate and to provide a more coherent and comprehensive regime of compensation insurance. These objectives cannot be achieved by tinkering with damage measures and by limited changes in liability standards for particularly **[*1590]** sympathetic sets of defendants, such as governmental entities, dramshops or non-profit organizations. Instead, modern tort law must be reformed systematically: by a complete redefinition of liability standards to better achieve accident reduction and insurance. [265]

FOOTNOTES:

n1 Brody, *When Products Turn into Liabilities,* FORTUNE Mar. 3, 1986, at 20; Wall St. J., Jan. 21, 1986, at 31, col. 1.

n2 *Sorry, Your Policy Is Cancelled,* TIME, Mar. 24, 1986, at 18; Brody, *supra* note 1, at 20.

n3 N.Y. Times, Mar. 8, 1986, at 35, col. 3; *Sorry Your Policy Is Cancelled, supra* note 2, at 18.

n4 U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE: INSURANCE COSTS INCREASED BUT VARIED AMONG PHYSICIANS AND HOSPITALS 27 (1986).

n5 N.Y. Times, Feb. 15, 1986, at 1, col. 1.

n6 Toronto Globe & Mail, Feb. 21, 1986, at B2, col. 1.

n7 N.Y. Times, Feb. 1, 1986, at 1, col. 5; Wall St. J., Feb. 3, 1986, at 5, col. 1.

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liability on insurance grounds leads to a reduction in total insurance coverage available to the society, rather than to an increase. The theory also shows that the parties most drastically affected by expanded liability and by the current insurance crisis are the low-income and poor, exactly the parties that courts had hoped most to aid.

Section I reviews the three existing theories and shows their inability to explain the insurance crisis. Sections II through V, then, present the theory of the paper itself. Section II demonstrates the economic effects, including the insurance effects, of tort rules. Section III describes the operation of private insurance markets. This Section shows why insurance exists, how insurance markets are defined, and how they must be maintained in order to survive. Section IV applies these insurance principles to explain the theoretical reasons that expanding liability is likely to affect private insurance markets. Section V examines the details of the recent insurance crisis in light of this theory. It explains why the insurance problems created by modern tort law have led particular providers, [29] especially municipalities, to cancel market insurance and to self-insure; how the shift to self-insurance has forced insurers to change the terms of insurance contracts or, in some cases, to refuse insurance coverage on any **[*1526]** terms; and why such changes in insurance markets harm principally the low-income and poor and, in many cases, benefit the high-income and wealthy. Finally, Section VI discusses why the crisis has affected the particular industries that it has and why the recent tort reform legislation in the various states is unlikely to solve the insurance problems our society faces.

This paper concludes that insurance markets can be stabilized only if courts recognize the adverse insurance consequences of expanded provider liability. Stabilizing current markets, however, is not equivalent to restoring their earlier vitality. Insurance markets can be widely restored in our society, and the scope of insurance expanded, only by a radical reconceptualization and redefinition of substantive tort law standards. The recently enacted tort reform legislation in the various states and even the more ambitious proposals of the Justice Department may serve as a temporary stop-gap, but they are unlikely to achieve stable reform because they do not challenge systematically the deeper source of the crisis: the failure of our courts to understand how legal rules affect the insurance function.

I. THREE CURRENT THEORIES AND THEIR EXPLANATORY FAILURES

In order to evaluate the collusion, insurance cycle, and the Justice Department's tort law theories, it is necessary to describe the history and manifestation of the insurance crisis in greater detail. Property/casualty insurance premiums have been increasing steadily since the early 1980's and probably before. [30] Simultaneously, an accelerating shift toward self-insurance has occurred in certain commercial casualty insurance lines. For example, over this period, growing numbers of doctors and other professionals have formed small mutual insurance groups instead of continuing to purchase malpractice insurance from market carriers. Some doctors, after shielding their assets, have continued to practice uninsured. [31] Similarly, increasing numbers of manufacturers have dropped market insurance in favor of the creation of captive offshore insurance subsidiaries. [32] At about the same time, in the early 1980's, insurers initiated efforts to restrict coverage levels in certain commercial lines by changing the terms of the basic policy from an occurrence to a claims-made basis. [33]

[*1527] The crisis of early 1986 consists only of a sharpening of these broader trends. As premiums increased, larger numbers of firms consciously decided to self-insure by establishing their own reserves. [34] The basic commercial insurance policy was revised more drastically: the claims-made policy was adopted almost universally, deductibles were raised, aggregate policy limits were lowered, and greater numbers of specific coverage exclusions were incorporated. [35] Despite these reductions in insurance coverage, premiums in many commercial casualty lines were increased by extraordinary amounts: in some cases by 400%, 1000%, 1500%, and more. [36] In some lines, such as coverage for nurse-midwives, municipalities, and day care centers, many insurers refused to offer coverage at any

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n8 N.Y. Times, Mar. 26, 1986, at C12, col. 4.

n9 Wall St. J., *supra* note 1.

n10 *Sorry, Your Policy Is Cancelled, supra* note 2, at 17-18; N.Y. Times, Mar. 4, 1986, at A26, col. 1 (editorial).

n11 N.Y. Times, May 12, 1986, at 1, col. 1.

n12 N.Y. Times, June 15, 1986, § 23, at 1, col. 4; Wall St. J., June 6, 1986, at 27, col. 1; New Haven Register, May 15, 1986, at 1, col. 1.

n13 N.Y. Times, Feb. 19, 1987, at 1, col. 5.; Wash. Post, Jan. 15, 1987, at A20, col. 1 (editorial); Wash. Post, Jan. 5, 1987, at 18, col. 1-4.

n14 N. WEBER, PRODUCT LIABILITY: THE CORPORATE RESPONSE 4-7 (Conf. Bd. 1987) [hereinafter Conf. Bd.]; Glaberson, Liability Rates Flattening Out as Crisis Eases, N.Y. Times, Feb. 9, 1987, at 1, col. 5; Wall St. J., Jan. 6, 1987, at 64, col. 2 (malpractice insurance costs continue to rise despite tort reform); Wash. Post, Jan. 5, 1987, at 18, col. 1.

n15 Conf. Bd., *supra* note 14, at 15-16.

n16 *Sorry, Your Policy Is Cancelled, supra* note 2, at 24.

n17 GOVERNOR'S ADVISORY COMM'N ON LIABILITY INSURANCE, INSURING OUR FUTURE 15, 24 (1986) (New York City Schools) [hereinafter CUOMO COMM'N].

n18 *See infra* text accompanying notes 237-39 & note 239.

n19 *See infra* text accompanying notes 240-43.

n20 *See* Goldberg, *Manufacturers Take Cover,* A.B.A. J., July 1, 1986, at 52, 55 (quoting Jay Angoff, Nat'l Ins. Consumer Org.); *The Liability Crisis: Who's To Blame?,* 6 MANHATTAN REP. 1, 9 (1986) (discussant's comment); Statement of J. Robert Hunter, Medical Mut. Liab. Ins. Soc'y of Md. (July 1, 1985). For a discussion of this theory, see *infra* text accompanying notes 39-45.

n21 *See* F. Bellotti, J. Van de Kamp, L. Thornburg, J. Mattox, C. Brown & B. La Follette, An Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance (Nat'l Ass'n of Attorneys Gen., Ad Hoc Comm. on Ins., May, 1986) (unpublished manuscript). This theory is discussed *infra* at text accompanying notes 46-58.

n22 *See, e.g.,* Goldberg, *supra* note 20, at 55 (quoting Frank Nutter, President, Alliance of American Insurers). For a discussion of this theory, see *infra* text accompanying notes 47-58.

n23 Recently, Florida and Hawaii have instituted new rate regulation of commercial casualty insurance lines allegedly to constrain insurer profit gouging. Several other state legislatures are considering regulation of this nature.

n24 U.S. DEP'T OF JUSTICE, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986) [hereinafter DOJ REPORT]. For a discussion of this theory, see *infra* text accompanying notes 59-71.

n25 For a summary, see NAT'L CONFERENCE OF STATE LEGISLATURES, SELECTED STATE

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LEGISLATIVE ACTION RE: AFFORDABILITY AND AVAILABILITY OF LIABILITY INSURANCE (Aug. 4, 1986).

n26 It should be remembered that the 42nd adoption of the U.C.C. occurred in 1965, 12 years after the first adoption in 1953.

n27 Noble, *Liability Insurance Reported Easier To Get Than Year Ago,* N.Y. Times, Mar. 27, 1987, at D18, col. 1 (quoting Justice Department press release).

n28 *See* Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law,* 14 J. LEGAL STUD. 461 (1985) [hereinafter *Enterprise Liability*].

n29 The term provider refers to producers of goods (manufacturers) and services (other than insurers), including government entities.

n30 Conf. Bd., *supra* note 14, at 4 (Table 2); WYATT CO., 1985 DIRECTORS AND OFFICERS LIABILITY SURVEY 17 (1985).

n31 Patricia Danzon reports that, as of 1985, over 40% of medical malpractice insurance was written by small mutual or captive insurance firms. P. DANZON, MEDICAL MALPRACTICE 93 (1985). For estimates of doctors who practice uninsured, see Zuckerman, *The Costs of Medical Malpractice,* 3 HEALTH AFFAIRS 128, 132-133 (1984).

n32 *See* INSURANCE SERVICES OFFICE, INC., THE COMING CAPACITY SHORTAGE 11 (1985).

n33 *See* INSURANCE SERVICES OFFICE, INC., COMPREHENSIVE GENERAL LIABILITY POLICY (2d ed. 1985). *See generally* AMERICAN INSURANCE ASSOCIATION, PRODUCT LIABILITY INSURANCE 23 (1979) (describing claims-made policy).

n34 N.Y. Times, Mar. 8, 1986, at 35, col. 3; *see* Conf. Bd., *supra* note 14, at 3 (Table 1); *Business Week* reports that, "Before the crisis, . . . 'self-insurance' totaled no more than 25% of the market. Now, it's about 33% and growing." *The Crisis Is Over but Insurance Will Never Be the Same,* BUS. WEEK, May 25, 1987, at 122, col. 1, 3. Others have estimated the current extent of self-insurance as constituting 25% to 47% of the property/casualty market. *See infra* note 193.

n35 For specific examples of these changes, see *infra* text accompanying notes 194-215.

n36 Compare the recent changes in premium-to-coverage ratios, *infra* text accompanying notes 216-21.

n37 *See infra* text accompanying notes 225-31.

n38 T. SCHELLING, *An Economist Looks at Risk and Liability,* in RISK, COMPENSATION, AND LIABILITY: THE POLICY CHOICES 53-55 (1986).

n39 *See, e.g., The Liability Crisis: Who's To Blame?, supra* note 20, at 9 (discussant's comment).

n40 Schwartz & Wilde, *Imperfect Information in Market for Contract Terms: The Examples of Warranties and Security Interests,* 69 VA. L. REV. 1387, 1414 (1983). *See generally* Rosen, *Hedonic Prices and Implicit Markets: Product Differentiation and Pure Competition,* 82 J. POL. ECON. 34 (1974).

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n41 For the same reason, the regulation of prices and terms in the casualty insurance industry is likely to be ineffective. *See* Stewart, Remembering a Stable Future, address delivered at ISO-III Industry Conf., Jan. 14, 1987 (unpublished manuscript on file with author).

n42 *See* Goldberg, *supra* note 20, at 55 (quoting Jay Angoff, Nat'l Ins. Consumer Org.).

n43 *See, e.g.,* U.S. Gen. Accounting Office, Statement of William J. Anderson, Director, Gen. Gov't Div. Before the Subcommittee on Oversight, Committee on Ways and Means, House of Representatives, on Profitability of the Property/Casualty Insurance Industry 8 (Mar. 13, 1986) (underwriting losses have bottomed out; industry will have substantial net gains over next five years); U.S. Gen. Accounting Office, Statement of Johnny C. Finch, Senior Associate Director, Gen. Gov't Div., Before the Subcommittee on Oversight, Committee on Ways and Means, House of Representatives, on Profitability of the Property/Casualty Insurance Industry 5 (Apr. 28, 1986) (industry profitable over long term).

n44 *See* AMERICAN INSURANCE ASSOCIATION, *supra* note 33, at 9, 44-47, 65-67, 72-73; R. MEHR & E. CAMMACK, PRINCIPLES OF INSURANCE 600-03 (6th ed. 1976).

n45 *See* Goldberg, *supra* note 20, at 55 (citing Jay Angoff's claim that rate increase is part of effort to convince legislators of "crisis in the courts").

n46 This is the principal explanation of the Cuomo Commission. *See* CUOMO COMM'N, *supra* note 17, at 10-11.

n47 *See* INSURANCE SERVICES OFFICE, INC., 1985: A CRITICAL YEAR 4 (1985); Goldberg, *supra* note 20, at 55 (quoting Frank Nutter, President of American Alliance of Insurers).

n48 A more implausible argument holds that premiums must be raised to make up for past losses. This account ignores the highly competitive character of the commercial casualty industry that would prevent recoupment.

n49 I am aware of no study that has attempted rigorously to demonstrate this relationship.

n50 For the aggregate portfolio of property/casualty insurers, see INSURANCE INFORMATION INST., 1986-87 PROPERTY/CASUALTY FACT BOOK 23 (1986). Industry investment income increased during 1985 by 10.5%. *Id.* at 20. Note also the simultaneous increases in payouts of self-insurers who maintain no reserve portfolio, such as New York City. *See* CUOMO COMM'N, *supra* note 17, at 35-36.

n51 INSURANCE INFORMATION INSTITUTE, *supra* note 50, at 49-50.

n52 This argument is relied upon heavily by the Cuomo Commission. *See, e.g.,* CUOMO COMM'N, *supra* note 17, at 15.

n53 *See* R. RIEGEL, J. MILLER & C. WILLIAMS, INSURANCE PRINCIPLES AND PRACTICES 567-89 (6th ed. 1976); INSURANCE SERVICES OFFICE, INC., *supra* note 32, at 14. The premium-to-surplus ratio regulations are promulgated under insurance commissions' authority to ensure that insurers remain solvent. *See, e.g.,* IOWA CODE § 505.8 (1983).

n54 *See* INSURANCE SERVICES OFFICE, INC., *supra* note 32, at 5, 14.

n55 CUOMO COMM'N, *supra* note 17, at 27-28.

n56 These ratios were obtained by dividing industrywide net premiums written in 1984 and 1985, INSURANCE INFORMATION INSTITUTE, 1986-87 PROPERTY/CASUALTY FACT BOOK 24

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(1986), by industry-wide policyholder's surplus at the end of the respective years, *id.* at 18. "Net premiums written" is defined as "premium income retained by insurance companies, direct or through reinsurance, less payments made for business reinsured"; "policyholder's surplus" is the "[s]um left after liabilities are deducted from assets . . .[,] the financial base that permits a company to sell insurance." *Id.* at 112.

n57 Of course, the premium-to-surplus ratio must be calculated at the firm level for individual insurance lines. It is within an insurer's judgment, however, to reallocate surplus and capacity from one line to another. In addition, even if some individual firms exceed the 3:1 or 4:1 ratio, the industry-wide figure shows that other firms have resources that could be allocated to these lines. For a description of the distribution of premium-to-surplus ratios across firms, see INSURANCE SERVICES OFFICE, INC., 1985: A CRITICAL YEAR 18-19 (1985).

n58 For an interesting, but to my mind, unproven theory of the premium cycle, based on the administrative costs of adjusting capacity levels, see R. WINTER, "CRISES" IN COMPETITIVE INSURANCE MARKETS (Hoover Institution Working Papers in Economics E-86-74 (Dec. 1986)).

n59 DOJ REPORT, *supra* note 24, at 45.

n60 *Id.* at 47.

n61 *Id.*

n62 *Id.* at 51.

n63 *Id.* at 60-75.

n64 Of course, there has been extensive industry lobbying for tort reform legislation. *See, e.g.,* The Need for Legislative Reform of the Tort System: A Report on the Liability Crisis from Affected Organizations (1986) (lobbying memorandum of 140 trade associations and other organizations on file with author).

n65 NAT'L CENTER FOR STATE COURTS, A PRELIMINARY EXAMINATION OF THE AVAILABLE CIVIL AND CRIMINAL TREND DATA IN STATE TRIAL COURTS FOR 1978, 1981 AND 1984.

n66 *Id.* at 2.

n67 *Id.*

n68 *See* M. PETERSON & G. PRIEST, THE CIVIL JURY: TRENDS IN TRIALS AND VERDICTS, COOK COUNTY, ILLINOIS, 1960-1979, at 7, Figure 1 (Rand Corp. R-2881-ICJ 1982).

n69 DOJ REPORT, *supra* note 24, at 45.

n70 *Id.* at 46 (filings data from Admin. Office of U.S. Courts); *id.* at 38 (average products liability jury verdict data from Jury Verdict Research, Inc.). Note that it is unclear whether the data on average award is based on state cases, federal cases, or a sample of both. It is also worth noting that "the reported average annual verdicts are not used by the Working Group as an accurate statement (though they may very well be) of the average jury verdict in any particular year." *Id.* at 36 n.33. I am skeptical of the Jury Verdict Research data because they make no pretense of being representative.

n71 *Id.* at 45, 47. These figures appear to include suits in both federal and state courts.

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n72 M. Trebilcock, The Social Insurance-Deterrence Dilemma of Modern North American Tort Law, 3-4 (2d draft Jan. 1987) (unpublished manuscript on file with author); Epstein, *Shooting the Insurance Messenger,* Chicago Tribune, May 30, 1986, § 1, at 25, col. 1.

n73 *See generally* A. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951). For a discussion of the influence of this theory on modern tort law, see *Enterprise Liability, supra* note 28, at 519-27.

n74 *See* Landes & Posner, *A Positive Economic Analysis of Products Liability,* 14 J. LEGAL STUD. 535 (1985); Shavell, *Strict Liability Versus Negligence,* 9 J. LEGAL STUD. 1 (1980).

n75 *See Enterprise Liability, supra* note 28, at 462-64. For a more detailed recounting of the concern of courts with providing insurance to the poor, see Priest, *Protecting the Poor Through Tort Law* (unpublished manuscript on file with author).

n76 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (in bank). This case is discussed in *Enterprise Liability, supra* note 28, at 505-11.

n77 This paper cannot review these developments in detail. For a more thorough discussion, particularly of products liability law, see *Enterprise Liability, supra* note 28, at 496-519. *See generally* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440-42 (1944) (in bank) (Traynor, J., concurring) (now classic statement of enterprise liability rationale).

n78 *See* Luque v. McLean, 8 Cal. 3d 136, 145-46, 501 P.2d 1163, 1169-70, 104 Cal. Rptr. 443, 449-50 (1972); McCown v. International Harvester Co., 463 Pa. 13, 18-19, 342 A.2d 381, 383-84 (1975) (Pomeroy, J., concurring) (stressing risk-spreading rationale for holding that contributory negligence does not apply to products liability cases).

n79 Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 422-28 (Tex. 1984) (abandoning assumption of risk, product misuse and failing to avoid damages in favor of single "comparative causation" concept that will proportionately reduce, but not preclude, the plaintiff's judgment). *But see* McCown v. International Harvester Co., 463 Pa. 13, 19, 342 A.2d 381, 384 (1975) (Pomeroy, J., concurring) (risk-spreading justifies denying manufacturers contributory negligence defense, but is outweighed by countervailing policy reasons in support of assumption of risk defense).

n80 *See Duncan,* 665 S.W.2d 414. In addition, see the insurance effects of manufacturer liability for foreseeable consumer misuse, Hughes v. Magic Chef, Inc., 288 N.W.2d 542, 546 (Iowa 1980); General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977), and despite intervening negligence, Huff v. White Motor Corp., 565 F.2d 104, 109-10 (7th Cir. 1977) (vehicle collision is foreseeable use).

n81 *E.g.,* Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). For a broader discussion of these developments, see PROSSER & KEETON ON THE LAW OF TORTS § 63 (W. Keeton 5th ed. 1984).

n82 The occurrence-manifestation disputes provide good examples. *See, e.g.,* Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981) (in addition to general liability policies in effect at time of asbestos inhalation, policies in effect at time of residence of asbestos in lung, and manifestation of asbestos-related disease cover liability of asbestos manufacturer to injured worker), *cert. denied,* 455 U.S. 1007 (1982). See also the invocation of the insurance rationale to resolve evidentiary issues against manufacturers in Cipollone v. Liggett Group, Civ. Action No. 83-2864 (D.N.J. Sept. 25, 1986).

n83 *See Enterprise Liability, supra* note 28, at 496-519.

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n84 Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 434, 573 P.2d 443, 457, 143 Cal. Rptr. 225 (1978) (fact that manufacturer took reasonable precautions to design safe product does not prevent imposition of strict liability upon hindsight judgment that product was unsafe); Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 202-09, 447 A.2d 539, 545-49 (1982) (manufacturers liable for failure to warn of hazards unknowable at time of manufacture). *But see* Feldman v. Lederle Laboratories, 97 N.J. 429, 479 A.2d 374 (1984) (apparently limiting such liability to asbestos-like circumstances).

n85 Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110 (La. 1986).

n86 *See, e.g.,* Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (creating "market share" liability), *cert. denied,* 449 U.S. 912 (1980).

n87 *E.g.,* Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

n88 *See generally* K. ABRAHAM, DISTRIBUTING RISK (1986); Keene, supra note 82, at 1041.

n89 *See, e.g.,* Hargerty v. L & L Marine Servs., 788 F.2d 315, 317-18 (5th Cir. 1986) (damages for fear of cancer recoverable by seaman under Jones Act).

n90 Legal rules also affect the levels of injurer and victim activity. The economic dimension of such a shift, however, is only perceptible if information is available -- as it seldom, if ever, is -- about the shapes of injurer and victim utility functions, including demand and supply conditions for injurer and victim activities, respectively. In my view, few practical benefits can be obtained by considering the abstract effects of internalizing costs to affect activity levels. *See* G. Priest, Internalizing Costs (1987) (unpublished manuscript on file with author).

n91 *See generally* R. POSNER, ECONOMIC ANALYSIS OF LAW 147-52 (3d ed. 1986).

n92 Awards in excess of compensatory damages, such as punitive damages, can in theory lead to either an increase or a reduction in aggregate safety levels. *See* Priest, *Punitive Damages and Enterprise Liability,* 56 S. CAL. L. REV. 123, 128-32 (1982); G. Priest & J. Donohue, The Determinants of the Accident Rate (1987) (unpublished manuscript on file with author).

n93 Injurers and victims are likely to make errors in choosing optimal forms of accident prevention and some accidents are not worth preventing.

n94 Again, this analysis puts aside considerations of greater than compensatory damages. *See supra* note 92.

n95 *See* Posner, *A Theory of Negligence,* 1 J. LEGAL STUD. 29 (1972). I am very skeptical that the negligence standard, as it is applied by courts and juries, closely resembles an economically efficient cost-benefit standard.

n96 *See* cases cited *supra* notes 76-89.

n97 As an example of the difference between savings and life insurance, a family that saves a certain amount each year for use after a wage earner's death can draw, after that event, on the accumulated savings amount (plus earned interest). In contrast, a family that purchases life insurance will receive much more in dollar benefits than it paid in premiums if the death occurs early relative to expected mortality, and much less in benefits than

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premiums paid if death occurs late.

n98 Statistical independence is when the occurrence of one event does not alter the probability of the other. For example, repeated flips of a fair coin are statistically independent events; even if the last 100 flips have all come up heads, there is still a 50% chance of tossing heads next time.

n99 *See* Marshall, *Insurance Theory: Reserves Versus Mutuality,* 12 ECON. INQUIRY 476 (1974).

n100 For a definition of variance, see *infra* note 103.

n101 The insurer may also monitor the risks of the insured's activity to persuade the insured to reduce its level of risk and provide a claims adjustment service. The relative effectiveness of insurers serving these functions is not likely to be different before and after the recent crisis. Thus, I do not regard them as central to an explanation of the crisis, even though they may be very important benefits provided by market insurance.

n102 DENENBERG, EILERS, HOFFMAN, KLINE, MELONE & SNIDER, RISK AND INSURANCE 191-92 (1964); *see also* Epstein, *Products Liability as an Insurance Market,* 14 J. LEGAL STUD. 645, 650-52 (1985) (discussing adverse selection and the failure of modern products liability law to control it).

n103 The variance of a distribution is the square of the sum of the differences between each observation and the mean: variance = delta<2> = sigma(x[i] - mean-x)<2>, where mean-x = the mean of the distribution and x[i], each observation.

n104 Again, I do not mean to minimize the productive efficiencies achieved by insurer monitoring of risky activities or by claims adjustment. *See supra* note 101.

n105 For other formulations of this point, see Cummins, *Insurer's Risk: A Restatement,* 41 J. RISK & INS. 147 (1974); Venezian, *Insurer Capital Needs Under Parameter Uncertainty,* 42 J. RISK & INS. 19 (1975).

n106 Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism,* 84 Q.J. ECON. 488 (1970). The unraveling process is described more fully and illustrated *infra* at text accompanying notes 216-26.

n107 The mutuality principle for insurance, which departs in some ways from the pooling effects of the law of large numbers, must be distinguished. *See infra* text accompanying notes 232-34.

n108 Marshall, *supra* note 99, at 477; *see infra* note 111 and accompanying text. This is also the best explanation for the terms of the typical force majeure clause in contract law.

n109 I hope it is obvious that by "narrow" I mean with small variance or concentrated around the mean as opposed to small in number.

n110 *See generally* James, *Accident Liability Reconsidered: The Impact of Liability Insurance,* 57 YALE L.J. 549 (1948).

n111 The term "risk spreading" is sometimes used to describe shifting the costs of bearing risks away from parties that generate them as, for example, assigned risk pools that shift the costs generated by more risky drivers to the less risky. I am using the term, instead, to refer to spreading that serves to reduce effective risk.

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n112 Irrelevant to this point, for example, are insurer productive efficiencies in risk monitoring, claims servicing or portfolio selection.

n113 It may exceed the sum, especially, if the total risks threaten to swamp the total assets of the insurer and there is a deadweight loss to reorganization through bankruptcy.

n114 *See* Rothschild & Stiglitz, *Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information,* 90 Q.J. ECON. 629 (1976).

n115 In this respect, the Justice Department Working Group's conclusion that state insurance regulation has not had much effect on the current insurance crisis, DOJ REPORT, *supra* note 24, at 59, 80, is likely to be a serious underestimation of the problem.

n116 For a discussion of methods of narrowing risk pools in the context of consumer product warranty insurance/repair contracts, see Priest, *A Theory of the Consumer Product Warranty,* 90 YALE L.J. 1297 (1981).

n117 Of course, there is always some level of redistribution in any risk pool from low-risk insureds to high-risk insureds because of the impossibility of perfect segregation. Insurance will still remain attractive to the low-risk insured if the extent of redistribution is less than the insured's relative risk aversion. Obviously, the more closely the premium for the risk pool approximates the risk brought by the low-risk insured, the more attractive market insurance becomes.

n118 See Zeckhauser, *Coverage for Catastrophic Illness,* 21 PUB. POL'Y 149 (1973), for interesting variations on this point.

n119 I am discussing here term insurance, rather than whole life insurance. Because whole life incorporates a predominant savings component, decisions about its purchase are different.

n120 Zeckhauser, *supra* note 118, at 157, suggests an old folks' home whose inhabitants are without descendants, and spend every resource they have while alive, but bequeath the assets they retained as necessary during life to the other inhabitants of the home for current enjoyment.

n121 Similar problems of measurement also explain why life insurance (unlike health or disability coverage) is never offered subject to subsequent valuation, but rather is offered in prespecified amounts.

n122 In fact, consumers as a group do pay *ex ante* for the excessive care demanded under a nodeductible policy, because the insurer exacts higher premiums to cover the higher amount of claims. *Ex post,* however, any individual insured faced with the choice of levels of medical care has much more to gain by using too much care than he or she loses in higher premiums. *See* Pauly, *The Economics of Moral Hazard: Comment,* 58 AM. ECON. REV. 531, 533-35 (1968).

n123 Controlling moral hazard, of course, is likely to also include some degree of hands-tying, its more typical explanation. *See id.* at 535.

n124 For example, Blue Cross-Blue Shield typically pays only 80% of major medical expenses. The insured coinsures the other 20%.

n125 I ignore here the effects of the Geneva and proposed Montreal Conventions limiting damages for international (but not United States originating) air travel. 47 Stat. 2021 (1929). These Conventions reduce differences in risk pools by limiting damages owed by the

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airlines to victims of air crashes.

n126 The most common and best-known alternative to market insurance is self-insurance -- the maintenance of reserves adequate to meet expected losses and the threat of bankrupty if these reserves prove too low. *See infra* notes 190-93 and accompanying text. Self-insurance has been popularly called "going bare." A recently popular alternative to market insurance, that is something of a hybrid of going bare and buying standard insurance, is insuring through industry mutuals. *See infra* text accompanying notes 227-42.

n127 The purchase of market insurance by a firm, thus, is likely to involve more complicated questions of corporate finance. *See* Mayers & Smith, *On the Corporate Demand for Insurance,* 55 J. BUS. 281 (1982); *see also infra* text accompanying note 164.

n128 For a discussion of the corporate demand for insurance, see *infra* text accompanying notes 159-64.

n129 *See supra* Section II.

n130 DOJ REPORT, *supra* note 24, at 49, 52.

n131 See *supra* text accompanying notes 65-71.

n132 I am grateful to Ralph A. Winter, Armen Alchian, and Jack Carr for their comments on this point.

n133 Ralph A. Winter has shown that insureds with relative risk aversion indices greater than one will be more likely to stay in than drop out of risk pools. R. Winter, Note on the Effect of Scalar Changes on Adverse Selection (1986) (unpublished manuscript on file with author).

n134 *See supra* Section II.

n135 DOJ REPORT, *supra* note 24, at 35-42, 45-52.

n136 *See* G. PRIEST, COMPENSATION SYSTEMS AND TORT LAW: A PRELIMINARY COMPARATIVE APPROACH, (Program in Civil Liability Working Paper No. 50, Yale Law School, Oct. 1986), in RISK, COMPENSATION & LIABILITY: THE POLICY CHOICES (1986); *see also* SEN. SUBCOMM. ON THE AGED, 99TH CONG., 2D SESS. WORKING PAPER NO. 1: A PROFILE OF HEALTH BENEFITS AND THE UNINSURED (Subcomm. Print Oct. 17, 1986).

n137 SEN. SUBCOMM. ON THE AGED, *supra* note 136.

n138 This point is emphasized in M. Trebilcock, *supra* note 72, at 3.

n139 For earlier discussions of this point, see Danzon, *Tort Reform and the Role of Government in Private Insurance Markets,* 13 J. LEGAL STUD. 517 (1984); Rea, *Nonpecuniary Loss and Breach of Contract,* 11 J. LEGAL STUD. 35 (1982).

n140 *See* M. PETERSON, COMPENSATION OF INJURIES: CIVIL JURY VERDICTS IN COOK COUNTY 21 n.6 (Rand Corp. Report No. R-3011-ICJ, 1984) (reporting views of lawyers and claims adjusters).

n141 Derived from *id.* at 14 and M. PETERSON & G. PRIEST, *supra* note 68, at 23.

n142 M. PETERSON, CIVIL JURIES IN THE 1980S: TRENDS IN JURY TRIALS AND VERDICTS IN CALIFORNIA AND COOK COUNTY, ILLINOIS 21 (Rand Corp. Report No. R-3466-ICS 1987).

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The mean verdict over the same period was $ 828,000, for which the disparity between the first-party insurance amount and the tort judgment would be far greater.

n143 VICTOR, COHEN & PHELPS, WORKERS' COMPENSATION AND WORKPLACE SAFETY 15 (Rand Report No. R-2918-ICJ, 1982).

n144 Viscusi, Economic Implications of Liability for Job Accidents, at n.14 (1987) (unpublished manuscript on file with author).

n145 Derived from M. PETERSON, *supra* note 140, at 14, 19. I am assuming here that the weekly maximum is ineffective and that there is no lump-sum award for permanent disability, assumptions which work in opposite directions.

n146 BLUE CROSS-BLUE SHIELD OF CONNECTICUT, THE COMPREHENSIVE HEALTHCARE PLAN; (1985) (deductibles of $ 400 and $ 1500 are also available); BLUE CROSS-BLUE SHIELD OF CONNECTICUT, SEMI-PRIVATE PLAN BENEFITS (1985).

n147 This assumption is quite rough. Some Blue Cross-Blue Shield Plans have out-of-pocket dollar limitations, although these typically apply only to basic health coverage and non-major medical.

n148 *See supra* note 146.

n149 There is some confirmation from studies of damage awards that have found the largest increases in medical damage claims in recent years in cases that involve more severe injuries, cases in which this moral hazard component is greatest. M. PETERSON, *supra* note 140, at 23-27

n150 *Cf.* J. RAWLS, A THEORY OF JUSTICE (1970).

n151 In addition, even if this percentage increase were uniform for all claims, a selective effect would lead to a resorting of those claims filed, pressed and successfully recovered, which will increase risk pool variance. Litigation costs vary by the size and merits of the claim. There are large fixed costs in the preparation of any tort claim. As a consequence, large claims tend to be overrepresented in any trial or settlement sample. *See* Priest & Klein, *The Selection of Disputes for Litigation,* 13 J. LEGAL STUD. 1 (1984). Virtually all discussions of recent increases in the size and frequency of large judgments in litigated cases fail to take this selection effect into account. *See, e.g.,* DOJ REPORT, *supra* note 24, at 36-40. Stated otherwise, low value tort claims -- those that reduce the average claim in a risk pool (the low-risk) -- are more likely to be culled from the pool, increasing pool variance.

n152 *E.g.,* FEDERAL TRADE COMM'N, WARRANTIES, RULES, CONSUMER FOLLOW-UP STUDY (Draft Final Report 1983).

n153 *See also* Epstein, *supra* note 102, at 668.

n154 Manufacturers, of course, cannot possibly have a comparative advantage to insurers in terms of creating risk pools. The purported aggregation advantage of manufacturers must be with respect to the transaction costs of entering into an insurance contract.

n155 Some commentators have alleged that, in particular contexts, particularly automobile casualty insurance, the limits on mandatory insurance may lead some low-income individuals into differentially engaging in high-risk activities because of the relatively greater likelihood that the damage judgment will exceed the person's assets. The best example is a teenage driver. *See* Keeton & Kwerel, *Externalities in Automobile Insurance and the Underinsured Driver Problem,* 27 J.L. & ECON. 149 (1984). The magnitude of this effect, as well as its

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premium. [37]

It should be emphasized that these drastic changes in insurance coverage occurred despite any evidence of increases in the underlying riskiness of the products or services affected by the crisis. Indeed, a recent study of underlying levels of risk asserts that injury rates have successively declined over time for almost all injury categories. [38]

To explain the modern crisis fully, a theory must account for all of these phenomena. It must explain not only the increase in insurance premiums, but also the trend toward self-insurance, the restructuring of the insurance contract, and the refusal of insurers to offer coverage in some markets at any premium. Such an explanation must also show why these changes occurred only within commercial casualty insurance lines and not in auto, life or health insurance lines and why these changes occurred despite any evident increase in the underlying accident or injury rate. None of the three existing sets of theories of the crisis does so.

A. *Collusion Theories*

It is a very common view that the insurance crisis has been caused by explicit price-fixing by commercial casualty insurers. [39] The price-fixing hypothesis, however, is implausible on its face. Obviously, the sudden increase **[*1528]** in premiums is consistent with price-fixing. Collusion, however, cannot explain why the basic insurance policy has been restructured. Except in very rare circumstances involving forms of localized price discrimination, monopolistic and competitive industries will offer products identical in all characteristics except price. [40] The commercial casualty insurance lines, in fact, are the least likely to support successful collusion because of the highly individualized character of commercial underwriting. In these lines, the extension or exclusion of coverage very frequently is individually tailored for specific firms, which makes pricing agreements among competitors extremely difficult, if not impossible, to police. [41] Finally, the refusal of insurers in several commercial lines to offer coverage at any premium is totally inconsistent with collusion. Since antitrust enforcement began in the 1890's, there have been very few examples of monopolists or conspirators who have rebuffed consumers begging to pay any price for a product, as insurers have rebuffed nurse-midwives and day care operators, among others.

A variant of the price-fixing theory is the claim that the crisis has been concocted by concerted manipulation of insurer financial accounts. According to this explanation, representations of the insurance industry's precarious financial position are gross exaggerations, designed to mislead legislators and the public about the need for tort reform. [42] In recent months, there has been heated debate over the implications of very recent increases in reported insurance industry earnings, [43] a debate which derives from claims of this nature.

The manipulation claim is fueled by the unusual character of insurance company accounting. Insurance company profits are the net of premium plus investment returns less losses (payouts and expenses). Losses, of course, are often paid out years after the receipt of premiums. To calculate a current year profitability against collected premiums, insurers report a figure called incurred losses which consists of the sum of losses **[*1529]** already paid, unpaid losses where the loss-generating event has occurred, and what are known as "losses incurred but not reported." [44] Losses incurred but not reported (IBNR) are in essence estimates by insurers of claims that will be, but have not yet been, filed against the current policy.

The insurance industry has justified recent large premium increases, and the restrictions introduced in coverage within the past year, by showing an excess of incurred losses over premium and investment returns. But the largest component of these incurred losses has been IBNR, which of course represents estimated rather than actually paid amounts. The

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applicability to any contexts involving product or service use, is unclear.

n156 *See* G. PRIEST, *supra* note 136, at 21-22.

n157 J. KAHALIK & N. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 71 (Rand Corp. Rep. No. R-3391-ICJ 1986).

n158 More precisely, 29% of tort judgment amounts represent defendants' costs, averaged to all users and consumers; 24% represent plaintiffs' costs, charged differentially to individual claimants. *Id.*

n159 These considerations do not apply to close corporations or corporations whose basic assets are individual human capital, such as doctors or other professionals.

n160 Main, *Corporate Insurance Purchases and Taxes,* 50 J. RISK & INS. 197 (1983) (citing FORTUNE, HOW MAJOR CORPORATIONS VIEW PROPERTY/LIABILITY INSURANCE (1973)).

n161 Mayers & Smith, *supra* note 127, at 285-86.

n162 *Id.* at 289-93. *See generally* Main, *supra* note 160.

n163 There may be a reason for a corporation to increase market insurance, however, if it will cover punitive damages, since insurance premiums are tax deductible, but punitive levies are not.

n164 *See* Mayers & Smith, *supra* note 127, at 283-84; *see also* Mayers & Smith, *Contractual Provisions, Organizational Structures and Conflict Control in Insurance Markets,* 54 J. BUS. 407 (1981).

n165 *See, e.g.,* R. WINTER, *supra* note 58; DOJ REPORT, *supra* note 24.

n166 *See supra* text accompanying notes 111-13.

n167 *See* R. WINTER, *supra* note 58.

n168 *See* Brown, *Product Liability: The Case of an Asset with Random Life,* 64 AM. ECON. REV. 149 (1974); Spence, *Consumer Misperceptions, Product Failure and Producer Liability,* 44 REV. ECON. STUD. 561 (1977).

n169 *See, e.g.,* Jeep Corp. v. Murray, 101 Nev. 640, 708 P.2d 297 (1985).

n170 *See, e.g.,* Leichtamer v. American Motors Co., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1984).

n171 *See* Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960) (refusal to enforce disclaimers of liability for personal injury in automobile warranties).

n172 *See infra* text accompanying notes 216-21.

n173 *Sorry, Your Policy Is Cancelled, supra* note 2, at 19. For other discussions of the effects of insurance premium increases on the ski industry, see N.Y. Times, Feb. 15, 1986, at 1, col. 1; Wall St., J., Jan. 21, 1986, at 31, col. 1.

n174 *Sorry, Your Policy Is Cancelled, supra* note 2, at 18.

n175 FORTUNE, Mar. 3, 1986, at 20, 23.

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n176 Wall St. J., Jan. 21, 1986, at 31, col. 5.

n177 N.Y. Times, Mar. 26, 1986, at C12, col 4.

n178 *See supra* text accompanying notes 16-17.

n179 *Sorry, Your Policy Is Cancelled, supra* note 2, at 18.

n180 *Id.* at 18-19; Wall St. J., Jan. 21, 1986, at 31, col. 1.

n181 Brody, When Products Turn into Liabilities, FORTUNE, Mar. 3, 1986, at 20; N.Y. Times, Feb. 1, 1986, at 1, col. 5; Wall St. J., Feb. 3, 1986, at 5, col. 1.

n182 Conf. Bd., *supra* note 14.

n183 Zuckerman, *supra* note 31, at 132; *see also* Danzon, Medical Malpractice: An Overview of the Issues 12 (1987) (unpublished manuscript on file with author) (reporting that 23% of OBG specialists have stopped performing certain high-risk procedures).

n184 *Sorry, Your Policy Is Cancelled, supra* note 2, at 18.

n185 The 1983 survey showed that 31.4% of doctors nationwide had increased fees in response to increases in malpractice insurance premiums. Zuckerman, *supra* note 31, at 132.

n186 New Haven J. Courier, Jan. 29, 1986, at 28, col 3.

n187 *See* Wall St. J., Jan. 21, 1986, at 31, col. 1.

n188 In contrast, other regulated enterprises can pass along increased insurance costs with commission approval. For example, the Century Cartage Company, a small trucking firm, was allowed by the Georgia Public Service Commission -- which presumably restricts entry into the industry -- to pass along to consumers part of its increases in insurance premiums. *Sorry, Your Policy Is Cancelled, supra* note 2, at 16.

n189 Note that when the relatively high-risk providers discontinue the provision of products and services, the effect is the reverse.

n190 N.Y. Times, Mar. 7, 1986, at D1, col. 3, D4, col. 1.

n191 *See* Mayers & Smith, *supra* note 127, at 287 (importance of adopting some corporate form beyond simple reserve set-asides to allow deductibility).

n192 Patricia Danzon reports that 40% percent of the physicians and hospitals are now insured through small mutual insurance groups. P. DANZON, *supra* note 31, at 93. These groups write 50% of total malpractice coverage. Danzon, *supra* note 183, at 1.

n193 Tillinghast estimated in 1986 that self-insurance composed 47% of the property/casualty market, although the broker Fred S. James & Co. estimated the amount at 25%. Taravella, *Alternative Risk Financing Growing in Popularity,* BUS. INS., Jan. 26, 1987, at 3, 14. Separately, Mitchell J. Cole of Tillinghast estimates self-insurance contributions will equal 50% of commercial insurance by 1989. Aschkenasy, *Self-Insurance Gaining on Commercial Carriers,* NAT'L UNDERWRITER, Mar. 9, 1987, at 1, col. 4; *see also supra* note 34.

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n194 *See, e.g.,* DOJ REPORT, *supra* note 24.

n195 BUS. INS., July 8, 1985, at 1. In addition, the carrier increased the premium from $ 116,000 to $ 1.2 million for the same amount of coverage.

n196 *Sorry, Your Policy Is Cancelled, supra* note 2, at 19.

n197 That low-risk insureds complain about increased deductibles does not mean that they do not benefit from the increase. Low-risk members complain when deductibles are increased, as any consumer complains of an increase in effective price. Low-risk insureds, however, would complain more (or leave the pool entirely) if the premium were raised by the amount necessary to sustain the previously lower deductible. For example, see the report of the decision of Hardee's Food Systems to select a deductible of $ 2 million in conjunction with installing non-skid floors to minimize falls. According to risk manager Susan Werner, Hardee's "just buys insurance against catastrophe . . . . We have a good loss prevention program." BUS. WEEK, *supra* note 34, at 122.

n198 *Sorry, Your Policy Is Cancelled, supra* note 2, at 20. There is every reason that insurers should exclude coverage of such claims, and that their exclusions should be enforceable. Sexual abuse of children is not the form of probabilistic loss for which the insurance function is appropriate. It is unclear, however, whether courts will find these exclusions enforceable in the compelling context of a suit by an abused child against a day-care center with low assets and an insurer with substantial assets where the motivating judicial objective is to maximize insurance coverage. The complete withdrawal of insurers from day-care coverage is strong evidence that judicial efforts to force coverage of uninsurable risks of this nature are short-sighted, reducing the effective insurance levels.

n199 *Id.* at 19.

n200 Wall St. J., Jan. 21, 1986, at 31.

n201 Toronto Star Field, Feb. 20, 1986, at A7.

n202 *Sorry, Your Policy Is Cancelled, supra* note 2, at 17.

n203 *See, e.g.,* the Directors' and Officers' policies offered by the American Home Assurance Company, 1986.

n204 Even "low-risk" cities may have purchased $ 15 million coverage in the past, because such potential losses were within the distribution of expected outcomes -- although far from the mean. Cities for which $ 15 million is close to the mean risk of loss are disadvantaged by the reduction in aggregate coverage.

n205 BUS. INS., July 1, 1985, at 12.

n206 BUS. INS., July 8, 1985, at 30.

n207 Professional errors and omissions coverage is often offered separately.

n208 WYATT CORP., 1985 DIRECTORS AND OFFICERS LIABILITY INSURANCE SURVEY 21-24 (1985).

n209 *Id.* at 21 (exclusion reported by 40% of survey participants).

n210 Wall St. J., Nov. 20, 1985, at 33, col. 4; *see also infra* text accompanying notes 213-15.

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n211 In this respect, the retro-date provision serves a similar function as a provision excluding pending or prior litigation.

n212 Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied,* 455 U.S. 1007 (1982).

n213 The widespread adoption of claims-made policies, so hotly contested in the insurance industry, has not been appreciated for its role in extending insurance availability. See, for example, the discussion in the Wall St. J., Nov. 20, 1985, at 33, col. 4.

n214 These policy terms are described in M. Aickin, Claims Made Wordings: How Appropriate Are They to Liability Problems? (1986) (unpublished paper presented at Seminar on Liability, Insurance and Safety Regulation, The Geneva Association, Apr. 7, 1986). For the most recent formulation, see INSURANCE INFORMATION INSTITUTE, INSURANCE NEWS: ISO BROADENS CGL COVERAGE AND CONSUMER PROTECTIONS; REGULATORS INTEND TO APPROVE PROGRAM (Jan. 14, 1986) (describing ISO and NAIC draft claims-made policies).

n215 *Id.*

n216 Wall St. J., Jan. 21, 1986, at 1, col. 1.

n217 New York Times, Mar. 8, 1986, at 35, col. 3.

n218 Toronto Star Field, Feb. 20, 1986, at A7.

n219 *Sorry, Your Policy Is Cancelled, supra* note 2, at 17.

n220 BUS. INS., July 1, 1985, at 12.

n221 *Sorry, Your Policy Is Cancelled, supra* note 2, at 18. For an explanation of why this company would pay for such a policy, see *infra* note 222.

n222 Apparently, the company chose this form of savings because "customers demand proof of insurance before they will give Specialty any business." *Id.*

n223 *See supra* text accompanying notes 201-10.

n224 N.Y. Times, Mar. 8, 1986, at 35, col. 3.

n225 The reduction of aggregate policy limits and the expansion of specific exclusions, of course, are forms of partial withdrawal of coverage. They represent increasingly desperate efforts of insurers to ward off the unraveling of insurance pools as risks generated by increasing legal exposure continue to rise. Where insurers are unable to discover ways to isolate low-risk members, they must withdraw the offer of coverage altogether.

n226 *See supra* text accompanying notes 176-84.

n227 *See supra* text accompanying notes 190-93.

n228 Wall St. J., Jan. 21, 1986, at 31, col. 1. Industry groups denied commercial liability insurance have pressed for Congressional enactment of a Risk Rentention Act facilitating the group mutual form. *See* Gesil, *House Ready To Act on Risk Retention Bill,* BUS. INS., July 28, 1986, at 1. Dennis Connolly of Johnson & Higgins, an insurance broker actively involved in the formation of risk retention groups, describes those that have successfully formed such groups "the cream of the dregs." Public comment at conference "Solutions to the Insurance

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Crisis: Exploring the Link Between Tort Reforms and Insurance Regulation," Program in Civil Liability, Yale Law School, February 28, 1987.

n229 *See infra* text accompanying notes 237-39.

n230 N.Y. Times, Mar. 31, 1986, at 37, col. 2.

n231 Posner, *Trends in Medical Malpractice Insurance, 1970-1985,* 49 LAW & CONTEMP. PROBS. 37, 42-44 (1986).

n232 *See generally* Hansmann, *The Organization of Insurance Companies: Mutual Versus Stock,* 1 J.L. ECON. & ORG. 125 (1985).

n233 *Id.* at 148.

n234 Hansmann alludes to this difference. *Id.*

n235 Victim claimants against a bankrupt firm, of course, do receive some share of full tort law damages. Strictly speaking, the issue is whether this share is greater or less than the amount of first-party coverage the claimants would have purchased.

n236 For example, by first-party insurers deciding to insure only some number of workers exposed to risks of some particular cumulative disease.

n237 *See* ONTARIO TASK FORCE ON INSURANCE, FINAL REPORT, May 1986, at 370-71.

n238 *Sorry, Your Policy Is Cancelled, supra* note 2, at 18.

n239 BUS. INS., Jan. 26, 1987, at 16; *see also* BUS. INS., July 15, 1985, at 3, for a description of the 191-city Texas Municipal League.

n240 *See* BUS. INS., *supra* note 195, at 1.

n241 *Sorry, Your Policy Is Cancelled, supra* note 2, at 18.

n242 BUS. INS., July 8, 1985, at 1, 30.

n243 *See infra* note 261.

n244 Put differently, insurance markets cannot be sustained where there is a substantial range for moral hazard. This is the reason that virtually all policies, including first-party policies, exclude coverage of intentional or reckless acts. *See also infra* note 249 for a discussion of the insurance difficulties of dramshop liability.

n245 It is possible that insurance might be sold to provide a form of claims adjustment or to capitalize on the variance in time that claims are filed, much like the sale of insurance to MGM after the fire at its MGM Grand Hotel in the early 1980's. For a contrasting interpretation of the *ex post* insurance of the MGM Grand, see Mayers & Smith, *supra* note 127, at 285-86.

n246 Workers' compensation may involve long tails of liability (the asbestos workers were workers), but generally limits damages to amounts far less than those available under tort law theories of recovery, incorporates deductibles and coinsurance features, and does not typically employ the tort system for the delivery of benefits. Though nominally paid for by the employer, workers' compensation much more closely resembles first-party than third-party tort law insurance.

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n247 *See supra* text accompanying notes 232-42.

n248 *See generally* CUOMO COMM'N, *supra* note 17, at 35-39 (discussing self-insurance by New York City).

n249 The relatively greater difficulty of insuring small entities may also explain the refusal of some insurers to offer dramshop coverage.

n250 *See Enterprise Liability, supra* note 28, at 505-19.

n251 The figure 35 million is often mentioned, but represents those who fail to possess insurance for any period throughout the year. It overstates the number denied medical care because of the absence of insurance. *See* SEN. SUBCOMM. ON THE AGED, *supra* note 136.

n252 *Id.*

n253 Of course, because our society prevents collection of some sets of claims (e.g., elimination of imprisonment for debt, bankruptcy protection), there will always be members of the population who are better off uninsured. *See also* Keeton & Kwerel, *supra* note 155.

n254 *See* SEN. SUBCOMM. ON THE AGED, *supra* note 136.

n255 *Id.*

n256 These issues are addressed in more detail in Priest, Protecting the Poor through Tort Law, (1987 unpublished manuscript on file with author).

n257 *See* ALASKA STAT. § 09.17.010(b) (1986) ($ 500,000); Colo. Rev. Stat. § 13-21-102.5(3) (Supp. 1986) ($ 500,000 if clear and convincing evidence, otherwise $ 250,000); Fla. Stat. § 768.80 ($ 450,000). But see Smith v. Department Ins., Fla. Sup. Ct. No. 69,551 (April 23, 1987) (holding cap unconstitutional as violating right to access to courts and right to trial by jury); Hawaii: CCH Prod. Liab. Rep. P91,230 (to be codified at HAW. REV. STAT. § 663 (award for pain and suffering in selected tort actions limited to $ 375,000); Kans. Stat. Ann. § 60-3407 (1986) ($ 250,000, medical malpractice, subject to cost of living adjustment); Maine, LD2080, 1986 ($ 250,000, alcohol servers (includes some economic losses)); Md. Ann. Code art. x, § 11-108(B) ($ 350,000); Massachusetts, H.6172 ($ 500,000 except where substantial impairment or disfigurement); Michigan, H.5154 ($ 225,000, medical malpractice (with exceptions)); Minn. Stat. Ann. § 549.23 2 (West Supp. 1986) ($ 400,000 on intangible lossess); Rev. Stat. Mo. § 538.210 (1986) ($ 350,000 medical malpractice); N.H. Rev. Stat. Ann. § 508:4-d (Supp. 1986) ($ 875,000); South Dakota, S.282, 1986 ($ 1,000,000 medical malpractice (all damages)); Utah, S.111, 1986 ($ 250,000 medical malpractice) (also total damage limits on dram shop liability); Wash. Rev. Code Ann. § 4.56.250(2) (West Supp. 1987) (multiple of average annual wage times life expectancy); West Virginia, S.714, 1986 ($ 1,000,000 medical malpractice) ($ 500,000, political subdivisions); Wisconsin, Special Session AB8, 1986 ($ 1,000,000). The Supreme Court of Canada has adopted a cap on non-economic losses by judicial decision (indexed, currently equal to roughly $ 215,000 Canadian). Andrews v. Grand & Toy Alberta, Ltd., (1978) 83 D.L.R. (3d) 452; Thornton v. School Dist. No. 47 (1978) 83 D.L.R. (3d) 609.

n258 ALASKA STAT. § 09.17.020 (1986) (no punitive damages unless supported by clear and convincing evidence); COLO. REV. STAT. §§ 13.21-102(1)(a) and -102(4) (Supp. 1986) (not greater than compensatory, one-third to state general fund); FLA. STAT. § 768.73 (1986) (not greater than three times compensatory, 60% to state fund); Hawaii, S.1, 1986; ILL. REV. STAT. ch. 110, para. 2-1207 (allowing trial court to enter remittitur and conditional new trial); IOWA CODE § 668A.1 (requiring jury to answer special interogatories before

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awarding punitive damages); MINN. STAT. ANN. § 549.191 (West Supp. 1986) (punitive damages may not be sought in original complaint; complaint may be amended to include punitive damages only if court finds prima facie evidence at hearing on motion to amend); Missouri S.742 (outlawed in product liability actions); N.H. REV. STAT. ANN. § 507:16 (Supp. 1986) (no punitive damages to be awarded in any action unless otherwise provided by statute); OKLA. STAT. ANN. tit. 23, § 9 (West 1987) (equal to compensatory damages unless court finds clear and convincing evidence of reckless disregard for rights of another); S.D.: Prod. Liab. Rep. (CCH) P94,385 (1986) (1986 S.D. Laws S.B. 280; only if court finds reasonable basis to believe wilful, wanton or malicious conduct occurred can discovery be had relating to punitive damages).

n259 COLO. REV. STAT. § 13-21-111.5 (Supp. 1986); FLA. STAT. § 768.81; Hawaii: CCH Prod. Liab. Rep. P91,210 (1986) (to be codified at HAW. REV. STAT. § 663) (for noneconomic damages except in specified types of cases); *id.* P91,433 (1986 Ill. Laws S.B. 1200 (except for medical expenses and when tortfeasors' fault is greater than or equal to 25% of total fault); MO. REV. STAT. § 538.230 (1986); Utah Laws 78-27-38 (Supp. 1986); Wyo. C.C.P. § 1-1-109 (1986); *see* NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 25.

n260 *E.g.,* ALASKA STAT. § 09.17.070 (Supp. 1986); CONN. GEN. STAT. § 52-225(b) (Supp. 1987); MINN. STAT. § 548.36 (Supp. 1987); *see* NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 25.

n261 *E.g.,* Municipal Liability: GA. STAT. § 36-33-1 (Supp. 1986); LA. STAT. § 9:2798.1 (1985); Dramshops: N.H. STAT. 507-F:1 et. seq. (Supp. 1986); ILL. STAT. 43 P135 § 6.21 (1986); Nonprofits: N.H. STAT. 508-15 (Supp. 1986); LA. STAT. § 9.2792 (1985); *see* NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 25.

n262 The Need for Legislative Reform, *supra* note 64, at 15-43 (discussing erosion of fault-based liability and increasing damage awards).

n263 Note that my example of defamation extends only to measures of damages. In the defamation area, as in other areas of tort law, there has been a substantial expansion of substantive liability on insurance grounds that is very difficult to defend.

n264 *See generally* Ellis, *Fairness and Efficiency in the Law of Punitive Damages,* 56 S. CAL. L. REV. 1, 10 (1982).

n265 For a further explanation of my views on this subject, see G. Priest, Modern Tort Law and Its Reform (unpublished manuscript on file with author, 1987).

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manipulation claim is that insurers have inflated IBNR estimates in order to suggest financial insecurity in the insurance industry and, thus, the need for tort reform. [45]

There is no doubt that IBNR amounts, as estimates, are manipulable. IBNR amounts can never be subjected to definitive evaluation. The manipulation of IBNR, however, can account for only a small set of the phenomena of the insurance crisis. Even if insurers can gain from financial manipulations of this sort, there is no plausible reason why insurers have manipulated IBNR amounts only in commercial casualty lines, rather than in other lines (such as auto or domestic casualty), where payouts might also be reduced by changes in the law. In addition, the alleged manipulation of IBNR would not explain why the insurance contract has been restructured to reduce levels of insurance coverage. Similarly, why have insurers withdrawn from some markets entirely, refusing to offer coverage at any premium? The manipulation theory cannot answer this question.

B. *Insurance Cycle Theories*

Probably the most prominent explanation of the crisis is the insurance cycle theory. According to this theory, insurance premiums were low during the late 1970's and early 1980's because interest rates and investment returns were high. In recent years, as interest rates have fallen with the decline in inflation, insurers have been forced to increase insurance premiums. [46] The crisis, thus, is no more than a predictable response to exogenous financial movements. It follows that, in the future, as interest rates return to higher levels, insurance premiums will decline and the crisis will pass. A common variant of the insurance cycle theory adds a claim of cutthroat **[*1530]** competition to the account. According to this version, during the days of high interest rates in the early 1980's, insurers wrote policies promiscuously, taking on any risks to accumulate premiums for investment. Now the industry has learned how myopic the scramble for insurance premiums was. Risks that should have been expected to be poor are only now being discovered to be poor. [47] Premiums must be raised to reflect underlying risks more accurately. [48]

Insurance cycle theories are superficially plausible because, in fact, premium cycles related to financial returns are inevitable. During the period between receipt of policy premiums and payoff of subsequent claims, insurers gain substantial returns from investment income. Competition among insurers forces them to lower premiums as investment gains rise and to raise premiums as investment returns fall. It follows that, to the extent insurers have invested in variable interest obligations, premiums will rise as interest rates decline, and the reverse. It is uncontrovertible that interest rates have declined since the early 1980's.

The insurance cycle theory, however, provides only a very partial explanation of the crisis. First, it seems unlikely that recent alterations in insurer investment portfolios provide a full explanation of the extraordinary premium increases observed during the current crisis. [49] Over the past two years, interest rates have declined only modestly. Moreover, insurers can hedge against interest rate changes by choice of investment portfolio. Common stock and many land investments, for example, have increased in value substantially. [50] Second, the insurance cycle theory does not explain why the current crisis has occurred only in selected commercial casualty lines. Declines in interest rates and investment income affect all insurance premiums. Over the past two years, for example, auto and household premiums have risen modestly (four to nine percent annually), [51] at rates that correspond to the real rate of interest, but that do not remotely resemble rates of increase in commercial casualty premiums. Third, changes in investment returns do not account for the most puzzling feature of the crisis: the refusal of insurers to offer coverage at any premium. The insurance cycle alone may lead to periodic insurance premium **[*1531]** adjustments, but it does not compel withdrawal from the business of offering insurance altogether.

Some commentators have tried to explain coverage restrictions and the concentration of the crisis in commercial casualty lines, by asserting a constraint on total insurance capacity. If

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insurers have reached an upper bound to the aggregate coverage they can write, then as insurers face either a larger pool of risks or a smaller addition to surplus from investment returns, they must reduce total coverage either by terminating some current policies, reducing levels of coverage within current policies, or both. An insurance capacity limitation, thus, might explain why insurers restructured contracts to lower coverage levels and why they withdrew from some markets altogether -- in particular, highly risky commercial casualty lines. [52]

The sources of the alleged insurance capacity constraint, however, are mysterious. Supporters of the theory invoke the behavior of some state insurance commissions, which prohibit insurers from exceeding a premium-to-surplus ratio of 4:1 and often recommend a ratio of 3:1. [53] More generally, commission or not, the 4:1 premium-to-surplus ratio is widely regarded as a "prudent" insurer objective. [54] Other commentators invoke the reinsurance market as a capacity constraint. [55] It is widely known that European reinsurers have drastically reduced underwriting capacity in U.S. markets.

The limited capacity explanation, however, is not generally helpful. First, it is not clear that insurance capacity has been exhausted. The property/casualty premium-to-surplus ratio in December 1984 was 1.85:1, and in December 1985 (the most recent statistic available) was 1.91:1, [56] both figures are far below the "prudent" or commission-mandated ratios of 4:1 and 3:1. [57] Second, even within specific insurance **[*1532]** lines, the premium-to-surplus ratio can be altered by insurer adjustments to surplus by means of (admittedly manipulable) IBNR entries or, more legitimately, by reinsurance agreements or capital formation. Reinsurance availability has surely declined, but this fact cannot be an explanation of the insurance crisis in the United States. Reinsurance capacity measures the extent to which reinsurers are willing to invest in U.S. markets; the decline in reinsurance capacity, thus, is the problem to be explained. What must be determined is why individual insurers and reinsurers have concluded that they cannot make money in commercial casualty insurance lines, despite the presence of insureds who are pleading for coverage. [58]

C. *The Justice Department's Tort Law Theory*

In a highly influential report, the United States Department of Justice has attributed the insurance crisis to increases both in tort claim frequency and in the size of damage recoveries in successful tort actions and settlements. The report documents an increase of 758% in federal product liability actions from 1974 to 1985, [59] a doubling of the rate of medical malpractice lawsuits from 1976 to 1981, and an increase of 141% in claims against municipalities from 1979 to 1983. [60] Overall, average damage awards have increased by fifteen percent annually since 1975. [61] The Department claims, in addition, that tort law rules have become more uncertain in recent years, exacerbating the effects of increasing claims and damages. [62] The results of the study led the Department to recommend a wide-ranging set of tort law reforms, including reinstating a fault liability standard, adopting scientific, rather than less stringent legal, causation standards, instituting a cap on non-economic damages, and eliminating joint and several liability, among others. [63] The argument put forth by the Justice Department's report has provided the principal justification for the enactment of diverse state legislation incorporating many of the Department's proposed reforms. [64]

The Justice Department's conclusions have been contested, most vigorously **[*1533]** in a study by the National Center for State Courts [65] which analyzed changes in state court, rather than federal court, filings. Of course, the very largest proportion of tort actions originate in state, not in federal, courts. The Center claims to find "no evidence to support the . . . existence of a national 'litigation explosion' in state trial courts during the 1981-84 time period." [66] Instead, the Center found a leveling off or even a decrease in litigation volume in the twenty states for which statistics were reported. [67]

Neither the Justice Department's nor the National Center for State Courts' statistics,

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however, is convincing. Although state court statistics provide the better index of tort litigation, the Center's study is misleading because its data are so highly aggregated. The volume of civil complaints and trials is dominated by auto collision, slip and fall, and other kinds of property injury cases, [68] which no one claims are affected by the current insurance crisis. Thus, an aggregate leveling or even decline in tort litigation may conceal substantial litigation increases in the specific areas of commercial activity most seriously affected.

The Justice Department's study, in contrast, does report caselaw trends in fields subjected to substantial premium increases or withdrawals of insurance coverage. Yet the Justice Department's study falls far short of documenting the source of the current crisis. The increase in rates of claims and size of damage awards reported by the Justice Department are far smaller than reported increases in insurance premiums. The report cites a 758% increase in federal product liability filings, but over an eleven year period, 1974-1985. [69] The increase in federal products liability filings from 1984 to 1985 was only about twenty percent. The increase in average damages awarded was about eighty percent, but it followed a drop of nearly twenty-five percent from 1983-1984. [70] Similarly, the number of malpractice actions more than doubled, but over a five-year period; claims against municipalities increased 141% percent, but over a four-year period. [71] No trial or settlement statistics, however, have shown increases that **[*1534]** even remotely correspond to the increases in insurance premiums at multiples of four, five, ten, fifteen, and more over a period of a few months.

Other commentators have criticized even the attempt to relate past tort payouts to current insurance premiums. Both Michael Trebilcock and Richard Epstein, for example, have argued that current premium levels need not relate in any way to past claims experience. Current premiums, instead, are set with respect to estimates of future claims experience. [72] In this view, insurance premiums represent a form of futures market for expected claims, just as stock prices reflect estimates of future corporate income.

Analytically, this proposition is surely correct. Yet there remains substantial reason to be skeptical as to why insurers, observing rapid (but not extraordinary) increases in claim frequency and damage levels over many years, would suddenly predict future increases at unprecedented levels. Nevertheless, like insurer estimates of IBNR, there is no way definitively to evaluate this kind of insurer calculation. Thus, however accurate the depiction of the relation between current premiums and future claims, the relation is unhelpful. It provides us with no method for determining the source of the crisis.

None of the three theories, then, can adequately explain the current crisis. Sections II through V of this Article set forth a different theory. They attempt to show precisely how changes in tort liability have undermined specific insurance markets, leading to the recent crisis. Section II briefly describes the direction of modern tort law and its economic effects.

II. MODERN TORT LAW AND ITS ECONOMIC EFFECTS

Since the early 1960's, courts have steadily expanded tort liability for injuries suffered in the context of product and service use. These changes in the law result from the acceptance of a coherent and powerful theory that justifies the use of tort law to compensate injured parties, a theory its founders called "enterprise liability." [73] According to the theory, expanded provider liability serves three important functions: to establish incentives for injury prevention; to provide insurance for injuries that cannot be prevented; and to modulate levels of activity by internalizing costs, including injury costs. [74]

[*1535] The second feature of the theory -- the importance of providing insurance for unpreventable losses -- is most crucial for understanding our current insurance crisis. According to enterprise liability theory, expanded legal liability does more than achieve optimal control of accident and activity rates. Expanded tort liability improves social welfare,

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in addition, because it provides a form of compensation insurance to consumers. A provider, especially a corporate provider, is in a substantially better position than a consumer to obtain insurance for product- or service-related losses, because a provider can either self-insure or can enter one insurance contract covering all consumers -- in comparison to the thousands of insurance contracts the set of consumers would need -- and can easily pass the proportionate insurance premium along in the product or service price. Most importantly, to tie insurance to the sale of the product or service will provide insurance coverage to consumers who might not otherwise obtain first-party coverage, in particular the poor or low-income among the consuming population. [75]

The insurance rationale was central to the first judicial adoption of enterprise liability theory, by the California Supreme Court in *Greenman v. Yuba Power Products,* [76] in 1963. The approach was rapidly extended across the various state jurisdictions, first in the products liability field and, later, in other areas of tort law. [77] Briefly, however, enterprise liability theory has justified both restrictions in available legal defenses and expansion of substantive liability standards.

As examples, since the mid-1960's, courts have invoked the insurance rationale to limit the defenses of contributory negligence, [78] assumption of risk, [79] and consumer product misuse; [80] to eliminate defenses related to the **[*1536]** status of the victim (as in actions brought by licensees and trespassers against property owners); [81] and to restrict the effectiveness of statutes of limitation. [82] At the same time, the theory has supported the affirmative extension of liability through the adoption of standards of strict liability, [83] retrospective liability, [84] and unreasonably dangerous per se, [85] relaxation of causation requirements, [86] and, more generally, through the near-universal acceptance of comparative negligence, which permits a jury to render judgments against defendants even if they are responsible only in some small proportion for a plaintiff's injury. [87]

These legal changes have particularly affected insurers because courts have simultaneously expanded the scope of the insurance contract. Again, under the influence of enterprise liability theory, courts have adopted the maximization of insurance coverage as the principal interpretive objective in insurance contract disputes. [88] Thus, courts have interpreted policy coverage provisions broadly and policy exclusions narrowly to achieve the compensation goal.

As a result of these doctrinal developments, both the range of defendants against whom a plaintiff might collect a judgment and the range of plaintiffs to whom a corporate defendant might ultimately be liable, have expanded. Courts have also expanded the range of losses for which compensation might be sought, chiefly by allowing increased recovery of emotional and other non-economic losses. [89]

[*1537] Understanding the insurance crisis requires that the economic effects of expanded liability be analyzed precisely. Putting aside administrative costs, a legal rule or agency regulation can have two principal economic effects: (1) it can influence investments in loss prevention to affect the accident rate; and (2) it can influence the provision of insurance for losses not prevented. [90] These two effects, prevention and insurance, are the only important economic consequences of any legal or regulatory policy. It is irrelevant which goals a court, a regulatory agency, or society is trying to achieve. It is unimportant if the motivation for a legal policy is some moral imperative, some vague or specific sense of justice, or personal or pecuniary advantage. The only important economic effects that any legal policy can have are effects on levels of investments in prevention of losses and of insurance for losses not prevented.

It is well accepted that the optimal level of accident prevention will be attained if incentives are created for both the provider and consumer to make additional safety investments up to the point at which the marginal costs of such investments equal their marginal benefits. [91]

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JOHN M. OLIN PROGRAM IN LAW AND ECONOMICS CONFERENCE ON "TORT REFORM": PROCEDURAL VERSUS SUBSTANTIVE CONTROLS OF MASS TORT CLASS ACTIONS

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* John M. Olin Professor of Law and Economics, Yale Law School. I am grateful to Edward A. Snyder, Mark A. Peterson, Alan O. Sykes and to participants of this conference for comments on an earlier draft. In the interest of full disclosure, I have occasionally provided testimony or counsel in mass tort class action litigation or related (such as insurance coverage) litigation, sometimes supporting, sometimes opposing certification of a class or approval of a class settlement. In the specific cases discussed in this article, I have participated only in Ahearn v Fibreboard et al, 162 FRD 505 (ED Tex 1995), testifying on insurance coverage, not class certification, issues.

SUMMARY:

... THE single most salient feature of the modern mass tort class action is the extraordinary power that derives from certification of a class alone. ... The central academic and judicial concerns about the modern mass tort class action described in Part I--adequacy of representation, plaintiff autonomy, conflict of interest, and the similarity of class to individual litigation--do not immediately appear related to the substantive goals of tort law described in Part II--efficiency, equity, and finality. ... Section *B* will explain why the various academic and judicial efforts to make class litigation more closely resemble individual litigation are best understood as efforts to evade the *Eisen* proscription in order to impose some substantive control over the class action, necessarily through procedural means. ... Section *B* also argues that procedural reforms focus excessive attention on class certification and settlement, neglecting other features of the administration of class litigation that also depart from the law's substantive ambitions. ... The principal academic approach to class action reform is structural in nature: enhancing adequacy of representation, maximizing class member control over the litigation and class member opportunities to opt out, and resolving conflicts of interest will purportedly cause the outcomes of class settlements to correspond to the substantive goals of the law. ...

ABSTRACT

Class certification in a mass tort case confers extraordinary negotiating power even where the underlying claim is meritless. This power stems from the prospect that claims of a large-numbered class might reach a jury that might render a large aggregate judgment under our vastly looser tort law standards. The power is so extreme that all mass tort claims certified

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class with identifiable members who have suffered identifiable harms and who appear intent on taking their claims to trial. [44] Over the same period, there has also been substantial judicial attention to two different types of classes: first, a settlement class, a class seeking class certification only after reaching a settlement with defendants; second, a futures class comprising individuals who have suffered no harm to date but who (say, because of exposure to some potentially harm-causing agent) might suffer harm in the future. A class can be defined to include such individuals though the individuals themselves may not be identifiable at the time of certification. Within the past 2 years, two courts in the Third Circuit have refused to certify settlement classes, including a settlement class that included futures claimants. Oppositely, a Fifth Circuit court has recently approved a mandatory futures settlement class: a settlement class comprising solely futures claimants where the class is defined to prohibit opting out by class members. Two of these decisions, at this writing, are awaiting U.S. Supreme Court resolution of their appeal.

In 1995, a Third Circuit court in the *General Motors Fuel Tank Litigation* decertified a settlement class on the grounds that the class failed to satisfy the Rule 23(a)(4) adequacy of representation requirement. [45] This opinion established a Third Circuit precedent requiring settlement classes to comply with all of the Rule 23 requirements for a litigation class. More recently, in an extremely prominent opinion, a Third Circuit court has decertified a settlement class that includes futures claimants. The class and **[*536]** the settlement was the result of many years of effort attempting to devise a nationwide settlement of all outstanding asbestos litigation. [46] The grounds for the court's decertification of the class mirror, not the hostility to class actions of the four opinions discussed above, but rather the values and concerns of the academic literature discussed in Section A. Thus, the Third Circuit court is concerned with the adequacy of class representation in the context of a mixed active/futures class. The court believes that no representative can assuredly be typical of futures claimants whose injuries have not yet occurred. The court is also concerned about the values of plaintiff autonomy. The class settlement in the case limited the annual number of available future opt-out opportunities, limitations which the court finds unduly restrictive given that the stakes of each claim are sufficient to support individual litigation. The court, in addition, sees conflict-of-interest issues as overwhelming: active class members seek immediate payouts; futures members, to maintain the magnitude of the fund at least until their injury is diagnosed. Finally, the court simply finds a settlement futures class so dissimilar to individual litigation as to challenge the court's view of appropriate civil litigation. The court recommends that Congress enact legislation creating a welfare compensation system for asbestos victims in place of the distribution plan before it, although suggesting that Congress maximize individuals' opt-out rights to allow them to maintain individual litigation. [48] *Georgine* has been appealed to the Supreme Court, whose decision will soon be rendered.

In contrast to these Third Circuit decisions, a Fifth Circuit court has very recently approved certification of a settlement class of a far more controversial nature: the class comprises exclusively futures claimants and is a mandatory class under Rule 23(b)(1)(b) from which opting out is unavailable. [49] This decision, *Flanagan v. Ahearn, et al.*, [50] is also before the U.S. Supreme [*537] Court along with the Third Circuit opinion in *Georgine*. The settlement class in *Ahearn* was structured and managed differently than the class in *Georgine*--differences sufficient to the Fifth Circuit court to justify approval of certification and of the settlement itself. The court simply rejects the Third Circuit's requirement that a settlement class meet all of requirements of a litigation class. Indeed, the court regards the settlement itself as resolving many of the problems of aggregation. The court finds that concerns about adequacy of representation of futures claimants and about conflict of interest between the class and its attorneys are answered with respect to this settlement because, prior to approval of the settlement, the district court had appointed a guardian ad litem to represent the class and to report on the adequacy of the settlement. [51] Finally, the court finds that, since the terms of the settlement provided only a lump-sum amount, rather than a specified distribution plan, potential conflicts of interest among class members are not relevant for the certification decision and can be dealt with later on approval of a plan of

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distribution.

These various recent judicial decisions regarding mass tort class actions are disparate over some range, but they incorporate many consistent values. First, there is a consistent preference for individual litigation to class litigation, justified on the grounds that problems of representation, conflict of interest, and inadequate plaintiff autonomy are eliminated or reduced in the individual litigation context. These cases are unanimous in concluding that individual litigation is to be preferred and should be the norm where the stakes of the claims are sufficient to support it. With the exception of the Third Circuit opinions, however, these courts do not apply the values of individual litigation in the same manner as the academic literature. There is a general fear of the negotiating power generated by class certification alone. The courts in various ways deal creatively with the procedural requirements of Rule 23 to cabin this power, for example, by introducing litigation maturity as a determinative criterion. Finally, there are strong differences in result, though not in underlying values, with respect to settlement and futures classes. The Third Circuit courts believe problems of adequacy of representation, conflict of interest, and plaintiff autonomy cannot be resolved in such litigation; a Fifth Circuit court, given some different procedural protections such as appointment of a guardian ad litem, is more sanguine.

C. The Advisory Committee's Reform Proposals

Within months of this writing, the Advisory Committee on Civil Rules released proposed amendments to Rule 23. These amendments have been **[*538]** interpreted as substantially reducing the availability of the class action device in the context of mass tort litigation. On these grounds, as will be explained, many of the Advisory Committee's proposals have been severely condemned, most prominently by a distinguished group of academics calling itself the Steering Committee to Oppose Proposed Rule 23. The proposed amendments of the Advisory Committee share many of the values of the modern academic concerns of mass tort class actions. First, the amendments seek to control class action problems through procedural means; second, the principal approach toward that control is to introduce requirements for class certification that will ensure that class litigation more closely resemble individual litigation.

The Advisory Committee proposes amending Rule 23(b)(3) in three different ways. It proposes adding as considerations as to whether class litigation is the superior method for resolving the case (1) "the practical ability of class members to pursue claims without class litigation," (2) the "maturity" of the underlying litigation, and (3) whether "the probable relief to individual class members justifies the costs and burdens of class litigation." In addition, the Advisory Committee proposes that Rule 23 specifically provide for the certification of settlement classes without regard to whether the purported class complies with the various predominance and superiority requirements of 23(b)(3). [52] Finally, the committee proposes relaxing the time at which the court must consider the issue of class certification and allowing immediate appellate review of class action certification without satisfaction of the otherwise demanding requirements of mandamus or without district court certification under 28 U.S.C. § 1292(b).

The proposed amendments of the Advisory Committee must be seen as conferring greater judicial control over the class action device than achieved under the current Rule 23. The mechanism of control remains procedural in nature. One amendment does require a court to review whether the litigation has reached a certain level of "maturity" prior to certification. The standard of "maturity" is novel. It was initially proposed some years ago by Professor Francis McGovern [53] and has received recent currency in the *Rhone-Poulenc* blood litigation and in the *Castano* cigarette litigation cases, discussed above. [54] While a substantive definition might be given to the term, the Advisory Committee in its notes insists that its meaning is **[*539]** procedural only: litigation becomes mature when highly uncertain facts are resolved or where results in individual litigation become consistent. [55]

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The remainder of the amendments, like much of the academic criticism, seeks to make class litigation more closely resemble individual litigation. Most obviously, one of the amendments would deny certification where individual class members are practically able to pursue their claims without class certification, such as with claims involving large individual stakes. Another amendment would deny certification if the claim is not likely to be brought as individual litigation: where the probable relief to the class fails to justify the costs and expenses of class litigation.

As mentioned, the Advisory Committee's proposals have been roundly criticized by an academic Steering Group. The Steering Group, however, criticizes only the proposal that limits certification of small-stakes class actions and that permits the certification of settlement classes, concerned about the prospect of collusive settlements. The Steering Committee has not opposed the amendment limiting class certification in high-stakes cases, presumably because its members share the Advisory Committee's concern over vindicating plaintiff autonomy.

D. Modern Concerns about the Mass Tort Class Action Summarized

The review, separately, of the academic literature, recent judicial opinions, and the Advisory Committee recommendations shows a remarkable consensus of opinion and value regarding the mass tort class action. First, all of these groups conclude that the mass tort class action in its current state is in need of substantial reform. There are differences in view, however, as to the reforms required. The academic literature contends that in many contexts class members receive inadequate settlements because of problems of conflict of interest. It also argues that individual control over the direction of the litigation is unduly submerged in the class context. In contrast, the view of these recent judicial opinions, perhaps including that of the Advisory Committee, is that the principal concern is the great negotiating power that attends class certification. It seeks to restrain the creation of that power through incorporating higher procedural standards for class certification.

To achieve these different reforms, however, all groups advocate essentially the identical remedy: increase plaintiff autonomy and reform class litigation so that it more closely resembles individual litigation. To the academics, the plaintiff autonomy and individual litigation will limit conflicts of interest. Thus, this literature recommends increasing the definition [10] of subclasses with the appointment of separate counsel to enhance representation, and it recommends, perhaps most importantly, maximizing opt-out opportunities to directly achieve the same ends. The judicial opinions and the Advisory Committee also endorse the individual litigation ideal. They seek, however, to maximize plaintiff autonomy directly, by reducing the number of class actions in favor of individual litigation through decertification in specific cases and by introducing new certification requirements such as the maturity of the action. Consistently, the Advisory Committee proposes immediate appeal of class certification decisions to provide a further review of the appropriateness of class versus individual litigation.

As mentioned above, it is an unusual circumstance to observe groups invoking identical values--increasing plaintiff autonomy and making class litigation resemble individual litigation--reach such different ultimate outcomes. As I shall attempt to explain in the remainder of this article, this curious position results from the purely procedural approach toward class action adopted by academics, the courts, and the Advisory Committee, admittedly, by approach seemingly compelled by the Supreme Court's decision in *Eisen*. A purely procedural approach to class action reform, however, necessarily ignores the relationship between the class action and the substantive ends of tort law. Many of the current problems that various commentators seek to reform derive from the deviation of class action outcomes and the outcomes commanded by substantive tort goals. Part III shows that, as a consequence, procedural reforms alone--whether those recommended by

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the academics, by the courts, or by the Advisory Committee--are insufficient to deal with those substantive problems. In order to clarify this point, Part II briefly reviews modern tort law's substantive goals.

II. THE SUBSTANTIVE OBJECTIVES OF TORT LAW: EFFICIENCY, EQUITY, FINALITY, AND THE ROLE OF THE CLASS ACTION

This part summarily reviews the basic substantive objectives of tort law. There is nothing novel in the discussion, but I believe that a disciplined focus on these objectives is helpful to the evaluation of the modern mass tort class action. Since so much of the modern literature addressing mass tort class actions has proceeded from a procedural approach, there has been little attention to the conformity between class action settlements and the substantive goals of tort law. In many instances, there is a general ambition to ensure positive recoveries for class members and a loose presumption that the larger the recovery, the better. [56] As I shall try to show here, the **[*541]** substantive ambitions of tort law compel some greater precision between the settlement award to an individual class member and the actual loss that that person suffered.

Courts and commentators, of course, have announced many different objectives of tort law. For purposes of this discussion, I have grouped these various objectives into two general categories: efficiency and equity. The discussion of these general categories is not meant to be comprehensive, though I believe that the description is generally faithful to the efficiency and equity traditions in tort law. While the subject of a substantial literature, it is not necessary here for the reader to choose between these categories or to accept that either one dominates the law of torts. I propose to show in Part III that the modern mass tort class action operates in practice in ways quite contrary to both the efficiency and equity objectives taken seriously.

Finally, I discuss a third objective of the law, which I call "finality." This goal is not separate from either efficiency or equity but is an implicit, yet seldom discussed, feature of both objectives. I believe that the goal of finality of tort litigation deserves separate treatment here because of its particular salience in the context of mass tort class actions. Mass tort class actions are characterized by an extended period of time between filing and settlement as well as, in the case of futures classes, between settlement and actual harm. Since neither the efficiency nor equity traditions in tort law regard participation in litigation as a value in itself, the long periods of time implicated in the context of mass tort class actions suggest the importance of greater attention to the converse value of litigation finality here than in the more familiar context of individual tort litigation.

A. Efficiency in Tort Law

Efficiency is surely the most carefully elaborated objective of tort law, well known, of course, to participants at this conference. In essence, it provides that a defendant is to be held liable in tort only in contexts where the harm to the plaintiff could have been prevented by a cost-effective investment of the defendant. Given liability, the defendant is held responsible for the precise injury costs of the plaintiff: not more, not less. Precision in damage assessment is necessary in order to achieve efficient incentives for defendants to make all cost-effective preventative investments, but only cost-effective preventative investments.

At the same time, incentives for efficient preventative investments must also be established for plaintiffs. Regardless of accident context, plaintiffs must also be led by liability standards to make all cost-effective investments in accident prevention. Wherever plaintiffs have failed to make such **[*542]** investments, courts must hold defendants not liable, denying plaintiffs compensation for losses that they have suffered in order that efficient incentives are created for plaintiff accident prevention. Here, the court need not engage in damage estimation; plaintiffs bear their own costs entirely, creating exactly the efficient incentive.

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The importance of precision in damages valuation cannot be overstated. To achieve optimal efficiency, if a settlement amount to any plaintiff is too low, defendants will be encouraged to engage in socially excessive accident-causing behavior. Just as important, however, where a settlement amount to any single plaintiff is too high, either given a defendant's compliance with efficient preventions standards or an excessive valuation of a plaintiff's loss, there is an equal loss to societal welfare. An excessively high award to any plaintiff will lead defendants to reduce the value created for society from the activity implicated in the lawsuit.

Precision in damages valuation also affects the value-creating activities of plaintiffs. If a settlement amount is too low relative to the plaintiff's loss, the plaintiff will be led to reduce the level of activity diminishing societal welfare. Conversely, if the settlement amount to the plaintiff is excessively high, the plaintiff may inefficiently reduce its own investment in accident precautions--reducing societal welfare.

In the context of the efficiency objective of tort litigation, the class action serves to aggregate a set of similar, individual actions. [57] That is, there is nothing to distinguish a class action from an accumulated set of individual actions. Class actions may enhance procedural efficiency by achieving some economy of scale in the conduct of the litigation. In addition--a traditional justification for class actions--the aggregation of individual actions into a class may enable litigation to proceed where, in the absence of the scale economy, no individual action could have been maintained--the example of the meritorious, low-stakes case. According to the efficiency rationale, however, the existence of small individual stakes is not a precondition for class aggregation, just as the existence of high individual stakes is not a disqualification for class treatment. Scale economies may be achieved just as readily for low-stakes as for high-stakes cases.

B. Equity in Tort Law

There is far less scholarly consensus regarding the equitable objectives of tort law but, generally speaking, the equitable approach is to view tort litigation as serving to vindicate some right of a plaintiff that has been violated **[*543]** by some misdeed of a defendant. [58] The consequent compensation paid to the plaintiff serves the goal of corrective justice by correcting the harm caused by the defendant. The litigation serves at once to vindicate the plaintiff's right to compel the defendant to acknowledge its wrongful behavior and to take corrective action, and to provide the corrective remedy in the form of compensation to the plaintiff.

Precision in the measurement of damages is equally important toward achieving societal equity as with achieving societal efficiency. Damages precision is important toward efficiency in creating exactly the efficient accident prevention incentives to maximize societal welfare. In the context of corrective justice, a defendant must pay an amount exactly commensurate to the harm it caused by its misdeed and the plaintiff must receive exactly that amount in compensation for the harm to be accurately corrected. While, with regard to the equity goal, there is something more of a symbolic character to the defendant's payment and to the plaintiff's receipt of compensation than with regard to efficiency, no one could support inadequate equitable correction or, conversely, excessive correction. To achieve optimal corrective justice, damages awards or settlements must be measured accurately.

In the context of the equity objective of tort law, the class action similarly serves principally as a procedural tool for the aggregation of individual claims. Unlike the efficiency goal, achieving cost savings through economies of scale in litigation is not particularly important toward achieving equity, with the principal exception where the stakes of the litigation are too low to justify individual action. In low-stakes cases, the class action is substantially more important with respect to the equity than the efficiency goal since without the class action the affected rights of plaintiffs may never otherwise be vindicated. There is no particular

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advantage toward achieving equity to aggregate claims into a class where the stakes are sufficiently high to support individual litigation.

C. Finality in Tort Law

As mentioned above, I believe that there is also a goal of tort law which I will call "finality." By this goal, I mean that, implicit in both the efficiency and equity approaches to tort law, there is an interest in achieving finality **[*544]** in litigation and proceeding with more normal life. For both the efficiency and equity values in tort law, tortious harm and tort litigation are viewed as departures from normality. According to the efficiency approach, tortious harm and consequent litigation represent social costs. The efficiency objective is to employ litigation to create incentives to reduce harm and to organize procedures to reduce total costs. But according to the efficiency ideal, the larger societal objective is to maximize society's productive activities. Litigation may be helpful toward that end, but the less litigation necessary to establish efficient incentives, the greater social productivity will be. Thus, there is a value to achieving finality in litigation in order to allow both plaintiffs and defendants to return to increasing social productivity.

Somewhat similarly, the equity objective of tort law is achieved when rights are vindicated. Here, too, tortious harm is regarded as an exception to normal existence, perhaps requiring correction, but disfavored in contrast to the normal value-creating activities of life. Tort litigation is only a tool to achieve correction, not an activity valued in itself. Therefore, as with efficiency, there is a social benefit in achieving finality in litigation to allow members of the society to return to their normal value-creating activities.

D. Damages Precision and the Substantive Goals of Tort Law

Precision in the valuation of damages to each plaintiff (including, where appropriate, a finding of no defendant liability) is crucial to the achievement of both the efficiency and equity objectives of tort law. The value of efficiency in societal interactions and the value of achieving correct justice are equally offended if the damages award or settlement amount to any single plaintiff is excessively high or low. In addition, according to both the efficiency and equity values, litigation is no more than a means to achieving these larger objectives and is not valuable itself. Thus, under either value, societal welfare is diminished if litigation itself is extended over a period beyond that necessary either to create efficient incentives or to achieve corrective justice.

As we shall see in the next part, there are strong reasons to believe that outcomes in the modern mass tort class action depart very substantially from either the efficiency or equity ideal. Part III returns to the concerns about the mass tort class action of the academic literature, the courts, and the Advisory Committee to illustrate the disparity.

III. THE FUNCTION OF THE CLASS ACTION AND THE SUBSTANTIVE GOALS OF TORT LAW

The central academic and judicial concerns about the modern mass tort class action described in Part I--adequacy of representation, plaintiff autonomy, **[*545]** conflict of interest, and the similarity of class to individual litigation--do not immediately appear related to the substantive goals of tort law described in Part II--efficiency, equity, and finality. This part attempts to show that they are closely related. From its origin, the class action under Rule 23 has been carefully cabined as a device of procedure alone, whose structure and operation can be defined strictly without regard to the substantive merits of the underlying claim. As has been discussed, over the succeeding years, the power attending class certification has steadily magnified to the point today where class certification confers extraordinary power, in many instances irrespective of any substantive merit to the underlying claim.

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This part argues that the concerns of the academic literature, the courts, and groups such as the Advisory Committee represent efforts to impose substantive control over the operation of the class action by the use of procedural means, means made necessary by the Supreme Court's constraint on substantive review at the point of class certification. Section *A* will describe the procedural conception of class certification culminating in the Supreme Court's 1974 decision in *Eisen v. Carlisle & Jacquelin*. [59] Section *B* will explain why the various academic and judicial efforts to make class litigation more closely resemble individual litigation are best understood as efforts to evade the *Eisen* proscription in order to impose some substantive control over the class action, necessarily through procedural means. Part IV will then demonstrate why these efforts, though possibly effective in individual cases, are likely to prove inadequate over the long run and, indeed, in many contexts are perverse. Many features of modern class actions which seem to violate procedural values may serve to better align class action outcomes with the substantive goals of tort law.

A. The Procedural Conception of Rule 23

From its modern origins in the 1966 revisions of the Federal Rules, Rule 23 has been regarded as a procedural device alone, to be implemented without regard to the substantive merits of the dispute. Rule 23, itself, is placed in the section of the Federal Rules denominated "Parties." As suggested by this positioning, certification of a class is treated merely as one of the Rules' means of naming parties, the initial act in the process of filing a claim. Put simply, Rule 23 determines whether the named plaintiff in the case may bring the action on behalf of a class--appropriate if the numerosity, commonality, typicality, and adequacy requirements are satisfied--or whether the named plaintiff must bring the action on his or **[*546]** her own behalf alone. The structure of the Rules provides for such a determination to be made without regard to the claim itself. The substantive merits of the claim will be considered, as in individual litigation, by motion on the pleadings, after discovery, say, by a Rule 12(b)(6) motion for failure to state a claim on which relief can be granted. According to this division, the character of the plaintiff as class or as individual has no particular relevance to resolution of the Rule 12 motion. It is consistent, for Rule 23(c)(1) to provide that class certification is to be determined by the court as practicable after the commencement of an action." The issue of class certification be resolved, before anything else in the case goes forth, since the only purpose of class certification decision is to determine the identity of the proper plaintiff.

Various lower court decisions following the 1966 revisions confirmed this conception. While there were a few earlier cases, a Fifth Circuit court's 1971 decision in *Miller v. Mackey Int'l., Inc.* [60] established the proposition clearly. In an opinion by Judge Wisdom, the court reversed a district court's denial of class certification because the district court might have been influenced in its certification ruling by its view of the substantive merits of the underlying action

> This portion of the [district court's] order indicates to us that in passing on the propriety of the class action the district judge may have considered whether the petition stated a cause of action or whether Miller would succeed on the merits. This was improper. In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met. . . .
>
> The decision whether there is a proper class does not depend on the existence of a cause of action. [61]

Judge Wisdom's ruling appeared to be importantly confirmed 3 years later in the U.S. Supreme Court's opinion in *Eisen v. Carlisle & Jacquelin*, although, as I shall argue later, the *Eisen* opinion can be read substantially more narrowly. [62] *Eisen*, of course, is an opinion of substantial eminence explaining the Supreme Court's approach to the revised Rule 23. The

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centra... the case relates to notice: whether individual notice is required to all class memb... if so, whether the plaintiff or the defendant must pay the bill. The claim involv... tions of securities law and antitrust violations in the context of stock exchange transa... e stakes in the **[*547]** case to the named plaintiff Eisen were stipulated to be no... n $ 70, the cost of individual notice to all members of the class, $ 225,000, althou... sts of partial notice or notice by publication, substantially less. The district court... t only limited individual notice was necessary to a subset of class members and c... e defendant with paying 90 percent of the notice costs based on the court's judgm... wing a preliminary hearing, that the class was more likely than not to prevail on the

The S... ourt overturned the district court's resolution entirely. The Court held that indivi... mandatory to each class member and that there is no provision in Rule 23 for a l... 's eview of the merits of the claim for purposes of shifting notice costs to a defen... rding to the Court, "We find nothing in either the language or history of Rule 23 th... ourt any authority to conduct a preliminary inquiry into the merits of a suit in ord... rmine whether it may be maintained as a class action." [63]

This la... n *Eisen* has been subsequently read as broadly as Judge Wisdom's language in *Miller*... it any evaluation of the merits of a claim at the point of class certification. [64] In my... dern class action developments have been importantly affected by that appro... e effects are dangerous. It is surely a curious circumstance in a country comm... rule of law to accept the propositions (1) that class certification alone creat... ating power, (2) that that power leads to actual settlements, sometimes large... ements, and, simultaneously, (3) that this great negotiating power can be creat... judicial review of a claim on the merits and, in some cases, without any merit... As I shall try to explain in the next section, the concerns of academics and the co... pr... osals for reform, the innovative judicial interpretations of class requir... the proposals of the Advisory Committee, are best understood as efforts to im... stantive control on the class action phenomenon where direct substantive revie... and only procedural means are available.

B. Vir... tiff Autonomy and the Individual Litigation Ideal as Surrogates for Subs...

Part I... how the central concerns of academics and the courts regarding mass tort class... from the values of vindicating **[*548]** plaintiff autonomy and seeking to ma... tion more closely resemble individual litigation. How do the values of plaint... nd individual litigation relate to the substantive objectives of tort law? The c... ortant because there has been no serious effort in the academic litera... y none in judicial opinions, to define the normative basis or content of the value... tonomy and individual litigation. Vindicating plaintiff autonomy by giving plain... ntrol over litigation most often is simply asserted as a value. The asser... d--and I have seen no challenge--perhaps because plaintiff autonomy seem... in a vague way personal freedom, a value in our society largely beyond challe... ly, I have seen no clearly articulated reason why class litigation ought to be made... individual litigation. The sentiment in favor of such a reform stems perha... e comfort and familiarity with individual litigation or from the vague notio... lems observed in class litigation are not as clearly evident in individual litiga...

It is c... values of plaintiff autonomy and individual litigation themselves do not follow... ary way from the substantive tort law objectives of efficiency or corre... he degree to which legal rules establish efficient incentives for the reduc... t-causing behavior is a concern quite different from the degree to which a plain... or her litigation. Similarly, the correction of an unjust harm has no clear

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relatio intiff's control over litigation. A society might adopt entirely different
subst ndards of tort law than predominate in our legal system and still value plaintiff
auton individual litigation. Put differently, one would measure a society's
achie the objectives of creating efficient incentives or redressing unjust harms
witho essary reference to the degree of plaintiff litigation control or the similarity of
class t al litigation.

Plainti my, thus, is not an intrinsic value in either the efficiency or corrective justice
traditi tiff autonomy does not resemble, say, religious freedom or personal freedom
as intr es. Religious freedom is an end valued in itself because of the widespread
belief ous activity, in itself, contributes value to life. Similarly, personal freedom is
an int e because of the belief in our society that the individual citizen is in the best
positi t rmine the values on which to enhance his or her life experience. In contrast,
in ne fficiency nor corrective justice traditions is litigation and, thus, individual
contr f , considered an activity that in and of itself brings value to life. Indeed,
accor h traditions, the richest society is that in which there is the least need for
litigat se of a lower level of inefficient or unjust harms. If efficient incentives could
be cr unjust harms **[*549]** redressed without litigation, or without individual
contr ation, so much the better.

Inste f autonomy in litigation is an instrumental, rather than an intrinsic, value. It
may e believed that, given an accident, individual plaintiff control over the
subse n will contribute to the creation of efficient behavioral incentives or the
redre of harms. With regard to efficiency, the individual plaintiff-victim, rather than
an at ne the representative, will be most interested and best placed to pursue the
claim compensation necessary to establish efficient incentives is obtained. [65]
Simil gard to corrective justice, the individual plaintiff-victim may well be thought
best nderstand the nature of the harm and what remedy is necessary to most
comp ss it. In both the efficiency and corrective justice traditions, plaintiff
auton y and individual litigation ideals are means, not ends, toward better achievement
of the c goals of the law.

It foll the context of the modern mass tort class action, the plaintiff autonomy
and i tion ideals are best understood as surrogates for more direct substantive
contr action litigation. Again, there are no coherent alternative justifications for
the p my and individual litigation values. The advocacy of academics and the
court s of plaintiff autonomy and making class litigation resemble individual
litiga , can be interpreted--and in an interpretation that justifies support for
these forts to create structural conditions for the achievement of the substantive
goals c ccording to this interpretation, the promotion by academics and the courts
of gr plaintiff control over class litigation may be plausibly based on the
unde hat greater plaintiff control will lead class litigation to comply more
preci substantive goals of the law. Similarly, the proposals by academics and the
court make class litigation resemble individual litigation may be plausibly
base rlying belief that a closer resemblance of class to individual litigation will
prom ent of the substantive objectives of the law.

This i of the import of these values gains particular credence given the strictly
proc s of Rule 23 in concept and in practice following the Supreme Court's ruling in
Eise rs to preclude a court from evaluating the substantive merits of a claim
prior cation. [66] While motion practice may follow, there is a strong preference
unde Rules and in modern jurisprudence toward allowing discovery **[*550]** to
proce olution of a claim on the merits. Virtually all mass tort class actions,
howe r to trial or judgment. As a consequence, there is no effective substantive
cont ss tort class action phenomenon at any point, except in the most extreme
case rts are willing to entertain summary judgment motions on the pleadings, a

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rare o r e in a tort case and, especially, in a tort case where personal injury is alleged. Acad ts, and groups such as the Advisory Committee, however, observe the multi n which mass tort class action practice departs from the substantive goals of the la ubject to the *Eisen* mandate, there are no direct means available for courts to exert ve control over mass tort class actions. Structural reforms--giving greater contro idual plaintiffs and making class litigation more closely resemble individual litigat me the only reform mechanisms available.

1. Aca oncerns about Mass Tort Class Actions as Surrogates for Substantive Controls

As de Part I, the principal academic concerns regarding mass tort class actions relat cy of representation, vindication of plaintiff autonomy, and control of confl e t. Each of these concerns may best be understood as an effort to more close utcomes of class litigation with the substantive objectives of tort law.

a. Ad Class Representation. A central concern of academics about the modern mass tort c in that the named plaintiffs in the case adequately represent the interests of each m the class. One fear is that the litigation will be controlled by the attorneys for th r than by the class members themselves. A second concern is that the name or plaintiffs may have interests that diverge from those of other class mem not fully advocate those different interests. This second concern has led prom mentators such as Coffee to vigorously recommend the definition of subcl with its separate named plaintiff and attorney. [67]

This c t the adequacy of representation is familiar, but its exaggerated character in the context is notable and has never been fully explained. In our democratic socie many occasions that require representation rather than direct citizen partic ike class actions, however, there are very few contexts where there is such a stro ment to secure what might be regarded as "perfect" representation. In the electo , for example, representation, rather than individual **[*551]** citizen partic omnipresent, yet there is universal acceptance of a much lower standard of repre than that demanded for the class action. There is no thought that every separ within the polity must receive specific and equivalent representation. All seem t our elected representatives provide a form of composite representation: repre terests of the polity on the whole, generally satisfactory to most interests, thou in many instances, ignoring, even disregarding, some specific interests. The s epresentation within a class action, in contrast, are much higher. Accor ominant academic approach, each distinguishable interest within a class (igno minimis) requires adequate representation both by named class member and t counsel.

To m st explanation for this higher standard of representation is to establish a struc actions that enhances the likelihood that the outcomes of class litigation will b ith the substantive objectives of the law. To achieve the substantive goals of th efficiency or corrective justice--it is necessary, first, to determine whet nt is liable and to whom and, second, to award each appropriate plaintiff the c compensation. [68] It is plausible that one means of increasing the likeli sult is to provide each distinct interest group within a class adequate repre by both named plaintiff and attorney. Thus, each interest group is able to pursu til it is found either that the group is ineligible for compensation or is fully comp versely, were some interest group within the class not represented, there woul n to fear that the substantive award to that group would depart from that appr ng to the substantive goals of the law. Securing adequate representation of m ss, therefore, is a procedural means of increasing the likelihood of a subs ct outcome of class litigation.

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as classes appear to settle, rather than litigate to judgment. Recommendations for class action reform have been solely procedural since Rule 23 has been implemented without substantive review of the underlying claim. This article shows that recent reform efforts in fact attempt to impose substantive controls on mass tort class actions through procedural means, efforts that necessarily will remain inadequate. The various problems attending mass tort class actions can only be effectively addressed if courts are given power to substantively review the underlying merits of a claim prior to class certification.

TEXT:

[*521] THE single most salient feature of the modern mass tort class action is the extraordinary power that derives from certification of a class alone. This power stems from the prospect that the tort claims of a large-numbered class might reach a jury that might render a large aggregate judgment. Three legal elements conjoin to create this great power: first, the relatively undemanding procedural requirements for class certification; second, the vastly looser substantive standards of pleading introduced by the Federal Rules increasing the prospect that any claim might reach a jury; and, third, the expansion of standards of tort liability and the restriction of available tort defenses since the 1960s increasing the prospect of an adverse judgment. [1] **[*522]** Together, the combination of undemanding standards for class certification, loose pleading requirements, and expanded standards of tort liability has transformed the mass tort class action into a massive tool of redistribution.

The power attending the mass tort class action is well known in anecdote and widely acknowledged even by our courts. Very recently, for example, Judge Posner, in an opinion decertifying a mass tort class action, alluded to the irreparable harm to a defendant from the prospect that "one jury, consisting of six persons, . . . will hold the fate of an industry in the palm of its hand." [2] This is not hyperbole, and there are two strong empirical confirmations of the point: commentators unanimously concede that virtually every mass tort class action that has been successfully certified has settled out of court rather than been litigated to judgment. For any subset of cases, uniform settlement and zero litigation is an extraordinary empirical fact, neither predicted by nor consistent with *any* current economic model of litigation and settlement. [3] It is reflective of the huge uncertainty and, therefore, the risk that attends judgment of a mass tort claim by a lay jury.

The second empirical proof is less easily generalized but is no less graphic. We have recently observed settlements or proposed settlements of mass tort class actions at enormous sums of money where there appears to be no substantive basis for defendant liability. The silicone breast implant litigation is an example, where several defendants are proposing settlement terms involving more than a billion dollars despite predominant scientific evidence indicating no relationship between the implants and the diseases claimed by the plaintiffs. [4]

There has been substantial attention in recent years to the power generated by the mass tort class action and increasing concern about abuses that might attend the exercise of that power. Although some commentators generally approve of modern developments, [5] the dominant academic literature is critical of features of the operation of mass tort class actions that appear to disfavor class plaintiffs as against defendants and class attorneys or disfavor certain subsets of class plaintiffs as against favored others. This literature has sought to remedy these problems by refining the class action as a **[*523]** procedural mechanism for claim aggregation through recommendations that would enhance the adequacy of class representation, better vindicate plaintiff autonomy, and reduce conflicts of interest between the class and its attorneys or among members of a class. [6] The emphasis of this literature on the values of representation, plaintiff autonomy, and the elimination of conflicts of interest has led to severe criticism of settlement classes (classes certified solely to validate a settlement) as well as of futures classes (classes comprising claimants who have yet to suffer an injury) because they seem to violate directly the representation and autonomy values. To the extent that this literature has focused on the substantive outcomes of mass tort class action settlements, its principal concern is that some settlements for a class as a whole or for

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b. Vind *Plaintiff Autonomy*. While the vindication of plaintiff autonomy is a broader theme e cademic class action literature, it is invoked as a value to justify the specif c dations of enhancing personal control over the litigation by the named, repre l s member and maximizing opportunities available to individual class mem r of the class. According to these recommendations, it is thought better if an ind s member, rather than a class attorney, is responsible for making all impor s concerning the conduct of the litigation. Increasing opt-out opportunities are ju grounds: first, it is thought appropriate for any individual class member, if diss the **[*552]** direction of the class litigation or of a class settlement, to be free to is or her action individually. Second, it is thought that both opt outs in fact and th ting out will appropriately discipline the class attorneys (and perhaps even t sentatives) to conduct the class litigation in the best interests of each mem s.

The p onomy value is similarly familiar, and its promotion hardly remarkable. Reco to enhance individual control and to maximize opting-out opportunities, howe us in the context of class actions because they directly contradict the natur nterprise. Most academic commentators strongly support the concept of class believe that it is appropriate to create classes and to bring litigation on behal This support, in part, may be based on the achievement of what economists call ec ale--the reduction of total litigation costs through the aggregation of claim similar value can be expressed in noneconomic terms: implementing the most ns of obtaining justice for a substantial number of citizens. Maximizing contr individual--even a representative individual--bears an uneasy relationship with the c ing the broader interests of a class. Increasing opportunities for opting out o ly inconsistent: each member that opts out reduces the advantage gain on of the class.

The r ons that derive from the plaintiff autonomy value can be plausibly supp e context of class actions, however, if they are recognized as surrogate mea the likelihood that the outcomes of litigation involving classes will corr bstantive goals of the law. Thus, there is reason to prefer some indiv ber, rather than the class attorney, to make decisions regarding the cond ti ion because it might be believed that such an individual will be most infor source and magnitude of the harm and, thus, will make the best deci to pursue liability and damages. Similarly, one might support increasing the c opting out of a class so that, where a class member believes that the class ing in some respect to appropriately pursue the tortfeasor or that the class o low, that individual can pursue the claim on his or her own. Opting out is inc the ambitions of class litigation, but it may be totally consistent with achie tantive goals of the law. Those who opt out reduce the power of the class, but th obtain judgments or settlements more fully reflective of tort law's subst he threat of opting out will lead those managing the litigation to better direc n toward results consistent with what could be obtained from individual litigat ons of substantive tort law. Thus, however internally inconsistent, vindic utonomy in the **[*553]** context of class actions serves as a procedural mean utcomes--which may include individual, not class, outcomes--with the substa ives of the law.

c. Red *icts of Interest*. Many reform recommendations within the academic literat d at reducing conflicts of interest. Conflicts of interest among class mem resolved through more segregated representation, discussed above. [69] More s relate to conflicts of interest as between the class and its attorneys. Here, erms that attorneys will settle class litigation on inadequate terms to obtai s from grateful defendants, will settle prematurely in order to obtain fees at an ill encourage class members to opt out in order to obtain higher

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contingency fees or will settle for inventories of individual clients on terms different than settlements for the class.

It is easy to condemn conflicts of interest and equally easy to recognize that the grounds for condemnation relate to efforts to achieve the substantive goals of the law. Thus, where attorneys press litigation at insufficient amounts because of defendant attorney fee promises, delay class litigation prematurely to obtain earlier fee payments, class plaintiffs recover settlement amounts less than what are compelled by the substantive goals of the law.

Other examples of conflicts of interest criticized in the academic literature are more difficult to evaluate. For instance, many commentators criticize circumstances in which those opting out of a class recover settlements larger than those of the average members of the class or in which lawyers settle claims of inventories of private clients on terms different than they settle claims of a class. [70] Such criticisms implicitly assume that the claims of all plaintiffs are equally meritorious. If there is equal substantive merit across claims, then any disparity in awards violates the substantive ambitions of the law. If the substantive merit of class members' claims differ, however, then disparate settlement terms for those claims may not reflect conflicts of interest but more faithful adherence to the law's substantive goals. [71]

2. Modern Judicial Approaches to Mass Tort Class Actions as Surrogates for Substantive Control

As described above, within the past 2 years, several federal appellate courts have indicated substantial hostility toward the mass tort class action, **[*554]** decertifying classes on mandatory Rule 23(b) certification, or appeal of a class settlement. [72] Among the grounds for this hostility is concern over the great pressure to settle that is created by class certification [73] and a preference for individual over class litigation, especially where the stakes of the case are sufficient to support individual suit. [74] Several courts have engrafted a "maturity" criterion onto certification. [75] Other courts have been concerned about settlement classes and future claims, [76] although a Fifth Circuit court has recently approved a mandatory futures settlement class, given the appointment of a guardian ad litem for the class who carefully reviewed and endorsed the terms of settlement. [77] Constrained by *Eisen's* apparent prohibition of review of the class claim on the merits, each of these courts has framed its objections to certification in procedural terms. It is not difficult, however, to perceive that the substantive basis for this judicial hostility to class certification is the concern that the outcomes of class certification will depart from the substantive objectives of the law.

The fear of pressure created by class certification toward unfair settlement is obviously a substantive, rather than a procedural, concern. Both the Fifth Circuit in *Castano* and the Seventh Circuit in *Rhone-Poulenc* openly address the questionable merit of class claims. In *Castano* the court carefully recites the Supreme Court's admonition in *Eisen* that the merits of the claim are irrelevant to class certification. [78] But it interprets Rule 23(b)(3)'s superiority requirement to implicate substantive review. According to the court, "this class must be decertified if it independently fails the superiority requirement of rule 23(b)(3). In the context of mass tort class actions, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. *Agent Orange*, 996 F.2d at 165-66. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards." [80] Similarly, the Seventh Circuit in *Rhone-Poulenc* explains, "A notable feature of this case, and one that has not been remarked [*555] on or encountered, so far as we are aware, in previous cases, is the demonstrated great likelihood that the plaintiffs' claims, despite their human appeal, have no merit." [81]

These decisions are obviously based on the substantive merit of the claim, not on

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compl · · prospective class with the procedural requirements of Rule 23. In both *Castar* · · *-Poulenc*, following these substantive criticisms of the class claims, the respec · · ntroduce a new element of Rule 23(b)(3)'s superiority evaluation: the relati · 'r · · of the claim. The concept of claim "maturity" might be given a purely proce · a · · ctation. Beneath the surface, however, it is apparent that the maturity criter · i · · or refusing class certification where the substantive merit of the claim is low.

The F · · · *Castano* sets forth a purely procedural definition of the maturity requir · · · ior record of trials from which the district court can draw the information neces · · · the predominance and superiority analysis required by Rule 23." [82] It was straig · · · he court to find the claim by the class in *Castano* immature since no single · · · g such a legal claim had ever proceeded to trial. [83] The implicit subs · · · the maturity requirement, however, is evident in its treatment by the Sever · · · *hone-Poulenc*. [84] The Seventh Circuit similarly found the class claim there to ha · · · ach a "consensus or maturing of judgment." [85] Unlike *Castano*, in *Rhone-Poule* · · · been 13 previous individual trials of the claim. Notable to the Seventh Circu · · · s of claim maturity was that defendants had prevailed in 12 of the 13 trials.

It is d · · · ore that the Seventh Circuit is employing the maturity standard as a surro · · · ntive review of the class claim on the merits. The court characterizes the 13 pr · · · the claim as a small sample. [87] But, purportedly, the issue before the court · · · l analysis of claim maturity is not the representativeness of outcomes base · · · e--a substantive concern--but rather whether there has been sufficient previ · · · litigating the claim to perceive whether class **[*556]** litigation is mana · · · er common rather than individual issues prevail, whether subclasses must be d · · · like. [88] The court finds the claim in *Rhone-Poulenc* to be immature with · · · of whether the litigation experience of the previous 13 trials established or re · · · ageability of the claim as a class action. Instead, the class claim was found "imm · · · e the court feared that certification would lead to settlement and the court rega · · · s without substantive merit.

Final · · · · ns expressed in the recent appellate opinions may also be seen to impli · · · e, rather than purely procedural, values. Several courts have referred to the a · · · fs to bring individual litigation as grounds for decertifying a class, [89] sugg · · · laintiff autonomy value, discussed above. Similarly, those courts that have deni · · · to settlement classes and futures classes have invoked concerns about the a · · · presentation and conflicts of interest which, at heart, derive from fear that the c · · · h settlements depart from the law's substantive goals. [90] In this respect, it is · · · one appellate court that has approved a mandatory futures-only sett' · · · he Fifth Circuit in *Ahearn* [91] --reached that judgment precisely because the lowe · · · pointed a guardian ad litem to represent the absent class. The court appr · · · ment because the guardian had conducted a thorough review and found the s · · · substantively in the best interests of the class. [92]

3. Th · · · mmittee's Proposed Amendments as Surrogates for Substantive Control

Final · · · ed amendments of the Advisory Committee on Civil Rules echo many of the t · · · d above. The committee has proposed denying certification both where the s · · · cient to support individual litigation and where stakes are so low that the cost · · · ceed any available benefits. The committee's amendments would formal · · · on maturity as a criterion for certification under Rule 23(b)(3), would allow · · · ny consideration of class certification, and would subject the district court' · · · decision to discretionary appellate review.

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[*557] T... visory Committee, of course, is constrained to formulate its amendments in proced... a... more strictly than academics and even the appellate courts; its task was to propos... a... nts to a specific rule of procedure. In essence, however, the committee's variou... r... amendments reflect an ambition of reducing the circumstances in which classe... i... tified. [93] This ambition is necessarily substantive in nature. The amend... n... osed by the Advisory Committee do not derive from a different conception of aggr... r do they implicate different means of conducting class litigation. Instead, they di... a... litigation, most plausibly (though unexpressed) because of a concern about e... c... ettlement pressure with respect to unmeritorious cases. Thus, the amendr... e... d deny class certification both where the stakes of individual claims are high ar... t, ...ly, where the stakes of individual claims are very low.

The Ad... ...mittee proposes, in addition, formalization of the litigation maturity criteri... ...s to the amendments define litigation maturity, however, somewhat differ... y... the appellate decisions described above. According to the Advisory Comm... ...ion becomes mature when "the results of individual litigation begin to conve... ...s adjudication may continue to be inappropriate, however, if individual litigati... ...to yield inconsistent results." [94] Defining litigation maturity in terms of consist... ...ult is interesting, but it cannot be seriously imagined that courts would implem... n... criterion in solely a procedural manner, without regard to the substantive merits ... That is, imagine litigation for which class certification has been proposed in whi... ...s underlying individual litigation has satisfied the Advisory Committee's matur... ...n achieving consistency of result, but the result has been consistently agair... ...of the plaintiffs and in favor of the defendant. This, of course, is the circu... ...ced the Seventh Circuit court in *Rhone-Poulenc*, where defendants had preva... ...he previous 13 trials. Consistency in favor of the defendant would satisfy the m... ...ment as defined by the Advisory Committee, but it would hardly consti... ...ing reason for class certification. Indeed, the Seventh Circuit court in *Rhone*... ...idering this precise situation, defined litigation "maturity" exactly oppos... ...of 13 verdicts for the defendant reflected the claim's immaturity. [95]

The f... ...s of the Advisory Committee also reflect substantive concerns about class actio... ...he committee proposed to amend **[*558]** Rule 23(c)(1) to provide for distri... ...ideration of class certification no longer "as soon as practicable after comm... ...an action" but "when practicable." The committee also recommends adop... ...ionary appellate review of a district court's class certification decision. Thes... ...are procedural in the sense that they affect the timing and nature of certif... ...but their effect, as above, can only be to reduce the likelihood of class certif... ...e explained earlier how certification "as soon as practicable" reinforces the pure... ...focus of Rule 23: certification means no more than determining the name of th... ...laying certification according to the Advisory Committee's proposed amer... ...ly serve to enhance a district court's substantive understanding of the case... ...viding for discretionary appellate review of a district court's class certi... ...n (as opposed to extraordinary review through mandamus or district court certi... ...issue under 28 U.S.C. § 1292(b)) will enhance the authority of appellate cou... ...ether the district court has properly applied the procedural requirements for ... ...n, but it will also enhance appellate authority to determine--as in the rece... ...isions discussed above--whether the underlying claim of the purported class ...ave merit.

C. S...

This ...pted to demonstrate that the various concerns about the mass tort class acti... ...appellate courts, and the Advisory Committee are at heart substantive, not ... ...erns. R...commendations to enhance the adequacy of representation, vind... ...autonomy, and reduce conflicts of interest are best understood as efforts to

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more ... employ the class action to achieve the substantive goals of the law. Simil ... nt decertification decisions of various appellate courts are best understood as re... as to the substantive merits of the respective underlying claims. Finally, the p... ...nments of the Advisory Committee, while necessarily procedural in appe... ...ce the likelihood of class certification and enhance the ability of district and appe... ...evaluate the substance of a claim prior to class certification.

The ... ...ticisms, decertification decisions, and Advisory Committee proposals, thus, are s... ...reflects serious concern that the outcomes of mass tort class action litiga... ...art from the substantive ambitions of the law. They are also similar in that each ... ...ddress those substantive concerns through procedural means. Next, Part IV wi... ...his procedural approach to class action reform is inadequate. **[*559]** Proce... ...may help align class action outcomes with substantive law in some conte... ...es in a general way, on the whole. In many other contexts, however, the proce... ...h to reform confuses substantive ends. A solely procedural approach misd... ...n from more direct methods of controlling class actions to better achieve the la... ...ive ambitions.

IV. T... ...S OF THE PROCEDURAL APPROACH

The ... ...argued that academic efforts to reform the mass tort class action by furth... ...edural values of adequacy of representation, vindicating plaintiff auto... ...olving conflicts of interest serve as surrogate means for conforming the outc... ...ttlements to the substantive goals of the law. It argued that efforts of vari... ...urts and the Advisory Committee to transform class litigation to resemble indi... ...serve a similar purpose.

This p... ...ain what I regard to be the grave limitations of this procedural approach to refor... ...ort class action. There are two central substantive problems of mass tort class ... ...e first has been the principal focus of academic reform proposals: to assure that c... ...s with meritorious claims receive sufficient settlement awards. The second has b... ...al focus of the recent appellate court decisions and, perhaps, of the Advi... ...'s proposals: to prevent aggregation into a class of claims that lack subst... ...This part argues that procedural values alone cannot adequately deal with e... ...substantive problems.

Sectio... ...by the values of representativeness, plaintiff autonomy and resolving confli... ...st are generally inadequate as substantive surrogates. It shows that these value... ...the evaluation of the substantive merit of the litigation and generate reco... ...hat sometimes thwart rather than promote substantive goals. Section *B* expl... ...deal of transforming the class action to resemble individual litigation defe... ...virtues of litigation on behalf of a class and paralyzes analysis of new forms ... ...that may be of substantial social value, such as settlement and futures classe... ...lso argues that procedural reforms focus excessive attention on class certif... ...tlement, neglecting other features of the administration of class litigation that a... ...m the law's substantive ambitions.

[*5... ...*Failings of the Representativeness, Autonomy, and Conflict-of-Interest Norm... ...s for Substantive Controls*

The p... ...mic approach to class action reform is structural in nature: enhancing adeq... ...ntation, maximizing class member control over the litigation and class me... ...ns to opt out, and resolving conflicts of interest will purportedly cause the outc... ...ttlements to correspond to the substantive goals of the law. Plaintiffs fully ... ...he various interests within a class will direct the litigation to achieve the goa... ...hey do not, class members can opt out or threaten to opt out in order to

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change h ...on of the litigation.

Regre b' ...ope that representative plaintiffs will make decisions about the course of class ... t correspond to the goals of tort law is, in most cases, hopelessly unrea ... action litigation is uniformly contingency-fee litigation. Few plaintiffs in contin ... litigation--whether the suit is brought individually or on behalf of a class-- exert ... stantive litigation control. As might be expected in a market economy that prote ... rights, contingency-fee litigation is controlled by the party that actually pays t ... st often, the attorneys for the class.

Lack o ... ol ... ontrol, of course, is exacerbated in the context of a class action. The power that a ... n ... certification derives from numbers. Given some magnitude of each indiv ... l ... he larger the class, the greater the negotiating power that follows from class ... As a consequence, there are strong incentives facing both the attorneys for th ... ss representatives to expand the definition of the class as much as poss ... class expands to include more diverse interests, however, the substantive under ... ir ... epresentative plaintiffs as to the nature of class claims and the relat ... F ... g those claims diminishes. Representative class members, necessarily, beco ... in ... ly dependent on class attorneys to understand the claims and how best to pursu ... h ...

Coffe ... v ... support for enhanced definition of subclasses with separate representatives and, ... ate counsel addresses this problem in part. [98] But the problem is endemic to r ... tions and cannot ever be fully solved. Especially in the context of tort clai ... ce of class members alleged to be victims will differ. Surely, Coffee is corr ... tutes an affirmative reform to create subclasses and to appoint repr ... t ... lass members who would otherwise be ignored. As the number of repr ... t ... members increases, however, problems of aggregation of the repr ... separate views increase. These problems, **[*561]** too, lead the group as a whol ... i ... gly rely on class attorneys to determine the course of the litigation.

The ... representation value has been principally endorsed by academics as a mec ... re that class members with meritorious claims receive sufficient sett ... [99] There is an inherent limitation, however, to the extent to which a proc ... ch as representation can advance substantive goals. In our democratic soci ... tion norms are egalitarian: one person, one vote. Substantive tort law norm ... have no egalitarian base. Tort victims are to receive damages awards or sett ... ng to the strength of their case and the seriousness of their wrongful injur ... review of relative class claims on the merits, accounting for substantive diffe ... e ... class member claims becomes difficult. The allocation of control over the litig ... -- ... ss definition to determination of the settlement distribution plan--will nece ... cted by the egalitarian expectations that follow from equal representation, rath ... nd completely by the norms of substantive tort law. Increasing the defi ... ses or invoking the procedural value of adequacy of representation can ... substantive problem.

The ... representation norm operates even more problematically with respect to the ... tive problem of class action litigation: the inclusion of unmeritorious clair ... ss. As mentioned above, there are powerful incentives for both class atto ... s ... sentative plaintiffs to expand the class definition as much as possible in orde ... r ... he class's negotiating power in settlement. Where the class is expanded to inclu ... ... our claims, enhancing adequacy of representation becomes a value cour ... substantive tort law goals. At the extreme, it provides for a repr ... ... in the control of the litigation to plaintiffs who should otherwise be excl ... s class. Yet even with respect to claims that have some, though less, merit, the e ... ... s of democratic representation elevates the influence of the

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unme[illegible]--especially if they are in large number--beyond that consistent with the subs[illegible]ls of tort law.

Refor[illegible]s actions by reducing conflicts of interest is also inadequate as a means of distin[illegible]et veen class claims that lack and that possess merit. As described earlier, many [illegible] commentators have criticized on grounds of conflict of interest the practice of attor[illegible]ng cases for inventories of private clients on terms different than they settle for t[illegible] On similar grounds, they have criticized attorneys entering **[*562]** sepa[illegible] different fee arrangements with opt outs or other private clients than with class mem[illegible]s.

If the [illegible] of all class members possess exactly equal merit, then settlement and fee pract[illegible]s nature represent clear conflicts and are worthy of condemnation. If the meri[illegible] claims differ, however, as is generally true in the case of mass torts, then settle[illegible] different terms or at different fees may well be justified according to the subst[illegible]bi[illegible]ons of the law. Where the claims of some plaintiffs are strong, the ambi[illegible]s [illegible] may be better achieved if the attorneys settle these claims with defer[illegible] amounts, perhaps receiving higher fees, [102] than if these plaintiffs are force[illegible] lower average awards as members of a class. Here, what appears to be a confl[illegible]rest, roundly condemned by academics, represents in fact the better achi[illegible] of tort law's goals.

The [illegible]us problem in such contexts, however, is whether the amounts awarded to the claim[illegible] in the class are excessive given substantive law. Where the meritorious cases [illegible] separately, the claims that remain in the class may represent no more than [illegible]er, [illegible] within some thin legal category to the meritorious claims, but without subst[illegible] The conflict-of-interest norm does not provide a basis for determining the under[illegible] a claim and, thus, is an inadequate surrogate for direct substantive review.

Finally [illegible]cedural value of maximizing plaintiff autonomy provides only a partial contri[illegible]ward achieving substantive tort goals. The plaintiff-autonomy value is invoked most [illegible] with respect to reforms that would maximize opt-out opportunities for class memb[illegible], it is commonly believed that actual opt outs or the threat of opt outs will provid[illegible] discipline to the conduct of class litigation.

As des[illegible]ib[illegible], opting out of a class may be the best means for a tort victim with a merit[illegible] obtain an appropriate settlement. While in virtually all large class action[illegible] some class members who opt out on grounds of principle--they dislike litigat[illegible] believe the cause of action in the case--most of those who opt out do so for reaso[illegible] with the goals of tort law: because they believe that they can obtain a better [illegible] an individual settlement or through litigation.

Where [illegible] numbers have opted out, however, the class settlement remains in effect for the [illegible] who have the weakest cases or even nonexistent cases. Defendants, of cours[illegible]s of this problem and **[*563]** often introduce what are called "walk-away [illegible] class settlements. These provisions allow the defendants to unilaterally cance[illegible] some number or some percentage of class members opt out. But "[illegible]" provisions themselves are problematic and introduce new and difficult tactic[illegible]s for defendants. Class members are given the opportunity to opt out after they [illegible] full notice of the claims in the litigation, including a description of the str[illegible] knesses of the claims and, in some circumstances such as a settlement notice, [illegible] the amount the defendant is willing to pay to settle the aggregate claims. In [illegible] notice will often exaggerate the merits of the litigation in order to con[illegible] to approve the settlement. Prior to the settlement notice, however, the indivi[illegible]al [illegible] may have only had a vague understanding--if any at all--of the nature of

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the litigatio d of its prospects. Yet, when a defendant invokes a "walk-away" provision, it does not r e members of a class to the status quo prior to the settlement. Instead, the defendant faces a certified class which has been informed--perhaps overinformed--of the merits of t gation and surely informed that the defendant values settlement on positive terms. Thi nomenon often leads defendants to renounce their "walk-away" right, even where the e been substantial numbers of opt outs. The class that remains--and with which the m t has been reached--may have little relation to the objectives of tort law if the lain ts members are substantively weak or nonexistent. In these circumstances, the plaintif onomy norm provides no help toward the problem of unmeritorious claims.

Finally, ma zing opt-out opportunities generates other substantive problems in class action adm tration beyond leaving chiefly unmeritorious claims within a class. A broad availa ility e opt-out opportunity relaxes the vigilance of the court with regard to the conduct o tigation. This problem provides further reasons for class action outcomes to depar fro s stantive objectives of the law.

The creati free and open opt-out rights allows a court to believe that the conduct of the class tic be adequately monitored by class members themselves. The court need only give attenti appropriate notice to members of the class in order to inform their opt-out decisions. T given the possession of a right to opt out, if any class member becomes dissatisfie the litigation, he or she can register that dissatisfaction by exercising the right. This a s a court to resume its normal position in litigation as an umpire resolving disputed i brought to its attention through the adversarial process, rather than as a carefu m f class attorneys' activities in contexts in which representative class mem rs ot be sufficiently informed to fulfill an adversarial role. This relaxed approach of cou s ows class attorneys to pursue aims in class administration (often **[*564]** politi al a unrelated to the substantive goals of the litigation. Obviously, the lower the level ju vigilance, the less the class litigation will adhere to the substantive objectives of t av her efficiency or equity. The litigation, instead, will be controlled by class attorneys e management of the class may have little to do with the substantive goals of tort l . A the plaintiff-autonomy value does not directly address these problems.

B. The Fai f the Individual Litigation Ideal as a Surrogate for Substantive Control

Many com rors and courts have criticized mass tort class actions based on ways that they depa m an image f individual litigation. Some believe that many of the problems of mass tort actions could be resolved if the class action were transformed to resemble individual on, such as by enhancing plaintiff autonomy and deputing representatives to make dec as if they were individual litigants. [105] Others believe that mass tort class actions sh e transformed into individual litigation literally: by maximizing opt-out rights and prefe ndividual to class litigation where the stakes of individual claims are high. [106] In still oth es, courts have decertified unusual classes--such as the settlement class including t s claimants in *Georgine*--because the nature of the class and the settlement seemed t t so substantially from the individual litigation ideal. [107]

It is alway blematic to compare an existing phenomenon to an ideal, and no less true in the case c s to class actions. The ideal of individual litigation--controlled by a fully informed , however in low, making no litigation investment not worth the expected benefit--is ly unrealistic in most mass tort contexts. As mentioned earlier, mass tort class litiga s fairly compared only to other high-risk contingency-fee litigation where the plaintiff s ttle more than as an instrument of the attorney pursuing the claim. In such a context, t seriously the ideal norms of individual plaintiff autonomy and control causes a reviewir t to misunderstand the essence of the issues before it.

Pursuit of dividual litigation ideal forfeits the benefits available from class treatment of legal issu e an important affirmative role **[*565]** for the class action in both the

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efficiency a corrective justice traditions of tort law. Class actions can substantially reduce the costs ation by exploiting economies of scale. Class actions can serve as the most effective r of achieving justice for a substantial group of citizens. The individual litigation i enies these benefits. Maximizing opt outs, for example, increases litigation costs and well lead class outcomes to further depart from the substantive ambitions of the law. M izing opt-out opportunities, as discussed, can be justified instrumentally as an indirect te que for imposing some form of discipline toward the direction of the litigation. Of course, e are serious questions as to how effective this indirect means can be, given class mem general lack of information about the litigation. It has become necessary to rely for su tive direction of class litigation on such an indirect mechanism as the opt out, admittedly questionable effect, because of the purely procedural constraint of class certificati w. The benefits of class aggregation could be better achieved if courts were to subject ai to direct substantive review on the merits prior to certification.

Similarly, commentators and courts have invoked the individual litigation ideal in the context of treatment of claims involving high stakes. Various courts have decertified classes in because the claims are of sufficient dollar magnitude to support individual litigation. e courts have expressed disfavor of class certification of any claim involving personal i on a similar ground. [109] The Advisory Committee has proposed amending Rule 23 to mak abili to pursue individual litigation an explicit factor under Rule 23(b)(3) superiorit is [110].

This appr o, simply forsakes all benefits to be achieved from class aggregation. There is no prin case for refusing class certification to large stakes claims. There is no analytical for concluding that the aggregation of large stakes claims cannot achieve economie le; indeed as a first approximation, just the opposite: in individual cases, litigation e ur are higher, the greater the stakes in the case. Thus, there exists a greater ra available economies from aggregation in highstakes than in low-stakes cases. Sin here is no analytical reason to believe that class aggregation will not prove to be the ec e means of achieving corrective justice for groups of aggrieved citizens, e h has suffered a more serious as opposed to a less serious loss. The explanat s of the Advisory Committee give no principled justification for such an amendm rsoever and simply conclude that wherever **[*566]** it is possible to segregat that might be brought individually from treatment in a class, it is appropri so [111].

Instead, th for refusing class status to large stakes claims is prudential. Various appellate nd, apparently, the Advisory Committee fear that class certification is being employed e essentially unmeritorious claims which, in turn, extort large--and unmerite offers from defendants who might otherwise be found free of liability. [112] If this t, then it is obviously more serious where the stakes of each individual claim are th han low.

But the p ure goes too far. The proposition that large-stakes claims are never deserving a egation because of the fear of unmerited settlements can only be maintaine where courts refuse to evaluate the merits of claims prior to class certificati in contrast, were to engage in direct substantive review of class claims prior to c on e extortion problem would disappear, and the benefits from the aggregat the stakes claims could be achieved.

Finally, th litigation ideal has paralyzed courts in their evaluation of the most controve o tort classes: settlement classes, futures classes, and mandato ne futures classes. As described earlier, two Third Circuit courts have recently d settlement classes, ruling that such classes can only be certified if they comply requirements for certification of a litigation class. [113] There are two importan tio to holding: first, that the fact of settlement will not affect the

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court's m[illegible]ability analysis; second, that futures classes will probably not ever be certified since the [illegible] of futures class members and the nature of the harm they might suffer exist only [illegible]ry and, thus, do not confer standing under the law of many states. These rulings fo[illegible]s from a preference for individual litigation than from a conclusion that settlemen[illegible] and futures class litigation depart so substantially from "normal" individual litigation [illegible]ey cannot be maintained. [114]

These Th[illegible]uit opinions are well crafted and thoroughly reasoned--in both cases by Judge Be[illegible] jurist of the highest intelligence and ability. I respectfully believe, however, that the a[illegible]h of these opinions, informed as it is by the individual litigation ideal, places limits on [illegible]s action device compelled only because of the current inability of courts to [*567] [illegible] in a thorough substantive review of the merits of a claim prior to class certific[illegible]

The ba[illegible]ntive question in evaluating any request to certify a settlement class is wheth[illegible]ns of the settlement are fair. The fairness evaluation must extend not only to the aggr[illegible]rms of the settlement but also to the terms of distribution of the settlement amoun[illegible] members of the class. According to the substantive goals of tort law, it is import[illegible]ass members with deserving claims receive their appropriate shares of the settlem[illegible] class members with weaker claims receive commensurately lower shares, and th[illegible]mbers with unmeritorious claims be excluded from the class definition. [115] Many [illegible] ni[illegible] even the conception of settlement classes because of concerns that such s[illegible]er[illegible] will frequently be collusive and that conflict-of-interest concerns will be great. [illegible] *Georgine* court refused class certification, in part, on these grounds. [117] At heart, [illegible]ve these issues are substantive issues. They can only be addressed properly with s[illegible]ti[illegible], not procedural, review.

The p[illegible] procedural approach to class certification imposes a serious structural challenge in the c[illegible] of [illegible]tlement classes. Where a settlement class has been proposed, the first issue [illegible] th[illegible] court is certification of the class; the court reaches the substantive fairness of the [illegible]m[illegible] after certification. Again, many courts recognize that certification alone of a c[illegible] unfair negotiating power in many litigation contexts. Where, however, a court [illegible]rti[illegible]ss, but then disapproved the terms of the settlement, the court has created [illegible] un[illegible] negotiating power without giving the defendant the benefit of the settle[illegible] Th[illegible] problem [illegible] specially acute where the grounds for disapproval of the settle[illegible]re[illegible] that th[illegible] aggregate settlement amount is insufficient but rather that the terms o[illegible] settlement distribution as among class members fails the substantive fairness stand[illegible]rgu[illegible]y, [illegible] concern was the underlying basis for the Third Circuit decisions decer[illegible] cl[illegible] *neral Motors Fuel Tank Litigation* and in *Georgine*. [118] It is best addre[illegible] ho[illegible] direct substantive, not indirect procedural, review of class certif[illegible].

The T[illegible] Circuit hostility to settlement and futures classes, in my **[*568]** view, derives more [illegible]lly [illegible] the limitations of the purely procedural approach to class action review. That [illegible] ca[illegible] coherently defined and that a settlement has been reached must affect the m[illegible]ab[illegible] of the action--which is to say, the prospect that the settlement might succe[illegible] ac[illegible] substantive goals of the law. Manageability, however, obviously does not e[illegible] t[illegible] settlement is substantively fair as among respective members of the class.

Simila[illegible] wo[illegible] difficult to argue that no settlement could ever be defined for a futures class [illegible]hi[illegible] substantive goals of tort law. The Third Circuit in *Georgine*, recoiling ag[illegible] ma[illegible] features of the settlement class in that case, [119] concluded that a gl[illegible]tion [illegible]s litigation problem was beyond the control of our civil litigation sy[illegible] re[illegible]ional attention, perhaps in the form of a compensation plan. [120] Th[illegible], t[illegible]m the excessive constraints of a purely procedural approach to

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some subset of class members have been too low either in absolute terms or in relation to settlements to more-favored class members or to individuals opting out of the class. [7]

At the same time, several appellate courts have indicated increasing concern of an opposite direction: that certification of a mass tort class action confers negotiating power unfair to defendants. Within recent years, courts in four federal appellate circuits have decertified significant mass tort class actions. [8] Each decision was based on the failure of the proposed class to satisfy one or another of the procedural requirements for certification under Rule 23, though openly in some [9] and lurking beneath the surface in the others is the fear that certification alone will be determinative of the dispute and unfairly determinative if the underlying substantive merit of the claim is low. Issues relating to settlement classes or to futures classes have received mixed reception in the courts. The Third Circuit has prominently staked a position opposing certification of both settlement classes and futures classes. [10] The Fifth Circuit, in contrast, though with somewhat different procedural safeguards, has recently approved a settlement involving a solely futures class. [11] At this writing, the U.S. Supreme Court is set to address the issues of settlement and futures classes in appeals of these two decisions.

Finally, within recent months, the Advisory Committee on Civil Rules **[*524]** has proposed important amendments to F.R.C.P. Rule 23 that in some respects meld the academic and judicial concerns. [12] In general, the proposed amendments seem to constrict substantially the availability of the class action device in the context of mass tort litigation. Thus, they disfavor certification of classes where the stakes are sufficient for claimants to support individual litigation and also disfavor some forms of low-stakes litigation where litigation costs are likely to exceed expected benefits. They introduce a new criterion of "maturity" for the determination under Rule 23(b)(3) of whether class litigation is superior to individual litigation. The committee also proposes an amendment that would explicitly approve certification of classes that have reached a settlement on grounds that certification prior to settlement would be unfair to defendants. Yet, however seemingly constrictive the proposed amendments, they are defended by the same values motivating the academic critics, in particular, the vindication of plaintiff autonomy. Thus, they presume that high-stakes cases are better brought individually, rather than as class litigation, so that the individual plaintiff will have maximum control and, conversely, that low-stakes litigation may be better if never brought because individuals would not do so where costs exceed benefits.

The Advisory Committee's proposed amendments have generated criticism, perhaps most prominently by a collection of well-known academics from leading schools calling itself the Steering Committee to Oppose Proposed Rule 23. [13] This group's concerns, however, extend only to the amendment's disfavor of small-stakes class actions and approval of what the Steering Committee views as potentially collusive settlement classes. The Steering Committee seems silently to approve the Advisory Committee's proposal with regard to high-stakes litigation, apparently sharing the value of promoting plaintiff autonomy.

As might be evident from the preceding discussion, there is a curious disjunction among these various approaches to the mass tort class action. The dominant academic literature, the Steering Committee, and some courts generally approve of class aggregation in the mass tort context, though insisting on a wide range of specific reforms to control what are regarded as abuses. They regard settlement and futures classes as so susceptible to abuse as to merit rejection in virtually all cases. In contrast, the four circuit courts and the Advisory Committee seem hostile to the mass tort class action in general, though the Advisory Committee endorses settlement classes **[*525]** as other courts endorse futures classes. What is curious is that each of these different groups invokes identical values to reach dramatically contrasting positions. The single value underlying each of these various conclusions is that the mass tort class action should be made to resemble individual litigation. The academic literature and the Steering Committee advance the values of representation, control of conflicts of interest and, most important, vindicating plaintiff

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the iss[illegible]

Viewe[illegible] procedure, the settlement plan in *Georgine* more closely resembles a legisl[illegible] than a judgment in a tort case. [121] But viewed from a concern about [illegible] goals the resolution of asbestos claims is inescapably a judicial, rather than a [illegible] The modern asbestos litigation phenomenon was created by the courts [illegible] liability against asbestos manufacturers and their insurers on the a[illegible] satisfy the goals of tort law. Asbestos litigation can be expected to contin[illegible] because, again, the courts have further expanded liability on behalf [illegible] exposed to the product to further advance substantive legal goals.

The pr[illegible] problem with respect to asbestos litigation, however, is not temporal, but fi[illegible] remain from asbestos manufacturers and insurers to compensate these [illegible] fund problem derives in a different way from the courts: in partic[illegible] of courts to limit multiple punitive damages recoveries from individ[illegible] the availability of funds to compensate future victims. The future [illegible] *Georgine* and the mandatory futures settlement class in *Ahearn* repres[illegible] with these problems.

The m[illegible] ues in settlement futures class litigation, however, are not procedural, but su[illegible] e settlements substantively fair in **[*569]** aggregate amount? Do they a[illegible] g members of the class in a way that complies with the su[illegible] law? These are uniquely judicial, not legislative, issues. The st[illegible] legal, not electoral. According to both efficiency and corre[illegible] the compensation to be distributed to the victims is to come from [illegible] sers themselves, not from the general tax base or from specific taxab[illegible] x on future chemical sales to support Superfund cleanups. As a cons[illegible] of justice, these substantive issues should be resolved by our co[illegible] ures. The controversy that surrounds settlement and futures classe[illegible] excessively narrow procedural approach to the issue of class adjud[illegible]

Final[illegible] n ideal and the procedural approach constrict judicial attention to [illegible] ass litigation that have important substantive effects. Rule 23 pr[illegible] rtification and notice. Rule 23, of course, confers general e[illegible] to manage an action, but once certification requirements are m[illegible] scrutiny is often relaxed.

There [illegible] stantive issues in all class litigation, however, relating to the specif[illegible] where there is a settlement, to the design of a distribution plan that a[illegible] procedural approach. In individual litigation, the definition of the p[illegible] ant; the distribution of the settlement or judgment is generally ei[illegible] relevant to the court. In class litigation, in contrast, class d[illegible] distribution have important substantive dimensions, d[illegible] urely procedural approach.

Th[illegible] class definitions will include individuals who do not merit re[illegible] stantive legal standard. Prior to class certification, plaintiffs' at[illegible] class definition possible in order to maximize their ba[illegible] ification, if settlement is expected, defendants will seek to ex[illegible] order to maximize the preclusive effect of the settlement. Class a[illegible] the size of the class is a relevant factor in the d[illegible] fees. Indeed, class attorneys are most likely to a[illegible] ividuals who have the weakest substantive cases, ur[illegible] n. Each of these reasons suggests that the class definition will

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gene[illegible] o[illegible] [illegible]p[illegible]nsive in relation to any substantive theory of liability or to the subs[illegible] ob[illegible]/es of th[illegible] law.

Once [illegible]ttlc[illegible] agreement has been reached, there are strong political incentives to inclu[illegible] as[illegible]'ers in the distribution of the settlement fund. The adequacy-of-repre[illegible]on[illegible] suggests that a class resembles **[*570]** a democratic unit, pressing towa[illegible]ga[illegible] distribution. Indeed, it is the unusual class in which some class member reca[illegible]i[illegible] y providing positive recoveries to all class members, a settlement distri[illegible]al[illegible] by definition, will depart from the substantive objectives of the law.

Inde[illegible]e di[illegible]e between settlement shares and substantive tort standards are often extr[illegible]vi[illegible] themselves of the defendant, class attorneys' chief remaining problems deriv[illegible]cl[illegible]e[illegible]ber objectors. There are strong incentives to anticipate objections and to pr[illegible]h[illegible] relatively generous provisions in the distribution plan.

This [illegible]c[illegible] use, once settlement is expected and the settlement amount de[illegible] generously adversarial character to class litigation. The only true su[illegible] s are members of the class themselves or, at least, those with rel[illegible]h[illegible] lower merit claims under the law who, substantively, are deserving of diffe[illegible]Ju[illegible] ares. In the absence of true controversy, for the court to maintain its rol[illegible] empire alone would disregard substantive values.

V. C[illegible]C[illegible]AN COU[illegible]TS REVIEW CLASS CLAIMS ON THE MERITS PRIOR TO CER[illegible]C[illegible]

The [illegible] argued that the procedural approach to controlling mass tort class ac[illegible]d[illegible] in se[illegible] respe[illegible], the point should be obvious. If one accepts that ce[illegible]f[illegible] lon[illegible] eater substantial negotiating power and accepts that that neg[illegible]e c[illegible]ated even in contexts where there is little or no substantive mer[illegible]el[illegible] it should be obvious that our legal system should provide for sub[illegible] he merits of class claims prior to certification.

Revi[illegible] prior to certification, however, is alien to our system. As is well known, the c[illegible] did not consider its role in the mass tort context [123] or surely imagine the r[illegible] that class certification would ultimately confer. They crafted Rule 23 viewi[illegible] a class as a procedural device alone. The subsequent academic co[illegible] trial treatment of the class action have accepted this procedural cast. Ac[illegible] tended to impose some substantive control on the mass tort class action, but[illegible] chosen--invoking the values of adequacy of representation, vi[illegible] [*571] autonomy, and control of conflicts of interest--are inadequate to [illegible] in my view, regrettably--has led appellate courts and groups such[illegible] to impose increasing constraints on the class action mec[illegible] certification decisions and through proposed amendments that would su[illegible] class action availability.

To m[illegible] confronting the policy arguments in favor of substantive review of class cla[illegible] for[illegible] there remains an important obstacle to their adoption: the Su[illegible]urt[illegible] decision in *Eisen*, discussed above. [124] In an ideal world, Rule 23 m[illegible]en[illegible] overrule *Eisen*. Before taking that step, however, it is worthwhile re[illegible]ser[illegible] the nature of its proscription. In my view, *Eisen* can be read to al[illegible]ul[illegible]ra[illegible] of substantive claim review prior to class certification.

Rec[illegible]he[illegible] in *Eisen* related to notice. The district court had determined that noti[illegible]ot[illegible] to class members, but only to a limited set. The court had also rule[illegible]e[illegible] was to be responsible for paying 90 percent of the costs of notice. This[illegible]ng[illegible] the court's finding, after holding a preliminary hearing, that the

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pla[illegible] than not to prevail on the merits.

The [illegible] the district court's conclusion. The Court ruled that Rule 23 ma[illegible] each class member. More important, the Court stated that ther[illegible] 23 for a lower court's review of the merits of the claim for pur[illegible] to a defendant. Allow me to quote more fully from the Co[illegible] than discussed above. The Court states,

We [illegible] language or history of Rule 23 that gives a court any authority to [illegible] into the merits of a suit in order to determine whether it may be [illegible] on. Indeed, such a procedure contravenes the Rule by allowing a re[illegible] benefits of a class action without first satisfying the requ[illegible] to obtain a determination on the merits of the clai[illegible] the class without any assurance that a class action may be ma[illegible] [125]

As [illegible] in *Eisen* has been subsequently read to prohibit any evaluation of [illegible] point of class certification, [126] a proposition similar to Judge Wi[illegible] [*572] *Int'l, Inc.* [127] A more narrow reading of *Eisen*, ho[illegible] is evident from the Court's treatment that the Court's concern ab[illegible] a claim at class certification is related to the district court's use of [illegible] costs to the defendant. Note that, immediately after the first se[illegible] nothing in the language or history of Rule 23 confers au[illegible] the Court justifies this approach by referring to "benefits" to th[illegible] review. These words remain mysterious to the modern eye, an[illegible] with a broad and neutral procedural conclusion similar to th[illegible]

Ac[illegible] on the merits would allow a representative plaintiff "to secure the [illegible] satisfying the requirements for it." It is not at all cl[illegible] Court is referring. Most probably, the Court is re[illegible] to the defendant, as approved by the district court be[illegible] that the plaintiff was more likely than not to prevail. Poss[illegible] that a finding that the plaintiff is likely to prevail wi[illegible] ruling on class certification. Either of these in[illegible] substantially from Judge Wisdom's more comprehensive pr[illegible] in *Miller* is procedural in nature: no review on the mer[illegible] review shows (1) no merit to the claim, or (2) su[illegible] [128] The Supreme Court in *Eisen* seems concerned only about th[illegible] a finding by the lower court following a certification he[illegible] is more likely to prevail or that the plaintiff's cla[illegible] cognizable benefit to the plaintiff. According to this rea[illegible] not a [illegible] rizing substantive review prior to certification, does no[illegible] determine whether there is sufficient merit to even en[illegible] complies with the various requirements of Rule 23.

Th[illegible] speculation. This reading of *Eisen* allows a court to control at th[illegible] two substantive concerns relating to class actions. A[illegible] cern--most important to the academic commentary--is [illegible] the fullest possible amount in class settlements. The se[illegible] --most important to the appellate courts and, pe[illegible] claims without merit **[*573]** not be certified for clas[illegible] negotiating power that derives from certification. Ar[illegible] decertification decisions of the Seventh Circuit in *Rh*[illegible] *Castano*. According to the reading suggested above, *Eis*[illegible] second, negative review: the determination that if the

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und[illegible] subs[illegible] e claim is without merit, class certification should be denied.

Wh[illegible] en [illegible] read in this manner or not, or whether further amendment of Rule 23 or [illegible] rat[illegible] of [illegible]isen is compelled, this article has argued that courts must extend bey[illegible] ed[illegible] review of class certification as well as of all remaining features of class adm[illegible] on. [illegible]ost in[illegible]ortant problem relating to modern mass tort class actions is alig[illegible] s a[illegible] utcom[illegible]s with the substantive goals of tort law.

FO[illegible]S:

n1 [illegible]ene[illegible] George L. Priest, *The Invention of Enterprise Liability: A Critical History of [illegible] ect[illegible] dations of Modern Tort Law*, 14 J Legal Stud 461 (1985).

n[illegible] *Mat[illegible] hone-Poulenc Rorer Inc, et al*, 51 F3d 1293, 1300 (7th Cir 1995). For a sin[illegible] me[illegible] *Valentino v C[illegible]r-Wallace, Inc*, 97 F3d 1227, 1232 (9th Cir 1996).

n3 [illegible]r ex[illegible] George L. Priest and Benjamin Klein, *The Selection of Disputes for Litig[illegible]* 3 J [illegible] Stud[illegible] (1984).

n[illegible] arcia[illegible] ell, *Science on Trial* (1996).

n[illegible] H. S[illegible] *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L Rev 94[illegible]).

n[illegible] r e[illegible] *Symposium: Mass Tortes: Serving Up Just Desserts*, 80 Cornell L Rev 81[illegible]

n7 [illegible] pa[illegible] John [illegible]. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Ac[illegible]* [illegible]olu[illegible] 13[illegible] (199[illegible]).

n[illegible] *Po[illegible]* (cited in note 2); *In re American Medical Systems, Inc*, 75 F3d 1069 (6th Cir [illegible] *as[illegible] merican To[illegible] Co*, 84 F3d 734 (5th Cir 1996); *Valentino* (cited in no[illegible]

n[illegible] e ca[illegible] d in note 2.

n[illegible] *Ger[illegible] tors [illegible]rp Pick-Up Truck Fuel Tank Prods Liability Litigation*, 55 F3d 76[illegible] 19[illegible] *[illegible] Prods, Inc*, 83 F3d 610 (3d Cir 1996).

n1 *Asb[illegible] Litigation (Ahearn)*, 90 F3d 963 (5th Cir 1996).

n[illegible] xt[illegible] proposed am[illegible]dments (*Proposed Changes to Federal Rule of Civil Pro[illegible] 3 a[illegible] sory [illegible]ommittee Notes*) appears at 24 Prod Safety & Liab Rptr 606 (B[illegible] lat[illegible] fairs [illegible]96), hereafter cited as *Advisory Committee Notes*.

n[illegible] ng[illegible] tee to Oppose Proposed Rule 23, *Letter to the Standing Committee on Ru[illegible] cti[illegible] [illegible]* ([illegible]istrative Office of the US Courts, June 1, 1996).

n[illegible] *v C[illegible] Jac[illegible]elin*, [illegible] 7 U.S. 156 (1974).

n[illegible] or [illegible], th[illegible] Cornell Symposium (cited in note 6).

n[illegible] e (cit[illegible] ote [illegible].

n[illegible] 1422[illegible]

n1 [illegible] Cra[illegible] [illegible]izes [illegible] is point. See Roger C. Cramton, *Individualized Justice,*

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Ma[illegible] and "[illegible]": An Introduction, 80 Cornell L Rev 811 (1995).
Se[illegible] fee, [illegible] ([illegible]).

n[illegible] 325; [illegible] Koniak, *Feasting While the Widow Weeps: Georgine v A[illegible]* [illegible] 1045 (1995).

n[illegible] ton, a[illegible] (cit[illegible] in note 13).

n[illegible] ichard [illegible] *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 Co[illegible] v 85[illegible] 5); [illegible] 1350 (cited in note 7); Schuck, at 964 (cited in note 5).

r[illegible] n pa[illegible] note 21).

r[illegible] offee [illegible] in n[illegible] 7). [illegible] also the Seventh Circuit's discussion of this point as ad[illegible] oun[illegible] *[illegible]one-Poulenc* (cited in note 2).

n[illegible] or ex[illegible] the [illegible] agreement in the *Georgine* futures class (cited in note 10 [illegible] mita[illegible] he grounds on which the Third Circuit rejected the *Ge*[illegible] len[illegible]

n2[illegible] s (ci[illegible] note [illegible]; S[illegible]uck, at 964 (cited in note 5); Coffee, at 1373 (cited in no[illegible]

n[illegible] equ[illegible] repr[illegible] issue, discussed above, relates to conflicts of interest ar[illegible] me[illegible] it to be dealt with--though not perfectly resolved--thro[illegible] crea[illegible] ses representing the different interests. See Coffee, at [illegible] d in [illegible]).

n[illegible] 350 [illegible] note 19).

n[illegible], at 37[illegible] n note 7).

n[illegible] 419 For [illegible] mo[illegible] gener[illegible] discussion of problems relating to attorneys' fees in cl[illegible] n, [illegible] E. Curtis, and Deborah Hensler, *Individuals within th[illegible]* [illegible] 71 NYU L Rev 296 (1996).

n[illegible] (cited in [illegible]

n[illegible] 31[illegible] in note 19).

n[illegible], at 31[illegible] Koniak (cited in note 19).

n[illegible] n ([illegible] no[illegible] 19).

n[illegible] *Po[illegible]enc* [illegible]).

n[illegible] 299.

n[illegible]

n[illegible] 300

n[illegible] 300 [illegible]

n[illegible] *n[illegible]* [illegible] in note 8).

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n4[illegible] [illegible]ntino (cited in [illegible] 2).

n4[illegible] are 97 F3d at 1[illegible]2-33 with 1233-34.

n42 [illegible]no, at 746 (cited in no[illegible] 8).

n43 [illegible] 747.

n44 [illegible]urse, as mentio[illegible]d earlier, all classes certified in a mass tort context appear to have [illegible]d their claims p[illegible]r to ju[illegible]gment.

n4[illegible] [illegible]al Motors Fuel Tank Litigation (cited in note 10). This excellent and con[illegible]ive [illegible] approval of the settlement on grounds of conflict of inte[illegible], sim[illegible], [illegible] the [illegible]orney fee award negotiated by counsel without court revi[illegible]

n46 [illegible]gine (cited in no[illegible] 10). The class settlement represented the outcome of the con[illegible]n of [illegible] asbestos cases by the Judicial Panel on Multidistrict Litig[illegible]d th[illegible] to J[illegible]e Charles R. Weiner. The history of this extraordinary effo[illegible]olve the a[illegible] litig[illegible]n appears in the *Georgine* opinion at 618-19. Also see Cof[illegible] 393-[illegible] ([illegible] note [illegible]).

n[illegible] [illegible]urt [illegible], as is typical in decisions decertifying classes, that there was no [illegible]lity [illegible]egard to asbestos personal injury claims--an always ava[illegible]nclus[illegible]n, [illegible]us given universal recovery by claimants against asbe[illegible]anufa[illegible]turers.

n4[illegible] [illegible]n argument [illegible] welfare-like distribution plan in a mass tort exposure case is the [illegible] achieving both justice and deterrence, see David R[illegible] *[illegible]llectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 [illegible] v 2[illegible] ([illegible])

n[illegible] [illegible]wer [illegible]d the mandatory class including futures claimants because the de[illegible] [illegible]gainst which all claimants might recover.

n5[illegible] [illegible]ote 1 [illegible].

n[illegible] [illegible]n v F[illegible] [illegible]al, 1[illegible]2 FRD 505 (ED Tex 1995).

n[illegible] [illegible]men[illegible] [illegible]vely overrule the Third Circuit decisions, discussed ab[illegible] [illegible]ng [illegible]tific[illegible] [illegible]nent classes to contexts in which the class would be cert[illegible] [illegible]tig[illegible]n. *Gen[illegible] Motors Fuel Tank Litigation* (cited in note 10); *Georgine* (cited in [illegible]

n5[illegible] [illegible]s E. [illegible] Mature Mass Tort Litigation, 69 BU L Rev 659 (1989).

n[illegible] [illegible]otes [illegible] 8 a[illegible].

n[illegible] [illegible]ry [illegible], at lines 135-52 (cited in note 12).

n[illegible] [illegible]ene[illegible] ([illegible] note 19). For a more precise advocacy of larger re[illegible] [illegible]ee [illegible] in note 7).

n[illegible] [illegible]th V[illegible] *[illegible]: Efficiency, Compensation, Deterrence, and Conflict of In[illegible]* Leg[illegible] [illegible]7[illegible]

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[illegible] justice approach to tort law at this level of generality is all [illegible] Obviously, there are many different corrective justice ap[illegible] [illegible]atly the rights of plaintiffs to be vindicated and the mi[illegible] def[illegible] [illegible]rrection. See, for example, George P. Fletcher, *Fairness an[illegible]* *To[illegible]* [illegible] Rev 537 (1972); Richard A. Epstein, *A Theory of Strict Liab[illegible]* Leg[illegible]

[illegible]

[illegible] *v M[illegible]* [illegible] F2d 424 (5th Cir 1971).

[illegible] 27 [illegible] *[illegible]han v Rosenstiel*, 424 F2d 161, 169 (3d Cir 1970)).

[illegible]

[illegible] at [illegible] 14).

[illegible] [illegible]hur R. Miller, and Mary Kay Kane, 7B *Federal Practice and Pro[illegible]* 17[illegible] [illegible]). Note that, shortly following the passage quoted above, the [illegible] [illegible]'s broad language in *Miller. Eisen* at 178 (cited in note 14) [illegible] a more limited interpretation of *Eisen*.

[illegible] [illegible]. Posner, *Economic Analysis of Law* 191 (4th ed 1992).

[illegible] [illegible]on of *Eisen* (cited in note 14), however, see text at notes 124[illegible]

[illegible]

[illegible] [illegible]ble standard of appropriate individual reward in the cor[illegible] [illegible]s acceptable a much lower standard of rep[illegible]n.

[illegible] [illegible]-33.

[illegible] [illegible]-28.

[illegible] in the text around notes 101-3.

[illegible] 10 above.

[illegible] *Pc[illegible]*); *Castano* (cited in note 8).

[illegible] *-Pc[illegible]*); *American Medical Systems* (cited in note 8).

[illegible] *-Pc[illegible]*); *Castano* (cited in note 8).

[illegible] *[illegible]ion* (cited in note 10); *Georgine* (cited in note 10).

[illegible]

[illegible] [illegible]te 8).

[illegible] other available methods for the fair and efficient adj[illegible] [illegible] 739.

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n8 [illegible] 46.

n8 [illegible] -Po[illegible] at 1[illegible] (cit[illegible] in note 2).

n8 [illegible] 15 ([illegible] note [illegible]).

n8 [illegible] 46 [illegible] rly [illegible] laim in *Castano* was that cigarette companies had wro[illegible] ea[illegible] [illegible] [illegible] [illegible].

n8 [illegible] sta[illegible] [illegible] on the maturity analysis in *Rhone-Poulenc*, extensively citi[illegible] [illegible] Circuit [illegible] at 748.

n8 [illegible] Po[illegible] at 1[illegible] (cit[illegible] in note 2).

n8 [illegible] 29[illegible]

n8 [illegible] Po[illegible] at 1[illegible] (ci[illegible] in note 2).

n8 [illegible] e C[illegible] *tano* [illegible] dis[illegible]ssion of these issues at 748-51 (cited in note 8).

n8 [illegible] *an* [illegible] *ical S*[illegible] *ms* ([illegible] in note 8); *Castano* (cited in note 8); *Rhone-Poulenc* (cit[illegible] 2).

n9 [illegible] d[illegible] ssion [illegible] ues in the text at notes 34-41.

n9 [illegible] ([illegible] in no[illegible]).

n9 [illegible] 32 [illegible].

n9 [illegible] is [illegible] the p[illegible] ed [illegible] endments are so vigorously criticized by groups such as the [illegible] Co[illegible] tee [illegible] 3).

n9 [illegible] *mmitt*[illegible] *tes*, [illegible] lines 227-30 (cited in note 12).

n9 [illegible] *Po*[illegible] *nc*, at 1[illegible] -130[illegible] (cited in note 2).

n9 [illegible] Circuit [illegible] expr[illegible] statement of this point in *Castano*, cited in text at note 80.

n9 [illegible] of[illegible] [illegible] ns a[illegible] addressed in text at notes 121-22.

n9 [illegible] (ci[illegible] in note [illegible].

n9 [illegible] t [illegible] notes 15[illegible].

n1 [illegible] notes [illegible] 30.

n1 [illegible]

n1 [illegible] if more [illegible] kill is required to establish the claim; lower fees if the cla[illegible] [illegible] ta[illegible]

n1 [illegible] notes 2[illegible] 2.

n1 [illegible] is. [illegible] litical i[illegible] ntives facing class attorneys that follow from treating the class

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n1[illegible] [illegible] *Litigation*, at 800-801 (cited in note 10) (discussing ina[illegible] [illegible] individual versus fleet purchasers); *Georgine*, at 63[illegible] [illegible] failure to include medical monitoring of futures me[illegible]

n1[illegible] [illegible] Court, at least in the oral argument on appeal. For a de[illegible] [illegible] *the Heat*, 19 Am Law 84-85 (April 1997).

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n1[illegible] [illegible] *Litigation*," 54 L & Contemp Prob 5 (1991).

n1[illegible] [illegible] in note [illegible] at text surrounding notes 62-64.

n1[illegible] [illegible]

n1[illegible] [illegible] at 1[illegible]-26 (cited in note 64).

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autonomy in the class action context because those are the features most characteristic of litigation in an individual context. They oppose settlement and futures classes because they believe that such classes depart irretrievably from the individual litigation model.

Though to an opposite result, the four Circuit Courts and the Advisory Committee promote exactly the same values, however more directly. By decertifying classes and introducing new requirements that reduce the likelihood of class certification, the courts and the Advisory Committee are effectively forcing claimants to pursue their litigation in individual, rather than class, form. The Advisory Committee's endorsement of settlement classes is simply inconsistent and not fully explained.

Obviously, values such as promoting plaintiff autonomy or making class litigation resemble individual litigation could not serve as the basis for such radically different approaches to the mass tort class action if their content and normative force were clear and well defined. As I shall explain in more detail, the value of promoting plaintiff autonomy, while certainly unobjectionable on its face, has never received adequate moral definition or justification. Its extraordinary pliability derives from the fact that, in the class action as in other contingency fee litigation contexts, the notion of plaintiff autonomy or plaintiff control over the litigation is largely meaningless. Similarly, there has been little effort to explain why class litigation should be made to resemble individual litigation beyond the fact that individual litigation is regarded as the norm and class litigation, the exception. The individual litigation ideal, thus, appears to be little more than preference for the known and accepted status quo.

This article argues that the unusual disjunction between value and recommendation derives from the failings of a solely procedural understanding of Rule 23 class actions in the mass tort context and the disregard of the relationship between the mass tort class action and the substantive objectives of tort law. Following the U.S. Supreme Court's important decision in *Eisen v. Carlisle & Jacquelin*, [14] it has been believed improper to evaluate the substantive merits of a claim in considering whether a case may proceed as a class action. The absence of substantive review prior to certification (along with the liberalized pleading standards of the Federal Rules and the expansion **[*526]** of tort liability standards, referred to above) has meant that class certification alone confers negotiating leverage sufficient to force a significant settlement regardless of the merit of the case. As I shall attempt to demonstrate in more detail below, the power generated by class certification generates outcomes that depart very substantially from the substantive ambitions of tort law. Regrettably, the largely procedural focus of the modern literature as well as of reform efforts of groups like the Advisory Committee seem to presuppose a congruity between class litigation and the substantive objectives of the law. As an unintended consequence, much of what the current academic literature criticizes as indicating conflict of interest or as a violation of plaintiff autonomy in fact represents efforts that may more closely align recoveries from class action litigation with substantive legal aims. The criticism of settlement and futures classes, in particular, ignores these substantive ends.

This article discusses the relationship between the modern mass tort class action and the substantive objectives of tort law. Part I reviews current criticisms of mass tort class actions and the most prominent proposed reforms. Part II addresses briefly the basic substantive aims of tort law and the role of class actions toward achieving those aims. Part III addresses directly the relationship between the class action and the substantive goals of tort law. Part III shows that the various concerns of the modern academic literature--representation, plaintiff autonomy, conflict of interest--as well as the decertification efforts by the courts and the tightening of certification standards by the Advisory Committee are best understood as devices for exerting substantive control over class actions through procedural means. Part IV, however, explains why advancing procedural values alone to obtain substantive control remains unsuccessful. It demonstrates that many practices associated with modern tort class actions heavily criticized in the modern literature as violating procedural values in fact serve to more completely achieve the substantive goals of tort law. It follows from this point that

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these procedural values are inadequate in themselves to exert appropriate substantive control over the modern class action. Finally, Part V addresses how courts and commentators, including the Advisory Committee, can abandon the accepted *Eisen* approach and focus their attention more directly on the relationship between the class action and the substantive goals of the law. This focus must extend beyond class certification to issues today largely ignored in the literature, including the definition of the class and the design of the class settlement plan.

I. MODERN CONCERNS ABOUT THE MASS TORT CLASS ACTION

This part examines in more detail the most prominent modern discussions of mass tort class actions. Although this sorting is admittedly inexact **[*527]** and though there are differences within each group, I will distinguish three separate approaches to mass tort class action reform: the first approach, deriving from the dominant academic literature, is generally supportive of the class action mechanism and is principally concerned about particular abuses that lead, in its view, to inadequate settlements for class members in some cases versus attorneys for the class and, in other cases, versus favored class members or individuals opting out of the class. This approach, as a general matter, opposes settlement and futures classes which, it is believed, systematically result in inadequate class settlements. The second approach is represented by an important set of recent judicial decisions. As mentioned, courts in four separate federal circuits have decertified classes, evidencing general hostility to the class action mechanism in the mass tort context. In addition, two other circuit courts have recently ruled on the availability of settlement futures classes--one decertifying the class, the other approving the class settlement. Finally, the third approach, not entirely separate from the preceding two, is represented by the proposals to amend Rule 23 of the Advisory Committee on Civil Rules whose recommendations bear some of the spirit of hostility to mass tort class actions, although they also--inconsistently--lend official approval to settlement classes.

This Part attempts to show that, however different these three approaches, they are alike in two respects: first, they all appear to derive from an effort to promote the value of plaintiff autonomy in litigation, believed submerged in the class context. Second, for reasons never fully explained, they all seek to make class litigation more closely resemble individual litigation through procedural means. This Part explains these views. Parts III and IV will show why I believe they are inadequate.

A. Academic Criticism of Mass Tort Class Actions

The primary academic concerns about the modern mass tort class action relate to issues of (1) the adequacy of class representation; (2) the vindication of plaintiff autonomy; and (3) conflicts of interest as between attorneys and the class or among class members. It is the basic view of this literature that problems of representation, conflict of interest and, obviously, plaintiff autonomy are largely solved in the individual litigation context. As a consequence, to the extent that class litigation can be made to resemble individual litigation, the problems of class litigation are reduced.

1. Adequacy of Class Representation

The concern over the adequacy of class representation relates to whether the named class plaintiffs will fully and completely make decisions with regard to the litigation similar to those that would be made if the entire class **[*528]** were polled on the question. Current conceptions view a litigation class as a democratic unit, though operating without regular democratic processes, such as voting. Instead, in the place of voting, the named class plaintiffs are chosen to be representative of the various interests of the class and deputed to act on behalf of the class with respect to decisions relating to the conduct of the litigation.

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Many commentators are concerned that the actual operation of class litigation departs substantially from this representative ideal. For example, many criticize the seeming fact that, most often, class litigation appears to be controlled nearly entirely by the attorneys for the class, with little substantive decision making by class representatives. [15] Similarly, many commentators have addressed the problem of achieving what might be called "comprehensive" representation: to the extent that interests or characteristics of class members differ, no single representative and, perhaps, no small subset of class members as representatives can adequately represent each member of the class. John Coffee, in particular, has vigorously advocated increasing the definition of subclasses--that is, units within the class comprising groups with different interests or concerns. [16] Each subclass would have its own representative members and, if necessary, its own attorney. [17]

The problem of class representation has been seen to be especially severe in the context of futures classes: classes of individuals who have yet to suffer a harm. While it is not difficult to select representatives from among a futures class, there is a serious question as to whether the class member selected will adequately represent the class given that, having not yet suffered harm, the representative has little interest in or concern about the dispute. [18] Some commentators have thought this problem to be essentially unresolvable and, thus, to provide strong support for opposing the creation of futures classes. [19]

2. Vindicating Plaintiff Autonomy

The plaintiff autonomy value seeks to give each class member as much individual control over his or her participation in the class litigation as possible. Roger Cramton, for example, views as the principal problem of class **[*529]** litigation what he calls the "tension between individual justice (party autonomy in an adversary system) and collective justice." [20] The plaintiff autonomy value is related to the adequacy of class representation. The representation question seeks to replicate through representative decisions the decisions individual class members would make if they were conducting the litigation themselves. Vindicating plaintiff autonomy, going further, calls for the adoption of procedures that would allow individual class members to take personal control over their role in the litigation.

Most basically, commentators concerned about plaintiff autonomy seek to maximize the availability of opt-out opportunities for class members. [21] According to this view, concerns of any nature about class litigation are diminished as long as class members are fully informed about the opportunity to opt out of the class in order to bring individual litigation and are freely able to exercise their opt-out rights. Maximizing opt-out opportunities, in fact, trumps concerns about inadequate representation, discussed above, or conflict of interest, discussed below. Thus, if the class is inadequately represented either by the representative plaintiffs or by class attorneys, individuals opting out of the class escape these harms and preserve their opportunity to litigate separately.

These concerns about plaintiff autonomy and the importance of the opportunity to opt out of a class have led many commentators to be severely critical of mandatory class actions under Rule 23(b)(1) and (2). [22] By definition, mandatory class actions from which opting out is prohibited violate the plaintiff autonomy norm. Similarly, many commentators are skeptical of any virtues of class treatment where the stakes in the litigation are sufficient to support individual litigation. [23] Where individual litigation is economically feasible, plaintiff autonomy can be best achieved by avoiding certification of a class altogether to allow plaintiffs to fully control their individual litigation.

Concerns about plaintiff autonomy have also fueled criticism of futures classes. The resolution of litigation involving futures plaintiffs is difficult if substantial subsequent opt-out opportunities exist because, with the availability of subsequent and unregulated opting out, it is not clear what dispute has been resolved. At the limit, if all but a single futures class member subsequently **[*530]** opt out of the settlement, the defendant has achieved

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nothing by settling with the class. This problem has been addressed in some futures class settlements by the imposition of opt-out limitations. [24] These limitations have been defined, in some cases, in terms of numbers of subsequent opt outs and, in others, in terms of timing, limiting the number of available opt outs over subsequent periods of time. As might be expected, limitations such as these on the opt-out opportunities of class members have been roundly condemned. [25]

3. Conflicts of Interest

Perhaps the most serious grounds of academic criticism of the modern mass tort class action relate to conflicts of interest as between class attorneys and the class itself or among class attorneys. [26] The most basic concern is the fear that class attorneys will settle a case at an inadequate settlement amount in order to obtain attorneys' fees. There are different mechanisms for such settlements to occur. In some cases, settlement agreements with defendants incorporate an allocation of the settlement fund as between the amount to be paid out to class members and the amount to be paid to the attorneys as fees. Many charge that tort defendants can obtain lower overall settlement amounts in their negotiations with class attorneys if the defendants agree to larger class attorney fee allocations. [27] In other contexts, class attorneys are believed to settle cases prematurely in order to more rapidly obtain an agreed-on contingency. [28] In still other contexts, where courts limit attorney fees or the fee award is otherwise expected to be constrained, class attorneys are believed to encourage class members to opt out of the class in order for the attorney to separately negotiate a contingency fee more favorable with the individual than with the class. [29]

Some commentators view the conflict-of-interest problem as defining the **[*531]** essence of class litigation. Coffee, for example, in his excellent discussion of current class action issues, regards the nature of mass tort class litigation as shifting markedly in recent years dominated by issues of conflict of interest. According to Coffee, in the early years of mass tort class litigation, plaintiff attorneys dominated direction and outcome, gaining from the judicial expansion of tort liability an advantage unexpected by defendants. Coffee believes, however, that, in more recent years, defendants have gained control of mass tort class litigation through aggressively seeking collusive agreements with plaintiffs' counsel. [30]

These concerns lead Coffee and many other prominent commentators to regard the reduction of conflict-of-interest problems as the central necessary reform of the mass tort class action phenomenon. As indicated earlier, virtually all class actions settle rather than proceed to final adjudication. Coffee proposes as the normative defining rule for class action settlement that no class member ought to receive in settlement an amount less than he or she would have received if they had individually litigated the action to judgment. [31] Coffee and many others, thus, are highly critical of class attorneys who maintain an inventory of plaintiffs separate from the class for whom they obtain settlements on substantially more favorable terms than those they achieve for the class. [32]

Finally, concerns about conflict of interest have led many commentators to be especially suspicious of settlement classes: claimants certified as a class by a court *after* a settlement with the defendant has been achieved. Principally, these commentators are concerned that the defendant has chosen the attorneys with whom to settle who, because of achieving the settlement on terms attractive to the defendant, become appointed as attorneys for the class. [33]

4. The Academic Concerns Summarized

As described above, the principal modern academic concerns about mass tort class actions are entirely procedural in nature. Reforming the adequacy of class representation, providing more individual control--vindicating plaintiff autonomy--through maximizing opt-out opportunities, and more closely aligning the interests of the class and its attorneys or

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interests among the class relate to the conduct of the litigation rather than to its substance. **[*532]** Put differently, these concerns presuppose that class litigation is otherwise consonant with the substantive goals of tort law.

Several of these concerns, of course, implicate substantive ends. Thus, John Coffee's criticism of collusive class action settlements assumes that these settlements afford lower recoveries to class members than are appropriate. Thus, he recommends that no individual class member receive in a class settlement less than the individual would receive if he or she were to individually litigate the case to judgment. Similar concerns address lawyers who settle private inventories of cases at average amounts greater than the same lawyers settle on behalf of the class they represent. Nevertheless, the approach toward resolution of these concerns remains procedural: enhancing representation, maximizing opt-out opportunities, managing the settlement process to reduce conflicts of interest.

Finally, as noted earlier, the procedural approach toward controlling mass tort class actions reflected in the modern academic literature is to make the class action more closely resemble individual litigation. Enhancing representation of class members means ensuring that class representatives make decisions that correspond more closely to the decisions the individual class member would make himself or herself in individual litigation. Reducing conflicts of interest means aligning the interests of attorneys with those of members of the class or among members of the class so that the litigation more closely resembles individual litigation. In most individual litigation, of course, there is no intraclient conflict, and the control afforded the plaintiff over the attorney reduces the attorney's ability to behave opportunistically at conflict with the client. Most important, maximizing opt-out opportunities achieves the individual litigation goal directly: class members who opt out convert themselves from class to individual litigants. Even without exercise, the opt-out opportunity serves to discipline class attorneys to reduce the differences between class and individual litigation in order to reduce the attraction of opting out.

B. Recent Judicial Approaches to the Mass Tort Class Action

Within the past 2 years, the most important development within the federal judiciary with respect to mass tort litigation has been the increasing willingness of circuit courts to reverse district court certification of classes under Rule 23. These circuit court opinions are remarkable since district court class certification decisions are not directly appealable and, thus, are only available for review either on certification by the district court under 28 U.S.C. § 1292(b), more drastically on mandamus, or on review of ultimate district court approval of a class settlement. Over this recent period, courts in the Seventh, Sixth, Ninth, and Fifth Circuits have decertified active **[*533]** classes, two separate courts in the Third Circuit have decertified settlement classes including a settlement futures class, although a court in the Fifth Circuit has recently approved a mandatory settlement class consisting solely of futures claimants.

There are several consistent themes running through these opinions. First, several courts appear acutely aware of the great negotiating power and pressure toward settlement generated by certification of a class alone. Each court struggles with the certification standards of Rule 23 to constrain that power, in particular, by giving exaggerated emphasis to the predominance of law and fact criteria of Rule 23(b)(3). Second, given the limitations of the purely procedural focus of Rule 23, various courts have engrafted a new criterion for class certification: the "maturity" of the litigation, a requirement that does not appear in Rule 23 (though would by an amendment proposed by the Advisory Committee) and, moreover, that is neither clearly defined nor consistently applied. Finally, to the Third Circuit, settlement and futures classes appear simply too novel--they depart too drastically from more normal litigation--to be entertained, though the Fifth Circuit has determined that procedural protections can be devised to justify them.

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The new direction of the federal appellate courts toward mass tort class actions has perhaps been led by the 1995 opinion of the Seventh Circuit in *Rhone-Poulenc*, [34] decertifying a national class comprising 2,000 to 120,000 hemophiliacs who sought to sue blood companies for distributing blood tainted with the HIV virus. More openly than in any other opinion, the court is concerned about the unfair pressure toward settlement that follows from class certification. The court applies the extraordinary remedy of mandamus to decertify the class because certification might force the defendants "to stake their companies on the outcome of a single jury trial, or be forced by the fear of the risk of bankruptcy to settle even if they have no legal liability." [35] According to the court, the litigation in this case would be better brought individually: the stakes of each individual claim are sufficiently high to support such litigation. In addition, the accumulated decisions of multiple juries, rather than a single verdict in a class action, are more likely to represent the substantively correct verdict with regard to the behavior of the defendants against members of the class. The court notes that, at the time of the lower court's certification, 13 individual cases had been tried, in 12 of which defendant verdicts were returned. The court views 13 trials to constitute a small sample [36] and concludes that the action has not reached **[*534]** a level of "consensus or maturing of judgment" [37] that will follow from further litigation. Finally, invoking the explicit requirements of Rule 23, the court concludes that the lower court has not shown convincingly that class litigation is superior. The potentially disparate laws of 50 states were not adequately considered. Nor did the lower court identify clearly the issues appropriately resolved in the class context. [38]

In the succeeding year, the Seventh Circuit's approach in *Rhone-Poulenc* was echoed in varying degrees in opinions decertifying classes in the Sixth, Ninth, and Fifth Circuits, respectively. In *In re American Medical Systems, Inc.*, a Sixth Circuit court decertified a 15,000-120,000 person class suing manufacturers of allegedly defective penile implants. Decertification is appropriate, according to the court, because the litigation can be supported individually. In addition, the district court had not adequately determined that the laws of the 50 states were sufficiently common with respect to the issues in the case. [39] Shortly after, in *Valentino v. Carter-Wallace, Inc.*, a Ninth Circuit court decertified a class suing a manufacturer of an epilepsy drug. Interestingly, the Ninth Circuit court expressly rejects the Seventh Circuit's concerns about negotiating power and pressure toward settlement in favor of the Sixth Circuit's approach in *American Medical Systems*, concluding that individual issues predominate over class issues given the claims in the case. [40] The rejection of the Seventh Circuit's approach is interesting, however, because the court in *Valentino* gives much greater attention to an explanation of the Seventh Circuit's concerns about pressure toward settlement and placing the fate of an industry in the hands of a single jury than it does to its conclusion that certification is inappropriate on grounds of lack of predominance. [41]

Finally, and most recently, a Fifth Circuit court in *Castano v. American Tobacco Co.* decertified a national class action against cigarette companies by a class of individuals purportedly addicted to nicotine, a class the court describes as the largest class ever entertained in the federal courts. The court, first, finds that differences in state law and differences among claimants in terms of the circumstances of their addiction compel decertification under Rule 23's predominance requirement. The court, however, proceeds to discuss the negotiating power issues, extensively and approvingly citing the Seventh Circuit's opinion in *Rhone-Poulenc*. The court is sensitive to **[*535]** the reality that "class certification magnifies and strengthens the number of unmeritorious claims." [42] Yet the court acknowledges the Supreme Court's ruling in *Eisen* that the substantive merits of a dispute are not appropriately considered in a class certification decision. Following the Seventh Circuit, the court finds the action here "immature," failing Rule 23(b)(3)'s superiority requirement. According to the Court, "a mass tort cannot be properly certified without a prior track record of trial from which the district court can draw the information necessary to make the predominance and superiority requirements required by Rule 23." [43]

Each of the four decisions discussed above decertified what I will call an "active" class: a

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SYMPOSIUM MASS TORTS: INTRODUCTION

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+ United States Court of Appeals for the Third Circuit. Judge Scirica also served as Chair of the Judicial Conference's **Mass Torts Working Group.**

TEXT:
[*1859]

Arguably the most vexing issue in modern civil litigation is the problem of personal injury mass torts - the accumulation of thousands (even millions) of claims through class actions or through aggregation in grouping individual lawsuits. Especially problematic are personal injury suits that are truly national in scope, implicating primarily state law, involving unresolved issues of causation and the possibility of latent injury. In many cases, these claims compete for a limited fund or insufficient assets and may threaten the financial stability of the defendants. Multiple individual filings threaten prompt adjudication of legitimate claims. Unreasonable delay, limited funds, and disparate verdicts on liability and damages raise serious questions of fairness. But aggregation has its price. It threatens individual consideration of cases and undermines the traditional lawyer/client relationship. Which prompts the question - how much aggregation, at what point in the litigation, and for what purpose?

In November 1999, the University of Pennsylvania Law School sponsored a Mass Torts Symposium to discuss these and other issues. The Symposium drew on and continued the work of the Judicial Conference's **Mass Torts Working Group.** [1] Symposium participants - including federal and state judges, litigators and corporate general counsel, academicians, and public interest lawyers - deliberated on federal/state issues, the problems of claims that may be made in the future, certification, settlement and closure of national mass tort actions, the unique problems of bankruptcy, and the costs and benefits of mass tort litigation.

[*1860] Not all mass claims are problematic. Since the 1966 revision of Rule 23, the federal legal system has, to a greater or lesser degree, satisfactorily accommodated class actions in antitrust, securities, consumer fraud, and employment discrimination. The adoption of the Multidistrict Litigation ("MDL") statute [2] and the discerning and resourceful actions of the MDL panel and transferee judges have permitted the fair and expeditious resolution of many mass claims.

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When over time serious mass claim problems were perceived, Congress and the Supreme Court Rules Committees responded with changes in substantive and procedural law. [3] In securities fraud, for example, Congress responded to perceived abuses of strike suits in private securities actions by amending both substantive and procedural law. The principal procedural changes raised the bar in bringing suit and gave parties with the highest stakes an opportunity to control the outcome of the litigation. [4] The principal substantive change provided a safe harbor for forward-looking statements. [5]

Similarly, the Judicial Conference Rules Committees responded to the risk of improvident and largely unreviewable class certification decisions by amending Rule 23. Granting or denying class certification is the defining moment in many class actions, for it may sound the death knell of the litigation or create irresistible pressure to settle. Accordingly, Rule 23 was amended to provide for an interlocutory appeal by permission of the court of appeals. [6] In addition, the amendment will facilitate development of the law on class certification. [7]

[*1861] Personal injury mass torts, however, are another matter. [8] They have proved less amenable to similar substantive and procedural solutions. In some mass torts - like asbestos - delay and extraordinary transactions costs (approaching two-thirds of recovered damages) [9] diminish the value of legitimate claims. Ten years ago, Judge Robert Parker pointedly described one impact of the massive asbestos litigation: "Four hundred and forty-eight members of the class have died waiting for their cases to be heard." [10] Judge Parker also noted that even if the court then could have closed thirty cases a month, it still would have taken six and a half years to try the cases in that 3000-member class action, during which time 5000 more cases would have been filed. [11] A decade later, asbestos litigation problems persist. [12] In another mass tort case - breast implants - defendants have paid billions of dollars for claims not as yet supported by verifiable scientific evidence. [13]

Two years ago, the Judicial Conference Working Group on Mass Torts, under the guidance of the Advisory Committee on Civil Rules, commenced its inquiry. The Working Group considered concepts central to the mass tort issue: maturity and elasticity, centralization versus devolution, and the incentives and disincentives in bringing suit. The Working Group also delved into many of the finer points of **[*1862]** mass tort litigation: the race to the courthouse for limited assets; the allocation of limited funds; the allocation of settlements by lawyers; unreasonably high transaction costs, including attorney's fees; collusive settlements; reverse auctions; forum shopping for trial or settlement; overlapping and competing class actions; "home cooking" in certain state courts and counties; fraudulent joinder to defeat diversity; choice of law issues; multiple punitive damages; resolving causation where the science is unclear; and the unique problems with futures claimants - asymptomatic plaintiffs in unlimited numbers, the difficulty in estimating damages in futures claims, and statute of limitations problems with the exposure-only plaintiff. The Working Group also was informed about duplicative and wasteful discovery; premature aggregation; the advisability of individual verdicts to ascertain liability and the range of damages; the need for closure of a mature tort; collateral litigation over insurance coverage; back door opt-outs; the "full faith and credit" significance and other consequences of overlapping class actions; efficiency and aggregation as compared with congestion and individual consideration; and the need for cooperation between federal and state courts. [14]

Throughout its study, the Working Group encountered ways attorney conduct appeared to shape the incentives in bringing suit, the course of litigation, and settlement. The identified issues included selection of counsel; the first-filed rule; solicitation of plaintiffs; the basis for determining attorney's fees; [15] the fiduciary responsibility of counsel; conflicts of interest; ethical considerations; charging contingent fees after settling cases on administrative grid-like schedules; "scorched earth" and "stonewalling" tactics by defense counsel; and "piling-on" strategies by plaintiffs' counsel with marginal claims. Underlying the inquiry into the impact of attorney conduct is an unresolved question: the concept of the "private attorney general," and the extent to which private attorneys should be able to vindicate the claims of

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persons with whom they have no direct relationship. Correspondingly, this concern raises the issue of the proper role of the federal and state attorneys general in litigating these broad-scale claims.

[*1863] The **Mass Torts Working Group** issued its Report in 1999. [16] Recognizing that the essential components for change were legislation, procedural rules, case management, and judicial education, the Working Group identified the principal problems in mass torts, proposed different models for resolution, recommended further study, and prepared the ground for further action. This Symposium builds on those efforts.

Congress is also involved in mass tort issues. [17] Both the House and Senate Judiciary Committees have held hearings on class actions. And in both houses, bills have been introduced to address class actions in general [18] and to resolve the outstanding asbestos cases. [19] After passing the federal Y2K Act, [20] Congress is actively considering class action removal legislation based on minimal diversity. [21] Another pending bill, in response to the Supreme Court's decision in Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, [22] would permit MDL transferee judges to try transferred cases. [23]

As we work to identify and resolve these problems of mass torts, we should keep in mind that all of these concerns implicate competing **[*1864]** principles and cross many lines: most significantly, the distinction between substantive and procedural law, and the principles of federalism - the proper allocation of jurisdiction between state and federal courts. In mass torts, the line between substance and procedure can be blurred. We know that procedure influences outcome. Few would deny that the aggregation of claims has a profound effect on the substantive rights of the parties - both aggregation under Rule 23 and aggregation in grouping individual claims.

One way to look at the problem is to ask how receptive the federal courts should be to nationwide causes of action that largely involve state law, and if so, should their jurisdiction extend through the entire proceeding, including trial? Or, to put it another way, should tort actions national in scope be handled in state court, and if so, for what purposes? From a policy standpoint, it can be argued that national (interstate) class actions are the paradigm for federal diversity jurisdiction because in a constitutional sense, they implicate interstate commerce and foreclose any state bias. Arguably, a legal system that permits robust litigation of mass tort claims should also provide ways to fairly and efficiently resolve those claims. Nationwide class actions appear to promote at least one aspect of fairness - similarly situated claimants receive similar treatment. [24]

Conversely, if state bias can be eliminated and a way can be found to preserve defendants' assets from multiple compensatory and punitive damage awards that will deplete the funds available for all claimants, [25] then state courts - which greatly outnumber federal courts - may be the more suitable fora for trials and to ascertain liability and range of damages. Furthermore, state and federal court cooperation and coordination may be able to mitigate problems of discovery duplication and overlapping class actions.

The excellent Symposium papers and the proposed models address the key issues, and are crucial to the debate. As we continue, we must keep in mind the aim of our inquiry: a just process in which a person with a legitimate claim (where liability can be proven) is able to get appropriate relief without undue delay and without undue costs. The papers presented at the Mass Torts Symposium, and the **[*1865]** ensuing discussion by the Symposium participants, move us closer to the goal.

FOOTNOTES:

n1. As discussed infra at text accompanying notes 13-16, the **Mass Torts Working Group**

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was commissioned in 1998 to identify the most serious issues of the mass torts phenomenon, analyze the most promising solutions, and report back in one year. Spearheaded by the United States Judicial Conference's Advisory Committee on Civil Rules and its chair, Judge Paul **Niemeyer,** the Group also comprised select members of the Judicial Panel on Multidistrict Litigation, and the Judicial Conference Committees on Bankruptcy, Court Administration and Management, Federal-State Jurisdiction, and Magistrate Judges. It received invaluable assistance from the Federal Judicial Center and from many committee staff and academicians, including Professors Edward Cooper, Geoffrey Hazard, and Francis McGovern.

n2. 28 U.S.C. 1407 (1994).

n3. Of course, the MDL statute was a congressional and judicial response to mass claims.

n4. See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 743, 743-49, (codified at 15 U.S.C. 78u-4(b) (Supp. II 1996)). The congressional amendments in procedure represented a departure from the uniform and transsubstantive nature of the federal rules and constituted a deviation from the procedures set forth in the Rules Enabling Act. 23 U.S.C. 2071-2077 (1994).

n5. See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 102, 109 Stat. 737, 749-56 (codified at 15 U.S.C. 77z-2, 78u-5 (Supp. II 1996)).

n6. See Fed. R. Civ. P. 23(f).

n7. Of course, class certification is not the only procedural issue implicated by mass claims. The Rules Committees continue to study other facets of Rule 23, including the advisability of settlement-only classes after Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997), and Ortiz v. Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295 (1999); strengthening the requirements for notice; appointment of class counsel; class counsel's fiduciary responsibilities; and setting standards for judicial approval of settlements and attorney fee awards.

n8. For example, unlike many class action claims, these torts often involve individual claims for substantial damages; accordingly, these claims feasibly may be pursued as stand-alone cases.

n9. See James S. Kakalik et al., Costs of Asbestos Litigation (1983). Although the study reporting on these figures is somewhat dated, the trend appears to continue. See, e.g., Amchem, 521 U.S. at 598 (noting that costs exceed recoveries by two to one).

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n10. Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 651 (E.D. Tex. 1990), rev'd, 151 F.3d 297 (5th Cir. 1998).

n11. See id. at 651-52.

n12. For example, asbestos cases continue to swamp courts. In the past five years, nearly 40,000 new asbestos cases were filed in federal courts alone. See Administrative Office of the Courts Statistics, U.S. District Courts Civil Cases Commenced by Nature of Suit, (Table C-2A) (Feb. 2000) <http://www.uscourts.gov/judbus1999/c02asep99.pdf>. And plaintiffs are suing a broader range of defendants, from hospitals that installed asbestos ceiling tiles to "banks that financed asbestos-contaminated properties." Susan Warren, Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps, Wall St. J., Apr. 12, 2000, at B1. Although precise numbers are unavailable, significant numbers of asbestos cases have been and continue to be filed in state courts.

n13. See, e.g., Marcia Angell, Science on Trial: The Clash of Medical Evidence and the Law in the Breast Cancer Case (1996) (concluding that breast implants do not substantially increase the risk of breast cancer); Hans Berkel et al., Breast Augmentation: A Risk Factor for Breast Cancer?, 326 New Eng. J. Med. 1649 (1992) (same); Heather Bryant & Penny Brashen, Breast Implants and Breast Cancer - Reanalysis of a Linkage Study, 332 New Eng. J. Med. 1535 (1995) (same).

n14. See generally Advisory Comm. on Civil Rules & Working Group on Mass Torts, Report on Mass Tort Litigation (Feb. 15, 1999) [hereinafter Report on Mass Tort Litigation]. See also Thomas E. Willging, Mass Torts Problems & Proposals, in Report on Mass Tort Litigation, supra, app. C.

n15. Some have asked whether it is possible to construct a procedure to provide both an incentive and a reasonable return, other than percentage of common fund or lodestar.

n16. Report on Mass Tort Litigation, supra note 14.

n17. In 1991, the Judicial Conference proposed that Congress consider a national legislative scheme to streamline asbestos case resolution. See Amchem, 521 U.S. at 598-99 (citing Report of the Proceedings of the Judicial Conference of the United States 33 (Mar. 12, 1991)). This proposal was based on the recommendation of the Conference's Ad Hoc Committee on Asbestos Litigation, appointed by Chief Justice Rehnquist. See id. Notably, in its most recent class action decisions, the Supreme Court specifically urged Congress to deal with the "elephantine mass of asbestos cases." Id. (citing recommendation by Judicial

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Conference Ad Hoc Committee on Asbestos Litigation for federal legislation creating a national asbestos dispute resolution scheme); see also Ortiz, 119 S. Ct. at 2302-03 n.1 (1999) (reiterating the call for national legislation and noting Congress's failure to respond).

n18. See, e.g., Class Action Fairness Act of 1999, S. 353, 106th Cong. (1999) (requiring, for example, plain-language notices to class members and advance notice of settlements to state and federal attorneys general).

n19. See Fairness in Asbestos Compensation Act of 1999, H.R. 1283, 106th Cong. (1999) (establishing an Office of Asbestos Compensation to determine if an asbestos claimant is entitled to compensation, and if so, how much); S. 758, 106th Cong. (1999) (paralleling H.R. 1283).

n20. Y2K Act, Pub. L. No. 106-37, 113 Stat. 185 (1999). The Act provides that a Y2K class action may be tried in federal court if the amount in controversy exceeds $ 10 million, and the plaintiff class consists of at least 100 members.

n21. See Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, 106th Cong. (1999) (passed by U.S. House of Representatives, Sept. 23, 1999).

n22. 523 U.S. 26 (1998).

n23. See Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999, H.R. 2112, 106th Cong. 2 (1999). The same bill also provides for removal of mass torts arising from single situs accidents. See id. 3.

n24. It is usually helpful to compare alternative approaches. In certain cases, the prospect of high costs, long delays, and limited assets for recovery may negate any realistic alternative to class actions.

n25. These goals also may be accomplished in a bankruptcy proceeding, which brings before the bankruptcy court all of the debtor's assets and all claims against those assets, then seeks to treat equally all similarly situated claimants.

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ARTICLE: **Punitive Damages:** A Relic That Has Outlived Its Origins

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SUMMARY:
... The doctrine of **punitive damages** truly is an ancient legal concept that inexplicably has evaded commitment to the archives of history. ... Whatever justification may be advanced to support the **punitive damage** concept, however, most commentators today acknowledge that the modern bases undergirding the theory in the United States are punishment and deterrence. ... Numerous jurisdictions, however, refuse to permit **punitive damage** claims against the estates of deceased wrongdoers because the punishment and deterrence rationales no longer are viable once the wrongdoer is deceased. ... Permitting a punitive award in the case of a deceased defendant truly exposes the fallacy of the **punitive damage** doctrine. ... These jurisdictions ostensibly ignore the very policy that undergirds the **punitive damage** concept -- punishment and deterrence against future wrongdoing -- and permit the wrongdoer to insure against liability for such awards. ... A particularly egregious aspect of the **punitive damage** doctrine as punishment is its application within the vicarious liability field. ... The applicability of liability insurance to cover **punitive damage** awards totally vitiates the punishment and deterrence rationales. ... The historical justifications for the doctrine, however, have long since become obsolete, particularly with the current unfettered expansion of the compensatory damage system. ... Abolishing the **punitive damage** doctrine would leave unaffected the civil tort system that continues to compensate plaintiffs for every conceivable injury. ...

TEXT:

[*1118] I. INTRODUCTION

The doctrine of **punitive damages** truly is an ancient legal concept that inexplicably has evaded commitment to the archives of history. Irrespective of the questionable validity of the

Perhaps the two factors that most significantly affect the amount of **punitive damages** awarded are the ratio rule and evidence of the defendant's financial condition. The ratio rule is a mechanism that allows an appellate court either to overturn a **punitive damage** award or to order remittitur if the court concludes that a reasonable relation does not exist between the compensatory and **punitive damages** awarded the plaintiff. [129] Most jurisdictions mandate that punitive awards bear a "reasonable relationship" to the amount of compensatory damages, [130] but no court ever has established **[*1146]** a fixed or precise ratio. [131] The rule, consequently, is anything but precise, and as one commentator has noted, its singular value is to serve as a "rough device to allow a court to pare down an excessive award of **punitive damages.**" [132] In an effort to instill some element of certainty into the ration rule, some courts have suggested that fact finders may consider certain factors in determining the issue of excessiveness of punitive awards: (1) the nature of the wrong; (2) the character of the conduct at issue; (3) the degree of the wrongdoer's culpability; (4) the situation and sensibilities of the concerned parties; and (5) the extent to which the conduct offends the public sense of justice and propriety. [133] Despite **[*1147]** these efforts, one scholar critically noted that "[t]his test is probably more often a rationalization of results than a means of obtaining them. The proper ratio between actual damages is placed at a figure which supports the judge's view of the verdict. . . ." [134] Another commentator has argured for more effective appellate review by asserting that "it is becoming increasingly clear that it is preferable for the court to have the simple right to set aside an award as excessive." [135] To permit **punitive damages** in the absence of a severely limiting ratio of punitive to actual damages simply invites disaster.

Many jurisdictions authorize the fact finder to consider the defendant's wealth in assessing **punitive damages.** [136] In these jurisdictions, the wealthier the defendant, the larger the permissible assessment of a punitory award. [137] The rule is premised on the rationale that the function of deterrence will not be served if the defendant can absorb the penalty with little or no discomfort because of existent wealth. [138] One court has sought to justify evidence of a defendant's financial wealth by stating that "what would be 'smart money' to a poor man would not be, and would not serve as a deterrent, to a rich man." [139]

Several significant problems arise when courts allow juries to **[*1148]** consider the defendant's wealth. First, ill informed juries generally overreact to the emotion provoking nature of evidence of a defendant's wealth. One commentator observed that:

It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare. Such evidence may do more harm than good; jurymen may be more interested in divesting vested interests than in attempting to fix penalties which will make for effective working of the admonitory function. [140]

Second, evidence of the defendant's wealth undoubtedly influences juries to award **punitive damages** in excess of any rational amount. [141] As an unintended consequence, financially poor codefendants are prejudiced unfairly if they are jointly and severally liable for a **punitive damages** award that the jury has inflated because of the other defendant's wealth. [142] Fortunately, not all jurisdictions adhere to this rationale. [143] Permitting the fact finder to consider evidence of a wrongdoer's wealth is really nothing more than a camouflaged mechanism designed to encourage large punitive assessments. In essence, it is a procedural device that promotes the redistribution of wealth in society.

D. Additional Patchwork Applications of the **Punitive Damage** Concept Among the Various Jurisdictions

Some jurisdictions have imposed certain limitations on the **punitive damage** doctrine that regrettably often serve to further muddy the water for practitioners and jurors. Some states, under a strict products liability theory, disallow **punitive damages** for property damage

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because the interests concerned in actions for property damage do not warrant the extension of this controversial doctrine. [144] Courts do not universally prohibit punitive awards for property damage, however, and such awards have occurred in aggravated circumstances of trespass, conversion, infringement of common law copyright, nuisance, and seizure of property by a secured party. [145]

Many jurisdictions restrict **punitive damages** by refusing to **[*1149]** permit such awards for breach of contract. [146] As might be expected, however, other jurisdictions authorize punitive awards for mere contract breaches. [147] In addition, even jurisdictions that generally exclude punitive awards for breaches of contract have formulated exceptions to the general rule. For example, an intentional breach of contract to marry [148] and a breach of contract by carriers or public servants [149] constitute exceptions in some jurisdictions. The basis of these punitive awards, however, usually lies not in the contractural breach itself, but in some tortious element of the defendant's conduct to which the fact finder links the award. [150]

Another area of nonuniform application is the applicability of **punitive damages** in wrongful death and survival actions. A significant number of jurisdictions prohibit **punitive damages** in wrongful death actions because these statutory causes of action specifically serve a compensatory purpose. [151] The Seventh Circuit recently dismissed **[*1150]** the **punitive damages** claims in wrongful death actions in several states that arose from a catastrophic airplane crash. [152] The court concluded that it should resolve the conflict of laws questions in the case in favor of federal regulation of airline tort liability, which prohibits **punitive damages,** because of the interests of passengers, airline corporations, airplane manufacturers, and state and federal governments. [153] Other jurisdictions, nonetheless, hold that **punitive damages** are appropriate in wrongful death actions. [154]

Contrary to the prohibition of **punitive damages** in wrongful death actions, many jurisdictions authorize the recovery of **punitive damages** in survival actions. [155] Numerous jurisdictions, however, refuse to permit **punitive damage** claims against the estates of deceased wrongdoers [156] because the punishment and deterrence rationales no longer are viable once the wrongdoer is deceased. [157] **[*1151]** Florida, Illinois, West Virginia, and Texas, however, have adopted a contrary rule. [158] Permitting a punitive award in the case of a deceased defendant truly exposes the fallacy of the **punitive damage** doctrine.

A particularly controversial area of **punitive damage** is successor liability. Under the successor liability theory, "a corporation acquiring all or substantially all of another corporation's assets, may 'inherit' the tort liability of the selling corporation." [159] Some courts have prohibited recovery of **punitive damages** from successor corporations. [160] Other courts, concerned with the ease with which succeeding legal entities can merge or consolidate, have authorized the imposition of **punitive damages** against successor corporations. [161] **[*1152]** The courts authorizing recovery of punitive awards against successor entities appear to be result oriented. These courts seemingly are concerned with providing a "deep pocket" for the plaintiff, whatever the successor corporation's relationship to its predecessor. Obviously, the successor corporation neither designed, manufactured, nor sold the product that caused the injury. Consequently, neither punishment nor deterrence are served by the imposition of **punitive damages** for a predecessor's defective product -- unless retribution against innocent parties is contemplated under the **punitive damage** doctrine.

Some jurisdictions authorize **punitive damages** in loss of consortium actions. [162] These courts predicate their decisions on the compensatory, rather than the punitive, purpose of the actions. Other jurisdictions reject recovery of **punitive damages** for loss of **[*1153]** consortium. [163] Understandably, permitting a punitory award in this context is difficult to justify under any of the rationale espoused by jurisdictions that recognize punitive awards.

Another patchwork application plaguing the **punitive damage** concept is the applicability of

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insurance coverage to such awards. Assuming that punitive awards are intended as punishment and deterrence, it is an insupportable contradiction to permit the wrongdoer to insure against wrongful acts that merit punitory deterrence. A majority of jurisdictions conclude that public policy forecloses the application of insurance coverage for punitive awards. [164] Essentially, these decisions conclude that permitting the wrongdoer to shift the financial burden would detract from the deterrent effect of the punitive award. Moreover, extending insurance coverage would, in effect, transfer the burden of the punitive award to the innocent consuming public through increased premium payments. Other jurisdictions hold that insurance coverage is a matter of private contract between the insurance company and the insured and, therefore, requires no public policy considerations. [165] These jurisdictions ostensibly ignore the very policy that undergirds the **punitive damage** concept -- punishment and deterrence against future wrongdoing -- and permit the wrongdoer to insure against liability for such awards. The result, of course, is to permit a windfall to the plaintiff at the expense of innocent consumers who must pay increased premium rates for their insurance policies. The dichotomy in attitude among the various jurisdictions regarding the public policy of sanctioning insurance coverage **[*1154]** against **punitive damage** awards lends further credence to the conclusion that the **punitive damage** concept represents an archaic doctrine that serves no useful public policy, but which continues only to enhance the largesse dispensed to the plaintiff.

The flawed nature of the **punitive damage** doctrine is clearly evident in the total absence of any uniformity of application. The legal rationale formulated to justify the concept is fraught with contradictions and is totally unpredictable in its effect. The anachronistic nature of the doctrine bespeaks the imperative need to relegate the doctrine to its rightful place in the archives of history. Most importantly, not only does the **punitive damage** doctrine not achieve the ordained objectives of punishment and deterrence, but rather, it presents an unfettered destructive force that erodes the economic stability of society. Surely, a doctrine possessing such questionable credentials and engendering such disquieting consequences should sound its own death knell.

V. RATIONALE FOR ABOLISHING **PUNITIVE DAMAGES**

A. The Adverse Economic Results of **Punitive Damages**

Because juries possess essentially limitless discretion in awarding **punitive damages,** [166] the amount of **punitive damages** awarded in recent years, as if feeding upon itself, has escalated to astronomical figures that boggle the mind. [167] Judge Friendly forecast this problem: "The legal difficulties engendered by claims for **punitive damages** on the part of hundreds of plaintiffs are staggering. . . . We have the gravest difficulty in perceiving how claims for **punitive damages** in such a multiplicity of actions throughout the **[*1155]** nation can be so administered as to avoid overkill." [168] Several commentators have expressed concern over the possible severe economic effects precipitated by huge **punitive damage** awards. [169] Although some commentators and courts have indicated that **punitive damages** have not yet produced the prophesied doom, [170] one recent scholarly article has cited the severe economic consequences of asbestos litigation that forced several formerly large and viable companies into the bankruptcy courts. [171] Fear of bankruptcy earlier this year prompted the Fifth Circuit to declare a universal abolition of punitive awards in industry-wide asbestosis litigation within its jurisdiction. [172] Although the Fifth Circuit did not extend its moratorium on exemplary damages beyond the realm of asbestos related litigation, the court's decision represents a gargantuan step toward the intelligent and overdue recognition of the inappropriateness and inherent destructiveness of the **punitive damage** concept in the modern tort reparations system.

Even Professor Owen, who formerly supported the award of **punitive damages** with few limitations, [173] has recently come to recognize the folly of continued and unbridled awards of exemplary damages. Professor Owen recently foreshadowed the Fifth Circuit's opinion in

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Jackson when he observed that "[1]arge assessments of **punitive damages** may not yet be a major threat to the continued viability of most manufacturing concerns, but the increasing number and size of such awards may fairly raise concern for the future **[*1156]** stability of American industry." [174] Professor Owen also has noted with alarm that courts increasingly have abdicated their traditional responsibility to control highly questionable punitive awards. [175] He has suggested several possibilities for establishing upper limits for future **punitive damage** awards. [176]

A byproduct of the continued success that plaintiffs have experienced in obtaining large **punitive damage** awards is the now universal practice of plaintiffs alleging and demanding **punitive damages** in an effort to increase the ultimate recovery from juries, [177] and to compel defendants to settle meritless cases because of the fear that a jury will return an outrageous **punitive damage** award. [178] Because of the discretionary nature of jury verdicts, a "verdict will not be disturbed as excessive unless it is so clearly so as to indicate that it was the result of passion, prejudice, partiality, or corruption; or that it was manifestly the result of disregard of the evidence or applicable rules of law." [179] Although some courts have overturned large punitive awards that shock the judicial conscience or are manifestly unjust, [180] the simple fact is that most huge punitive awards are affirmed. [181] This trend is creating a significant **[*1157]** threat to the stability of our economy. It is now time for courts and legislatures to reconsider the propriety of the **punitive damages** concept before it creates even more havoc and places our economy at risk. The **punitive damage** concept, if it ever possessed legitimacy in the civil tort system, surely is an anachronism whose time for service long since has passed and whose insatiable appetite no longer can be afforded.

The current availability of the **punitive damage** doctrine imposes excessively oppressive and burdensome discovery on defendants. Adhering to the philosophy of liberal discovery, courts ostensibly have concluded that the mere claim for **punitive damages** entitles the plaintiff to demand the production of interminable reams of documentary and other information potentially related to the issue of **punitive damages.** [182] For example, an increasing number of products liability plaintiffs incorporate an allegation for **punitive damages,** and concomitantly, the breadth and scope of court ordered discovery has expanded with this additional claim. Rampant abuse in the discovery process is economically ruinous to defendants, disruptive of the orderly administration of justice, and an unsightly blemish on the tort reparations system. Predictably the public perceives the unfettered discovery process as an unacceptable misuse of the legal system. Consequently, the defendant must choose between the Scylla of economically devastating discovery costs that can transform a favorable verdict into a pyrhhic economic victory and the Charybdis of outrageous and unwarranted **[*1158]** monetary settlements. [183]

B. Punishment and Deterrence Are Not Viable Theories for the Imposition of **Punitive Damages**

The purpose of the civil law historically has been to provide a remedy to compensate individuals injured by the wrongful conduct of others. [184] Even disinterested commentators such as Dean Prosser have noted the dichotomy of authorizing punishment under the aegis of the civil law, [185] and one court perceptively has observed:

It is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should recover anything more. And it is equally difficult to understand why, if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer, and not to the public in whose behalf he is punished. [186]

[*1159] Another court, ever more emphatically, queried:

How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies" Is not punishment out of place, irregular, anomalous, exceptional, unjust,

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unscientific, not to say absured and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant? [187]

As one commentator has observed, juries possessing neither expertise in deciding what constitutes just punishment nor skill in determining who should be punished are inflicting large **punitive damage** awards even though society has not deemed it appropriate to declare the offending conduct criminal. [188] Parties to civil litigation are subject to quasi-criminal fines, and courts are enforcing these penalties without the safeguards afforded even society's worst criminals. [189]

A particularly egregious aspect of the **punitive damage** doctrine as punishment is its application within the vicarious liability field. [190] Not only are courts inappropriately using punishment in a civil context, but by imposing on employers and principals liability for the **punitive damages** otherwise assessable against their employees and agents, the courts have diverted punishment from the wrongdoers to innocent parties. [191] One commentator has noted **[*1160]** critically that "it is beyond reason to fathom why an innocent employer should be held liable for more than compensation of the plaintiff's injuries." [192] Punishment and deterrence of the innocent does not comport with a system dedicated to the administration of justice.

Courts have long used the "deep pocket" rationale to justify the vicarious liability of employers and principals for compensatory damages. [193] although this theory arguably possesses merit for compensatory damages, its use tp extend punishment against employers and principals is insupportable under the guise of any theory or rationale. [194] For example, even though **punitive damages** against individual wrongdoers may be awarded in a section 1983 action, [195] neither the municipal nor the local government can be held vicariously liable for its employees' wanton and malicious conduct. [196] Irrespective of the care that employers exercise, they possess no means to identify and prevent each and every employee from engaging in antisocial acts. [197] Therefore, employers should not suffer punishment for conduct that they cannot prevent.

When an employer has attempted to screen employees during the hiring process, in an effort to hire the best available workers for business reasons, the imposition of **punitive damages** for a "hiring mistake" lacks any deterrent effect. [198] One expert has criticized **[*1161]** the "make-weight argument" that punitive awards will result in better hiring practices and asserts that the "absurdity" of this rationale should be "apparent to anyone who has ever been in the position of offering employment -- there simply is no way to gauge whether a potential employee will become violent when irritated, just as there is no method of determing with certainty whether he will be a good worker." [199] Another commentator also has observed, while discussing the lack of meaningful standards or limits on the amounts of **punitive damages** which a jury awards, that "[f]rom a deterrence standpoint, it confounds understanding to permit such vast uncertainty as to the level of the expected penalty." [200] Another scholar has asserted that high compensatory damages will have a sufficient deterrent effect, anyway; and if they do not, then the plaintiff can seek injunctive relief, the violation of which will subject the defendant to contempt proceedings and fines or jail. [201]

In addition, imposing vicarious liability for **punitive damages** creates the anomalous situation that the consumers or taxpayers in a community, who are the intended beneficiaries of the punishment administered to the wrongdoer, actually absorb the consequences **[*1162]** of the punishment. Ultimately, it is the innocent consumer and taxpayer who bears the burden of paying for the punitive award imposed upon a vicariously liable employer, corporate entity, or governmental body. [202] "The fact of the matter is that the liberal rules governing vicarious liability for **punitive damages** allow the wrong person or entity to be punished." [203] If an employer's hiring practices are so outrageous that society should punish them, the most appropriate forum is the criminal justice system, which metes out punishment according to predetermined rules and only against the party guilty of

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wrongdoing.

Not only is the punishment rationale of **punitive damages** decidedly inappropriate in a civil law context and the effect of the deterrence rationale minimal at best and unlikely at worst, but any redeeming value these rationales might have dwindles in the face of the ratio rule and the application of liability insurance. The ratio rule generally mandates a reasonable relationship between the amount of compensatory and **punitive damages.** [204] A majority of jurisdictions currently rejects any precise ratio rule. [205] Commentators have criticized the current approach to the ratio rule because the judicial refusal to establish a predetermined ratio creates uncertainty in assessing quasi-criminal fines; [206] and when courts apply a ratio, whether on an ad hoc basis or subject to some generalized ratio guidelines, [207] the concept of gearing the size of the **[*1163]** punitive award to the compensatory award simply does not mesh with the punishment rationale of **punitive damages.** [208] The applicability of liability insurance to cover **punitive damage** awards totally vitiates the punishment and deterrence rationales. A majority of jurisdictions has judicially declared that **punitive damages** are insurable. [209] The courts that refuse to allow insurance coverage on public policy grounds recognize that insurance negates the objectives purportedly served by **punitive damages.** [210] The allowance of insurance reduces the punishment of the wrongdoer while simultaneously imposing the effects of the punishment on all other policy holders through the vehicle of increased premiums. Permitting **punitive damage** insurance likewise conflicts with the deterrence objective by reducing the incentive to avoid loss-creating conduct. [211] This incongrous situation recently prompted one court to acknowledge that the **punitive damage** doctrine, as applied today, does not deter tortfeasors and, because of the unpredictable manner in which fact finders impose damages to punish, insurance should be permitted to provide coverage against exemplary damages. [212] More importantly, however, liability insurance for exemplary damages makes necessary the assessment of larger awards to achieve punishment and deterrence, which in turn causes insurance **[*1164]** costs and coverages to rise, which will, in turn, necessitate even larger punitive awards. [213] This circularity epitomizes the illogical nature of punitive awards.

Neither the punishment nor the deterrence rationale is appropriate in a civil law context. The entire concept of **punitive damages** today in civil actions is a wrong idea at the wrong time. [214]

C. Compensation Is Not a Viable Theory for the Imposition of **Punitive Damages**

The usual rationale for **punitive damages** is punishment and deterrence. [215] A few jurisdictions, however, continue to view **punitive damages** as a form of compensatory award for intangible injuries. [216] Irrespective of the viability of this rationale in earlier times, [217] the concept simply no longer is relevant. Compensatory awards currently provide recovery of all costs for physical injuries, disfigurement, physical impairment, loss of earnings and earning capacity, past and future medical expenses, past and future pain and suffering, past and future mental anguish, loss of society and companionship, and every conceivable intangible and imagined injury such as emotional distress [218] and insult. [219] Additionally, third parties such as spouses, children, and parents increasingly can recover compensatory awards for the intangible harms of loss of consortium, loss of parentage, loss of society, and loss of companionship. [220] **[*1165]** Undoubtedly, the most eloquent condemnation of **punitive damages** as a form of compensation is etched in an early Washington case:

There is nothing stinted in the rule of compensation. The party is fully compensated for all the injury done his person or his property, and for all losses which he may sustain by reason of the injury, in addition to recompense for physical pain, if any has been inflicted. But it does not stop here; it enters into the domain of feeling, tenderly inquires into his mental sufferings, and pays him for any anguish of mind that he may have experienced. Indignities received, insults borne, sense of shame or humiliation endured, lacerations of feelings, disfiguration, loss of reputation or social position, loss of honor, impairment of credit and

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every actual loss, and some which frequently border on the imaginary, are paid for under the rule of compensatory damages. The plaintiff is made entirely whole. The bond has been paid in full. Surely the public can have no interest in exacting the pound of flesh. [221]

Considering the expanded and virtually unlimited access to compensatory damages, **punitive damages** simply provide a windfall to the plaintiff, penalize the innocent consumers or society, and unnecessarily sap the vitality of the economy upon which society is totally dependent. [222]

The **punitive damage** doctrine theoretically is unsound, legally insupportable, economically unnecessary for plaintiffs, and economically disastrous for both defendants and innocent consumers. Therefore, it is time, and in fact, the hour grows late, for the legislatures and courts to dismantle this potentially destructive doctrine of another era. Neither right nor justice, neither fairness nor equity, and neither the vitality of the tort reparations system nor economic considerations warrant the survival of this outdated doctrine.

[*1166] VI. THE ALTERNATIVE IN THE ABSENCE OF TOTAL ABROGATION OF **PUNITIVE DAMAGES**

One commentator observed that the issue of **punitive damages** in the past "merited scant attention" because such awards were "rarely assessed and likely to be small in amount." [223] Unfortunately, the tort reparations situation today has changed drastically, and the antiquated concept of **punitive damages** as applied in the 1980s poses serious, if not potentially fatal, consequences. If a complete abrogation of the **punitive damage** doctrine is not an achievable objective, then a series of coordinated and precisely defined limitations is imperative to forestall the economically and doctrinally debilitating effects of this concept.

First, it is necessary to formulate certain standards of conduct and proof by which the fact finder determines **punitive damage** liability. Realistic and meaningful standards presently are nonexistent, and confusing jury instructions only serve to further the confusion of juries. [224] Either the courts or the legislatures should authorize the recovery of **punitive damages** only upon a stringent showing that a defendant acted with deliberate intent, ill motive, or maliciousness. [225]

Second, the courts should require a significantly higher standard of proof than the less exacting "preponderance of the evidence" burden. The degree of proof required should be elevated to **[*1167]** a "clear and convincing" standard [226] or a "beyond a reasonable doubt" burden. [227] The Second Circuit, based upon its assertion that conduct which would "give rise to **punitive damages** must be close to criminality," recently stated that the plaintiff must clearly establish this degree of behavior by the defendant. [228] Because the **punitive damages** concept represents an anomalous perversion of a criminal law concept grafted to the civil law, and considering the weaknesses inherent in the rationale underlying the **punitive damage** doctrine in today's society, the wisest course strongly suggests the adoption of the more stringent "beyond a reasonable doubt" burden of proof.

Third, it is necessary to reallocate judicial power so that judges, rather than unknowledgeable juries, decide if **punitive damages** are merited, and if so, in what amount. [229] Judges, equipped by experience and familiarity with legal concepts, are **[*1168]** better able than inexperienced juries to distinguish behavior that justifies punishment, [230] and hopefully would be able to avoid the bias and naivete that jurors express through inflated punitive awards. Many judges currently support such a realignment of duties. [231] If responsible jurisprudence mandates punishment through civil law remedies, it is only logical to utilize the knowledge of judicial officers to achieve fair and rationale results. **Punitive damages** awards have become too large, too destructive, and too far removed from economic reality to allow biased and rhetorically enraged juries to continue on their present course. [232]

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Fourth, specific limits should be established for **punitive damages** awards. [233] Such limitations would curtail the current destructive abuses of the doctrine and would eliminate the current inordinate number of outrageous awards. Professor Owen has suggested a limitation of either twice the amount of compensatory damages or the the plaintiff's costs plus $ 10,000. [234] A well-known example of a legislatively imposed limit on punishment oriented damages is the treble damage provision in the Clayton Act that allows actual damages plus twice their value as **punitive damages** for violations **[*1169]** of the antitrust laws. [235] Whether legislatures validate a dollar for dollar ratio or a single established amount, an equitable and workable upper limit is essential to control the undisciplined **punitive damages** doctrine. A dollar for dollar ratio presents the arguable advantage of flexibility that automatically would fluctuate both upward and downward, depending upon the amount of compensatory damages. A ratio limit also presents the danger, however, that juries artificially will inflate compensatory awards to increase the possible punitive amount. The logical solution, therefore, is to view the dollar for dollar ratio as an upper limit, subject to judicial reduction. [236] Unlike the Clayton Act treble damage provisions, judges would retain the authority to exercise discretion in reducing punitive awards below the statutorily allowed upper limit.

Fifth, the application of the **punitive damage** doctrine must be modified significantly in the strict tort liability context of product litigation. The legislature should declare that **punitive damages** may be awarded only once. If a plaintiff establishes that he suffered injury because a defendant supplied a product containing a design or marketing defect, then the plaintiff should receive total compensation for the injury. When hundreds or even thousands of plaintiffs prosecute claims for injuries that emanate from a single design or marketing defect that exists in a single line of a product, however, the product supplier should not endure multiple punishments for a single design defect. The product supplier is deemed liable simply because of the condition of the product -- a single design defect in a particular product. If the civil law is to embrace the added function of punishing product suppliers, then a single **[*1170]** award for a single design deficiency is sufficient. To borrow a phrase from Justice Holmes, "even a dog distinguishes between being stumbled over and being kicked," [237] and, as many asbestos manufacturers well know, [238] the **punitive damage** doctrine has assumed the form of strategically placed and excessively destructive kicks.

Sixth, any exemplary damages permitted and recovered should be payable to the state treasuries just like any other penal fines. [239] Plaintiffs currently receive compensation for every conceivable element of injury, [240] and **punitive damage** awards should not constitute a windfall for the plaintiff. Judicial transfer of **punitive damage** awards to the state would prevent unnecessary and inequitable windfalls to plaintiffs, would provide state funds that could be used for public purposes, and would be consistent with all other penal fines which are required to be paid to state treasuries. [241]

Seventh, if the **punitive damage** concept continues to survive its archaic origins, courts should declare that insurance coverage contravenes public policy. **Punitive damage** awards penalize innocent purchasers of insurance who suffer increased premiums each time a court concludes that liability insurance provides coverage **[*1171]** for such penalties. [242] Increased premiums do not punish the wrongdoer; they punish all innocent purchasers of insurance.

Last, and undoubtedly most important, the appellate courts must initiate a more aggressive and standardized attitude in reviewing exemplary awards. Currently, appellate courts overturn a **punitive damage** verdict as excessive only if it is the result of passion, prejudice, partiality, corruption, or is manifestly unjust. [243] Professor Owen recently recognized this problem and suggested that appellate courts should scrutinize carefully the trial record "for improper evidence, for argument that might have inflamed the jury, and for the sufficiency of the evidence as a whole." [244] Appellate courts too long have summarily characterized the amount of **punitive damage** awards as a fact issue for jury determination. This attitude is

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an abdication of appellate review responsibility and the results of such an abdication cannot be justified and should not continue.

VII. CONCLUSION

Punitive damages may have served a valuable function in the scheme of ancient law. The historical justifications for the doctrine, however, have long since become obsolete, particularly with the current unfettered expansion of the compensatory damage system. Because the **punitive damage** doctrine is monstrously archaic and because of the distorted and arbitrary fashion in which it currently operates, the harm it causes is significantly greater than any good it produces. In today's society, **punitive damages** merely create a windfall for plaintiffs without serving either as a punishment or a deterrence. The doctrine should be abolished because it is a doctrine of a bygone age of the law. [245] Abolishing the **punitive damage** doctrine would leave unaffected the civil tort system that **[*1172]** continues to compensate plaintiffs for every conceivable injury. Furthermore, if punishment or deterrence is necessary, legislatures should enact appropriate criminal statutes with the protections that normally accompany the imposition of penal fines.

If abolition of this outdated doctrine is not accomplished, then both logic and necessity require the imposition of severe restrictions to restrain the doctrine's ill-advised and economically devastating effects. The law continually must change and adapt to fulfill its noble purpose of insuring the fair and responsible administration of justice. This noble legal purpose is threatened by the onslaught of economically destructive punitive awards. Unless farsighted and aggressive judicial and legislative action is initiated, the **punitive damages** doctrine will continue to wreak a form of devastation never contemplated or intended in the evolution of the tort reparations system.

FOOTNOTES:

n1. K. REDDEN, **PUNITIVE DAMAGES** § 2.2(A)(1) (1980).

n2. See, e.g., id.; G. DRIVER & J. MILES, THE BABYLONIAN LAWS 500-01 (1952); Sales, The Emergence of **Punitive Damages** in Product Liability Actions: A Further Assault on the Citadel, 14 ST. MARY'S L.J. 351, 351 n.1 (1983); Special Project, An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation, 36 VAND. L. REV. 573, 691 (1983).

n3. K. REDDEN, supra note 1, § 2.2(A)(1).

n4. See, e.g., Exodus 22:1 (King James) ("If a man shall steal an ox, or a sheep, and kill it, or sell it, he shall restore five oxen for an ox, and four sheep for a sheep."); Exodus 22.9 (King James) ("For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, which another challengeth to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbour."). Mosaic law also provided for recovery of multiple damages for adultery and usury. See K. REDDEN, supra note 1, § 2.2(A)(1).

n5. See, Sales, supra note 2, at 353 (Roman civil law recognized **punitive damages)** (citing Walther & Plein, **Punitive Damages:** A Critical Analysis: Kirk v. Combs, 49 MARQ. L. REV. 369, 369 (1965)); see also W. BUCKLAND & A. McNAIR, ROMAN LAW AND COMMON LAW 344-45 (2d ed. 1952) (asserting that the basis of Roman civil law was punitive in nature); K. REDDEN, supra note 1, § 2.2(A)(1) (Roman law provided for multiple damage awards for injurious acts characterized by wanton willfulness or conscious deliberation);

n6. K. REDDEN, supra note 1, § 2.2(A)(2).

n7. 95 Eng. Rep. 768 (C.P. 1763).

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n8. Id. at 769. The plaintiff in Huckle sued the King's officers for illegal searches and seizures, assault, and false imprisonment under a "nameless warrant," and the court upheld an award of 300 pounds for "exemplary damages" even though actual damages were only 20 pounds. Id. In the related case of Wilkes v. Wood, 98 Eng. Rep. 489 (C.P. 1763), Lord Chief Justice Pratt stated that:

[A] jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.

Id. at 498-99.

n9. See generally J. GHIARDI & J. KIRCHER, **PUNITIVE DAMAGES** LAW AND PRACTICE § 1.02 (1984); Cooter, Economic Analysis of **Punitive Damages,** 56 S. CAL. L. REV. 79, 90 (1982); Duffy, **Punitive Damages:** A Doctrine Which Should Be Abolished, reprinted in DEFENSE RESEARCH INSTITUTE: THE CASE AGAINST **PUNITIVE DAMAGES** (D. Hirsch & J. Pouros eds. 1969); Owen, Civil Punishment and the Public Good, 56 S. CAL. L. REV. 103, 108 (1982); Sales, supra note 2, at 353-55.

n10. Duffy, supra note 9, at 4; Ellis, Fairness and Efficiency in the Law of **Punitive Damages,** 56 S. CAL. L. REV. 1, 12-13 (1982); Sales, supra note 2, at 353-54. A number of early cases in which defendants attempted to persuade courts to overturn arguably excessive jury verdicts furnished support for adoption of the **punitive damage** concept. See Ash v. Ash, 90 Eng. Rep. 526 (K.B. 1701) (court set aside a daughter's 2000 pound judgment against her mother because the "jury were very shy of giving a reason of their verdict"); Wood v. Gunston, 82 Eng. Rep. 867 (Banc. Sup. 1655) (the "Supreme Bench," which had replaced the King's Bench during the Interregnum, agreed that the court could overturn an excessive jury verdict in a slander suit and ordered a new trial); Hawkins v. Sciet, 81 Eng. Rep. 1099 (K.B. 1622) (first case to implicitly recognize the courts' power to set aside jury verdicts, although court allowed instant verdict to stand); see also Ellis, supra, at 12-15. Contra, Townsend v. Hughes, 86 Eng. Rep. 994 (C.P. 1649) (court held that it could not interfere with the jury's power to determine damage awards and sustained plaintiff's judgment of 4000 pounds).

n11. K. REDDEN, supra note 1, § 2.2(A)(2).

n12. Appellate courts in medieval England generally could not review a jury award of damages. Instead, a litigant oppressed by an allegedly excessive award of damages could pursue his grievance directly against the jury by means of a writ of attaint. If the court determined the damages excessive pursuant to its writ, the jury members were punishable under its provisions. Sales, supra note 2, at 354. Such punishment could be so severe that the jurors should "'become forever infamous; should forfeit their goods and the profits of their land; should themselves be imprisoned, and their wives and children thrown out of doors; should have their houses razed, their trees extirpated, and their meadows ploughed . . .'" K. REDDEN, supra note 1, § 2.2(A)(2) (quoting 3 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 402 (1836)).

n13. 45 Vt. 275 (1873).

n14. Id. at 286.

n15. K. REDDEN, supra note 1, § 2.2(A)(2).

n16. See Note, Exemplary Damages in the Law of Torts, 70 HARV. L. REV. 517, 530-33 (1957). Professor Ellis indicates that appellate courts today are more willing to use remittitur

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doctrine at early common law, the simple fact remains that none of the historical justifications supports the **punitive damage** theory in today's tort reparations system. The quest to bestow increasing compensation no longer can justify **punitive damage** awards because actual damages currently recoverable compensate plaintiffs more than adequately for every conceivable element of physical, emotional, or imagined injury. The desire to inflict punishment, likewise, represents an insupportable basis for awarding quasi-criminal fines in a civil context, and is inconsistent with ancient and modern jurisprudence because the civil law historically has been premised upon the concept of compensation and not penal retribution. Deterrence is an equally unsound basis upon which to establish a civil remedy. Unfortunately, theoretical arguments mask the archaic and destructive nature of the **punitive damages** doctrine. Considering that an award of **punitive damages** is actually counterproductive to the bases which originally provided credibility for its existence, the severe economic impact of mind boggling and unprecedented recent awards of **punitive damages,** and the potential for even more catastrophic economic consequences in the future, it is time to relegate this doctrine to its rightful niche in the annals of law.

Part II of this Article traces the evolution of the **punitive damage** theory, including ancient origins and current status. Part III explores the various justifications theorized in support of the doctrine's present viability. Part IV analyzes the patchwork applications and conflicting standards that measure conduct warranting an award of puntive damages, the treatment of vicariously liable corporate defendants, and other factors that affect the doctrine. This part emphasizes that **punitive damages** are awarded on the basis of highly questionable rationale and in an absurdly confusing **[*1119]** and noticeably destructive manner. Part V argues for the complete abolition of the **punitive damage** concept: ratio potest allegari deficiente lege. In the absence of complete abolition of **punitive damages,** part VI asserts the urgent need for immediate stringent limitations on a doctrine that currently operates as an undisciplined and unfettered juggernaut of destruction in the civil tort system. Responsible jurisprudence, however, argues forcefully in favor of relegating this legal dinosaur to an era that long since has passed.

II. THE EVOLUTION OF **PUNITIVE DAMAGES**

A. Ancient Origins and Early Common Law

The precursor of modern puntive damages was the statutory remedy of multiple awards, a practice that, like **punitive damages,** provided for awards in excess of actual harm. [1] One of the earliest systems of law to utilize civil **punitive damages** was the Code of Hammurabi in 2000 B.C. [2] Punitory forms of damages also appeared in the Hittite law in 1400 B.C. and in the Hindu Code of Manu in 200 B.C. [3] Even the Bible contains several examples of multiple damage remedies that Mosaic law provided for offenses such as stealing. [4] Commentators disagree over whether Roman civil law ever actually recognized the concept of **punitive damages.** [5] English courts before the eighteenth century, however, upheld jury verdicts that exceeded the plaintiff's actual physical harm, [6] and an **[*1120]** English court initially employed the term "exemplary damages" in 1763 in Huckle v. Money [7] to recognize that a jury legitimately could return a verdict for excessive monetary awards. [8]

Courts and commentators have proferred a variety of historical justifications for the development of **punitive damages.** [9] One theory postulates that courts used the concept of **punitive damages** to justify otherwise excessive jury verdicts. [10] Early English common-law juries consisted of local townspeople who knew more about the facts of cases than did the judges, and under the reign of Henry II the knights who acted as jurors also provided the only testimony at the trial. [11] Primitive English courts, therefore, only reluctantly interfered with the ostensibly knowledgeable decisions reached by English juries, [12] and the concept that damages possessed **[*1121]** a proper, albeit punitive quality, simply served to justify these purportedly excessive jury awards.

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to reduce excessive **punitive damage** awards. Iowa may be the only state that does not allow remittitur of such verdicts. The availability of remittitur in other states does not lead to any more certainty or consistency in **punitive damage** theory, however; increased availability just makes it more probable that state courts will refuse to uphold extremely large awards. Ellis, supra note 10, at 55 (citing K. REDDEN, supra note 1, § 10.5).

n17. J. GHIARDI & J. KIRCHER, supra note 9, § 1.02 4; K. REDDEN, supra note 1, § 2.2(C); Duffy, supra note 9, at 5; Sales, supra note 2, at 354.

n18. Sales, supra note 2, at 354 (citing Stuart v. Western Union Tel. Co., 66 Tex. 580, 18 S.W. 351 (1885)). The Texas Supreme Court in Stuart allowed recovery for mental anguish when the defendant failed to deliver a death message. The court stated that "the whole doctrine of punitory or exemplary damages has its foundation in a failure to recognize as elements upon which compensation may be given, many things which ought to be classed as injuries entitling the injured person to compensation." Stuart, 66 Tex. at 586, 18 S.W. at 353.

n19. 53 N.H. 342 (1873).

n20. See supra note 7 and accompanying text.

n21. Fay v. Parker, 53 N.H. at 364.

n22. 128 Eng. Rep. 761 (C.P. 1814).

n23. Id.

n24. Id.

n25. 95 Eng. Rep. 909 (C.P. 1769).

n26. Id. at 910.

n27. See K. REDDEN, supra note 1, § 7.5(D). "The availability of actual damages in tort for mental anguish, wounded feelings, indignity and embarrassment have made the awarding of exemplary damages on such bases redundant." Id. § 2.3(A).

n28. Id. § 7.5(D); Coccia & Morrissey, **Punitive Damages** in Products Liability Cases Should Not Be Allowed, 22 TRIAL LAW. GUIDE 46, 64-65 (1978); see infra notes 153-66 and accompanying text.

n29. 53 N.H. 342 (1873).

n30. Id. at 382.

n31. K. REDDEN, supra note 1, § 2.2(E) (citing Freifield, The Rationale of **Punitive Damages,** 1 OHIO ST. L.J. 5, 9 (1935)); Sales, supra note 2, at 355.

n32. K. REDDEN, supra note 1, § 2.2(E); Sales, supra note 2, at 355.

n33. Special Project, supra note 2, at 694.

n34. See Duffy, supra note 8, at 5; supra note 27 and accompanying text.

n35. Defense Research Institute: The Case Against **Punitive Damages,** 6-7 (D. Hirsch & J. Pouros eds. 1969); K. REDDEN, supra note 1, § 7.5(B). Dean Prosser stated:

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A crime is an offense against the public at large, for which the state, as the representative of the public, will bring proceedings in the form of a criminal prosecution. The purpose of such a proceeding is to protect and vindicate the interests of the public as a whole, by punishing the offender or eliminating him from society, either permanently or for a limited time, by reforming him or teaching him not to repeat the offense, and by deterring others from imitating him. . . .

The civil action for tort, on the other hand, is commenced and maintained by the injured person himself, and its purpose is to compensate him for the damage he has suffered, at the expense of the wrongdoer.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 7 (4th ed. 1971) (footnote omitted). Professors Lafave and Scott have observed:

Criminal law and the law of torts . . . are related branches of the law; yet in a sense they are two quite different matters. The aim of the criminal law . . . is to protect the public against harm, by punishing harmful results of conduct or at least situations . . . which are likely to result in harm if allowed to proceed further. The function of tort law is to compensate someone who is injured for the harm he has suffered.

W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 3, at 11 (1972).

n36. 1 N.J.L. 77 (1791).

n37. Id. at 77 (emphasis in original).

n38. Id. at 78.

n39. See K. REDDEN, supra note 1, § 2.3(B).

n40. Id. § 2.3(A); Ellis, supra note 10, at 11-12; Sales, supra note 2, at 355. Some disagreement, however, exists over whether the modern justification for **punitive damages** in England is compensation or punishment and deterrence. Compare Duffy, supra note 9, at 5 (citing Walther & Plein, **Punitive Damages:** A Critical Analysis: Kirk v. Combs, 49 MARQ. L. REV. 369, 371 (1965)) (theory that **punitive damages** are "compensation" for incompensable injuries has remained the modern English justification) with J. GHIARDI & J. KIRCHER, supra note 9, § 1.03, at 7 (citing Rookes v. Barnard, [1964] 1 All E.R. 367, 407) (despite early confusion, current purpose of **punitive damages** in English law is "to punish and deter").

n41. J. GHIARDI & J. KIRCHER, supra note 9, § 4.01-.1.6; Sales, supra note 2, at 363.

n42. See J. GHIARDI & J. KIRCHER, supra note 9, at table 4.1 (46 states and the District of Columbia allow **punitive damages** at common law); Duffy, supra note 9, at 6.

n43. Louisiana, Massachusetts, Nebraska, and Washington constitute this minority. See, e.g., McCoy v. Arkansas Natural Gas Co., 175 La. 487, 143 So. 383 (1932); City of Lowell v. Massachusetts Bonding & Ins. Co., 313 Mass. 257, 47 N.E.2d 265 (1943); Abel v. Conover, 170 Neb. 926, 104 N.W.2d 684 (1960); Kammerer v. Western Gear Corp., 96 Wash. 2d 416, 635 P.2d 708 (1981).

n44. These jurisdictions are Louisiana and Massachusetts. No authority exists in Louisiana law for imposing **punitive damages** in any case "unless it be for some particular wrong for which a statute expressly authorizes the imposition of some such penalty." McCoy v. Arkansas Natural Gas Co., 175 La. at 497, 143 So. at 386; see Killebrew v. Abbott

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Laboratories, 359 So. 2d 1275 (La. 1978). Massachusetts similarly disallows **punitive damages** in the absence of specific statutory authorization. City of Lowell v. Massachusetts Bonding & Ins. Co., 313 Mass. at 269-70, 47 N.E.2d at 272; see Caperci v. Huntoon, 397 F.2d 799, 801 (1st Cir.), cert. denied, 393 U.S. 940 (1968). Statutorily allowed **punitive damages** in Massachusetts include situations in which the defendant is guilty of unfair or deceptive insurance trade practices, MASS. GEN. LAWS ANN. ch. 176D, § 7 (West Supp. 1983-1984)(up to 25% of underlying claim), and illegal willful dissemination of the criminal record of an offender, MASS. GEN. LAWS. ANN. ch. 6, § 177 (West 1976) (minimum $ 100 to maximum $ 1000); see Barr v. Interbay Citizens Bank, 96 Wash. 2d. 409, 635 P.2d 441 (1981) (**punitive damages** allowed only under express statutory authorization).

n45. These jurisdictions include Indiana, Nebraska, and Washington. See, e.g., Glissman v. Rutt, 175 Ind. App. 493, 494, 372 N.E.2d 1188, 1189 (1978) (criminal prosecution bars imposition of **punitive damages)**; Abel v. Conover, 170 Neb. 926, 929, 104 N.W.2d 684, 688 (1960) (court stated unequivocally that "punitive, vindictive, or exemplary damages will not be allowed, and that the measure of recovery in all civil cases is compensation for the injury sustained"); Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 53, 25 P. 1072, 1074 (1891) (Washington will allow only compensatory damages because they now cover all possible injuries and to allow **punitive damages** in addition would be akin to "exacting the pound of flesh"); accord Kammerer v. Western Gear Corp., 96 Wash. 2d 416, 635 P.2d 708 (1981); Barr v. Interbay Citizens Bank, 96 Wash. 2d. 409, 635 P.2d 441 (1981).

n46. These states are Connecticut, Georgia, Michigan, and New Hampshire. See, e.g., Collens v. New Canaan Water Co., 155 Conn. 477, 488-89, 234 A.2d 825, 831-32 (1967) (**punitive damages** actually have a compensatory nature and may not exceed the amount of plaintiff's expenses of litigation, less taxable costs); Westview Cemetery, Inc. v. Blanchard, 234 Ga. 540, 543-46, 216 S.E.2d 776, 778-81 (1975) (recovery under § 105-2003 for injury "to the peace, happiness, or feelings of the plaintiff" may include **punitive damages** and, therefore, precludes the recovery of **punitive damages** under § 105-2002); Wise v. Daniel, 221 Mich. 229, 233-34, 190 N.W. 746, 747 (1922) (factfinder may not award exemplary damages as a separate amount for example or punishment, although compensatory damages may be increased); Vratsenes v. New Hampshire Auto, Inc., 112 N.H. 71, 73, 289 A.2d 66, 68 (1972) (punitive award not allowable, but compensatory damages may be increased to compensate plaintiff in cases of wanton, malicious, or oppressive conduct).

n47. See supra note 40 and accompanying text. The states that recognize punishment and deterrence as the rationales for **punitive damages** obviously do not include the four states that employ the punitive nomenclature in designating essentially compensatory awards. See supra note 46 and accompanying text.

n48. J. GHIARDI & J. KIRCHER, supra note 9, § 4.14 & n.1 (citing cases and statutes from 36 states and the District of Columbia).

n49. Ellis, supra note 10, at 3. Professor Ellis offered as possible justifications: (1) punishment of the defendant; (2) specific deterrence of the defendant; (3) general deterrence of others from acting in a similar manner; (4) preservation of the peace; (5) inducement of private law enforcement; (6) compensation of victims for otherwise uncompensable losses; and (7) payment of plaintiffs' attorneys' fees. Id.

n50. Id. at 3 n.10 (quoting T. BATY, VICARIOUS LIABILITY 148 (1916)).

n51. Ellis, supra note 10, at 11.

n52. See, e.g., Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 815 (6th Cir. 1982) (failure to warn would support punitive award if such failure manifested a flagrant

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indifference to the risk of harm); Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 928 n.13, 582 P.2d 980, 990 n.13, 148 Cal. Rptr. 389, 399 n.13 (1978) ("purpose of **punitive damage** is to punish wrongdoers and thereby deter commission of wrongful acts"); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 741 (Minn.), cert. denied, 449 U.S. 921 (1980) (court allowed **punitive damages,** even though manufacturer had ceased production of dangerous product, for purpose of deterring future misconduct and "to punish past misconduct"); Leimgruber v. Claridge Assocs., 73 N.J. 450, 454, 375 A.2d 652, 654 (1977) (theory of **punitive damages** is to punish the defendant for aggravated misconduct and deter such conduct in the future); Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J. Super. 436, 448, 358 A.2d 805, 811 (1976) (**punitive damages** are intended to punish the tortfeasor and prevent him from repeating such misconduct).

n53. J. GHIARDI & J. KIRCHER, supra note 9, § 5.39.

n54. See infra notes 101-07 & 188-201 and accompanying text.

n55. J. GHIARDI & J. KIRCHER, supra note 9, § 4.14.

n56. Id.

n57. See, e.g., Pringle Tax Serv., Inc. v. Knoblauch, 282 N.W.2d 151, 154 (Iowa 1979); Standard Life Ins. Co. v. Veal, 354 So. 2d 239, 247 (Miss. 1977); Newton V. Standard Fire Ins. Co., 291 N.C. 105, 114, 229 S.E.2d 297, 302 (1976); Detling v. Chockley, 70 Ohio St. 2d 134, 136, 436 N.E.2d 208, 209 (1982); City Nat'l. Bank v. Haynes, 614 S.W.2d 605, 609 (Tex. 1981); FBC Stores, Inc., v. Duncan, 214 Va. 246, 251, 198 S.E.2d 595, 599 (1973); Spencer v. Steinbrecher, 152 W. Va. 490, 500, 164, S.E.2d 710, 717 (1968). North Carolina consistently has allowed **punitive damages** solely on the basis of its policy to punish intentional wrongdoing and to deter others from similar behavior. See, e.g., Newton v. Standard Fire Ins. Co., 291 N.C. 105 at 114, 229 S.E.2d 297, 302 (1976).

n58. See, e.g., Kerr v. First Commodity Corp. of Boston, 735 F.2d 281, 289 (5th Cir. 1984) (applying Missouri law); Ray Dodge, Inc. v. Moore, 251 Ark. 1036, 1044, 479 S.W.2d 518, 523 (1972); Frick v. Abell, 198 Colo. 508, 511, 602 P.2d 852, 853 (Colo. 1979); Gent v. Collinsville Volkswagen, Inc., 116 Ill. App. 3d 496, , 451 N.E.2d 1385, 1391 (1983); Taylor v. Wachter, 227 Kan. 221, 224, 607 P.2d 1094, 1098 (1980); Bisset v. Goss, 481 S.W.2d 71, 74 (Ky. 1972); Wedeman v. City Chevrolet Co., 278 Md. 524, 531, 366 A.2d 7, 12 (1976); Miller v. Watkins, 653 P.2d 126, 133 (Mont. 1982); Fahrenberg v. Tengel, 96 Wis. 2d 211, 222, 291 N.W.2d 516 (1980).

n59. See, e.g., Acheson v. Shafter, 107 Ariz. 576, 578, 490 P.2d 832, 834 (1971) (**punitive damages** are meant to punish the wrongdoer and to act as a deterrent to further wrongdoing); Sandler v. Lawn-A-Mat Chem. & Equip. Co., 141 N.J. Super. 436, 448, 358 A.2d 805, 811 (1976) (**punitive damages** "are intended to punish the tortfeasor and prevent him from repeating such conduct").

n60. See, e.g., Jensen v. Peterson, 264 N.W.2d 139, 144 (Minn. 1978) (**punitive damages** deter particularly egregious conduct, but court does not indicate by whom); Kirchbaum v. Lowrey, 165 Minn. 233, 236, 206 N.W. 171, 173 (1925) (**punitive damages** deter willful, wanton, or malicious wrongs, but court does not specify by whom).

n61. See Malcom v. Little, 295 A.2d 711, 714 (Del. 1972); Riegel v. Aastad, 272 A.2d 715, 718 (Del. 1970).

n62. Malcom v. Little, 295 A.2d at 714 (Del. 1972); Riegel v. Aastad, 272 A.2d at 718 (Del. 1970).

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n63. See Hofer v. Lavender, No. C-2552 (Tex. July 11, 1984) (either deterrence or punishment, or both are now recognized as valid). Compare Wussow v. Commercial Mechanisms, Inc., 97 Wis. 2d 136, 155-56, 293 N.W.2d 897, 907 (1980) (punishment of past conduct is a sufficient basis for assessing **punitive damages,** even though they can also serve to deter future outrageous conduct) with John Mohr & Sons v. Jahnke, 55 Wis. 2d 402, 411, 198 N.W.2d 363, 368 (1972) (**punitive damages** act to punish and deter).

n64. J. GHIARDI & J. KIRCHER, supra note 9, § 4.15 at 17.

n65. Maine, Oregon, and Utah are among those states that specifically state that deterrence is the only proper basis of **punitive damages.** See, e.g., Foss v. Maine Turnpike Auth., 309 A.2d 339, 345 (Me. 1973) (deterrence is the proper justification for exemplary damages); Lewis v. Devils Lake Rock Crushing Co., 274 Or. 293, 300, 545 P.2d 1374, 1378 (1976)(deterrence is only proper basis for imposing **punitive damages)**; Nash v. Craigco, Inc., 585 P.2d 775, 778 (Utah 1978)(**punitive damages** teach the defendant not to repeat and warn others not to participate in such conduct).

n66. Jolley v. Puregro Co., 94 Idaho 702, 708-09, 496 P.2d 939, 945-46 (1972).

n67. See supra notes 56-60 and accompanying text. At least one jurisdiction, California, has suggested that **punitive damages** may be levied against a product supplier to deter the entire industry of which the defendant is a member. See Schleininger v. Questor Corp., 200 Cal. Rptr. 634 (1984). The extra penalty of monetary awards based on alleged wanton and reckless conduct by all members of an industry is an unwarranted extension of an already flawed concept.

n68. See J. GHIARDI & J. KIRCHER, supra note 9, § 4.15, at 18.

n69. Hofer v. Lavender No. C-2552 (Tex. July 11, 1984).

n70. In a strongly worded dissent Justice Spears noted that [t]he punitive and deterrant aims of exemplary damages are not separable. The general deterrent effect of an award can not be considered in isolation, because to a large extent general deterrence depends on punishment. Specifically, members of the public are deterred from similar misconduct because they witnessed the wrongdoers conduct. . . .

Id.

n71. See Collens v. New Canaan Water Co., 155 Conn. 477, 234 A.2d 825 (1967); Westview Cemetery, Inc. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975); McLaren v. Zeilinger, 103 Mich. App. 22, 302 N.W.2d 583 (1981); Perry v. Melton, 299 S.E.2d 8 (W. Va. 1982). But, as noted in Ratner v. Sioux Natural Gas Corp., 719 F.2d 801, 804 (5th Cir. 1983), "[t]he award of **punitive damages** is unconcerned with compensation; it is intended to punish the wrongdoer and deter the commission of similar offenses in the future."

n72. Sales, supra note 2, at 354; see Hink v. Sherman, 164 Mich. 352, 357, 129 N.W. 732, 734 (1911); Fay v. Parker, 53 N.H. 342, 380 (1873).

n73. See Stuart v. Western Union Tel. Co., 66 Tex. 530, 18 S.W. 351 (1885).

n74. Duffy, supra note 9, at 11; see also Reinah Dev. Corp. v. Kaaterskill Hotel, 86 A.D.2d 50, 448 N.Y.S.2d 686 (1982), rev'd on other grounds, 465 N.Y.2d 482, 452 N.E.2d 1238 (1983).

n75. See supra notes 17-29 and accompanying text.

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n76. See infra notes 213-20 and accompanying text.

n77. See generally J. GHIARDI & J. KIRCHER, supra note 9, § 5.01, at 2; Sales, supra note 2, at 364-65; Special Project, supra note 2, at 695.

n78. As an example, Dean Prosser has noted:

Something more than the mere commission of a tort is always required for **punitive damages.** There must be circumstances of aggravation or outrage, such as spite or "**malice,**" or a fraudulent or evil motive on the part of the defendant, or such a conscious and **deliberate disregard** of the interests of others that his conduct may be called willful or wanton. Lacking this element, there is general agreement that mere negligence is not enough, even though it is so extreme in degree as to be characterized as "gross," an unhappy term of ill-defined content, which occasionally, in a few jurisdictions, has been stretched to include the element of conscious indifference to consequences, and so to justify **punitive damages.** Still less, of course, can such damages be charged against one who acts under an innocent mistake in engaging in conduct that nevertheless constitutes a tort.

W. PROSSER, supra note 34, § 2, at 9-10. Similarly, Professor McCormick has suggested:

Since these damages are assessed for punishment and not for reparation, a positive element of conscious wrongdoing is always required. It must be shown either that the defendant was actuated by ill will, **malice,** or evil motive (which may appear by direct evidence of such motive, or from the inherent character of the tort itself, or from the oppressive character of his conduct, sometimes called "circumstances" of aggravation"), or by fraudulent purposes, or that he was so wanton and reckless, as to evince a conscious disregard of the rights of others. "Gross negligence" is a somewhat ambiguous expression. In the sense of extreme carelessness merely, it would probably not suffice, but only when it goes further and amounts to conscious indifference to harmful consequences.

McCORMICK, HANDBOOK OF THE LAW OF DAMAGES § 79, at 280-82 (1935). For the sake of simplicity, this Article adopts the broad terms of "intentional," "reckless," and "negligent" to describe and refer to the standards of conduct that govern the imposition of **punitive damages.** "Intentional" refers to that conduct which is characterized by willfulness or **malice,** whether express, implied in fact, or implied in law. "Reckless" refers to that conduct which, although not intentional, is marked by various degrees of indifference or wantonness. "Negligent" includes that nebulous area of careless action which courts generally have viewed as insufficient for the imposition of **punitive damages.** The circular and overlapping characteristics of these three categories reflect the ambiguity and lack of definition inherent in the **punitive damage** environment. See Ellis, supra note 9, at 34-37, for another attempt to deal with this confusion.

n79. See generally J. GHIARDI & J. KIRCHER, supra note 9, § 5.02. (The authors give numerous examples of the imposition of **punitive damages** for the intentional tort of assault and battery.) Some state legislatures have dictated that **punitive damages** are permissible for intentional or quasi-intentional conduct. See, e.g., MINN. STAT. ANN. § 549.20(1) (1984) (requiring "clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety or others"); MONT. CODE ANN. § 27-1-221 (1983) (where the defendant has been "guilty of oppression, fraud, or **malice,** actual or presumed"); NEV. REV. STAT. § 42.010(1)(1981) (where the defendant has "been guilty of oppression, fraud or **malice,** express or implied"); N.D. CENT. CODE § 32-03-07 (Supp. 1983) ("when the defendant has been guilty of oppression, fraud, or **malice,** actual or presumed"); OKLA. STAT. ANN. tit. 23, § 9 (1955) ("where the defendant has been guilty of oppression, fraud or **malice,** actual or presumed"); S.D. CODIFIED LAWS ANN. § 21-3-2 (1979) ("where the defendant has been guilty of oppression, fraud, or **malice,** actual or presumed"). One state legislature has mandated a reckless standard for awarding **punitive damages.** See COLO.

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REV. STAT. § 13-21-102 (1973) ("the injury complained of is attended by circumstances of fraud, **malice** or insult, or a wanton and reckless disregard of the injured party's rights and feelings").

n80. See Ellis, supra note 10, at 21-22 (when a defendant purposefully injures someone, then characterization of that action as the commission of a wrongful act with a culpable mental state that deserves punishment is relatively easy). The principal problems in justifying **punitive damages** from a just desserts standpoint arise when the defendant's conduct may not be characterized as purposeful harm. Much of the disagreement among the jurisdictions centers on expanding the **punitive damage** concept to embrace merely reckless conduct. Id.; see also Addair v. Huffman, 195 S.E.2d 739, 744 (W. Va. 1973) (**intentional disregard** of a law that protects the public from a particular abuse, thereby resulting in injury, gives rise to the imposition of **punitive damages)**.

n81. Sherman v. McDermott, 114 R.I. 107, 109, 329 A.2d 195, 196 (1974)(quoting Adams v. Lorraine Mfg. Co., 29 R.I. 333, 338, 71 A. 180, 182 (1908)).

n82. Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J. Super. 437, 448, 358 A.2d 805, 811 (1976)(quoting La Bruno v. Lawrence, 64 N.J. Super. 570, 575, 166 A.2d 822, 824 (1960), cert. denied, 34 N.J. 323, 168 A.2d 694 (1961); see Kocse v. Liberty Mut. Ins. Co., 152 N.J. Super. 371, 375-76, 377 A.2d 1234, 1236 (1977). Idaho applies a similar standard. See Cheney v. Palos Verdes Inv. Corp., 104 Idaho 897, 905, 665 P.2d 661, 669 (1983); Linscott v. Ranier Nat'l Life Ins. Co., 100 Idaho 854, 858, 606 P.2d 958, 962 (1980) (**punitive damages** are appropriate if defendant's act is an "extreme deviation from reasonable standards of conduct" and if defendant acted "with an understanding of or a disregard for its likely consequences"). Texas also arguably falls within this category. In Ogle v. Craig, 464 S.W. 2d 95 (Tex. 1971), the Texas Supreme Court stated that the "act complained of not only must be unlawful but also must partake of a wanton and malicious nature, or, as sometimes stated, somewhat of a criminal or wanton nature." Id. at 97 (quoting Dennis v. Dial Fin. & Thrift Co., 401 S.W.2d 803, 805 (Tex. 1966)). Texas, however, also allows recovery of **punitive damages** for grossly negligent conduct. See Schwartz v. Sears, Roebuck & Co., 669 F.2d 1091, 1093 (5th Cir. 1982); Burk Royalty Co. v. Walls, 616 S.W.2d 911, 920 (Tex. 1981); Houston Lighting & Power Co. v. Sue, 644 S.W.2d 835, 839 (Tex. Civ. App. 1982).

n83. Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 462, 521 P.2d 1103, 1110, 113 Cal. Rptr. 711, 718 (1974); see Colonial Life & Accident Ins. Co. v. Superior Court, 31 Cal. 3d 785, 792, 647 P.2d 86, 90, 183 Cal. Rptr. 810, 814 (1982).

n84. Shortle v. Central Vt. Pub. Serv. Corp., 137 Vt. 32, 33, 399 A.2d 517, 518 (1979). Other jurisdictions follow similar standards. See Freeman v. Anderson, 279 Ark. 282, 286-87, 651 S.W.2d 450, 452 (1983); Dalrymple v. Fields, 276 Ark. 185, 188, 633 S.W.2d 362, 363 (1982) (must be shown that "in the absence of proof of **malice** or willfulness there was a wanton and conscious disregard for the rights and safety of others"); Satterfield v. Rebsamen Ford, Inc., 253 Ark. 181, 185, 485 S.W.2d 192, 195 (1972) ("when the defendant acts with **malice,** . . . or with willfulness, wantonness, or conscious indifference to consequences from which **malice** may be inferred") (citations omitted); Sere v. Group Hospitalization, Inc., 443 A.2d 33, 37 (D.C. 1982) ("defendant's tortious conduct must have been outrageous, characterized by **malice,** wantonness, gross fraud, recklessness, or willful disregard of the plaintiff's rights"); Riggs Nat'l Bank v. Price, 359 A.2d 25, 28 (D.C. 1976) ("for outrageous conduct such as maliciousness, wantonness, gross fraud, recklessness and willful disregard of another's rights"); Toyota Motor Co. v. Moll, 438 So. 2d 192 (Fla. Dist. Ct. App. 1983) ("for actions or inactions amounting to willfulness, wantonness, maliciousness, recklessness, oppression, or outrageous conduct"); Kelsay v. Motorola, Inc., 74 III. 2d 172, 186, 384 N.E.2d 353, 359 (1978) ("committed with fraud, actual **malice,** deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate

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a wanton disregard of the rights of others"); Gent v. Collinsville Volkswagen, Inc., 116 III. App. 3d 496, 451 N.E.2d 1385 (1983); General Motors Corp. v. Piskor, 277 Md. 165, 175, 352 A.2d 810, 817 (1976) ("only when there is an element of fraud, **malice,** evil intent or oppression which enters into and forms a part of the wrongful act"); Nelson v. Jacobsen, 669 P.2d 1207, 1219 (Utah 1983) (requiring a higher standard of proof than "willful and malicious" for punitive awards in an alienation of affections case); Kesler v. Rogers, 542 P.2d 354, 359 (Utah 1974) ("for particularly grievous injury caused by conduct which is not only wrongful, but which is willful and malicious so that it seems to one's sense of justice that mere recompense for actual loss is inadequate").

n85. Jones v. Hospital for Joint Diseases and Medical Center, 96 A.D.2d 498, 499, 465 N.Y.S.2d 517, 517 (1982); see Le Mistral, Inc. v. Columbia Broadcasting Sys., 61 A.D.2d 491, 494, 402 N.Y.S.2d 815, 817 (1978) ("based upon tortious acts which involve ingredients of **malice,** fraud, oppression, insult, wanton or reckless disregard of the plaintiff's rights, or other circumstances of aggravation"). For other weak standard formulations, see Alyeska Pipeline Serv. Co. v. O'Kelley, 645 P.2d 767, 774 (Alaska 1982) ("characterized as outrageous, such as acts done with **malice** or bad motives or reckless indifference to the interests of another") (quoting Bridges v. Alaska Hous. Auth., 375 P.2d 696, 702 (Alaska 1962)); Sturm, Ruger & Co. v. Day, 594 P.2d 38, 46 (Alaska 1979); Malcolm v. Little, 295 A.2d 711, 714 (Del. 1972) ("when [the defendant's] wrongful act was committed willfully or wantonly") (quoting Riegel v. Aastad, 272 A.2d 715, 718 (Del. 1970)); Meyer v. Nottger, 241 N.W.2d 911, 922 (Iowa 1976) ("where defendant acts maliciously . . . where the nature of the illegal act is such as to negative any inference of feeling toward the person injured") (quoting Amos v. Prom, 115 F. Supp. 127, 136-37 (N.D. Iowa 1953)); McKinnon v. Tibbetts, 440 A.2d 1028, 1031 (Me. 1982) ("malicious, gross or wanton"); Foss v. Main Turnpike Auth., 309 A.2d 339, 345 (Me. 1973) ("the conduct of the defendant is found to be deliberate, malicious or grossly negligent"); Addair v. Huffman, 156 W. Va. 592, 599, 195 S.E.2d 739, 743 (1973) ("where there is an intentional wrong, or where there are circumstances which warrant an inference of **malice,** willfulness, or wanton disregard of the rights of others"); Petsch v. Florom, 538 P.2d 1011, 1013 (Wyo. 1975) ("the act of the defendant was committed maliciously, willfully or wantonly").

n86. Ex parte Smith, 412 So. 2d 1222, 1223 (Ala. 1982); see Ford Motor Credit Co. v. Washington, 420 So. 2d 14 (Ala. 1982); Ex parte Lewis, 416 So. 2d 410 (Ala. 1982).

n87. Cooter, supra note 9, at 80. Professor Cooter suggests that because most potential wrongdoers find it economically cheaper to comply with the law, noncompliance is usually unintentional. If the wrongdoer's actions are unintentional, then **punitive damages** are unnecessary for deterrence and underserved for punishment. Professor Cooter, however, also argues that some individuals intentionally cause harm, and that courts should impose **punitive damages** against these purposeful wrongdoers to offset either their illicit pleasure in noncompliance or the exceptional cost of compliance that instigates their noncompliance. Id. at 79-80. If, however, such deterrent or punitory measures are still necessary in light of the present expanded compensatory damage remedy, those effects should be achieved through the criminal processes, or at a minimum, restructured to preclude a windfall to an already fully compensated plaintiff.

n88. See Owen, **Punitive Damages** in Product Liability Litigation, 74 MICH. L. REV. 1258 (1976).

n89. Owen, supra note 9, at 106-07. Professor Owen asserts that the assessment of **punitive damages** in "deliberate" situations -- those concerning conduct intended to cause harm for no good reason -- "generally would be regarded as appropriate without much argument about either fairness or efficiency." Accordingly, **punitive damages** properly would lie in "evaluative" situations -- those in which the defendant evaluates the circumstances and decides that he will benefit enough from the act to justify its occurrence --

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but only if the defendant's choice is wrong (immoral) and the defendant knows or recklessly fails to discover its wrongfulness before acting. Professor Owen, however, now draws the line at "inadvertent" acts -- those that show no real thought by the defendant concerning the wrongfulness or implications of the act -- because a failure to think usually does not call for punishment. Id. This shift is understandable because an objective view of the courts' indiscriminate use of **punitive damages** would dampen the enthusiasm of even the doctrine's most ardent supporters.

n90. Sandler v. Lawn-A-Mat Chem. & Equip. Co., 141 N.J. Super. 437, 448, 358 A.2d 805, 811 (1976). The court also refers to conduct that evinces a "wanton and willful disregard of the rights of another." Id. Actual **malice,** likewise, reflects the Iowa and Maryland standards. See Feeney v. Scott County, 290 N.W.2d 885, 892 (Iowa 1980); see also West Des Moines State Bank v. Hawkeye Bancorp., 722 F.2d 411, 414 (8th Cir. 1983); Savol v. BL Ltd., 710 F.2d 1027, 1033 (4th Cir. 1983). South Carolina and Virginia also use similar formulations. See King v. Allstate Ins. Co., 272 S.C. 259, 263, 251 S.E.2d 194, 196 (1979)("must be **malice,** ill will, a conscious indifference to the rights of others, or a reckless disregard thereof")(quoting Cox v. Coleman, 189 S.C. 218, 221, 200 S.E. 762, 764 (1939)); Peacock Buick, Inc. v. Durkin, 221 Va. 1133, 1136-37, 277 S.E.2d 225, 227 (1981)(actual **malice or malice** in fact); Jordan v. Sauve, 219 Va. 448, 452, 247 S.E.2d 739, 741 (1978)("only where there is misconduct or actual **malice**").

n91. Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 697, 271 N.W.2d 368, 379 (1978); see Franklin Music Co. v. American Broadcasting Co., 616 F.2d 528, 542 (3d Cir. 1979) (Pennsylvania law requires bad motive or reckless indifference); Amish v. Walnut Creek Dev., Inc., 631 S.W.2d 866, 876 (Mo. App. 1982)(bad motive or evil intent).

n92. Under Missouri law, legal **malice** and not actual **malice** governs an award for **punitive damages.** Armstrong v. Republic Realty Mortgage Corp., 631 F.2d 1344, 1352 (8th Cir. 1980)(applying Missouri law); Pollock v. Brown, 569 S.W.2d 724, 732 (Mo. 1978). As noted by the court in Crues v. KFC Corp., 729 F.2d 1145, 1153 (8th Cir. 1984)(citing Beggs v. Universal C.I.T. Credit Corp., 409 S.W.2d 719 (Mo. 1966)), legal **malice** is defined to mean "whether the defendant did a wrongful act intentionally and without just cause or excuse . . . [meaning] that defendant not only intended to do the act which is ascertained to be wrongful but that he knew it was wrongful when he did it." Accord Pollock v. Brown, 569 S.W.2d at 724.

n93. Gulf Atl. Life Ins. Co. v. Barnes, 405 So. 2d 916 (Ala. 1981); Randall v. Ganz, 96 Idaho 785, 787, 537 P.2d 65, 67 (1975); Petsch v. Florom, 538 P.2d 1011, 1013 (Wyo. 1975).

n94. Burk Royalty Co., v. Walls, 616 S.W.2d 911, 920 (Tex. 1981); Jeffers v. Nysse, 98 Wis. 2d 543, 297 N.W.2d 495 (1980).

n95. Silberg v. California Life Ins. Co., 11 cal. 3d 452, 462, 521 P.2d 1103, 1110, 113 Cal. Rptr. 711, 718 (1974); Shortle v. Central Vt. Pub. Serv. Corp., 137 Vt. 32, 33, 399 A.2d 517, 518 (1974); see Newton v. Standard Fire Ins. Co., 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976)("'fraud, **malice,** such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, willfullness'")(quoting Baker v. Winslow, 184 N.C. 1, 113 S.E. 570 (1922)); Henry v. Deen, 61 N.C. App. 189, 195, 300 S.E.2d 707, 711 (1983)("based on aggravated, intentional, wanton or grossly negligent conduct"), rev'd on other grounds, 310 N.C. 75, 310 S.E.2d 327 (1984); Rubeck v. Huffman, 54 Ohio St. 2d 20, 23, 374 N.E.2d 411, 413 (1978)("caused by intentional, reckless, wanton, willful and gross acts or by **malice** inferred from conduct and surrounding circumstances").

n96. McClellan v. Highland Sales & Inv. Co., 484 S.W.2d 239, 242 (Mo. 1972). Under this approach, some element of wantonness or bad motive must exist. Id.; see also Kline v.

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Multi-Media Cablevision, Inc., 233 Kan. 188, 666 P.2d 711 (1983); Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 747, 418 P.2d 191, 199 (1966)("only when the conduct of the wrongdoer may be said to be maliciously intentional, fraudulent, oppressive, or committed recklessly or with a wanton disregard of the plaintiffs's rights").

n97. Salt River Valley Water Users' Ass'n. v. Giglio, 113 Ariz. 190, 202, 549 P.2d 162, 174 (1976). The court, however, did not impose **punitive damages** because of plaintiffs' failure to demonstrate the requisite degree of wanton or reckless disregard. Id. at 203, 549 P.2d at 175; see Nienstedt v. Wetzel, 133 Ariz. 348, 357, 651 P.2d 876, 885 (1982)("where the conduct of the wrongdoer is wanton, reckless or shows spite or ill will"); Currie v. Dooley, 132 Ariz. 584, 589, 647 P.2d 1182, 1187 (1982) (where the defendant's conduct "is wanton, reckless or shows spite or ill will").

n98. Richardson v. Gibalski, 625 S.W.2d 715, 717 (Tenn. Ct. App. 1979)(quoting Inland Container Corp. v. March, 529 S.W.2d 43, 45 (Tenn. 1975)). A similar amalgamated standard prevails in Montana. In the recent case of Kuiper v. Goodyear Tire & Rubber Co., 673 P.2d 1208 (Montana 1983), relying on Graham v. Clarks Fork Nat'l Bank, 631 P.2d 718 (Montana 1981), the court defined the wrongful act as "characterized by some such circumstances of aggravation, as willfulness, wantonness, **malice,** oppression, brutality, insult, recklessness, gross negligence, or gross fraud on the part of the defendant." 673 P.2d at 1213-14.

n99. See supra note 78, for Dean Prosser's and Professor McCormick's standards for justifying the imposition of **punitive damages.** Some commentators have elected to divide antisocial conduct into two categories: (1) that conduct which indicates that the defendant desired to cause the harm that the plaintiff sustained, or at least believed that the harm was substantially certain to follow from the conduct; and (2) situations in which the defendant knew, or should have had reason to know, not only that his conduct created an unreasonable risk of harm, but also that a strong probability -- although not a substantial certainty -- existed that the harm would result but, nevertheless, he proceeded with his conduct in reckless or conscious disregard of the consequences. J. GHIARDI & J. KIRCHER, supra note 9, § 5.01 at 8-9. These categories, however, appear to be the equivalent of the intentional and reckless or wanton categories. This characterization provides little illumination and even less meaningful guidance in applying the standard. This strained effort to characterize conduct warranting **punitive damages** merely dramatizes the total unsuitability of the **punitive damage** concept in the arena of civil torts reparations.

Unquestionably, there exists an inherent and unintelligible confusion in this area of the law. One commentator defined the recklessness category as conduct that does not suggest that the actor desired to hurt anyone and in which the actor's means of achieving his objective, rather than the objective itself, is scrutinized. This commentator emphasized the subtle differences in connotation of such terms as "conscious indifference,"" reckless disregard," "recklessness," and "wantonness." See Ellis, supra note 10, at 35.

Other commentators simply have labeled the basic types of conduct that warrant the imposition of **punitive damages** and have failed to analyze the standards by which such labeled conduct can be judged. See, e.g., Duffy, supra note 9, at 7 (majority of jurisdictions allow **punitive damages** if the defendant's actions were wanton, malicious, or oppressive) (citing Great Atl. & Pac. Tea Co., v. Smith, 218 Ky. 583, 136 S.W.2d 759 (1940) and 22 AM. JUR. 2D Damages § 236 (1965)); Special Project, supra note 2, at 695 (most states require that the defendant act with gross negligence, willfulness, or wantonness).

n100. As one commentator has observed, jury instructions on the standards for assessing **punitive damages** are unilluminating and, although judges usually tell the jurors that they can award **punitive damages** if the defendant acted with maliciousness, willfulness, wantonness, or in reckless disregard of the plaintiff's rights, most courts provide little if any meaningful guidelines. Ellis, supra note 10, at 38. A dramatic example of judicial ratification

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This attitude first may have manifested itself in American legal jurisprudence in Earl v. Tupper, [13] an early Vermont case in which the court announced that it would not grant a new trial for reason of excessive damage awards if the defendant's **malice,** oppression, or gross fraud contributed to the plaintiff's injury. [14] As the jury system continued its evolution and juries began to base their verdicts on the testimony of others, however, courts began exercising more control over the monetary amount of jury awards. [15] Consequently, jury determinations alone as justification for tolerating **punitive damages** as an integral element of the remedy in a tort reparations system began losing much, if not all, of their significance. [16]

Another theory espoused to justify the use of **punitive damages** views punitory damages as compensation for plaintiffs' ethereal injuries such as hurt feelings, humiliation, wounded dignity, mental anguish, and embarrassment, which the courts during the formative stages of the common law were reluctant to recognize as compensable injuries. [17] **Punitive damages,** therefore, performed the task of compensating plaintiffs for elements of personal harm that otherwise were unrecoverable. [18] In the early New Hampshire case **[*1122]** of Fay v. Parker, [19] the court discussed Huckle v. Money [20] and stated that the English decision "said no more, in substance, than that for the outrage and indignity heaped upon the plaintiff by the insolence, oppression, and tyranny of the defendant, a jury might give the plaintiff liberal damages." [21] Likewise, other early English courts allowed intangible injuries to serve as the basis for **punitive damages** awards. In Merest v. Harvey, [22] plaintiff instituted a trespass action because defendant intruded on plaintiff's land, fired several times at game, and used extremely intemperate language. The appellate court upheld a jury verdict of 500 pounds and queried,

[I]n a case where a man disregards every principle which actuates the conduct of a gentleman, what is to restrain him except damages? To be sure, one can hardly conceive worse conduct than this. What would be said to a person in a low situation in life, who should behave himself in this manner? [23]

The English court then refused to establish a principle that juries justifiably could award only "the absolute pecuniary damage that the plaintiff may sustain." [24] Similarly, the court in Tullidge v. Wade [25] emphasized offensive behavior while discussing guidelines for awarding damages. The Tullidge court stated, "In actions [involving seduction] . . . the circumstances of time and place, when and where the insult is given, require different damages; as it is a greater insult to be beaten upon the Royal Exchange than in a private room." [26]

The ambit of compensatory damages has expanded rapidly over recent years to include an entire spectrum of actual and ethereal injuries, including mental anguish, physical pain, loss of society, loss of consortium, emotional trauma, and other metaphysical injuries. [27] The legal rationale that **punitive damages** serve a compensatory function, therefore, has ceased to exist. Critics argue that the lack of a viable compensatory rationale makes **punitive damages** an anachronism that is no longer necessary or justifiable. [28] **[*1123]** As the court forcefully stated in Fay v. Parker, [29] the idea of **punitive damages** "is wrong, . . . is a monstrous heresy," and "is an unsightly and unhealthy excrescence, deforming the symmetry and body of the law." [30] At a minimum, and contrary to the philosophical theorem of civil tort reparations, this doctrine reflects a discomforting antibusiness bias.

A final justification urged in support of the **punitive damage** concept is that quasi-criminal fines satisfy a void allegedly created by the inequitable chasm between severe criminal penalties for wrongs concerning property losses and, in too many instances, lesser criminal penalties for more severe invasions of personal rights. [31] Civil courts, therefore, allegedly can utilize **punitive damages** to punish more severely the egregious torts that cause personal harm, [32] and a number of courts have expressed the rationale that citizens are more likely to institute suits to protect their rights and enforce the civil law if **punitive damages** provide an economic incentive to litigate. [33] Once again, however, because the concept of

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of the application of **punitive damages** despite judicial acknowledgement of the complete lack of any guiding standards for the jury is found in a recent Montana case. See First Bank (N.A.) - Billings v. TransAmerica Ins. Co., 679 P.2d 1217, 1222 (Mont. 1984).

n101. W. PROSSER, supra note 34, § 2, at 10; Ellis, supra note 10, at 36.

n102. W. PROSSER, supra note 34, § 2, at 10; Ellis, supra note 10, at 36-37 (but the definition of gross negligence is unclear); see Maxey v. Freightliner Corp., 665 F.2d 1367 (5th Cir. 1982) (en banc); Ex parte Smith, 412 So. 2d 1222, 1223 (Ala. 1982); Stinson v. Feminist Women's Health Center, Inc., 416 So. 2d 1183, 1185 (Fla. Dist. Ct. App. 1982); Kelsay v. Motorola, Inc., 74 III. 2d 172, 186, 384, N.E.2d 353, 359 (1978); Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 314, 362 N.E.2d 845, 847 (1977); Sebastian v. Wood, 246 Iowa 94, 66 N.W.2d 841 (1954); Newton v. Hornblower, Inc., 224 Kan. 506, 524-25, 582 P.2d 1136, 1150 (1978); Foss v. Maine Turnpike Auth., 309 A.2d 339, 345 (Me. 1973); Seals v. St. Regis Paper Co., 236 So. 2d 388, 392 (Miss. 1970); Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1981); Texas Pac. Coal & Oil Co. v. Robertson, 125 Tex. 4, 79 S.W.2d 830 (1935).

n103. See Wolf v. Nordstrom, Inc., 291 Ore. 828, 637 P.2d 1280 (1981); Chamberlain v. Jim Fisher Motors, Inc., 282 Ore. 229, 578 P.2d 1225 (1978).

n104. W. PROSSER, supra note 34, § 2, at 12. The imposition of **punitive damages** based on a theory of vicarious liability is probably the most controversial use of the doctrine. Id. The incongruous nature of vicarious **punitive damages** clearly is highlighted in the case of Martin v. Johns-Manville Corp., 469 A.2d 655 (Pa. Super. 1983), in which the court held that **punitive damages** are recoverable against a successor corporation for the vicarious liability of its predecessor even though the successor corporation was not responsible for the alleged defective product marketed by its predecessor.

n105. The Restatement (Second) of Torts contains this formulation of the complicity rule;

Punitive damages can properly by awarded against a master or other principal because of an act by an agent if, but only if, (a) the principal authorized the doing and the manner of the act, or (b) the agent was unfit and the principal was reckless in employing him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act.

RESTATEMENT (SECOND) OF TORTS § 909 (1979). The Restatement (Second) of Agency adopts this rule verbatim. RESTATEMENT (SECOND) OF AGENCY § 217C (1958). This rule represents the conservative view, and a number of jurisdictions either have adopted it expressly, adopted it without mentioning it, or adopted parts of it. See, e.g., Martin v. Texaco, Inc., 726 F.2d. 207 (5th Cir. 1984) (applying Texas law); Briner v. Hystop, 337 N.W.2d 858 (Iowa 1983). Dean Prosser has suggested that the majority of the jurisdictions have adopted the more liberal respondeat superior rule. W. PROSSER, supra note 34, § 2, at 12. It has been observed, however, that Dean Prosser cites an equal number of authorities for the respondeat superior and complicity rules. Ellis, supra note 10, at 63 n.266. Professor Ellis has asserted that half of the states follow each rule. Id. at 63. Professor Ellis does recognize that "Prosser's misleading statement may be on its way to becoming a self-fulfilling prophecy." Id. at 63 n.266.

n106. The drafters of the Restatement (Second) of Torts justify this liability because it "serves as a deterrent to the employment of unfit persons for important positions." RESTATEMENT (SECOND) OF TORTS § 909(c) comment b, at 468 (1979). The Restatement provides no clear definition of who constitutes a managerial agent. Jurisdictions that have adopted the complicity rule include the District of Columbia, Texas, New York, California, and Kansas. See Jordan v. Medley, 711 F.2d 211 (D.C. App. 1983) (landlord's passive

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participation while his son brandished a gun at tenants could constitute ratification of the employee's acts); Egan v. Mutual of Omaha Ins. Co., 63 Cal. App. 3d 659, 133 Cal. Rptr. 899 (1976)(claims adjuster held to be managerial agent despite title of his position); Kline v. Multi-Media Cablevision, Inc., 233 Kan. 988, 666 P.2d 711 (1983)(**punitive damages** not allowed for mere employee gross negligence in removing a manhole cover and then failing to erect a protective barrier); Gill v. Montgomery Ward & Co., 284 A.D. 36, 129 N.Y.S.2d 288 (1954)(head of "protective department" of defendant held to be managerial agent of defendant in action for false imprisonment); Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967)(**punitive damages** allowed when parties stipulated that offender was the "manager" of the club).

n107. See RESTATEMENT (SECOND) OF TORTS § 909(a)(1979).

n108. See id. § 909(d).

n109. See id. § 909(b).

n110. See, e.g., Maxey v. Freightliner Corp., 665 F.2d 1367 (5th Cir. 1982)(jury awarded $ 150,000 compensatory and $ 10,000,000 **punitive damages)**; Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979), on rehearing, 615 P.2d 621 (Alaska 1980)(a jury awarded in excess of $ 2,000,000 in **punitive damages** under strict tort liability cause of action involving defective gun); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (jury awarded $ 125,000,000 in **punitive damages,** which Court of Appeals reduced to $ 3,000,000, in Pinto rear-end case); Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981)(court allowed actual and **punitive damages** against manufacturer in jeep roll-over case); Rawlings Sporting Goods Co. v. Daniels, 619 S.W.2d 435 (Tex. Civ. App. 1981) (affirming imposition of $ 750,000 in **punitive damages).**

n111. 726 F.2d 657 (10th Cir. 1984).

n112. The court acknowledged that Oklahoma courts would refuse to hold a manufacturer liable if an unforeseeable subsequent modification caused the plaintiff's injuries. Id. at 659 (citing Texas Metal Fabricating Co. v. Northern Gas Prods. Corp., 404 F.2d 921 (10th Cir. 1968)). The court, however, chose to ignore factual evidence that the brakes could have averted the accident, and that the plaintiff's injuries resulted from his fingers being caught between the exposed belt and its pulley rather than from the mower blades. Saupitty, 726 F.2d at 660-61 (Seth, C.J., dissenting). Instead, the majority stated that "construing all of the evidence and the inferences therefrom in the light most favorable to the plaintiff, we cannot conclude that the removal of either the mower's brakes or its belt guard constituted a superseding, intervening cause of plaintiff's injury as a matter of law." Id. at 659-60.

n113. Saupitty, 726 F.2d at 660 (Seth, C.J., dissenting).

n114. Id. at 661 (Seth, C.J., dissenting).

n115. Piper Aircraft Corp. v. Coulter, 426 So. 2d 1108, 1109 (Fla. Dist. Ct. App. 1983); Phipps v. General Motors Corp., 278 Md. 337, 343, 363 A.2d 955, 958 (1976); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 265-66, 294 N.W.2d 437, 441 (1980).

n116. See Sales, supra note 2, at 380, 389-90. Several courts have rejected the application of **punitive damages** in strict tort liability actions. Gold v. Johns-Manville Sales Corp., 553 F. Supp. 482 (D.N.J. 1982); Butcher v. Robertshaw Controls Co., 550 F. Supp. 692 (D. Md. 1981); Walbrun v. Berkel, Inc., 433 F. Supp. 384 (E.D. Wis. 1976).

n117. The defendant unsuccessfully argued this in Wangen v. Ford Motor Co., 97 Wis. 2d

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260, 288, 294 N.W.2d 437, 453. Another argument against **punitive damages** in this area holds that manufacturers do not demonstrate the requisite degree of **malice** or quasi-criminal intent. See, e.g., Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981); Leichtamer v. American Motors Co., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981).

n118. K. REDDEN, supra note 1, at 118-19 (discussing excessive awards that cripple a corporate defendant); Special Project, supra note 2, at 806-45 (discussing recent bankruptcies). This possibility and other compelling concerns are delineated clearly by the dissent of Justice Rovira in Palmer v. A. H. Robins Co., 684 P.2d 187 (Colo. 1984). The Palmer majority rather glibly glosses over the significant issues that present philosophical impediments to the imposition of **punitive damages** in product liability actions. Id. at 228 (Rovira, J., dissenting).

n119. K. REDDEN, supra note 1, at 714.

n120. See Acosta v. Honda Motor Co., 717 F.2d 828 (3d Cir. 1983); Moran v. Johns-Manville Sales Corp., 691 F.2d 811 (6th Cir. 1982); Campus Sweater & Sportswear v. M.B. Kahn Constr., 515 F. Supp. 64 (D.S.C. 1979), aff'd, 644 F.2d 877 (4th Cir. 1981); Sturm, Ryer & Co. v. Day, 594 P.2d 38 (Alaska 1979), cert. denied, 454 U.S. 894 (1981); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981); Cloroben Chem. Corp. v. Comegys, 464 A.2d 887 (Del. Super. Ct. 1983); Piper Aircraft Corp. v. Coulter, 426 So. 2d 1108 (Fla. Dist. Ct. App. 1983); Froud v. Celotex Corp., 107 Ill. App. 3d 654, 437 N.E.2d 910 (1982) rev'd on other grounds, 98 Ill. 2d 1324, 456 N.E.2d 131 (1983); Grye v. Dayton-Hudson Corp., 297 N.W.2d 727 (Minn. 1980), cert. denied, 449 U.S. 921 (1980); Rinker v. Ford Motor Co., 567 S.W.2d 655 (Mo. Ct. App. 1978); Leichtamer v. American Motorist Corp., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981); Thiry v. Armstrong World Indus., 661 P.2d 515 (Okla. 1983); Rawlings Sporting Goods Co. v Daniels, 619 S.W.2d 435 (Tex. Civ. App. 1981); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980); Some courts have acknowledged the obvious -- that **punitive damages** are incompatable with the theory of strict tort liability. Gold v. Johns-Manville Sales Corp., 553 F. Supp. 482 (D. N.J. 1982); Butcher v. Robershaw Controls Co., 550 F. Supp. 692, 705 (D. Md. 1981).

n121. Some courts eschew this concern based on the absence of confirmed empirical data and conclude, therefore, that the potential for serious harm is of no moment. See Acosta v. Honda Motor Co., 717 F.2d 828 (3d Cir. 1983). The court did note, however, that "[i]t is, of course, possible that a sufficiently egregious error as to one product could result in the demise of its manufacturer." Id. at 838. In Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 817 (6th Cir. 1982), the court simply suggested that if **punitive damages** pose a real threat, then the federal or state legislature should provide the relief. In Campus Sweater & Sportwear Co. v. M. B. Kahn Constr. Co., 515 F. Supp. 64, 107 (D.S.C. 1979), aff'd, 644 F.2d 877 (4th Cir. 1981), the threat of multiple punitive awards purportedly "forces a prudent manufacturer intent on maximizing profits to hesitate before marketing a known defective or an untested product." Most recently, in Fischer v. Johns-Manville Corp., 193 N.J. Super. 113, 472 A.2d 577, (1984), the court failed the business community of this country and strongly endorsed the precept that "it is only the threat of **punitive damages** which ultimately can induce these entrepreneurs and others to act with a reasonable modicum of responsibility." Id. at 125, 472 A.2d at 584 (emphasis added). These attitudes strongly suggest the urgent necessity for the more thoughtful, rational, and dispassionate legislative process to address this significant and continually escalating problem in the tort reparation system. See Sturm, Ruger & Co. v. Day, 594 P.2d 38, 47 (Alaska 1979); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 741 (Minn.) cert. denied, 449 U.S. 921 (1980); State ex rel. Young v. Crookham, 290 Or. 61, 618 P.2d 1268 (1980); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 285-86, 294 N.W.2d 437, 451 (1980). Unfortunately, **punitive damages** also are awarded for conduct less egregious than marketing a known defective product. See, e.g., Worderson v. Ortho Pharmaceutical Corp., 681 P.2d 1038 (Kan. 1984); Willis v. Floyd Brace Co. [1983-

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1984 Transfer Binder] PROD. LIAB. REP. (CCH) P9862 (S.C. Nov. 14, 1983).

n122. For example in Acosta v. Honda Motor Co., 717 F.2d 828, 838 (3d Cir. 1983), the Third Circuit observed that, "[i]t is, of course, possible that 'a sufficiently egregious error as to one product' could result in the demise of its manufacturer, but such a result is not inevitable." In a supporting footnote, the court further observed, "[N]or is such a result necessarily untenable." More recently, in Martin v. Johns-Manville Corp., 469 A.2d 655, 665 (Pa. Super. 1983), appeal filed, Apr. 2, 1984, the court, in an equally off-handed manner, commented that, "if the defendant's conduct was so reckless and injured so many people, that the effect of the damages awarded against it is bankruptcy, we are hard pressed to understand why that defendant should not be required to live with the consequences of its actions." A similar view has been expressed by the Oregon court in State ex. rel. Young v. Crookham, 290 Or. 61, 618 P.2d 1268 (1980). In Fischer v. Johns-Manville Corp., 193 N.J. Super. 113, 472 A.2d 5778 (1984), the state court echoed, in less than moderate tones, the importance of exacting a pound of flesh from reckless defendants in its statement demanding "the ultimate protection which **punitive damages** afford." Id. at 127, 472 A.2d at 585. The courts likewise have rejected application of the double jeopardy principle to foreclose repeated **punitive damage** awards for identical product design defects. See Hansen v. Johns-Manville Corp., 734 F.2d 1036 (5th Cir. 1984).

n123. 727 F.2d 506 (5th Cir. 1984) (rehearing en banc granted).

n124. Id. at 525.

n125. Id. at 528 (citing Acosta v. Honda Motor Co., 717 F.2d at 838, n.15).

n126. Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 526 (5th Cir.) reh'g en banc granted, F.2d (5th Cir. 1984). The court stated:

We do not reach the issue whether Mississippi would find **punitive damages** inherently incompatible with the theory of strict liability in all cases. Our holding today is limited to the extraordinary circumstances of this litigation, where the allowance of **punitive damages** carries the manifest portent of undoing the strict liability remedy for present and prospective claimants and where the purposes of **punitive damages** are otherwise served.

We cannot predict, of course, whether other jurisdictions would subscribe to our approach in this litigation. From that perspective, our efforts to preserve the viability of strict liability compensation may be infected with an element of futility. The alternative, however, appears to be no solution at all, but mere resignation to defeat of the purposes of both strict liability and **punitive damages.** A fully satisfactory solution would require properly crafted federal legislation. Since that has not come to pass, we must proceed with fundamental justice as our guide.

The disallowance of **punitive damages** in this situation expresses this court's central concern for the continued viability of the strict liability cause of action for present and future claimants. Where strict liability for compensatory damages imposes adequate punishment as it does in this type of case, we decline to cleave to a judge-made remedy of **punitive damages** that would both fail in its own purpose and obstruct the broader objectives of the underlying cause of action which the plaintiff has cohosen to pursue.

Id. at 529-30.

n127. See, e.g., Williams v. Carr, 263 Ark. 326, 565 S.W.2d 400 (1978); American Motorcycle Inst., Inc. v. Mitchell, 380 So. 2d 452 (Fla. Dist. Ct. App. 1980); Pringle Tax Servs., Inc. v. Knoblauch, 282 N.W.2d 151 (Iowa 1979); Traylor v. Wachter, 227 Kan. 221, 607 P.2d 1094 (1980); Robison v. Katz, 94 N.M. 314, 610 P.2d 201 (1980); Fort Worth

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Elevators Co. v. Russell, 123 Tex. 128, 70 S.W.2d 397 (1934); Cates v. Barb, 650 P.2d 1159 (Wyo. 1982).

n128. W. PROSSER, supra note 34, § 2, at 13-14; see, e.g., Nelson v. Hartman, 648 P.2d 1176, 1178 (Mont. 1982) (no error in failing to admit defendant's driving record for **punitive damages** purposes because no **punitive damages** can exist without actual liability entitling the plaintiff to actual damages); Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 149-50, 70 S.W.2d 397, 409 (1934) (proof of actual damage prerequisite to punitive award); see generally Duffy, supra note 9, at 8; Ellis, supra note 10, at 54 (citing COMMITTEE ON STANDARD JURY INSTRUCTIONS, CIVIL, OF THE SUPERIOR COURT OF LOS ANGELES, CALIFORNIA JURY INSTRUCTIONS: CIVIL § 14.71 (Supp. 1981)); Sales, supra note 2, at 365; Note, 70 HARV. L. REV. 517, 528-29 (1957).

n129. K. REDDEN, supra note 1, at 63.

n130. Ellis, supra note 10, at 58 (citing D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES § 3.9, at 210-11 (1973) and W. PROSSER, supra note 34, § 2, at 14)); Sales, supra note 2, at 366; Special Project, supra note 2, at 696. Some states, however, require no rlationship whatever between punitive and compensatory awards. See, e.g., Pinckard v. Dunnavant, 206 So. 2d 340, 344 (Ala. 1968) (exemplary award need not be mathematically related to compensatory award); Ray Dodge, Inc. v. Moore, 251 Ark. 1036, 1046, 479 S.W.2d 518, 524 (1972) (factors other than ratio of **punitive damages** and actual damages to be considered); Lassitter v. International Union of Operating Eng'rs, 349 So. 2d 622, 626 (Fla. 1976) (**punitive damages** not required to be proportionate to compensatory damages); Southwestern Inv. Co. v. Neeley, 452 S.W.2d 705 (Tex. 1970) (**punitive damages** need only be reasonably proportional to actual damages); see generally Leimgruber v. Claridge Assocs., 73 N.J. 450, 457-59, 375 A.2d 652, 656-57 (1977) (discussing split among jurisdictions regarding "ratio" rule). Some courts have stated that an award which is extremely disproportional indicates that the jury acted with passion or prejudice. Dearmore v. Gold, 400 F.2d 887, 888 (5th Cir. 1968) (a ratio of 11 to 1 was too disproportional); Alley v. Gubser Dev. Co., 569 F. Supp. 36, 40 (D. Colo. 1983) (a ratio of 17 to 1 was too disproportional). In contrast, in Moore v. American United Life Ins. Co., 150 Cal. App. 3d 610, 636, 197 Cal. Rptr. 878, 894-95 (1984), a ratio of 83 to 1 was approved (citing Wetherbee v. United Ins. Co. of Am., 18 Cal. App. 3d 266, 95 Cal. Rptr. 678 (1971) (approving a punitive award ratio of 200 to 1)); accord Kerr v. Fruit Commodity Corp. of Boston, 735 F.2d 281 (8th Cir. 1984) (citing Price v. Ford Motor Credit Co., 530 S.W.2d 249 (Mo. App. 1975) (that Missouri has approved a 40 to 1 ratio)); robison v. Lescrenier, 721 F.2d 1101, 1113 (7th Cir. 1983) (applying Wisconsin law); Palmer v. A. H. Robins Co., No. 81SA149 (Colo. June 4, 1984) (en banc) (approving a ratio of 10.3 to 1 when the basic compensatory damage award was $ 600,000, resulting in a **punitive damage** award of $ 6,200,000).

n131. Wetherbee v. United Ins. Co. of Am., 18 Cal. App. 3d 266, 95 Cal. Rptr. 678 (1971); K. REDDEN, supra note 1, at 63-64 (citing Malcolm v. Little, 295 A.2d 711 (Del. 1972)). The imprecise nature of the rule is exemplified by the charge of the trial court that was approved on appeal by the Fifth Circuit in Martin v. Texaco, Inc., 726 F.2d 207 (5th cir. 1984). The trial court, in instructing the jury on the standard for measuring punitive awards under Texas law, stated:

The appropriate ratio will vary from case to case, depending on such factors as the character of the wrongful conduct, the extent to which the defendant is involved in the conduct and the extent to which that conduct offends a public sense of justice and propriety. A very recent court decision, last week as a matter of fact, listed five relevant factors for reviewing a jury's award of **punitive damages,** as follows: (1) The nature of the wrong; (2) The character of the conduct involved; (3) The degree of culpability of the wrongdoer; (4) The situation and sensibility of the parties; (5) The extent to which defendant's conduct offends a public sense

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of justice and propriety. Clearly, ladies and gentlemen, this is not an exact science, but is a concept that is very well dealt with by a jury. Now, for your further guidance, I have a few additional instructions. If you find liability in this case, then the decision is solely yours; consider the five guidelines that I gave you and find exemplary damages that you find appropriate in this case.

Id. at 213-14.

n132. K. REDDEN, supra note 1, at 64.

n133. See Maxey v. Freightliner Corp., 665 F.2d 1367, 1377-78 (5th Cir. 1982) (Fifth Circuit adopted the factors set forth in Alamo Nat'l Bank v. Kraus 616 S.W.2d 908 (Tex. 1981), but found that the defendant's behavior did not justify an award of $ 10,000,000 in **punitive damages** based on a compensatory award of $ 150,000); Alamo, 616 S.W.2d at 910 (court held that appellate court's review of these factors was not an erroneous standard, and allowed $ 500,000 in **punitive damages** and $ 12,900 in compensatory damages to stand); see also Leimgruber v. Claridge Assocs., 73 N.J. 450, 456-61, 375 A.2d 652, 655-58 (1977) (court upheld award of $ 16,500 in punitive and $ 1700 in compensatory damages because the awards did not "give rise to the inference of mistake, passion, prejudice, or partiality," "shock the conscience," or "result in a manifest denial of justice"). The Leimgruber court alluded to the following factors: (1) the nature of wrongdoing; (2) the extent of harm; (3) the intent of party committing the act; (4) the wealth of the perpetrator; and (5) any mitigating circumstance that may reduce damages. Id. at 456, 375 A.2d at 656-57. The court in Alley v. Gubser Dev. Co., 569 F. Supp. 36, 40 (D. Colo. 1983), articulated a similar standard of analysis. Another variant of this approach is reflected in Cates v. Eddy, 669 P.2d 912, 921 (Wyo. 1983). California predicates an award for **punitive damages** on a combination of three factors: the nature of defendant's acts; the amount of compensatory damages awarded; and the wealth of the defendant. See Professional Seminar Consultants v. Sino Am. Tech. Exch. Council, 727 F.2d 1470, 1473 (9th Cir. 1984) (applying California law); Neal v. Farmer's Ins. Exch., 21 Cal. 3d 910, 582 P.2d 980, 148 Cal. Rptr. 389 (1978); see also Comment, **Punitive Damages** and the Reasonable Relation Rule: A Study in Frustration of Purpose, 9 PAC. L.J. 823 (1978).

n134. Morris, **Punitive Damages** in Tort Cases, 44 HARV. L. REV. 1173, 1180 (1931).

n135. K. REDDEN, supra note 1, at 43.

n136. See K. REDDEN, supra note 1, at 61; Ellis, supra note 10, at 54; Special Project, supra note 2, at 695-96. Three states, Alabama, Kentucky, and Texas, do not allow consideration of the defendant's wealth. Special Project, supra note 2, at 696 n.753; see also RESTATMMENT (SECOND) OF TORTS § 908 (1979) (trier of fact may consider defendant's wealth in assessing punitive awards).

n137. Ellis, supra note 10, at 61.

n138. Neal v. Farmers Ins. Exch. 21 Cal. 3d 910, 929, 582 P.2d 980, 991, 148 Cal. Rptr. 389, 400 (1978) (award of $ 740,000 in **punitive damages** proper when it amounts to less than a week's worth of defendant's net income); Moore v. American United Life Ins. Co., 150 Cal. App. 3d 610, , 197 Cal. Rptr. 878, 899 (1984) (amount equal to 3.4 weeks of company's net annual income is appropriate).

n139. Hall v. Montgomery Ward & Co., 252 N.W.2d 421, 424 (Iowa 1977).

n140. Morris, supra note 133, at 1191.

n141. K. REDDEN, supra note 1, at 61-62.

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n142. Id. at 62.

n143. See, e.g., Texas Pub. Utils. Corp. v. Edwards, 99 S.W.2d 420, 427 (Tex. Civ. App. 1936) (improper for plaintiff's counsel to argue to jury that it should assess large **punitive damages** because defendant could afford to pay them).

n144. See, e.g., Eisert v. Greenberg Roofing & Sheet Metal Co., 314 N.W.2d 226, 228-29 (Minn. 1982).

n145. K. REDDEN, supra note 1, at 101-09.

n146. The Restatement of Contracts provides that, "**Punitive damages** are not recoverable for breach of contract." RESTATEMENT OF CONTRACTS § 342 (1932); see Note, supra note 16, at 531. The author emphasizes, however, that courts will allow **punitive damages** in many modern torts that are closely related to breach of contract, such as inducing another to breach a contract and wrongful termination of services by a public utility. Id.; see Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092, 1106 (11th Cir. 1983) (Florida does not allow **punitive damages** awards for breach of warranty claims under the Uniform Commercial Code); Saval v. BL Ltd., 710 F.2d 1027, 1033 (4th Cir. 1983) (Maryland does not permit **punitive damages** for contract breaches absent **malice)**; Superior Trucks, Inc. v. Allen, 664 S.W.2d 136 (Tex. Ct. App. 1983) (exemplary damages not allowed for breach of warranty); Ryan Mortgage Investors v. Fleming-Wood, 650 S.W.2d 928, 937 (Tex. Ct. App. 1983) (exemplary damages not permitted for breach of contract).

n147. See, e.g., Canada Dry Corp. v. Nehi Beverage Co., 723 F.2d 512, 524 (7th Cir. 1983) (applying Indiana law); Henderson v. United States Fidelity & Guaranty Co., 620 F.2d 530 (5th Cir. 1980) (applying Mississippi law), cert. denied, 449 U.S. 1034 (1980); Robison v. Katz, 94 N.M. 314, 610 P.2d 201 (1980).

n148. See, e.g., Smith v. Hawkins, 120 Kan. 518, 243 P. 1018 (1926); Baumle v. Verde, 33 Okla. 243, 124 P. 1083 (1912); see also K. REDDEN, supra note 1, at 41.

n149. See, e.g., Birmingham Water Works Co. v. Keiley, 2 Ala. App. 629, 56 So. 838 (1911); Kohler v. Kansas Power & Light Co., 192 Kan. 226, 387 P.2d 149 (1963); Southwestern Gas & Elce. Co. v. Stanley, 45 S.W.2d 671 (Tex. Civ. App. 1931), aff'd, 123 Tex. 157, 70 S.W.2d 413 (1934); see also K. REDDEN, supra note 1, at 41.

n150. K. REDDEN, supra note 1, at 41; see Sullivan, **Punitive Damages** in the Law of Contract: The Reality and the Illusion of Legal Change, 61 MINN. L. REV. 207 (1977). For a discussion of the allowance of **punitive damages** for tortious breach of contractual duties when a fidiciary duty exists, when an independent tort accompanies the breach of contract, when the defendant's conduct is also fraudulent, and when the defendant failed to deal fairly and in good faith, see K. REDDEN, supra note 1, at 52-53.

n151. Comment, Disallowing **Punitive Damages** for Wrongful Death While Allowing Them for Personal Injury and Property Damage Held To Be a Denial of Equal Protection, 8 CUM. L. REV. 567, 574-76 (1977). The author indicates that only 18 states allow recovery of **punitive damages** in wrongful death actions. Id. at 574-75. Alabama occupies the unique position of allowing only **punitive damages** in wrongful death actions. Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So. 2d 354 (1974); see also Rosenfeld v. Isaacs, 79 A.D.2d 630, 631, 433 N.Y.S.2d 623, 624 (1980).

n152. In re Air Crash Disaster Near Chicago, 644 F.2d 594 (7th Cir. cert. denied, 454 U.S. 878 (1981).

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n153. Id. at 632-33; accord, In re Paris Air Crash, 622 F.2d 1315 (9th Cir.), cert. denied, 449 U.S. 976 (1980); Eisert v. Greenberg Roofing & Sheet Metal Co., 314 N.W.2d 226 (Minn. 1982).

n154. See Boies v. Cole, 99 Ariz. 198, 407 P.2d 917 (1965); Gavica v. Hanson, 101 Idaho 58, 608 P.2d 861 (1980); Heil Co. v. Grant, 534 S.W.2d 916, 926 (Tex. Civ. App. 1976); Behrens v. Raleigh Hills Hosp. Inc., 675 P.2d 1179 (Utah 1983).

n155. See, e.g., Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 45 551 P.2d 334, 353, 131 Cal. Rptr. 14, 33, (1976) (allowance of **punitive damages** in tort actions generally is applicable only to survival actions and not to wrongful death actions); ILL. REV. STAT. ch. 111 2/3, § 77 (1966 & Supp. 1984-1985) (permits **punitive damages** in survival actions under the express provisions of the Public Utilities Act).

n156. See, e.g., Barnes v. Smith, 305 F.2d 226 (10th Cir. 1962); Sullivan v. Associated Billposters and Distribs. of United States and Canada, 6 F.2d 1000 (2nd Cir. 1925); Sanchez v. Marguez, 457 F. Supp. 359 (D. Colo. 1978) (statutory prohibition); Paul v. Milburn, 275 F. Supp. 105 (W.D. Tenn. 1967); Ford Motor Credit Co. v. Hill, 245 F. Supp. 796 (W.D. Mo. 1965); Amos v. Prom, 115 F. Supp. 127 (N.D. Iowa 1953); Holm Timber Indus. v. Plywood corp. of Am., 242 Cal. App. 2d 492, 51 Cal. Rptr. 597 (1966); Simone v. McKee, 142 Cal. App. 2d 307, 298 P.2d 667 (1956); Rowen v. LeMars Mut. Ins. Co., 282 N.W.2d 639 (Iowa 1979); Wolder v. Rahm, 249 N.W.2d 630 (Iowa 1977); Stevenson v. Stoufer, 237 Iowa 513, 21 N.W.2d 287 (1946); Thompson v. Estate of Petroff, 319 N.W.2d 400 (Minn. 1982); Mervis v. Wolverton, 211 So. 2d 847 (Miss. 1968) (statutory prohibition); Summa Corp. v. Greenspun, 96 Nev. 247, 607 P.2d 569 (1980) modified, 98 Nev. Adv. Ops. 157, 655 P.2d 513 (1982); Allen v. Anderson, 93 Nev. 204, 562 P.2d 487 (1977); Gordon v. Nathan, 43 A.D.2d 917, 352 N.Y.S.2d 464 (1974) (statutory prohibition); Thorpe v. Wilson, 58 N.C. App. 292, 293 S.E.2d 675 (1982); McAdams v. Blue, 3 N.C. App. 169, 164 S.E.2d 490 (1968); Morriss v. Barton, 200 Okla. 4, 190 P.2d 451 (1947); Pearson v. Galvin, 253 Or. 331, 454 P.2d 638 (1969); Ashcraft v. Saunders, 251 Or. 139, 444 P.2d 924 (1968); Hayes v. Gill, 216 Tenn. 39, 390 S.W.2d 213 (1965); Dalton v. Johnson, 204 Va. 102, 129 S.E.2d 647 (1963).

n157. Allen v. Anderson, 562 P.2d at 489-90. The Restatement (Second) of Torts also adopts this view:

Under statutes providing for the survival or revival of tort actions, the damages for a tort not involving death for which the tortfeasor is responsible are not affected by the death of either party before or during trial, except that . . . the death of the tortfeasor terminates liability for **punitive damages.**

RESTATEMENT (SECOND) OF TORTS § 926(b)(1979).

n158. Johnson v. Rinesmith, 238 So.2d 659 (Fla. App. 1969); National Bank of Bloomington v. Norfolk & Western Railway Co., 73 Ill. App. 2d 160, 383 N.E.2d 919 (1978); Perry v. Melton, 299 S.E.2d 8 (W. Va. 1982); Hofer v. Lavender, No. C-2552 (Tex. July 11, 1984).

n159. Special Project, supra note 2, at 830. Traditionally, the mere sale of a corporation does not impose liability on the successor for the tort liabilities of the predecessor. See Travis v. Harris Corp., 565 F.2d 443 (7th Cir. 1977); Knapp v. North Am. Rockwell Corp., 506 F.2d 361 (3d Cir. 1974), cert. denied, 421 U.S. 965 (1975); Cyr. v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974); Shane v. Hobam, Inc., 332 F. Supp. 526 (E.D. Pa. 1971); Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817 (D. Colo. 1968). There are four generally recognized exceptions in which liability may be imposed on the successor: contractual assumption of the tort liabilities of the predecessor; a transaction that is tantamount to a merger of the predecessor with the successor corporation; the operation of the predecessor as a mere continuation of

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itself through the successor corporation; and the fraudulent transfer of assets in an effort by the predecessor to escape liability. See Leannais v. Cincinnati, Inc., 565 F.2d 437 (7th Cir. 1977); R. G. Enstrom Corp. v. Interceptor Corp., 555 F.2d 277, 278 (10th Cir. 1977); Knapp v. North Am. Rockwell, 506 F.2d 361 (3d Cir.) cert. denied, 421 U.S. 965 (1974); Bonee v. L & M Const. Co., 518 F. Supp. 375 (M.D. Tenn. 1981); Menacho v. Adamson United Co., 420 F. Supp. 128 (D. N.J. 1976); Hernandez v. Johnson Press Corp., 70 Ill. App. 3d 664, 388 N.E.2d 778 (1979). Recently, some jurisdictions have rejected the general rule that precluded successor liability in favor of "product line" liability based on the socioeconomic policy of risk distribution. See Amader v. Johns-Manville Corp., 541 F. Supp. 1384 (E.D. Pa. 1982); Ray v. Alad Corp., 19 Cal. 3d 22, 560 P.2d 3 (1977); Ramirez v. Amsted Indus., Inc., 86 N.J. 332, 431 A.2d 811 (1981). More recent decisions have categorically rejected the product line concept of liability. Weaver v. Nash Int'l, Inc., 562 F. Supp. 860 (S.D. Iowa 1983); Cowan v. Harris Corp., PROD. LIAB. PEP. (CCH) P9667 (D. Kan. Dec. 7, 1982); Gonzalez v. Rock Wool Eng'g & Equip. Co., 117 Ill. App. 3d 435, 453 N.E.2d 762 (1983); Fenton Area Public Schools v. Sorensen-Gross Constr. Co., 124 Mich. App. 631, 335 N.W.2d 221 (1983). **Punitive damages** could not be imposed on a successor corporation under the standard that requires the vicariously liable entity to have authorized its employees or agents to engage in the intentional, wanton, or willful conduct at the time of the product's design and marketing. See supra notes 105-09 and accompanying text.

n160. Special Project, supra note 2, at 832-33.

n161. See, e.g., Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357, 391 (E.D. Pa. 1982) (successor corporation liable for **punitive damages** arising from tort that predecessor corporation committed because "successor is essentially identical to that of the predecessor corporation"). Recently, in Martin v. Johns-Manville Corp., 469 A.2d 655 (Pa. Super. 1983), appeal filed, Apr. 2, 1984, the Pennsylvania Superior Court authorized the award of **punitive damages** from a successor corporation as the result of the plaintiffs sustaining bronchogenic carcinoma from exposure to asbestos supplied by defendant's predecessor corporation. Relying on Campus Sweater & Sportwear Co. v. M.B. Kahn Constr. Co., 515 F. Supp. 64, 107 (D.S.C. 1979), aff'd, 644 F.2d 877 (4th Cir. 1981), Sturm, Ruger & Co. v. Day, 594 P.2d 38, 47 (Alaska 1979) cert. denied 454 U.S. 894 (1981) and Gryc v. Dayton-Hudson Corp. 297 N.W.2d 727, 741 (Minn. 1979), cert. denied, 449 U.S. 921 (1980), the Martin court held that **punitive damages** constituted a deterrent against manufacturers maximizing profits by marketing defective products. The court also addressed the issue of imposing **punitive damages** on a successor corporation not responsible for manufacturing and marketing the defective product. The court declared:

We believe, however, that in some circumstances a successor should be held accountable for the recklessness of its predecessor. This will be so when the goals that underlie the imposition of **punitive damages** -- punishment and deterrence -- will be advanced. . . . The fact that the successor does not continue the product line recklessly marketed by the predecessor, or cures the defect, will not necessarily preclude **punitive damages.** . . . We therefore hold that **punitive damages** are recoverable against a successor corporation when the plaintiff has shown such a degree of identity of the successor with its predecessor as to justify the conclusion that those responsible for the reckless conduct of the predecessor will be punished, and the successor will be deterred from similar conduct.

469 A.2d at 667. The extension of **punitive damages** to an innocent successor corporate entity demonstrates the blind commitment of courts to this archaic doctrine and a certain naivete as to the economic effects of the imposition of **punitive damages.**

n162. See, e.g., Sheats v. Bowen, 318 F. Supp. 640 (D.C. Del. 1970); Kohl v. Graham, 202 F. Supp 895 (D.C. Colo. 1962); Atlanta Life Ins. Co. v. Stanley, 276 Ala. 642, 165 So.2d 731, 738 (1964) (when husband can prove loss of society because of wife's injuries, "the assessment of reasonable compensation therefore must necessarily be left to the sound

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dicretion of the jury") (emphasis added).

n163. See, e.g., Fireman's Fund Am. Ins. Co. v. Coleman, 394 So. 2d 334, 341 (Ala. 1980) (only damages for loss of services allowed in derivative actions by spouses); Moran v. Stephens, 265 So. 2d 379, 380 (Fla. Dist. Ct. App. 1972) (husband cannot recover **punitive damages** in derivative action to his wife's action for dog attack injuries); Hammond v. North Am. Asbestosis Corp., 105 Ill. App. 3d 1033, 435 N.E.2d 540 (1982), aff'd, 454 N.E.2d 210 (Ill. 1983); Hughey v. Ausborn, 249 S.C. 470, 154 S.E.2d 839, 842 (1967) (the intentional wrong is not committed against the spouse).

n164. Dorsey v. Continental casualty Co., 730 F.2d 675 (1984); Northwestern Nat'l Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962); City of Products Corp. v. Globe Indem. Co., 88 Cal. App. 3d 31, 151 Cal. Rptr. 494 (1979); Hartford Accident & Indem. Co. v. United States Concrete Pipe Co., 369 So. 2d 451 (Fla. Dist. Ct. App. 1979); Brown v. Western Casualty & Sur. Co., 484 P.2d 1252 (Colo. App. 1971); Guaranty Abstract and Title Co. v. Interstate Fire and Casualty Co., 228 Kan. 532, 618 P.2d 1195 (1980).

n165. See Price v. Hartford Accident & Indemnity Co., 108 Ariz. 485, 502 P.2d 522 (1972); City of Cedar Rapids v. Northwestern Nat'l Ins. Co., 304 N.W.2d 22, (Iowa 1981); First Nat'l Bank of St. Mary's v. Fidelity & Deposit Co., 283 Md. 228, 389 A.2d 359 (1978); Anthony v. Frith, 394 So. 2d 867 (Miss. 1981); Harrell v. Travelers Indem. Co., 279 Or. 199, 567 P.2d 1013 (1977); Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 383 S.W.2d 1 (1964); Hensley v. Erie Ins. Co., 283 S.E.2d 227 (W. Va. 1981).

n166. Duffy, supra note 9, at 8; Ellis, supra note 10, at 20; Special Project, supra note 2, at 695.

n167. See, e.g., Maxey v. Freightliner Corp., 665 F.2d 1367, 1369 (5th Cir. 1982) aff'd, 722 F.2d 1238, 1242 (5th Cir. 1984) (court found evidence inadequate to support jury verdict of $ 10,000,000 in **punitive damages,** but on appeal following remand affirmed the trial court's remittitur of the award to $ 450,000); Dorsey v. Honda Motor Co., 655 F.2d 650, 654-58 (5th Cir. 1981) ($ 5,000,000 verdict upheld), modified, 670 F.2d 21, cert. denied, 459 U.S. 880 (1982); Airco, Inc. v. Simmons First Nat'l Bank, 276 Ark. 486, 492, 638 S.W.2d 660, 663 (1982) (upholding award of $ 3,000,000 as vindictive damages); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 821-24, 174 Cal. Rptr. 348, 389-91 (1981) (affirming trial court decision to reduce $ 125,000,000 jury verdict to $ 3,500,000); Palmer v. A.H. Robins Co., No. 81SA149 (Colo. June 4, 1984) (en banc) (approving $ 6,200,000 in **punitive damages** compared to an award of $ 600,000 in compensatory damages); Toyota Motor Co. v. Moll, 438 So. 2d 192 (Fla. Dist. Ct. App. 1983) (approving $ 3,000,000 **punitive damages** award); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 741 (Minn. 1980) (affirming **punitive damages** in amount of $ 1,000,000) cert. denied, 449 U.S. 921 (1980).

n168. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967). Another jurist noted that the destructive economic effects of **punitive damages** awards will impact "upon business and professional persons, firms and corporations, as well as upon ordinary persons when engaged in a wide variety of activities." Harrell v. Travelers Indem. Co., 279 Or. 199, 209-10, 567 P.2d 1013, 1018 (1977). As an example, see Ratner v. Sioux Natural Gas Corp., 719 F.2d 801, 805 (5th cir. 1983), acknowledging that allowance of an award of **punitive damages** against a bankrupt corporation would deprive legitimate creditors of any recovery and "would be overkill."

n169. Ellis, supra note 10, at 33-63; Owen, supra note 9, at 119-21; Sales, supra note 2, at 380-81.

n170. See Sales, supra note 2, at 380. The Court in Moore v. Remington Arms Co., 100 Ill. App. 3d 1102, 1111, 427 N.E.2d 608, 616-17 (1981), however, noted: "The tide has since

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compensatory damages currently embraces every conceivable element of tangible and intangible injury, [34] essentially unlimited compensatory damages serve as a more than adequate economic incentive for initiating civil litigation. By purpose and definition, the civil law historically has evolved to compensate and not to punish, [35] and in today's tort reparations system, compensatory damages **[*1124]** more than adequately fulfill this mission of total and complete reparations. This last justification for the **punitive damage** concept within the tort reparations system, therefore, not only is suspect, but more importantly, is inherently flawed.

B. Status of **Punitive Damages** Today

The first American enunciation of the theory of **punitive damages** occurred in 1791 when a New Jersey court charged the jury in Coryell v. Colbaugh [36] that "they were not to estimate the damages by any particular proof of suffering or actual loss" but, instead, should "give damages for example's sake, to prevent such offenses in future." [37] The Coryell court also stated that the damages should be "such a sum as would mark their disapprobation, and be an example to others." [38] Despite this clear characterization of the purpose of the **punitive damages** as deterrence, some historical confusion existed concerning the ultimate reasoning that lay at the root of punitive awards. [39] Whatever justification may be advanced to support the **punitive damage** concept, however, most commentators today acknowledge that the modern bases undergirding the theory in the United States are punishment and deterrence. [40] The status of the **punitive damage** doctrine in today's tort environment, however, remains remarkably unsettled. Jurisdictions disagree over the applicability of **punitive damages** in civil actions, and even those states embracing the **punitive damages** concept differ as to application. [41]

The majority of jurisdictions endorse **punitive damages** as a **[*1125]** component of the common law. [42] A minority of jurisdictions, nevertheless, prohibit the recovery of **punitive damages** under the common law. [43] Two of these jurisdictions allow **punitive damages** only in the narrow context of statutorily authorized situations. [44] At least three jurisdictions either totally or partially proscribe the use of **punitive damages** in all civil cases. [45] Additionally, four jurisdictions, despite judicial declarations that **punitive damages** constitute an integral part of the common law, so severely limit the scope and application of the doctrine that, in essence, **punitive damages** have been reduced to nothing more than compensatory damages. [46]

[*1126] III. BASIS FOR APPLYING THE **PUNITIVE DAMAGE** DOCTRINE

The generally accepted bases for **punitive damages** in those jurisdictions that have adopted the concept are punishment and deterrence. [47] Some jurisdictions adopt only one or the other of these rationales, while others adopt the dual rationales. Some jurisdictions still view **punitive damages** as an additional award to allowable compensatory sums -- to compensate for perceived gaps in reparations, as was practiced during the colonial era.

A. Punishment and Deterrence

The great majority of jurisdictions that currently authorize the recovery of noncompensatory, **punitive damages** adopt the dual rationales of punishment and deterrence as justification for their position. [48] One commentator offered seven legal theories in support of the **punitive damage** concept. [49] He acknowledged, however, that any legal doctrine that is predicated on such a disparate variety of grounds "may reasonably be suspected of resting on no very firm basis in policy." [50] Consequently, he reduced these seven rationale to two fundamental tenets: wrong-doers deserve punishment beyond that which compensatory damages provide, and the judicial system needs **punitive damages** to deter socially harmful, loss creating conduct by defendants. [51] A number of recent cases echo these incantations to justify the use of punitive measures. [52]

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turned; judgments for **punitive damages** are now routinely entered across the nation, and staggering sums have been awarded."

n171. Special Project, supra note 2, at 806-45. Manville Corp., Unarco, and Amatex Corp. have declared bankruptcy under Chapter 11 of the Bankruptcy Reform Act of 1978 because of litigation expenses, and compensatory and **punitive damage** awards related to asbestos cases. Id. at 808.

n172. See Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir.), reh'g en banc granted, F.2d (5th Cir. 1984) (discussed supra notes 123-26 and accompanying text).

n173. Owen, supra note 88, at 1257.

n174. Owen, Problems in Assessing **Punitive Damages** Against Manufacturers of Defective Products, 49 U. CHI. L. REV. 1, 6 (1981); see Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 841 (1967) (the impracticality of imposing an effective ceiling on punitive awards in hundreds of cases against a single manufacturer, when added to large compensatory damages, could lead to catastrophic awards).

n175. Owen, supra note 174, at 57.

n176. Owen, supra note 9, at 119 (suggesting upper limit of greater of (1) double the compensatory damages, or (2) litigation costs plus $ 10,000); Owen, supra note 174, at 48 (suggesting possible upper limit on **punitive damages** of $ 1,000,00 per plaintiff).

n177. Duffy, supra note 9, at 11 (trial tactics now are geared to exploit the **punitive damages** doctrine).

n178. Special Project, supra note 2, at 840 (five asbestos manufacturers formed an alliance to reduce the risk of any defendant "settling out" on the others).

n179. Riegel v. Aastad, 272 A.2d 715, 717-18 (Del. 1970). One reason that appellate courts find it difficult to overturn **punitive damage** awards is because the standards of review by which courts evaluate the excessiveness of these awards are extremely unclear. See, e.g., Professional Seminar Consultants v. Sino Am. Technology Exch. Council, Inc., 727 F.2d 1470, 1473 (9th Cir. 1984). The Ninth Circuit recognized in Professional Seminar Consultants that the standard of review for **punitive damages** in California is unclear. Compare Cher v. Forum Int'l, Ltd., 692 F.2d 634, 640 (9th Cir. 1982) (clearly erroneous standard), cert. denied 103 S. Ct. 3089 (1983) with Hasson v. Ford Motor Co., 32 Cal. 3d 388, 650 P.2d 1171, 185 Cal. Rptr. 654 (1982) (substantial evidence standad), cert. dismissed, 103 S. Ct. 1167 (1983). Judicial failure within a particular jurisdiction to provide even a consistent standard of review to prevent **punitive damages** from getting completely out of hand is disconcerting.

n180. Riegel v. Aastad, 272 A.2d at 718.

n181. See, e.g., Dorsey v. Honda Motor Co., 655 F.2d 650, 657 (5th Cir. 1981), cert. denied, 103 S. Ct. 1778 modified, 670 F.2d 21 (5th Cir. 1982) (actual damages of $ 750,000 and **punitive damages** of $ 5,000,000 affirmed); Airco, Inc. v. Simmons First Nat'l Bank, 276 Ark. 486, 638 S.W.2d 660 (1982) (actual damages of $ 1,070,000 and **punitive damages** of $ 3,000,000 affirmed); Vossler v. Richards Mfg. Co., 143 Cal. App. 3d 952, 192 Cal. Rptr. 219 (1983) (actual damages of $ 25,000 and **punitive damages** of $ 500,000 affirmed); Palmer v. A.H. Robins Co., No. 81SA149 (Colo. June 4, 1984 (en banc) (actual damages of $ 600,000 and **punitive damages** of $ 6,200,000 approved as reasonable); Ford Motor Co. v. Nowak, 638 S.W.2d 582, 585 (Tex. Ct. App. 1982) (actual damages of $ 400,000 and **punitive damages** of $ 4,000,000 affirmed).

n182. For example, in Jampole v. Touchy, 673 S.W.2d 569 (Tex. 1984), the Texas Supreme Court authorized virtually unlimited discovery and noted, "The documents showing GMC's knowledge of alternative designs are relevant to show conscious indifference in support of Jampole's claim of gross negligence." Id. at 573. Similarly, in General Motors Corporation v. Lawrence, 651 S.W.2d 732 (Tex. 1983), Justice Ray, in a concurring opinion relating to a discovery order, commented: "The scope of discovery in product defect cases may be permissibly wider, especially when the plaintiff is alleging grounds for the award of exemplary damages." Id. at 734. Similarly, the inclination to expand discovery for punitive allegations is reflected in other jurisdictions. See, e.g., Vollert v. Summa Corp., 389 F. Supp. 1348 (D.C. Hawaii 1975); Hughes v. Graves, 47 F.R.D 52 (W.D. Mo. 1969); Coy v. Superior Court of Contra Costa County, 23 Cal. Rptr. 393, 373 P.2d 457 (1962); Kuiper v. District Court of Eighth Judicial District, 632 P.2d 694, 702 (Mont. 1981).

n183. An example of the public's concern with the effect of unwarranted settlements is reflected in an editorial appearing in the Houston Post, September 3, 1984. Commenting on a lawsuit that was tried in the District Court in San Antonio, Texas and then settled with General Motors, the editorial stated:

A lawsuit settled out of court last week in San Antonio is an example of how far downhill our legal system has tumbled.

The passenger in a Pontiac TransAm sued General Motors for $ 50,000,000 after he was seriously injured in an accident. Testimony indicated the driver was drunk and traveling at 90 miles per hour.

But instead of suing the driver, the injured passenger sued GM, alleging the auto maker's advertising of the TransAm made the driver believe it was a stunt vehicle that could perform beyond the limits of a normal production car.

To any reasonable person, three errors are obvious in the story. First, the wrong party was sued. The driver was at fault, not General Motors. It seems no one these days is willing to take responsibility for his own actions. It's always someone else's fault. However, it doesn't take too much imagination to figure out why GM was sued instead of the driver: GM is richer.

Second, GM should not have settled. This is perhaps more understandable; GM wanted to avoid a long trial and the publicity.

Third, and the most obvious of all, the court should have thrown the lawsuit out at the first hearing. Judges and prosecutors repeatedly tell us dockets are overcrowded, but it is hard to empathize when frivolous lawsuits like this one are allowed to proceed." Houston Post, Sept. 3, 1984, at 13, col. 1.

n184. See Western Union Tel. Co. v. Guard, 283 Ky. 187, 197, 139 S.W.2d 722, 727 (1940); see also W. PROSSER, supra note 34, § 2, at 7.

n185. Dean Prosser referred to **punitive damages** as an "anomalous respect" in which "the ideas underlying the criminal law have invaded the field of torts." W. PROSSER, supra note 35, § 2, at 9.

n186. Bass v. Chicago & N.W. Ry., 42 Wis. 654, 672 (1877). Interestingly enough, the Bass opinion went on to accept the theory of **punitive damages** because of stare decisis. Wisconisn recently continued this inexplicable adherence to an outdated doctrine in Wangen v. Ford Motor Co., 97 Wis. 2d 260, 279-80, 294 N.W.2d 437, 448 (1980):

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Although controversy continues to surround the doctrine of **punitive damages** in the twentieth century, and although some have questioned whether tort law -- which is designed to compensate an injured plaintiff -- should also serve the function of the criminal law, i.e., to punish a defendant for the purpose of deterring him and others from further offenses, this court has consistently and frequently said that punishment and deterrence are important considerations in the law of torts in Wisconsin.

n187. Fay v. Parker, 53 N.H. 342, 382 (1873). Unlike Wisconsin, see supra note 186 and accompanying text, New Hampshire followed its instincts and limited **punitive damages** to a compensatory nature.

n188. Duffy, supra note 9, at 10.

n189. For example, juries have unlimited discretion in determining the amounts of punitive awards, whereas criminal fines must be fixed, and the burden of proof of civil **punitive damage** liability is established by a preponderance of the evidence and not evidence beyond a reasonable doubt. Likewise, civil defendants do not receive the protection against double jeopardy and, therefore, are subject to civil **punitive damages** and criminal fines for the same act. Similarly, civil defendants are subject to punitive awards on behalf of innumerable plaintiffs, thereby making any upper limit of liability nonexistent. Also, most crimes require a guilty intent. Finally, civil defendants subject to exemplary damages do not enjoy the protection against self-incrimination. See W. PROSSER, supra note 35, § 2, at 11; Duffy, supra note 9, at 9; Sales, supra note 2, at 363-64; see also Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (**punitive damages** could amount to tens of millions of dollars while the maximum criminal penalty would be three years imprisonment and a $ 10,000 fine for each of 12 violations).

n190. See K. REDDEN, supra note 1, at 630 ("The imposition of **punitive damages** is particularly offensive in the field of vicarious liability . . .").

n191. One scholar has stated:

If the purpose of awarding **punitive damages** is to compensate, the normal public policy reason for imposing vicarious liability would appear applicable. But if the purpose of **punitive damages** is to deter, as it is in the vast majority of jurisdictions today, the penalty is certainly of questionable effectiveness and justice if not imposed on the employee. The inequity is especially acute in the case of corporations where innocent stockholders ultimately bear the punitive burden.

K. REDDEN, supra note 1, at 35.

n192. Id. at 631.

n193. The "deep pocket" theory rests upon "the desire to insure that victims of tortious injury can reach a defendant with sufficient wealth to provide adequate compensation." Ellis, supra note 10, at 64. Employers generally are better able to meet this compensatory burden. Id. at 64-65.

n194. See Duffy, supra note 9, at 12-13. The concerns of the "deep pocket" rationale for uncompensated plaintiffs obviously do not apply to **punitive damages,** which theoretically perform direct punitive and deterrent functions. Ellis, supra note 10, at 65.

n195. 42 U.S.C. § 1983 (1982); see Smith v. Wade, 103 S. Ct. 1625 (1983) (defendant's conduct must be motivated by evil motive or intent).

n196. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (municipality may

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be held vicariously liable for acts of its employees).

n197. Duffy, supra note 9, at 12-13.

n198. Id. Many courts accept deterrence as one of the bases for **punitive damages.** See supra notes 47-60 & 64-70 and accompanying text. Deterrence can be specific -- of the individual defendant -- or general -- of other possible defendants. The strongest deterrence argument for **punitive damages** is specific deterrence. Some doubt exists as to whether exemplary awards accomplish this specific goal, and no empirical studies exist. Duffy, supra note 9, at 10-11. This uncertainty is especially strong when the individual defendant to be deterred is a corporate entity. The imposition of a punitive award cannot deter an employer if the employee's act is intentional. Conversely, the employee will not be deterred when the employer is made to pay a punitive award. Ellis, supra note 10, at 68-69. Moreover, the best selection and supervision methods available do not, and cannot, prevent occasional impulsive behavior by employees, and the larger the employer the less any possible deterrent effect because the large employer simply lacks that degree of total control and supervision of employees. J. GHIARDI & J. KIRCHER, supra note 9, § 2.08, at 19-21.

The general deterrent effect of **punitive damages,** likewise, is highly doubtful. Several noted authors term it "highly unlikely" that the civil law imposition of **punitive damages** will achieve the same goal of deterrence associated with the criminal law because: most people do not know what **punitive damages** are; those people who generally know what **punitive damages** are, do not know enough to appreciate the intended deterrent effect; and even sophisticated members of the public are compelled to make "judgment calls" regarding the type of conduct that will be subject to **punitive damages.** Id. § 2.09, at 23-24; see K. REDDEN, supra note 1, at 116 ("there is really nothing for which the employer can be punished, and . . . punitive liability is unlikely to encourage employers to use more care in screening or training their employees").

n199. K. REDDEN, supra note 1, at 631.

n200. Schwartz, Deterrence and Punishment in the Common Law of **Punitive Damages:** A Comment, 56 S. CAL. L. REV. 133, 141 (1982) (discussing the decision in Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr, 348 (1981), in which the appellate court affirmed the trial judge's reduction of punitive award from $ 125,000,000 to $ 3,500,000, but implied that it would have affirmed the trial court's acceptance of the $ 125,000,000 award or a reduction to $ 1,000,000).

n201. Duffy, supra note 9, at 10; see Roginsky v. Richardson-Merrell, Inc., 378 F.2d at 841 (compensatory awards have punitive elements, which would be more pronounced if **punitive damages** were eliminated).

n202. Realistically, employees of an employer or corporate entity seldom, if ever, indemnify the vicariously liable employer. Consequently, the ultimate "punishment" administered by the **punitive damage** doctrine is assessed in the form of higher insurance premiums, higher prices for services, and higher product costs that are spread across the entire section of innocent consumers or taxpayers. Roginsky v. Richardson-Merrell, Inc., 378 F.2d at 841. Likewise, creditors, sellers, suppliers, and distributors ultimately may pay the cost of the punishment meted out by the **punitive damage** doctrine without ever having committed a wrongful act. Ellis, supra note 10, at 66; see K. REDDEN, supra note 1, at 116 (losses will fall not on the employer, but on the public through price increases, or on innocent shareholders who never receive any benefit from the torts of corporate employees).

n203. J. GHIARDI & J. KIRCHER, supra note 9, § 2.04, at 12.

n204. See supra notes 127-35 and accompanying text.

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n205. See supra note 131 and accompanying text.

n206. Duffy, supra note 9, at 8; Sales, supra note 2, at 367 & n.82.

n207. As noted by the court in Leimgruber v. Claridge Assoc., 73 N.J. 450, 375 A.2d 652, 656 (1977):

The major difficulty in establishing the amount of the **punitive damage** recovery is the absence of any defeinitive [sic] standard or criterion to guide the trier of fact in determining the proper amount.

One major objection to the "ratio" rule is that it collides with the rationale for imposing **punitive damages** which are awarded, as noted, on a theory of punishment and deterrence. . . .

n208. If courts intend **punitive damages** to punish the defendant, then the wrongdoer's conduct constitutes a more important consideration than the amount of damage the plaintiff suffers, although compensatory damages represent the basis against which the **punitive damages** are compared. Leimgruber v. Claridge Assoc., 73 N.J. 450, 375 A.2d, 656 (1977); see generally Ellis, supra note 10, at 58-59. Professor Ellis asserts that, although one can form arguments that will theoretically justify the ratio rule, in reality "it invites juries to engage in wealth redistribution and exacerbates the perverse incentives already created by uncertain standards of **punitive damage** liability and the lack of functional criteria for the magnitude of assessments." Id. at 62-63.

n209. These courts adopt the position of Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 383 S.W.2d 1 (1964) (public policy not violated by allowance of insurance coverage for **punitive damages)**. Almost all courts allow insurance coverage for vicarious **punitive damage** liability. Ellis, supra note 10, at 71 (citing Dayton Hudson Corp. v. American Mut. Liab. Ins. Co., 621 P.2d 1155, 1160 (Okla. 1980)); Morrissey, **Punitive Damages** -- Insurability, 25 TRIAL LAW. GUIDE 257 (1981); Owen, supra note 88, at 1313 n.276 (1976).

n210. See. Ellis, supra note 10, at 71 (citing Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 441-42 (5th Cir. 1962)). Recently, in United States Concrete Pipe Co. v. Bould, 437 So. 2d 1061 (Fla. 1983), the Florida Supreme Court determined that insurance coverage would apply to **punitive damage** liability of an entity deemed vicariously liable, but would not apply to the individual responsible for the egregious conduct.

n211. Ellis, supra note 10, at 74.

n212. First Bank v. Transamerica Ins. Co., F. Supp. (D.Mont. 1984) (implicit in the court's analysis is recognition of the fact that **punitive damages** serve as nothing more than windfalls for plaintiffs).

n213. Ellis, supra note 10, at 75-76. The Second Circuit has noted another dilemma that liability insurance raises. If courts allow liability insurance for **punitive damages,** then the cost of providing arguably needless deterrence rests on the consuming public. If courts do not allow such insurance, then a sufficient egregious mistake can destroy a business, thereby punishing innocent stockholders. Roginsky v. Richardson-Merrell, Inc., 378 F.2d at 841.

n214. Even the ancient concept of satisfying the public's desire for revenge is outdated. As one author tersely observed, "vengeance is a questionable objective for a civilized legal system." Note, The Assessment of **Punitive Damages** Against an Entrepreneur for the Malicious Torts of His Employees, 70 YALE L.J. 1296, 1298 (1961). Society has long since

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progressed beyond the primitive concept of an eye for an eye and a tooth for a tooth.

n215. See supra notes 48-60 and accompanying text.

n216. See supra notes 71-76 and accompanying text.

n217. See supra notes 17-30 and accompanying text.

n218. Dillon v. Legg, 68 Cal. 2d 728, 730-31, 441 P.2d 912, 914, 69 Cal. Rptr. 72, 74 (1968) (en banc); Portee v. Jaffee, 417 A.2d 521 (N.J. 1980); W. PROSSER, supra note 34, § 12.

n219. Ellis, supra note 10, at 16-17. Professor Ellis cites the interesting case of Forde v. Skinner, 172 Eng. Rep. 687 (Horsham Assizes 1830), in which the court held that cutting off the hair of female paupers in a poor house, if done "with the malicious intent imputed [by the evidence] of 'taking down their pride,' . . . that will be an aggravation and ought to increase the damages." Ellis, supra note 10, at 17.

n220. Ellis, supra note 10, at 28; see Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983) (Texas Supreme Court rejected over 100 years of judicial interpretation of the Wrongful Death Act to redefine pecuniary loss to permit recovery of loss of society and mental anguish). Even recovery for emotional upset in the absence of any physical injury is now recoverable. See, e.g., Betancourt v. J. C. Penny Co., 554 F.2d 1206 (1st Cir. 1977).

n221. Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 P. 1072 (1891).

n222. Some commentators argue that "common sense makes it difficult to disbelieve that the possibility of a hefty punitive jury verdict would not deter a rational and reputable manufacturer." See J. GHIARDI & J. KIRCHER, supra note 9, § 6.07, at 24. But see Ellis, supra note 10, at 3 n.9 ("The burden of persuasion lies with the proponents of imposing **punitive damages;** if the question of whether imposing **punitive damages** promotes valid objectives cannot be persuasively answered in the affirmative, the damages are not justifiable and should not be imposed"). The vague and meaningless nature of the "reckless and wanton" standard as a basis for imposing **punitive damages** is exemplified in International Armament Corp. v. King, 674 S.W.2d 431 (Tex. Civ. App. 1984).

n223. Ellis, supra note 10, at 2.

n224. See supra notes 77-103 and accompanying text. Professor Ellis asserts that the vagueness of standards for determining liability and the wide discretion of juries in determining amounts of **punitive damages** extends "liability far beyond that justified by fairness." Ellis, supra note 10, at 76.

n225. One authority has stressed that substituting the terms "outrageous" or "flagrant" for the current vague terms would be useless because these words are just as elastic as those now in use. Ellis, supra note 10, at 51. The courts must realize the importance of strictly construing even "deliberate intent," "ill motive," and "maliciousness" standards. See Cooter, supra note 8, at 80 (proposing that courts should allow **punitive damages** only for intentional faults, which would include only gross or repeated conduct).

A bill currently before the United States Senate would limit the imposition of **punitive damages** in product liability cases to situations in which the defendant manufacturer or product seller acted with "reckless disregard . . . for the safety of product users, consumers, or persons who might be harmed by the product." S. 44, 98th Cong., 2d Sess. § 12(a)(2) (1984). The Senate bill further defines "reckless disregard" as "conscious, flagrant indifference to the safety of those persons who might be harmed by a product and an

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extreme departure from accepted practice." Id. § 12(j) (emphasis added). A similar bill before the United States House of Representatives deletes the word "conscious" and would require only that the defendant act "with a flagrant indifference to consumer safety . . . and an extreme departure from accepted practice." H.R. 5214, 98th Cong., 2d Sess. § 11(b) (1984) (emphasis added).

n226. Professor Owen recently recommended that courts institute a "clear and convincing" evidentiary test. He recognized that such a test might sacrifice a degree of efficiency in favor of some fairness, but fairness over efficiency and the concept that close cases should be resolved in favor of the accused are exactly what the American legal system should epitomize. See Owen, supra note 9, at 118-19 (ratio of additional innocent parties who get punished to the number of additional guilty parties who get punished by an expansion of the rule of **punitive damages** may be unfairly high). In Gavica v. Hanson, 101 Idaho 58, 608 P.2d 861, 864 (1980), the court suggested that **punitive damages** generally are not favored and should be awarded only upon clear evidence. Similarly, in Town of Jackson v. Shaw, 569 P.2d 1246, 1252 (Wyo. 1977), the court observed that "[p]unitive damages are not a favorite of the law, are to be allowed only with caution within narrow limits and have been the subject of much controversy." And, in Gent v. Collinsville Volkswagen, Inc., 116 Ill. App. 3d 496, 451 N.E.2d 1385, 1391 (1983), the court acknowledged that "[b]ecause of the penal nature of such damages, . . . the law disfavors them. . . ." See Acosta v. Honda Motor Co. v. Moll, 717 F.2d 828, 839 (3d Cir. 1983) (en banc) (need to prove "outrageous" conduct by clear and convincing proof); Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 360 (Ind. 1982) (the court announced a change to "clear and convincing evidence") S. 44, 98th Cong., 2d Sess. § 12(a)(2) (1984) (requiring "clear and convincing" proof); K. REDDEN, supra note 1, at 124-25 (advocating that courts increase the burden of proof to a "clear and convincing" standard); see also Note, Criminal Safeguards and the **Punitive Damages** Defendant, 34 U. CHI. L. REV. 408 (1967).

n227. See Schwartz, supra note 200, at 144 (the American legal tradition indicates that incriminating facts must be proved beyond a reasonable doubt before punishment can be inflicted, but under the **punitive damage** doctrine the civil law awards millions of dollars based on a preponderance of the evidence standard).

n228. Roginsky v. Richardson-Merrell, Inc., 378 F.2d at 843. The Second Circuit required only that the plaintiff clearly establish the defendant's recklessness. The term "reckless" lends itself to much confusion and arbitrariness, and therefore, courts should employ the more stringent standards of deliberate intent or maliciousness.

n229. See H.R. 5214, 98th Cong., 2d Sess. § 11(b), (c) (1984) (proposing that the court, rather than the jury, decide **punitive damage** liability and amount). But see S. 44, 98th Cong., 2d Sess. § 12(b), (c) (1984) (proposing that court decide the amount of **punitive damages,** but allowing jury initially to determine if defendant is liable for them).

n230. See Mallor & Roberts, **Punitive Damages:** Toward a Principled Approach, 31 HASTINGS L.J. 639, 670 (1980) (suggesting that "the very power of the remedy demands that judges exercise close control over the imposition and assessment of **punitive damages**"); Owen, supra note 9, at 120 (recommending reallocation of judicial power because of the experience of judges and because judges have less rigid preconceptions that might bias decisions); see also Torres v. North Am. Van Lines, Inc., 135 Ariz. 35, 658 P.2d 835, 841 (1983) (discussion of the role of experienced trial judge controlling **punitive damages** award).

n231. See Schwartz, supra note 200, at 146-47 (a questionnaire that the California Legislature's Joint Committee on Tort Liability submitted to California's Superior Court judges indicated that 56% of those judges who responded favored vesting in the trial court the authority to determine both when to award **punitive damages** and in what amount); see

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also Mallor & Roberts, supra note 230, at 664 (endorsing judicial determination of the appropriateness of punitive awards).

n232. The jury in Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981), rendered a **punitive damage** award of $ 125,000,000 for a single claim. More recently in Durgill v. Ford Motor Co., C.A. 79-3203A-28th Dist. Ct. of Nueces Co., Texas (1983), the jury rendered a verdict of $ 6,800,000 in actual damages and $ 100,000,000 in **punitive damages** for a single claim.

n233. See H.R. 5214, 98th Cong., 2d Sess. § 11(d) (1984) (limiting punitive awards to twice the amount of actual damages, and never allowing **punitive damages** to exceed $ 1,000,000 for any one claimant). The House bill also would permit the court to consider any prior **punitive damage** awards levied against the defendant. Id. § 11(e). A mathematical formula, as H.R. 5214 proposes, in the hands of an experienced trial judge might lead to equitable results. One commentator, however, has suggested that allowing a jury to consider prior punitive awards in an effort to minimize any current exemplary damages could backfire and cause a jury to fine a defendant even more harshly. K. REDDEN, supra note 1, at 122-23.

n234. See supra note 176.

n235. The Clayton Act provides in pertinent part:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a) (1982) (emphasis added). Professor Redden provides an excellent discussion of federal statutes that expressly provide for **punitive damages,** federal statutes that expressly preclude punitive awards, and federal statutes that are unclear on this issue. See K. REDDEN, supra note 1, at 558-93.

n236. Judge Friendly favored the power of judicial reduction of punitive awards when writing the opinion in Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967):

There is more to be said for drastic judicial control of the amount of punitive awards so as to keep the prospective total within some manageable bounds. This would require, for example, a reduction of the instant $ 100,000 award to something in the $ 5,000-$ 10,000 range, still leaving defendant exposed to several million dollars of exemplary damages.

Id. at 840.

n237. O.W. HOLMES, THE COMMON LAW 3 (1881). As stated in In re Nothern District of California "Dalcon Shield" IUD Products Liability Litigation, 526 F. Supp. 887, 899 (N.D. Cal. 1981), vacated on other grounds, 693 F.2d 847 (9th Cir. 1982), cert. denied, 103 S. Ct. 817 (1983), the purpose of **punitive damages** awards is "to sting, not kill, a defendant." But see, Acosta v. Honda Motor Co., 717 F.2d 828, 838 n.15 (3d Cir. 1983) (en banc), in which the court suggested punishment to destruction may constitute acceptable policy, or as the court more succinctly noted, "[n]or is such a result necessarily untenable").

n238. As noted by the court in Town of Jackson v. Shaw, 569 P.2d 1246, 1253 (Wyo. 1977), "The punitive allowance should be in an amount that would promote the public interest without financially annihilating the defendants." See Martin v. Johns-Manville Corp., 469 A.2d 655 (Pa. Super. 1983), which authorized **punitive damages** from a successor

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corporation for allegedly defective asbestos products supplied by a predecessor corporation. The punished legal entity neither designed, manufactured, nor sold the alleged defective product causing plaintiff's injury. In Morris v. Parke, Davis & Co., 573 F. Supp. 1324 (D.Cal. 1983), the court carried the **punitive damage** doctrine to its illogical extreme. The court approved the imposition of **punitive damages** on a defendant in a case in which strict tort liability was initially predicated on the market share theory because the plaintiffs could not establish that the defendant was the manufacturer or the seller of the injury causing product.

n239. See S. 44, 98th Cong., 2d Sess. § 12(e), (f)(1) (1984) (suggesting that the amount of **punitive damages** that a plaintiff can receive should not exceed the amount of compensatory damages awarded, with any remaining **punitive damages** going to a court-determined "public purpose"). The logic of this suggestion was recognized as early as 1877 by a court that, unfortunately, refused to follows its own instincts. See supra note 186 and accompanying text.

n240. See supra notes 215-20 and accompanying text.

n241. See Duffy, supra note 9, at 9.

n242. See supra notes 209-13 and accompanying text.

n243. See, e.g., Dempsey v. Auto Owners Ins. Co., 717 F.2d 556, 562 (11th Cir. 1983); White v. Conoco, Inc., 710 F.2d 1442, 1448 (10th Cir. 1983); Moore v. American United Life Ins. Co., 150 Cal. App. 3d 610, , 197 Cal. Rptr. 878, 897 (1984); Riegel v. Aastad, 272 A.2d 715, 717-18 (Del. 1970); Leimgruber v. Claridge Assoc., 73 N.J. 450, 375 A.2d 652, 656 (1977).

n244. Owen, supra note 174, at 57-58; see Warren v. Ford Motor Credit Co., 693 F.2d 1373, 1380 (11th Cir. 1982) (maximum limit is exceeded if award is "neither just nor proper").

n245. As the Fifth Circuit stated about an unrelated abusable relic, legal doctrines that invite appeals and confuse judges, juries, and attorneys ought to be given a "quick and not too decent a burial." United States v. Bailey, 468 F.2d 652, 668-69 (5th Cir. 1972), aff'd en banc, 480 F.2d 518 (5th Cir. 1973).

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[*1127] Courts generally are quick to assert that they fully control the extent of punishment meted out by **punitive damages.** [53] An exception to this rule, and one that has created much controversy because of the absence of any responsible theoretical foundations coupled with its fundamental inequities, [54] is the award of **punitive damages** based on vicarious liability. [55]

Courts are less than clear in defining and identifying the entities sought to be deterred by the effects of **punitive damages.** [56] For example, Iowa, Mississippi, North Carolina, Ohio, Texas, Virginia, and West Virginia intend to deter persons other than the defendant from committing acts similar to those that prompted the **punitive damage** award. [57] Other jurisdictions that have adopted **punitive damages** observe that it is their policy to deter both the defendant and other potential wrongdoers. [58] Arizona and New Jersey, however, hold that the deterrent effect of **punitive damages** should be directed only at the particular tortfeasor before the court, [59] while Minnesota is unclear concerning whom it intends to **[*1128]** deter with **punitive damages.** [60]

B. Punishment Only

Delaware is the only state that has adopted punishment as the sole purpose for the imposition of **punitive damages.** [61] The Delaware Supreme Court has stated that it will allow **punitive damages** only as punishment to the tortfeasor for willfully and wantonly committed wrongful acts. [62] Wisconsin, similarly, recognizes the punishment rationale as a sufficient, if not sole, basis for imposing **punitive damages.** [63]

C. Deterrence Only

Deterrence represents the singular basis for authorizing **punitive damages** in Alaska, Georgia, Idaho, Maine, Oregon, Rhode Island, and Utah. [64] Many of these jurisdictions, however, do not specifically hold deterrence as the sole rationale for awarding **punitive damages,** but merely imply this basis. [65] The Idaho Supreme Court, in discussing the policy of deterrence, observed:

We prefer to accentuate those cases which define the purpose of exemplary damages as a deterrent to the defendant and others from engaging in similar conduct in the future. We concede that any exemplary damages assessed against a defendant will appear to him to be punishment. However, we feel **[*1129]** that the courts in these civil cases should be motivated primarily by a purpose of deterrence and not by a purpose of punishment. In other words, the assessment of exemplary damages should be prompted by the court's or jury's desire to assure, to the extent possible via the imposition of a monetary penalty, that similar conduct does not occur in the future. Punishment, per se, should be left to the criminal law. [66]

Also, as in those jurisdictions that recognize both punishment and deterrence as the rationales for **punitive damages,** [67] the jurisdictions that recognize only a deterrence rationale fail to clarify the entities sought to be deterred by the award of **punitive damages.** [68] This lack of uniformity in policy and application reflects the inherent weakness in a doctrine that, rather than advancing the best interests of society, actually threatens society's economic underpinnings.

Texas recently has announced that either deterrence or punishment, separately and independently, constitute an appropriate rationale for the assessment of **punitive damages.** [69] Therefore, the plaintiff may elect to seek **punitive damages** based on only the deterrence rationale, on only the punishment rationale, or both. [70] This judicial aberration reflects not only the lack of legal soundness of the doctrine, but also demonstrates the court's acceptance of the notion that **punitive damages** can serve as a windfall for plaintiffs.

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D. Award of Additional Damages

Several jurisdictions view **punitive damages** as mere monetary awards that complement compensatory damages. [71] **Punitive damages, [*1130]** in these jurisdictions, serve to provide remuneration for intangible injuries such as hurt feelings, loss of companionship, wounded dignity, grief, embarrassment, [72] mental anguish, [73] or litigation expenses. [74] These jurisdictions predicate their philosophy on the outdated theorem that such injuries were not compensable under early common law. [75] Common sense and the current availability of expanded, if not unlimited, compensatory damages in all tort actions expose the fallacy of this rationale. [76]

IV. APPLICATION OF THE **PUNITIVE DAMAGE** DOCTRINE IN TODAY'S CONTEXT

A. Standards of Conduct That Warrant **Punitive Damages**

The ratio decidendi that courts employ when imposing **punitive damages** vary in almost indecipherable, yet extremely important, degress. The disparate innuendos and connotations that accompany the legal bases articulated to support **punitive damage** liability precipitate subtle shifts in jury interpretations, in understandings of the law, and in burdens of proof. For this reason, the jurisdiction in which a plaintiff institutes suit profoundly affects the outcome of his case. Generally, most jurisdictions focus on the defendant's conduct, rather than the nature or extent of the harm sustained by the plaintiff. [77] This restricted approach lends itself to anything but consistency. Although a broad standard is necessarily imprecise, most commentators acknowledge that the imposition of **punitive damages** requires more than a mere tortious act -- the defendant's conduct must be aggravated or outrageous, or characterized by some positive element of conscious wrongdoing. [78]

[*1131] 1. Standard of Intentional Conduct

Those jurisdictions and commentators who recognize the validity of the **punitive damage** doctrine envision recovery when the defendant's actions eithe are or are deemed to be intentional. [79] Most of these courts and commentators adopt this proposition **[*1132]** without hesitation and endeavor to expand the **punitive damage** concept to situations that concern more imprecise conduct. [80] It is in this area of marginally intentional conduct that the judicial standards for imposing **punitive damages** first become muddled and legally irrational. Some states, therefore, have espoused very strong standards of appellate review. In Rhode Island the courts will approve punitive awards only "upon evidence of such willfulness, recklessness or wickedness, on the part of the party at fault, as amounted to criminality." [81] New Jersey, similarly, requires the plaintiff to prove "actual **malice,** which is nothing more or less than intentional wrongdoing -- an evil-minded act . . . or an act accompanied by a wanton and willful disregard of the rights of another." [82] Other jurisdictions have couched the standard in slightly different, yet equally strong, language. California requires that "the defendant must be guilty of oppression, fraud or **malice.** . . . He must act with the intention to vex, injure or annoy, or with a conscious disregard of the plaintiff's rights." [83] In Vermont the plaintiff must show "that there was actual **malice** . . . conduct **[*1133]** manifesting personal ill will or carried out under circumstances evidencing insult or oppression, or even by conduct showing a reckless or wanton disregard of one's rights." [84] Other states employ weaker characterizations of the intentional conduct standard. New York requires that "the wrong [be] aggravated by evil or a wrongful motive or that there [be] willful and intentional misdoing, or a reckless indifference equivalent thereto." [85] Alabama possesses one **[*1134]** of the weaker intentional conduct standards in that the courts only require "some circumstances of aggravation, such as willfulness, wantonness, maliciousness, gross negligence or recklessness, oppression, outrageous conduct, indignity and contumely, insult, or fraud or gross fraud." [86]

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The standards of intentional conduct sufficient to warrant punitive awards vary in degrees, both from each other and from the reckless and negligent standards that many jurisdictions apply. Significantly, one legal scholar has proposed that courts should limit **punitive damages** to cases concerning intentional faults. [87] Another well-known scholar, who formerly enthusiastically supported a rather unrestricted approach to **punitive damages,** [88] after viewing the results of an unfettered application of **punitive damages** over a mere seven year period, now recognizes the importance of limiting **punitive damages** to intentional and quasi-intentional situations. [89]

[*1135] 2. Standard of Reckless Conduct

The broad area of reckless or wanton conduct is an ill-defined, often fluctuating category. The courts ostensibly have articulated a clearly defined and legally meaningful standard to evaluate potential liability for **punitive damages.** Any analysis of the cases, however, reveals an unintelligible, linguistic exercise in legalese, the significance of which doubtlessly is lost upon many legal scholars and, more importantly, most jurors. Generally, the cases delineate a continuum of antisocial conduct. The upper, aggravated end of this continuum approaches intentional conduct, and therefore, courts are more likely to authorize the imposition of **punitive damages** for this type of conduct. The lower, more passive end of the continuum consists of conduct that is simply improper or ill-conceived, but is not of such egregious quality that it warrants punitory measures. Between these two extremes is conduct that varies in often imperceptible, but extremely important degrees for the application of the **punitive damage** concept.

A review of the cases employing "the reckless or wanton" standard discloses a disturbing overlap between this standard and the intentional conduct standard. The distinctions between the two standards often are too imperceptible to allow absolute categorization. Some courts proclaim that the standard for the imposition of **punitive damages** is "actual **malice,** which is nothing more or less than intentional wrongdoing -- an evil-minded act" [90] , or "an evil intent deserving of punishment or of something in the nature of special ill will." [91] Some courts repudiate the necessity of demonstrating actual **malice** in favor or a standard of "legal **malice,**" which **[*1136]** appears to differ little from intentional conduct. [92] Others refer to "conscious disregard of [the plaintiff's] rights" and award **punitive damages** when the evidence demonstrates that the defendant acted willfull and maliciously. [93] Other courts denominate reckless or wanton conduct as "gross negligence" which then is defined as an "entire want of care" that raises an inference of "conscious indifference" to the rights of others. [94] Still other jurisdictions judge the defendant's conduct against a standard of reckless or wanton conduct, oppression, fraud, or **malice** under which the wrongdoer must act with the intent to vex, injure or annoy, [95] or act out of a maliciousness or recklessness that evidences an utter disregard of the consequences. [96] At least one court has judicially formulated a standard of reckless, wanton, or oppressive conduct that requires spite, ill will, or reckless indifference by the defendant. [97] Tennessee has **[*1137]** attempted to amalgamate all of the various characterizations of the reckless standard into one sentence. Tennessee courts will allow **punitive damages**

in cases involving fraud, **malice,** gross negligence or oppression, . . .or where a wrongful act is done with a bad motive or so recklessly as to imply a disregard of social obligation, . . . or where there is such willful misconduct or entire want of care as to raise a presumption of conscious indifference to consequences. [98]

The standards for measuring reckless or wanton conduct are confusing and devoid of any effective definition. Scholars universally have acknowledged the absence of any meaningful characterization. [99] Jurors motivated by the noble desire to render a fair verdict simply cannot fathom the intricacies in meaning and subtle connotations that characterize the different standards for measuring **[*1138]** reckless or wanton conduct. [100] Because of the absence of any understandable standards of measurement and the inevitably inconsistent

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interpretations by juries, every defendant increasingly is subject to the vagaries of individual jurisdictions and an uninformed jury.

3. Standard of Negligent Conduct

Most courts refuse to impose **punitive damages** for "negligent" conduct. [101] Some states purport, however, to recognize a distinction between mere negligence and gross negligence, and they invariably authorize **punitive damages** only for the latter. [102] At least one court had held that gross negligence, in and of itself, is not sufficient to support an award of **punitive damages.** [103]

B. The Corporate Defendant and **Punitive Damages**

The doctrine of vicarious liability provides a further avenue for courts to impose **punitive damages** on parties other than the actual wrongdoer. [104] A large number of jurisdictions adhere to the respondeat superior rule that an employer is subject to **punitive** [*1139] **damages** when an employee, while operating within the scope of his employment, commits tortious acts that further the employer's interests. The imposition of **punitive damages** vicariously on another is incongruous with the objective of deterrence. Punishing the employer or corporation for the acts of the servant simply metes out punishment based not on opprobrious conduct but on the mere legal relationship between the offending individual and his employer. A number of other jurisdictions, however, adopt the more conservative "complicity rule." [105] The complicity rule limits the imposition of vicarious liability for **punitive damages** to situations in which a managerial agent of the employer either commits the egregious act, [106] specifically authorizes the act, [107] or ratifies the [*1140] act [108] or when an unfit employee recklessly hired by the employer commits the act. [109] At least under the complicity rule, the employer or corporation has undertaken an affirmative, conscious act in hiring an unfit employee or authorizing the egregious act of the employee.

Courts also impose **punitive damages** on corporations under the recently formulated concept of strict tort liability. [110] A recent opinion by the United States Court of Appeals for the Tenth Circuit demonstrates the extent to which courts have expanded the award of **punitive damages** in strict liability situations. In Saupitty v. Yazoo Manufacturing Co. [111] the court affirmed awards of $ 560,000 in compensatory damages and $ 440,000 in **punitive damages** when the plaintiff's left hand and arm were injured by a riding lawnmower the defendant had manufactured. The court sanctioned the punitive award even though the plaintiff substantially had altered the product by removing both the belt guard and the brakes of the mower. [112] A vigorous dissent asserted that under applicable strict tort liability doctrine either of these material alterations to the mower should have constituted grounds for a directed verdict for the defendant. [113] The dissent also emphasized that even if the court elected to impose strict liability under such meager evidence, no evidence existed in the record to justify an award of [*1141] **punitive damages.** [114]

The imposition of **punitive damages** in the strict liability context also has been assailed on the grounds that **punitive damages** traditionally are awarded in tort actions in which the compensatory damages are premised on conduct, while compensatory damages in strict tort liability actions are based solely on the condition of the product. [115] Strict tort liability rests entirely on the socioeconomic policy of risk distribution. Following this rationale, the product supplier is essentially blameless. Liability is visited upon the product supplier on the theoretical basis that the supplier is the entity best able to absorb the loss suffered by a product user simply by distributing the added cost to the marketing public and by purchasing additional insurance. Consequently, courts in strict liability cases award compensatory damages because of the condition of the product, not the conduct of the product supplier. **Punitive damages** in a strict tort liability context, therefore, would seem to be plainly illogical because neither punishment nor deterrence of conduct is at issue. [116]

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An equally compelling argument against **punitive damages** in a strict liability context is that such awards in product liability cases produce economically and socially undesirable results. [117] The gravest danger in products liability is that an aggregate of punitive awards can bankrupt or financially cripple a business. [118] One commentator has observed that the recent trend toward more substantial **punitive damage** verdicts has reached the point at which the **[*1142]** question must be posed whether the goal of **punitive damages** is "punishment of the defendant or actually his annihilation." [119] Courts, however, increasingly ignore or only superficially address these arguments in their affirmation of **punitive damage** awards against manufacturers in a strict tort liability context. [120] The situation in strict tort liability is exacerbated by the fact that liability may be predicated on an alleged defective design or a defective warning on the product. Products are marketed in certain design lines and literally millions of identically designed or marketed products may exist. If **punitive damages** may be awarded repeatedly for the same design or marketing deficiency, then indeed, the **punitive damage** doctrine may be utilized to punish a product supplier to the point of economic destruction. [121] Several recent decisions, **[*1143]** unmindful of the concern for the continued economic viability of product suppliers, have acknowledged that the bankruptcy or other form of annihilation of a product supplier by the repeated imposition of **punitive damage** awards could be justified and judicially sanctioned. [122]

The Fifth Circuit recently recognized the serious problem of supplier annihilation in Jackson v. Johns-Manville Sales Corp. [123] and elected to reject the **punitive damages** concept in the area of industry-wide asbestos related litigation. The Fifth Circuit recognized that economic loss distribution represented the primary objective of strict tort liability [124] and noted that one court had suggested that "the demise of the manufacturer in such circumstances is not a 'necessarily untenable' result." [125] The Fifth Circuit, however, refused to accept this draconian result and stated that "[a]t the point where awards of **punitive damages** destroy the viability of the enterprises necessary to accomplish loss distribution, the remedy of **punitive damages** becomes incompatible with the strict liability cause of action." [126] The court's major rationale was the **[*1144]** continued financial viability of manufacturers, which would insure compensation for the projected future thousands of asbestosis claimants. The judges expressed a reluctance to provide a windfall to the current plaintiffs at the expense of future claimants who conceivably would be foreclosed from recovering even compensatory damages if repeated punitive awards continue to bankrupt manufacturers. Of course, the court did consider, in rejecting the **punitive damages** award, that the continued viability of product suppliers is the very essence of society's continued economic existence.

The Fifth Circuit's decision in Jackson is an implicit recognition of a problem that must concern the courts: should the judiciary determine whether businesses which constitute the underpinning of this society's economy continue to exist and remain viable as the producer of products necessary to service society and as the employer of the millions of individuals composing society? The avowed purpose of the **punitive damage** doctrine never has been and never should be the economic destruction of business entities. If such decisions should be imposed, they should emanate from a duly elected and representative legislative body. The destruction of businesses, the loss of thousands of jobs, the repeated trauma to the American economy, and the significantly increased product costs to consumers should not be the objective of any system. The current antibusiness attitude reflected in the multitude of recent decisions is troubling. Such judicially mandated, economically adverse consequences exceed society's tolerance of judicial activism, and punitive sentences of death for corporations should no longer **[*1145]** be permitted under the guise of a civil tort compensation system.

C. Other Factors Affecting **Punitive Damage** Awards

Most jurisdictions adhere to the rule that actual or compensatory damages are a prerequisite to an award of **punitive damages.** [127] The amount of actual or compensatory damages required are not specifically defined and, generally, nominal actual damages suffice. [128]

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*461 U.S. 30, *; 103 S. Ct. 1625, **;*
*75 L. Ed. 2d 632, ***; 1983 U.S. LEXIS 24*

SMITH v. WADE

No. 81-1196

SUPREME COURT OF THE UNITED STATES

461 U.S. 30; 103 S. Ct. 1625; 75 L. Ed. 2d 632; 1983 U.S. LEXIS 24; 51 U.S.L.W. 4407

November 10, 1982, Argued
April 20, 1983, Decided

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

DISPOSITION: 663 F.2d 778, affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant guard sought and was granted certiorari to the Court of Appeals for the Eighth Circuit to decide whether the court applied the correct legal standard in instructing the jury that it might award punitive damages to plaintiff inmate under 42 U.S.C.S. § 1983.

OVERVIEW: Plaintiff sued guard for violation of his constitutional rights under the Eighth Amendment. Inmate contended that guard knew or should have known that an assault against him was likely when he placed another inmate in his cell who was known for fighting. The jury awarded compensatory and punitive damages. The Court held that punitive damages were available in a proper § 1983 case. Guard argued it was not a proper case for punitive damages and that the jury instructions failed to require a finding of actual malicious intent. The court held that malicious intent was not required. Inmate in a § 1983 case did not have a more restricted remedy than a person asserting an ordinary tort cause of action and could be awarded punitive damages for recklessness or serious indifference to or disregard to inmate's rights. Guard contended the trial court erred in not requiring a higher standard for punitive damages than for compensatory damages. The Court found no error. Punitive damages were discretionary with the jury, whereas compensatory damages were not. The same threshold applied, even when the underlying standard was one of recklessness.

OUTCOME: The Court affirmed the decision because the jury instructions were in accord with the standard that punitive damages could be awarded for reckless indifference to inmate's federally protected rights.

CORE TERMS: punitive damages, recklessness, malice, motive, indifference, evil, common-law, exemplary damages, punitive, reckless, malicious, wanton, injure, gross negligence, common law, deterrence, willful, compensatory damages, actual malice, malicious intent, immunity, callous, intent to injure, wantonness, threshold, redress, reckless indifference, prevailing, plainly, wantonly

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32-33 (1858). More commonly in the punitive damages context, the term meant something in between fictional malice and actual injurious intent -- "that form of malice . . . where, without 'deliberate mind' or 'formed design,' the offender has been so grossly and recklessly negligent, so wantonly indifferent to another's rights, that he should be required to pay damages in excess of mere compensation as a punishment and example." *Press Pub. Co.* v. *McDonald*, 63 F. 238, 246 (CA2 1894). Accord, *e. g., Philadelphia, W. & B. R. Co.* v. *Quigley*, 21 How. 202, 214 (1859); *South & N. A. R. Co.* v. *McLendon*, 63 Ala. 266, 273-275 (1879); *Yerian* v. *Linkletter*, 80 Cal. 135, 138, 22 P. 70, 71 (1889) (Paterson, J., concurring); *Cameron* v. *Bryan*, 89 Iowa 214, 219, 56 N. W. 434 (1893); *Lynd* v. *Picket*, 7 Minn., at 200-202.

There was considerably less ambiguity or confusion concerning the meaning of "wantonness" in tort law:

"Wanton means reckless -- without regard to the rights of others. . . . Wantonly means causelessly, without restraint, and in reckless disregard of the rights of others. Wantonness is defined as a licentious act of one man towards the person of another, without regard to his rights; it has also been defined as the conscious failure by one charged with a duty to exercise due care and diligence to prevent an injury after the discovery of the peril, or under circumstances where he is charged with a knowledge of such peril, and being conscious of the inevitable or probable results of such failure." 30 American and English Encyclopedia of Law 2-4 (2d ed. 1905) (footnotes omitted).

The last sentence of that definition could have been written with this case in mind. See also, *e. g.*, 40 Cyclopedia of Law and Procedure 292-295 (1912). The word was used with the same meaning in the punitive damages context. See, *e. g., Texarkana Gas & Electric Light Co.* v. *Orr*, 59 Ark. 215, 224, 27 S. W. 66, 68 (1894); *Welch* v. *Durand*, 36 Conn. 182, 184-185 (1869); *Southern Kansas R. Co.* v. *Rice*, 38 Kan. 398, 403-404, 16 P. 817, 820 (1888).

Finally, "willfulness" did not mean intent to cause injury, but only voluntary action:

"Wilful . . . generally, as used in courts of law, implies nothing blamable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this: that he knows what he is doing, and intends to do what he is doing, and is a free agent. And wilfully does not imply that an act done in that spirit was necessarily a malicious act. . . ." 30 American and English Encyclopedia of Law 529-530 (2d ed. 1905) (footnote omitted).

"Wilful neglect or negligence has been defined as that degree of neglect arising where there is a reckless indifference to the safety of human life, or an intentional failure to perform a manifest duty to the public, in the performance of which the public and the party injured had an interest." *Id.*, at 535 (footnote omitted).

See also, *e. g.*, 40 Cyclopedia of Law and Procedure 944-947 (1912). Again, the punitive damages cases bear this reading out. *Cameron, supra*, at 219, 56 N. W., at 434; *Goetz, supra*, at 32-33; *Chiles* v. *Drake*, 59 Ky., at 152-155; *Peoria Bridge Assn.* v. *Loomis*, 20 Ill. 235, 251 (1858).

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This Court so stated on several occasions, before and shortly after 1871. In *Philadelphia, W. & B. R. Co.* v. *Quigley*, 21 How. 202 (1859), a diversity libel suit, the Court held erroneous an instruction that authorized the jury to return a punitive award but gave the jury virtually no substantive guidance as to the proper threshold. We described the standard thus:

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"Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, *or of criminal indifference to civil obligations."* Id., at 214 (emphasis added). n9

[*42] [*643] [**1633]** The Court further explained the standard for punitive damages in *Milwaukee & St. Paul R. Co.* v. Arms, 91 U.S. 489 (1876), a diversity railroad collision case:

"Redress commensurate to such [personal] injuries should be afforded. In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go farther, unless it was done wilfully, *or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them*. In that case, the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages." Id., at 493.

". . . To [assess punitive damages], there must have been some wilful misconduct, *or that entire want of care* **[*43]** *which would raise the presumption of a conscious indifference to consequences."* Id., at 495 (emphasis added).

The Court therefore held erroneous a jury instruction allowing a punitive award on "gross negligence'; it concluded that the latter term was too vague, and too likely to be confused with mere ordinary negligence, to provide a fair standard. It remanded for a new trial. n10

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n9 JUSTICE REHNQUIST's dissent reads this statement as a requirement of actual intent, *post*, at 68-69. This misreading depends in part on the faulty assumption, see n. 8, *supra*, that "malice" always meant intent to injure (*post*, at 68) -- a reading particularly inappropriate in light of the Court's express definition of malice as including "criminal indifference." As for the latter point, JUSTICE REHNQUIST reasons that the term "criminal indifference" must include an element of actual malicious intent. This surprising interpretation of the word "indifference" rests on the unstated and demonstrably false premise that intent to cause injury was always an element of crime. Not only were there crimes of recklessness or negligence (such as reckless homicide), but even crimes of intent commonly required only intent to do the criminal act (and, in some cases, knowledge that the injury would likely follow), rather than actual ill will or purpose to inflict an injury. See, *e. g.*, 1 J. Bishop, Commentaries on Criminal Law §§ 313-322 (5th ed. 1872); J. May, Law of Crimes §§ 30, 31, 232, 233 (2d ed. J. Beale, 1893); see also, *e. g.*, Model Penal Code § 2.02 (Tent. Draft No. 4, 1955). The case law clearly illustrates that "criminal" did not mean "with injurious intent" in the punitive damages context. *E. g., Hopkins* v. *Atlantic & St. L. R. Co.*, 36 N. H. 9, 18-19 (1857), overruled on other grounds, *Fay* v. *Parker*, 53 N. H. 342 (1872); *Brooke* v. *Clark*, 57 Tex. 105, 112-114 (1880); *Meibus* v. *Dodge*, 38 Wis. 300, 310-311 (1875).

JUSTICE REHNQUIST also cites *Day* v. *Woodworth*, 13 How. 363, 371 (1852), in support of an actual-intent requirement. *Post*, at 70. The language used in that case ("wanton and malicious, or gross and outrageous") was precisely the precedent that the *Philadelphia* Court was exegeting in the passage quoted in text, when it held that "malice" includes "criminal indifference." Moreover, the *Day* case did not present any issue of punitive damages; the

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Court discussed them merely as a sidelight to the costs-and-fees issue presented.

n10 As with *Philadelphia*, n. 9, *supra*, JUSTICE REHNQUIST's dissent reads this case as imposing a requirement of actual malicious intent, on the assumption that when the Court said "indifference to consequences" it really meant "intent to cause consequences," and when it said "recklessness" it really meant "bad motive or intent to injure." *Post*, at 70-73. This textual alchemy is untenable. For one thing, JUSTICE REHNQUIST's analysis of the case reflects the confusion in his dissent of motive with consciousness, see n. 6, *supra; post*, at 71-72, n. 7. Moreover, the *Milwaukee* Court did not say, or come close to saying, that recklessness is *identical* to intent, or that it is material only as *evidence* of intent; rather, it said that recklessness is *"equivalent"* to intent, meaning that the two are equally culpable and deserving of punishment and deterrence. 91 U.S., at 493. This also explains the Court's reference, two sentences later, to "evil motive," *ibid*. JUSTICE REHNQUIST's great reliance on this sentence confuses the *standard* for punitive damages with the *rationale* for them. Plainly, read in context, what the Court meant is that punitive damages are justified by the moral culpability of evil intent, or by the "equivalent" culpability of "reckless indifference to the rights of others." See also *Cowen* v. *Winters*, 96 F. 929, 934-935 (CA6 1899); *Alabama G. S. R. Co.* v. *Hill*, 90 Ala. 71, 80, 8 So. 90, 93 (1890); *Memphis & C. R. Co.* v. *Whitfield*, 44 Miss. 466, 494-495 (1870); *Thirkfield* v. *Mountain View Cemetery Assn.*, 12 Utah 76, 82, 41 P. 564, 565 (1895). The contrary reading adopted by JUSTICE REHNQUIST's dissent is flatly inconsistent with the Court's reiteration of the rule, 91 U.S., at 495 (emphasis added): "that entire want of care which would raise the presumption of a *conscious indifference to consequences*." Try as he might, JUSTICE REHNQUIST cannot transform indifference, conscious or otherwise, into intent.

JUSTICE REHNQUIST also relies on a four-sentence capsulization by the Reporter of Decisions of our unreported decision in *Western Union Telegraph Co.* v. *Eyser*, 91 U.S. 495, decided the same day. While the Reporter's summary does speak of the absence of "intentional wrong," *id.*, at 496, the factual context suggests that the basis of decision was the jury instruction that ordinary negligence would warrant punitive damages, combined with the fact that the defendant had taken some affirmative (though insufficient) steps to avoid injury to passersby. Thus, in context, the reference to "intentional wrong" is entirely consistent with the *Milwaukee* decision's test of "conscious indifference"; the defendant in *Western Union* was not indifferent to injury, but instead plainly intended to *avoid* injury.

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[*44] [*644] [**1634]** Ten years later, the Court in dictum suggested that perhaps even gross negligence would suffice after all, at least in some cases:

"For injuries resulting from a neglect of duties, in the discharge of which the public is interested, juries are also permitted to assess exemplary damages. These may be perhaps considered as falling under the head of cases of gross negligence, for any neglect of duties imposed for the protection of life or property is culpable, and deserves punishment." *Missouri Pacific R. Co.* v. *Humes*, 115 U.S. 512, 521 (1885).

See also *Minneapolis & St. Louis R. Co.* v. *Beckwith*, 129 U.S. 26, 34 (1889) ("culpable negligence"). n11

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n11 In two other cases the Court reaffirmed the *Philadelphia* "criminal indifference" standard and the *Milwaukee* "reckless indifference" standard. *Barry* v. *Edmunds*, 116 U.S., at 563; *Denver & R. G. R. Co.* v. *Harris*, 122 U.S. 597, 609-610 (1887).

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JUSTICE REHNQUIST's dissent relies on two later decisions of this Court, neither of which supports it. *Post*, at 74-75. In *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U.S. 101 (1893), the issue was whether a corporation could be liable in punitive damages for the tort of its employee. The Court, reasoning largely from general principles of *respondeat superior*, held that such vicarious liability could exist only when the employer had authorized or ratified the tort. In so doing, however, it expressly reaffirmed as "well settled" the general standard announced in the *Philadelphia* case, including liability for "criminal indifference." 147 U.S., at 107. JUSTICE REHNQUIST cites a passage quoting from one state case suggesting an intent requirement, *post*, at 74, but he omits to mention the court's extensive quotations from *Philadelphia* and *Milwaukee*, 147 U.S., at 112-113, and its express approval of and quotation from other state cases stating unequivocally that an employer can be liable for its own recklessness in hiring unfit employees, *id.*, at 114-116. See also n. 9, *supra*. In *Scott* v. *Donald*, 165 U.S., at 71-90, the issue was whether there was a sufficient amount in controversy. The Court held that allegations of "intentional, malicious and repeated interference" with federally protected rights, *id.*, at 89, were enough, if proved, to warrant punitive damages. The Court undertook no statement of a general standard for punitive damages beyond noting the unsurprising principle that such damages are awardable on proof of actual evil motive, *id.*, at 86. Under the allegations, of course, no question of liability for less culpable conduct was presented.

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[*45] The large majority of state and lower federal courts were in agreement that punitive damages awards did not require a showing of actual malicious intent; they permitted punitive awards on variously stated standards of negligence, recklessness, or other culpable conduct short of actual malicious intent. n12

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n12 In the often-cited case of *Welch* v. *Durand*, 36 Conn. 182 (1869), for example, the court held that punitive damages were proper where the defendant's pistol bullet, fired at a target, ricocheted and hit the plaintiff:

"In what cases then may smart money be awarded in addition to the damages? The proper answer to this question . . . seems to be, in actions of tort founded on the malicious or wanton misconduct or culpable neglect of the defendant. . . .

"In this case the defendant was guilty of wanton misconduct and culpable neglect. . . . It is an immaterial fact that the injury was unintentional, and that the ball glanced from the intended direction. . . . [If] the act is done where there are objects from which the balls may glance and endanger others, the act is wanton, reckless, without due care, and grossly negligent." *Id.*, at 185.

In *Frink & Co.* v. *Coe*, 4 Greene 555 (Iowa 1854), punitive damages were awarded against a stage company for employing a known drunkard as a driver, the court saying:

"In a case of gross negligence on the part of a stage proprietor, such as the employment of a known drunken driver, and where a passenger has been injured in consequence of such negligence, we think exemplary damages should be entertained.

. . . .

"If a stage proprietor or carrier is guilty of gross negligence, it amounts to that kind of gross misconduct which will justify a jury in giving exemplary damages, even where an *'intent* or *design'* to do the injury does not appear." *Id.*, at 559 (emphasis in original).

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Maysville & Lexington R. Co. v. Herrick, 76 Ky. 122 (1877), held that the trial court correctly refused to instruct the jury that "willful or intentional wrong" was required to award punitive damages in a railroad accident case, remarking:

"The absence of slight care in the management of a railroad train, or in keeping a railroad track in repair, is gross negligence; and to enable a passenger to recover punitive damages, in a case like this, it is not necessary to show the absence of all care, or 'reckless indifference to the safety of . . . passengers,' or 'intentional misconduct' on the part of the agents and officers of the company." *Id.*, at 127 (ellipsis in original).

Accord, *e. g.*, *Cowen* v. *Winters*, 96 F., at 934-935; *Press Pub. Co.* v. *McDonald*, 63 F., at 245-247; *Morning Journal Assn.* v. *Rutherford*, 51 F. 513, 514-515 (CA2 1892); *Fotheringham* v. *Adams Express Co.*, 36 F. 252, 253-254 (CC ED Mo. 1888); *United States* v. *Taylor*, 35 F. 484, 488 (CC SD Ala. 1888); *Malloy* v. *Bennett*, 15 F. 371, 373-374 (CC SDNY 1883); *Berry* v. *Fletcher*, 3 F. Cas. 286, 288 (No. 1,357) (CC Mo. 1870); *Alabama G. S. R. Co.* v. *Arnold*, 80 Ala. 600, 608, 2 So. 337, 342 (1886); *Texarkana Gas & Electric Light Co.* v. *Orr*, 59 Ark., at 224, 27 S. W., at 68; *Dorsey* v. *Manlove*, 14 Cal. 553, 555-556 (1860); *Florida Railway & Navigation Co.* v. *Webster*, 25 Fla. 394, 419-420, 5 So. 714, 719 (1889); *Jacobus* v. *Congregation of Children of Israel*, 107 Ga. 518, 521, 33 S. E. 853, 855 (1899); *Drohn* v. *Brewer*, 77 Ill. 280, 282-283 (1875); *Citizens' St. R. Co.* v. *Willoeby*, 134 Ind. 563, 569-570, 33 N. E. 627, 629 (1893); *Sawyer* v. *Sauer*, 10 Kan. 466, 470 (1872); *Goddard* v. *Grand Trunk R. Co.*, 57 Me. 202, 218 (1869); *Lynd* v. *Picket*, 7 Minn., at 200-202; *Memphis & C. R. Co.* v. *Whitfield*, 44 Miss., at 494-495, 500; *Buckley* v. *Knapp*, 48 Mo. 152, 161-162 (1871); *Caldwell* v. *New Jersey Steamboat Co.*, 47 N. Y. 282, 296 (1872); *Sullivan* v. *Oregon Railway & Navigation Co.*, 12 Ore. 392, 404-406, 7 P. 508, 517 (1885) (dictum); *Lake Shore & M. S. R. Co.* v. *Rosenzweig*, 113 Pa. 519, 543-544, 6 A. 545, 552-553 (1886); *Hart* v. *Charlotte, C. & A. R. Co.*, 33 S. C. 427, 435-436, 12 S. E. 9, 10 (1890); *Haley* v. *Mobile & O. R. Co.*, 66 Tenn. 239, 242-243 (1874); *Brooke* v. *Clark*, 57 Tex., at 112-114; *Thirkfield* v. *Mountain View Cemetery Assn.*, 12 Utah, at 82, 41 P., at 564-565; *Earl* v. *Tupper*, 45 Vt. 275, 286-287 (1873) (dictum); *Borland* v. *Barrett*, 76 Va. 128, 132-134 (1882); *Pickett* v. *Crook*, 20 Wis. 358, 359 (1866); *Union Pacific R. Co.* v. *Hause*, 1 Wyo. 27, 35 (1871).

JUSTICE REHNQUIST's assertion that a "solid majority of jurisdictions" required actual malicious intent, *post*, at 84, is simply untrue. In fact, there were fairly few jurisdictions that imposed such a requirement, and fewer yet that adhered to it consistently. JUSTICE REHNQUIST's attempt to establish this proposition with case citations, *post*, at 78-84, n. 12, does not offer him substantial support. Because the point is not of controlling significance, see n. 2, *supra*, we will not tarry here to analyze his citations case-by-case or State-by-State, but will only summarize the main themes.

Several of JUSTICE REHNQUIST's cases actually offer unequivocal support for the rule that punitive damages are available on a showing of negligence, recklessness, disregard for or indifference to the rights of others, and various other standards short of actual ill will or injurious intent. In this same vein, JUSTICE REHNQUIST continues to try to equate consciousness or knowledge with actual ill will or intent to injure, see n. 6, *supra*.

Other cases do not clearly support either JUSTICE REHNQUIST's view or ours. Some of these contain contradictory language in their formulations, indicating that the present distinction perhaps did not occur to the writers. Others support JUSTICE REHNQUIST's rule only if one makes the questionable assumption, see nn. 8, 9, *supra*, that terms like "malice," "wantonness," and "criminal" always meant actual intent to injure. Still others simply ruled on collateral questions (such as the admissibility of evidence of bad motive or of good faith) without purporting to state any general standard for punitive damages. Some were apparently limited to particular classes of torts. A comparison of this class of cases with those cited *supra*, this note, reveals that in many instances other decisions of the same courts clear

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up any ambiguity in favor of a recklessness or negligence standard.

A third class of cases are those in which the courts simply affirmed awards of punitive damages based on evidence of, or jury instructions requiring, actual malicious intent, without discussing whether a lesser showing might also be adequate. Often the cases in this category involved assault and battery or similar torts, where the facts presented little problem of negligence or recklessness. See also n. 11, *supra*. As with the previous category, many of the same courts spoke more directly in other cases, making it clear that injurious intent was *not* required.

Finally, even of those comparatively few cases that do seem to support JUSTICE REHNQUIST's view, many are of debatable authority. In nearly every State there was at least some late 19th-century authority supporting awards on less than ill will or intent to injure. Admittedly, in a few States this was the less accepted view, but in a substantial majority of jurisdictions the prevailing rule (as evidenced by the cases cited *supra*, this note, and numerous other cases not listed here) was that no such actual malicious intent was required.

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[*46] [*646] [**1635]**

[*HR4]** [4]
The same rule applies today. The Restatement (Second) of Torts (1979), for example, states: "Punitive damages may be awarded for conduct that is outrageous, because **[**1636]** of the defendant's **[*47]** evil motive *or his reckless indifference to the rights of others*." § 908 (2) (emphasis added); see also *id.*, Comment *b*. Most cases under state common law, although varying in **[*48]** their precise terminology, have adopted more or less the same rule, recognizing that punitive damages in tort cases may be awarded not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others, or even gross negligence. n13

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n13 *Loch Ridge Construction Corp.* v. *Barra*, 291 Ala. 312, 280 So. 2d 745 (1973); *Sturm, Ruger & Co.* v. *Day*, 594 P. 2d 38 (Alaska 1979), modified on other grounds, 615 P. 2d 621 (1980), and 627 P. 2d 204 (1981); *Huggins* v. *Deinhard*, 127 Ariz. 358, 621 P. 2d 45 (App. 1980); *White* v. *Brock*, 41 Colo. App. 156, 584 P. 2d 1224 (1978); *Collens* v. *New Canaan Water Co.*, 155 Conn. 477, 234 A. 2d 825 (1967); *Sheats* v. *Bowen*, 318 F.Supp. 640 (Del. 1970) (Delaware law); *Spar* v. *Obwoya*, 369 A. 2d 173 (D. C. 1977); *Adams* v. *Whitfield*, 290 So. 2d 49 (Fla. 1974); *Randall* v. *Ganz*, 96 Idaho 785, 537 P. 2d 65 (1975); *Pendowski* v. *Patent Scaffolding Co.*, 89 Ill. App. 3d 484, 411 N. E. 2d 910 (1980), appeal denied (Ill. 1981); *Meyer* v. *Nottger*, 241 N. W. 2d 911 (Iowa 1976); *Ford* v. *Guarantee Abstract & Title Co.*, 220 Kan. 244, 553 P. 2d 254 (1976); *Pettengill* v. *Turo*, 159 Me. 350, 193 A. 2d 367 (1963); *American Laundry Machine Industries* v. *Horan*, 45 Md. App. 97, 412 A. 2d 407 (1980); *Bailey* v. *Graves*, 411 Mich. 510, 309 N. W. 2d 166 (1981); *Huebsch* v. *Larson*, 291 Minn. 361, 191 N. W. 2d 433 (1971); *Mississippi Power Co.* v. *Jones*, 369 So. 2d 1381 (Miss. 1979); *Stenson* v. *Laclede Gas Co.*, 553 S. W. 2d 309 (Mo. App. 1977); *Butcher* v. *Petranek*, 181 Mont. 358, 593 P. 2d 743 (1979); *Berg* v. *Reaction Motors Division*, 37 N. J. 396, 181 A. 2d 487 (1962); *Robison* v. *Katz*, 94 N. M. 314, 610 P. 2d 201 (App.), cert. denied, 94 N. M. 675, 615 P. 2d 992 (1980); *Soucy* v. *Greyhound Corp.*, 27 App. Div. 2d 112, 276 N. Y. S. 2d 173 (1967); *Newton* v. *Standard Fire Insurance Co.*, 291 N. C. 105, 229 S. E. 2d 297 (1976); *Dahlen* v. *Landis*, 314 N. W. 2d 63 (N. D. 1981); *Leichtamer* v. *American Motors Corp.*, 67 Ohio St. 2d 456, 424 N. E. 2d 568 (1981); *Smith* v. *Johnston*, 591 P. 2d 1260 (Okla. 1978); *Focht* v. *Rabada*, 217 Pa. Super. 35, 268 A. 2d 157 (1970); *Sherman* v. *McDermott*, 114 R. I. 107, 329 A. 2d 195 (1974); *King* v. *Allstate Insurance Co.*, 272 S. C. 259, 251 S. E. 2d 194 (1979); *Hannahs* v. *Noah*, 83 S. D. 296, 158 N. W. 2d 678 (1968); *Inland Container Corp.* v.

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March, 529 S. W. 2d 43 (Tenn. 1975); *Shortle* v. *Central Vermont Public Service Corp.*, 137 Vt. 32, 399 A. 2d 517 (1979); *Wangen* v. *Ford Motor Co.*, 97 Wis. 2d 260, 294 N. W. 2d 437 (1980).

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[*HR1C]** [1C]
[*HR5]** [5]
The remaining question is whether the policies and purposes of § 1983 itself require a departure from the rules of tort common law. As a general matter, we discern no reason why a person whose federally guaranteed rights have **[*49]** been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action. Smith offers us no persuasive reason to the contrary.

Smith's argument, which he offers in several forms, is that an actual-intent **[***647]** standard is preferable to a recklessness standard because it is less vague. He points out that punitive damages, by their very nature, are not awarded to compensate the injured party. See *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981); *Electrical Workers* v. *Foust*, 442 U.S. 42, 48 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349-350 (1974). He concedes, of course, that deterrence of future egregious conduct is a primary purpose of both § 1983, see *Newport, supra*, at 268; *Owen* v. *City of Independence*, 445 U.S. 622, 651 (1980); *Robertson* v. *Wegmann*, 436 U.S. 584, 591 (1978), and of punitive damages, see *Newport, supra*, at 268; Restatement (Second) of Torts § 908(1) (1979). But deterrence, he contends, cannot be achieved unless the standard of conduct sought to be deterred is stated with sufficient clarity to enable potential defendants to conform to the law and to avoid the proposed sanction. Recklessness or callous indifference, he argues, is too uncertain a standard to achieve deterrence rationally and fairly. A prison guard, for example, can be expected to know whether he is acting with actual ill will or intent to injure, but not whether he is being reckless or callously indifferent.

[1637]** Smith's argument, if valid, would apply to ordinary tort cases as easily as to § 1983 suits; hence, it hardly presents an argument for adopting a different rule under § 1983. In any event, the argument is unpersuasive. While, *arguendo*, an intent standard may be easier to understand and apply to particular situations than a recklessness standard, we are not persuaded that a recklessness standard is too vague to be fair or useful. In the *Milwaukee* case, 91 U.S. 489 (1876), we adopted a recklessness standard rather than a gross negligence standard precisely because recklessness would better serve the need for adequate clarity and fair application. Almost **[*50]** a century later, in the First Amendment context, we held that punitive damages cannot be assessed for defamation in the absence of proof of "knowledge of falsity or reckless disregard for the truth." *Gertz*, 418 U.S., at 349. Our concern in *Gertz* was that the threat of punitive damages, if not limited to especially egregious cases, might "inhibit the vigorous exercise of First Amendment freedoms," *ibid.* -- a concern at least as pressing as any urged by Smith in this case. Yet we did not find it necessary to impose an actual-intent standard there. Just as Smith has not shown why § 1983 should give higher protection from punitive damages than ordinary tort law, he has not explained why it gives higher protection than we have demanded under the First Amendment.

[*HR6]** [6]
More fundamentally, Smith's argument for certainty in the interest of deterrence overlooks the distinction between a standard for punitive damages and a standard of liability in the first instance. Smith seems to assume that prison guards and other state officials look mainly to the standard for punitive damages in shaping their conduct. We question the premise; we assume, and hope, that most officials are guided primarily by the underlying standards **[***648]** of federal substantive law -- both out of devotion to duty, and in the interest of avoiding liability for compensatory damages. At any rate, the conscientious officer who

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desires clear guidance on how to do his job and avoid lawsuits can and should look to the standard for actionability in the first instance. The need for exceptional clarity in the standard for punitive damages arises only if one assumes that there are substantial numbers of officers who will not be deterred by compensatory damages; only such officers will seek to guide their conduct by the punitive damages standard. The presence of such officers constitutes a powerful argument *against* raising the threshold for punitive damages.

[*HR1D]** [1D]
In this case, the jury was instructed to apply a high standard of constitutional right ("physical abuse of such base, inhumane and barbaric proportions as to shock the sensibilities"). It was also instructed, under the principle of **[*51]** qualified immunity, that Smith could not be held liable at all unless he was guilty of "a callous indifference or a thoughtless disregard for the consequences of [his] act or failure to act," or of "a flagrant or remarkably bad failure to protect" Wade. These instructions are not challenged in this Court, nor were they challenged on grounds of vagueness in the lower courts. Smith's contention that this recklessness standard is too vague to provide clear guidance and reasonable deterrence might more properly be reserved for a challenge seeking different standards of liability in the first instance. As for punitive damages, however, in the absence of any persuasive argument to the contrary based on the policies of § 1983, we are content to adopt the policy judgment of the common law -- that reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law, should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages. See *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 233 (1970) (BRENNAN, J., concurring and dissenting).

IV

[*HR7]** [7]
Smith contends that even if § 1983 does not ordinarily require a showing of actual **[**1638]** malicious intent for an award of punitive damages, such a showing should be required in this case. He argues that the deterrent and punitive purposes of punitive damages are served only if the threshold for punitive damages is higher in every case than the underlying standard for liability in the first instance. In this case, while the District Judge did not use the same precise terms to explain the standards of liability for compensatory and punitive damages, the parties agree that there is no substantial difference between the showings required by the two instructions; both apply a standard of reckless or callous indifference to Wade's rights. Hence, Smith argues, the District Judge erred in not requiring a higher standard for punitive damages, namely, actual malicious intent.

This argument incorrectly assumes that, simply because the instructions specified the same *threshold* of liability for **[*52]** punitive and compensatory damages, the two forms of damages were equally available to the plaintiff. The argument overlooks a key feature of punitive damages -- that they are never awarded **[***649]** as of right, no matter how egregious the defendant's conduct. "If the plaintiff proves sufficiently serious misconduct on the defendant's part, the question whether to award punitive damages is left to the jury, which may or may not make such an award." D. Dobbs, Law of Remedies 204 (1973) (footnote omitted). n14 Compensatory damages, by contrast, are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss. n15 Hence, it is not entirely accurate to say that punitive and compensatory damages were awarded in this case on the same standard. To make its punitive award, the jury was required to find not only that Smith's conduct met the recklessness threshold (a question of ultimate fact), but *also* that his conduct merited a punitive award of $ 5,000 in addition to the compensatory award (a discretionary moral judgment).

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n14 See also, *e. g.*, Restatement (Second) of Torts § 908, Comment *d* (1979); J. Ghiardi & J. Kircher, Punitive Damages Law and Practice § 5.38 (1981); C. McCormick, Law of Damages 296 (1935); W. Prosser, Law of Torts 13 (4th ed. 1971); K. Redden, Punitive Damages § 3.4 (A) (1980); *Chuy* v. *Philadelphia Eagles Football Club*, 595 F.2d 1265, 1277-1278, n. 15 (CA3 1979) (en banc).

n15 The instructions in this case recognized this difference in treatment. The jury was instructed:

"If you find the issues in favor of the plaintiff, then you *must* award the plaintiff such sum as you believe will fairly and justly compensate the plaintiff for any damages you believe he sustained as a direct result of the conduct of the defendants . . . .

"In addition to actual damages, the law *permits* the jury, under certain circumstances, to award the injured person punitive and exemplary damages . . . .

"If you find the issues in favor of the plaintiff, and if the conduct of one or more of the defendants is shown to be a reckless or callous disregard of, or indifference to, the rights or safety of others, then you *may* assess punitive or exemplary damages in addition to any award of actual damages." Tr. 642-643 (emphasis added).

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[*53] Moreover, the rules of ordinary tort law are once more against Smith's argument. There has never been any general common-law rule that the threshold for punitive damages must always be higher than that for compensatory liability. On the contrary, both the First and Second Restatements of Torts have pointed out that "in torts like malicious prosecution that require a particular antisocial state of mind, the improper motive of the tortfeasor is both a necessary element in the cause of action and a reason for awarding punitive damages." n16 Accordingly, in situations where the standard for compensatory liability is as high as or higher than the usual threshold for punitive damages, most **[**1639]** courts will permit awards of punitive damages without requiring any extra showing. Several courts have so held expressly. n17 **[***650]** Many other courts, not directly addressing the congruence of compensatory and punitive thresholds, have held that punitive damages are available on the same showing of fault as is required by the underlying tort in, for example, intentional infliction of emotional distress, n18 defamation of a public official **[*54]** or public figure, n19 and defamation covered by a common-law qualified immunity. n20

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n16 Restatement of Torts § 908, Comment *c* (1939); Restatement (Second) of Torts § 908, Comment *c* (1979).

Although there is general agreement with the broad principle of § 908, Comment *c*, there is authority suggesting that the tort of malicious prosecution may have been a poorly chosen illustration of it. See, *e. g.*, *Adams* v. *Whitfield*, 290 So. 2d 49 (Fla. 1974); *Jordan* v. *Sauve*, 219 Va. 448, 247 S. E. 2d 739 (1978).

n17 *Huggins* v. *Deinhard*, 127 Ariz., at 359-360, 621 P. 2d, at 46-47; *Fletcher* v. *Western National Life Insurance Co.*, 10 Cal. App. 3d 376, 404, 89 Cal. Rptr. 78, 95 (1970); *Sere* v. *Group Hospitalization, Inc.*, 443 A. 2d 33, 37-38 (D. C. 1982); *Meyer* v. *Nottger*, 241 N. W. 2d, at 922; *Newton* v. *Standard Fire Insurance Co.*, 291 N. C., at 112, 229 S. E. 2d, at 301-302 (dictum); *Hall* v. *May Department Stores Co.*, 292 Ore. 131, 144-145, 637 P. 2d 126, 134-135 (1981); *Chuy* v. *Philadelphia Eagles Football Club, supra*, at 1276-1278 (CA3 1979) (en banc) (Pennsylvania law); *Johnson* v. *Woman's Hospital*, 527 S. W. 2d 133, 141-142 (Tenn. App.), cert. denied (Tenn. 1975).

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n18 See, *e. g.*, *Fletcher* v. *Western National Life Insurance Co., supra; Sere* v. *Group Hospitalization, Inc., supra; Cape Publications, Inc.* v. *Bridges*, 387 So. 2d 436 (Fla. App. 1980); *Meyer* v. *Nottger, supra; Hall* v. *May Department Stores Co., supra; Chuy* v. *Philadelphia Eagles Football Club, supra* (en banc) (Pennsylvania law). See also *Johnson* v. *Woman's Hospital, supra* (tort of outrageous conduct). Contra, *Knierim* v. *Izzo*, 22 Ill. 2d 73, 174 N. E. 2d 157 (1961).

n19 See, *e. g.*, *Davis* v. *Schuchat*, 166 U. S. App. D. C. 351, 510 F.2d 731 (1975) (District of Columbia law); *Fopay* v. *Noveroske*, 31 Ill. App. 3d 182, 334 N. E. 2d 79 (1975); *Goldwater* v. *Ginzburg*, 414 F.2d 324 (CA2 1969) (New York law); *Sprouse* v. *Clay Communication, Inc.*, 158 W. Va. 427, 211 S. E. 2d 674 (1975) (dictum). See also *Cape Publications, Inc.* v. *Bridges, supra* (false light).

In citing the cases in this footnote and in n. 20, *infra*, we intimate no view on any First Amendment issues they may raise.

n20 *E. g., Pirre* v. *Printing Developments, Inc.*, 468 F.Supp. 1028 (SDNY) (Connecticut and New York law), affirmance order, 614 F.2d 1290 (CA2 1979); *Weenig* v. *Wood*, 169 Ind. App. 413, 349 N. E. 2d 235 (1976); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980); *Snodgrass* v. *Headco Industries, Inc.*, 640 S. W. 2d 147 (Mo. App. 1982); *Miller* v. *Lear Siegler, Inc.*, 525 F.Supp. 46 (Kan. 1981) (Oklahoma law). See also n. 19, *supra*.

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This common-law rule makes sense in terms of the purposes of punitive damages. Punitive damages are awarded in the jury's discretion "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1979). The focus is on the character of the tortfeasor's conduct -- whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards. If it is of such a character, then it is appropriate to allow a jury to assess punitive damages; and that assessment does not become less appropriate simply because the plaintiff in the case faces a more demanding standard of actionability. To put it differently, society has an interest in deterring and punishing *all* intentional or reckless invasions of the rights of others, even though it sometimes **[*55]** chooses not to impose any liability for lesser degrees of fault. n21

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n21 "Moreover, after *Carey* punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury." *Carlson*, 446 U.S., at 22, n. 9.

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As with his first argument, Smith gives us no good reason to depart from the common-law rule in the context of § 1983. He argues that too low a standard of exposure to punitive damages in cases such as this threatens to undermine the policies of his qualified immunity as a prison guard. The same reasoning would apply with at least as much force to, for example, the First Amendment and common-law immunities involved in the defamation cases described above. In any case, Smith overstates the extent of his immunity. Smith is protected from liability **[***651]** for mere negligence because of the need to protect his use of discretion in his day-to-day decisions in the running of a correctional facility. See generally *Procunier* v. *Navarette*, 434 U.S. 555 (1978); *Wood* v. *Strickland*, 420 U.S. 308 (1975). But the immunity on which **[**1640]** Smith relies is coextensive with the interest it protects. n22 The very fact that the privilege is qualified reflects a recognition that there is

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CORE CONCEPTS - ◆ Hide Concepts

Constitutional Law > Civil Rights Enforcement > Civil Rights Act of 1871
See 42 U.S.C.S. § 1983.

Governments > Legislation > Interpretation
Constitutional Law > Civil Rights Enforcement > Civil Rights Act of 1871
In a case under 42 U.S.C.S. § 1983, in the absence of more specific guidance, the Court looks first to the common law of torts (both modern and as of date of enactment), with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute.

Constitutional Law > Civil Rights Enforcement > Civil Rights Act of 1871
Punitive damages are available in a "proper" 42 U.S.C.S. § 1983 action.

Torts > Damages > Punitive Damages
Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. Punitive damages in tort cases may be awarded not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others, or even gross negligence.

Torts > Damages > Punitive Damages
Constitutional Law > Civil Rights Enforcement > Civil Rights Act of 1871
As a general matter, the Court discerns no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action.

Torts > Damages > Punitive Damages
Constitutional Law > Civil Rights Enforcement > Civil Rights Act of 1871
Punitive damages, by their very nature, are not awarded to compensate the injured party. Deterrence of future egregious conduct is a primary purpose of both 42 U.S.C.S. § 1983 and of punitive damages.

Torts > Damages > Punitive Damages
Constitutional Law > Civil Rights Enforcement > Civil Rights Act of 1871
The Court adopts the policy judgment of the common law -- that reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law, should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages.

Torts > Damages > Punitive Damages
A key feature of punitive damages is that they are never awarded as of right, no matter how egregious the defendant's conduct. If the plaintiff proves sufficiently serious misconduct on the defendant's part, the question whether to award punitive damages is left to the jury, which may or may not make such an award. Compensatory damages, by contrast, are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.

Torts > Damages > Punitive Damages
In situations where the standard for compensatory liability is as high as or higher than the usual threshold for punitive damages, most courts permit awards of punitive

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no societal interest in protecting those uses of a prison guard's discretion that amount to reckless or callous indifference to the rights and safety of the prisoners in his charge. Once the protected sphere of privilege is exceeded, we see no reason why state officers should not be liable for their reckless misconduct on the same basis as private tortfeasors. n23

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n22 As we noted *supra*, at 33-34, Smith does not challenge the instruction on qualified immunity. We therefore assume for purposes of this case that the instruction was correct. See generally, *e. g.*, *Procunier* v. *Navarette*, 434 U.S. 555 (1978).

n23 We reject JUSTICE REHNQUIST's argument, *post*, at 92, that it somehow makes a difference that this suit was brought in federal court -- as though it were inappropriate or unseemly that federal courts dare to enforce federal rights vigorously. Indeed, one wonders whether JUSTICE REHNQUIST would complain as loudly if this § 1983 suit had been brought in state court, as it could have been. Although JUSTICE REHNQUIST casts his argument as an attack on meddling by federal *courts*, the true thrust of his complaint seems to be against federal *law* -- *i. e.*, the Civil Rights Act of 1871. We have explained at length why we think that the policies of that statute call for our holding today.

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[*56] V

[*HR1E]** [1E]
We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. We further hold that this threshold applies even when the underlying standard of liability for compensatory damages is one of recklessness. Because the jury instructions in this case are in accord with this rule, the judgment of the Court of Appeals is

Affirmed.

DISSENTBY: REHNQUIST; O'CONNOR

DISSENT: JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

This case requires us to determine what degree of culpability on the part of a defendant in an action under 42 U. S. C. § 1983 (1976 ed., Supp. V) will permit an award of punitive damages. The District Court instructed the jury that it could award punitive damages in favor of the plaintiff if it concluded that the defendant's conduct constituted "reckless or callous disregard of, or indifference to, the rights or safety of others." In my view, a forthright inquiry into the intent of the 42d Congress and a balanced consideration of the public policies at issue compel the conclusion that the proper standard for an award of punitive damages under § 1983 requires at least some degree of bad faith or improper motive on the part of the defendant.

[*57] The Court rejects a "wrongful intent" standard, instead requiring a **[***652]** plaintiff to show merely "reckless . . . indifference to the federally protected rights of others." The following justifications are offered by the Court for this result: first, the rule in "[most] cases [decided in the last 15 years] under state common law" is "more or less" equivalent to a recklessness standard; second, the Court asserts that a similar rule "[prevailed] at the time when § 1983 was enacted"; and finally, there is an "absence of any persuasive argument" for not applying existing state tort rules to the federal statutory remedies available against state

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and local officials under § 1983. In my opinion none of these justifications, taken singly or together, supports the Court's result. First, the decisions of state courts in the last decade or so are all but irrelevant in determining the intent of the 42d Congress, and thus, the meaning of § 1983. Second, the Court's characterization of the common-law rules prevailing when § 1983 was enacted is both oversimplified and misleading; in fact, the majority rule in 1871 seems to have been that some sort of "evil intent" -- and not mere recklessness -- was necessary to justify an award of punitive damages. Third, the Court's inability to distinguish a *state* court's award of punitive **[**1641]** damages against a state officer from a *federal* court's analogous action under §§ 1983 and 1988 precludes it from adequately assessing the public policies implicated by its decision. Finally, the Court fails utterly to grapple with the cogent and persuasive criticisms that have been offered of punitive damages generally.

I

Before examining these points, however, it is useful to consider briefly the purposes of punitive damages. A fundamental premise of our legal system is the notion that damages are awarded to *compensate* the victim -- to redress the injuries that he or she *actually* has suffered. D. Dobbs, Law of Remedies § 3.1 (1973); C. McCormick, Law of Damages **[*58]** 1 (1935). In sharp contrast to this principle, the doctrine of punitive damages permits the award of "damages" beyond even the most generous and expansive conception of actual injury to the plaintiff. This anomaly is rationalized principally on three grounds. First, punitive damages "are assessed for the avowed purpose of visiting *a punishment* upon the defendant." *Id.*, at 275 (emphasis added); Dobbs, *supra*, § 3.9, at 205; K. Redden, Punitive Damages § 2.1 (1980); Electrical Workers v. Foust, 442 U.S. 42, 48 (1979). Second, the doctrine is rationalized on the ground that it deters persons from violating the rights of others. *Ibid.* Third, punitive damages are justified as a "bounty" that encourages private lawsuits seeking to assert legal rights. *Ibid.*

Despite these attempted justifications, the doctrine of punitive damages has been vigorously criticized throughout the Nation's history. Countless cases remark that such damages have never been "a favorite of the law." n1 The year after § 1983 **[***653]** was enacted, the New Hampshire Supreme Court declared: "The idea of [punitive damages] is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry of the body of the law." Fay v. Parker, 53 N. H. 342, 382 (1872). n2 Such remarks reflect a number of deeply held reservations regarding punitive damages, which can only be briefly summarized here.

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n1 See, *e. g.*, Williams v. Bone, 74 Idaho 185, 189, 259 P. 2d 810, 812 (1953); Jolley v. Puregro Co., 94 Idaho 702, 709, 496 P. 2d 939, 946 (1972); Cays v. McDaniel, 204 Ore. 449, 283 P. 2d 658 (1955); First National Bank of Des Plaines v. Amco Engineering Co., 32 Ill App. 3d 451, 455, 335 N. E. 2d 591, 594 (1975). See also the numerous cases cited at 25 C. J. S., Damages § 117(1), p. 1114, n. 18.5 (1966).

n2 See also *Spokane Truck & Dray Co.* v. Hoefer, 2 Wash. 45, 56, 25 P. 1072, 1075 (1891) ("we believe that the doctrine of punitive damages is unsound in principle, and unfair and dangerous in practice . . ."); Roose v. Perkins, 9 Neb. 304, 315 (1879).

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[*59] Punitive damages are generally seen as a windfall to plaintiffs, who are entitled to receive full compensation for their injuries -- but no more. Even assuming that a punitive "fine" should be imposed after a civil trial, the penalty should go to the State, not to the plaintiff -- who by hypothesis is fully compensated. Moreover, although punitive damages are "quasi-criminal," *Huber* v. *Teuber*, 10 D. C. 484, 490 (1877), their imposition is

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unaccompanied by the types of safeguards present in criminal proceedings. This absence of safeguards is exacerbated by the fact that punitive damages are frequently based upon the caprice and prejudice of jurors. Walther & Plein, Punitive Damages: A Critical Analysis, 49 Marq. L. Rev. 369 (1965). We observed in *Electrical Workers* v. *Foust, supra*, at 50-51, n. 14, that "punitive damages may be employed to punish unpopular defendants," and noted elsewhere that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Finally, the alleged deterrence achieved by punitive damages awards is likely outweighed by the costs -- such as the encouragement of unnecessary litigation and the **[**1642]** chilling of desirable conduct -- flowing from the rule, at least when the standards on which the awards are based are ill-defined. Long, Punitive Damages: An Unsettled Doctrine, 25 Drake L. Rev. 870 (1976).

Because of these considerations, a significant number of American jurisdictions refuse to condone punitive damages awards. See, *e. g.*, *Killibrew* v. *Abbott Laboratories*, 359 So. 2d 1275 (La. 1978); *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1 (1891) (Holmes, J.); *Miller* v. *Kingsley*, 194 Neb. 123, 124, 230 N. W. 2d 472, 474 (1975); *Vratsenes* v. *New Hampshire Auto, Inc.*, 112 N. H. 71, 73, 289 A. 2d 66, 68 (1972); *Pereira* v. *International Basic Economy Corp.*, 95 P. R. R. 28 (1967); *Maki* v. *Aluminum Building Products*, 73 Wash. 2d 23, 25, 436 P. 2d 186, 187 **[*60]** (1968). See also *Murphy* v. *Hobbs*, 7 Colo. 541, 5 P. 119 (1884) (no punitive damages at common law). Other jurisdictions limit the amount of punitive damages that may be awarded, for example, to the plaintiff's attorney's fees, see *Triangle Sheet Metal Works, Inc.* v. *Silver*, 154 Conn. 116, 222 A. 2d 220 (1966), or otherwise, *Riggs* v. *Fremont Insurance Co.*, 85 Mich. App. 203, 270 N. W. 2d 654 (1978).

Nonetheless, a number of States do permit juries to award punitive damages in certain circumstances. Historically, however, there has been little uniformity among the standards applied in these States for determining on what basis a jury might award punitive damages. See, **[***654]** *e. g.*, Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1283, and n. 135 (1976); Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 52-53 (1982) ("the law of punitive damages is characterized by a high degree of uncertainty that stems from the use of a multiplicity of vague, overlapping terms"); *Duckett* v. *Pool*, 34 S. C. 311, 325, 13 S. E. 542, 547 (1891); *Lynd* v. *Picket*, 7 Minn. 184, 200 (1862).

One fundamental distinction is essential to an understanding of the differences among the various standards for punitive damages. Many jurisdictions have required some sort of wrongful motive, actual intention to inflict harm or intentional doing of an act known to be unlawful -- "express malice," "actual malice," "bad faith," "wilful wrong" or "ill will." n3 **[*61]** Other **[**1644]** States, however, have **[***655]** permitted punitive damages awards merely upon a showing of very careless or negligent conduct by the defendant -- "gross negligence," "recklessness," **[*62]** **[***656]** or "extreme carelessness." n4 In sharp contrast to the first set of terms noted above, which connote a requirement of actual ill will towards the plaintiff, these latter phrases import only a degree of negligence. This distinction between **[*63]** acts that are intentionally harmful and those that are very negligent, or unreasonable, involves a basic difference of kind, not just a variation of degree. W. Prosser, Law of Torts § 34, p. 185 (4th ed. 1971); Restatement (Second) of **[*64]** Torts § 500, Comment *f* (1965). The former typically demands inquiry into the actor's subjective motive and purpose, while the latter ordinarily requires only an objective determination of the relative risks and advantages accruing to society from particular behavior. See *id.*, § 282.

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n3 See the cases cited in n. 12, *infra*. Decisions handed down at the time the 42d Congress

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deliberated leave little question that when a court required a showing of malice in order to recover punitive damages, an inquiry into the actual mental state of the defendant -- his motives, intentions, knowledge, or design -- was required. The Court reasons that, when used in connection with punitive damages, "malice" really meant something akin to recklessness. The cases simply do not support the claim. The term "malice" often was prefaced with the qualifiers "actual" or "express." See, *e. g.*, *Barlow* v. *Lowder*, 35 Ark. 492, 496 (1880); *Barnett* v. *Reed*, 51 Pa. 190, 191 (1865); *Boardman* v. *Goldsmith*, 48 Vt. 403, 407, 411 (1875); *Ogg* v. *Murdock*, 25 W. Va. 139, 146-147 (1884). When it was not, the context in which it was used virtually always makes it completely clear that an inquiry into the actual intentions and motives of the defendant was required before punitive damages could be awarded. See, *e. g.*, *Brewer* v. *Watson*, 65 Ala. 88, 96-97 (1880); *Kelly* v. *McDonald*, 39 Ark. 387, 393 (1882); *Davis* v. *Hearst*, 160 Cal. 143, 163-164, 116 P. 530, 539-540 (1911) ("malice of evil motive"); *Huber* v. *Teuber*, 10 D. C. 484, 489-491 (1871); *Jeffersonville R. Co.* v. *Rogers*, 38 Ind. 116, 124-125 (1871); *Curl* v. *Chicago, R. I. & P. R. Co.*, 63 Iowa 417, 428-429, 19 N. W. 308 (1884); *Lynd* v. *Picket*, 7 Minn. 184 (1862); *Carli* v. *Union Depot, Street R. & T. Co.*, 32 Minn. 101, 104, 20 N. W. 89, 90 (1884); *Winter* v. *Peterson*, 24 N. J. L. 524, 529 (1854); *Haines* v. *Schultz*, 50 N. J. L. 481, 484-485, 14 A. 488, 489 (1888); *Causee* v. *Anders*, 20 N. C. 246, 248 (1839); *Windham* v. *Rhame*, 11 S. C. L. 283 (1858). And, even standing alone, the term generally was understood to require inquiry into the defendant's mental state: "In malicious injuries, the injurer foresees the specific evil result and wills it either explicitly or implicitly; in negligent injuries he may foresee a probable danger and may rashly risk the consequences, without being chargeable with a malicious intent." F. Wharton, Law of Negligence § 15 (1874).

Of course, there was a "technical," 19 American and English Encyclopedia of Law 623 (2 ed. 1901), definition of the term that had little to do with actual ill will, but which permitted such a mental state to be presumed from the mere occurrence of an injury. This virtually never was the basis for an award of punitive damages: if it had been, such damages would have been available in every tort action, which never was the rule in any jurisdiction. The Court does not seriously argue otherwise.

Moreover, malice was often the standard employed in jury instructions. *E. g.*, *Hays* v. *Anderson*, 57 Ala. 374 (1876); *Coleman & Newsome* v. *Ryan*, 58 Ga. 132, 134 (1877); *Jeffersonville R. Co.* v. *Rogers, supra*; *Lynd* v. *Picket, supra*; *Morely* v. *Dunbar*, 24 Wis. 183 (1869). There is not the slightest question that a jury of lay persons would have understood the phrase as requiring actual ill will, desire to injure, or other improper motive on the part of the defendant. "Malice" was defined by a dictionary published at the approximate time § 1983 was enacted as "extreme enmity of heart; a disposition to injure others unjustly for personal gratification or from a spirit of revenge; spite; deliberate mischief." Stormonth's English Dictionary 584 (1885). See also Webster's Dictionary 804 (1869); Worcester's Dictionary 873 (1860); 2 Abbott's Law Dictionary 72 (1879) ("a malignant design of evil . . . is the idea attached to the word in popular use"). In short, the available authorities demonstrate that for purposes of punitive damages at the time of the 42d Congress, "malice" imported an actual ill will, intent, or improper motive requirement.

In a few cases decided roughly contemporaneously with the enactment of § 1983, the terms "wanton" and "willful" were used, together with other phrases, to define the proper standard for an award of punitive damages. The Court finds little "ambiguity or confusion" surrounding these terms, and concludes that they clearly indicate a "recklessness" standard. The cases and commentators disagree. As one treatise flatly states: "[The] term 'wanton' has no peculiar legal signification. It has various meanings, depending on the connection in which it is used." 40 Cyclopedia of Law and Procedure 292-293 (1912). The "connection in which ['wanton'] is used," *ibid.*, in punitive damages cases virtually always reveals that the word was merely an alternative phrasing of the evil motive requirement. See, *e. g.*, *Pike* v. *Dilling*, 48 Me. 539 (1861); *Wilkinson* v. *Drew*, 75 Me. 360, 363 (1883); *Devine* v. *Rand*, 38 Vt. 621 (1866); *Boutwell* v. *Marr*, 71 Vt. 1, 11, 42 A. 607, 610 (1899). In the few cases where

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context does not make clear what was meant by "wanton," several considerations suggest that it was likely that an inquiry into the motives and intentions of the defendant was intended. As a general proposition, when used in criminal contexts, wanton meant that "the act done is of a wilful, wicked purpose." 30 American and English Encyclopedia of Law 3 (2d ed. 1905). In deciding whether to impose the "quasi-criminal" punishment of punitive damages, this meaning likely would have been that intended by courts using the phrase.

Moreover, as used in a jury instruction -- as occasionally was the case, see, *e. g., Jeffersonville R. Co.* v. Rogers, supra, at 124-125; *Pike* v. *Dilling, supra* -- the term would have been understood by laymen to require some sort of evil or dissolute intention. See Stormonth's English Dictionary 1146 (1885); Webster's Dictionary 1490 (1869); Worcester's Dictionary 1645 (1860). "Wantonly" most frequently was defined as "lewdly" which in turn was regarded as synonymous with "wickedly." Webster's Dictionary 768 (1869); Worcester's Dictionary 834 (1860). The Court's claim that decisions predicating punitive damages on wantonness reflected a recklessness standard is unfounded. The word had no fixed meaning, and decisions using it must be examined individually; to the extent the phrase did have a common meaning, it was, particularly in the context of punitive sanctions, one implying some sort of bad intent.

Likewise, the Court's conclusion regarding the meaning of decisions using the phrase "willful" is unduly simplified. Like "wanton," the phrase had no fixed meaning, 29 American and English Encyclopedia of Law 114-117 (1895); for the meaning intended in a particular context, reference must be had to the decisions at issue, see n. 12, *infra*. If one must generalize, criminal law again is useful, given the "quasi-criminal" character of punitive damages: "the word, as ordinarily used, means not merely voluntarily, but with bad purpose," 29 American and English Encyclopedia of Law 114 (1895). Even more important, however, is the fact that "willful" seldom, if ever, was an independent standard; rather, "willful injury" or "willfully illegal conduct" were the typical contexts in which the phrase appeared. As to these, even apart from the surrounding language of the punitive damages decisions, it was clear that "[to] constitute wilful injury there must be design, purpose, intent to do wrong and inflict the injury." 30 American and English Encyclopedia of Law 536 (2d ed. 1905). And, of course, a "willful trespass" or other misdeed meant an intentionally wrongful act. *Id.*, at 525-529. Thus, in jurisdictions using the term "willfully," the question generally was whether the defendant knowingly and intentionally harmed the plaintiff, or, alternatively, intentionally committed an act he knew to be tortious or unlawful. In both these cases, inquiry into the wrongful motive of the defendant plainly was demanded; of course, recklessness does not satisfy this requirement.

The Court's discussion of the term "willful negligence" is of little relevance to the common-law standard for punitive damages. The phrase seldom was used, particularly in the punitive damages context, and when it was, it justifiably encountered vigorous criticism. As one court remarked, the phrase "willful neglect" made as much sense as "guilty innocence." Kelly v. Malott, 135 F. 74 (CA7 1905). Faced with what appeared to be a self-contradictory term, the likely reaction of juries, courts, and Members of the 42d Congress would have been to focus on the unequivocal intent and malice requirements common at the time. In short, whatever general statements may have been made in some treatises regarding "wanton" and "willful," in determining the meaning of the terms in this context, a more careful inquiry is demanded. As the foregoing discussion and the cases discussed *infra* demonstrate, that inquiry makes it clear that the Court's recklessness standard was seldom used at the time of the enactment of § 1983.

n4 "Recklessness" generally was defined as "heedlessness" or "negligence," while synonyms included "careless." Stormonth's English Dictionary 832 (1885). In strict legal terms, recklessness is conduct somewhat more dangerous -- and therefore unreasonable -- than merely negligent conduct, see Restatement (Second) of Torts § 500 (1965); despite this distinction, it is plain that recklessness is different from intentionally harmful conduct not just

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in this type of degree, but in kind, *ibid.*, Comment *f*.

Undoubtedly, the recklessness or objective unreasonableness of particular conduct will be evidence of the intent of the actor, see n. 8, *infra*. This point has been recognized by commentators on the subject. In 1 J. Sutherland, Law of Damages (1882), for example, the author states the general rule that "[there] is . . . a marked difference legally, as there is practically, between a tort committed with and without malice; between a wrong done in the assertion of a supposed right, and one wantonly committed. . . ." *Id.*, at 716. The author, however, also observed that "such recklessness or negligence *as evinces* malice or conscious disregard of the rights of others," will support a punitive damages award. *Id.*, at 724 (emphasis added). It is a far different thing to say, as Sutherland does, that the defendant's recklessness is relevant to ascertaining ill will than it is to say, as the Court does, that this lack of care *itself* justifies punitive damages.

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The importance of this distinction is reflected in what one court, speaking not many years before the time § 1983 was enacted, said:

"[In] morals, and the eye of the law, there is a vast difference between the criminality of a person acting mistakenly from a worthy motive, and one committing the same act from a wanton and malignant spirit, and with a corrupt and wicked design." *Simpson* v. *McCaffrey*, 13 Ohio 508, 522 (1844).

The Ohio court, applying this distinction, held that punitive damages could only be awarded where some "evil motive" **[*65]** was involved. *Ibid.* Oliver Wendell Holmes identified precisely the same distinction between intentionally injurious conduct and careless conduct:

"Vengeance imports a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done. [Even] a dog distinguishes between being stumbled over and being kicked." O. Holmes, The Common Law 3 (1881). n5

[*657]** It is illuminating to examine the Court's reasoning with this distinction in mind.

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n5 The same point was made in *Wise* v. *Daniel*, 221 Mich. 229, 233, 190 N. W. 746, 747 (1922), where the court wrote:

"If a cow kicks a man in the face, the consequent physical hurt may equal that from a kick in the face with a hob-nailed boot, but the 'cussedness' of the cow raises no sense of outrage, while the malicious motive back of the boot kick adds materially to the victim's sense of outrage. If a man employs spite and venom in administering a physical hurt, he must not expect his maliciousness to escape consideration when he is cast to make compensation for his wrong."

See also *Inman* v. *Ball*, 65 Iowa 543, 546, 22 N. W. 666, 668 (1885) ("To warrant a jury in inflicting damages by way of punishment, it should appear that the act complained of was a willful or malicious wrong. . . . This is a very different state of mind and purpose from that of a person who has no more than good reason to believe his act is wrongful").

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[1645]** II

At bottom, this case requires the Court to decide when a particular remedy is available under § 1983. Until today, *ante*, at 34-35, n. 2, the Court has adhered, with some fidelity, to the scarcely controversial principle that its proper role in interpreting § 1983 is determining what the 42d Congress intended. That § 1983 is to be interpreted according to this basic principle of statutory construction, 2A C. Sands, Sutherland on Statutory Construction § 45.05 (4th ed. 1972), is clearly demonstrated by our many decisions relying upon the plain language of the section. See, *e. g.*, *Parratt* v. *Taylor*, 451 U.S. 527, 534 (1981); *Maine* v. *Thiboutot*, 448 U.S. 1, 4 (1980); *Owen* v. *City of Independence*, 445 U.S. 622, 635 (1980). The Court's opinion purports to pursue an inquiry **[*66]** into legislative intent, yet relies heavily upon state-court decisions decided well after the 42d Congress adjourned, see *ante*, at 48, n. 13. I find these cases unilluminating, at least in part because I am unprepared to attribute to the 42d Congress the truly extraordinary foresight that the Court seems to think it had. The reason our earlier decisions interpreting § 1983 have relied upon common-law decisions is simple: Members of the 42d Congress were lawyers, familiar with the law of their time. In resolving ambiguities in the enactments of that Congress, as with other Congresses, it is useful to consider the legal principles and rules that shaped the thinking of its Members. The decisions of state courts decided well after 1871, while of some academic interest, are largely irrelevant to what Members of the 42d Congress intended by way of a standard for punitive damages.

In an apparent attempt to justify its novel approach to discerning the intent of a body that deliberated more than a century ago, the Court makes passing reference to our decisions relating to common-law immunities under § 1983. These decisions provide no support for the Court's analysis, since they all plainly evidence an attempt to discern the intent of the 42d Congress, albeit indirectly, by reference to the common-law principles known to Members of that body. In *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), one of our earliest immunity decisions, we phrased the question whether legislators were immune from actions under § 1983 as follows:

"Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity?" *Id.*, at 376.

More recently, in *Newport* v. *Fact* **[***658]** *Concerts, Inc.*, 453 U.S. 247, 258 (1981), we said:

[*67] "It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum. . . . One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary."

Likewise, our other decisions with respect to common-law immunities under § 1983 clearly reveal that our consideration of state common-law rules is only a device to facilitate determination of congressional intent. n6 Decisions from the **[*68]** 1970's, relied on **[**1646]** by the Court, are almost completely irrelevant to this inquiry into legislative intent.

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n6 See also *Briscoe* v. *LaHue*, 460 U.S. 325, 337, 345 (1983) ("[No] evidence that Congress intended to abrogate the traditional common-law witness immunity in § 1983 actions," and "[in] 1871, common-law immunity for witnesses was well settled"); *Imbler* v. *Pachtman*, 424 U.S. 409, 417-418 (1976) ("*Tenney* squarely presented the issue of whether the Reconstruction Congress had intended to restrict the availability in § 1983 suits of those immunities which historically, and for reasons of public policy, had been accorded to various categories of officials"); *Procunier* v. *Navarette*, 434 U.S. 555, 561 (1978) ("Although the Court has recognized that in enacting § 1983 Congress must have intended to expose state officials to damages liability in some circumstances, the section has been consistently construed as not intending wholesale revocation of the common-law immunity afforded government officials"); *Carey* v. *Piphus*, 435 U.S. 247, 255 (1978) ("The Members of the Congress that enacted § 1983 did not address directly the question of damages, but the principle that damages are designed to compensate persons for injuries caused by the deprivation of rights hardly could have been foreign to many lawyers in Congress in 1871"); *Wood* v. *Strickland*, 420 U.S. 308, 316-318 (1975) (relying upon common-law tradition).

Our decision in *Pierson* v. *Ray*, 386 U.S. 547, 553-554 (1967), was based squarely on an attempt to determine what the 42d Congress intended in enacting § 1983. Chief Justice Warren wrote: "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley* v. *Fisher*, 13 Wall. 335 (1872)." Similarly, our decision in *Imbler* v. *Pachtman*, *supra*, at 421, was "predicated upon a considered inquiry into the immunity *historically accorded the relevant official at common law* and the interests behind it" (emphasis added).

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III

The Court also purports to rely on decisions, handed down in the second half of the last century by this Court, in drawing up its rule that mere recklessness will support an award of punitive damages. In fact, these decisions unambiguously support an actual-malice standard. The Court rests primarily on *Philadelphia, W. & B. R. Co.* v. *Quigley*, 21 How. 202 (1859), a diversity tort action against a railroad. There, we initially observed that in "certain actions of tort," punitive damages might be awarded, and then described those actions as "[whenever] the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity." *Id.*, at 214. As discussed previously, n. 3, *supra*, it was relatively clear at the time that "malice" required a **[***659]** showing of actual ill will or intent to injure. Perhaps foreseeing future efforts to expand the rule, however, we hastened to specify the type of malice that would warrant punitive damages: "the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of *was conceived in the spirit of mischief, or of criminal indifference to civil obligations*." 21 How., at 214 (emphasis added). It would have been difficult to have more clearly expressed the "actual malice" standard. We explicitly rejected an "implied malice" formulation, and then mandated inquiry into the "spirit" in which a defendant's act was "conceived."

The Court does not address the requirement, explicitly set forth in *Quigley*, that punitive damages depend on the spirit in which an act was conceived. Instead, focusing only on the words "criminal indifference," *ante*, at 41-42, n. 9, the Court **[*69]** suggests that the use of this phrase indicates that *Quigley* established no requirement of wrongful intent. This is unlikely. An authority on criminal law in the 1870's wrote:

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"In no one thing does criminal jurisprudence differ more from civil more than in its different doctrine concerning the intent. The law, seeking justice between man and man, frequently holds one to the civil consequences of his act, though he neither intended the act, nor suffered himself to be influenced by an evil mind, producing it unintended. . . . But the different nature of the criminal law admits of no such distinction; for crime proceeds only from a criminal mind . . . .

. . . .

". . . There is only one criterion by which the guilt of men is to be tested. It is whether the mind is criminal. . . . It is **[**1647]** therefore a principle of our legal system, as probably it is of every other, that the essence of an offense is the wrongful intent, without which it cannot exist." 1 J. Bishop, Criminal Law §§ 286-287 (5th ed. 1872).

Of course, as the Court notes, there are crimes based on reckless or negligent conduct; it reasons from this that the "criminality" requirement in *Quigley* is not confined to cases where persons act with wrongful intent. Yet the requirement of "criminal" spirit is far more sensibly interpreted, not as incorporating every possible twist and turn of criminal law, but as reflecting "a principle of our legal system . . . that the essence of an offence is the wrongful intent." 1 Bishop, *supra*, § 287. Indeed, the Court's argument proves far too much: if we are to assume that the reference to "criminal indifference" in *Quigley* was meant, as the Court argues, to incorporate every possible mental state that justifies the imposition of criminal sanctions, then punitive damages would be available for simple negligence. Plainly our decision in *Quigley* does not stand for this remarkable proposition.

[*70] Even assuming some ambiguity in our decision in *Quigley*, however, the careful discussion of punitive damages in *Day* v. *Woodworth*, 13 How. 363, 371 (1852), dispels any doubts. While the Court dismisses this treatment as "merely . . . a sidelight," *ante*, at 42, n. 9, in *Quigley* we evidently thought otherwise: in addition to citing and relying explicitly **[***660]** on *Day*, see 21 How., at 213-214, we also drew our punitive damages standard from that case. *Ibid. Day* made it perfectly clear that punitive damages cannot be awarded absent actual evil motive. It reasoned that punitive damages are predicated on the "malice, wantonness, oppression, or outrage of the defendant's conduct," and stated the following standard:

"In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, *had the injury been inflicted without design or intention*, something further by way of punishment or example." 13 How., at 371 (emphasis added).

Elsewhere in *Day* we explained that punitive damages are awarded because of "moral turpitude or atrocity." *Ibid.* It is obvious from these references that we understood the terms "malice" and "wantonness" as requiring that a defendant have acted with evil purposes or intent to do injury. It was with this understanding of the phrases in question that the *Quigley* Court framed its rule, and with this background, any fair reading of that decision could not avoid the conclusion that the Court intended to create an actual-malice requirement.

Our decisions following 1871 indicate yet more clearly that we adhered to an actual-malice or intent-to-injure requirement in punitive damages actions. In *Milwaukee & St. Paul R. Co.* v. *Arms*, 91 U.S. 489 (1876), a verdict against a railroad in a diversity action was reversed because the jury was erroneously charged that it might award punitive damages on **[*71]**

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a finding of "gross negligence." The *Arms* Court first expressed reservations regarding the entire doctrine of punitive damages, remarking that since "the question of intention is always material in an action of tort" in fixing compensatory damages, permitting punitive damages based on the same element posed the threat of double recovery. Nonetheless, acknowledging that the remedy had been approved in *Day* and *Quigley*, the Court concluded that the rule set forth in those decisions should be followed. After quoting the passage in *Quigley*, discussed above, rejecting an implied-malice and adopting an actual-intent-to-injure standard, the Court said:

"[The rule permitting punitive damages is] applicable to suits for personal injuries received through the negligence of others. Redress commensurate to such injuries should be afforded. In ascertaining its extent, the jury may consider **[**1648]** all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go farther, unless *it was done wilfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them*. . . . The tort is aggravated by *the evil motive, and on this rests the rule of exemplary damages*." 91 U.S., at 493 (emphasis added).

Read in context, this language strongly suggests that an actual-malice standard was intended. The rule of exemplary damages "rests" on a defendant's "evil motive," and, while **[***661]** "reckless indifference" may justify some awards of punitive damages, it may do so only in "that" class of "reckless indifference . . . which is equivalent to an *intentional violation"* of the plaintiff's rights. *Ibid.* (emphasis added).

This interpretation of the opinion in *Arms* is the only reading that can be squared with the holding of that case. n7 The **[*72]** Court held that it was error to give an instruction that "gross negligence" would support a finding of punitive damages. This instruction was condemned because "gross negligence" is "a relative term," and "a word of description, and not of definition." *Id.*, at 495. The Court regarded "gross negligence" as too imprecise and ill-defined a standard to support the extraordinary remedy of punitive damages. Given this, it is more than a little peculiar to read the *Arms* opinion as supporting the recklessness standard embraced by the Court.

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n7 Elsewhere in the *Arms* opinion, the Court stated that an award of punitive damages is available only where there was "some wilful misconduct, or that entire want of care which would raise the presumption of a *conscious* indifference to consequences." 91 U.S., at 495 (emphasis added). The Court notes the problems in transforming "indifference . . . into intent," *ante*, at 43-44, n. 10, without confronting the equally difficult task of transforming "[consciousness]" into inadvertence. Plainly, the question whether a defendant was "conscious" of a certain fact demands inquiry into his subjective mental state, not merely an objective determination of the reasonableness of his conduct. As others have observed: "When willfullness enters, negligence steps out. The former is characterized by advertence, and the latter by inadvertence." *Christy* v. *Butcher*, 153 Mo. App. 397, 401, 134 S. W. 1058, 1059 (1911). Yet, on reflection, the *Arms* formulation need not be regarded as self-contradictory: reckless and negligent conduct may be considered, and are highly probative, in determining whether to award punitive damages. They serve, however, as evidence of "willful misconduct," "evil motive," or a *conscious* choice to impose known injury on another, not as the standard for liability itself.

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A leading authority on the law of torts has written that there "is often no clear distinction at

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damages without requiring any extra showing.

Torts > Damages > Punitive Damages

Punitive damages are awarded in the jury's discretion to punish the defendant for his outrageous conduct and to deter him and others like him from similar conduct in the future. The focus is on the character of the tortfeasor's conduct -- whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards.

Constitutional Law > Civil Rights Enforcement > Civil Rights Act of 1871

The Court holds that a jury may be permitted to assess punitive damages in an action under 42 U.S.C.S. § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. It further holds that this threshold applies even when the underlying standard of liability for compensatory damages is one of recklessness.

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SYLLABUS: Respondent, while an inmate in a Missouri reformatory for youthful first offenders, was harassed, beaten, and sexually assaulted by his cellmates. He brought suit under 42 U. S. C. § 1983 in Federal District Court against petitioner, a guard at the reformatory, and others, alleging that his Eighth Amendment rights had been violated. Because of petitioner's qualified immunity, as a prison guard, from § 1983 liability, the trial judge instructed the jury that respondent could recover only if petitioner was guilty of "gross negligence" or "egregious failure to protect" respondent. The judge also charged the jury that it could award punitive damages in addition to actual damages if petitioner's conduct was shown to be "a reckless or callous disregard of, or indifference to, the rights or safety of others." The District Court entered judgment on a verdict finding petitioner liable and awarding both compensatory and punitive damages. The Court of Appeals affirmed.

Held:

1. Punitive damages are available in a proper case under § 1983. While there is little in the legislative history of § 1 of the Civil Rights Act of 1871 (from which § 1983 is derived) concerning the damages recoverable for the tort liability created by the statute, the availability of punitive damages was accepted as settled law by nearly all state and federal courts at the time of enactment. Moreover, this Court has rested decisions on related issues on the premise that punitive damages are available under § 1983. Pp. 34-38.

2. A jury may be permitted to assess punitive damages in a § 1983 action when the defendant's conduct involves reckless or callous indifference to the plaintiff's federally protected rights, as well as when it is motivated by evil motive or intent. The common law, both in 1871 and now, allows recovery of punitive damages in tort cases not only for actual malicious intent, but also for reckless indifference to the rights of others. Neither the policies nor the purposes of § 1983 require a departure from the common-law rule. Petitioner's contention that an actual-intent standard is preferable to a recklessness standard because it is less vague, and would more readily serve the purpose of deterrence of future egregious conduct, is unpersuasive. Cf. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323. Pp. 38-51.

3. The threshold standard for allowing punitive damages for reckless or callous indifference applies even in a case, such as here, where the underlying standard of liability for compensatory damages is also one of recklessness. There is no merit to petitioner's contention that actual malicious intent should be the standard for punitive damages because

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all between ['recklessness'] and 'gross' negligence, and the two have tended to merge and take on the same meaning, of an aggravated form of negligence . . . ." W. Prosser, Law of Torts § 34, p. 185 (4th ed. 1971); see also n. 3, *supra*. Given the virtual identity of the two standards, a Court that held that "gross negligence" was too imprecise a standard to warrant a punitive damages award would not likely have intended its dicta to be read as adopting "recklessness" as an alternative standard. In contrast, a standard of culpability demanding inquiry into the wrongful mental state of the defendant -- "evil motive," **[*73]** "conceived in the spirit of mischief, or of criminal indifference," or "design or intention" to do injury -- is different in kind, not just degree, from the "very careless" standard explicitly rejected by the *Arms* Court. This standard is a significant step away from the "relative" and ill-defined terms of "description" that the Court thought so unsatisfactory; it seems obvious that the *Arms* Court meant to take just such a step.

Moreover, the meaning of the *Arms* decision was made abundantly clear in a case decided the same day *Arms* was handed down. In *Western Union Telegraph Co.* v. *Eyser*, 91 U.S. 495 (1876), the Court reversed a decision of the Supreme Court of the Territory of Colorado holding that on "no view of the evidence was the **[**1649]** court below justified in instructing the jury that exemplary damages could be recovered." **[***662]** The Reporter of Decisions explained: "The [defendant's] omission to . . . give some other proper warning . . . was an act of negligence, entitling the plaintiff to compensatory damages. But there was nothing to authorize the jury to consider the omission as *wilful*: on the contrary, the evidence rebuts every presumption that there was *any intentional wrong.*" *Id.*, at 496 (emphasis added). n8 The defendant in the case, who left electrical wires strung several feet above the ground across a city street in Denver without any real warning, may well have been reckless; certainly, as in fact occurred, a jury could have reached this conclusion. But this was irrelevant: in order to recover punitive damages an "intentional wrong" is what was needed.

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n8 This Court's understanding of the term "willfully" was clearly stated in *Felton* v. *United States*, 96 U.S. 699, 702 (1878), where, in an action to recover a $ 1,000 penalty from a distiller, the Court said: "Doing or omitting to do a thing knowingly and wilfully, implies not only a knowledge of the thing, but a determination with a bad intent . . . ." Likewise, it quoted with approval from a Massachusetts decision stating that "wilfully" ordinarily means "not merely 'voluntarily,' but with a bad purpose." *Ibid*. See also n. 3, *supra*.

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[*74] Perhaps, by minute dissection of stray clauses in a few of the foregoing decisions, combined with a studied refusal to confront the plain intent underlying phrases like "evil motive," "design and intention," and "intentional wrong," one could discern some shadowy rule of liability resting on recklessness. *Ante*, at 39-48. Ninety years ago, however, the Court, after an exhaustive analysis of the foregoing decisions, explicitly and unambiguously reached precisely the opposite conclusion. In *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U.S. 101 (1893), the Court considered whether punitive damages were properly awarded against a railroad in a diversity action. The Court noted that the law on the subject was "well-settled," *id.*, at 107, and paraphrased the *Quigley* standard: The jury may award punitive damages "if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations." 147 U.S., at 107. Then, as it had in *Day* and *Arms*, the Court explained this formulation, observing that a *"guilty intention* on the part of the defendant is *required* in order to charge him with exemplary or punitive damages." 147 U.S., at 107 (emphases added). In addition, the Court quoted, with plain approval, the following statements of the New Jersey Supreme Court in *Haines* v. *Schultz*, 50 N. J. L. 481, 484, 14 A. 488, 489 (1888): "The right to award [punitive damages] rests primarily upon the single ground -- wrongful motive. . . . It is the wrongful personal intention to injure that calls forth the penalty. To this wrongful intent knowledge is an essential prerequisite." 147 U.S., at

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110. The Court went on to note that "criminal intent [is] necessary to warrant the imposition of [punitive] damages," *id.*, at 111, and elsewhere wrote that "wanton, malicious or oppressive intent" and "unlawful and criminal intent," were required for the award of such damages. *Ibid.; id.*, at 114. *Prentice* simply leaves no question that actual wrongful intent, not just recklessness, was required for a **[*75]** recovery of punitive damages, and, in addition, **[***663]** that this was what "well-settled" law always had required. n9

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n9 The Court does not attempt to explain the unequivocal and repeated statements in *Prentice* regarding the necessity of showing "guilty intention." It relies instead on the Court's quotation from a state case that observed in passing that punitive damages have been assessed on "evidence of such willfullness, recklessness or wickedness . . . as amounted to criminality." 147 U.S., at 115. Not only is this statement at best ambiguous, but the Court mentioned the state case only in its discussion of principles of *respondeat superior*, not in its earlier discussion of the standard for punitive damages.

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[1650]** And, once again, in *Scott* v. *Donald*, 165 U.S. 58, 86 (1897), we made it completely clear that actual malice was a prerequisite to a recovery of punitive damages. In *Scott*, we held that a complaint alleging a constitutional tort stated facts sufficient to support a claim for punitive damages. In so holding we carefully analyzed our prior decisions respecting punitive damages beginning with *Day* and continuing through *Prentice*. We repeated and applied the "well-settled" rule contained in those cases: "Damages have been defined to be the compensation which the law will award for an injury done, and are said to be exemplary and allowable in excess of the actual loss, where a tort is aggravated by *evil motive, actual malice, deliberate violence or oppression*." 165 U.S., at 86 (emphasis added). The point could not be clearer. The Court today fashions a federal standard for punitive damages, see 42 U. S. C. § 1988 (1976 ed., Supp. V), yet steadfastly refuses to follow those of our decisions speaking to that point. If it did, it would adopt a standard requiring "evil motive, actual malice, deliberate violence or oppression." *Ibid.*

In addition, the decisions rendered by state courts in the years preceding and immediately following the enactment of § 1983 attest to the fact that a solid majority of jurisdictions took the view that the standard for an award of punitive damages **[*76]** included a requirement of ill will. n10 To be sure, a few jurisdictions **[***664]** followed a broader standard; a careful review of the decisions at the time uncovers a number of decisions **[*77]** **[**1651]** that contain some reference to "recklessness." And equally clearly, in more recent years many courts have adopted a standard including "recklessness" as the minimal degree of culpability warranting punitive damages. n11

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n10 Legal treatises in use in the 1870's do not support the majority's assertion that punitive damages could be awarded on a showing of gross negligence, recklessness, or serious indifference to the rights of others. Instead, they support the rather unsurprising proposition that among the courts of the several States in the late 1870's, several views regarding punitive damages had evolved. Addison's Treatise on the Law of Torts says "in all cases of *malicious injuries and trespasses accompanied by personal insult, or oppressive and cruel conduct*, juries are told to give what are called exemplary damages." 2 C. Addison, Law of Torts 645 (1876) (emphasis added). The treatise continues: "Wherever the wrong or injury is of a grievous nature, done with a high hand, or is accompanied with deliberate intention to injure, or with words of contumely and abuse, and by circumstances of aggravation, the jury" may award punitive damages. *Ibid.* In a footnote Addison indicates that "malice" has been interpreted in several ways, including "an intention to set at defiance the legal rights of

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others," "wantonness or a willful disregard of the rights of others," "such a wanton character that it might properly be said to be willful," and "a disregard for the rights of others." *Id.*, at 646-647, n. 1. Plainly, as discussed in greater detail below, different States applied different rules, and that is all the treatise writer purported to say.

A similar pattern is followed in other hornbooks popular at the time. The authors make reference to some decisions articulating an actual-ill-will standard, while citing as well to decisions accepting a recklessness rule. Compare J. Deering, Law of Negligence § 415, text accompanying n. 1 (1886), with *id.*, at text accompanying n. 7; G. Field, Law of Damages § 78 (1876) ("The rule we have furnished not only requires that the act done should be injurious, and that actual loss be sustained thereby to the plaintiff, but also that it be willfully injurious. The *animus* of the wrongdoer is an important question to be considered in such cases, as it is in criminal cases. The wrong must be intended, and the result of a spirit of mischief, wantonness, or of criminal indifference to civil obligations, or the rights of others, from which malice may well be inferred"), with *id.*, § 84, at 91, n. 4 (gross negligence applied in an Iowa case); F. Hilliard, Law of Remedies for Torts 598-599 (2d ed. 1873) (detailing different standards prevailing); 2 S. Thompson, Law of Negligence 1264-1265 (1880) (noting conflicting views regarding intent requirement).

Moreover, Professor Greenleaf, one of the most respected legal commentators of his time, entirely denied the existence of any doctrine of punitive damages. 2 S. Greenleaf, Law of Evidence § 253 (15th ed. 1892). While his view has prevailed in a substantial minority of American jurisdictions, see *supra*, in many States it concededly has not been followed. Its importance for our purposes, however, lies in the fact that it was the considered judgment of a respected scholar, published and available at the time § 1983 was enacted. Likewise, in 1 J. Sutherland, Law of Damages (1882), the author notes that "bad motive" is necessary for an award of punitive damages, while permitting such a motive to be inferred from proof of negligent or reckless conduct. *Id.*, at 716, 724. Similarly, Judge Mayne's Treatise on Damages, indicated that the applicable standard for an award of punitive damages required some sort of improper motive. J. Mayne, Law of Damages 41 (1856).

n11 See the cases cited by the Court, *ante*, at 48, n. 13. In this regard, it is useful to consider a position commonly held in 1871, and not infrequently followed today. A number of States adhered to the requirement that actual ill will towards a victim was the standard for punitive damages, but permitted jurors to infer this mental state from the character of the tortfeasor's conduct. *E. g., Malone* v. *Murphy*, 2 Kan. 250, 263 (1864) (jury "may infer malice from want of probable cause, but they are not bound so to infer it"); *Lyon* v. *Hancock*, 35 Cal. 372, 376 (1868) ("Malice . . . is generally to be inferred from facts and circumstances"); *Farwell* v. *Warren*, 51 Ill. 467, 472 (1869) ("actuated by malice" which may be inferred from "wanton, willful or reckless disregard"); *Addair* v. *Huffman*, 156 W. Va. 592, 195 S. E. 2d 739 (1973); *Columbus Finance, Inc.* v. *Howard*, 42 Ohio St. 2d 178, 327 N. E. 2d 654 (1975). As one lower court described it, "fraud, oppression or malice" are necessary to recover punitive damages, but these elements "may be inferred from acts constituting such gross negligence as to warrant the inference of or be deemed equivalent to an evil intent." *Schuman* v. *Chatman*, 184 Okla. 224, 227, 86 P. 2d 615, 618 (1938). It is important to appreciate, however, that there is a fundamental distinction between the *standard* for punitive damages and the *evidence the jury may rely upon in meeting that standard*. To say that reckless behavior may, with other evidence, permit the jury to infer a particular mental state, is not to say, as the Court does, that reckless behavior alone satisfies the punitive damages claimant's standard of proof.

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Most clear of all, however, is the fact that at about the time § 1983 was enacted a considerable number of the 37 States **[*78]** then belonging to the Union required some showing of wrongful intent before punitive damages could be awarded. n12 As the cases

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[*668]** **[**1654]** set out in the margin reveal, it is but a statement **[*79]** of the obvious that "evil motive" was the general standard for punitive damages in many States at the time of the 42d Congress.

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n12 See, *e. g.*, *Roberts* v. *Heim*, 27 Ala. 678, 683 (1855) ("the law allows [punitive damages] whenever the trespass is committed in a rude, aggravating, or insulting manner, as malice may be inferred from these circumstances"); *Brewer* v. *Watson*, 65 Ala., at 96-97 ("it is clear . . . that where [a public] officer acts in good faith, he is not liable to exemplary damages"; "there can clearly be no recovery of exemplary . . . damages, without proof of" acts committed "maliciously, and with intent to injure"); *Hays* v. *Anderson*, 57 Ala., at 378; *Barlow* v. *Lowder*, 35 Ark., at 496 (instruction that "exemplary damages [are] allowed as a punishment for torts committed with fraud, actual malice, or deliberate violence or oppression" held a "textbook principle"); *Kelly* v. *McDonald*, 39 Ark., at 393 ("Exemplary damages ought not to be given, unless in cases of intentional violation of another's right, or when a proper act is done with an excess of force or violence, or with a malicious intent to injure another in his person or property"); *Ward* v. *Blackwood*, 41 Ark. 295, 299-301 (1883) (emphasis added) (punitive damages denied because "there was no evidence of previous malice, nor of deliberate cruelty, only of hot blood and a *certain recklessness*"; charge requiring "a wanton and willful manner, and under circumstance of outrage, cruelty and oppression, or with malice" approved); *Dorsey* v. *Manlove*, 14 Cal. 553, 558 (1860) (holding that absence of "bad faith," "wanton or malicious motives," or "willfully unjust or oppressive" conduct barred punitive damages; reference in dicta to "reckless disregard" not applied); *Nightingale* v. *Scannell*, 18 Cal. 315, 325 (1861); *Lyon* v. *Hancock, supra; Davis* v. *Hearst*, 160 Cal., at 163-164, 116 P., at 539-540 ("malice of evil motive" necessary to recover punitive damages in California); *Doroszka* v. *Lavine*, 111 Conn. 575, 150 A. 692 (1930) (reviewing cases limiting punitive damages to amount of attorney's fees); *Dibble* v. *Morris*, 26 Conn. 416, 426-427 (1857) ("settled" that jury can award "vindictive [damages] in proportion to the degree of malice or wantonness evinced by the defendant"); *Welch* v. *Durand*, 36 Conn. 182 (1869) (special rule for ultrahazardous activities); *Dalton* v. *Beers*, 38 Conn. 529 (1871); *Huber* v. *Teuber*, 10 D. C., at 489-491 (punitive damages "are sometimes allowable . . . as punishment of a quasi-criminal character for the wantonness and malice which inspired the wrong of the defendant"; "malignant motives" and "improper motive" required); *Yahoola River Mining Co.* v. *Irby*, 40 Ga. 479, 482 (1869) (*"bona fide* belief" by defendant that he was acting lawfully bars punitive damages); *Green* v. *Southern Express Co.*, 41 Ga. 515 (1871) (jury charge requiring "a desire to injure the accused" approved); *Coleman & Newsome* v. *Ryan*, 58 Ga., at 134, 135 (instruction that jury might award "vindictive damages, if they believed that the conduct of [the defendant] was malicious, and for the purpose of breaking up plaintiff's business"); *Jeffersonville R. Co.* v. *Rogers*, 38 Ind., at 124-125 (charge requiring "the spirit of oppressive malice or wantonness" approved); *Moore* v. *Crose*, 43 Ind. 30, 34-35 (1873) (punitive damages award reversed since "[there] [were] no elements of malice, insult, or deliberate oppression in the case . . . [and] appellant was acting under the belief that he had a valid right"); *Thomas* v. *Isett*, 1 Greene 470, 475 (Iowa 1848) ("wanton, rude, and aggravating manner, indicating malice or a desire to injure," needed for punitive damages); *Frink & Co.* v. *Coe*, 4 Greene 555, 559 (Iowa 1854) (special rule for common carriers); *Brown* v. *Allen*, 35 Iowa 306, 311 (1872) (instruction that malice-in-law would support punitive damages reversed; "This was clearly erroneous. It is an abrogation of the distinction between a simple trespass and its consequences, and a malicious one justifying exemplary damages. A simple trespass, because unlawful, might be, under the instruction, visited with punitive damages, however honestly the defendants may have believed they had the lawful right to take possession of the property in question"); *Fuller* v. *Chicago & N. W. R. Co.*, 31 Iowa 187, 204 (1871); *Curl* v. *Chicago, R. I. & P. R. Co.*, 63 Iowa, at 428-429, 19 N. W. 308 (instruction permitting punitive damages if defendant "willfully used unnecessary force" held improper: "This instruction is erroneous in that it does not make the recovery of exemplary damages dependent upon malice of the wrong doer. It

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holds that the willful use of unnecessary force is a ground for allowing exemplary damages. An act willfully done may not be accompanied by malice, *that is, a spirit of enmity, malevolence or ill will, with a desire to harm and a disposition to injure*"); Inman v. Ball, 65 Iowa, at 465, 22 N. W., at 668 (Rothrock, J.) ("To warrant a jury in inflicting damages by way of punishment, it should appear that the act complained of was a willful or malicious wrong. *There must be a purpose or intent to harass, oppress, or injure another. This is a very different state of mind and purpose from that of a person who has no more than good reason to believe his act is wrongful*"); Wentworth v. Blackman, 71 Iowa 255, 256-257, 32 N. W. 311, 311-312 (1887) (Rothrock, J.) (reversing award of punitive damages; "malicious act," which demands inquiry into defendant's "motives," required); Cameron v. Bryan, 89 Iowa 214, 56 N. W. 434 (1893) (Rothrock, J.) ("willful and malicious" conduct necessary); *Stinson* v. *Buisson*, 17 La. 567, 572 (1841) ("redress in damages should . . . be proportioned to the injury sustained, unless it be where they are given as an example to deter others from similar conduct in future, and really for the purpose of punishing men for their bad motives and intentions"); Biggs v. D'Aquin Bros., 13 La. Ann. 21, 22 (1858) (no punitive damages awardable against party acting in "good faith"); Wilkinson v. Drew, 75 Me., at 363 (while punitive damages are recoverable "in case as well as trespass," to recover them jury must find "that the act or omission of the defendant was willful and wanton," with "wantonly" explicitly defined as "indicating wicked intent"); Pike v. Dilling, 48 Me., at 543 (court approves instruction that punitive damages are awardable if defendant acted "wantonly," quoting statement requiring that defendant acted "'under the influence of actual malice, or with the intention to injure the plaintiff'"); Schindel v. Schindel, 12 Md. 108, 122-123 (1858) ("The man who, from bad and malicious intentions, commits a trespass, ought, in justice, to be dealt with more harshly than one who acts from no vicious feelings, but ignorantly"); *Baltimore & Ohio R. Co.* v. Blocher, 27 Md. 277, 287 (1867); Zimmerman v. Helser, 32 Md. 274, 278 (1869) (no punitive damages unless the defendant acts by "mere *pretence* for the purpose of perpetrating a wrong"); Friend v. Hamill, 34 Md. 298, 304-307, 314 (1870) ("malice, ill-will or corruption" necessary for punitive damages); Ellis v. Brockton Publishing Co., 198 Mass. 538, 542, 84 N. E. 1018, 1019 (1908) (punitive damages have not been and are not recoverable); Hyatt v. Adams, 16 Mich. 180, 198-199 (1867) (refusal to charge that "if from the evidence no evil motive be imputed to the defendant, then the rule of compensation is fixed by law, and . . . exemplary damages are not allowable," reversed); Goetz v. Ambs, 27 Mo. 28, 32-33 (1858) ("[Intention] . . . only becomes material in considering the question of exemplary damages. If the injury is not intentional, but results simply from a want of proper care, nothing more should be recovered than will compensate for the actual damage. . . . [But if] wilfulness -- a wrongful act, done intentionally . . ." exists, punitive damages are available); McKeon v. Citizens' R. Co., 42 Mo. 79, 87 (1867) (neither recklessness nor gross negligence supports punitive damages, which "can be given, if ever in a civil case, only in cases where the injury is intentionally, willfully, and maliciously done"); Lynd v. Picket, 7 Minn., at 201 (instruction that if defendants, knowing plaintiff's property "to be exempt, wilfully and maliciously attached [it with] the purpose of harassing and oppressing" him, then punitive damages are awardable explicitly approved as indicating "the facts necessary to be proved in order to justify [the jury] in giving exemplary damages"; "malice" includes acts defendant "[knows]" are "wrong and unlawful"); Carli v. Union Depot, Street R. & T. Co., 32 Minn., at 104, 20 N. W., at 90 (punitive damages "properly awarded only where the trespass appears to have been wanton, willful, or malicious, -- a *conscious* violation of the [plaintiff's] rights"); Whitfield v. Whitfield, 40 Miss. 352, 366-367 (1866) (punitive damages require "malice, fraud, oppression, or wilful wrong"; no punitive damages if defendant "acts in good faith, and with no intent injuriously to affect plaintiff's rights"); *Memphis & Charleston R. Co.* v. Whitfield, 44 Miss. 466, 488 (1870) (actual-intent rule "modified somewhat in . . . application, particularly to passenger carriers by steam"); Fay v. Parker, 53 N. H. 342 (1872) (no prior decision adopts rule of punitive damages; doctrine rejected entirely); Winter v. Peterson, 24 N. J. L., at 529 (if official acted "not only . . . without authority, but maliciously, he was liable to exemplary damages"; "maliciously" means "from improper motives"); Haines v. Schultz, 50 N. J. L. 481, 484-485, 14 A. 488-489 (1888) (punitive damages "[rest] primarily on a single ground -- wrongful motive. . . . [It] is

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the wrongful personal intention to injure that calls forth the penalty"; "punitive damages [rest] upon a wrongful motive of the defendant"); *King* v. *Patterson*, 49 N. J. L. 417, 419-420, 9 A. 705, 706 (1887) (while "malice" may not always mean actual ill will, when awarding punitive damages "malicious motive was required"); *Causee* v. *Anders*, 20 N. C., at 248 (punitive damages proper where defendant was "actuated by malice and a total disregard of the laws"); *Louder* v. *Hinson*, 49 N. C. 369, 371 (1857) (charge requiring desire "to wreak their vengeance" on the plaintiffs and "harass and insult them" approved); *Roberts* v. *Mason*, 10 Ohio St. 277, 279-280 (1859); *Simpson* v. *McCaffrey*, 13 Ohio 508, 522 (1884) (punitive damages available "for the wicked, corrupt, and malignant motive and design, which prompted [the guilty party] to the wrongful act"); *Rayner* v. *Kinney*, 14 Ohio St. 283, 287 (1863) (exemplary damages are "a punishment which should only attach to a wrongful intention. [Where] no wrongful intention is found, there is no just ground for the punishment of the defendant"); *Barnett* v. *Reed*, 51 Pa., at 191, 196 (instruction that, absent "actual malice or design to injure, the rule is compensatory damages; but where actual malice exists, a formed design to injure and oppress, the jury may give vindictive damages," termed "unexceptionable"); *M'Cabe* v. *Morehead*, 1 Watts & Serg. 513, 516 (Pa. 1841); *Herdic* v. *Young*, 55 Pa. 176, 177 (1867); *McDevitt* v. *Vial*, 7 Sadler 585, 590, 11 A. 645, 648-649 (Pa. 1887) (charge requiring "a high handed spirit, and a disposition to oppress and do wrong" approved); *Herreshoff* v. *Tripp*, 15 R. I. 92, 94, 23 A. 104, 105 (1885) (punitive damages "only when the defendant has acted maliciously or in bad faith"); *Windham* v. *Rhame*, 11 S. C. L., at 285-287 (where evidence "[shows] a malicious motive . . . damages may be awarded not only to recompense the plaintiff but to punish the defendant"; jury must "ascertain if the act be the result of accident or negligence, or of deliberate and evil purpose," and in latter instance, where injury results from "malfeasance," "an amount beyond the pecuniary loss should be given, by way of punishment"; "motive," "malicious purpose," and "intention" dispositive; statement that punitive damages require showing that defendant "malevolently with a view to harass, vex and insult the plaintiff" quoted with approval); *Cole* v. *Tucker*, 6 Tex. 266, 268 (1851) (punitive damages if "fraud, malice, or wilful wrong" or "a desire to injure" exist); *Neill* v. *Newton*, 24 Tex. 202, 204 (1859) (failure to allege "aggravated circumstances of misrepresentation and deception" bars punitive damages); *Bradshaw* v. *Buchanan*, 50 Tex. 492, 494 (1878) (punitive damages award reversed because "there is no evidence tending to show that appellants were actuated by malice . . . or that they [acted] wantonly, or with the intent to vex, harass, injure, or oppress him. On the contrary, the evidence strongly tends to show that they were actuated by no such motive"); *Parsons* v. *Harper*, 57 Va. 64, 78 (1860) (dictum; if an "act were done without malice, the party might not be liable to exemplary and vindictive damages"); *Virginia Railway & Power Co.* v. *House*, 148 Va. 879, 886, 193 S. E. 480, 482 (1927) ("well settled" law requires reversing punitive damages award because there was no evidence of "any malicious or willful wrong"); *Borland* v. *Barrett*, 76 Va. 128 (1882) (punitive damages no different from compensatory damages in Virginia); *Devine* v. *Rand*, 38 Vt., at 626 (emphasis added) (Since punitive damages "[depend] *entirely* upon the character and purpose of the defendant's acts, the usual evidence must be admissible to ascertain the disposition and intention which prompted them"; punitive damages depend on "wickedness and wilfullness"); *Lombard* v. *Batchelder*, 58 Vt. 558, 559-560, 5 A. 511, 512 (1886) ("malicious," "improper," and "evil" motive necessary); *Boutwell* v. *Marr*, 71 Vt., at 11, 42 A., at 610 ("wanton desire to injure"); *Earl* v. *Tupper*, 45 Vt. 275, 287-288 (1873) (after discussing rule in some States, court holds that punitive damages are "to be governed wholly by the malice or wantonness of the defendant"); *Hoadley* v. *Watson*, 45 Vt. 289, 292 (1873) (punitive damages available "on account of the bad spirit and wrong intention of the defendant"); *Boardman* v. *Goldsmith*, 48 Vt., at 407, 411 (instruction requiring that defendant "acted with express malice, intending to injure or disgrace the plaintiff" approved); *Ogg* v. *Murdock*, 25 W. Va., at 146-147 (approves, as "correct rule," statement "when . . . there is no actual malice or design to injure, the rule is to allow compensatory damages; but when actual malice exists, a formed design to injure and oppress, the jury may give vindictive damages"; holds "there being no proof of an intent to injure and oppress the plaintiff, the jury were not authorized to find that the defendant was actuated by malice and consequently they were not justified in giving

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vindictive damages"); *McWilliams* v. *Bragg*, 3 Wis. 424, 431 (1854) ("where . . . injury is inflicted under circumstances of aggravation, insult or cruelty, with vindictiveness and malice" punitive damages available); *Barnes* v. *Martin*, 15 Wis. *240, *245 (1862) (punitive damages not awardable "unless the jury should find that the acts [of the defendant] were without apparent cause, and proceeded from wanton or malicious motives"); *Morely* v. *Dunbar*, 24 Wis. 183, 186-187 (1869) (charge requiring "aggravation, insult, or cruelty, with vindictiveness or malice" approved; "malice" and "motive" are basis for punitive damages); *Hooker* v. *Newton*, 24 Wis. 292, 293 (1869) (approving charge requiring malice and intent to injure); *Hamlin* v. *Spaulding*, 27 Wis. 360, 364 (1870) (defendant must act "in bad faith, and, if not with actual malice, at least for the purpose of serving some ulterior object outside of the administration of criminal justice"); *Pickett* v. *Crook*, 20 Wis. 358 (1866) (not followed outside context of failure to control vicious animals); *Topolewski* v. *Plankinton Packing Co.*, 143 Wis. 52, 70, 126 N. W. 554, 560 (1910) ("the court has uniformly held that punitory damages are not allowable at all without the element of malice[;] the defendant [must have] acted with bad intent of some sort").

The Court's treatment of law prevailing in 1871 relies principally upon state-court decisions from the 1880's and 1890's. These cases are admittedly somewhat more relevant to what the 42d Congress intended than the 20th-century cases cited by the Court; particularly if they explain prior decisions, these cases may reflect a well-settled understanding in a particular jurisdiction of the law regarding punitive damages. Yet, decisions handed down well after 1871 are considerably *less* probative of legislative intent than decisions rendered before or shortly subsequent to the enactment of § 1983: it requires no detailed discussion to demonstrate that a Member of the 42d Congress would have been more influenced by a decision from 1870 than by one from the 1890's. Accordingly, the bulk of the cases cited by the Court must be ignored; they simply illustrate the historical shift in legal doctrine, pointed out in text, from an actual-intent standard to a recklessness standard. If the Court is serious in its attention to 19th-century law, analysis must focus on the common law as it stood at the time of the 42d Congress. Here, notwithstanding the Court's numerous attempts to explain why decisions do not mean what they plainly say, it remains clear that in a majority of jurisdictions actual malice was required in order to recover punitive damages.

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[*80] In short, a careful examination of the decisions available to the Members of the 42d Congress reveals a portrait different in important respects from that painted by the Court. While **[*81]** a few jurisdictions may have adopted a more lenient, if less precise, standard of recklessness, the majority's claim that the prevailing standard in 1871 was one of recklessness simply **[*82]** cannot be sustained. The decisions of this Court, which were likely well known to federal legislators, supported an *animus* requirement. As we said in *Day* v. *Woodworth*, 13 How. 363 **[*83]** (1852), and *Philadelphia, W. & B. R. Co.* v. *Quigley*, 21 How. 202 (1859), a "spirit of mischief" was necessary for an award of punitive damages. Among the States, **[*84]** there were many approaches to the imposition of punitive damages, with a variety of standards prevailing throughout the Nation. Nonetheless, a solid majority of jurisdictions followed the rule that punitive damages require some element of "evil motive," "wickedness," or "formed design to injure and oppress." Thus, if we are to adhere to the principle, consistently followed in our previous decisions, that the Members of the 42d Congress intended § 1983 to reflect existing common-law rules, it is very likely that wrongful *animus* was a prerequisite for an award of punitive damages.

IV

Even apart from this historical background, I am persuaded by a variety of additional factors that the 42d Congress intended a "wrongful intent" requirement. As mentioned above, punitive damages are not, and never have been, a favored remedy. In determining whether Congress, not bound by *stare decisis*, n13 would have embraced this often-condemned

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doctrine, it is worth considering the judgment of one of the most respected commentators in the field regarding the desirability of a legislatively enacted punitive damages remedy: "It is probable that, in the framing of a model code of damages to-day for use in a country unhampered by **[*85]** legal tradition, the doctrine of exemplary damages would find no place." C. McCormick, Law of Damages 276 (1935).

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n13 In 1864 the Kansas Supreme Court, although bound by prior precedent, agreed with Professor Greenleaf's condemnation of punitive damages, see n. 10, *supra*, and said "were the question an open one, we should be inclined to [compensation only]." *Malone* v. *Murphy*, 2 Kan., at 261. See also *Sullivan* v. *Oregon Railway & Navigation Co.*, 12 Ore. 392, 7 P. 508 (1885).

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In deciding whether Congress heeded such advice, it is useful to consider the language of § 1983 itself -- which should, of course, be the starting point for any inquiry into legislative intent. Section 1983 provides:

[1655]** "Every person who, under color **[***669]** of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party *injured* in an action at law, suit in equity, or other proper proceeding *for redress*" (emphasis added).

Plainly, the statutory language itself provides absolutely no support for the cause of action for punitive damages that the Court reads into the provision. Indeed, it merely creates "[liability] to the party injured . . . for redress." "Redress" means "[reparation] of, satisfaction or compensation for, a wrong sustained or the loss resulting from this." 8 Oxford English Dictionary 310 (1933). And, as the Court concedes, punitive damages are not "reparation" or "compensation"; their very purpose is to punish, not to compensate. If Congress meant to create a right to recover punitive damages, then it chose singularly inappropriate words: both the reference to injured parties and to redress suggests compensation, and not punishment.

Other statutes roughly contemporaneous with § 1983 illustrate that if Congress wanted to subject persons to a punitive damages remedy, it did so explicitly. For example, in § 59, 16 Stat. 207, Congress created express punitive damages remedies for various types of commercial misconduct. Likewise, the False Claims Act, § 5, 12 Stat. 698, provided a civil remedy of double damages and a $ 2,000 civil forfeiture penalty for certain misstatements to the Government. As one **[*86]** Court of Appeals has remarked: "Where Congress has intended [to create a right to punitive damages] it has found no difficulty in using language appropriate to that end." *United Mine Workers* v. *Patton*, 211 F.2d 742, 749 (CA4 1954). And yet, in § 1983 one searches in vain for some hint of such a remedy. n14

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n14 I agree with the Court's conclusion that the Act of May 31, 1870, § 2, 16 Stat. 140, is "revealing." That statute, like § 1983, was a Reconstruction civil rights statute. It created a private cause of action for persons suffering from racial discrimination in voting registration, and explicitly allowed recovery of a $ 500 civil penalty by the person aggrieved. Similar provision for recovery of punitive damages is conspicuously absent from § 1983. Likewise,

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the Act clearly conditions the award of damages on a knowing violation of the civil rights laws. It is difficult to see what comfort the Court derives from the section. It merely demonstrates that when Congress wished to impose punitive damages on a party, it did so explicitly, and, even then, required more than recklessness.

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In the light of the foregoing indications, it is accurate to say that the foundation upon which the right to punitive damages under § 1983 rests is precarious, at the best. Given the extraordinary diffidence and obliqueness with which the right was granted -- if it was -- it seems more than a little unusual to read that grant as incorporating the most expansive of the available views as to the standard for punitive damages. Given the legislative ambiguity, the sensible approach to the problem would be an honest recognition that, if we are to infer a right to punitive damages, it should be a restrained one, reflecting the Legislature's approach in creating the right. And surely, the right ought to be limited by the view of punitive damages that the Members of the 42d Congress **[***670]** would have had -- not by what some state courts have done a century later.

An intent requirement, unlike a recklessness standard, is logically consistent with the underlying justification for *punitive* damages. It is a fundamental principle of American law that penal consequences generally ought to be imposed only where there has been some sort of wrongful *animus* creating **[*87]** the type of culpability warranting this treatment. As we said in *Morissette* v. *United States*, 342 U.S. 246, 250-251 (1952): "A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar **[**1656]** exculpatory 'But I didn't mean to.'" This principle "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Id.*, at 250. Indeed, as indicated previously, 19th-century decisions consistently justified the imposition of a quasi-criminal "fine" by reference to the "wickedness" or "evil" conduct of the defendant, just as Oliver Wendell Holmes drew a sharp distinction between accidentally and intentionally kicking an animal. Given that punitive damages are meant to punish, it is difficult to believe that Congress would have departed from the "instinctive," "universal and persistent" linkage in our law between punishment and wrongful intent.

V

Finally, even if the evidence of congressional intent were less clearcut, I would be persuaded to resolve any ambiguity in favor of an actual-malice standard. It scarcely needs repeating that punitive damages are not a "favorite of the law," see *supra*, at 58, owing to the numerous persuasive criticisms that have been leveled against the doctrine. The majority reasons that these arguments apply to all awards of punitive damages, not just to those under § 1983; while this is of course correct, it does little to reduce the strength of the arguments, and, if they are persuasive, we should not blindly follow the mistakes other courts have made.

Much of what has been said above regarding the failings of a punitive damages remedy is equally appropriate here. It is anomalous, and counter to deep-rooted legal principles and common-sense notions, to punish persons who meant no harm, and to award a windfall, in the form of punitive damages, to someone who already has been fully compensated. **[*88]** These peculiarities ought to be carefully limited -- not expanded to every case where a jury may think a defendant was too careless, particularly where a vaguely defined, elastic standard like "reckless indifference" gives free reign to the biases and prejudices of juries. In short, there are persuasive reasons not to create a new punitive damages remedy unless it is clear that Congress so intended.

This argument is particularly powerful in a case like this, where the uncertainty resulting

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from largely random awards of punitive damages will have serious effects upon the performance by state and local officers **[***671]** of their official duties. n15 One of the principal themes of our immunity decisions is that the threat of liability must not deter an official's "willingness to execute his office with the decisiveness and the judgment required by the public good." *Scheuer* v. *Rhodes*, 416 U.S. 232, 240 (1974). To avoid stifling the types of initiative and decisiveness necessary for the "government to govern," *Dalehite* v. *United States*, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting), we have held that officials will be liable for compensatory damages only for certain types of conduct. Precisely the same reasoning applies to liability for punitive damages. Because punitive damages generally are not subject to any relation to actual harm suffered, and because the recklessness standard is so imprecise, the remedy poses an even greater threat to the ability of officials to take decisive, efficient action. After the Court's decision, governmental officials will be subjected to the possibility of damages awards unlimited by any harm they may have caused or the fact they acted with unquestioned good faith: when swift action is demanded, their thoughts likely will be on personal financial consequences that may result from their conduct -- but whose limits they cannot predict -- and not upon their **[*89]** official duties. It would have been difficult for the Court to **[**1657]** have fashioned a more effective Damoclean sword than the open-ended, standardless, and unpredictable liability it creates today. n16

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n15 This is not a new concern, see, *e. g.*, *Brewer* v. *Watson*, 65 Ala., at 96-97 (absent an actual-malice standard for punitive damages "few men, fit for such positions, could be induced to accept public trusts of this character").

n16 The Court relies all but exclusively on the notion that a recklessness standard for punitive damages is necessary to deter unconstitutional conduct by state officials. The issue is a little more complicated. The deterrence the Court pursues necessarily is accompanied by costs: as our decisions regarding common-law immunities explicitly recognize, see cases cited in n. 6, *supra*, the imposition of personal liability on officials gravely threatens their initiative and judgment, and scarcely serves to make public positions attractive to competent, responsible persons. While constitutional rights are high on our scale of values, so is an effective performance of the countless basic functions that modern governments increasingly have come to perform. In fashioning a punitive damages standard we should seek to achieve that level of deterrence that is most worth the costs it imposes.

The Court, however, simply ignores the potential costs of the standard it embraces. This single-minded desire to deter unconstitutional official actions would not logically stop at recklessness; awarding punitive damages on the basis of mere negligence, or on a strict liability basis, might result, in the short term, in even less unconstitutional conduct. Yet, just as with the Court's recklessness standard, this deterrence would come at too costly a price. The Court is unable to give any reason, related to achieving deterrence at a cost sensibly related to benefits obtained, for its choice of a recklessness standard. It offers no response to the obvious distinctions between the standard for punitive damages in state-law tort actions and that in § 1983 actions, where § 1988 provides attorney's fees and where issues of federalism are involved. It does not even attempt to discuss the plainly relevant question whether insurance may be obtained against punitive damages awards.

While fully recognizing that the issue is a complex one, in my judgment the dangers that accompany the vague recklessness standard adopted by the Court far outweigh the deterrence achieved thereby. Recklessness too easily shades into negligence, particularly when the defendant is an unpopular official -- whether because of his official actions, or for more invidious reasons. Punitive damages are not bound by a measure of actual damages, so when a jury does act improperly, the harm it may occasion can be great. These threats occur in an area -- the provision of governmental services -- where it is important to have efficient, competent public servants. I fear that the Court's decision poorly serves this goal, and that in

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the deterrent purposes of such damages would be served only if the threshold for those damages is higher in every case than the underlying standard for liability in the first instance. The common-law rule is otherwise, and there is no reason to depart from the common-law rule in the context of § 1983. Pp. 51-55.

COUNSEL: Robert Presson argued the cause for petitioner. With him on the brief were John Ashcroft, Attorney General of Missouri, and Paul Robert Otto, Assistant Attorney General.

Bradley H. Lockenvitz argued the cause and filed a brief for respondent.

JUDGES: BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL, J., joined, post, p. 56. O'CONNOR, J., filed a dissenting opinion, post, p. 92.

OPINIONBY: BRENNAN

OPINION: [*31] [*636] [**1627]** JUSTICE BRENNAN delivered the opinion of the Court.

[*HR1A]** [1A]
We granted certiorari in this case, 456 U.S. 924 (1982), to decide whether the District Court for the Western District of Missouri applied the correct legal standard in instructing the jury that it might award punitive damages under 42 U. S. C. § 1983 (1976 ed., Supp. V). n1 The Court of Appeals for the Eighth Circuit sustained the award of punitive damages. *Wade* v. *Haynes*, 663 F.2d 778 (1981). We affirm.

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n1 ↑Rev. Stat. § 1979, amended, 93 Stat. 1284. Section 1983 reads in relevant part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

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[*32] I

The petitioner, William H. Smith, is a guard at Algoa Reformatory, a unit of the Missouri Division of Corrections for youthful first offenders. The respondent, Daniel R. Wade, was assigned to Algoa as an inmate in 1976. In the summer of 1976 Wade voluntarily checked into Algoa's protective custody unit. Because of disciplinary violations during his stay in protective custody, Wade was given a short term in punitive segregation and then transferred to administrative segregation. On the evening of Wade's first day in administrative segregation, he was placed in a cell with another inmate. Later, when Smith came on duty in Wade's dormitory, he placed a third inmate in Wade's cell. According to Wade's testimony, his cellmates harassed, beat, and sexually assaulted him.

Wade brought suit under 42 U. S. C. § 1983 against Smith and four other guards and correctional officials, alleging that his Eighth Amendment rights had **[**1628]** been violated. At trial his evidence showed that he had placed himself in protective custody because of prior incidents of violence against him by other inmates. The third prisoner whom

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the end, official conduct will be less useful to our citizens, not better.

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[*672]** Moreover, notwithstanding the Court's inability to discern them, there are important distinctions between a right to **[*90]** damages under § 1983 and a similar right under state tort law. A leading rationale seized upon by proponents of punitive damages to justify the doctrine is that "the award is . . . a covert response to the legal system's overt refusal to provide financing for litigation." D. Dobbs, Law of Remedies 221 (1973); K. Redden, Punitive Damages § 2.4(C) (1980). Yet, 42 U. S. C. § 1988 (1976 ed., Supp. V) provides not just a "covert response" to plaintiffs' litigation expenses but an explicit provision for an award to the prevailing party in a § 1983 action of "a reasonable attorney's fee as part of the costs." By permitting punitive damages *as well as* attorney's fees, § 1983 plaintiffs, unlike state tort law plaintiffs, get not just one windfall but two -- one for them, and one for their lawyer. This difference between the incentives that are present in state tort actions, and those in § 1983 actions, makes the Court's reliance upon the standard for punitive damages in the former entirely inapposite: in fashioning a new financial lure to litigate under § 1983 the Court does not act in a vacuum, but, by adding to existing incentives, creates an imbalance of inducements to litigate that may have serious consequences. n17

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n17 In this respect, Congress' attitude towards punitive damages as revealed by its treatment of the subject in the Civil Rights Act of 1968 is highly illuminating. There, in marked contrast to § 1983, Congress explicitly included a right to punitive damages; notably, however, that right was limited to recoveries of $ 1,000. 42 U. S. C. § 3612(c). While Congress may have thought punitive damages appropriate in some cases, it recognized the dangers that such a remedy creates -- unfairness to defendants, stifling of initiative of state officials, comity concerns, and, perhaps most alarmingly, an open-ended incentive to litigate in a field where other such incentives already exist. See, *e. g.*, 42 U. S. C. § 1988 (1976 ed., Supp. V).

Petitioner did not argue, and the Court properly does not decide, whether the $ 1,000 limit in 42 U. S. C. § 3612(c), also should apply in actions under § 1983. It seems likely that it would. While the Court does not say so, its opinion seems to derive its punitive damages remedy from "the laws of the United States," concluding *sub silentio* that they "are suitable to carry [§ 1983] into effect." 42 U. S. C. § 1988 (1976 ed., Supp. V). (This follows from the Court's apparent view that, for example, in one of the several States where punitive damages are not available, a § 1983 plaintiff could recover such damages, thus indicating that it is not "the common law . . . of the State wherein the court having jurisdiction of such civil or criminal cause is held," § 1988, that the Court is applying.) If, therefore, we are to apply a punitive damages remedy "in conformity with the laws of the United States," then the most relevant law is 42 U. S. C. § 3612(c), limiting punitive damages in certain civil rights actions to $ 1,000.

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[*91] **[**1658]** The staggering effect of § 1983 claims upon the work load of the federal courts has been decried time and again. The torrent of frivolous claims under that section threatens to incapacitate the judicial system's resolution of claims where true injustice is involved; those claims which truly warrant redress are in a very real danger of being lost in a sea of meritless suits. Yet, apparently oblivious to this, the Court today reads into the silent, inhospitable terms of § 1983 a remedy that is designed to serve as a "bounty" to encourage private litigation. Dobbs, *supra*, at 221. In a time when the courts are flooded with suits that do not raise colorable claims, in large **[***673]** part because of the existing incentives for litigation under § 1983, it is regrettable that the Court should take upon itself, in apparent

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disregard for the likely intent of the 42d Congress, the legislative task of encouraging yet more litigation. n18 There is a limit to what the federal judicial system can bear.

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n18 The case is materially different from our decision in *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982), where our previous decisions strongly suggested that exhaustion of state administrative remedies is not required under § 1983. Here, our previous statements as to the standard for a recovery of punitive damages are inconsistent with the Court's formulation. In *Carey* v. *Piphus*, 435 U.S., at 257, n. 11, we implied that the absence of "malicious intention" would preclude an award of punitive damages. And, as discussed above, the standard for punitive damages recoveries in constitutional tort actions was that the case involve "a tort . . . aggravated by evil motive, actual malice, deliberate violence or oppression." *Scott* v. *Donald*, 165 U.S. 58, 86 (1897).

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[*92] Finally, by unquestioningly transferring the standard of punitive damages in *state* tort actions to *federal* § 1983 actions, the Court utterly fails to recognize the fundamental difference that exists between an award of punitive damages by a federal court, acting under § 1983, and a similar award by a state court acting under prevailing local laws. While state courts may choose to adopt such measures as they deem appropriate to punish officers of the jurisdiction in which they sit, the standards they choose to adopt can scarcely be taken as evidence of what it is appropriate for a federal court to do. See *Edelman* v. *Jordan*, 415 U.S. 651, 677, n. 19 (1974). When federal courts enforce punitive damages awards against local officials they intrude into sensitive areas of sovereignty of coordinate branches of our Nation, thus implicating the most basic values of our system of federalism. Moreover, by yet further distorting the incentives that exist for litigating claims against local officials in federal court, as opposed to state courts, the Court's decision makes it even more difficult for state courts to attempt to conform the conduct of state officials to the Constitution.

I dissent.

JUSTICE O'CONNOR, dissenting.

Although I agree with the result reached in JUSTICE REHNQUIST's dissent, I write separately because I cannot agree with the approach taken by either the Court or JUSTICE REHNQUIST. Both opinions engage in exhaustive, but ultimately unilluminating, exegesis of the common law of the availability of punitive damages in 1871. Although both the Court and JUSTICE REHNQUIST display admirable skills in legal research and analysis of great numbers of musty cases, the results do not significantly further the goal of the inquiry: to establish the intent of the 42d Congress. In interpreting § 1983, we have **[**1659]** often looked to the common law as it existed in 1871, in the belief that, when Congress was silent on a point, it intended to adopt the principles of the common law with which it was familiar. See, *e. g.*, *Newport* v. *Fact Concerts,* **[*93]** *Inc.*, 453 U.S. 247, 258 (1981); *Carey* v. *Piphus*, 435 U.S. 247, 255 (1978). This approach makes sense when there was a generally prevailing rule of common law, for **[***674]** then it is reasonable to assume that Congressmen were familiar with that rule and imagined that it would cover the cause of action that they were creating. But when a significant split in authority existed, it strains credulity to argue that Congress simply assumed that one view rather than the other would govern. Particularly in a case like this one, in which those interpreting the common law of 1871 must resort to dictionaries in an attempt to translate the language of the late 19th century into terms that judges of the late 20th century can understand, see *ante*, at 39-41, n. 8; 61-64, nn. 3, 4, and in an area in which the courts of the earlier period frequently used inexact and contradictory language, see *ante*, at 45-47, n. 12, we cannot safely infer anything about congressional intent from the divided contemporaneous judicial opinions. The battle of the string citations can have no

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winner.

Once it is established that the common law of 1871 provides us with no real guidance on this question, we should turn to the policies underlying § 1983 to determine which rule best accords with those policies. In *Fact Concerts*, we identified the purposes of § 1983 as pre-eminently to compensate victims of constitutional violations and to deter further violations. 453 U.S., at 268. See also *Robertson* v. *Wegmann*, 436 U.S. 584, 590-591 (1978); *Carey* v. *Piphus*, *supra*, at 254-257, and n. 9. The conceded availability of compensatory damages, particularly when coupled with the availability of attorney's fees under § 1988, completely fulfills the goal of compensation, leaving only deterrence to be served by awards of punitive damages. We must then confront the close question whether a standard permitting an award of unlimited punitive damages on the basis of recklessness will chill public officials in the performance of their duties more than it will deter violations of the Constitution, and whether the availability of punitive damages for reckless violations of the Constitution in addition to attorney's fees will create an **[*94]** incentive to bring an ever-increasing flood of § 1983 claims, threatening the ability of the federal courts to handle those that are meritorious. Although I cannot concur in JUSTICE REHNQUIST's wholesale condemnation of awards of punitive damages in any context or with the suggestion that punitive damages should not be available even for intentional or malicious violations of constitutional rights, I do agree with the discussion in Part V of his opinion of the special problems of permitting awards of punitive damages for the recklessness of public officials. Since awards of compensatory damages and attorney's fees already provide significant deterrence, I am persuaded that the policies counseling against awarding punitive damages for the recklessness of public officials outweigh the desirability of any incremental deterrent effect that such awards may have. Consequently, I dissent.

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Smith added to the cell had been placed in administrative segregation for fighting. Smith had made no effort to find out whether another cell was available; in fact there was another cell in the same dormitory with only one occupant. Further, only a few weeks earlier, another inmate had been beaten to death in the same dormitory during the same shift, while Smith had been on duty. Wade asserted that Smith and the other defendants knew or should have known that an assault against him was likely under the circumstances.

During trial, the District Judge entered a directed verdict for two of the defendants. He instructed the **[***637]** jury that Wade could make out an Eighth Amendment violation only by showing "physical abuse of such base, inhumane and barbaric proportions as to shock the sensibilities." Tr. 639. Further, because of Smith's qualified immunity as a prison **[*33]** guard, see *Procunier* v. *Navarette*, 434 U.S. 555 (1978), the judge instructed the jury that Wade could recover only if the defendants were guilty of "gross negligence" (defined as "a callous indifference or a thoughtless disregard for the consequences of one's act or failure to act") or "[egregious] failure to protect" (defined as "a flagrant or remarkably bad failure to protect") Wade. Tr. 641-642. He reiterated that Wade could not recover on a showing of simple negligence. *Id.*, at 644.

The District Judge also charged the jury that it could award punitive damages on a proper showing:

"In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

"If you find the issues in favor of the plaintiff, and if the conduct of one or more of the defendants is shown to be *a reckless or callous disregard of, or indifference to, the rights or safety of others*, then you may assess punitive or exemplary damages in addition to any award of actual damages.

". . . The amount of punitive or exemplary damages assessed against any defendant may be such sum as you believe will serve to punish that defendant and to deter him and others from like conduct." *Id.*, at 643 (emphasis added).

The jury returned verdicts for two of the three remaining defendants. It found Smith liable, however, and awarded $ 25,000 in compensatory damages and $ 5,000 in punitive damages. The District Court entered judgment on the verdict, and the Court of Appeals affirmed. *Wade* v. *Haynes*, 663 F.2d 778 (1981).

In this Court, Smith attacks only the award of punitive damages. He does not challenge the correctness of the instructions **[*34]** on liability or qualified immunity, nor does he question the adequacy of the evidence to support the verdict of liability for compensatory damages.

II

[*HR2]** [2]
Section 1983 is derived from § 1 of the Civil Rights Act of 1871, 17 Stat. 13. It was intended to create "a species of tort liability" in favor of persons deprived of federally secured rights. *Carey* v. *Piphus*, 435 U.S. 247, 253 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976). We noted in *Carey* that there was little in the section's legislative history concerning the damages recoverable for this tort liability, 435 U.S., at 255. In the absence of more specific guidance, we looked first to the common law of torts (both modern and as of 1871), with

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such modification or adaptation as might be necessary to carry out the purpose and policy of the statute. *Id.*, at 253-264. We have done the same in other contexts **[**1629]** arising under § 1983, **[***638]** especially the recurring problem of common-law immunities. n2

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n2 *Briscoe* v. *LaHue*, 460 U.S. 325 (1983); *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981); *Procunier* v. *Navarette*, 434 U.S. 555 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951).

JUSTICE REHNQUIST's dissent faults us for referring to modern tort decisions in construing § 1983. Its argument rests on the unstated and unsupported premise that Congress necessarily intended to freeze into permanent law whatever principles were current in 1871, rather than to incorporate applicable general legal principles as they evolve. *Post*, at 65-68; see also *post*, at 92-93 (O'CONNOR, J., dissenting). The dissents are correct, of course, that when the language of the section and its legislative history provide no clear answer, we have found useful guidance in the law prevailing at the time when § 1983 was enacted; but it does not follow that that law is absolutely controlling, or that current law is irrelevant. On the contrary, if the prevailing view on some point of general tort law had changed substantially in the intervening century (which is not the case here), we might be highly reluctant to assume that Congress intended to perpetuate a now-obsolete doctrine. See *Carey* v. *Piphus*, 435 U.S. 247, 257-258 (1978) ("[Over] the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well") (footnote omitted); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 231-232 (1970) (BRENNAN, J., concurring and dissenting); *Pierson, supra*, at 555 (citing modern authority for "the prevailing view in this country"); *Wood, supra*, at 318-319, and n. 9; *Tenney, supra*, at 375, and n. 5. Indeed, in *Imbler* we recognized a common-law immunity that first came into existence 25 years after § 1983 was enacted, 424 U.S., at 421-422. Under the dissents' view, *Imbler* was wrongly decided.

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[*35]

[*HR3]** [3]
Smith correctly concedes that "punitive damages are available in a 'proper' § 1983 action . . ." *Carlson* v. *Green*, 446 U.S. 14, 22 (1980); Brief for Petitioner 8. Although there was debate about the theoretical correctness of the punitive damages doctrine in the latter part of the last century, the doctrine was accepted as settled law by nearly all state and federal courts, including this Court. n3 It was likewise generally established that individual public officers were liable for punitive damages for their misconduct on the same basis as other individual defendants. n4 See also *Scott* v. *Donald*, 165 U.S. 58, 77-89 (1897) (punitive damages for constitutional tort). Further, although the precise **[***639]** issue of the availability of punitive damages under § 1983 has never come squarely **[*36]** before us, we have had occasion more than once to make clear our view that they are available; indeed, we have rested decisions on related questions on the premise of such availability. n5

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n3 See, *e. g.*, the cases cited in nn. 8 and 12, *infra*; *Day* v. *Woodworth*, 13 How. 363 (1852); *Philadelphia, W. & B. R. Co.* v. *Quigley*, 21 How. 202 (1859); *Milwaukee & St. Paul R. Co.* v. *Arms*, 91 U.S. 489 (1876); *Missouri Pacific R. Co.* v. *Humes*, 115 U.S. 512 (1885); *Barry* v. *Edmunds*, 116 U.S. 550 (1886); *Minneapolis & St. Louis R. Co.* v. *Beckwith*, 129 U.S. 26

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(1889); *Scott* v. *Donald*, 165 U.S. 58 (1897).

n4 *E. g., Nightingale* v. *Scannell*, 18 Cal. 315, 324-326 (1861); *Friend* v. *Hamill*, 34 Md. 298, 314 (1871); *Lynd* v. *Picket*, 7 Minn. 184, 200-202 (1862); *Parker* v. *Shackelford*, 61 Mo. 68, 72 (1875); *Rodgers* v. *Ferguson*, 36 Tex. 544 (1871); see, *e. g.*, *Stinson* v. *Buisson*, 17 La. 567, 572-573 (1841); *Nagle* v. *Mullison*, 34 Pa. 48 (1859); *Von Storch* v. *Winslow*, 13 R. I. 23, 24-25 (1880). Cf. *Brewer* v. *Watson*, 71 Ala. 299, 307 (1882). See also, *e. g.*, *Lane* v. *Yamamoto*, 2 Haw. App. 176, 628 P. 2d 634 (1981); *Wilson* v. *Eagan*, 297 N. W. 2d 146, 148-150 (Minn. 1980).

n5 In *Newport* v. *Fact Concerts, Inc., supra*, for example, we held that a municipality (as opposed to an individual defendant) is immune from liability for punitive damages under § 1983. A significant part of our reasoning was that deterrence of constitutional violations would be adequately accomplished by allowing punitive damages awards directly against the responsible individuals:

"Moreover, there is available a more effective means of deterrence. By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute [§ 1983] directly advances the public's interest in preventing repeated constitutional deprivations. In our view, this provides sufficient protection against the prospect that a public official may commit recurrent constitutional violations by reason of his office." *Id.*, at 269-270 (footnote omitted).

Similarly, in *Carlson* v. *Green*, 446 U.S. 14 (1980), we stated that punitive damages would be available in an action against federal officials directly under the Eighth Amendment, partly on the reasoning that since such damages are available under § 1983, it would be anomalous to allow punitive awards against state officers but not federal ones. *Id.*, at 22, and n. 9. See also *Adickes* v. *S. H. Kress & Co., supra*, at 233 (BRENNAN, J., concurring and dissenting); *Carey* v. *Piphus, supra*, at 257, n. 11; *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975) (punitive damages available under 42 U. S. C. § 1981).

JUSTICE REHNQUIST's dissent, without squarely denying that punitive damages are available under § 1983, does its best to cast doubt on the proposition. It argues that the phrase "for redress" at the end of the section means that Congress intended to limit recovery to compensatory damages. *Post*, at 85; see n. 1, *supra*. This novel construction is strained; a more plausible reading of the statute is that the phrase "or other proper proceeding for redress" is simply an expansive alternative to the preceding phrases "action at law" and "suit in equity," intended to avoid any unwanted technical limitations that might lurk in the other phrases.

Next JUSTICE REHNQUIST points to two other statutes enacted in 1863 and 1870 that provided expressly for punitive remedies. *Post*, at 85-86. Neither of these statutes enacted a punitive damages remedy as such, although they did create other forms of punitive civil remedies. The Act of March 2, 1863, § 3, 12 Stat. 698, created a civil fine for fraudulent military claims, apparently intended to stimulate suit by private attorneys general. The Act of July 8, 1870, § 59, 16 Stat. 207, was the treble damages provision of the revised patent code. These statutes do not support JUSTICE REHNQUIST's speculation that Congress acted expressly when it intended to approve punitive damages, since both statutes created new remedies not available at common law; moreover, they undercut his argument that Congress was hostile to punitive civil remedies in favor of private parties.

Finally, JUSTICE REHNQUIST argues that Congress would not likely have approved "this often-condemned doctrine" in the 1871 Civil Rights Act. *Post*, at 84. This speculation is remarkable, to say the least, given that Congress did approve a punitive civil remedy in an 1870 Civil Rights Act. Act of May 31, 1870, § 2, 16 Stat. 140 (creating private cause of action for fixed penalty on behalf of persons suffering racial discrimination in voting registration).

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Cf. 1889 Colo. Sess. Laws 64 (enacting punitive damages statute, including awards for "wanton and reckless disregard," five years after state court held against doctrine). At any rate, the punitive damages debate, though lively, was by no means one-sided. See, *e. g., Missouri Pacific R. Co.* v. *Humes, supra*, at 521-523; *Linsley* v. *Bushnell*, 15 Conn. 225, 235-237 (1842); *Frink & Co.* v. *Coe*, 4 Greene 555, 559-560 (Iowa 1854); *Chiles* v. *Drake*, 59 Ky. 146, 152-153 (1859); *Lynd* v. *Picket, supra*, at 200-201; *Taylor* v. *Grand Trunk R. Co.*, 48 N. H. 304, 320 (1869), overruled, *Fay* v. *Parker*, 53 N. H. 342 (1872); *Mayer* v. *Frobe*, 40 W. Va. 246, 22 S. E. 58 (1895); *Cosgriff Brothers* v. *Miller*, 10 Wyo. 190, 236-237, 68 P. 206, 216-217 (1902). See also *Tillotson* v. *Cheetham*, 3 Johns. 56, 63-64 (N. Y. 1808) (Kent, C. J.).

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[*37] [*640] [**1630]** Smith argues, nonetheless, that this was not a "proper" case in which to award punitive damages. More particularly, he attacks the instruction that punitive damages could be awarded on a finding of reckless or callous disregard of or indifference to Wade's rights or safety. Instead, he contends that the proper test is one of actual malicious intent -- "ill will, spite, or intent to injure." n6 Brief for Petitioner 9. **[*38] [**1631]** He offers two arguments for this position: first, that actual intent is the proper standard for punitive damages in all cases under § 1983; and second, that even if intent is not always required, it should be required here because the threshold for punitive damages should always be higher than that for liability in the first instance. We address these in turn.

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n6 Smith uses the term "actual malice" to refer to the standard he would apply. While the term may be an appropriate one, we prefer not to use it, simply to avoid the confusion and ambiguity that surrounds the word "malice." See n. 8, *infra*. Indeed, as Smith recognizes, this Court has used the very term "actual malice" in the defamation context to refer to a recklessness standard. Brief for Petitioner 8-9; see *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 251-252 (1974); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280 (1964).

We note in passing that it appears quite uncertain whether even JUSTICE REHNQUIST's dissent ultimately agrees with Smith's view that "ill will, spite, or intent to injure" should be required to allow punitive damages awards. JUSTICE REHNQUIST consistently confuses, and attempts to blend together, the quite distinct concepts of *intent to cause* injury, on one hand, and *subjective consciousness* of risk of injury (or of unlawfulness) on the other. For instance, his dissent purports to base its analysis on the "fundamental distinction" between "wrongful motive, actual intention to inflict harm *or intentional doing of an act known to be unlawful*," versus "very careless or negligent conduct," *post*, at 60-61 (emphasis added). Yet in the same paragraph, the dissent inaccurately recharacterizes the first element of this distinction as "acts that are intentionally harmful," requiring "inquiry into the actor's subjective motive and purpose." *Post*, at 63-64. Consciousness of consequences or of wrongdoing, of course, does not require injurious intent or motive; it is equally consistent with indifference toward or disregard for consequences. This confusion of standards continues throughout the opinion. JUSTICE REHNQUIST's dissent frequently uses such phrases as "intent to injure" or "evil motive"; yet at several points it refers more broadly to "subjective mental state" or like phrases, and expressly includes consciousness (as opposed to intent) in its reasoning. *Post*, at 63, n. 3, 71-72, n. 7, 72-73. More telling, perhaps, is its citation of cases and treatises, which frequently and consistently includes authority supporting (at most) a consciousness requirement rather than the "actual intent" standard for which the opinion purports to argue elsewhere. See, *e. g., post*, at 76-77, n. 10, 78-84, n. 12.

If JUSTICE REHNQUIST does indeed mean to propose a standard reaching subjective consciousness as well as actual injurious intent, one wonders why the instructions given in this case, *supra*, at 33, do not meet his standard. It is hard to see how Smith could have

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disregarded or been indifferent to the danger to Wade unless he was subjectively conscious of that danger. If JUSTICE REHNQUIST stands by his "fundamental distinction" and his use of authority, then, he has no apparent reason to dissent from our judgment.

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III

[*HR1B]** [1B]
Smith does not argue that the common law, either in 1871 or now, required or requires a showing of actual malicious intent **[*39]** for recovery of punitive damages. See Tr. of Oral Arg. 5-6, 9. n7

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n7 Indeed, the District Judge's instruction on punitive damages in this case was drawn with only slight alteration from a standard jury instruction manual under Missouri state law. See Tr. 576-577; Tr. of Oral Arg. 9, 42-43.

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Perhaps not surprisingly, there was significant variation (both terminological **[***641]** and substantive) among American jurisdictions in the latter 19th century on the precise standard to be applied in awarding punitive damages -- variation that was exacerbated by the ambiguity and slipperiness of such common terms as "malice" and "gross negligence." n8 Most of the **[*40]** confusion, however, **[**1632]** seems to have been over the **[***642]** degree of negligence, recklessness, carelessness, or culpable indifference that should be required -- not over whether actual intent **[*41]** was essential. On the contrary, the rule in a large majority of jurisdictions was that punitive damages (also called exemplary damages, vindictive damages, or smart money) could be awarded without a showing of actual ill will, spite, or intent to injure.

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n8 This terminological difficulty seems to be responsible in some degree for the dissent's error in asserting that intent was the majority rule in 1871, *post*, at 68-84. In particular, the dissent argues that "malice," "wantonness," and "willfulness" denoted actual ill will or intent to cause injury. See nn. 10, 12, *infra; post*, at 60-64, n. 3, 73, n. 8, 76-77, n. 10, 78-84, n. 12. See also n. 6, *supra* (dissent's confusion of knowledge with intent); n. 9, *infra* (concerning "criminal indifference"). With regard to "malice," the assumption is dubious at best; with regard to "wantonness" and "willfulness," it is just plain wrong.

"Malice," as used by courts and lawyers in the last century, was a hopelessly versatile and ambiguous term, carrying a broad spectrum of meanings. See generally, *e. g.*, 2 J. Sutherland, Law of Damages § 394 (3d ed. J. Berryman, 1903); 25 Cyclopedia of Law and Procedure 1666-1669 (1907). As the dissent correctly states, *post*, at 60-64, n. 3, in some instances (especially when it was modified by terms such as "actual" or "express," or in criminal law, where terms were generally more strictly construed than in civil law), it meant what the dissent says it meant -- actual ill will, spite, or intent to injure. On the other extreme, in tort law, it was often used without modification to mean what was sometimes called "implied malice" -- a purely fictional malice that was conclusively presumed to exist whenever a tort resulted from a voluntary act, even if no harm was intended. The term was sometimes, though not often, used in this fictional sense as a ground for punitive damages. *E. g., Childers* v. *San Jose Mercury Printing & Publishing Co.*, 105 Cal. 284, 289, 38 P. 903, 904-905 (1894). In other cases it was explained to mean an intent to do the act that caused the injury, as opposed to intent to cause the injury itself. *E. g., Goetz* v. *Ambs*, 27 Mo. 28,

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Intentional Disregard

Source: Legal > Federal Legal - U.S. > **Federal Cases Within 2 Years, Combined Courts** ⓘ
Terms: **"punitive damages" /15 (intentional /2 disregard)** (Edit Search)

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*202 F. Supp. 2d 869, *; 2002 U.S. Dist. LEXIS 10007, **

NOREEN BOOMSMA, as personal representative of the Estates of THOMAS G. BOOMSMA, deceased, and CHELSEA BOOMSMA, deceased; JUNE CAPLINGER, as personal representative of the Estate of SHARON L. BOOMSMA, deceased; and THOMAS J. PARINS, as Special Administrator of the Estate of JAMES A. SPENCER, deceased, Plaintiffs, -vs- STAR TRANSPORT, INC. and CHARLES I. BENNETT, Defendants & Third-Party Plaintiffs, -vs- STEPHANIE HANSEN, FAIRWATER GARAGE, INC., and AUTO OWNERS INSURANCE COMPANY, Third-Party Defendants.

Case Nos. 99-C-895 & 99-C-896 (consolidated)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

202 F. Supp. 2d 869; 2002 U.S. Dist. LEXIS 10007

May 14, 2002, Decided
May 14, 2002, Filed

DISPOSITION: [1]** Motions ruled upon.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiffs, representatives of decedents, sued defendants, a transportation company and a driver, alleging wrongful death damages claims. Plaintiffs moved for relief under Fed. R. Civ. P. 60(b) asserting that Illinois law applied to the wrongful death claims against defendants, or in the event Wisconsin law applies, plaintiffs moved for the court to certify an interlocutory appeal of the choice of law issue pursuant to 28 U.S.C.S. § 1292(b).

OVERVIEW: The driver's semi-trailer truck hit a car and school bus from behind causing a tragic accident that claimed the lives of five Wisconsin residents in Wisconsin. The driver was domiciled in Illinois and the company was a citizen of Illinois. Defendants asserted contributory negligence claims against Wisconsin residents. A district court judge previously dismissed the claims brought under Illinois law. Plaintiffs moved for relief from the order arguing that Illinois law applied to the wrongful death claims. The court found that there was insufficient evidence of injury-causing conduct occurring in Illinois to warrant the assumption that Illinois law governed plaintiffs' wrongful death damages claims. Even if some negligent conduct did occur in Illinois, for choice-of-law purposes such conduct neither outweighs the acts or omissions in Wisconsin nor overwhelms the presumption that the state where the injury took place had the most significant relationship. Plaintiffs failed to overcome the presumption that favored the law of the place where the injury occurred, or to show exceptional circumstances warranting relief from the earlier court rulings.

OUTCOME: Plaintiffs' motion for relief and request for certification of interlocutory appeal was denied.

CORE TERMS: punitive damages, third-party, wrongful death, choice-of-law, motion in

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not the least of which is that these experts are now attempting to contradict their prior sworn testimony on the question of whether injury-causing conduct occurred in Illinois. n5 The about-face of Mitler, the plaintiffs' sleep expert, is particularly flagrant. During his deposition, the following exchange took place:

> Q: Do you agree that [Bennett] may **[**17]** have been fully alert when he left Morton, Illinois and not fatigued, and then by the time he drove from Morton, Illinois to Keystone and then Keystone back to Morton, Illinois and then Morton Illinois to the location where the accident took place in Rosendale, Wisconsin, that he might have developed some level of fatigueness [sic]?
>
> A: *Yes, that's possible.*
>
> Q: All right.
>
> A: *It's very possible. It's likely.*

Deposition of Mark Mitler ("Mitler Dep."), p. 89 (emphasis added). In his affidavit, Mitler now opines that Bennett "was suffering **[*877]** from sleep deprivation and fatigue *when he departed from Star in Illinois* on September 23, 1996." Affidavit of Mark Mitler ("Mitler Aff."), P 15 (emphasis added). The basis for this new opinion is not clear. n6 It is obvious that the plaintiffs are attempting to "repair" their experts' deposition testimony by coming forward with affidavits more in line with their choice-of-law arguments. n7 This is improper. As a general rule, "the law of this circuit does not permit a party to create an issue of fact by submitting an affidavit whose conclusions contradict prior deposition or other sworn testimony." *EEOC v. Yellow Freight System, Inc.*, 253 F.3d 943, 952 (7th Cir. 2001) **[**18]** (en banc); *see also Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806, 143 L. Ed. 2d 966, 119 S. Ct. 1597 (1999). Accordingly, the Court grants the defendants' motion to strike the affidavits of Mitler and Baker [286-1]. The Court also concludes that there is insufficient evidence of injury-causing conduct occurring in Illinois to warrant the assumption that Illinois law should govern the plaintiffs' wrongful death damages claims. Even if some negligent conduct *did* occur in Illinois, the Court agrees with the defendants that for choice-of-law purposes such conduct "neither outweighs the acts or omissions in Wisconsin nor overwhelms the presumption that the State where the injury takes place has the most significant relationship."

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n5 These affidavits were also made after the time to file written export reports, after the close of discovery, and after the time to submit contested and uncontested facts. *See* Reply to Plaintiffs' Response to Defendants' Motion for Partial Summary Judgment, pp. 1-3. Indeed, to some extent the affidavits appear to have been used in lieu of the process provided in L.R. 6.05(b)(1) (the predecessor to Civ. L.R. 56.2). *Id.* **[**19]**

n6 Bennett left Morton, Illinois around 12:15 or 12:30 AM on September 23, 1996. The accident in Wisconsin did not occur until roughly seven hours later. Thus, as Mitler originally conceded, it seems more likely that fatigue developed (if at all) sometime after Bennett crossed into Wisconsin.

n7 Baker's affidavit and his deposition testimony are also in conflict. *See* Affidavit of Forrest Baker ("Baker Aff."), P 62; Deposition of Forrest Baker ("Baker Dep."), pp. 274-275.

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3. ***Where Are The Relationships Of The Parties Centered?***

The Court attaches comparatively little importance to this factor because, as the plaintiffs correctly note, "there was no [pre-injury] relationship between the decedents and Star and Bennett." *See* RESTATEMENT § 145, cmt. subsection (2))("W*hen* there is a relationship between the plaintiff and the defendant and *when* the injury was caused by an act done in the course of the relationship, the place where the relationship is centered is another contact to be considered.").

4. ***The Domiciles Of The Parties***

The decedents in this action **[**20]** were all domiciled in Wisconsin at the time of the accident. The plaintiffs, however, argue that only the *defendants'* domiciles are relevant *to the issue of whether to limit damages for wrongful death*. This argument finds support in Mitchell v. United Asbestos, 100 Ill. App. 3d 485, 426 N.E.2d 350, 358-59, 55 Ill. Dec. 375 (Ill.App. 1981). In *Mitchell*, the court noted that the purpose of a damages cap was "to protect *resident defendants* from excessive financial burdens." *Id.* (emphasis added). The domicile of the plaintiffs (who resided in the state with the cap) bore "no relationship" to this purpose. *Id.* Accordingly, the *Mitchell* court found that the residency of the defendants was the "only significant contact" with respect to the damages limitation issue. *Id.* Similarly, since defendants were domiciled in Illinois at the time of the accident, the plaintiffs argue that Star and Bennett should not enjoy the protection of Wisconsin's cap on wrongful death damages. Also, the plaintiffs argue that the Court must consider Illinois' interest in deterring tortious conduct by its own domiciliaries. 426 N.E.2d at 359; *see also* **[**21]** **[*878]** RESTATEMENT § 6 (c) (courts should consider "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue.").

The Seventh Circuit has observed that "critical to conflicts analysis is the notion that we must examine the choice-of-law rules not with regard to the various states' interests in general, but precisely, with regard to each state, s interest *in the specific question* [before the court]." *Air Crash*, 644 F.2d at 611 (emphasis added). The plaintiffs' arguments are consistent with this approach. Admittedly, Wisconsin does not have an interest in limiting damage awards against out-of-state defendants. However, the fact remains that the third-party defendants are all domiciled in Wisconsin and have a strong (perhaps even a constitutionally-protected) n8 interest in the application of Wisconsin law. "Depecage" notwithstanding, the claims and third-party claims in this action are, as the defendants note, "inextricably intertwined." Applying Illinois law to the underlying claims and Wisconsin law to the third-party claims would be both unworkable and unfair. As the third-party defendants observe in **[**22]** their brief, "it would seem almost impossible to concomitantly protect [the third party defendants'] domiciliary rights and allow plaintiff[s] to collect Illinois-type damages," since "the percentage of causal negligence eventually attributed to the third-party defendants will be measured in dollars." For example, if the plaintiffs recover one million dollars worth of "Illinois-type damages," and the third-party defendants are adjudged 50% at fault, the third-party defendants are on the hook for half a million dollars, instead of the $ 75,000 maximum permitted under Wisconsin law. This would be manifestly unfair to the third-party defendants, all Wisconsin domiciliaries, who have a justified expectation of limited liability. On the other hand, if the third-party defendants are afforded the protection of Wisconsin law and their liability is limited to $ 75,000, is it fair to subject the defendants, who are only 50% at fault under this hypothetical, to a judgment of $ 925,000? The plaintiffs have left these difficult questions unanswered. Therefore, although there would be persuasive arguments in favor of Illinois law if this case did not involve third-party claims against Wisconsin **[**23]** domiciliaries, the Court agrees with Judge Reynolds that the third-party claims cannot be ignored. In light of the presence of the third-party defendants, the "domiciles of the parties" factor favors the application of Wisconsin law.

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n8 An existing cause of action is regarded in Wisconsin as a vested right protected by the due process guarantee. *Hunter v. School District*, 90 Wis. 2d 523, 280 N.W.2d 313 (Wis. App. 1979), *aff'd*, 97 Wis. 2d 435, 293 N.W.2d 515 (Wis. 1980). The third-party defendants argue persuasively that "although [they] are the object, not the subject, of a claim, there is no reason to treat any differently [their] vested right to [the] protection afforded by the Wisconsin statutory cap."

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5. ***Conclusions***

With respect to the plaintiffs' wrongful death damages claims, two of the three relevant RESTATEMENT factors favor Wisconsin as the state with the most significant relationship to the occurrence and the parties. The third relevant factor -- "domiciles **[**24]** of the parties" -- presents a closer question, but the Court resolves this question in favor of Wisconsin law for the reasons discussed above. n9 The plaintiffs have failed to overcome the presumption **[*879]** that favors the law of the place where the injury occurred. Likewise, for purposes of Rule 60, they have failed to show "exceptional circumstances" warranting relief from the Court's earlier choice-of-law rulings. *Williams*, 890 F.2d at 995.

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n9 Even if this were the *only* relevant factor, as plaintiffs argue, the Court could not disregard the third-party claims against Wisconsin domiciliaries. As explained above, these claims are inextricably intertwined with the underlying claims against Bennett and Star.

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One last point, touched upon briefly by the defendants, is that the plaintiffs had no "justified expectation" that Illinois' law would apply to their claims. RESTATEMENT § 6(2)(d). Indeed, application of Illinois law to the plaintiffs' wrongful death damages claims would endorse a kind of lottery **[**25]** system for Wisconsin plaintiffs who are injured in Wisconsin. The "winners" of the lottery would be those injured by tortfeasors from other states that do not cap wrongful death damages. The "losers" would be those injured by fellow Wisconsin-ites, against whom recovery is limited. Such a system would undermine certainty, predictability and uniformity of result. *Id.*, § 6(f).

C. Certification Of An Interlocutory Appeal Under Section 1292(b)

In considering the plaintiffs' request for interlocutory review, the Court is mindful that the law disfavors "piecemeal appellate review of trial court decisions which do not terminate the litigation." *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265, 73 L. Ed. 2d 754, 102 S. Ct. 3081 (1982). Interlocutory appeal under Section 1292(b) is "used sparingly, in exceptional cases." 16 FEDERAL PRACTICE & PROCEDURE § 3929, at 365; *see also Baranski v. Serhant*, 602 F. Supp. 33, 36 (N.D. Ill. 1985). To demonstrate that interlocutory review under Section 1292(b) is appropriate, the movant must show that the district court's ruling involves "a controlling question of law as to which there is substantial **[**26]** ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). n10

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n10 A question of law may be "controlling" if its resolution "is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enterprise Corp. v.*

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Tushie-Montgomery Associates, Inc., 86 F.3d 656, 659 (7th Cir. 1996).

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With respect to the choice-of-law issue, the plaintiffs have failed to address the specific statutory criteria for certification. However, they do appeal to judicial efficiency by arguing that this case "should only be tried once and with the proper substantive laws." Implicit in Section 1292(b) is a directive to consider the "probable gains and losses of immediate appeal." FEDERAL PRACTICE & PROCEDURE § 3929, at 416. The advantages of immediate appeal increase with a number of factors, including the "length of the district court proceedings saved **[**27]** by reversal of an erroneous ruling." *Id.* On the other hand, if the trial of the case can be had in a few days, "the possibility of saving relatively small amounts of trial court time is not thought sufficient to justify immediate appeal." *Id.* at 434; *see also* *Cardwell v. C&O Railway Co.*, 504 F.2d 444, 446 (6th Cir. 1974) (Section 1292(b) "was not intended to authorize interlocutory appeals in ordinary suits for personal injuries or wrongful death that can be tried and disposed of on their merits in a few days."). Today's ruling disallowing evidence or argument in support of the plaintiffs' punitive damages claim n11 will significantly shorten the length of this trial, originally scheduled to last three weeks. Also, the defendants have stipulated that if Wisconsin law applies "the pecuniary loss for Sharon Boomsma, Thomas Boomsma and James Spencer is the statutory limit and accordingly evidence regarding the relationship along with monies, goods and services lost **[*880]** becomes unnecessary." Star & Bennett's Pre-Trial Report, p. 34. n12 In short, since it appears the trial will last a matter of days (not weeks), the only proferred rationale for certification of an **[**28]** immediate appeal (saving trial time) is no longer very compelling.

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n11 See *infra*, Part III.

n12 See *infra*, Part IV-H.

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Lastly, given the posture of this case, an immediate appeal will not "materially advance the ultimate termination of this litigation." Discovery has been concluded. Motions in limine have been filed. The case is ready for trial. If the choice-of-law issue were certified for interlocutory appeal, and a stay granted under Section 1292(b), trial would be postponed for an indefinite period. In short, certification under Section 1292(b) would only postpone the ultimate termination of this litigation, which has already been significantly delayed by the transfer of the case from Judge Reynolds to the undersigned District Judge. "'[Avoiding] delay is a particularly strong ground for denying appeal if certification is sought from a ruling made shortly before trial.'" *Kapossy v. McGraw-Hill, Inc.*, 942 F. Supp. 996, 1004 (D.N.J. 1996) (quoting *Baranski, supra*); *see also* **[**29]** *Singh v. Daimler-Benz, AG*, 800 F. Supp. 260, 263 (E.D. Pa. 1992), *aff'd*, 9 F.3d 303 (3rd Cir. 1993); *Edwards v. Nat'l Audubon Society, Inc.*, 411 F. Supp. 744 (S.D.N.Y. 1976).

For all of these reasons, the Court declines to certify an immediate appeal under Section 1292(b).

III. PUNITIVE DAMAGES

A. Punitive Damages In Wisconsin

Before the question of punitive damages can be submitted to a jury, the court must determine, as a matter of law, that there is sufficient evidence to support an award of

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punitive damages. *Sharp v. Case Corp.*, 227 Wis. 2d 1, 595 N.W.2d 380, 389 (Wis. 1999). As a consequence of the enactment in 1995 of Wis. Stat. § 895.85, Wisconsin is now "among the states having the most stringent punitive damage conduct requirements." R. Blatt et al., PUNITIVE DAMAGES 326-27 (2001 Supp.). Prior to the passage of this statute, the common law standard governing awards of punitive damages permitted such awards on the basis of "reckless indifference to or disregard of the rights of others on the part of the wrongdoer." *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437, 442 (1980) **[**30]** (citations omitted). This standard did *not* require proof of "an intentional desire to injure, vex or annoy, or proof of malice, in order to sustain an award for punitive damages." *Id.* By contrast Section 895.85 now provides that a plaintiff "may receive **punitive damages** if evidence is submitted showing that the defendant acted ***maliciously*** toward the plaintiff or in an ***intentional disregard*** of the rights of the plaintiff." Wis. Stat. § 895.85(3) (emphasis added). The intent of the legislature to heighten the standard for recovery of punitive damages could not be clearer. The change in the law was opposed by my colleague, Judge Lynn Adelman, when he served in the Wisconsin Senate. In a 1999 opinion, however, Judge Adelman acknowledged that the legislature's intent in passing the law had been "to make it more difficult for a plaintiff to recover punitive damages" by adopting a standard "more narrow than the case law standard which allowed punitive damages for conduct which showed a reckless indifference to or disregard of the rights of others on the part of the wrongdoer." *Unified Catholic Schools v. Universal Credit Card Services Corp.*, 34 F. Supp.2d 714, 718 (E.D. Wis. 1999). **[**31]** It is clear from the text of the statute that Section 895.85 marks a significant departure from the common law standard. The **[*881]** defendants' extensive citations to the legislative history underscore this point. n13

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n13 The Court does not agree with the plaintiffs that Star and Bennett have "misstated the law regarding the quantum of evidence required to secure an instruction for punitive damages." If anything, the plaintiffs mis-state the law when they imply that *Jones v. Secura Ins. Co.*, 2002 WI 11, 638 N.W.2d 575, 249 Wis. 2d 623 (2002) has liberalized the standard for recovery of punitive damages under Section 895.85. The decision in *Secura* contains a fleeting quotation of the pre-1995 common law standard. However, the new standard under Section 895.85 was not directly at issue in *Secura* and indeed was not even quoted in that decision except in a footnote. Likewise, it is misleading for the plaintiffs to quote a portion of the *Unified Catholic Schools* decision out of context for the proposition that "all that is required to be shown [to recover punitive damages] is . . . 'bad intent deserving of punishment.'"

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[**32]**

B. Applying Section 895.85

In Wisconsin, the malicious or intentional conduct necessary to recover punitive damages must be proved by clear and convincing evidence. PUNITIVE DAMAGES at 327 (citing *Wangen, supra*). Wisconsin Jury Instruction 1707.1 provides some guidance concerning how to apply the stringent standard adopted in Section 895.85. The first part of the instruction re-states the statutory language. The second part provides:

> A person's acts are malicious when they are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended. A person acts in ***intentional disregard*** of the rights of the plaintiff if the person acts ***with a purpose to disregard the plaintiff's rights***, or is ***aware that his or her acts are practically certain to result in the plaintiff's rights being disregarded***.

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Wis JI-Civil 1701.7.

The plaintiffs do not allege that either Star or Bennett acted maliciously or with a purpose to injure the decedents. Thus, if there is an argument to be made for **punitive damages,** it must be that the defendants acted with ***intentional disregard*** **[**33] for the rights of the plaintiffs in the sense of being aware that their acts were practically certain to result in the plaintiffs' rights being disregarded. As the jury instruction makes clear, "this state of mind has three characteristics that distinguish it from recklessness: (1) a subjective *awareness*** on the part of the defendant (2) that his conduct is ***practically certain*** to result in (3) the ***plaintiff's*** rights being disregarded. A jury may not consider whether the defendant "ought to have been aware" of the potential for a certain outcome. Instead, the focus must be on his actual awareness. Secondly, for an outcome to be "practically certain," it must be more than "reasonably probable" or "likely," it must approach being inevitable. For example, it is "practically certain" that shouting "Fire!" in a crowded theater will cause panic. It is *not* practically certain (though it is very likely) that the New York Yankees will go to the World Series again this year. Lastly, the thing which must be practically certain is not harm in the abstract, or even harm to a certain class of people (*e.g.*, other drivers on the road), but harm *to the plaintiff.* **[**34]** *Hanaway v. Bach*, No. 98-CV-233 (Wal. Co. Cir. Ct.) Nov. 5, 1999, at 15-17.

The plaintiffs have failed to come forward with evidence -- much less clear and convincing evidence -- that Star and/or Bennett acted with intentional disregard for the rights of the Boomsmas and James Spencer. Even if the Court accepts as true the testimony of the plaintiffs' experts that Star was so profit-hungry that it permitted or encouraged Bennett to violate federal hours-of-service regulations and/or drive in a fatigued condition, n14 Star's "active **[*882]** involvement in creating and sustaining such illegality" would amount at most to reckless disregard for the safety of other drivers. Such conduct would support an award of **punitive damages** under the pre-1995 common law standard. Wangen, supra. *It does not, however, constitute maliciousness or* ***intentional disregard*** *for the plaintiffs' rights. Accordingly, the defendants' motion in limine [260-1] is granted and the plaintiffs are barred from introducing evidence of the defendants' wealth or value. Likewise, in presenting their case for negligence, the plaintiffs must not argue, remark or suggest that the defendants' conduct was wilful,* **[**35]** *intentional, or malicious.*

IV. MOTIONS IN LIMINE

A. Plaintiff's Motion *In Limine* # 1 [251-1]

The plaintiffs' first motion in limine seeks to exclude evidence of Bennett's acquittal on criminal charges arising from the accident. The plaintiffs argue that such evidence is inadmissible hearsay, that it is irrelevant (because of the differing standards of proof in criminal and civil proceedings), and that its potential prejudice outweighs any probative value it may have. The third-party defendants join in the motion, relying upon United States v. De La Rosa, 171 F.3d 215 (5th Cir. 1999); United States v. Jones, 808 F.2d 561 (7th Cir. 1986), cert. denied, 481 U.S. 1006 (1987); and United States v. Lahey, 55 F.3d 1289 (7th Cir. 1995). Star and Bennett agree that evidence of the acquittal should be precluded. In addition, they argue that the Court's ruling, in limine, should extend "to preclude any party from making reference to the fact that Bennett was criminally prosecuted at all." The Court agrees that the broader order sought by the defendants is appropriate. To the extent it is necessary **[**36]** to introduce witnesses, exhibits, or trial transcripts from the criminal proceedings, the parties and their counsel must reference that evidence as being from "prior court proceedings." In the event that improper reference is made to the criminal prosecution, the Court will consider a defense motion to admit evidence of Bennett's acquittal or structure other appropriate relief.

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n14 In light of the discussion, *supra*, concerning injury-causing conduct that allegedly occurred in Illinois, the Court has its doubts.

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B. Plaintiff's Motion *In Limine* # 2 [252-1]

Plaintiffs' second motion in limine seeks to preclude any reference to the fact that Charles Bennett's wife, Elizabeth Bennett, may have "lost a child to death." Such evidence, according to the plaintiffs, would be irrelevant and intended purely "to gain sympathy with the jury." The motion, being unopposed, is granted.

C. Plaintiff's Motion *In Limine* # 3 [253-1]

Plaintiffs' third motion in limine seeks to exclude from evidence "any **[**37]** and all evidence, argument, and/or reference to" a letter that Noreen Boomsma sent to the editor of the *Fond du Lac Reporter* concerning "the criminal trial and/or fog conditions." This motion, being unopposed, is granted.

D. Plaintiff's Motion *In Limine* # 4 [254-1]

Plaintiffs' fourth motion in limine seeks to exclude "any and all evidence, argument, and/or reference to" the fact that Frank Bartzen "had an opinion that James Spencer died prior to his arrival at the scene." The defendants and third-party defendants agree that Bartzen, a "first responder" at the scene of the accident, should be precluded from offering an opinion on this question (because he is not qualified to do so), but maintain that he should be allowed to testify concerning his **[*883]** factual observations and his own actions at the scene. This proposed compromise is consistent with the Court's approach to the testimony of another non-expert who was on the scene shortly after the accident, Susan Casper. Accordingly, the motion is granted in part and denied in part. No opinion testimony may be elicited from Bartzen on the question of whether Spencer died prior to his arrival on the scene.

E. Forrest Baker [38]** [256-1 and 258-1])

Before the Court are two separate defense motions aimed at the expert witness testimony of Baker. These motions are untimely under the briefing schedule established by Judge Reynolds. The defendants are, of course, free to cross-examine Baker vigorously concerning his opinions and whether or not they are "speculative" during the trial of this action. These in limine motions, however, are denied.

F. "Non-Disclosed Experts" ([255-1] and [259-1])

The defendants seek to exclude the testimony of various "hybrid witnesses" whom the plaintiffs allegedly failed to disclose under Rule 26. The defendants earlier attempted to bar the testimony of Casper using the same rationale, but the Court determined that the version of Civ. L.R. 26.1 in effect during 1999-2000 did not require disclosure of hybrid witnesses. The same reasoning compels the Court to deny the defendants' motion[s] to bar non-disclosed experts.

G. Star's Motion To Bar Presentation Of Evidence Concerning Whether Star/Bennett Have Insurance Coverage For Punitive Damages [261-1]

In light of the Court's decision not to admit any evidence or argument pertaining to punitive damages (see **[**39]** discussion *supra*), defendants' motion to bar evidence of insurance

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coverage for punitive damages is granted. The plaintiffs, in any event, concede that such evidence is inadmissible.

H. Star/Bennett's Motion In Limine To Preclude Testimony From Decedents' Family Members Or Other Evidence Concerning "Loss Of Society & Companionship" Damages [262-1]

As noted above in connection with the likely length of the trial, the defendants have stipulated that the damages sustained by the plaintiffs who are legally entitled to recover damages for loss of society and companionship is the statutory maximum of $ 150,000. Accordingly, testimony or other evidence concerning such damages would serve no purpose other than to prejudice the defendants. The presentation of such evidence would also consume valuable time, which could be better devoted to issues that are actually in dispute. As the defendants correctly note, the stipulation means that "there is simply nothing for the jury to decide" with respect to this aspect of the case. In opposing this motion in limine, the plaintiffs reprise their arguments about the "unconscionable inequity" of applying Wisconsin law in this case. These **[**40]** arguments are in vain, however, because the Court has determined that Wisconsin law will apply. The motion is granted.

I. Star/Bennett's Motion To Preclude Evidence Of Bennett's Criminal Records [264-1]

Fourteen years ago, Bennett was convicted of multiple counts of sexually assaulting a minor. He served prison time. The defendants are understandably eager to keep this information from the jury. The Court agrees that the convictions are completely irrelevant to the issues in this case and potentially extremely **[*884]** prejudicial. The plaintiffs concede that the convictions are inadmissible under Rule 404 (character evidence), but argue that they may be admissible under Rule 609 for the purpose of impeaching Bennett's credibility should he testify. The Court will under Rule 609 exclude the prior felony evidence because fourteen years have passed since Bennett's conviction. Even if ten years have not passed since Bennett's release from the confinement imposed for the offense, the evidence is properly excluded under Rule 403.

J. Star/Bennett's Motion To Bar Evidence of Chelsea's State Of Mind Prior To Death [263-1]

The defendants, joined by the third-party defendants, ask **[**41]** the Court to "bar the plaintiffs from offering inferences or argument . . . concerning Chelsea Boomsma's state of mind prior to her death for purposes of a claim for mental suffering or mental anguish." The defendants acknowledge that Chelsea may have experienced physical pain in the interval between the accident and her death several hours later. However, the defendants maintain there is no evidence that Chelsea experienced mental suffering caused either by an awareness of her own injuries or because she knew about the demise of her family members. Thus, according to the defendants, it would be speculative and prejudicial to allow "inferences or argument" concerning Chelsea's state of mind. The defendants' argument is belied by the deposition testimony of Randall Campshure, another "first responder" at the accident scene. Mr. Campshure unequivocally testified that he heard a girl's voice coming from the wreckage of the Boomsma vehicle, saying "Help us, help us; get us out of here." Deposition of Randall Campshure ("Campshure Dep."), p. 23. Because there appears to be a factual basis for the plaintiffs' intended "argument" and "inference" concerning mental suffering endured by Chelsea, **[**42]** the defendants' motion is denied.

K. Star/Bennett's Motion To Bar Evidence Relating To Post-Accident Log Modifications [257-1]

The defendants seek to bar evidence that Star prompted Bennett to modify his driver's logs

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subsequent to the accident. The defendants argue that *post*-accident conduct lacks relevance and that, in any event, its probative value is outweighed by the danger of unfair prejudice to the defendants. According to the defendants, "what Bennett's *pre-accident* activities were and whether those activities are properly construed as 'on duty' or 'off duty' under Federal regulations can be placed before the jury without reference to the fact that Star met with Bennett *after* the accident and worked with him to amend the logs to comport with what Star felt was the appropriate interpretation of how to record that time." The plaintiffs argue that Star coerced Bennett into amending his logs and that such evidence is "highly probative of Star's business practices, and both defendants' proclivity for violating the law whenever they feel like it." Indeed, according to the plaintiffs, this evidence goes to the heart of their case, which is that "Star is a **[**43]** rogue firm that systematically violates federal laws enacted for safety simply to increase its revenues."

The Court disagrees with the defendants concerning the relevance of the disputed evidence. Although the parties' briefing fails to illuminate the point, it appears that the log modifications in question, though they were made (or discussed) after the accident, pertained to pre-accident entries. Evidence of the post-accident modifications could therefore be relevant if the modifications reflect a lack of care on the part of the defendants. *See* Fed. R. Evid. **[*885]** 401. As for prejudice, not every fact that is potentially embarrassing or difficult to explain should be excluded on prejudice grounds. The best way of dealing with this evidence is not to exclude it altogether but to allow. the defendants to present the jury with their own explanation concerning the modifications. The motion is denied.

L. Star/Bennett's Motion To Bar Accident Photos [265-1]

The defendants seek to bar the introduction of accident' scene photos, especially any that "graphically depict[] the decedents within the wreckage following the accident." The defendants propose that the Court only allow **[**44]** photographs taken after the decedents' bodies were removed from the wreckage. The Court is inclined to agree that "bodily photos" would be unfairly prejudicial, especially since several of the decedents were children. On the other hand, plaintiffs and third-party defendants suggest (without much elaboration) that at least some of these photos may be relevant to issues of liability. Lacking the benefit of *in camera* inspection, the Court is unable to assess these arguments under Rule 403. Accordingly, unless the parties are able to reach agreement amongst themselves, the defendants shall submit to the Court, ten days before the trial of this action, all photographs they seek to exclude. The Court will issue a ruling prior to the start of trial. The motion is held in abeyance.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Plaintiffs' "Motion For Relief From Order" [276-1] is DENIED; and

2. Star and Bennett's "Motion In Limine On Punitive Damages Claims" [260-1] is GRANTED; and

3. Plaintiffs' motion in limine No. 1 seeking to bar evidence of Bennett's acquittal [251-1] is GRANTED; and

4. Plaintiff's motion in limine No. 2 seeking to bar evidence **[**45]** that Elizabeth Bennett "lost a child to death" [252-1] is GRANTED; and

5. Plaintiff's motion in limine - No. 3 [253-1] is GRANTED; and

6. Plaintiff's motion in limine - No. 4 [254-1] is GRANTED in part and DENIED in part; and

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7. Defendants' motion to bar non-disclosed experts [255-1] is DENIED; and

8. Defendants' motion to bar non-disclosed expert opinions [259-1] is DENIED; and

9. Defendants' motion to bar the remarks of Forrest Baker that Star destroyed records [256-1] is DENIED; and

10. Defendants' motion to preclude evidence relating to post-accident log modifications [257-1] is DENIED; and

11. Defendants' motion to bar certain opinions of Forrest Baker [258-1] is DENIED; and

12. Defendants' motion to bar evidence of insurance coverage of punitive damages [261-1] is GRANTED; and

13. Defendants' motion to exclude evidence concerning loss of society and companionship [262-1] is GRANTED; and

14. Defendants' motion to bar evidence concerning Chelsea Boomsma's state of mind prior to death [263-1] is DENIED; and

15. Defendants' motion to preclude evidence of Bennett's criminal record [264-1] is GRANTED; and

16. Defendants' motion to exclude photographs **[**46]** of decedents' injuries [265-1] is held in abeyance; and

17. Defendants' motion to strike the affidavits of Mark Mitler and Forrest Baker [286-1] is GRANTED; and **[*886]**

18. The Court will conduct a conference call on May 24, 2002 at 10:00 AM (central time).

Dated at Milwaukee, Wisconsin, this 14th day of May, 2002.

SO ORDERED,

HON. RUDOLPH T. RANDA

U.S. District Judge

Source: Legal > Federal Legal - U.S. > **Federal Cases Within 2 Years, Combined Courts** ⓘ
Terms: **"punitive damages" /15 (intentional /2 disregard)** (Edit Search)
View: Full
Date/Time: Friday, October 11, 2002 - 12:45 AM EDT

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limine, significant relationship, log, decedents', immediate appeal, occurrence, practically, driver, choice of law, limine, depecage, injury-causing, certification, scene, intentional disregard, domiciliary, cap, modifications, domicile, regulations, deposition, domiciled, interlocutory appeal, common law, local law, interlocutory

CORE CONCEPTS - ◆ Hide Concepts

Civil Procedure > Relief From Judgment > Mistake & Excusable Neglect

Fed. R. Civ. P. 60(b) provides a district court with the discretion to afford relief from a judgment or order under certain specified circumstances. The residual provision in Fed. R. Civ. P. 60(b)(6) authorizes relief for any other reason justifying relief from the operation of the judgment. Relief is available pursuant to Fed. R. Civ. P. 60(b)(6) only in exceptional circumstances.

Civil Procedure > State & Federal Interrelationships > Choice of Law

Torts > Wrongful Death & Survival

Illinois courts apply the most significant relationship test to determine the applicable law in wrongful death actions. Two sets of criteria are provided for determining which state has the most significant relationship to the occurrence and the parties. The first set of criteria includes general factors such as the needs of the interstate system; relevant policies of the forum and other interested states; protection of justified expectations; the basic policies underlying the particular field of law; certainty, predictability, and uniformity of result; and ease in the determination and application of the law to be applied. The second and more specific set of criteria provides a list of contacts that should be taken into account by a district court. These are: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicil, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered. These factors are to be evaluated according to their relative importance with respect to the particular issue.

Civil Procedure > State & Federal Interrelationships > Choice of Law

Torts > Wrongful Death & Survival

In the context of a choice of law issue in a wrongful death claim, although Illinois no longer follows the simpler rule of lex loci delicti, the place where the injury occurred remains the single most important factor in applying the most significant relationship test. In the absence of unusual circumstances, the highest scorer on the most significant relationship test is the place where the tort occurred. Most often this is expressed in the form of a presumption that favors the law of the place where the injury occurred. Illinois' choice of law rules give presumptive importance to the place of injury. The local law of a state where the injury occurred should determine the rights and liabilities of the parties, unless Illinois has a more significant relationship with the occurrence and with the parties.

Civil Procedure > State & Federal Interrelationships > Choice of Law

Torts > Wrongful Death & Survival

In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which event the local law of the other state will be applied.The law selected determines the measure of damages in an action for wrongful death.

Civil Procedure > State & Federal Interrelationships > Choice of Law

Torts > Wrongful Death & Survival

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In the context of a wrongful death claim, it will be a relatively rare situation in which a state other than that where the injury occurs has the most significant relationship to the occurrence and the parties. The presumption furthers the choice-of-law values of certainty, predictability and uniformity of result and, since the state where the injury occurred will usually be readily ascertainable, of ease in the determination and application of the applicable law.

Civil Procedure > State & Federal Interrelationships > Choice of Law

Depecage refers to the process of determining choice of law on an issue-by-issue basis (versus a blanket approach).

Civil Procedure > Pleading & Practice > Pleadings > Supplemental Pleadings

A party is not permitted to create an issue of fact by submitting an affidavit whose conclusions contradict prior deposition or other sworn testimony.

Torts > Wrongful Death & Survival

Only the defendants' domiciles are relevant to the issue of whether to limit damages for wrongful death. The purpose of a damages cap is to protect resident defendants from excessive financial burdens. The domicile of the plaintiffs (who reside in a state with a cap) bears no relationship to this purpose. Accordingly, the residency of the defendants is the only significant contact with respect to the damages limitation issue.

Civil Procedure > State & Federal Interrelationships > Choice of Law

Critical to conflicts of law analysis is the notion that a district court must examine the choice-of-law rules not with regard to the various states' interests in general, but precisely, with regard to each states, interest in the specific question before the court.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

In considering a plaintiff's request for interlocutory review, a district court is mindful that the law disfavors piecemeal appellate review of trial court decisions which do not terminate the litigation. Interlocutory appeal under 28 U.S.C.S. § 1292(b) is used sparingly, in exceptional cases. To demonstrate that interlocutory review under § 1292 (b) is appropriate, a movant must show that the district court's ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Implicit in 28 U.S.C.S. § 1292(b) is a directive to consider the probable gains and losses of immediate appeal. The advantages of immediate appeal increase with a number of factors, including the length of the district court proceedings saved by reversal of an erroneous ruling. On the other hand, if the trial of a case can be had in a few days, the possibility of saving relatively small amounts of trial court time is not thought sufficient to justify immediate appeal.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Avoiding delay is a particularly strong ground for denying an interlocutory appeal if certification is sought from a ruling made shortly before trial.

Torts > Damages > Punitive Damages

Before the question of punitive damages can be submitted to a jury, a district court must determine, as a matter of law, that there is sufficient evidence to support an award of punitive damages. As a consequence of Wis. Stat. § 895.85 (1995), Wisconsin is now among the states having the most stringent punitive damage conduct

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requirements. Wis. Stat. § 895.85 (1995) provides that a plaintiff may receive **punitive damages** if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an **intentional disregard** of the rights of the plaintiff. Wis. Stat. § 895.85(3). The legislature's intent in passing the law had been to make it more difficult for a plaintiff to recover punitive damages by adopting a standard more narrow than the case law standard which allowed punitive damages for conduct which showed a reckless indifference to or disregard of the rights of others on the part of the wrongdoer.

Torts > Damages > Punitive Damages

In Wisconsin, the malicious or intentional conduct necessary to recover punitive damages must be proved by clear and convincing evidence. Wis. Stat. § 895.85 (1995). A person's acts are malicious when they are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended. A person acts in intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are practically certain to result in the plaintiff's rights being disregarded.

Torts > Damages > Punitive Damages

In the context of the **intentional disregard** necessary for a **punitive damages** award, the state of mind has three characteristics that distinguish it from recklessness: (1) a subjective awareness on the part of a defendant (2) that his conduct is practically certain to result in (3) a plaintiff's rights being disregarded. A jury may not consider whether the defendant ought to have been aware of the potential for a certain outcome. Instead, the focus must be on his actual awareness. Secondly, for an outcome to be practically certain, it must be more than reasonably probable or likely, it must approach being inevitable. Lastly, the thing which must be practically certain is not harm in the abstract, or even harm to a certain class of people (e.g., other drivers on the road), but harm to the plaintiff.

Evidence > Relevance > Relevant Evidence

Evidence of post-accident modifications can be relevant if the modifications reflect a lack of care on the part of the defendants. Fed. R. Evid. 401.

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For DEFENDANT(S): Paul J. Pytlik, Hills Legal Group, Waukesha, WI.

For DEFENDANT(S): Elliott R. Schiff, Jill B. Lewis, Schiff Gorman & Krkljes, Chicago, IL.

JUDGES: HON. RUDOLPH T. RANDA, U.S. District Judge.

OPINIONBY: RUDOLPH T. RANDA

OPINION: [*871]

DECISION AND ORDER

These actions come before the Court on a Rule 60(b) motion by the plaintiffs for relief from the Court's Orders of June 26, 2001 and March 7, 2002 as they relate to "choice of law." Specifically, the plaintiffs assert that Illinois law applies to their wrongful death damages claims against defendants Star Transport, Inc. ("Star") and Charles I. Bennett ("Bennett"). In the event the Court decides that Wisconsin law applies, the plaintiffs ask the Court to certify an interlocutory appeal of the choice-of-law issue pursuant to 28 U.S.C. § 1292(b). Also

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before the Court are a number of motions in limine, including a motion by Star and Bennett that would bar evidence or argument in support of the plaintiffs' claim for punitive damages. **[**2]**

For the reasons set forth below, the Court denies both the plaintiffs' motion for relief and their request for certification of an interlocutory appeal. In addition, the Court finds that there is insufficient evidence of malicious or intentional conduct on the part of either Star or Bennett to submit the question of punitive damages to a jury under Wis. Stat. § 895.85(3). The **[*872]** remaining motions in limine are addressed in Part IV of this opinion.

BACKGROUND

These actions arise from a tragic accident that occurred near Fond du Lac, Wisconsin in the Fall of 1996, claiming the lives of five Wisconsin residents: Thomas G. and Sharon Boomsma, their children, Chelsea and Owen (collectively "Boomsmas"), and a young man named James Spencer ("Spencer"). At approximately 7:15 AM on September 23, 1996, a semi-trailer truck hit the Boomsmas' car and a school bus from behind. The Boomsmas and their children were killed, along with Spencer, who was a passenger in the rear of the school bus. Defendant Bennett, the driver of the semi-trailer truck, was employed at the time of the accident by defendant Star. As discussed below, Bennett was domiciled in Illinois at the time of the accident and **[**3]** Star was a citizen of Illinois. Bennett was hauling a load of steel from Morton, Illinois to Hortonville, Wisconsin at the time of the collision.

Star and Bennett have asserted contributory negligence claims against the operator of the school bus, Stephanie Hansen ("Hansen"), the school bus owner, Fairwater Garage, Inc. ("Fairwater"), and Fairwater's liability carrier, Auto Owners Insurance Company ("Auto Owners"). These parties were all domiciled in Wisconsin at the time of the accident. On November 18, 1999, the claims against Hansen, et al. ("third-party claims") were consolidated with the action brought by the representatives of the Boomsma and Spencer estates.

On June 14, 2001, Judge Reynolds addressed Star and Bennett's motion for partial summary judgment, which sought the dismissal of the plaintiffs' claims for wrongful death damages under Illinois law. Judge Reynolds analyzed the relevant choice-of-law factors at length and concluded that "it appears that Wisconsin has a more substantial relationship to this action than Illinois." However, Judge Reynolds believed that the record was insufficiently developed to permit a determination with respect to one of the factors: where **[**4]** the injury-causing conduct occurred. Accordingly, he decided to hold the defendants' motion for partial summary judgment in abeyance and make a determination concerning choice of law "after all the evidence has been presented at trial."

A pre-trial/settlement conference with the parties in June of last year persuaded Judge Reynolds that there was no reason to postpone a decision respecting choice of law. Therefore, on June 26, 2001, Judge Reynolds granted the defendants' motion for partial summary judgment and dismissed all claims brought under Illinois law.

The consolidated actions were assigned to this branch of the Court on June 26, 2001. The Court decided various issues relating to the admissibility of expert witness testimony on March 7, 2002. In addition, the Court's March 7, 2002 opinion addressed the scope of Noreen Boomsma's claims. Analyzing Wis. Stat. § 895.04, the Court concluded that Noreen Boomsma (Chelsea and Owen's grandmother), lacked standing to pursue a claim for loss of society and companionship with respect to either grandchild and that her claim on behalf of Chelsea's estate would be limited to a claim for conscious pain and suffering. This aspect of the Court's **[**5]** March 7, 2002 opinion rested on the assumption that Judge Reynolds had correctly decided the choice-of-law issue.

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In response to the Court's March 7 decision, the plaintiffs filed the instant motion for relief under Rule 60 [276-1]. The plaintiffs argue that Illinois law should govern their wrongful death damages claims against Star and Bennett and that **[*873]** accordingly both Judge Reynolds' June 26, 2001 decision and the portion of the Court's March 7 order limiting Noreen Boomsma's claims should be vacated. The Court ordered briefing on the plaintiffs' motion, over the objection of Star and Bennett that the Rule 60 motion was untimely.

Additional facts and procedural history will be discussed as necessary below.

DISCUSSION

I. MOTIONS UNDER F.R.C.P. 60(b)

Rule 60(b) provides a district court with the discretion to afford relief from a judgment or order under certain specified circumstances. *Talano v. Northwestern Medical Faculty Foundation, Inc.*, 273 F.3d 757, 762 (7th Cir. 2001). The plaintiffs' motion rests upon the residual provision in Rule 60(b)(6) that authorizes relief for "any other reason justifying relief from the operation of the judgment. **[**6]** " Relief is available pursuant to 60(b)(6) only in "exceptional circumstances." *Williams v. Hatcher*, 890 F.2d 993, 995 (7th Cir.1989) (quotation omitted); *see also* 11 Charles A. Wright, et al., FEDERAL PRACTICE & PROCEDURE §§ 2864, at 357-76 (2d ed.1995).

II. CHOICE OF LAW

A. General Principles

1. *The "Most Significant Relationship" Test*

Illinois courts n1 apply the "most significant relationship" test of the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS to determine the applicable law in wrongful death actions. *In re Air Crash Near Chicago*, 644 F.2d 594, 611 (7th Cir.), *cert denied*, 454 U.S. 878 (1981); *see also Ingersoll v. Klein*, 46 Ill. 2d 42, 262 N.E.2d 593, 596 (Ill. 1970). The RESTATEMENT provides two sets of criteria for determining which state has the most significant relationship to the occurrence and the parties. *Air Crash*, 644 F.2d at 611. The first set of criteria "includes general factors such as the needs of the interstate system; relevant policies of the forum and other interested states; protection of justified expectations; the basic policies underlying the **[**7]** particular field of law; certainty, predictability, and uniformity of result; and ease in the determination and application of the law to be applied." *Id.* (citing RESTATEMENT § 6). The second and more specific set of criteria, found in Section 145 of the RESTATEMENT, provides a list of "contacts" that should be taken into account by the court. These are:

> (a) the place where the injury occurred;
>
> (b) the place where the conduct causing the injury occurred;
>
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties; and
>
> (d) the place where the relationship, if any, between the parties is centered.

RESTATEMENT § 145. These factors "are to be evaluated according to their relative importance with respect to the particular issue." *Id.*

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n1 The defendants and third-party defendants each note that there are arguments to be made in favor of applying Wisconsin's choice-of-law rules. However, especially since Illinois and Wisconsin choice-of-law judicial decisions "seem roughly in accord" (as the third-party defendants note), the Court sees no reason to re-visit this aspect of Judge Reynolds' decision concerning choice of law.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[**8]**

Although Illinois no longer follows the simpler rule of *lex loci delicti*, the place where the injury occurred remains the single most important factor in applying the "most significant relationship" test. "In the absence of unusual circumstances, the highest scorer on the 'most significant relationship' test is -- the place where the tort **[*874]** occurred." *Spinozzi v. ITT Sheraton*, 174 F.3d 842, 844 (7th Cir. 1999). Most often this is expressed in the form of a presumption that favors the law of the place where the injury occurred. *See Air Crash*, 644 F.2d at 616 (Illinois' choice-of-law rules give "presumptive importance to the place of injury."). In the *Ingersoll* case, for example, the Illinois Supreme Court stated that "the local law of the State where the injury occurred should determine the rights and liabilities of the parties, *unless* Illinois has a more significant relationship with the occurrence and with the parties . . . ." 262 N.E.2d at 595 (emphasis added). Similarly, Sections 175 and 178 of the RESTATEMENT provide:

§ 175. RIGHT OF ACTION FOR DEATH

> In an action for wrongful death, the local law of the state where **[**9]** the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship . . . to the occurrence and the parties, in which event the local law of the other state will be applied.

§ 178. DAMAGES

> The law selected by application of the rule of § 175 determines the measure of damages in an action for wrongful death.

RESTATEMENT, §§ 175 & 178. The commentary accompanying Section 175 suggests that it will be a "relatively rare situation" in which a "state other than that where the injury occurred" has the most significant relationship to the occurrence and the parties. *Id.* (cmt. (d), emphasis added). The commentary also explains that the presumption embodied in Section 175 "furthers the choice-of-law values of certainty, predictability and uniformity of result and, since the state where the injury occurred will usually be readily ascertainable, of ease in the determination and application of the applicable law." *Id.*

2. ***"Depecage"***

As noted in the Court's April 10, 2002 order, "depecage" is a French word for "dismemberment." BLACK'S LAW DICTIONARY 448 **[**10]** (7th ed. 1999). In this context, depecage refers to the process of determining choice of law on an issue-by-issue basis (versus a "blanket approach"). As the Seventh Circuit noted in *Ruiz v. Blentech Corp.*, 89 F.3d 320 (7th Cir. 1996), *cert denied*, 519 U.S. 1077, 136 L. Ed. 2d 677, 117 S. Ct. 737

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(1997), depecage is the approach embodied in the RESTATEMENT. The plaintiffs urge the Court to apply the concept of depecage and rule that (1) Illinois law will govern their wrongful death damages claims against defendants Star and Bennett; and (2) Wisconsin law will govern their punitive damages claims. n2 Depecage permits, but does not necessarily require, the application of different local law to different issues within a case. Thus, it is possible to analyze the wrongful death damages issue separately (as Judge Reynolds failed to do) and nevertheless agree with Judge Reynolds that on all issues Wisconsin has the most significant relationship to the occurrence and the parties.

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n2 The parties agree that Wisconsin law should govern the plaintiffs' claim for punitive damages and likewise the third-party claims against Hansen, Fairwater and Auto Owners. Accordingly, the Court will focus on which state's law should apply to the plaintiffs' wrongful death damages claims.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[**11]**

B. Wrongful Death Damages Claims Against Star & Bennett

The Court begins by identifying the conflict of laws. The version of the Wisconsin Wrongful Death Act that was in effect at the time of the accident limits non-economic damages to $ 150,000 per person. Wis. Stat. § 895.04(4) (1995-1996); *see also* **[*875]** Neiman v. American Nat'l Prop. & Cas. Co., 2000 WI 83, 613 N.W.2d 160, 164, 236 Wis. 2d 411 (2000). Illinois law contains no such limitation. n3 The plaintiffs have therefore shown an understandable persistence in seeking to avoid the application of Wisconsin law with respect to wrongful death damages. The Court will now turn to the relevant RESTATEMENT factors to determine, with respect to this issue, which state has the most significant relationship to the occurrence and the parties.

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n3 In addition, the plaintiffs argue that there is a "more subtle" conflict between Wisconsin law and the Federal Motor Carrier Safety Act, 49 U.S.C. § 30101, *et seq. The Court does not find this alleged conflict significant for purposes of determining whether to apply Wisconsin or Illinois law. See* Decision and Order of June 14, 2001, p. 12 n. 6.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[**12]**

1. ***Where Did The Injury Occur?***

It is undisputed that the accident giving rise to this lawsuit occurred in the State of Wisconsin. Although the Seventh Circuit has recently emphasized the pre-eminent importance of the place of the injury, Spinozzi, 174 F.3d at 844 (except in "unusual circumstances"), the plaintiffs urge the Court to disregard this factor altogether, citing Air Crash, 644 F.2d at 615. As its name suggests, this case arose from the crash of a Los Angeles-bound DC-10 aircraft shortly after take-off from O'Hare International Airport in Illinois. In that particular factual context, the Seventh Circuit believed that the place of injury was "fortuitous" and therefore not to be assigned as much importance as other factors under the "most significant relationship" test. *Id.* The instant case is clearly distinguishable. An airplane flies high above the earth. When it crashes, the place where it actually comes to rest depends on the speed of the craft, its trajectory, the nature and timing of the accident, prevailing winds, and so on. In the case relied upon by the plaintiffs, because the airplane was supposed to fly from Chicago **[**13]** to L.A., the Court observed that "had the DC-10's engine fallen off later, the injury might have occurred in one of any number of states." *Id.* There was, in other words, an element of fortuity, or chance, in the fact that the plane

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crashed in Illinois as opposed to some other state along the route. The same cannot be said of the accident in this case. Bennett was driving an earth-bound vehicle along a foggy patch of road near Fond du Lac, Wisconsin. He was headed for a destination in Wisconsin and was nowhere near any of the state's borders when the accident took place. It is not alleged that some latent defect existed in the truck, which might have caused an accident in any one of several states. In short, this case is distinguishable from *Air Crash*. There are no "unusual circumstances" that render the place of the accident fortuitous and thus insignificant for choice-of-law purposes. As far as the Court is concerned, therefore, the place of the accident remains the "highest scorer" on the most significant relationship test. *Spinozzi*, 174 F.3d at 844.

2. ***Where Did The Injury-Causing Conduct Occur?***

Although the accident occurred in Wisconsin, allegedly **[**14]** as a consequence of Bennett's negligence in "failing to adjust the speed of [his] motor vehicle to the weather and visibility conditions that existed at the time of the collision,"Amended Complaint, P 12, the plaintiffs also assert that negligent conduct occurring in Illinois was a "substantial factor" in causing the decedents' injuries. Specifically, they maintain that Star "directed," "permitted" and/or "urged" Bennett to operate his semi-trailer on September 23, 1996 in violation of federally-mandated hours-of-service regulations and/or in a fatigued condition. *Id.* **[*876]**

The facts adduced by the defendants show that: (1) Star customarily determined whether a driver had been on duty in excess of 70 hours in an 8-day period by auditing logs submitted by the driver, n4 (2) Star took disciplinary action with respect to the hours-of-service violations that it *did* know about (*i.e.*, those occurring during August of 1996, Bennett's first month on the job), and (3) Bennett submitted his log for the week of September 14 - September 22 on Saturday, September 21, 1996. The significance of the last fact (3) is that no one was on duty over the weekend to audit Bennett's logs. In other **[**15]** words, Bennett departed on his fateful trip to Wisconsin before any auditing of the logs could take place. Thus, Star could not have directed, permitted or urged Bennett to drive in violation of the regulations. Similarly, the defendants note a dearth of evidence that anyone at Star observed Bennett in a fatigued condition when he left Morton, Illinois very early on the morning of the 23rd.

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n4 Plaintiffs, citing the deposition testimony of defense expert Carmen W. Daecher ("Daecher"), argue that Star should have monitored hours-of-service on the basis of daily e-mails submitted by Bennett that included his hours of service. However, Daecher's testimony suggests that this would have been an imperfect means, at best, of calculating whether a driver was in violation of federal regulations. Deposition of Carmen W. Daecher ("Daecher Dep."), pp. 278-279.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Since the choice-of-law question originally came before Judge Reynolds on a motion for summary judgment, and since the plaintiffs are the proponents of Illinois law, **[**16]** it is their burden to come forward with evidence creating a genuine factual issue as to whether injury-causing conduct occurred in Illinois. The plaintiffs claim to have met this burden by placing in the record "numerous evidentiary materials indicating that Star dispatched Bennett from Illinois when he was over the federally mandated hours of service including the date of this crash, and that this led to fatigue that caused the crash." In reality, the plaintiffs' argument does not rest on "numerous evidentiary materials" but on the testimony of three experts: Thomas Corsi ("Corsi"), Mark Mitler ("Mitler"), and Forrest Baker ("Baker"). Corsi's testimony has been disallowed by the Court because his opinions lack the rigor required under *Daubert*. The affidavits of Mitler and Baker are problematic for a number of reasons,

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The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damages Reform

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SUMMARY:
... " The United States Supreme Court noted that this approach "insures that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." ... The federal court would also have the power to decide which state's substantive law to apply and would produce a single punitive damage award against the defendant for all members of the class. ... A special committee of the American Bar Association that studied punitive damages proposed that Congress establish a process for creating a national class action for multiple punitive damage claims arising out of conduct that results in similar injuries. ...

TEXT:

INTRODUCTION

In 1986, the American Law Institute (ALI) commissioned a study in response to the crisis confronting the United States tort litigation/liability insurance system. The project took more than five and one-half years and was authored by prominent professors from the nation's leading law schools. Advisers from academia as well as members of both the judiciary and

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n12 Id. In reviewing a case heard by the Alabama state courts, the United States Supreme Court stressed that the Alabama jury instructions at issue "enlightened the jury" on the "nature and purpose" of punitive damages. Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1044 (1991). These instructions could be easily drafted into statutory form enabling a legislature to provide clear and unequivocal guidelines for the jury to determine whether punitive damages should be awarded.

n13 Tuttle v. Raymond, 494 A.2d 1353, 1360-61 (Me. 1985). See, e.g., OwensIllinois v. Zenobia, 601 A.2d 633, 651 (Md. 1992); Rawlings v. Apodaca, 726 P.2d 565, 577 (Ariz. 1986); Freeman v. Andersen, 651 S.W.2d 450, 452 (Ark. 1983); Jardel v. Hughes, 523 A.2d 518, 527 (Del. 1987); Preston v. Murty, 512 N.E.2d 1174, 1175 (Ohio 1987); Lee v. Bank of America, 218 Cal. App. 3d 914, 920, 267 Cal. Rptr. 387, 390 (1990). See also David G. Owen, Punitive Damages in Products Liability Litigation, 74 MICH. L. REV. 1257, 1283 n.135 (1976) (" A ny definition of the punishable conduct, such as . . . "reckless' . . . disregard of the public safety will necessarily be quite vague."). See PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSE- QUENCES 128 (1988).

n14 See David G. Owen, The Moral Foundation of Punitive Damages, 40 ALA. L. REV. 705, 729 (1989); E. Donald Elliot, Why Punitive Damages Don't Deter Corporate Misconduct Effectively, 40 ALA. L. REV. 1053, 1057-60, 1065 (1989); 2 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES 418-19 (2d ed. 1989).

n15 An example of purely "intentional" wrongdoing would be an individual purposely firing a handgun at a specific person. In contrast, an example of "conscious" wrongdoing would be an individual purposely firing a handgun into a crowd of people.

n16 The American College of Trial Lawyers recommends that " t he appropriate minimum standard for culpability for punitive awards . . . requires a conscious indifference to the safety of others." ACTL REPORT, supra note 2, at 10. The American Bar Association recommends a standard of "conscious or deliberate disregard with respect to the plaintiff." ABA REPORT, supra note 2, at 18. See also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, 2 at 9-10 (5th ed. 1984) (punitive damages require circumstances of outrage, such as a "conscious and deliberate disregard of the interests of others").

n17 111 S. Ct. 1032 (1991). See generally Victor E. Schwartz & Mark A. Behrens, Punitive Damages Reform- -State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in Haslip, 42 AM. U. L. REV. 1365 (1993).

n18 See Haslip, 111 S. Ct. at 1046.

n19 See KEETON ET AL., supra note 16, at 9. See also Haslip, 111 S. Ct. at 1047- 50 (Scalia, J., concurring); James B. Sales, The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel, 14 ST. MARY'S L.J. 351, 351 (1983); Victor E. Schwartz & Liberty Magarian, Challenging the Constitutionality of Punitive Damages: Putting Rules of Reason on an Unbounded Legal Remedy, 28 AM. BUS. L.J. 485, 485 (1990); Samuel Freifield, The Rationale of Punitive Damages, 1 OHIO ST. L.J. 5, 7 (1935); and David L. Walther & Thomas A. Plein, Punitive Damages: A Critical Analysis: Kink v. Combs, 49 MARQ. L. REV. 369, 371 (1965).

n20 The "collateral source rule" prohibits a defendant from reducing damages based on benefits received by a plaintiff from outside, or collateral, sources such as insurance companies. See generally John G. Fleming, The Collateral Source Rule and Loss Allocation in Tort Law, 54 CAL. L. REV. 1478 (1986).

n21 See Note, Exemplary Damages in the Law of Torts, 70 HARV. L. REV. 517 (1957): "If

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an act is particularly wrongful, society imposes criminal sanctions in order to deter the wrongdoer and others from repeating the offense. But while some faults, such as ordinary negligence, should be discouraged, they do not warrant the stigma and severity of criminal punishment. Such deterrence is effected in tort law by shifting the loss: the defendant is forced to repair the harm done to the plaintiff." Id. at 523 (emphasis added).

n22 ALI STUDY, supra note 1, at 249.

n23 Id. at 248.

n24 See ABA REPORT, supra note 2, at 19; ACTL REPORT, supra note 2, at 15; Uniform Product Liability Act, 44 Fed. Reg. 62714, 62748 (1979). See also Dorsey D. Ellis, Jr., Punitive Damages, Due Process, and the Jury, 40 ALA. L. REV. 975, 994-95 (1989); Malcolm E. Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 VA. L. REV. 269, 298 (1983); David G. Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. CHI. L. REV. 1, 58-59 (1982).

n25 Haslip, 111 S. Ct. at 1046 n.11. One state, Colorado, requires proof beyond a reasonable doubt to support a punitive damages award. See COLO. REV. STAT. 13-25- 127 (2) (1989).

n26 See ALA. CODE 6-11-20 (Supp. 1992); ALASKA Stat. 09.17.020 (Supp. 1992); CAL. CIV. CODE 3294(a) (West Supp. 1992); GA. CODE ANN. 51-12-5.1 (Michie Supp. 1992); IND. CODE ANN. 34-4-34-2 (Burns 1986); IOWA CODE ANN. 668A.1 (West 1987); KAN. STAT. ANN. 60-3701(c) (1991); KY. REV. STAT. ANN. 411.184(2) (Michie/Bobbs-Merril 1991); MINN. STAT. ANN. 549.20 (West 1992); MISS. H.B. 1270 2(1)(a) (signed by governor Feb. 18, 1993); MONT. CODE ANN. 27- 1-221 (5) (1991); NEV. REV. STAT. ANN. 42.005(1) (Michie 1991); N.D. CENT. CODE 32-03.2-11 (signed by governor Mar. 31, 1993); OHIO REV. CODE ANN. 2307.80(A) (Anderson 1991); OKLA. STAT. ANN. tit. 23, 9 (West 1992); OR. REV. STAT. 30.925 (1991); S.C. CODE ANN. 15-33-135 (Law. Co-op., Supp. 1992); S.D. CODIFIED LAWS ANN. 21-1-4.1 (1987); UTAH CODE ANN. 78-18-1 (1992). Colorado requires proof of punitive damages liability "beyond a reasonable doubt." COLO. REV. STAT. 13-25- 127(2) (1987).

n27 See Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349 (Ind. 1982); Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675 (Ariz. 1986); Masaki v. General Motors Corp., 780 P.2d 566 (Haw. 1989); Tuttel v. Raymond, 494 A.2d 1353 (Me. 1985); Wangen v. Ford Motor Co., 294 N.W.2d 437 (Wis. 1980); Owens-Illinois v. Zenobia, 601 A.2d 633 (Md. 1992); Hodges v. S.C. Toof and Co., 833 S.W.2d 896, 901 (Tenn. 1992).

n28 See Haslip, 111 S. Ct. at 1064 (O'Connor, J., dissenting). Justice O'Connor argues that a clear and convincing evidence standard should be required of states because it would "signal to the jury that it should have a high level of confidence in its factual findings before imposing punitive damages." Id.

n29 Id. (a clear and convincing evidence standard would "permit closer scrutiny of the evidence by trial judges and reviewing courts").

n30 See id. (clear and convincing evidence standard would "constrain jury discretion"); See also Zenobia, 601 A.2d at 657; Masaki, 780 P.2d at 575. In Masaki, the Supreme Court of Hawaii held:

P unitive damages are a form of punishment and can stigmatize the defendant in much the same way as a criminal conviction. It is because of the penal character of punitive damages that a standard of proof more akin to that required in criminal trials is appropriate, rather than the preponderance of the evidence standard generally employed in trials of civil

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actions . . . . A more stringent standard of proof will assure that punitive damages are properly awarded.

780 P.2d at 575.

n31 See ALI STUDY, supra note 1, at 252-53.

n32 See id. at 253 ("we shall call for more searching reform of the criteria governing the size of punitive awards").

n33 See 1 JAMES D. GHIARDI & JOHN M. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE 5.36 & Table 5-3 (1985 & Supp. 1989); Kenneth S. Abraham & John C. Jeffries, Punitive Damages and the Rule of Law: The Role of Defendant's Wealth, 18 J. LEGAL STUD. 415, 415 n.1 (1989); Dan B. Dobbs, Ending Punishment in "Punitive" Damages: Deterrence Measured Remedies, 40 ALA. L. REV. 831, 870 n.96 (1989).

n34 ALI STUDY, supra note 1, at 254-55.

n35 See id. See also Dobbs, supra note 33, at 870-85.

n36 ALI STUDY, supra note 1, at 254.

n37 Id. at 254-55.

n38 Id. at 255. See also PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 118 (1988) ("When assessed against a corporation, for example, punitive damages are paid by stockholders, not by the responsible executives, and often not even by the stockholders who owned the company when the original mistakes were made.").

n39 See Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1045 (1991) (" T he factfinder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket."). Alabama allows the defendant's wealth to be considered on appellate review, but during trial the jury is precluded from considering the wealth of the defendant. The Haslip opinion suggests that the jury's focus in determining punitive damages should be on the defendant's active wrongdoing, not on his wealth. In finding that Alabama's procedure met due process standards, the Supreme Court in Haslip relied on the Alabama trial court's decision to not allow the jury to consider the defendant's wealth.

n40 Bifurcation requires the same jury, usually at the defendant's request, to determine subsequent to deciding liability for compensatory damages whether liability for punitive damages exists and, if liability does exist, the amount of punitive damages.

n41 See ALI STUDY, supra note 1, at 255 n.41.

n42 See ALI STUDY, supra note 1, at 264. A jury that is informed about a firm's substantial profits from the product at issue in the case could be improperly influenced to issue a favorable plaintiff's verdict even though the case is weak for finding liability.

n43 See ALI STUDY, supra note 1, at 255 n.41. See also Ellis, supra note 24, at 1003-07.

n44 See ABA REPORT, supra note 2, at 19.

n45 See ACTL REPORT, supra note 2, at 18-19. In the first common law decision on this point by a state supreme court, the Tennessee Supreme Court recently held that defendants may move for bifurcation in punitive damages cases. Hodges v. S.C. Toof & Co., 833 S.W.2d

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896 (Tenn. 1992). The Tennessee holding follows changes made in several other states through court rules and legislation. See ALI STUDY, supra note 1, at 95, 101.

n46 See ALI STUDY, supra note 1, at 256. This reform has been supported by commentators as well. See Griffin B. Bell & Perry E. Pearce, Punitive Damages and the Tort System, 22 U. RICH. L. REV. 1 (1987); David G. Owen, Punitive Damages in Products Liability Litigation, 74 MICH. L. REV. 1257 (1976); Malcolm E. Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 VA. L. REV. 269 (1983).

n47 ALI STUDY, supra note 1, at 256. See also Ellis, supra note 20, at 1003-07.

n48 See JUSTICE REFORM, supra note 2.

n49 See Council on California Competitiveness Report, California's Jobs And Future, 90 (April 23, 1992) (Peter V. Ueberroth, Chairman).

n50 For federal statutes requiring judicial assessment of punitive damages, see Petroleum Marketing Practices Act, 105(d)(2), 15 U.S.C. 2805(d)(2) (1988), and Fair Credit Reporting Act, 616, 15 U.S.C. 1681n(2) (1988). For federal statutes requiring judges to determine the amount of any damages, see Equal Credit Opportunity Act, 706, 15 U.S.C. 1691e(b) (1988); Patent Act, July 19, 1952, ch. 950, 35 U.S.C. 284 (1988); and Fair Housing Act, Title VIII, 812, Civil Rights Act of 1968, 42 U.S.C. 3612(c) (1988).

n51 See CONN. GEN. STAT. ANN. 52-240b (West Supp. 1990) (product liability actions).

n52 See KAN. STAT. ANN. 60-3702 (1989).

n53 See OHIO REV. CODE ANN. 2307.80(B) (Baldwin 1990).

n54 See Spaziano v. Florida, 468 U.S. 447 (1984); Clemons v. Mississippi, 494 U.S. 738 (1990); Hildwin v. Florida, 490 U.S. 638 (1989); Cabana v. Bullock, 474 U.S. 376 (1986).

n55 See cases cited supra note 54. Note especially the Court's reasoning in Spaziano: "The Sixth Amendment never has been thought to guarantee a right to a jury determination of appropriate punishment to be imposed on an individual . . . ." 468 U.S. at 459.

n56 Several federal courts of appeals, including most recently the Fourth Circuit Court of Appeals, have held that the Seventh Amendment does not prohibit judicial assessment of punitive damages at the trial or appellate level. See Shamblin's Ready-Mix v. Eaton Corp., 873 F.2d 736 (4th Cir. 1989); Thomson v. Kerr-McGee Refining Corp., 660 F.2d 1380 (10th Cir. 1981); Swofford v. B & W, Inc., 336 F.2d 406 (5th Cir. 1964). The United States Supreme Court has approved of judicial assessment of discretionary damages that serve a punitive purpose in civil penalty cases. See Tull v. United States, 481 U.S. 412 (1987). The Court has also implicitly upheld the practice in patent cases. See Curtis v. Loether, 415 U.S. 189, 196 n.12 (1974). See generally Alan H. Scheiner, Note, Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power, 91 COLUM. L. REV. 142 (1991).

n57 The Reporters Study does not recommend a specific ratio of punitive to compensatory damages that states should adopt. See ALI STUDY, supra note 1, at 259 ("Our concern in this Report is to endorse the substantive principle of the ratio of punitive to compensatory damages, not to commit ourselves to specific judgments about each of the issues in the operative formula.").

n58 Id.

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n59 Pacific Mut. Life Ins. Co. v. Haslip, 111 S.Ct. 1032, 1046 (1991).

n60 See id. at 1043. The Court has provided states with an opportunity to meet this challenge in recent cases, vacating at least twelve decisions "in light of Haslip." See Fleming Landfill, Inc. v. Garnes, 111 S. Ct. 2882 (1991); Transamerica Occidental Life Ins. Co. v. Koire, 111 S. Ct. 2253 (1991); Southern Life & Health Ins. Co. v. Turner, 111 S. Ct. 1678 (1991); AMCA Int'l Fin. Co. v. Hilgedick, 111 S. Ct. 1614 (1991); Intercontinental Life Ins. Co. v. Lindblom, 111 S. Ct. 1575 (1991); Clayton Brokerage Co. v. Jordan, 111 S. Ct. 1298 (1991); Reserve Life Ins. Co. v. Eichenseer, 111 S. Ct. 1298 (1991); Hospital Auth. of Gwinnett County v. Jones, 111 S. Ct. 1298 (1991); Church of Scientology of Calif. v. Wollersheim, 111 S. Ct. 1298 (1991); International Soc. for Krishna Consciousness of Calif. v. George, 111 S. Ct. 1299 (1991); Pacific Lighting Co. v. MGW, Inc., 111 S. Ct. 1299 (1991); Portec, Inc. v. The Post Office, 111 S. Ct. 1299 (1991).

n61 See N.D. CENT. CODE 32-03.2-11(1)-(5) (signed by governor Mar. 31, 1993).

n62 413 S.E.2d 897, 908 (W. Va. 1991). In Garnes, the Supreme Court of Appeals of West Virginia found an award of $ 105,000 punitive damages with nominal compensatory damages to be unconstitutional. Id. at 910.

n63 596 A.2d 687, 710, (Md. Ct. Spec. App. 1991), cert. denied, 605 A.2d 137 (Md. 1992).

n64 Id. at 720, 596 A.2d at 711.

n65 See ACTL REPORT, supra note 2, at 15. Some states have already adopted similar limitations. See, e.g., NEV. REV. STAT. 42.005 (1991) (limiting punitive damages awards to $ 300,000 in cases where compensatory damages are less than $ 100,000 and to three times the amount of compensatory damages in cases of $ 100,000 or more); TEX. CIV. PRAC. & REM. CODE ANN. 41.007 (West Supp. 1992) (confining punitive damages to four times actual damages, or $ 200,000, whichever is greater); N.D. CENT. CODE 32-03.2-11(4) (signed by governor Mar. 31, 1993) (limiting punitive damages to twice compensatory damages, or $ 250,000, whichever is greater); Cf. CONN. GEN. STAT. 52-240a (West Supp. 1990) (punitive award may not exceed twice the compensatory damages).

n66 The American Bar Association has proposed a three-to-one ratio of punitive to compensatory damages. See ABA REPORT, supra note 2, at 62. Cf. FLA. STAT. ANN. 768.73 (1)(b) (West Supp. 1992) (punitive damages capped at three times compensatory damages unless "clear and convincing evidence" is presented by the plaintiff to show that a higher award is not excessive). In a model punitive damages statute, President Bush's Council on Competitiveness limited punitive damages to the amount of compensatory awards. See PRESIDENT'S COUNCIL ON COMPETITIVENESS REPORT, MODEL PUNITIVE DAMAGES ACT (1991). See also COLO. REV. STAT. 13-21-102(1)(a)(1987) (punitive award may not exceed compensatory damages). Cf. OKLA. STAT. tit. 23, 9 (1987) (punitive damages capped at compensatory damages awarded unless plaintiff establishes case by clear and convincing evidence).

n67 Sometimes this flexibility is needed. For example, if a person throws acid at another, but only damages his clothing which is worth $ 250, it seems inappropriate to limit punitive damages awards to $ 1,000. In such a case it may be appropriate to invoke damages up to $ 250,000.

n68 ACTL REPORT, supra note 2, at 15.

n69 ALI STUDY, supra note 1, at 256.

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n70 Id.

n71 See ABA REPORT, supra note 2, at 63-64 (listing seventeen possible factors that courts should consider in reviewing jury awarded damages).

n72 The Alabama Supreme Court set forth specific factors for the trial court to consider and required trial courts to note in the record their reasons for sustaining a jury verdict or setting it aside. Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1044 (1991).

n73 Id. at 1045. In a key footnote, the Court contrasted Alabama's detailed appellate guidelines with the punitive damages schemes of two other states about which "Justices expressed concern" in previous cases. See Haslip, 111 S. Ct. at 1045 n.10 ("In those respective schemes, an amount awarded would be set aside or modified only if it was "manifestly and grossly excessive,' or would be considered excessive when "it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience.' ") (citations omitted). The Court's footnote suggests that states with open-ended appellate review schemes may be vulnerable to constitutional attack on the ground that their review of punitive damage awards is vague and arbitrary, and therefore violates due process. Indeed, since Haslip, several courts have set aside state punitive damages review standards analogous to those questioned in Haslip. See Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991) (setting aside South Carolina punitive damages scheme); Gamble v. Stevenson, 406 S.E.2d 350 (S.C. 1991) (same); Johnson v. Hugo's Skateaway, 949 F.2d 1338 (4th Cir. 1991) (setting aside Virginia punitive damages procedure); Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (W. Va. 1991) (West Virginia law; same); Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs., Inc., 596 A.2d 687 (Md. Ct. Spec. App. 1991), cert. denied, 605 A.2d 137 (Md. 1992) (Maryland law; same).

n74 Haslip, 111 S. Ct. at 1045.

n75 ALI STUDY, supra note 1, at 95.

n76 Id. at 101.

n77 The Study recommends the following four guidelines:

1. The regulation must have been promulgated by a specialized administrative agency with the statutory responsibility to monitor risk-creating activities in that domain and to establish and revise regularly specific standards governing enterprise behavior;

2. The agency must have addressed the specific risk at issue in the case at hand, and must have made an explicit judgment about what type of legal conditions are appropriate;

3. The enterprise in question must have complied with all the relevant standards prescribed by the agency; and

4. The defendant must have disclosed to the regulatory agency any material in its possession (or of which it had good reason to be aware) concerning either the hazards posed by the defendant's activities or the available means of controlling the related risks.

Id. at 110.

n78 A recent study by the prestigious Brookings Institution points out the strong need for the adoption of a compliance with regulatory standards defense, particularly with regard to the pharmaceutical industry. See PETER HUBER & ROBERT LITAN, THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION (1991). See also PETER HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988).

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n79 Note that in all of the controversial product liability medical device and drug litigation, plaintiffs allege that the manufacturer wrongfully withheld material information from the FDA. See, e.g., Lee v. Baxter Healthcare Corp., 721 F. Supp. 89 (D. Md. 1989); Bravman v. Baxter Healthcare Corp., 984 F.2d 71 (2nd Cir. 1993).

n80 See ARIZ. REV. STAT. ANN. 12-701 (1992); N.J. STAT. ANN. 2A:58C-5(c) (West 1987); OHIO REV. CODE ANN. 2307.80 (Anderson 1991); OR. REV. STAT. 30.927 (1991); UTAH CODE ANN. 78-18-12 (1992). Recently, the First and Fifth Circuit Courts of Appeals recognized the strong public policy for the "compliance with FDA standards" defense. Both circuits shielded a medical device manufacturer from any liability for damages because the medical devices had been approved by the FDA before the manufacturer marketed the device. See King v. Collagen Corp., 983 F.2d 1130 (1st Cir. 1993); Stamps v. Collagen Corp., 984 F.2d 1416 (5th Cir. 1993).

n81 See Victor E. Schwartz & Liberty Magarian, Multiple Punitive Damage Awards in Mass Disaster and Product Liability Litigation: An Assault on Due Process, 8 ADELPHIA L.J. 101 (1992); Dennis N. Jones et al., Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process, 43 ALA. L. REV. 1 (1991); John C. Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 VA. L. REV. 139, 147 (1986).

n82 See Lester Brickman, The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?, 13 CARDOZO L. REV. 1819, 1866-67 (1992); R. Barclay Surrick, Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?, 87 DICK. L. REV. 265 (1983).

n83 See ALI STUDY, supra note 1, at 261 n.50. See also Roginsky v. RichardsonMerrell, Inc., 378 F.2d 382 (2d Cir. 1967) (criticizing application of punitive damages in mass marketed product litigation); Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir. 1984) (same).

n84 ALI STUDY, supra note 1, at 260.

n85 Id. at 412-19.

n86 Id. at 419-21.

n87 See ABA REPORT, supra note 2, at 78-81. Upon motion by a defendant and a finding by a court that "there is a reasonable possibility that adequate compensatory damages will not be available if punitive damages are not brought under control," there would be a single mass trial in federal court on the punitive damages issue. Id. at 79. The results of that trial would be binding on all class members. Id. at 81.

n88 See ACTL REPORT, supra note 2, at 20-26.

n89 The principal advantage of these proposals is that they would apportion punitive damages awards to all claimants. Policymakers considering a solution to the mass tort problem, however, should not embrace these approaches they contain the false assumption that punitive damages serve as a "bonus" to compensatory damages, rather than as a tool for punishment and deterrence.

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the practicing bar also made contributions. The resulting report, entitled Enterprise Responsibility **[*264]** for Personal Injury (Reporters' Study or Study), [1] focused on a wide array of substantive and procedural issues in the law of torts. The Reporters' Study was not subjected to the formal American Law Institute approval process. Instead, the Study was made available by the ALI for the bench, bar, and state legislators to use as a resource to develop personal injury law.

The Reporters' recommendations on one topic, namely, punitive damages, are particularly appropriate and timely. In response to perceived abuses and unfairness in punitive damages awards, "more and more voices are calling for major overhauls of this area of the law." [2] Even the United States Supreme Court has expressed concern in recent years that punitive damages awards have "run wild." [3]

Part I of this article will briefly discuss the Study's analysis of the need for punitive damages reform. Part II will discuss the Study's recommendations concerning reform of the standard by which punitive damages should be awarded. Part III will discuss the Study's recommendations to set reasonable limits on the size of punitive damages awards. Part IV will discuss the Study's recommendation of a shield against tort damages, particularly punitive damages, for products that comply with federal regulatory standards. Part V will discuss the Reporters' proposal to deal with the special problem of multiple, or repetitive, punitive damages awards. **[*265]**

I. THE NEED FOR REFORM

After examining empirical evidence, the Reporters found that the present system for awarding punitive damages has become more like a state lottery than a system of justice. [4] Little guidance is given to juries, courts, and litigation parties as to how to decide whether and when punitive damages should be awarded. Once a decision is made to award punitive damages, juries again are not given substantive guidance for deriving an appropriate amount to award.

Vagueness and uncertainty in punitive damages law undermines confidence in the civil justice system and has a substantial and detrimental impact on American industry. For instance, the specter of spiraling liability has sometimes discouraged manufacturers from developing and marketing new and useful products. [5] Similar concerns have also led to the withdrawal of some products from the market. [6] The climate of uncertainty puts American business at a sizable disadvantage in its attempt to compete with foreign enterprise. [7] This is **[*266]** particularly true in the area of innovation where the United States has traditionally been a leader. [8] Because foreign manufacturers can innovate and develop products in a more "friendly" environment, they receive a competitive advantage over their American counterparts. [9]

To confront these problems, the Reporters' Study recommends several specific reforms that judges and state legislators can incorporate into existing state procedures for the award of punitive damages.

II. STANDARDS FOR REFORM

The ALI Reporters, as discussed above, found serious flaws in the present system for awarding punitive damages. In response, the Study provides several recommendations to make clear the legal conditions in which punitive damages may be awarded. First, a standard is established by which the trier of fact can evaluate whether an enterprise defendant should be liable for punitive damages. Second, the Study recommends a burden of proof standard that a plaintiff must meet to show that a defendant's conduct warrants the imposition of punitive damages.

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A. Proscribed Conduct

The Reporters' Study recommends a standard of "reckless disregard for the safety of others" as the appropriate standard for liability for punitive damages in enterprise cases. [10] "Reckless disregard," the Study explains, "should involve both conscious advertence to the risks in question . . . and gross deviation from the appropriate standard of care." [11] The Study also cautions that juries must be "explicitly instructed" that manufacturers must engage in risk-utility balancing. Additionally, juries must be told that their belief that the defendant negligently struck the incorrect balance is insufficient to subject the defendant to punitive, as opposed to compensatory, damages. [12] **[*267]**

The "reckless disregard" standard recommended by the Reporters would not significantly increase the predictability of punitive damages liability. Courts and scholars have recognized that "recklessness" and "gross negligence" standards provide little guidance to jurors because they cover "too broad and too vague an area of behavior. . . ." [13] Individuals and companies, therefore, are unable to identify and avoid behavior that will trigger a punitive damages award. The result is that the deterrent effect of punitive damages is undermined. [14]

A similar, but more precise standard, would require a plaintiff to show that the defendant acted with "conscious, intentional indifference to safety" as a predicate to punitive damages liability. [15] Practitioners who advocate punitive damages reform recommend precisely this standard. [16] The United States Supreme Court supported this **[*268]** standard in Pacific Mutual Life Ins. Co. v. Haslip. [17] The Court emphasized that " t he trial court specifically found the conduct in question "evidenced intentional, malicious, gross, or oppressive fraud.' " [18] Importantly, a "conscious, intentional" standard would establish the type of clear and strong trigger that juries and defendants need to promote deterrence and make punitive damages liability consistent.

Sound public policy also suggests that punitive damages be reserved for cases of conscious, intentional wrongdoing. One must remember that in their origins, and at the time the Framers ratified the Constitution, punitive damages were reserved solely for intentional torts, such as battery, assault, trespass, and false imprisonment. [19] Punitive damages should not be awarded for less than this type of egregious conduct. The compensatory tort system with its ample awards, especially for pain and suffering, has developed mechanisms such as the collateral source rule [20] to deter wrongful conduct that falls short of conscious wrongdoing. [21]

B. Burden of Proof

The Reporters' Study recommends a "clear and convincing evidence" burden of proof standard to be applied in determining whether punitive damages are warranted in civil tort cases. [22] According to the Reporters, this burden of proof standard is proposed **[*269]** because it will "signal clearly to juries that there is something special about a punitive award, and also give s judges somewhat greater leverage in controlling the parties' allegations about, and the jury's assessments of, such evidence before and during as well as after the trial." [23]

The clear and convincing evidence standard is the accepted trend in the law of punitive damages. Each of the principal groups that have analyzed the product liability system since 1979 has recommended the clear and convincing evidence requirement. [24] The American Bar Association recommended this standard in 1986 and the American College of Trial Lawyers, an association of plaintiff and defense attorneys who have substantial experience in litigation, followed with their recommendation in 1989. Further, the United States Supreme Court in Haslip noted: "There is much to be said in favor of a State's requiring, as many do, . . . a standard of "clear and convincing evidence' or, even, "beyond a reasonable doubt,' . . . as in the criminal context." [25] Approximately half of the states have undertaken this initiative either by legislative action [26] or judicial decision. [27] **[*270]**

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Public policy makes clear that legislatures and courts should adopt this middle burden of proof standard. First, the clear and convincing standard signals to juries that they should be more certain of their decision when they invoke punishment, as contrasted with awarding compensatory damages. [28] Second, trial courts are alerted that some cases may not be appropriate for hearing by a jury. [29] Finally, the standard gives appellate courts power to carefully review decisions, making sure that punitive damages are properly awarded. [30]

III. THE SIZE OF PUNITIVE AWARDS

The recommendations made by the Reporters' Study, as described in the previous section, would rationalize and modestly tighten the standards for punitive damages liability in approximately one-half of the states. The Reporters were also concerned, however, about the size of punitive damages awards [31] and believed that some guidelines should be adopted to control excessiveness in all of the states. [32] In response, the Study recommends several reforms governing the size of punitive awards.

The Reporters' recommendations can be packaged into three categories: (1) recommendations that seek to limit prejudicial evidence from and provide structure to trials involving punitive damages; (2) recommendations to change the method by which punitive damages awards are generally assessed; and (3) recommendations that seek to establish meaningful procedures for review of punitive damages awards. **[*271]**

A. Recommendations as to Admissible Evidence and Trial Structure

The Reporters were concerned about current trial practice in many states that allows evidence of a defendant's wealth to be paraded before a jury. This procedure prejudices defendants because it improperly allows the jury to focus on the defendant's wealth, rather than the allegedly wrongful conduct. The Reporters were also concerned about the structure of many punitive damages trials. Current trial practice in many states allows jurors to hear issues relevant only to the determination of punitive damages while assessing a defendant's liability for compensatory damages. To respond to these concerns, the Study makes a couple of recommendations.

1. The Defendant's Wealth

The Study recommends that, counter to popular practice, [33] evidence of a defendant's total wealth should "no longer be admissible in assessing punitive damages." [34] The Study would, however, allow reference to the profits earned by the defendant from the alleged tortious activity at issue.

The Reporters offer several reasons why evidence of a defendant's total assets is "irrelevant" in claims arising out of enterprise injuries. [35] First, corporate wealth is typically spread among various corporate subsidiaries. Thus "it is often only an accident of the corporate structure that places this wealth in the hands of the particular defendant entity." [36] Second, evidence of a defendant's wealth may unduly prejudice large corporate defendants, "which incur proportionately more instances of wrongdoing simply because of their greater volume of business." [37] Third, imposing a burden of punitive damages on a corporation punishes persons who often are not guilty or wealthy, such as corporate employees, small shareholders, and people who buy the company's products and may have to pay more for them. [38] **[*272]**

The Reporters' recommendation to exclude evidence of a defendant's total wealth represents sound public policy. When a jury is allowed to focus on a defendant's wealth, the jury is free to disregard what is really at issue in the case: whether and to what extent the defendant's conduct was wrongful. [39]

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2. Bifurcation of Punitive Damages Trials

Courts and legislatures that adopt the Reporters' Study's recommendation to allow reference to the profits earned by the defendant from the particular alleged tortious activity should also permit the defendant to bifurcate the trial. [40] The use of a bifurcated trial procedure is recommended by the Reporters' Study. [41] Bifurcation is equitable because it prevents the jury from hearing highly prejudicial evidence of profits when determining basic liability. Information regarding profits is relevant only to determining the amount of punitive damages to be awarded. [42] Bifurcation also allows the jury to easily separate the burden of proof that is required for compensatory damages awards (i.e., proof by a preponderance of the evidence) from that which the Reporters recommend for the award of punitive damages (i.e., proof by clear and convincing evidence). [43] The American Bar Association [44] and the American College of Trial Lawyers have endorsed this reform. [45] **[*273]**

B. Recommendations About the Assessment of Punitive Damages Awards

Another concern among the Reporters was that in almost all states punitive damages are assessed by a jury verdict. According to the Study, juries are often without adequate guidance as to how large a punitive damages award is appropriate. In response to this problem, the Study recommends that courts assess punitive damages based on some ratio of the amount of compensatory damages previously awarded by the jury.

1. Assessment by the Court

The Study strongly recommends placing the responsibility for assessing the amount of punitive awards on judges rather than juries. [46] This reform, the Study explains, "is, after all, the standard followed in all other explicitly penal (as opposed to remedial) legal regimes." [47]

The Council on Competitiveness [48] under President Bush and the Council on California Competitiveness [49] have recommended this reform. It is currently the law in some federal statutory causes of action, [50] as well as the states of Connecticut, [51] Kansas [52] and Ohio. [53] **[*274]**

Some critics have challenged judicial assessment of punitive damages as a violation of a defendant's right to jury trial under the Seventh Amendment to the United States Constitution. This criticism is unlikely to hold up if asserted in court. In the past, defendants in criminal cases have challenged judges' activity in sentencing as a violation of their Sixth Amendment right to a jury trial. [54] The Supreme Court, however, has held that no violation exists because sentencing is not a determination of guilt or innocence. [55] Rather, sentencing involves consideration of many factors, including evidence that might be inadmissible under the formal rules of evidence. Moreover, a criminal defendant's Sixth Amendment right to trial by jury is given a broader scope than a civil defendant or plaintiff's right under the Seventh Amendment. Thus, we believe that the recommendation is constitutional under the Seventh Amendment. [56] We also believe that the Reporters' recommendation that courts set the amount of punitive damages awards has a basis in sound public policy because judges are particularly suited to evaluate such material in a dispassionate manner.

2. Ratio of Punitive to Compensatory Damages

The Reporters' Study also recommends that punitive damages awards be limited to some ratio of compensatory damages. [57] Furthermore, the Study suggests that an alternative monetary ceiling ("perhaps $ 25,000") should be permitted for cases "in which the plaintiff's harms were minimal, even though the defendant's behavior **[*275]** was egregious." [58]

The Reporters' Study's recommendation on this issue comports with recent commentary from

the courts. In Haslip, the United States Supreme Court found a four-to-one ratio of punitive to compensatory damages to be "close to the line" of being unconstitutional. [59] The Supreme Court has made clear that this is an area where states can do the most good in providing a reasonable and rational safeguard against punitive damages awards that "run wild." [60]

Indeed, at least one state legislature [61] and two state courts since Haslip, including one state supreme court and one mid-level state appellate court, have met the Supreme Court's challenge and focused their actions on the important relationship between punitive and compensatory damages. In Garnes v. Fleming Landfill, Inc., the Supreme Court of West Virginia stated: "Punitive damages should bear a reasonable relationship to the potential of harm caused by the defendant's action and that generally means that punitive damages must bear a reasonable relationship to actual damages. . . ." [62] The Maryland Court of Special Appeals, in Alexander & Alexander, Inc. v. B. Dixon Evander & Associates, recently applied Haslip to invalidate a punitive damages award. According to the court, the award **[*276]** was "all out of proportion to both the harm caused and the perniciousness of the conduct." [63] The court found that the punitive damages award "surely crosse d th e line" set forth in Haslip. [64]

Similar to the Reporters' recommendation, but more detailed, the American College of Trial Lawyers (ACTL) has recommended that punitive damages should be limited to twice the amount of compensatory damages awarded, or $ 250,000, whichever is greater. [65] The ACTL's recommendation is perhaps the best approach of the many proposals advanced to place reasonable limits on punitive damages awards. [66] The ACTL's flexible approach keeps the law from being an absolute prisoner of ratios and allows courts to do justice in the unusual case in which a defendant's conduct was egregious, but resulted in little actual harm. [67]

Note that when states act on the Reporters' Study and the ACTL's recommendations, the statute must provide: (1) that the jury should not be informed of the limit; and (2) if a jury's award for punitive damages exceeds the limit, the award will be reduced by the judge. [68] The reason for these two provisions is that informing the jury of the dollar limit may lead jurors to perceive that the ratio, or the specific figure, is a guideline for assessing punitive damages. In practical terms, the limit could become a floor for punitive damages, rather than a ceiling. **[*277]**

A. Strict Post-Trial Review Procedures

The Reporters' Study additionally recommends establishing detailed post-trial standards for judicial review of punitive damages awards. [69] According to the Reporters, "Such a list would give lawyers and juries somewhat clearer guidance at trial, and it would also strengthen the hand of judges in reviewing trial verdicts . . . ." [70] This approach has already been endorsed by the American Bar Association. [71]

States that establish guidelines for post-trial review should consider the approach adopted by Alabama and approved by the United States Supreme Court in Haslip. The Alabama Supreme Court had in place post-trial procedures for scrutinizing and, where necessary, overturning punitive awards. [72] As an additional check, the Alabama Supreme Court provided a meaningful standard for appellate review by undertaking both a comparative and substantive analysis to "insure that the punitive award does not "exceed the amount that will accomplish society's goals of punishment and deterrence.' " [73] The United States Supreme Court noted that this approach "insures that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to **[*278]** compensatory damages." [74]

IV. COMPLIANCE WITH REGULATORY STANDARDS DEFENSE

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As described in Part I of this article, punitive damages have caused a stifling effect on the development and marketing of some new and useful products. Products have been taken off the market, for example, because of the fear of punitive damages liability. The Reporters' Study responds to these concerns by recommending that states create a shield against tort damages, particularly punitive damages. The shield would be appropriate in cases where the harmcausing aspect of a product complied with the requirements of a federal administrative regulation.

The Reporters endorsed this concept in no uncertain terms:

We believe that the risk of overdeterrence of socially valuable activities through the imposition of tort liability on regulated products and activities merits more widespread recognition of a regulatory compliance defense . . . . [75] The strongest case for a regulatory compliance defense arises when punitive damages are sought. If a defendant has fully complied with a regulatory requirement and fully disclosed all material information relating to risk and its control, it is hard to justify the jury's freedom to award punitive damages. [76]

In this regard, the Study sets out four guidelines for courts and legislatures to follow to develop a compliance with regulatory standards defense. [77]

The public policy reason for this type of rule is clear: society wants to encourage companies to invest and develop new and useful products, especially in the area of medicine. [78] The Study's recommendation would provide a strong incentive for the innovation of **[*279]** pharmaceuticals and medical devices. At the same time, the recommendation calls for punishing manufacturers who withhold material information from a federal government agency, such as the Federal Food and Drug Administration. This approach would separate good manufacturing practices from the bad the dolphin from the tuna. [79] Indeed, at least five states have enacted a defense against punitive damages liability for drugs and medical devices approved by the FDA. [80]

V. MULTIPLE PUNITIVE AWARDS

The last major issue studied by the Reporters was multiple, or repetitive, punitive damages awards. Mass torts pose a special problem in the law of punitive damages. [81] Substantial punitive awards in cases brought in mass enterprise injuries may strip a corporate defendant of its insurance coverage and assets. [82] Such awards endanger the ability of later claimants to receive compensation for their injuries. [83] In response, the Reporters' Study recommends federal action to "authorize mandatory class actions for multiple punitive **[*280]** damages arising out of large-scale mass torts." [84] The Study offers two approaches. First, in mass disaster types of cases, such as airplane crashes, all claims could be consolidated in a federal court. That court would have power to compel joinder by issuing injunctions against any related suits in any state or federal court. The federal court would also have the power to decide which state's substantive law to apply and would produce a single punitive damage award against the defendant for all members of the class. [85] Second, in cases involving mass exposure that occurs over years or decades, such as in asbestos product liability cases, there would be greater judicial discretion whether to consolidate such cases. The court's principal focus would be on whether the number or cost of separate actions threatens to deplete the defendant's assets. [86]

Other principal groups supporting tort law reform are calling for similar federal action. A special committee of the American Bar Association that studied punitive damages proposed that Congress establish a process for creating a national class action for multiple punitive damage claims arising out of conduct that results in similar injuries. [87] The American College of Trial Lawyers concluded that the preferred approach would be a multi-district or national class action requiring all litigants to appear in the same forum, with no option to opt out. [88]

The difficulty with the Reporters' Study's, American Bar Association's, and American College of Trial Lawyers' proposals is that they require burdensome and complicated procedural reforms, and impose new or national choice-of-law rules. The proposals also fail to deal with situations involving lower numbers, but potentially devastating punitive damages claims (i.e., less than one hundred claims). Most importantly, many situations exist in which common facts are insufficient to justify a class. This is particularly true when product liability actions do not involve a single incident mass tort (i.e., a plane crash or hotel fire). [89] **[*281]**

A better solution would focus on the social goals of punitive damages--punishment and deterrence. This solution could establish a presumption that the first award of punitive damages imposed against the defendant, for harm arising out of a single act or course of conduct, is sufficient to punish the defendant and to deter others from similar wrongful conduct in the future. Subsequent claimants would be allowed, however, to overcome this presumption and pursue additional punitive damages, but only by presenting new and substantial evidence of previously undiscovered conscious and deliberate misconduct by the defendant. In this way, defendants and claimants will be guarded against the counter-productive effects of repetitive overpunishment. At the same time, society preserves a way to augment punishment if it is discovered that the original punishment was based on inadequate information. This process could be most easily established by federal law, but could also be carried out by the courts themselves through the principle of comity.

VI. CONCLUSION

The ALI Reporters' Study offers several recommendations to increase the consistency and predictability of punitive damages awards. Generally, the recommendations are fair and reasonable. Many of the Study's recommendations comport with the letter and spirit of the United States Supreme Court decision in Haslip, [90] and many are supported by the other principal groups advocating punitive damages reform, including the American Bar Association and the American College of Trial Lawyers. While we do not agree with all of the Study's recommendations, we do believe they should be given close attention by both legislators and the courts.

FOOTNOTES:

n1 See 2 AMERICAN LAW INST., REPORTERS' STUDY ON ENTERPRISE RESPONSIBIL- ITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE (1991) hereinafter ALI STUDY .

n2 Id. at 232. There have been two major systemic reanalyses of punitive damages in the past several years. See ABA SPECIAL COMMITTEE ON PUNITIVE DAMAGES, PUNI- TIVE DAMAGES: A CONSTRUCTIVE EXAMINATION (1986) hereinafter ABA REPORT ; AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON PUNITIVE DAMAGES OF THE COM- MITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE (Mar. 3, 1989) hereinafter ACTL REPORT . The Council on Competitiveness under President Bush also recently made punitive damages reform a primary goal on its agenda. See PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991) hereinafter JUSTICE REFORM .

n3 See Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1043 (1991). See also Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 280-82 (1989) (Brennan and Marshall, J.J., concurring) (O'Connor and Stevens, J.J., concurring in part and dissenting in part); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor and Scalia, J.J., concurring in part and concurring in the judgment); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270-71 (1981) (Brennan, Marshall, and Stevens, J.J., dissenting). See generally Victor E. Schwartz & Mark A. Behrens, Haslip May Alter Tort-Claim Strategies, THE NAT'L L.J., Feb. 17, 1992, at 23. As this article went to press, the Court in TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870 (W.Va.),

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cert. granted, 113 S. Ct. 594 (1992), agreed to hear arguments in another case about the constitutionality of punitive damages. Exactly what the Court will do is, of course, mere speculation, but the decision to hear the case is evidence of the Justices' continuing concern about the frequency of excessive punitive damages awards.

n4 According to the Study:

The pattern depicted by the empirical research appears to be that enterprises are subject to an occasional risk of what may turn out to be a very large punitive award: an award that may be multiplied if a single business decision about, say, a product design or warning leads to numerous successful tort claims, each with its own punitive component.

ALI STUDY, supra note 1, at 235.

n5 See PETER HUBER & ROBERT LITAN, THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION, 7 (1991) (reporting on American Medical Association study finding that " i nnovative new products are not being developed or are being withheld from the market because of liability concerns or inability to obtain adequate insurance"). See also WALTER OLSON, THE LITIGATION EXPLOSION (1991); PETER HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988); Victor E. Schwartz & Liberty Mahshigian, Issues in Tort Reform: National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future?, 48 OHIO ST. L.J. 387 (1987); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) ("The threat of such enormous awards has a detrimental effect on the research and development of new products.") (O'Connor, J., and Scalia, J., concurring).

n6 See Brown v. Superior Ct., 44 Cal. 3d 1049, 1064, 751 P.2d 470, 479 (1988) (discussing withdrawal of Bendectin from the market after the price increased by more than 300 percent and the withdrawal of all but two manufacturers of diphtheria-tetanuspertussis vaccine when the price increased a hundredfold from eleven cents per dose to $ 11.40 per dose).

n7 See S. REP. NO. 215, 102d Cong., 1st Sess. 9 (1991) ("American manufacturers and product sellers generally pay product liability insurance rates that are 20 to 50 times higher than those of foreign competitors. This disparity is attributable in large part to the uncertainties and costs of the American tort litigation system."); H.R. REP. NO. 748, 100th Cong., 2d Sess., pt. 1, at 24 (1988) ("Without having to absorb the costs of product liability exposure for most of their sales, foreign corporations have an obvious price advantage. In Japan and Europe, product liability laws are more stable, litigation less frequent, and large damage awards uncommon.").

n8 See Man C. Maloo & Benjamin A. Neil, Products Liability Exposure: The Sacrifice of American Innovation, 13 J. PROD. LIAB. 361 (1991).

n9 In Japan and Europe contingency fees are prohibited and judges, not juries, decide the amount of verdicts. Our competitors also have the advantage of a predictable law. The United States patchwork of product liability laws stands in stark contrast to the uniform approach taken by the European Community. See generally FIRST ANNUAL RE- PORT OF THE U.S.-JAPAN WORKING GROUP ON THE STRUCTURAL IMPEDIMENTS INITIA- TIVE (MAY 22, 1991) (comments of the Japanese delegation); Alfred W. Cortese, Jr. & Kathleen L. Blaner, The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game?, 9 J.L. & COM. 167 (1989).

n10 ALI STUDY, supra note 1, at 248.

n11 Id.

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ARTICLE: REINING IN **PUNITIVE DAMAGES** "RUN WILD": PROPOSALS FOR **REFORM** BY COURTS AND LEGISLATURES*

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SUMMARY:
... [1] The Court has provided some general controls, holding that the Due Process Clause of the Fourteenth Amendment imposes both substantive limits on the size of punitive damages awards [2] and procedural limits on when and how punitive damages may be awarded. ... [7] Courts and commentators alike have emphasized the "potentially devastating" ramifications of a punitive damages award on a civil defendant's character, reputation, business, and good will. ... The unpredictability of a prospective punitive damage award contributes significantly

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did not constitute an unfair trade practice.

The Alabama jury awarded Dr. Gore $ 4,000 as compensatory damages for the difference in the value of the car he "bargained for" and the car he received. [96] The jury also awarded $ 4 million in punitive damages, which the jury apparently calculated by multiplying Dr. Gore's damage estimate ($ 4,000) by 1,000, the number of cars BMW allegedly sold throughout the country under its nondisclosure policy. [97]

On appeal to the Alabama Supreme Court, BMW contended, among other things, that its out-of-state conduct was permissible under the disclosure statutes of other states and, therefore, could not serve to augment a punitive damages **[*1025]** award. The Alabama Supreme Court agreed, holding that the jury should not have been permitted to consider sales by BMW outside of Alabama. [98] Having found the verdict tainted, the court reduced the punitive damages award to $ 2 million, believing that this amount was "a constitutionally reasonable" punishment for BMW's conduct in Alabama. [99]

Ultimately, the United States Supreme Court decided that the $ 2 million award still left a punishment that exceeded Alabama's legitimate interests in protecting the rights of its citizens and was, therefore, unconstitutionally excessive. [100]

Before tackling the "excessiveness" issue, however, the Court commented at length on constitutional principles that are involved when a state attempts to punish out-of-state conduct, observing that the Constitution has a "special concern both with the maintenance of a national economic union unfettered by stateimposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." [101] The Court outlined the following three basic principles.

Interstate Commerce: The Court noted that a defendant's participation in the "national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce." [102] Congress is permitted to make nationwide rules involving interstate commerce, but "it is clear that no single State can do so, or even impose its policy choice on neighboring States." [103]

State Sovereignty and Comity: Next, the Court noted that "one State's power to impose burdens on interstate commerce is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States." [104] The Court made the critical admonition that: "Principles of state sovereignty and comity demand that a State may not impose economic sanctions on **[*1026]**

violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." [105]

Due Process: Finally, the Court suggested that punishing a defendant for lawful extraterritorial conduct would violate due process. The Court stated:

Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions. [106]

Applying these fundamental principles, the Court approvingly concluded that the Alabama Supreme Court "properly eschewed reliance on BMW's out-of-state conduct and based its remitted award solely on conduct that occurred within Alabama." [107]

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Although BMW involved conduct (i.e., failure to disclose minor refinishing) that was permissible outside Alabama under the disclosure statutes of other states, the Supreme Court was careful to explain that its holding was not limited to instances of state legislation, but applied broadly to any form in which state power is exercised-specifically including state court decisions. The Court said: "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." [108] Elsewhere in the opinion, the **[*1027]** Court again emphasized that "the economic penalties that a State . . . inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy." [109]

Indeed, as a tort policy matter, a state court judgment that a defendant's conduct is not tortious provides a signal that the defendant's conduct does not justify the imposition of punitive damages in that state. Such a finding should be given equal (and perhaps greater) legal weight than a statutory "safe harbor," such as the disclosure laws at issue in BMW. The reason is that, in most jurisdictions, conduct comporting with a legislative or regulatory standard may still be found tortious by a jury asked to determine whether the defendant met applicable standards of care. [110] On the other hand, a finding of "no liability" in a tort action suggests strongly that, in that jurisdiction, the defendant's conduct was lawful. BMW says that it is unconstitutional for a jury in a forum state to consider lawful conduct in other states when deciding punitive damages issues. [111]

Precluding evidence of the defendant's out-of-state activity would prevent such due process violations. It also would prevent the possibility of due process violations that could arise if the forum state were examining conduct that occurred in jurisdictions that had not yet determined for themselves whether the defendant's conduct should subject it to liability. Tort law varies widely between states and one state cannot assume what the legislature or citizens (jurors) of other states may decide. [112] In that regard, if the forum state's court "guessed **[*1028]** wrong" and concluded that another state ("State X") would find the defendant's conduct to be unlawful, but State X later decides either through legislation or judicial decision that the conduct is lawful, the forum state's ruling would be violative of the principles set forth in BMW. [113]

Finally, it is important to note that precluding evidence of a defendant's conduct outside the forum state would not result in culpable defendants "escaping" appropriate punishment because those other states would be free to impose punishment on behalf of their own citizens if it was determined that the defendant's conduct should subject it to liability.

G. Compliance with FDA Pre-Market Approval Standards Defense

Punitive damages should not be permitted in cases alleging harms caused by FDA pre-market approved pharmaceuticals, vaccines, or medical devices, unless the approval was obtained through fraud or bribery. The public policy reason for this type of rule is that society should encourage companies to invest in and develop new and useful life-prolonging and life-saving products. This reform, which is already law in several states, [114] received strong support in a compre **[*1029]** hensive study of the civil justice system by the American Law Institute. The study's authors concluded:

We believe that the risk of overdeterrence of socially valuable activities through the imposition of tort liability on regulated products and activities merits more widespread recognition of a regulatory compliance defense.

. . . .

The strongest case for a regulatory compliance defense arises when punitive damages are sought. If a defendant has fully complied with a regulatory requirement and fully disclosed all

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material information relating to risk and its control, it is hard to justify the jury's freedom to award punitive damages. [115]

If implemented, a compliance with FDA pre-market approval standards defense against punitive damages would provide a strong incentive for the innovation of products that may otherwise be withheld because of concerns about uncertain and arbitrary liability. At the same time, such a defense could punish manufacturers who intentionally withhold material information from the FDA by subjecting such manufacturers to punitive damages liability.

H. Limiting Multiple **Punitive Damages** Awards

The **reforms** that have been discussed in this Article could be accomplished at the state or federal level; many could be (and have been) accomplished by judicial decision. Because of the limits on the ability of individual states to control conduct in other states, however, and the United States Supreme Court's past unwillingness to clarify due process limits on multiple punitive damages awards, Congress should enact legislation making clear that defendants are not to be punished ad infinitum for a single act or course of conduct. **[*1030]**

1. Problems Caused by Multiple Punitive Damages

As a result of the expansion of punitive damages beyond the traditional intentional torts, courts in the 1970s began to apply punitive damages more than once against the same defendant, for example, in the developing field of products liability. As a result, defendants began to be punished over and over again for what was essentially a single act or course of conduct. [116]

Multiple punitive damages awards present significant problems for plaintiffs and defendants. For instance, multiple "windfall" recoveries of punitive damages can deplete a defendant's limited resources, endangering the ability of future claimants to recover even basic out-of-pocket expenses and damages for their pain and suffering. [117]

Moreover, excessive imposition of awards may drive a company out of business. [118] When this occurs, the devastating "ripple" effect can extend far beyond the defendant company to injured persons who are thereafter unable to recover compensation for their injuries. There are concomitant losses suffered by the company's employees, who may lose their jobs, as well as by those other businesses that rely on the company or its employees for income. Economic harm to the company also affects shareholders, such as pension funds and ordinary citizens, and other investors who face the loss of their savings.

The detrimental impact of multiple punitive damages exists even in cases which are settled, rather than tried. A federal appellate judge astutely recognized this problem when he wrote: **[*1031]**

The potential for punitive awards is a weighty factor in settlement negotiations and inevitably results in a larger settlement agreement than would ordinarily be obtained. To the extent that this premium exceeds what would otherwise be a fair and reasonable settlement for compensatory damages, assets that could be available for satisfaction of future compensatory claims are dissipated. [119]

Multiple imposition of punitive damages also poses a significant obstacle to global settlement negotiations in repetitive litigation and blocks the ability of claimants to recover quickly for their injuries or the loss of loved ones. As one federal district judge wrote: "Barring

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successive punitive damages awards against a defendant for the same conduct would remove the major obstacle to settlement of mass tort litigation and open the way for the prompt resolution of the damage claims of many thousands of injured plaintiffs." [120]

Furthermore, federal and state courts have expressed strong concerns that multiple punitive damages awards may

violate constitutionally protected due process rights. [121] Com **[*1032]** mentators in the field have expressed the same concerns. [122]

Lastly, multiple punitive damages awards undermine the integrity of the justice system by transforming it into a lottery where a few people collect arbitrary "wins" at the expense of everyone else-the company, its employees, its shareholders, and ordinary consumers. With the exception of those lawyers who reap windfalls from repetitive punitive damages, nobody can seriously argue that repeatedly punishing anyone for a single act makes sense or benefits society.

2. Uniform, National Legislative Action Is Needed

"Unquestionably, a national solution is needed" to the problem of multiple punitive damages awards. [123] The individual states are powerless to provide a comprehensive remedy because one state cannot dictate judicial or legislative policies to another state. [124] Thus, even though a state may act to con **[*1033]** trol the problems of multiple punitive damages awards within its borders, it cannot control the imposition of punitive damages awards in other jurisdictions. [125]

The clearest evidence of this weakness was described in an opinion written by former United States District Judge H. Lee Sarokin. In Juzwin v. Amtorg Trading Corp., [126] involving claims against an asbestos manufacturer, Judge Sarokin vacated an earlier order striking plaintiffs' punitive damages claims on the ground that multiple imposition of punitive damages imposed without guidelines violated due process, in part, because he believed that he was powerless to limit other courts from imposing punitive damages awards against the same defendant. [127]

Unfortunately, the United States Supreme Court has proven unwilling to solve the problem of multiple punitive damages and appears unlikely to do so at any time soon. [128] Indeed, the **[*1034]** Florida Supreme Court has asserted that "any realistic solution to the problems caused by [multiple punitive damages awards] in the United States . . . can only be effected by federal legislation." [129]

Congressional action is needed to "disallow[] the repeated sanction of punitive damages against the same defendant for one act." [130] This would "protect[] the due process rights of corporate defendants as well as the rights of injured plaintiffs to be compensated, rather than see money which is rightfully theirs be distributed as a windfall." [131]

Conclusion

Larger and larger punitive damages verdicts are being rendered based on weak burdens of proof, irrelevant and even prejudicial evidence, and often multiple times against the same defendant for the same activity. This has led the United States Supreme Court to express serious concern that punitive damages awards in this country have "run wild." [132]

The civil justice system should not be a "litigation lottery" characterized by excessiveness and arbitrariness. **Punitive damages reform** is needed to restore balance, fairness, and predictability to the law. We recommend a number of reforms. While all of these could be achieved through legislation, many could be accomplished by courts through the

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development of the common law; only one would require federal action. Specifically, we recommend:

(1) Establishing a liability "trigger" that reflects the intentional tort origins and quasi-criminal nature of punitive dam **[*1035]** ages awards-"clear and convincing evidence" of "actual malice."

(2) Requiring proportionality in punitive damages so that the punishment fits the offense.

(3) Permitting a defendant to request "bifurcation" of a punitive damages trial so that the proceedings on punitive damages would be separate from and subsequent to the proceedings on compensatory damages. The same jury would hear both phases of the case. This would prevent evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by jurors and improperly considered when they are determining basic liability.

(4) Precluding plaintiffs from introducing prejudicial net worth evidence.

(5) Precluding evidence of a defendant's out-of-state conduct to award and calculate punitive damages.

(6) Encouraging the development and marketing of lifesaving and life-enhancing pharmaceuticals, vaccines, and medical devices by creating a defense to punitive damages based on compliance with FDA pre-market approval standards, except in cases where the approval was obtained through fraud or bribery.

(7) Federal legislation to address the special problem of multiple punitive damages awards; this would protect against unfair overkill, guard against possible due process violations, and help preserve the ability of future claimants to recover basic out-ofpocket expenses and damages for their pain and suffering.

FOOTNOTES:

n1 Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

n2 See BMW of North Am., Inc. v. Gore, 517 U.S. 559, 585-86 (1996); see also TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 458 (1993); Pacific Mutual, 499 U.S. at 23-24; cf. Pulla v. Amoco Oil Co., 72 F.3d 648, 661 (8th Cir. 1995) (opinion by retired Supreme Court Justice Byron White) (striking down punitive damages award as "excessive, unreasonable and violative of due process").

n3 See Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994).

n4 See **Punitive Damages** Tort **Reform:** Hearing Before the Senate Comm. on the Judiciary, 104th Cong. (Apr. 4, 1995) (testimony of Theodore Olson, former Assistant United States Attorney for the Office of Legal Counsel); Special Report, The Top Ten Verdicts of 1999, Law. Wkly. USA, Jan. 10, 2000, at 2000 LWUSA 25.

n5 Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 297 (1989) (O'Connor, J., concurring in part and dissenting in part) (quoting Banker's Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring in part and concurring in judgment)). All jurisdictions, except Louisiana, Nebraska, Massachusetts, Michigan and Washington state, permit the award of punitive damages. Michigan permits "exemplary" damages as compensation for mental suffering consisting of a sense of insult, indignity, humiliation, or injury to feelings, but does not permit punitive damages for purposes of punishment. See Product Liability Desk Reference-A Fifty State Compendium (Morton Daller ed., 2000).

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n6 City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270 (1981) (Brennan, J., dissenting).

n7 Addington v. Texas, 441 U.S. 418, 426 (1979).

n8 Browning-Ferris, 492 U.S. at 281 (Brennan and Marshall, J.J., concurring); see also International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 50 (1979) ("The impact of [a punitive damages award] is unpredictable and potentially substantial."); Comment, Criminal Safeguards and the Punitive Damages Defendant, 34 U. Chi. L. Rev. 408, 417 (1967) (Punitive damages awards have "'momentous and serious' . . . consequences" for civil defendants.) (citation omitted).

n9 See generally Victor E. Schwartz & Mark A. Behrens, **Punitive Damages Reform**-State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in Haslip, 42 Am. U. L. Rev. 1365 (1993).

n10 See James B. Sales & Kenneth B. Cole, Jr., Punitive Damages: A Relic That Has Outlived Its Origins, 37 Vand. L. Rev. 1117 (1984); see also Beardmore v. Carrington, 95 Eng. Rep. 790 (C.P. 1764) (illegal search and seizure); Bruce v. Rawlins, 95 Eng. Rep. 934 (C.P. 1770) (same); Sharpe v. Brice, 96 Eng. Rep. 557 (C.P. 1774) (same).

n11 95 Eng. Rep. 768 (C.P. 1763).

n12 98 Eng. Rep. 489 (C.P. 1763).

n13 Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. Rev. 1, 14 (1982). In Wilkes, Lord Chief Justice Pratt announced: "A jury shall have it in their power to give damages for more than the injury received . . . as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." Wilkes, 98 Eng. Rep. at 498-99; see also Calvin R. Massey, The Excessive Fines Clause and Punitive Damages: Some Lessons From History, 40 Vand. L. Rev. 1233 (1987).

n14 See, e.g., Grey v. Grant, 95 Eng. Rep. 794 (C.P. 1764); Benson v. Frederick, 97 Eng. Rep. 1130 (K.B. 1766).

n15 See, e.g., Hewlett v. Cruchley, 128 Eng. Rep. 696 (C.P. 1813); Leith v. Pope, 96 Eng. Rep. 777 (C.P. 1779).

n16 See, e.g., Fabrigas v. Mostyn, 96 Eng. Rep. 549 (C.P. 1774).

n17 See, e.g., Merest v. Harvey, 128 Eng. Rep. 761 (C.P. 1814); Sears v. Lyons, 171 Eng. Rep. 658 (K.B. 1818). Punitive damages also were allowed for seduction. See, e.g., Tullidge v. Wade, 95 Eng. Rep. 909 (C.P. 1769). In addition, for a period, English courts permitted an award of punitive damages for criminal conversation (i.e., adultery). See Duberly v. Gunning, 100 Eng. Rep. 1226 (K.B. 1792).

n18 James B. Sales, The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on The Citadel, 14 St. Mary's L.J. 351, 355 (1983).

n19 The use of "private attorneys general" to sanction antisocial conduct unregulated by the criminal law reached America in 1784. See Genay v. Norris, 1 S.C. 6 (1784); see also David G. Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1263, 1287-88 (1976).

n20 See, e.g., Ward v. Blackwood, 41 Ark. 295 (1883); Lyon v. Hancock, 35 Cal. 372

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(1868); Corwin v. Walton, 18 Mo. 71 (1853); Trogden v. Terry, 172 N.C. 540 (1916); Porter v. Seiler, 23 Pa. 424 (1854).

n21 See, e.g., Sheik v. Hobson, 64 Iowa 146 (1884); Louisville & Nashville R.R. Co. v. Ballard, 85 Ky. 307 (1887); Vanch v. Hall, 3 N.J.L. 814 (Sup. Ct. 1811).

n22 See, e.g., Brown v. McBride, 24 Misc. 235, 52 N.Y.S. 620 (Sup. Ct. Queens County 1898).

n23 See, e.g., Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101 (1893); Green v. Southern Express Co., 41 Ga. 515 (1871); Schlencker v. Risley, 4 Ill. 483 (1842); Taber v. Hutson, 5 Ind. 322 (1854); Jackson v. American Tel. & Tel. Co., 51 S.E. 1015 (N.C. 1905); Parsons v. Harper, 57 Va. 64 (1860); Hamlin v. Spaulding, 27 Wis. 360 (1870).

n24 See, e.g., Dorsey v. Manlove, 14 Cal. 553 (1860); Treat v. Barber, 7 Conn. 274 (1828); Singer Mfg. Co. v. Holdfodt, 86 Ill. 455 (1877); Taylor v. Giger, 3 Ky. 586 (1808); Schindel v. Schindel, 12 Md. 108 (1858); Huling v. Henderson, 161 Pa. 553 (1894); Bradshaw v. Buchanan, 50 Tex. 492 (1878).

n25 See, e.g., Yazoo & Miss. Valley R.R. Co. v. Sanders, 87 Miss. 607 (1905); Schumacher v. Shawhan Distillery Co., 178 Mo. App. 361 (1914).

n26 See, e.g., Linsley v. Bushnell, 15 Conn. 225 (1842); Whipple v. Walpole, 10 N.H. 130 (1839); Pickett v. Crook, 20 Wis. 358 (1866). As in England, punitive damages were also awarded in cases involving seduction. See, e.g., Reutkemeier v. Nolte, 179 Iowa 342 (1917); Coryell v. Colbaugh, 1 N.J. 77 (1791).

n27 Ellis, supra note 13, at 2.

n28 See, e.g., Southern Kan. Ry. v. Rice, 38 Kan. 398 (1888) ($ 35 costs and fees, $ 10 injury to feelings, $ 71.75 punitive); Fay v. Parker, 53 N.H. 342 (1872) ($ 150 actual, $ 331.67 exemplary); Woodman v. Nottingham, 49 N.H. 387 (1870) ($ 578 actual, $ 100 exemplary); Taylor v. Grand Trunk Ry. Co., 48 N.H. 304 (1869) ($ 500 actual damages, $ 858.50 exemplary).

n29 In 1967, a California court of appeals held for the first time that punitive damages were recoverable in a strict products liability action. See Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689 (Cal. Ct. App. 1967).

n30 "Mass tort" litigation began in the late 1960s with cases involving the sale of the anti-cholesterol drug MER/29. See Paul D. Rheingold, The MER/29 Story-An Instance of Successful Mass Disaster Litigation, 56 Cal. L. Rev. 116 (1968); Roginsky v. RichardsonMerrell, Inc., 378 F.2d 832 (2d Cir. 1967). See generally Richard A. Seltzer, Punitive Damages In Mass Tort Litigation: Addressing The Problems of Fairness, Efficiency And Control, 52 Fordham L. Rev. 37 (1983).

n31 See Victor E. Schwartz et al., Multiple Imposition Of **Punitive Damages:** The Case For **Reform,** Critical Legal Issues: Working Paper Series (Wash. Legal Found. Mar. 1995).

n32 See, e.g., Utah Code Ann. § 78-18-1(1)(a) (West 1992) (malice or fraud or reckless indifference toward, and a disregard of, the rights of others).

n33 See e.g., Wisker v. Hart, 766 P.2d 168 (Kan. 1988) ("gross negligence").

n34 See Gillham v. Admiral Corp., 523 F.2d 102 (6th Cir. 1975) ($ 125,000 compensatory damages, $ 50,000 attorneys' fees, $ 100,000 punitive damages); Toole v. Richardson-

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Merrell, Inc., 251 Cal. App. 2d 689 (Cal. Ct. App. 1967) ($ 175,000 compensatory, $ 250,000 punitive damages); Moore v. Jewel Tea Co., 253 N.E.2d 636 (Ill. App. 1969) ($ 920,000 compensatory damages, $ 10,000 punitive damages), aff'd, 263 N.E.2d 103 (Ill. 1970).

n35 George L. Priest, Punitive Damages and Enterprise Liability, 56 S. Cal. L. Rev. 123, 123 (1982).

n36 John Calvin Jeffries, Jr., A Comment on The Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 142 (1986); see also Peter W. Huber, The Legal Revolution and its Consequences (1988); Walter K. Olson, The Litigation Explosion (1991).

n37 Malcolm Wheeler, A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation, 40 Ala. L. Rev. 919 (1989).

n38 512 U.S. 415 (1994).

n39 Id. at 432. Honda Motor involved an all terrain vehicle that flipped over when an inebriated plaintiff tried to drive it up a hill. See id. at 418. The Court struck down a punitive damages award on the ground that Oregon law violated due process because it did not provide an opportunity for meaningful appellate review of the size of punitive damages awards. See id. at 432. One year earlier, in TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993), Justice O'Connor observed:

Corporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy. Moreover, they often represent a large accumulation of productive resources: jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth. Finally, juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from "wealthy" corporations to comparatively needier plaintiffs.

Id. at 491 (O'Connor, J., dissenting) (citation omitted).

n40 See generally Bruce N. Kuhlik & Richard F. Kingham, The Adverse Effects of Standardless Punitive Damage Awards on Pharmaceutical Development and Availability, 45 Food Drug Cosm. L.J. 693, 693 (1990) ("There is a growing body of evidence that the threat of punitive damages deters the development and marketing of beneficial products.").

n41 See, e.g., Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311 (9th Cir. 1995); Turpin v. Merrell Dow Pharm., Inc., 736 F. Supp. 737 (E.D. Ky. 1990), aff'd, 959 F.2d 1349 (6th Cir. 1992).

n42 See, e.g., Ealy v. Richardson-Merrell, Inc., 897 F.2d 1159 (D.C. Cir. 1990) (overturning $ 75 million punitive damages award).

n43 See S. Rep. No. 105-32, at 41-42 (1997) (Senate Commerce Committee Report on Product Liability Reform Act of 1997).

n44 See Michael Rustad, Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts (Roscoe Pound Found. 1991).

n45 Professor Rustad said in his report: "The actual number of punitive damages awards in product liability litigation is unknown and possibly unknowable because no comprehensive recording system exists." Id. at 2 (emphasis added).

n46 See Brian J. Ostrom & Neal B. Kauder, Examining the Work of State Courts, 1993: A National Perspective from the Court Statistics Project 24 (State Justice Inst. 1993).

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n47 See Stephen Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1, 28 (1990) (noting that "jury verdicts in the minority of matters actually adjudicated play an important role in determining the worth, or settlement value, or civil matters filed but not tried").

n48 George L. Priest, **Punitive Damages Reform:** The Case of Alabama, 56 La. L. Rev. 825, 830 (1996).

n49 Steven Hayward, The Role of Punitive Damages in Civil Litigation: New Evidence from Lawsuit Filings 8 (Pacific Research Inst. Public Pol'y Feb. 1996).

n50 Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

n51 Actual malice is required in Maryland and the District of Columbia. See Owens-Illinois v. Zenobia, 601 A.2d 633 (Md. 1992), Jonathan Woodner, Co. v. Breeden, 665 A.2d 929 (D.C. 1995).

n52 See Malcolm E. Wheeler, The Constitutional Case for Reforming Punitive Damage Procedures, 69 Va. L. Rev. 269, 298 (1983).

n53 See Ala. Code § 6-11-20 (1993); Alaska Stat. § 09.17.020 (1998); Cal. Civ. Code § 3294(a) (West 1997); Fla. Stat. Ann. § 768.73 (West 1997); Ga. Code Ann. § 51-12-5.1 (1999); Iowa Code Ann. § 668A.1 (1998); Kan. Stat. Ann. § 60-3701(c) (1998); Ky. Rev. Stat. Ann. § 411.184(2) (Michie/Bobbs-Merrill 1998); Minn. Stat. Ann. § 549.20 (West Supp. 1998); Miss. Code Ann. § 11-1-65(1)(a) (Supp. 1998); Mont. Code Ann. § 27-1-221(5) (1998); N.J. Stat. Ann. § 2A:15-5.12 (1999); Nev. Rev. Stat. Ann. § 42-005(1) (1998); N.C. Gen. Stat. 10-15(b) (1999); N.D. Cent. Code § 32-03.2-11 (Supp. 1999); Ohio Rev. Code Ann. § 2307.80(A) (Anderson 1999); Okla. Stat. Ann. tit. 23, § 9.1 (West Supp. 1998); Or. Rev. Stat. § 18.537 (1997); S.C. Code Ann. § 15-33-135 (Law. Co-op. Supp. 1998); S.D. Codified Laws Ann. § 21-1-4.1 (1999); Tex. Civ. Prac. & Rem. Code § 41.003 (1999); Utah Code Ann. § 78-18-1 (1999); Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675 (Ariz. 1986); Jonathan Woodner Co. v. Breeden, 665 A.2d 929 (D.C. App. 1995); Masaki v. General Motors Corp., 780 P.2d 566 (Haw. 1989); Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349 (Ind. 1982); Tuttel v. Raymond, 494 A.2d 1353 (Me. 1985); Owens-Illinois v. Zenobia, 601 A.2d 633 (Md. 1992); Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104 (Mo. 1996); Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992); Wangen v. Ford Motor Co., 294 N.W.2d 437 (Wis. 1980). One state, Colorado, requires proof "beyond a reasonable doubt" in punitive damages cases. See Colo. Rev. Stat. § 13-25-127(2) (1987).

n54 See Punitive Damages: A Constructive Examination, 1986 A.B.A. Sec. Litig. Special Comm. on Punitive Damages 19 [hereinafter ABA Report]; Report on Punitive Damages of the Comm. on Special Problems in the Administration of Justice, Am. College of Trial Law. 15-16 (1989) [hereinafter ACTL Report]; Uniform Law Commissioners' Model Punitive Damages Act § 5 (approved July 18, 1996) [hereinafter Model Punitive Damages Act]; see also 2 Enterprise Responsibility for Personal Injury-Reporters' Study 248-49 (1991) [hereinafter ALI Reporters' Study].

n55 See Pacific Mutual, 499 U.S. at 23 n.11 (stating that "there is much to be said in favor of a State's requiring, as many do, . . . a standard of 'clear and convincing evidence'"). Congress has responded to the Court's observation by requiring plaintiffs to prove "clear and convincing evidence" of punitive damages liability before punitive damages can be imposed against volunteers of nonprofit organizations. See Volunteer Protection Act of 1997, Pub. L. No. 105-19, 111 Stat. 218.

n56 See Lane v. Hughes Aircraft Co., 993 P.2d 388 (Cal. 2000) (Brown, J., concurring).

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n57 See Solem v. Helm, 463 U.S. 277, 284 (1983) ("The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence."); Weems v. United States, 217 U.S. 349, 366-67 (1910) (It is "a precept of the fundamental law" as well as "a precept of justice that punishment for crime should be graduated and proportioned to the offense.").

n58 Some examples of federal criminal fines, even for particularly egregious crimes, do not exceed $ 250,000 and include: (1) tampering with consumer products ($ 250,000, if death results); (2) assault on the President ($ 30,000); (3) bank robbery ($ 75,000); (4) sexual exploitation of children ($ 100,000); and (5) treason ($ 10,000). See Federal Sentencing Guidelines § § 2N1.1, 5E1.2, 2A6.1, 2B3.1, 2G2.1, 2M1.1 (Phylis Skloot Bamberger & David J. Gottlieb eds., 3d ed. Supp. 1999).

n59 Lewis Powell, The "Bizarre" Results of Punitive Damages, Wall St. J., Mar. 8, 1995, at A21.

n60 See Ala. Code § 6-11-21 (1993); Alaska Stat. § 9.17.020(f)-(h) (1998); Colo. Rev. Stat. § 13-21-102(1)(a)(1998); Conn. Gen. Stat. § 52240b (1999); Fla. Stat. Ann. § 768.73 (1)(b) (West 1997); Ind. Code Ann. § 34-51-3-4 (1999); Kan. Stat. Ann. § 60-3701 (1998); N.J. Stat. Ann. § 2A:15-5.14 (West 1999); N.C. Gen. Stat. § 1D-25 (1999); N.D. Cent. Code § 32.03.2-11(4) (1999); 23 Okl. St. § 9.1 (1998); Tex. Civ. Prac. & Rem. Code Ann. § 41.008 (West 1999); Va. Code Ann. § 8.01-38.1 (1999).

n61 See generally ACTL Report, supra note 54, at 15 (proposing that punitive damages be awarded up to two times a plaintiff's compensatory damages or $ 250,000, whichever is greater); ABA Report, supra note 54, at 64-66 (recommending that punitive damages awards in excess of three-to-one ratio to compensatory damages be considered presumptively "excessive"); ALI Reporters' Study, supra note 54, at 258-59 (endorsing concept of ratio coupled with alternative monetary ceiling).

n62 At the federal level, Congress included a **cap** on punitive damages for individuals and small businesses in the Year 2000 Readiness and Responsibility Act, Pub. L. 106-37, 113 Stat. 135 [hereinafter Y2K Act]. The Y2K Act established procedures and legal standards for lawsuits stemming from Year 2000 date-related computer failures. A bill to **cap** punitive damages for individuals and small businesses in all civil actions was reported out of the House Judiciary Committee in February of 2000 by voice vote. See H.R. Rep. No. 106-494 (2000). The House passed the bill on February 16, 2000.

n63 Thomas Jefferson, A Bill for Proportioning Crimes and Punishment in Cases Heretofore Capital (1779), in Papers of Thomas Jefferson 2:492, 493 (Julian P. Boyd ed., 1950).

n64 For example, in a 1999 products liability case arising out of an automobile accident involving a drunk driver, a California court left untouched a jury award of $ 107 million in compensatory damages; the court approved punitive damages in the case totaling $ 1.09 billion. See Frederic M. Biddle, GM Verdict Cut $ 3.8 Billion in Suit Over Explosion, Wall St. J., Aug. 27, 1999, at B5. In a 1996 case, an Alabama jury awarded $ 50 million in compensatory damages and $ 100 million in punitive damages. The automobile's manufacturer argued that the plaintiff had been intoxicated and lost control of his car after falling asleep at the wheel. See Hardy v. General Motors Corp., CV-93-56 (Ala. Cir. Ct. Lowndes County verdict June 3, 1996).

n65 See Edward Felsenthal, Punitive Awards Are Called Modest, Rare, Wall St. J., June 17, 1996, at B4.

n66 See W. Kip Viscusi, The Social Costs of Punitive Damages Against Corporations In

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to the uncertainty (and therefore the risk) of a court trial outcome. ... [62] This recommendation reflects the practical reality that a punitive damages award exceeding $ 250,000 would bankrupt most individuals and small businesses. ... [98] Having found the verdict tainted, the court reduced the punitive damages award to $ 2 million, believing that this amount was "a constitutionally reasonable" punishment for BMW's conduct in Alabama. ...

TEXT:
[*1003]

Introduction

The United States Supreme Court has expressed serious concern in recent years that punitive damages awards in this country have "run wild," jeopardizing fundamental constitutional rights. [1] The Court has provided some general controls, holding that the Due Process Clause of the Fourteenth Amendment imposes both substantive limits on the size of punitive damages awards [2] and procedural limits on when and how **[*1004]** punitive damages may be awarded. [3] Yet, excessive punitive damages awards continue to be a major problem in many states. [4] Reform is urgently needed to restore balance, fairness, and predictability to the law. Jackpot justice should not be permitted to replace fairness and rationality in punitive damages law.

Punitive damages are not normal civil or tort law damages. They are not awarded to compensate for a harm; that purpose is accomplished by compensatory damages, which provide compensation for both economic losses (e.g., lost wages, medical expenses, and substitute domestic services) and noneconomic losses (e.g., "pain and suffering"). Punitive damages are awarded "to further the aims of the criminal law: 'to punish reprehensible conduct and to deter its future occurrence.'" [5] They provide a "windfall recovery" for plaintiffs. [6]

Punitive damages, like many forms of punishment, are by their nature, designed to "engender adverse social consequences," including in many instances, debilitating stigma. [7] Courts and commentators alike have emphasized the "potentially devastating" ramifications of a punitive damages award on a civil defendant's character, reputation, business, and good will. [8] The problems created by this stigma are amplified by **[*1005]** the way the media reports on punitive damages awards. While a large initial punitive damages verdict may frequently make front page national news, an appellate decision reducing or reversing the award several years later usually gets little coverage, if it is reported at all. The truth often fails to catch up with the perception created about the defendant.

This Article traces the history of punitive damages awards from their early limited inception to the modern expansive trend. It will then describe the problems of runaway and unpredictable awards. Finally, the article will provide background and support for a number of needed **reforms** to our nation's **punitive damages** jurisprudence. Nearly all of these **reforms** could be accomplished both by courts through the development of the common law and by legislatures; a few would require legislation; one calls for congressional action. [9]

By way of summary, we propose establishing a "trigger," or standard, for punitive damages liability that reflects the intentional tort roots of punitive damages awards. We believe that punitive damages should only be awarded if there is "clear and convincing evidence" that the defendant acted with "actual malice" toward the claimant. We also propose limits on punitive damages awards so that the punishment fits the offense. This would help prevent due process violations and promote settlements.

We also call for a number of procedural and evidentiary changes in punitive damages law to safeguard fundamental due process rights. We believe that, at a defendant's request, a trial

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Environmental and Safety Torts, 87 Geo. L.J. 285, 294 (1998).

n67 See Troy L. Cady, Disadvantaging the Disadvantaged: The Discriminatory Effect of Punitive Damage **Caps,** 25 Hofstra L. Rev. 1005 (1997).

n68 See U.S. Small Bus. Admin. (visited Mar. 7, 2000) <http://www.sba.gov/womeninbusiness>.

n69 See U.S. Small Bus. Admin., Minorities in Business iii (Office of Advocacy 1999).

n70 See id.

n71 See Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992); Transportation Ins. Co. v. Moriel, 879 S.W.2d 10 (Tex. 1994).

n72 See, e.g., Cal. Civ. Code § 3295(d) (West Supp. 1999); Minn. Stat. Ann. § 549.20 (West Supp. 1999); Miss Code Ann. § 11-1-65(1)(a) (Supp. 1999).

n73 See ABA Report, supra note 54, at 19; ACTL Report, supra note 54, at 18-19; Model Punitive Damages Act, supra note 54, § 11; ALI Reporters' Study, supra note 54, at 255 n.41.

n74 Strickland v. Owens Corning, 142 F.3d 353, 359 (6th Cir. 1998) (citations omitted). As one leading commentator noted:

Juries have a natural sympathy for injured persons and not infrequently a corresponding hostility to "big business." The notion that juror consideration of the multimillion, often multibillion, dollar figures on a corporate balance sheet would operate to protect such defendants against excessive liability is, in context, almost laughable.

John Calvin Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 146-47 (1986) (citations omitted).

n75 Defendants, however, should be able to introduce net worth evidence to mitigate damages. When introduced for this purpose, net worth evidence is not likely to produce a verdict based on bias or prejudice.

n76 499 U.S. 1 (1991).

n77 Id. at 22.

n78 Id.

n79 509 U.S. 443 (1993).

n80 Id. at 464. The Court did not rule on this potential due process violation because TXO had not preserved the issue for appeal. See id.

n81 517 U.S. 559 (1996).

n82 Id. at 574. In BMW, the United States Supreme Court established three guideposts to determine when a punitive award is excessive and violates due process. See infra Part III.F. Significantly, the Court did not even discuss wealth as a factor in developing its guideposts. That fact has led Judge Easterbrook to conclude that such evidence is irrelevant and inadmissible. See Pivot Point Int'l v. Charlene Prods., Inc., 932 F. Supp. 220 (N.D. Ill. 1996) (Easterbrook, J., sitting by designation).

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n83 BMW, 517 U.S. at 585; see also Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . . .").

n84 Dissenting in TXO, Justice O'Connor stated:

Corporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy. Moreover, they often represent a large accumulation of productive resources; jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth. Finally, juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from "wealthy" corporations to comparatively needier plaintiffs.

TXO, 509 U.S. at 491 (O'Connor, J., dissenting). Justice O'Connor dissented because she believed that TXO had preserved the "wealth issue" for appeal. She would have overturned the punitive damages award on the ground that the jury was "unduly influenced by the fact that TXO was a very large, out-of-state corporation." Id. at 489; see also Dick Thornburgh, No End in Sight as Punitive Damages Go Up, Up, Up, Wall St. J., Mar. 13, 2000, at A47.

n85 ALI Reporters' Study, supra note 54, at 254-55 (stating that "in determining the size of the award that is sufficient for deterrence, what is relevant is not the defendant's overall wealth, but rather the profit it realized from the particular tortious activity in question . . . . Use of evidence of the defendant's wealth in calculating punitive damages against organizational defendants therefore cannot be justified even by the rationale of economic deterrence, let alone of retributive punishment.") (second emphasis added); see also Victor Schwartz & Mark Behrens, The American Law Institute's Reporters' Study On Enterprise Responsibility For Personal Injury: A Timely Call For **Punitive Damages Reform,** 30 San Diego L. Rev. 263, 271-72 (1993) ("The Reporters' recommendation to exclude evidence of a defendant's total wealth represents sound public policy. When a jury is allowed to focus on a defendant's wealth, the jury is free to disregard what is really at issue in the case: whether and to what extent the defendant's conduct was wrongful.").

n86 Zazu Designs v. L'Oreal, S.A., 979 F.2d 499, 508 (7th Cir. 1992) (Easterbrook, J.).

n87 See ALI Reporters' Study, supra note 54, at 255 n.40. The ALI Reporters also pointed to another reason that a defendant's assets are irrelevant to the issue of punitive damages:

The actual burden of imposing a higher legal penalty on account of size cannot be borne by the formal corporate entity and will rarely be borne by the officials actually responsible; instead, the burden ultimately falls on the shareholder, customer, or worker constituencies of the firm, who often are not especially wealthy.

ALI Reporters' Study, supra note 54, at 255.

n88 See Kemezy v. Peters, 79 F.3d 33, 35 (7th Cir. 1996) (Posner, J.) (The idea that a larger punishment is needed to deter a rich person than a person of modest means "does not apply to institutions as distinct from natural persons."). As Judge Easterbrook has explained:

Corporations . . . are not wealthy in the sense that persons are. Corporations are abstractions; investors own the net worth of the business. These investors pay any punitive awards (the value of their shares decreases), and they may be of average wealth. Pension trusts and mutual funds, aggregating the investments of millions of average persons, own the bulk of many large corporations. Seeing the corporation as wealthy is an illusion, which like other mirages frequently leads people astray.

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Zazu Designs, 979 F.2d at 508.

n89 Kenneth S. Abraham & John Calvin Jeffries, Jr., Punitive Damages and the Rule of Law: The Role of Defendant's Wealth, 18 J. Legal. Stud. 415, 417 (1989) (emphasis added).

n90 517 U.S. 559 (1996).

n91 Id. at 585.

n92 Id. at 563.

n93 Id. at 565.

n94 See id. at 563-64.

n95 See BMW, 517 U.S. at 565.

n96 Id.

n97 See id. at 567.

n98 See id.

n99 Id.

n100 See BMW, 517 U.S. at 585-86.

n101 Id. at 571-72 (quoting Healy v. Beer Inst., 491 U.S. 324, 335-36 (1989)).

n102 Id. at 585.

n103 Id. at 571.

n104 Id. (citation omitted).

n105 BMW, 517 U.S. at 572; see also Bigelow v. Virginia, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."); New York Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914) ("It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called into question and hence authorities directly dealing with it do not abound."); Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction . . . . Each State is independent of all the others in this particular.").

n106 BMW, 517 U.S. at 572-73; see also Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.").

n107 BMW, 517 U.S. at 573-74.

n108 Id. at 572 n.17; see also Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521 (1992) (holding that state regulation for preemption purposes can be as effectively exerted through

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an award of tort damages as through state administrative or legislative lawmaking processes); New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959) ("Regulation can be as effectively exerted through an award of damages as through some form of preventative relief.").

n109 BMW, 517 U.S. at 572.

n110 See generally Restatement (Third) Of The Law Of Torts: Products Liability § 4(b) (1998) (evidence of product's compliance with safety statutes or regulations "does not preclude as a matter of law a finding of product defect").

n111 See BMW, 517 U.S. at 572.

n112 See In re American Med. Sys., Inc., 75 F.3d 1069, 1085 (6th Cir. 1996) (decertifying class action, in part, because the trial court judge failed to consider how negligence law differed from jurisdiction to jurisdiction); Castano v. American Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996) (multistate class action decertified, because trial court failed to consider how variations in state law would affect federal rule requirements regarding class actions); In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300 (7th Cir. 1995) (Posner, J.) (comparing differing state pattern instructions on negligence and differing formulations on the meaning of negligence).

n113 See Margaret Meriwether Cordray, The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards, 78 Or. L. Rev. 275, 309 (1999) ("Constitutional principles of sovereignty and federalism thus forbid a state from imposing punitive damages based on the defendant's out-of-state conduct, regardless of whether the defendant's conduct was lawful or unlawful where it occurred. To allow an individual state to impose punitive damages based on conduct, lawful or unlawful, having no significant contacts with that state would indeed, 'throw down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.'" (quoting New York Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914)).

n114 See Ariz. Rev. Stat. Ann. § 12-701 (West 1999); Mich. Stat. Ann. § 600.2946(5) (1999); N.J. Stat. Ann. § 2A:58C-5(c) (West 1999); Ohio Rev. Code Ann. § 2307.801(c) (West 1999); Or. Rev. Stat. § 30.927(1) (1998); Utah Code Ann. § 78-18-2 (1999); see also Colo. Rev. Stat. § 1321-403(1)(b) (1999) (rebuttable presumption that product was not defective if it complied with federal or state standards); N.D. Cent. Code § 28-01.402 (1)(a) (1999) (same).

n115 ALI Reporters' Study, supra note 54, at 95, 101.

n116 See Victor E. Schwartz & Liberty Magarian, Multiple Punitive Damage Awards in Mass Disaster and Product Liability Litigation: An Assault on Due Process, 8 Adelphia L.J. 101 (1992).

n117 See Edwards v. Armstrong World Indus., Inc., 911 F.2d 1151, 1155 (5th Cir. 1990) ("If no change occurs in our tort or constitutional law, the time will arrive when [a defendant's] liability for punitive damages imperils its ability to pay compensatory claims . . . ."); Bishop v. General Motors Corp., 925 F. Supp. 294, 298 (D.N.J. 1996) ("Indeed, one of the many cogent criticisms of punitive damages is that multiple punitive damage liability can both bankrupt a defendant and preclude recovery for tardy plaintiffs.").

n118 See generally Froud v. Celotex Corp., 437 N.E.2d 910, 914 (Ill. 1982) (Sullivan, J.,

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concurring) ("It cannot be denied that the spectre of the destruction of companies, and even individuals, as a result of punitive damage awards is a threatening, present reality.").

n119 Dunn v. Hovic, 1 F.3d 1371, 1398 (3d Cir. 1993) (Weis, J., dissenting), modified in part, 13 F.3d 58 (3d Cir. 1993).

n120 William Schwartzer, Punishment Ad Absurdum, 11 Cal. Law. 116 (Oct. 1991).

n121 See Racich v. Celotex Corp., 887 F.2d 393, 398 (2d Cir. 1989) ("We agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle."); Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1064 (D.N.J. 1989) ("The court holds that due process places a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct. Regardless of whether a sanction is labelled 'civil' or 'criminal' in nature, it cannot be tolerated under the requirements of due process if it amounts to unrestricted punishment."), vacated, 718 F. Supp. 1233 (D.N.J. 1989), rev'd on other grounds sub nom., Juzwin v. Asbestos Corp., 900 F.2d 686 (3d Cir. 1990); In re Northern Dist. of Calif. "Dalkon Shield" IUD Prod. Liab. Litig., 526 F. Supp. 887, 899 (N.D. Cal. 1981) ("A defendant has a due process right to be protected against unlimited multiple punishment for the same act."), vacated and remanded on other grounds, 693 F.2d 847 (9th Cir. 1982); see also King v. Armstrong World Indus., Inc., 906 F.2d 1022, 1031 (5th Cir. 1990) ("It must be said that a strong arguable basis exists for applying the due process clause . . . to a jury's award of punitive damages in a mass tort context."), reh'g denied, 914 F.2d 251 (5th Cir. 1990); In re Federal Skywalk Cases, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J., dissenting) (Unlimited punishment for one course of conduct "would violate the sense of 'fundamental fairness' that is essential to constitutional due process."); Morse v. Southern Union Co., 38 F. Supp. 2d 1120, 1126 n.12 (W.D. Mo. 1998) ("While the Missouri courts seem not to have considered whether the likelihood of multiple claims should limit punitive damages recovery, I believe such a factor may be required by Due Process."); McBride v. General Motors Corp., 737 F. Supp. 1563, 1570 (M.D. Ga. 1990) ("Due process may place a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct."); Magallanes v. Superior Ct., 167 Cal. App. 3d 878, 888, (Cal. Ct. App. 1985) ("It is also fair to ask whether a defendant who has been punished with punitive damages when the case is first tried should be punished again when the second, or the tenth, or the hundredth case is tried.").

n122 See Dan D. Dobbs, Law of Remedies § 3.11(8) (2d ed. 1993) ("If the first verdict for punitive damages . . . represents the appropriate level of punishment, it may be seriously unfair to inflict additional punishment in all subsequent cases. Besides the unfairness, such awards may destroy a valuable business and may exhaust its assets so that later victims of the same tort collect nothing at all."); John Calvin Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139 (1986); Dennis Jones et al., Multiple Punitive Damages Awards For A Single Course of Wrongful Conduct: The Need For A National Policy To Protect Due Process, 40 Ala. L. Rev. 1 (1991).

n123 Dunn v. Hovic, 1 F.3d 1371, 1399 (3d Cir. 1993) (Weis, J., dissenting); see also Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 415 (5th Cir. 1986) (en banc) (Clark, C.J., dissenting) ("The court is frustrated by the lack of congressional action [to solve the multiple punitive damages problem]. Clearly the powers of Congress to tax and regulate give that forum the interstate reach and flexibility needed to allocate the relatively scarce resources that must be available to present and future claimants to achieve the greatest good for society.").

n124 This problem was described by the ALI:

Single-state action . . . is an ineffectual response to the problem, because one state cannot

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control what happens in other jurisdictions. In fact, the state that acts alone may simply provide some relief to out-of-state manufacturers at the expense of its own citizen-victims, a situation that hardly provides much law reform incentive for state legislators.

ALI Reporters' Study, supra note 54, at 261. Recognizing that a uniform remedy can only be achieved at the federal level, the ALI Reporters' Study recommended Congressional action. See ALI Reporters' Study, supra note 54, at 261.

n125 Florida does not permit punitive damages to be awarded more than once for the same act or course of conduct unless the court determines by clear and convincing evidence that the amount of punitive damages previously awarded was insufficient to punish the defendant. In that situation, the court may permit a jury to consider an award of subsequent punitive damages. Any subsequent awards must be reduced by the amount of any earlier punitive damages awards. See Fla. Stat. Ann. § 768.73(2) (West 1997). Missouri passed a statute, applicable in most tort actions, that allows a defendant to file a post-trial motion requesting a credit for prior awards arising out of the same conduct. See Mo. Ann. Stat. § 510.263.4 (1999). A Georgia statute limiting punitive damages in product liability cases to a single award, see Ga. Code Ann. § 51-125.1(e) (1999), was declared unconstitutional. See McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990).

n126 718 F. Supp. 1233 (D.N.J. 1989), rev'd on other grounds sub nom., Juzwin v. Asbestos Corp., 900 F.2d 686 (3d Cir. 1990).

n127 See id. at 1235 ("This court does not have the power or the authority to prohibit subsequent awards in other courts, notwithstanding its opinion that such subsequent awards violate the due process rights of the defendants . . . . Until there is uniformity either through Supreme Court decision or national legislation, this court is powerless to fashion a remedy which will protect the due process rights of this defendant or other defendants similarly situated."); see also Davis v. Celotex Corp., 420 S.E.2d 557, 566 (W. Va. 1992) (noting that, because punitive damages can be awarded "nationwide, it is doubtful that one state's ruling would necessarily bind other jurisdictions"); Fischer v. Johns-Manville Corp., 512 A.2d 466, 480 (N.J. 1986) ("At the state court level we are powerless to implement solutions to the nationwide problems created by [multiple punitive damages awards]."). See generally David Lafferty, Note, Juzwin v. Amtorg Trading Corp.: Multiple Assessments of Punitive Damages In Toxic Tort Litigation, 8 Pace Envtl. L. Rev. 647, 665 (1991) (concluding that the problem of multiple punitive damages awards "cries out for congressional action").

n128 See generally TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 472 (1993) (Scalia and Thomas, J.J., concurring in the judgment) (indicating a belief that "any perceived 'unfairness' in the common-law punitive damages regime" should be fixed by legislatures).

n129 W.R. Grace & Co.-Conn. v. Waters, 638 So. 2d 502, 505 (Fla. 1994); see also Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 865-66 (Iowa 1994) ("We do not disagree that the problem of successive punitive damages awards in mass tort cases arising from the same conduct is a serious one . . . . We believe neither our action nor legislative action in Iowa will curb the problem of multiple punitive damage awards in mass tort litigation.").

n130 140 Cong. Rec. S14835-6 (daily ed. Oct. 7, 1994) (statement of Sen. Danforth).

n131 Id.

n132 Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

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involving a punitive damages claim should be "bifurcated" so that the proceedings on punitive damages are separate from and subsequent to the proceedings on compensatory damages before the same jury. This would prevent evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by the jurors and improperly considered when they are determining basic liability. We also suggest that **[*1006]** evidence of a defendant's net worth should be excluded from consideration at trial. Further, we explain that evidence of a defendant's out-of-state activity should not be considered when determining an award of punitive damages.

Next, to encourage the innovation and distribution of lifesaving and life-enhancing products that are socially beneficial to society, we recommend that punitive damages should not be permitted in cases alleging harms caused by FDA pre-market approved pharmaceuticals, vaccines, or medical devices, unless the approval was obtained through fraud or bribery.

Finally, we argue for federal legislation to address the special problem of multiple punitive damages awards for a single act or course of conduct. Repetitive punishment is not only unfair overkill, but it can strip a company of assets and endanger the ability of future claimants to recover even basic out-of-pocket expenses and damages for their pain and suffering.

I. Background: The Development of Punitive Damages Law

A. The First 200 Years

Punitive, or exemplary, damages first received explicit recognition by the English common law in 1763 in two cases involving illegal searches and seizures by officers of the Crown. [10] In Huckle v. Money, [11] the first case to use the term "exemplary damages," and its companion case, Wilkes v. Wood, [12] English courts for the first time expressed that "the punitive and deterrent purposes of damage awards could be separated from their compensatory function." [13] **[*1007]**

Huckle and Wilkes were followed by cases approving punitive damages awards in a narrow category of torts involving conscious and intentional harm inflicted by one person on another. These "intentional torts" included assault and battery, [14] malicious prosecution, [15] false imprisonment, [16] and trespass. [17] Punitive damages were allowed in these cases as an auxiliary, or "helper," to the criminal law system, which in eighteenth century England "punished more severely for infractions involving property damage than for invasions of personal rights." [18]

As in England, punitive damages in colonial America (and through the nineteenth and well into the twentieth centuries) were available only in a comparatively small class of torts-"the traditional intentional torts." [19] These included: assault and battery, [20] libel and slander, [21] malicious prosecution, [22] false imprisonment, [23] and intentional interferences with property **[*1008]** such as trespass and conversion, malicious attachment, or destruction of property, [24] private nuisance, [25] and similar wrongful conduct. [26] In general, punitive damages "merited scant attention," because they "were rarely assessed and likely to be small in amount." [27] Typically, punitive damages awards only slightly exceeded compensatory damages awards, if at all. [28]

B. The Modern Era

Beginning in the late 1960s, American courts began to depart radically from the historical "intentional tort" moorings of punitive damages. [29] The advent of "mass tort" litigation resulted in an increase of punitive damages claims against manufacturers, [30] including the possibility of repeated imposition of punitive damages for an alleged risk in a single product line or a single decision. [31] **[*1009]**

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"Reckless disregard" became a popular standard for punitive damages liability. [32] A number of states utilize a triple "trigger"-punitive damages can be awarded if the defendant engaged in either willful, wanton, or gross misconduct. The triple trigger approach gives plaintiffs three separate paths to obtain punitive damages. In some states, "gross negligence" can support a punitive damages award. [33]

Changes in punitive damages law and practice also impacted both the frequency and size of punitive damages awards. For example, until 1976, there were only three reported appellate court decisions upholding awards of punitive damages in product liability cases, and the punitive damages award in each case was modest in proportion to the compensatory damages awarded. [34] Then, in the late 1970s and 1980s, the size of punitive damages awards "increased dramatically" [35] and "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface." [36] "Today," as one respected commentator in the field has noted, "hardly a month goes by without a multi-million dollar punitive damages verdict in a product liability case." [37]

This phenomenon is fueled in part by evidentiary rules that permit a contingency fee plaintiff's lawyer to tell the jury not only about the profit the defendant made on a product, but also the general wealth of the corporation as a whole. Plaintiffs' lawyers argue to juries that large, wealthy corporations will "get the message" only if punitive damages are sub **[*1010]** stantial. As the United States Supreme Court noted in Honda Motor Co., Ltd. v. Oberg, [38] a products liability punitive damages case, "The presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." [39]

II. **Punitive Damages Reform** Is Needed

A. The Problem with Runaway **Punitive Damages**

Reform is needed to address the chilling effect that the threat of runaway punitive damages can have on job-creators and the general public, who are denied socially beneficial products. Reform also would help prevent due process violations.

The chilling effect of punitive damages is illustrated by the litigation involving the drug Bendectin, an anti-nausea morning sickness drug once marketed by Merrell Dow Pharmaceuticals, Inc. [40] Although the drug had been and still is approved by the Food and Drug Administration and is widely acclaimed by health care professionals worldwide, Merrell Dow withdrew Bendectin from the market in 1983, in part **[*1011]** from concerns about punitive damages liability. Merrell Dow has never lost a final judgment in any Bendectin case in the twenty-year history of the litigation; trial judges often dismiss these cases prior to trial. [41] The lack of any meaningful standards, however, has resulted in some substantial punitive damages verdicts, which eventually have been overturned by trial courts or on appeal. [42]

The sheer unpredictability of the current system has also resulted in overdeterrence. A Conference Board Study of corporate executives found that fear of liability suits had prompted thirtysix percent of the firms to discontinue a product and thirty percent to decide against introducing a new product. [43]

B. "Data Wars" and the In Terrorem Effect of **Punitive Damages**

Opponents of **punitive damages reform** have argued that changes in the law are not needed, because headline-grabbing awards are often reduced on appeal. For example, one study funded by plaintiffs' lawyers has suggested that there were only 355 punitive damages awards in products liability cases from 1965 to 1990. [44] While the author of this study has

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conceded that this number was only a "guesstimate," [45] the study also overlooked the practical reality that actual punitive awards represent just the tip of the iceberg in regard to their impact. They are dwarfed by the amounts paid out in settlements due to the in terrorem effect of punitive damages.

On average, over ninety percent of cases are settled out of court or otherwise disposed of without trial. [46] In many of **[*1012]** these cases, the threat of punitive damages may be abused as a "wild card" to force higher settlements. [47] As Yale law professor George Priest has observed:

The availability of unlimited punitive damages affects the 95% to 98% of cases that settle out of court prior to trial. It is obvious and indisputable that a punitive damages claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process, increasing the likelihood of litigation. [48]

Professor Priest's observation is supported by the findings of a 1996 Pacific Research Institute for Public Policy study, which concluded:

1. The unpredictability of a prospective punitive damage award contributes significantly to the uncertainty (and therefore the risk) of a court trial outcome.

2. Both the uncertainty posed by the prospect of unlimited punitive damages, combined with the relative probability of a punitive damage award if a case goes to jury trial, provide litigants who demand punitive damages with potent leverage against risk-averse defendants, and tip the balance in settlement bargains in favor of litigants with weak or frivolous cases. [49]

III. Proposals For **Punitive Damages Reform**

In order to address the United States Supreme Court's concern that punitive damages awards in this country have "run wild," [50] clear, rational rules are needed to protect fundamental constitutional rights, remove barriers to interstate commerce, and promote economic growth and innovation, while at the same time providing incentives for responsible business practices. Below, we discuss a number of proposals that find strong support in both the law and sound public policy. **[*1013]**

A. Actual Malice "Trigger"

Punitive damages should only be awarded if the defendant's conduct exhibited actual malice. This "trigger" reflects the roots of punitive damages law. At the time the Founding Fathers ratified the Constitution and until relatively recent times, punitive damages were reserved for clearly intentional torts such as assault, battery, trespass, and false imprisonment. While the actual malice standard is more conservative than the current law in most states, [51] we believe it is preferable to other standards, such as the "triple trigger" approach, because it would help separate conduct that is particularly reprehensible and worthy of punishment from that which is not.

B. "Clear and Convincing Evidence" Burden of Proof

A claimant should be required to establish proof of punitive damages liability by "clear and convincing evidence." The "clear and convincing evidence" burden of proof standard reflects the quasi-criminal nature of punitive damages; it takes a middle ground between the burden

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of proof standard ordinarily used in civil cases (i.e., proof by a "preponderance of the evidence") and the criminal law standard (i.e., proof "beyond a reasonable doubt"). [52] The standard is now law in twenty-nine states and the District of Columbia, [53] and has been recom **[*1014]** mended by each of the principal academic groups to analyze the law of punitive damages over the past decade, including the American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws. [54] The United States Supreme Court has specifically endorsed the "clear and convincing evidence" burden of proof standard in punitive damages cases. [55]

C. Proportionality: Making the Punishment Fit the "Offense"

1. A Proposal for **Reform**

Reasonable parameters should be put on **punitive damages** awards to make the punishment fit the offense. [56] Proportionality has been an important part of the United States Supreme Court's consideration of the validity of criminal punishment. [57] Even very serious crimes such as larceny, robbery, and arson **[*1015]** have sentences defined by a statutory maximum. [58] As former Supreme Court Justice Lewis Powell wrote: "It is long past time to bring the law of punitive damages into conformity with our notions of just punishment." [59]

A number of states have enacted statutes to address excessiveness in punitive damages awards. [60] We support permitting punitive damages awards against larger businesses up to two times the amount awarded to the claimant for economic and noneconomic losses, or $ 250,000, whichever is greater. [61] This flexible approach accomplishes punishment and deterrence in the unusual situation where there is serious misconduct and relatively minor actual damages. We also support limiting the maximum single punishment against an individual or small business to two times the amount awarded to the claimant for economic and noneconomic losses, or $ 250,000, whichever is less (i.e., $ 250,000 would be the maximum). [62] **[*1016]** This recommendation reflects the practical reality that a punitive damages award exceeding $ 250,000 would bankrupt most individuals and small businesses.

2. Arguments Challenging Proportionality Are Unsupported

It has been argued that proportionality may result in inadequate deterrence. As Thomas Jefferson noted, however, "if the punishment were only proportional to the injury, men would feel that their inclination as well as their duty to see the laws observed." [63] Indeed, federal antitrust laws have worked well for decades with punishment set in proportion to actual losses.

Furthermore, it should be remembered that there is no limit on the number of times a business can be punished and that when a business engages in wrongful conduct it does not know how many people will be hurt and how much harm might occur. There is simply no way for a company to predetermine the actual damages of all persons who may be injured by its conduct. One also must remember that compensatory damages themselves can run very high, so they can definitely have a deterrent effect on wrongful behavior as well. [64]

The argument that proportionality may somehow result in inadequate deterrence has been rebutted by empirical fact. A study by two Cornell University Law School professors and the National Center for State Courts found that awards in product liability punitive damages cases, after all appeals were exhausted, have almost always been within two times compensatory damages. [65] **[*1017]**

We have been asked, in light of this report, why a so-called **"cap"** on punitive damages is needed. The answer is that the present system is time consuming and wasteful. It may take months or years until the final "appeal" is determined. It is our judgment that having a firm outer limit on punitive damages will reduce appeals and legal costs without sacrificing

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deterrence. This should benefit both plaintiffs and defendants.

In addition, it has been argued that totally unlimited punitive damages are needed to police corporate wrongdoing. This assertion is not supported by fact. There is no credible evidence that the behavior of businesses is less safe in either those states that have set limits on punitive damages or in the states that do not permit punitive damages at all. [66] Furthermore, plaintiffs in these states have no more difficulty obtaining legal representation than in those states where the "sky is the limit."

Finally, it has been suggested that a proportionality requirement for punitive damages could be unfair to women and other minority groups that tend to recover less in compensatory damages than other groups, because it may reduce the amount such individuals could recover in punitive damages. [67] First, this argument totally misapprehends the basic premise that punitive damages have absolutely nothing to do with compensating an individual for a loss; they are purely a "windfall" to the claimant.

Second, the argument ignores the needs of women and minority groups in business, particularly small businesses, who face threats to their enterprises as a result of unlimited punitive damages. The U.S. Small Business Administration's Office of Women's Business Ownership has reported that there are 8 million women-owned businesses in the United States. [68] In addition, the U.S. Small Business Administration's Office of Advocacy has reported that, by 1997, there were an estimated 3.25 million minority-owned businesses in the United States, **[*1018]** generating $ 495 billion in revenues, and employing nearly 4 million workers. [69] From 1987 to 1997, the number of minority-owned businesses increased 168%, while revenues grew twice as fast-343%. [70] **Punitive damages reform** would benefit these businesses greatly.

D. Bifurcation

At a defendant's request, a trial involving a punitive damages claim should be divided so that the proceedings on punitive damages are separate from and subsequent to the proceedings on compensatory damages. Judicial economy would be achieved by having the same jury determine both compensatory damages and punitive damages issues.

Bifurcated trials are equitable, because they prevent evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by jurors and improperly considered when they are determining basic liability. For example, plaintiffs' lawyers like to introduce evidence of a company's net worth. Although a jury is often instructed to ignore such evidence unless it decides to punish the defendant, it is difficult, as a practical matter, for jurors to do so. The net result may be that jurors overlook key issues regarding whether a defendant is liable for compensatory damages; they may make an award simply because they believe that the defendant "can afford it." Bifurcation would help prevent that unfair result because evidence of the defendant's net worth would be inadmissible in the first part (i.e., compensatory damages phase) of the case.

Bifurcation also helps jurors "compartmentalize" a trial, allowing them to more easily separate the burden of proof that is required for compensatory damage awards (i.e., proof by a preponderance of the evidence) from a higher burden of proof for punitive damages (i.e., proof by clear and convincing evidence).

Recognizing the benefit of bifurcation, some courts have adopted the procedure as a matter of common law reform. [71] **[*1019]** Other states have made changes through court rules or legislation. [72] Bifurcation of punitive damages trials is supported by the American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws, among other well-known organizations. [73]

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E. Excluding Evidence of a Defendant's Net Worth by Plaintiffs

Evidence of a defendant's net worth can lead to a punitive damages award based on bias, prejudice, or passion. Introduction of such evidence by plaintiffs is, at bottom, "an improper 'appeal to class prejudice and pandering to the perception that corporations wield disparate power,'" generally made for no reason "'other than to prejudice . . . the jury's sworn duty to reach a fair, honest and just verdict.'" [74] To reduce the possibility that quasi-criminal punishment could be meted out for improper purposes, plaintiffs should be precluded from making such "deep pockets" arguments. [75]

1. The United States Supreme Court Speaks and Leading Academics Agree

The United States Supreme Court has indicated that overreliance upon a corporate defendant's financial condition may violate due process. For example, one of the reasons the **[*1020]** Court gave for upholding Alabama's punitive damages scheme in Pacific Mutual Life Insurance Co. v. Haslip [76] was the fact that Alabama does not permit introduction of the defendant's financial condition, and its juries therefore "must be guided by more than the defendant's net worth." [77] The Court stated: "Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." [78]

Subsequently, the Court said in TXO Production Corp. v. Alliance Resources Corp. [79] that "the emphasis on the wealth of the wrongdoer increased the risk that the [punitive damages] award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident." [80] Most recently, in BMW of North America, Inc. v. Gore [81] the Court expressed its strongest reservations about the use of wealth evidence in punitive damages cases. The Court stated that "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." [82]

The defendant's right to notice would be a "phantom" right if a punitive damages award could be based on a defendant's net worth at the time of trial. Indeed, in BMW, the Supreme Court was careful to emphasize that "the fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business." [83] **[*1021]**

The risk of a punitive damages award reflecting jury bias is particularly great where the defendant is a large corporation. [84] For precisely this reason, a report prepared by tort scholars for the prestigious American Law Institute recommended that evidence of a corporation's net worth should "no longer be admissible in assessing punitive damages." [85] After all, as one respected federal appellate judge has noted, "having a large net worth [is not] the wrong to be deterred!" [86]

Furthermore, consideration of a corporate defendant's net wealth can lead to arbitrary awards. Corporations can incur proportionately more instances of punishment simply because of their greater volume of business. For example, in a given period there might be fifty punitive damages awards against a larger company and only five against a smaller company. If each punitive damages assessment is one percent of the **[*1022]** defendant's assets, the large company will have lost half its assets after this period. The smaller company, which behaved in exactly the same way, would still have ninety-five percent of its assets. [87]

2. Arguments for Net Worth Evidence Admissibility Are Ill-Considered

Plaintiffs generally argue that evidence of a defendant's overall financial condition is rationally related to the goals of punishment and deterrence, on the theory that the wealthier the defendant, the higher the financial penalty must be in order to give a culpable defendant

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both the punishment it deserves and the economic incentive not to repeat its wrongdoing.

While this may be true in the case of individual defendants acting personally out of malicious or spiteful motives-i.e., it may take a larger punishment to deter a millionaire from punching someone in the nose than to deter a person of modest means-it has no applicability to corporate behavior, which is almost invariably motivated by economics. [88] As two noted scholars on punitive damages awards have explained: **[*1023]**

Deterrence theory is based on the (usually and to one or another extent plausible) assumption that actors weigh the expected costs and benefits of their future actions. Specifically, a potentially liable defendant will compare the benefits it will derive from an action that risks tort liability against the discounted present expected value of the liability that will be imposed if the risk occurs. Whether a defendant is wealthy or poor, this cost-benefit calculation is the same. If, as is likely, a wealthy defendant derives no greater benefit from a given action than a poor defendant, then both will be equally deterred (or equally undeterred) by the threat of tort liability. A defendant's existing assets do not increase the expected value of a given future action. Therefore they do not require any adjustment in the level of sanction needed to offset that expected value. The defendant's wealth or lack of it is thus irrelevant to the deterrence of socially undesirable conduct. [89]

F. Excluding Evidence of Extraterritorial Conduct

Evidence of a defendant's out-of-state activity to award and calculate punitive damages can violate constitutional principals of interstate commerce, state sovereignty, comity, and due process. Plaintiffs should be precluded from admitting such evidence.

This issue was a principal focus of the Supreme Court's opinion in BMW of North America, Inc. v. Gore. [90] In BMW, the Court indicated that the Commerce and Due Process Clauses of the United States Constitution prohibit state courts from using the punitive damages mechanism as a means of regulating conduct in other states. In a crucial sentence, the Court said: "While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation." [91]

Months after purchasing a new BMW sedan from an Alabama dealer, and without noticing any flaws in its appearance, Dr. Gore took his vehicle to a "detailer"-someone who would thoroughly clean the car inside and out to make it look "snazz **[*1024]** ier than it normally would appear." [92] The detailer noted that portions of Dr. Gore's car had been repainted and brought this to the doctor's attention. Dr. Gore sued the American distributor of BMW automobiles seeking both compensatory and punitive damages on the theory that BMW's failure to disclose the repainting constituted "gross, oppressive or malicious" fraud under Alabama law. [93]

At trial, BMW acknowledged that it had a national policy of repairing cars that were damaged in the course of manufacture or during shipment. If the cost of a repair exceeded 3% of the car's suggested retail price, it was placed in company service for a period of time and then sold as used. If the repair was less than 3% of the purchase price, however, BMW sold the car as "new" without advising the dealer or the customer that any repairs had been made. [94]

Because the cost of repainting Dr. Gore's car was only about 1.5% of the car's suggested retail price, BMW did not disclose its repair to the Alabama dealer or to Dr. Gore. BMW's nondisclosure policy was consistent with the statutory laws of approximately twenty-five states which define disclosure obligations of automobile manufacturers, distributors, and retailers. [95] Under these state laws, BMW's failure to disclose minor refinishing was lawful and

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ARTICLE: RECALIBRATING THE SCALES OF JUSTICE THROUGH NATIONAL PUNITIVE DAMAGE REFORM

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SUMMARY:
... As little as 30 years ago, punitive damages awards were "rarely assessed" and usually "small in amount." ... There is no uniform method to the courts' punitive damage award reductions; often there is no explanation as to why the verdict is excessive or why the remitted amount was chosen as the appropriate punishment. ... C. The Fourteenth Amendment - Can a Punitive Damage Award Violate Due Process? ... BMW appealed to the Supreme Court, claiming that the punitive damage award was unconstitutional because it was grossly excessive and because it constituted extraterritorial punishment. ... How does criminal incarceration translate into monetary sanctions? If a defendant could be sentenced to five years in jail and $ 100,000, should the punitive damage award be limited to the $ 100,000? Commentators have observed the difficulty associated with comparing criminal penalties to civil punishment. ... Because the punitive damage award should be based in part on the amount of injury the defendant has caused and this information may not be known fully at the time of the assessment of the first punitive award, a "first comer" rule may not punish the defendant adequately for her misconduct. ... Federal tort reform will benefit both the consumer and the manufacturer with consumers knowing their rights and manufacturers knowing their responsibilities. ...

TEXT:
[*1573] [*1574]

Introduction

We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit in every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus. [105] **[*1598]**

In Haslip, Lemmie L. Ruffin, an agent for Pacific Mutual, made a proposal to supply health and life insurance for the employees of Roosevelt City, Alabama. [106] The city approved the proposal and began issuing payments, which were effected through deductions from its employees' paychecks, to Ruffin. [107] Instead of remitting these payments to Union Fidelity, the health insurance company, Ruffin misappropriated the money. [108] When the insurance company did not receive the payments, it sent notices to Ruffin that it was discontinuing health coverage to the city. [109]

In 1982, Cleopatra Haslip, a city employee, was hospitalized and the insurance company refused to cover the expenses. [110] Haslip, along with other injured city employees, sued Ruffin and Pacific Mutual for intentional fraud, alleging that Ruffin stole their insurance premiums and allowed their policies to lapse. [111] The jury agreed, awarding Haslip compensatory and punitive damages in the amount of $ 1,040,000. [112] On appeal, the Alabama Supreme Court rejected Pacific Mutual's claim that the punitive damage award was a product of inadequate judicial review and a violation of due process and upheld the punitive damage award. [113] The Supreme Court subsequently affirmed the state court's holding on appeal, again finding that the requirements of due process had been met. [114] The Court held that in order to determine "whether a punitive award is reasonably related to the goals of deterrence and retribution," a court should consider: **[*1599]**

(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation. [115]

After Haslip, courts were left to determine whether the punitive damage award was reasonable using the preceding "totality of the circumstances" test.

2.

TXO Production Corp. v. Alliance Resources Corp.

In an effort to decide whether the punitive damage award in TXO Production Corp. v. Alliance Resources Corp. [116] was reasonable, the Supreme Court of West Virginia engaged in a comparative analysis of all post-Haslip court decisions searching for a pattern of what courts

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find reasonable. The court placed the cases into three categories: (1) "really stupid defendants;" [117] (2) "really mean defendants;" [118] and, (3) "really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm." [119] The West Virginia court held that TXO fell within the "really mean" category. [120] **[*1600]**

In this case, punitive damages were awarded to punish TXO for its unscrupulous business dealings. TXO wanted oil and gas rights to a 1000-acre tract in West Virginia in which Alliance held a leasehold interest. [121] After trying to purchase Alliance's rights without success, TXO made Alliance a "phenomenal" offer on the condition that the offer would be reduced if less than full oil and gas mineral and leasehold rights were conveyed. [122] TXO, looking for a way to reduce its payments to Alliance, located a grant of some mineral rights to a third party, Mr. Signaigo. [123] As Mr. Signaigo explained to TXO, however, the grant concerned only coal rights and, therefore, did not involve Alliance's oil and gas rights. [124] TXO tried to force Mr. Signaigo to lie in an affidavit by claiming that the oil and gas rights may have been included in the grant, but Mr. Signaigo refused. [125] TXO, fully informed that the grant did not affect oil and gas rights, then bought the grant and threatened Alliance with it, trying to force Alliance to accept reduced royalties. [126] When Alliance refused to comply, TXO brought suit and Alliance counterclaimed. [127]

At trial, Alliance demonstrated that TXO acted in bad faith because it knew that it had no claim against Alliance for the oil and gas rights. [128] Alliance also offered evidence that TXO was a large company; that the revenues from the oil and gas rights at issue were substantial; and that TXO "had engaged in similar nefarious activities in its business dealings in other parts of the country." [129] The jury found TXO at fault and awarded Alliance its actual damages totaling $ 19,000, the costs of defending the TXO action, and $ 10 million in punitive damages. [130] The Supreme Court of West Virginia upheld the award, stating: **[*1601]**

The type of fraudulent action intentionally undertaken by TXO in this case could potentially cause millions of dollars in damages to other victims. As for the reprehensibility of TXO's conduct, we can say no more than we have already said, and we believe the jury's verdict says more than we could say in an opinion twice this length. Just as important, an award of this magnitude is necessary to discourage TXO from continuing its pattern and practice of fraud, trickery and deceit. [131]

The United States Supreme Court affirmed the lower court's decision, holding that the $ 10 million punitive damage award, which was 526 times the actual damages, was not "grossly excessive" and thus did not violate due process. [132] As in Haslip, the Court refused to adopt a bright line test, instead focusing on the "reasonableness" of the punitive damages to determine whether the award was grossly excessive. [133] The Court rejected TXO's argument that the award was unreasonable, [134] adding that it was appropriate to consider the harm that could have occurred as a result of the defendant's conduct when assessing the reasonableness of a punitive damage award. [135]

By rejecting the notion that due process requires a particular ratio between punitive and compensatory damages, the Supreme Court in Haslip and TXO left lower courts without concrete guidance as to what constitutes an unreasonable award. To this point, the Court endorsed a variety of factors used by state courts to assess and review punitive damage awards, without articulating any sort of hierarchy among them. Moreover, the court made clear that no single factor is dispositive no matter how seemingly outrageous. [136] The Court held that a "grossly excessive" award would violate due process, but left the **[*1602]**

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courts to determine on a case-by-case basis whether a particular punitive award was grossly excessive. [137]

3.

Honda Motor Co. v. Oberg

Not every punitive damage case has resulted in victory for the plaintiff. In Honda Motor Co. v. Oberg, [138] for example, the Supreme Court struck down an amendment to a state constitution that prohibited judicial review of punitive awards as violative of due process. [139] In Honda, Oberg brought a product liability suit against Honda, who manufactured and sold three-wheeled all-terrain vehicles that had a propensity to overturn - a fact that Honda knew or should have known. [140] When Oberg's vehicle overturned, he suffered severe and permanent injuries. [141] The jury awarded Oberg $ 919,000 in compensatory damages, which was reduced to $ 735,000 because the jury found that the plaintiff's negligence contributed to the accident, and $ 5 million in punitive damages. [142] Honda appealed, arguing that the punitive award violated the Due Process Clause because it was excessive and because Oregon courts lacked the authority to review and correct excessive jury awards. [143] The Supreme Court held that the amendment to the Oregon Constitution, which prohibited post-verdict judicial review of the amount of a jury award unless there was no evidence to support the award, violated procedural due process. [144]

Even though the Court reversed the punitive award on constitutional grounds, Honda has had little impact on punitive damage cases because of the narrow holding and the unusual facts, in that Oregon was the only state that barred post-verdict judicial review of punitive damage awards. [145] **[*1603]**

4.

BMW of North America, Inc. v. Gore

The most recent due process challenge to a punitive damage award was brought in BMW of North America, Inc. v. Gore. [146] In BMW, the jury awarded the plaintiff $ 4000 in compensatory damages and $ 4 million in punitive damages because BMW failed to inform the plaintiff that the "new" car they sold him had been partially refinished. [147] On appeal, the state supreme court reduced the punitive damage award to $ 2 million. [148] BMW appealed to the Supreme Court, claiming that the punitive damage award was unconstitutional because it was grossly excessive and because it constituted extraterritorial punishment. [149]

In a 5-4 decision, the Supreme Court held that the $ 2 million punitive damage award was so grossly excessive that it "transcended the constitutional limit." [150] Justice Stevens, writing for the five-member majority, articulated three "guideposts" which the Court considered in its due process calculus: (1) the degree of repre-hensibility of the conduct; (2) the disparity between the harm suffered by Gore and the punitive damage award; and, (3) the difference between this remedy and the civil (and criminal) penalties authorized or imposed in comparable cases. [151] **[*1604]**

Justice Scalia, joined by Justice Thomas, dissented on federalism grounds. [152] Justice Scalia, although agreeing that punitive damage reform may be needed, believed that it was not the role of the Court to impose its subjective assessment of reasonableness on the states. [153] The Court's decision, according to Justice Scalia, "was really no more than a disagreement with the community's sense of indignation or outrage expressed in the punitive award of the Alabama jury." [154] Justice Scalia did not believe that such an action was authorized by the Due Process Clause's procedural guarantees. [155] Finally, Justice Scalia criticized the lack of

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guidance the decision gave to the states:

In truth, the "guideposts" mark a road to nowhere; they provide no real guidance at all. As to "degree of reprehensibility" of the defendant's conduct, we learn that ""nonviolent crimes are less serious than crimes marked by violence or the threat of violence,'" and that ""trickery and deceit'" are "more reprehensible than negligence." As to the ratio of punitive to compensatory damages, we are told that a ""general concern of reasonableness ... enters into the constitutional calculus,'" - though even "a breathtaking 500 to 1" will not necessarily do anything more than ""raise a suspicious judicial eyebrow.'" And as to legislative sanctions provided for comparable misconduct, they should be accorded ""substantial deference.'" One expects the Court to conclude: "To thine own self be true."

These criss-crossing platitudes yield no real answers in no real cases. [156]

The legal effect of the "guideposts" articulated by the Court establishes federal standards governing what traditionally has been the exclusive province of the states. [157] In actuality, however, the Supreme Court's "guideposts" offer little real guidance. [158] The Court did not say that the articulated guideposts were the only factors for consideration, leaving courts free to employ other factors when **[*1605]** assessing the constitutionality of damage awards. [159] Moreover, the vagueness of the guideposts lends further credence to the notion that federal tort reform, where Congress can delineate the precise penalties for selected improper behavior, is necessary. [160]

Although the first two guideposts, the reprehensibility of the defendant's conduct and the relationship between the actual harm and the punitive damages, long have been part of the punitive damage assessment process in most states, the third guidepost, which requires a comparison with statutory penalties, is relatively new. [161] Requiring that a punitive award bear some resemblance to statutory penalties for similar conduct raises some concern because statutory penalties often are outdated and obsolete. [162] Statutory penalties, once fixed, rarely are adjusted for inflation. In fact, punitive damages are generally most beneficial in areas where regulation is unable to police or to keep abreast with advancement. [163] The Supreme Court in BMW, however, apparently believed there should be some degree of deference to legislative judgments concerning sanctions for particular conduct.

The fact that criminal sanctions accompany potential civil sanctions presents another impediment to a comparison of the statutorily prescribed civil sanctions with punitive damage awards. [164] How do **[*1606]** criminal penalties for proscribed conduct factor into the civil penalty comparison? Certainly, if criminal penalties exist for similar conduct, the punitive award need not resemble the available civil penalty. How does criminal incarceration translate into monetary sanctions? If a defendant could be sentenced to five years in jail and $ 100,000, should the punitive damage award be limited to the $ 100,000? Commentators have observed the difficulty associated with comparing criminal penalties to civil punishment. [165]

The BMW decision has spurred a great deal of debate over whether federal tort reform is necessary now that the Court has struck down a grossly excessive award. [166] This Article argues that although BMW is a milestone in the war against excessive damage awards, it will have little actual impact in the trenches. District and appellate courts may scrutinize awards more closely, but BMW is sufficiently amorphous to provide no real guidance. [167] In fact, after the Supreme Court rendered its decision in BMW, some expected the Court to remand the pending sixteen cases for application of the guideposts. [168] The Court only remanded a few cases for further consideration in light of BMW, however, and denied certiorari in the rest,

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thereby leaving the lower court rulings in effect. [169] The denial of certiorari lends further credibility to the argument that BMW did not change anything operationally, and that federal tort reform is as necessary now as it was before the BMW decision was rendered. [170]

The Supreme Court simply is incapable of policing every excessive punitive award, and because every state has its own standards and regulations, there is very little predictability in the law. [171] The Supreme Court, which can do no more than overturn those awards that constitute blatant violations of the Constitution, is not the appropriate vehicle for tort reform. Reform must come from the **[*1607]** legislature, which is uniquely suited to balance the interests involved and to weigh the benefits of the punitive damages system against its abuse. [172]

5. Undecided due process challenges - multiple punitive damage awards

With the exception of the due process questions raised and answered by the Supreme Court in BMW, the Court has left a number of due process concerns unresolved. One such issue is whether multiple punitive damage awards against a single defendant for the same act or course of conduct violates due process. The threat of multiple punitive damage awards against a single defendant arises most frequently in the context of mass torts evident with products such as asbestos, [173] Agent Orange, [174] the Ford Pinto, [175] and the Dalkon Shield. [176]

Imposition of multiple punitive damage awards for the same act poses a number of serious problems. If early plaintiffs are awarded large punitive damage amounts, they could render the defendant bankrupt and unable to adequately compensate later plaintiffs for actual damages. [177] In addition, multiple punitive awards discourage the development of new and potentially valuable products. [178] The **[*1608]** possibility of multiple awards also impedes settlements and forces higher settlements than the defendant should pay, because each plaintiff has an incentive to wait for the windfall generated by a punitive award.

The Third Circuit recently addressed the constitutionality of multiple punitive awards in Dunn v. Hovic. [179] In Dunn, the plaintiff was injured by asbestos products manufactured by the defendant, Owens-Corning Fiberglass Corporation ("OCF"). [180] The district court awarded the plaintiff $ 500,000 in compensatory damages and $ 2 million in punitive damages. [181]

On appeal to the Third Circuit, OCF argued that repeated imposition of punitive damages for the same act was an arbitrary deprivation of property without due process and violated the Fourteenth Amendment. [182] Although the appeals court rejected OCF's due process argument, [183] it held that corporate defendants may introduce evidence of past punitive awards imposed on them for the jury to consider when assessing the amount of punitive damages that should be awarded in the present case. [184] The Third Circuit, like many other courts, expressed the need for legislation to address the national issue of multiple punitive damage awards. [185]

Considering the inappropriateness of repetitive punitive damage awards, Professor Gary T. Schwartz has argued that the Due Process Clause should incorporate the prohibition against double jeopardy of **[*1609]** the Fifth Amendment, like it does the prohibition against excessive fines from the Eighth Amendment; therefore, multiple punitive awards could be a violation of due process. [186] As another commentator stated, "At some point, justifiable punishment ends and overkill begins." [187] There should be safeguards implemented to prevent such repeated punishment.

Whether the aggregate of all punitive awards against a single defendant for a single act would be grossly disproportionate to the misconduct and thereby violate due process is an appropriate matter for federal legislators. As the following discussion explains, neither the judiciary nor the state legislatures are capable of effectively regulating against the imposition

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of multiple punitive awards.

Despite their concern about a defendant's due process rights, courts thus far have been unwilling to articulate a "one bite" or a "first comer" rule, citing both their inability to prevent other jurisdictions from awarding punitive damages and their concern about whether the first jury is capable of granting a single award to account fully for the defendant's misconduct. [188] Because the punitive damage award should be based in part on the amount of injury the defendant has caused and this information may not be known fully at the time of the assessment of the first punitive award, a "first comer" **[*1610]** rule may not punish the defendant adequately for her misconduct. [189] The first award may be low because the extent of actual damages to all injured parties may not be known at the time of the first case to consider punitive awards. [190] Moreover, if new evidence of wrongdoing on the part of the defendant is discovered after the first punitive award, it would be inappropriate not to permit the imposition of more than one award. [191] Courts repeatedly have urged a national legislative solution to the punitive damage problems because no single court has the power to prohibit subsequent awards in other courts. [192]

Similarly, individual state legislatures cannot prevent the imposition of multiple punitive awards for a single act because a state's power to regulate conduct stops at its borders. [193] For example, Georgia's tort law permits only one punitive award for any act regardless of the **[*1611]** number of separate causes of action that might arise from that act. [194] Although this may aid corporations being sued in Georgia, it has no bearing on actions brought in other states. [195] Plaintiffs could avoid the Georgia statute simply by bringing their action elsewhere.

D. The Seventh Amendment - Does Judicial Review of Jury Verdicts For Excessiveness Violate the Re-Examination Clause?

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. [196]

The most recent constitutional challenge to a jury's verdict on damages, Gasperini v. Center for Humanities, Inc., [197] did not, like most of the recent decisions, address such issues as when an award is excessive or which factors should be used in making this determination. Instead, Gasperini pertained to the constitutionality of appellate review of the excessiveness of damage awards. [198]

The Gasperini appeal stemmed from a jury award of $ 450,000 in damages to a photographer when the Center for Humanities, a company that produces educational videos, lost 300 slide transparencies after producing his video. [199] The Second Circuit found the damage award excessive and ordered the photographer to accept a remitted award of $ 100,000 or suffer through a new trial on damages. [200]

On appeal to the Supreme Court, Gasperini contended that the appellate court's remittitur was a violation of his Seventh Amendment rights. [201] The Supreme Court held that, as long as the standard of review was "abuse of discretion," appellate review of the district court's **[*1612]** findings regarding excessive damages was reconcilable with the Seventh Amendment. [202]

The Court also considered whether federal courts in diversity cases should use a federal standard, [203] which is extremely deferential to jury verdicts, or a state standard, [204] which is

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less deferential to jury verdicts, to determine whether a jury award is excessive. [205] The Court held that New York's standard used to check excessive damages should be applied by the federal court to avoid state and federal courts in the same jurisdiction reaching different conclusions on the same issues. [206] Thus, the district court was charged with determining whether the jury's verdict "materially deviated" from reasonable compensation, and the appellate court reviews the district court's application of this test for an abuse of discretion. [207]

Unlike the substantive due process cases, Gasperini involved an issue that certainly was within the province of the judiciary and has been resolved with relative ease, clarity, and precision. Substantive due process, on the other hand, lacks clarity and precision because it requires the Court to analyze excessiveness on a case-by-case basis. The judiciary is ill-equipped to address problems requiring it to assess a community's sense of outrage or social conscience. **[*1613]**

V. Federal Tort Reform Legislation

The public's perception that punitive damages are "running wild" and "skyrocketing" has given rise to a call for national tort reform. Federal tort reform supporters claim that the interstate nature of product sales, as well as the inability of states to regulate conduct outside their boundaries, makes federal legislation appropriate and necessary. [208] The goal of the recently proposed national tort reform legislation is to protect corporate manufacturers from excessive punitive damage awards. [209] Proponents of national tort reform claim that punitive damages have the potential to cripple U.S. industry and thereby inhibit their competitiveness in the global market. [210]

A. The Common Sense Product Liability Legal Reform Act

Federal tort reform legislation has been considered by Congress in every year since 1982. [211] Recently, House Bill 956, labeled "The Common Sense Product Liability Legal Reform Act of 1996," passed both Houses of Congress. [212] House Bill 956, which would have applied to all product liability actions, [213] would have reformed tort **[*1614]** law radically by preempting state law in what traditionally has been an area of state regulation. [214] It recommended raising the burden of proof to "clear and convincing evidence" [215] and articulated a single **standard** for awarding **punitive damages:** the defendant's conduct would have to exhibit "a conscious, flagrant indifference to the rights or safety of others." [216] The bill also placed a cap on punitive damage awards [217] and would have permitted either party to bifurcate the trial of punitive damages from liability and compensatory damages. [218] President Clinton, however, vetoed H.R. 956 on May 2, 1996. [219] **[*1615]**

B. Why Do We Need Federal Tort Reform?

Federal tort reform is necessary to safeguard against undeserved and excessive awards and to protect the defendant, the public, and the integrity of the judicial process. [220] Reform is necessary to combat the vagueness in determinations of liability and assessments of amounts of punishment. [221] Such vagueness leaves juries without guidance, inviting them to make improper awards based on their personal biases and prejudices. [222] Moreover, not only are each state's liability and damage assessment standards vague, they are all different - resulting in 49 different laws for a manufacturer to adhere to. The application of the patchwork of state laws and vague **standards** which make up the **punitive damage** system has been erratic at best. This uncertainty has been unfair both to consumers who never can be certain of their rights and to manufacturers who never can be sure of their responsibilities.

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A single, uniform law of punitive damages would reduce the number of punitive damage claims being brought and reduce transaction costs. If both plaintiffs and manufacturers can recognize legitimate claims against a manufacturer, the number of frivolous suits brought will be reduced and settlement will be encouraged. Predictability and uniformity of result are of particular importance in **[*1616]** areas where the parties are likely to give advance thought to the legal consequences of their actions. [224] Without certainty and predictability, the efficacy of punitive damage awards will be undermined substantially. [225]

Moreover, the integrity of the judicial system is threatened when there is unpredictability in the law and its application. [226] Instability in the law and its application breeds discontent and disrespect for the law which, in turn, erodes public confidence in the legal process. [227]

In addition, the current patchwork of state laws increases forum shopping. [228] Because manufacturers generally sell their products across state lines, [229] suits could be brought in many states. Informed plaintiffs simply bring suits in states that have more consumer-friendly laws. National legislation would solve this problem by creating a single **standard** of liability.

By clarifying the muddled state laws, federal tort reform would provide more certainty and predictability. The goals of **punitive damages** - punishment and deterrence - would be furthered if the law were made more exact, definite, and predictable. Manufacturers would be able to predict, by reference to pre-existing situations which had been resolved, what conduct is prohibited. The implementation **[*1617]** of federal legislation ultimately would provide manufacturers with more notice as to both the prohibited conduct and the severity of the punishment. [230] Through repeated application, the federal standard would become increasingly definite and would clarify the conduct that is prohibited, thereby reducing the need for litigation.

Federal tort reform would also establish, on a national level, the safeguards necessary to ensure against abuse of the punitive damages sanction. The quasi-criminal nature of the punitive damages doctrine demands safeguards that are not normally associated with damages awarded in the civil context. [231] The criminal law has built-in protections to prevent excessive punishment in a single proceeding (the Excessive Fines Clause) [232] or multiple punishments assessed in different proceedings for the same act (the Double Jeopardy Clause). [233] Federal tort reform could create the appropriate safeguards to identify and address the problems that plague the punitive damages doctrine.

C. Federal Tort Reform Proposal

1. The burden of proof - clear and convincing evidence

As proposed in the federal bill and the Model Act, the burden of proof necessary to prove entitlement to punitive damage awards should be "clear and convincing" evidence. [234] Because punitive damages are "quasi criminal," [235] standing somewhere between tort and criminal law, it seems appropriate to apply an intermediate evidentiary burden of proof. The purpose of tort law is to compensate victims (restitutionary), [236] using a "preponderance of the evidence" burden of proof, which means that the plaintiff need prove only that it is more likely than not that the defendant committed the **[*1618]** alleged act. The purpose of criminal law is to punish and deter (retributive), using a "beyond a reasonable doubt" burden of proof, which means that the prosecutor must prove that there is no reasonable question that the defendant committed the act. [237] Like criminal sanctions, punitive damages are awarded to victims to punish and deter misconduct; but like tort awards, they are awarded in a civil suit to the plaintiff. It makes sense, therefore, that the burden of proof for punitive damages lie somewhere in between the burden for criminal sanctions and the burden for tort

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awards.

The "clear and convincing" evidence standard, which is a lighter burden than "beyond a reasonable doubt" but heavier than proving by a preponderance of the evidence, falls within this intermediate ground. Clear and convincing evidence is "that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." [238] The clear and convincing evidence burden of proof should be adopted as a safeguard for the defendant's rights in recognition of the criminal component of the penalty and to offset potential bias in favor of the plaintiff and against the corporate manufacturer.

2. The liability **standard** - "a conscious, flagrant indifference to the rights or safety of others" [239]

Under the current rubric of **punitive damages,** every state has a different way of characterizing and defining what form of conduct gives rise to the imposition of punitive damage awards. [240] Pursuant to the various state tort reform statutes, punitive damages can be awarded when the defendant's conduct was grossly negligent, intentional, willful, wanton, malicious, reckless, outrageous or when the defendant exhibited a flagrant disregard for others. [241] Most **[*1619]** states, however, offer no definition of these vague terms. [242] Having so many different standards for defining prohibited conduct makes it much more difficult for corporations who do business in many states to determine the character and nature of the prohibited conduct.

Although commentators may bicker over which **standard** should define the nature of the conduct that gives rise to **punitive damage** awards, no one can dispute the value of having a single national definition for this conduct. The proposed federal **standard** in the most recent bill described actions deserving **punitive damage** awards as those that are "carried out by the defendant with a conscious, flagrant indifference to the safety of others." [243] The passage of a federal bill to regulate the imposition of **punitive damage** awards nationally would provide a single uniform definition. Certainly, a uniform **standard** would provide more reliability and predictability than the current menagerie of standards promulgated, yet undefined, by the many states. Moreover, through its application, the single standard would become increasingly definite over time, making the class of prohibited conduct increasingly clear and reducing the need for litigation. [244]

A "flagrant indifference" **standard** would require a degree of intentional action not present in some current state statutes that allow **punitive damages** for simple or gross negligence. Intent should be a necessary element in order to justify punitive damages. [245] The **[*1620]** criminal component of punitive damages mandates that a defendant act intentionally before this form of punishment may be imposed upon him. Otherwise, the justifications for imposing punitive damages, punishment and deterrence, break down. That a defendant should not be punished for unintentional conduct seems obvious. Such a defendant is not deserving of punishment because only blameworthy conduct should be subject to punishment. In addition, the effectiveness of deterrence decreases when defendants are punished for unintentional conduct, because such conduct is more difficult for individuals to identify and control. [246]

3. Bifurcation of punitive damage issues

The proposed federal bill, if enacted, would have allowed either party to bifurcate the trial of punitive damages from the other issues in the case. [247] The primary reason for bifurcation is to prevent jury bias and prejudice. [248] For example, although defendant's wealth must be considered when determining punitive damages, [249] some concern exists that juries might improperly consider such evidence when assessing plaintiffs' compensatory damages. To avoid this impropriety, bifurcation should be permitted. [250] It must be acknowledged, however, that bifurcation would lead to more costly and time consuming trials, which in turn

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would be detrimental to the injured victim.

4. Capping punitive damage awards

Recently proposed federal legislation would cap punitive damage awards in products liability cases at twice the economic [251] and **[*1621]** noneconomic loss, [252] or $ 250,000, whichever is greater. [253] Whether to place an arbitrary cap on the amount of punitive damages that can be awarded or to limit them to a multiple of the actual damages suffered is perhaps the most controversial of all tort reform issues.

a. Even if punitive damages cost consumers good products, they should not be limited

Cap supporters argue that the cap provides necessary relief for corporations who currently are subject to unbridled jury discretion in awarding punitive damages. [254] They also argue that the threat of excessively large punitive damage awards discourages companies from marketing new products, thereby depriving the public of beneficial products and rendering American businesses unable to compete in a global market. [255] The conference report on the recently proposed federal legislation stated:

American manufacturers must contend with the uncertainty created by 51 different product liability jurisdictions in their own domestic market. The result is a de facto "liability tax" which chills interstate commerce and deprives consumers of product choices available to **[*1622]** consumers in other nations throughout the world. Unfortunately, instead of encouraging the development of safer products, the present system often forces manufacturers to increase product prices or withdraw products from the market altogether. [256]

Cap supporters argue that because of fear of unquantifiable liability exposure, the cautious manufacturers would be over-deterred and unwilling to invest in research and development for potentially valuable products. [257] The threat of large punitive damage awards can discourage the use of safe products, taking choices and valuable products away from consumers. For example, decades after the Dalkon Shield disaster, many doctors still refuse to prescribe new, safe, reliable IUDs for women, [258] despite the fact that experts find the IUD to be a low risk, dependable form of birth control. [259] Doctors are not alone. Apparently, even manufacturers are not interested in marketing the product in the United States because of the threat of excessive punitive awards. [260]

Cap supporters also argue that limiting punitive damages would be beneficial because it would put the defendant on notice regarding his potential liability for inappropriate conduct. The Supreme Court in BMW noted the importance of "fair notice" as to both the type of conduct that will give rise to punitive awards and the severity of the potential punishment that will be imposed. [261]

Capping punitive damages, however, is a double-edged sword, the costs of which far outweigh the benefits. Even if all of the arguments put forth by supporters of a cap are true, [262] those arguments still are **[*1623]** insufficient to justify a superficial, arbitrary limit on punitive awards. Punitive damage awards operate to deter the conduct society wishes to abolish. [263] A punitive award, therefore, must be high enough to achieve this goal. Limiting punitive damage awards would undermine the deterrent value of the threat of such awards.

The essential purpose of punitive damages would be thwarted if we required that they

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As little as 30 years ago, punitive damages awards were "rarely assessed" and usually "small in amount." Recently, however, the frequency and size of such awards have been skyrocketing. One commentator has observed that "hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case." And it appears that the upward trajectory continues unabated. The increased frequency and size of punitive awards, however, has not been matched by a corresponding expansion of procedural protections or predictability. On the contrary, although some courts have made genuine efforts at reform, many courts continue to provide jurors with skeletal guidance that permits the traditional guarantor of fairness - the jury itself - to be converted into a source of caprice and bias. [1]

Justice Sandra Day O'Connor **[*1575]**

Unfortunately, some manufacturers put corporate profit before **public safety.** The threat of **punitive damage** sanctions, however, serves to deter corporations from knowingly marketing unsafe products and from trading **public safety** for corporate profits. **Punitive damage** awards are a necessary restraint on the abuse of corporate power, curbing the often anti-social practices of the economic elite. As noted by Senator Ernest Hollings (D-S.C.), the imposition of punitive damage awards in product liability cases has increased the safety in the everyday lives of American consumers noticeably:

We could spend an afternoon pointing out the good that product liability has done. We do not get blown up by that Pinto gas tank. Cars all have antilock brakes. That elevator is checked. The steps are marked. Little children do not burn up in flammable pajamas. The women of America are not threatened with Dalkon Shields. [2]

An increase in the magnitude and frequency of punitive damage awards, however, necessitates a reconsideration of the doctrine and precipitates the need for safeguards to protect the tort system from abuse. Punitive damage reform must be enacted, and must address the many criticisms of the current doctrine: that punitive damages cause unnecessary litigation; are unjustified and excessive; far exceed statutory penalties for similar conduct; subject defendants to multiple punishments for the same conduct; overcompensate plaintiffs; are detrimental to society because they handicap the competitiveness of American businesses; are responsible for rising insurance costs; and are unconstitutional on a variety of grounds. [3] Perhaps most troubling, however, is the fact that although punitive damages are quasi-criminal in nature, [4] they are imposed in the course of civil litigation without many of the procedural safeguards that accompany criminal penalties. [5] **[*1576]**

The rise in punitive damage awards and the need to implement safeguards have not gone unnoticed by state legislatures, the judiciary, and various other entities. Forty-six states have passed tort reform legislation; [6] there is a new Restatement of Torts; [7] the Supreme Court has rejected a punitive damage award as unconstitutionally excessive; [8] and the National Conference of Commissioners on Uniform State Laws recently approved a Model Punitive Damages Act. [9]

Despite these efforts, punitive awards of enormous magnitude still are being exacted from unsuspecting corporate defendants for differing **standards** of misconduct. The problem with state tort reform is that actions that might warrant the imposition of **punitive damages** in one state might not warrant them in another. The current patchwork of state tort laws is ineffective against unjustified, excessive awards and undermines the efficacy of the punitive damage doctrine.

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conform to any mathematical equation. In Rideout's-Brown Service, Inc. v. Holloway, [the district court] said that for punitive damages to be effective the amount of damages "ought to be large enough to hurt. It ought to sting in order to deter, that is its purpose." [264]

Although the threat of punitive awards may discourage manufacturers from developing some products, more importantly, it keeps many dangerous products off the market. Economic efficiency, not economic perfection, is all that is required by our tort system. [265]

Tort law's goal of promoting efficient resource allocation also supports not capping punitive damage awards. [266] Because a business is an economically-rational, profit-seeking entity, it will evaluate the costs and benefits of undertaking any activity, manufacturing decision, or design choice. [267] If a company believes that the benefits of a particular action outweigh the costs, it will undertake that action. [268] **[*1624]**

Tort law's deterrent effect is based on utilitarian values; more specifically, punitive damages liability deters socially unacceptable behavior by increasing the cost of such behavior so that it no longer is economically rational to act in that manner. [269] Punitive damages awarded in tort cases have the effect of regulating social conduct by punishing and deterring conduct that society deems unacceptable. In order to achieve these goals, the threat of punitive damages must be greater than the benefit achieved by the misconduct. Because corporations are the only parties with perfect information on this equation, deterrence will be effective only if the threat of large punitive damages continues to loom over those willing to place corporate profit ahead of human safety. [270]

If punitive damages are capped, they would cease to be an effective deterrent. Capped damages would enable defendants to calculate their maximum exposure and thereby permit an economic analysis similar to the one conducted by Ford in the Pinto case. [271] In the **[*1625]** end, capped damages effectively would lower safety **standards.** As Representative John Conyers (D-Mich.) noted:

The cap of $ 250,000 on **punitive damages** is tragic. No Fortune 500 company, or some not even Fortune 500, will be deterred from placing dangerous products on the market because of a quarter of a million dollar threat of punitive damages. It will be factored into the pricing. [272]

For example, suppose Compact Cars wants to manufacture a new 1997 model Pinto. Compact's design engineers approach management with a design choice: should they include rubber bladders around the gas tank to reduce explosions when there are rear-end collisions, or should they forgo the bladder in order to reduce costs? Compact's preliminary tests show that upon rear impact at thirty miles per hour, the gas tank has a four percent chance of exploding. Management retains an economist to conduct a cost/benefit analysis on the rubber bladder. The economist finds that it will cost Compact $ 50 per car to include the rubber bladder. Compact plans to sell five million Pintos. So, the cost of including the bladder is $ 250 million.

The Compact economist then turns to the cost savings, or benefit, of excluding the bladder. He estimates that Compact will be sued for 100 burn deaths and 200 serious burn injuries as a result of gas tank explosions. [273] He estimates the compensatory damages for each human life at $ 250,000 and each human injury at $ 100,000. The damages Compact will sustain, therefore, are $ 45 million.

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If the new federal tort reform bill [274] including a cap on punitive damages had passed, the economist would calculate the cost associated with the punitive damages. [275] If every death resulted in the maximum punitive damage award under the new statute, Compact would owe $ 50 million [276] and if every injured plaintiff also received the maximum punitive damage award, Compact would owe an **[*1626]** additional $ 50 million. [277] Thus, Compact's total potential punitive damages liability would be $ 100 million.

The economist would determine that while the cost of including the bladder would be $ 250 million, it would cost Compact only an estimated $ 145 million in damages if they chose to exclude the bladder. Compact's management, being economically rational business people, would decide that the costs of excluding the bladder exceed its benefits, and would direct the engineers not to include the bladder in the new Pinto.

This example, while admittedly rudimentary in its economic analysis, demonstrates how companies could factor punitive damages into the cost-benefit analysis of any given design choice. If corporations can do this, they will continue to put corporate profit ahead of human safety and the goals of our punitive damage system will be eviscerated.

Unless punitive damages are greater than the full economic profit of the misconduct, corporations will not be deterred; no economic incentive to avoid socially reprehensible conduct will be created. [278] If the total potential cost in damages is less than the benefit of profit or expenditures saved, then manufacturers will continue to engage in unsafe practices. [279] Further, because corporations control all of the information regarding design choices and manufacturing decisions, it is virtually impossible to determine properly the amount of economic benefit the defendant might reap from the corporation's misconduct. [280]

Moreover, simply capturing the defendant's profits, the exact amount defendant benefitted, is not enough to function as a deterrent even if it were possible to determine accurately the amount. Because not all defendants are caught and brought to justice, many defendants would undertake the misconduct with the hope that they would not get caught. If corporations stand to lose **[*1627]** exactly the amount that they would gain from the conduct, and there is a chance that they will not get caught, corporations will favor misconduct. To deter effectively, the potential loss must exceed the potential gain. The rationales that justify punitive damage awards, punishment and deterrence, are effective precisely because of the unpredictability of the size of such awards. Therefore, one of the biggest complaints of tort reform advocates, that the size of punitive damage awards is unpredictable, [281] is precisely what makes them an effective deterrent.

Capping punitive awards at a multiple of compensatory damages would eviscerate the punitive and deterrence goals underlying punitive damage awards. Professors Michael Rustad and Thomas Koenig argue that:

Lopsided ratios between punitive and compensatory damages awards are often necessary for the punishment and deterrence of powerful corporations. The remedy's effectiveness in doing so stems from its unpredictability. Capping punitive damages would undermine the deterrent effect of the remedy by making it possible for corporations to calculate their maximum exposure and therefore make a profit-based determination as to whether "really mean behavior" is good business practice. [282]

Another problem inherent in making punitive damages a multiple of compensatory damages arises when the manufacturer could have caused an enormous amount of harm but

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fortuitously escaped with minimal actual damage. In cases where the actual damages are low, the jury will be unable to take into account the nature of the misconduct or the potential harm that could have resulted from the defendant's actions. [283] Punitive damages should be based, at least in part, on the outrageousness of the defendant's conduct, not solely on the severity of the actual harm caused.

Limiting potential punitive damage liability would put ethical corporations, ones which spend funds testing a product's safety prior to marketing, at a competitive disadvantage. Ethical corporations would be forced to charge a higher price for their products because of the added expenses of testing. **[*1628]**

Punitive damages are consistent with the self-interest of the business community in terms of long-run competitiveness. The remedy keeps the ethical corporation from being at a competitive disadvantage. Restricting this remedy tempts corporations to put profits before **public safety.** In the long run, the American emphasis on safety, backed by **punitive damages** against those corporations which violate this important American value, will produce the top quality products needed to compete in the international marketplace. [284]

Therefore, even if punitive damage awards do hamper the development of some new products and do threaten American competitiveness, they should not be capped. Capping punitive damages would weaken their value as a deterrent by permitting manufacturers to calculate the potential loss associated with manufacturing dangerous products, and then determine whether such socially reprehensible conduct is good business. Moreover, the egregiousness of the defendant's conduct and the potential harm it could have caused no longer would factor into the punishment. And finally, corporations that do test their products and make design choices that weigh human impact more heavily than corporate profit would be at a competitive disadvantage. Capping punitive damages would encourage the misconduct society seeks to prevent, resulting in a cure that would be worse than the disease.

b. Even if punitive damages cost consumers money in the form of higher prices, they should not be limited

Proponents of limiting a defendant's liability for intentional misconduct also argue that large punitive damage awards actually harm consumers, employees, and shareholders of the corporation, because the corporation ultimately must pass these expenses on to them. [285] When a corporation is forced to pay punitive damages, it raises corporate operating expenses. [286] Corporations, then, cover these increased costs by raising prices and forcing the consumer to bear the burden assessed for corporate misconduct. [287] Such price **[*1629]** raising often is referred to as a "tort tax" or a "hidden tax." [288] Thus, instead of defendants bearing tort award costs directly, consumers actually would subsidize tort damages awarded to victims. [289]

In a competitive market, however, it is unlikely that a manufacturer could pass all of these costs on to its consumers and still maintain its competitive market position. [290] In a purely captive consumer situation, corporations would be able to pass off any expense incurred by raising prices. [291] In a competitive market, however, a corporation could not raise its prices too high or consumers would switch to a competitor's product. [292] Even when there is no competitive market and the corporation has a monopoly over a product or service, [293] at some point the utility derived from the product or service would be outweighed by the cost.

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Simply put, if a corporation raises the price too high, the consumer will stop buying the product. Corporations, therefore, will try to avoid incurring punitive damage judgments because they often cannot pass off all the costs on consumers. In this way, punitive damage payments allow society to regulate corporate conduct.

The "pass-through" economic argument - that consumers, not the corporation, bear the extra burden associated with punitive damages in the form of higher prices - does not support capping punitive **[*1630]** damage awards. If a choice must be made between the public in general and the specific consumers of a product made by a manufacturer who exhibits a flagrant indifference to human safety, the burden should fall upon the latter. [294] The consumer has a choice, unlike the unsuspecting victim, or society in general. The consumer can avoid sharing in the cost of the corporation's misconduct simply by refusing to buy the corporation's product. Those who would have benefitted from the corporate wrongdoing, including consumers, shareholders, and employees, should bear the burden of the costs associated with that conduct. [295]

c. Limiting punitive damages to a multiple of economic and noneconomic loss discriminates against women and minorities

In addition, the proposed cap on punitive damages discriminates against woman and minorities. Because human life usually is valued in terms of economic loss, which often translates into earning potential, [296] disparate awards are granted to victims of different genders, even though they suffer the same injuries. [297] For example, two individuals, a man and a woman, suffer exactly the same injury rendering both unable to work. The man is an engineer. His economic damages would include his lost wages, say $ 200,000, and his potential punitive damage award would be a multiple of these same **[*1631]** lost wages. Under the proposed federal bill, his punitive damages award would be two times $ 200,000, or $ 400,000. The woman is a homemaker and has suffered little economic loss, so the compensation she receives for the same injury would be substantially less as would any possible punitive award she may receive, capped at $ 250,000. As this example demonstrates, capping punitive damages in product liability cases will have a disproportionately negative impact on women. [298]

The same rationale applies to minorities. "Women and minorities' wages are between three-quarter and one-half of the salaries of average white men ... [with] white women earning only 69 cents, African-American women earned only 62 cents, and Hispanic women earned only 54 cents for every dollar earned by white men." [299] Like women, minorities generally occupy lower-paying jobs and therefore have less economic loss. [300]

This disparity results in unequal punishment of similarly situated wrongdoers. Corporations who manufacture products marketed exclusively or predominantly toward women and minorities would not be punished as severely as corporations who manufacture products marketed toward men, where there is generally higher economic loss and therefore the potential for higher punitive damages. Not only would women and minorities not receive as large a punitive damage award when they are injured, but they would have to contend with more unsafe products. This system of economic valuation is the functional equivalent of a directive that companies will not be punished as severely if they hurt a woman or minority as they will be if they hurt a Caucasian man. Therefore, manufacturers of products targeting women and minorities would take fewer safety precautions and would engage in more risky behavior because they have less to lose. This directive is magnified by the fact that women and minorities have less access to the legal system and are less likely to **[*1632]** bring suit. [301] Moreover, in light of the lower compensatory damages and accordingly lower punitive damages, women and minorities would be less likely to find counsel willing to take their case. Therefore, capping punitive damages as some multiple of economic loss has a discriminatory impact on women and minorities.

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d. The Model Act proposes a better solution

The unbridled discretion of juries to award any punishment amount they see fit without any guidance is an unnecessary evil. For the reasons discussed above, however, capping punitive damages also is too extreme. [302] The Model Act proposes a better alternative. Instead of imposing an arbitrary cap on punitive awards, the Model Act requires the jury to consider several factors to determine what constitutes a "fair and reasonable amount of punitive damages," including:

(1) the nature of defendant's wrongful conduct and its effect on the claimant and others;

(2) the amount of compensatory damages;

(3) any profit or gain, obtained by the defendant through the wrongful conduct, in excess of that likely to be divested by this or other actions against the defendant for compensatory damages or restitution;

(4) the defendant's present and future financial condition and the effect of an award on each condition;

(5) any fines, penalties, damages, or restitution paid or to be paid by the defendant arising from the wrongful conduct;

(6) any adverse effect of the award on innocent persons;

(7) any remedial measures taken or not taken by the defendant since the wrongful conduct;

(8) compliance or noncompliance with any applicable standard promulgated by a governmental or other generally recognized agency or organization whose function it is to establish standards; and

(9) any other aggravating or mitigating factors relevant to the amount of the award. [303]

The factors offered in the Model Act track those endorsed by the Supreme Court in Haslip, TXO, and BMW. [304] Requiring the jury to **[*1633]** consider certain well-defined factors in determining the amount of punitive damages awarded would result in easier and more limited review by both the district and appellate courts. Such guidance regarding the criteria for assessing the amount of awards would add greater certainty to the award process and would reduce the instances of excessive awards, without sacrificing the goals behind the imposition of such awards: punishment and deterrence. In those instances when excessive awards are proffered, judicial remittitur or reversal would be made easier by consideration of the mandated factors.

If the burden of proof is raised and the liability **standard** is changed to require a degree of intent, as proposed in this Article, then **punitive damage** awards would be available only when the plaintiff proves by clear and convincing evidence that the defendant acted with conscious indifference towards the plaintiff's safety. Why should the potential liability of an individual who acts intentionally to harm society be limited? Senator Orrin Hatch (R-Utah) once said: "Punitive damages reform is not about shielding wrongdoers from liability, ... Safeguards are needed to protect against abuse in the award of punitive damages." [305] If punitive damages were capped for those corporations who are proven, by clear and convincing evidence, to have acted intentionally to harm society with no regard for anything

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but corporate profits, wrongdoers would be shielded from liability. Raising the evidentiary burden and liability standards are the only necessary safeguards. Moreover, judicial review and the tool of remittitur still will be available.

The better route is the one proposed in the Model Act, where the legislature dictates the factors that a jury must consider when assessing a punitive damage award and requires detailed findings justifying the award. The Model Act, unlike the vetoed federal bill, also addresses the problem posed by multiple punitive damages awards that are unfairly duplicative. [306]

It provides: "If the court determines that an award of punitive damages in the pending case is unfairly duplicative, it shall reduce the award accordingly." [307] It requires that courts consider the following:

The bases of liability for the punitive damages awarded, the purposes for which the awards were made, how the awards were determined or calculated, whether the defendant has already **[*1634]** disgorged any unwarranted economic gain for which it was held liable under Section 6(b), and any other evidence offered by the parties relevant to the issue of whether the petitioner is being subjected to unfair duplicative awards of punitive damages. [308]

Federal legislation should incorporate this concept from the Model Act rather than a "first comer" rule, and should regulate the imposition of multiple punitive damage awards for the same conduct. Proponents of national tort reform designed to curb the imposition of multiple damage awards have advocated a "first comer" rule accompanied by a limited number of exceptions. [309] For example, if the plaintiff in a later suit is able to offer new evidence not present at the first trial, or if the judge determines that the amount of punitive damages awarded in the first case was insufficient to punish or deter the defendant, a second award may be justified. Federal legislation either should incorporate the consideration of past punitive damage awards into the assessment process or should allow the defendant, on post-verdict motion, to bring to the court's attention other punitive awards paid, so that the court can reduce the jury verdict accordingly. [310]

If corporate manufacturers still need saving from profit-threatening punitive damage awards, the legislature could then revisit the cap issue. [311] At present, why destroy the goals of punitive awards, rendering them ineffective for their anticipated purpose, by capping them? [312] **[*1635]**

5. Regulatory compliance as a bar to punitive damages

A regulatory compliance defense has appeared in many of the recent congressional bills on tort reform as well as in a number of state tort reform measures. [313] This defense provides that compliance with existing regulations either presumptively or conclusively, depending upon the legislation, immunizes the defendant from the imposition of **punitive damages.** In effect, this means that the federal regulatory **standards** become the tort **standards** as well. The arguments in favor of such a defense are agency expertise, predictability, and reduction in the scope of liability. The agencies that promulgate regulations are experts in their field and they know, better than judges or juries, what standards of safety are reasonable in a particular industry. [314] The agency has obtained the necessary data to make risk comparisons and to set properly a safe standard that protects the public. [315] The judiciary, therefore,

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should defer to agency expertise. [316] A regulatory compliance defense would mandate such deference.

Moreover, such a defense would help to control what many characterize as escalating and unjustified punitive damage awards by reducing the scope of liability and by giving defendants more notice as to the prohibited conduct. Finally, penalizing defendants by awarding punitive damages when the defendant has complied with existing federal regulations can be viewed as fundamentally unfair and inefficient.

There are problems, however, which plague the regulatory compliance defense. One significant problem is that agency regulations often are vague, inadequate, outdated, and obsolete. [317] **[*1636]** Regulations generally set minimal, not optimal safety standards, which is a concern voiced by many courts and noted in the American Law Institute's Restatement (Third) of Torts which rejects a regulatory compliance defense. [318] Pursuant to the Restatement, non-compliance with federal regulations renders a product defective. [319] Compliance, on the other hand, is mere evidence of non-defectiveness and does not preclude a finding that the product is defective. [320]

Agencies lack the resources and the ability to keep pace with technological advancement. Moreover, delays inherent in the regulatory process make it impossible to keep regulations up-to-date, especially in this high-tech era when science is changing so quickly. [321] In addition, government prosecution for violations of agency regulations occur infrequently. [322] The government simply does not have the resources to police corporate misconduct. **[*1637]**

In addition to inadequate and antiquated regulations, there is also the threat of agency capture. [323] ""Agency capture' refers to domination of an agency by the entities that the agency was created to control." [324] Because agencies depend upon industry for data and expertise when they promulgate regulations, agency choices predictably reflect industry perspectives. [325] Moreover, because many agency staff members have worked in the regulated industry, they share the industry's perspective or expect to work for some regulated entity in the future, and thus hesitate to criticize industry proposals. [326] Moreover, industry has vast resources to devote to agency lobbying, compared to public interest groups. Corporations have all the information and the resources.

For these reasons, although evidence of regulatory compliance might be relevant in a determination of whether to award punitive damages, it should not be conclusively or presumptively determinative. [327] Although regulatory compliance should not be a defense to claims of misconduct, federal legislation could include regulatory compliance among the factors to be considered in assessing punitive damages, as the Model Act proposes. [328]

Conclusion

Punitive damage awards can be an effective legal tool for controlling corporate misconduct. However, the increase in the magnitude and frequency of such awards warrants closer scrutiny of the doctrine and the introduction of safeguards to protect American industry from abusive penalties. When punitive damage sanctions are awarded in excessive amounts or are imposed erratically against undeserving defendants, the tort system as a whole is undermined. Federal tort **[*1638]** reform legislation is the most appropriate vehicle for achieving the optimum balance in the application of the punitive damage doctrine.

Despite the BMW decision, the Supreme Court has provided little actual guidance regarding the imposition of punitive damage awards. Similarly, state courts and legislatures, although trying to assist in preventing what they have observed as manifest injustice in the imposition

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of these awards, have been equally ineffective in curbing abuse of the punitive damages system, largely because their power to regulate stops at their geographic borders. Legislative, not judicial, action is needed, and to be effective the legislation must be national.

In an effort to reflect the quasi-criminal nature of **punitive damage** sanctions, federal tort reform should raise the burden of proof and create a uniform liability **standard** predicated on the defendant's intent. Bifurcation of trials also should be adopted to insure against jury irrationality and bias. Most importantly, federal reform should articulate a uniform set of factors for mandatory consideration in calculating punitive damage awards. Such reforms would effectuate the necessary safeguards against abuse of the punitive penalties while simultaneously ensuring that intentional misconduct does not go unpunished. While safeguards are needed to protect against abuse in the award of punitive damages, reform should not shield wrongdoers who have been found, by clear and convincing evidence, to have intentionally sacrificed **public safety** for corporate profits. Reforms that would cap **punitive damages** by limiting them to a multiple of the economic and noneconomic loss or to some arbitrary amount should be avoided because they will undermine the efficacy of the punitive damage system. Capping punitive damages would shield wrongdoers, and thereby encourage misconduct, with women and minorities suffering most.

Federal reform is the only solution to the national crisis in the tort system. Only through national reform can the uniformity and the certainty necessary to yield predictable results be achieved. Federal tort reform will benefit both the consumer and the manufacturer with consumers knowing their rights and manufacturers knowing their responsibilities. This will reduce litigation, increase settlement, and foster respect for, and compliance with, the law.

FOOTNOTES:

n1. TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 500-01 (1993) (O'Connor, J., dissenting) (internal citations omitted).

n2. 142 Cong. Rec. S2344 (daily ed. Mar. 20, 1996) (statement of Sen. Hollings).

n3. See, e.g., John L. Meredith & Brian P. Casey, Taking Cover: Preserving Error When Hit with a Claim for Punitive Damages, 47 Baylor L. Rev. 923, 938 (1995) (noting that prejudicial awards that evidence no concern for deterrence or retribution are unconstitutional regardless of size of award (citing TXO Prod. Corp., 509 U.S. at 467 (Kennedy, J., concurring))); Developments in the Law - Jury Determination of Punitive Damages, 110 Harv. L. Rev. 1513, 1514-15 (1997) (listing potential harms resulting from excessive and indiscriminate punitive damage awards, including "deterrence of socially desirable activities [and] removal of useful products from the market").

n4. See infra notes 26-31 and accompanying text (noting that punitive damages stand somewhere between tort law, whose purpose is restitutionary, and criminal law, whose purpose is retributive).

n5. See Smith v. Wade, 461 U.S. 30, 59 (1983) (recognizing that although punitive awards are quasi-criminal in nature, defendants cannot take advantage of safeguards associated with criminal proceedings).

n6. See Kimberly A. Pace, The Tax Deductibility of Punitive Damage Payments: Who Should Ultimately Bear the Burden for Corporate Misconduct?, 47 Ala. L. Rev. 825, 843 (1996) (stating that 46 states have enacted tort reform legislation curbing punitive awards in response to increased frequency and size of such awards in recent years).

n7. See Restatement (Third) of Torts: Products Liability (Proposed Final Draft 1997).

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n8. See BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589 (1996).

n9. See Model Punitive Damages Act (1996) [hereinafter Model Act]. The Model Act was passed by the National Conference of Commissioners on Uniform State Laws on July 18, 1996, to "tighten up" state procedures with respect to punitive damages. See Marcia Coyle, Model Act Would Tighten Punitives, Nat'l L.J., Aug. 5, 1996, at A12. The commissioners hope that the Model Act will be adopted by the states. See id. It is doubtful, however, that the states will abandon the effort expended in passing legislation that reflects their views on the appropriate means of tort reform in favor of the Model Act.

n10. See infra notes 70-207 and accompanying text (analyzing Supreme Court review of damages under Fifth, Seventh, Eighth, and Fourteenth Amendments).

n11. See Jim Fieweger, Note, The Need for Reform of Punitive Damages in Mass Tort Litigation: Juzwin v. Amtorg Trading Corp., 39 DePaul L. Rev. 775, 794-800, 823 (1990) (illustrating judicial system's inability to adapt to mass tort litigation).

n12. See id. at 823 ("As a result of the state based nature of punitive claims, federal and state courts are powerless to individually remedy the shortcomings in mass tort punitive damages procedures. Congress, therefore, must step in to cure the ills of mass tort litigation."); Jonathan Hadley Koenig, Note, Punitive Damage "Overkill" After TXO Production Corp. v. Alliance Resources: The Need for a Congressional Solution, 36 Wm. & Mary L. Rev. 751, 768-69 (1995) (stressing need for legislative solution to punitive damage abuses).

n13. See 142 Cong. Rec. S2560 (daily ed. Mar. 21, 1996) (statement of Sen. Rockefeller).

n14. Although it is true that punitive damages traditionally have been a matter of state regulation, Congress alone has the power to protect interstate commerce. See U.S. Const. art. I, 8, cl. 3. States have been effective in regulating punitive damages within their borders, but they are incapable of doing so on a national level. See Janet V. Hallahan, Social Interests Versus Plaintiffs' Rights: The Constitutional Battle over Statutory Limitations on Punitive Damages, 26 Loy. U. Chi. L.J. 405, 406-07 (1995) (explaining that courts have upheld state laws restricting punitive damage awards).

n15. See Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (indicating that Commerce Clause prohibits states from regulating commerce wholly outside its borders even if such commerce affects conditions within state).

n16. See Fieweger, supra note 11, at 823 (stating that congressional solution to excessive punitive awards is needed to address problem on national scale).

n17. See Day v. Woodworth, 54 U.S. 363, 371 (1851) (recognizing propriety of awarding punitive damages).

n18. See Wilkes v. Wood, 98 Eng. Rep. 489, 498-99 (K.B. 1763) ("[Punitive d]amages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."); see also Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 274 (1989) (tracing roots of punitive damages to thirteenth century England). For a detailed history of punitive damages, see Michael Rustad & Thomas Koenig, Historical Continuity of Punitive Damage Awards: Reforming the Tort Reformers, 42 Am. U. L. Rev. 1269, 1284-1304 (1993).

n19. See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 8 n.4 (1991) (comparing Fay v. Parker, 53 N.H. 342, 382 (1872), with Luther v. Shaw, 147 N.W. 18, 20 (Wis. 1914)). The Court in Fay indicated, "The idea is wrong. It is a monstrous heresy. It is an unsightly and an

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unhealthy excrescence, deforming the symmetry of the body of law." Fay, 53 N.H. at 382. In comparison, the court in Luther saw punitive awards as a positive influence on society.

The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to, and confidence in, the courts of law by those wronged or oppressed by acts or practices not cognizable, in or not sufficiently punished, by the criminal law.

Luther, 147 N.W. at 20.

n20. Compensatory damages are awarded to compensate injured plaintiffs, to restore them to the position they would have been in if the injury never had occurred. See Restatement (Second) of Torts 908(1) (1995) [hereinafter Restatement]. Compensatory damages reimburse the injured person for medical expenses, lost wages, lost earning capacity, and pain and suffering. See id. Punitive damages are not intended to compensate the individual plaintiff. See, e.g., Enstan Group, Inc. v. Grassgreen, 812 F. Supp. 1562, 1583 n.14 (M.D. Ala. 1993); Freeman v. World Airways, Inc., 596 F. Supp. 841, 846 (D. Ma. 1984); Morris v. Parke, Davis & Co., 573 F. Supp. 1324, 1326 (C.D. Cal. 1983).

n21. Restatement, supra note 20, 908(1); see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (noting that punitive damages "are not compensation for injury ... [but] are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); William B. Hale, Handbook on the Law of Torts 234 (1896) (stating that punitive damages are awarded because of "the grossness of the wrong done, rather than as a measure of compensation").

n22. See Angela P. Harris, Rereading Punitive Damages: Beyond the Public/Private Distinction, 40 Ala. L. Rev. 1079, 1097-98 (arguing that conventional notion of tort law as a private right concerned only with compensation, and criminal law as a public right concerned with punishment, is inaccurate).

n23. See F. Warren Jacoby, The Relationship of Punitive Damages and Compensatory Damages in Tort Actions, 75 Dick. L. Rev. 585, 587 (1970) ("Punitive damages are not intended to remunerate the injured party for the damages he may have sustained. They are not to compensate; they are the penalty the law inflicts for gross, wanton, and culpable negligence, and are allowed as a warning or as an example to defendants or others."); see also Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1333 (5th Cir. 1995) ("Punitive damages ... are fundamentally collective; their purpose is to protect society by punishing and deterring wrongdoing.").

n24. See Douglas L. Carden, Punitive Damages in Products Liability Cases, 16 Santa Clara L. Rev. 895, 922 (1976) (stating that compensatory damages alone may not deter wrongful conduct); see also The Product Liability Fairness Act: Hearings on S. 565 Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism of the Senate Comm. on Commerce, Science, and Transp., 104th Cong. 234-36 (1995) [hereinafter Product Liability Fairness Hearing] (statement of Jonathan Massey, attorney, Washington, D.C.) (stating that compensatory damages alone are not enough of a deterrent to keep dangerous products off the market - punitive damages are necessary); Punitive Damage Tort Reform, 1995: Hearings on S. 671 & S. 672 Before the Senate Judiciary Comm., 104th Cong. 79 (1995) [hereinafter Punitive Damages Hearing] (statement of Robert Creamer, Executive Director,

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To date, the Supreme Court has considered whether punitive damage awards violate the Fifth, Seventh, Eighth, and Fourteenth Amendments. [10] Despite visiting the issue numerous times, the Court has given little practical guidance regarding the propriety of punitive damage awards. Notwithstanding the creation of substantive due process, the Court is not the appropriate vehicle for weighing the costs and benefits of the tort system or for instituting the type of reform that is necessary to curb abuse of the punitive damage doctrine. [11] This is a legislative and not a judicial function. [12] **[*1577]** Should the Supreme Court supplant the jury's assessment of reasonableness and sense of community outrage with its own?

The punitive damages problem is a national problem that has an enormous impact on interstate commerce, considering that seventy percent of all products manufactured in the United States cross state lines before they are sold. [13] Consequently, this national problem requires a national solution. [14] No individual state legislature or court has the ability to regulate beyond its geographic borders. [15] The Supreme Court is not an efficient means for regulating excessive **punitive damages** - nor is it the appropriate branch of government to impose such **standards.** [16] As demonstrated in this Article, national application of federal tort reform legislation is most capable of regulating the imposition of **punitive damage** awards and eviscerating the problems associated with these sanctions. The certainty and predictability concomitant with federal legislation is necessary to promote consistency, fairness, equality, predictability, and efficiency.

Part I of this Article describes the history, nature, and purpose of punitive damages as well as the assessment process for these awards. Part II details the current state of punitive damage awards and the need for reform. Part III considers the measures states have taken to regulate punitive damages within their borders. Part IV analyzes the Supreme Court decisions that have set the constitutional parameters of punitive damage awards. Part IV explores some of the undecided contemporary issues that plague the tort system, noting that the Supreme Court decisions in this area have not obviated the need for federal reform.

Finally, in Part V, this Article addresses the merits of federal tort reform legislation, concluding that federal tort reform, which would regulate the punitive damage system on a national level, is necessary to further the goals underlying punitive damage awards. Part V examines the various tort reform issues that have been proposed, **[*1578]** including the issues of increasing the burden of proof and the liability **standard** to obtain punitive awards, bifurcating the trial of **punitive damages** from other issues in the case, capping **punitive damage** awards, and implementing a regulatory compliance defense.

Part V proposes enacting federal legislation to increase the burden of proof and liability **standard** in recognition of the quasi-criminal nature of **punitive damages.** Such reform will safeguard against undeserved **punitive damage** awards and infuse the system with the certainty and predictability necessary to discourage misconduct and reduce litigation. It also proposes bifurcation of trials to limit juror bias, and the articulation of factors for mandatory consideration in assessing the amount of punitive awards. It rejects capping punitive damage awards because it undermines the goals of the punitive damage doctrine and has a discriminatory impact on women and minorities.

Part V also considers the regulatory compliance defense, recognizing that although such a defense should be a factor considered in the assessment of punitive damage awards, using it as a conclusive defense would be extremely dangerous. Part V concludes by finding that the best solution is to have the regulatory and judicial systems working in tandem to police corporate behavior.

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Illinois Public Action). Mr. Creamer indicated that compensatory damages alone do not provide enough protection to consumers:

In the Ford Pinto case, an economic calculation was made that 180 violent deaths and 180 additional serious injuries would cost the company less than the $ 11 per car necessary to prevent them. It is only the possibility that a jury might award substantial punitive damages of unknown size that prevents this kind of death calculus from being done by corporations every day.

Id.

n25. See Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377, 1383-84 (5th Cir. 1991) (upholding size of punitive damage award because of its deterrent effect on manufacturer); Lynda G. Wilson, Note, Corporate Successor Liability for Punitive Damages in Products Liability Litigation, 40 S.C. L. Rev. 509, 513-14 (1989) (stating that punitive damages help in deterring misconduct and prove to be useful tool in preventing manufacturers' wrongful acts).

n26. See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting) (describing punitive damages as "quasi-criminal punishment"); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989) ("Punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law ...."); Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (explaining that punitive damage awards are "quasi-criminal"); see also David G. Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1258, 1260 (1976) (detailing purpose of punitive damages in products liability litigation); Richard A. Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problem of Fairness, Efficiency and Control, 52 Fordham L. Rev. 37, 43 (1983) (addressing quasi-criminal nature of punitive sanctions).

n27. Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 2 (1982).

n28. See Restatement, supra note 20, 908 cmt. a (stating that purpose of punitive damages is same as purpose of criminal fines); see also David G. Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 8 (1982) ("The purpose of such damages is punishment and deterrence, rather than compensation ...."); Seltzer, supra note 26, at 43 (explaining that purpose of punitive damages is to punish offenders).

n29. Landgraf v. USI Film Prod., 511 U.S. 244, 281 (1994); see also Haslip, 499 U.S. at 19 (noting that punitive damages serve same purposes as criminal punishment - "retribution and deterrence"); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 82 (1971) (stating that punitive damages "serve the same function as criminal penalties and are in effect private fines").

n30. See Haslip, 499 U.S. at 19 (finding that most states impose punitive damages "for purposes of retribution and deterrence"); Day v. Woodworth, 54 U.S. 363, 371 (1851) (explaining that juries often awarded additional compensation to plaintiffs in cases where defendants' acts were seen as wanton or malicious); Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1332-33 (5th Cir. 1995) (stating that punitive damages punish wrongdoers for their intentional or malicious acts and are used to deter similar future conduct); Acosta v. Honda

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Motor Co., 717 F.2d 828, 836-37 (3d Cir. 1983) (providing arguments for and against using punitive damages to serve goals of punishment and deterrence); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 735-36 (Minn. 1980) ("The punitive damages remedy serves to punish a ... manufacturer for and deter that manufacturer from willfully, wantonly, or maliciously marketing a [product] which is unreasonably dangerous ...."); Wangen v. Ford Motor Co., 294 N.W.2d 437, 458-59 (Wis. 1980) (indicating that jury awards should not be more than necessary to serve purposes of punitive damages - punishment and deterrence); see also Model Act, supra note 9, 1 at 3 (noting that ""punitive damages' means an award of money made to a claimant solely to punish or deter"); Richard C. Ausness, Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation, 74 Ky. L.J. 1, 39, 70-71 (1986) (explaining economic model of punitive damages for purpose of deterrence); Robert D. Cooter, Punitive Damages for Deterrence: When and How Much?, 40 Ala. L. Rev. 1143, 1146 (1989) (indicating that punishment and deterrence are goals of punitive damages); Ellis, supra note 27, at 8-9 (describing objective of punitive damage awards); Jacoby, supra note 23, at 587-88; Owen, supra note 28, at 8-9.

n31. But see Robert D. Cooter, Economic Analysis of Punitive Damages, 56 So. Cal. L. Rev. 79, 90 (1982) (suggesting that courts may have additional motives for awarding punitive damages including rewarding plaintiffs who otherwise would not have sued and compensating victims fully); Ellis, supra note 27, at 3 (listing several purposes for imposing punitive damages including preserving the peace, inducing private law enforcement, compensating victims for otherwise uncompensated losses, and paying plaintiffs' attorney fees); David G. Owen, A Punitive Damage Overview: Functions, Problems and Reform, 39 Vill. L. Rev. 363, 374 (1994) (articulating five functions of punitive damage awards: education, retribution, deterrence, compensation, and law enforcement); see also Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co., 515 F. Supp. 64, 105 (D.S.C. 1979) (holding that punitive damages deter manufacturers from misconduct, encourage production of safer products, and serve as "private revenge which is carried out in the courts rather than through duels or in back alleys"), aff'd, 644 F.2d 877 (4th Cir. 1981). This Article addresses only true punitive damage awards, not compensatory damages masked as punitive.

n32. Kan. Stat. Ann. 60-3701(b) (1994); see also Miss. Code Ann. 11-1-65(e) (Supp. 1996). The Mississippi Code also mandates that courts consider a variety of factors in assessing damages:

In all cases involving an award of punitive damages, the fact-finder, in determining the amount of punitive damages, shall consider, to the extent relevant, the following: the defendant's financial condition and net worth; the nature and reprehensibility of the defendant's wrongdoing, for example, the impact of defendant's conduct on the plaintiff, or the relationship of the defendant to the plaintiff; the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm; the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; and any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages.

Id.

n33. See Coffey v. Fayette Tubular Prods., 929 S.W.2d 326 (Tenn. 1996). The court in Coffey enumerated the factors for consideration in assessing a punitive damage award:

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In Hodges we set forth a list of factors to guide the discretion of the fact finder in assessing the amount of punitive damages. We instructed the fact finder to consider:

(1) The defendant's financial affairs, financial condition, and net worth;

(2) The nature and reprehensibility of the defendant's wrongdoing, for example

(A) The impact of defendant's conduct on the plaintiff, or

(B) The relationship of defendant to plaintiff;

(3) The defendant's awareness of the amount of harm being caused and defendant's motivation in causing the harm;

(4) The duration of defendant's misconduct and whether defendant attempted to conceal the conduct;

(5) The expense plaintiff has borne in the attempt to recover the losses;

(6) Whether defendant profited from the activity, and if defendant did profit, whether the punitive award should be in excess of the profit in order to deter similar future behavior;

(7) Whether, and the extent to which, defendant has been subjected to previous punitive damage awards based upon the same wrongful act;

(8) Whether, once the misconduct became known to the defendant, defendant took remedial action or attempted to make amends by offering a prompt and fair settlement for actual harm caused;

(9) Any other circumstances shown by the evidence that bear on determining the proper amount of the punitive award.

Id. at 328 (citing Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901-02 (Tenn. 1992)); see also Jonathan Woodner Co. v. Breeden, 665 A.2d 929, 941 n.19 (D.C. 1995) (explaining factors drawn from common law used in determining punitive awards); Schaffer v. Edward D. Jones & Co., 552 N.W.2d 801, 807 n.3 (S.D. 1996) (setting forth factors jury may consider when awarding punitive damages); Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co., 539 N.W.2d 111, 122 (Wis. Ct. App. 1995) (noting that Wisconsin "case law establishes the factors to be considered in determining the proper amount to be awarded as punitive damages").

n34. See Restatement, supra note 20, 908(2) & cmts. b-e.

n35. See Owen, supra note 28, at 9 (noting that juries consider the seriousness of defendant's misconduct when assessing punitive damages).

n36. See TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 460 (1993) (noting that in calculating punitive damages, jury may consider potential harm that might have resulted from defendant's bad acts as well as harm that actually occurred, but requiring reasonable relationship between harm and punitive damage award (citing Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21 (1991))); Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 909 (W. Va. 1991) ("As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages."); see also Acosta v. Honda Motor Co., 717 F.2d 828, 839 (3d Cir. 1983) (recognizing that size of compensatory damage award

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should be considered when assessing punitive award); Tudor Assocs. Ltd., II v. AJ & AJ Servicing, Inc., 843 F. Supp. 68, 79 (E.D.N.C. 1993) (requiring punitive damage awards to "bear a rational relationship to the sum reasonably needed to punish the defendant for his conduct"); Owen, supra note 28, at 9 (explaining that some states mandate that punitive awards "bear a reasonable relationship" to compensatory award). But see Jacoby, supra note 23, at 603-04 (arguing that there is no logical basis for requiring punitive damages to be related to compensatory). The Supreme Court made clear in TXO, however, that the ratio of punitive damages to actual damages, although a factor to be considered, is not dispositive. See TXO, 509 U.S. at 462.

n37. See, e.g., Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991) (stating that in assessing punitive damages, jury should consider "financial position" of defendant); Boyle v. Lorimar Productions, Inc., 13 F.3d 1357, 1359-60 (9th Cir. 1994) (noting that California's jury instructions require juries to consider defendant's financial condition in determining whether award is sufficient to punish and deter); Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566, 603 (W.D. Okla. 1979) (instructing jury that consideration of defendant's wealth when assessing punitive damages is "consistent with the general purpose of such an award in deterring the defendant ... from committing similar acts in the future, and for punishment of the defendant for such acts"), aff'd, 637 F.2d 743 (10th Cir. 1980).

n38. See Kenneth S. Abraham & John C. Jeffries, Jr., Punitive Damages and the Rule of Law: The Role of Defendant's Wealth, 19 J. Legal Stud. 415, 416-20 (1989) (arguing that considering defendant's wealth when assessing a punitive award encourages punishment based solely on defendant's status, is incompatible with purposes of tort law and compensation, and does not deter socially undesirable conduct). Such criticism ignores the fact that punitive damages are not based merely in tort law, but actually stand between tort and criminal law; therefore, the fact that considerations of wealth make them incompatible with the traditional notions of tort compensation offers no support for excluding this information from the punitive damage assessment process.

n39. See TXO, 509 U.S. at 464 n.29 (noting that for punitive damages to be effective, courts must take into account all relevant factors, including defendant's financial position); cf. Theodore Eisenberg et al., The Predictability of Punitive Damages, 26 J. Legal Stud. 623, 628-29 (1997) (arguing that amount of punitive damages should reflect defendant's financial position).

n40. The jury instruction given in TXO read in relevant part:

> The object of [punitive damages] is to deter [product manufacturers] from committing like offenses in the future. Therefore the law recognizes that to in fact deter such conduct may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances.

TXO, 509 U.S. at 464 n.29.

n41. See TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 880, 889 (W. Va. 1992) ("An award that might be unreasonable if awarded against Jeff's Neighborhood Hot Dog Stand could be quite reasonable if awarded for the same conduct against McDonald's."), aff'd, 509 U.S. 443 (1993).

n42. See Haslip, 499 U.S. at 21-22 (noting that in assessing punitive damages, jury should consider "financial position" of defendant); Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1333

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(5th Cir. 1995) (indicating that because the purpose of punitive damages is to deter wrongdoing, damage awards are tailored to defendant's wealth); Acosta v. Honda Motor Co., 717 F.2d 828, 839 (3d Cir. 1983) ("This court has previously recognized that ... the wealth of the defendant ... should be taken into account in assessing punitive damages."); Caron v. Caron, 577 A.2d 1178, 1180 (Me. 1990) (noting that damages must have some relationship to defendant's financial status in order to act as deterrent); Braley v. Berkshire Mut. Ins. Co., 440 A.2d 359, 363 (Me. 1982) (stating that punitive damage awards "must ... bear some relationship to the actual wealth of the defendant"); Whittington v. Whittington, 535 So. 2d 573, 584 (Miss. 1988) (considering financial worth of defendant in computing punitive damages); Bundy v. Century Equip. Co., 692 P.2d 754, 759 (Utah 1984) (finding that, in absence of evidence regarding defendant's net worth, an award of punitive damages cannot be sustained); see also Kan. Stat. Ann. 60-3701 (1994) (stating that court must consider financial condition of defendant in assessing punitive damage award); Miss. Code Ann. 11-1-65(e) (Supp. 1996) (noting that fact-finder must consider "defendant's financial condition and net worth" in determining amount of punitive damages to award); Restatement, supra note 20, 908(2) & cmts. b-e.

n43. See Haslip, 499 U.S. at 22.

While punitive damages in Alabama may embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extent of the defendant's wrongful gain, the factfinder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.

Id.

n44. See Owen, supra note 28, at 9. But see Conn. Gen. Stat. Ann. 52-240b (West 1991) (noting that judge shall determine amount of punitive damages to be awarded in products liability cases); Kan. Stat. Ann. 60-3701 (1994) (allowing jury to decide if punitive damages are appropriate, but shifting determination of amount from jury to judge); Ohio Rev. Code Ann. 2307.80 (Anderson 1995) (mandating that court determine amount of damages); Owen, supra note 26, at 1320-22 (advocating that judges, not juries, should determine amount of punitive damage awards); Lisa M. Sharkey, Comment, Judge or Jury: Who Should Assess Punitive Damages, 64 U. Cin. L. Rev. 1089 (1996) (arguing that judges, not juries, should decide amount of punitive damage awards).

n45. See, e.g., Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Cal. Ct. App. 1981) (upholding trial court's remittitur to $ 3.5 million of a jury award of $ 125 million in punitive damages); 735 Ill. Comp. Stat. Ann. 5/2-1207 (West 1992) (noting that trial court has discretion to enter remittitur if punitive damage award is excessive). In fact, in Honda Motor Co. v. Oberg, 512 U.S. 415 (1994), the Supreme Court held that an amendment to a state constitution that prohibited judicial review of punitive damage awards was a violation of due process. See id. at 432.

n46. See 735 Ill. Comp. Stat. Ann. 5/2-1115.05(c) (West Supp. 1996); see also Minn. Stat. Ann. 549.20 (West Supp. 1996) (permitting separate proceeding to determine punitive damages); N.C. Gen. Stat. 1D-30 (1995) (allowing defendant to request that liability for compensatory and punitive damages be tried separately).

n47. See, e.g., Kan. Stat. Ann. 60-3701 (1994); Mont. Code Ann. 27-1-221(7)(a) (1991).

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n48. See Mont. Code Ann. 27-1-221(7)(a) (1995) (stating that evidence of defendant's financial condition is not admissible until fact finder determines, in a separate proceeding, amount of punitive damage award, at which point defendant's financial condition must be considered); see also Utah Code Ann. 78-18-1(2) (1996) (noting that evidence of defendant's wealth is admissible only after finding liability for punitive damages); Oberg, 512 U.S. at 432 ("The presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.").

n49. See Oberg, 512 U.S. at 432 (recognizing jury bias against large out-of-state firms); see also Glennon v. Dean Witter Reynolds, Inc., 83 F.3d 132, 138 (6th Cir. 1996) (deciding that review of arbitrators' punitive awards is unwarranted "because arbitrators do not share juries' bias against big business defendants").

n50. See, e.g., Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 54-55 (1991) (O'Connor, J., dissenting) ("Over the last 20 years, the Court has repeatedly criticized common-law punitive damages procedures on the ground that they invite discriminatory and otherwise illegitimate awards." (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974))); id. at 39 (Scalia, J., concurring) ("Punitive damages assessed under common-law procedures are far from a fossil, or even an endangered species. They are (regrettably to many) vigorously alive. To effect their elimination may well be wise, but is not the role of the Due Process Clause."); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., and Stevens, J., concurring in part and dissenting in part) ("Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $ 250,000. Since then, awards more than 30 times as high have been sustained on appeal.") (internal citations omitted); see also Product Liability Fairness Hearing, supra note 24, at 432 (statement of Theodore B. Olson, Esq., Gibson, Dunn & Crutcher LLP) (stating that "punitive damage awards are exploding out of control"). But see Michael Rustad, In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data, 78 Iowa L. Rev. 1, 57-58 (1992) (finding that from 1965 to 1990, there were only 355 punitive damage awards in products liability cases and more than half of these punitive damage awards were reduced in settlement or were reduced by appellate courts).

n51. 499 U.S. 1 (1991).

n52. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 61-62 (1991) (O'Connor, J., dissenting) (internal citations omitted).

n53. Petition for Writ of Certiorari at 26, BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589 (1996) (No. 94-896).

n54. For example, in the well-publicized McDonald's case in which a customer spilled coffee into her lap, the jury's award of $ 2.7 million in punitive damages was reduced by the judge to $ 640,000. See Liebeck v. McDonald's Restaurants, Inc., No. CV-93-02419, 1995 WL 360309, at *1 (D.N.M. Aug. 18, 1994); Benjamin Weiser, Tort Reform's Promise, Peril; Legislation Could Mean Tight Limits on Liability, Wash. Post, Sept. 14, 1995, at A1 (stating that $ 2.7 million award later was reduced by judge to $ 640,000). The $ 70 million verdict against a director of Amerco was reduced to $ 7 million. See In re Shoen, 193 B.R. 302, 305 (Bankr. D. Ariz. 1996) (reducing jury damages award in remittitur proceeding based on jury finding that defendants reduced plaintiff's stock value in contested corporation by $ 1.4 billion). The $ 58 million verdict against Maryland Casualty for breach of contract and bad faith also was reversed as excessive. See Dempsey v. Maryland Cas. Co., BC-033631 (Super. Ct. Los Angeles Co., Oct. 27, 1994) (invalidating $ 61 million jury award based on Maryland Casualty's breach of contract and bad faith in refusing to pay fire insurance claim); Verdicts Reversed by Judges, Nat'l L.J., Feb. 6, 1995, at C14 (listing Dempsey as one of 11 of 1994's

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largest damage award reversals). In the Mercury Finance case, the judge found the $ 50 million award excessive and offered the plaintiff a choice between a new trial or a remitted award of $ 2 million. See Johnson v. Mercury Fin. Co. of Ala., No. CV-93-072 (Cir. Ct. Barbour Co. Ala., Jan. 27, 1995) (reducing award through undisclosed settlement when trial court deemed $ 90,000 compensatory and $ 50 million punitive awards excessive based on used car sale in which $ 1000 was added to $ 2700 automobile purchase price to cover financing acquisition fee); Alvin C. Harrell, Disclosure of "Acquisition Fees" in Assignments of Consumer Chattel, 49 Consumer Fin. L.Q. Rep. 145, 147-48 (1995) (describing political climate in Barbour County, Alabama, including historical ties between plaintiff's attorney, 6000 member jury pool, and judge presiding over case which led to excessive award in "aberrational" decision of otherwise "well-settled" legal principle in consumer chattel paper transfer). The parties reportedly settled rather than seek a new trial. See id. at 148. The $ 6.9 million punitive damage award against Baker & McKenzie for sexual harassment subsequently was reduced by the judge to $ 3.5 million. See Weeks v. Baker & McKenzie, 66 Fair Empl. Prac. Cas. (BNA) 581, 584-85 (Cal. Super. Ct. Nov. 28, 1994) (finding 138:1 ratio of punitive to compensatory award excessive where law firm defendant took corrective action before trial by forcing offending partner to leave firm and reducing award from $ 6.9 million to $ 3.5 million). The judge reversed the $ 80 million verdict against Hughes for racial discrimination, finding the award excessive and "grossly disproportionate." Lane v. Hughes Aircraft Co. Inc., BC-075519 (Super. Ct., Los Angeles Co., Oct. 19, 1994) (finding that prejudicial evidence was admitted improperly and that plaintiff's counsel improperly used inflammatory language in arguments to jury); Verdicts Reversed by Judges, Nat'l L.J., Feb. 6, 1995, at C14 (citing Hughes Aircraft as one of 11 of 1994's largest damage award reversals). The $ 109 million judgment against Blockbuster for "maliciously defrauding one of its investors" was settled. See Owen McDonald, Out-of-Court Settlement Reached in Blockbuster Investor Suit, Jan. 7, 1996, available in 1996 WL 8351823. The $ 5 million judgment against Hilton Hotel for negligence and for maliciously and oppressively denying the plaintiff her right to safety subsequently was reduced by the judge to $ 3.9 million. See Coughlin v. Hilton Hotels Corp., 879 F. Supp. 1047, 1053 (D. Nev. 1995) (reducing compensation contribution and punitive treble damage amounts by $ 400,000 previously paid by separate defendant); Robin Abcarian, Balancing Safety and the Bottom Line in Nevada, L.A. Times, June 7, 1995, at 1 (reporting Nevada state legislative efforts to reduce hotel liability for safety and security related negligence involving hotel guests).

n55. See Weiser, supra note 54, at A1 (outlining proposed tort reform legislation). In his exhaustive 1992 study of punitive damages, Professor Michael Rustad found that half of all punitive awards are appealed and half of those appealed are reversed or reduced. See Rustad, supra note 50, at 57-58. Yet even this study does not reflect accurately how many awards would have been reduced by the court because many plaintiffs settle for less than the amount rewarded before the court has the opportunity to reduce. See id.

n56. See Darryl K. Brown, Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrine, 47 Hastings L.J. 1255, 1301 (1996) (arguing that courts have regulated the imposition of punitive damages by focusing "jury deliberation on factors deemed relevant by the legislature and minimizing consideration of irrelevant factors").

n57. See Product Liability Fairness Hearing, supra note 24, at 432 (statement of Theodore B. Olson, Esq., Gibson, Dunn & Crutcher LLP) ("The frequency and magnitude of punitive damage awards are exploding out of control when measured either by jury verdicts or by amounts affirmed on appeal ....").

n58. See id.

n59. See Carrie Menkel-Meadow, Whose Dispute Is It Anyway?: A Philisophical and Democratic Defense of Settlement (In Some Cases), 83 Geo. L.J. 2663, 2680-81 (1995)

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(describing effect of jury verdicts and settlement process on future litigation).

n60. See Punitive Damages Hearing, supra note 24, at 85-94 (statement of George L. Priest, Professor of Law and Economics, Yale Law School). According to one study, there has been a dramatic increase in punitive damage claims filed in tort cases. See id. at 87.

n61. See Pace, supra note 6, at 841.

n62. See Malcolm E. Wheeler, A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation, 40 Ala. L. Rev. 919, 919 (1989) ("The last two decades have witnessed dramatic growth in both the frequency and size of punitive damages awards in product liability litigation.... Today, hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case."); see also James B. Sales, The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel, 14 St. Mary's L.J. 351, 391-92 (1983) (noting that product suppliers are threatened by number and size of punitive damages awards facing manufacturing industry). But see Stephen Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1, 35-62 (1990) (presenting empirical evidence to contradict claims regarding size and frequency of punitive damages awards); Rustad, supra note 50, at 23 ("Every empirical study of punitive damages awards concludes that there is simply no evidence that punitive damages are routinely awarded.").

n63. See, e.g., Ga. Code Ann. 51-12-5.1(c) (1993 & Supp. 1996) ("Punitive damages shall be awarded not as compensation to a plaintiff but solely to punish, penalize, or deter a defendant ...."); Ky. Rev. Stat. Ann. 411.184(1)(f) (Banks-Baldwin 1995) (""Punitive damages' includes exemplary damages and means damages, other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future ....").

n64. See, e.g., Ala. Code 6-11-20(a) (Supp. 1992); Cal. Civ. Code 3294(a) (West Supp. 1992); Conn. Gen. Stat. Ann. 52-240(b) (West 1997); Ga. Code Ann. 51-12-5.1(d), (e) (1993 & Supp. 1996); 735 Ill. Comp. Stat. Ann. 5/22107 (West Supp. 1996); Ohio Rev. Code Ann. 2307.801(A) (Banks-Baldwin 1994); Or. Rev. Stat. 30.925(1) (1995).

n65. See, e.g., Ala. Code 6-11-20(a); Alaska Stat. 09.17.020 (Michie Supp. 1996); Cal. Civ. Code 3294(a); Ga. Code Ann. 51-12-5.1(b); Idaho Code 6-1604(1) (1992); 735 Ill. Comp. Stat. Ann. 5/21115.05(b); Ind. Code Ann. 34-4-34-2 (West Supp. 1996); Iowa Code Ann. 668A.1 (West 1992); Kan. Stat. Ann. 60-3701(c) (1995); Ky. Rev. Stat. Ann. 411.184; Minn. Stat. Ann. 549.20(a) (West 1996); Miss. Code Ann. 11-1-65(1)(a) (1995); Mont. Code Ann. 27-1-221(5) (1991); Nev. Rev. Stat. Ann. 42.005 (Michie 1995); N.J. Stat. Ann. 2A:15-5.12 (West Supp. 1996); N.C. Gen. Stat. 1D-15(b) (1995); N.D. Cent. Code 32-03.2-11 (Supp. 1995); Ohio Rev. Code Ann. 2307.80 (products liability cases); id. 2315.21(c)(3) (all other tort actions); Okla. Stat. Ann. tit. 23, 9(A) (West 1987); Or. Rev. Stat. 18.537; S.C. Code Ann. 15-33-135 (Law. Co-op. 1993); S.D. Codified Laws 60-3701(c) (Michie 1993); Utah Code Ann. 78-18-1(a) (1992). The state of Colorado raised the burden of proof to "beyond a reasonable doubt" before punitive damages can be imposed. See Colo. Rev. Stat. Ann. 13-25-127(2) (West 1989). The state of Maryland requires proof of actual malice. See Md. Code Ann., Cts. & Jud. Proc. 3-504(b) (1995); see also Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 653 (Md. 1992) (holding that proof of actual malice is required to award punitive damages).

n66. See, e.g., Ohio Rev. Code Ann. 2307.801(B); Or. Rev. Stat. 30.925(2); Tex. Civ. Prac. & Rem. Code Ann. 41.011(a), 41.012 (West 1997).

n67. See supra note 65 and accompanying text.

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n68. See, e.g., Colo. Rev. Stat. Ann. 13-21-102 (West Supp. 1996) (stating that punitive damage awards cannot exceed compensatory damages); Conn. Gen. Stat. Ann. 52-240(b); Fla. Stat. Ann. 768.73(1) (West 1992 & Supp. 1993) (limiting punitive damages to three times compensatory damages unless plaintiff proves by clear and convincing evidence that higher award is not excessive); 735 Ill. Comp. Stat. 5/2-1115.05(a) (limiting punitive damages to three times economic damages); Ind. Code Ann. 34-4-34-4; Kan. Stat. Ann. 60-3701; Mont. Code Ann. 27-1-221; Nev. Rev. Stat. Ann. 42.005 (imposing $ 300,000 cap on punitive damages when actual damages are less than $ 100,000); N.J. Stat. Ann. 2A:15-5.14 (b) (limiting punitive damages to five times compensatory damages or $ 350,000, whichever is greater); N.C. Gen. Stat. 1D-25(b) (capping punitive damages at greater of three times compensatory damages or $ 250,000); N.D. Cent. Code 32-03.2-11(4) (stating that punitive damages cannot exceed two times compensatory damages or $ 250,000, whichever is greater); Ohio Rev. Code Ann. 2307.80; Okla. Stat. Ann. tit. 23, 9; Tex. Civ. Prac. & Rem. Code Ann. 41.007 (capping punitive damages at greater of $ 200,000 or four times compensatory damages); Va. Code Ann. 8.01-38.1 (Michie 1992) (capping all punitive damages at $ 350,000). But see Ga. Code Ann. 51-12-5.1(e)(1) ("In a tort case in which the cause of action arises from product liability, there shall be no limitation regarding the amount which may be awarded as punitive damages.") (emphasis added). Georgia does, however, offer defendants some protection in that only one punitive award can be recovered for any act regardless of the number of separate causes of action that might arise from that act. See id. 51-12-5.1(e)(1). Although this may aid corporations being sued in Georgia, it has no bearing on actions brought in other states, because Georgia's power to legislate stops at its borders. See supra notes 14-15 and accompanying text (discussing national scope of tort award problems).

n69. See, e.g., 735 Ill. Comp. Stat. 5/2-2107 (stating that if defendant's conduct "was approved by or was in compliance with **standards** set forth in an applicable federal or state statute or in a regulation" then no **punitive damages** may be awarded); Ohio Rev. Code Ann. 2307.80 (compliance with FDA regulations bars punitive damage awards); 1987 Tex. Gen. Laws 81.008 (same). But see Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 735-36 (Minn. 1980) (holding that compliance with minimal federal **standards** of product flammability testing in children's clothing materials does not preclude award of **punitive damages)**.

n70. See, e.g., BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1604 (1996) (due process challenge); Honda Motor Co. v. Oberg, 512 U.S. 415, 418 (1994) (procedural due process challenge); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 446 (1993) (procedural and substantive due process challenge); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 7 (1990) (procedural due process challenge); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276-77 (1989) (due process and excessive fines challenge); Paul M. Sykes, Note, Marking a Road to Nowhere? Supreme Court Sets Punitive Damages Guideposts in BMW v. Gore, 75 N.C. L. Rev. 1084, 1086 n.9 (1997) (listing recent Supreme Court decisions involving constitutional challenges to punitive damages awards).

n71. See U.S. Const. amend. V ("Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb...."); U.S. Const. amend. VII ("In Suits at common law ... no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."); U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed...."); U.S. Const. amend. XIV, 1 ("Nor shall any State deprive any person of life, liberty, or property, without due process of law....").

n72. See, e.g., Haslip, 499 U.S. at 41 (Kennedy, J., concurring) (urging legislators to consider measures that address size and unpredictability of punitive damages awards).

n73. 116 S. Ct. 1589 (1996).

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n74. See BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1602-03 (1996) ("As in Haslip, [499 U.S. 1 (1991),] we are not prepared to draw a bright line marking the constitutionally acceptable punitive damages award. Unlike that case, however, we are fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit."). At least a majority of the Court held that the award was unconstitutionally excessive. Unfortunately, the Justices are no more uniform in their views regarding the regulation of punitive damage awards than the 50 states. See Timothy S. Lykowski, Tightening the Constitutional Noose Around Punitive Damages Challenges: TXO, What It Means, and Suggestions That Address Remaining Concerns, 68 S. Cal. L. Rev. 203, 228-38 (1994) (providing comparative analysis of various Supreme Court Justices' approaches to punitive damages awards including Justice Scalia's "traditional approach," Justice Stevens' "reasonableness" approach, Justice Kennedy's "comparative" approach, and Justice O'Connor's "most limiting" approach).

n75. U.S. Const. amend. V.

n76. 490 U.S. 435 (1989).

n77. United States v. Halper, 490 U.S. 435, 446 (1989).

n78. See id. at 437-38.

n79. See id. at 448-49. The Court held that if the civil payment had been remedial, as opposed to punitive, it would have been constitutional. See id.

n80. Id. at 451.

n81. See infra notes 90-96 and accompanying text (considering Double Jeopardy Clause implications of splitting plaintiffs' damage awards in light of growing state efforts to recoup portions of punitive damage awards into state treasuries and victims' compensation funds); see also Clay R. Stevens, Comment, Split-Recovery: A Constitutional Answer to the Punitive Damages Dilemma, 21 Pepp. L. Rev. 857, 885 (1994) (arguing that Court in Halper implicitly suggested that split recovery of punitive damages implicates Double Jeopardy Clause).

n82. See Stevens, supra note 81, at 884.

n83. U.S. Const. amend. VIII.

n84. 492 U.S. 257 (1989).

n85. See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 260 (1989). Until 1980, Browning-Ferris was the sole provider of roll-off waste collection service (large scale trash removal) in Burlington, Vermont. See id. That year, a former Browning-Ferris local manager entered the market himself, creating a company named Kelco. See id. Kelco had 40% of the roll-off waste market within one year and 43% within two years. See id. When Browning-Ferris was unable to buy out its only competition, the company reacted by trying to drive Kelco out of business by cutting its price by 40% for all new business. See id. Browning-Ferris' regional vice-president ordered the Burlington office to "put [Kelco] out of business. Do whatever it takes. Squish him like a bug." Id. A salesman in the Burlington office was told to put Kelco out of business, being instructed that if "it means give the stuff away, give it away." Id. at 260-61. Kelco brought suit against Browning-Ferris alleging that Browning-Ferris' illegal pricing strategy violated section 2 of the Sherman Act. See id. at 261. A Vermont jury found that Browning-Ferris tried to monopolize the roll-off waste disposal market by interfering with Kelco's contractual relations and awarded Kelco $ 51,000 in compensatory damages (later trebled) and $ 6 million in punitive damages. See id. at 260-

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I. Punitive Damages

A. The Nature and Purpose of Punitive Damages

Punitive damages long have been a part of American common law, [17] as they were a part of the preceding English common law. [18] The debate regarding the legitimacy of the punitive damages doctrine has been raging since the doctrine's inception. [19] Punitive damages, **[*1579]** unlike compensatory damages, [20] are "awarded against a [manufacturer] to punish [it] for outrageous conduct and to deter [it] and others like [it] from similar conduct in the future." [21] Although the general nature of tort law is a "private right," punitive damages are a "public remedy" for a "public wrong." [22] In this way, punitive damages are state-imposed penalties for anti-social conduct, protecting society by imposing penalties on manufacturers for their conscious, flagrant indifference to human safety. [23] Because compensatory damages alone would be insufficient, [24] punitive damages are needed to **[*1580]** punish guilty wrongdoers and to deter the future misconduct of manufacturers. [25] Punitive damages are intended as both a specific deterrent, so that the offending defendant will not repeat her misconduct, as well as a general deterrent, so that others will be dissuaded from engaging in similar misconduct.

Punitive damage awards are quasi-criminal sanctions imposed on the wrongdoer to punish misconduct and to deter similar offensive conduct by the defendant and other potential wrongdoers. [26] "The concept of punitive damages lies in the borderland that both bridges and separates criminal law and torts." [27] These awards are not really damages at all; they serve the same purpose as fines and penalties. [28] "The very labels given "punitive' or "exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions." [29] Punitive damages are civil payments imposed to punish or deter [30] socially reprehensible **[*1581]** conduct that places **public safety** in jeopardy. [31]

B. Arriving at a Proper **Punitive Damage** Award

Two issues have been the subject of much debate in assessing a punitive damage award: (1) the factors that the decision-maker should take into account when determining the amount of punitive damages to award; and (2) whether the judge or jury should determine the amount of the award and at what point in the proceeding it should be determined.

1. Factors to be considered in determining the amount of punitive damages to award

Many factors can be taken into account when assessing a punitive damage award. Some states have legislated the factors that should be considered by the fact-finder when determining the amount of punitive damages. In Kansas, for example, where the judge, not the jury, determines the amount of punitive damages to award, the court may consider:

(1) The likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct;

(2) the degree of the defendant's awareness of that likelihood;

(3) the profitability of the defendant's misconduct; **[*1582]**

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61.

n86. See id. at 260. The court found this interpretation consistent with the intent of the Framers, which was to place limits on the powers of the new government. See id. at 266.

n87. Id. at 264 (emphasis added).

n88. See Stephen R. McAllister, A Pragmatic Approach to the Eighth Amendment and Punitive Damages, 43 U. Kan. L. Rev. 761, 780-87 (1995) (arguing that Excessive Fines Clause should apply where states require that a percentage of a punitive damage award be paid into the state treasury or to a state-sponsored fund).

n89. See Browning-Ferris, 492 U.S. at 276 n.21 ("We leave [this] question open for purposes of the Eighth Amendment's Excessive Fines Clause.").

n90. See, e.g., Colo. Rev. Stat. Ann. 13-21-102(4) (repealed 1995) (one-third of all punitive damage awards must be paid into state treasury); Fla. Stat. Ann. 768.73(2)-(4) (West Supp. 1992) (thirty-five percent of punitive damage awards must be paid into state funds); Ga. Code Ann. 51-12-5.1(e)(2) (1993 & Supp. 1997) (seventy-five percent of all punitive damage awards are paid into state treasury); 735 Ill. Comp. Stat. Ann. 5/2-1207 (West Supp. 1996) (statute allows trial court to apportion punitive damage award between plaintiff, his attorney, and State's Department of Rehabilitation at its discretion); Iowa Code Ann. 668A.1(1)-(2) (West 1987) (statute requires that seventy-five percent of punitive damage award be paid into civil fund); Kan. Stat. Ann. 60-3402(e) (1994) (fifty percent of all punitive damage awards in medical malpractice cases must be paid into state treasury); Mo. Ann. Stat. 537.675.2 (West Supp. 1992) (fifty percent of punitive damage award paid to the Tort Victims Compensation Fund); N.Y. C.P.L.R. 8701 (McKinney Supp. 1995) (statute requires that 20% of punitive damage awards be paid to state); Or. Rev. St. 18.540 (1994) (after plaintiff's attorney fees have been paid, 50% of remaining punitive damage award will go to state's Criminal Injuries Compensation Fund); Utah Code Ann. 78-18-1(3) (1992) (after plaintiff's attorney fees and court costs have been paid, 50% of punitive damage award in excess of $ 20,000 will go to state's General Fund). In a 1992 amendment, the state of Florida reduced its portion of the punitive damage award from 60% to 35% to prevent the state's take from discouraging lawyers who work on a contingency basis from pursuing cases where the recovery would almost exclusively be punitive damages (a case with low compensatory damages - such as an injured homemaker without lost wages). See Fla. Stat. Ann. 768.73(2)(b) (West Supp. 1992).

n91. See supra note 90 and accompanying text.

n92. See, e.g., E. Jeffrey Grube, Note, Punitive Damages: A Misplaced Remedy, 66 S. Cal. L. Rev. 839, 845-55 (1993) (arguing that windfalls from punitive damage awards could go directly to states without undermining deterrent rationale); Leo M. Stepanian II, Comment, The Feasibility of Full State Extraction of Punitive Damage Awards, 32 Duq. L. Rev. 301, 327-28 (1994) (arguing in favor of awarding punitive damages directly to the state instead of the plaintiff). But see James D. Ghiardi, Punitive Damages: State Extraction Practice Is Subject to Eighth Amendment Limitations, 26 Tort & Ins. L.J. 119, 130-31 (1990) (maintaining that awarding punitive damages to state brings these awards within purview of Eighth Amendment's Excessive Fines Clause, which may result in them being held unconstitutional).

n93. The plaintiff already has received full compensation for her injuries through compensatory damages. Allowing the plaintiff to keep a punitive damage award, therefore, provides the plaintiff with a windfall. See Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 841 (2d Cir. 1967) (denying punitive damage award when evidence was insufficient to meet New York recklessness requirement and citing increased government regulation, criminal penalties, and compensatory awards as sufficient deterance measures); Molenaar v. United

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Cattle Co., 553 N.W.2d 424, 427 (Minn. App. 1996) ("State legislatures have imposed other reforms, such as avoiding a windfall by requiring the punitive damages to be paid to the state rather than a litigant."); see also Note, An Economic Analysis of Plaintiff's Windfall from Punitive Damage Litigation, 105 Harv. L. Rev. 1900, 1907-08 (1992) (arguing that punitive damage awards create plaintiff windfalls leading to inefficient economic results and proposing legislative response requiring payment to state fund). But see Stevens, supra note 81, at 908 n.77 ("The plaintiff is not completely undeserving because she must expend time, effort, and money as the catalyst who brings the defendant to justice for the sake of society.").

n94. See Harris, supra note 22, at 1102 (stating that punitive damages are concerned with injuries to community). Commentators also have argued that if the state were awarded all punitive damage awards, it would increase the number of times parties settled and thereby reduce litigation of these types of cases. See Stepanian, supra note 92, at 325-27. Full state extraction enhances the incentive to settle because plaintiffs likely would settle for any amount greater than their compensatory damages. This result is based on the premise that plaintiffs would be able to keep the money in excess of compensatory damages, whereas that excess amount would go to the state if the case went to trial. See id.

n95. See McBride v. General Motors Corp., 737 F. Supp. 1563, 1569-70, 1578 (M.D. Ga. 1990) (finding that state statute allocating 75% of all products liability punitive damage awards to state was a violation of Excessive Fines Clause and was a violation of due process and equal protection because it applied only to product liability suits); Kirk v. Denver Publ'g Co., 818 P.2d 262, 272 (Co. 1992) (holding that state statute that required one third of punitive damage award to be paid to public treasury was unconstitutional taking under both United States and Colorado Constitutions because punitive damage judgment is private property right); Gordon v. State, 585 So. 2d 1033, 1035-38 (Fla. Dist. Ct. App. 1991), aff'd, 608 So. 2d 800 (Fla. 1992) (finding Florida provision apportioning punitive damage awards between plaintiff and state constitutional because a plaintiff does not have a cognizable right to recover punitive damages); see also Burke v. Deere & Co., 780 F. Supp. 1225, 1242 (S.D. Iowa 1991) (holding that state statute that requires portion of punitive award to be paid to civil reparations fund administered by courts does not provide state with any interest in award and, therefore, does not implicate Eighth Amendment concerns), rev'd, 6 F.3d 497 (8th Cir. 1993); Fuller v. Preferred Risk Life Ins. Co., 577 So. 2d 878, 887 (Ala. 1991) (Shores, J., concurring) (suggesting that court has inherent power to apportion punitive damages between plaintiff and state general fund or "some special fund that serves a public purpose or advances the cause of justice"); Shepard Components, Inc. v. Brice Petrides-Donohoe & Assocs., Inc., 473 N.W.2d 612, 619 (Iowa 1991) (requiring 75% of punitive damage award to be paid to state does not violate due process or equal protection because plaintiffs do not have vested property rights in punitive damage awards).

n96. See Owens-Corning Fiberglas Corp. v. Dudley, 667 So. 2d 783, 783 (Fla. Dist. Ct. App.) (per curiam), cert. denied, 116 S. Ct. 2498 (1996) (affirming without comment trial court verdict awarding $ 4.06 million in compensatory damages, $ 8.25 million in punitive damages, and $ 3320 in plaintiff's costs in asbestos personal injury action).

n97. See BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1591-92 (1996) (providing three "guideposts" used to indicate the excessiveness of a punitive damage award: (1) the degree of reprehensibility of defendant's conduct; (2) the ratio between plaintiff's compensatory damages and the punitive damage award; and (3) the difference between the award and the civil or criminal sanctions that could be imposed for comparable misconduct). The "guideposts" articulated in BMW look surprisingly similar to the considerations Justice O'Connor proposed in her dissent in Browning-Ferris. Justice O'Connor stated:

First, the reviewing court must accord "substantial deference" to legislative judgments

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concerning appropriate sanctions for the conduct at issue. Second, the court should examine the gravity of the defendant's conduct and the harshness of the award of punitive damages. Third, because punitive damages are penal in nature, the court should compare the civil and criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil and criminal penalties imposed by different jurisdictions for the same or similar conduct.

Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., dissenting).

n98. Browning-Ferris, 492 U.S. at 279.

n99. See BMW, 116 S. Ct. at 1595 ("Only when an award can fairly be categorized as "grossly excessive' ... does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.").

n100. In addition to its analysis under the Eighth Amendment, Browning-Ferris is significant for its foreshadowing of substantive due process review of punitive damage awards. Justice Brennan, joined by Justice Marshall, issued a concurring opinion expressing his belief that the Due Process Clause imposes both procedural and substantive limitations on punitive awards. See Browning-Ferris, 492 U.S. at 280-81 (Brennan, J., concurring). Justice Brennan actually suggested the "grossly excessive" test, which subsequently was endorsed by the Court. See id. at 281 (Brennan, J., concurring). Justice O'Connor, joined by Justice Stevens, dissented on the Excessive Fines Clause issue and agreed with Justice Brennan regarding the substantive limitations imposed by the Due Process Clause. See id. at 283 (O'Connor, J., dissenting).

n101. U.S. Const. amend XIV, 1.

n102. See infra note 186 and accompanying text.

n103. 499 U.S. 1 (1991).

n104. See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) ("We cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be per se unconstitutional.").

n105. Id.

n106. See id. at 4.

n107. See id. at 5. An arrangement was made for Union Fidelity to send its billings for the city's health insurance premiums to Ruffin at one of Pacific Mutual's branch offices. See id. Once recieved, Ruffin was responsible for remitting the payments to Union Fidelity. See id.

n108. See id.

n109. See id. The cancellation notices never were forwarded to the city. See id.

n110. See id. The insurance company refused to extend coverage to Haslip and, as a result of her inability to pay, her doctors placed the account with a collection agency, adversely affecting Haslip's credit. See id.

n111. See id. Ruffin was sued individually and as a proprietorship, and Pacific Mutual was sued under a theory of respondeat superior. See id.

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n112. See id. at 6-7. The jury was instructed that if it found the defendants liable for fraud, it could award punitive damages to the plaintiff. See id. at 6. The jury also was directed to take into consideration "the character and the degree of the wrong as shown by the evidence and necessity of preventing similar harm" when fixing the amount. Id. at 6 n.1.

n113. See Pacific Mut. Life Ins. Co. v. Haslip, 553 So. 2d 537 (Ala. 1989), aff'd, 499 U.S. 1 (1991). The Alabama Supreme Court determined that the trial judge appropriately had reviewed the punitive damages awarded by the jury, held a hearing, and set forth on the record the reasons why he felt the law did not authorize a remittur. See id. at 543.

n114. See Haslip, 499 U.S. at 21, 23-24. "This appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and deter its repetition." Id. at 21.

n115. Id. at 21-22. The Supreme Court reiterated the criteria set forth by the Alabama Supreme Court in Hammond v. City of Godsen, 493 So. 2d 1374, 1379 (Ala. 1986), for determining whether a punitive award is excessive or inadequate. See Haslip, 499 U.S. at 20.

n116. 419 S.E.2d 870 (W. Va. 1992), aff'd, 509 U.S. 443 (1993).

n117. See TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 888 (W. Va. 1992), aff'd, 509 U.S. 443 (1993). According to the court, "really stupid defendants" are those who have harmed victims unintentionally as a result of extreme carelessness. See id. The court held that in those "really stupid" cases, punitive damages generally should be limited to five times the compensatory damages. See id. at 889.

n118. See id. at 889. "Really mean defendants" are those who have committed intentional acts that they knew were harmful. See id. The court held that in these cases, punitive damages that are 500 times compensatory damages are not per se unreasonable. See id.

n119. See id. at 887-88. The court held that when actual compensatory damages are minimal and the potential for harm from defendant's stupidity was great, a punitive award exceeding five times the compensatory award may be justified. See id. at 889.

n120. See id. Because the type of fraudulent action intentionally undertaken by the defendant could have caused millions of dollars in damages to other victims, the court found the defendant within the "really mean" category and, consequently, subject to substantial punitive damages. See id.

n121. See TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 447-49 (1993).

n122. See id. at 447 (quoting TXO, 419 S.E.2d at 875). TXO would pay Alliance $ 20 per acre in cash, 22% of the oil and gas revenues in royalties, and all of the development costs as part of the "phenomenal" offer. See id.

n123. See id. at 448.

n124. See id.

n125. See id. at 449.

n126. See id.

n127. See id. at 449-50.

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n128. See id. at 450.

n129. See id. at 450-51. Alliance introduced evidence that TXO had been caught in four similar instances of fraud and misrepresentation preceding the activities in this case. See TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 881-83 (W. Va. 1992), aff'd, 509 U.S. 443 (1993); see also Sandra L. Nunn, The Due Process Ramifications of Punitive Damages, 63 U. Cin. L. Rev. 1029, 1032 n.22 (1995) (discussing videotaped depositions of four attorneys concerning matters in which TXO and each of its clients were involved).

n130. See TXO, 509 U.S. at 451.

n131. TXO, 419 S.E.2d at 889-90. In deciding whether the $ 10 million punitive damage award in this case met the "reasonable relationship" test under West Virginia law, the court considered three factors: "(1) the potential harm that TXO's actions could have caused; (2) the maliciousness of TXO's actions; and, (3) the penalty necessary to discourage TXO from undertaking such endeavors in the future." Id. at 889.

n132. See TXO, 509 U.S. at 462.

n133. See id. at 458.

n134. See id. at 462. The Supreme Court held that "the disparity between the punitive award and the potential harm does not, in our view, "jar one's constitutional sensibilities.'" Id. (quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991)). The Court held that the "dramatic disparity" is not dispositive in light of the potential harm to which Alliance was subject, TXO's bad faith, TXO's wealth, and the fact that TXO had a long standing pattern of fraud, trickery, and deceit. See id.

n135. See id. at 460. The Supreme Court noted that the "shocking disparity" stressed by TXO dissipates when one considers the possible loss of royalties payments to Alliance had TXO succeeded in its wrongful plan. See id. at 462.

n136. A "dramatic disparity" between actual damages and punitive damages (even one 526 times the actual damages) is not determinative of excessiveness in light of other factors involved in the case. See id. at 459-62.

n137. See Nunn, supra note 129, at 1085 (recognizing that because the Supreme Court's line of constitutional impropriety moves on a case-by-case basis, "exactly what will cause a punitive damages award to cross this moving line in a given case remains unanswered").

n138. 512 U.S. 415 (1994).

n139. See Honda Motor Co. v. Oberg, 512 U.S. 415, 435 (1994).

n140. See id. at 418.

n141. See id.

n142. See id.

n143. See id.

n144. See id. at 430-32. Although Oregon provides pre-verdict safeguards against arbitrary awards, the safeguards do not protect the defendant adequately from the possibility that juries may disregard specific instructions and may impose excessive punitive damages. See

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id. at 429.

n145. See id. at 426.

n146. 116 S. Ct. 1589 (1996).

n147. See BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1593-94 (1996). Apparently, Gore requested that the jury award punitive damages in the amount of $ 4000 for each of the approximately 1000 partially refinished cars that BMW sold as new during a ten-year period, even though many of these sales took place outside the state and in states where it was not illegal to withhold this information from the customer. See Brief for Petitioner at 7, BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589 (1996) (No. 94-896), available in 1995 WL 126508.

n148. See BMW, 116 S. Ct. at 1595. The Alabama Supreme Court found that the jury improperly included sales outside the state in computing the amount of punitive damages. See id. The court held that the state could not punish BMW for acts that occurred outside state borders. See id. The court determined that a $ 2 million punitive damage award would be "constitutionally reasonable" under the circumstances. See id.

n149. See id. at 1592-93.

n150. See id. at 1604. The Court held: "Only when an award can fairly be categorized as "grossly excessive' in relation to [the state's legitimate interests in punishment and deterrence] does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." Id. at 1595.

n151. See id. at 1598-99. In his concurrence, Justice Breyer, articulated seven factors that appellate courts should use to determine whether a punitive damage award is grossly excessive: (1) the award must bear a "reasonable relationship" to the harm that is likely to occur from defendant's conduct as well as the harm that actually has occurred; (2) the "degree of reprehensibility" of defendant's conduct; (3) the award must "remove the profit" of the illegal activity; (4) the financial condition of the defendant; (5) the costs of the litigation and the state's desire to encourage plaintiffs to bring wrongdoers to trial; (6) whether criminal sanctions have been imposed; and (7) whether other civil actions have been filed against this defendant for the same conduct. See id. at 1606-07 (Breyer, J., concurring) (citing Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989)).

n152. See id. at 1610 (Scalia, J., dissenting). Justice Scalia stated, "Since the Constitution does not make that concern any of our business, the Court's activities in this area are an unjustified incursion into the province of state governments." See id. (Scalia, J., dissenting). Justice Ginsburg, joined by the Chief Justice, also dissented on federalism grounds with Justice Ginsburg arguing that the Court was encroaching on decisions more appropriately left to the states. See id. at 1614 (Ginsburg, J., dissenting).

n153. See id. at 1610-11 (Scalia, J., dissenting).

n154. Id. at 1611 (Scalia, J., dissenting).

n155. See id. at 1611-12 (Scalia, J., dissenting).

n156. See id. at 1612 (Scalia, J., dissenting) (internal citations omitted).

n157. See id. at 1613 (Scalia, J., dissenting).

n158. See supra note 156 and accompanying text.

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n159. See BMW, 116 S. Ct. at 1613 (Scalia, J., dissenting) (noting that loophole in guideposts will cause state courts to uphold large awards for the protection of consumers).

n160. See infra note 163 and accompanying text (explaining why current system does not work).

n161. See Marcia Coyle, Punies Decision Gives Business Potent Ammo, Nat'l L.J., June 3, 1996, at A11.

n162. See infra notes 317-21 and accompanying text (explaining that statutory and regulatory penalties offer only minimum standards and are often outdated because of rapidly changing technology).

n163. See Teresa Moran Schwartz, Prescription Products and the Proposed Restatement (Third), 61 Tenn. L. Rev. 1357, 1385 (1994) [hereinafter Schwartz, Prescription Products] (declaring that tort system takes over when regulation fails). Regulation often is inadequate to police corporate wrongdoing because: (1) regulatory agencies are understaffed and underfunded; (2) the regulations are outdated; (3) there is generally a "lag time" between technological advances and regulations to cover those advances; and (4) regulatory violations often are difficult to police. The tort system in general and punitive damage awards in particular play a vital role in policing corporate wrongdoing when the agencies and regulations fall short. See generally Teresa Moran Schwartz, The Impact of the New Products Liability Restatement on Prescription Products, 50 Food & Drug L.J. 399, 405-06 (1995) [hereinafter Schwartz, Impact of the New Restatement] (describing lack of clarity in current FDA regulations); Schwartz, Prescription Products, supra, at 1385-87 (explaining how regulations and tort system can work together to deter unsafe practices); Teresa Moran Schwartz, Punitive Damages and Regulated Products, 42 Am. U. L. Rev. 1335, 1343-44 (1993) [hereinafter Schwartz, Punitive Damages] (detailing judicial treatment of regulations and listing concerns about process); Teresa Moran Schwartz, The Role of Federal Safety Regulations in Products Liability Actions, 41 Vand. L. Rev. 1121, 1146-52 (1988) [hereinafter Schwartz, Products Liability] (articulating reasons why federal regulatory standards do not work).

n164. See Lykowski, supra note 74, at 247 (citing factors that limit usefulness of comparison with criminal penalties).

n165. See id. (recognizing that tools such as maximum fine levels and imposition of fines per incident give judges "infinite flexibity" when determining damage award).

n166. See Peter A. Antonucci, BMW v. Gore: What Signal Is the Supreme Court Really Sending on Punitive Damages?, Nov. 22, 1996, available in 1996 WL 672396 (calling BMW and subsequent cases "the vehicles that will drive the next chapter in the nation's battle to reform the tort system").

n167. See supra note 156 and accompanying text (describing why Supreme Court's guideposts articulated in BMW are not helpful).

n168. See Marcia Coyle, Court Disposes of Punitives Lawsuits, Nat'l L.J., June 10, 1996, at A12 (speculating that cases with excessive awards would be remanded for application of guideposts).

n169. The Court remanded Ford Motor Co. v. Sperau, 116 S. Ct. 1843 (1996), Combustion Eng'g, Inc. v. Johansen, 116 S. Ct. 1843 (1996), and Apache Corp. v. Moore, 116 S. Ct. 1843 (1996).

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n170. See Mark I. Levy, High Court Takes Care of Business, Nat'l L.J., July 29, 1996, at C8 (suggesting that denial of review of cases means Justices see limits of decision).

n171. See S. Rep. No. 104-69, at 5-6 (1995) (calling current product liability litigation system "a lottery").

n172. See id. at 14 (stating that only federal legislation can create uniformity necessary in liability system).

n173. See Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 816 (6th Cir. 1982) (awarding punitive damages to insulation installer for disease suffered due to asbestos).

n174. See In re Agent Orange Prod. Liab. Litig., 506 F. Supp. 762, 773-74 (E.D.N.Y. 1980) (barring chemical companies that produced Agent Orange from seeking contribution or indemnification from federal government).

n175. See Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 820 (1981) (awarding damages to individuals severely burned in Ford Pinto).

n176. See In re Dalkon Shield IUD Prods. Liab. Litig., 526 F. Supp. 887 (N.D. Cal. 1981), vacated and remanded on other grounds sub nom. Abed v. A.H. Robins Co., 693 F.2d 847 (9th Cir. 1982).

n177. See Note, Class Actions for Punitive Damages, 81 Mich. L. Rev. 1787, 1791 (1983) (viewing multiple punitive damage awards as harmful because defendants' assets may be exhausted prematurely). Judge William W. Schwarzer explained to Congress how this problem may exist presently in asbestos litigation:

There are now some 100,000 asbestos cases pending in federal and state courts, and it is expected that over the next ten years an equal number will be filed. Considering that nearly every one of these cases includes a prayer for punitive damages, should such damages be awarded in many of these cases, the aggregate amount would be far in excess of what the defendants would be able to pay. Even without considering punitive damages, the compensation claims alone currently exceed the aggregate assets of the asbestos industry.

Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary, 102d Cong. 137 (1992) (statement of Judge William W. Schwartzer, Director, Federal Judicial Center) (footnote omitted).

n178. See Judith Camile Glasscock, Comment, Emptying the Deep Pocket in Mass Tort Litigation, 18 St. Mary's L.J. 977, 993 (1987) (listing discontinuation of beneficial products as possible outcome of multiple punitive awards).

n179. 1 F.3d 1371 (3d Cir. 1993).

n180. See Dunn v. Owens-Corning Fiberglass, 774 F. Supp. 929, 933-34 (D.V.I. 1991).

n181. See Dunn v. Hovic, 1 F.3d 1371, 1373 (3d Cir. 1993). The Third Circuit remitted the punitive award to $ 1 million. See id.

n182. See id. at 1374.

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n183. See id. at 1389 (ruling that evidence produced by defendant fell short of due process violation).

n184. See id. at 1391 (suggesting that "punitive damages overkill" can be solved by scrutinizing past awards paid and ability of defendant to pay future awards). The defendant, however, may not always want to admit evidence concerning other punitive awards that have been imposed. On the one hand, evidence of prior awards of punitive damages could persuade the jury that the defendant already has received sufficient punishment for his act and that no further deterrence is necessary. See John A. Albers, Note & Comment, State of Confusion: Substantive and Procedural Due Process with Regard to Punitive Damages After TXO Production Corp. v. Alliance Resources Corp., 26 U. Tol. L. Rev. 159, 201 (1994) (acknowledging that previous punitive damage award payouts may promote sympathy for defendants). On the other hand, such evidence could infuriate the jury, demonstrating to them just how egregious others perceive the defendant's acts to be. See Dennis N. Jones, Multiple Punitive Damage Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process, 43 Ala. L. Rev. 1, 29-30 (1991) (noting that jury might decide to award similarly high damages).

n185. See Dunn, 1 F.3d at 1386 ("No single court can fashion an effective response to the national problem flowing from mass exposure to asbestos products."); see also Fischer v. Johns-Manville Corp., 512 A.2d 466, 480 (N.J. 1986) (admitting that courts are powerless in this area); Davis v. Celotex Corp., 420 S.E.2d 557, 565-66 (W. Va. 1992) (discussing unfairness in allowing courts to determine punitive damages).

n186. See Gary T. Schwartz, Mass Torts and Punitive Damages: A Comment, 39 Vill. L. Rev. 415, 422-23 (1994). Professor Schwartz argued:

This inappropriateness is seen as rooted in our legal system's norm against double jeopardy - let alone multiple jeopardy.... United States v. Halper seemingly indicates that the Double Jeopardy Clause does not pertain to private suits seeking punitive damages. Yet, whatever the limitations of the Excessive Fines Clause, when a punitive damage award becomes sufficiently excessive, it violates the substantive norms included in the Due Process Clause. (This point was raised by the Court as a possibility in Browning-Ferris, and was confirmed by the Supreme Court's later opinions in Pacific Mutual Life Insurance v. Haslip and TXO.) Similarly, the core of the prohibition against double jeopardy is probably included in the Due Process guarantee.

Id. (footnotes omitted).

n187. See Seltzer, supra note 26, at 55.

n188. See Juzwin v. Amtorg Trading Corp., 718 F. Supp. 1233, 1235 (D.N.J. 1989) (citing diversity of treatment by courts as reason not to have one-award rule), rev'd sub nom. Juzwin v. Asbestos Corp., 900 F.2d 686 (3d Cir. 1990). The Court pointed out:

This court does not have the power or the authority to prohibit subsequent awards in other courts, notwithstanding its opinion that such subsequent awards violate the due process rights of the defendants against whom such verdicts are entered. Until there is uniformity either through Supreme Court decision or national legislation, this court is powerless to

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fashion a remedy which will protect the due process rights of this defendant or other defendants similarly situated.

Id. Congress once considered enacting a national "first comer" statute, but ultimately rejected this legislation because the first punitive award assessed against a defendant may not punish it sufficiently for its misconduct. See S. 44, 98th Cong. 12f (1984).

n189. See Juzwin, 718 F. Supp. at 1235 (realizing that jury instructions stating that punitive award must relate to actual harm suffered directly conflicted with "first-comer" statute that accounts for all of defendant's misconduct). Although it seems unfair that the first plaintiff gets the entire punitive damage award, the first plaintiff has the heaviest burden in bringing suit. Once the first plaintiff blazes a trail, it will be easier for others to follow. A punitive damage award is not a reward or compensation; it is not earned by the plaintiff. Rather, it is a punitive sanction against the defendant for misconduct.

n190. See id. (recognizing impossiblity of ensuring that one award covers all of defendant's misconduct).

n191. See Victor E. Schwartz & Mark A. Behrens, The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damages Reform, 30 San Diego L. Rev. 263, 281 (1993) (advocating proposal in which subsequent claimants could seek punitive damages only by presenting new evidence of defendants' "conscious and deliberate misconduct"); see also Punitive Damages Hearing, supra note 24, at 100 (testimony of Victor E. Schwartz, Esq., General Counsel, American Tort Reform Association) (agreeing with Senator Hatch's proposed solution to problem of multiple damage awards). Such evidence could include the fact that the defendant destroyed or hid damning evidence in the first trial. See id. at 102 (allowing further punishment of defendant in such instances).

n192. See, e.g., TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 472 (1993) (Scalia, J., concurring) (stating that punitive damage reform should be undertaken by "the proper institutions of our society," legislatures, not courts); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 39 (1991) (Scalia, J., concurring) (noting that state and federal legislatures should work to restrict punitive damages); Dunn v. Hovic, 1 F.3d 1371, 1399 (3d Cir. 1993) (Weis, J., dissenting) ("Unquestionably, a national solution is needed."); Cantrell v. GAF Corp., 999 F.2d 1007, 1017 (6th Cir. 1993) (noting that relief from multiple punitive awards should be sought from legislature, not courts); Glasscock v. Armstrong Cork Co., 946 F.2d 1085, 1096-97 (5th Cir. 1991) (realizing problems in law as it stands); Edwards v. Armstrong World Indus., Inc., 911 F.2d 1151, 1155 (5th Cir. 1990) ("If no change occurs in our tort or constitutional law, the time will arrive when [a defendant's] liability for punitive damages imperils its ability to pay compensatory claims and its corporate existence."), rev'd sub nom. Celotex Corp. v. Edwards, 514 U.S. 300 (1995); Juzwin, 718 F. Supp. at 1235 (urging national legislation or Supreme Court decision to promote uniformity and protect due process rights); W.R. Grace & Co. v. Waters, 638 So. 2d 502, 505 (Fla. 1994) (noting that the only "realistic solution" to imposition of multiple punitive awards is "federal legislation").

n193. See John Calvin Jeffries, Jr., A Comment on the Constitutionality of Punitive Damage Awards, 72 Va. L. Rev. 139, 147 (1986) (explaining that repetitive nature of damages cannot be stopped unless national solution is attempted).

n194. See Ga. Code Ann. 51-12-5.1(e)(1) (Supp. 1996); see also Mo. Ann. Stat. 510.263 (4) (West Supp. 1997) (crediting defendant with prior punitive damage payments).

n195. See U.S. Const. art. I, 8 ("The Congress shall have Power ... To regulate Commerce

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(4) the duration of the misconduct and any intentional concealment of it;

(5) the attitude and conduct of the defendant upon discovery of the misconduct;

(6) the financial condition of the defendant; and,

(7) the total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct, including but not limited to, compensatory, exemplary and punitive damage awards to persons in situations similar to those of the claimant and the severity of the criminal penalties to which the defendant has been or may be subjected. [32]

In other states, the courts have fashioned the factors for consideration. [33] **[*1583]**

The many factors that legislators and judges have created can be reduced to three basic considerations: (1) the character of the defendant's act; (2) the nature and extent of the plaintiff's injuries; and (3) the defendant's wealth. [34] A jury considers the character of the defendant's act so that the punishment will bear some relationship to the wrong committed. [35] The jury is told to take into account the nature and extent of the plaintiff's injuries so that the punitive damages awarded will have a rational relationship to the injury caused. [36] The jury also is instructed to consider the financial position of the defendant so that the punitive damage award actually will punish and deter the defendant. [37] This third factor has been the subject of considerable criticism. [38] The rationale behind consideration of the defendant's financial position is that the **[*1584]** deterrent benefit of punitive awards will be unrealized if the award does not cause the defendant to suffer. [39] Wealthy defendants, therefore, might have to pay more than poor defendants for committing the exact same offense. [40] In theory, the defendant's wealth should be irrelevant because society is equally harmed when a poor defendant acts with flagrant indifference as it is when a rich one behaves indifferently. Despite the characterization of the wrong as a public wrong, the goals of punitive awards - punishment and deterrence - will not be effectuated equally when the penalty impacts defendants differently because of their financial status. The fact-finder must consider the defendant's wealth so that the damage award will have an equally punitive effect on all wrongdoers, because it takes more to punish a wealthy defendant than it does to punish a poor one. A multi-billion dollar corporation, like Exxon, for example, would not be punished or deterred by a $ 100,000 punitive damage award, but the same award could cripple a small business owner, like Joe's Gas Station. [41] To punish and deter manufacturers effectively and equitably, therefore, the financial status of the defendant should be a factor in determining the amount of punitive damages to award. [42] The defendant's wealth alone, however, should not justify **[*1585]** imposition of a disproportionately large punitive damage award. [43]

2. Who decides how much to award and when

Most states allow juries to determine the amount of punitive damage awards. [44] Judges, however, retain the power to remit or reverse the award if they believe that it reflects a prejudice or passion on the part of the jury. [45]

With regard to when punitive damages are determined, many states permit some form of bifurcation of the punitive damage issues. Illinois permits all issues related to punitive damages to be tried separately but by the same fact-finder at the defendant's request. [46] Other states, like Kansas and Montana, allow the jury in the first proceeding to determine whether to award punitive damages and then require a separate, second proceeding to determine the amount of such an award. [47] Some states have determined that evidence of the defendant's wealth should not be admitted until the separate proceeding on the amount of punitive damages, because such evidence tends to prejudice the jury. [48] Jurors tend to be biased **[*1586]** against large, wealthy corporations, particularly when the corporation does

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with foreign Nations, and among the several States...."); see also Punitive Damages Hearing, supra note 24, at 100 (testimony of Victor E. Schwartz, Esq., General Counsel, American Tort Reform Association) (noting that Congress should respond to the request by "federal and state judges, as well as state legislators," for multiple punitive damages fairness legislation).

n196. U.S. Const. amend. VII.

n197. 116 S. Ct. 2211 (1996).

n198. See Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2215 (1996).

n199. See Gasperini v. Center for Humanities, Inc., 66 F.3d 427, 428 (2d Cir.) (awarding $ 1500 for each lost slide), vacated, 116 S. Ct. 2211 (1996).

n200. See id. at 431.

n201. Gasperini, 116 S. Ct. at 2215 (questioning whether New York's practice of appellate review of jury awards is compatible with Seventh Amendment right to trial by jury).

n202. See id. at 2222-24. Gasperini was a major victory for the business community. Had the Court held that appellate review was not constitutional, there would be virtually no check on unbridled power of juries to award unjustified amounts of punitive damages. In 1992, an exhaustive punitive damage study of the 355 punitive damage awards in product liability cases over the 25 years preceding 1992 found that more than half of all punitive awards were appealed, and that more than half of those appealed were reversed or reduced. See Rustad, supra note 50, at 57. Absent the check of judicial review/remittitur, all of the awards determined to be unreasonable and excessive would have stood.

n203. See Gasperini, 116 S. Ct. at 2217-18 (citing "shock the conscience" as federal standard).

n204. See id. (citing "deviates materially" as N.Y. state standard). In its 1986 effort to reform tort law, New York codified a standard of judicial review on the size of jury verdicts. See N.Y. C.P.L.R. 5501(c) (McKinney 1995). According to the New York legislature, the federal "shock the conscience" test was an insufficient check on damages awards. Therefore, New York enacted a standard that would invite more careful appellate scrutiny of damage awards: "the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." Id.

n205. See Gasperini, 116 S. Ct. at 2219-24 (examining Erie doctrine and ruling that Seventh Amendment does not preclude federal courts from using "deviates materially" standard).

n206. See id. at 2220-21 (acknowledging that the "twin aims" of the Erie doctrine, "discouragement of forum-shopping and avoidance of inequitable administration of the laws," forces such a decision (quoting Hanna v. Plumer, 380 U.S. 460, 468 (1965))). Although the state law was procedural, the state's objective in enacting the law was substantive. See id. at 2220. If the federal courts continued to apply the federal standard to cases arising out of New York law, there would be a substantial difference in the outcome of the cases, thereby implicating the twin aims of Erie. See id.

n207. See id. at 2220-21 (stating that "abuse of discretion" is standard currently used by federal circuits when faced with assertion of inadequacy or excessiveness).

n208. See Robert Bork & Theodore Olson, Commentary, Trial Lawyers and Other Closet Federalists, Wash. Times, Mar. 9, 1995, at A21 (explaining that "litigation explosion

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disregards state lines"). Congressional power to regulate punitive damage awards in products liability cases comes from the Commerce Clause. See U.S. Const. art. I, 8 ("The Congress shall have the Power ... To regulate Commerce with foreign Nations, and among the several States....").

n209. See S. Rep. No. 104-69, at 1-2 (1995) (charging current liability system with stifling innovation and with keeping beneficial products off market).

n210. See id. at 2 (explaining that American companies are hampered by liability system when competing in global market). Research and development in American industry are being halted or discouraged by the threat of excessive punitive damage awards, thereby making American businesses less competitive in the international market. Consequently, the punitive damages problem is a direct threat to the economic stability of corporate America. See id. at 10-11; see also 141 Cong. Rec. S6398 (daily ed. May 10, 1995) (statement of Sen. Glenn) (advocating that legislation is needed to reform system). But see Product Liability Fairness Hearing, supra note 24, at 505 (statement of Stephen Daniels, Ph.D., American Bar Foundation) (challenging notion that punitive damages are source of problem). Proponents also claim that ultimately, consumers are paying for excessive punitive damage awards as companies will pass the burden onto the consumer in the form of higher prices for their goods and services. See 141 Cong. Rec. S6397 (daily ed. May 10, 1995) (statement of Sen. Domenici) (noting that Americans no longer can afford to pay tort tax).

n211. See S. Rep. No. 104-69, at 14-17 (1995) (providing history of tort reform legislation in Congress).

n212. See H.R. 956, 104th Cong. (1996); see also Otto G. Obermaier & Lee Dranikoff, Congressional Legislation Seeks Litigation Reform, N.Y. L.J., Oct. 23, 1995, at S1 (listing different pieces of legislation recently passed by Congress).

n213. See H.R. 956 2(b) (setting forth purposes of Act). If tort reform is as urgent as proponents claim, then it should be applicable to all cases in which punitive damages can be assessed. In 1996, product liability actions represented only 10% of all federal civil cases filed. See Annual Report of the Director of the Administrative Office of the United States Courts, Table C-2A, at 138 (1996). Limiting these reforms to product liability actions thus would not have the widespread impact some might expect.

n214. See H.R. 956, 102. The federal bill would not have preempted more restrictive state laws. See id. 108(b)(3)(D). The federal bill would have set only the minimum **standards** for reforming **punitive damage** awards. If the state law were more restrictive of punitive awards - for instance, if a state had a higher burden of proof, like Colorado where the burden is beyond a reasonable doubt, or if it had a lower cap, like Virginia where all punitive damage awards are capped at $ 350,000 - then the more restrictive state law would have continued to prevail in that jurisdiction. There was no logical reason supporting such a one-sided application of law. Certainly, the federal legislature was not doing this to preserve state sovereignty, because the bill would have preempted all those states which had less restrictive laws. Moreover, such a provision would have undermined the uniformity and predictability that would have been created by enacting a national law. A federal law would be most beneficial if it preempts all state laws, both those that are more restrictive and those that are more lenient. If the federal legislature insisted upon this one-sided preemption, however, it should have limited the law to cut-and-dry issues such as the amount of the cap, as opposed to issues involving more discretion and potential ambiguity such as the liability **standard.**

n215. See id. 108(a) (awarding **punitive damages** only if there is "clear and convincing" evidence of defendant's misconduct).

n216. Id.

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n217. See id. 108(b) (placing cap on punitive damage awards of two times economic and noneconomic loss or $ 250,000, whichever is greater).

n218. See id. 108(c) (permitting either party to request a separate proceeding, to be held after the determination of the amount of compensatory damages, on whether to award punitive damages and the amount of the award).

n219. See Veto Message from the President, 142 Cong. Rec. H4425 (daily ed. May 6, 1996). Many claim that Clinton is controlled by the American trial lawyers who do not want to limit runaway juries because it would reduce their earnings. See John F. Harris, Clinton Vetoes Products Liability Measure; Move Triggers Barrage of Accusations Between White House and Hill Republicans, Wash. Post, May 3, 1996, at A14 (quoting Bob Dole as saying, "It is the trial lawyers who are calling the shots at the White House."); see also John E. Yang, House Fails to Override Liability Veto, Wash. Post, May 10, 1996, at A23 (charging President Clinton with putting interests of trial lawyers before other Americans). Some also claim that the Republicans were not pushing tort reform very hard because it was an important GOP fund-raising tool, and in an election year, they wanted the manufacturers' lobby to keep funneling money their way. See T.R. Goldman, Tort Reform: What Happened, What's Next, Legal Times, July 8, 1996, at 1 (quoting GOP House staffer as saying, "If federal tort reform efforts had concluded in 1995 the influence of trial lawyer money on the Democratic presidential campaign would have been seriously eroded, and with it, a lucrative GOP fund-raising tool as well.").

n220. The use of, and demand for, excessive awards as a social reform tool has become too wide-spread. Multimillion dollar punitive awards have become the rule rather than the exception and as such, area threat to the viability of the manufacturing community and the stability of American industry.

n221. See Ellis, supra note 27, at 34-53 (arguing that vague **punitive damage standards** and broad jury discretion is unfair and inefficient).

n222. See id. at 56 (stating that uncertain criteria for arriving at punitive amounts invariably will lead to unpredictability and disparate awards); Owen, supra note 31, at 384 (noting that **standards** for determining defendant's liability and assessing **punitive damages** are too vague).

n223. The current **punitive damage** system leaves manufacturers without any definite notion of what conduct is prohibited and what punishment will be imposed. See Nadine E. Roddy, Punitive Damages in Strict Products Liability Litigation, 23 Wm. & Mary L. Rev. 333, 347 (1981) (noting that manufacturers often contend that **standards** for **punitive damages** do not give proper notice). Without a clear idea of what conduct is prohibited, manufacturers cannot alter their behavior in order to be law abiding. As one commentator noted:

People cannot obey the law unless they know it; they cannot know the law unless they know which law to learn. If I am to know the law that governs an act or transaction, I must be able to identify, before I act, the one state empowered to govern. It is no answer to say that I can usually comply with the more restrictive rule, because that eliminates the political authority of the more permissive state. Nor is it an answer to say that I do not need to know rules of compensation, loss allocation, and the like. I believe that one should generally obey the applicable law even if the sanctions for violation are light, but this view is not universally shared. If we give even a little credence to the insights of law and economics, my need to know the law extends to rules that specify the consequences of compliance and violation.

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Douglas Laycock, Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92 Colum. L. Rev. 249, 319 (1992) (footnotes omitted).

n224. See In re A.H. Robins Co., 880 F.2d 709, 730 n.29 (4th Cir. 1989).

Two goals of tort law should be predictability and uniformity. As a practical matter, until the legality of a particular course of conduct has been adjudicated, potential defendants are guided only by a general standard ... and by analogous cases decided under that standard. What may appear to be inconsistent adjudications in similar situations can generally be rationalized because of differences in the facts. But if various fact finders reach inconsistent conclusions about the same set of facts, the defendant (and others in similar circumstances) is left without any guidance concerning the legality of its conduct, which may serve important legitimate aims.

Id.

n225. See Robert D. Cooter, Punitive Damages for Deterrence: When and How Much?, 40 Ala. L. Rev. 1143, 1145 (1989) (mentioning that uncertain punitive damages are neither fair nor efficient).

n226. Martin A. Kloter, Reappraising the Jury's Role as a Finder of Fact, 20 Ga. L. Rev. 123, 127 (1985) (discussing idea that unpredictability impairs judicial process).

n227. See Friedrich August von Hayek, The Road to Serfdom 78 (1944) ("One could write a history of the decline of the Rule of Law ... in terms of the progressive introduction of these vague formulas into legislation and jurisdiction, and of the increasing arbitrariness and uncertainty of, and the consequent disrespect for, the law and the judicature."); see also Jason Scott Johnston, Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form, 76 Cornell L. Rev. 341, 341 (1991) (noting that certainty is central concern of modern jurisprudence); Nancy Levit, Ethereal Torts, 61 Geo. Wash. L. Rev. 136, 136-37 (1992) (stating that law involves search for order and predictability); Roscoe Pound, Justice According to Law, 13 Colum. L. Rev. 696, 705 (1913) (arguing that society administers justice according to law by fixing standards that individuals may determine prior to controversy, thereby providing reasonable assurance that all individuals receive similar treatment).

n228. See Note, Forum Shopping Reconsidered, 103 Harv. L. Rev. 1677, 1689 (1990) (stating that forum shopping is caused by disparate results among various state systems).

n229. Seventy percent of all products manufactured are sold in other states. See 142 Cong. Rec. S2560 (daily ed. Mar. 21, 1996) (statement of Sen. Rockefeller).

n230. The notions of fairness and justice require that individuals have notice as to what constitutes socially reprehensible conduct and as to the punishment for non-compliance. See BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1598-99 (1996) (explaining that fairness under Constitution requires notice of possible punishment).

n231. See supra notes 26-31 and accompanying text (discussing why punitive damages may be described as "quasi-criminal"); Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (discussing special legal categorization for punitive damages).

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n232. See discussion supra Part IV.B.

n233. See discussion supra Part IV.A.

n234. See H.R. 956, 104th Cong. 108(a) (1996); Model Act, supra note 9, 5(2).

n235. See supra notes 26-31 and accompanying text; see also Kenneth Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 Yale L.J. 1795, 1810-13 (1992) (analyzing distinctions between criminal and civil penalties).

n236. But see Steven D. Smith, The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law, 72 Cornell L. Rev. 765, 766 (1987) (rejecting restitutionary aspect of tort law, instead proposing dispute resolution as essential function of tort law).

n237. See In re Winship, 397 U.S. 358, 363-64 (1970).

n238. H.R. 956, 101(4).

n239. Id. 108(a) (emphasis added).

n240. See infra notes 241-42 (providing examples of differing approaches to punitive damages).

n241. Alabama's statute, for example, permits punitive damages "in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff." Ala. Code 6-11-20(a) (1993 & Supp. 1996). Florida's statute permits punitive damages for "willful, wanton, or gross misconduct." Fla. Stat. Ann. 768.73(1)(a) (West 1994 & Supp. 1995). Georgia allows punitive damages when "defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." Ga. Code Ann. 51-12-5.1(b) (1982 & Supp. 1997). Illinois allows for punitive damage awards only when the "defendant's conduct was with evil motive or with reckless and outrageous indifference to a highly unreasonable risk of harm and with a conscious indifference to the rights and safety of others." Ill. Comp. Stat. Ann 5/2-1115.05(b) (West 1993). Mississippi permits the imposition of punitive damages for a wide range of conduct; the plaintiff must prove "that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud." Miss. Code Ann. 11-1-65(1)(a) (Supp. 1996). Perhaps the broadest of all states' tort reform laws, Mississippi's statute allows punitive damages upon proof of anything from "actual malice," which implies a high degree of intentionality, to "gross negligence," which merely can be a reckless disregard of others. See id.

n242. Vagueness in the **standard** for awarding **punitive damages** is particularly destructive because these damages, standing somewhere between criminal and tort law, publicly condemn a defendant's actions as socially reprehensible. See David G. Owen, The Moral Foundations of **Punitive Damages,** 40 Ala. L. Rev. 705, 727-28 (1989) (noting that vague **standard** is harmful because damages often lead to public stigma and society should be certain such condemnation is appropriate).

n243. H.R. 956, 108(a). This also is the standard adopted by the Model Act recently approved by the uniform law commissioners. See Model Act, supra note 9, 5(2) (noting that "defendant acted with a malicious or fraudulent intent to cause the injury or a conscious and flagrant disregard for the rights or interests of others in causing the injury"). The single federal **standard,** however, is preferable to the Model Act **standard** which seems to

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articulate a number of different kinds of conduct that will give rise to **punitive damages.**

n244. But see E. Donald Elliot, Why Punitive Damages Don't Deter Corporate Misconduct Effectively, 40 Ala. L. Rev. 1053, 1057-58 (1989) (arguing that "conscious indifference" **standard** is too vague).

n245. See Ellis, supra note 27, at 22-23 (arguing that even if **standards** for assessing **punitive damages** were consistent, any movement away from "purposeful harm" **standard** would be problematic).

n246. See Gregory J. Sexto, Corporate Insurability of **Punitive Damages** Arising from Employee Acts, 11 J. Corp. L. 99, 113 (1985) (observing that it is more difficult to deter unintentional conduct than intentional conduct).

n247. See H.R. 956, 108(c) (stating that bifurcation is permissible).

n248. See John T. Simpson, Jr., Discovery of Net Worth in Bifurcated Punitive Damages Cases: A Suggested Approach After Transportation Insurance Co. v. Moriel, 37 S. Tex. L. Rev. 193, 228 (1996) (asserting jury prejudice is negated because defendant's net worth is not admissible until jury finds defendant liable for punitive damages).

n249. See TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 880, 889 (W. Va. 1992) (discussing role wealth should play in computing appropriate punitive award), aff'd, 509 U.S. 443 (1993).

n250. See Malcolm E. Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, 272 (1983) (noting that bifurcation may be necessary to ensure due process protections). But see Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 17 (1991) (holding that common law method of determining punitive damages is not "so inherently unfair as to deny due process and be per se unconstitutional").

n251. See H.R. 956, 108(8). Economic losses are those actual out-of-pocket expenses suffered by the injured party such as medical bills and lost wages. See id.

n252. See id. 101(12). Noneconomic loss is pain and suffering or non-pecuniary damages. See id.

n253. See id. 108(b). The bill, however, contains an additur provision that permits a judge to raise a punitive damage award if the court determines that the statutory cap "would result in an award of punitive damages that is insufficient to punish the egregious conduct of the defendant against whom the punitive damages are to be awarded or to deter such conduct in the future." Id. 108(b)(3)(A). Although this provision attempts to placate those who oppose capping punitive damage awards, its constitutionality is suspect under existing precedent. See Dimick v. Schiedt, 293 U.S. 474, 495 (1935) (finding that additur could not be utilized by federal courts because procedure violates Seventh Amendment); see also Irene Deaville Sann, Remittiturs (and Additurs) in the Federal Courts: An Evaluation with Suggested Alternatives, 38 Case W. Res. L. Rev. 157, 163-64 (1987) (stating that federal courts may not add to jury awards because of possible Seventh Amendment violation). But see Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2222 n.16 (1996) (hinting that federal additur soon may be held constitutional by Supreme Court, because four Justices in Dimick conceded that nothing in Seventh Amendment precludes federal court from forcing additur (citing Dimick, 293 U.S. at 495)).

There is no logical reason for the different constitutional treatment of additur and remittitur, and at least two states currently authorize judicial additur of punitive damage awards. See Mo. Ann. Stat. 510.263(6) (West Supp. 1997) ("The doctrines of remittitur and additur ...

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shall apply to punitive damage awards."); Tenn. Code Ann. 20-10-101(a)(10) (Supp. 1996) ("The trial judge may suggest an additur in such amount or amounts as the trial judge deems proper.").

n254. See Amelia J. Toy, Comment, Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective, 40 Emory L.J. 303, 323 (1991) (outlining argument of cap supporters and stating that corporations could be driven to bankruptcy unless statutory caps are imposed).

n255. It is hard to follow the argument that American competitiveness in the global marketplace is hampered by punitive awards. Foreign manufacturers that do business in the United States are subject to the same conditions as American manufacturers. Moreover, it seems that manufacturing better, safer products will improve American competitiveness far more than limiting punitive damage awards will.

n256. Conference Report on H.R. 956, Common Sense Product Liability Reform of 1996, 142 Cong. Rec. H3190 (daily ed. Mar. 29, 1996) (statement of Rep. Bliley).

n257. See Ausness, supra note 30, at 85-86 (stating that potential exposure to liability leads to significant social costs); Ellis, supra note 27, at 47 (noting that uncertainty as to amount of punitive damages causes considerable losses to society).

n258. See Patricia Cohen, The IUD: Birth-Control Device that the United States Market Won't Bear, Wash. Post, Aug. 6, 1996, at A1, A10 (observing that doctors in United States are reluctant to prescribe IUD devices even though they are freely prescribed and widely used in European markets).

n259. See id. (pointing out that some experts on women's health belive that IUD is excellent option for many women).

n260. See id. (stating that many manufacturers believe that introducing device to U.S. market is not worth potential exposure to liability).

n261. See BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1598-99 (1996) (discussing how common notions of fairness mandate that people receive fair notice of punishment they may face).

n262. See Rustad, supra note 50, at 83 (proposing that **punitive damages** do not harm American corporations any more than foreign corporations because both are subject to U.S. law); Product Liability **Standards:** Hearings on H.R. 1910 Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce, 103d Cong. 329, 332 (1994) (statement of Andrew F. Popper, Professor of Law and Deputy Dean, Washington College of Law) (arguing that there is no tort crisis sufficient to justify congressional intervention). There does not seem to be sufficient objective evidence to conclude that American businesses are harmed as badly as cap supporters claim or that consumers are deprived of a large number of products by over-deterrence. Although it is beyond the scope of this Article, a great deal of empirical evidence is needed to support these claims. Without sufficient objective evidence, it is impossible to draw a conclusion either way. This Article, therefore, presumes that consumers lose out on some products when American businesses are hampered by large punitive damage awards.

n263. See Wilson, supra note 25, at 513-14 (indicating that punitive damages assist in deterring misconduct).

n264. See Associates Fin. Servs. Co. of Ala. v. Barbour, 592 So. 2d 191, 199 (Ala. 1991) (reciting reasoning of earlier case in which court found that only substantial monetary fines

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will ensure that purpose of punitive damages is carried out (quoting Rideout's-Brown Serv., Inc. v. Holloway, 397 So. 2d 125, 127 (Ala. 1981))) (citation omitted).

n265. Although it may be true that the punitive damage system occasionally deprives the public of valuable products, it also protects the public from exposure to dangerous products. No remedy is perfect.

n266. See William M. Landes & Richard A. Posner, The Economic Structure of Tort Law 4-5 (1987) (discussing early thinking on tort law and positive economic theory). Judge Learned Hand articulated his famous negligence formula, B < PL, in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). According to Judge Hand, harmful activity should be deterred when the cost of that harm (L) multiplied by its probability (P) is greater than the cost of preventing the harm (B). Thus, if B < P there is no harmful activity. See id.; see also Richard A. Posner, Economic Analysis of Law 163-68 (1992) (explaining Judge Hand's formula for determining negligence liability).

n267. See Jerry J. Phillips, A Comment on Proposal for Determining Amounts of Punitive Awards, 40 Ala. L. Rev. 1117, 1118 (1989) (noting that cost-benefit analysis often is utilized when considering which activities and designs to avoid).

n268. See id. (stating that company will take action only if cost of such action is less than its potential benefits).

n269. See Landes & Posner, supra note 266, at 4-5 (discussing view that tort liability discourages behavior that is unjustified by utilitarian **standards)**.

n270. Commentators have argued that **punitive damages** are inappropriate when the manufacturer weighed the costs and benefits of a particular activity and undertook the activity because the cost was less than the benefit. See Wheeler, supra note 62, at 953 (arguing that juries should be instructed to consider cost-benefit analysis in assessing liability). Such an argument presupposes that socially desirable conduct turns on a pure economic analysis of available options. This premise overlooks the fact that punitive damages are awarded to punish a manufacturer for socially reprehensible conduct. They are a form of regulation. Punitive damages are not awarded simply for economic inefficiency, because a corporation took an action even though costs exceed benefits; they are also awarded when potential societal costs exceed potential societal benefits. Societal costs and benefits cannot be measured purely in monetary terms. For example, under an economic efficiency analysis of the costs and benefits of excluding the rubber bladder from vehicle design, Ford properly concluded that it would be more economically efficient to exclude the bladder. See Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 361 (1981). Despite the correctness of the economic analysis, few dispute the appropriateness of imposing damages for such conduct.

n271. See Grimshaw, 174 Cal. Rptr. at 361 (discussing design changes that were examined by Ford but rejected due to their additional expense). The plaintiffs were passengers in a Ford Pinto when it was rear-ended and burst into flames. See id. at 359. Plaintiff Gray died and Plaintiff Grimshaw suffered severe burns to his entire body. See id. The court found that Ford knew of the design defect in the Pinto and knew that the gas tank would explode in rear-end collisions even at low speeds. See id. at 361-62. Ford had conducted several crash tests that demonstrated the Pinto's susceptibility to fire. See id. at 385. Despite this knowledge, Ford chose not to correct the design problem after conducting a risk/benefit analysis. See id. at 361. Ford discovered that it would cost $ 11 per vehicle to install rubber bladders in 11 million Pintos and 1.5 million trucks, totaling $ 137 million; and it estimated that it would cost only $ 49.5 million if instead they paid the compensatory damages of the 360 people they anticipated would die or be injured in fires resulting from this design flaw. See Owen, supra note 28, at 56 n.264 (reproducing Grush-Saunby Report that Ford had prepared on costs and benefits of correcting Pinto's defective gas tank). Ford performed a

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straight forward cost-benefit analysis and chose the least expensive alternative. See Grimshaw, 174 Cal. Rptr. at 361. Grimshaw was awarded $ 2,516,000 in compensatory damages and $ 125 million in punitive damages, which the trial court reduced to $ 3.5 million. See id. at 358.

n272. Conference Report on H.R. 956, Common Sense Product Liability Reform Act of 1996, 142 Cong. Rec. H3188 (daily ed. Mar. 29, 1996) (statement of Rep. Conyers, Jr.).

n273. Of course, the actual number of injuries will be much higher than those who actually sue Compact. Many injured individuals will not sue at all; some will collect from their insurance company or from the insurance company of the driver who rear-ended them. Only those plaintiffs or their attorneys who realize that there may have been a design defect in the car will bring suit against Compact.

n274. H.R. 956, 104th Cong. (1996).

n275. Although it is true that the federal bill did allow for additur in certain circumstances and, therefore, did not have an absolute cap, Congress' clearly expressed intent is that judges should do so only in the rarest of cases. See H.R. Conf. Rep. No. 104-481, at 31 (1996).

n276. The statute provided for $ 250,000 or two times compensatory damages, whichever is greater. See H.R. 956, 108(b). In the case of the 100 burn deaths, where compensatory damages are estimated at $ 250,000, punitive damages would be two times the compensatory damages or $ 50 million.

n277. In the case of the 200 injured plaintiffs, $ 250,000 is more than two times their compensatory damages, which are only $ 100,000 in this example. Thus, each injured plaintiff would receive $ 250,000 for a total of $ 50 million.

n278. Of course, there is the loss of public confidence in the corporation and litigation expenses that add to the "expense" of committing socially reprehensible actions. In fact, one commentator has recommended that punitive damage awards and the reasons for the punishment be highly publicized to effectuate a more powerful social sanction. See Andrea A. Curcio, Painful Publicity - An Alternate Punitive Damages Sanction, 45 DePaul L. Rev. 341, 372 (1996) (arguing that publicizing corporate misconduct and resulting penalties on the Internet will best effectuate intended punishment and deterrence).

n279. See generally Rustad & Koening, supra note 18, at 1316 (discussing Gearhart v. Uniden Corp. of Am., 781 F.2d 147 (8th Cir. 1986), in which defendant accepted liability for known defendant as "a mere cost of doing business").

n280. See id. at 1312.

n281. See Elliott, supra note 244, at 1057 (claiming that unpredictability is the "central failing" of punitive damages).

n282. Rustad & Koenig, supra note 18, at 1277.

n283. Presumably, the additur provisions of the federal bill would have permitted higher awards in such cases at the judge's discretion. See H.R. 956, 104th Cong. 108(b)(3)(A) (1996). Congress' intention, however, was that "occasions for additional awards will be very limited indeed." H.R. Conf. Rep. No. 104-481, at 31 (1996).

n284. Michael Rustad & Thomas Koenig, Punitive Damages in Products Liability: A Research Report, 3 Prod. Liab. L.J. 85, 94 (1992).

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n285. See Product Liability Fairness Hearing, supra note 24, at 89 (testimony of William Fry, Executive Director, HALT, an organization of Americans for Legal Reform) (noting that punitive damages, or fear of them, are passed on "to consumers in the form of higher prices or products not getting to the market").

n286. See 141 Cong. Rec. S5884 (daily ed. May 1, 1995) (statement of Sen. Hatch) (discussing need for U.S. manufacturers to add costs of punitive damages into price of products thus affecting U.S. consumers and competitiveness of U.S. corporations in global marketplace).

n287. Proponents for national tort reform contend that punitive damage awards need regulation because consumers, especially the low income purchasers, ultimately bear the costs of punitive damage payments. See id. at S5882 (statement of Sen. Hatch) ("The effect of the greater frequency and magnitude of punitive damages recoveries of modern times has been to increase the price level for all products and services provided in the U.S. economy."); see also id. at S5801 (daily ed. Apr. 27, 1995) (statement of Sen. Snowe) (claiming that consumers must pay higher prices due to runaway awards). One problem with this theory, however, is that it assumes that the consumer is a captive and would continue to buy the corporation's product or service regardless of the increases in price. One cannot ignore the argument that in a competitive market, a corporation would not be able to raise its prices too high or consumers simply would switch to a competitor's product. See generally George J. Stigler, The Theory of Price 21-44 (1966) (delineating factors affecting consumer demand including price fluctuations).

n288. See 141 Cong Rec. S5950 (daily ed. May 2, 1995) (statement of Sen. Kyl) (musing that "these outrageous punitive damages create a tort tax paid by consumers in the form of higher prices, higher insurance premiums, and reduced market choice and quality"); Richard J. Mahoney, Punishment Without End, Wash. Post, June 15, 1995, at A21 ("The real damage caused by multiple punitive damage awards is that the American public has been hit with a "hidden litigation tax.'").

n289. Furthermore, if corporations are permitted to insure against punitive damage awards as some states allow, a manufacturer with insurance would pass the costs of premiums on to consumers and the insurance company would spread the loss associated with the punitive damage payment among its customers in the form of higher premiums.

n290. See generally Stigler, supra note 287, at 87 (describing type of competitive market in which sellers outnumber buyers).

n291. See generally id. (describing type of competitive market in which buyers outnumber sellers).

n292. See generally id. at 21-44 (discussing factors affecting consumer demand including responses to price increases).

n293. Such a situation could arise if a corporation had a patent on one of its product and chose not to license it to others.

n294. This is true, even if, as proponents of tort reform argue, punitive damage payments are skyrocketing in magnitude. It should not be forgotten that punitive damage awards undergo judicial review to determine their reasonableness. See supra notes 45, 55 and accompanying text (discussing settlement agreements and reductions in awards by appeals courts).

n295. As one commentator noted:

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not have strong ties to the state. [49]

II. The Current State of Punitive Damages

Courts and commentators have found that punitive damage awards are increasing at an alarming pace. [50] Dissenting in Pacific Mutual Life Insurance Co. v. Haslip, [51] Justice O'Connor noted:

Recent years ... have witnessed an explosion in the frequency and size of punitive damages awards. A recent study by the RAND Corporation found that punitive damages were assessed against one of every ten defendants who were found liable for compensatory damages in California. The amounts can be staggering. Within nine months of our decision in Browning-Ferris, there were no fewer than six punitive damages awards of more than $ 20 million. Medians as well as averages are skyrocketing, meaning that even routine awards are growing in size. The amounts "seem to be limited only by the ability of lawyers to string zeros together in drafting a complaint." [52] **[*1587]**

Nowhere is the proof of out-of-control awards more evident than in the staggering jury verdicts themselves and in the trial or appellate court treatment of such verdicts on review:

In August, September, and October 1994, for example, juries imposed punitive exactions of $ 5 billion against Exxon; $ 109 million against Blockbuster Entertainment Corp.; $ 80 million against Hughes Aircraft; $ 70 million against a director of Amerco, the corporate parent of U-Haul; $ 65 million against Southern California Physicians Insurance Exchange; $ 58 million against Maryland Casualty Co.; $ 57.5 million against Key Pharmaceutical; $ 50 million against Mercury Finance; $ 31 million against Chevron U.S.A.; $ 15 million against Merrell Dow Pharmaceuticals, Inc.; $ 8 million against Schering-Plough Corp.; $ 7 million against Nash Finch Co.; $ 6.9 million against the law firm Baker & McKenzie; $ 6.6 million against Farmers Insurance Co.; $ 6.5 million against Wal-Mart; $ 5 million against the Hilton Hotel Corporation; and $ 2.7 million against McDonald's. [53]

Most of these jury awards subsequently were reduced by trial or appellate judges and other cases were settled for less than the amount awarded. [54] In fact, thirty of the seventy-two jury verdicts in 1994 for **[*1588]** $ 10 million or more were reduced or set aside. [55] Two truths can be deduced from this fact: (1) juries are awarding unjustified and excessive punitive damages with increasing frequency; and (2) the check of judicial review is functioning in some cases as an effective safeguard against the unbridled discretion of juries. [56]

Judicial remittitur is not enough, however. Even with that mechanism, the amounts affirmed by appellate courts are rising exponentially along with jury verdicts. [57] Moreover, appellate courts are not guided by any "perceptible formula" in remitting awards. [58] There is no uniform method to the courts' punitive damage award reductions; often there is no explanation as to why the verdict is excessive or why the remitted amount was chosen as the appropriate punishment. Judicial review of punitive awards, like the jury verdicts themselves, is guided only by the general rule that the award not be excessive. Finally, because the fear of excessive jury verdicts drive settlements, [59] the fact that judicial remittitur permits after-the-fact correction of unconstitutional awards does not provide a valid **[*1589]** solution.

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Loss spreading is a separate justification for imposing a full measure of damages on business firms that cause the harm. Firms can spread the losses broadly among individuals who benefit from the harm-causing activity. Depending on the economics of the situation, losses are spread either among consumers through increased prices or among owners by virtue of lower profits. Either way, someone who derives a substantial direct benefit from the injury-producing product or activity bears the cost.

Charles R. Temper, Compensation for Harm from Charitable Activity, 76 Cornell L. Rev. 401, 430-31 (1991) (footnote omitted).

n296. See Thomas Koenig & Michael Rustad, His and Her Tort Reform: Gender Injustice in Disguise, 70 Wash. L. Rev. 1, 78-79 (1995) (explaining that women generally receive smaller economic awards for similar injuries because women generally have lower earnings and spend fewer years in workforce).

n297. See Punitive Damages Hearing, supra note 24, at 80 (statement of Robert Creamer, Executive Director, Illinois Public Action).

This proposal would have the result of basing punishment meted out to a wrongdoer on the income of the victim. It would punish those who injure wealthy executives more than those who injure women who are homemakers. It would punish those who injure sports stars more than those who injure children. The proposal is particularly discriminatory against women, who generally suffer less economic loss from injury than men since they typically earn less income.

Id. (statement of Robert Creamer, Executive Director, Illinois Public Action).

n298. See Koenig & Rustad, supra note 296, at 87.

When damages awards are based primarily on out-of-pocket costs and loss of earnings, women are placed at a significant disadvantage. Without the prospect of non-economic and punitive damages, many grievously injured women will be unable to convince an attorney to take their case. The proposed limitations on punitive damages are gender injustice in disguise.

Id.

n299. 138 Cong. Rec. S6521 (daily ed. May 12, 1992) (statement of Sen. Cranston).

n300. See Kathleen Morris, Through the Looking Glass: Recent Developments in Affirmative Action, 11 Berkeley Women's L.J. 182, 188 (1996) (charging that "minorities and women tend to be "ghettoized' into lower-paying, lower-skilled jobs").

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n301. See Jenny Rivera, The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements, 4 J.L. & Pol'y 463, 498 (1996) (finding access to the legal system a significant obstacle for minority women).

n302. See supra notes 23-31 and accompanying text.

n303. Model Act, supra note 9, 7.

n304. See BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1598-1602 (1996); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 468 n.28 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991).

n305. Punitive Damages Hearing, supra note 24, at 1 (statement of Sen. Hatch).

n306. See Model Act, supra note 9, 10(a).

n307. Model Act, supra note 9, 10(a). The Model Act also requires that the reviewing court make and enter its findings and the basis for its decision. See id. 10(c).

n308. Id. 10.

n309. See Punitive Damages Hearing, supra note 24, at 105 (testimony of Victor E. Schwartz, Esq., General Counsel, American Tort Reform Association) (calling on Congress to remedy unfairness caused by imposition of multiple punitive damage awards).

n310. See id. 10.

n311. On a purely practical note, Congress would be more likely to pass tort reform legislation if the controversial cap were omitted. As Congress has tried to pass such reform every year since 1982, it would seem preferable to pass some reform - like the elevated burden of proof and uniform standard requiring intentional conduct - rather than no reform. Given President Clinton's re-election, perhaps it is time that Congress consider a more limited reform for the time being.

n312. The effectiveness of punitive damage awards already are undermined by permitting their insurability and the tax deductibility. See Pace, supra note 6, at 828 (insisting that tax deductibility of punitive damages frustrates deterrence and punishment goals of product liability laws). Permitting corporations to insure against their own intentional misconduct or to deduct the payment of these fines from their taxes costs the public twice, first when it is subjected to unsafe products and second when it must bear the burden of the corporation's intentional misconduct through higher taxes and insurance premiums. See id. Ideally, federal reform would address both of these concerns by prohibiting their insurability and removing the tax incentive, that is, deductibility, for the misconduct. See id.

n313. See supra note 68 and accompanying text (listing state statutes that include regulatory compliance defense). The most recent federal tort reform attempt, H.R. 956, originally contained a regulatory compliance defense for companies that act in compliance with FDA regulations. See H.R. 956, 104th Cong. 7 (1996); see also Victor E. Schwartz & Mark A. Behrens, Punitive Damages Reform - State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in Haslip, 42 Am. U. L. Rev. 1365, 1383 (1993) (arguing in favor of regulatory compliance defense against punitive damages).

n314. See Peter Huber, Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 Colum. L. Rev. 277, 333-35 (1985) (asserting that courts should defer to expert opinions of agencies); see also James A. Henderson, Jr., Judicial

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Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication, 73 Colum. L. Rev. 1531, 1555-56 (1973) (challenging suitability of courts to implement tort reform).

n315. See Huber, supra note 314, at 335 (indicating that licensing agencies such as Nuclear Regulatory Commision compare public risks among industry competitors).

n316. See id. (expressing view that courts are not qualified to second-guess agencies).

n317. See Don Phillips, As Upstart Valujet Grew, So Did FAA's Anxieties, Wash. Post, June 10, 1996, at A1, A12 ("I've been concerned for some time that the airline picture is changing faster that our methods of checking up on the changing picture." (quoting John L. McLucas, a former FAA administrator)).

n318. See Restatement (Third) of Torts, supra note 7, 7 & cmt. e (adopting common law approach that regulatory standards set minimal not optimal standards and therefore, rejecting per se regulatory compliance defense); see also Plummer v. Lederle Labs., 819 F.2d 349, 356 (2d Cir. 1987) (concluding that compliance with federal consumer notification regulations precludes application of strict liability but may be used to establish negligence); Silkwood v. Kerr-McGee Corp., 769 F.2d 1451, 1458 (10th Cir. 1985) (upholding on remand punitive damages award despite defendant's compliance with federal nuclear safety regulations); Toner v. Lederle Labs., 732 P.2d 297, 311 n.12 (Idaho 1987) (arguing that FDA certification should constitute non-negligence per se); Gonzales v. Surgidev Corp., 899 P.2d 576, 590-91 (N.M. 1995) (stating that compliance with regulations will not preclude award of punitive damages); Mulhern v. Outboard Marine Corp., 432 N.W.2d 130, 135 (Wis. Ct. App. 1988) ("Compliance with the federal regulation would not have preempted the state strict liability action because the Act and the regulation are only minimum safety standards which do not provide private tort remedies."). But see Grundberg v. Upjohn Co., 813 P.2d 89 (Utah 1991) (giving judicial deference to regulatory compliance); Stone Man, Inc. v. Green, 435 S.E.2d 205, 206 (Ga. 1993) (stating that punitive damages generally are not available when defendant has complied with applicable regulations governing conduct at issue); McDaniel v. McNeil Lab. Inc., 241 N.W.2d 822, 828 (Neb. 1976) (refusing to submit to strict liability theory in case where defendant adhered to FDA regulations).

n319. See Restatement (Third) of Torts, supra note 7, 7(a).

n320. See id. 7(b).

n321. See Schwartz, Products Liability, supra note 163, at 1152 (finding that in cases where punitive damage are awarded regulatory agencies generally have failed to protect public adequately); see also Rustad, supra note 50, at 73 ("The government is a slow starter and a slow finisher in uncovering corporate misconduct in product liability cases.").

n322. See Rustad, supra note 50, at 73-75 (speculating that government reluctance to investigate and prosecute product liability cases is due to expense and expertise required). Professor Rustad found 355 punitive damage awards in products liability actions from 1965 to 1990. See id. at 30; see also Rustad & Koenig, supra note 284, at 89 (stating that punitive damage awards are rare, although actual number of awards is unknown because no national reporting system exists). Examining each of these cases, Professor Rustad found that government regulators were ineffective at uncovering corporate misconduct.

Despite these serious threats to the public safety, corporate defendants rarely received official sanctions. Only one defendant [of 355] in our sample was criminally sanctioned for its failure to protect the consuming public. A total of only eleven defendants received some form of civil penalty from a local, state, or federal agency.

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Rustad, supra note 50, at 73.

n323. See Schwartz, Products Liability, supra note 163, at 1147 (discussing extent of influence enjoyed by business on agencies because agencies rely on industry-generated data in developing regulations).

n324. John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 677 n.308 (1996); see also Richard J. Pierce, Jr., The Role of the Judiciary in Implementing an Agency Theory of Government, 64 N.Y.U. L. Rev. 1239, 1280-81 (1989) (describing how members of industry and agency policy-makers control decision-making process); Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 Harv. L. Rev. 1511, 1565-66 (1992) (suggesting that top level of agency policy-makers, because they are fewer in number, are easier to influence than the hundreds of legislators needed to pass new laws).

n325. See Schwartz, Products Liability, supra note 163, at 1147.

n326. See Seidenfeld, supra note 324, at 1565.

n327. See Schwartz, Punitive Damages, supra note 163, at 1363 (arguing against regulatory compliance defenses); see also Schwartz, Products Liability, supra note 163, at 1147 (voicing concerns that industry has too much influence on regulatory process as compared to the relatively weak influence of public interest groups).

n328. See Model Act, supra note 9, 7.

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Safeguards should be implemented to prevent the abuse earlier in the trial process, thereby saving the parties and the courts time and money. Moreover, if the rise in the magnitude and frequency of punitive damage awards is unjustified, then inappropriate punitive damage judgments are being awarded, unfairly subjecting defendants to the social stigma of being branded a wrongdoer and forcing defendants to spend time and money defending against undeserved penalties. [60]

III. State Tort Reform Legislation

As a result of the increase in frequency and magnitude of punitive damage awards in the last ten years, state legislatures have been actively passing tort reform legislation. Forty-six states either have prohibited punitive damages or have enacted legislation aimed at reducing their frequency and size. [61]

Due to the perceived increase in awards of punitive damages in products liability litigation, [62] states have started to regulate punitive damages more heavily to ensure that they are administered fairly. Most state statutes prescribe the purposes behind punitive damages, [63] the conditions on which punitive damages may be awarded, [64] the burden of proving liability for such an award, [65] and the factors that **[*1590]** the jury may consider in assessing the award. [66] Some states have raised the burden of proof necessary to obtain a punitive damage award from "a preponderance of the evidence" to "clear and convincing evidence." [67] Other states have placed a ceiling on the amount of the punitive damage award, [68] and some have barred punitive damages if the wrongdoer had complied with existing government regulations. [69] **[*1591]**

By limiting and regulating the award of punitive damages, states are sanctioning their imposition. Such regulation makes punitive dam-ages look more like fines and penalties imposed by the state to punish intolerable conduct than like damage awards. As the states have recognized, procedural safeguards are needed to protect defendants from the wrongful imposition of these quasi-criminal sanctions and to protect the integrity of the legal system.

IV. Judicial Reform of Punitive Damages

As the frequency and magnitude of punitive damages have grown, so have the challenges to their constitutionality. [70] The Supreme Court has considered whether punitive damage awards violate the Fifth, Seventh, Eighth, and Fourteenth Amendments. [71] Until re-cently, the Court merely has criticized runaway jury verdicts in punitive damage cases and stressed the need for legislative reform to curtail these abuses. [72] In its recent decision, BMW of North America, Inc. v. Gore, [73] the Court expressed its willingness to use judicial discretion to strike down awards that are deemed excessive. [74] Many questions surround the Supreme Court's scrutiny of the constitution- **[*1592]** ality of punitive damages and, in particular, whether there is any legitimate constitutional basis for overturning such jury awards. The following analysis of Supreme Court cases that have considered the constitutionality of punitive damage awards reveals that the Supreme Court has not yet spoken on many contemporary issues. A survey of these cases further raises the questions of whether the Supreme Court's reform of punitive damages has helped to clarify the law at all, and whether these decisions have highlighted the need for federal legislation to regulate such damages.

A. The Fifth Amendment - Double Jeopardy Clause

Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb .... [75]

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In United States v. Halper, [76] the Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment limits the amount the government can recover (for punishment) in a civil action after the defendant already has been criminally punished. [77] In Halper, the defendant was convicted of violating sixty-five counts of the criminal false claims statute, was sentenced to two years imprisonment, and then was assessed a $ 5000 fine when the government brought a subsequent civil suit. [78] The Supreme Court held that the civil penalty was unconstitutional under the Double Jeopardy Clause because it amounted to two separate punishments for the same offense. [79]

The Court further stated, however, that "nothing in today's opinion precludes a private party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment. The protections of the Double Jeopardy Clause are not triggered by litigation between private parties." [80] Despite this state-ment, when a portion of the punitive damage award is paid to the state, the Double Jeopardy Clause, like the Excessive Fines Clause, could be implicated. [81] Although being punished twice in the civil **[*1593]** justice system may not be unconstitutional under the Fifth Amendment, the constitutional prohibition against double jeopardy generally supports the argument that repetitive punishment is fundamentally unfair. [82]

B. The Eighth Amendment - Are Punitive Damage Awards Excessive Fines?

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. [83]

Punitive damages awards also have been attacked on Eighth Amendment grounds because they can allegedly constitute excessive fines. The Supreme Court, in Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., [84] rejected a claim that a $ 6 million punitive damage award was unconstitutional under the Excessive Fines Clause of the Eighth Amendment. [85] The Court held that the Excessive Fines Clause does not apply to awards in litigation between private parties. [86] The Court explained that the excessive fines clause "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." [87]

This language implies that a punitive damage award, if apportioned between the plaintiff and the state, could raise constitutional concerns under the Eighth Amendment. [88] In Browning-Ferris, the Court **[*1594]** explicitly left open the question of whether a suit brought by a private party in the name of the United States, in which the government would share in any damage award, violates the Eighth Amendment. [89]

This issue has become increasingly important since a number of states have passed legislation that apportion punitive damages between the plaintiff and the state. [90] In these states, a portion of the punitive damage award must be paid either directly to the state's treasury or into a state-sanctioned fund. [91] Commentators long have argued that punitive damages should be paid to the state or to a public fund, or apportioned between the state and the plaintiff. [92] Two reasons exist for awarding the state a portion of any punitive award: (1) punitive damages are a windfall for the plaintiff; [93] and **[*1595]** (2) punitive damages are awarded to punish the defendant for a public wrong, an offense against societal welfare. [94] A few lower courts have considered the propriety of state apportionment laws, [95] but the

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Supreme Court has yet to consider the issue.

What will the Supreme Court do with a case in which the punitive award is apportioned between the state and the plaintiff? In light of the wide-spread proliferation of state tort reform efforts to regulate the procedures for imposing, assessing, and apportioning punitive damages, punitive damages awarded in lawsuits between private parties have become sufficiently governmental in character to invoke Eighth Amendment scrutiny - if not for the entire award, at least for the portion being paid to the state. Thus far, however, the Supreme Court has rejected one opportunity (by denying certiorari) to determine whether a state's sharing of a punitive damage **[*1596]** award - apportioned pursuant to a state statute - invokes Eighth Amendment scrutiny. [96]

Applying the Excessive Fines Clause to punitive damage awards raises another question: What constitutes an excessive fine? Because the Eighth Amendment prohibits only excessive fines, not all fines, the Supreme Court would have to determine whether the portion of a particular punitive award paid to the state is excessive. Such a finding probably would require the Court to articulate "guideposts" for determining what is excessive under the Eighth Amendment.

Will the Supreme Court apply the same "guideposts" to determine excessiveness under the Eighth Amendment that it articulated in BMW, [97] or will it craft even more factors for judges to consider? In the past, the Court has refused to create a substantive federal excessiveness standard, holding that "although petitioners and their amici would like us to craft some common-law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages, or makes reference to statutory penalties for similar conduct, these are matters of state, not federal, common law." [98]

In light of the recent decision in BMW of North America, Inc. v. Gore, where the Court expressed its willingness to overturn excessive awards on a due process basis, [99] the Excessive Fines Clause now seems **[*1597]** unnecessary in the analysis of punitive damage awards. [100] If the total amount of the punitive damage award is not excessive under the Due Process Clause, then a state's smaller share of that amount logically cannot be excessive.

C. The Fourteenth Amendment - Can a Punitive Damage Award Violate Due Process?

Nor shall any State deprive any person of life, liberty, or property, without due process of law.... [101]

The Supreme Court has held that although the Double Jeopardy and Excessive Fines Clauses do not apply to punitive damage awards paid to private litigants, the Due Process Clause of the Fourteenth Amendment does. [102]

1.

Pacific Mutual Life Insurance Co. v. Haslip

In Pacific Mutual Life Insurance Co. v. Haslip, [103] the Supreme Court upheld the constitutionality of the punitive damage award against a challenge that the award violated due process. [104] The Court explains:

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ARTICLE: THE ROAD TO FEDERAL PRODUCT LIABILITY REFORM

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SUMMARY:
... In late 1981, a major effort to enact federal legislation began under the leadership of former Wisconsin Republican Senator Robert Kasten. ... A final version of the model law, known as the Model Uniform Product Liability Act, has been the basis for legislation in about nine states. ... Proponents of reform, however, do not advocate a complete federal "takeover" of product liability law. ... In about eleven states, conduct such as abusing alcohol or drugs does not preclude a person from recovering in a product liability action, even if the drug or alcohol usage was a substantial cause of the harm. ... Some opponents of **punitive damage** reform have obscured a very basic fact: **punitive damages** are punishment. ... Bifurcation also helps jurors "compartmentalize" a trial, allowing them to more easily separate the burden of proof that is required for compensatory damage awards (proof by a preponderance of the evidence) from a higher burden of proof (proof by clear and convincing evidence) for **punitive damages.** ... In these states, if an employee has a successful product liability claim against a manufacturer or product seller, his employer can recover the amount of workers' compensation benefits paid to the employee from the product liability damage award, even if the employer is responsible for the injury. ...

TEXT:
[*1363]

House Bill 956 would have reversed this effect and modified state law in a very positive way by placing a private incentive on employers to keep their workplaces safe. [129] In sum, if an employer was at fault in causing a workplace injury, it would bear the costs of workers' compensation.

III. Biomaterials Access Assurance

Each year millions of citizens depend on the availability of implantable medical devices, such as pacemakers, heart valves, artificial blood vessels, and hip and knee joints. The availability of these devices is critically threatened, however, because suppliers have ceased supplying raw materials and component parts to medical implant manufacturers. A 1994 study by Aronoff Associates concluded that there are significant numbers of raw materials that are "at risk" of shortages in the immediate future. [130] Suppliers have found that the cost of responding to litigation related to medical implants far exceeds potential sales revenues, even though courts are not finding suppliers liable. [131]

House Bill 956 would have helped prevent a public health crisis by limiting the liability of biomaterials suppliers to instances of genuine fault. It would have also established a procedure to ensure that **[*1383]** suppliers could avoid litigation without incurring heavy legal costs. The provision did not in any way diminish the existing liability of implantable medical device manufacturers. [132] The provision was the subject of hearings and enjoyed strong bipartisan support. [133]

Conclusion

The current product liability system in the United States is an example of what is wrong, not right, with our legal system. We need reasonable rules that will separate the bad from the good. We need a system that has predictability - that will encourage appropriate conduct. The "real" consumers of America, those who purchase and use products on a daily basis, will benefit by getting the products that they need and by no longer having to pay unfair and unreasonable "product liability taxes." Jobs will be created. Federal product liability legislation can provide these results, while preserving a legal system that will target dangerous and defective products.

After a decade and a half of debate and learning about the subject, federal product liability legislation does carefully balance and meet these goals.

FOOTNOTES:

n1. See S. Rep. No. 69, 104th Cong., 1st Sess. 15 (1995).

n2. See id. at 17.

n3. See id.

n4. See Common Sense Legal Reform Act of 1995, H.R. 10, 104th Cong., 1st Sess. (1995).

n5. See **Common Sense Product** Liability Reform Act, H.R. 917, 104th Cong., 1st Sess. (1995).

n6. See H.R. Rep. No. 64, 104th Cong., 1st Sess. 7 (1995); H.R. Rep. No. 63, 104th Cong., 1st Sess. 12 (1995).

n7. See **Common Sense Product** Liability and Legal Reform Act of 1995, H.R. 956, 104th Cong., 1st Sess. (1995).

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n8. See 141 Cong. Rec. H3027 (daily ed. Mar. 10, 1995).

n9. See Product Liability Fairness Act of 1995, S. 565, 104th Cong., 1st Sess. (1995).

n10. See S. Rep. No. 69, supra note 1, at 14.

n11. See id. at 15.

n12. See 141 Cong. Rec. S6407 (daily ed. May 10, 1995).

n13. See H.R. Conf. Rep. No. 481, 104th Cong., 2d Sess. (1996).

n14. Id.

n15. See 142 Cong. Rec. S2590 (daily ed. Mar. 21, 1996).

n16. See 142 Cong. Rec. H3204 (daily ed. Mar. 29, 1996).

n17. See Sending a Message on Product Liability, Wash. Post, May 1, 1996, at A6.

n18. See John F. Harris, Clinton Vetoes Product Liability Measure, Wash. Post, May 3, 1996, at A14; Neil A. Lewis, President Vetoes Limits on Liability, N.Y. Times, May 3, 1996, at A1; Warren P. Strobel, Clinton Uses Human Props to Put a Spin on Liability **Veto,** Wash. Times, May 3, 1996, at A5; The Lawyers' **Veto,** Wall St. J., May 3, 1996, at A12. In order to preserve a record vote on the issue, the House attempted a **veto** override on May 9, 1996; it fell 23 votes short of passage.

n19. H.R. Conf. Rep. No. 481, supra note 13.

n20. Interagency Task Force on Product Liability, U.S. Dep't of Commerce, Final Report V-19 to V-21 (1976).

n21. Id.

n22. Product Liability Risk Retention Act of 1981, Pub. L. No. 97-45, 95 Stat. 949 (codified as amended at 15 U.S.C. 3901-3904 (1994)).

n23. 15 U.S.C. 3901-3906 (1994).

n24. See id.

n25. See S. Rep. No. 69, supra note 1, at 26.

n26. See 43 Fed. Reg. 14,612 (1978).

n27. See Model Uniform Product Liability Act, 44 Fed. Reg. 62,714 (1979).

n28. Ill. Ann. Stat. ch. 735, para. 5/2-622, -623, -1107.1, -1115.05, -1115.1, -1115.2, -1116, -1205.1, -2104, -2105, -2106, -2106.5, -2108, -2109, 5/13-213 (Smith-Hurd 1996).

n29. Tex. Civ. Prac. & Rem. Code Ann. 33.001 (West 1996).

n30. Ind. Code Ann. 33-1-1.5-1, -4, -9, -10, 34-4-34-4, -5, -6 (West 1996).

n31. N.D. Cent. Code 28-01.3-07 to -09, .4-01 to -04 (1995).

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n32. N.J. Stat. Ann. 2A:15-5.2, .3, .9 (West 1996).

n33. Or. Rev. Stat. 18.537 (1995).

n34. Wis. Stat. Ann. 895.85 (West 1996).

n35. See S. Rep. No. 69, supra note 1, at 26.

n36. See H.R. Rep. No. 63, supra note 6, at 27; H.R. Rep. No. 64, supra note 6, at 40-41; S. Rep. No. 69, supra note 1, at 64-66.

n37. In two separate opinions, the West Virginia Court of Appeals reflected on this issue. In Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (W. Va. 1991), the court stated:

State courts have adopted standards that are, for the most part, not predictable, not consistent and not uniform. Such fuzzy standards inevitably are most likely to be applied arbitrarily against out-of-state defendants. Moreover, this is a problem that state courts are by themselves incapable of correcting regardless of surpassing integrity and boundless goodwill. State courts cannot weigh the appropriate trade-offs in cases concerning the national economy and national welfare when these trade-offs involve benefits that accrue outside the jurisdiction of the forum and detriments that accrue inside the jurisdiction of the forum.

Id. at 905. Earlier, in Blankenship v. General Motors Corp., 406 S.E.2d 781 (W. Va. 1991), the court opined:

Indeed, in some world other than the one in which we live, where this Court were called upon to make national policy, we might very well take a meat ax to some current product liability rules. Therefore, we do not claim that our adoption of rules liberal to plaintiffs comports, necessarily, with some Platonic ideal of perfect justice. Rather, for a tiny state incapable of controlling the direction of national law in terms of appropriate trade-offs among employment, research, development, and compensation for the injured users of products, the adoption of rules liberal to plaintiffs is simple self-defense.

Id. at 786.

n38. See S. Rep. No. 69, supra note 1, at 13. As Governor of Arkansas, President Clinton twice sat on NGA committees that drafted and unanimously approved resolutions calling for federal product liability reform. See Trial Lawyers' Triumph, Wash. Post, Mar. 19, 1996, at A16.

n39. See S. Rep. No. 69, supra note 1, at 13.

n40. Id. at 13-14.

n41. Id. at 14.

n42. See id.

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n43. See Hearings on H.R. 1910 Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce, 103d Cong., 2d Sess. 451 (1994) (statement of James S. Oliphant, President, Defense Research Institute).

n44. See id.

n45. See Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 28 O.J. Eur. Comm. 29 (No. L210) (1985).

n46. See Minpo (Civil Code), Law No. 85 of 1994. See generally Mark A. Behrens & Daniel H. Raddock, Japan's New Product Liability Law: The Citadel of Strict Liability Falls, but Access to Recovery Is Limited by Formidable Barriers, 16 U. Pa. J. Int'l Bus. L. 669 (1996).

n47. See **Common Sense Product** Liability Reform Act: Hearings on H.R. 10 Before the House Comm. on the Judiciary, 104th Cong., 1st Sess. 53 (1995) (testimony of Larry S. Stewart, President, Ass'n of Trial Lawyers of America); **Common Sense Product** Liability Reform Act: Hearings on H.R. 10 Before the Subcomm. on Commerce, Trade, and Hazardous Materials of the House Comm. on Commerce, 104th Cong., 1st Sess. 25 (1995) (testimony of Larry S. Stewart, President, Ass'n of Trial Lawyers of America); **Common Sense Product** Liability Reform Act: Hearings Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism of the Senate Comm. on Commerce, Science, and Transportation, 104th Cong., 1st Sess. (1995) (testimony of Larry S. Stewart, President, Ass'n of Trial Lawyers of America).

n48. Congress gave the District of Columbia its own judicial system by enacting the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 570 (codified in scattered sections of 28 U.S.C.).

n49. See S. Rep. No. 69, supra note 1, at 25 (discussing the effective date of Senate Bill 565).

n50. See, e.g., Simmons v. Monarch Mach. Tool Co., 596 N.E.2d 318, 320 n.3 (Mass. 1992) (imposing "super-strict" liability).

n51. S. Rep. No. 69, supra note 1, at 27. The report cites the following examples: the United States Grain Standards Act in 1916, 7 U.S.C. 71-87, 111, 113, 241-73, 2209 (1994) (establishing uniform national standards for grain); the United States Cotton Standards Act in 1923, 7 U.S.C. 51-65 (1994) (requiring uniform classifications for judging quality or value of cotton); the Tobacco Inspection Act in 1935, 7 U.S.C. 511-511r (1994) (requiring compliance with uniform national classifications); the Food, Drug, and Cosmetic Act in 1938, 21 U.S.C. 301-395 (1994) (establishing standards for safety and labeling of drugs); the Consumer Product Safety Act in 1972, 15 U.S.C. 2051-2084 (1994) (setting uniform safety standards for consumer products); and the General Aircraft Revitalization Act of 1994, 49 U.S.C. 40101 (Supp. 1995) (establishing an 18-year national statute of repose for general aviation aircraft). S. Rep. No. 69, supra note 1, at 27 nn.99-100.

n52. S. Rep. No. 69, supra note 1, at 31; see W. Page Keeton et al., Prosser and Keeton on the Law of Torts 705 (5th ed. 1984).

n53. S. Rep. No. 69, supra note 1, at 31.

n54. Id.; see Kelly v. Htansom Bros., Inc. 331 A.2d 737, 740 (Pa. Super. Ct. 1974).

n55. S. Rep. No. 69, supra note 1, at 31.

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n56. Id.

n57. Id.

n58. Id.; see Colo. Rev. Stat. 13-21-402 (1987); Del. Code Ann. tit. 18, 7001 (1989); Ga. Code Ann. 51-1-11.1 (Supp. 1995); Idaho Code 6-1407 (1990); Ill. Ann. Stat. ch. 735, para. 5/2-621 (Smith-Hurd 1992) (formerly Ill. Rev. Stat. ch. 110, para. 2-621 (1989)); Iowa Code 613.18 (Supp. 1995); Kan. Stat. Ann. 60-3306 (1994); Ky. Rev. Stat. Ann. 411.340 (Michie/Bobbs-Merrill 1992); La. Rev. Stat. Ann. 2800.53 (West 1991); Md. Code Ann., Cts. & Jud. Proc. 5-311 (1982); Minn. Stat. Ann. 544.41 (West 1988); Mo. Rev. Stat. 537.762 (1988); Neb. Rev. Stat. 25-21,181 (1995); N.J. Stat. Ann. 2A:58C-9 (West 1995); N.C. Gen. Stat. 99B-2 (1995); N.D. Cent. Code 28-01.3-04 (Supp. 1995); Ohio Rev. Code Ann. 2307.78 (Anderson 1991); S.D. Codified Laws Ann. 20-9-9 (1995); Tenn. Code Ann. 29-28-106 (Supp. 1995); Wash. Rev. Code Ann. 7.72.040 (West 1992).

n59. See H.R. Conf. Rep. No. 481, supra note 13, at 6-7.

n60. Id. at 7.

n61. S. Rep. No. 69, supra note 1, at 33 n.116.

n62. See Cal. Veh. Code 17150-51 (West 1971); Conn. Gen. Stat. Ann. 14-154a (West 1987); D.C. Code Ann. 40-408 (1990); Fla. Stat. Ann. 324.021(9)(b) (Supp. 1994) (exempts leased vehicles); Idaho Code 49-2417 (1994); Iowa Code 321.493 (1985); Me. Rev. Stat. Ann. tit. 29-A, 1652-1653 (West Supp. 1995); Mich. Comp. Laws Ann. 257.401 (West Supp. 1995); Minn. Stat. 170.54 (1986); N.Y. Veh. & Traf. Law 388 (McKinney 1986); R.I. Gen. Laws 31-33-6, 31-33-7 (1995).

n63. S. Rep. No. 69, supra note 1, at 33.

n64. See H.R. Conf. Rep. No. 481, supra note 13, 103(c), at 7-8.

n65. S. Rep. No. 69, supra note 1, at 33.

n66. Id.; see H.R. Conf. Rep. No. 481, supra note 13, at 8.

n67. S. Rep. No. 69, supra note 1, at 33; see Wash. Rev. Code 5.40.060 (West 1995).

n68. S. Rep. No. 69, supra note 1, at 33.

n69. Id. The majority of states have laws that do not permit recovery in this situation. Id. at 33 n.17. Five states, Alabama, Maryland, North Carolina, South Carolina, and Virginia, and the District of Columbia, continue to recognize contributory negligence as an absolute defense. Id. Thirty-two states have adopted some form of modified comparative fault standard: Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. Id.

n70. H.R. Conf. Rep. No. 481, supra note 13, 105(a), at 8.

n71. See Victor E. Schwartz, Comparative Negligence app. b (3d ed. 1994).

n72. See H.R. Conf. Rep. No. 481, supra note 13, 105(a), at 8.

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n73. See id. 106(a), at 9.

n74. Id.

n75. See H.R. Rep. No. 63, supra note 6, at 10-11; S. Rep. No. 69, supra note 1, at 43.

n76. See H.R. Rep. No. 63, supra note 1, at 11; S. Rep. No. 69, supra note 1, at 44.

n77. Statutes of repose exist in the following states: Ark. Code Ann. 16-116-105(c) (Michie 1987) ("anticipated life" of product); Colo. Rev. Stat. 13-21-403 (1987) (10 years); Conn. Gen. Stat. 52-577a (1991 & Supp. 1995) (10 years); Ga. Code Ann. 51-1-11(b)(2) (1982 & Supp. 1995) (10 years); Idaho Code 6-1403(2) (1990) ("useful safe life" of product); Ill. Ann. Stat. ch. 735, para. 5/13-213(b) (Smith-Hurd 1992) (12 years from date of first sale, or 10 years from date of sale to first user, whichever is shorter); Ind. Code Ann. 33-1-1.5-5(b) (West 1996) (10 years); Kan. Stat. Ann. 60-3303 (1994) ("useful safe life" of product); Ky. Rev. Stat. Ann. 411.310(1) (Michie/Bobbs-Merrill 1992) (presumption that product is not defective if harm occurred five years after sale to first consumer or eight years after manufacture); Mich. Stat. Ann. 27A.5805 (Callaghan 1986 & Supp. 1995) (if product in use for 10 years, plaintiff must prove prima facie case without benefit of any presumption); Minn. Stat. Ann. 604.03 (West 1988) ("useful life" of product); Neb. Rev. Stat. 25-224 (1995) (10 years); N.D. Cent. Code 28-01.3-08(1) (Supp. 1995) (10 years); Or. Rev. Stat. 30.905(1) (1995) (10 years); Tenn. Code Ann. 29-28-103(a) (1988 & Supp. 1995) (10 years); Tex. Civ. Prac. & Rem. Code Ann. 16.012 (West Supp. 1995) (15 years); Wash. Rev. Code Ann. 7.72.060(1) (West 1992) ("useful safe life" of product).

n78. General Aircraft Revitalization Act of 1994, Pub. L. No. 103-298, 3, 108 Stat. 1552 (codified at 49 U.S.C. 40101 (West Supp. 1995)). This law has resulted in production of safer aircraft and the creation of thousands of new jobs, and has not been perceived as unfair or challenged in the courts. See Geoffrey A. Campbell, Study: Business Booms After Tort Reform Enacted, A.B.A. J., Jan. 1996, at 28 ("The light aircraft industry is taking off as reduced liability encourages technological innovation.").

n79. See H.R. Conf. Rep. No. 481, supra note 13, 106(b), at 9.

n80. See Tex. Civ. Prac. & Rem. Code Ann. 16.012 (West Supp. 1995).

n81. H.R. Conf. Rep. No. 481, supra note 13, 106(b), at 9.

n82. Id. 107, at 9-10.

n83. Id.

n84. Id.

n85. Id.

n86. William Fry, Executive Director of HALT, a nonprofit legal reform organization supported by 70,000 individual members nationwide, testified before the Consumer Affairs, Foreign Commerce, and Tourism Subcommittee of the Senate Committee on Commerce, Science, and Transportation that ADR mechanisms are "a way to lower costs, simplify procedures and achieve fairness through avoidance of technical rules of law." S. Rep. No. 69, supra note 1, at 29. He said that HALT supports the use of ADR mechanisms to allow consumers to handle their own legal affairs. See id.

n87. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991); see also Honda Motor Corp. v. Oberg, 114 S. Ct. 2331, 2340 (1994) (stating that **punitive damages** "pose an acute

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danger of arbitrary deprivation of property," raising serious due process concerns).

n88. BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1604 (1996); see also TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 458 (1993); Pacific Mut. Life Ins. Co., 499 U.S. at 23-24; Oberg, 114 S. Ct. at 2335; see also Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276 (1989) ("Due process imposes some limits on jury awards of **punitive damages,** and it is not disputed that a jury award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness"). In Browning-Ferris, the Court did not squarely address the issue of whether the Due Process Clause places outer limits on the size of **punitive damages** because the issue had not been preserved for appeal. Id. at 276-77; cf. Pulla v. Amoco Oil Co., 72 F.3d 648, 661 (8th Cir. 1995) (opinion by retired Supreme Court Justice Byron White) (striking down **punitive damages** award as "excessive, unreasonable and violative of due process").

n89. In Oberg, 114 S. Ct. at 2341, a case involving an all-terrain vehicle that flipped over when an inebriated plaintiff tried to drive it up a hill, the Court struck down a **punitive damages** award on the ground that Oregon law violated due process, because it did not provide an opportunity for meaningful appellate review of the size of **punitive damages** awards. Id.

n90. Dan B. Dobbs, Handbook on the Law of Remedies 3.9, at 204 (1973).

n91. Id. 3.9, at 204-05.

n92. Id. 3.1, at 135-38.

n93. Id. 3.9, at 219-20.

n94. For example, a 1992 Science magazine article reported that at least two companies have delayed AIDS vaccine research and another company abandoned one promising approach as a result of liability concerns. Jon Cohen, Is Liability Slowing AIDS Vaccines?, Science, Apr. 10, 1992, at 168-69.

n95. See S. Rep. No. 69, supra note 1, at 36.

n96. H.R. Conf. Rep. No. 481, supra note 13, 103, at 6-8.

n97. Id. 108(a), at 10 (imposing a "clear and convincing evidence" standard).

n98. Id. 108(b), at 10 (setting out limits on **punitive damage** awards).

n99. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 17 (1991).

n100. Id. 108(a), at 10.

n101. See H.R. Conf. Rep. No. 481, supra note 13, 108(a), at 10-11.

n102. Ala. Code 6-11-20 (1993); Alaska Stat. 09-17-020 (1994); Cal. Civ. Code 3294(a) (West 1970 & Supp. 1996); Ga. Code Ann. 51.12-5.1(b) (Supp. 1995); Iowa Code Ann. 668A.1 (West 1987); Kan. Stat. Ann. 60-3701(c) (1994); Ky. Rev. Stat. Ann. 411.184(2) (Michie/Bobbs-Merrill 1991); Minn. Stat. Ann. 549.20 (West 1988 & Supp. 1995); Miss. Code Ann. 11-1-65(1)(a) (Supp. 1995); Mont. Code Ann. 27-1-221(5) (1995); Nev. Rev. Stat. Ann. 42-005(1) (Michie Supp. 1995); N.J. Stat. Ann. 2A:15-5.12 (West 1995); N.C. Gen. Stat. 1D-15(b) (1995); N.D. Cent. Code 32-03.2-11 (Supp. 1995); Ohio Rev. Code Ann. 2307.80(A) (Anderson 1991); Okla. Stat. Ann. tit. 23, 9.1 (West Supp. 1995); Or. Rev. Stat.

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18.537 (1995); S.C. Code Ann. 15-33-135 (Law. Co-op. Supp. 1994); S.D. Codified Laws Ann. 21-1-4.1 (1987); Tex. Civ. Prac. & Rem. Code Ann. 41.003 (West 1995); Utah Code Ann. 78-18-1 (1992); Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 681 (Ariz. 1986); Jonathan Woodner Co. v. Breeden, 665 A.2d 929, 937 (D.C. Cir. 1995); Masaki v. General Motors Corp., 780 P.2d 566, 575 (Haw. 1989); Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 362-63 (Ind. 1982); Tuttel v. Raymond, 494 A.2d 1353, 1363 (Me. 1985); Owens-Illinois v. Zenobia, 601 A.2d 633, 657 (Md. 1992); Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992); Wangen v. Ford Motor Co., 294 N.W.2d 437, 458 (Wis. 1980). One state, Colorado, requires proof beyond a reasonable doubt in **punitive damages** cases. Colo. Rev. Stat. 13-25-127(2) (1987).

n103. See American Bar Ass'n, Special Comm. on **Punitive Damages** of the Am. Bar Ass'n Section on Litigation, **Punitive Damages:** A Constructive Examination 19 (Am. Bar Ass'n 1986) [hereinafter ABA Report]; American College of Trial Lawyers Rep. on **Punitive Damages** of the Comm. on Special Problems in the Administration of Justice 15-16 (1989) [hereinafter ACTL Report]; 2 Enterprise Responsibility for Personal Injury - Reporters' Study 248-49 (Am. Law Inst. 1991) [hereinafter ALI Reporters' Study]; National Conference of Commissioners on Uniform State Laws, Uniform Law Commissioners' Model **Punitive Damages** Act 5 (approved by uniform law commissioners on July 18, 1996) [hereinafter Uniform Law Commissioners' Model **Punitive Damages** Act]. See generally Victor E. Schwartz & Mark A. Behrens, The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury: A Timely Call for **Punitive Damages** Reform, 30 San Diego L. Rev. 263 (1993).

n104. See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 n.11 (1991) (stating that "there is much to be said in favor of a State's requiring, as many do,... a standard of "clear and convincing evidence'"). Ultimately, the Court rejected this higher level of proof in cases that meet constitutional scrutiny in favor of a lesser standard "buttressed ... by the procedural and substantive protections." Id.

n105. See H.R. Conf. Rep. No. 481, supra note 13, 108(b), at 10.

n106. See id.

n107. Id.

n108. Id. 108(a), at 10.

n109. See ABA Report, supra note 103, at 64-66 (recommending that **punitive damage** awards in excess of three-to-one ratio to compensatory damages be considered presumptively "excessive"); ACTL Report, supra note 103, at 15 (proposing that **punitive damages** be awarded up to twice compensatory damages or $ 250,000, whichever is greater); ALI Reporters' Study, supra note 103, at 258-59 (endorsing concept of ratio coupled with alternative monetary ceiling).

n110. Ill. Ann. Stat., ch. 735, para. 5/2-1115.05 (Smith-Hurd 1995) (**punitive damages** limited to three times amount of claimant's economic damages); Ind. Code Ann. 34-4-34-5 (1995) (**punitive damages** limited to the greater of three times actual damages or $ 50,000); N.J. Stat. Ann. 2A:15-5.14 (West 1995) (**punitive damages** limited to five times amount of claimant's compensatory damages or $ 350,000, whichever is greater); N.C. Gen. Stat. 1D-25 (1995) (**punitive damages** limited to three times amount of claimant's compensatory damages or $ 250,000, whichever is greater); Okla. S.B. 263 (exemplary damages may not exceed the greatest of $ 500,000, twice the amount of actual damages awarded, or the increased financial benefit derived by defendant or insurer as a direct result of the injurious conduct); Tex. Civ. Prac. & Rem. Code Ann. 41.008 (West 1995) (limits **punitive damages** awards to $ 200,000 or two times economic damages plus an amount

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equal to any noneconomic damages up to $ 750,000). Other states have also capped **punitive damage** awards. See, e.g., Colo. Rev. Stat. 13-21-102(1)(a) (1995) (punitive award may not exceed compensatory damages); Conn. Gen. Stat. 52-204b (West Supp. 1992) (punitive award permitted up to twice the compensatory damages); Fla. Stat. Ann. 768.73(1)(a) (West Supp. 1992) (**punitive damages** may be awarded up to three times compensatory damages unless "clear and convincing evidence" is presented by the plaintiff to show that a higher award is not excessive); Nev. Rev. Stat. 42.005 (1991) (**punitive damages** awards permitted up to $ 300,000 in cases in which compensatory damages are less than $ 100,000 and to three times the amount of compensatory damages in cases of $ 100,000 or more); N.D. Cent. Code 32.03.2-11(4) (1995) (permitting **punitive damages** up to twice compensatory damages, or $ 250,000, whichever is greater); Va. Code Ann. 8.01-38.1 (Michie 1994) (**punitive damages** permitted up to a maximum of $ 350,000).

n111. See H.R. Conf. Rep. No. 481, supra note 13, 108(b)(3)(D), at 11. See generally Victor E. Schwartz & Mark A. Behrens, Federal Product Liability Reform Legislation Is Consistent with Virginia Law and Should Be Strongly Supported, 4 Geo. Mason U. L. Rev. 279 (1996) (discussing the burden of proof required to establish liability and the liability standard for recovery of **punitive damages** under H.B. 956).

n112. See H.R. Conf. Rep. No. 481, supra note 13, 108(c), at 11-12.

n113. See Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 30 (Tex. 1994) (adopting "the requirement of bifurcated trials in **punitive damages** cases"); Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992) (holding that "where **punitive damages** are sought, the court, upon motion of defendant, shall bifurcate the trial").

n114. See, e.g., Cal. Civ. Code 3295(d) (West Supp. 1995); Minn. Stat. Ann. 549.20 (West Supp. 1995); Miss. Code Ann. 11-1-65(1)(a) (Supp. 1995).

n115. See ABA Report, supra note 103, at 19; ACTL Report, supra note 103, at 18-19; ALI Reporters' Study, supra note 103, at 255 n.41; Uniform Law Commissioners' Model **Punitive Damages** Act, supra note 103, 11.

n116. See Coney v. J.L.G. Indus., Inc., 454 N.E.2d 197, 204 (Ill. 1983) (defining joint and several liability).

n117. S. Rep. No. 69, supra note 1, at 45. See generally Senator Larry Pressler & Kevin V. Schieffer, Joint and Several Liability: A Case for Reform, 65 Denv. U. L. Rev. 651 (1988) (discussing doctrine of joint and several liability and offering possible reforms).

n118. Id.

n119. Id. at 46.

n120. See Schwartz, supra note 71, app. b.

n121. See H.R. Conf. Rep. No. 481, supra note 13, 110(a), (b)(1), at 12.

n122. The legislation provided that responsibility for a claimant's harm would be apportioned in reference to all persons responsible for the plaintiff's injury, whether or not such person was a party to the action. See id. 110(b)(2), at 12. This position is sound public policy and reflects the trend in the tort law of the states. See, e.g., DaFonte v. Up-Right, Inc., 828 P.2d 140, 145 (Cal. 1992) (stating that no defendant shall have joint liability for noneconomic damages); Fabre v. Marin, 623 So. 2d 1182, 1185-86 (Fla. 1993) (stating that "for purposes of non-economic damages a plaintiff should take each defendant as he or she finds them").

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n123. Cal. Civ. Code Ann. 1431.2 (West Supp. 1996).

n124. Neb. Rev. Stat. 25-21,185.10 (1995).

n125. S. Rep. No. 69, supra note 1, at 49.

n126. Id. The employer assumes the employee's rights against the manufacturer by subrogation.

n127. See id.

n128. See Arthur Larson, Workmen's Compensation for Occupational Injuries and Death 76.36 (desk ed. 1991) (discussing the California approach that deducts compensation from an employer's third-party recovery).

n129. See H.R. Conf. Rep. No. 481, supra note 13, at 12-14.

n130. See Aronoff Assocs., Market Study: Biomaterials Supply for Permanent Medical Implants (Mar. 1994).

n131. See generally Edward M. Mansfield, Reflections on Current Limits on Component and Raw Materials Supplier Liability and the Proposed Third Restatement, 84 Ky. L.J. 221, 235-37 (1995-96).

n132. See H.R. Conf. Rep. No. 481, supra note 13, 201-206, at 14-23.

n133. No minority position was taken in regard to this provision of the Senate bill. See S. Rep. No. 69, supra note 1, at 51-52, 56-80.

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Introduction

The road toward the enactment of federal product liability reform legislation has been a long one. The effort can be traced back to an Interagency Task Force that began under President Ford in 1976 and concluded under President Carter in 1980. In late 1981, a major effort to enact federal legislation began under the leadership of former Wisconsin Republican Senator Robert Kasten. [1]

For the last two Congresses, bipartisan product liability reform has been an achievable goal in the United States Senate. Yet, in both September 1992 and June 1994, a minority of members, many of whom held key Senate leadership positions, filibustered the product liability bill when supporters tried to bring it to the Floor. [2] Both times, proponents fell just short of the sixty votes needed to overcome the filibuster. [3]

In the 104th Congress, the effort to enact liability reform legislation originated in the House of Representatives with a quick and successful start. The success of the measure was due in large part to the prominence of legal reform in the House Republican "Contract with America." House Judiciary Committee Chairman Henry Hyde introduced a bill on the opening day of the 104th Congress, January 4, **[*1364]** 1995. [4] Michael Oxley, Chairman of the Subcommittee on Commerce, Trade, and Hazardous Materials of the House Commerce Committee introduced a bill on February 13, 1995. [5] Their committees held hearings in February, [6] and the bills were subsequently combined and reintroduced as House Bill 956, the "**Common Sense Product** Liability and Legal Reform Act of 1995." [7] The House effort culminated on March 10, 1995, with the approval of House Bill 956 by a vote of 265 to 161. [8]

Several days later, on March 15, 1995, bipartisan legislation was introduced by West Virginia Democratic Senator John D. Rockefeller IV, Republican Senator Slade Gorton of Washington, and others. [9] The Senate Committee on Commerce, Science, and Transportation's Subcommittee on Consumer Affairs, Foreign Commerce, and Tourism held hearings in April, [10] and quickly reported out a bill. [11] On May 10, 1995, the Senate approved House Bill 956, as amended by Senate Bill 565, the "Product Liability Fairness Act of 1995," by a vote of sixty-one to thirty-seven. [12]

On March 14, 1996, members appointed by the House and Senate leadership agreed upon a conference report that resolved differences between the House and Senate bills. [13] The Senate passed the conference report on House Bill 956, renamed the "**Common Sense Product** Liability and Legal Reform Act of 1996," [14] on March 21, 1996, by a vote of fifty-nine to forty. [15] The House passed it on March 29, 1996, by a vote of 259 to 158. [16] The conference report was sent to President Clinton on April 30, 1996, after a ceremony at the United States Capitol that included brief statements in support of the report by then Senate Majority Leader Robert Dole and House Speaker Newt **[*1365]** Gingrich. [17] President Clinton vetoed the conference report on May 2, 1996, marking the fifteenth **veto** of his presidency. [18]

This Article will briefly describe the history of the federal product liability effort. The Article then focuses on the 1995-96 legislation, and in particular the conference report on House Bill 956. [19] The Article will show that the proposed federal product liability law would provide fair and balanced common-sense rules that draw upon strong mainstream academic support and are consistent with the laws of many states. Furthermore, the Article will describe ways in which the proposed legislation would benefit consumers and businesses, create jobs, improve product safety, encourage innovation, and stimulate economic growth. The Article concludes that federal liability reform should be strongly supported.

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I. Historical Background

A. The Federal Interagency Task Force on Product Liability

Under Presidents Ford and Carter, a Federal Interagency Task Force on Product Liability studied the problems of liability laws intensely. The Task Force made two principal recommendations. First, to achieve the goal of enabling small businesses to have a better and fairer opportunity in the liability insurance market, the Task Force recommended that federal legislation be enacted that would allow businesses to form self-insurance pools. [20] This would require preemption of certain state insurance regulation. [21] The resulting legislation, the Product Liability Risk Retention Act, became law in 1981. [22] It was extended to all liability coverage (with the exception of workers' compensation) in 1986. [23] The legislation helped to ensure not only competitive markets, but also that any savings from the stabilization of the tort system would flow to insureds, not to insurance companies. [24]
[*1366]

Second, the Task Force found that uncertainties in the current product liability system create unnecessary legal costs, impede interstate commerce, and stifle innovation, among other problems. [25] In 1978, the Task Force, after conducting an eighteen-month study, issued a report that recommended the drafting of a model uniform product liability law for use by the states. The report intimated that reforms of the system would be enacted at the federal level if the states did not enact the model law. [26]

B. The Model Uniform Product Liability Act

A final version of the model law, known as the Model Uniform Product Liability Act, [27] has been the basis for legislation in about nine states. Unfortunately, the Uniform Act has not been applied uniformly. Instead, state legislatures have adopted provisions of the law in a piecemeal fashion. This trend continued into 1995 with the enactment of various liability reform laws in Illinois, [28] Texas, [29] Indiana, [30] North Dakota, [31] New Jersey, [32] Oregon, [33] and Wisconsin, [34] among other states.

C. Problems with a State-by-State Approach

One inherent problem with state product liability legislation, apart from rules that differ from state to state, is that a state cannot regulate product liability problems outside its borders. On average, over seventy percent of the goods that are manufactured in a particular state are shipped and sold out of that state. [35] For this reason, state tort reform legislation, while useful, often has less than a thirty percent "effectiveness" standard for that state's businesses. On the other hand, all of a state's citizens who sue in the state are governed by the state's product liability law. Thus, while enactment of product liability legislation in individual states can be helpful, product liability is a matter of interstate commerce.
[*1367]

The Conference of State Supreme Court Justices, the National Conference of State Legislators, and other credible sources believe that the formulation of product liability law should be left solely to the states. [36] On the other hand, some state courts, despite their sensitivity to states' rights, believe that a federal product liability law is appropriate. These courts have recognized that federal liability legislation is the only mechanism to ensure that fair and uniform law will be applied evenly throughout the United States. [37]

Furthermore, since 1986, the National Governors' Association (NGA) has supported a federal product liability law. [38] On January 31, 1995, for the third time, the NGA adopted a resolution calling for Congress to enact a uniform federal product liability law. [39] The NGA's most recent resolution reads in pertinent part:

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The National Governors' Association recognizes that the current patchwork of U.S. product liability laws is too costly, time-consuming, unpredictable, and counter productive, resulting in severely adverse effects on American consumers, workers, competitiveness, innovation and commerce. **[*1368]**

Clearly, a national product liability code would greatly enhance the effectiveness of interstate commerce. The Governors urge Congress to adopt a federal uniform product liability code. [40]

Moreover, the strongly states' rights-oriented American Legislative Exchange Council (ALEC), the nation's largest bipartisan coalition of state legislators with over 2400 members nationwide, supports the enactment of federal product liability legislation. [41] ALEC has several times called on Congress to enact a federal product liability law. [42]

In February 1992 the Defense Research Institute (DRI), the principal national organization of defense attorneys, reversed its long-standing opposition and now supports federal product liability reform legislation. [43] The DRI previously supported reform on a state-by-state basis. [44]

Interestingly, the Europeans began an effort to enact uniform product liability law a year or two after the U.S. Congress first looked at the subject in late 1981. In July 1985 the Council of the European Community adopted a uniform product liability directive that is now the law in thirteen European countries. [45] Amazingly, it has been easier for these diverse European countries to cede their sovereignty in this area than it has been for the U.S. Congress to agree on a uniform law for the United States. In addition to Europe's adoption of a uniform code, Japan has enacted its first product liability law, which became effective on July 1, 1995. [46]

D. Legislatures Versus Courts

Some consumer advocacy groups and plaintiffs' lawyers have argued that neither Congress nor state legislatures have any business in reforming liability laws. They contend that the subject should be left to the courts. Most recently, for example, President of the Association of Trial Lawyers of America (ATLA) Larry Stewart suggested to both **[*1369]** the House and Senate Commerce Committees that product liability law should be left to the courts on a case-by-case basis. [47]

Proponents of reform, however, do not advocate a complete federal "takeover" of product liability law. But in a few core areas, Congress is better suited to formulate sound national policy than courts operating in fifty-one different jurisdictions. [48] Proponents of a uniform federal product liability law believe that when courts formulate law, in general, they only have the opportunity to hear from two attorneys who are focused on the interests of their clients. In contrast, Congress has had the opportunity of hearing, as the records clearly show, from a broad spectrum of interests. Congress can formulate rules with the nation's interests in mind. Moreover, Congress has been developing product liability rules for over a decade and a half. The rules, of course, will only apply to cases filed after the date of enactment of the law. [49]

Arguably, Congress has acted more deliberately than some courts have. For over two hundred years, tort law had developed very slowly in the courts, without abrupt change. In current times, however, abrupt changes are occurring more frequently. [50] In addition, when courts make law, their rules are formulated only after a case has been decided by a jury. If the same "common-law" system were used to determine speeds on highways, for example,

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the signs would be turned backward and the speed limit subject to change daily - rules regarding wrongdoing would be made only after a person was given a speeding ticket. **[*1370]**

II. Principal Provisions of Liability Reform Legislation in the 104th Congress

Congress has long exercised its authority in matters of interstate commerce by enacting federal solutions to national problems. [51] The liability reform legislation considered by the 104th Congress was consistent with this traditional area of activity.

A. Fair Rules for Product Seller, Lessor, and Renter Liability

Product sellers in about thirty states that wholesale or sell a product are potentially liable for defects that they are neither aware of nor able to discover. [52] They are often drawn in as defendants in product liability cases. Product sellers, however, rarely pay the judgment. In more than ninety-five percent of the cases, the manufacturer bears responsibility for the harm. [53] The seller gets contribution or indemnification from the manufacturer, and the manufacturer ultimately pays the damages. [54]

This approach generates substantial, unnecessary legal costs. [55] As a consequence, the expense incurred by small businesses is passed on to consumers in the form of higher prices. [56] A more efficient alternative is for the claimant to sue the manufacturer directly and to sue the product seller only if it was directly at fault. [57] Approximately twenty states already have changed their laws and now hold product sellers, such as wholesalers and retailers, liable in tort only if they were negli- **[*1371]** gent (for example, misassembled the product or failed to convey appropriate warnings to customers). [58]

House Bill 956 would have held product sellers liable only for their own negligence or for a product's failure to conform to an express warranty made by the product seller. [59] A product seller, however, would have been held liable for the manufacturer's errors if the manufacturer could not be brought into court in any state where the action could have been brought or if the court determined that the manufacturer lacked funds to pay the judgment. [60] Thus, the provision would have ensured that an injured person could always sue either the manufacturer or the product seller.

The legislation also provided relief for companies that rent or lease products. [61] These companies are subject in ten states and the District of Columbia to liability for the tortious acts of their lessees and renters, even if the rental company is not negligent and there is no defect in the product. [62] In these minority of states, a rental company is held vicariously liable for the negligence of its customers simply because the company owns the product and has given permission for its use. [63]

House Bill 956 provided that companies that rent or lease products would be subject to liability in a product liability action for their own negligence, but not the negligence of those beyond their control. [64] **[*1372]**

B. Barring Claims Due to a Person's Use of Illegal Drugs or Drunkenness

In about eleven states, conduct such as abusing alcohol or drugs does not preclude a person from recovering in a product liability action, even if the drug or alcohol usage was a substantial cause of the harm. [65] For many years, product liability proposals in Congress have sought to change this law. For example, House Bill 956 provided that if the principal cause of

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an accident is the claimant's intoxification, he would not be able to recover. [66] The provision was based on a statute enacted in the State of Washington. [67]

The alcohol/drug defense represents good public policy. [68] It lets people know that if the effects of drugs or alcohol are the principal cause of an accident, they will not recover through the product liability system. [69] The alcohol/drug defense also relieves law-abiding citizens from the burden of subsidizing others' irresponsible conduct through higher consumer prices.

C. Limiting Recovery for Those Who Misuse or Alter Products

Under the current product liability system, in some instances, defendants are required to pay for harms caused by claimants who grossly misuse products then turn to the "deep pocket" for compensation when they are injured. As a result, manufacturers and responsible consumers are unfairly punished. This system reflects bad policy, and clearly deviates from traditional notions of fairness and individual responsibility.

House Bill 956 placed responsibility for the reasonable use of products where it is most effective - on the person using the product. [70] Following the law in the majority of states, [71] House Bill 956 provided that a claimant's damage award would be reduced by the amount attributable to misuse or alteration of a product if the defend- **[*1373]** ant could show that the misuse or alteration was in violation of adequate warnings or instructions, or involved a risk of harm that should have been known by an ordinary user of the product. [72]

D. Uniform Time Limits on Liability

1. Pro-Plaintiff "Discovery Rule" Statute of Limitations. - House Bill 956 would have established a two-year statute of limitations for product liability actions that would begin to run when the claimant discovered or, in the exercise of reasonable care, should have discovered both the harm that is the subject of the action and its cause. [73] This provision would have opened courthouse doors to many whose right to sue would no longer depend on which state statute happened to apply to their claim.

House Bill 956 also would have alleviated the frequent hardship to the families who have lost a loved one caused by the statute of limitation periods in state wrongful death statutes. Unlike the prevailing rule in most state wrongful death statutes, which bars claims after a certain number of years following the date of the family member's death, the bill would have preserved these claims for the "discovery" period, that is, until two years after a surviving relative discovered, or in the exercise of reasonable diligence could have discovered, the cause of his loved one's death. [74]

2. Statute of Repose. - For over a decade and a half, scores of small business owners have testified about the effect of liability for very old machine tools and durable goods. The products have been used safely for a substantial period of time and manufacturers are willing to stand behind warranties they make about how long a product will last. Nevertheless, as a result of liability from stale claims, some of these companies are, by no fault of their own, falling behind competitively because they are disadvantaged by liability rules that create an artificial preference for newer, mostly foreign, industries. [75]

Principal competitors of the United States have enacted legislation recognizing that, at some point, an outer time limit on litigation is reasonable and necessary. The new "pro-consumer" Japanese product liability law and the European Community Product Liability Directive have a repose period of ten years that covers all products. [76] In the **[*1374]** United States, a growing number of states (approximately seventeen) have enacted statutes of repose ranging from eight years to a maximum of fifteen years, with the typical repose period between ten and twelve years. [77] Recently, Congress enacted the General Aircraft

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Revitalization Act of 1994, which created a federal eighteen-year statute of repose for general aviation aircraft. [78]

House Bill 956, which was not preemptive of state statutes, elected a fifteen-year statute of repose. [79] This is fifty percent longer than the Japanese law and the European Directive, and equal in length to the longest state statute of repose, which is currently the law in the State of Texas. [80] The provision was limited to durable goods and did not apply in cases involving a "toxic harm." [81]

E. Alternative Dispute Resolution

The legal system is inaccessible to many product liability claimants because of its complexity and expense. The alternative dispute resolution (ADR) procedure provision in House Bill 956 [82] would have increased access to the legal system and sped resolution of legal disputes so that money would be distributed to claimants more quickly. **[*1375]**

House Bill 956 allowed either party to a dispute to offer to proceed pursuant to any voluntary and nonbinding ADR procedures established in the law of the state where the action is brought or under the rules of the court in which the action is maintained. [83] The legislation would have required the offer to be made within sixty days after service of the initial complaint or the applicable deadline for a responsive pleading, whichever is later. [84] There would have been no penalty on a party who refuses to proceed to ADR. [85]

The ADR provision would have been especially beneficial for persons with smaller claims, because they frequently are unable to afford or obtain lawyers to represent them in expensive courtroom litigation. Such plaintiffs more easily can secure attorneys to represent them in ADR proceedings, which are free of cumbersome rules of procedure and evidence and do not require the use of expensive expert witnesses. [86]

F. **Punitive Damages** - Clear and Basic Rules for Quasi-Criminal Punishment

1. In General. - The U.S. Supreme Court has observed that **punitive damages** have "run wild" in the United States, jeopardizing fundamental constitutional rights. [87] The Court has held that the Due Process Clause of the Fourteenth Amendment imposes a substantive limit on the size of **punitive damages** awards. [88] It has also held that **[*1376]** the Constitution provides procedural limits on when and how **punitive damages** may be awarded. [89]

Some opponents of **punitive damage** reform have obscured a very basic fact: **punitive damages** are punishment. [90] **Punitive damages** developed out of English law to serve as a "helper" to the criminal law, and the focus was, and should be on, conduct that was of such a publicly egregious nature that it should be subject to criminal punishment. [91] They are not intended to compensate people for something they have lost; that purpose is accomplished by compensatory damages. [92] Nevertheless, unlike the criminal law system, in many states there are virtually no standards for when **punitive damages** may be awarded and no clear guidelines as to their amount - good behavior is swept in with the bad. [93]

The unpredictable nature of the current system has resulted in overdeterrence and has inhibited product innovation. [94] A Conference Board study of corporate executives reported that fear of liability suits prompted thirty-six percent of the firms studied to discontinue a product and thirty percent to withhold a new product. [95] Clearly, rational rules are needed to promote innovation and responsible manufacturing practices, while at the same time providing assurances that wrongdoers will be justly punished and deterred from future misconduct.

House Bill 956 incorporated the basic elements of any criminal law. First, it defined the "crime," or the offense that deserves punishment. [96] Second, it provided for clear standards

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of proof so that judges and juries can appreciate that they are imposing punishment for reprehensible conduct, and not merely negligence. [97] Finally, and **[*1377]** most importantly, it defined the potential judgment or "sentence." [98] At present, **punitive damages** law fails these requirements, as evidenced by the Supreme Court's concern about **punitive damages** that "run wild." [99]

2. Defining When **Punitive Damages** May Be Awarded. - Under House Bill 956, **punitive damages** would have been awarded only if the plaintiff proved by "clear and convincing evidence" that the defendant violated the standard of "**conscious,** flagrant indifference to the rights or safety of others." [100] The "clear and convincing evidence" burden of proof standard represents a "middle ground" between the burden of proof standard ordinarily used in civil cases ("preponderance of the evidence"), and the criminal law standard ("beyond a reasonable doubt"). [101] It reflects the quasi-criminal nature of **punitive damages.** The standard is now law by statute or decision in twenty-eight states and the District of Columbia, [102] and has been recommended by each of the principal academic groups to analyze the law of **punitive damages** since 1979, including the American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws. [103] The Supreme **[*1378]** Court has recognized the merits of the "clear and convincing evidence" burden of proof standard in **punitive damages** cases. [104]

3. Making the Punishment Proportional to the Harm. - Perhaps most importantly, House Bill 956 put reasonable parameters on the amount of **punitive damages** awarded to help assure that punishment is proportional to harm. It permitted **punitive damages** to be awarded against larger businesses up to the greater of two times a plaintiff's compensatory damages (economic and noneconomic loss), or $ 250,000. [105] It also recognized that smaller businesses and organizations, as well as individuals, need special protection from excessive **punitive damages.** The legislation thus set forth the maximum amount of **punitive damages** recoverable against an individual or small business as the lesser of two times the amount awarded to the claimant for economic and noneconomic losses, or $ 250,000. [106] Judges would have been permitted to augment the **punitive damages** award against a larger business up to the amount of the jury verdict by finding the "proportionate" award "insufficient to punish the egregious conduct of the defendant." [107] This provision was a limited measure intended to be applied only in cases when the defendant's misconduct was extraordinarily harmful and far exceeded "**conscious,** flagrant indifference to the safety of others." [108]

The proportionality requirements in House Bill 956, as in the criminal law, would have helped ensure that the punishment is proportional to the harm. "Mainstream" academic groups, including the American Bar Association and the American College of Trial Lawyers, have recommended that **punitive damages** be awarded in proportion **[*1379]** to actual damages. [109] Furthermore, approximately one-quarter of the states have enacted legislation to address the problem of excessive **punitive damages,** most recently including Illinois, Indiana, New Jersey, North Carolina, Oklahoma, and Texas. [110] House Bill 956 did not preempt more restrictive state laws limiting **punitive damages.** [111]

4. Bifurcation. - House Bill 956 also would have made a procedural reform called "bifurcation," which a number of states have enacted. [112] At either party's request, the trial may be divided so that the proceedings on **punitive damages** would be separate from and subsequent to the proceedings on compensatory damages. Judicial economy is achieved by having the same jury determine both compensatory damages and **punitive damages** issues. **[*1380]**

Bifurcated trials are equitable, because they prevent evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by jurors and improperly considered when they are determining basic liability (for example, the net worth of a company or the wealth of a defendant). Bifurcation also helps jurors "compartmentalize" a

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trial, allowing them to more easily separate the burden of proof that is required for compensatory damage awards (proof by a preponderance of the evidence) from a higher burden of proof (proof by clear and convincing evidence) for **punitive damages.**

Recognizing these benefits, some courts have recently required bifurcation as a matter of common-law reform. [113] Other states have made similar changes through court rules or legislation. [114] This reform is supported by the American Law Institute's Reporters' Study, the American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws. [115]

G. Balanced Rules for Joint Liability

The rule of joint liability, commonly called joint and several liability, provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant will be liable for the total amount of damages. [116] The Senate Committee on Commerce, Science, and Transportation observed that the system is "unfair and [it] blunts incentives for safety, because it allows negligent actors to under-insure and puts full responsibility on those who may have been only marginally at fault." [117] Thus, a jury's specific finding that a defendant is minimally at fault is overridden and the minor player in the lawsuit bears an unfair and costly burden. [118] **[*1381]**

Joint and several liability is extremely harmful to society. For example, it has caused suppliers of raw materials and component parts to refuse to supply manufacturers of medical devices. As a result, patients who need medical devices suffer. It has also caused manufacturers of protective sporting goods equipment, such as safety helmets, to withdraw products from the market or to be chilled from introducing new products. [119] Recognizing the need for reform of this unfair doctrine, at least thirty-three states have abolished or modified the principle of joint and several liability. [120]

House Bill 956 adopted a balanced approach between those who call for the abolition of joint liability and those who wish to leave it unchecked. The legislation eliminated joint liability for "noneconomic damages" (such as damages for pain and suffering or emotional distress), while permitting the states to retain full joint liability with respect to economic losses (for example, lost wages, medical expenses, and substitute domestic services). [121] This means that the legislation would have held each defendant liable for noneconomic damages in an amount proportional to its percentage of fault for the harm. [122] This "fair share" rule was based on a joint liability reform enacted in California through a ballot initiative approved by the majority of voters in 1986. [123] The same approach was enacted by the Nebraska legislature in 1991. [124]

H. Creating Incentives for a Safe Workplace

Workers' compensation statutes have essentially two purposes: to provide an employee injured in the course of employment with a quick and inexpensive way to recover for his injury, and to maximize the incentive for employers to maintain a safe workplace. [125] In most states, however, the incentive for employers to ensure workplace safety has been substantially undermined. In these states, if an employee **[*1382]** has a successful product liability claim against a manufacturer or product seller, his employer can recover the amount of workers' compensation benefits paid to the employee from the product liability damage award, even if the employer is responsible for the injury. [126] If the employee obtains product liability damages against the manufacturer, the employer takes back the amount of workers' compensation it paid to the employee. [127] This result occurs even when the employer's negligence has been a principal cause of the accident. Workers' compensation experts have vehemently criticized this rule, because it has "set[ ] ... off a flood of confusion and litigation." [128]

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House Rpt.104-064p1 - COMMON SENSE LEGAL STANDARDS REFORM ACT OF 1995

TITLE II--PUNITIVE DAMAGES REFORM

SEC. 201. PUNITIVE DAMAGES.

(a) GENERAL RULE- Punitive damages may, to the extent permitted by applicable State law, be awarded in any civil action for harm in any Federal or State court against a defendant if the claimant establishes by clear and convincing evidence that the harm suffered was result of conduct--

(1) specifically intended to cause harm, or

(2) conduct manifesting a conscious, flagrant indifference to the rights of others.

(b) PROPORTIONAL AWARDS- The amount of punitive damages that may be awarded to a claimant in any civil action subject to this title shall not exceed 3 times the amount of damages awarded to the claimant for the economic loss on which the claimant's action is based, or $250,000, whichever is greater. The requirements of this subsection shall be applied by the court and shall not be disclosed to the jury.

(c) APPLICABILITY AND PREEMPTION- Except as provided in section 301, this title shall apply to any civil action brought in any Federal or State court on any theory where punitive damages are sought. This title does not create a cause of action for punitive damages in any jurisdiction that does not authorize such actions.

(d) BIFURCATION AT EITHER PARTY'S REQUEST- At the request of either party, the trier of fact shall consider in a separate proceeding whether punitive damages are to be awarded and the amount of such award. If a separate proceeding is requested, evidence relevant only to the claim of punitive damages, as determined by applicable State law, shall be inadmissible in any proceeding to determine whether compensatory damages are to be awarded.

SEC. 202. DEFINITIONS.

As used in this title:

(1) The term `claimant' means any person who brings a civil action and any person on

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whose behalf such an action is brought; if such action is brought through or on behalf of an estate, the term includes the claimant's decedent and if such action is brought through or on behalf of a minor or incompetent, the term includes the claimant's legal guardian.

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

(3) The term `economic loss' means any pecuniary loss resulting from harm (including the loss of earnings, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities), to the extent recovery for such loss is allowed under applicable State law.

(4) The term `harm' means any legally cognizable wrong or injury for which punitive damages may be imposed.

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

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

TITLE III--EFFECT ON OTHER LAW; EFFECTIVE DATE

SEC. 301. EFFECT ON OTHER LAW.

Nothing in title I or II shall be construed to--

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

(2) supersede any Federal law;

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

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

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

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

(7) supersede any Federal law that prescribes a specific regimen for punitive damages.

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ARTICLE: Has the Supreme Court Sounded the Death Knell for Jury Assessed **Punitive Damages?** A Critical Re-Examination of the American Jury

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SUMMARY:
... To the extent that modern juries function solely as fact finders, the assessment of a **punitive damage** award, at least as to the amount, is outside the purview of the jury. ... Many of the early Colonial Charters incorporated the right to jury trial. ... The defendant requested a jury trial, but the district court denied the request. ... The Court in BMW was not so shy, and although the Court divided by a five to four margin, BMW became the first case that "invalidated a state court **punitive damage** assessment solely because of its excessive amount. ... Applying these factors to BMW's conduct, the Court concluded that the **punitive damage** component of the verdict violated BMW's substantive due process right to be free from excessive **punitive damage** awards, and remanded the case to the Alabama Supreme Court for further proceedings. ... In an unpublished opinion, the Ninth Circuit affirmed the **punitive damage** award and determined that the district court had found that it was "proportional and fair" and that the size of the award "did not violate Cooper's due process rights. ... In order to avoid this problem, the Court concluded that a **punitive damage** award was not a "fact" because of the nature of the punitive award itself. ... First, **punitive damage** awards are not a "fact." ...

TEXT:
[*411]

LAST TERM, the United States Supreme Court drastically altered the balance of power between **judge** and jury, and the legal community barely noticed. Although Cooper Industries, Inc. v. Leatherman Tool Group, Inc. [1] is remarkable for what it does overtly - it changes the standard of review in **punitive damages** cases from an abuse of discretion review to de novo review; it is even more remarkable for what it does covertly - it arguably takes the right to assess **punitive damages** in the first instance entirely out of the hands of the jury.

According to the Court, "unlike the measure of actual damages suffered, which presents a

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courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money'; This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case. [108]

Thus, despite the Court's recognition that **punitive damages** were controversial, it concluded that the practice of awarding them was so deeply ingrained in the common law, it would violate principles of stare decisis to strike them down. Day is interesting, moreover, in that it purports to hold that **punitive damage** awards must always be left to the discretion of the jury. In the next Part, this Article explores the degree to which the Court has moved away from that position.

II. The Relative Power of the **Judge** and Jury in Awarding Damages

A. The Early Common Law

Throughout the history of using juries in civil trials, there have been questions about what is within the province of the jury and what is not. For example, there was much debate about what constituted an action in equity, which did not carry the right to a jury trial, and one at law, which did. This debate was particularly acrimonious prior to the merger that occurred with the adoption of the Federal Rules in 1938. Even after the merger, the debate continues. [109] In colonial America, juries were sometimes given the ability to decide matters of law as well as fact. [110] There are even documented cases of a **judge** **[*431]** instructing a jury to "redeliberate" and return a different verdict. [111] A particularly knotty problem, however, has been the extent to which a **judge** has the right to interfere with the amount awarded by juries, particularly where the award is punitive as opposed to compensatory.

Historically, judicial interference with jury awards and determinations has a substantial pedigree. For example, in 1655, the Upper Bench ordered a new trial in Wood v. Gunston, [112] a defamation case in which the plaintiff had been branded a "traitor." The jury awarded him £ 1500. A motion was made to set aside the verdict and grant a **[*432]** new trial. The Upper Bench granted the motion, stating "it is frequent in our books for the Court to take notice of miscarriages of juries, and to grant new tryals upon them ... ." [113] Likewise, in Ash v. Ash, [114] a daughter sued her mother for assault, battery, and false imprisonment. The plaintiff was confined for approximately two to three hours, and the jury awarded £ 2000. Chief Justice Holt overturned the award and granted a new trial, explaining that the jury thought it had "an absolute despotick power," but that he, the **judge,** "did rectify that mistake, for the jury are to try causes with the assistance of the **Judges,** and ought to give reasons when required." [115]

Nearly one hundred years later, the King's Bench reaffirmed Ash in Sharpe v. Brice. [116] In an action for trespass against a customs official, the plaintiff recovered £ 500 in damages, which the trial **judge** found to be "very excessive," and a new trial was ordered. The plaintiff argued that a new trial could not be granted in tort, as opposed to contract, actions because of excessive damages. The reasoning was that in tort actions the jury has discretion to award the appropriate amount and that, unlike contract actions, the amount of damages was not fixed. The court disagreed: "It has never been laid down, that the Court will not grant a new trial for excessive damages in any cases of tort. It was held so long ago ... that the jury have not a despotic power in such actions." [117] Rather, a new trial could be had in tort actions where "the damages [are] excessive and outrageous ... ." [118]

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Courts in the newly formed United States were more cautious about reducing jury awards, particularly where the awards were characterized as compensatory rather than punitive. [119] In Tillotson v. Cheetham [120] the plaintiff was the Secretary of State of New York. The defendant published a newspaper called the Republican Watch Tower, in which he accused the plaintiff of accepting bribes and behaving **[*433]** in a generally corrupt manner. The jury awarded $ 1,400 in damages, at which time the defendant moved for a new trial on the basis of excessive damages. The court refused, stating that it could not

interfere on account of the damages. A case must be very gross, and the recovery enormous to justify our interposition on a mere question of damages, in an action of slander. We have no standard by which we can measure the just amount and ascertain the excess. It is a matter resting in the sound discretion of a jury. [121]

Similarly, Coleman v. Southwick [122] is another defamation case in which the jury awarded $ 5,000. There, the court said,

the question of damages was within the proper and peculiar province of the jury. It rested in their sound discretion, under all the circumstances of the case, and unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption, we cannot, consistently with the precedents interfere with the verdict. [123]

The court went on to state,

the damages, therefore, must be so excessive as to strike mankind, at first blush, as being beyond all measure unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line, for they have no standard by which to ascertain the excess. [124]

Justice Spencer dissented, stating that he would "not enter upon the question of excessiveness of damages, and desire to be understood, as neither denying or supporting the doctrine advanced by a majority of the court upon that point ... ." [125]

[*434] One commentator theorizes that juridical reluctance to disturb jury awards, particularly awards arising out of slander or defamation, is as much a function of societal concerns as it is of judicial restraint.

Early nineteenth-century reporters reveal a world in which dignitary concerns - honor and a good name - were far more prized than today. The torts that vindicated those concerns - slander, libel, trivial battery, criminal conversation - were much more frequently brought and

were treated with great seriousness by the courts. **Judges** in these cases were very reluctant to interfere with damages. In case after case, courts admitted that damages were very large, larger than the court might like, but were within the jury's discretion both because they were difficult to measure and because some public policy might be served by large damages. [126]

The Supreme Court continued to remain solicitous of the jury's right to assess damages. In Parsons v. Bedford, [127] Justice Story observed that

the trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy ... . One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the Seventh Amendment of the constitution proposed by congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people. [128]

Nonetheless, incursions began to be made. The earliest instance of an American court granting a new trial on the basis of excessive damages appears to have been Kuhn v. North. [129] That case was an action for trespass in which a sheriff was made to levy on the plaintiff's property pursuant to a faulty warrant. When the jury returned a verdict for $ 950, the court stated that it could not

account for these heavy damages, except on the ground of some misconception of the jury, perhaps arising from something said in the charge, and because, though I have cautioned them against intemperate damages, the jury might have conceived, from a remark **[*435]** by me often made, that of damages they were the sole and exclusive **judges.** [130]

The court continued as follows:

And if there were any principle of law, denying the power of the court to grant a new trial on account of excessive damages, in any action of tort, I would not do it in this; but there is no such principle. If there were, it would be time to change it; such an arbitrary power, vested in any body of men, **judges** or jurors, would be intolerable. [131]

Blunt v. Little [132] was the first case to authorize the use of remittitur. [133] The action was for malicious prosecution and the jury returned a verdict for $ 2,000. Justice Story began by stating that "the court may grant a new trial for excessive damages," but only when "it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, [then] it is as much the duty of the court to interfere, to prevent the wrong ... ." [134] He concluded by stating that "the cause should be submitted to another jury, unless the plaintiff

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is willing to remit $ 500 of his damages." [135]

More than sixty years later, the Supreme Court finally blessed the use of remittitur in Northern Pacific Railroad Co. v. Herbert. [136] There, the defendant argued that remittitur was improper because it invaded the province of the jury. The Court responded that

the exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict was a matter within the discretion of the court. [The trial court] held that the amount found was excessive, but that no error had been committed on the trial. In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could, therefore, be properly allowed to stand. [137]

The practice of remittitur came under constitutional attack in Arkansas Valley Land & Cattle Co. v. Mann. [138] In particular, the defendant **[*436]** argued that remittitur deprived him of his Seventh Amendment right to jury trial. In response, the Court held that

to make the decision of the motion for a new trial depend upon a remission of part of the verdict is, in effect, a re-examination by the court, in a mode not known at the common law, of facts tried by the jury and therefore was a violation of the Seventh Amendment of the constitution. [139]

The Court further explained:

The practice which this court approved in Railroad Co. v. Herbert is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury, and grants a new trial, where the damages are palpably or outrageously excessive. But, in considering whether a new trial should be granted upon that ground, the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate, before passing upon the motion for a new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial, unless, by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give him any cause for complaint. Notwithstanding such remission, it is still open to him to show, in the court which tried the case, that the plaintiff was not entitled to a verdict in any sum, and to insist, either in that court or in the appellate court, that such errors of law were committed as entitled him to have a new trial of the whole case. [140]

Judges were not given a totally free reign with respect to remittitur, however. In Kennon v. Gilmer, [141] the jury returned a verdict for actual damages in the amount of $ 20,000 and medical expenses of $ 750. The defendant appealed and the Supreme Court of Montana

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reduced the award by half. The United States Supreme Court held that this procedure violated the Seventh Amendment. It held that the proper procedure was remittitur or new trial, but that the reviewing court could not simply substitute its own interpretation of the proper amount of the award. [142]

Toward the end of the nineteenth century, the Supreme Court examined the role of the **judge** and jury in awarding damages, and came down squarely on the side of the jury. In Barry v. Edmunds, [143] the **[*437]** plaintiff attempted to satisfy a lien against property arising out of unpaid back taxes. He attempted to pay, in part, with coupons issued by the State of Virginia. The tax collector refused the tender and levied on the plaintiff's property by forcibly removing a horse, which the plaintiff claimed was worth more than twice what he owed. Prior to the levy, the Court had held that payment in the form of the state's tax receivable coupons was sufficient to extinguish the debt, but Virginia's legislature then enacted a statute ordering the tax collector to levy against the property of a tax payer who attempted to use the coupons.

Eventually the defendant, in his role as tax collector, advertised throughout the county that the plaintiff was a delinquent taxpayer, and that his property would be sold at public auction to satisfy the debt, which was viewed by the plaintiff as defamation. He brought suit in federal court, which declined jurisdiction because the damages could not, in the **judge's** view, exceed the statutory minimum of $ 500. In reversing, the Court held that the jury had broad discretion to impose "exemplary, punitive, or vindictive damages." [144] The Court then made the following, rather sweeping, pronouncement:

For nothing is better settled than that, in such cases as the present, and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict ... . [A] verdict will not be set aside in a case of tort for excessive damages "unless the court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence, or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated," that is, "unless the verdict is so excessive or outrageous," with reference to all the circumstances of the case, "as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them." In no case is it permissible for the court to substitute itself for the jury, and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice, which the jury itself is the appointed constitutional tribunal to award. [145]

B. Twentieth Century Cases

Notwithstanding the broad language of Edmunds, during the course of the twentieth century, the Supreme Court continued to make incursions into the jury's historically powerful role in American **[*438]** jurisprudence. This move was precipitated by a fundamental shift in the way the Court viewed the method by which it would determine what questions would be left to a jury. From the adoption of the Seventh Amendment, the Court typically used a historical test. In United States v. Wonson, [146] Justice Story, while riding circuit, [147] heard an action for a debt incurred by the defendant pursuant to the Embargo Supplementary Act in which the jury returned a defense verdict, and the United States appealed.

Interpreting the Seventh Amendment, Justice Story stated that the reference to "common

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law" refers to English common law: "Beyond all question, the common law here alluded to is not the common law of any individual state (for it probably differs in all), but is the common law of England, the grand reservoir of all our jurisprudence." [148] He elaborated, contending that, "according to the rules of the common law the facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court, before which the suit is depending, for good cause shown ... ." [149]

Nonetheless, the Court began to use procedural devices to take verdicts from juries and began to take a functional, as opposed to historical, view of the role of the jury. For example, at issue in Fidelity & Deposit Co. of Maryland v. United States [150] was a rule of civil procedure that was a precursor to a summary judgment proceeding. The rule allowed plaintiffs in contract actions to submit affidavits establishing the existence of the contract, and the failure to pay. If the defendant could submit a counter-affidavit showing valid grounds of defense, then the case went to the jury; if not, judgment for the liquidated amount was entered for the plaintiff. Here, the defendant failed to submit a sufficient affidavit and the trial court entered judgment.

[*439] On appeal, the plaintiff argued both that the rule exceeded the power of the court to promulgate it and that it violated the Seventh Amendment. The Court disagreed:

If it were true that the rule deprived the plaintiff in error of the right of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleading as means to delay the recovery of just demands. [151]

Courts were still not permitted, however, to totally substitute their judgment for that of the jury. Slocum v. New York Life Insurance Co. [152] was an action to recover benefits under a life insurance policy. The evidence clearly established that the policy had lapsed for non-payment of premiums. At trial, the defendant moved for a directed verdict and, after the jury returned a verdict for the plaintiff, for judgment notwithstanding the verdict. Both motions were denied. The defendant appealed to the circuit court which reversed the plaintiff's verdict and entered judgment for the defendant pursuant to an applicable state statute. The plaintiff then appealed to the United States Supreme Court alleging that the procedure violated the Seventh Amendment, and the Court agreed.

The Court stated,

while on the trial in the circuit court, the jury returned a general verdict for the plaintiff, the Circuit Court of Appeals on an examination of the evidence concluded that it was not sufficient to sustain the verdict, and on that ground directed a judgment for the defendant. In other words, the Circuit Court of Appeals directed a judgment for one party when the verdict was for the other, and did this on the theory, not that the judgment was required by the state of the pleadings, but that it was warranted by the evidence. It will be perceived, therefore, that the court, although practically setting the verdict aside, did not order a new trial, but assumed to pass finally upon the issues of fact presented by the pleadings and to direct a judgment accordingly. If this was an infraction of the Seventh Amendment, it matters not that it was in conformity with the state statute, or with the practice thereunder in the courts of the State, for neither the statute nor the practice could be followed in opposition to the Amendment, which, although not applicable to proceedings in the courts of

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the several States, is controlling in the Federal courts. [153]

[*440]

The Court here appears to have returned to the historical test that was beginning to be challenged by the more functional approach. This is evidenced by the fact that the Court undertook a lengthy examination of the procedure available at "common law" for non-suit. It stated that its decisions regarding the right to jury trial established that the jurisprudence

affords no justification whatever for overruling or departing from the repeated decisions of this court, reaching back to the beginning of the last century, wherein it uniformly has been held (a) that we must look to the common law for a definition of the nature and extent of the right of trial by jury which the Constitution declares "shall be preserved;" (b) that the right so preserved is the right to have the issues of fact presented by the pleadings tried by a jury of twelve, under the direction and superintendence of the court; (c) that the rendition of a verdict is of the substance of the right, because to dispense with a verdict is to eliminate the jury, which is no less a part of the tribunal charged with the trial than is the court; and (d) that when the issues have been so tried and a verdict rendered they cannot be re-examined otherwise than on a new trial granted by the court in which the first trial was had, or ordered by the appellate court for some error of law affecting the verdict. [154]

However, subsequent cases were beginning to once again move away from the historical approach. In Gasoline Products Co. v. Champlain Refining Co., [155] the Court determined that a remand on the issue of damages alone would not violate the Seventh Amendment. The Court stated that

we are not now concerned with the form of the ancient rule. It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance. All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law. Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure. It does not prohibit the introduction of new methods for ascertaining what facts are in issue, or require that an issue once correctly determined, in accordance with the constitutional command, be tried a second time, even though justice demands that another distinct issue, because erroneously determined, must again be passed on by a jury... . Here we hold that where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a **[*441]** new trial of that issue even though another and separable issue must be tried again. [156]

Then came the oddity that is Dimick v. Schiedt. [157] There, the plaintiff sought damages for injuries arising out of an automobile accident. The jury returned a verdict for $ 500 and the plaintiff moved for a new trial alleging, among other things, that the damages were inadequate. The trial court ordered a new trial unless the defendant would consent to an increase of the damages to $ 1,500. The defendant consented, and plaintiff's motion for new trial was denied. The defendant then appealed, and the circuit court reversed, holding that additur [158] violated the Seventh Amendment. A sharply divided Supreme Court affirmed the court of appeals. The Court began by stating that "in order to ascertain the scope and

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meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." [159] Once again, the Court appeared to be retreating back to the historical approach.

The plaintiff argued that if remittitur was constitutional, as held in Blunt v. Little and its progeny, so too must additur be constitutional. Once again, the Court disagreed.

In the light reflected by the foregoing review of the English decisions and commentators, it, therefore, may be that if the question of remittitur were now before us for the first time, it would be decided otherwise. But, first announced by Mr. Justice Story in 1822, the doctrine has been accepted as the law for more than a hundred years and uniformly applied in the federal courts during that time. And, as it finds some support in the practice of the English courts prior to the adoption of the Constitution, we may assume that in a case involving a remittitur, which this case does not, the doctrine would not be reconsidered or disturbed at this late day. [160]

Noting that "maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care[,]" [161] the Court declared **[*442]** that it would not permit a "doubtful precedent [to be] extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of the fundamental law of the land." [162]

In any event, the Court also found a constitutional distinction in the principles of remittitur and additur.

Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess - in that sense that it has been found by the jury - and that the remittitur has the effect of merely lopping off an excrescence. But, where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict. [163]

To hold otherwise, concluded the Court, "is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept 'an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess.'" [164]

Vacillating yet again, the Court returned to the functional approach in Galloway v. United States, [165] a case in which the Court authorized the use of the directed verdict, its rhetoric in Slocum notwithstanding. The plaintiff sought benefits under a military insurance policy, claiming total and permanent disability. The trial court directed a verdict for the defendant on the grounds that there was **[*443]** insufficient evidence of "total and permanent" disability because, although the plaintiff presented evidence of insanity beginning in 1919 and ending in 1941, there were gaps during which he did not meet his burden of showing "continuous" insanity. [166]

After examining the evidence, the Court concurred with this conclusion, but then embarked on a lengthy exposition of its method of interpreting the Seventh Amendment, which was

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decidedly functional in its approach:

The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were "the rules of the common law" then prevalent, including those relating to the procedure by which the **judge** regulated the jury's role on questions of fact, crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries. In 1791 this process already had resulted in widely divergent common-law rules on procedural matters among the states, and between them and England. And none of the contemporaneous rules regarding judicial control of the evidence going to juries or its sufficiency to support a verdict had reached any precise, much less final, form. In addition, the passage of time has obscured much of the procedure which then may have had more or less definite form, even for historical purposes. [167]

Ultimately, the Court summed up its approach by stating that "the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions." [168] The Court's approach led Justice Black to lament, in dissent, that "today's decision marks a continuation of the gradual process of judicial erosion which in one hundred fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." [169]

[*444]

C. Judicial Involvement in Assessing Penalties

The preceding section has demonstrated that over the course of time, the Court has been increasingly willing to curtail some of the jury's power through procedural devices and the like. In a separate line of cases, the Court has considered the specific topic at hand - whether **judges,** rather than juries, are the appropriate persons to assess civil statutory penalties and **punitive damages.** As a starting point, recall that the Court in Day v. Woodworth [170] stated that **punitive damage** assessments have "always [been] left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." [171]

However, where statutory civil penalties are concerned, the courts have been less solicitous. Swofford v. B&W, Inc. [172] is illustrative. Swofford was a patent infringement case in which the plaintiffs contended that they were entitled to have a jury assess the amount of **punitive damages.** However, the patent statute at issue explicitly authorized the **judge** to assess damages in the absence of a jury. [173] In interpreting the statute, the Fifth Circuit observed that it had found "no authority for the proposition that the parties enjoyed a constitutional right to jury trial on the award and amount of exemplary damages." [174] The court then concluded that

we do not agree that a reading of these cases leads to the conclusion that exemplary damages and attorneys' fees are jury questions as of right. The reason is that exemplary damages and attorneys' fees are not money claims triable by jury, although they are awarded in a "legal" action. [175]

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Likewise, in Tull v. United States, [176] the government brought suit against a developer for dumping fill on wetlands in violation of the **[*445]** Clean Water Act. A provision of the act authorizes relief in the form of permanent or temporary injunctions and provides that violators of the Act "shall be subject to a civil penalty not to exceed $ 10,000 per day." [177] As a consequence of this provision, the government sought over $ 22 million in civil penalties. The defendant requested a jury trial, but the district court denied the request. The court, after a bench trial, concluded that the defendant was guilty of illegal dumping and fashioned a remedy that had both legal and equitable components. The total amount of civil penalties assessed by the district court was $ 325,000.

The Fourth Circuit affirmed over a dissent and the Supreme Court granted certiorari to resolve a split among the circuit courts. The Court first characterized the civil penalties as being of a "punitive nature" [178] and held that although the petitioners had the right to jury trial to determine liability, a **judge** was the appropriate person to fix the amount. The Court started with the legislative history of the Clean Water Act and noted that "the legislative history ... [shows] that Congress intended that trial **judges** perform the highly discretionary calculations necessary to award civil penalties after liability is found. We must decide therefore whether Congress can, consistent with the Seventh Amendment, authorize **judges** to assess civil penalties." [179]

Resorting once again to the functionality test, the Court observed that "the Seventh Amendment is silent on the question whether a jury must determine the remedy in a trial in which it must determine liability." [180] The Court concluded that the issue turned on "whether the jury must shoulder this responsibility as necessary to preserve the 'substance of the common-law right of trial by jury,'" [181] and concluded that a jury is not necessary for that purpose. The Court stated, "nothing in the Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial. Instead, the language defines the kind of cases for which jury trial is preserved, namely suits at common law." [182] While conceding that there is "almost no direct evidence concerning the intention of the framers of the Seventh Amendment itself," the Court asserted that "we have **[*446]** been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial." [183]

The Court also rested its decision on the rationale that Congress has authority to set limits on civil penalties.

Since Congress itself may fix the civil penalties, it may delegate that determination to trial **judges.** In this case, highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act. These are the kinds of calculations traditionally performed by **judges.** [184]

Relying on Tull, the Fourth Circuit held that **judges** may substitute their judgment for the jury's on the amount of damages assessed. [185] In Shamblin's Ready Mix v. Eaton Corp., a jury returned a verdict in favor of the plaintiff and awarded $ 600,000 in **punitive damages.** The court of appeals reversed and remanded for a new trial, holding that the damages were excessive. The second jury awarded $ 650,000 in **punitive damages** and the defendant again appealed on the ground that the punitive awards were excessive. On the second appeal, the defendants urged the court of appeals to "determine the amount of **punitive damages** rather than remand for yet a third trial." [186] The plaintiffs, however, maintained that the Seventh Amendment required a remand so a third jury could determine the

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question of historical or predictive fact, the level of **punitive damages** is not really a 'fact' 'tried' by the jury." [2] If one takes this statement at face value, litigants no longer have a right to have a jury determine the amount of **punitive damages.** To the extent that modern juries function solely as fact finders, [3] the assessment of a **punitive damage** award, at least as to the amount, is outside the purview of the jury. Irrespective of whether, from a normative standpoint, [4] this is a desirable state of events, it is now the law of the land in federal courts. [5]

[*412] This Article undertakes to trace the historical events that led both to the rise of the jury and the case law which has, over time, eroded the jury's power, culminating with the Supreme Court's decision in Cooper. This Article likewise examines the constitutional tension between the Seventh and Fourteenth Amendments that has been the focus of the Court's **punitive damages** jurisprudence in recent years, and proposes a framework which best utilizes the populist voice of the jury and the technical expertise of the **judge,** thereby maximizing the institutional strengths of each.

Accordingly, Part I focuses on the historical development of **punitive damages** and the jury's function in awarding them. Particular attention is paid to the origins of the jury, the adoption of the Seventh Amendment and the historical pedigree of **punitive damages** award. Part II examines the division of power between the **judge** and jury in awarding **punitive damages** and surveys the Supreme Court's incursions in recent years into the role of the jury. Interestingly, during this period the Court shifted from a traditional, historical analysis in which the jury's power was paramount, to a functional approach which focused on the "fundamental" characteristics of the jury. This, in turn, led to increasing judicial control over jury verdicts in general, and **punitive damages** awards in particular. Part III examines the constitutionality of **punitive damages** awards subjected to due process attacks, both from a procedural and a substantive standpoint. Part IV is an analysis of the Court's decision in Cooper, including a critical examination of the rationale of the case. Finally, Part V suggests a framework for federal district courts to employ when a plaintiff requests **punitive damages** in a civil case.

I. Historical Perspective

A. The Rise of the Jury

Although the origins of the first use of juries is a topic of considerable scholarly debate, [6] it appears that the first juries to perform fact finding and adjudicatory functions were created in England by Henry II, who came to the throne in 1154. [7] Henry II implemented the jury system through a series of statutory enactments that provided a remedy **[*413]** for dispossessed free-holders. [8] These enactments became known collectively as the assize of novel disseisin, and permitted claimants to submit their cause to a jury composed of persons with actual knowledge of the case. [9] That jurors were required to have actual knowledge of the facts of the case suggests that juries functioned as witnesses as much as fact finding bodies. [10]

The jury's dual role as fact finder and witness, however, appears to have died out by the mid-seventeenth century when it became "a punishable offense to contact or inform jurors of any facts or law relating to an impending trial." [11] By this point in history, the civil jury trial had taken on the more familiar format of jurors weighing evidence based solely upon in-court testimony. [12]

Whatever the jury's origins or original functions, it was so firmly ingrained in England's common law that the right to jury trial was given constitutional proportions when King John signed the Magna Carta on June 15, 1215. The Magna Carta provided:

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appropriate amount to award in **punitive damages.** The court stated that the issue was whether the Seventh Amendment "requires that the amount of **punitive damages** be determined by a jury." [187]

The court began its analysis by noting that its sister circuits had "reduced the amount of **punitive damages** without remanding for a new trial." [188] Although the court acknowledged that in Kennon v. Gilmore [189] the Supreme Court had held that the Seventh Amendment **[*447]** precludes a **judge** from substituting his or her judgment for the jury's with respect to compensatory damages, it held that **punitive damages** were fundamentally different from compensatory damages, and, therefore, Kennon did not apply. [190]

The purpose of compensatory damages is to make the plaintiff whole by vindicating a private wrong. Assessing the extent of harm is appropriately within the province of the jury in its capacity of fact finder. In contrast, **punitive damages** serve a public purpose. **Punitive damages** "are not compensation for an injury. Instead they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." [191]

Further, the court held that, consistent with the Supreme Court's halting trend toward the functional test, "the measure of damages in a cause of action for a tort is not a fundamental element of a trial. The proper measure is a function of law not of facts found by a jury." [192] Finally, relying on Tull, the court stated that "there is no principled distinction between civil penalties and the modern concept of **punitive damages.** Both serve the same purposes to deter and punish proscribed conduct." [193] Thus, the court held that "the Seventh Amendment does not require that the amount of **punitive damages** be assessed by a jury." [194]

Shamblin's Ready Mix, however, turned out to have a short shelf life. Just two years later, the Fourth Circuit reversed itself and overruled Shamblin's Ready Mix in Defender Industries, Inc. v. Northwestern Mutual Life Co. [195] The court began by distinguishing Tull, the case upon which the previous panel had relied. The court noted that the Shamblin's Ready Mix court had "reasoned that **punitive damages** are similar to civil penalties and, therefore, a determination of the appropriate amount is not a fundamental element of a jury trial." [196] The Shamblin's Ready Mix court did concede that Tull contained "some rather broad language," but distinguished Tull on the ground that the Court was there deciding the issue of whether determining the amount of a civil penalty could be delegated to the trial **judge** without the necessity of a jury determination. Ultimately, the Shamblin's Ready Mix panel concluded that "the Tull decision cannot stand for the **[*448]** proposition that a plaintiff bringing a state common-law cause of action does not have a right to a jury determination of the amount of **punitive damages.**" [197]

Relying on Kennon v. Gilmore, which the Shamblin's Ready Mix court had been careful to distinguish, the Defender Industries court concluded that, as Kennon made clear, the Seventh Amendment "guarantees a [right to a] jury determination of the amount of tort damages." [198] The Defender Industries court made no attempt to address the distinction made in Shamblin's Ready Mix between compensatory and **punitive damages,** but instead relied on two Supreme Court cases decided after Shamblin's: Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc. [199] and Pacific Mutual Life Insurance Co. v. Haslip. [200] These decisions, according to the Defender Industries court, "emphasize the fundamental character of a jury assessment of the amount of **punitive damages.**" [201] In overruling Shamblin's Ready Mix, the court stated "an assessment by a jury of the amount of **punitive damages** is an inherent and fundamental element of the common-law right to trial by jury." [202] Accordingly, the court held that the Seventh Amendment guarantees a litigant the right to a jury determination of the amount to be awarded as **punitive damages.** [203]

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D. State Legislative Involvement in Assessing Penalties

There have also been legislative attempts to mandate judicial assessment. For example, in 1987 Ohio lawmakers enacted legislation which provided that "in a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court." [204] A few years later, however, in Zoppo v. Homestead Insurance Co., [205] the Ohio Supreme Court, determined that the legislation violated the Ohio Constitution. [206] The **[*449]** court stated that the right to jury trial "cannot be invaded or violated by either legislative act or judicial order or decree." [207] The court found that because the right to jury assessment of **punitive damages** "stems from the common law and is encompassed within the right to trial by jury," [208] any attempt to remove damage assessment from the jury violated the Constitution.

The Ohio legislature, however, was convinced that tort reform in general, and judicial oversight of **punitive damages** assessment in particular, was necessary. As a result, in 1999, it enacted a sweeping tort reform bill that affected eighteen different titles, thirty-eight chapters, and over one hundred different sections of the Revised Code. [209] Although the bill, as enacted, was found unconstitutional for a variety of reasons, [210] the court paid particular attention to the amended version of the code section found problematic by the Zoppo court. The amended version removed the requirement that **punitive damages** be judicially assessed, but provided that **punitive damages** should be capped. In holding that this part of the overall tort reform was unconstitutional, the court stated that "a statute that allows the jury to determine the amount of **punitive damages** to be awarded but denies the litigant the benefit of that determination stands on no better constitutional footing than one that precludes the jury from making the determination in the first instance." [211]

The Kansas Supreme Court reached the opposite conclusion. At issue was a statute which provided that, to the extent that the case was one in which **punitive damages** were recoverable, the jury's role was to decide whether to award them in the first instance. If the jury voted to award **punitive damages,** then the amount was to have been determined by the **judge** in a separate hearing outside the presence of the jury. [212] After conducting a survey of common law practice, the court **[*450]** concluded that **punitive damages,** unlike compensatory damages, did not give rise to a factual question and that **punitive damages** were not considered a remedy at common law, but were rather merely "incident" to a cause of action. [213] While conceding that juries had historically assessed **punitive damages,** [214] the court further concluded that a claim for **punitive damages** was not a right at common law. [215]

Having concluded that plaintiffs do not have a common law "right" to **punitive damages,** the court reasoned that the legislature could constitutionally abolish **punitive damages** altogether. This conclusion led the court to reason that if the legislature had the power to abolish **punitive damages,** it also had the power to do something less drastic, including requiring judicial assessment of **punitive damages.** [216] Accordingly, the court held the Kansas legislation was constitutional under both the United States Constitution and the Kansas Constitution. [217]

III. The Due Process Attacks

In addition to the litigation surrounding the respective roles of the **judge** and jury in assessing **punitive damages,** the concept of awarding **punitive damages** itself has come under substantial constitutional attack on due process grounds in recent years. In Pacific Mutual **[*451]** Life Insurance Co. v. Haslip, [218] the Supreme Court first addressed the constitutional limits on **punitive damages** awards. In Haslip, the plaintiffs, Cleopatra Haslip and several coworkers, brought suit against Pacific Mutual Life Insurance Company and one

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of its agents. The plaintiffs alleged that the agent had embezzled premiums that were to have been forwarded to the company, causing their insurance policies to lapse. When Haslip was hospitalized, the company refused to honor her policy and she was forced to pay the hospital and physician's bills herself. When she was unable to do so, her account was forwarded to a collection agency, adversely affecting her credit rating.

In charging the jury on **punitive damages,** the trial court instructed the jury that imposition of **punitive damages** was discretionary and entirely within the purview of the jury. The trial court further instructed the jury that should they choose to award such damages, they must consider "the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." [219] The jury returned a general verdict in the plaintiffs' favor in the amount of $ 1,040,000 which included **punitive damages** in the amount of $ 840,000. The defendant appealed to the Alabama Supreme Court, which affirmed the award. [220]

In the United States Supreme Court, the defendant argued that the common law procedure used in Alabama, which gave juries unlimited **[*452]** discretion in determining the amount awarded, as evidenced by the jury instructions, violated its right to due process under the Fourteenth Amendment. By a seven to one margin, [221] the Court upheld the award, but for differing analytical reasons. The majority concluded that the award was valid first because juries had unbounded discretion over **punitive damages** awards at the time that the Fourteenth Amendment was adopted. Having made that determination, the second prong of the analysis concluded that the award should be upheld because Alabama's procedures were not entirely irrational. [222]

With respect to the first prong, the court recalled its prior precedent that recognized juries as the arbiters of **punitive damages** awards.

Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable. [223]

In light of this long historical practice, the Court declared that it could not conclude that the process was "so inherently unfair as to deny due process and be per se unconstitutional." [224] However, the Court expressed its concern over jury verdicts that "ran wild" and allowed that "unlimited [jury] discretion ... in the fixing of **punitive damages** may invite extreme results that jar one's constitutional sensibilities." [225] The Court refused to adopt a "mathematical bright line" regarding **punitive damages** awards, but stated that "general concerns of reasonableness" properly entered into the "constitutional calculus." [226]

With these general guidelines in mind, the Court examined Alabama's procedures and determined that the Haslip jury's discretion had been restrained in a reasonable fashion. It found that the jury instructions simultaneously advanced a legitimate state interest while protecting the defendant's right to "rational decision making." [227] The Court found that Alabama's procedures were constitutionally permissible not only because the jury instructions constrained the jury's discretion, but also because jury awards were subject to a further constitutional check in the appellate courts. The Court cited with approval **[*453]** the post trial procedures mandated by the Alabama Supreme Court in Hammond v. City of Gadsden [228] and noted that the Alabama Supreme Court undertook a comparative analysis to "ensure that the award does 'not exceed an amount that will accomplish society's goals of punishment and deterrence.'" [229] Although the Court expressed some concern that the amount awarded exceeded "200 times the out of pocket expenses" of the plaintiff, it

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nonetheless ultimately concluded that the defendant "had the benefit of the full panoply of Alabama's procedural protections" and the award was therefore constitutional. [230]

Lastly, the Court announced a series of factors to be taken into consideration in reviewing a **punitive damages** award:

(a) whether there is a reasonable relationship between the **punitive damage** award and the harm likely to result from the defendant's conduct ... ; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct ... . [231]

The Court walked a fine line in its due process analysis. Although the majority's holding was grounded on procedural due process, its reference to "fundamental fairness" and "general reasonableness" left open the possibility that an award could be challenged on substantive, as opposed to procedural, due process grounds. This was not lost on Justice Scalia, who concurred in the judgment, but would have limited the constitutional review to whether certain procedural safeguards were in place. [232]

The sole dissenter was Justice O'Connor, who concluded that the jury instructions did not limit the jury's discretion, but rather required a jury to make only two decisions: "(1) whether or not to impose **punitive [*454] damages** against the defendant, and (2) if so, in what amount." [233] She stressed that the instructions informed the jury that "imposition of **punitive damages** is entirely discretionary with the jury." [234] In Justice O'Connor's view the instructions were impermissibly "vague" in that they "suggest[ ] no criteria on which to base the exercise of that discretion" and that the instructions, therefore, "as much permits a determination based upon ... the color of the defendant's skin as upon a reasoned analysis of the offensive conduct." [235] Accordingly, Justice O'Connor would have stricken the Alabama common law **punitive damage** scheme as void for vagueness.

The next case of constitutional proportions heard by the Court was TXO Production Corp. v. Alliance Resources Corp., [236] a case which made "explicit what was implicit in Haslip" [237] - a substantive due process right to be free from "grossly excessive" **punitive damages** awards. [238] In this case, TXO brought suit to quiet title as to oil and gas development, and Alliance brought a counterclaim for slander of title. The jury awarded Alliance $ 19,000 in actual damages and $ 10 million in **punitive damages.** A sharply divided Court upheld the award. [239] Justice Stevens, joined by Chief Justice Rehnquist and Justice Blackmun, wrote the plurality opinion, holding that the proper inquiry is "whether there is a reasonable relationship between the **punitive damages** award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred." [240]

The Court observed that had TXO been successful in its scheme, it would have enjoyed a massive reduction in its royalty obligations to Alliance, and therefore, the punitive award, though disproportionate to the compensatory award, was warranted. [241] Moreover, because TXO's behavior constituted a substantial threat to other third parties, the "dramatic disparity" between the amounts did not render the award so "grossly excessive" as to violate due process. [242] And although this analysis clearly speaks to substantive, rather than procedural concerns, Justice Stevens felt compelled to write:

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We do not suggest that a defendant has a substantive due process right to a correct determination of the "reasonableness" of a **punitive damages** award ... . State law generally imposes a requirement that **punitive damages** be "reasonable." A violation of a state law "reasonableness" requirement would not, however, necessarily establish that the award is so "grossly excessive" as to violate the Federal Constitution. [243]

This analysis, of course, begs the question and may even be disingenuous. [244] After all, the substantive due process analysis had its genesis in Haslip in which the Court referred to "general reasonableness" and "fundamental fairness." [245]

In his concurrence, Justice Scalia reiterated that, in his view, substantive due process should not be employed to scrutinize the size of the award. Rather, his view, first stated in Haslip, is that the due process right associated with **punitive damages** awards refers to a procedural rather than a substantive due process right. Further, he sees little distinction between the "reasonableness" requirement applicable in many states and the "grossly excessive" constitutional standard:

To say (as I do) that "procedural due process" requires judicial review of **punitive damages** awards for reasonableness is not to say that there is a federal constitutional right to a substantively correct "reasonableness" determination - which is, in my view, what the plurality tries to assure today ... . Judicial assessment of [the] reasonableness [of **punitive damages** awards] is a federal right, but a correct assessment of their reasonableness is not. [246]

Thus, Justice Scalia contends that reviewing courts should never take into account the amount of the award; the only inquiry should be whether the process was fair.

[*456] In a lengthy dissenting opinion, Justice O'Connor takes the opposite position, contending that "the frequency and size of [punitive] awards have been skyrocketing," [247] thereby implying that some mechanism must be used to reign them in. Her principle concern, as it was in Haslip, is that juries are given insufficient or incomprehensibly vague instructions which establish no articulable standard for juries to follow when awarding damages. She contends that the mechanisms for imposing **punitive damages** "is rapidly becoming an arbitrary and oppressive system" [248] which resulted in the "monstrous award" [249] imposed upon TXO. In Justice O'Connor's view, where juries receive only "vague and amorphous guidance" [250] with respect to **punitive damages,** the risk that they will return a verdict based upon "prejudice, bias and caprice remains a real one ... ." [251] She reiterates that "influences such as caprice, passion, bias, and prejudice are antithetical to the rule of law. If there is a fixture of due process, it is that a verdict based on such influences cannot stand." [252] Finally, Justice O'Connor was concerned that there was little meaningful appellate review of the jury's award, and took particular issue with the West Virginia Supreme Court's treatment of the case. [253]

The issue of appellate review was again raised in Honda Motor Co., Ltd. v. Oberg. [254] In that case, the plaintiff was riding an all-terrain vehicle, manufactured and sold by defendant, when the vehicle overturned and injured the plaintiff. The jury found for the plaintiff, and awarded compensatory damages in the amount of $ 919,390.39 and **punitive damages** in

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the amount of $ 5,000,000. [255] The defendant appealed to the Oregon Court of Appeals, arguing that the punitive award violated its due process rights because the award was grossly excessive, and was the product of standardless jury discretion. The defendant also contended that the Oregon statutory scheme effectively precluded appellate review of punitive awards "unless the court can **[*457]** affirmatively say there is no evidence to support the verdict." [256] After the defendant failed to prevail in the Oregon courts of appeal, the United States Supreme Court granted certiorari to consider whether Oregon's limited judicial review of **punitive damages** awards was consistent with due process. [257]

The Court began by recognizing that its "recent cases have ... imposed a substantive limit on the size of **punitive damages** awards," but concluded that the case before the Court did not concern the standard that should be used to identify unconstitutionally excessive awards. [258] Instead, the Court was focused on the procedural safeguards, which, in the Court's view, were necessary to ensure that **punitive damages** were not imposed arbitrarily in violation of the defendant's procedural due process rights. In particular, the Court undertook review to determine whether it was procedurally infirm to completely abrogate the right to appellate review of a **punitive damages** award. [259]

In answering that question, the Court looked first to whether the procedure in question deviated from that established at common law, [260] and concluded that "judicial review of the size of **punitive damages** awards has been a safeguard against excessive verdicts for as long as **punitive damages** have been awarded." [261] Citing to its decisions in Haslip and TXO, the Court stated that where an award was subjected to meaningful and adequate review by the trial court and subsequent appellate review, it should be given a "strong presumption of validity." [262] The negative inference, of course, is that in the absence of such procedural protections, the verdicts will be suspect.

The Court then undertook a comprehensive review of the common law cases, beginning with Huckle v. Money, [263] in which the court did not grant a new trial but recognized its ability to do so, and ending with an observation that in "the federal courts and in every State, except Oregon, **judges** review the size of damages awards." [264] Accordingly, the Court concluded that Oregon's procedure did not follow common law procedures because Oregon courts were permitted to **[*458]** review awards in only a few narrow instances, [265] and were expressly forbidden by the Oregon Supreme Court's interpretation of Oregon's constitutional provisions to order a new trial based solely on the ground that the award is excessive. [266]

Having determined that the Oregon procedures deviate from the common law norm, the Court then scrutinized the "constitutional implications of [the State's] deviation from established common law procedures." [267] The Court concluded that the "implications" were fatal to Oregon's constitutional scheme:

While Oregon's judicial review ensures that **punitive damages** are not awarded against defendants entirely innocent of conduct warranting exemplary damages, Oregon, unlike the common law, provides no assurance that those whose conduct is sanctionable by **punitive damages** are not subjected to **punitive damages** of arbitrary amounts. What we are concerned with is the possibility that a culpable defendant may be unjustly punished; evidence of culpability warranting some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing. [268]

Harkening back to its Haslip/TXO "presumption of validity," the Court went on to elaborate that "Oregon's abrogation of a well-established common-law protection against arbitrary

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deprivations of property raises a presumption that its procedures violate the Due Process Clause. As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." [269] The Court concluded:

Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences. Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger. Oregon has removed that safeguard without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time. For these reasons, we hold that Oregon's denial **[*459]** of judicial review of the size of **punitive damages** awards violates the Due Process Clause of the Fourteenth Amendment. [270]

Against the backdrop of Haslip, TXO, and Oberg came the Court's landmark decision in BMW of North America v. Gore. [271] Although some commentators suggest that BMW "marks the official recognition of a whole new area of constitutional analysis, the substantive due process right to be free from unreasonably large **punitive damages** awards," [272] that ground was already broken by TXO. [273] In TXO, the Court at least implied that there was a substantive component to the due process analysis in **punitive damages** awards review, but simply found that the award at issue there did not violate that standard. The Court in BMW was not so shy, and although the Court divided by a five to four margin, BMW became the first case that "invalidated a state court **punitive damage** assessment solely because of its excessive amount." [274]

At issue in BMW was Ira Gore's assertion that he had been defrauded by BMW's practice of retouching the paint of new cars damaged in transit and sold as new. BMW acknowledged that it had adopted a "nationwide policy" of repairing any damage that did not exceed three percent of the price of the vehicle and then delivering it as new, without informing either the dealer or the customer that the repairs had been made. [275] Bringing suit in an Alabama state court, Gore prayed for $ 500,000 in compensatory and **punitive damages.** [276]

At trial, the parties argued about the scope of the injury upon which damages should be calculated. Gore argued that any **punitive damages** award should be computed based upon all cars sold nationwide because of BMW's "national policy." BMW, raising Federalism **[*460]** principles, argued that the case must be confined to cars sold in Alabama because Alabama had no interest in deterring conduct in other states. Ultimately, the trial **judge** admitted evidence of nationwide car sales over BMW's objection. The jury returned a verdict in favor of Gore, awarding him $ 4,000 in compensatory and $ 4 million in **punitive damages.** [277]

BMW then filed a post trial motion to set aside the **punitive damages** award as excessive, which the trial court denied. [278] The Alabama Supreme Court likewise rejected BMW's claim that the award "exceeded the constitutionally permissible amount," [279] but ordered a remittitur to $ 2 million, finding that the trial court improperly relied on sales in other jurisdictions. [280]

In holding the remitted amount to be constitutionally excessive, the United States Supreme Court first endorsed BMW's position that any award in Alabama could not take into account conduct in other jurisdictions: "We think it follows from ... principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the

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intent of changing the tortfeasors' lawful conduct in other States." [281]

The Court then announced a three-prong test to be applied by reviewing courts in determining whether a punitive award is in excess of the constitutionally permissible limit: (1) the "degree of reprehensibility" of the defendant's action; (2) the "disparity between the harm or potential harm" suffered by the plaintiff and the **punitive damages** award; and (3) the difference between the penalty imposed in the case under review as compared to penalties imposed in other similar cases. [282] Applying these factors to BMW's conduct, the Court concluded that the **punitive damage** component of the verdict violated BMW's substantive due process right to be free from excessive **punitive [*461] damage** awards, and remanded the case to the Alabama Supreme Court for further proceedings. [283]

Justice Breyer, joined by Justice O'Connor and Justice Souter, concurred in the result, finding that the award was procedurally, as opposed to substantively, infirm. After first recognizing that the awards were the product of "fair procedures," and therefore will be "entitled to a strong presumption of validity," Justice Breyer went on to explain that, in his view, although the procedures here were not manifestly unfair, they were the product of an unconstrained jury given virtually unlimited discretion. [284] Although he based his concurrence on procedural grounds, he was willing to concede that substantive due process concerns had been raised. In determining that the award in BMW must be reversed, he stated, "the award in this case was both (a) the product of a system of standards that did not significantly constrain a court's, and hence a jury's, discretion in making that **[*462]** award; and (b) grossly excessive in light of the State's legitimate **punitive damages** objectives." [285]

Justice Scalia, who had concurred in the judgments in Haslip and TXO because the awards were not reduced and concurred in Oberg because that case involved procedural, rather than substantive, due process, dissented in BMW. Joined by Justice Thomas, Justice Scalia reiterated his position from the concurrences of the prior three cases:

I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against "unfairness" - neither the unfairness of an excessive civil compensatory award, nor the unfairness of an "unreasonable" punitive award. What the Fourteenth Amendment's procedural guarantee assures is an opportunity to contest the reasonableness of a damages judgment in state court; but there is no federal guarantee a damages award actually be reasonable. [286]

In Justice Scalia's view, the BMW case was significant in that it revived a "substantive due process right" to be free from the imposition of a "grossly excessive" award, a concept which previously had been "moribund" for a century. [287] He found this revival of the substantive right troubling because, in his view, it vests the lower courts, and ultimately, the Supreme Court, with the authority to decide that which is not of constitutional proportions, but rather a function of the lower court's determination of the "reasonableness" of the award. He pointed out that although the earlier cases of Haslip, TXO, and Oberg had, at least implicitly, recognized the substantive prong of the Court's due process review of punitive awards, none of those cases went as far as "declaring a punitive award unconstitutional simply because it was 'too big.'" [288] Justice Scalia concluded that the BMW decision,

though dressed up as a legal opinion, is really no more than a disagreement with the community's sense of indignation or outrage.... It reflects not merely, as the concurrence candidly acknowledges, "a judgment about a matter of degree," but a judgment about the

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appropriate degree of indignation or outrage, which is hardly an analytical determination. [289]

Finally, Justice Ginsberg, joined by the Chief Justice, likewise dissented, primarily on principles of Federalism. "The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally **[*463]** within the States' domain, and does so in the face of reform measures recently adopted or currently under consideration in legislative arenas." [290] Justice Ginsberg also viewed the procedures in place under the Alabama common law scheme as a sufficient restraint on the jury's discretion, and so would have left the award untouched. [291]

Thus, the opinion of the majority, which relied on the "grossly excessive" standard, rested squarely on substantive due process grounds, while the three concurring justices relied more heavily on procedural due process, but acknowledged the substantive element. The four dissenting justices would not incorporate a substantive analysis to reviewing a **punitive damages** award, but would only reverse for a violation of procedural due process.

IV. Cooper Industries, Inc. v. Leatherman Tool Group, Inc.

At issue in Cooper Industries, Inc. v. Leatherman Tool Group, Inc. [292] was the proper standard of review when an appellate court was called upon to determine the constitutionality of a particular punitive award. By the time Cooper was argued in February 2001, the general state of the law was that **punitive damages** awards had a long historical pedigree in both English and American common law and were therefore, generally speaking, constitutional. [293] Moreover, under the Seventh Amendment, **punitive damages** awards were to be awarded by juries, not **judges,** though **judges** had oversight power through traditional common law mechanisms, such as a motion for a new trial, directed verdict, judgment notwithstanding the verdict, and remittitur. [294]

However, **punitive damages** awards could become unconstitutional to the extent the awards were a product of insufficient process, which, in turn resulted in arbitrary awards that reflected the unconstrained discretion of the jury. These awards were unconstitutional because they were thought to violate the procedural prong of the due process guarantee. [295] Likewise, awards violated the Fifth and Fourteenth Amendments in a substantive sense when the awards were "grossly excessive." Awards were grossly excessive when they were out **[*464]** of proportion to the reprehensibility of the defendant's conduct, there was a great disparity between the harm suffered by the plaintiff and the amount of the award was completely out of step with other awards made in comparable cases. [296]

However, there was substantial uncertainty about what standard to use when reviewing such an award. Typically, any fact found by a jury is subject only to an abuse of discretion review. Thus, to the extent that punitive awards are set by juries, the amount of the award was subject only to appellate reversal if the trial court had abused its discretion in entering the judgment. [297] This, however, created tension between the Seventh Amendment on the one hand, and the Fifth and Fourteenth Amendments on the other. Assuming that each of the Amendments are of equal dignity (as one must), reviewing courts were given the daunting task of attempting to balance them. This balancing was done by the Supreme Court, somewhat painfully, in Gasperini v. Center for Humanities, Inc. [298] Although the award in Gasperini was compensatory, when the Court held that jury awards could be reviewed by a federal appellate body for an abuse of discretion, many believed that the Court would come to the same conclusion with respect to punitive awards.

We were wrong.

Leatherman Tool Group sued a competing tool manufacturer for trade-dress infringement,

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unfair competition, and false advertising when Cooper Industries, Inc. used Leatherman's advertising materials to promote Cooper's product. [299] The jury returned a verdict in favor of Leatherman, which included a $ 50,000 compensatory award and a $ 4.5 million punitive award. Cooper made post trial motions to have the awards declared "grossly excessive" and therefore unconstitutional under BMW. The trial court denied the motion and Cooper appealed.

In an unpublished opinion, the Ninth Circuit affirmed the **punitive damage** award and determined that the district court had found that it was "proportional and fair" and that the size of the award "did not violate Cooper's due process rights." [300] The Ninth Circuit then **[*465]** determined that "the district court did not abuse its discretion in declining to reduce the amount of the **punitive damages.**" [301] The Supreme Court granted certiorari to determine "whether the Court of Appeals reviewed the constitutionality of the **punitive damages** award under the correct standard and also whether the award violated the criteria" articulated in BMW. [302] The Court concluded that the constitutional issues raised in connection with the awarding of **punitive damages** merited de novo review. [303]

The Court started with the proposition that "if no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's 'determination under an abuse-of-discretion standard.'" [304] Because issues of constitutional proportions are raised when **punitive damages** are awarded, however, this observation did not end the inquiry. The problem, of course, is that when a fact found by a jury is reviewed for anything other than abuse of discretion, it violates the Seventh Amendment prohibition on re-examination of the facts found by a jury. [305]

In order to avoid this problem, the Court concluded that a **punitive damage** award was not a "fact" because of the nature of the punitive award itself. First, the Court made distinctions between the nature of compensatory and **punitive damages:**

Although compensatory damages and **punitive damages** are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. The latter, which have been described as "quasi-criminal," operate as "private fines" intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of **punitive damages** is an expression of its moral condemnation. [306]

Thus,

unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of **punitive damages** is not really a "fact" "tried" by the jury. Because the jury's **[*466]** award of **punitive damages** does not constitute a finding of 'fact,' appellate review of the District Court's determination that an award is consistent with due process does not implicate ... Seventh Amendment concerns raised ... . [307]

The Court acknowledged Barry v. Edmunds, [308] in which it had held that "it is the peculiar function of the jury to set the amount of **punitive damages**[,]" and Day v. Woodworth, [309] which held that **punitive damages** should be "left to the discretion of the jury." The Court

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No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right. [13]

In ensuing years, English monarchs have "reaffirmed the Magna Charta [sic] thirty-eight times." [14]

In 1285, the nisi prius system of adjudication was established in England. [15] Under this system, circuit **judges** of assize traveled to counties to hear cases, even where the cases were filed in the common law **[*414]** courts located in London. [16] What remains unclear, however, is the nature of the proceeding in the Westminster Court after a verdict had been rendered by a nisi prius **judge.** [17] Some commentators believe the Westminster Court acted as an appellate body which re-examined facts, while others believe the entire cause was retried by the Westminster Court. [18]

By the mid seventeenth century, as the American colonies were being founded, "trial by jury [had] emerged as the principle defense of English liberties." [19] Professors Dawson and Landsman posit that the role of the jury had a profound impact upon English society. They contend that "relying on the jury and other lay decisionmakers such as justices of the peace had the unanticipated effect of training 'English society, through its local leadership, in the skills and the practice of self-government.'" [20] This experience would give the English citizenry - and the American colonists - the will to fight for what they perceived as their unadulterated right to trial by jury.

The original colonists did, in fact, bring trial by jury with them to the new world. Many of the early Colonial Charters incorporated the right to jury trial. For example, as early as 1606, the Charter to the **[*415]** Virginia Company provided for trial by jury. [21] By 1624, all civil and criminal cases were tried by jury in Virginia. [22] The Massachusetts Bay Colony introduced the right to trial by jury in 1628 and codified that right in 1641. [23] The Colony of West New Jersey provided for jury trial in 1677 as did Pennsylvania in 1682. [24] By 1727, eight of the original thirteen colonies had explicitly incorporated the right to a jury trial. [25] Ultimately, all thirteen colonies provided for the right to jury trial either expressly or through the common law. [26]

Against this backdrop, King George III was attempting to expand the jurisdiction of the admiralty and vice-admiralty courts in the colonies, which sat in equity without a jury. [27] This troubled the early colonists. [28] Ultimately, it became an extremely contentious issue in the years preceding the outbreak of hostilities between England and the colonies. [29] Some have argued that the threat of the abolition of trial by jury was one of the principal causes of the American Revolution. [30] In any event, after the outbreak of hostilities between the colonies and England, each of the thirteen states formally adopted the civil jury trial. [31]

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B. The Constitutional Convention and the Seventh Amendment

Whatever role the jury trial played in the instigation of the war, surprisingly little attention was paid to the issue by the delegates to the First Constitutional Convention, [32] despite the fact that the fifth resolve [33] stated, "the respective colonies are entitled to the common law of England, and more especially, to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." [34] The federal convention was held in two sessions. The first session began on May 25, 1787, and ended on July 26, 1787.

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distinguished these cases in a rather circular manner, by simply stating that the two cases "do not, however, indicate that the amount of **punitive damages** imposed by the jury is itself a 'fact' within the meaning of the Seventh Amendment's Reexamination Clause." [310]

In a somewhat more satisfying analysis, the Court then distinguished the cases on historical grounds: "In any event, **punitive damages** have evolved somewhat since the time of respondent's sources. Until well into the century, **punitive damages** frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time." [311] In other words, the Court said that to the extent **punitive damages** have historically been awarded by juries, the historical context has changed and the reasons for allowing juries to award **punitive damages** no longer exist. [312]

Justice Ginsberg, the lone dissenter, was persuaded by neither analysis. She began by repeating the Court's holding that a jury's award of **punitive damages** does not constitute a finding of fact subject to the Seventh Amendment - a proposition with which she largely agrees. However, she was concerned that because "a jury's verdict on **punitive damages** is fundamentally dependent on determinations we characterize as factfindings," she concluded that **punitive damages** are more appropriately characterized as other non-economic injuries, such as pain and suffering. [313]

One million dollars' worth of pain and suffering does not exist as a "fact" in the world any more or less than one million dollars' worth **[*467]** of moral outrage. Both derive their meaning from a set of underlying facts as determined by a jury. If one exercise in quantification is properly regarded as factfinding, it seems to me the other should be so regarded as well. [314]

However, Justice Ginsberg's observations to the contrary, neither de novo review of the amount of a **punitive damages** award nor jury involvement as the arbiter of community outrage need be sacrificed on the altar of Cooper Industries.

V. A Modest Proposal

Commentators have long debated whether the jury or the **judge** should determine the amount of a **punitive damage** award, and credible arguments have been made on both sides. Proponents of jury assessment argue that historically, the right to jury trial was of tremendous importance to the framers. [315] This was so because the framers believed that individual participation in the democratic process could be accomplished only through the check juries placed on both the legislative branches, through jury nullification, [316] and the judicial branch, whom, it was feared, would become tyrannical, a critique which continues to exist today. [317] Moreover, there were, and are, concerns that federal **judges,** who have life tenure, could behave erratically in assessing **punitive damages.** [318]

[*468] Another theme in favor of jury assessment is that the jury is an institutional member of the "body politic." When serving on a jury, citizens are engaged in the direct exercise of democracy, as opposed to the representative form found in the legislative body, and serve as the "conscience of the community." [319] This theme is echoed by those who view the jury as a barometer of "moral outrage" when assessing **punitive damages.** [320] Some commentators have gone so far as to say that judicially imposed **punitive damages** are both "elitist" and "unconstitutional." [321]

On the other hand, there are persuasive reasons why the **judge,** not the jury, should assess

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punitive damages. The most frequently cited reason is that juries have "run wild," [322] awarding "monstrous" [323] damages that have been "skyrocketing" [324] out of control, [325] thus prompting widespread state tort reform, with varying degrees of success. [326] The theory is that **judges** are less likely to be swayed by bias, prejudice, or caprice. [327] A related argument is that **judges** have much more experience in meting out punishment because of their experience **[*469]** in sentencing criminals and imposing civil fines and penalties. [328] As a result, it is argued, judicially assessed punitive awards would result in greater consistency in the amounts awarded, resulting in desirable economic efficiencies. [329]

It is likewise argued that **judges** are better able to assess awards that would achieve one of the primary goals of **punitive damages** - deterrence.

Juries believe that such awards express the community's outrage at certain forms of behavior, and **judges'** instructions encourage juries to think in precisely these terms. In fact, empirical evidence ... suggests that juries are not attempting to promote optimal deterrence but instead to punish wrongdoing with, at most, a signal designed to ensure that certain misconduct will not happen again. [330]

Lastly, there are those who argue that juries should never assess penalties because remedies simply do not come within the Seventh Amendment guarantee. [331] Professor Murphy cites three arguments **[*470]** that have been advanced to permit judicially reduced **punitive damages** without the need for a new trial. [332] First, **punitive damage** awards are not a "fact." Second, the question of an award's excessiveness is a "matter of law." Finally, reduction to the constitutional maximum is not a remittitur. [333]

The Supreme Court in Cooper held that the first argument is conclusive, and the Court's holding bears repeating here: "Unlike the measure of actual damages suffered, which presents a question of fact, the level of **punitive damages** is not really a 'fact' 'tried' by the jury." [334] If the amount is not a "fact," it is never within the province of the jury because the jury's sole function in a civil trial is to act as a fact finder. Therefore, the question is not whether the jury should assess **punitive damages,** but whether they are constitutionally permitted to do so. In the wake of Cooper, the answer to the latter question may be in the negative.

Thus, this Article proposes that federal courts can, and should, modify the manner in which **punitive damages** are assessed. First, the jury must find facts that justify the imposition of the award. The jury should then rank the culpability of the conduct into one of three categories: 1) grossly negligent; 2) recklessly indifferent; or 3) maliciously or fraudulently oppressive. Finally, the jury should determine the wealth of the defendant. [335] Once the jury has performed these functions, the **judge** should then determine the amount necessary to effectuate the goal of **punitive damages,** which is to punish the defendant and deter similar misconduct. The use of such a scheme would solve the problem of unbounded jury discretion that has raised procedural due process concerns and would likewise curb or curtail "grossly excessive" awards that raise substantive due process issues.

This proposal has the salutary effect of eradicating the Gasperini problem, at least where **punitive damages** are concerned. Because the jury would not make an initial determination of the **punitive damages,** the re-examination clause would not be implicated. The facts found **[*471]** by the jury to support the punitive award would continue to be reviewed under an abuse of discretion standard, which, as Justice Ginsberg pointed out in Gasperini, involves not so much a review of the facts, but rather of the trial court's use of its discretion, which is a matter of law. The actual amount awarded, on the other hand, would be subject to

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a de novo review to determine whether the judicially awarded amount exceeded constitutional parameters. [336]

This proposal also has the advantage of exploiting the institutional strengths of both the jury and the **judge.** The jury has the advantage of being the voice of the community expressing the moral outrage of the public. It likewise allows the jury to continue to be the arbiter of the degree of the punishment, if not the actual dollar amount. Finally, it permits the **judge** to use his or her considerable experience and expertise in assessing penalties and imposing punishment. Further, because the **judge** has experience superior to the jury's the predictability and consistency of awards will improve. The result would be a form of "technocratic populism," [337] which allows the jury to be the arbiter of the normative judgments, but employs the expertise of the bench in translating those judgments to actual awards.

Conclusion

Punitive damages have long been a thorn in our collective judicial side. The problem has generated a great deal of judicial and scholarly ink and has prompted numerous empirical studies to define the problem which, in turn, has resulted in tort reform that has largely failed. This Article proposes a shift in the way in which **punitive damages** are assessed that needs no tort reform legislation; the law is already on the books. With a single swipe of its judicial pen, the Supreme Court has decreed that **punitive damages** are not a fact to be found by the jury. Therefore, it should be - perhaps must be - **judges,** rather than juries, that assess the amount to be awarded with guidance from the jury on the degree of culpability and concomitant moral outrage.

FOOTNOTES:

n1. 121 S. Ct. 1678 (2001).

n2. Id. at 1686 (internal citations omitted).

n3. See, e.g., Wright v. West, 505 U.S. 277, 296 (1992) (jury is trier of fact); Harding v. U.S., 335 F.2d 515, 517 (9th Cir. 1964) ("Jury [is] sole trier of fact."). This was not always the case, however. At early common law, juries sometimes acted as triers of law as well as fact. See infra Part I.

n4. See infra Part II.

n5. Because the Seventh Amendment has not been incorporated and made applicable to the several states by the Fourteenth Amendment, a state could theoretically abolish all jury trials by appropriate legislation. See Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974) ("The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment.").

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n6. See, e.g., Stephan Landsman, The Civil Jury in America: Scenes from an Unappreciated History, 44 Hastings L.J. 579, 582 (1993) (articulating competing theories regarding the jury's origins).

n7. See Sir Patrick Devlin, Trial By Jury 7 (1956).

n8. See 1 Sir Frederick Pollock & Frederic W. Maitland, The History Of English Law Before The Time Of Edward I 74 (2d ed. 1959).

n9. See Landsman, supra note 6, at 582.

n10. See William Forsyth, History Of Trial By Jury 105 (Burt Franklin ed., Lenox Hill Pub. & Dist. Co. 1971) (1878).

n11. Landsman, supra note 6, at 586 (citing Lloyd E. Moore, The Jury 70 (1973)).

n12. See id. at 587.

n13. Magna Carta (1215) (Eng.) art. 29. Modern historians no longer accept the theory that the right to jury trials originated with the Magna Carta, although the framers of the Constitution apparently thought this was the case. See e.g., F. Heller, The Sixth Amendment To The Constitution 15 (1951); Pollock & Maitland, supra note 8, at 173 n.3.

n14. Richard S. Arnold, Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials, 22 Hofstra L. Rev. 1, 13 (1993).

n15. See James C. Lopez, Comment, Appellate Control of Excessive Jury Verdicts Since Gasperini v. Center for Humanities: From Nisi Prius Courts to "Gasperini Hearings," 66 U. Cinn. L. Rev. 1323 (1998).

n16. See William Wirt Blume, Review of Facts in Jury Cases - The Seventh Amendment, 20 J. Am. Judicature Soc'y 130, 131 (1936).

n17. See id.

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n18. Commentators arguing that the Westminster Court acted as an appellate court considering the evidence anew include William Wirt Blume, Blume, supra note 16; Barbara Lerner, Comment, Remittitur Review: Constitutionality and Efficiency in Liquidated and Unliquidated Damages Cases, 43 U. Chi. L. Rev. 376, 382-83 (1976); E.W. Hinton, Note, Power of Federal Appellate Court to Review Ruling on Motion for New Trial, 1 U. Chi. L. Rev. 111, 113 (1933); Comment, Federal Appellate Review of Excessive or Inadequate Damage Awards, 28 Fordham L. Rev. 500, 502-04 (1959); William Renwick Riddell, New Trial at the Common Law, 26 Yale L.J. 49, 52-57 (1916); Comment, Federal Practice-Appeal and Error-Review of Denial of Motion for New Trial, 32 Mich. L. Rev. 387, 388 & n.5 (1933); Note, Appealability of Rulings on Motion for New Trial in the Federal Courts, 98 U. Pa. L. Rev. 575, 579 (1950); Jerry LeMond, Comment, Federal Review of Excessive Verdicts, 30 Tex. L. Rev. 242, 243-44 (1951). Expressions of the opposite view include Gasperini v. Center for Humanities, 518 U.S. 415, 454-56 (1996) (Scalia, J., dissenting); and Frank Warran Hackett, Has a Trial **Judge** of a United States Court the Right to Direct a Verdict, 24 Yale L.J. 127, 142 (1914). The question becomes an important one for Seventh Amendment purposes because it is generally assumed that the "common law" referred to in the amendment is the law of England as it existed in 1791 when the Bill of Rights was adopted. See U.S. v. Wonson, 28 F. Cas. 745, 750 (1812) ("Beyond all question, the common law here alluded to is not the common law of any individual State (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence.").

n19. Landsman, supra note 6, at 590.

n20. Id. at 588, citing John P. Dawson, A History Of Law **Judges** 118-20 (1960).

n21. See Harold M. Hyman & Catherine M. Tarrant, Aspects Of American Trial Jury History, in The Jury System in America: A Critical Overview 23, 24 (Rita James Simon ed., 1975).

n22. See Landsman, supra note 6, at 592.

n23. See id.

n24. See id.

n25. See 1 J. Kendall Few, In Defense of Trial By Jury 36 (1993).

n26. See Landsman, supra note 6, at 592.

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↑n27. See Charles W. Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639, 654 n.47 (1973).

↑n28. In a letter dated June 6, 1766, George Mason wrote to the Committee of Merchants in London asserting that the vice-admiralty courts' expanding jurisdiction was a threat to the continuing right to a jury trial and explicitly recognizing this as a point of dispute. See 1 The Papers of George Mason 65, 67 (R. Rutland ed. 1970).

↑n29. See id.

↑n30. There is some documentary support for this proposition. See, e.g., the comments of James M'Dowall of North Carolina reprinted in 3 The Debates In The Several State Conventions On The Adoption Of The Federal Constitution 143 (J. Elliot ed. 1891) [hereinafter Elliot's Debates] ("What made the people revolt from Great Britain? The trial by jury, that great safeguard of liberty, was taken away, and a stamp duty placed upon them.").

↑n31. See, e.g., Ga. Const. of 1777 art. LXI, in 2 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 785 (F. Thorpe ed. 1909); Md. Const. of 1776 art. III, in 2 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 785 (F. Thorpe ed. 1909) at 1686; Mass. Const. of 1780 art. XV, in 3 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 785 (F. Thorpe ed. 1909) at 1891-92; N.H. Const. of 1784 art XX, in 4 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 785 (F. Thorpe ed. 1909) at 2456; N.J. Const. of 1776 art. XXII, in 5 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 785 (F. Thorpe ed. 1909) at 2598; N.Y. Const. of 1777 art. XLI, in 5 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 785 (F. Thorpe ed. 1909) at 2637; I N.C. Const. of 1776, Declaration of Rights, art XI, in 5 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 785 (F. Thorpe ed. 1909) at 3083; I S.C. Const. of 1778 art. XLI, in 6 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 785 (F. Thorpe ed. 1909) at 3257; Va. Const. of 1776, Bill of Rights, 11, in 7 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 785 (F. Thorpe ed. 1909) at 3814.

↑n32. Edith Guild Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289, 291 (1966) ("We have almost no direct evidence concerning the intention of the framers of the Seventh Amendment itself."); Wolfram, supra note 27, at 657 ("There is no surviving record of any discussion of civil jury trial even thought there had been some discussion of the federal judiciary in prior meetings.").

↑n33. During the latter portion of the 1770s, American colonists held several congresses

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protesting the enforcement of a series of laws collectively known as the Intolerable Acts. During the course of these congresses, the colonists introduced resolutions cataloguing fundamental freedoms that the colonists believed to be essential to ordered liberty, and which they believed were being infringed by authoritarian British Rule. The Fifth Resolve was one in a series of resolutions introduced at the First Continental Congress held in 1784. See, e.g., Landsman, supra note 6, at 596.

↑n34. Declaration And Resolves Of The First Continental Congress, 1774, Res. 5, reprinted in Sources Of Our Liberties 151 (Richard L. Perry & John C. Cooper eds., 1952).

↑n35. See Henderson, supra note 32, at 293.

↑n36. See Wolfram, supra note 27, at 657.

↑n37. The proposed language was "That Trials for Criminal Offences be in the State where the Offence was committed by jury." The printed copy that was prepared by the Committee on Detail contained an exception for cases of impeachment. See 2 Records Of The Federal Convention OF 1787 (M. Farrand ed. 1911) at 137-50 [hereinafter Farrand Records].

↑n38. See Henderson, supra note 32, at 294.

↑n39. See Wolfram, supra note 27, at 658.

↑n40. See id.

↑n41. See J. Madison, Debates in the Federal Convention, in 2 Farrand Records, supra note 37, at 587-88. It should be noted, however, that Professor Wolfram allows for the possibility that the issue was first raised by "the troublesome twenty-nine year old delegate from South Carolina, Charles Pickney." Wolfram, supra note 27, at 658 n.56.

↑n42. See J. Madison, Debates in the Federal Convention, in 2 Farrand Records, supra note 37, at 587-88. (The following discussion ensued:

Mr. Gorham. It is not possible to discriminate equity cases from those in which juries are proper. The Representatives of the people may be safely trusted in this matter. Mr. Gerry urged the necessity of Juries to guard [against] corrupt **Judges.** He proposed that the

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Committee last appointed should be directed to provide a clause for securing the trial by Juries. Col. Mason perceived the difficulty mentioned by Mr. Gorham. The jury cases cannot be specified. A general principle laid down on this and some other points would be sufficient. He wished the plan had been prefaced with a Bill of Rights, & would second a Motion if made for the purpose - It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours. Mr. Gerry concurred in the idea and moved for a Committee to prepare a Bill of Rights. Col. Mason 2ded the motion. Mr. Sherman was for securing the rights of the people where requisite. The State Declarations of Rights are not repealed by this constitution; and being in force are sufficient - there are many cases where juries are proper which cannot be discriminated. The Legislature may be safely trusted. Col. Mason: The laws of the U.S. are to be paramount to State Bills of Rights.).

n43. P. Ford, Pamphlets on the Constitution, reprinted in 3 Farrand Records, supra note 37, at 101.

n44. J. Madison Debates in the Federal Convention, reprinted in 2 Farrand Records, supra note 37, at 628.

n45. J. Madison, Debates in the Federal Convention, in 2 Farrand Records, supra note 37, at 628. See also Remarks of James Iredell in the North Carolina Ratifying Convention (July 29, 1788), reprinted in 4 Elliot's Debates, supra note 30, at 165-66 (diversity of state practice too great to overcome); The Federalist No. 83 (Alexander Hamilton) (Isaac Kramnick ed. 1788) at 467-68 (stating:

It appears that there is a material diversity as well in the modification as in the extent of the institution of trial by jury in civil cases, in the several States; and from this fact these obvious reflections flow: first, that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the States; and secondly, that more or at least as much might been hazarded by taking the system of any one State for a standard, as by omitting a provision altogether and leaving the matter, as it has been left, to legislative regulation.);

Remarks of James Wilson in the Pennsylvania Ratifying Convention (Dec. 7, 1787), reprinted in 2 Elliot's Debates, supra note 30, at 488-89 ("no particular mode of trial by jury could be discovered that would suit them all").

n46. See U.S. Const. art. III.

n47. Wolfram, supra note 27, at 567.

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n48. See Landsman, supra note 6, at 597. Professor Landsman, in support of this proposition, points to the series of events that became known as the Shay's Rebellion. The Shay's Rebellion occurred when colonies began manipulating currencies to aid debtors and censured **judges** for deciding cases in creditor's favor. Professor Wolfram explains that in the aftermath of the war, the paper currency which had been printed by the Colonies became largely worthless. When creditors refused to accept it and brought suit on the debt, sympathetic jurors, many of whom were themselves debtors, were reluctant to apply the law and discharge the debt in contravention of the law. Professor Wolfram concludes that "the refusal of jurors to award damages on [creditor's] claims was precisely the reason why its guarantee was sought." Wolfram, supra note 27, at 681.

n49. See, e.g., Henderson, supra note 32, at 293 (observing,

it seems likely that the true reason for omitting a ... provision for civil juries was at least in part that the convention members simply wanted to go home. They had worked hard through a hot, steamy Philadelphia summer on the more difficult and more central problems of representation in Congress and choice of a national executive, and they had had enough.).

n50. Landsman, supra note 6, at 598.

n51. See Forrest Mcdonal, Nous Ordo Seclorum 41 (1985).

n52. See id. at 290-91.

n53. See Henderson, supra note 32. Professor Wolfram suggests that

one of the earliest successes of the "Federalists," the party that eventually won the battle over the adoption of the Constitution was to foist upon their opponents the appellation "Anti-federalists." The connotations of opposition to a system of state-national governments and of sheer obstructionism were well appreciated by the "Anti-federalists' who vigorously argued that the name was better deserved by the supporters of the Constitution, who in fact should not be regarded as "Federalists," but rather as "consolidationists" or '"nationalists."

Wolfram, supra note 27, at 667 n.77.

n54. James Wilson, a delegate at the Pennsylvania ratifying convention, posed the following hypothetical: "The plaintiff comes from another state; he comes a stranger, unknown as to his character or mode of life, while the other party is in the midst of his friends, or perhaps

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his dependants. Would a trial by jury, in such a case, insure justice to the stranger?" Remarks of James Wilson in the Pennsylvania Ratifying Convention (Dec. 11, 1787), reprinted in 2 Elliot's Debates, supra note 30, at 517. Likewise, another delegate made the following remarks:

A suit is depending between a citizen of Carolina and Georgia, and it becomes necessary to try it in Georgia. What is the consequence? Why, the citizen of this state must rest his cause upon the jury of his opponent's vicinage, where, unknown and unrelated, he stands a very poor chance for justice against one whose neighbors, whose friends and relations compose the greater part of his **judges.** It is in this case, and only in cases of a similar nature with this, that the right of trial by jury is not established; and judging from myself, it is in this instance only that every man would wish to resign it, not to a jury with whom he is unacquainted, but to an impartial and responsible individual.

Remarks of Robert Barnwell in the South Carolina Convention (Jan. 17, 1788), reprinted in 4 Elliot's Debates, supra note 30, at 295.

n55. See 3 Elliot's Debates, supra note 30, at 68.

n56. See J. Madison, Debates in the Federal Convention, in 2 Farrand Records, supra note 37, at 587-88. See the remarks of Colonel Mason in 2 Farrand Records, supra note 42, at 587-88. (stating: "The jury cases cannot be specified.").

n57. See J. Madison, Debates in the Federal Convention, in 2 Farrand Records, supra note 37 at 587. See also the remarks of Mr. Sherman, in 2 Farrand Records, supra note 37, at 587-88 (stating: "The Legislature may be safely trusted.").

n58. See Wolfram, supra note 27, at 665-67 and sources cited therein.

n59. The Federalist No. 83, supra note 45, at 461.

n60. Id. at 464.

n61. Id.

n62. Landsman, supra note 6, at 598.

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The second session began on August 6 and continued until September 17, 1787. [35] During the adjournment, a Committee on Detail prepared a first draft of the Constitution, which was presented to the delegates when the convention reconvened on August 6. [36] This draft contained a guarantee of a jury trial in criminal cases, but made no mention of a jury hearing civil cases. [37] On August 27 and 28, the Convention, **[*417]** in full session, discussed the judiciary articles, but no mention was made of the right to jury trial in civil cases. [38]

Once the Committee on Detail had finalized the structural elements of the document, a Committee on Style and Arrangement was appointed to develop its final, printed format. [39] That committee filed its final report on September 12 - five days before the Convention was to adjourn. [40] Only at this late date was the issue of a civil jury guarantee raised by Hugh Williamson, a North Carolina delegate. [41] When Williamson objected to the lack of a civil jury guarantee, the other delegates pointed out that including such a provision would be fraught with insurmountable drafting difficulties because the jury trial procedures varied too greatly among the several states and because it would be too difficult to distinguish between cases sounding in law and those sounding in equity. [42] James Wilson, one of the members of the Committee on Detail stated:

When, therefore, this subject was in discussion, we were involved in difficulties, which pressed on all sides, and no precedent could be discovered to direct our course. The cases open to a jury, differed in different states; it was therefore impracticable, on that ground, to have made a general rule. [43]

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On September 15, Delegates Pickney and Gerry moved to add the following language to article III: "And a trial by jury shall be preserved as usual in civil cases." [44] James Madison recorded the ensuing discussion:

Mr. Gorham. The constitution of Juries is different in different States and the trial itself is usual in different cases in different States, Mr. King urged the same objections.

Genl. Pinckney. He thought such a clause in the Constitution would be pregnant with embarrassments. [45]

In the end, the motion was defeated and the finalized document contained no civil jury guarantee. [46] Professor Wolfram contends that this omission was nearly a "fatal blunder" and observes that:

[the] general history of the background and adoption of the Bill of Rights usually brings to mind images of great constitutional debates over the freedoms of speech and press, the non-establishment of religion, the protections of due process, safeguards for those accused of crime and the like. It is, therefore, somewhat incongruous to a [twenty-first] century reader to learn that the entire issue of the absence of a bill of rights was precipitated at the Philadelphia Convention by an objection that the document under consideration lacked a specific guarantee of jury trial in civil cases. [47]

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n63. Id. at 599. See also Wolfram, supra note 27, at 662-66. (The lack of a provision for a jury trial became one of the chief sources of attack on the Constitution in the debates over its adoption in 1788 and led to the proposal and ratification of the Seventh Amendment 1789.); Herbert J. Storing, What the Anti-Federalists Were For 64 (1981) ("The most important [of the Anti-Federalists' demands], and the most widely uttered objections against the Constitution [were] that it did not provide for (and therefore effectively abolished) trial by jury in civil cases."); Ann Woolhandler & Michael G. Collins, The Article III Jury, 87 Va. L. Rev. 587 n.23 (2001) (concluding:

The framers were concerned that Article III effectively removed the jury from a civil trial, and were even concerned that since the Supreme Court had appellate review as to both "law and fact," even if juries were retained nominally, their verdicts could, in effect, be "vetoed" by the Court's different finding of fact.)

See also Remarks of Patrick Henry in the Virginia Ratifying Convention (June 20, 1788), reprinted in 3 Elliot's Debates, supra note 30, at 544 (noting that the provision for appellate jurisdiction "will, in its operation, destroy the trial by jury"); Letters of Centinel, No. 1 (Oct. 5, 1787), reprinted in 2 The Complete Anti-Federalist 143 (Herbert J. Storing ed., 1981) (stating that the "trial by jury in civil cases is taken away" given the Supreme Court's appellate jurisdiction); Essays of Cincinnatus, No. 2, (noting that jury trial was taken away both because of Article III's reference to appellate jurisdiction and its silence on original trials); Essay of a Democratic Federalist (Oct. 17, 1787), reprinted in 3 The Complete Anti-Federalist, at 59-60 (commenting on "the entire abolition of the trial by jury in civil cases," given the federal appellate power over law and fact); see also Michael G. Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 Wis. L. Rev. 39, 108-10 & nn.193-95 (noting that the primary basis for the Anti-Federalists' claim that Article III destroyed jury trials was grounded in the fear of federal appellate review of jury fact finding).

n64. See, e.g., Remarks of Mr. Bloodworth in the North Carolina Ratifying Convention (July 28, 1788), reprinted in 4 Elliot's Debates, supra note 30 (querying whether "the trial by jury is not cut off"); Luther Martin, Genuine Information (Nov. 29, 1787), reprinted in 3 Farrand Records, supra note 37, at 221 (the absence of the right to jury, together with Supreme Court review of both law and fact, "absolutely takes away: trial by jury"); Essays of Cincinnatus, No. 2 (Nov. 8, 1787), reprinted in 6 The Complete Anti-Federalist, supra note 63, at 10-13 (observing that "the trial by jury does seem to be taken away in civil cases"); Wat Tyler, Proclamation (Oct. 24, 1787), reprinted in The Complete Bill of Rights 558 ("trial by jury is abolished in all civil cases"); Essay by Timoleon (Nov. 1, 1787), reprinted in The Complete Bill of Rights 559 (express guarantee to jury trial in criminal cases, combined with silence with respect to civil trials, implies no jury in civil trials).

n65. See, e.g., Essays by a Farmer, No. 4, Maryland Gazette, Mar. 21, 1788, reprinted in 5 The Complete Anti-Federalist, supra note 63, at 38 (Herbert J. Storing ed., 1981) ("The trial by jury is - the democratic branch of the judiciary power - more necessary than representatives in the legislature ... .") (emphasis omitted); Letter from Thomas Jefferson to

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Abbe Arnoux (July 19, 1789), reprinted in The Complete Bill of Rights 596 (Neil H. Cogan ed., 1997) (stating that citizen participation in the judicial branch was more important than participation in the judicial branch).

n66. 3 Elliot's Debates, supra note 30, at 544. Patrick Henry spoke passionately about the right to jury trial:

(a) one of the "rights dear to human nature," (b) "trial by jury is the best appendage of freedom," (c) a "sacred right" (d) "that invaluable blessing," and (e) "that trial by jury which our ancestors secured their lives and property with," "that noble palladium" "that excellent mode of trial," "the transcendent excellency of this trial, its essentiality to the preservation of liberty, and the extreme danger of substituting any other mode."

Wolfram, supra note 27, at 670 n.85.

n67. Debates And Proceedings In The Convention Of The Commonwealth Of Massachusetts 80 (1856).

n68. Id.

n69. 3 Elliot's Debates, supra note 30, at 658.

n70. See Ann Woolhandler & Michael G. Collins, The Article III Jury, 87 Va. L. Rev. 587, 594 (2001).

n71. See infra Part III.

n72. The Federalist No. 83. (Alexander Hamilton) (Issac Kramnick), paraphrasing Patrick Henry's remarks reprinted in 3 Elliot's Debates, supra note 30, at 544.

n73. Interestingly, at the time the Seventh Amendment was adopted, the jury was able to pass on both law and fact. In Georgia v. Brailsford, Chief Justice John Jay instructed the jury:

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It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to **judge** of both, and to determine the law as well as the fact in controversy ... . Both objects are lawfully, within your power of decision.

Georgia v. Brailsford, 3 U.S. (1 Dall.) 1, 4 (1794). Brailsford has never been explicitly overruled.

n74. The purpose of **punitive damages** is "to punish what has occurred and to deter ... repetition" of the misconduct. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 20-21 (1991).

n75. See Michael Rustad & Thomas Koenig, The Historical Continuity of **Punitive Damages** Awards: Reforming the Tort Reformers, 42 Am. U. L. Rev. 1269, 1285 (1993) (citing Exodus 22:4 (theft carries a penalty of double restitution); Luke 19:8 (quadruple restitution for fraud or theft)).

n76. See Rustad & Koenig, supra note 75, at 1285, citing 1 Linda L. Schlueter & Kenneth R. Redden, **Punitive Damages** 3 (2d ed. 1989).

n77. See Rustad & Koenig, supra note 75, at 1285. In an amusing aside, Professors Rustad and Koenig relate the following anecdote:

The laws of the XII Tables declared that whoever should do a personal injury to another should pay twenty-five asses, a considerable sum at the time. At a later time, however, when money abounded, this penalty became so insignificant that one Lucius Veratius used to amuse himself by striking those whom he met in the streets in the face, and then tendering them the legal amends, from a wallet which a slave carried after him for the purpose.

Id. (citing Vindictive Damages, 4 AM. L.J. 61, 75 (1852)).

n78. See generally H. Jolowicz, The Assessment of Penalties in Primitive Law, Cambridge Legal Essays (1926).

n79. See Plato, Protagoras 324b; Plato, Laws 9.85b & 9.934a.

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n80. See e.g., Barry Nicholas, An Introduction To Roman Law 215-25 (1997); Linda L. Schlueter & Kenneth R. Redden, 1 **Punitive Damages** 3 (2d ed. 1989); James B. Sales & Kenneth B. Cole, Jr., **Punitive Damages:** A Relic Tthat Has Outlived Its Origins, 37 Vand. L. Rev. 1117 (1984).

n81. For example, the Statute of Gloucester provided for treble damages for waste. Statute of Gloucester (1278), 6 Edw. I, c. 5.

n82. 98 Eng. Rep. 489 (K.B. 1763).

n83. 95 Eng. Rep. 768 (K.B. 1763).

n84. See Wilkes, 98 Eng. Rep. at 489.

n85. Id. at 498-99.

n86. Landsman, supra note 6, at 591.

n87. See Huckle, 95 Eng. Rep. at 768.

n88. Id. at 768-69. A.S. Turberville, a noted British historian, characterized the climate that led to the first award of **punitive damages** as follows:

It was during the Bute administration in 1762 that John Wilkes, assisted by the satirical poet Charles Churchill, started his scurrilous newspaper The North Briton, which first became famous for the violence of its attacks upon the favourite and all his compatriots. In May 1763 a new ministry came into office, its outstanding member being George Grenville. At the prorogation of Parliament the King had made the customary speech from the throne. In No. 45 of his paper, published on 23rd April, Wilkes had severely criticized the passages in the speech relating to the Peace of Paris and especially a reference to what the King of Prussia had gained from the treaty. Wilkes bluntly declared that the King had given "the sanction of his sacred name to the most odious measures and to the most unjustifiable public declarations from a throne ever renowned for truth, honour, and unsullied virtue." Speeches from the throne in Parliament are always regarded as the declarations of the ministers; but it was characteristic of George III to regard this criticism as an accusation of falsehood and as being therefore a gross personal libel. He insisted on the prosecution of the author, and the new ministers were nothing loathe to acquiesce. As the article was anonymous the

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Government issued a "general warrant, mentioning no specific names for the apprehension of 'the authors, printers, and publishers' of the North Briton," and under this warrant Wilkes was arrested, together with forty-eight other persons, who were suspected, some of them quite wrongly, to have been concerned in the issuing of No. 45. Wilkes stigmatized the general warrant as illegal and "a ridiculous warrant against the whole English people."

A.S. Turberville, English Men And Manners In The 18th Century 44-46 (2d ed. 1957). The Chief Justice in Wilkes opined that the Government's practices, "which had been produced since the Revolution, are no justification of a practice in itself illegal, and contrary to the fundamental principles of the constitution." Wilkes, 98 Eng. Rep. at 499.

n89. See Cooper Indus., Inc. v. Leatherman Tool Group., Inc., 121 S. Ct. 1678, 1683 (2001) (Compensatory damages redress the concrete loss that a plaintiff has suffered by reason of the defendant's wrongful conduct, but **punitive damages** are private fines intended to punish the defendant and deter future wrongdoing.).

n90. 1 N.J.L. 90 (1791).

n91. Id. at 91.

n92. Id.

n93. 1 S.C.L. (1 Bay) 6 (1784).

n94. Id.

n95. See, e.g., Colleen P. Murphy, Judicial Assessment of Legal Remedies, 94 Nw. U. L. Rev. 153, 178 (1999); Wolfram, supra note 27 at 681.

n96. Rustad & Koenig, supra note 75, at n.96 (quoting 1 Theodore Sedgwick, A Treatise On The Measure Of Damages 347 at 687).

n97. Id. at n.153 (quoting Sedgwick, supra note 96, at 39).

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n98. See 2 Simon Greenleaf, A Treatise On The Law Of Evidence 240 n.2 (16th ed. 1899) (contending that **punitive damages** remedy is inconsistent with the purpose of tort law).

n99. Rustad & Koenig, supra note 75, at n.137 (quoting Letter from G.K., Correspondent, to the Editor, Central Law Journal, reprinted in 6 Cent. L.J., 74, 74 (1878) [hereinafter Letter to the Editor] (citing Chief Justice Ryan's opinion in Bass v. Chicago & N.W. Ry. Co., 42 Wis. 654, 672 (1877)).

n100. Id.

n101. 2 Simon Greenleaf, A Treatise On the Law of Evidence 253 at 294 n.2 (William Draper Lewis ed. 1897).

n102. Id.

n103. Fay v. Parker, 53 N.H. 342, 383 (1872).

n104. 54 U.S. 363 (1851).

n105. Most commentators, including the Court itself, recognize this as the first case in which the Court sanctioned **punitive damage** awards. But see Malcolm E. Wheeler, The Constitutional Case for Reforming **Punitive Damages** Procedures, 69 Va. L. Rev. 269, 273-74 n.15 (1983). Professor Wheeler writes as follows:

Some confusion exists as to when the Supreme Court first considered the constitutionality of **punitive damages** awards to private plaintiffs. Justice Harlan, speaking for the plurality in Curtis Publishing Co. v. Butts, 388 U.S. 130, 159 (1967), and the authors of two law review notes, Note, In Defense of **Punitive Damages** [55 N.Y.U. L. Rev. 303 (1980)], at 331 & n.151; Note, The Imposition of Punishment by Civil Courts: A Reappraisal of **Punitive Damages,** 41 N.Y.U. L. Rev. 1158, 1177-78 (1966), have suggested that the Court upheld the constitutionality of such awards in Day v. Woodworth, 54 U.S. (13 How.) 363 (1851). **Punitive damages,** however, were not at issue in that case. The petitioner, who had been the plaintiff and prevailing party in the trial court, challenged the judgment on the ground that the jury had improperly refused to award him his costs of suit. The Supreme Court affirmed, holding that costs could be awarded only if authorized by the appropriate legislative body and that no such authorization had been shown. In dictum the Court distinguished an award of costs from an award of **punitive damages.** Id. at 371. In several later cases the Court expressed an erroneous belief that Day had sanctioned **punitive damages.** See Scott v. Donald, 165 U.S. 58, 87-89 (1897); Milwaukee & St. P. Ry. v. Arms, 91 U.S. 489, 492-93 (1875); Philadelphia, W. & B.R.R. v. Quigley, 62 U.S. (21 How.) 202, 213-14 (1858).

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↑n106. Day, 54 U.S. at 371.

↑n107. Id.

↑n108. Id.

↑n109. See, e.g., Dairy Queen Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

↑n110. It is odd that the early American juries were given law as well as fact finding tasks. It was likely an effort to thwart what were perceived as unjust laws foisted upon the colonies by England. Certainly, the English common law did not permit juries to find law as well as fact; a doctrine that was strongly reiterated by Lord Hardwicke shortly before hostilities broke out between the Colonies and the Crown. In The King v. Poole, Cas. T. Hard, 95 Eng. Rep. 15 (K.B. 1774), the question was whether Mr. Poole had been validly elected as the mayor of Liverpool, and the jury returned a verdict that he had not been, contrary to the Nisi Prius **Judge's** instructions on the law of elections. Lord Hardwicke began by stating that "the general rule is, that if the **Judge** of Nisi Prius directs the jury on the point of law, and they think it fit obstinately to find a verdict contrary to his direction, that is a sufficient ground for granting a new trial." Id. at 17. Lord Hardwicke then qualified the general rule stating that when the **judge** instructs the jury incorrectly, and the verdict is in line with what the law actually is, rather than the instructions given, a new trial would not be granted. This pronouncement, however, comes dangerously close to the notion that juries, rather than **judges,** are the arbiters of law, as well as fact. Lest the court be misunderstood, Lord Hardwicke declared,

The thing that governs greatly in this determination is, that the point of law is not to be determined by juries; juries have a power by law to determine matters of fact only: and it is of the greatest consequence to the law of England and to the subject, that these powers of the **Judge** and jury are kept distinct; that the **Judge** determines the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of England.

Id. at 16.

↑n111. One of the earliest recorded instances in the American Colonies of a **judge** influencing a jury verdict occurred during the Salem Witch Trials. One of the accused,

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Rebecka Nurse, was originally found not guilty by the jury, yet she was nonetheless hanged as a witch. When questioned about it, one of the members of her jury testified as follows:

I Thomas Fisk, the Subscriber hereof, being one of them that were of the Jury of the last week at Salem-Court, upon the Tryal of Rebecka Nurse, etc., being desired by some of the Relations why the Jury brought her in Guilty, after her Verdict not Guilty; I do hereby give my reasons to be as follows, viz. When the Verdict not Guilty was, the honoured Court was pleased to object against it, saying to them [the jury], that they think they let slip the words, which the Prisoner at the Bar spake against her self which were spoken in reply to Goodwife Hobbs and her Daughter, who had been faulty in setting their hands to the Devils Book, as they have confessed formerly; the words were "what, do these persons give in Evidence against me now, they used to come against us." After the honoured Court had manifested their dissatisfaction of the Verdict, several of the Jury declared themselves desirous to go out again, and thereupon the honoured Court gave leave; but when we came to consider the Case, I could not tell how to take her words, as evidence against her, till she had a further opportunity to put her Sense upon them, if she would take it; and then going into Court, I mentioned the aforesaid, which by one of the Court were affirmed to have been spoken by her, she being then at the Bar, but made no reply, nor interpretation of them; whereupon those words were to me principal Evidence against her.

Statement of Thomas Fisk, Juror, July 4, 1692, in The Salem Witchcraft Papers (Paul Boyer & Stephen Nissenbaum eds. 1977).

n112. Style 466 (Upper Bench 1655).

n113. Id.

n114. 90 Eng. Rep. 526 (K.B. 1697).

n115. Id.

n116. 96 Eng. Rep. 557 (C.P. 1774).

n117. Id. at 557.

n118. Id. at 557. Interestingly, the court noted that the plaintiff had offered to set off a £ 300 award the defendant had against the plaintiff, thereby lowering the amount to be paid to Sharpe by the customs official to £ 200. When the official refused, the court stated that "this

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shows a want of candour on [the customs official's] side, and he is therefore entitled to no assistance." Id.

n119. As the Court noted in Honda v. Oberg, 512 U.S. 415, 434 n.12 (1994), "Judicial deference to jury verdicts may have been stronger in 18th-century America than in England, and **judges'** power to order new trials for excessive damages more contested."

n120. 2 Johns. 63 (N.Y. Sup. Ct. 1806).

n121. Id. at 73.

n122. 9 Johns. 45 (N.Y. Sup. Ct. 1812).

n123. Id. at 50-51.

n124. Id. at 51.

n125. Id. Numerous cases from the early nineteenth century repeated this theme. See, e.g., M'Connell v. Hampton, 12 Johns. 234, 236 (N.Y. Sup. Ct. 1815), in which an action for assault and false imprisonment arising from a military officer's court martial of a civilian for treason. In granting a new trial for excessive damages, the court repeated the familiar formula:

To justify the court in setting aside a verdict, the damages ought to appear outrageous, or manifestly to exceed the injury, and such that all mankind would, at once, pronounce unreasonable, and so as to induce the court to believe that the jury must have acted from prejudice or partiality, or were influenced by some improper considerations. It is not necessary that the court should believe that the jury acted corruptly. Their feelings might be so excited, or their passions so inflamed, as to mislead their judgments, and induce them to give a verdict, which their own sober reflection would not approve.

Id. at 236.

n126. Renee B. Lettow, New Trial for Verdict Against the Law: **Judge**-Jury Relations in Early Nineteenth Century America, 71 Notre Dame L. Rev. 505, 548 (1996).

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n127. 28 U.S. 433 (1830).

n128. Id. at 446.

n129. 10 Serg. & Rawle 399 (Pa. 1823). One case, Bourke v. Bulow, 1 S.C.L. 49 (S.C. Com. Pl. 1787) states that "there are many cases in the books, for new trials on account of excessive damages, where they have been granted ... ." However, it is almost certain that the court there was referring to English jurisprudence.

n130. Khun, 10 Serg. & Rawle at 408.

n131. Id. at 409.

n132. 3 F. Cas. 760 (C.C.D. Mass. 1822).

n133. Remittitur is a procedural device which allows the court to order the plaintiff to remit a portion of the award or to face a new trial. See, e.g., Fed. R. Civ. P. 59.

n134. Id. at 761-62.

n135. Id. at 762.

n136. 116 U.S. 642 (1886).

n137. Id. at 646-47.

n138. 130 U.S. 69 (1889).

n139. Id. at 72-73.

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Although the variance in jury procedures among the colonies may have posed drafting problems - which was the ostensible reason for omission of the right to jury trial in civil cases - other forces may have been at work. Scholars have theorized that the drafters, made up primarily of wealthy nationalists, may have seen civil juries as being **[*419]** prone to engaging in jury nullification in favor of their debtor peers at the expense of the wealthy, creditor class. [48] Other scholars conclude that the failure to include a Bill of Rights to the original document was simply a function of the exhaustion of the delegates. [49] Whatever the reason for the omission of the right to a civil jury, it "signaled a profound shift in the way an exceedingly powerful segment of society had come to view the institution." [50]

Commentators identify two possible reasons for the declining importance of the civil jury, at least in the minds of the framers. First, prior to the revolution, colonial juries were thought to counterbalance the power of English **judges** seeking to enforce laws enacted by Parliament that were thought to be harsh or unfair. Since colonial legislatures were by then enacting the applicable laws, this was no longer seen as a threat. [51] Second, jury decisions were likely to be less predictable than **judge**-made decisions and were more likely to protect the emerging nation's fragile financial condition. [52]

The omission of the right to jury trial in civil cases became a lightening rod during the ratification debates that followed. The national discourse was being led by two sharply divided groups. On one side of the debate were the Federalists who were proponents of the Constitution as it had emerged from the Constitutional Convention. On the other were the Anti-Federalists who opposed its adoption, in part, because of the lack of a civil jury guarantee. [53] Many of the Federalists **[*420]** were concerned that inclusion of the right to a jury in a federal court could lead to jury bias in diversity cases, and opposed it on that basis. [54] Other Federalists argued that the right to a jury in civil cases need not be constitutionally guaranteed because the state constitutions preserved the right to jury trial, and would control in federal courts. [55] This, however, reflected a spurious understanding of the interaction between federal and state courts and the Supremacy Clause. The third argument centered on the relative difficulty of distinguishing which cases were at law, and therefore required a jury, and those that sounded in equity and did not. [56] The fourth argument was simply to leave the matter to Congress, which the Anti-Federalists countered by pointing out that the Constitution was meant to protect citizens from corrupt federal governmental interference. The Federalists' weak reply was, essentially, that only good men would be elected to Congress, and, therefore, there was no need to worry. [57] The final argument was **[*421]** that jury trial practices varied among the several states to such a degree that any attempt at uniformity was futile. [58]

In one of the Federalist Papers, Alexander Hamilton took a different tack. First, he observed that "the objection to the plan of the convention, which has met with most success in [New York] and perhaps in several of the other States, is that relative to the want of a constitutional provision for the trial by jury in civil cases." [59] Hamilton characterized the dispute as follows:

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government. [60]

His thesis was that the omission of the express right to jury trial did not amount to the abolition of the institution; states were free to order jury trials as they saw fit, and,

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↑n140. Id. at 74-75.

↑n141. 131 U.S. 22 (1889).

↑n142. See id. at 29-30.

↑n143. 116 U.S. 550 (1886).

↑n144. Id. at 562.

↑n145. Id. at 565 (internal citations omitted).

↑n146. 28 F. Cas. 745 (C.C. Mass. 1812).

↑n147. The concept of "circuit riding" traces its origins back to the Judiciary Act of 1789. Under the Act, which was motivated by Federalism principles, each Justice was required to "ride circuit" in addition to acting as a United States Supreme Court Justice. At the time, Circuit courts were composed of one district court **judge** and two Supreme Court Justices, known as "Circuit Justices." The Circuit Justices were required to preside over matters located within each district in their Circuit twice a year. Although circuit riding was very unpopular amongst the Justices, the technical requirement remained a part of the judiciary system until 1891. See, e.g., Eric J. Gribbin, Note, California Split: A Plan to Divide the Ninth Circuit, 47 Duke L. J. 351 (1997).

↑n148. Wonson, 28 F. Cas. at 750.

↑n149. Id.

↑n150. 187 U.S. 315 (1902).

↑n151. Id. at 320.

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n152. 228 U.S. 364 (1913).

n153. Id. at 376-77.

n154. Id. at 397.

n155. 283 U.S. 494 (1931).

n156. Id. at 498-99.

n157. 293 U.S. 474 (1935).

n158. Additur is the conceptual inverse of remittitur. Theoretically, argued the plaintiff in Dimick, if a defendant who is subjected to excessive damages can be granted a new trial unless the plaintiff agrees to submit to a lower award, so too should a plaintiff be accorded a similar power. Thus, if the damages awarded are inadequate, the plaintiff should have the power to force a new trial unless the defendant agrees to enlarge the award. See id.

n159. Id. at 476.

n160. Id. at 484-85.

n161. Id. at 486.

n162. Id. at 485.

n163. Id. at 486.

n164. Id. at 487. In this 5-4 decision, Justice Stone argued in his dissenting opinion that the Court was better served by its prior use of the functional approach and catalogued the

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procedural devices upheld by the Court that were not available at common law.

Thus this Court has held that a federal court, without the consent of the parties, may constitutionally appoint auditors to hear testimony, examine books and accounts, and frame and report upon issues of fact, as an aid to the jury in arriving at its verdict; it may require both a general and a special verdict and set aside the general verdict for the plaintiff and direct a verdict for the defendant on the basis of the facts specially found; and it may accept so much of the verdict as declares that the plaintiff is entitled to recover, and set aside so much of it as fixes the amount of the damages, and order a new trial of that issue alone. Yet none of these procedures was known to the common law. In fact, the very practice, so firmly imbedded in federal procedure, of making a motion for a new trial directly to the trial **judge,** instead of to the court en banc, was never adopted by the common law. But this Court has found in the Seventh Amendment no bar to the adoption by the federal courts of these novel methods of dealing with the verdict of a jury, for they left unimpaired the function of the jury to decide issues of fact, which it had exercised before the adoption of the amendment.

Id. at 491-92 (Stone, J., dissenting) (internal citations omitted).

n165. 319 U.S. 372 (1943).

n166. Id. at 387-88.

n167. Id. at 390-92 (internal citations omitted).

n168. Id. at 392.

n169. Id. at 397 (Black, J., dissenting). The use of the functional approach led to the Court's approval of the reduction of the number of jurors constitutionally required in both criminal, and civil cases. See, e.g., Colgrave v. Battin, 413 U.S. 149 (1973); Williams v. Florida, 399 U.S. 78 (1970). In another series of cases interpreting the Seventh Amendment tangentially related to the subject matter of this article, but ultimately beyond its scope, is that series of cases which examine in what instance litigants are entitled to a jury in the first instance. In Ross v. Bernhard, 396 U.S. 531 (1970), for example, the Court held that plaintiffs in a shareholders derivative suit were entitled to a jury. The Court established a three part test to determine when one is entitled to a jury. First, the Court will use an historical test, and look to whether the common law would have provided a jury. Second, the Court will look to the nature of the remedy sought, and in particular whether it is primarily equitable or legal in character. Finally, the Court will examine the relative abilities and limitations of the jury. This last point is relevant to the division of labor between **judge** and jury in assessing **punitive damages,** and is discussed further later in this Article.

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n170. 54 U.S. 363 (1851).

n171. Id. at 371; see also Barry v. Edmunds, 116 U.S. 550, 565 (1886) ("For nothing is better settled than that, in such cases as the present, and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict.").

n172. 336 F.2d 406 (5th Cir. 1964).

n173. See 35 U.S.C. 284 (1994). The statute states that "the court may increase the damages up to three times the amount found or assessed."

n174. Swofford, 336 F.2d at 412.

n175. Id. at 413.

n176. 481 U.S. 412 (1987).

n177. Id. at 414.

n178. Id. at 423.

n179. Id. at 425 (internal citations omitted).

n180. Id. at 425-26.

n181. Id. at 426.

n182. Id. at 426 n.9.

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n183. Id.

n184. Id. This statement could have significant implications with respect to **punitive damages** as well. It is well settled that states have the right to regulate **punitive damages** awards, as does Congress. If the reasoning in Tull is extended, it strengthens the argument that **judges,** rather than juries, should set **punitive damage** awards. See discussion infra Part V.

n185. See Shamblin's Ready Mix, Inc. v. Eaton Corp., 873 F.2d 736 (4th Cir. 1989).

n186. Id. at 739-40.

n187. Id. at 740.

n188. Id. The court cites to the following cases: Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 207 (1st Cir. 1987) (verdict for $ 3,000,000 reduced to $ 300,000); Bell v. City of Milwaukee, 746 F.2d 1205, 1267, 1279 (7th Cir. 1984) (verdict for $ 350,000 reduced to $ 50,000); Guzman v. W. State Bank, 540 F.2d 948, 954 (8th Cir. 1976) (verdict for $ 25,000 reduced to $ 10,000); Shimman v. Frank, 625 F.2d 80, 102, 104 (6th Cir. 1980) (judgment for $ 75,000 reduced to $ 20,000). The court goes on to recognize that none of these decisions discussed the Seventh Amendment. Shamblin's Ready Mix, 873 F.2d at 740-41.

n189. 131 U.S. 22 (1889).

n190. See id. at 28-30.

n191. Shamblin's Ready Mix, 873 F.2d at 741 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)).

n192. Id. at 742.

n193. Id.

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n194. Id.

n195. 938 F.2d 502 (4th Cir. 1991).

n196. Id. at 506.

n197. Id.

n198. Id.

n199. 492 U.S. 257 (1989) (concerning an attack on **punitive damages** based upon the Eighth Amendment's prohibition on excessive fines).

n200. 499 U.S. 1 (1991). Haslip is discussed at length below.

n201. Defender Ind., 938 F.2d at 506.

n202. Id. at 507.

n203. See id. at 507.

n204. Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 401 (Ohio 1994), citing Ohio Rev. Code Ann. 2315.21(C)(2) (West 1987), which has since been amended.

n205. 644 N.E.2d 397 (Ohio 1994).

n206. The Ohio Constitution provides that "the right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury." Ohio Const. art. I, 5. Recall that the Seventh Amendment of the United States Constitution has does not apply to individual states. See supra note 5.

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n207. Zoppo, 644 N.E.2d at 401.

n208. Id.

n209. H.B. 350 (Ohio 1996) (which contained an amended version of section 2315.21).

n210. H.B. 350 was found unconstitutional as whole because it "usurped judicial power in violation of the Ohio Constitution's separation of powers." State ex. rel. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1097 (Ohio 1999).

n211. Sheward, 715 N.E.2d at 1091. In 2001, the Ohio legislature enacted S.B. 108 which contained yet another version of 2315.21, which went into effect in July 2001. Section (C)(1) provides, "In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages." Ohio Rev. Code Ann. 2315.21(C)(1).

n212. See Kan. Stat. Ann. 60-3701(a) (West 1995).

n213. See Smith v. Printup, 866 P.2d 985 (Kan. 1993).

n214. See discussion supra Part I.

n215. See id. at 997-98.

n216. See id.

n217. See id. at 998. The plaintiffs were arguing that the statute violated the Fourteenth Amendment of the United States Constitution, rather than the Seventh, which is not incorporated to the states. The plaintiffs were also arguing that the statutory scheme violated the right to jury trial in the Kansas Constitution, which is similar to the Ohio Constitution, and provides "the right of trial by jury shall be inviolate." Kan. Const. 5 . One other state, Connecticut, provides for judicial assessment of **punitive damages** awards in product liability cases only: "If the trier of fact determines that **punitive damages** should be awarded, the court shall determine the amount of such damages not to exceed an amount

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equal to twice the damages awarded to the plaintiff." Conn. Gen. Stat. Ann. 52-240b (West 2001). To date, it appears that the statute has not been challenged on jury trial right grounds. The United States Circuit Courts of Appeals that have addressed the issue have found similar legislation unconstitutional. See, e.g., Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co., 938 F.2d 502 (4th Cir. 1991), discussed above; O'Gilivie v. Int'l Playtex, Inc. 821 F.2d 1438 (10th Cir. 1987); McKinnon v. Berwyn, 750 F.2d 1383 (7th Cir. 1984). However, a number of other Circuits have reduced awards without remanding for a new trial. See, e.g., Rowlet v. Anheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987); Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984); and Guzman v. W. State Bank, 540 F.2d 948 (8th Cir. 1976), which suggests that those Circuits do not believe judicial assessment is unconstitutional.

↑n218. 499 U.S. 1 (1991). As the Haslip court noted, "the constitutional status of **punitive damages** ... is not an issue that is new to this Court ... . Challenges had been raised before; ... [but] they have been rejected or deferred." Id. at 12.

↑n219. Id. at 6 n.1. (The charge to the jury in full was as follows:

Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find a fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as **punitive damages.** This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff, whatever plaintiff you are talking about, has had a fraud perpetrated upon them and as a direct result they were injured and in addition to compensatory damages you may in your discretion award **punitive damages.** Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, it does to the plaintiff, by way of punishment to the defendant and for the added purpose of protecting the public by detering [sic] the defendant and others from doing such wrong in the future. Imposition of **punitive damages** is entirely discretionary with the jury, that means you don't have to award it unless this jury feels that you should do so. Should you award **punitive damages,** in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.)

↑n220. See id. at 7.

↑n221. Justice Souter did not participate in the decision.

↑n222. See Haslip, 499 U.S. at 2.

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n223. Id. at 15.

n224. Id. at 17.

n225. Id. at 18.

n226. Id.

n227. Id. at 20.

n228. 493 So. 2d 1374 (Ala. 1986). The Hammond factors include the "culpability of the defendant's conduct," the "desirability of discouraging others from similar conduct[,]" the "impact upon the parties," and "other factors, such as the impact on innocent third parties." Haslip, 499 U.S. at 20 (citing Hammond, 493 So. 2d at 1379).

n229. Haslip, 499 U.S. at 21.

n230. Id. at 23-24.

n231. Id. at 21-22.

n232. See id. at 24-25 (Scalia, J., concurring).

n233. Id. at 44.

n234. Id. at 44 (O'Connor, J., dissenting).

n235. Id. at 44-45.

n236. 509 U.S. 443 (1993).

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n237. Id. at 470 (Scalia, J., dissenting).

n238. TXO Prod. Corp., 509 U.S. at 458.

n239. Id. at 443.

n240. Id. at 460 (quoting Haslip, 499 U.S. at 21).

n241. See id. at 462.

n242. Id.

n243. Id. at 458 n.24.

n244. Writing separately, Justice Kennedy took issue with precisely this portion of the plurality opinion:

To ask whether a particular award of **punitive damages** is grossly excessive begs the question: excessive in relation to what? The answer excessive in relation to the conduct of the tortfeasor may be correct, but it is unhelpful, for we are still bereft of any standard by which to compare the punishment to the malefaction that gave rise to it. A reviewing court employing this formulation comes close to relying upon nothing more than its own subjective reaction to a particular **punitive damages** award in deciding whether the award violates the Constitution. This type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend. Furthermore, it might give the illusion of judicial certainty where none in fact exists, and, in so doing, discourage legislative intervention that might prevent unjust punitive awards.

Id. at 466-67.

n245. Haslip, 499 U.S. at 18.

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therefore, the Anti-Federalists were making much ado about nothing. He concluded that there is no "inseparable connexion between the existence of liberty and the trial by jury in civil cases" [61] and "the jury's role could be safely reduced in democratic post-revolutionary America." [62]

The Anti-Federalists reacted violently to this rhetoric. So strong was the opposition that the Anti-Federalists "treated the absence of a civil jury guarantee as warranting the rejection of the Constitution in its entirety." [63] Their first objection was that, Hamilton's remarks notwithstanding, **[*422]** the structure of the Constitution did, in fact, take away the right to jury trial. [64] Their second objection was that the jury right to trial was too important to concepts of individual liberty and was necessary to ensure the freedom of the nascent Republic. [65] Patrick Henry was particularly eloquent:

To hear gentlemen of such penetration make use of such arguments to persuade us to part with that trial by jury, is very astonishing. We are told that we are to part with that trial by jury which our ancestors secured their lives and property with, and we are to build castles in the air, and substitute visionary modes of decision for that noble palladium. I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common-law suits. The unanimous verdict of twelve impartial men cannot be reversed. [66]

[*423]

The Anti-Federalists were largely successful in convincing the citizenry that the newly created Constitution abolished the right to a jury trial in civil cases. As a result, in both Massachusetts and New Hampshire, in order to obtain a majority in the respective conventions necessary to ratify the Constitution, the Federalist constituent had to agree to certain "conciliatory propositions." [67] The proposed language was as follows: "In civil actions between citizens of different States, every issue of fact arising in actions at common law, shall be tried by a jury, if the parties, or either of them, request it." [68]

Virginia, New York, and Rhode Island recommended similar amendments. Virginia's proposed language was particularly sweeping. It read "that, in controversies respecting property, and in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people and [should] remain sacred and inviolable." [69] In the end, it was Anti-Federalist agitation that resulted in the adoption of the Seventh Amendment, among others, because the Anti-Federalists refused to ratify the constitution without assurances that the amendments would be forthcoming. [70] To the extent, then, that the historical perspective remains relevant in constitutional analysis of the relative powers of the **judge** and the jury where **punitive damages** are concerned, [71] the view of the Anti-Federalists that the right to jury trial constituted "the very palladium of free government" [72] suggests that if **punitive damages** were awarded at common law by the jury, we do violence to the Seventh Amendment to take such awards from them. [73]

[*424] However, the inquiry cannot end there. Part II demonstrates that the constitutional question no longer turns upon what procedures were historically available at common law. Rather, the court will inquire whether the particular function is "fundamental" to the role of the jury. It is this question to which one must ultimately turn to analyze the validity of the Court's action in Cooper. Nonetheless, because the historical test preceded the functional test, it is necessary to examine the historical pedigree of **punitive damages.** [74]

C. The Early **Punitive Damages** Cases

The concept of **punitive damages** is rooted in ancient times. For example, the Bible, [75] the

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n246. TXO, 509 U.S. at 471 (Scalia, J., concurring).

n247. Id. at 500 (O'Connor, J., dissenting).

n248. Id. at 473 (O'Connor, J., dissenting).

n249. Id.

n250. Id. at 474.

n251. Id.

n252. Id. at 475-76.

n253. See id. at 497. Justice O'Connor was rightly disturbed by the West Virginia court's reference to categorizing the defendant as "really stupid" or "really mean" and allowing greater damages for the latter category: "Reference to categories like 'really stupid' or 'really mean' are a caricature of the difficult task of determining whether an award may be upheld consistent with due process." Id. at 498.

n254. 512 U.S. 415 (1994).

n255. See id. at 418.

n256. Id. (citing Or. Const. art. VII (amend.), 3.).

n257. See id.

n258. Id. at 420.

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↑n259. See id.

↑n260. See id. at 421.

↑n261. Id.

↑n262. Id. at 421.

↑n263. 95 Eng. Rep. 768 (K.B. 1763).

↑n264. Oberg, 512 U.S. at 426.

↑n265. For example, prior to Oberg, an Oregon court could only order a new trial where the jury was improperly instructed, there was error during trial or there was no evidence to support the punitive award. See id.

↑n266. See id. at 428.

↑n267. Id. at 421.

↑n268. Id. at 429.

↑n269. Id. at 430.

↑n270. Id. at 432.

↑n271. 517 U.S. 559 (1996).

↑n272. Glen R. Whitehead, BMW of North America v. Gore: Is the Supreme Court Initiating

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Judicial Tort Reform?, 16 QLR 533, 533 (1997).

n273. Colleen P. Murphy, Judgment as a Matter of Law on **Punitive Damages,** 75 Tul. L. Rev. 459, 479 n.53 (2000) (stating:

At least a few members of the Supreme Court have explicitly recognized a distinction between common law review for reasonableness and review as to whether an award violates the due process clause. As a plurality of the Court noted in a decision a few years before BMW: "A violation of a state law reasonableness requirement would not ... necessarily establish that the award is so grossly excessive as to violate the Federal Constitution." The Supreme Court, however, has confused matters by describing review under due process in terms of "reasonableness." "[A] general concern[ ] of reasonableness ... properly enters into the constitutional calculus." (citations omitted)).

n274. Whitehead, supra note 272, at 559.

n275. See BMW, 517 U.S. at 563-64.

n276. See id. at 563.

n277. See id. at 565.

n278. See id.

n279. Id. at 566.

n280. See id. at 567. Rather than using a multiplier of the compensatory award, as the trial court had done, the Alabama Supreme Court relied on "comparative analysis" of awards in Alabama and other jurisdictions. See id.

n281. Id. at 572. Other states' consumer protection laws expressly permitted automobile manufacturers to repair damage not exceeding three percent without disclosing that fact to the dealer or the ultimate end user. Thus, BMW's conduct was lawful in other jurisdictions. See id. at 569-71.

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n282. See id. at 575. This is a distillation of the factors first articulated in Haslip. See supra note 218 and accompanying text.

n283. See id. at 586. On remand, BMW of North America, Inc. v. Gore, 701 So. 2d 507 (Ala. 1997), the Alabama Supreme Court characterized the Supreme Court's decision as follows:

The United States Supreme Court announced, for the first time and by a 5-4 vote, that a **punitive damages** award, even one that is the product of a fair trial, may be so large as to violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Supreme Court determined that, under the Due Process Clause, a defendant has the right to fair notice not only of the conduct that may subject him to punishment, but also of the severity of the penalty that a state may impose for such conduct. BMW, 517 U.S. at [513], 116 S. Ct. at 1598. The Supreme Court recognized that a state may impose **punitive damages** to further its legitimate interest in punishing misconduct and deterring a repetition of that conduct. 517 U.S. at [568], 116 S. Ct. at 1595. To that end, a state has flexibility in determining the level of **punitive damages** the state will allow in different classes of cases. Id. The Supreme Court held that an award of **punitive damages** enters "the zone of arbitrariness that violates the Due Process Clause only when that award can be fairly categorized as 'grossly excessive'" in relation to those legitimate interests. Id. The Supreme Court then set out the following three "guideposts" by which a reviewing court could determine whether a **punitive damages** award is constitutionally excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio between the plaintiff's award of compensatory damages and the amount of the **punitive damages;** and (3) the difference between the **punitive damages** award and the civil or criminal sanctions that could be imposed for comparable misconduct.

701 So. 2d at 509.

Ultimately, the Alabama Supreme Court held that the plaintiff must accept a remitted award to $ 50,000, which Gore did. On September 10, 1997, the Supreme Court entered a "certificate of judgment of affirmance" noting that Gore did file an acceptance of remittitur of **punitive damages** to the amount of $ 50,000. Id. at 509. The certificate ordered "that the judgment of the circuit court for **punitive damages** is reduced to the sum of $ 50,000 and as thus reduced, the judgment of the circuit court is hereby affirmed, with interest and costs." Id. at 515.

n284. See id. at 587 (Breyer, J., concurring).

n285. Id. at 595.

n286. Id. at 598-99. (Scalia, J., dissenting).

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n287. Id.

n288. Id. at 600.

n289. Id. at 599-600.

n290. Id. at 607 (Ginsberg, J., dissenting).

n291. See id.

n292. 121 S. Ct. 1678 (2001).

n293. See supra Part II.C.

n294. See supra Part III. Of course, each of these mechanisms were later codified in the Federal Rules of Civil Procedure and judgment notwithstanding the verdict became a judgment as a matter of law. See Fed. Rule. Civ. P. 50.

n295. See Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991); Honda Motor Co. v. Oberg, 512 U.S. 415, 430 (1994).

n296. See BMW of North America, Inc. v. Gore, 517 U.S. 559, 576 (1996).

n297. See, e.g., Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996).

n298. Id. Gasperini involved application of the Erie Doctrine to a New York statutory scheme which required New York appellate courts apply a more stringent standard of review than that contemplated by the Federal scheme, and which implicated the Seventh Amendment.

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n299. See Cooper Indus., Inc., 121 S. Ct. at 1680-81.

n300. Leatherman Tool Group, Inc. v. Cooper Indus., Inc., Nos. 98-35147 & 98-35415, 1999 U.S. App. LEXIS 33657, at 3-4 (9th Cir. Dec. 17, 1999).

n301. Id. at 5.

n302. See Cooper Indus., 121 S. Ct. at 1682.

n303. See id. at 1683.

n304. Id. at 1684.

n305. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried to a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

n306. Cooper Indus., 121 S. Ct. at 1683.

n307. Id. at 1686.

n308. 116 U.S. 550, 565 (1886).

n309. 13 U.S. (1 How.) 363, 371 (1852).

n310. 121 S. Ct. at 1686 n.11. The Reexamination Clause is contained within the Seventh Amendment, and provides, "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

n311. Cooper Indus., 121 S. Ct. at 1686 n.11.

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n312. See id.

n313. Id. at 1691. (Ginsberg, J., dissenting).

n314. Id.

n315. See supra Part II.B.

n316. Three years after the Seventh Amendment was adopted, the jury was instructed that they had the right "to determine the law as well as the fact in controversy." Georgia v. Brailsford, 3 U.S. (1 Dall.) 1, 4 (1794).

n317. See, e.g., Darryl K. Brown, Structure And Relationship In The Jurisprudence Of Juries: Comparing The Capital Sentencing And **Punitive Damages** Doctrines, 47 Hastings L.J. 1255 (1996). The author points out that in terms of legal process theory, a critique that can be fairly leveled at **judges,** is that, they may bring personal bias to the bench and to the extent that most federal **judges** are highly educated and come from relatively privileged backgrounds, there may be an inclination on the part of the **judges** to side with wealthy business interests and to refuse to grant appropriate **punitive damages** awards, i.e., awards that are not sufficiently large enough to deter and punish a wealthy corporate defendant.

n318. See Margaret M. Koesel, Invading the Province of the Jury: Section 2315.21(c) and Judicial Determination of the Amount of **Punitive Damages,** 15 Ohio N.U. L. Rev. 55 (1988) (stating:

The inability to easily remove **judges** from the bench gives rise to the fear that an "eccentric" will remain on the bench once appointed. And because trial **judges** sit alone, the possibility that any one person's judgment will be idiosyncratic and not countered by others adds to the fear of an individual **judge's** eccentricity. That is confirmed when citizens and trial lawyers experience "**judge**-shopping." Trial attorneys certainly realize, as do many citizens who have had some involvement in court processes, that outcomes can vary substantially according to the **judge** who presides over a case. The considerable power concentrated in a single individual gives rise to fear of "arbitrary action." In a legislature, jury, or even multi-member appellate court, the fear of one eccentric participant is substantially diminished.).

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n319. Henderson By & Through Hartsfield v. Alabama Power Co., 627 So. 2d 878, 893 (Ala. 1993).

n320. See, e.g., BMW of North America, Inc. v. Gore, 517 U.S. 559, 600 (1997) (Scalia, J., dissenting).

n321. See, e.g., Koesel, supra note 318, at 58, citing Fisher, "Tort Reform" Is An Attack of Ohio Citizens, Plain Dealer, Aug. 20, 1987, at 13B (for the "elitist" remark; and S. DARLING, OHIO CIVIL JUSTICE REFORM ACT, at v (1987) for the "unconstitutional" remark).

n322. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

n323. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 473 (1993); see also Fay v. Parker, 53 N.H. 342, 382 (1872) (**punitive damages** are, in general, "monstrous heresy").

n324. TXO, 509 U.S. at 500 (O'Connor, J., dissenting).

n325. The empirical data are conflicting, however. See, e.g., Thomas M. Selsheimer and Steven H. Stodgill, Due Precess and **Punitive Damages:** Providing Meaningful Guidance to the Jury, 47 S.M.U. L. Rev. 329 (1994) ("Anecdotal evidence of skyrocketing awards is plentiful; hard empirical data is not ... . Part of the problem is, of course, a statistical one burdened by the adage that one can prove anything with statistics."); Michael L. Rustad, Unraveling **Punitive Damages:** Current Data and Further Inquiry, 1998 Wis. L. Rev. 15 (1998) (citing nine **punitive damages** studies that show **punitive damage** awards are rare, and that increases in **punitive damages** are limited to only a few jurisdictions).

n326. For a comprehensive review of state tort reform, see Richard L. Blatt et al., **Punitive Damages:** A State-by-State Guide to Law and Practice (1999 & Supp. 2001).

n327. See, e.g., Paul **Mogin, Why Judges,** Not Juries, Should Set **Punitive Damages,** 65 U. Chi. L. Rev. 179 (1998) (**judges** "are more likely to be able to base the severity of the penalty on a rational assessment of the facts, rather than an emotional reaction to the defendant's misconduct").

n328. See **Mogin,** supra note 327 ("Because of their responsibility for sentencing in criminal cases and for imposing civil statutory penalties, **judges** ordinarily have much more experience than jurors in determining punishments and far more familiarity with the sanctions imposed for various types of misconduct."). Professor **Mogin** points out that in the

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criminal justice system, we almost universally allocate to the jury the responsibility of finding guilt, but then charge the court with determining the penalty:

In criminal cases (other than capital cases) sentences are determined by **judges** in both federal court and the courts of all but eight states. By statute, defendants in six states have a right, in cases triable to a jury, to have a jury fix their punishment, within the limits established by statute. Ark. Code Ann. 5-4-103 (Michie 1993) (granting this right only for crimes of rape and statutory rape); 57 Okla. Stat. Ann 353 (West 1991); Tex. Crim. P. Code Ann. 532.055(2) (Baldwin 1990 & Supp. 1997). In Tennessee, defendants have such a right in misdemeanor cases. Tenn. Code Ann. 40-20-104 (Michie 1990). In Missouri, a trial **judge** can impose a sentence less than or equal to the sentence chosen by the jury.

Id. at n.3.

n329. See, e.g., Cass R. Sunstein et al., Assessing **Punitive Damages** (With Notes on Cognition and Valuation in the Law), 107 Yale L.J. 2071, 2077 (1998) (stating:

From the standpoint of economic efficiency, unpredictable awards need not be troublesome; perhaps individual awards cannot be calculated in advance, but if people can calculate the expected value of the relevant risks, there should be no efficiency loss. If awards are unpredictable, however, resources are likely to be wasted on that calculation, and as a practical matter, a risk of extremely high awards is likely to produce excessive caution in risk-averse managers and companies. Hence unpredictable awards create both unfairness and (on reasonable assumptions) inefficiency, in a way that may overdeter desirable activity.).

See also Developments in the Law - The Paths of Civil Litigation, 113 Harv. L. Rev. 1752, 1802-03 (2000) (recommending that **judges,** not juries, determine **punitive damages** awards in order to "promote predictability and rationality").

n330. Sunstein et al., supra note 329, at 2085.

n331. See, e.g., Colleen P. Murphy, Judicial Assessment of Legal Remedies, 94 Nw. U. L. Rev. 153, 172 (1999) ("The assessment of highly discretionary, multifactored remedies such as civil penalties, statutory damages, and **punitive damages** should not be considered to fall within the scope of the Seventh Amendment.").

n332. This is a concept not far removed from allowing judicial assessment at the outset.

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n333. See Murphy, supra note 331, at 202.

n334. Cooper Indus., 121 S. Ct. at 1686.

n335. There has been controversy over whether the defendant's wealth should be relevant. See, e.g., David G. Owen, A **Punitive Damages** Overview: Functions, Problems and Reform, 39 Vill. L. Rev. 363 (1994). However, this Article takes the position that the wealth of the defendant is highly relevant. A punitive award against a middle-income individual of, say, $ 25,000, might have tremendous punitive and deterrent value. The same award levied against a large, wealthy corporation would have a de minimis effect.

n336. This aspect of the Cooper case is discussed more fully in Lisa Litwiller, Re-Examining Gasparini: Damages Assessments and Standards of Review, forthcoming in volume 28, Ohio N.U. L. Rev.

n337. Sunstein et al., supra note 329, at 2079.

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Babylonian Hammurabi Code, [76] and the Hindu Code of Manu [77] all contain provisions for exemplary damages, or an ancient species of them. **Punitive damages** were part of the law of the Hittites [78] and the ancient Greeks. [79] Scholars are in general agreement that multiple damages remedies were part of Roman Civil Law. [80] Similar approaches are found at early common law, with multiple damages statutes dating back as far as 1278. [81] However, the earliest **[*425]** reported cases of exemplary or **punitive damages** in the English common law were Wilkes v. Wood [82] and its companion case, Huckle v. Money. [83] In Wilkes, the plaintiff was engaged in the publication of several radical broadsheets in which he accused George III of lying about the status of peace negotiations with France. He was arrested and charged with seditious libel but was acquitted because his statements were protected by the parliamentary privilege. After his acquittal, he promptly sued a number of officials and was awarded £ 1000. [84] In affirming the award, Lord Chief Justice Pratt stated that juries are entitled

to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself. [85]

This inclusion of a punitive component within the damages award "is generally agreed to have been the first occasion on which an avowedly punitive award was permitted." [86]

In Huckle, a companion case based upon substantially similar facts as the Wilkes case, the publisher's employee sued for false imprisonment, trespass, and assault. [87] The Chief Justice stated:

The personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20 [pounds] damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light ... . I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject. [88]

[*426]

It was this case that introduced the term "exemplary damages," the forerunner to the modern concept of **punitive damages** meant to punish or deter the tortfeasor rather than compensate the victim. [89]

The first case of **punitive damages** awarded in the United States appears to have been Coryell v. Colbaugh. [90] There, the plaintiff sued for breach of a promise to marry and seduction. Her father had already sued the defendant and been awarded approximately £ 75. The defendant objected to the second trial, asserting that Ms. Coryell's claim was precluded by the prior suit. The court disagreed, and allowed the jury to be charged, stating, "the injury complained of was of the most atrocious and dishonorable nature, and called for exemplary damages." [91] The **judge** told the jury "not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for example's sake, to prevent such offences in future; and also to allow liberal damages for the breach ... ." [92] The court also stated that the

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wealth of the defendant was irrelevant despite the defendant's attempts to mitigate damages by demonstrating that he was poor.

In Genay v. Norris, [93] the plaintiff was apparently newly arrived in the United States when the defendant and some of his cronies decided **[*427]** to engage him in a prank. Apparently all the parties were quite intoxicated and it was not difficult to contrive a sham "duel," with unloaded pistols. At the conclusion of the "duel" the defendant proposed that they should reconcile their dispute over a drink. Unbeknownst to Mr. Genay, Dr. Norris put cantharides (more commonly known as Spanish Fly) into the plaintiff's drink, which caused the former to become quite ill. In charging the jury, the court stated:

Notwithstanding it was called a frolic, yet the proceedings appeared to be the result of a combination, which wrought a very serious injury to the plaintiff, and such a one as entitled him to very exemplary damages, especially from a professional character, who could not plead ignorance of the operation, and powerful effects of this medicine. [94]

The jury awarded £ 400 in damages.

Commentators have argued that the rise of **punitive damages** in England and the United States may be attributed to juries assessing damages they felt were warranted, but where there was no significant injury or the injury was not easily quantifiable. [95] Scholars sometimes attribute the rise of exemplary or vindictive damages as the product of juries departing significantly from simple compensation.

In actions of tort, when gross fraud, wantonness, malice, or oppression appears, the jury [is] not bound to adhere to the strict line of compensation, but may, by a severer verdict, at once impose a punishment on the defendant, and hold him [or her] up as an example to the community. It might be said, indeed, that the malicious character of the defendant's intent does, in fact, increase the injury, and the doctrine of exemplary damages might thus be reconciled with the strict notion of compensation ... . The idea of compensation is abandoned and that of punishment introduced. [96]

The primary proponent of **punitive damages** in the nineteenth century was Theodore Sedgwick. In Sedgwick's view, where there is fraud, malice, gross negligence, or oppression,

the law ... adopts a wholly different rule ... . It permits the jury to give what it terms punitory, or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender. [97]

[*428]

The concept of **punitive damages** was not without opposition, however. Those opposing **punitive damages** awards argued that the concept was foreign to, and logically inconsistent with, the purpose of compensatory tort law, which is to put the victim in as good a position as he or she would have been but for the conduct of the tortfeasor. [98] Nineteenth century

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commentators went further and questioned the normative fairness of the remedy to society as a whole. For example, in a letter to the editor of an 1878 edition of The Central Law Journal, one writer stated: "It is difficult, in principle, to understand why, ... if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer, and not to the public in whose behalf he is punished." [99] The writer elaborated as follows:

The doctrine of allowing **punitive damages** rests, at least at the present time, on an unsound foundation. Eminent legal writers have long ago pronounced against it, and have contended that the rule is against the self-evidence and undisputable truth which has become a legal maxim, that a plaintiff ought to recover no more damages than he has actually sustained. [100]

The most influential opponent of **punitive damages** was Professor Simon Greenleaf. His primary thesis was that there are two types of laws that have developed over time. One body of law, primarily the constitutional and criminal laws, are "public" laws. [101] On the other hand, a second body of law, such as contract and tort, are "private." [102] To permit the public function of punishment and deterrence to enter the private law arena was to improperly mix the two functions. Professor Sedgwick's view that **punitive damages** were necessary to redress certain types of "private" transgressions ultimately prevailed, but Professor Greenleaf was successful with at least one **judge** who wrote that **punitive damages** awards are "monstrous heresy[,] ... an unsightly and unhealthy excresence, deforming the symmetry of the body of law." [103]

[*429] In any event, by the time the United States Supreme Court heard the case of Day v. Woodworth [104] in 1851, **punitive damages** awards were so common that the Court placed its official imprimatur on the practice over a due process objection. [105] In Day, the plaintiff sued the defendants for trespass after the defendants tore down a part of a dam owned by the plaintiff. At issue was whether the defendants were justified in partially destroying the dam because it interfered with dams upstream owned by the defendants' employer, and, if not, what damages the plaintiff was entitled to. Although the case was not precisely about **punitive damages,** the Court gave a lengthy discourse on the subject, focusing on common and statutory law pedigree of **punitive damages** awards.

The Court began by acknowledging that there was a great deal of controversy about **punitive damages** in the legal community in general and in the legal academy in particular. However, the Court likewise acknowledged that **punitive damages** had been part of the common law scheme for so long that their validity as a vehicle for punishment and deterrence "will not admit of argument." [106] The Court also highlighted the fact that historically, many torts recognized today were not common law causes of action and that juries often over-compensated plaintiffs in order to redress dignitary harms. The Court stated,

[*430]

in many civil actions ... the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory. [107]

The Court went on to note that

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SYMPOSIUM: Reply: Why There is No Defense of Punitive Damages

W. KIP VISCUSI *

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TEXT:

My analysis of punitive damages in environmental and products liability cases concludes that these awards impose substantial costs on society, and that abolishing punitive damages would improve social welfare. The two commentaries on my proposal are written by prominent proponents of punitive damages. Professor Luban has been a leading advocate of punitive damages as a form of punishment, [1] and Professor Eisenberg has promoted the view that punitive damages are both small and predictable. [2] Not surprisingly, each of them is critical of my proposal, but as I will indicate below, neither provides any evidence that punitive damages play a constructive role in society. Without such a beneficial function, the costs of these awards cannot be justified.

I. DO PUNITIVE DAMAGES HAVE A DETERRENT EFFECT?

The linchpin of any law and economics argument in favor of punitive damages is that these awards alter incentives. For the corporate decisions involving environmental and safety torts which were the focus of my paper, fostering safer decisions is essential if punitive damages are to play a constructive role. I set out to evaluate the effect of punitive damages by examining the risk performance in the four states that do not permit punitive damages as compared with the other states that do. This analysis considers an extremely wide range of risk measures -- toxic chemical accidents, toxic chemical accidents causing injury or death, toxic chemical discharges, surface water discharges, total toxic releases, medical misadventure mortality rates, total accidental mortality rates, and a variety of liability insurance premium measures.

This detailed effort to detect a deterrent effect yielded no evidence of any safety incentive role. This lack of evidence is consistent with the proposition that punitive damages are random. Of course, from a statistical standpoint it is not possible to prove a negative -- that punitive damages have zero effect. The most I can do is conclude, based on the data I have analyzed, that we cannot reject the hypothesis that punitive damages have zero effect. Notwithstanding the length of their critiques, neither Professor Luban nor Professor Eisenberg presents any empirical evidence indicating that punitive damages have a deterrent effect. The most these authors can do is offer some conjectures about why my data analysis may

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damages, if in fact they have a deterrence role. Ultimately, Professor Eisenberg blames the absence of any punitive damages effects not on statistical niceties, but on the relatively powerful role of regulatory policy (for environmental risks) and the relatively small role of punitive damages (for products liability and medical malpractice). Abolishing punitive damages will not sacrifice deterrence.

Table 2

Insurance Performance Differences between States with and without Punitive Damages

	Premiums ($ 1,000)	Population (1,000)
TOTAL INSURANCE		
States without punitive damages:		
Louisiana	$ 4,520,578	4,338
Michigan	$ 9,870,463	9,538
Nebraska	$ 1,738,960	1,639
New Hampshire	$ 1,198,307	1,148
Washington	$ 4,745,126	5,447
Five state totals	$ 22,073,434	22,111
States with punitive damages:		
Other 45 states and DC	$ 241,086,656	240,778
States with insurable punitives	$ 65,288,517	71,043
States with uninsutable punitives	$ 150,312,113	144,949
States with uncertain insurance rul	$ 31,150,917	30,273
MEDICAL MALPRACTICE		
States without punitive damages:		
Louisiana	$ 70,675	4,338
Michigan	$ 193,836	9,538
Nebraska	$ 21,783	1,639
New Hampshire	$ 20,696	1,148
Washington	$ 97,863	5,447
Five state totals	$ 404,853	22,111
States with punitive damages		
Other 45 states and DC	$ 5,567,016	240,778
States with insurable punitives	$ 1,420,860	71,043
States with uninsurable punitives	$ 3,768,674	144,949
States with uncertain insurance rul	$ 575,187	30,273
PRODUCT LIABILITY		
States without punitive damages:		
Louisiana	$ 26,442	4,338
Michigan	$ 74,587	9,538
Nebraska	$ 14,351	1,639
New Hampshire	$ 8.336	1,148
Washington	$ 38,312	5,447
Five state totals	$ 162,028	22,111

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States with punitive damages:		
Other 45 states and DC	$ 1,998,224	240,778
States with insurable punitives	$ 481,672	71,043
States with uninsurable punitives	$ 1,295,844	144,949
States with uncertain insurance rules regarding punitives	$ 255,807	30,273
OTHER LIABILITY		
States without punitive damages:		
Louisiana	$ 370,069	4,338
Michigan	$ 760,467	9,538
Nebraska	$ 141,883	1,639
New Hampshire	$ 88,891	1,148
Washington	$ 369,689	5,447
Five state totals	$ 1,730,999	22,111
States with punitive damages:		
Other 45 states and DC	$ 20,219,759	240,778
States with insurable punitives	$ 4,759,881	71,043
States with uninsurable punitives	$ 13,335,308	144,949
States with uncertain insurance rules regarding punitives	$ 2,603,478	30,273

TOTAL INSURANCE

	Premiums/Population	**t-statistic**
States without punitive damages:		
Louisiana	$ 1.042	
Michigan	$ 1.035	
Nebraska	$ 1.061	
New Hampshire	$ 1.044	
Washington	$ 871	
Five state totals	$ 998	
States with punitive damages:		
Other 45 states and DC	$ 1.001	0.03
States with insurable punitives	$ 919	1.32
States with uninsutable punitives	$ 1.037	0.53
States with uncertain insurance rul	$ 1.029	0.37
MEDICAL MALPRACTICE		
States without punitive damages:		
Louisiana	$ 16	
Michigan	$ 20	
Nebraska	$ 13	
New Hampshire	$ 18	
Washington	$ 18	
Five state totals	$ 18	
States with punitive damages		
Other 45 states and DC	$ 23	1.00

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States with insurable punitives	$ 20		0.39
States with uninsurable punitives	$ 26		1.29
States with uncertain insurance rul	$ 19		0.35
PRODUCT LIABILITY			
States without punitive damages:			
Louisiana		$ 6.10	
Michigan		$ 7.82	
Nebraska		$ 8.76	
New Hampshire		$ 7.26	
Washington		$ 7.03	
Five state totals		$ 7.33	
States with punitive damages:			
Other 45 states and DC	$ 8.30		0.93
States with insurable punitives	$ 6.78		0.69
States with uninsurable punitives	$ 8.94		1.51
States with uncertain insurance rules regarding punitives	$ 8.45		1.13
OTHER LIABILITY			
States without punitive damages:			
Louisiana		$ 85	
Michigan		$ 80	
Nebraska		$ 87	
New Hampshire		$ 77	
Washington		$ 68	
Five state totals		$ 78	
States with punitive damages:			
Other 45 states and DC	$ 84		0.63
States with insurable punitives	$ 67		1.06
States with uninsurable punitives	$ 92		1.23
States with uncertain insurance rules regarding punitives	$ 86		0.82

Note: The t-statistic tests the weighted means for the five states which do not award punitive damages against the weighted mean for the states in the category described.

Source: The Fact Book 1997: Property/Casualty Insurance Facts

VIII. WHERE DO WE STAND?

Punitive damages inflict substantial random penalties on firms but offer no constructive deterrence benefits to justify there costs. My article provides a comprehensive assessment of risk measures, none of which indicates that states without punitive damages fared worse. No deterrence effects could be detected. Neither Professor Luban nor Professor Eisenberg provides any empirical evidence whatsoever that supports the deterrence hypothesis. Indeed, Professor Eisenberg correctly observes that, compared to regulatory and other incentives, punitive damages should not be expected to have much of a deterrent effect.

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The closest either author came to finding a deterrence link was in their discussion of the predictability of punitive damages based on the earlier Eisenberg et al. study. However, that article in fact provides strong support for the randomness hypothesis. To the extent that other variables explain a small amount of the variation in punitive damages awards, they capture information that is not available at the time of the safety decision (for example, the size of the compensatory damages award), or involve broad case class measures that provide no basis whatsoever for enabling a firm to determine which choices within a case class are likely to lead to a punitive damages sanction.

Because punitive damages impose costs with no tangible benefits, any defense ultimately must rest on the intangible. Professor Luban cites the role of retribution, but this function is not appropriate for penalizing institutions and will impose costs primarily on innocent consumers, shareholders, and employees. Ultimately, retribution makes sense only if it will make our lives safer, which is to say that there must be some deterrence effect. Even retribution advocates hope that such penalties will "send a message," but if sending this message does not foster safer decisions, what constructive function is achieved? All that is left is vengeance, and that is not a constructive function for our legal system. [52] Abolishing punitive damages for environmental and safety torts would impose no tangible losses. Whatever intangible effects exist must surely be outweighed by the increased confidence we would have in a legal system that no longer imposed punitive damages in a random and capricious manner.

FOOTNOTES:

n1 *See* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393 (1993).

n2 *See* Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997).

n3 *See* David Luban, *A Flawed Case Against Punitive Damages*, 87 GEO. L.J. 359 (1998).

n4 The principal empirical measure is the expected replacement rate for worker earnings, which should have no effect if differences in replacement rates across states do not matter. *See* MICHAEL J. MOORE & W. KIP VISCUSI, COMPENSATION MECHANISMS FOR JOB RISKS: WAGES, WORKERS' COMPENSATION, AND PRODUCT LIABILITY 76 (1990); W. KIP VISCUSI, REFORMING PRODUCTS LIABILITY 178 (1991) [hereinafter VISCUSI, REFORMING PRODUCTS LIABILITY].

n5 *See* Wesley A. Magat & W. Kip Viscusi, *Effectiveness of EPA's Regulatory Enforcement: The Case of Industrial Effluent Standards*, 33 J.L. & ECON. 331-60 (1990).

n6 *See* Luban, *supra* note 3, at 359.

n7 *Id.* at 378.

n8 *Id.*

n9 *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, III HARV. L. REV. 869, 950-51 (1998).

n10 *See* Luban, *supra* note 3, at 366-67.

n11 *See* VISCUSI, REFORMING PRODUCTS LIABILITY, *supra* note 4, at 6-11.

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n12 *See id.* at 26-28.

n13 *See* Luban, *supra* note 3, at 366-67.

n14 *See* Eisenberg et al., *supra* note 2, at 648 tbl.5.

n15 *See id.* at 632-35.

n16 *See id.* at 634.

n17 *See id.* at 642-43.

n18 *See id.* at 644-45. The pseudo-r-squared for the clustered model, which is the preferred statistical model with multiple trials from the same county, was 0.124.

n19 *See* Luban, *supra* note 3, at 361.

n20 *See* Eisenberg et al., *supra* note 2, at 648.

n21 *See id.*

n22 *See* A. Mitchell Polinsky, *Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al.*, 26 J. LEGAL STUD. 663, 672 (1997) (emphasis added).

n23 *See* Luban, *supra* note 3, at 370.

n24 For a broad review of the range of such biases, see generally W. KIP VISCUSI, RATIONAL RISK POLICY (1998).

n25 *See* W. Kip Viscusi. *How Do Judges Think About Risk?* 4-9 (Apr. 28, 1998) (unpublished manuscript, on file with author).

n26 *See id.* at 23-24.

n27 *See id.* at 12-16.

n28 *See* Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury as a Risk Manager*, 40 ARIZ. L. REV. (forthcoming Fall 1998).

n29 *See* Daniel Kahneman et al., *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. RISK & UNCERTAINTY 49 (1998); Cass Sunstein at al., *Assessing Punitive Damages (with Notes on Cognition and the Valuation in Law)*, 107 YALE L.J. 2071, 2100 (1998).

n30 *See* Luban, *supra* note 3, at 370.

n31 *See id.*

n32 *See* Reid Hastie et al., *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, 22 L. & HUM. BEHAV. 287 (1998).

n33 The Hans and Lofquist study cited by Luban, *supra* note 3, at 370 n.54, does not say that jurors' primary bias is antiplaintiff, only that "jurors focused most on the plaintiffs" -- whatever that means. Because such studies were interview studies of individual jurors after they were members of a jury, rather than experimental studies that manipulated the group

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aspect of the decision, their relevance to Luban's claims is unclear. *See* Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 L. & SOC'Y REV. 85, 94 (1992).

n34 *Luban, supra* note 3, at 368 n.34.

n35 *Id.* at 371.

n36 *Id.*

n37 *See* Polinsky & Shavell, *supra* note 9, at 950-52.

n38 *See* Luban, *supra* note 3, at 376.

n39 *See* VISCUSI, REFORMING PRODUCTS LIABILITY, *supra* note 4, at 119-21.

n40 *See* W. Kip Viscusi & James T. Hamilton, *Are Risk Regulators Rational? Evidence from Hazardous Waste Cleanups*, AM. ECON. REV. (forthcoming 1999).

n41 *See id.*

n42 *See* W. KIP VISCUSI, RISK BY CHOICE: REGULATING HEALTH AND SAFETY IN THE WORKPLACE 16-19 (1983).

n43 *See* W. KIP VISCUSI, FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK 65 (1992).

n44 Theodore Eisenberg, *Measuring the Deterrent Effect of Punitive Damages*, 87 GEO. L.J. 347 (1998).

n45 *Id.* at 350.

n46 Some issues he raises do not have merit, such as his suggestion that I use either negative binomial or Poisson regressions. *See id.* at 350 n.21. These methods are preferable only when the number of event counts in a state is low. Mine is large.

n47 Eisenberg discusses the power of the test issue at length. *See id.* at 349.

n48 *See id.* at 353.

n49 *See* Eisenberg et al., *supra* note 2, at 644-45, 648.

n50 *See* Eisenberg, *supra* note 44, at 349.

n51 *See* RICHARD BLATT ET AL., PUNITIVE DAMAGES: A STATE BY STATE GUIDE TO LAW AND PRACTICE tbl.8-1 (1991). More recently, New Hampshire permitted punitive damages under narrowly defined statutory circumstances. *See id.* at 111 (Supp. 1993).

n52 In the first edition of *Law and Literature: A Misunderstood Relation*, Judge Richard A. Posner observes: "Vengeance, however, is an extremely clumsy method of maintaining order (hence its frequent, but exaggerated association with radical disorder and unending strife). . . ." RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 29 (1st ed. 1988). In the second edition of the book, Posner reiterates this theme:

> The threat of retribution is not an adequate deterrent in situations where an aggressor is unlikely to be punished every time, so that punishment does not

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> equal crime when all his punishments and all his crimes are summed. And a commitment to limited retaliation, or to accepting money or goods in settlement of any wrong, is hard to stick by in the highly emotional circumstances in which revenge is provoked and administered. So vengeance falls out of favor, not only in ethics but in law. . .

RICHARD A. POSNER, LAW AND LITERATURE: REVISED AND ENLARGED EDITION 57 (2d ed. 1998).

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not be conclusive. However, no statistical test can ever prove conclusively that there is a zero effect; statistical tests can only find that there is no statistically significant basis for rejecting the hypothesis that there is no effect in the data analyzed. That is the nature of statistical hypothesis testing. If in fact there is any deterrent role for punitive damages, why do Luban and Eisenberg fail to cite any empirical evidence whatsoever to support this hypothesis?

Professor Luban's principal concern is whether the nonpunitive states benefit from the deterrent effect of punitive damages on other states. [3] For precisely the concern that he raises, I omitted nationally marketed products such as motor vehicles from my analysis, even though the analysis of these data yielded results that were consistent with my findings for the other risk measures. The risk categories I analyzed, such as medical malpractice misadventures and toxic chemical spills, are quite local in character and thus should be most responsive to the incentives imposed in that jurisdiction. If some national firms are involved and if they do not vary their safety practices by locale, as Luban hypothesizes, then the deterrent effect on these firms will be muted -- but not eliminated. The deterrent effect of punitive damages will then be governed by the weighted average effect of punitive damages across all states in which the firm or doctor operates, which will be reduced by the extent of the firm's or doctor's operations in the non-punitive damages states.

Luban's hypothesis that safety decisions do not vary across different states is inconsistent with empirical evidence of other risk policies that vary across states. If Luban was correct, state differences in workers' compensation regimes likewise would not affect job safety, but in fact interstate policy differences have dramatic effects on safety, reducing job fatality rates by one-third. [4] Similarly, water pollution discharges are extremely responsive to state and local differences in EPA enforcement activities. [5] The risk categories I analyzed for punitive damages are not idiosyncratic and should be responsive to state differences in economic incentives, just as has been the case for risk policy effects documented in the literature. The strong evidence supporting the incentive effects of regulatory policies highlights the relative advantage of using regulation rather than punitive damages to promote safety.

II. IS RETRIBUTION A LEGITIMATE OBJECTIVE?

Even in the absence of an incentive effect, all may not be lost, as Professor Luban suggests that punishment for bad conduct is a legitimate role for punitive damages, hence the term "punitive." [6] Careful scrutiny of the arguments in favor of a retributive role reveals that in fact their underlying concern is really the deterrence value of punitive awards, but the author has not recognized it as such. Punitive damages, in Luban's view, will "send a message." [7] But we should only be concerned about doing so if such messages will foster safer behavior. Luban seems more concerned with such deterrence effects, which he calls "forward-looking," than with retribution, which he labels "backward-looking." [8]

From an economic standpoint, whether legal philosophers are looking backward, forward, or not looking at all, is inconsequential. If punitive damages are levied in a manner that is not random and capricious, economic actors will look forward and anticipate these costs, producing a deterrent effect. A major theme of my article is that when firms look forward, the prospect of punitive damages is so uncertain that there is no deterrent effect. Moreover, there is no need to augment the safety incentives provided by the market, government regulation, and compensatory damages.

Courts essentially are trying to send a message that will change behavior so that the defendant does not injure again. Any such message-sending and concern with safety behavior is what economists mean by deterrence. Once concern about incentives enters any discussion of retribution, such concerns should be recognized really as notions of deterrence.

Is there nevertheless a benefit from punishing wrongdoers apart from the deterrence rationale? Corporate entities are not children or criminals who need to be punished. They are

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institutions. Punitive damages inflict harm on current shareholders, customers, and employees. None of these individuals may have even been involved in the original safety decision. For long-term risks, such as asbestos, the economic players today are quite different from those who made the risk decisions decades ago at the time of exposure. Even for contemporaneous risks, it is not easy to locate the responsible employee for a large institution's actions. [9] Even if the responsible employee is identified, that individual will not suffer the full effects of the punitive damages award. The employee can simply quit his job, thus limiting the institution's ability to sanction him. The result is that innocent people who are not responsible for the risk decision nonetheless will suffer the economic sanction.

Misdirected penalties do not promote justice or penalize wrongdoers. Ultimately, any legitimate defense of punitive damages requires that they have some constructive role in making our lives safer. Such an objective is called deterrence.

III. ARE THERE OTHER RATIONALES FOR PUNITIVE DAMAGES?

Punitive damages also affect the character of the litigation process. Professor Luban believes it is desirable that punitive damages reduce "hardball bargaining by defendants" and offer a bounty to plaintiffs' lawyers. [10] The desirability of these effects is doubtful, and punitive damages are not well suited to these tasks.

Luban's hypothesized recalcitrant bargaining by defendants suggests an assumed inequity in which the defendants have the bargaining leverage. However, the major wave of tort liability reforms in the 1980s was in large part an effort to restrain the rising power of plaintiffs in the wake of the massive rise in tort liability. [11] Depicting plaintiffs as without economic influence is inconsistent with the tripling in liability costs in the mid-1980s. [12]

Increasing punitive damages to foster out-of-court settlements will promote such settlements insofar as punitive damages raise the expected loss to the firm more than the expected benefit of litigation to the plaintiff, due to both plaintiff risk aversion and the pattern-setting implications of a punitive award. Inflicting massive but uncertain economic harms on defendants to promote settlements is no more justifiable than inflicting similar random harms on plaintiffs, which would also promote settlements. The litigation process and out-of-court bargaining has a legitimate role to play in our legal system. Luban would short-circuit these efforts by penalizing one party indiscriminately simply to bring them to their knees in the settlement process.

Punitive damages also may serve as a reward for plaintiffs' lawyers, benefiting Luban's "bounty hunter." [13] Luban apparently believes there is not enough litigation in our society and that punitive damages bounties are needed to induce more lawsuits. However, even if one wanted to increase litigation, punitive damages are not well suited to the task: These bounties are restricted only to cases in which punitive damages are awarded. Punitive damages cases also tend to have large compensatory damages awards [14] so that the additional financial incentive is not needed. It is the small stakes cases that most lack the incentive for litigation. Legal reforms such as additional payments for legal fees could address such a problem, if in fact it is believed to be important. Punitive damages simply give an added windfall to lawyers in cases in which the rewards already tend to be great.

IV. ARE PUNITIVE DAMAGES PREDICTABLE?

If punitive damages are to deter, and thus promote safety, potential injurers must be able to anticipate that they will incur additional expected liability costs if they adopt riskier safety or environmental policies. If punitive damages are random and simply a wild card encountered by unlucky defendants, then there will be no deterrent effect. Luban and Eisenberg both cite statistical evidence reported in a study by Eisenberg et al. [15] as indicating that punitive damages are predictable. For predictability to matter, a corporation or other potential injurer

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must be able to anticipate the expected penalty at the time of the risky decision.

Does the evidence in the study by Eisenberg et al. show that punitive damages are predictable in the contexts that were the focus of my paper? Their sample consisted of just under 3000 trials from 75 counties. However, about one-third of the cases were routine automobile tort cases, and only approximately 17% were in the volatile areas of products liability, medical malpractice, and toxic substance liability that were of concern in my paper. [16] Various summary statistics from the Eisenberg et al. paper, such as punitive damage frequency or level, consequently do not directly pertain to the case mix in my study.

The first predictability issue is whether punitive damages will be awarded. Punitive damages awards seem to vary wildly in their sample, with the percentage of plaintiffs' victories with punitive damages awards ranging from 0% to 27% by county. [17] Whether jurisdictions are randomly variable or whether the variability continues across jurisdictions is unclear. The Eisenberg et al. statistical model explains only 12% of the variation in the probability of a punitive damages award. [18] Even that estimate overstates how much liability corporations can anticipate, because one of the explanatory variables was the value of the compensatory award, which is not known ex ante. The most influential variables were indicators of broad case categories, such as intentional tort or contract fraud. Knowing the broad category of case, however, still leaves the lion's share of the variation unexplained, and more importantly does not tell a firm which of its risk decisions within a case category, such as products liability, will lead to punitive damages. This distinction is critical. Indeed, there are no variables in the Eisenberg et al. model that permit firms to estimate different probabilities of a punitive damages award for different risk decisions. There will be no deterrent effect unless firms can predict such differences.

The second issue considered by Eisenberg et al. is the level of punitive damages. Professor Luban seems impressed with the precision of the Eisenberg et al. analysis of punitive damages award levels. According to Luban: "The punitive award equals the compensatory award to the .782 power and multiplied by 8.117. You cannot get much better predictability than that." [19] Such statements are statistically meaningless. This relationship gives us an illusory sense of mathematical precision. Obtaining such a statistical estimate tells us nothing whatsoever about the predictability of the relationship or the variation of the actual award around the predicted amount.

A close look at their analysis of award levels reveals that it offers virtually no predictive guidance to firms. The Eisenberg et al. analysis of damages award levels is *conditional on a nonzero punitive damages award*. Whether there will be a punitive damages award is itself largely unknowable to the firm making a safety decision. If firms are bad at making such predictions, their analysis of the level of the award will also be flawed. Moreover, the actual ability to predict the amount of punitive awards even conditional on there being an award is much less than the explanatory power of the regression explaining 46-47% of the variation would suggest. [20] The focus of the analysis is on the logarithm of punitive damages, which is the dependent variable to be explained. Taking logs of award amounts compresses the extent of the variation in what is of actual concern to defendants, which is the level of punitive damages, not its log. A punitive damages award of $ 1,000,000 is 1000 times worse than an award of $ 1000 -- but in logs, getting hit with the million dollar award looks only twice as bad (that is, a log value of six versus three). Their log transformation consequently shrinks much of the extreme variation in the size of punitive damages awards.

Given this mathematical transformation, what variables do Eisenberg et al. then give us to "predict" punitive damages, conditional on a punitive award? The two most influential variables are the value of compensatory damages and whether the compensatory award is zero. Neither of these trial outcome values are known to the corporation at the time of the risky decision, so one needs a model to predict these levels as well before their values can be used to predict punitive awards. Although Eisenberg et al. present no such model, any such

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estimates undoubtedly would involve substantial error.

What then is left in the predictive equation for the punitive damages level? The only variables that are statistically significant are whether the suit is (1) individual versus business, (2) involves toxic substances, or (3) is some "other tort." [21] Once again, however, within a class of decisions, such as those affecting environmental risks, there is no variable that can assist the firm in distinguishing which decisions will lead to large punitive damages awards and which will not. Thus there will be no deterrent effect.

My pessimistic conclusion regarding the value of the Eisenberg et al. analysis is not unique. As Professor A. Mitchell Polinsky observed: "The point I want to make here is that, notwithstanding their claims, *their results are consistent with the possibility that in each jurisdiction and case category jury decisions to award punitive damages are random*." [22] Indeed, the title of the Eisenberg et al. article -- *The Predictability of Punitive Damages* -- is a misnomer. Their article gives corporate decision makers no basis for predicting the punitive awards arising from different safety choices.

V. DO COGNITIVE BIASES IMPEDE THE RATIONALITY OF COURT DECISIONS?

A principal theme of my article is that cognitive biases in thinking about risk will impede the jury's ability to make rational judgments. Indeed, because these biases often lead to exaggerated responses to risk, the result will be a bias against corporate defendants and an excessive tendency to award punitive damages. In discussing diverse evidence from the literature, I generalized based on a large body of research for a wide variety of risk situations, many of which involved experimental results. This approach is consistent with usual scientific methods in this field of study.

Professor Luban fears, without any substantive basis, that such extrapolations are "larded with uncertainty and heavily context-sensitive." [23] But the opposite is the case, as I am unaware of any evidence that has ever indicated that the risk perception or decision biases I cited are limited to specific experimental contexts. [24]

Indeed, my studies specifically suggest that judicial actors may be quite vulnerable to these same kinds of influences. Let us consider three principal biases. First, do judicial actors have an exaggerated response to small risks? In a survey of almost one hundred judges, I found that judges overestimated small risks and underestimated large risks, thus exhibiting the same pattern as the population at large. [25] Second, is there an exaggerated response to ambiguous risks, such as those posed by new products? The judges in my sample preferred old products with known risks to safer new products for which the risk levels were less well established. [26] Third, when the stakes tended to become extremely large, judges failed in their ability to correctly apply legal rules, as they tended to award punitive damages even in cases where the firm passed traditional economics negligence tests. [27] Judges had great difficulty with low probability-high loss events, as do people more generally.

Judges did, however, perform better than jurors with respect to hindsight bias, where Reid Hastie and I found that jurors were much more prone to be victims of hindsight bias. [28] Judicial review, such as that which has led to the frequent overturning or reduction of punitive awards, can restrain some of these jury excesses.

A basic difficulty is that juries cannot think sensibly about punitive damages awards when attempting to set the level of such penalties. The mock jury analysis by Kahneman, Sunstein, and Schkade found that juries had a reasonable sense of the gravity of an offense but were unable to link it to a dollar punitive award in a sensible manner. [29]

Professor Luban seeks refuge in the hope that group decisions by juries will be better than individual decisions, [30] and he hypothesizes that there is an antiplaintiff bias that may be

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offsetting. [31] The jury study by Hastie, Schkade, and Payne [32] demonstrates, however, that each of these conjectures is false. Their study found that individual juror liability judgments are antidefendant initially and that in three of four cases group deliberation shifted the verdicts further in the antidefendant direction. [33] Indeed, even Professor Luban concedes that juries may not always make unbiased liability judgments: "Of course I do not mean that jurors invariably respect this doctrinal point. Irresponsible juries may elect to pick the deep pockets of a blameless corporation -- which I take to be one of Viscusi's main worries." [34] The attractiveness to juries of raiding deep corporate pockets is one of the most fundamental truths in the tort area.

Professor Luban also expresses concern with cognitive biases of corporate decision makers. Whereas the biases I cite tended to produce excessive safety, he suggests two other biases that could cut the other way. People may look at risk with a "rose-colored lens," underestimating its magnitude. [35] Even if such an effect exists -- though I have never seen such an effect documented for health, safety, or environmental risks in any context -- it would have to exceed the effect of total overreactions to risk in order to lead to excessive risk levels.

Luban also hypothesizes that risk managers could be subject to "precommitment bias," [36] whereby decisionmakers become locked into decisions that they otherwise would like to reverse as more information is learned. However, Luban never demonstrates that people will be systematically precommitted to excessively risky choices. In addition, punitive damages are not well suited to disciplining rogue managers who make bad decisions. [37]

Luban's concerns along these lines are intended to show that corporations may make bad safety decisions. This observation misses the main thrust of my argument. I never claimed that corporations could never make mistakes in choosing the level of the risk. Mistakes are made. There will be some situations in which firms will choose a risk level that is above the socially optimal level. However, the most effective way to discipline such erroneous decisions is through market forces, government regulation, and compensatory damages -- not punitive damages.

VI. WILL OTHER SOCIAL INSTITUTIONS PROVIDE ADEQUATE INCENTIVES?

In the absence of punitive damages, enterprises making unsafe choices risk (1) lower profits due to consumer, worker, and public reactions, (2) regulatory sanctions, if safety standards are violated, and (3) compensatory damages awards. Professor Luban's primary doubts relate to the efficacy of regulatory sanctions and whether there is a pro-corporate bias. [38] The opposite bias is in fact the case. For a broad range of regulatory activities, the level of the health and safety mandated by government regulations is too safe, as compared to the economically efficient level. [39] Politics may intrude, as may cognitive biases, but studies of these effects suggests that they lead to excessive regulatory stringency. [40] Indeed, the result for the highly politically sensitive toxic waste cleanup effort is that firms spend billions of dollars per expected cancer case prevented by these efforts. [41]

Nevertheless, Professor Luban worries about problems of underenforcement, such as OSHA's limited inspection resources, which I have documented as well. [42] OSHA is not, however, the only institutional player. Each expected job fatality costs the firm $ 3-$ 7 million in higher wages per year in terms of compensating differentials for risk, and each additional lost workday injury has a wage cost of $ 50,000 per injury. [43] Workers' compensation also creates powerful incentives for safety, so that the total financial incentives from both the market and workers' compensation is on the order of $ 100 billion annually for job safety alone. One need not rely solely on government regulation to foster job safety.

Professor Eisenberg's concerns are the opposite of those of Professor Luban. He believes that regulatory efforts may be so powerful that they swamp the effect of punitive damages. After

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providing an extremely detailed review of the sanctions imposed by environmental statutes, he concludes: "The system of federal environmental laws does not leave much room for added deterrence in the areas so central to Viscusi's study." [44] Exactly. There is no additional constructive role for punitive damages with respect to environmental torts because government regulations are so comprehensive and stringent. Let us now move on to products liability and medical malpractice. I also believe that the role of other social institutions is so dominant that punitive damages are not needed in these domains either. In cases of products liability and medical malpractice, there is no evidence of a deterrent effect, because in Professor Eisenberg's view "the problem is instead that punitive damages have not been shown to play a major role in either area." [45] Manufacturers of breast implants, asbestos, and the Ford Pinto no doubt might suggest that punitive damages can, in fact, be consequential. However, even if Eisenberg is right that punitive damages really are too infrequent to have a deterrent role for such cases, they will not be missed. The world will not be a less safe place if we eliminate punitive damages. However, enterprises will be spared the risk of the low probability/high stakes penalty that is inflicted with such randomness that it fails to have any desirable incentive effects.

VII. ARE THERE OUTSTANDING STATISTICAL CONCERNS?

Professor Eisenberg raises several technical issues that should be addressed as well. [46] He asks if the sample size of fifty states is large enough to be conclusive. [47] More and better data are always desirable, but there is more information in these observations than Eisenberg suggests. In the case of toxic chemical spills, for example, I do not use information on whether one representative firm from each state had a toxic chemical spill on a given day. That would be fifty observations. Rather, I have information on toxic chemical spills of all firms in the state across several years, which are averaged to form the risk variable. The empirical analysis has two potential sources of error. The first source of error is the state-specific random error. This error is reduced by having multiple observation across firms and time. Indeed, in every case my analysis included comprehensive information from across the entire state, and the toxic release data included multi-year data as well. The second source of error arises from the particular cross section of states, where the extent to which I can reduce this error is in fact limited by my fifty state observations.

Professor Eisenberg also expresses concern that other variables, such as those reflecting subtleties in the state's liability regime, should be included in the analysis. [48] Such omitted variables create potential biases only if they are correlated in significant ways with the punitive damages measures. If, for example, all states with punitive damages had damages caps, these measures would limit the extent of the average influence of punitive damages in these states, but it would not alter the direction of the effects. States with punitive damages still should be safer if they have a deterrent effect -- just not quite as safe as would be the case if there were no caps. Moreover, my estimates reflect the difference between the accident rates in the nonpunitive states and the average accident rates in states with punitive damages. I am not estimating what the effect would be if there were no punitive damages caps in the punitive damages states, but this is not the world in which we live.

It is noteworthy that my statistical analysis not only included a punitive damages regime measure but also a detailed set of variables pertaining to the insurance status of punitive damages. In contrast, the punitive damages study by Eisenberg et al. did not include any punitive damages variables or legal regime variables, though some of their analyses did include local indicator variables. [49]

Professor Eisenberg also hypothesizes that the mix of states that I designate as no-punitive-damages states may matter. He suggests that recognizing exemplary damages may be consequential, and notes that the fact that Louisiana does not permit punitive damages for products liability and medical malpractice might alter my results. [50] My classification of the punitive versus nonpunitive states followed published guidelines, but the distinctions are

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admittedly complex as states do differ in the character of their punitive damages regimes. [51] Four states do not permit punitive damages, but of the remainder that do, the conduct required to support punitive damages varies. For example, two states (Louisiana and Massachusetts) have punitive damages requirements that vary with statutory authorization of punitive damages awards, fourteen states require proof of malice, and eight states require proof of gross negligence. My empirical estimates in effect calculate the average effect of the punitive damages across the mix of punitive damages requirements currently in place.

Eisenberg's Louisiana hypothesis is easy to test and is not borne out by the data. Tables 1 and 2 add Louisiana to the group of nonpunitive damages states for the analyses of the lines that might be affected by the absence of punitive damages for medical malpractice and products liability. The results parallel the earlier findings excluding Louisiana and do not indicate any deterrent effect. The five states that do not recognize punitive damages for medical malpractice are no riskier than the forty-five states that do. The only significant influences are the mixed effects of higher risk levels in states with insurable punitive damages and lower risk levels in states with uncertain insurance status for punitive damages. The insurance results in Table 2 reveal no significant differences due to punitive damages on total insurance, medical malpractice insurance, products liability insurance, or other insurance. The empirical results for punitive damages are quite robust.

Table 1

Accidental Death Rates in States with and without Punitive Damages

MEDICAL MISADVENTURE DEATHS

	Deaths	Population (1,000s)
States without punitive damages:		
Louisiana	50	4,338
Michigan	82	9,537
Nebraska	20	1,639
New Hampshire	14	1,148
Washington	42	5,448
Five state totals	208	22,111
States with punitive damages:		
Other 45 states and DC	2,409	240,778
States with insurable punitives	892	71,043
States with uninsurable punitives	1,367	144,949
States with uncertain insurance rules regarding punitives	213	30,273
TOTAL DEATHS		
States without punitive damages:		
Louisiana	1,829	4,338
Michigan	2,906	9,538
Nebraska	591	1,639
New Hampshire	288	1,148
Washington	1,722	5,448
Five state totals	7,336	22,111
States with punitive damages:		
Other 45 states and DC	84,102	240,778

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States with insurable punitives	29,857	71,043
States with uninsurable punitives	46,813	144,949
States with uncertain insurance rules regarding punitives	9,548	30,273

MEDICAL MISADVENTURE DEATHS

	Deaths/Population (100,000s)	**t-statistic**
States without punitive damages:		
Louisiana	1.153	
Michigan	0.860	
Nebraska	1.220	
New Hampshire	1.220	
Washington	0.771	
Five state totals	0.941	
States with punitive damages:		
Other 45 states and DC	1.000	0.33
States with insurable punitives	1.256	1.78 *
States with uninsurable punitives	0.943	0.01
States with uncertain insurance rules regarding punitives	0.704	2.53 **
TOTAL DEATHS		
States without punitive damages:		
Louisiana	42.162	
Michigan	30.468	
Nebraska	36.059	
New Hampshire	25.087	
Washington	31.608	
Five state totals	33.178	
States with punitive damages:		
Other 45 states and DC	34.929	0.51
States with insurable punitives	42.027	2.46 **
States with uninsurable punitives	32.296	0.35
States with uncertain insurance rules regarding punitives	31.540	0.66

Note: The t-statistic tests the weighted mean death rate for the five states which do not award punitive damages against the weighted mean for the states in the category described.

Source: National Safety Council. Accident Facts, 1997 edition.

What then are we to make of Professor Eisenberg's statistical quibbles? Eisenberg has sought refuge in complexity. We could always use more data and more refined variables. However, the simple fact is that there is no evidence that the no-punitive-damages states perform worse than the punitive damages states. Indeed, Eisenberg does not even attempt to offer such evidence. My result was not restricted to one risk measure; on the contrary, I analyzed a wide range of very comprehensive tables of risks that should be affected by punitive

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COMMENTARY: A COMMENT ON THE CONSTITUTIONALITY OF PUNITIVE DAMAGES.

John Calvin Jeffries, Jr. *

* Professor of Law, University of Virginia. This comment grew out of work for a law firm and was, therefore, in origin not disinterested. Nevertheless, the decision to accord these views wider circulation was entirely my own, and they are offered here without reference to any pending litigation.

Thanks go to Kenneth S. Abraham and Daniel R. Ortiz, who read and criticized an earlier draft. Special thanks to Geoff Mearns, Susan Ressel, and Tom Stallings, each of whom individually and in collaboration with one another played an important role in preparing this paper for publication.

SUMMARY:
... One prominent aspect of this crisis is the problem of punitive damages. ... Specifically, I suggest that repetitive punitive awards for a single course of conduct may amount to an unconstitutionally excessive fine in violation of the eighth amendment and of the more general requirement of due process of law. ... Equally unavailing is the naive suggestion that excessive multiple liability can be avoided by instructing the jury to consider the defendant's wealth in fixing an appropriate punitive award. ... Neither history nor logic limits the requirement of proportionality to the criminal law; it includes as well a prohibition of excessive punishment by means of civil fine or penalty. Whether that prohibition lies in the eighth amendment ban on "excessive fines" or in the "fundamental fairness" required by due process of law ultimately does not matter. ...

TEXT:
[*139] AS everyone who reads the newspapers must know, the American civil liability system is approaching a crisis. One prominent aspect of this crisis is the problem of punitive damages. In my view, punitive damages are out of control. Certainly recent awards are unprecedented in both incidence and amount. Moreover, the explosion in punitive judgments has not been accompanied by a reform of the terms of their imposition. Punitive damages may be inflicted without adequate procedural safeguards, in the absence of meaningful substantive standards, and in virtually unlimited amounts. Nowhere is the danger more complete than in products liability and other mass tort cases, where punitive damages may

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n1 For an especially sustained and thoughtful analysis of this issue, see Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269 (1983); see also Comment, Criminal Safeguards and the Punitive Damages Defendant, 34 U. Chi. L. Rev. 408 (1967).

n2 See generally Meyers & Barrus, Punitive Damages in Products Liability Cases: A Survey, 51 Ins. Couns. J. 212 (1984) (providing an encyclopedic description of the standards for awarding punitive damages in products liability cases).

n3 See, e.g., Childres, Remedies, 1965 Ann. Surv. Am. L. 289-93 (1966); Note, The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages, 41 N.Y.U. L. Rev. 1158, 1178-80 (1966).

n4 See Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173 (1931).

n5 See, e.g., Szuch & Shelley, Time to Eliminate Punitive Damages?, Nat'l L.J., Fed. 28, 1983, at 13, 36.

n6 See, e.g., M. Peterson, Punitive Damages: Preliminary Empirical Findings 11 (1985), which reports that the average punitive award in Cook County, Illinois increased from $ 4,000 during 1960-1964 to $ 489,000 during 1980-1984. Peterson's data show that, although most punitive awards remained modest, business defendants were increasingly subject to the risk of extraordinarily high punitive awards -- enough to create a more than one hundred-fold increase in the overall average.

n7 378 F.2d 832 (2d Cir. 1967).

n8 Id. at 839.

n9 Id.

n10 Id. at 839-40.

n11 Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1258, 1261 & n.12 (1976).

n12 Full citation to these cases, as well as a thoughtful investigation of possible solutions to the problems they pose, may be found in Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency, and Control, 52 Fordham L. Rev. 37 (1983).

n13 Id. at 40.

n14 L. Frumer & M. Friedman, Products Liability (1984), for example, is a comprehensive treatise on products liability, published in hard-cover binders to allow frequent supplementation and change. It was first published in 1960 and went through 21 copyrights in the years through 1984. A chapter on punitive damages in products liability cases was first added in 1980. It ran 11 pages and reported only 30 cases. The corresponding chapter in the 1984 edition and accompanying supplement entry run 102 pages and cite cases too numerous to count. See 3 id., ch. 10A.

The same lesson may be drawn from K. Redden, Punitive Damages (1980), a comprehensive treatise on the subject of punitive damages. As originally published, it contained a five-page section on "Products Liability." See id. § 4.2(A)(2). The pocket part issued five years later supplements the original section with an additional 21 pages on "Products Liability: In General" and adds an entirely new discussion of punitive damages in the context of "Mass Products Liability." See id. § 4.2(A)(2)(a)-(b) (K. Redden & L. Schlueter eds. Supp. 1985).

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n15 K. Redden, supra note 14, cites more than 40 recent books and articles on this subject, and more are published every month.

n16 The Hon. Spencer Williams, Mass Tort Class Actions: Going, Going, Gone?, 98 F.R.D. 323, 324 (1983).

n17 Owen, supra note 11, at 1261.

n18 See Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1 (1982).

n19 Id. at 2 n.9.

n20 Id. at 59.

n21 Toyota Motor Co. v. Moll, 438 So. 2d 192 (Fla. Dist. Ct. App. 1983) ($ 3 million punitive judgment for fuel system design defects affirmed); Wolmer v. Chrysler Corp. 474 So. 2d 834 (Fla. Dist. Ct. App. 1985) ($ 3 million punitive award for fuel system defect reinstated); Ford Motor Co. v. Nowak, 638 S.W.2d 582 (Tex. Civ. App. 1982) ($ 4 million punitive judgment for transmission design defect affirmed), writ ref. n.r.e. (1983).

n22 Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984) ($ 6.2 million punitive judgment affirmed).

n23 See, e.g., Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565 (6th Cir. 1985) ($ 1.5 million punitive award affirmed in an asbestos case); Dorsey v. Honda Motor Co. 655 F.2d 650 (5th Cir. 1981) ($ 5 million punitive award for automobile design defect affirmed), modified on other grounds, 670 F.2d 21 (5th Cir.), cert. denied, 459 U.S. 880 (1982); Maxey v. Freightliner Corp., 450 F. Supp. 955 (N.D. Tex. 1978) ($ 10 million punitive award for truck design defect set aside), aff'd, 665 F.2d 1367 (5th Cir. 1982); Hansen v. Johns-Manville Corp., No. G-79-124 (S.D. Tex May 12, 1982) ($ 1 million punitive judgment entered in asbestos case), modified, 734 F.2d 1036 (5th Cir. 1984) (reduced to $ 300,000); Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979) ($ 2.9 million punitive award for pistol design defect affirmed), modified on reh'g, 615 P.2d 621 (Alaska 1980) (reduced to $ 500,000), cert. denied, 454 U.S. 894 (1981); Chastain v. Lynndale Int'l, No. CIV-80-23 (Cleburne Cty. Cir. Ct., Ark. 1981) ($ 3 million punitive judgment); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) ($ 125 million punitive award for automobile design reduced to $ 3.5 million); Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984) ($ 6.2 million punitive award in IUD case affirmed); Wolmer v. Chrysler Corp. 474 So. 2d 834 (Fla. Dist. Ct. App. 1985) ($ 3 million punitive award for automobile design defect reinstated); Toyota Motor Co. v. Moll, 438 So. 2d 192 (Fla. Dist. Ct. App. 1983) ($ 3 million punitive award for automobile design defect affirmed); Stambaugh v. International Harvester Co., 102 Ill. 2d 250, 464 N.E.2d 1011 (1984) ($ 15 million punitive award for tractor design defect dismissed for improper venue); Johnson v. Lederle Laboratories, No. 81-C-2470 (Sedgewick Cty. Dist. Ct., Kan. 1984) ($ 8 million punitive award entered in polio vaccine case); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727 (Minn.) ($ 1 punitive award for flammable pajama affirmed), cert. denied, 449 U.S. 921 (1980); Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456 424 N.E.2d 568 (1981) ($ 1.1 million punitive judgment for automobile design defect entered); Ford Motor Co. v. Nowak, 638 S.W.2d 582 (Tex. Civ. App. 1982) ($ 4 million punitive award for automobile design defect affirmed), writ ref. n.r.e. (1983); see also Walsh, Filing of Punitive Damage Claims in Focus of Increasing Controversy, Wall St. J., Nov. 12, 1984, at 27, col. 4 (reporting $ 100 million punitive award against Ford Motor Co. in recent case).

n24 Tarnoff, Leap in Punitive Damages Cited, Bus. Ins., Dec. 2, 1985, at 58.

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n25 *Id.*

n26 See Wall St. J., Dec. 11, 1985, at 3, col. 3.

n27 See Szuch & Shelley, supra note 5, at 13 ("The classic example of mass tort litigation is the nationwide asbestos litigation. To date, more than 10,000 actions have been filed in virtually every jurisdiction. In almost all of these cases, plaintiffs seek punitive damages . . .").

n28 Owen, supra note 18, at 6.

n29 See, e.g., L. Frumer & M. Friedman, supra note 14, at 46-47 (discussing but not endorsing this suggestion).

n30 See Owen, supra note 18, at 20 (including an informed and sensitive discussion of the problems of "juror limitations and attitudes" in this context).

n31 U.S. Const. amend. VIII.

n32 Id. amend. XIV, § 1.

n33 Robinson v. California, 370 U.S. 660, 667 (1962).

n34 Id. at 666-67; id. at 675 (Douglas, J., concurring).

n35 See, e.g., Schilb v. Kuebel, 404 U.S. 357, 365 (1971).

n36 See Whitney Stores v. Summerford, 280 F. Supp. 406, 411 (D.S.C.) (three-judge court), aff'd mem., 393 U.S. 9 (1968); J. Nowak, R. Rotunda & J. Young, Constitutional Law 413 (2d ed. 1983).

n37 My colleague Ken Abraham auggests that this conclusion is not so obvious as I have made it seem. He notes the long-standing formal distinction that the eighth amendment may guard only against governmental abuses that cannot readily be identified in a private tort action. In my view, this intuition is plausible precisely because private tort actions ordinarily seek compensation rather than punishment. I would suppose that no award of compensatory damages, at least if adequately grounded in the evidence, could ever be considered unconstitutionally excessive. Where, however, the private tort plaintiff seeks to exact a penalty, the determination of whether that penalty is excessive should not depend on who gets the money. If, for example, a government were alleged to have authorized unconstitutionally excessive punishment by means of a civil fine, it surely would be no defense that the money went to a good cause. By the same token, it seems to me irrelevant that unconstitutionally excessive punishment imposed by means of punitive damages goes to the benefit of a private plaintiff.

n38 See Ingraham v. Wright, 430 U.S. 651, 664-68 (1977).

n39 Id. at 669 n.37.

n40 U.S. Const. amend. V (emphasis added).

n41 Id. amend. VI (emphasis added).

n42 Seltzer, supra note 12, at 43.

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n43 See, e.g., Doroszka v. Lavine, 111 Conn. 575, 150 A. 692 (1930); Owen, Civil Punishment and the Public Good, 56 S. Cal. L. Rev. 103 (1982). This is very distinctly a minority view. Today, only three states assign any compensatory function to punitive damages, and in only one is it identified as the primary goal. See K. Redden, supra note 14, § 2.3(A), at 32 n.38.

n44 See K. Redden, supra note 14, § 2.2(B)-(C), at 28-29. This development is described in some detail in Note, supra note 3, at 1160-61.

n45 See R. Epstein, Modern Products Liability Law 176-84 (1980). Epstein analyzes the possible rationales for punitive damages and concludes that punitive damages are most appropriate "as a kind of substitute punishment for conduct which is, or should be, punishable under the criminal law but which may well escape detection and punishment by the public authorities." Id. at 177. Epstein examines and rejects the notion that punitive damages actually serve a compensatory purpose. Id. at 177-78.

n46 372 U.S. 144 (1963).

n47 Id. at 168-69 (footnotes omitted).

n48 See K. Redden, supra note 14, § 2.3(A), at 31 ("it has been well-settled doctrine in this country for over a century that exemplary damages are non-compensatory in character").

n49 Cf. Ex parte Lange, 85 U.S. (18 Wall.) 163, 168-69 ("In civil cases . . . no man shall be twice vexed for one and the same cause. . . [In criminal cases n]o one can be twice punished for the same crime . . .").

n50 See, e.g., In re Winship, 397 U.S. 358 (1970) (requiring proof beyond a reasonable doubt as the constitutional standard for criminal conviction, despite the absence of any provision specifically addressed to that question).

n51 See, e.g., Shaffer v. Heitner, 433 U.S. 186 (1977) (finding constitutional inadequacy in traditional quasi-in-rem jurisdiction).

n52 Lassiter v. Department of Social Servs., 452 U.S. 18, 25 (1981).

n53 Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

n54 International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).

n55 Rochin v. California, 342 U.S. 165, 173 (1952).

n56 Among the several articulations of this principle, one of the most instructive comes from Lassiter v. Department of Social Servs., 452 U.S. 18 (1981). There the Court summarized the command of due process and outlined the analysis to be followed in determining its application to a particular context:

For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.
Id. at 24-25 (citation omitted).

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n57 55 Wis. 2d 402, 198 N.W.2d 363 (1972).

n58 Id. at 409, 198 N.W.2d at 367; see also id. at 412, 198 N.W.2d at 368 ("Two penalties on the same or different theories for the same act violates basic fairness and thus due process of law."); Hometowne Builders v. Atlantic Nat'l Bank, 477 F. Supp. 717, 720 (E.D. Va. 1977) ("combination of treble damages and punitive damages is necessarily duplicative").

Note that *John Mohr & Sons* illustrates the eminently sensible action that a state court can take when the matter is entirely within its control. The problem of multiple recovery arose in that case only because there was a state statute authorizing treble damages. The Wisconsin Supreme Court was able, therefore, to solve this problem on a local basis, and it did so. The problem of repetitive punitive awards in the multistate mass tort situation, by contrast, although presenting unfairness incomparably more severe than anything involved in *John Mohr & Sons,* is not capable of local resolution.

n59 See, e.g., Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 6-7 (1982) (deriving the necessity for a limit on aggregate awards from general theories of punishment); Owen, supra note 18, at 44-59 (recognizing "the threat of over-punishment from multiple awards for a single product mistake" and exploring mechanisms for asserting greater judicial control); Seltzer, supra note 12, at 61 (endorsing class action device as a means of implementing such a limitation). Indeed, even the commentators, increasingly in the minority, who endorse the general utility and fairness of punitive damages, concede the need for some reform to limit multiple recoveries for a single course of conduct. See, e.g., Riley, Punitive Damages: The Doctrine of Just Enrichment, 27 Drake L. Rev. 195, 252 (1977-78).

n60 W. McKechnie, Magna Carta: A Commentary on the Great Charter of King John 285 (2d rev. ed. 1914).

n61 See 3 W. Blackstone, Commentaries *376.

n62 Black's Law Dictionary (4th ed. 1951) defines the term as "[a] pecuniary penalty, in the nature of a fine, imposed upon a person for some fault or misconduct, he being 'in mercy' for his offense." Id. at 107.

n63 For a general history, see 2 F. Pollock & F. Maitland, The History of English Law Before the Time of Edward I, at 510-14 (1895).

n64 Id. at 524.

n65 The amercement is sometimes loosely described as a criminal sanction. In an anachronistic sense, that is true, for many of the wrongs for which amercements were assessed would today be recognized as crimes. It is equally true, however, that amercements were assessed for misconduct that today would be treated as civil in nature. And then, as now, the two regimes substantially overlapped. See id. at 516, 520-21; 2 W. Holdsworth, A History of English Law 357-69, 449-57 (1923); 3 id. at 276-78.

Whatever retrospective characterization one might choose, at the time amercements were not distinctly criminal in nature. This is made abundantly clear by Blackstone, who asserted that "[t]he reasonableness of fines in criminal cases has also been usually regulated by the determination of magna carta, concerning amercements for misbehaviour in matters of civil right." 4 W. Blackstone, Commentaries *372. In this statement, Blackstone consciously distinguished between civil and criminal and correctly identified amercements as a form of civil punishment.

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n66 See Pleas of the Crown for the County of Gloucester, 1221 at xxxiv (F. Maitland ed., 1884).

n67 W. McKechnie, supra note 60, at 285.

n68 See Tait, Studies in Magna Carta: *Waynagium* and *Contenementum,* 27 Eur. Hist. Rev. 720, 724-27 (1927). Tait translates chapter 20 as saying that a freeman shall be amerced "saving always his position; and a merchant in the same way, saving his trade; and a villein shall be amerced in the same way, saving his tillage." Id. at 727.

n69 4 W. Blackstone, Commentaries *372.

n70 W. McKechnie, supra note 60, at 288-89.

n71 Specifically, Chapter 21 provides that "[e]arls and barons shall not be amerced except through their peers, and only in accordance with the degree of the offence." Id. at 295. Chapter 22 adds that "[a] clerk shall not be amerced in respect of his lay holding except after the manner of the others aforesaid; further, he shall not be amerced in accordance with the extent of his ecclesiastical benefice." Id. at 298.

n72 See A. Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America (1968).

n73 Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

n74 E. Coke, Second Institute 50 (3d ed. 1669).

n75 See, e.g., Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856) (recognizing that "[t]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Charta" and examining particular provisions of Magna Carta at some length); Twining v. New Jersey, 211 U.S. 78, 100-01 (1908) (extending the same observation to the due process clause of the fourteenth amendment).

n76 463 U.S. 277 (1983).

n77 Id. at 285 n.10.

n78 Id. at 286.

n79 Id. at 285.

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be repetitively invoked against a single course of conduct in unfair and potentially ruinous aggregation.

Not surprisingly, this situation has become a focus of constitutional debate. The main line of attack asserts the inadequacy of procedural protections against unjustified or erroneous punitive awards. This argument starts from the premise that the law of punitive damages should conform, so far as possible, to the law of criminal punishment. Because punitive damages procedures actually fall far short of this model, they may well be thought constitutionally infirm. This argument has been explored in a growing body of academic commentary. [1]

[*140] A second line of attack focuses on the substantive criteria for punitive liability. Under traditional doctrine, the standards are merely epithetical -- for example, that the defendant acted "maliciously" or "wilfully or wantonly" or with "flagrant indifference" to the rights of others. [2] Imposition of criminal liability on such a basis would be void for vagueness, and one is left to wonder why the same defects of lack of notice and arbitrariness of result are not also fatal for punishment in another form. This too has been suggested in the literature. [3]

The point of this comment is to suggest a third reason for doubting the constitutionality of punitive damages. Repectitive and unrestrained punitive liability for a single course of conduct threatens aggregate punishment that is, by any sensible standard, excessive and unfair. In my view, this result is not merely unfortunate; it is arguably unconstitutional. Specifically, I suggest that repetitive punitive awards for a single course of conduct may amount to an unconstitutionally excessive fine in violation of the eighth amendment and of the more general requirement of due process of law. The balance of this comment explores that idea. I hope to show that punitive damages in mass tort litigation are far more vulnerable to constitutional attack than has commonly been supposed and thus to encourage closer judicial scrutiny of current practice.

I

At the outset, one might ask whether it is not too late in the day to suggest the unconstitutionality of punitive damages. After all, punitive damages have been around for a long time. [4] Whatever academics may say against them, punitive damages at least have the warrant of past practice, and that in itself suggests constitutional permissibility. In fact, however, the application of traditional punitive damages doctrine to modern mass tort litigation has produced a situation altogether different from past experience. The problem addressed here is therefore surprisingly new.

[*141] The destructive synergism between traditional punitive damages doctrine and modern mass tort litigation was first perceived in 1967. Before that time, the typical punitive damages claim arose from an isolated incident involving only two parties. The usual allegation was that defendant's tortious conduct had been motivated by a malicious or spiteful desire to injure the plaintiff. [5] The jury had only to assess the particular transaction before it and to determine on that basis whether the defendant's conduct warranted a punitive award. The narrow factual boundaries of these disputes seem also to have suggested natural limits on the size of awards. In any event, most punitive judgments were, by today's standards, almost trivial in amount. [6] Although not constrained by the same procedural requirements as other forms of punishment, punitive damages at least were based on a manageable jury inquiry. In such circumstances, and despite the grave questions raised by the absence of procedural safeguards and the lack of adequate standards, it was possible to view punitive damages as minimally consistent with fundamental fairness.

By 1967 suits involving "MER/29," an anti-cholestrol drug with disastrous side effects, began to reveal the dangers of traditional punitive damages doctrine as applied to modern mass tort

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situations, especially those involving product liability. The Second Circuit identified and canvassed those dangers in *Roginsky v. Richardson-Merrell, Inc.* [7] Judge Henry Friendly focused on the special difficulties of allowing punitive damages in mass tort cases. Judge Friendly foresaw that repetitive punitive awards for a single course of conduct could subject a defendant to liability of staggering magnitude. The cumulation of such punishment might far exceed the maximum penalties authorized by the criminal law -- indeed might exceed any level of sanction that could rationally be thought necessary to serve any legitimate purpose. No mechanism existed for effective **[*142]** control of aggregate awards nor for meaningful guidance of jury decisionmaking. The *Roginsky* trial judge had done all he could by instructing the jury that it might "consider the potentially wide effect of the actions of the corporation and, on the other hand, the potential number of actions similar to this one to which that wide effect may render the defendant subject." [8] But, as Judge Friendly noted, "it is hard to see what even the most intelligent jury would do with this, being inherently unable to know what punitive damages, if any, other juries in other states may award other plaintiffs in actions yet untried." [9] There was no rule that the first award would exhaust punitive liability, nor did it seem "either fair or practicable to limit punitive recoveries to an indeterminate number of first-comers, leaving it to some unascertained court to cry, 'Hold, enough,' in the hope that others would follow." [10] In short, the Second Circuit saw in repetitive punitive awards for marketing a single defective product a system careening out of control, and it reversed the $ 100,000 punitive award made in that case.

In the years immediately following *Roginsky,* Judge Friendly's fears may have seemed overwrought. In 1976 a leading authority wrote that *"Roginsky* appeared . . . to have laid the matter to rest" and could find only three subsequent cases in which punitive awards for defective products had been upheld on appeal. [11] The calm, however, did not last. In the mid-1970's, unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface. Many of these awards were also unprecedented in amount. And these trends continued and accelerated into the 1980's.

Today, Judge Friendly's fears have become reality. Thousands of punitive damages claims have been filed against manufacturers of mass-marketed products. These include suits arising from the sale of asbestos, formaldehyde, DES, Agent Orange, automobiles, tampons, and the Dalkon Shield. [12] Typically, the manufacturers of **[*143]** these products have faced not only massive (and presumably justified) compensatory liability but also repetitive and unrestrained punitive awards, sometimes in hundreds of different actions. Similar problems have arisen in other mass tort situations, for example, the collapse of the skywalks in the Kansas City Hyatt Regency. [13]

The sudden upsurge of punitive damages claims can be traced in the secondary literature. Treatises that attempt encyclopedic coverage of these subjects have struggled to keep up with the explosion of litigation in this field. [14] Not surprisingly, the developing crisis has promoted a flood of secondary comment. [15] The nation's trial judges have also been quick to sound the alarm. One knowledgeable trial judge was moved by first-hand experience with punitive claims in modern products liability cases to make a dire prediction:

Recently, and unprecedented in history, state and federal trial judges are being inundated with mass filings of lawsuits by individual plaintiffs, *each* seeking compensation and a share of large punitive damage awards, based on a single catastrophe or the mass production and sale by one defendant of a defective product. . . [I]t is not an overly pessimistic prediction that, absent some legislative or judicial solution, our attempt to try these virtually identical lawsuits, one-by-one, will bankrupt both the state and federal court systems. [16]

[*144] Also notable is the intellectual migration of a leading authority in this field, Professor David Owen. In 1976 Professor Owen published an important article in which he endorsed awards of punitive damages in products liability cases. He concluded "that punitive damages may be usefully employed in products liability litigation to punish and to deter the

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marketing of defective products in flagrant disregard of the public safety." [17] Barely six years later, he reconsidered. [18] At the time of the first article, Owen reported, the largest product liability punitive award ever upheld on appeal was $ 250,000. By the time of the later work, the California courts had affirmed on appeal a punitive award of $ 3.5 million, reduced from an original jury assessment of $ 125 million; the Fifth Circuit had just reinstated a $ 5 million punitive award against Honda Motor Co.; and a canvass of recent trial court decisions revealed several more multimillion dollar awards in the works. [19] These cases led Owen to a reassement:

My conclusion in 1976 was that punitive damages awards should be permitted in appropriate products liability cases. After the judicial experience of the ensuing years, I remain convinced of the need to retain this tool of legal control over corporate abuses. . .

Yet the experience of the past several years has raised questions whether the punitive damages doctrine is being abused in products cases, whether some manufacturers are being punished who should not be, and whether penalties, though appropriately assessed, are sometimes unfairly large. [20]

More recent cases show that Owen's concern for "unfairly large" punitive awards was, in fact, understated. Several more multimillion dollar judgments against automobile manufacturers [21] and an even larger Dalkon Shield award [22] have been affirmed on appeal. **[*145]** Trial court judgments in amounts of $ 1 million or larger have become almost commonplace. [23] Insurance sources report that in the years 1983 to 1985, California courts entered thirty-eight punitive awards in excess of $ 1 million. [24] In fact, in the first half of 1985 five California juries entered punitive awards totalling $ 242 million. [25] Of course, even this sum is dwarfed by the $ 3 billion (yes, billion) punitive assessment in the Texaco-Pennzoil litigation. [26] Some of these judgments may be reduced on appeal, but others will not. For most cases, the likelihood is a very large settlement.

Even more disturbing, judgments of this magnitude represent only a small fraction of the total exposure to punitive liability. Most of these awards were for defective product design or manufacture. Every person injured thereby may make an independent claim for punitive damages. The prospect, therefore, is not merely **[*146]** that very large punitive awards may be made in isolated cases, but that they may be repetitively imposed for a single course of conduct. [27] In this way, the defendant may be punished ten or twenty or a hundred times over, in cumulations so extravagant and destructive as to defy any rational justification and to threaten the civil noted, these developments "may fairly raise concern for the future stability of American industry." [28]

Finally, it should be noted that a state-law solution to this problem is not feasible. The court that denies an additional award on the ground that the defendant has been sufficiently punished by previous judgments has no guarantee that other courts will follow suit. Courts in the same jurisdiction perhaps may be made to agree, but courts elsewhere would remain free to contradict that judgment. In reality, therefore, the most that an individual state can do is to adopt a self-denying ordinance that would succeed only in disadvantaging its own citizens relative to claimants in less responsible jurisdictions. The likelihood would be just the opposite -- that a kind of competition will develop to show that Texas plaintiffs (and their lawyers) are just as entitled to riches as their California counterparts.

Equally unavailing is the naive suggestion that excessive multiple liability can be avoided by instructing the jury to consider the defendant's wealth in fixing an appropriate punitive award. Theoretically, later juries should moderate their awards by taking into account compensatory and punitive awards imposed in earlier litigation. [29] Yet, this supposed protection for the defendant would obviously "backfire" if, as seems inevitable, the jury takes a history of prior awards as evidence of liability in the instant case. Moreover, juries have a natural sympathy for injured persons and not infrequently a corresponding hostility to "big

business." The notion that juror consideration of the multimillion, often multibillion, dollar figures on a corporate balance sheet would operate to protect **[*147]** such defendants against excessive liability is, in context, almost laughable. [30]

The unfortunate truth is that the evil of repetitive and unconstrained punitive damages cannot be forestalled on such an ad hoc basis, by either court or jury. A realistic solution to this problem come from the United States Congress or from a recognition by the federal courts of a constitutional limitation on punitive damages, a limit that state courts would then be obliged to respect. My suggestion here is that the case for a federal constitutional restraint on punitive damages is far stronger than has commonly been perceived.

II

Two provisions of the Constitution speak to the problem of repetitive punitive awards in mass tort litigation. The eighth amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." [31] Additionally, the fourteenth amendment forbids any state to "deprive any person of life, liberty, or property, without due process of law." [32] The command of due process has long been understood to incorporate a requirement of "fundamental fairness" in the administration of law -- even for large corporations. In my view, neither of these guarantees can comfortably be construed to permit ultimited multiple impositions of punitive liability for a single course of conduct.

A

The eighth amendment to the Constitution of the United States forbids excessive bail, excessive fines, and cruel and unusual punishment. The three are obviously related. In fact, because the guarantee against cruel and unusual punishment has been construed to forbid punishment that is excessive but not otherwise unusual, [33] the last clause has tended to subsume the first two. Nevertheless, **[*148]** the amendment's text does explicitly record that the constitutional prohibition reaches "excessive fines," as well as unjustified incarceration.

Moreover, there is no apparent reason to doubt that the prohibition against excessive fines applies to the states. The Supreme Court has so held with respect to cruel and unusual punishment [34] and has assumed the same result for excessive bail. [35] Because the disapproval of excessive fines is logically intertwined with the other two provisions of the eighth amendment, its applicability to the states seems clear. [36]

That punitive damages are functionally fines also seems clear. They inflict monetary penalties on the basis of particularized assessments of fault. The fact that the penalties are paid to private plaintiffs rather than to the government itself does not matter, for the eighth amendment was plainly designed to forbid excessive punishment, not government self-enrichment. [37]

More problematic is the question whether the eighth amendment applies to civil or quasi-criminal fines, as well as to distinctively criminal punishments. The Supreme Court has noted that past applications of the eighth amendment ban on cruel and unusual punishment involve criminal sanctions and has suggested that the amendment might be limited to that context. [38] The Court, however, has recognized that certain punishments should be treated as criminal for purposes of the eighth amendment, even **[*149]** though they are not explicitly so labeled. [39] Thus, at least in some circumstances, the applicability of the eighth amendment turns on a functional analysis rather than mere formalism. This is entirely sound, for it is clear that a nominally civil fine may be every bit as "excessive" as a criminal one and should be equally objectionable.

This conclusion is reinforced by the significant textual differences between the eighth

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amendment anf those Bill of Rights guarantees specifically limited to the criminal context. The fifth amendment, for example, provides that no person shall be held to answer "for a capital, or otherwise infamous *crime"* without indictment by grand jury, and that no person shall "for the same *offence* . . . be twice put in jeopardy of life or limb; nor shall be compelled *in any criminal case* to be a witness against himself." [40] Similarly, the sixth amendment explicitly details rights available "[i]n all *criminal* prosecutions." [41] In contrast, the eighth amendment speaks to the severity of punishment rather than to its characterization. Although criminal punishments are admittedly more likely than civil sanctions to be unconstitutionally excessive under the eighth amendment, this is only a factual generalization, not a limitation of principle.

The critical fact, therefore, is that punitive damages are, as the name implies, a form of punishment. One authority noted that "[t]hese awards are not really damages at all. Rather, they are quasi-criminal sanctions imposed to punish defendants and to deter repetition of the offensive conduct by the defendant and other potential wrongdoers." [42] Although this conclusion seems obvious, some authorities and a few courts identify compensation for otherwise uncompensated losses as a purpose of punitive damages. [43] In large measure, this is mere anachronism. It survives from the days when pain and suffering, mental anguish, and other intangible harms were not permissible elements of an ordinary compensatory **[*150]** award. [44] Today, of course, such restrictions no longer apply, and there is no good reason to believe that modern punitive damages awards correct any systematic inadequacy in ordinary compensatory remedies. [45] This is not to say that compensatory damages are always and everywhere sufficient to that purpose or that the goal of compensation is necessarily irrelevant to the law of punitive damages. The point is rather that compensation is, at best, a secondary concern in assessing punitive awards. That compensation may in some jurisdictions play a subsidiary role does not detract from the fact that retribution and deterrence are the main objectives. Punitive damages are therefore correctly treated as a form of punishment.

This conclusion is buttressed by reference to the Supreme Court's announced criteria for determining whether a sanction is punitive in nature. In *Kennedy v. Mendoza-Martinez,* [46] the Court listed seven factors relevant to that inquiry:

[w]hether the sanction involves an afirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. [47]

With the possible exception of the first, each of these factors supports the characterization of punitive damages as punitive. Indeed, the common designation of "punitive" or "exemplary" damages implies that such awards have historically been regarded as punishment, at least in this country. [48] Like most forms of punishment, **[*151]** punitive damages require a finding of scienter -- typically, that the defendant acted maliciously or with callous disregard for the rights of others. Obviously, punitive damages further the traditional aims of punishment, namely retribution and deterrence, and are usually supported on precisely such grounds. The behavior sanctioned by punitive liability is usually also subject to criminal prosecution, at least where it is performed with the requisite culpability. Finally, no alternative purpose can rationally be thought to account for current practice in awarding punitive damages, largely because of the great disparity between the size of the awards entered and any nonpunitive purpose they might be imagined to serve.

Taken together, the *Mendoza-Martinez* factors confirm that punitive damages are in fact, as well as in name, a quasi-criminal form of punishment. They are functionally equivalent to the "fines" addressed by the eighth amendment and should be subject to constitutional scrutiny

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on that basis.

It remains, therefore, only to determine when a punitive award, or aggregation of awards, should be deemed "excessive," and hence unconstitutional. One plausible position would be that a punishment is presumptively excessive if duplicative. [49] Even if this strict limitation were rejected, it should still be clear that punishment is excessive if gratuitous -- that is, if it is imposed in amounts so extravagant as to have no rational relation to the legitimate goals of retribution and deterrence. Such an inquiry is hardly self-executing, but absent a stricter rule, courts should be instructed that some such inquiry is constitutionally required.

B

Although the eighth amendment prohibition of "excessive fines" seems directly applicable to punitive damages, that conclusion is not essential to this argument. That protection is in any event subsumed in the more general requirement of due process of law. As the Supreme Court has repeatedly made clear, the content of due process is not limited to the specific provisions of the Bill of **[*152]** Rights. [50] Nor is due process confined to criminal prosecutions; it applies to any legal proceeding or regime by which any person may be deprived of "life, liberty, or property." [51] Due process requires, in whatever context, that legal procedures be consistent with "fundamental fairness"; [52] that they be consonant with "ordinary notions of fair play and the settled rules of law"; [53] that they accord with "traditional notions of fair play and substantial justice"; [54] and that they not offend "the community's sense of fair play and decency." [55] However phrased, the message is clear; due process mandates at all times, in all circumstances, and *for all defendants,* "fundamental fairness" at the hands of the law. [56]

In discovering what "fundamental fairness" requires in the context of punitive damages, one might begin with the precedents. Strictly speaking, there are very few. One reason is that the infliction of repetitive and debilitating punitive awards for a single course of conduct is such a recent phenomenon. Until the last half decade, few courts would have anticipated, much less attempted to solve, the problem of runaway punitive damages in products liability cases. Equally important, these cases are brought under state law. Because the problem arises not from any single judgment, but from the repetitive and cumulative litigation of punitive claims, no **[*153]** state has either the incentive or the opportunity to take corrective action. All a state court can do is to instruct the jury properly in the case before it, and the current crisis testifies to the inadequacy of that remedy.

Nevertheless, the few courts that have considered the matter agree that the requirement of fundamental fairness does limit multiple punitive recoveries for a single course of conduct. Perhaps the strictest limitation comes from *John Mohr & Sons v. Jahnke,* [57] in which the Wisconsin Supreme Court disallowed a very modest punitive award ($ 500) because the claimant had already recovered treble damages, as authorized by state law. The court said that "to allow treble damages and punitive damages would amount to double recovery of a penalty and thus violate the basis fairness of a judicial proceeding required by the due process clause of the fourteenth amendment to the federal Constitution." [58] The same basic proposition has been strongly supported by academic lawyers, virtually all of whom agree that some limit on aggregate punitive recovery is needed in mass tort situations. [59]

That few courts have had occasion to consider this issue in its modern context does not mean, however, that recognition of a federal constitutional restraint on aggregate punitive liability lacks **[*154]** precedential support. Quite the opposite is true. Limiting aggregate punitive awards is a straightforward application of an ancient and settled principle of Anglo-American justice. That principle condemns excessive monetary penalties, whether civil or criminal. More specifically, it requires, at a minimum, that monetary penalties be limited in amount so as not to threaten the defendant's economic viability.

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The story begins in the early days of English justice, before crime and tort were clearly distinct. At a very early date, the tribal blood feud was superseded by money payments in lieu of vengeance. At first such payments were merely customary, but later they became mandatory. These sums included elements that today would be characterized as compensatory and others that would be regarded as punitive. Appropriately, they were owed not only to the victim or his family but also to the king or lord. As the feudal structure grew more complex, the multiplicity of such charges became more onerous, until finally it became "practically impossible" for an offender to "buy back the peace once it had been broken." [60]

At this point the king stepped in with an offer of protection. A wrongdoer could surrender himself and his goods to the king, who would restore him to the protection of the law on payment of a fine. Because all of his goods were technically delivered to the king, the offender was said to be "a mercie" or "at the king's mercy" with respect to their disposition. [61] The fine ultimately imposed thus came to be known as an "amercement," [62] and in early Norman England it was the usual penalty for a very broad range of delicts and offenses. Indeed, even after "felony" had come to be separately defined and distinctively punished, amercements continued to be the penalty imposed for the residual category of lesser offenses. [63]

Unlike the early payments used to forestall blood feuds, amercements were not levied according to any fixed schedule but arbitrarily **[*155]** according to the degree that the king or his officers chose to relax the forfeiture of all the offender's goods. [64] Thus, the amercement functioned as an ad hoc fine, levied in potentially unlimited amounts as a form of civil punishment for a very wide range of delicts and offenses. [65]

Not surprisingly, this unlimited punitive authority proved easily susceptible to abuse. In Magna Carta, therefore, when the polity of the nation rose up to restrain monarchial power and curb executive abuse, amercements were a subject of great concern. Although some provisions of that great document merely vindicate the parochial interests of the baronial class, others have stood through time as early expressions of fundamental principles of liberty and justice. [66] Into the latter category fall the three separate chapters of Magna Carta devoted to the limitation of amercements. In the first of these, Chapter 20 of the Great Charter, the king was made to concede that:

A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense, yet saving always his 'contenement'; and a merchant in the same way, saving his 'merchandise'; and a villein shall be amerced in the same way, saving his 'wainage' -- if they have fallen into our mercy; and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighbourhood. [67]

The three specialized words refer to the necessities of economic **[*156]** livelihood of a person in the identified station in life -- not bare survival, but continued economic viability in a particular position. [68] Thus, as Blackstone summarized, to the landowner is saved "his contenement, or land; to the trader his merchandize; and to the countryman his wainage, or team and instruments of husbandry." [69] As McKechnie elaborated, the "merchandise" to which the merchant was in all events entitled could mean either "the stock-in-trade without which the pursuit of his calling would be impossible" or, more broadly, "his business itself, his position as a merchant[;] . . . in either view the Charter saves to him his means of earning a living." [70] The same general principle is applied to nobles and clerks in the next two chapters. [71]

From these three provisions of Magna Carta, two related protections emerge. First, there is a requirement of reasonableness, of proportionality, of sensible relation between punishment and offense. Second, the penalty inflicted should not, in any event, destroy the offender's means of making a living in his particular trade or calling. Magna Carta guaranteed not just

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bare survival, but continued productive economic viability.

Although this discussion may seem a bit arcane, in fact these principles have direct contemporary application. The Constitution as originally submitted to the states was roundly criticized for failing to include a declaration of rights. Magna Carta and the English Bill of Rights were invoked as models of what was required, and a tacit understanding was reached that some such provisions would be added by way of amendment. [72] In his first inaugural, President Washington called for a bill of rights, and the first Congress responded by submitting proposals to the states. These were based **[*157]** in part on proposals drafted by a committee of the Virginia ratifying convention, which had sought to carry forward protections of Magna Carta and the English Bill of Rights. As the Supreme Court has stated, "[t]he law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principle of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors." [73]

The vehicle was the due process clause of the fifth amendment. Coke had recognized that "due process of law" and Magna Carta's guarantee of the "law of the land" meant the same thing. [74] The Framers, therefore, in requiring "due process of law," and their successors in extending that guarantee to the states, meant to adopt as components of American constitutionalism the fundamental liberties and protections secured by Magna Carta.

This correspondence has been repeatedly and explicitly noted by the Supreme Court. [75] Indeed, only recently the Court had occasion to invoke Magna Carta in a context directly relevant to the topic at hand. In *Solem v. Helm,* [76] the Court held that a life sentence without possibility of parole for a seventh nonviolent felony violated the eighth amendment guarantee against cruel and unusual punishment. The Court traced the lineage of that provision back through the Virginia Declaration of Right to the English Bill of Rights and Magna Carta. [77] The Court made unmistakably plain that the eighth amendment incorporated the English principle of proportionality, "including the right to be free from excessive punishments." [78] In the course of that argument, the Court cited and specifically relied on a case in which disproportionate punishment **[*158]** resulted from an excessive fine rather than from a sentence of incarceration. [79]

Although the *Solem* Court dealt with criminal sanctions and thus had no need to go beyond the conventional application of the eighth amendment to penalties of that sort, nothing in the opinion or analysis would support such a limitation. Indeed, as has been noted, the modern principle of proportionality derives directly from the Magna Carta provisions on amercements. Neither history nor logic limits the requirement of proportionality to the criminal law; it includes as well a prohibition of excessive punishment by means of civil fine or penalty. Whether that prohibition lies in the eighth amendment ban on "excessive fines" or in the "fundamental fairness" required by due process of law ultimately does not matter. The crucial point is that a historically informed assessment of these guarantees demonstrates the existence in principle of a constitutional restraint on the severity of civil sanctions.

III

I do not claim that the unconstitutionality of punitive damages follows inexorably from what has been said. The aim of this comment has been merely to open the debate. Further analysis may be required to determine at what point such penalties become "excessive" under the eighth amendment or, on a balancing of all the interests, violative of "fundamental fairness" under the due process clause. Under either formulation, there is room for discussion. My purpose is to establish both the need for, and the legitimacy of, an inquiry of this kind.

FOOTNOTES:

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*517 U.S. 559, *; 116 S. Ct. 1589, **;*
*134 L. Ed. 2d 809, ***; 1996 U.S. LEXIS 3390*

BMW OF NORTH AMERICA, INC., PETITIONER v. IRA GORE, JR.

No. 94-896.

SUPREME COURT OF THE UNITED STATES

517 U.S. 559; 116 S. Ct. 1589; 134 L. Ed. 2d 809; 1996 U.S. LEXIS 3390; 64 U.S.L.W. 4335; 96 Cal. Daily Op. Service 3490; 96 Daily Journal DAR 5747; 9 Fla. L. Weekly Fed. S 585

October 11, 1995, Argued
May 20, 1996, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

DISPOSITION: 646 So.2d 619, reversed and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner automobile distributor appealed a decision of the Supreme Court of Alabama which affirmed a finding in favor of respondent auto owner on petitioner's post-trial motion to set aside a punitive damages award in an action alleging suppression of a material fact.

OVERVIEW: Respondent discovered that his new car had been repainted. He brought suit against petitioner distributor alleging that its failure to disclose the repair constituted suppression of a material fact. Evidence was introduced at trial that petitioner had a policy of nondisclosure where pre-delivery repairs amounted to less than 3 percent of the retail price of the car. The jury awarded actual damages of $ 4,000 and punitive damages of $ 4,000,000. Petitioner's motion to set aside the punitive damages award was denied by both the trial court and the appellate court. However, the appellate court reduced the award to $ 2,000,000 because it was inaccurately calculated. The United States Supreme Court granted certiorari. It reversed and remanded the case. It held that petitioner's conduct was not particularly reprehensible because it only caused minor economic harm and the 500 to 1 ratio of punitive damages to compensatory damages was not reasonable.

OUTCOME: Denial of motion to set aside the punitive damages award was reversed where the Court held that petitioner distributor's conduct was not particularly reprehensible because it only caused minor economic harm and a 500 to 1 ratio of punitive damages to compensatory damages was not reasonable.

CORE TERMS: punitive damages, repair, disclosure, punitive damages award, excessive, compensatory damages, nondisclosure, cap, reprehensible, punitive award, out-of-state, grossly, repainted, dealer, retail price, ratio, lawful, nationwide, misconduct, costing, excessiveness, punitive, consumers, allocate, guideposts, manufacturer, reasonable relationship, reprehensibility, distributor, purchaser

CORE CONCEPTS - ♦ Hide Concepts

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n11 Other than *Yates* v. *BMW of North America, Inc.*, 642 So. 2d 937 (Ala. 1993), in which no punitive damages were awarded, the Alabama Supreme Court cited no such cases. In another portion of its opinion, 646 So. 2d at 629, the court did cite five Alabama cases, none of which involved either a dispute arising out of the purchase of an automobile or an award of punitive damages. *G. M. Mosley Contractors, Inc.* v. *Phillips*, 487 So. 2d 876, 879 (Ala. 1986); *Hollis* v. *Wyrosdick*, 508 So. 2d 704 (Ala. 1987); *Campbell* v. *Burns*, 512 So. 2d 1341, 1343 (Ala. 1987); *Ashbee* v. *Brock*, 510 So. 2d 214 (Ala. 1987); and *Jawad* v. *Granade*, 497 So. 2d 471 (Ala. 1986). All of these cases support the proposition that appellate courts in Alabama presume that jury verdicts are correct. In light of the Alabama Supreme Court's conclusion that (1) the jury had computed its award by multiplying $ 4,000 by the number of refinished vehicles sold in the United States and (2) that the award should have been based on Alabama conduct, respect for the error-free portion of the jury verdict would seem to produce an award of $ 56,000 ($ 4,000 multiplied by 14, the number of repainted vehicles sold in Alabama).

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[*568] Because we believed that a review of this case would help to illuminate "the character of the standard that will identify unconstitutionally excessive awards" of punitive damages, see *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 420, 129 L. Ed. 2d 336, 114 S. Ct. 2331 (1994), we granted certiorari, 513 U.S. 1125 (1995).

II

[*HR3]** [3]
Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974); *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266-267, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1981); *Haslip*, 499 U.S. at 22. In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence. See *TXO*, 509 U.S. at 456; *Haslip*, 499 U.S. at 21, 22. Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. Cf. *TXO*, 509 U.S. at 456. For that reason, the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve. We therefore focus our attention first on the scope of Alabama's legitimate interests in punishing BMW and deterring it from future misconduct.

[*HR4]** [4]
No one doubts that a State may protect its citizens by prohibiting deceptive trade practices and by requiring automobile **[*569]** distributors to disclose presale repairs that affect the **[**1596]** value of a new car. But the States need not, and in fact do not, provide such protection in a uniform manner. Some States rely on the judicial process to formulate and enforce an appropriate disclosure requirement by applying principles of contract and tort law. n12 Other States have enacted **[***823]** various forms of legislation that define the disclosure obligations of automobile manufacturers, distributors, and dealers. n13 **[*570]** The result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n12 See, *e. g.*, *Rivers* v. *BMW of North America, Inc.*, 214 Ga. App. 880, 449 S.E.2d 337 (1994) (nondisclosure of presale paint repairs that occurred before state disclosure statute

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enacted); *Wedmore v. Jordan Motors, Inc.*, 589 N.E.2d 1180 (Ind. App. 1992) (same).

n13 Four States require disclosure of vehicle repairs costing more than 3 percent of suggested retail price. Ariz. Rev. Stat. Ann. § 28-1304.03 (1989); N. C. Gen. Stat. § 20-305.1(d)(5a) (1995); S. C. Code § 56-32-20 (Supp. 1995); Va. Code Ann. § 46.2-1571(D) (Supp. 1995). An additional three States mandate disclosure when the cost of repairs exceeds 3 percent or $ 500, whichever is greater. Ala. Code § 8-19-5(22)(c) (1993); Cal. Veh. Code Ann. §§ 9990-9991 (West Supp. 1996); Okla. Stat., Tit. 47, § 1112.1 (1991). Indiana imposes a 4 percent disclosure threshold. Ind. Code §§ 9-23-4-4, 9-23-4-5 (1993). Minnesota requires disclosure of repairs costing more than 4 percent of suggested retail price or $ 500, whichever is greater. Minn. Stat. § 325F.664 (1994). New York requires disclosure when the cost of repairs exceeds 5 percent of suggested retail price. N. Y. Gen. Bus. Law §§ 396-p(5)(a), (d) (McKinney Supp. 1996). Vermont imposes a 5 percent disclosure threshold for the first $ 10,000 in repair costs and 2 percent thereafter. Vt. Stat. Ann., Tit. 9, § 4087 (d) (1993). Eleven States mandate disclosure only of damage costing more than 6 percent of retail value to repair. Ark. Code Ann. § 23-112-705 (1992); Idaho Code § 49-1624 (1994); Ill. Comp. Stat., ch. 815, § 710/5 (1994); Ky. Rev. Stat. Ann. § 190.0491(5) (Baldwin 1988); La. Rev. Stat. Ann § 32:1260 (West Supp. 1995); Miss. Motor Vehicle Comm'n, Regulation No. 1 (1992); N. H. Rev. Stat. Ann. § 357-C:5(III)(d) (1995); Ohio Rev. Code Ann. § 4517.61 (1994); R. I. Gen. Laws §§ 31-5.1-18(d), (f) (1995); Wis. Stat. § 218.01(2d) (a) (1994); Wyo. Stat. § 31-16-115 (1994). Two States require disclosure of repairs costing $ 3,000 or more. See Iowa Code Ann. § 321.69 (Supp. 1996); N. D. Admin. Code § 37-09-01-01 (1992). Georgia mandates disclosure of paint damage that costs more than $ 500 to repair. Ga. Code Ann. §§ 40-1-5(b)-(e) (1994) (enacted after respondent purchased his car). Florida requires dealers to disclose paint repair costing more than $ 100 of which they have actual knowledge. Fla. Stat. § 320.27(9)(n) (1992). Oregon requires manufacturers to disclose all "postmanufacturing" damage and repairs. It is unclear whether this mandate would apply to repairs such as those at issue here. Ore. Rev. Stat. § 650.155 (1991).

Many, but not all, of the statutes exclude from the computation of repair cost the value of certain components -- typically items such as glass, tires, wheels and bumpers -- when they are replaced with identical manufacturer's original equipment. *E. g.*, Cal. Veh. Code Ann. §§ 9990-9991 (West Supp. 1996); Ga. Code Ann. §§ 40-1-5(b)-(e) (1994); Ill. Comp. Stat., ch. 815, § 710/5 (1994); Ky. Rev. Stat. Ann. § 190.0491(5) (Baldwin 1988); Okla. Stat., Tit. 47, § 1112.1 (1991); Va. Code Ann. § 46.2-1571(D) (Supp. 1995); Vt. Stat. Ann., Tit. 9, § 4087 (d) (1993).

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That diversity demonstrates that reasonable people may disagree about the value of a full disclosure requirement. Some legislatures may conclude that affirmative disclosure requirements are unnecessary because the self-interest of those involved in the automobile trade in developing and maintaining the goodwill of their customers will motivate them to make voluntary disclosures or to refrain from selling cars that do not comply with self-imposed standards. Those legislatures that do adopt affirmative disclosure obligations may take into account the cost of government regulation, choosing to draw a line exempting minor repairs from such a requirement. In formulating a disclosure standard, States may also consider other goals, such as providing a "safe harbor" for automobile manufacturers, distributors, and dealers against lawsuits over minor repairs. n14

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n14 Also, a state legislature might plausibly conclude that the administrative costs associated with full disclosure would have the effect of raising car prices to the State's residents.

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[*HR5]** [5]
[*HR6]** [6]
We may assume, *arguendo*, that it would be wise for every State to adopt Dr. Gore's preferred rule, requiring full disclosure of every presale repair to a car, no matter how trivial and regardless of its actual impact on the value of the car. **[*571]** But while we do not doubt that Congress has ample authority to enact **[***824]** such a policy for the entire Nation, n15 it **[**1597]** is clear that no single State could do so, or even impose its own policy choice on neighboring States. See *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594, 26 L. Ed. 845 (1881) ("No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular"). n16 Similarly, one State's power to impose burdens on the interstate market for automobiles is not only subordinate to the federal power over interstate commerce, *Gibbons* v. *Ogden*, 22 U.S. 1, 9 Wheat. 1, 194-196, 6 L. Ed. 23 (1824), but is also constrained by the need to respect the interests of other States, see, *e. g.*, *Healy* v. *Beer Institute* , 491 U.S. 324, 335-336, 105 L. Ed. 2d 275, 109 S. Ct. 2491 (1989) (the Constitution has a "special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on **[*572]** interstate commerce and with the autonomy of the individual States within their respective spheres" (footnote omitted)); *Edgar* v. *MITE Corp.*, 457 U.S. 624, 643, 73 L. Ed. 2d 269, 102 S. Ct. 2629 (1982).

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n15 Federal disclosure requirements are, of course, a familiar part of our law. See, *e. g.*, the Federal Food, Drug, and Cosmetic Act, as added by the Nutrition Labeling and Education Act of 1990, 104 Stat. 2353, 21 U.S.C. § 343; the Truth In Lending Act, 82 Stat. 148, as amended, 15 U.S.C. § 1604; the Securities Exchange Act of 1934, 48 Stat. 892, 894, as amended, 15 U.S.C. §§ 78l-78m; Federal Cigarette Labeling and Advertising Act, 79 Stat. 283, as amended, 15 U.S.C. § 1333; Alcoholic Beverage Labeling Act of 1988, 102 Stat. 4519, 27 U.S.C. § 215.

n16 See also *Bigelow* v. *Virginia*, 421 U.S. 809, 824, 44 L. Ed. 2d 600, 95 S. Ct. 2222 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State"); *New York Life Ins. Co.* v. *Head*, 234 U.S. 149, 161, 58 L. Ed. 1259, 34 S. Ct. 879 (1914) ("It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound"); *Huntington* v. *Attrill*, 146 U.S. 657, 669, 36 L. Ed. 1123, 13 S. Ct. 224 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States").

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[*HR7]** [7]
[*HR8A]** [8A]
[*HR9]** [9]
[*HR10A]** [10A]
We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States. n17 Before this Court Dr. Gore argued that the large punitive damages award was necessary to induce BMW to change the nationwide policy that it adopted in 1983. n18 But by attempting to alter BMW's nationwide policy, Alabama

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would be infringing on the policy **[***825]** choices of other States. To avoid such encroachment, the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy. Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not **[*573]** have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. n19 **[**1598]** Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.

[*HR8B]** [8B]
[*HR10B]** [10B]

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - n17 State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised"); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959) ("Regulation can be as effectively exerted through an award of damages as through some form of preventive relief").

n18 Brief for Respondent 11-12, 23, 27-28; Tr. of Oral Arg. 50-54. Dr. Gore's interest in altering the nationwide policy stems from his concern that BMW would not (or could not) discontinue the policy in Alabama alone. Brief for Respondent 11. "If Alabama were limited to imposing punitive damages based only on BMW's gain from fraudulent sales in Alabama, the resulting award would have no prospect of protecting Alabama consumers from fraud, as it would provide no incentive for BMW to alter the unitary, national policy of nondisclosure which yielded BMW millions of dollars in profits." *Id.*, at 23. The record discloses no basis for Dr. Gore's contention that BMW could not comply with Alabama's law without changing its nationwide policy. n19 See *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363, 54 L. Ed. 2d 604, 98 S. Ct. 663 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort"). Our cases concerning recidivist statutes are not to the contrary. Habitual offender statutes permit the sentencing court to enhance a defendant's punishment for a crime in light of prior convictions, including convictions in foreign jurisdictions. See *e. g.*, Ala. Code § 13A-5-9 (1994); Cal. Penal Code Ann. §§ 667.5(f), 668 (West Supp. 1996); Ill. Comp. Stat., ch. 720, § 5/33B-1 (1994); N. Y. Penal Law §§ 70.04, 70.06, 70.08, 70.10 (McKinney 1987 and Supp. 1996); Tex. Penal Code Ann. § 12.42 (1994 and Supp. 1995-1996). A sentencing judge may even consider past criminal behavior which did not result in a conviction and lawful conduct that bears on the defendant's character and prospects for rehabilitation. *Williams* v. *New York*, 337 U.S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949). But we have never held that a sentencing court could properly *punish* lawful conduct. This distinction is precisely the one we draw here. See n. 21, *infra*.

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[*HR11A]** [11A]
[*HR12A]** [12A]
In this case, we accept the Alabama Supreme Court's interpretation of the jury verdict as reflecting a computation of the amount of punitive damages "based in large part on conduct that happened in other jurisdictions." 646 So. 2d at 627. As the Alabama Supreme Court noted, neither the jury nor the trial court was presented with evidence that any of BMW's out-of-state conduct was unlawful. "The only testimony touching the issue showed that approximately 60% of the vehicles that were refinished were sold in states where failure to

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disclose the repair was not an unfair trade practice." *Id.*, at 627, n. 6. n20 The Alabama Supreme Court therefore properly eschewed reliance on BMW's out-of-state conduct, *id.*, at 628, and based its remitted award solely on **[*574]** conduct that occurred within Alabama. n21 The award must be analyzed in the light of the same conduct, with consideration given only to the interests of Alabama consumers, rather than those of the entire Nation. When the scope of the interest in punishment and deterrence that an Alabama court may appropriately consider is properly limited, it is apparent -- for **[***826]** reasons that we shall now address -- that this award is grossly excessive.

[*HR11B]** [11B]
[*HR12B]** [12B]

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - n20 Given that the verdict was based in part on out-of-state conduct that was lawful where it occurred, we need not consider whether one State may properly attempt to change a tortfeasor's *unlawful* conduct in another State. n21 Of course, the fact that the Alabama Supreme Court correctly concluded that it was error for the jury to use the number of sales in other States as a multiplier in computing the amount of its punitive sanction does not mean that evidence describing out-of-state transactions is irrelevant in a case of this kind. To the contrary, as we stated in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 462, n. 28, 125 L. Ed. 2d 366, 113 S. Ct. 2711 (1993), such evidence may be relevant to the determination of the degree of reprehensibility of the defendant's conduct.

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III

[*HR1B]** [1B]
[*HR13]** [13]
[*HR14A]** [14A]
Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. n22 Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose for adhering to the nondisclosure policy adopted in 1983, lead us to the conclusion that **[*575]** the $ 2 million award against BMW is grossly excessive: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized **[**1599]** or imposed in comparable cases. We discuss these considerations in turn.

[*HR14B]** [14B]

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - n22 See *Miller* v. *Florida*, 482 U.S. 423, 96 L. Ed. 2d 351, 107 S. Ct. 2446 (1987) (*Ex Post Facto* Clause violated by retroactive imposition of revised sentencing guidelines that provided longer sentence for defendant's crime); *Bouie* v. *City of Columbia*, 378 U.S. 347, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1964) (retroactive application of new construction of statute violated due process); *id.*, at 350-355 (citing cases); *Lankford* v. *Idaho*, 500 U.S. 110, 114 L. Ed. 2d 173, 111 S. Ct. 1723 (1991) (due process violated because defendant and his counsel did not have adequate notice that judge might impose death sentence). The strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, but the basic protection against "judgments without notice" afforded by the Due Process Clause, *Shaffer* v. *Heitner*, 433 U.S. 186, 217, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977) (STEVENS, J., concurring in

judgment), is implicated by civil *penalties*.

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Degree of Reprehensibility

[*HR15]** [15]
[*HR16]** [16]
[*HR17]** [17]
Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. n23 As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect "the enormity of his offense." *Day* v. *Woodworth*, 54 U.S. 363, 13 HOW 363, 371, 14 L. Ed. 181 (1852). See also *St. Louis, I. M. & S. R. Co.* v. *Williams*, 251 U.S. 63, 66-67, 64 L. Ed. 139, 40 S. Ct. 71 (1919) (punitive award may not be "wholly disproportioned to the offense"); *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 301, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989) (O'CONNOR, J., concurring in part and dissenting in part) (reviewing court "should examine the gravity of the defendant's conduct and the harshness of the award of punitive damages"). n24 This principle reflects the accepted view that some wrongs are more blameworthy than others. Thus, we have said that **[*576]** "nonviolent crimes are less serious than crimes marked by violence or the **[***827]** threat of violence." *Solem* v. *Helm*, 463 U.S. 277, 292-293, 77 L. Ed. 2d 637, 103 S. Ct. 3001 (1983). Similarly, "trickery and deceit," *TXO*, 509 U.S. at 462, are more reprehensible than negligence. In *TXO*, both the West Virginia Supreme Court and the Justices of this Court placed special emphasis on the principle that punitive damages may not be "grossly out of proportion to the severity of the offense." n25 *Id.*, at 453, 462. Indeed, for JUSTICE KENNEDY, the defendant's intentional malice was the decisive element in a "close and difficult" case. *Id.*, at 468. n26

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n23 "The flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages." Owen, A Punitive Damages Overview: Functions, Problems and Reform, 39 Vill. L. Rev. 363, 387 (1994).

N24 The principle that punishment should fit the crime "is deeply rooted and frequently repeated in common-law jurisprudence." *Solem* v. *Helm*, 463 U.S. 277, 284, 77 L. Ed. 2d 637, 103 S. Ct. 3001 (1983). See *Burkett* v. *Lanata*, 15 La. Ann. 337, 339 (1860) (punitive damages should be "commensurate to the nature of the offence"); *Blanchard* v. *Morris*, 15 Ill. 35, 36 (1853) ("We cannot say [the exemplary damages] are excessive under the circumstances; for the proofs show that threats, violence, and imprisonment, were accompanied by mental fear, torture, and agony of mind"); *Louisville & Northern R. Co.* v. *Brown*, 127 Ky. 732, 749, 106 S.W. 795, 799 (1908) ("We are not aware of any case in which the court has sustained a verdict as large as this one unless the injuries were permanent").

n25 *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 22, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991).

n26 The dissenters also recognized that "TXO's conduct was clearly wrongful, calculated, and improper . . . ." *TXO*, 509 U.S. at 482 (opinion of O'CONNOR, J.).

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[*HR1C]** [1C]
[*HR18]** [18]
In this case, none of the aggravating factors associated with particularly reprehensible

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conduct is present. The harm BMW inflicted on Dr. Gore was purely economic in nature. The presale refinishing of the car had no effect on its performance or safety features, or even its appearance for at least nine months after his purchase. BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others. To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, *id.*, at 453, or when the target is financially vulnerable, can warrant a substantial penalty. But this observation does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages.

[*HR19]** [19]
Dr. Gore contends that BMW's conduct was particularly reprehensible because nondisclosure of the repairs to his car formed part of a nationwide pattern of tortious conduct. Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument **[*577]** that strong medicine is required to cure the defendant's disrespect for the law. See *id.*, at 462, n. 28. Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more **[**1600]** reprehensible than an individual instance of malfeasance. See *Gryger* v. *Burke*, 334 U.S. 728, 732, 92 L. Ed. 1683, 68 S. Ct. 1256 (1948).

In support of his thesis, Dr. Gore advances two arguments. First, he asserts that the state disclosure statutes supplement, rather than supplant, existing remedies for breach of contract and common-law fraud. Thus, according to Dr. Gore, the statutes may not properly be viewed as immunizing from liability the nondisclosure of repairs costing less than the applicable statutory threshold. Brief for Respondent 18-19. Second, Dr. Gore maintains that BMW should have anticipated that its failure to disclose similar repair work could expose it to liability for fraud. *Id.*, at 4-5.

[*HR1D]** [1D]
[*HR20]** [20]
We recognize, of course, that only state courts may authoritatively construe state statutes. As far as we are aware, at the time this action was commenced no state court had explicitly addressed whether its State's disclosure statute provides a safe harbor for nondisclosure of presumptively **[***828]** minor repairs or should be construed instead as supplementing common-law duties. n27 A review of the text of the statutes, **[*578]** however, persuades us that in the absence of a state-court determination to the contrary, a corporate executive could reasonably interpret the disclosure requirements as establishing safe harbors. In California, for example, the disclosure statute defines "material" damage to a motor vehicle as damage requiring repairs costing in excess of 3 percent of the suggested retail price or $ 500, whichever is greater. Cal. Veh. Code Ann. § 9990 (West Supp. 1996). The Illinois statute states that in cases in which disclosure is not required, "nondisclosure does not constitute a misrepresentation or omission of fact." Ill. Comp. Stat., ch. 815, § 710/5 (1994). n28 Perhaps the statutes may also be interpreted in another way. We simply emphasize that the record contains no evidence that BMW's decision to follow a disclosure policy that coincided with the strictest extant state statute was sufficiently reprehensible to justify a $ 2 million award of punitive damages.

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n27 In *Jeter* v. *M & M Dodge, Inc.*, 634 So. 2d 1383 (La. App. 1994), a Louisiana court of appeals suggested that the Louisiana disclosure statute functions as a safe harbor. Finding that the cost of repairing presale damage to the plaintiff's car exceeded the statutory disclosure threshold, the court held that the disclosure statute did not provide a defense to the action. *Id.*, at 1384.

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During the pendency of this litigation, Alabama enacted a disclosure statute which defines "material" damage to a new car as damage requiring repairs costing in excess of 3 percent of suggested retail price or $ 500, whichever is greater. Ala. Code § 8-19-5(22) (1993). After its decision in this case, the Alabama Supreme Court stated in dicta that the remedies available under this section of its Deceptive Trade Practices Act did not displace or alter pre-existing remedies available under either the common law or other statutes. *Hines* v. *Riverside Chevrolet-Olds, Inc.*, 655 So. 2d 909, 917, n. 2 (1994). It refused, however, to "recognize, or impose on automobile manufacturers, a general duty to disclose every repair of damage, however slight, incurred during the manufacturing process." *Id.*, at 921. Instead, it held that whether a defendant has a duty to disclose is a question of fact "for the jury to determine." *Id.*, at 918. In reaching that conclusion it overruled two earlier decisions that seemed to indicate that as a matter of law there was no disclosure obligation in cases comparable to this one. *Id.*, at 920 (overruling *Century 21-Reeves Realty, Inc.* v. *McConnell Cadillac, Inc.*, 626 So. 2d 1273 (Ala. 1993), and *Cobb* v. *Southeast Toyota Distributors, Inc.*, 569 So. 2d 395 (Ala. 1990)).

n28 See also Ariz. Rev. Stat. Ann. § 28-1304.03 (1989) ("If disclosure is not required under this section, a purchaser may not revoke or rescind a sales contract due solely to the fact that the new motor vehicle was damaged and repaired prior to completion of the sale"); Ind. Code § 9-23-4-5 (1993) (providing that "repaired damage to a customer-ordered new motor vehicle not exceeding four percent (4%) of the manufacturer's suggested retail price does not need to be disclosed at the time of sale"); N. C. Gen. Stat. § 20-305.1(e) (1993) (requiring disclosure of repairs costing more than 5 percent of suggested retail price and prohibiting revocation or rescission of sales contract on the basis of less costly repairs); Okla. Stat., Tit. 47, § 1112.1 (1991) (defining "material" damage to a car as damage requiring repairs costing in excess of 3 percent of suggested retail price or $ 500, whichever is greater).

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[*579]

[*HR1E]** [1E]
[*HR21]** [21]
Dr. Gore's second argument for treating BMW as a recidivist is that the company should have anticipated that its actions would be considered fraudulent in some, if not all, jurisdictions. This contention overlooks the fact that actionable fraud requires a *material* **[**1601]** misrepresentation or omission. n29 This qualifier invites line-drawing of just the sort engaged in by States with disclosure statutes and by BMW. We do not think it can be disputed that there may exist minor imperfections in the finish of a new car that can be repaired (or indeed, left unrepaired) **[***829]** without materially affecting the car's value. n30 There is no evidence that BMW acted in bad faith when it sought to establish the appropriate line between presumptively minor damage and damage requiring disclosure to purchasers. For this purpose, BMW could reasonably rely on state disclosure statutes for guidance. In this regard, it is also significant that there is no evidence that BMW persisted in a course of conduct after it had been adjudged unlawful on even one occasion, let alone repeated occasions. n31

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n29 Restatement (Second) of Torts § 538 (1977); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 108 (5th ed. 1984).

n30 The Alabama Supreme Court has held that a car may be considered "new" as a matter of law even if its finish contains minor cosmetic flaws. *Wilburn* v. *Larry Savage Chevrolet, Inc.*, 477 So. 2d 384 (1985). We note also that at trial respondent only introduced evidence

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of undisclosed paint damage to new cars repaired at a cost of $ 300 or more. This decision suggests that respondent believed that the jury might consider some repairs too *de minimis* to warrant disclosure.

n31 Before the verdict in this case, BMW had changed its policy with respect to Alabama and two other States. Five days after the jury award, BMW altered its nationwide policy to one of full disclosure.

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[*HR1F]** [1F]
Finally, the record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive, such as were present in *Haslip* and *TXO. Haslip*, 499 U.S. at 5; *TXO*, 509 U.S. at 453. We accept, of course, the jury's finding that BMW suppressed **[*580]** a material fact which Alabama law obligated it to communicate to prospective purchasers of repainted cars in that State. But the omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good-faith basis for believing that no duty to disclose exists.

[*HR22]** [22]
That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award. Because this case exhibits none of the circumstances ordinarily associated with egregiously improper conduct, we are persuaded that BMW's conduct was not sufficiently reprehensible to warrant imposition of a $ 2 million exemplary damages award.

Ratio

The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff. See *TXO*, 509 U.S. at 459; *Haslip*, 499 U.S. at 23. The principle that exemplary damages must bear a "reasonable relationship" to compensatory damages has a long pedigree. n32 Scholars have identified a number of early English statutes authorizing the **[*581]** award of multiple **[***830]** damages for particular wrongs. Some 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages. n33 Our **[**1602]** decisions in both *Haslip* and *TXO* endorsed the proposition that a comparison between the compensatory award and the punitive award is significant.

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n32 See, *e. g.*, *Grant* v. *McDonogh*, 7 La. Ann. 447, 448 (1852) ("Exemplary damages allowed should bear some proportion to the real damage sustained"); *Saunders* v. *Mullen*, 66 Iowa 728, 729, 24 N.W. 529 (1885) ("When the actual damages are so small, the amount allowed as exemplary damages should not be so large"); *Flannery* v. *Baltimore & Ohio R. Co.*, 15 D. C. 111, 125 (1885) (when punitive damages award "is out of all proportion to the injuries received, we feel it our duty to interfere"); *Houston & Texas Central R. Co.* v. *Nichols*, 9 Am. & Eng. R. R. Cas. 361, 365 (Tex. 1882) ("Exemplary damages, when allowed, should bear proportion to the actual damages sustained"); *McCarthy* v. *Niskern*, 22 Minn. 90, 91-92 (1875) (punitive damages "enormously in excess of what may justly be regarded as compensation" for the injury must be set aside "to prevent injustice").

n33 Owen, *supra* n. 23, at 368, and n. 23. One English statute, for example, provides that officers arresting persons out of their jurisdiction shall pay double damages. 3 Edw., I., ch. 35. Another directs that in an action for forcible entry or detainer, the plaintiff shall recover treble damages. 8 Hen. VI, ch. 9, § 6.

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Present-day federal law allows or mandates imposition of multiple damages for a wide assortment of offenses, including violations of the antitrust laws, see § 4 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. § 15, and the Racketeer Influenced and Corrupt Organizations Act, see 18 U.S.C. § 1964, and certain breaches of the trademark laws, see § 35 of the Trademark Act of 1946, 60 Stat. 439, as amended, 15 U.S.C. § 1117, and the patent laws, see 66 Stat. 813, 35 U.S.C. § 284.

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In *Haslip* we concluded that even though a punitive damages award of "more than 4 times the amount of compensatory damages" might be "close to the line," it did not "cross the line into the area of constitutional impropriety." 499 U.S. at 23-24. *TXO*, following dicta in *Haslip*, refined this analysis by confirming that the proper inquiry is "'whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred.'" *TXO*, 509 U.S. at 460 (emphasis in original), quoting *Haslip*, 499 U.S. at 21. Thus, in upholding the $ 10 million award in *TXO*, we relied on the difference between that figure and the harm to the victim that would have ensued if the tortious plan had succeeded. That difference suggested that the relevant ratio was not more than 10 to 1. n34

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n34 "While petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents, in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme. Thus, even if the actual value of the 'potential harm' to respondents is not between $ 5 million and $ 8.3 million, but is closer to $ 4 million, or $ 2 million, or even $ 1 million, the disparity between the punitive award and the potential harm does not, in our view, 'jar one's constitutional sensibilities.'" *TXO*, 509 U.S. at 462, quoting *Haslip*, 499 U.S. at 18.

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[*582]

[*HR1G]** [1G]
The $ 2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court is 500 times the amount of his actual harm as determined by the jury. n35 Moreover, there is no suggestion that Dr. Gore or any other BMW purchaser was threatened with any additional potential harm by BMW's nondisclosure policy. The disparity in this case is thus dramatically greater than those considered in *Haslip* and *TXO*. n36

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n35 Even assuming each repainted BMW suffers a diminution in value of approximately $ 4,000, the award is 35 times greater than the total damages of all 14 Alabama consumers who purchased repainted BMW's.

n36 The ratio here is also dramatically greater than any award that would be permissible under the statutes and proposed statutes summarized in the appendix to JUSTICE GINSBURG's dissenting opinion. *Post*, at 615-616.

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[*HR23]** [23]

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Torts > Damages > Punitive Damages
Constitutional Law > Substantive Due Process > Scope of Protection
The Due Process Clause, U.S. Const. amend. XIV, prohibits a state from imposing a "grossly excessive" punishment on a tortfeasor.

Torts > Damages > Punitive Damages
Constitutional Law > Substantive Due Process > Scope of Protection
Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition. In the federal system, states necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most states that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the state's legitimate interests in punishment and deterrence. Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause, U.S. Const. amend. XIV. For that reason, the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve.

Constitutional Law > Relations Among Governments
No state can legislate except with reference to its own jurisdiction. Each state is independent of all the others in this particular.

Constitutional Law > Congressional Duties & Powers > Commerce Clause
A state may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other states.

Constitutional Law > Relations Among Governments
State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised. Regulation can be as effectively exerted through an award of damages as through some form of preventive relief.

Constitutional Law > Substantive Due Process > Scope of Protection
To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.

Torts > Damages > Punitive Damages
In determining punitive damages, evidence describing out-of-state transactions may be relevant to the determination of the degree of reprehensibility of the defendant's conduct.

Constitutional Law > Substantive Due Process > Scope of Protection
Elementary notions of fairness enshrined in constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose.

Constitutional Law > Procedural Due Process > Scope of Protection
The strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, but the basic protection against judgments without notice afforded by the Due Process Clause, U.S. Const. amend. V, is implicated by civil penalties.

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Of course, "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* **[***831]** damages to the punitive award. *TXO*, 509 U.S. at 458. n37 Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach. Once again, "we return to what we said . . . in *Haslip:* 'We need not, and **[*583]** indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus.'" *Id.*, at 458 (quoting *Haslip*, 499 U.S. at **[**1603]** 18). In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis. When the ratio is a breathtaking 500 to 1, however, the award must surely "raise a suspicious judicial eyebrow." *TXO*, 509 U.S. at 481 (O'CONNOR, J., dissenting).

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n37 Conceivably the Alabama Supreme Court's selection of a 500-to-1 ratio was an application of JUSTICE SCALIA's identification of one possible reading of the plurality opinion in *TXO:* Any future due process challenge to a punitive damages award could be disposed of with the simple observation that "this is no worse than *TXO*." 509 U.S. at 472 (SCALIA, J., concurring in judgment). As we explain in the text, this award is significantly worse than the award in *TXO*.

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Sanctions for Comparable Misconduct

[*HR1H]** [1H]
[*HR24]** [24]
Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness. As JUSTICE O'CONNOR has correctly observed, "a reviewing court engaged in determining whether an award of punitive damages is excessive should "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. at 301 (opinion concurring in part and dissenting in part). In *Haslip*, 499 U.S. at 23, the Court noted that although the exemplary award was "much in excess of the fine that could be imposed," imprisonment was also authorized in the criminal context. n38 In this **[*584]** case the $ 2 million economic sanction imposed on BMW is substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance.

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n38 Although the Court did not address the size of the punitive damages award in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984), the dissenters commented on its excessive character, noting that the "$ 10 million [punitive damages award] that the jury imposed is 100 times greater than the maximum fine that may be imposed . . . for a single violation of federal standards" and "more than 10 times greater than the largest single fine that the Commission has ever imposed." *Id.*, at 263 (BLACKMUN, J., dissenting). In *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964), the Court observed that the punitive award for libel was "one thousand times greater than the maximum fine provided by the Alabama criminal statute," and concluded that the "fear of damage awards under a rule such as that invoked by the Alabama courts

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here may be markedly more inhibiting than the fear of prosecution under a criminal statute." *Id.*, at 277.

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The maximum civil penalty authorized by the Alabama Legislature for a violation of its Deceptive Trade Practices Act is $ 2,000; n39 other States authorize more severe sanctions, with the maxima ranging from $ 5,000 to $ 10,000. n40 Significantly, some statutes draw a distinction between first offenders and recidivists; thus, in New York the penalty is $ 50 for a first offense and $ 250 for subsequent offenses. None of these statutes would provide an out-of-state distributor with fair notice that the first violation -- or, indeed the first 14 violations -- of its provisions might subject an offender to a multimillion dollar penalty. Moreover, at the time BMW's policy was first challenged, there does not appear to have been any judicial decision in Alabama or elsewhere indicating that application of that policy might give rise to such severe punishment.

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n39 Ala. Code § 8-19-11(b) (1993).

n40 See, *e. g.*, Ark. Code Ann. § 23-112-309(b) (1992) (up to $ 5,000 for violation of state Motor Vehicle Commission Act that would allow suspension of dealer's license; up to $ 10,000 for violation of Act that would allow revocation of dealer's license); Fla. Stat. § 320.27(12) (1992) (up to $ 1,000); Ga. Code Ann. §§ 40-1-5(g), 10-1-397(a) (1994 and Supp. 1996) (up to $ 2,000 administratively; up to $ 5,000 in superior court); Ind. Code § 9-23-6-4 (1993) ($ 50 to $ 1,000); N. H. Rev. Stat. Ann. §§ 357-C:15, 651:2 (1995 and Supp. 1995) (corporate fine of up to $ 20,000); N. Y. Gen. Bus. Law § 396-p(6) (McKinney Supp. 1995) ($ 50 for first offense; $ 250 for subsequent offenses).

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[*HR1I]** [1I]
The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal. The fact that a multimillion dollar penalty prompted a change in policy sheds no light on the question whether a lesser deterrent would have adequately protected the interests of Alabama consumers. In **[*585]** the absence of a history of noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance with the disclosure requirement imposed **[**1604]** by the Alabama Supreme Court in this case.

IV

[*HR1J]** [1J]
We assume, as the juries in this case and in the *Yates* case found, that the undisclosed damage to the new BMW's affected their actual value. Notwithstanding the evidence adduced by BMW in an effort to prove that the repainted cars conformed to the same quality standards as its other cars, we also assume that it knew, or should have known, that as time passed the repainted cars would lose their attractive appearance more rapidly than other BMW's. Moreover, we of course accept the Alabama courts' view that the state interest in protecting its citizens from deceptive trade practices justifies a sanction in addition to the recovery of compensatory damages. We cannot, however, accept the conclusion of the Alabama Supreme Court that BMW's conduct was sufficiently egregious to justify a punitive sanction that is tantamount to a severe criminal penalty.

[*HR1K]** [1K]

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[*HR25]** [25]
[*HR26]** [26]
The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce. While each State **[***833]** has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.

[*HR27A]** [27A]
[*HR28]** [28]
As in *Haslip*, we are not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award. Unlike that case, however, we are fully convinced that the grossly excessive award imposed in this **[*586]** case transcends the constitutional limit. n41 Whether the appropriate remedy requires a new trial or merely an independent determination by the Alabama Supreme Court of the award necessary to vindicate the economic interests of Alabama consumers is a matter that should be addressed by the state court in the first instance.

[*HR27B]** [27B]

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - n41 JUSTICE GINSBURG expresses concern that we are "the *only* federal court policing" this limit. *Post*, at 613. The small number of punitive damages questions that we have reviewed in recent years, together with the fact that this is the first case in decades in which we have found that a punitive damages award exceeds the constitutional limit, indicates that this concern is at best premature. In any event, this consideration surely does not justify an abdication of our responsibility to enforce constitutional protections in an extraordinary case such as this one.

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The judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

CONCURBY: BREYER

CONCUR: JUSTICE BREYER, with whom JUSTICE O'CONNOR and JUSTICE SOUTER join, concurring.

The Alabama state courts have assessed the defendant $ 2 million in "punitive damages" for having knowingly failed to tell a BMW automobile buyer that, at a cost of $ 600, it had repainted portions of his new $ 40,000 car, thereby lowering its potential resale value by about 10%. The Court's opinion, which I join, explains why we have concluded that this award, in this case, was "grossly excessive" in relation to legitimate punitive damages objectives, and hence an arbitrary deprivation of life, liberty, or property in violation of the Due Process Clause. See *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453, 454, 125 L. Ed. 2d 366, 113 S. Ct. 2711 (1993) (A "grossly excessive" punitive award amounts to an "arbitrary deprivation of property without due process of law") (plurality opinion). Members of this Court have generally thought, however, that if "fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption **[*587]** of validity." *Id.*, at 457. See also *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 40-42, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991) (KENNEDY, J., concurring in

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judgment). And the Court also has found that punitive damages procedures very similar to those followed here were not, by themselves, fundamentally unfair. *Id.*, at 15-24. Thus, I believe it important to explain why this presumption of validity is overcome in this instance.

[1605]** The reason flows from the Court's emphasis in *Haslip* upon the constitutional importance of legal standards that provide "reasonable constraints" within which "discretion is exercised," that assure "meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages," and permit "appellate **[***834]** review [that] makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Id.*, at 20-21. See also *id.*, at 18 ("Unlimited jury discretion -- or unlimited judicial discretion for that matter -- in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities").

This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion. *Daniels* v. *Williams*, 474 U.S. 327, 331, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986); *Dent* v. *West Virginia*, 129 U.S. 114, 123, 32 L. Ed. 623, 9 S. Ct. 231 (1889). Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself. See *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112, 93 L. Ed. 533, 69 S. Ct. 463 (1949) (Jackson, J., concurring) ("There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally").

[*588] Legal standards need not be precise in order to satisfy this constitutional concern. See *Haslip, supra*, at 20 (comparing punitive damages standards to such legal standards as "reasonable care," "due diligence," and "best interests of the child") (internal quotation marks omitted). But they must offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior. The standards the Alabama courts applied here are vague and open ended to the point where they risk arbitrary results. In my view, although the vagueness of those standards does not, by itself, violate due process, see *Haslip, supra*, it does invite the kind of scrutiny the Court has given the particular verdict before us. See *id.*, at 18 ("Concerns of . . . adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus"); *TXO, supra*, at 475 ("It cannot be denied that the lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury's verdict") (O'CONNOR, J., dissenting). This is because the standards, as the Alabama Supreme Court authoritatively interpreted them here, provided no significant constraints or protection against arbitrary results.

First, the Alabama statute that permits punitive damages does not itself contain a standard that readily distinguishes between conduct warranting very small, and conduct warranting very large, punitive damages awards. That statute permits punitive damages in cases of "oppression, fraud, wantonness, or malice." Ala. Code § 6-11-20(a) (1993). But the statute goes on to define those terms broadly, to encompass far more than the egregious conduct that those terms, at first reading, might seem to imply. An intentional misrepresentation, made through a statement or **[***835]** silence, can easily amount to "fraud" sufficient to warrant punitive damages. See § 6-11-20(b)(1) ("Fraud" includes "intentional . . . concealment of a material fact the concealing party had a **[*589]** duty to disclose, which was gross, *oppressive, or malicious* and committed with the intention . . . of thereby depriving a person or entity of property") (emphasis added); § 6-11-20(b)(2) ("Malice" includes *any "wrongful act without* just cause or *excuse . . . with an intent to injure* the . . . *property* of another") (emphasis added); § 6-11-20(b)(5) ("Oppression" includes "subjecting

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a person to . . . unjust hardship in conscious disregard of that person's rights"). The statute thereby authorizes punitive damages for the most **[**1606]** serious kinds of misrepresentations, say, tricking the elderly out of their life savings, for much less serious conduct, such as the failure to disclose repainting a car, at issue here, and for a vast range of conduct in between.

Second, the Alabama courts, in this case, have applied the "factors" intended to constrain punitive damages awards in a way that belies that purpose. *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989), sets forth seven factors that appellate courts use to determine whether or not a jury award was "grossly excessive" and which, in principle, might make up for the lack of significant constraint in the statute. But, as the Alabama courts have authoritatively interpreted them, and as their application in this case illustrates, they impose little actual constraint.

(a) *Green Oil* requires that a punitive damages award "bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred." *Id.*, at 223. But this standard does little to guide a determination of what counts as a "reasonable" relationship, as this case illustrates. The record evidence of past, present, or likely future harm consists of (a) $ 4,000 of harm to Dr. Gore's BMW; (b) 13 other similar Alabama instances; and (c) references to about 1,000 similar instances in other States. The Alabama Supreme Court, disregarding BMW's failure to make relevant objection to the out-of-state instances at trial (as was the court's right), held that the last mentioned, out-of-state instances did *not* **[*590]** count as relevant harm. It went on to find "a reasonable relationship" between the harm and the $ 2 million punitive damages award *without "considering those acts that occurred in other jurisdictions*." 646 So. 2d 619, 628 (1995) (emphasis added). For reasons explored by the majority in greater depth, see *ante*, at 574-586, the relationship between this award and the underlying conduct seems well beyond the bounds of the "reasonable." To find a "reasonable relationship" between purely economic harm totaling $ 56,000, without significant evidence of future repetition, and a punitive award of $ 2 million is to empty the "reasonable relationship" test of meaningful content. As thus construed, it does not set forth a legal standard that could have significantly constrained the discretion of Alabama factfinders.

(b) *Green Oil*'s second factor is the "degree of reprehensibility" of the defendant's conduct. *Green Oil, supra*, at 223. Like the "reasonable relationship" test, this factor provides little guidance on how to relate culpability to the size of an award. The Alabama court, in considering this factor, found "reprehensible" that BMW **[***836]** followed a conscious policy of not disclosing repairs to new cars when the cost of repairs amounted to less than 3% of the car's value. Of course, *any* conscious policy of not disclosing a repair -- where one knows the nondisclosure might cost the customer resale value -- is "reprehensible" to *some* degree. But, for the reasons discussed by the majority, *ante*, at 575-580, I do not see how the Alabama courts could find conduct that (they assumed) caused $ 56,000 of relevant economic harm *especially* or *unusually* reprehensible enough to warrant $ 2 million in punitive damages, or a significant portion of that award. To find to the contrary, as the Alabama courts did, is not simply unreasonable; it is to make "reprehensibility" a concept without constraining force, *i. e.*, to deprive the concept of its constraining power to protect against serious and capricious deprivations.

[*591] (c) *Green Oil*'s third factor requires "punitive damages" to "remove the profit" of the illegal activity and "be in excess of the profit, so that the defendant recognizes a loss." *Green Oil*, 539 So. 2d at 223. This factor has the ability to limit awards to a fixed, rational amount. But as applied, that concept's potential was not realized, for the court did not limit the award to anywhere near the $ 56,000 in profits evidenced in the record. Given the record's description of the conduct and its prevalence, this factor could not justify much of the $ 2 million award.

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(d) *Green Oil*'s fourth factor is the "financial position" of the defendant. *Ibid.* Since a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of this factor to the State's **[**1607]** interest in retribution (though not necessarily to its interest in deterrence, given the more distant relation between a defendant's wealth and its responses to economic incentives). See *TXO*, 509 U.S. at 462, and n. 28 (plurality opinion); *id.*, at 469 (KENNEDY, J., concurring in part and concurring in judgment); *Haslip*, 499 U.S. at 21-22; *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989) (O'CONNOR, J., concurring in part and dissenting in part). This factor, however, is not necessarily intended to act as a significant *constraint* on punitive awards. Rather, it provides an open-ended basis for inflating awards when the defendant is wealthy, as this case may illustrate. That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as "reprehensibility," to constrain significantly an award that purports to punish a defendant's conduct.

(e) *Green Oil*'s fifth factor is the "costs of litigation" and the State's desire "to encourage plaintiffs to bring wrongdoers to trial." 539 So. 2d at 223. This standard provides meaningful constraint to the extent that the enhancement it authorized is linked to a fixed, ascertainable amount approximating actual costs, even when defined generously to reflect **[*592]** the contingent nature of plaintiffs' victories. But as this case shows, the factor cannot operate as a constraint when an award much in excess of costs is approved for other reasons. An additional aspect of the standard -- the need to "encourage plaintiffs to bring wrongdoers to trial" -- is a factor that does not constrain, **[***837]** but enhances, discretionary power -- especially when unsupported by evidence of a *special* need to encourage litigation (which the Alabama courts here did not mention).

(f) *Green Oil*'s sixth factor is whether or not "criminal sanctions have been imposed on the defendant for his conduct." *Ibid.* This factor did not apply here.

(g) *Green Oil*'s seventh factor requires that "other civil actions" filed "against the same defendant, based on the same conduct," be considered in mitigation. *Id.*, at 224. That factor did not apply here.

Thus, the first, second, and third *Green Oil* factors, in principle, might sometimes act as constraints on arbitrary behavior. But *as the Alabama courts interpreted those standards in this case*, even taking those three factors together, they could not have significantly constrained the court system's ability to impose "grossly excessive" awards.

Third, the state courts neither referred to, nor made any effort to find, nor enunciated any other standard that either directly, or indirectly as background, might have supplied the constraining legal force that the statute and *Green Oil* standards (as interpreted here) lack. Dr. Gore did argue to the jury an economic theory based on the need to offset the totality of the harm that the defendant's conduct caused. Some theory of that general kind might have provided a significant constraint on arbitrary awards (at least where confined to the relevant harm-causing conduct, see *ante*, at 570-574). Some economists, for example, have argued for a standard that would deter illegal activity causing solely economic harm through the use of punitive damages awards that, as a whole, would take from a wrongdoer the total cost of the **[*593]** harm caused. See, *e. g.*, S. Shavell, Economic Analysis of Accident Law 162 (1987) ("If liability equals losses caused multiplied by . . . the inverse of the probability of suit, injurers will act optimally under liability rules despite the chance that they will escape suit"); Cooter, Punitive Damages for Deterrence: When and How Much, 40 Ala. L. Rev. 1143, 1146-1148 (1989). My understanding of the intuitive essence of some of those theories, which I put in crude form (leaving out various qualifications), is that they could permit juries to calculate punitive damages by making a rough estimate of global harm, dividing that estimate by a similarly rough estimate of the number of successful lawsuits that would likely be brought, and adding generous attorney's fees and other costs. Smaller damages would

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not sufficiently discourage firms from engaging in the harmful conduct, while larger damages would "over-deter" by leading potential defendants **[**1608]** to spend more to prevent the activity that causes the economic harm, say, through employee training, than the cost of the harm itself. See Galligan, Augmented Awards: The Efficient Evolution of Punitive Damages, 51 La. L. Rev. 3, 17-20, 28-30 (1990). Larger damages might also "double count" by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover.

The record before us, however, contains nothing suggesting that the Alabama Supreme Court, when determining the allowable award, applied *any* "economic" theory that might explain the $ 2 million recovery. **[***838]** Cf. *Browning-Ferris, supra*, at 300 (noting that the Constitution "does not incorporate the views of the Law and Economics School," nor does it "'require the States to subscribe to any particular economic theory'") (O'CONNOR, J., concurring in part and dissenting in part) (quoting *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92, 95 L. Ed. 2d 67, 107 S. Ct. 1637 (1987)). And courts properly tend to judge the rationality of judicial actions in terms of the reasons that were given, and the facts that were before the court, cf. *TXO*, **[*594]** *supra*, at 468 (KENNEDY, J., concurring in part and concurring in judgment), not those that might have been given on the basis of some conceivable set of facts (unlike the rationality of economic statutes enacted by legislatures subject to the public's control through the ballot box, see, *e. g.*, *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993)). Therefore, reference to a constraining "economic" theory, which might have counseled more deferential review by this Court, is lacking in this case.

Fourth, I cannot find any community understanding or historic practice that this award might exemplify and which, therefore, would provide background standards constraining arbitrary behavior and excessive awards. A punitive damages award of $ 2 million for intentional misrepresentation causing $ 56,000 of harm is extraordinary by historical standards, and, as far as I am aware, finds no analogue until relatively recent times. *Amici* for Dr. Gore attempt to show that this is not true, pointing to various historical cases which, according to their calculations, represented roughly equivalent punitive awards for similarly culpable conduct. See Brief for James D. A. Boyle et al. as *Amici Curiae* 4-5 (hereinafter Legal Historians' Brief). Among others, they cite *Wilkes* v. *Wood*, Lofft 1, 98 Eng. Rep. 489 (C. P. 1763) (# 1,000 said to be equivalent of $ 1.5 million, for warrantless search of papers); *Huckle* v. *Money*, 2 Wills. 205, 95 Eng. Rep. 768 (K. B. 1763) (# 300, said to be $ 450,000, for 6-hour false imprisonment); *Hewlett* v. *Cruchley*, 5 Taunt. 277, 128 Eng. Rep. 696 (C. P. 1813) (# 2,000, said to be $ 680,000, for malicious prosecution); *Merest* v. *Harvey*, 5 Taunt. 442, 128 Eng. Rep. 761 (C. P. 1814) (# 500, said to be $ 165,000, for poaching). But *amici* apparently base their conversions on a mathematical assumption, namely, that inflation has progressed at a constant 3% rate of inflation. See Legal Historians' Brief 4. In fact, consistent, cumulative inflation is a modern phenomenon. See McCusker, How Much Is That in Real Money? A Historical Price Index for Use as a Deflator **[*595]** of Money Values in the Economy of the United States, 101 Proceedings of American Antiquarian Society 297, 310, 323-332 (1992). Estimates based on historical rates of valuation, while highly approximate, suggest that the ancient extraordinary awards are small compared to the $ 2 million here at issue, or other modern punitive damages figures. See Appendix to this opinion, *infra*, at 597-598 (suggesting that the modern equivalent of the awards in the above cases is something like $ 150,000, $ 45,000, $ 100,000, and $ 25,000, respectively). And, as the majority opinion makes clear, the record contains nothing to suggest that the extraordinary size of the award in this case is explained by the extraordinary wrongfulness of the defendant's behavior, measured **[***839]** by historical or community standards, rather than arbitrariness or caprice.

Fifth, there are no other legislative enactments here that classify awards and impose quantitative limits that would significantly cabin the fairly unbounded discretion created by the absence of constraining legal standards. Cf., *e. g.*, Tex. Civ. Prac. & Rem. Code

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[1609]** Ann. § 41.008 (Supp. 1996) (punitive damages generally limited to greater of double damages, or $ 200,000, except cap does not apply to suits arising from certain serious criminal acts enumerated in the statute); Conn. Gen. Stat. § 52-240b (1995) (punitive damages may not exceed double compensatory damages in product liability cases); Fla. Stat. § 768.73(1) (Supp. 1993) (punitive damages in certain actions limited to treble compensatory damages); Ga. Code Ann. § 51-12-5.1(g) (Supp. 1995) ($ 250,000 cap in certain actions).

The upshot is that the rules that purport to channel discretion in this kind of case, here did not do so in fact. That means that the award in this case was both (a) the product of a system of standards that did not significantly constrain a court's, and hence a jury's, discretion in making that award; and (b) grossly excessive in light of the State's legitimate punitive damages objectives.

[*596] The first of these reasons has special importance where courts review a jury-determined punitive damages award. That is because one cannot expect to direct jurors like legislators through the ballot box; nor can one expect those jurors to interpret law like judges, who work within a discipline and hierarchical organization that normally promotes roughly uniform interpretation and application of the law. Yet here Alabama expects jurors to act, at least a little, like legislators or judges, for it permits them, to a certain extent, to create public policy and to apply that policy, not to compensate a victim, but to achieve a policy-related objective outside the confines of the particular case.

To the extent that neither clear legal principles nor fairly obvious historical or community-based standards (defining, say, especially egregious behavior) significantly constrain punitive damages awards, is there not a substantial risk of outcomes so arbitrary that they become difficult to square with the Constitution's assurance, to every citizen, of the law's protection? The standards here, as authoritatively interpreted, in my view, make this threat real and not theoretical. And, in these unusual circumstances, where legal standards offer virtually no constraint, I believe that this lack of constraining standards warrants this Court's detailed examination of the award.

The second reason -- the severe disproportionality between the award and the legitimate punitive damages objectives -- reflects a judgment about a matter of degree. I recognize that it is often difficult to determine just when a punitive award exceeds an amount reasonably related to a State's legitimate interests, or when that excess is so great as to amount to a matter of constitutional concern. Yet whatever the difficulties of drawing a precise line, once we examine the award in this case, it is not difficult to say that this award lies on the line's far side. The severe lack of proportionality between the size of the award and the underlying punitive damages objectives shows that the award falls into the category **[*597]** of "gross excessiveness" set forth in this Court's prior cases. **[***840]**

These two reasons *taken together* overcome what would otherwise amount to a "strong presumption of validity." *TXO*, 509 U.S. at 457. And, for those two reasons, I conclude that the award in this unusual case violates the basic guarantee of nonarbitrary governmental behavior that the Due Process Clause provides.

APPENDIX TO OPINION OF BREYER, J.

Although I recognize that all estimates of historic rates of inflation are subject to dispute, including, I assume, the sources below, those sources suggest that the value of the 18th and 19th century judgments cited by *amici* is much less than the figures *amici* arrived at under their presumption of a constant 3% rate of inflation.

In 1763, # 1 (Eng.) was worth # 1.73 Pennsylvania currency. See U.S. Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, Series Z -- 585, p.

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1198 (Bicentennial ed. 1975). For the period 1766-1772, # 1 (Penn.) was worth $ 45.99 (U.S. 1991). See McCusker, How Much Is That in Real Money? A Historical Price Index for Use as a Deflator of Money Values in the Economy of the United States, 101 American Antiquarian Society 297, 333 **[**1610]** (1992). Thus, # 1 (Eng. 1763) is worth about $ 79.56 (U.S. 1991). Accounting for the 12% inflation of the U.S. dollar between 1991 and 1995 (when *amici* filed their brief), see Economic Indicators, 104th Cong., 2d Sess., p. 23 (Feb. 1996), # 1 (Eng. 1763) is worth about $ 89.11 (U.S. 1995).

Calculated another way, # 1 (Eng. 1763) is worth about # 72.84 (Eng. 1991). See McCusker, *supra*, at 312, 342, 350. And # 1 (Eng. 1991) is worth $ 1.77 (U.S. 1991). See 78 Fed. Reserve Bulletin A68 (Feb. 1992). Thus, # 1 (Eng. 1763) amounts to about $ 128.93 (U.S. 1991). Again, accounting for inflation between 1991 and 1995, this amounts to about $ 144.40 (U.S. 1995).

[*598] Thus, the above sources suggest that the # 1,000 award in *Wilkes* in 1763 roughly amounts to between $ 89,110 and $ 144,440 today, not $ 1.5 million. And the # 300 award in *Huckle* that same year would seem to be worth between $ 26,733 and $ 43,320 today, not $ 450,000.

For the period of the *Hewlett* and *Merest* decisions, # 1 (Eng. 1813) is worth about # 25.3 (Eng. 1991). See McCusker, *supra*, at 344, 350. Using the 1991 exchange rate, # 1 (Eng. 1813) is worth about $ 44.78 (U.S. 1991). Accounting for inflation between 1991 and 1995, this amounts to about $ 50.16 (U.S. 1995).

Thus, the # 2,000 and # 500 awards in *Hewlett* and *Merest* would seem to be closer to $ 100,320 and $ 25,080, respectively, than to *amici's* estimates of $ 680,000 and $ 165,000.

DISSENTBY: SCALIA; GINSBURG

DISSENT: JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

Today we see the latest manifestation of this Court's recent and increasingly insistent "concern about punitive damages that 'run wild.'" *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 18, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991). Since the Constitution does not make that concern any of our business, the Court's activities in this area are an unjustified incursion into the province of state governments.

In earlier cases that were the prelude **[***841]** to this decision, I set forth my view that a state trial procedure that commits the decision whether to impose punitive damages, and the amount, to the discretion of the jury, subject to some judicial review for "reasonableness," furnishes a defendant with all the process that is "due." See *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 470, 125 L. Ed. 2d 366, 113 S. Ct. 2711 (1993) (SCALIA, J., concurring in judgment); *Haslip, supra*, at 25-28 (SCALIA, J., concurring in judgment); cf. *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 435-436, 129 L. Ed. 2d 336, 114 S. Ct. 2331 (1994) (SCALIA, J., concurring). I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against **[*599]** "unfairness" -- neither the unfairness of an excessive civil compensatory award, nor the unfairness of an "unreasonable" punitive award. What the Fourteenth Amendment's procedural guarantee assures is an opportunity to contest the reasonableness of a damages judgment in state court; but there is no federal guarantee a damages award actually *be* reasonable. See *TXO, supra*, at 471 (SCALIA, J., concurring in judgment).

This view, which adheres to the text of the Due *Process* Clause, has not prevailed in our punitive damages cases. See *TXO*, 509 U.S. at 453-462 (plurality opinion); *id.*, at 478-481 (O'CONNOR, J., dissenting); *Haslip, supra*, at 18. When, however, a constitutional doctrine adopted by the Court is not only mistaken but also insusceptible of principled application, I

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do not feel bound to give it *stare decisis* effect -- indeed, I do not feel justified in doing so. See, *e. g.*, *Witte* v. *United States*, 515 U.S. 389, 406, 132 L. Ed. 2d 351, 115 S. Ct. 2199 (1995) (SCALIA, J., concurring in judgment); *Walton* v. *Arizona*, 497 U.S. 639, 673, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990) (SCALIA, J., concurring in judgment in part and dissenting in part). Our punitive damages jurisprudence compels such a response. The Constitution provides no warrant for federalizing yet another aspect of our Nation's legal culture (no matter **[**1611]** how much in need of correction it may be), and the application of the Court's new rule of constitutional law is constrained by no principle other than the Justices' subjective assessment of the "reasonableness" of the award in relation to the conduct for which it was assessed.

Because today's judgment represents the first instance of this Court's invalidation of a state-court punitive assessment as simply unreasonably large, I think it a proper occasion to discuss these points at some length.

I

The most significant aspects of today's decision -- the identification of a "substantive due process" right against a "grossly excessive" award, and the concomitant assumption **[*600]** of ultimate authority to decide anew a matter of "reasonableness" resolved in lower court proceedings -- are of course not new. *Haslip* and *TXO* revived the notion, moribund since its appearance in the first years of this century, that the measure of civil punishment poses a question of constitutional dimension to be answered by this Court. Neither of those cases, however, nor any of the precedents upon which they relied, actually took the step of declaring a **[***842]** punitive award unconstitutional simply because it was "too big."

At the time of adoption of the Fourteenth Amendment, it was well understood that punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved. See, *e. g.*, *Barry* v. *Edmunds*, 116 U.S. 550, 565, 29 L. Ed. 729, 6 S. Ct. 501 (1886); *Missouri Pacific R. Co.* v. *Humes*, 115 U.S. 512, 521, 29 L. Ed. 463, 6 S. Ct. 110 (1885); *Day* v. *Woodworth*, 54 U.S. 363, 13 HOW 363, 371, 14 L. Ed. 181 (1852). See generally *Haslip, supra*, at 25-27 (SCALIA, J., concurring in judgment). Today's decision, though dressed up as a legal opinion, is really no more than a disagreement with the community's sense of indignation or outrage expressed in the punitive award of the Alabama jury, as reduced by the State Supreme Court. It reflects not merely, as the concurrence candidly acknowledges, "a judgment about a matter of degree," *ante*, at 596; but a judgment about the appropriate degree of indignation or outrage, which is hardly an analytical determination.

There is no precedential warrant for giving our judgment priority over the judgment of state courts and juries on this matter. The only support for the Court's position is to be found in a handful of errant federal cases, bunched within a few years of one other, which invented the notion that an unfairly severe civil sanction amounts to a violation of constitutional liberties. These were the decisions upon which the *TXO* plurality relied in pronouncing that the Due Process Clause "imposes substantive limits 'beyond which penalties may not go,'" 509 U.S. at 454 (quoting *Seaboard Air Line R. Co.* v. *Seegers*, 207 U.S. 73, 78, 52 L. Ed. 108, 28 S. Ct. 28 (1907)); see also 509 U.S., **[*601]** at 478-481 (O'CONNOR, J., dissenting); *Haslip, supra*, at 18. Although they are our precedents, they are themselves too shallowly rooted to justify the Court's recent undertaking. The only case relied upon in which the Court actually invalidated a civil sanction does not even support constitutional review for excessiveness, since it really concerned the validity, as a matter of *procedural* due process, of state legislation that imposed a significant penalty on a common carrier which lacked the means of determining the legality of its actions before the penalty was imposed. See *Southwestern Telegraph & Telephone Co.* v. *Danaher*, 238 U.S. 482, 489-491, 59 L. Ed. 1419, 35 S. Ct. 886 (1915). The *amount* of the penalty was not a subject of independent scrutiny. As for the remaining cases, while the opinions do consider arguments that statutory penalties can, by

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Torts > Damages > Punitive Damages

Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. Exemplary damages imposed on a defendant should reflect the enormity of his offense. Punitive awards may not be wholly disproportioned to the offense.

Torts > Business & Employment Torts > Deceit & Fraud

Torts > Damages > Punitive Damages

Some wrongs are more blameworthy than others. Nonviolent crimes are less serious than crimes marked by violence or the threat of violence. Similarly, trickery and deceit are more reprehensible than negligence.

Torts > Damages > Punitive Damages

Infliction of economic injury, especially when done intentionally through affirmative acts of misconduct or when the target is financially vulnerable, can warrant a substantial penalty. But this observation does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages.

Torts > Damages > Punitive Damages

Evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices

The Alabama Supreme Court has held that a car may be considered "new" as a matter of law even if its finish contains minor cosmetic flaws.

Torts > Damages > Punitive Damages

Perhaps the most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff. The principle that exemplary damages must bear a "reasonable relationship" to compensatory damages has a long pedigree.

Torts > Damages > Punitive Damages

The proper inquiry in determining if a punitive damage award is excessive is whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.

Torts > Damages > Punitive Damages

Courts have consistently rejected the notion that the constitutional line determining excess in an award of punitive damages is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.

Torts > Damages > Punitive Damages

A reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.

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reason of their excessiveness, violate due process, not a single one of these judgments invalidates a damages award. See *Seaboard, supra*, at 78-79; *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U.S. 86, 111-112, 53 L. Ed. 417, 29 S. Ct. 220 (1909); *Standard Oil Co. of Ind.* v. *Missouri*, 224 U.S. 270, 286, 290, 56 L. Ed. 760, 32 S. Ct. 406 (1912); *St. Louis, I. M. & S. R. Co.* v. *Williams*, 251 U.S. 63, 66-67, **[**1612]** 64 L. Ed. 139, 40 S. Ct. 71 (1919).

More importantly, this latter group of cases -- which again are the *sole* precedential foundation put forward for the rule of constitutional law espoused by today's Court -- simply fabricated the "substantive due process" right at issue. *Seaboard* assigned no precedent to its bald assertion **[***843]** that the Constitution imposes "limits beyond which penalties may not go," 207 U.S. at 78. *Waters-Pierce* cited only *Coffey* v. *County of Harlan*, 204 U.S. 659, 51 L. Ed. 666, 27 S. Ct. 305 (1907), a case which inquired into the constitutionality of state *procedure, id.*, at 662-663. *Standard Oil* simply cited *Waters-Pierce*, and *St. Louis, I. M. & S. R. Co.* offered in addition to these cases only *Collins* v. *Johnston*, 237 U.S. 502, 59 L. Ed. 1071, 35 S. Ct. 649 (1915), which said nothing to support the notion of a "substantive due process" right against excessive civil penalties, but to the contrary asserted that the prescribing and imposing of criminal punishment were "functions peculiarly belonging to the several States," **[*602]** *id.*, at 509-510. Thus, the only authority for the Court's position is simply not authoritative. These cases fall far short of what is needed to supplant this country's longstanding practice regarding exemplary awards, see, *e. g., Haslip*, 499 U.S. at 15-18; *id.*, at 25-28 (SCALIA, J., concurring in judgment).

II

One might understand the Court's eagerness to enter this field, rather than leave it with the state legislatures, if it had something useful to say. In fact, however, its opinion provides virtually no guidance to legislatures, and to state and federal courts, as to what a "constitutionally proper" level of punitive damages might be.

We are instructed at the outset of Part II of the Court's opinion -- the beginning of its substantive analysis -- that "the federal excessiveness inquiry . . . begins with an identification of the state interests that a punitive award is designed to serve." *Ante*, at 568. On first reading this, one is faced with the prospect that federal punitive damages law (the new field created by today's decision) will be beset by the sort of "interest analysis" that has laid waste the formerly comprehensible field of conflict of laws. The thought that each assessment of punitive damages, as to each offense, must be examined to determine the precise "state interests" pursued, is most unsettling. Moreover, if those "interests" are the most fundamental determinant of an award, one would think that due process would require the assessing jury to be *instructed* about them.

It appears, however (and I certainly hope), that all this is a false alarm. As Part II of the Court's opinion unfolds, it turns out to be directed, not to the question "How much punishment is too much?" but rather to the question "Which acts can be punished?" "Alabama does not have the power," the Court says, "to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents." *Ante*, at 572-573. That may be true, though **[*603]** only in the narrow sense that a person cannot be *held liable to be punished* on the basis of a lawful act. But if a person has been held subject to punishment because he committed an *un*lawful act, the *degree* of his punishment assuredly *can* be increased on the basis of any other conduct of his that displays his wickedness, unlawful or not. Criminal sentences can be computed, we have said, on the basis of "information concerning every aspect of a defendant's life," *Williams* v. *New York*, **[***844]** 337 U.S. 241, 250-252, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949). The Court at one point seems to acknowledge this, observing that, although a sentencing court "[cannot] properly *punish* lawful conduct," it may in assessing the penalty "consider . . . lawful conduct that bears on the defendant's character." *Ante*, at 573, n. 19. That concession is quite incompatible, however, with the later assertion that, since "neither the jury nor the trial court

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was presented with evidence that any of BMW's out-of-state conduct was unlawful," the Alabama Supreme Court "therefore properly eschewed reliance on BMW's out-of-state conduct, . . . and based its remitted award solely on conduct that occurred within Alabama." *Ante*, at 573-574. Why could the Supreme Court of Alabama not consider lawful (but disreputable) conduct, both inside **[**1613]** and outside Alabama, for the purpose of assessing just how bad an actor BMW was?

The Court follows up its statement that "Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred" with the statement: "Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions." *Ante*, at 572-573. The Court provides us no citation of authority to support this proposition -- other than the barely analogous cases cited earlier in the opinion, see *ante*, at 571-572 -- and I know of none.

These significant issues pronounced upon by the Court are not remotely presented for resolution in the present case. There is no basis for believing that Alabama has sought to control conduct elsewhere. The statutes at issue merely **[*604]** permit civil juries to treat conduct such as petitioner's as fraud, and authorize an award of appropriate punitive damages in the event the fraud is found to be "gross, oppressive, or malicious," Ala. Code § 6-11-20(b)(1) (1993). To be sure, respondent did invite the jury to consider out-of-state conduct in its calculation of damages, but any increase in the jury's initial award based on that consideration is not a component of the remitted judgment before us. As the Court several times recognizes, in computing the amount of the remitted award the Alabama Supreme Court -- whether it was constitutionally required to or not -- "expressly disclaimed any reliance on acts that occurred in other jurisdictions." *Ante*, at 567 (internal quotation marks omitted); see also *ante*, at 573-574. * Thus, the only question presented by this case is whether that award, limited to petitioner's Alabama conduct and viewed in light of the factors identified as properly informing the inquiry, is excessive. The Court's sweeping (and largely unsupported) statements regarding the relationship of punitive awards **[***845]** to lawful or unlawful out-of-state conduct are the purest dicta.

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* The Alabama Supreme Court said:

"We must conclude that the award of punitive damages was based in large part on conduct that happened in other jurisdictions . . . . Although evidence of similar acts in other jurisdictions is admissible as to the issue of 'pattern and practice' of such acts, . . . this jury could not use the number of similar acts that a defendant has committed in other jurisdictions as a multiplier when determining the *dollar amount* of a punitive damages award. Such evidence may not be considered in setting the size of the civil penalty, because neither the jury nor the trial court had evidence before it showing in which states the conduct was wrongful." 646 So. 2d 619, 627 (1994).

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III

In Part III of its opinion, the Court identifies "three guideposts" that lead it to the conclusion that the award in this case is excessive: degree of reprehensibility, ratio between punitive award and plaintiff's actual harm, and legislative **[*605]** sanctions provided for comparable misconduct. *Ante*, at 574-585. The legal significance of these "guideposts" is nowhere explored, but their necessary effect is to establish federal standards governing the hitherto exclusively state law of damages. Apparently (though it is by no means clear) all three federal "guideposts" can be overridden if "necessary to deter future misconduct," *ante*, at 584 -- a loophole that will encourage state reviewing courts to uphold awards as necessary

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for the "adequat[e] protect[ion]" of state consumers, *ibid.* By effectively requiring state reviewing courts to concoct rationalizations -- whether within the "guideposts" or through the loophole -- to justify the intuitive punitive reactions of state juries, the Court accords neither category of institution the respect it deserves.

Of course it will not be easy for the States to comply with this new federal law of damages, no matter how willing they are to do so. In truth, the "guideposts" mark a road to nowhere; they provide no real guidance at all. As to "degree of reprehensibility" of the defendant's conduct, we learn that "'nonviolent crimes are less serious than crimes marked by violence or the threat of violence,'" *ante*, at 576 (quoting *Solem* v. *Helm*, 463 U.S. 277, 292-293, 77 L. Ed. 2d 637, 103 S. Ct. 3001 (1983)), and that "'trickery and deceit'" are "more reprehensible than negligence," *ante*, at 576. As to the ratio of punitive to compensatory damages, we are told that a "'general concer[n] of reasonableness . . . enter[s] into the constitutional **[**1614]** calculus,'" *ante*, at 583 (quoting *TXO*, 509 U.S. at 458) -- though even "a breathtaking 500 to 1" will not necessarily do anything more than "'raise a suspicious judicial eyebrow,'" *ante*, at 583 (quoting *TXO, supra*, at 481 (O'CONNOR, J., dissenting), an opinion which, when confronted with that "breathtaking" ratio, approved it). And as to legislative sanctions provided for comparable misconduct, they should be accorded "'substantial deference,'" *ante*, at 583 (quoting *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 301, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989) (O'CONNOR, J., concurring in part and dissenting **[*606]** in part)). One expects the Court to conclude: "To thine own self be true."

These criss-crossing platitudes yield no real answers in no real cases. And it must be noted that the Court nowhere says that these three "guideposts" are the *only* guideposts; indeed, it makes very clear that they are not -- explaining away the earlier opinions that do not really follow these "guideposts" on the basis of *additional* factors, thereby "reiterating our rejection of a categorical approach." *Ante*, at 582. In other words, even these utter platitudes, if they should ever happen to produce an answer, may be overridden by other unnamed considerations. The Court has constructed a framework that does not **[***846]** genuinely constrain, that does not inform state legislatures and lower courts -- that does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not "fair."

The Court distinguishes today's result from *Haslip* and *TXO* partly on the ground that "the record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive, such as were present in *Haslip* and *TXO*." *Ante*, at 579. This seemingly rejects the findings necessarily made by the jury -- that petitioner had committed a fraud that was "gross, oppressive, or malicious," Ala. Code § 6-11-20(b)(1) (1993). Perhaps that rejection is intentional; the Court does not say.

The relationship between judicial application of the new "guideposts" and jury findings poses a real problem for the Court, since as a matter of logic there is no more justification for ignoring the jury's determination as to *how* reprehensible petitioner's conduct was (*i. e.*, how much it deserves to be punished), than there is for ignoring its determination that it was reprehensible *at all* (*i. e.*, that the wrong was willful and punitive damages are therefore recoverable). That the issue has been framed in terms of a constitutional right against unreasonably *excessive* awards should not obscure **[*607]** the fact that the logical and necessary consequence of the Court's approach is the recognition of a constitutional right against unreasonably *imposed* awards as well. The elevation of "fairness" in punishment to a principle of "substantive due process" means that every punitive award unreasonably imposed is unconstitutional; such an award is by definition excessive, since it attaches a penalty to conduct undeserving of punishment. Indeed, if the Court is correct, it must be that every claim that a state jury's award of *compensatory* damages is "unreasonable" (because not supported by the evidence) amounts to an assertion of constitutional injury. See *TXO, supra*, at 471 (SCALIA, J. concurring in judgment). And the same would be true for

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determinations of liability. By today's logic, *every* dispute as to evidentiary sufficiency in a state civil suit poses a question of constitutional moment, subject to review in this Court. That is a stupefying proposition.

For the foregoing reasons, I respectfully dissent.

JUSTICE GINSBURG, with whom THE CHIEF JUSTICE joins, dissenting.

The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within the States' domain, and does so in the face of reform measures recently adopted or currently under consideration in legislative arenas. The Alabama Supreme Court, in this case, endeavored to follow this Court's prior instructions; and, more recently, Alabama's highest court has installed further **[**1615]** controls on awards of punitive damages (see *infra*, at 613-614, n. 6). I would therefore leave the state court's judgment undisturbed, and resist unnecessary intrusion into an area dominantly of state concern.

I

The respect due the Alabama Supreme Court requires that we strip **[***847]** from this case a false issue: No impermissible "extraterritoriality" infects the judgment before us; the excessiveness **[*608]** of the award is the sole issue genuinely presented. The Court ultimately so recognizes, see *ante*, at 573-574, but further clarification is in order.

Dr. Gore's experience was not unprecedented among customers who bought BMW vehicles sold as flawless and brand-new. In addition to his own encounter, Gore showed, through paint repair orders introduced at trial, that on 983 other occasions since 1983, BMW had shipped new vehicles to dealers without disclosing paint repairs costing at least $ 300, Tr. 585-586; at least 14 of the repainted vehicles, the evidence also showed, were sold as new and undamaged to consumers in Alabama. 646 So. 2d 619, 623 (Ala. 1994). Sales nationwide, Alabama's Supreme Court said, were admissible "as to the issue of a 'pattern and practice' of such acts." *Id.*, at 627. There was "no error," the court reiterated, "in the admission of the evidence that showed how pervasive the nondisclosure policy was and the intent behind BMW NA's adoption of it." *Id.*, at 628. That determination comports with this Court's expositions. See *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 462, 125 L. Ed. 2d 366, 113 S. Ct. 2711, and n. 28 (1993) (characterizing as "well-settled" the admissibility of "evidence of [defendant's] alleged wrongdoing in other parts of the country" and of defendant's "wealth"); see also Brief for Petitioner 22 (recognizing that similar acts, out-of-state, traditionally have been considered relevant "for the limited purpose of determining that the conduct before the court was reprehensible because it was part of a pattern rather than an isolated incident").

Alabama's highest court next declared that the

> "jury could not use the number of similar acts that a defendant has committed in other jurisdictions as a multiplier when determining the *dollar amount* of a punitive damages award. Such evidence may not be considered in setting the size of the civil penalty, because neither the jury nor the trial court had evidence before it showing in which states the conduct was wrongful." **[*609]** 646 So. 2d at 627 (emphasis in original) (footnote omitted).

Because the Alabama Supreme Court provided this clear statement of the State's law, the multiplier problem encountered in Gore's case is not likely to occur again. Now, as a matter of Alabama law, it is plainly impermissible to assess punitive damages by multiplication based

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on out-of-state events not shown to be unlawful. See, *e. g., Independent Life and Accident Ins. Co.* v. *Harrington*, 658 So. 2d 892, 902-903 (Ala. 1994) (under *BMW* v. *Gore*, trial court erred in relying on defendant insurance company's out-of-state insurance policies in determining harm caused by defendant's unlawful actions).

No Alabama authority, it bears emphasis -- no statute, judicial decision, or trial judge instruction -- ever countenanced the jury's multiplication of the $ 4,000 diminution in value estimated for each refinished car by the number of such cars (approximately 1,000) shown to have been sold nationwide. The sole prompt to the jury to use nationwide sales as a multiplier came from Gore's lawyer during summation. App. 31, Tr. 812-813. Notably, counsel **[***848]** for BMW failed to object to Gore's multiplication suggestion, even though BMW's counsel interrupted to make unrelated objections four other times during Gore's closing statement. Tr. 810-811, 854-855, 858, 870-871. Nor did BMW's counsel request a charge instructing the jury not to consider out-of-state sales in calculating the punitive damages award. See Record 513-529 (listing all charges requested by counsel).

Following the verdict, BMW's counsel challenged the *admission* of the paint repair orders, but not, alternately, the jury's apparent use of the orders in a multiplication exercise. Curiously, during postverdict argument, BMW's counsel urged that if the **[**1616]** repair orders were indeed admissible, then Gore would have a "full right" to suggest a multiplier-based disgorgement. Tr. 932.

[*610] In brief, Gore's case is idiosyncratic. The jury's improper multiplication, tardily featured by petitioner, is unlikely to recur in Alabama and does not call for error correction by this Court.

Because the jury apparently (and erroneously) had used acts in other States as a multiplier to arrive at a $ 4 million sum for punitive damages, the Alabama Supreme Court itself determined "'the maximum amount that a properly functioning jury could have awarded.'" 646 So. 2d at 630 (Houston, J., concurring specially) (quoting *Big B, Inc.* v. *Cottingham*, 634 So. 2d 999, 1006 (Ala. 1993)). The *per curiam* opinion emphasized that in arriving at $ 2 million as "the *amount of punitive damages* to be awarded in this case, [the court did] not consider those acts that occurred in other jurisdictions." 646 So. 2d at 628 (emphasis in original). As this Court recognizes, the Alabama high court "properly eschewed reliance on BMW's out-of-state conduct and based its remitted award solely on conduct that occurred within Alabama." *Ante*, at 573-574 (citation omitted). In sum, the Alabama Supreme Court left standing the jury's decision that the facts warranted *an award* of punitive damages -- a determination not contested in this Court -- and the state court concluded that, considering only acts in Alabama, $ 2 million was "a constitutionally reasonable punitive damages award." 646 So. 2d at 629.

II

A

Alabama's Supreme Court reports that it "thoroughly and painstakingly" reviewed the jury's award, *ibid.*, according to principles set out in its own pathmarking decisions and in this Court's opinions in *TXO* and *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 21, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991). 646 So. 2d at 621. The Alabama court said it gave weight to several factors, including BMW's deliberate ("reprehensible") presentation of refinished cars as new and undamaged, without disclosing that the value of those cars had been reduced by an estimated **[*611]** 10%, n1 the financial position of the defendant, and the costs of litigation. *Id.*, at 625-626. These standards, we previously held, "impos[e] a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." *Haslip*, **[***849]** 499 U.S. at 22; see also *TXO*, 509 U.S. at 462, n. 28. Alabama's highest court could have displayed its labor pains more visibly, n2 but its

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judgment is nonetheless entitled to a presumption of legitimacy. See *Rowan* v. *Runnels*, 46 U.S. 134, 5 HOW 134, 139, 12 L. Ed. 85 (1847) ("This court will always feel itself bound to respect the decisions of the State courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws.").

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n1 According to trial testimony, in late May 1992, BMW began redirecting refinished cars out of Alabama and two other States. Tr. 964. The jury returned its verdict in favor of Gore on June 12, 1992. Five days later, BMW changed its national policy to one of full disclosure. *Id.*, at 1026.

n2 See, *e. g.*, Brief for Law and Economics Scholars et al. as *Amici Curiae* 6-28 (economic analysis demonstrates that Alabama Supreme Court's judgment was not unreasonable); W. Landes & R. Posner, Economic Structure of Tort Law 160-163 (1987) (economic model for assessing propriety of punitive damages in certain tort cases).

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We accept, of course, that Alabama's Supreme Court applied the State's own law correctly. Under that law, the State's objectives -- "punishment and deterrence" -- guide punitive damages awards. See *Birmingham* v. *Benson*, 631 So. 2d 902, 904 (Ala. 1994). Nor should we be quick to find a constitutional infirmity when the highest state court endeavored a corrective for one counsel's slip and the other's oversight -- counsel for plaintiff's excess in summation, unobjected to by counsel for defendant, see *supra*, at 609 -- and when the state court did so intending to follow the process approved in our *Haslip* and *TXO* decisions.

B

The Court finds Alabama's $ 2 million award not simply excessive, but grossly so, and therefore unconstitutional. **[*612]** The decision **[**1617]** leads us further into territory traditionally within the States' domain, n3 and commits the Court, now and again, to correct "misapplication of a properly stated rule of law." But cf. this Court's Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). n4 The Court is not well equipped **[*613]** for this mission. Tellingly, the Court repeats that it brings to the task no "mathematical **[***850]** formula," *ante*, at 582, no "categorical approach," *ibid.*, no "bright line," *ante*, at 585. It has only a vague concept of substantive due process, a "raised eyebrow" test, see *ante*, at 583, as its ultimate guide. n5

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n3 See *ante*, at 568 ("In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case."); *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 278, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989) (In any "lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law."); *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 255, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984) ("Punitive damages have long been a part of traditional state tort law.").

n4 Petitioner invites the Court to address the question of multiple punitive damages awards stemming from the same alleged misconduct. The Court does not take up the invitation, and rightly so, in my judgment, for this case does not present the issue. For three reasons, the question of multiple awards is hypothetical, not real, in Gore's case. First, the punitive

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damages award in favor of Gore is the only such award yet entered against BMW on account of its nondisclosure policy.

Second, BMW did not raise the issue of multiple punitives below. Indeed, in its reply brief before the Alabama Supreme Court, BMW stated: "Gore confuses our point about fairness among plaintiffs. He treats this point as a premature 'multiple punitive damages' argument. But, contrary to Gore's contention, we are not asking this Court to hold, as a matter of law, that a 'constitutional violation occurs when a defendant is subjected to punitive damages in two separate cases.'" Reply Brief for Appellant in Nos. 1920324, 1920325 (Ala. Sup. Ct.), p. 48 (internal citations omitted).

Third, if BMW had already suffered a punitive damages judgment in connection with its nondisclosure policy, Alabama's highest court presumably would have taken that fact into consideration. In reviewing punitive damages awards attacked as excessive, the Alabama Supreme Court considers whether "there have been other civil actions against the same defendant, based on the same conduct." 646 So. 2d 619, 624 (1994) (quoting *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 224 (Ala. 1989)). If so, "this should be taken into account in mitigation of the punitive damages award." 646 So. 2d at 624. The Alabama court accordingly observed that Gore's counsel had filed 24 other actions against BMW in Alabama and Georgia, but that no other punitive damages award had so far resulted. *Id.*, at 626.

n5 Justice Breyer's concurring opinion offers nothing more solid. Under *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991), he acknowledges, Alabama's standards for punitive damages, standing alone, do not violate due process. *Ante*, at 588. But they "invit[e] the kind of scrutiny the Court has given the particular verdict before us." *Ibid.* Pursuing that invitation, Justice Breyer concludes that, matching the particular facts of this case to Alabama's "legitimate punitive damages objectives," *ante*, at 596, the award was "'gross[ly] excessiv[e],'" *ante*, at 597. The exercise is engaging, but ultimately tells us only this: too big will be judged unfair. What is the Court's measure of too big? Not a cap of the kind a legislature could order, or a mathematical test this Court can divine and impose. Too big is, in the end, the amount at which five Members of the Court bridle.

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In contrast to habeas corpus review under 28 U.S.C. § 2254, the Court will work at this business alone. It will not be aided by the federal district courts and courts of appeals. It will be the *only* federal court policing the area. The Court's readiness to superintend state-court punitive damages awards is all the more puzzling in view of the Court's longstanding reluctance to countenance review, even by courts of appeals, of the size of verdicts returned by juries in federal district court proceedings. See generally 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2820 (2d ed. 1995). And the reexamination prominent in state courts n6 and in legislative arenas, see Appendix, **[*614] [**1618]** *infra* this page, serves to underscore why the Court's enterprise is undue.

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n6 See, *e. g., Distinctive Printing and Packaging Co. v. Cox*, 232 Neb. 846, 857, 443 N.W.2d 566, 574 (1989) (*per curiam*) ("Punitive, vindictive, or exemplary damages contravene Neb. Const. art. VII, § 5, and thus are not allowed in this jurisdiction."); *Santana v. Registrars of Voters of Worcester*, 398 Mass. 862, 502 N.E.2d 132 (1986) (punitive damages are not permitted, unless expressly authorized by statute); *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wash. 2d 826, 852, 726 P.2d 8, 23 (1986) (en banc) (same).

In *Life Ins. Co. of Georgia v. Johnson*, No. 1940357 (Nov. 17, 1995), the Alabama Supreme Court revised the State's regime for assessments of punitive damages. Henceforth, trials will

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Torts > Damages > Punitive Damages

The fact that a defendant is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several states impose on the conduct of its business. Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual states from imposing undue burdens on interstate commerce. While each state has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire nation.

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SYLLABUS: After respondent Gore purchased a new BMW automobile from an authorized Alabama dealer, he discovered that the car had been repainted. He brought this suit for compensatory and punitive damages against petitioner, the American distributor of BMW's, alleging, *inter alia*, that the failure to disclose the repainting constituted fraud under Alabama law. At trial, BMW acknowledged that it followed a nationwide policy of not advising its dealers, and hence their customers, of predelivery damage to new cars when the cost of repair did not exceed 3 percent of the car's suggested retail price. Gore's vehicle fell into that category. The jury returned a verdict finding BMW liable for compensatory damages of $ 4,000, and assessing $ 4 million in punitive damages. The trial judge denied BMW's post-trial motion to set aside the punitive damages award, holding, among other things, that the award was not "grossly excessive" and thus did not violate the Due Process Clause of the Fourteenth Amendment. See, *e. g.*, *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 454, 125 L. Ed. 2d 366, 113 S. Ct. 2711. The Alabama Supreme Court agreed, but reduced the award to $ 2 million on the ground that, in computing the amount, the jury had improperly multiplied Gore's compensatory damages by the number of similar sales in all States, not just those in Alabama.
Held: The $ 2 million punitive damages award is grossly excessive and therefore exceeds the constitutional limit. Pp. 568-586.

(a) Because such an award violates due process only when it can fairly be categorized as "grossly excessive" in relation to the State's legitimate interests in punishing unlawful conduct and deterring its repetition, cf. *TXO*, 509 U.S. at 456, the federal excessiveness inquiry appropriately begins with an identification of the state interests that such an award is designed to serve. Principles of state sovereignty and comity forbid a State to enact policies for the entire Nation, or to impose its own policy choice on neighboring States. See *e. g.*, *Healy* v. *Beer Institute*, 491 U.S. 324, 335-336, 105 L. Ed. 2d 275, 109 S. Ct. 2491. Accordingly, the economic penalties that a State inflicts on those who transgress its laws, whether the penalties are legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and economy, rather than those of other States or the entire Nation. Gore's award must therefore be analyzed in the light of conduct that occurred solely within Alabama, with consideration being given only to the interests of Alabama consumers. Pp. 568-574.

(b) Elementary notions of fairness enshrined in this Court's constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose. Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose, lead to the conclusion that the $ 2 million award is grossly excessive. Pp. 574-575.

(c) None of the aggravating factors associated with the first (and perhaps most important) indicium of a punitive damages award's excessiveness -- the degree of reprehensibility of the defendant's conduct, see *e. g.*, *Day* v. *Woodworth*, 54 U.S. 363, 13 HOW 363, 371, 14 L. Ed.

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181 -- is present here. The harm BMW inflicted on Gore was purely economic; the presale repainting had no effect on the car's performance, safety features, or appearance; and BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others. Gore's contention that BMW's nondisclosure was particularly reprehensible because it formed part of a nationwide pattern of tortious conduct is rejected, because a corporate executive could reasonably have interpreted the relevant state statutes as establishing safe harbors for nondisclosure of presumptively minor repairs, and because there is no evidence either that BMW acted in bad faith when it sought to establish the appropriate line between minor damage and damage requiring disclosure to purchasers, or that it persisted in its course of conduct after it had been adjudged unlawful. Finally, there is no evidence that BMW engaged in deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive. Pp. 575-580.

(d) The second (and perhaps most commonly cited) indicium of excessiveness -- the ratio between the plaintiff's compensatory damages and the amount of the punitive damages, see *e. g., TXO*, 509 U.S. at 459 -- also weighs against Gore, because his $ 2 million award is 500 times the amount of his actual harm as determined by the jury, and there is no suggestion that he or any other BMW purchaser was threatened with any additional potential harm by BMW's nondisclosure policy. Although it is not possible to draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case, see, *e. g., id.*, at 458, the ratio here is clearly outside the acceptable range. Pp. 580-583.

(e) Gore's punitive damages award is not saved by the third relevant indicium of excessiveness -- the difference between it and the civil or criminal sanctions that could be imposed for comparable misconduct, see, *e. g., Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 23, 113 L. Ed. 2d 1, 111 S. Ct. 1032 -- because $ 2 million is substantially greater than Alabama's applicable $ 2,000 fine and the penalties imposed in other States for similar malfeasance, and because none of the pertinent statutes or interpretive decisions would have put an out-of-state distributor on notice that it might be subject to a multimillion dollar sanction. Moreover, in the absence of a BMW history of noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient. Pp. 583-585.

(f) Thus, BMW's conduct was not sufficiently egregious to justify the severe punitive sanction imposed against it. Whether the appropriate remedy requires a new trial or merely an independent determination by the Alabama Supreme Court of the award necessary to vindicate Alabama consumers' economic interests is a matter for that court to address in the first instance. Pp. 585-586.

COUNSEL: Andrew L. Frey argued the cause for petitioner. With him on the briefs were Kenneth S. Geller, Evan M. Tager, Michael C. Quillen, Dennis J. Helfman, and David Cordero.

Michael H. Gottesman argued the cause for respondent. With him on the brief were Jonathan S. Massey, Andrew W. Bolt II, John W. Haley, Bruce J. McKee, Kenneth J. Chesebro, and Stephen K. Wollstein. *

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* Briefs of amici curiae urging reversal were filed for the American Automobile Manufacturers Association et al. by Kenneth W. Starr, Paul T. Cappuccio, Christopher Landau, Richard A. Cordray, and Phillip D. Brady; for the American Council of Life Insurance et al. by Patricia A. Dunn, Stephen J. Goodman, Phillip E. Stano, and Theresa L. Sorota; for the American Tort Reform Association et al. by Victor E. Schwartz, Scott L. Winkelman, Sherman Joyce, and Fred J. Hiestand; for the Business Council of Alabama by Forrest S. Latta; for the Center for Claims Resolution by John D. Aldock and Frederick C. Schafrick; for the Chamber of

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Commerce of the United States of America by Timothy B. Dyk, Stephen A. Bokat, and Robin S. Conrad; for the Farmers Insurance Exchange et al. by Irving H. Greines, Robin Meadow, Barbara W. Ravitz, and Robert A. Olson; for the Life Insurance Company of Georgia et al. by Theodore B. Olson, Larry L. Simms, Theodore J. Boutrous, Jr., John K. Bush, Theodore J. Fischkin, and Marcus Bergh; for the National Association of Manufacturers by Carter G. Phillips and Jan Amundson; for the New England Council et al. by Stephen S. Ostrach; for Owens-Corning Fiberglas Corporation by Charles Fried, Michael W. Schwartz, and Karen I. Ward; for Owens-Illinois, Inc., by Griffin B. Bell and David L. Gray; for Pharmaceutical Research and Manufacturers of America by Andrew T. Berry; for the Product Liability Advisory Council, Inc., et al. by Malcolm E. Wheeler; for the TIG Insurance Company by Ellis J. Horvitz, Barry R. Levy, Frederic D. Cohen, and Mitchell C. Tilner; and for the Washington Legal Foundation et al. by Arvin Maskin, Steven Alan Reiss, Katherine Oberlies, Daniel J. Popeol, and Paul D. Kamenar.

Briefs of amici curiae urging affirmance were filed for the Alabama Trial Lawyers Association by Russell J. Drake; for the Association of Trial Lawyers of America by Jeffrey Robert White, Cheryl Flax-Davidson, and Larry S. Stewart; and for the National Association of Securities and Commercial Law Attorneys by Kevin P. Roddy, James P. Solimano, Steve W. Berman, and Jonathan W. Cuneo.

Briefs of amici curiae were filed for CBS, Inc., et al. by P. Cameron DeVore, Marshall J. Nelson, Douglas P. Jacobs, Jonathan E. Thackeray, John C. Fontaine, Cristina L. Mendoza, William A. Niese, Karlene Goller, Susan Weiner, Richard M. Schmidt, Jr., R. Bruce Rich, Slade R. Metcalf, Jane E. Kirtley, Bruce W. Sanford, and Henry S. Hoberman; for Trial Lawyers for Public Justice, P. C., by Leslie A. Brueckner and Arthur H. Bryant; for Richard L. Blatt et al. by Mr. Blatt, pro se, and Robert W. Hammesfahr, pro se; for James D. A. Boyle et al. by Arthur F. McEvoy III, pro se; and for Kenneth G. Dau-Schmidt et al. by Mark M. Hager, pro se.

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JUDGES: STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, in which O'CONNOR and SOUTER, JJ., joined, post, p. 586. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, post, p. 598. GINSBURG, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, post, p. 607.

OPINIONBY: STEVENS

OPINION: [*818]**

[*562] [1592]** JUSTICE STEVENS delivered the opinion of the Court.

[*HR1A]** [1A]
[*HR2]** [2]
The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a "'grossly excessive'" punishment on a tortfeasor. *TXO Production Corp.* v. *Alliance* **[***819]** *Resources Corp.*, 509 U.S. 443, 454, 125 L. Ed. 2d 366, 113 S. Ct. 2711 (1993) (and cases cited). The wrongdoing involved in this case was the decision by a national distributor of automobiles not to advise its dealers, and hence their customers, of predelivery **[**1593]** damage to new cars when the cost of repair amounted to less than 3 percent of the car's suggested retail price. The question presented **[*563]** is whether a $ 2 million punitive damages award to the purchaser of one of these cars exceeds the constitutional limit.

I

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In January 1990, Dr. Ira Gore, Jr. (respondent), purchased a black BMW sports sedan for $ 40,750.88 from an authorized BMW dealer in Birmingham, Alabama. After driving the car for approximately nine months, and without noticing any flaws in its appearance, Dr. Gore took the car to "Slick Finish," an independent detailer, to make it look "'snazzier than it normally would appear.'" 646 So. 2d 619, 621 (Ala. 1994). Mr. Slick, the proprietor, detected evidence that the car had been repainted. n1 Convinced that he had been cheated, Dr. Gore brought suit against petitioner BMW of North America (BMW), the American distributor of BMW automobiles. n2 Dr. Gore alleged, *inter alia*, that the failure to disclose that the car had been repainted constituted suppression of a material fact. n3 The complaint prayed for $ 500,000 in compensatory and punitive damages, and costs.

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n1 The top, hood, trunk, and quarter panels of Dr. Gore's car were repainted at BMW's vehicle preparation center in Brunswick, Georgia. The parties presumed that the damage was caused by exposure to acid rain during transit between the manufacturing plant in Germany and the preparation center.

n2 Dr. Gore also named the German manufacturer and the Birmingham dealership as defendants.

n3 Alabama codified its common-law cause of action for fraud in a 1907 statute that is still in effect. *Hackmeyer* v. *Hackmeyer*, 268 Ala. 329, 333, 106 So. 2d 245, 249 (1958). The statute provides: "Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." Ala. Code § 6-5-102 (1993); see Ala. Code § 4299 (1907).

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At trial, BMW acknowledged that it had adopted a nationwide policy in 1983 concerning cars that were damaged in the course of manufacture or transportation. If the cost of repairing the damage exceeded 3 percent of the car's suggested [*564] retail price, the car was placed in company service for a period of time and then sold as used. If the repair cost did not exceed 3 percent of the suggested retail price, however, the car was sold as new without advising the dealer that any repairs had been made. Because the $ 601.37 cost of repainting Dr. Gore's car was only about 1.5 percent of its suggested retail price, BMW did not disclose the damage or repair to the Birmingham dealer.

Dr. Gore asserted that his repainted car was worth less than a car that had not been refinished. To prove his actual damages of $ 4,000, he relied on the testimony of a former BMW dealer, who estimated that the value of a repainted BMW was approximately 10 percent less than the value of a new car that had [***820] not been damaged and repaired. n4 To support his claim for punitive damages, Dr. Gore introduced evidence that since 1983 BMW had sold 983 refinished cars as new, including 14 in Alabama, without disclosing that the cars had been repainted before sale at a cost of more than $ 300 per vehicle. n5 Using the actual damage estimate of $ 4,000 per vehicle, Dr. Gore argued that a punitive award of $ 4 million would provide an appropriate penalty for selling approximately 1,000 cars for more than they were worth.

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n4 The dealer who testified to the reduction in value is the former owner of the Birmingham dealership sued in this action. He sold the dealership approximately one year before the trial.

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n5 Dr. Gore did not explain the significance of the $ 300 cutoff.

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In defense of its disclosure policy, BMW argued that it was under no obligation to disclose repairs of minor damage to new cars and that Dr. Gore's car was as good as a car with the original factory finish. It disputed Dr. Gore's assertion that the value of the car was impaired by the repainting and argued that this good-faith belief made a punitive award inappropriate. BMW also maintained that transactions in jurisdictions other than Alabama had no relevance to Dr. Gore's claim.

[*565] The jury returned a verdict finding BMW liable for compensatory damages of **[**1594]** $ 4,000. In addition, the jury assessed $ 4 million in punitive damages, based on a determination that the nondisclosure policy constituted "gross, oppressive or malicious" fraud. n6 See Ala. Code §§ 6-11-20, 6-11-21 (1993).

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n6 The jury also found the Birmingham dealership liable for Dr. Gore's compensatory damages and the German manufacturer liable for both the compensatory and punitive damages. The dealership did not appeal the judgment against it. The Alabama Supreme Court held that the trial court did not have jurisdiction over the German manufacturer and therefore reversed the judgment against that defendant.

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BMW filed a post-trial motion to set aside the punitive damages award. The company introduced evidence to establish that its nondisclosure policy was consistent with the laws of roughly 25 States defining the disclosure obligations of automobile manufacturers, distributors, and dealers. The most stringent of these statutes required disclosure of repairs costing more than 3 percent of the suggested retail price; none mandated disclosure of less costly repairs. n7 Relying on these statutes, BMW contended that its conduct was lawful in these States and therefore could not provide the basis for an award of punitive damages.

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n7 BMW acknowledged that a Georgia statute enacted *after* Dr. Gore purchased his car would require disclosure of similar repairs to a car before it was sold in Georgia. Ga. Code Ann. §§ 40-1-5(b)-(e) (1994).

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BMW also drew the court's attention to the fact that its nondisclosure policy had never been adjudged unlawful before this action was filed. Just months before Dr. Gore's case went to trial, the jury in a similar lawsuit filed by another Alabama BMW purchaser found that BMW's failure to disclose paint repair constituted fraud. *Yates* v. *BMW of North America, Inc.*, 642 So. 2d 937 (Ala. 1993). n8 Before the **[*566]** judgment in this case, BMW changed its policy by taking steps to avoid the sale of any **[***821]** refinished vehicles in Alabama and two other States. When the $ 4 million verdict was returned in this case, BMW promptly instituted a nationwide policy of full disclosure of all repairs, no matter how minor.

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n8 While awarding a comparable amount of compensatory damages, the *Yates* jury awarded no punitive damages at all. In *Yates*, the plaintiff also relied on the 1983 nondisclosure

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policy, but instead of offering evidence of 983 repairs costing more than $ 300 each, he introduced a bulk exhibit containing 5,856 repair bills to show that petitioner had sold over 5,800 new BMW vehicles without disclosing that they had been repaired.

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In response to BMW's arguments, Dr. Gore asserted that the policy change demonstrated the efficacy of the punitive damages award. He noted that while no jury had held the policy unlawful, BMW had received a number of customer complaints relating to undisclosed repairs and had settled some lawsuits. n9 Finally, he maintained that the disclosure statutes of other States were irrelevant because BMW had failed to offer any evidence that the disclosure statutes supplanted, rather than supplemented, existing causes of action for common-law fraud.

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n9 Prior to the lawsuits filed by Dr. Yates and Dr. Gore, BMW and various BMW dealers had been sued 14 times concerning presale paint or damage repair. According to the testimony of BMW's in-house counsel at the postjudgment hearing on damages, only one of the suits concerned a car repainted by BMW.

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The trial judge denied BMW's post-trial motion, holding, *inter alia*, that the award was not excessive. On appeal, the Alabama Supreme Court also rejected BMW's claim that the award exceeded the constitutionally permissible amount. 646 So. 2d 619 (1994). The court's excessiveness inquiry applied the factors articulated in *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218, 223-224 (Ala. 1989), and approved in *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 21-22, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991). 646 So. 2d at 624-625. Based on its analysis, the court concluded that BMW's conduct was "reprehensible"; the nondisclosure was profitable for the company; the judgment "would not have a substantial impact upon [BMW's] financial position"; the litigation had been expensive; no criminal sanctions had been imposed on BMW for the same conduct; the award of *no* punitive **[*567]** damages in *Yates* reflected "the inherent uncertainty of the trial process"; and the punitive award bore a "reasonable relationship" to "the harm that **[**1595]** was likely to occur from [BMW's] conduct as well as . . . the harm that actually occurred." 646 So. 2d at 625-627.

The Alabama Supreme Court did, however, rule in BMW's favor on one critical point: The court found that the jury improperly computed the amount of punitive damages by multiplying Dr. Gore's compensatory damages by the number of similar sales in other jurisdictions. *Id.*, at 627. Having found the verdict tainted, the court held that "a constitutionally reasonable punitive damages award in this case is $ 2,000,000," *id.*, at 629, and therefore ordered a remittitur in that amount. n10 The court's discussion of the amount of its remitted award expressly disclaimed any reliance on "acts that occurred in other jurisdictions"; instead, the court explained that it had used a "comparative analysis" that considered Alabama cases, "along with cases from other jurisdictions, involving the sale of an automobile where the seller misrepresented the condition of the vehicle **[***822]** and the jury awarded punitive damages to the purchaser." n11 *Id.*, at 628.

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n10 The Alabama Supreme Court did not indicate whether the $ 2 million figure represented the court's independent assessment of the appropriate level of punitive damages, or its determination of the maximum amount that the jury could have awarded consistent with the Due Process Clause.

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Citation: **601 a.2d 633**

*325 Md. 420, *; 601 A.2d 633, **;*
*1992 Md. LEXIS 21, ***; CCH Prod. Liab. Rep. P13,060*

OWENS-ILLINOIS, INC. et al. v. William ZENOBIA, Sr. et al.

No. 66, September Term, 1991

Court of Appeals of Maryland

325 Md. 420; 601 A.2d 633; 1992 Md. LEXIS 21; CCH Prod. Liab. Rep. P13,060

February 14, 1992, Filed

SUBSEQUENT HISTORY: [*1]**

Reconsideration Denied March 11, 1992. *

* The addendum to this opinion denying Motion for Reconsideration can be found at 325 Md. 665 and 602 A.2d 1182.

PRIOR HISTORY: Certiorari to Court of Special Appeals (Circuit Court for Baltimore City). Mabel H. Hubbard, JUDGE

DISPOSITION: JUDGMENT OF THE COURT OF SPECIAL APPEALS VACATED, AND CASES REMANDED TO THE COURT OF SPECIAL APPEALS WITH DIRECTIONS TO VACATE THE JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AND REMAND THE CASES TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. PLAINTIFFS TO PAY ONE-THIRD OF THE COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS AND DEFENDANTS OWENS-ILLINOIS, INC., MCIC, INC., ANCHOR PACKING CO. AND PORTER HAYDEN COMPANY, TO PAY TWO-THIRDS OF THE COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS.

CASE SUMMARY

PROCEDURAL POSTURE: Defendants, a manufacturer and two suppliers/installers of asbestos containing products, sought review of a judgment of the Court of Special Appeals (Maryland) that affirmed the circuit court's judgment awarding compensatory damages against all defendants, and also affirmed the award of punitive damages against defendant manufacturer, in plaintiffs' strict liability action seeking damages for injuries resulting from exposure to asbestos.

OVERVIEW: Defendants, a manufacturer and two suppliers/installers of asbestos containing products, challenged judgments entered in the circuit court awarding compensatory and punitive damages to plaintiffs in plaintiffs' strict liability action alleging that they were injured by exposure to asbestos. The court vacated the judgment of the Court of Special Appeals, which affirmed the compensatory damage awards as to all defendants and the punitive damage award against defendant manufacturer, and remanded for further proceedings. The court ruled, among other things, that the jury was not properly instructed with respect to the standard for awarding punitive damages against defendant manufacturer. Overruling prior case law, the court held that punitive damages could be awarded only on a showing by clear and convincing evidence that defendant was guilty of "actual malice," and that in a strict liability action, proof was

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because they pertain to what other companies knew about asbestos, are not proper "state of the art" evidence. In order to resolve these arguments, it is necessary to discuss briefly why any element of knowledge is relevant in this strict liability case.

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n4 The defendants Anchor Packing Co., MCIC, Inc., Porter Hayden Company and Owens-Illinois object to the admission of the deposition testimony of Dr. Mancuso. The defendant Owens-Illinois also objects to the admission of the deposition testimony of Mr. John Humphrey, Mr. Louis Pechstein and Dr. Kenneth Smith.

Dr. Mancuso is a medical doctor who served as an industrial hygiene consultant to the Philip Carey Co. (predecessor to Celotex Corp.) in 1962 and 1963. Mr. John Humphrey was President of the Philip Carey Co. from 1948 to 1967. Mr. Louis Pechstein was in charge of corporate records, claims and studies for the Philip Carey Co. from 1955 to 1979. Dr. Kenneth Smith was the medical director for Johns-Manville Corp. from 1944 to 1966.

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A.

Section 402A of the Restatement (Second) of Torts, adopted by this Court in **[**639]** *Phipps v. General Motors Corp.*, 278 Md. 337, 344, 363 A.2d 955, 958 (1976), requires that, in order to recover under a theory of strict liability, a plaintiff must show:

> "(1) [that] the product was in a defective condition at the time it left the possession or control of the seller,
> (2) that it was unreasonably dangerous to the user or consumer,
> (3) that the defect was a cause of the injuries, and
> (4) that the product was expected to and did reach the consumer without substantial change in its condition."

Thus, on its face, § 402A subjects a seller of a defective product to strict liability without regard to the knowledge of the defect and "even though [the seller] has exercised all possible care in the preparation and sale of the product." Restatement (Second) of Torts § 402A, Comment a (1965).

[*433] When a product is alleged to be defective because of a failure to give an adequate warning, however, many courts have relied on Comment j of § 402A. Comment j explains that "the seller is required to give warning against [the danger], if he has knowledge, or by the **[***12]** application of reasonable, developed human skill and foresight should have knowledge, of the . . . danger." The comment goes on to distinguish a product containing an adequate warning from a defective product, stating: "a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." n5

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n5 Those jurisdiction which hold that evidence of knowledge of dangerous quality is relevant in a failure to warn case, do not regard lack of knowledge as a factor in a strict liability design defect case. *See* C. Marvel, Annotation, *Strict Products Liability: Liability for Failure to Warn as Dependent on Defendant's Knowledge of Danger*, 33 A.L.R. 4th 368, 378 n. 14 (1984).

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Several courts have acknowledged that the language in Comment j appears to contradict or create an exception to the basic rule set out in § 402A. *See, e.g.,* Woodill v. Parke Davis & Co., 79 Ill.2d 26, 37, 37 Ill.Dec. 304, 310, 402 N.E.2d 194, 200 (1980); **[***13]** *Little v. PPG Industries, Inc.*, 19 Wash. App. 812, 821-822, 579 P.2d 940, 946-947 (1978), *modified on other grounds*, 92 Wash.2d 118, 594 P.2d 911 (1979). Nevertheless, the majority of courts which have considered a failure to warn case in the context of strict liability have either expressly or implicitly held that "a manufacturer of a product, which is defective only because of the lack of an adequate warning, is not liable when the failure to warn resulted from an absence of knowledge of the dangerous quality of that product.

Moreover, the courts reason, the presence of the required knowledge can be established by evidence that the dangerous quality of the product should have been known by a manufacturer because it was known in the scientific or expert community. As Judge John Minor Wisdom stated for the court in another case involving a claimed injury from asbestos, *Borel v. Fibreboard Paper Products Corporation*, **[*434]** 493 F.2d 1076, 1089 (5th Cir.1973), *cert. denied*,

> 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1974),
> "in cases such as the instant **[***14]** case, the manufacturer is held to the knowledge and skill of an expert. This is relevant in determining (1) whether the manufacturer knew or should have known the danger . . . . The manufacturer's status as expert means that at a minimum he must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby."

The same point was made by the United States Court of Appeals for the Fourth Circuit in

> *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1164 (4th Cir.1986):
> "Industry standards and state of the art are not synonymous. State of the art includes all of the available knowledge on a subject at a given time, and this includes scientific, medical, engineering, and any other knowledge that may be available. State of the art includes the element of time: What is known and when was this knowledge available."

See, e.g., Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 344 (5th Cir.1982); *Gordon v. Niagara Mach. & Tool Works*, 574 F.2d 1182, 1190 (5th Cir.1978); **[**640]** *Shell Oil Co. v. Gutierrez*, 119 Ariz. 426, 434, 581 P.2d 271, 279 (1978); **[***15]** *Oakes v. Geigy Agricultural Chemicals*, 272 Cal.App. 2d 645, 651, 77 Cal.Rptr. 709, 713 (3d Dist.1969); *Woodill v. Parke Davis & Co., supra*, 79 Ill.2d at 37, 37 Ill.Dec. at 308, 402 N.E.2d at 198; *Smith v. E.R. Squibb & Sons, Inc.*, 405 Mich. 79, 90, 273 N.W.2d 476, 480 (1979); *McKee v. Moore*, 648 P.2d 21 (Okla.1982); *Cochran v. Brooke*, 243 Or. 89, 94-96, 409 P.2d 904, 906-907 (1966). *See also* C. Marvel, Annotation, *Strict Products Liability: Liability for Failure to Warn as Dependent on Defendant's Knowledge of Danger*, 33 A.L.R.4th 368 (1984), and cases cited therein. n6 **[*435]** As previously indicated, this evidence concerning the presence or absence of knowledge in the expert community is called "state of the art" evidence.

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n6 For two competing views on the desirability of allowing a knowledge component in a strict liability case, *see* W. Murray, Jr., *Requiring Omniscience: The Duty to Warn of Scientifically*

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Undiscoverable Product Defects, 71 Geo.L.J. 1635, 1638 n. 21 (1983); J. Martineau, *The Duty to Warn Under Strict Products Liability as Limited by the Knowledge Requirement: A Regretful Retention of Negligence Concepts*, 26 St. Louis U.L.J. 125 (1981).

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Consequently, in a failure to warn case governed by the Restatement § 402A and Comment j, negligence concepts to some extent have been grafted onto strict liability. In such cases, a majority of courts hold that an element of knowledge or "state of the art" evidence is directly pertinent to a cause of action under § 402A of the Restatement (Second) of Torts, and liability is no longer entirely "strict." n7

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n7 Professors Henderson and Twerski argue that the difference between strict liability and negligence in a failure to warn case is entirely semantic and unnecessarily confusing. They suggest that since courts apply negligence concepts in all failure to warn cases, all such cases sound in negligence. J. Henderson and A. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U.L.Rev. 265 (1990).

We note that despite the overlap of negligence principles in a strict liability failure to warn case, strict liability differs from a negligence cause of action in that contributory negligence is not a defense to a strict liability claim. *Ellsworth v. Sherne Lingerie, Inc.*, 303 Md. 581, 597-598, 495 A.2d 348, 356-357 (1985). In addition, in light of the other comments to § 402A of the Restatement (Second) of Torts, which apply in defective design, defective construction, and failure to warn cases, there are some differences between a negligent failure to warn case and a failure to warn based upon § 402A and Comment j.

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On the other hand, a few courts have held that neither the defendant's actual knowledge nor evidence of scientific knowledge about the dangerous characteristics of the product is relevant in a strict liability failure to warn case. *Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434, 436-439 (Mo.1984); *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 202-208, 447 A.2d 539, 545-549 (1982); *Kisor v. Johns-Manville Corp.*, 783 F.2d 1337, 1340-1342 (9th Cir. 1986) (applying Washington law).

Before the trial in the present cases the plaintiffs asserted that evidence of knowledge should not be relevant with **[*436]** regard to their strict liability claims. The defendants, however, argued that the plaintiffs were required to produce "state of the art" evidence as part of their case. The trial judge, apparently relying on a prior ruling in another case by Judge Levin for the Circuit Court for Baltimore City, agreed with the defendants and required that the plaintiffs introduce "state of the art" evidence. Consequently, at trial the plaintiffs introduced evidence designed to show the requisite knowledge or "state **[***18]** of the art." Moreover, neither side in the Court of Special Appeals or before this Court challenged the trial court's ruling that a knowledge component or "state of the art" is pertinent in a strict liability failure to warn case.

The United States Court of Appeals for the Fourth Circuit, applying Maryland law, has held that in a strict liability failure to warn case, "state of the art" is relevant with regard to the defendant's liability. *See Lohrmann v. Pittsburgh Corning Corp., supra*, 782 F.2d at 1164 ("in Maryland, state of the art can be considered in a strict liability tort case where the claimed defect is a failure to warn"). The federal Court of Appeals reasoned that in *Phipps v. General Motors Corp., supra*, **[**641]** this Court "adopted strict liability in tort as expressed in § 402A of the Restatement (Second) of Torts," that Comment j is part of § 402A, and that

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> "[t]he language of Comment (j) is state-of-the-art language because it requires the seller to give a warning if he has knowledge, 'or by the application of reasonable, developed human skill and foresight should have knowledge' of the danger."

Lohrmann v. Pittsburgh Corning Corp., supra, 782 F.2d at 1164-1165. **[***19]**

While this Court has not previously dealt with this issue, we agree that our adoption of § 402A in the *Phipps* case included Comment j and the knowledge component provided for in Comment j. The *Phipps* opinion expressly indicated that our adoption of § 402A included the official comments

> (278 Md. at 346, 363 A.2d at 959-960):
> **[*437]** "Under § 402A, various defenses are still available to the seller in an action based on strict liability in tort. These defenses are set forth and explained in the official comments following § 402A."

Moreover, in *Phipps* we discussed with approval several of the official comments, including Comment j. *Ibid.* In addition, as pointed out by the court in *Lohrmann*, 782 F.2d at 1164, the *Phipps* opinion went on to state that "[d]espite the use of the term 'strict liability' the seller is not an insurer, as absolute liability is not imposed on the seller for any injury resulting from the use of his product." 278 Md. at 351-352, 363 A.2d at 963. *See also Miles Laboratories v. Doe*, 315 Md. 704, 724, 556 A.2d 1107, 1117 (1989) **[***20]** ("[o]ur adoption of § 402A in *Phipps* . . . implicitly adopted the substance of Comment k"); *Ellsworth v. Sherne Lingerie, Inc.*, 303 Md. 581, 591-592, 495 A.2d 348, 353 (1985) (to the same effect with respect to Comment g of § 402A).

We hold that Comment j of § 402A is applicable to a strict liability cause of action where the alleged defect is a failure to give adequate warnings. Therefore, the seller is not strictly liable for failure to warn unless the seller has "knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the . . . danger." Restatement (Second) of Torts § 402A, Comment j. Moreover, we agree with the numerous cases holding that, for purposes of the "should have knowledge" component of comment j, a manufacturer of a product is held to the knowledge of an expert in the field. *See Babylon v. Scruton*, 215 Md. 299, 304, 138 A.2d 375, 378 (1958), quoting 2 Harper & James, *The Law of Torts* § 28.4 (negligence case pointing out that "'a person who undertakes such manufacturing will be held to the skill of an expert in that business **[***21]** and to an expert's knowledge of the arts, materials, and processes. Thus he must keep reasonably abreast of scientific knowledge and discoveries **[*438]** touching his product . . .'"). n8

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n8 It is not entirely clear whether the knowledge or state of the art component in a strict liability failure to warn case is an element to be proven by the plaintiff or is an affirmative defense. *Cf. Ellsworth v. Sherne Lingerie, Inc., supra*, 303 Md. at 592-596, 495 A.2d at 353-356 (discussing whether "misuse" of a product is a part of the plaintiff's case or an affirmative defense).

Prosser and Keeton take the position that a plaintiff who seeks to recover in a strict liability failure to warn case must show that the defendant knew or should have known of the hazard about which he failed to warn. Prosser and Keeton, *Torts* § 99, at 697 (5th ed. 1984). *See*

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also M. Madden, *Products Liability* § 10.3, at 377-378 (2d ed. 1988). On the other hand, an American Law Reports Annotation collecting cases concerning strict liability for failure to warn seems to assert that the absence of knowledge of the danger is an affirmative defense which must be proven by the defendant. C. Marvel, Annotation, *Strict Products Liability: Liability For Failure to Warn as Dependent on Defendant's Knowledge of Danger, supra*, 33 A.L.R. 4th 368, and cases cited therein. Many cases also refer to the knowledge component in a strict liability failure to warn case as a "defense."

It is not necessary for us to decide in this case whether the knowledge component is an element of the plaintiff's case or an affirmative defense because neither the plaintiffs nor the defendants have raised any issue in this regard. Nevertheless, we agree with those authorities, and with the Circuit Court for Baltimore City, that the knowledge or state of the art component is an element to be proven by the plaintiff. In a strict liability failure to warn case, the alleged defect is the failure of the seller to give an adequate warning. The seller, however, need not give any warning if the requisite state of the art or knowledge does not require it. Thus, where a product lacks a warning because of insufficient knowledge on the part of the manufacturer or in the scientific field involved, the product is not defective. As defectiveness is an element to be proven by the plaintiff, the knowledge or state of the art component is not an affirmative defense. *See Ellsworth v. Sherne Lingerie, Inc., supra*, 303 Md. at 597, 495 A.2d at 356.

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B.

As previously stated, the defendants argue that the deposition evidence was inadmissible because (1) they were not present at the depositions and did not have the opportunity to cross examine the deponents, and (2) this deposition evidence, pertaining to what other asbestos manufacturers knew about the dangers of asbestos, is not proper "state of the art" evidence. We shall first address the requirements of Maryland Rule 2-419 and the former testimony exception **[*439]** to the hearsay rule, and then discuss the admissibility of the depositions on relevance grounds.

1.

The defendants argue that the deposition testimony should not have been admitted because they were not present at the depositions and did not have an opportunity to cross examine the witnesses. The defendant suppliers/installers Anchor Packing Co., Porter Hayden and MCIC, Inc., were not present at the deposition of Dr. Mancuso, nor were any other non-manufacturing suppliers/installers of asbestos. Several manufacturers, however, were present at this deposition, including Owens-Illinois. Similarly, although Owens-Illinois was not present, several defendant manufacturers attended the depositions of Dr. Smith, Mr. **[***23]** Pechstein and Mr. Humphrey.

Depositions meeting the requirements of Maryland Rule 2-419 may be admissible under the former testimony exception to the rule against hearsay. n9 In *Huffington v. State*, 304 Md. 559, 569-574, 500 A.2d 272, 277-279 (majority opinion), 304 Md. at 597, 500 A.2d at 291 (dissenting opinion) (1985), *cert. denied*, 478 U.S. 1023, 106 S.Ct. 3315, 92 L.Ed.2d 745 (1986), we endorsed the substance of Federal Rule of Evidence 804(b)(1) as the test for the admissibility **[*440]** of former testimony. n10 *See also Grandison v. State*, 305 Md. 685, 734-735, 506 A.2d 580, 609-610, *cert. denied*, 479 U.S. 873, 107 S.Ct. 38, 93 L.Ed.2d 174 (1986).

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n9 Maryland Rule 2-419(a)(3)(C) provides that deposition testimony may be used when the

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deponent is unavailable. Rule 2-419(c) further provides:

> **"Deposition Taken in Another Action.** -- A deposition lawfully taken in another action may be used like any other deposition if the other action was brought in any court of this State, of any other state, or of the United States, involved the same subject matter, and was brought between the same parties or their representatives or predecessors in interest."

Although Rule 2-419(c) applies only when the deponent is unavailable, the Court of Special Appeals held that because the defendants did not object to the depositions on this ground, they had waived the objection. No party has challenged before us this ruling by the Court of Special Appeals. **[***24]**

n10 Federal Rule of Evidence 804(b)(1) provides:

> **"Former Testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

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The United States Court of Appeals for the Sixth Circuit in *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289, 1295 (6th Cir.1983), *cert. denied*, 467 U.S. 1253, 104 S.Ct. 3537, 82 L.Ed.2d 842 (1984), quoting Weinstein & Berger, *Evidence* § 804(b)(1)[04], at 804-67 (1969), noted that "'cases decided since the enactment of 804(b)(1) for the most part indicate a reluctance to interpret "predecessor in interest" in its old, narrow, and substantive law sense, of privity.'" Accordingly, the court explained the former testimony hearsay exception contained in 804(b)(1) **[***25]** as follows (*Ibid.*, quoting *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179, 1187 (3d Cir.), **[**643]** *cert. denied*,

> 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978)):
> "'if it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party.' Under these circumstances, the previous party having like motive to develop the testimony about the same material facts is, in the final analysis, a predecessor in interest to the present party."

Thus, a "predecessor in interest" for the purposes of this rule is interpreted to include any party with a similar motive to develop the testimony. Privity between the two parties is no longer required. Deposition testimony is admissible if some other party, present at the deposition, had **[*441]** the same opportunity and similar motive to develop the testimony as the party against whom the deposition is offered. *Clay v. Johns-Manville Sales Corp., supra*, 722 F.2d at 1294-1295; *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1505 (11th Cir.1985); **[***26]** *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 462-463 (5th Cir.1985). As we have expressly adopted the substance of Federal Rule of Evidence 804(b)(1), we agree that "[m]otive to develop the testimony, [rather than privity between the parties], is the key factor" in assessing whether the parties present at the deposition are predecessors in interest for purposes of Maryland Rule 2-419(c). J. Murphy, *Maryland Evidence Handbook* § 802(D), at 259 (1989).

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In deciding whether the deposition testimony was properly admitted in these cases, we shall first address the principal argument of the defendant suppliers/installers as to why the deposition of Dr. Mancuso was improperly admitted against them. They argue that their interests were not adequately protected by the presence of the manufacturers at the Dr. Mancuso deposition because manufacturers of asbestos would not have the same motive to develop certain testimony as a supplier/installer would. Therefore, the argument continues, the manufacturers were not the predecessors in interest of suppliers/installers. In fact, the suppliers/installers argue, their interests conflict with the interests of the manufacturers **[***27]** in this litigation.

The depositions were admitted for the limited purpose of proving "state of the art." As earlier explained, state of the art evidence is directly relevant to whether a product was defective when it was sold by a manufacturer. In a strict liability action, if a product is defective when it was sold by a manufacturer because it lacked a warning of its dangerous characteristics, although it should have had such a warning in light of the state of the art, and if the defective and dangerous product reaches the user plaintiff without substantial change, middlemen or intermediate sellers of the defective product are strictly liable to the plaintiff user just as the manufacturer is liable to the plaintiff. **[*442]** Restatement (Second) of Torts § 402A, Comment f; *Eaton Corp. v. Wright*, 281 Md. 80, 88-90, 375 A.2d 1122, 1126-1127 (1977). This principle, at least at the present stage of the law's development, is fully applicable in a strict liability failure to warn case. Prosser and Keeton explain as follows (Prosser and Keeton, *Torts* § 99, at 697 (5th ed. 1984), emphasis added):

> "It is commonly said that a product can be defective **[***28]** in the kind of way that makes it unreasonably dangerous by failing to warn or failing adequately to warn about a risk or hazard related to the way a product is designed. But notwithstanding what a few courts have said, a claimant who seeks recovery on this basis must, according to the generally accepted view, prove that the manufacturer-designer was negligent. There will be no liability without a showing that the defendant designer knew or should have known in the exercise of ordinary care of the risk or hazard about which he failed to warn. . . .
>
> "There is one aspect of this so-called strict liability in addition to the matter of defenses and limitations on liability that distinguish it from negligence liability. *When a manufacturer or assembler* **[**644]** *markets without adequate warnings, a reseller is subject to liability without negligence in reselling the product without adequate warning. Thus, all those in the marketing chain subsequent to a sale by the manufacturer are liable without negligence for the negligence of the manufacturer in failing to warn or adequately to warn.*"

See also Nissen Corp. v. Miller, 323 Md. 613, 624, 594 A.2d 564, 569 (1991) **[***29]** ("It is clear that Maryland espoused the doctrine of strict liability in tort in order to relieve plaintiffs of the burden of proving specific acts of negligence . . . where plaintiffs can prove a product is defective and unreasonably dangerous *when placed in the stream of commerce*") (emphasis added). Consequently, with respect to the strict liability claim of a plaintiff, intermediate sellers such as the suppliers/installers in the present case have the same interest as the manufacturers in attempting to show **[*443]** that the state of the art did not require a warning and that, therefore, the product was not defective under the principles of § 402A, Comment j, of the Restatement (Second) of Torts. n11

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n11 The supplier/installers in the present case disagree that, with respect to the strict liability claims of the plaintiffs, the suppliers/installers and the manufacturers have the same interests concerning a deposition on state of the art. The supplier/installers argue that, whereas a manufacturer may be strictly liable to the plaintiffs if the product failed to contain warnings which were dictated by the state of the art, an intermediate supplier of the same product is not strictly liable to the plaintiffs unless he knew or, based on information actually given to him, should have known that a warning was required. While there might be merit in this argument if the plaintiffs' cause of action were based on negligence, as pointed out above the argument is inconsistent with the principles of strict liability under § 402A of the Restatement even as modified by Comment j. Furthermore, the defendants cite no cases, and we are aware of none, supporting the defendants' view of an intermediate seller's liability to a plaintiff in a strict liability cause of action.

We would agree that there is a circumstance when the interests of a supplier/installer and a manufacturer would not be the same in examining a deponent such as Dr. Mancuso. To the extent that the deposition might relate to an indemnity claim by the supplier/installer against the manufacturer, it would be to the supplier/installer's benefit to elicit testimony that, whereas expert medical and scientific information existed so as to warrant a warning by manufacturers, such information was not generally known outside the scientific community and would not have been readily available to non-manufacturing suppliers/installers. In the instant cases, however, the defendant suppliers/installers complain solely about the admission of the Dr. Mancuso deposition at the trial of the plaintiffs' claims. They have made no complaint about the evidence at the separate cross-claims trial.

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The defendant Owens-Illinois has even less cause to complain about the admission of depositions under Maryland Rule 2-419(c). A defendant manufacturer was present at each of the depositions admitted against Owens-Illinois. Owens-Illinois clearly is held to the same "state of the art" standard as those defendants present at the depositions. The defendants at the depositions are predecessors in interest to Owens-Illinois because they had the same opportunity to develop the testimony. Therefore, these depositions fall within the former testimony exception to the rule **[*444]** against hearsay and are admissible against Owens-Illinois under Rule 2-419(c).

2.

We now turn to the defendants' argument that these depositions should not have been admitted because they do not address what was known to the expert, medical or scientific community but, rather, address what other asbestos manufacturing companies knew. As previously stated, all manufacturers are held to the knowledge and skill of an expert. *Borel v. Fibreboard Paper Products Corporation, supra*, 493 F.2d at 1089. The defendants' argument that this expert testimony is irrelevant because it relates only to **[***31]** what individual companies discovered, "reflects a misunderstanding of a critical issue in any product liability action: the state of the art pertaining to any possible risks associated with the product." *Dartez v. Fibreboard Corp., supra*, 765 F.2d at 461.

The United States Court of Appeals for the Fifth Circuit considered this argument **[**645]** in an identical context in *Dartez v. Fibreboard Corp., supra.* That court determined that similar deposition evidence was relevant to the state of the art element of a products liability case, explaining (*Ibid.*) (emphasis added):

> "Dartez was required to establish that the dangers of asbestos were reasonably foreseeable or scientifically discoverable at the time of his exposure before these defendants could be found liable . . . . *Borel* holds all manufacturers to the

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> knowledge and skill of an expert. They are obliged to keep abreast of any scientific discoveries and are presumed to know the results of all such advances. Moreover, they each bear the duty to fully test their products to uncover all scientifically discoverable dangers before the products are sold . . . . The actual knowledge of an **[***32]** individual manufacturer is not the issue."

Accord Clay v. Johns-Manville Sales Corp., supra, 722 F.2d at 1294-1295.

[*445] We agree with the United States Courts of Appeal for the Fifth and Sixth Circuits that deposition evidence concerning what scientific and medical experts in the field knew about the dangers of asbestos is relevant to the plaintiff's attempt to prove state of the art. Such expert evidence is not irrelevant merely because these experts were employed by private companies. Because manufacturers are held to the standards and knowledge of an expert, this evidence is relevant to show what was scientifically and medically available and discoverable by other experts in the field.

Moreover, "'the admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal.'" *Bloodsworth v. State*, 307 Md. 164, 185-186, 512 A.2d 1056, 1067 (1986), quoting *Raithel v. State*, 280 Md. 291, 301, 372 A.2d 1069, 1074-1075 (1977). Here, the deposition evidence included statements **[***33]** concerning the availability of published scientific and medical data about the dangers of asbestos exposure in addition to statements about the results of experiments conducted by experts on behalf of the Johns-Manville and Philip Carey Companies.

Furthermore, even if the admission of the depositions were an abuse of discretion, the defendants have not shown that the error was prejudicial. The live testimony of Dr. Schepers in large part duplicated the state of the art evidence in the depositions. Dr. Schepers testified that in 1930 there were approximately fifty medical articles concerning the dangers of asbestos and that by 1960 there were "nearly a thousand" such articles. Dr. Schepers further testified about experiments which he conducted with asbestos containing products on behalf of Owens-Illinois.

In light of the nature of the deposition testimony and the additional state of the art testimony by Dr. Schepers, the defendants have not shown that the admission of these depositions constituted reversible error.

[*446] II.

The defendant Owens-Illinois contends that the trial court should not have instructed the jury that the duty to warn continues after the defendant stops **[***34]** manufacturing or selling products containing asbestos. The instruction only applied to the *Zenobia* case. The plaintiff Zenobia had argued that because he was a smoker and smoking aggravated the development of asbestosis, a post-exposure warning from Owens-Illinois would have prevented the aggravation of his disease. Owens-Illinois stopped manufacturing asbestos in 1958. Owens-Illinois' argument is not that, under the particular facts of this case, it was not required to give a warning after 1958. Instead, Owens-Illinois argues that, as a matter of law, a manufacturer has no duty whatsoever to warn after it stops manufacturing the product.

Generally, a manufacturer of a defective product has a duty to warn of product defects which the manufacturer discovers after the time of sale. As this Court stated in *Rekab, Inc. v. Frank Hrubetz & Co.*, 261 Md. 141, 146, 274 A.2d 107, 110 (1971), **[**646]** quoting 1 Frumer and Friedman, *Products Liability* § 8.02, at 148.3, "'[e]ven if there is no duty to warn at the time of the sale, facts may thereafter come to the attention of the manufacturer which

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make it imperative that a warning then be given.'" *See, e.g.,* **[***35]** *LaBelle v. McCauley Ind. Corp.*, 649 F.2d 46, 48-49 (1st Cir.1981); *Fell v. Kewanee Farm Equipment Co.*, 457 N.W.2d 911, 920 (Iowa 1990); *Comstock v. General Motors Corp.*, 358 Mich. 163, 176, 99 N.W.2d 627, 634 (1959); *Feldman v. Lederle Laboratories*, 125 N.J. 117, 144, 592 A.2d 1176, 1190 (1991) ("a manufacturer is obligated to communicate a warning based on subsequently-acquired knowledge of the danger as soon as reasonably foreseeable"); *Smith v. Selco Products, Inc.*, 96 N.C.App. 151, 158, 385 S.E.2d 173, 176-177 (1989), *review denied*, 326 N.C. 598, 393 S.E.2d 883 (1990) ("A manufacturer does not completely discharge its duty to warn simply by providing some warnings of some dangerous propensity of its product at the **[*447]** time of sale. A continuing duty exists to provide post-sale warnings of any deficiencies it learns exist in the product"). Therefore, if a manufacturer discovers a product defect after the time of sale, the manufacturer must make reasonable efforts to issue a post-sale warning. *Rekab, Inc. v. Frank Hrubetz & Co., supra*, 261 Md. at 147, 274 A.2d at 111, **[***36]** quoting *Levin v. Walter Kidde & Co., Inc.*, 251 Md. 560, 564, 248 A.2d 151, 154 (1968) ("The duty owed is a reasonable warning"). *See also Comstock v. General Motors Corp., supra*, 358 Mich. at 176, 99 N.W.2d at 634 (General Motors had a duty to "take all reasonable means to convey effective warning").

Owens-Illinois does not argue that *Rekab, Inc. v. Frank Hrubetz & Co., supra*, was wrongly decided. In fact Owens-Illinois acknowledges its continuing duty to warn of defects. Nonetheless, it contends that, as a matter of law, its continuing duty to warn ceased when it stopped manufacturing asbestos products in 1958. Owens-Illinois relies on the assertion that "state of the art" information about the hazards of asbestos was no longer available to it after 1958. Alternatively, Owens-Illinois contends that even if it had known of the hazards of asbestos after 1958, it had no reasonable means of communicating a warning to the users of its products, including the plaintiff Zenobia.

We cannot agree with Owens-Illinois' reasoning. n12 As previously stated, the post-sale duty to warn requires **[***37]** reasonable efforts to inform users of the hazard once the manufacturer is or should be aware of the need for a warning. Owens-Illinois was not precluded from showing that it did not become aware of the need for a warning or **[*448]** that, in light of the fact that it no longer manufactured the product, it made reasonable efforts to warn.

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n12 The defendant Anchor Packing Co., Inc., makes a similar argument based on the fact that the plaintiff Zenobia was not exposed to asbestos products supplied by Anchor after 1953. Anchor argues that because Zenobia was no longer a user of the product, no reasonable effort to warn would have reached him. Our rejection of Owens-Illinois' continuing duty to warn argument also applies to Anchor Packing Co.'s argument.

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The Supreme Court of Washington addressed this issue in *Lockwood v. AC & S, Inc.*, 109 Wash.2d 235, 744 P.2d 605 (1987). The plaintiff Lockwood had asbestosis as a result of his exposure to a Raymark Industries product. Raymark argued **[***38]** that documents revealing what it knew about the hazards of asbestos after 1972 were irrelevant because Lockwood's last exposure preceded 1972. The court rejected this argument, stating

> (109 Wash.2d at 260, 744 P.2d at 691):
> "[W]e believe that if Raymark had made a reasonable effort to provide Lockwood with the information it acquired about the dangers of asbestos exposure after his retirement, the seriousness of his injury might have been reduced. Under those circumstances, Raymark had a continuing duty to warn Lockwood of the known dangers of its product after he was no longer exposed to it."

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required of actual knowledge of the defect and deliberate disregard of the consequences. The court also ruled that testimony from depositions, at which defendants were not present, was properly admitted under Md. R. Civ. P., Cir. Ct. 2-419.

OUTCOME: The court vacated and remanded the judgment that affirmed the judgment of the circuit court awarding compensatory damages against defendants, a manufacturer and two suppliers/installers of asbestos containing products, and punitive damages against defendant manufacturer in plaintiffs' action alleging that they were injured by exposure to asbestos, ruling that the jury was not properly instructed as to punitive damages.

CORE TERMS: punitive damages, manufacturer, strict liability, deposition, asbestos, warning, actual malice, failure to warn, motive, warn, cross-claim, seller, supplier, punitive damages award, actual knowledge, implied malice, non-intentional, products liability, installer, evil, compensatory damages, intent to injure, wanton, deliberate, standard of proof, gross negligence, malice, common law, defective product, hazard

CORE CONCEPTS - ◆ Hide Concepts

Torts > Products Liability > Strict Liability

In order to recover under a theory of strict liability, a plaintiff must show: (1) that the product was in a defective condition at the time it left the possession or control of the seller, (2) that it was unreasonably dangerous to the user or consumer, (3) that the defect was a cause of the injuries, and (4) that the product was expected to and did reach the consumer without substantial change in its condition. Thus, a seller of a defective product is subjected to strict liability without regard to the knowledge of the defect and even though the seller has exercised all possible care in the preparation and sale of the product.

Torts > Products Liability > Duty to Warn

The seller of a product is required to give warning against the danger, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the danger. A product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

Torts > Products Liability > Duty to Warn

A manufacturer of a product, which is defective only because of the lack of an adequate warning, is not liable when the failure to warn resulted from an absence of knowledge of the dangerous quality of that product. Moreover, the presence of the required knowledge can be established by evidence that the dangerous quality of the product should have been known by a manufacturer because it was known in the scientific or expert community. The manufacturer is held to the knowledge and skill of an expert. This is relevant in determining (1) whether the manufacturer knew or should have known the danger. The manufacturer's status as expert means that at a minimum he must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby.

Evidence > Witnesses > Expert Testimony

Industry standards and state of the art are not synonymous. State of the art includes all of the available knowledge on a subject at a given time, and this includes scientific, medical, engineering, and any other knowledge that may be available. State of the art includes the element of time: What is known and when was this knowledge available. This evidence concerning the presence or absence of knowledge in the expert community is called "state of the art" evidence.

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The court cautioned that the "warning should be required to the extent practicable" under the circumstances. **[**647]**

The fact that a manufacturer or seller has discontinued its asbestos product line, and the fact that the plaintiff was no longer exposed to its product, are not circumstances which should necessarily relieve the seller of its duty to warn. Rather, these factors are relevant to a determination of what reasonable efforts to discover the danger and to warn are required. n13 A seller is not entitled to automatic relief from its continuing duty to warn **[***39]** merely because it no longer manufacturers a defective product.

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n13 *See* V. Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*,

> 58 N.Y.U.L.Rev. 892, 896 (1983):
> "[T]he facts of a particular case, such as the gravity and likelihood of harm, the number of persons affected, and the economic cost and practical problems associated with identifying and contacting current product users, should all be relevant in determining whether a manufacturer has satisfactorily discharged a post-sale duty to warn."

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[*449] III.

The defendant Anchor Packing Co. makes two additional arguments. It asserts that because the verdict for compensatory damages was excessive in the *Zenobia* case, the trial court should have granted its motion for new trial or for remittitur. In addition, it argues that the plaintiff Zenobia failed to show that the products which Anchor Packing Co. supplied or installed contained asbestos or that Zenobia was exposed to Anchor Packing **[***40]** Co.'s products. The record in the *Zenobia* case does not support Anchor Packing Co.'s arguments.

The granting or denial of a motion for new trial based upon the excessiveness of damages or a motion for remittitur is within the discretion of the trial court. As stated by this Court in *Banegura v. Taylor*, 312 Md. 609, 624, 541 A.2d 969, 976 (1988), quoting

> *Kirkpatrick v. Zimmerman*, 257 Md. 215, 218, 262 A.2d 531, 532 (1970):
> "[A]n abuse of that discretion may be reviewed by an appellate court . . . but . . . '[w]e know of no case where this Court has ever disturbed the exercise of the lower court's discretion in denying a motion for [a] new trial because of the inadequacy or excessiveness of [compensatory] damages.'"

The plaintiff Zenobia produced medical evidence that showed that his injuries are permanent and progressive. We cannot say that the trial court abused its discretion in refusing to grant Anchor Packing Co.'s motion for new trial or remittitur.

With respect to Anchor Packing Co.'s second argument that the plaintiff Zenobia failed to show that he was exposed to products which contained asbestos **[***41]** supplied by Anchor Packing Co., it is simply not supported by the factual record in this case. The plaintiff Zenobia testified that he had handled gaskets used on high temperature steam lines bearing the label "Anchor Packing" while working at the Maryland Shipbuilding and Drydock. He

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testified that he cut and hammered these products supplied by **[*450]** Anchor Packing Co. and that these products generated dust. Furthermore, Anchor Packing Co. admitted to selling gaskets containing asbestos designed for high temperature steam lines. This testimony undercuts Anchor Packing Co.'s argument that Zenobia failed to prove that he was exposed to Anchor Packing Co.'s asbestos containing products.

IV.

In granting the petitions for a writ of certiorari in these cases, this Court issued an order requesting that the briefs and argument encompass the following issue:

> "In light of the concurring opinion of Judges Eldridge, Chasanow, and Cole in *Schaefer v. Miller*, 322 Md. 297, 312-332, 587 A.2d 491 (1991), what should be the correct standard under Maryland law for the allowance of punitive damages in negligence and products liability cases, *i.e.*, gross **[***42]** negligence, actual malice, or some other standard. *See, e.g.*, *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 297 A.2d 721 (1972); *Davis v. Gordon*, 183 Md. 129, 36 A.2d 699 (1944)."

See Maryland Rule 8-131(b).

As noted in the opinion of Judges Eldridge, Cole and Chasanow in *Schaefer v. Miller, supra*, **[**648]** 322 Md. at 312-332, 587 A.2d at 498-509, in recent years there has been a proliferation of claims for punitive damages in tort cases, and awards of punitive damages have often been extremely high. *See* 2 J. Ghiardi and J. Kircher, *Punitive Damages Law and Practice* § 21.01, at 2 (1985); D. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U.Chi.L.Rev. 1, 6 (1982) ("Large assessments of punitive damages may not yet be a major threat to the continued viability of most manufacturing concerns, but the increasing number and size of such awards may fairly raise concern for the future stability of American industry"); M. Peterson, S. Sarma, M. Shanley, *Punitive Damages*, (Rand, The Institute for Civil Justice, 1987); J. **[***43]** Sales and K. Cole, *Punitive Damages: A Relic* **[*451]** *That Has Outlived Its Origins*, 37 Vand.L.Rev. 1117, 1154 (1984) ("the amount of punitive damages awarded in recent years . . . has escalated to astronomical figures that boggle the mind"). *But see* S. Daniels and J. Martin, *Myth and Reality in Punitive Damages*, 75 Minn.L.Rev. 1 (1990).

Accompanying this increase in punitive damages claims, awards and amounts of awards, is renewed criticism of the concept of punitive damages in a tort system designed primarily to compensate injured parties for harm. *See, e.g.*, E. Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 Ala.L.Rev. 1053 (1989); *Pacific Mutual Life Ins. Co. v. Haslip*, U.S. , , 111 S.Ct. 1032, 1043, 113 L.Ed.2d 1, 20 (1991). In Maryland the criticism has been partly fueled and justified because juries are provided with imprecise and uncertain characterizations of the type of conduct which will expose a defendant to a potential award of punitive damages. Accordingly, we shall (1) examine these characterizations of a defendant's conduct **[***44]** in light of the historic objectives of punitive damages, (2) more precisely define the nature of conduct potentially subject to a punitive damages award in non-intentional tort cases, and (3) heighten the standard of proof required of a plaintiff seeking an award of punitive damages.

These cases, along with two others heard by us on the same day, n14 directly raise the problem of what basic standard of wrongful conduct should be used for the allowance of punitive damages in negligence actions generally, and in products liability actions based on either negligence or on strict liability. The jury in these cases received the following

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instruction on punitive damages:

> "Implied malice, which the plaintiffs have to prove in order to recover punitive damages in this case, requires a finding by you of a wanton disposition, grossly irresponsible **[*452]** to the rights of others, extreme recklessness and utter disregard for the rights of others."

Similarly, the Court of Special Appeals evaluated the evidence and stated that in order to affirm a punitive damages award,

> "[w]e . . . require a showing that the defendant conducted itself 'in an extraordinary manner characterized by **[***45]** a wanton and reckless disregard for the rights of others.'"

MCIC, Inc. v. Zenobia, 86 Md.App. 456, 466, 587 A.2d 531, 536 (1991), quoting *Eagle-Picher v. Balbos*, 84 Md.App. 10, 73, 578 A.2d 228, 259 (1990), *cert. granted*, 322 Md. 737, 589 A.2d 968 (1991). Each court required the plaintiffs to show by a preponderance of evidence that the defendants acted with "implied" rather than "actual" malice. That is, the plaintiffs were not required to show that the defendants' conduct was characterized by evil motive, intent to injure, fraud, or actual knowledge of the defective nature of the products coupled with a deliberate disregard of the consequences. Instead, the plaintiffs were required to show only that the defendants' conduct was grossly negligent.

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n14 *Eagle-Picher Industries, Inc., et al. v. Balbos, et al.* (No. 22, Sept. Term 1991); *Owens-Illinois, Inc. v. Armstrong, et al.* (No. 77, Sept. Term 1991).

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The standard **[***46]** applied by the trial court and the Court of Special Appeals results from, and consequently requires reexamination of, some of the decisions of this Court relating to punitive damages. That **[**649]** re-examination involves two separate rulings by this Court over the past twenty years. First, the injuries of the plaintiffs are surrounded by "contractual" relationships, *e.g.*, the employment contract, the contracts to produce/supply asbestos, etc. Consequently, these cases call into question the validity of this Court's holdings in *H & R Block v. Testerman*, 275 Md. 36, 338 A.2d 48 (1975), and *Wedeman v. City Chevrolet*, 278 Md. 524, 366 A.2d 7 (1976), that, when a contract is involved, the standard for an award of punitive damages differs depending on whether the tortious conduct occurs before or after the contract. Second, these cases challenge the application of the implied malice standard of *Smith v. Gray Concrete Pipe Co., supra*, to a negligence or other non-intentional tort case.

[*453] A.

For the reasons set out more fully in the opinion of Judges Eldridge, Cole and Chasanow in *Schaefer v. Miller, supra*, 322 Md. at 312-322, 587 A.2d at 498-509, **[***47]** we abandon the "arising out of contract" distinction drawn in *H & R Block v. Testerman, supra, Wedeman v. City Chevrolet, supra*, and their progeny, for the purposes of allowing an award of punitive damages in tort cases. Under the *Testerman-Wedeman* rule, where a contractual relationship existed, the basic standard for exposure to punitive damage liability would vary depending on

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whether the wrongful conduct took place before or after the formation of the contract. The *Testerman-Wedeman* principle required that, if the wrongful conduct constituting the basis for a punitive damages claim occurred after the formation of a contract, the plaintiff must prove actual malice in order for the jury to consider an award of punitive damages, but if the wrongful conduct occurred before the formation of a contract, punitive damages were allowable upon a showing of "implied" malice. *H & R Block v. Testerman, supra*, 275 Md. at 46-47, 338 A.2d at 54; *Wedeman v. City Chevrolet, supra*, 278 Md. at 532, 366 A.2d at 13. n15

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n15 Defective product actions, "[i]n a very real sense, . . . arise out of a contractual relationship." *American Laundry Mach. v. Horan*, 45 Md.App. 97, 116, 412 A.2d 407, 419 (1980). Despite this statement in the first Court of Special Appeals case to consider punitive damages in a defective product negligence action, the Court of Special Appeals has consistently held that implied malice will suffice to support an award of punitive damages in a products liability case. *See MCIC, Inc. v. Zenobia*, 86 Md.App. 456, 466, 587 A.2d 531, 536 (1991); *Owens-Illinois v. Armstrong*, 87 Md.App. 699, 719, 591 A.2d 544, 553, *cert. granted*, 324 Md. 90, 595 A.2d 1077 (1991); *Eagle-Picher v. Balbos*, 84 Md.App. 10, 72-73, 578 A.2d 228, 259 (1990), *cert. granted*, 322 Md. 737, 589 A.2d 968 (1991); *Harley-Davidson Motor Co., Inc. v. Wisniewski*, 50 Md.App. 339, 437 A.2d 700 (1981), *cert. denied*, 292 Md. 596 (1982); *American Laundry Mach. v. Horan, supra.*

In *American Laundry Mach. v. Horan, supra*, 45 Md.App. at 116, 412 A.2d at 419, the Court of Special Appeals reasoned that because the contract was not one between the party injured and the manufacturer of the product, the tort did not "arise out of a contract" and that the "standard to be applied, therefore, is not that stated in *Testerman*, but rather the 'legal equivalent' implied malice standard normally applicable in tort cases." *Ibid.* Because of the approach we take in this case, we need not express any view concerning this reasoning by the Court of Special Appeals.

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[*454] "[T]he purposes **[**650]** of punitive damages relate entirely to the nature of the defendant's conduct." *Schaefer v. Miller, supra*, 322 Md. at 321, 587 A.2d at 503. Whether the tort occurred before or after the formation of a contractual relationship should not determine whether actual or implied malice is required for allowing an award of punitive damages. Rather, the availability of a punitive damages award ought to depend upon the heinous nature of the defendant's tortious conduct. *Schaefer*, 322 Md. at 321-322, 587 A.2d at 503. *See, e.g., Vancherie v. Siperly*, 243 Md. 366, 373-374, 221 A.2d 356, 360 (1966); *McClung-Logan v. Thomas*, 226 Md. 136, 148, 172 A.2d 494, 500 (1961); *Davis v. Gordon, supra*, 183 Md. at 133-134, 36 A.2d at 701; *Heinze v. Murphy*, 180 Md. 423, 431-432, 24 A.2d 917, 921-922 (1942); *Nichols v. Meyer*, 139 Md. 450, 457, 115 A. 786, 788 (1921); *Baltimore and Ohio R.R. Co. v. Boyd*, 63 Md. 325, 334-335 (1885).

Awarding punitive **[***49]** damages based upon the heinous nature of the defendant's tortious conduct furthers the historical purposes of punitive damages -- punishment and deterrence. *Schaefer v. Miller, supra*, 322 Md. at 321, 587 A.2d at 503; *Embrey v. Holly*, 293 Md. 128, 142, 442 A.2d 966, 973 (1982); *First Nat'l Bank v. Fid. & Dep. Co.*, 283 Md. 228, 232, 389 A.2d 359, 361 (1978). Thus, punitive damages are awarded in an attempt to punish a defendant whose conduct is characterized by evil motive, intent to injure, or fraud, and to warn others contemplating similar conduct of the serious risk of monetary liability.

Because the *Testerman-Wedeman* distinction focuses on when the conduct occurred rather than on the nature of the conduct, it has no relationship to the purposes of punitive damages. Furthermore, the "'arising out of contractual relations' rule formulated in

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Testerman and *Wedeman* had no support in the Maryland cases relied on in the *Testerman* **[*455]** and *Wedeman* opinions." *Schaefer v. Miller, supra*, 322 Md. at 316, 587 A.2d at 501. As more fully **[***50]** set out in *Schaefer*, 322 Md. at 322-323, 587 A.2d at 504, the *Testerman-Wedeman* rule has led to irrational results and its application has been inconsistent.

The irrational and inconsistent application of a punitive damages standard undermines the objective of deterrence because persons cannot predict, and thus choose to abstain from, the type of behavior that is sanctioned by a punitive damages award. Consequently we abandon the "arising out of a contract" distinction "and return to the principles relating to punitive damages which had prevailed in this State for many, many years before *Testerman.*" *Schaefer v. Miller, supra*, 322 Md. at 327, 587 A.2d at 506.

B.

In the years before *Testerman*, this Court had articulated two standards governing an award of punitive damages in non-intentional tort cases. The test that applied prior to 1972 was that "punitive damages were not recoverable in negligence actions absent actual malice or similar wrongful motive. They were not recoverable on an implied malice basis no matter how gross, reckless, or wanton the defendant's conduct might be." *Schaefer v. Miller, supra*, 322 Md. at 327, 587 A.2d at 506. **[***51]** Although articulated in various ways, the so called "actual malice" standard was explained in an earlier case as follows:

> "[T]o entitle one to such damages there must be an element of fraud, or malice, or evil intent . . . entering into and forming part of the wrongful act. It is in such cases as these that exemplary or punitive damages are awarded as a punishment for the evil motive or intent with which the act is done, and as an example or warning to others."

Philadelphia, W. & B.R. Co. v. Hoeflich, 62 Md. 300, 307 (1884). *See, e.g., Davis v. Gordon, supra*, 183 Md. at 133, 36 A.2d at 701 (in negligence cases, punitive damages are **[*456]** awarded as a punishment for evil motive or intent); *Heinze v. Murphy, supra*, 180 Md. at 429-431, 24 A.2d at 921 ("fraud, malice, or evil intent" is required).

In *Davis v. Gordon, supra*, this Court refused to adopt an implied malice standard for the allowance of punitive damages in a negligence action and held that there must be "actual malice." In reaching this conclusion, the Court analyzed whether the adoption of an **[***52]** implied malice standard would serve the deterrent and penal objectives of punitive damages. 183 Md. at 133, 36 A.2d at 701. Because the implied malice standard would not further either objective of punishment or deterrence, it was rejected.

In 1972 this Court, for the first time in a non-intentional tort action, allowed an award of punitive damages based upon implied malice. *Smith v. Gray Concrete Pipe Co., supra.* The Court in *Smith* relied upon out-of-state authority to allow the plaintiff to recover punitive damages upon a showing that the defendant was guilty of "gross negligence," which was defined as a "wanton or reckless disregard for human life." *Smith*, 267 Md. at 167, 297 A.2d at 731. n16 The *Smith* opinion did not attempt **[**651]** to analyze how this newly established "gross negligence" standard would promote the objectives of punitive damages.

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n16 Judge Marvin Smith, dissenting in *Smith v. Gray Concrete Pipe Co., supra*, 267 Md. at 173-174, 297 A.2d at 734-735, discussed the inconsistency between the majority's opinion

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and earlier Maryland cases, including *Davis v. Gordon, supra.*

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The gross negligence standard has led to inconsistent results and frustration of the purposes of punitive damages in non-intentional tort cases. *Schaefer v. Miller, supra,* 322 Md. at 332, 587 A.2d at 508. Such a possibility was foreseen by the *Smith* Court, as the majority in *Smith* expressed concern that a test requiring "wanton" conduct or "reckless disregard of the rights of others" presented "the danger of . . . a test which may be so flexible that it can become virtually unlimited in its application." *Smith v. Gray Concrete Pipe Co., supra,* 267 Md. at 166, 297 A.2d at **[*457]** 731. Despite the *Smith* Court's limitation of the implied malice standard to torts involving the operation of motor vehicles, the standard has been freely applied to other non-intentional torts. *See, e.g., Exxon Corp. v. Yarema,* 69 Md.App. 124, 516 A.2d 990 (1986), *cert. denied,* 309 Md. 47, 522 A.2d 392 (1987); *Medina v. Meilhammer,* 62 Md.App. 239, 489 A.2d 35, *cert. denied,* 303 Md. 683, 496 A.2d 683 (1985); **[***54]** *American Laundry Mach. v. Horan,* 45 Md.App. 97, 412 A.2d 407 (1980). *See also Liscombe v. Potomac Edison Co.,* 303 Md. 619, 637, 495 A.2d 838, 847 (1985) (assuming, without deciding, that the *Smith* holding was applicable to non-intentional torts not involving the operation of motor vehicles).

In the face of "a literal explosion of punitive damage law and practice," n17 many states have acted to define more accurately the type of conduct which can form the basis for a punitive damages award. In *Tuttle v. Raymond,* 494 A.2d 1353 (Me.1985), the Supreme Judicial Court of Maine reviewed its law on punitive damages. The implied malice standard applied by the lower courts in *Tuttle* allowed recovery of punitive damages upon a showing that the defendant's conduct was "wanton, malicious, reckless or grossly negligent." 494 A.2d at 1360. The court rejected this standard, stating

> (494 A.2d at 1361):
> "'Gross' negligence simply covers too broad and too vague an area of behavior, resulting in an unfair and inefficient use of the doctrine of punitive damages . . . . A **[***55]** similar problem exists with allowing punitive damages based merely upon 'reckless' conduct. 'To sanction punitive damages solely upon the basis of conduct characterized as heedless disregard of the consequences would be to allow virtually limitless imposition of punitive damages.'"

The Maine court went on to point out that the implied malice standard "overextends the availability of punitive **[*458]** damages" and consequently "dulls the potentially keen edge of the doctrine as an effective deterrent of truly reprehensible conduct." *Ibid. See also Rawlings v. Apodaca,* 151 Ariz. 149, 162, 726 P.2d 565, 578 (1986) ("We do not believe that the concept of punitive damages should be stretched. We restrict its availability to those cases in which the defendant's wrongful conduct was guided by evil motives"); *Preston v. Murty,* 32 Ohio St.3d 334, 335, 512 N.E.2d 1174, 1175-1176 (1987) ("this [recklessness] is the type of malice which has remained frustratingly vague . . . a positive element of wrongdoing is always required"); *Lee v. Bank of America,* 218 Cal.App.3d 914, 920, 267 Cal.Rptr. 387, 390 (2d Dist.1990) **[***56]** (gross negligence or recklessness is not enough); *First Interstate Bank of Nevada v. Jafbros Auto Body Inc.,* 106 Nev. 54, 56-57, 787 P.2d 765, 767 (1990) (without substantial evidence of oppression, fraud, or malice, even unconscionable irresponsibility will not support a punitive damages award). n18

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n17 2 J. Ghiardi and J. Kircher, *Punitive Damages Law and Practice* § 21.01, at 2 (1985).

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n18 *See* American College of Trial Lawyers, *Committee Report on Punitive Damages*, at 6 and n. 23 (1989):

> "[I]t appears that the law is evolving in many jurisdictions to require that there be some conscious indifference to the rights of others before punitive damages are warranted.
>
> * * *
>
> "*See, e.g., Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986); *Freeman v. Anderson*, 279 Ark. 282, 651 S.W.2d 450 (1983); *Jardel v. Hughes*, 523 A.2d 518 (Del.1987); *Tuttle v. Raymond, supra,; Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987); *Enright v. Lubow*, 202 N.J.Super. 58, 493 A.2d 1288 (App.Div.1985)."

The Committee recommended, at 12, that the following standards be used:

> "[P]ermitting punitive awards based merely on different degrees of carelessness or inadvertent conduct exacerbates the already difficult problem of articulating a clear standard to be employed by the trier of fact and for review on appeal. Thus, the logical and practical line of demarcation should be drawn at the point where the defendant realizes that his or her conduct will, or that there is a strong probability that it may, cause the resulting harm. Conduct, such as extreme carelessness, which does not involve this basic element of consciousness should not be the subject of punitive damages."

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[652]**

As previously indicated, arbitrary and inconsistent application of the standard for awarding punitive damages frustrates **[*459]** the dual purposes of punishment and deterrence. Implied malice as that term has been used, with its various and imprecise formulations, fosters this uncertainty. As pointed out by Professor Ellis, (D. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*,

> 56 S.Cal.L.Rev. 1, 52-53 (1982)):
> "[T]he law of punitive damages is characterized by a high degree of uncertainty that stems from the use of a multiplicity of vague, overlapping terms . . . . Accordingly, there is little reason to believe that only deserving defendants are punished, or that fair notice of punishable conduct is provided."

See also D. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich.L.Rev. 1257, 1283 n. 135 (1976) ("any definition of the punishable conduct, such as marketing a product in 'reckless,' 'wanton,' or 'flagrant' disregard of the public safety will necessarily be quite vague"); J. Henderson and A. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U.L.Rev. 265, 290 (1990); **[***58]** D. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, supra*, U.Chi.L.Rev. at 23 ("reckless" standard exposes the defendant to punitive damages liability even if the decision was made in good faith).

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The implied malice test adopted in *Smith v. Gray Concrete Pipe Co.* has been overbroad in its application and has resulted in inconsistent jury verdicts involving similar facts. It provides little guidance for individuals and companies to enable them to predict behavior that will either trigger or avoid punitive damages liability, and it undermines the deterrent effect of these awards. n19

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n19 *See* 2 L. Schlueter and K. Redden, *Punitive Damages*, Appendix B, at 418-419 (2nd ed. 1989), explaining:

> "Punitive damage awards can only affect behavior if an actor is able to conform to established standards of conduct. If the standards are constantly changing, the actor may be unable to predict accurately the line that separates desirable from undesirable conduct. A potential defendant will either become too cautious, refusing to engage in socially beneficial behavior or will follow a course of behavior that imposes more harm on society than benefit."

Accord D. Owen, *The Moral Foundation of Punitive Damages*, 40 Ala.L.Rev. 705, 729 (1989); E. Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 Ala.L.Rev. 1053, 1057-1060, 1065 (1989); D. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U.Chi.L.Rev. 1, 22-23, 47-49 (1982).

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[*460] Therefore, we overrule *Smith v. Gray Concrete Pipe Co.* and its progeny, including *Nast v. Lockett*, 312 Md. 343, 539 A.2d 1113 (1988). In a non-intentional tort action, the trier of facts may not award punitive damages unless the plaintiff has established that the defendant's conduct was characterized by evil motive, intent to injure, ill will, or fraud, *i.e.*, "actual malice." n20 *See Davis v. Gordon, supra*, 183 Md. at 133, 36 A.2d at 701. n21

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n20 We recognize that the term "actual malice" has meant different things in the law, that its popular connotation may not always be the same as its legal meaning, and that its use has been criticized. *See, e.g., Masson v. New Yorker Magazine, Inc.*, U.S. , , 111 S.Ct. 2419, 2430, 115 L.Ed.2d 447, 469 (1991); *Hart-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666 n. 7, 109 S.Ct. 2678, 2685, 105 L.Ed.2d 562, 576 (1989); *Ross v. State*, 308 Md. 337, 340 n. 1, 519 A.2d 735, 736 n. 1. Nevertheless, we simply use the term in this opinion as a shorthand method of referring to conduct characterized by evil motive, intent to injure, ill will, or fraud. In instructing juries with respect to punitive damages, however, it would be preferable for trial judges not to use the term "actual malice." **[***60]**

n21 The scope of this opinion primarily encompasses the standard of conduct which will support an award of punitive damages in so called non-intentional tort cases, *i.e.* negligence and strict liability cases. In addition, our overruling of the *Testerman-Wedeman* "arising out of contract" principle is applicable to all tort actions. We shall not at this time, however, reconsider or modify the legal principles concerning the type of conduct which will support an award of punitive damages in so-called intentional tort actions, *i.e.*, tort actions other than negligence and strict liability. To some extent, the applicable legal principles are reviewed in *Schaefer v. Miller*, 322 Md. 297, 319-320, 587 A.2d 491, 502-503 (1991).

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[653]**

C.

"Actual malice," defined above as conduct of the defendant characterized by evil motive, intent to injure, ill will, or fraud, does not translate easily into products liability cases. **[*461]** "Products liability" actions are those cases in which the cause of action arises from an injury caused by a defective product. The theories **[***61]** of liability in such cases are negligence, strict liability and breach of warranty. n22 As we held in Part B above, in ordinary non-intentional tort cases, the plaintiff must prove that the defendant's conduct was characterized by an evil motive or intent to injure, or defraud the plaintiff. *Davis v. Gordon, supra*, 183 Md. at 133, 36 A.2d at 701. Nevertheless, it is not likely that a manufacturer or supplier of a defective product would specifically intend to harm a particular consumer. We agree with the academic commentary and the courts that "[t]he manufacturer of a defective product operating in vastly different circumstances, . . . will require a unique description of what specific conduct will render it liable for punitive damages." 2 Ghiardi and Kircher, *Punitive Damages Law and Practice, supra*, § 6.04 at 12. Some form of "knowledge" of a defect and a subsequent disregard of the danger are required for allowing an award of punitive damages in most jurisdictions. After a survey of the cases, Ghiardi and Kircher state (§ 6.21 at 98):

> "In summary, case law establishes that a defendant must have specific knowledge of a product's defect **[***62]** and its potential for harm before an exemplary award is appropriate. This knowledge is usually gained through defendant's testing procedures before marketing or through postmarketing consumer accident reports and complaints received by the defendant."

See, e.g., Donahue v. Phillips Petroleum Co., 866 F.2d 1008, 1013-1014 (8th Cir.1989) (applying Missouri law); *Fell* **[*462]** *v. Kewanee Farm Equipment Co., supra*, 457 N.W.2d at 919-920.

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n22 In Maryland a breach of warranty suit is a contract action. *See Nissen Corp. v. Miller*, 323 Md. 613, 619, 594 A.2d 564, 567 (1991); *Frericks v. General Motors Corp.*, 278 Md. 304, 307, 363 A.2d 460, 461 (1976); *Frericks v. General Motors Corp.*, 274 Md. 288, 299, 336 A.2d 118, 125 (1975); *Volkswagen of America v. Young*, 272 Md. 201, 220, 321 A.2d 737, 747 (1974). Therefore, like any other contract action, punitive damages are not recoverable under a breach of warranty count.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[***63]**

We believe that in products liability cases the equivalent of the "evil motive," "intent to defraud," or "intent to injure," which generally characterizes "actual malice," is actual knowledge of the defect and deliberate disregard of the consequences. Therefore, in order for actual malice to be found in a products liability case, regardless of whether the cause of action for compensatory damages is based on negligence or strict liability, the plaintiff must prove (1) actual knowledge of the defect on the part of the defendant, and (2) the defendant's conscious or deliberate disregard of the foreseeable harm resulting from the defect.

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The knowledge component, which we hold is necessary to support an award of punitive damages, does *not* mean "constructive knowledge" or "substantial knowledge" or "should have known." More is required to expose a defendant to a potential punitive damages award. The plaintiff must show that the defendant *actually* knew of the defect and of the danger of the product at the time the product **[**654]** left the defendant's possession or control. n23 *See Sch. Dist. of Independence v. U.S. Gypsum*, 750 S.W.2d 442, 446 (Mo.App.1988) ("No Missouri **[***64]** case has permitted submission of punitive damage claim in a strict products liability case on the theory that the defendant should have known of a dangerous defect in its product"). n24

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n23 Actual knowledge, however, does include the wilful refusal to know. *See, e.g., State v. McCallum*, 321 Md. 451, 458-461, 583 A.2d 250, 253-255 (1991) (Chasanow, J., concurring) ("'[K]nowledge' exists where a person believes that it is probable that something is a fact, but deliberately shuts his or her eyes or avoids making reasonable inquiry with a conscious purpose to avoid learning the truth.") Therefore, a defendant cannot shut his eyes or plug his ears when he is presented with evidence of a defect and thereby avoid liability for punitive damages.

n24 For cases involving instances where the plaintiffs demonstrated the actual knowledge required, *see, e.g., Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 672, 512 A.2d 466, 481 (1986) ("the evidence supports a finding that Johns-Manville knew of the dangers created by its product. Not only did it fail to warn users of the serious health hazards associated with exposure to asbestos, it actually took affirmative steps to conceal this information from the public"); *Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 484, 738 P.2d 1210, 1240 (1987) ("Far from simply being 'grossly negligent' in marketing the Dalkon Shield, there was substantial evidence to conclude that Robins deliberately, intentionally, and actively concealed the dangers of the Shield for year after year").

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[*463] Furthermore, the plaintiff is required to show that, armed with this actual knowledge, the defendant consciously or deliberately disregarded the potential harm to consumers. Professor Owen suggests the term "flagrant indifference." D. Owen, *Punitive Damages in Products Liability Litigation, supra*, 74 Mich.L.Rev. at 1369. We prefer the characterization "conscious or deliberate disregard," and emphatically state that negligence alone, no matter how gross, wanton, or outrageous, will not satisfy this standard. Instead the test requires a bad faith decision by the defendant to market a product, knowing of the defect and danger, in conscious or deliberate disregard of the threat to the safety of the consumer.

D.

The defendant Owens-Illinois and several amici argue that a theory of strict liability in tort is inconsistent with an award of punitive damages because strict liability by its nature does not require a showing of fault, and an award of punitive damages requires fault to be valid. Although a few commentators have endorsed this argument, n25 the majority of courts which have considered the issue have found no logical inconsistency in allowing a punitive damages **[***66]** award in a strict liability action. *See Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38, 46-47 (Alaska 1979), *cert.* **[*464]** *denied*, 454 U.S. 894, 102 S.Ct. 391, 70 L.Ed.2d 209 (1981); *Masaki v. General Motors Corp.*, 71 Haw. 1, 9-11, 780 P.2d 566, 571-572 (1989); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 732 (Minn.), *cert. denied sub nom. Riegel Textile Corp. v. Gryc*, 449 U.S. 921, 101 S.Ct. 320, 66 L.Ed.2d 149 (1980); *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 652-654, 512 A.2d 466, 470-471 (1986);

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Torts > Products Liability > Strict Liability
In a failure to warn case, negligence concepts to some extent have been grafted onto strict liability. In such cases, an element of knowledge or "state of the art" evidence is directly pertinent to a cause of action, and liability is no longer entirely "strict."

Torts > Products Liability > Strict Liability
Despite the overlap of negligence principles in a strict liability failure to warn case, strict liability differs from a negligence cause of action in that contributory negligence is not a defense to a strict liability claim.

Torts > Products Liability > Strict Liability
In a strict liability failure to warn case, "state of the art" evidence is relevant with regard to the defendant's liability. The seller is required to give a warning if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge of the danger.

Torts > Products Liability > Strict Liability
Despite the use of the term "strict liability" the seller is not an insurer, as absolute liability is not imposed on the seller for any injury resulting from the use of his product.

Torts > Products Liability > Strict Liability
In a strict liability cause of action where the alleged defect is a failure to give adequate warnings, the seller is not strictly liable for failure to warn unless the seller has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the danger. For purposes of the "should have knowledge" component, a manufacturer of a product is held to the knowledge of an expert in the field.

Torts > Products Liability > Strict Liability
The knowledge or state of the art component is an element to be proven by the plaintiff. In a strict liability failure to warn case, the alleged defect is the failure of the seller to give an adequate warning. The seller, however, need not give any warning if the requisite state of the art or knowledge does not require it. Thus, where a product lacks a warning because of insufficient knowledge on the part of the manufacturer or in the scientific field involved, the product is not defective. As defectiveness is an element to be proven by the plaintiff, the knowledge or state of the art component is not an affirmative defense.

Evidence > Hearsay Rule & Exceptions > Former Testimony of Unavailable Declarant
Depositions meeting the requirements of Md. R. Civ. P., Cir. Ct. 2-419 may be admissible under the former testimony exception to the rule against hearsay. The substance of Fed. R. Civ. P. 804(b)(1) is the test for the admissibility of former testimony.

Evidence > Hearsay Rule & Exceptions > Former Testimony of Unavailable Declarant
Md. R. Civ. P., Cir. Ct. 2-419(a)(3)(C) provides that deposition testimony may be used when the deponent is unavailable. Rule 2-419(c) further provides that a deposition lawfully taken in another action may be used like any other deposition if the other action was brought in any court of this state, of any other state, or of the United States, involved the same subject matter, and was brought between the same parties or their representatives or predecessors in interest.

Evidence > Hearsay Rule & Exceptions > Former Testimony of Unavailable Declarant
Fed. R. Evid. 804(b)(1) provides that testimony given as a witness at another hearing

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Home Ins. Co. v. American Home Products, 75 N.Y.2d 196, 204, 551 N.Y.S.2d 481, 486, 550 N.E.2d 930, 935 (1990); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 270, 294 N.W.2d 437, 443 (1980); *Fleet & Semple v. Hollenkemp*, 52 Ky. 219, 225-226 (1852) (first case recognizing punitive damages in strict liability and rejecting the argument that they are inconsistent). *See also* cases cited in R. Lockwood, **[***67]** Annotation, *Allowance of Punitive Damages in Products Liability Case*, 29 A.L.R.3d 1021, 1022 (1970) and Supplemental Cases. *But see Scott v. Fruehauf Corp.*, 302 S.C. 364, 370, 396 S.E.2d 354, 357 (1990); *Butcher v. Robertshaw Controls Co.*, 550 F.Supp. 692, 705 (D.Md.1981); *Doe v. Miles Laboratories, Inc.*, 675 F.Supp. 1466, 1481 (D.Md.1987), **[**655]** *aff'd*, 927 F.2d 187 (4th Cir.1991).

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n25 *See, e.g.*, 2 Ghiardi and Kircher, *Punitive Damages Law and Practice, supra*, § 6.01 at 2-5; F. Tozer, *Punitive Damages and Products Liability*, 39 Ins. Counsel J. 300 (1972). *But see* D. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich.L.Rev. 1257, 1268-1271 (1976) (where the author systematically raises and rejects each argument concerning the incompatibility of strict liability actions and punitive damages awards).

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The plaintiffs before trial in these cases dismissed **[***68]** all theories of liability except for strict liability. Thus, as stated in Part I, in order to recover compensatory damages under a strict liability theory, the plaintiffs were required to prove:

> "(1) [that] the product was in a defective condition at the time it left the possession or control of the seller;
>
> (2) that it was unreasonably dangerous to the user or consumer;
>
> (3) that the defect was a cause of the injuries;
>
> (4) that the product was expected to and did reach the consumer without substantial change in its condition."

Phipps v. General Motors Corp., supra, 278 Md. at 344, 363 A.2d at 958. In addition, for the reasons set forth in Part I of this opinion, a "knowledge" or "state of the art" element is pertinent in a strict liability case based on a failure to warn. While the cause of action does not require **[*465]** a showing of any particular intent or actual knowledge, it also does not require the plaintiff to negate an evil intent or actual knowledge of a defect and deliberate disregard of the consequences. Therefore the elements of a strict liability claim are not inconsistent with evidence of evil intent or wrongdoing offered **[***69]** to support a punitive damages award.

It is true that the evidence necessary to support a punitive damages award goes far beyond that required to support a compensatory damages award based on the underlying strict liability claim. In the same manner, the evidence of actual malice that will support a punitive damages award in a products liability action based on negligence requires the plaintiff to prove much more than negligence. The defendant Owens-Illinois does not argue, however, that there is an inconsistency between a negligence cause of action and punitive damages. The showing of actual malice required for a punitive damages award is the same regardless of whether the plaintiff's claim for compensatory damages was based on strict liability or on negligence. In either case, the evidence must show malicious conduct and not simply the

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supplying of a defective product or negligence.

We agree with the Supreme Court of New Jersey that "[t]he right to recover punitive damages cannot sensibly, in this day and age, be made to turn on the form of the pleading." *Fischer v. Johns-Manville Corp., supra*, 103 N.J. at 658, 512 A.2d at 474. Therefore, punitive **[***70]** damages are recoverable in a strict products liability case in the same manner as they are available in a products liability negligence case.

E.

The defendant Owens-Illinois and some amici have argued that, in order for a jury to consider a punitive damages award, a plaintiff should be required to establish by clear and convincing evidence that the defendant's conduct was characterized by actual malice.

[*466] The function of the standard of proof is to "allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323, 329 (1979). Furthermore, the clear and convincing standard has been used

> "in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof." *Ibid.*

See Pacific Mutual Life Ins. Co. v. Haslip, supra, U.S. , 111 S.Ct. at 1062, 113 L.Ed.2d at 43 **[***71]** (O'Connor, J., dissenting) ("there is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character of punitive damages means that there is more than just money at stake").

Maryland requires a "clear and convincing evidence" standard of proof in cases of **[**656]** fraud, *First Nat'l Bk. v. U.S.F. & G. Co.*, 275 Md. 400, 340 A.2d 275 (1975), and in attorney disciplinary proceedings, *Bar Ass'n of Baltimore City v. Posner*, 275 Md. 250, 339 A.2d 657, *cert. denied*, 423 U.S. 1016, 96 S.Ct. 451, 46 L.Ed.2d 388 (1975). In *First Nat'l Bk. v. U.S.F. & G. Co., supra*, 275 Md. at 411, 340 A.2d at 283, this Court stated:

> "When fraud, dishonesty or criminal conduct is imputed, something more than a mere preponderance of evidence must be produced; the proof must be 'clear and satisfactory' and be of such a character as to appeal strongly to the conscience of the court."

See also Everett v. Baltimore Gas & Elec., 307 Md. 286, 301, 513 A.2d 882, 890 (1986) ("certain cases **[***72]** require a more exacting standard because of the seriousness of the allegations").

A growing majority of states requires that a plaintiff prove the defendant's malicious conduct by clear and convincing **[*467]** evidence before punitive damages can be considered. n26 Many states have adopted the clear and convincing standard by statute. n27 Other states have adopted the standard by judicial decisions. *See Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 332, 723 P.2d 675, 681 (1986); *Masaki v. General Motors Corp., supra*, 71 Haw. 1, 780 P.2d 566; *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind.1982);

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Tuttle v. Raymond, supra, 494 A.2d at 1363; *Wangen v. Ford Motor Co., supra*, 97 Wis.2d 260, 270, 294 N.W.2d 437, 443.

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n26 Adoption of this standard is supported by the academic commentary on the topic of punitive damages as well. *See American College of Trial Lawyers, Committee Report on Punitive Damages, supra*, at 12; D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 Ala.L.Rev. 975, 994-995 (1989); M. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va.L.Rev. 269, 298 (1983); D. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, supra*, 49 U.Chi.L.Rev. at 58-59. **[***73]**

n27 Ala.Code § 6-11-20 (1991 Cum.Supp.); Alaska Stat. § 09.17.020 (1991 Cum.Supp.); Cal.Civ.Code § 3294(a) (West 1992 Cum.Supp.); Ga.Code Ann. § 51-12-5.1 (Michie 1991 Cum.Supp.); Ind.Code Ann. § 34-4-34-2 (Burns 1986); Iowa Code § 668A.1 (West 1987); Kan.Stat.Ann. § 60-3701(c) (1991 Cum.Supp.); Ky.Rev.Stat.Ann. § 411.184(2) (Michie/Bobbs-Morril 1990 Cum.Supp.); Minn.Stat.Ann. § 549.20 (West 1988); Mont.Code Ann. § 27-1-221(5) (1991); Nev.Rev.Stat. § 42.005(1) (Michie 1991 Cum.Supp.); N.D.Cent.Code § 32-03.2-11 (1991 Cum.Supp.); Ohio Rev.Code Ann. § 2307.80(A) (Anderson 1991); Okla.Stat. tit. 23, § 9 (West 1987); Or.Rev.Stat. § 30.925 (1991); S.C.Code Ann. § 15-33-135 (Law Co-op.1991 Cum.Supp.); S.D.Codified Laws Ann. § 21-1-4.1 (1987); Utah Code Ann. § 78-18-1 (1991 Cum.Supp.).

Colorado requires proof beyond a reasonable doubt to support a punitive damages award. Colo.Rev.Stat. § 13-25-127(2) (1989).

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In *Masaki v. General Motors Corp., supra*, the products liability case arose when the van the plaintiff was repairing "self-shifted" into reverse gear, rendering the **[***74]** plaintiff a quadriplegic. Masaki alleged that the product was defectively designed and manufactured and that he had not been warned of the defect. The case was presented to the jury on negligence, strict liability and breach of warranty theories, and the jury awarded both compensatory and punitive damages. The Supreme Court of Hawaii began its analysis **[*468]** by reviewing the purposes of punitive damages as punishment and deterrence. In order to effect these purposes, "a positive element of conscious wrongdoing is always required. Thus punitive damages are not awarded for mere inadvertence, mistake or errors of judgment." 71 Haw. at 7, 780 P.2d at 571, *citing*, Restatement (Second) of Torts § 908, Comment b. The *Masaki* court then expressed two compelling reasons for adopting a clear and convincing standard, stating

> (71 Haw. at 16, 780 P.2d at 575):
> "[P]unitive damages are a form of punishment and can stigmatize the defendant in much the same way as a criminal conviction. It is because of the penal character of punitive damages that a standard of proof more akin to that required in criminal trials is appropriate **[***75]** . . . . A more stringent standard of proof will assure that punitive damages are properly awarded."

Similarly, the Supreme Court of Arizona adopted a clear and convincing evidence standard of proof for punitive damages in **[**657]** *Linthicum v. Nationwide Life Ins. Co., supra*, 150 Ariz. 326, 723 P.2d 675. That court stated

> (150 Ariz. at 332, 723 P.2d at 681):
> "As this remedy is only to be awarded in the most egregious of cases, where

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> there is reprehensible conduct combined with an evil mind over and above that required for the commission of a tort, we believe it appropriate to impose a more stringent standard of proof."

The Arizona Court reasoned that a loose assessment of punitive damages undermines the "deterrent impact" and thus "becomes onerous not only to defendants but the public as a whole." *Ibid.*

Both the Arizona court and the Hawaii court looked to the Supreme Judicial Court of Maine's opinion in *Tuttle v. Raymond, supra*, 494 A.2d 1353, for guidance. In that action arising out of an automobile accident, the court was urged to abolish the common law allowance of punitive damages in Maine. While the **[***76]** Court refused to abolish common law punitive damages in Maine, it did "redefine and clarify the type of tortious conduct necessary to justify **[*469]** an award of punitive damages . . . and heighten[ed] the standard of proof incumbent on a plaintiff seeking such an award." *Tuttle*, 494 A.2d at 1354. The court imposed a higher burden of proof because, "although punitive damages serve an important function in our legal system, they can be onerous when loosely assessed." 494 A.2d at 1363. The court explained (*Ibid.*):

> "The potential consequences of a punitive damages claim warrant a requirement that the plaintiff present proof greater than a mere preponderance of the evidence. Therefore, we hold that a plaintiff may recover exemplary damages based on tortious conduct only if he can prove by clear and convincing evidence that the defendant acted with malice."

Use of a clear and convincing standard of proof will help to insure that punitive damages are properly awarded. We hold that this heightened standard is appropriate in the assessment of punitive damages because of their penal nature and potential for debilitating harm. Consequently, **[***77]** in *any* tort case a plaintiff must establish by clear and convincing evidence the basis for an award of punitive damages.

F.

We now turn to the matter of the effective date of our holdings with respect to punitive damages.

Until today, under Maryland common law a plaintiff in a tort case was required to establish by a preponderance of the evidence those circumstances which would authorize the allowance of an award for punitive damages. By changing this standard of proof to clear and convincing evidence, we have not overruled any particular Maryland cases on the ground that they were wrongly decided at the time. Instead, we have exercised our constitutional authority to change the common law. *See* *Murphy v. Edmonds*, 325 Md. 342, 362, 601 A.2d 102, 112 (1992); *Julian v. Christopher*, 320 Md. 1, 9-11, 575 A.2d 735, 739 (1990); *Wildermuth* **[*470]** *v. State*, 310 Md. 496, 529, 530 A.2d 275, 291-292 (1987); *Ireland v. State*, 310 Md. 328, 331-332, 529 A.2d 365, 366-367 (1987); *Kelley v. R.G. Industries, Inc.*, 304 Md. 124, 140, 497 A.2d 1143, 1150-1151 (1985), **[***78]** and cases there cited.

Recently in *Julian v. Christopher, supra*, 320 Md. at 10-11, 575 A.2d at 739, we reiterated the principle that "[o]rdinarily decisions which change the common law apply prospectively, as well as to the litigants before the court. *Williams v. State*, 292 Md. 201, 217, 438 A.2d 1301, 1309 (1981)." Thus in *Boblitz v. Boblitz*, 296 Md. 242, 275, 462 A.2d 506, 522 (1983), we changed the common law by abrogating interspousal immunity in negligence cases and held that the change was applicable to the case then before the Court and to causes of action

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accruing after the date of our decision.

Where, however, a change in the common law does not affect the elements of a cause of action but relates to requirements at a trial, we have held that the change applies "to cases where the trials . . . commence after the date of our opinion in the **[**658]** present case," *Jones v. State*, 302 Md. 153, 161, 486 A.2d 184, 189 (1985). *See also, e.g., Williams v. State, supra*, 292 Md. at 219, 438 A.2d at 1310; *Lewis v. State*, 285 Md. 705, 716, 404 A.2d 1073, 1079 (1979). **[***79]**

Therefore, the "clear and convincing" standard of proof for punitive damages in tort cases applies to the instant cases, to the other two cases heard by us the same day (Nos. 22 and 77), and to all trials commencing and trials in progress on or after the date this opinion is filed.

The overruling of both *Smith v. Gray Concrete Pipe Co., supra*, and the "arising out of contract" principle of *H & R Block v. Testerman, supra*, and *Wedeman v. City Chevrolet, supra*, is in a somewhat different category. By overruling those holdings, we are not changing the common law. Rather, for the reasons set forth in this opinion and in *Schaefer v. Miller, supra*, 322 Md. at 312-332, 587 A.2d at 498-509, we have concluded that the *Smith, Testerman* and *Wedeman* holdings were erroneous **[*471]** and were inconsistent with Maryland common law. Moreover, this Court had not previously decided whether the *Smith* and *Testerman- Wedeman* principles were even applicable to products liability cases.

When a prior case in this Court is overruled on the ground that it was erroneously **[***80]** decided, the question whether our new holding is retroactive or only prospective is governed by the principles set forth in opinions such as *American Trucking Ass'ns v. Goldstein*, 312 Md. 583, 591-595, 541 A.2d 955, 959-961 (1988); *Potts v. State*, 300 Md. 567, 576-583, 479 A.2d 1335, 1340-1343 (1984); *McClain v. State*, 288 Md. 456, 470, 419 A.2d 369, 375 (1980); *State v. Hicks*, 285 Md. 310, 336-338, 403 A.2d 356, 370-371 (1979); *Wiggins v. State*, 275 Md. 689, 698-716, 344 A.2d 80, 85-95 (majority opinion), 275 Md. at 732-741, 344 A.2d at 104-109 (dissenting opinion) (1975). *See also Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).

As set forth in the above-cited cases, two major considerations in determining whether a new holding is to be applied only prospectively are the purpose of the holding and the extent of reliance upon the overruled cases. Because the primary purpose of punitive damages is to deter defendants rather than to benefit plaintiffs, the **[***81]** purpose is served by applying today's decision retroactively. Furthermore, this is not a situation where there may have been reliance on the *Smith* case and the *Testerman-Wedeman* principle. A potential tort plaintiff does not in advance plan for or depend upon a particular punitive damages standard in a possible future tort case.

Therefore, our overruling of *Smith* and our overruling the "arising out of contract" principle of *Testerman* and *Wedeman* shall be retroactive as well as prospective. At the same time, however, a defendant in some other case may not complain about a trial court's application of *Smith* or the *Testerman-Wedeman* rule if the defendant failed to object or properly preserve the issue, and if the issue was not raised pursuant to Maryland Rule 8-131(b). *See Murphy v. Edmonds, supra*, 325 Md. at 375, 601 A.2d at 118 (no **[*472]** party questioned the applicability of the "gross negligence" standard for punitive damages, and the issue was not raised by this Court under Rule 8-131(b); therefore this Court would not apply a different standard); *Boyer v. State*, 323 Md. 558, 581 n. 15, 594 A.2d 121, 132 n. 15 (1991) **[***82]** (same). n28

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n28 Although we have in this case changed the standard of proof for punitive damages, and

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overruled the *Smith* case and the "arising out of contract" principle of *Testerman* and *Wedeman*, some of the amici briefs have suggested additional changes in the law regarding punitive damages, such as adoption of the standards discussed in *Pacific Mut. Life Ins. Co. v. Haslip*, U.S. , - , 111 S.Ct. 1032, 1044-1046, 113 L.Ed.2d 1, 21-23 (1991), requiring a punitive damages award to bear some relationship to the compensatory damages, requiring a punitive damages award to have some relationship to the plaintiff's costs or harm not covered by compensatory damages (*see* the authorities reviewed in *St. Luke Church v. Smith*, 318 Md. 337, 344-354, 568 A.2d 35, 38-43 (1990)), limiting the admissibility of net worth evidence, and other matters. We shall, however, leave any exploration of these issues for another day.

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G.

As pointed out above, **[***83]** the standards for allowing an award of punitive **[**659]** damages, articulated in this opinion, apply to the present cases. Therefore, the new standards govern the plaintiffs' claims for punitive damages against Owens-Illinois.

As discussed earlier, the punitive damages claims in the present cases were submitted to the jury under an "implied malice" standard. In addition, the jury was not instructed that the standard of proof was clear and convincing evidence. Because the jury was not properly instructed as to the standards for allowing awards of punitive damages, we remand for a new trial of the claims for punitive damages against Owens-Illinois. The parties, of course, are not limited to the same evidence produced at the original trial. Consequently, when all of the evidence in the remand trial on punitive damages is introduced, the trial court must determine, based on the standards articulated today, whether there is sufficient evidence to present the **[*473]** issue of punitive damages to the jury. If so, the trial court must properly instruct the jury as to the elements which must be shown by the plaintiffs as well as to the standard of proof. n29

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n29 Several amicus curiae briefs filed in support of the defendants in these cases present two suggestions concerning trials on the issue of punitive damages.

First they argue that evidence of prior punitive damage awards for the same "course of conduct" should be admissible to mitigate a punitive damages award. They assert that the potential for multiple awards of punitive damages violates the fundamental fairness guaranteed by the Due Process Clause of the Fourteenth Amendment. We do not agree with the argument that a refusal to allow the jury to consider prior awards of punitive damages violates fundamental fairness. Amici make no distinction between those punitive damages awards that are pending on appeal, those that have been reversed and those that have been paid. If an award of punitive damages has in fact been satisfied, the evidence of the defendant's financial means might in some cases reflect that payment. Furthermore, the admission of prior punitive damage awards would require the trial court to conduct a complicated evidentiary proceedings to determine if the defendant had in fact satisfied the punitive judgment. We decline to impose this onerous burden on the trial court.

Second, amici argue that we should impose mandatory bifurcation of the compensatory and punitive damages claims. We note that a trial court may exercise its discretion and bifurcate these issues, pursuant to Maryland Rule 2-503(b). In addition, as frequently occurs in light of Maryland Code (1974, 1989 Repl.Vol.), § 10-913(a) of the Courts and Judicial Proceedings Article (precluding evidence of a defendant's financial means until there has been a finding that punitive damages are supportable under the facts), the trial court will instruct the jury on the compensatory claims and on the defendant's potential liability for punitive damages.

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Then, once the jury has made a finding of liability on the underlying claims and has determined that there should be liability for punitive damages, the trial court will further instruct the jury concerning the calculation of a punitive damages award. This is precisely the procedure that was followed in these cases.

If there were two separate damages trials in every case, much of the evidence at the trial solely on the issue of punitive damages would duplicate the evidence admitted at the compensatory damages trial. Many of the same witnesses would have to be recalled to repeat their testimony before the jury. In light of the fact that this duplication would burden both witnesses and jurors as well as waste judicial resources, we believe that mandatory bifurcation is undesirable.

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V.

The plaintiffs argue that the trial court should not have reduced their awards by deeming that the defendants **[*474]** were entitled to contribution against Raymark, Inc., and that Anchor Packing Co. was entitled to indemnity against Raymark. Raymark was a manufacturer of asbestos.

Although Raymark was named as a defendant in the original complaint in the *Dickerson* case, this manufacturer settled early with the plaintiff Dickerson. Dickerson later filed an amended complaint, which superseded the original complaint, and which did not name Raymark as a defendant. Raymark also settled early with the plaintiff Zenobia. Raymark was never named as a defendant in the *Zenobia* case, either in the original or in any amended complaint. Sometime after these settlements but before the cross-claims trial, Raymark came under the jurisdiction of the federal bankruptcy court.

As far as the docket entries or record in these cases show, no defendant ever filed a cross-claim expressly against Raymark. Furthermore, the defendants do not in this **[**660]** Court dispute the plaintiffs' assertion that Raymark never had any notice of a cross-claim against it. Instead, the cross-claims in these cases **[***85]** were effected by a cross-claim "stipulation" providing that every defendant named in the original complaint or in an amended complaint

> "stipulate and agree that cross-claims . . . are considered to have been filed by each defendant against each other defendant. Each defendant is considered to have denied the allegations of the cross-claims filed against it."

Because Raymark was never named in the original or an amended complaint in the *Zenobia* case, Raymark could not have entered into this stipulation in the *Zenobia* case. Raymark was not a party to the *Zenobia* case, and no defendant sought to implead Raymark into the *Zenobia* case. *See* Maryland Rule 2-322 requiring service, upon a person not previously a party to the action, of a summons, the complaint, and all pleadings and motions previously filed in the action. The trial court could not exercise jurisdiction to grant a cross-claim against Raymark in the *Zenobia* case.

[*475] With respect to the *Dickerson* case, the "stipulation" apparently covers the cross-claims against Raymark for contribution because Raymark was named in Dickerson's original complaint. The plaintiff Dickerson argues that **[***86]** the trial court should not have determined that Raymark was a joint tortfeasor because Raymark had filed for bankruptcy protection at the time of the cross-claims trial.

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It is not necessary for us to determine, however, whether the trial court violated the automatic bankruptcy stay in granting the cross-claims against Raymark for contribution in the *Dickerson* case, because there was insufficient evidence in that case to find that Raymark was a joint tortfeasor. No evidence was presented against Raymark at the trial on the plaintiffs' claims, presumably because Raymark was not a defendant at that stage. In the cross-claims trial, the only evidence submitted against Raymark was the deposition of an Anchor Packing Co. employee who stated that Anchor bought sixty to seventy-five percent of its asbestos containing products from Raymark. There was no evidence presented at either trial regarding (1) the plaintiff Dickerson's exposure to Raymark's products, (2) whether Raymark's products were a substantial factor in causing the plaintiff Dickerson's injuries, or (3) whether Raymark failed to warn the plaintiff Dickerson of the dangers in its products. In order for Raymark to be adjudicated **[***87]** a joint tortfeasor, the defendants seeking contribution must prove each of the elements that the plaintiff is required to prove. There was simply no such evidence in the *Dickerson* case.

Therefore, the granting of the cross-claims against Raymark in both the *Dickerson* and the *Zenobia* cases are reversed. On remand the compensatory awards must be adjusted to reflect the reversal of the cross-claim adjudication of Raymark as a joint tortfeasor. For this reason the judgments for compensatory damages must be vacated.

JUDGMENT OF THE COURT OF SPECIAL APPEALS VACATED, AND CASES REMANDED TO THE COURT OF SPECIAL APPEALS WITH DIRECTIONS TO VACATE THE JUDGMENTS OF THE CIRCUIT COURT FOR **[*476]** BALTIMORE CITY AND REMAND THE CASES TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. PLAINTIFFS TO PAY ONE-THIRD OF THE COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS AND DEFENDANTS OWENS-ILLINOIS, INC., MCIC, INC., ANCHOR PACKING CO. AND PORTER HAYDEN COMPANY, TO PAY TWO-THIRDS OF THE COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS.

CONCURBY: McAULIFFE; BELL (In Part)

BELL (In Part)

CONCUR: McAULIFFE, Judge, concurring.

I join in all except Part IV of **[***88]** the Court's opinion. With respect to Part IV, I concur in the result. I agree that we should abandon **[**661]** the "arising out of a contract" distinction discussed in Part IV A of the Court's opinion and that we should adopt the "clear and convincing" standard of proof for the award of punitive damages in any case. Moreover, I agree with the specific test adopted by the Court for the availability of punitive damages in a products liability case.

I write separately only to point out that although the Court's opinion makes clear that "actual knowledge of the defect and deliberate disregard of the consequences" will be considered the equivalent of "evil motive," "intent to defraud," or "intent to injure" and therefore within the definition of "actual malice" in products liability cases, Court's opinion at 461, 601 A.2d at 653 it does not state whether an "equivalent" state of mind will be recognized in other non-intentional torts. The Court's opinion should not, I suggest, be interpreted as excluding that possibility.

There is a state of mind that falls just short of an intent to injure, but is sufficiently egregious to be treated as the **[*477]** legal equivalent of an intent **[***89]** to injure for criminal as well as civil purposes. Judge Moylan, writing for the Court of Special Appeals in *DeBettencourt v. State*, 48 Md.App. 522, 530, 428 A.2d 479, *cert. denied*, 290 Md. 713 (1981), provides an apt definition:

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> It is . . . that the willful doing of a dangerous and reckless act with wanton indifference to the consequences and perils involved, is just as blameworthy, and just as worthy of punishment, when the harmful result ensues, as is the express intent to kill itself. This highly blameworthy state of mind is not one of mere negligence . . . . It is not merely one even of gross criminal negligence . . . . It involves rather the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not. The common law treats such a state of mind as just as blameworthy, just as anti-social and, therefore, just as truly murderous as the specific intents to kill and to harm.

More recently, *see Robinson v. State*, 307 Md. 738, 744-46, 517 A.2d 94 (1986).

The Court's test for liability for punitive damages **[***90]** in a products liability case -- that the defendant had actual knowledge of the defect and proceeded with a conscious or deliberate disregard of the foreseeable harm resulting from the defect -- is the civil analogue of *DeBettencourt*'s "deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not." The Court thereby acknowledges that a mental state sufficiently egregious to support a conviction of murder is sufficiently egregious to support the imposition of punitive damages.

This rationale, defined precisely and shorn of terms which might suggest that a lesser state of mind would suffice, should apply with equal force in all non-intentional tort cases. A person who is actually aware that his action **[*478]** involves a clear and serious danger of substantial harm to the plaintiff or anyone in the plaintiff's class, and who unreasonably takes such action with flagrant indifference as to whether anyone will be harmed or not, should be liable for punitive damages if his conduct causes the foreseeable harm. This type of outrageous conduct, being just short of intentional harm, warrants such a sanction. **[***91]** Although the requisite conduct and state of mind will often include gross negligence, the test would not be met by a showing of gross negligence alone.

I assume that the Court does no more than to leave this discussion for another day.

DISSENTBY: BELL (In Part)

DISSENT: ROBERT M. BELL, Judge, concurring and dissenting.

As relevant to this opinion, n1 the Court's opinion today effects a significant, if not, revolutionary, change in Maryland law respecting punitive damages. In one fell swoop, we have modified the law of punitive **[**662]** damages in three respects. First, we have abolished the distinction held to exist, for purposes of determining whether punitive damages may be awarded, between torts "arising out of contract" and those that do not, overruling in the process *H & R Block v. Testerman*, 275 Md. 36, 338 A.2d 48 (1975) and *Wedeman v. City Chevrolet*, 278 Md. 524, 366 A.2d 7 (1976). In an even greater step, we have followed the trend and held that a new, higher burden of proof henceforth will apply when a party seeks punitive damages. Thus, we have joined the trend of permitting awards of punitive damages only upon greater proof than **[***92]** usually required in civil cases. We made this change in an effort "to insure that punitive damages are properly awarded."

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n1 I agree with the Court's opinion except for portions of part IV B. and C., which this opinion addresses.

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Finally, we reformulated the test for determining whether, in a given case, punitive damages may be awarded. A casualty of that formulation is *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 297 A.2d 721 (1972), the case in which "implied malice" was first recognized to be a predicate for the award of punitive damages. Stating the reason **[*479]** a new standard is necessary, the majority notes that, when decided, *Smith v. Gray Concrete Pipe Co., supra*, was inconsistent with this Court's precedents and did not attempt to analyze how a "gross negligence" standard promoted the objectives of punitive damages. Furthermore, it says that the *Smith* standard produced "inconsistent results and frustration of the purposes of punitive **[***93]** damages in non-intentional tort cases." The majority asserts that the standard "provides little guidance for individuals and companies to enable them to predict behavior that will either trigger or avoid punitive damages liability, and it undermines the deterrent effect of these awards." (footnote omitted)

In its place, relying on *Davis v. Gordon*, 183 Md. 129, 133, 36 A.2d 699, 701 (1944), the Court adopts, in non-intentional tort cases, a standard of "actual malice," *i.e.* "evil motive," "intent to injure," "ill-will," or "fraud." Because, however, in the usual products liability case, whether proceeding on negligence or strict liability, the sale of the product, defective by virtue of a failure to warn or otherwise, ordinarily will not involve evil motive, conscious intent to injure any particular person, ill will or fraud, we also adopt a variation on the "actual malice" theme: actual knowledge of the defect and conscious or deliberate disregard of the consequences. The majority deems that standard to be the equivalent of "actual malice." But the first prong of that equivalent, the majority is emphatic, must be strictly limited; it means that **[***94]** nothing less than "actual knowledge" will suffice. That there is available evidence about which a defendant "should have known" will not be sufficient to support an award of punitive damages. The most the majority will concede is that, where a "willful refusal to know" -- *i.e.*, "where a person believes that it is probable that something is a fact, but deliberately shuts his or her eyes or avoids making reasonable inquiry with a conscious purpose to avoid learning the truth," *see* concurring opinion (Chasanow, J.) in *State v. McCallum*, 321 Md. 451, 458, 583 A.2d 250, 253 (1991), is proven, the person so refusing will be charged with actual knowledge of the product's defect.

[*480] Because I share some of the majority's concerns regarding the proliferation of punitive damages claims and their amounts, I join, enthusiastically, with it in adopting two of the changes. I can see no reason for maintaining a distinction, for punitive damages purposes, between torts arising out of a contract and those that do not. Similarly, I believe that requiring proof of punitive damages by clear and convincing evidence is fair and just. Allowing punitive **[***95]** damages to be assessed against a defendant is serious business; it is right that we take steps to insure that it is not viewed lightly. Enhancing the burden of proof to a level commensurate with the seriousness of the matter to be decided is appropriate. I agree with the majority that, because the purpose of punitive damages is, at least in part, to punish, requiring a lower burden of proof for its award is inconsistent with the way we treat other serious cases.

I part company with the majority on the question of what is the appropriate standard for determining the cases in which **[**663]** punitive damages are appropriate. While I have no quarrel with requiring that, in some cases, "actual malice," characterized as "evil motive," "intent to injure", "ill will", "fraud", or, in the case of products liability actions, "actual knowledge of the defective nature of the product, coupled with a deliberate disregard of the consequences", be shown, I am opposed to excising from the standard the concept adopted by *Smith v. Gray Concrete Pipe Company* (267 Md. at 167, 297 A.2d at 731): "wanton or reckless disregard for human life," sometimes characterized as "gross negligence". **[***96]** That standard, now the old one, is a floor, not a ceiling; it sets a minimum requirement, not a maximum. Therefore, if a defendant acts with "actual malice," however, characterized, he or she will be subject to an award of punitive damages under the old

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of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Evidence > Hearsay Rule & Exceptions > Former Testimony of Unavailable Declarant

Under Fed. R. Evid. 804(b)(1), if it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party. Under these circumstances, the previous party having like motive to develop the testimony about the same material facts is, in the final analysis, a predecessor in interest to the present party.

Evidence > Hearsay Rule & Exceptions > Former Testimony of Unavailable Declarant

A "predecessor in interest" for the purposes of Fed. R. Evid. 804(b)(1) is interpreted to include any party with a similar motive to develop the testimony. Privity between the two parties is no longer required. Deposition testimony is admissible if some other party, present at the deposition, had the same opportunity and similar motive to develop the testimony as the party against whom the deposition is offered. Motive to develop the testimony, rather than privity between the parties, is the key factor" in assessing whether the parties present at the deposition are predecessors in interest for purposes of Md. R. Civ. P., Cir. Ct. 2-419(c).

Torts > Products Liability > Strict Liability

State of the art evidence is directly relevant to whether a product was defective when it was sold by a manufacturer. In a strict liability action, if a product is defective when it was sold by a manufacturer because it lacked a warning of its dangerous characteristics, although it should have had such a warning in light of the state of the art, and if the defective and dangerous product reaches the user plaintiff without substantial change, middlemen or intermediate sellers of the defective product are strictly liable to the plaintiff user just as the manufacturer is liable to the plaintiff. This principle, is fully applicable in a strict liability failure to warn case.

Evidence > Witnesses > Expert Testimony

Deposition evidence concerning what scientific and medical experts in the field knew about the dangers of asbestos is relevant to the plaintiff's attempt to prove state of the art. Such expert evidence is not irrelevant merely because these experts were employed by private companies. Because manufacturers are held to the standards and knowledge of an expert, this evidence is relevant to show what was scientifically and medically available and discoverable by other experts in the field.

Civil Procedure > Appeals > Standards of Review > Standards Generally

The admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal.

Torts > Products Liability > Duty to Warn

Generally, a manufacturer of a defective product has a duty to warn of product defects which the manufacturer discovers after the time of sale. Even if there is no duty to warn at the time of the sale, facts may thereafter come to the attention of the manufacturer which make it imperative that a warning then be given. Therefore, if a manufacturer discovers a product defect after the time of sale, the manufacturer must make reasonable efforts to issue a post-sale warning.

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standard. On the other hand, by adopting the "actual malice" standard, the majority does much more than excise a useless phrase, it places outside the scope of punitive damages eligibility numerous deserving cases, differing from cases that remain punitive **[*481]** damages eligible only in the subjective element. That change simply goes too far.

The perception is that more claims for punitive damages, involving conduct so diverse that predictability and, therefore, the ability to choose the proper conduct and avoid being culpable, than were justified, were being brought and allowed with the result that the purposes of punitive damages were being undermined. The changes proposed are for the purpose of making the awards more uniform and consistent with the historical bases for punitive damages awards: punishment and deterrence. The purposes of punitive damages are better served, it has been determined, by requiring a more stringent **[***97]** standard for assessing punitive damages and by requiring a greater burden of proof. To be sure, one of the goals of today's decision is to set a higher threshold for punitive damages eligibility. That is accomplished by changing the burden of proof, that clearly will exclude some undeserving cases, no doubt, a large number, even applying the old standard. But, by both changing the burden of proof and the standard, an even greater percentage of deserving cases, heretofore eligible for punitive damages awards, is affected. Indeed, by so doing, not only is the threshold raised, but excluded is an entire category of cases, non-intentional torts, involving, in many instances, injuries of greater severity than in cases that still qualify and, thus, not necessarily those least deserving of an award of punitive damages. And the distinction causing the exclusion is the subjective intent of the defendant. While I can agree, as I have previously indicated, to raising the threshold by raising the level of the proof required, I cannot agree that punitive damages should be awarded only in cases of "actual malice," where there is a subjective intent element. In cases where there is no actual **[***98]** malice, the totality of the circumstances may reveal conduct on the part of a defendant that is just as heinous as the conduct motivated by that actual malice and, so, for all intents and purposes is the same.

[*482] Although not intentional, *i.e.*, willful, conduct, nevertheless, may be outrageousness and extreme in the context in which it occurs, and may produce injuries commensurate with those caused by intentional conduct. In other words, conduct may be so reckless and outrageous as to be the equivalent of intentional conduct. That is precisely what *Smith v. Gray Concrete Pipe Co., supra*, held and the facts as reported in that case justified that pronouncement. It was because the facts were so egregious that the Court was motivated to opine:

> We regard a "wanton or reckless disregard for the human life" in the operation of a motor vehicle, with the known dangers and risks attendant to such conduct, as the legal equivalent of malice. It is a standard which, although stopping short of wilful or intentional injury, contemplates conduct which is of an extraordinary or outrageous character. Yet, it is both a functional and definitive test **[***99]** which, as we have noted, enjoys the virtue of having been frequently applied in this state. And if, as a test, it has been **[**664]** regarded as adequately stringent to serve as a basis for possible imprisonment, then, surely, there appears to be no valid reason for deeming it too liberal for imposing simple sanctions.

267 Md. at 167, 297 A.2d at 731-32. n2

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n2 The majority makes an extraordinary observation -- it suggests that implied malice

"provides little guidance for individuals and companies to enable them to predict behavior . . . ." If that is correct, then it is difficult to understand how, for example, manslaughter by motor vehicle, and other, similar crimes, can be upheld since among the purposes of the criminal law, like punitive damages, are punishment and deterrence.

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Permitting punitive damages when one acts with actual malice, but not when, given the totality of the circumstances, that same person acts in total disregard for the safety of others has no reasoned basis.

Consider the **[***100]** following example. A hot water pipe bursts in a crowded apartment complex quite near an open area upon which young people are playing baseball. A repair **[*483]** team dispatched to make repairs observes young people playing baseball nearby. It also sees that the area of the affected pipe is in easy reach of a baseball hit to the outfield. Nevertheless, they dig a hole, but, being unable to proceed due to the temperature of the water, suspend operations. Although aware of the young people playing in the area, they leave without warning them of the hole or its contents or in any way marking or obstructing the hole. One of the outfielders, having chased and caught a ball hit to the outfield, falls into the hole and is severely injured.

Under the new standard, if it could be proved that a member of the repair team harbored ill will toward the outfielder and, in the back of his mind, entertained a hope that the outfielder, or one of the other players, would fall in the unattended hole, then, in addition to compensable damages, the outfielder could recover punitive damages. On the other hand, if none of the members of the repair team knew any of the ball players and, in fact, harbored **[***101]** no evil motive at all, no punitive damages could be recovered, notwithstanding that they acted, given the circumstances, in total disregard of the safety of the ballplayers. I can see no reasoned difference between these scenarios. n3 The state of mind of the individual simply is not so important a factor as to permit recovery in one case and not in the other.

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n3 Were the products liability formulation of the standard applied, the case would clearly be a punitive damages eligible case.

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I am satisfied that allowing punitive damages for "wanton and reckless conduct," the test enunciated in *Smith*, serves the purposes of punishment and deterrence. Gross negligence, outrageous conduct, etc. cannot be defined in a vacuum. To have meaning, the terms must be viewed in a factual context. The conduct described in the example is not only outrageous and extraordinary, it is the *sine qua non* of reckless conduct. Such conduct should be punished. And that scenario presents a striking example of the kind of conduct a **[***102]** defendant must not engage in if he or she is to avoid paying punitive damages. The example I have proffered **[*484]** is not the only one that can be posited. There are hundreds of such cases. The long and short of it is that changing the standard for punitive damages will eliminate numbers of cases, in which, heretofore, punitive damages would have been appropriate and those cases now are eliminated not because their facts are not egregious enough to justify such an award but because other, less serious, and perhaps, undeserving, cases may also qualify for such damages. n4 With all due respect, that is not a sufficiently **[**665]** good reason to change the rules of the game. n5

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n4 To be sure, in *Davis v. Gordon, supra*, this Court did reject an invitation to assess punitive damages in negligence actions on an implied malice standard; however, in that case, punitive damages would not have been appropriate under any standard. The invitation was accepted in *Smith v. Gray Concrete Pipe Co., supra*. In that case, unlike in *Davis*, rather than deferring to the punitive and deterrent effect of the rules of the road, as opposed to a verdict in a civil case for damages, the Court, in fashioning a standard for the award of such damages, looked to the "usual precedent . . . of manslaughter by motor vehicle." 267 Md. at 167, 297 A.2d at 731, "requiring proof of gross negligence, which has been defined in this context as 'a wanton and reckless disregard for human life'." 267 Md. at 167-168, 297 A.2d at 731. **[***103]

n5 Just last week, we issued the opinion in the non-economic damages cap case, *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992). The effect of the ruling in that case is to burden the most severely injured victims of accidents, those whose non-economic damages exceed $ 350,000. *See* dissenting opinion, Chasanow, J., 325 Md. at 378, 601 A.2d at 120. Coming as it does on the heels of that opinion, this opinion, by excluding non-intentional torts from the list of punitive damages eligible cases, continues that trend.

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Insulating a defendant from an award of punitive damages except when he or she acts with actual malice, meaning with an evil intent, ill will, with intent to injure, or to defraud, provides a disincentive for that defendant to act reasonably. Since, from the standpoint of a defendant's pocketbook, it makes no difference in the award of damages, whether he or she is negligent or grossly negligent, that is, his or her conduct is extreme to a point just short of being intentional, requiring that defendant to pay compensatory **[***104]** damages for the victims's injuries is not likely to **[*485]** have a deterrent effect; it is not likely to cause him or her to consider, not to mention, change, his or her conduct.

Requiring a high threshold before a products liability case becomes punitive damages eligible presents other problems. Where a prerequisite to being assessed punitive damages is actual knowledge, *i.e.*, whether the defendant actually knows about the product's defect, there is the danger that a defendant will avoid knowledge of that defect rather than keep abreast of developments regarding the product; he or she may decide that the less he or she knows about the product, the better off he or she is. That is particularly true given the strictness of the "actual knowledge" test the Court has formulated.

Notwithstanding the characterization by the majority of the standard applicable to products liability cases as involving "actual malice", even a cursory review of the standard adopted indicates that that simply is not the case. Requiring actual knowledge of the product's defect is but one prong of the test. The other prong, that there be a conscious or deliberate disregard of the foreseeable harm resulting **[***105]** from the defect presents a different situation altogether. That concept is reminiscent of "implied malice" and, more to the point, like "gross negligence" requires definition on a case by case basis. It goes without saying that when an issue is a question for the factfinder, different factfinders will invariably reach different results from the same, or similar, evidence. Consequently, when different factfinders are presented with the same, or similar, evidence, we can anticipate that different results are likely to be reached.

Thus, although couched in terms of a unitary standard, what we really have adopted is a two-prong standard, one applicable to non-intentional torts and the other, containing an aspect quite similar to the standard we have just discarded, applicable to products liability cases. If we can tolerate case by case judicial definition of the requisite conduct in products liability cases, I can see no reason why we cannot continue to do so in non-intentional tort cases. After all, it **[*486]** is the application of the test, not its formulation, that is critical. Perhaps we should busy ourselves in developing more effective review mechanisms rather

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than attempting **[***106]** to redefine the conduct that will support punitive damages.

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Torts > Products Liability > Duty to Warn

The post-sale duty to warn requires reasonable efforts to inform users of the hazard once the manufacturer is or should be aware of the need for a warning. The fact that a manufacturer or seller has discontinued its product line, and the fact that the plaintiff was no longer exposed to its product, are not circumstances which should necessarily relieve the seller of its duty to warn. Rather, these factors are relevant to a determination of what reasonable efforts to discover the danger and to warn are required. A seller is not entitled to automatic relief from its continuing duty to warn merely because it no longer manufacturers a defective product. The facts of a particular case, such as the gravity and likelihood of harm, the number of persons affected, and the economic cost and practical problems associated with identifying and contacting current product users, should all be relevant in determining whether a manufacturer has satisfactorily discharged a post-sale duty to warn.

Civil Procedure > Relief From Judgment > Motions for New Trial

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

The granting or denial of a motion for new trial based upon the excessiveness of damages or a motion for remittitur is within the discretion of the trial court. An abuse of that discretion may be reviewed by an appellate court.

Torts > Damages > Punitive Damages

The purposes of punitive damages relate entirely to the nature of the defendant's conduct. Whether the tort occurred before or after the formation of a contractual relationship should not determine whether actual or implied malice is required for allowing an award of punitive damages. Rather, the availability of a punitive damages award ought to depend upon the heinous nature of the defendant's tortious conduct. Awarding punitive damages based upon the heinous nature of the defendant's tortious conduct furthers the historical purposes of punitive damages, punishment and deterrence. Thus, punitive damages are awarded in an attempt to punish a defendant whose conduct is characterized by evil motive, intent to injure, or fraud, and to warn others contemplating similar conduct of the serious risk of monetary liability.

Torts > Damages > Punitive Damages

In a non-intentional tort action, the trier of facts may not award punitive damages unless the plaintiff has established that the defendant's conduct was characterized by evil motive, intent to injure, ill will, or fraud, i.e., "actual malice."

Torts > Damages > Punitive Damages

In Maryland a breach of warranty suit is a contract action. Therefore, like any other contract action, punitive damages are not recoverable under a breach of warranty count.

Torts > Damages > Punitive Damages

In products liability cases the equivalent of the "evil motive," "intent to defraud," or "intent to injure," which generally characterizes "actual malice," is actual knowledge of the defect and deliberate disregard of the consequences. Therefore, in order for actual malice to be found in a products liability case, regardless of whether the cause of action for compensatory damages is based on negligence or strict liability, the plaintiff must prove (1) actual knowledge of the defect on the part of the defendant, and (2) the defendant's conscious or deliberate disregard of the foreseeable harm resulting from the defect. The knowledge component, which is necessary to support an award of punitive damages, does not mean "constructive knowledge" or "substantial knowledge" or "should have known." More is required to expose a defendant to a potential punitive

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damages award. The plaintiff must show that the defendant actually knew of the defect and of the danger of the product at the time the product left the defendant's possession or control.

Torts > Damages > Punitive Damages

For purposes of awarding punitive damages in a products liability action, actual knowledge includes the wilful refusal to know. Therefore, a defendant cannot shut his eyes or plug his ears when he is presented with evidence of a defect and thereby avoid liability for punitive damages.

Torts > Damages > Punitive Damages

For purposes of awarding punitive damages in a products liability action, the plaintiff is required to show that, armed with actual knowledge of the defective condition, the defendant consciously or deliberately disregarded the potential harm to consumers. Negligence alone, no matter how gross, wanton, or outrageous, will not satisfy this standard. Instead the test requires a bad faith decision by the defendant to market a product, knowing of the defect and danger, in conscious or deliberate disregard of the threat to the safety of the consumer.

Torts > Damages > Punitive Damages

The showing of actual malice required for a punitive damages award is the same regardless of whether the plaintiff's claim for compensatory damages was based on strict liability or on negligence. In either case, the evidence must show malicious conduct and not simply the supplying of a defective product or negligence.

Evidence > Procedural Considerations > Burdens of Proof, Presumptions & Inferences

The function of the standard of proof is to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Evidence > Procedural Considerations > Burdens of Proof, Presumptions & Inferences

Maryland requires a "clear and convincing evidence" standard of proof in cases of fraud, and in attorney disciplinary proceedings. When fraud, dishonesty or criminal conduct is imputed, something more than a mere preponderance of evidence must be produced; the proof must be "clear and satisfactory" and be of such a character as to appeal strongly to the conscience of the court.

Torts > Damages > Punitive Damages

The clear and convincing standard of proof is appropriate in the assessment of punitive damages because of their penal nature and potential for debilitating harm. Consequently, in any tort case a plaintiff must establish by clear and convincing evidence the basis for an award of punitive damages.

Governments > Courts > Judicial Precedents

Ordinarily decisions which change the common law apply prospectively, as well as to the litigants before the court. Where, however, a change in the common law does not affect the elements of a cause of action but relates to requirements at a trial, the change applies to cases where the trials commence after the date of the opinion in the present case.

Governments > Courts > Judicial Precedents

Two major considerations in determining whether a new holding is to be applied only prospectively are the purpose of the holding and the extent of reliance upon the overruled cases.

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JUDGES: Murphy, C.J., Eldridge, Rodowsky, McAuliffe, Chasanow, Karwacki and Robert M. Bell, JJ. **[***3]** McAuliffe, Judge, concurring. Robert M. Bell, Judge, concurring and dissenting.

OPINIONBY: ELDRIDGE

OPINION: [636] [*427]**

We issued a writ of certiorari in these cases to consider several important questions relating to a strict products **[*428]** liability cause of action based on failure to warn of the dangerousness of the products, and to reconsider some of the principles governing awards of punitive damages in tort cases.

The plaintiffs Louis L. Dickerson and William L. Zenobia filed in the Circuit Court for Baltimore City separate complaints seeking damages for injuries resulting from exposure to asbestos, and the complaints were consolidated for purposes of trial and appeal. Both plaintiffs have pleural and parenchymal asbestosis. At the time of the trial, the plaintiffs abandoned all theories of liability except for strict liability under § 402A of the Restatement (Second) of Torts.

The plaintiff Dickerson sought damages from Owens-Illinois, Inc., Eagle-Picher Industries, Inc., and Celotex Corp., all of which manufactured products containing asbestos, and from MCIC, Inc., and Porter **[**637]** Hayden Company, both of which supplied and installed products containing asbestos. Dickerson claimed that he was **[***4]** exposed to asbestos from 1953 to 1963 when he worked as a laborer both at the shipyard and at the steel mill owned and operated by the Bethlehem Steel Corporation at Sparrows Point, Maryland.

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The plaintiff Zenobia sought damages from the manufacturer Owens-Illinois, Inc., and the suppliers/installers MCIC, Inc., Porter Hayden Co. and Anchor Packing Co. n1 Zenobia alleged that he was exposed to asbestos while working as a painter for four months at the Bethlehem Steel Sparrows Point shipyard in 1948, while working as a pipe fitter for eighteen months at the Maryland Shipbuilding and Drydock shipyard in 1951 and 1952, and while employed as a cleanup man at the Carling Brewery for three months in 1968.

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n1 All other defendants named by both plaintiffs in the original complaints and subsequent amended complaints had either been granted summary judgment before the trial or had settled prior to or during the trial.

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[*429] The jury awarded compensatory damages to the plaintiff Dickerson in the amount of $ 1,300,000 against **[***5]** all five defendants. In addition, the jury initially determined that punitive damages were warranted against certain defendants, and, subsequently the jury awarded punitive damages against Owens-Illinois in the amount of $ 235,000, against Porter Hayden in the amount of $ 2,500, and against Celotex in the amount of $ 372,000. The jury awarded to the plaintiff Zenobia compensatory damages in the amount of $ 1,200,000 against all four defendants; subsequently it awarded punitive damages against Owens-Illinois in the amount of $ 235,000 and against Porter Hayden in the amount of $ 2,500.

Pursuant to a stipulation, each of the defendants was deemed to have cross-claimed for contribution or indemnity against all other defendants prior to trial. Anchor Packing Co., a supplier and installer of products containing asbestos, sought in the *Zenobia* case indemnity against Raymark, Inc., a manufacturer, asserting that Raymark was Anchor's primary source of asbestos containing products. Raymark, Inc., had settled with both plaintiffs before trial. The cross-claims were tried separately, after the verdicts for the plaintiffs. At the time of the cross-claim trial, Raymark, Inc., was under **[***6]** the exclusive jurisdiction of the bankruptcy court. The circuit court granted the defendants' cross-claims for contribution against all settling defendants including Raymark, Inc. The compensatory damages verdicts were reduced proportionally in light of the releases between the plaintiffs and the settling defendants. In addition, the trial court held that Anchor Packing Co. was entitled to indemnity against Raymark, Inc., in the *Zenobia* case. Thus, because of the plaintiff Zenobia's settlement with and release of Raymark, the trial court struck the jury's award against Anchor Packing.

The compensatory and punitive damages awards were appealed to the Court of Special Appeals by Owens-Illinois, Inc., MCIC, Inc., Porter Hayden, Co., Eagle-Picher Industries, **[*430]** Inc., and Anchor Packing, Co. n2 The plaintiffs appealed from the cross-claim determinations. The Court of Special Appeals affirmed all aspects of the awards for compensatory damages and affirmed the awards in the cross-claim trial. The award of punitive damages against Owens-Illinois was affirmed, and the award of punitive damages against Porter Hayden was reversed. *See* *MCIC, Inc. v. Zenobia*, 86 Md. App. 456, 587 A.2d 531 (1991). **[***7]**

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n2 Before argument in the Court of Special Appeals, the defendants Celotex Corp. and Eagle-Picher Industries, Inc., filed a bankruptcy petition. All further proceedings in the cases against Eagle-Picher Industries and Celotex Corp. were automatically stayed.

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Thereafter petitions and cross-petitions for a writ of certiorari were filed in this Court. The only manufacturer which filed a certiorari petition was Owens-Illinois. Owens-Illinois argued that it was entitled to a new trial because certain depositions were improperly admitted into evidence, and because the trial court gave an erroneous jury instruction that Owens-Illinois had a duty to warn of the hazards of asbestos after it had stopped manufacturing **[**638]** products containing asbestos. Owens-Illinois also challenged the award of punitive damages. MCIC, Inc., and Porter Hayden Co., which supplied and installed products containing asbestos, also filed certiorari petitions which raised a single issue, namely whether certain deposition testimony was erroneously admitted **[***8]** against them.

The plaintiffs filed a conditional cross-petition for a writ of certiorari, asking that the Court address the issues raised in the cross-claims trial if the Court granted the defendants' petitions. Specifically, the plaintiffs requested this Court to decide whether the bankrupt debtor Raymark, Inc., can be adjudicated a joint tortfeasor without leave of the bankruptcy court. If so, the plaintiffs argued that Raymark was not properly adjudicated a joint tortfeasor, and that, therefore, contribution, as well as indemnity in favor of Anchor Packing Co., should not have been awarded with regard to Raymark.

[*431] In response to the plaintiffs' conditional cross-petition for certiorari, the defendant Anchor Packing Co. filed a conditional cross-petition for certiorari. In the event that this Court granted the plaintiffs' conditional cross-petition, Anchor Packing Co. requested that the Court address the following contentions: (1) certain deposition testimony was erroneously admitted; (2) an instruction that Anchor had a continuing duty to warn of the hazards of asbestos after the plaintiffs' last exposure to asbestos containing products was improper; (3) the plaintiff **[***9]** Zenobia failed to show that the products which Anchor supplied and/or installed contained asbestos or that the plaintiff Zenobia was exposed to Anchor's products; and (4) because the verdict for compensatory damages was excessive and against the weight of the evidence, Anchor's motion for a new trial or remittitur should have been granted.

This Court granted all of the petitions and cross-petitions. Additional facts will be set forth in the particular parts of this opinion to which the facts relate. n3

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n3 We note that there were numerous issues which were raised and decided in the Court of Special Appeals but which were not raised in this Court. For example, in the Court of Special Appeals all of the defendants now before this Court had argued that the evidence was insufficient to show that the defendants' activities were substantial factors in causing the plaintiffs' injuries. In this Court, the defendant Anchor Packing Co. is the only defendant raising this issue, and it asserted only that "Zenobia failed to prove that Anchor's product contained asbestos or that Zenobia was regularly or frequently exposed to respirable asbestos dust from an Anchor product." (Anchor's conditional cross-petition for a writ of certiorari, p. 16).

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I.

The defendants' initial argument is that certain deposition evidence should not have been admitted because it was irrelevant and because these defendants were not present at the depositions and thus were unable to cross examine the deponents. n4 The depositions were admitted into evidence **[*432]** for the limited purpose of proving what the defendants should have known concerning the dangers of asbestos. Such knowledge is often referred to as "state of the art." The defendants do not argue that "state of the art" or an element of knowledge is not relevant in this strict liability case; rather they insist that these depositions,

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*42 U. Miami L. Rev. 803, **

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42 U. Miami L. Rev. 803

LENGTH: 11071 words

COMMENT: Punitive Damages in Florida Negligence Cases: How Much Negligence Is Enough?

NANETTE A. O'DONNELL

SUMMARY:
... Rather, the content of the warning and Cyanamid's behavior in submitting information of the product's dangerous propensities to the product's suppliers in no way suggested "even gross negligence, much less **intentional** misconduct." ...

TEXT:

[*803] I. INTRODUCTION

The issue of whether plaintiffs in negligence cases may be entitled to punitive damages has long been the subject of controversy. [1] Many commentators have argued against the propriety of punitive damages and have concluded that this category of damages should be abolished. [2] Others, without necessarily conceding the validity of punitive damages, have argued that their availability should be limited to a narrow range of conduct. [3] Notwithstanding the views of commentators, the doctrine is well entrenched in our legal system. [4] The controversy **[*804]** in the various jurisdictions thus has centered around the conduct and state of mind requirements that must be satisfied before a jury may award punitive damages. Although virtually all jurisdictions recognize the propriety of punitive damages, courts have expressed disagreement over the "quantum of culpability" [5] that must be demonstrated to support such an award. [6]

Florida has not escaped this controversy. [7] The disagreement has manifested itself in the Supreme Court of Florida's numerous attempts to formulate a standard that governs whether the issue of punitive damages should be submitted to a jury. Under the current standard, the character of negligence necessary to justify an award of punitive damages is the same as that required to sustain a conviction for manslaughter. [8] Trial courts, however, have experienced difficulty in determining what kind of conduct would satisfy this standard because, as recent cases have revealed, the standard is subject to two interpretations. Under the first interpretation, recklessness as defined in the Second Restatement of Torts would be sufficient to justify an award of punitive damages; under the second, some undefined element or aggravating circumstance must also be present. [9] Furthermore, once judges allow the jury to consider the issue of punitive damages, two difficulties arise that prevent it from effectively evaluating whether a defendant's conduct merits such damages: One problem

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The jury instruction should be revised to provide the jury with more precise guidelines to the question of what kind of conduct warrants punitive damages. The instructions should inform juries that the key factors in determining whether the defendant was **reckless** are the degree of the risk created by the defendant's conduct and the defendant's knowledge of that risk. [133] The jury instruction, for example, could include the criteria contained in the Restatement, that is, whether the defendant knew or had reason to know that his conduct created a strong probability of harm. [134] Until jury instructions on punitive damages are revised to include language that is understandable to laymen, many juries will continue to award punitive damages in an uninformed manner -- and many appellate courts will continue to reverse them. [135]

IV. CONCLUSION

The Supreme Court of Florida has failed to explain what kind of conduct actually fulfills the criminal manslaughter standard for punitive damages. The court should interpret the standard as allowing the issue of punitive damages to be submitted to the jury when the defendant acts with actual or constructive knowledge that his conduct is creating a strong probability of harm. An additional requirement of aggravating circumstances or flagrant misconduct should not be imposed because it would increase the subjectivity of punitive damages awards and thereby undermine the goals of punishment and deterrence. Furthermore, the standard jury instruction on punitive damages should be revised to conform to such an interpretation to **[*828]** ensure that juries can rationally decide whether to subject a defendant to liability for punitive damages.

FOOTNOTES:

n1. Owen, *Punitive Damages in Products Liability Litigation,* 74 MICH. L. REV. 1257, 1263-64 (1976); Comment, *Punitive Damages Insurance: Why Some Courts Take the Smart Out of "Smart Money",* 40 U. MIAMI L. REV. 979, 987 (1986).

n2. *Compare* Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline,* 11 FORUM 57, 57-63 (1975) (arguing that punitive damages should be abolished) *and* Ghiardi, *The Case Against Punitive Damages,* 8 FORUM 411, 417-19 (1972) (same) *with* Mallor & Roberts, *Punitive Damages: Toward a Principled Approach,* 31 HASTINGS L.J. 639, 647 (1980) (arguing for the retention of the doctrine of punitive damages) *and* Note, *In Defense of Punitive Damages,* 55 N.Y.U. L. REV. 303, 327-45 (1980) (same).

n3. *See* Comment, *supra* note 1, at 987 (arguing that jurists disagree over the propriety, scope, and purposes of the doctrine); *see also* Levit, *Punitive Damages: Yesterday, Today and Tomorrow,* 1980 INS. L.J. 257, 261 (arguing that it is "more constructive" to focus on "clear abuses" of the doctrine than to advocate its abolition).

n4. Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851); *see* Mallor & Roberts, *supra* note 2, at 639; Owen, *supra* note 1, at 1263. Punitive damages are currently available in all but five states. Ausness, *Punitive Damages in Products Liability,* 74 KY. L.J. 1, 4 & n.9 (1985-86). Louisiana, Nebraska, and Puerto Rico prohibit punitive damages entirely. *Id.* Massachusetts and Washington prohibit punitive damages unless a statute specifically allows their award, and Connecticut limits punitive damages to the expenses of litigation. *Id.*

n5. Comment, *supra* note 1, at 989.

n6. This disagreement is demonstrated by the variety of terms that jurisdictions have utilized in formulating their punitive damages standards. Some states, for example, have required a defendant to commit a tort "maliciously" before allowing punitive damages to be awarded. *See, e.g.,* Kirksey v. Jernigan, 45 So. 2d 188, 189 (Fla. 1950) (stating that the malice that would support an award of punitive damages can be inferred from an entire want

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of care to duty); Bennett v. Howard, 141 Tex. 101, 107, 170 S.W.2d 709, 712 (1942) (noting that the rule is almost universally recognized that punitive damages may be recovered only for injuries resulting from wrongs that are accompanied by some aggravating circumstances of malice or fraud). Other states have allowed punitive damages when "willful and wanton" conduct is involved. *See, e.g.,* Unfried v. Libert, 20 Idaho 708, 728, 119 P. 885, 891 (1911) (predicating punitive damages on the "wanton, malicious, or gross and outrageous" conduct of the wrongdoer). Finally, other states have allowed punitive damages when a defendant acts in "conscious disregard for the rights of others." *See, e.g.,* Honaker v. Leonard, 325 F. Supp. 212, 214 (E.D. Tenn. 1971) (allowing punitive damages for conduct that raises a presumption of conscious indifference to consequences); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 267, 294 N.W.2d 437, 442 (1977) (requiring "**reckless** indifference for others' rights and conscious deliberate disregard of them").

n7. *See infra* Section II.

n8. *See, e.g.,* Chrysler Corp. v. Wolmer, 499 So. 2d 823, 825 (Fla. 1986); Como Oil Co. v. O'Loughlin, 466 So. 2d 1061, 1062 (Fla. 1985); White Constr. Co. v. Dupont, 455 So. 2d 1026, 1028 (Fla. 1984).

n9. *See infra* Section IIIA.

n10. *See* Ellis, *Fairness and Efficiency in the Law of Punitive Damages,* 56 S. CAL. L. REV. 1, 3-12 (1982); *see also* Wangen v. Ford Motor Co., 97 Wis. 260, 280, 294 N.W.2d 437, 448 (1980) (stating that the doctrine of punitive damages "discourages private reprisals, restrains the strong, influential and unscrupulous, vindicates the right[s] of the weak, and encourages recourse to and confidence in the courts").

n11. These justifications find support in the notion that **reckless** conduct may be so wrongful that it should be sanctioned regardless of whether the community has defined the conduct as criminal. *See, e.g.,* Mallor & Roberts, *supra* note 2, at 644-45. One observer disagrees with this notion:

If the defendant's conduct has not been of a nature to invoke society's sanctions, if his entire community has not previously seen fit to call out for punishment of such acts, there is clearly no reason why a given jury may . . . in an emotion-ridden court room, enact and enforce punitive measures on an *ad hoc* basis.

Conrad, *Punitive Damages: A Challenge to the Defense,* 5 FOR THE DEFENSE 9, 10-11 (1964). This argument, however, overlooks the fact that a community cannot possibly foresee and precisely define all conduct that may be morally reprehensible.

n12. *See, e.g.,* Campbell v. Government Employees Ins. Co., 306 So. 2d 525, 531 (Fla. 1974) (stating that punitive damages are imposed "to serve the predominant function of deterrence and punishment"); RESTATEMENT (SECOND) OF TORTS § 908(1) (1979) (Punitive damages are "awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."); D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 204 (1973) (noting that punitive damages are usually awarded as a punishment or deterrent); *see also Wangen,* 97 Wis. 2d at 281, 294 N.W.2d at 449 (stating that an award of punitive damages "has the effect of bringing to punishment types of conduct that though oppressive and hurtful to the individual almost invariably go unpunished by the public prosecutor"). Some businesses, after weighing the risk of paying compensatory damages against the cost of changing **reckless** business practices, may accept the risk of future litigation rather than change their business practices. *See Wangen,* 97 Wis. 2d at 285-86, 294 N.W.2d at 451; *see also* Funk v. Kerbaugh, 222 Pa. 18, 70 A. 953 (1908) (per curiam) (upholding an award of punitive damages against a defendant who was involved in the construction of a railroad and decided it would be less

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expensive to pay damages than to alter its blasting method). This cost-benefit balance, however, may be affected if punitive damages are injected into the equation. The possibility that potential defendants will be liable for sums amounting to more than the amount that would be necessary to compensate injured plaintiffs might provide a strong disincentive to the continuation of such conduct in the future. *Wangen,* 97 Wis. 2d at 286, 294 N.W.2d at 451. Any benefit derived from such a business practice might be outweighed by the risk of having to pay punitive damages. The business entity, therefore, would be encouraged to change its behavior, to the ultimate benefit of the public.

n13. *See Campbell,* 306 So. 2d at 531 (stating that punitive damages help "to maintain public tranquillity by permitting the wronged plaintiff to take his revenge in the courtroom and not by self-help"); Owen, *supra* note 1, at 1282-83 (arguing that "punishment satisfies the individual's and society's need for vengeance, and thus serves to rectify some of the negative effects of prior misconduct"); *see also* Mallor & Roberts, *supra* note 2, at 650 (asserting that "[a]lthough revenge is not a civilized basis for imposing punitive damages, the prevention of private vengeance clearly is"); Note, *Exemplary Damages in the Law of Torts,* 70 HARV. L. REV. 517, 521-22 (1957) (suggesting that punitive damages serve the purpose of revenge).

n14. Ellis, *supra* note 10, at 9.

n15. Comment, *supra* note 1, at 988.

n16. *See, e.g., Wangen,* 97 Wis. 2d at 281, 294 N.W.2d at 449; *Campbell,* 306 So. 2d at 531; Ellis, *supra* note 10, at 10.

n17. Punishment and deterrence are the only justifications for punitive damages that Florida courts have accepted. *See, e.g.,* Celotex Corp. v. Pickett, 490 So. 2d 35, 38 (Fla. 1986) (holding that punitive damages "are imposed as a punishment of the defendant and as a deterrent to others"); Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545, 549 (Fla. 1981) (holding that punishment and deterrence are the only purposes of **punitive damages**); *see also* Winn & Lovett Grocery Co. v. Archer, 126 Fla. 308, 327, 171 So. 214, 221 (1936) (stating that **punitive damages** act as "smart money" against the defendant "by way of punishment or example as a deterrent to others").

n18. *See infra* Section IIIA.

n19. According to the Restatement, the actor is engaging in **intentional** conduct if he "desires to cause consequences of his act, or [if] he believes that the consequences are **substantially certain to result** from [the act]." RESTATEMENT (SECOND) OF TORTS § 8A (1965).

n20. *See id.* § 500 comment f. The Restatement defines recklessness as follows:

The Actor's conduct is in **reckless** disregard of the safety of another if he does an act or **intentionally** fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Id. § 500. Comment a to section 500 further explains that recklessness may consist of one of two types of conduct. In one, the actor knows or has reason to know of facts that create a high degree of risk of physical harm to another and deliberately proceeds to act, or fails to act, in conscious disregard of that risk. In the other type of conduct, the actor knows or has reason to know of those facts, but fails to appreciate the high degree of risk involved. Under this second category, the actor is held to the realization of the aggravated risk even though

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he himself was not aware of it. *Id.* comment a.

n21. *Id.* comment f.

n22. *Id.*

n23. *See id.* § 282 & comment e. As compared to recklessness, negligence involves conduct that subjects another to an unreasonable risk that falls below the level of a strong probability of harm. *See id.* § 500 comments f & g.

n24. *Id.* comment g.

n25. The Restatement provides that "[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his **reckless** indifference to the rights of others." RESTATEMENT (SECOND) OF TORTS § 908(2) (1979).

n26. 30 Fla. 1, 11 So. 506 (1892).

n27. *Id.* at 13-15, 11 So. at 507.

n28. *Id.* at 39, 11 So. at 513. According to the supreme court, the instruction was defective because it left the jury "to its own ideas, whatever they [were], as to what want of care constitutes the gross negligence authorizing the allowance of [punitive] damages." *Id.*

n29. *Id.* As support for this standard, the court relied on *Florida Railway & Navigation Co. v. Webster,* in which an injured train passenger sued a railroad company for failure to maintain its track. 25 Fla. 394, 416, 420-21, 5 So. 714, 718, 719-20 (1889). In *Webster,* the Supreme Court of Florida held that a jury could award punitive damages if the "negligence was so gross as to amount to misconduct and recklessness." *Id.* at 419, 5 So. at 719.

n30. The Supreme Court of Florida established the criminal manslaughter standard for punitive damages in Carraway v. Revell, 116 So. 2d 16 (Fla. 1959). For a discussion of *Carraway,* see *infra* notes 35-44 and accompanying text.

n31. 94 So. 2d 854 (Fla. 1957).

n32. *Id.* at 855.

n33. *Id.* at 858.

n34. *Id.* (emphasis added). At least two district courts of appeal differ over whether *Griffith* represents the current state of the law. *Compare* Paterson v. Deeb, 472 So. 2d 1210, 1221 (Fla. 1st DCA 1985) ("We find nothing in *Como Oil* . . . and *White Construction* . . . which suggests that the supreme court has overruled or otherwise limited the rule in *[Griffith].*"), *revs. denied,* 484 So. 2d 8 (Fla.), 484 So. 2d 9 (Fla. 1986) *with* Ten Assocs. v. Brunson, 492 So. 2d 1149, 1151 & n.1 (Fla. 3d DCA) (dicta) (disagreeing with the *Paterson* court's view of *Griffith*), *rev. denied,* 501 So. 2d 1281 (Fla. 1986).

n35. 116 So. 2d 16 (Fla. 1959).

n36. The Florida guest statute provided in part as follows:

No person transported by the owner or operator of a motor vehicle as his guest or passenger, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the gross negligence or willful and wanton misconduct of the

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owner or operator of such motor vehicle. . . .

FLA. STAT. § 320.59 (1971), *repealed by* Ch. 72-1, §§ 1-2, Laws of Fla. (1972).

n37. *Carraway,* 116 So. 2d at 18.

n38. *Id.* Section 782.07 of the Florida Statutes defines manslaughter as the "killing of a human being by act, procurement or culpable negligence of another, without lawful justification." FLA. STAT. § 782.07 (1987).

n39. *Carraway,* 116 So. 2d at 22.

n40. *Id.*

n41. *Id.* at 20 (quoting Carraway v. Revell, 112 So. 2d 71, 75 (Fla. 1st DCA), *rev'd on other grounds,* 116 So. 2d 16 (Fla. 1959)).

n42. *Id.* at 20 n.12.

n43. The punitive damages standards that the supreme court articulated in *Carraway* and Florida Southern Railway v. Hirst, 30 Fla. 1, 11 So. 506 (1892), were virtually identical. *See Carraway,* 116 So. 2d at 20 n.12; *Hirst,* 30 Fla. at 38-39, 11 So. at 513. Yet the court's interpretation of what conduct would fulfill the standards in these two cases was inconsistent. *Hirst* provided for punitive damages to be awarded in cases involving certain extreme degrees of gross negligence. *See supra* notes 26-29 and accompanying text. *Carraway,* in contrast, separated gross negligence and the negligence necessary to support an award of punitive damages into two mutually exclusive categories. *See Carraway,* 116 So. 2d at 22.

n44. The court could have confined the criminal manslaughter standard for punitive damages to guest statute cases only. Because the guest statute already required gross negligence for compensatory damages, the court had to require something more for punitive damages. Otherwise, as the *Carraway* court itself recognized, a successful claimant under the guest statute would necessarily have been entitled to recover both punitive damages and compensatory damages. 116 So. 2d at 21.

n45. *See, e.g.,* Atlas Properties, Inc. v. Didich, 226 So. 2d 684 (Fla. 1968) (upholding an award of punitive damages without making reference to either the criminal manslaughter standard or *Carraway*); *see also* Piper Aircraft Corp. v. Coulter, 426 So. 2d 1108 (Fla. 4th DCA) (same), *rev. denied,* 436 So. 2d 100 (Fla. 1983); American Motors Corp. v. Ellis, 403 So. 2d 459 (Fla. 1st DCA 1981) (same), *rev. denied,* 415 So. 2d 1359 (Fla. 1982). *But cf.* Castlewood Int'l Corp. v. LaFleur, 322 So. 2d 520, 521 n.1 (Fla. 1975) (suggesting that the lower court's opinion would have conflicted with *Carraway* if it had upheld a punitive damages award by a jury that had been clearly instructed that it could award punitive damages for gross negligence). In *Atlas,* a plaintiff brought a wrongful death action against his landlord for the loss of his daughter who drowned as a result of having had her arm caught in an uncovered pool drain. The Supreme Court of Florida held that the evidence introduced at trial was sufficient to sustain an award of punitive damages. *Atlas,* 226 So. 2d at 690. The evidence showed that the pool was unsupervised; the drain was missing a cover in violation of safety statutes; the landlord was repeatedly warned of dangers involved in operating a pool without a drain cover; the landlord failed to warn its tenants of the condition; and the landlord chose to save money rather than remedy the dangerous condition. Atlas Properties, Inc. v. Didich, 213 So. 2d 278, 279 (Fla. 3d DCA), *aff'd,* 226 So. 2d 684 (Fla. 1968). It is far from certain that these facts would have been sufficient to support a punitive damage award if *Atlas* had been decided after White Construction Co. v. Dupont, 455 So. 2d 1026 (Fla. 1984).

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n46. *See, e.g.,* Ellis v. Golconda Corp., 352 So. 2d 1221, 1225 (Fla. 1st DCA 1977), *cert. denied sub nom.* Peterson v. McKenzie Tank Lines, 365 So. 2d 715 (Fla. 1978); Florida Power Corp. v. Scudder, 350 So. 2d 106, 110 (Fla. 2d DCA 1977), *cert. denied,* 362 So. 2d 1056 (Fla.), *appeal dismissed,* 439 U.S. 922 (1978); Carter v. Lake Wales Hosp. Ass'n, 213 So. 2d 898, 900 (Fla. 2d DCA 1968).

n47. *See, e.g.,* Monty v. Hayward, 451 So. 2d 938, 938 (Fla. 4th DCA 1984), *rev. denied,* 461 So. 2d 115 (Fla. 1985); K. D. Lewis Enters. Corp. v. Smith, 445 So. 2d 1032, 1038 (Fla. 5th DCA 1984).

n48. *See* Arab Termite & Pest Control of Fla., Inc. v. Jenkins, 409 So. 2d 1039, 1042 (Fla. 1982); Ingram v. Pettit, 340 So. 2d 922, 923-24 (Fla. 1976).

n49. 340 So. 2d 922 (Fla. 1976).

n50. *Id.* at 924-25.

n51. *Id.* at 923.

n52. *Id.*

n53. *Id.* at 924.

n54. *Id.* at 923-24.

n55. *Id.* at 924-25. The supreme court relied heavily on the public policy evidenced by laws outlawing drunk driving. *See id.* at 925 & n. 12.

n56. *Id.* at 924 (emphasis added).

n57. *Id.*

n58. As Justice Sundberg argued in dissent, the majority was totally emasculating the principle of proximate causation" at least in situations such as the one at bar "where there [was] no evidence at all that the intoxication *caused* any irregularities in the operation of the vehicle." *Id.* at 926 (Sundberg, J., dissenting).

n59. *See* Carraway v. Revell, 116 So. 2d 16, 20 & n.12 (Fla. 1959). For a discussion of *Carraway,* see *supra* notes 35-42 and accompanying text.

n60. *See supra* note 55 and accompanying text.

n61. *See* Arab Termite & Pest Control of Fla., Inc. v. Jenkins, 409 So. 2d 1039 (Fla. 1982); Wackenhut Corp. v. Canty, 359 So. 2d 430 (Fla. 1978); cases cited *supra* note 45.

n62. 409 So. 2d 1039 (Fla. 1982). Wackenhut Corp. v. Canty, 359 So. 2d 430 (Fla. 1978), an earlier case, also marked a departure by the supreme court from *Carraway.* In *Wackenhut,* the plaintiff, a customer, brought a battery and negligence action against a store to recover compensatory and punitive damages for injuries he sustained when the store's security guard pulled on his colostomy bag. *Id.* at 431. At trial, the jury awarded the plaintiff $ 180,000 in punitive damages in addition to $ 50,000 in compensatory damages. *Id.* at 432. The trial judge granted the defendant's motion for a new trial on the issue of punitive damages after the plaintiff refused to accept a remittitur. *Id.* On appeal, the Third District Court of Appeal reversed the trial court and reinstated the punitive damage award. *Id.* The Supreme Court of Florida affirmed the Third District's decision, holding that the $ 180,000 punitive damage award was proper, not excessive. *Id.* at 435. Making no reference to

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Carraway, the supreme court ruled that it was proper to submit the issue of punitive damages to the jury if a tort was committed "in an outrageous manner or with fraud, malice, wantonness, or oppression," and that punitive damages were thereafter left to the jury's discretion. *Id.* at 435-36.

n63. *Arab Termite,* 409 So. 2d at 1040.

n64. *Id.*

n65. Jenkins v. Arab Termite & Pest Control Serv. of Fla., Inc., 388 So. 2d 44, 45 (Fla. 2d DCA 1980), *rev'd,* 409 So. 2d 1039 (Fla. 1982).

n66. The supreme court held that the trial judge could find the amount of the jury verdict to be excessive if it bore an insufficient relationship to the degree of the defendant's misconduct. *Arab Termite,* 409 So. 2d at 1043.

n67. *Id.* at 1041 (citing Winn & Lovett Grocery Co. v. Archer, 126 Fla. 308, 327, 171 So. 214, 221 (1936)). Relying on *Ingram,* the supreme court in *Arab Termite* also restated the "public wrong" theory of punitive damages. *Id.* at 1042. It is interesting to note that the wrongful conduct that the court confronted in *Arab Termite* -- negligent ventilation of a fumigated house -- affected the public in an entirely different manner than the wrongful act in *Ingram* -- driving while intoxicated.

n68. The *Arab Termite* standard focuses on the defendant's subjective state of mind rather than on the nature of his conduct because, in paraphrasing the *Winn & Lovett* opinion, the *Arab Termite* court failed to include from that opinion the following language that would require conduct that could be objectively ascertained: Punitive damages are awarded in cases in which torts are committed "with such gross negligence as to *indicate* a wanton disregard of the rights of others." *Winn & Lovett,* 126 Fla. at 327, 171 So. at 221 (emphasis added). This omission might have been more significant (by foreshadowing a higher standard) if it were not for the fact that the *Arab Termite* court allowed punitive damages for conduct that appeared to be at most grossly negligent. *See infra* note 70 and accompanying text.

n69. Carraway v. Revell, 116 So. 2d 16, 20 & n. 12 (Fla. 1959); *supra* text accompanying notes 41-42.

n70. As reported by the supreme court, the evidence merely showed that the pest control service used a pesticide that was not specified in the contract and that the exterminator's employees "negligently aerated the house." *Arab Termite,* 409 So. 2d at 1040. This conduct probably would not fulfill the definition of recklessness contained in the Restatement. *See* RESTATEMENT (SECOND) OF TORTS § 500 (1965). Although this evidence might suggest that the exterminator's conduct created a strong probability of harm, it does not show that the exterminator knew or had reason to know of this risk, i.e., no facts showed that the exterminator had any reason to believe that anyone would reenter the fumigated house before it was safe to do so.

n71. 455 So. 2d 1026 (Fla. 1984).

n72. The defendant White Construction Co., which owned the loader, leased it to the other defendant, Limerock Industries, Inc. *Id.* at 1027. Both defendants were closely held corporations with a common controlling shareholder. White Constr. co. v. Dupont, 430 So. 2d 915, 916 n.2 (Fla. 1st DCA 1983), *rev'd,* 455 So. 2d 1026 (Fla. 1984).

n73. *White,* 455 So. 2d at 1027.

n74. *Id.*

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n75. *Id.*

n76. *Id.* at 1028.

n77. 116 So. 2d 16 (Fla. 1959).

n78. Subsequent cases reveal that the supreme court **intended** the appellate courts to apply this standard in reviewing both actual jury awards and directed verdicts. *See, e.g.,* Como Oil Co. v. O'Loughlin, 466 So. 2d 1061, 1062 (Fla. 1985) (upholding the trial court's directed verdict on the issue of punitive damages under the criminal manslaughter standard).

n79. *White,* 455 So. 2d at 1028 (quoting *Carraway,* 116 So. 2d at 20). In adopting the criminal manslaughter standard, the court gave no indication that it **intended** to limit punitive damages to only those situations in which deaths had occurred.

n80. *Id.*

n81. *Id.* (quoting *Carraway,* 116 So. 2d at 20 n.12).

n82. *Id.*

n83. 30 Fla. 1, 11 So. 506 (1892).

n84. 116 So. 2d 16, 20 n.12 (Fla. 1959).

n85. 91 Fla. 214, 221, 107 So. 360, 363 (1926). *Cannon* involved a prosecution brought under the manslaughter statute. For the relevant text of the current version of this statute, see *supra* note 38. In attempting to define the term "culpable negligence" in the statute, the supreme court stated in dicta that the degree of negligence necessary to justify a conviction should be at least as high as that required for an award of punitive damages in a civil case. *Id.* at 222, 107 So. at 362-63.

n86. *Hirst,* 30 Fla. at 39, 11 So. at 513; *see supra* notes 26-29 and accompanying text.

n87. RESTATEMENT (SECOND) OF TORTS § 500 & comment f (1965); *See supra* notes 20-25 and accompanying text.

n88. This conclusion can be reached only after engaging in a proximate cause analysis because another actor, the driver of the loader, also contributed to the creation of the risk. The defendants' conduct, allowing the loader to be operated with defective brakes, by itself, probably did not create a risk that amounted to a strong probability of harm. Rather, the act of the driver of the loader, by driving at top speed, raised the risk to a much greater likelihood of harm. The question therefore is whether the defendants' conduct, and not that of the driver, created a strong probability of harm. To resolve this question it is necessary to consider whether the defendants could have foreseen the possibility that the driver of the loader might contribute to the risk of harm. *See* Florida Dep't of Transp. v. Anglin, 502 So. 2d 896, 898 (Fla. 1987); Gibson v. Avis Rent-A-Car Sys., 386 So. 2d 520, 522 (Fla. 1980); Waters v. ITT Rayonier, Inc., 493 So. 2d 67, 68-69 (Fla. 1st DCA 1986); *see also* RESTATEMENT (SECOND) OF TORTS § 501 (1965) (stating that the rules for determining if an actor is liable for recklessness "are the same as those which determine his liability for negligent misconduct"). Although few facts are reported in *White,* it seems reasonably foreseeable that the driver of a loader that hauls material at a mining site on occasion might drive at excessive speeds to satisfy relevant working quotas or timetables. Because the intervening cause, the employee's act of driving the loader at top speed, was reasonably

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foreseeable, the defendants' failure to maintain the loader's brakes could have created a strong probability of harm.

n89. White Constr. Co. v. Dupont, 455 So. 2d 1026, 1028 (Fla. 1984).

n90. *See supra* note 88.

n91. *White,* 455 So. 2d at 1027.

n92. *Id.* at 1028.

n93. The First District Court of Appeal rejected the argument that *White* stood for the proposition that "punitive damages cannot be recovered *even when the defendant has actual knowledge* of a hazard and yet fails to warn or take corrective action." Johns-Manville Sales Corp. v. Janssens, 463 So. 2d 242, 263 (Fla. 1st DCA 1984), *rev. denied,* 467 So. 2d 999 (Fla. 1985). Instead, the First District distinguished *White* as a case that involved "nothing more than a single isolated instance of negligence, i.e., the defendant operated the loader even though aware that its brakes were defective." *Id.* In offering this distinction, the court may have been suggesting that the defendants in *White* lacked the sufficient level of knowledge for punitive damages to be imposed.

n94. *White,* 455 So. 2d at 1029.

n95. *See* Chrysler Corp. v. Wolmer, 499 So. 2d 823 (Fla. 1986). For a discussion of *Wolmer, see infra* notes 108-14 and accompanying text.

n96. 466 So. 2d 1061 (Fla. 1985).

n97. *Id.* at 1061.

n98. *Id.* The driver permitted between 50 and 350 gallons of gasoline to be introduced into an underground tank, and as a result, the tank overflowed. *Id.* at 1061-62.

n99. *Id.* at 1062. According to the dissenting opinion, there was also evidence that the truck driver left the truck unattended while pumping was in progress "even though it was pointed out to him that the equipment and truck were leaking." *Id.* at 1063 (Shaw & Erlich, JJ., concurring and dissenting).

n100. *Id.* at 1062.

n101. Respondent's Brief on the Merits at 42, Chrysler Corp. v. Wolmer, 499 So. 2d 823 (Fla. 1986) (No. 67761).

n102. Nor would he have had any reason to know that he was creating a risk if the truck's flow meter gave him no indication that the tank was overflowing.

n103. 498 So. 2d 859 (Fla. 1986).

n104. *Id.* at 860. Acrylamide, the toxic chemical in the product, had been linked to a variety of conditions ranging from neuropathy and atasia to severe skin eruptions. *Id.*

n105. *Id.* at 862.

n106. The warning label noted that the product contained acrylamide and stated that "[r] epeated skin contact, inhalation or swallowing may cause nervous system disturbances." *Id.*

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n107. *Id.*

n108. 499 So. 2d 823 (Fla. 1986).

n109. *Id.* at 824.

n110. Chrysler Corp. v. Wolmer, 474 So. 2d 834, 839 (Fla. 4th DCA 1985), *rev'd,* 499 So. 2d 823 (Fla. 1986).

n111. 463 So. 2d 242 (Fla. 1st DCA 1984), *rev. denied,* 467 So. 2d 999 (Fla. 1985).

n112. *Wolmer,* 499 So. 2d at 824-25.

n113. *Wolmer,* 474 So. 2d at 836 (quoting Johns-Manville Sales Corp. v. Janssens, 463 So. 2d 242, 249 (Fla. 1st DCA 1984), *rev. denied,* 467 So. 2d 999 (Fla. 1985)).

n114. *Wolmer,* 499 So. 2d at 826. The court also suggested that Chrysler lacked constructive knowledge (i.e., had no reason to know) of the fuel system's danger. *See id.* (stating that "a closer reading of [the crash] test results" did not support the district court of appeal's interpretation that Chrysler was put "on notice of the fuel system defects").

n115. The extra factor may be flagrant misconduct. In *American Cyanamid,* the supreme court suggested that flagrant misconduct must be present before punitive damages may be awarded. *See* American Cyanamid Co. v. Roy, 498 So. 2d 859, 863 (Fla. 1986). In holding that an award of punitive damages was inappropriate, the court stated, "[T]he facts simply do not reflect the kind of flagrant misconduct that would justify a finding of willful and wanton disregard for the safety of persons." *Id.* (quoting American Cyanamid v. Roy, 466 So. 2d 1079, 1085 (Fla. 4th DCA 1984) (Anstead, C.J., dissenting), *rev'd,* 498 So. 2d 859 (Fla. 1986)).

A possible explanation of why the court would require flagrant misconduct in addition to the Restatement definition of recklessness may rest in the court's frequent use of the "public wrong" theory. *See, e.g.,* Chrysler Corp. v. Wolmer, 499 So. 2d 823, 825 (Fla. 1986); American Cyanamid Co. v. Roy, 498 So. 2d 859, 861 (Fla. 1986); Ingram v. Pettit, 340 So. 2d 922, 923-24 (Fla. 1976). Under this theory, a tort must create a risk to the public and not just to individuals before it merits punitive damages. Thus, the scope of the tort, or in other words, the number of people affected by it, determines whether punitive damages are appropriate. The application of the public wrong rationale, however, is extremely difficult. On the one hand, it could be argued that the conduct in *White* satisfies this theory, as the defective brakes endangered the public as a whole. On the other hand, one could argue that the loader's defective brakes posed a danger to only a limited number of construction workers. Hence, not only is it difficult to determine whether a tort affects the public, but a competent lawyer can almost always argue that a defendant exposed the public to harm in some way. In addition, it is unclear why individuals should not receive protection from **reckless** conduct to the same extent as would the public. Despite the uncertainties as to exactly what element beyond that of Restatement recklessness is necessary before punitive damages are merited under the supreme court's manslaughter standard, it is clear that a standard requiring flagrant misconduct would represent a policy statement to the lower courts that punitive damages should be awarded sparingly.

n116. *See supra* note 17 and accompanying text.

n117. It remains unclear whether the Florida Tort and Insurance Reform Act of 1986 will have any effect on the punitive damages standard. *See* Ch. 86-160, Laws of Fla. (codified in scattered sections of FLA. STAT. chs. 110, 120, 458-59, 624, 626-27, 629, 768 (1987)) [hereinafter FTIRA]. For a general discussion of the Act's provisions, see Fort, Granger,

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[*805] relates to the lack of conformity between the standard jury instruction on punitive damages and the criminal manslaughter standard, which judges apply to determine if there is any basis in the evidence to support the imposition of punitive damages. The other problem arises because even if a jury were to apply the criminal manslaughter standard, the standard, as currently formulated, lacks sufficient guidelines to inform the jury whether it may award punitive damages.

This Comment traces the development of the punitive damages standard in the context of Florida cases involving negligent conduct. Section II explores the evolution of the current punitive damages standard as articulated by the principal Supreme Court of Florida cases. Section IIIA analyzes recent cases in which the supreme court has applied the current standard. In so doing, the Section attempts to discover what kind of conduct would satisfy the standard, and considers whether the standard's most recent formulation can assist trial courts in deciding if a defendant's conduct is sufficiently culpable to create a jury question on the issue of punitive damages. Section IIIB addresses the question of which of the two interpretations of the current standard better promotes the purposes of punitive damages. Finally, Section IIIC examines the respective roles of the judge and jury in applying the current punitive damages standard.

II. EVOLUTION OF THE FLORIDA STANDARD FOR SUBMITTING THE ISSUE OF PUNITIVE DAMAGES TO THE JURY IN NEGLIGENCE CASES

Courts and commentators have suggested that punitive damages serve several purposes. [10] The two principal justifications [11] that they have articulated are that punitive damages serve to punish an individual **[*806]** for his **reckless** conduct and to deter him and others from engaging in similar acts in the future. [12] Other justifications for punitive damages look to their effect on the victim rather than on the wrongdoer. Punitive damages, for example, help to maintain public order by offering victims of serious misconduct an alternative to private acts of vengeance. [13] Closely related to the concept of vengeance is the concept of vindication. Punitive damages vindicate the rights of injured persons by acting as an "official declaration that they were wronged by the defendant." [14] In addition to these justifications, some courts have recognized the "spur-to-litigation" [15] rationale. According to this argument, the availability of punitive damages is necessary to induce injured persons to act as private attorneys general to stop misconduct. [16]

Relying upon the first two justifications -- punishment and deterrence -- Florida courts over the years have embraced the doctrine of **[*807]** punitive damages. [17] More recently, however, courts have taken a decidedly less favorable view. But before examining the evolution of the punitive damages standard in Florida, it is necessary to begin with a general discussion of the various categories of culpable behavior set out in the Second Restatement of Torts. The Restatement will also serve as a useful tort framework against which the current Florida standard will later be analyzed. [18]

Under the Restatement, culpable behavior falls into one of three categories that differ according to the extent of the risk of harm and the actor's knowledge of that risk. These categories include **intentional, reckless,** and negligent conduct. **Intentional** behavior represents the highest level of culpability and exists if the actor knows that the harm his behavior may produce is substantially certain to occur. [19] **Reckless** behavior, the intermediate level of culpability, exists if the actor knows or has reason to know of a "strong probability" of harm. [20] For recklessness, therefore, it is enough that the actor "realizes or, from facts which he knows, should realize" [21] that there is a strong probability that his behavior will result in harm. [22] The lowest degree of culpability, ordinary negligence, exists if an actor engages in **[*808]** conduct that creates an unreasonable risk. [23] Negligent conduct is characterized by mere inadvertence, incompetence, unskillfulness, or failure to take adequate precautions. [24] It is important to note, however, that the Restatement allows punitive damages to be awarded if the defendant acts recklessly. [25]

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Polston & Wilkes, *Florida's Tort Reform: Response to a Persistent Problem,* 14 FLA. ST. U.L. REV. 505 (1986) [hereinafter *Tort Reform*]. Section 52 of the Act limits the amount of punitive damages that may be awarded to three times the amount of actual damages awarded in any case based on negligence, strict liability, products liability, professional liability, or breach of warranty "that involves willful, wanton, or gross misconduct." FTIRA § 52, FLA. STAT. § 768.73(1)(a) (1987). Because the supreme court has held that gross negligence alone is insufficient to support an award of punitive damages, the legislature's inclusion of the term "gross misconduct" in the act "could be considered either excess verbiage or as modifying the standard under which punitive damages may be awarded." STAFF OF THE FLA. S. COMM. ON COMMERCE, FLA. MED. MALPRACTICE REFORM AND A REV. OF COURT-ORDERED ARBITRATION 32-33 (January 1988). In any event, the legislature's use of the term "gross misconduct" to lower the punitive damages standard is not necessarily inconsistent with the basic purposes of the Act. The principal purpose of the Act is to alleviate a crisis in the insurance industry. *See* FTIRA preamble. In furtherance of this purpose, the Act limited the amount of noneconomic damages that a claimant could recover to a total of $ 450,000. *Id.* § 59, FLA. STAT. § 768.80 (1987). The Supreme Court of Florida recently ruled that this cap violated the provision in the Constitution of Florida that guarantees access to the courts for the redress of grievances. *See* Smith v. Department of Ins., 507 So. 2d 1080, 1087-89 (Fla. 1987) (striking down section 768.80 as violating article I, section 21 of the Constitution of Florida). If the court interprets the term "gross misconduct" as lowering the punitive damages standard, any frustration of the Act's legislative **intent** by *Smith* may be partially mitigated. Some observers have argued that juries will award punitive damages under the name "mental injuries" if they cannot award them in the form of punitive damages. *See, e.g.,* Mallor & Roberts, *supra* note 2, at 645-46; Note, *supra* note 2, at 331 & n.149. With a lower punitive damages standard, juries would be more likely to award a greater amount of damages under the category of punitive damages rather than that of noneconomic, compensatory damages. The public policy of Florida prohibits insurance for punitive damages. U.S. Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1064 (Fla. 1983). Insurance companies, therefore, would end up paying less in compensatory damages overall. Thus, even though the legislature was unable to address the insurance crisis by establishing a cap on noneconomic damages, it may be successful in combating the crisis by allowing juries to move damages into a category for which insurance companies are not responsible -- punitive damages.

n118. *See, e.g.,* Rose v. Locke, 423 U.S. 48, 49 (1975) (per curiam); Bouie v. City of Columbia, 378 U.S. 347, 350-51 (1964); United States v. Harriss, 347 U.S. 612, 617 (1954); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); *see also* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 79-80 (1968) (noting the "conventional" view "that people are entitled to know what they are forbidden to do so that they may shape their conduct accordingly").

n119. *See* Ellis, *supra* note 10, at 5-6 & n.19 (arguing that one should not be punished for his act "unless it has been authoritatively declared to be wrongful before its commission or unless the actor has otherwise been given prior notice that the act is wrong"); *Tort Reform, supra* note 117, at 521 (arguing that "[d]eterrence is facilitated by predictability, which punitive damage awards are lacking"); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures,* 69 VA. L. REV. 269, 308-09 (1983) (arguing that the "greatest danger of underdeterrence arises from the fact that most punitive damages laws do not provide juries with guidance as to whether punitive damages should be awarded"). *But cf.* Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages,* 41 N.Y.U. L. REV. 1158, 1179 (arguing that "[i]t is doubtful whether there is a constitutional right to precise punitive standards").

n120. Comment, *supra* note 1, at 995 & n.65. Courts historically have struggled to minimize subjectivity in resolving controversies. The Supreme Court of the United States' attempt to define obscenity serves as a well-known example of this difficulty. *See generally*

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Miller v. California, 413 U.S. 15, 37 (1973) (Douglas, J., dissenting) ("The Court has worked hard to define obscenity and concededly has failed."); Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (arguing that the Court, in the obscenity cases, has been "faced with the task of trying to define what may be indefinable"). Yet despite the difficulty of defining obscenity, the Court has refused to abandon this task. *See Jacobellis,* 378 U.S. at 197 (Stewart, J., concurring) ("I know [hard-core pornography] when I see it."). The Court instead has endeavored to formulate standards that provide some measure of predictability. *See Miller,* 413 U.S. at 37. Similarly, the Supreme Court of Florida should adopt a punitive damages standard that affords potential litigants some degree of predictability.

n121. One may argue that so long as the supreme court maintains the Restatement standard as a threshold requirement, the defendant can be said to be on fair notice of what conduct will result in sanctions and the policy of deterrence therefore will not be compromised. Such an argument, however, fails to recognize the practical reality that upon hearing such language as "flagrant conduct" or "aggravating circumstances," the jury is likely to emphasize this part of the standard over any part that sets forth the more legalistic terminology similar to that of the Restatement: knowledge of a "strong probability of harm." *See* RESTATEMENT (SECOND) OF TORTS § 500 comment f (1965). Thus, in actual practice the standard is likely to be applied in a highly subjective manner.

n122. Indeed, such an approach shares some of the same disadvantages as the much-criticized "outrageous" standard used in cases involving the tort of **intentional** infliction of emotional distress. *See generally* Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: **Intentional** Infliction of Emotional Distress by Outrageous Conduct,* 82 COLUM. L. REV. 42, 51-54 (1982) (arguing that the outrageousness "concept . . . fails to provide clear guidance either to those whose conduct it purports to regulate, or to those who must evaluate that conduct"). Florida courts have accepted the Restatement's formulation of the elements for the tort of **intentional** infliction of emotional distress. *See* Metropolitan Life Ins. Co. v. McCarson, 467 So. 2d 277, 278-79 (Fla. 1985).

n123. By requiring aggravating circumstances in addition to Restatement recklessness, the court would be inviting another problem: the conversion of the punitive damages inquiry into a battle over semantics. This is because in alleging an aggravating factor, the plaintiff in reality may be doing nothing more than attempting to restate in a grandiose manner facts that form an essential element of the Restatement definition of recklessness. In such a case, the additional requirement of aggravating circumstances would be illusory. For example, an amicus curiae brief in the supreme court case of *American Cyanamid Co. v. Roy* suggested that, at least in the area of products liability, a "criminal coverup" is a requisite aggravating factor for an award of punitive damages. *See* Brief of Amicus Curiae Florida Defense Lawyers Association in Support of Petitioner at 2, American Cyanamid Co. v. Roy, 498 So. 2d 859 (Fla. 1986) (No. 67124). Yet a "criminal coverup" might amount simply to a failure to warn after becoming aware of a defect.

n124. *See, e.g.,* Wackenhut Corp. v. Canty, 359 So. 2d 430, 435-36 (Fla. 1978); Winn & Lovett Grocery Co. v. Archer, 126 Fla. 306, 328-29, 171 So. 214, 222 (1936); Hospital Corp. of Lake Worth v. Romaguera, 511 So. 2d 559, 564-65 (Fla. 4th DCA 1986). For a general discussion of *Wackenhut,* see *supra* note 62.

n125. Before *White,* judges and juries applied essentially the same standard. During this time, a sufficient basis for a punitive damages claim existed if a tort was committed "in an outrageous manner or with fraud, malice, wantonness or oppression." Arab Termite & Pest Control of Fla., Inc. v. Jenkins, 409 So. 2d 1039, 1041 (Fla. 1982) (quoting *Wackenhut,* 359 So. 2d at 435-36). This standard was materially the same as the standard jury instruction on punitive damages, which allows the jury to award punitive damages if it finds that the defendant "acted with malice, moral turpitude, wantonness, willfulness, or **reckless** indifference to the rights of others." FLA. STD. JURY INSTR. (CIV.) 6.12 (February 1987).

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Although the jury instruction contains reference to recklessness and the standard applied by the judge did not, this difference was inconsequential because the term recklessness is usually considered to be synonymous with the term "wantonness," a form of conduct that would create a sufficient basis for punitive damages. *See* RESTATEMENT (SECOND) OF TORTS § 500 special note (1965).

n126. *See supra* text accompanying notes 77-81.

n127. FLA. STD. JURY INSTR. (CIV.) 6.12 (February 1987).

n128. For example, although the standard jury instruction allows a jury to award punitive damages when a defendant has acted with malice, the criminal manslaughter standard does not even apply to this conduct.

n129. *See supra* notes 68-69 and accompanying text.

n130. The difficulties continue to the appellate level. Because appellate courts, like trial judges, review the evidence under the *White* criminal manslaughter standard, they will also be applying a different standard than that applied by juries.

n131. The Supreme Court of Florida authorized the Supreme Court Committee on Standard Jury Instructions and The Florida Bar to publish and distribute standard jury instructions. *In re* Use by the Trial Courts of the Standard Jury Instructions, 198 So. 2d 319, 319 (Fla. 1967). The court, however, recognized that a litigant's right to object to the use of a standard instruction has been maintained. *Id.*

n132. *See supra* Section IIIA.

n133. *See supra* notes 19-25 and accompanying text.

n134. *See supra* notes 20-22 and accompanying text. Ironically, the standard jury instruction that defines the element of "culpable negligence" in criminal manslaughter provides the jury with greater guidance than the current punitive damages instruction: "Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury." FLA. STD. JURY INSTR. (CRIM.) 68-68a (May 1987).

n135. Recently, litigants recovering punitive damages from juries often have had little success in preserving their awards on appeal. *See, e.g.,* Chrysler Corp. v. Wolmer, 499 So. 2d 823 (Fla. 1986) (upholding the trial court's granting of a renewed motion for a directed verdict after the jury had awarded $ 3 million in punitive damages); American Cyanamid Co. v. Roy, 498 So. 2d 859 (Fla. 1986) (reversing a punitive damages verdict of $ 45,000); White Constr. Co. v. Dupont, 455 So. 2d 1026 (Fla. 1984) (reversing a punitive damages award of $ 2.5 million); Pantry Pride Enters., Inc. v. Velazquez, 503 So. 2d 429 (Fla. 3d DCA 1987) (reversing an award of punitive damages); Ten Assocs. V. Brunson, 492 So. 2d 1149 (Fla. 3d DCA) (same), *rev. denied,* 501 So. 2d 1281 (Fla. 1986).

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A. *The Standard Under Early Decisions: Gross Negligence*

In the late 1800's, Florida courts permitted the recovery of punitive damages for certain degrees of gross negligence. In *Florida Southern Railway v. Hirst,* [26] a passenger on a train sued a railroad company for injuries he suffered as a result of a train collision that allegedly occurred because of the railroad company's negligence. [27] The Supreme Court of Florida held that the trial court erred in instructing the jury "simply" that gross negligence was sufficient to warrant an award of punitive damages. [28] The trial court, instead, should have "confined" the term gross negligence to that extreme degree of negligence that would be present if the "negligence [was] of a gross and flagrant character, evincing **reckless** disregard of human life . . . or a grossly careless disregard of the safety and welfare of the public." [29] Under this reasoning, punitive damages would be considered appropriate if a case involved an extreme degree of gross negligence.

Shortly before establishing the criminal manslaughter standard, [30] the Supreme Court of Florida, in *Griffith v. Shamrock Village, Inc.,* [31] again allowed punitive damages to be imposed for gross negligence. In **[*809]** *Griffith,* a tenant sued his landlord to recover compensatory and punitive damages, contending that the landlord had voluntarily assumed the duty of receiving telephone messages for his tenants and that, by failing to deliver a message, the landlord evidenced a lack of care and inattention to his duty that constituted gross negligence. [32] The supreme court reversed the trial court's directed verdict, holding that there was sufficient evidence to support this contention. [33] In what appeared to be a relaxation of the *Hirst* standard, the court stated: "[P]unitive damages can be recovered in actions such as this and . . . malice may be imputed to defendant from *gross negligence,* i.e., a want of slight care." [34]

B. *The Emergence of the Criminal Manslaughter Standard:* Carraway v. Revell

In 1959, the Supreme Court of Florida seized upon an opportunity to revise the standard that governs whether punitive damages may be awarded even though the particular case, *Carraway v. Revell,* [35] did not involve a punitive damages issue. In *Carraway,* the plaintiff sued the driver of an automobile under a Florida guest statute [36] to recover compensatory damages for the death of his son, a passenger in the vehicle. [37] The trial judge granted judgment for the defendant, reasoning that because the requirement of gross negligence under the guest statute was the same as the element of culpable negligence under the criminal manslaughter statute, compensatory damages could not be recovered unless the negligence was of a degree that would be sufficient to warrant a manslaughter conviction. [38] Under **[*810]** this view, therefore, gross negligence and culpable negligence were treated as synonymous. On certiorari, the supreme court rejected this reasoning and defined gross negligence under the guest statute as "that kind or degree of negligence which lies in the area between ordinary negligence" [39] and the kind of misconduct that would warrant a conviction for manslaughter. [40] In dicta, the court attempted to explain the distinction between gross negligence and the culpable negligence element of criminal manslaughter by noting that "the character of negligence necessary to sustain a conviction for manslaughter is the same as that required to sustain a recovery for punitive damages." [41] In its opinion, the *Carraway* court defined the type of conduct that would justify an award of punitive damages:

The character of negligence necessary to sustain an award of punitive damages must be of "a gross and flagrant character, evincing **reckless** disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that **reckless** indifference to the rights of others which is equivalent to an **intentional** violation of them." [42]

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According to the court, therefore, this standard encompassed conduct that went beyond gross negligence, which was the required degree of negligence under the guest statute.

The supreme court's decision in *Carraway* had the potential for producing far reaching effects. The case might have marked a watershed in Florida tort law by once and for all eliminating gross negligence as a basis for awarding punitive damages. [43] On the other hand, *Carraway* might have simply represented an aberration, a peculiar case limited to a now defunct guest statute. [44]

[*811] C. *The Departure from* Carraway

Following *Carraway,* Florida courts applied a number of punitive damages standards, and as a result, *Carraway* proved to have little effect on Florida tort law. [45] Although some district courts of appeal followed *Carraway* by requiring conduct more severe than gross negligence for punitive damages to be awarded, [46] others continued to allow punitive damages for extreme degrees of gross negligence. [47] Subsequently, the supreme court added to this assortment of standards by introducing the "public wrong" theory for punitive damages. [48]

In *Ingram v. Pettit,* [49] for example, the supreme court used this theory to declare drunk driving to be **reckless** conduct. [50] *Ingram* involved a suit for compensatory and punitive damages against an automobile driver who caused a collision. Although the defendant **[*812]** was legally intoxicated at the time of the accident, there was no evidence that he was operating the vehicle abnormally. [51] Citing *Carraway,* the defendant contended that punitive damages could be awarded only if there was willful conduct equivalent to that in a criminal manslaughter case. [52] The supreme court rejected this contention because it focused exclusively on semantic distinctions between degrees of negligence rather than on the policies that the distinctions were **intended** to further. [53] Instead, the court advocated an approach that emphasizes the policy of deterring future harm to the public and thus concluded that punitive damages should be awarded only in those cases in which "private injuries partake of public wrongs." [54] In light of the state's policy against highway accidents, driving while intoxicated constitutes a public menace that should be deterred by punishment. [55] The court therefore held that a jury may award punitive damages against an intoxicated driver who was involved in an accident regardless of whether there was "external proof of carelessness or abnormal driving," because driving while intoxicated "evinces, without more, a sufficiently **reckless** *attitude."* [56] Despite the court's statement to the contrary, [57] this holding appears to undermine the traditional requirement of proof of proximate cause. That is, by not requiring any external manifestation of **reckless** driving, the court was allowing punitive damages to be awarded even if a plaintiff was unable to trace the injury arising from an automobile accident to the alleged **reckless** act -- driving while intoxicated. [58] In contrast, *Carraway* suggested that the conduct allegedly warranting punitive damages must itself be of a "gross and flagrant character" before punitive damages may be properly awarded. [59] Thus, driven by social policy considerations against drunk driving, [60] *Ingram* marked a significant retreat from the *Carraway* criminal manslaughter standard.

In later cases, the Supreme Court of Florida, without making **[*813]** reference to *Carraway* or the criminal manslaughter standard, passed over the issue of when punitive damages may properly be considered by the jury. [61] In *Arab Termite & Pest Control of Florida, Inc. v. Jenkins,* [62] for example, a jury awarded the plaintiff both compensatory and punitive damages for the wrongful death of her husband. [63] The plaintiff's husband died after he reentered his fumigated house, which the defendant, a pest control service, had negligently aerated. [64] The Second District Court of Appeal reversed a remittitur granted by the trial court, holding that the trial court had erred in finding the award excessive. [65] The supreme court reversed the district court's decision, [66] and ruled that a legal basis for punitive damages existed if a tort was committed "in an outrageous manner or with fraud, malice, wantonness or oppression." [67]

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This standard represents an abandonment of the *Carraway* approach. The *Arab Termite* standard focused on the subjective state of mind of the defendant. [68] The *Carraway* standard, in contrast, **[*814]** related to objective acts and required that the defendant's conduct be "gross and flagrant" or demonstrate an "entire want of care which would raise the presumption of a conscious indifference to consequences or which shows wantonness." [69] Moreover, it is unlikely that the pest control service's conduct in *Arab Termite* would have warranted punitive damages if the court had applied the criminal manslaughter standard because the exterminators lacked sufficient knowledge of the risk created by their conduct to satisfy the knowledge element of recklessness. [70]

D. *The Return to* Carraway: White Construction Co. v. Dupont

In the 1984 case of *White Construction Co. v. Dupont,* [71] the Supreme Court of Florida attempted to resolve the controversy regarding the appropriate punitive damages standard by readopting the *Carraway* criminal manslaughter standard, and thus requiring more than gross negligence for punitive damages to be awarded. In this case, the plaintiff, an independent truck driver, sued the defendants, which respectively owned a loader and a mine, [72] to recover for injuries he sustained at the mining site. [73] The litigation arose after one of the defendant's employees drove the forty ton loader "at top speed" [74] and collided with the plaintiff's truck, causing it to run him over. [75] The evidence showed that the loader's brakes had not been working for some time and that the defendants were aware of this **[*815]** condition. [76] According to the supreme court, *Carraway v. Revell* [77] set forth the appropriate standard for the judge to apply in determining whether the jury may consider the issue of punitive damages: [78] "[T]he character of negligence necessary to sustain a conviction for manslaughter is the same as that required to sustain a recovery of punitive damages." [79] Under this standard, "something more than gross negligence is needed to justify the imposition of punitive damages." [80] In the words of the court:

The character of negligence necessary to sustain an award of punitive damages must be of a "gross and flagrant character, evincing **reckless** disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that **reckless** indifference to the rights of others which is equivalent to an **intentional** violation of them." [81]

Without articulating its reasoning, the supreme court held that although the evidence "would be sufficient to show that the [defendants] were negligent," it was insufficient, "as a matter of law," to raise a triable issue of punitive damages. [82]

III. COMMENT

A. *The Two Alternative Interpretations of the Current Standard for Submitting the Issue of Punitive Damages to the Jury in Negligence Cases*

The *White* criminal manslaughter standard cannot be understood without recognizing a distinction between the way the court verbally formulated the standard and the way the court apparently meant it to be applied. The *White* criminal manslaughter standard purports to be a more stringent standard than the earlier standards, which had allowed recovery for gross negligence. Ironically, however, the standard **[*816]** that the court articulated in *White* actually originated in an earlier case, *Florida Southern Railway v. Hirst,* [83] that had allowed punitive damages to be recovered for certain kinds of gross negligence.

White reaffirmed the punitive damages standard set forth in *Carraway v. Revell,* [84] which had adopted the standard that appeared in the criminal manslaughter case of *Cannon v. State.* [85] *Cannon,* however, borrowed its standard from *Hirst,* in which the court allowed punitive

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damages to be recovered for certain extreme degrees of gross negligence. [86] Thus, although the supreme court in *White* stated that it was adopting a standard that would permit judges to submit the issue of punitive damages to a jury in cases in which the defendant's conduct would satisfy the criminal manslaughter standard, and thus constituted more than gross negligence, the court actually defined that conduct in terms that it had earlier construed as including some degrees of gross negligence. The court's verbal formulation of the kind of conduct that would merit punitive damages in *White,* therefore, was no more stringent than the standard established in earlier cases.

The seeming contradiction between the supreme court's purported adoption of a criminal manslaughter standard and its reliance on a definition that it had previously interpreted to include gross negligence can be adequately explained only if the supreme court **intended** lower courts to follow its actions, and ignore what the court explicitly said. Thus, to figure out what the standard means, lower courts have had to watch the manner in which the supreme court has applied the standard. Yet even a focus on the court's actions provides incomplete guidance because, in promulgating the standard, the court has failed to set forth any kind of coherent approach for determining what conduct merits punitive damages. Observers and lower courts thus have been left only to guess why the supreme court arrives at any given result.

The Restatement, however, offers a useful theoretical framework that focuses the discussion of when punitive damages may be awarded **[*817]** to two factors. As discussed earlier, the Restatement defines conduct as **reckless** and therefore suitable for punitive damages if (1) it creates a strong probability of harm, and (2) the actor knows or has reason to know of this risk. [87] In analyzing the recent supreme court cases under the Restatement criteria, the question that must be addressed is whether conduct that would fulfill the Restatement definition of recklessness would be sufficient under the *White* criminal manslaughter standard to create a jury question on the issue of punitive damages, or whether something more is also required.

Of all the cases decided under the criminal manslaughter standard, *White* is the most perplexing. Because the court failed to articulate any reasoning, the case may be interpreted in two ways: As requiring only Restatement recklessness or as requiring, in addition to Restatement recklessness, some undefined element or aggravating circumstance, such as flagrant misconduct. As it was fairly likely that the defendants' conduct in *White* created a strong probability of harm, [88] the critical issue, in determining which of these two interpretations is correct, is whether the defendants knew or had reason to know of the strong probability of harm that their conduct created.

White may be interpreted as being consistent with the Restatement definition of recklessness if the defendants had no actual or constructive knowledge that their conduct was creating a high risk of harm. The facts showed that the defendants knew that the loader's brakes had not been working for some time. [89] Knowledge of this fact alone, however, would not be sufficient to establish the knowledge **[*818]** required under the Restatement (i.e., knowledge of a strong probability of harm) because the defective brakes, by themselves, probably did not create a strong probability of harm. [90] They merely created an unreasonable risk. Rather, the existence of defective brakes coupled with the fact that the loader was driven "at top speed" [91] raised the risk to a strong probability of harm.

The crucial question in determining whether the defendants were aware of a strong probability of harm, therefore, is whether, in addition to being aware that the loader's brakes were defective, they knew or had reason to know that the loader would be driven at top speed. Given the court's failure to articulate any reasoning, a definitive answer to this question is impossible. Nevertheless, the court's opinion can support an argument that the defendants were not aware that the loader would be driven at high speeds:

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The evidence in this case showed that the loader's brakes had not been working for some time, and that the [defendants] were aware of this fact. Although this evidence would be sufficient to show that the [defendants] were negligent, it is not sufficient as a matter of law, to submit the issue of punitive damages to the jury. [92]

The direct implication of this passage is that the evidence did not show that the defendants were aware that the loaders would be driven at top speed. [93] Thus, the defendants had no knowledge or reason to know that their failure to repair the brakes caused a strong probability of harm. The supreme court's denial of punitive damages was therefore consistent with the Restatement's definition of recklessness.

White, however, contains some language that supports the contrary argument: The court is requiring more than the Restatement definition of recklessness because the defendants did have knowledge that their behavior was creating a strong probability of harm. The basis of this argument lies in the court's rather cryptic statement that **[*819]** it did not need to address the defendants' argument that the trial court erred in allowing the plaintiffs' "safety expert to testify that [the defendants] were 'knowingly exposing people to injury or death.'" [94] The existence of this testimony would indicate that the record contained some evidence that could have shown that the defendants knew of a strong probability of harm. In light of this evidence, the court's ruling that punitive damages should not have been awarded as a matter of law suggests that the court was requiring something more than Restatement recklessness.

With one exception, [95] the cases decided since *White* do little to resolve the issue left open by that case: Whether the *White* criminal manslaughter standard requires something more than the Restatement's requirements for recklessness before the judge may submit the issue of punitive damages to the jury. The court in these cases did not reach this question because the conduct at issue did not meet even the threshold of the Restatement requirements.

The conduct in *Como Oil Co. v. O'Loughlin,* [96] the first case that the Supreme Court of Florida decided after *White* that is relevant to this issue, rose, at most, to the level of gross negligence. In *Como Oil,* the plaintiff sought punitive damages against an oil company for injuries she suffered in a gasoline explosion and fire that resulted from the negligence of the defendant's employee. [97] The explosion occurred after the employee, a truck driver, overfilled a gasoline storage tank. [98] The evidence merely showed that the driver failed to check the amount of gasoline in the tank before pumping the gasoline and that he "watched the flow meter on the truck rather than the actual filling operation." [99] The supreme court held that this evidence did not satisfy the *White* criminal manslaughter standard. [100] Although the court did not fully articulate its reasoning, it appears certain that the driver's conduct failed to satisfy the Restatement's definition of recklessness. The driver was "simply careless," [101] and thus had no knowledge **[*820]** that his conduct was creating a risk of harm. [102]

Similarly, the Supreme Court of Florida, in *American Cyanamid Co. v. Roy,* [103] was unable to answer whether the *White* criminal manslaughter standard requires something more than Restatement recklessness because the conduct involved in that case did not create a strong probability of harm. In *American Cyanamid,* the plaintiff brought suit against Cyanamid to recover compensatory and punitive damages for injuries he suffered after being exposed to a toxic chemical contained in one of the company's products. [104] The supreme court rejected the argument that Cyanamid's negligence in failing to warn users of the chemical's dangers rose to the level necessary to support an award of punitive damages. [105] Rather, the content of the warning [106] and Cyanamid's behavior in submitting information of the product's dangerous propensities to the product's suppliers in no way suggested "even gross negligence, much less **intentional** misconduct." [107] Under a Restatement analysis, it appears that if Cyanamid had apprised potential users of the product's dangers, the risk would have been reduced to something less than a strong probability of harm. Cyanamid's conduct therefore did not even meet the Restatement's definition of recklessness.

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Chrysler Corp. v. Wolmer, [108] the most recent of the supreme court's decisions concerning the appropriate punitive damages standard, may offer some insight as to what the *White* criminal manslaughter standard requires. The basis of the court's jurisdiction in *Wolmer* suggests that the criminal manslaughter standard requires something more than Restatement recklessness, but the court's manner of deciding the merits of the case reduces the likelihood that this is a definitive interpretation. In *Wolmer,* the plaintiff, an owner of a Chrysler automobile, brought a wrongful death action against Chrysler for the loss of his wife, alleging that the company's negligent design of the vehicle's fuel system caused his wife's death in an automobile accident. [109] The Fourth District Court of Appeal reversed the **[*821]** trial court's directed verdict on the issue of punitive damages. [110] The supreme court granted review under its conflict jurisdiction, finding that because the Fourth District applied a standard that the First District had formulated in *Johns-Manville Sales Corp. v. Janssens,* [111] the lower court's opinion "expressly and directly conflict[ed]" with the court's criminal manslaughter standard cases of *Como Oil* and *White.* [112]

The source of conflict, the *Johns-Manville* standard, bears a close resemblance to the Restatement recklessness standard. The *Johns-Manville* standard allows punitive damages if the plaintiff can show that the manufacturer had "knowledge that its product [was] inherently dangerous . . . and that its continued use [was] likely to cause injury or death, but nevertheless continue[d] to market the product." [113] Thus, the *Johns-Manville* standard, like the Restatement, requires knowledge of a likelihood of harm. By ruling that this standard conflicts with *White,* the court in effect suggested that the criminal manslaughter standard requires conduct more severe than Restatement recklessness. The court, however, by deciding on the merits that Chrysler was not liable for punitive damages because it lacked actual knowledge of the risk, [114] was relieved of the necessity of explaining exactly how the *Johns-Manville* standard conflicted with *White,* that is, what element is needed in addition to knowledge of a likelihood of harm. Consequently, Florida law today remains unclear as to whether the *White* criminal manslaughter standard requires something more than traditional Restatement recklessness. If in fact such an additional element is required, its identity remains uncertain. [115]

[*822] B. *An Assessment of the Two Interpretations and the Policies Underlying Punitive Damages*

In Florida, the policies that justify the award of punitive damages in negligence cases are punishment and deterrence. [116] These policies would be frustrated significantly if the Supreme Court of Florida adopts a standard that requires, in addition to Restatement recklessness, some kind of flagrant conduct or other aggravating circumstance because such an additional requirement would inject greater subjectivity and unpredictability into the punitive damages inquiry. Accordingly, the court in future cases should construe the *White* criminal manslaughter standard as requiring only knowledge of a strong probability of harm, not aggravating circumstances, to support an award of punitive damages. [117]

[*823] The policies of punishment and deterrence are furthered only if persons are able to avoid conduct that would lead to sanctions. One of the most deeply rooted notions in American jurisprudence is that punishment for an act is unfair if a person is not on notice that the act is wrong. [118] Thus, the clearer the punitive damages standard, the fairer it is to impose punishment. Moreover, the deterrent value of a sanction is likely to be diminished if persons are not put on reasonable notice that their conduct will result in punishment. Again, the clearer the punitive damages standard, the more effective it is as a deterrent. [119] By offering some degree of notice and predictability, the Restatement standard for recklessness is better suited to promote the policies of punishment and deterrence than a standard that focuses on an undefined requirement of aggravating circumstances or flagrant misconduct.

Although the Restatement, concededly, does not completely **[*824]** eliminate subjectivity

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as to what conduct is sufficiently culpable to merit punitive damages, [120] it does provide guidelines that give some measure of predictability. The Restatement regime focuses on two factors -- the actor's knowledge and the degree of risk. These factors are quantifiable, although imprecise, and allow a person to avoid engaging in conduct that he knows is likely to create a serious risk of harm to others. In contrast, a standard that focuses on aggravating circumstances or flagrant misconduct is subjective to a far greater degree. [121] In applying such a standard, a judge would have little restraint beyond the dictates of his conscience in deciding whether a defendant's conduct strikes him as egregious or in some other way more aggravated than recklessness. [122] In light of its adverse effect on the policies of punishment and deterrence, [123] a requirement under the **[*825]** *White* criminal manslaughter standard that some aggravating circumstance exist before the judge may submit the issue of punitive damages to the jury should not be imposed.

C. *The Roles of the Judge and the Jury in Applying the Criminal Manslaughter Standard*

Once the trial judge determines that there is a sufficient basis in the evidence to support a demand for punitive damages, he then presents the issue to the jury. [124] Juries, however, face two major obstacles that prevent them from effectively evaluating whether a defendant's conduct warrants punitive damages. First, in considering whether a defendant's conduct merits punitive damages, the jury applies a different standard from the one that the judge applies to determine whether there is a basis for a punitive damages claim. Second, even if the jury were to apply the same standard as does the judge (i.e., the *White* criminal manslaughter standard), it would be hampered by the standard's lack of guidelines as to whether the defendant's conduct merits punitive damages.

The *White* criminal manslaughter standard and the standard jury instruction on punitive damages represent markedly different formulations of when punitive damages are justified. [125] Since *White* was decided, a judge allows the jury to consider the issue of punitive damages if, after viewing the evidence in a light most favorable to the plaintiff, he finds that the character of negligence exhibited by the **[*826]** defendant was equivalent to the type of negligence that would justify a conviction for manslaughter. [126] If a judge finds such a basis to be present, he then instructs the jury that it may award punitive damages if it finds that the defendant "acted with malice, moral turpitude, wantonness, willfulness, or **reckless** indifference to the rights of others." [127] In addition to representing entirely different formulations [128] of whether punitive damages may be awarded, the two standards focus on entirely different criteria. Unlike the jury instruction, which relates to the defendant's subjective state of mind, the criminal manslaughter standard focuses on acts of the defendant and the consequences of those acts. [129]

Because the jury is instructed to apply a different standard, it never receives the opportunity to fulfill its traditional role as the trier of fact: to decide whether the defendant's conduct in fact warrants punitive damages. In other words, a jury might have reservations about awarding punitive damages if it were able to consider the defendant's conduct under the criminal manslaughter standard. [130] Therefore, to restore the jury to its proper role as the ultimate finder of fact, the Florida standard jury instruction on punitive damages should be revised to conform to *White.* [131]

Even if the standard instruction were revised to conform to the *White* criminal manslaughter standard, another obstacle would still confront the jury. The jury would continue to lack guidelines that would permit it to properly decide whether the defendant's conduct merits punitive damages. As discussed above, the trial judge himself cannot be entirely certain what the standard means because recent supreme court cases can be subjected to two interpretations. [132] Yet the difficulties facing juries are even greater than those facing trial judges in applying *White.* Unlike a judge, a jury is unable to compare **[*827]** the conduct before it to conduct in prior cases. Rather, the jury's only tool is the vague language of the criminal manslaughter standard.

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ARTICLE: **PUNITIVE DAMAGES** SYMPOSIUM: **Punitive Damages** Reform: The **Case of Alabama**

George L. **Priest** *

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SUMMARY:
... This paper addresses the modern grounds for **punitive damages** reform. ... During the 1993-94 fiscal year, an extraordinary 95.6% of tort cases filed in Bullock County included a **punitive damages** claim; 78.8%, in Lowndes County. ... Forty years ago, in a tort law regime that provided little in the way of consumer remedies, it might have been believed that ever-increasing civil liability verdicts, including **punitive damages** verdicts, would serve to reduce the number of accidents. ... Again, research of my own currently in progress shows that low-income consumers, if injured, are less likely to seek an attorney; even with an attorney, they are less likely to sue; less likely to recover; and, again by definition, less likely to recover large damage judgments since their lost income is typically low and pain and suffering awards, which are highly correlated with lost income, equally low. ... The Court found that a $ 2 million **Alabama punitive damages** verdict in a case involving a $ 6,000 compensatory economic loss to be constitutionally excessive. ... While the **punitive damages** experience in **Alabama** may appear unusual, there is always the potential for a substantial **punitive damages** verdict in any jurisdiction. ...

TEXT:
[*825]

This paper addresses the modern grounds for **punitive damages** reform. [1] It focuses on particular problems relating to **punitive damages** verdicts in **Alabama,** but the issue extends substantially beyond the **Alabama** case. **Punitive damages** verdicts are relatively infrequent in many jurisdictions. [2] From time to time, however, an occasional jury can render an enormous **punitive damages** verdict even in a jurisdiction where **punitive damages** awards are infrequent. Oftentimes, the trial or an appellate court will remit such a verdict, and the pattern of **punitive damages** infrequency will be restored. There is reason to believe, however, that in recent years the **Alabama** experience has been substantially different. As I shall describe in more detail below, beginning in the early 1990s, **punitive damages** verdicts increased in **Alabama** both in frequency and magnitude. While some of these verdicts were remitted in part on appeal, [3] there was no clear signal from the **Alabama**

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In my view, a merely procedural approach to the **punitive damages** problem will never be successful. Indeed, we have stark evidence of its failure. In 1991 in the Haslip case, the Supreme Court specifically approved the procedure for reviewing **punitive damages** verdicts for excessiveness adopted by the **Alabama** Supreme Court. [40] Viewing the **Alabama** procedure on its face, few can contest **[*838]** that the review procedure appears reasonable. [41] In practice, however, as the Gallant case proves and as the statistics from the rural **Alabama** counties strongly suggest, the **punitive damages** problem in **Alabama,** under the procedures approved by the United States Supreme Court, has grown to epidemic proportions.

The Court's recent BMW opinion, however, strikes out in a new direction. The Court found that a $ 2 million **Alabama punitive damages** verdict in a case involving a $ 6,000 compensatory economic loss to be constitutionally excessive. [42] The Court adopted three new metrics for the evaluation of excessiveness: the relation between the **punitive damages** verdict and 1) the "degree of reprehensibility" of the underlying tortious action; 2) the magnitude of compensatory losses; and, 3) criminal statutory penalties for similar offenses. [43] These metrics are likely to be far more successful in constraining **punitive damages** verdicts than the vague and overlapping "factors" under which **Alabama** courts previously reviewed **punitive damages** verdicts. [44]

Nevertheless, there remain serious questions as to how effective this form of comparison will prove in practice. Reprehensibility is a very vague concept and hardly susceptible of careful measurement. Similarly, the mathematical relationship between the compensatory and **punitive damages** elements is an odd judicial principle. Is there a principled reason that a ratio of 1 to 5 or 1 to 4 is constitutionally suspect in comparison to a ratio of 1 to 2 or less? Moreover, if the purpose of **punitive damages** is to deter behavior that is morally reprehensible, the relevance of the compensatory loss is not immediately evident unless an intent to affect the magnitude of loss was a specific element of the reprehensible action. Many totally inadvertent or accidental actions generate huge loss; many repugnant and reprehensible actions generate little harm, measured solely in compensatory terms of lost income, needed expense, and pain and suffering. Perhaps the most helpful metric is the relationship to statutory criminal penalties for comparable offenses. Here, legal analysis can be employed with some precision, though the question then arises why, given the existence of some criminal penalty for comparable action, punishment should be delegated to a civil jury through a **punitive damages** verdict in any case.

Upon reflection, it is not surprising that the Supreme Court has found it difficult to deal with excessive **punitive damages.** The Supreme Court's job, in general, is to define rights. Few would contest--I do not contest--that **punitive damages** may be appropriate in some contexts. I would not support a constitu- **[*839]** tional right of immunity from **punitive damages** (though that may well be an important improvement over the current state of the law).

What is needed for **punitive damages** reform is a prudential judgment of the appropriate cap or limit to **punitive damages** that will allow some room for punishing egregious behavior but constrain the deleterious effects of unlimited **punitive damages** judgments on consumers. For example, the proportional limit of three times economic losses or $ 250,000 in the recently enacted products liability legislation is a prudential judgment of that nature. But that prudential judgment is a uniquely legislative, not judicial, exercise. Regrettably, the President vetoed the legislation.

With respect to reform by the states, the question is somewhat different. **Punitive damages** verdicts implicate both interstate and foreign commerce in a manner that only Congress can address. Some have argued that a state without a significant manufacturing or interstate service sector could actually benefit its citizens by adopting an expansive civil liability regime

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at the expense of citizens of other states. **Alabama** may well be an example of this phenomenon. Congress is in the best position to provide a solution to this issue.

Secondly, there is one further effect of our modern **punitive damages** regime that should not go unnoticed: the effect on the competitiveness of American manufacturers and producers. Some have argued that large **punitive damages** verdicts in the U.S. are neutral with respect to competitiveness since 1) foreign courts do not award such verdicts against U.S. producers with respect to sales abroad; and, because 2) foreign producers are equally subject to such verdicts for sales in the United States. (Note that BMW is a German corporation.) Thus, for United States sales, foreign producers, just like United States producers, must add expected **punitive damages** and joint and several liability verdicts into the prices of products and services. (It is often lost on these observers that an increase in prices on account of **punitive damages**--even if operating neutrally--is not an affirmative argument on behalf of consumers.)

This analysis, however, is only partially correct. Increasingly, foreign courts are refusing to enforce extraordinary judgments from U.S. courts against foreign defendants. For example, the German Federal Court of Justice (Germany's highest court for civil and commerical matters) recently refused to enforce a $ 400,000 **punitive damages** verdict obtained in an American court by an American plaintiff against a German defendant on the grounds that the **punitive damages** verdict was inconsistent with German public policy. [45] In the same case, an intermediate United States court already had reduced the pain and suffering damages component from $ 200,000 to $ 70,000 on the same grounds. [46] **[*840]**

Foreign judgments of this nature should be alarming both to Congress and to United States courts. First, they are strong evidence that the current course of American law does not command widespread assent among reasoned commentators--yet another grounds for general **punitive damages** reform. Secondly, such judgments suggest an increasing competitiveness problem facing United States producers here in the United States. To the extent that United States **punitive damages** verdicts must be enforced abroad and foreign courts refuse to enforce them, foreign producers need not add the costs of the American civil justice system, including **punitive damages** and excessive pain and suffering awards, into the prices of products and services sold in the United States. Thus, foreign producers can underprice American producers in sales to American consumers here in the United States.

Ironically, although American producers and their employees are harmed by this effect, American consumers benefit because they can obtain products and services at lower prices without the effects of our **punitive damages** verdicts built in. [47] Put slightly differently, the refusal of foreign courts to enforce large **punitive damages** or pain and suffering awards from American courts represents a type of tort reform, regrettably however, only available--prior to **punitive damages** reform--to foreign, rather than to United States, producers.

These various reasons support an argument for widespread **punitive damages** reform. While the **punitive damages** experience in **Alabama** may appear unusual, there is always the potential for a substantial **punitive damages** verdict in any jurisdiction. In addition, there is the potential for **punitive damages** verdicts to increase in magnitude and frequency so as to become routine, as I believe to be the case in **Alabama** prior to BMW of North America, Inc. v. Gore. It is too early to observe any effect of the BMW decision, and it is only speculation whether the seeming increase in precision of the three metrics defined by the Supreme Court can change the **punitive damages** environment in **Alabama.** If not, then some more drastic prudential judgment will be necessary to reduce the harm to consumers from excessive **punitive damages** awards.

FOOTNOTES:

[n1] This paper is an expansion of testimony presented to the Senate Committee on the Judiciary on **Punitive Damages** Tort Reform in April 1995. It presents some results of

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empirical work conducted since that presentation and discusses the recent U.S. Supreme Court opinion in BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1966).

n2 See Michael Rustad, In Defense of **Punitive Damages** in Products Liability: Testing Tort Anecdotes with Empirical Data, 78 Iowa L. Rev. 1 (1992).

n3 For a recent example, see Life Ins. Co. of Georgia v. Johnson, No. 1940357, 1996 WL 202543 (**Ala.** Apr. 26, 1996) ($ 12.5 million **punitive damages** verdict remitted to $ 5 million); but cf. Foster v. Life Ins. Co. of Georgia, 656 So. 2d 333 (**Ala.** 1994) ($ 250,000 **punitive damages** verdict by trial judge vacated by **Alabama** Supreme Court reinstating jury's $ 1 million **punitive damages** award).

n4 For the extraordinary effects that repeated **punitive damages** verdicts have had on tort claims, see infra text accompanying notes 16-20.

n5 See, e.g., Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032 (1991); TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S. Ct. 2711 (1993) (U.S. Supreme Court approval of **Alabama punitive damages** review procedures).

n6 BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996).

n7 Id.

n8 W. Page Keeton et al., Prosser and Keeton on the Law of Torts 9 (5th ed. 1984).

n9 See, e.g., Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Stud. 399 (1973); **George** L. **Priest,** Selective Characteristics of Litigation, 9 J. Legal Stud. 399 (1980).

n10 These statistics are derived from a study by Forrest Latta, a summary of which formed the basis for the **Alabama** Supreme Court's statistical appendix in Life Ins. Co. of Georgia v. Johnson, No. 1940357, 1996 WL 202543 (**Ala.** April 26, 1996).

n11 See Rustad, supra note 2.

n12 All statistics presented are those for non-wrongful death cases only. **Alabama** procedures provide that the only measure of damages for wrongful death is **punitive damages.** It may well be appropriate to include wrongful death awards in this study both because the **Alabama** standards for wrongful death recoveries are equivalent to the standards for **punitive damages** recoveries in other cases and because the procedure for trial and appellate review is the same. See Green Oil Co. v. Hornsby, 539 So. 2d 218 (**Ala.** 1989). Nevertheless, the unusual character of **Alabama** verdicts in comparison to those of other states is best seen if the **Alabama** wrongful death experience is excluded since **Alabama** wrongful death procedures differ from those of virtually all other states.

n13 Gallant v. Prudential Life Ins. Co., Barbour County, AL, CV-93-50 (1994). See discussion infra text accompanying notes 27-36.

n14 See Rustad, supra note 2.

n15 **George** L. **Priest,** Private Litigants and the Court Congestion Problem, 69 B.U. L. Rev. 527, Table 1 at 540 (1989).

n16 These data were collected under a research project organized and directed by myself and Professor James R. Barth, Auburn University, and conducted by Cornerstone Research, Menlo Park, California, for the case Gallant v. Prudential. Data are available from the author.

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n17 See **George** L. **Priest,** The Role of the Civil Jury in a System of Private Litigation, 1990 U. Chi. Leg. Forum 161 (1990) (65% of all jury trials in the Chicago trial courts deal with auto accidents).

n18 Indeed, I present an anecdotal case--though a telling one--infra text accompanying notes 27-36.

n19 These statistics are taken from **Alabama** Dept. of Commerce, 1994 Economic Abstract of **Alabama** at Tables 5-1, 5-4, 5-7, 5-13, 5-17, 9-7, 9-11, 13-4, 13-5, 13-6, 13-7, 13-9.

n20 This figure again excludes wrongful death awards. See supra note 12. If such awards were included, the amount equals $ 109 million, equal to $ 26 per capita. See Life Ins. Co. of Georgia v. Johnson, No. 1940357, 1996 WL 202543 app. (**Ala.** Apr. 26, 1996).

n21 For a discussion of the development of modern tort law, see **George** L. **Priest,** The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law, 14 J. Legal Stud. 461 (1985).

n22 William M. Landes & Richard A. Posner, The Economic Structure of Tort Law (1987); Richard A. Posner, Economic Analysis of Law (4th ed., 1992); Steven Shavell, Economic Analysis of Accident Law (1987).

n23 See sources cited supra note 22. Of course, the latter is also a justification for the class action.

n24 See **George** L. **Priest,** The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521 (1987).

n25 Again, I have endorsed limits on pain and suffering awards in contexts of expanded liability, though this issue is somewhat beyond the focus on **punitive damages** here. See id.

n26 Joseph E. Stigletz, Economics of the Public Sector 347 (1986).

n27 Gallant v. Prudential Life Ins. Co., Barbour County, AL, CV-93-50 (1994) [hereinafter cited as Gallant].

n28 Id.

n29 See generally American Law Institute, Restatement of Restitution and Unjust Enrichment (1936).

n30 Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032 (1991). But see BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996), discussed infra.

n31 Gallant (mem. op.).

n32 BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996) (striking down a **punitive damages** verdict awarded by an **Alabama** court).

n33 Testimony of Professor James R. Barth, Auburn University in Gallant, supra note 27. Copy on file with author.

n34 Id.

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n35 Gallant, supra note 27, Trial Transcript at 647, April 6, 1994.

n36 See supra text accompanying note 19.

n37 See, e.g., BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996); Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994); TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S. Ct. 2711 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 449 U.S. 1, 111 S. Ct. 1032 (1991).

n38 Haslip, 499 U.S. at 1, 111 S. Ct. at 1032.

n39 Oberg, 114 S. Ct. at 2331.

n40 Haslip, 499 U.S. at 1, 111 S. Ct. at 1032.

n41 The **Alabama** review procedure consists of evaluating a **punitive damages** verdict according to a wide and seemingly comprehensive list of relevant "factors," such as the "culpability" of the defendant's action, the relationship of the verdict to the harm imposed, etc. See Davis Law & Rachel Sanders Cochran, **Punitive Damages** and Pre-Verdict Procedures, Life of Georgia: A Bold New Frontier, July 1996 The **Alabama** Lawyer 225.

n42 BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996).

n43 Id.

n44 On this point, see in particular, the concurring opinion of Justice Breyer in BMW.

n45 Judgment of June 4, 1992, BGH Gr. Sen. Z., discussed in **George** L. **Priest,** Lawyers, Liability and Law Reform: Effects on American Economic Growth and Trade Competitiveness, 71 U. Denver L. Rev. 115, 146-47 (1993).

n46 Id.

n47 The June 4, 1992 judgment, discussed supra notes 45-46, involved a personal assault, rather than harm caused in the context of product or service use, though the German Court made clear that its opinion was meant to extend to these broader effects. Of course, there is no benefit to American citizens where **punitive damages** verdicts go unenforced in the context of personal assault.

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Supreme Court or any court of appeal as to what limits there might be to continued **punitive damages** awards. Perhaps as a consequence, the frequency and magnitude of **punitive damages** awards continued to escalate and to dramatically affect the entire civil dispute process. [4] As a consequence, **punitive damages** claims and awards have become a routine feature of the **Alabama** civil liability regime.

This paper addresses the **Alabama** phenomenon. While the **Alabama** experience, to my knowledge, is unique--there are no studies showing civil jury verdicts of this magnitude in any other American jurisdiction--there is no reason to believe that the phenomenon is unique to **Alabama** jurisprudence. Indeed, oddly enough, the procedures for trial and appellate review of **punitive damages** verdicts had been developed in the caselaw more completely for **Alabama** than for any other United States jurisdiction. [5] Instead, the recent **Alabama** experience **[*826]** seems reflective, more generally, of the consequences of permissive appellate review of jury trial **punitive damages** verdicts. As suggested by the **Alabama** experience, **punitive damages** verdicts can begin to snowball. As citizens see large **punitive damages** verdicts awarded in increasing numbers of cases, expectations and understandings begin to change. The large **punitive damages** verdict becomes the norm, rather than the exception. This paper documents that experience in **Alabama** and discusses the effects of such judgments on deterrence and on the welfare of consumers.

Within the past weeks, the United States Supreme Court has once again reviewed an **Alabama punitive damages** verdict and, for the first time, determined that the verdict and, to some extent, current **Alabama punitive damages** review procedures, fail constitutional norms. [6] This paper reviews that decision in the context of the broader **Alabama** experience, and discusses the likelihood that the new approach toward the review of **punitive damages** judgments adopted by the Supreme Court can halt the spiraling **punitive damages** experience in **Alabama** or other jurisdictions.

Part I reviews the **Alabama** experience to document what I regard to be the increasing commonality of **Alabama punitive damages** verdicts and claims. Parts II and III address the effects of routine **punitive damages** claims and verdicts. Part II focuses on deterrence, the principal rationale for **punitive damages,** and Part III discusses consumer welfare. Part II shows that the deterrent effect of **punitive damages** verdicts has been vastly overrated, especially with respect to corporate defendants. Part III explains how the principal victims of excessive **punitive damages** verdicts are consumers, and low-income consumers most of all. Finally, Part IV discusses whether effective **punitive damages** reform can be effected through the courts, reviewing the Supreme Court's decision in BMW of North America, Inc. v. Gore, [7] or whether a legislative constraint on **punitive damages** is necessary. It is, of course, too early to determine what the effect of the BMW decision will be; indeed, it is premature to anticipate how the **Alabama** Supreme Court will respond to the decision. Part IV, however, hazards some preliminary thoughts on the extent to which the more careful inquiry now required by the United States Supreme Court can affect a **punitive damages** "environment," an environment now reaching to the level of citizen-juror expectations, such as that in **Alabama.** Part IV suggests that there are reasons to believe that legislative approaches to the **punitive damages** problem may still be required.

I. The Increasing Commonality of **Punitive Damages**

Forty years ago, **punitive damages** verdicts were exceptionally rare in all jurisdictions and were available against only the most extreme and egregious of **[*827]** defendant actions. [8] The world of civil litigation is surely different today, especially in **Alabama.** Both the number and, especially, magnitude of **punitive damages** judgments have increased dramatically. Indeed, in **Alabama,** the frequency of claims for **punitive damages** has increased to approach the routine. These claims affect the settlement process by increasing the litigation rate [9] and, necessarily, the ultimate magnitude of settlements, even in cases that are settled out of court.

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A recent study of **punitive damages** trial verdicts illustrates the phenomenon. [10] **Punitive damages** verdicts of greater than $ 1 million are alleged to be rare, and verdicts in the multi-millions extremely rare. [11] **Alabama** appears to be an exception. In 1991, there were eleven reported **punitive damages** verdicts equal to or greater than $ 1 million and individual verdicts of $ 25 million, $ 45 million and $ 50 million. [12] In 1992, there were twenty-two reported **punitive damages** verdicts equal to or greater than $ 1 million and individual verdicts of $ 18 million, $ 25 million and $ 33.2 million. In 1993, there were fifteen verdicts equal to or greater than $ 1 million and individual verdicts of $ 12.5 million, $ 19.5 million and $ 65 million. Finally, in 1994, there were twelve verdicts equal to or greater than $ 1 million and individual verdicts of $ 22.7 million, $ 25 million [13] and $ 33.5 million.

The frequency of million dollar and multi-million dollar verdicts over this time period is astounding and is suggestive of the commonality of **punitive damages** in **Alabama.** There remains, however, a better test of the commonality thesis. Some commentators continue to dismiss concerns about **punitive damages** on the grounds that even these numbers are not very large, given the number of jury verdicts reported across the country in any year. [14] In the American system of civil justice, of course, very few verdicts of any kind are reported, relative to the number of claims filed, since only two to five percent of civil cases filed **[*828]** ever proceed to a verdict. [15] The better test of the commonality of **punitive damages** verdicts derives from a study of claims.

Recently, I participated in an empirical study of the frequency of **punitive damages** claims in **Alabama.** A study of claims--the proportion of all tort cases filed that incorporate a claim for **punitive damages**--is the best test of the commonality of **punitive damages** expectations. The study, which to my knowledge is one of the only studies of **punitive damages** claims, was conducted in three **Alabama** counties: Bullock, Lowndes, and Barbour Counties. Each of these counties is a relatively rural locale with a small population and without substantial industry. We studied all tort actions filed in these counties in the past several fiscal years to determine the numbers in which **punitive damages** were claimed. To summarize the most recent statistics, we found that in the fiscal year 1992-93, 76.5% of all tort cases filed in Bullock County included a **punitive damages** claim; 65.1% in Lowndes County; and 78.3% in Barbour County. [16]

The exceptionally high proportion of **punitive damages** claims and the universality of such high proportions over each of the counties studied are striking and nearly incredible. Again, the study was not limited to claims involving high dollar amounts or product liability claims or, even, claims against corporate defendants; the study addressed all tort claims. Anyone familiar with our civil justice system knows that most tort actions involve relatively routine forms of accidents, such as traffic accidents. [17] That 65% to 78% of all tort actions over a given fiscal year included **punitive damages** claims starkly challenges the notion that **punitive damages** are an infrequent and seldom invoked remedy across American civil law.

Incredible as these numbers may seem, in the succeeding fiscal year, the proportion or number of tort cases including a **punitive damages** claim actually increased in each of the counties. During the 1993-94 fiscal year, an extraordinary 95.6% of tort cases filed in Bullock County included a **punitive damages** claim; 78.8%, in Lowndes County. In Barbour County, the proportion of tort cases including a **punitive damages** claim decreased from 78.3% to 72.1%, but the absolute number of **punitive damages** claims increased during 1993-94 by over 40%.

Much of the debate over **punitive damages** proceeds in the form of competing anecdotes in which a defender of our modern regime presents a case of exceptionally egregious defendant behavior deserving of **punitive damages** and **[*829]** a supporter of reform presents an opposite example. [18] The **Alabama** numbers belie anecdotes. No one can plausibly claim that 72.1% to 95.6% of all accident cases over an entire year in any county of the United States

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involve the form of exceptionally egregious defendant behavior that might merit substantial **punitive damages.** These numbers show that the role of **punitive damages** has changed dramatically in the **Alabama** civil justice system from an occasional remedy invoked against outrageous action to a commonplace of tort law practice.

These numbers also belie the commonly-heard defense that actual **punitive damages** verdicts are rare and that many of those awarded by juries are later reduced on appeal such that there is no substantial effect. Debate can be had on what is meant by the term "rare" and what constitutes, in terms of magnitude of verdicts, a "substantial" effect. The impression is often suggested, however, that even for the nation in its entirety, **punitive damages** claims amount to nothing more than a handful.

Our **Alabama** study demonstrates that this is a great misimpression. Again, we did not select the largest cities in **Alabama** or industrial or manufacturing centers; in fact, we did just the opposite. The counties that we studied in **Alabama** are rural, with modest populations and a relatively non-urbanized citizenry. For example, Bullock County has a total population of only 11,042, 4,040 of whom are employed, and a per capita income of $ 9,212. Lowndes County has a total population of 12,658, with 5,300 employed, and a per capita income of $ 10,628. Barbour County is somewhat larger, with a total population of 25,417, with 12,400 employed, and a per capita income of $ 12,100. [19] None of these counties, however, resembles in the slightest metropolitan areas such as Miami, Los Angeles, or Dallas.

What did we find? In 1993-94, despite these small populations, **punitive damages** claims in these rural counties constituted far more than the claimed nationwide "handful." In Bullock County, 43 of 45 tort actions included a **punitive damages** claim; in Lowndes County, 52 of 66 tort actions included a **punitive damages** claim; in Barbour County, 93 of 129 tort actions included a **punitive damages** claim. Are **punitive damages** in **Alabama** insignificant? The claims reported above are quite recent and remain in the litigation pipeline. Looking to much earlier claims, however, our study in **Alabama** showed that the magnitude of **punitive damages** judgments affirmed by the **Alabama** Supreme Court from 1987 through the first half of 1994 totalled $ 53.2 million, [20] equal to roughly $ 13 per **Alabama** citizen.

This study demonstrates that the number and magnitude of affirmed **punitive damages** verdicts is only the very small tip of an extraordinary iceberg. Again, **[*830]** it is universally conceded that only 2% to 5% of cases filed ever proceed to verdict. Thus, it is not surprising that the systematic observation of any single type of verdict is relatively rare. What the **Alabama** numbers show is that the availability of unlimited **punitive damages** affects the 95% to 98% of cases that settle out of court prior to trial. It is obvious and indisputable that a **punitive damages** claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process, increasing the likelihood of litigation. Thus, as shown in the Bullock, Lowndes, and Barbour County figures, modern **Alabama** rules with respect to **punitive damages** impose these effects on a majority of even settled cases.

The next two Parts review the effects of **punitive damages** verdicts in contexts in which such verdicts have become commonplace. Part II discusses the deterrence justification of **punitive damages.** Part III addresses the effects of **punitive damages** on consumers, low-income consumers in particular.

II. Do **Punitive Damages** Serve a Necessary Deterrent Purpose?

Virtually every supporter defends **punitive damages** on the grounds of deterrence, accompanied by an anecdote or two involving persons who suffered serious losses in contexts in which most observers would agree that the respective defendant should have prevented

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the accident. Generally, the anecdotes speak for themselves: I have never once seen a careful study in a specific case showing that a **punitive damages** judgment of some particular amount was necessary to deter some particular wrongful behavior. Instead, the argument proceeds by implication. The basic defense of **punitive damages**--and I believe that it is the only serious defense--is the implication that large, unlimited **punitive damages** verdicts are necessary to control injurious activities in society. Put in a slightly different way, it is implied that without the availability of unlimited **punitive damages** awards, potential defendants, especially corporate defendants, would face no deterrent threat to prevent them from causing injuries.

Forty years ago, in a tort law regime that provided little in the way of consumer remedies, it might have been believed that ever-increasing civil liability verdicts, including **punitive damages** verdicts, would serve to reduce the number of accidents. [21] That view, however, has been totally discredited today, and I know of no serious tort scholar publishing in a major legal journal who could maintain it. Instead, it is widely accepted--and it is a routine proposition of a first-year modern torts course--that compensatory damages--economic losses and pain and suffering--serve a complete deterrent purpose in addition to their role in compensating injured parties. Compensatory damages impose costs on **[*831]** defendants who wrongfully fail to prevent accidents, costs equal in amount to the injuries suffered. Compensatory damages internalize injury costs to defendants where some action has wrongfully injured an innocent party.

Indeed, the strongest theory in the modern tort academy is that full compensatory damages generate exactly the optimal level of deterrence of accidents--not too little and not too much. [22] For purposes of deterrence or accident prevention, there is no need for **punitive damages** of any dimension, not to mention unlimited **punitive damages,** given the availability of full compensatory damages. Of course, this is a theoretical conclusion, and there remains dispute in the academy as to whether, as an empirical matter, court, or juries calculate compensatory damages with perfection in every case or in every context. Thus, substantial academic attention has been given to the refinement of liability rules so that the deterrent effects of compensatory damages may be sharpened.

Given the role of compensatory damages as a deterrent, however, the analysis of punitive or other exemplary damages becomes substantially different. The only justification on grounds of deterrence for any exemplary award beyond the compensatory is that compensatory damages are inadequate for some reason, such as juries awarding damages which are too low in some dimension or some set of injuries going undetected or perhaps being too insignificant individually to justify litigation. [23] The only plausible defense of **punitive damages** on deterrence grounds is to restore aggregate damages to a level equal to that which is fully compensatory.

Opponents of **punitive damages** reform currently avoid this issue, but their failure to confront it suggests the ultimate weakness of their opposition. Again, anecdotes involving individuals suffering serious losses are not generally helpful to the analysis. I am extremely sympathetic--as all of us are--to individuals suffering serious injuries. We all wish that wrongfully injurious actions might have been avoided. Given a wrongful injury, we all want the victim to receive full compensation for economic losses and pain and suffering.

The question for **punitive damages** tort reform, however, is as follows: Given full compensation to the victim, is there some affirmative deterrent purpose served by awarding further damages? Is there some reason to believe that the payment of full compensatory damages will fail to deter the defendant, such that some further multiple through **punitive damages** is absolutely necessary? For corporate defendants, the answer surely is no. Corporate defendants who must maximize profits net of costs must necessarily take the prospect of compensatory damages into account when determining how to invest in accident prevention. Again, this analysis presumes full compensation. If there were some reason to

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believe that juries were systematically undervaluing economic losses or pain and suffering, **[*832] punitive damages** might be necessary to make up for the shortfall. Of course, the opposite may be true. Many, including myself, believe that juries overvalue compensatory damages, including pain and suffering, justifying increased limits on pain and suffering awards, especially in contexts of expanded liability. [24] Barring such a shortfall, however, there is no justification for **punitive damages** on deterrence grounds.

The analysis is, perhaps, somewhat different in the context of individual, noncorporate defendants who are less subject to cost constraints and, perhaps, more inclined to behave unconscionably. This is the reason that exemplary or **punitive damages** are often awarded in cases involving intentional harms such as assault.

As administered by juries, however, our current civil liability regime approaches the issue exactly backwards. In our current regime, large **punitive damages** verdicts are seldom awarded against non-corporate defendants. I know of no one objecting to a **punitive damages** cap on the grounds that it will impair the deterrence of private individuals. Instead, large **punitive damages** verdicts are most typically awarded against corporate defendants who, as profit maximizers (a motivation often irrationally held against them), will be carefully responsive to compensatory damages. Corporate defendants need no **punitive damages** verdict to encourage them to take all cost-effective precautions to prevent injuries; compensatory damages alone achieve that result. Thus, the increasingly commonplace plaintiff lawyer's charge to a jury to "send the corporate defendant a signal" ignores entirely the universally accepted academic view that, to a corporate defendant, full compensatory damages are not only an effective signal, but also the only signal needed.

III. Do **Punitive Damages** Help or Hurt Consumers?

If the effect of **punitive damages** were to benefit consumers or if their effect were even neutral to the consumer interest, we might not be concerned that **punitive damages** are unnecessary to deter corporate defendants from injurious behavior. The central problem of **punitive damages,** however, is that, except in the rare cases of jury undervaluation of damages or underlitigation, **punitive damages** settlements and verdicts affirmatively harm consumers, low-income consumers most of all.

Where **punitive damages** become commonplace in civil litigation, as in **Alabama,** or even where they become a significant risk to business operations, consumers are harmed because expected **punitive damages** verdicts or settlements must be built into the prices of products and services. The effect of the increased frequency and magnitude of **punitive damages** recoveries of modern times has been to increase the price level for all products and services provided in the United States economy. To observe this phenomenon is not to say that **[*833]** injured consumers should go uncompensated. If a consumer suffers an injury that can be attributed to some wrongful activity of a defendant, whether manufacturer or service provider, that consumer should receive compensation for economic losses and for reasonable non-economic losses, such as pain and suffering. [25] In contrast, **punitive damages,** by definition, go beyond the compensatory. The problem with the increasing commonality of large **punitive damages** verdicts and settlements, such as those in **Alabama,** is that the awards to some consumers of greater than compensatory damages must be built into the prices paid by all other consumers.

It is an obvious implication of this proposition that low-income consumers are most seriously harmed by our current **punitive damages** regime. First, lowincome consumers have less money generally and, regardless of the product or service, are more seriously affected in terms of the purchasing power of their limited resources when price levels increase. Secondly, and most importantly, low-income consumers are not the typical beneficiaries of large **punitive damages** verdicts or settlements, at least not on a systematic basis. Again, research of my own currently in progress shows that low-income consumers, if injured, are

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less likely to seek an attorney; even with an attorney, they are less likely to sue; less likely to recover; and, again by definition, less likely to recover large damage judgments since their lost income is typically low and pain and suffering awards, which are highly correlated with lost income, equally low.

Put more simply, where **punitive damages** verdicts and settlements are frequent and large, low-income consumers are forced to subsidize high-income consumers as expected **punitive damages** awards are built into the prices of products and services. All consumers--high-income and low-income alike--pay the increased prices; chiefly the high-income gain the return in high compensatory and **punitive damages** recoveries. Again, a low-income individual will receive a **punitive damages** windfall, but the far more systematic effect is to harm the low-income consumer as the prices of products and services generally are increased to adjust for the expectation of future **punitive damages** payouts.

It is important to recognize that the current effect of the doctrines of comparative negligence and joint and several liability is similar. Comparative negligence and joint and several liability have their most general effects on organizations or entities which engage in a large scope of activities, such as state and municipal governmental entities, public utilities, and the like. It has become a commonplace of modern civil litigation for plaintiffs' attorneys to join as defendants any governmental entity or utility remotely associated with an injury. Thus, state governments and municipalities are joined as defendants on claims that roads were misdesigned or poorly maintained, or that a guard rail or telephone pole could have been placed in a better position. Forty years ago, attorneys would not have thought to include entities whose causal relationship to **[*834]** the harm was so low or, alternatively, if they had attempted to join such entities, the claim would have been dismissed. Today, such litigation is routine and imposes substantial litigation expenses upon our state and municipal governments as well as liability expenses, infrequently but chiefly under the operation of the doctrines of comparative negligence and joint and several liability, where the truly responsible defendants have gone bankrupt, leaving our governments and utilities to suffer the remaining judgment.

It is clear that, for very similar reasons, operation of the doctrines of comparative negligence and joint and several liability harms citizens in general, but low-income citizens most of all. Damages judgments against state and municipal governments must be paid from state and municipal financial sources. It is well-established that state and, especially, municipal finance are seriously regressive in effect, charging more to middle- and low-income citizens, proportionate to income, than to relatively high-income citizens. [26]

These propositions about the effect of **punitive damages,** comparative negligence and joint and several liability on low-income citizens may appear abstract; however, I believe that they are generally accepted within the academic community. To illustrate their import with greater salience, however, I would like to present one recent example of a **punitive damages** verdict in **Alabama:** the case that inspired the research presented above. The case will both reaffirm the pressing need for **punitive damages** reform and illustrate why such reform should be expanded to all state and federal litigation.

In the case of Gallant v. Prudential, [27] decided by jury verdict in April 1994, Iran and Leslie Gallant sued Prudential Life Insurance Company based on the actions of a Prudential agent. The Gallants purchased a combination life insurance-annuity policy with a $ 25,000 face value at a monthly premium of roughly $ 39.00. At the time of sale, the agent told them that the value of the annuity was roughly twice what it in fact was. The agent had added together the table indicating "Projected Return" with the table indicating the lower "Guaranteed Return." A jury found this action fraudulent and held the agent liable and Prudential separately liable for failing to better supervise the agent. [28]

Fortunately, the problem was discovered before the policyholder had died or had retired to

receive the annuity. Thus, to the time of trial, there was no true economic loss beyond the failed expectation of the larger future return. According to the transcript of the testimony, the Gallants testified that, between the time they discovered the misinformation and Prudential called them to offer a remedy (Prudential offered to return their premiums or to discuss adjusting the policy), they had suffered roughly two weeks of sleepless nights and substantial anger at having been misled. That was the extent of their "mental anguish." **[*835]**

Twenty years ago, cases of this nature were part of the legal field entitled Restitution, in which the appropriate remedy was restitution of all paid premiums or out-of-pocket costs. On very rare occasions, such as especially egregious actions by a defendant, some courts considered awarding plaintiffs the benefit of the bargain, say, by increasing their annuity benefits. [29]

Our modern world has changed. After a one and one-half day trial, an **Alabama** jury awarded the Gallants damages equal to $ 30,000 in economic loss, $ 400,000 in mental anguish, and $ 25 million in **punitive damages.** Again, the face value of the insurance policy was only $ 25,000.

I do not wish to minimize the harm to the Gallants, especially the indignity of the misrepresentation, or condone the fraudulent actions of the agent, apparently perpetrated on several other **Alabama** citizens who recovered separately. Nevertheless, there is not a single person to whom I have described this case--not an attorney, whether plaintiff or defendant; not a liberal or a conservative; not even a radical or idealistic Yale Law student (or faculty member)--who has not been shocked by the outcome or who could defend it as a rational or sensible verdict in the context of the harm. Again, many defenders of **punitive damages** argue that exceptionally large verdicts are usually overturned on appeal. **Alabama's** review procedure for **punitive damages** verdicts had been carefully analyzed and approved by the United States Supreme Court shortly before the Gallant trial. [30] In the Gallant case, however, the judge conducting the review affirmed the $ 25 million award in its entirety, though directing part of the amount to be paid to the State. [31] The case was later settled prior to the United States Supreme Court's recent decision in BMW of North America, Inc. v. Gore. [32]

What will be the effect of a **punitive damages** verdict of this nature? The Gallants appear to be persons of modest means (at least before the verdict). Does a verdict of this nature help middle- or low-income consumers in the aggregate? Unfortunately, totally the opposite is true. The insurance policy in question--face value, $ 25,000--was the cheapest form of life insurance/annuity available on the market; its monthly premium was only $ 39.00. Obviously, at such a premium, the insurance carrier could not be expecting to make a substantial profit on the policy. Indeed, an economic expert in the case for Prudential estimated that, over the entire life of the policy, the premiums net of payouts paid by the Gallants would increase Prudential's assets by only $ 46.00. [33] Prudential, like most other life insurance companies, profits more **[*836]** substantially from large dollar, rather than small dollar, policies. The expert estimated that the verdict reduced dividends to every **Alabama** policyholder (Prudential is a mutual carrier) by $ 323. [34]

How do we analyze a case like this in terms of whether **punitive damages** serve a necessary deterrent effect? In his closing argument, the highly effective attorney for the Gallants asked the jury to determine a level of damages that would send a "message" to the giant Prudential Life Insurance Company that fraudulent behavior on the part of an agent would not be tolerated. [35] What kind of damages message is necessary to achieve that effect? Obviously, if the insurer stood to gain no more than $ 46 over the life of the policy, any damages judgment greater than $ 46 sends the insurer a message by making the policy unprofitable. (Of course, I ignore entirely Prudential's defense costs plus the reputational harm from the lawsuit.) The jury in the Gallant case went substantially beyond that amount, however, in awarding compensatory damages of $ 30,000 for economic loss and $ 400,000

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for the mental anguish from the two weeks of lost sleep and anger. It certainly cannot be argued that the jury undervalued the Gallant's compensatory loss--indeed, the $ 400,000 mental anguish award itself is extreme. The median per capita income in Barbour County, where the Gallant case was tried, was $ 12,100. [36] Furthermore, there is no reason to think that the agent's behavior in other contexts would go undetected. (Prudential later settled other cases brought by the agent's clients.) As a consequence, there is little justification for a **punitive damages** award whatsoever.

What will be the effect of **punitive damages** verdicts such as that in the Gallant case? In the face of such a verdict, what is the rational response of an insurer like Prudential, or other insurers selling similar policies? Regrettably, but necessarily in a competitive industry, the rational response is to quit selling such low value policies altogether. It makes very little sense to expose the company and its policyholders to the risk of such a damages verdict given the very small gain from the sale of such a policy.

Is this the type of product that our civil liability system should drive from the market? Obviously not, and low-income consumers in **Alabama** are directly harmed as a result. Here, the dramatically differential effects of such verdicts on high-income versus low-income consumers are made clear. In my own view, it is far more important to our society--if a choice had to be made--to have our insurance industry provide life insurance coverage to low-income citizens than to high-income citizens, since the relatively affluent of our society have other means of providing financial security for their families. The availability of financial protection and security at relatively low cost will be substantially diminished if such low premium policies, as here, are no longer available. **[*837]**

More generally, where expected **punitive damages** verdicts are added to the prices of products and services, the first to feel the effect will be low-income consumers. And where the magnitude of **punitive damages** verdicts rises, imperiling the continued provision of the product or service, the first to be affected will be those products and services with the lowest profit margins, those most attractive to the low-income consumers. The Gallant case provides a dramatic example of the effect. Following Gallant and other large **punitive damages** verdicts, several insurers quit offering coverage in **Alabama** altogether.

Punitive damages reform would cure that ill to the benefit of all Americans, especially low-income Americans. **Punitive damages** verdicts such as the $ 25 million verdict in the Gallant case encourage wasteful litigation. Indeed, litigation seeking **punitive damages** judgments against financial service companies has become an industry in **Alabama.** By increasing the prices of all products and services, **punitive damages** verdicts and settlements reduce the purchasing power of all Americans, especially the poor.

IV. **Punitive Damages** Reform: Statutory or Judicial?

Many defenders of the current regime question why legislatures should become involved in civil liability reform, rather than leaving reform initiatives to the courts. The question is particularly appropriate given that the Supreme Court has addressed the issue of the excessiveness of **punitive damages** in several recent cases, including the BMW decision. [37]

First, it is evident, after many opportunities, that the Supreme Court has great difficulty proceeding beyond what might be called a "procedural" approach to the **punitive damages** problem. With the exception of the recent BMW opinion, the only form of **punitive damages** control that the Court has adopted has been purely procedural--approving a set of procedures at the state level for judicial review of **punitive damages** verdicts, [38] or disapproving a state judicial procedure as not providing sufficient review. [39] The recent BMW opinion, as I shall describe, addresses directly the question of the excessiveness of **punitive damages** verdicts, but chiefly adopts a new set of procedural comparisons for judicial evaluation.

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*494 A.2d 1353, *; 1985 Me. LEXIS 744, **;*
58 A.L.R.4th 859

HATTIE TUTTLE v. RALPH RAYMOND, III

Law Docket No. And-84-79

Supreme Judicial Court of Maine

494 A.2d 1353; 1985 Me. LEXIS 744; 58 A.L.R.4th 859

September 19, 1984, Argued
June 21, 1985, Decided

CASE SUMMARY

PROCEDURAL POSTURE: Defendant driver appealed the decision of the Superior Court, Androscoggin County (Maine), which entered a final judgment ordering defendant to pay plaintiff accident victim punitive damages, in an action arising out of the serious injuries sustained by plaintiff in an automobile collision involving defendant.

OVERVIEW: Plaintiff accident victim was seriously injured when an automobile driven by defendant driver struck her automobile. Defendant appealed the trial court's award of punitive damages to plaintiff. The court vacated the trial court's award of punitive damages, but affirmed the judgment, as amended. The court held that in the absence of constitutional compulsion, it could see no reason to bar actions for punitive damages based on the fact that the underlying conduct was also subject to criminal prosecution. The court found that the extra recovery afforded to plaintiff by punitive damages did not constitute a windfall, but rather, provided an incentive for private civil enforcement of society's rules against serious misconduct. The court held that punitive damages were available based upon tortious conduct only if defendant acted with malice, so defendant's conduct was insufficient to support an award of punitive damages because defendant's conduct was not accompanied by malice. The court also held that plaintiff could recover exemplary damages based upon tortious conduct only if he could prove by clear and convincing evidence that defendant acted with malice.

OUTCOME: The court vacated the award of damages to plaintiff accident victim, but affirmed the judgment as amended. The court retained the doctrine of punitive damages, but held that tortious conduct would justify an exemplary award only when plaintiff could prove by clear and convincing evidence that defendant acted with either express or implied malice.

CORE TERMS: punitive damages, exemplary, malice, common law, exemplary damages, tortious conduct, deterrent, clear and convincing evidence, fact finder, criminal prosecution, civil action, punished, windfall, criminal law, civil law, compensatory, safeguards, reckless disregard, standard of proof, preponderance, reckless, observe, deterrence, punitive, abolish, abandon, punishment imposed, double jeopardy, implied malice, treble damages

CORE CONCEPTS - ◆ Hide Concepts

Torts > Damages > Punitive Damages
In several recent decisions, the Supreme Judicial Court of Maine has indicated its

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argument had "a certain equitable ring" to it, the Wisconsin Supreme Court ultimately rejected it. *Id.* The court stated:

> The "windfall criterion" overlooks that the payment of punitive damages to the injured party is justifiable as a practical matter, because such damages do serve to compensate the injured party for uncompensated expenses, *e.g.*, attorneys' fees and litigation expenses, and that the windfall motivates reluctant plaintiffs to go forward with their claims. If punitive damages were paid to the public treasury, fewer wrongdoers would be punished because the injured would have no inducement to spend the extra time and expense to prove a claim for punitive damages once an action had been brought.

Id. at 292, 294 N.W.2d at 454. A Maine author has suggested that punitive damages could be split between plaintiffs and the state pursuant to legislative action. Note, *supra* note 4, at 458.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[**19]**

The defendant next argues that the doctrine of punitive damages invites abuse because there is no objective standard by which to determine the amount of a proper award. *See* Ellis, *supra* note 4, at 53-57. According to the defendant, the jury is left to speculate concerning the appropriate amount of punitive damages in a given case, with the result of arbitrary and excessive awards. The defendant contends that this is a flaw in the doctrine that outweighs any justification for allowing exemplary awards.

In fact, however, the lack of any precise formula by which punitive damages can be calculated is one of the important assets of the doctrine. "Punitive damages . . . can be individualized to provide a deterrent that will be adequate for each case." Mallor and Roberts, *supra* note 4, at 657. Such flexibility can ensure a sufficient award in the case of a rich defendant and avoid an overburdensome one where the defendant is not as wealthy. *Id.* at 666; *see Hanover Insurance Co.*, 464 A.2d at 158 (to provide an effective deterrent, punitive damages should bear some relationship to the actual wealth of the defendant). Flexibility is also necessary to avoid situations **[**20]** where the potential benefits of wrongdoing could outweigh a known maximum liability. *See* Mallor and Roberts, *supra* note 4, at 648-49, 666; Morris, *supra* note 4, at 1185-87. In short, "although a quantitative formula would be comforting, it would be undesirable." Mallor and Roberts, *supra* note 4, at 666.

We, of course, do not advocate the availability of punitive damages on a completely open-ended basis. The trial court must reject a claim for punitive damages as a matter of law unless the plaintiff presents adequate proof that the defendant acted in a sufficiently culpable manner. n19 *See McKinnon v. Tibbetts*, 440 A.2d 1028, 1031 (Me. 1982). Further, even after the plaintiff has satisfied his prima facie burden on the issue of exemplary damages, the fact finder must weigh "all relevant aggravating and mitigating factors" presented by the parties, including the egregiousness of the defendant's conduct, the ability of the defendant to pay such an award, and any criminal punishment imposed for the conduct in question. *Hanover Insurance Co.*, 464 A.2d at 158-59; *see also* Mallor and Roberts, *supra* note 4, at 667-69 (enumerating factors to be considered **[**21]** in assessing punitive damages). After such consideration, an exemplary award is "within the *sound* discretion of the fact finder." *Hanover Insurance Co.* 464 A.2d at 158 (emphasis added). If the fact finder awards punitive damages that are excessive in light of the relevant factors, the trial court or this Court can intervene. *See* M.R. Civ. P. 59(a); *Hall v. Edwards*, 138 Me. 231, 233-34, 23 A.2d 889-890 (1942); *Sullivan v. McCafferty*, 117 Me. 1, 9, 102 A. 324, 327 (1917).

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n19 *See infra* sections III and IV (to satisfy prima facie burden plaintiff must show by *clear and convincing evidence* that defendant acted *with malice*).

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[*1360] We also observe that the lack of precision in measuring appropriate exemplary awards is not a trait unique to the doctrine of punitive damages. Compensatory awards for intangible harm, such as pain and suffering, and emotional distress, are likewise not subject to any exact standard for determining an appropriate amount. *See* Mallor and Roberts, **[**22]** *supra* note 4, at 646.

In conclusion, we are not persuaded that we should abolish common law punitive damages in Maine. n20 It may well be, as the defendant argues, that the doctrine of punitive damages no longer serves any purpose for which it was originally intended. n21

> This argument [,however,] fails to account for the fact that many legal doctrines serve purposes that differ from those for which they originally were developed. . . . So long as a doctrine continues to serve a necessary policy goal, the fact that it has diverged from its original function does not provide a basis for abolishing the doctrine. *The pertinent question is whether punitive damages continue to serve a rational policy*.

Mallor & Roberts, *supra* note 4, at 644 (emphasis added). We conclude that they do.

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n20 We note that, although our opinion today provides a careful evaluation of a longstanding doctrine, many issues concerning the availability of punitive damages, which are not raised by this case, remain for future consideration and resolution. These issues include, *inter alia*, whether one can insure against the assessment of punitive damages, whether one can be vicariously liable for punitive damages, and the application of punitive damages in products liability and multiple plaintiff litigation. It should be clear that our decision not to abandon the doctrine of punitive damages does not eliminate the need for future definition and modification of it. **[**23]**

n21 Some theorize that punitive damages initially compensated plaintiffs for intangible harms, which were not cognizable under the existing common law. *See* Mallor and Roberts, *supra* note 4, at 643-44; Ghiardi, *supra* note 4, at 286-87. Of course, modern tort law now allows compensatory damages for such intangible injuries, eliminating that particular basis for punitive damages. It has also been suggested that punitive damages first arose in cases involving "affronts to the honor of the victims," as a means of satisfying insulted plaintiffs and preventing them from resorting to violent forms of self-help, such as dueling. Ellis, *supra* note 4, at 14-15, 17-18. It is not so clear that this function of the doctrine of punitive damages has become obsolete. *Compare* Mallor and Roberts, *supra* note 4, at 650, *and* Morris, *supra* note 4, at 1198-99, *with* Ellis, *supra* note 4, at 29. In any event, it is not the primary justification given for exemplary awards today.

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III.

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Although we reject the defendant's contention that we should abolish common law punitive damages **[**24]** in Maine, we perceive cogent reasons for avoiding an overbroad application of the doctrine. Notions of fairness and efficiency weigh against allowing exemplary awards where the stated goal of deterring reprehensible conduct would be furthered only marginally or not at all. *See* Ellis, *supra* note 4, at 21-33, 39-53. Rather, punitive damages should be available based only upon a limited class of misconduct where deterrence is both paramount and likely to be achieved. With this in mind, we turn to a re-examination of the type of tortious conduct that can justify an exemplary award in Maine.

It is generally accepted that mere negligence cannot support an award of punitive damages. W. Prosser, *Handbook of the Law of Torts* 10 (4th ed. 1971); Restatement (Second) of Torts § 908 comment b (1977); *see McKinnon v. Tibbetts*, 440 A.2d 1028, 1031 (Me. 1982). Beyond that, however, there has been some variation in describing the quality of tortious conduct necessary to support an exemplary award. W. Prosser, *supra*, at 9-10; Ellis, *supra* note 4, at 20, 34-37. Recent decisions of this Court have indicated that Maine law recognizes the availability of punitive damages **[**25]** based upon "wanton, malicious, reckless or grossly negligent conduct." *See, e.g., Oliver v. Martin*, 460 A.2d 594, 595 n.2 (Me. 1983); *McKinnon*, 440 A.2d at 1031 **[*1361]** n. 2; *Auburn Harpswell Association v. Day*, 438 A.2d 234, 237 n.2 (Me. 1981) (per curiam).

Such a standard is overbroad. Whatever qualitative difference exists between mere negligence and "gross" negligence, it is insufficient to justify allowing punitive damages based upon the latter class of conduct. *See* W. Prosser, *supra*, at 10 ("mere negligence . . ., even though it is so extreme in degree as to be characterized as 'gross,' an unhappy term of ill-defined content," is insufficient to support punitive damages); Ellis, *supra* note 4, at 36-37. "Gross" negligence simply covers too broad and too vague an area of behavior, resulting in an unfair and inefficient use of the doctrine of punitive damages. *See* Ellis, *supra* note 4, at 36-37, 39-53. A similar problem exists with allowing punitive damages based merely upon "reckless" conduct. "To sanction punitive damages solely upon the basis of conduct characterized as 'heedless disregard of the consequences' would be to allow virtually **[**26]** limitless imposition of punitive damages." *Miller Pipeline Corp. v. Broeker*, 460 N.E.2d 177, 185 (Ind. Ct. App. 1984). A standard that allows exemplary awards based upon gross negligence or mere reckless disregard of the circumstances overextends the availability of punitive damages, and dulls the potentially keen edge of the doctrine as an effective deterrent of truly reprehensible conduct.

We therefore determine that a new standard is needed in Maine. "If one were to select a single word or term to describe [the] essence [of conduct warranting punitive damages], it would be 'malice.'" *Miller Pipeline Corp.*, 460 N.E.2d at 180 (quoting *Hibschman Pontiac, Inc. v. Batchelor*, 340 N.E.2d 377, 385 (Ind. Ct. App. 1976) (Garrard, J., concurring)). Indeed, the *malicious* commission of a tort is a common thread running through many of the decisions in which this Court has upheld an award of punitive damages. n22 We therefore hold that punitive damages are available based upon tortious conduct only if the defendant acted with malice.

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n22 *See, e.g., Auburn Harpswell Association v. Day*, 438 A.2d 234, 237 (Me. 1981) (per curiam); *Farrell v. Kramer*, 159 Me. 387, 391, 193 A.2d 560, 562 (1963); *Hall v. Edwards*, 138 Me. 231, 233-34, 23 A.2d 889, 890 (1942); *Saliem v. Glovsky*, 132 Me. 402, 410, 172 A. 4, 8 (1934); *Bourisk v. Derry Lumber Co.*, 130 Me. 376, 378, 156 A. 382, 382-83 (1931); *Kaklegian v. Zakarian*, 123 Me. 469, 469-70, 123 A. 900, 900 (1924); *Jones v. Grindel*, 121 Me. 348, 350, 117 A. 308, 309 (1922); *Webb v. Gilman*, 80 Me. 177, 187-88, 13 A. 688, 688 (1888); *Johnson v. Smith*, 64 Me. 553, 554 (1875); *Goddard v. Grand Trunk Railway*, 57 Me. 202, 218 (1869).

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- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[**27]**

This requirement of malice will be most obviously satisfied by a showing of "express" or "actual" malice. Such malice exists where the defendant's tortious conduct is motivated by ill will toward the plaintiff. *See* H & R Block, Inc. v. Testerman, 275 Md. 36, 43, 338 A.2d 48, 52 (1975); *Detling v. Chockley*, 70 Ohio St.2d 134, , 436 N.E.2d 208, 210 (1982) (quoting Columbus Finance v. Howard, 42 Ohio St.2d 178, 184, 327 N.E.2d 654, 658 (1975)); W. Prosser, *supra*, at 9-10 & n.65; Ellis, *supra* note 4, at 21 & n.109. Punitive damages will also be available, however, where deliberate conduct by the defendant, although motivated by something other than ill will toward any particular party, is so outrageous that malice toward a person injured as a result of that conduct can be implied. We emphasize that, for the purpose of assessing punitive damages, such "implied" or "legal" malice will *not* be established by the defendant's mere reckless disregard of the circumstances. *See* Miller Pipeline Corp., 460 N.E.2d at 185. n23

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n23 We observe that an apparent conflict exists between *Miller Pipeline Corp.* and another decision by a different panel of the Indiana Court of Appeals concerning the quality of tortious conduct that can justify an exemplary award. *Compare* Miller Pipeline Corp., 460 N.E.2d at 179-80, 185, *with* Orkin Exterminating Company, Inc. v. Traina, 461 N.E.2d 693, 702-03 (Ind. Ct. App. 1984); *see* Miller Pipeline Corp. v. Broeker, 464 N.E.2d 12, 12 (Ind. Ct. App. 1984) (rejecting the *Orkin* standard, which "contemplates something considerably less than the malice standard . . . enunciated in *Miller Pipeline*," and denying a petition for rehearing). As is indicated in our opinion, we find the malice standard enunciated in *Miller Pipeline Corp.* persuasive. *See* Miller Pipeline Corp., 460 N.E.2d at 179-80, 185.

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We recognize that in some other jurisdictions the malice necessary to support an **[*1362]** award of punitive damages can be implied from a mere reckless disregard of the circumstances. *See, e.g.*, American Laundry Machinery Industries v. Horan, 45 Md. App. 97, , 412 A.2d 407, 419 (1980); Glidden v. Skinner, 142 Vt. 644, , 458 A.2d 1142, 1144 (1983) (quoting *Shortle v. Central Vermont Public Service Corp.*, 137 Vt. 32, 33, 399 A.2d 517, 518 (1979)); *cf.* Restatement (Second) of Torts § 908 (1977) ("Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive *or his reckless indifference to the rights of others*." (emphasis added)). We adopt a narrower view in order to reduce the vagueness and uncertainty surrounding the concept of implied malice in this context. *See* Ellis, *supra* note 4, at 34-37. As we indicated earlier, by allowing punitive damages based only upon this more certain and more culpable class of conduct, the efficiency and the fairness of the doctrine as a deterrent is increased. *See id.* at 39-53.

In the case at bar, the evidence shows that the plaintiff was seriously injured by **[**29]** the defendant's reckless operation of an automobile. The plaintiff contends that such conduct on the part of the defendant is sufficient to support an award of punitive damages. *See* Smith v. Gray Concrete Pipe Company, Inc., 267 Md. 149, , 297 A.2d 721, 728-32 (1972). n24 Under the standard we announce today, it clearly is not. We certainly do not condone the defendant's conduct; nor do we fail to appreciate the tragic injuries imposed upon the plaintiff as a result of that conduct. We have determined, however, that deterrence -- recognized by this Court as "*the* proper justification" for punitive damages n25 -- cannot justify imposing an exemplary award in addition to compensatory damages and possibly criminal sanctions based solely upon a defendant's reckless disregard of the circumstances. Because the defendant's conduct was not accompanied by malice, either express or implied, we vacate the award of punitive damages.

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n24 *But see id.* at , 297 A.2d at 734-35 (Smith, J., dissenting) (finding reckless operation of motor vehicle insufficient to demonstrate actual or implied malice); *First National Bank of St. Mary's v. Fidelity and Deposit Co.*, 283 Md. 228, n.3, 389 A.2d 359, 362 n.3 (1978) ("Only under the peculiar facts and circumstances existing in *Smith v. Gray Concrete Pipe Company, Inc.*, . . . has this Court permitted recovery of exemplary damages in connection with an automobile accident."). **[**30]**

n25 *Braley v. Berkshire Mutual Insurance Co.*, 440 A.2d 359, 362 (Me. 1982) (quoting *Foss v Maine Turnpike Authority*, 309 A.2d 339, 345 (Me. 1973) (emphasis in original)).

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IV.

Our stated goal of avoiding an overbroad application of the doctrine of punitive damages leads us to consider another issue raised by the defendant, namely, the standard of proof that should govern a claim for an exemplary award. Presently in Maine, a plaintiff must prove his case for punitive damages by a preponderance of the evidence. *See McKinnon v. Tibbetts*, 440 A.2d 1028, 1031 (Me. 1982). The defendant urges us to abandon that rule, and to impose instead the more stringent proof requirement of clear and convincing evidence upon a plaintiff seeking an exemplary award. We realize that, in light of our holding in section III, *supra*, it is not necessary for us to address this question to dispose of the case now before us. For the benefit of litigants, bench, and bar, however, we conclude that it is appropriate to confront this issue now in the context of our reexamination of the doctrine of punitive **[**31]** damages, rather than postpone it to some future date.

[*1363] This Court recently noted that "although the preponderance [of the evidence] standard normally prevails in a civil case, appellate courts in a large number of categories of litigation have found compelling reasons for requiring a higher form of proof." *Taylor v. Commissioner of Mental Health*, 481 A.2d 139, 150 (Me. 1984). In *Taylor*, we listed a wide variety of cases where the United States Supreme Court, the Law Court, or a court of some other jurisdiction has imposed the requirement of clear and convincing evidence upon the party bearing the burden of proof. *Id.* at 149-50. Under this standard of proof, we observed, "the party with the burden of persuasion may prevail only if he can 'place in the ultimate factfinder an abiding conviction that the truth of [his] factual contentions are "highly probable".'" *Id.* at 153 (quoting *Colorado v. New Mexico*, 467 U.S. 310, , 104 S. Ct. 2433, 2438, 81 L. Ed. 2d 247 (1984)).

We conclude that such a higher standard of proof is appropriate for a claim for punitive damages. *See Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 850-51 (2d Cir. **[**32]** 1967); *Travelers Indemnity Co. v. Armstrong*, 442 N.E.2d 349, 360-63 (Ind. 1982); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, , 294 N.W.2d 437, 457-58 (1980). It should be obvious from our discussion in section II, *Supra*, that, although punitive damages serve an important function in our legal system, they can be onerous when loosely assessed. The potential consequences of a punitive damages claim warrant a requirement that the plaintiff present proof greater than a mere preponderance of the evidence. Therefore, we hold that a plaintiff may recover exemplary damages based upon tortious conduct only if he can prove by clear and convincing evidence that the defendant acted with malice.

V.

Because our opinion today substantially alters Maine law governing the availability of punitive damages, we address the scope of its temporal applicability. We discuss the effect of this decision upon the parties now before us as well as upon claims for punitive damages in general.

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As indicated in section III, *supra*, we give the defendant, "who has undertaken to change the law [governing punitive damages], the fruit of [his] victory." *Myrick v. James*, 444 A.2d 987, 1001 **[**33]** (Me. 1982). We adhere to our practice of applying such changes in the common law to the parties presently before us. *Id.*

Further, "we discern no reason, here, to depart from the general rule that the changes in the law we now announce [are] applicable to any case that has not been terminated in final manner." *MacDonald v. MacDonald*, 412 A.2d 71, 75 (Me. 1980). This is not a case where public reliance on our previous decisions dictates that we limit the retroactive effect of our decision. *See Myrick*, 444 A.2d at 1001-02; *Black v. Solmitz*, 409 A.2d 634, 640 (Me. 1979). Although our decision may deprive some plaintiffs of exemplary awards they would have received under prior law, the primary concern of the doctrine of punitive damages is to deter misconduct, not to benefit plaintiffs. Also, we have given notice of our intent to reexamine the availability of common law punitive damages in Maine on several occasions. *E.g.*, *Hanover Insurance Co. v. Hayward*, 464 A.2d 156, 158 n.2 (Me. 1983); *Oliver v. Martin*, 460 A.2d 594, 595 n.2 (Me. 1983); *Braley v. Berkshire Mutual Insurance Co.*, 440 A.2d 359, 361 n.4 (Me. 1982). We determine that our decision today **[**34]** should be given full retroactive effect.

VI.

In summary, we retain the doctrine of punitive damages at common law in Maine, but not without substantial modification. Tortious conduct will justify an exemplary award only when the plaintiff can prove by clear and convincing evidence that the defendant **[*1364]** acted with either express or implied malice. This rule applies retroactively. Although it is apparent that the defendant in this case acted recklessly, reckless conduct alone cannot satisfy the element of malice necessary to justify an exemplary award. Accordingly, the judgment as to punitive damages must be vacated.

The entry is:

Judgment amended by vacating award of punitive damages; as so amended, judgment affirmed.

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willingness, should the proper occasion arise, to re-examine the judicially created rule of punitive damages in light of modern considerations and authorities.

Torts > Damages > Punitive Damages

A substantial majority of jurisdictions today allow common law punitive damages in appropriate cases as a recovery beyond the amount necessary to compensate the plaintiff, for the purpose of deterrence or punishment or both.

Torts > Damages > Punitive Damages

The absence of certain procedural safeguards, which are required in criminal prosecutions, presents no constitutional bar to the imposition of punitive damages in a civil action.

Constitutional Law > Procedural Due Process > Double Jeopardy

Torts > Damages > Punitive Damages

In the constitutional sense, jeopardy is a technical term that encompasses only the risk inherent in proceedings that are "essentially criminal." Accordingly, a civil action for punitive damages cannot infringe on a defendant's constitutional right to be free from double jeopardy. A claim for punitive damages is based upon a private wrong, and is clearly distinguishable from a criminal prosecution, which is brought solely on the behalf of the public. The state and federal constitutional prohibitions against double jeopardy present no bar to actions for punitive damages.

Torts > Damages > Punitive Damages

Punitive damages can be individualized to provide a deterrent that will be adequate for each case. Such flexibility can ensure a sufficient award in the case of a rich defendant and avoid an overburdensome one where the defendant is not as wealthy. Flexibility is also necessary to avoid situations where the potential benefits of wrongdoing could outweigh a known maximum liability. In short, although a quantitative formula would be comforting, it would be undesirable.

Evidence > Procedural Considerations > Burdens of Proof, Presumptions & Inferences

Torts > Damages > Punitive Damages

The trial court must reject a claim for punitive damages as a matter of law unless the plaintiff presents adequate proof that the defendant acted in a sufficiently culpable manner. Further, even after the plaintiff has satisfied his prima facie burden on the issue of exemplary damages, the fact finder must weigh all relevant aggravating and mitigating factors presented by the parties, including the egregiousness of the defendant's conduct, the ability of the defendant to pay such an award, and any criminal punishment imposed for the conduct in question. After such consideration, an exemplary award is within the sound discretion of the fact finder. If the fact finder awards punitive damages that are excessive in light of the relevant factors, the trial court or the reviewing court can intervene. Me. R. Civ. P. 59(a).

Torts > Damages > Punitive Damages

Punitive damages should be available based only upon a limited class of misconduct where deterrence is both paramount and likely to be achieved.

Torts > Damages > Punitive Damages

Torts > Negligence > Negligence Generally

It is generally accepted that mere negligence cannot support an award of punitive damages.

Torts > Damages > Punitive Damages

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Torts > Negligence > Negligence Generally

Whatever qualitative difference exists between mere negligence and "gross" negligence, it is insufficient to justify allowing punitive damages based upon the latter class of conduct. "Gross" negligence simply covers too broad and too vague an area of behavior, resulting in an unfair and inefficient use of the doctrine of punitive damages. A similar problem exists with allowing punitive damages based merely upon "reckless" conduct. To sanction punitive damages solely upon the basis of conduct characterized as heedless disregard of the consequences would be to allow virtually limitless imposition of punitive damages. A standard that allows exemplary awards based upon gross negligence or mere reckless disregard of the circumstances overextends the availability of punitive damages, and dulls the potentially keen edge of the doctrine as an effective deterrent of truly reprehensible conduct.

Torts > Damages > Punitive Damages

If one were to select a single word or term to describe the essence of conduct warranting punitive damages, it would be "malice." Indeed, the malicious commission of a tort is a common thread running through many of the decisions in which the court has upheld an award of punitive damages.

Torts > Damages > Punitive Damages

The requirement of malice will be most obviously satisfied by a showing of "express" or "actual" malice. Such malice exists where the defendant's tortious conduct is motivated by ill will toward the plaintiff. Punitive damages will also be available, however, where deliberate conduct by the defendant, although motivated by something other than ill will toward any particular party, is so outrageous that malice toward a person injured as a result of that conduct can be implied. For the purpose of assessing punitive damages, such "implied" or "legal" malice will not be established by the defendant's mere reckless disregard of the circumstances.

Evidence > Procedural Considerations > Burdens of Proof, Presumptions & Inferences

Although the preponderance of the evidence standard normally prevails in a civil case, appellate courts in a large number of categories of litigation have found compelling reasons for requiring a higher form of proof.

Evidence > Procedural Considerations > Burdens of Proof, Presumptions & Inferences

The party with the burden of persuasion may prevail only if he can place in the ultimate factfinder an abiding conviction that the truth of his factual contentions are "highly probable".

Evidence > Procedural Considerations > Burdens of Proof, Presumptions & Inferences

Torts > Damages > Punitive Damages

Although punitive damages serve an important function in the legal system, they can be onerous when loosely assessed. The potential consequences of a punitive damages claim warrant a requirement that the plaintiff present proof greater than a mere preponderance of the evidence.

Governments > Courts > Authority to Adjudicate

The court gives the defendant, who has undertaken to change the law governing punitive damages, the fruit of his victory.

Governments > Courts > Authority to Adjudicate

There is a general rule that the changes in the law the court announces are applicable to any case that has not been terminated in final manner.

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COUNSEL: [1]**

Attorneys for Plaintiff: Murphy and Coyne. Coleman G. Coyne, Jr., Esq. (orally). Paul P. Murphy, Esq. Lewiston, Maine.

Attorneys for Defendant: Hunt, Thompson & Bowie. James M. Bowie, Esq. (orally). M. Roberts Hunt, Esq. Portland, Maine.

JUDGES: Violette, J. wrote the opinion. McKusick, C.J., and Roberts, Violette, Wathen, Glassman and Scolnik, JJ.

OPINIONBY: VIOLETTE

OPINION: [*1354] This action arises out of the serious injuries sustained by the plaintiff in an automobile collision involving the defendant. After a jury trial, the Superior Court, Androscoggin County, entered a final judgment ordering the defendant to pay the plaintiff $50,000 in compensatory damages and $22,000 in punitive damages. On appeal, the defendant challenges only the award of punitive damages. First, the defendant urges this Court to abolish common law punitive damages in Maine. Alternatively, the defendant contends that punitive damages are inappropriate as a matter of law on the facts underlying this case. Finally, should both of those arguments fail to persuade the Court, the defendant argues that several errors in the trial below nevertheless require reversal of the punitive damages award.

In several **[**2]** recent decisions, this Court has indicated its willingness, should the proper occasion arise, to re-examine "the judicially created rule of punitive damages . . . in light of modern considerations and authorities." *Braley v. Berkshire Mutual Insurance Co.*, 440 A.2d 359, 361 n.4 (Me. 1982); *see, e.g., Hanover Insurance Co. v. Hayward*, 464 A.2d 156, 158 n.2 (Me. 1983); *Oliver v. Martin*, 460 A.2d 594, 595 n.2 (Me. 1983). This case presents such an occasion. n1 We refuse to abolish common law punitive damages in Maine. We do take this opportunity, however, to redefine and clarify the type of tortious conduct necessary to justify an award of exemplary damages. Furthermore, we heighten the standard of proof incumbent upon a plaintiff seeking such an award. We hold that, in order to recover punitive damages, a plaintiff must prove by clear and convincing evidence that the defendant acted with malice. We conclude that the conduct of the defendant in this case does not justify the imposition of an exemplary award. n2 Accordingly, we sustain the appeal.

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n1 The defendant has properly preserved the issue for appellate review. *Cf. Hanover Insurance Co.*, 464 A.2d at 158 n.2; *Oliver*, 460 A.2d at 595 n.2; *Braley*, 440 A.2d at 361 n.4. **[**3]**

n2 We reach this conclusion without relying upon our newly announced rule heightening the standard of proof applicable to claims for punitive damages. *See infra* section IV. Even under the preponderance of the evidence standard heretofore applied to punitive damages claims, *see McKinnon v. Tibbetts*, 440 A.2d 1028, 1031 (Me. 1982), the plaintiff did not demonstrate conduct sufficiently culpable to justify an award of punitive damages. *See infra* section III.

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I.

On July 6, 1977 the plaintiff, Hattie Tuttle, was seriously injured when a Lincoln driven by the defendant, Ralph Raymond, III, struck the Plymouth in which she was a passenger. The force

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of the impact sheared the Plymouth in half. Based on the evidence presented at trial, the jury could have found that the defendant was driving at an excessive speed in a 25 mile per hour zone when he struck the Plymouth, and that the defendant went through a red light just before the impact.

The defendant conceded liability at trial and focused instead on the amount of damages the jury should properly award. **[*1355]** From the outset **[**4]** of the litigation, the defendant asserted both that punitive damages should not be recognized under the law of Maine and that, in any event, the facts of this case did not generate the issue of punitive damages. Nevertheless, the trial court submitted this issue to the jury, and refused to disturb the jury's decision to award $22,000 in exemplary damages.

II.

Vigorous criticism of the doctrine of punitive damages is hardly a recent development in the field of jurisprudence. Arguments against the availability of such awards have been circulating for one hundred years and longer. n3 During those hundred years, commentators have exhaustively analyzed the doctrine. n4 Nonetheless, a substantial majority of jurisdictions today allow common law punitive damages in appropriate cases as a recovery beyond the amount necessary to compensate the plaintiff, for the purpose of deterrence or punishment or both. *See* J. Ghiardi & J. Kircher, *Punitive Damages: Law and Practice* § 4.01, at 4-1, 4-2 (1981); *see also id.* at § 4.16, table 4-1, at 18-22 (Supp. 1984).

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n3 *See, e.g., Pike v. Dilling*, 48 Me. 539, 544-45 (1861) (Rice, J., dissenting); *Murphy v. Hobbs*, 7 Colo. 541, , 5 P. 119, 124-26 (1884); *Boyer v. Barr*, 8 Neb. 68, 71-75 (1878); *Fay v. Parker*, 53 N.H. 342, 397 (1873); *Bass v. Chicago & Northwestern Railway*, 42 Wis. 654, 672-73 (1877) (opinion of Ryan, C.J.). **[**5]**

n4 *See, e.g.*, Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S.Cal.L.Rev. 1 (1983); Ghiardi, *Should Punitive Damages Be Abolished? -- A Statement for the Affirmative*, 1965 A.B.A. Proc. Sec. Ins., Negl. and Comp. Law 282; Mallor and Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L.J. 639 (1980); Morris, *Punitive Damages in Tort Cases*, 44 Harv.L.Rev. 1173 (1931); Note, *The Vitality of the Doctrine of Punitive Damages in Maine*, 35 Me.L.Rev. 447 (1983).

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The law of Maine on this issue is in accord with the position of this substantial majority. Since adopting the doctrine of punitive damages in *Pike v. Dilling*, 48 Me. 539 (1861), this Court has frequently and consistently reaffirmed the availability of such awards at common law under the appropriate circumstances. n5 "It would be simplistic to characterize [this position] as mere blind adherence to an outmoded principle. Rather, the doctrine of punitive damages survives because it continues to serve the useful purposes of expressing society's disapproval of intolerable conduct **[**6]** and deterring such conduct where no other remedy would suffice." Mallor and Roberts, *supra* note 4, at 641; *see Braley v. Berkshire Mutual Insurance Co.*, 440 A.2d 359, 361, 362 (Me. 1982); *Foss v. Maine Turnpike Authority*, 309 A.2d 339, 345 (Me. 1973); *see also* Mallor and Roberts, *supra* note 4, at 647-49; Note, *supra* note 4, at 451-55.

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n5 *See, e.g., Auburn Harpswell Association v. Day*, 438 A.2d 234, 237 (Me. 1981) (per curiam); *Farrell v. Kramer*, 159 Me. 387, 391, 193 A.2d 560, 562 (1963); *Pettengill v. Turo*, 159 Me. 350, 362-63, 193 A.2d 367, 374-75 (1963); *Hall v. Edwards*, 138 Me. 231, 233-34,

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23 A.2d 889, 890 (1942); *Kaklegian v. Zakarian*, 123 Me. 469, 469-70, 123 A. 900, 900 (1924); *Jones v. Grindel*, 121 Me. 348, 350, 117 A. 308, 309 (1922); *Webb v. Gilman*, 80 Me. 177, 187-88, 13 A. 688, 688 (1888); *Johnson v. Smith*, 64 Me. 553, 554 (1875); *Goddard v. Grand Trunk Railway*, 57 Me. 202, 218 (1869).

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The defendant in the case at bar contends that we should **[**7]** nevertheless abandon the judicially created rule of punitive damages in this state. In support of this position, the defendant proffers several arguments, which we consider seriatim. After careful consideration, we conclude that the doctrine of punitive damages retains its viability, and we refuse to abrogate the availability of exemplary awards at common law in Maine.

One objection raised by the defendant is that the civil law is ill-suited to accomplish the goals that purportedly justify the doctrine of punitive damages. The defendant contends that the proper function of the civil tort law is to make plaintiffs **[*1356]** whole, and that grave problems arise when it is used to extract from defendants something beyond full compensation for the victim. The defendant asserts that the primary purpose allegedly served by the doctrine of punitive damages, deterrence through punishment, is more properly left to the criminal law with its attendant procedural safeguards.

The bright line that the defendant attempts to interpose between the civil and the criminal law is in fact artificial. The courts of this country historically have not restricted the civil law to a compensatory function. **[**8]** In 1851, the United States Supreme Court, relying on over a century of judicial precedent, observed: "By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of a penalty or punishment, given to the party injured." *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371, 14 L. Ed. 181 (1851). Use of the civil law to shape social behavior is both logical and desirable. There are many instances where the criminal law alone is inadequate to achieve the desired deterrent effect. *See* Mallor and Roberts, *supra* note 4, at 655-58. For instance, even when the defendant's conduct violates a criminal statute, it may be a crime that is rarely prosecuted, or the maximum applicable penalty may not correspond to the actual outrageousness of the conduct and the defendant's ability to pay. *See id.* at 656-57. Of course, where a criminal sanction does constitute an adequate deterrent in a given case, there is no justification for adding a civil penalty in the form of punitive damages. *See id.* at 658; Note, *supra* note 4, at 456-57. This potential problem, however, does **[**9]** not require the wholesale abrogation of the doctrine of punitive damages. A more sensible solution is to allow the fact finder to consider evidence of any criminal punishment imposed for the conduct in question as a mitigating factor on the issue of punitive damages, n6 a step already taken by this Court. *See Hanover Insurance Co. v. Hayward*, 464 A.2d 156, 159 (Me. 1983). n7

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n6 We note that, despite our decision in *Hanover Insurance Co. v. Hayward*, 464 A.2d 156 (Me. 1983), the trial court in this case excluded evidence of the fact that the defendant was convicted and punished criminally for the same conduct that gave rise to this civil litigation. A defendant is entitled to have the jury consider such evidence when it decides whether to assess punitive damages and, if so, in what amount. *See id.* at 159. Because of our disposition of this case, however, we need not decide whether the trial court's exclusion of this evidence constitutes reversible error. *See infra* section III.

n7 *But see* Note, *Hanover Insurance Co. v. Hayward: Imposition of Punitive Damages in Addition to Criminal Sanctions*, 36 Me.L.Rev. 467, 480-83 (1984) (outlining "several problems with the *Hayward* approach").

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Furthermore, the lack of certain procedural safeguards, which are required in criminal prosecutions, n8 does not render the civil law unfit to serve this deterrent function. The statute books provide many examples where penalties, in the form of multiple damages payable to a private party, **[*1357]** are imposed in civil actions for the purpose of discouraging undesirable conduct. n9 The absence of these procedural safeguards presents no constitutional bar to the imposition of punitive damages in a civil action. *See Malandris v. Merrill, Lynch, Pierce, Fenner & Smith*, 703 F.2d 1152, 1173 (10th Cir. 1981) (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 159, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967)). The reason for requiring such safeguards in the criminal arena, the threat to the defendant of incarceration or other substantial stigma, does not justify their application in actions for punitive damages.

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n8 As stated by one commentator, who was obviously uncomfortable with the notion of punitive damages:

> Again, when assessed exemplary damages, the accused [sic] is really punished for a criminal offense without the safeguards of a criminal trial. He is summoned into court to make compensation for a purely private injury, with no issue upon a criminal charge presented; punishment by fine is inflicted without indictment or sworn information; the rules of evidence as to criminal trials are rejected; the doctrine of reasonable doubt is replaced by the rule of preponderance of evidence; the defendant is compelled to testify against himself; and, though in criminal offenses the law fixes a maximum penalty which is imposed by the court, the jury is entirely free to assess exemplary damages, subject only to the power of the court, unwillingly exercised, to set aside the verdict. The procedure and principles of criminal law are disregarded. . . .

Willis, *Measure of Damages When Property Is Wrongfully Taken by a Private Individual*, 22 Harv.L.Rev. 419, 421 (1909); *see also* Note, *supra* note 7, at 481-82. **[**11]**

n9 *See e.g.*, 10 M.R.S.A. § 1322 (1980) (providing for treble damages, attorney's fees, and costs for willful violation of Fair Credit Reporting Act); 14 M.R.S.A. § 6034 (1980) (providing for double damages, attorney's fees, and costs for willful retention of security deposit in violation of law); 15 U.S.C. § 15 (1976) (providing for treble damages, attorney's fees, and costs for violation of antitrust laws); 15 U.S.C. § 72 (1976) (providing for treble damages, attorney's fees, and costs for unfair competition in importing trade).

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In a related argument, the defendant criticizes the doctrine of punitive damages because it permits a person to be punished twice for the same offense. The defendant observes that in the case at bar he was *both* convicted and fined in a criminal proceeding *and* assessed with punitive damages in a subsequent civil proceeding based upon the same conduct. n10 The defendant contends that the assessment of an exemplary award in addition to criminal punishment for the same conduct offends the constitutional prohibition against placing a defendant twice in jeopardy. **[**12]** The defendant acknowledges that we recently rejected this precise argument in *Hanover Insurance Co.*, 464 A.2d at 159, but urges us to abandon the reasoning articulated in that case in favor of a new rule that would prevent such double punishment. n11

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n10 *See supra* note 6.

n11 The defendant suggests that this Court embrace the rule followed in Indiana, where the courts have held that the possibility of criminal prosecution bars an action for punitive damages based upon the same conduct. *See Taber v. Hutson*, 5 Ind. 322, 325 (1854); *Glissman v. Rutt*, 175 Ind. App. 493, 496-97, 372 N.E.2d 1188, 1190 (1978). The Indiana courts themselves, however, have commented that "the rule preventing recovery of punitive damages due to the possibility of criminal prosecution is no doubt ripe for reexamination." *Smith v. Mills*, 179 Ind. App. 459, , 385 N.E.2d 1205, 1208 (1979); *Glissman*, 175 Ind. App. at 497, 372 N.E.2d at 1191.

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"In the constitutional sense," jeopardy is a technical term that **[**13]** encompasses only the risk inherent in proceedings that are "essentially criminal." *Breed v. Jones*, 421 U.S. 519, 529, 44 L. Ed. 2d 346, 95 S. Ct. 1779 (1975). Accordingly, a civil action for punitive damages cannot infringe on a defendant's constitutional right to be free from double jeopardy. *Hanover Insurance Co.*, 464 A.2d at 159; *E.F. Hutton and Co. v. Anderson*, 42 Colo. App. 497, 499, 596 P.2d 413, 415 (1979); *Svejcara v. Whitman*, 82 N.M. 739, , 487 P.2d 167, 169 (N.M.Ct.App. 1971); *see Helvering v. Mitchell*, 303 U.S. 391, 398-99, 82 L. Ed. 917, 58 S. Ct. 630 (1938), *cited with approval in Breed*, 421 U.S. at 528. n12 A claim for punitive damages is based upon a *private* wrong, and is clearly distinguishable from a criminal prosecution, which is brought solely on the behalf of the public. *Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 97 N.J. 37, , 477 A.2d 1224, 1231 (1984); *Svejcara*, N.M. at , 487 P.2d at 169; *see Moody v. State ex rel. Payne*, 355 So.2d 1116, 1120 (Ala. 1978) ("it is well settled that exemplary damages are not to be equated with criminal punishment"). The state and federal constitutional prohibitions **[**14]** **[*1358]** against double jeopardy present no bar to actions for punitive damages. n13

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n12 *See also Curtis Publishing Co. v. Butts*, 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967). In *Curtis Publishing Co.*, the Supreme Court, without explicitly addressing the double jeopardy issue, stated: "The Constitution presents no general bar to the assessment of punitive damages in a civil case. . . ." *Id.* at 159.

n13 Even in Indiana, where the possibility of criminal prosecution bars an action for punitive damages based upon the same conduct, *see supra* note 11, the courts acknowledge that such a rule is not constitutionally compelled. *See Glissman v. Rutt*, 175 Ind. App. 493, 497, 372 N.E.2d 1188, 1190-91 (1978).

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In the absence of constitutional compulsion, we can see no reason to bar actions for punitive damages based upon the fact that the underlying conduct is also subject to criminal prosecution. n14 Such a step would "[fall] short of a principled approach." Mallor and Roberts, **[**15]** *supra* note 4, at 656. As we noted earlier, n15 "the criminal system cannot always adequately fulfill its role as an enforcer of society's rules. . . ." *Id.* at 658; *see Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 820, 174 Cal.Rptr. 348, 389 (1981); *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 186, 384 N.E.2d 353, 359, 23 Ill. Dec. 559 (1978); *Roshak v. Leathers*, 277 Or. 207, 213-16, 560 P.2d 275, 278-79 (1977). We therefore prefer a more flexible rule, whereby the fact finder may consider any criminal punishment imposed for the conduct in question as a mitigating factor on the issue of punitive damages. *Hanover*

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Insurance Co., 464 A.2d at 159.

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n14 *See* 17-A M.R.S.A. § 3(2) (1983). Section 3(2) of the Maine Criminal Code provides:

> This code does not bar, suspend, or otherwise affect any right or liability for damages, penalty, forfeiture or other remedy authorized by law to be recovered or enforced in a civil action, regardless of whether the conduct involved in such civil action constitutes an offense defined in this code.

But see Note, *supra* note 7, at 476-83 (acknowledging this provision of the criminal code, but concluding that punishment under the code and punitive damages should not both be imposed for the same conduct). **[**16]**

n15 *See supra* pp. 6-7.

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Another objection to punitive damages raised by the defendant is that they bestow a windfall upon the plaintiff. As the defendant observes, such damages are awarded in Maine in excess of any amount necessary to compensate the plaintiff. *See Braley v. Berkshire Mutual Insurance Co.*, 440 A.2d 359, 361, 362 (Me. 1982). The defendant contends that a plaintiff injured by a tort is entitled to be made whole, and not to be put in a better position than if the tort had never occurred. *See, e.g., Collens v. New Canaan Water Co.*, 155 Conn. 477, , 234 A.2d 825, 831-32 (1967) ("punitive" damages are compensatory in function, and may not exceed costs of litigation); *Vratsenes v. N.H. Auto, Inc.*, 112 N.H. 71, , 289 A.2d 66, 68 (1972) ("no damages other than compensatory are to be awarded").

We find, however, that the extra recovery afforded to plaintiffs by punitive damages, rather than constituting a "windfall," serves a useful purpose. The potential for recovering an exemplary award provides an incentive for private civil enforcement of society's rules **[**17]** against serious misconduct. n16 *See* Mallor and Roberts, *supra* note 4, at 649-50. As noted earlier, n17 the civil law effectively augments the criminal law in deterring intolerable conduct. The doctrine of punitive damages encourages the use of civil actions by private parties in response to such conduct, especially when the prospective compensatory recovery is **[*1359]** low or the expected cost of litigation is high. n18 *See id.*

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n16 The defendant contends that this incentive is in fact a drawback because plaintiffs will attempt to maximize their recoveries without any regard as to what amount of punitive damages would serve as a just and sufficient deterrent. *See* Morris, *supra* note 4, at 1178. This, however, is not so much a problem inherent in the doctrine of punitive damages as it is a byproduct of our chosen adversary system of justice. We use this system because potential excesses, such as the one raised by the defendant, are hopefully cured by an equally zealous and competent advocate on the opposing side, an impartial jury as a fact finder, and a wise and wary judge overseeing the entire proceeding. **[**18]**

n17 *See supra* pp. 6-7, 11-12.

n18 In *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437 (1980), the defendant argued that, in order to avoid giving the plaintiff a windfall, the court should award any punitive damages to the public. *Id.* at 291, 294 N.W.2d at 454. After noting that this

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ARTICLE: Punitive Damages: A Relic That Has Outlived Its Origins

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SUMMARY:
... The doctrine of punitive damages truly is an ancient legal concept that inexplicably has evaded commitment to the archives of history. ... Whatever justification may be advanced to support the punitive damage concept, however, most commentators today acknowledge that the modern bases undergirding the theory in the United States are punishment and deterrence. ... Numerous jurisdictions, however, refuse to permit punitive damage claims against the estates of deceased wrongdoers because the punishment and deterrence rationales no longer are viable once the wrongdoer is deceased. ... Permitting a punitive award in the case of a deceased defendant truly exposes the fallacy of the punitive damage doctrine. ... These jurisdictions ostensibly ignore the very policy that undergirds the punitive damage concept -- punishment and deterrence against future wrongdoing -- and permit the wrongdoer to insure against liability for such awards. ... A particularly egregious aspect of the punitive damage doctrine as punishment is its application within the vicarious liability field. ... The applicability of liability insurance to cover punitive damage awards totally vitiates the punishment and deterrence rationales. ... The historical justifications for the doctrine, however, have long since become obsolete, particularly with the current unfettered expansion of the compensatory damage system. ... Abolishing the punitive damage doctrine would leave unaffected the civil tort system that continues to compensate plaintiffs for every conceivable injury. ...

TEXT:

[*1118] I. INTRODUCTION

The doctrine of punitive damages truly is an ancient legal concept that inexplicably has evaded commitment to the archives of history. Irrespective of the questionable validity of the

awarded are the ratio rule and evidence of the defendant's financial condition. The ratio rule is a mechanism that allows an appellate court either to overturn a punitive damage award or to order remittitur if the court concludes that a reasonable relation does not exist between the compensatory and punitive damages awarded the plaintiff. [129] Most jurisdictions mandate that punitive awards bear a "reasonable relationship" to the amount of compensatory damages, [130] but no court ever has established **[*1146]** a fixed or precise ratio. [131] The rule, consequently, is anything but precise, and as one commentator has noted, its singular value is to serve as a "rough device to allow a court to pare down an excessive award of punitive damages." [132] In an effort to instill some element of certainty into the ration rule, some courts have suggested that fact finders may consider certain factors in determining the issue of excessiveness of punitive awards: (1) the nature of the wrong; (2) the character of the conduct at issue; (3) the degree of the wrongdoer's culpability; (4) the situation and sensibilities of the concerned parties; and (5) the extent to which the conduct offends the public sense of justice and propriety. [133] Despite **[*1147]** these efforts, one scholar critically noted that "[t]his test is probably more often a rationalization of results than a means of obtaining them. The proper ratio between actual damages is placed at a figure which supports the judge's view of the verdict. . . ." [134] Another commentator has argued for more effective appellate review by asserting that "it is becoming increasingly clear that it is preferable for the court to have the simple right to set aside an award as excessive." [135] To permit punitive damages in the absence of a severely limiting ratio of punitive to actual damages simply invites disaster.

Many jurisdictions authorize the fact finder to consider the defendant's wealth in assessing punitive damages. [136] In these jurisdictions, the wealthier the defendant, the larger the permissible assessment of a punitory award. [137] The rule is premised on the rationale that the function of deterrence will not be served if the defendant can absorb the penalty with little or no discomfort because of existent wealth. [138] One court has sought to justify evidence of a defendant's financial wealth by stating that "what would be 'smart money' to a poor man would not be, and would not serve as a deterrent, to a rich man." [139]

Several significant problems arise when courts allow juries to **[*1148]** consider the defendant's wealth. First, ill informed juries generally overreact to the emotion provoking nature of evidence of a defendant's wealth. One commentator observed that:

It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare. Such evidence may do more harm than good; jurymen may be more interested in divesting vested interests than in attempting to fix penalties which will make for effective working of the admonitory function. [140]

Second, evidence of the defendant's wealth undoubtedly influences juries to award punitive damages in excess of any rational amount. [141] As an unintended consequence, financially poor codefendants are prejudiced unfairly if they are jointly and severally liable for a punitive damages award that the jury has inflated because of the other defendant's wealth. [142] Fortunately, not all jurisdictions adhere to this rationale. [143] Permitting the fact finder to consider evidence of a wrongdoer's wealth is really nothing more than a camouflaged mechanism designed to encourage large punitive assessments. In essence, it is a procedural device that promotes the redistribution of wealth in society.

D. Additional Patchwork Applications of the Punitive Damage Concept Among the Various Jurisdictions

Some jurisdictions have imposed certain limitations on the punitive damage doctrine that regrettably often serve to further muddy the water for practitioners and jurors. Some states, under a strict products liability theory, disallow punitive damages for property damage because the interests concerned in actions for property damage do not warrant the extension of this controversial doctrine. [144] Courts do not universally prohibit punitive awards for

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property damage, however, and such awards have occurred in aggravated circumstances of trespass, conversion, infringement of common law copyright, nuisance, and seizure of property by a secured party. [145]

Many jurisdictions restrict punitive damages by refusing to **[*1149]** permit such awards for breach of contract. [146] As might be expected, however, other jurisdictions authorize punitive awards for mere contract breaches. [147] In addition, even jurisdictions that generally exclude punitive awards for breaches of contract have formulated exceptions to the general rule. For example, an intentional breach of contract to marry [148] and a breach of contract by carriers or public servants [149] constitute exceptions in some jurisdictions. The basis of these punitive awards, however, usually lies not in the contractural breach itself, but in some tortious element of the defendant's conduct to which the fact finder links the award. [150]

Another area of nonuniform application is the applicability of punitive damages in wrongful death and survival actions. A significant number of jurisdictions prohibit punitive damages in wrongful death actions because these statutory causes of action specifically serve a compensatory purpose. [151] The Seventh Circuit recently dismissed **[*1150]** the punitive damages claims in wrongful death actions in several states that arose from a catastrophic airplane crash. [152] The court concluded that it should resolve the conflict of laws questions in the case in favor of federal regulation of airline tort liability, which prohibits punitive damages, because of the interests of passengers, airline corporations, airplane manufacturers, and state and federal governments. [153] Other jurisdictions, nonetheless, hold that punitive damages are appropriate in wrongful death actions. [154]

Contrary to the prohibition of punitive damages in wrongful death actions, many jurisdictions authorize the recovery of punitive damages in survival actions. [155] Numerous jurisdictions, however, refuse to permit punitive damage claims against the estates of deceased wrongdoers [156] because the punishment and deterrence rationales no longer are viable once the wrongdoer is deceased. [157] **[*1151]** Florida, Illinois, West Virginia, and Texas, however, have adopted a contrary rule. [158] Permitting a punitive award in the case of a deceased defendant truly exposes the fallacy of the punitive damage doctrine.

A particularly controversial area of punitive damage is successor liability. Under the successor liability theory, "a corporation acquiring all or substantially all of another corporation's assets, may 'inherit' the tort liability of the selling corporation." [159] Some courts have prohibited recovery of punitive damages from successor corporations. [160] Other courts, concerned with the ease with which succeeding legal entities can merge or consolidate, have authorized the imposition of punitive damages against successor corporations. [161] **[*1152]** The courts authorizing recovery of punitive awards against successor entities appear to be result oriented. These courts seemingly are concerned with providing a "deep pocket" for the plaintiff, whatever the successor corporation's relationship to its predecessor. Obviously, the successor corporation neither designed, manufactured, nor sold the product that caused the injury. Consequently, neither punishment nor deterrence are served by the imposition of punitive damages for a predecessor's defective product -- unless retribution against innocent parties is contemplated under the punitive damage doctrine.

Some jurisdictions authorize punitive damages in loss of consortium actions. [162] These courts predicate their decisions on the compensatory, rather than the punitive, purpose of the actions. Other jurisdictions reject recovery of punitive damages for loss of **[*1153]** consortium. [163] Understandably, permitting a punitory award in this context is difficult to justify under any of the rationale espoused by jurisdictions that recognize punitive awards.

Another patchwork application plaguing the punitive damage concept is the applicability of insurance coverage to such awards. Assuming that punitive awards are intended as punishment and deterrence, it is an insupportable contradiction to permit the wrongdoer to insure against wrongful acts that merit punitory deterrence. A majority of jurisdictions

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conclude that public policy forecloses the application of insurance coverage for punitive awards. [164] Essentially, these decisions conclude that permitting the wrongdoer to shift the financial burden would detract from the deterrent effect of the punitive award. Moreover, extending insurance coverage would, in effect, transfer the burden of the punitive award to the innocent consuming public through increased premium payments. Other jurisdictions hold that insurance coverage is a matter of private contract between the insurance company and the insured and, therefore, requires no public policy considerations. [165] These jurisdictions ostensibly ignore the very policy that undergirds the punitive damage concept -- punishment and deterrence against future wrongdoing -- and permit the wrongdoer to insure against liability for such awards. The result, of course, is to permit a windfall to the plaintiff at the expense of innocent consumers who must pay increased premium rates for their insurance policies. The dichotomy in attitude among the various jurisdictions regarding the public policy of sanctioning insurance coverage **[*1154]** against punitive damage awards lends further credence to the conclusion that the punitive damage concept represents an archaic doctrine that serves no useful public policy, but which continues only to enhance the largesse dispensed to the plaintiff.

The flawed nature of the punitive damage doctrine is clearly evident in the total absence of any uniformity of application. The legal rationale formulated to justify the concept is fraught with contradictions and is totally unpredictable in its effect. The anachronistic nature of the doctrine bespeaks the imperative need to relegate the doctrine to its rightful place in the archives of history. Most importantly, not only does the punitive damage doctrine not achieve the ordained objectives of punishment and deterrence, but rather, it presents an unfettered destructive force that erodes the economic stability of society. Surely, a doctrine possessing such questionable credentials and engendering such disquieting consequences should sound its own death knell.

V. RATIONALE FOR ABOLISHING PUNITIVE DAMAGES

A. The Adverse Economic Results of Punitive Damages

Because juries possess essentially limitless discretion in awarding punitive damages, [166] the amount of punitive damages awarded in recent years, as if feeding upon itself, has escalated to astronomical figures that boggle the mind. [167] Judge Friendly forecast this problem: "The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the **[*1155]** nation can be so administered as to avoid overkill." [168] Several commentators have expressed concern over the possible severe economic effects precipitated by huge punitive damage awards. [169] Although some commentators and courts have indicated that punitive damages have not yet produced the prophesied doom, [170] one recent scholarly article has cited the severe economic consequences of asbestos litigation that forced several formerly large and viable companies into the bankruptcy courts. [171] Fear of bankruptcy earlier this year prompted the Fifth Circuit to declare a universal abolition of punitive awards in industry-wide asbestosis litigation within its jurisdiction. [172] Although the Fifth Circuit did not extend its moratorium on exemplary damages beyond the realm of asbestos related litigation, the court's decision represents a gargantuan step toward the intelligent and overdue recognition of the inappropriateness and inherent destructiveness of the punitive damage concept in the modern tort reparations system.

Even Professor Owen, who formerly supported the award of punitive damages with few limitations, [173] has recently come to recognize the folly of continued and unbridled awards of exemplary damages. Professor Owen recently foreshadowed the Fifth Circuit's opinion in Jackson when he observed that "[1]arge assessments of punitive damages may not yet be a major threat to the continued viability of most manufacturing concerns, but the increasing number and size of such awards may fairly raise concern for the future **[*1156]** stability of

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American industry." [174] Professor Owen also has noted with alarm that courts increasingly have abdicated their traditional responsibility to control highly questionable punitive awards. [175] He has suggested several possibilities for establishing upper limits for future punitive damage awards. [176]

A byproduct of the continued success that plaintiffs have experienced in obtaining large punitive damage awards is the now universal practice of plaintiffs alleging and demanding punitive damages in an effort to increase the ultimate recovery from juries, [177] and to compel defendants to settle meritless cases because of the fear that a jury will return an outrageous punitive damage award. [178] Because of the discretionary nature of jury verdicts, a "verdict will not be disturbed as excessive unless it is so clearly so as to indicate that it was the result of passion, prejudice, partiality, or corruption; or that it was manifestly the result of disregard of the evidence or applicable rules of law." [179] Although some courts have overturned large punitive awards that shock the judicial conscience or are manifestly unjust, [180] the simple fact is that most huge punitive awards are affirmed. [181] This trend is creating a significant **[*1157]** threat to the stability of our economy. It is now time for courts and legislatures to reconsider the propriety of the punitive damages concept before it creates even more havoc and places our economy at risk. The punitive damage concept, if it ever possessed legitimacy in the civil tort system, surely is an anachronism whose time for service long since has passed and whose insatiable appetite no longer can be afforded.

The current availability of the punitive damage doctrine imposes excessively oppressive and burdensome discovery on defendants. Adhering to the philosophy of liberal discovery, courts ostensibly have concluded that the mere claim for punitive damages entitles the plaintiff to demand the production of interminable reams of documentary and other information potentially related to the issue of punitive damages. [182] For example, an increasing number of products liability plaintiffs incorporate an allegation for punitive damages, and concomitantly, the breadth and scope of court ordered discovery has expanded with this additional claim. Rampant abuse in the discovery process is economically ruinous to defendants, disruptive of the orderly administration of justice, and an unsightly blemish on the tort reparations system. Predictably the public perceives the unfettered discovery process as an unacceptable misuse of the legal system. Consequently, the defendant must choose between the Scylla of economically devastating discovery costs that can transform a favorable verdict into a pyrhhic economic victory and the Charybdis of outrageous and unwarranted **[*1158]** monetary settlements. [183]

B. Punishment and Deterrence Are Not Viable Theories for the Imposition of Punitive Damages

The purpose of the civil law historically has been to provide a remedy to compensate individuals injured by the wrongful conduct of others. [184] Even disinterested commentators such as Dean Prosser have noted the dichotomy of authorizing punishment under the aegis of the civil law, [185] and one court perceptively has observed:

It is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should recover anything more. And it is equally difficult to understand why, if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer, and not to the public in whose behalf he is punished. [186]

[*1159] Another court, ever more emphatically, queried:

How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies" Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absured and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant? [187]

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As one commentator has observed, juries possessing neither expertise in deciding what constitutes just punishment nor skill in determining who should be punished are inflicting large punitive damage awards even though society has not deemed it appropriate to declare the offending conduct criminal. [188] Parties to civil litigation are subject to quasi-criminal fines, and courts are enforcing these penalties without the safeguards afforded even society's worst criminals. [189]

A particularly egregious aspect of the punitive damage doctrine as punishment is its application within the vicarious liability field. [190] Not only are courts inappropriately using punishment in a civil context, but by imposing on employers and principals liability for the punitive damages otherwise assessable against their employees and agents, the courts have diverted punishment from the wrongdoers to innocent parties. [191] One commentator has noted **[*1160]** critically that "it is beyond reason to fathom why an innocent employer should be held liable for more than compensation of the plaintiff's injuries." [192] Punishment and deterrence of the innocent does not comport with a system dedicated to the administration of justice.

Courts have long used the "deep pocket" rationale to justify the vicarious liability of employers and principals for compensatory damages. [193] although this theory arguably possesses merit for compensatory damages, its use tp extend punishment against employers and principals is insupportable under the guise of any theory or rationale. [194] For example, even though punitive damages against individual wrongdoers may be awarded in a section 1983 action, [195] neither the municipal nor the local government can be held vicariously liable for its employees' wanton and malicious conduct. [196] Irrespective of the care that employers exercise, they possess no means to identify and prevent each and every employee from engaging in antisocial acts. [197] Therefore, employers should not suffer punishment for conduct that they cannot prevent.

When an employer has attempted to screen employees during the hiring process, in an effort to hire the best available workers for business reasons, the imposition of punitive damages for a "hiring mistake" lacks any deterrent effect. [198] One expert has criticized **[*1161]** the "make-weight argument" that punitive awards will result in better hiring practices and asserts that the "absurdity" of this rationale should be "apparent to anyone who has ever been in the position of offering employment -- there simply is no way to gauge whether a potential employee will become violent when irritated, just as there is no method of determing with certainty whether he will be a good worker." [199] Another commentator also has observed, while discussing the lack of meaningful **standards** or limits on the amounts of **punitive damages** which a jury awards, that "[f]rom a deterrence standpoint, it confounds understanding to permit such vast uncertainty as to the level of the expected penalty." [200] Another scholar has asserted that high compensatory damages will have a sufficient deterrent effect, anyway; and if they do not, then the plaintiff can seek injunctive relief, the violation of which will subject the defendant to contempt proceedings and fines or jail. [201]

In addition, imposing vicarious liability for punitive damages creates the anomalous situation that the consumers or taxpayers in a community, who are the intended beneficiaries of the punishment administered to the wrongdoer, actually absorb the consequences **[*1162]** of the punishment. Ultimately, it is the innocent consumer and taxpayer who bears the burden of paying for the punitive award imposed upon a vicariously liable employer, corporate entity, or governmental body. [202] "The fact of the matter is that the liberal rules governing vicarious liability for punitive damages allow the wrong person or entity to be punished." [203] If an employer's hiring practices are so outrageous that society should punish them, the most appropriate forum is the criminal justice system, which metes out punishment according to predetermined rules and only against the party guilty of wrongdoing.

Not only is the punishment rationale of punitive damages decidedly inappropriate in a civil law context and the effect of the deterrence rationale minimal at best and unlikely at worst,

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but any redeeming value these rationales might have dwindles in the face of the ratio rule and the application of liability insurance. The ratio rule generally mandates a reasonable relationship between the amount of compensatory and punitive damages. [204] A majority of jurisdictions currently rejects any precise ratio rule. [205] Commentators have criticized the current approach to the ratio rule because the judicial refusal to establish a predetermined ratio creates uncertainty in assessing quasi-criminal fines; [206] and when courts apply a ratio, whether on an ad hoc basis or subject to some generalized ratio guidelines, [207] the concept of gearing the size of the **[*1163]** punitive award to the compensatory award simply does not mesh with the punishment rationale of punitive damages. [208] The applicability of liability insurance to cover punitive damage awards totally vitiates the punishment and deterrence rationales. A majority of jurisdictions has judicially declared that punitive damages are insurable. [209] The courts that refuse to allow insurance coverage on public policy grounds recognize that insurance negates the objectives purportedly served by punitive damages. [210] The allowance of insurance reduces the punishment of the wrongdoer while simultaneously imposing the effects of the punishment on all other policy holders through the vehicle of increased premiums. Permitting punitive damage insurance likewise conflicts with the deterrence objective by reducing the incentive to avoid loss-creating conduct. [211] This incongrous situation recently prompted one court to acknowledge that the punitive damage doctrine, as applied today, does not deter tortfeasors and, because of the unpredictable manner in which fact finders impose damages to punish, insurance should be permitted to provide coverage against exemplary damages. [212] More importantly, however, liability insurance for exemplary damages makes necessary the assessment of larger awards to achieve punishment and deterrence, which in turn causes insurance **[*1164]** costs and coverages to rise, which will, in turn, necessitate even larger punitive awards. [213] This circularity epitomizes the illogical nature of punitive awards.

Neither the punishment nor the deterrence rationale is appropriate in a civil law context. The entire concept of punitive damages today in civil actions is a wrong idea at the wrong time. [214]

C. Compensation Is Not a Viable Theory for the Imposition of Punitive Damages

The usual rationale for punitive damages is punishment and deterrence. [215] A few jurisdictions, however, continue to view punitive damages as a form of compensatory award for intangible injuries. [216] Irrespective of the viability of this rationale in earlier times, [217] the concept simply no longer is relevant. Compensatory awards currently provide recovery of all costs for physical injuries, disfigurement, physical impairment, loss of earnings and earning capacity, past and future medical expenses, past and future pain and suffering, past and future mental anguish, loss of society and companionship, and every conceivable intangible and imagined injury such as emotional distress [218] and insult. [219] Additionally, third parties such as spouses, children, and parents increasingly can recover compensatory awards for the intangible harms of loss of consortium, loss of parentage, loss of society, and loss of companionship. [220] **[*1165]** Undoubtedly, the most eloquent condemnation of punitive damages as a form of compensation is etched in an early Washington case:

There is nothing stinted in the rule of compensation. The party is fully compensated for all the injury done his person or his property, and for all losses which he may sustain by reason of the injury, in addition to recompense for physical pain, if any has been inflicted. But it does not stop here; it enters into the domain of feeling, tenderly inquires into his mental sufferings, and pays him for any anguish of mind that he may have experienced. Indignities received, insults borne, sense of shame or humiliation endured, lacerations of feelings, disfiguration, loss of reputation or social position, loss of honor, impairment of credit and every actual loss, and some which frequently border on the imaginary, are paid for under the rule of compensatory damages. The plaintiff is made entirely whole. The bond has been paid in full. Surely the public can have no interest in exacting the pound of flesh. [221]

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Considering the expanded and virtually unlimited access to compensatory damages, punitive damages simply provide a windfall to the plaintiff, penalize the innocent consumers or society, and unnecessarily sap the vitality of the economy upon which society is totally dependent. [222]

The punitive damage doctrine theoretically is unsound, legally insupportable, economically unnecessary for plaintiffs, and economically disastrous for both defendants and innocent consumers. Therefore, it is time, and in fact, the hour grows late, for the legislatures and courts to dismantle this potentially destructive doctrine of another era. Neither right nor justice, neither fairness nor equity, and neither the vitality of the tort reparations system nor economic considerations warrant the survival of this outdated doctrine.

[*1166] VI. THE ALTERNATIVE IN THE ABSENCE OF TOTAL ABROGATION OF PUNITIVE DAMAGES

One commentator observed that the issue of punitive damages in the past "merited scant attention" because such awards were "rarely assessed and likely to be small in amount." [223] Unfortunately, the tort reparations situation today has changed drastically, and the antiquated concept of punitive damages as applied in the 1980s poses serious, if not potentially fatal, consequences. If a complete abrogation of the punitive damage doctrine is not an achievable objective, then a series of coordinated and precisely defined limitations is imperative to forestall the economically and doctrinally debilitating effects of this concept.

First, it is necessary to formulate certain **standards** of conduct and proof by which the fact finder determines **punitive damage** liability. Realistic and meaningful **standards** presently are nonexistent, and confusing jury instructions only serve to further the confusion of juries. [224] Either the courts or the legislatures should authorize the recovery of punitive damages only upon a stringent showing that a defendant acted with deliberate intent, ill motive, or maliciousness. [225]

Second, the courts should require a significantly higher standard of proof than the less exacting "preponderance of the evidence" burden. The degree of proof required should be elevated to **[*1167]** a "clear and convincing" standard [226] or a "beyond a reasonable doubt" burden. [227] The Second Circuit, based upon its assertion that conduct which would "give rise to punitive damages must be close to criminality," recently stated that the plaintiff must clearly establish this degree of behavior by the defendant. [228] Because the punitive damages concept represents an anomalous perversion of a criminal law concept grafted to the civil law, and considering the weaknesses inherent in the rationale underlying the punitive damage doctrine in today's society, the wisest course strongly suggests the adoption of the more stringent "beyond a reasonable doubt" burden of proof.

Third, it is necessary to reallocate judicial power so that judges, rather than unknowledgeable juries, decide if punitive damages are merited, and if so, in what amount. [229] Judges, equipped by experience and familiarity with legal concepts, are **[*1168]** better able than inexperienced juries to distinguish behavior that justifies punishment, [230] and hopefully would be able to avoid the bias and naivete that jurors express through inflated punitive awards. Many judges currently support such a realignment of duties. [231] If responsible jurisprudence mandates punishment through civil law remedies, it is only logical to utilize the knowledge of judicial officers to achieve fair and rationale results. Punitive damages awards have become too large, too destructive, and too far removed from economic reality to allow biased and rhetorically enraged juries to continue on their present course. [232]

Fourth, specific limits should be established for punitive damages awards. [233] Such limitations would curtail the current destructive abuses of the doctrine and would eliminate the current inordinate number of outrageous awards. Professor Owen has suggested a limitation of either twice the amount of compensatory damages or the the plaintiff's costs plus $ 10,000. [234] A

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well-known example of a legislatively imposed limit on punishment oriented damages is the treble damage provision in the Clayton Act that allows actual damages plus twice their value as punitive damages for violations **[*1169]** of the antitrust laws. [235] Whether legislatures validate a dollar for dollar ratio or a single established amount, an equitable and workable upper limit is essential to control the undisciplined punitive damages doctrine. A dollar for dollar ratio presents the arguable advantage of flexibility that automatically would fluctuate both upward and downward, depending upon the amount of compensatory damages. A ratio limit also presents the danger, however, that juries artificially will inflate compensatory awards to increase the possible punitive amount. The logical solution, therefore, is to view the dollar for dollar ratio as an upper limit, subject to judicial reduction. [236] Unlike the Clayton Act treble damage provisions, judges would retain the authority to exercise discretion in reducing punitive awards below the statutorily allowed upper limit.

Fifth, the application of the punitive damage doctrine must be modified significantly in the strict tort liability context of product litigation. The legislature should declare that punitive damages may be awarded only once. If a plaintiff establishes that he suffered injury because a defendant supplied a product containing a design or marketing defect, then the plaintiff should receive total compensation for the injury. When hundreds or even thousands of plaintiffs prosecute claims for injuries that emanate from a single design or marketing defect that exists in a single line of a product, however, the product supplier should not endure multiple punishments for a single design defect. The product supplier is deemed liable simply because of the condition of the product -- a single design defect in a particular product. If the civil law is to embrace the added function of punishing product suppliers, then a single **[*1170]** award for a single design deficiency is sufficient. To borrow a phrase from Justice Holmes, "even a dog distinguishes between being stumbled over and being kicked," [237] and, as many asbestos manufacturers well know, [238] the punitive damage doctrine has assumed the form of strategically placed and excessively destructive kicks.

Sixth, any exemplary damages permitted and recovered should be payable to the state treasuries just like any other penal fines. [239] Plaintiffs currently receive compensation for every conceivable element of injury, [240] and punitive damage awards should not constitute a windfall for the plaintiff. Judicial transfer of punitive damage awards to the state would prevent unnecessary and inequitable windfalls to plaintiffs, would provide state funds that could be used for public purposes, and would be consistent with all other penal fines which are required to be paid to state treasuries. [241]

Seventh, if the punitive damage concept continues to survive its archaic origins, courts should declare that insurance coverage contravenes public policy. Punitive damage awards penalize innocent purchasers of insurance who suffer increased premiums each time a court concludes that liability insurance provides coverage **[*1171]** for such penalties. [242] Increased premiums do not punish the wrongdoer; they punish all innocent purchasers of insurance.

Last, and undoubtedly most important, the appellate courts must initiate a more aggressive and standardized attitude in reviewing exemplary awards. Currently, appellate courts overturn a punitive damage verdict as excessive only if it is the result of passion, prejudice, partiality, corruption, or is manifestly unjust. [243] Professor Owen recently recognized this problem and suggested that appellate courts should scrutinize carefully the trial record "for improper evidence, for argument that might have inflamed the jury, and for the sufficiency of the evidence as a whole." [244] Appellate courts too long have summarily characterized the amount of punitive damage awards as a fact issue for jury determination. This attitude is an abdication of appellate review responsibility and the results of such an abdication cannot be justified and should not continue.

VII. CONCLUSION

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Punitive damages may have served a valuable function in the scheme of ancient law. The historical justifications for the doctrine, however, have long since become obsolete, particularly with the current unfettered expansion of the compensatory damage system. Because the punitive damage doctrine is monstrously archaic and because of the distorted and arbitrary fashion in which it currently operates, the harm it causes is significantly greater than any good it produces. In today's society, punitive damages merely create a windfall for plaintiffs without serving either as a punishment or a deterrence. The doctrine should be abolished because it is a doctrine of a bygone age of the law. [245] Abolishing the punitive damage doctrine would leave unaffected the civil tort system that **[*1172]** continues to compensate plaintiffs for every conceivable injury. Furthermore, if punishment or deterrence is necessary, legislatures should enact appropriate criminal statutes with the protections that normally accompany the imposition of penal fines.

If abolition of this outdated doctrine is not accomplished, then both logic and necessity require the imposition of severe restrictions to restrain the doctrine's ill-advised and economically devastating effects. The law continually must change and adapt to fulfill its noble purpose of insuring the fair and responsible administration of justice. This noble legal purpose is threatened by the onslaught of economically destructive punitive awards. Unless farsighted and aggressive judicial and legislative action is initiated, the punitive damages doctrine will continue to wreak a form of devastation never contemplated or intended in the evolution of the tort reparations system.

FOOTNOTES:

n1. K. REDDEN, PUNITIVE DAMAGES § 2.2(A)(1) (1980).

n2. See, e.g., id.; G. DRIVER & J. MILES, THE BABYLONIAN LAWS 500-01 (1952); Sales, The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel, 14 ST. MARY'S L.J. 351, 351 n.1 (1983); Special Project, An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation, 36 VAND. L. REV. 573, 691 (1983).

n3. K. REDDEN, supra note 1, § 2.2(A)(1).

n4. See, e.g., Exodus 22:1 (King James) ("If a man shall steal an ox, or a sheep, and kill it, or sell it, he shall restore five oxen for an ox, and four sheep for a sheep."); Exodus 22.9 (King James) ("For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, which another challengeth to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbour."). Mosaic law also provided for recovery of multiple damages for adultery and usury. See K. REDDEN, supra note 1, § 2.2(A)(1).

n5. See, Sales, supra note 2, at 353 (Roman civil law recognized punitive damages) (citing Walther & Plein, Punitive Damages: A Critical Analysis: Kirk v. Combs, 49 MARQ. L. REV. 369, 369 (1965)); see also W. BUCKLAND & A. McNAIR, ROMAN LAW AND COMMON LAW 344-45 (2d ed. 1952) (asserting that the basis of Roman civil law was punitive in nature); K. REDDEN, supra note 1, § 2.2(A)(1) (Roman law provided for multiple damage awards for injurious acts characterized by wanton willfulness or conscious deliberation);

n6. K. REDDEN, supra note 1, § 2.2(A)(2).

n7. 95 Eng. Rep. 768 (C.P. 1763).

n8. Id. at 769. The plaintiff in Huckle sued the King's officers for illegal searches and seizures, assault, and false imprisonment under a "nameless warrant," and the court upheld an award of 300 pounds for "exemplary damages" even though actual damages were only 20 pounds. Id. In the related case of Wilkes v. Wood, 98 Eng. Rep. 489 (C.P. 1763), Lord Chief Justice Pratt stated that:

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[A] jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.

Id. at 498-99.

n9. See generally J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 1.02 (1984); Cooter, Economic Analysis of Punitive Damages, 56 S. CAL. L. REV. 79, 90 (1982); Duffy, Punitive Damages: A Doctrine Which Should Be Abolished, reprinted in DEFENSE RESEARCH INSTITUTE: THE CASE AGAINST PUNITIVE DAMAGES (D. Hirsch & J. Pouros eds. 1969); Owen, Civil Punishment and the Public Good, 56 S. CAL. L. REV. 103, 108 (1982); Sales, supra note 2, at 353-55.

n10. Duffy, supra note 9, at 4; Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. CAL. L. REV. 1, 12-13 (1982); Sales, supra note 2, at 353-54. A number of early cases in which defendants attempted to persuade courts to overturn arguably excessive jury verdicts furnished support for adoption of the punitive damage concept. See Ash v. Ash, 90 Eng. Rep. 526 (K.B. 1701) (court set aside a daughter's 2000 pound judgment against her mother because the "jury were very shy of giving a reason of their verdict"); Wood v. Gunston, 82 Eng. Rep. 867 (Banc. Sup. 1655) (the "Supreme Bench," which had replaced the King's Bench during the Interregnum, agreed that the court could overturn an excessive jury verdict in a slander suit and ordered a new trial); Hawkins v. Sciet, 81 Eng. Rep. 1099 (K.B. 1622) (first case to implicitly recognize the courts' power to set aside jury verdicts, although court allowed instant verdict to stand); see also Ellis, supra, at 12-15. Contra, Townsend v. Hughes, 86 Eng. Rep. 994 (C.P. 1649) (court held that it could not interfere with the jury's power to determine damage awards and sustained plaintiff's judgment of 4000 pounds).

n11. K. REDDEN, supra note 1, § 2.2(A)(2).

n12. Appellate courts in medieval England generally could not review a jury award of damages. Instead, a litigant oppressed by an allegedly excessive award of damages could pursue his grievance directly against the jury by means of a writ of attaint. If the court determined the damages excessive pursuant to its writ, the jury members were punishable under its provisions. Sales, supra note 2, at 354. Such punishment could be so severe that the jurors should "'become forever infamous; should forfeit their goods and the profits of their land; should themselves be imprisoned, and their wives and children thrown out of doors; should have their houses razed, their trees extirpated, and their meadows ploughed . . .'" K. REDDEN, supra note 1, § 2.2(A)(2) (quoting 3 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 402 (1836)).

n13. 45 Vt. 275 (1873).

n14. Id. at 286.

n15. K. REDDEN, supra note 1, § 2.2(A)(2).

n16. See Note, Exemplary Damages in the Law of Torts, 70 HARV. L. REV. 517, 530-33 (1957). Professor Ellis indicates that appellate courts today are more willing to use remittitur to reduce excessive punitive damage awards. Iowa may be the only state that does not allow remittitur of such verdicts. The availability of remittitur in other states does not lead to any more certainty or consistency in punitive damage theory, however; increased availability just makes it more probable that state courts will refuse to uphold extremely large awards. Ellis, supra note 10, at 55 (citing K. REDDEN, supra note 1, § 10.5).

doctrine at early common law, the simple fact remains that none of the historical justifications supports the punitive damage theory in today's tort reparations system. The quest to bestow increasing compensation no longer can justify punitive damage awards because actual damages currently recoverable compensate plaintiffs more than adequately for every conceivable element of physical, emotional, or imagined injury. The desire to inflict punishment, likewise, represents an insupportable basis for awarding quasi-criminal fines in a civil context, and is inconsistent with ancient and modern jurisprudence because the civil law historically has been premised upon the concept of compensation and not penal retribution. Deterrence is an equally unsound basis upon which to establish a civil remedy. Unfortunately, theoretical arguments mask the archaic and destructive nature of the punitive damages doctrine. Considering that an award of punitive damages is actually counterproductive to the bases which originally provided credibility for its existence, the severe economic impact of mind boggling and unprecedented recent awards of punitive damages, and the potential for even more catastrophic economic consequences in the future, it is time to relegate this doctrine to its rightful niche in the annals of law.

Part II of this Article traces the evolution of the punitive damage theory, including ancient origins and current status. Part III explores the various justifications theorized in support of the doctrine's present viability. Part IV analyzes the patchwork applications and conflicting standards that measure conduct warranting an award of puntive damages, the treatment of vicariously liable corporate defendants, and other factors that affect the doctrine. This part emphasizes that punitive damages are awarded on the basis of highly questionable rationale and in an absurdly confusing **[*1119]** and noticeably destructive manner. Part V argues for the complete abolition of the punitive damage concept: ratio potest allegari deficiente lege. In the absence of complete abolition of punitive damages, part VI asserts the urgent need for immediate stringent limitations on a doctrine that currently operates as an undisciplined and unfettered juggernaut of destruction in the civil tort system. Responsible jurisprudence, however, argues forcefully in favor of relegating this legal dinosaur to an era that long since has passed.

II. THE EVOLUTION OF PUNITIVE DAMAGES

A. Ancient Origins and Early Common Law

The precursor of modern puntive damages was the statutory remedy of multiple awards, a practice that, like punitive damages, provided for awards in excess of actual harm. [1] One of the earliest systems of law to utilize civil punitive damages was the Code of Hammurabi in 2000 B.C. [2] Punitory forms of damages also appeared in the Hittite law in 1400 B.C. and in the Hindu Code of Manu in 200 B.C. [3] Even the Bible contains several examples of multiple damage remedies that Mosaic law provided for offenses such as stealing. [4] Commentators disagree over whether Roman civil law ever actually recognized the concept of punitive damages. [5] English courts before the eighteenth century, however, upheld jury verdicts that exceeded the plaintiff's actual physical harm, [6] and an **[*1120]** English court initially employed the term "exemplary damages" in 1763 in Huckle v. Money [7] to recognize that a jury legitimately could return a verdict for excessive monetary awards. [8]

Courts and commentators have proferred a variety of historical justifications for the development of punitive damages. [9] One theory postulates that courts used the concept of punitive damages to justify otherwise excessive jury verdicts. [10] Early English common-law juries consisted of local townspeople who knew more about the facts of cases than did the judges, and under the reign of Henry II the knights who acted as jurors also provided the only testimony at the trial. [11] Primitive English courts, therefore, only reluctantly interfered with the ostensibly knowledgeable decisions reached by English juries, [12] and the concept that damages possessed **[*1121]** a proper, albeit punitive quality, simply served to justify these purportedly excessive jury awards.

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n17. J. GHIARDI & J. KIRCHER, supra note 9, § 1.02 4; K. REDDEN, supra note 1, § 2.2(C); Duffy, supra note 9, at 5; Sales, supra note 2, at 354.

n18. Sales, supra note 2, at 354 (citing Stuart v. Western Union Tel. Co., 66 Tex. 580, 18 S.W. 351 (1885)). The Texas Supreme Court in Stuart allowed recovery for mental anguish when the defendant failed to deliver a death message. The court stated that "the whole doctrine of punitory or exemplary damages has its foundation in a failure to recognize as elements upon which compensation may be given, many things which ought to be classed as injuries entitling the injured person to compensation." Stuart, 66 Tex. at 586, 18 S.W. at 353.

n19. 53 N.H. 342 (1873).

n20. See supra note 7 and accompanying text.

n21. Fay v. Parker, 53 N.H. at 364.

n22. 128 Eng. Rep. 761 (C.P. 1814).

n23. Id.

n24. Id.

n25. 95 Eng. Rep. 909 (C.P. 1769).

n26. Id. at 910.

n27. See K. REDDEN, supra note 1, § 7.5(D). "The availability of actual damages in tort for mental anguish, wounded feelings, indignity and embarrassment have made the awarding of exemplary damages on such bases redundant." Id. § 2.3(A).

n28. Id. § 7.5(D); Coccia & Morrissey, Punitive Damages in Products Liability Cases Should Not Be Allowed, 22 TRIAL LAW. GUIDE 46, 64-65 (1978); see infra notes 153-66 and accompanying text.

n29. 53 N.H. 342 (1873).

n30. Id. at 382.

n31. K. REDDEN, supra note 1, § 2.2(E) (citing Freifield, The Rationale of Punitive Damages, 1 OHIO ST. L.J. 5, 9 (1935)); Sales, supra note 2, at 355.

n32. K. REDDEN, supra note 1, § 2.2(E); Sales, supra note 2, at 355.

n33. Special Project, supra note 2, at 694.

n34. See Duffy, supra note 8, at 5; supra note 27 and accompanying text.

n35. Defense Research Institute: The Case Against Punitive Damages, 6-7 (D. Hirsch & J. Pouros eds. 1969); K. REDDEN, supra note 1, § 7.5(B). Dean Prosser stated:

A crime is an offense against the public at large, for which the state, as the representative of the public, will bring proceedings in the form of a criminal prosecution. The purpose of such a proceeding is to protect and vindicate the interests of the public as a whole, by punishing the offender or eliminating him from society, either permanently or for a limited time, by reforming him or teaching him not to repeat the offense, and by deterring others from

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imitating him. . . .

The civil action for tort, on the other hand, is commenced and maintained by the injured person himself, and its purpose is to compensate him for the damage he has suffered, at the expense of the wrongdoer.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 7 (4th ed. 1971) (footnote omitted). Professors Lafave and Scott have observed:

Criminal law and the law of torts . . . are related branches of the law; yet in a sense they are two quite different matters. The aim of the criminal law . . . is to protect the public against harm, by punishing harmful results of conduct or at least situations . . . which are likely to result in harm if allowed to proceed further. The function of tort law is to compensate someone who is injured for the harm he has suffered.

W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 3, at 11 (1972).

n36. 1 N.J.L. 77 (1791).

n37. Id. at 77 (emphasis in original).

n38. Id. at 78.

n39. See K. REDDEN, supra note 1, § 2.3(B).

n40. Id. § 2.3(A); Ellis, supra note 10, at 11-12; Sales, supra note 2, at 355. Some disagreement, however, exists over whether the modern justification for punitive damages in England is compensation or punishment and deterrence. Compare Duffy, supra note 9, at 5 (citing Walther & Plein, Punitive Damages: A Critical Analysis: Kirk v. Combs, 49 MARQ. L. REV. 369, 371 (1965)) (theory that punitive damages are "compensation" for incompensable injuries has remained the modern English justification) with J. GHIARDI & J. KIRCHER, supra note 9, § 1.03, at 7 (citing Rookes v. Barnard, [1964] 1 All E.R. 367, 407) (despite early confusion, current purpose of punitive damages in English law is "to punish and deter").

n41. J. GHIARDI & J. KIRCHER, supra note 9, § 4.01-.1.6; Sales, supra note 2, at 363.

n42. See J. GHIARDI & J. KIRCHER, supra note 9, at table 4.1 (46 states and the District of Columbia allow punitive damages at common law); Duffy, supra note 9, at 6.

n43. Louisiana, Massachusetts, Nebraska, and Washington constitute this minority. See, e.g., McCoy v. Arkansas Natural Gas Co., 175 La. 487, 143 So. 383 (1932); City of Lowell v. Massachusetts Bonding & Ins. Co., 313 Mass. 257, 47 N.E.2d 265 (1943); Abel v. Conover, 170 Neb. 926, 104 N.W.2d 684 (1960); Kammerer v. Western Gear Corp., 96 Wash. 2d 416, 635 P.2d 708 (1981).

n44. These jurisdictions are Louisiana and Massachusetts. No authority exists in Louisiana law for imposing punitive damages in any case "unless it be for some particular wrong for which a statute expressly authorizes the imposition of some such penalty." McCoy v. Arkansas Natural Gas Co., 175 La. at 497, 143 So. at 386; see Killebrew v. Abbott Laboratories, 359 So. 2d 1275 (La. 1978). Massachusetts similarly disallows punitive damages in the absence of specific statutory authorization. City of Lowell v. Massachusetts Bonding & Ins. Co., 313 Mass. at 269-70, 47 N.E.2d at 272; see Caperci v. Huntoon, 397 F.2d 799, 801 (1st Cir.), cert. denied, 393 U.S. 940 (1968). Statutorily allowed punitive damages in Massachusetts include situations in which the defendant is guilty of unfair or deceptive insurance trade practices, MASS. GEN. LAWS ANN. ch. 176D, § 7 (West Supp. 1983-1984)(up to 25% of underlying claim), and illegal willful dissemination of the criminal

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record of an offender, MASS. GEN. LAWS. ANN. ch. 6, § 177 (West 1976) (minimum $ 100 to maximum $ 1000); see Barr v. Interbay Citizens Bank, 96 Wash. 2d. 409, 635 P.2d 441 (1981) (punitive damages allowed only under express statutory authorization).

n45. These jurisdictions include Indiana, Nebraska, and Washington. See, e.g., Glissman v. Rutt, 175 Ind. App. 493, 494, 372 N.E.2d 1188, 1189 (1978) (criminal prosecution bars imposition of punitive damages); Abel v. Conover, 170 Neb. 926, 929, 104 N.W.2d 684, 688 (1960) (court stated unequivocally that "punitive, vindictive, or exemplary damages will not be allowed, and that the measure of recovery in all civil cases is compensation for the injury sustained"); Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 53, 25 P. 1072, 1074 (1891) (Washington will allow only compensatory damages because they now cover all possible injuries and to allow punitive damages in addition would be akin to "exacting the pound of flesh"); accord Kammerer v. Western Gear Corp., 96 Wash. 2d 416, 635 P.2d 708 (1981); Barr v. Interbay Citizens Bank, 96 Wash. 2d. 409, 635 P.2d 441 (1981).

n46. These states are Connecticut, Georgia, Michigan, and New Hampshire. See, e.g., Collens v. New Canaan Water Co., 155 Conn. 477, 488-89, 234 A.2d 825, 831-32 (1967) (punitive damages actually have a compensatory nature and may not exceed the amount of plaintiff's expenses of litigation, less taxable costs); Westview Cemetery, Inc. v. Blanchard, 234 Ga. 540, 543-46, 216 S.E.2d 776, 778-81 (1975) (recovery under § 105-2003 for injury "to the peace, happiness, or feelings of the plaintiff" may include punitive damages and, therefore, precludes the recovery of punitive damages under § 105-2002); Wise v. Daniel, 221 Mich. 229, 233-34, 190 N.W. 746, 747 (1922) (factfinder may not award exemplary damages as a separate amount for example or punishment, although compensatory damages may be increased); Vratsenes v. New Hampshire Auto, Inc., 112 N.H. 71, 73, 289 A.2d 66, 68 (1972) (punitive award not allowable, but compensatory damages may be increased to compensate plaintiff in cases of wanton, malicious, or oppressive conduct).

n47. See supra note 40 and accompanying text. The states that recognize punishment and deterrence as the rationales for punitive damages obviously do not include the four states that employ the punitive nomenclature in designating essentially compensatory awards. See supra note 46 and accompanying text.

n48. J. GHIARDI & J. KIRCHER, supra note 9, § 4.14 & n.1 (citing cases and statutes from 36 states and the District of Columbia).

n49. Ellis, supra note 10, at 3. Professor Ellis offered as possible justifications: (1) punishment of the defendant; (2) specific deterrence of the defendant; (3) general deterrence of others from acting in a similar manner; (4) preservation of the peace; (5) inducement of private law enforcement; (6) compensation of victims for otherwise uncompensable losses; and (7) payment of plaintiffs' attorneys' fees. Id.

n50. Id. at 3 n.10 (quoting T. BATY, VICARIOUS LIABILITY 148 (1916)).

n51. Ellis, supra note 10, at 11.

n52. See, e.g., Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 815 (6th Cir. 1982) (failure to warn would support punitive award if such failure manifested a flagrant indifference to the risk of harm); Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 928 n.13, 582 P.2d 980, 990 n.13, 148 Cal. Rptr. 389, 399 n.13 (1978) ("purpose of punitive damage is to punish wrongdoers and thereby deter commission of wrongful acts"); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 741 (Minn.), cert. denied, 449 U.S. 921 (1980) (court allowed punitive damages, even though manufacturer had ceased production of dangerous product, for purpose of deterring future misconduct and "to punish past misconduct"); Leimgruber v. Claridge Assocs., 73 N.J. 450, 454, 375 A.2d 652, 654 (1977) (theory of punitive damages is to punish the defendant for aggravated misconduct and deter such conduct in the future);

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Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J. Super. 436, 448, 358 A.2d 805, 811 (1976) (punitive damages are intended to punish the tortfeasor and prevent him from repeating such misconduct).

n53. J. GHIARDI & J. KIRCHER, supra note 9, § 5.39.

n54. See infra notes 101-07 & 188-201 and accompanying text.

n55. J. GHIARDI & J. KIRCHER, supra note 9, § 4.14.

n56. Id.

n57. See, e.g., Pringle Tax Serv., Inc. v. Knoblauch, 282 N.W.2d 151, 154 (Iowa 1979); Standard Life Ins. Co. v. Veal, 354 So. 2d 239, 247 (Miss. 1977); Newton V. Standard Fire Ins. Co., 291 N.C. 105, 114, 229 S.E.2d 297, 302 (1976); Detling v. Chockley, 70 Ohio St. 2d 134, 136, 436 N.E.2d 208, 209 (1982); City Nat'l. Bank v. Haynes, 614 S.W.2d 605, 609 (Tex. 1981); FBC Stores, Inc., v. Duncan, 214 Va. 246, 251, 198 S.E.2d 595, 599 (1973); Spencer v. Steinbrecher, 152 W. Va. 490, 500, 164, S.E.2d 710, 717 (1968). North Carolina consistently has allowed punitive damages solely on the basis of its policy to punish intentional wrongdoing and to deter others from similar behavior. See, e.g., Newton v. Standard Fire Ins. Co., 291 N.C. 105 at 114, 229 S.E.2d 297, 302 (1976).

n58. See, e.g., Kerr v. First Commodity Corp. of Boston, 735 F.2d 281, 289 (5th Cir. 1984) (applying Missouri law); Ray Dodge, Inc. v. Moore, 251 Ark. 1036, 1044, 479 S.W.2d 518, 523 (1972); Frick v. Abell, 198 Colo. 508, 511, 602 P.2d 852, 853 (Colo. 1979); Gent v. Collinsville Volkswagen, Inc., 116 Ill. App. 3d 496, , 451 N.E.2d 1385, 1391 (1983); Taylor v. Wachter, 227 Kan. 221, 224, 607 P.2d 1094, 1098 (1980); Bisset v. Goss, 481 S.W.2d 71, 74 (Ky. 1972); Wedeman v. City Chevrolet Co., 278 Md. 524, 531, 366 A.2d 7, 12 (1976); Miller v. Watkins, 653 P.2d 126, 133 (Mont. 1982); Fahrenberg v. Tengel, 96 Wis. 2d 211, 222, 291 N.W.2d 516 (1980).

n59. See, e.g., Acheson v. Shafter, 107 Ariz. 576, 578, 490 P.2d 832, 834 (1971) (punitive damages are meant to punish the wrongdoer and to act as a deterrent to further wrongdoing); Sandler v. Lawn-A-Mat Chem. & Equip. Co., 141 N.J. Super. 436, 448, 358 A.2d 805, 811 (1976) (punitive damages "are intended to punish the tortfeasor and prevent him from repeating such conduct").

n60. See, e.g., Jensen v. Peterson, 264 N.W.2d 139, 144 (Minn. 1978) (punitive damages deter particularly egregious conduct, but court does not indicate by whom); Kirchbaum v. Lowrey, 165 Minn. 233, 236, 206 N.W. 171, 173 (1925) (punitive damages deter willful, wanton, or malicious wrongs, but court does not specify by whom).

n61. See Malcom v. Little, 295 A.2d 711, 714 (Del. 1972); Riegel v. Aastad, 272 A.2d 715, 718 (Del. 1970).

n62. Malcom v. Little, 295 A.2d at 714 (Del. 1972); Riegel v. Aastad, 272 A.2d at 718 (Del. 1970).

n63. See Hofer v. Lavender, No. C-2552 (Tex. July 11, 1984) (either deterrence or punishment, or both are now recognized as valid). Compare Wussow v. Commercial Mechanisms, Inc., 97 Wis. 2d 136, 155-56, 293 N.W.2d 897, 907 (1980) (punishment of past conduct is a sufficient basis for assessing punitive damages, even though they can also serve to deter future outrageous conduct) with John Mohr & Sons v. Jahnke, 55 Wis. 2d 402, 411, 198 N.W.2d 363, 368 (1972) (punitive damages act to punish and deter).

n64. J. GHIARDI & J. KIRCHER, supra note 9, § 4.15 at 17.

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n65. Maine, Oregon, and Utah are among those states that specifically state that deterrence is the only proper basis of punitive damages. See, e.g., Foss v. Maine Turnpike Auth., 309 A.2d 339, 345 (Me. 1973) (deterrence is the proper justification for exemplary damages); Lewis v. Devils Lake Rock Crushing Co., 274 Or. 293, 300, 545 P.2d 1374, 1378 (1976)(deterrence is only proper basis for imposing punitive damages); Nash v. Craigco, Inc., 585 P.2d 775, 778 (Utah 1978)(punitive damages teach the defendant not to repeat and warn others not to participate in such conduct).

n66. Jolley v. Puregro Co., 94 Idaho 702, 708-09, 496 P.2d 939, 945-46 (1972).

n67. See supra notes 56-60 and accompanying text. At least one jurisdiction, California, has suggested that punitive damages may be levied against a product supplier to deter the entire industry of which the defendant is a member. See Schleininger v. Questor Corp., 200 Cal. Rptr. 634 (1984). The extra penalty of monetary awards based on alleged wanton and **reckless** conduct by all members of an industry is an unwarranted extension of an already flawed concept.

n68. See J. GHIARDI & J. KIRCHER, supra note 9, § 4.15, at 18.

n69. Hofer v. Lavender No. C-2552 (Tex. July 11, 1984).

n70. In a strongly worded dissent Justice Spears noted that [t]he punitive and deterrant aims of exemplary damages are not separable. The general deterrent effect of an award can not be considered in isolation, because to a large extent general deterrence depends on punishment. Specifically, members of the public are deterred from similar misconduct because they witnessed the wrongdoers conduct. . . .

Id.

n71. See Collens v. New Canaan Water Co., 155 Conn. 477, 234 A.2d 825 (1967); Westview Cemetery, Inc. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975); McLaren v. Zeilinger, 103 Mich. App. 22, 302 N.W.2d 583 (1981); Perry v. Melton, 299 S.E.2d 8 (W. Va. 1982). But, as noted in Ratner v. Sioux Natural Gas Corp., 719 F.2d 801, 804 (5th Cir. 1983), "[t]he award of punitive damages is unconcerned with compensation; it is intended to punish the wrongdoer and deter the commission of similar offenses in the future."

n72. Sales, supra note 2, at 354; see Hink v. Sherman, 164 Mich. 352, 357, 129 N.W. 732, 734 (1911); Fay v. Parker, 53 N.H. 342, 380 (1873).

n73. See Stuart v. Western Union Tel. Co., 66 Tex. 530, 18 S.W. 351 (1885).

n74. Duffy, supra note 9, at 11; see also Reinah Dev. Corp. v. Kaaterskill Hotel, 86 A.D.2d 50, 448 N.Y.S.2d 686 (1982), rev'd on other grounds, 465 N.Y.2d 482, 452 N.E.2d 1238 (1983).

n75. See supra notes 17-29 and accompanying text.

n76. See infra notes 213-20 and accompanying text.

n77. See generally J. GHIARDI & J. KIRCHER, supra note 9, § 5.01, at 2; Sales, supra note 2, at 364-65; Special Project, supra note 2, at 695.

n78. As an example, Dean Prosser has noted:

Something more than the mere commission of a tort is always required for punitive

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damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton. Lacking this element, there is general agreement that mere negligence is not enough, even though it is so extreme in degree as to be characterized as "gross," an unhappy term of ill-defined content, which occasionally, in a few jurisdictions, has been stretched to include the element of conscious indifference to consequences, and so to justify punitive damages. Still less, of course, can such damages be charged against one who acts under an innocent mistake in engaging in conduct that nevertheless constitutes a tort.

W. PROSSER, supra note 34, § 2, at 9-10. Similarly, Professor McCormick has suggested:

Since these damages are assessed for punishment and not for reparation, a positive element of conscious wrongdoing is always required. It must be shown either that the defendant was actuated by ill will, malice, or evil motive (which may appear by direct evidence of such motive, or from the inherent character of the tort itself, or from the oppressive character of his conduct, sometimes called "circumstances" of aggravation"), or by fraudulent purposes, or that he was so wanton and **reckless,** as to evince a conscious disregard of the rights of others. "Gross negligence" is a somewhat ambiguous expression. In the sense of extreme carelessness merely, it would probably not suffice, but only when it goes further and amounts to conscious indifference to harmful consequences.

McCORMICK, HANDBOOK OF THE LAW OF DAMAGES § 79, at 280-82 (1935). For the sake of simplicity, this Article adopts the broad terms of "intentional," "**reckless,**" and "negligent" to describe and refer to the **standards** of conduct that govern the imposition of **punitive damages.** "Intentional" refers to that conduct which is characterized by willfulness or malice, whether express, implied in fact, or implied in law. "**Reckless**" refers to that conduct which, although not intentional, is marked by various degrees of indifference or wantonness. "Negligent" includes that nebulous area of careless action which courts generally have viewed as insufficient for the imposition of punitive damages. The circular and overlapping characteristics of these three categories reflect the ambiguity and lack of definition inherent in the punitive damage environment. See Ellis, supra note 9, at 34-37, for another attempt to deal with this confusion.

n79. See generally J. GHIARDI & J. KIRCHER, supra note 9, § 5.02. (The authors give numerous examples of the imposition of punitive damages for the intentional tort of assault and battery.) Some state legislatures have dictated that punitive damages are permissible for intentional or quasi-intentional conduct. See, e.g., MINN. STAT. ANN. § 549.20(1) (1984) (requiring "clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety or others"); MONT. CODE ANN. § 27-1-221 (1983) (where the defendant has been "guilty of oppression, fraud, or malice, actual or presumed"); NEV. REV. STAT. § 42.010(1)(1981) (where the defendant has "been guilty of oppression, fraud or malice, express or implied"); N.D. CENT. CODE § 32-03-07 (Supp. 1983) ("when the defendant has been guilty of oppression, fraud, or malice, actual or presumed"); OKLA. STAT. ANN. tit. 23, § 9 (1955) ("where the defendant has been guilty of oppression, fraud or malice, actual or presumed"); S.D. CODIFIED LAWS ANN. § 21-3-2 (1979) ("where the defendant has been guilty of oppression, fraud, or malice, actual or presumed"). One state legislature has mandated a **reckless standard** for awarding **punitive damages.** See COLO. REV. STAT. § 13-21-102 (1973) ("the injury complained of is attended by circumstances of fraud, malice or insult, or a wanton and **reckless** disregard of the injured party's rights and feelings").

n80. See Ellis, supra note 10, at 21-22 (when a defendant purposefully injures someone, then characterization of that action as the commission of a wrongful act with a culpable mental state that deserves punishment is relatively easy). The principal problems in justifying punitive damages from a just desserts standpoint arise when the defendant's

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conduct may not be characterized as purposeful harm. Much of the disagreement among the jurisdictions centers on expanding the punitive damage concept to embrace merely **reckless** conduct. Id.; see also Addair v. Huffman, 195 S.E.2d 739, 744 (W. Va. 1973) (intentional disregard of a law that protects the public from a particular abuse, thereby resulting in injury, gives rise to the imposition of punitive damages).

n81. Sherman v. McDermott, 114 R.I. 107, 109, 329 A.2d 195, 196 (1974)(quoting Adams v. Lorraine Mfg. Co., 29 R.I. 333, 338, 71 A. 180, 182 (1908)).

n82. Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J. Super. 437, 448, 358 A.2d 805, 811 (1976)(quoting La Bruno v. Lawrence, 64 N.J. Super. 570, 575, 166 A.2d 822, 824 (1960), cert. denied, 34 N.J. 323, 168 A.2d 694 (1961); see Kocse v. Liberty Mut. Ins. Co., 152 N.J. Super. 371, 375-76, 377 A.2d 1234, 1236 (1977). Idaho applies a similar standard. See Cheney v. Palos Verdes Inv. Corp., 104 Idaho 897, 905, 665 P.2d 661, 669 (1983); Linscott v. Ranier Nat'l Life Ins. Co., 100 Idaho 854, 858, 606 P.2d 958, 962 (1980) (**punitive damages** are appropriate if defendant's act is an "extreme deviation from reasonable **standards** of conduct" and if defendant acted "with an understanding of or a disregard for its likely consequences"). Texas also arguably falls within this category. In Ogle v. Craig, 464 S.W. 2d 95 (Tex. 1971), the Texas Supreme Court stated that the "act complained of not only must be unlawful but also must partake of a wanton and malicious nature, or, as sometimes stated, somewhat of a criminal or wanton nature." Id. at 97 (quoting Dennis v. Dial Fin. & Thrift Co., 401 S.W.2d 803, 805 (Tex. 1966)). Texas, however, also allows recovery of punitive damages for grossly negligent conduct. See Schwartz v. Sears, Roebuck & Co., 669 F.2d 1091, 1093 (5th Cir. 1982); Burk Royalty Co. v. Walls, 616 S.W.2d 911, 920 (Tex. 1981); Houston Lighting & Power Co. v. Sue, 644 S.W.2d 835, 839 (Tex. Civ. App. 1982).

n83. Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 462, 521 P.2d 1103, 1110, 113 Cal. Rptr. 711, 718 (1974); see Colonial Life & Accident Ins. Co. v. Superior Court, 31 Cal. 3d 785, 792, 647 P.2d 86, 90, 183 Cal. Rptr. 810, 814 (1982).

n84. Shortle v. Central Vt. Pub. Serv. Corp., 137 Vt. 32, 33, 399 A.2d 517, 518 (1979). Other jurisdictions follow similar standards. See Freeman v. Anderson, 279 Ark. 282, 286-87, 651 S.W.2d 450, 452 (1983); Dalrymple v. Fields, 276 Ark. 185, 188, 633 S.W.2d 362, 363 (1982) (must be shown that "in the absence of proof of malice or willfulness there was a wanton and conscious disregard for the rights and safety of others"); Satterfield v. Rebsamen Ford, Inc., 253 Ark. 181, 185, 485 S.W.2d 192, 195 (1972) ("when the defendant acts with malice, . . . or with willfulness, wantonness, or conscious indifference to consequences from which malice may be inferred") (citations omitted); Sere v. Group Hospitalization, Inc., 443 A.2d 33, 37 (D.C. 1982) ("defendant's tortious conduct must have been outrageous, characterized by malice, wantonness, gross fraud, recklessness, or willful disregard of the plaintiff's rights"); Riggs Nat'l Bank v. Price, 359 A.2d 25, 28 (D.C. 1976) ("for outrageous conduct such as maliciousness, wantonness, gross fraud, recklessness and willful disregard of another's rights"); Toyota Motor Co. v. Moll, 438 So. 2d 192 (Fla. Dist. Ct. App. 1983) ("for actions or inactions amounting to willfulness, wantonness, maliciousness, recklessness, oppression, or outrageous conduct"); Kelsay v. Motorola, Inc., 74 III. 2d 172, 186, 384 N.E.2d 353, 359 (1978) ("committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others"); Gent v. Collinsville Volkswagen, Inc., 116 III. App. 3d 496, 451 N.E.2d 1385 (1983); General Motors Corp. v. Piskor, 277 Md. 165, 175, 352 A.2d 810, 817 (1976) ("only when there is an element of fraud, malice, evil intent or oppression which enters into and forms a part of the wrongful act"); Nelson v. Jacobsen, 669 P.2d 1207, 1219 (Utah 1983) (requiring a higher standard of proof than "willful and malicious" for punitive awards in an alienation of affections case); Kesler v. Rogers, 542 P.2d 354, 359 (Utah 1974) ("for particularly grievous injury caused by conduct which is not only wrongful, but which is willful and malicious so that it seems to one's sense of justice that

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mere recompense for actual loss is inadequate").

n85. Jones v. Hospital for Joint Diseases and Medical Center, 96 A.D.2d 498, 499, 465 N.Y.S.2d 517, 517 (1982); see Le Mistral, Inc. v. Columbia Broadcasting Sys., 61 A.D.2d 491, 494, 402 N.Y.S.2d 815, 817 (1978) ("based upon tortious acts which involve ingredients of malice, fraud, oppression, insult, wanton or **reckless** disregard of the plaintiff's rights, or other circumstances of aggravation"). For other weak standard formulations, see Alyeska Pipeline Serv. Co. v. O'Kelley, 645 P.2d 767, 774 (Alaska 1982) ("characterized as outrageous, such as acts done with malice or bad motives or **reckless** indifference to the interests of another") (quoting Bridges v. Alaska Hous. Auth., 375 P.2d 696, 702 (Alaska 1962)); Sturm, Ruger & Co. v. Day, 594 P.2d 38, 46 (Alaska 1979); Malcolm v. Little, 295 A.2d 711, 714 (Del. 1972) ("when [the defendant's] wrongful act was committed willfully or wantonly") (quoting Riegel v. Aastad, 272 A.2d 715, 718 (Del. 1970)); Meyer v. Nottger, 241 N.W.2d 911, 922 (Iowa 1976) ("where defendant acts maliciously . . . where the nature of the illegal act is such as to negative any inference of feeling toward the person injured") (quoting Amos v. Prom, 115 F. Supp. 127, 136-37 (N.D. Iowa 1953)); McKinnon v. Tibbetts, 440 A.2d 1028, 1031 (Me. 1982) ("malicious, gross or wanton"); Foss v. Main Turnpike Auth., 309 A.2d 339, 345 (Me. 1973) ("the conduct of the defendant is found to be deliberate, malicious or grossly negligent"); Addair v. Huffman, 156 W. Va. 592, 599, 195 S.E.2d 739, 743 (1973) ("where there is an intentional wrong, or where there are circumstances which warrant an inference of malice, willfulness, or wanton disregard of the rights of others"); Petsch v. Florom, 538 P.2d 1011, 1013 (Wyo. 1975) ("the act of the defendant was committed maliciously, willfully or wantonly").

n86. Ex parte Smith, 412 So. 2d 1222, 1223 (Ala. 1982); see Ford Motor Credit Co. v. Washington, 420 So. 2d 14 (Ala. 1982); Ex parte Lewis, 416 So. 2d 410 (Ala. 1982).

n87. Cooter, supra note 9, at 80. Professor Cooter suggests that because most potential wrongdoers find it economically cheaper to comply with the law, noncompliance is usually unintentional. If the wrongdoer's actions are unintentional, then punitive damages are unnecessary for deterrence and underserved for punishment. Professor Cooter, however, also argues that some individuals intentionally cause harm, and that courts should impose punitive damages against these purposeful wrongdoers to offset either their illicit pleasure in noncompliance or the exceptional cost of compliance that instigates their noncompliance. Id. at 79-80. If, however, such deterrent or punitory measures are still necessary in light of the present expanded compensatory damage remedy, those effects should be achieved through the criminal processes, or at a minimum, restructured to preclude a windfall to an already fully compensated plaintiff.

n88. See Owen, Punitive Damages in Product Liability Litigation, 74 MICH. L. REV. 1258 (1976).

n89. Owen, supra note 9, at 106-07. Professor Owen asserts that the assessment of punitive damages in "deliberate" situations -- those concerning conduct intended to cause harm for no good reason -- "generally would be regarded as appropriate without much argument about either fairness or efficiency." Accordingly, punitive damages properly would lie in "evaluative" situations -- those in which the defendant evaluates the circumstances and decides that he will benefit enough from the act to justify its occurrence -- but only if the defendant's choice is wrong (immoral) and the defendant knows or recklessly fails to discover its wrongfulness before acting. Professor Owen, however, now draws the line at "inadvertent" acts -- those that show no real thought by the defendant concerning the wrongfulness or implications of the act -- because a failure to think usually does not call for punishment. Id. This shift is understandable because an objective view of the courts' indiscriminate use of punitive damages would dampen the enthusiasm of even the doctrine's most ardent supporters.

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n90. Sandler v. Lawn-A-Mat Chem. & Equip. Co., 141 N.J. Super. 437, 448, 358 A.2d 805, 811 (1976). The court also refers to conduct that evinces a "wanton and willful disregard of the rights of another." Id. Actual malice, likewise, reflects the Iowa and Maryland standards. See Feeney v. Scott County, 290 N.W.2d 885, 892 (Iowa 1980); see also West Des Moines State Bank v. Hawkeye Bancorp., 722 F.2d 411, 414 (8th Cir. 1983); Savol v. BL Ltd., 710 F.2d 1027, 1033 (4th Cir. 1983). South Carolina and Virginia also use similar formulations. See King v. Allstate Ins. Co., 272 S.C. 259, 263, 251 S.E.2d 194, 196 (1979)("must be malice, ill will, a conscious indifference to the rights of others, or a **reckless** disregard thereof")(quoting Cox v. Coleman, 189 S.C. 218, 221, 200 S.E. 762, 764 (1939)); Peacock Buick, Inc. v. Durkin, 221 Va. 1133, 1136-37, 277 S.E.2d 225, 227 (1981)(actual malice or malice in fact); Jordan v. Sauve, 219 Va. 448, 452, 247 S.E.2d 739, 741 (1978)("only where there is misconduct or actual malice").

n91. Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 697, 271 N.W.2d 368, 379 (1978); see Franklin Music Co. v. American Broadcasting Co., 616 F.2d 528, 542 (3d Cir. 1979) (Pennsylvania law requires bad motive or **reckless** indifference); Amish v. Walnut Creek Dev., Inc., 631 S.W.2d 866, 876 (Mo. App. 1982)(bad motive or evil intent).

n92. Under Missouri law, legal malice and not actual malice governs an award for punitive damages. Armstrong v. Republic Realty Mortgage Corp., 631 F.2d 1344, 1352 (8th Cir. 1980) (applying Missouri law); Pollock v. Brown, 569 S.W.2d 724, 732 (Mo. 1978). As noted by the court in Crues v. KFC Corp., 729 F.2d 1145, 1153 (8th Cir. 1984)(citing Beggs v. Universal C.I.T. Credit Corp., 409 S.W.2d 719 (Mo. 1966)), legal malice is defined to mean "whether the defendant did a wrongful act intentionally and without just cause or excuse . . . [meaning] that defendant not only intended to do the act which is ascertained to be wrongful but that he knew it was wrongful when he did it." Accord Pollock v. Brown, 569 S.W.2d at 724.

n93. Gulf Atl. Life Ins. Co. v. Barnes, 405 So. 2d 916 (Ala. 1981); Randall v. Ganz, 96 Idaho 785, 787, 537 P.2d 65, 67 (1975); Petsch v. Florom, 538 P.2d 1011, 1013 (Wyo. 1975).

n94. Burk Royalty Co., v. Walls, 616 S.W.2d 911, 920 (Tex. 1981); Jeffers v. Nysse, 98 Wis. 2d 543, 297 N.W.2d 495 (1980).

n95. Silberg v. California Life Ins. Co., 11 cal. 3d 452, 462, 521 P.2d 1103, 1110, 113 Cal. Rptr. 711, 718 (1974); Shortle v. Central Vt. Pub. Serv. Corp., 137 Vt. 32, 33, 399 A.2d 517, 518 (1974); see Newton v. Standard Fire Ins. Co., 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976)("'fraud, malice, such a degree of negligence as indicates a **reckless** indifference to consequences, oppression, insult, rudeness, caprice, willfullness'")(quoting Baker v. Winslow, 184 N.C. 1, 113 S.E. 570 (1922)); Henry v. Deen, 61 N.C. App. 189, 195, 300 S.E.2d 707, 711 (1983)("based on aggravated, intentional, wanton or grossly negligent conduct"), rev'd on other grounds, 310 N.C. 75, 310 S.E.2d 327 (1984); Rubeck v. Huffman, 54 Ohio St. 2d 20, 23, 374 N.E.2d 411, 413 (1978)("caused by intentional, **reckless,** wanton, willful and gross acts or by malice inferred from conduct and surrounding circumstances").

n96. McClellan v. Highland Sales & Inv. Co., 484 S.W.2d 239, 242 (Mo. 1972). Under this approach, some element of wantonness or bad motive must exist. Id.; see also Kline v. Multi-Media Cablevision, Inc., 233 Kan. 188, 666 P.2d 711 (1983); Loucks v. Albuquerque Nat'l Bank, 76 N.M. 735, 747, 418 P.2d 191, 199 (1966)("only when the conduct of the wrongdoer may be said to be maliciously intentional, fraudulent, oppressive, or committed recklessly or with a wanton disregard of the plaintiffs's rights").

n97. Salt River Valley Water Users' Ass'n. v. Giglio, 113 Ariz. 190, 202, 549 P.2d 162, 174 (1976). The court, however, did not impose punitive damages because of plaintiffs' failure to demonstrate the requisite degree of wanton or **reckless** disregard. Id. at 203, 549 P.2d at

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175; see Nienstedt v. Wetzel, 133 Ariz. 348, 357, 651 P.2d 876, 885 (1982)("where the conduct of the wrongdoer is wanton, **reckless** or shows spite or ill will"); Currie v. Dooley, 132 Ariz. 584, 589, 647 P.2d 1182, 1187 (1982) (where the defendant's conduct "is wanton, **reckless** or shows spite or ill will").

n98. Richardson v. Gibalski, 625 S.W.2d 715, 717 (Tenn. Ct. App. 1979)(quoting Inland Container Corp. v. March, 529 S.W.2d 43, 45 (Tenn. 1975)). A similar amalgamated standard prevails in Montana. In the recent case of Kuiper v. Goodyear Tire & Rubber Co., 673 P.2d 1208 (Montana 1983), relying on Graham v. Clarks Fork Nat'l Bank, 631 P.2d 718 (Montana 1981), the court defined the wrongful act as "characterized by some such circumstances of aggravation, as willfulness, wantonness, malice, oppression, brutality, insult, recklessness, gross negligence, or gross fraud on the part of the defendant." 673 P.2d at 1213-14.

n99. See supra note 78, for Dean Prosser's and Professor McCormick's **standards** for justifying the imposition of **punitive damages.** Some commentators have elected to divide antisocial conduct into two categories: (1) that conduct which indicates that the defendant desired to cause the harm that the plaintiff sustained, or at least believed that the harm was **substantially certain** to follow from the conduct; and (2) situations in which the defendant knew, or should have had reason to know, not only that his conduct created an unreasonable risk of harm, but also that a strong probability -- although not a substantial certainty -- existed that the harm would result but, nevertheless, he proceeded with his conduct in **reckless** or conscious disregard of the consequences. J. GHIARDI & J. KIRCHER, supra note 9, § 5.01 at 8-9. These categories, however, appear to be the equivalent of the intentional and **reckless** or wanton categories. This characterization provides little illumination and even less meaningful guidance in applying the **standard.** This strained effort to characterize conduct warranting **punitive damages** merely dramatizes the total unsuitability of the punitive damage concept in the arena of civil torts reparations.

Unquestionably, there exists an inherent and unintelligible confusion in this area of the law. One commentator defined the recklessness category as conduct that does not suggest that the actor desired to hurt anyone and in which the actor's means of achieving his objective, rather than the objective itself, is scrutinized. This commentator emphasized the subtle differences in connotation of such terms as "conscious indifference,"" **reckless** disregard," "recklessness," and "wantonness." See Ellis, supra note 10, at 35.

Other commentators simply have labeled the basic types of conduct that warrant the imposition of **punitive damages** and have failed to analyze the **standards** by which such labeled conduct can be judged. See, e.g., Duffy, supra note 9, at 7 (majority of jurisdictions allow punitive damages if the defendant's actions were wanton, malicious, or oppressive) (citing Great Atl. & Pac. Tea Co., v. Smith, 218 Ky. 583, 136 S.W.2d 759 (1940) and 22 AM. JUR. 2D Damages § 236 (1965)); Special Project, supra note 2, at 695 (most states require that the defendant act with gross negligence, willfulness, or wantonness).

n100. As one commentator has observed, jury instructions on the **standards** for assessing **punitive damages** are unilluminating and, although judges usually tell the jurors that they can award punitive damages if the defendant acted with maliciousness, willfulness, wantonness, or in **reckless** disregard of the plaintiff's rights, most courts provide little if any meaningful guidelines. Ellis, supra note 10, at 38. A dramatic example of judicial ratification of the application of **punitive damages** despite judicial acknowledgement of the complete lack of any guiding **standards** for the jury is found in a recent Montana case. See First Bank (N.A.) - Billings v. TransAmerica Ins. Co., 679 P.2d 1217, 1222 (Mont. 1984).

n101. W. PROSSER, supra note 34, § 2, at 10; Ellis, supra note 10, at 36.

n102. W. PROSSER, supra note 34, § 2, at 10; Ellis, supra note 10, at 36-37 (but the definition of gross negligence is unclear); see Maxey v. Freightliner Corp., 665 F.2d 1367

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This attitude first may have manifested itself in American legal jurisprudence in Earl v. Tupper, [13] an early Vermont case in which the court announced that it would not grant a new trial for reason of excessive damage awards if the defendant's malice, oppression, or gross fraud contributed to the plaintiff's injury. [14] As the jury system continued its evolution and juries began to base their verdicts on the testimony of others, however, courts began exercising more control over the monetary amount of jury awards. [15] Consequently, jury determinations alone as justification for tolerating punitive damages as an integral element of the remedy in a tort reparations system began losing much, if not all, of their significance. [16]

Another theory espoused to justify the use of punitive damages views punitory damages as compensation for plaintiffs' ethereal injuries such as hurt feelings, humiliation, wounded dignity, mental anguish, and embarrassment, which the courts during the formative stages of the common law were reluctant to recognize as compensable injuries. [17] Punitive damages, therefore, performed the task of compensating plaintiffs for elements of personal harm that otherwise were unrecoverable. [18] In the early New Hampshire case **[*1122]** of Fay v. Parker, [19] the court discussed Huckle v. Money [20] and stated that the English decision "said no more, in substance, than that for the outrage and indignity heaped upon the plaintiff by the insolence, oppression, and tyranny of the defendant, a jury might give the plaintiff liberal damages." [21] Likewise, other early English courts allowed intangible injuries to serve as the basis for punitive damages awards. In Merest v. Harvey, [22] plaintiff instituted a trespass action because defendant intruded on plaintiff's land, fired several times at game, and used extremely intemperate language. The appellate court upheld a jury verdict of 500 pounds and queried,

[I]n a case where a man disregards every principle which actuates the conduct of a gentleman, what is to restrain him except damages? To be sure, one can hardly conceive worse conduct than this. What would be said to a person in a low situation in life, who should behave himself in this manner? [23]

The English court then refused to establish a principle that juries justifiably could award only "the absolute pecuniary damage that the plaintiff may sustain." [24] Similarly, the court in Tullidge v. Wade [25] emphasized offensive behavior while discussing guidelines for awarding damages. The Tullidge court stated, "In actions [involving seduction] . . . the circumstances of time and place, when and where the insult is given, require different damages; as it is a greater insult to be beaten upon the Royal Exchange than in a private room." [26]

The ambit of compensatory damages has expanded rapidly over recent years to include an entire spectrum of actual and ethereal injuries, including mental anguish, physical pain, loss of society, loss of consortium, emotional trauma, and other metaphysical injuries. [27] The legal rationale that punitive damages serve a compensatory function, therefore, has ceased to exist. Critics argue that the lack of a viable compensatory rationale makes punitive damages an anachronism that is no longer necessary or justifiable. [28] **[*1123]** As the court forcefully stated in Fay v. Parker, [29] the idea of punitive damages "is wrong, . . . is a monstrous heresy," and "is an unsightly and unhealthy excrescence, deforming the symmetry and body of the law." [30] At a minimum, and contrary to the philosophical theorem of civil tort reparations, this doctrine reflects a discomforting antibusiness bias.

A final justification urged in support of the punitive damage concept is that quasi-criminal fines satisfy a void allegedly created by the inequitable chasm between severe criminal penalties for wrongs concerning property losses and, in too many instances, lesser criminal penalties for more severe invasions of personal rights. [31] Civil courts, therefore, allegedly can utilize punitive damages to punish more severely the egregious torts that cause personal harm, [32] and a number of courts have expressed the rationale that citizens are more likely to institute suits to protect their rights and enforce the civil law if punitive damages provide an economic incentive to litigate. [33] Once again, however, because the concept of compensatory damages currently embraces every conceivable element of tangible and intangible injury, [34]

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(5th Cir. 1982) (en banc); Ex parte Smith, 412 So. 2d 1222, 1223 (Ala. 1982); Stinson v. Feminist Women's Health Center, Inc., 416 So. 2d 1183, 1185 (Fla. Dist. Ct. App. 1982); Kelsay v. Motorola, Inc., 74 III. 2d 172, 186, 384, N.E.2d 353, 359 (1978); Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 314, 362 N.E.2d 845, 847 (1977); Sebastian v. Wood, 246 Iowa 94, 66 N.W.2d 841 (1954); Newton v. Hornblower, Inc., 224 Kan. 506, 524-25, 582 P.2d 1136, 1150 (1978); Foss v. Maine Turnpike Auth., 309 A.2d 339, 345 (Me. 1973); Seals v. St. Regis Paper Co., 236 So. 2d 388, 392 (Miss. 1970); Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1981); Texas Pac. Coal & Oil Co. v. Robertson, 125 Tex. 4, 79 S.W.2d 830 (1935).

n103. See Wolf v. Nordstrom, Inc., 291 Ore. 828, 637 P.2d 1280 (1981); Chamberlain v. Jim Fisher Motors, Inc., 282 Ore. 229, 578 P.2d 1225 (1978).

n104. W. PROSSER, supra note 34, § 2, at 12. The imposition of punitive damages based on a theory of vicarious liability is probably the most controversial use of the doctrine. Id. The incongruous nature of vicarious punitive damages clearly is highlighted in the case of Martin v. Johns-Manville Corp., 469 A.2d 655 (Pa. Super. 1983), in which the court held that punitive damages are recoverable against a successor corporation for the vicarious liability of its predecessor even though the successor corporation was not responsible for the alleged defective product marketed by its predecessor.

n105. The Restatement (Second) of Torts contains this formulation of the complicity rule;

Punitive damages can properly by awarded against a master or other principal because of an act by an agent if, but only if, (a) the principal authorized the doing and the manner of the act, or (b) the agent was unfit and the principal was **reckless** in employing him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act.

RESTATEMENT (SECOND) OF TORTS § 909 (1979). The Restatement (Second) of Agency adopts this rule verbatim. RESTATEMENT (SECOND) OF AGENCY § 217C (1958). This rule represents the conservative view, and a number of jurisdictions either have adopted it expressly, adopted it without mentioning it, or adopted parts of it. See, e.g., Martin v. Texaco, Inc., 726 F.2d. 207 (5th Cir. 1984) (applying Texas law); Briner v. Hystop, 337 N.W.2d 858 (Iowa 1983). Dean Prosser has suggested that the majority of the jurisdictions have adopted the more liberal respondeat superior rule. W. PROSSER, supra note 34, § 2, at 12. It has been observed, however, that Dean Prosser cites an equal number of authorities for the respondeat superior and complicity rules. Ellis, supra note 10, at 63 n.266. Professor Ellis has asserted that half of the states follow each rule. Id. at 63. Professor Ellis does recognize that "Prosser's misleading statement may be on its way to becoming a self-fulfilling prophecy." Id. at 63 n.266.

n106. The drafters of the Restatement (Second) of Torts justify this liability because it "serves as a deterrent to the employment of unfit persons for important positions." RESTATEMENT (SECOND) OF TORTS § 909(c) comment b, at 468 (1979). The Restatement provides no clear definition of who constitutes a managerial agent. Jurisdictions that have adopted the complicity rule include the District of Columbia, Texas, New York, California, and Kansas. See Jordan v. Medley, 711 F.2d 211 (D.C. App. 1983) (landlord's passive participation while his son brandished a gun at tenants could constitute ratification of the employee's acts); Egan v. Mutual of Omaha Ins. Co., 63 Cal. App. 3d 659, 133 Cal. Rptr. 899 (1976)(claims adjuster held to be managerial agent despite title of his position); Kline v. Multi-Media Cablevision, Inc., 233 Kan. 988, 666 P.2d 711 (1983)(punitive damages not allowed for mere employee gross negligence in removing a manhole cover and then failing to erect a protective barrier); Gill v. Montgomery Ward & Co., 284 A.D. 36, 129 N.Y.S.2d 288 (1954)(head of "protective department" of defendant held to be managerial agent of defendant in action for false imprisonment); Fisher v. Carrousel Motor Hotel, Inc., 424

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S.W.2d 627 (Tex. 1967)(punitive damages allowed when parties stipulated that offender was the "manager" of the club).

n107. See RESTATEMENT (SECOND) OF TORTS § 909(a)(1979).

n108. See id. § 909(d).

n109. See id. § 909(b).

n110. See, e.g., Maxey v. Freightliner Corp., 665 F.2d 1367 (5th Cir. 1982)(jury awarded $ 150,000 compensatory and $ 10,000,000 punitive damages); Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979), on rehearing, 615 P.2d 621 (Alaska 1980)(a jury awarded in excess of $ 2,000,000 in punitive damages under strict tort liability cause of action involving defective gun); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (jury awarded $ 125,000,000 in punitive damages, which Court of Appeals reduced to $ 3,000,000, in Pinto rear-end case); Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981)(court allowed actual and punitive damages against manufacturer in jeep roll-over case); Rawlings Sporting Goods Co. v. Daniels, 619 S.W.2d 435 (Tex. Civ. App. 1981) (affirming imposition of $ 750,000 in punitive damages).

n111. 726 F.2d 657 (10th Cir. 1984).

n112. The court acknowledged that Oklahoma courts would refuse to hold a manufacturer liable if an unforeseeable subsequent modification caused the plaintiff's injuries. Id. at 659 (citing Texas Metal Fabricating Co. v. Northern Gas Prods. Corp., 404 F.2d 921 (10th Cir. 1968)). The court, however, chose to ignore factual evidence that the brakes could have averted the accident, and that the plaintiff's injuries resulted from his fingers being caught between the exposed belt and its pulley rather than from the mower blades. Saupitty, 726 F.2d at 660-61 (Seth, C.J., dissenting). Instead, the majority stated that "construing all of the evidence and the inferences therefrom in the light most favorable to the plaintiff, we cannot conclude that the removal of either the mower's brakes or its belt guard constituted a superseding, intervening cause of plaintiff's injury as a matter of law." Id. at 659-60.

n113. Saupitty, 726 F.2d at 660 (Seth, C.J., dissenting).

n114. Id. at 661 (Seth, C.J., dissenting).

n115. Piper Aircraft Corp. v. Coulter, 426 So. 2d 1108, 1109 (Fla. Dist. Ct. App. 1983); Phipps v. General Motors Corp., 278 Md. 337, 343, 363 A.2d 955, 958 (1976); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 265-66, 294 N.W.2d 437, 441 (1980).

n116. See Sales, supra note 2, at 380, 389-90. Several courts have rejected the application of punitive damages in strict tort liability actions. Gold v. Johns-Manville Sales Corp., 553 F. Supp. 482 (D.N.J. 1982); Butcher v. Robertshaw Controls Co., 550 F. Supp. 692 (D. Md. 1981); Walbrun v. Berkel, Inc., 433 F. Supp. 384 (E.D. Wis. 1976).

n117. The defendant unsuccessfully argued this in Wangen v. Ford Motor Co., 97 Wis. 2d 260, 288, 294 N.W.2d 437, 453. Another argument against punitive damages in this area holds that manufacturers do not demonstrate the requisite degree of malice or quasi-criminal intent. See, e.g., Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981); Leichtamer v. American Motors Co., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981).

n118. K. REDDEN, supra note 1, at 118-19 (discussing excessive awards that cripple a corporate defendant); Special Project, supra note 2, at 806-45 (discussing recent bankruptcies). This possibility and other compelling concerns are delineated clearly by the dissent of Justice Rovira in Palmer v. A. H. Robins Co., 684 P.2d 187 (Colo. 1984). The

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Palmer majority rather glibly glosses over the significant issues that present philosophical impediments to the imposition of punitive damages in product liability actions. Id. at 228 (Rovira, J., dissenting).

n119. K. REDDEN, supra note 1, at 714.

n120. See Acosta v. Honda Motor Co., 717 F.2d 828 (3d Cir. 1983); Moran v. Johns-Manville Sales Corp., 691 F.2d 811 (6th Cir. 1982); Campus Sweater & Sportswear v. M.B. Kahn Constr., 515 F. Supp. 64 (D.S.C. 1979), aff'd, 644 F.2d 877 (4th Cir. 1981); Sturm, Ryer & Co. v. Day, 594 P.2d 38 (Alaska 1979), cert. denied, 454 U.S. 894 (1981); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981); Cloroben Chem. Corp. v. Comegys, 464 A.2d 887 (Del. Super. Ct. 1983); Piper Aircraft Corp. v. Coulter, 426 So. 2d 1108 (Fla. Dist. Ct. App. 1983); Froud v. Celotex Corp., 107 Ill. App. 3d 654, 437 N.E.2d 910 (1982) rev'd on other grounds, 98 Ill. 2d 1324, 456 N.E.2d 131 (1983); Grye v. Dayton-Hudson Corp., 297 N.W.2d 727 (Minn. 1980), cert. denied, 449 U.S. 921 (1980); Rinker v. Ford Motor Co., 567 S.W.2d 655 (Mo. Ct. App. 1978); Leichtamer v. American Motorist Corp., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981); Thiry v. Armstrong World Indus., 661 P.2d 515 (Okla. 1983); Rawlings Sporting Goods Co. v Daniels, 619 S.W.2d 435 (Tex. Civ. App. 1981); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980); Some courts have acknowledged the obvious -- that punitive damages are incompatable with the theory of strict tort liability. Gold v. Johns-Manville Sales Corp., 553 F. Supp. 482 (D. N.J. 1982); Butcher v. Robershaw Controls Co., 550 F. Supp. 692, 705 (D. Md. 1981).

n121. Some courts eschew this concern based on the absence of confirmed empirical data and conclude, therefore, that the potential for serious harm is of no moment. See Acosta v. Honda Motor Co., 717 F.2d 828 (3d Cir. 1983). The court did note, however, that "[i]t is, of course, possible that a sufficiently egregious error as to one product could result in the demise of its manufacturer." Id. at 838. In Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 817 (6th Cir. 1982), the court simply suggested that if punitive damages pose a real threat, then the federal or state legislature should provide the relief. In Campus Sweater & Sportwear Co. v. M. B. Kahn Constr. Co., 515 F. Supp. 64, 107 (D.S.C. 1979), aff'd, 644 F.2d 877 (4th Cir. 1981), the threat of multiple punitive awards purportedly "forces a prudent manufacturer intent on maximizing profits to hesitate before marketing a known defective or an untested product." Most recently, in Fischer v. Johns-Manville Corp., 193 N.J. Super. 113, 472 A.2d 577, (1984), the court failed the business community of this country and strongly endorsed the precept that "it is only the threat of punitive damages which ultimately can induce these entrepreneurs and others to act with a reasonable modicum of responsibility." Id. at 125, 472 A.2d at 584 (emphasis added). These attitudes strongly suggest the urgent necessity for the more thoughtful, rational, and dispassionate legislative process to address this significant and continually escalating problem in the tort reparation system. See Sturm, Ruger & Co. v. Day, 594 P.2d 38, 47 (Alaska 1979); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 741 (Minn.) cert. denied, 449 U.S. 921 (1980); State ex rel. Young v. Crookham, 290 Or. 61, 618 P.2d 1268 (1980); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 285-86, 294 N.W.2d 437, 451 (1980). Unfortunately, punitive damages also are awarded for conduct less egregious than marketing a known defective product. See, e.g., Worderson v. Ortho Pharmaceutical Corp., 681 P.2d 1038 (Kan. 1984); Willis v. Floyd Brace Co. [1983-1984 Transfer Binder] PROD. LIAB. REP. (CCH) P9862 (S.C. Nov. 14, 1983).

n122. For example in Acosta v. Honda Motor Co., 717 F.2d 828, 838 (3d Cir. 1983), the Third Circuit observed that, "[i]t is, of course, possible that 'a sufficiently egregious error as to one product' could result in the demise of its manufacturer, but such a result is not inevitable." In a supporting footnote, the court further observed, "[N]or is such a result necessarily untenable." More recently, in Martin v. Johns-Manville Corp., 469 A.2d 655, 665 (Pa. Super. 1983), appeal filed, Apr. 2, 1984, the court, in an equally off-handed manner, commented that, "if the defendant's conduct was so **reckless** and injured so many people, that the effect of the damages awarded against it is bankruptcy, we are hard pressed to

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understand why that defendant should not be required to live with the consequences of its actions." A similar view has been expressed by the Oregon court in State ex. rel. Young v. Crookham, 290 Or. 61, 618 P.2d 1268 (1980). In Fischer v. Johns-Manville Corp., 193 N.J. Super. 113, 472 A.2d 5778 (1984), the state court echoed, in less than moderate tones, the importance of exacting a pound of flesh from **reckless** defendants in its statement demanding "the ultimate protection which punitive damages afford." Id. at 127, 472 A.2d at 585. The courts likewise have rejected application of the double jeopardy principle to foreclose repeated punitive damage awards for identical product design defects. See Hansen v. Johns-Manville Corp., 734 F.2d 1036 (5th Cir. 1984).

n123. 727 F.2d 506 (5th Cir. 1984) (rehearing en banc granted).

n124. Id. at 525.

n125. Id. at 528 (citing Acosta v. Honda Motor Co., 717 F.2d at 838, n.15).

n126. Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 526 (5th Cir.) reh'g en banc granted, F.2d (5th Cir. 1984). The court stated:

We do not reach the issue whether Mississippi would find punitive damages inherently incompatible with the theory of strict liability in all cases. Our holding today is limited to the extraordinary circumstances of this litigation, where the allowance of punitive damages carries the manifest portent of undoing the strict liability remedy for present and prospective claimants and where the purposes of punitive damages are otherwise served.

We cannot predict, of course, whether other jurisdictions would subscribe to our approach in this litigation. From that perspective, our efforts to preserve the viability of strict liability compensation may be infected with an element of futility. The alternative, however, appears to be no solution at all, but mere resignation to defeat of the purposes of both strict liability and punitive damages. A fully satisfactory solution would require properly crafted federal legislation. Since that has not come to pass, we must proceed with fundamental justice as our guide.

The disallowance of punitive damages in this situation expresses this court's central concern for the continued viability of the strict liability cause of action for present and future claimants. Where strict liability for compensatory damages imposes adequate punishment as it does in this type of case, we decline to cleave to a judge-made remedy of punitive damages that would both fail in its own purpose and obstruct the broader objectives of the underlying cause of action which the plaintiff has cohosen to pursue.

Id. at 529-30.

n127. See, e.g., Williams v. Carr, 263 Ark. 326, 565 S.W.2d 400 (1978); American Motorcycle Inst., Inc. v. Mitchell, 380 So. 2d 452 (Fla. Dist. Ct. App. 1980); Pringle Tax Servs., Inc. v. Knoblauch, 282 N.W.2d 151 (Iowa 1979); Traylor v. Wachter, 227 Kan. 221, 607 P.2d 1094 (1980); Robison v. Katz, 94 N.M. 314, 610 P.2d 201 (1980); Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 70 S.W.2d 397 (1934); Cates v. Barb, 650 P.2d 1159 (Wyo. 1982).

n128. W. PROSSER, supra note 34, § 2, at 13-14; see, e.g., Nelson v. Hartman, 648 P.2d 1176, 1178 (Mont. 1982) (no error in failing to admit defendant's driving record for punitive damages purposes because no punitive damages can exist without actual liability entitling the plaintiff to actual damages); Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 149-50, 70 S.W.2d 397, 409 (1934) (proof of actual damage prerequisite to punitive award); see generally Duffy, supra note 9, at 8; Ellis, supra note 10, at 54 (citing COMMITTEE ON STANDARD JURY INSTRUCTIONS, CIVIL, OF THE SUPERIOR COURT OF LOS ANGELES,

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CALIFORNIA JURY INSTRUCTIONS: CIVIL § 14.71 (Supp. 1981)); Sales, supra note 2, at 365; Note, 70 HARV. L. REV. 517, 528-29 (1957).

n129. K. REDDEN, supra note 1, at 63.

n130. Ellis, supra note 10, at 58 (citing D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES § 3.9, at 210-11 (1973) and W. PROSSER, supra note 34, § 2, at 14)); Sales, supra note 2, at 366; Special Project, supra note 2, at 696. Some states, however, require no rlationship whatever between punitive and compensatory awards. See, e.g., Pinckard v. Dunnavant, 206 So. 2d 340, 344 (Ala. 1968) (exemplary award need not be mathematically related to compensatory award); Ray Dodge, Inc. v. Moore, 251 Ark. 1036, 1046, 479 S.W.2d 518, 524 (1972) (factors other than ratio of punitive damages and actual damages to be considered); Lassitter v. International Union of Operating Eng'rs, 349 So. 2d 622, 626 (Fla. 1976) (punitive damages not required to be proportionate to compensatory damages); Southwestern Inv. Co. v. Neeley, 452 S.W.2d 705 (Tex. 1970) (punitive damages need only be reasonably proportional to actual damages); see generally Leimgruber v. Claridge Assocs., 73 N.J. 450, 457-59, 375 A.2d 652, 656-57 (1977) (discussing split among jurisdictions regarding "ratio" rule). Some courts have stated that an award which is extremely disproportional indicates that the jury acted with passion or prejudice. Dearmore v. Gold, 400 F.2d 887, 888 (5th Cir. 1968) (a ratio of 11 to 1 was too disproportional); Alley v. Gubser Dev. Co., 569 F. Supp. 36, 40 (D. Colo. 1983) (a ratio of 17 to 1 was too disproportional). In contrast, in Moore v. American United Life Ins. Co., 150 Cal. App. 3d 610, 636, 197 Cal. Rptr. 878, 894-95 (1984), a ratio of 83 to 1 was approved (citing Wetherbee v. United Ins. Co. of Am., 18 Cal. App. 3d 266, 95 Cal. Rptr. 678 (1971) (approving a punitive award ratio of 200 to 1)); accord Kerr v. Fruit Commodity Corp. of Boston, 735 F.2d 281 (8th Cir. 1984) (citing Price v. Ford Motor Credit Co., 530 S.W.2d 249 (Mo. App. 1975) (that Missouri has approved a 40 to 1 ratio)); robison v. Lescrenier, 721 F.2d 1101, 1113 (7th Cir. 1983) (applying Wisconsin law); Palmer v. A. H. Robins Co., No. 81SA149 (Colo. June 4, 1984) (en banc) (approving a ratio of 10.3 to 1 when the basic compensatory damage award was $ 600,000, resulting in a punitive damage award of $ 6,200,000).

n131. Wetherbee v. United Ins. Co. of Am., 18 Cal. App. 3d 266, 95 Cal. Rptr. 678 (1971); K. REDDEN, supra note 1, at 63-64 (citing Malcolm v. Little, 295 A.2d 711 (Del. 1972)). The imprecise nature of the rule is exemplified by the charge of the trial court that was approved on appeal by the Fifth Circuit in Martin v. Texaco, Inc., 726 F.2d 207 (5th cir. 1984). The trial court, in instructing the jury on the standard for measuring punitive awards under Texas law, stated:

The appropriate ratio will vary from case to case, depending on such factors as the character of the wrongful conduct, the extent to which the defendant is involved in the conduct and the extent to which that conduct offends a public sense of justice and propriety. A very recent court decision, last week as a matter of fact, listed five relevant factors for reviewing a jury's award of punitive damages, as follows: (1) The nature of the wrong; (2) The character of the conduct involved; (3) The degree of culpability of the wrongdoer; (4) The situation and sensibility of the parties; (5) The extent to which defendant's conduct offends a public sense of justice and propriety. Clearly, ladies and gentlemen, this is not an exact science, but is a concept that is very well dealt with by a jury. Now, for your further guidance, I have a few additional instructions. If you find liability in this case, then the decision is solely yours; consider the five guidelines that I gave you and find exemplary damages that you find appropriate in this case.

Id. at 213-14.

n132. K. REDDEN, supra note 1, at 64.

n133. See Maxey v. Freightliner Corp., 665 F.2d 1367, 1377-78 (5th Cir. 1982) (Fifth

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Circuit adopted the factors set forth in Alamo Nat'l Bank v. Kraus 616 S.W.2d 908 (Tex. 1981), but found that the defendant's behavior did not justify an award of $ 10,000,000 in punitive damages based on a compensatory award of $ 150,000); Alamo, 616 S.W.2d at 910 (court held that appellate court's review of these factors was not an erroneous **standard,** and allowed $ 500,000 in **punitive damages** and $ 12,900 in compensatory damages to stand); see also Leimgruber v. Claridge Assocs., 73 N.J. 450, 456-61, 375 A.2d 652, 655-58 (1977) (court upheld award of $ 16,500 in punitive and $ 1700 in compensatory damages because the awards did not "give rise to the inference of mistake, passion, prejudice, or partiality," "shock the conscience," or "result in a manifest denial of justice"). The Leimgruber court alluded to the following factors: (1) the nature of wrongdoing; (2) the extent of harm; (3) the intent of party committing the act; (4) the wealth of the perpetrator; and (5) any mitigating circumstance that may reduce damages. Id. at 456, 375 A.2d at 656-57. The court in Alley v. Gubser Dev. Co., 569 F. Supp. 36, 40 (D. Colo. 1983), articulated a similar standard of analysis. Another variant of this approach is reflected in Cates v. Eddy, 669 P.2d 912, 921 (Wyo. 1983). California predicates an award for punitive damages on a combination of three factors: the nature of defendant's acts; the amount of compensatory damages awarded; and the wealth of the defendant. See Professional Seminar Consultants v. Sino Am. Tech. Exch. Council, 727 F.2d 1470, 1473 (9th Cir. 1984) (applying California law); Neal v. Farmer's Ins. Exch., 21 Cal. 3d 910, 582 P.2d 980, 148 Cal. Rptr. 389 (1978); see also Comment, Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose, 9 PAC. L.J. 823 (1978).

n134. Morris, Punitive Damages in Tort Cases, 44 HARV. L. REV. 1173, 1180 (1931).

n135. K. REDDEN, supra note 1, at 43.

n136. See K. REDDEN, supra note 1, at 61; Ellis, supra note 10, at 54; Special Project, supra note 2, at 695-96. Three states, Alabama, Kentucky, and Texas, do not allow consideration of the defendant's wealth. Special Project, supra note 2, at 696 n.753; see also RESTATMMENT (SECOND) OF TORTS § 908 (1979) (trier of fact may consider defendant's wealth in assessing punitive awards).

n137. Ellis, supra note 10, at 61.

n138. Neal v. Farmers Ins. Exch. 21 Cal. 3d 910, 929, 582 P.2d 980, 991, 148 Cal. Rptr. 389, 400 (1978) (award of $ 740,000 in punitive damages proper when it amounts to less than a week's worth of defendant's net income); Moore v. American United Life Ins. Co., 150 Cal. App. 3d 610, , 197 Cal. Rptr. 878, 899 (1984) (amount equal to 3.4 weeks of company's net annual income is appropriate).

n139. Hall v. Montgomery Ward & Co., 252 N.W.2d 421, 424 (Iowa 1977).

n140. Morris, supra note 133, at 1191.

n141. K. REDDEN, supra note 1, at 61-62.

n142. Id. at 62.

n143. See, e.g., Texas Pub. Utils. Corp. v. Edwards, 99 S.W.2d 420, 427 (Tex. Civ. App. 1936) (improper for plaintiff's counsel to argue to jury that it should assess large punitive damages because defendant could afford to pay them).

n144. See, e.g., Eisert v. Greenberg Roofing & Sheet Metal Co., 314 N.W.2d 226, 228-29 (Minn. 1982).

n145. K. REDDEN, supra note 1, at 101-09.

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n146. The Restatement of Contracts provides that, "Punitive damages are not recoverable for breach of contract." RESTATEMENT OF CONTRACTS § 342 (1932); see Note, supra note 16, at 531. The author emphasizes, however, that courts will allow punitive damages in many modern torts that are closely related to breach of contract, such as inducing another to breach a contract and wrongful termination of services by a public utility. Id.; see Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092, 1106 (11th Cir. 1983) (Florida does not allow punitive damages awards for breach of warranty claims under the Uniform Commercial Code); Saval v. BL Ltd., 710 F.2d 1027, 1033 (4th Cir. 1983) (Maryland does not permit punitive damages for contract breaches absent malice); Superior Trucks, Inc. v. Allen, 664 S.W.2d 136 (Tex. Ct. App. 1983) (exemplary damages not allowed for breach of warranty); Ryan Mortgage Investors v. Fleming-Wood, 650 S.W.2d 928, 937 (Tex. Ct. App. 1983) (exemplary damages not permitted for breach of contract).

n147. See, e.g., Canada Dry Corp. v. Nehi Beverage Co., 723 F.2d 512, 524 (7th Cir. 1983) (applying Indiana law); Henderson v. United States Fidelity & Guaranty Co., 620 F.2d 530 (5th Cir. 1980) (applying Mississippi law), cert. denied, 449 U.S. 1034 (1980); Robison v. Katz, 94 N.M. 314, 610 P.2d 201 (1980).

n148. See, e.g., Smith v. Hawkins, 120 Kan. 518, 243 P. 1018 (1926); Baumle v. Verde, 33 Okla. 243, 124 P. 1083 (1912); see also K. REDDEN, supra note 1, at 41.

n149. See, e.g., Birmingham Water Works Co. v. Keiley, 2 Ala. App. 629, 56 So. 838 (1911); Kohler v. Kansas Power & Light Co., 192 Kan. 226, 387 P.2d 149 (1963); Southwestern Gas & Elce. Co. v. Stanley, 45 S.W.2d 671 (Tex. Civ. App. 1931), aff'd, 123 Tex. 157, 70 S.W.2d 413 (1934); see also K. REDDEN, supra note 1, at 41.

n150. K. REDDEN, supra note 1, at 41; see Sullivan, Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change, 61 MINN. L. REV. 207 (1977). For a discussion of the allowance of punitive damages for tortious breach of contractual duties when a fidiciary duty exists, when an independent tort accompanies the breach of contract, when the defendant's conduct is also fraudulent, and when the defendant failed to deal fairly and in good faith, see K. REDDEN, supra note 1, at 52-53.

n151. Comment, Disallowing Punitive Damages for Wrongful Death While Allowing Them for Personal Injury and Property Damage Held To Be a Denial of Equal Protection, 8 CUM. L. REV. 567, 574-76 (1977). The author indicates that only 18 states allow recovery of punitive damages in wrongful death actions. Id. at 574-75. Alabama occupies the unique position of allowing only punitive damages in wrongful death actions. Eich v. Town of Gulf Shores, 293 Ala. 95, 300 So. 2d 354 (1974); see also Rosenfeld v. Isaacs, 79 A.D.2d 630, 631, 433 N.Y.S.2d 623, 624 (1980).

n152. In re Air Crash Disaster Near Chicago, 644 F.2d 594 (7th Cir. cert. denied, 454 U.S. 878 (1981).

n153. Id. at 632-33; accord, In re Paris Air Crash, 622 F.2d 1315 (9th Cir.), cert. denied, 449 U.S. 976 (1980); Eisert v. Greenberg Roofing & Sheet Metal Co., 314 N.W.2d 226 (Minn. 1982).

n154. See Boies v. Cole, 99 Ariz. 198, 407 P.2d 917 (1965); Gavica v. Hanson, 101 Idaho 58, 608 P.2d 861 (1980); Heil Co. v. Grant, 534 S.W.2d 916, 926 (Tex. Civ. App. 1976); Behrens v. Raleigh Hills Hosp. Inc., 675 P.2d 1179 (Utah 1983).

n155. See, e.g., Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 45 551 P.2d 334, 353, 131 Cal. Rptr. 14, 33, (1976) (allowance of punitive damages in tort actions generally is applicable only to survival actions and not to wrongful death actions); ILL. REV.

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STAT. ch. 111 2/3, § 77 (1966 & Supp. 1984-1985) (permits punitive damages in survival actions under the express provisions of the Public Utilities Act).

n156. See, e.g., Barnes v. Smith, 305 F.2d 226 (10th Cir. 1962); Sullivan v. Associated Billposters and Distribs. of United States and Canada, 6 F.2d 1000 (2nd Cir. 1925); Sanchez v. Marguez, 457 F. Supp. 359 (D. Colo. 1978) (statutory prohibition); Paul v. Milburn, 275 F. Supp. 105 (W.D. Tenn. 1967); Ford Motor Credit Co. v. Hill, 245 F. Supp. 796 (W.D. Mo. 1965); Amos v. Prom, 115 F. Supp. 127 (N.D. Iowa 1953); Holm Timber Indus. v. Plywood corp. of Am., 242 Cal. App. 2d 492, 51 Cal. Rptr. 597 (1966); Simone v. McKee, 142 Cal. App. 2d 307, 298 P.2d 667 (1956); Rowen v. LeMars Mut. Ins. Co., 282 N.W.2d 639 (Iowa 1979); Wolder v. Rahm, 249 N.W.2d 630 (Iowa 1977); Stevenson v. Stoufer, 237 Iowa 513, 21 N.W.2d 287 (1946); Thompson v. Estate of Petroff, 319 N.W.2d 400 (Minn. 1982); Mervis v. Wolverton, 211 So. 2d 847 (Miss. 1968) (statutory prohibition); Summa Corp. v. Greenspun, 96 Nev. 247, 607 P.2d 569 (1980) modified, 98 Nev. Adv. Ops. 157, 655 P.2d 513 (1982); Allen v. Anderson, 93 Nev. 204, 562 P.2d 487 (1977); Gordon v. Nathan, 43 A.D.2d 917, 352 N.Y.S.2d 464 (1974) (statutory prohibition); Thorpe v. Wilson, 58 N.C. App. 292, 293 S.E.2d 675 (1982); McAdams v. Blue, 3 N.C. App. 169, 164 S.E.2d 490 (1968); Morriss v. Barton, 200 Okla. 4, 190 P.2d 451 (1947); Pearson v. Galvin, 253 Or. 331, 454 P.2d 638 (1969); Ashcraft v. Saunders, 251 Or. 139, 444 P.2d 924 (1968); Hayes v. Gill, 216 Tenn. 39, 390 S.W.2d 213 (1965); Dalton v. Johnson, 204 Va. 102, 129 S.E.2d 647 (1963).

n157. Allen v. Anderson, 562 P.2d at 489-90. The Restatement (Second) of Torts also adopts this view:

Under statutes providing for the survival or revival of tort actions, the damages for a tort not involving death for which the tortfeasor is responsible are not affected by the death of either party before or during trial, except that . . . the death of the tortfeasor terminates liability for punitive damages.

RESTATEMENT (SECOND) OF TORTS § 926(b)(1979).

n158. Johnson v. Rinesmith, 238 So.2d 659 (Fla. App. 1969); National Bank of Bloomington v. Norfolk & Western Railway Co., 73 Ill. App. 2d 160, 383 N.E.2d 919 (1978); Perry v. Melton, 299 S.E.2d 8 (W. Va. 1982); Hofer v. Lavender, No. C-2552 (Tex. July 11, 1984).

n159. Special Project, supra note 2, at 830. Traditionally, the mere sale of a corporation does not impose liability on the successor for the tort liabilities of the predecessor. See Travis v. Harris Corp., 565 F.2d 443 (7th Cir. 1977); Knapp v. North Am. Rockwell Corp., 506 F.2d 361 (3d Cir. 1974), cert. denied, 421 U.S. 965 (1975); Cyr. v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974); Shane v. Hobam, Inc., 332 F. Supp. 526 (E.D. Pa. 1971); Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817 (D. Colo. 1968). There are four generally recognized exceptions in which liability may be imposed on the successor: contractual assumption of the tort liabilities of the predecessor; a transaction that is tantamount to a merger of the predecessor with the successor corporation; the operation of the predecessor as a mere continuation of itself through the successor corporation; and the fraudulent transfer of assets in an effort by the predecessor to escape liability. See Leannais v. Cincinnati, Inc., 565 F.2d 437 (7th Cir. 1977); R. G. Enstrom Corp. v. Interceptor Corp., 555 F.2d 277, 278 (10th Cir. 1977); Knapp v. North Am. Rockwell, 506 F.2d 361 (3d Cir.) cert. denied, 421 U.S. 965 (1974); Bonee v. L & M Const. Co., 518 F. Supp. 375 (M.D. Tenn. 1981); Menacho v. Adamson United Co., 420 F. Supp. 128 (D. N.J. 1976); Hernandez v. Johnson Press Corp., 70 Ill. App. 3d 664, 388 N.E.2d 778 (1979). Recently, some jurisdictions have rejected the general rule that precluded successor liability in favor of "product line" liability based on the socioeconomic policy of risk distribution. See Amader v. Johns-Manville Corp., 541 F. Supp. 1384 (E.D. Pa. 1982); Ray v. Alad Corp., 19 Cal. 3d 22, 560 P.2d 3 (1977); Ramirez v. Amsted Indus., Inc., 86 N.J. 332, 431 A.2d 811 (1981). More recent decisions have categorically rejected the

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product line concept of liability. Weaver v. Nash Int'l, Inc., 562 F. Supp. 860 (S.D. Iowa 1983); Cowan v. Harris Corp., PROD. LIAB. PEP. (CCH) P9667 (D. Kan. Dec. 7, 1982); Gonzalez v. Rock Wool Eng'g & Equip. Co., 117 Ill. App. 3d 435, 453 N.E.2d 762 (1983); Fenton Area Public Schools v. Sorensen-Gross Constr. Co., 124 Mich. App. 631, 335 N.W.2d 221 (1983). **Punitive damages** could not be imposed on a successor corporation under the **standard** that requires the vicariously liable entity to have authorized its employees or agents to engage in the intentional, wanton, or willful conduct at the time of the product's design and marketing. See supra notes 105-09 and accompanying text.

n160. Special Project, supra note 2, at 832-33.

n161. See, e.g., Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357, 391 (E.D. Pa. 1982) (successor corporation liable for punitive damages arising from tort that predecessor corporation committed because "successor is essentially identical to that of the predecessor corporation"). Recently, in Martin v. Johns-Manville Corp., 469 A.2d 655 (Pa. Super. 1983), appeal filed, Apr. 2, 1984, the Pennsylvania Superior Court authorized the award of punitive damages from a successor corporation as the result of the plaintiffs sustaining bronchogenic carcinoma from exposure to asbestos supplied by defendant's predecessor corporation. Relying on Campus Sweater & Sportwear Co. v. M.B. Kahn Constr. Co., 515 F. Supp. 64, 107 (D.S.C. 1979), aff'd, 644 F.2d 877 (4th Cir. 1981), Sturm, Ruger & Co. v. Day, 594 P.2d 38, 47 (Alaska 1979) cert. denied 454 U.S. 894 (1981) and Gryc v. Dayton-Hudson Corp. 297 N.W.2d 727, 741 (Minn. 1979), cert. denied, 449 U.S. 921 (1980), the Martin court held that punitive damages constituted a deterrent against manufacturers maximizing profits by marketing defective products. The court also addressed the issue of imposing punitive damages on a successor corporation not responsible for manufacturing and marketing the defective product. The court declared:

We believe, however, that in some circumstances a successor should be held accountable for the recklessness of its predecessor. This will be so when the goals that underlie the imposition of punitive damages -- punishment and deterrence -- will be advanced. . . . The fact that the successor does not continue the product line recklessly marketed by the predecessor, or cures the defect, will not necessarily preclude punitive damages. . . . We therefore hold that punitive damages are recoverable against a successor corporation when the plaintiff has shown such a degree of identity of the successor with its predecessor as to justify the conclusion that those responsible for the **reckless** conduct of the predecessor will be punished, and the successor will be deterred from similar conduct.

469 A.2d at 667. The extension of punitive damages to an innocent successor corporate entity demonstrates the blind commitment of courts to this archaic doctrine and a certain naivete as to the economic effects of the imposition of punitive damages.

n162. See, e.g., Sheats v. Bowen, 318 F. Supp. 640 (D.C. Del. 1970); Kohl v. Graham, 202 F. Supp 895 (D.C. Colo. 1962); Atlanta Life Ins. Co. v. Stanley, 276 Ala. 642, 165 So.2d 731, 738 (1964) (when husband can prove loss of society because of wife's injuries, "the assessment of reasonable compensation therefore must necessarily be left to the sound dicretion of the jury") (emphasis added).

n163. See, e.g., Fireman's Fund Am. Ins. Co. v. Coleman, 394 So. 2d 334, 341 (Ala. 1980) (only damages for loss of services allowed in derivative actions by spouses); Moran v. Stephens, 265 So. 2d 379, 380 (Fla. Dist. Ct. App. 1972) (husband cannot recover punitive damages in derivative action to his wife's action for dog attack injuries); Hammond v. North Am. Asbestosis Corp., 105 Ill. App. 3d 1033, 435 N.E.2d 540 (1982), aff'd, 454 N.E.2d 210 (Ill. 1983); Hughey v. Ausborn, 249 S.C. 470, 154 S.E.2d 839, 842 (1967) (the intentional wrong is not committed against the spouse).

n164. Dorsey v. Continental casualty Co., 730 F.2d 675 (1984); Northwestern Nat'l Co. v.

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McNulty, 307 F.2d 432 (5th Cir. 1962); City of Products Corp. v. Globe Indem. Co., 88 Cal. App. 3d 31, 151 Cal. Rptr. 494 (1979); Hartford Accident & Indem. Co. v. United States Concrete Pipe Co., 369 So. 2d 451 (Fla. Dist. Ct. App. 1979); Brown v. Western Casualty & Sur. Co., 484 P.2d 1252 (Colo. App. 1971); Guaranty Abstract and Title Co. v. Interstate Fire and Casualty Co., 228 Kan. 532, 618 P.2d 1195 (1980).

n165. See Price v. Hartford Accident & Indemnity Co., 108 Ariz. 485, 502 P.2d 522 (1972); City of Cedar Rapids v. Northwestern Nat'l Ins. Co., 304 N.W.2d 22, (Iowa 1981); First Nat'l Bank of St. Mary's v. Fidelity & Deposit Co., 283 Md. 228, 389 A.2d 359 (1978); Anthony v. Frith, 394 So. 2d 867 (Miss. 1981); Harrell v. Travelers Indem. Co., 279 Or. 199, 567 P.2d 1013 (1977); Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 383 S.W.2d 1 (1964); Hensley v. Erie Ins. Co., 283 S.E.2d 227 (W. Va. 1981).

n166. Duffy, supra note 9, at 8; Ellis, supra note 10, at 20; Special Project, supra note 2, at 695.

n167. See, e.g., Maxey v. Freightliner Corp., 665 F.2d 1367, 1369 (5th Cir. 1982) aff'd, 722 F.2d 1238, 1242 (5th Cir. 1984) (court found evidence inadequate to support jury verdict of $ 10,000,000 in punitive damages, but on appeal following remand affirmed the trial court's remittitur of the award to $ 450,000); Dorsey v. Honda Motor Co., 655 F.2d 650, 654-58 (5th Cir. 1981) ($ 5,000,000 verdict upheld), modified, 670 F.2d 21, cert. denied, 459 U.S. 880 (1982); Airco, Inc. v. Simmons First Nat'l Bank, 276 Ark. 486, 492, 638 S.W.2d 660, 663 (1982) (upholding award of $ 3,000,000 as vindictive damages); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 821-24, 174 Cal. Rptr. 348, 389-91 (1981) (affirming trial court decision to reduce $ 125,000,000 jury verdict to $ 3,500,000); Palmer v. A.H. Robins Co., No. 81SA149 (Colo. June 4, 1984) (en banc) (approving $ 6,200,000 in punitive damages compared to an award of $ 600,000 in compensatory damages); Toyota Motor Co. v. Moll, 438 So. 2d 192 (Fla. Dist. Ct. App. 1983) (approving $ 3,000,000 punitive damages award); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 741 (Minn. 1980) (affirming punitive damages in amount of $ 1,000,000) cert. denied, 449 U.S. 921 (1980).

n168. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967). Another jurist noted that the destructive economic effects of punitive damages awards will impact "upon business and professional persons, firms and corporations, as well as upon ordinary persons when engaged in a wide variety of activities." Harrell v. Travelers Indem. Co., 279 Or. 199, 209-10, 567 P.2d 1013, 1018 (1977). As an example, see Ratner v. Sioux Natural Gas Corp., 719 F.2d 801, 805 (5th cir. 1983), acknowledging that allowance of an award of punitive damages against a bankrupt corporation would deprive legitimate creditors of any recovery and "would be overkill."

n169. Ellis, supra note 10, at 33-63; Owen, supra note 9, at 119-21; Sales, supra note 2, at 380-81.

n170. See Sales, supra note 2, at 380. The Court in Moore v. Remington Arms Co., 100 Ill. App. 3d 1102, 1111, 427 N.E.2d 608, 616-17 (1981), however, noted: "The tide has since turned; judgments for punitive damages are now routinely entered across the nation, and staggering sums have been awarded."

n171. Special Project, supra note 2, at 806-45. Manville Corp., Unarco, and Amatex Corp. have declared bankruptcy under Chapter 11 of the Bankruptcy Reform Act of 1978 because of litigation expenses, and compensatory and punitive damage awards related to asbestos cases. Id. at 808.

n172. See Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir.), reh'g en banc granted, F.2d (5th Cir. 1984) (discussed supra notes 123-26 and accompanying text).

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essentially unlimited compensatory damages serve as a more than adequate economic incentive for initiating civil litigation. By purpose and definition, the civil law historically has evolved to compensate and not to punish, [35] and in today's tort reparations system, compensatory damages **[*1124]** more than adequately fulfill this mission of total and complete reparations. This last justification for the punitive damage concept within the tort reparations system, therefore, not only is suspect, but more importantly, is inherently flawed.

B. Status of Punitive Damages Today

The first American enunciation of the theory of punitive damages occurred in 1791 when a New Jersey court charged the jury in Coryell v. Colbaugh [36] that "they were not to estimate the damages by any particular proof of suffering or actual loss" but, instead, should "give damages for example's sake, to prevent such offenses in future." [37] The Coryell court also stated that the damages should be "such a sum as would mark their disapprobation, and be an example to others." [38] Despite this clear characterization of the purpose of the punitive damages as deterrence, some historical confusion existed concerning the ultimate reasoning that lay at the root of punitive awards. [39] Whatever justification may be advanced to support the punitive damage concept, however, most commentators today acknowledge that the modern bases undergirding the theory in the United States are punishment and deterrence. [40] The status of the punitive damage doctrine in today's tort environment, however, remains remarkably unsettled. Jurisdictions disagree over the applicability of punitive damages in civil actions, and even those states embracing the punitive damages concept differ as to application. [41]

The majority of jurisdictions endorse punitive damages as a **[*1125]** component of the common law. [42] A minority of jurisdictions, nevertheless, prohibit the recovery of punitive damages under the common law. [43] Two of these jurisdictions allow punitive damages only in the narrow context of statutorily authorized situations. [44] At least three jurisdictions either totally or partially proscribe the use of punitive damages in all civil cases. [45] Additionally, four jurisdictions, despite judicial declarations that punitive damages constitute an integral part of the common law, so severely limit the scope and application of the doctrine that, in essence, punitive damages have been reduced to nothing more than compensatory damages. [46]

[*1126] III. BASIS FOR APPLYING THE PUNITIVE DAMAGE DOCTRINE

The generally accepted bases for punitive damages in those jurisdictions that have adopted the concept are punishment and deterrence. [47] Some jurisdictions adopt only one or the other of these rationales, while others adopt the dual rationales. Some jurisdictions still view punitive damages as an additional award to allowable compensatory sums -- to compensate for perceived gaps in reparations, as was practiced during the colonial era.

A. Punishment and Deterrence

The great majority of jurisdictions that currently authorize the recovery of noncompensatory, punitive damages adopt the dual rationales of punishment and deterrence as justification for their position. [48] One commentator offered seven legal theories in support of the punitive damage concept. [49] He acknowledged, however, that any legal doctrine that is predicated on such a disparate variety of grounds "may reasonably be suspected of resting on no very firm basis in policy." [50] Consequently, he reduced these seven rationale to two fundamental tenets: wrong-doers deserve punishment beyond that which compensatory damages provide, and the judicial system needs punitive damages to deter socially harmful, loss creating conduct by defendants. [51] A number of recent cases echo these incantations to justify the use of punitive measures. [52]

[*1127] Courts generally are quick to assert that they fully control the extent of

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n173. Owen, supra note 88, at 1257.

n174. Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. CHI. L. REV. 1, 6 (1981); see Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 841 (1967) (the impracticality of imposing an effective ceiling on punitive awards in hundreds of cases against a single manufacturer, when added to large compensatory damages, could lead to catastrophic awards).

n175. Owen, supra note 174, at 57.

n176. Owen, supra note 9, at 119 (suggesting upper limit of greater of (1) double the compensatory damages, or (2) litigation costs plus $ 10,000); Owen, supra note 174, at 48 (suggesting possible upper limit on punitive damages of $ 1,000,00 per plaintiff).

n177. Duffy, supra note 9, at 11 (trial tactics now are geared to exploit the punitive damages doctrine).

n178. Special Project, supra note 2, at 840 (five asbestos manufacturers formed an alliance to reduce the risk of any defendant "settling out" on the others).

n179. Riegel v. Aastad, 272 A.2d 715, 717-18 (Del. 1970). One reason that appellate courts find it difficult to overturn **punitive damage** awards is because the **standards** of review by which courts evaluate the excessiveness of these awards are extremely unclear. See, e.g., Professional Seminar Consultants v. Sino Am. Technology Exch. Council, Inc., 727 F.2d 1470, 1473 (9th Cir. 1984). The Ninth Circuit recognized in Professional Seminar Consultants that the **standard** of review for **punitive damages** in California is unclear. Compare Cher v. Forum Int'l, Ltd., 692 F.2d 634, 640 (9th Cir. 1982) (clearly erroneous standard), cert. denied 103 S. Ct. 3089 (1983) with Hasson v. Ford Motor Co., 32 Cal. 3d 388, 650 P.2d 1171, 185 Cal. Rptr. 654 (1982) (substantial evidence standad), cert. dismissed, 103 S. Ct. 1167 (1983). Judicial failure within a particular jurisdiction to provide even a consistent **standard** of review to prevent **punitive damages** from getting completely out of hand is disconcerting.

n180. Riegel v. Aastad, 272 A.2d at 718.

n181. See, e.g., Dorsey v. Honda Motor Co., 655 F.2d 650, 657 (5th Cir. 1981), cert. denied, 103 S. Ct. 1778 modified, 670 F.2d 21 (5th Cir. 1982) (actual damages of $ 750,000 and punitive damages of $ 5,000,000 affirmed); Airco, Inc. v. Simmons First Nat'l Bank, 276 Ark. 486, 638 S.W.2d 660 (1982) (actual damages of $ 1,070,000 and punitive damages of $ 3,000,000 affirmed); Vossler v. Richards Mfg. Co., 143 Cal. App. 3d 952, 192 Cal. Rptr. 219 (1983) (actual damages of $ 25,000 and punitive damages of $ 500,000 affirmed); Palmer v. A.H. Robins Co., No. 81SA149 (Colo. June 4, 1984 (en banc) (actual damages of $ 600,000 and punitive damages of $ 6,200,000 approved as reasonable); Ford Motor Co. v. Nowak, 638 S.W.2d 582, 585 (Tex. Ct. App. 1982) (actual damages of $ 400,000 and punitive damages of $ 4,000,000 affirmed).

n182. For example, in Jampole v. Touchy, 673 S.W.2d 569 (Tex. 1984), the Texas Supreme Court authorized virtually unlimited discovery and noted, "The documents showing GMC's knowledge of alternative designs are relevant to show conscious indifference in support of Jampole's claim of gross negligence." Id. at 573. Similarly, in General Motors Corporation v. Lawrence, 651 S.W.2d 732 (Tex. 1983), Justice Ray, in a concurring opinion relating to a discovery order, commented: "The scope of discovery in product defect cases may be permissibly wider, especially when the plaintiff is alleging grounds for the award of exemplary damages." Id. at 734. Similarly, the inclination to expand discovery for punitive allegations is reflected in other jurisdictions. See, e.g., Vollert v. Summa Corp., 389 F. Supp. 1348 (D.C. Hawaii 1975); Hughes v. Graves, 47 F.R.D 52 (W.D. Mo. 1969); Coy v. Superior Court of

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Contra Costa County, 23 Cal. Rptr. 393, 373 P.2d 457 (1962); Kuiper v. District Court of Eighth Judicial District, 632 P.2d 694, 702 (Mont. 1981).

n183. An example of the public's concern with the effect of unwarranted settlements is reflected in an editorial appearing in the Houston Post, September 3, 1984. Commenting on a lawsuit that was tried in the District Court in San Antonio, Texas and then settled with General Motors, the editorial stated:

A lawsuit settled out of court last week in San Antonio is an example of how far downhill our legal system has tumbled.

The passenger in a Pontiac TransAm sued General Motors for $ 50,000,000 after he was seriously injured in an accident. Testimony indicated the driver was drunk and traveling at 90 miles per hour.

But instead of suing the driver, the injured passenger sued GM, alleging the auto maker's advertising of the TransAm made the driver believe it was a stunt vehicle that could perform beyond the limits of a normal production car.

To any reasonable person, three errors are obvious in the story. First, the wrong party was sued. The driver was at fault, not General Motors. It seems no one these days is willing to take responsibility for his own actions. It's always someone else's fault. However, it doesn't take too much imagination to figure out why GM was sued instead of the driver: GM is richer.

Second, GM should not have settled. This is perhaps more understandable; GM wanted to avoid a long trial and the publicity.

Third, and the most obvious of all, the court should have thrown the lawsuit out at the first hearing. Judges and prosecutors repeatedly tell us dockets are overcrowded, but it is hard to empathize when frivolous lawsuits like this one are allowed to proceed." Houston Post, Sept. 3, 1984, at 13, col. 1.

n184. See Western Union Tel. Co. v. Guard, 283 Ky. 187, 197, 139 S.W.2d 722, 727 (1940); see also W. PROSSER, supra note 34, § 2, at 7.

n185. Dean Prosser referred to punitive damages as an "anomalous respect" in which "the ideas underlying the criminal law have invaded the field of torts." W. PROSSER, supra note 35, § 2, at 9.

n186. Bass v. Chicago & N.W. Ry., 42 Wis. 654, 672 (1877). Interestingly enough, the Bass opinion went on to accept the theory of punitive damages because of stare decisis. Wisconisn recently continued this inexplicable adherence to an outdated doctrine in Wangen v. Ford Motor Co., 97 Wis. 2d 260, 279-80, 294 N.W.2d 437, 448 (1980):

Although controversy continues to surround the doctrine of punitive damages in the twentieth century, and although some have questioned whether tort law -- which is designed to compensate an injured plaintiff -- should also serve the function of the criminal law, i.e., to punish a defendant for the purpose of deterring him and others from further offenses, this court has consistently and frequently said that punishment and deterrence are important considerations in the law of torts in Wisconsin.

n187. Fay v. Parker, 53 N.H. 342, 382 (1873). Unlike Wisconsin, see supra note 186 and accompanying text, New Hampshire followed its instincts and limited punitive damages to a compensatory nature.

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n188. Duffy, supra note 9, at 10.

n189. For example, juries have unlimited discretion in determining the amounts of punitive awards, whereas criminal fines must be fixed, and the burden of proof of civil punitive damage liability is established by a preponderance of the evidence and not evidence beyond a reasonable doubt. Likewise, civil defendants do not receive the protection against double jeopardy and, therefore, are subject to civil punitive damages and criminal fines for the same act. Similarly, civil defendants are subject to punitive awards on behalf of innumerable plaintiffs, thereby making any upper limit of liability nonexistent. Also, most crimes require a guilty intent. Finally, civil defendants subject to exemplary damages do not enjoy the protection against self-incrimination. See W. PROSSER, supra note 35, § 2, at 11; Duffy, supra note 9, at 9; Sales, supra note 2, at 363-64; see also Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (punitive damages could amount to tens of millions of dollars while the maximum criminal penalty would be three years imprisonment and a $ 10,000 fine for each of 12 violations).

n190. See K. REDDEN, supra note 1, at 630 ("The imposition of punitive damages is particularly offensive in the field of vicarious liability . . .").

n191. One scholar has stated:

If the purpose of awarding punitive damages is to compensate, the normal public policy reason for imposing vicarious liability would appear applicable. But if the purpose of punitive damages is to deter, as it is in the vast majority of jurisdictions today, the penalty is certainly of questionable effectiveness and justice if not imposed on the employee. The inequity is especially acute in the case of corporations where innocent stockholders ultimately bear the punitive burden.

K. REDDEN, supra note 1, at 35.

n192. Id. at 631.

n193. The "deep pocket" theory rests upon "the desire to insure that victims of tortious injury can reach a defendant with sufficient wealth to provide adequate compensation." Ellis, supra note 10, at 64. Employers generally are better able to meet this compensatory burden. Id. at 64-65.

n194. See Duffy, supra note 9, at 12-13. The concerns of the "deep pocket" rationale for uncompensated plaintiffs obviously do not apply to punitive damages, which theoretically perform direct punitive and deterrent functions. Ellis, supra note 10, at 65.

n195. 42 U.S.C. § 1983 (1982); see Smith v. Wade, 103 S. Ct. 1625 (1983) (defendant's conduct must be motivated by evil motive or intent).

n196. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (municipality may be held vicariously liable for acts of its employees).

n197. Duffy, supra note 9, at 12-13.

n198. Id. Many courts accept deterrence as one of the bases for punitive damages. See supra notes 47-60 & 64-70 and accompanying text. Deterrence can be specific -- of the individual defendant -- or general -- of other possible defendants. The strongest deterrence argument for punitive damages is specific deterrence. Some doubt exists as to whether exemplary awards accomplish this specific goal, and no empirical studies exist. Duffy, supra note 9, at 10-11. This uncertainty is especially strong when the individual defendant to be deterred is a corporate entity. The imposition of a punitive award cannot deter an employer if

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the employee's act is intentional. Conversely, the employee will not be deterred when the employer is made to pay a punitive award. Ellis, supra note 10, at 68-69. Moreover, the best selection and supervision methods available do not, and cannot, prevent occasional impulsive behavior by employees, and the larger the employer the less any possible deterrent effect because the large employer simply lacks that degree of total control and supervision of employees. J. GHIARDI & J. KIRCHER, supra note 9, § 2.08, at 19-21.

The general deterrent effect of punitive damages, likewise, is highly doubtful. Several noted authors term it "highly unlikely" that the civil law imposition of punitive damages will achieve the same goal of deterrence associated with the criminal law because: most people do not know what punitive damages are; those people who generally know what punitive damages are, do not know enough to appreciate the intended deterrent effect; and even sophisticated members of the public are compelled to make "judgment calls" regarding the type of conduct that will be subject to punitive damages. Id. § 2.09, at 23-24; see K. REDDEN, supra note 1, at 116 ("there is really nothing for which the employer can be punished, and . . . punitive liability is unlikely to encourage employers to use more care in screening or training their employees").

n199. K. REDDEN, supra note 1, at 631.

n200. Schwartz, Deterrence and Punishment in the Common Law of Punitive Damages: A Comment, 56 S. CAL. L. REV. 133, 141 (1982) (discussing the decision in Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr, 348 (1981), in which the appellate court affirmed the trial judge's reduction of punitive award from $ 125,000,000 to $ 3,500,000, but implied that it would have affirmed the trial court's acceptance of the $ 125,000,000 award or a reduction to $ 1,000,000).

n201. Duffy, supra note 9, at 10; see Roginsky v. Richardson-Merrell, Inc., 378 F.2d at 841 (compensatory awards have punitive elements, which would be more pronounced if punitive damages were eliminated).

n202. Realistically, employees of an employer or corporate entity seldom, if ever, indemnify the vicariously liable employer. Consequently, the ultimate "punishment" administered by the punitive damage doctrine is assessed in the form of higher insurance premiums, higher prices for services, and higher product costs that are spread across the entire section of innocent consumers or taxpayers. Roginsky v. Richardson-Merrell, Inc., 378 F.2d at 841. Likewise, creditors, sellers, suppliers, and distributors ultimately may pay the cost of the punishment meted out by the punitive damage doctrine without ever having committed a wrongful act. Ellis, supra note 10, at 66; see K. REDDEN, supra note 1, at 116 (losses will fall not on the employer, but on the public through price increases, or on innocent shareholders who never receive any benefit from the torts of corporate employees).

n203. J. GHIARDI & J. KIRCHER, supra note 9, § 2.04, at 12.

n204. See supra notes 127-35 and accompanying text.

n205. See supra note 131 and accompanying text.

n206. Duffy, supra note 9, at 8; Sales, supra note 2, at 367 & n.82.

n207. As noted by the court in Leimgruber v. Claridge Assoc., 73 N.J. 450, 375 A.2d 652, 656 (1977):

The major difficulty in establishing the amount of the **punitive damage** recovery is the absence of any defeinitive [sic] **standard** or criterion to guide the trier of fact in determining the proper amount.

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One major objection to the "ratio" rule is that it collides with the rationale for imposing punitive damages which are awarded, as noted, on a theory of punishment and deterrence. . . .

n208. If courts intend punitive damages to punish the defendant, then the wrongdoer's conduct constitutes a more important consideration than the amount of damage the plaintiff suffers, although compensatory damages represent the basis against which the punitive damages are compared. Leimgruber v. Claridge Assoc., 73 N.J. 450, 375 A.2d, 656 (1977); see generally Ellis, supra note 10, at 58-59. Professor Ellis asserts that, although one can form arguments that will theoretically justify the ratio rule, in reality "it invites juries to engage in wealth redistribution and exacerbates the perverse incentives already created by uncertain **standards of punitive damage** liability and the lack of functional criteria for the magnitude of assessments." Id. at 62-63.

n209. These courts adopt the position of Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 383 S.W.2d 1 (1964) (public policy not violated by allowance of insurance coverage for punitive damages). Almost all courts allow insurance coverage for vicarious punitive damage liability. Ellis, supra note 10, at 71 (citing Dayton Hudson Corp. v. American Mut. Liab. Ins. Co., 621 P.2d 1155, 1160 (Okla. 1980)); Morrissey, Punitive Damages -- Insurability, 25 TRIAL LAW. GUIDE 257 (1981); Owen, supra note 88, at 1313 n.276 (1976).

n210. See. Ellis, supra note 10, at 71 (citing Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 441-42 (5th Cir. 1962)). Recently, in United States Concrete Pipe Co. v. Bould, 437 So. 2d 1061 (Fla. 1983), the Florida Supreme Court determined that insurance coverage would apply to punitive damage liability of an entity deemed vicariously liable, but would not apply to the individual responsible for the egregious conduct.

n211. Ellis, supra note 10, at 74.

n212. First Bank v. Transamerica Ins. Co., F. Supp. (D.Mont. 1984) (implicit in the court's analysis is recognition of the fact that punitive damages serve as nothing more than windfalls for plaintiffs).

n213. Ellis, supra note 10, at 75-76. The Second Circuit has noted another dilemma that liability insurance raises. If courts allow liability insurance for punitive damages, then the cost of providing arguably needless deterrence rests on the consuming public. If courts do not allow such insurance, then a sufficient egregious mistake can destroy a business, thereby punishing innocent stockholders. Roginsky v. Richardson-Merrell, Inc., 378 F.2d at 841.

n214. Even the ancient concept of satisfying the public's desire for revenge is outdated. As one author tersely observed, "vengeance is a questionable objective for a civilized legal system." Note, The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees, 70 YALE L.J. 1296, 1298 (1961). Society has long since progressed beyond the primitive concept of an eye for an eye and a tooth for a tooth.

n215. See supra notes 48-60 and accompanying text.

n216. See supra notes 71-76 and accompanying text.

n217. See supra notes 17-30 and accompanying text.

n218. Dillon v. Legg, 68 Cal. 2d 728, 730-31, 441 P.2d 912, 914, 69 Cal. Rptr. 72, 74 (1968) (en banc); Portee v. Jaffee, 417 A.2d 521 (N.J. 1980); W. PROSSER, supra note 34, § 12.

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n219. Ellis, supra note 10, at 16-17. Professor Ellis cites the interesting case of Forde v. Skinner, 172 Eng. Rep. 687 (Horsham Assizes 1830), in which the court held that cutting off the hair of female paupers in a poor house, if done "with the malicious intent imputed [by the evidence] of 'taking down their pride,' . . . that will be an aggravation and ought to increase the damages." Ellis, supra note 10, at 17.

n220. Ellis, supra note 10, at 28; see Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983) (Texas Supreme Court rejected over 100 years of judicial interpretation of the Wrongful Death Act to redefine pecuniary loss to permit recovery of loss of society and mental anguish). Even recovery for emotional upset in the absence of any physical injury is now recoverable. See, e.g., Betancourt v. J. C. Penny Co., 554 F.2d 1206 (1st Cir. 1977).

n221. Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 P. 1072 (1891).

n222. Some commentators argue that "common sense makes it difficult to disbelieve that the possibility of a hefty punitive jury verdict would not deter a rational and reputable manufacturer." See J. GHIARDI & J. KIRCHER, supra note 9, § 6.07, at 24. But see Ellis, supra note 10, at 3 n.9 ("The burden of persuasion lies with the proponents of imposing punitive damages; if the question of whether imposing punitive damages promotes valid objectives cannot be persuasively answered in the affirmative, the damages are not justifiable and should not be imposed"). The vague and meaningless nature of the "**reckless** and wanton" **standard** as a basis for imposing **punitive damages** is exemplified in International Armament Corp. v. King, 674 S.W.2d 431 (Tex. Civ. App. 1984).

n223. Ellis, supra note 10, at 2.

n224. See supra notes 77-103 and accompanying text. Professor Ellis asserts that the vagueness of **standards** for determining liability and the wide discretion of juries in determining amounts of **punitive damages** extends "liability far beyond that justified by fairness." Ellis, supra note 10, at 76.

n225. One authority has stressed that substituting the terms "outrageous" or "flagrant" for the current vague terms would be useless because these words are just as elastic as those now in use. Ellis, supra note 10, at 51. The courts must realize the importance of strictly construing even "deliberate intent," "ill motive," and "maliciousness" **standards.** See Cooter, supra note 8, at 80 (proposing that courts should allow **punitive damages** only for intentional faults, which would include only gross or repeated conduct).

A bill currently before the United States Senate would limit the imposition of punitive damages in product liability cases to situations in which the defendant manufacturer or product seller acted with "**reckless** disregard . . . for the safety of product users, consumers, or persons who might be harmed by the product." S. 44, 98th Cong., 2d Sess. § 12(a)(2) (1984). The Senate bill further defines "**reckless** disregard" as "conscious, flagrant indifference to the safety of those persons who might be harmed by a product and an extreme departure from accepted practice." Id. § 12(j) (emphasis added). A similar bill before the United States House of Representatives deletes the word "conscious" and would require only that the defendant act "with a flagrant indifference to consumer safety . . . and an extreme departure from accepted practice." H.R. 5214, 98th Cong., 2d Sess. § 11(b) (1984) (emphasis added).

n226. Professor Owen recently recommended that courts institute a "clear and convincing" evidentiary test. He recognized that such a test might sacrifice a degree of efficiency in favor of some fairness, but fairness over efficiency and the concept that close cases should be resolved in favor of the accused are exactly what the American legal system should epitomize. See Owen, supra note 9, at 118-19 (ratio of additional innocent parties who get

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punished to the number of additional guilty parties who get punished by an expansion of the rule of punitive damages may be unfairly high). In Gavica v. Hanson, 101 Idaho 58, 608 P.2d 861, 864 (1980), the court suggested that punitive damages generally are not favored and should be awarded only upon clear evidence. Similarly, in Town of Jackson v. Shaw, 569 P.2d 1246, 1252 (Wyo. 1977), the court observed that "[p]unitive damages are not a favorite of the law, are to be allowed only with caution within narrow limits and have been the subject of much controversy." And, in Gent v. Collinsville Volkswagen, Inc., 116 Ill. App. 3d 496, 451 N.E.2d 1385, 1391 (1983), the court acknowledged that "[b]ecause of the penal nature of such damages, . . . the law disfavors them. . . ." See Acosta v. Honda Motor Co. v. Moll, 717 F.2d 828, 839 (3d Cir. 1983) (en banc) (need to prove "outrageous" conduct by clear and convincing proof); Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 360 (Ind. 1982) (the court announced a change to "clear and convincing evidence") S. 44, 98th Cong., 2d Sess. § 12(a)(2) (1984) (requiring "clear and convincing" proof); K. REDDEN, supra note 1, at 124-25 (advocating that courts increase the burden of proof to a "clear and convincing" **standard)**; see also Note, Criminal Safeguards and the **Punitive Damages** Defendant, 34 U. CHI. L. REV. 408 (1967).

n227. See Schwartz, supra note 200, at 144 (the American legal tradition indicates that incriminating facts must be proved beyond a reasonable doubt before punishment can be inflicted, but under the punitive damage doctrine the civil law awards millions of dollars based on a preponderance of the evidence standard).

n228. Roginsky v. Richardson-Merrell, Inc., 378 F.2d at 843. The Second Circuit required only that the plaintiff clearly establish the defendant's recklessness. The term **"reckless"** lends itself to much confusion and arbitrariness, and therefore, courts should employ the more stringent standards of deliberate intent or maliciousness.

n229. See H.R. 5214, 98th Cong., 2d Sess. § 11(b), (c) (1984) (proposing that the court, rather than the jury, decide punitive damage liability and amount). But see S. 44, 98th Cong., 2d Sess. § 12(b), (c) (1984) (proposing that court decide the amount of punitive damages, but allowing jury initially to determine if defendant is liable for them).

n230. See Mallor & Roberts, Punitive Damages: Toward a Principled Approach, 31 HASTINGS L.J. 639, 670 (1980) (suggesting that "the very power of the remedy demands that judges exercise close control over the imposition and assessment of punitive damages"); Owen, supra note 9, at 120 (recommending reallocation of judicial power because of the experience of judges and because judges have less rigid preconceptions that might bias decisions); see also Torres v. North Am. Van Lines, Inc., 135 Ariz. 35, 658 P.2d 835, 841 (1983) (discussion of the role of experienced trial judge controlling punitive damages award).

n231. See Schwartz, supra note 200, at 146-47 (a questionnaire that the California Legislature's Joint Committee on Tort Liability submitted to California's Superior Court judges indicated that 56% of those judges who responded favored vesting in the trial court the authority to determine both when to award punitive damages and in what amount); see also Mallor & Roberts, supra note 230, at 664 (endorsing judicial determination of the appropriateness of punitive awards).

n232. The jury in Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981), rendered a punitive damage award of $ 125,000,000 for a single claim. More recently in Durgill v. Ford Motor Co., C.A. 79-3203A-28th Dist. Ct. of Nueces Co., Texas (1983), the jury rendered a verdict of $ 6,800,000 in actual damages and $ 100,000,000 in punitive damages for a single claim.

n233. See H.R. 5214, 98th Cong., 2d Sess. § 11(d) (1984) (limiting punitive awards to twice the amount of actual damages, and never allowing punitive damages to exceed $

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1,000,000 for any one claimant). The House bill also would permit the court to consider any prior punitive damage awards levied against the defendant. Id. § 11(e). A mathematical formula, as H.R. 5214 proposes, in the hands of an experienced trial judge might lead to equitable results. One commentator, however, has suggested that allowing a jury to consider prior punitive awards in an effort to minimize any current exemplary damages could backfire and cause a jury to fine a defendant even more harshly. K. REDDEN, supra note 1, at 122-23.

n234. See supra note 176.

n235. The Clayton Act provides in pertinent part:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a) (1982) (emphasis added). Professor Redden provides an excellent discussion of federal statutes that expressly provide for punitive damages, federal statutes that expressly preclude punitive awards, and federal statutes that are unclear on this issue. See K. REDDEN, supra note 1, at 558-93.

n236. Judge Friendly favored the power of judicial reduction of punitive awards when writing the opinion in Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967):

There is more to be said for drastic judicial control of the amount of punitive awards so as to keep the prospective total within some manageable bounds. This would require, for example, a reduction of the instant $ 100,000 award to something in the $ 5,000-$ 10,000 range, still leaving defendant exposed to several million dollars of exemplary damages.

Id. at 840.

n237. O.W. HOLMES, THE COMMON LAW 3 (1881). As stated in In re Nothern District of California "Dalcon Shield" IUD Products Liability Litigation, 526 F. Supp. 887, 899 (N.D. Cal. 1981), vacated on other grounds, 693 F.2d 847 (9th Cir. 1982), cert. denied, 103 S. Ct. 817 (1983), the purpose of punitive damages awards is "to sting, not kill, a defendant." But see, Acosta v. Honda Motor Co., 717 F.2d 828, 838 n.15 (3d Cir. 1983) (en banc), in which the court suggested punishment to destruction may constitute acceptable policy, or as the court more succinctly noted, "[n]or is such a result necessarily untenable").

n238. As noted by the court in Town of Jackson v. Shaw, 569 P.2d 1246, 1253 (Wyo. 1977), "The punitive allowance should be in an amount that would promote the public interest without financially annihilating the defendants." See Martin v. Johns-Manville Corp., 469 A.2d 655 (Pa. Super. 1983), which authorized punitive damages from a successor corporation for allegedly defective asbestos products supplied by a predecessor corporation. The punished legal entity neither designed, manufactured, nor sold the alleged defective product causing plaintiff's injury. In Morris v. Parke, Davis & Co., 573 F. Supp. 1324 (D.Cal. 1983), the court carried the punitive damage doctrine to its illogical extreme. The court approved the imposition of punitive damages on a defendant in a case in which strict tort liability was initially predicated on the market share theory because the plaintiffs could not establish that the defendant was the manufacturer or the seller of the injury causing product.

n239. See S. 44, 98th Cong., 2d Sess. § 12(e), (f)(1) (1984) (suggesting that the amount of punitive damages that a plaintiff can receive should not exceed the amount of

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compensatory damages awarded, with any remaining punitive damages going to a court-determined "public purpose"). The logic of this suggestion was recognized as early as 1877 by a court that, unfortunately, refused to follows its own instincts. See supra note 186 and accompanying text.

n240. See supra notes 215-20 and accompanying text.

n241. See Duffy, supra note 9, at 9.

n242. See supra notes 209-13 and accompanying text.

n243. See, e.g., Dempsey v. Auto Owners Ins. Co., 717 F.2d 556, 562 (11th Cir. 1983); White v. Conoco, Inc., 710 F.2d 1442, 1448 (10th Cir. 1983); Moore v. American United Life Ins. Co., 150 Cal. App. 3d 610, , 197 Cal. Rptr. 878, 897 (1984); Riegel v. Aastad, 272 A.2d 715, 717-18 (Del. 1970); Leimgruber v. Claridge Assoc., 73 N.J. 450, 375 A.2d 652, 656 (1977).

n244. Owen, supra note 174, at 57-58; see Warren v. Ford Motor Credit Co., 693 F.2d 1373, 1380 (11th Cir. 1982) (maximum limit is exceeded if award is "neither just nor proper").

n245. As the Fifth Circuit stated about an unrelated abusable relic, legal doctrines that invite appeals and confuse judges, juries, and attorneys ought to be given a "quick and not too decent a burial." United States v. Bailey, 468 F.2d 652, 668-69 (5th Cir. 1972), aff'd en banc, 480 F.2d 518 (5th Cir. 1973).

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punishment meted out by punitive damages. [53] An exception to this rule, and one that has created much controversy because of the absence of any responsible theoretical foundations coupled with its fundamental inequities, [54] is the award of punitive damages based on vicarious liability. [55]

Courts are less than clear in defining and identifying the entities sought to be deterred by the effects of punitive damages. [56] For example, Iowa, Mississippi, North Carolina, Ohio, Texas, Virginia, and West Virginia intend to deter persons other than the defendant from committing acts similar to those that prompted the punitive damage award. [57] Other jurisdictions that have adopted punitive damages observe that it is their policy to deter both the defendant and other potential wrongdoers. [58] Arizona and New Jersey, however, hold that the deterrent effect of punitive damages should be directed only at the particular tortfeasor before the court, [59] while Minnesota is unclear concerning whom it intends to **[*1128]** deter with punitive damages. [60]

B. Punishment Only

Delaware is the only state that has adopted punishment as the sole purpose for the imposition of punitive damages. [61] The Delaware Supreme Court has stated that it will allow punitive damages only as punishment to the tortfeasor for willfully and wantonly committed wrongful acts. [62] Wisconsin, similarly, recognizes the punishment rationale as a sufficient, if not sole, basis for imposing punitive damages. [63]

C. Deterrence Only

Deterrence represents the singular basis for authorizing punitive damages in Alaska, Georgia, Idaho, Maine, Oregon, Rhode Island, and Utah. [64] Many of these jurisdictions, however, do not specifically hold deterrence as the sole rationale for awarding punitive damages, but merely imply this basis. [65] The Idaho Supreme Court, in discussing the policy of deterrence, observed:

We prefer to accentuate those cases which define the purpose of exemplary damages as a deterrent to the defendant and others from engaging in similar conduct in the future. We concede that any exemplary damages assessed against a defendant will appear to him to be punishment. However, we feel **[*1129]** that the courts in these civil cases should be motivated primarily by a purpose of deterrence and not by a purpose of punishment. In other words, the assessment of exemplary damages should be prompted by the court's or jury's desire to assure, to the extent possible via the imposition of a monetary penalty, that similar conduct does not occur in the future. Punishment, per se, should be left to the criminal law. [66]

Also, as in those jurisdictions that recognize both punishment and deterrence as the rationales for punitive damages, [67] the jurisdictions that recognize only a deterrence rationale fail to clarify the entities sought to be deterred by the award of punitive damages. [68] This lack of uniformity in policy and application reflects the inherent weakness in a doctrine that, rather than advancing the best interests of society, actually threatens society's economic underpinnings.

Texas recently has announced that either deterrence or punishment, separately and independently, constitute an appropriate rationale for the assessment of punitive damages. [69] Therefore, the plaintiff may elect to seek punitive damages based on only the deterrence rationale, on only the punishment rationale, or both. [70] This judicial aberration reflects not only the lack of legal soundness of the doctrine, but also demonstrates the court's acceptance of the notion that punitive damages can serve as a windfall for plaintiffs.

D. Award of Additional Damages

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Several jurisdictions view punitive damages as mere monetary awards that complement compensatory damages. [71] Punitive damages, **[*1130]** in these jurisdictions, serve to provide remuneration for intangible injuries such as hurt feelings, loss of companionship, wounded dignity, grief, embarrassment, [72] mental anguish, [73] or litigation expenses. [74] These jurisdictions predicate their philosophy on the outdated theorem that such injuries were not compensable under early common law. [75] Common sense and the current availability of expanded, if not unlimited, compensatory damages in all tort actions expose the fallacy of this rationale. [76]

IV. APPLICATION OF THE **PUNITIVE DAMAGE** DOCTRINE IN TODAY'S CONTEXT

A. **Standards** of Conduct That Warrant **Punitive Damages**

The ratio decidendi that courts employ when imposing **punitive damages** vary in almost indecipherable, yet extremely important, degress. The disparate innuendos and connotations that accompany the legal bases articulated to support punitive damage liability precipitate subtle shifts in jury interpretations, in understandings of the law, and in burdens of proof. For this reason, the jurisdiction in which a plaintiff institutes suit profoundly affects the outcome of his case. Generally, most jurisdictions focus on the defendant's conduct, rather than the nature or extent of the harm sustained by the plaintiff. [77] This restricted approach lends itself to anything but consistency. Although a broad **standard** is necessarily imprecise, most commentators acknowledge that the imposition of **punitive damages** requires more than a mere tortious act -- the defendant's conduct must be aggravated or outrageous, or characterized by some positive element of conscious wrongdoing. [78]

[*1131] 1. **Standard** of Intentional Conduct

Those jurisdictions and commentators who recognize the validity of the **punitive damage** doctrine envision recovery when the defendant's actions eithe are or are deemed to be intentional. [79] Most of these courts and commentators adopt this proposition **[*1132]** without hesitation and endeavor to expand the punitive damage concept to situations that concern more imprecise conduct. [80] It is in this area of marginally intentional conduct that the judicial **standards** for imposing **punitive damages** first become muddled and legally irrational. Some states, therefore, have espoused very strong **standards** of appellate review. In Rhode Island the courts will approve punitive awards only "upon evidence of such willfulness, recklessness or wickedness, on the part of the party at fault, as amounted to criminality." [81] New Jersey, similarly, requires the plaintiff to prove "actual malice, which is nothing more or less than intentional wrongdoing -- an evil-minded act . . . or an act accompanied by a wanton and willful disregard of the rights of another." [82] Other jurisdictions have couched the standard in slightly different, yet equally strong, language. California requires that "the defendant must be guilty of oppression, fraud or malice. . . . He must act with the intention to vex, injure or annoy, or with a conscious disregard of the plaintiff's rights." [83] In Vermont the plaintiff must show "that there was actual malice . . . conduct **[*1133]** manifesting personal ill will or carried out under circumstances evidencing insult or oppression, or even by conduct showing a **reckless** or wanton disregard of one's rights." [84] Other states employ weaker characterizations of the intentional conduct standard. New York requires that "the wrong [be] aggravated by evil or a wrongful motive or that there [be] willful and intentional misdoing, or a **reckless** indifference equivalent thereto." [85] Alabama possesses one **[*1134]** of the weaker intentional conduct standards in that the courts only require "some circumstances of aggravation, such as willfulness, wantonness, maliciousness, gross negligence or recklessness, oppression, outrageous conduct, indignity and contumely, insult, or fraud or gross fraud." [86]

The standards of intentional conduct sufficient to warrant punitive awards vary in degrees, both from each other and from the **reckless** and negligent standards that many jurisdictions

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apply. Significantly, one legal scholar has proposed that courts should limit punitive damages to cases concerning intentional faults. [87] Another well-known scholar, who formerly enthusiastically supported a rather unrestricted approach to punitive damages, [88] after viewing the results of an unfettered application of punitive damages over a mere seven year period, now recognizes the importance of limiting **punitive damages** to intentional and quasi-intentional situations. [89]

[*1135] 2. **Standard of Reckless** Conduct

The broad area of **reckless** or wanton conduct is an ill-defined, often fluctuating category. The courts ostensibly have articulated a clearly defined and legally meaningful **standard** to evaluate potential liability for **punitive damages.** Any analysis of the cases, however, reveals an unintelligible, linguistic exercise in legalese, the significance of which doubtlessly is lost upon many legal scholars and, more importantly, most jurors. Generally, the cases delineate a continuum of antisocial conduct. The upper, aggravated end of this continuum approaches intentional conduct, and therefore, courts are more likely to authorize the imposition of punitive damages for this type of conduct. The lower, more passive end of the continuum consists of conduct that is simply improper or ill-conceived, but is not of such egregious quality that it warrants punitory measures. Between these two extremes is conduct that varies in often imperceptible, but extremely important degrees for the application of the **punitive damage** concept.

A review of the cases employing "the **reckless** or wanton" **standard** discloses a disturbing overlap between this standard and the intentional conduct standard. The distinctions between the two standards often are too imperceptible to allow absolute categorization. Some courts proclaim that the **standard** for the imposition of **punitive damages** is "actual malice, which is nothing more or less than intentional wrongdoing -- an evil-minded act" [90] , or "an evil intent deserving of punishment or of something in the nature of special ill will." [91] Some courts repudiate the necessity of demonstrating actual malice in favor or a standard of "legal malice," which **[*1136]** appears to differ little from intentional conduct. [92] Others refer to "conscious disregard of [the plaintiff's] rights" and award punitive damages when the evidence demonstrates that the defendant acted willfull and maliciously. [93] Other courts denominate **reckless** or wanton conduct as "gross negligence" which then is defined as an "entire want of care" that raises an inference of "conscious indifference" to the rights of others. [94] Still other jurisdictions judge the defendant's conduct against a standard of **reckless** or wanton conduct, oppression, fraud, or malice under which the wrongdoer must act with the intent to vex, injure or annoy, [95] or act out of a maliciousness or recklessness that evidences an utter disregard of the consequences. [96] At least one court has judicially formulated a standard of **reckless,** wanton, or oppressive conduct that requires spite, ill will, or **reckless** indifference by the defendant. [97] Tennessee has **[*1137]** attempted to amalgamate all of the various characterizations of the **reckless standard** into one sentence. Tennessee courts will allow **punitive damages**

in cases involving fraud, malice, gross negligence or oppression, . . .or where a wrongful act is done with a bad motive or so recklessly as to imply a disregard of social obligation, . . . or where there is such willful misconduct or entire want of care as to raise a presumption of conscious indifference to consequences. [98]

The standards for measuring **reckless** or wanton conduct are confusing and devoid of any effective definition. Scholars universally have acknowledged the absence of any meaningful characterization. [99] Jurors motivated by the noble desire to render a fair verdict simply cannot fathom the intricacies in meaning and subtle connotations that characterize the different standards for measuring **[*1138] reckless** or wanton conduct. [100] Because of the absence of any understandable standards of measurement and the inevitably inconsistent interpretations by juries, every defendant increasingly is subject to the vagaries of individual jurisdictions and an uninformed jury.

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3. **Standard** of Negligent Conduct

Most courts refuse to impose **punitive damages** for "negligent" conduct. [101] Some states purport, however, to recognize a distinction between mere negligence and gross negligence, and they invariably authorize punitive damages only for the latter. [102] At least one court had held that gross negligence, in and of itself, is not sufficient to support an award of punitive damages. [103]

B. The Corporate Defendant and Punitive Damages

The doctrine of vicarious liability provides a further avenue for courts to impose punitive damages on parties other than the actual wrongdoer. [104] A large number of jurisdictions adhere to the respondeat superior rule that an employer is subject to punitive **[*1139]** damages when an employee, while operating within the scope of his employment, commits tortious acts that further the employer's interests. The imposition of punitive damages vicariously on another is incongruous with the objective of deterrence. Punishing the employer or corporation for the acts of the servant simply metes out punishment based not on opprobrious conduct but on the mere legal relationship between the offending individual and his employer. A number of other jurisdictions, however, adopt the more conservative "complicity rule." [105] The complicity rule limits the imposition of vicarious liability for punitive damages to situations in which a managerial agent of the employer either commits the egregious act, [106] specifically authorizes the act, [107] or ratifies the **[*1140]** act [108] or when an unfit employee recklessly hired by the employer commits the act. [109] At least under the complicity rule, the employer or corporation has undertaken an affirmative, conscious act in hiring an unfit employee or authorizing the egregious act of the employee.

Courts also impose punitive damages on corporations under the recently formulated concept of strict tort liability. [110] A recent opinion by the United States Court of Appeals for the Tenth Circuit demonstrates the extent to which courts have expanded the award of punitive damages in strict liability situations. In Saupitty v. Yazoo Manufacturing Co. [111] the court affirmed awards of $ 560,000 in compensatory damages and $ 440,000 in punitive damages when the plaintiff's left hand and arm were injured by a riding lawnmower the defendant had manufactured. The court sanctioned the punitive award even though the plaintiff substantially had altered the product by removing both the belt guard and the brakes of the mower. [112] A vigorous dissent asserted that under applicable strict tort liability doctrine either of these material alterations to the mower should have constituted grounds for a directed verdict for the defendant. [113] The dissent also emphasized that even if the court elected to impose strict liability under such meager evidence, no evidence existed in the record to justify an award of **[*1141]** punitive damages. [114]

The imposition of punitive damages in the strict liability context also has been assailed on the grounds that punitive damages traditionally are awarded in tort actions in which the compensatory damages are premised on conduct, while compensatory damages in strict tort liability actions are based solely on the condition of the product. [115] Strict tort liability rests entirely on the socioeconomic policy of risk distribution. Following this rationale, the product supplier is essentially blameless. Liability is visited upon the product supplier on the theoretical basis that the supplier is the entity best able to absorb the loss suffered by a product user simply by distributing the added cost to the marketing public and by purchasing additional insurance. Consequently, courts in strict liability cases award compensatory damages because of the condition of the product, not the conduct of the product supplier. Punitive damages in a strict tort liability context, therefore, would seem to be plainly illogical because neither punishment nor deterrence of conduct is at issue. [116]

An equally compelling argument against punitive damages in a strict liability context is that such awards in product liability cases produce economically and socially undesirable results.

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[117] The gravest danger in products liability is that an aggregate of punitive awards can bankrupt or financially cripple a business. [118] One commentator has observed that the recent trend toward more substantial punitive damage verdicts has reached the point at which the **[*1142]** question must be posed whether the goal of punitive damages is "punishment of the defendant or actually his annihilation." [119] Courts, however, increasingly ignore or only superficially address these arguments in their affirmation of punitive damage awards against manufacturers in a strict tort liability context. [120] The situation in strict tort liability is exacerbated by the fact that liability may be predicated on an alleged defective design or a defective warning on the product. Products are marketed in certain design lines and literally millions of identically designed or marketed products may exist. If punitive damages may be awarded repeatedly for the same design or marketing deficiency, then indeed, the punitive damage doctrine may be utilized to punish a product supplier to the point of economic destruction. [121] Several recent decisions, **[*1143]** unmindful of the concern for the continued economic viability of product suppliers, have acknowledged that the bankruptcy or other form of annihilation of a product supplier by the repeated imposition of punitive damage awards could be justified and judicially sanctioned. [122]

The Fifth Circuit recently recognized the serious problem of supplier annihilation in Jackson v. Johns-Manville Sales Corp. [123] and elected to reject the punitive damages concept in the area of industry-wide asbestos related litigation. The Fifth Circuit recognized that economic loss distribution represented the primary objective of strict tort liability [124] and noted that one court had suggested that "the demise of the manufacturer in such circumstances is not a 'necessarily untenable' result." [125] The Fifth Circuit, however, refused to accept this draconian result and stated that "[a]t the point where awards of punitive damages destroy the viability of the enterprises necessary to accomplish loss distribution, the remedy of punitive damages becomes incompatible with the strict liability cause of action." [126] The court's major rationale was the **[*1144]** continued financial viability of manufacturers, which would insure compensation for the projected future thousands of asbestosis claimants. The judges expressed a reluctance to provide a windfall to the current plaintiffs at the expense of future claimants who conceivably would be foreclosed from recovering even compensatory damages if repeated punitive awards continue to bankrupt manufacturers. Of course, the court did consider, in rejecting the punitive damages award, that the continued viability of product suppliers is the very essence of society's continued economic existence.

The Fifth Circuit's decision in Jackson is an implicit recognition of a problem that must concern the courts: should the judiciary determine whether businesses which constitute the underpinning of this society's economy continue to exist and remain viable as the producer of products necessary to service society and as the employer of the millions of individuals composing society? The avowed purpose of the punitive damage doctrine never has been and never should be the economic destruction of business entities. If such decisions should be imposed, they should emanate from a duly elected and representative legislative body. The destruction of businesses, the loss of thousands of jobs, the repeated trauma to the American economy, and the significantly increased product costs to consumers should not be the objective of any system. The current antibusiness attitude reflected in the multitude of recent decisions is troubling. Such judicially mandated, economically adverse consequences exceed society's tolerance of judicial activism, and punitive sentences of death for corporations should no longer **[*1145]** be permitted under the guise of a civil tort compensation system.

C. Other Factors Affecting Punitive Damage Awards

Most jurisdictions adhere to the rule that actual or compensatory damages are a prerequisite to an award of punitive damages. [127] The amount of actual or compensatory damages required are not specifically defined and, generally, nominal actual damages suffice. [128]

Perhaps the two factors that most significantly affect the amount of punitive damages

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DEVELOPMENTS IN THE LAW -- THE PATHS OF CIVIL LITIGATION III. Problems and Proposals in Punitive Damages Reform

SUMMARY:
... As the modern lawsuit grows more complex and as large classes of plaintiff-victims bring suits against companies and even industries, the threat of punitive damages looms larger over defendants. ... The idea that an injurer must have notice of its potential liability for a harmful act was the driving motivation behind the important 1996 Supreme Court decision in BMW of North America, Inc. v. Gore, which overturned a punitive award of $ 2 million as violative of the Due Process Clause. ... Finally, some states have attempted to reduce the apparent irrationality of punitive damage awards by bifurcating the litigation pro-cess into a liability stage and a damages stage. ... Thus, not only would courts have to consistently apply a multiplier to cover the current enforcement gap, legislatures would also have to allow plaintiffs acting as private attorneys general to recover for the costs to common property or future generations in order to achieve deterrence based on the full social harm the injurer causes. ... Culpability might remain a factor, however, for punitive damages against defendants - whether individuals or corporations - who were reckless or intended to cause injury. ... Currently, only a slight majority of states allow defendants to insure against the risk of punitive liability. ...

TEXT:
[*1783]

As the modern lawsuit grows more complex and as large classes of plaintiff-victims bring suits against companies and even industries, n1 the threat of punitive damages looms larger over defendants. Of course, punitive damages are not awarded in all cases, n2 and they are increasingly remitted by trial judges. n3 When awarded, however, they can be both spectacular and devastating - attracting popular n4 and academic n5 attention. Recent punitive jury awards include a $ 223.82 million legal malpractice award, n6 a $ 114.5 million products liability award, n7 and at least a dozen more verdicts between $ 20 million and $ 100 million. n8 These examples do not represent the ceiling for awards in unique cases: a California jury awarded a plaintiff almost $ 5 billion in a 1999 products liability case against General Motors, n9 and a Hawaii **[*1784]** jury awarded a plaintiff more than $ 20 billion. n10 Punitive damages are also unpredictable; juries sometimes award more than a plaintiff claims, and judges today adjust the size of jury verdicts more routinely than in the past. n11

In its current state, the doctrine of punitive damages has a questionable logical basis, is difficult to apply, and is unpredictable. This Part presents the irrational state of the law of punitive damages and suggests a modest program of reform. Section A describes the growing problem with punitive damages awards. Section B analyzes the most recent forays

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areas; criminal penalties, both monetary and non-monetary, do not increase with the defendant's wealth.

Although these suggestions promote efficiency and theoretical coherence, enhancing the rationality and symmetry of punitive damages, proposals for reform from outside the deterrence theory school augment their strength. The most obvious first step in promoting predictability and rationality is for judges instead of juries to make the primary determination of punitive awards. n117 One of the foundational inconsistencies of the doctrine of punitive damages is that punitive amounts are determined by juries while the reasons for awards are given by judges - reasons which may not be the real reasons behind the award. n118 In addition, jurors with consistent reasons or equal levels of moral condemnation may not attach consistent valuations to those reasons. n119 A judge-imposed sanction on defendants that a jury has found punitively liable would also bypass the failure of juries to take into account the necessities of corporate risk and decisionmaking. This failure manifests itself in an intuition that corporations should not "treat people like statistics" - and in the psychological bias against **[*1803]** corporations that has been documented in jury determinations of corporate culpability. n120 Accordingly, juries incentivize defendants toward an inefficient zero level of risk in their activities and products. To enhance the rationality of the judge's award, a panel of experts or even an independent agency might provide useful aid in assessing any cost-benefit analysis conducted ex ante by the defendant. n121 Judicial damages determinations may not represent a radical departure from current practice, as many awards are remitted by the trial judge or on appeal, n122 but would be an important step in shaping a more predictable and therefore a more effective deterrent standard for punitive liability. n123

The extension of this procedural concern is that, if punitive damages are to continue to have a retributive purpose, the procedures for their determination should be similar to those used in the criminal context, perhaps entrusting the decision to seek punitive damages to public prosecutors and turning over all damages to the state. n124 This proposal probably goes too far, n125 but it has two virtues. First, greater **[*1804]** procedural safeguards for punitive liability, such as a "clear and convincing" standard, n126 would curb some of the criticism that punitive damages allow criminal liability under civil standards. Second, the development of a widespread or even national punitive liability rule (for example, a stringent requirement about intent) to replace the existing system of interrelated and varying standards would alleviate both predictability concerns and the cross-jurisdictional problem. n127 Finally, acknowledging the public role and purpose of punitive damages - through state collection of punitive damages or statutory standards for judges to administer as a matter of law - would give the institution of punitive damages a clearer role in civil litigation. n128

E. Conclusion

In the short run, these changes would probably reduce the overall level of punitive awards. In a sense, this is the answer that the Supreme Court and many commentators have given to the question of how to deal with punitive damages distortions; the Gore standard, for example, created new standards under which to reduce damage awards. Removing considerations of wealth and culpability and placing punitive power in the hands of judges would probably have the effect of at least curbing the highest awards. The effect of these reforms, ideally, would be that defendants would be better able to determine the desired level of safety ex ante, avoiding some of the enforcement problems created by litigation ex post. More abstractly, these changes **[*1805]** raise the question: Is the legal community willing to sacrifice some tort enforcement for greater punitive damages rationality?

If compensatory damages - which seem easier rationally to predict than punitive damages n129 - can take the place of some of the enforcement lost through punitive damages reform, then a general reduction in the amount of punitive damages awarded is not necessarily a bad idea. Although the idea that punitive damages should fill the enforcement gap is most

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developed in law and economics scholarship, the rationale exists even in the case law. n130 If the litigation system itself can be structured better to fill the enforcement gap, courts might be open to phasing out large extracompensatory awards. It is worth asking, therefore, whether other techniques of litigation that are part of the new shape of lawsuits could fulfill those deterrent and punitive purposes more effectively than punitive damages.

Two potential alternatives exist that could close the enforcement gap by encouraging more awards of compensatory damages, providing deterrence without some of the troubling theoretical inconsistencies associated with punitive damages. For example, wider acceptance of a subrogation technique would allow insurers to pay victims directly for their injuries in the proper amount, then sue the defendants for the whole. This technique would place plaintiffs and defendants on a more even playing field by allowing an experienced market player to make one major investment in litigating the claims arising from a given accident. n131 A wider latitude for class action certification might also reduce the number of cases in the courts, the number of uncompensated victims, and the size of the enforcement gap. n132 In particular, institutional class representatives would have the resources to manage both common claims and differences between class members, the time differential between the appearance of various claims, and the substantive demands of mass tort litigation. Subrogation and class actions both reduce the cost per claim of litigating multi-victim accidents and allow more plaintiffs to prosecute their claims, closing the enforcement gap.

A potentially more difficult task is to find a logical and effective way to replace the retributive value of punitive damages. This approach **[*1806]** assumes that, given full deterrence and compensation for victims, further retribution would still be desirable. This proposition is questionable, n133 but some alternatives to punitive damages may yet exist in this area. For example, regulatory penalties might ultimately replace the law enforcement or deterrent aspects of punitive damages. n134 The same regulatory agencies that make enforcement decisions about safety regulations might also decide whether violations are so severe as to deserve punitive liability in addition to regulatory penalties. n135 Such a suggestion adds an element of expertise to Murphy's suggestion that a state actor have responsibility for requesting punitive liability. n136

With these more systemic long-term possibilities in view, a modest program of incremental change such as that suggested above can reduce the law's reliance on punitive damages to meet the goals of deterrence and punishment. To be most effective, however, legislative bodies in each state must define the purposes of punitive damages and the desired level of deterrence. Perhaps with centralized, national data from an expert agency, states would be able to justify their particular regimes as effective in fulfilling those purposes while minimizing distortive effects. This process of definition and justification would reduce the sometimes irrational nature of punitive damages, the Court's main target in Gore, and would also solidify the theoretical framework for punitive damages. Such a project could be accomplished in time, transforming punitive damages from one of the most vilified elements of the litigation process into a useful and rational adjunct to compensatory damages.

FOOTNOTES:

n1. See supra Part II; supra Part IV.

n2. A detailed empirical survey of punitive damage awards in 45 of the most populous U.S. counties found that punitive damages are awarded in less than 10% of jury trials. See Theodore Eisenberg, John Goerdt, Brian Ostrom, David Rottman & Martin Wells, The Predictability of Punitive Damages, 26 J. Legal Stud. 623, 632-35 (1997). The median punitive award was $ 50,000, but because of high-end awards, the mean punitive award was $ 534,000. See id. at 634 tbl.1.

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n3. See, e.g., Reductions: Verdicts Reduced After Trial, Nat'l L.J., Feb. 22, 1999, at C16. In most cases, remittitur is not a simple reduction of the award (which would substitute the discretion of the court for that of the jury), but rather a grant of a new trial if the plaintiff does not agree to accept a lower award than that determined by the jury. See generally Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1327-29 (11th Cir. 1999) (discussing this aspect of the remittitur process).

n4. A recent high-profile products liability case, for example, was brought against McDonald's by a customer who spilled her McDonald's coffee, burning herself, and received an award of $ 2.9 million. See Liebeck v. McDonald's Restaurants, P.T.S., Inc., No. CV-93-02419, 1995 WL 360309 (D.N.M. Aug. 18, 1994).

n5. See infra pp. 1785-86, 1787-88.

n6. See Reductions: Verdicts Reduced After Trial, supra note 3 (discussing Piscitelli v. Friedenberg, No. 707862 (Cal. Super. Ct., San Diego County, Jan. 14, 1998)).

n7. See Margaret Cronin Fisk, 7,600 Volts Equals $ 114M Verdict, Nat'l L.J., Nov. 22, 1999, at A10 (discussing the post-verdict settlement in Aultman v. Duncan Mfg., No. CV-96-077 (Ala. Cir. Ct., Hale County, Oct. 29, 1999) and describing its terms).

n8. See generally Margaret Cronin Fisk, Verdicts: The Big Numbers of 1999, Nat'l L.J., Feb. 28, 1999, at C4; Reductions: Verdicts Reduced After Trial, supra note 3.

n9. See GM's Challenge to $ 4.9 Billion Judgment Set for August 26 Hearing in California, Prod. Liab. Daily (BNA) D6 (Aug. 17, 1999), available in Westlaw, BNA-PLD File.

n10. The plaintiff in this case brought suit in Hawaii state court, claiming that the Marcos family of the Philippines imprisoned and tortured him after he discovered a cache of gold hidden by Japan in the Phillippines during World War II. See Roxas v. Marcos, 969 P.2d 1209, 1218-33 (Haw. 1998). The Hawaii Supreme Court reduced the verdict to $ 6 million, finding that the jury award was too speculative. See id. at 1275.

n11. See Reductions: Verdicts Reduced After Trial, supra note 3 ("Judges hacked away at large jury awards at an unprecedented pace in 1998.").

n12. Deterrence theory seeks to minimize social harm by deterring harmful conduct to the point at which the expected benefits lost by the prevented conduct equal the expected harm it will cause. See infra p. 1795.

n13. Commentators once criticized punitive damages for failing to fit neatly into the system of compensation represented by tort law or into the retributive purposes of criminal law. For example, the highest court of New Hampshire once called punitive damages "an unsightly and unhealthy excrescence, deforming the symmetry of the body of law." Fay v. Parker, 53 N.H. 342, 382 (1872).

n14. See, e.g., W. Kip Viscusi, The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts, 87 Geo. L.J. 285, 322-27 (1998).

n15. See, e.g., GM's Challenge to $ 4.9 Billion Judgment Set for August 26 Hearing in California, supra note 9 (quoting the plaintiff's attorney's defense of the $ 4.8 billion punitive award: "How else do you punish a huge corporation with a daily revenue of $ 440 million and cash on hand amounting to more than $ 12 billion?").

n16. Richard W. Murphy, Superbifurcation: Making Room for State Prosecution in the Punitive Damages Process, 76 N.C. L. Rev. 463, 468 (1998).

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n17. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting). Justice O'Connor added that, in her view, "common-law procedures for awarding punitive damages fall into the latter category." Id.

n18. The word "distortion" is used here to describe any pernicious effects or unnecessary costs that the regime of punitive damages has on the legal system that might disappear if other mechanisms replaced it.

n19. See David G. Owen, A Punitive Damages Overview: Functions, Problems, and Reform, 39 Vill. L. Rev. 363, 378-79 (1994) (arguing that punitive damages may serve as compensation for unrecompensable injuries and litigation costs). But see Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1332 n.10 (5th Cir. 1995) (noting that few states recognize a compensatory function for punitive damages).

n20. The term "private attorney general" refers to a plaintiff who is given a cause of action by the state not primarily to enable the plaintiff to seek redress for individual injuries, but to facilitate the enforcement of public policy.

n21. See Owen, supra note 19, at 375-77.

n22. See Viscusi, supra note 14, at 322-27.

n23. See, e.g., Thomas Koenig, The Shadow Effect of Punitive Damages on Settlements, 1998 Wis. L. Rev. 169, 173. This perspective causes controversy not only because of its empirical claim, but also because some of its critics perceive it as serving a corporate agenda at the expense of social welfare. See Stephen Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1, 9-14 (1990) (describing the politicization of the punitive damages debate). Punitive damages usually apply only to torts that are intentional ("really mean") or grossly negligent ("really stupid"), TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 887 (W. Va. 1992), but some of the largest awards are levied against corporations for accidents that occur in the course of their business. The perceived advantage that corporate defendants enjoy in the justice system justifies this phenomenon to some. Corporate defendants, however, fight punitive damages not only in the courtroom, but also in the pages of academic journals. See, e.g., Elizabeth Amon, Exxon Bankrolls Critics of Punitives, Then It Cites the Research in Appeal of $ 5.3B Valdez Award, Nat'l L.J., May 5, 1999, at A1 (describing Exxon's sponsorship of the research of Professors Sunstein and Viscusi).

n24. See generally, e.g., Bruce Chapman & Michael Trebilcock, Punitive Damages: Divergence in Search of a Rationale, 40 Ala. L. Rev. 741 (1989); Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1 (1982); Thomas C. Galligan, Jr., Augmented Awards: The Efficient Evolution of Punitive Damages, 51 La. L. Rev. 3 (1990); A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869 (1998); infra pp. 1795-96.

n25. See, e.g., Polinsky & Shavell, supra note 24, at 878-81; Viscusi, supra note 14, at 322-27.

n26. 517 U.S. 559 (1996).

n27. See Murphy, supra note 16, at 537.

n28. See, e.g., Dorsey D. Ellis, Jr., Punitive Damages, Due Process, and the Jury, 40 Ala. L. Rev. 975, 991-99 (1989).

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n29. Compare Koenig, supra note 23, at 172 (noting that additional settlement pressure may exist when parties negotiate settlements according to their perceptions of the populist views of juries), with A. Mitchell Polinsky, Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al., 26 J. Legal Stud. 663, 665 (1997) (arguing that settlement amounts mirror trial awards and thus pose no greater threat to defendants).

n30. See Koenig, supra note 23, at 208.

n31. See Eisenberg, Goerdt, Ostrom, Rottman & Wells, supra note 2, at 625.

n32. See David Luban, A Flawed Case Against Punitive Damages, 87 Geo. L.J. 359, 365 (1998).

n33. See Eisenberg, Goerdt, Ostrom, Rottman & Wells, supra note 2, at 651-52.

n34. See Polinsky, supra note 29; see also E. Berton Spence, Punitive Damages in Alabama After BMW v. Gore: Are Outcomes Any More Predictable?, 59 Ala. Law. 314, 314-15 (1998) (finding that punitive damage awards were no more predictable after the redefinition of excessiveness review).

n35. See Cass R. Sunstein, Daniel Kahneman & David Schkade, Assessing Punitive Damages (with Notes on Cognition and Valuation in Law), 107 Yale L.J. 2071 (1998).

n36. Id. at 2074.

n37. See infra pp. 1796-97.

n38. 517 U.S. 559 (1996).

n39. In Browning-Ferris Industries. v. Kelco Disposal, Inc., 492 U.S. 257 (1989), the Court held that the Excessive Fines Clause applies only when part of a damages award is to be paid to the state. See id. at 264; see also infra note 74. Pacific Mutual Life Insurance. Co. v. Haslip, 499 U.S. 1 (1991), applied the Due Process Clause to the excessiveness review of punitive damages, upholding vicarious punitive liability for up to four times the amount of a compensatory award. See id. at 23-24. The due process inquiry depended on states' historical reliance on punitive damages, see id. at 17, and on procedural safeguards used by the state court to ensure the fairness of the award, see id. at 19-20. In TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993), the Court sustained a punitive award of $ 10 million on compensatory damages of $ 19,000, calling into question the existence of "excessiveness" standards at all. See id. at 446, 466. To add more procedural certainty to the propriety of a given award, the Court also ruled that judicial review must be available for awards of punitive damages. See Honda Motor Corp. v. Oberg, 512 U.S. 415, 435 (1994).

n40. Gore, 517 U.S. at 564.

n41. See id. at 567.

n42. Id. at 585-86.

n43. See id. at 585.

n44. See id. at 574-75.

n45. See id.

n46. See id. at 582-83.

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n47. 499 U.S. 1 (1991).

n48. 509 U.S. 443 (1993).

n49. The ratio of punitive damages to actual compensatory damages upheld in TXO was higher than 10:1, but the Court held that the relevant ratio in this case was the much lower ratio of punitive damages to potential compensatory damages. See id. at 462. On this basis, the Court noted that a ratio of up to 10:1 would not be presumptively unconstitutional. See id.

n50. See Gore, 517 U.S. at 585-86.

n51. Id. at 606 (Scalia, J., dissenting).

n52. Compare Continental Trend Resources, Inc. v. Oxy USA, Inc., 101 F.3d 634, 643 (10th Cir. 1996) (holding that courts must give plaintiffs the choice between remittitur and a new trial), and Lee v. Edwards, 101 F.3d 805, 813 (2d Cir. 1996) (same), with Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1331-32 (11th Cir. 1999) (holding that courts may simply reduce awards on constitutional grounds without giving plaintiffs a choice).

n53. 97 F.3d 914 (7th Cir. 1996).

n54. See id. at 920. Although he relied on Gore and found that the punitive award of $ 22,500 was consistent with Gore's two "numerical" guideposts (the ratio of punitive damages to compensatory damages and comparable awards for similar conduct), Judge Posner questioned the ratio guidepost, stating that "the smaller the compensatory damages, the higher the ratio of punitive to compensatory damages has to be in order to fulfill the objectives of awarding punitive damages." Id. at 919. Posner's remark echoes the deterrence theorists' concern over the enforcement gap. See infra pp. 1795-96.

n55. 101 F.3d 805 (2d Cir. 1996).

n56. See id. at 813.

n57. 101 F.3d 634 (10th Cir. 1996).

n58. See id. at 641.

n59. See Lee, 101 F.3d at 813.

n60. See Jordan v. Shaw Indus., Inc., 131 F.3d 134, 1997 WL 734029, at *5 (4th Cir. 1997).

n61. BMW of North America, Inc. v. Gore, 517 U.S. 559, 583 (1996) (quoting TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting)).

n62. Parsons v. First Investors Corp., 122 F.3d 525, 530 (8th Cir. 1997).

n63. Riley v. Kurtz, No. 98-1077, 1999 WL 801560, at *8 (6th Cir. 1999).

n64. See Gore, 517 U.S. at 574 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

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n65. Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc., 181 F.3d 446, 468 (3d Cir. 1999).

n66. See Owen, supra note 19, at 384-85 ("Vague standards ...provide[] ...flexibility to achieve justice on the individual facts.").

n67. Punitive damages are a state law problem insofar as the law of punitive damages is state doctrine. However, to treat the problem on a state-by-state basis ignores some of the most salient justifications for the use of punitive damages, which require national change. See infra p. 1794.

n68. For example, in Wilson v. IBP, Inc., 558 N.W.2d 132, 148 (Iowa 1996), the Iowa Supreme Court combined the various excessiveness factors of Gore, Haslip, and several state cases and balanced them against one another. In the Alabama cases of McKowan v. Bentley, No. 1971357, 1999 WL 667290, at *7 (Ala. Aug. 27, 1999), and Cherokee Electric Cooperative v. Cochran, 706 So. 2d 1188, 1194 (Ala. 1997), the Alabama Supreme Court held that the state practice of awarding punitive damages only in wrongful death actions overcame Gore's requirement that punitive damages must bear a reasonable relationship to compensatory damages "because a state can make homicide expensive." Id. at 1194. In addition, various courts have elided the due process "notice" guideposts of Gore by embracing the notion that extremely reprehensible conduct can diminish the importance of the other two factors. See, e.g., Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 52 (Tex. 1998).

n69. See, e.g., Routh Wrecker Serv., Inc. v. Washington, 980 S.W.2d 240, 244 (Ark. 1998) (explaining that the state test of excessiveness, whether the award "shocked the conscience" of the trial court, should be considered prior to the Gore guideposts and applying both the state and federal tests in turn).

n70. For example, the South Carolina Court of Appeals noted that "although punitive damages have received increasing academic criticism in recent years ...the doctrine's viability is unchallenged in South Carolina's jurisprudence." Clark v. Cantrell, 504 S.E.2d 605, 609 & n.2 (S.C. Ct. App. 1998) (citing Owen, supra note 19, and Polinsky & Shavell, supra note 24). In a few cases, however, academic discussion has reinforced state decisions. See, e.g., Jones v. Shaffer, 573 So .2d 740, 744 (Miss. 1990) (citing Steven Shavell, Economic Analysis of Accident Law (1987), to justify a compensatory use of punitive damages). The slight notice of academic theories by state courts is surprising in light of Justice Breyer's observation in Gore that a state's reliance on a "constraining "economic' theory" might be a factor favoring deference in federal court excessiveness review. BMW of North America, Inc. v. Gore, 517 U.S. 559, 594 (1996) (Breyer, J., concurring).

n71. See, e.g., N.H. Rev. Stat. Ann. 507:16 (1986). Other states prohibit punitive damages for certain types of cases. For a complete list of state statutes in effect in 1996 concerning punitive damages, see Gore, 517 U.S. at 614 (Ginsburg, J., dissenting).

n72. See, e.g., Colo. Rev. Stat. 13-21-102 (1997); Conn. Gen. Stat. 52-240b (1997).

n73. See, e.g., Ga. Code Ann. 51-12-5.1 (Supp. 1999); Kan. Stat. Ann. 60-3701 (1994). Other states use lower caps in cases in which compensatory awards are low. See, e.g., Nev. Rev. Stat. 42.005 (1999).

n74. See, e.g., Iowa Code 668A.1 (1998); Utah Code Ann. 78-18-1 (1996). Although these laws may implicate the Excessive Fines clause of the Constitution, because they involve payment to the state, several courts have upheld them against such challenges. See, e.g., Fust v. Missouri, 947 S.W.2d 424 (Mo. 1997); see also Sonja Larsen, Annotation, Validity, Construction, and Application of Statutes Requiring that Percentage of Punitive Damages Awards Be Paid Directly to State or Court-Administered Fund, 16 A.L.R.5th 129 (1993).

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n75. People injured in states with punitive damages caps or bans further subsidize these taxpayer redistributions because they suffer from injury at the same rate as people in states that allow punitive damages, see Viscusi, supra note 14, at 288-90, but they cannot recover as much for their injuries.

n76. See, e.g., Cal. Civ. Code 3295 (West 1997); Mo. Rev. Stat. 510.263 (Supp. 1999).

n77. Murphy, supra note 16, at 472.

n78. Bifurcation is also an option in federal trials, though it is not mandatory. See Fed. R. Civ. P. 42(b).

n79. See Koenig, supra note 23, at 208.

n80. This literature is extensive, and the authors document it thoroughly. See Polinsky & Shavell, supra note 24, at 876 n.12, 877 n.14. Among the major works they cite are Darryl Biggar, A Model of Punitive Damages in Tort, 15 Int'l Rev. L. & Econ. 1 (1995); Robert D. Cooter, Punitive Damages for Deterrence: When and How Much?, 40 Ala. L. Rev. 1143 (1989); and Ellis, supra note 24.

n81. See generally Polinsky & Shavell, supra note 24.

n82. See id. at 874-75.

n83. The ideas summarized in this paragraph have been developed over the course of more than a quarter-century of law and economics scholarship. See, e.g., Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis (1970); William M. Landes & Richard A. Posner, The Economic Structure of Tort Law (1987); Richard A. Posner, Economic Analysis of Law (2d ed. 1972); Shavell, supra note 70; Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968).

n84. See Polinsky & Shavell, supra note 24, at 874.

n85. See id. at 905-10.

n86. See id. at 874-75.

n87. See id. at 874. To use their simple example, suppose an injurer causes $ 100,000 worth of harm to each of its victims, and the probability of the injurer being caught and held legally responsible is one in four. The total damages should thus be $ 400,000 to each victim who successfully sues: a punitive award of $ 300,000 in addition to the compensatory award of $ 100,000. Such an award will cause the injurer to pay for the total social injury caused, despite the existence of a 75% enforcement gap. See id. at 874-75.

n88. See id. at 905-10.

n89. For example, if a state permits compensation for emotional distress in addition to injuries, this policy represents a judgment that the conduct of the injurer was more reprehensible than conduct for which no such compensation is allowed. It might be argued that culpability should be measured by potential harm, an approach approved by the Supreme Court in TXO. See TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 462 (1993). Polinsky and Shavell reject this argument, contending that a potential defendant will structure his conduct to account for probable compensatory and punitive damages, so the ex post award of only actual damages has no effect on deterrence. See Polinsky & Shavell, supra note 24, at 914-17.

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n90. If, for example, a doctor leaves a surgical tool inside a patient, compensatory damages will on average be quite high (because most plaintiffs will sue and win), and punitive damages are therefore unnecessary. See Polinsky and Shavell, supra note 24, at 906. The same logic, the authors claim, applies to mass torts such as the Exxon Valdez oil spill. See id. at 903-04.

n91. See id. at 910-14.

n92. Id. at 911.

n93. See id. at 933.

n94. See Viscusi, supra note 14, at 288-90.

n95. Id. at 334.

n96. See generally id. There is a flaw in Viscusi's argument caused by the cross-jurisdictional problem, see supra p. 1794, which limits the effectiveness of state reforms. Because corporations are likely to adjust their level of safety to the national average of liability instead of customizing their products and behavior for each state, there should not be variations in the accident rate between states with varying levels of liability. National corporations can minimize costs by allowing the same number of accidents in each jurisdiction (using an optimal average level of safety) and paying different amounts in different states when held liable for those accidents. See also Luban, supra note 32, at 363-64.

n97. See Viscusi, supra note 14, at 335 (noting the possibility of regulatory enforcement of corporate safety requirements).

n98. Indeed, in their empirical study, Professor Eisenberg and his colleagues found no evidence to suggest that punitive damages are awarded against corporations more frequently than against individuals. See Eisenberg, Goerdt, Ostrom, Rottman & Wells, supra note 2, at 646. They did, however, find that the amount of punitive awards is generally higher against businesses. See id. at 649.

n99. This problem, at least, is a limitation of Polinsky and Shavell's specific formulation of the model. It might be possible to construct a system in which a multiplier not only aggregated unenforced claims, but also forced injurers to internalize the entire cost of accidents; this system would, however, require extraordinary efforts at valuation by legislatures and unprecedented cooperation among judges. Even if such costs could be measured and agreed upon, the necessary systematic recalibration of measurements of individual harm by reference to social harm would be impossible. For a documentation of the practical problems of legislative valuation as a determinant of social harm, see Luban, supra note 32, at 375-77 (citing the Occupational Safety and Health Act, 29 U.S.C. 666(e) (1994), which "treats serial homicide as a misdemeanor," as an example of a law that cannot represent Congress's considered judgment about the value of deterrence).

n100. In addition, this system would create distributional problems. Because early awards are high, there is more incentive for anyone with a colorable claim of injury to sue; in turn, less "enforcement gap" damages are available to each plaintiff. These competing incentives might arrive at some equilibrium, but one in which damages to compensate plaintiffs with lower expected damages would be transferred in the form of punitive damages to those plaintiffs with higher expected damages (and therefore enough incentive to bring suit). Payment of punitive damages into state funds would exacerbate this problem by reducing the plaintiff's claim value, pricing more of the claimants with lower expected damages out of litigation.

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n101. See, e.g., Fisk, supra note 8; Reductions: Verdicts Reduced After Trial, supra note 3; Verdicts: The Big Numbers of 1997, Nat'l L.J., Feb. 23, 1998, at C2.

n102. See, e.g., Eisenberg, Goerdt, Ostrom, Rottman & Wells, supra note 2, at 644-46 (finding that the potential for punitive liability affects settlement amounts).

n103. See, e.g., Fisk, supra note 8; Reductions: Verdicts Reduced After Trial, supra note 3; Verdicts: The Big Numbers of 1997, supra note 101.

n104. See Eisenberg, Goerdt, Ostrom, Rottman & Wells, supra note 2, at 644-46.

n105. See Polinsky & Shavell, supra note 24, at 903-04 (discussing the case of the Exxon Valdez).

n106. See Eisenberg, Goerdt, Ostrom, Rottman & Wells, supra note 2, at 644-46.

n107. See, e.g., GM's Challenge to $ 4.9 Billion Judgment Set for August 26 Hearing in California, supra note 9 (products liability).

n108. See, e.g., Reductions: Verdicts Reduced After Trial, supra note 3 (legal malpractice).

n109. See Polinsky & Shavell, supra note 24, at 905-10.

n110. Recklessness in such cases might be defined as the failure to perform any cost-benefit analysis at all or by creating some other standard, see infra note 127.

n111. Punitive awards in cases involving intentional injuries have generally been less controversial than in other cases. This acceptance of punitive damages may result from the fact that intentional torts look the most like "aggravated wrongs" for which the retributive function of punitive damages is most appropriate. See Owen, supra note 19, at 375-77; see also William M. Landes & Richard A. Posner, An Economic Theory of Intentional Torts, 1 Int'l Rev. L. & Econ. 127, 127-39 (1981) (explaining that economic analysis is relevant to deterring the intentional behavior of tortfeasors).

n112. See Robert G. Schloerb, Richard L. Blatt, Robert W. Hammesfahr & Lori S. Nu-gent, Punitive Damages: A Guide to the Insurability of Punitive Damages in the United States and its Territories 39 (1988); Polinsky & Shavell, supra note 24, at 931 & n.193.

n113. See Polinsky & Shavell, supra note 24, at 933 (noting that the fear of a large judgment is a greater deterrent to a risk-averse defendant than a stream of well-calibrated insurance premiums).

n114. This feature of insurance has a distributional benefit as well as a deterrent benefit, as it forces an entire industry that engages in a risky activity to pay for that activity, instead of placing the entire burden on the single defendant who is "struck by lightning" when a jury award is assessed. Furthermore, the distribution might be across an "industry" of risk takers comprising individuals. Shifting the burden of cost-benefit analysis to the insurance industry lessens the critique, see supra p. 1797, that some of those individuals might not be acting rationally at the time of an accident.

n115. See Polinsky & Shavell, supra note 24, at 910-14.

n116. See id. The idea that wealth need not play a part in punitive damage awards has support in the case law. In Kemezy v. Peters, 79 F.3d 33 (7th Cir. 1996), which was lost in the aftermath of Gore, Judge Posner found that "none of [the purposes served by awarding

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into the field by the courts, and section C discusses academic reform proposals. Section D argues that deterrence theory n12 can provide a foundation for bringing more rationality and consistency to punitive damages.

A. The Problem with Punitive Damages

Criticism of punitive damages is widespread, but critics express widely divergent views on precisely what is wrong with them. Once attacked on formal grounds, n13 opponents today criticize them for failing to supplement the other elements of the civil justice system effectively. These opponents believe that punitive damages threaten productive members of society with insolvency simply to satisfy the public's indignation upon seeing the innocent harmed. n14 To advocates, punitive damages are the only way for society to express that indignation in a way that a corporation will understand: n15 by checking the power of corporate America, punitive damages prevent the public from "driving repainted, exploding Ford Pintos while washing down **[*1785]** unsafe drugs with scalding coffee." n16 Moderates see the virtues of punitive damages but also fear their misapplication. As Justice O'Connor has written: "Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm." n17

Many complaints concerning punitive damages share a common theme: because the practical and theoretical boundaries of punitive damages are undefined, especially as established by jury awards, such awards act as distortions n18 on the legal system. These distortions may exist because it is hard to identify a role that punitive damages uniquely play in the justice system. Punitive damages compensate victims for certain losses that standard compensatory awards do not cover; n19 they act as punishment for bad acts, empowering private attorneys general n20 to seek retribution where criminal sanctions prove impracticable; n21 and they supplement the important deterrent functions of both tort and criminal law. This lack of a unique role opens punitive damages to the criticism that another, perhaps existing, feature of the legal system could replace them. Developments in punitive damages in the last several years are attempts to cure some of these distortions.

Some punitive damages reformers believe that the purpose of damages is to induce potential defendants to take a socially optimal level of care, not to deter harmful conduct completely. Traditional tort reformers, therefore, argue that punitive damages, by painting a target on the chests of the companies with the deepest pockets, stifle innovation and harm shareholders. n22 The winners are individual plaintiffs who were "lucky" enough to be injured, the losers are defendants and **[*1786]** the general public, as defendants pass the cost of punitive liability along to consumers through higher prices for products and services. n23

Law and economics scholars and deterrence theorists espouse a related view: n24 the potential for enormous punitive awards distorts the traditional tort mechanisms of compensation (or insurance) and deterrence by introducing irrelevant factors into calculations of the cost of harmful conduct. Punitive damages make injurers pay for much more than the harm they cause, in effect overdeterring some kinds of conduct and discouraging some socially beneficial activity. n25 In other words, punitive damages make ex ante calculations of potential liability almost impossible.

The notice that is important to deterrence theorists for economic reasons is important to courts for the additional reason that predictability is an important rule of law value - sometimes elevated to the level of a due process requirement. The idea that an injurer must have notice of its potential liability for a harmful act was the driving motivation behind the important 1996 Supreme Court decision in BMW of North America, Inc. v. Gore, n26 which overturned a punitive award of $ 2 million as violative of the Due Process Clause. Punitive damages, however, are sometimes so great that potential defendants cannot anticipate

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punitive damages] depends critically on proof that the defendant's income or wealth exceeds some specified level.... Rich people are not famous for being indifferent to money." Id. at 35. He therefore held that a plaintiff could not dispute his award of punitive damages simply because the jury failed to consider the defendant's wealth. See id. at 36.

n117. In some states, this idea is already in practice. For example, in Kansas, the jury as fact-finder decides whether punitive liability is appropriate, and then the judge determines the proper amount of punitive damages. See Kan. Stat. Ann. 60-3701 (1994). This suggestion has been made elsewhere. See Paul Mogin, Why Judges, Not Juries, Should Set Punitive Damages, 65 U. Chi. L. Rev. 179, 207-23 (1998).

n118. It is true that this situation exists in many areas of civil litigation, but if punitive damages are to have both deterrent and retributive purposes in addition to compensatory purposes, then an analogy may again be drawn to criminal law, in which a jury determines liability (guilt), but a judge conducts the sentencing. "How great were the plaintiff's injuries?" is a question of fact, and "How must the law incentivize rational behavior on the part of the defendant?" is a question of law - and in the latter area, judges have more expertise than juries.

n119. See Sunstein, Kahneman & Schkade, supra note 35, at 2074. Despite this fact, the authors argue that juries should continue to be used in assessing punitive damages, but they recommend changes that would impose some uniformity on the dollar amount that accompanies a given jury's intended level of punishment. See id. at 2121-24. They also acknowledge, however, that "if optimal deterrence is the purpose of the award of punitive damages, the jury system is an extremely bad institution." Id. at 2111.

n120. See, e.g., Viscusi, supra note 14, at 328-30. Viscusi discusses the hindsight bias that produces a "common assumption" in juries that firms "should have anticipated all possible accidents." Id. at 328. He also notes that juries may overestimate the importance of small probabilities, leading them to penalize corporations when risks, acceptable in the abstract, turn into concrete injuries. See id. at 329.

n121. It has been suggested that entrusting expert administrators to determine damages amounts can best eliminate the valuation and risk biases that jury verdicts reflect, removing judges from the equation entirely and bestowing the benefits of "bureaucratic rationality" on the system. See Sunstein, Kahneman & Schkade, supra note 35, at 2124 ("An administratively operated schedule of fines and penalties seems better than juries at producing deterrence, for such a system would reduce the costs of decision and probably reduce the cost of errors as well.").

n122. See Reductions: Verdicts Reduced After Trial, supra note 3.

n123. The bifurcation responses enacted in several states take steps toward this ideal, as the damages portion of a trial is sometimes heard only before a judge, see Conn. Gen. Stat. Ann. 52-240b (1997); Kan. Stat. Ann. 60-3702(a) (1994), and as these responses often carry other procedural safeguards such as separate discovery, see, e.g., Ala. Code 6-11-20 (1993); Cal. Civ. Code 3294(a) (1997); Mont. Code Ann. 27-1-221(5) (1999). Importantly, the bifurcated trial is a way to remove some forms of jury bias without removing the jury. Some evidence, such as corporate cost-benefit analyses, which would be relevant to a finding of negligence at the liability phase, might be seen as an indication of "heartlessness" at the damages phase and inflate an award. See Developments in the Law - The Civil Jury, 110 Harv. L. Rev. 1408, 1529-30 (1997). Bifurcation thus can be seen as another important procedural safeguard that advances the rationality goal in awarding punitive damages.

n124. See Murphy, supra note 16, at 501-03.

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n125. This scheme poses several problems, including a reduction in a plaintiff's incentive to sue and the placement of decisions that are essentially regulatory in the office of state prosecutors. A different way of placing the punitive function in state hands would be to entrust punitive enforcement to regulatory agencies, see Viscusi, supra note 14, at 317-20, although this too would essentially remove punitive liability from the realm of civil litigation altogether.

Both of these suggestions would encounter opposition not only from the plaintiff's bar, but also from academics who advocate the virtues of the private attorney general system of tort enforcement. These writers prefer the private attorney general "bounty hunter" to either the bureaucrat or the unchecked corporate sector. Luban, supra note 32, at 366. In this view, the increased incentive to sue created by punitive damages is not a distortion caused by punitive damages, but a valuable way of privately financing law enforcement. See id. at 367.

A compromise would be to divert all punitive awards to the state, encouraging private attorneys to seek punitive damages by paying them fees equal to their lost opportunity cost. This compromise would remove the incentive for plaintiffs to sue for the stars in hopes of a giant windfall, but it would also prevent a large, non-criminal enforcement burden from being placed on the shoulders of public prosecutors. Enforcement decisions, furthermore, might be made by neutral state officials, but the further punitive liability investment in a given claim would be made by the private attorneys who already have a substantial investment in the litigation.

n126. Such a standard has support in both statutory and case law. See, e.g., Watkins v. Ford Motor Co., 190 F.3d 1213, 1217 n.2 (11th Cir. 1999) (citing Ga. Code Ann. 15-12-5.1(b) (1999), which requires clear and convincing evidence of the defendant's intent before imposing punitive liability). But see Honda Motor Corp. v. Oberg, 512 U.S. 415, 433 (1994) (noting that a clear and convincing standard of liability may not be an adequate safeguard against excessive punitive awards).

n127. In a system of punitive damages based solely on deterrence, for example, such a rule might remove punitive liability for a defendant who is able to show that he conducted a cost-benefit analysis ex ante for the product or activity in question. The strictness of the desired rule could be adjusted by changing the assumptions required in performing the analysis.

n128. This public role might extend to coordinating one punitive award for the defendant's conduct across the entire state - or better yet, nation - instead of subjecting the defendant to repeated punitive awards for the same conduct in every state. See Murphy, supra note 16, at 473, 524-27.

n129. See supra pp. 1787-88.

n130. See, e.g., Nutrivida, Inc. v. Inmuno Vital, Inc., 46 F. Supp. 2d 1310, 1316-17 (S.D. Fla. 1998) (using punitive damages to deter conduct that would be undeterred by compensatory damages); cf. Wilson v. IBP, Inc., 558 N.W.2d 132, 145 (Iowa 1996) (using punitive damages to deter potential harm that might otherwise go undeterred); Bowen v. Caldor, Inc., 710 A.2d 267, 285 (Md. 1998) (same).

n131. Cf. David Rosenberg, The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System, 97 Harv. L. Rev. 849, 889-92 (1984) (describing the claim investment incentives of plaintiffs' attorneys).

n132. See infra pp. 1809-10.

n133. It is questionable because of the problems inherent in attempting to punish a corporation for its past conduct - how do you teach a corporation "a lesson," especially when

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its directors or officers may not have been affiliated with the corporation when the injury occurred? In addition, the "retributive" function of punitive damages might not be necessary if there were a reliable way to fill the enforcement gap; the reason "punishment" must be an object of punitive damages may simply be that compensatory damages will inevitably fall short of the total social harm caused by the injury.

n134. See Viscusi, supra note 14, at 317-20 (describing how government regulation provides incentives for safety).

n135. Independent agencies might use promulgated regulations to adjudicate punitive liability, further enhancing predictability.

n136. See supra p. 1803.

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them, making it impossible to choose a course of action beforehand.

The power of private attorneys general to impose tort sanctions under a rationale normally protected by state discretion and criminal **[*1787]** procedural safeguards adds another layer of distortion to both the civil and criminal systems of deterrence and punishment. Punitive damages allow retribution to intrude into the realm of civil litigation, which is troubling because civil standards of proof are lower than criminal standards and the moral culpability of the defendant may be less clear. n27 If it is acknowledged that punitive damages have the purpose of retribution for bad acts, then it is unclear why overzealous and interested "prosecutors" are better suited for such a purpose than criminal prosecutors and the safeguards of the criminal law. n28

Finally, the difficulty of predicting the potential liability for a harmful act pressures defendants to settle cases - especially class actions - in which punitive awards are possible, however unlikely. Some dispute this effect for garden-variety torts, n29 but mass tort cases provide a clear example of the settlement leverage that the threat of a punitive award bestows upon plaintiffs. n30 To some, this pressure for settlement when the plaintiff has very little chance of winning may result in an inflated settlement amount n31 and the appearance of an admission of guilt. To defend the system, plaintiffs' advocates describe a system in which corporations play hardball with plaintiffs who have legitimate claims, wearing them down by threatening to drag out litigation until they settle for a fraction of their claims' worth. n32

The very existence of these problems is in dispute, and the dispute is compounded by the fact that empirical data on punitive damages that can garner the agreement of a wide cross-section of the legal community continues to prove elusive. Professor Eisenberg and his colleagues, for example, argue that not only is there a rational pattern to the award of punitive damages, but that there is also a discernible ratio of punitive to compensatory damages that makes punitive amounts predictable. n33 Professor Polinsky, however, uses this same data to support the proposition that punitive damages are irrational, **[*1788]** significant, and unpredictable. n34 Another study n35 reveals a distortion arising not from legal standards or processes, but from human psychology. This study concluded that potential jurors "have a great deal of difficulty in mapping such [moral] judgments onto an unbounded scale of dollars. Shared moral judgments but erratic, unpredictable, and arbitrary awards, possibly even meaningless awards, are a potential product of this difficulty." n36 Finally, Professor Viscusi uses data about accidents to argue that punitive damages have no effect on behavior and therefore should be abolished as superfluous. n37 Unfortunately, the empirical uncertainty surrounding punitive damages makes it difficult to support most reform proposals with convincing data.

B. Federal and State Responses to the Punitive Damages Problem

There have been several efforts in recent years to define the legal foundations of punitive damages and to describe ways to apply them intelligently and systematically. However, these responses have not been entirely satisfactory: the Supreme Court offered a possibility for national change that has failed in its implementation, and although states have proposed several interesting solutions, states can only partially alleviate the problem because of their limited jurisdiction.

1. The Supreme Court and BMW v. Gore. - During the 1990s the Supreme Court was quite active in the area of punitive damages, issuing five different rulings, including BMW of North America, Inc. v. Gore n38 in 1996. Most of the Court's activity early in the decade concerned how to determine whether a particular punitive award is excessive and therefore in violation of the Excessive Fines Clause of the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment. n39 Although the Supreme Court could not possibly, in a **[*1789]** handful of cases, bring order and uniformity to the various state law doctrines that allow for

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punitive damages, the Court did articulate a test that would systematically reduce some of the highest awards. The Court's rulings, however, failed to reform punitive damages law (or to stem the tide of criticism), and the apportionment of punitive damages seems no more evenhanded or principled at the end of the decade than it was at the beginning. The Court's rulings were inadequate in two significant respects: first, they failed to articulate a coherent rationale for punitive damages or describe constitutionally permissible limits on the purpose of punitive liability; and second, their standards for determining "excessiveness" are subject to almost infinite discretion and make the outcome of the individual case no more predictable than it was before.

The most important theme to emerge from the Court's recent punitive damages cases was that the Due Process Clause limits the size of punitive damages awards. The plaintiff in Gore, Dr. Ira Gore, had bought a BMW that the dealer had represented to him as new; the car had in fact been repainted and was worth $ 4000 less than Gore was led to believe. The jury awarded Gore the $ 4000 in compensatory damages, plus $ 4 million in punitive damages, which Gore had claimed "would provide an appropriate penalty for selling approximately 1000 cars for [$ 4000] more than they were worth." n40 On BMW's post-trial motion, the Alabama Supreme Court remitted the award to $ 2 million. n41

The Supreme Court struck down the award as unconstitutional, declaring it "grossly excessive" and thus a violation of the Due Process Clause. n42 The Court based its decision on rule of law values, noting that any damages would be excessive if the defendant could not have had notice of them at the time of the conduct. n43 In doing so, the Supreme Court established three "guideposts" for determining the excessiveness of punitive awards: the degree of reprehensibility of the conduct, the disparity between the actual or potential compensatory and punitive damages awarded, and the amounts of punitive awards in comparable cases. n44 Writing for the Court, Justice Stevens reasoned that such considerations would further the legitimate goals of punitive damages: adequate notice both protects the defendant from the quasi- **[*1790]** criminal, retributive aspects of punitive damages and ensures the proper working of the regime's deterrent function. n45 However, the Court declined to suggest a mathematical bright line for constitutionality, relying on the "reprehensibility" guidepost to limit or justify the fruits of the jury's imagination. n46 Pacific Mutual Life Insurance Co. v. Haslip n47 and TXO Production Corp. v. Alliance Resources Corp. n48 had upheld punitive-compensatory ratios of only 4:1 and 10:1 n49 respectively, and the Court concluded that the 500:1 ratio present in the Gore case did not survive constitutional review. n50

2. The Application of Excessiveness Review in Federal Courts. - Dissenting in Gore, Justice Scalia claimed that the "test" that the Court developed would provide no guidance at all to courts: "These crisscrossing platitudes yield no real answers in no real cases." n51 The development of punitive damages law in the federal courts has confirmed his fears. Eight circuits have applied Gore to determine the excessiveness of punitive awards, with some circuit conflict emerging over procedural aspects of the remittitur process n52 and with mixed results over the substantive meaning of the guideposts.

In most cases, the federal circuit courts' reasoning has some basis in the language of Gore, but their holdings do not necessarily follow from that decision. For example, in Cooper v. Casey, n53 Judge Posner of the Seventh Circuit upheld a 12:1 ratio of punitive damages to compensatory damages (higher than the potential ratio explicitly approved in TXO) because he determined that the moral culpability of the defendant was so high that that particular Gore factor should carry added weight. n54 In several other cases, courts of appeals used factors **[*1791]** external to the Gore tests to strike down punitive awards that the Supreme Court might have upheld under Gore. In Lee v. Edwards, n55 after finding that the district court's award passed the Gore test, the Second Circuit nonetheless reduced the award on the grounds that the court below had no discretion to allow such a high award. n56 Similarly, the Tenth Circuit in Continental Trend Resources, Inc. v. OXY USA, Inc. n57 found

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that the Gore guideposts supported a large punitive award, but the court nevertheless refused to uphold an award that it found to be unnecessarily large for purposes of deterrence. n58

An additional problem is that, because Gore failed to articulate a bright-line rule, courts have used precedent to expand the permissible ratio of punitive to compensatory awards far beyond those sanctioned in Haslip and TXO and even beyond the ratio struck down in Gore. The punitive award in Lee was $ 75,000, which represented a ratio of punitive to compensatory damages of 75,000:1 because the compensatory award was nominal. n59 Relying on this precedent, the Fourth Circuit upheld ratios of up to 488:1, despite the fact that the compensatory damages awarded were actual, not nominal. n60 This decision suggests that, despite the "suspicious judicial eyebrow" that the Supreme Court raised at the 500:1 ratio in Gore, n61 judges continue to use precedent to expand the outer limits of the permissible ratio.

Finally, two circuits seem to have given up trying to apply the Gore guideposts as stated and instead have glossed the Supreme Court's opinion to create a test for unconstitutional excessiveness that is easier to apply (though arguably no more determinative). The Eighth Circuit described Gore as a constitutional test to determine whether an award is so disproportionate to a state's interests in punitive damages as to be in a "zone of arbitrariness." n62 Similarly, the Sixth Circuit interpreted the Gore test as asking whether the disparity between the punitive and compensatory awards "shocks the conscience." n63

These cases suggest that the Gore standards provide little direction for litigants. The result is that meaningful notice of potential liability, **[*1792]** perhaps the key element in the due process analysis of Gore, n64 is lost among the guideposts. As the Third Circuit stated, "the Supreme Court has instructed as to the analysis but has provided nothing concrete as to the amount" that might be excessive. n65 The larger implication is that the potential for a constitutional limit on punitive awards - which could provide a foundation for reducing the pressures they place on the civil litigation system - has gone unrealized. Although a general limit on punitive damages could reduce settlement pressures, provide greater procedural safeguards for defendants, or approach a goal of optimal deterrence, federal punitive damages law ensures none of these things to litigants; remittitur as a matter of law is not guaranteed. Perhaps these wildly divergent applications of Gore represent a triumph of justice in the individual case. n66 However, this benefit may come at the cost of judges' abusing their discretion in contravention of the rule of law values that the Supreme Court intended that Gore protect.

3. State Responses to Punitive Damages. - Some of the most extensive reforms of punitive damages have occurred in state law, and insofar as punitive damages are a "state law problem," n67 these state responses represent a good start. Many recent state court cases in which the excessiveness of punitive damages has been litigated have combined the Gore standard with existing state law. This approach has led to unrecognizable permutations of Gore in a few cases, n68 but in others, courts merely applied state-law excessiveness review before conducting a Gore analysis. n69 State courts have also occasionally taken **[*1793]** notice of academic treatments of punitive damages, but these discussions have rarely had a determinative impact on the outcome of cases. n70

In most states, however, the primary locus of punitive damages reform is not the judiciary, but the legislature. State legislatures have attempted a variety of approaches that reduce the size of the permissible punitive award or the plaintiff's incentive to seek it. A few states have severely limited the availability of punitive damages to specific statutory circumstances. n71

Perhaps the most common response among other states is to cap each punitive award at a given dollar amount or at a fixed ratio to the compensatory award. Eleven states have punitive damages caps that range from one to five times the amount of compensatory

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damages, n72 while others provide for absolute caps, ranging from $ 300,000 to $ 5 million. n73 The effect of such requirements is to lower the incentive for plaintiffs to litigate unmeritorious claims and reduce the burden on state industry that punitive damages represent. Another, more subtle way of altering plaintiffs' incentives and rectifying distributional problems is to require the payment of punitive damages into state funds. Thirteen states now have laws allowing a percentage of many punitive awards to be paid to the state treasury or to a state-administered victims' compensation fund. n74 In doing so, the state essentially **[*1794]** redistributes punitive damages from the plaintiffs who win the punitive damages lottery to either the state taxpayers as a whole or to those victims who did not have a large enough claim to pay for litigation. n75

Finally, some states have attempted to reduce the apparent irrationality of punitive damage awards by bifurcating the litigation pro-cess into a liability stage and a damages stage. Usually upon the defendant's request, trials in twelve states n76 must be bifurcated to separate the determination whether punitive liability is appropriate from the consideration of the amount of the award. Because certain evidence concerning the extent of the injury may not be available to sway the jury's sympathies at the initial phase, a plaintiff is less able to "play the jury lottery" n77 and must invest more in litigation costs to seek a large jury verdict. n78

These reforms are a beneficial first step, and the limitation of punitive amounts in particular may help defendants take better account of potential punitive liability in settlements as well as in litigation. n79 However, because defendants are unlikely to customize mass-produced goods to the liability rules of different states, punitive damages are most likely to induce change in potential defendants' national business. This phenomenon may blunt the impact in each state of that state's individual reforms. Because national corporate defendants can cost-effectively make only limited changes in their state-to-state business, the national average level of punitive liability is probably more likely to to influence behavior than the level in any particular state. At least in cases involving national corporations, the defendant will calculate its potential liability across all relevant jurisdictions and will adjust its behavior accordingly. This cross-jurisdictional problem heightens the necessity for definitive national reform of punitive damages. In contrast, the system resulting from state reforms is ad hoc: while it may be an improvement in practice, it is not necessarily more theoretically consistent or even rational. Although the states are currently the most effective reformers of punitive damages doctrine, the concomitant problems of coordination and scope make the absence of a national statement about excessiveness even more conspicuous.

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C. Deterrence Theory and the Rational Choice Proposals

Recent academic literature concerning punitive damages falls into two categories: rational choice theory discussions of the punitive damages regime and empirical studies that support or refute various reform efforts. One provocative and ambitious solution to the punitive damages distortion problem comes from the field of law and economics. Professors Polinsky and Shavell build on the twenty-year-old rational choice literature on punitive damages n80 in an attempt to bring order to the field of punitive damages. n81 They define the legitimate objectives of punitive damages and radically change the calculation of punitive damages to match these objectives. Polinsky and Shavell argue that the best justification for punitive damages is to fill the enforcement gap created by the tort system through the use of an award multiplier formula that considers the likelihood that a tortfeasor will escape liability. n82

The foundation for this argument is deterrence theory, one of the pillars of the law and economics movement. The tort system, this argument begins, serves two purposes: to compensate victims for individual harms and to deter injurers from perpetuating social

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harms. In a perfectly operating system, all victims of harm would receive compensation, thus forcing injurers to internalize the costs of their actions and encouraging them to cease behavior that causes net social harm. By punishing too rarely or in insufficient amounts, damages might fail to deter socially harmful behavior. But if imposed too often or in excessive amounts, damages can overdeter by increasing the cost of net-beneficial behavior. n83 Out of this background, Polinsky and Shavell argue that the true purpose of punitive damages is to fill the enforcement gap - to serve as a proxy for the compensatory damages not awarded to victims because not all tortious acts result in judgments against injurers. n84 Punitive damages should force the full cost of tortious behavior into the injurer's calculus. "Punishment," from this perspective, **[*1796]** is irrelevant; the goal of "punishment" is merely another way to state the goal of deterrence. n85 Polinsky and Shavell recommend that, when considering awards of punitive damages, judges should derive a multiplier from the chance that the harmful conduct would not have been caught and litigated. n86 Judges should apply this multiplier to compensatory awards to determine the proper level of punitive damages. n87

Several implications flow from this analysis. First, the authors argue that the reprehensibility of the defendant's action is irrelevant to the determination of the award. n88 Instead, the reprehensibility of the injurer's conduct should be "measured" by the amount the plaintiff is allowed to recover n89 and the likelihood that the injurer will escape liability. n90 The multiplier will deter the conduct that should be deterred regardless of the defendant's moral culpability. Second, the wealth of the defendant should be irrelevant in determining a punitive award. n91 It does not matter whether a corporation is wealthy; if compensatory damages (multiplied to cover the enforcement gap) make one particular harmful activity unprofitable, the corporation will stop the activity. Consideration of wealth is no more than "a tax on corporate size and success." n92 Finally, the scope of state-recognized liability insurance may be expanded to cover punitive liability to lower the costs of paying for accidents. n93

Although acknowledging the importance of Polinsky and Shavell's work, Professor Viscusi offers an alternative solution: to abolish the institution **[*1797]** of punitive damages altogether. Based on an empirical study, Viscusi claims that states that prohibit punitive damages have no greater rate of certain kinds of toxic chemical accidents and toxic environmental releases than states that permit punitive damages. n94 Viscusi argues that punitive damages impose costs on corporate activities such as research and development; they are "a dangerous lottery for firms engaged in potentially risky lines of corporate activity." n95 These costs, passed on to the public through higher prices, are greater than the corresponding benefit of fewer accidents. n96 Viscusi proposes to eliminate punitive damages altogether and look for other sources of corporate accident deterrence. n97

The virtue of these scholars' work and of deterrence theory in general is to present a comprehensive framework within which to analyze punitive damages. Their theory takes the desperately needed steps of defining the appropriate goals of punitive damages; striking a balance between punishment, deterrence, and compensation; and providing a complete system for producing the desired results. Given that a major critique of jury verdicts is their supposed irrationality, a rational system to determine the proper size of punitive awards is attractive. Yet there are problems with their theory that cause it to fall short as a response to the problem of punitive damages distortions.

It should be noted first that this particular iteration of deterrence theory suffers from many of the same problems that affect law and economics in general. For example, it proceeds on the assumption that all potential injurers will conduct an ex ante cost-benefit analysis each time that they act. Although many of the largest awards are in cases of products liability and mass tort, in which corporations might be expected to conduct such an analysis and to account for the possibility of punitive damages, such rational calculation may not always be realistic for an individual doctor who faces the prospect of punitive malpractice liability. n98 A second

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problem (shared by other rational **[*1798]** choice proposals) is the global coordination problem. Although tort law in a perfectly working market might force injurers to internalize the costs of the injuries that they cause, the internalized costs are still only those recognized by the legal system as compensable to someone. n99 Thus, not only would courts have to consistently apply a multiplier to cover the current enforcement gap, legislatures would also have to allow plaintiffs acting as private attorneys general to recover for the costs to common property or future generations in order to achieve deterrence based on the full social harm the injurer causes.

In addition to these large-scale problems, Polinsky and Shavell's proposal presents several other theoretical difficulties that prevent it from being an optimal solution to the problem of punitive damages distortions. For example, the fewer the number of plaintiffs who sue for damages in a particular case, the more damages each would receive as their share of the overall award. Plaintiffs who sue early, before many suits are brought, are therefore likely to receive higher awards. The success of early plaintiffs will raise the expected award for those potential plaintiffs who have waited to see the outcome of early cases before filing claims, but high early awards will also dry up the pool of damages from which later plaintiffs would draw upon proving their case. Thus, a multiplier calculated early will be systematically too large, and plaintiffs who sue later will either end up with nothing (because compensation for their injuries has already been paid to other plaintiffs in the form of punitive damages) or will force the defendant to pay again (which would be double counting, producing overdeterrence). n100

[*1799] Another problem is the effect of punitive damages on settlements. One reason that many settlements are large, despite a low chance of plaintiff victory, is the possibility that juries might award irrationally large punitive damages. n101 If punitive damages have an effect on settlements, n102 the enforcement gap theory either breaks down or becomes even more complex: settlements compensate for some unknown percentage of the enforcement gap. The multiplier therefore would have to take into account not only prior and prospective judgments against the injurer, but also all settled claims. Otherwise the defendant would face too much liability - paying for its action both in settlements and in court.

Finally, there are problems of implementation. Even assuming that damages could perfectly eliminate the enforcement gap, any such system would demand fantastic feats of prediction and calculation from judges. Determining the multiplier in each particular case would also require much more information than is probably available to assess the size of the enforcement gap and the damages necessary to close it. The empirical data concerning punitive awards and their effect on defendants are not currently sophisticated enough to support the kind of calculations necessary to put a deterrence theory regime into practice. The problems of implementation might therefore dull some of the luster of a theoretically integrated approach to punitive damages. In addition, the practical effect of Polinsky and Shavell's program would probably be greater than they imagine; although the most notorious punitive awards are extremely large, n103 punitive awards are relatively rare and often less than compensatory damages awarded in the same cases. n104 Polinsky and Shavell could achieve their goal of reducing the biggest and most publicized awards, n105 but they would explode the number of cases in which punitive damages were awarded and probably also increase the size of the awards. Perhaps this result would advance the goal of deterrence, but it is almost certainly not what most deterrence theorists envision.

D. Suggestions for Reform of Punitive Damages

Judicial responses to the problems posed by punitive damages are generally incremental but incoherent; in contrast, deterrence theorists' **[*1800]** responses are theoretically complete but too radical to be practicable. The suggestions that follow are an attempt to synthesize the strengths of the Gore approach and of deterrence theory into a modest proposal for the

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reform of punitive damages; this proposal reduces the distortions that punitive damages cause by selectively applying them where their value can be best realized. Punitive damages should promote the values of efficiency, predictability, and rationality to support goals of due process, optimal deterrence, and equitable compensation. Also, any program of reform should be adaptable to the existing litigation system to maximize the prospects for lasting, integrated change.

It is important to keep in mind the practical strength of the Supreme Court's approach: it has potential for national change within the context of the existing punitive damages doctrine. Two premises may therefore prevent us from straying too far into the theoretical realm. First, abandoning the notion that punitive damages must fill the entire enforcement gap in every case yields a much less intrusive change to the current system. Second, acknowledging that punitive damages may have a retributive purpose in addition to their deterrent purpose is more compatible with the established case law and enables us to make more rational arguments about how to fulfill this retributive purpose. These premises imply that, for now, a good first step would be to limit punitive damages to cases in which they currently apply under state law - rather than the current practice of applying them in all cases in which there is an enforcement gap. Deterrence theorists might object that such extractions water down the effectiveness of their proposals, but the alternative that they offer would require too great a paradigm shift.

These limitations suggest an initial distinction between two types of cases that currently result in punitive damages. Punitive damages are awarded most often in cases of intentional tort n106 and most notoriously in cases of products liability n107 and malpractice. n108 However, moral culpability should almost never be taken into account in the award of punitive damages n109 when the tortfeasor is a corporation (or other continuing business entity). Especially in products liability or contract cases in which the corporation may have performed a cost-benefit analysis before acting, a finding of culpability is merely an excuse to overdeter. Forcing a defendant to pay compensation for the harm it causes will fulfill the expectations that the defendant had at the time of the injury; punitive damages will only further deter harm if those **[*1801]** expectations were unrealistically low. Culpability might remain a factor, however, for punitive damages against defendants - whether individuals or corporations - who were reckless n110 or intended to cause injury. n111 Confining culpability considerations to cases in which there is a clearly culpable target and using deterrence considerations in other cases of corporate action is a rough divide; however, it brings greater consistency by matching the different rationales behind punitive damages to the cases in which those rationales apply.

A second feature of the economic model of punitive damages that the legal system should adopt is the proposition that punitive damages should be insurable. Currently, only a slight majority of states allow defendants to insure against the risk of punitive liability. n112 Allowing **insurance coverage of punitive damages** greatly increases the predictability of the liability costs of a given product or activity. Restricting insurability discourages risk-averse defendants from engaging in potentially beneficial activities. n113 In addition, insurability allows for greater risk management. Insurers may be in a better position than potential defendants to predict the costs of accidents and to distribute those costs across an entire industry of risk takers. n114

Finally, as Polinsky and Shavell's suggest, the wealth of a defendant should be excluded from the consideration of a punitive award. n115 Wealth considerations may serve an expressive function, sending a message to corporations that their wealth will not shield them from breaking the law. However, a defendant's wealth is irrelevant **[*1802]** to the deterrence rationale of punitive damages. n116 If an injurer has to pay more for a particular course of action than he profits from it - as he would if the amount required for deterrence is well-calculated - he will discontinue the action regardless of how much money he has in the bank. Similarly, wealth considerations are inconsistent with the retributive goals of the law in other

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ESSAY: WHAT IS A **TORT** CLAIM? AN INTERPRETATION OF CONTEMPORARY **TORT REFORM**

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SUMMARY:
... One of the most common questions raised on the first day of **torts** class is, "What is a **tort?**" On their first day of law school, students falter until, eventually, it emerges that a **tort** is a civil wrong not arising out of contract. ... Indeed, the evolving conception of a **tort** claim reflects the effort to have what some reformers may think is the best of two worlds -- the imposition of liability on particular wrongdoers that is at the core of **tort** liability, and the standardization of recovery that is at the core of health and disability insurance and other non-**tort** compensation systems. ... A true system of liability for risk creation would dispense compensation on a much more uniform basis than would traditional **tort** liability, because it would base awards on potential loss rather than actual loss, and inevitably there would be less individualized damage computation when the plaintiffs had not yet suffered injury. ... Finally, aside from **tort** law, no compensation system explicitly pays claimants for their pain and suffering, and even those that pay compensation which might be viewed as a surrogate for pain and suffering only pay in limited amounts. ... For many the full trade has not yet been completed, however, and for this reason too I would expect more **reform** that makes **tort** liability look increasingly like non-**tort** law. ...

TEXT:

[*172] INTRODUCTION

One of the most common questions raised on the first day of **torts** class is, "What is a **tort?**" On their first day of law school, students falter until, eventually, it emerges that a **tort** is a civil wrong not arising out of contract. This almost completely circular definition is not enlightening, and that is part of the lesson. Unless you already know what contitutes a civil wrong, the definition is useless. And once you know what constitutes a civil wrong, the definition is unnecessary. In this Essay I shall explore the changing character of the civil wrongs that are governed by "accident law" -- negligence and strict liability for personal injury -- by looking at the implications of recently proposed and enacted **tort reforms** for our conception of the nature of a **tort** claim in this field.

In the last ten years, both proposed and actually adopted accident law **reforms** have proliferated. The scope and magnitude of these **reforms** are unparalleled in the history of **tort** law. They have come from the left, the center, and the right; they have involved medical, products, environmental, and other forms of liability; and they run the conceptual gamut from tinkering with **tort** law doctrine, to imposing liability for creating the

circumstances that distinguish one plaintiff from another. In this respect the abolition of the collateral source rule is a move away from rather than toward the traditional conception of a **tort** claim.

To sum up, the three **reforms** of damages law that I have canvassed in this Subpart -- statutory caps, scheduling, and reversal of the collateral source rule -- are graphic illustrations of both of the effects of eroding the traditional conception of a **tort** claim that I have been underscoring. These **reforms** help to counteract the potentially arbitrary or discriminatory application of **tort** law to particular claimants, and they import into **tort** law devices that non-**tort** systems have used successfully in providing compensation. For example, under the traditional rules governing pain and suffering, [*194] enormous sums may be paid for pain and suffering to a few claimants. At the same time, other individuals' economic losses may go undercompensated. As it becomes recognized that for practical purposes a finite amount of money is available to compensate the victims of accidental illness and injury, this kind of distribution is transformed into a target for **reform.** Similarly, the collateral source rule permits double compensation for expenses that have been paid by a claimant's own insurance, even while other claimants have not been fully compensated for their medical expenses or lost wages. Both statutory caps on pain and suffering and the abolition of the collateral source rule can be viewed as attempts to reduce this kind of inequity among claimants, by preserving the large but ultimately finite sum that is available to compensate **tort** claimants for those who are most in need -- victims with uncompensated out-of-pocket losses.

Proposals for scheduling damage awards would move the system toward another form of equity as well. The great strength of the traditional conception of a **tort** claim is its capacity to take into account the individual circumstances of the plaintiff and the particular chain of events leading to injury. The enormous discretion accorded the jury under this conception, however, also creates the potential that circumstances that ought to be legally irrelevant to the outcome of the claim may be taken into account. As groups, African-Americans and whites, men and women, the wealthy and the poor may fare differently as claimants under the traditional conception. Similarly, individual defendants and corporations, professional and nonprofessional defendants, local defendants and foreign defendants may fare differently. n59

The various forms of damage scheduling that recently have been proposed would tend to mitigate different outcomes because of prejudice or favoritism based on the foregoing factors. Everyone with the same injury would receive an award within a prespecified range. Admittedly, the data from which schedules are constructed might include outcomes based on such prejudice or favoritism. But by averaging or aggregating the outcomes from a representative sample of claims, the effect of these biases would be submerged; all subsequent claimants would receive awards that averaged the positive [*195] and negative differences resulting from the biases. n60 Thus, damage scheduling would attempt to avoid the silent inequities that can be camouflaged by what Holmes called the "featureless generality" of jury verdicts under the traditional conception. n61

In addition to the effect of these **reforms** in the law of damages on equity among claimants, each **reform** represents an effort to import into **tort** law one or more features that are characteristic of non-**tort** compensation schemes. Three parallels here are striking. First, nearly all non-**tort** compensation systems employ rules governing coordination of benefits that are designed to avoid duplicate or overlapping coverage. n62 Private insurance policies accomplish coordination through policy provisions; social insurance accomplishes it through statutory directives or regulations. Along the entire range of compensation systems, the only major exception to this practice is the collateral source rule of traditional **tort** law. Abolition of the rule is therefore a major landmark in the development of **tort** law. Abolition not only makes **tort** resemble other systems; in this respect it makes **tort** law one of them.

Second, damage scheduling of **tort** awards has counterparts in any number of non-**tort** compensation systems that use categorical rules of various sorts to ignore idiosyncracies and differences among individuals, in the interest of achieving equity among claimants and increasing administrative efficiency. Examples include the social security "grid" used to classify disabilities for purposes of SSDI; n63 the lump sums that workers' compensation pays for designated permanent disabilities; n64 and the "diagnostic review group" (DRG) limitations on Medicare reimbursements for particular kinds of illnesses and medical procedures that have been spreading through health insurance generally. n65 These devices are coming to be seen as attractive methods of capturing for **tort** law some of the efficiencies and equities generated by non-**tort** systems, and they are finding [*196] their way into the **tort reform** movement in the form of caps on

damages and proposals for damage scheduling.

Finally, aside from **tort** law, no compensation system explicitly pays claimants for their pain and suffering, and even those that pay compensation which might be viewed as a surrogate for pain and suffering only pay in limited amounts. n66 By foregoing such payment, these systems make compensation of out-of-pocket loss a priority, and at the same time avoid the statistical uncertainty that they would face if compensation of a non-objective category of loss were available without limit. Statutory caps on pain and suffering resonate with both these concerns.

C. Class Actions and Bankruptcy

In this Essay, I cannot undertake a thorough review of the developments in class actions and bankruptcy that have occurred during the last decade, nor can I do justice to the many innovative proposals for **reform** that have emerged during the same period. It is sufficient to note here that many of the important developments in class actions and bankruptcy in recent years have occurred in **tort** litigation, and that virtually every important actual and proposed change in the way these fields handle **tort** claims has had or would have the effect of rendering the particular circumstances of each plaintiff's claim less significant than they would have been under the traditional conception. n67

The **tort** system simply cannot resolve hundreds of thousands of claims through the ordinary process of individual litigation. n68 By their very nature, class actions tend to focus on the general rather than on the particular. For example, determinations regarding negligence (or strict liability) and at least some features of causation often are made generally and become binding on all members of the class. In addition, in a number of mass **tort** actions, including asbestos [*197] and Dalkon Shield litigation, the courts and such ancillaries as special masters and consultants have constructed schemes that would encourage or require claimants to be categorized and then compensated on the basis of that categorization. n69 In these cases the courts have used their class action and bankruptcy authority to fashion methods of standardizing claims and distributing payment, all under the rubric of imposing "**tort** liability." n70 Thus, in a very real sense the principal point of filing for Chapter Eleven bankruptcy reorganization in response to mass **tort** litigation is to trigger judicial authority to treat collectively claimants who otherwise would have the right to more individual treatment. Finally, much of the academic writing about class actions and damages in mass **tort** cases has been directed at devising satisfactory methods of departing from the traditional conception of a **tort** claim, through damage scheduling, aggregative valuation, and the like. n71



In short, the function of class actions and bankruptcy reorganization in connection with **tort** claims is precisely to facilitate the demise of the traditional conception of a **tort** claim in mass **tort** actions. In these settings the law has begun to recognize that, for a variety of reasons, the individualization that is at the heart of the traditional conception is an unaffordable luxury. The rules governing the resolution of **tort** claims through class actions and bankruptcy -- and the innovations that are now being proposed and seriously considered -- make it increasingly feasible to depart from the traditional conception by paying comparatively less attention to the particulars of individual claims than would be paid outside these settings.

*D. Waivers and Disclaimers of **Tort** Liability*

The last set of **reforms** that I shall analyze does not involve change in the rules governing **tort** liability or damages, but elective [*198] substitution of alternative regimes for those rules. At the beginning of the modern era of **tort** law, **tort** liability displaced contract law as the source of liability for personal injury in settings, including the delivery of health care and the sale of products, n72 where injurers and victims could have contracted before injury about their rights and obligations. That displacement did not merely make **tort** liability the dominant system for redressing wrongful personal injury; because **tort** law could not be set aside by contract, **tort** liability became the exclusive source of law governing liability for personal injury. n73 The traditional conception of a **tort** claim therefore also became the exclusive reference point for adjudicating personal injury claims. **Tort** liability could not be waived; it could not be disclaimed; and it could not be contracted away.

The citadel that these no-waiver, no-disclaimer, no-contract rules built is now in the early stages of being dismantled. In the fields of automobile liability, medical malpractice, and products liability, limited adoptions of elective no-fault regimes and far-reaching proposals for authorization of liability and compensation contracts are reordering personal injury law. The common characteristic of these measures, and in a sense their most

important feature, is the suspension of the traditional conception's monopoly in the field of civil liability. Personal injury law and **tort** law are no longer synonymous.

These nontraditional measures can be classified most comfortably along two axes. First, they permit displacement of **tort** law either at the election of one party or upon the agreement of both parties. Thus, an alternative regime may be selected in a number of ways: only by the claimant, n74 only by the injurer, n75 or only upon mutual agreement. n76 Second, the alternative regime may be selected [*199] before a cause of action in **tort** arises, n77 after a cause of action arises, n78 or at either point. The result is a combination of different possibilities, together with variations within each depending on whether full or only partial displacement of **tort** law rules governing liability and damages is permitted. n79 For example, the Virginia and Florida birth-injury compensation programs n80 afford obstetricians and hospitals an annual right to opt out of **tort** liability for birth-related neurological defects, but in exercising this right these health-care providers must opt into a no-fault compensation system financed by flat surcharges against them. On the other hand, the federal child vaccine-injury program n81 is financed by pharmaceutical companies, and affords claimants who are already injured a right to opt into a no-fault compensation scheme that is comparatively less generous than the **tort** system has been to successful claimants in this field.

There are two main features of this entire cluster of possibilities. The first is that they are just that -- possibilities. The parties' relationship need not be completely constrained by **tort** law in general or by the traditional conception in particular. By contract or (depending on the variation in question) at the unilateral election of one of the parties, the full individualization required by the traditional conception may be set aside. Second, in virtually all of these **reforms** and proposals, what **tort** law is set aside for is a set of rights and liabilities that is far more standardized and far less individualized than **tort** rights. Typically the claimant under these schemes is assured full compensation for medical expenses, partial compensation for lost wages, and sometimes a lump sum equivalent to pain [*200] and suffering damages that is subject to a specified monetary ceiling. n82 There is no need to prove negligence, and in some instances statutory presumptions of causation eliminate the need to prove that the claimant suffered actual harm at the hands of the party who would be a defendant if he were making a **tort** claim. n83

The contract alternatives thus sidestep some of the political difficulties entailed in the construction and implementation of mandatory non-**tort** compensation schemes, and encourage the more or less voluntary adoption of such schemes. For example, where the right to opt out of **tort** liability is unilateral, the political objections of those who are given that right are likely to fade away, since they can elect to remain in the **tort** system. To meet the objections of those against whom this right is exercised, some quid pro quo is necessary. This is likely to mean that the compensation scheme that substitutes for **tort** liability must be comparatively generous, either financially or through liberalization of compensability criteria.

So far the legislatures have chosen to construct these elective systems themselves, leaving one or both of the parties merely to elect or not to elect participation in a legislatively specified alternative to **tort** law. The next logical step in the development of contract alternatives may well be legislative or even judicial authorization for potential claimants and defendants to construct alternative systems themselves. Potential parties may then opt out of **tort** liability and into those systems by mutual agreement. But, for two reasons, this next step may be some years away. First, neither legislatures nor courts are likely to be comfortable with full freedom to contract out of **tort** liability before assessing experience with the more limited regimes that have been adopted. Second, some system must be devised for bringing into the picture the insurers whose interests would be affected by individual choices. For example, when patients or physicians opt out of the **tort** system, the exposure of both the physician's malpractice liability insurer and the patient's first-party and social insurers may be affected; these impacts need to be considered, and a method of accounting for them through rate changes, rebates, surcharges, and the like must be devised. Otherwise some of the principal beneficiaries and victims of a decision to opt out of **tort** and into an alternative regime will be left on the sidelines.

[*201] If these problems were solved, it is quite possible that permitting the parties to opt out of **tort** liability by mutual agreement would generate a whole series of other schemes, custom designed by the parties for particular kinds of transactions or relationships: for lawnmower-related injuries, drug side effects, and the like. Legislatures cannot reasonably be expected to formulate such compensation programs individually, but they can be expected to authorize such contracts in general and establish specific constraints

on their terms. n84 Even if the law cannot construct such schemes, it can allow the parties whose interests would be served by doing so to construct them. The right to opt out of **tort** liability would create the opportunity to do just that. The courts could police these contracts, having received the legislative message that, subject to the legislatively prescribed constraints, waivers and disclaimers of **tort** liability are presumptively valid rather than presumptively unconscionable. The private sector could then proceed to try to solve the technical obstacles to constructing alternative compensation systems.

III. IMPLICATIONS FOR THE FUTURE

Because I have claimed not merely to be describing what has already become **tort** law, but also to be using proposals for **reform** to predict what else will happen to **tort** law, I want to suggest in this Part why I think that the future will bring more of the same kinds of **tort reform** that I have been emphasizing. I argued above that contemporary **reform** has the effect of promoting greater equity among claimants. Of course, what counts as equitable or inequitable depends on what factors are considered legally important or irrelevant. Identical treatment of all claimants or all defendants is not equitable if there are relevant differences among members of these categories. The developments that I have canvassed seem to me likely to influence several forms of inequity that have long been recognized in the **tort** system, but nonetheless have been tolerated. As these inequities become less tolerable, **reforms** that respond to them are likely to be regarded with favor.

One inequity involves differences in the quality of the lawyers [*202] representing claimants. Some are adept at proving causation in the face of scientific uncertainty, some are not. Some are capable of winning million-dollar verdicts and some are not. By imposing liability without requiring proof of causation and by standardizing award levels, a number of the **reforms** would tend to mitigate the effect of such differences. Another form of inequity I mentioned earlier is the possibility of jury prejudice -- racism, sexism, xenophobia, and a variety of other biases. As we become more and more aware of diversity in our population and more sensitive to that diversity, sweeping the possibility of these kinds of jury prejudices under the rug becomes less and less comfortable, and **reforms** that respond to or tend to neutralize the prejudices by standardizing award levels become more attractive.

A third form of inequity might be called "legal luck." If you are unlucky enough to fall in your bathtub, you receive limited compensation from health and disability insurance, but if you suffer the same injury at the hands of a third party like your doctor or the manufacturer of your car, under the traditional conception the sky is the limit -- you are free to seek the pot of gold at the end of the rainbow. Few people ever find that pot of gold, and in certain respects, some recent **reforms** may simply bring the law on the books into line with the way **tort** law is actually practiced in most cases through compromise and settlement. But some of the **reforms** attempt to contain and manage the differences resulting from legal luck by shrinking the differences in compensation available from **tort** and the other systems, though without eliminating the differences. The result is a **tort** system that still has deterrence capacity and still awards more in damages than alternative systems, but that generates less difference in compensation levels and therefore makes people less uncomfortable about the effect of legal luck. n85 [*203] Because this and the other two forms of inequity are likely to remain troubling to many observers of the **tort** system, pressure for continued **reform** of this sort is likely to continue.

In addition to reducing inequity among claimants, I have argued that the **reforms** I have canvassed draw heavily on the devices employed by non-**tort** compensation systems. In my view the explanation is twofold. First, many of the reformers find the non-**tort** systems appealing, and are willing to settle for half-a-loaf rather than none. n86 They get half a compensation system -- one operated by a court rather than an insurance company or government agency, or one in which **tort** liability is not abolished but is made optional. There is every reason to expect that this kind of pressure will continue. For example, my colleague Jeffrey O'Connell has created several new forms of elective no-fault in recent years and some are now being adopted. n87 This development is likely to encourage no-fault reformers.

The second reason for the appeal of non-**tort** systems is that the scope of **tort** liability has been expanding for at least the last century. Politically, the time for a quid pro quo seems to have come. More and more people have the right to recover in **tort.** When the scope of **tort** liability was limited and defenses were many, full individualization and unlimited damages seemed sensible. As liability has expanded and the defenses to it have withered away, for at least some reformers a trade-off was overdue. The features of non-

tort systems that award lower levels of compensation in return for providing compensation to more victims appear to be an appealing trade for this expansion in the scope of liability. For many the full [*204] trade has not yet been completed, however, and for this reason too I would expect more **reform** that makes **tort** liability look increasingly like non-**tort** law.

It should go without saying that whether all these changes are desirable is a separate matter. One might think that dealing with the risk of jury prejudice by standardizing awards and ignoring diversity is a bad idea. One might favor the development of more non-**tort** compensation systems, but think that trying to transform **tort** law into a non-**tort** system is not sensible. Or one might favor the latter idea, but object to certain of the **reforms** that are employed to achieve the transformation of **tort** law. I happen to think, for example, that placing absolute dollar caps on pain and suffering damages burdens precisely the wrong people -- those who have suffered serious injuries early in their lives -- because they are the people who are most likely to receive a large recovery. Scheduling damages for all claimants makes much more sense to me.

But all that is a matter for another day. The first task is to understand the underlying significance and common direction of contemporary **tort reform.** Having gained a grasp of that significance, we can then undertake the normative task of assessing the wisdom of the **reforms.** Then at least we would not be debating the simplistic question of whether a particular **reform** does or should benefit plaintiffs or defendants. We could instead address more complicated and difficult questions involving how to handle diversity, which forms of equity among claimants are preferable, and **tort** law's proper relationship with the non-**tort** systems that are its institutional relatives. That is the kind of **tort reform** debate toward which we ought to be heading.

CONCLUSION

Let me conclude by emphasizing that my analysis has been offered in the spirit of interpretation, and indeed interpretation of an unfinished and evolving text. The multiple authors of the text probably would not recognize it in my interpretation. The whole text of **tort reform,** however, may not only be greater than the sum of its parts, but different from that sum as well. Whether my own interpretation will turn out to be correct, of course, depends on how the text continues to be written. But whatever the significance and shape of contemporary **tort reform** movement ultimately turn out to be, the road to that completed text should be very exciting indeed.

FOOTNOTES:

n1. In some respects this de-emphasizing of the particulars of individual claims reflects a focus on distributive instead of corrective justice -- that is, on the overall distribution of goods in society, rather than on the obligations of particular defendants to particular plaintiffs. For discussion of this distinction, see generally Jules L. Coleman, *Moral Theories of **Torts**: Their Scope and Limits* (pts. 1 & 2), 1 LAW & PHIL. 371 (1982), 2 LAW & PHIL. 5 (1983). But as I shall try to show in the remainder of this Essay, more is at issue in contemporary **tort reform** than whether to pursue corrective or distributive justice through the imposition of **tort** liability.

n2. *See infra* Subpart I.A.

n3. *See infra* Subpart I.B.

n4. *See infra* Subpart I.C.

n5. *See, e.g.,* Vaughan v. Menlove, 3 Bing (N.C.) 468, 132 Eng. Rep. 490 (C.P. 1837); *see also* 3 FOWLER HARPER ET AL., THE LAW OF **TORTS** § 16.2, at 389 (2d ed. 1986).

n6. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 98-99 (Mark D. Howe ed., Belknap Press 1963) (1881).

n7. *See generally* James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law,* 51 IND. L.J. 467 (1976).

n8. Admittedly, in certain other respects even traditional negligence law does not attend to the unique facts of the case at hand. For example, the external standard used to determine whether the defendant was negligent abstracts from the defendant's own circumstances and disabilities in evaluating the quality of his or

her conduct. *See* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW 24 (1985) (discussing the "reasonable person" standard); David Rosenberg, *Damage Scheduling in Mass Exposure Cases,* 1 COURTS, HEALTH SCI. & L. 335, 339 (1991) ("[T]here is no mistaking the averaging design of the external, reasonable person standard of the negligence rule.").

n9. *See* RESTATEMENT (SECOND) OF **TORTS** § 520 cmt. l (1965).

n10. As delineated in the Second *Restatement of* ***Torts,*** these are:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from [the activity] will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on;

(f) extent to which its value to the community is outweighed by its dangerous attributes.

Id. § 520.

n11. *See* VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE § § 1.1, 1.4-1.6 (2d ed. 1986).

n12. *See, e.g.,* Micallef v. Miehle Co., 348 N.E.2d 571, 578 (N.Y. 1976) (overturning the "patent-danger" rule, which barred recovery for injuries resulting from a patent, rather than a latent, danger).

n13. *See* 4 HARPER et al., *supra* note 5, § 20.2, at 91.

n14. *See, e.g.,* Guenther v. Armstrong Rubber Co., 406 F.2d 1315, 1318 (3d Cir. 1969) (evidence that defendant manufactured 75% to 80% of tires in stock not sufficient for plaintiff to get to jury); Smith v. Rapid Transit, Inc., 58 N.E.2d 754, 755 (Mass. 1945) (evidence that defendant operated a bus route at approximate time and place of plaintiff's collision with bus not admissible on question of defendant's ownership of particular bus). *See generally* David Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation,* 1982 AM. BAR FOUND. RES. J. 487.

n15. *See, e.g.,* Herskovits v. Group Health Coop., 664 P.2d 474, 476-77 (Wash. 1983) (jury permitted to determine whether physician's failure to diagnose illness in timely fashion was proximate cause of death, upon evidence that decedent's chance of survival was reduced from 39% to 25%).

n16. The members of the jury are of course permitted to generalize from their own experience in and understanding of the physical world in order to answer the counterfactual causal inquiry. Indeed, it is hard to imagine how the causal inquiry could be resolved without reference to such experience and understanding, unless it were by reference to statistical generalizations.

n17. On at least some views of the matter it also is not sufficient that the defendant harmed the plaintiff; harm to the plaintiff must also have been foreseeably risked. *See* Palsgraf v. Long Island R.R., 162 N.E. 99, 99 (N.Y. 1928). In addition, in at least some situations the type of harm risked, and not some other type, must have occurred in order to hold the defendant liable. *See* Petition of Kinsman, 338 F.2d 708, 726 (2d Cir. 1964) (defendant liable only if injury to plaintiff caused by failure to raise a drawbridge before bridge was struck by drifting vessel was foreseeable).

n18. *See, e.g.,* Steinhauser v. Hertz, 421 F.2d 1169, 1173-74 (2d Cir. 1970) (holding that plaintiff is entitled to recover in full if jury finds that accident was "precipitating factor" causing schizophrenia in child, who previously exhibited latent schizophrenic tendencies).

n19. *See* SCHWARTZ, *supra* note 11, § 2.1, at 30-32. The same approach is used in jurisdictions where comparative negligence also applies in strict liability actions. *See, e.g.,* Daly v. General Motors Corp., 575 P.2d 1162, 1168-69 (Cal. 1978) (proportionately reducing plaintiff's recovery where plaintiff failed to use safety belts and door locks, and was driving while intoxicated).

n20. The ideal of corrective justice is often impossible to achieve in a number of respects. For example, the "wrongdoer" may be an individual employee of a legal construct -- a corporation -- but the corporation is

likely to be the defendant; the basis for the imposition of liability may not be that the defendant is a "wrongdoer," but that the defendant should be held liable notwithstanding the absence of wrongdoing; and the defendant's insurance company, not the defendant, may provide the funds that "correct" the "wrong."

n21. *See generally* Geoffrey C. Hazard, Jr., *Authority in the Dock,* 69 B.U. L. REV. 469 (1989).

n22. *See generally* Kenneth S. Abraham, *The Insurance Implications of Alternative Compensation Systems,* 25 HOUS. L. REV. 817 (1988) (arguing that the difficulty of defining compensable events in product and process injuries, including environmental exposure injuries, makes expansion of health and disability coverage in private first-party and social insurance policies a more viable alternative than no-fault insurance schemes); James A. Henderson, Jr., *The Boundary Problems of Enterprise Liability,* 41 MD. L. REV. 659 (1982) (discussing problems in defining compensable events under an enterprise liability system for technologically advanced activities).

n23. For a compendium, synthesis, and analysis of much of this scholarship and law **reform,** see generally the two-volume AMERICAN LAW INSTITUTE REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991) [hereinafter ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY]. *See also* **TORT** LAW AND THE PUBLIC INTEREST (Peter H. Schuck ed., 1991) (discussing **tort reform** controversy).

n24. For a catalogue of the **reforms** that were adopted by statute, see Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s **Tort** Crisis and the Law **Reform** Process,* 27 HOUS. L. REV. 207, 220-22 (1990).

n25. *See, e.g., In re* Fibreboard Corp., 893 F.2d 706, 712 (5th Cir. 1990) (overruling district court's "imaginative approach" that had required full trial on liability for 11 class representatives using evidence from 30 illustrative plaintiffs, enabling jury then to determine damages suffered by remaining 2990 class members); Jenkins v. Raymark Indus., 782 F.2d 468, 475 (5th Cir. 1986) (affirming district court's ratification of plaintiff class in mass-**tort** asbestos action, using bifurcated trials to determine punitive and actual damages separately). *See generally* PETER H. SCHUCK, AGENT ORANGE ON TRIAL (1986) (examining judicial approaches to Agent Orange litigation and suggesting alternatives); Francis E. McGovern, *Resolving Mature Mass **Tort** Litigation,* 69 B.U. L. REV. 659 (1989) (examining judicial approaches to asbestos-related and Dalkon Shield litigation, and suggesting alternatives).

n26. *See infra* Subpart II.A.

n27. *See infra* Subpart II.B.

n28. *See infra* Subpart II.C.

n29. *See infra* Subpart II.D.

n30. *See, e.g.,* Sterling v. Velsicol Chemical Corp., 647 F. Supp. 303, 321-22 (W.D. Tenn. 1987) (approving "enhanced risk" or "enhanced susceptibility" to disease as compensable injury); Glen O. Robinson, *Probabilistic Causation and Compensation for Tortious Risk,* 14 J. LEGAL STUD. 779, 783 (1985) (arguing that the basic objectives of **tort** law are better served if liability is based on risk of injury rather than on actual occurrence of harm).

n31. *See, e.g.,* Rosenberg, *supra* note 8, at 341-42 (suggesting that firms potentially liable for claims involving toxic exposure set aside a fund, or purchase m commercial insurance to cover such claims); Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks,* 37 UCLA L. REV. 439 (1990) (arguing in favor of increased risk of harm as a compensable event). In a sense, this modified approach departs even more radically from the traditional conception of a **tort** claim than does the pure approach. Under the pure approach the imposition of liability on the defendant and the receipt of compensation by the plaintiff are simultaneous. There is a direct, face-to-face connection between the plaintiff and the defendant in the course of the claim, and the judgment rendered obligates the defendant to pay the plaintiff. But under the modified approach the defendant does not pay the plaintiff directly; it pays into a fund that later pays the plaintiff.

This separation of the imposition of liability from the payment of compensation may seem to be merely formal. From the plaintiff's standpoint the defendant pays the plaintiff, and the plaintiff cannot recover unless

he or she has been harmed by the defendant. On the other hand, from the defendant's standpoint, its liability is not to an individual or even to a group of individuals. Rather, the defendant is liable to a kind of intermediary -- the fund created by its payment of the judgment against it. The identities of the individuals whose harm the defendant's actions have risked are immaterial to the defendant. By the time this risk materializes in harm, the defendant's legal relationship with and obligation to these individuals has terminated. In effect, the defendant has paid a tax calibrated to the riskiness of its activities and that tax has been used to finance a system that will later be used to compensate those who subsequently become victims of these activities.

n32. Diethylstilbestrol (DES) was marketed as a prescription drug for the prevention of miscarriage, and was later alleged to cause cancer in daughters of some women who took DES during pregnancy. *See, e.g.,* Sindell v. Abbott Lab., 607 P.2d 924, 925 (Cal. 1980) (holding defendants liable in proportion to their share of the DES market).

n33. *See, e.g.,* Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981).

n34. *See supra* note 14 and accompanying text.

n35. In some jurisdictions a defendant may avoid liability by showing that the plaintiff could not have been exposed to that defendant's product. For example, the defendant may show that during the years in question it made no sales in the state where the plaintiff resided. *See, e.g.,* McCormack v. Abbott Lab., 617 F. Supp. 1521, 1526 (D. Mass. 1985). In other jurisdictions, however, even this showing will not suffice to exonerate the defendant. *See, e.g.,* Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1074-75 (N.Y. 1989).

n36. *See, e.g.,* Herskovitz v. Group Health Coop., 664 P.2d 474, 479 (Wash. 1983) (measuring damages in a wrongful death case by the percent reduction in chance of survival); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the* ***Tort*** *System,* 97 HARV. L. REV. 849 (1984).

n37. Like market-share liability, this approach is fraught with practical problems, not the least of which is the potential unreliability of the statistical evidence on which it would rely. *See* Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass* ***Tort Reform,*** 73 VA. L. REV. 845, 867 (1987) (noting that "the data necessary to support the probabilistic measures of causation that could serve as surrogates for causal responsibility will rarely be available").

n38. In **tort,** the dominant compensable event is the occurrence of an injury resulting from the fault of the defendant. By contrast, in workers' compensation and automobile no-fault insurance the event is an injury caused by employment or while driving. In health and disability insurance (private or social), the event is a loss falling into the appropriate category, regardless of fault or cause.

n39. There actually are two problems: (1) it is sometimes difficult to know whether a particular injury was caused by the activity in question (medical care or exposure to a product or environmental hazard, for example); and (2) even assuming that the injury was caused by the activity in question, not all such injuries must be included within the compensation system to assure optimal internalization of the cost of injuries associated with the activity. Examples in this category might include a minor side effect of beneficial medical treatment or an accidental cut caused by a sharp knife. Imposing **tort** liability for risk creation responds more to the first than to the second problem.

n40. At the very least, **tort** liability appears to be expanded under this approach. To be entirely consistent, of course, damages should be calculated in proportion to risk regardless of the percentage probability that the defendant's action caused the plaintiff harm. For example, if a defendant is liable for 30% of a claimant's loss when there is a 30% chance that the defendant caused the loss, then the defendant should be held liable for only 70% of the loss when the chance that the defendant caused the loss is 70%. If under a new regime the defendant were held liable only for 70% of the loss in the latter situation, then liability would have been contracted in this respect, because under traditional rules the defendant would pay 100% of the loss in such a situation.

n41. Between 1985 and 1988, 23 jurisdictions placed caps on damage recoveries. *See* Sanders & Joyce, *supra* note 24, at 220-22.

n42. *See, e.g.,* STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 228-35 (1987)

(arguing that socially ideal compensation cannot be achieved under a liability system that compensates for nonpecuniary losses); Samuel A. Rea Jr., *Non-Pecuniary Loss and Breach of Contract,* 11 J. LEGAL STUD. 35 (1982) (exploring "inefficiency" of full compensation for nonpecuniary losses resulting from breach); Alan Schwartz, *Proposals for Products Liability* ***Reform:*** *A Theoretical Synthesis,* 97 YALE L.J. 353, 362-67, 408-11 (1988) (contending that **tort** liability should apply only to pecuniary losses while nonpecuniary harm should be covered by a legislatively-mandated system of fines).

n43. *See, e.g.,* Kenneth S. Abraham & Glen O. Robinson, *Aggregative Valuation of Mass* ***Tort*** *Claims,* LAW & CONTEMP. PROBS., Autumn 1990, at 137. *See generally* Rosenberg, *supra* note 8 (proposing damage scheduling through averaging and prioritizing compensation in lieu of individual awards); James F. Blumstein et al., *Beyond* ***Tort Reform:*** *Developing Better Tools for Assessing Damages for Personal Injury,* 8 YALE J. ON REG. 171 (1991) (proposing development of a reporting system that would have precedential value for future awards); Randall R. Bovbjerg et al., *Valuing Life and Limb in* ***Tort:*** *Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908 (1989) (proposing three alternative frameworks to perfect valuation of noneconomic damages under the current system of liability).

n44. Depending on the complexity of the schedule, it might take into account the severity of the injury, its degree of permanence, and the life expectancy of the party injured.

n45. *See, e.g.,* Bovbjerg et al., *supra* note 43, at 921-22 (tables summarizing a sample of jury awards).

n46. *See generally* Abraham & Robinson, *supra* note 43.

n47. Of course, it is possible to imagine damage schedules that create only rebuttable presumptions and therefore permit the claimant to show that, because of the unusual severity of the injury, the upper limit applicable to that kind of injury should be relaxed. *See id.* at 147-48. Such an approach will tend to have fewer of the effects I point to in the text, but because of the typical operation of even rebuttable presumptions, these effects still are likely to appear to some degree.

n48. *See* 4 HARPER et al., *supra* note 5, § 25.22, at 648-51.

n49. *See* 1 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, *supra* note 23, at 162-64.

n50. *See* Kenneth S. Abraham, *Medical Malpractice* ***Reform:*** *A Preliminary Analysis,* 36 MD. L. REV. 489, 504-06 (1977) (discussing potential modifications of the collateral source rule); Prentiss E. Feagles et al.; Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis,* 1975 DUKE L. J. 1417, 1447-50 (citing California, Idaho, Iowa, New York, Pennsylvania, and Tennessee statutes).

n51. In total, 25 jurisdictions have now enacted some form of legislation governing the collateral source rule. *See* Sanders & Joyce, *supra* note 24, at 220-22 (table listing those states enacting such legislation between 1985 and 1988).

n52. Strictly speaking, in some of these jurisdictions the rule has not been completely abolished because the statutes abolishing the rule apply only to specified sources or exclude specified sources from their application. In addition, decisions in a number of federal cases have ruled the statutes inapplicable to certain federal social insurance programs, on the ground that the abolition would interfere with the federal statutory rights of reimbursement accorded some of these sources of social insurance. *See, e.g.,* Rubin v. Sullivan, 720 F. Supp. 840, 846 (D. Haw. 1989) (disallowing matching funds under Medicaid); Abrams v. Heckler, 582 F. Supp. 1155, 1165 (S.D.N.Y. 1984) (upholding regulation precluding Medicare payments for services covered by auto insurance policies).

n53. For explanations of the reasons for this unsystematic exercise of insurers' rights of subrogation and reimbursement, see 1 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, *supra* note 23, at 164.

n54. *See* John G. Fleming, *The Collateral Source Rule and Loss Allocation in* ***Tort*** *Law,* 54 CAL. L. REV. 1478, 1498-1512 (1966) (outlining several methods by which insurers obtain reimbursement).

n55. Most estimates are that between 30 and 37 million people in the United States (out of a population of 250 million) are uninsured. *See, e.g.,* CONGRESSIONAL RESEARCH SERVICE, HEALTH INSURANCE AND THE UNINSURED: BACKGROUND DATA AND ANALYSIS 93 (1988); M. Eugene Moyer, *A Revised Look at the Number of Uninsured Americans,* 8 HEALTH AFF. 102 (1989).

n56. Hawaii was the last state to adopt a workers' compensation law, in 1963. *See* ARTHUR O. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 5.30 (1952 & Supp. 1989).

n57. *See* Social Security Act, 42 U.S.C. § 1396 (1988).

n58. *See* HEALTH INSURANCE ASSOCIATION OF AMERICA, 1988 UPDATE: SOURCE BOOK OF HEALTH INSURANCE DATA 7 (1988) (table).

n59. For example, one study showed that juries are likely to award substantially more in product liability, malpractice, or work injury cases than in an automobile case involving injury of the same severity. *See* AUDREY CHIN & MARK A. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS 52-56 (1985).

n60. *See* Abraham & Robinson, *supra* note 43, at 150-51; Rosenberg, *supra* note 8, at 340-41.

n61. HOLMES, *supra* note 6, at 89.

n62. *See* KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY 133-72 (1986) (discussing the purposes and implications of and devices for coordinated coverage).

n63. For discussion of the promulgation of the grid, and the controversy and litigation that followed, see JERRY L. MASHAW, BUREAUCRATIC JUSTICE (1983).

n64. *See* LARSON, *supra* note 56, at § 58.00.

n65. *See* Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (1984) (codified as amended in scattered sections of 42 U.S.C.). For discussion of these limitations, see J. Timothy Phillips & Don E. Wlneberg, *Medicare Prospective Payment: A Quiet Revolution,* 87 W. VA. L. REV. 27 (1984).

n66. The lump sum workers' compensation payments for specified permanent disabilities bear a close resemblance to pain and suffering damages, though they are not so denominated. Pain and suffering is also recoverable under automobile uninsured or underinsured motorist insurance, but the right to benefits is contingent on the existence of a valid cause of action in **tort** against the uninsured or underinsured motorist.

n67. For fairly recent sets of recommendations, see AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT, TENTATIVE DRAFT No. 1 (Apr. 14, 1989) and TENTATIVE DRAFT No. 2 (Apr. 6, 1990); AMERICAN BAR ASSOCIATION COMMISSION ON MASS **TORTS,** REVISED FINAL REPORT AND RECOMMENDATIONS (1989) [hereinafter COMMISSION ON MASS **TORTS]**.

n68. For example, the Agent Orange, Dalkon Shield, and asbestos litigation have involved about 125,000, 210,000, and 340,000 claimants, respectively. *See* COMMISSION ON MASS **TORTS,** *supra* note 67, at 15e.

n69. *See* Kenneth R. Feinberg, *The Dalkon Shield Claimants' Trust Claims Resolution Facility,* LAW & CONTEMP. PROBS., Autumn 1990, at 79; McGovern, *supra* note 25, at 659.

n70. In other cases some trial judges have attempted to employ collective devices for resolving individual issues without great success. *See, e.g., In re* Fibreboard Corp., 893 F.2d 706, 712 (5th Cir. 1990) (granting mandamus against trial court's plan to determine liability and damages for an entire class of 3000 claimants based on a trial of selected claims representing different asbestos-related disease categories). For in-depth discussion of other innovative efforts that have met with mixed success, see Linda S. Mullinex, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass* ***Tort*** *Litigation,* 32 WM. & MARY L. REV. 475 (1991).

n71. Without question, David Rosenberg has been in the forefront of this effort. *See, e.g.,* Rosenberg, *supra* note 8, at 335.

n72. *See, e.g.,* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916) (holding that purchaser of a vehicle may sue manufacturer for negligence, notwithstanding absence of privity of contract between them).

n73. *See, e.g.,* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 97 (N.J. 1960) (holding that

risk of harm, to wholesale substitution of no-fault compensation schemes for **tort** liability. Both academic analysis and partisan debate over the wisdom and practicality of these **reforms** has been and continues to be intense. In short, **tort** law is in considerable turmoil and there is no end in sight.

It would be a mistake to try to find a single central message in all of this analysis, debate, and **reform,** for the subject is not monolithic. Some proposals and analyses have been based on the assertion [*173] of principle, some on pragmatic judgments about the most workable mix of **tort** law, regulation, and insurance, and some have been transparently self-serving. Nonetheless, it has been common to divide contemporary **tort reform** into two categories: **reforms** that would increase the scope of **tort** liability and **reforms** that would decrease it. This is obviously a useful classification, for it captures what is important to those who are immediately affected: whether a **reform** produces more or less liability, more or less compensation. This concern with whether plaintiffs or defendants gain an immediate benefit from a **reform,** however, obscures something else that is beginning to happen, and that I think will continue to happen in contemporary **tort** law.

At the core of our traditional conception of a **tort** claim are two notion: the right to individualized determination of the defendant's liability, and the right to custom-tailored compensation for the actual loss suffered by the claimant. The particular circumstances of the claim play an essential role in such a conception. But the combined effect of a number of the **reforms** that have surfaced in recent years is the erosion of this conception. In one way or another these measures de-emphasize the particulars of the individual claim.

In eroding the traditional conception, the **reforms** seem to me to be significant in two related ways. First, they promote a version of equity among claimants that both accords a priority to the compensation of out-of-pocket loss and reduces the risk of disadvantaging members of particular groups. n1 Second, the **reforms** import into **tort** law some of the more appealing (though to some people, unappealing) features of non-**tort** compensation systems -- workers' compensation, auto no-fault, and private and social insurance. Because non-**tort** compensation systems tend to standardize claims and recoveries at the expense of individualization, it is no surprise that the two effects of recent **reform** are related. Indeed, the evolving conception of a **tort** claim reflects the effort to have what some reformers may think is the best of two worlds -- the imposition of liability on particular wrongdoers that is at the core of **tort** liability, and the [*174] standardization of recovery that is at the core of health and disability insurance and other non-**tort** compensation systems.

At the outset a word about the character of my inquiry is in order. I do not contend that the authors of contemporary **tort reforms** have consciously attempted to change our conception of what it means to have a **tort** claim. On the contrary, most of those involved in **tort reform,** whether in litigation, in the legislatures, or in the pages of law reviews, are concerned mainly with expanding or contracting liability, not explaining or even understanding the jurisprudential significance of the **reforms** they propose. And because I want not only to describe the recent past but also to predict the future course and significance of **reform,** my analysis covers both **reforms** that already have been enacted and those that are being given serious consideration -- though I do not include proposals for **reform** that are at this stage mere pie-in-the-sky. For all these reasons, I shall offer what I describe as an interpretation -- a reading of the major features of contemporary **tort reform,** designed more to uncover their ultimate meaning and significance than to assess their immediate impact.

I. THE TRADITIONAL CONCEPTION

The traditional conception of a **tort** claim is rooted in the notion that every claim is unique. This conception is reflected both in the rules of law that govern the making of **tort** claims and in the manner in which they are implemented. There is individualization throughout: in the application of liability standards, n2 in the rules governing causation, n3 and in the assessment of the claimant's damages. n4

A. Liability Standards

From the time of its emergence as the dominant standard of liability for accidental harm, negligence has been defined as the failure to exercise the care that would be reasonable under the circumstances. n5 Although, as Holmes suggested over a century ago, n6 our notions of negligence might well have crystallized into a set of categorical [*175] rules delineating the kinds of behavior that do or do not satisfy the negligence standard, this kind of crystallization never occurred. On the contrary, even the nineteenth century

automobile manufacturer could not use disclaimer of implied warranty to relieve it of liability when plaintiff was injured because of manufacturing defect).

n74. This approach is employed by the National Vaccine Act, which provides no-fault compensation to individuals suffering side effects from the administration of child vaccines. *See* National Vaccine Act, 42 U.S.C. § § 300aa-1 to -34 (1988).

n75. This approach is employed by the Virginia and Florida birth-injury funds. *See* VA. CODE ANN. § § 38.2-5000 to -5021 (Michie 1990 & Supp. 1991); FLA. STAT. ANN. § § 766.301-.316 (West Supp. 1989).

n76. For proposals in this regard, see 1 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, *supra* note 23, at 487-536; Jeffrey O'Connell, *A "Neo-No-Fault" Contract In Lieu of* ***Tort:*** *Preaccident Guarantees of Postaccident Settlement Offers,* 73 CAL. L. REV. 898 (1985).

n77. *See, e.g.,* Richard Epstein, *Medical Malpractice, Imperfect Information, and the Contractual Foundation for Medical Services,* LAW & CONTEMP. PROBS., Spring 1986, at 201 (discussing contracts for health services, especially in light of the rise of health maintenance organizations (HMOs)); Glen O. Robinson, *Rethinking the Allocation of Medical Malpractice Risks between Patients and Providers,* LAW & CONTEMP. PROBS., Spring 1986, at 173.

n78. *See, e.g.,* Jeffrey O'Connell, *Offers That Can't Be Refused: Foreclosure of Personal Injury Claims By Defendants' Prompt Tender of Claimants' Net Economic Losses,* 77 NW. U. L. REV. 589, 601 (1982) (proposing a statute that would give a defendant in a personal injury action the option of foreclosing such claims by offering, within 60 days, to pay the claimant's net economic loss, or "special" damages, in excess of losses covered by the claimant's collateral sources).

n79. For example, complete *ex ante* waiver of **tort** liability might be permitted, or such waivers might be permitted only if the potential injurer promised to provide a substitute compensation package, such as no-fault payment of full economic loss resulting from an injury for which there would otherwise be **tort** liability. *See id.;* Kenneth S. Abraham, *Medical Liability* ***Reform:*** *A Conceptual Framework,* 260 JAMA 68, 71-72 (1988).

n80. *See supra* note 75.

n81. *See supra* note 74.

n82. *See, e.g.,* VA. CODE ANN. § 38.2-5009 (Michie 1990 & Supp. 1991).

n83. *See, e.g., id.* § 38.2-5008.

n84. These constraints would have to deal with at least two issues: how to establish the equivalent of "informed consent" or "knowing waiver" by claimants (and those who might become claimants), and the substantive requirements and limits of the approach substituted for **tort** liability. We have considerable experience with the former. As to the latter, a requirement that the alternative have a monetary value equivalent to the **tort** right waived, in light of the probability and severity of potential injury and any price differential offered in return for the waiver, might provide a suitable baseline.

n85. In a somewhat similar manner the imposition of liability for creating risk might be interpreted as a method of dealing with "legal luck" from the defendant's rather than the plaintiff's perspective. Under the traditional conception, either there is full liability or there is none. The party who has acted negligently, but has the luck not to have caused injury, escapes entirely, while the defendant who is negligent in the same way, but unlucky enough to have injured someone, may have to shoulder enormous liability for the injuries its actions caused. Morally speaking, the defendant whose risky actions do not cause injury stands in the same position as the defendant whose actions do. *See* Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks,* 37 UCLA L. REV. 439, 453 (1990). Liability for creating risk would diminish this distinction without a moral difference among defendants. Admittedly, however, two different factors tend to mitigate the effect of these forms of legal luck for defendants: liability insurance and the repeat-player phenomenon. By insuring, the potential defendant can transfer to an insurance pool the risk of having the bad luck of injuring someone; and even the noninsured actor mitigates the effect of such bad legal luck through what amounts to self-insurance if that actor has a sufficiently broad base of claims experience to be a repeat player. The argument for imposing liability for creating risk in order to mitigate the impact of legal luck

is therefore much weaker from defendants' than from plaintiffs' perspective.

n86. The logic of this development (if not also the history) proceeds as follows: First, the weaknesses of the traditional conception of **tort** law are recognized. Next, serious consideration is given to the adoption of non-**tort** liability and compensation systems that would supplement or displace the traditional conception, but the political and technical obstacles to the construction of such systems are recognized. Attention therefore turns again to **reform** within the **tort** system. **Tort reforms** are then formulated that in one way or another attempt to capture the benefits of the infeasible compensation-system alternatives to **tort** liability, while avoiding the disadvantages of these alternatives. This progression is not a figment of my interpretive imagination; it is explicit, for example, in the recent study group report on **tort reform** to the American Law Institute. *See* 1 ENTERPRISE LIABILITY FOR PERSONAL INJURY, *supra* note 23, at 6-7.

n87. *See, e.g.,* Jeffrey O'Connell, *A Model Bill Allowing Choice Between Auto Insurance Payable With and Without Regard to Fault,* 51 OHIO ST. L.J. 947, 947-51 (1990).

per se no-duty rules have slowly eroded in favor of submission of negligence claims to juries for decision. n7 The result is that at least in principle every negligence case is unique, for the law makes no effort to treat it as a member of a general category governed by a legal rule. n8 The only precedent that most negligence cases set (and the major rule that most follow) is that because reasonable people could disagree about whether the behavior involved was negligent, the case should be submitted to the jury.

In the fields of accident law dominated by strict liability rather than negligence the situation is similar. The defectiveness of a particular product's design and the adequacy of the warning it carried may be litigated time and again, even though the same design and warning are involved in each separate case. In environmental liability, the law on the books is that the courts, not juries, are to decide such questions as whether a particular activity is "abnormally dangerous" and therefore warrants the imposition of strict liability for the injury it causes. n9 The test for what constitutes an abnormally dangerous activity, however, requires consideration of six different and largely incommensurable factors. n10 As a consequence, the imposition of this form of strict liability is highly context dependent, and per se rules govern its application to only a few especially dangerous activities such as blasting. In most other situations the [*176] unique circumstances of each case must be considered in determining whether to impose strict liability for the consequences of the activity.

What is true of liability standards themselves is also true of most available defenses. It is now the law in most of the country that the doctrine of comparative negligence does not bar a plaintiff's recovery, but instead reduces the size of that recovery in proportion to the amount of negligence attributable to the plaintiff. n11 Whether comparative negligence or contributory negligence is in force, however, each doctrine focuses on the particular character of the plaintiff's conduct under the circumstances of the case. The same is true of certain other defenses to both negligence and strict liability, including product misuse and assumption of risk. n12

B. Causation

The notion that each **tort** claim is unique also is reflected in the traditional rules governing proof of causation. The plaintiff must prove by a preponderance of the evidence that, but for the defendant's conduct, the plaintiff would not have suffered the loss in question. n13 I admit that this but-for test in a sense divorces the causation issue from the unique facts of the case at hand because the jury must decide what would have happened had the defendant not been negligent (or not engaged in a strict liability activity). Because by hypothesis the defendant was negligent (or engaged in a strict liability activity), this decision requires a counterfactual inquiry involving one important "fact" that differs from the case at hand.

Nonetheless, the focus of the causation inquiry on the unique facts of the individual case does emerge, and nowhere more than in the rules regarding what cannot count as evidence of causation. "Naked" statistical evidence regarding the probability that the defendant's action caused the plaintiff harm is inadmissible, n14 with [*177] only a few exceptions. n15 The result is that the jury is not permitted to base its decision on evidence about causation in other situations. n16 When there simply are no particular facts (or there are insufficient facts) on which to base a causal determination, the plaintiff has failed to make out a prima facie case and the defendant wins automatically.

Moreover, the essence of the traditional causation requirement is that the action of the defendant must have wronged the plaintiff by causing him or her actual physical harm. That is, the defendant's actions must not only risk harm to the plaintiff, but that harm, or a harm very much like it, must actually occur. n17 The idea that **tort** liability is imposed only when the defendant's actions have caused physical harm to the plaintiff is so obvious that it is almost transparent, but it is a critically important feature of the traditional conception of accident law. Without an actual-harm requirement, the plaintiff is a mere member of the public toward whom the defendant behaved improperly, and the imposition of liability on the defendant -- however measured -- begins to resemble criminal punishment for wrongdoing to the public at large rather than the rectification of a wrong to a particular individual. The actual-harm requirement thus makes the unique causal connection between the defendant's action and plaintiff's harm the focus of inquiry.

C. Damages

Without question, the rules governing recovery of damages in **tort** cases most clearly reflect the traditional conception of the uniqueness of every **tort** claim. The successful plaintiff is entitled to [*178]

recover individualized and unlimited damages for past and future out-of-pocket expenses such as lost wages and medical costs, and for past and future pain and suffering. Evidence of awards made to others who have suffered similar injuries not only is not binding -- it is not even admissible; the jury does not hear of other awards and cannot consider them in assessing damages. The principle of individualization is so strong, in fact, that a "thin-skull" rule prevails, under which a plaintiff who is especially susceptible to injury may recover in full. n18

Even the major exception to this principle of individualized full recovery confirms it. Under the doctrine of comparative negligence, the negligence of the plaintiff does not bar recovery, but merely reduces the plaintiff's recovery in proportion to the amount of negligence attributable to him or her. n19 The baseline against which this reduction occurs, however, is full and individualized recovery; comparative negligence thus maintains **tort** law's allegiance to this principle of individualized recovery even while creating an exception to it.

In summary, the individualized character of the determinations that make up the traditional conception is evident when the rules governing standards of conduct, causation, and damages described above are considered together. And they have been surprisingly resistant to change. I think that the traditional conception has been so appealing because resolution of personal injury claims in court, before juries, has remained important. Part of this appeal is rooted in the ideal of corrective justice, under which a wrongdoer is required to rectify the harm done to his or her victim.

But in my view more is at stake than this simple, sometimes primitive, and in the modern context, often impossible ideal. n20 Also at stake is the idea that, without the aid of the government and the [*179] whole apparatus of the criminal law, ordinary aggrieved citizens can put authority on trial. That idea has become part of the democratic ideal in this country, and **tort** law is a major vehicle through which that confrontation occurs, n21 or at least seems to occur. We have been willing to tolerate much that is unattractive and unfair about **tort** law in order to permit ordinary people to sue large institutions for malpractice, defectively designed products, and hazardous exposure to pollutants. There have always been alternatives, but they lie outside the **tort** system -- stronger regulation for deterrence, and no-fault systems like workers' and auto compensation schemes. But, for two reasons, until recently there did not seem to be any feasible way to extend the compensation systems beyond employment and auto injuries: it appeared necessary to cut back on **tort** liability in order to extend these approaches into other fields, and that was politically difficult. Further, because of the difficulty of defining the events that would trigger a right to compensation, there did not seem to be any technically feasible way to construct workable no-fault systems of compensation in other fields. n22

What is now beginning to happen is that **tort** law is groping toward an arrangement that circumvents these difficulties by maintaining the right to sue in **tort,** while at the same time importing some of the more attractive features of non-**tort** compensation systems into **tort** law. The importing has begun to occur and will continue, I think, both because the alternatives are attractive in their own right, and because they would remedy some of the weaknesses of **tort** law that we once were willing to tolerate, but which have become increasingly objectionable. Of course it is open to question what the future will bring, for my analysis is almost as much a prediction of what is going to happen as it is a description of what has already happened. But a great deal has already happened, and in any case the role of the legal scholar sometimes is to help us see [*180] where we are going. That is what I will try to do in the following discussion.

II. THE IMPACT OF RECENT DEVELOPMENTS ON THE TRADITIONAL CONCEPTION

The decade of the 1980s was a period of enormous ferment in **tort** law scholarship and **tort** law **reform.** Significant new proposals for reordering **tort** law emerged, n23 the liability insurance "crisis" of the middle of the decade catalyzed support for some of these proposals, and **tort reform** statutes of one sort or another were enacted in over forty states. n24 In addition, judicial action in a series of mass **tort** cases experimented with new approaches on a number of different fronts. n25

Although this scholarship and the legislative and judicial action that it helped to spawn are diverse, on discernible theme is the tendency of many of the **reforms** to depart from the traditional conception of the uniqueness of every **tort** claim. Each of a series of **reforms** would erode (or has begun to erode) this traditional conception, by rendering the particular circumstances of the plaintiff or defendant less significant to

the outcome of the claim than they would have been in the past. Interestingly, this common characteristic links together a number of otherwise quite different **reforms.** Some of these expand the scope of liability, by imposing liability measured by the degree of risk imposed on the plaintiff. n26 Others contract liability, by reversing the traditional "collateral source" [*181] rule or by placing caps on damages recoverable for pain and suffering. n27 Some facilitate the institution of **tort** claims by breaking down barriers to class actions, n28 while others make it more difficult or impossible to bring **tort** actions by authorizing waivers or disclaimers of **tort** liability. n29

A. Liability for the Tortious Creation of Risk

Perhaps the most radical of all the measures that would erode the traditional conception of a **tort** claim involves liability for the tortious creation of risk. A cluster of recent proposals and judicial decisions has begun a process of eliminating the actual harm requirement of **tort** law. Each **reform** makes the unique facts of the plaintiff's claim less important to his or her rights of recovery than they would be traditionally. In each instance, this departure is accomplished by measuring liability according to the degree of risk imposed on the plaintiff rather than by the amount of actual harm the plaintiff suffered.

The extreme form of liability for risk creation is liability imposed even before anyone suffers actual physical harm. A number of commentators and a few cases have advanced this idea. n30 They would compensate those subjected merely to the risk of harm -- for example, because they were exposed to a carcinogenic substance -- and would measure liability by multiplying the probability that the risk will materialize in harm by the expected magnitude of loss should it occur. If a plaintiff had a twenty-five percent chance of contracting cancer because of a tortious exposure to a carcinogen, she would receive twenty-five percent of the value of a claim for actually contracting the disease. A modified approach would measure liability in roughly the same manner, but would create a "fund" into which the defendant's payment would be made. Those who subsequently suffered injury would then be entitled to recover from the fund, based on the probability that their harm was caused by a party contributing to the fund. n31

[*182] A less extreme approach would impose liability for risk only after harm had already been suffered. This approach may be starting to become commonplace. Perhaps the most well-known example is market-share liability, adopted most prominently in a number of DES cases, n32 and sometimes employed in asbestos claims as well. n33 In such cases, each of many companies has marketed a generically identical or nearly identical substance; a large number of individuals are able to prove exposure to the substance and the occurrence of harm resulting from that exposure, but are unable to identify the particular defendant or defendants responsible for his or her exposure. Traditional rules governing proof of causation would leave such a plaintiff without a viable claim, because proof of any individual marketer's responsibility for the plaintiff's exposure would be impossible. Even proof that a particular company had marketed more than fifty percent of the substance in question would not satisfy the burden of proof under the traditional rule that naked statistical evidence is inadmissible. n34

Market-share liability responds to this problem of the indeterminate defendant by permitting the plaintiff to recover from each [*183] marketer of the offending substance in proportion to the market share of that defendant. There need be no showing that the plaintiff was in fact exposed to any individual defendant's product. n35 The theory behind the doctrine rests on the probability that each defendant's product injured someone, and that such injury is highly likely to have occurred in proportion to each defendant's market share. By foregoing the requirement that a plaintiff prove causation in the traditional manner, those deserving of compensation receive it, and potential defendants are threatened with liability in proportion to the degree of harm that their actions caused. In the long run, in theory, each defendant will end up paying the same sum that it would have paid had perfect evidence of causation been available. In order to achieve this result, however, each defendant is held liable in proportion to the risk that its actions created rather than for the actual harm it caused a particular plaintiff.

The practical difficulties of implementing a market-share liability scheme are great, but these difficulties are beside the point. For my purposes here, the important point is that market-share liability marks a distinct departure from the traditional conception of a **tort** claim. It simply does not matter whether a particular defendant in a market-share case actually injured the plaintiff or not, for a defendant's action and the plaintiff's harm need not match. Any defendant's wrong now consists of having risked harming the plaintiff, rather than of having actually caused the plaintiff harm. Each plaintiff is a surrogate for all the parties whom a

defendant actually injured, even though the defendant may not have injured that plaintiff. One traditionally essential set of particulars about the plaintiff's claim has therefore become completely irrelevant.

What market-share liability does in a narrow range of cases, other recent proposals and a few cases would accomplish much more broadly. These measures would extend the theory behind market-share liability to cases in which there is a form of direct evidence of the degree of risk imposed on the plaintiff by the defendant. Where market-share liability uses market share as a proxy for risk, these approaches would use epidemiological or other statistical [*184] measures of the degree of risk imposed on the plaintiff by the defendant. n36 It is important to recognize that these approaches would not merely set aside the traditional prohibition against the use of naked statistical evidence to prove causation. Rather, they would impose liability even when statistical evidence showed that it was less probable than not that the defendant's actions caused the plaintiff's harm. In such cases, the plaintiff would recover only the percentage of his or her losses equal to the percentage probability that the defendant's actions had caused the losses.

Proportional liability for creating risk thus resembles market-share liability in the way it departs from the traditional conception of a **tort** claim. n37 Because there is no requirement of a match between the defendant's actions and the plaintiff's harm, even a defendant that probably has not harmed the plaintiff may be required under this approach to compensate the plaintiff for a portion of his losses. The basis of the plaintiff's claim has been transformed into a demand for compensation that depends much less than a traditional claim on the particulars of the parties' circumstances.

One point of significance about these different moves toward imposing liability for creating risk is that they are a response to the difficulty of creating non-**tort** compensation systems in the fields where proving causation is so difficult for plaintiffs. A primary feature of any liability or compensation system is the compensable event, or trigger of the right to compensation. That event may be defined by reference to fault, cause, or loss. n38 The principal technical problem that has prevented the development of no-fault medical, products, and environmental-injury compensation schemes analogous to those governing auto and work-related injuries is the difficulty of constructing a satisfactory set of compensable events. [*185] Because it is considered highly desirable to internalize within the health-care, products, and chemical industries the cost of injuries in each field, cause-based compensation systems are preferred. Otherwise, it would be technically more sensible (though in all probability financially impossible) simply to adopt loss-based systems providing universal health and disability insurance, instead of trying to charge each activity with the cost of providing no-fault compensation for the injuries associated with the activity.

Proposals for imposing **tort** liability for the creation of risk respond to this problem n39 by circumventing it. When **tort** liability is imposed for the creation of risk, then many of the knotty problems that would be associated with the definition and proof of a compensable event under a non-**tort,** no-fault compensation system are avoided. Certainly, it would be equally possible to avoid these technical problems within a no-fault compensation system by paying claimants for exposure to risk rather than for actual harm. Circumventing the problem within the **tort** system, however, avoids a political obstacle to the construction of such a non-**tort** system. To set up such a system outside **tort** law might require abolishing or restricting **tort** liability. Setting it up within **tort** law does not abolish or restrict **tort** liability; n40 on the contrary, it expands the scope of **tort** liability and thereby avoids both the technical and the political obstacles to the construction of a full-blown compensation scheme.

The result looks something like a compensation system operating in court. A true system of liability for risk creation would dispense compensation on a much more uniform basis than would traditional **tort** liability, because it would base awards on potential loss rather than actual loss, and inevitably there would be less individualized [*186] damage computation when the plaintiffs had not yet suffered injury. That this all appears a bit jerry-rigged and therefore only vaguely resembles the non-**tort** compensation systems with which we are familiar may be part of the point: that is sometimes what happens when you take a fish out of water.

B. Damages

If liability for creating risk appears only vaguely to be moving the **tort** system toward the standardization that is so characteristic of non-**tort** systems, recent **reforms** in the law of damages move **tort** law in that direction with a vengeance. I shall discuss three such **reforms** here: statutory caps on the sums recoverable

as damages, proposals for scheduling damage recoveries, and abolition of the collateral source rule.

1. Caps on Damages for Pain and Suffering. -- Perhaps the most visible **reform** enacted in the wake of the liability insurance crisis of the mid-1980s was the statutory cap on pain and suffering damages. n41 Typically set at a figure of $ 250,000 or higher, these caps are designed at least in part to preclude the occasional enormous judgment resulting from a "runaway" jury. Statutory caps also respond in a crude way to the argument that because it would make little economic sense for potential victims to insure themselves against pain and suffering, **tort** law should not impose liability for this form of loss.

There are plausible (though in my view unconvincing) arguments for completely abolishing the right to recover pain and suffering damages. n42 Yet, if the right of some victims to recover in full for their pain and suffering is abolished, then the principle that underlies retention of the right of full recovery of such damages by other victims demands explanation. It might be argued, for example, that statutory caps simply recognize that it would be unreasonable for a jury to assess the present value of any individual's pain and suffering [*187] at a level in excess of the cap in question, because no amount of pain and suffering could rationally be valued in excess of the cap. On this view, a cap assures that what is already irrelevant is not given weight nonetheless. But given the fact that juries commonly awarded sums in excess of what later became the statutory cap in particular jurisdictions, this argument is weak. An occasional jury might be regarded as utterly irrational; but common awards above a specified level suggest (even if they do not prove) that it is not irrational so to assess the value of certain kinds of pain and suffering. The operative principle behind caps is more likely to be that, although some claimants incur pain and suffering that could legitimately support awards in excess of the cap, some such excess awards are the result of inaccurate or punitive assessments. In order to avoid the latter, the caps are formulated to preclude the former as well.

Another plausible but ultimately unconvincing explanation for caps is that the real function of pain and suffering damages is to provide the claimant with a method of financing activities that become more desirable to him or her as a result of his injury -- the projected cost of which normally is not recoverable as an out-of-pocket loss. The permanently injured athlete may wish to purchase a wide-screen television and season tickets to the local team's games, for example. Because it would be very rare that the present value of such expenses would exceed the statutory cap, the cap serves to prevent overcompensation for this category of expense. The weakness of this explanation, however, is that there is no necessary connection between the degree of a claimant's pain and suffering and the magnitude of the expense the claimant is likely to incur in order to engage i substitute activities. In addition, this theory cannot begin to explain awards made for lost enjoyment of life's activities to comatose claimants or others who could not possibly use their awards to finance the purchase of substitute enjoyments.

Whatever the motive for the enactment of statutory caps on pain and suffering damages, and regardless of whether there is a coherent principle underlying them, the effect of the caps is clear. Statutory caps compromise the traditional principle of full compensation for both economic and noneconomic loss suffered by a successful **tort** claimant. A cap renders irrelevant to the plaintiff's claim any pain and suffering that would be assessed a value in excess of the cap. The unique circumstances of those seriously injured victims whose pain and suffering would fall into this category therefore are ignored. In jurisdictions that have enacted caps, for all intents [*188] and purposes a **tort** claim is no longer an action for full recovery of damages suffered by very seriously injured or exceptionally sensitive claimants. These claimants, not tortfeasors, bear the risk that they will suffer unusually severe pain and suffering.

2. Damage Scheduling. -- A number of proposals for limiting the individualization of damage awards in other ways have recently emerged. n43 These proposals would subject awards for pain and suffering to "schedules" defining the lower and upper limits of awardable damages for particular kinds or categories of loss. The most straightforward of these proposals would categorize typical injuries according to their severity, n44 and would prescribe the range of awardable pain and suffering damages for each category. The amount awardable for a temporary minor injury such as an improperly set fracture would be lower than that awardable for a permanent major injury such as blindness or the loss of a limb. n45 A broader version of this approach would apply it not only to awards for pain and suffering, but to damages for economic loss as well. The plaintiff simply would receive a lump sum chosen from within a pre-specified range applicable to the category in which his or her injury fit.

Glen Robinson and I recently have proposed an analogous but more far-reaching scheme for

"aggregative valuation" of claims in mass **tort** actions. n46 Under our proposal, the early claimants would try or settle their claims pursuant to traditional rules governing recoverable damages. These results would then be aggregated and used as the basis for constructing damage "profiles" for each category of loss. Later claimants' recoveries would be subject to the upper and lower limits specified in the profiles. Because these profiles would be constructed from data regarding actual awards and settlements [*189] in the same action, they necessarily would take into account the discounting of these awards and settlements by juries or the parties themselves because of such nondamage-related issues as negligence and causation. Unlike more conventional damage scheduling, our approach therefore would take into account not only the severity of injury suffered, but also the strength or weakness of other elements of the claim.

There is one sense in which the effect of all damage scheduling could resemble the effect of statutory caps. If the highest category on the schedule had an upper limit, then the most severely injured or especially sensitive claimants would bear the same risk of suffering above-ceiling losses as they would when a statutory cap was in force. The highest category in a damage schedule need not have a closed end, however, although many of the proposals for scheduling seem to assume a closed end. In any event, the interesting features of damage scheduling lie in their effect throughout the schedule, not merely at the high end.

First, scheduling renders irrelevant the special severity of the losses suffered by claimants falling into any of the schedule's categories. The claimant with an extraordinarily painful broken arm finds himself undercompensated for his pain and suffering if under traditional rules he would have recovered more than the schedule allows him. n47 Indeed, if the schedule applies to both pain and suffering and economic loss, some claimants could find that they are not even fully compensated for their medical expenses and lost wages, because their losses in these categories alone exceed the upper limit allowed for a broken arm. Second, unlike the statutory cap, damage scheduling inserts a floor under which awards for a particular category of injury may not fall. Not only is the special severity of an injury or the claimant's special sensitivity irrelevant; the unusual mildness of the injury or the claimant's insensitivity to the injury also does not count. The claimants who heal far more quickly than the average person or who work in spite of their pain can pocket their awards with impunity, though presumably the awards made to such claimants will be at the low end of the scale.

In short, damage scheduling standardizes awards by treating [*190] claims that otherwise would not be alike as though they were alike. The claims that would be outliers in any given category are brought back within a normal distribution of awards. Like the outlier claims that are subject to caps, some of these would have been the result of jury error, but some simply would have warranted special treatment under the traditional conception of a **tort** claim. Plaintiffs whose claims might lie outside the high end of any particular schedule bear the risk that they will be less than "fully" compensated because their special characteristics are not taken into account. In contrast, defendants bear the risk that outliers on the low side will be more than "fully" compensated for the same reason. In both instances, however, the unique circumstances in which the plaintiff finds himself or herself -- circumstances that play such a central role in the assessment of damages under the traditional conception of a **tort** claim -- are of only limited significance in fixing the amount of the award the plaintiff receives.

3. Collateral Sources. -- The traditional "collateral source rule" governs the **tort** law treatment of collateral sources of compensation for the plaintiff's losses, such as health or disability insurance. The rule provides that evidence of past or probable future payment of such benefits to the plaintiff is inadmissible in the trial of a **tort** action. n48 The result of this rule of evidence is of course also substantive: the plaintiff is entitled to recover in full from the defendant for losses that already have been or will in the future be paid by collateral sources such as first-party or social insurance.

The standard critique of the rule has been that it is inappropriate to impose liability on a defendant for sums that the plaintiff has not in fact lost, because she is insured. The standard responses have been that these losses are a real social cost even if the plaintiff has not lost them, and that optimal deterrence therefore requires that the defendant be threatened with liability for all the costs of its activities; that the plaintiff should not be denied the benefit of his or her foresight in purchasing insurance; that because plaintiffs often do not receive compensation for some losses, duplicate recovery for other losses helps to make them whole; and that in any event double compensation of the plaintiff can be avoided by permitting the plaintiff's insurer to contract for a right of reimbursement for its payments out of any subsequent **tort** recovery that the plaintiff secures. n49 For years the traditional rule held out against its critics, [*191] but then it began to crumble. In

the 1970s several jurisdictions abolished it by statute in medical malpractice cases; n50 in the 1980s a larger number abolished it (again by statute) in all **tort** claims. n51 In these jurisdictions, past and prospective insurance benefits paid or payable to the plaintiff are offset against the plaintiff's recovery. n52

The recent reversals of the collateral source rule present a more complicated picture than either statutory caps or damage scheduling. These reversals might be interpreted to have trained more rather than less attention on the particular circumstances of the plaintiff in a **tort** claim. In my view, however, these changes represent a move in the opposite direction. For the most part, recent modifications of the collateral source rule run with rather than against the grain of the other changes I have been canvassing.

The opposite argument, that reversal of the traditional rule represents a move toward rather than away from individualization, is as follows. The collateral source rule ignores differences among plaintiffs, because in computing the plaintiff's losses it precludes consideration of any collateral compensation received by the plaintiff for those losses. By requiring that such collateral payments to the plaintiff be taken into account in computing damage awards, statutory reversals of the rule (according to this view) increase the focus of the **tort** action on the plaintiff's particular circumstances -- in this instance, the plaintiff's access to insurance against some of the very losses that he or she has sued to recover.

For two reasons, however, I think that this interpretation does not fit the facts as well as a very different interpretation. First, the notion that the collateral source rule ignores the plaintiff's access to [*192] collateral sources is overly simple. In fact, the rule is responsive to these sources even as it prohibits reference to them at trial. Health and disability insurers usually provide in their policies that they shall be subrogated to the rights of their insureds against third parties who have caused these insureds to suffer losses covered by the policy. Statutes creating social insurance often do the same. In each instance, insurers' rights of subrogation may be exercised directly against these third parties -- such as tortfeasors -- or the subrogation rights may be translated into the right to be reimbursed for the amount of these insurance benefits out of any **tort** recovery secured by the policyholder. In practice, these rights of subrogation and reimbursement are not exercised systematically, but they are exercised. n53

Consequently, the assertion that the collateral source rule ignores the differential availability of insurance benefits to plaintiffs is far from accurate. The rule actually attends to these differences by permitting the creation of a fund out of which insurers can be reimbursed for the benefits they have paid. n54 In the absence of the rule, private and social insurers' rights of subrogation and reimbursement are far less meaningful. Requiring that a plaintiff's past and future access to insurance benefits be ignored in court was traditional **tort** law's method of distinguishing those who did and did not have such benefits. Abolishing the rule means the opposite: a plaintiff's status as an insurance beneficiary is no longer protected, and those who do and do not have insurance receive the same net compensation.

The second reason I interpret recent abolitions of the collateral source rule to be departures from the traditional conception is a bit more subjective. The collateral source rule has a moralistic quality about it, in that it seeks to assure that those who have been provident enough to purchase insurance are not denied the benefit of that providence. Yet, although the citizens of this country are far from being fully insured against the economic consequences of illness and injury, first-party and social insurance are no longer the uncommon or nonexistent phenomena they were at the time the rule came into existence and received this kind of moralistic support. [*193] For example, most Americans have health insurance, n55 virtually all the employed have workers' compensation covering them against wage losses resulting from work-related accidents or disease; n56 Social Security Disability Insurance (SSDI) provides nearly the entire working population with subsistence-level insurance against wage loss resulting from permanent disability; n57 and a much smaller but still significant percentage of the working population is covered against wage loss by private disability insurance. n58

The statutory abolitions of the collateral source rule that have been adopted in many states are at least partly a reflection of this growth in the forms and scope of loss insurance coverage protecting the American public. These statutes recognize that loss insurance is so widespread that it is the rare plaintiff whose losses are not covered in some respect by one or more sources of private or social insurance. Admittedly, abolition of the collateral source rule places the precise character of the plaintiff's collateral sources of coverage at issue in each individual **tort** claim; but from a broader perspective, such abolition emphasizes what most **tort** claimants have in common -- collateral sources of insurance coverage -- rather than isolating the particular

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ARTICLE: INDIVIDUAL ACTION AND COLLECTIVE RESPONSIBILITY: THE DILEMMA OF MASS TORT REFORM.

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SUMMARY:
... DURING the past two decades we have witnessed a series of large-scale accidents almost unprecedented in their frequency and scope: the collapse of the Buffalo Creek dam; the MGM-Grand Hotel fire; the fall of the skywalk at the Hyatt Hotel in Kansas City; the asbestos "crisis"; thousands of tort claims for injuries allegedly caused by such drugs as Bendectin and DES; suits by servicemen and their families for damages resulting from diseases allegedly caused by exposure to Agent Orange in Vietnam; and other disasters so noteworthy that the names of the places they occurred have come to signify the events themselves -- Love Canal, Three Mile Island, Bhopal. ... A last reason for the limited success of the class action device is that, given the present state of some substantive rules of liability, class action treatment actually would be inappropriate in a number of mass tort cases. ... On this view, the additional cost of litigating many mass tort claims individually constitutes the premium that the legal system is willing to pay to diversify the risk of error in its use of collective responsibility rules of substantive liability. ... Therefore, upon return to a system of individual responsibility in tort, the expansion of first-party coverage that would be necessary to assure compensation for out-of-pocket losses to those who would previously have been entitled to tort recoveries would include the following: 1) higher benefits for those with limited medical or hospitalization insurance; 2) medical and hospitalization insurance for the fifteen to twenty percent of the population that is currently uninsured; 3) insurance against wage losses resulting from non-work-related injury or disease not covered (or not fully covered) by social security or existing private disability insurance; and 4) insurance against work-related wage loss substantially exceeding the workers' compensation ceiling. ...

TEXT:
[*845] DURING the past two decades we have witnessed a series of large-scale accidents almost unprecedented in their frequency and scope: the collapse of the Buffalo Creek dam; [1]

defendants are unable to meet their burden, they are held jointly and severally liable. Moreover, even if defendants are able to apportion damages the shift has collectivizing effects, because most of the cost of apportioning has been spread among defendants instead of shouldered by the plaintiff. [48]

[*863] Debate about whether the incentive effects created by joint and several liability rules are superior to approaches that decline to impose such forms of collective responsibility is unresolved. [49] Arguably, the more collective responsibility a given rule entails -- on its face or because of the collectivizing effects of liability insurance -- the less optimal is its effect on the safety incentives of those to whom it applies. Free-riding will confound these incentives, because the cost of failing to optimize safety will be collectively, rather than individually, imposed. Because most enterprises subject to joint and several liability will not receive sufficient benefit to warrant optimal investment, they will underinvest in safety if others can capture some of that benefit. [50]

To the extent that these collective responsibility rules have incentive effects that are, in fact, suboptimal, they must seek a separate, noneconomic justification. In my view, this justification must derive (when it can be given at all) from the sense in which the defendants actually have or have not acted in a collective fashion. Yet something like actual collective activity by potential defendants can be discovered more easily in some cases than in others. The problem is illustrated by the following examples.

Example One. Separate enterprises polluting a drinking water supply act independently, but are aware that the others are acting in a manner that may make subsequent tracing of individual responsibility for diseases caused by drinking the polluted water difficult. [51]

[*864] In this example the predictable effect of the actions of independent enterprises is their combination into a single, indistinguishable, injury-causing force. Here the notion that each independent act is a cause of the subsequent force is plausible, as is the associated notion that those responsible have acted collectively. [52] Consciously parallel actions that have predictably joint effects very closely resemble actions taken in concert.

When there is no such subsequent combination of independent but consciously parallel actions, however, the imposition of collective responsibility requires other support. Sometimes justifications are available. For instance, collective action may precede the creation of an injury-creating force. The evidence of collusion among asbestos manufacturers to suppress information about its dangers may support the imposition of collective responsibility in actions against them, [53] and decisions made by trade associations about product design or marketing that eventuate in injuries may support the imposition of collective responsibility on association members. [54]

The situations in which even these attenuated notions of collective action can be invoked, however, are limited. Moreover, the question whether a finding of collective causal responsibility is appropriate in such cases can be reached only when the connection between the forces set in motion by the defendants and the plaintiffs' disease or injuries is provable. Often plaintiffs can prove this connection by preestablished relationships, as in cases of signature disease, by epidemiological studies conducted specifically for the litigation at hand, [55] or by clinical judgments made by qualified experts. In such cases, what harmed the plaintiff may be clear, even **[*865]** if who caused the harm, either factually or legally, may not be clear. Substance causation is proved, but source causation is at issue.

More problematic are cases involving nonsignature diseases in which substance causation is also at issue. Lung cancer, leukemia, and birth defects have a variety of causes, some better understood than others. The parties potentially responsible for such harms, assuming that they can be identified, often have not acted collectively, even in an attenuated sense. Yet each has caused some harm to potential, indeterminate plaintiffs. As Professor Glen Robinson has argued, the logic of market share liability suggests that these potentially responsible

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parties could be held liable based on a formula reflecting the probability that each party harmed a particular plaintiff. [56] Logical though this approach might be, it is unfortunately very impractical, because nothing even remotely as precise a proxy for the probability of responsibility as market share is available in most nonsignature disease cases. [57] Science has progressed to the point where it can identify some substances and exposures that seem to increase the probability of certain diseases, but only infrequently can these probabilities be quantified with any precision. [58]

The argument for imposing collective responsibility in nonsignature disease cases, therefore, is not strong. The next examples generate a rationale supporting this approach, not to recommend it, but to demonstrate how far the law would have to extend beyond its current limits to impose collective responsibility in nonsignature disease cases.

Example Two. The probability of contracting a particular disease is substantially increased by exposure to any of several substances. Exposure to more than one of these substances arithmetically increases the probability of contracting the disease.

[*866] Here a number of obstacles to the imposition of collective responsibility on those responsible for exposure can be identified. First, the plaintiff must prove his exposure to each substance, because otherwise potentially responsible sources with no connection to the plaintiff's harm could be held liable. Second, unless the plaintiff is exposed to all or most of the substances that increase the probability of contracting the disease, the plaintiff will rarely be able to prove that exposure to these substances more probably than not accounts for the disease. Third, even if the plaintiff's burden of proof were relaxed and the award of probabilistically measured compensation were allowed, the need for more precise quantification of probabilities than is normally possible would foreclose any such award. Only if the plaintiff can overcome these very substantial obstacles can the court then face directly the question whether the sources are collectively responsible.

But on what basis can it be concluded that the sources are collectively responsible? If each source knew both that the exposures for which it is responsible increase the risk of harm to those exposed and that scientific uncertainty renders linking causal responsibility to any particular exposure impossible, then the sources stand in a similar relation to the harm as the defendants in Example One. The relation is not exactly the same, however, because in Example One each party contributed to some actual harm -- the pollution. Example One thus involves the problem of apportionment, while Example Two poses the problem of causation *vel non.* In Example Two each exposure merely increased the risk that the plaintiff would contract the disease in question, and increased it no more than if the plaintiff had been exposed only to that substance. There is neither actual collective action nor proven causal responsibility on each party's part in Example Two. In the end, therefore, the imposition of collective responsibility for nonsignature disease in cases of arithmetically increased risk must find justification, if at all, not on its own terms, but as a surrogate for individual responsibility.

Example Three. The facts are the same as Example Two, but the sources' contribution to the risk of contracting the disease is exponential, because exposure to the different substances in combination has a synergistic effect.

Under these circumstances the defendants' action is more collective, at least in the sense that the combination of their individual **[*867]** actions is more than the sum of its parts. To the extent that each knows of the potential effect of its actions and acts anyway, something resembling consciously parallel action has occurred. Whether this will warrant imposing collective responsibility, however, depends on the kind of synergy involved. In the simplest and most extreme case, exposure to one or even all but one of the substances involves no danger, because no risk exists in the absence of all the actions. If the sources have knowledge of this effect, then their actions can be called collective in a meaningful sense -- they exhibit a mutual, conscious disregard of consequence.

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In other cases, however, each substance alone is also capable of causing some harm. In such cases it is unclear whether each substance contributed to the harm. The sources responsible for each substance may have acted in a consciously parallel fashion, but these actions may not have had a combined effect. Whether the additional, exponentially increased risk produced by the combination of the substances is more probably than not responsible for the plaintiff's harm depends on the risk posed by each substance and the strength of their synergy. When the synergy is more probably than not responsible for the disease, then the sources not only have acted collectively; proof of their collective effect should satisfy conventional doctrines governing proof of causation. When this synergy is less probably than not the cause of the plaintiff's disease, however, the case looks more like Example Two and poses the same difficulties as that example. [59]

In sum, the justification for imposing collective responsibility in a large variety of nonsignature disease cases is not easy to find. Often no collective action of even the attenuated sort that might warrant a finding of collective responsibility in other mass tort situations can be identified; the use of collective responsibility as a surrogate for individual responsibility does not necessarily have the incentive effects that might otherwise justify its imposition; and in any case, the data necessary to support the probabilistic measures of causation that could serve as surrogates for causal responsibility will rarely be available. The entire effort usually requires **[*868]** more than the legal or scientific state of the art is capable of providing.

D. The Risk of Insolvency

An entirely different impetus toward collective responsibility is evident in the search for a solvent defendant. The risk that the defendant is insolvent -- typically borne by the plaintiff in an accident case -- has occasionally prompted courts even in conventional tort cases to spread joint and several liability beyond its traditional bounds, and to extend liability to certain defendants in situations that would not otherwise permit a finding of proximate cause. [60] For the most part, however, liability rules are formulated without regard for the potential insolvency of the defendant.

The rise of mass tort litigation suggests three reasons for taking this risk into consideration in formulating liability rules. [61] The first is the potential misdistribution of assets between tort claimants, other creditors, and owners of an enterprise threatened with insolvency because of its responsibility for a mass accident. [62] The longer the period between the actions that produce mass injuries and the final resolution of all claims that result, the greater the opportunity for the commercial creditors and owners of the responsible **[*869]** enterprise to divert their assets and thereby to preclude tort claimants from recovering their losses. Without liability rules that prevent this kind of diversion, the enterprise has an incentive to engage in excessively risky activity.

The second reason for taking the potential insolvency of defendants into account in formulating liability rules is a corollary of the first. Under traditional rules governing the allocation of the risk of insolvency, early tort claimants obtain compensation for their losses until the defendant's assets are depleted; consequently, later claimants may find that the defendant has become insolvent by the time their claims mature. An adjustment of rights among tort claimants would be required to prevent this inequity.

Finally, a defendant threatened with insolvency over a long period will almost inevitably operate less efficiently than it would if the threat were removed. Its access to capital markets will be hindered, worthwhile mergers may be blocked, and other features of its operation may be impeded. Earlier resolution of claims than is permitted under traditional rules of tort liability could reduce or eliminate these inefficiencies by removing the sword of Damocles hanging over the defendant's neck. [63]

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Any liability rule that attempts to adjust for the potential misdistributions, inequities, and inefficiencies produced by the risk of insolvency will inevitably have more features of collective responsibility than the traditional rule it replaces. For example, under current rules, victims whose claims are resolved late in the distribution of all the claims against a defendant bear the greatest risk that the defendant's insolvency will foreclose their recoveries. The Manville Corporation cited this potential inequity as a justification for its proposed reorganization under Chapter Eleven of the bankruptcy law. [64] Manville's reorganization proposals contemplated shifting some of this risk of insolvency to current claimants by limiting the damages they could recover for asbestos-related injury to their out-of-pocket losses. Thus more assets would be available for later claimants. [65] Professor Mark Roe has also proposed shifting **[*870]** the risk of insolvency forward in time by affording all claimants compensation analogous to an annuity whose value would vary with the future earnings of the defendant and with the frequency and severity of the claims made against it. [66]

In each of these and similar proposals, the shareholders, current commercial creditors, current tort claimants, and future tort claimants of a defendant collectively bear the risk of the defendant's insolvency. In different proposals this risk is allocated to the parties in different ways, but in each the risk of insolvency is lifted, to a great extent, from the shoulders of future tort claimants. The advantage of these collective approaches is not only greater equity among plaintiffs, [67] but greater equity between tort claimants and commercial creditors and greater efficiency in operating the potentially insolvent enterprise under uncertainty about the scope of future tort claims. [68] Such advantages are achieved, however, only at the cost of a radical revision of the traditional rights of shareholders, as well as commercial and tort creditors with claims already in existence.

In short, as the risk of insolvency increases, the traditional rights of shareholders, creditors, and current tort claimants can remain untouched only if the interests of future tort claimants are sacrificed. With liability rules reflecting individual responsibility, that sacrifice occurs, because the passage of time may leave future claimants without a fund from which to claim recovery. With more collective liability rules in place, the sacrifice can be mitigated, but only through a corresponding sacrifice of currently existing rights.

E. Collective Procedures and Equity Among Plaintiffs

The final conflict between individual and collective models of responsibility occurs because of the availability of two very different approaches to mass tort litigation. Individual procedures maximize the litigants' control over their own cases. Allowing independent litigation of a series of claims arising out of the same accident or course of conduct, however, is unnecessarily expensive. More importantly, separate litigation of hundreds or thousands of nearly **[*871]** identical cases may violate what I shall call the "equity principle" -- the notion that like cases shall be treated alike.

Although the equity principle is a central norm in our system of justice, it has rarely troubled accident law in any special way. Part of the explanation is that its force has been dissipated by the important distinction between questions of law and questions of fact. A question of fact is said to be one "about which reasonable people could disagree." This formulation is a suitable approach to the allocation of decisionmaking authority between judge and jury. Yet its implication is not only that people on the *same* jury could legitimately disagree about the answer to a question of fact, but also that *different* juries could legitimately disagree if the question were put to them. This characterization of questions of fact thus suggests that cases involving identical facts, submitted to different juries, can justifiably be decided differently. Yet this notion and the equity principle cannot live easily together, if they can live together at all.

The tension has been reconciled in several ways. The first way is simply to apply the equity principle only to questions of law. This limitation on the reach of the principle might be

supported by the argument that because the function of the jury is to determine the facts in a case, no one can know that two cases are alike in relevant respects until two juries have decided them in the same way. If two similar cases are decided differently, then they are only that: similar, but not identical, in the respects considered relevant by the two juries. In such cases the norm underlying the equity principle is not violated.

This reconcilation may seem to work when it is focused on comparisons of jury decisions in seemingly similar but unrelated cases, because its circularity makes it irrefutable in the absence of independent data about the facts of these cases. But of course this kind of reconciliation is nothing but circular. Moreover, in mass tort litigation the cases submitted to juries are more than merely "similar"; often they arise out of the same accident or identical set of facts. No one would say that the facts in two such cases are different precisely and only because two juries decided the cases differently.

A different way to reconcile the tension between the equity principle and the law's treatment of questions of fact is to ascribe the difference in the results of seemingly identical cases not to juries' **[*872]** answers to empirical questions, but to their answers to mixed questions of law and fact. Two juries may have agreed on the facts "on the ground" but characterized them differently. For example, one jury may have concluded that the defendant was negligent or its product defective, while the other reached the opposite conclusion. This reconciliation, however, is even less satisfactory than the previous one. Why should it be any more acceptable to violate the equity principle because of jury differences about mixed questions of law and fact than about pure questions of fact? Because the equity principle is undoubtedly applicable to pure questions of law, the more a factual question has in common with a question of law, the stronger the argument for deciding it in the same way in cases with common facts.

A third way to reconcile the tension is to ascribe responsibility for differences in the results of like cases to such exogenous variables as the quality of legal representation available to the parties. This is less a reconciliation of the tension than a recognition of it, because almost any variable that accounts for such differences is exogenous when two cases are alike in all relevant respects. In some sense other attempts at reconciliation may be ways of avoiding this recognition that legal outcome is so dependent on input. Although this fact of legal life is commonplace, it is easier to tolerate in dissimilar cases than in those that are very nearly identical. One can never say with certainty about a single, isolated case that a greater investment of resources or some other change in input would have altered its outcome, but once two like cases have produced different outcomes, one cannot avoid the fact that some variable or variables account for the difference. With the rise of mass accidents the problem of assuring equity among plaintiffs has become more severe, because of the greater possibility that many similarly or identically situated plaintiffs will be treated differently under circumstances that preclude rationalization of the different outcomes of their cases.

As a consequence, the advantages of streamlining the procedures used in mass tort litigation have become increasingly evident. Achieving these advantages, however, requires deciding whether to treat plaintiffs individually or to construct procedural devices that will link their fortunes in collective fashion. Three procedural devices which address this choice might play considerable roles in mass accident litigation. Each can be seen as a method of reducing **[*873]** the costs of administering such litigation as well as promoting equity among plaintiffs. First, the doctrine of collateral estoppel, or issue preclusion, may be used to make decisions in early cases binding in later cases involving the same set of facts. Second, class action suits may be employed so that a single decision on common issues binds all or most plaintiffs whose claims arise out of the same set of facts. Third, under some circumstances the doctrine of stare decisis may be invoked to assure that issues decided as a matter of law in one case are resolved the same way in later cases. Yet because these doctrines strike compromises between individual and collective forms of responsibility, none of the devices as currently formulated reduces the costs of mass tort litigation or responds to the demands of the equity principle as much as might otherwise be expected.

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1. Collateral Estoppel

Collateral estoppel operates to preclude a party from relitigating in one case an issue decided against it (or against those in "privity of interest" with it) in an earlier case. The doctrine had limited application until the decision of the Supreme Court in *Parklane Hosiery v. Shore.* [69] Before *Parklane,* the "mutuality" requirement permitted collateral estoppel at the federal level only if the party invoking the doctrine would have been estopped to raise the issue in question again had the earlier decision been decided against him rather than in his favor. [70] The major use of the device was to prevent repeat litigation of the *same issue by the same parties.* It could be used "defensively" by a defendant who had prevailed on a particular issue or issues in earlier litigation against the same party, and could be used "offensively" by a plaintiff who had prevailed in earlier litigation against the same party and who was litigating a different claim involving an issue already decided between them.

With the demise of the mutuality requirement, collateral estoppel can be used by litigants who were not parties to the earlier litigation deciding the issue in question. For this reason the doctrine **[*874]** may appear to have considerable potential for use in mass tort litigation. Once an issue is decided in the first case arising out of a mass accident, for example, it might not have to be relitigated in subsequent claims involving the same facts. Equity among plaintiffs and substantial savings in administrative costs would result.

For a variety of reasons, however, this potential is more apparent than real. First, the "defensive" form of the doctrine still is not available against a plaintiff not a party to earlier litigation, because he cannot be deprived through collateral estoppel of the right to an initial trial by jury. A defendant who has already prevailed in earlier litigation against one plaintiff still can be forced by another plaintiff to relitigate identical and previously resolved issues. The defendant may therefore be held liable to one plaintiff even after prevailing against another plaintiff injured in the same accident; earlier plaintiffs may find that although they have failed to recover, subsequent and identically situated plaintiffs have been successful. Under these circumstances equity among plaintiffs is sacrificed to assure each plaintiff the constitutional right to individual responsibility for his own suit.

Parklane's elimination of the mutuality requirement is subject to another exception that also emasculates its value for much mass disaster litigation. The Court held that "offensive" collateral estoppel could be invoked in the federal courts by a litigant not a party to the earlier case only if that litigant could not have joined the earlier case with reasonable ease. [71] In other words, potential litigants are not allowed to stand on the sidelines awaiting the outcome of crucial litigation, planning to use favorable results but to ignore unfavorable rulings in subsequent litigation. This limitation may prevent the *Parklane* rule from discouraging joinder of claims, but it certainly does not encourage any more joinder than did the previous rule. Depending on what counts as reasonable ease in joining the earlier case, the new collateral estoppel may have no greater collectivizing effect than the previous rule.

The third limitation on the new doctrine is that its availability depends on the earlier litigation being structured in anticipation of the doctrine's later use. Without such structuring, a determination that the issues in a subsequent case were actually decided in an **[*875]** earlier one may not be possible. Otherwise, the decision in the earlier case may be ambiguous on key issues. For example, in drug or toxics litigation plaintiffs will have been exposed to the hazardous substance at different times and for different lengths of time. Unless the earlier judgment specifies the time or times at which the defendant's conduct began to subject it to liability, that judgment will have no collateral effect in subsequent cases involving plaintiffs exposed at times slightly different from the earlier plaintiff. [72] Yet the plaintiffs in the earlier case normally will have very little incentive to structure a case so that its judgment may subsequently have preclusive effect.

Finally, in mass disaster litigation the choice of the case that is to have preclusive effect on

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later disputes is crucial. A number of similar cases probably will be proceeding simultaneously; if the resolutions of the issue or issues they share are inconsistent, any designation that one will have preclusive effect in subsequent litigation would ignore the others and would be utterly arbitrary. [73] This kind of arbitrariness can be avoided only by severely limiting the number of cases in which collateral estoppel is available. [74]

In sum, when collateral estoppel is applicable, it is collective in the extreme, although the collective responsibility it reflects is one-directional. The victory of an early plaintiff relieves subsequent plaintiffs of the responsibility for proving the components of their claims, without placing any additional responsibility on these subsequent plaintiffs. Nonetheless, collectivization in mass tort cases through this doctrine is likely to be unusual. Taken together, the current limitations on the use of collateral estoppel deprive the doctrine of much of its capacity for reducing administrative costs and achieving equity among plaintiffs in mass tort litigation. The plaintiffs' seventh amendment right to trial by jury and concern **[*876]** for fairness to defendants imbues the doctrine with a heavy -- and probably appropriate -- emphasis on individual responsibility.

2. Class Actions

In contrast to collateral estoppel, which depends on fortuitous structuring of preclusive litigation and the absence of inconsistent verdicts to be effective, class actions might combine claims in a way that avoids both these obstacles. [75] Class actions therefore have considerable potential to promote the equity principle and to reduce administrative costs in mass tort litigation. They might serve the equity principle by deciding common issues in one piece of litigation rather than in a series, and they might reduce the costs of litigation in the same fashion. [76] In short, class actions might be a powerful device for collectivizing responsibility among plaintiffs. [77]

Class actions nevertheless have not realized their full potential for achieving these aims. As long ago as 1966, the Federal Rules Advisory Committee Note to Rule 23, the federal rule of procedure governing class actions, stated that:

A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. [78]

[*877] Although the Advisory Committee's pessimism was not entirely warranted, it was partly correct. Interpretations of Rule 23 have placed substantial practical obstacles in the paths of plaintiffs wishing to invoke it. Decisions of the Supreme Court require plaintiffs bringing class actions to pay the costs of providing notice to class members. [79] This is a very expensive process in mass tort cases that involve hundreds or thousands of persons whose identities may be unknown. The Court also has held that each of the named plaintiffs in a class action must satisfy diversity of citizenship demands [80] and that all plaintiffs must meet the amount in controversy requirement. [81] Taken together, these requirements undoubtedly foreclose a considerable amount of federal class action litigation in mass tort cases. [82]

Two other considerations have further limited the success of the class action in collectivizing responsibility among plaintiffs. First, as heavily collective as a class action is when it is operative, the federal approach is often optional, allowing plaintiffs to combine their forces and fates if they wish, but usually permitting those who wish to go their own way not to join the class. [83] Collective **[*878]** responsibility, with both its benefits and burdens, is available through the class action, but individual responsibility is not foreclosed for the plaintiff who wishes it.

The major limitation of this approach is the obvious one. When participation in the class

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action is not mandatory for members of the class, individuals may opt out to pursue their claims separately. In this manner a class may break apart, causing excess expense and the inequitable resolution of similar cases. In cases where the prospect of liability is so great that for practical purposes the defendant has only a limited fund available to compensate all plaintiffs, class members who do not opt out may find that the fund has been exhausted before the class action is resolved because of the greater time it takes to litigate class actions. [84]

[*879] A last reason for the limited success of the class action device is that, given the present state of some substantive rules of liability, class action treatment actually would be inappropriate in a number of mass tort cases. For example, different state choice of law rules may render the legal issues applicable to the different claimants variable. Likewise, the factual circumstances under which plaintiffs have been injured or exposed to danger may vary so greatly that individual, rather than common, issues predominate. [85]

Nonetheless, courts could adopt more flexible approaches to class actions than these limitations suggest. [86] The predominance of common over individual issues -- one of the requisites to class action certification -- is a comparative question, but the key is to isolate the sets of issues to be compared. If the individual issues to be compared with common issues are defined as all those that must be decided to resolve the claims of all the victims of the accident in question, common issues may not predominate. In many mass tort cases, however, the court can identify subclasses of claimants who share enough common issues for these to predominate over the individual questions and can certify these subclasses in accordance with Rule 23's dictates. [87] For example, in a mass exposure case where victims have been exposed during different periods, the court could certify subclasses based on periods of exposure, perhaps by keying the subclasses to periods when the defendant's knowledge of the dangers in question increased. Claims regarding standards of care and causation that are chronologically distinct **[*880]** then could be segregated and considered in groups.

Decisions on these and other flexible methods of certifying class actions in mass tort cases follow no consistent pattern. The courts seem to be "ad-hocing" in ways that defy characterization. [88] In the absence of a strong trend toward the use of class actions in mass tort cases, a third device for streamlining litigation and promoting equity among plaintiffs is worth examining.

3. Stare Decisis

More than a century ago, Holmes predicted the increasing use of stare decisis in accident cases. [89] As prescient as Holmes may have been on other matters, this prediction has not stood the test of time. In traditional accident cases fact situations usually have been considered too varied to fall into the kinds of patterns Holmes envisioned. [90] Modern courts, less burdened with the nineteenth-century distrust of jury discretion, have been comfortable submitting a wide range of questions to juries. Nonetheless, stare decisis is a potentially powerful method of importing collective responsibility into mass disaster litigation. By assuring uniformity in the decision of legal issues, the doctrine can serve the equity principle; by predetermining the answers to some questions and making others predictable, it can help to reduce the cost of resolving legal disputes.

[*881] The capacity of stare decisis to achieve these ends depends on what constitutes a legal, as distinct from a factual, question. Here the problem posed by Holmes comes to the fore. A factual question has traditionally been one on which reasonable people could reasonably disagree. But this formulation does not clarify why a court, trying a series of claims arising out of the same or very similar mass accidents and seeing juries "oscillating to and fro" on the same mixed questions of law and fact, should continue to submit these questions to a series of juries.

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A typical dangerous exposure accident illustrates the dilemma faced by a court confronting the problem of inconsistent jury verdicts in identical cases. Assuming that the court takes seriously the Advisory Committee's dictum that class actions normally are not appropriate in mass accident cases and does not certify such an action, a series of identical or closely similar cases results. If the first case tried to a jury is decided for the defendant, collateral estoppel is not available in the second case, which the jury decides for the plaintiff. These inconsistent verdicts render collateral estoppel on common issues unavailable in any of the remaining cases. The court now has two options open to it. One option is to ignore the equity principle and to entertain, perhaps into the next decade, a series of separate lawsuits, with all their corresponding costs. The other option is for the court to "see the necessity of making up its mind for itself," as Holmes suggested, and to decide as a matter of law the issues that otherwise will have to be litigated repetitively as subsequent cases come to trial.

At first glance the option of finding a course of conduct to be negligent (or not negligent) as a matter of law may seem inappropriate when there are preexisting verdicts that are inconsistent with such a finding. Yet this is inconsistency no different in impact from what occurs whenever a rule of law (as opposed to a finding of fact) is overturned. Although the system might have to tolerate a few inconsistent pre-existing verdicts under this approach, it could avoid many more by assuring equity among plaintiffs in future cases. The approach would treat future plaintiffs collectively, as stare decisis always has, by removing constantly recurring issues from the realm of jury discretion.

The strongest argument against such a move applies generally not only to stare decisis, but also to limitations on the use of collateral estoppel and class actions in mass tort cases. The individual **[*882]** responsibility norm so evident in the rules governing the application of these three devices is the touchstone of the argument. The stance the law takes in this field is that equity among plaintiffs and economy in litigation are values that hold if other things are equal, but that the interest in individual control of litigation and individualized determination of legal rights may trump those values in virtually all cases.

This conclusion may simply reflect the notion that when individual claimants desire, their rights may properly depend on the effort, resources, and skill they invest in establishing or defending these rights. To force claimants to bear collective responsibility for the outcomes of their claims would transgress this principle. Plaintiffs may join voluntarily and bear collective responsibility under some circumstances, but ordinarily they will not be forced into such a position. Class actions in mass tort cases therefore are normally optional, and stare decisis is rarely used to take mixed questions of law and fact from the jury.

Although this explanation is plausible, it fails to account fully for the law's willingness to employ doctrines that, through the creation of substantive collective responsibility, join together the fates of defendants in these same cases. If control over one's own fate is so highly valued, why is it afforded more easily to plaintiffs than to defendants? This difference in treatment calls for a better explanation.

A second way to account for the curious mixture of individual and collective responsibility in the procedural doctrines governing mass torts is that the law in this field attempts to hedge against its own imperfections. Uncertainty about the accuracy and justifiability of the results produced by substantive collective responsibility doctrines may demand significant limits on the reach of collective responsibility procedures. The hedge is possible because the current formulations of the procedural rules allow outcomes to vary from case to case, even when collective responsibility rules on matters of substance are employed. The possibility of variation is a method of diversifying the risk of legal error by distributing it among a series of individual cases. Thus, the more certainty the system has that the results produced by a substantive collective responsibility rule are justified, the greater should be its willingness to adopt collective procedures. Conversely, the less certain the justification for collective responsibility, the more caution that **[*883]** must be exercised to limit the collective effects of the procedures used. On this view, the additional cost of litigating many mass tort claims

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individually constitutes the premium that the legal system is willing to pay to diversify the risk of error in its use of collective responsibility rules of substantive liability.

In sum, having adopted rules of collective responsibility that allow tort claims that would otherwise fail or could never even be brought, the law has severely limited its own ability to manage this litigation. Paradoxically, mass tort law has adopted procedural rules that fail to solve problems of equity among plaintiffs and multiply the cost of litigation in order to guard against weaknesses in the substantive rules of collective responsibility that bring these two problems into being. This may be the most telling of all the criticisms that can be leveled at the developing substantive rules.

III. CONFRONTING THE DILEMMA

The problems posed by mass tort litigation are diverse, and, apart from the size of the plaintiff class, no single set of characteristics defines the mass tort. Running through each of the principal problems that tend to be raised by mass tort litigation, however, is the tension between the traditional notion of individual responsibility and the expanded notion of collective responsibility. Only by confronting the dilemma created by this tension can the tort system clarify what is at stake in determining the shape of mass tort law.

Several generic responses to the dilemma are possible. One is to hold fast to the traditional notion of individual responsibility, by refusing to establish special tort, insolvency, and procedural rules governing mass torts. Another is to take the path on which the law seems to have embarked, by expanding existing rules as they apply to mass torts and thereby importing notions of collective responsibility into the system. A critical issue posed by the current move toward more collective responsibility, however, is what is gained by doing so.

Certainly the deterrent effects of imposing liability on a collective basis are speculative at best. [91] Perhaps the move can be explained **[*884]** instead as an effort to retain the sense of popular control over large enterprises and institutions that in other respects are thought to control the populace. Cost internalization may thus have moral, or at least symbolic, as well as economic connotations. Yet as the analysis in Part II suggested, collective responsibility doctrines tend to promote at best a very attenuated form of cost internalization. In almost every case the only obvious gain from moving toward collective responsibility is that the move facilitates the compensation of victims. This is the principal effect of more collective rules governing the standard of liability, proof of causation, and insolvency, and it must also be counted as one of the major aims of the procedural devices that create collective responsibility among plaintiffs.

The costs of extending compensation to victims through rules of collective responsibility in this manner, however, are high. Litigation in cases involving scientific uncertainty, for example, can be complex and lengthy. Insolvency proceedings in which the interests of early and late tort claimants, creditors, and shareholders conflict may require the intricate negotiation and reorganization of rights. In cases where the gains in deterrence and equity are substantial, these costs may be worth paying, but when the magnitude or the very existence of these gains is questionable, [92] as it often is in cases where collective responsibility is invoked, the only remaining gain -- the extension of compensation to victims -- may be obtainable in other settings at a lesser cost.

Two other approaches can make use of nonadjudicatory systems to provide compensation to victims. The first is to create special administrative compensation funds to deal with the damages caused by mass torts. Such an approach would attempt to circumvent many of the problems that arise when collective responsibility is invoked in a system designed for the application of individual responsibility. A second and preferable approach is to return to the traditional system of individual responsibility in tort, but to link that return to tradition with expanded forms of first-party compensation **[*885]** for accident victims. This approach not only would recognize the problems posed by an increased emphasis on collective

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the MGM-Grand Hotel fire; [2] the fall of the skywalk at the Hyatt Hotel in Kansas City; [3] the asbestos "crisis"; [4] thousands of tort claims for injuries allegedly caused by such drugs as Bendectin [5] and DES; [6] suits by servicemen and their families for damages resulting from diseases allegedly caused by exposure to Agent Orange in Vietnam; [7] and other disasters so noteworthy that the names of the places they occurred have come to signify the events themselves -- Love Canal, Three Mile Island, Bhopal. Injuries on this scale occurred in the past, although less often and usually with less impact; [8] however, only recently has the legal system become preoccupied **[*846]** with mass injuries and the problems posed by the litigation they engender.

Notwithstanding the burgeoning legal literature on the subject, [9] basic issues remain unresolved. Are "mass" torts qualitatively different from "traditional" accidents, or are they only quantitatively different? What are the legal characteristics of mass torts? Are the legal issues posed by mass torts independent of each other or are they connected in a way that clarifies the concept of a mass tort itself? Without answers to these questions, the search for solutions to the perceived problems of mass tort litigation is doomed to be without direction.

I maintain that the "mass tort" is not a single, unitary phenomenon, but a name given to a series of very different kinds of accidents posing a cluster of different legal problems. The only obvious link between all these accidents is the large number of people injured in each. As a consequence, proposals to solve "the" mass tort problem ultimately target only individual features of the cluster of issues that characterize mass tort litigation, and leave the other features untouched. Much of the tort reform legislation enacted state-by-state during the past two years reflects this ad hoc approach. [10]

Despite the disparate nature of the legal problems that characterize mass torts, many of the possible solutions to these problems must wrestle with similar concerns. Each must resolve a dilemma about the nature of legal responsibility that is presently unrecognized and therefore unsettled: the choice between individual and **[*847]** collective forms of responsibility. Increasingly, traditional conceptions of individual action and individual responsibility are being called into question by conceptions that overlook differences between individual parties and thereby promote more collective forms of responsibility.

In my view, the move toward collective responsibility in tort law is not, on the whole, a sensible development. The move is creating serious problems for the legal system, and it is confounding the nation's liability insurance markets. [11] Of course, the move toward collective responsibility is not characteristic of only mass torts; it is at the core of much tort liability, though usually it is well-hidden in conventional tort law. Yet because mass torts pose the dilemma with special severity, they are an especially suitable vehicle for examining it.

In this Article I shall try to clarify the dilemma and the set of choices it generates for the reform of mass tort law. Part I sets out the features of the responsibility dilemma that characterize the search for solutions to mass tort problems. Part II examines the most salient characteristics of the phenomena that tend to be termed "mass torts." This Part explores the ways in which the responsibility dilemma analyzed in Part I figures in the different problems that trouble mass tort litigation and criticizes several of the developments in this field. Finally, Part III takes up the different non-tort solutions that are available for solving these problems and demonstrates the implications of my analysis for reform of mass tort law.

I. TWO MODELS OF RESPONSIBILITY

Almost all forms of civil liability ultimately are individual. Liability is either imposed on a defendant, who pays the plaintiff to satisfy the judgment, or liability is not imposed and the plaintiff or some collateral source absorbs the loss. Behind this focus on the pocket out of which payment is made, however, lies a world in which different elements of the tort and compensation systems combine to produce more complicated forms of responsibility. Two models of responsibility facilitate an understanding of this less visible **[*848]** world; they

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responsibility in tort law, but also would avoid the difficulties encountered in constructing administrative compensation funds. Furthermore, it would acknowledge that the appeal of these alternatives is that they facilitate the compensation of victims. Without an alternative compensation source, the lure of collective responsibility will remain strong, and the effort to retain individual responsibility in tort will be continually undermined.

A. Administrative Compensation Funds

A system of administrative compensation funds that displace or supplement the tort system is the first possible alternative for dealing with the consequences of mass accidents. Such funds can make increased use of the rules of collective responsibility but can apply them through a method and in a forum constructed specifically for the invocation of collective responsibility. At both the federal and state levels, funds that are in some ways analogous to those proposed for application to mass accidents have been established for limited purposes. The federal "Superfund" for cleaning up hazardous waste storage sites is perhaps the most notable, [93] but others, such as the Black Lung Disease Fund, also are in place, [94] and a number have been proposed. [95] Even so common a program as the workers' compensation system can be considered a distant relative. Unfortunately, the obstacles to the effective implementation of the approach are so serious that it cannot now be considered a feasible way to solve the dilemma posed by large-scale accidents.

On paper the operation of a fund would be appealingly simple. Assessments would be made against enterprises creating the risk of **[*886]** the kinds of injuries to be compensable by the fund. These assessments would be pooled, and the fund thereby created would finance the payment of compensation. The injuries to be made compensable by the fund would be defined, and a right to recover from the fund in an administrative proceeding -- a right that could be equally or more collective than the tort rights it replaces -- would be created. Among other factors, [96] the measure of compensation would take account of the sums available to the fund.

In theory a fund set up in this way could resolve or circumvent many of the problems that are characteristic of mass tort litigation. Because claims would no longer involve individual defendants with assets at stake, many of the traditional rules and procedures developed by tort law to assure that no liability is imposed without some individual responsibility would be irrelevant. In addition, the new rules of collective responsibility could be applied without the procedural and substantive safeguards of individual rights that now raise the cost of resolving mass accident disputes through fullscale adjudication. [97]

As appealing as this prospect is, however, none of the available methods of structuring funds would solve enough of the problems of principle and practice that funds would pose to make them attractive as a general alternative. Rather, only in the unusual case would the construction of a fund be sensible. To see why this would be so, an examination of the three major issues a fund must confront in striking a balance between individual and collective responsibility is useful. These issues involve: 1) the events to be compensable by a fund; 2) the method of financing the fund; and 3) the measure of compensation awarded to eligible victims.

1. The Compensable Event

The events triggering a claimant's right to receive compensation from a fund might be defined to circumvent many of the problems posed by tort litigation against individual defendants. For example, the compensable event could be defined by reference to a designated outcome (e.g., contracting a particular disease or suffering a particular kind of injury), as well as, perhaps, by reference to **[*887]** other prerequisites (e.g., exposure to a substance capable of causing the particular disease or injury). A party causally responsible for the claimant's injuries would have neither the incentive nor the opportunity to litigate causation issues, because no enterprise would be held responsible by the fund for any

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particular injury. Consequently, few of the incentives that increase the cost of conventional mass tort litigation would operate in a proceeding against the fund.

Moreover, this approach to the definition of the compensable event would almost automatically eliminate the procedural problems that typically afflict mass accident litigation. Nothing would encourage a fund to treat the central factual issues in a series of identical claims as questions of fact that could be decided differently in different instances. Rather, like cases could easily be treated alike by a fund, which would have institutional memory and rules to assure that those injured under circumstances considered identical receive treatment that does not violate the equity principle. The enormous difficulties of using collateral estoppel, class actions, and stare decisis in tort litigation to reduce the costs of resolving claims and to promote equity among plaintiffs could be transcended easily. [98]

Another advantage of this approach to defining the compensable event would be its capacity to avoid some of the problems of proving causation that plague mass tort litigation. No longer would proof of source causation be required, because a fund would eliminate the plaintiff's obligation to identify the particular party or enterprise responsible for his injury. Exposure and substance causation still would require proof, but the former is often not a problem, and the latter could be handled in new ways that would take advantage of the fund's capacities. For example, factual presumptions based on existing scientific data or developed by the fund's scientific staff could aid the claimant's efforts. [99] In cases where the **[*888]** claimant suffered a signature disease, the claimant might be entitled to recovery unless a special reason to believe the disease had a different cause in his case could be demonstrated.

It would be a mistake, however, to suppose that this technique would solve all the problems of proving causation encountered in conventional mass tort litigation. A large percentage of potential claims -- perhaps even the vast majority -- would involve sufficient causal uncertainty that indulging in presumptions would be factually unwarranted. Certainly this would be true whenever the probability that the claimant's injury or disease was caused by an event covered by the fund was substantially less than fifty percent. Any presumption of causation in such cases would produce more inaccuracy than would the wholesale denial of claims, even if some of these in fact would merit compensation. [100] Eventually the fund might accumulate enough data to support a large body of presumptions, but the length of time necessary to develop such a data base cannot be estimated with certainty. In any case, that data might well demonstrate that most of the diseases resulting from mass torts have other causes, in which case few presumptions would be warranted.

Two possible arrangements could deal with the prospect of uncertain substance causation. The fund could offer compensation only for a set of designated compensable events (those for which factual presumptions of substance and exposure causation are warranted) and leave persons suffering other diseases to their traditional causes of action in tort, to the extent that they could meet their burdens of proof. [101] The defect of this approach is that it might severely limit the jurisdiction of a fund, because the number of situations in which causal presumptions would be factually warranted might be comparatively small.

An alternative arrangement could permit a fund to offer compensation to all those with diseases allegedly caused by events compensable by the fund, but to offer it on an ex post probabilistic basis. No presumptions would be required, although they might be used. Claimants would receive only that percentage of their losses **[*889]** equal to the probability (as understood at the time of the claim) that the loss was caused by an event compensable by the fund -- that is, by the activities of one or more contributors to the fund. Thus, if the probability that the claimant's disease was caused by a compensable event were thirty percent, then the claimant would receive thirty percent of his compensable losses. To take account of potential changes in scientific knowledge of causation, claimants might be offered the choice between the lump-sum payment of their losses, discounted by causal probability and paid on a present-value basis, and the periodic payment of their losses, making them eligible for increases, but vulnerable to decreases, in the payments based on annually

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recalculated probabilities. [102]

For several reasons, however, the problems of administering this second approach could prove to be enormous. First, sufficiently precise data to warrant estimating causal probabilities might not be available in many of the cases that would otherwise be subject to a fund's jurisdiction. Second, because the compensation paid would be partial, the inclination of decisionmakers to tailor their findings to a claimant's needs might be strong, causing the cost of operating the fund to rise. Finally, a variable periodic payment approach could be vulnerable to continual disputes about award levels, also driving up the costs of a fund's operation. In short, given the current state of scientific knowledge, precise enough definitions of compensable events to warrant the widespread use of funds probably are not feasible.

2. Financing

The method of calculating the assessments that finance the fund would be integral to achieving any incentive effects that the fund could create. The more crudely calculated the assessments, the more collective the system of responsibility that the fund would implement. The problems posed in developing financing for a fund involve the structuring of assessments, the risk of contributor insolvency, and the scope of retroactive liability.

Assessment structure. The fund could be financed in one of two **[*890]** major ways. It could assess what might be called *quantity-based* charges against the enterprises responsible for contributing to the fund. These charges would affect production or activity levels but would have little impact on safety levels. For instance, charges against the manufacturers of chemical feedstocks [103] based on volume and toxicity would influence the cost of the feedstocks. This would affect the amount of each that is produced and, in turn, the amounts of hazardous substances produced. However, such quantity-based assessments could have no effect on the level of safety at which the activities using these substances were conducted, because the charges levied would not vary with these levels of safety. [104]

In contrast, *quality-based* assessments could affect safety levels. Charges against the operators of hazardous waste storage dumps, for example, might distinguish between different methods of containment, the distance of the dump from population centers, and other safety-related factors. Quality-based standards could be supplemented by experience-rating that would vary assessments in accordance with the number of injuries clearly caused by an enterprise's activities. The choice between the two assessment systems would be problematic. Quantity-based assessments usually would be simpler to administer than quality-based standards, even without supplementing the latter with experience-rating, but quantity-based standards probably would have inferior incentive effects, except when safety levels varied only within a narrow range and when the research incentives created by quality-based assessments were weak. [105]

Given current levels of knowledge about causation, however, optimism that a fund's assessment structure could permit fine-tuning of the safety incentives of the enterprises subject to the assessments would be unwarranted. [106] Indeed, in light of the unpredict-ability of many mass accidents, some parties causing them probably would not have been assessed charges at all, because the **[*891]** administrators of the fund had not anticipated these parties' potential responsibility for future injuries. The less predictable an accident, the more difficult it is to deter with any system of responsibility, whether applied by a fund or by the tort system.

Even in many cases of total unpredictability, however, and certainly in those where some crude charges had been assessed, the safety incentives created by a fund probably would be no more crude and diffused than those produced by the current tort-law mixture of individual and collective responsibility, but they probably would not produce deterrent effects more precise than those generated by tort law either. I reach this conclusion because the administrators of a fund would know and make use of roughly the same information that

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liability insurers now know about their policyholders. The dilution of incentives resulting from the collective, categorical character of the fund's assessment structure would not necessarily differ from that now produced by the effects of joint and several liability, market share liability, and the other collective causation doctrines that appear to be growing in influence. Therefore, to the extent that the present liability and self-insurance of responsible enterprises has been priced or calculated to account for these collective responsibility doctrines, the shift to funds financed by these enterprises would neither sacrifice the incentive-creating capacity of the mass tort system nor increase it substantially.

The Risk of Insolvency. Because of the fund's method of financing, it would allocate the risk of insolvency quite differently from conventional tort and bankruptcy law. A fund would remain liable to claimants even after parties that caused their injuries might become insolvent; consequently, the risk of misdistribution of a responsible party's assets among tort claimants would be eliminated. In effect, contributors to the fund would share the risk that one or more of their number might become insolvent after the adoption of the fund.

On the surface this form of risk-sharing would appear to result in more equitable relations among firms who would previously have been codefendants in tort claims brought by the victims now compensated by the fund. Under the developing tort rules governing the apportionment of damages among codefendants, each defendant is held jointly and severally liable for indivisible injuries caused either jointly or cumulatively by the defendants. For example, the coincidence of being a codepositor in a waste disposal site **[*892]** can produce an obligation not only for one's own actions but for those of codepositors as well, should such codepositors be insolvent at the time of the judgment. [107] The formal risk of such fortuitous liability would be greatly reduced by a fund, which forces all solvent contributors to share the risk of their cocontributors' insolvency.

The scope of the risk-sharing produced by a fund would depend on the nature of the fund's assessments. The longer the latency period between the risk-creating act and the occurrence of a compensable event, the greater difficulty the fund would experience in setting the assessment rates. If in the long run the rates charged a group of enterprises were excessive, the group would bear less of the risk of the insolvency of its members than if the rates charged were too low. Assessments could be deliberately set higher than the predicted exposure requires, as a kind of premium paid by each enterprise for protection against the risk of asset diversion by the shareholders and creditors of other enterprises. If an enterprise became insolvent, a cushion against this risk of insolvency would have accumulated, and assesments might not have to be increased to account for the loss of a contributor. In the absence of insolvencies, any excess could inure to the benefit of contributors through reduced (or less steeply increased) rates.

The consequence of this arrangement is that no single potentially responsible party would be forced to bear the cost of liability caused by multiple insolvent or unavailable responsible parties. However, because individual defendants frequently would be insured against such liability anyway, and because the cases which consist of only one rather than a group of solvent defendants would probably be uncommon, this improvement in equity among defendants often would be more theoretical than real.

A fund's method of financing also might have some impact on the uncertainty costs presently produced by the risk of a responsible enterprise's insolvency. To the extent that a fund could impose retrospective assessments on a contributing enterprise to account for any emerging evidence of the injuries caused by the enterprise's past activities, analogous uncertainty costs would remain under the fund. Although placing limits on retrospective assessment would reduce this uncertainty, the limits would have at least one undesirable **[*893]** effect. Limiting retrospective assessment would create a moral hazard, because an enterprise enjoying such protection would in effect be provided with unlimited insurance against liability. Other enterprises contributing to the fund would bear collective responsibility for the consequences of this hazard. Because both the emerging rules governing collective causation

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and the protections against liability provided by bankruptcy law create analogous moral hazards, however, limiting retrospective assessment might not be so objectionable in fact as it seems to be in theory. Nonetheless, if limiting retrospective assessment by a fund were considered unacceptable, then the uncertainty costs produced by unlimited liability would remain even under the fund.

The Problem of Retroactive Liability. The last critical question bearing on the financing of the fund would be whether those who were exposed, before the establishment of the fund, to a hazardous substance, drug, or other activity subject to the fund's jurisdiction, but who manifested the relevant injury or disease after the establishment, would be entitled to compensation. There are a number of alternatives. First, the parties could be denied compensation from the fund and allowed a traditional tort cause of action. In light of the long-latency period of many of the diseases that would be covered by some sort of administrative fund, however, this approach would preserve for thirty or more years most of the problems the fund had been created to solve.

Second, these long-latency claimants could be allowed to recover from the fund, but their share of compensation could be paid out of general revenues rather than through assessments against contributing enterprises. The feasibility of this approach, of course, might by influenced by the limits of the federal budget.

Third, assessments financing the fund could be set to anticipate not only the claims arising out of future activities of enterprises financing the fund, but also to reflect the past activities of both these firms and other firms no longer in existence. This alternative would achieve the same aims as does the imposition of strict liability in tort for the failure to warn of or remedy unknowable dangers, but here the "retroactive" obligation would be imposed broadly on all fund contributors rather than on particular defendants. [108]

[*894] This last approach also would pose practical problems. Not only would responsible enterprises be relieved of tort liability for their past activities, but their liability insurers also would be relieved of contractual responsibility for defending claims and paying judgments that could no longer be entered against their policyholders. In a sense these insurers would be unjustly enriched unless they were required to contribute to the portion of the fund used to compensate the victims of activities occurring before the establishment of the fund. Yet no fair formula for such a contribution could be fashioned without predicting the exposure these insurers would have faced had the fund not been established, and such a prediction would be quite speculative. Enterprises that had paid large insurance premiums could nonetheless justifiably demand some such contribution from their insurers before they would support the establishment of a fund. [109]

3. The Measure of Compensation

In a very real sense the measure of compensation adopted by a fund would be the key to its feasibility, because the cost of compensating victims through a fund inevitably would be a prime issue in evaluating the proposals for establishing it. [110] The tension between the two models of responsibility is therefore reflected in the issues surrounding the choice of a measure of compensation. The focal point of this tension is the fact that a principle of full compensation, including payment for pain and suffering associated with personal injury, obtains in tort law. A fund almost certainly **[*895]** would have to deny compensation for such intangible losses, because the limitation of recovery to more objectively provable out-of-pocket losses would be necessary both to avoid disputes not easily resolved without fact-finding proceedings and to limit the total cost of providing compensation. [111]

Although the arguments for awarding pain and suffering damages in tort are plausible, the same arguments are problematic when made in favor of awarding such damages in the administrative context. The cost of litigating many tort claims would be prohibitive in the absence of such awards, because they provide a fund out of which to pay plaintiffs' attorneys

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without reducing net awards for out-of-pocket losses. But the attorney's role in obtaining compensation from a fund would be much reduced. Additionally, a more subtle tension between the compensatory justification for awarding only out-of-pocket damages when a fund is in place and the deterrence justification for awarding pain and suffering damages in all settings renders the measure of compensation problem more complex. The availability of pain and suffering damages from a fund might complicate (or bankrupt) it to the point of failure; but pain and suffering is a social cost that the contributors to a fund should internalize if a fund purports to be a rough substitute for the tort system.

Proponents of a fund can provide two responses to such a costinternalization criticism. The first has already been rehearsed: the deterrent effect of collective responsibility for mass torts is so diffuse and ineffective that the shift to a fund would involve little sacrifice in deterrence. A second and quite different response would be to create fund substitutes for the deterrence achieved through the threat of tort liability for pain and suffering or punitive damages. A more logical and controllable alternative to awards for pain and suffering might be to award scheduled death benefits keyed to life expectancy at the age of death and scheduled lumpsum **[*896]** benefits for other designated disabilities resulting from events compensable by the fund (sterility, blindness, loss of a limb, and so forth). The death benefit probably would cover a large percentage of the events compensable by the fund because, unfortunately, one common event that would be compensable -- cancer -- very frequently causes death within a few years of its detection or is cured.

Another rough substitute for pain and suffering could be fashioned by granting the compensation fund itself a new form of quasi-subrogation action. For example, this cause of action could be allowed against a particular enterprise only under circumstances where an award of punitive damages would have been available had individual tort claims for compensatory damages not been foreclosed by the adoption of the fund. Because the fund would be entitled to bring only one such action, the threat of overdeterrence through multiple awards of punitive damages that now troubles the tort system would be eliminated. [112] The single action for punitive damages would allow the jury to consider the mass character of the injuries caused by the defendant, a process difficult to arrange in a suit by one or a few of the victims of a mass accident. [113] The fact that any award would be paid to the fund and would help to compensate large numbers of victims, rather than be a windfall to a single plaintiff, would also be relevant. All this, however, would be a rather cumbersome and indirect way to retain the deterrent effect of tort liability for pain and suffering damages. [114]

[*897] The last problem a fund must face in setting its measure of compensation also would put two goals in conflict. The problem is whether the fund or the claimant's collateral sources (for example, health or disability insurers) should bear the primary responsibility for the losses compensable by the fund. Channelling primary responsibility through the fund might have the activity and production level effects on parties contributing to the fund discussed previously. [115] In contrast, making a claimant's collateral sources primary and denying these sources any rights of subrogation against the fund would protect the financial integrity of the fund. This approach would reduce the activity and production level effects a fund might otherwise generate, because the premiums that victims would pay for health and disability insurance would hide the full cost of injuries associated with the activities of the contributing parties. Yet the possibility of achieving some of these incentive effects would be the strongest argument for using a fund, rather than private first-party coverage or social insurance alone, to compensate the victims of mass torts. These latter forms of compensation have little potential for influencing the behavior of those potentially responsible for causing mass accidents. From this point of view, therefore, the conflict between the cost-limitation and incentive-creation goals should be resolved in favor of the fund as the primary source and a claimant's collateral insurance as only a secondary source of compensation.

[*898] Setting coverage priorities this way, however, would risk forcing the nation's chemical and pharmaceutical companies to finance an under-the-table system of national health and disability insurance. If the fund's compensation criteria were unduly generous and

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undiscriminating, much of the cost of medical expenses and lost wages resulting from a variety of causes could be shifted to the enterprises contributing to the fund. Some observers have charged that this has been the experience in the black-lung compensation program, albeit on a smaller scale. [116] To avoid this result, the compensable event and measure of compensation would have to be defined so that only the cost of injuries actually caused by any of the parties contributing to the fund would be paid by the fund. Yet as my discussion of the compensable event indicated, optimism that definitions precise enough to avoid overinclusiveness but broad enough to warrant adoption of a system of funds could, in fact, be fashioned would be unrealistic.

My reluctant but inevitable conclusion, then, is that a system of administrative compensation funds would not be a satisfactory approach to the mass tort problem. The costs of using funds would probably be too great, the obstacles to their effective operation too numerous, and the dangers they would pose too serious to justify their adoption on any but a very limited and experimental basis. At every turn -- in defining the compensable event, in financing the fund, and in setting the measure of compensation -- the idea of a fund is an attractive but impractical alternative to the collective responsibility that is increasingly evident in tort law.

B. Expanded First-Party Insurance

Almost by a process of elimination, the approach to the compensation of mass tort victims that has the most appeal is a return to a tort system based on a model of individual responsibility, and a reduction of the appeal of more collective concepts of responsibility by expanding existing first-party sources of insurance available to victims. To a large extent this approach would recognize that any deterrence worth achieving through the threat of tort liability **[*899]** could be achieved by the traditional system of individual responsibility, that the obstacles to the successful operation of administrative compensation funds would be prodigious, and that the compensation afforded by the move toward collective responsibility in tort or administrative systems could be more effectively provided through first-party insurance.

Importantly, this approach would rely on existing forms of insurance; it would not be a special purpose no-fault system and would not require the creation of new forms of coverage available only to the victims of mass torts. This expanded system could be operated either by private entities or by government. In theory either option is feasible, because private insurers now market health and disability insurance, and the federal and state governments now provide health and disability protection through a variety of programs.

Such coverage now parallels the compensation available in tort. For instance, the desire to provide compensation for two major components of out-of-pocket loss -- medical expenses and lost wages -- currently contributes to the lure of collective responsibility in tort law. Even if concern for the intangible losses of survivors resulting from wrongful death is included as a component of loss, each of the components also is currently insured or insurable through first-party medical and hospitalization coverage, workers' compensation, life insurance, and first-party disability insurance. A patchwork array of social insurance also provides coverage that sometimes substitutes for or supplements this private insurance. Thus, over eighty percent of the population is protected by medical or hospitalization insurance of some sort, [117] the average family owns over $ 58,000 worth of life insurance, [118] most of the working population is protected by workers' compensation against wage loss (as well as medical expenses) resulting from work-related injuries, [119] and this same group also is protected through the Social **[*900]** Security Disability Insurance system (SSDI), up to a minimal ceiling, against wage loss resulting from long-term, total disability. [120] A much smaller percentage of the labor force is protected against wage loss resulting from "non-occupational" injury or disease, especially if the disability in question is partial or short-term. [121]

Therefore, upon return to a system of individual responsibility in tort, the expansion of first-

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party coverage that would be necessary to assure compensation for out-of-pocket losses to those who would previously have been entitled to tort recoveries would include the following: 1) higher benefits for those with limited medical or hospitalization insurance; 2) medical and hospitalization insurance for the fifteen to twenty percent of the population that is currently uninsured; 3) insurance against wage losses resulting from non-work-related injury or disease not covered (or not fully covered) by social security or existing private disability insurance; and 4) insurance against work-related wage loss substantially exceeding the workers' compensation ceiling.

The cost of all this additional coverage would be immense -- tens of billions of dollars at the least. Little of this sum would represent "new" costs, however, because the expansion of coverage would protect against losses that currently occur but are borne by the individual victim. Apart from the overhead involved in extending the coverage, and the increase in claims that inevitably results when more losses are insured, the expansion of first-party coverage would merely spread losses rather than create them. Nonetheless, any attempt to institute an expanded system of first-party insurance would face substantial obstacles and hard choices.

For example, the tort system now provides mandatory protection for victims: with a few exceptions, a potential victim cannot opt to waive future tort rights in return for a present benefit. Consequently, to provide victims with the equivalent of what they would lose upon return to an individual responsibility system in tort, an expanded first-party system would have to be mandatory. Yet how this mandate could be effectively enforced is not at all clear. One **[*901]** approach would be to require employers to administer a mandatory system. Another would be to require proof of required minimum coverages upon renewal of driver's licenses. An individualized enforcement system -- on the model of draft registration -- could be used for remaining individuals. A third approach would be to encourage insurers to offer in one policy a set of coverages satisfying the purchase requirement and to issue a certificate resembling a W-2 form to be filed with tax returns.

While a number of such enforcement devices might be feasible, the difficulties of trying to assure that over two hundred million people have purchased (or had purchased for them) two or three different kinds of insurance should not be underestimated. For this reason, a mandatory system probably would have to consist of governmentally provided social insurance, rather than privately-marketed insurance protection. [122] Under such an approach, the desired benefit levels would simply be provided to eligible victims. Payment could be financed either out of general revenues or through contributions on the model of the social security system. When social insurance is mandatory, however, it tends to provide very limited benefit levels; therefore, the problem of the undercompensated victim probably would not be eliminated by the introduction of increased social insurance.

An expanded system of private first-party insurance, on the other hand, need not be automatically mandatory. Torts (including mass torts) cause only a small portion of the death and disability in this country; [123] to require the purchase of first-party insurance against all death, disability, and health care costs solely to compensate the small portion of these misfortunes that is tortiously caused would be massive overkill. Purchase of first-party coverage might therefore remain entirely voluntary (except for a few existing exceptions such as no-fault automobile insurance), or companies writing medical, hospitalization, or disability coverage might be required to offer customers the option to purchase a package of legislatively prescribed coverage. Because purchasing such coverage **[*902]** would be optional, it would not have to be limited to subsistence-level benefits.

Reducing the scope of tort liability by deemphasizing collective responsibility, however, probably would not noticeably increase incentives to purchase first-party coverage, even if insurance companies were strongly encouraged to offer it. If this were indeed the case, then the four gaps in first-party health and disability protection available to compensate accident victims identified earlier would remain. Any of these gaps would be significant, but one gap in

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first-party coverage would be the most prominent -- the absence of widespread, substantial insurance against non-occupationally caused disability. This wage-loss component would thus be the missing link in any effort to use first-party insurance as a substitute for compensation in tort. The nature of the private market in disability insurance is therefore worth examining, because the first-party approach to tort reform must pin its hopes on this market.

An initial explanation for the sparseness of private disability insurance may be informational. Although at any given age the average adult is as likely to suffer a serious disability as to die, he spends about ten times as much each year for life than for disability insurance. Perhaps the prospect of death appears so much more salient and dreadful than the prospect of disability that the insurance markets have reacted accordingly. In any case, a concerted campaign to educate the population about the comparative probabilities of death and disability might create greater demand for disability insurance.

Two other market failures, however, are much more likely to be at the heart of the problem. [124] The first is the problem of adverse selection. All voluntary insurance is afflicted to some extent by the disproportionate tendency of those who are more likely to suffer losses to apply for coverage. Unless the insurer can screen applicants effectively and reject or risk-classify those with above-average expected losses, its risk-pooling efforts will be undermined, and the price of coverage will rise. Yet because information about the probability of suffering an insured loss is more probably in the insured's exclusive possession in the disability insurance context than in others, disability insurers may find it difficult to risk-classify **[*903]** with accuracy. In addition, the fact that private disability insurance has never been widespread has prevented the accumulation of data that might render the risk-classification process more accurate. The market's inability to neutralize adverse selection has thus perpetuated itself.

A second and related market failure is the problem of moral hazard: the tendency of an insured party to exercise less care to minimize losses than he would exercise if he were uninsured. With disability insurance, moral hazard is present both ex ante and ex post. The insured individual is more likely to suffer a loss and more likely to stay disabled than the uninsured. Both forms of moral hazard can be mitigated by limiting the amount of coverage sold to a percentage of the insured's pre-disability income (usually a maximum of about sixty percent) and by coordinating with other sources of wage-loss insurance so that overinsurance is not possible. Nonetheless, the prospect of working is sometimes not as attractive as the prospect of leisure with lower income, and economic conditions may reduce the job prospects of even the marginally able or disabled who would prefer to work. For both reasons, the cost of disability insurance is driven up unless the insurer can accurately assess the validity of both initial and continuing claims.

Yet as the controversy surrounding the SSDI program in the early 1980's illustrated, [125] the very concept of disability is more subjective than are most insured events. Therefore, both fraudulent and innocently invalid claims are more difficult to detect, claims expenses are higher than in other lines of insurance, disputes between claimants and insurers are more frequent, and the cost of coverage is higher than it would be in the absence of these consequences of moral hazard. As a result, private disability insurance -- especially when individually purchased -- is a comparatively expensive insurance product, and less is purchased than might otherwise be expected.

The problems of adverse selection and moral hazard, then, probably are largely responsible for the weakness of the private disability insurance market. No magic solutions to these problems exist. Perhaps the best approach would simply leave the market to operate as it always has, permitting it to grow as tort liability ceases its own expansion, as demand for disability insurance slowly increases, **[*904]** and as the market itself develops new devices for reducing adverse selection and moral hazard. For those who are unsatisfied by such a laissez-faire stance, however, I can offer a few new directions for the search for solutions to both adverse selection and moral hazard in disability insurance.

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The best way to deal with adverse selection, of course, would be to remove the selection decision from the applicant. This could be accomplished either by making individual purchase mandatory [126] or by marketing coverage on a group, rather than an individual, basis. If participation by all group members were automatic, then the adverse selection effect could be largely eliminated. Because about seventy percent of the private disability insurance now sold in this country is group insurance, [127] however, placing greater emphasis on the group approach would not seem to be a promising way to expand the incidence of disability protection. On the other hand, conceivably some effort to encourage the employers who now offer health insurance as a fringe benefit to offer disability insurance along with it -- perhaps through special tax incentives to the employer -- could have the desired effect.

Similarly, possible solutions to the moral hazard problem should recognize the reasons that the problem is so severe in disability insurance. First, the definition of "disability" inevitably makes eligibility decisions more subjective than in other forms of coverage. This problem could be addressed directly, rather than through the indirect methods traditionally employed. For example, policies could be offered in which "disability" is defined exclusively by reference to a series of designated conditions that would count automatically as "disabling." Because the existence of these conditions could be more objectively verified than disability itself, eligibility could be more easily determined and borderline disputes more easily avoided.

Moreover, although some disabilities might not be covered as a result of this approach, the cost of the more limited form of coverage would be correspondingly reduced and demand might increase. The SSDI experience with a version of this approach, while mixed, has met with some success, [128] and some private insurers already **[*905]** use the method on a nonexclusive, limited basis. Individual insurers, however, probably would have less than optimal incentives to innovate in this way, because other insurers could copy innovations at a relatively low cost compared to those of the innovating company. [129] Either collective or legally mandatory experimentation could therefore be necessary to test the utility of this designated disability approach.

The second reason moral hazard is so severe in disability insurance is that any periodic payment system inevitably creates continuing incentives for the claimant to remain eligible for payment. The monthly payment system generally used by disability insurers is bound to be afflicted in this way. In contrast, the great virtue of the tort system's approach, for all its other disadvantages, is that it avoids ex post moral hazard by paying damages in a lump sum. To capture this virtue, a form of damage scheduling on the model of the lump sum payments made in workers' compensation might help to alleviate some of the moral hazard in disability insurance. By paying lump sums for certain designated disability conditions and at the same time by insuring a lower percentage of lost wages (up to a maximum of forty percent, for example), both the incentive of the insured to remain disabled after payment of the lump sum and the cost of providing continuing coverage when the disability continued could be reduced.

Each of these suggestions tentatively outlines experimental solutions for some of the problems that now limit the scope of the private disability insurance market. The prospect that any of these solutions would immediately increase demand for disability insurance, lower the cost of coverage, or make the market generally more vigorous is unlikely; but just as the tort system is not set in stone, neither is the insurance market. New ways of providing disability insurance that reduce some of the problems the market now faces are long overdue. Similar efforts to fill the other gaps in the first-party market -- especially for the portion of the population without health insurance -- should also be undertaken. Legislative or regulatory encouragement of experimentation may be required to enlist the creative energies of the insurance industry in this endeavor. Although legal intrusion into the market is a serious venture, such a foray is well worth considering, especially if the new **[*906]** insurance protection would aid in the attempt to rehabilitate tort law.

IV. CONCLUSION

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represent polar examples of phenomena that in practice combine both individual and collective responsibility themes.

Under the model of *individual responsibility,* injuries have identifiable legal causes, and those responsible for these causes are held liable for their legally defined results. An action (or inaction) produces liability only if, absent that action, injury would not have occurred. It follows that liability can be imposed only for injuries "caused" in this sense. In addition, the model implicitly assumes that those held liable actually bear responsibility by paying damages out of their own pockets. This is a world of people and enterprises with clear identities, of distinct actions that can be ascribed to identifiable parties, of assets that cannot be exhausted by potential or actual liability, and of insurance that can be priced to reflect accurately the probability that the policyholder will suffer a compensable loss. [12]

In contrast, the model of *collective responsibility* is as yet inchoate and underdeveloped, but has increasing explanatory power. Under this regime, injuries often have multiple legal causes, and parties are held liable not only individually but also as members of a group. As a result they may be held liable for damages that another party would pay under the individual model. In addition, in the world of collective responsibility, a party can externalize the risk or cost of liability by declaring bankruptcy or by purchasing insurance that cannot be priced to reflect with accuracy the probability of loss. In all these ways responsibility for the loss in question is shared collectively.

How and when does one of these two models dominate the other? First, in certain settings one model may be a more accurate description of the non-legal world than the other. If in fact certain kinds of injuries are the product of several parties acting together, then a conception of legal responsibility that reflects this understanding of the world makes sense. Thus, collective responsibility may be the natural outcome of collective action. Second, concern for equity among parties also may affect the dominance of one model over the other. While rules of individual responsibility treat parties to different lawsuits as isolated from one another and from **[*849]** other legal actions, rules of collective responsibility treat parties as members of groups and naturally provide greater opportunity to consider treating like cases alike. Finally, since the model of individual responsibility often falls short of achieving its aims, a collective model may sometimes more effectively achieve the aims of individual responsibility. Thus collective responsibility may be adopted as a surrogate for individual responsibility.

These considerations make the choice between individual and collective responsibility seem deceptively easy. Making that choice in mass tort litigation is rarely easy, however, because in practice the justifications for choosing one model over the other are mixed. The parties potentially responsible for mass torts often are neither clearly isolated individuals nor consciously collective groups; promoting equity among plaintiffs tends to be appropriate only if other factors are equal, because equity conflicts with the countervailing interest in individual control of litigation; and using collective responsibility as a surrogate for individual responsibility risks the appearance of unfairness, because the imposition of tort liability is likely to have connotations that are publicly interpreted by reference to the norms of individual, rather than collective, responsibility. Mass tort law therefore reflects the tension between the two models, as the next Part reveals.

II. THE LEGAL CHARACTERISTICS OF MASS TORTS

The choice between the models of individual and collective responsibility is most often available in mass tort litigation because the limits of the individual model are most evident in these cases. Yet the accidents that produce the legal problems characterizing mass torts are by no means homogeneous. Apart from the large number of persons injured, the lawsuits that arise out of such diverse occurrences as airplane crashes, exposure to hazardous substances or dangerous drugs, and nuclear accidents do not necessarily have much in common. Some of these "accidents" are sudden events, others occur gradually, and still

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The dilemma of mass tort reform is that the legal system is presented with a choice among unsatisfactory alternatives. On the one hand, the system may muddle along as it has, slowly constructing ever-more collective liability standards and applying them through the most expensive method of claim resolution -- full-scale adjudication. On the other hand, the system can recognize the dangers on its path and return to standards emphasizing individual responsibility. But a return to more traditional rules could limit the availability of compensation to the victims of mass accidents and could forego the attempt to allocate responsibility for much of the damage caused by such accidents.

Until recently, these two alternatives defined the contours of the debate over mass tort reform. But two other alternatives also merit consideration. First, collective responsibility standards could be retained and applied through a mass tort compensation fund or funds. Unfortunately, a fund would have great disadvantages as well as benefits. Given current knowledge, placing effective constraints on a fund's compensation criteria would be difficult; yet, ironically, the same limited knowledge about causation in mass tort litigation is part of what prompts consideration of funds as an alternative to the current system.

A second alternative would return to the traditional tort system but also promote the expansion of first-party insurance to assure adequate compensation of victims. This approach would also pose problems. Mandating the purchase of coverage could prove to be an administrative nightmare; yet making purchase optional might not sufficiently increase the amount of coverage available to potential victims.

Regardless of the alternative or alternatives that are adopted, recognition of the dilemma of mass tort reform should clarify what is at stake in making choices about reform. The principal lesson taught by the dilemma may be that the model of individual responsibility underlying many of the precepts of traditional tort law is losing its influence. What began as a regime of liability for fault, and then developed into a method of affecting behavior by imposing liability without fault, is now evolving toward a system of liability **[*907]** without either fault or causation. As individual responsibility in the tort system fades away, it is worth wondering whether the remaining advantages of the system could be more effectively preserved by adopting other compensation schemes and simultaneously returning tort law to its earlier state.

The answer depends not only on what has already occurred, but on what the future brings as well. In a sense, therefore, the problem is what to do until the future comes. If the tort system is in the midst of a temporary period of a few decades in which society's technological capacities have outstripped its ability to deal with their consequences, then it will be able to muddle through without radical reform. Perhaps the tort system will have to adopt even more collective responsibility standards and apply them even less efficiently and more expensively than at present. Matters may become worse before they get better, but slowly our knowledge of and capacity to deal with the adverse consequences of powerful technologies will grow, and with that growth the legal system will eventually be able to banish uncertainty and return to the model of individual responsibility it is designed to follow.

On the other hand, the future may not be so benign. We may be at the beginning of a long, unhappy period during which we will be paying for the bargain we have made, and continue to make, in order to reap the benefits of advanced technologies. If this rather Faustian vision is accurate, the paradigmatic problem the legal system will face is the mass tort, and bending the rules of individual responsibility into collective responsibility devices may prove inadequate to the task. The legal problems mass torts pose are proving to be qualitatively different from those of the past, and an effective, long-term solution to those problems simply may not lie in the tort system as we have known it.

FOOTNOTES:

n1 See G. Stern, The Buffalo Creek Disaster (1976).

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n2 See In re MGM Grand Hotel Fire Litig., 570 F. Supp. 913 (D. Nev. 1983).

n3 See In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), cert. denied, 459 U.S. 988 (1982).

n4 See P. Brodeur, Outrageous Misconduct (1985) (detailing the circumstances surrounding the asbestos cases); Special Project, An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation, 36 Vand. L. Rev. 573 (1983).

n5 See In re Bendectin Prod. Liab. Litig., 749 F.2d 300 (6th Cir. 1984).

n6 See Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

n7 See In re Agent Orange Prod. Liab. Litig., 534 F. Supp. 1046 (E.D.N.Y. 1982).

n8 A number of factors probably explain why mass tort claims were not a fixture on the legal scene until recently. The most important is that successful claims for diseases with long-latency periods require the development of considerable medical knowledge about causation -- a development that did not occur until recently. Moreover, the legal system had to create a "discovery" exception to statutes of limitations to permit the instigation of such suits. See, e.g., Scott v. Rinehart & Dennis Co., 116 W. Va. 319, 180 S.E. 276 (1935) (period for bringing claim for silicosis had expired before plaintiff could have known he had contracted the disease).

In contrast, mass tort claims for injuries caused by sudden accidents were sometimes brought in the past. See, e.g., Jacobs v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 141 Conn. 86, 103 A.2d 805 (1954) (detailing suit arising out of 1944 circus fire that killed 169 persons). Criminal actions were frequently brought in mass accident cases as well. See, e.g., Commonwealth v. Welansky, 316 Mass. 383, 55 N.E.2d 902 (1944) (manslaughter charge arising out of "Cocoanut Grove" fire); People v. Harris, 74 Misc. 353, 134 N.Y.S. 409 (Ct. Gen. Sess. 1911) (manslaughter charge arising out of "Triangle Shirt Waist" fire).

n9 See, e.g., Rethinking Tort and Environmental Liability Laws: Needs and Objectives of the Late 20th Century and Beyond, 24 Hous. L. Rev. 1 (1987); Critical Issues in Tort Reform, 14 J. Legal Stud. 459 (1985); Toxic Waste and Environmental Law, 33 Clev. St. L. Rev. 1 (1984-85); Catastrophic Personal Injuries, 13 J. Legal Stud. 415 (1984); An Analysis of the Legal, Social and Political Issues Posed by Asbestos Litigation, 36 Vand. L. Rev. 573 (1983).

n10 For a catalogue of these reforms, see U.S. Dep't of Justice, Tort Policy Working Group, An Update on the Liability Crisis 65-73 (1987).

n11 See Abraham, Making Sense of the Liability Insurance Crisis, 48 Ohio St. L.J. (forthcoming 1987).

n12 For a discussion of the problems of pricing liability insurance, see K. Abraham, Distributing Risk: Insurance, Legal Theory, and Public Policy 64-100 (1986).

n13 Although the term accident usually connotes a sudden event, I shall use it to refer to sudden, gradual, and serial occurrences that produce mass injuries eventuating in tort claims.

n14 In the Agent Orange litigation, for example, defendants spent $ 100 million to prepare for trial. See P. Schuck, Agent Orange on Trial 5 (1986).

n15 See, e.g., id. at 87-90.

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n16 See Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145 (1980).

n17 See In re MGM Grand Hotel Fire Litig., 570 F. Supp. 913, 920-24 (D. Nev. 1983).

n18 Cf. Feinberg, The Toxic Tort Litigation Crisis: Conceptual Problems and Proposed Solutions, 24 Hous. L. Rev. 155, 162 (1987) (the more defendants in a suit, the higher the potential payoff, and the lower the incentives of plaintiffs to settle).

n19 This phenomenon appears to have been the major obstacle to settlement in the MGM Grand Hotel fire litigation. See 570 F. Supp. at 933-36.

n20 For an analysis of the factors that more generally promote settlement and litigation, see Priest & Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1 (1984).

n21 See, e.g., A. Lowenfeld, Aviation Law §§ 7.12-.22 (2d ed. 1981) (discussing the claims arising from two major air disasters).

n22 See N.Y. Times, Mar. 24, 1985, § 4, at 22, col. 1. For an analysis of the variety of factors that may prompt settlement in mass tort cases, see Sand, How Much Is Enough? Observations in Light of the Agent Orange Settlement, 9 Harv. Envtl. L. Rev. 283, 296-306 (1985).

n23 Commentators also suggest that the transaction costs of a tort action increase not merely additively, but exponentially, with increases in the number of parties in the action. See, e.g., P. Schuck, supra note 14, at 7; Epstein, The Legal and Insurance Dynamics of Mass Tort Litigation, 13 J. Legal Stud. 475, 476-77 (1984).

n24 See Black & Lilienfeld, Epidemiologic Proof in Toxic Tort Litigation, 52 Fordham L. Rev. 732 (1984); Dore, A Commentary on the Use of Epidemiological Evidence in Demonstrating Cause-in-Fact, 7 Harv. Envtl. L. Rev. 429, 431-33, 436-37 (1983); Hall & Silbergeld, Reappraising Epidemiology: A Response to Mr. Dore, 7 Harv. Envtl. L. Rev. 441, 441-43 (1983); Hoffman, The Use of Epidemiological Data in the Courts, 120 Am. J. Epidemiology 190 (1984).

n25 For example, the definitive findings on the effects of exposure to asbestos after long-latency periods were first published in Selikoff, Churg, & Hammond, The Occurrence of Asbestosis Among Insulation Workers in the United States, 132 Annals N.Y. Acad. Sci. 139 (1965).

n26 See, e.g., Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 462-63, 150 P.2d 436, 441 (1944) (Traynor, J., concurring).

n27 See Calabresi & Hirschoff, Toward a Test for Strict Liability in Torts, 81 Yale L.J. 1055, 1067-70 (1972); Calabresi & Klevorick, Four Tests for Liability in Torts, 14 J. Legal Stud. 585, 591-92, 611-13 (1985).

n28 See, e.g., Spano v. Perini Corp., 25 N.Y.2d 11, 14-15, 250 N.E.2d 31, 33 (1969). Some courts hold out the possibility of a rare exception. See, e.g., Whitman Hotel Corp. v. Elliot & Watrous Eng'g Co., 137 Conn. 562, 566, 79 A.2d 591, 593 (1951).

n29 See Restatement (Second) of Torts § 402A (1965).

n30 On this view, both negligence and strict liability adopt cost-benefit tests, the former dependent on foresight and the latter on hindsight. See Keeton, Product Liability and the Meaning of Defect, 5 St. Mary's L.J. 30, 37-38 (1973); Wade, On the Effect in Product

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Liability of Knowledge Unavailable Prior to Marketing, 58 N.Y.U. L. Rev. 734, 739, 756-59 (1983).

n31 See, e.g., Dart v. Wiebe Mfg., Inc., 147 Ariz. 242, 709 P.2d 876 (1985); Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434 (Mo. 1984); Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 197, 447 A.2d 539, 542 (1982).

n32 See Schwartz, Products Liability, Corporate Structure, and Bankruptcy: Toxic Substances and the Remote Risk Relationship, 14 J. Legal Stud. 689, 693-94 (1985).

n33 For a discussion of the other explanations for the movement to strict liability, see Calabresi & Klevorick, supra note 27, at 594-602.

n34 Cf. Cooter, Prices and Sanctions, 84 Colum. L. Rev. 1523, 1540 (1984) (strict liability is superior to negligence when relatively large errors are likely in the identification of the efficient level of care and relatively small errors are likely in the computation of damages or assignment of liability).

n35 See Calabresi & Hirschoff, supra note 27, at 1062-63.

n36 See Shavell, Strict Liability Versus Negligence, 9 J. Legal Stud. 1 (1980).

n37 See, e.g., Helling v. Carey, 83 Wash. 2d 514, 520-21, 519 P.2d 981, 984-85 (1974) (Utter, J., concurring).

n38 Signature diseases include vaginal adenocarcinoma, caused almost exclusively by exposure to the drug DES in utero, and mesothelioma, caused almost exclusively by inhalation of asbestos fibers. See Abraham & Merrill, Scientific Uncertainty in the Courts, Issues in Sci. and Tech., Winter 1986, at 93, 101.

n39 See Rabin, Environmental Liability and the Tort System, 24 Hous. L. Rev. 27, 29 (1987); Rosenberg, The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System, 97 Harv. L. Rev. 849, 855-58 (1984) (proposing that burden of proof problems be solved by adopting a system of proportional compensation).

n40 See supra notes 32-36 and accompanying text.

n41 See S. Epstein, The Politics of Cancer 39 (1978); Elliott, Goal Analysis Versus Institutional Analysis of Toxic Compensation Systems, 73 Geo. L.J. 1357, 1362 (1985) (discussing limited information processing capacities of legal doctrines).

n42 See Dore, supra note 24, at 436-37.

n43 See Michie v. Great Lakes Steel Div., 495 F.2d 213 (6th Cir.), cert. denied, 419 U.S. 997 (1974).

n44 A second explanation for relaxing the traditional burdens of proof is quite different. Because the large number of plaintiffs in mass tort cases can threaten the solvency of any single defendant, all parties -- plaintiffs and defendants -- have an even greater incentive than normal to join all potentially responsible parties. As the search for a deep pocket widens, the connection between the actions of a particular defendant and the plaintiff's losses becomes attenuated. Thus the necessity for a shift in the plaintiff's burden of proof arises so that the purpose of joining the additional defendant with only attenuated causal responsibility is not defeated. In such cases a defendant with limited causal responsibility for the plaintiff's loss may come to bear more than an equitable share of liability for that loss, either because liability is imposed in equal shares or because some defendants are insolvent and others bear their remaining liability.

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n45 In some cases, there are both. For example, considerable evidence indicates that collusion among asbestos manufacturers prevented dissemination of information about its dangers. See P. Brodeur, supra note 4, at 109-31, 178-80.

n46 Thus, the intention is to produce a more accurate assessment of individual responsibility on the part of defendants. Traditional burdens of proof result in inaccurate assessments of responsibility whenever a plaintiff is unable to pinpoint responsibility that in fact should be borne by another party. Shifting the burden of proof to defendants may also result in inaccuracy; but when the over-assessment of responsibility produced by collective rules that shift the burden of proof is smaller than the under-assessment produced by retaining the traditional rules, a shift comes closer to imposing the "correct" amount of liability. Such a shift therefore departs less from the individual responsibility standard than a rule that actually embodies the standard.

n47 See, e.g., Collins v. Eli Lilly Co., 116 Wis. 2d 166, 198-200, 342 N.W.2d 37, 52-53 (1984) (liability in DES case apportioned among defendants on basis of comparative negligence rather than market share), cert. denied, 469 U.S. 826 (1985).

n48 One other effect of collective rules governing proof of causation is worth noting here. The most unpredictable feature of any accident is the amount of damage it produces. Slight differences in physical circumstances, in the susceptibility of those exposed to risk, in the age or earning capacity of victims, or in other factors can result in wide variations in the amount of liability imposed on a responsible party. One accident barely scratches a victim, but an identical one causes mayhem. Large enterprises that suffer frequent claims are somewhat protected from such vicissitudes by the law of large numbers, and those with less frequent claims can buy similar protection through insurance. Collectivizing doctrines governing causation further smooth out this unpredictable variation in the severity of claims, thereby removing the capricious feature of rules having a more individual emphasis.

n49 See, e.g., Landes & Posner, Joint and Multiple Tortfeasors: An Economic Analysis, 9 J. Legal Stud. 517 (1980); Rizzo & Arnold, Causal Apportionment in the Law of Torts: An Economic Theory, 80 Colum. L. Rev. 1399 (1980).

n50 Collective responsibility rules may have suboptimal effects not only on safety levels but on activity or production levels as well. Reducing production levels will reduce market share and therefore the extent of an enterprise's market share liability in most cases. Under at least some versions of this doctrine, however, responsible enterprises continue to bear part of the cost of injuries caused by enterprises not subject to suit because of insolvency or jurisdictional factors. Only by eliminating involvement in an activity altogether will an enterprise be assured of avoiding the free-rider effects of market share or joint and several liability for losses caused by the activity.

n51 See, e.g., Michie v. Great Lakes Steel Div., 495 F.2d 213, 215, 216-18 (6th Cir.), cert. denied, 419 U.S. 997 (1974).

n52 Moreover, in some of these cases each defendant's action not only increases the difficulty of apportioning individual responsibility; when they combine, these actions may also have synergistic effects that increase the likelihood (sometimes *predictably*) that the actions of the others will cause harm. For discussion of synergy, see infra note 59 and accompanying text.

n53 See P. Brodeur, supra note 4, at 109-31, 178-80.

n54 See, e.g., Hall v. E. I. Du Pont De Nemours & Co., 345 F. Supp. 353, 371-74 (E.D.N.Y. 1972).

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n55 See, e.g., Sulesky v. United States, 545 F. Supp. 426, 429-30 (S.D. W. Va. 1982) (epidemiological studies of the side effects of swine flu vaccination). Cf. In re Agent Orange Prod. Liab. Litig., 597 F. Supp. 740, 854-56 (E.D.N.Y. 1984) (epidemiological studies of the effects of exposure to Agent Orange).

n56 See Robinson, Multiple Causation in Tort Law: Reflections on the DES Cases, 68 Va. L. Rev. 713, 759-69 (1982).

n57 Cf. Rosenberg, supra note 39, at 881-85 (arguing in favor of proportional compensation).

n58 The limitations of available data also render impractical both Professor Robinson's and Professor Rosenberg's creative proposals for compensation on the basis of risk rather than actual harm. See Robinson, Probabilistic Causation and Compensation for Tortious Risk, 14 J. Legal Stud. 779 (1985); Rosenberg, supra note 39, at 885-87. For an effort by workers exposed to asbestos to recover for their increased risk of contracting cancer, see Devlin v. Federal Shipbldg. & Dry Dock Co., 202 N.J. Super. 556, 495 A.2d 495 (1985).

n59 As complicated as the examples are, they are oversimplified. For instance, potentially relevant factors such as differences in the doses or durations of exposure to each of the substances involved have been deliberately excluded. The inclusion of these matters would make judgments about the nature of each source's responsibility considerably more difficult.

n60 See, e.g., Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971) (liability of vendor of alcoholic beverages to victim of vendor's drunken customer); see also Trenier v. California Inv. and Dev. Corp., 105 Cal. App. 3d 44, 46 n.1, 164 Cal. Rptr. 156, 157 n.1 (1980) (noting that the *Vesely* doctrine added a solvent defendant -- the bar owner).

Rules governing the liability of a successor corporation for the torts of its predecessor also are developing to meet the risk that a defendant is insolvent. See, e.g., Leannais v. Cincinnati, Inc., 565 F.2d 437, 439-43 (7th Cir. 1977); Ray v. Alad Corp., 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

n61 The role played by the risk of insolvency in mass tort claims, like the other characteristics of mass torts, is not independent of the others. Rather, the risk of insolvency is partially a product of these characteristics and, in turn, partially a cause of their existence. The impact of the size of mass disasters on the risk of insolvency is obvious: the greater the number of plaintiffs injured and the more the losses suffered, the greater the risk that damages will exceed the defendant's assets. Similarly, the same problem that often leads to difficulties in proving breach of the applicable standard of care -- the passage of time between the actions that ultimately will result in liability and the actual imposition of that liability -- also creates the potential for creditors and owners of an enterprise to drain a defendant's assets and render it insolvent by the time the latency period ends and injuries begin to manifest themselves. At least in some mass tort cases, the threat of multiple awards of punitive damages, a very common characteristic of mass disaster litigation, is the real threat to the solvency of defendants.

n62 See Roe, Bankruptcy and Mass Tort, 84 Colum. L. Rev. 846, 855, 863-64 (1984).

n63 See id. at 856-62.

n64 See In re Johns-Manville Corp., Summary of the Joint Plan of Reorganization 1 (Nov. 21, 1983).

n65 See id. at 7-8. The plan eventually adopted did not embody these proposals. See In re Johns-Manville Corp., Second Amended and Restated Plan of Reorganization, slip op. at 8, 45

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(Bankr. S.D.N.Y. Dec. 18, 1986).

n66 See Roe, supra note 62, at 871-74.

n67 Cf. id. at 855 (suggesting that a first-come, first-served rule might not be inequitable in this context).

n68 See supra note 63 and accompanying text.

n69 439 U.S. 322 (1979).

n70 In some jurisdictions the mutuality requirement had already been abolished in state cases. See, e.g., Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942).

n71 439 U.S. at 331.

n72 See, e.g., Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 344-45 (5th Cir. 1982).

n73 See Currie, Mutuality of Collateral Estoppel: Limits of the *Bernhard* Doctrine, 9 Stan. L. Rev. 281, 285-89 (1957).

n74 The doctrine therefore will be of use only when a first plaintiff has prevailed (presumably both at trial and on appeal) and a second then invokes the doctrine and is sustained on appeal before any inconsistent verdicts in other trials are entered. If inconsistent verdicts are entered before the second plaintiff's use of the doctrine is considered on appeal, then the appellate court could not affirm without the arbitrariness just described. Given the time involved in trying a case to a verdict and appealing it, a defendant will easily prevail at trial in at least one case and thereby render the doctrine unavailable in the remainder of the untried cases raising the same issue.

n75 Perhaps the most notable example is the Agent Orange case. See In re Agent Orange Prod. Liab. Litig. (Ryan v. Dow Chem. Co.), 611 F. Supp. 1396 (E.D.N.Y. 1985). For an analysis of the entire case and proposals for reform, see P. Schuck, supra note 14.

n76 Indeed, one can paint a picture of what would happen if the obstacles to the use of collateral estoppel were removed that looks very much like a class action. Other potential plaintiffs would have an incentive to help finance the first plaintiff's claim because they could benefit greatly themselves if the claim succeeded. The major difference between this state of affairs and a class action would be the absence of mutuality -- in subsequent cases the defendant would be precluded from relitigating issues decided against it, but as nonparties to the earlier suit, new plaintiffs would not be precluded by any earlier determinations favorable to the defendant. Class actions avoid much of this potential violation of the equity principle.

n77 Although the use of class actions may thus streamline litigation, they may also make possible some small claims that would not otherwise be lodged if they had to be separately litigated. In this way class actions may actually increase, rather than reduce, overall litigation costs. See Weinstein, Some Reflections on the "Abusiveness" of Class Actions, 58 F.R.D. 299, 300 (1973).

n78 Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 69, 103 (1966).

n79 See Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

n80 See 7 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1755 (1972 & Supp. 1985).

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n81 See Zahn v. International Paper Co., 414 U.S. 291, 301-02 (1973).

n82 See Mullenix, Class Resolution of the Mass Tort Case: A Proposed Federal Procedure Act, 64 Tex. L. Rev. 1039, 1047-60 (1986) (discussing the imperfect fit between Rule 23 and the problems of mass torts).

n83 Rule 23 provides for several situations in which, once a class action is certified, all members must join the class. See Fed. R. Civ. P. 23(b)(1). These are obviously the most powerful forms of class action because they assure both the maximum economy and the most fidelity to the equity principle. Two are most important to this analysis. In the first, an action can be certifed if separate actions could result in inconsistent verdicts producing incompatible standards of conduct. Id. 23(b)(1)(A). Although this provision may appear to solve the problem that makes collateral estoppel so rarely available in mass disaster litigation, in fact it is inapplicable to cases that pose only the possibility of inconsistent verdicts in claims for money damages. The provision would apply to mass tort litigation only when the defendant simply could not comply with all potential orders that might be issued if the action were not certified for class treatment. See In re Bendectin Prods. Liab. Litig., 749 F.2d 300, 305 (6th Cir. 1984); McDonnell Douglas Corp. v. United States Dist. Court, 523 F.2d 1083, 1086 (9th Cir. 1975), cert. denied, 425 U.S. 911 (1976).

The second situation in which an action can be certified as mandatory occurs when separate adjudications by some members of the class would be dispositive, as a practical matter, of the interests of other members of the class. See Fed. R. Civ. P. 23(b)(1)(B). The most important application of this section to mass torts should come in cases of prospective insolvency of the defendant. See Proposed Amendments to Rules of Civil Procedure for the United States District Courts, supra note 78, at 101. Whenever a limited fund (in comparison to the potential damages that are awardable) is available to compensate class members, their interests would be prejudiced if recoveries by early plaintiffs exhausted the defendant's assets. Certification of a class action in such cases promotes equity among plaintiffs by collectivizing the risk of insolvency on the part of the defendant.

Setting aside the difficulties of determining in advance when this threat is sufficiently real to warrant certification, one notable decision threatens this provision's usefulness. In a case growing out of the collapse of the skywalk in the Kansas City Hyatt Hotel in 1981, the United States Court of Appeals for the Eighth Circuit held that the Federal Anti-Injunction Act is violated by mandatory certification when claims by class members are pending in state court. The court reasoned that certification would constitute an injunction against the prosecution of these claims. See In re Federal Skywalk Cases, 680 F.2d 1175, 1180-81 (8th Cir.), cert. denied, 459 U.S. 988 (1982). If this decision holds, few mass tort claims will be certifiable as mandatory class actions, because of the likelihood that at least one class member will file an action in state court before the time certification would otherwise be granted by the appropriate federal court.

n84 A second weakness of this form of class action, however, may also be a strength. The touchstones for certification of a class action that are optional for class members are the predominance of common questions of law or fact over individual ones and the superiority of class over separate adjudication of the controversy. See Fed. R. Civ. P. 23(b)(3). These two standards are sufficiently vague that courts presented with requests for certification have considerable discretion in deciding whether to certify. For example, the predominance standard does not indicate whether class action treatment is appropriate in cases where different claimants would be subject to the liability rules of different states because of choice of law rules. See In re Northern Dist. of Cal. Dalkon Shield Litig., 693 F.2d 847, 850-52 (9th Cir. 1982) (reversing certification of class action for punitive damages that involved plaintiffs from 50 states). Nor does the superiority requirement preclude certification on the ground that the cost of individual litigation would be prohibitive.

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When this discretion is combined with that entailed in the courts' authority under Rule 23 to certify actions with respect to particular subclasses and issues, see Fed. R. Civ. P. 23(c)(4), the flexibility of the Rule and the power of the judge presented with a request for certification of optional actions is apparent. See, e.g., Ouellette v. International Paper Co., 86 F.R.D. 476, 480 (D. Vt. 1980); Payton v. Abbott Labs, 83 F.R.D. 382, 387 (D. Mass. 1979), vacated on grounds that a predominance of common issues no longer existed, 100 F.R.D. 336 (D. Mass. 1983). Through these devices the courts can assure that common issues are decided in common, while they resolve separately issues and problems which do not warrant common treatment. Nonetheless, this flexibility and discretion have prompted some courts to take to heart the Advisory Committee's 1966 dictum and to refuse to certify individual issues that might well be better resolved through class treatment, on the ground that common questions did not predominate over individual ones. See, e.g., In re Three Mile Island Litig., 87 F.R.D. 433, 441-42 (M.D. Pa. 1980).

n85 See, e.g., In re Northern Dist. of Cal. Dalkon Shield Litig., 693 F.2d 847, 853-55 (9th Cir. 1982).

n86 For an argument in favor of vastly increased use of class actions in mass exposure cases, see Rosenberg, supra note 39, at 908-16.

n87 See Fed. R. Civ. P. 23(c)(4).

n88 See, e.g., In re Bendectin Prods. Liab. Litig., 102 F.R.D. 239 (S.D. Ohio) (judge certified class for settlement purposes only), appeal dismissed sub. nom. Schreier v. Merrell Dow Pharmaceutical, Inc., 745 F.2d 58 (6th Cir.) (mem.), mandamus to vacate certification, 749 F.2d 300 (6th Cir. 1984); In re Federal Skywalk Cases, 93 F.R.D. 415, 419 (W.D. Mo.) (judge certified a "non-opt out" class), vacated, 680 F.2d 1175 (8th Cir.), cert. denied, 459 U.S. 988 (1982); In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig., 521 F. Supp. 1188, 1192-95 (N.D. Cal.) (judge certified a nationwide class on punitive damages issue and a statewide class for common liability issues), modified, 526 F. Supp. 887 (N.D. Cal. 1981), vacated, 693 F.2d 847 (9th Cir. 1982); Payton v. Abbott Labs, 83 F.R.D. 382, 387 (D. Mass. 1979) (judge certified class for resolution of particular issues).

n89 "But supposing a state of facts often repeated in practice, is it to be imagined that the court is to go on leaving the standard to the jury forever? Is it not manifest, on the contrary, that if the jury is, on the whole, as fair a tribunal as it is represented to be, the lesson which can be got from that source will be learned? Either the court will find that the fair teaching of experience is that the conduct complained of usually is or is not blameworthy, and therefore, unless explained, is or is not a ground of liability; or it will find the jury oscillating to and fro, and will see the necessity of making up its mind for itself." O. Holmes, The Common Law 98 (1881).

n90 In the few situations that are sufficiently homogeneous to warrant the treatment Holmes recommended -- rear-end collisions, for example -- settlements in the shadow of the legal rule occur so frequently that the cases are litigated only rarely.

n91 For an argument that even the traditional tort law system fails to achieve its deterrence goals, see Sugarman, Doing Away with Tort Law, 73 Calif. L. Rev. 555, 559-91 (1985).

n92 See Institute of Medicine, Vaccine Supply and Innovation 118-19 (1985); Dewes, Economic Incentives for Controlling Industrial Disease: The Asbestos Case, 15 J. Legal Stud. 289 (1986); Kitch, The Vaccine Dilemma, Issues in Sci. & Tech., Winter 1986, at 108; Huber, Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 Colum. L. Rev. 277 (1985).

n93 See Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9657 (1982).

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n94 See Federal Mine Safety and Health Act (as amended by the Black Lung Benefits Reform Act), 30 U.S.C. § 902 (1982).

n95 See, e.g., Superfund Section 301(e) Study Group, Injuries and Damages from Hazardous Wastes -- Analysis and Improvement of Legal Remedies, Senate Comm. on Env't & Pub. Works, 97th Cong., 2d Sess. 193-254 (1982) [hereinafter Study Group Report]; Elliott, supra note 41, at 1359-60; Pierce, Encouraging Safety: The Limits of Tort Law and Government Regulation, 33 Vand. L. Rev. 1281, 1321-22 (1980). For a criticism of the approach, see Rabin, supra note 39, at 45-50.

n96 See infra notes 110-116 and accompanying text.

n97 See Pierce, Institutional Aspects of Tort Reform, 73 Calif. L. Rev. 917, 937-39 (1985).

n98 As I suggested above, fidelity to the equity principle is not always a virtue. A fund would have the capacity to make compensation decisions categorically; but this would be a capacity to be categorically incorrect as well as categorically correct. Instead of hedging in the manner of the current system by limiting the scope of the equity principle, a fund would take a different approach: it would hedge by exercising restraint in designating compensable events and by periodically revising the probability calculations and presumptions on which its measure of compensation would be based.

n99 See Study Group Report, supra note 95, at 213-19.

n100 For a discussion of the accuracy implications of the different rules governing the proof of causation in conventional tort law, see Rosenberg, supra note 39, at 861-77.

n101 This would create a two-tiered system resembling that proposed by the Superfund Study Group. See Study Group Report, supra note 95, at 193-205.

n102 This suggestion is derived from Professor Mark Roe's ingenious proposal for compensating tort claimants in bankruptcy reorganizations based on an analogy to a variable annuity. See Roe, supra note 62, at 871-74.

n103 Chemical feedstocks are basic chemical compounds used to produce more complex, sometimes hazardous substances.

n104 For a more detailed analysis, see K. Abraham, supra note 12, at 53-54.

n105 Such incentives are weakest when the potential dangers are unknown and a research focus therefore is not preordained, when the necessary research requires a high capital investment, and when the industry in question is relatively unconcentrated.

n106 See Sugarman, supra note 91, at 636-41.

n107 See, e.g., United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983).

n108 While the question has not been completely settled, retroactive assessments of this sort probably are constitutional. See Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1975) (upholding legislation which provided for retroactive benefits to victims of black lung disease).

n109 Conceivably a crude formula based on the amount of unexhausted coverage could be used. Different percentages would have to be set for primary and excess coverage. A more complicated formula, accounting for the difference between occurrence and claims-made policies, might be required as well. For a description of the difference between occurrence

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others take place serially over periods of time. [13] Some of the injuries result immediately, while others take years before manifestation. Because not all mass **[*850]** tort litigation exhibits all the same characteristics, no single solution of "the" mass tort problem can be formulated -- a cluster of problems, rather than a single problem, is involved. Nevertheless, several legal problems that often characterize mass tort litigation can be isolated, and the different ways in which the dilemma of responsibility arises in this litigation can be identified.

This Part examines five separate common characteristics of mass torts: the size of the legal actions resulting from mass accidents; the nature of the standard of care to be applied in evaluating the defendants' conduct; the variety of problems that plaintiffs encounter in attempting to prove causation; the character of liability rules governing the rights of mass tort claimants against insolvent defendants; and the stress placed on procedural devices to promote equity among claimants and to streamline the work of the legal system.

A. Size

The term "mass tort" itself suggests that the size of mass accidents and the number of parties to the legal action or actions subsequently instituted are essential characteristics. But the size of a lawsuit is not only a defining characteristic of a mass tort action; size is also an important influence on its outcome. A tort action with many parties poses problems different in kind from an action arising out of a traditional, "two-party" accident -- problems which affect the behavior of the parties involved in the lawsuit, the likelihood and content of any settlement, and the ultimate choice between the models of responsibility that govern the litigation.

The behavior of the defendants in actions with one or a few plaintiffs and in mass actions with hundreds of plaintiffs is likely to differ significantly. The defendant (or its liability insurer, or both) in a mass action faces the prospect of very high costs. [14] If all the claims rise or fall together, the incentive to leave no stone unturned in defending is very great; the defendant may invest far more than in a traditional case. In contrast, if the defendant faces a series of suits, each arising out of essentially the same set of facts -- hundreds of users of a particular drug claiming damages for **[*851]** side effects, for example -- then the defendant has a slightly different, but similar, incentive. Here the defendant may invest more than might otherwise be rational to defend early claims in order to to establish a reputation for toughness, or to generate early evidence that it will prevail in later suits. This strategy may deter later suits or increase the defendant's chances of obtaining favorable settlements. Either incentive threatens to increase the complexity, length, and cost of the litigation in question.

The number of defendants in a mass tort action also may influence the defendants' behavior. Although a group of defendants in a single action may be able to reduce their average costs by joint investment in the proof of common issues, their interests often conflict regarding other issues. [15] The most critical conflict concerns each defendant's relative responsibility for the plaintiffs' losses. When substantive liability rules emphasize individual responsibility, each defendant has an incentive to avoid liability entirely by proving other defendants responsible. Collective responsibility rules may render complete escape from liability more difficult, depending on the nature of the rule and of the defendant, but not necessarily impossible. For instance, a defendant in a market share liability case may try to prove that it had no share of the market relevant to the plaintiff's claims. [16] Regardless of the model of responsibility implicated by the substantive rules, the effort to pin responsibility on other defendants therefore may be more complicated in a mass tort action than the straightforward effort to avoid liability in a typical two-party case.

The possibility of cross-claims among defendants for contribution or indemnity not only increases the number of issues that may have to be litigated; it also may make joint cooperation difficult. For example, the litigation concerning the MGM Grand Hotel fire involved

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and claims-made insurance policies, see K. Abraham, supra note 12, at 49-51. One model that might be used is the "Wellington Accords" on the contribution responsibilities of the companies providing liability insurance for asbestos manufacturers in cases involving multiple coverage. See Wellington, Asbestos: The Private Management of a Public Problem, 33 Clev. St. L. Rev. 375 (1984-85). But the Wellington Accords were voluntary; a mandatory contribution to a fund established for mass tort claims might be impossible.

n110 For example, the cost of the Superfund Study Group's proposal, using a no-fault system, has been estimated by the American Insurance Association at $ 29 billion per year. See Connolly, Responses to Kenneth R. Feinberg, 24 Hous. L. Rev. 175, 179 (1987).

n111 One sure way to drive up total compensation costs and thereby undermine any administrative system would be to allow victims to recover both from the fund and to bring tort actions. Even if the tort recovery were reduced by the amount of compensation paid by a fund, many of the defects of the current system would be preserved by such an approach. The recommended preservation of tort claims was thus one of the major defects of the Superfund Study Group's recommendations. See Study Group Report, supra note 95, at 255-71. Yet, as a practical matter, this kind of compromise probably would be necessary to secure political support for the creation of a fund.

n112 The threat of multiple awards for a single course of misconduct has long been a problem in theory. See Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967); Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1258 (1976). In recent years the problem has become a practical one as well. See Jeffries, A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 141 (1986); Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1 (1982).

n113 Even this approach would not solve all of the problems in awarding punitive damages in mass tort actions. For example, if the mass accident in question caused serial injuries, the fund could not bring a punitive damage action until a considerable portion of those injuries had manifested themselves, yet it would not always be easy for the administrators of the fund to determine when that point had been reached.

n114 Under this approach an award of punitive damages should be sought by the fund whenever there are substantial injuries caused by an identifiable responsible party but a large portion of these injuries have not generated successful claims against the fund. This might occur in a number of situations. Injured persons might not know they are injured, or the fund might be unable to distinguish those entitled to compensation from those not entitled, but nevertheless be able to say how many persons in the aggregate had been injured by the responsible party. The amount of damages awarded should reflect the cost of injuries, including pain and suffering, which otherwise would not be internalized by the responsible party.

Why, then, should the term "punitive" damages be used to describe an award that would be designed so clearly to achieve the ends normally understood to be served by awards of compensatory damages -- the promotion of optimal deterrence? Proponents of a fund would have to make the following argument: traditionally, punitive damages are available in tort when the defendant has acted recklessly or with malicious intent to cause harm. In these cases, the expected cost of the risk taken by the defendant far exceeds the cost of avoiding it; therefore, a defendant faced with the prospect of liability for costs so far in excess of the expected benefits would be reckless (or worse) to risk incurring these costs. A rational defendant would take such a risk only if, in fact, it did not expect to face liability for the full costs of the harms caused by the risk. Therefore, optimal deterrence would be promoted under either the tort system or an administrative fund if the defendant who did not otherwise anticipate bearing full responsibility for compensatory damages would nevertheless be threatened with liability for punitive damages roughly equal to the amount of compensatory

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damage liability that it would avoid.

n115 See supra notes 103-106 and accompanying text.

n116 Benefits paid under the Black Lung Program rose from $ 110 million in 1970 to an estimated $ 1.7 billion in 1980. See U.S. Dep't of Commerce, Bureau of the Census, Statistical Abstract of the United States 1984, at 374 (104th ed.). For a description of the program, see Meiser, The Black Lung Benefits Act, 17 Forum 813 (1982).

n117 For example, in 1983 more than 190 million people in the United States had private hospitalization insurance in some form and more than 178 million had insurance against the costs of surgery. See Health Ins. Ass'n of Am., Source Book of 1984-1985 Health Insurance Data 87-88. In 1981 at least 32 million people (some of them included in the figures just cited) had Medicare or Medicaid coverage. See U.S. Dep't of Commerce, Bureau of the Census, supra note 116, at 107. Estimates of those without any health insurance range from 8 to 16 percent of the population. Health Ins. Ass'n of Am., supra, at 9.

n118 See American Council of Life Ins., Life Insurance Fact Book Update 4 (1985).

n119 In 1981, workers' compensation covered 79 million people. See U.S. Dep't of Commerce, Bureau of the Census, supra note 116, at 389.

n120 In 1980, SSDI covered 89.7 million people. See id. at 375.

n121 For example, in 1983 only 24 million people -- slightly more than 20 % of the labor force -- were protected by private, long-term disability insurance, and only about 36 million people were protected by short-term disability insurance. See Health Insurance Ass'n of Am., supra note 117, at 16.

n122 For a recommendation of a combined social/private insurance approach, see Sugarman, supra note 91, at 648-51; see also P. Schuck, supra note 14, at 280 (recommending more first-party insurance in this situation).

n123 For example, in 1984, 93 % of all deaths were from natural causes, whereas 2.4 % were caused by non-motor-vehicle accidents. See American Council of Life Ins., supra note 118, at 43.

n124 See S. Rea, Jr., Disability Insurance and Public Policy (1981).

n125 For a description, see J. Mashaw, Bureaucratic Justice 106-23 (1983).

n126 See supra note 122-23 and accompanying text.

n127 See Health Ins. Ass'n of Am., supra note 117, at 16.

n128 See J. Mashaw, supra note 125, at 109-14.

n129 See K. Abraham, supra note 12, at 78-79.

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more than one hundred defendants, many with cross-claims against each other. [17] With interests to protect in relation to other defendants, each defendant may wish to appear and examine others in depositions, to propound interrogatories to others, to cross-examine the others' witnesses at trial, and generally to act **[*852]** independently. The greater the number of defendants in any action, the greater the likelihood of such cross-claims and the greater the cost of the litigation to all parties.

The number of parties involved also affects the plaintiffs' incentives and opportunities. As the number of plaintiffs who are parties to any suit increases, more assets are available to invest in the discovery and proof of common issues. Such cooperation can lower the average cost per party and thereby reduce the pressure on any given plaintiff to settle to protect his investment. With the pressure to settle reduced, the complexity, length, and total cost of the litigation is likely to increase. [18]

The probability that a case will be litigated may be increased not only by the incentives affecting plaintiffs and defendants as a class, but also by the behavior of individual parties. Whenever settlement depends on the cooperation or agreement of certain parties, they may behave strategically by demanding superior treatment as a condition of their agreement. Refusals to settle are not always strategic, however, because a party may occupy a position that legitimately requires special, separate treatment. For instance, to assure that total settlement payments stay within the limits of insurance coverage or other available assets, defendants who are subject to cross-claims by codefendants may need protection against such claims before settling with plaintiffs. Defendants not subject to such cross-claims have no need for this protection. Yet without the cooperation of the latter set of defendants, the former set may be unwilling or unable to settle. [19] In short, the more parties to the litigation, the greater the difficulty of fashioning a settlement to which all essential parties will agree. [20]

Under some circumstances, of course, a combination of incentives in mass tort cases may make settlement more rather than less likely. A defendant facing plaintiffs with pooled resources and more staying power than the typical individual claimant may decide that the necessity of heavy litigation expenditures is not worth **[*853]** their potential benefit. Major airplane crash litigation apparently follows this pattern, though usually only after substantial investment in the case by both sides. [21] The fear of high litigation costs, in addition to the threat of adverse verdicts, also seems to have motivated the defendants' settlement offers in the Agent Orange and Bendectin litigation. [22] Although the mass character of the litigation in these and similar instances makes settlement more likely, settlement is nevertheless more costly because of the mass character of the cases. Thus, other things being equal, a mass tort claim is likely to be more complex, lengthy, and costly than an equivalent claim involving only two parties. [23]

The complexity and cost of mass injury litigation, however, are only quantitative effects of size; the size of such litigation can render it qualitatively different from ordinary tort cases as well. First, size is part of the reason that the choice between individual and collective models of responsibility can be posed at all. For example, the choice of an appropriate liability standard depends heavily on the incentive effects of the threat that the standard will be applied in the future. The sporadic and isolated imposition of liability in a few unrelated, ordinary accident cases may have little incentive effect on future actors, simply because the cases are sporadic and isolated. Even the threat that a particular standard that has been adopted previously in an ordinary accident case also will be adopted in mass tort cases is far weaker than the message sent when a new standard actually is applied in a mass tort case. A responsibility dilemma therefore is not likely to be acute unless it is posed by the extended set of claims characteristic of mass tort litigation.

Second, only after the scientific community develops at least some knowledge about the causes of injuries at issue in mass tort cases can the legal system even contemplate adopting collective responsibility **[*854]** rules that displace certain of the problems of tracing

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individual responsibility. The greater number of injured parties in a mass tort case can be a prerequisite to the development of such knowledge. For example, in some cases the existence of a large number of people with the same disease or injury is necessary to the scientific identification of its cause. [24] The first asbestos worker who contracts lung cancer has a myriad of possible causes to consider, but once many asbestos workers contract the same disease, epidemiologists can begin to make judgments about causation. [25] In contrast, in other instances potential claimants cannot proceed far enough even to have difficulty proving causation, because they cannot identify potentially responsible defendants by analyzing a large number of similar claims.

In sum, the most salient feature of mass tort litigation is more than a merely definitional property; size also affects the behavior of the litigants, influences their incentives to settle, and helps to create the other legal problems associated with the choice between the individual and collective models of responsibility.

B. The Applicable Standard of Care

The responsibility dilemma characteristic of mass tort litigation emerges again in the choice between fault and non-fault standards of liability. Negligence is generally an individual responsibility standard; strict liability is a feature of regimes weighed more toward collective responsibility. The explanation for this difference involves more than the evident stress on individual fault in negligence law; strict liability sometimes serves as a surrogate that more effectively achieves the aims of negligence law than negligence itself. [26] More importantly, strict liability tends to be imposed at a **[*855]** higher level of generality than negligence liability. It is applied to categories of activities, with less regard for detailed differences in the behavior of or care taken by individuals or firms comprising these categories. [27] For example, a blaster is strictly liable for injuries caused by that activity, regardless of the time, place, or manner in which the blasting occurs; [28] likewise, the maker of an unreasonably dangerous product is liable for the injuries it causes, despite the amount of care exercised in the product's design and manufacture. [29] Strict liability is imposed because of characteristics that activities share, rather than because of features of behavior that distinguish actors engaging in the same activity.

Despite these collective responsibility implications of strict liability, its use as a standard of care in the typical products liability case is not a major substantive change, because negligence and strict liability ordinarily produce similar outcomes. Although negligence liability requires foreseeability of the risk in question and strict liability does not, usually the risk was foreseeable even if the defendant did not actually foresee it. Others in the industry or the scientific community will have sufficiently recognized the danger to put the defendant on notice of the existence of the risk. In these cases a strict liability standard simply relieves the plaintiff of the burden of proving what probably was the case and probably could be proved. [30]

The collective responsibility implications of strict liability are more prominent, however, in cases where a long-latency period occurs between the exposure to a dangerous substance and the manifestation of a disease caused by the exposure. The longer the latency period after the plaintiff's exposure to the risk created by the defendant, the greater the chance that unforeseen and possibly **[*856]** unforeseeable risks were recognized only after exposure. The critical issue in such cases is whether the defendant should be held liable for a failure to reduce or to warn of risks that were unknown and unknowable at the time they posed a danger to the plaintiff. The defendant in such a case typically raises a "state of the art" defense based on its inability to discover or understand the danger at the time of the exposure. [31] In effect, the defendant claims that it should not be liable if it were not negligent.

The appeal of this claim to be judged by an individual responsibility standard is strong. On the other hand, requiring a showing of negligence in long-latency cases would place on

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plaintiffs significant difficulties of proof. Proof of negligence would require a showing that the defendant actually knew of the danger in question -- always a difficult burden to meet -- or that it should have known of the danger. Yet if the defendant, others in the industry, and the scientific community were unaware of the danger, then the plaintiff would be required to prove that the defendant was negligent in conducting insufficient research into the dangers of the product or material in question and that a reasonable level of research would have uncovered the danger. [32]

Such proof would be enormously complicated, expensive, and difficult. It would involve showing the prospective benefits to the defendant at the time of conducting the research, the prospective costs, and the probability that a reasonable level of research would have uncovered the danger in question. Furthermore, different defendants might have different research obligations, depending on their research capacities and other characteristics. Moreover, all this would have to be proved twenty years or more after the period in question. By imposing strict liability rather than negligence in such cases, the tort system can ignore differences in the prospective benefits and costs to different enterprises of conducting research that would have revealed undiscovered risks; instead, the system holds the industry producing the product or taking the action in question to a collective standard. The drift toward strict **[*857]** liability in failure to warn cases, therefore, can be explained partially as a reaction to the difficulties of proving negligence in long-latency cases. [33] In these cases strict liability may serve as a surrogate for negligence by overimposing liability (from the standpoint of the negligence standard) less than adherence to a negligence standard would underimpose liability. [34]

A different justification must be provided for imposing strict liability in long-latency cases in which a reasonable level of research would not have uncovered the risk that culminated years later in mass injuries. Here strict liability is not a surrogate for negligence because the cases do not involve negligence. Instead, the justification for imposing strict liability must rest, if it exists at all, on the impact on future actors of the threat of strict liability. This threat may encourage additional research by future actors into the risks posed by their activities [35] or may influence levels of activity and production unaffected by the threat of negligence liability. [36]

Underlying this kind of justification for the imposition of strict liability in conventional cases, however, there has always seemed to be an unstated moral predicate. This predicate is that a standard of care that imposes liability on a defendant and thereby "uses" that defendant to influence future actors is morally acceptable *if the defendant could have predicted such a use of strict liability.* Thus the moral acceptability of strict liability stems from its predictability. Predictability subjects the actual defendant to all of the incentive effects that the threat of strict liability produces and eliminates the "use" of the defendant *only* as a means to influence others.

Prediction becomes more difficult, however, as the period between the time an enterprise tries to predict its liability for present actions and the time liability actually is imposed increases. To the extent an enterprise now subject to suit could not have predicted the imposition of strict liability, no incentives were created by that **[*858]** prospect, and the justification for imposing strict liability can only be its impact on the future actors who can now anticipate strict liability. Under such circumstances the defendant is used only to influence the behavior of others. Thus, strict liability has the greatest potential to use defendants as a means to an end unrelated to their past actions in long-latency cases.

This phenomenon is perhaps the strongest example of the way in which the adoption of strict liability in long-latency cases collectivizes responsibility when injuries are largely unpredictable. In the first decade or two after a strict liability standard is adopted, its imposition holds past actors responsible for the consequences of their own actions, but the exclusive purpose of imposing liability is to influence others. In effect, the law enlists past actors in service of its effort to control future actors -- it holds the former collectively

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responsible for influencing the behavior of the latter.

Unfortunately, the most obvious method of avoiding this "retroactive" imposition of obligations -- prospective announcement of a new rule of liability -- would be feasible in this field only in the most attenuated way. Because of the long-latency periods involved, the prospective rule could not have an immediate effect on litigation, but could apply only to those claims resulting from exposures that occur after the time when potential defendants could reasonably have predicted the ultimate imposition of strict liability. If this watershed point were to lie somewhere in the mid-1970's, then a strict liability rule announced prospectively today would not begin to have application until the late-1990's, when injuries from exposures occurring after the watershed would manifest themselves.

This would be an odd-looking rule indeed. More important, it would be a rule that might not achieve its aims. Current actors could not be confident that such a rule would be applied when the first opportunities for application would not occur for ten years or more. Because such a threat lacks credibility, its incentive effects might be weak. Therefore, the need to make the threat to impose strict liability in future cases credible may explain its current imposition in cases involving actions that occurred before the state of the art could anticipate such liability, and from which the typical moral predicate for the imposition of liability is absent.

At this point in the analysis, two ways in which strict liability takes a step toward collective responsibility have emerged. First, strict liability, much more than negligence liability, embodies a **[*859]** standard of conduct that results in liability for ordinary rather than exceptional activity. A finding of strict liability makes a statement about an activity, not an actor alone, and is therefore a statement about all who are engaged in the activity. It is like a finding that an entire industry is negligent as a matter of law, though without the fault implied by such a finding. [37] Second, in long-latency cases that disallow a state-of-the-art defense, current defendants bear the cost of making a credible threat to impose liability on future defendants, and are held responsible so that the system can control the behavior of others.

These are only small steps toward collective responsibility. To judge an individual defendant by a standard that applies to the actions of a group of actors is not to impose liability on the group; to impose liability on an individual actor primarily to affect the behavior of others imposes a kind of vicarious, rather than overtly collective, responsibility. Nonetheless, the rise of strict liability, especially in long-latency cases, portends more direct forms of collective responsibility, because the imposition of strict liability begins to dissolve the conceptual boundaries between individual actors. If a defendant is held liable because of the nature of the activity in which it and others engage, despite differences in the manner of conducting the activity, the differences between the actors are submerged. If a defendant is held liable for actions which posed unpredictable risks solely in order to influence others' behavior now, an otherwise important difference between them -- their control over different sets of events -- is ignored. These small movements toward collective responsibility grow larger in the new doctrines governing causation.

C. Proof of Causation

It should come as no surprise that proving causation often is especially difficult in mass tort cases. The factors that render causal relations unclear and knowledge about the risk posed by a variety of hazards underdeveloped at the time of trial are likely to be the same ones that hindered the enterprise's ability to make sophisticated risk-safety calculations in the first place. An enterprise that **[*860]** cannot predict the consequences of its actions with the requisite degree of certainty may not invest in the degree of loss prevention that, with hindsight, would have been optimal. The result may be mass exposure to risk and potentially massive injury.

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To meet traditional burdens of proof in a regime that emphasizes individual responsibility, the plaintiff must show what I shall call *substance, source,* and *exposure* causation. That is, he must prove that the substance for which the defendant is responsible can cause his injury or disease, that the defendant and not someone else was the source of the substance, and that he was in fact exposed to the substance in a way that has caused his disease. In many cases proof of some of these elements is simple; in some cases, proof of one automatically proves another. For example, when a particular disease is caused almost exclusively by a particular substance, the occurrence of the disease is the substance's "signature." [38] Proof that the plaintiff has the disease, therefore, is also proof of both exposure and substance causation. In many cases, however, meeting the traditional burden of proof as to each of these elements is no minor accomplishment.

Probably no doctrinal requirement has more troubled the courts in mass injury cases than the traditional rule that the plaintiff bears the burden of proving causation. [39] One reason for the problem is the long-latency period associated with diseases caused by dangerous exposures to certain drugs, toxic chemicals, or hazardous waste. [40] Because the period between the exposure allegedly producing the disease and the manifestation of the disease can be twenty years or more, [41] evidence of any connection between the defendant's actions and the plaintiff's loss may often have disappeared or become unavailable.

[*861] Another reason proving causation is so troubling in mass tort cases is that scientific knowledge often is insufficient to allow a firm conclusion about the cause of the plaintiff's injury. Clinical and epidemiological studies may support the conclusion that exposure to a substance for which the defendant is responsible *may have been* a cause of the plaintiff's loss; such studies may even provide some guidance as to the probability of this causal connection. Their value is often limited, however, because they will not support the traditionally required inference that the defendant was *more probably than not* a cause. [42] The difficulties of proof are no less troubling when the question is how much of plaintiff's damages were caused by each defendant, even assuming that together the defendants are responsible for all such damages. [43]

The pressure to relax the traditional burdens of proof regarding causation and apportionment of damages has been strong. Without such relaxation often the plaintiff will fail, notwithstanding the appeal of his claim and the probability that the defendant or defendants have caused injuries to someone, even if not to the plaintiff. [44] The courts have responded to the pressure with a series of doctrinal innovations that adopt a more collective focus than the rules they replace.

The new rules can shift the burdens of proof and adopt a more collective emphasis in several ways. In signature disease cases, market share liability entirely relieves the plaintiff of the burden of proving source causation. That burden is shifted to the defendants, who normally are unable to disprove causation and therefore bear liability collectively, albeit in proportion to their market shares. The defendants in signature disease cases have not necessarily **[*862]** acted collectively to cause plaintiff's damages, although sometimes the actions of each contributed. [45] Rather, market share liability is an effort to impose collective responsibility in a way that mirrors the amount of each defendant's individual responsibility: it is a surrogate for individual responsibility. [46]

Joint and several liability imposed on independent tortfeasors -- another method of shifting the burden of proof -- has even more collective effects for two reasons. First, the amount of liability imposed bears no necessary relation to the degree of responsibility of any particular defendant for the plaintiff's injury. In certain cases the amount of liability imposed may not even reflect the probability that a particular defendant is responsible at all. [47] Second, because each defendant bears the risk of the others' insolvencies, it may have to pay both its own non-causal share and a portion of the shares of codefendants. Shifting the burden of apportioning damages to a group of defendants, each of whom has caused an undetermined part of a plaintiff's injuries, also is a collective response to the causation problem, because if

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ARTICLE: COMPENSATION FOR MASS PRIVATE DELICTS: EVOLVING ROLES OF ADMINISTRATIVE, CRIMINAL, AND TORT LAW

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* Senior Judge, Eastern District of New York. Thanks are due to Adam Zimmerman, Esq., Gregory S. Chernack, Esq., Edwin J. Wesely, Esq., Professor Norman Abrams, and Professor Victor J. Stone, for their assistance with this paper. Many others with specialized knowledge made helpful comments, some of which are referred to in the footnotes that follow.

SUMMARY:
... This paper begins an exploration of the evolving role of administrative, criminal, and tort law in compensating victims and deterring mass delicts. ... Part IV highlights how increased use of compensation in criminal and administrative law has been accompanied by curbs to limit recovery in the tort system. ... In some ways this development is a return to an earlier time, in the long-ago past of criminal and tort law. ... It provided for an administrative agency (overseen by a special master) to hear claims against the airlines (and possibly others) and provide swift compensation. ... In the past century tort law has expanded its primary role to compensate. ... Also pending were a class action in the Southern District of New York and an action brought by the SEC in the District of Columbia. ... The Trend Against Compensating Victims Through the Tort System ... It allows the federal courts to throttle private state tort law. ... First, the tort system can provide more flexible forms of recovery. ... Even a balanced administrative-criminal-tort system will pose challenges. ... C. The Role of the Tort System ...

In this essay, the Honorable Judge Weinstein explores the "evolving role of administrative, criminal and tort law in compensating victims and deterring mass delicts." This essay, originally delivered as part of the Paul M. Van Arsdell Lecture, at the University of Illinois College of Law, begins by discussing the evolution of these three models in compensating victims of **mass torts,** and how recent developments have led these three models to overlap. Administrative law is primarily designed to prevent **mass torts** through regulation. Changes in discovery rules, as well as long-arm statutes, among other factors, have begun to favor "those seeking private remedies in the courts." The evolution of criminal law beyond the protection of the public can be seen through the increased use of fines and forfeitures in criminal proceedings, although this trend has the effect of reducing the amount available to pay victims restitution. In part III, Judge Weinstein provides recent examples of this trend towards overlap in federal district court as well as in administrative law. Parts IV and V

suits. [101]

Transaction costs to society and in compensating victims can be very high. It has been estimated that such costs of the tort system in dealing with products liability and environmental claims consume up to two-thirds of the resources that society devotes to resolving such claims; only about one-third of total outlays by the parties and the court system **[*971]** is paid as compensation to successful plaintiffs. [102] In the DES cases, a defense attorney suggested to me that transaction costs in that litigation consumed almost ninety percent of the total award to victims. This was probably true at the earlier stages of the controversy when many cases were being contested. Now that **settlements** take place on a privately administered matrix basis with the help of a court appointed special master, the transaction costs are probably no longer excessive.

Despite these costs, on balance, I think the tort model provides a distinctly democratic and effective means for protecting victims and ensuring that their injuries are properly compensated. [103] On the whole, the tort system provides more flexible forms of relief, prevents agency capture, promotes vigilance of both producers and the public, spreads information relevant to the public interest, and displays sensitivity to populations not always served by the general political process.

First, the tort system can provide more flexible forms of recovery. Considerations long associated with equity jurisprudence have motivated many of the procedural and substantive responses of American courts to problems posed by complex multi-party, multi-issue **mass tort** cases. [104] Many **mass tort** resolutions have moved away from the traditional courtroom individual remedies, and have instead set up aggregated **settlements,** compensation-administrative plans, and insurance-type installment payment programs supervised by the courts. [105]

Second, the tort model can reduce tendencies toward "agency capture." [106] While government has a vital role in our society's health, I have an inherent distrust of government as the sole protector of our rights and **[*972]** safety. [107] Administrative agencies are subject to political pressures not to regulate too stringently; the finances of agencies can be cut if enforcement policies of the executive or legislature change; pressure to appoint administrators favorable to industry sometimes exists; and there is a movement to and from private industry that can create conflicts. [108] In sum, agencies are susceptible to the needs of the industry they are charged with regulating.

Admittedly, the recommendation of the American Law Institute regarding regulatory preclusion of private actions does have a certain charm in its symmetry. As Professor Richard B. Stewart posits, the recommendations do streamline the "two track" system of tort and administrative law (but not the third track of criminal law). [109] Nevertheless, as regulatory failures with a host of products suggest - from Asbestos to tires to the Zeppelin - tort law often provides more reliable, open, and politics-free protection to the public. [110]

[*973] Third, I believe there is a distinct, continuing, and prominent role for private litigation and entrepreneurial private attorneys in this field. [111] Both the criminal and administrative agencies are somewhat less tenacious in pursuing delictors than private civil attorneys induced by their desire to earn fees and of private litigants for personal vindication. [112]

Fourth, private litigation is good at exposing bad acts. As contrasted with the Continental and English civil systems, which place premiums on secrecy and confidentiality, U.S. courts provide for liberal discovery rules, open courtrooms, and presumptions in favor of unsealing documents that may involve the public interest. [113] The U.S. court system is able to make bad acts visible and subject to public discussion in ways that administrative FOIA requests sometimes cannot. [114]

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The tort model also provides sensitivity to populations otherwise under-served by administrative and prosecutorial action. [115] This is true **[*974]** not only of the large desegregation, prison, discrimination, and disability cases, but also in environmental and consumer regulation. [116]

In sum, these features of the private civil system provide a democratic addition to administrative and criminal forms of compensation. This private counterweight is a critical component of American jurisprudence. At an international conference in Geneva on class actions and other methods of compensating masses of injured people, I was struck by what I took to be an underlying assumption of Europe, South America, and the Far East. They emphasize a "top-down" approach: the government and other agencies provide protection and compensation for those injured without much say by the individual. [117]

In contrast, the U.S. civil system is, I suggest, one of "bottom-up." The individual, through his or her attorney, defends and prosecutes private rights against corporations, the government (subject to the somewhat outdated and unjust governmental immunity defenses), and others. The attitudes of American society obviously affect its view of courts and litigation. From the outset, the colonies and subsequently the postrevolutionary generations showed a sense of private independence and initiative somewhat different from that of the British Empire and other nations. [118] This tradition continues today in the evolution of American law.

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VI. Opportunities and Difficulties in Integrating the Three Models

As the attack continues on our traditional tort system and as its role is attenuated in remedying large-scale injuries, we should ask: How can we design our hydra-headed system to compensate individuals fairly and efficiently? How can we maintain the tort system's known advantages in compensating for mass disasters while effectively utilizing the criminal and administrative system to ensure that those injured receive adequate compensation at reasonable cost? I believe that an integrated administrative-criminal-tort system offers distinct advantages even though it presents difficulties and risks.

First, I want to discuss how the growing use of the criminal and administrative system to compensate individuals ironically tends to alienate individual victims from the legal process. Second, I will highlight the risks and advantages of a fully integrated system. Finally, I will underscore the valuable role the tort system can continue to play in compensating individuals fairly, reducing transactional inefficiency, and deterring future bad acts.

A. Alienation of Individuals from the Legal Process

Ultimately, the developments I have already described present a serious risk: they will further alienate individual victims from the legal process. As described in the last section, the traditional tort model can be more "democratic" because the individual litigant plays a central role. By contrast, the tendency in administrative and criminal law is to favor the government's position over that of the person injured. [119] As I have noted, there is pressure on the courts to reduce private mass litigation. [120] These tendencies disfavor the tort leg of the compensation stool and threaten our "bottom-up" jurisprudence.

[*976] Individuals are squeezed out of the legal process in other ways as well. Victims now have a right to be heard at sentencing, particularly for purposes of restitution, as well as in some rule-making and other decisions of administrative agencies. [121] Yet those seeking to be protected or compensated are usually only peripheral players in the administrative and criminal law systems. [122] By contrast, in civil litigation, the individual harmed has a right to

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be heard from the outset and throughout. Even in class and other mass actions, more and more attorneys remain in contact with their clients through group meetings, telephone exchanges, and new mediums like e-mail and the Web. [123] Additionally, those claiming injury have an absolute right to be heard in any fairness hearing held by the court before approval of a class **settlement.** [124]

We must also consider the different legal burdens a victim assumes in order to receive compensation. If a victim must rely on the criminal system to receive compensation, the prosecutor must satisfy the "beyond a reasonable doubt" standard of guilt and demonstrate that a defendant acted with the requisite mens rea, which usually requires a subjective intent to harm. [125] In comparison, the traditional tort model requires proof of negligence only by a preponderance of the evidence. Under the civil standard, it is more likely that victims will be compensated. The compassion of jurors for persons like themselves who have been injured also places victims at an advantage in civil trials. This may be particularly true of previously unprotected groups. [126]

[*977] The burden in administrative cases varies. Usually a government agency must merely demonstrate something by a preponderance of the evidence; [127] occasionally it must demonstrate by clear and convincing evidence. [128] Hence, the ability to obtain recovery usually - albeit not always - requires no greater burden than in civil cases, and sometimes the practical burden is less than it would be in a civil case. [129] Because of these differences, it is possible that a civil or administrative action can succeed where an earlier criminal case failed. This may be particularly true for minorities. [130]

B. Advantages and Disadvantages of Full Integration

Even a balanced administrative-criminal-tort system will pose challenges. A fully integrated system increases the burden of coordination among parties, stimulates the creation of federal barriers for private litigants, and may induce excessive recoveries. Overall, however, a coordinated tort - administrative - criminal system will reduce the threat of duplicative litigation, give judges a more complete picture of victims' needs, and provide opportunities for more creative remedies.

1. Disadvantages

i. Coordination

A potential difficulty with an integrated system is that any coordination among governmental agencies, prosecutors, private attorneys, and the courts can slow ultimate disposition. Nevertheless, particularly if private attorneys recognize the advantage of cooperation with criminal and administrative agencies in their private suits, they can be expected to try to expedite the matter in order to obtain their fee. [131] Moreover, if a single **[*978]** broad **settlement** - such as in a generic drug case - can be reached, the need for multiple actions can be eliminated.

ii. Restrictive Legislation and Federalism

There is the possibility that coordination will encourage those who oppose private recovery to enact legislation requiring permission from the relevant governmental agency before bringing class actions. [132] A threat to our federalism exists if the more potent federal criminal-administrative-civil litigation triumvirate overwhelms the state Erie tort approach. Preemption increases the threat to private civil litigation; but it does not seem a serious impediment to civil actions at the moment. [133]

iii. Excessive (or Inadequate) Recoveries

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The use of criminal law and administrative law as a club to induce excessive (or inadequate) recoveries presents risks of abuse, but these risks can be guarded against. The courts have felt no compunction about reviewing unfair administrative action. Criminal law rights and forfeiture rights have been protected by both Congress and the courts against overreaching. [134]

As a matter of policy the criminal system should not occupy a central role in providing for private compensation. This is true regardless of the mental state required for the particular crime charged. Criminal convictions still carry a great stigma of moral turpitude, even in regulatory offense crimes where mens rea is minimal. [135] The system should not force a defendant into settling unfair civil claims in order to avoid a criminal prosecution.

If we are to provide fair remedies (in and out of the courtroom), Congress and the courts should ensure that criminal and administrative proceedings do not overshadow the tort system. If, however, there is a good independent reason to bring administrative or criminal proceedings, **[*979]** private compensation through restitution or disgorgement as a collateral matter is appropriate. [136]

2. Advantages

i. Duplicative Litigation

The integrated model offers several advantages. First, if all three prongs can be combined in the same court, the threat of duplicative litigation is minimized. Lawyers and judges who are familiar with the case can work together to bring about a speedy termination of the dispute. The possibility of a global **settlement** increases.

ii. Equitable Allocation and Restitution

The judge who has all aspects of the case before him or her is able to get a complete picture of the entire group of victims and of the defendant. This permits allocation of the defendant's resources in the most equitable manner. It also minimizes the risk that the defendant will hide his or her assets. The danger that plaintiffs in another civil action will be shortchanged is reduced. [137] By ensuring that the victims are heard in any related proceeding, a judge can guarantee that they are not forgotten or crushed by an overly bureaucratic process.

iii. Flexible Relief

Finally, a more integrated system has advantages in designing the form of relief and how it is allocated. For example, the so-called fluid recovery in a class action or a private action based upon damage, in nuisance cases, to the community generally (rather than to individuals seeking compensation), permits private persons and private attorneys to accomplish some of the things the government should be doing through executive, legislative, administrative, or criminal action. [138] Private actions by individuals or private nongovernmental groups to obtain remedies for the population generally against abuses in prisons, mental institutions, **[*980]** schools, toxic dumps, or the like are in this category. By combining the skills and resources of government prosecutors, administrators, and the private bar, an integrated model provides new opportunities for community protection. As already noted, to the extent that the administrative and criminal systems eliminate all the benefits of noncompliance with the law, **punitive damages** in civil suits can be eliminated, leaving the private action to deal only with pure compensation. [139]

C. The Role of the Tort System

The private tort model plays a valuable role in this integrated system. [140] Without an effective procedure for obtaining compensation for large numbers of people injured through the

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tortuous conduct of malefactors, most of the injured would be uncompensated and the tortfeasor would not pay the full social cost of its activities. Consolidations, advertisements by plaintiffs' counsel, contingency fees, class actions, and the whole panoply of organizational approaches we have developed for private enforcement of private rights are essential in a society as complex as ours. We should not dismantle or substantially reduce the private tort model solely in reliance on the administrative and criminal law models. Cooperation among them to increase transactional efficiency and reduce costs to defendants, plaintiffs and the government should be encouraged.

An approach to conflicts of laws and jurisdiction that will permit one court to apply one rule of law and one procedural system in conducting one litigation involving one related series of dispute is desirable. [141] It is useful, where the dispute is pending in different federal courts, to have multiple actions consolidated before one judge. Transfers, either pursuant to 1404 of title 28 of the U.S. Code or by the multidistrict panel, or by stays of cases pending in other federal district or state courts should be utilized where appropriate to put all related proceedings - civil, administrative, and criminal - before the same judge. [142]

In the federal system, transfer by the multidistrict panel to one court can be only for pretrial purposes, [143] although that centralization often results in a **settlement.** A federal civil case can more easily be transferred to the place where the criminal case is pending [144] because venue **[*981]** rules are stricter for criminal than for civil cases. [145] If the cases are pending in the state and federal systems, or in a number of states, consolidation becomes difficult, although there are limited provisions for stays and for removal of some matters from state to federal court. [146] Statutory authority for more comprehensive consolidation would be useful. [147]

VII. Conclusion

Ours is a mixed economy and legal system, energized by private entrepreneurship, government responsibility, and charitable communal impulse. All elements have their roles. Often these roles overlap. How all of our institutions can work together without impinging on and reducing the effectiveness of each presents intriguing problems for the law and for society.

It is natural for administrative lawyers and criminal prosecutors to resent private attorneys piggy-backing on their work to bring large civil suits with high fees. Yet, as evidenced by examples such as the Rubin case, administrative agencies are sometimes ill-suited to aggressively retrieve money on behalf of private plaintiffs. There are many cases of the government itself contracting out private collection services. Private lawyers can be extremely competent and innovative in pursuing damages.

As Professors Goldberg and Zipinsky write, private litigation protects the "default norm that the civil justice system will provide a remedy for every wrong." [148] Efforts should be made to ensure that the private attorneys, motivated by fees, are available. [149]

Private counsel can assist in gathering facts and in advising and quieting the fears of clients. They have an important role in our judicial system. Our "bottom-up" approach to protection of individuals should not be abandoned or hobbled. Excessive fees can be avoided, but adequate fees that will nurture a strong bar - capable of protecting individual rights generally and their clients' rights particularly - should be maintained in any joint criminal-administrative-private integrated proceeding. [150]

[*982] It would be useful for the government agencies involved - state and federal - together with the private bar to work out policies for cooperation, perhaps through such associations as the American Law Institute or the American Bar Association's Section on Litigation. Appropriate administrative rule making and amendments of sentencing guidelines

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and the Attorney General's guidelines need consideration. [151]

The courts must ensure fairness. The threat of administrative or criminal action to force a civil **settlement** would be particularly dangerous. Nor should a civil **settlement** allow the "buying-off" of a justifiable criminal or administrative proceeding.

More complex technology, globalization of communication, aggregation of production and distribution entities, and growth and urbanization of populations all conspire to make more effective methods for compensating large numbers of those injured by mass delicts desirable - whether through private suits, criminal prosecutions, administrative actions, mediation and arbitration, or a combination of them. [152]

FOOTNOTES:

n1. Various devices are designed to keep cases out of the courts. An example is the "lemon laws" designed to give purchasers of automobiles and other machinery a right to exchange defective purchases, see, e.g., Sarah Hale, Mechanics Fuming Over Veto, Newsday, Feb. 25, 2000, at A5 (discussing veto of bill to permit return to manufacturers of defective emission-testing equipment similar to automobile lemon law) and of New York's extensive mediation services, see Deborah Hensler, A Research Agenda: What We Need to Know About Court Connected ADR, A.B.A. Disp. Resol. Mag., Fall 1999, at 15; Samuel Estreicher & Kenneth J. Turnbull, Class Actions and Arbitration, 233 N.Y. L.J. 3 (2000); David Gladwell, Modern Litigation Culture, the First Six Months of the Civil Justice Reforms in England and Wales, 19 Civ. Just. Q. 9 (2000); Relevant Civil Procedure Rules Adopted by British Judiciary, April 26, 1999 (Rule 1.4(2) (courts can encourage alternate dispute resolution where appropriate)); Sol Schreiber & Laura Weisenbach, In re Estate of Ferdinand E. Marcos Human Rights Litigation: The Personal Account of the Role of the Special Master, 31 Loy. L. Rev. 475 (1998); Jack B. Weinstein, Some Benefits and Risks of Privatization of Justice Through ADR, 11 Ohio St. J. Disp. Resol. 241 (1996) [hereinafter Weinstein, Benefits & Risks]; Jack B. Weinstein, Preliminary Thoughts on Alternate Dispute Resolution (Apr. 2000) [hereinafter Weinstein, Preliminary Thoughts] (International Law Conference, Nicosia, Cyprus) (unpublished) (on file with the University of Illinois Law Review) and citations therein. Even the university disciplinary system may be used to keep grievances and financial claims out of the courts. See Letter from Professor Norman Abrams, to author (Oct. 9, 2000) (on file with the University of Illinois Law Review). For a chart suggesting the relatively small proportion of possible compensation cases that go through the civil court system to trial, see Jack B. Weinstein, The Restatement of Torts and the Courts, 54 Vand. L. Rev. 1439, 1445 (2001) [hereinafter Weinstein, Restatement].

n2. This development is not new. From the earliest days of the modern derivative suit and class action, a strong relationship between the plaintiffs' bar and the government developed through the receipt from the latter of information about acts of putative defendants that might provide a basis for private mass actions. In the thirties and since, for example, much of the private securities litigation depended upon reports required by the S.E.C. and investigations by it, Congress and the Department of Justice, and prosecutions based on violations of federal and state securities acts. E.g., David Ratner & Thomas Lee Hazen, Securities Regulation 12 (5th ed. 1966).

n3. For my views of Alternate Dispute Resolution, see, e.g., Weinstein, Benefits and Risks, supra note 1; Weinstein, Preliminary Thoughts, supra note 1; see also, e.g., Emmanuel Gaillard, The New ADR Rules of the International Chamber of Commerce, N.Y. L.J., Oct. 10,

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2001, at 3 (ICC Court of Arbitration expansion as "the world's pre-eminent arbitration institution"). As applied to employer-employee disputes, ADR may be substantially tilting the law away from protections of workers.

n4. E.g., F. H. Lawson et al., Amos and Walton's Introduction to French Law 200 (3d ed. 1967)

If criminal proceedings have been initiated, the victim may elect to work out his civil remedies in a separate civil action before the civil courts, or to intervene as civil party in the criminal proceedings. In the former case the civil action must be stayed while the penal action is being prosecuted, with a view to preventing contradictory findings of fact. In the latter case the penal and civil actions are considered simultaneously by the criminal court, which may both punish the wrongdoer in accordance with the criminal law and indemnify the victim in accordance with the civil law. A person who has suffered loss as a result of the criminal act of another has nearly always a civil remedy, because fault is necessarily present. Before intervening in penal proceedings, however, the victim must consider the prospects of success in the penal action, since, if the case is one within the competence of the tribunal de police or the tribunal correctionnel, civil damages will not be awarded unless the penal action succeeds. If it fails, for example because the prosecution has not proved mens rea, civil damages will not be awarded and a fresh civil action would have to follow. It is otherwise in cases coming before the cour d'assises, where, if negligence is proved, civil damages may be awarded in the absence of proof of mens rea.

Id. (footnotes omitted) (emphasis in original). Stanley S. Arkin, Commencement of Criminal Actions - A More Global View, N.Y. L.J., Oct. 12, 2000, at 3 ("In France, any person or legal entity that claims to have been harmed by a violation of law may bring a civil action to obtain damages... . A claimed victim also has the right, pursuant to the Criminal Code, to bring or participate in, a public criminal action."). Some American states permit private persons to start a criminal action. The federal statutes require the prosecution to commence a criminal action.

n5. 18 U.S.C.A. 1961-1968 (West Supp. 2000). The RICO statute creates a private cause of action based on the criminal violation. A civil suit by the government can provide a wide range of remedies including injunction and disgorgement of profits. The stigma of being labeled a "racketeer" should not induce **settlement** of the civil and criminal actions. E.g., Falise v. Am. Tobacco Co., 94 F. Supp. 2d 316 (E.D.N.Y. 2000); Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc., 74 F. Supp. 2d 221 (E.D.N.Y. 1999); Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc., 71 F. Supp. 2d 139 (E.D.N.Y. 1999); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 113 F. Supp. 2d 345 (E.D.N.Y. 2000); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 36 F. Supp. 2d 560 (E.D.N.Y. 1999); Simon v. Philip Morris, Inc., 86 F. Supp. 2d 95 (E.D.N.Y. 2000); United States v. Philip Morris, Inc., 116 F. Supp. 2d 131, 155 (D.D.C. 2000) (dismissing some causes of action but retaining RICO-based causes).

n6. E.g., 18 U.S.C. 3063 (1994) (criminal powers of Environmental Protection Agency); 15 U.S.C. 1644 (1994) (consumer credit); 18 U.S.C. 1365 (1994 & Supp. IV 1998) (tampering with consumer products).

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n7. E.g., Child Support Recovery Act of 1992, 18 U.S.C. 228 (1994 & Supp. IV 1998); Catherine Wimberly, Deadbeat Dads, Welfare Moms, and Uncle Sam: How the Child Support Recovery Act Punishes Single Mother Families, 53 Stan. L. Rev. 729 (2000) (describing relation of criminal law and private litigation in enforcing child support orders).

n8. See Norman Abrams, Administrative Process Alternatives to the Criminal Process 3-10 (1979).

n9. See, e.g., Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., No. 98 CV 3287 (E.D.N.Y. Oct. 4, 2001) (Memorandum and Order).

n10. E.g., 18 U.S.C. 2264 (1994) (domestic violence); id. 2264 (stalking); 18 U.S.C.A. 3555 (West Supp. 2000) (notice to victims).

n11. 18 U.S.C. 3510 (1994 & Supp. IV 1998).

n12. E.g., id. 3556 (order of restitution); id. 3662 (order of restitution); id. 3663a (mandatory restitution to victims of certain crimes); id. 3664 (procedure for issuance and enforcement of order of restitution); 11 U.S.C. 523 (nondischargeability in bankruptcy); 21 U.S.C. 853(q) (Supp. II 1996) (cleanup costs associated with methamphetamine manufacturing); 42 U.S.C. 1316 (1994) (public assistance); 42 U.S.C. 2210 nt (radiation exposure compensation); U.S. Sentencing Guidelines Manual 5E1.1, 8B.1.1. Total restitution ordered in fiscal year 1999 was $ 1,827,516,440. See Memorandum from Sentencing Commission to the author (Oct. 11, 2000) (on file with author). Restitution is payable before a fine. U.S. Sentencing Guidelines Manual 5E1.1(c). If there is no identifiable victim, the court may order "community restitution." Id. 5E1.1(d). It may include services and be payable over time. Id. 5E1.1(e)-(f). The remedy is particularly useful against organizations where incarceration is not possible. See id. 8B1.1; United States v. All Star Indus., 962 F.2d 465 (5th Cir. 1992) (corporation ordered to pay restitution for losses that occurred more than five years before return of indictment). An order of restitution is a lien in favor of the United States on all property and rights to property of the person fined as if it were liability for unpaid taxes. See generally 18 U.S.C.A. 3613(c) (West Supp. 2000). The lien arises on the entry of judgment and continues until satisfied, remitted or set aside, or for twenty years plus the period of incarceration or upon the death of the defendant. See id. 3613(b); see also Office of the Attorney Gen., U.S. Dep't of Justice, Attorney General Guidelines for Victim and Witness Assistance (2000). While the terms are sometimes used in this paper interchangeably, "restitution" is designed to cover the losses of a victim, and goes to the victim, while "disgorgement" is intended to take back gains obtained by the perpetrator in violation of law rather than reimbursing the victim for loss. Forfeitures attendant upon criminal acts such as drug trafficking are partly a matter of disgorgement, but primarily one of the punishments through loss of assets such as vehicles that were used in transportation. See 21 U.S.C. 881 (1994) (for features in drug cases). In a sense, such forfeitures are a form of "restitution" to the public at large for the general ravages of drugs. This complex area is beyond the scope of this paper. For a discussion of the technical procedural problems in

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providing restitution under the Sentencing Guidelines, see W. Royal Furgeson Jr. et al., The Perplexing Problem with Criminal Monetary Penalties in Federal Courts, 19 Rev. Litig. 167 (2000).

n13. 15 U.S.C. 78(c) (1994).

n14. 21 U.S.C. 321 (1994 & Supp. IV 1998).

n15. 42 U.S.C.A. 7607 (West Supp. 2000) (administrative provisions and air pollution); Letter from Eric Schaeffer, Director, Office of Regulatory Enforcement of EPA, to author (Oct. 2, 2000) (on file with author). Mr. Schaeffer, illustrating the complexity of administrative restitution and disgorgement policies, wrote:

... .

Brief Overview of EPA's "Restitution-Related" Enforcement Authorities:

Most of the federal environmental laws authorize EPA to initiate a range of enforcement responses to environmental noncompliance. These responses include criminal, civil judicial, and civil administrative actions. In an average year, EPA initiates approximately ten times the number of administrative enforcement actions as it does judicial actions. Criminal or civil judicial actions are typically brought to address intentional egregious, or exceptionally complicated actions, or where significant injunctive relief is needed. With rare exceptions, EPA seeks to recover any economic benefit of noncompliance (EBN) realized as a result of the violations in all enforcement actions.

EPA recoups government costs for hazardous substance clean-ups through administrative or judicial cost recovery actions under its Comprehensive Environmental Response Act (CERCLA or Superfund) and Oil Pollution Act (OPA) authorities. We can also order Potentially Responsible Parties (PRPs) to conduct the required clean-up themselves. CERCLA and the OPA further provide for authorized "Natural Resource Trustees" to conduct natural resource damages (NRD) assessments as a means of evaluating the need for restoring the public's natural resources following releases of hazardous substances into the environment. While EPA is not a Natural Resource Trustee, we coordinate with the Trustees in the context of NRD assessments, investigations, and planning for response actions.

Recovery of Economic Benefit of Noncompliance in EPA Enforcement Actions:

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The recapture of a violator's EBN is the cornerstone of EPA's civil penalty program to deter and address violations of environmental law. It is assumed that most regulated entities will comply with the law when the costs of noncompliance exceed the benefits. Penalties that recoup the EBN realized by the violators serve to "level the playing field" and ensure that no company obtains a competitive edge from its noncompliance.

Many of the environmental statutes administered by EPA explicitly require federal courts, in judicial cases, and the EPA Administrator or her delegatees, in administrative actions, to consider a violator's EBN in imposing civil penalties. Examples include the Clean Water Act (CWA), Safe Drinking Water Act (SDWA), Clean Air Act (CAA) and the [Emergency] Planning and Community Right-to-Know Act (EPCRA). While EBN is not specifically identified as a penalty factor in other statutes, e.g., the Resource Conversation and Recovery Act (RCRA), the Toxic Substances Control Act (TSCA), and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), in practice, both federal judges and EPA's Administrative Law Judges (ALJs) routinely consider the EBN to the violator in assessing appropriate penalties. This amount serves as a "floor" to which a "gravity" penalty component reflecting the seriousness and/or willfulness of the violation is added to ensure an adequate deterrent impact.

EPA Penalty Policies and Guidelines:

As discussed above, most of the federal environmental laws provide for a range of possible enforcement responses and provide EPA with the discretion to select the most effective enforcement response for each given instance of noncompliance. EPA issues Enforcement Response Policies (ERPs) to guide decision as to whether to seek penalties in specific cases and, if so, the appropriate forum in which to seek them, i.e., in the U.S. Courts, or before EPA's ALJs. We have also issued many civil penalty policies to ensure that adequate and consistent penalties are calculated for comparable violations. Some of these policies establish general guidelines on how to calculate civil penalties, while others are statute-specific penalty policies for individual media programs. EPA may seek stakeholder input when developing these policies, particularly from our State partners who typically serve as co-regulators under the environmental laws.

EPA ensures that administratively imposed penalties and **settlements** of civil penalty actions are consistent with our policies. Where compelling equitable circumstances make the application of a particular policy inappropriate or unfair, however, EPA will depart from the policy in an effort to match the penalty to the facts of the case. This approach reflects the status of our penalty policies as non-binding guidance rather than formal rules. For the same

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describe the effects that increased use of criminal and administrative law in compensating victims of mass delicts, the trend towards limiting recovery in tort law, and the costs and benefits of these developments. He concludes by positing that tort law still plays a vital role in compensating victims of mass delicts. Finally, in part IV, Judge Weinstein suggests that tort law could be better integrated into the three model system, and how such an integrated administrative-criminal-tort system could help reduce duplicative litigation.

TEXT:
[*948]

I. Introduction

Four main divisions of the law are utilized in compelling compensation from, and in sometimes deterring, those whose delicts cause harm to masses of people: (1) criminal; (2) administrative; (3) civil, particularly tort; and (4) arbitration and mediation. [1] What the roles of these divisions should be; how, if at all, they should be integrated; what are the dangers and advantages of these branches working together and separately; and what are the paths of the future remain somewhat unclear. Already there is substantial evidence of a series of developing related tendencies that may call for greater cooperation among those responsible for each in compensating individuals. I will emphasize **mass torts,** but much of what I will say applies to individual cases.

This paper begins an exploration of the evolving role of administrative, criminal, and tort law in compensating victims and deterring mass delicts. [2] The fourth leg of arbitration and mediation (or alternate dispute resolution) - where most important disputes are now being decided - is beyond the scope of this article. [3] Part II traces the evolution of the three models and illustrates how their roles in compensating individuals have **[*949]** begun to overlap. Part III provides examples of these trends in federal district court and administrative law. Part IV highlights how increased use of compensation in criminal and administrative law has been accompanied by curbs to limit recovery in the tort system. Part V describes the costs and benefits of these developments - concluding that tort law still plays a vital role in ensuring a more "democratic" method of compensation. Part VI suggests how tort law can be better integrated into this multi-armed system to ensure more effective remedies for mass delicts.

The overlapping of these enforcement arms raises questions about what their special roles ought to be, individually and cooperatively. We can think of an integrated approach as a "French model" [4] because it mimics some aspects of the continental system by fusing administrative, criminal, and tort proceedings into a single or related actions.

In the criminal law there has been an expansion of, for example, fraud actions, racketeer influenced (RICO) actions, [5] increased environmental and consumer protection prosecutions, [6] and criminal enforcement **[*950]** of orders requiring support for children [7] - many of which might have been brought as private tort actions. Much of this substantive expansion has taken place at the federal level. It has required increased resources for the federal courts and federal enforcement agencies. Attempts to move cases from the criminal courts to civil courts and administrative agencies have not been particularly successful partly because criminal law expansion and incarceration has been embraced by politics. [8] Some advances in decriminalization by the creation of drug courts have been valuable. In the area of consumer fraud, a shift from criminal to private civil prosecutions has been marked. [9]

The criminal law has, however, begun to focus more closely on the interests of victims. [10] It now provides them with a right to be heard at sentencing. [11] Strong provisions require restitution for monetary losses. [12]

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reason, the Agency's Consolidated Rules of Practice for administrative actions (40 CFR Part 22; http://www.epa.gov/oalj/crop.pdf) requires EPA's ALJs to "consider" our penalty policies, but they do not bind them. See 40 CFR 22.27(b).

When EPA identifies cases that are appropriate for civil judicial or criminal enforcement, we refer them to the U.S. Department of Justice (DOJ) and/or the appropriate United States Attorneys for filing in the U.S. District Courts. In most judicial cases, the DOJ or U.S. Attorneys will typically request the statutory maximum penalty in the complaint, but may consult the applicable EPA penalty policies for guidance in the context of **settlement** negotiations.

n16. 15 U.S.C. 2053; see also Note on Legislation, CPSC Seeks Introduction of Legislation Calling for Study of Enforcement Changes, 28 Prod. Safety & Liab. Rep. (BNA) 930 (Oct 9, 2000).

n17. 29 U.S.C. 651-678.

n18. 42 U.S.C. 2000e-4.

n19. 49 U.S.C. 102; 49 U.S.C. 30127 (air bags).

n20. See 49 U.S.C. 307 (transfer of ICC jurisdiction to Department of Transportation).

n21. While criminal law actions seem quite distinct from administrative law in this way, the former has many of the characteristics of the latter in its administration. For one thing, the Department of Justice uses internal rule making to control prosecutors and provides some rudimentary guidelines to U.S. Attorneys on restitution. See generally Norman Abrams, Exploring Limits on the Use of Administrative Agencies in the Felony Criminal Process, 33 Isr. L. Rev. 539 (1999).

n22. See Am. Law Inst., 2 Enterprise Responsibility for Personal Injury 83 (1991).

n23. The expansion of the federal criminal law and administrative remedies tends to shift power to Washington, D.C., and away from state regulation of tort law. This development is

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contrary to the tendency by the conservative members of the Supreme Court to shore up states' rights at the expense of the federal government and its laws through broader interpretations of the Ninth Amendment (rights retained by the people), Tenth Amendment (powers not delegated reserved), and the Eleventh Amendment (no federal judicial power permitting certain suits against the states) as well as limits on Section 5 of the Fourteenth Amendment (power of Congress to enforce the substantive terms of the Amendment). E.g., United States v. Morrison, 529 U.S. 598 (2000) (striking down Violence Against Women Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding that ADEA could not abrogate states' Eleventh Amendment immunity); Alden v. Maine, 527 U.S. 706 (1999) (Congress cannot subject state to suit in state court without its consent); Printz v. United States, 521 U.S. 898 (1997); Mitchell S. Lustig, Rehnquist Court Redefines the Commerce Clause, N.Y. L.J., Mar. 28, 2000, at 3.

n24. See United States v. Winkler, 817 F. Supp. 1530, 1537 (D. Kan. 1993) (restitution amount in criminal case set at sum determined in civil suit by the Federal Deposit Insurance Corporation; the amount of restitution was to be credited to the civil judgment).

n25. The New York Attorney General also frequently handles "cases in which the issues of restitution and disgorgement figure prominently in the relief." His authority to do so in a parens patriae capacity flows from New York's Executive Law:

Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply in the name of the people of the state of New York, to the supreme court of the state of New York ... for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages and, in an appropriate case, cancelling any certificate filed under and by virtue of the provisions of [Penal Law 440 or General Business Law 130] ... and the court may award the relief applied for or so much thereof as it may deem proper ... ."

N.Y. Exec. Law 63(12) (1993) (emphasis added); Letter from Attorney General of New York, to author (Sept. 12, 2000) (on file with author).

n26. See Edward Brunet, Improving Class Action Efficiency by Expanded Use of Parens Partiae Suit and Intervention, 74 Tul. L. Rev. 1919, 1921 (2000). City Corporation Counsel have brought suits against such industries as the gun and paint (lead) industries. Id.; see also David J. Kaufman, Franchise Scam Halted by Attorney General's Office, N.Y. L.J., Aug. 24, 2000, at 3.

n27. See generally Jack B. Weinstein, Individual Justice in **Mass Tort** Litigation (1995) [hereinafter Weinstein, Individual Justice]; Jack B. Weinstein, **Mass Tort** Jurisdiction and Choice of Law in a Multinational World, Communicating by Extraterrestrial Satellites, 37 Willamette L. Rev. 145 (2001) [hereinafter Weinstein, **Mass Tort]** (examining jurisdiction and conflict of law issues in **mass torts)**; Jack B. Weinstein, Some Reflections on United States Group Actions, 45 Am. J. Comp. L. 833, 834 (1997); Jack B. Weinstein, Compensating Large Numbers of People For Inflicted Harms, 11 Duke J. Comp. & Int'l L. 166 (2001)

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[hereinafter Weinstein, Compensating] (discussing various approaches to compensation); Weinstein, Restatement, supra note 1 (exploring impact of the Restatement in the Courts); see also Howard M. Erickson, Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation, 34 U.C. Davis L. Rev. 1, 41 (2000) (combining public and private lawyering enhances deterrence).

n28. It has been suggested that the emphasis on aggregate **settlements** to dispose of these cases - often without individual client input - should be discouraged by ethical rules. See Nancy J. Moore, The Case Against Changing the Aggregate **Settlement** Rule in **Mass Tort** Lawsuits, 41 S. Tex. L. Rev. 149, 153-55 (1999). I cannot agree that the ethical dangers (which can be guarded against) outweigh the advantages in providing remedies to those wronged.

n29. See Letter of Administrative Office of United States Courts, to Chief Justice 3-5 (Sept. 27, 2000). In 1980 the proportion of federal civil cases terminated by trial was nine percent, but it had declined to about three percent by 1999; total jury trials decreased by nineteen percent between 1982 and 1999. In 1992 the proportion of criminal cases terminated by trial was twenty-two percent; in 1999 it was eleven percent. Id. Even eleven percent seems high. In my court it is far lower and, of course, this figure does not take into account the large number of cases in which prosecution is declined.

n30. The technique goes back to Civil War fraud prosecutions, recently encouraged by statutory amendment. E.g., Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000), rev'g, United States ex rel. Stevens v. Vt. Agency of Natural Res., 162 F.3d 195, 208 (2d Cir. 1998) (Weinstein, J., dissenting); Kurt Eichenwald, Big Hospital Manager to Pay a Fraud **Settlement** of $ 95 Million, N.Y. Times, Oct 3, 2000, at A21 (practice a subject of widespread criminal and civil investigations of hospital industry; suits were "filed under the federal whistle-blower laws."). The result of this development is related to the privatization issue. Government is increasingly relying on the private sector to carry on its governmental duties. See Daniel Guttman, Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty, 52 Admin. L. Rev. 859 (2000). The examples range from privately operated schools and prisons to the use of private collection agencies and attorneys to collect loan debts. When I was County Attorney of Nassau County my legal staff did all the legal work of all county departments; now staff has been reduced and many of the more difficult litigations are handled by private litigators for a fee. As in the case of qui tam prosecutions, the line between public-governmental and private activities has been blurred. The government also uses private attorneys to collect debts. On the need for holding fees down in such matters, see Mark A. Behrens & Donald J. Kochan, Let the Sunshine in: The Need for Open Competitive Bidding in Government Retention of Private Legal Services, Prod. Safety & Liab. Rep. (BNA), at 915 (Oct. 2, 2000); cf. In re Auction Houses Antitrust Litigation, 196 F.R.D. 444 (S.D.N.Y. 2000) (auction to obtain less expensive representative of class, considerations pro and con and authorities).

n31. See Brad Seligman, The California Alternative to Class Action: The Unfair Competition Law, Class Action Litig. Rep. 252 (2000); see also Bergeron v. Philip Morris, Inc., 100 F. Supp. 2d 164, 171-72 (E.D.N.Y. 2000) (describing the New York and Massachusetts consumer protection statutes).

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n32. Oliver Wendell Holmes, Jr., The Common Law 39 (Dover Publ'ns 1991) (1881); Theodore F.T. Plucknett, A Concise History of the Common Law 374 (2d ed. 1936) ("The modern distinction between crime and tort is ... one of those classifications which it is futile to press upon medieval law."). The question of what the basic rationale of the criminal law is may not be free from dispute. E.g., George P. Fletcher, The Fall and Rise of Criminal Theory, 1 Buff. Crim. L. Rev. 275, 287 (1988).

n33. Cf. Per Henrick Lindblom, Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure, 45 Am. J. Comp. L. 805, 811 (1997) ("general courts have been afforded a restricted role as guarantors of the rights of private citizens"). See generally Papers and Oral Discussion of Conference on Comparative Procedure in Florence, Italy, 1997, in 45 Am. J. Comp. L. (1997) and in Weinstein, Compensating, supra note 27.

n34. See Weinstein, Compensating, supra note 27 (international conference on comparative procedure, summer 2000).

n35. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (updating 49 U.S.C. 40101); see also 147 Cong. Rec. E1764-01 (daily ed. Oct. 2, 2001) (explanation and criticism of the Act by Hon. Henry A. Waxman).

n36. Air Transportation Safety and System Stabilization Act 402(8), 404(a), Pub. L. No. 107-42, 115 Stat. 230, 237 (2001) (definition and duties of special master).

n37. Id. 403(b)(3) (decision within 120 days of filing of claim).

n38. For a preliminary discussion of the Act, which must be modified because of technical problems beyond the scope of this article, see, for example, Norman B. Arnoff & Sue C. Jacobs, **Terrorism's** Effects and Insurance Coverage, N.Y. L.J., Oct. 9, 2001, at 3 (urging prompt mediation); James D. Tussing & Stewart B. Herman, Government Acts to Bail Out U.S. Airlines, N.Y. L.J., Oct. 4, 2001, at 3; Karen Friefeld, Dilemma for Families: Quick Claims or Court?, Newsday, Oct. 4, 2001, at A30; Lizette Alvarez, An Airline Bailout: Senate Backs $ 15 Billion for Industry and Sets Up Victims' Fund, N.Y. Times, Sept. 22, 2001, at A1; Jim Dwyer & Diana B. Henriques, Money for Families of Attack Victims Could Vary Widely, N.Y. Times, Sept. 20, 2001, at A1; Jenna Greene, Insurance Experts Say Some Disputes Are Likely, Nat'L L.J., Sept. 24, 2001, at A11; Diana B. Henriques & David Barstow, Fund for Victims' Families Already Proves Sore Point, N.Y. Times, Oct. 1, 2001, at A1; Sarah Sparks & Milo Geyelin, Experts Offer Ways to Manage Terror Lawsuits, Wall St. J., Sept. 25, 2001, at A10; Seth Stern, Who Pays the Damages for Sept. 11?, Christian Sci. Monitor, Sept. 27, 2001, at 4; Ruth Bryna Cohen, Most Lawyers Agree with Moratorium on Filing over **Terrorism,** Legal Intelligencer, at http://www.law.com (last visited Sept. 19, 2001). Coordination of civil cases with criminal prosecutions may involve political consequences. See

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David Johnston & Benjamin Weiser, Ashcroft Is Centralizing Control over the Prosecution and Prevention of **Terrorism,** N.Y. Times, Oct. 10, 2001, at B9 (shift of control from U.S. Attorney General in Southern District of New York to Washington, D.C.).

n39. See, e.g., Jack B. Weinstein, Individual Justice in **Mass Tort** Litigation 48-49 (1995) (discussing consolidation of suits arising from World Trade Center disaster of 1993); id. at 123, 308-10 (black lung, atomic energy, and children's vaccines).

n40. Individual and, whenever possible, personal contact with victims is recommended. While the methods for implementing AG Guidelines provisions are relatively straightforward in cases where the number of victims is limited, they can present challenges as the number of victims grows into the hundreds and thousands. In carrying out their obligations under the AG guidelines in cases with large numbers of victims, responsible officials should use the means, given the circumstances, most likely to achieve actual contact with and notice to victims. Dep't of Justice Deputy Att'y Gen's Victim's Rights Working Group, Dep't of Justice, Att'y Gen Guidelines for Victim and Witness Assistance 11 (2000); see also, e.g., United States v. Blake, 89 F. Supp. 2d 328, 347-48 (E.D.N.Y. 2000); Frank Carrington & George Nicholson, The Victims' Movement: An Idea Whose Time Has Come, 11 Pepp. L. Rev. 1 (1984); Christopher R. Goddu, Comment, Victims' "Rights" or a Fair Trial Wronged, 41 Buff. L. Rev. 245 (1993); cf. Scott P. Boylan, Coffee from a Samovar: The Role of the Victim in the Criminal Procedure of Russia and the Proposed Victims Rights Amendment to the United States Constitution, 4 U.C. Davis J. Int'l L. & Policy 103 (1998) (describing Russian system in which victims can actively participate at trial and on appeal).

n41. See 18 U.S.C. 3553(a)(7) (Supp. I 1995) (requiring court to consider "the need to provide restitution to any victims of the offense" in determining sentence); U.S. Sentencing Guidelines Manual 5E1.1 (1998). Producers and sellers of illegal drugs would be subject to civil suits from those they harm under legislation passed by the United States House on October 9, 2000. See N.Y. L.J., Oct. 11, 2000, at 1.

n42. E.g., 18 U.S.C. 982 (1994).

n43. E.g., U.S. Sentencing Guidelines Manual 5 E1.1 (1998); Blake, 89 F. Supp. 2d at 351-52; United States v. Cheung, 952 F. Supp. 148, 150-51 (E.D.N.Y.1997); United States v. Ferranti, 928 F. Supp. 206, 220-23 (E.D.N.Y.1996), aff'd, 135 F.3d 116 (2d Cir.), cert. denied, 523 U.S. 1096 (1998).

n44. Cf. Letter from Lawrence E. Maxwell, Inspector in Charge, U.S. Postal Inspection Service, to author (Oct. 16, 2000) (on file with the University of Illinois Law Review):

The Postal Inspection Service enforces approximately 200 federal statutes in protecting the Nation's mail system. Restitution is utilized primarily in mail fraud investigations (18 U.S.C.

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1341), mail theft (18 U.S.C. 1708) and various other crimes in which the Postal Service is victimized financially. These include contract frauds, embezzlements, and fraudulent workmen's compensation claims. The Postal Service also receives criminal fines and civil penalties for violations of a number of statutes.

First and foremost, the Inspection Service, as a law enforcement agency must and does seek to restore property to victims of these crimes, whether they are consumers, businesses, or other government victims. To do otherwise would not only be wrong, but would invite legislative restrictions on enforcement policies. In civil cases, our restitution strategy relies largely on a variety of statutes. For example, under the Program Fraud Civil Remedies Act (PFCRA) we can seek up to twice the amount of the loss plus penalties. In these types of cases, we weigh the seriousness of the act to the respondent's ability to pay. Other factors, i.e., the breadth of the fraud and deterrence value the impositions of penalties have also enter into the calculus. When cases are developed by investigators, the Agency first evaluates the underlying circumstances. Our recommendations are then presented to the Department of Justice (DOJ) who decides if the case will proceed through the judicial system. The Act also allows us to take action even if the agency did not incur a loss, but other conditions of the Act are met.

Under the False Claims Act, a similar process is employed. One major difference, however, is the fact the government can seek treble damages and penalties up to $ 10,000 per occurrence.

With the recent passage of the Civil Asset Forfeiture Reform Act (CAFRA), certain provisions enhance our ability to recover money and property in the fraud arena. We now have the authority to forfeit the proceeds of mail fraud schemes without employing a money laundering analysis. More importantly, CAFRA also provides a mechanism to restore the property to victims, where heretofore this process was difficult if not impossible in the wide range of cases we investigate.

Although seemingly a logical and practical tool, formulating restitution strategies has not been as easy as we would hope. Some of the problems we encounter include coordination among civil and criminal prosecutors, our own General Counsel's Office, and coordination among other agencies involved in the task force operation. For example, whenever a complex criminal prosecution is in progress, the prosecutor is reluctant to invite a coordinated civil or administrative forfeiture, or some other administrative action without a complete bifurcation. One reason for this is the ever present discovery issues, which remain a concern for most prosecutors of the criminal aspects of the case. This issue is a continuing topic at DOJ Forfeiture Component Meetings as well as LECC conferences. One remedy to alleviate this concern was provided by CAFRA, in that civil judicial forfeiture can be stayed during the

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pendency of the criminal case.

Coordinating the civil and criminal prosecutions not only allows the most effective strategical approach by the government, but also presents the most complete picture of the loss and the assets available for distribution to victims. Ultimately, a coordinated strategy provides the best opportunities for victim recoveries, while enabling the court to determine the appropriate penalty for the crime.

The Inspection Service also is awarded criminal fines in some of its cases. Fines are intended not only as a punishment to the offender, but they help offset the investigative costs to the agency. However, the government should not benefit at the expense of victims. Every effort must be made to identify victims and their losses.

I do not believe it is necessary to legislate greater cooperation amongst all interested parties in a case. This cooperation though should be strongly encouraged by the Department of Justice, United States Attorneys, and the courts.

n45. See Abrams, supra note 8, at 4 (emphasis in original):

What has not been generally observed is that the criminal process is a hybrid that in its totality is really an administrative process - that is, a system of governmental activity directly affecting the individual, one component of which happens to use the judiciary as a fact-finder, law-applier and sanction imposer.

Id.

n46. On balance, the huge improvements in auto safety are due to: (1) statutory and detailed administrative regulation, and oversight of manufacturers by the DOT's requirement of accident reporting for recall purposes; (2) public perceptions of the need for safe cars when they buy new vehicles; and (3) new technological improvements. Recoveries in civil suits as a protective deterrent device are probably less effective than any of the first three. See generally Robert L. Rabin, Keynote Paper: Reassessing Regulatory Compliance, 88 Geo. L. J. 2049, 2070 (2000).

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n47. There has been a related expansion of the right to sue through whittling away of standing and other limiting doctrines preventing suits in the public interest that protect in environmental pollution matters. E.g., Ara B. Gershengorn, Private Party Standing to Raise Tenth Amendment Commandeering Challenges, 100 Colum. L. Rev. 1065, 1074-75 (2000); see also United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 685-90 (1973); Marcia Cole, Campaign 2000 Focus Is "Judicial Activism", Nat'l L.J., Aug. 21, 2000, at A1 (the evolution of the standing doctrine has become "a major barrier against environmental enforcement efforts); Martin A. Schwartz, Federal Rights Without Remedies, N.Y. L.J., Dec. 19, 2000, at 3 (increasing Eleventh Amendment limitations on federal rights of action); but see Friends of Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc., 528 U.S. 167, 189 (2000) (reasonable environmental concerns sufficient to establish injury-in-fact); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 109-10 (1998).

n48. E.g., Congress to Expedite Passage of Tread Bill to Enhance NHTSA Power, Consumer Safety, Prod. Safety & Liab. Rep. (BNA), at 859 (Sept. 18, 2000).

n49. See Letter from Stephen G. Burns, Acting Gen. Counsel of Nuclear Regulatory Commission, to author (Sept. 28, 2000):

It is well-known that the civilian uses of radioactive materials, most notably in power plants, do pose the risk of injury to large numbers of people. The risk is quite small, but it is nonetheless not zero... . In the event of a major offsite release of radiation at a nuclear power plant in the United States, all claims of radiological injury from the plant (other than those claims covered by workmen's compensation statutes) would be handled under the Price-Anderson Act, which is found at section 170 of the Atomic Energy Act of 1954, as amended (Price-Anderson is codified at 42 U.S.C. 2210 and in definitions in 42 U.S.C. 2014). Price-Anderson was ... designed to address several of the features of **mass torts,** most notably the need to provide full and prompt compensation for widespread exposure to potentially harmful agents, the effects of which may not reveal themselves for many years; difficulties in proving causation; heavy transactional costs; and threats to the financial ability of many companies to respond to traditional damage awards.

Price-Anderson mixes tort and administrative law principles, and although the Act covers only private suits, it could operate alongside the NRC's use of its authority under the Atomic Energy Act to pursue civil or criminal penalties for violations of the Atomic Energy Act or the Agency's regulations. Under the indemnification provisions of Price-Anderson, all liability is channeled to the licensed operator of a power plant, and an operator's liability is in turn limited. Cases are removable to the Federal District Court where the accident took place, but this Court must apply State tort law to the extent that it is consistent with the Act. Justified claims are compensated out of private insurance that the NRC requires each licensee to maintain, and, to the extent that damages exceed such insurance, out of a retrospective premium pool to which every power plant licensee must contribute in the event of an accident at any plant. The Act provides that there would be a waiver of defenses should the NRC determine that there has been an "extraordinary nuclear occurrence", that is, an event causing radiation levels off-site that are "substantial" and that have resulted, or will result, in "substantial" damage to off-site persons or property. The waivers relieve plaintiffs of a

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requirement to prove fault; they need prove only that the incident caused their injuries. The Act instructs the NRC to make full use of private insurance organizations to coordinate procedures for handling, investigating, and settling claims. Through 1997, there had been 195 claims, and compensation of about 131 million dollars paid. However, that amount included some transaction costs, such as legal expenses. The Act also permits **punitive damages** in some cases, thus reducing the amounts available to compensate injuries. In cases in which public liability may exceed the limit of liability, courts are authorized to establish priorities among claimants

... .

The Price-Anderson Act is designed to cope with a **mass tort** after the fact, but much of the NRC's work is devoted to preventing a **mass tort.** Under the agency's statutory authorities other than Price-Anderson, the agency employs civil, criminal, and administrative modes, encourages **settlement** of disputes, and employs forms resembling restitution. For example, seeking to maintain or restore safe conditions, the agency may, on its own, deny license applications, and modify, suspend or revoke licenses already granted, and it may seek, through the Attorney General, injunctive or other equitable relief for violation of regulatory requirements. Aiming to deter unsafe conduct, the agency may on its own impose civil penalties, and may ask the Attorney General to pursue criminal penalties, including imprisonment. In matters that reach litigation before the agency's administrative judges, the agency encourages **settlement,** and reviews each proposed **settlement** to determine whether it is in the public interest. An overview of the considerations in making this determination may be found in a recent Commission order, In re Sequoyah Fuels Corporation and General Atomics, 46 NRC 195, CLI-97-13 (1997) (available at 1997 WL 687867 [NRC]).

In pursuit of a safety-conscious work environment, the agency uses something like restitution, though restitution before adjudication. It is the policy of the agency to encourage licensees to maintain or restore the pay and benefits of an employee who alleges retaliation for raising safety issues, pending reconsideration or resolution of the matter. See 61 Fed. Reg. 24339, col. 3 (May 14, 1996)

n50. Oral and written presentations to Conference on Restatement Third, Vanderbilt University Law School (Sept., 2000).

n51. E.g., Stephen B. Burbank & Linda J. Silberman, Civil Procedure Reform in Comparative Context: The United States of America, 45 Am. J. Comp. L. 675 (1997).

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n52. E.g., 28 U.S.C. 1367 (1994) (supplemental jurisdiction); Jack B. Weinstein, After Fifty Years of Federal Rules of Civil Procedure Are the Barriers to Justice Being Raised, 137 U. Pa. L. Rev. 1901, 1914 (1988); Jack B. Weinstein, The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie, 54 Brook. L. Rev. 1, 24 (1988); Jack B. Weinstein, Procedural Reform as a Surrogate for Substantive Law Revision, 59 Brook. L. Rev. 827, 834 (1993).

For a good short summary of class actions and **mass torts,** with some quantification, see Deborah R. Hensler, Mass or Class? Form and Function in **Mass Tort** Litigation (papers to be delivered AALS annual meeting, San Francisco, Cal., Jan. 5, 2001).

n53. Falise v. Am. Tobacco Co., 94 F. Supp. 2d 316 (E.D.N.Y. 2000).

n54. John C. Coffee Jr., Class Wars: The Dilemma of the **Mass Tort** Class Action, 95 Colum L. Rev. 1343, 1384 (1995); Ralph R. Mabey & Peter A. Zisser, Improving Treatment of Future Claims: The Unfinished Business Left by the Manville Amendments, 69 Am. Bank. L.J. 487, 506 (1995); Nat'l Bankr. Review Comm'n, Treatment of Mass Future Claims in Bankruptcy, Ch. 2, in Bankruptcy; The Next 20 Years (1997).

n55. See Marc Galanter, Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change, 9 L. & Soc'y Rev. 95, 114-24 (1974) (documenting how wealthier parties are able to translate their privileges into litigation victories not only with high priced attorney's but also as repeat players in the system). Much of the classic analysis in this article does not apply today to massive actions where both sides are well represented because of the huge fees available.

n56. 928 F. Supp. 206 (E.D.N.Y. 1996).

n57. Hughey v. United States, 495 U.S. 411, 413 (1990); cf. United States v. Soderling, 970 F.2d 529, 533 (9th Cir. 1991) (restitution greater than loss permitted if part of a plea agreement where government agrees to curtail prosecution); United States v. Casamento, 887 F.2d 1141, 1177 (2d Cir. 1989) (restitution in form of drug treatment to those who took drugs as a result of defendant's drug trafficking not permitted).

n58. But see United States v. Brown, 744 F.2d 905 (not the equivalent of a civil judgment so that protections of civil adjudication not required); Bonnie Arnett Von Roeder, The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982, 63 Tex. L. Rev. 671 (1984).

n59. United States v. Porter, 41 F.3d 68, 71 (2d Cir. 1994) (sentencing judge, not

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[*951] In the administrative area, we have created powerful agencies such as the Securities and Exchange Commission (SEC), [13] the Food and Drug Administration (FDA), [14] the Environmental Protection Agency (EPA), [15] **[*952]** the Consumer Safety Products Commission (CPSC), [16] the Occupational Safety and Health Administration (OSHA), [17] the Equal Opportunity Employment Commission (EEOC), [18] and the Department of Transportation (DOT). [19] In contrast, the powers of the now-defunct Interstate Commerce Commission (ICC) were limited primarily to controlling contractual relationships between shippers and carriers, [20] but included some aspects of safe operation of railroads and trucks. The new agencies utilize orders for recalls of dangerous products, and seek to deter by fines, injunctions, and orders for disgorgement and restitution. [21] Detailed product safety regulations are now a chief method of protecting the public directly by controlling risks. [22]

The protective blanket of administrative agencies currently covers the entire population in its day-to-day activities. These administrative agencies increasingly use disgorgement, mediation, **settlement,** and other techniques to compel malefactors to provide compensation to individuals who have been harmed. [23] Criminal and civil suits may be used by these agencies in conjunction with the more usual administrative proceedings. [24] **[*953]** Parens patriae suits by state attorneys general, [25] as in the recent tobacco cases, can be categorized as within this administrative zone. [26] Some are based on tort theory and employ private counsel to conduct litigation.

In the civil area, there has been a vast expansion in the use of remedies to deal with privately induced environmental problems and those caused by pharmaceutical, chemical, and other industries. [27] The class action is the most dramatic of these devices because it permits the aggregation of large numbers of claims that otherwise would not have been prosecuted; most of those who have been injured are not required to take any remedial action on their own behalf. Other less obvious forms serve the same purpose: for example, advertising and contacts with unions have enabled some lawyers to obtain tens of thousands of clients, permitting them to bring consolidated civil actions, or settle without trials on a matrix basis huge numbers of claims in such matters as asbestos, breast implants, and diethylstilbestrol (DES). [28] The individual entrepreneurship of lawyers who have become rich and powerful as a result of these massive litigations has excited the approbation of some and created **[*954]** antipathy in others. Despite the increased litigation, the number of cases tried before juries has been steadily decreasing in the federal courts. [29]

Even the federal government strongly relies on private attorneys in prosecutions of federal government claims through increased emphasis on "whistle blower" qui tam actions. [30] Such suits can be categorized as private civil litigations although the Attorney General can take charge of them. Another alternative to class actions allows private plaintiffs to rely on an unlawful practice as a basis for injunctive and restitutionary relief even when those bringing suit have not themselves been injured. [31]

The result of these developments is that we now have three separate but overlapping branches of law (four, if we include alternate dispute resolution) attempting to perform similar functions: the compensation of victims and deterrence of future bad acts. In some ways this development is a return to an earlier time, in the long-ago past of criminal and tort law. As Holmes pointed out, early tort law was "directed only to intentional wrongs," and these actions "had a criminal as well as a civil aspect [in that they] had the double object of satisfying the private party for his loss, and the king for the breach of peace." [32]

[*955] The trend to compensate through governmental litigation marks a departure for the U.S. civil system. While primary reliance on the government to compensate victims has been a commonplace feature of the "top-down" justice systems in Europe, South America, and the Far East, [33] the U.S. system has traditionally followed a more "bottom-up" approach. [34] Individuals, through their private attorneys, defend or prosecute to enforce their own rights

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probation, must supervise restitution terms and enforcement).

n60. E.g., 18 U.S.C. 3663 (1994 & Supp. IV 1998) (how court determines amount of restitution).

n61. Cf. United States v. Maurer, 266 F.3d 150, 153 (2d Cir. 2000) (restitution did not have to take into account possible set-off available in a civil suit).

n62. 952 F. Supp. 148 (E.D.N.Y. 1997).

n63. 18 U.S.C. 1964(c) (Supp. III 1997).

n64. United States v. Berardini, 112 F.3d 606, 612 (2d Cir. 1997) (payment by defendant into a fund for known, but not located victims proper).

n65. Fed. R. Crim. P. 11(e)(1).

n66. 99 Crim. 84. (E.D.N.Y. 1999).

n67. E.g., 18 U.S.C.A. 3663(a)(1)(B)(i)(II) (West 2000) (court should consider financial needs of defendant in determining amount of restitution).

n68. E.g., Rhonda L. Rundle, SEC Files Securities-Fraud Suits; Executives Also Face Indictments, Wall St. J., Sept. 28, 2000, at B18 (SEC filed "civil lawsuits and other enforcement actions," and "indictments" were also "handed up."). In describing these administrative law cases, I have relied on press reports.

n69. Stephen Labaton, Generic-Drug Maker Agrees to **Settlement** in Price-Fixing Case, N.Y. Times, July 13, 2000, at A1.

n70. Service Company Must Pay $ 11 Million in ValueJet Crash, N.Y. Times, Aug. 15, 2000, at A12. The $ 2 million in fines was subsequently reduced to $ 1.75 million in a **settlement** between SabreTech and the FAA. Betsy McKay, SabreTech Sets Accord with FAA on Role in 1996 ValueJet Crash, Wall St. J., May 23, 2001, at B2.

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n71. Service Company Must Pay $ 11 Million in ValueJet Crash, N.Y. Times, Aug. 15, 2000, at A12.

n72. E.g., Peter Aronson, Disability **Settlement** Sets Record, Nat'l L.J., Aug. 28, 2000, at B1 (American Airlines agrees to pay $ 1.7 million to ninety-nine individuals for violations of the Rehabilitation Act of 1973 after suit brought by the Department of Labor); Andy Pasztor, U.S. Regulators Seek to Fine Boeing $ 1.2 Million, Wall St. J., Aug. 3, 2000 (FAA seeking to fine Boeing for lax manufacturing controls); cf. Safety Commission Recalls 91,000 Go-Karts After One Death and Two Injuries, N.Y. Times, Aug. 15, 2000, at A12 (CPSC acted after go-karts had reportedly caused death and injuries by entangling the hair or garments of the rider in exposed rotating parts); see also Letter from Eric Schaeffer, to author, supra note 15.

n73. Fed. Trade Comm'n v. Mylan Labs. Inc., 62 F. Supp. 2d 25, 36 (D.D.C. 1999).

n74. Id. at 37 (citing cases permitting the FTC to pursue monetary relief under 13(b) of the Federal Trade Commission Act).

n75. Letter from Robert Pitofsky, Chairman, Federal Trade Comm'n, to author (Aug. 14, 2000).

n76. United States v. Universal Management Servs., Inc., 191 F.3d 750 (6th Cir. 1999) (affirming $ 100 million award FDA obtained through disgorgement by a consent decree), cert. denied, 530 U.S. 1274 (2000); Dierdre Davidson, FDA Now Packs a Heavy Punch, Nat'l L.J., July 17, 2000, at B6. This trend is not to be confused with the Supreme Court's possible cutting back on the finding of private rights of action in a statute. E.g., Alexander v. Sandoval, 121 S. Ct. 1511 (2001) (no private right of action to enforce regulations under Title VI of Civil Rights Act of 1964); Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996). The question in the former line of cases is whether an agency that is statutorily granted the power to institute litigation also has the power to seek restitution; this is a different question from whether individuals are allowed to bring suit even though a statute does not explicitly grant them such power.

n77. Telephone Conversation with Litigation Deputy of FDA (Aug. 28, 2000). There are no guidelines with respect to cooperation of the agency with private attorneys for those claiming injury.

n78. Herzfeld v. United States District Court, 699 F.2d 503, 506 (10th Cir. 1983).

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↑n79. Id.; see also, e.g., Letter from First Senior Deputy Comptroller of the Currency, to author (Sept. 6, 2000):

The OCC is authorized under its primary enforcement statute, 12 U.S.C. 1818, to order a bank, or its officers, directors, or other "institution-affiliated parties," to pay restitution to a party that has suffered a loss as a result of the bank's or the individuals misconduct. While the OCC has issued no specific regulations or guidelines on this subject, both statutory and case law have established legal standards for when the agency may order a bank or an individual to pay restitution.

Under 12 U.S.C. 1818(b), the OCC may issue a cease and desist order to a bank or an individual who violates a law, rule, or regulation; condition imposed in writing or formal written agreement entered into with the agency; or who engages in an unsafe or unsound practice. The OCC's cease and desist power includes the authority to order a respondent to make restitution, provide reimbursement, indemnification, or guarantee against loss, provided that the respondent was either unjustly enriched, or the violation or practice involved a reckless disregard for the law or any applicable regulations or prior agency order. 12 U.S.C. 1818(b)(6)(A).

The case law has further defined when the OCC may order payment of restitution. Specifically, in Rappaport v. U.S. Dep't of the Treasury, 59 F.3d 212 (D.C. Cir. 1995), cert denied, 516 U.S. 1073 (1996), the D.C. Circuit held that the common law definition of "unjust enrichment" applied to the term as it is used in 12 U.S.C. 1818(b)(6)(A). Under the D.C. Circuit's interpretation, unjust enrichment requires a showing that the party against whom restitution is sought has received and retained a benefit that properly belongs to another. Rapport, 59 F.3d at 217. Moreover, the amount of restitution owed is measured by the defendants gain, rather than the plaintiff's loss. Id.

The OCC does not typically consult with the United States Attorney or private attorneys before making a decision to seek restitution. However, where there is a parallel criminal case, we routinely contact the appropriate U.S. Attorney's Office in order to coordinate our actions and ensure they will not in any way interfere with the criminal case.

Eliot Spitzer, the Attorney General of New York has suggested that joint federal-state cooperation can avail government restitutionary relief, even when unavailable under the agencies own statute. In a recent action brought jointly with the FTC against an Internet website publisher charged with fraudulently billing visitors to its sites, the New York Attorney General's participation in the action included a demand for restitution - relief generally unavailable under the FTC's own statute. Letter from the Attorney General of New York, to author (Sept. 12, 2000).

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n80. Cf. Jane Stapelton, Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences, 54 Vand. L. Rev. 941, 956 (2001) (methods "to contain the voraciousness of the negligence principle within tolerable bounds"); John Caher, Court Seen as Slow in Expanding Tort Claims, Criminal Defendants' Rights, N.Y.L.J., July 24, 2001, at 1 (describing trend against private litigants in decisions by the New York Court of Appeals); Theodore Eisenberg & Steward J. Schwab, Double Standard on Appeal: An Empirical Analysis of Employment Discrimination Cases in the U.S. Courts of Appeals (July 16, 2001) (unpublished manuscript, on file with the University of Illinois Law Review) (appellate courts more likely to reverse plaintiff victory than defense verdict in employment discrimination and other civil rights cases).

n81. See generally, II Am. Law Inst., Reporters' Study, Enterprise Liability for Personal Injury, ch. 7, Workers' Compensation and Product Liability 183 (1991). In some states recoveries have not kept pace fully with rising costs of living. In other states it has been possible to circumvent the barrier against directly suing the employer by first suing the manufacturer of a "defective" machine involved in the injury, then having the manufacturer, in turn, sue the employer. E.g., Ibarra v. Equip. Control, 268 A.D.2d 13 (N.Y. App. Div. 2000).

n82. Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 101-426, 83 Stat. 742, 745-98 (codified in scattered sections of 30 U.S.C.) (Black Lung Act); see also Deal Reached on Aid for Uranium Miners, N.Y. Times, Oct. 6, 2000, at A20 (proposals to compensate uranium miners and workers). But see Air Transportation Safety and Systems Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001).

n83. See Jack B. Weinstein, Individual Justice in **Mass Tort** Litigation 123-24 (1995); see also Matthew L. Wald, Lawmakers Bar Payments for Workers on Weapons, N.Y. Times, Sept. 27, 2000, at 12 (compensation proposed to those made sick or killed while working on nuclear weapons).

n84. Weinstein, supra note 83, at 123.

n85. E.g., Jack B. Weinstein, Adjudicative Justice in a Diverse Mass Society, 8 J.L. & Pol'y 385 (2000).

n86. See W. Page Keeton et al., Prosser & Keeton on Torts 585-86 (5th ed. 1984) (discussing statutes dealing with auto insurance). See, e.g., John M. Shields, Reviewing the Threshold for "Serious Injury", 224 N.Y. L.J., Aug. 24, 2000, at 1 (referring to serious injury in automobile accident cases). At the federal level, similar legislative efforts are underway, largely - but not completely - stymied to date by the power of rich plaintiffs attorneys' donations to one political party, balancing potential defendants' donations to the other. See

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generally Bob Van Voris, Clinton's a Surprising Tort Reformer, Nat'l L.J., Aug. 14, 2000, at 1 (listing as limitations on plaintiffs' suits: the General Aviation Revitalization Act of 1994, the Federally Supported Health Centers Assistance Act of 1995, the Small Business Job Protection Act of 1996, the Aviation Disaster Family Assistance Act of 1996, the Bill Emerson Good Samaritan Food Donation Act of 1996, the Coast Guard Authorization Act of 1996, Volunteer Protection Act of 1997, the Amtrak Reform and Accountability Act of 1997, the Securities Litigation Uniform Standards Act of 1998, the Biomaterials Access Assurance Act of 1998, and the Year 2000 Information and Readiness Act). Notably, federal legislation attempted to limit federally financed legal aid centers from pursuing class actions - severely restricting the ability of impact litigation in areas of poverty law. The Supreme Court recently held these restrictions unconstitutional. See Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001). For the effect of donating to political parties and candidates to obtain or deny such limiting legislation, see, for example, John M. Broder and Don Van Natta, Jr., Perks for Biggest Donors and Pleas for More Cash, N.Y. Times, July 30, 2000, at 1.

n87. E.g., Ortiz v. Fibreboard Corporation, 527 U.S. 815 (1999); Amchem Prod., Inc. v. Windsor, 521 U.S. 591 (1997); In re Repetitive Stress Injury Litig., 11 F.3d 368 (2d Cir. 1993).

n88. See Fed. R. Civ. P. 23(f) and advisory committee notes. For a debate between proponents and opponents of interstate class actions, see Frederick M. Baron, The Truth About 5.353: Unfairness in Class Actions, 69 U.S. L. Wk., Sept. 12, 2000, at 2131. See, e.g., Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C. 77a); Paul A. Ferrillo, New Tide Rising in Securities Class Action Litigation, 223 N.Y. L.J., Aug. 8, 2000, at 1.

n89. "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987). This permits removal cases even though a state claim and nondiversity action in a state court might appear to preclude removal. See Lyons v. Phillip Morris, Inc., 225 F.3d 909, 912 (8th Cir. 2000); Anthony E. Szdlowski, Preemption in the Securities Industry: A Diminished Standard?, 74 St. John's L. Rev. 259 (2000); Michael Hoenig, More on Pre-Emption of Air-Bag Restraint Claims, N.Y. L.J., Sept. 11, 2000, at 3.

n90. United States v. Locke, 529 U.S. 89, 94 (2000) (preempting state regulations "governing oil tanker operations and designs"); e.g., Pegram v. Hendrich, 530 U.S. 211 (2000); Geier v. Am. Honda Motor Co., 529 U.S. 1913 (2000); Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000); Sakellaridis v. Polar Air Cargo, Inc., 104 F. Supp. 2d 160 (E.D.N.Y. 2000); Burke v. Dow Chem. Co., 797 F. Supp. 1128 (E.D.N.Y. 1992); Leo T. Crowley, ERISA Pre-Emption Returns in Managed Care, 224 N.Y. L.J., Aug. 2, 2000, at 3; Allison M. Zieve, Grier v. Honda: The News Is Not All Bad for Consumers, 28 Product Safety & Liability Rep. (BNA) 622 (2000); see also Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2000) (granting certiorari on whether federal medical devise law bars state tort claims that a company made fraudulent representations to the FDA in seeking clearance for an orthopedic screw system).

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n91. See Sakellaridis, 104 F. Supp. 2d at 162.

n92. Mickey Meece, The Very Model of Conciliation: Companies Adopting Postal Service Grievance Process, N.Y. Times, Sept. 6, 2000, at C1 (documenting thirty percent drop of formal complaints within the postal service with new national mediation program); see also Samuel Estreicher & Kenneth J. Turnbull, New Guidance on Predispute Mandatory Arbitration Agreements, 224 N.Y. L.J, Sept. 13, 2000, at 3; Robert S. Greenberger, As Arbitration Spreads to Consumer Purchasers, a Court Battle Looms, Attorneys Lead a Backlash Against Corporate Practice that Reduces Lawsuits, Wall St. J., Sept. 19, 2000, at A1; Arbitration May Trump Class Actions Under TILA, Electronic Fund Transfer Act, U.S. L. Wk., Sept. 12, 2000, at 1132; Weinstein, Preliminary Thoughts, supra note 1.

n93. E.g., Major League Baseball Players Ass'n v. Garvey, 121 S. Ct. 1724 (2001) (courts not authorized to review labor-arbitration decision on merits despite alleged error); Lawrence W. Newman, Ethics in International Arbitration, 224 N.Y. L.J., July 31, 2000, at 3 (American Attorneys more likely to reveal adverse information); Steven J. Shore & Franklin D. Ormsten, Arbitration Still Has Broad Reach in Securities, 224 N.Y. L.J., Aug 9, 2000, at 3; DOL Seeks to Expand Use of Mediators to Resolve Disputes Under Employment Laws, U.S. L. Wk., Jan. 9, 2001; Weinstein, Preliminary Thoughts, supra note 1. The use of binding arbitration has become increasingly popular - particularly for Internet businesses where the choice of applicable law is uncertain and new technology has made it easier to impose. Elizabeth G. Thornburg, Going Private: Technology, Due Process, and Internet Dispute Resolution, 34 U.C. Davis L. Rev. 151, 179-84 (2000) (describing trends in arbitration as more favorable to businesses who can choose applicable substantive and procedural law and less favorable to consumers).

n94. E.g., Watson v. Texas, No. 00-41269, 2001 WL 883533 (5th Cir. Aug. 7, 2001); United States v. Philip Morris, Inc., 116 F. Supp. 2d 131 (D.D.C. 2000); Pam Belluck, Chicago Gun Suit Fails, but California's Proceeds, N.Y. Times, Sept. 16, 2000, at A9; Richard B. Schmitt, Cities Begin Fact-Finding Phase in Gun Law Suits, Wall St. J., Sept. 25, 2000, at B30.

n95. E.g., Alison Frankel & Paul Breverman, ATLA's War Room, Am. Law., Oct. 2000 (coordinated work of plaintiff trial lawyers).

n96. Henry Weinstein, Attack Waged on Fees Anti-Tobacco Attorney Received, L.A. Times, Mar. 15, 2001, at A1.

n97. E.g., Barry Meier, Lawyer in Holocaust Case Faces Litany of Complaints, N.Y. Times, Sept. 8, 2000. Some of the attorneys in this case have served without fees in a striking example of devotion to the public interest. Id.

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n98. Michael Winesip, The Explorer on Trial, NY Times, Dec. 17, 2000, (Magazine), at 52 (describing the staffing, investigatory, and budget limitations of the National Highway Traffic Safety Administration).

n99. Keith Bradsher, Documents Portray Tire Debacle as a Story of Lost Opportunities, N.Y. Times, Sept. 11, 2000, at A1. The nondisclosure of this information raises serious problems of ethical obligations owed by attorneys to report damages to law enforcement officials. The problem of secret **settlements** may also provide a reason for concern. Jack B. Weinstein, Secrecy in Civil Trials, 9 Brook. J.L. & Soc. Pol. 53, 58 (2000).

n100. Am. Law Inst., 1 Reporters' Study: Enterprise Responsibility for Personal Injury, The Institutional Framework 398-402 (1991) [hereinafter Enterprise Responsibility].

n101. The study summarized its proposal for preclusion of tort liability for negligence as follows:

First, the risk must have been placed under regulatory control by a specialized administrative agency, a body with statutory authority to monitor and assess risk-creating activities in its area of responsibility, and with a mandate to establish and revise regularly specific regulatory controls on enterprise behavior... .

Second, the enterprise in question must have complied with all relevant regulatory requirements.

Third, the defendant must have publicly disclosed to the relevant regulatory agency any material information in its possession (or of which it has reason to be aware) concerning the risks posed by the defendant's activities and/or the means of controlling them. This requirement would extend to information indicating that agency standards or tests may be inadequate or inappropriate.

Enterprise Responsibility, supra note 100, at 95-97.

n102. Richard B. Stewart, Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual Track System, 88 Geo. L.J. 2167, 2168 (2000) (citing Enterprise Responsibility, supra note 100, at 384).

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n103. Significantly, as civil rights abroad become more effective, American style litigation is expanding abroad. E.g., Suzanne Kepner, Britain's Legal Barriers Start to Fall, Discrimination Lawsuits Are Becoming More Common, N.Y. Times, Oct. 4, 2000, at W1 (proposes that "thanks, in part, to the cultural influence of America" smaller claims have been brought to court).

n104. The procedural techniques to aggregate and manage mass disaster cases, such as broad joinder devices and class actions, are creatures of equity. Promulgation of the Federal Rules of Civil Procedure in 1938 theoretically merged law and equity in the federal system, which is where most **mass tort** cases are filed. Jack B. Weinstein & Eileen B. Hershenov, The Effect of Equity on **Mass Tort** Law, 1991 U. Ill. L. Rev. 269, 279.

n105. In the Dalkon Shield litigation, some 195,000 claims have been filed since A.H. Robins's bankruptcy resulted in a personal injury compensation trust fund that will eventually total some $ 2.5 billion. The court appointed five trustees to carry out functions of the trust. The trustees were responsible for designing and implementing a claims-restitution facility pursuant to guidelines set out in the trust agreement for purposes of resolving personal injury claims. See id. The hundreds of millions in Agent Orange funds were used to aid tens of thousands of veterans and hundreds of thousands of family members in an administrative scheme. See Final Report of the Special Master in Agent Orange Litigation on the Distribution of the Agent Orange **Settlement** Fund, Sept. 1997, In re "Agent Orange" Product Liability Litigation, MDL No. 381.

n106. See generally Thomas W. Merrill, Capture Theory and the Courts: 1967-1983, 72 Chi.-Kent L. Rev. 1039 (1997) (discussing the development of administrative legal doctrine).

n107. Bob Van Voris, Tire Deaths: Criminal Acts?, Nat'l L.J., Sept. 18, 2000, at A1 (discussing the involvement of the U.S. government in the Bridgestone/Firestone controversy).

n108. Paul Strauss, Handling a Plaintiff's Sexual Harassment Case, 26 Litigation 4, 37 (2000) (discussing limitations of EEOC interviews and investigations); Tom Hamburger, Laurie McGinley & David S. Cloud, Industries That Backed Bush Are Now Seeking Return on Investment, Wall St. J., Mar. 3, 2001, at 1; John Harwood & Kathy Chen, Under President Bush, Regulatory Rollback Has a Major Impact, Wall St. J., Aug. 3, 2001, at 1 (describing "quiet revolution" of regulatory relaxation for banks, hospitals, oil companies, telecommunication giants employers, and corporations); e.g., Tom Brune, Reno: $ 23M Needed in Big Tobacco Suit, Newsday, Oct. 6, 2000, at A16 ("Reno also objected to provisions [of a proposed statute effectively cutting off funds to prosecution of tobacco companies] saying that could "allow politics to interfere with the conduct of litigation.'"); see also Leslie Wayne & Michael Moss, Bailout for Airlines Showed the Weight of a Mighty Lobby, N.Y. Times, Oct. 10, 2001, at A1.

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n109. Richard B. Stewart, Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System, 88 Geo. L.J. 2167 (2000).

n110. The recent "revelation" that Firestone tires used on heavy Ford sports utility automobiles had dangerous tread separation problems, probably leading to scores of deaths, is instructive. In 1978 there was a recall of almost fifteen million Firestone tires that had passed government tests devised for an earlier technology, but insufficient for new steel belted tires. New regulations were drafted in 1980. But the next administration cancelled procedures to devise any new regulations and the budget of the National Highway Safety Commission was sharply cut to avoid the "high cost of government regulation on the industry." Keith Bradsher, Stricter Rules for Tire Safety Were Scrapped by Reagan, N.Y. Times, Sept. 4, 2000, at A10. Neither Congress nor the executive branch adequately protected the public. See Joan Claybrook, Congress's Part in the Firestone Crises, N.Y. Times, Sept. 4, 2000 at A17. Now the administrative branch may require the recall of many millions of tires at an expense of hundreds of millions of dollars, but after extensive loss of life and injuries resulting from the defects. We can also expect private class action and individual suits for death, injuries and property damage in the tire cases. Although the threat of private suits did not prevent either the 1978 or 2000 recall fiascoes, I am convinced that such suits do discourage carelessness and cover-ups of dangers by industry. Potential civil suits are an important back-up for governmental inadequacy. Keith Bradsher, Documents Portray Tire Debacle as a Story of Lost Opportunities, N.Y. Times, Sept. 11, 2000, at A1, A23 (discussing information sharing between personal injury attorneys regarding the Firestone's situation); see also Howard M. Erichson, Coattail Class Actions: Reflections on Microsoft, "Tobacco' and the Mixing of Public and Private Lawyering in Mass Litigation, 34 U.C. Davis L. Rev. 1, 6 (2000) (describing the relationship between private and public lawyering); Joseph L. Gastwirth, Suggestions for Reconciling the Values of Statistical Science with the Goals and Need of the Legal and Regulatory Processes, Proceedings of the Section on Epidemiology, Am. Stat. Ass'n (1998) (impact of delayed warning on some substances can entail substantial risk to public). In a letter dated March 13, 2001 to the author, Professor Gastwirth concludes that some 100 cases of Reye syndrome may have been averted if the FDA had not delayed warnings of the affect of aspirin on children in 1982.

n111. Jack B. Weinstein, A View from the Judiciary, 13 Cardozo L. Rev. 1957 (1992) (Proceedings of the Administrative Conference of the United States, October 31, 1991 Colloquy: An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims). Neither administrative nor criminal law will stop attorneys who see big bucks in civil litigation. See, e.g., Bob Van Voris & Matt Fleischer, Feeding Frenzy over Firestone, Nat'l L.J., Sept. 11, 2000, at A1 (discussing plaintiff attorney preparation for possible Firestone litigation); Center for Auto Safety, Car Owners Sue Bridgestone, Say Recall Insufficient, 69 U.S. L. Wk. Aug. 29, 2000, at 2123; see also, e.g., Jenna Greene, FTC Affected by Deluge of Mergers, Nat'l L.J., Sept. 18, 2000, at B5 (discussing FTC difficulties at prosecuting violations in areas other than mergers); Gretchen Morgenson, Many Holes Weaken Safety Net for Victims of Failed Brokerages, N.Y. Times, Sept. 25, 2000, at A1; Mathew L. Ward & Keith Bradsher, Safety Agency Wants Increase in Its Authority, N.Y. Times, Sept. 9, 2000, at C1 (discussing the National Highway Traffic Safety Administration's request for more money to investigate safety problems).

n112. The author recently heard a case that provides an intriguing example of the limitations of criminal restitution. In a scheme involving fraudulently rolled back automobile odometers, the government was unable to identify the victims of the fraud. The defendant's

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activities extended from 1990 until late 1996. By this time, many of the consumers had already resold the cars to second or third generation purchasers without suspecting the fraud. The U.S. Attorney stated in the pre-sentencing report that

tracing chains of ownership would be labor-intensive and time-consuming. Moreover, given the number of victims in the case, the difficulty in setting a fair market value for each vehicle at the time of its fraudulent sale, and the difficulty of calculating the value of extra charges (such as the increased finance charges or insurance costs) it is impossible to set an exact restitution amount.

United States v. Faden, Docket No. 99 CR 275-01 Pre-Sentence Investigation Report, March 31, 1999. A plaintiff's attorney interested in certifying a class has a market incentive to identify these victims for the purposes of compensation.

n113. See Jack B. Weinstein, Secrecy in Civil Trials: Some Tentative Views, 9 J.L. & Pol'y 53, 58 (2000); Jack B. Weinstein & Catherine Wimberly, Secrecy in Law and Science, 23 Cardozo L. Rev. 1 (2001) (forthcoming).

n114. Notably, the 1991 A.L.I. study recommendations would only grant regulatory compliance as a defense to liability if defendants publicly disclosed relevant information concerning the risks posed by their actions:

The defendant must have publicly disclosed to the relevant regulatory agency any material information in its possession (or of which it has reason to be aware) concerning the risks posed by the defendant's activities and/or the means of controlling them. This requirement would extend to information indicating that agency standards or tests may be inadequate or inappropriate.

Stewart, supra note 102, at 2168.

n115. See John Hart Ely, Democracy and Distrust 135-79 (1980); see also United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1937) ("Prejudice against discrete and insular minorities may be a special condition ... curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities ... may call for a correspondingly more searching judicial inquiry.").

n116. See Staci Jeanne Krupp, Environmental Hazards: Assessing the Risk to Women, 12 Fordham Envt'l L.J. 111 (2000) (describing how models used by the EPA are based on weight and fat levels of the average male and do not adequately protect the needs of women).

n117. E.g., Arbitration Ass'n, The Claims Resolution Process on Dormant Accounts in Switzerland (1999); Richard Capalli & Caludio Consolo, Class Actions for Continental Europe,

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against corporations and other malefactors. Providing victims with the power to obtain redress for their own injuries reflects the attitude of American society that such a system is more democratic (more responsive to victims needs) and more efficient (more reliant upon market forces and private initiative to bring about more complete and effective remedies).

A striking example of this interplay followed the September 11, 2001, attack on the Pentagon and World Trade Center. In view of the resulting thousands of deaths and injuries and the likelihood of tens of thousands of suits in state and federal court with tens of billions of dollars in potential recoveries, Congress enacted the Air Transportation Safety and System Stabilization Act. [35] It provided for an administrative agency (overseen by a special master [36]) to hear claims against the airlines (and possibly others) and provide swift compensation. [37] An attempt was also made to consolidate all private actions in the U.S. District Court for the Southern District of New York with possibly some cooperation between the courts and the Special Master. [38] The concept of the Act appears **[*956]** to be based partly on a number of current federal administrative agencies. [39]

II. The Evolution of "Compensation"

In times past, with rudiments today, we essentially relied upon self-help to achieve compensation. This lawless procedure, with its inclination to invite new retaliations was slowly supplanted by religious and state regulation. These controls attempted to provide relief and protect the public with a more neutral process.

English and American models relied on growing governmental institutions such as professional police forces, criminal judicial systems, and prisons to punish and rehabilitate. In a recent development, criminal sentencing now emphasizes the rights of victims, [40] restitution, [41] and the seizing of assets through forfeiture, [42] as well as incarceration.

The basic goal of the criminal law is protection of the state and public rather than compensation of individuals. Heavy fines and forfeitures may in fact reduce the assets of defendants that are available to pay victims either through private litigation or restitution. Nevertheless, in criminal proceedings, the current tendency favors compensation through restitution of those injured by a crime. [43] A form of restitution without judicial intervention may take place even in the criminal investigative **[*957]** stage when the criminal realizes the game is up and pays back the victim "voluntarily." [44]

Administrative agencies serve a function similar to that of criminal law. [45] Regulation through continuous supervision and intervention of the **[*958]** government to prevent damages to the general population is the focus. The shift to administrative agencies with broad powers over pharmaceuticals, air and water, automobiles, discrimination, safety in the workplace, and consumer products and the like represents a tidal movement designed to protect the entire population. [46] These developments have considerably increased putative plaintiffs' protections. [47]

In addition to compensation of private persons and deterrence - now goals also of civil and criminal litigation - administrative law is designed primarily to prevent future harms to the general population by regulation. For example, it is much more effective in protecting those on the highways to regulate tires, air bags, instability, and the like before accidents occur by requiring safe construction through detailed standards, than by deterring dangerous design through the threat of future damage awards or fines. [48] The work of agencies such as the Nuclear Regulatory Commission is an extreme example of the need to regulate rather than solely to deter. [49]

[*959] In the past century tort law has expanded its primary role to compensate. [50] Beginning with the adoption of the Federal Rules of Civil Procedure in 1938, the law began to favor strongly those seeking private remedies in the courts. Broad as-of-right discovery,

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6 Temple Int. & Comp. L.J. 217, 218 (1993); Weinstein, Compensating, supra note 27. But see Phillippe A. Grumback, Notorious Swiss Holocaust Denier Imprisoned, Justice, Summer 2000, at 12 (three associations had right to appear in proceedings); Norbert W<um u>kler, United Nations Compensation Commission: A New Contribution to the Process of International Claims Resolution, J. Int'l Econ. L. 249 (1999).

It is interesting to refer to the "clash" between the Americans and Japanese respecting their versions of constitutional democracy, which was "seen" by the Americans who, in effect, wrote the new Japanese constitution. See John W. Dower, Embracing Defeat, Japan in the Wake of World War II 353 (1999).

In mid-February 1946, ... Matsumoto attempted to persuade occupation authorities that fundamental differences between East and West were at issue here. "A juridical system is very much like certain kinds of plants, which transplanted from their native soil, degenerate, or even die," he wrote in a memorandum to [U.S.] GHQ. "Some of [the] roses of the West, when cultivated in Japan, lose their fragrance totally." This East-is-East-and-West-is-West improvisation was less red rose than red herring, for far more was involved here than white men's flora ill suited to Eastern soil, or a simplistic clash between "Western" and "Japanese" cultures. The basic conflict lay between two Western systems of legal thinking. Put over simply, these experts, well grounded in German legislative and administrative law and a German-style "theory of state structure," were largely indifferent to American concerns about popular sovereignty and human rights."

Id.

n118. E.g., Fred Anderson, Crucible of War: The Seven Years' War and the Fate of Empire in British North America, 1754-1766, at 219-22 (2000) ("exasperating," independence of colonial soldiers, "colonial obstinacy," "resistance to imperial authority"; contrasted with attitude of British Commander "that his authority flowed from the royal prerogative and royal commission" with command control over colonial governors, officers, legislatures, and troops); Joyce Appleby, Inheriting the Revolution, The First Generation of Americans 5 (2000) ("Independence made possible the creation of a distinctive American Society that honored individual initiative, institutional restraint and popular public participation."); id. at 7 ("the autonomous individual emerged as an ideal"); id. at 26 ("Thomas Jefferson's presidential election ushered in an era of participatory politics, making way for a distinctive American political culture.") id. at 75 ("The principal citizens of American cities were merchants or lawyers - the former to make the money, the latter to adjudicate the suits that money provoked."); id. at 109 ("lawyers were abundant"); see also Alan Ryan, My Way, N.Y. Rev., Aug. 10, 2000, at 47 (more self-seeking than communitarian efforts by Americans). But cf. Larry McMurty, Inventing the West, N.Y. Rev., Aug. 10, 2000, at 24 ("most of the traditions which we associate with the American West were invented by pulp writers, poster artists, impresarios, and advertising men.").

n119. E.g., In re Rashid, 210 F.3d 201, 208 (3d Cir. 2000) (restitution to fraud victim entered prior to October 1998 amendments to the Bankruptcy Code are dischargeable if payable to private parties, but not if payable to the government).

n120. E.g., Summary of Report of the United States Judicial Conference Committee on

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Federal-State Jurisdiction, March 2000 (recommendation that Congress be urged to provide for state courts as the primary forum for personal injury claims arising from denial of health benefits).

n121. E.g., Administrative Procedure Act (APA), 5 U.S.C. 553(c) (1994) ("After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.").

n122. According to Michael Solender, General Counsel of the Consumer Product Safety Commission, "the overriding issues in our cases are typically different from private litigation. Our cases focus on the risk to the public and the conduct of the company, not on whether an individual deserves compensation for his or her injury." CPSC Letter to author, 2 (Sept. 6, 2000). CPSC counsel is generally discouraged from coordinating activities with plaintiff's counsel, and "strives to treat all plaintiff and defense lawyers evenhandedly" to avoid an appearance of conflict. Id. The FTC, which unlike the CPSC seeks disgorgement in addition to equitable relief and penalties, generally only seeks this relief "in cases that do not require the application of agency expertise to develop new principles of law." Letter from General Counsel Valentine, to author 3 (Sept. 1, 2000).

n123. See Weinstein, Compensating, supra note 27. The U.S. Attorney General guidelines actually call for similar victim contact in criminal matters. For example, the guidelines state:

[A] toll free telephone number system can be established that not only would permit victims to call in and get recorded information concerning the status of the matter, but would actually call the victims to alert them to a change in status. With individuals' increasing ability to access the Internet, Web sites can be created that contain information concerning the progress of investigations and prosecutions.

U.S. Dep't of Justice Attorney General Guidelines for Victim and Witness Assistance 13, Jan. 13, 2000. I have not spoken with many attorneys who knew of these guidelines or consistently follow them.

n124. Fed. R. Civ. P. 23(d).

n125. Once guilt is established beyond a reasonable doubt, sentencing decision on restitution and the like are made by the judge utilizing a preponderance standard.

n126. See Krupp, supra note 116 ("governmental regulation provides women little protection").

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n127. New York state agencies enjoy less oversight than federal agencies. E.g., Steadman v. SEC, 450 U.S. 91, 102 (1981) (holding that under section 7(c) of the Administrative Procedure Act, a sanction may not be imposed or rule or order issued unless the case is proved by a preponderance of the evidence); David Siegal, Only an "Abuse of Discretion" that "Shocks the Conscious" Can Be Used by a Court to Overturn Sanction by an Agency, N.Y. L. Digest, Feb. 2001 (discussing Featherstone v. Franco, 95 N.Y.2d 550 (2000)); Thomas R. Newman & Steven J. Ahmuty Jr., Review of Administrative Penalties, N.Y.L.J., May 2, 2001, at 3 (discussing New York case law).

n128. E.g., Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir. 1996) (denial of Social Security benefits must be supported by clear and convincing evidence).

n129. See 42 U.S.C. 423(f) (1994); Jack B. Weinstein, Equality and the Law: Social Security Disability Cases in the Federal Courts, 35 Syracuse L. Rev. 897, 902 (1984).

n130. As a result of the different burdens of proof and substantive and mental elements, an acquittal in a criminal case does not have a collateral estoppel effect in a civil one. No situation more vividly illustrates this fact than the O.J. Simpson trials. A refusal of an administrative agency to act will not preclude a civil suit on the initiative of private litigants.

n131. Plaintiff's attorneys have already become adept at using government agency studies published on the Internet to their advantage. See Erichson, supra note 110, at 1; Robert J. Ambrogi, From Tobacco Hazard to Auto Safety, Sites Abound, Nat'l L.J., Mar. 26, 2001, at B9. In qui tam actions, if the Department of Justice does not intervene, private attorneys can themselves run with the ball. Sometimes the urge to obtain fees can appear unseemly. E.g., Van Voris & Fleischer, supra note 111, at 2 (describing several attorneys' efforts to capitalize a Firestone tire recall); Alison Frankel, Tobacco Fees, Am. Law., Sept. 2000, at 98.

n132. Cf. Lindblom, supra note 33; Victor E. Schwartz, Finally, a Chance to Reform Product Liability Law, Wall St. J., Sept. 9, 1992, at A15 (proposing federal product liability law as method to clarify law of **punitive damages)**.

n133. For example, the court of appeals for the First Circuit upheld Massachusetts' restrictions on cigarette advertisements in the state's three largest metropolitan areas after they were attacked on preemption grounds. See Consolidated Cigar Corp. v. Reilly, 218 F.3d 30 (1st Cir. 2000), rev'd sub nom. Lorillard Tobacco Co. v. Reilly, 121 S. Ct. 2404 (2001). See discussion in Blue Cross & Blue Sheild of N.J., Inc. v. Philip Morris, Inc., No. 98 CV 3287 (E.D.N.Y. Oct. 4, 2001) (Memorandum and Order).

n134. E.g., United States v. Bajakajian, 524 U.S. 321 (1998) (holding that Excessive Fines Clause applies to forfeiture).

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n135. While the mens rea problem is not extreme in administrative rulings, in general, it would seem appropriate to approach the roles of the administrative agency in much the same way as the criminal prosecutor - i.e., the administrative agency should not be used primarily to enforce tort liability.

n136. For an interesting example of the interplay between criminal and civil prosecutions, see Douglas Franz et al., The Unraveling of a Conspiracy: Private Files Fuel an Art Auction Inquiry, N.Y. Times, Oct. 8, 2000, at A1.

n137. When the criminal, administrative, and civil actions are brought separately, the opposite risk also exists - the possibility of double recovery by some victims. Consolidation before one judge is the most effective way to avoid this problem. Judges can deal with this potential difficulty on a case by case basis. E.g., SEC v. Palmisano, 135 F.3d 860, 865-66 (2d Cir. 1998); SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996) (upholding award of disgorgement to agency with set-off amounts paid to private litigants in prior **settlement)**.

n138. An example is the tobacco passive exposure to smoke class action on behalf of flight attendants in Florida. Broin v. Philip Morris Co., 641 So. 2d 888 (Fl. Dist. Ct. App. 1994); Miami Trial Settles, Legal Intelligencer, Feb. 10, 1998, at 4. The result, appropriately I think, was the provision of medical treatment for the flight attendants rather than compensation to the individual members of the class.

n139. See Letter from Eric Schaeffer of the EPA, supra note 15.

n140. I am not here dealing with the substantive matters of what the tort law is or the scope of preemption or the kind of regulatory compliance preclusion that may block private suits. See Robert L. Rabin, Reassessing Regulatory Compliance, 88 Geo. L.J. (2000) (distinguishing related doctrines of regulatory compliance and preemption); Symposium, Regulatory Compliance as a Defense to Product Liability, 88 Geo. L.J. 2049 (2000).

n141. See Weinstein, **Mass Tort,** supra note 27, at 145.

n142. E.g., Note, Firestone Litigants Ask Multidistrict Panel for Consolidated Pretrial Proceedings, Class Action Litigation Reporter, Sept. 22, 2000, at 3888 (defendants seek consolidation of more suits based on defective tires in one federal district court).

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n143. See 28 U.S.C. 1407(a) (Supp. IV 1998); Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 40 (1998).

n144. See 28 U.S.C. 1404.

n145. Compare 28 U.S.C. 1391 (1994) (civil venue provisions), with U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall ... [be tried by a] an impartial jury of the State and district wherein the crime shall have been committed ... .").

n146. See 28 U.S.C. 1441.

n147. Deborah R. Hensler et al., Class Action Dilemmas 28-31 (2000).

n148. John C. Goldberg & Benjamin C. Zipinsky, The Third Restatement and the Place of Duty in Negligence, 54 Vand. L. Rev. (forthcoming 2000).

n149. E.g., Dick Thornburgh, Sue, but Don't Prosecute, N.Y. Times, Sept. 20, 2000, at A27; Carol Vogel & Ralph Blumenthal, Art Auction Houses Agree to Pay $ 512 Million in Price Fixing Cases, N.Y. Times, Sept. 23, 2000, at A1; Carol Vogel & Ralph Blumenthal, Ex-Chief to Pay Bulk of Claims for Sotheby's, N.Y. Times, Sept. 25, 2000, at A1 ($ 156 million and $ 30 million).

n150. E.g., Edward W. Gerecke, Halting Regulation Through Litigation, Nat'l L.J., Oct. 9, 2000, at B11 ("In these gun and tobacco cases, a sometimes frustrated, and oftentimes very willing, governmental entity joins forces with teams of lawyers to pursue the industry. Many of these lawyers have the financial capacity to take on an industry ... .").

n151. E.g., Abrams, supra note 21, at 539, 559-74 (discussing rule making by the Department of Justice and Sentencing Commission). These agencies could provide guidelines for integrating civil and criminal practice in compensation. The Attorney General Guidelines for Victim and Witness Assistance recognizes that "the use of representative victims and victim proxies (such as organizations that represent the interests of the victim class or actual class action representatives)" may be appropriate methods to provide victims with notice and information. Office of the Attorney Gen., U.S. Dep't of Justice, Attorney General Guidelines for Victim and Witness Assistance 2000, at 13 (2000). Given the complexity of the issues that I have outlined above, more guidance will be necessary.

n152. See generally Weinstein, Individual Justice, supra note 27; Weinstein, **Mass Tort,**

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supra note 27; Weinstein, Compensating, supra note 27.

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flexible pleadings, consolidation of related cases, multidistrict transfers, long-arm statutes, as well as the relaxation of exclusionary evidence rules, tended to favor those plaintiffs seeking help from the courts. [51] Amendments to the Federal Rules as, for example, those widening Rule 23 on class actions, have tended to enhance the power of plaintiffs. [52]

[*960] The bankruptcy laws have also been useful in enhancing civil recoveries. [53] Some experts have suggested expanded bankruptcy as a substitute for class actions. [54] They underestimate, in my opinion, the transactional and other costs of bankruptcy and the difficulties of coordinating the bankruptcy proceedings with related civil cases.

Taking advantage of the open door to the courthouse has been a skilled plaintiffs' bar that has, partly through generous contingency fees and advertising, become powerful and well coordinated. In mass cases, the power of plaintiffs' and defendants' bars and the procedures available to them is now fairly equal. [55]

III. Examples

Having three separate branches of the law simultaneously providing compensation to the same victims for the same delicts creates difficulties. First is the obvious problem of duplicative (or triplicate) litigation. To have the same matter relitigated, often in different courts, wastes resources and sometimes risks conflicting approaches and outcomes. Such repetitive litigation can squander a defendant's resources, preventing victims from receiving as much compensation as they should. Partial fusion of the administrative, criminal, and tort systems offers an opportunity to amalgamate, enabling imposition of criminal and administrative controls and sanctions while compensating individuals for their losses in a coordinated civil proceeding. A few of my cases over the past several years illustrate the opportunities that this development offers, but also exposes some of the problems. The expansion of criminal and administrative actions into areas traditionally reserved for tort law poses problems of integration, communication among parties and institutions, and compensation for the victims.

A. The Docket of a District Court

An illustrative case is United States v. Ferranti. [56] It involved a particularly heinous arson. The defendant had set his store on fire at night. It was located on the ground floor of a three-story building. The upper **[*961]** floors contained occupied residential apartments. The building was virtually destroyed, leaving the tenants psychologically seared and homeless, with most of their possessions gone. Even worse, a firefighter had been killed in attempting to contain the blaze.

In determining the proper fine and amount of restitution, this case was relatively simple because it involved only a single federal criminal prosecution. The award of restitution was authorized only for the loss caused by the specific conduct constituting the offense, [57] but that loss plus a fine absorbed all of the defendant's assets. Thus, there was no point in victims' bringing any separate civil proceeding. The sentencing took on a quasi-civil aspect because it was used to fulfill some of the goals of the tort system. [58] It was necessary for the court to analyze the assets of the defendant, which were sizeable, and to determine the amount of monetary harm the numerous victims had suffered.

The court ordered restitution of almost $ 1.5 million, allocating it among the tenants, the City of New York, insurance companies and owners of damaged real property. The rest of the defendant's assets were taken in fines. Because the defendant's real property had to be completely liquidated, the court ordered that the defendant provide the U.S. Attorney's Office with full information regarding his property so that it could monitor the sales. The distribution of assets was through the Court Clerk's Office and the Probation Department. [59] Had the assets of the defendant been greater, a civil suit would almost surely have been brought on

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behalf of some of the injured to recover for their emotional damages and possibly for **punitive damages.** The restitution statutes do not now cover such losses; [60] a separate civil action to recover such damages is required, unless the defendant voluntarily consents to pay. [61]

A second litigation, United States v. Cheung, [62] was somewhat more complicated. It consisted of both a criminal prosecution and a parallel federal civil suit. Both proceedings were before me. The case involved a ponzi-type financial fraud that mulcted Chinese immigrants. The defendant was indicted and also sued by a class of the victims pursuant to civil **[*962]** RICO. [63] I sought to ensure that the victims received maximum recovery while minimizing transaction costs.

Through coordinated efforts of the magistrate judge, the Assistant U.S. Attorney, plaintiffs' counsel in the class action, and the FBI, a disposition was reached in which the defendant pleaded guilty to two counts of the indictment and the civil litigation was settled for $ 200,000, to be divided among the class members and the plaintiffs' attorney. As part of the sentence, the court ordered $ 1.25 million in restitution (essentially all of the defendants remaining assets) that was shared among all the victims. Distribution of the funds involved cooperation of the Probation Department, the U.S. Attorney, and private counsel for the victims. [64] Private counsel received an appropriate fee. He had played a useful role explaining to his clients what was happening. The victims appeared with class counsel before the court at the sentencing to express their rage.

In order to avoid any impropriety in the Cheung case, not only did I avoid participating in plea negotiations, (which the criminal law explicitly precludes), [65] but I declined involvement in the civil case as well. Because the two sets of negotiations were so closely related, I felt that involvement in either would raise the specter of impropriety. This detachment was also important when I conducted fairness hearings.

The third case, United States v. Rubin, [66] a securities fraud matter, raised more difficult problems. The criminal proceeding was the only part of the litigation in my court. Also pending were a class action in the Southern District of New York and an action brought by the SEC in the District of Columbia. In this situation, the three models, which should work together, were relatively uncoordinated except by counsel for the defendant. One of the considerations in the criminal case was to ensure that fines payable to the government would not so strip the defendant of assets as to make it impossible to make whole those defrauded. That was accomplished by setting aside enough restitution money through the criminal case to provide payments in the settled class action.

It was necessary in Rubin to determine what assets the defendant possessed so that victims were not shortchanged. Counsel for the defendant, the plaintiffs in the class action, and the U.S. Attorney prosecuting the criminal action appeared to be cooperating in exploring what could be paid. The SEC seemed quiescent, though it had threatened to seek appointment of a receiver to secure the defendant's assets. The government in the criminal case contended that during the pendency of these three proceedings, the defendant divested himself of most of his assets. Yet, in neither its criminal nor its administrative capacity had the government **[*963]** sought injunctions or liens to prevent a possible loss of assets that might have been used for disgorgement or restitution in the criminal or SEC actions. By contrast, the plaintiffs' attorneys in the civil action moved promptly to ensure that assets sufficient to settle the civil case were set aside.

The Rubin case is further complicated by the fact that the defendant appears to be suffering from the early stages of Alzheimer's disease. By criminal statute, funds for a defendant's support and treatment and for care of his family must be taken into account, reducing the funds available for a restitution order [67] - factors not ordinarily considered in a civil or administrative proceeding.

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Putative defendants have often avoided criminal prosecutions, or arranged for reduced pleas, by consenting to compensate victims. The hammer over their heads is the threat of a criminal or administrative prosecution. The use of district attorneys as collection agencies for locally favored institutions was at one time pervasive.

B. Administrative Law Examples

The growing emphasis on protection of the safety of the population at large by administrative and criminal agencies has reduced the need for tort law as a deterrent to dangerous conduct. Examples regularly appear in the press showing the shift towards administrative law. [68]

A recent case involved allegedly anticompetitive behavior by Mylan Laboratories, a generic drug manufacturer. Mylan faced an action brought by the FTC as well as several private law suits. An agreement, in which Mylan agreed to pay $ 147 million, has reportedly been reached with the government and most of the private litigants. Much of the money will be used to compensate those who were forced to pay higher drug prices. Some $ 35 million will be used to settle some of the private lawsuits, and $ 12 million will go to the government and private attorneys. [69]

The Mylan result seems to benefit all the parties involved. The defendant has settled virtually all of the litigation against it and paid a substantial penalty for its behavior; the government and private attorneys were able to coordinate their actions, expediting a solution to this case in a single **settlement;** and, most importantly, restitution will be used to benefit those who were harmed by anticompetitive action.

[*964] In another recent incident - the ValueJet Airlines crash in the Everglades that killed 110 people in 1996 - a federal judge in a criminal case ordered a contractor, SabreTech, to pay $ 2 million in fines and $ 9 million in restitution for illegally causing the transportation of hazardous waste that contributed to the accident. [70] The National Transportation Safety Board (NTSB) split the blame for the crash among SabreTech, ValueJet, and the Federal Aviation Administration (FAA) for lax oversight of the fast-growing discount airline. SabreTech's insurers have reportedly paid $ 262 million to settle lawsuits by the families of the victims. Private litigations can go forward (assuming the defendant has any assets). Finally, SabreTech has been charged with murder in state court. [71]

What is particularly interesting about SabreTech's defending in multiple venues is the relationship of the case to **punitive damages.** To the extent that the criminal and administrative penalties cover the full social costs and punishment for a massive wrong there seems to me to be little justification for adding **punitive damages** to an individual's compensatory tort judgment.

These cases are illustrative of a growing phenomenon - the seeking of restitution or disgorgement by administrative agencies. [72] For example, in the Mylan case, the district court held that the FTC had disgorgement authority pursuant to section 13(b) of the Federal Trade Commission Act. [73] The FTC argued in Mylan - a contention accepted by five courts of appeals and many district courts - that its power to seek injunctive relief includes the power to order disgorgement and restitution. [74] Central to the FTC's argument was that "companies, if advised by counsel that the only remedy [the FTC possesses] is [an order] to cease engaging in illegal conduct, will go ahead with the bad behavior until someone tells them to stop." [75] The court's ruling that the FTC had this power to order disgorgement undoubtedly helped settle the related litigations.

In another case, the United States Court of Appeals for the Sixth Circuit ruled that the FDA has the authority to seek restitution in connection **[*965]** with its supervision of pharmaceuticals. [76] This case was relied upon by the FDA in suggesting disgorgement by

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Abbot Laboratory, resulting in a $ 100 million **settlement.** Pressure was applied jointly by the FDA and the Department of Justice seeking a global **settlement** without, apparently, cooperating with the private attorneys for the injured. [77]

The SEC itself has the power to administer a restitution fund. [78] This authority stems from its exercise of ancillary jurisdiction. [79]

C. Conclusions

These examples illustrate three important concepts. First, and perhaps most obvious, is the powerful authority criminal prosecutors and **[*966]** administrative agencies possess. In Ferranti, Cheung, and Rubin, the U.S. Attorney along with the probation department were responsible for recommending large fines and restitution, locating victims, monitoring the liquidation of assets and ensuring that the defendant retained adequate funds to compensate victims. Mylan and SabreTech illustrate how administrative agencies, like the FTC and FDA, are not only assuming larger roles in coordinating litigation, but seeking fines and disgorgement that may cover the full social cost of a massive wrong.

Second, these cases suggest that despite their increased authority, prosecutors and administrative agents are not always well suited to facilitate communication with, and provide effective remedies for, victims. In Cheung, the private plaintiff's lawyer was largely responsible for communicating with the victims, and in Rubin, the combined efforts of the U.S. Attorney's Office and the SEC proved to be less effective than those of private attorneys in protecting the funds necessary to compensate victims. The tort model continued to play an important role in addressing victims needs.

Finally, these examples demonstrate the desirability of guidelines that instruct attorneys and judges on how to coordinate and balance criminal, administrative, and private actions. The Mylan result benefited all the parties involved partly because the government and private attorneys were apparently able to coordinate their actions, expediting a comprehensive remedy in a single **settlement.** As administrative agencies and prosecutors exercise additional authority to address victims' needs, resolving conflicts of interest and better communication among themselves and with private counsel and the aggrieved will be essential to providing fair and adequate relief.

IV. The Trend Against Compensating Victims Through the Tort System

While criminal and administrative law have moved towards victim compensation as one of their goals (even if it is a secondary one), concurrently there has been a recent marked attempt to limit the power of recovery through the civil system. [80] Congress, state tort reforms, federal court decisions, increased use of alternative dispute resolution, **[*967]** and parens patriae suits have all tended to limit the traditional effectiveness of the privately driven tort system.

Diverting and limiting private suits to vindicate tort rights is not new. Workers' compensation laws were adopted some one hundred years ago. They have served fairly well to reduce transactional costs while speeding modest recoveries without a required showing of fault. [81] The black lung cases, unlike asbestos, have been removed from the courts and assigned to administrative resolution; [82] the high costs, however, have somewhat soured Congress on this technique of using administrative agencies to compensate. [83] In the matter of children's vaccines, Congress has drawn most claims into the government-administered compensation program, reportedly at low costs of administration. [84]

An obvious example of the trend away from traditional private litigation is the concerted political effort to restrict civil actions in mass cases. [85] Tort reform in the states, sparked primarily by powerful potential defendants, has truncated substantive tort law, established

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procedural roadblocks, and capped remedies. Extensive limits on personal injury claims in the automobile field have also had some success in taking many relatively minor auto cases out of the courts. [86]

[*968] The federal courts themselves have attempted, particularly at the appellate level, to limit class and other aggregate actions. [87] Judicial door-closing was recently accelerated slightly when Rule 23 of the Federal Rules of Civil Procedure was amended to permit interlocutory appeals from class certification orders, enabling the appellate courts to quash class actions quickly before **settlement.** [88]

Another federal development that has had some impact in reducing civil litigation alternatives is the preemption doctrine. [89] It allows the federal courts to throttle private state tort law. [90] The Supreme Court has been cautious in utilizing this technique to convert shielding federal statutes into swords striking at state litigation and administrative protections. [91]

Increased reliance by private and public institutions on Alternative Dispute Resolution (ADR) techniques has drained a good deal of potential civil litigation out of the courts. [92] The tendency to rely on ADR in **[*969]** securities disputes, labor matters, and international business disputes has been striking. [93]

Another important example of bypassing traditional private tort law is the recoveries sought by state and federal attorneys general. For example, in tobacco cases, they have acted as parens patriae on behalf of consumers, but using private plaintiffs' attorneys to conduct much of the litigation. [94]

V. Costs and Benefits of Mass Actions

There are advantages and disadvantages to shifting compensation for private wrongs from the private system to the criminal and administrative systems. On the one hand, the tort model may be subject to abuse. Plaintiff attorneys may charge excessive fees, have conflicts with their clients and the public interest, deter technological innovation, and create high transaction costs for victims and society. But, on the other hand, as my own experience has convinced me in cases that I have presided over - such as Agent Orange, DES, asbestos, tobacco, gun, and breast implants - the tort model provides an effective democratic and egalitarian means for protecting victims and ensuring that their injuries are properly compensated. On the whole, the tort system can be more flexible, prevent agency capture, promote procedural and substantive law innovations, and be more sensitive to people's needs than governmental processes. [95]

Private mass actions are subject to abuse. Particularly upsetting to some are the billions of dollars in legal fees in the recent tobacco cases. [96] While private lawyers have the opportunity and obligation to stay in **[*970]** touch with clients, some have disregarded this role. [97] Personal injury lawyers sometimes also neglect their larger obligation to the public interest in their "vigorous advocacy." As personal injury lawyers shared with each other information about dozens of deaths involving Ford Explorers equipped with Firestone Tires, they reportedly held back much of the information from federal regulators. In this instance, the general lack of confidence in the National Highway Transit Safety Administration may have been reasonable. [98] According to one report on the coordination of lawsuits against auto and tire makers, plaintiffs lawyers feared prompting a federal investigation that could unfairly find Firestone tires free of defects. [99]

Private litigation may also chill scientific innovation and create high transaction costs for victims and society at large. A 1991 ALI study suggested that the tort system, combined with administrative regulation, might over-deter development of technologically complex products such as drugs, vaccines, and aircrafts. [100] The study recommended that industry compliance with federal regulations plus preemption be used as a limited defense to product liability

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THE INCIDENCE, SCOPE, AND PURPOSE OF **PUNITIVE DAMAGES:** ARTICLE: RECONSIDERING INSURANCE FOR **PUNITIVE DAMAGES**

Tom Baker *

* Connecticut Mutual Professor and Director, Insurance Law Center, University of Connecticut School of Law. Copyright, January 1997, Tom Baker. Thank you to Mary Coombs, Clark Freshman and David Luban for comments on an earlier draft.

SUMMARY:
... (3) Contract provisions intended to eliminate coverage for claims that are likely to result in **punitive damage** awards; and ...

TEXT:
[*101]

I. Introduction

Many courts refuse on policy grounds to enforce contracts to provide insurance for **punitive damages,** to the general applause of academic commentary. [1] According to the conventional wisdom, insurance for **punitive damages** defeats the purposes of those damages and therefore courts should prohibit that insurance. This Article reexamines the conventional wisdom in light of basic information about the liability insurance market and concludes that there is little evidence of a need for this particular form of judicial regulation.

The next two parts of this Article set the scene for the main discussion in Part IV. Part II reviews the deterrence and retribution objections to insurance for **punitive damages.** Part III then describes restrictions that insurance companies have placed on the insurance they offer for **punitive damages** and explains those restrictions as efforts to control moral hazard and adverse selection.

Part IV considers the case for judicial regulation of **punitive damages** insurance in light of these market restrictions. Part IV argues that the twin problems of moral hazard and adverse selection provide insurance companies with adequate incentive to address the deterrence objection to **punitive damages** insurance and that the companies' control over underwriting and contracting places them in a better position than courts to address that objection. Therefore, there is no need for courts to act on deterrence grounds to prohibit insurance for **punitive damages.**

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large **punitive damages** awards does not exist in any practical sense, because individuals and small businesses rarely purchase insurance with the kinds of limits that would be needed to cover multi-million dollar awards. [58]

Of course, empirical research suggests that the far more common **punitive damages** award is well under $ 100,000. [59] At least among the business and professional classes in the United States, automobile and general liability insurance coverage at that level is widely purchased. Thus, the available insurance limits would be insufficient to pay **punitive damages** only in the exceptionally egregious case--when the jury really became angry at the defendant. This suggests that insurance policy limits may function, in a very rough way, to ameliorate some of the prevention and retribution-based concerns about insurance for **punitive damages.** If the jury really wants to impose a million dollar punishment on an individual or a small business defendant, there is a good chance that award will exceed the available insurance limits.

[*119] In the large commercial insurance market, substantial policy limits are far more common. Indeed, in commercial liability insurance cases in which I have participated, annual limits well into the hundreds of millions of dollars are not unusual. [60] This suggests that, except in the mass tort situation, dollar limits alone do not effectively limit the **punitive damages** insurance coverage available to corporate America.

Nevertheless, as discussed below, I have a working assumption that **punitive damages** exclusions are more common in umbrella and excess policies. To the degree this is so, the dollar limits on primary insurance coverage would tend to limit the **punitive damages** coverage for the large corporate market in much the same way as insurance purchasing patterns limit the **punitive damages** coverage in the personal and small business markets.

C. Contract Provisions

Although insurance underwriting and dollar limits on insurance policies do restrict insurance for **punitive damages** in a manner that answers some of the theoretical objections to such insurance, these two aspects of insurance practice are hardly a complete answer to those objections. If there is to be a real answer--and I believe there is, especially for the prevention-based objections--it has to come from the insurance contract.

There are three types of contract provisions that reduce the insurance coverage that would otherwise be provided for **punitive damages** claims under standard liability insurance policies: intentional harm exclusions, **punitive damages** exclusions, and claim-specific exclusions. The paragraphs that follow describe each of these.

1. intentional harm exclusions

Standard general liability insurance forms exclude coverage for bodily injury and property damage that is "expected or intended from the standpoint of the insured." [61] The requirement in the standard automobile liability policy that the injury or damage be "caused by accident" serves a similar function. [62] Courts differ on the precise meaning given to these words, but the common idea is the elimination of liability insurance coverage in situations in which the insured knew or **[*120]** should have known to a very high probability that harm would result. [63] Insurance companies have long included such exclusions in their policies because of concerns about moral hazard, in both the "situational" and "individual" senses of that term. [64]

Insurance for intentional harm raises serious situational moral hazard concerns. [65] As discussed in the context of the prevention objections to insurance for **punitive damages,** there is good reason to believe that insurance for intentional harm poses a clearer insurance-deterrence tradeoff than insurance for inadvertent harm. Although certainly not all actors can

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or will act in the manner predicted by the theory of moral hazard, the insurance industry has made a collective decision not to provide insurance for intentional harm, except for certain narrow or specialized forms of coverage. [66] Thus, insurance is actually available for punitive (and, for that matter, compensatory) damages only in cases in which the defendant has not been shown to have intended the harm.

[*121] Insurance against intentional harm also raises individual moral hazard concerns because such insurance will be disproportionately attractive to those who are not constrained by conventional norms against causing harm. If insurance for intentional harm were available, anyone who was about to cause such harm would be well advised to buy that insurance. Conversely, anyone who was reasonably sure she was not going to cause harm intentionally would be well advised not to buy that insurance. Because we are talking about intentional harm, people can identify in advance (to a significant but not perfect degree) whether they will need the insurance, and they can hide that fact from the insurance company (at least the first time [67]). Thus, insurance for intentional harm also presents an adverse selection problem, [68] with the result that insurance that excluded coverage for intentional harm would tend to drive out from the market insurance that offered such coverage. [69]

As a result of the intentional harm exclusion in liability insurance, tort law in action addresses questions of fault, not only in a tort claim filed by a plaintiff, but also in the presentation of that claim to the defendant's liability insurance company. In the tort claim, the formal fault lines are two: between liability and no liability, and between compensatory and **punitive damages.** The insurance claim adds a third fault line--between intentional and unintentional harm.

The relationship between the **punitive damages** fault line and the intentional harm fault line is not straightforward. Not all cases of intentional harm will meet the applicable tort law standard for **punitive damages,** [70] nor will all **punitive damages** cases meet the applicable insurance law standard for intentional harm. The question of whether to enforce contracts to provide **punitive damages** matters only for cases in which the **punitive damages** standard is met, but the intentional harm standard is not. [71]

[*122]

2. **punitive damages** exclusions

The most straightforward way to eliminate insurance coverage for **punitive damages** is to include in the insurance policy a provision explicitly excluding coverage for **punitive damages.** The fact that **punitive damages** exclusions typically are not included in primary liability insurance policies represents a considered choice to offer that coverage. Indeed, efforts to include such exclusions in the industry-wide standard form primary policies have been rejected on marketing grounds. [72] This suggests that most insurance companies prefer to sell, and most policyholders prefer to buy, primary liability insurance policies that do not contain a blanket exclusion for **punitive damages.** This suggests, as well, that intentional harm exclusions are an adequate solution to the moral hazard and adverse selection problems that are posed by insurance for **punitive damages.**

Nevertheless, it appears that **punitive damages** exclusions appear more often in umbrella and excess liability insurance policies. [73] If so, this may reflect a judgment that, in an excess policy, a **punitive damages** exclusion serves as a less expensive proxy for an intentional harm exclusion. A very large **punitive damages** award is quite likely to reflect the jury's conclusion that the defendant consciously caused serious harm. Nevertheless, an insurance company cannot avoid paying that claim, based on an intentional harm exclusion, without a second trial. [74] Avoiding coverage based on a **punitive damages** exclusion, in contrast, would require no second trial.

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3. claim-specific exclusions

Liability insurance policies also commonly contain claim-specific exclusions that limit indirectly the insurance that is actually available for **punitive damages.** Contemporary standard form examples of such exclusions include provisions relating to claims arising out of asbestos, sexual harassment and molestation, assault, and pollution. These are all liability claims that are disproportionately likely to arouse a strong sense of moral indignation on the part of juries and, thus, pose a disproportionate risk of **punitive damages.**

[*123] Some insurance policies also contain claim-specific exclusions that are specially drafted for the particular insureds to whom they apply. These "manuscript" exclusions are inserted into general liability insurance policies with some regularity once a product becomes the subject of mass tort litigation. Examples include exclusions relating to breast implants, IUDs and toxic shock syndrome. [75]

It seems unlikely that claim-specific exclusions are inserted in liability insurance policies solely because of concerns about **punitive damages.** But the exclusions do have the effect of reducing insurance companies' **punitive damages** exposure. More important, however, these exclusions highlight the fact that insurance is an iterative game.

Insurers have strong incentives to eliminate the disproportionately risky from their insurance pools. Thus, having insurance against claims during one policy period is no guarantee that there will be insurance against claims in the future. Indeed, this is becoming even more true as the insurance industry shifts from "occurrence" to "claims made" forms of coverage. [76] Consequently, regardless of the extent of the insurance for **punitive damages** that initially is offered for sale on the insurance market, the theoretical concern that **punitive damages** insurance would allow an insured to avoid all the financial consequences of egregious future action is unlikely to be borne out in practice for repeat players such as manufacturers and retailers.

D. Public Policy Based Refusals to Pay

Insurance companies largely have chosen to limit **punitive damages** coverage indirectly, rather than by explicitly excluding coverage for **punitive damages.** Notwithstanding the freedom of contract ideology that still animates much of insurance practice, [77] liability insurance companies regularly refuse to pay **punitive damages** claims on the grounds that public **[*124]** policy forbids it. [78] Today, about half of the U.S. jurisdictions are receptive to this defense, at least with respect to direct (as opposed to vicarious) **punitive damages.** [79] The merits of this defense are addressed in Part IV of this Article.

Recalling my earlier claim that insurance companies have concluded "that intentional harm exclusions are an adequate solution to the moral hazard and adverse selection problems that are posed by insurance for **punitive damages,**" [80] the careful reader may ask, "Why, then, do insurance companies regularly refuse to pay **punitive damages** on grounds of public policy?" After all, if an insurance company wants to pay a **punitive damages** claim, there is no one with standing to sue who will object: the insured gets the coverage and the victim gets the money.

Three possible explanations have occurred to me. The first follows from the internal division in insurance companies between claims departments and "production" departments (sales and marketing). The absence of an explicit **punitive damages** exclusion allows the production departments to sell the "broadest coverage available," while the public policy against **punitive damages** insurance allows the claims department to avoid paying those damages. One reason that claims and production departments are separated bureaucratically in insurance companies is to minimize the ability of producers to pressure those who pay

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claims and, just as important, to permit the producers to say to their customers that they have no control over whether a claim gets paid, thus helping to preserve the personal relationship between producers and customers. [81]

The second reason follows from the divided nature of the industry's decision not to include a **punitive damages** exclusion in the commercial liability insurance policy. [82] Clearly, the dissenting companies did not agree that offering **punitive damages** coverage was a good idea. The **[*125]** implied exclusion allows those companies to achieve at least part of their goal of excluding **punitive damages** while still using the industry standard form. [83]

The third reason is a game theoretic explanation. In the individual instance, it is almost always in the insurance company's interest not to pay a claim, provided it can do so without losing good will. The "public policy" against **punitive damages** insurance allows the insurance company to refuse to pay that part of the claim without appearing to exercise its discretion in so doing and, therefore, without sacrificing good will. Thus, even though offering the insurance may be in the best interests of the industry as a whole (a fact suggested by the absence of the exclusion in the standard policy), the contrary interests in the individual situations overwhelm that collective interest. This is another instance of the familiar prisoners' dilemma, in which individually rational action leads to a collectively irrational result. [84]

Notwithstanding these explanations, interviews with personal injury lawyers (both plaintiff and defense) suggest that insurance companies in fact do pay **punitive damages** claims at the **settlement** stage even in states in which they are not required to do so. [85] Thus, the public policy against insurance for **punitive damages** does not mean that there is no **punitive damages** coverage, but rather that in an individual case insurance companies have the power to decide whether to pay or not.

A rational insurance company will make that decision in a manner that takes into account the size of the claim, the likelihood that the customer will be lost, the profitability of the account, and, perhaps most important, the size of the potential judgment it can avoid by paying some **punitive damages** "tribute" at the **settlement** stage. [86] In practice, this means that some **punitive damages** coverage in fact is provided in the **settlement** stage. [87]

[*126]

E. Summary

When we examine insurance practice, we find that the insurance that is actually available on the insurance market is more restrictive than the unlimited insurance considered in the theoretical discussion. Except for specialized forms of coverage, insurance for intentional harm is not available. The insurance for unintentional harm that is available excludes some claims that pose a disproportionate risk of **punitive damages.** Moreover, insurance underwriters regularly restrict, or refuse to provide, coverage to insureds who pose a disproportionate risk of **punitive damages.** All these restrictions follow from insurance companies' efforts to combat moral hazard and adverse selection. [88] We also find that, even in states in which **punitive damages** are formally uninsurable, insurance companies regularly pay **punitive damages** claims at the **settlement** stage. Thus, **punitive damages** insurance does not pose all the problems suggested in the theoretical discussion, nor is prohibiting such insurance the panacea that a purely theoretical or doctrinal approach might suggest.

Clearly, this description has not demonstrated that "in fact" these market restrictions on insurance for **punitive damages** prevent that insurance from undercutting the prevention and retribution objectives of those damages. What it has demonstrated, however, is that insurance companies have a strong financial incentive to construct the insurance relationship

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in a manner that answers the theoretical objections to insurance for **punitive damages** and that insurance companies underwrite and draft insurance contracts in ways that appear to be consistent with that incentive. The next part of this Article discusses whether, in light of this incentive and those aspects of insurance practice, courts should nevertheless refuse to enforce contracts to provide insurance for **punitive damages.**

IV. Reconsidering Insurance for **Punitive Damages**

The prevention objection to insurance for **punitive damages** is an instrumental one. It says that insurance for **punitive damages** should be prohibited because that insurance will reduce the deterrent effect of those damages. Yet, all insurance reduces the financial impact of the insured- against event, a fact that has not prevented widespread acceptance of liability insurance. Thus, the prevention objection to insurance for **punitive damages** must turn on a significant difference between the effect of that insurance and the effect of insurance for compensatory damages. **[*127]** There has to be, in other words, some basis for concluding that insurance for **punitive damages** undercuts tort law's prevention purpose more than insurance for compensatory damages.

Part II argued that this basis can be found by comparing the moral hazard and adverse selection problems posed by the two types of insurance. In theory, insurance for **punitive damages** poses greater moral hazard and adverse selection problems than insurance for compensatory damages, because defendants who are subjected to **punitive damages** awards are more likely than other defendants to have known that their conduct violated the applicable legal standard and to have predicted before buying insurance that this would be the case. Given their proven willingness to violate legal standards, we can reasonably conclude that these defendants are less able than other defendants to be governed by the norm prevention aspect of tort law. Thus, **punitive damages** insurance is objectionable from a prevention standpoint because it reduces the financial incentive of tort damages for those who need that incentive the most.

From a prevention perspective, the policy choice between permitting or prohibiting insurance for **punitive damages** comes down to a simple question: can insurance companies be counted upon to make adequate efforts to control the moral hazard and adverse selection problems posed by such insurance? As Part III discussed, insurance companies have great financial incentive to control the moral hazard of insurance, not only because of the increased loss that results, but also because of the accompanying problem of adverse selection. As a result, the insurance that is actually available for **punitive damages** is far more restrictive than what is assumed in the theoretical discussion. Indeed, when we look at insurance practice, we find that the insurance contract already attempts to eliminate insurance for those whom insurance companies have decided most need the financial incentive of damages.

Insurance practice is far more protective of the prevention objectives of tort law than the crude distinction in insurance law between compensatory and **punitive damages.** Through the use of the intentional harm exclusion, insurance practice regulates the prevention effect, not only of **punitive damages,** but also of compensatory damages. Given the incentive of insurance companies to control moral hazard and adverse selection, and their ability to do so through the use of underwriting and insurance contract provisions, [89] the best course for judges concerned **[*128]** about **punitive damages,** insurance, and the prevention objectives of tort law is to leave well enough alone. [90]

With respect to the retribution objection to **punitive damages,** insurance practice provides a less definitive response. The intentional harm exclusion addresses part of the retribution objection. Indeed, because the intentional harm exclusion applies to all damages, insurance practice does a more thorough job in this respect than insurance law to further the retributive purposes of tort law. Nevertheless, the goals of insurance companies do not mesh

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as neatly with the retribution objectives of tort law as they do with the prevention objectives of tort law. Insurance companies seek to control moral hazard and adverse selection because, speaking metaphorically, that puts money in their pockets. Furthering the retribution objectives of the common law is less clearly in their self interest. Indeed, provided that the problems of moral hazard and adverse selection can be addressed, softening the retributive punch of the common law would seem to be good business. Thus, the more importance courts give to notions of retribution in developing their approach to **punitive damages,** the stronger the objection to insurance for **punitive damages.**

Nevertheless, once we acknowledge that the insurance market does not, in most cases, offer coverage for intentional harm, the remaining retribution objections to **punitive damages** insurance seem, from a practical perspective, minor. While we do not have good data on the frequency of **punitive damages** claims, there is a growing body of research on **punitive damages** awards that shows that such awards are rare [91] and that they are often struck down on appeal. [92] If and when the time comes to pay a **punitive damages** award, the insurance carrier is almost certain to claim that the insured defendant intended the harm and, therefore, that there is no insurance for the claim. Although insurance companies will not (and should not) win all those coverage cases, they will win some, and many more will be settled for a percentage of the amount claimed. The result is that even with insurance for **punitive [*129] damages,** tort law in action calibrates the "sting" of a judgment according to the culpability of the defendant to a far greater extent than is acknowledged in the typical judicial decision prohibiting insurance for **punitive damages.** [93] Moreover, as interviews with personal injury lawyers suggest, efforts to improve the calibration of that sting by prohibiting insurance for **punitive damages** will have less of an effect on tort law in action than a judge or legislator might wish, because some insurance for **punitive damages** in fact is provided even when such insurance is prohibited. [94]

V. Implications for Tort and Insurance Policy

There are several conclusions that follow from the above discussion. The first is that, from both a prevention and a retribution perspective, it makes little practical difference whether **punitive damages** are insurable or not. That does not mean, of course, that it might not make a great difference to individual parties in individual cases. But there is little reason to believe that prohibiting the insurance will have much effect on social welfare. Any assertion that permitting the insurance will increase loss by inhibiting the prevention aspect of tort law can easily be answered by reference to the strong incentive for insurance companies to control moral hazard and adverse selection and by the counter assertion that the availability of the insurance will enhance the norm projection aspect of tort law. Similarly, the intentional harm exclusion answers some of the retribution objections to insurance for **punitive damages.** Moreover, in some cases that do not involve intentional harm, the availability of the insurance will increase the likelihood that plaintiffs will file actions, thereby enhancing tort law's ability to achieve its retributive ends.

The second conclusion follows from the first: if insurance for **punitive damages** is not of great practical importance to the prevention or retribution purposes of tort law, there must be some other explanation for courts' efforts to prohibit that insurance. One plausible explanation lies in a combination of the legitimation function of courts and the dynamics of the prisoners' dilemma described at the conclusion of Part III (in which the individually rational decision not to pay a particular **punitive damages** claims overwhelms the collectively rational decision to offer such coverage). The prisoners' dilemma explains why insurance companies would repeatedly ask courts to refuse to enforce their promise, and the legitimation function explains why courts sometimes grant this request. **[*130]** No judge likes the law to appear a fool, and the "sound bite" on **punitive damages** insurance can easily make the law appear a fool.

My final conclusion is hardly unique to this paper. Indeed, it is the common theme of much of

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the current insurance law scholarship: tort law cannot be fully understood without paying close attention to insurance, and insurance law cannot be understood without paying close attention to tort law. [95] The clearest demonstration offered in this paper lies in the centrality of the intentional harm exclusion to the conclusion that insurance for **punitive damages** does not significantly undercut the prevention and retribution objectives of tort law.

The intentional harm exclusion exists to enable insurance companies to make money by controlling moral hazard and adverse selection, but it also furthers important prevention and retribution purposes of tort law. As a result, the insurance company that denies a claim because of the intentional harm exclusion furthers the prevention and retribution goals of tort law nearly as much as the plaintiff who asserts the claim in the first place. Thus, the intentional harm battle that dominates much insurance coverage litigation has important consequences beyond the resolution of that litigation. Indeed, no less than the plaintiff who brings the claim, the insurance company that (properly) denies the claim on intentional harm grounds acts on behalf of all victims and potential victims of intentional harm to prevent loss and to achieve retribution.

FOOTNOTES:

n1. See, e.g., W. Page Keeton et al., Prosser and Keeton on the Law of Torts 2 (5th ed. 1984); Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of **Punitive Damages,** 56 S. Cal. L. Rev 1, 73-76 (1982); Alan I. Widiss, Liability Insurance Coverage for **Punitive Damages?** Discerning Answers to the Conundrum Created by Disputes Involving Conflicting Public Policies, Pragmatic Considerations and Political Actions, 39 Vill. L. Rev. 455, 462 (1994).

n2. In reaching this conclusion, I do not consider the claim by some courts that insurance for **punitive damages** should be permitted on the grounds that **punitive damages** do not serve their intended function. See Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1, 5 (Tenn. 1964). I agree with Dean Ellis that if these courts are right, the better approach is to address **punitive damages** directly. See Ellis, supra note 1, at 75.

n3. See Joseph E. Stiglitz, Risk, Incentives and Insurance: The Pure Theory of Moral Hazard, 8 Geneva Papers on Risk & Ins. 4, 6 (1983) (AThe more and better insurance that is provided against some contingency, the less incentive individuals have to avoid the insured event, because the less they bear the full consequences of their actions.")

n4. A nice example of the importance of paying attention to this distinction appears in Jon D. Hanson and Kyle D. Logue, The First-Party Insurance Externality: An Economic Justification for Enterprise Liability, 76 Cornell L. Rev. 129 (1990) (criticizing tort theorists for failing to consider the fact that first party insurance for individuals is rarely experience-rated). Two theoretical papers that simultaneously illustrate the importance of paying attention to insurance institutions and the difficulty of doing so within the bounds of economic theory are Seth J. Chandler, The Interaction of the Tort System and Liability Insurance Regulation: Understanding Moral Hazard, 2 Conn. Ins. L. J. 91 (1996) [hereinafter Chandler, Understanding] and Seth J. Chandler, Visualizing Moral Hazard, 1 Conn. Ins. L.J. 97 (1995) [hereinafter Chandler, Visualizing].

n5. See, e.g., Stiglitz, supra note 3. This is not a criticism of economic theory, but rather a call for careful application of that theory in the context of insurance institutions. See Chandler, Visualizing, supra note 4 for a formal demonstration, using computer-assisted mathematical modeling, of the theoretical ability of insurance contract provisions to reduce the insurance-deterrence tradeoff.

n6. See Ellis, supra note 1 (Following the conventions of law and economics scholarship, Ellis uses the term "deterrence," rather than "prevention.")

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n7. See id. at 10-12. For example, the fact that **punitive damages** serve to compensate plaintiffs for otherwise non-compensable harm does not tell us which plaintiffs are entitled to those additional damages. We need notions of retribution or deterrence to explain why providing greater than the usual compensatory damages is best in one case and not another. We accept less than complete compensation generally, perhaps because we are uncomfortable with requiring negligent or strictly liable defendants to bear the entire cost of their injury causing activity, or because we want to encourage people to "lump it" to some degree in order to discourage claiming. But, when a defendant behaves in a sufficiently flagrant fashion, we are less uncomfortable with requiring that defendant to bear the full costs (or more) of his or her conduct and we no longer believe that the plaintiff should "lump it." If we explore why our feelings are different for the flagrant defendant, we will see that the reasons track those that will be discussed in the paragraphs on retribution and deterrence below. See infra Parts II.C-D.

Ellis did not address directly the legitimation purpose of **punitive damages:** for example, convincing us that tort law is in fact capable of constraining the behavior of powerful economic actors. Nevertheless, his analysis applies to that purpose as well: legitimation may well be the most important purpose of **punitive damages,** but that purpose cannot tell us when to assess those damages.

n8. See Widiss, supra note 1, at 465-66. The courts of many jurisdictions, including such populous states as California, Florida, Illinois and New York, forbid the insurance of direct **punitive damages** on public policy grounds. All states permit the insurance of **punitive damages** that are assessed vicariously. See id.

n9. See, e.g., Robert D. Cooter, Economic Analysis of **Punitive Damages,** 56 S. Cal. L. Rev. 79, 96 (1982) (arguing that this criticism should give way because insurance makes both victims and tortfeasors better off); Ellis, supra note 1, at 73-76. While I agree with the conclusion that **punitive damages** insurance should not be prohibited, I disagree strongly with Cooter's reasoning because it takes an ex post approach to victim welfare that fails to acknowledge victims' autonomy. For a critique of ex post approaches to victim welfare, see Mark Geistfeld, Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries, 83 Cal. L. Rev. 773 (1995).

n10. See Marc Galanter & David Luban, Poetic Justice: **Punitive Damages** and Legal Pluralism, 42 Am. U. L. Rev. 1393, 1429 (1993).

n11. Cf. David G. Owen, A **Punitive Damages** Overview: Functions, Problems and Reform, 39 Vill. L. Rev. 363, 374 (1994) (referring to the "education" function of **punitive damages)**.

n12. I do not want to suggest, however, that this function cannot be accommodated within the concept of deterrence as it is used in economic analysis. From an economic perspective, Galanter and Luban are simply highlighting the fact that people have preferences for things other than money. Fining Bob for doing X will affect the behavior of Alice, a rational conformist, not simply because she wants to avoid the fine imposed on Bob, but also because she values living her life in a socially acceptable way. In other words, she is deterred from doing X, not only by the probabilistic costs attributable to the risk of being fined, but also because of the value she places on living in a socially responsible manner (and the corollary of that value, the loss to her self-understanding attributable to engaging in stigmatized behavior--a loss that will occur whether or not she is caught).

n13. It is possible that the norm or rule will itself be the result of a cost-benefit analysis. To the extent individuals make a cost-benefit calculation, however, the costs and benefits are assessed, not with reference to the probability of loss that may be imposed on others (Learned Hand's BPL, see United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir.

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1947)), but with reference to what there is to gain or lose by breaching the applicable norm.

n14. See Ellis, supra note 1, at 25-33.

n15. See David G. Owen, Civil Punishment and the Public Good, 56 S. Cal. L. Rev. 103, 113 (1982) (Aeach of Professor Ellis' categories seems all-inclusive or almost so: none of the categories appear to exclude many, if any, cases.").

n16. See Cooter, supra note 9, at 80-81.

n17. See id. Using the numbers provided in Cooter's exploding pop bottle hypothetical, I was able to calculate a "tipping point" that occurs when the bottler is held liable for thirty percent or less of the costs of exploding pop bottles.

n18. See Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System--And Why Not?, 140 U. Pa. L. Rev. 1147 (1992) (an exhaustive review of the empirical literature and findings in the tort field).

n19. See Cooter, supra note 9, at 91. For an analysis that suggests that this difference between negligence and strict liability disappears when insurance companies specify precaution conditions, see Chandler, Understanding, supra note 4, at 138-40.

n20. See Cooter, supra note 9, at 91.

n21. An alternative, and more practically important threshold, is provided by insurance contract provisions that specify the precautions that insureds must take to avoid harm. See generally Chandler, Understanding, supra note 4; Chandler, Visualizing, supra note 4. The intentional harm and accident provisions discussed in Part III of this paper are two examples of such provisions.

n22. See, e.g., Ellen Wertheimer, **Punitive Damages** and Strict Products Liability: An Essay in Oxymoron, 39 Vill. L. Rev. 505 (1994).

n23. The reluctance of some legal authorities to police domestic violence could well lead one to conclude that the "law in action" does not regard such violence as entirely illegitimate. See Richard J. Gelles & Murray A. Strauss, Intimate Violence 20-25 (1988).

n24. See Morris Dees, Finding the Forum for a Victory, Nat'l L.J., Feb. 11, 1991 at S3 (describing the Southern Law Poverty Center's strategy of bankrupting white supremacists).

n25. See Chandler, Visualizing, supra note 4, at 123 (using computer-assisted modeling to estimate a tipping point that occurs, in the absence of precaution conditions in the insurance contract, at an indemnification level of twenty percent).

n26. See Gary T. Schwartz, Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?, 42 UCLA L. Rev. 377 (1994).

n27. See Stiglitz, supra note 3.

n28. See text accompanying notes 42-45 (discussing insurance and retribution).

n29. Indeed, as Kent Syverud has suggested, at times insurance institutions can anticipate legal norms. See Kent D. Syverud, On the Demand for Liability Insurance, 72 Tex. L. Rev. 1629, 1638 n.33 (1994).

n30. Note that this is a probabilistic statement; not an assertion that all those subjected to

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an award will have this level of intent. Unless we deny that the standard for **punitive damages** has anything to do with intent (or that fact finders are more often right than wrong), this probabilistic statement will be true regardless of the precise standard for **punitive damages.** For a listing of various standards employed by courts, see Michael Rustad & Thomas **Koenig,** The Historical Continuity of **Punitive Damages** Awards: Reforming the Tort Reformers, 42 Am. U. L. Rev. 1269, 1317 n.240 (1993).

n31. Cf. Cooter, supra note 9, at 85-86 (suggesting that the imprecision of legal standards explains much of the inadvertent violation of those standards).

n32. See Widiss, supra note 1, at 482.

n33. See, e.g., 2 Stuart M. Speiser et al., The American Law of Torts 8:50 (1985) (describing standards for the imposition of vicarious **punitive damages,** some of which require a considerably lower level of fault than negligence). Absent vicarious liability for **punitive damages,** principals would have an incentive not to monitor their agents' behavior so as not to have the knowledge necessary to support a direct **punitive damages** award.

n34. For an argument that the deterrent purposes of **punitive damages** is satisfied by compensating only the lawyer (and not the plaintiff), see Note, An Economic Analysis of the Plaintiff's Windfall from **Punitive Damage** Litigation, 105 Harv. L. Rev. 1900 (1992). This argument ignores the conflicts of interest between plaintiffs and their lawyers that would result from compensating lawyers but not their clients.

n35. See Galanter & Luban, supra note 10, at 1432.

n36. Id. at 1434.

n37. Id. at 1432.

n38. Id. (internal quotations omitted).

n39. See, e.g., Jules L. Coleman, Risks and Wrongs 218-19 (1992). As I will discuss in Part IV, tort law in action recognizes additional gradations in culpability, mainly because of insurance.

n40. See Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. Rev. 1659, 1663 & 1691 (1992).

n41. See id.

n42. See id. at 1685, 1695.

n43. In the context of groups or subcultures opposed to the prevailing legal regime, the social consequences of a **punitive damages** award may not be negative.

n44. See Galanter & Luban, supra note 10, at 1440 (AHigh **punitive damages** awards hit homo economicus where it hurts: an eye for an eye, a tooth for a tooth, and a bottom line for a bottom line. It is poetic justice."); Hampton, supra note 40, at 1688-89.

n45. See Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Ct. App. 1981) (an appeal case where jury awarded $ 125 million to a boy who was badly burned in an explosion of a Ford Pinto).

n46. I start with the form, not because of a theoretical position that the interpretation of form contracts should start with the form, but rather because insurance practitioners do. See

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The incentives of insurance companies do not mesh as neatly with the retributive objectives of tort law. Accordingly, retribution provides a somewhat stronger case for judicial regulation of **punitive damages** **[*102]** insurance (as well as other aspects of liability insurance). Nevertheless, even with **punitive damages** insurance, tort law in action will calibrate the sting of a tort action according to the culpability of the defendant, and insurance underwriting practices reduce the ability of repeat offenders to use insurance to insulate themselves from the retributive aims of tort law. Moreover, because there is nothing a court can do to stop an insurance company from paying a **punitive damages** claim, particularly at the **settlement** stage, there is little reason to believe that judicial regulation of **punitive damages** insurance will have a significant impact on the retributive function of tort law. Thus, even the retribution-based case for implying a **punitive damages** exclusion in liability insurance policies is at best a weak one. [2]

Part V addresses the implications of this analysis for tort and insurance policy. As this Article illustrates, a primary function of insurance institutions is constructing insurance relationships that minimize the insurance-deterrence tradeoff predicted by economic theory. [3] Thus, when discussing "insurance" in the context of tort policy, we have to be careful to distinguish between theoretical conceptions of insurance and insurance as it is actually provided through insurance institutions. [4] Similarly, when discussing insurance policy, we cannot forget that insurance institutions play an important role in furthering the objectives of tort policy.

This Article illustrates the point most concretely by using the existence of intentional harm exclusions as the primary basis for the **[*103]** conclusion that there is little to gain by prohibiting insurance for **punitive damages.** Because of intentional harm exclusions, the liability insurance that is actually provided through the insurance market poses much less an insurance-deterrence tradeoff than the simple model of insurance that is employed in most economic theory. [5] Furthermore, the significance of these exclusions to that tradeoff means that insurance companies that (properly) deny claims on intentional harm grounds serve important deterrence and retribution functions that further the objectives of tort law.

II. A Theoretical Perspective on Insurance for **Punitive Damages**

It is well established in the theoretical literature that there are two primary justifications for **punitive damages:** retribution and prevention. [6] As Ellis has shown, the remaining justifications, such as compensation or legitimation, depend on theories of retribution or prevention to explain why **punitive damages** should be assessed in one case but not another. [7] It is commonly observed that insurance for **punitive damages** defeats the purposes of those damages. [8] If we understand retribution to require **[*104]** the deprivation of something that the offender values, then the tension between **punitive damages** and insurance is obvious. A money judgment hardly stings the defendant when it is an insurance company that pays. Similarly, if we understand prevention to require imposition of the cost of harm on the offending party, the tension between insurance and **punitive damages** is equally obvious. The higher, and perhaps prohibitive, price that the offender must pay to purchase insurance in the future pales in comparison to the **punitive damages** judgment thereby avoided. The standard theoretical analysis criticizes insurance for **punitive damages** on just these grounds. [9] While I do not entirely dispute this analysis, the theoretical case against enforcing contracts to insure **punitive damages** is not as strong as commonly understood.

A. **Punitive Damages** as Prevention

"Prevention" is a term that I have borrowed from Professors Galanter and Luban in place of the more commonly used term "deterrence." [10] By using "prevention," Galanter and Luban intend to capture, not only the idea that **punitive damages** can prevent loss by subjecting people to severe financial consequences for causing loss, but also the idea that **punitive**

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Tom Baker, Constructing the Insurance Relationship: Sales Stories, Claims Stories, and Insurance Contract Damages, 72 Tex. L. Rev. 1395, 1409 (1994) [hereinafter Baker, Stories].

n47. This Article will differ from what I understand to be insurance industry custom by including within the category of "general liability insurance" the liability insurance that is sold as part of residential insurance packages, such as homeowners, renters, condominium, and dwelling insurance. I do this because liability insurance in these packages provides the same kind of broad form protection--using much of the same policy language--as the popular Commercial General Liability insurance form.

n48. See, e.g., 1 Susan J. Miller & Philip Lefebvre, Miller's Standard Insurance Policies Annotated 409 (1996). In the noncommercial, individual market, the primary bodily injury and property damage coverage is provided as part of the residential insurance package (i.e., homeowners, renters, condominium or dwelling insurance) and the primary personal injury coverage is provided by an umbrella insurance policy. See, e.g., ISO, HO3 and ISO personal umbrella forms.

n49. Irvin E. Schermer, Automobile Liability Insurance 23.01 (3d ed. 1995).

n50. APrimary" insurance is the first layer of insurance that covers a risk. "Excess" or "umbrella" insurance provides coverage once the primary insurance is exhausted (although in certain circumstances an umbrella policy may be primary). As discussed below, it is my working assumption that **punitive damages** exclusions are more common in umbrella and excess insurance policies.

n51. But see Widiss, supra note 1, at 475 (collecting cases stating that the insurance policy is ambiguous on this point). The ambiguity doctrine (by which ambiguous policy provisions are interpreted to favor the policyholder) means that it makes no practical difference whether we conclude that the standard form policy unambiguously provides coverage for **punitive damages** or that the policy is ambiguous on this point. The "as damages" litigation in the environmental context makes clear that courts take a very expansive interpretation of the meaning of the word "damages" in liability insurance policies. See, e.g., AIU Ins. Co. v. Superior Court, 799 P.2d 1253 (1990).

n52. See Tom Baker, On the Genealogy of Moral Hazard, 75 Tex. L. Rev. 237 (1996) [hereinafter Baker, Genealogy].

n53. See id.

n54. Insurance writers sometimes refer to moral hazard as a tendency toward fraud or destruction, but, given that honesty and avoidance of harm are conventional social norms, we can understand a tendency toward fraud or destruction as an example of a lack of attachment to conventional social norms. I use the word "conventional" so as not to suggest that dishonesty, destructiveness, violence and the like are not social norms in certain times and places.

n55. For an extensive study of insurance companies' efforts to manage the incentives created by insurance, see Carol Heimer, Reactive Risk and Rational Action (1985).

n56. See Baker, Genealogy, supra note 52, at 238.

n57. These observations were related in the interviews reported in Tom Baker, Transforming Punishment into Compensation: In the Shadow of **Punitive Damages,** 1998 Wis. L. Rev. 211 [hereinafter Baker, Transforming]. Given the addictive nature of alcohol, this is hardly surprising, but I would welcome suggestions of ways to test this assertion.

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n58. This "working assumption" is based on interviews with personal injury lawyers. See id. (reporting interviews).

n59. See Stephen Daniels & Joanne Martin, Myth and Reality in **Punitive Damages,** 75 Minn. L. Rev. 1, 42 (1990).

n60. See, e.g., Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co., 26 Cal. Rptr. 2d 35 (Ct. App. 1995) (the consolidated asbestos insurance coverage cases).

n61. See, e.g., Miller & Lefebvre, supra note 48, at 409.

n62. See Schermer, supra note 49, 23.02.

n63. See Robert H. Jerry, Understanding Insurance Law 861-63 (2d ed. 1996).

n64. See Heimer, supra note 55.

n65. What I refer to as "situational" moral hazard is that aspect of the insurance trade's concept of moral hazard that coincides with the concept as it is used in economic theory: the effect on incentives whenever one person bears the costs of harm caused by another. In such a situation, the person causing the harm has less incentive to avoid that harm than if (all other things being equal) she bore the full costs of that harm herself. See Baker, Genealogy, supra note 52, at 238.

n66. The insurance contract discussion in this paper is limited to automobile liability insurance and to the bodily injury and property damage coverage provided in general liability insurance policies. There are other forms of insurance that provide **punitive damages** insurance. The most significant of these other forms of insurance, in terms of the numbers of policies in force, is known as "personal injury" coverage. This coverage is commonly included in commercial general liability insurance packages and in umbrella insurance policies sold to individuals.

Personal injury coverage often is provided without an intentional injury exclusion, especially at the primary level. See, e.g., Miller & Lefebvre, supra note 48, at 412. Personal injury coverage is "named-peril" insurance that, as that characterization suggests, provides coverage only against a number of specific kinds of claims (hence the term, named perils). Today, those claims include defamation, wrongful prosecution, and trespass. See Terri D. Keville, Note, Advertising Injury Coverage: An Overview, 65 S. Cal. L. Rev. 919, 928 (1992).

Other forms of insurance that provide some coverage for **punitive damages** includes directors and officers liability insurance, errors and omissions insurance (for lawyers, accountants, and insurance agents), and reinsurance (insurance for insurance companies). I mention these forms of insurance only to make it clear that I am aware that the analysis in this Article is directed at coverage for bodily injury and property damage and that there may be forms of insurance coverage for which the market does not provide an adequate answer to the theoretical objections to insurance for **punitive damages.**

n67. For a discussion of the repeat player, see infra text accompanying notes 75-76.

n68. Adverse selection refers to the tendency for insurance to be purchased by people who are disproportionately likely to experience an insured-against event. See Michael Rothschild & Joseph Stiglitz, Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information, 90 Q.J. Econ. 629, 632 (1976).

n69. See id.; George A. Akerlof, The Market for "Lemons": Quality Uncertainty and the

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Market Mechanism, 84 Q.J. Econ. 488, 492-93 (1970).

n70. Of course, there has to be some resulting bodily injury, personal injury, or property damage for there to be insurance coverage. For a listing of verbal formulations used by courts as the **punitive damages** standard, see Rustad & **Koenig,** supra note 30, at 1317 n.240.

n71. At least outside of the specialized or narrowly targeted coverage discussed in supra note 66.

n72. See Widiss, supra note 1, at 488.

n73. This working assumption is based on my involvement over the last nine years in large commercial coverage cases.

n74. Avoiding coverage on the basis of an intentional harm exclusion requires a factual finding that the insured committed the relevant act with the requisite intent. Since the standards for **punitive damages** and the intentional harm exclusion are not the same, there will have to be a second coverage trial.

n75. I am aware of these examples from discussions with lawyers involved in these mass tort cases. We know that these manuscript exclusions exist because insurance coverage for a product that becomes the subject of mass tort claims typically ends shortly after the claims situation becomes acute, even though the manufacturer continues to have general liability insurance.

n76. An occurrence policy is triggered by harm that takes place during the policy period, regardless when the claim is made; a claims made policy is triggered when a claim is made during the policy period, provided that claim arises from harm that took place after the "retroactive date" of the policy. See Sparks v. St. Paul Ins. Co., 495 A.2d 406 (1985). Claims made policies give insurance companies a greater ability to terminate coverage when the number or type or size of claims becomes acute.

n77. See Baker, Stories, supra note 46, at 1408, 1417; cf. Friedrich Kessler, Contracts of Adhesion--Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629 (1943).

n78. It takes some familiarity with insurance practice to fully appreciate the irony of insurance companies relying on public policy arguments to avoid paying claims otherwise covered by their insurance policies. The irony comes from the steadfast complaints of insurance interests about judges who "rewrite" insurance policies to provide coverage that the insurance companies did not sell. According to that same logic, a judge who refused to enforce an insurance company's promise to pay a **punitive damages** claim would be "rewriting" the policy to take away coverage that the policyholder had bought. As my prior writing makes clear, I do not agree that judges who refuse to enforce standard form provisions are requiring insurance companies to provide insurance that they did not sell, nor would I seriously assert that, when a manufacturer purchases a liability policy covering risks in a state whose courts oppose such coverage, the manufacturer is buying **punitive damages** coverage for those risks. See Baker, Stories, supra note 46.

n79. See Widiss, supra note 1, at 466-68.

n80. Supra Part III.C.2.

n81. See Baker, Stories, supra note 46, at 1416.

n82. See Widiss, supra note 1, at 488.

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n83. One of the most important benefits of using the industry standard form is gaining access to the collective loss experience of all insurance companies that use the form.

n84. See Douglas G. Baird et al., Game Theory and the Law, 48-49, 312-313 (1994) (providing a game theoretic account of the prisoners' dilemma). For a brief history of the dilemma, see Paradoxes of Rationality and Cooperation 3-4 (Richmond Campbell & Lanning Sowden eds., 1985).

n85. See Baker, Transforming, supra note 57 (interviews with personal injury lawyers practicing in Florida, a jurisdiction that will not enforce contracts to insure **punitive damages)**. Note that the moneys paid are not denominated as **punitive damages.**

n86. See id.

n87. See id.

n88. An additional dynamic, not explored in the text, is the effort to define insurance as a culturally acceptable practice. See Baker, Genealogy, supra note 52.

n89. For examples of other contract provisions used to control moral hazard, see Heimer, supra note 55.

n90. In light of my earlier writing, I should clarify that I am advocating a judicial "hands-off" approach here because insurance companies' incentives and contracting practices are consistent with the objectives of the legal system and because enforcing contracts to provide **punitive damages** insurance is not inconsistent with insureds' expectations. See Baker, Stories, supra note 46, at 1420-22 (discussing how judges construct the insurance relationship).

n91. See, e.g., Daniels & Martin, supra note 59; Michael Rustad, In Defense of **Punitive Damages** in Products Liability: Testing Tort Anecdotes with Empirical Data, 78 Iowa L. Rev. 1 (1992); Rustad & **Koenig,** supra note 30.

n92. See William M. Landes & Richard A. Posner, New Light on **Punitive Damages,** Regulation, Sept./Oct. 1986, at 33.

n93. See Widiss, supra note 1.

n94. See Baker, Transforming, supra note 57.

n95. See, e.g., Kenneth S. Abraham, Distributing Risk (1986); Chandler, Understanding, supra note 4; Chandler, Visualizing, supra note 4; Syverud, supra note 29.

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damages can prevent loss by making a strong statement that certain conduct lies well outside the bounds of the acceptable. [11] I prefer Galanter and Luban's "prevention" because it helps to remind me (and may help remind others) of this norm projection function of punishment, which has not been emphasized in the economic analysis of law. [12] As Galanter and Luban recognize, human behavior **[*105]** is strongly conformist. In most situations, we decide on the appropriate level of care, not by making an explicit cost-benefit calculation, but rather by observing whether there is a rule or norm that applies to a given situation. [13] If so, we typically orient our behavior to that rule or norm. One way **punitive damages** awards prevent harm is by reminding people that norms of safety or care exist and stigmatizing flagrant violation of them.

Whether we focus on the financial or norm projection aspects of **punitive damages,** however, the difficult theoretical question is why we need **punitive damages** to prevent harm, when compensatory damage awards already project norms and create financial incentives for conforming to those norms. Why, in other words, punish defendants to prevent harm when we already attempt to compensate plaintiffs at the level that is (at least theoretically) appropriate for preventing harm?

Ellis has explained that **punitive damages** are an efficient complement to compensatory damages in three situations:

(1) When the probability of being held liable for breach of a legal standard is less than the probability of loss resulting from that breach;

(2) When there are important harms that would not be considered in computing a compensatory damage award; and

(3) When the actor derives an illegitimate benefit from the harmful act. [14]

[*106] The first situation results from what I will call the "underenforcement" problem; the second situation results from what I will call the "externalities" problem; and the third situation, from what I will call the "deviance" problem. While these categories may be criticized as overbroad, [15] they provide a helpful framework for discussing whether **punitive damages** insurance is consistent with the prevention justification for **punitive damages.**

1. underenforcement and externalities

The underenforcement and externalities problems are alike in that they highlight the failure of the compensatory damages regime to impose the full costs of harm on those who are liable for causing that harm. The underenforcement problem means that some people who should be held responsible for causing harm are not. The externalities problem means that those who are held responsible are not required to compensate all those harmed for all the harm suffered. Both problems threaten the prevention function of the legal regime.

Negligence regimes can in theory withstand substantial uncompensated harm with no loss in their deterrent effect. [16] Nevertheless, there is a tipping point below which it would be rational for the actor to ignore the legal standard. [17] **Punitive damages** can move that tipping point downward, compensating for underenforcement and undercompensation. We know from empirical research that the U.S. legal system is characterized by massive underenforcement and substantial undercompensation. [18] Were damages limited to compensation, a rational actor who was not constrained by the conscience, stigma, or good will costs that typically accompany the violation of social norms would often be better off ignoring legal standards governing caretaking conduct. **Punitive damages** assessed when a defendant deliberately ignores a legal standard can discourage actors from deliberately

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taking advantage of the underenforcement and externalities problems.

[*107] In theory, strict liability regimes are much more sensitive to underenforcement and undercompensation problems than negligence regimes. [19] Indeed, as Cooter has shown, any reduction in enforcement or compensation will result in reduced care. [20] Although this analysis can be understood as a reason for preferring negligence to strict liability, it also provides a theoretical justification for the use of **punitive damages** within a strict liability regime. Given that we know that only a fraction of injured individuals makes claims, we can confidently say that all real world strict liability regimes will be characterized by underenforcement. Within a strict liability regime, **punitive damages** could create the same threshold effect as the negligence standard, [21] thereby increasing the level of safety under strict liability. Thus, rather than being incoherent, [22] the imposition of **punitive damages** in an appropriate strict liability case may serve a useful prevention function.

2. deviance

The "deviance" problem arises from the actor who is unable or unwilling to act in accordance with the values that are recognized as legitimate by the prevailing legal regime. Ellis uses as his example a man who engages in violence because of the infidelity of his spouse. Compensatory damages are not an adequate deterrent in Ellis's example because the husband derives satisfaction from inflicting injury on the spouse or her sexual partner. Other examples of the deviance problem include violence by members of groups committed to an alternative social order. At least formally, the satisfaction that results from self-help violence is not recognized as legitimate in the U.S. legal regime, [23] and **punitive damages** are one way to make that point.

[*108] While it seems unlikely that the threat of a **punitive damages** judgment will do much to prevent such harm, an actual **punitive damages** judgment may at least partially incapacitate organized groups in conflict with the existing social order. The **punitive damages** judgments obtained by the Southern Poverty Law Center against the Klu Klux Klan and other white supremacists represent one attempt to use **punitive damages** for this specific deterrence purpose. [24]

B. Considering **Punitive Damages** Insurance in Light of the Prevention Justification

Like the uncompensated harm that results from underenforcement and externalities, liability insurance lowers the cost of violating a legal standard. Accordingly, liability insurance is subject to the same tipping point analysis. [25] In theory, the incentive effects of insurance and uncompensated harm are additive. Thus, given the problems of underenforcement and externalities, one might wonder how much deterrence insured damages really provide. [26] For compensatory damages, this insurance-deterrence tradeoff [27] is widely tolerated. Thus, the theoretical possibility of the tradeoff cannot itself be a serious objection to **punitive damages.** What might be different about **punitive damages?**

One answer turns on the theoretical purposes of compensatory and **punitive damages:** both compensatory and **punitive damages** are intended to prevent harm, but only compensatory damages are intended to provide compensation for victims, and only **punitive damages** are intended to provide retribution. In light of this distinction, we could say that the insurance-deterrence tradeoff is tolerated for compensatory damages because insurance for compensatory damages enhances tort law's compensation function without undercutting its retribution function. Insurance for **punitive damages,** on the other hand, appears to undercut tort law's retribution function without providing any necessary benefit in terms of compensation. [28]

[*109] **Punitive damages** also differ from compensatory damages in a manner more directly related to the prevention rationale. Recall Galanter and Luban's observation that tort

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damages prevent harm, not only through financial incentives, but also through norm projection. Clearly, insurance reduces the financial incentives created by tort damages; this is so for both compensatory and **punitive damages.** Insurance does not undercut so fundamentally, however, the norm projection aspect of tort damages. Indeed, insurance may improve the norm projection aspect of tort law: the existence of insurance makes it more likely that damage awards will be paid, thereby increasing the ability of plaintiffs to vindicate their rights through tort law. Moreover, the existence of insurance institutions facilitates the dissemination of the norms created and reflected in tort law. [29]

Nevertheless, it seems likely that norm projection will have less effect on behavior that meets the standard for **punitive damages** awards than on behavior that does not meet that standard. Defendants who are liable for **punitive damages** are more likely to have known that their conduct violated (or was likely to violate) the relevant standard of care than defendants who are not held liable. [30] Those who are willing to violate a legal standard are unlikely to be deterred from violating it again simply by being reminded of the standard. Indeed, given the underenforcement and externalities problems discussed above, a rational actor may be better off ignoring legal standards governing caretaking conduct. **Punitive damages** can change this conscious cost-benefit calculus only if the actor expects to bear the costs of those damages.

Insurance for compensatory damages does not undercut the prevention rationale of tort damages to the same extent, because those who violate legal standards inadvertently are governed more by tort law's norm projection function than those who violate legal standards deliberately. [31] As this suggests, the lower the level of intent required for **punitive damages,** the weaker the prevention-based objection to insurance for those damages. Thus, it is not surprising that U.S. courts **[*110]** universally enforce contracts to provide insurance for vicarious **punitive damages.** [32] Vicarious **punitive damages** are assessed against a principal who was merely negligent in the supervision of her agent. [33] For that reason, the insurance-deterrence tradeoff for vicarious **punitive damages** should be similar to that for compensatory damages. Moreover, insuring vicarious **punitive damages** enhances the norm projection aspects of tort law by providing an incentive for plaintiffs and their lawyers to bring to public attention flagrant breaches of legal standards. [34]

C. **Punitive Damages** as Retribution

Using work by the philosopher Jean Hampton, Galanter and Luban have offered a strong retribution-based defense of **punitive damages.** [35] Following Hampton, they explain that the purpose of retribution is to express "public commitment to the value of persons." [36] A public commitment to the value of persons requires a public response when a person acts deliberately to cause harm (or in a way known to have a very high probability of causing harm), because that person has denied the value of those he has harmed. In effect, his actions say to his victims, "You are worth so much less than I that I can hurt you deliberately.

As Galanter and Luban explain, the retributive purpose of **punitive damages** "is to reassert the truth about the relative value of wrongdoer and victim by inflicting a publicly visible defeat on the wrongdoer." [37] For this reason, they describe **punitive damages** awards as a form of "expressive defeat." [38]

Yet, compensatory damage awards also can be understood as a form of expressive defeat. After all, the victim wins the lawsuit and the perpetrator is required to pay the victim for the harm caused. Thus, as **[*111]** with prevention, one might reasonably ask why we need **punitive damages** for retribution, when we already compensate in a manner that appears to serve this retributive purpose? The answer must be that the relative value that would be asserted in a legal regime that limited damages to compensation would be false.

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There are (at least) two reasons why the relative values would be false. The first dovetails with Ellis's deterrence justifications for **punitive damages.** The second follows from the relatively low level of moral culpability that is required for compensatory damages.

First, as the underenforcement and externalities problems reveal, perpetrators as a class wrongfully cause more harm to victims than they are required to pay as compensation. The presence of this substantial uncompensated harm defeats the compensatory damages regime's claim to an efficient result (i.e., one in which the benefits to society of an activity that causes harm exceed its costs). Moreover, as the deviance problem reveals, damages that are based solely on compensation can encourage the use of harm to achieve improper ends. For both these reasons, a legal regime that limited damages to compensation would systematically privilege perpetrators over victims and would encourage perpetrators to treat victims as means to achieve ends that are illegitimate within the logic of the legal regime.

Second, compensatory damage awards do not adequately satisfy the moral requirement that the consequences of action turn on moral culpability. Think of the distinction that young children learn between hurting someone "by accident" and hurting someone "on purpose." The higher level consequence given to children for hurting someone "on purpose" represents an effort to teach them about the value of persons and--this is the crucial point--the role that distinctions made on the basis of the actor's state of mind play in maintaining that value.

For good reasons, compensatory damages are assessed for much harm that is caused "by accident" and are not, as a formal matter, computed on the basis of moral culpability (beyond the requirement that the threshold liability standard is met). [39] Yet, public commitment to the morally appropriate value of persons requires that there be greater consequences for harm that is done "on purpose." I do not mean to suggest that the formulations used with children are adequate to describe the distinctions that tort law does or should make, but the point should be clear. In tort law, compensatory damages are assessed when harm results from an act of relatively low moral culpability. When the perpetrator's **[*112]** moral culpability significantly exceeds that level, there must be some additional consequence, or else tort law has failed to "right the wrong." [40] Thus, without **punitive damages** (or some other additional consequence), tort law fails, because the "wrong" is a function, not only of the harm caused, but also of the moral culpability of the person who caused it. [41]

D. **Punitive Damages** Insurance and Retribution

Punitive damages can be justified on retributive grounds, then, because the relative value of persons asserted by compensatory damages is, in the sense described above, false. It is false because compensatory damages allow perpetrators to cause harm to achieve illegitimate ends. And it is also false because compensatory damages, alone, cannot right the wrong caused by perpetrators whose moral culpability significantly exceeds the compensatory damages threshold.

Does insurance for **punitive damages** undercut these retributive justifications? The quick answer is "of course." If by retribution we mean hurting the perpetrator, how can money paid by an insurance company "right the wrong"? Although the insurance company may raise rates, refuse to provide coverage, or insert a restrictive exclusion, these are muted punishments, at least as compared to requiring the perpetrator to pay the **punitive damages** award directly.

Yet, as Hampton notes, retribution is not synonymous with punishment. [42] Wrongs are made right in other ways as well. Public ceremonies, apologies, and financial payments all help to reassert the value of the person wronged relative to the person who committed the wrong. Indeed, whether or not a **punitive damages** award is insured, that award makes a public statement about the value of the victim that contradicts the private assessment of the

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perpetrator at the time the wrong was committed. Moreover, insured or not, a **punitive damages** award represents a consequence for extreme culpable behavior that goes beyond that for less culpable behavior. Although an insured **punitive damages** award clearly will hurt less than an uninsured one, it nevertheless does hurt: insurance is made more expensive and less available in the future; for commercial entities there is a loss of good will; and for any individuals involved, there are negative social consequences. [43]

[*113] With that said, one cannot escape the fact that insurance for **punitive damages** would allow a perpetrator, in return for a fee paid in advance, to escape a significant part of the consequences for extreme, culpable behavior. Thus, even though the **punitive damages** award may reassert publicly the value of the victim, the fact that the perpetrator would not be the one who pays that award would at least partially defeat the "poetic justice" that Galanter, Luban and Hampton regard as one of the most attractive features of **punitive damages.** [44] Indeed, in the Grimshaw case described by these scholars, [45] were we to learn that the jury's award was to have been paid, not by Ford, but rather by Aetna, Travelers, or Lloyd's, we might wonder whether a significant part of the jury's message might be lost on Ford (much as Galanter, Luban and Hampton wondered what message Ford received when the judge reduced the jury's **punitive damages** award by ninety-seven percent).

E. Summary

The analysis thus far can be summed up as follows: the theoretical justifications for **punitive damages** are to prevent harm and to provide retribution for highly culpable harm. Insurance for **punitive damages** undercuts the prevention justification when it reduces the financial impact of those damages on defendants (and potential defendants) who are unlikely to respond adequately to the norm projection aspects of tort law. Moreover, insurance for **punitive damages** undercuts the retribution justification when it allows a perpetrator to escape responsibility for the consequences of egregious action. At the same time, however, by encouraging victims to seek and collect **punitive damages,** insurance for **punitive damages** enhances tort law's capacity to project norms and to reassert publicly the value of those injured.

The lower the level of intent required for **punitive damages,** the weaker the theoretical objections to insurance for those damages. Thus, insurance for vicarious **punitive damages** does not seriously undercut the prevention justification, because vicarious damages are assessed against defendants who are no less likely to respond adequately to the norm projection aspect of tort law than defendants subjected simply to compensatory damages awards. Similarly, because vicariously liable **[*114]** defendants are significantly less morally culpable than defendants subjected to direct **punitive damages** awards, insurance for vicarious **punitive damages** is less objectionable from a retribution perspective. Indeed, distinguishing between the insurability of direct and vicarious damages should facilitate the calibration of the "sting" of those damages to the culpability of the defendant.

III. Observations on the Insurance for **Punitive Damages** That Is Actually available on the U.S. Insurance Market

The preceding discussion has addressed the relationship between insurance and **punitive damages** from a simple (perhaps simplistic) theoretical perspective in which insurance is an all or nothing phenomenon. The insurance for **punitive damages** that is actually provided through the insurance market is more complex. This part of the Article will describe important aspects of the insurance that is actually available in order to lay the groundwork for considering whether insurance-in-action presents the theoretical problems addressed in the discussion above.

In the insurance field, the starting point for analyzing what insurance is provided in any insurance transaction is the insurance policy form used in that transaction. [46] Typically, that

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form is a standard form insurance policy drafted by an insurance trade association. Even when an insurance company chooses to use a form other than the industry standard, it would be unusual for that form to differ from the industry standard other than in detail.

As a result of this standardization, we can learn a great deal about the nature of the insurance that is actually available on the insurance market without undertaking an exhaustive market survey. Indeed, we can go a long way toward understanding what **punitive damages** insurance is actually available by focusing on the standard form policies used for the two types of liability insurance which comprise the vast bulk of what is sold in the United States: automobile liability insurance and general liability insurance. [47] Whether the policyholder is John Doe, Cafe **[*115]** Juanita, or Mega Chemical Company, the basic provisions of the applicable automobile and general liability insurance policy forms will be remarkably similar, particularly as regards insurance for **punitive damages** claims.

The central promise of the standard automobile and general liability insurance policies appears in what is called the "Insuring Agreement" of the policies. In general liability insurance policies, that promise is to pay "those sums the insured becomes legally obligated to pay as damages because of bodily injury, personal injury, or property damage." [48] In automobile liability insurance policies, that promise is to pay "all sums which the insured shall become legally obligated to pay as damages by reason of bodily injury [or property damage] ... sustained by any person, caused by accident." [49]

In both of these insuring agreements, the company promises to pay those sums "the insured shall become legally obligated to pay as damages." The agreements do not distinguish among kinds of damages. Nor are there distinctions among kinds of damages elsewhere in the standard primary automobile and general liability forms used by most U.S. insurance companies. [50] Indeed, there is little dispute that, on their face, most primary general and automobile policies provide coverage for **punitive damages.** [51]

[*116] Nevertheless, the insurance that is actually available for **punitive damages** is far from unlimited. Insurance companies limit the coverage provided for **punitive damages** by using the following four tools:

(1)Underwriting practices intended to avoid providing coverage for some targets of **punitive damages** claims;

(2) Insurance policies with dollar limits that are less than the amount of a likely **punitive damages** judgment;

(3) Contract provisions intended to eliminate coverage for claims that are likely to result in **punitive damage** awards; and

(4) Public policy based refusals to fulfill the promise to pay **punitive damages** claims.

Of course, these are in addition to the option of including an explicit **punitive damages** exclusion in the liability insurance policy. The sections that follow describe each of these tools.

A. Underwriting

Insurance underwriting is the process of deciding how much insurance to provide to whom, against what risks, and at what price. At least since the eighteenth century, one aim of underwriters has been to exclude from the insurance pool those members of a given rate class whose loss experience is expected to exceed that of the average for the class or,

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alternatively, to charge these higher risk individuals a higher premium (which, in effect, is to create a new rate class).

In identifying which potential insureds to exclude from the insurance pool on this basis, underwriters have been guided by the concept of moral hazard. As I have described in detail elsewhere, the insurance concept of moral hazard is similar to the concept of moral hazard developed by economists. [52] But while economists understand moral hazard to be a property of institutional arrangements for the sharing of risk, insurance underwriters understand moral hazard also to be part of the character of the individuals or entities that participate in insurance arrangements.

In insurance practice, the differing loss experience of insureds within a given rate class is understood to be attributable, in significant part, to **[*117]** variations in this second, "individual," sense of moral hazard. [53] Although it can be difficult to determine what exactly is meant by an individual's moral hazard, there are least two components that are relevant to **punitive damages:** (1) the propensity to take care (or not) to avoid harm to the person and possessions of oneself and others, and (2) the degree of attachment to other conventional social norms. [54] Implicit in this understanding of moral hazard is the belief that, all other things being equal, people who are careful and who observe other conventional social norms are less likely to be the subject of **punitive damages** awards than those who are not careful or do not observe such norms.

As with many other aspects of insurance practice, we can understand insurance underwriting as an attempt to control the incentives created by insurance. [55] Insurance underwriting attempts to control insurance incentives by addressing the moral hazard of insurance applicants. Although I am sometimes skeptical of insurance underwriters' ability to identify and exclude insureds on the basis of moral hazard, [56] whatever success they do enjoy in this regard will decrease the **punitive damages** exposure of their employers.

In this context, we can understand insurance underwriting as an attempt to exclude from the insurance pool people who are (1) less likely to be guided by the norm projection aspects of tort law; (2) more likely to respond to the incentives created by underenforcement, externalities or insurance; and (3) more likely to cause harm with the culpability deserving of retribution. As this description suggests, efforts by insurance companies to reduce or control the moral hazard of insurance will also tend to ameliorate the retribution and prevention objections to insurance for **punitive damages.**

One example of the effect that insurance underwriting can have on the actual insurance that is available for **punitive damages** comes from automobile liability insurance. Perhaps the most common **punitive damages** automobile accident case is that of the wrongful death caused by a drunk driver. According to plaintiffs' lawyers, it is not unusual for **[*118]** such drivers to have had a conviction for driving under the influence (DUI). [57] Insurance companies in the standard and preferred risk automobile insurance markets routinely refuse to sell insurance policies to people who have a DUI conviction. Those with a DUI conviction can obtain insurance in the substandard market or, failing that, from the residual automobile insurance pool. The policies sold in these other markets, however, provide low dollar coverage--often as little as $ 25,000 per accident or less--that is well below the expected liability for any serious automobile accident. As a result, **punitive damages** insurance in fact is not widely available to those drivers believed to be most likely to be the subject of a **punitive damages** claim.

B. Dollar Limits on Insurance Coverage

As this automobile insurance example illustrates, dollar limits on coverage also serve to limit insurance companies' exposure to **punitive damages** claims, particularly for large **punitive damages** claims. Indeed, in the personal and small business markets, insurance against

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SYMPOSIUM: Punitive Damages: The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts

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TEXT:

INTRODUCTION

Perhaps more than any other aspect of the judicial system, punitive damages have come to symbolize the problems of our nation's courts. Punitive damages awards are often substantial -- running into the millions, and in rare cases, the billions of dollars. These awards are also highly variable. Often there is no clear-cut basis to predict the likely size of the punitive damage award, even knowing the compensatory damages amount. The high stakes and high variability of punitive damage awards are of substantial concern to companies, as punitive damages may pose a catastrophic threat of corporate insolvency. Punitive damages' high stakes raise legitimate concerns for legal reformers, in light of the general belief that juries lack sufficiently well-defined guidelines and expertise to set punitive awards reliably.

In her dissenting opinion in *Pacific Mutual Life Insurance Co. v. Haslip*, Justice O'Connor eloquently summarized the current deficiencies in the Court's handling of punitive damage awards:

> Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm. Regrettably, common-law procedures for awarding punitive damages fall into the latter category. States routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so. Rarely is a jury told anything more specific than 'do what you think best.' . . .
>
> In my view, such instructions are so fraught with uncertainty that they defy rational implementation. Instead, they encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections. Juries are able to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth. Multimillion dollar losses are inflicted on a whim. While I do not question the general legitimacy of punitive damages, I

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States with uncertain insurance rules regarding punitives	44.6	13.9

REDUCTION IN TOTAL RELEASES

	t-statistic, 1988-1992	**t-statistic, 1990-1992**
States without punitive damages:		
Michigan		
Nebraska		
New Hampshire		
Washington		
four state totals		
States with punitive damages:		
Other 46 states and DC	0.41	1.35 *
States with insurable punitives	0.58	1.87 **
States with uninsurable punitives	1.45 *	0.53
States with uncertain insurance rules regarding punitives	1.29	1.29

Note: The t-statistic tests the weighted mean for the four states which do not award punitive damages against the weighted mean for the states in the category described.

** Significant at the 95 percent confidence level.
*** Significant at the 99 percent confidence level.

For sources, see Table 6A, *infra*.

The third panel in Table 2 focuses on the percent reduction in surface water discharges, which are measured in terms of pounds of toxic pollutants released. Statistics appear for two time periods, 1988-1992 and 1990-1992. The percent reductions in the no-punitive-damages states are 66% in 1988-1992. Each of these discharge reduction amounts is significantly below that of the other states, and the magnitude of the discrepancy is substantial. This statistically significant difference between punitive damages states and the no-punitive-damages states is the better performance of no-punitive-damages states with respect to water discharges of toxic chemicals. The comparison of the percent reduction in surface water discharges in the no-punitive-damages states with the various punitive-damages-insurance regimes indicates that the no-punitive-damages states had the highest such reductions. This reduction value is significantly different from that in all three punitive-damages-insurance status regimes. These statistically significant efforts provide no evidence of a deterrent role of punitive damages. To the extent that the superior performance of the no-punitive-damages states is due to other economic factors, the statistical analysis in the Appendix controls for such influences.

The final panel in Table 2 considers the percent reduction in total toxic releases. This category encompasses surface water discharges, underground injection, releases to land, fugitive or nonpoint air emissions, and stack or point air emissions. The no-punitive-damages states are not significantly different from the punitive damages states from 1988-1992 and perform significantly better than the punitive damages states from 1990-1992. The reduction in total chemical releases is significantly lower in the no-punitive-damages states from 1988-1992 as compared to states with uncertain status for punitive damages insurance. The larger chemical reductions in states with uninsurable punitives from 1988-1992 seems to be due to

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the early years in that time period because there is no statistically significant difference from 1990-1992. The Appendix will analyze other causative factors as well.

C. ACCIDENTAL FATALITY RATES

Accidental fatality rates per person in different states also should reflect any deterrent effect of punitive damages. If punitive damages lead firms to choose safer risk levels, the accident rates should be higher in the four states that do not permit punitive awards.

The first set of accidental deaths in Table 3 pertains to medical misadventures, which consists of complications and misadventures of surgical and medical care. To the extent that medical malpractice punitive damages awards have a deterrent effect, these rates should be higher in the states that do not have punitive damages. The medical misadventure death rate is 0.89 per 100,000 population in the no-punitive states, which is not significantly different from states that recognize punitive damages. The overall United States death rate average is a bit higher than in the no-punitive damages-states, or 1.00 death per 100,000. These differences are the opposite of what one would expect if punitive damages deterred dangerous behavior. More refined analyses of medical misadventures by insurance status indicates that these rates are higher in states in which punitive damages are insurable and lower in states in which the insurability status of punitive damages is uncertain. As in the case of the toxic release results, some differences such as this will occur on a random basis. What is clear is that there is no consistent pattern of a deterrent effect of punitive damages.

Table 3

Accidental Death Rates in States with and without Punitive Damages

MEDICAL MISADVENTURE DEATHS

	Deaths	Population (1,000s)
States without punitive damages:		
Michigan	82	9,537
Nebraska	20	1,639
New Hampshire	14	1,148
Washington	42	5,448
Four state totals	158	17,772
States with punitive damages:		
Other 46 states and DC	2,459	245,117
States with insurable punitives	892	71,043
States with uninsurable punitives	1,367	144,949
States with uncertain insurance rules regarding punitives	213	30,273
TOTAL DEATHS		
States without punitive damages:		
Michigan	2,906	9,538
Nebraska	591	1,639
New Hampshire	288	1,148
Washington	1,722	5,448
Four state totals	5,507	17,773
States with punitive damages:		

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Other 46 states and DC	85,931	245,117
States with insurable punitives	29,857	71,043
States with uninsurable punitives	46,813	144,949
States with uncertain insurance rules regarding punitives	9,548	30,273

MEDICAL MISADVENTURE DEATHS

	Deaths/Population (100,000s)	**t-statistic**
States without punitive damages:		
Michigan	0.860	
Nebraska	1.220	
New Hampshire	1.220	
Washington	0.771	
Four state totals	0.889	
States with punitive damages:		
Other 46 states and DC	1.003	0.58
States with insurable punitives	1.256	1.87 **
States with uninsurable punitives	0.943	0.29
States with uncertain insurance rules regarding punitives	0.704	2.03 **
TOTAL DEATHS		
States without punitive damages:		
Michigan	30.468	
Nebraska	36.059	
New Hampshire	25.087	
Washington	31.608	
Four state totals	30.985	
States with punitive damages:		
Other 46 states and DC	35.057	1.09
States with insurable punitives	42.027	2.85 ***
States with uninsurable punitives	32.296	0.51
States with uncertain insurance rules regarding punitives	31.540	0.17

Note: The t-statistic tests the weighted mean death rate for the four states which do not award punitive damages against the weighted mean for the states in the category described.

For sources, see Table 6A. *infra*.

Table 4

Insurance Performance Differences between States with and without Punitive Damages

TOTAL INSURANCE

	Premiums	**Population**

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	($ 1,000)	(1,000)
States without punitive damages:		
Michigan	$ 9,870,463	9,538
Nebraska	$ 1,738,960	1,639
New Hampshire	$ 1,198,307	1,148
Washington	$ 4,745,126	5,447
Four state totals	$ 17,552,856	17,772
States with punitive damages:		
Other 46 states and DC	$ 245,607,234	245,117
States with insurable punitives	$ 65,288,517	71,043
States with uninsurable punitives	$ 150,312,113	144,949
States with uncertain insurance rul	$ 31,150,917	30.273
MEDICAL MALPRACTICE		
States without punitive damages:		
Michigan	$ 193,836	9,538
Nebraska	$ 21,783	1,639
New Hampshire	$ 20,696	1,148
Washington	$ 97,863	5,447
Four state totals	$ 334,178	17,772
States with punitive damages:		
Other 46 states and DC	$ 5,637,691	245,117
States with insurable punitives	$ 1,420,860	71,043
States with uninsurable punitives	$ 3,768,674	144,949
States with uncertain insurance rul	$ 575,187	30,273
PRODUCT LIABILITY		
States without punitive damages:		
Michigan	$ 74,587	9,538
Nebraska	$ 14,351	1,639
New Hampshire	$ 8,336	1,148
Washington	$ 38,312	5,447
Four state totals	$ 135,586	17,772
States with punitive damages:		
Other 46 states and DC	$ 2,024,666	245,117
States with insurable punitives	$ 481,672	71,043
States with uninsurable punitives	$ 1,295,844	144,949
States with uncertain insurance rules regarding punitives	$ 255,807	30,273
OTHER LIABILITY		
States without punitive damages:		
Michigan	$ 760,467	9,538
Nebraska	$ 141,883	1,639
New Hampshire	$ 88,891	1,148
Washington	$ 369,689	5,447
Four state totals	$ 1,360,930	17,772

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States with punitive damages:		
Other 46 states and DC	$ 20,589,828	245,117
States with insurable punitives	$ 4,759,881	71,043
States with uninsurable punitives	$ 13,335,308	144,949
States with uncertain insurance rules regarding punitives	$ 2,603,478	30,273

TOTAL INSURANCE

	Premiums/Population	**t-statistic**
States without punitive damages:		
Michigan	$ 1.035	
Nebraska	$ 1,061	
New Hampshire	$ 1.044	
Washington	$ 871	
Four state totals	$ 988	
States with punitive damages:		
Other 46 states and DC	$ 1.002	0.18
States with insurable punitives	$ 919	1.02
States with uninsurable punitives	$ 1.037	0.60
States with uncertain insurance rul	$ 1.029	0.44

MEDICAL MALPRACTICE

States without punitive damages:		
Michigan	$ 20	
Nebraska	$ 13	
New Hampshire	$ 18	
Washington	$ 18	
Four state totals	$ 19	
States with punitive damages:		
Other 46 states and DC	$ 23	0.79
States with insurable punitives	$ 20	0.24
States with uninsurable punitives	$ 26	1.08
States with uncertain insurance rul	$ 19	0.11

PRODUCT LIABILITY

States without punitive damages:		
Michigan	$ 7.82	
Nebraska	$ 8.76	
New Hampshire	$ 7.26	
Washington	$ 7.03	
Four state totals	$ 7.63	
States with punitive damages:		
Other 46 states and DC	$ 8.26	0.54
States with insurable punitives	$ 6.78	0.96
States with uninsurable punitives	$ 8.94	1.11
States with uncertain insurance rules regarding punitives	$ 8.45	0.76

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OTHER LIABILITY		
States without punitive damages:		
Michigan	$ 80	
Nebraska	$ 87	
New Hampshire	$ 77	
Washington	$ 68	
Four state totals	$ 77	
States with punitive damages:		
Other 46 states and DC	$ 84	0.57
States with insurable punitives	$ 67	0.80
States with uninsurable punitives	$ 92	1.24
States with uncertain insurance rules regarding punitives	$ 86	0.90

Note: The t-statistic tests the weighted means for the four states which do not award punitive damages against the weighted mean for the states in the category described.

For sources, see Table 6A, *infra*.

The second measure in the bottom panel of Table 3, which pertains to all causes of accidental death, is the overall death rate. Once again, the rates are somewhat lower in the states without punitive damages, 31.0 versus 35.1. However, this difference is statistically insignificant. The only statistically significant difference in the total accidental death results is the higher rate in states with insurable punitive damages, as compared to the no-punitive damages states. States with punitive damages are not safer.

D. INSURANCE PREMIUM DIFFERENCES

A final set of measures of the risk-averting effects of punitive damages are insurance premium levels. Punitive damages are often uninsurable under standard insurance policies. Moreover, eighteen of the forty-six states that allow punitive damages explicitly prohibit insurance of punitive damages assessed directly against an insured for its own actions. [13] However, if punitive damages deter firms from making risky decisions, the risk levels should decline, lowering the associated premium levels.

To the extent that insurers are willing to provide coverage of punitive damages, states that permit punitive damages would have higher insurance premiums. Overall, there is no net significant relationship borne out in the results below, irrespective of the punitive damages regime or the insurability of punitive damages. Table 4 presents four different insurance premium measures -- total insurance premiums, medical malpractice premiums, product liability premiums, and other liability premiums. To adjust for state size, the third column of statistics puts each of these measures in terms of the premium per 1000 residents in the state. The results are consistent in all four cases. The per capita insurance premium is the same or lower for the average of the four states that do not recognize punitive damages. Moreover, in every instance, there is no statistically significant difference between the four no-punitive-damages states and the rest of the country. These results hold true as well when the comparison is between states with no punitive damages and each of the three insurability regimes.

Using insurance premiums as a proxy for risk levels has the same general implications as do fatality rates: There is no evident effect of punitive awards. This result is notable because it

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encompasses two somewhat different consequences of accidents. Accidental deaths involve fatalities for which the monetary loss does not fully capture the social welfare costs. In contrast, insurance premiums abstract from all non-monetary effects and address only the financial consequences of risk. The fact that neither measure indicated a decrease in risk resulting from punitive awards suggests that a broad range of risk-related actions are insensitive to the deterrent effect of punitive damages.

E. WHITHER THE DETERRENT EFFECT?

If punitive damages do in fact provide deterrence through their financial penalties on risky actions, states with punitive damages should exhibit superior performance in some risk dimension. The comprehensive analysis presented here is more extensive than any previous empirical assessment in the literature. It addresses accidental fatalities from various sources, a variety of insurance premium measures, chemical accident data, and toxic chemical discharge statistics. Moreover, it distinguishes states based on the insurance status of punitive damages. States with punitive damages exhibit no safer risk performance than states without punitive damages. The statistically significant differences observed follow no clear pattern and would occur by chance given the large number of statistical tests for differences relative to the four states without punitive damages. It is instructive to review these statistically significant differences, as they have no consistent relation to any particular punitive damages-insurance regime. In Table 1, states with uncertain insurance status had higher, not lower, levels of toxic chemical accidents and toxic chemical accidents involving injury. In Table 2, three of the punitive damages groupings (all such states, states with insurable punitive damages, states with uninsurable punitives, and states with uncertain punitives insurability) performed worse in terms of the percent reduction in surface water discharges. For the reduction in total chemical releases, states without punitives performed better from 1990-1992 and the same from 1988-1992. States with uninsurable punitives performed better from 1988-1992, but not from 1990-1992. States with uninsurable punitives performed worse over the 1990-1992 period, but not significantly so. However, these toxic release results are not corroborated by any of the other three toxic release variables analyzed. The final set of statistically significant differences is shown in Table 3, which indicates higher medical misadventure deaths and total accidental death rates for states with insurable punitives and lower medical misadventure death rates when the insurability of punitive damages is uncertain.

These statistically significant differences display no consistent direction or pattern. The more detailed multivariate analysis in the Appendix largely eliminates these effects. Moreover, the differences all involve refined categorizations of the punitive-damages-insurance regimes. None of the differences pertain to the overall comparison of states without punitive damages and states that recognize punitive damages. As is especially apparent in the insurance results in Table 4, punitive damages do not have a significant deterrent effect. Consequently, moving to a no-punitive-damages liability regime would sacrifice little of the deterrence sought by the tort liability system.

The above results are consistent with the views expressed by punitive damages critics, who observe that random and unpredictable awards will not have a deterrent effect. Further examination below of the circumstances that some scholars have identified as potential areas where punitive damages could serve a productive role will reveal some of the reasons for this lack of efficacy. The set of such circumstances is both narrowly defined and involves judgments that are likely beyond a jury's competence.

II. PRINCIPLES FOR CORPORATE RISK DECISIONS

A. THE NATURE OF RISK TRADEOFFS

A conceptual reference point for assessing the role of punitive damages for corporate,

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environmental, and safety torts is to begin with the underlying corporate actions themselves. How should corporations conceptualize risky decisions, and what guidelines should govern responsible behavior? What is the institutional context for these acts that gives rise to the environmental and safety damages? What criterion should be applied in assessing the social desirability of corporate acts? In the usual parlance of economics, the initial question is whether there is some kind of market failure whereby private incentives alone would create inadequate incentives for safety. If there is such a failure, one should then ask whether compensatory damages and government regulations suffice, or whether punitive damages are needed to augment these awards to create appropriate incentives for safety. What do we mean by an appropriate level of safety?

The standard economic theory of punitive damages and incentives casts the analysis within a highly stylized situation of certainty. [14] Does the economic value of the definite harm resulting from an action exceed the benefits? The task then becomes setting a damage amount so that the company recognizes the full costs of its actions and exercises an appropriate degree of care in its activities. These formulations are overly simplistic, however, because they neglect potential risks that affect corporate actions and the linkage of the company's behavior to the societal effects. Particularly with product and environmental risks, the adverse repercussions of corporate actions usually stem not from deliberate corporate acts, but from acts that may generate adverse societal effects with some probability less than one. Indeed, most real catastrophes have very remote possibilities of occurrence. To understand fully what legal sanctions may be appropriate when corporate decisions generate social harms, it is necessary to explicitly account for the tradeoffs inherent in corporate risk decisionmaking.

In situations of risk and uncertainty, the appropriate comparison is between the costs of the safety action and the value of the expected benefits. If the expected benefits to society of greater safety exceed the expected costs to the company, decisions to invest in safety are efficient. Similarly, it is not socially worthwhile to make safety investments when the expected social benefits are exceeded by the costs once all social consequences are fully recognized and valued. One may, nevertheless, wish to compensate those who suffer the damages costs, even if the risk level is efficient, but this is a distributional and fairness issue, and is thus outside the scope of this article.

The test for whether safety incentives are adequate requires that one weight the value of the harms that might occur by the probability that the harms will occur. [15] Comparing the actual loss of the accident event with the costs of safety precautions may create a very misleading assessment of the economic desirability of precautions. Losses must be weighed by their probability of occurrence, which may be quite small. If the probability of the accident is very low, the expected losses (that is, the loss multiplied by its probability) will likewise be reduced and substantial precautions will not be warranted. To the extent that juries operating after the fact focus on the actual loss that has occurred, rather than the expected loss before the risky action, errors in jury behavior will be particularly great when the probabilities involved are small and the stakes involved are high.

Consider the following example. Suppose that there is one chance in a million that there will be a catastrophic loss of $ 3 billion, which is a figure not unlike the total social value of the loss of life in a major plane crash. We will assume this amount represents the full economic value of preventing the crash, not just the earnings loss. The company could eliminate this risk of an accident by an expenditure of $ 10,000. Is it worth it? The expected accident costs without the safety precaution equal the probability of 1/1,000,000 multiplied by the $ 3 billion loss, for a total expected loss of $ 3000. This figure is far below the $ 10,000 amount of additional safety costs. From a benefit-cost standpoint, there is no economic efficiency justification for additional care. However, if juries focus on the value of the loss alone, failing to weight it by the probability, then the comparison after the accident will be between the $ 3 billion loss and the $ 10,000 in safety expenditures. Precautions not only appear warranted,

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but failing to take precautions now appears to be reckless and irresponsible given the differences in the orders of magnitude involved. The first major prerequisite for thinking sensibly about corporate risk decisions is that the comparison should be between safety costs and expected incremental benefits of these expenditures at the time of the corporate action, not the consequences after the fact when the outcome is known.

B. TRADEOFFS ARE NECESSARY EVEN WHEN RISKS ARE UNCERTAIN

That the risks are uncertain or may not be precisely known does not displace the need to compare the costs and expected benefits of greater safety. We may know, for example, that smoking cigarettes is risky, but not whether the lifetime mortality risk is 1/6 or 1/3. However, these judgments should be based on the state of the information at the time of the corporate action, not after the fact. Such uncertainty involving the need to make judgments with only incomplete information available are quite common in punitive damages contexts.

Even when the firm has substantial knowledge, it may not know the exact probability of adverse outcomes. In the McDonald's coffee cup case, [16] the company had more information about the risk than in most liability contexts but still was not perfectly knowledgeable. In that case, a woman received a $ 160,000 award for compensatory damages and a $ 2.7 million award for punitive damages after spilling hot coffee on her lap. The punitive damages award was reduced by the court from its initial jury award level to $ 480,000, and ultimately McDonald's settled the case out of court for an undisclosed amount.

How should McDonald's have thought about the temperature selection decision? At least to a certain degree, higher coffee temperatures enhance the flavor and keep the coffee warmer longer, which is a benefit to customers. Increased temperatures, however, may also pose a risk of scalding, particularly in instances in which the consumer is not careful.

McDonald's has two sources of information regarding the risk. [17] First, it controlled the temperature of the coffee and required that it be served at temperatures from 180 to 190 degrees Fahrenheit. Skin burn rates increase exponentially at temperatures above 140 degrees Fahrenheit. If the company had reduced the temperature of the coffee, it could have converted a situation of known risks to one in which there was a certainty of no injury. However, for most commercially viable coffee temperatures, there would be at least some risk of burn injury. The question is how substantial this risk would be.

A key issue is that McDonald's cannot monitor the extent of consumer carelessness. How often will purchasers from their drive-through window put the coffee on their lap or between their knees while driving? Preventing all such injuries from careless use of a hot product sets the risk level too low and is thus inefficient. Given the consumer desirability of hot coffee and McDonald's desire to accommodate consumer preferences, the ideal temperature for coffee should not be so tepid that no burns would result. The fact that coffee is hot is well known and readily motivating once the customer holds the cup. The appropriate approach to the liability issue is to ask whether McDonald's struck an appropriate balance between costs and benefits, recognizing the effects for the entire market and the reasonable judgments McDonald's could make; the liability issue should not focus solely on the situation for the individual plaintiff who was harmed or that individual's possibly idiosyncratic carelessness.

Although McDonald's could not monitor all such behavior, it did have some consumer reports of injuries. Using such information, as well as scientific evidence on temperatures that lead to scalding and burns, one could then pose the coffee safety issue in the following manner: Reducing the temperature of the coffee would decrease the expected number of injuries; one would want to weight the value of these injuries to account for not only the monetary losses but also the value of any health effects to the injured individuals. If, however, the coffee temperature is lowered, the company will presumably lose profits because of decreased coffee sales. There may also be diminished welfare to consumers, including those who still

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purchase the coffee, because of the more tepid coffee temperature. From an economic efficiency standpoint, McDonald's should lower the temperature of the coffee so long as the reduction in the expected costs to the injured consumers exceeds the expected benefits both to the consumers and the company from hot coffee. Indeed, in a subsequent coffee burn case, Judge Frank Easterbrook posed the tradeoff in exactly this manner. [18]

The appropriate assessment should consequently be from the standpoint of the entire market, taking into account the preferences of all consumers and the injuries to all consumers. The issue is not what temperature makes sense for consumers who drive with coffee on their lap because McDonald's cannot distinguish its customers based on their level of care. The typical focus of court cases, however, is not on the market choice but on consumers who have experienced isolated injuries which often have a small associated probability of occurrence. Court cases by their very nature focus on individuals, whereas regulation and legislation is better suited to dealing with markets. Preventing such injuries would involve substantial costs across a product line to make the necessary improvements for a mass-marketed product.

Matters become more complex when there is uncertainty regarding the risk probability. Even safety experts may sharply disagree on such probabilities. A dramatic example of uncertainty is with respect to scientific debates over the "doomsday rock." Some astronomers have hypothesized that a large asteroid will someday hit the earth and have catastrophic consequences, a phenomenon that captured the fantasy of Hollywood scriptwriters in 1998. [19] Scientists from Cornell University, who have sought government funding to support a research program for rockets to divert or destroy such asteroids, estimated our risk of death as being as high as 1/6000. [20] An arguably more realistic assessment of the risk from a consensus group of scientists estimates the individual risk of death from the doomsday rock as 1/2,000,000. [21] This broad range of scientific judgment reflects the extent of our ignorance regarding the magnitude of the risk and the presence of substantial uncertainty.

Such divergences of opinion are not restricted to extraterrestrial battles. Similar kinds of uncertainties are present with respect to highly litigated products such as breast implants. The Food and Drug Administration (FDA) banned silicon breast implants from the market, citing the presence of substantial hazards, whereas the American Medical Association continued to issue press releases indicating that the risks appeared to be small. [22] The most recent scientific evidence fails to indicate a significant risk, though risks that do not lead to signature diseases, such as the mesothelioma risk from asbestos, are often difficult to link to product exposures. [23] These uncertainties have not impeded the courts from awarding punitive damages to women with breast implants.

Our inability to pinpoint risk levels was also evident in the case of "low" risks from British beef. Scientists in England faced uncertainties in 1996 about the risks of "mad cow" disease from eating British beef. Estimates of the ultimate fatalities from Creutzfeldt-Jakobs disease range from 5 to 500,000 deaths in Britain. [24] This enormous gap in the estimated level of risk provides little information to make sound judgments about the consequences of beef consumption for the British.

Another extreme example of persistent uncertainty is the catastrophe involving TWA Flight 800. [25] Even after months of investigation, it is not entirely clear whether the cause of the accident was a bomb, a missile, or a mechanical failure. The determination of the cause of the accident has a potentially significant impact on TWA's ultimate liability. Moreover, even if the accident occurred due to some kind of structural failure, unless the cause of that failure can be identified, the appropriate precaution warranted would not be known. The result has been that TWA has adopted a more diffuse set of safety reforms -- increased airline security and efforts to decrease the risk of explosion for fuel tanks.

Information gathered over time can be helpful but not always definitive. Recent problems

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> see a strong need to provide juries with standards to constrain their discretion so that they may exercise their power wisely, not capriciously or maliciously. The Constitution requires as much. [1]

The usual approach to evaluating legal rules such as those pertaining to punitive damages is to assess their performance in well-defined hypothetical scenarios. If there is a problem with how these legal rules might perform in different accident contexts, then the solution is to tinker with the structure of the rule so that it will continue to perform well in situations in which it is effective, while at the same time eliminating the problems that arise in other contexts where it performs less satisfactorily. This kind of thought process provided the impetus for the tort liability reforms enacted in response to the 1984-1986 liability insurance crisis. [2] Yet, even though punitive damages reforms were often at the forefront of liability reforms adopted by various states in the mid to late 1980s, dissatisfaction with courts' assessment of punitive damages continues.

Accordingly, the approach taken in this article is a more fundamental one. Rather than focusing solely on isolated examples of extreme punitive damages excess, I suggest that we reassess whether punitive damages serve any constructive role at all. In doing so, I adopt a methodology that differs from the usual hypothetical case study approach that dominates the law and economics literature. The usual stylized liability problem formulations implicitly assume empirical relationships that may not in fact exist. In particular, they assume that punitive damages serve a valuable deterrent function. Moreover, they assume that juries will apply punitive damages to narrowly defined economics problems, whereas juries in practice may apply punitive damages more broadly. Prior reform efforts have invariably resulted not in subtle tinkering with punitive damages formulas according to economists' prescriptions, but rather in the imposition of some kind of cap or limit on punitive damages. This article goes beyond those reform efforts to ask whether punitive damages should be abolished altogether for corporations in environmental and safety torts.

The methodological approach I use is based not on hypothetical economic problems but rather on a societal benefit-cost approach of the type typically used to assess other social policies, such as government regulations: On balance, do punitive damages generate more benefits to society than costs? Even after a wave of tort liability reform measures, there is still widespread dissatisfaction with the role of punitive damages in our legal system. It is instructive to ask whether these adverse effects are so great that punitive damages do not pass a benefit-cost test. Put somewhat differently, would society's welfare be improved if we eliminated punitive damages as a legal instrument? This article will explore that question in the context of corporate actions affecting risk and environmental safety.

My reform prescription that we abolish punitive damages in this context would seem to contradict the plausibly constructive role that punitive damages may play in selected instances. However, the kind of fine tuning of punitive damages to narrowly defined circumstances that law and economics scholars envision [3] is required to ensure a constructive role for punitive damages does not account for how juries actually behave. Moreover, none of the state reforms of punitive damages have incorporated subtle economic criteria for awarding and setting punitive damages. Rather, they have all focused on very simple approaches, such as damages caps. [4]

The overriding issue that must be addressed before abolishing punitive damages is whether doing so will eliminate a constructive force for the promotion of safety and the protection of the environment. Because no existing study adequately addresses this issue, this article presents the most comprehensive empirical assessment to date of the effects of punitive damages. This task is facilitated by the fact that four states already have liability regimes in which punitive damages are not awarded. Have these states performed worse on any reasonable measure of safety, as one would expect, if punitive damages do in fact have a deterrent effect?

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encountered with automobile airbags indicate that even for some safety-related products with substantial opportunities for gathering safety data, it may take time for knowledge to develop. Automobile companies can learn about the properties of airbags through crash tests as well as through market experience. Because fatalities caused by airbags are a relatively rare event -- with about fifty estimated fatalities to date [26] -- the risk consequences of airbags and the particular risks they pose to children, small adults, and the elderly were not immediately apparent. Moreover, evidence on the benefits of airbags is based on engineering model projections rather than tallies of actual lives saved. Mirroring juries' tendency to focus on the harm caused in the individual case rather than on the defendant-corporation's pre-accident risk-benefit assessment, the public has responded with greater concern for the identified lives lost than the more hypothetical estimated lives saved.

Problems posed by continuing uncertainties plague even the most expert risk assessors. The consequences of mistaken judgments are particularly severe in zero-infinity problems, that is, those situations in which either there is no loss or the loss is catastrophic. A recent financial catastrophe affected the most venerable insurance institution, Lloyd's of London. Lloyd's persistently underestimated the scope of the asbestos litigation, for which it served as a major reinsurer. Lloyd's 1982 worst-case scenario of the total number of asbestos cases that would emerge was 81,000. The company later developed an assesment of the total number of claims, updating its estimate to 180,000 in 1990. [27] These estimates remained considerably below the American Bar Association's estimate of the litigation level, which was 340,000 claims in 1990. [28] The outcome for Lloyd's is that it has thus far survived, but it has had to undergo a major reorganization along with the imposition of substantial losses upon many Lloyd's "names."

The occurrence of substantial losses in this as well as other zero-infinity contexts does not necessarily imply that the decisions themselves were bad. The appropriate reference point for judging these decisions is whether they were sound at the time when they were made, not whether the decisionmaker was unlucky. The high losses that occurred are simply a reflection of the nature of the stakes and the risks involved. In the case of Lloyd's, the possibility of catastrophic losses arose from the positively correlated nature of mass toxic tort lawsuits. Rather than incurring a series of independent and identically distributed risks, it encountered many highly correlated risks that imposed considerable losses once juries found the asbestos firms liable. Corporations likewise engage in high stakes decisions -- whether it be a small risk of environmental disaster or a hazard from a mass marketed consumer product that could injure thousands. The appropriate reference point for judging such risk decisions is whether they were prudent given their expected consequences. A zero risk ideal will not be feasible.

C. RISK BALANCING IN PERSONAL DECISIONS

We cannot blame all hazards on corporate actions and bad decisions. Moreover, corporations are not unique in making tradeoffs involving risk that may not produce perfect safety. Risks are an inescapable part of our daily lives. The sources of risks that increase one's annual death risk by 1 in a 1,000,000 include the following: drinking a half a liter of wine, living two days in New York or Boston (air pollution), traveling ten minutes by bicycle, traveling 150 miles by car, eating forty tablespoons of peanut butter, or eating 100 charcoal broiled steaks. [30] Although we might wish to reduce the risks in our life, few of us would be willing to give up all of our daily activities, many of which generate risks. We make risk tradeoffs every day, and corporations must engage in a similar balancing.

The infeasibility of attaining a zero-risk outcome stems from the fact that the cost of risk reduction increases as the level of the risk declines. [31] Because achieving risk reductions gets increasingly more expensive as we improve our levels of safety, at some point it is desirable to stop our quest for reducing one type of risk and use our resources for greater risk reduction elsewhere. Sources of personal risks include smoking, failure to use seatbelts, lack

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of exercise, and poor diets. Even the most disciplined safety-minded consumers indulge in some risky activities. Travel is inherently risky, whether by plane or by car. To the extent that we drive smaller, fuel-efficient cars, we incur greater risks. Cars that resembled tanks would be safer, but more expensive and more cumbersome to operate. Our daily lives are not governed by a single-minded commitment to safety but by the need to strike a reasonable balance between safety and other concerns, such as our desire to travel or occasional enjoyment of a decadent dessert. The task of the legal system is to provide incentives for corporations to strike an appropriate balance using appropriate societal values for the benefits of improved safety as our guide.

D. ECONOMIC RESOURCES ARE LIMITED

Consider what would happen if we did not attempt to strike such a reasonable balance but instead sought to achieve zero risks at any cost. Suppose, for example, that all societal resources were devoted to accident reduction. Even if we spent all our money for this purpose, the United States economy would only have enough resources to spend less than $ 60 million per accidental fatality. [32] These expenditures would leave us nothing to spend on food, cancer prevention, environmental quality, medical care, or many other worthwhile expenditures. There are limits as to how much safety we can efficiently achieve and, accordingly, on the amounts we should spend. In some cases, government regulations have cost more than $ 60 million per fatality. Some, such as the Occupational Safety and Health Administration (OSHA) formaldehyde standard, cost in the billions. Such expenditure levels on risk prevention are not possible across the board since incurring them would bankrupt the economy.

Notably, even in the areas that have been the targets of major government regulation, we are not risk-free. After more than a quarter of a century of risk and environmental regulation, substantial hazards remain. [33] We are safer than before, in part because of society's greater affluence, but we are not risk-free. On average, we continue to face an annual risk of motor-vehicle accidents of 1/5000, an annual risk of job accidents per worker of just under 1/10,000, an annual risk of death and injury in a home accident of 1/11,000, and an annual risk of an aviation accident of 1/250,000. [34] The continued existence of these risks does not necessarily imply that regulatory agencies have been remiss. Rather, they indicate that zero risk levels are unachievable.

Perhaps the main exception to the infeasibility of the quest for attaining zero risk is the Delaney Clause. [35] Under this clause, the FDA prohibits all food additives that pose any risk of cancer. More specifically, the Delaney Clause states that "no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal, or if it is found, after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animals." [36] Despite this zero-risk ideal for food additives, considerable natural and synthetic sources of cancer risk remain in our diets. Natural carcinogens include chemicals contained in apples, pears, broccoli, basil, alcohol, peanut butter, coffee, lettuce, and a wide variety of other staples of very healthy diets. [37] There are also risks that arise from human action, ranging from pesticide residues to saccharin as an artificial sweetener. Moreover, how much we eat and the character of what we eat, such as the consumption of fatty foods, have profound implications for the riskiness of our diet. Even substantial vigilance and dietary planning will not result in a risk-free diet.

E. ELIMINATING RISK BECOMES INORDINATELY COSTLY

The exorbitant costs of reducing risks to a zero level is reflected in what Justice Breyer refers to as the "90-10 principle." He gives the example of the Superfund program:

> Let me provide some examples. The first comes from a case in my own court, *United States v. Ottati & Goss*, arising out of a ten-year effort to force cleanup of

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> a toxic waste dump in southern New Hampshire. The site was mostly cleaned up. All but one of the private parties had settled. The remaining private party litigated the cost of cleaning up the last little bit, a cost of about $ 9.3 million to remove a small amount of highly diluted PCBs and "volatile organic compounds" (benzene and gasoline components) by incinerating the dirt. How much extra safety did this $ 9.3 million buy? The forty-thousand-page record of this ten-year effort indicated (and all the parties seemed to agree) that, without the extra expenditure, the waste dump was clean enough for children playing on the site to eat small amounts of dirt daily for 70 days each year without significant harm. Burning the soil would have made it clean enough for the children to eat small amounts daily for 245 days per year without significant harm. But there were no dirt-eating children playing in the area, for it was a swamp. Nor were dirt-eating children likely to appear there, for future building seemed unlikely. The parties also agreed that at least half of the volatile organic chemicals would likely evaporate by the year 2000. To spend $ 9.3 million to protect non-existent dirt-eating children is what I mean by the problem of "the last 10 percent." [38]

In practice, the drop-off in the efficacy of hazardous waste cleanup expenditures may be even steeper. Justice Breyer hypothesized that the government spreads 90% of its resources to eliminate the last 10% of the risk. Put somewhat differently, it eliminates 90% of the risk by the most effective 10% of its expenditures. In practice, the initial expenditures are even more effective than Justice Breyer conjectured, as the Superfund program achieves over 99% of its risk reduction with the first 5% of the total cleanup expenditures that it requires for the hazardous waste sites. [39] However, the essential point of Justice Breyer's example is certainly correct. The initial large risk reductions come the cheapest. As we spend more money to reduce risk, it becomes increasingly expensive to achieve risk reductions. Indeed, Breyer's hypothesis that eliminating the last 10% of the risk costs us 90% of our risk reduction dollar is not an unrealistic indicator of the dramatic declines in the efficacy of risk reducing expenditures. Because of this rapid drop-off in the efficiency of risk reduction expenditures, it is imperative to ask how much safety is really desirable. And, whether other uses of the money would produce more safety benefits.

F. RANDOM EVENTS AND IMPERFECT CORPORATE CONTROL LIMIT RISK REDUCTION

Failure to recognize the limits of risk-reducing expenditures often leads to unrealistic goals. When the Occupational Safety and Health Act was passed, legislators predicted dramatic declines in job risks would result from the bill. [40] Similarly, projections of the efficacy of seatbelts in reducing motor vehicle fatalities greatly overstated the extent of the improvement that occurred. [41] The ideal of perfect safety has proven to be an illusory goal.

One source of limits to improving safety is that both people and technology matter. Companies cannot simply select a risk-free technology. Even very safe technologies do not eliminate all sources of risk. Most government regulatory efforts have focused on technological improvements, such as improved guarding on machines and passive restraint systems for cars, rather than making people more safety conscious. Influencing the actions of the individuals who also may contribute to risk is sometimes a concern as well, particularly with respect to hazard warnings. However, it is difficult to eliminate all risky behaviors.

Furthermore, increases in safety technology may make it less imperative for people to take protective action, thus impeding safety improvements. Since seatbelts make cars safer, it becomes less important for drivers to exercise care. [42] In addition, people may overestimate the efficacy of technological improvements to safety and fail to take the appropriate level of care. In my analysis of safety caps, I show that people are often lulled into a false sense of security by treating child safety caps as being risk-free, leaving containers with such caps around the house and exposed to children. [43] The mechanism underlying this effect was the

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subject of a more thorough exploration with respect to cigarette lighters. There is evidence that parents believe that safety mechanisms for cigarette lighters dramatically improve their safety. This improvement in safety characteristics decreases parents' concerns about the location of the lighter and the exposure of children to cigarette lighters. [44]

Overall statistics suggest that worker actions may be quite prominent sources of risk. Pilot error is responsible for 75% of all airplane accidents. [45] From 45-88% of workers' compensation claims involve accidents in which worker behavior played a contributory role. [46] A study by OSHA found that the majority of deaths of deep sea divers in the North Sea could be traced to worker behavior rather than inadequacies in technology. [47]

What these results mean for company behavior is that consumers and workers are often major contributors to accidents and that technology changes alone will not eliminate risk. The policy levers that can be most readily manipulated by a corporation are changes in product design, changes in the technology of the workplace, and similar technological improvements. Corporations have much more difficulty altering human behavior. Consumers take actions on a decentralized basis. How they use a product cannot be monitored by a corporation. A company can provide hazard warnings, as McDonald's now writes "HOT! HOT!" across the top of its coffee cups. In the case of very potent risks, there can be requirements of safety training, such as the certified pesticide applicators requirement for using dangerous pesticides and the requirement that a motorvehicle license be obtained before driving a car. However, a corporation cannot deploy safety managers to accompany consumers while they are using products because of the decentralized nature of this activity. Juries may ignore this lack of control as one jury did when it awarded $ 25 million in punitive damages to the heirs of a woman who drove around a lowered railroad-crossing gate and was killed. [48]

Decentralized decisions do not, however, imply no corporate control. Profit centers within organizations provide decentralized incentives. Indeed, if inefficiencies escalated with respect to firm size, the largest firms in the economy would be the least profitable. Large firms, which are the safest in terms of accident records for workers on the job, would face the greatest financial risk. [49]

Worker behavior is an intermediate case. Companies can establish guidelines for worker behavior and also control worker behavior more readily than consumer behavior. However, companies cannot continuously monitor the safety-related behaviors of all workers. Supervisors may be able to observe whether protective equipment is being worn and other visible indicators of safety when production is in a group context. However, the difficulty of eliminating unsafe behaviors is reflected in the continued dominance of worker actions as a contributing cause of job accidents. Just as companies cannot entirely control risk because they cannot entirely control consumers, workers are at risk in part because they do not have complete control over their workers' actions.

Thus, in large corporations, random errors arise both for technological performance and worker behavior. In the case of technologies, firms have organizational control over the choice of technology but not over all aspects of its performance. Equipment runs the risk of failing just as the Challenger space shuttle ran the risk of a booster rocket exploding. Similarly, firms can prescribe behavior for workers, but unless they incur inefficiently high levels of monitoring costs some risk of worker failure remains.

The bureaucratic nature of corporate decisionmaking introduces an aspect of uncertainty into risk decisions. The difficulties in maintaining corporate control, and in recognizing the difference between central decisions by a corporation and decentralized mistaken actions within a corporation, are reflected in the American Law Institute's recommended principles guiding the award of punitive damages: "An enterprise should be liable for punitive damages only when there is clear and convincing evidence of reckless disregard for the safety of others in the decisions made by management officials or other senior personnel." [50]

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As the potential independent causes of an accident proliferate, the culpability for not taking a particular precaution decreases. Companies faced with risk situations in which multiple independent causes combine will have a cloudier notion of the likely consequences of safety improvements than in well-defined risk situations. From the standpoint of corporate decisionmaking, the multiplicity of possible risk sources and the absence of a sound understanding of the risk level tend to mute the perceived efficacy of precautionary actions. Before the accident, the appropriate precaution is less clear-cut than after the fact.

Furthermore, in some cases, substantial uncertainties may remain even after the accident, as in the case of the crash of TWA Flight 800. Whether the extensive security requirements enacted after such accidents produce benefits exceeding the substantial costs and delays imposed on passengers depends in large part on the likelihood of such accidents in the future.

III. PUNITIVE DAMAGES ARE NOT NEEDED FOR DETERRENCE

A. COMPENSATORY DAMAGES ARE GENERALLY ADEQUATE FOR DETERRENCE

The assessment of risk measures in Part I failed to reveal any deterrent effect of punitive damages; as a practical level, punitive awards do not enhance safety. This Part addresses a somewhat different issue: that is, even if punitive damages did enhance deterrence, is there any need for them to supplement the safety incentives provided by compensatory awards?

For a large class of circumstances, compensatory damages alone provide adequate deterrence. Consider a case in which all accident costs are financial or involve monetary equivalents. In the case of nonmonetary losses such as environmental damage, the economic assumption is that from the standpoint of those who are injured, this loss can be translated into a fixed amount of money. In such circumstances, both strict liability and negligence rules create efficient levels of safety. [51] In particular, the financial incentives facing the injurer will be adequate to ensure appropriate levels of deterrence.

From an efficiency standpoint then, there is no rationale for additional sanctions. Penalties that go beyond those needed to create an efficient level of safety will produce safety benefits that are not commensurate with the costs being incurred, and these costs in turn will lead to higher prices and other adverse economic effects. Policies for which the benefits to society are exceeded by the costs are not in our net national interest.

Although punitive damages are not generally warranted, there are some narrowly defined circumstances in which analysts have suggested that they could play a potentially constructive role. The discussion below will outline the circumstances that have been identified in which punitive damages can potentially promote more efficient levels of safety. I will then assess the importance of these circumstances and compare these potential benefits of punitive damages with the adverse effects that punitive damages generate.

Table 5

Theoretical Factors Triggering the Pertinence of Punitive Damages

FACTOR	PROBLEM	SOLUTION
Enforcement Error	Probability that harm will go undetected and/or unpunished.	Multiply compensatory damages by the reciprocal of the enforcement probability.
Gap between Compensatory	Optimal compensation from	Impose a fine, regulatory

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Damages for Adequate Deterrence	insurance standpoint provides inadequate deterrence.	penalty, or use punitive damages as a deterrence penalty.
Malicious Intent	Party causing accident derives enjoyment from inflicting harm that may affect value of loss to victim. Usually not relevant for corporate behavior.	Increase damages to offset such enjoyment.

B. POTENTIAL TRIGGERS OF PUNITIVE DAMAGES [52]

Any efficiency-based rationale for going beyond compensatory damages to assess a punitive award requires that conditions other than those in the standard economic loss model be met. Table 5 summarizes the three situations in which, theoretically, punitive damages may be relevant -- enforcement error, a gap between compensatory damages and the deterrence value, and malicious intent. Satisfying at least one of the criteria is a prerequisite for having apotentially sound basis for awarding punitive damages regarding certain corporate acts or actions which might have had probabilistic elements.

The first of the three hypothesized justifications for punitive damages is an enforcement error. Suppose the compensatory damage amount would have provided optimal deterrence, as with monetary harms. However, if an enforcement error creates the probability that the corporation will not suffer this sanction, then there is a rationale for increasing the damages level if tort liability is the only source of financial incentives for safety. A series of authors have shown that compensatory damages provide appropriate deterrence in a situation of imperfect enforcement after the compensatory amount has been multiplied by the reciprocal of the probability that the sanction will be imposed. [53] This formulation ensures that the expected penalty facing the firm equals the optimal deterrence value, taking into account the probability that it will not be levied.

One should, however, be careful in interpreting this underenforcement rationale since courts do limit the extent of liability to exclude many cases of remote risks for which enforcement is difficult. For example, in tort cases, the circle of harm is limited to those directly affected by the accident. [54] If sanction costs would escalate if all indirect effects were taken into account because the ramifications of any favorable or adverse event throughout the economy are extensive. Moreover, it is not clear that accidents create net indirect losses. Damages paid by companies will also stimulate the economy through a variety of indirect efforts, so for symmetry purposes, it is inappropriate to penalize companies for indirect losses without crediting them for the indirect benefits generated by the damage payment. Similarly, benefit-cost analyses for government regulations do not include indirect effects because other expenditures otherwise would have indirect consequences.

Even if one acknowledges the role of enforcement error in muting the effect of compensatory damages on incentives, this factor may not be particularly pertinent for corporate risk decisions. The usual example of an enforcement error problem is midnight dumping of toxic chemicals. Dumping environmental hazards in this manner is explicitly designed to evade enforcement. If there is some probability the polluter will not be caught, compensatory damages will lead to expected sanctions that are less then what is needed for efficient deterrence. Thus, it would seem that additional sanctions in the form of punitive damages would be required to create appropriate incentives.

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However, the tort liability system is not the only institutional actor. The Resource Conservation and Recovery Act [56] (RCRA) imposes sanctions for reckless disposal of hazardous wastes, such as the midnight dumping example. Thus, in addition to potential compensatory damages, other societal mechanisms exist to promote safety and environmental quality. As will be indicated below in the discussion of the role of regulation more generally, much of the belief in the need for stringent punitive damages stems from a tort-centric perspective that ignores the role of such other societal institutions.

For the most part, corporate actions do not follow the clandestine nature of midnight dumping. McDonald's, for example, could not disavow that it had sold the coffee that spilled on the unfortunate woman's lap. The manufacturers of Ford Pintos and GMC trucks likewise could not escape enforcement because the identities of these vehicles were apparent, and the mass-produced nature of the products led to risks that were well known and highly publicized. Moreover, the fact that there may be underenforcement for some classes of behavior does not imply that this rationale for punitive damages can be used for corporate acts in which there is no significant enforcement error.

Even if there is a situation with enforcement error and no regulatory incentives, it is not clear that juries can make sensible judgments on this issue. The analytic task for jurors is extremely complex. In a court case, there presumably is no enforcement error: the firm has been identified. The jury must consequently make an enforcement error judgment across an entire market or set of activities. This task is nontrivial even if no other courts will award punitive damages. However, if other cases involving the risky behavior also might generate punitive damages, the incentives will be too great if punitive damages are set in each case by a jury which is assuming that no other punitive damages will be awarded. In practice, punitive damages in one jurisdiction often lead to efforts to obtain punitive damages in similar cases, which in turn may lead the defendant to settle such cases out of court even if the case is not litigated. Juries have no reliable basis for anticipating the snowball effect of their punitive damages award on other court awards. Failure to recognize the potential ramifications of a punitive award will lead to excessive deterrence.

A second potential role of punitive damages arises when the appropriate deterrence values of damage and sufficient compensation amounts differ. This situation pertains to the character of the accident rather than the mere size of the loss. In particular, does the accident do more than simply lower welfare by the value of losing a fixed sum of money? Does it, for example also impede our ability to enjoy specific money or consumption activities? This situation may occur for severe health effects such as brain damage, which impedes an accident victim's ability to derive well-being from a court award. Accidents that cause fatalities or severely disabling injuries are also prime examples. In these instances, compensatory damages amounts may not provide adequate deterrence because the value of preventing irreplaceable health losses, such as in the case of death, goes beyond the monetary sums involved.

The implicit deterrence value of life associated with preventing a small risk of death ranges from $ 3-[illegible] million per statistical life, with the midpoint value of $ 5 million. [58] Court awards for compensatory damages after fatalities are typically well below that amount. Compensatory damages are intended to ease the financial burdens of the survivors rather than to reflect the well-being of the deceased or provide efficient deterrence. In contrast, punitive damages can have a deterrence function that goes beyond the compensation function to reflect the harm to society of preventing the risky outcome.

Using punitive damages for deterrence is not ideal, however, as it provides compensation to accident victims or their estates that exceeds the optimal insurance value of their loss. Punitive awards for monetary losses are not in consumers' interest because they will, in effect, pay for the unneeded insurance provided by these damages through higher product prices. [59] People will be forced to pay for a level of tort liability insurance beyond what they would buy on their own in the world of perfect insurance markets.

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Government fines and regulatory penalties are superior mechanisms to punitive damages because they create incentives without overinsurance. As will be documented below, the market sanction is $ 3-[illegible] million for each fatality. When job markets for employment risks or product markets for consumption risks function effectively, they will transmit incentives for safety through higher [illegible]es for risky jobs and lower prices for hazardous products. If operative, this economic mechanism will meet the deterrence objective, and the courts can focus on their co[illegible] role. Even if market incentives fall short, imperfect market incentives when coupled with compensatory damages may generate incentives for safety that may be adequate or possibly even too great. That punitive damages are not in widespread use for wrongful death actions may indicate that neglect of safety is typically not so extreme in most cases that [illegible] financial penalties are needed.

The third situation in which there may be a trigger for punitive damages is malicious behavior, as in intentional torts. The enjoyment that parties derive from inflicting harm may well be viewed as a [illegible] unacceptable component of the behavior. As indicated in Table 5, such concerns seem [illegible] pertinent to personal actions than corporate ones. A punitive damages amount [illegible] the injurer's enjoyment from causing the accident will establish the additional incentive needed for the appropriate degree of care. [60] Given the scope of actions considered in the article -- corporate environmental and safety torts -- this rationale for punitive damages is [illegible] pertinent.

If the compensatory damage amount imposed on the company creates appropriate incentives, then there is [illegible] role for punitive damages. When this condition is not met, one of the three potential triggers of punitive damages must be present for there to be any role for a punitive award. In [illegible] environmental and safety torts, however, the malicious intent concern is largely irrelevant, so the principal factors that could trigger punitive damages are enforcement error [illegible] deterrence for health effects. In most situations of corporate acts, enforcement error is [illegible] major concern or is beyond a jury's competence. Indeed, such judgments would be quite difficult to make even for sophisticated legal scholars. Compensation for health losses to promote deterrence provides overinsurance. Whether punitive damages have a constructive role in such contexts depends in large part on the other societal incentive mechanisms in place. The subsequent discussion explores why, put simply, corporations will not completely ignore safety in the absence of tort liability.

What are the broader ramifications of this review of the theoretical underpinnings of punitive damages? The theoretical case for punitive damages is restricted to narrowly defined circumstances for which as I have demonstrated, the rationale for punitive damages is not compelling. This rather [illegible]ky theoretical foundation may in fact help explain why in practice punitive damages have [illegible] proven to be an effective deterrent. Punitive damages can, at best, play a limited role [illegible] specific contexts likely to be beyond a jury's expertise, such as making complicated statistical judgments regarding the size of the enforcement error based on a case when the deterrent has in fact been identified. Indeed, it is noteworthy that the articles [illegible] punitive damages do not give any actual case examples where juries have made awards [illegible] line with the theoretical ideal but instead focus on hypothetical case studies in which [illegible] or attempts to [illegible] more clarity than has yet been evident in our court system [illegible] the court [illegible] performance has produced no demonstrable safety benefits.

C. MARKET [illegible]ES PROMOTE SAFETY

How juries [illegible] the assessment that the firm has been sufficiently remiss to warrant punitive [illegible] is u[illegible]. Juries may fail not only in their thinking about the expected benefits [illegible] safe[illegible] but also in their analysis of the costs of accidents to the firm. In thinking [illegible] adequate of [illegible] incentives, it should be recognized that the court system is [illegible] only [illegible] that affects corporate behavior. Unfortunately, most of the legal literature suffers [illegible] centric perspective in which the courts are the only social

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institution - rk. The courts are not the only safety incentive mechanism in place. For firms that sell ri roducts the market or hire workers into risky jobs, there may be a market response t ris y activi , such as an unwillingness to fly ValuJet after a crash. Indeed, economist imates the implicit value of life are based on observed wage premiums for risky jobs a igher p es now commanded by safer products in the market. These substantial ket pre ums are in the range of $ 3-$ 7 million per statistical life. [61]

The source ese val s is analysis of compensating differentials for risk, controlling for various as of the rker's job. It is useful to provide some sense of the nature of these studies, w n turn i icates the prevalence of these market incentives for risk. [62] There have been rous s ies of compensating differentials that workers receive for hazardous jobs in the d Stat as well as in many other countries, such as Australia and Japan. The basic idea se stu s is to analyze statistically the wage premium workers receive for added risk e job. typical worker in the United States faces an annual job-related fatality risk '10,00 [63] In return, the worker receives an average wage premium of $ 500, where amou has been estimated by controlling statistically for other aspects of the worker the job. On average, 10,000 workers would receive a total of $ 5 million (10,000 w times 00 per worker) in return for the one expected statistical death among the us, th ue of a statistical life is $ 5 million.

It is impor to unde and what this number means. It is not the value a person must receive to ifferen ween certain death and life. No amount of money may suffice. Nor is it th a e that would purchase in a life insurance policy. Desired compensation for one's l ill be less. Rather, it simply reflects the risk-money tradeoff from the standpoin p ventic This amount would be pertinent for setting punitive damages from a deterren ndpoi compensatory damages were deducted and the firm otherwise completely ed saf . However, even in this case, such an award would provide overinsura onsu , for example, would not want to purchase products with such a punitive d insu policy ttached to it.

In addition ese mo risk tradeoffs in prices and wages, there are other economic mechanis may safety. Consumers may boycott the product. There also may be stock mar rc ercuss that either embody these reputational effects or reflect additional reassessn inves f the value of the firm in the wake of these accidents. [64]

The courts ast imp ly, recognize other financial consequences that affect corporate incentives degree rehen ibility of the corporation's behavior and the divergence between t rate and the appropriate degree of care are typically among the factors to ideres the setting of punitive damages. However, the assumption that it is only the s that p vide incentives after an accident establishes an unrealistic reference Some rations conceivably may set their safety level at zero. But rampant f saf ncom on, even in situations in which there is no anticipation of liability. T ol nomer hows t at other societal mechanisms foster safety incentives. Governm ulation k syst matic neglect of safety. There will also be market penalties safe pro s, as well as reputational costs.

D. GOVE T REGU N PROVIDES ADDITIONAL INCENTIVES FOR SAFETY

Airplane c s enera ck market losses that average $ 50 million per life lost. [65] Governm nctions mpose costs on firms when there are regulatory violations. To capture a ie ely t ntive structure that should be designed for punitive damages, it is also es t take onsid ation the incentives provided through these other institutio ors. Ot , firms will be penalized multiple times by separate social institutio h of wh ener ting incentives to decrease risk.

Companie entives f fety come from a variety of sources. For marketed products,

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consumer spond to a eived increase in risk by being willing to pay less for products declared h hazardous, h as the Audi 2000 brakes or alar in apples. Notably, the Ford Pinto wa pped from Fo s product line not long after the Ford Pinto litigation. [66]

In additio the value of urt awards, companies also suffer stock price diminutions and adverse p icity that m pose costs well beyond the court awards themselves. A detailed study of t effects of to bility publicity on the value of firms indicates that these effects were ofte bstantial, a many cases exceeded the actual awards themselves. [67] Furtherm , stock price cts are suffered not only by corporate officers but also by stockhold not involved i he decision.

In consid the risk-red ion incentives facing companies, it is worth-while to recognize that ther multiple in ional actors that generate such incentives. The market and the courts ar o such soci itutions, but a variety of government regulations are at work as well. Airp e safety is s to Federal Aviation Administration (FAA) rules, air traffic controlle ctions, and nment inspections. Cigarettes bear congressionally mandated warning d are subje ring nt advertising restrictions. They also are the focus of a propose 68.5 billion ative package. In the case of prescription drugs, the FDA not only sets standards f sting the drugs but also, in effect, writes the warning language that acc nies all new scription drugs. [68] For oil tankers in sensitive inland waterways like Princ illiam Sound ulatio n by the state and federal government, actions by the Coast G , performanc escor tugboats, and other actions not under corporate control affect ac nt preventio vell s reaction after a spill has occurred.

The exist e of govern regulations that specify standards of corporate behavior often can serv a refere for fficient corporate actions. [69] The legislative mandates of regulato encies a quite restrictive. Typically, they require that firms provide a greater of safety uld e efficient from an economic standpoint. [70] The cost per statistic saved by t effort is often well beyond $ 5 million. Due to the influence of restricti islative ma s, ag ncies often set these standards based on risk alone, not risk-cos eoffs. As a c que ce, an American Law Institute panel recommended that well-def government lator requirements should afford a regulatory compliance defense st punitive d ges [71]

The cour o not curre e out punitive damages in cases of regulatory compliance. In one par rly egre , a ompany was penalized $ 210 million for a chemical spill that wa in EPA and took no land out of agricultural use. [72]

Althoug Supreme C has n t yet recognized a regulatory compliance defense to punitive ges, it has nize the importance of government regulations and the charact orporate b r. In *BMW of North America, Inc. v. Gore*, [73] the Supreme Court o d:

> The is no eviden t BMW acted in bad faith when it sought to establish the ap riate line n presumptively minor damage and damage requiring di re to p . For his purpose, BMW could reasonably rely on state di re statu ida ce. In this regard, it is also significant that there is no ence that ersi ed in a course of conduct after it had been ac d unlawfu on e occasion, let alone repeated occasions. . . . In an al e of a histo on- mpliance with known statutory requirements, there is sis for ass tha more modest sanction would not have been su t to motiva l co pliance with the disclosure requirement imposed by th ama Supr ourt in this case. [74]

This reco ion of th nce of regulatory compliance is in no way inconsistent with the

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Any assessment of the desirability of punitive damages requires a thorough assessment of whether they serve any constructive deterrent function. [5] Part I of this article examines possible measures of the efficacy of punitive damages and fails to find any systemic differences in the safety and environmental performance between states with punitive damages and states without them. Thus, there is no deterrence benefit that justifies the chaos and economic disruption inflicted by punitive damages.

Part II defines the context of the corporate risk decisions that are the subject of this study. How do corporations make risk decisions, and what factors, including legal rules, influence them? Punitive damages can influence these risk decisions by increasing the financial sanctions for adverse outcomes of risky decisions. However, if experience shows that punitive damages awards are unpredictable or unlikely, there will be less deterrence.

Part III reviews the conceptual rationales for punitive damage that have been offered in the law and economics literature. These conceptual rationales all deal with highly specialized circumstances, which often involve refined economic judgments likely to be beyond a jury's competence. Consequently, the absence of a measurable deterrent effect of punitive damages is not surprising. Moreover, market forces and regulatory incentives are more powerful and more appropriate means to provide the necessary deterrence incentives.

The absence of any positive record of accomplishment for punitive damages does not, however, imply that they are benign or inconsequential. Part IV examines some of the concrete economic harms that occur when indiscriminate legal sanctions are levied without a sound economic basis.

If punitive damages are so problematic, why have they resisted meaningful reform? Part V explores these issues, tracing the difficulties to various kinds of incorrect approaches to risk decisions embodied in jury behavior and societal reactions to risk more generally. Part VI concludes the paper with a proposal to eliminate punitive damages for corporate risk and environmental decisions.

I. PUNITIVE DAMAGES HAVE NO SIGNIFICANT DETERRENT EFFECT

The linchpin for any economic argument in support of punitive damages is their role in deterring risky behavior. Section IIIB explores the stated economic bases for punitive damages, all of which hinge on an assumed empirical relationship between punitive damages and corporate risk decisions.

The rationale for such a linkage is straightforward. Punitive damages increase the penalty on the firm after an accident or adverse environmental outcome. When the firm calculates the costs of increased safety against the expected costs associated with adverse risk outcomes, the potential for punitive damages will boost expected costs of risky outcomes, making precautions more attractive.

While this deterrence relationship is not controversial, the linkages in practice may not be so clearly consequential. Suppose that juries award punitive damages and set their amount in a completely random and capricious manner. [6] Under this extreme assumption, there will be no linkage between the expected punitive damages costs and the firm's risk action. [7] Consequently, the existence of a deterrent effect depends on whether punitive damages awards follow the prescriptions touted by legal scholars or the more random patterns asserted by punitive damages critics. Exploring the deterrence linkages will help resolve which of the opposing viewpoints about jury behavior is correct.

If all states had the same punitive damages regimes and if these did not vary over time, it would be impossible to assess their influence. Fortunately, a natural experiment already

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Court's r in the *Me ic* case. [75] In that case the Court ruled that the preemption provision f medical d es did ot preclude lawsuits against defective products. The product q tion had er bee explicitly reviewed by the FDA, but instead was a variant of a simi rly rketed luct. M eover, the nature of the FDA review process for medical devices i n s rigorou s for pr scription drugs. [76]

The Unite tates Supr Court made clear the narrow limitations that should pertain to a regulato mption efense: "Moreover federal requirements must be 'applicab the devic question, and, according to the regulations, pre-empt state law only if th e 'specific nterpart regulations' or 'specific' to a 'particular device.'" [77] A regulator mplianc se is c rtainly desirable but does not go far enough. Punitive damage even i situations of regulatory noncompliance, as there are regulato s s t n stablish financial incentives for care.

The adva ta of gov ent re lations go beyond simply establishing well-defined standard behavior a safe har ors for corporate action. Regulatory agencies often serve an inform nal role, for res rch and for data gathering. The National Highway Traffic Safety A s information on the number of motor vehicle deaths, assisting ssing r ks. NHTSA, for example, kept a running tally of the number this pa y relat d to gas tank placement. [78] More recently, it has develop ed and lives lost due to air bags. A central data analysis of this t tiv use regulatory agencies may be able to identify trends in compar od may be able to pool information regarding similar products o y ri ore pr sely than would be possible using information available to the com to ities also can serve a coordinating role. One such role is to stand the mea g of har d warning language, as in the case of the FDA warning languag rug m keted by different companies. [79]

There ar tag s regulation as well. The process of formulating regulations can pro e re on lation of competing interests, such as public access to a product ver ncerns with safety. There can also be a debate over the merits c es, ng to bear a specialized expertise of regulatory officials rather t , e less specialized knowledge and may be more prone to percepti .

The char f the st regu ory compliance defense is forward looking. On a retrospe s, l the situation before the accident, the sole emphasis is on compen owe after the accident, companies would be subject both to compen d d d government regulations that would emerge after the acciden rma hat the accident provided. Compliance with these regulati ffici erating behavior for the matters addressed by the regulati ima ective of punitive damages that are levied from a deterre iola f these guidelines would be subject to regulatory penaltie ry i ives for compliance.

E. DYNA TMENT OMOTES SAFETY

Even wi r re ory sanctions, there are often strong incentives for compar bel after a major accident or a catastrophe. A major impetus for incr s th accident itself often conveys substantial information about t risk. the accident has occurred the company will be aware of the nee an atory agencies may also establish new guidelines for risk actions se management process is a dynamic process even without addition es ed by the courts, companies will often have the incentive to alter t e the becomes apparent.

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An impor rning i through actual events. Auto companies can observe the frequen h ruck tanks catch fire upon side impact. Pharmaceutical compani e of a e reactions to drugs that they can use to assess product risks. Si p s can n about risks after major catastrophes, such as a major oil spill c r lisas

The diffe es e cases s in terms of the sample size involved and the relationship of the s c) robu y. For mass marketed automobiles and pharmaceutical products s su a very ge sample size. In contrast, major catastrophes tend to involve r er abili and often are more idiosyncratic events. Learning that the O-rings c thra cold weather can help reduce the risk of catastrophes from an the e, but there have not been enough trials of space shuttle launche le t tify all such possible risks of explosion with precision. Catastr p m informative with respect to the particular risk that caused a single t not ide information to make judgments for all causes that might g da ks in future.

Catastr ot a nated because risks of substantial losses are usually small. The wid i imat hat arise because of the unanticipated character of catastro ed i Challenger disaster experience. Before the Challenger disaster im hat the chance of such a disaster was one flight in 100,00 aster, the agency estimated the risk of such a catastr n seventy-eight. A single adverse event led NASA officials to raise y a factor of 1000.

Part of t o the information conveyed by the event, indicating the limits of w ver, dditional consequence of the catastrophe was to increase the cre A who had higher risk assessments. Even before the Challen NAS gineers [81] had estimated the risk of catastrophe as one flight in y indicated that the risk of a booster failure was one flight in thirty

The Cha oc difficulties of risk assessment within the context of large organiz in the organization have different perspectives on the risk and wei ly. The working engineers placed the greatest weight on the like r rockets, whereas more senior NASA officials placed greater ed record of success that they had experienced to date. [83]

The Cha zes the difficulties involved in situations of uncertainty coupled astrophic events. There may be widely disparate estimates of the risk ates may be particularly great in the case of large organiz av with quite different perspectives. After a catastrophe occurs, the high ss e vindicated, but even if the catastrophe had not occurred it may st t the high risk assessors were correct but there simply had not bec erience the catastrophic event. Another possibility is that the low nd we were simply unlucky. [84]

Part of t se is a change both in regulatory standards and legislative require s t usands of cancers related to asbestos became better known, society f ways. The courts levied damages and firms reorganized under h ghtened its regulations to a cost in excess of $ 100 million per cas s did the EPA. The result was a regulatory response and a wave of ed a period of inadequate regulation. This experience, while extrem events and major accidents generate a substantial amount of infor ccident that will lead to diverse governmental and private respon

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IV. PUNI[illegible] E[illegible] AG[illegible] CAUSE ECONOMIC HARM

A. PUNIT[illegible] D[illegible] AGE[illegible] DISCOURAGE BENEFIT-COST TRADEOFFS

If punitive [illegible] simply ineffective and caused no adverse consequences, they should be elimin[illegible] their overall performance may be even worse than simply failing to foster co[illegible] y inc[illegible]ives; random and unpredictable punitive damages may in fact caus[illegible] e e[illegible] omic [illegible]arms.

One exar[illegible] uch [illegible] adverse consequence is that punitive damage awards discourage compan[illegible] oing [illegible]e kin[illegible] of risk management analyses of benefits and costs that are in societ[illegible] st b[illegible] may offend jurors' sensitivities. Ideally, tort liability and the other societal [illegible] ns [illegible] prom[illegible]ing safety should encourage companies to strike a reasonable balance b[illegible] isk [illegible] d cost. Safety improvements should be pursued only so long as the expected [illegible] to [illegible]ety e[illegible]eed the costs. These benefits are not only financial. Monetary measures [illegible] nefit [illegible]ould also include society's willingness to pay for the health-risk redu[illegible] viron[illegible]ntal improvements that will take place because of the increase [illegible] of [illegible] by t[illegible] corporation. Thus, the benefit-cost tradeoff simply requires that safe[illegible] be [illegible]derta[illegible]n so long as they are in society's best interest.

Who shou[illegible] po[illegible]le for making such judgments? Should it be the company, with its extensive [illegible] ge [illegible] he c[illegible] characteristics of the product and the market consequences? As Judge [illegible] s ob[illegible]ed, companies regularly incorporate such safety concerns in a manne[illegible] s the pertinent tradeoffs. Firms routinely perform cost-effectiveness analyses [illegible] s. S[illegible] studies include recognition of the costs of injury and the costs of [illegible] dge [illegible]terbrook notes that the jury perspective tends to be incomple[illegible] cus [illegible] he effects on the injured person in court, not on the invisible [illegible] rest [illegible] society who will be affected by the corporate response to tort liability c[illegible] Th[illegible] com[illegible]nies are more likely to take the societal perspective on costs and bene[illegible] rea[illegible] rors [illegible] to focus on the case specifics.

Making pr[illegible] ses [illegible]nts [illegible] costs and benefits of safety actions is often feasible for large cor[illegible] Mot[illegible] any, for example, was able to explicitly calculate the costs and [illegible] ina[illegible] a safety hazard for the Ford Pinto. [86] General Motors similarly [illegible] sts a[illegible] benefits of fuel-fed fires. [87] Making such calculations may offend s[illegible] tivit[illegible] thinking rigorously about risks and costs is exactly what we woul[illegible] to [illegible] at they can strike a reasonable balance between risks and cost[illegible] Fo[illegible] ions [illegible]ed the costs and risk associated with different gas tank locations for t[illegible] ord[illegible] to. [illegible] h these estimates have been widely touted by plaintiffs' lawyers as rep[illegible] alcu[illegible] undertaken by Ford with respect to the risk of gas tank explosion upo[illegible] ct, [illegible] recent assessment suggests that these calculations pertained not [illegible] ass[illegible] with rear impact, but rather with the risk of explosion of the gas tan[illegible] le [illegible]. [88] Moreover, the analytical context appears to have been a pro[illegible] tor[illegible], not an effort to escape liability. Regardless of which particular t[illegible] t to [illegible] he calculations pertain, Ford had extensive quantitative information f[illegible] s of [illegible] n risks, which it could use to assess the risks and the conseq[illegible] the [illegible] design. Simply making such calculations, however, led to subs[illegible] Fo[illegible] avior. [89]

The natur[illegible] of [illegible] latic[illegible] as follows. Relocating the gas tank would cost Ford $ 11 per car or truc[illegible] r 12[illegible] n cars and light trucks creates a total cost of over $ 137.5 mill[illegible] n. [illegible] ate [illegible] oving the gas tank would prevent 180 burn deaths valued at $ [illegible] lea[illegible] serious burn injuries valued at $ 67,000 per injury, and 2100 burne[illegible] ied [illegible] per vehicle. Based on Ford's estimates, the value of the risk re[illegible] b[illegible] s w[illegible] $ 49.6 million -- far less than the $ 137.5 million in

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costs. A m[illegible] e va[illegible]on of the risk to life and health using a deterrence value of life of $ [illegible] har[illegible]e court awards, leads to assessed safety benefit values of $ 1.4 [illegible] / ar[illegible]f magnitude greater than the costs. [90] Whether Ford's decisio[illegible] as i[illegible] de[illegible]s[illegible]n the potential design benefits from the rear gas tank location, hic[illegible] co[illegible]non [illegible]tchbacks. Only by making such a calculation can we assess w[illegible]b[illegible] c[illegible]any [illegible]e the right tradeoff and, if not, how much it fell short.

Ford clear[illegible] cal[illegible]ions by undervaluing safety. However, the company should be appl[illegible]ts t[illegible]least grapple systematically with the cost and safety implicat[illegible]acti[illegible]. In[illegible], in the wake of this experience, we now know how Ford erred in [illegible]tl[illegible]afe[illegible]nefits. In other cases, the error might be an overas[illegible]co[illegible]or a[illegible]ure to adequately assess risks. By making these tradeoffs explicit[illegible]or[illegible]n f[illegible]our experiences and make more sensible risk tradeoffs in the fut[illegible]If,[illegible]ve[illegible]our[illegible]eate a chilling atmosphere for analysis in which explicit tradeoff[illegible][illegible]ecc[illegible]of the alleged immorality of considering the inevitable tradeoff[illegible][illegible]s[illegible]s[illegible], then we will suppress the type of systematic thinking about risk tha[illegible][illegible]q[illegible]cou[illegible]nhance our safety much more than clandestine, qualitative decisio[illegible]

In the p[illegible]nwa[illegible]n the Ford Pinto case, there is no evidence that the courts consid[illegible]e[illegible]or[illegible]anctions. It is likely, however, that market incentives for safety [illegible]nsi[illegible]s tank fires and explosions are visible and highly dramatic events [illegible]hc[illegible]e-[illegible]ted" by news organizations. After such accidents, companies will su[illegible]b[illegible]e[illegible]ers[illegible]blicity costs that create powerful incentives to make produc[illegible]court-imposed penalties. Thus, even if Ford erred before the accide[illegible]ul[illegible]ect the market to generate powerful incentives for safety once th[illegible]ub[illegible]ed.

B. PUN[illegible]RO[illegible]E COUNTERPRODUCTIVE SPENDING AND WASTEFUL PRECA[illegible]LE[illegible]TO INCREASED RISK

A possi[illegible]of[illegible]mages might be that additional safety incentives, even if unprec[illegible]in[illegible]o harm and might have some protective benefit. In this view, [illegible]romote safety at any cost without worrying about benefit-cost c[illegible]h an approach is not simply that it offends economists' quest for po[illegible]y test in which benefits exceed the costs, but rather that by imposi[illegible]attempt to promote zero risks, we may actually not be reduci[illegible]ll.

The se[illegible]ve[illegible]s counterproductive. Spending inordinate amounts of money to ach[illegible]risk once risks have reached a reasonably safe level is more than s[illegible]. It diverts these funds from other productive uses. Such other[illegible]safety benefits and favorable health effects so that diverti[illegible]xpenditures involves real health costs.

Judge [illegible]tes Court of Appeals for the District of Columbia has correctly obser[illegible]ersion of resources, there may be the loss of a statistical life every[illegible]vernment spends an inordinate amount on regulatory efforts. He su[illegible]in the vicinity of $ 10 million per statistical life have no net benef[illegible]funds otherwise could have had a greater effect in reducing risk b[illegible]edical care, housing, and other life-extending consumption items.[illegible]al estimates suggest that expenditures around $ 10 million could[illegible]statistical life, my estimates, which use an approach that avoids[illegible]s of disentangling the causality involving income and morta[illegible]ppropriate reference point is $ 50 million. [92] What this estim[illegible]e we spend $ 50 million or more to eliminate an expected

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death, t is th istical life because we divert resources from other worthwhile
morta ducin urpo s.

The na of this k-risk c t may seem surprising, but its underlying economic principle
is cap in the f wi g c ple. Suppose that some risk prevention is no more safety-
enhan han dic tc nd filling them back up again. Such efforts do nothing to
promo ety, b e be injured in the process. Moreover, if we had devoted the
ditch g resc a dard bundle of consumer items, including items such as
medic e, som ave been saved. Saving that $ 50 million, instead of
spendi on end th omise little or no return, produces greater overall health,
becau grea nt results allows us to spend more on the types of goods and
servic t will , alth.

C. PU E DAMA S D AGE INNOVATION

Punitiv mages a h gu ssential mechanism for generating a large tort liability
award e abs u e damages, the court award will be restricted to the much
more t dar o such high awards bolster the incentives for safety or do
they h ome a ssions?

Most a ment n have focused on anecdotal evidence. To address this issue
more natic re and I [93] developed a large database that included
measu f innova n b try for a large sample of firms. These innovations included
new p s, new uctions, and other measures that would provide reliable
indica f the de the industry was undertaking the kinds of activities that
would o the ess that has enhanced our lives and well-being. At low and
mode s of awards have the constructive effect that supporters of the
liabili em h ed. In particular, modest levels of damages foster
innov nd p hat bolster our level of safety. Thus, a modest award level
has a ructiv g firms to undertake the kinds of product modifications and
new p t intr l reduce our risks.

Once t amage s very high, however, the effect is counterpro-ductive. High
dama ls sup n across the board. Firms in effect stop innovating because
of the ntial y suffer for new and uncertain product introductions, as
oppos hnologies. Once damages become excessively high, either
produ lop or firms will withdraw from the market altogether. Such
withd as t n the United States private aircraft industry's production of
priva es. [9

A mor miner s the effect of punitive damages on vaccines. Vaccines are
vital t physi nfortunately, some people suffer side effects from vaccines,
which subm urdens on the affected firms. The wave of litigation against
vacci uce an 50% reduction in the number of manufacturers of
vacci single-product monopolies are the producers of many
majo r polio, mumps, measles, rabies, and rubella. In much the
same s are now produced only by a single-product supplier, as
other ave t. [96] The substantial increase in vaccine prices, far above
the o nflat be traced to the rising role of liability costs. [97] In the usual
econo ontext means that fewer people will buy the product. The same is
true c ines - accines has increased, the rate of immunization in the
Unite s ha

These mic te and demonstrable. However, they have largely been
ignor discussion has focused on punishment of corporations.
The c on what financial incentive we should provide to

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corpo to ecognizing that we benefit from corporate activity in many ways at e f lives. Unfortunately, litigation, particularly in the case of sever s t damages, tends to focus on the narrow context of the indivi ce ader effect on corporate incentives and the economy as a whole.

The h lottery can be influential even when punitive damages are not a damages can have a chilling effect on corporate behav nt case involves the Cabbage Patch doll, which chewed off the ha e company received substantial adverse publicity and the girl's $ 25 million punitive damages award. [99] In another alleg mber at a New York performance of *Cats* filed a suit askin compensatory damages because one of the cats in the show dance, sat on her lap, and mussed up her hair. [100] Seem nitive damages can have chilling economic effects. Even if there im ve damages in such instances, the unpredictability of juries and t due to past punitive damages awards in other seemingly frivol t of court to avoid the risk of a major financial penal

V. WH

Why d ing sound judgments regarding risk actions and associated punit to e especially great for punitive damages as comp tory damages? Does the risk assessment context create additi o not err more when assessing punitive damages, the large a more pressing concern. However, juries' ability to make actions is likely to be severely limited.

Decisi ainty are notoriously difficult. People often make syste ns because these situations impose much greater dema choices involving certainty. [101] These errors in perce havior of individuals within organizations as well as juries ch of the many errors in perception and decision will b n the character of the risk decision and the infor

A. OU S

An im en probabilities and consequences. The probability is the likeli he consequence represents the magnitude of the loss in an ac y is that people may confuse the two components. [102] High ly affect perceptions of the preventability of the accid ss *ex post* does not, however, imply that the *ex ante* occurred was large or that this probability could have gh preventive actions. Thus, the correct test of whet ree of care is whether the cost of the precaution was less t y that would have resulted from the precaution, multi l loss. [103] Making such a judgment requires, however, that j e, before the accident, and make a risk judgment unta has in fact occurred.

B. H

A pit is that they may incorrectly assess the firm's know hindsight they may infer that the company also

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had fu... mp... t care enough about safety to invest in a greater level of pro... eve... e clairvoyant powers implicit in the common assumption that t... icip... possible accidents.

Using ... forr... s the yardstick for determining how companies should select... a hi... el of safety precautions will seem optimal compared to what ... sen... n the more imperfect information available before the accid... ro... approach in the courtroom, consequently, will overstate the m... tiv... s required to align the incentives of the firm with those neede... it ... f care. Hindsight bias of juries consequently leads to exces... ns... es overstate the firm's degree of knowledge prior to the ac...

Ideall... ju... ess t... oration's decision based on the degree of risk inforr... ging... te behavior based on subsequent information rather than ... he ... he safety action will lead to an overstatement of the behav... . J... erbrook notes that juries are more prone to problems of hin... or... are more likely to focus correctly on the prosp... e Easterbrook observes: "The 'ex post' perspective of litiga... distorts judgment." [105]

Puttin... ght b... inherently difficult for juries. What was the state of inforn... f the ... n, and will the jury use this as the reference point? After the fa... s oc... he retrospective accident probability will be 1.0. Howe... refe... for assessing whether the firm has met its oblig... nade... iate *ex ante* risk tradeoff given the available inforr... mi... set of corporate protective actions. These corpo... technology and operating procedures that could affect...

C. IRR... E... PROBABILITIES AND PREMIUMS FOR ZERO RISK

Many ... risk p... on stem from the character of the risk. For low proba... ve b... their attention, people usually overestimate the level ... *ide*... end to be overestimated, while very large risks often ... To ... at accidents and major catastrophes involve small proba... verestimate their likelihood once these possibilities are c... when people are completely unaware of the risk, they ... hazard. [107]

The p... eq... ect for jury assessments of corporate risk actions is that peopl... fiec... having a higher probability of an accident than was the case ... con... y will attempt to avoid these risks more than they would ... re p... understood. After the fact, the hazards will be ident... ri... *ex post* basis, there will be a tendency of juries to over-asses... g small probabilities, reflecting the observed syste... e level of the risk. Overcoming this bias may be diffic...

A cor... ov... mall probabilities is that people will be willing to pay a prem... ert... situation of zero risk. [108] Since people overestimate small ... , d... m a small probability to zero will have a greater effec... iv... n a risk decrease of the same magnitude that did not r... aluation of risk reduction, for example, have indicated that r... ousehold chemical products from 5/10,000 to zero has a mu... sumers than decreasing the risk level from 15/10,000

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to 5/1 se represents twice the risk decrease associated with zero ri . Whereas economic predictions would indicate that peopl ngness to pay for successive reductions in risk, in practi ly high value on the last reduction in risk that decre of zero risk leads government officials to declare that our fo rat g, for example, that only a small number of Americans will b od r.

This p bias ce jury behavior. To the extent that juries also exhibit a cert um, limination of the risk by a company by more than is warra reduction. Similarly, departures from zero risk will be viewe n they are. Juries will not appropriately value the comp a small, but nevertheless nonzero amount. This latter relati risk perceptions in terms of overestimating small proba ionship between actual risks and perceived risks so that t ce uction in risk than has actually occurred. [110] Figure 1 illustr tio risks. People overestimate small risks and under ge ed probability curve is flatter than the actual proba tha e line. Juries consequently underestimate the extent of the ri ved and overestimate the importance of further risk reduc erestimation of corporate risk-reduction efforts leads to jur in cases involving risk and uncertainty.

D. IR RISKS

The c portant role. People tend to overreact to risks assoc that represent increases from accustomed risk levels, risks ir nd risks associated with highly publicized events. [111] Peopl nd outcome amounts, rating the probability as higher if the

What of these elements will be present in many punitive dama illnesses. Consider, for example, litigation involving breas plants involve a new technology which presents new risks. plants incurred risks that were then outside of their perso enerated considerable publicity. Asbestos risks likew outside of the control of the exposed individual, and invol cognizant of when they incurred the risk because of evolv d to overreact to such risks, producing excessive resp se essing liability and punitive damages.

E. IR AIN RISKS

A fin ally influential is the well-known Ellsberg paradox. [113] P chance of winning a prize to an equivalent "soft" prob unterpart to this effect in the case of losses. Stud biguous risks and environmental damage indicate that cisely understood risks of adverse outcomes are pref es of an adverse environmental outcome even thou t verse outcome is the same in each instance. For exam e, own chance of an adverse consequence of 2/1000 rathe is either 1/1000 or 3/1000.

This p end to make companies more cautious in situations of amb ns of known risk. However, if they are unfortunate enou e despite their precautions, juries are likely to be

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particu rgi uri ticularly likely to be excessively demanding in
situati ns that they treat the risks incurred by the company as
being re y tain. Thus, we are led to a perhaps paradoxical result.
Situat n autionary behavior will be particularly difficult for
comp a vell-defined risks, should have more lenient liability
stand people (and thus juries), to overestimate uncertain
risks r ate defendants particularly harshly in situations of
uncer

Again, tha ith respect to this and other errors in jury behavior is
that j ot al risk decisionmakers before the fact, but rather as
critics after the fact. From this external reference point,
jurors ments that are rational regarding precautions, but that
may b result may be jury anger with a company's
perfor ction.

VI. RE

A. THE PUN MAGES CEILINGS

Curre s have been largely preoccupied with the search for
an el es to compensatory damages. Punitive damages have
been evel punitive damages reforms that have either
estab t ratios between punitive damages and
comp and I have shown that damages caps have been the
most ever, punitive damages ceilings and multipliers have a
seem re is no apparent basis for setting such quantitative
guide cap counterproductive by serving as an anchor, setting a
targe 118

The U ndicated that the extent of the punitive damages
amou satory damages level, but has resisted strict
numc nitive damages award in *Pacific Mutual Life Insurance*
Co. v are aware that the punitive damages award in this
case i compensatory damages. . . . While the monetary
comp be close to the line, the award here did not lack
objec *Corp. v. Alliance Resources Corp.*, the Court upheld
an av the compensatory damages amount:

this award is 'grossly excessive,' TXO places its
t is over 526 times as large as the actual
er stresses the shocking disparity between the
ory award, that shock dissipates when one
ondents, in terms of reduced or eliminated
succeeded in its illicit scheme. 120

In *BM* , the Court overturned a punitive damages award that
was 1 nsatory damages amount, but the Court did not
overt d some numerical guideline for propriety: "As in
Hasli bright line marking the limits of a constitutionally
accep 121 Rather, the problem was that the award did not
reflec of BMW or the level of damages needed to provide
the a

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The le[illegible] fo[illegible] beyond any punitive damage formulas or caps. All such effort[illegible] [illegible]r' impetus is that punitive damages are out of control and that v[illegible] discipline. Picking a cap of $ 1 million has no more econ[illegible] target number, whether $ 500,000 or $ 5 million.

If a le[illegible] olic [illegible]ns' entally flawed, the solution is to eliminate it rather than to res' [illegible]he [illegible] than set arbitrary ceilings on punitive damages, an appro[illegible] t social costs of punitive damages is to abolish them altoge[illegible] ignificant deterrence and will eliminate all of the puniti[illegible] [illegible]ated the arbitrary cutoffs on punitive awards.

B. A P[illegible] [illegible]'E DAMAGES

Do pu[illegible] ost test? Put somewhat differently, is there any basis whats[illegible] [illegible]c [illegible]e[illegible] efits derived from punitive damages exceed the wide range[illegible] [illegible]ts[illegible] [illegible]n awards? The benefits side of the ledger indicates no signif[illegible] [illegible]a[illegible] tory damages do serve an essential role in a wide varie[illegible] victims and providing incentives for deterrence. Aboli[illegible] t diminish the current role of compensatory damages; such [illegible] s of accident victims and create incentives for deter[illegible]

The m[illegible] e adequacy of compensatory damages for deterrence involv[illegible] nstances. Concerns about punishing malicious behavior are p[illegible] on, and only rarely to corporate risk decisions. Simil[illegible] alient problem for corporate actions, which are typically readi[illegible] arge-scale losses for which punitive damages might be awar[illegible] ate decisions have traditionally played a role in major catas[illegible] tial individual loss, and in these instances the identity of th[illegible] n. Moreover, assessing the enforcement error prob[illegible] al judgments likely beyond any jury's competence.

The f[illegible] amages might be warranted is for outcomes such as fatali[illegible] onetary equivalents are needed to create adequate deter[illegible] es in such instances create inefficiencies. They provide exce[illegible] rding accident victims a damages payment much large[illegible] he victims would voluntarily choose if given the option of pu[illegible] olicy for such losses. Punitive damages are also rarely awar[illegible] as fatalities because corporations seldom completely ignor[illegible] ey may occasionally fall short of an adequate level of safet[illegible] ls, regulatory sanctions, and market-based penalties can b[illegible]).

The c[illegible] l established. Punitive damages are highly uncertain and c[illegible] firms engaged in potentially risky lines of corporate activ[illegible] urage risk-taking, such as the development of new phar[illegible] s of commerce. In the absence of such progress, our stan[illegible] nt adverse effects on our health. Excessive punitive dam[illegible] nd create excessive incentives for safety that may in fact i[illegible]

The v[illegible] he role of punitive damages in the liability system is well estab[illegible] ontinued despite more than a decade of state-level puni[illegible] e reforms invariably constrain the level of punitive dam[illegible] tle guidance to juries about when punitive damages are v[illegible] ised in the law and economics literature. The reason

exists. Four states -- Michigan, Nebraska, New Hampshire and Washington -- do not permit punitive damages. [8] Thus, these four states already have in place the liability regime that I recommend. Is there any evidence that these states fare worse with respect to risk than the states that do permit punitive damages?

Punitive damages regimes of course differ in character. Criteria for punitive damages awards may differ in terms of the statutory requirements or nature of the conduct that must be present for punitive awards to be pertinent. [9] There also may be punitive damages caps and limits on insurability. The analysis below assesses the average effect of these punitive damages regimes as compared to the no-punitive-damages states.

The nature of the statistical tests is twofold. First, this part analyzes the average risk levels for states with and without punitive damages. Is there a significant difference in performance that reflects evidence of a deterrent effect of punitive awards? Such patterns may not, however, be fully informative, as the states may differ in other ways, such as income levels and industry mix. The second set of tests provided in the Appendix consists of multivariate regression results that explicitly control for these differences. The implications of these more refined statistical tests mirror the overall mean across state comparisons: there is no evidence of a significant deterrent effect of punitive damages.

A. TOXIC CHEMICAL ACCIDENTS

Accidents involving toxic chemicals are local in character and should be quite responsive to differences in states' financial incentives. Because these accidents are relatively infrequent, Table 1 presents two measures of toxic chemical accidents over the 1988-1992 period. The total number of chemical accidents in the top panel was 34,000 over that period. As indicated in the bottom panel of Table 1, the number of toxic chemical accidents involving injury and death was just over 2000. In each case the accident rate per 100,000 population was lower for the four states without punitive damages than for the rest of the country. The calculations in the table of accident rates per capita account for differences in state size. Other adjustments, such as accident rates based on a measure of industrial activity, also show no effect from punitive damages. There is no statistically significant difference between the states with and without punitive damages in terms of the risk level.

States with punitive damages are not, however, a homogeneous group. An important difference pertains to whether corporations in those states can insure against punitive damages. Some states permit insurance, other states explicitly prohibit insurance, and a third group of states have not resolved whether to allow insurance. If insurance premiums adjust to reflect the higher expected costs when punitive damages are permitted, then any deterrent effect of punitive damages should be similar irrespective of their insurability. One might hypothesize, however, that if there is less than full responsiveness of insurance rates to risk levels, the effect of punitive damages should be greater when insurance is not permitted.

Table 1

Environmental Risk Differences in States with and without Punitive Damages

TOXIC CHEMICAL ACCIDENTS, 1988-1992

	Accidents	Population (1,000s)
States without punitive damages:		
Michigan	869	9,418
Nebraska	163	1,604
New Hampshire	112	1,114

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why t ... n unable to provide such guidance is that there is simply
no w ... n which a compelling case for punitive damages exists.
For t ... e damages awards be eliminated for corporate risk and
envir ...

Woul ... with compensatory damages? From a tort-centric
persp ... principal source of incentives for corporate behavior.
How ... uch broader environment than the tort system.
Corp ... enerate powerful incentives for safety. The workers
who a ... the job are hired in a market. Similarly, the products
the c ... who themselves respond to risk levels. Public reactions
and t ... sult after major corporate transgressions will generate
addit ... er these financial incentives.

Gover ... sti ... e a wide variety of regulatory requirements that
influe ... nmental decisions. These regulations typically impose
more ... erson would select to meet an efficient level of safety.
More ... tory penalties even when there is no accident, thus
maki ... s in a broader range of circumstances. Consequently,
corp ... e of government regulations consequently should not be
expo ... mpany's actions violate a regulation, then we can rely
upon ... tory agencies to foster the appropriate safety
incen ... mages would augment these regulatory sanctions, as
woul ... ould be powerful incentives for safety, even for
regul ... sition of punitive damages.

Even ... a case for punitive damages is hard. With some effort,
scho ... amples of situations meriting punitive awards such as
those ... en for narrowly defined hypothetical cases there is no
empi ... ries can make reliable judgments on the subtle
statis ... ed. Moreover, there is a wealth of empirical evidence
docu ... ve in judging risky actions -- biases that typically will
be pr ...

The l ... t us to have omniscient juries apply tightly
circu ... generated by highly specialized economic models. If
punit ... orm of damages, there is no reason to believe that
jurie ... in the future than they have after a decade of punitive
dam ...

Punit ... f our judicial system. Legal observers such as Supreme
Cour ... d the randomness of jury behavior. [122] Punitive
dam ... ificant deterrent effects, but the unpredictable chance
of ca ... bstantial harm. If one were to apply the usual tools of
polic ... vernment expenditure programs and regulations, the
requi ... Do punitive damages create more good for society than
harm ... v conceivable test of efficacy. The most sensible legal
refor ... for corporate safety and environmental tort.

APPE ... F DETERRENCE EFFECTS

Tabl ... rious mean-risk measures for states with and without
puni ... of course, differ in more dimensions than punitive
dam ... detailed multivariate regression analysis counterparts
that ... of punitive damages given a variety of other variables,
such ... comparison, the regression table numbering in the

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Appendix follows that in the text. The results mirror those in the simpler means tests, and in some respec are even stronger. Pu itive damages have no significant effect in generating deterrence f any of the safety mea ures considered. Some of the beneficial deterrent effects in the alysis of the means r o doubt is attributable to other economic influences.

Table 1A foc s on the total number of chemical accidents and the total number of such accidents inv ing injury and death. These regressions control explicitly for the size of the population, ti number of manufact ring employees per capita household income, and the Republican pr idential vote. Howeve r, they also include measures of the extent of chemical industry activity, including the numb r of employees in the chemical industry, the oil and gas extraction in stry, and oil refini g. While a variety of these industry mix variables are consequenti s predictors of ch m l accidents, states with no punitive damages do not perform diff tly in any significant manner. The omitted punitive damages variable is for states with r unitive damages per itted. These states consequently serve as the reference point for ass ng the role of punitive damages in all the subsequent regressions. The main question to b ddressed is whether there is evidence of a deterrent effect in any of the three punitive dam s regime states f r which insuring punitive damages is permitted, states where such i rance is not perm tt , and states where the status of such insurance has yet to be resolve

The regressi analysis in Table 1 r toxic chemical accidents will follow the same general pattern as all bsequent analyse will first estimate a single model including the three punitive dam s variables and a scale measure such as population. The equation will then be exp d to include othe ables of potential influence, such as those reflecting industry mix l political factors. T results for toxic chemical accidents in Table 1A do not indicate any ificant influence ny of the three punitive damagesinsurance regimes.

Table 1A

Regression Results for 1988-1 Toxic Chemical Accidents and Toxic Chemical Accidents I lving Injury or

Variable	Toxic Chemical Accidents	
Intercept	-239.009	492.084
	(303.400)	(407.554)
Population	1.45 x 10<-4> ***	2.91 x 10<-5>
	(0.14 x 10<-4>)	(2.22 x 10<-5>)
State has p itives, but ambiguousl insurable punitives icator	427.263	-30.197
	(359.881)	(180.016)
State has i urable punitives indicator	301.412	42.918
	(313.636)	(152.688)
State has w insurable punitives i icator	-51.666	12.525
	(319.234)	(154.400)
Manufacturi g Employees		0.603 *
		(0.336)
Per Capita ousehold Income		-0.015*
		(0.008)
Republican esidential Vote (19 2		3.856
		(5.533)
Chemical E loyees		-2.083

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(SIC 28)		(2.715)
Oil and Gas Extraction Employees (SIC 13)		2.722 (3.172)
Oil Refining Employees (SIC 291)		157.272 *** (18.723)
[ILLEGIBLE TEXT]	0.687	0.931
Variable	**Toxic Chemical Accidents Involving Injury or Death**	
Intercept	-16.213 (17.228)	2.268 (23.303)
Population	9.75 x 10<-6> *** (0.80 x 10<-6>)	1.86 x 10<-6> (1.27 x 10<-6>)
State has punitives, but ambiguously insurable punitives indicator	14.916 (20.435)	2.892 (10.293)
State has insurable punitives indicator	11.796 (17.809)	2.906 (8.730)
State has uninsurable punitives indicator	5.952 (18.127)	14.836 (8.828)
Manufacturing Employees		0.076 *** (0.019)
Per Capita Household Income		-0.0003 (0.0005)
Republican Presidential Vote (1992%)		0.312 (0.316)
Chemical Employees (SIC 2)		-0.726 *** (0.155)
Oil and Gas Extraction Employees (SIC 13)		-1.305 *** (0.181)
Oil Refining Employees (SIC 291)		12.896 *** (1.071)
[ILLEGIBLE TEXT]	0.771	0.949

Note: standard errors in parentheses. Employment figures are in thousands.

* Significant at 90% confidence level.

** Significant at 95% confidence level.

*** Significant at 99% confidence level.

The toxic release regression results in Table 2A present analyses of the determinants of facilities reporting toxic discharges, forms reporting toxic discharges, forms reporting toxic discharges, reduction in surface water discharges, and reduction in total releases. The other variables include measures from equations as well as toxic facilities per capita. In

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some ca[illegible]s the explanatory power [illegible]he regressions is very low. Since the object of the estimat[illegible] is t[illegible] test whether punit[illegible] damages matter, not to predict these toxic releases, the abs[illegible]ce of a strong predictive [illegible]ionship for the some of the toxic discharge variables is not a n[illegible]r c[illegible]cern. The toxic re[illegible] regressions also fail to indicate a deterrent role of punitive [illegible]es. For the most pa[illegible]he three punitive damages regimes have no significant effect. T[illegible]e no significant eff[illegible]n Panel A. The only exception in Panels A, B, and C of Table 2[illegible] with respect to th[illegible] percent reduction in surface water discharges there is one [illegible] t effect, which go[illegible] opposite direction needed for a deterrent effect, as it indic[illegible] of a reduction in d[illegible]rges when there are punitives, but they are not insurab[illegible]ever, in the fuller v[illegible]n of the statistical model there is no such influence. Panel C [illegible]Ta[illegible] 2A includes no st[illegible]ally significant insurance variable effects. Overall, the punitiv[illegible]s regime states d[illegible] differ in any significant manner for the Toxic Release Invent[illegible]

Table 2

Regre[illegible]n [illegible]sults for Toxic R[illegible]e Inventory

Panel [illegible] Reporting Sour[illegible]duction Activities in 1992

Variable	Percent of Facilities Reporting Reduction Activities	
Interc[illegible]t	0.364 ***	0.602 ***
	(0.032)	(0.114)
State [illegible]s punitives, but ambigu[illegible]l[illegible] insurable punitiv[illegible] indic	-0.014	0.025
	(0.040)	(0.038)
State [illegible]urable punitive indica	0.0028	0.047
	(0.0360)	(0.034)
State [illegible]s u[illegible]nsurable punitiv[illegible] indic[illegible]r	0.0021	0.024
	(0.0341)	(0.031)
TRI fa[illegible]lities per 100,000 popula[illegible]n		-0.012 **
		(-0.005)
Manuf[illegible]g employees per 100,0[illegible]ation		1.98e<-5> **
		(0.82e<-5>)
House[illegible]ome per capita		-2.87e<-6>
		(2.08e<-6>)
Republ[illegible]an [illegible]residential Vote (1992		-0.0053 ***
		(0.0018)
[ILLE[illegible]LE TEXT]	0.009	0.314

Variable	Percent of Forms Reporting Reduction Activities	
Interc[illegible]	0.278 ***	0.531 ***
	(0.033)	(0.107)
State [illegible]nitives, but ambigu[illegible]sly [illegible]nsurable punitiv[illegible]s indic[illegible]r	-0.022	-0.027
	(0.041)	(0.036)
State [illegible]insurable punitives	-0.031	-0.024

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indica'	(0.037)	(0.032)
State i insurable punitives	0.005	0.022
indica	(0.035)	(0.029)
TRI fa it es per 100,000		-0.014 ***
popula n		(0.004)
Manufa ing employees per		2.38e<-5> ***
100,0 lation		(0.77e<-5>)
Househ come per capita		-2.74e<-6>
		(1.96e<-6>)
Republ residential Vote		-0.006 ***
(1992		(0.002)
[ILLE XT]	0.042	0.435

Note: s' errors in parentheses. Observations weighted by state population.

For sou e Table 6A, *infra*.

* Signi 90% confidence level.

** Sig t 95% confidence l el.

*** Si at 99% confidence l vel.

Panel ges in Surface W r Discharges Reported in 1992 Toxic Release Invent

Variable		Percent Reduction in Surface Water Discharges from 1988 to 1992
Interc	38.399	-127.897
	(100.480)	(415.575)
State nitives, but	-197.371	-152.063
ambig nsurable punitiv s	(125.638)	(140.004)
indic		
State surable punitives	-13.735	44.804
indica	(111.757)	(123.456)
State nsurable punitiv s	-16.762	8.755
indica	(106.050)	(113.921)
TRI fa es per 100,000		-3.138
popula		(16.793)
Manuf employees per		0.014
100,0 ation		(0.030)
Housel ome per capita		0.007
		(0.008)
Republ esidential Vote		-4.291
(1992		(6.637)

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[ILLEG EXT]	0.043	0.014
Variable	**Percent Reduction in Surface Water Discharges from 1990 to 1992**	
Interc	27.540	-84.428
	(87.515)	(350.535)
State l nitives, but ambigu y insurable punitives indica	-204.937 * (109.426)	-145.391 (118.017)
State l surable punitives indica	-12.954 (97.982)	50.666 (104.669)
State l nsurable punitives indicat	-31.050 (92.366)	0.228 (95.976)
TRI facil es per 100,000 populatio		-3.660 (14.156)
Manufactur g employees per 100,000 po lation		0.019 (0.025)
Household ome per capita		0.0057 (0.0064)
Republican esidential Vote (1992%)		-5.718 (5.593)
[ILLEGIBLE EXT]	0.076	0.092

Note: standa errors in parenthes. Observations weighted by state population.

For sources, Table 6A, *infra*.

* Significant 90% confidence l .

** Significa t 95% confidence l el.

*** Significa at 99% confidence l vel.

Table 3A pre ts a series of two s of regressions for which the dependent variables are the per capit tality rates from ical misadventures and all accidents. In each case, the first regress eported includes an intercept and a set of indicator or dummy variables for whether t state permits pu damages and their insurability status. The second set of regressio includes the p ita manufacturing employees to control for industry mix, the per ita household inc to control for wealth effects, and the percent Republican p dential vote in 1 control for political influences. The medical misadventur quation also inclu the number of physicians per capita.

In none of th quations in Table is there evidence that punitive damages reduce risk. The only sta ally significant i is that the total accidental death rate is higher in the states w surable punitiv s, which is the opposite of a deterrence relationship.

Table 4A pr s analogous reg results for the per capita value of different insurance

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premiums, w... are the counte... the mean estimates in Table 2. As before, the four measures ar... per capita val... insurance premiums, medical malpractice premiums, pr... ct, and other li... miums. The explanatory variables parallel those included in T... 3A. All three o... ive damages variables in Table 4A are statistically significant. T... extent that p... ages have a deterrent role, the risk levels and the premium amo... s should be lo... unitive damages states. The competing effect is that the prosp... of punitive da... boost premium levels for any given level of risk. Howev..., it is ... states with in... itive damages that have higher premium rates but the other two ... nitive damages ... pings.

Panel C: Cha... es in Total To... ...es Reported in 1992 Toxic Release Inventory

Variable	Percent Reduction in Total Toxic Releases from 1988 to 1992	
Intercept	31.207 ***	6.568
	(8.304)	(31.959)
State has p... tives, but ambiguously ...surable punit... indicator	10.171	5.762
	(10.384)	(10.767)
State ... ...rable punitiv... indicator	-4.109	-2.050
	(9.236)	(9.494)
State has ... ...nsurable punit... indicator	9.449	7.506
	(8.765)	(8.761)
TRI f... liti... per 100,000 popul... n		0.752
		(1.291)
Manuf... ...employees pe... 100,0... ...ion		-0.0025
		(0.0023)
House... ...e per capita		0.0012 ***
		(0.0006)
Republi... ...esidential Vo... (1992		-0.122
		(0.510)
[ILLF... ...E ... T]	0.101	0.167

Variable	Percent Reduction in Total Toxic Releases from 1990 to 1992	
Interc...	25.222 ***	40.997
	(7.035)	(27.138)
State ... ...tives, but ambig... ...ly ...surable punit... indic...	-12.522	-7.808
	(8.797)	(9.143)
State ... ...rable punitiv... indic...	-10.937	-3.028
	(7.831)	(8.062)
State ... ...surable punit... indic...	-1.068	1.843
	(7.425)	(7.439)
TRI fa... ...s per 100,000 popul...		-1.481
		(1.097)

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Manufa · employees per 100,0 · tion		0.0022 (0.0019)
House! · e per capita		2.13e<-4> (4.97e<-4>)
Republ · sidential Vot (1992		-0.764 * (0.433)
[ILLEG · T]	0.097	0.175

Note: s' · rrors in parenth · bservations weighted by state population.

For sou · Table 6A, *infra*.

* Signi · 0% confidence

** Sig · 05% confidenc

*** Sig · 99% confiden · .

For ref · le 5A summa · means and standard deviation of the variables used, and Ta · ides the data · .

Table 3

Regre · lts for Acci · ath Rates Per Capita

	ariable	**Medical Misadventures**
Interc	0.952 ***	-0.447
	(0.219)	(0.908)
State · ives, but ambig · urable punit · ator	-0.367	-0.396
	(0.274)	(0.279)
State · rable punitiv · indic	0.352	0.201
	(0.244)	(0.251)
State · urable puni · indic	0.045	-0.048
	(0.231)	(0.234)
Manuf · Employees per 100,0 · ion		2.92 x 10<-5>
		(2.60 x 10<-5>)
House! · per capit ·		-1.34 x 10<-5>
		(1.59 x 10<-5>)
Republ · sidential Vo · (199		0.029 *
		(0.015)
Physi · capita		0.0029 **
		(0.0013)
[ILLE ·]	0.184	0.231
	ariable	**All Accidental Deaths**
Interc	30.836 ***	52.919 ***
	(3.335)	(9.607)

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State ...	...tives, but	0.821	-1.595
ambig...	...surable	(4.170)	(3.250)
punit...	...tor		
State	...able punitiv...	11.027 ***	6.185 **
indica...		(3.709)	(2.885)
State	...urable puni...	0.271	-1.228
indica...		(3.520)	(2.666)
Manufa...	...mployees per		-4.79 x 10<-4>
100,0...	...on		(3.04 x 10<-4>)
House...	...per capita		-8.40 x 10<-4> ***
			(1.76 x 10<-4>)
Republ...	...idential Vo...		0.298 *
(1992			(0.149)
Physi...	capita		
[ILLE...	...]	0.366	0.645

Note: s... ...rors in paren...

For so... ...ble 6A, *infra*.

* Signi... ...% confidenc...

** Sig... ...5% confidenc...

*** Si... ...99% confide... ...l.

Table ...

Insura... ...um Regres... ...sults

Panel ... ...surance a... ...al Malpractice Insurance Premiums

	Variable	**Total Insurance Premiums**
Inter...		983.739 *** 345.809
		(81.761) (272.208)
State ...	...tives, but	45.089 1.719
ambig...	...rable	(101.765) (83.369)
punit...	...tor	
State	...ble punitiv...	-64.696 -26.772
indic...		(90.825) (75.165)
State	...urable pun...	52.910 2.484
indic...		(86.323) (70.190)
Manuf...	...mployees pe...	-0.011
100,0...	...n	(0.008)
House...	...per capi...	0.012 **
		(0.005)
Republ...	...dential V...	1.408

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(1992			(4.478)
Physic	100,000		1.200 ***
popul			(0.396)
[ILLE	]	0.060	0.429

Variable	Medical Malpractice Premiums	
Interc	18.856 ***	-9.403
	(5.800)	(18.403)
State h ves, but ambigu insurable puniti ctor	0.196	-6.242
	(7.219)	(5.636)
State ble puniti indic	1.033	-2.586
	(6.443)	(5.082)
State ins rable puni indic	6.666	-0.970
	(6.124)	(4.745)
Manufa g Employees p 100,00 lat n		-0.0011 **
		(0.0005)
Househ com per capi		-3.15 x 10<-4>
		(3.23 x 10<-4>)
Republican residential V (1992%)		0.478
		(0.303)
Physicians er 100,000 population		0.149 ***
		(0.027)
[ILLEGIBLE TEXT]	0.024	0.461

Note: standard errors in paren .

* Significant at 90% confiden .

** Significant at 95% confide l.

*** Significant at 99% confid el.

Panel B: Product Liability a er Liability Premiums

Variable	Product Liability Premiums	
Intercept	7.654 ***	0.588
	(1.156)	(3.180)
State has punitives, but ously insurable p nitives inc	0.792	2.517 **
	(1.439)	(1.068)
State has insura le puni indicator	-0.871	0.657
	(1.284)	(0.951)
State has uninsu able p indicator	1.284	2.161 **
	(1.221)	(0.880)
Manufacturing Em loyees 100,000 popu lat n		4.93 x 10<-4> ***
		(1.00 x 10<-4>)

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Washington	594	5,147
Four state totals	1,738	17,283
States with punitive damages:		
Other 46 states and DC	32,162	237,727
States with insurable punitives	11,382	68,213
States with uninsurable punitives	15,334	141,930
States with uncertain insurance rules regarding punitives	5,558	28,698
TOXIC CHEMICAL ACCIDENTS INVOLVING INJURY OR DEATH, 1988-1992		
States without punitive damages:		
Michigan	50	9,418
Nebraska	17	1,604
New Hampshire	14	1,114
Washington	42	5,147
Four state totals	123	17,283
States with punitive damages:		
Other 46 states and DC	2,016	237,727
States with insurable punitives	559	68,213
States with uninsurable punitives	1,199	141,930
States with uncertain insurance rules regarding punitives	272	28,698

TOXIC CHEMICAL ACCIDENTS, 1988-1992

	Accidents/ Population (100,000s)	**t-statistic**
States without punitive damages:		
Michigan	9.2	
Nebraska	10.2	
New Hampshire	10.1	
Washington	11.5	
Four state totals	10.1	
States with punitive damages:		
Other 46 states and DC	13.5	0.76
States with insurable punitives	16.7	0.96
States with uninsurable punitives	10.8	0.34
States with uncertain insurance rules regarding punitives	19.4	2.26 **
TOXIC CHEMICAL ACCIDENTS INVOLVING INJURY OR DEATH, 1988-1992		
States without punitive damages:		
Michigan	0.53	
Nebraska	1.06	
New Hampshire	1.26	
Washington	0.82	
Four state totals	0.71	

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Household Income per cap		1.98 x 10<-4> ***
		(0.58 x 10<-4>)
Republican Presidential Vote (1992...)		-0.105 **
		(0.050)
[ILLEGIBLE TEXT]	0.127	0.558
Variable	**Other Liability Premiums**	
Intercept	76.514 ***	77.122 *
	(12.519)	(41.161)
State has punitives, bu... ...ously insurable punitives ind...	9.396	14.078
	(15.582)	(13.831)
State has insura... e p... indicator	-9.487	5.526
	(13.907)	(12.315)
State has uninsurable ... s indicator	15.036	17.342
	(13.217)	(11.390)
Manufacturi... Employees 100,000 popu... n		7.43 x 10<-5>
		(129.24 x 10<-5>)
Household I...come per ca		0.0019 **
		(0.0008)
Republican Presi...nti... Vote (1992...)		-1.794 ***
		(0.641)
[ILLEGIBLE TEXT]	0.144	0.380

Note: standar... errors in par... s.

* Significant at 90% confi... l.

** Significant at 95%... vel.

*** Signific... at 99%... evel.

Table 5A Su... mary of V... ...ns (Std. Deviations)

Variable		Mean	Std. Dev.
Employees in Manufact... (1,000s)	...tor, 1992	358.078400	383.595900
Employees in the O... Ind... ...SIC 1...	...xtraction ...0s)	5.464706	21.851420
Employ... the O... 291), ... (1,...	Industry (SIC	1.109804	4.374529
Employ... the O... Products Industry ...	Allied ...996 (1,000s)	19.664710	24.921650
Indicator which equ... punitive damages	...tates without	0.078431	0.271524
Indicator which equ... insu... punitiv...	...tates with	0.470588	0.504101
Indica... ...ch ...	...tates with	0.352941	0.482640

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unins ... e puniti ...			
Indica ... ich equa ...	tates with	0.117647	0.325396
unce ... insuran ...	...es		
Medica ... ractice ...	r capita	21.494960	11.611970
(19 ...			
Medica ... dventur ...	er 100,000	1.103261	0.519397
Pop ... , 199 ...			
Motor ... e Acci ...	Per 100,000	17.868230	5.744419
Popul ... , 199 ...			
Other ... ty Fee ...	capita (1995)	83.748800	35.775910
Per Ca ... mploye ...	ring	0.065000	0.026700
Sec ... 2			
Per Ca ... ouseho ...	94	32,440.040000	4,851.375000
Propo ... f TRI ...	porting	0.366000	0.090010
Red ... Activ ...			
Propo ... TRI ...	ing Reduction	0.259706	0.069365
Acti ...			
Perce ... tic ...	ter	(65.743860)	454.705200
Dis ... from ...			
Perce ... tion ...	er	(43.913040)	380.355500
Dis ... from ...			
Perce ... ction ...	c Releases	33.526780	25.755110
fro ... to 199 ...			
Perce ... tio ...	c Releases	16.880070	17.135410
fro 2			
Physi ... ...),(...	on, 1994	219.568600	79.608360
Popula ... 95		5.154,699.060000	5.741,453.000000
Produ ... lity ...	capita	7.800801	2.622146
(19			
Ratio ... facil ...	population	0.090300	0.042000
in t ... s			
Repub ... te in ...	ntial	37.668630	6.419486
Ele			
Total ... a ...	,000	38.127320	8.818885
Pop ...			
Total ... e ...	pita (1995)	1,005.691000	199.321900
Toxic ... l Ac ...	j Injury	41.941180	60.336200
or ... 988- ...			
Toxic ... l Ac ...	1992	664.705900	908.791800

Table ...

Data ... or ... al ... is

		Source
Total ... d ...	1	NATIONAL SAFETY COUNCIL, ACCIDENT
misad ... dea ...	0	FACTS 26-27 (1997).

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popula...	
Employ... the ch... llied produc... st... (...oyees in th... and ... ...ustry (SIC ... nd e... l refini... t... 996.	State and Area Employment, Hours and Earnings, Bureau of Labor Statistics, 1997 (on-line searchable series catalog, http://146.142.4.24/cgi-bin/dsrv?sa).
Emplo... ...a... during	U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 740 tbl. 1213 (116th ed. 1996).
Manufact... ...ummary	U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 740 tbl. 1213 (116th ed. 1996).
Per Capi... Hous... 1994.	U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 465 tbl. 716 (116th ed. 1996).
Money In... of ... ...n income, ...te, ...4 dollars: ... t...	U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 465 tbl. 716 (116th ed. 1996).
Physicia... ... ...n for 1994.	U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 124 tbl. 181 (116th ed. 1996).
Active n... ...der... nurses, ... t...	U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 124 tbl. 181 (116th ed. 1996).
1995 pop... ...n	U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 28 tbl. 27 (116th ed. 1996).
Resident ...ulat... 1970-199...	U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 28 tbl. 27 (116th ed. 1996).
Republic ...e ...tial election.	U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 271 tbl. 435 (116th ed. 1996).
Popular ... , by political ...y, ...8 and 1992.	U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 271 tbl. 435 (116th ed. 1996).
Surface w... ...d... ...al toxic rel... ...2.	U.S. ENVIRONMENTAL PROTECTION AGENCY OFFICE OF POLLUTION PREVENTION AND TOXICS, 1992 TOXICS RELEASE INVENTORY (TRI) PUBLIC DATA RELEASE 196-204 tbl. 3-12.A (1994).
Toxic chemi... ...ic chemical ac... ...e... ...ry or death for t... ...c	JOEL A. TICKNER & HILLEL GRAY, ACCIDENTS DO HAPPEN: TOXIC CHEMICAL ACCIDENT PATTERNS IN THE UNITED STATES

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5 (1994).

Toxic releas[illegible] ENVIRONMENTAL PROTECTION AGENCY OFFICE
Facilities, [illegible] OF POLLUTION PREVENTION AND TOXICS,
facilities a[illegible] ource 1992 TOXICS RELEASE INVENTORY (TRI)
reduction ac[illegible] PUBLIC DATA RELEASE 136-37 tbl. 2-13
(1994).

Insurance pre[illegible] INSURANCE INFORMATION INSTITUTE, THE
FACT BOOK 1997; PROPERTY/CASUALTY
INSURANCE FACTS 34-35 (1996).

GRAPHIC:
FIGURE 1, **Rel[illegible]io[illegible] ved and Actual Risk Levels**

FOOTNOTES:

n1 Pacific Mu[illegible] L[illegible] 499 U.S. 1, 45-46 (1991) (O'Connor, J., dissenting) (granting juries "u[illegible] less discretion" with regard to punitive damages violates constit[illegible]io[illegible] r the Due Process Clause).

n2 For a deta[illegible]d[illegible] erformance of different aspects of the tort liability system along t[illegible] AMERICAN LAW INSTITUTE, ENTERPRISE RESPONSIBILI[illegible] Y: REPORTERS' STUDY (1991) [hereinafter AMERICAN LA[illegible]

n3 For a com[illegible]el[illegible] omics perspective, see A. Mitchell Polinsky & Steven Shavell, *Punit[illegible]* Analysis*, 111 HARV. L. REV. 869 (1998).

n4 For a revi[illegible]c[illegible] reforms, see W. Kip Viscusi & Patricia Born, *Medical Malpractice Ins[illegible]* bility Reform*, 24 J. LEGAL STUD. 463 (1995). For a general review[illegible] ges, see RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A [illegible] LAW AND PRACTICE (1991).

n5 Unpredict[illegible] other than simply less deterrence for risk-related decisions. Unp[illegible] incentives for actions that do not reduce risk, leading to inefficient i[illegible] on the character of the penalties firms expect to be imposed.

n6 For a criti[illegible]e[illegible] punitive damages, see George L. Priest, *Punitive Damages Refo[illegible]* 56 LA. L. REV. 825 (1996).

n7 If the pa[illegible]n[illegible] ot predictable, firms could respond by climinating all sources of ris[illegible] made risk-free, such responses often take the form of withdrawin[illegible] r not putting risky new products on the market.

n8 *See* BLA[illegible]T[illegible]

n9 *See id.* at 18[illegible] ket part) (noting that in New Hampshire there are limited statut[illegible] ch punitive damages can be awarded).

n10 863 P.2[illegible]

n11 *See* "C[illegible]r[illegible] reat to State's Businesses, Attorney Claims*, 16 Chem. Reg. [illegible](992).

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n12 *See* Eric . F ne *and the Infliction of Emotional Distress*, 30 TORT & INS. L.J. 1[illegible], 1

n13 *See* BL[illegible]T ET [illegible] 77.

n14 *See* Robert D. [illegible] *nages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143 (1[illegible] y in Cooter's analysis arises with respect to enforcement error, n[illegible] s.

n15 By the same lo[illegible] mages awards, even large ones, will not promote safety, just as period quiring HIV/AIDS was low did not lead to extensive precautions. *See* Tom[illegible] *imism about AIDS is Premature*, WALL ST. J., Feb. 4, 1998, at A22.

n16 *See* Liebeck v. [illegible] nts, P.T.S., Inc., No. CV-93-121419, 1995 WL 360309 (D.N.M. Aug.

n17 For a detailed d[illegible] rmation available to McDonald's, see S. Reed Morgan, *McDonald's E* TIMES, Sept. 19, 1994, at 26.

n18 *See* McMahon v. [illegible], No. 97-4131, 1998 WL 351294 (7th Cir. July 2, 1998).

n19 *See* ARMAGEDD[illegible] ctures 1998); DEEP IMPACT (Paramount Pictures and Dreamworks L.L.C. ar[illegible] ment 1998).

n20 *See* William J. B *Menace to Early Life, Could Still Destroy Earth*, N.Y. TIMES, June 18, 1991

n21 *See The Threat [illegible]* MIST, Sept. 11, 1993, at 13.

n22 For a summary [illegible] en the American Medical Association's Council on Scientific Affairs claim[illegible] convincing evidence that breast implants caused health problems and t[illegible] the Food and Drug Administration, see John Schwartz, *FDA and Al[illegible] mplants*, WASH. POST, Dec. 1, 1993, at A4.

n23 *See* MARCIA AN[illegible] TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BRE[illegible] 00-110 (1996).

n24 *See Mad Cows a* [illegible] NOMIST, Mar. 30, 1996, at 25.

n25 *See* Robert W. H[illegible] titerrorist Rhetoric*, 19 REGULATION 51, 51-57 (1996); *see also* Matt[illegible] *-11: Rewiring Urged*, N.Y. TIMES, Apr. 12, 1998, at S4.

n26 *See Car Safety [illegible]* e, ECONOMIST, Nov. 30, 1996, at 29.

n27 *See* Nicholas Si[illegible] *uman or Natural Disaster?* (1994) (paper presented at the Stanford Univer[illegible] Social Treatment of Catastrophic Risk) (on file with author).

n28 For further disc[illegible] g scientific knowledge regarding asbestos, see W. Kip Viscusi, *Alternativ[illegible] nses to Asbestos*, J. OF RISK AND UNCERTAINTY 147 (1996) and the r[illegible] therein.

n29 A recent award i[illegible] s case levied a $ 31 million punitive damages

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penalty on Owens Corn . *See* Ballard v. Owens-Corning Fiberglas Corp., No. CL-93-1087-AD (Fl. C) (verdict) (discussed in 25 Prod. Safety & Liab. Rep. (BNA) 103 (Jan. .

n30 *See* Richard Wils Daily Risks of Life, TECH. REV., Feb. 1979, at 45.

n31 For an example o al costs of risk reduction, see W. KIP VISCUSI, RISK BY C ICE: RE ND SAFETY IN THE WORKPLACE (1983). Also see the discussion below o 0-10 principle, *infra* note 38 and accompanying text.

n32 This calculation i in W. KIP VISCUSI, FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPO GK (1992).

n33 In addition to ac low, there are also other hazards such as a risk of homicide, risks of mor from air pollution, risks of skin cancer from ultraviolet ra iation, a ed by an airbag, among many other hazards.

n34 *See* W. KIP VIS KING THE RISKY DECISION 24 (1992). These data in turn are based on d TIONAL SAFETY COUNCIL, ACCIDENT FACTS (various years).

n35 21 U.S.C. § 34

n36 *Id.* The statutor additives is identical. *See* 21 U.S.C. § 379e(b)(5) (B) (1994).

n37 *See* Bruce N. A ossible Carcinogenic Hazards, 236 SCIENCE 271, 271-80 (19); Lois S Carcinogens: Setting Priorities, 258 SCIENCE 261, 263 (1992).

n38 STEPHEN BREY VICIOUS CIRCLE 11-12 (1993).

n39 *See* W. Kip Visc milton, *Cleaning up Superfund*, PUB. INTEREST, Summer 19 6, at 52- rivate parties contribute to these expenditures.

n40 *See* V CUST, s

n41 *See* Sam Peltzm utomobile Safety Regulation, 83 J. POL. ECON. 677, 679 (197 (arguing t ation has not affected the highway death rate).

n42 *See id.* This is t moral hazard.

n43 For a summary VISCUSI, *supra* note 32.

n44 *See* W. Kip Visc llo, *The Effect of Product Safety Regulation on Safety P ions*, 1 7, 921 (1994).

n45 *See* IP VI RODUCTS LIABILITY 8 (1991).

n46 Son of the sul er behavior stems from false reporting of accidents. Over a fiv icago Transit Authority employees accounted for 1200 inju claims. T of injuries suggest possible fraud or misrepres ion, n orkers are riskier. For further discussion, see VISCUSI, note

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n47 *See* V... USI, s... 5, ...

n48 *See* V... tman ... lo. ... 001, 1997 WL 614962 (Ohio App. Sept. 30, 1997). The trial ju... educ... v... es award to $ 15 million, and an Ohio appellate court affi... the aw...

n49 This gr... ter s... n r... the stronger merit rating of workers' compensation premiums f... er... ployers in large firms were not responsive to incentives, n... ch i... lc... served. *See* Michael J. Moore & W. Kip Viscusi, *Promoting S... ty Th... rs... nsation*, 20 RAND J. OF ECON. 4, 499-515 (1989).

n50 2 AME... AN LA... TF... note 2, at 264 (1991) (discussing the merits and disadvantag... ce... lti...

n51 *See, e.* ... A. M... LI... AN INTRODUCTION TO LAW AND ECONOMICS (2d ed. 198...).

n52 *See* Po... ra... 3, for a more detailed review of these principles.

n53 *See* Co... r, s... , a... references contained therein.

n54 *See* Ro... ns Dr... p... v. Flint, 275 U.S. 303, 307-08 (1927) (Holmes, J.) (holding tha... l... on other than person injured merely because injured pers... as ... t... h other person unknown to tortfeasor).

n55 For a ... n... omic rationales for limiting the scope of liability, see *Barl... er* ... 54 F.2d 50, 52-54 (1st Cir. 1985).

n56 42 U.S. ... 8...

n57 GM also ... ad in... se... menting its risk analysis. *See* E.C. Ivey, *Value Analysis of A... Fuel* ... ne 29, 1973) (on file with author).

n58 *See* V... 2, ...

n59 *See* V... S... 5.

n60 *See* P... *s of Punitive Damages*. Department of Economics, Massachuset... rking Paper No. 97-17 (Sept. 1997); Peter Diamond, *Int... iency Concerns in Punitive Damages for Reckless Disregard of ... s to* ... f Economics, Massachusetts Institute of Technology ... 1997).

n61 For re... , s... USI, *supra* note 32.

n62 For a ... v, ... at 59-73.

n63 *See i...*

n64 For rev... ock market repercussions of liability suits, see evidence as ... ec... oni Hersch, *The Market Response to Product Safety Litig...* ... (1990).

n65 *See* ... *ntal Death: A Capital Market Approach*, 3 J. RISK & UNCERTA... .

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n66 *See* ... 5, ...-13. More generally, for evidence on the price premium... rk K. Dreyfus & W. Kip Viscusi, *Rates of Time Preference... omobile Safety and Fuel Efficiency*, 38 J.L. & ECON. 7... (

n67 For a ric... f... t... price effects for product liability events published in the V... e major events associated with the Agent Orange litigation, s... 64, at 213-30. Also see the study of airplane crash st... f... *ra* note 65.

n68 *See*... ... *and Products Liability: The Role of the Food and Drug Ad...* METIC L.J. 233, 236 (1986).

n69 *S...* 5, ...-28; AMERICAN LAW INSTITUTE, *supra* note 2

n70 For... m... o... s of safety, see VISCUSI, *supra* note 43 at 118-24.

n71 *See*... *upra* note 2, at 110. For a stronger advocacy of a regulato... iability, see W. Kip Viscusi et al., *Deterring Inefficie... onomic Rationale for the FDA Regulatory Compli...* . 1437 (1994).

n72 *S...* -CI-00158 (Ky. Cir. Ct. June 24, 1996).

n73 5...

n74 *Id...*

n75 M... (1996) (finding that the Medical Device Amend... te causes of action).

n76 *S...* *n and Liability for Pharmaceuticals and Medical Device... i...* ON (Thomas Lenard & Henry Miller eds.) (forthco...

n77 *M...*

n78 *S...* *he Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1030 (...

n79 *S...*

n80 *S...* e V... *w Shuttle Disaster Leads NASA to Consider Options*, N.Y... ...24.

n81 *S...* e D... ER LAUNCH DECISION 274 (1996).

n82 *S...* e S... *s by Air Force Said Risks Were 1 in 35*, N.Y. TIMES, ...eb. ... Air Force estimate was prepared by the rain safety ... opl... ty used by NASA. These officials had more experi... ce ...

n83 *S...* e V...

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n84 A bran[illegible] sian decision theory provides detailed guidelines for incorpora[illegible], *e.g.*, HOWARD RAIFFA, DECISION ANALYSIS: INTRODUCT[illegible] NDER UNCERTAINTY (1968).

n85 S[illegible]e C[illegible] F.2d 210, 215 (7th Cir. 1990) (Easterbrook, J., concur[illegible]ng) ([illegible] "minimize the sum of construction, operation, and inj[illegible]ry co[illegible]

n86 For a d[illegible] calculations, *see* VISCUSI, *supra* note 45, at 111-13.

n87 *See* E.C[illegible] *Fuel Fed Fire Related Fatalities*, GM Memorandum (June 2[illegible], 1[illegible]

n88 S[illegible]e V.[illegible]].

n89 S[illegible]e R[illegible] ITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFEN[illegible]RS

n90 These c[illegible] detail in VISCUSI, *supra* note 45, at 111-13. These calcula[illegible] rnal Ford Company report by E.S. Grush & C.S. Saund[illegible], *F[illegible]duced Fires and Fuel Leakages, reprinted in* FISSE[illegible] 4.

n91 S[illegible] A, 938 F.2d 1310, 1326 (D.C. Cir. 1991) (Willia[illegible], J.

n92 S[illegible] *of Regulatory Costs and Policy Evaluation Criteria*, 25 RAN[illegible] J. I use is to explicitly link the implicit value of saving[illegible] sta[illegible] ads to the loss of a statistical life through regulat[illegible] on, see W. Kip Viscusi, *Regulating the Regul[illegible]*

n93 M[illegible] *uct Liability, Research and Development, and Innov[illegible]* (1993).

n94 [illegible] 5

n95 *[illegible]* ppears in AMA Board of Trustees, *Impact of Produc[illegible] Medical Technology*, 137 PROC. House of Deleg[illegible]

n96 [illegible] *ury Compensation: Hearing on H.R. 1780, H.R. 4777, [illegible] on Health and the Env't of the House Comm. on Energ[illegible]* (1986).

n97 [illegible] te 95, at 7. Further discussion appears in Gina Colata[illegible] *ses in Childhood Vaccines*, 232 SCIENCE 1339 (1986)

n98 [illegible] baum, *Rationing Without Justice: Children and the Ameri[illegible]* P[illegible]. 1859, 1867-68 (1992).

n99 [illegible] 45-47 (Jan. 17, 1997).

n10[illegible] *Character was Much Too Frisky*, N.Y. TIMES, Feb.

1, 199 ... ir ... hese alleged damages is no longer with the show.

n101 ... he ... ems, see W. KIP VISCUSI, RATIONAL RISK POLICY (1998

n102 ... ffi ... essing the magnitude of punitive damages. *See* Daniel ... *d Erratic Awards: The Psychology of Punitive Damag* ... -84 (1998).

n103 ... he ... ty formulation, *see* VISCUSI, *supra* note 45. This conce ... ormula." A company is liable if the cost of precau ... cident multiplied by the size of the loss. *See* United ... d 169 (2d Cir. 1947).

n104 ... RE ... IE ET AL., A STUDY OF JUROR AND JURY JUDG ... FFECTS ON LIABILITY JUDGMENTS (1998).

n105 ... 210, 215 (7th Cir. 1990) (Easterbrook, J., concur

n106 ... CEPTABLE RISK (1981).

n107 ... DISASTER INSURANCE PROTECTION: PUBLIC POLIC

n108 ... hat are truly zero risk, though some components may h

n109 ... *gation of the Rationality of Consumer Valuations of Mul* ... 465 (1987).

n110 ... 3

n111 ... ena, see FISCHHOFF ET AL., *supra* note 106; VISCU ... T AL., 4 U.S. DEP'T OF THE INTERIOR, EVALU ... FINAL ENVIRONMENTAL IMPACT STATEMENT PROPO ... 1972).

n112 ... NDIVIDUAL DIFFERENCES IN SUBJECTIVE RISK THRES

n113 ... *, and the Savage Axioms*, 75 Q.J. ECON. 643 (1961

n114 ... *ation of Ambiguous Risk Information*, 31 THEORY & DEC ... scusi & Wesley A. Magat, *Bayesian Decisions with Ambig* ... ERTAINTY 371 (1992). The latter language is from *E* ... 17 U.S. 559 (1996).

n115 ... rms, see Alexander Volokh. *Punitive Damages and E* ... *ues*, 213 Reason Foundation Policy Study 20 n.91 (199 ... damages reforms have been considered by Cong ... ges reform has been enacted.

n116

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States with punitive damages:		
Other 46 states and DC	0.85	0.74
States with insurable punitives	0.82	0.70
States with uninsurable punitives	0.84	0.60
States with uncertain insurance rules regarding punitives	0.95	1.89 **

Note: The t-statistic tests the weighted mean accident rate for the four states which do not award punitive damages against the weighted mean for the states in the category described.

For sources, see Table 6A, *infra*.

The results in Table 1 do not indicate any incentive role for the insurability status. States with no punitive damages permitted have a toxic chemical accident rate of 10.1 per 100,000 population, which is below the rate of 10.8 for states with uninsurable punitives, where these differences are not statistically significant. States with insurable punitives and uncertain insurance have higher, not lower, risk levels than the states without punitive damages, where these differences are statistically significant for the states with uncertain insurability of punitives. None of the effects in Table 1 indicate a deterrent role of punitive damages in reducing toxic chemical accidents.

B. TOXIC CHEMICAL RELEASE RISKS

A related set of risk measures consists of four environmental outcome measures developed by the United States Environmental Protection Agency (EPA) as part of its Toxic Release Inventory database. These environmental risks are also local in character, so they should be subject to regional differences in financial incentives -- to the extent that punitive damages exert a deterrent effect.

Analyzing the EPA toxic chemical release data is of interest for two reasons. First, the government's statistics on handling toxic chemicals provide an instructive measure of the safety of companies' handling of dangerous chemicals. If punitive damages have a deterrent effect, they should promote safer chemical practices. Second, the Toxic Release Inventory database itself may give rise to litigation, including lawsuits that lead to punitive damages. One prominent such case was a fear-of-cancer case in California, *Potter v. Firestone Tire & Rubber Co.* [10] Using data derived from Toxic Release Inventory reports and other government risk management data, plaintiffs who lived near a landfill sued Firestone, which was responsible for some chemicals dumped at that site. [11] The California Supreme Court allowed such claims in a negligence action provided that the plaintiffs met certain conditions, such as proving that the fear flowed from their personal knowledge of the risk. [12] The four measures examined in Table 2 are among the principal indices of toxic releases compiled by the EPA, which monitors manufacturing facilities in the United States that handle substances designated by the EPA as toxic. The EPA requires facilities to file forms that report on activities directed at reducing the amount of toxic releases from a given source.

The first panel of toxic release statistics in Table 2 pertains to the number of facilities that reduced their discharges. The fraction of facilities reducing their discharges is 0.36 in the no-punitive-damages states and 0.36 for the country as a whole. Reported source reductions, as measured by the number of facilities reporting source reductions, do not vary with the presence of punitive damages. The analysis of facilities reporting toxic release reductions indicates no significant differences even when the insurability status of punitive damages is recognized. The proportion of facilities reducing discharges is 0.36 for the no-punitive-damages states and also 0.36 for the states with insurable punitives, the states with

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n117 dvantages of ceilings and multipliers, see 2 AMERI t 258-59.

n11 *riability in Civil Jury Awards*, 21 L. & HUM. BEHA

n11 99 U.S. 1 (1991).

n12 es Corp., 509 U.S. 443, 459-64 (1993).

n121 .S. 559, 585 (1996).

n122 ip, 499 U.S. 1, 45-6 (1991) (O'Connor, J., disse

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uninsurable punitives, and the states with uncertain legal status regarding punitive damages. These levels are virtually identical irrespective of the punitive damages regime.

Facilities may, however, have multiple sources of toxic releases, leading to the filing of multiple forms per facility. The second panel in Table 2 presents analogous discharge reduction statistics using the number of forms as the unit of analysis rather than the number of facilities. This measure consequently adjusts for facility-related differences in the scale of potentially polluting activities. The no-punitive-damages states once again do not exhibit a significant difference in source reductions. The fraction of forms reflecting source reductions is 0.27 for the no-punitive-damages states and 0.25 for the entire country. Whereas the no-punitive-damages states had a fraction -- 0.27 -- of forms reporting discharges, each of the three punitive-damages-insurance state groupings had a lower (statistically insignificant) proportion of such reductions. The no-punitive-damages states perform almost identically to the various punitive-damages-insurance regimes with respect to forms reporting reductions in discharges.

Table 2

Reductions in Surface Water Discharges in States with and without Punitive Damages (SWD)

FACILITIES REPORTING REDUCTIONS, IN TOXIC RELEASE INVENTORY (TRI)

	# TRI Facilities	Number of Facilities Reducing Discharges
States without punitive damages:		
Michigan	969	337
Nebraska	180	60
New Hampshire	129	51
Washington	332	134
Four state totals	1,610	582
States with punitive damages:		
Other 46 states and DC	21,837	7,864
States with insurable punitives	7,375	2,651
States with uninsurable punitives	12,487	4,507
States with uncertain insurance rules regarding punitives	2,104	758

FACILITIES REPORTING REDUCTIONS, IN TOXIC RELEASE INVENTORY (TRI)

	Proportion of Facilities Reducing Discharges	t-statistic
States without punitive damages:		
Michigan	0.348	
Nebraska	0.333	
New Hampshire	0.395	
Washington	0.404	
Four state totals	0.361	

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States with punitive damages:		
Other 46 states and DC	0.360	0.08
States with insurable punitives	0.359	0.13
States with uninsurable punitives	0.361	0.04
States with uncertain insurance rules regarding punitives	0.360	0.08

FORMS REPORTING REDUCTIONS IN DISCHARGES

	# TRI Forms	**Number of Forms Reducing Discharges**
States without punitive damages:		
Michigan	3,747	996
Nebraska	540	134
New Hampshire	362	83
Washington	1,035	319
Four state totals	5,684	1,532
States with punitive damages:		
Other 46 states and DC	74,737	18,897
States with insurable punitives	25,679	6,147
States with uninsurable punitives	40,962	10,754
States with uncertain insurance rules regarding punitives	8,458	2,079

FORMS REPORTING REDUCTIONS IN DISCHARGES

	Proportion of Forms Reducing Discharges	**t-statistic**
States without punitive damages:		
Michigan	0.266	
Nebraska	0.248	
New Hampshire	0.229	
Washington	0.308	
Four state totals	0.270	
States with punitive damages:		
Other 46 states and DC	0.253	0.63
States with insurable punitives	0.239	1.28
States with uninsurable punitives	0.263	0.23
States with uncertain insurance rules regarding punitives	0.246	0.91

REDUCTION IN SURFACE WATER DISCHARGES

	Percent reduction in SWD,	**Percent reduction in SWD, 1990-**

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	1988-1992	1992
States without punitive damages:		
Michigan	34.9	8.4
Nebraska	-43.7	9.8
New Hampshire	85.9	70.9
Washington	70.3	68.0
States with punitive damages:		
Four state totals	66.0	62.6
Other 46 states and DC	9.5	-45.7
States with insurable punitives	-3.3	-56.6
States with uninsurable punitives	54.6	12.7
States with uncertain insurance rules regarding punitives	-159.0	-268.1

REDUCTION IN SURFACE WATER DISCHARGES

	t-statistic, 1988-1992	t-statistic, 1990-1992
States without punitive damages:		
Michigan		
Nebraska		
New Hampshire		
Washington		
States with punitive damages:		
Four state totals		
Other 46 states and DC	2.15 **	3.12 ***
States with insurable punitives	4.36 ***	4.61 ***
States with uninsurable punitives	0.54	2.66 ***
States with uncertain insurance rules regarding punitives	3.61 ***	4.62 ***

REDUCTION IN TOTAL RELEASES

	Percent reduction in total releases, 1988-1992	Percent reduction in total releases, 1990-1992
States without punitive damages:		
Michigan	26.2	19.0
Nebraska	31.2	25.0
New Hampshire	54.6	29.0
Washington	40.3	36.8
four state totals	32.0	24.4
States with punitive damages:		
Other 46 states and DC	35.2	14.0
States with insurable punitives	26.9	8.4
States with uninsurable punitives	40.3	21.5

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TEXT:

I. INTRODUCTION

September 11, 2001, is an unforgettable date for many reasons. n1 In addition to its political, social, and historical importance, it may mark a watershed of insurance history as well. n2 The value of the insured **losses** due to the collapse of the World Trade Center (WTC) towers is estimated to total at least $ 35 **billion** and perhaps $ 75 **billion.** n3 In addition, most of the people killed by terrorism were covered by life insurance. Many business operations were affected, invoking possible business interruption coverage. The airplanes that became weapons of destruction carried passengers whose estates are likely to press claims against the airlines operating the flights (United and American), potentially raising issues of liability coverage. n4

n1 This article's focus on insurance issues related to September 11 of necessity dwells on the World Trade Center **losses** more than those stemming from the attack on the Pentagon or the crash of a fourth hijacked airliner in the Pennsylvania countryside when passengers attempted to retake the plane and prevent its use as a weapon. Although these other two shocking acts of terrorism will give rise to insurance claims of considerable magnitude, they fall far below the scope and severity of the WTC terror attacks in economic and insurance terms. The author will also follow what appears to be an emerging convention of using the term "September 11" as a noun with relatively clear meaning as well as using a number of synonyms for the atrocity (e.g., attack, terrorism, disaster, incident). *See* James J. Kilpatrick,

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policyholder with such coverage might have had a supplier or customer in the towers, in which case the coverage is probably triggered. Coverage may not be applicable where a peripheral business was impacted only indirectly without its own physical damage. n34 Contingent BI coverage may also apply to **losses** brought about by damage to a service provider such as in a case of suspended utility services or may, depending on policy language, apply to suspension of operations required by government action in the wake of the tragedy such as the cordoning off of a restricted area. n35

n33 *See* Sclafane, *supra* note 29, at 53, 54.

n34 *See id.* at 53 (coverage unlikely); Hsieh, *supra* note 25, at 21 (coverage likely according to policyholder attorney if policyholder can show property **loss** to key customer, supplier, distributor, or manufacturer).

n35 *See* Hsieh, *supra* note 25, at 21. Corollary to this type of coverage may be the question of whether a business was "forced" to shut down because of government action or merely did so voluntarily for a variety of reasons. *See* Lenckus, *supra* note 25, at 1, 62 (coverage for stock exchange company claims of business interruption may hinge on whether shutdown was in fact required by government restrictions on access to lower Manhattan).

In the past, courts have divided on whether there must be a complete stoppage of business or whether a significant and demonstrable showdown might suffice. n36 The most recent Insurance Services Office form for BI coverage provides that a slowdown of the business constitutes a suspension, n37 but much of the potential post-disaster coverage may be written on older forms that may give rise to litigation over this question. In addition, issues may arise over whether companies that lost income due to the tragedy but whose own facilities were not physically harmed will have coverage. Physical damage is a requisite, but courts may differ as to the quantum of physical damage required. The current standard policy contains rather clear language conditioning coverage on a causal relationship to physical damage rather than simply a connection to physical damage.

n36 *See* Reidy & Carter, *supra* note 24, at A23. *See, e.g.*, Am. Med. Imaging Corp. v. St. Paul Fire and Marine Ins. Co., 949 F.2d 690 (3d Cir. 1991) (slowdown sufficient). In addition, a business that is not generating any revenue may be unable to obtain coverage. *See, e.g.*, Cont'l Ins. Co. v. DNE Corp., 834 S.W.2d 930, 934 (Tenn. 1992).

n37 *See* Sclafane, *supra* note 29, at 54. The treatment of a business slowdown as a "suspension" is not accomplished through a specific definition in the policy but follows from the policy's general treatment of lost income as covered under certain conditions, with coverage reduced or lost when income is at predamage levels. *See, e.g.*, Form CP 00 30 06 95, *reprinted in* POLICY KIT, *supra* note 17, at 237-40.

A debate may also arise over whether the business is really stopped or constricted if other production capacity is available. n38 This type of coverage dispute may arise during the processing of September 11 claims due to the large number of affected businesses that have offices at other locations in addition to those directly affected by the collapse of the towers. For example, tenants such as insurance brokers Aon and Marsh & McClennan and the law firms Cleary Gottlieb Steen & Hamilton and Sidley Austin Brown & Wood have other offices, backed-up data, and access to temporary services. All were undoubtedly affected in their business by the tragedy. Whether they were affected enough could become a litigated question if their insurers choose to dispute business interruption claims.

n38 *See, e.g.*, Fold-Pak Corp. v. Liberty Mut. Fire Ins. Co., 784 F. Supp. 49, 54 (N.D.N.Y. 1992) (to collect policy proceeds, business must produce evidence that it was unable to meet customer needs through alternative facilities).

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E. *Automobile Insurance*

Although overlooked in most of the discussion to date, many automobiles were destroyed or damaged in the September 11 disaster. Owners with comprehensive auto coverage can make valid claims that fall within coverage, although standard personal and business auto policies contain a war risk exclusion. n39

n39 *See, e.g.*, Personal Auto Policy No. PP 00 01 06 98 (ISO 1997), *reprinted in* POLICY KIT, *supra* note 17, at 11 (**loss** excluded if due to "War (declared or undeclared) . . . Civil war . . . Insurrection . . . or Rebellion or revolution); Business Auto Coverage Form No. CA 00 01 07 97, *reprinted in* POLICY KIT, *supra* note 17, at 498, 503:

> 1. We will not pay for "**loss**" caused by or resulting from any of the following. Such "**loss**" is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the "**loss**".
> . . .
>
> **b. War or Military Action**
> (1) War, including undeclared or civil war;
> (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government sovereign or other authority using military personnel or other agents; or
> (3) Insurrection, rebellion, revolution, usurped power or action taken by governmental authority in hindering or defending against any of these.

F. *Liability Insurance*

Although most of the insurance focus in the aftermath of the September 11 disaster has been on property and life claims, there are significant liability insurance issues, although some may have been truncated by legislation. The four large planes that were the subject of the coordinated terrorist attack all appear to have been hijacked with relative ease, paving the way for nonfrivolous claims by passengers' estates and ground victims. In what is popularly referred to as the airline bailout act, Congress not only provided direct financial aid to the industry but limited liability to the insurance carried by the airlines. n40 The enactment eliminates many but perhaps not all of a number of interesting tort law and liability coverage issues that would otherwise emerge from September 11.

n40 *See* Air Transportation Safety and System Stabilization Act, Pub. L. 107-42, 115 Stat. 230, H.R. 2926 (107th Cong., 1st Sess.) (enacted Sept. 22, 2001), §§ 101-107 (provisions for disaster relief for airlines), § 408 (liability of airlines "arising from the terrorist-related aircraft crashes" of September 11 "shall not be in an amount greater than the limits of the liability coverage maintained by the air carrier").

The seemingly obvious theory of tort liability against American and United would posit that the airlines were negligent in their screening (or nonscreening) of passengers and in failing to take reasonable steps to prevent hijacking and use of the planes as weapons. As common carriers, the airlines are strictly liable to passengers, and monetary recovery for injury or death to domestic passengers is not limited by the Warsaw Convention as is the case with international flights. n41 Because all four hijacked planes were on domestic routes, the claims for these hundreds of dead passengers will undoubtedly be significant, although

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probably not sufficient to imperil the solvency of any insurers if the recovery is limited to claims by the passengers' families.

n41 *See* 49 Stat. 3000 et seq., T.S. No. 876 (1934), *reprinted following* 49 U.S.C. App. § 1502; El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155 (1999) (Warsaw Convention bars passenger's claim of psychosomatic injury inflicted by airline search); Zicherman v. Korean Air Lines Co., 516 U.S. 217 (1996) (Convention governs claim in connection with civilian airline flight mistakenly shot down over Soviet skies).

As to claims against the airlines by those injured on the ground, airlines would argue that the claims are farfetched as to foreseeability. Perhaps, but perhaps not. Hijackings, although uncommon in the United States for twenty-five years, have been shown to be a past and continuing menace. n42 A reasonable jury could find that the pre-September 11 status quo of metal detector walk-throughs, perfunctory security screening of employees, permissible carryon bags containing four-inch pen knives, and failure to conduct background checks on passengers was an accident waiting to happen. The suicidal piloting of the craft into buildings caught people by surprise (which explains the lack of passenger resistance until passengers on the fourth flight found out what had happened in the previous three assaults). But a jury could find the risk to nonpassengers from inadequate security to be foreseeable. After all, Tom Clancy foresaw it in a best-seller. n43 Although not in aircraft, suicide bombings by motor vehicle or in person have occurred with some frequency outside the United States, the attack on U.S. Marines in Lebanon in 1983 being perhaps the most prominent to Americans. n44

n42 *See, e.g.*, text and accompanying notes 150-70, *infra* (hijackings and other terrorist acts continued to occur with some frequency in the world during the 1980s and 1990s, most by militant Islamic groups); Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1000 (2d Cir. 1974) (more than 200 hijackings took place between 1960 and 1970, a fact of which insurers and airlines both were constructively aware).

n43 *See* TOM CLANCY, DEBT OF HONOR (1996) (terrorists hijack airplane and drive it into U.S. Capitol during president's State of the Union message, killing nearly all top national leaders in one fell swoop. *See also* TOM CLANCY, EXECUTIVE ORDERS (1998) (protagonist Cabinet member becomes president in aftermath of tragedy and must deal with hostile foreign powers and Muslim extremists behind terrorist airplane attack).

n44 *See, e.g.*, Steve Coll, *Bomb Kills India's Ex-Premier Gandhi; Campaign Rally Attack Leaves 14 Other Dead in Tamil Nadu*, WASH. POST, May 22, 1991, at A1 (suicide bomber pedestrian kills former Indian prime minister); Ron Maitz & Don Melrio, *America Under Attack: Security*, ATLANTA CONST., Sept. 12, 2001, at 9A (in 1983, suicide bomber drives truck laden with explosives into barracks in Lebanon housing U.S. Marines, killing 241 as they slept; also referring to attack on U.S.S. Cole by suicide motorboat bombing during 2000 and consequent deaths of sailors).

Although hindsight can be said to be twenty-twenty, it is hardly beyond question that airlines could be held liable to persons other than their passengers for lax security leading to the September 11 hijackings and carnage. At a minimum, such claims could survive motions to dismiss or summary judgment motions and require substantial defense under the duty-to-defend policies of commercial airline insurance. The airline protection act makes such claims far less likely by establishing a fund for victims to be administered by a special master with access to the fund requiring a waiver of otherwise available court actions. n45 In light of the limited liability also conferred in the Act, prospective claimants are unlikely to elect to pursue the airlines. In addition, the standard commercial general liability, or CGL, policy contains a war risk exclusion, as do most airline liability policies. n46 But by its terms, the exclusion "applies only to liability assumed under a contract or agreement." n47

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n45 *See* Airline Stabilization Act, *supra* note 40, §§ 103, 401-409.

n46 The CGL exclusion states that the policy does not apply to:

> **i. War**
> "Bodily injury" or "property damage" due to war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution.

See CGL Policy Form No. CG 00 01 07 98 (ISO 1997), *reprinted in* POLICY KIT, *supra* note 17, at 460. Airline liability coverage is usually written on forms other than the standard CGL because the CGL contains an Aircraft Exclusion that would obviously be inconsistent with a commercial airline policyholder. In other regards, however, the language of the typical airline policy and the standard CGL is the same or similar.

n47 *Id.*

In other words, airline liability insurers bear substantial exposure, but probably not catastrophic exposure, particularly when victims can turn to the government fund rather than attempt to litigate exceptions to the Airline Stabilization Act's ban on punitive damages, limitation on recovery, or the constitutionality of the legislation. n48 Ground victims of September 11 may have perfectly valid negligence claims against the airlines but there may be no insurance to pay the claims if successful, particularly if policies are exhausted by the claims for passenger claimants, and if there is another source of compensation. n49 A combination of economics, public relations, and poor likelihood of legal success may explain why these insurers are unlikely to raise the war exclusion. Notwithstanding the legislative protection, the airlines themselves have seen a substantial drop in passengers and could face bankruptcy or consolidation, making them less attractive litigation targets. n50

n48 The airline passengers and tower occupants arguably acquired causes of action on September 11. To the extent that Congress truncated or eliminated these causes of action eleven days later, the Airline Stabilization Act has the uncomfortable look of a taking of a property right without due process or a civil version of an ex post facto law. To be sure, Congress has in the past acted to limit tort claims and to replace the tort system with an administrative remedial scheme. In these instances, there was known to be a potential batch of claims of varying magnitude and merit. With the Airline Stabilization Act, Congress acted to remove litigation rights that were fully vested for a discreet, identifiable (if large) group. The merits of the claims are arguably strong and nonspeculative, especially for the airline passengers and crew. As to the crew, despite workers' compensation laws, the airlines arguably committed intentional wrongdoing in that they were repeatedly warned by crew members (as was the government) of the inadequate security system governing air travel.

n49 *See* Airline Stabilization Act, *supra* note 40, § 405(b)(5) (prohibiting awards of punitive damages in claims against victim compensation fund); *American Airlines to claim $ 2.3* ***billion***, BUS. INS., Oct. 29, 2001, at 1 (noting legislation and that American Airlines parent company said that it expected the claims paid by its insurers to total $ 2.3 **billion)**.

n50 *See As Big* ***Losses*** *Widen, an Airline Shake-Up Appears Unavoidable*, WALL ST. J., Nov. 6, 2001, at A5.

G. *Product Liability, Errors and Omissions, or Professional Liability Coverage*

Claims could conceivably be made against the professional who designed the airplanes or the

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buildings in question, although the likelihood of such claims being successful is slight. The theory of such claims would be that the airplane was improperly designed as to security features (e.g., the cockpit door that could be penetrated) or flammability of fuel. The designers and builders of the towers would be accused of failing to design against impact and fire of the type seen on September 11. These sorts of claims appear farfetched because both the airplanes and the towers appear to have been state of the art at the time of their design and manufacture. n51 Most observers describe the towers as having held up for an amazingly long time in view of the tremendous impact and fire that occurred. n52 In addition, the manufacture and construction involved took place years and even decades before the incident, making it likely that statutes of limitation or repose under applicable state law would foreclose such claims. n53

n51 *See generally* PROSSER & KEETON ON TORTS (describing elements of product liability claims and available defenses).

n52 Seabrook, *supra* note 2, at 64. Ironically, Osama bin Laden is reputed to have been videotaped telling associates that he expected only the top portion of the towers to fall. *See also* Walter Pincus & Karen DeYoung, *New bin Laden tape described as incriminating; U.S. officials mull whether and who to release video*, LAS VEGAS REV.-J., Dec. 9, 2001, at 3A, col. 5 (tape in U.S. possession but authorities have not determined whether to release contents publically). Bin Laden's opinions and expectations, of course, are probably irrelevant to the legal issues presented save for some marginal impact on the question of whether September 11 qualifies as an excluded war risk.

n53 *See, e.g.*, N.Y.C.P.L.R. § 214(6) (three-year statute of limitations for negligence) (McKinney 2001); N.Y. U.C.C. Law § 2-725 (McKinney 2001) (four-year statute of limitations in connection with warranty claims arising from sale of goods).

H. *Directors & Officers Coverage*

The typical Directors & Officers, or D & O, policy provides coverage if a director or officer is sued for a wrongful act, usually defined as "any act, error, omission, misstatement, misleading statement, or neglect or breach of duty by the individual insureds solely in their capacities as directors and/or officers of the Company insured." n54 Policy language may vary but the concept is the same: director or officer negligence that causes injury may be covered. Claims of negligence against the airlines and others associated with poor security could include director and officer defendants as well. As with the claims implicating general liability insurance, D & O coverage may be strained but is not likely to be in financial disarray from such claims, provided the relevant policies have aggregate limits, which is highly likely. n55

n54 *See, e.g.*, Directors and Officers Reimbursement Indemnity Policy, *reprinted in* POLICY KIT, *supra* note 17, at 579, 581.

n55 Liability insurance written without an aggregate limit would expose the insurer to the possibility that the September 11 **losses** would be considered more than one "occurrence" under the policy, requiring the insurers to pay considerable amounts. However, the general approach to counting liability insurance occurrences is to focus on the cause of the **loss** rather than the effects. *See* STEMPEL, *supra* note 14, § 2.06[h]. Applied to the September 11 tragedy, this strongly argues for a relatively limited number of occurrences (e.g., each plane hijacked, the impact on each building) rather than a potentially bankrupting determination of thousands of occurrences (e.g., each death or injury).

I. *Miscellaneous Types of Coverage*

Although not of the magnitude of mainstream property insurance, a market exists for

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insurance covering planned events such as plays, sports contests, and concerts. In the wake of the September 11 tragedy, major sports leagues suspended operations for approximately a week, a pattern replicated for some entertainment events. These policies are usually triggered, however, only by government-imposed cancellation or physical damage that precludes the event (e.g., a collapsed building, an injured soloist). Because most of the September 11-related cancellations were voluntary, these policies may not be triggered. n56

n56 Susanne Sclafane, *Business Interruption Insurers Expect 'Ripple Effect' from Terrorist Attack Claims*, NAT'L UNDERWRITER (Property & Casualty ed.), Sept. 24, 2001, at 11 (quoting Ernest & Young senior risk management specialist John Dorf).

In the main, then, it appears that if the war risk and related exclusions are to have a significant role in post-September 11 coverage battles, their impact will be in the area of property insurance. n57 Property insurance is the likely battleground both for the war risk exclusion and for counting occurrences. Although the insurance industry appears to have the financial strength to withstand the blow of September 11, n58 any additional disasters of such magnitude in the near future could imperil the solvency of the industry. n59 Should these future contingent risks involve terrorism, it is worth examining the efficacy of a war risk exclusion should insurers wish to assert it in the future or reconsider its application to some September 11 claims if their financial future begins to cloud.

n57 *See* Christopher E. Mandel, *Impact of attacks felt across all lines*, BUS. INS., Oct. 15, 2001, at 10 (most conservative realistic total **loss** estimate is $ 41 **billion,** most in property lines):

> A consensus seems to have emerged about which lines will be hardest hit by this event. Direct property **losses** will likely be in the range of $ 8 **billion** to $ 12 **billion,** including claims for the World Trade Center itself ($ 3.5 **billion** in real property values alone) and surrounding properties, including an untold number of personal autos. Liability, indirect property or business **losses** and contingent business interruption **losses** ($ 4 to $ 7 **billion)** will add to the total.

Id.

n58 *See id.* (estimated property and casualty capital worldwide is $ 300 **billion,** "$ 200 **billion** of which is on the commercial side," but according to Standard & Poor's, insurance system is at risk if September 11 **losses** exceed $ 50 **billion)**.

n59 *See id.* (after September 11, insurance industry cannot "afford a major natural catastrophe of the magnitude of **Hurricane** Andrew or the 1994 Northridge earthquake, due to the impact on reinsurance treaties now so much at risk").

III. HOW MANY OCCURRENCES?

As noted above, the most newsworthy case to date appears to be the battle between twin towers owner Larry Silverstein and Swiss Re, which wrote property coverage on the towers. n60 Silverstein, who holds a long-term lease on the WTC and suffered not only the destruction of the towers but also physical damage to other WTC property, has stated an intent to rebuild on the site, contending that he is obligated to rebuild under the lease as well as inspired to rebuild as a reaction to the attack. n61 The Swiss Re suit has been described as "a clear effort to put pressure on the alliance [of Silverstein, the Port Authority of New York and New Jersey, Silverstein's lenders, and co-investors] and possibly prompt some of the investors or lenders to pressure Mr. Silverstein to walk away from a rebuilding effort."

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n62 Despite the destruction at Ground Zero, Silverstein "has pledged to continue to pay his mortgage and ground rent," n63 although the property will not be a money-maker anytime soon.

n60 *See* McLeod, *supra* note 8, at 1; Labaton & Glater, *supra* note 8, at C2. *See also* Dave Lenckus, *Whether WTC attack is one event or two debated*, BUS. INS., Oct. 1, 2001, at 22; Jim Stanton, *Insurers make threat to block terror pay-outs*, EVENING NEWS--SCOTLAND, Sept. 28, 2001, at B3 (showing cross-Atlantic reach of the story).

n61 *See* Labaton & Glater, *supra* note 8, at C1, col. 4, C14, col. 2 (Silverstein "speaks of rebuilding lower Manhattan with almost religious zeal. 'There's no way I could not go forward and build this thing,' he said in an interview on Wednesday [October 31, 2001]. 'What these terrorists have tried to do is destroy the symbol of New York, destroy the symbol of our economic progress, our strength, our way of life, and I can't handle that.'").

n62 *See* Labaton & Glater, *supra* note 8, at C14 (attributing this analysis to "experts" and describing Silverstein coalition as "a tenuous alliance, one which is certain to fracture should some members begin to sense that they will not be repaid by Mr. Silverstein or come to believe that he cannot get all the money he claims that his insurers owe him and cannot cap his liability"). Silverstein has retained advocates to lobby Congress for legislation limiting the liability of the WTC to $ 1 **billion** for claims that may be made by victim families or businesses contending that WTC errors exacerbated the destruction from the terrorist attack, leading to some criticism that Silverstein is trying to have it both ways: limiting his liability but maximizing the liability of his insurer for the property **loss.** *See id.* at C1, C14.

n63 *See* Labaton & Glater, *supra* note 8, at C14; Alessandra Stanley, *Trade Center Leaseholder Pledges to Rebuild*, N.Y. TIMES, Oct. 5, 2001, at B2 (Silverstein states that he is "obligated by my lease to pay rent for 99 years, I am obligated to rebuild, and I have the money to rebuild," assuming his claims for insurance coverage are successful); Bloomberg News, *Trade Center Operator Seeks $ 7.2* ***Billion*** *from Insurers, available at* http://newsday.com/business/printedition/ny-bzsil092404961oct09.story (visited May 1, 2002).

Thus, the stakes of the Swiss Re/Silverstein dispute are high in and of themselves. The matter is also a potentially high-stakes dispute in that it may set precedent for other claims or future cases involving the determination of the number of occurrences under an insurance policy. However, the public contentions of the parties suggest that the WTC dispute may turn more on particularized policy language or contracting behavior by policyholder and insurer. A final insurance policy for the property was not in place on September 11, making binders and other evidence of insuring intent potentially important to a final adjudication or settlement of the issue. n64 As one account put it, Swiss Re and Silverstein "cite entirely different sets of coverage terms" as controlling the outcome of the dispute. n65

n64 *See* Labaton & Glater, *supra* note 8, at C14:

> The policies [or property insurance] were still under negotiation, and the coverage included the disputed terms of the so-called "binders," or promises by insurance carriers to provide coverage. A policy was formally issued by Travelers, a Citigroup subsidiary, on September 14, after a flurry of e-mails and phone calls among the lawyers negotiating the terms of the policy, but other carriers are keeping quiet about whether they will agree to be bound by those terms or by others. Swiss Re executives say that the case turns on a tightly scrawled note on one of the binders that strikes some language and replaces it with the phrase "subject to wording to be agreed." In its complaint, the insurance company asserts that the crashes are a single event under the language in effect on

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September 11.

This type of rolling or late documentation of an insurance agreement is not unusual for such risks. *See* E.E. Mazier, *Swiss Re WTC Lawsuit Analyzed*, NAT'L UNDERWRITER (Property & Casualty ed.), Nov. 5, 2001, at 46 (comments of insurance coverage attorneys Vince Vitkowsky and Laurie Kamaiko of New York office of Edwards & Angell, LLP).

n65 *See* McLeod, *supra* note 8, at 1:

> Swiss Re says it is bound under a property form that broker Willis Group Ltd., developed and that features a restrictive definition of "occurrence" that precludes the two-event argument.
>
> Silverstein, on the other hand, contends the entire program is governed by a form used by a primary insurer, Travelers Property/Casualty Corp., that does not define occurrence. Under these circumstances, it says, New York law would treat each tower's **loss** as a separate event.
>
> Muddying the waters further, insurance and legal sources say that other insurers on the program may have used other variations of coverage wordings on their own participations, including different definitions of occurrence.

Although Swiss Re is the lead insurer on the WTC property, the total coverage package involves approximately twenty carriers with varying percentages of the risk. Most significant are Swiss Re (20.9 percent), Lloyd's (19.3 percent), Allianz (15.6 percent), ACE (8.4 percent), Chubb (7.2 percent), Westport (6.7 percent), Travelers (5.9 percent), and Royal (5 percent), with another fourteen insurers comprising the additional 11 percent of the risk. Swiss Re has also contended that Silverstein purchased insufficient insurance on the property. *See* McLeod, *supra* note 8, at 1, 27 (describing history of placement negotiations and amounts in question at various times).

To the extent that the WTC coverage dispute is typical, the Swiss Re position appears ill taken. Standard property insurance policies define covered perils but usually do not define what constitutes a "**loss**" or "occurrence" or the number of occurrences. Liability insurance typically contains language defining an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." n66 This definition, in place largely since 1966 (when the language embellishing "accident" was added), n67 is designed to make clear that a covered occurrence need not be abrupt or confined in scope. At the same time, neither are damages befalling a property or all claims against a policyholder designed to be batched together unless they are sufficiently connected. n68

n66 *See* CGL Policy Form CG 00 01 07 98 (ISO 1997), *reprinted in* POLICY KIT, *supra* note 17, at 468.

n67 *See* EUGENE R. ANDERSON, JORDAN S. STANZLER & LORELIE S. MASTERS, INSURANCE COVERAGE LITIGATION § 9.02 (2d ed. 2000) for a discussion of the history of changes to the wording of the definition of occurrence in liability policies.

n68 *See* STEMPEL, *supra* note 14, § 2.06[h].

The number of occurrences taking place under a policy of insurance is generally determined according to a "cause" test rather than an "effects" test. n69 The focus is on the number of

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causes of **loss** rather than on the number of injuries. For example, a policyholder could not seriously suggest that every decedent or injured worker constitutes an "occurrence" under an applicable liability policy or that each damaged component of the towers is an occurrence.

n69 *See id.*; ROBERT H. JERRY II, UNDERSTANDING INSURANCE LAW § 65[c] (2d ed. 1996); *see also, e.g.*, Michigan Chem. Corp. v. Am. Home Assur. Co., 728 F.2d 374 (6th Cir. 1984) (applying Michigan law); Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56 (3d Cir. 1982) (applying Massachusetts law); Transp. Ins. Co. v. Lee Way Motor Freight, Inc., 487 F. Supp. 1325, 1330 (N.D. Tex. 1980) (citing cases) (applying Texas law). *But see* Elston-Richards Storage Co. v. Indem. Ins. Co. of N. Am., 194 F. Supp. 673 (W.D. Mich. 1960), *aff'd*, 291 F.2d 627 (6th Cir. 1961) (leading case cited for effects test). *See also* Arthur A. Johnson Corp. v. Indemnity Ins. Co., 164 N.E.2d 704 (N.Y. 1959) (adopting what court said was a hybrid version of cause analysis, focusing more on the event of **loss** than on negligent act or acts causing the **loss)**. During the intervening forty years, cause analysis in general has focused more on the **loss** event than on negligence or malfeasance leading to a **loss** event, making the *Johnson* case a part of the majority approach.

Nor would policyholders want such a liberal approach to counting occurrences, due to deductibles or self-insured retentions that normally far exceed the **loss** of any one element of insured property and often exceed the value of individual liability claims. However, policyholders do have an interest in an approach to counting occurrences that is not too restrictive should they be faced with potentially catastrophic **losses** and limited to a single occurrence of insurance coverage.

Case law on the determination of insurance tends to strike a moderately pro-policyholder balance in close cases. For example, where there are liability claims stemming from a manufacturing problem, a court is likely to find occurrences based on wholesale shipment or episodes of **loss** created by the product rather than calling the product defect a single occurrence stemming from defective design, a problem at the home plant, or mislabeling. n70 The bulk of case law takes a similar approach regarding not only shipments but also injury from defective products and damage to property. n71

n70 *See* STEMPEL, *supra* note 14, § 2.06[h]; JERRY, *supra* note 69, § 65[c]; *see also, e.g., Mich. Chem. Corp.*, 728 F.2d at 374 (applying Michigan law) (number of occurrences in connection with claims arising out of contaminated/mislabeled livestock feed determined according to number of deadly shipments of material to farmers who later became claimants, resulting in four occurrences rather than one occurrence from the mislabeling problem or hundreds of occurrences due to number of dead cattle); Maurice Pincoffs Co. v. St. Paul Fire & Marine Ins. Co., 447 F.2d 204 (5th Cir. 1971) (applying Texas law) (similar facts involving contaminated bird seed; court finds eight occurrences based on sales rather than one occurrence from contamination or 100 occurrences due to 100 dead birds).

n71 *See, e.g.*, Dicola v. Am. Steamship Owners Mut. Prot. & Indem. Ass'n (*In re* Prudential Lines, Inc.), 158 F.3d 65, 77-79 (2d Cir. 1998) (asbestos exposure inflicting bodily harm constitutes multiple occurrences even if root cause of problem is injurious quality of asbestos); H.E. Butt Grocery Co. v. Nat'l Union Fire Ins. Co., 150 F.3d 526, 533 (5th Cir. 1998) (two employee sexual assaults on children are two occurrences, not one occurrence stemming from a single negligent failure to supervise); Stonewall Ins. v. Asbestos Claims Mgmt. Corp., 73 F. 3d 1213 (2d Cir. 1995) (same as *Prudential Lines* regarding asbestos injury); Babcock & Wilcox Co. v. Arkwright-Boston Mfg. Mut. Ins. Co., 53 F.3d 762, 767-68 (6th Cir. 1995) (asbestos injuries were separate occurrences notwithstanding arguable batching language of policy); Am. Red Cross v. Travelers Indem. Co. of R.I., 816 F. Supp. 755, 761 (D.D.C. 1993) (each distribution of contaminated blood was occurrence); Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368 (E.D.N.Y. 1988) (each major shipment of Agent Orange during the Vietnam War a separate occurrence); Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co., 765 A.2d 891 (Conn. 2001) (same approach re asbestos bodily injury);

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Commercial Union v. Porter Hayden Co., 698 A.2d 1167 (Md. 1997); *Arthur A. Johnson Corp.*, 164 N.E.2d at 704. *But see* Owens-Illinois v. Aetna Cas. Sur. Co., 597 F. Supp. 1515 (D.D.C. 1984) (manufacture and sale of insulation that resulted in insured being named in thousands of asbestos-related lawsuits a single occurrence); Hartford Accident & Indem. Co. v. Wesolowski, 305 N.E.2d 907 (N.Y. 1973) (where automobile's careening sideswipe of one car and head-on crash into another is part of continuous uninterrupted path, incident constitutes one occurrence for insurance purposes). Importantly for purposes of the WTC coverage litigation, *Arthur A. Johnson* and *Wesolowski* utilized the same event-causing-injury approach and are fully consistent at law and distinguished by their facts, suggesting that New York law favors the policyholder in this high-profile case.

Where the cause of **loss** is part of a system or policy, courts have found but one occurrence. n72 These precedents provide some support to the WTC insurers that undoubtedly will argue that the September 11 terrorism emanates from but one al Qaida/bin Laden master plan. Although this appears to be true, the fact remains that the plan had two rather discrete and separate episodes: driving one plane into the North Tower, and driving a completely separate plane, operated by another airline and crew, into the South Tower, both planes commandeered in separate hijackings rather than launched as parts of one fleet.

n72 *See, e.g., Appalachian Ins. Co.*, 676 F.2d at 56 (applying Massachusetts law) (employment discrimination resulting from company policies is one occurrence rather than multiple occurrences based on number of affected employees); *Transp. Ins. Co.*, 487 F. Supp. at 1330 (applying Texas law) (same); Interstate Fire & Cas. Co. v. Archdiocese of Portland, 747 F. Supp. 618 (D. Or. 1990) (negligent supervision of priest who committed child abuse is one occurrence) (note that this case and its progeny are contra to *H.E. Butt Grocery Co.*, 150 F.3d at 526 and its line of cases cited in note 71, *supra). Accord* Foust v. Ranger Ins. Co., 975 S.W.2d 329 (Tex. App. 1998) (damage to cotton plantings from single herbicide spraying is one occurrence); Phillips v. Ostrer, 481 So. 2d 1241 (Fla. Dist. Ct. App. 1985) (common plan of fraud is one occurrence despite separate overt acts carrying out fraud). In particular, the WTC insurers may invoke the reasoning of *Bethany Christian Church v. Preferred Risk Mutual Insurance Co.*, 942 F. Supp. 330 (S.D. Tex. 1996), which held that embezzlement by a church employee over a period of time was but a single course of conduct and hence a single occurrence under the relevant employee dishonesty policy.

However, the legal rule enunciated in *Archdiocese of Portland* could have been used to support a finding of multiple occurrences. 747 F. Supp. at 622 ("Application of the cause theory depends upon whether there was one proximate, uninterrupted and continuing cause which resulted in all of the injuries and damage for which the claimant seeks coverage."). By this yardstick, the two separate airline crashes into the North and South Towers, separated by thirty minutes and two different hijackings, would appear to constitute two occurrences by any reasonable definition. The *Archdiocese of Portland* result can most effectively be explained in that there were multiple instances of abuse but a single child victim. *See also* Interstate Fire & Cas. Co. v. Archdiocese of Portland, 35 F.3d 1325 (9th Cir. 1993) (reversing trial court and finding that, notwithstanding single child victim and common modus operandi of perpetrator, instances of injury during different policy periods constituted different occurrences).

Courts have found but one occurrence where the damages are linked to an essentially unbroken chain, such as when a car leaves the road and brushes against a row of parked cars. n73 Insurers will undoubtedly invoke these precedents to argue that the WTC **losses** are the result of a similar sort of careening collision. This argument seems distinctly less persuasive than the "common scheme" argument asserting that the WTC **loss** resulted from a single terrorist initiative. The fall of the towers may have been a chain reaction, but it was indisputably the product of two separate collisions involving two separate vehicles and is thus rather readily distinguishable from the cases involving careening automobiles or a derailed train of many components. n74

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What Was Sept. 11?, LAS VEGAS REV.-J., Nov. 25, 2001, at 4E, col. 6 (noting that the incident has been described in a variety of ways connoting a terrorist or warlike act, as well as with terms such as tragedy, catastrophe, massacre, and disaster; also suggesting that "September 11" itself has now become a noun known to all).

n2 *See* William C. Rempel & Richard A. Serrano, *America Attacked*, L.A. TIMES, Sept. 12, 2001, at A1 (describing attacks and U.S. reaction); David Lieberman, *Extreme heat, 'pancaking' doom towers into rubble; 2,000-degree fire wilts steel; cave-in faster with each floor*, USA TODAY, Sept. 13, 2001, at 1A, col. 3 (describing attacks and destruction); Vernon Loeb, *A Global, Pan-Islamic Network; Terrorism Entrepreneur Unifies Groups Financially, Politically*, WASH. POST, Aug. 23, 1998, at A1 (describing bin Laden's background and terrorist network). *See also* John Seabrook, *The Tower Builder: Why did the World Trade Center buildings fall down when they did?*, NEW YORKER, Nov. 19, 2001, at 64, 68-71 (describing engineering aspects of disaster with extensive focus on Les Robertson, one of the lead structural engineers involved in the building of the towers); James Glanz, *Why World Trade Center Towers Stood, Then Fell*, N.Y. TIMES, Nov. 11, 2001, at B1, col. 3. *See also* James Glanz, *Wounded Buildings Offer Survival Lessons*, N.Y. TIMES, Dec. 4, 2001, at D1, col. 2 (discussing mechanics of fall of 7 WTC, which was not struck by one of the airplanes, and survival of nearby 90 West Street, which was constructed in 1907 using more concrete, which is more resistant to fire but otherwise heavier and not as strong as steel).

n3 *See* Susanne Sclafane, *$ 75* ***Billion?*** *The Guessing Continues*, NAT'L UNDERWRITER (Property & Casualty ed.), Oct. 1, 2001 at 6 (noting that initial lower estimates of damage in the $ 35-$ 50 **billion** range were generally being revised upward by insurers); Alan Cowell & Joseph B. Treaster, *Insurance* ***losses*** *could hit a staggering $ 72* ***billion***, LAS VEGAS SUN, Sept. 24, 2001, at 4C (leading insurance consulting firm estimates that insured **losses** stemming from WTC disaster will approximate $ 72 **billion)**. The Insurance Services Office website provides a relatively current tally of claims of which it is aware arising from the tower attacks. *See* www.iso.com/docs/news.htm.

n4 But the airlines' liability is capped at the amount of their insurance in force. *See* text and accompanying note 45, *infra* (discussing airline assistance legislation enacted by Congress in wake of tragedy). *See also* Michael Freedman, *Waiting in the Wings; Plaintiff lawyers have restrained themselves in the wake of the September 11 attacks. That's about to change*, FORBES, Oct. 29, 2001, at 62.

Nearly all of these policies, like almost all insurance policies, contain some type of war risk exclusion. As discussed below, these exclusions in brief state that the insurance coverage will not apply to **losses** caused by acts of war. War rhetoric emerged immediately in the aftermath of the disaster, with President George W. Bush and other leaders describing the terrorism as an act of war against the United States and addressing the problem of terrorism as the next war that America must prosecute and win to ensure the survival of the nation and its free society. News accounts and programming picked up the theme, frequently referring to "America at War" and a "War on Terrorism." n5 Concerns were consequently raised regarding whether the war risk exclusions in applicable policies would bar coverage for the September 11 **losses.** Many insurers and industry spokes-persons responded to these concerns by stating that the carriers would not invoke the exclusion, an undoubtedly wise public relations move. n6

n5 *See, e.g.*, William C. Rempel & Richard A. Serrano, *America Attacked: The Political Response 'Acts Of War' Bush Vows Full Assault*, L.A. TIMES, Sept. 13, 2001, at A1; Siobhan Roberts, *U.S. Under Attack: Building Twin Towers an Engineering Feat*, WASH. POST, Sept. 12, 2001, at A9.

n6 *See* Theresa Agovino, *Life insurers, regulators move to quickly pay claims: War, terrorism exclusions not invoked*, LAS VEGAS SUN, Sept. 24, 2001, at 4C. *But see* Caroline McDonald,

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n73 *See, e.g.*, St. Paul-Mercury Indem. Co. v. Rutland, 225 F.2d 689 (5th Cir. 1955) (applying Georgia law) (truck hitting train and causing derailment of sixteen cars belonging to fourteen different owners is one occurrence); Olsen v. Moore, 202 N.W.2d 236 (Wis. 1972) (policyholder's car hit two cars in two opposite lanes; one occurrence); *Wesolowski*, 305 N.E.2d at 907 (careening car that hits two other vehicles in rapid succession creates one insured occurrence). *But see* State Farm Mut. Auto. Ins. Co. v. Lawrence, 26 P.3d 1074 (Alaska 2001) (separately injured victims of automobile's path are each entitled to separate policy limits for occurrence under auto policy).

n74 *But see* Great Lakes Dredge & Dock Co. v. City of Chicago, 260 F.3d 789 (7th Cir. 2001) (damage caused by 1993 Chicago flood when tunnel wall breached stems from one occurrence).

Thus, a case like *American Indemnity Co. v. McQuaig* n75 would seem apt precedent. There, the court found that two gunshots by the policyholder that were separated by two minutes were two distinct occurrences. Similarly instructive is *Goose Creek Consolidated I.S.D. v. Continental Casualty Co.*, n76 in which the court found that arson inflicted on two different school buildings constituted two occurrences despite the seeming commonality of the arsonists.

n75 435 So. 2d 414 (Fla. Dist. Ct. App. 1983). *But see* Koikos v. Travelers Ins. Co., 240 F.3d 1331 (11th Cir. 2001) (trial court finds two shots fired in "nearly concurrent" fashion to be one occurrence; viewing trial court as in tension with *McQuaig*, appellate court certifies to Florida Supreme Court question of whether instant case involved one or two occurrence under restaurant owner's liability policy). The Florida Supreme Court heard oral argument on *Koikos* on Nov. 8, 2001. As of this writing, the court has not rendered a decision.

n76 658 So. 2d 338 (Tex. App. 1983). *Accord* Lexington Ins. Co. v. Travelers Indem. Co., Case No. 00-15407, 2001 U.S. App. LEXIS 20575 (9th Cir. Sept. 11, 2001) (arson fires of four separate courthouses by a single dissatisfied litigant constitute four separate occurrences, notwithstanding the single perpetrator and linkage in motive and methodology); State Farm Lloyds, Inc. v. Scott, 960 S.W.2d 781 (Tex. App. 1997) (two gunshots causing injury are two occurrences under liability insurance policy).

In the case cited to reports, the WTC policyholders' counsel argues that New York has clearly embraced a view favorable to policyholders. n77 In *Arthur A. Johnson Corp. v. Indemnity Insurance Co.*, n78 one wall of a building collapsed due to heavy rainfall. Almost an hour later, another wall collapsed with "no suggestion that the collapse of the first wall caused the failure of the second." n79 The Court of Appeals, New York's highest court, considered the events as two separate occurrences, triggering higher property insurance coverage. n80 New York case law on liability insurance is similar. n81

n77 *See* Labaton & Glater, *supra* note 8, at C14:

> Mr. Silverstein's lawyers maintain that New York state law, which governs the case, makes clear that each crash and collapse was a separate insurable event. In 1959, they note, the New York Court of Appeals found that the collapse of two walls in adjoining buildings owned by one person, 50 minutes apart, were distinct events.

Id.

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n78 64 N.E.2d 704 (N.Y. 1959).

n79 *Id.*

n80 *See id. See also* Kuhn's of Brownsville v. Bituminous Cas. Co., 270 S.W.2d 358 (Tenn. 1954) (excavation designed to combine buildings but resulting in the collapse of each building two days apart constitutes two occurrences).

The efficient proximate cause approach is applied with particular emphasis on the temporal element in New York. *See, e.g.*, Album Realty Corp. v. Am. Home Assur. Co., 607 N.E.2d 804 (N.Y.1992) (cause of **loss** is covered break of pipes leading to water damage rather than the freezing that caused pipes to rupture); Bird v. St. Paul Fire & Marine Ins. Co., 120 N.E. 86 (N.Y. 1918) (ship damaged by concussion of explosion rather than the fire that led to the explosion); Home Ins. Co. v. Am. Ins. Co., 537 N.Y.S.2d 516 (N.Y. App. Div. 1989) (electric arcing considered cause of **loss,** leading to coverage even though arcing was product of steam causing electrical equipment to short out). In *Bird*, Justice Cardozo enunciated the approach to insurance causation that prevails in New York and other states to this day and also enunciated the precursors to the modern "reasonable expectations" approach to insurance coverage.

> General definitions of a proximate cause give little aid. Our guide is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract. It is his intention, expressed or fairly to be inferred, that counts. There are times when the law permits us to go far back in tracing events to causes. The inquiry for us is how far the parties to this contract intended us to go. The causes within their contemplation are the only causes that concern us. . . . The same cause producing the same effect may be proximate or remote as the contract of the parties seems to place it in light or shadow. That cause is to be held predominant which they would think of as predominant. A common-sense appraisement of everyday forms of speech and modes of thought must tell us when to stop.
>
> . . .
>
> This view of the problems of causation shows how impossible it is to set aside as immaterial the element of proximity in space. The law solves these problems pragmatically. There is no use in arguing that distance ought not to count, if life and experience tell us that it does. The question is not what men ought to think of as a cause. The question is what they do think of as a cause. We must put ourselves in the place of the average owner whose boat or building is damaged by the concussion of a distant explosion, let us say a mile away . . . when the fire is at all times so remote that there is never exposure to its direct perils, and that exposure to its indirect perils comes only through the presence of extraordinary conditions, the release and intervention of tremendous forces of destruction.

Bird, 120 N.E. at 87. *See also* Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970) (Part I) (recognizing and defining reasonable expectations doctrine).

Applied to the deaths and property damage at Ground Zero, the facts of the attack and resulting damage would tend to indicate a reverse-*Bird* situation. The concussion or impact with the airplane came first and caused significant damage directly flowing from the crash. Greater damage resulted, however, from the resulting fire that became the efficient proximate cause of the demise of the towers.

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n81 *See* cases cited in note 71, *supra*.

Swiss Re argues that the WTC property coverage is not undefined or covered by analogy to the standardized definition of occurrence found in liability insurance policies. Rather, Swiss Re argues that the controlling language is that of the "WilProp2000" form used by the broker. The form defines an "occurrence" as "damages that are attributable directly or indirectly to one cause or to one series of similar causes. All such **losses** will be added together and . . . will be treated as one occurrence irrespective of the period of time or area over which such **losses** occur." n82

n82 *See* McLeod, *supra* note 8, at 27. Although the disputants give different versions of what happened and what constitutes the contract of insurance, at least one observer finds that Swiss Re's claim to incorporating the WilProp2000 form "does not withstand scrutiny." *See* Mark Geistfeld, *Number of Attacks Is Key in Sept. 11 Dispute*, N.Y.L.J., Dec. 21, 2001, at 8. Professor Geistfeld reaches this conclusion based on the uncontested statements in the parties' pleadings and concludes as a matter of law that Swiss Re cannot assert that the contract was incomplete until acceptable wording was agreed upon in light of the nondebated facts of the transaction, insurance placement custom, and Swiss Re's failure to insist upon more restrictive language in the binder that it issued. By contrast, Travelers did insist upon using its form, which contains no definition of "occurrence."

Although this language is more restrictive than a complete absence of definition and appears more restrictive than the standard CGL definition of an occurrence as "substantially the same exposure to the same general conditions," the WilProp2000 language does not foreclose a finding of two occurrences in connection with the WTC **losses.** Even under the language preferred by Swiss Re, the issue is far from clear. In fact, the better argument appears to be that there were two occurrences even if the issue is governed by the form.

Coverage under the WilProp2000 would hinge on whether the collapse of the towers is due to a "series of similar causes." The two aircraft crashes into two separate buildings are clearly not one cause. The two events are similar, but it is far from clear that they are of a series. The modus operandi of the airline hijackings was similar and the two seizures were coordinated. But were they one series? One dictionary defines a "series" as:

> 1 a: a number of things or events of the same class coming one after another in spatial or temporal succession <a concert [series]><the hall opened into a [series] of small rooms> b: a set of regularly presented television programs each of which is complete in itself 2: the indicated sum of usu. infinite sequence of numbers 3 a: the coins or currency of a particular country and period b: a group of postage stamps in different denominations 4: a succession of volumes or issues published with related subjects or authors, similar format and price, or continuous numbering . . . 6: a group of chemical compounds related in composition and structure . . . in series: in serial arrangement. n83

n83 *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1068 (10th ed. 1996).

"Similar" is defined as

> 1: having characteristics in common: strictly comparable 2: alike in substance or essentials: CORRESPONDING <no two animal habitats are exactly [similar] . . . 3: not differing in shape but only in size or position ([similar] triangles> [similar]

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polygons.

SIMILAR, ANALOGOUS, PARALLEL mean closely resembling each other. Similar implies the possibility of being mistaken for each other <all houses in the development are *similar*>. n84

n84 *Id.* at 1093.

"Cause" is defined as "1 a: a reason for an action or condition: motive b: something that brings about an effect or a result . . . an agent that brings something about." n85 The literal definitions of terms in the text of even the more restrictive WilProp2000 definition are not conclusive but suggest that a series of events is something more uniform and tightly bound that the WTC plane crashes of September 11. A series implies replication of the same product in a rather direct and unvarying pattern. For example, when the South Tower collapsed, the falling concrete floors did not comprise 104 separate occurrences. The collapsing floors were of one series as the building pancaked in a domino effect when the steel support gave way and floor upon floor collapsed due to the cascading weight of the concrete. n86

n85 *Id.* at 1082.

n86 *See* Seabrook, *supra* note 2, at 64 (describing WTC construction, design, and engineering, and process by which towers collapsed); James Glanz, *Why Trade Center Towers Stood, Then Fell*, N.Y. TIMES, Nov. 11, 2001, at B1 (same).

By contrast, the two airplane collisions with the buildings were arguably separate events rather than part of the same sequence. The planes took off separately on separate routes. They were seized by separate teams of terrorists. They were flown in separate patterns toward two separate targets (the North Tower and the South Tower). They created two separate fires and had two separate, although similar, destructive effects on the two different buildings. Under these circumstances, it is not unreasonable to view the collapse of the towers as two separate occurrences even under the WilProp2000 language. They could not be mistaken for one another as might an assembly line of bricks that fall in sequence.

One could argue from the dictionary definitions that there is only one occurrence because the WTC **losses** were "caused" by Osama bin Laden and al Qaida. But if this reasoning is accepted, then the Pentagon and Pennsylvania plane crashes are also part of this one occurrence. If all events had been insured by Swiss Re, the insurer could then argue that it was subject to only one policy limit, a result that seems absurd. Although suggesting that all havoc wreaked at the WTC had but one cause (bin Laden) has a less obviously absurd ring to it, it is also a farfetched contention. Even a resourceful, ruthless, and empowered terrorist cannot cause damage until he or she produces a damage-causing event. Even if we give one person or organization all "credit" for the plane hijacking scheme (forgetting that it was carried out by nineteen murderers), the **losses** caused by the scheme stemmed from two separate airplane crashes. If there had been only one plane flown into one tower, there would have been considerably less damage--probably not half as much but nonetheless a distinctly lower order of magnitude of insured **loss.**

In addition, there are other facts suggesting that it is more appropriate to characterize the demise of the towers as more than a single occurrence. For example, 7 WTC, a forty-seven-story structure in the complex, collapsed late the next day "as a result of a fire that apparently ignited shortly after the towers were hit." n87 The Silverstein group did not hold a lease on 7 WTC. n88 If it had, the policyholder arguably would have suffered physical damage from three separate occurrences, suggesting that the North Tower and South Tower collapses were distinct enough to be separate occurrences even under the WilProp2000 form.

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n87 *See* Lieberman, *supra* note 2, at 1A, col. 3 (also noting that One Liberty Plaza, a nearby building, "partially caved in" late in the day of Wednesday, September 12). Although the language of the WilProp2000 form has not been litigated, similarly unifying contract language has been found not to make all asbestos-related injuries one occurrence when they stem from exposure to different sources of asbestos. *See, e.g.*, Babcock & Wilcox Co. v. Arkwright-Boston Mfg. Mut. Ins. Co., 53 F.3d 762, 767-68 (6th Cir. 1995), *cert. denied*, 516 U.S. 1140 (1996). *But see* Geistfeld, *supra* note 82 (arguing that if WilProp2000 form controls, damage to towers is one occurrence resulting from series of related terrorist attacks). As reflected in the discussion in this article, I disagree with Professor Geistfeld on this point. The hijacking terrorism directed at the towers was sufficiently separated that it does not constitute the same series of events in the manner of earthquake aftershocks or gusts of the same **hurricane.**

n88 *See* Complaint of World Trade Center Properties LLC v. ACE Bermuda Ins. Ltd. & XL Ins. Ltd., No. 01 CV 9731 (Nov. 5, 2001) at PP5-10 (The Silverstein group leased the buildings at 1, 2, 4, and 5 WTC.).

If the WilProp2000 form applies, there is a rub for the policyholder, however. If a court finds both the insurer and policyholder interpretations of this more restrictive language to be reasonable, the hornbook rule of insurance law in New York as elsewhere is that uncertainties are resolved against the drafter, which is usually the insurer or its agents. n89 But if Swiss Re is correct, the Willis form definition of an occurrence may be viewed as language chosen by the policyholder through its agent, the broker, n90 in which case the insurer could find itself in the rare position of being able to utilize the ambiguity principle in its favor.

n89 *See* STEMPEL, *supra* note 14, § 4.08.

n90 A broker is usually regarded as the agent of the policyholder for most purposes, although the broker is often considered the insurer's agent for purposes of processing premium payments, notices, or claims. *See* STEMPEL, *supra* note 14, § 6.01. Despite the general rule, a broker's status may hinge on the facts of the instant case as to the broker's duties, responsibilities, and source of compensation. *Id.*

Further complicating things is that New York is what one might call a weak or, at most, moderate, ambiguity state (as opposed to a strong ambiguity state), i.e., one where the court invokes the ambiguity doctrine only as a last resort when other indicia of meaning fail to clarify the construction of the policy. n91 In the WTC dispute, a court may find that negotiation conduct and the context of the risk placement argue more strongly in favor of one side or the other. For example, a court might find that in light of premiums paid relative to similar risks, the parties tacitly intended to treat the $ 3.6 **billion** figure as the absolute aggregate limit of liability for the risk. Alternatively, there may be no external indicators of the outer limit of coverage or the degree of separation required for separate occurrences.

n91 *See* STEMPEL, *supra* note 14, § 4.08[g] (describing nuances of different versions of ambiguity analysis and dividing states into strong, moderate, and weak versions of the ambiguity approach).

Elements of the "drafting history" of the standard occurrence definition found in the CGL policy, however, suggest that the notion of a "series" of "related" events is what insurers sought to embody in the basic standard form, n92 which implies that the WilProp2000 really has no more restrictive definition of the number of occurrences than does the standard CGL. If this is the case, a policyholder could claim two occurrences in the WTC property **loss** rather than one.

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n92 *See* ANDERSON, STANZLER & MASTERS, *supra* note 67, § 9.02[A], at 9-10 (quoting INA executive Lyman J. Baldwin that 1966 definition of occurrence, which used "accident or exposure to conditions" language, was designed to treat as one occurrence a "related series of events" and providing additional drafting history).

Another means for assessing the debate over the more restrictive occurrence definition is to ask whether the two plane crashes wrought distinct damage. n93 It appears that they did, a fact that suggests that there were two occurrences rather than one. Although the September 11 tragedy can be laid at the feet of a particular heinous plot by a seemingly coordinated group of psychotics, the fact remains that the incident would have been far different without the second airplane crash. Insurers can perhaps argue that, as a matter of physics and fact, the collapse of the North Tower (that was a foregone conclusion after the first collision) would have brought down the South Tower. This possible argument seems inconsistent with the facts. Each tower came down independently and at separate times due to separate airplane attacks and separate resulting fires. Although the initial collapse of the South Tower shook the earth, the North Tower remained standing for another half-hour and appeared to collapse because fire weakened the steel support, not because the earlier fall of the South Tower had undermined the integrity of the North Tower (although the earlier collapse hardly helped). Depending on the factual evidence adduced if the coverage dispute is tried, the court may find that the second tower would have survived with comparatively minimal damage if not for the second aircraft strike. If that is the scientific case in fact, this strongly argues for a finding of two occurrences. Conversely, a finding that the fall of the one tower would have surely brought down the second tower even in the absence of a second airplane strike argues for the insurer's position, but that position seems undercut by the observable facts of the disaster.

n93 *See* Mazier, *supra* note 64, at 46, 50 (paraphrasing assessment of insurer attorney Laurie Kamaiko that courts could consider whether one airplane could have caused all damage, whether collapse of WTC 7 "hours after the twin towers fell" was distinct occurrence, and relationship between tower collapses and damage to particular adjacent property).

IV. THE HISTORY AND RATIONALE OF THE WAR RISK EXCLUSION AND RELATED EXCLUSIONS

Insurance, of course, is simply a form of risk shifting and risk spreading among people. n94 Modern risk management has evolved from merchants dividing precious goods among horses or ships (so that the entire cargo would not be lost if one went down) to sophisticated interlocking insurance products designed to provide indemnity and often defense if property is lost or the policyholder sued. n95

n94 *See* STEMPEL, *supra* note 14, § 1.01.

n95 For a brief but lively review of insurance history, see ANDREW TOBIAS, THE INVISIBLE BANKERS (1982). For more extensive historical background, see ANTHONY BROWN, LLOYD'S OF LONDON (1975). *See also* STEMPEL, *supra* note 14, § 1.01 at 1-4; EMERIC FISCHER & PETER NASH SWISHER, PRINCIPLES OF INSURANCE LAW xxxvi (2d ed. 1995); WILLIAM H.A. CARR, PERILS NAMED AND UNNAMED: THE STORY OF THE INSURANCE COMPANY OF NORTH AMERICA (1966) (sketching history and development of insurance industry).

Insurers, of course, make their money by distributing risk. The very reason for having insurance is to spread risk. People or businesses purchase insurance as a way of spreading risk among a wide group of similarly situated policyholders. By doing this, the policyholder agrees to accept a certain **loss** (the payment of the premium) in return for obtaining protection should it experience a large but unpredictable **loss.** The nature of insurance realistically requires that the happening of insured events--or at least their severity and time

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of occurrence--be contingent and comparatively isolated rather than certain or widespread in order to create an environment in which private insurers will want to operate and in which other entities will want to purchase insurance.

The ability to give up a comparatively small amount of certain **loss** (the premium) in return for a large amount of protection (the policy limits) should a large **loss** occur makes insurance an attractive concept. Insurers are able to offer this product by virtue of spreading the risk of the contingent **loss** (e.g., fire, **hurricane,** flood) among a large group of policyholders. More important, the group (or risk pool) of policyholders must be sufficiently large and variegated that the pool of policyholders as a whole is not too greatly damaged by any one incident or series of related incidents.

Insurers seek to cover "uncorrelated" risk and to avoid "correlated" risk. For example, providing homeowners' insurance to more than a million policyholders randomly distributed across the continental United States creates a risk pool upon which a property insurer can profitably operate, provided that it charges adequate premiums and otherwise engages in sound underwriting. Because risk distribution and pooling are so central to insurance, the underwriting process seeks to achieve a large but sound and uncorrelated pool of policyholders. Insurance policies are written to provide defenses to coverage and grounds for rescission should the policyholder's conduct tend to undermine maintenance of a sound risk pool.

Property insurance forms commonly exclude war risks n96 or similar dangers. n97 Liability policies typically contain a similar exclusion but may provide that the exclusion "applies only to liability assumed under a contract or agreement." n98 The purpose of these exclusions is to prevent the insurer from becoming responsible for the coverage of a large and correlated risk. For example, if war comes to Elm City, it will bring areawide property damage, thereby destroying the risk spreading and law of averages used by insurers to make money. Even a bad hailstorm or tornado will usually cause only confined or episodic damage. By contrast, a peril such as war tends to bring widespread damage to all policyholders in a region over an extended period of time. Life insurance policies frequently exclude war as a cause of death so that they are not faced with an avalanche of claims should the population be mobilized. Courts have enforced well-drafted war risk exclusions where the insurer has been careful not to mislead the policyholder or were the policyholder is reasonably sophisticated. Because most courts look for the cause nearest the **loss** to determine if coverage exists, policyholder counsel may be able to turn the confusion of riot-related or perhaps even war-related destruction to their advantage by arguing that the real cause of the **loss** was fire or simple theft, smoke damage, water damage, etc., that may merely have had its initial roots in the excluded event. n99

n96 *See* text and accompany notes 19-25, *supra* (reproducing war risk exclusionary language and reviewing case law). Commercial Property Policy No. CP 10 20 06 95 (ISO 1994), *reprinted in* POLICY KIT, *supra* note 17, at 174.

n97 Policies often exclude riot-related damages as well. Two interesting and notable riot exclusion cases involved policies issued in connection with famed stuntman Evel Knievel's 1974 attempted motorcycle jump of the Snake River Canyon near Twin Falls, Idaho. *See* Foremost Ins. Co. v. Putzier, 606 P.2d 987 (Idaho 1980); Foremost Ins. Co. v. Putzier (Antonio Guanche), 627 P.2d 317 (Idaho 1981). The basic commercial property policy, even one that covers riot and looting **losses,** usually excludes **losses** for:

> (1) War, including undeclared or civil war;
> (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

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(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

See Commercial Property Policy No. CP 10 30 06 95 (ISO 1994), *reprinted in* POLICY KIT, *supra* note 17, at 222.

n98 *See* Commercial General Liability Policy No. CG 00 01 07 98 (ISO 1997), *reprinted in* POLICY KIT, *supra* note 17, at 461.

n99 *See* STEMPEL, *supra* note 14, at ch. 7. Nuclear Incident exclusions provide another example of an exclusion designed to further the insurer's goal of covering varied and uncorrelated risk in the nuclear disaster. This exclusion is usually made part of insurance policies by endorsement and is found in both property and liability policies. The exclusion provides that the insurance does not apply to any **loss** resulting from "nuclear material." *See* CGL Endorsement No. IL 00 21 04 98 (ISO 1997), *reprinted in* POLICY KIT, *supra* note 17, at 486.

In a similar vein, property insurers typically exclude coverage for flooding or "earth movement" (a/k/a earthquakes or mudslides) for reasons of protecting the risk pool. Specific flood policies are available from the federal government, n100 and earth movement coverage may be obtained by endorsement or through government-supported insurance. n101 The additional coverage is available at an additional premium and is made feasible by the widespread risk underwriting made possible by the government or an alliance of insurers. These types of arrangements are not being urged to permit insurers to offer coverage against terrorist acts in the future. In addition, insurers, particularly liability insurers, may exclude certain risks not so much because they are universal in scope when they take place but because they occur with sufficient frequency and severity so as to make underwriting and pricing very difficult. For example, the standard CGL policy, in a reaction to poor claims experience in the past, now broadly excludes coverage for pollution liability and often excludes asbestos-related claims. n102

n100 *See* National Flood Insurance Act of 1968, 42 U.S.C. §§ 4011-4128 (2000).

n101 *See* text and accompanying notes 195-205, *infra* (discussing government programs to aid catastrophic insurance markets).

n102 *See* STEMPEL, *supra* note 14, § 14.11.

The war risk exclusion thus has been a staple of insurance for decades or even centuries and has been used in some form even before its rationale was firmly articulated by insurance theory. Disputes over the effect of hostilities on coverage have been part of the insurance scene since at least the days of Lloyd's Coffee House and the Barbary Pirates. As the scope and lethality of war have increased, there have been further skirmishes between policyholder and insurer with mixed results. As discussed below, courts construing the common war risk exclusions tend to have protected policyholders, denying coverage only when the **loss** is quite clearly closely intertwined with military activity. Where the **loss** is only a collateral consequence of hostilities, coverage has usually been found.

V. KEY CASES CONSTRUING THE WAR RISK EXCLUSION

During World War I, commercial ships were occasionally the collateral victims of the war for control of the shipping lanes. **Losses** ensued, resulting in a leading case, *Queen Insurance Co. v. Globe & Rutgers Fire Insurance Co.* n103 in which the Court found that the collision of two commercial vessels was not excluded by the war risk exclusion even though the ships were part of two separate convoys bringing supplies to assist the war effort of the Allies.

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Because the commercial ships brought each other down and no military craft were involved, the Court found the exclusion inapplicable even though the convoys would not have been sailing "but for" the war. n104 Furthermore, the convoys were traveling in the dark without lights in order to avoid detection and one convoy had changed course because of an earlier submarine attack. n105 No matter; the collision itself was still not considered a sufficiently direct war casualty even though the policy language at issue was quite broad in that it excluded "all consequences . . . of hostilities or warlike operations." n106 This case rather neatly illustrates the insurance law distinction between a cause in fact and a sufficiently proximate cause (in time or dominance) to trigger or preclude insurance coverage. n107 The *Globe & Rutgers* Court relied on this principle and saw that it was well established in both American and English insurance law. n108

n103 263 U.S. 487 (1924).

n104 Writing for the Court, Oliver Wendell Holmes noted that the insurer had urged "with plausibility that the collision would not have happened but for the proceedings thus prescribed as an essential part of the conduct of war." Holmes also noted (but ultimately rejected) the insurers' argument that the purpose of policy and the differing nature of war risk argued for application of the exclusion. "[The insurer] states that, while the premiums upon war risk insurance were greatly increased, those upon marine risks underwent but little change." *See id.* at 491-92.

n105 The Court's description of the scene of the **loss** certainly sounds more like something out of a John Wayne war movie than business as usual in the shipping industry:

> The Napoli sailed from New York for Genoa with a cargo of which a part was intended for the Italian Government and a small part was munitions of war. All of it was contraband. At Gibraltar she joined a convoy, as it was practically necessary to do although nor [sic] ordered by the military powers. The convoy sailed with screened lights, pretected [sic] by British, Italian and American war vessels, and navigated by an Italian commander on the Napoli, subject to the command of a British captain as the senior naval officer present. . . . At about midnight July 4 another convoy similarly commanded met this one head on. It was seen only a very few minutes before the meeting, there was much confusion, and one of its vessels, the Lamington, a British steamship, struck the Napoli and sank her.

Id.

n106 *Id.* at 490. In another case close in time, where the direct and immediate cause of the **loss** was seizure, the Court had no difficulty finding for the insurer. *See* Standard Oil Co. v. United States (the Llama), 267 U.S. 76 (1925) (proximate cause of **loss** was seizure from war). *Accord* Magoun v. New England Marine Ins. Co., 16 F. Cas. 483 (No. 8,961) (C.C. Mass. 1840) (Storey, C.J.) (seizure by foreign authorities excluded from coverage).

n107 *See* STEMPEL, *supra* note 14, § 7.02; JERRY, *supra* note 69, § 67. *See, e.g.*, Shinrone v. Ins. Co. of N. Am., 570 F.2d 715 (8th Cir. 1978) (applying South Dakota law); Graham v. Pub. Employees Mut. Ins. Co., 656 P.2d 1077 (Wash. 1983).

n108 *See Globe & Rutgers*, 263 U.S. at 492:

> The common understanding is that in construing these policies we are not to take

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> broad views but generally are to stop our inquiries with the cause nearest to the **loss.** This is a settled rule of construction, and, if it is understood, does not deserve much criticism, since theoretically at least the parties can shape their contract as they like.

See also Britain Steamship Co. v. The King, 1.A.C. 99 (1921), *affirming* 2 K.B. 670 (1919). For a more recent application of this principle in settings, *see* York Ins. Co. v. Williams Seafood of Albany, Inc., 544 S.E.2d 156 (Ga. 2001) (cause of **loss** is covered sinkhole collapse rather than excluded flood that led to collapse); Medine v. Geico Gen. Ins. Co., 748 So. 2d 532 (La. Ct. App. 4th Cir. 1999) (parade exclusion does not apply when vehicle leaves parade and automobile mishap occurs; injury caused by ordinary accident rather than parade accident).

For a detailed discussion of the treatment of efficient proximate cause in New York, see footnote 80, *supra*.

Life insurance cases arising out of World War I were consistent with this approach: if life was lost due to an accident, coverage obtained even if the activity was spurred by the war effort; but where life was lost as a direct result of a hostile act, the war exclusion applied. n109

n109 *See, e.g.*, Stankus v. N.Y. Life Ins. Co., 44 N.E. 2d 687 (Mass. 1942); Vanderbilt v. Travelers' Ins. Co., 184 N.Y.S. 54 (N.Y. 1920); Riche v. Metropolitan Life Ins. Co., 84 N.Y.S.2d 832 (Sup. Ct. Cayuga Co. 1948) (presenting interesting twist in application of concept of efficient proximate cause; insured dies from antiaircraft fire while flying military mission; policy had aeronautic exclusion but not war risk exclusion; court held for coverage, finding that insured died of covered cause (war) and not the uncovered cause of ordinary plane flight).

Also during World War I, there arose disputes between policyholders and life insurers as to coverage when servicemen afflicted with influenza during the great epidemic of 1918-19 died. Decisions in these cases divided, as one court summarized:

> It is . . . recognized that there is a diversity in the holdings, arising not because one group of states follows one line of decision and another group follows another, but because of the difference in the wording of the policies themselves. The cases fall, broadly, into two groups, one holding that the *status* of the insured as a soldier or sailor is determinative, the other that the *cause of death* is determinative. n110

n110 *See* Coit v. Jefferson Standard Life Ins. Co., 168 P.2d 163, 164 (Cal. 1946) (emphasis in original) (reviewing influenza death cases of the World War I era).

During World War II, similar disputes arose and there were also a number of life insurance claims centering on the issue of whether the death at issue was the result of war or another, insured factor. n111 Life insurers generally enjoyed some success defeating claims related to the death of military personnel. n112 But life insurers were generally unable to take advantage of the exclusion after hostilities ceased in 1945, even if military personnel died under circumstances occasioned by the war effort (e.g., the argument that the decedent would never have been in Europe to have a mishap if not for the war). n113 The same approaches governed Korean War insurance claims notwithstanding the fact that war was never declared. n114

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Act-of-War Determination Will Influence Coverage, NAT'L UNDERWRITER, Sept. 17, 2001, at 5 ("The question of the day for the insurance industry and its policyholders might not simply be how many **billions** of dollars will be sustained in **losses** from last week's terrorist attack on the World Trade Center towers, but whether the action is proclaimed to be an act of war.") (suggesting that property insurers are waiting for more definitive account of persons or organizations responsible and that war risk exclusion may be invoked if tower attacks can be said to be the work of a hostile nation).

Although insurer pronouncements of noninvocation of the war risk defense to coverage are comforting in the short term, the events of September 11 are probably only the beginning of further examination of the exclusion's role in policies rather than an end to uncertainty. First, to state the obvious, each insurer is different and each policy is different (even though standardized language is characteristic of the industry). Some insurers that issued policies containing standard war risk exclusions may refuse to follow the insurance industry's announced refusal to invoke the exclusion. n7 Other insurers may have variants of the war exclusion or policies that they view as excluding terrorism or attacks other than conventional war. As a result, coverage litigation may soon follow.

n7 *See* McDonald, *supra* note 6, at 5.

The author anticipates not only questions about the war risk exclusion, but also countless case-specific disputes about the valuation of lost property, the applicability of business interruption coverage, and the legitimacy of claims. Insurers fear an avalanche of fraudulent or inflated claims. In perhaps the most publicized early coverage dispute, Swiss Re filed suit seeking a declaratory judgment that the September 11 damage to the towers was one "occurrence" rather than two, which would obligate the company to cover "only" an estimated $ 3.6 **billion** in property **losses** rather than the $ 7.2 **billion** sought by developer Larry A. Silverstein, who holds a ninety-nine-year lease on the affected area. n8

n8 *See* Stephen Labaton & Jonathan D. Glater, *Twin Towers At the Center of Legal Brawl*, N.Y. TIMES, Nov. 3, 2001, at C1 ("In the suit [Swiss Re] seeks to limit how much it will have to pay to cover the destruction of the twin towers. Lawyers representing the various parties involved agree that more lawsuits are likely to follow."). *See also* Douglas McLeod, *Swiss Re sues over WTC **loss** amid debate on policy terms*, BUS. INS., Oct. 29, 2001, at 1 (providing more extensive background on insurance coverage issues in the litigation).

Beyond the immediate questions of coverage and construction, the events of September 11 at a minimum suggest that insurers must reevaluate the efficacy of the standard war risk exclusion and their underwriting practices and reserves in light of the new face of terrorism. Perhaps as much as $ 100 **billion** of insurance capital was effectively eliminated on September 11 along with the lost towers, although the final tally will be slower in coming, as will the final payment to all claimants. Only serious **hurricanes** or earthquakes hitting populated areas come close to rivaling these sorts of insurance **losses.** Notwithstanding insurer assurances of adequate capacity to pay September 11 claims, n9 concerns remain. At a minimum, the September 11 tragedy has put pressure on insurers, including the financial health of particular carriers and the utility of common efforts to increase capacity such as reinsurance, fronting, and the use of captive insurers. n10 If insurance underwriting and coverage remains unchanged and terrorists follow their "success" of September 11 with further similar efforts, the **losses** could be staggering and industry decimating. Insurers have recognized this and have began to talk about a federally backed risk pool in the aftermath of the attacks, n11 with support from the Bush administration and others in government.

n9 *See* Lisa Howard & Susanne Sclafane, *Reinsurers Face 'Moment of Truth,'* NAT'L UNDERWRITER (Property & Casualty ed.), Oct. 1, 2001, at 23; Agovino, *supra* note 6, at 4C.

n10 *See* Caroline McDonald, *Terrorist Attacks Magnify Effects of Hardening Market*, NAT'L

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n111 The presence of war risk exclusions in life insurance policies prompted Congress to enact the Servicemen's Group Life Insurance Act in 1965. Veterans of conflicts prior to the Vietnam War were obviously unaided by the Act. Even today, the maximum death benefit is only $ 20,000. *See* 38 U.S.C. §§ 765-776 (2000).

n112 *See, e.g.*, New York Life Ins. Co. v. Bennion, 158 F.2d 260 (10th Cir. 1946) (deaths arising out of Pearl Harbor attack excluded under war risk provisions of policy even though Japan did not formally declare war against United States before attacking). Captain Mervyn Bennion was in command of the Battleship West Virginia at Pearl Harbor and died at his post when hit by bombs dropped by Japanese military planes in an attack on a U.S. military installation. *See id.* at 261. It would be hard to imagine a more direct **loss** from an act of war. Nonetheless, Capt. Bennion's estate received the support of a dissenting judge, who found the exclusion insufficiently clear to preclude coverage. *See id.* at 266 (Huxman, J., dissenting) (War "is a word of many meanings. It cannot be said that it has but a single meaning. . . . In a legal sense, we are not and cannot be at war with another nation until Congress has declared war."). *Accord* Caruso v. John Hancock Mut. Life Ins. Co., 53 A.2d 222 (N.J. 1947). *Contra* Pang v. Sun Life Assur. Co., 37 Haw. 208 (1945) (death of fireman stationed near Pearl Harbor due to bombing was not death caused by act of war).

A closer case for the exclusion was presented in *Coit*, 168 P.2d at 163, where the insured soldier died in an army hospital after an appendectomy. The *Coit* court nonetheless found this to be a death incident to service during time of war and denied coverage. *But see id.* at 170 (Carter, J., dissenting) (finding that although decedent was in military service, his death was "*in no way connected with, caused by or the result of that military service or war*" and that policy language excluded only war risks, not risks causing injury to soldiers). *See also* Laurendeau v. Metropolitan Life Ins. Co., 71 A.2d 588 (Vt. 1950) (policyholder denied double indemnity recovery pursuant to policy terms where insured killed in 1943 automobile accident while on furlough).

n113 *See, e.g.*, Stinson v. N.Y. Life Ins. Co., 167 F.2d 233 (D.C. Cir. 1948) (exclusion loses force after actual fighting stops even though there had not been a formal declaration of the end of hostilities; insurer must provide coverage for soldier who accidently fell to death from window of Hotel du Nord in Reims, France, on October 2, 1945, five months after German surrender of military forces). Where death results from combat, the war risk exclusion generally applies irrespective of other legal issues surrounding the theater of war. *See, e.g.*, Carson v. Equitable Life Assur. Soc., 317 A.2d 474 (Conn. Super. Ct. 1973) (no coverage where soldier died during combat on reconnaissance patrol in Vietnam that occurred while cease-fire truce was supposed to be in effect). *But see Riche*, 84 N.Y.S.2d at 832 (where insurer issued policy with flight risk but not war risk exclusion; court construes exclusion strictly against insurer and declares coverage where insured killed by enemy anti-aircraft fire). *See also* Pearce v. Am. Defender Life Ins. Co., 330 S.E.2d 9 (N.C. App. 1985) (insurer required to cover death stemming from 1979 training flight accident largely on grounds of estoppel due to unclear communication with opinion not definitive as to interpretation of war risk exclusion).

n114 *See, e.g.*, Goodrich v. John Hancock Mut. Life Ins., 234 N.Y.S. 587 (N.Y. App. Div. 1962) (Korean Conflict clearly war and soldier's death, although result of accidental discharge of firearm rather than conflict with enemy, was incident to military service; case remanded on issue of whether war exclusion was sufficiently prominent in policy as required by state insurance regulations); Lynch v. Nat'l Life & Accident Ins. Co., 278 S.W.2d 32 (Mo. 1955) (war exclusion enforced against soldier claiming benefits after being maimed and losing foot in Korean Conflict); Stanbery v. Aetna Life Ins. Co., 98 A.2d 134 (N.J. Super. Ct. 1953). As the *Goodrich* court put it:

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> We are not so far removed from reality but to recognize that in the language of the average person, the conflict in Korea was considered a war, not by declaration but by the fact that our armed forces were sent there and participated in the fighting and our solders were wounded and died on the battlefields of Korea.

World War II property insurers, acting under the precedent of *Rutgers & Globe*, assumed that commercial **losses** were covered even if craft were operating under blackout mode or attempting to evade warships. n115 This rationale appeared to hold during the Vietnam War, where one court found coverage when a commercial aircraft collided with a military plane. Although the planes were over Vietnam only because of the conflict, the efficient proximate cause of **loss** was deemed due to air travel rather than to an act of war and the exclusion did not bar coverage. n116

n115 *See* Susan Massman, *War Risk Exclusion Legal History Outlined, FC&S On Lines Column*, NAT'L UNDERWRITER (Property & Casualty ed.), Sept. 24, 2001, at 40, 45.

n116 *See* Aircraft Int'l, Inc. v. United States, 460 F.2d 1065 (5th Cir. 1972). *See generally* Jason B. Libby, *War Risk Aviation Exclusions*, 60 J. AIR. L. & COM. 609 (1994-95); Sidney I. Simon, *The Dilemma of War and Military Exclusion Clauses in Insurance Contracts*, 19 AM. BUS. L.J. 31, 34 (1981). Northwest Airlines, Inc. v. Globe Indem. Co., 225 N.W.2d 831 (Minn. 1975)) (the famous "D.B. Cooper" hijacking of an airplane followed by the perpetrator's parachuting into the Washington state wilderness with ransom money provides another example of a failed effort to assert the war risk exclusion and its cousins).

One commentator has read *Globe & Rutgers* as demonstrating that "courts will relegate the war exclusion to a nonperforming role if it can be shown that damage to covered property can otherwise be attributed to some specified cause of **loss.**" n117 If this assessment is literally correct, policyholders who suffered **losses** by fire or other perils that emerged only as a consequence of the attack (and not from the initial impact) may be able to successfully argue that they are covered even if the September 11 terrorism is deemed an act of war (which, as discussed below, it is not). This seems plausible for policyholders on the periphery of Ground Zero and for policyholders with **losses** more attributable to fire than to the physical impact of the airplanes. It took an hour or so of raging fire culminating in building collapse (both covered causes of **loss** in the standard commercial property form) to cause the **loss** of the great bulk of the towers. However, efficient proximate cause analysis may not provide an avenue for coverage for **losses** caused by the initial airplane impacts if the crashes come within the war risk exclusion.

n117 *See* Massman, *supra* note 115, at 45.

In what appears to be the first reported case in a hijacking coverage dispute, an intermediate appellate state court ruled that a plane hijacked to Cuba was stolen rather than commandeered in a war. Hence, the theft coverage of the plane was applicable. The war risk exclusion was never seriously discussed as the insurer defended largely on the grounds that the plane had been borrowed rather than permanently taken. n118 The Florida Supreme Court reached this holding even though the hijacking had elements of military engagement. n119 This holding is consistent with the definitive modern case on the exclusion in *Pan American World Airways v. Aetna Casualty and Surety Co.*, n120 in which the policyholder's airplane was hijacked and later totally destroyed as a result of armed hijackers claiming to be acting on behalf of a Palestinian liberation group motivated by political disputes with Israel.

n118 *See* Am. Fire and Cas. Co. v. Sunny S. Aircraft Serv., Inc., 151 So. 2d 276 (Fla. 1973).

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n119 After the passenger hijacked the small plane, the pilot was forced to land in Cuba in a pasture. When the pilot attempted to return to the United States, the plane was attacked by Cuban military aircraft and damaged by the gunfire. The pilot "escaped and made a forced landing. Rebel forces [apparently paramilitary troops backing the then-insurgent Fidel Castro rather than the soon-to-be deposed Juan Battista, but the opinion is ambiguous on this point] hid him and the plane for several days, after which he took off and returned to his point of departure in Broward County. *See id.* at 277.

n120 505 F.2d 989 (2d Cir. 1974) (applying New York law).

In *Pan Am*, the district court found the policy's version of the war exclusion inapplicable, as were the exclusions for government seizure and rebelling or insurrection. n121 The Second Circuit affirmed in an opinion that is a tour de force in limiting the reach of these war risk exclusions. n122 The *Pan Am* court described the hijack and the plane's odyssey and ultimate destruction by members of the Popular Front for the Liberation of Palestine (PFLP). n123 Ironically, the PFLP action, like the terrorist operations of September 11, involved efforts to seize multiple planes at approximately the same time. n124 Unlike the September 11 tragedy, the PFLP hijacked planes were "only" removed and destroyed rather than deployed as suicide bombs. Passengers were used as hostages as the PFLP bargained for the release of prisoners but this aspect of the drama was apparently resolved without any deaths.

n121 *See* Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 368 F. Supp. 1098 (S.D.N.Y. 1973).

n122 *Pan Am*, 505 F. 2d at 998.

n123 *Id.* at 998-1000.

n124 *Id.* at 999. On the same date as the Pan Am hijacking, September 6, 1970, the PFLP hijacked TWA Flight 741 originating in Frankfurt and Swissair Flight 100 originating in Zurich. An attempt to hijack El Al Flight 219 was "foiled in the air by El Al security personnel." On September 9, a BOAC airplane was also hijacked as part of this connected activity.

The *Pan Am* court reasoned that the war risk exclusions, although lengthy, were ambiguous regarding the appropriate characterization of this event: whether the two gun-toting plane thieves were garden-variety hijackers, soldiers in an ongoing war of liberation, part of a "seizure" by a quasi-government, an incident of insurrection, or something else. Faced with the uncertainty, the court applied the ambiguity principle to find for the policyholder. n125 On a deeper level, the court assessed the language, purpose, and background of the war risk exclusions and concluded that they were not intended to apply to this type of event. n126

n125 *See id.* at 999-1001.

n126 See *id.* at 999-1004.

Of particular interest to the court was the history of hijacking and the lack of specific exclusionary language in the all-risk policies held by Pan Am. n127 In particular, the availability of specific hijacking exclusions used by insurers prompted the court to make the negative inference that the standard war exclusion was therefore not a hijacking exclusion unless the plane was taken by uniformed army personnel or a more obviously paramilitary group for a purpose resembling more traditional warfare activity. n128 Insurers were aware of both the terrorist risk and the availability of specific exclusions to bar coverage of the risk, prompting the court to conclude that when Pan Am's insurers "failed to exclude 'political risks in words descriptive of today's world events,' they acted at their own peril." n129

n127 See *id.* at 1000 (noting that "between 1960 and 1970 over 200 commercial aircraft

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were hijacked, eight of which belonged to Pan American"). In addition, the PFLP in 1969 hijacked a TWA plane to Damascus and damaged it through detonation. "The [Pan Am] all risk insurers took no steps to clarify their exclusions even after the Damascus **loss** made it clear that the London market did not consider the PFLP hijackings to be within the terms of [the standard war risk exclusions]."

n128 *See id.* at 1000-01 (noting availability of London market forms for aviation policies that specifically excluded wrongful seizure by nongovernment entities, the AV-48 endorsement, and the AV-48A endorsement that specifically excluded "hijacking" and "acts for political or terrorist purposes").

n129 *Id.* at 1001.

The *Pan Am* court also assessed the case in light of the well-established insurance law doctrine of looking to the "efficient proximate cause" of the **loss** to determine coverage. n130 By analogy, the court found Pan Am's **loss** similar to the **loss** in *Globe and Rutgers*, n131 in which the Court refused to bar coverage where the **loss** was only an indirect consequence of hostilities rather than a direct casualty of military activity directed at the policyholder. n132

n130 *See id.* at 1006-07. The *Pan Am* court used the arguably disparaging term "mechanical" to describe the historically narrow New York law focus on temporal proximity between cause and **loss.** *See id.* at 1007-08. Whatever the apt term, the Second Circuit was sure that "for insurance purposes, the mechanical cause of the present **loss** was two men, who by force of arms, diverted Flight 093 from it intended destination." *Id.* at 1007.

n131 *See* Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co., 282 F.2d 976 (2d Cir. 1922), *aff'd*, 263 U.S. 487 (1924), discussed at text and accompanying notes 104-114, *supra*, and by the *Pan Am* court. *Pan Am*, 505 F.2d at 1007.

n132 *See Pan Am*, 505 F.2d at 1005-07 (citing Britain S.S. Co. v. The Kin, 2 K.B. 670 (C.A. 1919), *aff'd*, 1921 1 A.C. 99 (1920) (convoy lost because it took different route to avoid hostilities); Ionides v. Universal Marine Ins. Co., 143 Eng. Rep. 445 (C.P. 1863) (ship running aground because Confederate military forces had extinguished Cape Hatteras lighthouse was covered marine peril rather than excluded war peril); Standard Oil v. United States, 340 U.S. 54 (1950) (commercial ship's collision with minesweeper was covered marine peril even though minesweeper was in harbor only because of war activities necessitating patrol for mines)). *See also* Welt v. Conn. Mut. Life Ins. Co., 48 N.Y. 34 (1871), *cited in Pan Am*, 505 F.2d at 1013 (death of insured during railroad robbery covered because four uniformed perpetrators could not be established as soldiers in Civil War conflict raging at time of decedent's death). *Contra* Int'l Dairy Eng. Co. v. Am. Home Assur. Co., 352 F. Supp. 827 (N.D. Cal. 1970), *aff'd*, 474 F.2d 1242 (9th Cir. 1973) (warehouse fire in Vietnam ignited by U.S. military parachute flare excluded war risk because of direct flow from hostile military act); Hamdi & Ibrahim Mango Co. v. Reliance Ins. Co., 291 F.2d 437 (2d Cir. 1961) (**loss** of auto parts due to mortar shelling during Battle of Haifa excluded war risk **loss)** (both cases cited in *Pan Am*, 505 F.2d at 1017).

Although the terms "insurrection," "rebellion," or "usurped power" all connote something less widely and militarily disruptive than a "war," n133 the *Pan Am* court found that even these lesser terms required more than the isolated acts of even a fairly large number of miscreants. Rather, there must be an effort to depose or replace a government and to offer something of an alternative (although anarchy might in some circumstances constitute the alternative). n134 Because the court found that the PFLP lacked sufficient indicia of a sovereign entity, it also found that the taking of the Pan Am plane constitute an excluded "seizure." n135

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n133 *See* Home Ins. Co. v. Davila, 212 F.2d 731, 736 (1st Cir. 1954) (discussing terms as progression of hostility moving toward war) (cited in *Pan Am*, 505 F.2d at 1017).

n134 *See Pan Am*, 505 F.2d at 1010-11 (suggesting that the usurped power exclusion would only apply in situations similar to Charles the Pretender's occupation of Derby in an effort to wrest the throne of England for himself and his followers). Despite the political agenda of the PFLP, the *Pan Am* court did not see such a concrete political objective emanating from the PFLP terrorism. *See also id.* at 1011 ("a de facto government is necessary to constitute a usurped power"); *id.* at 1014 (using 1916 Easter Rebellion in Dublin as example of civil war or usurped power).

n135 *See id.* at 1008-10, 1013-15.

The *Pan Am* holding and rationale is persuasive. The purpose of the war risk exclusion is to prevent insurers from being wiped out by correlated claims (those emanating from one source or affecting a discreet group rather than a cross-section or large population) that inflict abnormal **losses** throughout society. An act of terrorism, even repeated acts of terrorism, does not inflict the countrywide correlated **losses** of a state of armed conflict (be it civil commotion, insurrection, civil war, or war between established nations). Even where the conflict does not involve conventional troops or established governments, there is a difference between the occasional act of terror (e.g., a car bomb at a Jerusalem intersection) and the hostilities of insurrection, militias, or guerilla troops (e.g., raids throughout the countryside in Peru by the Shining Path rebels).

Although terrorist initiatives make normal **loss** prediction much more difficult, they do not pose the same risk calculation and risk distribution problems presented by more dispersed, semi-constant war. Although terrorism can of course strike anywhere or anytime, it tends not to engulf or affect entire regions on a sustained basis. For example, the WTC attack, although horrific, was relatively isolated in geography and intense hostilities (only two "shots" were fired). As of this writing, months have passed without similar incident and most people in New York and environs have returned to an essentially normal existence. Persons in other regions of the country are relatively untouched, at least in the sense of physical or financial **loss.** If, instead, September 11 had seen the emergence of guerilla forces based in the Catskills and raiding throughout the Northeast, there would be a different problem. The area involved would be large and consistently affected. The risk pool maintenance function of the war risk exclusion is not imperiled when it does not bar coverage for what is essentially an isolated crime, albeit one with political overtones.

In addition, there would usually be an element of civil war or insurrection associated with this hypothesized state of affairs. As the Second Circuit observed in *Pan Am*, the hijackers of that airplane were not part of an effort to overthrow or establish a government. They just wanted to destroy the property of a Western corporation. In related fashion, the bin Laden forces wanted to kill Westerners (many of the dead were not Americans) and destroy Western property for political ends (e.g., forcing U.S. troops out of Saudi Arabia, reducing or eliminating support for Israel, and driving a wedge between the West and more moderate Islamic elements). The September 11 terrorists did not want to conquer the United States (war), depose the government (insurrection), or support a faction during domestic strife (civil war). The September 11 terrorism, despite its awful magnitude, is more properly seen as a gruesomely heightened version of the *Pan Am* hijacking rather than as an incident of war.

The function of the war exclusion could, of course, be seriously jeopardized if courts construe it not to apply to widespread acts tantamount to armed conflict. When in doubt, courts dealing with either the war or riot exclusions should take a functional approach rather than a hypertextual one, asking whether granting the coverage claim would defeat the purpose of the exclusions and expose the insurer to dangerous **losses** outside the contemplation of the parties to the policy.

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But courts at times have taken an extremely narrow view of the exclusion. For example, one's first intuition might be that war exclusions would presumably apply if the unfortunate residents of Sarajevo (during the Bosnia crisis), Mogadishu (during the time of warlord feuding), or Beirut (during the late 1970s and 1980s) brought claims since those cities seemed at certain times essentially in the throes of ongoing military and paramilitary conflict despite the absence of a formal declaration of war. That intuition is apparently wrong, at least according to one prominent decision, *Holiday Inns, Inc. v. Aetna Insurance Co.*, n136 a case arising out of Lebanese hostilities.

n136 571 F. Supp. 1460 (S.D.N.Y. 1983).

The Holiday Inn was one of the most prominent buildings in Beirut. The hotel became embroiled in a running battle between Christian and Muslim factions in Lebanon. The hotel "was severely damaged by events occurring during a period from October, 1975, to April 9, 1976." n137 On October 25, 1975, "a battle began for the possession and control of the Kantari district" near the hotel. n138 The conflict

> marked the emergence of a new fighting force on the streets of Beirut. This was the Mourabitoun, the militia force of the Independent Nasserite Organization. The existence of the Independent Nasserite Organization was well known; it was one of numerous groups comprising what may generally be described as the "Moslem left" (as opposed to the Christian right). What had not been realized was the Independent Nasserite Organization had a large and effective militia. These were the Mourabitoun. On October 25, 1975, the Mourabitoun organized an attack from one of the Moslem suburbs to the south, driving west into Kantari toward the sea front. n139
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> . . .
>
> In their attack upon the Kantari district, the Mourabitoun were joined by some Saiqa militiamen. The Saiqa was a Palestinian commando organization, backed by Syria [as well as militia from the PFLP]. The opponents of these forces consisted of militiamen from the Phalange and the Party of Liberal Nationalists ("P.N.L."). The Phalange was organized along paramilitary lines in the mid-1930s. It drew most of its support from the Christian population of Lebanon, although some Moslems were also to be found in its ranks. . . . Its militia, called the Tigers, numbered at least 3,500 men in 1975. n140
>
> . . .
>
> As the fighting in Kantari progressed, the bells of the Christian churches were rung, and all Phalangists in the area turned out to resist the Mourabitoun. In other parts of Kantari, the Phalangists were able to repel the attacks; the quick seizure of the Murr Tower constituted the Mourabitoun's main success of the night.
>
> Having seized the Murr Tower [the tallest building in the neighborhood and indeed the tallest building in Beirut], the Mourabitoun installed sand bags and heavy machine guns on the top floors. By doing so, the Mourabitoun were able to harass Phalangist street movements in several directions. n141

n137 *Id.*

n138 *Id.* at 1467.

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n139 *Id.* at 1468, citing JOHN BULLOCH, DEATH OF A COUNTRY (1977).

n140 *Id.*

n141 *Id.* at 1469 (citations omitted).

The court's description certainly sounds like something out of a war movie. From October 1975 to April 1976 this fighting continued, resulting in shelling that damaged the Holiday Inn, which was occupied by Phalangists during the course of continued fighting. Shots and hostilities were exchanged between the Holiday Inn occupants and opponents in other hotels.

> The Holiday Inn was finally wrested from Phalangist hands during fierce fighting between March 21 and 26, 1976. . . . During this fighting the Holiday Inn changed hands several times. By March 23, however, it was occupied by Moslem and Palestinian leftists. "This time the Inn was properly and effectively garrisoned, and ceased to be fought over, though it was frequently used as a sniper position." n142

n142 *Id.* at 1471 (citations omitted).

Notwithstanding this environment sounding like a theater of war, the court found that the Beirut conflict did not qualify as "war" under the standard war risk exclusion because the conflict surrounding the Holiday Inn was not one between governments or quasi-governments. n143 For similar reasons, the fighting was not civil war or insurrection. n144 It could be seen as more ganglike than a true political movement. At least the court could not with certainty describe the Beirut bloodshed as war, civil war, or an insurrection against a specific government. In the face of the ambiguity (a reasonable person could call the incidents one big gang battle or label it a civil war between factions competing to be quasi-governments), the insurer lost because it had the burden of establishing with clarity the applicability of the exclusion. n145

n143 *See id.* at 1498-99. Without doubt, however, there was plenty of fighting and bloodshed in the region. *See id.* at 1472-85 (reviewing tortured history of conflict in Lebanon and the Middle East).

n144 *Id.* at 1494: "'Insurrection' presents the key issue because 'rebellion,' 'revolution,' and 'civil war' are progressive stages in the development of civil unrest, the most rudimentary form of which is 'insurrection.'" (quoting Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1017 (2d Cir. 1974) (emphasis that of the *Holiday Inns* court; *Pan Am* court citing Home Ins. Co. v. Davila, 212 F. 2d 731, 736 (1st Cir. 1954), and The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 666 (1862))).

n145 *See id.* at 1503:

> Aetna, as an all risk insurer, had the burden of proving that the damage to the Holiday Inn was caused by a peril whose consequences were excluded by the policy. . . . Having failed to sustain that burden, Aetna is liable under the policy. The Holiday Inn was damaged by a series of factional "civil commotions" of increasing violence. The Lebanese government could not deal effectively with these commotions. The country came close to anarchy, but the constitutional government existed throughout; the requisite intent to overthrow it has not been

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> proved to the exclusion of other interpretations; and there was no "war" in Lebanon between sovereign or quasi-sovereign states.

In reaching its decision in favor of coverage, the *Holiday Inns* court was strongly influenced by the *Pan Am* case, which was cited throughout the *Holiday Inns* decision. The *Holiday Inns* court was also influenced by a British decision involving insurance coverage and Lebanese hostilities. In *Spinney's v. Royal Insurance Co.*, n146 the court faced the similar question of whether damage to commercial property stemming from the street fighting of the era was covered as an ordinary **loss** akin to vandalism or whether the **loss** resulted from war or civil war, making the exclusion applicable. The English court, in an opinion by the prominent Lord Michael Mustill, an acknowledged expert on insurance, concluded that it "cannot find that by January, 1976, matters had advanced between massive civil strife and virtual anarchy to the state of a civil war. Perhaps they did later, but that is not for decision here." n147

n146 1980 1 Lloyd's L. Rep. 406, 432 (Q.B.).

n147 *See Holiday Inns*, 571 F. Supp. at 1487, citing *Spinney's*, 1980 1 Lloyd's L. Rep., at 432 (emphasis added). *Holiday Inns* Judge Haight added:

> I do not cite the English court's judgment in *Spinney's*, on this point or any other, as precedent for findings of fact in my own judgment. That is because the evidence in the record of this trial constitutes the basis for this Court's findings, not the evidence adduced before another tribunal at a different trial. But I am free, as in the point of relevance under discussion, to accept Justice Mustill's legal analysis; or to adopt as useful his characterization of conditions in Lebanon if it conforms to the evidence in the trial before me.

See id. at 1487, n. 125. Despite the disclaimer and the utility of the *Pan Am* precedent, Judge Haight was clearly comforted by knowing that a respected English judge had viewed essentially the same imbroglio and found it to fall short of war.

The *Holiday Inns* decision suggests that American courts would be reluctant to find even guerilla troops in the Catskills to meet the terms of the standard war risk exclusion. Where there is a more distinct effort to overthrow a particular government, however, courts have characterized this as civil war. n148 In some cases a battle of "quasi-sovereign" forces for control of land can constitute a state of war. n149 Where regular troops of a sovereign government are involved, the war risk exclusion has been held to preclude coverage, even where the **loss** is not caused by the direct actions of the troops. For example, in *TRT/FTC Communications, Inc. v. Insurance Company of the State of Pennsylvania*, n150 the court denied coverage for merchandise removed from a store at gunpoint by armed men in civilian clothing because the **loss** took place in a commercial sector of Panama City during the disruption caused by the U.S. military operation against former Panamanian dictator Manuel Noriega. n151 Where troops are irregular but the context establishes civil war or its equivalent, **losses** sufficiently related to the conflict have been found excluded by language barring coverage for insurrection or civil commotion. For example, merchants with stores looted during factional fighting for control of Liberia were not covered. n152 Similarly, the seizure of ships owned by Nicaraguan dictator General Anastasio Sozmoza was deemed proximately caused by "ongoing civil war in Nicaragua," an excluded peril. n153 Short of these situations, however, case law, particularly the relatively recent precedents of *Pan Am* and *Holiday Inns*, suggests that the war risk exclusion is inapplicable. n154

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n148 *See, e.g., Davila*, 212 F.2d at 736 (**losses** caused by competing forces in struggle for control of Puerto Rico constitute civil war, thereby precluding coverage); Wilker Bros. Co. v. Lumberman's Mut. Cas. Co., 529 F. Supp. 133, 116 (S.D.N.Y. 1981) ("civil war" existed in Nicaragua during 1978-79 as Sandinista rebels sought to oust government of dictator General Antonio Somoza); OPE Shipping, Ltd. v. Allstate Ins. Co., 521 F. Supp. 342, 349 (S.D.N.Y. 1981) (same).

n149 *See, e.g.*, Hamdi & Ibrahim Mango Co. v. Reliance Ins. Co., 291 F.2d 437, 442 (2d Cir. 1961) (clashes between armed and organized Arabs and Jews for control of Palestine (now Israel) constituted state of war; **loss** of cargo damaged by mortar fire in port of Haifa excluded from coverage under war risk exclusion). *See also* Int'l Rescue Comm. v. Reliance Ins. Co., 646 N.Y.S.2d 112 (N.Y. App. Div. 1996) (whether Somalia in 1993 was in a state of war was a question of fact precluding summary judgment for insurer in claim arising out of injury by land mine); *but see id.* at 114-115 (Ellerin, J., dissenting) (Somalia was in midst of civil war and insurrection as a matter of law during time of injury and injury clearly stemmed from warlike activity).

n150 847 F. Supp. 28 (Del. 1993).

n151 *See id.* at 30-31. *But see* Sherwin-Williams Co. v. Ins. Co. of State of Pa., 863 F. Supp. 542 (N.D. Ohio 1994) (policyholder with looting **losses** arising out of Panama conflict covered where it had specifically added "civil commotion" coverage by endorsement). *But see also* Sherwin-Williams Co. v. Ins. Co. of State of Pa., 105 F.3d 258 (6th Cir. 1997) (reversing in part for remand to require policyholder to prove inability to access primary coverage before it may recover from excess insurer).

n152 *See* Younis Bros. & Co., Inc. v. Cigna Worldwide Ins. Co., 91 F.3d 13 (3d Cir. 1996). The court reached this view even though some of the **losses** were due to fire, which arguably was a covered cause of **loss** nearer in time and more dominant than the de facto civil war raging in Liberia at the time. The **losses** took place during the June-October period of 1990 and in the court's view all stemmed from the "state of insurrection [that] existed in Liberia during the relevant time period; and, that the insurrection caused [the] **losses.**" *See id.* at 14. The court cited *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.* approvingly, suggesting that it viewed the case of Liberian civil war as different than the terrorist actions in *Pan Am. See also* Home Ins. Co. v. Davila, 212 F.2d 731, 736 (1st Cir. 1954) (defining "insurrection or rebellion" as "movement accompanied by action specifically intended to overthrow the constituted government and to take possession of the inherent powers thereof," a feature absent in the September 11 attacks).

n153 *See OPE Shipping*, 521 F. Supp. at 342. The *OPE Shipping* holding is both fact specific and debatable. It is arguably at odds with New York law on efficient proximate cause, which tends to focus on the cause closest to the **loss** to a greater degree than other states. In *OPE Shipping*, the immediate cause of the **loss** was the seizure by their own crews, apparently including the captains or masters of the voyage, which would ordinarily qualify as "barratry," a covered cause of **loss** under most marine insurance policies. The crews took the ships to Cuba and Panama, countries friendly with the Sandinistas, the anti-Somoza group that eventually deposed Somoza. The court found more than ordinary barratry, however, because the crew members spearheading the seizure were Sandinista supporters who acted "on direct orders from Sandinista authorities as agents of the insurrection and rebellion." *See id.* at 343. *See also* Productos Carnic, S.A. v. Central Am. Beef and Seafood Trading Co., 621 F. 2d 683 (5th Cir. 1980) (upholding injunction pending resolution of claims arising from Sandinista seizure of meat packing plant formerly owned by Somoza); Republic of China v. Nat'l. Union Fire Ins. Co. of Pittsburgh, 151 F. Supp. 211 (D. Md. 1957) (defection of ship's crew alone is not covered **loss** due to barratry; for barratry, master of ship must defect or betray vessel owner).

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n154 *See* Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F. 2d 989, 1012-13 (2d Cir. 1974):

> [War is] a course of hostility engaged in by entities that have at least significant attributes of sovereignty. Under international law war is waged by states or state-like entities.
>
> . . .
>
> English and American cases dealing with the insurance meaning of "war" have defined it in accordance with the ancient international law definition: war refers to and includes only hostilities carried on by entities that constitute governments at least de facto in character.

Accord N. Bay Sch. Ins. Auth. v. Indus. Indem. Co., 10 Cal. Rptr. 2d 88 (Cal. Ct. App. 1992) (vandalism of school by group of juvenile delinquents is not "riot" for purposes of triggering policy language regarding calculation of number of occurrences; although **loss** is not a riot, the holding is a victory for insurer, preventing attachment of coverage due to lack of aggregation of **losses)**. *But see id.* at 92 (White, P.J., dissenting) (arguing that "riot" is ambiguous under the circumstances and that uncertainty should be resolved in favor of policyholder).

VI. THE WAR RISK EXCLUSION AND ITS POTENTIAL APPLICATION TO CONTESTED SEPTEMBER 11 COVERAGE CLAIMS

In light of the history of war risk exclusion litigation, insurers can hardly be accused of making a gratuitous gesture in the aftermath of the September 11 tragedy. n155 If insurers with standard war risk exclusions attempt to invoke the exclusions as a basis for denying coverage, they are likely to lose in courts of law as well as in the court of public opinion. n156 Case law, although limited, has carved a fairly clear demarcation between real "wars" and even the most bellicose, deadly, and destructive terrorist acts.

n155 *See, e.g.*, Christopher Oster, *On War Question, Insurers' Front Is Hardly United*, WALL ST. J. Sept. 19, 2001, at B1, col. 3 (quoting AIG CEO Maurice Greenberg: "I don't think anybody in their right mind would [invoke the war risk exclusion]. [A] member of the administration termed it a war . . . but it's not a war in the conventional sense of the word. No one is going to deny claims on that basis."). *But see* Randy J. Maniloff, *The War Risk Exclusion--Looking Beyond the Events of September 11th*, MEALEY'S LITIG. REP.: INS., Sept. 25, 2001, at 37, 39 (attorney representing insurers arguing that standard war risk exclusion is potentially applicable to September 11 claims) ("cases make clear that, if their only consideration had been sanctity of their policy language, the insurance industry would not have been beyond the pale to have reserved their rights with respect to claims arising out of the September 11th attacks"). With due respect to this author, I am constrained to disagree.

n156 It appears that some insurers may attempt to invoke the war risk exclusion, notwithstanding the many public pronouncements to the contrary. *See, e.g.*, Oster, *supra* note 155 (ACE Ltd. refrains from disavowal of exclusion and Arab Insurance Group appears to suggest that it is applicable). *But see* Oster, *supra* note 155 (quoting AIG CEO Maurice Greenberg).

The key case, of course, is *Pan Am*, in which the Second Circuit found that a hijacking and the destruction of an airliner was an act of larceny rather than an act of war. Neither could the episode be fairly characterized as the product of civil war, revolution, or domestic insurrection. Although the destruction of two skyscrapers is of greater magnitude than the destruction of an airplane, the analogy would likely be controlling should any war risk

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UNDERWRITER (Property & Casualty ed.), Oct. 1, 2001, at 10; E.E. Mazier, *Hard Market Hikes Friction With Fronts*, NAT'L UNDERWRITER (Property & Casualty ed.), Oct. 1, 2001, at 12; Mark E. Ruquet, *Brokers See Big Boost in Captive Interest*, NAT'L UNDERWRITER (Property & Casualty ed.), Oct. 1, 2001, at 13; Caroline McDonald, *Captive Services May Be Harder to Find*, NAT'L UNDERWRITER (Property & Casualty ed.), Oct. 1, 2001, at 11.

n11 *See* Steven Brostoff, *Fed Role in Terror Re Debated*, NAT'L UNDERWRITER (Property & Casualty ed.), Oct. 1, 2001, at 8; Steven Brostoff, *AIA, Alliance Draft Pool Proposals*, NAT'L UNDERWRITER (Property & Casualty ed.), Oct. 1, 2001, at 8; Steven Brostoff, *No Easy Answers on Coverage for Future* ***Losses*** *from Terrorism*, NAT'L UNDERWRITER (Property & Casualty ed.), Oct. 1, 2001, at 25.

In addition to the issue of counting occurrences, the September 11 terror raises a number of potentially difficult coverage issues. Brought particularly to the forefront is the seldom-litigated war risk exclusion. September 11 will prompt further examination of the exclusion, its function, its language, and its variants. Although the exclusion may be effectively overlooked under these extraordinary circumstances, the clause remains a staple of many insurance policies. As discussed below, the current standard war risk exclusion is not likely to bar coverage for even the extreme terrorism of September 11. n12 Historically, more specific exclusionary endorsements have been used to limit the terrorism risk, with considerable variance among policyholders, insurers, and reinsurers.

n12 *See* text and accompanying notes 103-175, *infra*.

If insurers wish to avoid terrorism risk as a standard matter, rewritten standard policy forms are required. Alternatively, insurers have argued that without federal financial backing, coverage will contract or uniformly be made subject to blanket terrorism exclusions. If insurers and policyholders wish to have protection against terrorism risks in the future, underwriting and pricing will obviously be affected regardless of the level of government aid.

This article focuses on the prominent issues of occurrence counting and the current status of the war risk exclusion but also touches upon other insurance issues likely to arise in connection with September 11 claims. Part II briefly outlines the types of insurance potentially applicable to the September 11 tragedy and resulting issues that may arise. Part III addresses the issue of whether the terrorist attack was one occurrence or two, a question with an answer that implicates $ 3.6 **billion** in property insurance written on the towers. Part IV discusses the rationale, history, and function of the war risk exclusion. Part V examines key precedent about the war risk exclusion. Part VI discusses the degree to which the September 11 tragedy does or does not fit the war risk exclusion. Part VII outlines possible government and industry reactions to the problems associated with terrorism **losses** and the future insurance coverage for such claims.

II. POTENTIALLY APPLICABLE INSURANCE AND COVERAGE QUESTIONS PRESENTED BY THE SEPTEMBER 11 TERRORISM

In the wake of the September 11 tragedy, economic **loss** and insurance claims are a given. To a perhaps unprecedented degree, a wide variety of coverages is implicated, touching upon practically all major lines of coverage, many of which usually contain some type of war risk exclusion and will also be affected by other coverage questions. n13

n13 *See* Tamara Loomis, *Insurance Coverage: Terrorist Attack Raises Complex Issues*, N.Y.L.J., Oct. 11, 2001, at 5. In addition, other terrorist events in the fall of 2001 and the ensuing military activity in Afghanistan and the conflict in the Middle East may raise insurance coverage disputes. This article will not address those issues although all of them might fall under the broad topic of terrorism. *See* Diane Richardson, *Anthrax Exposure Raises Cover Questions*, NAT'L UNDERWRITER (Property & Casualty ed.), Nov. 26, 2001, at 20

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coverage litigation ensue from the September 11 episode. In both cases, the perpetrators were politically motivated but were not military employees of a foreign power. None were in the military or affiliated with any recognized government. Nor can they be said to have been guerrilla fighters.

If anything, one can characterize the September 11 hijackers as less political than those who took the Pan Am plane thirty years earlier. The PFLP, however deplorable its methods, by comparison looked more like a political-governmental movement than al Qaida. The former had an avowed political goal: a separate Palestinian state carved from (or perhaps through the eradication of) Israel. The closest thing to a political platform for al Qaida seems to be the removal of American troops from Saudi Arabia. Osama bin Laden has not argued publically for a separate al Qaida nation, although his remarks can be interpreted to advocate the overthrow of certain Middle East governments. But to be replaced with what? Only after the United States began bombing Taliban positions in Afghanistan did bin Laden belatedly suggest that a Palestinian state was part of his goal, perhaps giving him as much geopolitical definition as the PFLP, which the Second Circuit nonetheless found not to be a government or military entity engaged in war.

Unless insurers can distinguish their situation from that of Aetna in the *Pan Am* case, they are unlikely to prevail in a coverage dispute about the September 11 attacks. Even critics of some of the *Pan Am* court's interpretations must concede that the court is correct in its general approach to insurance policy construction. Exclusions are strictly construed against the insurer; n157 any ambiguity is resolved against the insurer that drafted and implemented the relevant policy language. n158 According to these normal axioms of insurance policy construction, unless a terror situation clearly rises to the level of war, the policyholder should prevail. n159

n157 *See* BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK OF INSURANCE COVERAGE LITIGATION § 103[b][1] (10th ed. 2000); STEMPEL, *supra* note 14, § 2.06; EUGENE ANDERSON, LORELIE S. MASTERS & JORDAN S. STANZLER, INSURANCE COVERAGE LITIGATION §§ 2.01-2.06; Ace Wire & Cable Co. v. Aetna Cas. & Sur. Co., 457 N.E.2d 761 (N.Y. 1983).

n158 *See* OSTRAGER & NEWMAN, *supra* note 157; ANDERSON, MASTERS & STANZLER, *supra* note 157; STEMPEL, *supra* note 14, § 4.08; *Ace Wire & Cable Co.*, 457 N.E.2d at 761.

n159 In one case arising out of the 1993 bombing of the WTC, the war risk exclusion issue was not raised, apparently because the case involved a contractual indemnity agreement between the WTC and Hilton Hotels, although Hilton's liability insurer was involved after having apparently paid claims by patrons injured in the bombing. *See* Nat'l Union Fire Ins. Co. v. Port Auth., 690 N.Y.S.2d 260 (N.Y. App. Div. 1999) (finding indemnity agreement in lease inapplicable as "it is plain that the planting of the bomb whose detonation led to the claimants' injuries, in a portion of the World Trade Center over which respondents indisputably exercised no control was not in any way attributable to the use of occupancy of the premises respondents leased and managed").

The insurer position in seeking to enforce a standard war risk exclusion is further undermined by two significant factors: (1) an exclusion clearly excluding terrorism can be drafted; and (2) despite the passage of considerable time, insurers have failed to rewrite the general war exclusion to exclude terrorism.

As to the first factor, and perhaps stating the obvious, an insurer can draft an exclusion that bars coverage for terrorism. Insurers have in fact drafted and used such exclusions. A specific terrorism exclusion was available in 1970 at the time of the *Pan Am* hijacking. This was of significant import to the Second Circuit, which correctly reasoned that it seemed erroneous to read the war exclusion as a terrorism exclusion when there was available a

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separate and clear terrorism exclusion that was not used in the policy. n160 This type of thinking is but common sense and a corollary to the ambiguity rule of contract law. If language is arguably unclear but could easily have been made clear if intended to have the result asserted by the drafter, the contra proferentem principle of construing ambiguities against the drafter takes on particular force. n161

n160 *See* text and accompanying notes 129, *supra*.

n161 *See* George Backer Mgmt. Corp. v. Acme Quilting Co., 385 N.E.2d 1062 (N.Y. 1978). *See also* Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531 (1996) (regarding the contra proferentem principle as key to insurance policy construction and assessing the principle in similar manner).

Regarding the second factor arguing against treating the war risk exclusion as a terrorism exclusion, the *Pan Am* case was decided more than a quarter of a century ago. During that time, terrorism has increased in magnitude, refinement, and deadliness. Palestinian terrorists murdered a dozen Israeli athletes at the 1972 Olympics in Munich. n162 Subsequent acts ratcheted up the death toll for terrorism: 241 Marines in Lebanon in 1983; n163 thirty-two American soldiers in Somalia in 1993; n164 nineteen Americans killed with the Khobar Towers bombing in Saudi Arabia in 1996; n165 224 killed and 4,500 wounded when the U.S. embassies in Kenya and Tanzania were hit by car bombs in 1998; n166 and thirty-two sailors killed in the suicide speedboat bombing attack on the U.S.S. Cole in 2000. n167 In addition, suicidal terrorists proved that not even well-guarded chief executives of nations were safe. n168 Of particular relevance is that insurers were constructively aware of a similar suicide bomb attempt to attack the Eiffel Tower that was thwarted by authorities. n169 Even more relevant is the fact that insurers had seen the WTC itself victimized by a 1993 terrorist bomb that killed several and injured more than 1,000, n170 a near miss that probably should have been recognized as a harbinger of more heinous acts to come. n171

n162 Jennifer Rosenberg, *20th Century History, The History of the Olympics: 1972--Munich, West Germany*, THE HISTORY NET, *available at* http://history1900s.about.com/library/weekly/aa081000u.htm (visited Nov. 2, 2001) ("The 1972 Olympic Games will probably be best remembered for the murder of eleven Israeli Olympians.").

n163 *See* Philip Taubman, *O'Neill Considers Backing a Change in Marine Mission*, N.Y. TIMES, Dec. 30, 1983, at A1, col. 6.

n164 Vernon Loeb & Walter Pincus, *Bomb Suspect Has Been a Target; Aides Say Bin Laden Had Motive, Means to Attack*, WASH. POST, Aug. 13, 1998, at A1 (bin Laden "claimed responsibility for an attempted December 1992 bombing of 100 U.S. servicemen in Yemen, and he has publicly said that his soldiers fought U.S. troops during Operation Restore Hope in 1993 in Somalia, where U.S. officials believe that he supplied weapons that shot down American helicopters"); Mark Huband, *Somalis shoot down two US helicopters*, GUARDIAN, Oct. 4, 1993, at 8; Ann Devroy, *Somalia Options Reviewed as Discontent in Congress Grows; New Deployment Raises Confusion on U.S. Goals*, WASH. POST, Oct. 6, 1993, at A1 (twelve U.S. soldiers killed in Oct. 3-4, 1993, battle that became the subject of the book and movie *Black Hawk Down). See* MARK BOWDEN, BLACK HAWK DOWN: A STORY OF MODERN WAR (1999).

n165 *See* Editorial, *The Bombing at Khobar*, WASH. POST, June 27, 1996, at A28 ("Beirut, Oklahoma City; now add Khobar Towers to the bloody list. . . . As the attack on New York City's World Trade Center showed, even civilians are not exempt from such risks today.").

n166 *See* Ian Johnson & Alfred Kueppers, *Until Last Month, a Traveler from Sudan Stumped Investigators*, WALL ST. J., Oct. 19, 2001, at A1 (summarizing damage and widely held view

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that truck bombings of embassies were projects of bin Laden and al Qaida); William Claiborne, *Bombs at 2 U.S. Embassies in Africa Kill 81; 8 Americans Among the Dead*, WASH. POST, Aug. 8, 1998, at A1.

n167 *See* Maitz & Melrio, *supra* note 44, at 9A.

n168 *See* Coll, *supra* note 44, at A1 (Rajiv Gandhi killed by suicide bomber who approached him at campaign rally with explosives hidden in basket of flowers); Susan B. Glasser, *Alliance: U.S. killed al-Qaida leaders*, LAS VEGAS SUN, Dec. 5, 2001, at 1A, 12A (Egyptian Premier Anwar Sadat killed by fanatical Muslims in his personal guard who were in turn killed by guards loyal to Sadat; assassination of Sadat is generally thought to have been masterminded by Ayman al-Zawahri, an Egyptian doctor and founder of Islamic Jihad, later thought to have become Osama bin Laden's chief deputy in al Qaida and possible mastermind of September 11 terrorism).

n169 *See* Gregory Katz, *Algerian militants key to al-Qaida; Arrests suggest failed '94 hijacking was blueprint for attacks*, LAS VEGAS REV.-J., Oct. 20, 2001, at 10A, col. 1.

n170 *See* William M. Carley, *Explosive Theory: Bombing in New York Bears Some Hallmarks of Mideast Terrorists: A Motive Remains Unclear in Blast that Killed Five and Injured 1,000 or More: Businesses Find New Offices*, WALL ST. J., Mar. 1, 1993, at A1, col. 6 ("tremendous power of the bomb, its strategic placement to knock out much of the lighting, power and communications in the World Trade Center, and its huge success in disrupting lower Manhattan bear all the characteristics of a professional terrorist operation").

n171 *See* News Summary, *The FBI Determined that a bomb caused the World Trade Center explosion*, WALL ST. J., Mar. 1, 1993, at A1, col. 3 ("Bomb, which left a four-story hole below New York's 110-story twin tower complex, may have contained as much as 1,500 pounds of explosives. Terrorism analysts said Friday's noontime attack had all the markings of certain Mideast terror groups."); News Summary, *Bomb Inquiry Focuses on Links to Muslim Cleric*, WALL ST. J., Mar. 8, 1993, at A1, col. 3.

Terrorism has not abated since 1974 and, if anything, appears to have accelerated. But the standard war risk exclusion of 2001 reads almost exactly as did the 1970 exclusion that was insufficient to preclude coverage in the *Pan Am* case. Further, almost everyone in liability insurance or related legal services is or reasonably should be aware of the *Pan Am* case. It is a famous case decided by a prominent federal appeals court that sits in the commercial heart of America, perhaps not more than a mile from Ground Zero. For more than twenty-five years, insurers have been on notice that the standard war risk exclusion would almost certainly not preclude coverage for **losses** caused by terrorism.

In deciding that the **losses** connected to the 1975-76 battle in Beirut were not excluded acts of war, the *Holiday Inns* court was strongly influenced not only by the ambiguity doctrine and the insurer's burden to prove the applicability of an exclusion but also by the insurer's failure to revise its war risk language in the wake of *Pan Am v. Aetna*.

The Second Circuit decided *Pan Am* on October 15, 1974. At that time Holiday Inn was negotiating, through brokers, with present defendant Aetna the all-risk policy forming the subject matter of the case at bar. The policy issued under date of March 11, 1975. The "Aetna" involved in *Pan Am* was a different company. But the Second Circuit, in a scholarly, thirty-three-page opinion by Judge Hays, with encyclopedic citation of authority, placed the insurance industry on notice when it declared certain principles of insurance law applicable to, and defined terms appearing in, all-risk property policies. It often happens that insurers and their insureds, ligating the question of coverage, draw analogies to judgments of prior centuries. The Second Circuit performed that historical analysis in *Pan Am*, updating the ancient insurance phrases within the general context of this century's tragic Middle East

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strife, and it did so during the gestation period of the very policy in suit. n172

n172 Holiday Inns, Inc. v. Aetna Ins. Co., 571 F. Supp. 1460, 1461 (S.D.N.Y. 1983).

Despite this notice and the ready availability of clearly exclusionary language, insurers made no significant changes in the standard exclusion. Under these circumstances, insurers are in a difficult position when attempting to argue that the war exclusion is also a terrorism exclusion. Policyholders can argue that insurers with only a standard war exclusion are effectively estopped to provide coverage when terrorism causes **losses.** If otherwise valid September 11 coverable claims are opposed solely on the basis of the standard war risk exclusion, policyholders should win on summary judgment. n173 If insurers are to avoid covering the aftermath of September 11, they must incorporate more specific terrorism exclusions into their policies or have other valid grounds of defense (e.g., business **loss** that does not flow from physical damage).

n173 *See* FED. R. CIV. P. 56 (judgment may be entered for moving party, even party bearing burden of persuasion, if there is no genuine dispute of material fact and movant is entitled to judgment as a matter of law). Conceivably, a war risk coverage dispute could have something more to raise a genuine dispute of material fact, such as communications between the parties that indicated a policyholder's understanding that terrorism **losses** were excluded or that a premium was reduced based on this understanding. Absent special facts like this (that are unlikely), however, September 11 policyholders should prevail on war risk issues without the need for full trial of the dispute.

For a different view making thoughtful arguments and invoking my own writings to argue that the September 11 terrorism is sufficiently distinct from the Pan Am terrorism to come within the exclusion, *see* Randy J. Maniloff, *The 'War Risk' Exclusion: Distinguishing Between 'War' and 'Terrorism' After September 11*, 16 MEALEY'S LITIG. REP.: INS. 6, Dec. 11, 2001, at 1, 8-9.

Insurers can argue with some force that September 11 was a quantum leap not only in terrorist impact but also in the response, both rhetorical and military, to terrorism. Within one day, political leaders and news organizations referred to the events as an "act of war" that placed America at "war" with al Qaida and with countries that aid or abet its activities. The ensuing weeks have seen continued references to "America at War," the "War on Terrorism," and the like. Much of this rhetoric has come straight from the top. Political leaders and the media of course condemned the *Pan Am* hijacking but the incident stirred no similar war rhetoric.

Nor did the United States respond to the 1970 hijacking with much more than rhetoric and diplomacy. By contrast, the killings of September 11 stirred the federal government into action. Hundreds of suspected terrorists or collaborators were detained or arrested. Diplomatic efforts to forge an anti-bin Laden, anti-Taliban coalition went into overdrive. Military forces were deployed. Afghanistan was bombed.

These responses give insurers fuel for arguing that there really was something different about this terrorist event that vaulted it from the ordinary into an excluded event of war. Although such arguments could give a court pause, they are unlikely to remove any September 11 coverage disputes from the precedential force and factual analogy provided by *Pan Am*. In addition, the theory and rationale of the war risk exclusion suggests that the exclusion cannot be appropriately applied to the September 11 **losses.**

As discussed above, the risk distribution rationale for the war exclusion is in the way that war changes the actuarial rules of insurance. In peacetime, fortuitous, isolated, episodic **losses** (even if large) do not fundamentally alter the law of averages, historical trends, and the law of large numbers. A prudent insurer can achieve a large pool of uncorrelated risk and price its

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products profitably even if the risks insured include even dangerous natural phenomena (e.g., wildfires, **hurricanes,** earthquakes) affecting miles of land and millions of people. During wartime, all risk is to a degree correlated, sometimes severely. Think of London or Dresden during World War II for property insurance; Normandy Beach for life insurance; and the Gulf War, where charred Iraqi and Kuwaiti vehicles appeared to dot the road to Baghdad, for auto insurance.

Similarly, war changes the equation of risk fundamentally in that it engages hordes of people, usually at the government's behest, in intentional acts of death and destruction. Without war, actuaries and underwriters need worry only about individuals or relatively small groups that may inflict injury upon insureds. Even if these groups are rather large, widely dispersed across the country, or disproportionately and troublesomely concentrated in certain areas, the havoc that these groups can wreak, however large, is not as systemic as war and does not alter the norms of risk distribution as much as does war.

The insurance industry's historical practices confirm this distinction. Insurers never exclude coverage for **losses** resulting from thugs, even organized bands of thugs, much less the Cosa Nostra or other criminal organizations. These domestic groups have many "members," perhaps more than al Qaida and other terrorist organizations. Domestic gangs can be extremely destructive, acting with deliberate, far-flung, and sustained malice. Yet insurance policies do not exclude their damage except perhaps in cases where their activity rises to the level of a full-blown riot with looting and the policy contains a riot exclusion. In addition to covering such human-generated **losses,** insurers have also historically been willing to cover **hurricanes** and similarly widely dispersed natural disasters. Only with **Hurricane** Andrew's severe **losses** in 1992 was Florida required to take government action to make the risk insurable through a windstorm pool. Earth movement has historically be excluded in the standard policy but can be purchased with relative ease at premiums that are not particularly high. Floods have been excluded but are insurable under the government program.

From a contract construction and insurance law perspective, all of these examples tend to vindicate the accepted view (expressed in *Pan Am*) that the war risk exclusion does not apply to terrorism **losses.** These other exclusions (windstorm, flood, earth movement) are all more clear and comprehensive than the war risk exclusion. Some of the limitations on coverage are in the insuring agreement itself (e.g., they are not covered perils in a property policy). In those cases, the policyholder will not even enjoy the benefit of the legal rule that requires strict construction of an exclusion against an insurer. But for the war risk exclusion, the legal rules of insurance in construing ambiguous policy language and exclusions should result in policyholders winning any such coverage battles.

From a structural or instrumental perspective, the treatment of these other risks also suggests that real war is different and that terrorism, even the awful new terrorism of the post-September 11 world, is not enough like real war to meet the purpose and objective of the war risk exclusion. Put another way, one can address the war risk exclusion by asking what the September 11 terrorism most resembles: fire, crime, **hurricane,** earthquake, flood, or war? One can make decent arguments for any as the favored analogy but war seems the least likely. Although the September 11 horror was a terrible **loss,** it is probably more like the Northridge earthquake, **Hurricane** Andrew, or the Galveston **Hurricane** of 1906. These disasters caused great **loss** of property and life but were within the scope of insurance coverage. Put another way, Manhattan was dealt a terrible blow by the terrorists, but Manhattan is a long way from becoming Kabul. n174

n174 The generally excluded cause of **loss** most like the WTC attack is probably earthquake. The tragedy involved terrible destruction based on physical collapse of buildings and support--but destruction relatively confined (unlike the miles often affected by **hurricane** or flood). Although the earthquake risk is usually excluded in the standard policy, it is excluded with a clarity not found in the war risk exclusion, another factor suggesting the inapplicability of the

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war risk exclusion to bar coverage.

But see Maniloff, *supra* note 173, at 8-9. Maniloff argues with some force that September 11 is a sufficiently different terrorist incident because its magnitude and dispersion give it the risk management problems normally associated with a conventional war. In making this argument, Maniloff notes that my prior writings can be invoked to support his position. *See* Maniloff, *supra* note 173, at 8-9 (quoting an excerpt of LAW OF INSURANCE CONTRACT DISPUTES, *supra* note 14, § 1.02[a], which states that the "purpose of the war exclusion is to prevent insurers from being wiped out by correlated claims . . . that inflict abnormal **losses** throughout society. The function of the war exclusion would be seriously jeopardized if courts did not construe it to prevent widespread terrorist acts tantamount to armed conflict.").

The Maniloff article makes a strong argument for insurers against the tide of popular opinion opposing application of the war risk exclusion. Nonetheless, I am constrained to disagree with Maniloff's analysis for two reasons. First, although the September 11 terrorism was indeed something tragically more than a car bomb or a deranged armed intruder, it nonetheless was a concentrated event--or at most four concentrated events. Severe as the damage may have been, it does not resemble the widespread but correlated **loss** inflicted when a nation is in a state of war. Again, the Manhattan versus Kabul comparison is instructive if perhaps corny. As also stated in my treatise (and fairly quoted by Maniloff), the function of the war exclusion "is not imperiled when it does not bar coverage for what is essentially an isolated crime, albeit one with political overtones." Maniloff, *supra* note 173, at 8-9 (quoting LAW OF INSURANCE CONTRACT DISPUTES, *supra* note 14, at 1-12 and 1-13). September 11 took terrorism to a new level but the hijackings of that awful day were not widespread enough to rise to the level of "war." Something like the Manhattan-wide terrorism portrayed in the movie *Siege*, if continued long enough in substantial degree, might qualify as terrorism cum war.

Second, the continued passage of time with no insurance industry revision of the war exclusion has led me to conclude that it would simply be unfair under the ground rules of contract law to construe the term "war" so broadly, particularly in light of the case law and the insurance norm that exclusions are construed narrowly and to the detriment of the insurers, even if the insurers' argument is reasonable. The language quoted by Maniloff was written in 1993 for the 1994 First Edition of my treatise. Further passage of time has made me less sympathetic to insurers' failure to revise the exclusion and more receptive to the policyholder argument that continued terrorism during the intervening years makes it less responsible to give insurers the benefit of any doubt as to the applicability of a war exclusion to terrorist **losses.** In retrospect, I should have seen this more clearly even in 1993 (ironically, the year of the WTC car bombing). It is also, of course, possible that the horror of September 11 and a desire to see victim policyholders compensated have unduly influenced my thinking. On balance, however, although I stand by the broad analysis cited by Maniloff, I do not think that it applies to the September 11 **losses.**

Terrible as it was, the nature of the September 11 **loss** is simply not all that close to that of war, even the low-tech brutality of guerilla war. Again, a comparison of Manhattan and Kabul is instructive as is a comparison with the United States and Afghanistan during much of the past twenty-two years. Since September 11, the news media have made much of fear gripping the United States. Notwithstanding that the national perspective has been changed by the atrocities of September 11, most of America has been engaged in business as usual in the months after the tragedy and is likely to continue to proceed with a high degree of normalcy. This would not be the case in the aftermath of the first battle of anything resembling a real war, civil war, rebellion, or insurrection. Compare the United States in September 2001 with the former Yugoslavia during September of any year between 1989 and 1995, and the distinction becomes clearer. The terrorists "achieved" a considerable amount on September 11 but they did not ignite a situation sufficiently similar to war to alter

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risk management axioms.

The insurance industry essentially acknowledged the weakness of the war exclusion when so many of its members so quickly announced that they would not defend claims on the basis of the exclusion. Some, like AIG Chief Executive Officer and industry giant Maurice Greenberg, were openly dismissive of the possibility that the exclusion could apply to the September 11 **losses.** n175 In effect, insurers eschewing the war risk exclusion gave up almost nothing in the way of legal leverage in order to obtain useful, positive public relations. This is not to say, however, that the September tragedy will not change the insurance business for insurers and policyholders alike.

n175 *See* Oster, *supra* note 155.

VII. INSURANCE INDUSTRY AND GOVERNMENT REACTION; PROSPECTS FOR FUTURE COVERAGE OF TERRORISM **LOSSES**

Regardless of how they are characterized, the September 11 **losses** are dramatic. Covering them will put significant strain on insurers at all levels and may produce insolvencies. n176 As discussed above, the case law of the war risk exclusion suggests that insurers will not avoid payment on this basis for the September 11 **losses** and that the standard war risk exclusion will not protect insurers from similar claims in the future.

n176 *See* Sally Roberts, *Market hardening rapidly: Intermediaries warn cedents of big rate hikes, tighter conditions in wake of attacks*, BUS. INS., Nov. 5, 2001, at 10, 33, 34 (September 11 disaster unique in history of insurance **loss** not only because of magnitude but because it cut across virtually all lines of insurance); Meg Fletcher, *Sept. 11 creates challenges for work comp*, BUS. INS., Nov. 5, 2001, at 1, 60 (September 11 largest workers' compensation insurance **loss** in history due to concentration of employees at core site of disaster); *Some European insurers seek to cancel policies*, BUS. INS. ONLINE, *available at* businessinsurance.com (visited Oct. 4, 2001). The strain will be logistical as well as financial because of the need to quickly process a large volume of claims and ward off claimant opportunism without inviting a public relations problem. *See* Mark Maremont & Christopher Oster, *Insurers Gird for Disaster-Related Fraud*, WALL ST. J., Sept. 27, 2001, at B2 (quoting one industry insider as expecting "a wave of workers' compensation and disability claims" from persons not actually at site of the tragedy); *New York Moves to Combat Insurance Fraud After Terror Attacks*, BEST'S INS. NEWS, Oct. 4, 2001, at 2.

But precedent, history, and practice also show that insurers can deploy a clear terrorism exclusion that precludes coverage. n177 After September 11, insurers are likely to make this exclusion much more common as an endorsement or perhaps even in revised forms for standard coverage. The weakness of the war risk exclusion and the ravages of September 11 may prompt an industry shift to reduced coverage overall. Already, insurers have announced that they are canceling coverage, will not renew coverage absent specific terrorism exclusions, are raising premiums, or are withdrawing from certain markets. n178 Even venues far afield of the United States or obvious terror targets are affected. For example, the slated insurer of the 2002 World Cup soccer tournament withdrew coverage in the wake of September 11. n179

n177 *See, e.g.*, Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1000-01 (noting existence in 1970 of clearly worded insurer endorsements excluding terrorism coverage). *See also* text and accompanying notes, *supra* (noting insurer failure to utilize established terrorism exclusions as indicating terrorism **losses** covered in standard policies).

n178 *See* Roberts, *supra* note 176, at 10, 33-34; *UN Pulls Staff Out of Somalia After Losing Insurance Coverage*, Dow Jones Int'l News Wire, Sept. 24, 2001, *available at* Westlaw ALLNEWSPLUS database; *Coverage shortfall threatens airport operations*, BUS. INS. ONLINE,

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available at www.businessinsurance.com/index.php3?action=view&id=959 (Sept. 25, 2001) (airports that are not government owned have liability limits ranging from $ 50 million to $ 1 **billion,** the higher amount difficult to keep in place or increase in aftermath of September 11).

n179 *See* Sarah Veysey, *Berkshire steps in to cover World Cup: FIFA replaces cancelled AXA-led cover*, BUS. INS., Nov. 5, 2001, at 56 (after September 11 attacks, AXA Colonia, lead insurer on consortium that had agreed to provide up to $ 852 million (944 Euros) in coverage for the 2002 World Cup soccer games, canceled its coverage). As the headline of the cited article implies, alternative coverage was found when National Indemnity Co., a unit of Berkshire Hathaway, agreed to provide coverage. The "program's premium and limits were not disclosed," making it hard to evaluate the impact of terrorism on underwriting and pricing in this instance. The World Cup episode does, however, have implications for the ongoing debate regarding government support for insurers. Despite the underwriting challenges of the post-September 11 world, it appears that insurance coverage remains available, a trend that suggests caution and conservatism regarding the magnitude and type of government assistance to insurers.

As to the September 11 **losses,** insurers have stated that the blow, although a hard one, can be borne by the industry. n180 In fact, as the rubble has cleared, so have the prospects of insurers that appear to be able to profit in the long term from newfound customer willingness to pay higher premiums for coverage. n181 Requests for government assistance have focused on protecting insurers from future terrorism **losses** beyond their capacity and thus encouraging insurers to continue to write this coverage for acceptable rates notwithstanding that September 11 has changed the industry's view of terrorism risks and the feasibility of underwriting them.

n180 Regulators have not uniformly accepted all of these insurer assurances at face value. *See, e.g.*, Joseph B. Treaster, *Lloyd's Says It Can Pay, But Officials Seek Proof*, N.Y. TIMES, Nov. 4, 2001, at B4, col. 1 ("Lloyd's has been staggered by heavy **losses** in the September 11 terrorist attacks. And now, insurance analysts, rating agencies and regulators are raising questions about Lloyd's ability to pay its share of coverage for the attacks, the worst single disaster ever for the insurance industry."). If Lloyd's is in a financial pinch because of the September 11 **losses,** it could of course have a significant ripple effect. For example, Lloyd's has 22 percent of the risk on the WTC properties that are the subject of the coverage litigation described in Part III of this article that, depending on how one counts occurrences, is either $ 3.6 **billion** or $ 7.2 **billion** in coverage, making Lloyd's syndicates responsible for $ 700 million or $ 1.5 **billion** in coverage. *See also* Treaster, at B4 (total Lloyd's liability for September 11 claims estimated at $ 8 **billion;** group of insurance regulators retains Arthur Andersen to audit Lloyd's finances for assurance).

n181 *See* Christopher Oster, *Bouncing Back: Insurance Companies Benefit from Sept. 11, Still Seek Federal Aid*, WALL ST. J., Nov. 15, 2001, at A1, col. 1.

Insurers have argued that substantial government backing is necessary to save the industry from additional calamities or the scary prospect that terrorism could become more frequent. n182 A number of proposals have surfaced, with considerable focus on one put forth by the U.S. Senate n183 and another from the House of Representatives, n184 with the White House offering a proposal more akin to the House bill. n185 Describing and commenting upon the proposals, one leading newspaper noted:

> In the Senate version, backed by the industry, insurance companies would commit their capital to a pool and if **losses** in any year exceed the pool, the government would be on the hook for the rest. The idea copies the British approach taken after the IRA destroyed $ 500 million of property in London in

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1992. The problem is that this keeps government involved for all time and creates a new government entity (another Fannie Mae!) with great potential for mischief.

For its part, the Bush administration proposes that the government reinsure the market, but only for three years. For 2002, the feds would cover 80% of terrorist claims up to $ 20 **billion** and 90% above $ 20 **billion.** The government share of the risk would decline in later years and stop altogether in 2005.

The flaw in the Bush plan is that it offers first-dollar coverage, which would leave taxpayers on the hook for most of anything Osama bin Laden does in the next year. But we still prefer a plan with a sunset provision because the problem itself is short term. The insurance industry needs more capital than it has right now to cover terrorism, and only the government has deep enough pockets. But over time the market will unfreeze--premiums for terror coverage will be priced and capital will return. n186

n182 *See* Christopher Oster, *Reports on Insurers Covering Terrorism Stress Federal Role*, WALL ST. J., Nov. 14, 2001, at A24, col. 2.

n183 The Senate bill was titled the "Terrorism Risk Insurance Act of 2001." The bill as drafted provides for a two-year program of government subsidy of excess **losses** from terrorism with the option of renewal for one year by the government. The subsidy of 90 percent sharing of **losses** would become operative when industry **losses** exceed $ 10 **billion.** During the second year of the proposed program, the attachment point would be $ 20 **billion.** Should terrorism **losses** exceed $ 100 **billion,** Congress would act to determine an appropriate aid or cost-sharing arrangement. As of this writing, the bill had not been formally introduced despite press coverage of the proposal. *See* Steven Brostoff, *Federal Terrorism Bill Stalls*, NAT'L UNDERWRITER (Property & Casualty ed.), Nov. 19, 2001, at 5.

n184 As of this writing, the House bill had been approved by the Financial Services Committee. *See* Steven Brostoff, ***Terrorism Insurance*** *Loan Program Clears Committee*, NAT'L UNDERWRITER (Property & Casualty ed.), Nov. 12, 2001, at 5 (describing provisions of H.R. 3210, Terrorism Risk Protection Act, and noting mixed insurer attitudes toward the bill and industry preference for Senate bill). *See also* Mark A. Hoffman & Roberto Ceniceros, *Lukewarm response to House plan to offer loans for terrorism* ***losses***, BUS. INS., Nov. 12, 2001, at 3 (same); Jackie Spinner, *Insurance Aid Plan Takes Shape; Parties Split on Repayment to U.S. for Terrorism Coverage*, WASH. POST, Nov. 8, 2001, at A4. The House legislation would provide 90 percent subsidy in the form of loans for insurer terrorism **losses** exceeding $ 1 **billion. If losses** exceed $ 20 **billion,** policyholders would be assessed to provide coverage assistance and insurers would obtain tax breaks in order to facilitate building reserves against future **losses.** *See* Stephen Labaton, *The Liability: Daschle Seeks Compromise on Aid Plan for Insurers*, N.Y. TIMES, Nov. 12, 2001, at 10, col. 6. Subsequent differences between the House and the Senate prevented passage of any terror insurance legislation prior to congressional recess for the holidays. *See* Mark A. Hoffman, *Insurers empty-handed: House, Senate impasse dooms terrorism relief bill*, BUS. INS., Dec. 24, 2001/Dec. 31, 2001, at 1.

n185 This is perhaps not surprising because the primary sponsors of the House bill are Republicans generally allied with the president. Perhaps also unsurprisingly, the House bill not only addresses insurance assistance but provides for a ban on punitive damages in connection with any disputes over terrorism coverage with noneconomic damages exempted from any otherwise applicable rules of joint liability. *See* H.R. 3210 § 14 (b)(1), (2).

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n186 Editorial, *Ensuring Insurance*, WALL ST. J., Oct. 24, 2001, at A22, col. 2. The Senate Banking Committee version of the plan, as described in a subsequent news article, would require insurers to absorb the "first $ 10 **billion** in [terrorist] claims and the government would pay 90 percent of claims exceeding that [amount]." *See also* Oster, *supra* note 182, at A24, col. 2 (describing administration and other proposals in more detail); Mark A. Hoffman, *White House suggests alternative to terror pool*, BUS. INS., Oct. 22, 2001, at 4 (same); Stephen Labaton & Joseph B. Treaster, *Bush Details Plan to Help Insurers on Future Terror Claims*, N.Y. TIMES, Oct. 16, 2001, at C1, col. 2 (same).

Endorsing a government bailout/backup of private industry did not come easy to the newspaper's editorial writers, n187 but they, like insurer lobbyists, have made a colorable case for some form of government role in assuring a continued market for terrorism coverage. n188 Certainly, it seems to be a better case than existed for the airline bailout act, n189 which Congress rushed into law less than two weeks after the September 11 disaster. n190 In that instance, Congress gave short shrift to the possibility that we would all be better off if the airline crisis was handled through the bankruptcy and market systems. n191 Many think that this would have led, after some short-term discomfort, to a stronger system of consolidated, solvent carriers. n192 Irrespective of the merits of the airline bailout, the case for assistance to the insurance industry appears stronger. n193

n187 *Ensuring Insurance*, supra note 186:

> We would rather eat cabbage for the next 20 years than have to suggest that the insurance industry needs some government help.
> . . .
> But government does have the duty to provide for national defense, and in this case it clearly failed to deal with terrorist risk. On the other hand, any government aid must be constructed so that it doesn't put taxpayers at permanent risk.

n188 *See* Oster, *supra* note 182, at A24 (noting that reports by Weiss Ratings, Inc., Fitch Inc. and Standard & Poor's stress need for federal involvement in maintaining insurer capacity to underwrite terrorism risks.

> The reports from the ratings firms generally support the industry's contention that legislation is needed quickly because most reinsurers that normally take on some of the risk underwritten by insurers have said they will quit offering terrorism coverage after Jan. 1. About 70 percent of insurance contracts renew Jan. 1.

n189 *See* Stabilization Act, *supra* note 46, § 408(b)(3). The Act provides more than $ 5 **billion** in monetary aid to the airline industry and also limits airline liability to the amount of insurance in force through creating a federal cause of action for **losses** but making the federal action a claimant's "exclusive remedy for damages arising out of the hijacking and subsequent crashes of such flights." *Id.* § 408(b)(1). The Act also provides that all September 11 claims be venued in the Southern District of New York (§ 408(b)(3)), with applicable law to be that of the site where the crash occurred (§ 408(b)(2)).

n190 *See id.* (providing for $ 5 **billion** in direct financial assistance, $ 10 **billion** in loan

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(discussing possible insurance issues arising out of anthrax poisoning following September 11 tragedy).

A. *Life Insurance*

Life insurance, of course, is triggered if the insured life is lost in a manner not excluded by coverage. As compared to property, casualty, and health insurance, life insurance tends to have more stable risk pools and steady profits. Compared to other insurers, life insurers spend proportionately less on adjusting claims and defending claims. Their inquiry is relatively confined: Did the insured life expire? How? Is there any basis for denying coverage due to an excluded cause of death or other defense such as misrepresentation? n14

n14 *See generally* JEFFREY W. STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES ch. 18 (2d ed. 1999 & Supp. 2002).

In the September 11 attack claims, the normal rules of life insurance were altered primarily by the difficulty of "proving" death and producing tangible physical evidence of death. Many of the bodies of the dead will never be found in any identifiable form, a consequence of the awful collapse of two huge buildings. In response, the New York State Insurance Department issued a rule providing that insurers licensed in New York "must accept affidavits from the families of those missing as proof of death when a death certificate was not readily available," with the department providing a standard form affidavit on its website. n15

n15 *See* Agovino, *supra* note 6, at 4C.

As to the possible use of the war risk exclusion, life insurers appear to be the least likely in the industry to use it and also made perhaps the strongest public assurances that they were strong enough to withstand the huge **losses** involved. n16 Like other industry leaders, life insurers have publicly stated that they would not invoke war risk exclusions to deny coverage. As discussed in Part VI, the war risk exclusion is unlikely to be successful even if invoked by some life insurers in response to September 11 claims. The war risk exclusion would appear to apply to any American military personnel killed in connection with retaliatory action against Taliban or terrorist organizations.

n16 *See* Agovino, *supra* note 6, at 4C (noting that financial consultant estimates that life insurers have net cash capital of $ 231 **billion** and that likely claims will not exceed $ 3 **billion;** giving example of MetLife, nation's largest life insurer, as estimating that it will pay $ 464 million in claims, a small percentage of its reserves and capital). *See also* Sclafane, *supra* note 3, at 6 (noting that another consultant estimates $ 20 **billion** in liability claims related to deaths, based on assumption of 10,000 deaths valued at $ 2 million per person). The actual final death toll is likely to be slightly less than 3,000. *See Nationalities of victims listed/494 foreigners from 91 countries lost lives on 9/11*, HOUSTON CHRON., Apr. 6, 2002, *available at* WL 3254505.

Unlike the more uniformly standardized policy forms found in property and casualty insurance, life insurance policies may vary considerably and frequently do not always contain a war exclusion, particularly if the policy is sold to a civilian who is not subject to a conceivable resumption of the military draft. For example, life insurance policies selected as representative for inclusion in the *Insurance Professionals' Policy Kit* do not contain war exclusions. n17 If nothing else, however, case law suggests that such exclusions are common in life insurance, perhaps more frequently when policies are issued or renewed during a time of open or prolonged hostilities.

n17 *See, e.g.*, One Year Renewable and Convertible Term Life Policy, No. AM 627E1-80, *reprinted in* ALLIANCE OF AMERICAN INSURERS, INSURANCE PROFESSIONALS POLICY KIT (2001 ed.) at 149, 151 (suicide excluded but death from war or terrorism not excluded)

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guarantees, and liability limitation).

Congress, of course, would regard the disappearance of airlines as a bad thing but appears to have misunderstood the consequences. Delta Airlines might, for example, fail, a prospect that Senator Orrin Hatch (R-Utah) candidly admitted was a large motivation for his vote because of the company's many workers in his state (*see* CONG. REC. S9594 (Sept. 21, 2001), which was a view voiced by all legislators from states with significant airline operations (*see, e.g.*, Sen. Carl Levin, D-Mich.; CONG. REC. S9595, Sept. 22, 2001). Airline failure does not, however, mean that the airplanes would disappear from the face of the earth or that other aspects of the operation would not be purchased and continue in some form or be reconstituted under a new entrepreneurial entity. Congress was concerned about airline health not only because of the role of air travel in the daily business economy but also because commercial airlines were likely to be needed in transporting soldiers and activated reservists to designated posts. *See* CONG. REC. S9591 (Statement of Sen. Jon Corzine (D-.N.J.) (Sept. 21, 2001) (Military officials "told us [Sen. Corzine and Sen. Robert Torricelli (D-N.J.)] that about 40 percent of the transportation that our military folks will need in a full war might be provided by our private aviation industry. The strength of that industry clearly is important for our national security.").

n191 The congressional debates on the Act suggest that legislators really did think, to pen a bad pun, that the sky was falling. Legislators appeared to believe that bankruptcy was imminent for the major airlines if financial assistance was not forthcoming. The airlines, of course, had been grounded for several days in the wake of the attacks and resumed flights were underpatronized while fixed costs of the airlines remained high, resulting in millions of dollars of **losses** each day. *See supra* note 190; *see generally* CONG. REC. S9590-9600 (Sept. 21, 2000).

Even though the Bankruptcy Code provides for Chapter 11 reorganization bankruptcies in which debtors can continue to operate their businesses while delaying and reducing payments to creditors, Congress must have unconsciously or implicitly believed that the airlines were in such dire straits that they could not give vendors adequate protection to continue to purchase fuel and the other necessities of operation. In addition, sufficiently dismal financial reports would require the Chapter 11 bankruptcy to be converted to a Chapter 7 liquidation bankruptcy. Under either of these scenarios, the airlines would be implicitly seen as heading for disappearance rather than as able to emerge from bankruptcy as a continuing industry.

n192 *See Ensuring Insurance, supra* note 186, at A22:

> We are especially sorry to have to consider government aid [for insurers] given the spending extravaganza in Washington at the moment. Any industry remotely affected by the events of September 11 has its hand out, and little of this special pleading makes any economic sense. The $ 15 **billion** bailout of the airline industry is a case in point. A few bankruptcies would not disturb the fact that airplanes would still be there to fly--albeit under new, and probably better, owners.

n193 *See Ensuring Insurance, supra* note 186, at A22:

> But property and casualty insurance is different. Unlike the airline industry, which involves hard assets, the insurance industry is a crucial part of the financial

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> underpinnings of the real economy. Without insurance, the real estate, construction and shipping industries would be moribund (and small businesses that are located in malls or have big landlords--florists, bookstores and shoe stores--might soon follow). Moreover, the [insurance] aid packages now being considered by Congress do not constitute a bailout in the sense that the industry has promised to pay off all claims from September 11.

Before rushing to any insurance judgment along the lines of the airline bailout, insurers and policymakers need to step back and assess terrorist risks without panic even though the clock is ticking (and as of this writing may have expired in some cases) on policy renewal, reinsurance agreements, exclusionary language, and the like. n194 In particular, to determine the appropriateness and nature of any government assistance, the terror risk should be analogized to that presented by other tough risks such as flood, earthquake, or **hurricane.** To the extent that terrorism parallels these risks, the industry and government response should probably parallel the traditional treatment of those risks. To the extent that terrorism presents a truly more difficult risk, government aid is warranted, but only to the extent of that greater difficulty in the risk. Anything more gives insurers a bailout rather than measured assistance that can be justified by its utility to society.

n194 January 1, 2002, has been advanced as something of an absolute deadline by the insurance industry because it is the date on which many reinsurance agreements are up for renewal. If reinsurance is not renewed, the argument goes, primary and excess insurers will be unwilling or unable to write coverage for terrorism **losses.** Even if this insurance doomsday scenario is correct, the consequences appear manageable. Even without reinsurance, large primary or excess carriers would appear to have the capacity to write limited coverage for terrorism at higher premiums. For example, a business may not be able to get all of the terrorism coverage that it wants but can perhaps buy lower-limits terrorism coverage that will protect it from most risks. In the meantime, insurers and Congress could continue to work rationally toward a solution without undue haste.

If a second unthinkable terrorist act takes place (e.g., the Sears Tower destroyed by suicide bombers) before a considered resolution is enacted, there would be a large uninsured **loss,** requiring the government to step in with emergency assistance, just as the Federal Emergency Management Agency now does for society's less prominent victims of uninsured flood and tornado damage. This could be expensive, of course, but probably does not result in the federal government paying any more money than is planned under the various proposed means of assisting the insurance industry. Although insurance is an important underpinning of coverage, even a total unavailability of **terrorism insurance** is hardly likely to grind business to a halt. Will the tenants of the Sears Tower really stop coming to work without **terrorism insurance?**

Under that logic, one might initially think of the terrorist risk as something that should be addressed with a risk pool in which insurers are forced to participate as a condition of doing business, something like the **hurricane** and windstorm pools found in Florida or other **hurricane**-prone states. n195 Seven states have some form of government-sponsored windstorm plan. n196 These plans function in a manner similar to residual plans for high-risk homeowner and automobile insurance. If an individual insurer will not accept the risk, the pool takes the risk, usually at a high premium. The pool is backed by insurers on a prorated basis according to market share with the state standing in reserve should the **losses** in a given year threaten the pool. n197

n195 *See* SCOTT E. HARRINGTON & GREGORY R. NIEHAUS, RISK MANAGEMENT AND INSURANCE 584, 585-87 (1999) (describing beach and windstorm insurance coverage programs in Gulf Coast and Atlantic Coast states, with detailed description of Florida

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programs responding to hard market created by **Hurricane** Andrew); Sean F. Mooney, *Are Terrorism Risks Really Uninsurable*, NAT'L UNDERWRITER (Property & Casualty ed.), Oct. 22, 2001, at 49 ("terrorism coverage for single-family homes would at this point appear to not involve abnormally high catastrophic exposures, beyond that already covered for natural perils like **hurricanes**").

n196 *See* HARRINGTON & NIEHAUS, *supra* note 195, at 584 (beach and windstorm insurance coverage programs operate in Alabama, Florida, Louisiana, Mississippi, North Carlina, South Carolina, and Texas).

n197 *See* HARRINGTON & NIEHAUS, *supra* note 195, at 584 (also presenting graph of amounts of exposure for state plans) and at 585-87 (describing Florida situation, in which there is long-standing residual market mechanism of Florida Windstorm Underwriting Association/Residential Property and Casualty Joint Underwriting Association created in 1993 in the aftermath of **Hurricane** Andrew as the insurer of last resort and the **Hurricane** Catastrophe Fund that operates as reinsurer for property insurers). *See also* Mooney, *supra* note 195, at 49 (describing Hawaii **Hurricane** Relief Fund, which was established in the aftermath of **Hurricane** Iniki in 1992 but which was discontinued and implicitly deemed no longer necessary by 2000; "the fund was structured to encourage its eventual replacement by the private sector").

Another model is flood insurance. Under the National Flood Insurance Act of 1968, n198 the federal government offers flood insurance at subsidized rates on property in flood-risk zones, but only up to a relatively low limit. n199 Since 1983, the government has offered a "write-your-own" program that appears to have successfully encouraged insurers to offer flood coverage, with more than three-fourths of the nation's flood insurance being written on this basis. n200

n198 *See* 42 U.S.C. §§ 4011-4128 (2000).

n199 *See* GEORGE E. REJDA, PRINCIPLES OF RISK MANAGEMENT AND INSURANCE 192 (4th ed. 1992). Until 1978, the subsidized insurance program was operated jointly by the federal government and private insurers. In 1978, the federal government "took over the program." The limits of coverage under the emergency program for national flood insurance (as of 1992) were $ 35,000 for single-family homes and $ 10,000 for contents, with a residential structure maximum of $ 100,000. Under the "regular" program, the limits are $ 185,000 on the dwelling and $ 60,000 on contents. *Id. See also* HARRINGTON & NIEHAUS, *supra* note 195, at 581-83 (describing program); JAMES S. TRIESCHMANN & SANDRA G. GUSTAVSON, RISK MANAGEMENT & INSURANCE 244 (9th ed. 1995) (also describing program).

n200 *See* REJDA, *supra* note 199, at 192.

Under the write-your-own program, private insurers sell flood insurance under their own names, collect the premiums, retain a specified percentage for commissions and expenses, and invest the remaining premiums. The companies service the flood insurance contracts, adjust **losses,** and pay their own claims. If the insurers' **losses** are not covered by premiums and investment income, they are reimbursed for the difference. However, any profits go to the U.S. Treasury. n201

n201 REJDA, *supra* note 199, at 192, citing NAT'L UNDERWRITER (Property & Casualty ed.), Nov. 11, 1983, at 2, and providing further explanation of the program at 192-93. *See also* TRIESCHMANN & GUSTAVSON, *supra* note 199, at 244 (also describing program).

Earthquake coverage is similar to flood coverage except that the insurance industry appears to have succeeded in making earthquake coverage available without direct government aid. Normally, earth movement, like flood, is excluded from the standard property policy. Specific

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coverage can usually be purchased at an additional premium except in certain high-risk areas. n202 After the 1994 Northridge earthquake, California established the California Earthquake Authority, a state-run but privately financed plan to insure against earthquakes. n203

> In essence, each participating insurer can write CEA earthquake policies, keep a portion of the premium for administrative expenses, and have the risk borne by the CEA. . . . The CEA can obtain up to $ 10.5 **billion** from various sources to pay claims (in addition to the premium revenue from CEA earthquake policies). Given its capital sources, the CEA can be viewed as a pooling arrangement among participating insurers. n204

n202 *See* HARRINGTON & NIEHAUS, *supra* note 195, at 581.

n203 *See* HARRINGTON & NIEHAUS, *supra* note 195, at 587-88 (describing California program).

n204 *See* HARRINGTON & NIEHAUS, *supra* note 195, at 587-88.

For thirty years, the federal government has helped to facilitate the acceptance and pooling of **hurricane,** flood, and earthquake risks. This approach appears to have succeeded in prompting private insurers to write coverage, even where the risk involved is equivalent to the awful **losses** of September 11. n205 The subsidy approach is, of course, subject to criticism in that it arguably encourages unwise activity such as building in **hurricane**-, flood-, or earthquake-prone areas. Any subsidy program poses this danger: it involves the government assisting in activities that make so little economic sense that the private market would discourage or even prohibit them.

n205 *See* HARRINGTON & NIEHAUS, *supra* note 195, at 587, n.8 (if an earthquake with the intensity of the 1906 San Francisco earthquake were to hit populated areas of California today, potential **losses** "[would be] higher than $ 50 **billion,**" a figure in accord with **loss** estimates for the September 11 tragedy). *See* text and accompanying notes 3-4, *supra* (discussing estimates of September 11 **losses)**. Similarly, one can argue that because the government did not act to bail insurers out of the problems created by asbestos liability that exceeded the September 11 liability, then the government should be similarly reluctant to engage in terror insurance intervention. *See* Towers Perrin Reinsurance, *September 11, 2001: Implications for the Insurance Industry*, Sept. 26, 2001, at 5 (total insurer **losses** from asbestos liability of approximately $ 120 **billion,** $ 55 to $ 65 **billion** of which fell upon U.S. insurers). Asbestos liability, however, accumulated over time, giving insurers opportunities for gradual or phased response, while future terrorism **losses** could be rapid and unanticipated, as were the September 11 **losses.**

Government backing of **"terrorism insurance"** presents no real analogy to this problem except perhaps in rare circumstances. Terrorism coverage seems not to encourage the type of moral hazard or adverse selection posed by government efforts to facilitate **hurricane,** flood, or earthquake insurance. If these programs are defensible, some government role in fostering a market for terrorism coverage seems defensible. But the seeming comparability of these risks suggests that government programs aimed at terrorism coverage need not be more grand or generous than those existing for **hurricane,** flood, or earthquake risks. n206

n206 Arguably, the better case can be made for doing less in the arena of terrorism coverage and letting the proverbial chips fall where they may upon private insurers. *See* Morgan

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Stanley Equity Research North America, *Insurance-Property-Casualty Bulletin*, Sept. 17, 2001, at 12:

> There is a history of unsuccessful outcomes to ponder when Congress has interfered, with the best of intentions, to prop up insolvent financial institutions that got themselves in trouble through poor risk management. The savings and loan crisis comes to mind.
> . . .
> Anytime managements are allowed to make bad risk management decisions and escape the consequences, a precedent is set and lessons are learned. In the case of insurance, two unfortunate consequences result: 1) customers learn not to discriminate--that is, pay for--the value of good risk management and strong ratings, driving down margins so that returns support only the lowest common denominator; 2) some managements learn there are no bad consequences for bad behavior, and take more risk, threatening the system and ultimately increasing costs to everyone.
>
> The insurance business already suffers greatly from the fact that buyers do not discriminate adequately between companies with good and bad claims-paying ratings, and good and bad balance sheets. Now, a time has finally arrived in which the sheep and goats of the industry will be separated. It would be unfortunate if the sheep acquiesced with or even encouraged an effort by Congress to dress up the goats to look like sheep.

Some have argued that terrorism presents a bigger problem than other tough risks, at least right now because capacity is already strained by the September 11 attack. n207 In addition, weaker reinsurers will be strained, perhaps unable to pay claims, and subject to failure from the shock of these **losses.** n208 At least in the short term, and perhaps over the longer term as well, it has been argued that terrorism is simply too hard to underwrite because of its unpredictability and the lack of a historical actuarial record upon which to cost out the risk of exposure to terrorism. n209 One arguable analogy is the United Kingdom, which established a terrorism reinsurance program (Pool Re) in response to IRA attacks. n210 Of course, weather is unpredictable, too. But while we do not know when and where the next tornado will hit, insurers can average out the risk over time and collect a premium sufficient to protect themselves provided the risk is pooled and distributed.

n207 *See Ensuring Insurance, supra* note 186, at A22:

> The costs of another terrorist attack would be beyond the capacity of industry to bear. Right now, without paying any claims, the industry has about $ 300 **billion** in capital, but the capital of the firms that are most exposed comes to between $ 80 **billion** and $ 100 **billion.** If the total claims arising from September 11 amount to anything near the high end of the estimate--$ 100 **billion**--then bid goodbye to almost one-third of the industry.

n208 *See Insurance-Property-Casualty Bulletin, supra* note 206, at 6 (because of September 11 attacks, "*capacity of the reinsurance market worldwide to take risk, currently around $ 120* ***billion*** *annually of premium, will shrink significantly*,--perhaps by one-third or more"). *See also id.* at 7 (Lloyd's syndicates may be particularly vulnerable because of "habit of

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reinsuring internally").

n209 *See Ensuring Insurance, supra* note 186, at A22:

> The risk of more terrorist acts cannot be quantified at the moment, thus premiums for terror coverage can't be priced. The abominable events of September 11 were the largest human-made disaster the industry has ever seen. Until that date, the probability of terrorism was considered so low that coverage was included as a "give-away"--it was neither priced in premiums nor charged for--and no capital was set aside to pay for it. By now, although the probability of another terrorist attack is high, actuaries cannot quantify the risk.

n210 *See September 11, 2001: Implications for the Insurance Industry, supra* note 205, at 10 (analogizing U.K. program to U.S. flood insurance program).

In addition, the insurance industry has shown itself capable of underwriting other difficult risks without government assistance, although often not to the extent desired by policyholders or at prices deemed attractive by policyholders. There have also been occasionally severe shortages or unavailability of coverage. For example, during the mid-1970s, there was the medical malpractice "crisis." During the 1980s, there was a generally hard market noted for "crises" in product liability insurance, pollution, and D & O liability coverage. n211

n211 *See* Sarah Veysey, *Lloyd's can absorb* ***loss***, BUS. INS., Oct. 1, 2001, at 1.

Without minimizing the seriousness of these problems, it appears that insurance markets have largely surmounted them. Various state governments actively assisted the formation of new carriers and the continuation of existing underwriting to provide medical malpractice coverage during the 1970s. But today, this coverage is largely provided by the private sector with some state government involvement through risk pools and physicians' catastrophe funds. A federal program of subsidized medical malpractice insurance has not been implemented, notwithstanding the difficulty and expense of medical malpractice insurance during the past thirty years.

Similarly, the perceived product liability insurance crises prompted unsuccessful efforts to federalize product liability law and some talk of federal aid on the insurance front. Instead, insurers and brokers worked to establish new carriers (e.g., Ace Ltd. and XL) n212 and policies (claims-made policies in lieu of the traditional occurrence policy) as well as to revise standard policies. Product liability insurance again became widely available, although at generally higher prices even during the largely soft market of the 1990s.

n212 *See* Christopher Oster, *supra* note 181, at A1, col. 1, and A17, col. 5 ("In the mid-1980s, [Marsh & McLennan] launched Ace Ltd. and Exel Capital, now known as XL. Those moves came in response to some established insurers ceasing to write liability coverage in the wake of huge jury awards for asbestos-related illnesses and big judgments against corporate directors and officers. Both Ace and XL went on to become publicly traded. Marsh retains small stakes in them."). Legislation enacted largely during the 1980s also facilitated the formation of risk retention groups and captive insurers.

The hard 1980s market for D & O insurance was a less extreme parallel of the product liability situation. The law of corporate director liability was seen as expanding too rapidly by many, n213 prompting D & O insurers to hike premiums or refuse to write coverage n214

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(and also prompting reluctance to take director posts). n215 State governments responded with remedial protective legislation. n216 Courts responded (although perhaps not consciously) by not aggressively expanding the potential new frontiers of liability. n217 Insurers responded with more careful underwriting practices and higher premiums. n218 D & O insurance is today not cheap but it is widely available, without significant government assistance.

n213 *See, e.g.*, Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (holding directors liable for insufficient vetting of proposed merger arranged by CEO); ROBERT W. HAMILTON, CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES; CASES AND MATERIALS 789 (7th ed. 2001) ("Response of the corporate bar to *Van Gorkom* was one of shocked incredulity," with many commentators suggesting that the decision had gutted protections directors previously enjoyed under the business judgment rule. *Id.* at 780-81.).

n214 The hard market in D & O insurance was not solely the result of any one case or doctrinal development, even when the case was one of Delaware law, a key jurisdiction for corporate governance matters. *See* HAMILTON, *supra* note 213, at 781, n.22:

> The decision in *Van Gorkom* was handed down during a "liability insurance crisis" in the United States. During this period insurance companies writing liability insurance in a variety of areas were reducing their exposure by reducing coverage limits, increasing premiums, and declining entirely to insure specific risks. Directors' and officers' liability insurance was involved in this process, and some of the activities described in the text may have been the consequence of the difficulties some companies were experiencing in obtaining or maintaining acceptable levels of liability insurance for their directors.

See also Tamar Lewin, *Director Insurance Drying Up*, N.Y. TIMES, Mar. 7, 1986, at D1, col. 3; William Glaberson, *Liability Rates Flattening Out as Crisis Eases*, N.Y. TIMES, Feb. 9, 1987, at A1, col. 5 (both cited by Hamilton).

n215 *See* Robert W. Hamilton, *Reliance and Liability Standards for Outside Directors*, 24 WAKE FOREST L. REV. 5, 28-29 (1989).

n216 *See, e.g.*, DEL. GEN. CORP. LAW § 102(b)(7) (2000) (providing that corporation may by specific provision in certificate of incorporation eliminate or limit personal liability of director for breach of fiduciary duty, provided that director may still remain liable where there is breach of duty of loyalty, bad faith, violation of statutory provisions on dividends, or director improperly derives personal benefit). *See also* MODEL BUSINESS CORPORATION ACT § 2.02(b)(4) (1990 revision to Act) (similar provision reacting to *Van Gorkom*). As of 1999, "43 states had adopted statutes similar either to this section or to Del. CGL § 102(b)(7)." *See* HAMILTON, *supra* note 213, at 782.

n217 *See, e.g.*, Cede & Co., Cinerama, Inc. v. Technicolor, Inc., 634 A. 2d 345 (Del. 1993) (finding no basis for plaintiff recovery merely because of director negligence or breach of duty; plaintiff must also show causality and damages).

n218 *See* William Glaberson, *Liability Rates Flattening Out as Crisis Eases*, N.Y. TIMES, Feb. 9, 1987, at A1, col. 5. The insurance industry also responded with the formation of new carriers better equipped to take on the D & O risk. *See* Oster, *supra* note 181, at A17, col. 5 (broker Marsh & McLennan formed Ace and XL insurers for this purpose as well as to provide high excess products coverage).

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Pollution coverage is a similar story. The standard CGL was revised to eliminate coverage for any pollution liability, without even the prior exception for sudden and accidental pollution. Although pollution coverage is not cheap or always easy to obtain, policyholders can buy back such coverage or purchase environmental impairment coverage, usually on a claims-made basis to avoid the problems of underwriting this risk on an occurrence basis. Although the government has not offered to be the pollution insurer of last resort (for the seemingly obvious reason that it does not want to encourage pollution), it arguably has done this indirectly through the Superfund program.

Distilled to its essence, the crucial question regarding government aid to insurers is whether terrorism is really all that distinct from these other tough risks. Determining which risk terrorism most resembles suggests the appropriate role--or nonrole--of government backing. The implicit view of the Bush administration and some commentators is that in the long term, terrorism can be underwritten, perhaps without the seemingly permanent government-backed protection seen with **hurricane,** flood, and earthquake insurance or with only state-by-state government intervention. n219 The necessary assumptions here are that government and society will obtain a better grasp of the terrorism problem and that insurers will acquire expertise sufficient to underwrite the risk. n220 This view assumes that the next several years will see a disabling of foreign powers that support terrorism, curtailment of terrorist funding, better intelligence, increasingly effective antiterror technology, and generally better homeland security (e.g., airport screeners who are competent and not engaged in illegal activities). This may be a necessary condition if effective insurer underwriting is to occur. If terrorism is contained, a track record will develop for which actuaries can make calculations based on a world of episodic but not overwhelming terrorist threat. n221

n219 *See Ensuring Insurance, supra* note 186, at A22. For example, perhaps New York, Illinois, and California will need to be more interventionist than Kansas, Missouri, and the Dakotas in view of the high concentration of potential terrorism targets in those skyscraperladen states with substantial urban commercial concentrations.

n220 Other respected commentators have argued that perhaps no government aid is needed for insurers. *See* Robert B. Reich, *Subsidies Aren't a Wartime Necessity*, WALL ST. J., Oct. 16, 2001, at A26, col. 4 (criticizing airline bailout and arguing against assistance requested by other businesses):

> The insurance industry has a somewhat stronger case. It's not seeking compensation for terrorist-induced **losses,** nor protection against future **losses** that it could otherwise cover. It wants protection against possible future claims so large and unpredictable as to be difficult to assess in advance--in effect, a new capacity it can't provide. Still, some skepticism may be in order. After all, insurers are in the business of assessing risk and setting premiums accordingly; it's hard to imagine why no insurer or reinsurer is capable of doing this for future terrorist attacks.

n221 *See* Mooney, *supra* note 195, at 49 (Mooney suggests caution before labeling terrorism an uninsurable risk. "Terrorism as such is now 'perceived' to be uninsurable. Prior to September 11 the perception was radically different--the coverage was practically given away. Even after September 11, it can be argued that not all terrorism acts need be viewed as uninsurable.").

If the campaign against terrorism is not particularly successful, the underwriting job is harder

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but perhaps not impossible. Even in a world where September 11 horrors take place with some frequency, insurers can control their exposure through policy limits, site-specific underwriting (e.g., willingness to insure the Bugtussle Mall but not the John Hancock building), large deductibles or self-insured retentions, very high premiums (for those unwilling to go bare or self-insure), and tailored exclusions. For example, a reasonable property insurer may be willing to cover the John Hancock building for everything but attacks by hijacked aircraft if the policyholder can demonstrate adequate protection against car bombers, ninja-like ground attackers, and demolition terrorists. In that case, the building may be "uninsurable" for hijacking attacks without a government program but there would still exist a de facto government program for airport security (regardless of who provides the security worker with a W-2 form) and military interdiction where commercial planes violate no-fly zones around major cities with skyscrapers that may be terrorist targets.

Before making any long-term decisions about the government role in relation to terrorism coverage, policymakers should remember the rationale for assisting insurers in the first place. The goal is not to help insurers because they face financial difficulty but to assist insurers so that insurance will be available to permit business and society to continue to operate productively. If terrorism coverage can indeed continue to be offered at even high prices, it may be wiser to simply treat this as a cost of doing business. Notwithstanding the difficulties posed by September 11, one source estimates that during 2002 the cost of risk to corporations per $ 1,000 of revenue will be $ 9.42 as compared to a range of $ 5.20 to $ 8.30 during the last decade. n222 Although every dollar counts to the cost-conscious corporation, these figures can be read as suggesting that insurance rates will rise by something less than one-half of one percent even without government subsidies. This is hardly a compelling case for much of a bailout. Although there will be particularly hard segments of the insurance market, something modest and temporary seems more in order.

n222 Robert P. Harwig, *2002: Capitalism At Its Best (and Worst)*, NAT'L UNDERWRITER (Property & Casualty ed.), Nov. 19, 2001, at 25 (presenting Prudential Securities estimates from 2000 Risk and Insurance Management Society Estimates).

One potentially positive aspect of the September 11 horror for the future of insurance underwriting is that property and liability insurers may assume the role that boiler and machinery insurers have long held--using the underwriting process to increase the safety of the policyholder's operations. With boiler and machinery insurance, the policyholder not only gets coverage but also gets the expert safety inspection of the boiler or other equipment. In the early twentieth century and to a continued extent, Underwriters Laboratories, a company begun by insurers to assist in reducing risk, improved the safety of electrical appliances by testing as a condition of insurability. Today's insurers might take a similar approach and require that policyholders demonstrate reasonable counterterrorism measures as a condition of obtaining insurance or price premiums aggressively according to the policyholder's self-protection against terrorism.

Under this scenario, it seems plausible that insurers can indeed still write some sort of terror coverage and make money, provided that they dodge the bullet of another WTC disaster before policies are renewed and increased premiums collected. If government backing is necessary, it may be required for as little as a year or two. Despite the depressing litany of terrorist incidents noted in Part VI of this article, including the 1993 bombing of the same WTC destroyed on September 11, insurers continued to write terrorism coverage at no cost (assuming that one accepts that the standard war risk exclusion is not a terrorism exclusion, even for the mega-terrorism of September 11). One can therefore argue with some force that, notwithstanding the cries for aid, insurers will provide some risk distribution and management options for terrorism. n223 Before adopting a permanent legislative approach to the problem, the United States would do well to study insurance activity in Israel, Britain, and Northern Ireland, all of which have faced substantial terrorist activity and continued to persevere with a modern economy. n224

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n223 One can argue that despite the September 11 **loss,** the event was a financially positive one for the insurance industry as a whole. *See* Oster, *supra* note 181, at A1, col. 1 (brokers and investment bankers forming insurance companies to take advantage of business opportunities provided by September 11 disaster), and at A17, col. 2 (Marsh & McLennan CEO Jeffrey W. Greenberg, then at insurer AIG, was criticized for opportunism when in 1992 he described **Hurricane** Andrew destruction as presenting business prospects for insurers ("an opportunity to get price increases now") but history proved him correct notwithstanding Florida regulators' temporary moratorium on rate increases when Greenberg's memo was leaked); Henny Sender & Chrisopher Oster, *Insurers Have Easy Time Raising Money*, WALL ST. J., Oct. 24, 2001, at C1, col. 3; Thomas K. Meakin, *Insurers Still Standing After WTC Attack*, NAT'L UNDERWRITER (Property & Casualty ed.), Oct. 22, 2001, at 28 (demonstrating that despite fall in stock prices in the wake of September 11, many insurers remain quite solvent); Andrew Ross Sorkin & Joseph B. Treaster, *2 Private Firms Taking Stake in Casualty Insurer*, N.Y. TIMES, Oct. 24, 2001, at C1, col. 2. *See also* Morgan Stanley, *World Trade Center Special Issue*, EQUITY RESEARCH N.A., Sept. 17, 2001 (suggesting that weaker insurers and reinsurers may be brought down by September 11 **losses** but that stronger carriers will benefit from the shakeout due to a predicted "flight to quality" by buyers in coming policy placements).

n224 *See* Mooney, *supra* note 195, at 49:

> Pool Re in the United Kingdom, designed to provide terrorism coverage in that country, allowed for the growth of a competitive private sector, and, prior to September 11, Pool Re had contracted substantially.
>
> In summary, the potential risk of terrorism appears to be too much for the existing insurance system to handle. Hence, there is a clear role for the federal government to act to avoid a financial calamity.
>
> However, this role should be carefully circumscribed and include strong incentives for the early reentry of private sector mechanisms for risk transfer.

See also Mazier, *supra* note 64, at 46, 48 (New York insurance coverage attorney notes that U.K. terrorism had damage of far lower magnitude than September 11 attack).

But on the proverbial other hand, insurers can also argue that twenty-first century terrorism is different. n225 It includes not only the elements of past terrorism (hate, ignorance, weapons, willingness to die for a cause no matter how bizarre, theological if warped commitment to the cause, aid and sanctuary from nations that wish to use the terrorist for political purposes) but also a new level of organization. Now the suicidal fanatic has learned to fly and through the support of a far-flung and well-heeled network is better able to infiltrate the target society and move undetected. Josef Stalin once grimly but accurately observed that a single death is a tragedy but a million deaths is a statistic. Paradoxically, terrorism has moved from an ability to inflict tragic but relatively contained **losses** to the threat of massive and mind- and emotion-numbing **losses.**

n225 *See* Calmetta Coleman, *Buffett Says Insurers Made Mistake on Terror as Berkshire Posts **Loss***, WALL ST. J., Nov. 12, 2001, at B3, col. 4 (billionaire investor Warren Buffett, head of Berkshire Hathaway, states in letter to shareholders that Berkshire's insurance operations made "'huge mistake' by not anticipating the need to collect extra premium for terrorist acts, and he outlined plans to revamp underwriting practices"). Although noting the seriousness of terrorism, Buffett's letter implicitly suggests that insurers can cover terrorism

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[hereinafter POLICY KIT]. *See also* Flexible-Premium (Universal) Life Insurance Policy, Form 7-82 MIAC, *reprinted in* POLICY KIT at 171, 177 (no war exclusion found in policy form).

B. *Health Insurance*

Many of those requiring medical care in the wake of the disaster were undoubtedly insured. Perhaps surprisingly, some health insurance policies contain war exclusions. n18 Generally, however, medical insurance is thought not to frequently contain war exclusions or to be subject to coverage defenses based on the war risk exclusion, although the presence of such an exclusion would be consistent with general insurance principles.

n18 *See* Major Medical Expense Policy No. IA 5710, *reprinted in* POLICY KIT, *supra* note 17, at 139, 142 ("We will not pay benefits for any charges incurred as a result of: . . . 3. war, declared or undeclared, or any act thereof.").

C. *Property Insurance*

First-party property insurance generally applies to **loss** caused by "direct physical **loss"** to covered property. n19 There would appear to be unquestionable coverage for the **loss** of the WTC towers and their contents (including company records but not currency or negotiable instruments), as well as for the physical damage to surrounding property due to the airplane collisions. Even if a resistant (and politically tone-deaf) court were to find the collapse of the towers to be only an indirect result of the attack, the more immediate cause of the collapse was the fire that weakened the steel frame of the buildings--and fire is an unquestionably covered cause of **loss** in property policies. n20 But, as with other policies, the typical property policy contains a war risk exclusion that could potentially be invoked. n21 In addition, standard property insurance typically excludes coverage for **loss** resulting from enforcement of the laws, government action, nuclear hazard, utility failures, n22 or business income **losses** stemming from utility service interruption. n23

n19 *See, e.g.*, Building and Personal Property Coverage Form, CP 00 10 06 95 (ISO 1994), *reprinted in* POLICY KIT, *supra* note 17, at 185 ("We will pay for direct physical **loss** of or damage to Covered Property."). Renters' insurance will present issues similar to those found with real property insurance policies. *See* Jay Romano, *A Lesson in Catastrophe, and Renter's Insurance*, N.Y. TIMES, Oct. 4, 2001, at C1. In the aftermath of the attacks, at least one property insurance coverage dispute has arisen related to the mechanics of contracting and adding property to coverage. *See* Damien Tomlinson, *Aussie firm seeks cover for WTC **loss***, BUS. INS., Nov. 26, 2001, at 19 (Westfield Holdings Ltd., insured by Zurich, a developer of a WTC shopping mall, signed lease in July 2001 and claims coverage as automatically added property under blanket policy; Zurich contests). This type of dispute regarding covered items and effective dates is not peculiar to property insurance and may appear in slightly different form with other lines of insurance as well.

n20 Insurance law generally follows the concept of "efficient proximate cause" in determining the cause (or causes) of a **loss.** The determination of cause of **loss** is a function of both the cause nearest the **loss** and the dominant cause of the **loss.** When that determination is made, coverage then turns on whether the proximate cause (or concurrent proximate causes) is covered under the applicable policy. *See* STEMPEL, *supra* note 14, §§ 7.01-7.02. New York adheres particularly closely to this approach with an emphasis on the cause nearest the **loss** in time and space. See text and accompanying notes 65-75, *infra*. In the case of the towers, one can make a strong case that fire was both the cause nearest the **loss** in time and the dominant cause of the **loss** in connection with the collapse of the buildings. Although the terrorist suicide hijacking is clearly a cause-in-fact of the **loss, the loss** is not necessarily excluded under prevailing insurance law, even where the policy contains a terrorism exclusion, unless the exclusion is broadly worded enough to encompass remote or less significant causes.

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if they underwrite it correctly at an adequate premium. In effect, an arguable financial genius suggests no need for an extensive government role in assisting insurers in order to maintain terrorism coverage. Buffett's assessment also implicitly accepts the view that the standard war risk exclusions (that were undoubtedly contained in the Berkshire and General Re policies) do not preclude coverage for terrorism **losses.**

In the sense of now having potentially great magnitude, twenty-first century terrorism looks like a **hurricane,** flood, or earthquake. But these natural disasters, because of their very dispersion, seldom hit the wealthiest pockets of society. Many floods are in rural areas, as are earthquakes. **Hurricanes** often wreak the greatest havoc on areas of light development and population. When this is not the case, of course, the quantum of **loss** becomes industry threatening. **Hurricane** Andrew was the worst **hurricane** not because of its strength but because it hit Miami. Similarly, the Northridge earthquake was not the strongest earthquake but did the most damage because it took place in populated, developed, wealthy southern California. By their nature, terrorist attacks in the United States are likely to be aimed at population centers, particularly at landmarks, which tend to involve higher property damage and business **losses.**

Insurers can thus argue that terrorism has moved to a sufficiently higher-order magnitude with greater dispersion because of this potential intensity. In effect, a severe act of terrorism becomes a vertical **hurricane,** earthquake, or flood and therefore becomes the type of correlated risk that the private sector cannot underwrite alone. n226 Although not "war" in the classic sense or within the meaning of the standard war risk exclusion, it is warlike in its correlation and severity as well as in its unpredictability. If one accepts this view, a long-term or permanent government commitment to helping spur terrorism coverage that functions similarly to windstorm, flood, and earthquake programs may be justified.

n226 *See* Christopher E. Mandel, *Impact of attacks felt across all lines*, BUS. INS., Oct. 15, 2001, at 10.

What seems unjustified, except in only the shorted immediate term, is first-dollar or unlimited government coverage of terrorism **losses.** n227 The September 11 **losses** are different largely because they are so big. Prior to September 11, the insurance industry showed that it could absorb "little" terrorism **losses** and did so without apparent increase in premium. If the government starts picking up the terrorism tab from dollar one and does so to the full extent of the **loss,** it essentially bails out insurers with little in return. Even if this government underwriting is not at the 100 percent level, it would remain an unwarranted gift to the insurance industry. Government coverage at 90 percent or 80 percent levels is essentially the same thing, even at a level in excess of $ 10 **billion** of industry **losses.**

n227 *See* Mooney, *supra* note 195, at 49 (suggesting that after initial emergency role for government, insurers should be able to underwrite terrorism risks. "Can risk of $ 40 **billion** be transferred in the private sector of the U.S. economy? Yes, if the correct mechanisms are in place. For perspective, the stock market transfers the financial risks of corporations every day.").

One searches the trade literature in vain for any notion of how the industry or its congressional supporters derived these high percentages of required government subsidy. One could as easily argue for 50-50 cost sharing of high excess **losses,** although even this more reasonable figure has a pulled-from-thin-air quality. Perhaps a more studied analysis of insurance industry finances would show that far less government assistance is required or that the attachment point for such aid should be considerably higher (e.g., $ 25 **billion).** The burden in calculating and defending this figure, however, should be placed upon insurers. Until the amount of needed assistance is clearly demonstrated, government aid should be only what is necessary to keep the market functioning in some form. Because of looming reinsurance treaty renewal dates, some action is inevitable, but policymakers should not be

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stampeded into doing more than what is necessary.

A rush to judgment toward excessive government generosity, as occurred in the airline bailout, would be a particularly unwise move by Congress. n228 Insurers and risk managers have made a strong case regarding the seriousness of the problem and a reasonably compelling case for having at least an emergency program in place in time for the next round of reinsurance renewals. n229 However, the short-term triage required for generally healthy insurers whose future looks brighter than their past hardly calls for the immediate establishment of a long-term government program of high **loss** subsidy. Quick action may be needed to preserve some semblance of coverage in the short term. There is no need to lock the United States into a massive program of insurance subsidies until the situation is better studied, understood, and steadied.

n228 As of this writing, Congress has yet to enact either a temporary or a permanent program for backing **terrorism insurance.** *See* Hoffman, *supra* note 184, at 1 (House-Senate disagreements prevent passage of legislation during 2001); Mark A. Hoffman, *Insurers still await action by Congress*, BUS. INS., Nov. 26, 2001, at 3. *See also* Steven Brostoff, *Timing, Suspicion Hurts Insurers in D.C.*, NAT'L UNDERWRITER (Property & Casualty ed.), Dec. 3, 2001, at 41 (offering explanation for difference between swift congressional aid for airlines and other industries as contrasted with greater reluctance to aid insurers; explaining part of the difference as congressional regret from acting hastily and too generously on behalf of airlines); text and accompanying notes 40-45, *supra* (describing airline assistance legislation).

n229 *See* Editorial, *Industry must lobby Congress now on terrorism coverage*, BUS. INS., Nov. 12, 2001, at 8 (noting industry preference for Senate bill and arguing that situation is urgent):

> All in the insurance industry are holding their breath, waiting to see what federal law-makers will do next.
>
> The question of whether and how the U.S. government will alleviate the burden of insuring future terrorism risks is central to nearly all impending discussions of renewals among buyers and sellers of commercial insurance and reinsurance. Renewal negotiations must begin soon for 2002 programs to be completed by Jan. 1, but without knowing how the government might step in, it is impossible to discuss pricing and capacity for **terrorism insurance.** This looming question also creates uncertainty for all other coverage discussions.
>
> . . .
>
> The Senate approach is preferable because it would provide only catastrophic protection. It also would call for the government to provide true coverage of **losses** rather than simply loans with potentially onerous repayment terms, as under the House measure.

See also Jane Merriman, *Insurers pressured as WTC bill heads toward $ 70bln*, REUTERS ENGLISH NEWS SERV., Oct. 16, 2001, *available at* Westlaw ALLNEWSPLUS database; Dave Lenckus, *Airports lose terror cover*, BUS. INS., Oct. 1, 2001, at 1. There were many individual insurer acts of retrenchment. For example, in the immediate aftermath of the attacks, the St. Paul Companies sent a notice to its agents and brokers imposing a moratorium on writing any new business in the New York metropolitan area. The Lloyd's Underwriting Association on September 17, 2001, issued a General Notice of Cancellation of Hull War Risks to the members of its market Insurance Brokers Committee designed to effect notice as of September 19, 2001, and to provide for cancellation of these risks as soon as

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permitted by respective contracts of coverage.

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Terms: **loss and "terrorism insurance" and loss and hurricane and billion** (Edit Search)
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n21 *See, e.g.*, Causes of **Loss,** Basic Form, No. CP 10 10 06 95 (ISO 1995), *reprinted in* POLICY KIT, *supra* note 17, at 220, 222 (bold in original):

> 1. We will not pay for **loss** or damage caused directly or indirectly by any of the following. Such **loss** or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the **loss.**
>
> . . .
> **f. War and Military Action**
> (1) War, including undeclared or civil war;
> (2) Warlike action by a military force, including action in hindering or defending an actual or expected attack by any government, sovereign or other authority using military personnel or other agents.
> (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

n22 *See id.* at 221, excluding coverage for **losses** resulting from:

> **a. Ordinance or Law**
> The enforcement of any ordinance or law:
> (1) Regulating the construction, use or repair of any property; or
> (2) Requiring the tearing down of any property, including the cost of removing its debris.
>
> This exclusion, Ordinance or Law, applies whether the **loss** results from:
> (1) An ordinance or law that is enforced even if the property has not been damaged; or
> (2) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical **loss** to that property.
> . . .
> **c. Governmental Action**
> Seizure or destruction of property by order of governmental authority.
> But we will pay for **loss** or damage caused by or resulting from acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread, if the fire would be covered under this Coverage part.
> **d. Nuclear Hazard**
> Nuclear reaction or radiation, or radioactive contamination, however caused.
> But if nuclear reaction or radiation, or radioactive contamination, results in fire, we will pay for the **loss** or damage caused by that fire.
>
> **e. Utility Services**
> The failure of power or other utility service supplied to the described premises, however caused, if the failure occurs away from the described premises.
>
> But if the failure of power or other utility service results in a Covered Cause of **Loss,** we will pay for the **loss** or damage caused by that Covered Cause of **Loss.**
>
> This exclusion does not apply to the Business Income coverage or to Extra

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Expense coverage. Instead, the Special Exclusion in paragraphs b.3.a(1) applies to these coverages.

n23 *See, e.g., id.* at 222 (excluding business income coverage from **loss** of utility services unless utility failure brings about another, covered cause of **loss)**.

D. *Business Interruption*

Business interruption, also referred to as business income or BI, coverage is usually sold as an adjunct to property coverage but is also sold separately. Such coverage typically provides payments for lost earnings (and sometimes payroll, rent, insurance premiums, utility bills, and taxes) to businesses that are forced to close or slow down significantly due to a covered first-party property **loss.** n24 The September 11 attacks present pronounced business interruption claims because most of the property damage occurred in the core of one of the world's leading business centers. n25 Unlike other large historical **losses** from earthquakes or **hurricanes,** virtually all destruction on September 11 affected commercial enterprises.

n24 *See* STEMPEL, *supra* note 14, at ch. 15; Andrew M. Reidy & Robert L. Carter, *Insurance Law: Business Interruption*, NAT'L L.J., Oct. 1, 2001, at A23.

n25 *See* Dave Lenckus, *Securities firms seek coverage for shutdown: Claims will test interruption provisions*, BUS. INS., Nov. 5, 2001, at 1; Sylvia Hsieh, *'Business Interruption' Claims Soar in Terrorist Aftermath*, LAW. WKLY. USA, Oct. 29, 2001, at 1.

To some extent, business interruption coverage issues will resemble straight property **loss** claims in that any claim excluded under the basic property policy is likely to be excluded under the business interruption coverage. n26 In addition, business interruption coverage has additional prerequisites that must be satisfied. Such policies typically require a "necessary suspension" of the business "operations" due to the **loss** for a "period of restoration" of the physical damage." n27 At a minimum, the towers themselves and surrounding businesses near the Ground Zero area that were physically damaged would appear to meet this prong of coverage. n28 Beyond this, the precise contours of business interruption coverage are harder to ascertain and may vary considerably by policy, policyholder, and situation. n29

n26 Some policies may, however, provide business interruption coverage, even when there is no physical **loss** to covered property. *See, e.g.*, Sloan v. Phoenix of Hartford Ins. Co., 207 N.W.2d 434 (Mich. Ct. App. 1973) (coverage for movie theater that, although undamaged itself, was closed due to curfew imposed in response to urban riots). *See* text and accompanying note *infra*.

n27 *See* Business Income and Extra Expense Coverage Form, No. CP 00 30 06 95, *reprinted in* POLICY KIT, *supra* note 17, at 237.

n28 *See* Reidy & Carter, *supra* note 24, at A23; Hsieh, *supra* note 25, at 21 ("'If you were in the World Trade Center, there's no question you had a direct physical **loss.** But if a guy owns a sandwich shop or dry cleaner 12 blocks away, and his place is covered in half a foot of crud, does he have a direct physical **loss?**'," quoting policyholder attorney Lorelie Masters, who also noted possibility of separately applicable policy provisions concerning dust and debris.).

n29 *See* Susanne Sclafane, *FC&S Ponders Business Income Claims*, NAT'L UNDERWRITER, Oct. 8, 2001, at 51 (recording in-house discussion/debate of staff members at Fidelity Casualty & Surety regarding existence of business interruption coverage under variant

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scenarios from WTC **loss** with substantial disagreement and uncertainty). *See, e.g.*, Two Caesars Corp. v. Jefferson Ins. Co., 280 A.2d 305 (D.C. 1971) (policy language provided for coverage for riot **losses** if there was direct physical damage to insured property; no coverage where business was lost due to government curfew occasioned by physical damage to property of others stemming from urban riots triggered by assassination of Martin Luther King).

A common standard BI form does provide limited BI coverage from restricted access to the insured business because of physical damage that occurs but is not on the policyholder's premises. n30 This type of coverage usually requires a seventy-two-hour waiting period and typically carries a common benefit limit of $ 250,000 for up to three weeks of such closure. n31 For example, the Reagan National Airport serving Washington, D.C., was closed by government order for nearly a month after the September 11 attacks. Businesses at the airport probably have coverage under this policy provision but perhaps not nearly enough to provide full indemnity. After reopening, traffic was down at Reagan and other airports. This continuing, long-term business slowdown may become the subject of claims for additional coverage but the policyholder is unlikely to prevail unless it obtained special BI endorsements or an uncapped amount of benefits. n32

n30 *See* Hsieh, *supra* note 25, at 21 (noting property insurance coverage for "contingent business interruption" when policyholder's business is disrupted by direct physical **loss** to supplier or customer and that this type of coverage "has the potential to apply across the country," according to one policyholder attorney).

n31 *See* Business Income and Extra Expense Coverage Form, No. CP 00 30 06 95, *reprinted in* POLICY KIT, *supra* note 17, at 238:

> . . .
> **b. Civil Authority.** We will pay for the actual **loss** of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical **loss** of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of **Loss.**
>
> The coverage for Business Income will begin seventy-two hours after the time of that action and will apply for a period of up to three consecutive weeks after coverage begins.
>
> The coverage for Extra Expense will begin immediately after the time of that action and will end:
> (1) 3 consecutive weeks after the time of that action; or
> (2) When your Business Income coverage ends; whichever is later.

See also Sclafane, *supra* note 29, at 52, 54.

n32 *See* Sclafane, *supra* note 29, at 54. Some policyholders may also have purchased specific ordinance or law coverage by endorsement. *See* Ordinance or Law Coverage, Form CP 04 05 06 95 (ISO 1994), *reprinted in* POLICY KIT, *supra* note 17, at 256.

In addition, notwithstanding the spirit of unity evidenced in the aftermath of the attack, there will be policyholder-insurer disputes as to valuation of claims and the validity of claimed extra expenses occasioned by the business interruption. n33 Claims may also arise under a relatively frequent endorsement providing "contingent" BI coverage where the policy-holder has a major supplier or customer that is lost through direct physical damage. For example, a

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COMMENT: THE INCALCULABLE RISK: HOW THE WORLD TRADE CENTER DISASTER ACCELERATED THE EVOLUTION OF INSURANCE TERRORISM EXCLUSIONS

Jane Kendall

SUMMARY:
... Welts illustrates the pattern that accounts for much of the divergence in modern cases involving terrorism, between the actuarial impetus for the war exclusion and its judicially bounded operation. ... An effective terrorism exclusion will be one that successfully marries simplicity of language with precision of purpose in identifying sources of inestimable loss capable of producing claims so catastrophic as to invalidate rate-setting models and destabilize the financial condition of the insurer. ... Given the history of war exclusion clauses, their probable ineffectiveness for eliminating terrorist acts from the universe of insured events, and the current opportunity for crafting and implementing effective terrorism exclusions, however, insurers need to differentiate between the two in order to ensure adequate protection from liability. ...

"The deliberate and deadly attacks, which were carried out yesterday against our country, were more than acts of terror. They were acts of war."

- President George W. Bush, September 12, 2001. [1]

"Based on our analysis it seems clear that the attacks in New York, on the Pentagon, or on the plane that crashed in Pennsylvania do not constitute "acts of war' as contemplated by the language of these [insurance policy] exclusions."

- Commissioner James C. Bernstein, Minnesota Commerce Department Insurance Division, September 24, 2001. [2]

TEXT:
[*569] I. Introduction

For all practical purposes - including the quintessentially utilitarian matter of insurance - the last vestiges of the distinction between war and international terrorism went up in smoke

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include the following:

(1) A "war," whether declared or undeclared, can exist only where sovereign or quasi-sovereign entities engage in hostilities. [98] Terrorism exclusions should specify that terrorist acts may, but need not, be committed on behalf of or sponsored by any sovereign or quasi-sovereign entity.

(2) An act of war cannot be committed by a terrorist group other than a de facto government or an entity acting on behalf of a government. [99] Terrorism exclusions should stipulate that a terrorist act may, but need not, be committed by or on behalf of a group that comprises a de facto government or a recognized government.

(3) The actions of a "tiny non-governmental entity" fighting the United States do not constitute "war" between the United States and that entity. [100] Terrorism exclusions should make it clear that the size of a terrorist organization is not relevant to the determination as to whether or not its act is excluded.

(4) Words describing violent events commonly used in war-risk exclusions are construed as having "dimensions besides the level **[*593]** of violence," which may include requirements that multiple actors be involved. [101] For example, according to the Pan Am court, for there to be a ""riot' three or more actors must gather in the same place ... ." [102] Similarly, "for there to be a civil commotion, the agents causing the disorder must gather together and cause a disturbance ... ." [103] Drafters should specify that excluded acts of terrorism may be committed by one or more persons or entities.

Pan Am also provides a number of cautions for insurers with respect to practices that may result in findings of ambiguity:

(1) Terms stipulating a number of specific types of excluded conduct will not be construed as describing an inclusive continuum of violent acts; rather, at least one of the specific types of conduct must fairly describe the cause of the loss. [104] Terrorism exclusions should be carefully drafted to avoid interpretations that limit the excluded conduct to specific listed actions.

(2) An insurer's adoption of a new exclusion to deal with the particular type of loss sustained by an insured within a short time after the loss was incurred will be deemed evidence that the insurer's previous exclusion language was ambiguous. [105] Care should be taken to file and implement the most comprehensive and clearest exclusionary language possible and to avoid being forced to revise and refile after unanticipated losses have been incurred.

(3) In some jurisdictions, contra proferentem is applied in disputes between insurers and reinsurers as well as in those between insurers and unsophisticated insurance consumers. [106] In these jurisdictions, ambiguities may be resolved against the drafter, even where the opposing parties are the insurer and the reinsurer of the same risk and both are sophisticated parties. [107] **[*594]** Since the insurer's exclusions are subject to filing and approval by state insurance regulators, it is critical that the language filed for inclusion in the primary contract be consistent with any reinsurance agreement exclusions to avoid primary writer liability for losses that will be unrecoverable under the terms of the carrier's reinsurance agreements.

D. Revisiting the NAIC's Draft

Building upon the NAIC's draft definition and guided by both readability considerations and the admonitions of the Pan Am court, the author offers the following as a starting point from which insurers might develop terrorism exclusions appropriate for their particular products:

Losses due to acts of terrorism are not covered. For purposes of this exclusion:

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"Act of terrorism" means an act that is dangerous to or destructive of:

. human life;

. human health; or

. property of any kind. This includes both tangible and intangible property. It includes real property and personal property. It includes infrastructure such as roads, bridges, and tunnels; power systems and water systems; broadcasting systems and computer systems.

The act must be planned or carried out by a person or group acting on behalf of an organization based outside of the United States.

The organization may be, but is not limited to, one that:

. claims to be motivated by political, religious, or social beliefs; or

. aims to intimidate, influence, or coerce the United States government or its citizens.

[*595] The organization may, but need not, be:

. a sovereign entity--an independent state or government;

. a quasi-sovereign entity--one that has some traits of a sovereign entity; or

. a de facto government--one that has taken over or separated from a regular government.

It need not be an organization of a particular size.

"Acting on behalf of" an organization means:

. acting as its agent or representative;

. affiliated with it; or

. being sponsored or supported by it in any way. This includes receiving assistance, funding, training, direction, or equipment from the organization.

"Based outside of the United States" means founded, located, headquartered, or maintaining a presence outside of the United States.

"Losses due to acts of terrorism" includes losses incurred in attempted acts of terrorism. [108]

V. Conclusion

The risk of unpredictable multi-billion dollar losses due to acts of transnational terrorism is a risk that cannot currently be insured against without exposing the insurance industry to dangerous **[*596]** financial destabilization and particular insurers to insolvency. Traditional war-risk exclusions are ineffective devices for eliminating these exposures, despite certain present-day similarities between war and terrorism. To protect themselves and the ability of the industry to provide coverage for insurable risks, insurers must implement effective policy

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exclusions in order to effect the transfer of catastrophic terrorism risks and the assumption of such losses by an alternate mechanism still to be identified by Congress. Owing to the recent crisis, state insurance regulators have generally agreed to approve terrorism exclusions, and case law suggests that the courts will uphold them if - but only if - they are written in a clear and unambiguous manner. Insurers must be informed and guided by past judicial interpretations in crafting such legally adequate and enforceable plain English exclusions for losses due to terrorism.

FOOTNOTES:

↑n1. President George W. Bush, Remarks at End of Cabinet Room Meeting with National Security Team (Sept. 12, 2001), in Text of Bush Statement, Wash. Post, Sept. 13, 2001, at A3.

↑n2. Press Release, Minnesota Commerce Department, Insurance Division, Statement of Minnesota Commerce Commissioner James C. Bernstein, Insurance Policy "Act of War" Exclusion (Sept. 24, 2001), available at http://www.commerce.state.mn.us/pages/NewsReleases/Releases2001/News010924.htm (last visited Apr. 4, 2002).

↑n3. A week after the attacks, Steven J. Dreyer, Managing Director for U.S. Insurance Industry Ratings at Standard & Poor's, commented that the insurance industry could "withstand an enormous financial hit ... . The totals would have to exceed [fifty billion dollars] before we would begin to worry about the insurance system." Scott Farley, U.S. Attack "Will Not Cripple the Insurance Industry,' Ins. Day (London), Sept. 18, 2001, at 3, available at LEXIS, News Library, Insday File. By recent estimates, the total financial impact on insurers worldwide could reach 70 billion dollars. Claire Wilkinson, Final Cost from WTC "Could Exceed $ 70bn,' Ins. Day (London), Nov. 7, 2001, available at LEXIS, News Library, Insday File. This would far surpass the $ 15.5 billion in total claims resulting from Hurricane Andrew in 1992, the most catastrophic single event on record prior to the September 11 attacks. Linda Stern, Processing a $ 25 Billion Claim: The Insurance Industry Gears Up for Massive Settlements, Newsweek, Sept. 24, 2001, at 56. It would dwarf the $ 775 million outlay for claims associated with the 1992 Los Angeles riots, the most expensive man-made disaster in the past one hundred years. At the Top of a Terrible List, Bus. Wk., Sept. 24, 2001, at 12. According to Insurance Services Office, Inc. and the National Association of Independent Insurers, for the first time ever, the property and casualty insurance industry in the United States reported a net loss for the nine months ending on September 30, 2001. Press Release, Insurance Services Office, Inc. and the National Association of Independent Insurers, First-Ever Nine-Month Net Loss for Property/Casualty Industry in Wake of September 11 Attack and Deterioration in Investment Results (Dec. 19, 2001), at http://www.iso.com/docs/pres260.htm (last visited Apr. 4, 2002). The $ 3.1 billion aggregate net loss after taxes through September was attributed primarily to the September 11 attacks and sharply contrasts with a net gain of $ 16.8 billion for the same period in 2000. Id.

↑n4. The National Association of Insurance Commissioners ("NAIC") is an organization comprised of the chief state insurance regulatory officials of the fifty states, the District of Columbia, and several U.S. territories. For more information about the NAIC, see NAIC's Web site at http://www.naic.org/1misc/aboutnaic/about/about01.htm (last visited Apr. 4, 2002).

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n5. Letter from Rep. Michael G. Oxley, Chairman, House Committee on Financial Services, et al. to Kathleen Sebelius, President, National Association of Insurance Commissioners (Sept. 17, 2001), available at http://www.naic.org/1news/releases/rel01/doc/091801lt.pdf (last visited Apr. 4, 2002).

n6. Id. (emphasis added).

n7. See Lee Bergquist, NML to Honor All Attack Claims; Insurer Won't Cite "Acts of War' Exclusion, Milwaukee J. Sentinel, Sept. 15, 2001, at 1D (Northwestern Mutual Life Insurance Company); Tamara Loomis, Crisis Management: Terrorist Actions Prompt Laudable Responses, N.Y. Law J., Sept. 20, 2001, at 5 (Chubb Corp., Swiss Re, and Hartford Financial Services Group); Christopher Oster, Ace Joins Insurers That Won't Invoke Act-of-War Clause, Wall St. J., Sept. 20, 2001, at B2 (Ace Ltd.); David Pilla, Life Insurers Dismiss War Exclusion, Best's Ins. News, Sept. 18, 2001, available at 2001 WL 24724943 (MetLife Inc., Prudential Financial, and CIGNA).

n8. See Scott Farley, Fitch Initial Review Is Complete, Ins. Day (London), Sept. 26, 2001, available at LEXIS, News Library, Insday File (commenting that "any efforts to invoke acts of war exclusions ... could backfire. Such action might reduce losses, but would cause severe long-term damage to reputations and franchise values ... ."); Loomis, supra note 7, at 5 (discussing the necessity for tactfulness in public statements following the disaster).

n9. The leading case pertaining to war exclusions as applied to losses incurred as the result of terrorist actions is Pan American World Airways, Inc. v. Aetna Casualty & Surety Co., 505 F.2d 989 (2d Cir. 1974), in which a commercial plane was hijacked in mid-flight by terrorists, taken to Egypt, and destroyed. In a lengthy opinion, the court surveyed and summarized many of the earlier cases and held that the losses due to terrorism were not excluded under any of the several war exclusions of the all-risk insurer. See id. at 1012-15; see also discussion infra Parts III.A., IV.C.

n10. See Metro. Police Retiring Ass'n v. Tobriner, 306 F.2d 775, 777 (D.C. Cir. 1962). See generally Robert Riegel et al., Insurance Principles and Practices: Property and Liability, chs. 1-2 (6th ed. 1976) (explaining fundamental principles of risk, risk management, and the insurance mechanism).

n11. See, e.g., Jordan v. Group Health Ass'n, 107 F.2d 239, 244-45 (D.C. Cir. 1939); Mich. Hosp. Serv. v. Sharpe, 63 N.W.2d 638, 639 (Mich. 1954).

n12. See Riegel et al., supra note 10, at 17.

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↑n13. See Epmeier v. United States, 199 F.2d 508, 509-10 (7th Cir. 1952).

↑n14. See Metro. Life Ins. Co. v. State Bd. of Equalization, 652 P.2d 426, 428 (Cal. 1982); Riegel et al., supra note 10, at 23.

↑n15. The "Law of Large Numbers" is the statistical proposition that the more opportunities exist for an event to occur, the closer the actual relationship of occurrences to opportunities will be to the true probability. Lewis C. Workman, The Mathematical Foundations of Life Insurance 121 (1982). Once the true probability is estimated by observing a large sample of events, it must then be applied to a large number of exposures before the actual occurrences will approximate the true probability. Emmett J. Vaughan & Therese M. Vaughan, Fundamentals of Risk and Insurance 25 (7th ed. 1996). Extremely catastrophic events are generally considered to be uninsurable in part because by nature they fail to conform to models based on the Law of Large Numbers. Riegel et al., supra note 10, at 20-21. Past experience with events of such great magnitude is usually too sparse to accurately predict how often a similar event can be expected to occur. Id. Further, where a particular loss is grossly disproportionate to other losses that can be anticipated to occur within the pool of policyholders, the catastrophic loss invalidates the calculation of rates and has the potential to create insolvency for the insurer. Id. The device of reinsurance, which will be discussed below, can mitigate some of the deleterious effects of potentially catastrophic exposures. See discussion infra Part III.A.

↑n16. Riegel et al., supra note 10, at 18-21.

↑n17. See Jackie Spinner, Putting a Price on "What Ifs': Actuaries Lack Figures to Fix Premiums for Terrorism Insurance, Wash. Post, Oct. 24, 2001, at E1 (quoting John Purple, Chief Actuary at the Connecticut Department of Insurance, as commenting that "at its simplest, a model multiplies the probability of an event happening by the probability of how big it might be to determine the probable financial cost. The cost can then be translated into the price charged for insurance.").

↑n18. Riegel et al., supra note 10, at 17-18.

↑n19. See generally 1 Arthur Biddle, A Treatise on the Law of Insurance 487 (1893) (discussing the history and rationale for the war exclusion).

↑n20. Id. 487, at 440-41.

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With regard to war, the rule is that citizens or subjects of one country cannot trade with those of another at war with the former, without the license of the King, President, or other legal authority... . Therefore every insurance on alien property must be understood not to cover property lost during hostilities.

Id. (footnotes omitted).

↑n21. Id. 490, at 445.

↑n22. Id. 492, at 446 (citing The Prize Cases, 67 U.S. 635 (1862); Robinson v. Int'l Life Assurance Soc'y, 42 N.Y. 54 (1870)).

↑n23. Adverse selection is the phenomenon by which those most likely to incur losses tend to purchase and retain insurance coverage and those least likely to incur losses tend to refrain from purchasing coverage, thus skewing the probability of losses away from normal expected values that would result given random selection by the general population. See generally Vaughan & Vaughan, supra note 15, at 28-29. War exclusions address the issue by recognizing the tendency of those likely to be called to military service to obtain life insurance protection with more frequency than others, and by eliminating the additional hazard created by that adverse selection while still allowing the applicants the availability of life insurance. See William F. Meyer, Life and Health Insurance Law 7.6, at 205-06 (1972).

↑n24. See Riegel et al., supra note 10, at 20; Spinner, supra note 17, at E5 (quoting Laureen Regan, Associate Professor of Risk Management and Insurance at Temple University, as commenting that "when you can't rely on things happening by accident, the entire pricing process falls apart... . We have to be able to estimate how often this will happen.").

↑n25. A contract of adhesion is defined as "[a] standard-form contract prepared by one party, to be signed by the party in a weaker position, [usually] a consumer, who has little choice about the terms." Black's Law Dictionary 318-19 (7th ed. 1999). For cases treating insurance policies as contracts of adhesion, see, e.g., Healy Tibbits Constr. Co. v. Employers' Surplus Lines Ins. Co., 140 Cal. Rptr. 375, 379 (Cal. Ct. App. 1977); Princeton Ins. Co. v. Chunmuang, 698 A.2d 9, 12 (N.J. 1997).

↑n26. See, e.g., Schmutz v. Employees' Fire Ins. Co., 76 F.2d 119, 122 (2d Cir. 1935); Albritton v. Fireman's Fund Ins. Co., 70 So. 2d 111, 113 (La. 1953); Raska v. Farm Bureau Mut. Ins. Co., 314 N.W.2d 440, 441 (Mich. 1982); Hoffman & Place v. Aetna Fire Ins. Co., 32 N.Y. 405, 411 (1865); Buckeye Union Ins. Co. v. Price, 313 N.E.2d 844, 846 (Ohio 1974).

↑n27. 48 N.Y. 34 (1871).

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↑n28. Id. at 38.

↑n29. Id.

↑n30. Id.

↑n31. Id. at 39.

↑n32. Id.

↑n33. Id. at 40.

↑n34. The interpretations of these terms by the Welts court retain their vitality today. For example, the case was cited for its interpretation of "war" in Pan American World Airways, Inc. v. Aetna Casualty & Surety Co., 505 F.2d 989, 1013 (2d Cir. 1974), the leading modern case interpreting terms used in typical war exclusions. The comprehensive insurance law treatise, Couch on Insurance, cites Welts for its interpretation of "military service" in discussing the treatment of civilians under war exclusions. 10 Lee R. Russ, Couch on Insurance 143:45 (3d ed. 1998).

↑n35. Welts, 48 N.Y. at 40.

↑n36. See Pan Am, 505 F.2d at 1012.

↑n37. Although there is little case law directly on point as to the inefficacy of war exclusions relative to modern terrorist acts, an exception is Pan Am, discussed infra at Parts III.A, IV.C. The opinion extensively catalogs and examines the terms commonly used in war exclusions in the context of a terrorist hijacking, establishing persuasive precedent that seems likely to weigh heavily in the analysis of any court called upon to consider insurance exclusions invoked in denials of claims resulting from the events of September 11, 2001. A more recent case, Holiday Inns, Inc. v. Aetna Insurance Co., 571 F. Supp. 1460 (S.D.N.Y. 1983), cites Pan Am heavily in its rejection of an insurer's attempt to characterize the destruction of a hotel in Lebanon due to fighting between Christian and Moslem militia groups as the result of "war."

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↑n38. John T. Sinnott, Chairman and CEO of Marsh, Inc. explained as follows:

The problem with what happened on September 11 is that it presented a risk that no one could conceive would happen. When the buildings were built, loss scenarios did contemplate the impact of one Boeing 707 (the largest commercial aircraft at the time), however the idea of two, fully fueled 767s hitting both towers was unimaginable.

Terror Insurance Availability: Hearing on Terrorism Insurance Before the Senate Comm. on Banking, Housing, and Urban Affairs, 107th Cong. (2001) [hereinafter Senate Hearing] (statement of John T. Sinnott, Chairman and CEO, Marsh, Inc.), 2001 WL 26187268. See also Blackest Day as Insurers Fear for Staff, Ins. Day (London), Sept. 12, 2001, at 1 ("The unprecedented events of yesterday are generally not even found in the "worst case scenarios' run by some firms."), available at LEXIS, News Library, Insday File; Richard A. Fogel, Sept. 11: Risk Management Lessons Learned, N.Y. Law J., Nov. 2, 2001, at 1, 6 ("Most commercial property insurance policies contain a standard war risk exclusion. Cases interpreting this exclusion, mostly as a result of litigation ensuing from the 1993 attack on the Twin Towers, limits its applicability."); Jon L. Gelman & Lewis L. Heller, World Trade Center Tragedy Creates Complex Workers' Compensation Issues, N.J. L.J., Oct. 8, 2001, at 108 ("Horrible and catastrophic events such as occurred on Sept. 11, 2001, were never contemplated in the legislative crafting of our nation's social, remedial insurance paradigm."); Christopher A. Jennings, Where Do We Go from Here? War Risk Exclusion Clauses and "Acts of War" by Non-Sovereign Entities, Fed. Law., Nov.-Dec. 2001, at 60, 64 ("Surprisingly, even after the 1993 bombing of the World Trade Center, insurers continued to include risks arising from acts of terrorism in the basket of insurable risks under traditional all-risk insurance policies."); Spinner, supra note 17, at E1 (quoting John Purple, chief actuary at the Connecticut Department of Insurance, as commenting that "we model for catastrophes, but my guess is nobody ever modeled for a 767 full of fuel crashing into the World Trade Center. I doubt that anyone ever thought that was a possibility."); Walter Updegrave, How Strong Is the Safety Net?, Money, Nov. 2001, at 130, 134-35 ("Many [insurers] routinely run an RDS (realistic disaster scenario), such as two jumbo jets colliding over a large city or a major earthquake hitting Los Angeles, to determine their PML (probable maximum liability). But no one envisioned a catastrophe like the one that occurred on Sept. 11.").

↑n39. 505 F.2d 989 (2d Cir. 1974).

↑n40. Id. at 993.

↑n41. Id. at 994.

↑n42. Id. at 999.

↑n43. Id. at 999-1001 (citations omitted).

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↑n44. See Senate Hearing, supra note 38 (statement of Robert E. Vagley, President, American Insurance Association) (quoting Warren Buffet, CEO of Berkshire-Hathaway, one of the world's largest reinsurers, as stating that "terrorism today is not at all like terrorism of 25 years ago... . The power to inflict damage has gone up a factor of-- who knows what--10, 50 ... you can't price for that."), 2001 WL 26187266; Arthur H. Garrison, How the World Changed: A History of the Development of Terrorism, Address at the Delaware Criminal Justice Council (Oct. 28-29, 2001) (describing the progressive evolution of terrorist activity during the 1990s toward actions aimed at mass destruction for its own sake, fueled by hatred for the West and America and religious extremist thought, and marked by characteristics of "asymmetric warfare"), available at http://www.state.de.us/cjc/history.ppt (last visited Apr. 4, 2002).

↑n45. See generally Jonathan F. Bank & Lance A. Warrick, The Regulation of Reinsurance, in American Bar Association, The State of Insurance Regulation 127, 137-46 (Francine L. Semaya & Vincent J. Vitkowsky eds., 1991); Vaughan & Vaughan, supra note 15, at 150-52.

↑n46. Riegel et al., supra note 10, at 120; Updegrave, supra note 38, at 135.

↑n47. See Riegel et al., supra note 10, at 120.

↑n48. See Bank & Warrick, supra note 45, at 137-46; Alice Schroeder et al., Reinsurance Recoverables--The Lake Wobegon Problem, in Insurance-Property-Casualty: World Trade Center Special Issue (Morgan Stanley Dean Witter & Co., New York, N.Y.), Sept. 17, 2001, at 4.

↑n49. Riegel et al., supra note 10, at 121-26.

↑n50. See Tom Condon, Insuring Insurers; Little-Known Reinsurance Companies Play Big Roles in Spreading Out Huge Risk, Hartford Courant, Oct. 9, 2001, at E1; Joseph G. Finnerty III & Eric S. Connuck, Sept. 11: What Is the Impact on the Insurers?, N.Y. Law J., Nov. 26, 2001, at 1; Douglas McLeod, Insurers Shaken But Solvent--So Far, Bus. Ins., Oct. 1, 2001, at 1; Schroeder, supra note 48, at 4; Updegrave, supra note 38, at 132.

↑n51. See McLeod, supra note 50, at 1.

↑n52. See Gary Thompson, Insurance for Losses Resulting from the Terrorist Attacks of September 11, 2001, 12 Mealey's Litig. Rep.: Reinsurance No. 11, at 21 (Oct. 4, 2001); Updegrave, supra note 38, at 132-33.

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↑n53. See Finnerty & Connuck, supra note 50, at 6 ("A "clash event' of the magnitude of Sept. 11 contradicts the actuarial assumptions relied upon by reinsurers when they diversify risks in this manner."); Schroeder, supra note 48, at 4.

↑n54. See Updegrave, supra note 38, at 135 ("When large policies are involved--such as many in the World Trade Center incident--it's not uncommon to see a chain of twenty or more insurers.").

↑n55. See Christopher Oster, Lloyd's Faces Challenge Following Attack on Twin Towers, Wall St. J., Sept. 18, 2001, at A4; David Pilla, Tillinghast Says WTC Disaster May Hit $ 58 Billion, Best's Ins. News, Sept. 24, 2001, available at 2001 WL 24724985.

↑n56. Schroeder, supra note 48, at 5.

↑n57. Finnerty & Connuck, supra note 50, at 6.

↑n58. See Senate Hearing, supra note 38 (statement of Walter K. Knorr, Chief Financial Officer, City of Chicago) (testifying that the City of Chicago had been presented with a "premium increase of over 5,000 percent" to renew its insurance, including substantially less terrorism coverage for O'Hare and Midway airports); Adrian Ladbury, Life After Sept. 11: No Capacity Crisis, Ins. Day (London), Oct. 9, 2001, at 1 (quoting Ruud Bosman, Executive Vice President of global property insurer FM Global), available at LEXIS, News Library, Insday File.

↑n59. See Dawn Kopecki, Congress Mulls Insurer Aid as Rates for Some Jump 5,000%, Capital Markets Rep., Oct. 25, 2001 (quoting Ronald E. Ferguson, Chairman of General Re Corp., one of the four largest reinsurers in the world, while testifying before the Senate Banking Committee, as commenting, "I don't think we'll ever get back to the way we were before Sept. 11... . The question becomes, how many Sept. 11ths can we take? And the answer is, this one."), available at WL 10/25/01 **Cap.** Mkt. Rep. 15:12:00.

↑n60. See Senate Hearing, supra note 38 (statement of Ron E. Ferguson, Chairman, General Re Corporation) ("Before September 11 the threat of terrorism within our borders seemed remote. Because of that, no insurance or reinsurance premiums were collected for terrorism coverages, and no assets or reserves were allocated to terrorism exposures.").

↑n61. See sources cited supra notes 7-8.

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along with the twin towers of the World Trade Center on September 11, 2001. Though in many contexts these constructs remain viable and distinguishable in a theoretical legal sense, in the pragmatic mathematical realm of the actuary, both war and international terrorism now represent incalculable risks capable of rendering **[*570]** key elements of the insurance industry insolvent. [3] The line between transnational terrorism and warfare was obscured by the attacks to the point of nonexistence in the perception of Americans--irrespective of the intricacies of international law. That fact is evidenced not only by the words of President Bush, but ironically, by those of congressional leaders, who admonished the insurance industry, days after the attacks, not to lose sight of the distinction.

Fearful that insurers would attempt to invoke standard policy exclusions for losses due to "war or acts of war" in the aftermath of the disaster, members of the House Financial Services Committee and the Insurance Subcommittee directed a letter to the National Association of Insurance Commissioners ("NAIC"), [4] downplaying the President's war rhetoric as a mere reflection of "the passion and determination of our country, not the legal reality of Tuesday's destruction." [5] Yet, in subtly revealing terminology, **[*571]** the congressional letter went on to condemn "any attempt to evade coverage obligations by either primary insurers or reinsurers based on such legal maneuvering" as "unsupportable and unpatriotic." [6]

The congressmen need not have worried. Soon after the terrorist attacks, a number of large insurers with much at stake in the disaster issued public statements announcing their intentions not to invoke war exclusions. [7] Had the insurers been inclined to do so - negative public relations notwithstanding [8] - they would not likely have prevailed when challenged in court. [9]

This comment examines the intended function of war exclusions in insurance policies and discusses judicial interpretations of those exclusions in cases involving terrorist acts. It recounts the events leading to the terrorism insurance crisis of 2001 and the apparent resolution of that crisis. Finally, it suggests ways in which the insurance industry may employ prior lessons learned from the history of judicial interpretation of war exclusions to avoid possible legal pitfalls that might otherwise negate the legitimate and necessary purposes of terrorism exclusions.

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II. Insurance and the Rationale for Excluding Coverage for Losses Due to War

A. What Makes Insurance Insurance

Fundamentally, insurance represents the delicate balance between the uncertainty and the predictability of future events associated with unfavorable consequences. [10] Where there is no risk, there can be no insurance, and arrangements not involving risk which masquerade as insurance are more accurately understood as entitlement programs. [11] Nor can an insurance proposition operate where the risk is real but inestimable. [12] To produce a mutually beneficial arrangement, the insurance bargain must relieve one party of the burden of uncertainty associated with potential losses, while allowing the other party to profit from their reasonable calculability. [13]

Insurance is of value to the purchaser only because it allows for the sharing of risk across a pool of other similarly situated but widely distributed purchasers, guaranteeing for each purchaser protection against substantial but uncertain losses in exchange for the payment of premiums both certain and manageable. [14] The application of the "Law of Large Numbers" [15] allows insurers to **[*573]** predict losses accurately enough to calculate premium rates, which will not be prohibitively high, but which will nonetheless produce reserves adequate to pay claims when and if the losses insured against occur. [16] The cornerstone of the entire

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↑n62. See Senate Hearing, supra note 38 (testimony of Robert E. Vagley, President, American Insurance Association) ("We have not attempted to invoke war exclusions, despite the militaristic nature of, and rhetoric surrounding, the attacks."); Randy J. Maniloff, The War Risk Exclusion--Looking Beyond the Events of September 11th, 13 Mealey's Litig. Rep.: Ins. Insolvency No. 9, at 21 (Oct. 11, 2001).

[A] review of [Pan American World Airways, Inc., v. Aetna Casualty & Surety Co., 505 F.2d 989 (2d Cir. 1974)] leaves no doubt that the question whether the "war risk" exclusion would apply to claims arising out of the recent attacks in New York and Washington is by no means as cut and dry as the impression one gets from reading the media reports that have simply cited [the case] and dismissed the issue out of hand.

Id.

The author identifies, inter alia, the possibility that there was sponsorship of the attacks by a state or other "sovereignty," the declaration by bin Laden of a "jihad" or holy war against the United States, and the fact that Congress authorized the use of force in response pursuant to the War Powers Resolution as distinguishing features of the events of September 11, 2001, that might have influenced judicial construction of particular war-risk exclusions in favor of insurers. See also Alexander Nicoll, US Advised to Concentrate on Victory, Fin. Times, Oct. 19, 2001, at 2. (commenting that "the US has a newly defined enemy which is ... international terrorism and terrorist-sponsored states") (emphasis added); Rod Norland et al., War on Terror, Newsweek, Dec. 17, 2001, at 22 (discussing the terrorist "colonization" and "hijacking" of Afghanistan).

↑n63. See sources cited supra note 7.

↑n64. See, e.g., Chubb CEO Says Industry is Strong, Warns of Unavailability of Future Terrorism Coverage, 11 Ins. Coverage Litig. Rep. (Andrews Publ'ns, Inc.) No. 44, at 989 (Oct. 5, 2001) (reporting warning of the chairman and chief executive officer of reinsurer Chubb Corp. that a series of terrorist attacks could threaten the solvency of the insurance industry), available at LEXIS, Insurance Library, Andrews File; NAIC Backs Federal Role on Terror Re, Ins. Chron., Oct. 29, 2001, at 1 (quoting David Mathis, Chief Executive Officer of Kemper Insurance Co., as telling the National Association of Insurance Commissioners that "reinsurers have already notified Kemper ... that they intend to exclude or dramatically scale back terrorism coverage in contracts up for renewal... . We recognize that this may be the only way to protect their solvency."), [hereinafter NAIC Backs] available at LEXIS, News Library, Allnews File; Douglas Quenqua, Insurers Act to Protect Against Attacks, PR Week, Nov. 2, 2001, at 6 (quoting Edward Morgan, Senior Vice President and Communications Officer of the Hartford Insurance Group as stating "Our primary message is that this industry has finite resources, and terrorism is something you can't predict, so the re-insurance markets can't protect it."), available at LEXIS, News Library, Allnews File.

↑n65. See NAIC Backs, supra note 64.

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↑n66. See id; see also America's Insurance Industry: Keeping the Promise: Hearing on the Impact of the September 11, 2001 Terrorist Attacks on America's Insurance System Before the House Comm. on Financial Services, 107th Cong. 25 (2001) [hereinafter House Hearing] (testimony of Kathleen Sebelius, President, National Association of Insurance Commissioners) ("We know the insurance industry cannot withstand multiple events of this magnitude without harm to all consumers."), available at http://www.house.gov/financialservices/107-45.pdf (last visited Apr. 4, 2002).

↑n67. For testimony of the insurance industry before Congress, see generally Senate Hearing, supra note 38, and House Hearing, supra note 66. "Pool Re" is the Pool Reinsurance Company, a mutual reinsurance company established by the British government as a mechanism for providing coverage of losses due to terrorism. For an in-depth description and analysis of Pool Re, see generally William B. Bice, Comment, British Government Reinsurance and Acts of Terrorism: The Problems of Pool Re, 15 U. Pa. J. Int'l Bus. L. 441 (1994).

↑n68. Senate Hearing, supra note 38 (testimony of Robert E. Vagley, President, American Insurance Association) ("More than two-thirds of annual reinsurance contracts--agreements by which primary insurance companies purchase their own insurance to adequately spread the risk of large-scale losses--are renewed each January 1."); Mike McNamee, Terror Insurance: How to Stop the Coming Crisis, Bus. Wk., Dec. 10, 2001, at 36; Christopher Oster & Michael Schroeder, Carriers Plan Lower-Cost Terror-Insurance Pool, Wall St. J., Nov. 8, 2001, at A10.

↑n69. See, e.g., Michael Schroeder, Senate Panel Is Set to Offer Bill to Back Terrorism Insurance, Wall St. J., Oct. 26, 2001, at A4 (reporting that Zurich Financial Services' Zurich Global Energy, insurer for oil, gas, mining, and power-generating companies, had announced to clients that it would not renew terrorism coverage on property policies).

↑n70. See 14 Eric Mills Holmes & L. Anthony Sutin, Holmes's Appleman on Insurance 2d 103.1, at 77 (2000).

↑n71. See id.

↑n72. Bank & Warrick, supra note 48, at 137-46.

↑n73. See Terrorism Risk, The Role of the Federal Government in Assuring That Insurance for Terrorist Acts Remains Available to Consumers: Hearing Before the Senate Comm. on Commerce, Science, and Transportation, 107th Cong. (2001) (statement of Diane Koken, Pa. Insurance Commissioner, testifying on behalf of the NAIC), available at 2001 WL 26187327.

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These are considered to be the product of free market negotiations among sophisticated insurance underwriters, brokers, and professional corporate risk managers who rely upon the traditional powers of buyers and sellers to bargain for the best deal they can get. The state regulatory interest in such large transactions is mainly that they not impair the overall financial health of an insurer, since monitoring insurer solvency is a major responsibility of the regulators.

Id. See also Holmes & Sutin, supra note 70.

↑n74. See Diane Brady & Mike McNamee, Give Insurers a Break--But Not a Free Ride, Bus. Wk., Oct. 29, 2001, at 38.

States, which regulate the industry, require underwriters to provide terrorism coverage, and will likely continue to do so. But the industry contends that it has no choice but to either forgo offering such coverage to businesses it considers an undue risk, or charge such exorbitant rates as to be prohibitive. The reason: reinsurance companies, which back up their policies, say they'll cut off terror insurance on Jan. 1, when trillions of dollars in policies expire. That could prompt underwriters to balk at writing policies altogether because they don't want to be left holding the bag. With no coverage, lenders won't lend, builders won't build, and business will grind to a halt.

Id.

↑n75. Senate Hearing, supra note 38 (testimony of Robert E. Vagley, President, American Insurance Association).

Primary carriers, however, do not have the same flexibility as reinsurers with respect to our own products because we are subject to tighter regulatory controls. Any terrorism exclusions we might choose to introduce must be approved by individual state insurance departments... . If exclusions were not approved, primary insurers would be left to shoulder 100 percent of future terrorist losses, which we simply cannot afford to do. Our only remaining option--one we would prefer not to consider--would be to simply withdraw from certain markets, and/or lines of coverage.

Id.

↑n76. See Press Release, NAIC, NAIC Urges Final Action on Terrorism Insurance Litigation (Dec. 17, 2001), at http://www.naic.org/1news/releases/rel01/121701<uscore>terrorism.htm (last visited Apr. 4, 2002) (quoting December 14, 2001 letter from Terri Vaughan, President of the NAIC, to Senators Thomas Daschle and Trent Lott).

↑n77. See generally Emeric Fischer & Peter Nash Swisher, Principles of Insurance Law 7.01

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(2d ed. 1994).

↑n78. Arthur D. Postal, Despite Terrorism "Crisis,' P/C Reinsurance Pool Will Be Tough Sell on Capitol Hill, Ins. Acct., Oct. 1, 2001, at 1 (quoting Kathleen Sebelius, Chairman of the NAIC), available at 2001 WL 2524499.

↑n79. See NAIC Backs, supra note 64.

↑n80. Press Release, NAIC, Members Adopt Resolution Regarding Availability of Terrorism Coverage (Oct. 24, 2001), at http://www.naic.org/1news/releases/rel01/102401mmbrsadoptrsltnregardavlbltyterrcov.htm (last visited Apr. 4, 2002).

↑n81. Under the administration's proposal, the government would have initially paid eighty percent of the first $ 20 billion in terrorism-related insurance claims and ninety percent thereafter, with the government's contribution gradually decreasing over the three-year period. See Terrorism Risk Insurance: Hearing Before the House Subcomm. on Capital Markets, Ins., and Gov't Sponsored Enters., 107th Cong. 5 (2001) (statement of Paul H. O'Neill, Secretary of the Treasury), 2001 WL 26187520.

↑n82. H.R. 3210, 107th Cong. (2001).

↑n83. The House measure would have created a temporary program by which financial assistance in the form of loans up to an aggregate total of $ 20 billion would be provided to property and casualty insurers affected by a triggering terrorist event, ninety percent of which would subsequently be repaid by the insurers in accordance with assessments capped at three percent of each insurer's aggregate written premium in any given year. Id. The text of H.R. 3210 is available on the Internet at the Library of Congress's federal legislative information system found at http://thomas.loc.gov.

↑n84. See Today's Debate: Terrorism Insurance, As Clock Ticks, Congress Sits on Quick Terror-Insurance Fix, USA Today, Dec. 7, 2001, at A16 ("The House leadership attached the liability protection to its otherwise worthwhile terrorism insurance bill that passed last week. Meanwhile, in the Senate, Republicans say no bill will pass without it, virtually guaranteeing gridlock with Democrats who oppose it."); Jackie Spinner, Congress Unable to Pass Terror Insurance Bill: Deadlock Ends Hope for Quick Action on Issue, Wash. Post, Dec. 21, 2001, at E1.

↑n85. On December 18, 2001, new NAIC President Terri Vaughan stated that "there is strong consensus among NAIC members that if Congress doesn't act, state insurance regulators will

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be left with no choice but to begin approving some exclusions for commercial lines." Press Release, NAIC, NAIC Members Make Decision Regarding Terrorism Insurance (Dec. 18, 2001), at http://www.naic.org/1news/releases/rel01/index.htm (last visited Apr. 4, 2002).

↑n86. Dennis Kelly, Regulators Adopt Definition of Terrorist Act, Best's Ins. News, Dec. 11, 2001, available at 2001 WL 24726087.

↑n87. Press Release, NAIC, NAIC Members Come to Agreement Regarding Exclusions for Acts of Terrorism (Dec. 21, 2001) at http://www.naic.org/1news/releases/rel01/index.htm (last visited Apr. 4, 2002). According to the Insurance Services Office, Inc. ("ISO"), drafter of the NAIC-endorsed exclusion, the $ 25 million threshold (commonly used in the property and casualty insurance business to identify a catastrophic loss) would not apply where terrorist acts involve the use of nuclear, chemical, or biological materials. Press Release, ISO, ISO Gratified by Insurance Regulators' Call for Approval of Terrorism Exclusions; Wording Free to Non-Customers (Dec. 21, 2001), at http://www.iso.com/docs/pres262.htm (last visited Apr. 4, 2002); see also Hard Hit at the World Trade Center: At the Top of a Terrible List, Bus. Wk., Sept. 24, 2001, at 12 (listing insured losses from some man-made disasters of the last decade, including the 1993 World Trade Center bombing ($ 510 million) and the Oklahoma City bombing ($ 125 million)).

↑n88. See discussion supra Part II.B.

↑n89. Most states have "readability" statutes or regulations requiring that policy language achieve a certain "Flesch Reading Ease score" in order to be approved for use. See, e.g., Conn. Gen. Stat. 38a-295 to -300 (2001); Ind. Code Ann. 27-1-26-1 to -12 (Michie 2001); Ky. Rev. Stat. Ann. 304.14-420-.14-450 (Michie 2001); N.Y. Ins. Law 3102 (McKinney 2000); 14 Va. Admin. Code 5-110-10 to -80 (West 2001). In some states, readability requirements apply only to coverage intended for consumers, rather than those intended for more sophisticated commercial policyholders. However, given the impact of the World Trade Center disaster on carriers of individual and group life insurance, which are generally subject to these rules, contract exclusions intended for application across multiple lines of insurance should be drafted so as to achieve compliance with readability requirements.

↑n90. See discussion supra notes 77-87 and accompanying text.

↑n91. Kelly, supra note 86. According to Montana Insurance Commissioner John Morrison, the phrase "not an agent of a sovereign state" is "intended to distinguish terrorism from war, and the reference to motives is intended to distinguish acts of terrorism from acts of vandalism." Id.

↑n92. For example, calculated according to the methodology prescribed by Virginia's regulation for simplified and readable accident and sickness insurance policies, 14 Va. Admin.

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Code 5-110-50(D)(2) (West 2001), the text achieves a Flesch Reading Ease score of just 0.56, far below the minimum required score of 40.

n93. See id. 5-110-50. The Virginia readability regulation, like most others that employ the Flesch Reading Ease Test, specifies that "[a] unit of words ending with a period, semicolon, or colon, but excluding headings, captions, and subcaptions, shall be counted as a sentence." Id. 5-110-50(D)(4)(b).

n94. Readability rules often provide that changes made to policy terms to improve their readability must not interfere with the accuracy or adequacy of the contract. For example, the Virginia readability regulation states that "revision of the policy to make it more readable must not lead to its devaluation as a legal document." Id. 5-110-50(A).

n95. See sources cited supra note 62 and accompanying text.

n96. 505 F.2d 989 (2d Cir. 1974).

n97. See generally id. (discussing the proper manner by which to interpret exclusionary terms in an insurance policy).

n98. Id. at 1005; see also New York Life Ins. Co. v. Bennion, 158 F.2d 260, 264 (10th Cir. 1946); Vanderbilt v. Travelers' Ins. Co., 184 N.Y.S. 54, 55 (1920).

n99. Pan Am, 505 F.2d at 1012; see also Welts v. Conn. Mut. Life Ins. Co., 48 N.Y. 34, 40 (1871).

n100. Pan Am, 505 F.2d at 1019 n.15.

n101. Id. at 1005.

n102. Id.

n103. Id. at 1020 (citing Hartford Fire Ins. Co v. War Eagle Coal Co., 295 F. 663, 665 (4th Cir. 1924)).

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n104. Id. at 1005 ("The ... insurers' shotgun approach belies its claim that these terms have certain fixed meanings."); see also Younis Bros. & Co. v. CIGNA Worldwide Ins. Co., 899 F. Supp. 1385, 1392 (E.D. Pa. 1995); Holiday Inns Inc. v. Aetna Ins. Co., 571 F. Supp. 1460, 1461 (S.D.N.Y. 1983).

n105. Pan Am, 505 F.2d at 1000 (citing Orren v. Phoenix Ins. Co., 179 N.W.2d 166, 169 (Minn. 1970); Hartol Prod. Corp. v. Prudential Ins. Co., 47 N.E.2d 687, 690-91 (N.Y. 1943)).

n106. Id. at 1002.

n107. See Jeffrey W. Stempel, Reassessing the "Sophisticated" Policyholder Defense in Insurance Coverage Litigation, 42 Drake L. Rev. 807, 840-42 (1993).

n108. This draft exclusion is consistent with the NAIC's intent not to categorize domestic criminal acts as terrorism for purposes of its exclusion. See supra note 91 and accompanying text. Although it is beyond the scope of this Comment to address this decision, the 1995 bombing of the Murrah Building in Oklahoma City calls into question whether previously held assumptions about the capacity of the law enforcement system to prevent catastrophic terrorist acts perpetrated in the United States by United States citizens can survive as the basis for a determination of insurability. If the distinctions between war and transnational terrorism have vanished in the context of insurability, distinctions between transnational and domestic acts of terrorism, which may be equally unpredictable and result in losses of similar severity, should also be reconsidered.

In addition to the NAIC draft exclusion, several other defnitions were taken into consideration. See 18 U.S.C. 2331 (1994); S. 1751, 107th Cong. 3(1) (2001); H.R. 3210, 107th Cong. 16(1) (2001); S.B. 5798, 224th Sess. (N.Y. 2001); 28 C.F.R. 0.85(1) (2001).

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structure is the application of actuarial probability principles using complex statistical models based on data gathered from past experience. [17] Discernment of a pattern that can be projected to forecast future losses is the sine qua non which, if lacking, eliminates the possibility of rational rate-setting. [18]

B. The Uninsurable Nature of Losses Due to War and the Pattern of Judicial Interpretation

War has for many years been recognized, both actuarially and legally, as an uninsurable hazard. [19] The actuarial rationales for excluding coverage of losses due to war have not always been fortified, however, by judicial constructions of the policy language used by insurers to effect the desired protection of their policyholder risk pools. In both life insurance and property and casualty insurance - two of the hardest hit markets in the World Trade Center disaster - some early judicial cases interpreting the meaning of "war" were based on general prohibitions against entering into illegal contracts. [20] Since contracts which would "aid **[*574]** the resources of the enemy" in time of war were forbidden, [21] it became necessary to pinpoint when a war had commenced. Those early decisions established that the existence of a state of war was a facts-and-circumstances determination rather than an issue merely of whether or not war had been declared. One treatise citing Civil War vintage decisions, for example, noted that "to create belligerent rights, it is not necessary that there should be war between separate and independent powers, but ... they may exist between parties to a civil war, and a state of war may exist without any formal declaration of it by either side." [22]

The courts reined in this broad interpretation, however, when they found it necessary to construe specific exclusions intended by insurers to protect themselves and their policyholder pools from adverse selection by life insurance applicants and from catastrophic losses under property insurance policies. [23] Conditions resulting in non-random selection of risks (adverse selection) or in the possibility of grossly non-uniform maximum exposures (catastrophic losses) interfere with the proper working of the Law of Large Numbers in ways that can destabilize the financial condition of the insurer, and are therefore categorized as uninsurable. [24] While not contesting the logic of the insurers' objectives in excluding war risks, courts have insisted upon precision in contract terms in order to prevent unfair claim denials. In deciding such cases, courts have consistently invoked the doctrine of contra proferentem - that ambiguities in contract language, especially **[*575]** in contracts of adhesion [25] such as insurance policies, must be construed strictly against the drafter and liberally in favor of the policyholder. [26]

In Welts v. Connecticut Mutual Life Insurance Co., [27] for example, the court interpreted insurance policy language restricting the insured person from entering into "any military or naval service whatsoever" [28] and excluding death "from any of the casualties or consequences of war or rebellion, or from belligerent forces in any place where he may be." [29] The insured was shot and killed while employed by the government of the United States, supervising the building of railroad bridges to be used by the Union Army for military purposes during the Civil War. [30] Though his assailants demanded first to know whether anyone there "wore a federal uniform," there was no evidence that they were Confederate soldiers or were acting under Confederate authority. [31] The court, noting that "the company frames the policy and chooses the language" and that any uncertainty in the policy's terms should therefore be resolved in favor of the insured, held that "the general understanding of the term [military service] includes such persons only as are liable to do duty in the field as combatants." [32] The court further held that "the language used can be considered as including only death from casualties or consequences of war or rebellion, carried on or waged by authority of some de facto government, at least." [33]

Quite possibly, as would have been consistent with the justification for the exclusion, the insurer's intent was to exclude **[*576]** deaths resulting in any way from activity in furtherance of the war effort, which might subject the insured to significantly increased

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mortality risk. Yet, if that was the intent, the language failed to convey it clearly. The court found the exclusion to be ambiguously worded, and therefore construed it against the insurer, thus endowing the terms "military service" and "war," as used in insurance policies, with legal meanings that would thenceforth guide courts in construing war risk exclusions [34] - meanings distinct from and possibly contrary to those intended by the insurers who initially used the terms.

Welts illustrates the pattern that accounts for much of the divergence in modern cases involving terrorism, between the actuarial impetus for the war exclusion and its judicially bounded operation. Where a terrorist act reproduces the conditions of uninsurability associated with traditional warfare, a determination as to whether the event was or was not "carried on or waged by authority of some de facto government" [35] (or the present-day equivalent determination of whether or not the entity possessed "at least significant attributes of sovereignty" [36]) is a judicial exercise that bears only the most attenuated relationship to a determination of whether the event ought or ought not be deemed insurable. Nevertheless, prevailing case law wrought by the reiterative interpretations of courts applying contra proferentem to generations of insurance policy exclusions has refined the legal meaning of war and related terms for insurance purposes to the extent that it is now generally anticipated that war exclusions will not be held to function effectively to exclude terrorist acts. [37]

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III. Inadequate Protection and the Post-September 11 Insurance Crisis

A. Industry Unreadiness and the Role of Reinsurance

Prior to September 11, 2001, the insurance industry failed to recognize and adjust to the dual realities that exposure from terrorist actions could be so financially devastating as to undermine the entire insurance system and that the industry's standard policy exclusions utterly failed to protect it from exposures of such enormous magnitude. [38] A wake-up call might have come as early as 1974, when the Court of Appeals for the Second Circuit decided Pan American World Airways, Inc., v. Aetna Casualty & Surety **[*578]** Co. [39] The industry's failure to respond adequately to a strong admonition by the court in that case, even after the 1993 bombing of the World Trade Center provided a preview of the disaster that ultimately occurred, is at least in part attributable to the false sense of security created by the widespread use of reinsurance in providing coverage for potentially catastrophic losses.

In Pan Am, the court was called upon to construe a number of all-risk policy exclusions in connection with the terrorist hijacking of a United States airliner by members of the Popular Front for the Liberation of Palestine, who forced the plane's crew to fly the plane to Egypt, where the plane was destroyed with explosives. [40] In holding that the losses resulting from the terrorist action were covered under the terms of the policy, notwithstanding exclusions pertaining inter alia to war, warlike operations, military or usurped power, insurrection, riot, and civil commotion, [41] the court forcefully emphasized that if the general rule is that ambiguous insurance policy terms are to be construed strictly against the insurer, then a fortiori, the doctrine of contra proferentem demands such interpretation when the insurer knew its exclusions were ambiguous and failed to clarify them accordingly. [42] Citing evidence that the risk of hijacking was well known to the insurers and that, moreover, the insurers were aware that their policy exclusions were ambiguous, the court concluded that "when the all risk insurers failed to exclude "political risks in words descriptive of today's world events,' they acted at their own peril." [43]

Given this judicial road-map provided by the Pan Am court and the geometric progression in the capacity for mass destruction by terrorists in the last decade, [44] the fact that there remained, in **[*579]** 2001, numerous insurance policies lacking detailed, explicit, and

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comprehensive terrorism exclusions would seem inexplicable but for certain industry practices that met instant obsolescence in the aftermath of September 11. One of the most significant of these was the prevalence of, and reliance on, reinsurance as a device used by insurers for spreading the risk of potentially catastrophic losses, such as those due to terrorism, that might exceed the amount which could be withstood solely on the basis of the insurers' own financial capacities.

Reinsurance is a market mechanism that allows insurers to accept more risk than would otherwise be permitted by regulators monitoring their financial solvency. [45] Through a reinsurance agreement (or "treaty"), an insurance company that directly provides coverage to policyholders (a "primary writer") transfers (or "cedes") a portion of its risk to a reinsurance company, which may in turn transfer portions, through "retrocession," to other companies. [46] Each insurer in the chain thus limits, at least in theory, the liability it retains to a specified dollar amount or percentage of the total potential loss. [47] In financial reporting, the insurer is allowed to offset its claim liabilities by amounts it expects to receive from its reinsurers, provided the reinsurers' financial condition is acceptable to regulators in the primary writer's domiciliary state. [48]

Although reinsurance ordinarily functions beneficially for both insurers and policyholders by increasing the overall capacity of the market, stabilizing insurers' profits, and allowing for the acquisition of coverage on large risks without the necessity of negotiation with multiple insurers, [49] the World Trade Center disaster **[*580]** has brought into sharp focus a major drawback of this arrangement that can, in certain situations known as "clash events," result in a breakdown of the system. [50] In a clash event, an occurrence, often unanticipated or unpredictable but of catastrophic proportions, concentrates significant losses across multiple lines of insurance simultaneously. [51] The World Trade Center disaster, by far the most catastrophic clash event in insurance history, is generating claims in aviation, property, liability, life, workers' compensation, business interruption, health, disability, automobile, and other miscellaneous lines of insurance, all centralized within one concentrated area. [52] Where the complex, overlapping reinsurance arrangements of the primary writers of these coverages resulted in reinsurers being exposed to catastrophic losses across multiple lines of insurance, companies that in ordinary circumstances would have benefited by diversifying across product lines may instead find themselves over-leveraged and insolvent. [53]

Additionally, the retrocession arrangements behind policies providing benefits as large as those now payable due to World Trade Center losses are often multi-layered, involving extensive chains of insurers. [54] This practice creates further complex interdependencies and even more opportunities for reinsurer failures in clash events where reinsurers who are party to numerous retrocession agreements incur compound losses. [55]

When the dust settles after a catastrophic clash event and the losses are finally quantified, if any reinsurers have failed - and at **[*581]** least one industry analyst has placed the probability that some reinsurers will fail due to the World Trade Center event at close to one hundred percent [56] - the primary writers, still contractually bound to pay the full policy benefits to policyholders regardless of background reinsurance arrangements, are forced to make up the difference. [57]

B. The Terrorism Insurance Crisis and Its Outcome

As noted by insurers and financial analysts, the unprecedented magnitude and severity of the disaster that occurred on September 11, 2001, did not change the probability that another disaster of unimaginable proportions could occur at any time. [58] It was that eventuality, even more than that which had already occurred, that caused the breakdown of certain market mechanisms for providing terrorism-risk insurance and resulted in fundamental changes in insurance and reinsurance practices. [59] Industry unreadiness, disadvantageous aspects of the insurance and reinsurance regulatory scheme in the United States, and unfortunate timing

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each played a role in the accelerated sequence of events that culminated in the virtual elimination of terrorism coverage by insurers in the United States.

Having failed, for the most part, to implement explicit terrorism exclusions because of factors such as the competitiveness of the market, the perception of adequate protection created by complex ceding and retrocession arrangements, and the failure of actuarial worst-case maximum liability models to contemplate a **[*582]** terrorism-generated clash event of such gigantic proportions, [60] most insurers and reinsurers had only war-risk exclusions to fall back on at the time the World Trade Center was destroyed. Assessing the negative public relations consequences and the perceived unlikelihood of withstanding legal challenges that might follow from an attempted invocation of these exclusions in connection with September 11 losses, insurers and their global reinsurers made the decision to refrain from invoking war risk exclusions and to treat the losses as covered. [61] They did so irrespective of the possibility that some war exclusions might have been found applicable, even under the intense scrutiny of courts applying contra proferentem, given that the events of September 11 were unique and distinguishable from prior terrorist activities in a number of ways. [62] Nevertheless, insurers agreed to provide benefits for losses under the existing policies, thereby waiving any application of war exclusions. [63] In so doing, however, they did not foreclose the possibility of excluding such losses in the future. [64] **[*583]** On the contrary, reinsurers pointedly reserved the right to exclude terrorism-related losses explicitly, as a matter of financial survival. [65]

A consensus quickly emerged among reinsurers that while the industry could survive the huge losses generated by the September 11 disaster, it could not absorb another shock of that magnitude in the near term. [66] In late September, the industry turned to Congress for intervention, proposing the creation of a federally-managed terrorism reinsurance pool modeled after the British system known as "Pool Re." [67] With seventy percent of the reinsurance agreements overlaying property insurance policies in the United States scheduled for renewal on January 1, 2002, reinsurers could not afford to delay taking action to revise their agreement terms so as to exclude terrorism coverage under renewing contracts. [68] Large reinsurers began announcing their intention to **[*584]** exclude all such coverage, while continuing to press for federal assistance. [69]

Reinsurers were able to revise their agreement terms, despite the consternation of Congress and state insurance regulators, because of the absence of state filing and approval requirements for reinsurance contract terms. [70] Whereas state regulatory agencies exercise veto power over the specific terms of insurance policies intended for issuance to consumers by direct writers, they exercise little power over the terms of reinsurance treaties as a matter of longstanding practice. [71] Although state regulators closely monitor the solvency of reinsurers, [72] their traditional willingness to allow flexibility in the terms of reinsurance treaties reflects a recognition that such agreements memorialize complex, negotiated financial arrangements between knowledgeable, sophisticated parties. Treaties are not amenable to standard terms; instead, they are customized to meet the unique needs and circumstances of particular insurers and their specific books of business. [73]

Since filing and approval of reinsurance contracts were not required, reinsurers were free to announce changes prior to renewing agreements with ceding primary writers for 2002, leaving the **[*585]** primary insurers without coverage for their excess risks attributable to terrorism. [74] The primary writers, however, could not in turn revise their contracts with policyholders, because they required approval by reluctant state regulators. [75] Mindful of the need for businesses to protect against losses due to terrorism, the regulators hesitated to allow direct insurers to file and obtain approval of terrorism exclusions. [76]

The NAIC, representing state insurance regulators who generally favor the preservation of the traditional role of the states in regulating the business of insurance, [77] initially opposed proposals for federal intervention, fearing that a federal terrorism reinsurance pool would

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"supplant the private market." [78] As reinsurers began to pull out, however, the NAIC joined the industry in supporting federal intervention to create an alternative mechanism, in recognition of the untenable position of the primary writers **[*586]** and the threat to their solvency presented by potential terrorism losses absent a federal "backstop." [79] On October 24, the organization adopted the following resolution:

Reinsurers are notifying their customers that they will no longer cover terrorism risk, and primary carriers are notifying state insurance regulators that they intend to seek exclusions of terrorism coverage in their contracts with policyholders. This lack of availability will have a severe adverse effect on our country's economy if, for example, lenders are unwilling to make loans without terrorism coverage.

We, the National Association of Insurance Commissioners, therefore pledge to work with the Congress and the White House and with other interested parties and take action as soon as possible to address this critical issue. [80]

Rejecting the industry's proposal for a federal reinsurance pool, the Bush administration proposed a plan in which the government would assume most terrorism losses during 2002, in order to give the industry time to recover from its September 11 losses, before gradually resuming responsibility for the full risk associated with providing terrorism coverage by the expiration of the program at the end of three years. [81] Both the House Financial Services Committee and the Senate Banking Committee held hearings on the subject in late October, followed by the introduction in the House on November 1, 2001, of the Terrorism Risk Protection Act, [82] a temporary program that would have provided financial assistance to property and casualty insurers in the form of loans. [83] Although the House passed its bill on November 29, the **[*587]** Senate became embroiled in a partisan dispute over an attached tort-**reform** measure barring **punitive damages** in lawsuits arising from terrorist attacks, and failed to reach agreement before adjourning on December 20, 2001. [84]

As Congress neared adjournment and it became less and less likely that federal safeguards would be in place soon enough to benefit insurers facing the year-end expiration of their reinsurance agreements, state regulators began to acknowledge that they would have no choice but to approve terrorism exclusions filed by primary insurers. [85] The NAIC took the step of adopting a definition of "act of terrorism" to be used as a guide for insurers who would file exclusions, [86] and when Congress adjourned without enacting federal legislation, the NAIC announced that "given Congress' failure to act, regulators will begin allowing insurers to exclude terrorism losses if a terrorist act causes total insured losses exceeding $ 25 million." [87] As a result, barring further federal legislative developments that could convince reinsurers to re-enter the terrorism insurance market and cause regulators to **[*588]** withdraw their approvals, explicit terrorism exclusions will now become ubiquitous across all lines of insurance that could be adversely affected by terrorist attacks like those of September 11, 2001.

IV. Lessons Learned: Avoiding the Pitfalls of Contra Proferentem

A. The Need for Unambiguous, Plain-English Terminology

Now that the World Trade Center disaster and the insurance crisis it generated have demonstrated, in no uncertain terms, the uninsurability of catastrophic acts of terrorism, insurers face the challenge of drafting and implementing exclusionary policy terms that state regulators will approve, yet will withstand judicial scrutiny. Case law attests to the dangers of ambiguity, in terms of both decisions adverse to particular insurers and of judicially

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precedential constructions contrary to insurer intent. [88] The insurance industry must take care not to squander the words and phrases that might be strung together to produce an effective policy exclusion by allowing each, in turn, to become invested with a legal meaning that confounds the purpose of the provision. At the same time, exclusionary terms must satisfy state "readability" requirements by using words calculated to be understood according to their "plain English" meanings by the majority of potential policyholders. [89] An effective terrorism exclusion will be one that successfully marries simplicity of language with precision of purpose in identifying sources of inestimable loss capable of producing claims so catastrophic as to invalidate rate-setting models and destabilize the financial condition of the insurer.

[*589]

B. Exercise: The NAIC's Proposed Definition

Acknowledging that the NAIC, of necessity, crafted its proposal in the chaotic aftermath of September 11, [90] it is instructive, both as an illustration of the complexity of the insurers' task and as a cautionary exercise, to examine the regulators' proposed definition of "act of terrorism:"

An act, intentionally dangerous or destructive to human life, health, tangible or intangible property or infrastructure, carried out by a person or group that is not an agent of a sovereign state, but is acting on behalf of an organization based in a country other than the United States, and motivated by political, religious, or social beliefs. [91]

As a preliminary matter, the proposed definition, standing alone, does not satisfy the readability requirements imposed by many states for various types of coverage. [92] Although an isolated definition generally would not be evaluated separately but would be considered either as part of the policy form in its entirety or of a word sample selected in accordance with the regulation, the absence of sentence-differentiating punctuation and the number of multi-syllabic words used do not comport with the stated aims of these simplified policy language rules. [93] Corrective measures needed include the use of short sentences or clauses separated by semicolons or colons, the use of short, easily understood words, and the use of additional definitions, expressed in simplified language, to clarify any complex or technical terms that must be retained in order to preserve the precision and accuracy of the definition as part of a legal document. [94]

[*590] As to ambiguity, the grammatical structure of the NAIC's proposed definition gives rise to at least the following interpretive issues:

(1) Whether the modifier "intentionally" pertains only to "dangerous" or to both "dangerous" and "destructive";

(2) Whether "dangerous" stands alone, or pertains, like "destructive," to "human life, health, tangible or intangible property or infrastructure";

(3) Whether "human" modifies only "life"; both "life" and "health," or "life, health, tangible or intangible property or infrastructure";

(4) Whether the phrase "tangible or intangible" pertains only to "property," or to both "property" and "infrastructure";

(5) Whether "group" alone, or both "person" and "group," are modified by the phrase "that is not an agent of a sovereign state ..."; and

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(6) Whether it is the "person or group" or the "organization based in a country other than the United States" that must be "motivated by political, religious, or social beliefs."

Moreover, the elements of intent, sponsorship, and motivation imbedded in the definition invite courts to define the terms in the light "most favorable to the insured," which may create a result radically different from the exclusionary intent of the insurers. For example, if a hijacked airplane, intended to be flown into the White House, instead nose-dives into an office building in Pennsylvania as passengers attempt to foil the hijackers' plan, could it not be argued that contra proferentem compels the interpretation that the losses resulted from the acts of the brave passengers and were not due to "an act intentionally dangerous or destructive ... carried out by [terrorist(s)]?" If a terrorist "cell" comprised of foreign citizens legally residing in the United States who profess to be disciples of Osama bin Laden, but who have received no training, funding, or other sponsorship from Al Qaeda, undertake a suicide mission resulting in catastrophic loss of life and property, are the losses excluded as resulting from an "act of terrorism" as **[*591]** defined, or are they covered because they are the result of domestic criminal activity? If an organization claims motivation exclusively based on religion for its violent activities, yet those activities are abhorrent to the official tenets of that religion and are publicly renounced by its leaders, are these violent events "acts of terrorism," or do they fail the motivation prong of the definition?

Finally, the proposed terminology used by the NAIC, without further definition of key words and phrases, leaves room for misinterpretation. At a minimum, the terms "infrastructure," "sovereign," "acting on behalf of," and "based" require further clarification.

C. Where Traditional War Exclusions Failed

It may be irrelevant now whether war exclusions might have been construed to apply to the attacks on the World Trade Center and the Pentagon, given certain salient features of those events that might have distinguished them from terrorist actions examined in earlier insurance cases. [95] In any case, after September 11, 2001, "war" and "terrorism" are now interchangeable terms when used as insurance shorthand for catastrophic acts of transnational violence constituting uninsurable risks. Given the history of war exclusion clauses, their probable ineffectiveness for eliminating terrorist acts from the universe of insured events, and the current opportunity for crafting and implementing effective terrorism exclusions, however, insurers need to differentiate between the two in order to ensure adequate protection from liability.

In crafting terrorism exclusions, insurers should be guided by the reasoning of courts that have held specific war-risk exclusions to be inadequate for purposes of excluding terrorism risks or have assigned legal meaning to specific terms that might appear within terrorism exclusions. If, conceptually, acts of war and acts of terrorism exist as distinct categories of risk, drafters should pay close attention to case law identifying the features courts view as essential for characterizing a given event as one or the other. Moreover, drafters should be guided by the overarching objective of deriving definitions appropriate for insurance purposes, **[*592]** even where legal definitions of terms for other purposes may be well established. In so doing, drafters should aim to eliminate any definitional gaps that could result in the failure of an exclusion to capture an uninsurable mega-catastrophe occurring in the gray area between "war" and "terrorism."

There are few judicial cases addressing the distinctions between "war" and "terrorism" for insurance purposes; the most relevant case and the one generally cited by commentators after the World Trade Center disaster is Pan American World Airways, Inc. v. The Aetna Casualty & Surety Co. [96] The court in Pan Am surveyed and summarized many of the earlier cases bearing on aspects of the distinction, making the case a key source of information on how various exclusionary terms will be construed. [97] Relevant delimiters provided by the case

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ARTICLE: PUNITIVE DAMAGES SYMPOSIUM: Punitive Damages Reform: The Case of Alabama

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SUMMARY:
... This paper addresses the modern grounds for punitive damages reform. ... During the 1993-94 fiscal year, an extraordinary 95.6% of tort cases filed in Bullock County included a punitive damages claim; 78.8%, in Lowndes County. ... Forty years ago, in a tort law regime that provided little in the way of consumer remedies, it might have been believed that ever-increasing civil liability verdicts, including punitive damages verdicts, would serve to reduce the number of accidents. ... Again, research of my own currently in progress shows that low-income consumers, if injured, are less likely to seek an attorney; even with an attorney, they are less likely to sue; less likely to recover; and, again by definition, less likely to recover large damage judgments since their lost income is typically low and pain and suffering awards, which are highly correlated with lost income, equally low. ... The Court found that a $ 2 million Alabama punitive damages verdict in a case involving a $ 6,000 compensatory economic loss to be constitutionally excessive. ... While the punitive damages experience in Alabama may appear unusual, there is always the potential for a substantial punitive damages verdict in any jurisdiction. ...

TEXT:
[*825]

This paper addresses the modern grounds for punitive damages reform. [1] It focuses on particular problems relating to punitive damages verdicts in Alabama, but the issue extends substantially beyond the Alabama case. Punitive damages verdicts are relatively infrequent in many jurisdictions. [2] From time to time, however, an occasional jury can render an enormous punitive damages verdict even in a jurisdiction where punitive damages awards are infrequent. Oftentimes, the trial or an appellate court will remit such a verdict, and the pattern of punitive damages infrequency will be restored. There is reason to believe, however, that in recent years the Alabama experience has been substantially different. As I shall describe in more detail below, beginning in the early 1990s, punitive damages verdicts increased in Alabama both in frequency and magnitude. While some of these verdicts were remitted in part on appeal, [3] there was no clear signal from the Alabama Supreme Court or any court of appeal as to what limits there might be to continued punitive damages awards. Perhaps as a consequence, the frequency and magnitude of punitive damages awards

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for excessiveness adopted by the Alabama Supreme Court. [40] Viewing the Alabama procedure on its face, few can contest **[*838]** that the review procedure appears reasonable. [41] In practice, however, as the Gallant case proves and as the statistics from the rural Alabama counties strongly suggest, the punitive damages problem in Alabama, under the procedures approved by the United States Supreme Court, has grown to epidemic proportions.

The Court's recent BMW opinion, however, strikes out in a new direction. The Court found that a $ 2 million Alabama punitive damages verdict in a case involving a $ 6,000 compensatory economic loss to be constitutionally excessive. [42] The Court adopted three new metrics for the evaluation of excessiveness: the relation between the punitive damages verdict and 1) the "degree of reprehensibility" of the underlying tortious action; 2) the magnitude of compensatory losses; and, 3) criminal statutory penalties for similar offenses. [43] These metrics are likely to be far more successful in constraining punitive damages verdicts than the vague and overlapping "factors" under which Alabama courts previously reviewed punitive damages verdicts. [44]

Nevertheless, there remain serious questions as to how effective this form of comparison will prove in practice. Reprehensibility is a very vague concept and hardly susceptible of careful measurement. Similarly, the mathematical relationship between the compensatory and punitive damages elements is an odd judicial principle. Is there a principled reason that a ratio of 1 to 5 or 1 to 4 is constitutionally suspect in comparison to a ratio of 1 to 2 or less? Moreover, if the purpose of punitive damages is to deter behavior that is morally reprehensible, the relevance of the compensatory loss is not immediately evident unless an intent to affect the magnitude of loss was a specific element of the reprehensible action. Many totally inadvertent or accidental actions generate huge loss; many repugnant and reprehensible actions generate little harm, measured solely in compensatory terms of lost income, needed expense, and pain and suffering. Perhaps the most helpful metric is the relationship to statutory criminal penalties for comparable offenses. Here, legal analysis can be employed with some precision, though the question then arises why, given the existence of some criminal penalty for comparable action, punishment should be delegated to a civil jury through a punitive damages verdict in any case.

Upon reflection, it is not surprising that the Supreme Court has found it difficult to deal with excessive punitive damages. The Supreme Court's job, in general, is to define rights. Few would contest--I do not contest--that punitive damages may be appropriate in some contexts. I would not support a constitu- **[*839]** tional right of immunity from punitive damages (though that may well be an important improvement over the current state of the law).

What is needed for punitive damages reform is a prudential judgment of the appropriate cap or limit to punitive damages that will allow some room for punishing egregious behavior but constrain the deleterious effects of unlimited punitive damages judgments on consumers. For example, the proportional limit of three times economic losses or $ 250,000 in the recently enacted products liability legislation is a prudential judgment of that nature. But that prudential judgment is a uniquely legislative, not judicial, exercise. Regrettably, the President vetoed the legislation.

With respect to reform by the states, the question is somewhat different. Punitive damages verdicts implicate both interstate and foreign commerce in a manner that only Congress can address. Some have argued that a state without a significant manufacturing or interstate service sector could actually benefit its citizens by adopting an expansive civil liability regime at the expense of citizens of other states. Alabama may well be an example of this phenomenon. Congress is in the best position to provide a solution to this issue.

Secondly, there is one further effect of our modern punitive damages regime that should not go unnoticed: the effect on the competitiveness of American manufacturers and producers.

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Some have argued that large punitive damages verdicts in the U.S. are neutral with respect to competitiveness since 1) foreign courts do not award such verdicts against U.S. producers with respect to sales abroad; and, because 2) foreign producers are equally subject to such verdicts for sales in the United States. (Note that BMW is a German corporation.) Thus, for United States sales, foreign producers, just like United States producers, must add expected punitive damages and joint and several liability verdicts into the prices of products and services. (It is often lost on these observers that an increase in prices on account of punitive damages--even if operating neutrally--is not an affirmative argument on behalf of consumers.)

This analysis, however, is only partially correct. Increasingly, foreign courts are refusing to enforce extraordinary judgments from U.S. courts against foreign defendants. For example, the German Federal Court of Justice (Germany's highest court for civil and commerical matters) recently refused to enforce a $ 400,000 punitive damages verdict obtained in an American court by an American plaintiff against a German defendant on the grounds that the punitive damages verdict was inconsistent with German public policy. [45] In the same case, an intermediate United States court already had reduced the pain and suffering damages component from $ 200,000 to $ 70,000 on the same grounds. [46] **[*840]**

Foreign judgments of this nature should be alarming both to Congress and to United States courts. First, they are strong evidence that the current course of American law does not command widespread assent among reasoned commentators--yet another grounds for general punitive damages reform. Secondly, such judgments suggest an increasing competitiveness problem facing United States producers here in the United States. To the extent that United States punitive damages verdicts must be enforced abroad and foreign courts refuse to enforce them, foreign producers need not add the costs of the American civil justice system, including punitive damages and excessive pain and suffering awards, into the prices of products and services sold in the United States. Thus, foreign producers can underprice American producers in sales to American consumers here in the United States.

Ironically, although American producers and their employees are harmed by this effect, American consumers benefit because they can obtain products and services at lower prices without the effects of our punitive damages verdicts built in. [47] Put slightly differently, the refusal of foreign courts to enforce large punitive damages or pain and suffering awards from American courts represents a type of tort reform, regrettably however, only available--prior to punitive damages reform--to foreign, rather than to United States, producers.

These various reasons support an argument for widespread punitive damages reform. While the punitive damages experience in Alabama may appear unusual, there is always the potential for a substantial punitive damages verdict in any jurisdiction. In addition, there is the potential for punitive damages verdicts to increase in magnitude and frequency so as to become routine, as I believe to be the case in Alabama prior to BMW of North America, Inc. v. Gore. It is too early to observe any effect of the BMW decision, and it is only speculation whether the seeming increase in precision of the three metrics defined by the Supreme Court can change the punitive damages environment in Alabama. If not, then some more drastic prudential judgment will be necessary to reduce the harm to consumers from excessive punitive damages awards.

FOOTNOTES:

↑n1 This paper is an expansion of testimony presented to the Senate Committee on the Judiciary on Punitive Damages Tort Reform in April 1995. It presents some results of empirical work conducted since that presentation and discusses the recent U.S. Supreme Court opinion in BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1966).

↑n2 See Michael Rustad, In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data, 78 Iowa L. Rev. 1 (1992).

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n3 For a recent example, see Life Ins. Co. of Georgia v. Johnson, No. 1940357, 1996 WL 202543 (Ala. Apr. 26, 1996) ($ 12.5 million punitive damages verdict remitted to $ 5 million); but cf. Foster v. Life Ins. Co. of Georgia, 656 So. 2d 333 (Ala. 1994) ($ 250,000 punitive damages verdict by trial judge vacated by Alabama Supreme Court reinstating jury's $ 1 million punitive damages award).

n4 For the extraordinary effects that repeated punitive damages verdicts have had on tort claims, see infra text accompanying notes 16-20.

n5 See, e.g., Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032 (1991); TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S. Ct. 2711 (1993) (U.S. Supreme Court approval of Alabama punitive damages review procedures).

n6 BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996).

n7 Id.

n8 W. Page Keeton et al., Prosser and Keeton on the Law of Torts 9 (5th ed. 1984).

n9 See, e.g., Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Stud. 399 (1973); George L. Priest, Selective Characteristics of Litigation, 9 J. Legal Stud. 399 (1980).

n10 These statistics are derived from a study by Forrest Latta, a summary of which formed the basis for the Alabama Supreme Court's statistical appendix in Life Ins. Co. of Georgia v. Johnson, No. 1940357, 1996 WL 202543 (Ala. April 26, 1996).

n11 See Rustad, supra note 2.

n12 All statistics presented are those for non-wrongful death cases only. Alabama procedures provide that the only measure of damages for wrongful death is punitive damages. It may well be appropriate to include wrongful death awards in this study both because the Alabama standards for wrongful death recoveries are equivalent to the standards for punitive damages recoveries in other cases and because the procedure for trial and appellate review is the same. See Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989). Nevertheless, the unusual character of Alabama verdicts in comparison to those of other states is best seen if the Alabama wrongful death experience is excluded since Alabama wrongful death procedures differ from those of virtually all other states.

n13 Gallant v. Prudential Life Ins. Co., Barbour County, AL, CV-93-50 (1994). See discussion infra text accompanying notes 27-36.

n14 See Rustad, supra note 2.

n15 George L. Priest, Private Litigants and the Court Congestion Problem, 69 B.U. L. Rev. 527, Table 1 at 540 (1989).

n16 These data were collected under a research project organized and directed by myself and Professor James R. Barth, Auburn University, and conducted by Cornerstone Research, Menlo Park, California, for the case Gallant v. Prudential. Data are available from the author.

n17 See George L. Priest, The Role of the Civil Jury in a System of Private Litigation, 1990 U. Chi. Leg. Forum 161 (1990) (65% of all jury trials in the Chicago trial courts deal with auto accidents).

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↑n18 Indeed, I present an anecdotal case--though a telling one--infra text accompanying notes 27-36.

↑n19 These statistics are taken from Alabama Dept. of Commerce, 1994 Economic Abstract of Alabama at Tables 5-1, 5-4, 5-7, 5-13, 5-17, 9-7, 9-11, 13-4, 13-5, 13-6, 13-7, 13-9.

↑n20 This figure again excludes wrongful death awards. See supra note 12. If such awards were included, the amount equals $ 109 million, equal to $ 26 per capita. See Life Ins. Co. of Georgia v. Johnson, No. 1940357, 1996 WL 202543 app. (Ala. Apr. 26, 1996).

↑n21 For a discussion of the development of modern tort law, see George L. Priest, The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law, 14 J. Legal Stud. 461 (1985).

↑n22 William M. Landes & Richard A. Posner, The Economic Structure of Tort Law (1987); Richard A. Posner, Economic Analysis of Law (4th ed., 1992); Steven Shavell, Economic Analysis of Accident Law (1987).

↑n23 See sources cited supra note 22. Of course, the latter is also a justification for the class action.

↑n24 See George L. Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521 (1987).

↑n25 Again, I have endorsed limits on pain and suffering awards in contexts of expanded liability, though this issue is somewhat beyond the focus on punitive damages here. See id.

↑n26 Joseph E. Stigletz, Economics of the Public Sector 347 (1986).

↑n27 Gallant v. Prudential Life Ins. Co., Barbour County, AL, CV-93-50 (1994) [hereinafter cited as Gallant].

↑n28 Id.

↑n29 See generally American Law Institute, Restatement of Restitution and Unjust Enrichment (1936).

↑n30 Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032 (1991). But see BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996), discussed infra.

↑n31 Gallant (mem. op.).

↑n32 BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996) (striking down a punitive damages verdict awarded by an Alabama court).

↑n33 Testimony of Professor James R. Barth, Auburn University in Gallant, supra note 27. Copy on file with author.

↑n34 Id.

↑n35 Gallant, supra note 27, Trial Transcript at 647, April 6, 1994.

↑n36 See supra text accompanying note 19.

↑n37 See, e.g., BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996); Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994); TXO Production Corp. v. Alliance Resources Corp., 509

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continued to escalate and to dramatically affect the entire civil dispute process. [4] As a consequence, punitive damages claims and awards have become a routine feature of the Alabama civil liability regime.

This paper addresses the Alabama phenomenon. While the Alabama experience, to my knowledge, is unique--there are no studies showing civil jury verdicts of this magnitude in any other American jurisdiction--there is no reason to believe that the phenomenon is unique to Alabama jurisprudence. Indeed, oddly enough, the procedures for trial and appellate review of punitive damages verdicts had been developed in the caselaw more completely for Alabama than for any other United States jurisdiction. [5] Instead, the recent Alabama experience **[*826]** seems reflective, more generally, of the consequences of permissive appellate review of jury trial punitive damages verdicts. As suggested by the Alabama experience, punitive damages verdicts can begin to snowball. As citizens see large punitive damages verdicts awarded in increasing numbers of cases, expectations and understandings begin to change. The large punitive damages verdict becomes the norm, rather than the exception. This paper documents that experience in Alabama and discusses the effects of such judgments on deterrence and on the welfare of consumers.

Within the past weeks, the United States Supreme Court has once again reviewed an Alabama punitive damages verdict and, for the first time, determined that the verdict and, to some extent, current Alabama punitive damages review procedures, fail constitutional norms. [6] This paper reviews that decision in the context of the broader Alabama experience, and discusses the likelihood that the new approach toward the review of punitive damages judgments adopted by the Supreme Court can halt the spiraling punitive damages experience in Alabama or other jurisdictions.

Part I reviews the Alabama experience to document what I regard to be the increasing commonality of Alabama punitive damages verdicts and claims. Parts II and III address the effects of routine punitive damages claims and verdicts. Part II focuses on deterrence, the principal rationale for punitive damages, and Part III discusses consumer welfare. Part II shows that the deterrent effect of punitive damages verdicts has been vastly overrated, especially with respect to corporate defendants. Part III explains how the principal victims of excessive punitive damages verdicts are consumers, and low-income consumers most of all. Finally, Part IV discusses whether effective punitive damages reform can be effected through the courts, reviewing the Supreme Court's decision in BMW of North America, Inc. v. Gore, [7] or whether a legislative constraint on punitive damages is necessary. It is, of course, too early to determine what the effect of the BMW decision will be; indeed, it is premature to anticipate how the Alabama Supreme Court will respond to the decision. Part IV, however, hazards some preliminary thoughts on the extent to which the more careful inquiry now required by the United States Supreme Court can affect a punitive damages "environment," an environment now reaching to the level of citizen-juror expectations, such as that in Alabama. Part IV suggests that there are reasons to believe that legislative approaches to the punitive damages problem may still be required.

I. The Increasing Commonality of Punitive Damages

Forty years ago, punitive damages verdicts were exceptionally rare in all jurisdictions and were available against only the most extreme and egregious of **[*827]** defendant actions. [8] The world of civil litigation is surely different today, especially in Alabama. Both the number and, especially, magnitude of punitive damages judgments have increased dramatically. Indeed, in Alabama, the frequency of claims for punitive damages has increased to approach the routine. These claims affect the settlement process by increasing the litigation rate [9] and, necessarily, the ultimate magnitude of settlements, even in cases that are settled out of court.

A recent study of punitive damages trial verdicts illustrates the phenomenon. [10] Punitive

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damages verdicts of greater than $ 1 million are alleged to be rare, and verdicts in the multi-millions extremely rare. [11] Alabama appears to be an exception. In 1991, there were eleven reported punitive damages verdicts equal to or greater than $ 1 million and individual verdicts of $ 25 million, $ 45 million and $ 50 million. [12] In 1992, there were twenty-two reported punitive damages verdicts equal to or greater than $ 1 million and individual verdicts of $ 18 million, $ 25 million and $ 33.2 million. In 1993, there were fifteen verdicts equal to or greater than $ 1 million and individual verdicts of $ 12.5 million, $ 19.5 million and $ 65 million. Finally, in 1994, there were twelve verdicts equal to or greater than $ 1 million and individual verdicts of $ 22.7 million, $ 25 million [13] and $ 33.5 million.

The frequency of million dollar and multi-million dollar verdicts over this time period is astounding and is suggestive of the commonality of punitive damages in Alabama. There remains, however, a better test of the commonality thesis. Some commentators continue to dismiss concerns about punitive damages on the grounds that even these numbers are not very large, given the number of jury verdicts reported across the country in any year. [14] In the American system of civil justice, of course, very few verdicts of any kind are reported, relative to the number of claims filed, since only two to five percent of civil cases filed **[*828]** ever proceed to a verdict. [15] The better test of the commonality of punitive damages verdicts derives from a study of claims.

Recently, I participated in an empirical study of the frequency of punitive damages claims in Alabama. A study of claims--the proportion of all tort cases filed that incorporate a claim for punitive damages--is the best test of the commonality of punitive damages expectations. The study, which to my knowledge is one of the only studies of punitive damages claims, was conducted in three Alabama counties: Bullock, Lowndes, and Barbour Counties. Each of these counties is a relatively rural locale with a small population and without substantial industry. We studied all tort actions filed in these counties in the past several fiscal years to determine the numbers in which punitive damages were claimed. To summarize the most recent statistics, we found that in the fiscal year 1992-93, 76.5% of all tort cases filed in Bullock County included a punitive damages claim; 65.1% in Lowndes County; and 78.3% in Barbour County. [16]

The exceptionally high proportion of punitive damages claims and the universality of such high proportions over each of the counties studied are striking and nearly incredible. Again, the study was not limited to claims involving high dollar amounts or product liability claims or, even, claims against corporate defendants; the study addressed all tort claims. Anyone familiar with our civil justice system knows that most tort actions involve relatively routine forms of accidents, such as traffic accidents. [17] That 65% to 78% of all tort actions over a given fiscal year included punitive damages claims starkly challenges the notion that punitive damages are an infrequent and seldom invoked remedy across American civil law.

Incredible as these numbers may seem, in the succeeding fiscal year, the proportion or number of tort cases including a punitive damages claim actually increased in each of the counties. During the 1993-94 fiscal year, an extraordinary 95.6% of tort cases filed in Bullock County included a punitive damages claim; 78.8%, in Lowndes County. In Barbour County, the proportion of tort cases including a punitive damages claim decreased from 78.3% to 72.1%, but the absolute number of punitive damages claims increased during 1993-94 by over 40%.

Much of the debate over punitive damages proceeds in the form of competing anecdotes in which a defender of our modern regime presents a case of exceptionally egregious defendant behavior deserving of punitive damages and **[*829]** a supporter of reform presents an opposite example. [18] The Alabama numbers belie anecdotes. No one can plausibly claim that 72.1% to 95.6% of all accident cases over an entire year in any county of the United States involve the form of exceptionally egregious defendant behavior that might merit substantial punitive damages. These numbers show that the role of punitive damages has changed

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dramatically in the Alabama civil justice system from an occasional remedy invoked against outrageous action to a commonplace of tort law practice.

These numbers also belie the commonly-heard defense that actual punitive damages verdicts are rare and that many of those awarded by juries are later reduced on appeal such that there is no substantial effect. Debate can be had on what is meant by the term "rare" and what constitutes, in terms of magnitude of verdicts, a "substantial" effect. The impression is often suggested, however, that even for the nation in its entirety, punitive damages claims amount to nothing more than a handful.

Our Alabama study demonstrates that this is a great misimpression. Again, we did not select the largest cities in Alabama or industrial or manufacturing centers; in fact, we did just the opposite. The counties that we studied in Alabama are rural, with modest populations and a relatively non-urbanized citizenry. For example, Bullock County has a total population of only 11,042, 4,040 of whom are employed, and a per capita income of $ 9,212. Lowndes County has a total population of 12,658, with 5,300 employed, and a per capita income of $ 10,628. Barbour County is somewhat larger, with a total population of 25,417, with 12,400 employed, and a per capita income of $ 12,100. [19] None of these counties, however, resembles in the slightest metropolitan areas such as Miami, Los Angeles, or Dallas.

What did we find? In 1993-94, despite these small populations, punitive damages claims in these rural counties constituted far more than the claimed nationwide "handful." In Bullock County, 43 of 45 tort actions included a punitive damages claim; in Lowndes County, 52 of 66 tort actions included a punitive damages claim; in Barbour County, 93 of 129 tort actions included a punitive damages claim. Are punitive damages in Alabama insignificant? The claims reported above are quite recent and remain in the litigation pipeline. Looking to much earlier claims, however, our study in Alabama showed that the magnitude of punitive damages judgments affirmed by the Alabama Supreme Court from 1987 through the first half of 1994 totalled $ 53.2 million, [20] equal to roughly $ 13 per Alabama citizen.

This study demonstrates that the number and magnitude of affirmed punitive damages verdicts is only the very small tip of an extraordinary iceberg. Again, **[*830]** it is universally conceded that only 2% to 5% of cases filed ever proceed to verdict. Thus, it is not surprising that the systematic observation of any single type of verdict is relatively rare. What the Alabama numbers show is that the availability of unlimited punitive damages affects the 95% to 98% of cases that settle out of court prior to trial. It is obvious and indisputable that a punitive damages claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process, increasing the likelihood of litigation. Thus, as shown in the Bullock, Lowndes, and Barbour County figures, modern Alabama rules with respect to punitive damages impose these effects on a majority of even settled cases.

The next two Parts review the effects of punitive damages verdicts in contexts in which such verdicts have become commonplace. Part II discusses the deterrence justification of punitive damages. Part III addresses the effects of punitive damages on consumers, low-income consumers in particular.

II. Do Punitive Damages Serve a Necessary Deterrent Purpose?

Virtually every supporter defends punitive damages on the grounds of deterrence, accompanied by an anecdote or two involving persons who suffered serious losses in contexts in which most observers would agree that the respective defendant should have prevented the accident. Generally, the anecdotes speak for themselves: I have never once seen a careful study in a specific case showing that a punitive damages judgment of some particular amount was necessary to deter some particular wrongful behavior. Instead, the argument proceeds by implication. The basic defense of punitive damages--and I believe that it is the

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only serious defense--is the implication that large, unlimited punitive damages verdicts are necessary to control injurious activities in society. Put in a slightly different way, it is implied that without the availability of unlimited punitive damages awards, potential defendants, especially corporate defendants, would face no deterrent threat to prevent them from causing injuries.

Forty years ago, in a tort law regime that provided little in the way of consumer remedies, it might have been believed that ever-increasing civil liability verdicts, including punitive damages verdicts, would serve to reduce the number of accidents. [21] That view, however, has been totally discredited today, and I know of no serious tort scholar publishing in a major legal journal who could maintain it. Instead, it is widely accepted--and it is a routine proposition of a first-year modern torts course--that compensatory damages--economic losses and pain and suffering--serve a complete deterrent purpose in addition to their role in compensating injured parties. Compensatory damages impose costs on **[*831]** defendants who wrongfully fail to prevent accidents, costs equal in amount to the injuries suffered. Compensatory damages internalize injury costs to defendants where some action has wrongfully injured an innocent party.

Indeed, the strongest theory in the modern tort academy is that full compensatory damages generate exactly the optimal level of deterrence of accidents--not too little and not too much. [22] For purposes of deterrence or accident prevention, there is no need for punitive damages of any dimension, not to mention unlimited punitive damages, given the availability of full compensatory damages. Of course, this is a theoretical conclusion, and there remains dispute in the academy as to whether, as an empirical matter, court, or juries calculate compensatory damages with perfection in every case or in every context. Thus, substantial academic attention has been given to the refinement of liability rules so that the deterrent effects of compensatory damages may be sharpened.

Given the role of compensatory damages as a deterrent, however, the analysis of punitive or other exemplary damages becomes substantially different. The only justification on grounds of deterrence for any exemplary award beyond the compensatory is that compensatory damages are inadequate for some reason, such as juries awarding damages which are too low in some dimension or some set of injuries going undetected or perhaps being too insignificant individually to justify litigation. [23] The only plausible defense of punitive damages on deterrence grounds is to restore aggregate damages to a level equal to that which is fully compensatory.

Opponents of punitive damages reform currently avoid this issue, but their failure to confront it suggests the ultimate weakness of their opposition. Again, anecdotes involving individuals suffering serious losses are not generally helpful to the analysis. I am extremely sympathetic--as all of us are--to individuals suffering serious injuries. We all wish that wrongfully injurious actions might have been avoided. Given a wrongful injury, we all want the victim to receive full compensation for economic losses and pain and suffering.

The question for punitive damages tort reform, however, is as follows: Given full compensation to the victim, is there some affirmative deterrent purpose served by awarding further damages? Is there some reason to believe that the payment of full compensatory damages will fail to deter the defendant, such that some further multiple through punitive damages is absolutely necessary? For corporate defendants, the answer surely is no. Corporate defendants who must maximize profits net of costs must necessarily take the prospect of compensatory damages into account when determining how to invest in accident prevention. Again, this analysis presumes full compensation. If there were some reason to believe that juries were systematically undervaluing economic losses or pain and suffering, **[*832]** punitive damages might be necessary to make up for the shortfall. Of course, the opposite may be true. Many, including myself, believe that juries overvalue compensatory damages, including pain and suffering, justifying increased limits on pain and suffering

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awards, especially in contexts of expanded liability. [24] Barring such a shortfall, however, there is no justification for punitive damages on deterrence grounds.

The analysis is, perhaps, somewhat different in the context of individual, noncorporate defendants who are less subject to cost constraints and, perhaps, more inclined to behave unconscionably. This is the reason that exemplary or punitive damages are often awarded in cases involving intentional harms such as assault.

As administered by juries, however, our current civil liability regime approaches the issue exactly backwards. In our current regime, large punitive damages verdicts are seldom awarded against non-corporate defendants. I know of no one objecting to a punitive damages cap on the grounds that it will impair the deterrence of private individuals. Instead, large punitive damages verdicts are most typically awarded against corporate defendants who, as profit maximizers (a motivation often irrationally held against them), will be carefully responsive to compensatory damages. Corporate defendants need no punitive damages verdict to encourage them to take all cost-effective precautions to prevent injuries; compensatory damages alone achieve that result. Thus, the increasingly commonplace plaintiff lawyer's charge to a jury to "send the corporate defendant a signal" ignores entirely the universally accepted academic view that, to a corporate defendant, full compensatory damages are not only an effective signal, but also the only signal needed.

III. Do Punitive Damages Help or Hurt Consumers?

If the effect of punitive damages were to benefit consumers or if their effect were even neutral to the consumer interest, we might not be concerned that punitive damages are unnecessary to deter corporate defendants from injurious behavior. The central problem of punitive damages, however, is that, except in the rare cases of jury undervaluation of damages or underlitigation, punitive damages settlements and verdicts affirmatively harm consumers, low-income consumers most of all.

Where punitive damages become commonplace in civil litigation, as in Alabama, or even where they become a significant risk to business operations, consumers are harmed because expected punitive damages verdicts or settlements must be built into the prices of products and services. The effect of the increased frequency and magnitude of punitive damages recoveries of modern times has been to increase the price level for all products and services provided in the United States economy. To observe this phenomenon is not to say that **[*833]** injured consumers should go uncompensated. If a consumer suffers an injury that can be attributed to some wrongful activity of a defendant, whether manufacturer or service provider, that consumer should receive compensation for economic losses and for reasonable non-economic losses, such as pain and suffering. [25] In contrast, punitive damages, by definition, go beyond the compensatory. The problem with the increasing commonality of large punitive damages verdicts and settlements, such as those in Alabama, is that the awards to some consumers of greater than compensatory damages must be built into the prices paid by all other consumers.

It is an obvious implication of this proposition that low-income consumers are most seriously harmed by our current punitive damages regime. First, lowincome consumers have less money generally and, regardless of the product or service, are more seriously affected in terms of the purchasing power of their limited resources when price levels increase. Secondly, and most importantly, low-income consumers are not the typical beneficiaries of large punitive damages verdicts or settlements, at least not on a systematic basis. Again, research of my own currently in progress shows that low-income consumers, if injured, are less likely to seek an attorney; even with an attorney, they are less likely to sue; less likely to recover; and, again by definition, less likely to recover large damage judgments since their lost income is typically low and pain and suffering awards, which are highly correlated with lost income, equally low.

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Put more simply, where punitive damages verdicts and settlements are frequent and large, low-income consumers are forced to subsidize high-income consumers as expected punitive damages awards are built into the prices of products and services. All consumers--high-income and low-income alike--pay the increased prices; chiefly the high-income gain the return in high compensatory and punitive damages recoveries. Again, a low-income individual will receive a punitive damages windfall, but the far more systematic effect is to harm the low-income consumer as the prices of products and services generally are increased to adjust for the expectation of future punitive damages payouts.

It is important to recognize that the current effect of the doctrines of comparative negligence and joint and several liability is similar. Comparative negligence and joint and several liability have their most general effects on organizations or entities which engage in a large scope of activities, such as state and municipal governmental entities, public utilities, and the like. It has become a commonplace of modern civil litigation for plaintiffs' attorneys to join as defendants any governmental entity or utility remotely associated with an injury. Thus, state governments and municipalities are joined as defendants on claims that roads were misdesigned or poorly maintained, or that a guard rail or telephone pole could have been placed in a better position. Forty years ago, attorneys would not have thought to include entities whose causal relationship to **[*834]** the harm was so low or, alternatively, if they had attempted to join such entities, the claim would have been dismissed. Today, such litigation is routine and imposes substantial litigation expenses upon our state and municipal governments as well as liability expenses, infrequently but chiefly under the operation of the doctrines of comparative negligence and joint and several liability, where the truly responsible defendants have gone bankrupt, leaving our governments and utilities to suffer the remaining judgment.

It is clear that, for very similar reasons, operation of the doctrines of comparative negligence and joint and several liability harms citizens in general, but low-income citizens most of all. Damages judgments against state and municipal governments must be paid from state and municipal financial sources. It is well-established that state and, especially, municipal finance are seriously regressive in effect, charging more to middle- and low-income citizens, proportionate to income, than to relatively high-income citizens. [26]

These propositions about the effect of punitive damages, comparative negligence and joint and several liability on low-income citizens may appear abstract; however, I believe that they are generally accepted within the academic community. To illustrate their import with greater salience, however, I would like to present one recent example of a punitive damages verdict in Alabama: the case that inspired the research presented above. The case will both reaffirm the pressing need for punitive damages reform and illustrate why such reform should be expanded to all state and federal litigation.

In the case of Gallant v. Prudential, [27] decided by jury verdict in April 1994, Iran and Leslie Gallant sued Prudential Life Insurance Company based on the actions of a Prudential agent. The Gallants purchased a combination life insurance-annuity policy with a $ 25,000 face value at a monthly premium of roughly $ 39.00. At the time of sale, the agent told them that the value of the annuity was roughly twice what it in fact was. The agent had added together the table indicating "Projected Return" with the table indicating the lower "Guaranteed Return." A jury found this action fraudulent and held the agent liable and Prudential separately liable for failing to better supervise the agent. [28]

Fortunately, the problem was discovered before the policyholder had died or had retired to receive the annuity. Thus, to the time of trial, there was no true economic loss beyond the failed expectation of the larger future return. According to the transcript of the testimony, the Gallants testified that, between the time they discovered the misinformation and Prudential called them to offer a remedy (Prudential offered to return their premiums or to

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discuss adjusting the policy), they had suffered roughly two weeks of sleepless nights and substantial anger at having been misled. That was the extent of their "mental anguish." **[*835]**

Twenty years ago, cases of this nature were part of the legal field entitled Restitution, in which the appropriate remedy was restitution of all paid premiums or out-of-pocket costs. On very rare occasions, such as especially egregious actions by a defendant, some courts considered awarding plaintiffs the benefit of the bargain, say, by increasing their annuity benefits. [29]

Our modern world has changed. After a one and one-half day trial, an Alabama jury awarded the Gallants damages equal to $ 30,000 in economic loss, $ 400,000 in mental anguish, and $ 25 million in punitive damages. Again, the face value of the insurance policy was only $ 25,000.

I do not wish to minimize the harm to the Gallants, especially the indignity of the misrepresentation, or condone the fraudulent actions of the agent, apparently perpetrated on several other Alabama citizens who recovered separately. Nevertheless, there is not a single person to whom I have described this case--not an attorney, whether plaintiff or defendant; not a liberal or a conservative; not even a radical or idealistic Yale Law student (or faculty member)--who has not been shocked by the outcome or who could defend it as a rational or sensible verdict in the context of the harm. Again, many defenders of punitive damages argue that exceptionally large verdicts are usually overturned on appeal. Alabama's review procedure for punitive damages verdicts had been carefully analyzed and approved by the United States Supreme Court shortly before the Gallant trial. [30] In the Gallant case, however, the judge conducting the review affirmed the $ 25 million award in its entirety, though directing part of the amount to be paid to the State. [31] The case was later settled prior to the United States Supreme Court's recent decision in BMW of North America, Inc. v. Gore. [32]

What will be the effect of a punitive damages verdict of this nature? The Gallants appear to be persons of modest means (at least before the verdict). Does a verdict of this nature help middle- or low-income consumers in the aggregate? Unfortunately, totally the opposite is true. The insurance policy in question--face value, $ 25,000--was the cheapest form of life insurance/annuity available on the market; its monthly premium was only $ 39.00. Obviously, at such a premium, the insurance carrier could not be expecting to make a substantial profit on the policy. Indeed, an economic expert in the case for Prudential estimated that, over the entire life of the policy, the premiums net of payouts paid by the Gallants would increase Prudential's assets by only $ 46.00. [33] Prudential, like most other life insurance companies, profits more **[*836]** substantially from large dollar, rather than small dollar, policies. The expert estimated that the verdict reduced dividends to every Alabama policyholder (Prudential is a mutual carrier) by $ 323. [34]

How do we analyze a case like this in terms of whether punitive damages serve a necessary deterrent effect? In his closing argument, the highly effective attorney for the Gallants asked the jury to determine a level of damages that would send a "message" to the giant Prudential Life Insurance Company that fraudulent behavior on the part of an agent would not be tolerated. [35] What kind of damages message is necessary to achieve that effect? Obviously, if the insurer stood to gain no more than $ 46 over the life of the policy, any damages judgment greater than $ 46 sends the insurer a message by making the policy unprofitable. (Of course, I ignore entirely Prudential's defense costs plus the reputational harm from the lawsuit.) The jury in the Gallant case went substantially beyond that amount, however, in awarding compensatory damages of $ 30,000 for economic loss and $ 400,000 for the mental anguish from the two weeks of lost sleep and anger. It certainly cannot be argued that the jury undervalued the Gallant's compensatory loss--indeed, the $ 400,000 mental anguish award itself is extreme. The median per capita income in Barbour County, where the Gallant case was tried, was $ 12,100. [36] Furthermore, there is no reason to think that the

agent's behavior in other contexts would go undetected. (Prudential later settled other cases brought by the agent's clients.) As a consequence, there is little justification for a punitive damages award whatsoever.

What will be the effect of punitive damages verdicts such as that in the Gallant case? In the face of such a verdict, what is the rational response of an insurer like Prudential, or other insurers selling similar policies? Regrettably, but necessarily in a competitive industry, the rational response is to quit selling such low value policies altogether. It makes very little sense to expose the company and its policyholders to the risk of such a damages verdict given the very small gain from the sale of such a policy.

Is this the type of product that our civil liability system should drive from the market? Obviously not, and low-income consumers in Alabama are directly harmed as a result. Here, the dramatically differential effects of such verdicts on high-income versus low-income consumers are made clear. In my own view, it is far more important to our society--if a choice had to be made--to have our insurance industry provide life insurance coverage to low-income citizens than to high-income citizens, since the relatively affluent of our society have other means of providing financial security for their families. The availability of financial protection and security at relatively low cost will be substantially diminished if such low premium policies, as here, are no longer available. **[*837]**

More generally, where expected punitive damages verdicts are added to the prices of products and services, the first to feel the effect will be low-income consumers. And where the magnitude of punitive damages verdicts rises, imperiling the continued provision of the product or service, the first to be affected will be those products and services with the lowest profit margins, those most attractive to the low-income consumers. The Gallant case provides a dramatic example of the effect. Following Gallant and other large punitive damages verdicts, several insurers quit offering coverage in Alabama altogether.

Punitive damages reform would cure that ill to the benefit of all Americans, especially low-income Americans. Punitive damages verdicts such as the $ 25 million verdict in the Gallant case encourage wasteful litigation. Indeed, litigation seeking punitive damages judgments against financial service companies has become an industry in Alabama. By increasing the prices of all products and services, punitive damages verdicts and settlements reduce the purchasing power of all Americans, especially the poor.

IV. Punitive Damages Reform: Statutory or Judicial?

Many defenders of the current regime question why legislatures should become involved in civil liability reform, rather than leaving reform initiatives to the courts. The question is particularly appropriate given that the Supreme Court has addressed the issue of the excessiveness of punitive damages in several recent cases, including the BMW decision. [37]

First, it is evident, after many opportunities, that the Supreme Court has great difficulty proceeding beyond what might be called a "procedural" approach to the punitive damages problem. With the exception of the recent BMW opinion, the only form of punitive damages control that the Court has adopted has been purely procedural--approving a set of procedures at the state level for judicial review of punitive damages verdicts, [38] or disapproving a state judicial procedure as not providing sufficient review. [39] The recent BMW opinion, as I shall describe, addresses directly the question of the excessiveness of punitive damages verdicts, but chiefly adopts a new set of procedural comparisons for judicial evaluation.

In my view, a merely procedural approach to the punitive damages problem will never be successful. Indeed, we have stark evidence of its failure. In 1991 in the Haslip case, the Supreme Court specifically approved the procedure for reviewing punitive damages verdicts

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ARTICLE: THE THIRD WAVE OF FEDERAL TORT REFORM: PROTECTING THE PUBLIC OR PUSHING THE CONSTITUTIONAL ENVELOPE?

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+ Minority General Counsel and Counsel, respectively, U.S. House Judiciary Committee. The opinions expressed herein represent the views of the authors and do not reflect the views of the House Judiciary Committee. The authors are grateful for comments received on earlier drafts by Victor Schwartz, Mark Behrens, Jeffrey White, Alan Morrison, Roger Ballantine, Andrew Popper, Jonathan Yarowsky, and Michael Rustad, and for the research assistance of Dawn Burton.

SUMMARY:
... In none of these statutes did Congress purport to leave state law in place while attempting to modify its content." ...

TEXT:
[*592]

I. INTRODUCTION

The United States has experienced several phases of federal tort reforms. [1] Congress' initial legislative reform efforts sought to alter state tort law applicable between common carriers and their employees by eliminating a number of common law defenses and substituting a comparative negligence standard. [2] In this regard, after the 1906 Employers' Liability Act [3] was struck down on Commerce Clause grounds, [4] Congress narrowed the law and enacted a similar law, the 1908 Employers' Liability Act. [5]

Commencing in the middle part of the century, Congress sought to encourage a variety of forms of conduct - such as the construction of nuclear power facilities [6] and swine flu immunization [7] - by granting potential defendants partial immunity from tort liability. In exchange for forfeiting common law rights against these private parties, claimants were granted offsetting legal benefits, such as the ability to seek damages against the United States under the Federal Torts Claims Act. [8]

[*593] Beginning in the 1990's, Congress commenced what can be viewed as a third phase of, or wave of, tort reform. These laws and proposals limit or pare back a number of common

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As for the due process challenge, O'Conner rejected the contention that it was irrational to apply the 1988 Amendments to circumstances other than the Three Mile Island nuclear accident. [162] After noting the **[*611]** plaintiff must overcome a "strong presumption" [163] of constitutionality, the court found retroactive application of the removal and consolidation provisions of the 1988 Amendments could provide advantages and efficiencies to a broad class of nuclear incidents above and beyond the Three Mile Island accident. [164]

In TMI [165] the court applied a straightforward rational basis constitutional test, finding the 1988 Amendments furthered Congress' stated goals of " 'uniformity, equity, and efficiency in the disposition of public liability claims' arising from nuclear accidents." [166] The Third Circuit found that retroactive application applied the Price-Anderson Act to all parties and therefore eliminated the potential for inconsistent results between jurisdictions. [167] Furthermore, TMI asserted the 1988 Amendments promoted efficiency by allowing consolidation of all nuclear accident cases in a single forum, remedying what the court referred to as "procedural problems plaguing the TMI cases." [168]

F. Westfall Act

In reaction to the Supreme Court's decision in Westfall v. Erwin [169] limiting federal employees' immunity from tort, [170] Congress enacted the Federal Employees' Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act"). [171] The Westfall Act broadened the Federal Drivers Act to provide for substitution of the United States as a defendant in actions arising from torts committed by federal employees acting within the scope of their employment, and applied retroactively to cases pending on the date of enactment. [172]

Rather than challenging the general limitations on liability set forth in the Westfall Act, plaintiffs focused on provisions applying to pending **[*612]** actions. However, claims that the Act's retroactivity provisions violated Fifth Amendment due process rights were rejected by the Eleventh Circuit in Sowell v. American Cyanimid; [173] the Sixth Circuit in Arbour v. Jenkins; [174] and the Tenth Circuit in Salmon v. Shwarz. [175] In each case, the courts found that "a legal claim [for tortious injury] affords no definite or enforceable property right until reduced to a final judgment," [176] and were therefore not subject to constitutional protection. In Salmon the court also argued that any disadvantages to plaintiffs were offset by the legal benefits available under the Westfall Act, noting "there are advantages afforded under the [Federal Torts Claims Act, such as] the administrative claim procedure for more expeditious resolutions, and the liability of the government in lieu of the risk that individual defendants may be judgment proof." [177]

IV. THE THIRD WAVE: PROTECTING THE PUBLIC OR PUSHING THE CONSTITUTIONALENVELOPE?

The third and most recent wave of federal tort reforms was initiated in the 1990's, when Congress enacted several narrowly tailored laws providing specific liability exemptions; such as a statute of repose for general aviation, exemptions from ordinary negligence for food donors and volunteers, caps on liability for rail passenger providers, and limitations on liability for medical implant suppliers who meet certain contractual and other product specifications, and limitations on liability in **Y2K** actions. [178] Due to the relatively narrow scope of these laws, they have not yet been applied in a manner giving rise to constitutional challenge. [179] **[*613]** Congress has also considered a number of far broader liability reforms involving areas such as products liability, medical malpractice and tobacco liability. [180] Collectively, this third wave of reforms raise a number of constitutional issues which have not been fully addressed in either the first or second wave of federal tort laws.

A. Recently Enacted Federal Tort Reforms

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1. General Aviation Revitalization Act of 1994

The General Aviation Revitalization Act of 1994 (the "General Aviation Act") [181] provides for an 18-year federal statute of repose for manufacturers of "general aviation aircraft" [182] and their component parts. As such, the law operates to prevent plaintiffs from bringing civil actions for death or injury or damage to property stemming from an accident against a manufacturer of a general aviation aircraft or component part which is more than 18 years old. The statute operates on a "rolling basis," so that if an original part is replaced, the new part would have a new 18-year statute of repose commencing with its replacement. [183]

The General Aviation Act does not apply in cases in which: (1) the manufacturer has misrepresented safety information to the Federal Aviation Administration; (2) the claimant was a passenger for purposes of receiving emergency medical treatment; (3) the claimant was not aboard the aircraft; and (4) actions are brought pursuant to written warranties. [184] The General Aviation Act is "one-way preemptive," that is to say it only supersedes state laws where there are no statutes of repose or which provide for a longer statute of repose. [185]

The General Aviation Act stems from concerns that the United States' general aviation industry was declining in part due to excessive liability burdens and the costs of defending so-called frivolous lawsuits. **[*614]** In their report on the legislation, the House Transportation Committee concluded that "an important factor in the decline of general aviation manufacturing has been the industry's product liability costs, which have increased from $ 24 million in 1978 to more than $ 200 million a year in recent years." [186] An additional factor justifying Congress' interest was the fact that the general aviation industry was considered uniquely susceptible to federal tort relief because it was otherwise subject to " 'cradle to grave'federal regulatory oversight" - including FAA approval of aircraft designs, federal licensing of pilots, mechanics and maintenance facilities, federal regulation of air routes and fuel handling, and FAA and National Transportation Safety Board review of aircraft accidents. [187]

The liability law which was ultimately enacted was far less comprehensive than previous versions of the legislation. As originally introduced by Senator Kassebaum (R-KA) and approved by the Senate Commerce Committee in 1986, general aviation reform would have established a uniform federal standard of negligence for general aviation accidents; mandated comparative negligence; altered the rules of evidence in general aviation cases (i.e., to explicitly provide that plaintiffs may not introduce evidence of subsequent remedial measures); set forth a federal standard for the award of **punitive damages;** created a two-year federal statute of limitations for bringing liability actions, and allowed automatic removal to federal courts as well as providing for a federal statute of repose (originally sought to be 12 years). [188]

Due to the controversy engendered by such a wide-ranging approach, [189] by 1993 the bill's sponsors settled on seeking a single reform - the imposition of a 15-year statute of repose. In order to obtain the consensus necessary to obtain clearance for consideration and approval in the Senate, the bill was further modified to extend the statute of repose period to 18-years, and exceptions were added to exempt cases involving misrepresentations to the FAA and written warranties, as well as persons injured on the ground and pursuant to medical evacuation. [190]

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2. Bill Emerson Good Samaritan Food Donation Act

The Bill Emerson Good Samaritan Food Donation Act (the "Food Donation Act"), [191] enacted in 1996, exempts persons who donate [192] food and grocery products to nonprofits [193] for

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distribution to the needy, as well as the non-profits themselves, from civil or criminal liability in connection with food which is "apparently wholesome" and grocery products which are "apparently fit" (i.e., meeting applicable quality and labeling standards). [194]

The Food Donation Act allows persons to donate food and grocery products which do not meet applicable quality and labeling standards without fear of liability so long as the nonprofit organization is so informed, agrees to remedy the defect, and has the knowledge to do so. [195] The law also protects persons who permit food to be "gleaned" (harvested from their land free of charge) from civil or criminal liability arising from the gleaner, except in cases of gross negligence or intentional misconduct. [196] The Food Donation Act does not include a specific clause stating that it is one-way preemptive, however, it is written in such a manner that it provides only relief from liability in specified situations, and therefore does not appear to create any liability where gross negligence or intentional misconduct occur except as otherwise provided under state law. [197]

Proponents of the Food Donation Act asserted it was needed to provide a minimum federal floor of liability protection in order to encourage the various forms of food donation activity. [198] While it was acknowledged that all states had adopted some form of liability protection to food donors, supporters believed these laws were inconsistent and created confusion, particularly for large national food donors. [199]

[*616] The Food Donation Act was based on a model good samaritan statute which Congress adopted in 1990. [200] In March of 1996, a conference committee declined to extend the law into a federal mandate as part of the Agriculture bill because of stated federalism and jurisdictional concerns. [201] However, in the wake of the death of the proposal's principal supporter, Rep. Bill Emerson (R-MO), the legislation received renewed attention and was able to easily pass the House and Senate in substantially the same form as the introduced version. [202]

3. Volunteer Protection Act of 1997

The Volunteer Protection Act of 1997 (the "Volunteer Protection Act"), [203] provides a variety of protections from liability to individuals who volunteer for nonprofit organizations [204] or government agencies. [205] The principal form of protection provided by the Act insulates volunteers [206] from actions for harm caused by ordinary negligence (i.e., not caused by willful or criminal conduct, gross negligence, reckless misconduct or a conscious, or flagrant indifference to the rights or safety of others). [207] This protection from civil liability does not apply to volunteers acting outside the scope of their responsibility, volunteers acting without a required license, certification, or authorization, or harm caused by a motor vehicle. [208]

[*617] In addition, the Volunteer Protection Act provides special protections to volunteers for actions involving **punitive damages** and actions involving joint and several liability with respect to volunteers acting within the scope of their employment. [209] **Punitive damages** may only be allowed if the plaintiff establishes by clear and convincing evidence that the harm was caused by willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of others. [210] Joint and several liability by volunteers is eliminated for "non-economic" damages (e.g., pain and suffering). Instead, under the Volunteer Protection Act volunteers are only responsible for paying non-economic damages to the extent of their "percentage of responsibility" (as determined by the trier of fact). [211]

The Volunteer Protection Act is one-way preemptive, superseding state laws "except to the extent that such laws are inconsistent with [the] Act, except that [the] Act shall not preempt any state law that provides additional protections from liability relating to volunteers...." [212] However, the Volunteer Protection Act permits the operation of certain state laws requiring that nonprofit organizations operate in a safe and sound manner, namely, laws requiring nonprofit organizations to adopt risk management procedures (e.g., training volunteers), be

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subject to respondeat superior (i.e., vicarious employer liability for employee negligence), and have a secure source of funds for victim recovery available. [213] **[*618]** States are also permitted to exempt lawsuits brought against volunteers by police officers and other state and local officials. [214] In addition, the Volunteer Protection Act allows states to enact stand alone legislation opting out of the new volunteer protection provisions entirely. [215]

The legislation's supporters asserted that an increase in the number of lawsuits being brought against volunteers was having a negative impact on volunteerism. [216] Proponents also asserted that inconsistencies between the various state laws were having an adverse impact on national volunteer organizations. During House floor debate, Judiciary Chairman Hyde (R-IL) argued that "the Red Cross, for example, would like to be able to train people... for disaster relief... and it is important that they not have to concern themselves with the checkerboard of liability laws. In addition, there is a very small insurance market to cover volunteers. The cost of that insurance becomes prohibitive if it has to be complicated by a plethora of liability standards from state to state." [217]

The Volunteer Protection Act traces its roots to legislation introduced by Rep. Porter (R-IL) in 1987 as H.R. 911 and reintroduced as that bill number in each succeeding Congress. [218] Rather than mandating immunity for specified volunteer activity, the approach taken by these bills was to encourage the states to adopt volunteer liability protection provisions by offering the incentive of a one percent increase in their Social Security block grants. [219] During the 105[su'th'] Congress, however, proponents of volunteer liability legislation took a more aggressive approach, mandating the liability limitations, rather than encouraging them through **[*619]** block grants. [220] In order to obtain the consensus needed to pass the bill in the Senate, the legislation was revised to exclude the nonprofit organizations themselves from coverage and exempt motor vehicle liability cases. [221]

4. Section 161 of the Amtrak Reform and Accountability Act of 1997

Section 161 of the Amtrak Reform and Accountability Act of 1997 (the "Amtrak Act") [222] provides liability protections relating to the standards for awarding **punitive damages** and overall damage awards stemming from accidents in connection with the provision of rail passenger transportation. [223]

With regard to **punitive damages,** the Amtrak Act provides that such damages may only be awarded if a passenger establishes by clear and convincing evidence that the harm resulted from conduct carried out with a conscious, flagrant indifference to the rights or safety of others. [224] The Amtrak Act also limits the aggregate overall damages that may be awarded to all passengers for all claims (including **punitive damages)** from a particular rail accident to $ 200 million. [225]

The final law also specifies that Amtrak and other providers of rail transportation may enter into indemnification agreements allocating financial responsibility for passenger accidents. [226] This is apparently intended to preserve Amtrak's authority to enter into agreements with track owners and operators whom Amtrak assumes liability for in the event of a passenger accident, without resolving the issue of whether such agreements are ultimately enforceable in court. [227] In exchange for these various **[*620]** protections, the Amtrak Act mandates that Amtrak maintains a total minimum liability coverage through insurance and self-insurance of at least $ 200 million per accident or incident. [228] Proponents of passenger rail liability reforms sought to justify them on the basis that they would save the taxpayers' money, since Amtrak is a publicly-funded corporation. [229] Supporters also observed that there was precedent at the federal and state level for limiting liability associated with public transportation. [230]

The version of passenger rail liability limitations passed into law was far narrower than the originally proposed reforms. In addition to adopting a minimum federal standard for awarding

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punitive damages, proponents had initially sought: a non-economic damages cap at an amount equal to economic damages plus $ 250,000; a **punitive damages** cap at the greater of $ 250,000 or three times economic damages; and a mandate of the enforceability of indemnification agreements. [231] The original version of the bill would have also applied to all potential plaintiffs - passengers as well as non-passengers and property owners harmed by passenger rail accidents. [232] These latter provisions were opposed by many Democrats, [233] and after failing to pass the Senate, were deleted from the final bill.

5. Biomaterials Access Assurance Act of 1998

The Biomaterials Access Assurance Act of 1998 ("Biomaterials Access Assurance Act"), [234] allows suppliers of raw materials and medical implant component parts to be dismissed from product liability actions if **[*621]** they meet certain contractual and other product specifications. [235] The concept behind the Biomaterials Access Assurance Act dates from the product liability bill vetoed by President Clinton during the 104[su'th'] Congress. That bill included a title exempting medical implant suppliers from product liability actions so long as they have met certain contractual and other product specifications. [236] Proponents of the Act argued that frivolous suits against implant suppliers, as well as the fear of such lawsuits, have an adverse impact on the availability of life-saving medical implants. [237]

During the 105[su'th'] Congress, however, proponents agreed to a number of legislative refinements which narrowed the overall impact of the Act. Most importantly, rather than permanently barring a liability action against suppliers who meet these conditions (as the 104[su'th'] Congress' version would have), under the Biomaterials Access Assurance Act, an implant supplier may subsequently be impleaded back into the action if a claimant or manufacturer can show by clear and convincing evidence that the supplier's negligence was the actual and proximate cause of the **[*622]** harm. [238] The Biomaterials Access Assurance Act excludes actions involving silicon breast implants completely. [239]

The dismissal and impleader provisions in the Biomaterials Access Assurance Act are enforceable through an elaborate set of procedural mandates. For example, in order to obtain a pre-trial dismissal, the Act specifies that a defendant may file a motion alleging that it has met the various legal requirements for dismissal, including the contractual and other product specifications. [240] While the motion is pending, the Biomaterials Access Assurance Act limits discovery and requires that state courts rule on the motion based on the pleadings and affidavits before it. [241] It also sets forth rules for the issuance of summary judgments and stays. [242] Post-trial motions to implead are also subject to limited discovery **[*623]** and the Act provides further opportunity for the supplier to supplement the record before any trial on the merits may proceed. [243]

6. **Y2K** Act

The most recent as well as wide ranging tort reform enacted by Congress is the **Y2K** Act signed into law by President Clinton on July 20, 1999. [244] The law provides liability relief for defendants in legal actions stemming from Year 2000 computer failures (e.g., where computer software or hardware fails to process a two digit code of 00 as being the year 2000) by enacting a number of substantive and procedural provisions which preempt state liability law. The law limits the liability exposure of **Y2K** defendants, and is intended to clarify the legal rules applicable to such actions, thereby, in the proponents' words, "reducing the potential for frivolous lawsuits" [245] and "increasing the likelihood that the entity who bears responsibility for the **Y2K** compliance will work quickly to fix the problem and reduce damages." [246]

The law limits **punitive damage** claims in **Y2K** actions by specifying that they must be proved by "clear and convincing evidence," [247] and capping the amount of such claims that may be brought against "small business" defendants (defined as individuals having a net

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worth of less than $ 500,000 and businesses with fewer than 50 employees) [248] at the lesser of 3 times compensatory damages or $ 250,000. The cap does not apply where the defendant acted with specific intent to injure. [249] The legislation also provides generally that defendants are only liable for their proportionate share of liability (in lieu of the common law rule of joint and several liability). This preemptive rule does not apply (i) in **[*624]** cases brought by consumers who sue individually, rather than as part of a larger class; or (ii) where the defendant acted with specific intent to injure the plaintiff or knowingly committed fraud. [250]

The legislation also alters a number of statutory and common law rules in contract and tort actions involving **Y2K** claims. It mandates strict enforcement of all contractual terms, unless such enforcement is inconsistent with state statutory law, or the state common law doctrine of unconscionability, including adhesion, in effect on January 1, 1999. [251] The Act also specifically provides that damage limitations provided for in contracts relating to **Y2K** legal claims are strictly enforceable. [252] The **Y2K** Act further specifically codifies mitigation of damage requirements by providing that damage awards must exclude compensation for damages the plaintiff could reasonably have avoided in light of any disclosure or other information of which the plaintiff was or reasonably should have been aware. [253] The law also codifies the so-called "economic loss" rule, which prohibits tort plaintiffs from seeking economic or consequential damages (e.g., lost profits stemming from a **Y2K** failure) unless such damages are permitted by contract or they result from damage to personal or real property. [254]

In an effort to prevent states from enacting laws making it easier to sue perceived "deep pocket" corporate defendants in **Y2K** cases than in ordinary liability cases, the Act "freezes" certain aspects of state law into effect. Thus, for example, if a **Y2K** action for breach or repudiation of contract is brought, the bill specifies that state law doctrine on the doctrines of "impossibility" and "commercial impracticability" shall be determined by state law as it exists on January 1, 1999. [255]

[*625] The bill also makes a number of changes in order to prevent lawsuits from being brought against non-negligent defendants or those not in direct privity with the harmed party. As a result, the Act freezes state law concerning the standard of evidence needed to establish a defendant's state of mind in a tort action as of January 1, 1999, [256] and eliminates the doctrine of so-called "bystander liability" by providing that **Y2K** service providers are not liable to third parties who are not in privity with them unless the defendant actually knew, or recklessly disregarded a known and substantial risk, that a **Y2K** failure would occur. [257] This latter change makes it more difficult, for example, for a customer of a business that was certified to be **Y2K** compliant to sue the certifying consultant. Finally, in this regard, the law provides that the fact that a **Y2K** failure occurred in an environment within the control of the defendant shall not be permitted to constitute a sole basis for the recovery of damages. [258]

The Act further makes a number of procedural changes concerning legal actions involving **Y2K** claims. These include a notice and "cooling off" period preventing **Y2K** actions from proceeding to trial until the defendant has first had a 90-day opportunity to fix the **Y2K** failure after receiving written notice of the particular problem. [259] The law also provides for heightened pleading requirements by requiring that plaintiffs must provide specificity in the notice of damages sought in **Y2K** actions; the factual basis for the damages claim; a statement of specific information regarding the manifestations of the material defect and the facts supporting such material defect; and a statement of facts showing a strong inference that the defendant acted with a required state of mind. [260]

The law also overhauls the procedural rules applicable to **Y2K** class actions. Subject to certain limited exceptions, the Act requires that **Y2K** class actions be considered in federal, rather than state court. [261] (This provision is similar to broader legislation that would apply to all cases, rather than just **Y2K** cases. [262]) In addition, the bill only permits **Y2K** **[*626]**

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actions which involve "material" product defects to proceed as class actions and requires class members to receive direct notice of the class action (rather than mere notice by publication). [263]

There are several important overall limitations in scope in the **Y2K** Act. First, the Act only applies to **Y2K** failures which occur on or before January 1, 2003. [264] This three-year time limitation was an important factor noted by President Clinton when he agreed to sign the legislation. [265] In addition, the legislation does not apply to any claims for personal injury or wrongful death, [266] and does not apply to securities actions. [267] The law is also written to be "one-way preemptive,"' so that its provisions do not supercede any state law having stricter liability restrictions. [268]

To a certain extent, the legislation signed into law reflected a compromise between tort reform supporters and high technology concerns, on the one hand, and tort reform opponents, on the other hand. This explains why Democrats opted to offer their own substitute **Y2K** liability legislation in the House and Senate, with some of these provisions being incorporated into the final legislative product. [269] This is also why many of the more far reaching provisions of the original House and Senate bills such as the "reasonable efforts" defense, "loser pays" provision, and limitations on the overall liability of officers and directors were dropped during the legislative process or in conference, [270] and why the Administration insisted on the inclusion of numerous provisions that exempted **[*627]** so-called "bad actors" (i.e., intentional tortfeasors) from the bill's protections. [271]

B. Recently Considered Tort Reform Proposals

1. Senate Product Liability Proposal

Congress has been considering product liability legislation as early as 1979 when Rep. John Dingell (D-MI) introduced legislation which would have federalized a number of areas of state liability law. [272] Proponents of such reforms argue, inter alia, that state laws have led to excessive product liability damage awards, and the unpredictable and "patchwork" nature of the state product liability system harms the competitiveness of domestic manufacturing firms. [273] After being unable to bring a product liability reform bill to either the House or Senate floor for a number of years, during the 104[su'th'] Congress the House and Senate agreed to product liability legislation. That legislation would have, inter alia, capped **punitive damages** for large and small businesses and narrowed the standards for awarding such damages; eliminated joint and several liability for non-economic damages; created a fifteen-year statute of repose and a two-year statute of limitations; limited seller liability; and limited liability for medical implant suppliers. President Clinton subsequently vetoed the legislation. [274]

In the wake of President Clinton's veto, the White House entered into negotiations with Senators Rockefeller (D-WVA) and Gorton (R- **[*628]** WA), culminating in a somewhat narrower form of product liability legislation (the "Senate Product Liability Proposal"). [275] The Senate Product Liability Proposal was brought directly to the Senate floor but its proponents were unable to obtain cloture to cut off debate. [276]

The Senate Product Liability Proposal would cap the maximum amount of **punitive damages** which may be awarded against "small businesses" [277] and individuals with a net worth of less than one-half million dollars at the lesser of two times "compensatory" damages or $ 250,000. [278] In addition, the proposal would narrow the grounds for the award of **punitive damages** to those cases where there is a "conscious, flagrant, indifference to the rights or safety of others" which can be established by "clear and convincing evidence." [279] The foregoing restrictions do not apply in cases where death results. [280]

The Senate Product Liability Proposal also provides for a national statute of limitations and

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statute of repose. [281] The statute of limitations would be two years from the date a product liability harm is discovered or should have been discovered "in the exercise of reasonable care." [282] The statute of repose is 18-years, but is limited to "durable goods," defined as goods used in the workplace which are subject to a claim for harm under the applicable workers compensation laws. [283] The proposal **[*629]** also preempts state tort law in cases where the claimant has used alcohol or drugs, or where the product has been misused or altered. It is a complete defense to liability where claimant's drug or alcohol use was more than 50% responsible for the harm. [284] With regard to product misuse or alteration, the Senate Proposal provides that claimant's damages shall be reduced by the portion of harm attributable to misuse (whether by the claimant or otherwise). [285] This applies where the defendant can prove that a percentage of the claimant's harm was proximately caused by use or alteration of a product in violation of or contrary to an express warning or involved a risk of harm which was known or should have been known by a reasonable person who uses the product. [286] Damages to a claimant as a result of workplace injuries would be exempt from this comparative negligence standard. [287]

The Senate Proposal also offers relief to product sellers, lessors, and renters by specifying that they may only be subject to a product liability suit where they: (1) failed to exercise reasonable care; (2) violated an express warranty; or (3) engaged in intentional wrongdoing. [288] This has the effect of eliminating seller liability under theories of strict liability, failure to warn, or breach of an implied warranty.

The Senate Proposal includes provisions designed to encourage alternative dispute resolution ("ADR") and settlement negotiations. It grants the parties the option of using any applicable voluntary, non-binding ADR within specified time periods after a product liability suit is brought. [289]

The proposal exempts several categories of product liability actions from its provisions entirely. [290] These include actions involving "commercial loss" by other businesses; negligent gun sales; tobacco products; breast implants, defective tissues, organs and blood; and electricity, water and natural gas. [291] The proposal also includes a workers' compensation subrogation provision which would alter state law to provide if the **[*630]** trier of fact finds by clear and convincing evidence that fault of the employer was a substantial factor in causing a workplace injury, the employer would have to bear the costs of the worker. [292]

2. House Medical Malpractice Proposal

Over the last two Congresses, the House has passed medical malpractice reform legislation four separate times, [293] with the Senate failing to concur on each occasion. Supporters of these reforms claim that excessive and frivolous medical malpractice claims unduly increase the costs of health care, both directly (through increased insurance premiums) and indirectly (through the costs of so-called "defensive medicine"). [294]

The most recent proposal (the "House Medical Malpractice Proposal") [295] considered in the 105[su'th'] Congress would have preempted state law concerning "health care liability actions" [296] in a number of regards. It would limit "non-economic" damages [297] by capping their award at **[*631]** $ 250,000 [298] as well as eliminating claimants' rights to hold defendants jointly and severally liable for such non-economic damages. [299] The proposal also prohibits bringing any health care liability action more than two years after an injury and the cause of the injury is discovered, or, in the exercise of reasonable care, should have been discovered. [300]

The House Medical Malpractice proposal would also limit **punitive damage** awards by creating a maximum cap of the greater of $ 250,000 or three times "economic damages," [301] and narrow the grounds for awarding **punitive damages** to cases where it can be established by clear and convincing evidence that the injury was suffered by conduct

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manifesting a "conscious, flagrant indifference to the rights and safety of others." [302]

Other proposed changes would allow for the periodic payment of damages and modifications to the collateral source rule. [303] Under the House Medical Malpractice Proposal, a defendant is permitted to pay any health care liability damage award greater than $ 50,000 in periodic installments as determined by the court. [304] The proposal would alter the traditional collateral source rule [305] by allowing defendants to introduce **[*632]** evidence of any collateral payments received by claimants and eliminating rights to subrogation by third parties. [306]

3. Tobacco Settlement

Over the course of the 105[su'th'] Congress the House and Senate also considered enacting a variation of the global tobacco settlement (the "Tobacco Settlement") [307] which includes a number of provisions limiting claimants' ability to bring tobacco related lawsuits under state tort law. Proponents asserted that absent these litigation reforms there would be no incentive for the tobacco companies to agree to make the payments and accept the other restrictions set forth in the settlement. [308]

In many respects, the litigation restrictions contained in the Tobacco Settlement go well beyond the pending product liability and medical malpractice reform proposals. For example, instead of capping or narrowing the standards for the award of **punitive damages,** the Tobacco Settlement provides total immunity from **punitive damages** for any past misconduct by tobacco companies. [309] Moreover, in addition to completely eliminating liability by sellers or agents of the tobacco industry, [310] the agreement legislatively preempts any pending or future Attorney General actions and any "addiction/dependence" claims. [311]

[*633] The Tobacco Settlement provides for an annual cap on tobacco liability equal to 33% of the annual "Industry Base Payment" (an agreed upon amount equal to $ 6 billion in the first year, increasing to $ 15 billion in the ninth year and thereafter), [312] resulting in a maximum liability of $ 5 billion per year. [313] This amount is to be paid each year, regardless of whether the annual amount of judgments and settlements aggregate to the maximum figure (any shortfall is subject to allocation by a Presidential Commission). [314] In addition, because the Tobacco Settlement solely provides for the industry to receive an 80% credit against this maximum amount for any liability judgments or settlements entered into (a so-called 20% "litigation co-payment penalty"), the industry is also subject to a secondary liability of up to an additional $ 1 billion per year. [315] To the extent judgments and settlements exceed the maximum statutory amount in any given year, the liability carries over to the following year. [316] In addition, individual claimants may only recover $ 1 million in a given year, even if awarded more, unless there are funds left over from the Industry Base Payment. [317] In order to help ameliorate any perceived unfairness between the liability obligations of the participating companies and other tobacco companies, the Tobacco Settlement requires non-participating companies to place into an escrow fund 150% of what would otherwise have been their share of the annual payment pending their payment of any liability claims. Under the settlement "these escrowed funds would be earmarked for potential liability payments, and the manufacturer would reclaim them with interest 35 years later to the extent they had not been paid out in liability." [318] The Tobacco Settlement provides that tobacco manufacturers will pay their own legal defense **[*634]** fees, but is silent on the issue of the payment of plaintiff's fees for legal services performed on behalf of the State Attorneys General. [319]

The Tobacco Settlement eliminates joint liability between participating and non-participating tobacco companies, [320] requiring instead that tobacco companies agree to share responsibility with respect to suits brought against each other. [321] The Tobacco Settlement also bans third party payers from bringing suits (other than non-aggregated subrogation suits [322]) claiming they have paid a portion of damages which should have been paid by the tobacco companies. [323]

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The Tobacco Settlement additionally imposes a number of procedural and evidentiary requirements with respect to tobacco liability actions. Significantly, it bars current and future class actions in federal and state courts as well as all other devices for the consolidation and aggregation of claims without the tobacco companies' consent. [324] The proposal also provides for a panel of three federal judges to review all claims of privilege or trade secrets asserted at the state or federal level with respect to tobacco industry documents. [325] The Tobacco Settlement further specifies that the existence of "reduced risk tobacco products" [326] are neither admissible nor discoverable in civil liability actions. [327]

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C. Constitutional Analysis of Recent Federal Tort Reforms [328]

This Part analyzes the range of potential constitutional challenges which may be brought against federal tort reforms. As a threshold matter, there is a question whether these proposals constitute a valid exercise of Congress' commerce authority, and if not, whether they may be justified under Section Five of the Fourteenth Amendment. In addition, there are separate questions whether the reforms violate (1) Fifth Amendment due process and equal protection principles; (2) Seventh Amendment jury trial requirements; and (3) Tenth Amendment federalism principles.

1. Constitutional Authority

a. Commerce Clause [329]

Although The Employers' Liability Cases [330] placed limitations on Congress' ability to alter state tort law with respect to intrastate conduct, [331] the Court had subsequently deferred to Congress concerning commerce authority [332] matters for nearly sixty years (from 1937 to 1995). [333] In the wake of Lopez v. United States [334] striking down the Gun-Free School Zones Act of 1990, [335] however, there is concern that under appropriate circumstances federal tort reforms may again be invalidated **[*636]** on these grounds. [336] Both the Volunteer Protection Act and the Food Donation Act may present such cases. [337]

In Lopez, the Court identified three categories of activity Congress may regulate under its commerce power: the "use of the channels of interstate commerce," the "instrumentalities of interstate commerce," and activity "that substantially affects interstate commerce." [338] The Court found that the school gun ban at issue clearly did not implicate either of the first two categories, and, after reviewing a series of factors, found its affect on interstate commerce was too removed to comply with the third category. [339]

If challenged on Commerce Clause grounds, defenders of the Volunteer Protection Act and the Food Donation Act will no doubt attempt to distinguish Lopez by asserting that although volunteerism and food donation have significant local and non-commercial aspects, in the aggregate such activities can substantially affect interstate commerce because: they serve valuable community functions, are linked with federal expenditures and involve the use of federal tax exemptions, are subject to replacement by private commercial services, and implicate the interstate insurance market. Further, defenders of the Volunteer Protection Act **[*637]** will be able to argue that unlike the School-Gun ban struck down in Lopez, the Volunteer Protection Act contains detailed legislative findings to this effect [340] and is supported by abundant legislative history [341] reiterating its Commerce Clause rationale. Indeed, in his dissent in Lopez, Justice Souter suggested that if Congress had included explicit legislative finding that guns in schools have a substantial affect on interstate commerce, "the result in this case might well have been different." [342]

Defenders of these liability laws may also point to the fact that Lopez is a highly fact specific

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law rights of action, often without providing any direct substitute or alternative legal remedy to claimants. The initiatives affect a range of activities - from volunteerism to various types of commercial conduct. [9]

A major unanswered question with respect to this "third wave" of tort reform is the extent to which these laws and proposals conform with constitutional requirements. We expect adversely impacted claimants to assert that the reforms: (1) exceed Congress' legislative authority under the Commerce Clause (and, to the extent applicable, section five of the Fourteenth Amendment); (2) violate Fifth Amendment due process and equal protection requirements; (3) violate Seventh Amendment jury trial rights; and (4) are inconsistent with Tenth Amendment federalism principles. To analyze and consider these claims, we review Supreme Court and lower court decisions considering the constitutionality of earlier federal tort reform laws.

We find that although all but one of the previous federal tort reform laws were ultimately upheld against a variety of constitutional challenges, [10] the current set of initiatives raise a number of novel legal questions that have yet to be directly and fully addressed by the Supreme Court. For example, several of the measures, such as the Bill Emerson Good Samaritan Food Donation Act [11] and the Volunteer Protection Act of 1997, [12] may have a significant impact on intrastate activity, and could therefore be found inconsistent with Congress' Commerce Clause authority, in light of the Supreme Court's recent decision in Lopez v. United States. [13]

In the event Congress' Commerce Clause authority is struck down with regard to a particular tort reform, defendants may assert that the law is based on Congress' authority to protect due process under section five of the Fourteenth Amendment, particularly to the extent the tort reform includes **punitive damage** limitations. While cases such as BMW of **[*594]** North America v. Gore [14] and Honda Motor Co. v. Oberg [15] invalidated particular state law **punitive damage** awards as violating due process, the Court has yet to evaluate legislative efforts by Congress to affirmatively codify limitations on **punitive damages.**

Supreme Court guidance may also be necessary to ascertain the extent the Seventh Amendment jury trial right operates as a constraint on Congress' ability to limit common law rights, such as capping the amount of non-economic damages payable in particular tort actions. On the few occasions this issue has been presented to the courts in the context of previous federal tort reforms, the Seventh Amendment issue has been side-stepped since the law in question provided for separate administrative remedies against the United States. [16]

A final potential constitutional issue presented by the recent set of tort reforms concerns federalism and state sovereignty. Tort reforms such as those relating to medical implant suppliers, [17] **Y2K** liability actions, [18] and the tobacco settlement [19] have and would impose detailed and rigorous procedural as well as substantive requirements upon state courts. If the Court is willing to extend the federalism concerns enunciated in New York v. United States [20] and Printz v. United States, [21] these initiatives could also be subject to credible challenges under the Tenth Amendment.

II. THE FIRST WAVE: EXPANDING EMPLOYERS' LIABILITY BY WAIVING COMMON LAWDEFENSES

Although an analysis of state tort reform laws is beyond the scope of this article, according to a recent study, in the last fourteen years twenty-four states have handed down seventy-five separate decisions overturning all or part of these laws. At the same time, courts have issued one hundred twenty decisions upholding various aspects of the state laws. [22] Congress' [23] **[*595]** first effort to preempt state tort law [24] came in the form of the 1906 Employers' Liability Act [25] and the 1908 Employers' Liability Act. [26] Both laws represented efforts to eliminate certain common law employer defenses and substitute a comparative (as opposed

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decision, and the Court has subsequently upheld other laws having a seemingly precarious nexus to interstate commerce. Recently, for example, the Supreme Court failed to grant certiorari in two companion cases, United States v. Ramey [343] and United States v. Moore, [344] where the Fourth Circuit found the federal arson statute [345] to constitute an appropriate exercise of Congress' commerce power. In those cases, the principal linkage to interstate commerce was a burned trailer's usage of electricity derived from an interstate power grid. [346]

At the same time, challengers of the Volunteer Protection Act and Food Donation Act's constitutionality will be able to argue that many of the factors used to strike down Lopez are also present in these laws. For example, the majority opinion placed great emphasis on the gun ban not **[*638]** constituting an "essential part of larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activities were regulated." [347] The linkage between non-commercial volunteer and food donation activities and interstate commerce is also arguably somewhat attenuated. As the Court observed in Lopez, "to uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states [and]... there never will be a distinction between what is truly national and what is truly local." [348]

Another factor mitigating against the constitutionality of both the Volunteer Protection Act and the Food Donation Act is their lack of an interstate commerce jurisdictional requirement. According to the Court in Lopez, one of the problems with the school gun ban was that it contained "no express jurisdictional element which might limit its reach to a discrete set of firearms possessions that additionally have an explicit connection with or effect on interstate commerce." [349] Notably, the Ramey and Moore decisions [350] involved a statute which contained such an express jurisdictional element. [351] Further, when Congress acted in 1996 to remedy the constitutional infirmity in the school gun ban invalidated by Lopez, it limited the law to firearms that have "moved in or that otherwise [affect] interstate or foreign commerce." [352] This is also the lesson of The Employers' Liability Cases [353] and The Second Employers' Liability Cases [354] - only after the employers' liability law was changed to clearly limit its application to injuries involving persons employed in interstate commerce was the statute found to pass constitutional scrutiny. [355]

[*639] Finally, the Court in Lopez observed there were certain traditional areas of state law, such as criminal law and education, which should be off limits to federal intervention. [356] The concurrence by Justices Kennedy and O'Connor also reasoned that the Federal Government should avoid involving itself in areas which fall within the "traditional concern of the states," noting that over 40 states had adopted laws outlawing the possession of firearms on or near school grounds. [357] These same concerns could also lie with the Volunteer Protection Act and Food Donation Act, particularly given that all 50 states have adopted some form of special liability protection for volunteers in general and good samaritan food donation activities in particular. [358] Accordingly, if Lopez represents a substantial turning point in the Court's Commerce Clause jurisdiction, rather than a mere symbolic warning, it is likely to prove difficult to uphold laws which involve activity which is both intrastate and non-commercial in nature. [359]

b. Section Five of the Fourteenth Amendment

While the Commerce Clause is the most obvious source of authority to justify federal tort legislation, Section Five of the Fourteenth Amendment also grants Congress the power to legislatively enforce the constitutional requirement of due process. [360] Several recent tort reform proposals have made reference to this authority. For example, the product liability legislation reported by the Senate Commerce Committee in 1997 includes a finding that "it is the constitutional role of the national government to... protect due process rights." [361] Similarly, the Volunteer Protection Act of 1997 contains an express finding that "liability

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reform is an appropriate use of the powers contained in... the fourteenth amendment to the United States Constitution." [362]

[*640] The Supreme Court has never considered whether Section Five of the Fourteenth Amendment provides the necessary authority to support federal tort reforms, although it has validated the use of this authority in other contexts, most notably voting rights laws. [363] Significantly, in City of Boerne v. Flores, [364] in invalidating the Religious Freedom Restoration Act of 1993 (RFRA), [365] the Court restated its understanding of the scope of legislative authority generally available under Section Five of the Fourteenth Amendment. The Boerne Court held that Congress' power under Section Five extends only to " 'enforcing' the provisions of the Fourteenth Amendment .. rather than decreeing the substance of the Fourteenth Amendment's restrictions on the states." [366]

Boerne emphasized the importance of developing a legislative record of constitutional infirmities supporting the need for legislation under Section Five of the Fourteenth Amendment. The Court emphasized:

While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends achieved. The appropriateness of the remedial measures must be considered in light of the evil presented.... In contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. [367]

Given these parameters, it would seem that the most plausible case for the use of congressional authority under Section Five of the Fourteenth Amendment pertains to limitations on **punitive damages.** Advocates of using this authority will be able to point to two recent Supreme Court precedents striking down specific **punitive damage** awards based on due process grounds. In 1996, in BMW of North America v. Gore, [368] the Court found that a judgment of $ 2 million in **punitive damages** awarded to a consumer fraud plaintiff sustaining actual damages of only $ 4,000 was so "grossly excessive" [369] as to violate due process. Two **[*641]** years earlier, in Honda Motor Co. v. Oberg, [370] the Court invalidated a **punitive damage** award of $ 5 million, finding that an Oregon law limiting the scope of judicial review of **punitive damage** awards [371] violated procedural due process.

In Gore the Court identified three "guideposts" for determining whether a **punitive damage** award is "grossly excessive": degree of reprehensibility, ratio between punitive award and plaintiff's actual harm, and legislative sanctions provided for possible misconduct. [372] The second of these guideposts, ratio between **punitive damages** award and actual harm, is arguably directly evocative of provisions in the Senate Product Liability Proposal which cap the maximum **punitive damage** award payable by "small businesses" at the lesser of $ 250,000 or two times compensatory damages. [373] In Gore, the Court made much of the fact that "the $ 2 million in **punitive damages** awarded to Dr. Gore by the Alabama Supreme Court is 500 times the amount of actual harm determined by the jury." [374] Furthermore, although the Supreme Court has previously found other challenged **punitive damage** awards not to violate due process in Pacific Mutual Life Insurance Co. v. Haslip [375] and TXO Production Corp. v. Alliance Resources Corp., [376] the Gore Court read these decisions as "endorsing the proposition that a comparison between the compensatory award and punitive award is significant" in assessing whether the award violated due process. [377]

[*642] Defenders of Congress' use of authority under Section Five of the Fourteenth Amendment to limit **punitive damages** also find support in the Court's decision in Honda. [378] The Court, in considering whether Oregon's existing procedures for awarding **punitive damages** were fair, observed in dicta, "the clear and convincing standard of proof [required under Oregon law] is an important check against the unwarranted imposition of **punitive damages.**" [379] This would seem to favorably relate to the provisions in the various product

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liability reforms seeking to import this evidentiary requirement into federal law. [380]

At the same time, while cases such as Gore and Honda have opened the door for Congress to use the Constitution's Fourteenth Amendment authority to limit **punitive damages,** a strong argument can be made that the proposed caps on **punitive damages** in the pending tort reform proposals do not fall within the "guideposts" laid down by the Court. [381] Although the Court has considered the punitive to compensatory damage ratios in its recent decisions, it has consistently rejected the notion of a straightforward arithmetic cut-off or cap. In Gore, the Majority declared:

We have consistently rejected the notion that the constitutional line [of due process] is marked by a simple mathematical formula, even one that compares actual and **punitive damages** to the punitive award. Indeed low awards of compensatory damages may properly support a higher ratio than high compensatory damage awards, if for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of the non-economic harm might have been difficult to determine. [382]

Similarly, the Courts in Haslip and TXO have rejected the formulaic use of **punitive damage** ratios in assessing due process. [383] Persons challenging congressional authority under Section Five of the Fourteenth Amendment in this regard will be able to note the ratio of punitive to compensatory damages permitted in those cases - 4 to 1 in Haslip, and more than 500 to one in TXO are both well in excess of the ratio permitted **[*643]** under the Senate Product Liability Proposal. [384] Moreover, since the Senate Product Liability Proposal provides for a **punitive damages** cap at the lesser of $ 250,000 or two times compensatory damages, it will not always be tied into the amount of compensatory damages. [385] To the extent that various **punitive damage** limitations go beyond the Court's pronouncements concerning due process, they may violate the admonition in Boerne that "Congress does not enforce a constitutional right by changing what the right is." [386]

It is also uncertain whether the incidence of **punitive damage** awards in product liability cases provides the extensive legislative record needed to comply with Boerne's mandate that the statutory remedy "be considered in light of the evil presented." [387] Although supporters of tort reforms can point to a number of instances of harmful **punitive damage** awards, [388] opponents can also cite studies detailing the limited incidence of **punitive damage** awards. [389] Further, in considering whether the standard for reviewing the constitutionality of **punitive damage** awards would require the federal courts to entangle themselves in innumerable disputes, Gore found such concerns to be "premature at best" [390] because of the "small number of **punitive damages** questions that we have reviewed in recent years, together with the fact that this is the first case in decades in which we have found that a **punitive damages** award exceeds the constitutional limit...." [391]

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2. Fifth Amendment [392]

The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property without due process of law," [393] a proscription which has been held to include an equal protection component. [394] In the past, claimants have unsuccessfully sought to challenge federal tort reforms on both due process (e.g., claiming the law was unfair as a substantive or a procedural matter) [395] and equal protection (e.g., the law provides differential treatment for classes of tort claimants) grounds. [396] Assuming the courts continue to apply the lenient "rational basis test," [397] plaintiffs challenging federal tort reforms under the Fifth Amendment will be placed in the difficult posture of overcoming the asserted legislative justifications. This is a standard claimants have been unable to meet in Supreme Court cases such as Usery [398] and Duke Power. [399]

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[*645] In addition to the issue of whether a particular tort reform is seen as "rational," plaintiffs may also argue that the law does not provide a legislative quid pro quo. The latter issue raises two separate questions: whether the reform provides any requisite benefit or advantage to offset the forfeiture of common law rights; and whether any such quid pro quo is required as a constitutional matter. With regard to the first question, a strong argument can be made that several recently enacted reforms such as the General Aviation Act, Volunteer Protection Act, Food Donation, Biomaterials Access Assurance Act and **Y2K** Act [400] do not provide any offsetting legal benefits, at least to the parties directly harmed by the loss of their common law rights. Unlike the Price-Anderson Act upheld in Duke Power, [401] these laws provide no recourse to a secure source of funds or waiver of any of the defendant's legal rights, and in contrast to the Swine Flu Act, Atomic Testing Liability Act, Westfall Act and various other federal laws immunizing volunteers associated with federal activities [402] the laws provide no substitution of the United States as a defendant for any harm caused by volunteer negligence. A related argument was articulated in Carr, when the Fourth Circuit observed that the Federal Drivers Act benefited all government employees - even potential **[*646]** plaintiffs - by providing them with protection against liability from automobile accidents. [403]

If these tort reforms are to be upheld in the face of a quid pro quo requirement, their defenders will likely resort to the argument that any necessary benefits may extend to society or persons who benefit from volunteerism generally, rather than impaired claimants directly. This is the contention accepted by the California Supreme Court in Fein v. Permanente Medical Group, [404] in upholding that state's medical malpractice reforms [405] against constitutional challenge. In Fein, the California court stated "even if due process principles required some 'quid pro quo' to support the statute, it would be difficult to say that the preservation of a viable medical malpractice insurance industry in this state was not an adequate benefit for the detriment the legislation imposes on malpractice plaintiffs." [406]

In contrast, other tort reforms such as the Amtrak Act and the Senate Product Liability Proposal [407] could be construed as providing a directly offsetting benefit to affected claimants. The constitutional difficulty with respect to these proposals may come from establishing that the quantum of offsetting statutory benefits approaches that found in Duke Power. For example, while both the Amtrak Act and the Price-Anderson Act require potential defendants to provide insurance in the event of an accident, [408] the Amtrak Act contains no waiver of any common law defenses and does not obligate the Federal Government to provide any indemnification or commit itself to take any actions to protect the public in the event of an accident. [409] In Duke Power, the Court found such assurances to be a "fair and reasonable substitute for the uncertain **[*647]** recovery of damages from a utility or component manufacturer." [410]

Some of the potential legal benefits available to plaintiffs under the Senate Product Liability Proposal include the provision of a two-way preemptive federal statute of limitations running from the time the harm was actually discovered (or should have been discovered) rather than the date of the actual harm, and standards for the award of **punitive damages** and statutes of repose which can also operate to preempt some current laws which are less favorable to plaintiffs. [411] A potential constitutional infirmity with this proposal is the class of claimants which would benefit from these provisions is not necessarily the same as those whose rights will be impaired by other proposed liability limitations. This stands in contrast to Duke Power, where the persons subject to forfeiture of their common law rights in the event of a nuclear accident appear to constitute the same class of individuals benefiting from the liability waivers contained in the Price-Anderson Act. [412]

While defenders of these tort reforms may have some difficulty establishing that the reforms adequately provide for an offsetting legal benefit of the type found in Duke Power, they may be more readily able to claim a quid pro quo is not a constitutional requirement in the first

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instance. Although as a formal matter in New York Central [413] and Duke Power [414] the Supreme Court reserved the question of whether a quid pro quo is necessary for compliance with due process and equal protection, there is a significant degree of dicta skeptical of such a requirement. In Duke Power, for example, before finding that the Price-Anderson Act provided an adequate quid pro quo, the Court noted, "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonably just substitute for the common-law or state tort law remedies it replaces." [415] In upholding the Swine Flu Act against a constitutional due process challenge, the Fifth Circuit in Ducharme observed "legislation has even been upheld where no remedy was substituted in place of the cause of action that was taken away." [416] There also is sentiment **[*648]** in a number of cases upholding state laws altering common law rights such as Munn v. Illinois [417] and Silver v. Silver [418] for the propositions that: "[a] person has no property, no vested interest in any rule of the common law" [419] and "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." [420]

3. Seventh Amendment [421]

The Seventh Amendment provides, "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." [422] The cases in which federal tort reforms have been directly subject to constitutional challenge to date do not provide a great deal of guidance concerning the scope and operation of the Seventh Amendment. The Employees' Liability Cases did not reach the issue of the Seventh Amendment's application to the 1906 Employers' Liability Act because the law was invalidated on other grounds, while the issue was not raised in The Second Employees' Liability Cases, [423] Usery, [424] or Duke Power. [425] While the Seventh Amendment issue was raised in challenges to the Federal Drivers Act, Swine Flu Act, and the Atomic Testing Liability Act, it was rejected in those instances because the Seventh Amendment was held not to apply to laws substituting an administrative remedy against the United States. [426]

Notwithstanding the lack of direct legal precedent in tort reform cases, defenders of proposals such as the House Medical Malpractice **[*649]** Proposal's cap on non-economic damages [427] (which appears to implicate jury trial rights most directly) [428] should be able to make several supporting legal arguments. They could first assert that to the extent the Seventh Amendment may apply to a particular federal tort reform, it would only limit Congress' ability to cap damages in diversity cases brought in federal court, rather than its ability to alter underlying state court jury rights. This concept is based on the Supreme Court's 1916 decision in Minneapolis & St. Louis RR v. Bombolis, [429] which upheld application of the 1908 Employers' Liability Act in state courts even though Minnesota law permitted civil claims to be adjudicated by less than a unanimous jury (in derogation of the common law). [430] In rejecting the constitutional argument, the Bombolis Court noted that the Seventh Amendment was expressly limited to "proceedings in the courts of the United States." [431]

Second, defenders of damage caps may assert that based on the Court's 1987 decision in Tull v. United States [432] statutory caps should be deemed to constitute "legal' rather than "factual" determinations which are not subject to the Seventh Amendment. In Tull, although the Court found that actions brought under the Clean Water Act [433] were generally subject to the Seventh Amendment, [434] it ultimately concluded the Seventh **[*650]** Amendment did not apply to the civil penalty determinations at issue under the Act. The Court found that since the assessment of civil penalties involved neither the " 'substance of a common-law right to a trial by jury' nor a 'fundamental element of a jury trial'" [435] it was not a required jury function under the Seventh Amendment. [436] In a footnote to its opinion, the Court suggested even more broadly, "nothing in the [Seventh] Amendment's language suggests

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that the right to a jury trial extends to the remedy phase of a civil trial." [437] Relying in part on this footnote, the Fourth Circuit in Boyd v. Bulala [438] held caps on damages did not violate the right to a jury trial, observing "it is not the role of the jury to determine the legal consequences of its factual findings.... That is a matter for the legislature.' [439] Similarly in Franklin v. Mazda Motor Corp., [440] a Maryland district court wrote that "juries always find facts on a matrix of laws given to them by the legislature and by precedent and it can hardly be argued that limitations imposed by law are a usurpation of the jury function." [441]

Third, defenders of damage caps may argue that since legislatures have open-ended authority under the Seventh Amendment to eliminate a right of action completely, they should also have the authority to eliminate certain jury prerogatives. This is premised on the Court's 1917 decision in Mountain Timber Co. v. Washington, [442] upholding against Seventh Amendment challenge the constitutionality of a Washington law eliminating causes of actions by employees against employers (and replacing **[*651]** them with a workers' compensation regime). [443] More recently, federal courts in Boyd and Franklin utilized supplemental arguments extending this line of reasoning to validate state laws limiting damage awards. In Boyd the Fourth Circuit upheld the constitutionality of Virginia's cap on damages, reasoning "if a legislature may completely abolish a cause of action without violating the right of trial by jury, we think it permissibly may limit damages recoverable for a cause of action as well." [444] Similarly, in Franklin the district court wrote, "the power of the legislature to define, augment, or even abolish complete causes of action must necessarily include the power to define by statute what damages may be recovered by a litigant with a particular cause of action." [445]

Those challenging damage caps on Seventh Amendment grounds may attempt to respond to these lines of argument through a variety of contentions. First, rather than giving Congress free rein to deny jury rights in state courts, a closer reading of Bombolis may indicate it should more properly be seen as an effort to limit congressional preemption of state court procedures. For example, language in Bombolis stating the Seventh Amendment should not be permitted to operate to void state court procedures lest "both federal and state courts... by fluctuating hybridization be bereft of all real, independent existence" [446] indicate more of a respect for federalism than antipathy to state jury trial rights.

With regard to the argument that damage caps involve legal rather than factual determinations, persons challenging the constitutionality of caps may point to several cases undercutting Tull and its progeny. In the 1935 case Dimick v. Schiedt [447] the Court held the federal practice of additur, by which a federal judge believing a jury award to be unduly low allowed defendants to choose between an increase in a damage award or a new trial, unconstitutional. Finding no evidence that English common law courts had the authority to increase the amount of jury verdicts, [448] the Court held that increasing the amount of a jury award was a question **[*652]** of fact [449] protected by the Seventh Amendment. [450] Moreover, district court decisions invalidating state damage caps in Boyd v. Bulala [451] and Reuwer v. Hunter [452] may have some residual intellectual import despite their being overruled by the Fourth Circuit. In Boyd the district court reasoned that "since the assessment of damages is a fact issue... a limitation on [their] performance... is a limitation on the role of the jury." [453] Reuwer distinguished Tull on the grounds it concerned "the assessment of a civil penalty" [454] rather than "the determination of damages" [455] and went on to find that "in terms of the jury's role, history justifies no distinction between the liability and the remedy phases of a trial of a common-law action." [456]

Third, those challenging damage caps may seek to distinguish Mountain Timber by asserting that rather than allowing for a legislature to completely eliminate common law rights, the Seventh Amendment merely permits the legislature to do so where it provides a comparable substitute regime, such as the workers compensation laws described in that case. As for the corollary claim that the greater legislative power (e.g., abrogating causes of action completely) includes the lesser (e.g., capping damages), this arguably proves too much. If

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Congress had such broad ranging authority, it could circumscribe any aspect of a common law or other legal action, thereby reducing the Seventh Amendment to a nullity.

Ultimately it appears damage caps are likely to present another constitutional case of first impression for the Supreme Court. The trends in the relevant cases, however, would appear to favor those defending caps. The Court has previously countenanced the erosion of jury trial rights in the form of directed verdicts, six-person juries, and liberal use of collateral estoppel, among other procedural devices. [457] Moreover, the Supreme Court precedent most favorable to defenders of caps Tull (1987) is far more recent than the Dimick decision (1935). While lower federal court decisions concerning state damage caps reach varying conclusions, **[*653]** the circuit court precedent on this matter - the Fourth Circuit decision in Boyd v. Bulala [458] - favors the defenders of caps as well.

4. Tenth Amendment [459]

Courts have previously not been accommodating of Tenth Amendment federalism concerns [460] in the context of federal tort reform laws. The Second Employers' Liability Cases rejected the federalism contention raised in that case, finding that the Supremacy Clause made it clear that laws made "in pursuance of the Constitution" prevailed over any conflicting state laws. [461] Tenth Amendment concerns were also dismissed in lower court decisions reviewing the constitutionality of the Swine Flu Act [462] and Atomic Testing Liability Act. [463]

However, in recent years the general nature of federalism concerns has expanded. In 1992 in New York v. United States, [464] the Court invalidated a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (the "Radioactive Waste Policy Amendments Act') [465] requiring states to assume ownership of radioactive waste or accept legal liability for damages caused by the waste. Under New York v. United States, even if a particular law is found to constitute a valid exercise of Congress' Commerce Clause authority, it may still be struck down if it "commandeers the legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program." [466] These concerns were reiterated more recently in Printz v. United States, [467] where the Court invalidated portions of the Brady Handgun **[*654]** Violence Protection Act [468] requiring local law enforcement officials to conduct background checks on prospective gun purchasers.

Whether any tort reforms are found to be unconstitutional on Tenth Amendment grounds is likely to depend in part on whether the Court is willing to extend and build upon the federalism concerns expressed in New York v. United States and Printz. As the case law currently stands, defenders of tort reform measures are likely to assert that a distinction can readily be drawn between the holding in New York v. United States - prohibiting federal commandeering of the state legislative process by compelling the enactment of a regulatory program - and federal tort reforms which merely require state courts to honor federal law. The Court itself observed as much when it distinguished a series of federal laws which were enforceable in state courts from the Radioactive Waste Policy Amendments Act:

These cases involve no more than an application of the Supremacy Clause's provisions that federal law "shall be the supreme Law of the Land," enforceable in every state. More to the point, all involve congressional regulation of individuals, not congressional requirements that states regulate. Federal statutes enforceable in state courts do, in a sense, direct state judgments to enforce them, but this sort of federal "direction" of state judges is mandated by the text of the Supremacy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to regulate. [469]

Moreover, in Printz the Supreme Court continued to distinguish between legislation directly commandeering the legislature and the mere use by Congress of the state courts. In examining the laws enacted in the first several Congresses in order to clarify the legislative history of the Constitution and Bill of Rights, the Court identified a series of federal laws

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which made use of the state courts, writing, "these early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions.... It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time." [470]

[*655] On the other hand, parties seeking to challenge these tort reforms may assert that rather than provide for an alternative liability scheme (as the 1908 Act did) or substitute the United States as a defendant pursuant to the Federal Torts Claims Act (as the Federal Drivers Act, Swine Flu Act, and Atomic Testing Liability Act did), the reforms impermissibly set forth a limited number of federal limitations on liability, while reserving the remainder of the legal issues to state law. [471] One of the problems with the Radioactive Waste Policy Amendments Act identified by the Court in New York v. United States was that "where the Federal Government directs the states to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." [472]

A related contention is that unlike the laws early federal laws enforceable in state courts distinguished in Printz, recent tort reforms can be said to be more intrusive in that they affirmatively limit the application of state law. In a recent article in TRIAL Magazine, Jeffrey White, the Associate General Counsel of the Association of Trial Lawyers of America, argues that the early laws represent "instances in which Congress established a federal cause of action or federal administrative regulatory scheme affecting private conduct and preempted conflicting state law. In none of these statutes did Congress purport to leave state law in place while attempting to modify its content." [473]

Potentially more problematic may be the fact that specific proposals such as the Biomaterials Access Assurance Act, the Tobacco Settlement and the **Y2K** Act impose an elaborate set of procedural mandates directly on state courts with respect to state causes of action. This, it can be asserted, goes beyond requiring the supremacy of federal legal standards **[*656]** by proscribing detailed and potentially costly procedures on the state courts. For example, the Biomaterials Access Assurance Act specifies detailed rules concerning motions to dismiss, limits discovery pending ruling on such motions, requires that rulings be made solely on the basis of pleadings and affidavits, and specifies rules for consideration of summary judgment and stay motions. [474] The Tobacco Settlement prevents states from allowing any form of consolidation of tobacco claims, even if this is the least costly and most efficient means of resolving such lawsuits. [475] The Tobacco Settlement also prevents state courts from resolving attorney client privilege and trade secret disputes regarding tobacco documents and alters state court evidentiary rules by prohibiting the admission or discovery of any evidence concerning "reduced-risk" tobacco products. [476] The **Y2K** Act also mandates a variety of procedural rules upon state courts, such as notice, "cool-down" and heightened pleading requirements and prohibits state courts from considering most forms of **Y2K** class actions. [477]

Although we are aware of no direct Supreme Court precedent regarding whether Congress may mandate procedural rules on state courts concerning state causes of action, plaintiffs will be able to point to dicta in several recent decisions concerning the preemptive effect of civil rights claims brought under 42 U.S.C. 1983 indicating that such requirements may well cross the constitutional line. In Felder v. Casey, [478] the Court observed that it is an "unassailable proposition.... that states may establish the rules of procedure governing litigation in their own courts." In Johnson v. Fankell, [479] the Court reiterated what it termed "the general rule 'bottomed deeply in belief in the importance of state control of state judicial procedure... that federal law takes state courts as it finds them.'" [480] The Johnson Court also observed that judicial respect for the principal of federalism "is at its apex when we confront a claim that federal law requires a state to undertake something as fundamental **[*657]** as restructuring the operation of its courts" [481] and "it is a matter for each state to decide how

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to structure its judicial system." [482]

Because of such concerns, during hearings concerning the Tobacco Settlement Professor Tribe testified "for Congress directly to regulate the procedures used by state courts in adjudicating state-law tort claims - to forbid them, for example, from applying their generally applicable class action procedures in cases involving tobacco suits - would raise serious questions under the Tenth Amendment and principles of federalism." [483] Although the Tobacco Settlement provides for removal to federal court of tobacco liability suits for which class action certification is sought [484] - presumably in an effort to ameliorate the Tenth Amendment concerns - this mechanism may still be subject to further constitutional problems. Such problems as whether it constitutes an impermissible attempt to extend federal jurisdiction where it is otherwise lacking in violation of Article III of the Constitution. This is similar to the issue the Third and Seventh Circuit dealt with in the context of the 1988 Amendments to the Price-Anderson Act, which converted nuclear accident claims into federal causes of action. [485]

V. CONCLUSION

Over the last several years, Congress has enacted a series of federal tort reform laws. These statutes have partially preempted state tort law in the **[*658]** areas of general aviation aircraft liability (the General Aviation Revitalization Act of 1994); donation of food for distribution to the needy (the Bill Emerson Good Samaritan Food Donation Act); volunteer activity generally (the Volunteer Protection Act of 1997); public railway transportation (Section 161 of the Amtrak Reform and Accountability Act of 1997); medical implant supplies (the Biomaterials Access Assurance Act) and year 2000 computer failures (the **Y2K** Act). [486] At the same time, Congress has considered a number of more far-reaching proposals, including legislation preempting state laws concerning product liability, medical malpractice, and tobacco litigation. [487]

In general, these enacted and pending reforms represent a third wave of federal tort reform. They seek to isolate a particular area of tort law (such as product liability or medical malpractice) or a sub-area (such as the general aviation or biomaterials supplies aspects of product liability), and carve out a set of protections designed to minimize the liability of defendants as compared to what their liability would be under state law. While the justification asserted for these reforms - encouraging beneficial social and economic activities - is similar to that proffered for earlier phases of tort reform, the nature of several of the proposals is sufficiently different to present a number of new constitutional issues.

With regard to the Commerce Clause, laws such as the Food Donation Act and Volunteer Protection Act will not only have a significant impact on intrastate activity, but also regulate non-commercial, volunteer activity. The question presented by these laws is whether the Commerce Clause permits preemption of state law where Congress finds there is a connection to interstate commerce, or the courts are required to consider whether the nexus is simply too tenuous to justify intrusion on the traditional state law tort system.

In the event Commerce Clause authority is struck down in the context of a particular tort reform, courts may also be presented with the issue of whether the law is authorized by Congress' power under Section Five of the Fourteenth Amendment. In particular, this issue may arise with respect to **punitive damage** limitations, given the Court's recent decisions in BMW of North America v. Gore [488] and Honda Motor Co. v. **[*659]** Oberg. [489] The critical question is whether these tort reforms would be viewed as merely implementing these court-made constitutional constraints, or whether the tort reforms represent an entirely new legislative restrictions on the states.

In terms of the Fifth Amendment, a number of recent tort reforms would abrogate common law rights without providing any direct offsetting legal benefit to plaintiffs. There is some

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doubt as to whether a legislative quid pro quo is constitutionally required to comport with the Fifth Amendment. However, if a court finds such a requirement does exist, the courts will be forced to consider whether any legal benefit provided by the laws must apply to impacted litigants in particular or society as a whole, and the extent the legal benefit must offer a reasonably comparable substitute to harmed plaintiffs.

The Seventh Amendment jury trial issues raised by the tort reforms are also somewhat novel. If the Court takes up this question, it will need to consider whether the Seventh Amendment applies to federal legislation abrogating state court jury rights and the extent reforms such as damage caps represent factual issues (traditionally considered by juries) or legal issues (traditionally resolved by legislatures).

As for the Tenth Amendment, the third wave tort reforms described in this article not only alter state substantive tort law, but in some cases go on to proscribe detailed state court procedures. Although federalism-based challenges to federal tort reforms have been unsuccessful in the past, in recent years the Court has shown renewed interest in the Tenth Amendment in New York v. United States [490] and Printz. [491] Under these cases, the principal issue for pending tort reforms will be whether they constitute a "commandeering" of the state legislative process, or merely require that state courts honor federal law.

Political constraints have mandated that the third wave reforms enacted to date be relatively narrow and modest in their scope. It is perhaps because of these limitations that no case has yet arisen presenting these constitutional issues in the context of a recently enacted reform. [492] However, if Congress enacts any of the broader reforms currently being considered, the courts will likely be faced with the constitutional questions noted in this article.

FOOTNOTES:

n1. As used herein, the phrase "federal tort reform" is not intended to have a favorable or unfavorable connotation, but rather to generically describe a statutory law or proposal preempting state tort law.

n2. 1906 Employers' Liability Act, Pub. L. No. 59-219, 34 Stat. 232 (codified at 45 U.S.C. 51-60) (1906) (repealed 1907) and 1908 Employers' Liability Act, Pub. L. No. 60-100, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. 51-60 (1994)).

n3. Pub. L. No. 59-219, 34 Stat. 232 (codified at 45 U.S.C. 51-60) (1906) (repealed 1907).

n4. Infra note 29 and accompanying text.

n5. Pub. L. No. 60-100, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. 51-60 (1994)).

n6. Atomic Testing Liability Act, Pub. L. No. 101-510, 104 Stat. 1837, 42 U.S.C. 2212 (1994).

n7. National Swine Flu Immunization Program of 1976, Pub. L. No. 94-380, 90 Stat. 1113, 42 U.S.C. 247b (1976) (repealed 1978).

n8. 28 U.S.C. 2671-2680 (1994).

n9. Volunteer Protection Act of 1997, Pub. L. No. 105-19, 111 Stat. 218 (codified at 42 U.S.C.A. 14501-14505 (West Supp. III 1997)); General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552-54 (1994) (codified at 49 U.S.C. 40101 note (1994));

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to a contributory) **[*596]** negligence regime. [27] The principal constitutional issue raised in Supreme Court challenges was whether the laws were authorized under the Commerce Clause (although the Court also briefly considered issues in the nature of due process and federalism concerns). [28]

A. 1906 Employers' Liability Act

The 1906 Employers' Liability Act (the "1906 Act") [29] required, inter alia, that common carriers compensate their employees for damages caused by defects in equipment or the negligence of their fellow employees, eliminated the common law doctrine of contributory negligence and substituted a form of comparative negligence, and eliminated any bars or defenses to liability set forth in employment contracts. [30] The 1906 Act applied to "every common carrier engaged in trade or commerce... between the several states... [with regard to] any of its employees...." [31]

In The Employers' Liability Cases, [32] the Court considered the constitutionality of the 1906 Act. The Court first considered the question of whether Congress had the authority to enact laws dealing with the master-servant relationship, "a subject hitherto treated as being exclusively within the control of the states." [33] The Court rejected this contention, holding, "the test of power is not merely the matter regulated, but whether the regulation is directly one of interstate commerce...." [34]

Next, the Court considered whether the 1906 Act constituted a valid exercise of Congress' authority to regulate interstate commerce under the Commerce Clause. [35] Although the statute was limited to carriers engaged in interstate commerce, the Court read the law as applying to instances where such carriers were transacting purely intrastate business. [36] Therefore, the court held the 1906 Act was being applied in an unconstitutional manner:

[*597] Concluding, as we do, that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant of the Constitution and non-enforceable.... [37]

Having found the 1906 Act's asserted regulation of intrastate commerce to be unconstitutional, the Court put off considering arguments that the law violated employers' Fifth Amendment due process rights [38] (i.e., because it was claimed to have arbitrarily subjected common carriers to greater liability than other employers engaged in interstate commerce), and that it compromised employers' Seventh Amendment [39] right to a jury trial. [40]

Subsequently, in El Paso & Northeastern Railway Co. v. Gutierrez, [41] the Court found that the 1906 Act could be applied to United States territories "in view of the plenary power of Congress under the Constitution over the Territories of the United States." [42] Since the Court concluded that the provisions of the Act declared unconstitutional in The Employers' Liability Cases were separable and that Congress would have enacted them independently, it upheld the law in these areas. [43]

B. 1908 Employers' Liability Act

In 1908 Congress enacted a substantially similar version of the Employers' Liability Act (the "1908 Act"), limiting the statute to cases involving employees "suffering injury while... employed by [carriers engaged in interstate commerce] in such commerce...." [44] Employers again complained that the law imposed substantially more liability on them than they were subject to under the common law, and hence challenged its constitutionality. In 1912, the Court upheld the constitutionality of the law in The Second Employers' Liability Cases

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Y2K Act, Pub. L. No. 106-37, 113 Stat. 6601 (codified at 15 U.S.C. 6601-17 (1999)); Product Liability Reform Act of 1998, S. 2236, 105[su'th'] Cong. (1998).

↑n10. See infra note 29.

↑n11. Pub. L. No. 104-210, 110 Stat. 3011 (to be codified at 42 U.S.C.A. 1791 (West Supp. 1998)).

↑n12. Pub. L. No. 105-19, 111 Stat. 218 (codified at 42 U.S.C.A. 14501-14505 (West Supp. III 1997)).

↑n13. 514 U.S. 549 (1995).

↑n14. 517 U.S. 559 (1996).

↑n15. 512 U.S. 415 (1994).

↑n16. See infra note 393.

↑n17. The Biomaterials Access Assurance Act, H.R. 872, 105th Cong. (1997) (enacted).

↑n18. The **Y2K** Act, Pub. L. No. 106-37, 113 Stat. 6601 (codified at 15 U.S.C. 6601-17 (1999)).

↑n19. Proposed Tobacco Industry Settlement, 12.3 TPLR 3.203 (June 20, 1997).

↑n20. 505 U.S. 144 (1992).

↑n21. 521 U.S. 98 (1997).

↑n22. See Schwartz, Behrens & Taylor, Appendix A & B.

↑n23. In contrast to the relatively small number and modest scope of federal tort reforms, states have adopted numerous statutory changes to their own tort laws. In the early part of the 1900's, states enacted a series of workers' compensation laws ultimately upheld by the Supreme Court in cases such as New York Central R. Co. v. White and Mountain Timber v. Washington, 243 U.S. 188 (1917). See Silver v. Silver, 280 U.S. 117 (1929) (upholding Connecticut automobile guest statute); Chicago, Burlington & Quincy R. Co. v. McGuire, 219 U.S. 549 (1910) (upholding Iowa law abrogating fellow servant doctrine); Arizona Employers Liability Cases, 250 U.S. 400 (1919) (upholding Arizona law providing strict employer liability for inherently dangerous work).

More recently, states have enacted tort laws providing protections to defendants with every state adopting some form of tort reform in the last twenty some years. See Martha Middleton, A Changing Landscape, ABA JOURNAL, 56, 59 (1995). For useful summaries of the nature of the statutory changes made by the states, see VICTOR E. SCHWARTZ, MARK E. BEHRENS, & MARK D. TAYLOR, WHO SHOULD MAKE AMERICA'S TORT LAW: COURTS OR LEGISLATURES? (Washington Legal Foundation) (1997); Mark Thompson, Letting the Air out of Tort Reform, ABA JOURNAL, 64 (1997); Henry Cohen, Fifty-State Survey on Selected Product Liability Issues, May 24, 1995 (Congressional Research Service Report 95-300A).

↑n24. In addition to adopting laws preempting state common law of tort, Congress has enacted a number of liability laws pursuant to its maritime and international treaty authority. See Limitation of Vessel Owners Liability Act, 46 U.S.C. App. 181-196 (1994) (enacted in 1893) (setting shipping liability rules in case of damage or harm occurring without privity or knowledge of ship owner), found to constitute valid exercise of Congress' maritime and

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commerce authority in Providence & New York Steamship Co. v. Hill Manufacturing Co., 109 U.S. 578 (1883); Longshoreman and Harbor Workers' Compensation Act, 33 U.S.C. 901-950 (1994) (enacted in 1927) (providing a workers' compensation scheme for injuries occurring in the navigable waters of the United States), upheld against due process challenge in Crowell v. Benson, 285 U.S. 22 (1932); Convention For the Unification of Certain Rules Relating to International Carriage By Air (Warsaw Convention), Oct. 12, 1929, 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11, as amended and supplemented by Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol (Montreal Agreement), Agreement No. CAB 18,999, approved by Order No. E-28, 680, May 13, 1966 (CAB Docket 17,325), reprinted in 49 U.S.C. 1502 (1994) (limits international air carriers' potential liability for property loss or damage or personal injury to $ 75,000 and creates a presumption of liability for accidents and limiting passengers' recovery for injuries during transportation covered by the Convention) upheld against constitutional challenge in Indemnity Ins. Co. of North America v. Pan American Airways, 58 F. Supp. 338 (S.D.N.Y. 1944); Pierre v. Eastern Airlines, Inc., 152 F. Supp. 486 (D.N.J. 1957). See also Death on the High Seas by Wrongful Act, 46 U.S.C. App. 761 - 68 (setting liability rules for negligence and other misconduct on the high seas); 46 U.S.C. app. 688 (1994) (abrogating the fellow servant rule and granting seamen the same rights as railway workers under the Employers Liability Act of 1908); 46 U.S.C.A. 183 (West Supp. 1998) (recognizing certain limitations on non-economic damages set forth in cruise ship contracts and tickets and permitting international owners to rely on state statutory damage limitations relating to employee medical malpractice claims).

n25. Pub. L. No. 59-219, 34 Stat. 232 (codified at 45 U.S.C. 51-60) (1906) (repealed 1907).

n26. Pub. L. No. 60-100, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. 51-60 (1994)).

n27. Under the doctrine of contributory negligence a plaintiff is completely barred from recovery if he or she bears any amount of fault, while comparative negligence reduces a plaintiff's recovery by his or her percentage of negligence. See Restatement (Second) of Torts 552A (1977).

n28. See The Employers' Liability Cases, 207 U.S. 463 (1907) and The Second Employers' Liability Cases (Mondou v. New York), 223 U.S. 1 (1912).

n29. Pub. L. No. 59-219, 34 Stat. 232 (codified at 45 U.S.C. 51-60) (1906) (repealed 1907).

n30. See id.

n31. Id. 51.

n32. 207 U.S. 463 (1907).

n33. 207 U.S. at 491.

n34. Id. at 495.

n35. See infra note 296.

n36. 207 U.S. at 503.

n37. 207 U.S. at 504.

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n38. See infra note 357 and accompanying text.

n39. See infra note 386 and accompanying text.

n40. 207 U.S. at 503.

n41. 215 U.S. 87 (1909).

n42. Id. at 93.

n43. Id. at 96-97.

n44. Pub. L. No. 60-100, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. 51-60 (1994)).

n45. 223 U.S. 1 (1912).

n46. Id.

n47. Id. at 51 (citations omitted).

n48. Id. at 49.

n49. Id.

n50. 94 U.S. 113 (1876) (Illinois statute setting maximum grain storage rates upheld against Fourteenth Amendment due process challenge that it abrogates the common law rule that such charges are required to be "reasonable").

n51. 223 U.S. at 50, citing Munn, 94 U.S. 113, 134 (additional citations omitted).

n52. 223 U.S. at 51.

n53. Id.

n54. Id. at 52.

n55. Id. at 53 (citations omitted).

n56. 17 U.S. 316 (1819).

n57. 223 U.S. at 53, citing McCulloch at 405.

n58. 223 U.S. at 58.

n59. 30 U.S.C. 901-945 (1994).

n60. Pub. L. No. 91-173, 83 Stat. 742 (1969).

n61. Rather than preempting state common law directly, the Black Lung Benefits Act had the effect of preempting state workers' compensation laws.

n62. The specific presumptions and evidentiary rules objected to included: (1) the definition of total disability under 402(f) of the Black Lung Benefits Act requiring compensation for former miners who might be employable in other lines of work; (2) the irrebuttable presumption of total disability under 411(c)(3) where there is clinical evidence of complicated

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pneumoconiosis; (3) the rebuttable presumptions under 411(c)(1) and (2) that operators were responsible for pneumoconiosis for miners employed more than ten years; (4) the rebuttable presumption under 411(c)(4) that miners employed for more than fifteen years who are able to marshal evidence demonstrating a totally disabling respiratory or pulmonary ailment have been disabled by pneumoconiosis; (5) the requirement under 413(b) that claims for benefits not be denied solely on the basis of negative chest X-rays; and (6) the limitation on the use of rebuttal evidence in cases under 411(c)(4). See Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 22-37 (1976).

n63. 428 U.S. 1 (1976). The case proceeded directly to the Supreme Court after being considered by a three-judge district court panel pursuant to 28 U.S.C. 2282, 2284 (1994). See Turner Elkhorn Mining Co. v. Brennan, 385 F. Supp. 424 (1974) (upholding the provisions of the Black Lung Benefits Act against constitutional challenge, with the exception of the limitation on the use of rebuttal evidence in cases under 411(c)(4)).

n64. 428 U.S. at 15 (citations omitted).

n65. Id., (citing New York Central R. Co. v. White, 243 U.S. 188 (1917)) (New Yorker workers' compensation law); Philadelphia, Baltimore & Washington R. Co. v. Schubert, 224 U.S. 603 (1912) (1908 Employers Liability Act).

n66. Id. at 18-19 (citations omitted).

n67. Id. at 22-38.

n68. Id. at 26.

n69. Congress has enacted a number of federal tort reforms which have not been challenged on constitutional grounds in federal court. These include several instances in which Congress has elected to substitute the United States as a defendant for volunteers performing a variety of activity associated with the Federal Government. See, e.g., (1) Federally Supported Health Centers Assistance Act of 1992, 42 U.S.C. 233 (g) & (o) (1994) (health centers and their officers, employees, and contractors and health clinic professionals); (2) National Service Trust Act, 42 U.S.C. 12651b(f) & 12651g (a)(B) (1994) (enacted in 1993) (board members and volunteers in the National and Community Service program); (3) Take Pride in America Act, 16 U.S.C. 4604 (c)(2) (1994) (Take Pride in America Act volunteers) (enacted in 1990); (4) Support for East European Democracy Act of 1989, 22 U.S.C. 5422 (c)(2)(A) (1994) (volunteers providing technical assistance to Poland or Hungary); (5) Federal Land Policy and Management Act of 1976, 43 U.S.C. 1737 (f) (1994) (Bureau of Land Management volunteers); (6) Domestic Volunteer Service Act of 1973, 42 U.S.C. 5055(f)(3) (1994) (VISTA volunteers); (7) Volunteers in the National Forests Act of 1972, 16 U.S.C. 558c(b) (1994) (Forest Service volunteers); (8) Volunteers in Parks Act of 1969, 16 U.S.C. 18i(b) (1994) (National Parks volunteers); (9) Peace Corps Act, 22 U.S.C. 2504(h)(1994) (enacted in 1961) (Peace Corps volunteers); (10) Fish and Wildlife Act of 1956, 16 U.S.C. 742f(c)(4) (1994) (volunteers in Fish and Wildlife Service or National Oceanic and Atmospheric Administration programs); (11) Federally Supported Health Centers Assistance Act of 1995, 42 U.S.C. 203 note (Supp. I 1995); and (12) 18 U.S.C.A. 1955 note (West Supp. IV 1997).

n70. Pub. L. No. 87-258, 1, 75 Stat. 539 (codified as amended at 28 U.S.C. 2679) (1994)).

n71. Id. 2679(b).

n72. See S. Rep. No. 87-736 (1961), reprinted in 1962 U.S.C.C.A.N. 2784.

n73. 422 F.2d 1007 (4[su'th'] Cir. 1970).

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n74. 539 F.2d 955 (3d Cir. 1976).

n75. 225 F. Supp. 881 (W.D. Mo. 1963).

n76. 422 F.2d 1007.

n77. 280 U.S. 117 (1929).

n78. Id. at 122.

n79. 422 F.2d at 1011.

n80. See id. at 1101. A Torts Claims Act remedy may not be available to federal workers because of the exclusivity provisions of the Employees' Compensation Act, 5 U.S.C. 8116(c).

n81. 422 F.2d at 1101.

n82. Id.

n83. Id. at 1012 (quoting McGowan v. Maryland, 366 U.S. 420, 426).

n84. Id.

n85. 539 F.2d 955

n86. 539 F.2d 955, 959 (3d Cir. 1976) (citations omitted).

n87. Id. at 959-60.

n88. 225 F. Supp. 881.

n89. Id. at 881, 882.

n90. Pub. L. No. 85-256, 71 Stat. 576 (1957).

n91. Pub. L. No. 89-645, 80 Stat. 891 (1966).

n92. Pub. L. No. 94-197, 89 Stat. 1111-1115 (1975).

n93. Codified as amended in scattered sections of 42 U.S.C. (1994).

n94. 42 U.S.C. 2210(c) (1994). The Price-Anderson Act required the nuclear industry to purchase the maximum level of liability insurance available on the market - $ 60 million - and provided that the Federal Government would indemnify the industry, if necessary, up to $ 500 million.

n95. 42 U.S.C. 2210(n)(1), 2210(c) (1994).

n96. 438 U.S. 59 (1978).

n97. Id. at 72-81.

n98. Id. at 81-82.

n99. Id. at 82.

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n100. Id. at 83.

n101. Id. at 84.

n102. Id.

n103. Carolina Environmental Study Group v. Duke Power Co., 431 F. Supp. 203, 222 (W.D.N.C. 1977), rev'd, 438 U.S. 59 (1978).

n104. 438 U.S. at 84-85.

n105. Id. at 87.

n106. Id. at 87-88 (citations omitted).

n107. Id. at 88.

n108. Id. at 88, n.32, (quoting Munn v. Illinois, 94 U.S. 113, 134 (1877)). In the same footnote, the Court also quoted from its 1929 decision in Silver v. Silver, 280 U.S. 117 (1929), for the principle that "the 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object.'" Id.

n109. Id. at 88.

n110. Id. at 90.

n111. 1913 N.Y. Laws 816; 1914 N.Y. Laws 41, 316.

n112. 243 U.S. 188 (1917). In New York Central R. Co. v. White, the Court found the New York workers' compensation law to be "reasonable" and in conformance with "natural justice." Id. at 203. The Court specifically reserved the question of whether New York could have eliminated the parties' common law rights without setting up an alternative compensation scheme: "it perhaps may be doubted whether the state could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead. No such question is here presented." Id. at 201. The New York workers' compensation law was further amended and upheld against due process challenge in New York Central R. Co. v. Bianc, 250 U.S. 596 (1919).

n113. 33 U.S.C. 901-950 (1994).

n114. 285 U.S. 22 (1932), overruled on other grounds, Director, Office of Workers' Compensation Programs v. Perini North River Assoc., 459 U.S. 297 (1983). In Crowell, the Court found the Federal Longshoreman and Harbor Workers' Compensation Act, requiring employers to pay reasonable statutory compensation to maritime employees who are disabled or die from work injuries while on United States navigable waters, to conform to due process requirements since it was reasonable and similar to other workers' compensation schemes. Id. at 41. The Court found the employers' Seventh Amendment claim to be "unavailing" since the compensation arrangement had previously been governed by maritime law and fell within Congress' admiralty jurisdiction. Id. at 45.

n115. 438 U.S. at 88.

n116. Id. at 93.

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n117. Id. at 84 n.27.

n118. Id.

n119. Id. at 94. The Fifth Amendment "takings" clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

n120. 438 U.S. at 94. The Tucker Act, inter alia, waives United States sovereign immunity for claims founded on statutes, regulations, contracts or provisions of the Constitution that create substantive rights to money damages. 28 U.S.C. 1491 (1994).

n121. 438 U.S. at 94 n.39.

n122. Swine Flu Act, Pub. L. No. 94-380, 90 Stat. 1113, 42 U.S.C. 247b (1976) (repealed 1978).

n123. Under the Swine Flu Act, although the procedures of the Federal Tort Claims Act are made applicable to suits against the United States, the Act did not limit a plaintiff's theory of recovery to negligence alone. See 42 U.S.C. 247b(k)(2)(A); 28 U.S.C. 1346(b) and 2674 (1976). Instead, the United States is made liable upon any basis which would have been available against the program participant under applicable state law, "including negligence, strict liability in tort, and breach of warranty." 42 U.S.C. 247b(k)(2)(A)(I) (1976).

n124. 42 U.S.C. 247b(k)(7) (1976).

n125. 433 F. Supp. 231 (M.D. Tenn. 1977).

n126. 431 F. Supp. 411 (W.D. Okl. 1977).

n127. No. 77-L-0274-S (W.D. Ala., June 3, 1977).

n128. 574 F.2d 1307 (5th Cir. 1978).

n129. Id. at 1310. In Sparks, the court stated, "the statutory classification comes here clothed with a presumption of constitutionality and it 'will not be set aside if any state of facts reasonably may be conceived to justify it.'" 431 F. Supp. at 418. In Wolfe, the court adopted the reasoning of Sparks to the extent necessary to reach the issues raised by the plaintiff, but went on to observe that it need not necessarily reach the constitutional issues since the plaintiff, a doctor, had voluntarily consented to the legal limitations of the Swine Flu Act. 433 F. Supp. at 236, 237-238.

n130. 574 F.2d at 1311.

n131. Id. at 1310.

n132. 574 F.2d at 1311; 431 F. Supp. at 418.

n133. 431 F. Supp. at 418.

n134. Id. at 416.

n135. See infra note 427.

n136. Sparks, 431 F. Supp. at 419.

n137. Id. at 420.

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n138. Pub. L. No. 101-510, 104 Stat. 1837, 42 U.S.C. 2212 (1994). The statute provides "the remedy against the United States provided by [the FTCA] as appropriate, for injury, loss of property, personal injury, or death shall apply to any civil action for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States." Id. 2212(b)(1).

n139. 786 F.2d 8 (1st Cir. 1986).

n140. 820 F.2d 982 (9th Cir. 1987).

n141. Hammond, 786 F.2d at 12 & 820 F.2d at 989 (quoting New York Central R. Co. v. White, 243 U.S. 188, 198).

n142. Id.

n143. Id. at 12-14 (considering Fifth Amendment due process and equal protection challenges); In re Consolidated United States Atmospheric Testing Litigation, 820 F.2d at 989-91 (rejecting both procedural and substantive due process challenges).

n144. Id. at 991 (citing Hammond, 786 F.2d at 14).

n145. 786 F.2d at 15. In addition to the Fifth, Seventh, and Tenth Amendment arguments discussed supra, the court rejected claims that the law was unconstitutional because it was an "unexpected law," violated the Ninth Amendment (preserving all unenumerated rights for the people), right of access to the courts, and prohibition against ex post facto laws. Id.

n146. Id.

n147. Id. at 15 (citing National League of Cities, 426 U.S. 833 (1976), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (Congress lacks authority to impose wage and hour standards on state and local government employees).

n148. Hammond, 786 F.2d at 15 (citing Garcia, 469 U.S. 528 (1985)).

n149. Pub. L. No. 100-408, 102 Stat. 1066 (codified as amended at 42 U.S.C. 2210 (1994)).

n150. The 1966 amendments to the Price-Anderson Act provided for transfer to federal district court of all actions arising out of an "extraordinary nuclear occurrence." 42 U.S.C. 2210(n)(2)(1994). The failure of such definition to apply to the Three Mile Island accident was seen as a significant impetus for Price-Anderson's 1988 expansion. See S. Rep. No. 100-218, at 13 (1987).

n151. 42 U.S.C. 2014 (1994).

n152. Id. 2219(n)(2).

n153. 13 F.3d 1090 (7[su'th'] Cir. 1994).

n154. 940 F.2d 832 (3d Cir. 1991).

n155. 89 F.3d 1106 (3d Cir. 1996), cert. denied, Aldrich v. General Pub. Utils. Corp., U.S. ; 117 S.Ct. 739; 136 L. Ed. 2d 678; 65 U.S.L.W. 3487 (U.S. 1997).

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n156. Article III of the Constitution provides that federal judicial power extends to cases "arising under the Constitution, the Laws of the United States, and Treaties made... under their authority." U.S. Const. art. III, 2.

n157. 13 F.3d at 1099. In considering the Article III issue, O'Conner reviewed prior Supreme Court precedent such as Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 738 (1824), and Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983). The court read these cases as establishing that "more than a jurisdictional grant is required for a matter to 'arise under' the Constitution or laws of the United States," but that "where Congress has the authority to legislate in a given area and substantively does so, a grant of federal subject matter jurisdiction will survive an Article III challenge." 13 F.3d at 1098-99 (citations omitted).

n158. 13 F.3d at 1100.

n159. Id.

n160. 940 F.2d at 857.

n161. Id.

n162. In O'Conner, plaintiff alleged he had been overexposed to radioactive materials in his position as a pipe fitter for Commonwealth Edison nuclear facility. Id. at 1093.

n163. Id. at 1102.

n164. Id.

n165. In TMI, plaintiffs asserted that retroactive application of the 1988 Amendments violated their due process rights by requiring resort to Pennsylvania's two-year statute of limitations (rather than Mississippi's six-year statute) thereby resulting in a dismissal of their action. 89 F.3d at 1110-11.

n166. Id. at 1113, (quoting H.R. Rep. No. 100-104, pt. 3, at 18 (1987)).

n167. Id. at 1113.

n168. Id. at 1114. In re TMI Litigation Cases Consol. II also rejected due process and equal protection claims as well as other "collateral" arguments relating to federalism and state sovereignty concerns. 940 F.2d at 860-61. See also O'Conner, 13 F.3d at 1102, n. 10. ("the removal of cases arising under [the laws of the United States] from state into federal courts is... no invasion of state domain.").

n169. 484 U.S. 292 (1988) (conduct by federal officials must be discretionary in nature as well as within the scope of their employment to enjoy absolute state-law tort immunity).

n170. Arbour v. Jenkins, 903 F.2d 416 (6[su'th'] Cir. 1990).

n171. Pub. L. No. 100-694, 102 Stat. 4563 (codified as amended at 28 U.S.C. 2679 (1994)).

n172. Id. The Westfall Act amended the Federal Torts Claims Act.

n173. 888 F.2d 802 (11[su'th'] Cir. 1989).

n174. 903 F.2d at 416.

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↑n175. 948 F.2d 1131 (10[su'th'] Cir. 1991).

↑n176. Salmon, 924 F.2d at 1143.

↑n177. Id.

↑n178. See infra nn.174, 184, 216, 228 & 244. Other recent examples of federal tort reforms include (1) 49 U.S.C. 28102 (1994) (enacted in 1990) (limiting passenger rail liability for Virginia commuter lines to $ 200 million per accident in the District of Columbia along with requiring such railways to maintain minimum liability coverage of $ 200 million); (2) Federal Credit Union Act, 12 U.S.C. 1787(c)(3)(A) (1994) (enacted in 1987) (limiting damages for lost profits, lost opportunity, and pain and suffering stemming from the liquidation of federal credit unions) (enacted in 1987); (3) National Childhood Vaccine Injury Compensation Act of 1986, 42 U.S.C. 300aa-1-34 (1994) (providing no-fault compensation scheme for injuries resulting from child vaccines and eliminating most forms of state law liability for vaccine manufacturers and administrators); and (4) Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), 42 U.S.C. 9612(e) & 9658 (a) (1994) (providing that bringing Superfund claim does not constitute a waiver of rights under state law and substituting federal for state statute of limitations). See also Year 2000 Information and Readiness Disclosure Act, 15 U.S.C. 1 note (1998) (preempting state contract actions and evidentiary rules stemming from the dissemination of information concerning the Year 2000 computer problems).

↑n179. See infra n.456.

↑n180. See infra notes 241, 261 & 273. A number of other tort reform proposals may be on the congressional agenda which are not discussed in detail herein. See e.g., Trade and Professional Association Free Flow of Information Act of 1997, H.R. 1542 & S. 1135, 105 [su'th'] Cong. (1997) (providing expanded liability protections for non-profit organizations); and Auto Choice Reform Act of 1997, H.R. 2021 & S. 625, 105[su'th'] Cong. (1997) (preempting state automobile liability law to permit motorists to of the ability to seek non-economic damages); Fairness in Asbestos Compensation Act of 1998, H.R. 3905, 105[su'th'] Cong. (1998) (preempting state law concerning liability for asbestos to provide an administrative procedure subject to a variety of caps and limitations on liability).

↑n181. Pub. L. No. 103-298, 108 Stat. 1552-54 (1994) (codified at 49 U.S.C. 40101 note (1994)).

↑n182. General Aviation Act 2(c). In the scope of this provision a "general aviation aircraft" is defined as aircraft of less than 20 seats not engaged in scheduled passenger carrying operations.

↑n183. Id. 2(a)(2) & 3.

↑n184. Id. 2(b). In excluding "written" warranties, the law would presumably apply to supersede any implied warranties which may have applied beyond the statute of repose period.

↑n185. Id. 2(d).

↑n186. See H.R. Rep. No. 103-525, pt. 1, at 2 (1994). Proponents had noted that production of general aviation aircrafts by domestic manufacturers had declined from 17,000 units in 1979 to 954 units in 1993. This in turn was asserted to have led to a direct loss of 20,000 aviation jobs and an indirect loss of another 80,000 jobs in related industries. Id.

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(Mondou v. New York). [45]

On this occasion, the Court found the law constituted a valid exercise of Congress' commerce authority. [46] Although the 1908 Act was limited to injuries involving persons employed in interstate commerce, it **[*598]** had been asserted the law should be struck down because co-employees causing the injury may not have been so engaged. The Court disagreed, observing "this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power." [47]

The Court also considered and rejected several objections to the 1908 Act in the nature of due process concerns - that it unreasonably abrogated common law rules, that it interfered with "liberty of contract," [48] and that it arbitrarily placed employers in a "disfavored class." [49] The Court disposed of the contention that the law unreasonably altered rules of common law, quoting from their 1876 decision in Munn v. Illinois [50] for the proposition that:

A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will... of the legislature, unless prevented by constitutional limitations. Indeed, the greater office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. [51]

The Court also found that changes in common law liability rules would promote workplace safety and were well within Congress' discretion. [52] The fact that other states had enacted special rules concerning workplace liability was of little importance to the Court, which observed that such laws "were far from uniform" and it was left to Congress to determine whether national law "would better serve the needs of commerce." [53]

The Court readily disposed of the "liberty of contract argument" raised by the employers. Recent decisions had established that "if Congress possesses the power to impose... liability, which we here hold that it does, it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation or device in evasion of it." [54]

As for the question of whether the 1908 Act effectuated an impermissible classification discriminating against railways, the Court found **[*599]** that even if it is assumed that the Fifth Amendment Due Process Clause incorporates the same standards as the Fourteenth Amendment's Equal Protection Clause, the law was not unconstitutional:

[The Equal Protection Clause] does not take from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute distinctions, and condemns what is done only when it is without any reasonable basis, and is therefore purely arbitrary.... Tested by these standards, this classification is not objectionable. [55]

The Court next considered a federalism-related question - whether Congress had the authority to preempt state laws concerning the same subject matter as the 1908 Act. Using a straightforward Supremacy Clause analysis to reject this concern, the Court quoted McCulloch v. Maryland [56] for the proposition that the "government of the United States... though limited in powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or the laws of any state, to the contrary notwithstanding.'" [57]

The Court also used the Supremacy Clause as the constitutional justification for allowing the 1908 Act to be enforced in state court. The Court reasoned, "the fact that a state court

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n187. Id. at 5-6.

n188. See S. 2794, 99th Cong. (1986).

n189. See, e.g., S. Rep. No. 101-303, at 2 (1990) (Senate Judiciary Committee issued an adverse report on general aviation legislation, concluding, inter alia, that "the General Aviation Accident Liability Standards Act [S. 640] should not be passed by the Senate and enacted into law. The bill has not been proven to be necessary and would represent an unwise policy decision on the part of the Senate, if adopted. Further, a number of the specific substantive provisions of the bill are so problematic that the entire bill is fatally flawed.").

n190. The House version of the legislation further clarified that it would only apply to limit suits brought against general aviation manufacturers in their capacity as manufacturers. See General Aviation Act, 2(a).

n191. Pub. L. No. 104-210, 110 Stat. 3011 (codified at 42 U.S.C.A. 1791 (West Supp. 1998)).

n192. The Food Donation Act applies to persons who donate as well as "glean" food, with "gleaner" defined to mean "a person who harvests for free distribution to the needy... an agricultural crop that has been donated by the owner." Id. 1791(b)(5) & (c)(1).

n193. The Food Donation Act defines "nonprofit organization" as an entity that (A) is operated for religious, charitable, or educational purposes; and (B) does not provide net earnings or operate in a manner that benefits any of its officers, employees, or shareholders. Id. 1791(b) (9).

n194. Id. 1791(b)(1), (b)(2),(c)(1) & (c)(2).

n195. Id. 1791(d).

n196. Id. 1791(d).

n197. The operative provisions of the law provide that persons, gleaners, and nonprofit organizations "shall not be subject to civil or criminal liability" arising from a specified set of circumstances. Id. 1791(c)(1) & (c)(2).

n198. See, e.g., H.R. Rep. No. 104-661, at 3 (1996).

n199. See, e.g., The Good Samaritan Food Donation Act, Hearing on H.R. 2428 Before the Subcomm. on Postsecondary Education, Training and Life-Long Learning of the House Comm. on Economic and Educational Opportunities, 104th Cong., 5 (1996) (statement of Rep. Danner) ("while each of the 50 states have Good Samaritan legislation in place, the level of protection differs and the liability concerns of the national and regional donors are not uniformly addressed. Adoption of this bill would eliminate this disparity and facilitate greater support of private sector feeding programs....").

n200. National and Community Service Act of 1990, 42 U.S.C. 12571, 12671-12673 (1994).

n201. See H.R. Rep. No. 104-494, at 405 (1996).

n202. The Senate adopted amendments which clarified that "gross negligence" included a failure to act and that the law did not supersede state or local health regulations covering nonprofit organizations. See 142 Cong. Rec. S9532 -33 (daily ed. Aug. 2, 1996).

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n203. Pub. L. No. 105-19, 111 Stat. 218 (codified at 42 U.S.C.A. 14501-14505 (West Supp. III 1997)).

n204. "Nonprofit organization" is defined to include any organization exempt from federal taxation under section 501(c)(3) of the Internal Revenue Code as well as any not-for-profit organized and conducted for the public benefit and operated primarily for charitable, civic, educational, religious, welfare or health purposes, so long as the group does not practice any action constituting a federal hate crime. Id. 14505(4).

n205. The Volunteer Protection Act does not provide any direct liability protections to the nonprofit organizations or government agencies. Id. 14503(c).

n206. "Volunteer" is defined to mean an individual (including a director or officer) performing services for a "nonprofit organization" or a governmental entity who does not receive compensation (other than reasonable expenses) in excess of $ 500 per year. Id. 14505 (6).

n207. Id. 14503(a)(3).

n208. Id. 14503(a)(1), (2) & (3). The Act also excludes from liability protection any specific misconduct constituting a crime of violence or international terrorism, hate crime, sexual offense, civil rights violation, or which is caused by the influence of alcohol or drugs in violation of state law as well as volunteers performing services for groups responsible for federal hate crimes (e.g., crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity). Id. 14503(f) & 14505(4). (Federal hate crimes are defined at 28 U.S.C. 534 note).

n209. Unlike the liability protections against acts of ordinary negligence, the Volunteer Protection Act's limitations on liability for **punitive damages** and joint and several liability for non-economic damages are not limited to actions where the volunteer was acting with any required license or was not caused by a motor vehicle. An additional variation in coverage concerns the scope of the joint and several liability damage limitations set forth in the Volunteer Protection Act. By its terms the provisions prohibiting actions against volunteers for ordinary negligence and limiting **punitive damage** actions do not apply to affect civil actions brought by a nonprofit or governmental entity against their volunteers. There is no such limitation contained in the provisions limiting non-economic damages in joint and several liability cases. See 42 U.S.C. 14503 (a), (c), (e) & 14504.

n210. Id. 14503(e)(1).

n211. Id. 14504(b)(1).

n212. Id. 14502(a). Under some scenarios, determinations regarding the interaction between state law and the Act could be problematic with regard to tort reforms. Consider a state such as Idaho where **punitive damages** may be established by a "preponderance of the evidence," but such awards are limited to "wanton, malicious or outrageous misconduct." Idaho Code 6-1604 (1996). In the event of a voluntary liability case in Idaho involving a **punitive damage** claim, it would be unclear whether a defendant would be permitted to use the stricter evidentiary requirement of the Volunteer Protection Act requiring "clear and convincing evidence" to establish **punitive damages,** while at the same time benefiting from the stricter state law requirement limiting **punitive damages** to "outrageous misconduct" (as compared to the Volunteer Protection Act's seemingly more lenient standard of "flagrant indifference to the rights or safety of others").

n213. Id. 14503(d)(1), (2) & (4).

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n214. Id. 14503(d)(3).

n215. Such opt-out authority would only apply to volunteer liability cases where all of the parties to the proceeding are residents of the state in question. Id. 14502(b).

n216. See, e.g., H.R. Rep. No. 105-101, pt. 1, at 5-8 (1997). In particular, supporters pointed to a 1996 report prepared by the Nonprofit Risk Management Center (an organization designed to meet the insurance and risk management needs of the nonprofit community) in cooperation with the ABA Section on Business Law which found that there had been a significant increase in the number of lawsuits brought against volunteers since the mid-1980's, and a study by the Independent Sector (an organization of foundations, charities, and businesses that tracks nonprofit activities) indicating that the rate of volunteerism had dropped from 54% in 1989 to 48% in 1993. Id. at 5-6 (1997); 143 Cong. Rec. S3861-62 (daily ed. May 1, 1997) (statement of Sen. Coverdell).

n217. 143 Cong. Rec. H3101 (daily ed. May 21, 1997) (statement of Rep. Hyde).

n218. See H.R. 911, 100th Cong. (1987).

n219. In 1993, Rep. Porter offered his bill as an amendment to the National Service Trust Act, and it was approved by the full House after a perfecting amendment offered by Rep. John Bryant was adopted (providing that as a condition of the volunteer immunity, the states require - rather than just permit - laws insuring that covered nonprofit organizations operate in a safe and sound manner). The Bryant amendment was approved by a vote of 239-194, and the Porter Amendment, as perfected by the Bryant Amendment, was agreed to by a vote of 362-61. See 139 Cong. Rec. H5376-82, H5422-23 (daily ed. July 28, 1993). The Porter amendment was subsequently dropped in conference with the Senate.

n220. See S. 543, 105th Cong. (1997); H.R. 1167, 105th Cong, 1st Sess. (1997).

n221. Further modest revisions were made to the bill when the House Judiciary Committee approved amendments providing that the bill would only apply to causes of action from events occurring after the bill's effective date and excluding from the bill's coverage volunteers performing services for groups responsible for federal hate crimes. See H.R. Rep. No. 105-101, pt. 1 at 9, 16 (1997).

n222. Pub. L. No. 105-134, 111 Stat. 2570 (codified at 49 U.S.C.A. 28103 (West Supp. 1998)).

n223. The Amtrak Act is analyzed as a federal tort reform herein because it operates to supersede state law, since Amtrak is not considered an agency or instrumentality for purposes of the Federal Torts Claims Act. See Senter v. Amtrak, 540 F. Supp. 557 (D.N.J. 1982) (Amtrak, unlike federal agencies and instrumentalities, found to be subject to **punitive damage** liability).

n224. 49 U.S.C. 28103(a)(1).

n225. Id. 28103(a)(2). It is unclear how the damage cap is to be apportioned in the event claims are established which exceed $ 200 million.

n226. Id. 28103(b).

n227. The introduced version of the legislation would have provided that such obligations "shall be enforceable, notwithstanding any other statutory or common law or public policy...." This was an effort to overturn a district court decision in National Railroad Passenger Corp v. Consolidated Rail Corp., 698 F. Supp. 951 (D.C. 1988), vacated, 892 F.2d 1066 (D.C. Cir.

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1990) (voiding an indemnification agreement between "mtrak and Conrail implicated by a 1987 Chase, Maryland collision as being against public policy). See H.R. 2247, 105th Cong. 401 (1997); H.R. Rep. No. 105-251, at 7, 22 (1997).

n228. 49 U.S.C. 28103(c).

n229. See, e.g., H.R. Rep. No. 105-251, at 21 (1997).

n230. Id. The report of the House Committee on Transportation and Infrastructure also rejected safety concerns raised by the liability limitations, due to the claimed extensive federal regulatory role: "Railroad safety is subject to regulation by the Federal Railroad Administration. Under current law, any single violation of a federal safety law or regulation can subject an individual or a company to a fine from $ 500 to $ 10,000 - with the maximum increased to $ 20,000 for willful violations." Id. at 22.

n231. H.R. 2247, 105th Cong. 401 (1997).

n232. Id.

n233. See, e.g., H.R. Rep. No. 105-251, at 93-94 (1997) (minority views contending that reforms initially approved by the Committee were "neither fair nor sensible." In particular, the views complained that **punitive damages** should not be linked to the amount of economic loss, non-economic damages should not be dependent on economic damages, and mandating the upholding of indemnification agreements would encourage recklessness by the freight railways).

n234. Biomaterials Access Assurance Act of 1988, Pub. L. No. 105-230, 112 Stat. 1519 (1998) (codified at 21 U.S.C. 1601-1606) (1998)).

n235. The Biomaterials Access Assurance Act of 1998 limits the liability under state product liability law of biomaterials suppliers that directly or indirectly supply component parts or raw materials for use in the manufacture of an implant, to only those who fail to meet contractual and other specifications and such conduct was an actual and proximate cause of the harm to the claimant. Id. 5(a).

A biomaterials supplier does not receive liability protection under the "failure to meet contractual specifications" exception if the raw materials or component parts delivered: (1) did not constitute the product described in the contract; (2) failed to meet any specifications that were provided to the supplier and not expressly repudiated; (3) failed to meet any specifications published by the biomaterials supplier; (4) failed to meet any specifications provided to the manufacturer by the biomaterials supplier; (5) failed to meet any specifications contained in a master file submitted by the supplier to the Secretary of Health and Human Services and that is currently maintained by the supplier for the purposes of premarket approval of medical devices; or (6) failed to meet any specifications included in the submissions for purposes of premarket approval or review by the FDA provided by the manufacturer to the supplier and not repudiated by the supplier. Id. 5(d).

The Biomaterials Access Assurance Act of 1998 also requires the manufacturer of an implant to be named a party unless the manufacturer is subject to service of process solely in a jurisdiction in which the biomaterials supplier is not domiciled or subject to a service of process, or if an action against the manufacturer is barred by applicable law. Id. 6(b).

n236. Common Sense Product Liability and Legal Reform Act, H.R. Conf. Rep. No. 104-481 (1996). Provisions to protect biomaterials suppliers were also included in the Senate Product Liability Proposal during the 105[su'th'] Congress.

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n237. Biomaterials Access Assurance Act of 1997: Hearing on H.R. 872 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 105th Cong., 1st Sess. 96 (1997) (statement of Jorge E. Ramirez, Sales and Marketing Manager, Hoechst Corp.). Proponents of the Act also argued that the patchwork of fifty separate product liability laws leads to venue-shopping and confusion and that the system can be improved by limiting the liability of materials suppliers. Id.

n238. See supra note 235 at 7. In order to implead a supplier back into the action, a manufacturer or a claimant must file a motion within 90 days after entry of a final judgment.

n239. Id. 3(2)(D)(iii). The Biomaterials Access Assurance Act also excludes actions involving: (1) health care providers where the sale or use of an implant is incidental to the transaction and where the essence of the transaction is the furnishing of judgment, skill, or services; and (2) a person acting in the capacity of a manufacturer, seller, or biomaterials supplier. Id. 3(2)(D)(i) & (ii).

n240. Id. 6(a). Grounds for the motion to dismiss include that the defendant is: (1) a biomaterials supplier; and (2) is not a manufacturer, or a seller of the implant or it has not been established that it supplied raw materials or component parts in violation of the contractual requirements or specifications.

n241. Id. 6(c). The Act specifies a number of rules pertaining to the motion to dismiss. For example, in a proceeding on a motion to dismiss, the defendant may submit an affidavit demonstrating that it has not included the implant on a list filed with the Secretary of Health and Human Services. Id. 6(c)(2)(A). The claimant may then submit an affidavit demonstrating that the Secretary of Health and Human services has issued a declaration with respect to the defendant and the implant or demonstrating that the defendant is liable as a seller of the implant. Id. 6(c)(2)(B). If a defendant files a motion to dismiss, no discovery will be permitted in connection to the action that is the subject of the motion, other than discovery necessary to determine a motion to dismiss for lack of jurisdiction until the court rules on the motion to dismiss based on the affidavits submitted by the parties. Id. 6(c)(1)(A). If a defendant files a motion to dismiss on the grounds that the biomaterials supplier did not supply raw material or component parts in violation of contractual requirements or specifications, the court may permit discovery that is limited to issues relevant to the pending motion to dismiss or the jurisdiction of the court. Id. 6(c)(1)(B). Unless the defendant is demonstrated to be a manufacturer or seller of the implant, the court will consider the defendant to be a biomaterials supplier who is not subject to an action for harm to a claimant caused by an implant, other than an action relating to liability for a violation of contractual requirements or specifications. Id. 6(c)(3)(A). The court is required to grant a motion to dismiss any action that asserts liability of the defendant on the grounds that the defendant is not a manufacturer or seller unless the claimant submits a valid affidavit demonstrating that the defendant is liable as a manufacturer or a seller. Id. 6(c)(3)(B). The court is required to rule on a motion to dismiss solely on the basis of the pleadings and affidavits submitted by the parties. Id. 6(c)(3). If the court determines that the pleadings and affidavits raise genuine issues of material facts with respect to a motion concerning contractual requirements and specifications, the court may deem the motion to dismiss to be a motion for summary judgment. Id. 6(c)(4).

n242. Id. 6(d) & 5(b)(3)(D). Under the Act, a biomaterials supplier is entitled to summary judgment only if the court finds no genuine issue of material fact as to the legal requirements for dismissal. Discovery prior to a ruling on a summary judgment motion is limited to establishing whether a genuine issue of material fact exists as to the legal requirements of dismissal. In response to a claimant's petition for a declaration, the court is required to stay all proceedings with respect to a defendant until the Secretary makes a final decision as to whether the defendant is a manufacturer and may incur liability.

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n243. Id. 7(c) & 7(b)(1).

n244. Pub. L. No. 106-37, 113 Stat. 6601 (codified at 15 U.S.C. 6601-17 (1999)).

n245. H.R. Rep. No. 106-131, pt. 1, at 14 (1999).

n246. Id.

n247. Id. 5(a).

n248. Id. 5(b)(2). Section 5(c) of the **Y2K** Act contains an absolute prohibition on the award of **punitive damages** in a **Y2K** action against a "government entity." Because of concern that this would protect public, but not private, universities, the Consolidated Appropriations Act for Fiscal Year 2000 amended Section 5 of the **Y2K** Act to prohibit the award of **punitive damages** against all institutions of higher education. Consolidated Appropriations Act for Fiscal Year 2000, Pub. L. No. 106-113, 311, 113 Stat. 151 (1999). (The provision will not apply to an institution of higher education if the **Y2K** failure in the **Y2K** action occurred in a computer-based student financial aid system of that institution of higher education, and the institution: (1) has not passed **Y2K** data exchange testing with the Department of Education or (2) is not or was not in the process of performing data exchange testing with the Department of Education at the time the Department terminates such testing.).

n249. Id. 5(b).

n250. Id. 6. In addition, if portions of the plaintiff's damage claim ultimately prove to be uncollectible, and the plaintiff is an individual with a net worth of less than $ 200,000 (a so-called "widow or orphan") and damages are greater than 10% of a plaintiff's net worth, a solvent defendant is responsible for paying an additional 100% share of their liability, or an additional 150% of this amount if they acted with "reckless disregard for the likelihood that its acts would cause injury."

n251. Id. 4(d).

n252. Id. 11. The legislation does not specify whether it would be appropriate to enforce a damage limitation that was found to be unconscionable or a provision of adhesion, as is generally the case under section 4(d) of the Act.

n253. Id. 9. This limitation on damages does not apply where the defendant has engaged in fraud.

n254. Id. 12. Some Democrats and the Administration sought to limit the applicability of the new rule so that it would not apply where there was fraud in the inducement. Ultimately, the legislation only excluded claims for intentional tort which arise independent of a contract.

n255. Id. 10. It is unclear if this would prevent courts from looking to common law interpretations on these doctrines which develop after January 1, 1999. It is also unclear whether this provision would apply to protect plaintiffs in the event a state changed their law to further expand these doctrines, given that section 16 says the law is not to be construed to affect state law affording greater protections to defendants in **Y2K** actions.

n256. Id. 13(a).

n257. Id. 13(b).

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n258. Id. 13(c).

n259. Id. 7.

n260. Id. 8.

n261. Id. 15(c). The only exceptions to the mandated federal court jurisdiction for **Y2K** class actions are where (1) a substantial majority of members of the plaintiff class are citizens of a single state, the primary defendants are citizens of that state, and the claims asserted will be governed primarily by the laws of that state; (2) the primary defendants are states or state officials; (3) the plaintiff class does not seek an award of **punitive damages** and the amount in controversy is less than $ 10 million; or (4) there are less than 100 members of the class. The burden is on the plaintiff to establish that any of these four exceptions apply.

n262. See, e.g., Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, 106[su'th'] Cong. (1999); Class Action Fairness Act of 1999, S. 353, 106[su'th'] Cong. (1999). [ck nexis]

n263. Id. 15(a) & (b). The class notice is also required to include information concerning the attorney's fee arrangements.

The **Y2K** Act includes several other minor procedural and technical provisions, including regulatory relief from penalties for **Y2K** related reporting or monitoring violations (4 (g)); consumer protection to ensures that homeowners cannot be foreclosed on due to a **Y2K** failure (4(h)); authorizing federal courts to appoint special masters to consider **Y2K** matters (14); applying Rule 704 of the Federal Rules of Civil Procedure (concerning the use of expert testimony) to state courts (17); and civil penalty waivers for first-time violations by a small business of federally enforceable rules or requirements that are caused by a **Y2K** failure (18);

n264. Id. 4(a).

n265. Statement on Signing **Y2K** Act, 35 Weekly Comp. Pres. Doc. 143 (July 20, 1999).

n266. Id. 4(c).

n267. Id. 4(i).

n268. Id. 16.

n269. See House Democratic substitute offered by Rep. Conyers (D-MI), 145 Cong. Rec. H3039-51(daily ed. May 12, 1999); Senate Democratic substitute offered by Sen. Kerry (D-MA), 145 Cong. Rec. S657B76 (daily ed. June 12, 1999).

n270. The House passed version of H.R. 775 included: (i) a "reasonable efforts" defense providing that the fact that a defendant took reasonable measures to prevent the **Y2K**-related failure was a complete defense to liability; (ii) a "loser pays" (or "English Rule") provision requiring a litigant to be liable to pay the other side's attorneys' fees if they rejected a pre-trial settlement offer and ultimately secured a less favorable verdict; and (iii) a provision capping the personal liability of corporate directors and officers at the greater of $ 100,000 or their past 12-months' compensation. See H.R. 775, 106[su'th'] Cong, 303, 507, & 305.

n271. See **Y2K** Act 5(b), 6, 9, & 12 (limiting protections relating to **punitive damages,** proportionate liability, duty to mitigate, and "economic loss" rule).

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n272. Among other things, the legislation would have created federal liability standards along with a statute of limitations and repose and restricted the availability of **punitive damage** awards. For a detailed legislative history of federal product liability reform efforts, see S. Rep. No. 105-32, at 15-19 (1997); Victor E. Schwartz & Mark A. Behrens, Federal Product Liability Reform in 1997: History and Public Policy Support Its Enactment Now, 64 Tenn. L. Rev. 595, 599 - 601 (1997); Sherman Joyce, Product Liability Law in the Federal Arena, 19 Seattle U. L. Rev. 421 (1996); Beth Rogers, Note, Legal Reform - at the Expense of Federalism? House Bill 956, Common Sense Civil Justice Reform Act and Senate Bill 565, Product Liability Reform Act, 21 U. Dayton L. Rev. 513, 517 - 519 (1996).

n273. Product Liability Reform: Hearing Before the Committee on the Judiciary, 105th Cong. 9 (1997) (statement of Peter H. Hickok, Owner, Hickok Manufacturing Co., Inc.); Product Liability and Legal Reform: Hearing on H.R. 10 Before the Committee on the Judiciary, 104th Cong. 1 (1995) (statement of Rep. Hyde). See also Michael Rustad, Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers, 48 Rutgers L. Rev. 673 (1996).

n274. Message on Returning Without Approval to the House of Representatives the Common Sense Product Liability Legal Reform Act of 1996, 32 Weekly Comp. Pres. Doc. 780 (May 2, 1996). The President's Veto Statement opposed, inter alia, provisions eliminating joint and several liability for non-economic damages and the limitations on **punitive damages.** It also noted that the legislation inappropriately intruded on state authority. The House failed to obtain the two-thirds vote necessary to override the President's veto on May 9, 1996 by a vote of 258 to 163. See 142 Cong. Rec. H4764 (daily ed. May 9, 1996).

n275. The Product Liability Reform Act of 1998, S. 2236, 105[su'th'] Cong. (1998). The Senate Proposal applies to a broad range of "product liability actions," defined as a civil action brought on any theory for harm caused by a product. Id. 101(16). It omits any provision concerning joint and several liability, and narrows the scope of a number of other provisions included in last Congress' product liability bill.

n276. See 144 Cong. Rec. S7255 (daily ed. June 26, 1998).

n277. A small business is defined as those with fewer than 25 full time employees and annual revenues of $ 5 million or less. Id. 110(b)(2)(A)(ii). The annual revenues and numbers of employees of a corporation include the annual revenues and employees of any parent corporation, subsidiary, branch, division, or unit of that corporation. Id. 110(b)(2)(B)(i) & (ii).

n278. Id. 110(b)(1)(A) & (B). Compensatory damages include both economic and non-economic damages. Id. 101(6).

n279. Id. 110(a)(1). The Senate Proposal also provides for a bifurcated determination of **punitive damage** awards. Under the proposal, any party may request that the court consider in a separate proceeding, subsequent to the determination of compensatory damages, whether **punitive damages** should be awarded. Id. 110(a)(2)(A).

n280. Id. 111.

n281. Id. 106(a), Id. 107(a).

n282. Id. 106(a). The proposal provides an exception to the statute of limitations so that persons with a legal disability may file a product liability action up to two years after the date in which the person ceases to have the disability. Id. 106(b)(1). It also provides that if a civil action is stayed or enjoined, the statute of limitations will be tolled until the end of the stay

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or injunction. Id. 106(b)(2). Finally, if a statute of limitations or statute of repose provision shortens the period during which a product liability action could be otherwise brought, the claimant may bring the product liability action within one year after the date of enactment of the legislation. Id. 108.

n283. Id. 107(a). The proposal provides exceptions to the statute of repose for (1) motor vehicles, vessels, aircraft or trains used primarily to transport passengers for hire, (2) actions based on an express warranty in writing for longer than eighteen years, and (3) the limitation period established by the General Aviation Revitalization Act of 1994. Id. 107(c).

n284. Id. 104(a).

n285. Id. 105(a).

n286. Id. 105(a)(1)(A) & (B).

n287. Id. 105(b).

n288. Id. 103(a)(1). Under the proposal, a product seller will not be considered to have failed to exercise reasonable care if there was no reasonable opportunity to inspect the product, or if the inspection would not have revealed the aspect of the product that allegedly caused the claimant's harm. Id. 103(a)(2).

n289. Id. 109(a) & (b). Under the proposal, the claimant or defendant may offer to an adverse party to proceed under ADR within 60 days of the service of the initial complaint or the expiration of the period for a responsive pleading, and an offeree must file a written notice of acceptance or rejection within 20 days of receipt of the offer.

n290. Id. 101(15)(B) & 102(a)(2).

n291. Id.

n292. Title II of the Senate Product Liability Proposal also included relief for suppliers of raw materials and component parts for medical implants, a form of which was subsequently signed into law. See supra section IV.A.5.

The Senate Proposal includes a general preemption provision, indicating that except as otherwise provided, the legislation is to preempt certain state law on a "two-way" basis. As such, the bill could operate to preempt some laws that are more favorable to defendants than the draft provides. For example, under the Senate Proposal, actions brought in states which do not have a statute of limitations running from the time harm is discovered would be subject to a lengthier statute of limitations period than under their currently applicable law. See supra note 283 (for example, Virginia bars claims filed a specified number of years after a person has been injured, regardless of whether the person actually knew of the injury. See VA Code Ann. 8.01-243 (Michie 1997)). The preemption provisions are not drafted to provide causes of action where they do not otherwise exist. For example, the **punitive damages** caps would only apply in states which otherwise allow for **punitive damages,** rather than allowing for **punitive damage** actions in all states. Id. 110(a)(1).

n293. See Balanced Budget Act of 1997, H.R. 2015, 105th Cong. (1997); Health Care Coverage Availability and Affordability Act, H.R. 3160, 104th Cong. (1996); Balanced Budget Act of 1995, H.R. 2491, 104th Cong. (1995); Common Sense Product Liability and Legal Reform Act of 1995, H.R. 956, 104th Cong. (1995).

n294. See, e.g., Rep. Bill Thomas, Rest of Country Deserves Medical Liability Reforms State of California Passed for itself Two Decades Ago, Roll Call, Nov. 13, 1995 (Health Care Policy

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Briefing), at 9.

n295. See supra note 294.

n296. A health care liability action is defined as a civil action brought in a state or federal court against a health care provider, an entity which is obligated to provide or pay for health benefits under any health plan (including any person or entity acting under a contract or arrangement to provide or administer a health benefit), or the manufacturer, distributor, supplier, marketer, promoter, or seller of a medical product in which the claimant alleges a health care liability claim. Id. 4802(10).

n297. Id. 4812(a)(1). Non-economic damages are defined as damages paid to an individual for pain and suffering, inconvenience, emotional distress, mental anguish, loss of society and companionship, injury to reputation, humiliation, and other subjective, nonpecuniary losses. Id. 4802(14).

n298. Id. Although there is no provision dealing with preemption issues, these provisions are written so they would not preempt any state law with higher liability caps.

n299. Id. 4812(a)(2).

n300. Id. 4811(a). The proposal provides an exception so that persons with a legal disability may file an action up to two years after the date on which they cease to have the legal disability. Id. 4811(b). It also provides a transitional provision so that if a provision under the statute of limitations shortens the period during which a health care liability action would be brought, the claimant may bring an action up to two years after the date of enactment of this Act. Id. 4811(c).

n301. Id. 4812(b)(2). Economic loss is defined in the proposal as any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities), to the extent recovery for such loss is allowed under applicable state or federal law. Id. 4802(8).

n302. Id. 4812(b)(1). The proposal also allows for bifurcated proceedings for the consideration of **punitive damage** claims and ban **punitive damage** awards in the case of drugs or other devices that have been approved by the FDA or any other drug generally recognized as safe and effective pursuant to FDA-established conditions. Id. 4812(c)(2), (d)(1). The ban on **punitive damages** would not apply in cases where the defendant intentionally and wrongfully withheld from or misrepresented information to the Food and Drug Administration that is material and relevant to the harm suffered by the claimant. Id. 4812(d)(1)(B).

n303. In addition, the House Medical Malpractice Proposal requires that any ADR system used to resolve health care liability actions or claims must include provisions specified in the bill regarding statute of limitations, non-economic damages, joint and several liability, **punitive damages,** the collateral source rule, and periodic payments of damage awards. Id. 4813.

n304. Id. 4812(E). The judgment of the court awarding periodic payments may not be reopened to contest, amend, or modify the schedule or amount of the payments, absent any fraud.

n305. Under the collateral source rule, a victim is able to obtain compensation for the full amount of damages incurred, and his or her health insurance provider is able to seek subrogation in respect of its own payments to the victim. See Restatement (Second) Torts

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derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize those laws as operative within the state as it is to recognize the state laws." [58]

C. Black Lung Benefits Act of 1972

Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972 [59] ("Black Lung Benefits Act"), requires that employers provide benefits to coal miners suffering from "black lung disease" (pneumonoconiosis) and their survivor families. [60] Although enacted more than sixty years after the 1908 Employers' Liability Act, The Black Lung Benefits Act can be seen as consistent with the first wave of federal tort reforms through its restrictions on employer legal rights. [61]

[*600] Shortly after the Black Lung Benefits Act was enacted, a number of coal mine operators challenged its constitutionality, claiming it violated their Fifth Amendment due process rights because it applied "retrospectively" (by requiring the benefit payments be made to miners who had left employment before the law's effective date), and asserting that the presumptions and evidentiary rules were arbitrary and irrational. [62] In 1976, the Supreme Court upheld the constitutionality of these provisions in Usery v. Turner Elkhorn Mining Co. [63]

In reviewing the retrospective applicability of the Black Lung Benefits Act, the Court observed it was "by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality," [64] and it had previously upheld laws effectuating "workmen's compensation principles analogous to those enacted here." [65] In this case, the Court found that the retrospective liability scheme in question was justified and rational, even though it applied to mine operators doing business prior to the law's enactment:

We are unwilling to assess the wisdom of Congress' chosen scheme by examining the degree to which the "cost-savings" enjoyed by operators in the pre-enactment period produced "excess" profits, or the degree to which the retrospective liability imposed on the early operators can now be passed on to the consumer. It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical is not a question of constitutional dimension. [66]

[*601] The Court applied a similar analysis in considering the various challenges to the Black Lung Benefits Act's presumptions and evidentiary rules, finding each to have a rational basis. [67] In dicta, however, the Court refused to grant Congress totally unfettered discretion in setting liability rules, indicating it might face a far more difficult problem upholding legislation granting benefits retrospectively to families of miners who did not die of black lung disease and who were unaware and unaffected by the illness during their lives. [68]

III. THE SECOND WAVE: ENCOURAGING BENEFICIAL ACTIVITIES BY LIMITING PLAINTIFFS' COMMON LAW RIGHTS IN EXCHANGE FOR OFFSETTING LEGALBENEFITS

The second wave of federal tort reform began in the middle of the 20[su'th'] century when Congress enacted a number of laws granting liability protections for defendants while generally providing substitute remedies for harmed parties. The following is an analysis of these "second wave" laws which have been challenged on constitutional grounds. [69]

A. Federal Drivers Act

In 1961, Congress enacted the Federal Drivers Act, [70] making the Federal Torts Claims Act the exclusive remedy for injuries resulting from the operation of a motor vehicle by

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920(A) (1979).

n306. Id. 4812(F). If the defendant introduces evidence of collateral source payments, the claimant may introduce evidence of the insurance amount that is paid or likely to be paid to secure the collateral source payment. Id. 4812(F)(1). The provider of the collateral source payment cannot recover any amount against the claimant or receive a lien or credit against the claimant's recovery, or be subrogated the right of the claimant, whether the action is settled or tried. Id. 4812(F)(2).

n307. Proposed Tobacco Industry Settlement, 12.3 TPLR 3.203 (June 20, 1997). Legislation was introduced in the 105[su'th'] Congress which would convert the provisions of the Proposed Resolution into legislative language. See Universal Tobacco Settlement Act, S. 1414, 105th Cong. (1997) . Eventually, the Senate considered a version of the legislation which excluded many of the litigation descriptions described herein, but the Senate failed to invoke cloture to cut off debate on the legislation. See Universal Tobacco Settlement Act, S. 1415, 105[su'th'] Cong. (1997); 144 Cong. Rec. S6743 (daily ed. June 17, 1998).

n308. The Civil Liability Portions of the Proposed Tobacco Settlement: Hearing Before the House Comm. On the Judiciary, 105[su'th'] Cong. (1998) (written statement of Meyer Koplow at 3-4).

n309. Id. at 3.221, Title VIII.B.1. The settlement deems a one-time $ 60 billion payment made by the tobacco industry to public health funds to constitute resolution of past **punitive damage** claims. Proponents also argue that given the poor record of private tobacco plaintiffs to date, these litigation "concessions" will have little practical impact. See 12.3 TPLR at 3.203-3.205 ("none of [the past civil actions] has to date resulted in the collection of any monies to compensate smokers or third-party payors").

n310. The Tobacco Settlement also eliminates claims against sellers entirely (Title VIII.B.5), whereas the Senate Product Liability Proposal would limit seller liability to claims involving failure to exercise reasonable care, violation of an express warranty, and intentional wrongdoing. See supra note 289 and accompanying text.

n311. 12.3 TPLR at 3.221, Title VIII.A.

n312. Id. at 3.218, Title VI.B.3. The Industry Base Payment is to be increased to account for inflation at a rate of the greater of 3% or the consumer price index, and is to be decreased to account for any cumulative decline in unit cigarette volume (from the 1996 base). Each participating company's share of the Industry Base Payment is to be based on their respective current market shares.

n313. Under the settlement proposal, obligations for annual payments apply only to entities selling into the domestic market. Id. Title VI.B.6

n314. Id. at 3.222, Title VIII.B.10. Under the settlement, "the Commission will be entitled to consider, among public health, governmental entities, and other uses of the funds, applications for compensation from persons, including non-subrogation claims of third party payors, not otherwise entitled to compensation under the Act."

n315. Id. at 3.221, Title VIII.B.9. The litigation co-payment provision was apparently included to provide an incentive for the tobacco industry to fully defend themselves in liability actions.

n316. Id. Title VIII.B.9.

n317. Id. Any excess rolls forward without interest to be paid at a rate of $ 1 million per

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year, until the first year that the annual aggregate cap is not exceeded, at which time the remainder is to be paid in full. The settlement treats any eligible third party payer actions not based on subrogation (i.e., those filed before June 9, 1997) as having been brought by a single plaintiff and subject to the $ 1 million rollover requirement.

n318. Id. at 3.215, Title III.

n319. Id. Title VIII.B.11. Although not set forth in the settlement, several of the parties have separately agreed that the tobacco industry will pay up to $ 500 million per year to attorneys representing the states with the specific amounts to be determined by a panel of three arbitrators. See Suein Z. Hwang & Milo Geyelin, Tobacco Concerns Set Pact on Legal Fees, Wall St. J., Dec. 2, 1997, at A2.

n320. 12.3 TPLR at 3.221, Title VIII.B.4.

n321. Id.

n322. A subrogation suit would include a health insurer seeking to recoup any medical benefit payments it made to a claimant.

n323. 12.3 TPLR at 3.221, Title VIII.B.5.b. This means, for example, that asbestos defendants and union health and welfare funds which have paid workers for cancer and other disease claims would be unable to bring suit seeking reimbursement from tobacco companies for their portion of smoking related diseases.

n324. Id. Title VIII.B.2. The settlement provides for "individual trials only," specifically barring "class actions, joinder, aggregations, consolidations, extrapolations or other devices to resolve cases other than on the basis of individual trials, without defendant's consent." This provision is subject to enforcement by removal to federal court by the defendant "upon receipt or application to, or order of, state court providing for trial or other procedure in violation of the [individual trial] provision." Id.

n325. Id. at 3.232, Appendix VIII.3. The three judge panel is to be appointed by the Judicial Conference and is to decide the disputes in accordance with the ABI/ALI Model Rules and principles of federal law concerning privilege and the Uniform Trade Secrets Act concerning trade secrecy. The panel's costs are to be borne by the tobacco industry, which is also required to pay their opponents' costs and attorneys' fees if the tobacco company did not have a good faith factual and legal basis for the assertion of the privilege.

n326. Id. at 3.221, Title VIII(B)(7). An example of a reduced risk tobacco product would be a less carcinogenic cigarette.

n327. Id.

n328. For a general discussion of the constitutionality of various tort reform laws and proposals, see Henry Cohen, The Constitutionality of Federal Tort Reform Legislation, CRS Report for Congress (Oct. 24, 1997); Kathryn L. Vezina, Note, Constitutional Challenges to Caps on Tort Damages: Is Tort Reform the Dragon Slayer or is it the Dragon?, 42 ME. L. REV. 218 (1990); Susan C. Schmidt & Andrew B. Derman, The Constitutionality of Federal Products Liability/Toxic Tort Legislation, 6 J. PROD. LIAB. 171 (1983); Martin H. Redish, Legislative Responses to the Medical Malpractice Insurance Crisis: Constitutional Implications, 55 TEX L. REV759 (1977).

n329. For a general analysis of Commerce Clause issues in the context of federal tort reforms, see Jerry J. Phillips, Hoisted by One's Own Petard: When a Conservative Commerce Clause Interpretation Meets Conservative Tort Reform, 64 TENN L. REV 647 (1997).

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n330. 207 U.S. 463 (1907).

n331. See supra note 37 and accompanying text.

n332. Article I, Section 8 of the Constitution provides, inter alia, "Congress shall have Power... To regulate Commerce with foreign Nations and among the several States...." U.S. Const. art I, 8, cl. 3.

n333. The Court went from NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), to Lopez v. United States, 514 U.S. 549 (1995), without striking down a single federal law on Commerce Clause grounds.

n334. 514 U.S. 549 (1995).

n335. 18 U.S.C. 922(q)(2)(A) (1994) (The Gun-Free School Zones Act of 1990 made it a federal criminal offense to knowingly possess a firearm in a school zone).

n336. See, e.g., T.R. Goldman, Lopez Gives Tort Reform a New Weapon, Legal Times, May 8, 1995, at 2 (quoting Harvard Law School Professor Lawrence Tribe for the proposition that "Lopez is a reminder that the commerce clause is not a blank check. As such, it will operate to at least raise significant questions about some of the elements of proposed tort reforms pending in Congress").

n337. Commerce Clause concerns may also be raised in the context of other tort reforms. For conflicting views on the likely constitutionality of federal product liability and medical malpractice legislation, see Schwartz & Behrens, supra note 273 at 606-7 ("in contrast to [the Gun-Free School Zones Act struck down in Lopez], product liability is without question a matter of interstate commerce"); Phillips, supra note 330 at 663 ("the four factors of Lopez - legislative findings, jurisdictional fact, localness, and nature of the activity - all point to varying degrees to the conclusion that [product liability legislation] may well be unconstitutional if enacted under the authority of the Commerce Clause"); Rogers, supra note 273 at 540 ("Because Congress' claim to Commerce Clause authority is based on arbitrary conclusions [product liability legislation] is constitutionally questionable"); Robert M. Ackerman, Tort Law and Federalism: Whatever Happened to Devolution?, 14 YALE L. & POL'Y REV. 429, 441 (1996) ("the increasingly commercial nature of medical practice would almost certainly qualify [it] for federal regulation under the commerce power"); Gary T. Schwartz, Considering the Proper Federal Role in American Tort Law, 38 ARIZ. L. REV. 917, 922 ("the federal interest in malpractice is doubtful: malpractice seems strikingly lacking in either [interstate] spill-over effects or a clear uniformity need").

n338. 514 U.S. at 558-559.

n339. Id. at 559-568. If challenged, the laws' defenders should be able to assert that the mere fact that the regulated activity involves "non-profit" as opposed to "for-profit" activity is not necessarily dispositive of the Commerce Clause issue. For example, last term in Camps Newfound/Owatonna v. Town of Harrison, U.S. ; 117 S.Ct. 1590, 1602 (1997), the Supreme Court found that the so-called "dormant Commerce Clause" was implicated by a Maine law concerning non-profits, observing "there is no reason why an enterprise's nonprofit character should exclude it from the coverage of either the affirmative or the negative aspect of the [Commerce] Clause...."

n340. 42 U.S.C.A. 14501(a)(7) (West Supp. III 1997).

n341. See, e.g., H.R. Rep. No. 105-101, pt. 1, at 6-7 (1997) ("Volunteerism is a national activity and the decline in volunteerism is a national concern. And in many cases, volunteer

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activities cross state lines.... The patchwork quality of state volunteer liability laws also has a negative effect on the cost of insurance. Because of the small size of the market for volunteer liability insurance, insurers do not differentiate among the states."); 143 Cong. Rec. S3879 (daily ed. May 1, 1997) (statement of Sen. McConnell) ("If the Kentucky Red Cross volunteer wants to cross over into Tennessee or Ohio or Illinois or Indiana or West Virginia or Virginia and help his neighbor recover from a flood, then he should not have to call his lawyer to check on his liability potential in a surrounding state. We must have a uniform minimum standard.").

n342. 514 U.S. at 612.

n343. 24 F.3d 602 (4th Cir. 1994), cert. denied, 514 U.S. 1103 (1995).

n344. 25 F.3d 1042 (4th Cir. 1994), cert. denied, 514 U.S. 1102 (1995). See also Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995), cert. denied, Cargill, Inc. v. United States, 516 U.S. 955 (1995) (existence of migratory birds on property created sufficient nexus with interstate commerce to permit regulation of lands by Army Corps of Engineers under the Clean Water Act).

n345. 18 U.S.C. 844(I) (1994).

n346. See Ramey, 24 F.3d at 607; United States v. Moore, No. 93-5273, 1994 U.S. App. LEXIS 14314, at *10-11 (4th Cir. Apr. 13, 1994). See also Ackerman, supra note 338 at 439 (arguing Lopez is undercut by numerous circuit court decisions upholding the Freedom of Access to Clinic Entrances Act on Commerce Clause grounds).

But see Brzonkala v. Virginia Polytechnic Institute & State Univ., 169 F.3d 820 (4th Cir. 1999)(en banc), cert. granted, sub. nom., U.S. v. Morrison, 120 S.Ct. 11 (U.S. Sept. 28, 1999) (No. 99-5, 99-29) (striking down the civil rights remedy of the Violence Against Women Act of 1994 as an unconstitutional exercise of Congress's powers under the Commerce Clause and Section 5 of the Fourteenth Amendment).

n347. 514 U.S. at 561 (emphasis added).

n348. Id. at 567-68.

n349. Id. at 562.

n350. Supra notes 345 & 346.

n351. 18 U.S.C. 844(I) (1994) (applying federal criminal law to crimes against property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce").

n352. 18 U.S.C.A. 922(q)(2)(A) (1994) (amended 1996) (West Supp. 1998).

n353. 207 U.S. 463 (1907).

n354. 223 U.S. 1 (1912).

n355. This was one of the principal constitutional concerns with the Volunteer Protection Act highlighted by the Justice Department Office of Legal Counsel in their comments on the legislation. They wrote that even with an express congressional finding creating a nexus between volunteer liability and the Federal Government, "we are concerned that the bill might invite challenge as to Congress' source of authority because it is not directly tied to Congress' spending power... and not limited to volunteer organizations that engage in

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interstate commerce or liability that arises by reason of volunteer services affecting interstate commerce." (Office of Legal Counsel Comments on S. 543, Volunteer Protection Act of 1997 (on file with authors) (citations omitted)).

n356. 514 U.S. at 641.

n357. Id. at 651-52.

n358. See Nonprofit Risk Management Center, State Liability Laws for Charitable Organizations and Volunteers (1996); La Vonne Grabiak, State Laws Limiting Liability of Food Donors, CRS Memorandum for Congress (March 16, 1987). But see The Second Employers' Liability Cases, supra note 53 (disregarding that state workplace liability laws "were far from uniform" in upholding the constitutionality of the 1908 Act).

n359. 514 U.S. 549.

n360. Section Five of the Fourteenth Amendment grants Congress "the power to enforce, by appropriate legislation, the provisions of the [Fourteenth Amendment]." U.S. Const. amend XIV, 5.

n361. S. 648, 2 (a)(9) (1997). The Commerce Committee Report also concludes that "Federal legislation to reform **punitive damages** falls squarely within the 'broad power' of Congress to 'carry out' both the letter and spirit of the Fourteenth Amendment." S. Rep. No. 105-32, at 45 (1997).

n362. 42 U.S.C.A. 14501(a)(7)(D)(ii) (West Supp. III 1997). The House Judiciary Committee Report included a "Constitutional Authority Statement" stating that the legislation was authorized under both the Commerce Clause and the Fourteenth Amendment. H.R. Rep. No. 105-101, pt. 1, at 13 (1997).

n363. See, e.g., South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) (provisions in the Voting Rights Act of 1965); Katzenbach v. Morgan, 384 U.S. 641 (1966) (ban on literacy tests that had prevented certain persons schooled in Puerto Rico from voting); Oregon v. Mitchell, 400 U.S. 112 (1970) (5-year nationwide ban on literacy tests); City of Rome v United States, 446 U.S. 156 (1980) (extension of Voting Rights Act's requirement that certain jurisdictions pre-clear changes in voting procedures). These laws implicated Congress' due process power under the Fourteenth Amendment and voting rights powers under the Fifteenth Amendment.

n364. 521 U.S. ; 117 S.Ct. 2157; 138 L.Ed. 624; 65 U.S.L.W. 4612 (U.S. June 25, 1997).

n365. 42 U.S.C. 2000bb-2000bb-4 (1994) (prohibiting federal, state, and local governments from substantially burdening the exercise of religion).

n366. 65 U.S.L.W at 4615, quoting South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966).

n367. 65 U.S.L.W. at 4618 (citations omitted).

n368. 517 U.S. 559, 116 S.Ct. 1589, 134 L. Ed. 2d 809, 64 U.S.L.W. 4335 (1996).

n369. 64 U.S.L.W. at 4339.

n370. 512 U.S. 415 (1994).

n371. An amendment to the Oregon Constitution prohibits judicial review of **punitive**

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damage amounts "unless the court can affirmatively say there is no evidence to support the verdict." See 512 U.S. at 418.

n372. 64 U.S.L.W. at 4339.

n373. Supra note 279. A number of tort reform proposals seek to limit **punitive damage** awards. See Common Sense Product Liability and Legal Reform Act, H.R. Conf. Rep. No. 104-481 (1996) (capping **punitive damages** generally at greater of two times compensatory damages or $ 250,000, subject to judicial authority to increase up to jury award based on specified extenuating circumstances, with cap on small businesses and certain individuals set at lesser of these two amounts); House Medical Malpractice Proposal, supra note 302 (capping **punitive damages** at the greater of $ 250,000 or three times economic damages); the Tobacco Settlement, supra note 310, would eliminate **punitive damage** liability completely for past misconduct by the tobacco industry.

n374. 64 U.S.L.W. at 4342.

n375. 499 U.S. 1 (1991) (**punitive damage** award of more than $ 1 million where insurance company found responsible for fraud of employee found not to violate Fourteenth Amendment due process). In Haslip, the Court also considered in dicta the constitutionality of state imposition of a higher standard of proof to establish **punitive damages,** writing, "there is much to be said in favor of a State's requiring... a standard of 'clear and convincing evidence' or, even, 'beyond a reasonable doubt'.... We are not persuaded, however, that the Due Process Clause requires that much." Id. at 23 n.11.

n376. 509 U.S. 443 (1993) (**punitive damage** award of $ 10 million stemming from slander of title case found not to violate Fourteenth Amendment due process).

n377. 64 U.S.L.W. at 4341.

n378. 512 U.S. 415.

n379. 512 U.S. at 433 (although this aspect of Oregon law was determined in and of itself not sufficient to protect against arbitrary awards).

n380. See Bill Emerson Good Samaritan Food Donation Act, supra note 191; Volunteer Protection Act, supra note 204; Amtrak Act, supra note 223; Senate Product Liability Proposal, supra note 276; House Medical Malpractice Proposal, supra note 294.

n381. In his dissent to Gore, Justice Scalia wrote that the Majority's "' guideposts' mark a road to nowhere; they provide no real guidance at all." 64 U.S.L.W. at 4348.

n382. Id. at 4342.

n383. In Haslip, the Court wrote "we need not, and indeed we cannot draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." 499 U.S. at 18. This language was affirmatively quoted in TXO. 509 U.S. at 458.

n384. See supra note 278 & 279. The Senate Product Liability Proposal caps the amount of **punitive damages** that may be awarded against "small businesses" and certain individuals.

n385. Id.

n386. 65 U.S.L.W at 4615.

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n387. Id. at 4618.

n388. See S. Rep. No. 105-32, at 46-47 (1997) (noting that excessive **punitive damage** awards were overturned involving the drug Benedictin and Sabin polio vaccine; and that recent studies by Texas Policy Foundation and Institute for Civil Justice had found marked increases in the frequency and size of **punitive damage** awards in Dallas and Houston and the size of **punitive damage** awards in Chicago). See also Haslip, 499 U.S. at 18 ("we note once again our concern about **punitive damages** that 'run wild.'"); Browning-Ferris Industries of Vermont v. Kelco Disposal, 492 U.S. 257, 282 (1989) (O'Connor, J., dissenting) ("awards of **punitive damages** are skyrocketing [and] the threat of such enormous awards has a detrimental effect on the research and development of new products.").

n389. See S. Rep. No. 105-32, at 74-75 (1997) (dissenting views noting a study by Dr. Stephen Daniels showed that between 1981-1985, **punitive damages** were only awarded in 4.9% of the cases reviewed and from 1988-1990 were only awarded in 4.8% of cases reviewed; study by Professors Michael Rustad and Thomas Koenig reviewing all product liability awards from 1965-1990 in federal and state courts and finding only 355 cases of **punitive damage** awards in 25 years).

n390. 64 U.S.L.W. at 4343 n.41.

n391. Id.

n392. For an analysis of Fifth Amendment issues in the context of tort reform, see Steven J. Werber, The Constitutional Dimension of a National Products Liability Statute of Repose, 40 VILL. L. REV. 985 (1995) (federal products liability statute of repose likely to violate equal protection because it cannot be supported under a rationale basis test); Marco de Sae Silva, Constitutional Challenges to Washington's Limit on Non-economic Damages in Cases of Personal Injury or Death, 63 WASH. L. REV. 653 (1988) (caps on non-economic damages appear not to violate due process and equal protection because only minimal level of judicial scrutiny will be applied); Mary Ann Willis, Comment, Limitation on Recovery of Damages: Medical Malpractice Cases: A Violation of Equal Protection?, 54 U. CINN. L. REV. 1329 (1986) (concluding that state limits on medical malpractice awards likely violate equal protection).

n393. U.S. Const. amend. V.

n394. See Bolling v. Sharpe, 347 U.S. 497 (1954) (Fifth Amendment due process found to incorporate equal protection guarantees in case involving public school desegregation by the Federal Government in the District of Columbia).

n395. Courts have varied on whether to differentiate between "substantive" and "procedural" due process when scrutinizing federal tort reforms. See, e.g., Second Employers' Liability Cases, 223 U.S. 1 (applying a generic due process analysis); In re Consolidated United States Atmospheric Testing Litigation, 820 F.2d at 989-91 (separately analyzing and rejecting substantive and procedural due process claims).

n396. A separate due process issue which has arisen in those tort reform laws which have been reviewed by the courts is whether the law operates as an unconstitutional taking. In the case of the initiatives described in this article, it seems doubtful a credible taking argument could be advanced, given Hammond's holding that a taking claim would not lie under the Atomic Testing Liability Act unless the claimant had been forced to forfeit a "final, unreviewable judgment." See 786 F.2d at 12.

n397. See Usery, 428 U.S. at 15; Carr, 539 F.2d at 959; Thomason, 438 U.S. at 84; Sparks, 574 F.2d at 1310; In re Consolidated United States Atmospheric Testing Litigation, 786 F.2d at 991; and O'Conner & TMI, 940 F.2d at 1102. But see Jones v. State Board of

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Medicine, 555 P.2d 399 (1976); Carson v. Maurer, 424 A.2d 825 (1980) (State courts applying the so-called "intermediate scrutiny" test where the tort reform is seen as depriving parties of their "fundamental" right to a jury trial).

n398. In Usery, 428 U.S. at 33, the Court granted strong deference to Congress in its assessment concerning the efficacy of competing expert opinions: "The reliability of negative X-ray evidence was debated forcefully on both sides before the Congress, and the Operators here suggest nothing new to add to the debate; they are simply dissatisfied with Congress' conclusion." Id.

n399. 438 U.S. 59 (1978).

n400. It could be argued that several recently enacted and pending tort reform proposals, such as the Biomaterials Access Assurance Act and the Tobacco Settlement provide plaintiffs with no direct offsetting benefits. However, some may contend that individuals bringing tobacco lawsuits may benefit from provisions intended to provide for the development of a more orderly tobacco liability payout system and the potential of receiving any unused liability funds allocated by the presidential commission. See supra notes 313-315 and accompanying text.

n401. See 438 U.S. at 90. Although the Volunteer Protection Act permits states to adopt laws insuring that non-profits make a secure source of funds available in the event of injury, unlike Price-Anderson, the Act does not insure that such security is made available.

n402. See e.g., (1) Federally Supported Health Centers Assistance Act of 1992, 42 U.S.C. 233 (g) & (o) (1994) (health centers and their officers, employees, and contractors and health clinic professionals); (2) National Service Trust Act, 42 U.S.C. 12651b(f) & 12651g (a) (B) (1994) (enacted in 1993) (board members and volunteers in the National and Community Service program); (3) Take Pride in America Act, 16 U.S.C. 4604 (c)(2) (1994) (Take Pride in America Act volunteers) (enacted in 1990); (4) Support for East European Democracy Act of 1989, 22 U.S.C. 5422 (c)(2)(A) (1994) (volunteers providing technical assistance to Poland or Hungary); (5) Federal Land Policy and Management Act of 1976, 43 U.S.C. 1737 (f) (1994) (Bureau of Land Management volunteers); (6) Domestic Volunteer Service Act of 1973, 42 U.S.C. 5055(f)(3) (1994) (VISTA volunteers); (7) Volunteers in the National Forests Act of 1972, 16 U.S.C. 558c (b) (1994) (Forest Service volunteers); (8) Volunteers in Parks Act of 1969, 16 U.S.C. 18i (b) (1994) (National Parks volunteers); (9) Peace Corps Act, 22 U.S.C. 2504(h)(1994) (enacted in 1961) (Peace Corps volunteers); (10) Fish and Wildlife Act of 1956, 16 U.S.C. 742f(c)(4) (1994) (volunteers in Fish and Wildlife Service or National Oceanic and Atmospheric Administration programs); (11) Federally Supported Health Centers Assistance Act of 1995, 42 U.S.C. 203 note (Supp. I 1995); and (12) 18 U.S.C.A. 1955 note (West Supp. IV 1997); 42 U.S.C. 247b (1976) (repealed 1978); 42 U.S.C. 2212 (1994); 28 U.S.C. 2679 (1994).

n403. See 5 U.S.C. 8116 (c).

n404. 695 P.2d 665, appeal dismissed for want of a substantial federal question, 474 U.S. 892. See also Roa v. Lodi Medical Group, Inc., 695 P.2d 164 (capping attorneys' fees in medical malpractice actions), appeal dismissed, 474 U.S. 990 (1985).

n405. The reforms upheld in Fein capped non-economic damages at $ 250,000 and modified the collateral source rule in medical malpractice cases. 695 P.2d at 665.

n406. Id. at 160 n.18. Justice White dissented from plaintiff's appeal of Fein, finding there was a clear split concerning the constitutionality of damage limitations in medical malpractice cases, noting, "one of the reasons for the division among the state courts is [the quid pro quo] question left unresolved by this Court in Duke Power...." See Fein v. Permanente

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Medical Group, 474 U.S. 892, 894 (1985).

n407. Another issue presented by the Senate Product Liability Proposal is whether caps on **punitive damages,** as opposed to compensatory damages, are the type of restrictions subject to constitutional challenge. Some commentators have concluded that there is no constitutional right to seek **punitive damages.** See Janet V. Hallahan, Social Interests Versus Plaintiffs' Rights: The Constitutional Battle Over Statutory Limitations on **Punitive Damages,** 26 LOY. U. CHI. L.J. 405 (1995); Malcolm E. Wheeler, The Constitutional Case for Reforming **Punitive Damages** Procedures, 69 VA. L. REV. 269 (1983).

n408. See 42 U.S.C. 2210 (c) (1994); 49 U.S.C. 28103 (c).

n409. These provisions are included in the Price-Anderson Act. See 42 U.S.C. 2210 (n)(1), 2210 (c) (1994).

n410. 348 U.S. at 91.

n411. See supra notes 280-284 & 294 and accompanying text.

n412. The Senate Product Liability Proposal can also be contrasted with the Warsaw Convention, 49 Stat. 3000 (1934), which limits recoverable damages in exchange for providing all plaintiffs with a guaranteed recovery through its strict liability provisions.

n413. See 243 U.S. 188.

n414. See 438 U.S. 59.

n415. Id. at 88.

n416. Ducharme, 574 F.2d at 1310. See also Carr, 280 U.S. at 122. But see Sparks, 341 F. Supp. at 416 ("a replacement or substitution of remedies, while perhaps not technically necessary for due process, is nonetheless even more indicative of the satisfaction of due process requirements."); Honda Motor Co. v. Oberg, 512 U.S. 415 at 430 ("Oregon's abrogation of well-established common law protections against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause.").

n417. 94 U.S. 113 (1876).

n418. 280 U.S. 117 (1929).

n419. Munn, 94 U.S. at 134.

n420. Silver, 280 U.S. at 122.

n421. For an analysis of Seventh Amendment issues in the context of tort reforms, see Colleen P. Murphy, Determining the Tension Between Legislative Power and Jury Authority, 74 TEX. L. REV. 345 (1995) (raising questions concerning Congress' ability to cap, but not eliminate right to seek compensatory damages); James F. Tiu, Challenging Medical Malpractice Damage Awards on Seventh Amendment Grounds: Attack in Search of a Rationale, 59 U. CIN. L. REV. 213 (1990) (Federal courts have not found that statutory limits on damages in medical malpractice actions violate the Seventh Amendment); Paul B. Weiss, Comment, Reforming Tort Reform: Is there Substance to the Seventh Amendment?, 38 CATH. U. L. REV. 737 (1989) (disagreeing with courts recognizing legislative power to impose damage caps).

n422. U.S. Const. amend. VII.

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n423. 223 U.S. 1.

n424. 428 U.S. 1.

n425. 438 U.S. 59.

n426. See 225 F. Supp at 882; 574 F.2d at 1311; 786 F.2d at 15.

n427. The House Medical Malpractice Proposal would cap economic damages at $ 250,000. See supra note 299.

n428. A number of federal tort reforms can be claimed to abrogate Seventh Amendment jury trial protections by legislatively resolving matters previously considered by a jury at common law. For example, the Emerson Food Donation Act and the Volunteer Protection Act both eliminate liability for ordinary negligence; the General Aviation Act and the Senate Product Liability Proposal eliminate tort liability where a statute of repose applies; and the Senate Product Liability Proposal, House Medical Malpractice Proposal and the Tobacco Settlement would cap or eliminate **punitive damages.** But see Colleen P. Murphy, Integrating the Constitutional Authority of Civil and Criminal Juries, 61 GEO. WASH. L. REV. 723 (1993) (Seventh Amendment does not require juries to assess **punitive damages** because determination is unguided by meaningful standards).

n429. 241 U.S. 211 (1916). See also Simler v. Connor, 372 U.S. 221 (1963) (in federal district court diversity of citizenship action, federal rather than state law governs in determining whether the plaintiff is entitled to a jury trial).

n430. Minnesota law permits five members of a six person jury to reach a verdict in a civil action if the jury has deliberated for twelve hours without reaching a unanimous verdict. See 241 U.S. 211.

n431. 241 U.S. at 217. The Court also wrote that its decision was premised on the grounds that "the first ten Amendments, including of course the Seventh, are not concerned with state action and deal only with federal action." Id.

n432. 481 U.S. 412 (1987).

n433. 33 U.S.C. 1319 (1994).

n434. Although Clean Water Act actions were statutory in nature, the Court found the Seventh Amendment also applied to actions "that are analogous to 'suits at common law.'" 481 U.S. at 417. In the case of the Clean Water Act, the Court observed that although legal actions brought under it were similar to actions traditionally brought at law (such as debt actions) and equity (such as nuisance actions), the "'more important'" determination for Seventh Amendment purposes was the nature of the relief being sought. Id. at 421 (citations omitted). Since a civil penalty was traditionally sought in a court of law, the Court concluded that the core underlying question of legal responsibility should be heard by a jury under the Seventh Amendment. Id. at 425.

n435. Id.

n436. Since the text of the Seventh Amendment is silent on the question of whether a jury determination is required with respect to the remedy phase of a trial, the Court reasoned the "answer must depend on whether the jury must shoulder this responsibility as necessary to preserve the 'substance of the common-law right of trial by jury.'"Id. at 426 (citations omitted). The Court went on to argue since Congress had the clear authority to fix the

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government employees acting within **[*602]** the scope of their employment. [71] Unlike many private employers, the Federal Government did not obtain private liability insurance for its employees, and Congress considered the Act necessary to allow the government to attract competent drivers. [72] The Federal Drivers Act was upheld against a variety of constitutional challenges in Carr v. United States, [73] Thomason v. Sanchez, [74] and Nistendirk v. McGee. [75]

Carr involved an action in which a federal employee brought an automobile liability action against a co-employee, claiming the Federal Drivers Act violated due process by abrogating common law rights without providing a legislative quid pro quo. [76] The Fourth Circuit responded first that the premise of that argument had been rejected in Silver v. Silver [77] (upholding the constitutionality of a Connecticut guest statute preventing non-paying guests from bringing negligence suits against owners or operators of automobiles), when the Supreme Court held "the Constitution does not forbid the creation of new rights, or the abolition of old rights recognized by the common law." [78] Secondly, Carr observed "in any event Congress provided an adequate quid pro quo for the common law cause of action which it abolished." [79] The court believed this to be the case even if the plaintiff, as a federal employee, was not entitled to bring suit against the Federal Government. [80] This was because the Federal Drivers Act benefited all federal employees - including the plaintiff - by providing them with protection against liability from automobile accidents. [81]

Carr also rejected the contention that the Federal Drivers Act denied the plaintiff his equal protection rights by treating automobile liability actions in a manner different from other liability actions involving government co-workers. [82] The court found that "the statutory classification comes here clothed with a presumption of constitutionality and it will not be set aside if any state of facts reasonably may be conceived to justify it." [83] In this instance, the Fourth Circuit found the Federal Drivers **[*603]** Act to be a justified response to the problem of an undue financial burden otherwise being placed on government drivers. [84]

Thomason represented another case where the Federal Drivers Act was upheld against a due process challenge. [85] The Third Circuit held that the right to sue a co-worker does not enjoy constitutional protection and that statutory classifications along these lines "need not be justified by a compelling governmental interest" and do not "create a suspect classification" or "involve a fundamental interest." [86] The court found the Federal Drivers Act to be a reasonable response to the financial burden imposed on government workers and that "the magnitude of the automobile insurance problem justified Congress' separate treatment of this specific problem." [87]

Finally, in Nistendirk, a federal district court considered and rejected the argument that the Federal Drivers Act violated the plaintiff's Seventh Amendment right to a jury trial. [88] The court found that where a common law action was eliminated entirely and an action against the government substituted in its place, "the guarantees of the Seventh Amendment do not apply." [89]

B. The Price-Anderson Act

As enacted in 1957, [90] and amended in 1966, [91] and 1975, [92] the Price-Anderson Act ("Price-Anderson") [93] provided for a maximum aggregate liability of $ 560 million in the event of a nuclear accident at a federally licensed nuclear power plant, such maximum amount to be distributed to claimants from a pool of funds derived from the owner's insurance, contributions from other nuclear plant owners, and the Federal Government. [94] In exchange for these benefits, the plant owner was required to waive all of its defenses to liability if sued as a result of a nuclear accident, and Congress was required to take whatever additional action was deemed necessary and appropriate to protect the public. [95]

[*604] In 1978, the Court upheld Price-Anderson in Duke Power Co. v. Carolina Environmental Study Group, [96] the most recent Supreme Court decision concerning the

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amount of the civil penalty, it could also delegate that authority to the court, particularly in actions such as those under the Clean Water Act which involved "highly discretionary calculations." Id. at 427.

n437. 481 U.S. at 426 n.9 (citations omitted). The Court also observed, "we have been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial." Id.

n438. 877 F.2d 1191 (4th Cir. 1989).

n439. Id. at 1196 (citations omitted).

n440. 704 F. Supp. 1325 (D. Md. 1989). Both Boyd and Franklin raised Seventh Amendment issues because they involved diversity actions brought in federal court.

n441. Id. at 1331. See also Davis v. Omitowoju, 883 F.2d 1155 (3d Cir. 1989) (Seventh Amendment does not apply to the Virgin Island's cap on non-economic damages in medical malpractice actions because the second clause of the Seventh Amendment - preventing facts tried by the jury from being reexamined - apply to courts, not legislatures).

n442. 243 U.S. at 219.

n443. The Court found that the Seventh Amendment did not apply where a cause of action was completely eliminated, writing "as between employee and employer the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury." Id. at 235.

n444. 877 F.2d at 1196 (citations omitted).

n445. 704 F. Supp. at 1331.

n446. 241 U.S. at 221.

n447. 293 U.S. 474 (1935).

n448. The Court observed "in order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." Id. at 476. The Court went on to note that other than isolated exceptions it had found no historical evidence of English common law courts being able to increase the amount of a jury verdict, on either an absolute or conditional basis. Id. at 476-77.

n449. "The controlling distinction between the power of the court and that of the jury is that the former has the power to determine the law and the latter to determine the facts." Id. at 486.

n450. According to the Court, "where the verdict is too small, an increase by the court is an addition of something which in no sense can be said to be included in the verdict." Id.

n451. 647 F. Supp. 781 (W.D. Va. 1986), reaff'd, 672 F. Supp. 915 (W.D. Va. 1987), aff'd in part, rev'd in part, questions certified, 877 F.2d 1191 (4th Cir. 1989).

n452. 684 F. Supp. 1340 (1988).

n453. 647 F. Supp. at 789.

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n454. 684 F. Supp. at 1344.

n455. Id.

n456. Id.

n457. See Galloway v. United States, 319 U.S. 372 (1943) (directed verdict); Colgrove v. Battin, 413 U.S. 149 (1973) (six-person juries); Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (collateral estoppel).

n458. 877 F.2d 1191 (4th Cir. 1989).

n459. For an analysis of Tenth Amendment and related issues in the context of proposed product liability reforms, see Jeffrey White, Does the Products Bill Collide with Tenth Amendment?, Trial, Nov. 1997, at 30; Cynthia C. Lebow, Federalism and Product Liability Reform: A Warning Not Heeded, 64 TENN. L. REV. 665 (1997); Wendy E. Parmet, Stealth Preemption: The Proposed Federalization of State Court Procedures, 44 Vill. L. Rev. 1 (1999).

n460. The Tenth Amendment provides "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X.

n461. 223 U.S. at 53. The Employers' Liability Cases also found that Congress had the authority to enact a law dealing with master-servant relationships so long as it involved interstate commerce. See Restatement (Second) of Torts 552A (1977); The Employers' Liability Cases, 207 U.S. 463 (1907) and The Second Employers' Liability Cases (Mondou v. New York), 223 U.S. 1 (1912); Pub. L. No. 59-219, 34 Stat. 232 (codified at 45 U.S.C. 51-60) (1906) (repealed 1907); 207 U.S. 463 (1907).

n462. See 431 F. Supp. at 419.

n463. See 786 F.2d at 15.

n464. 505 U.S. at 144.

n465. 42 U.S.C. 2021b-2021j (1994).

n466. 505 U.S. at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

n467. 117 S.Ct. 2365; 138 L.Ed. 2d 914; 65 U.S.L.W. 4731 (U.S. June 27, 1997) (5-4 decision).

n468. 18 U.S.C. 922(s) (1994).

n469. 505 U.S. at 178-79. Lebow, supra note 460 at 689 concludes that last year's product liability bill would have violated Tenth Amendment federalism principles, and distinguishes this line of cases, in part because it "directs the state courts to actually alter state tort law and related procedures as mandated by Congress."

n470. 65 U.S.L.W. at 4733-34. It may be significant, however, that the laws cited by the Court in Printz involved using state courts to effectuate uniquely federal policies, such as those relating to immigration, rather than matters which typically fell within state prerogatives, such as tort law.

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n471. The Court in New York v. United States also noted a constitutional line between congressional and state legislative responsibilities: "The allocation of power contained in the Commerce Clause, for example, authorizes congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." 505 U.S. at 166.

n472. 505 U.S. at 169. Cf. Erie Railroad Co. v. Tomkins, 304 U.S. 64, 78 (1938) ("Congress has no power to declare state substantive rules of common law applicable in a state... be they commercial law or a part of the law of torts. Moreover, no clause in the Constitution purports to confer such a power upon the federal courts."); Guaranty Trust Co. v. New York, 326 U.S. 99 (1945) (Federal courts bound by state statutes of limitations since they are substantive, not procedural).

n473. White, supra note 460, at 32. One could argue that The Second Employers' Liability Cases, 223 U.S. 1 (1912), constituted a tort reform which altered state law in eliminating certain common law employer liability defenses. However, the Majority in Printz read this precedent somewhat narrowly when it said "the Second Employers' Liability Cases stand for the proposition that a state court must entertain a claim arising under federal law only 'when its ordinary jurisdiction as prescribed by local law is appropriate to the occasion and is invoked in conformity with those laws.' "65 U.S.L.W. at 4733, citing Second Employers' Liability Cases, 223 U.S at 56-57.

n474. See Biomaterials Access Assurance Act of 1997: Hearing on H.R. 872 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 105th Cong., 1st Sess. 96 (1997).

n475. See 12.3 TPLR at 3.221, Title VIII.B.2.

n476. See 12.3 TPLR at 3.232, Appendix VIII.3; 3.221, Title VIII (B)(7).

n477. See **Y2K** Act 7, 8 & 15.

n478. 487 U.S. 131, 138 (1988) (Wisconsin notice of claim statute found to be inconsistent with and preempted by 42 U.S.C. 1983).

n479. 117 S. Ct. 1800 (1997) (42 U.S.C. 1983 held not to preempt Idaho procedural rules concerning appealability of orders).

n480. Id. at 1805 (citing Howlett v. Rose, 496 U.S. 356, 372 (1990)) quoting Henry Hart, The Relations Between State and Federal Law, 54 COLUM. L. REV. 489, 508 (1954)).

n481. Id. at 1807.

n482. Id. n.13. For their part, defendants may attempt to assert that procedural requirements such as those set forth in the Biomaterials Access Assurance Act and the Tobacco Settlement are no more burdensome on state courts than the comparative negligence determinations required under the 1908 Employers' Liability Act and that given the Court's recent decision in Amchem Products v. George Windsor, 117 S. Ct. 2231, 138 L.Ed. 2d 689, 65 U.S.L.W. 4635 (1997) (narrowing ability to obtain class certifications in mass product liability cases under the Federal Rules of Civil Procedure), it is unlikely the class action rules would prove to be of significant benefit in tobacco litigation in any event.

n483. The Global Tobacco Settlement: Hearings Before the Senate Comm. on the Judiciary, 105[su'th'] Cong., (1997) (Statement of Lawrence H. Tribe, Tyler Professor of Law, Harvard Law School).

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n484. See 12.3 TPLR at 3.221, Title VIII.B.2. The Universal Tobacco Settlement Act, S. 1414, 105th Cong. (1997) contains a general prohibition on class actions, along with a mechanism for removal by a defendant of "an action that involves a violation of [the class action prohibition]... to an appropriate federal court."

n485. See 13 F.3d at 1099, 940 F.2d at 857. For an analysis of the possible Article III issue in the context of the Tobacco Settlement, see The Global Tobacco Settlement: Hearings Before the Senate Comm. on the Judiciary, 105th Cong., (1997) (statement of Lawrence H. Tribe, Tyler Professor of Law, Harvard Law School) ("Although Congress may as a general proposition regulate the the jurisdiction of the federal courts, it may not by statute enlarge their Article III jurisdiction.... Accordingly, I do not think that the proposed statute could be applied to permit the removal of an action where federal jurisdiction were otherwise lacking"); Hearing on the Civil Liability Portions of the Proposed Tobacco Settlement Before the House Comm. On the Judiciary, 105[su'th'] Cong., 2d Sess. (1998) (statement of James F. Pfander, University of Illinois College of Law) ("The existence of a federal question, even by way of defense, should solve any Article III problem with the removal scheme").

n486. See Pub. L. No. 103-298, 108 Stat. 1552-54 (1994) (codified at 49 U.S.C. 40101 note (1994));Pub. L. No. 104-210, 110 Stat. 3011 (codified at 42 U.S.C.A. 1791 (West Supp. 1998));Pub. L. No. 105-19, 111 Stat. 218 (codified at 42 U.S.C.A. 14501-14505 (West Supp. III 1997));Pub. L. No. 105-134, 111 Stat. 2570 (codified at 49 U.S.C.A. 28103 (West Supp. 1998)); Biomaterials Access Assurance Act of 1988, Pub. L. No. 105-230, 112 Stat. 1519 (1998) (codified at 21 U.S.C. 1601-1606 (1998)); **Y2K** Act, Pub. L. No. 106-37, 113 Stat. 6601 (codified at 15 U.S.C. 6601-17 (1999)).

n487. See The Product Liability Reform Act of 1998, S. 2236, 105[su'th'] Cong. (1998); Balanced Budget Act of 1997, H.R. 2015, 105[su'th'] Cong. (1997); Proposed Tobacco Industry Settlement, 12.3 TPLR 3.203 (June 20, 1997).

n488. 64 U.S.L.W. at 4339.

n489. See 512 U.S. at 418.

n490. 505 U.S. at 144.

n491. 117 S.Ct. 2365; 138 L.Ed. 2d 914; 65 U.S.L.W. 4731 (U.S. June 27, 1997) (5-4 decision).

n492. For example, the dissenting views to the House Judiciary Report on the Volunteer Protection Act noted that a Westlaw search of indicated the legislation would not have altered the decision of any case reported over the prior seven years. H.R. Rep. No. 105-101, pt. 1, at 17 (1997).

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constitutionality of a federal tort reform. In Duke Power, after finding the plaintiffs - a group of individuals who lived near proposed new nuclear power plants along with an environmental group and a labor union - had standing to challenge the law [97] and that it was "ripe" for adjudication, [98] the Court held Price-Anderson did not violate their Fifth Amendment due process rights. [99] The Court found Price-Anderson to be a "classic example of an economic regulation," [100] which should be upheld unless it can be established that Congress' judgment was "demonstrably arbitrary or irrational." [101] Based on this review standard, the Court found it was appropriate for Congress to encourage the construction of nuclear power facilities in the manner set forth in the Price-Anderson Act. [102]

The Court rejected the district court's assertion [103] that the $ 560 million damage limitation was arbitrary and not rationally related to the potential damages caused by a possible nuclear accident. Instead, the Court found the dollar limitation a reasonable starting point given that the risk of a nuclear accident was very small, and that in the event an accident did occur, it was likely Congress would take further action ameliorating the hardship (as Congress had done with respect to previous natural disasters). [104] The Court also disagreed with the district court's determination that liability limitations in the Price-Anderson Act would encourage irresponsibility, pointing to the rigorous regulatory review process and the still significant damages a power plant owner would face in the event of an accident. [105]

Finally, the Court disagreed with the lower court's conclusion that the Price-Anderson Act should not survive scrutiny under the Due Process Clause because it failed to provide injured parties with a satisfactory quid pro quo to compensate for the forfeiture of their common law rights. [106] First, the Court noted "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute **[*605]** remedy." [107] In so doing, the Court observed in a footnote that the Second Employers' Liability Cases stood for the proposition that "our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.'" [108]

Ultimately, however, the Court failed to resolve whether or not a quid pro quo was required to satisfy the Due Process Clause, since it found the requisite substitute remedy had been effectuated by the Price-Anderson Act. [109] The Court noted the Price-Anderson Act provided a secure source of funds to victims harmed by a nuclear accident, mandated a waiver of the owner's common law defenses, and allowed claims to be satisfied without resulting in an inequitable "race to the courthouse." [110] In this respect, the Court observed that the Price-Anderson Act was somewhat comparable to the New York worker's compensation statute [111] upheld in New York Central R. Co. v. White, [112] and the Federal Longshoremen and Harbor Workers' Compensation Act [113] upheld in Crowell v. Benson [114] (both being upheld against due process challenges). [115] The Court also rejected the plaintiff's Fifth Amendment equal protection claim, finding that this argument "largely tracked and duplicated those made in support of the due process claim." [116]

[*606] The Court did not separately consider any federalism issues. The plaintiffs had sought to argue that Price-Anderson "encroaches on substantial state governmental interests" [117] and should therefore be subject to an augmented standard of review under the Due Process Clause, but the Court could find no basis in law for this contention. [118]

The Court also did not reach the plaintiffs' argument that the Price-Anderson Act effectuated an unconstitutional Fifth Amendment "taking". [119] The Court found that it was not necessary to consider this argument because in their view the Price-Anderson Act did not withdraw plaintiffs' ability to bring a claim for an unjust taking under the Tucker Act. [120] In the Court's view, the question as to whether a takings claim could be established under the Fifth Amendment "is a matter appropriately left for another day." [121]

C. Swine Flu Act

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In 1976, Congress adopted the Swine Flu Act, [122] substituting the liability of the United States under the Federal Torts Claim Act for the liability of manufacturers, distributors, and volunteer medical personnel in connection with the administration of the swine flu vaccine. [123] Under the Swine Flu Act, although these program participants are not directly liable to harmed individuals for personal injury or death, the United States is permitted to seek indemnification from them on the basis of their negligence or breach of contract. [124]

The Swine Flu Act was upheld against constitutional challenge by district courts in Tennessee (Wolfe v. Merrill National Laboratories [125]), Oklahoma (Sparks v. Wyeth Laboratories, Inc. [126]), and Alabama (Stephens v. Wyeth Laboratories, Inc. [127]) in 1977, as well as by the Fifth **[*607]** Circuit in Ducharme v. Merrill-National Laboratories [128] the following year. The courts found the Swine Flu Act to involve "the area of social and economic welfare" and applied a rational basis standard of review in rejecting plaintiffs' Fifth Amendment due process and equal protection arguments. [129] Applying this standard, the Fifth Circuit in Ducharme concluded that "the procedure established under the [Swine Flu] Act is rationally related to achieving the goal of assuring interstate distribution of the swine flu vaccine." [130] The court also rejected the plaintiff's takings assertion, finding the law did not apply retroactively to remove any "vested" property rights from claimants. [131]

The Ducharme and Sparks courts also rejected the contention that the Swine Flu Act violated plaintiffs' Seventh Amendment rights, holding the United States as the "sovereign" was not subject to the Seventh Amendment. [132] In Sparks, the Oklahoma district court observed, "it is axiomatic that if a cause of action against [the sovereign] can be abolished, the jury trial of that action is also abolished. The elemental fact is that suits against the sovereign were unknown at common law." [133] The court noted that similar arguments had been raised - and rejected - in the context of the Federal Drivers Act. [134]

In Sparks, the district court further rejected the plaintiff's argument that the Swine Flu Act violated the Tenth Amendment [135] by calling for the assistance of state and local governments. The court noted that in our modern economy it was appropriate for the federal and state governments to work together in responding to common problems, so long as the legislation does not impose a "coercion on the states," [136] and in the case of the Swine Flu Act, the law specifically sanctioned voluntary cooperation by state governments concerning health matters. [137]

[*608]

D. Atomic Testing Liability Act

The 1984 Atomic Testing Liability Act ("Atomic Testing Liability Act") made an action against the United States under the Federal Tort Claims Act the exclusive remedy for injury or death due to exposure to radiation from atomic weapons testing programs carried out by government contractors. [138] The law was found to be constitutional by the First Circuit in Hammond v. United States [139] in 1986 and by the Ninth Circuit in In re Consolidated United States Atmospheric Testing Litigation [140] in 1987.

As was the case with the Swine Flu Act, the courts readily disposed of plaintiffs' Fifth Amendment takings assertion, citing New York Central R. Co. v. White for the proposition that "no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." [141] In Hammond, the First Circuit concluded that a takings claim would not lie unless and until a harmed party has a "final, unreviewable judgment." [142]

As for the Fifth Amendment due process challenge, like other tort reforms, the courts use a rational basis review standard to conclude the Atomic Testing Liability Act was reasonably designed to encourage federal contractors to participate in the nuclear weapons program. [143]

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In reaching this conclusion, the courts in Hammond and In re Consolidated United States Atmospheric Testing Litigation stated that the Due Process Clause permitted Congress to choose from a range of alternative compensation schemes when it preempted state tort law:

Although Congress could have relieved the independent contractors of their burden of defending suits for radiation and still provided those injured by radiation a more generous substitute compensation scheme, we cannot say that Congress' choice of means was without any rational basis.... When the program began Congress could have mandated that all tort claims arising from it be litigated through the [Federal Tort Claims Act]. [144]

[*609] The First Circuit in Hammond also disposed of a number of other constitutional challenges to the Atomic Testing Liability Act, including the assertion that the law violated the Seventh and Tenth Amendments. [145] Using the same reasoning developed in upholding the Swine Flu Act (and the Federal Drivers Act before that), the Court found the Seventh Amendment did not apply to federal laws involving the sovereign, concluding, "when the United States abolishes a cause of action and then sets up a separate administrative remedy against itself, as it has here, the seventh amendment does not require that it must also provide a jury trial." [146]

Finally, in Hammond, the plaintiff asserted the Atomic Testing Liability Act improperly invaded state prerogatives in light of the Court's 1976 decision in National League of Cities v. Usery. [147] In rejecting this argument, the court responded that not only was National League of Cites distinguishable because it involved a limitation on Congress' commerce authority (rather than the war powers authority implicated by the Atomic Testing Liability Act), but that National League of Cities had been overruled by the Supreme Court in Garcia v. San Antonio Metropolitan Transit Authority. [148]

E. 1988 Amendments to the Price-Anderson Act

In 1988, Price-Anderson was amended for a third time pursuant to the Price-Anderson Amendments Act of 1988 (the "1988 Amendments"). [149] Under the 1988 Amendments, claims arising from "nuclear incidents" were considered to be exclusively federal causes of action. [150] Such actions, denoted as "public liability actions," are to be based on the applicable state law where the nuclear accident occurred except to the extent such law is inconsistent with federal law (e.g., Price-Anderson). [151] The 1988 Amendments also provided for consolidation of all claims in the **[*610]** federal district court where the accident occurred, and were made to apply retroactively to any claim pending on the date of enactment. [152]

The constitutionality of the 1988 Amendments was upheld by the Seventh Circuit in O'Conner v. Commonwealth Edison Co., [153] and by the Third Circuit in In re TMI Litigation Cases Consol. II [154] and In re TMI. [155] These cases principally considered two constitutional questions - whether the 1988 Amendments conferred jurisdiction in the federal courts in violation of Article III of the Constitution, [156] and whether the retroactive nature of the law violated Fifth Amendment due process. With regard to the Article III issue, O'Conner found that the 1988 Amendments did not "merely create federal jurisdiction for a state claim, rather [they] affirmatively 'embodied substantive federal policies.'" [157] O'Conner further noted that rather than "adopting in wholesale fashion state law," [158] the Price-Anderson Act created a "new and entirely federal cause of action." [159] In re TMI Litigation Cases Consol. II reached the same conclusion, finding that "the Act while relying for definition upon state law elements, contains the federal components necessary to survive the constitutional challenge." [160] The court went on to note there were numerous features of federal law for a court to consider in a Price-Anderson Act public liability action, such as whether the cause of action resulted from a nuclear incident, the waiver of state law defenses, the limited availability of **punitive damages,** and whether the action is otherwise inconsistent with federal law. [161]

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Lawrence B. Lindsey: Assistant to the President for Economic Policy

Nature of Meeting or Event: [redacted] ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
Larry Lindsey is traveling to Atlanta, GA as part of the "Realizing the Dream Iniaitive." In the morning he will meet with Mrs. Coretta King and Mr. Martin King III to disucss the project (official meeting.) At noon he will give the luncheon speech at a political fundraiser (political). Later in the day he will take part ina roundtable discussion with area CEOs (official discussion)

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You MUST complete a travel voucher listing all expenses (regardless of payment method) following the trip.

Please send this form to the Counsel's Office (Room 128, EEOB) at least three (3) days before commencement of travel

TO BE COMPLETED BY COUNSEL'S OFFICE ☐ Approved ☐ Disapproved Pursuant to: ☐ 31 U.S.C. § 1353 ☐ 5 C.F.R. 2635.204(f)

Counsel's Signature: Date:

(REV. 7/96)

Approved 3/12/02 per 5 CFR 2635.204(f)

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

In order to consider whether the Government may accept from an outside source payment of your travel, subsistence and related expenses under the GSA travel rule or 5 C.F.R. 2635.204(f), you must complete the information below. You must submit this form and related documentation and receive approval PRIOR to commencement of travel. Failure to receive PRIOR approval may result in you having to pay the travel expenses yourself. The outside source need not be a 501(c)(3) organization, but if it is, please state so on this form and include the IRS determination letter.

CONTACT PERSON: Christal West

PHONE NUMBER: 6-6620

DATE OF REQUEST: 3-12-02

Please include a copy of the letter of invitation.

Your Name and Position:
David Hobbs, Deputy Assistant to the President for Legislative Affairs

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
NRCC Winter Meeting

Dates of Travel: 2/14/02 - 2/17/02 **Destination(s):** Miami, FL

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):
NRCC

Contact at Organization Making the Payment: Elizabeth Sabin

Address of Organization: 320 First Street, SE
Washington, DC 20003

Phone: 479-7075

Expense:	Amount:	Method:*
Transportation (specify): Air fare	$400.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging: Hotel	$395 per night (3 nights)	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals: Per Diem	$30 ($240 total)	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify):		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)

*Payment may be made either in-kind or by check made payable to the U.S. Treasury; you may not directly receive payment by either cash or a check made out to you.

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TO BE COMPLETED BY COUNSEL'S OFFICE ☒ Approved ☐ Disapproved Pursuant to: ☐ 31 U.S.C. §1353 ☒ 5 C.F.R. 2635.204(f)

Counsel's Signature [signature] **Date** 3/13/02

(REV. 7/96)

REV_00263994

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

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CONTACT PERSON: Christal West

PHONE NUMBER: 6-6620

DATE OF REQUEST: 3-12-02

Please include a copy of the letter of invitation.

Your Name and Position:
David Hobbs, Deputy Assistant to the President for Legislative Affairs

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:

NRCC Annual "Bright Lights and Broadway"
Participant in Legislative Affairs Briefing

Dates of Travel: 12/9/01 - 12/11/01 Destination(s): New York City

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):

National Republican Congressional Committee

Contact at Organization Making the Payment: Elizabeth Sabin

Address of Organization: 320 First Street, SE
Washington, DC 20003

Phone: 479-7020

Expense:	Amount:	Method:*
Transportation (specify): Amtrak Train	$172.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging: Hotel	$560.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify):		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)

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TO BE COMPLETED BY COUNSEL'S OFFICE: ☒ Approved ☐ Disapproved Pursuant to: ☐ 31 U.S.C. § 1353 ☒ 5 C.F.R. 2635.204(f)

Counsel's Signature: [signature] Date: 3/13/02

(REV. 7/96)

REV_00263995

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

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CONTACT PERSON: Caroline Boeckel

PHONE NUMBER: 456-6421

DATE OF REQUEST: March 12, 2002

Please include a copy of the letter of invitation.

Your Name and Position:
Dylan Glenn: Special Assistant to the President for Economic Policy

Nature of Meeting or Event: [redacted] ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
Dylan Glenn is traveling to Atlanta, GA as part of the "Realizing the dream Initiative." In the morning he will meet with Mrs. Coretta King and Mr. Martin King III to discuss the project (official meeting). At noon he will give the luncheon speech at a political fundraiser (political). Later in the day he will take part in a roundtable discussion with area CEOs (official discussion).

Dates of Travel: 3-18-02 3-19-02 **Destination(s):** Atlanta, GA

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):
The Georgia State Republican Party will pay 1/3 of the costs of the ticket of the trip. The rest will come from the White House.

Contact at Organization Making the Payment: Tamara Hyatt

Address of Organization: Georgia State Republican Party
Address TBD

Phone: 404-257-5559

Expense:	Amount:	Method:*
Transportation (specify): 1/3 the Delta Airline ticket	$502.02	☒ Reimbursable ☐ Other (Political Only)
Lodging:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify): Ground Transportation	TBD	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)

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TO BE COMPLETED BY COUNSEL'S OFFICE ☒ Approved ☐ Disapproved Pursuant to: ☐ 31 U.S.C. § 1353 ☒ 5 C.F.R. 2635.204(f)

Counsel's Signature: [signature] Date: 3/12/02

(REV. 7/96)

REV_00263996

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

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CONTACT PERSON: Christal West

PHONE NUMBER: 6-6620

DATE OF REQUEST: 3-12-02

Please include a copy of the letter of invitation.

Your Name and Position:
David Hobbs; Deputy Assistant to the President for Leg. Affairs

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
Will speak to the House-Senate Republican CoS's at their Annual Retreat

Dates of Travel: 2/19/02 - 2/21/02 Destination(s): The Greenbriar; White Sulphur Springs, WV

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):
Republican National Committee

Contact at Organization Making the Payment: Jack Oliver

Address of Organization: 310 First Street, SE
Washington, DC 20003

Phone: (202) 863-8700

Expense:	Amount:	Method:*
Transportation (specify): —	—	☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging: The Greenbriar (2 nights)	$655.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify):		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)

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TO BE COMPLETED BY COUNSEL'S OFFICE ☒ Approved ☐ Disapproved Pursuant to: ☐ 31 U.S.C. §1353 ☒ 5 C.F.R. §2635.204(f)

Counsel's Signature [signature] Date 3/13/02

(REV. 7/96)

REV_00263997

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

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CONTACT PERSON: Dan Keniry

PHONE NUMBER: 6-6620

DATE OF REQUEST: 3-14-02

Please include a copy of the letter of invitation.

Your Name and Position:
Dan Keniry ; Special Assistant for Legislative Affairs

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
NRCC 2002 Ski Trip
Will speak at Legislative Breakfast

Dates of Travel: 3/14/02 - 3/18/02 **Destination(s):** Lake Tahoe, CA

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):
NRCC

Contact at Organization Making the Payment: Elizabeth Sabin

Address of Organization: 320 First Street, SE
Washington, DC 20003

Phone: (202) 479-7075

Expense:	Amount:	Method:*
Transportation (specify): Airfare	$665.50	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging: Hotel - 4 Nights	$1036.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals: 3 meals	$100.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify): Lift Tickets (4day)	$224.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)

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Counsel's Signature [signature] **Date** 3/14/02

(REV. 7/96)

REV_00263998

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

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CONTACT PERSON: David Thomas

PHONE NUMBER: 6-7944

DATE OF REQUEST: 3-14-02

Please include a copy of the letter of invitation.

Your Name and Position:

David Thomas Associate Political Director

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:

Political meeting

Dates of Travel: 3-19-02 / 3-21-02 **Destination(s):** Washington Dulles, to Sacramento CA, to Washington Dulles

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):

RNC

Contact at Organization Making the Payment: Lynn Jaskulski

Address of Organization: RNC

310 First St. SE

Washington DC 20003

Phone:

Expense:	Amount:	Method:*
Transportation (specify): United Airlines	1,460 00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging: HYATT	218 00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify):		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)

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TO BE COMPLETED BY COUNSEL'S OFFICE ☒ Approved ☐ Disapproved **Pursuant to:** ☐ 31 U.S.C. § 1353 ☒ 5 C.F.R. 2635.204(f)

Counsel's Signature [signature] **Date** 3/15/02

REV_00263999

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

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CONTACT PERSON: Kirk Blalock

PHONE NUMBER: 63771

DATE OF REQUEST: 3/18/02

Please include a copy of the letter of invitation.

Your Name and Position:
Kirk Blalock, SAP and Dep. Director of OPL

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
To attend RNC Majority Fund Spring Meeting - To promote adminstration policy

Dates of Travel: 3/21/02 - 3/24/02 **Destination(s):** Tampa, FL

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):
Republican National Committee

Contact at Organization Making the Payment: Jay Banning

Address of Organization: 310 First Street, SE
Washington, DC 20003

Phone: 202-863-8700

Expense:	Amount:	Method:*
Transportation (specify): Air	$1100.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging: Hotel	$950.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify):		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)

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Counsel's Signature _____ **Date** _____

(REV. 7/96)

REV_00264000

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

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CONTACT PERSON: Shannon Burkhart

PHONE NUMBER: 456-6155

DATE OF REQUEST: 3/20/02

Please include a copy of the letter of invitation.

Your Name and Position: Jim Wilkinson, Special Asst. to the Pres. & Dep. Dir. of Communications

Nature of Meeting or Event: ☐ Official ☑ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:

RNC Majority Fund / Spring Training Event
Jim Wilkinson will participate in a panel discussion on Saturday afternoon as a WH communicator.

Dates of Travel: 3/22 - 3/24/02 **Destination(s):** Don CeSar Hotel, St Petersburg, FL

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):

RNC

Contact at Organization Making the Payment: Stephanie Strategos

Address of Organization: 310 First Street, SE
Washington, DC 20003

Phone: 202-863-8713

Expense:	Amount:	Method:*
Transportation (specify): Air - Northwest Airlines	$489.74	☑ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging: 2 nights @ Don CeSar Hotel	approx $350/night	☑ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals: At Hotel		☑ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify): 2 Baseball preseason tix		☑ In Kind ☐ Reimbursable ☐ Other (Political Only)

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Counsel's Signature [signature] **Date** 3/20/02

(REV. 7/96)

REV_00264001

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

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CONTACT PERSON: Kirk Blalock

PHONE NUMBER: 63771

DATE OF REQUEST: 3/20/02

Please include a copy of the letter of invitation.

Your Name and Position:
Kirk Blalock, SAP and Deputy Director of Public Liaison

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
To attend RNC Majority Fund Summer Meeting

Dates of Travel: 3/21 - 3/24/02 **Destination(s):** Tampa, FL

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):
Republican National Committee

Contact at Organization Making the Payment: Jay Banning

Address of Organization: 310 First Street, SE
Washington, DC 20003

Phone: 202-863-8500

Expense:	Amount:	Method:*
Transportation (specify): Air	$1050.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging: Hotel	$950.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify):		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)

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TO BE COMPLETED BY COUNSEL'S OFFICE ☒ Approved ☐ Disapproved Pursuant to: ☐ 31 U.S.C. § 1353 ☒ 5 C.F.R. 2635.204(f)

Counsel's Signature [signature] Date 3/20/02

(REV. 7/98)

REV_00264002

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

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CONTACT PERSON: Christal West

PHONE NUMBER: 6-6620

DATE OF REQUEST: 3-20-02

Please include a copy of the letter of invitation.

Your Name and Position:
David Hobbs; Deputy Asst. to the President for Leg. Affairs

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
RNC Majority Fund Spring Training Event
Participating in Legislative Affairs Briefings (Roundtable)

Dates of Travel: 3/22/02 - 3/24/02 Destination(s): St. Petersburg Beach, FL

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):
RNC

Contact at Organization Making the Payment: Stephanie Strategas

Address of Organization: 310 First Street, SE
Washington, DC 20003

Phone: (202) 863-8713/8700

Expense:	Amount:	Method:*
Transportation (specify): Airfare	$450.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging: Hotel (2 nights)	$618.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals: 5 meals	$225.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify): green fees	$200.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)

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Counsel's Signature: [signature] Date: 3/21/02

(REV. 7/96)

REV_00264003

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

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CONTACT PERSON: Christal West

PHONE NUMBER: 6-66620

DATE OF REQUEST: 3-20-02

Please include a copy of the letter of invitation.

Your Name and Position: Brian Conklin, Special Asst. to the President for Leg Affairs

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:

RNC Majority Fund Spring Training Event
Participating in Legislative Affairs Briefings

Dates of Travel: 3/22/02 - 3/24/02 Destination(s): St. Petersburg Beach, FL

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):

RNC

Contact at Organization Making the Payment: Stephanie Strategas

Address of Organization: 310 First Street, SE
Washington, DC 20003

Phone: (202) 863-8700

Expense:	Amount:	Method:*
Transportation (specify): Airfare	$450.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging: Hotel (2 nights)	$618.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals: 5 meals	$225.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify): green fee	9100.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)

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TO BE COMPLETED BY COUNSEL'S OFFICE ☒ Approved ☐ Disapproved Pursuant to: ☐ 31 U.S.C. § 1353 ☒ 5 C.F.R. 2635.204(f)

Counsel's Signature: RW Cobb Date: 3/21/02

(REV. 7/96)

REV_00264004

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

In order to consider whether the Government may accept from an outside source payment of your travel, subsistence and related expenses under the GSA travel rule or 5 C.F.R. 2635.204(f), you must complete the information below. You must submit this form and related documentation and receive approval PRIOR to commencement of travel. Failure to receive PRIOR approval may result in you having to pay the travel expenses yourself. The outside source need not be a 501(c)(3) organization, but if it is, please state so on this form and include the IRS determination letter.

CONTACT PERSON: PAUL DICK

PHONE NUMBER: 66508

DATE OF REQUEST: 3/25

Please include a copy of the letter of invitation.

Your Name and Position:
KARL ROVE SENIOR ADVISOR TO THE PRESIDENT

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
CHAMBLISS FOR SENATE POLITICAL ROUNDTABLE

Dates of Travel: 3/26 **Destination(s):** SAVANNAH, MACON, SAVANNAH

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):
CHAMBLISS FOR SENATE

Contact at Organization Making the Payment: ROB LEEBERN

Address of Organization: CHAMBLISS FOR SENATE
3224 PEACHTREE RD NE ATLANTA, GA 30305

Phone: 404-949-9688

Expense:	Amount:	Method:*
Transportation (specify): CHARTER	$2540	☑ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify):		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)

*Payment may be made either in-kind or by check made payable to the U.S. Treasury; you may not directly receive payment by either cash or a check made out to you.

This form and any accompanying memorandum of approval must be attached to your travel authorization. You MUST complete a travel voucher listing all expenses (regardless of payment method) following the trip.

Please send this form to the Counsel's Office (Room 128, EEOB) at least three (3) days before commencement of travel

TO BE COMPLETED BY COUNSEL'S OFFICE ☒ Approved ☐ Disapproved **Pursuant to:** ☐ 31 U.S.C. § 1353 ☒ 5 C.F.R. 2635.204(f)

Counsel's Signature [signature] **Date** 3/26/02

(REV. 7/96)

REV_00264005

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

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CONTACT PERSON: Kate Marinis

PHONE NUMBER: 456522

DATE OF REQUEST: 3/25/02

Please include a copy of the letter of invitation.

Your Name and Position: Ken Mehlman

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:

Ken is traveling w/ the President to SC, GA, and FL. Then he is doing an event for Kay Granger in Ft. Worth, then returning to DC.

Dates of Travel: 3/28/02 **Destination(s):** Washington, DC

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):

RNC

Contact at Organization Making the Payment: Kay Banning

Address of Organization: 310 First Street, SE
Washington, DC 20003

Phone: 863-8500

Expense:	Amount:	Method:*
Transportation (specify): American Airlines	$419.50	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify):		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)

*Payment may be made either in-kind or by check made payable to the U.S. Treasury; you may not directly receive payment by either cash or a check made out to you.

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Please send this form to the Counsel's Office (Room 128, EEOB) at least three (3) days before commencement of travel

TO BE COMPLETED BY COUNSEL'S OFFICE ☒ Approved ☐ Disapproved Pursuant to: ☐ 31 U.S.C. § 1353 ☒ 5 C.F.R. 2635.204(f)

Counsel's Signature [signature] **Date** 3/26/02

(REV. 7/96)

REV_00264006

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

In order to consider whether the Government may accept from an outside source payment of your travel, subsistence and related expenses under the GSA travel rule or 5 C.F.R. 2635.204(f), you must complete the information below. You must submit this form and related documentation and receive approval PRIOR to commencement of travel. Failure to receive PRIOR approval may result in you having to pay the travel expenses yourself. The outside source need not be a 501(c)(3) organization, but if it is, please state so on this form and include the IRS determination letter.

CONTACT PERSON: David Thomas

PHONE NUMBER: 6-7944

DATE OF REQUEST: 3-27-02

Please include a copy of the letter of invitation.

Your Name and Position:
David Thomas Associate Political Director

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
Political meetings to be paid for by RNC

Dates of Travel: 4-3-02 / 4-7-02 **Destination(s):** Denver CO / Phoenix AZ / Albuquerque NM

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):
RNC

Contact at Organization Making the Payment: Lynn Jaskwiski

Address of Organization: RNC
310 First St SE
Washington DC 20003

Phone:

Expense:	Amount:	Method:*
Transportation (specify): Air United Airlines	1606 ea	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging: Phoenix 70 Albuquerque 100	170 ea	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify):		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)

*Payment may be made either in-kind or by check made payable to the U.S. Treasury; you may not directly receive payment by either cash or a check made out to you.

This form and any accompanying memorandum of approval must be attached to your travel authorization. You MUST complete a travel voucher listing all expenses (regardless of payment method) following the trip.

Please send this form to the Counsel's Office (Room 128, EEOB) at least three (3) days before commencement of travel

TO BE COMPLETED BY COUNSEL'S OFFICE ☒ Approved ☐ Disapproved Pursuant to: ☐ 31 U.S.C. 1353 ☒ 5 C.F.R. 2635.204(f)

Counsel's Signature: [signature] Date: 3/28/02

REV_00264007

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

In order to consider whether the Government may accept from an outside source payment of your travel, subsistence and related expenses under the GSA travel rule or 5 C.F.R. 2635.204(f), you must complete the information below. You must submit this form and related documentation and receive approval PRIOR to commencement of travel. Failure to receive PRIOR approval may result in you having to pay the travel expenses yourself. The outside source need not be a 501(c)(3) organization, but if it is, please state so on this form and include the IRS determination letter.

CONTACT PERSON: Parker Hamilton

PHONE NUMBER: 6-6238

DATE OF REQUEST: 3/28/02

Please include a copy of the letter of invitation.

Your Name and Position:
Nicolle Devenish, Special Assistant to the President and Director of Media Affairs

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:

RNC State Chairmen's Meeting
~~Coordinate media message with Republican state parties, participate in communications training sessions for state party officials and~~ employees, meet with reporters and staff members from White House and RNC Communications and Political offices

Dates of Travel: 4/17/02-4/19/02 **Destination(s):** New Orleans, LA

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):

~~Republican National Committee~~

Contact at Organization Making the Payment: Karen Willard

Address of Organization: ~~310 First Street, SE~~
Washington, DC 20003

Phone: (202) 863-8834

Expense:	Amount:	Method:*
Transportation (specify): commercial air	$194.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging: The Fairmont Hotel	$382.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals: some included	$100.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify):		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)

*Payment may be made either in-kind or by check made payable to the U.S. Treasury; you may not directly receive payment by either cash or a check made out to you.

This form and any accompanying memorandum of approval must be attached to your travel authorization. You MUST complete a travel voucher listing all expenses (regardless of payment method) following the trip.

Please send this form to the Counsel's Office (Room 128, EEOB) at least three (3) days before commencement of travel

TO BE COMPLETED BY COUNSEL'S OFFICE ☒ Approved ☐ Disapproved Pursuant to: ☐ 31 U.S.C. § 1353 ☒ 5 C.F.R. 2635.204(f)

Counsel's Signature [signature] **Date** 3/27/02

(REV. 7/96)

REV_00264008

TRAVEL AUTHORIZATION

WHITE HOUSE OFFICE

DATE OF REQUEST: 4/1/02

TRAVEL AUTHORIZATION NUMBER: _____

Please Print

Last Name	First Name		
Davis	Alicia		
Extension: 6-6173	**Room:** 100	**Title:** AD	**Office:** OPA
Contact Person: *please print* Alicia Davis			**Extension:** 6-6173

ATTACHMENTS:

☒ Invitation/Documentation Regarding Event ☒ Travel Expenses From Outside Sources Form

PURPOSE OF TRAVEL *(include event dates and host information, if applicable):*

Karl Rove is the keynote speaker at an RNC fundraiser and a fundraiser for Congresswoman Sue Kelly.

DEPARTURE:			RETURN:		
Date:	**Time:**	**Mode:**	**Date:**	**Time:**	**Mode:**
04/04/02	10:00 AM	Plane	04/04/02	8:30 PM	Plane

ITINERARY *(List all cities including those through which flights are routed):*

Origin: Washington, DC

Destination: New York, New York

Return to: Washington, DC

FUNDING SOURCE:

☐ Official ☒ Political ☐ Mixed ☐ 501 (c)(3) ☐ Other: _____

NOTE: *For travel funded by political, 501(c)(3) or other sources, an approved "Travel Expenses From Outside Source" form must be attached.*

SPECIAL EXPENSES

Hotel:		**Per Diem:**		**Privately Owned Vehicle:**	$500.00
Air Fare:	$252.00	**Taxi:**		**Standard Vehicle Rental:**	
Train Fare:		**Mini-Van Rental:**		**TOTAL ESTIMATED EXPENSES:**	$752.00

APPROVING SIGNATURES:

Office Head:	**Chief of Staff or Designee:**
White House Management:	**Political Travel:**

(REV. 1/02)

ORIGINAL (WH MANAGEMENT COPY)

REV_00264009

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

In order to consider whether the Government may accept from an outside source payment of your travel, subsistence and related expenses under the GSA travel rule or 5 C.F.R. 2635.204(f), you must complete the information below. You must submit this form and related documentation and receive approval PRIOR to commencement of travel. Failure to receive PRIOR approval may result in you having to pay the travel expenses yourself. The outside source need not be a 501(c)(3) organization, but if it is, please state so on this form and include the IRS determination letter.

CONTACT PERSON: Alicia Davis

PHONE NUMBER: 6-6173

DATE OF REQUEST: 4/1/02

Please include a copy of the letter of invitation.

Your Name and Position:
Alicia Davis, Associate Director

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
Karl Rove is the keynote speaker at 2 events in New York City. I will be staffing the event.

Dates of Travel: 4/4/02 **Destination(s):** New York City

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):
Republican National Committee

Contact at Organization Making the Payment: Jay Banning

Address of Organization: 310 1st Street SE
Washington, DC 20003

Phone: 202-863-8500

Expense:	Amount:	Method:*
Transportation (specify): Airplane	$252.00	☐ In Kind ☐ Reimbursable ☒ Other (Political Only) RNC
Lodging:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify): Car	$500.00	☐ In Kind ☐ Reimbursable ☒ Other (Political Only) RNC

*Payment may be made either in-kind or by check made payable to the U.S. Treasury; you may not directly receive payment by either cash or a check made out to you.

This form and any accompanying memorandum of approval must be attached to your travel authorization. You MUST complete a travel voucher listing all expenses (regardless of payment method) following the trip.

Please send this form to the Counsel's Office (Room 128, EEOB) at least three (3) days before commencement of travel

TO BE COMPLETED BY COUNSEL'S OFFICE ☐ Approved ☐ Disapproved **Pursuant to:** ☐ 31 U.S.C. § 1353 ☐ 5 C.F.R. 2635.204(f)

Counsel's Signature _____ **Date** _____

(REV. 7/96)

REV_00264010

DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT

Carrier Envelope: Sue Kelly for Congress
P.O. Box 599
Katonah, New York 10536

Response Envelope: Sue Kelly for Congress
P.O. Box 599
Katonah, New York 10536

Invitation:

Honorary Co-Chair Governor George E. Pataki

and

The Honorable Michael R. Bloomberg

invite you to attend a reception

in support of

Congresswoman Sue Kelly

With Special Guest

Karl Rove

Thursday, April 4, 2002

5:30 p.m. – 7:30 p.m.

The Yale Club
50 Vanderbilt Avenue
Manhattan

$1,000 per person

R.S.V.P. to Jennie Esterow
(212) 290-1393 or by
enclosed response card

Response Card:

_____ Yes, I will attend the reception in support of Congresswoman Kelly on April 4th. Enclosed is my contribution of $_____.

_____ No, I will not be able to attend the reception in support of Congresswoman Kelly on April 4th. Enclosed is my contribution of $_____.

Please make all checks payable to Sue Kelly for Congress.
All checks should be received by March 31st.

Name_____

Address_____

City_____State_____Zip_____

Home Phone_____Work Phone_____

Employer_____

Occupation_____

Business Address_____

City_____State_____Zip_____

Federal law prohibits any corporate, Ltd. or P.C. checks. $1,000 maximum contribution per person per primary election and $1,000 maximum contribution per person per general election. Federal law requires political committees to report the name, mailing address, occupation and name of employer for each individual whose contributions aggregate in excess of $2000 in a calendar year. Contributions are not deductible for Federal income tax purposes.

Paid for by Sue Kelly for Congress

TRAVEL AUTHORIZATION

WHITE HOUSE OFFICE

DATE OF REQUEST: 4/1/02

Please Print

TRAVEL AUTHORIZATION NUMBER: _____

Last Name	First Name		
Rove	Karl		
Extension: 6-2369	**Room:** 2nd Fl WW	**Title:** Senior Advisor	**Office:** OSI
Contact Person: *please print* Alicia Davis			**Extension:** 6-6173

ATTACHMENTS:

☒ Invitation/Documentation Regarding Event ☒ Travel Expenses From Outside Sources Form

PURPOSE OF TRAVEL *(include event dates and host information, if applicable):*

Karl Rove is the keynote speaker at an RNC fundraiser and a fundraiser for Congresswoman Sue Kelly.

DEPARTURE:			RETURN:		
Date:	**Time:**	**Mode:**	**Date:**	**Time:**	**Mode:**
04/04/02	10:00 AM	Plane	04/04/02	8:30 PM	Plane

ITINERARY *(List all cities including those through which flights are routed):*

Origin: Washington, DC

Destination: New York, New York

Return to: Waco, Texas

FUNDING SOURCE:

☐ Official ☒ Political ☐ Mixed ☐ 501 (c)(3) ☐ Other: _____

NOTE: *For travel funded by political, 501(c)(3) or other sources, an approved "Travel Expenses From Outside Source" form must be attached.*

SPECIAL EXPENSES

Hotel:		**Per Diem:**		**Privately Owned Vehicle:**	$500.00
Air Fare:	$252.00	**Taxi:**		**Standard Vehicle Rental:**	
Train Fare:		**Mini-Van Rental:**		**TOTAL ESTIMATED EXPENSES:**	$752.00

APPROVING SIGNATURES:

Office Head:	**Chief of Staff or Designee:**
White House Management:	**Political Travel:**

(REV. 1/02)

ORIGINAL (WH MANAGEMENT COPY)

REV_00264013

TRAVEL AUTHORIZATION

WHITE HOUSE OFFICE

DATE OF REQUEST: 4/1/02

TRAVEL AUTHORIZATION NUMBER: _____

Please Print

Last Name	First Name		
Rove	Karl		
Extension: 6-2369	**Room:** WW 2nd Floor	**Title:** Senior Advisor	**Office:** OSI
Contact Person: *please print* Alicia Davis			**Extension:** 6-6173

ATTACHMENTS:

☒ Invitation/Documentation Regarding Event ☒ Travel Expenses From Outside Sources Form

PURPOSE OF TRAVEL *(include event dates and host information, if applicable):*

Karl Rove is the keynote speaker at an RNC fundraiser and a fundraiser for Congresswoman Sue Kelly.

DEPARTURE:			RETURN:		
Date: 04/04/02	**Time:** 10:00 AM	**Mode:** Plane	**Date:** 04/04/02	**Time:** 8:30 PM	**Mode:** Plane

ITINERARY *(List all cities including those through which flights are routed):*

Origin: Washington, DC

Destination: New York, New York

Return to: Washington, DC

FUNDING SOURCE:

☐ Official ☒ Political ☐ Mixed ☐ 501 (c)(3) ☐ Other: _____

NOTE: *For travel funded by political, 501(c)(3) or other sources, an approved "Travel Expenses From Outside Source" form must be attached.*

SPECIAL EXPENSES

Hotel:		**Per Diem:**		**Privately Owned Vehicle:**	$500.00
Air Fare:	$252.00	**Taxi:**		**Standard Vehicle Rental:**	
Train Fare:		**Mini-Van Rental:**		**TOTAL ESTIMATED EXPENSES:**	$752.00

APPROVING SIGNATURES:

Office Head:	**Chief of Staff or Designee:**
White House Management:	**Political Travel:**

(REV. 1/02)

ORIGINAL (WH MANAGEMENT COPY)

REV_00264014

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

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CONTACT PERSON: Alicia Davis

PHONE NUMBER: 6-6173

DATE OF REQUEST: 4/1/02

Please include a copy of the letter of invitation.

Your Name and Position:
Karl Rove, Senior Advisor

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
Karl Rove is the keynote speaker at 2 events in New York City.

Dates of Travel: 4/4/02 **Destination(s):** New York City

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):
Republican National Committee

Contact at Organization Making the Payment: Jay Banning

Address of Organization: 310 1st Street SE
Washington, DC 20003

Phone: 202-863-8500

Expense:	Amount:	Method:*
Transportation (specify): Airplane	$252.00	☐ In Kind ☐ Reimbursable ☒ Other (Political Only) RNC
Lodging:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify): Car	$500.00	☐ In Kind ☐ Reimbursable ☒ Other (Political Only) RNC

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You MUST complete a travel voucher listing all expenses (regardless of payment method) following the trip.

Please send this form to the Counsel's Office (Room 128, EEOB) at least three (3) days before commencement of travel

TO BE COMPLETED BY COUNSEL'S OFFICE ☐ Approved ☐ Disapproved Pursuant to: ☐ 31 U.S.C. § 1353 ☐ 5 C.F.R. 2635.204(f)

Counsel's Signature _____ **Date** _____

(REV. 7/96)

REV_00264015

DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT

Carrier Envelope: Sue Kelly for Congress
P.O. Box 599
Katonah, New York 10536

Response Envelope: Sue Kelly for Congress
P.O. Box 599
Katonah, New York 10536

Invitation:

Honorary Co-Chair Governor George E. Pataki

and

The Honorable Michael R. Bloomberg

invite you to attend a reception

in support of

Congresswoman Sue Kelly

With Special Guest

Karl Rove

Thursday, April 4, 2002

5:30 p.m. – 7:30 p.m.

The Yale Club
50 Vanderbilt Avenue
Manhattan

$1,000 per person

R.S.V.P. to Jennie Esterow
(212) 290-1393 or by
enclosed response card

Response Card:

_____ Yes, I will attend the reception in support of Congresswoman Kelly on April 4th. Enclosed is my contribution of $_____.

_____ No, I will not be able to attend the reception in support of Congresswoman Kelly on April 4th. Enclosed is my contribution of $_____.

Please make all checks payable to Sue Kelly for Congress.
All checks should be received by March 31st.

Name_____

Address_____

City_____State_____Zip_____

Home Phone_____Work Phone_____

Employer_____

Occupation_____

Business Address_____

City_____State_____Zip_____

Federal law prohibits any corporate, Ltd. or P.C. checks. $1,000 maximum contribution per person per primary election and $1,000 maximum contribution per person per general election. Federal law requires political committees to report the name, mailing address, occupation and name of employer for each individual whose contributions aggregate in excess of $2000 in a calendar year. Contributions are not deductible for Federal income tax purposes.

Paid for by Sue Kelly for Congress

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

In order to consider whether the Government may accept from an outside source payment of your travel, subsistence and related expenses under the GSA travel rule or 5 C.F.R. 2635.204(f), you must complete the information below. You must submit this form and related documentation and receive approval PRIOR to commencement of travel. Failure to receive PRIOR approval may result in you having to pay the travel expenses yourself. The outside source need not be a 501(c)(3) organization, but if it is, please state so on this form and include the IRS determination letter.

CONTACT PERSON: Alicia Davis

PHONE NUMBER: 6-6173

DATE OF REQUEST: 4/1/02

Please include a copy of the letter of invitation.

Your Name and Position:
Karl Rove, Senior Advisor

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
Karl Rove is the keynote speaker at 2 events in New York City.

Dates of Travel: 4/4/02 Destination(s): New York City

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):
Republican National Committee

Contact at Organization Making the Payment: Jay Banning

Address of Organization: 310 1st Street SE
Washington, DC 20003

Phone: 202-863-8500

Expense:	Amount:	Method:*
Transportation (specify): Airplane	$252.00	☒ In Kind ☐ Reimbursable ☒ Other (Political Only) RNC
Lodging:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify): Car	$500.00	☒ In Kind ☐ Reimbursable ☒ Other (Political Only) RNC

*Payment may be made either in-kind or by check made payable to the U.S. Treasury; you may not directly receive payment by either cash or a check made out to you.

This form and any accompanying memorandum of approval must be attached to your travel authorization. You MUST complete a travel voucher listing all expenses (regardless of payment method) following the trip.

Please send this form to the Counsel's Office (Room 128, EEOB) at least three (3) days before commencement of travel

TO BE COMPLETED BY COUNSEL'S OFFICE ☒ Approved ☐ Disapproved Pursuant to: ☐ 31 U.S.C. § 1353 ☒ 5 C.F.R. 2635.204(f)

Counsel's Signature [signature] Date 4/3/02

(REV. 7/96)

REV_00264018

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

In order to consider whether the Government may accept from an outside source payment of your travel, subsistence and related expenses under the GSA travel rule or 5 C.F.R. 2635.204(f), you must complete the information below. You must submit this form and related documentation and receive approval PRIOR to commencement of travel. Failure to receive PRIOR approval may result in you having to pay the travel expenses yourself. The outside source need not be a 501(c)(3) organization, but if it is, please state so on this form and include the IRS determination letter.

CONTACT PERSON: Alicia Davis

PHONE NUMBER: 6-6173

DATE OF REQUEST: 4/1/02

Please include a copy of the letter of invitation.

Your Name and Position:
Alicia Davis, Associate Director

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
Karl Rove is the keynote speaker at 2 events in New York City. I will be staffing the event.

Dates of Travel: 4/4/02 **Destination(s):** New York City

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):
Republican National Committee

Contact at Organization Making the Payment: Jay Banning

Address of Organization: 310 1st Street SE
Washington, DC 20003

Phone: 202-863-8500

Expense:	Amount:	Method:*
Transportation (specify): Airplane	$252.00	☒ In Kind ☐ Reimbursable ☒ Other (Political Only) RNC
Lodging:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify): Car	$500.00	☒ In Kind ☐ Reimbursable ☒ Other (Political Only) RNC

*Payment may be made either in-kind or by check made payable to the U.S. Treasury; you may not directly receive payment by either cash or a check made out to you.

This form and any accompanying memorandum of approval must be attached to your travel authorization. You MUST complete a travel voucher listing all expenses (regardless of payment method) following the trip.

Please send this form to the Counsel's Office (Room 128, EEOB) at least three (3) days before commencement of travel

TO BE COMPLETED BY COUNSEL'S OFFICE ☒ Approved ☐ Disapproved Pursuant to: ☐ 31 U.S.C. § 1353 ☒ 5 C.F.R. 2635.204(f)

Counsel's Signature [signature] **Date** 4/3/02

(REV. 7/96)

REV_00264019

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

In order to consider whether the Government may accept from an outside source payment of your travel, subsistence and related expenses under the GSA travel rule or 5 C.F.R. 2635.204(f), you must complete the information below. You must submit this form and related documentation and receive approval PRIOR to commencement of travel. Failure to receive PRIOR approval may result in you having to pay the travel expenses yourself. The outside source need not be a 501(c)(3) organization, but if it is, please state so on this form and include the IRS determination letter.

Please include a copy of the letter of invitation.

CONTACT PERSON: Jason Cole

PHONE NUMBER: 60345

DATE OF REQUEST: 04/03/2002

Your Name and Position:
Sara Taylor

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
St. Louis 72 RNC Meeting
Iowa College Republican Grassroots Training and Convention

Dates of Travel: 04/04/2002-04/07/2002 **Destination(s):** St. Louis, MO / Des Moines, IA

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):
Republican National Committee

Contact at Organization Making the Payment: Amber Lyons

Address of Organization: 310 First Street SE
Washington, D.C. 20003

Phone: 202-863-8586

Expense:	Amount	Method:*
Transportation (specify): American Airlines	$851.05	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify): Rental Car	$39.01	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)

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This form and any accompanying memorandum of approval must be attached to your travel authorization. You MUST complete a travel voucher listing all expenses (regardless of payment method) following the trip.

Please send this form to the Counsel's Office (Room 128, EEOB) at least three (3) days before commencement of travel

TO BE COMPLETED BY COUNSEL'S OFFICE: ☒ Approved ☐ Disapproved Pursuant to: ☐ 31 U.S.C. § 1353 ☒ 5 C.F.R. 2635.204(f)

Counsel's Signature: [signature] Date: 4/4/02

(REV. 7/96)

REV_00264020

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

In order to consider whether the Government may accept from an outside source payment of your travel, subsistence and related expenses under the GSA travel rule or 5 C.F.R. 2635.204(f), you must complete the information below. You must submit this form and related documentation and receive approval PRIOR to commencement of travel. Failure to receive PRIOR approval may result in you having to pay the travel expenses yourself. The outside source need not be a 501(c)(3) organization, but if it is, please state so on this form and include the IRS determination letter.

CONTACT PERSON: Kate Marinis

PHONE NUMBER: x66522

DATE OF REQUEST: 4/3/02

Please include a copy of the letter of invitation.

Your Name and Position:
Karl Rove, Senior Advisor

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
Karl is headlining a lunch for the Republican National Committee in Cincinnati, OH. It is a fundraiser for the 2002 RNC Gala.

Dates of Travel: 4/8/02 **Destination(s):** Cincinnati, OH

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):
~~Republican National Committee~~

Contact at Organization Making the Payment: Jay Banning

Address of Organization: ~~310 First Street, SE~~
Washington, DC 20003

Phone: 202-863-8560

Expense:	Amount:	Method:*
Transportation (specify): Delta Airlines	$972.50	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify):		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)

*Payment may be made either in-kind or by check made payable to the U.S. Treasury; you may not directly receive payment by either cash or a check made out to you.

This form and any accompanying memorandum of approval must be attached to your travel authorization.
You MUST complete a travel voucher listing all expenses (regardless of payment method) following the trip.

Please send this form to the Counsel's Office (Room 128, EEOB) at least three (3) days before commencement of travel

TO BE COMPLETED BY COUNSEL'S OFFICE ☒ Approved ☐ Disapproved Pursuant to: ☐ 31 U.S.C. § 1353 ☒ 5 C.F.R. 2635.204(f)

Counsel's Signature [signature] **Date** 3/4/02

(REV. 7/96)

REV_00264021

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

In order to consider whether the Government may accept from an outside source payment of your travel, subsistence and related expenses under the GSA travel rule or 5 C.F.R. 2635.204(f), you must complete the information below. You must submit this form and related documentation and receive approval PRIOR to commencement of travel. Failure to receive PRIOR approval may result in you having to pay the travel expenses yourself. The outside source need not be a 501(c)(3) organization, but if it is, please state so on this form and include the IRS determination letter.

CONTACT PERSON: Kate Marinis

PHONE NUMBER: x66522

DATE OF REQUEST: 4/3/02

Please include a copy of the letter of invitation.

Your Name and Position:
Ken Mehlman, Deputy Assistant to the President and Director of Political Affairs

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
RNC 72-hour Task Force Meeting

Dates of Travel: 4/4/02 - 4/6/02 **Destination(s):** St. Louis, MO

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):
~~Republican National Committee~~

Contact at Organization Making the Payment: Jay Banning

Address of Organization: ~~310 First Street, SE~~
Washington, DC 20003

Phone: 863-8560

Expense:	Amount:	Method:*
Transportation (specify): American Airlines / charter	$216	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging: Sheraton Westport	$90	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify):		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)

*Payment may be made either in-kind or by check made payable to the U.S. Treasury; you may not directly receive payment by either cash or a check made out to you.

This form and any accompanying memorandum of approval must be attached to your travel authorization. You MUST complete a travel voucher listing all expenses (regardless of payment method) following the trip.

Please send this form to the Counsel's Office (Room 128, EEOB) at least three (3) days before commencement of travel

TO BE COMPLETED BY COUNSEL'S OFFICE ☒ Approved ☐ Disapproved **Pursuant to:** ☐ 31 U.S.C. § 1353 ☐ 5 C.F.R. 2635.204(f)

Counsel's Signature [signature] **Date** 4/3/02

(REV. 7/96)

REV_00264022

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

In order to consider whether the Government may accept from an outside source payment of your travel, subsistence and related expenses under the GSA travel rule or 5 C.F.R. 2635.204(f), you must complete the information below. You must submit this form and related documentation and receive approval PRIOR to commencement of travel. Failure to receive PRIOR approval may result in you having to pay the travel expenses yourself. The outside source need not be a 501(c)(3) organization, but if it is, please state so on this form and include the IRS determination letter.

CONTACT PERSON: Kathy Rust

PHONE NUMBER: 6-6581

DATE OF REQUEST: April 4, 2002

Please include a copy of the letter of invitation.

Your Name and Position: Deborah Spagnoli, Special Asst. to the President for Intergovernmental Affairs

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:

Particpate and attend Republican Governor's Conference in Naples, Florida.

Dates of Travel: 04/07/02-04/09/02 **Destination(s):** Naples, Florida

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):

Republican Governors Association

Contact at Organization Making the Payment: Susan Nelson

Address of Organization: 310 First Street, SE
Washington, DC 20003

Phone: 202/863-8587

Expense:	Amount:	Method:*
Transportation (specify): US Airways	1007.50	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging: Ritz Carlton, Naples, FL	490.00 plus tx	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals: Lunch/Dinners	100.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify): Ground Transportation	100.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)

*Payment may be made either in-kind or by check made payable to the U.S. Treasury; you may not directly receive payment by either cash or a check made out to you.

This form and any accompanying memorandum of approval must be attached to your travel authorization. You MUST complete a travel voucher listing all expenses (regardless of payment method) following the trip.

Please send this form to the Counsel's Office (Room 128, EEOB) at least three (3) days before commencement of travel

TO BE COMPLETED BY COUNSEL'S OFFICE ☒ Approved ☐ Disapproved **Pursuant to:** ☐ 31 U.S.C. § 1353 ☒ 5 C.F.R. 2635.204(f)

Counsel's Signature [signature] **Date** 4/4/02

(REV. 7/96)

REV_00264023

REV_00264024

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

Travel - Mission Designations

OA/NARA#: 1824/1742
9632

Box 61
Folder 7

February 6, 2002

MEMORANDUM FOR JOSEPH HAGIN
ASSISTANT TO THE PRESIDENT AND
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: HECTOR F. IRASTORZA, JR.
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: Joe M. Allbaugh, Director of FEMA

SUBJECT: Request White House Mission Designation for Travel

Request approval of the following proposed White House Mission:

1. Requesting Principal: Joe M. Allbaugh, Director of FEMA

2. Purpose of the trip: To conduct emergency disaster site visits to Oklahoma, Kansas and Missouri.

3. 24 hour Point Of Contact: Kevin M. Caulfield, Cell: PRA 6

4. Travel Itinerary:
a. Dates: 07 February and 08 February 2002
b. Requested time of departure: Would like to depart Andrews AFB at or about 0800 on 07 Feb. bound for Oklahoma City, Ok. , and Remain Over Night (RON) in OK City. On 08 February, 2002, requesting to depart Oklahoma City at or about 0700 bound for Wichita, Kansas. Then at or about 1230 Depart Wichita, KN, bound for Kansas City, Missouri. At or about 1830, Depart Kansas City, MO, bound for Andrews Air Force Base.

5. Total number of passengers: Seven (7)

6. Special considerations: There are hundreds of thousands of American's without electrical power in freezing weather.

REVIEW:

HECTOR F. IRASTORZA, Jr.
Deputy Assistant to the President for Management and Administration

APPROVAL:

APPROVED ~~DISAPPROVED~~
~~JOSEPH HAGIN~~ ANDREW CARD
~~Deputy~~ Chief of Staff ~~for Operations~~

Cc: White House Counsel
Director, White House Military Office
Executive Secretary, National Security Council
Director, White House Airlift Operations

OFFICE OF THE VICE PRESIDENT

WASHINGTON

February 7, 2002

MEMORANDUM FOR JOSEPH HAGIN
ASSISTANT TO THE PRESIDENT AND
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: HECTOR F. IRASTORZA, JR.
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: ERIC EDELMAN
PRINCIPAL DEPUTY ASSISTANT TO THE VICE PRESIDENT
FOR NATIONAL SECURITY AFFAIRS

SUBJECT: REQUEST WHITE HOUSE MISSION DESIGNATION FOR TRAVEL

Request approval of the following proposed White House Mission:

1. Requesting Principal: Eric Edelman, Principal Deputy Assistant to the Vice President for National Security Affairs

2. Purpose of the trip: To conduct Site Survey for Vice Presidential travel to Europe and the Middle East.

3. 24 Hour Point of Contact: Dan Wilmot, Cell- PRA 6

4. Travel Itinerary:
   a. Date: 8 – 23 February 2002
   b. Requested time of Departure: See attached schedule

5. Total number of passengers: Seventeen (17)

6. Special considerations: Helicopter support is also requested in countries as needed.

REVIEW:

HECTOR F. IRASTORZA, JR.
Deputy Assistant to the President for Management and Administration

APPROVAL

2/7/02

APPROVED _____ DISAPPROVED

ANDREW CARD
CHIEF OF STAFF TO THE PRESIDENT

Cc: White House Counsel
Director, White House Military Office
Executive Secretary, National Security Council
Director, White House Airlift Operations

SITE SURVEY TEAM'S SCHEDULE

Friday, 8 February 2002

6:00 pm — Depart Andrews Air Force Base en route Gander, Newfoundland
Flight Time: 2+45
Time Change: +1.5 (EST)

10:15 pm — Arrive Gander, Newfoundland (Refuel 45 min minimum)

11:00 pm — Depart Gander, Newfoundland en route Shannon, Ireland
Flight Time: 3+55
Time Change: +5 (EST)
+3.5 (Newfoundland)

Saturday, 9 February 2002

6:25 am — Arrive Shannon, Ireland (Crew Rest 15 hr minimum)

9:25 pm — Depart Shannon, Ireland en route Souda, Greece
Flight Time: 4+00
Time Change: +7 (EST)
+2 (Ireland)

Sunday, 10 February 2002

3:15 am — Arrive Souda, Greece (Refuel 45 minutes minimum)

4:00 am — Depart Souda, Greece en route Jeddah, Saudi Arabia
Flight Time: 2+50
Time Change: +8 (EST)
+1 (Greece)

7:50 am — Arrive Jiddah, Saudi Arabia

1:00 pm — Depart Jiddah, Saudi Arabia en route Riyadh, Saudi Arabia
Flight Time: 1+20
Time Change: +8 (EST)
NC (Jiddah)

2:20 pm — Arrive King Khalid International Airport

RON — Riyadh, Saudi Arabia

Monday, 11 February 2002

3:00 pm — Depart Riyadh, Saudi Arabia en route Salalah, Oman
Flight Time: 1+45
Time Change: +9 (EST)
+1 (Saudi Arabia)

5:45 pm — Arrive Salalah International Airport

RON — Salalah, Oman

REV_00264028

Tuesday, 12 February 2002

10:00 am Depart Salalah, Oman en route Muscat Oman
Flight Time: 1+20
Time Change: +9 (EST)
NC

11:20 am Arrive Seeb International Airport

RON Muscat, Oman

Wednesday, 13 February 2002

10:00 am Depart Muscat, Oman en route Abu Dhabi, United Arab Emirates
Flight Time: 0+50
Time Change:+9 (EST)
+NC (Oman)

10:50 am Arrive Abu Dhabi International Airport, United Arab Emirates

6:00 pm Depart Abu Dhabi, United Arab Emirates en route Doha, Qatar
Flight Time: 0+50
Time Change:+8 (EST)
-1 (UAE)

5:50 pm Arrive Doha International Airport

RON Doha, Qatar

Thursday, 14 February 2002

5:00 pm Depart Doha, Qatar en route Manama, Bahrain
Flight Time: 0+30
Time Change:+8 (EST)
NC (Qatar)

5:30 pm Arrive Bahrain International Airport

RON Manama, Bahrain

Friday, 15 February 2002

5:00 pm Depart Manama, Bahrain en route Kuwait City, Kuwait
Flight Time: 0+55
Time Change: +8 (EST)
NC (Bahrain)

5:55 pm Arrive Kuwait City International Airport

RON Kuwait City, Kuwait

Saturday, 16 February 2002

RON Kuwait City, Kuwait

Sunday, 17 February 2002

10:00 am Depart Kuwait City, Kuwait en route Cairo, Egypt
Flight Time: 2+40
Time Change: +7 (EST)
-1 (Kuwait)

11:40 am Arrive Cairo, Egypt

RON Cairo, Egypt

Monday, 18 February 2002

RON Cairo, Egypt

Tuesday, 19 February 2002

8:00 am Depart Cairo, Egypt en route Amman, Jordan
Flight Time: 0+55
Time Change: +7 (EST)
NC (Egypt)

8:55 am Arrive Amman, Jordan

5:00 pm Depart Amman, Jordan en route Tel Aviv, Israel
Flight Time: 0+30
Time Change: +7 (EST)
NC (Jordan)

5:30 pm Arrive Israel International Airport

RON Tel Aviv, Israel

Wednesday, 20 February 2002

RON Tel Aviv, Israel

Thursday, 21 February 2002

10:00 am Depart Tel Aviv, Israel en route Ankara, Turkey
Flight Time: 1+30
Time Change: +7 (EST)
NC (Israel)

11:30 am Arrive Ankara, Turkey

6:00 pm Depart Ankara, Turkey en route London, England
Flight Time: 4+15
Time Change: +6 (EST)
-2 (Turkey)

8:15 pm Arrive London, England

RON London, England

Friday, 22 February 2002
RON England

Saturday, 23 February 2002

8:00 am Depart London, England en route Keflavik, Iceland
Flight Time: 2+55
Time Change: +5 (EST)
NC (England)

10:55 am Arrive Keflavik, Iceland (Refuel 45 min minimum)

11:40 am Depart Keflavik, Iceland en route Gander, Newfoundland
Flight Time: 4+00
Time Change: 1+5 (EST)
-3.5 (Iceland)

Sunday, 23 February 2002

12:20 pm Arrive Gander, Newfoundland (Refuel 45 min minimum)

1:05 pm Depart Gander, Newfoundland en route Andrews AFB
Flight Time: 3+25
Time Change: - 1.5 (Iceland)

3:00 pm Arrive Andrews AFB

THE WHITE HOUSE

WASHINGTON

MEMORANDUM

Sic AHCard 2/4/02

TO: ANDREW H. CARD, JR.
CHIEF OF STAFF

THROUGH: HECTOR IRASTORZA
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: BRADLEY A. BLAKEMAN BAB
DEPUTY ASSISTANT TO THE PRESIDENT FOR
APPOINTMENTS AND SCHEDULING

DATE: FEBRUARY 1, 2002

SUBJECT: MILITARY AIR REQUEST FOR TRAVEL TO MEXICO, EL SALVADOR, AND PERU

The President will travel to Latin America in March. In direct support of the President's visit a Site Survey team will travel from Washington, DC to Mexico on Monday, February 11, 2002. The Site Survey team will then travel to El Salvador and Peru finishing the trip in Washington, DC on Sunday, February 17, 2002. The use of commercial air transportation is not feasible due to time constraints on the team's travel itinerary and the unavailability of acceptable connections to the desired destinations. Request a military aircraft to transport approximately 30 members of the Site Survey team in accordance with the itinerary below.

Monday, February 11, 2002

8:00 am	Depart Andrews Air Force Base en route Monterrey, Mexico
	Flight Time: 3 hours, 45 minutes
	Time Change: -1
10:45 am	Arrive Monterrey, Mexico
RON	Monterrey, Mexico

Tuesday, February 12, 2002

RON	Monterrey, Mexico

Wednesday, February 13, 2002

8:00 am	Depart Monterrey, Mexico en route San Salvador, El Salvador
	Flight Time: 2 hours, 30 minutes
	Time Change: No Time Change
10:30 am	Arrive San Salvador, El Salvador
RON	San Salvador, El Salvador

Thursday, February 14, 2002

RON	San Salvador, El Salvador

Friday, February 15, 2002

8:00 am	Depart San Salvador, El Salvador en route Lima, Peru
	Flight Time: 4 hours, 5 minutes
	Time Change: +1 hour
1:05 pm	Arrive Lima, Peru
RON	Lima, Peru

Saturday, February 16, 2002

RON	Lima, Peru

Sunday, February 17, 2002

8:00 am	Depart Lima, Peru en route Andrews Air Force Base
	Flight Time: 7 hours, 15 minutes
	Time Change: -1 hour
3:15 pm	Arrive Andrews Air Force Base
RON	Washington, DC

Helicopter support is also requested in countries as needed.
It is respectfully requested that you approve the mission set forth.

APPROVE / DISAPPROVE

ANDREW H. CARD, JR 2/4/02
CHIEF OF STAFF

CC: White House Counsel
Director, White House Military Office
Director, Airlift Operations

THE WHITE HOUSE

WASHINGTON

MEMORANDUM

TO: ANDREW H. CARD, JR.
CHIEF OF STAFF

THROUGH: HECTOR IRASTORZA HI
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: GOVERNOR TOM RIDGE Tom Ridge
ASSISTANT TO THE PRESIDENT AND
HOMELAND SECURITY ADVISOR

DATE: FEBRUARY 7, 2002

SUBJECT: MILITARY AIR REQUEST FOR TRAVEL TO MEXICO CITY AND EL PASO

I will travel to Mexico City and El Paso in early March. The use of commercial air transportation is not feasible due to time constraints and the unavailability of acceptable commercial connections to the desired destinations. Request a military aircraft to transport approximately 35 members of the delegation, including security and press, in accordance with the itinerary below.

Monday, March 4, 2002

9:00 am	Depart Andrews Air Force Base en route Mexico City, Mexico
11:50 am	Arrive Mexico City
RON	Mexico City

Tuesday, March 5, 2002

RON	Mexico City

Wednesday, March 6, 2002

8:30 am	Depart Mexico City
9:40 am	Arrive El Paso, Texas
1:30 pm	Depart El Paso
7:45 pm	Arrive Andrews Air Force Base

REV_00264034

It is respectfully requested that you approve the mission set forth.

APPROVE/DISAPPROVE

ANDREW H. CARD, JR.
CHIEF OF STAFF

CC: White House Counsel
Director, White House Military Office
Director, Airlift Operations

THE WHITE HOUSE

WASHINGTON

January 18, 2002

MEMORANDUM FOR JOSEPH HAGIN
ASSISTANT TO THE PRESIDENT AND
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: HECTOR F. IRASTORZA, JR.
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: CONDOLEEZZA RICE

SUBJECT: Request White House Mission Designation for President Karzai of Afghanistan to Travel to Washington

Request approval of the following proposed White House Mission:

1. Requesting Principal: Secretary of State Powell.

2. Purpose of the Trip: To provide transportation for President Karzai to Washington DC to meet with President Bush and other senior United States Government officials.

3. 24 hour Point of Contact: Jeff Lunstead PRA 6 Steve Young PRA 6

4. Travel Itinerary:

a. Dates: January 26, 2002 - February 1, 2002

b. Requested Time of Departure: Depart Kabul to arrive in Washington DC on the afternoon of January 27. Travel to New York City early a.m. on January 30. Depart New York City on January 31 to London and then possibly back to Kabul.

5. Total Number of Passengers: Maximum of 10

6. Special Considerations: If possible, request an aircraft without U.S. markings.

APPROVED / DISAPPROVED

JOSEPH HAGIN AHCard
Deputy Chief of Staff for Operations

cc: White House Counsel
Director, White House Military Office
Executive Secretary, National Security Council
Director, White House Airlift Operations

9340
Add-on

THE WHITE HOUSE

WASHINGTON

January 18, 2002

MEMORANDUM FOR JOSEPH HAGIN
ASSISTANT TO THE PRESIDENT AND
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: HECTOR F. IRASTORZA, JR.
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: CONDOLEEZZA RICE

SUBJECT: Revised White House Mission Designation Request for Presidential Delegation to Honduras

Request approval of the following proposed White House Mission:

1. Requesting Principal: Department of State

2. Purpose of Trip: You previously approved a White House Mission to transport a presidential delegation to attend the inauguration of president-elect Ricardo Maduro in Tegucigalpa, Honduras. The Department of State has subsequently requested the use of in-theater U.S. military helicopter support stationed at Soto Cano Air Base in Honduras to transport the U.S. delegation from Tegucigalpa to Copan on January 27 and from Copan to San Pedro Sula on January 28 for the farewell of President Maduro.

3. 24 hour Point of Contact: Terry Steers Gonzalez PRA 6
PRA 6 Back up: Arnold Chacon PRA 6

4. Travel Itinerary: Depart Washington DC on January 26 onboard appropriate military aircraft transportation to destination described above
   a. Dates: January 26-28, 2002
   b. Requested time of departure: January 26, TBD

5. Total Number of Passengers: Maximum of 8

6. Special Considerations: Milair support is necessary as commercial transportation is not viable. The Government of Honduras offered transportation arrangements but will require a three-hour bus ride from San Pedro to Copan and back the

following morning. For security and safety concerns, as well as time constraints for the delegation, U.S. military helicopter support is recommended.

APPROVED/DISAPPROVED

JOSEPH HAGIN
Deputy Chief of Staff for Operations

Attachment
Tab A Incoming Correspondence

cc: White House Counsel
Director, White House Military Office
Executive Secretary, National Security Council
Director, White House Airlift Operations

S/S 200201128

United States Department of State

Washington, D.C. 20520
www.state.gov

January 17, 2002

UNCLASSIFIED

MEMORANDUM FOR STEPHEN E. BIEGUN
EXECUTIVE SECRETARY
NATIONAL SECURITY COUNCIL

Subject: Request for In-theater Military Air Support for Honduran Inauguration

The U.S. Embassy in Honduras has informed us that the Government of Honduras will be holding the official inaugural events scheduled for January 27 - 28 in three separate locations throughout the country. Consequently, the Department of State is requesting the NSC to authorize the non-reimbursable use of U.S. military helicopter support stationed at Soto Cano Air Base in Honduras to transport the U.S. delegation from Tegucigalpa to Copan on January 27 and from Copan to San Pedro Sula on January 28 for the farewell by President Maduro. Military air support to and from Honduras has already been approved.

While the Government of Honduras has offered to transport the U.S. delegation to the second of three inaugural events in Copan, the current arrangements call for a three hour bus ride from San Pedro Sula to Copan and back the following morning. For security and safety concerns, as well as time considerations for the delegation, U.S. military helicopter support is recommended.

The U.S. delegation, including U.S. Embassy officials and security detail, may number as many as 25 persons. It will be led by a cabinet-level U.S. official.

The point of contact for this mission is Terry Steers-Gonzalez, Honduras Desk Officer. He can be reached at 202-647-3330.

Deborah Kennedy for
Maura Harty
Executive Secretary

JAN 18 8:24

UNCLASSIFIED

REV_00264040

THE WHITE HOUSE

WASHINGTON

January 7, 2002

MEMORANDUM FOR JOE HAGIN
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: **HECTOR IRASTORZA, JR.**
DEPUTY ASSISTANT TO THE PRESIDENT FOR MANAGEMENT AND ADMINISTRATION

FROM: **ALBERT HAWKINS**
ASSISTANT TO THE PRESIDENT AND CABINET SECRETARY

SUBJECT: **WHITE HOUSE MISSION TO THE 2002 OLYMPICS FOR THE OFFICIAL DELEGATION**

I request a White House Mission for the official delegation to the Opening Ceremonies of the 2002 Winter Olympics. The proposed trip would take place Friday, February 8, 2002. The delegation would include Cabinet Secretaries, others named as part of the delegation, and White House senior staff, as appropriate.

1. Requesting Principal: Albert Hawkins

2. Purpose of the Trip: To participate with the President in the Opening Ceremonies of the 2002 Olympic Games in Salt Lake City, Utah

3. 24-hour Point of Contact: Albert Hawkins [White House Signal]

4. Travel Itinerary:
   Travel directly to Salt Lake City, Utah, February 8, 2002
   Attend the Opening Ceremonies
   Return to Washington, D.C. (either return immediately or remain overnight with return on February 9)

5. Total number of Passengers: TBD

6. Special Considerations: Security risks and the limited availability of commercial transportation during this time

Thank you for your consideration of this request.

REVIEW:

HECTOR IRASTORZA, JR.
Deputy Assistant to the president for Management and Administration

APPROVAL: Pending Presidential trip assets utilized

APPROVED DISAPPROVED

SECRETARY ANDREW H. CARD, JR.
Chief of Staff to the President

cc: White House Counsel
Director, White House Military Office
Executive Secretary, National Security Council
Director, White House Airlift Operations
Cabinet Secretary

THE WHITE HOUSE

WASHINGTON

JANUARY 15, 2002

MEMORANDUM FOR JOSEPH HAGIN
ASSISTANT TO THE PRESIDENT AND
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: HECTOR F. IRASTORZA, JR.
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: TIM ADAMS, CHIEF OF STAFF
US DEPARTMENT OF THE TREASURY

SUBJECT: Request White House Mission Designation for Travel

Request approval of the following proposed White House Mission:

1. Requesting Principal: Deputy Secretary Ken Dam, US Department of the Treasury

2. Purpose of the trip: For Deputy Secretary Dam to conduct official meeting in Pakistan and India with Cabinet-level ministers and, in the case of Pakistan, a likely meeting with President General Musharraf. The current political situation and lack of reliable civilian commercial air service between Pakistan and India does not allow the mission to be completed in a timely or efficient manner.

3. 24 Hour Point of Contact: Robb LaKritz, Special Assistant to the Deputy Secretary. (202)622-0497 (office)

PRA 6

4. Travel Itinerary:

	Dates & Times
NYC to Ramstein AFB	Feb. 2-3, 2002
	Dep. 6:00 pm EST
	Arr. 7:30 am GER
Ramstein AFB to Islamabad	Feb. 3, 2002
	Dep. 8:30 am GER
	Arr. 7:30 pm ISB
Islamabad to Delhi	Feb. 5, 2002
	Dep. 5:00 pm ISB
	Arr. 6:45 pm DEL

4.Travel Itinerary:

Delhi to Bangalore	Feb. 9, 2002
	Dep. 5:00 pm DEL
	Arr. 7:35 pm BAN
Bangalore to Mumbai	Feb. 10, 2002
	Dep. 6:00 pm BAN
	Arr. 7:30 pm MUM
Mumbai to Ramstein AFB	Feb. 13, 2002
	Dep. 8:00 am MUM
	Arr. 8:00 am GER
Ramstein AFB to WDC	Feb. 13, 2002
	Dep. 9:00 am GER
	Arr. 12:00 pm WDC

5. Total Number of Passengers: 9

6. Special Considerations:

REVIEW:

HECTOR F. IRASTORZA, Jr.
Deputy Assistant to the President for Management and Administration

APPROVAL:

APPROVED
JOSEPH HAGIN
Deputy Chief of Staff for Operations

DISAPPROVED

Cc: White House Counsel
Director, White House Military Office
Executive Secretary, National Security Council
Director, White House Airlift Operations
Office of Cabinet Affairs

THE WHITE HOUSE
MILITARY OFFICE

OPERATIONS
WASHINGTON, DC 20502

File

7 JAN 2002

MEMO FOR: Cathy Alix
THROUGH: General Rosenker
SUBJECT: Request for WH Mission for Mrs Cheney

a. Air Ops created the attached request (TAB A) for C-21 support for Mrs Cheney for travel from DC to Minneapolis on 9 Jan, and follow on to Westchester County, NY on 10 Jan. Return to DC scheduled for 11 Jan.

b. This request is based on request from Secret Service (Tony Zotto) at TAB B. Discussions with POC from Secret Service indicate that this request came directly from the Vice President. Commercial travel arrangements were previously made, however the Vice President requested that possibility of Military Air be explored.

c. Secret Service is requesting this as a reimbursable mission. Approximate total flight time will be 5+ 30 (2+30 Andrews to Minneapolis, 2+10 Minneapolis to Westchester and 0+50 Westchester to DC) for a cost of approximately $4800 providing the C-21 is able to be tasked from the unit at Andrews.

d. In anticipation of approval, we've tasked OSD to support this mission (TAB C)

e. Recommendation: Approve mission on a reimbursable basis as requested.

V/R Mike Irwin

THE WHITE HOUSE

WASHINGTON

January 7, 2002

MEMORANDUM FOR JOSEPH W. HAGIN
ASSISTANT TO THE PRESIDENT AND
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: HECTOR F. IRASTORZA, JR.
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: MARK V. ROSENKER
DEPUTY ASSISTANT TO THE PRESIDENT AND
DIRECTOR, WHITE HOUSE MILITARY OFFICE

SUBJECT: Request for Presidential Executive Airlift Support

Request approval of the following proposed White House Mission:

1. Requesting principal: Anthony M. Zotto.

2. Purpose of the support: Provide transportation (C-21 aircraft) for the Vice President's spouse from Andrews AFB, Maryland to Minneapolis, Minnesota, and Westchester County, New York during the period of January 9-11, 2002. This mission should be conducted on a reimbursable basis.

3. A 24-hour point of contact (POC): Airlift Operations director on-call. Contact through White House Signal Switchboard at (202) 757-6000.

REVIEW:

HECTOR F. IRASTORZA, JR.
Deputy Assistant to the President for
Management and Administration

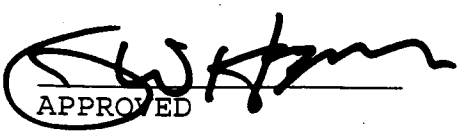

APPROVED

DISAPPROVED

JOSEPH HAGIN
Deputy Chief of Staff for Operations

cc:
White House Counsel
Director, White House Airlift Operations

DEPARTMENT OF THE TREASURY
UNITED STATES SECRET SERVICE

January 4, 2002

MEMORANDUM FOR: MARK V. ROSENKER
DEPUTY ASSISTANT TO THE PRESIDENT AND DIRECTOR,
WHITE HOUSE MILITARY OFFICE

FROM: ANTHONY M. ZOTTO
SPECIAL AGENT IN CHARGE
VICE PRESIDENTIAL PROTECTIVE DIVISION
U.S. SECRET SERVICE

SUBJECT: AIRCRAFT SUPPORT FOR MRS. CHENEY FOR TRAVEL TO MINNEAPOLIS, MN ON JANUARY 9, 2002 AND TO PLEASANTVILLE, NY ON JANUARY 10, 2002.

The Vice President has requested the U.S. Secret Service to coordinate with the White House Military Office to support Mrs. Cheney's travel. Mrs. Cheney is scheduled to travel from Washington, DC to Minneapolis, MN on January 9, 2002 and remain overnight. Mrs. Cheney will then travel from Minneapolis, MN to Westchester County New York on January 10, 2002 and remain overnight. Mrs. Cheney will return to Washington, DC on January 11, 2002.

The U.S. Secret Service is requesting a C-21 aircraft to support Mrs. Cheney's upcoming travel. The cost of the aircraft will be split between the staff for Mrs. Cheney, and the U.S. Secret Service. There will be a total of four passengers traveling on this trip.

The requested time of departure from Andrews AFB on January 9, 2002 is approximately 8:30AM. The approximate departure time from Minneapolis, MN to Westchester County New York is approximately 12:30PM, and the approximate departure time from Westchester County to Andrews AFB is 2:00PM.

I can be reached at PRA 6 should you have any questions regarding this request.

THE WHITE HOUSE

WASHINGTON

January 4, 2002

MEMORANDUM FOR LT COL TIM GROSZ, USAF
MILITARY ASSISTANT TO THE EXECUTIVE SECRETARY

SUBJECT: DoD Airlift Support for Spouse of the Vice President

The Vice President has requested military airlift support (C-21) for Mrs. Cheney's travel to Minneapolis, MN and Westchester County, NY during the period January 9-11, 2002. Her party will consist of four passengers, and the tentative scenario is as follows:

Jan 09, 2002/0830L:	Depart Andrews AFB, MD (KADW)
Jan 09, 2002/TBD:	Arrive Minneapolis, MN (KMSP)
Jan 10, 2002/1230L:	Depart Minneapolis, MN (KMSP)
Jan 10, 2002/TBD:	Arrive Westchester, NY (KHPN)
Jan 11, 2002/1400L:	Depart Westchester, NY (KHPN)
Jan 11, 2002/TBD:	Arrive Andrews AFB, MD (KADW)

This is a White House directed mission requirement as verbally received from Special Agent in Charge Anthony Zotto, United States Secret Service. This travel support has been requested in accordance with Section 6 of the Presidential Protection Assistance Act of 1976, and should be conducted on a reimbursable basis.

The Secret Service point of contact for operational issues is Special Agent Mark Ouellette. He may be contacted at (202) 757-1850.

The staff point of contact for funding issues is Ms. Claire O'Donnell, Deputy Assistant to the Vice President for Operations. She may be contacted at (202) 456-5307.

Our unit point of contact is Mr. Dennis Stump. He may be contacted at (202) 757-1263, or through the White House Signal Switchboard at (202) 757-6000. As always, your continued support is greatly appreciated.

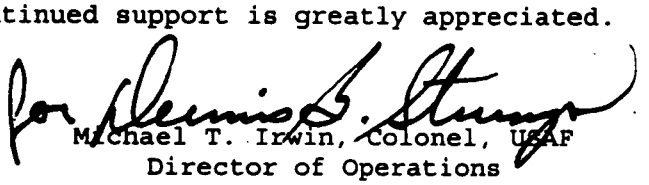

Michael T. Irwin, Colonel, USAF
Director of Operations
White House Military Office

REV_00264049

THE WHITE HOUSE
MILITARY OFFICE

OPERATIONS
WASHINGTON, DC 20502

2 JAN 2002

MEMO FOR: Cathy Alix
SUBJECT: Request for WH Mission Status for Former Senator John Danforth to Africa

Delegation to Egypt, Eritrea, Kenya, and the Sudan

a. Mission is scheduled for 10-18 Jan 02.

b. DoD Exec Sec is aware of the request and views this as a State Department (vice White House) mission. They agree that military air is probably required due to lack of adequate/robust service into many of the locations. Hhowever DoD believes that State Department should accomplish on a reimbursable basis.

c. In our discussions with State Dept POC, we've asked them to look at commercial service into Cairo (vice Germany) as well to increase DoD options. Commercial service is readily available into Cairo and there is no business to be conducted in Germany.

d. DoD would evaluate stops and aircraft available, but would most likely support with C-130/C-12 and or C-21 assets or some combination there of from In-theater assets.

e. Two ways to support this mission if it is to be reimbursable: a) Have State Forward the request directly to DoD Exec Sec as a reimbursable mission under the Economy Act. b) Approve as a White House reimbursable missions. This would give it the priority to be supported, but also insure that State Dept vice DoD picks up the cost of the mission.

e. Recommendation: Based on mission, and recognition by all that commercial service won't accommodate entire requirement, would recommend consideration for White House designation, but on a reimbursable basis.

V/R Mike Irwin

REV_00264050

THE WHITE HOUSE

WASHINGTON

January 3, 2002

MEMORANDUM FOR JOSEPH HAGIN
ASSISTANT TO THE PRESIDENT AND
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: HECTOR F. IRASTORZA, JR.
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: CONDOLEEZZA RICE

SUBJECT: Request White House Mission Designation for Special Envoy Danforth

Request approval of the following proposed White House Mission:

1. Requesting Principal: Department of State.

2. Purpose of the Trip: In furtherance of the President's foreign policy objectives regarding the peace process in Sudan, Special Envoy Danforth will travel to the region to measure progress in the peace process and to secure agreement to and implementation of proposals establish in his previous visit.

3. 24-hour Point of Contact: John Sheely, PRA 6

PRA 6

4. Travel Itinerary: Depart Frankfurt, GE on January 11 for Cairo, Asmara, Nairobi, Khartoum, Nuba Mountais, Rumbek, location TBD (Garang's location), and Khartoum. (See attached Department of State request for details of itinerary.)

a. Dates: January 11 - January 18, 2002
b. Requested Time of Departure: TBD

5. Total Number of Passengers: 7

6. Special Considerations: Milair support is necessary to maintain secure communications and due to the inability to complete the mission through commercial transportation within the given time constraints.

APPROVED ON A NON-REIMBURSABLE BASIS

APPROVED ON A REIMBURSABLE BASIS

DISAPPROVED

JOSEPH HAGIN
Deputy Chief of Staff for Operations

Attachments
Tab A Incoming Correspondence

cc: White House Counsel
Director, White House Military Office
Executive Secretary, National Security Council
Director, White House Airlift Operations

S/S 200130120

United States Department of State

Washington, D.C. 20520
www.state.gov

December 31, 2001

UNCLASSIFIED

MEMORANDUM FOR STEPHEN E. BIEGUN
EXECUTIVE SECRETARY
NATIONAL SECURITY COUNCIL

SUBJECT: Request for Special Air Missions Aircraft

In furtherance of the President's foreign policy, John Danforth, Special Envoy of the President for Peace in Sudan and a delegation of six others will travel to Egypt, Eritrea, Kenya and Sudan from January 10 through January 18, 2002 (see attached itinerary). The purpose of the trip is to measure progress by the Government of Sudan and the Sudanese Peoples' Liberation Movement (SPLM) in securing agreement to and implementation of the four proposals established during the Special Envoy's November visit to this region.

The Department requests that this trip be declared a White House Mission and that an appropriate aircraft be made available on a non-reimbursable basis. A military aircraft is necessary because of the need to have secure communication links with the White House, the National Security Council and the Department at all times. In addition, unreliable and time-consuming commercial air schedules within Africa make it impossible for the Special Envoy to visit the numerous countries within the time he is free to travel. The delegation will travel to and from Frankfurt, Germany via commercial air.

The point of contact in the Department is John Sheely, Bureau of African Affairs Deputy Executive Director. Mr. Sheely can be reached at (202) 647-4417, and pager (202) 409-2420. Mr. Sheely can also be reached after-hours through the State Department's Operations Center at (202) 647-1512.

This request has been cleared by the State Department's Office of the Legal Adviser.

Maura Harty
Executive Secretary

Attachment: As stated

UNCLASSIFIED

REV_00264053

Notional Schedule
Senator Danforth, Regional Trip
January 8 - 16, 2002

Thursday, January 10th
3:48pm Depart for Frankfurt from St. Louis (overnight)(tentative)

Friday, January 11th
9:55am Arrive Frankfurt
11:30am Depart Frankfurt to Cairo (Milair)
5:30pm Arrive Cairo
RON Cairo

Saturday, January 12th
Meetings with President Mubarak and Sudan POC Suliman
3:00pm Depart for Asmara (Milair)
7:00pm Arrive Asmara
RON Asmara

NOTE: MAY ADD ADDIS ABABA LEG (+1 DAY)

Sunday, January 13th
Meetings with President Asias and FM Said Abdalla Ali
3:00pm Depart for Nairobi (milair)
6:00pm Arrive Nairobi
RON Nairobi

Monday, January 14th
Meetings with President Moi and General Sumbeiywo
2:00pm Depart for Khartoum (Milair)
4:30pm Arrive Khartoum (before sundown)
RON Khartoum

Tuesday, January 15th
Meetings with Bashir and/or Ghazi
RON Khartoum

Wednesday, January 16th
6:00am Sunrise departure for Nuba Mountais (WFP aircraft)
8:00am Arrive site
11:00am Depart for Polio eradication location (WFP transport)
12:00pm Arrive site
3:00pm Depart for Rumbek (WFP transport)
5:00pm Arrive Rumbek (before sundown)

REV_00264054

RON Rumbek

Thursday, January 17th

6:00am Sunrise departure for Garang's location (WFP Acft)
Meetings with Garang
3:00pm Depart for Khartoum (WFP Acft)
5:00pm Arrive Khartoum (before sundown)
Final briefings, meeting make-ups, press conference if any.
RON Khartoum

Friday, January 18th

9:00am Depart for Frankfurt (Milair)
2:00pm Arrive Frankfurt
5:00pm Flight to St. Louis (Tentative)
10:45pm Arrive St. Louis (Tentative)

REV_00264055

Brett Kavanaugh

THE WHITE HOUSE
MILITARY OFFICE

OPERATIONS
WASHINGTON, DC 20502

2 JAN 2002

MEMO FOR: Cathy Alix
SUBJECT: Request for WH Mission Status for EPA trip to Asia

Delegation to Egypt, Eritrea, Kenya, and the Sudan

a. Mission is requested for 11-20 January. During this time frame, the 89th is overcommitted and does not have the airframes to support this mission. (We are already challenged supporting the existing White House missions currently scheduled during this time frame; i.e. Delegation to Nicaragua, VP Missions, Sec Principi (COG) mission, Governor Ridge Mission, First Lady mission)

b. Request is incorrect in that it mentions "in accordance with the Economy Act." Economy Act request are submitted to DoD as reimbursable missions to be considered on an "as capable / no mission impact " basis. Discussions with the POC at EPA make clear that the intent of this request is to have mission designated a White House non-reimbursable mission.

c. DoD perspective is that nature of this mission is strictly EPA vice White House business. In addition, commercial air is available into the mission locations. Security concerns mentioned as justification is not compelling.

d. Estimated total flight time for the entire mission would be approximately 49.5 hours. Based on a C-20 rate of approximately $3600/hr, total cost of the mission would be over $178K. Even at a reimbursable rate, DoD would need to cancel other justifiable missions to support

e. Recommendation: Suggest mission not be approved as a White House mission since it does not meet the common White House designated criteria. At $178K EPA could probably not support on a reimbursable basis; in addition DoD would have difficulty supporting without canceling other missions (primarily CODEL) previously scheduled.

V/R Mike Irwin

REV_00264056

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 3 2002

OFFICE OF THE
ADMINISTRATOR

MEMORANDUM FOR JOSEPH HAGIN
ASSISTANT TO THE PRESIDENT AND
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: HECTOR F. IRASTORZA, JR.
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: EILEEN MCGINNIS
CHIEF OF STAFF
ENVIRONMENTAL PROTECTION AGENCY

SUBJECT: Request White House Mission Designation for Travel

In accordance with the Economy Act, 31 U.S.C. § 1535, I request approval of the following White House Mission:

1. Requesting Principal: Christine Todd Whitman, Administrator, U.S. Environmental Protection Agency.

2. Purpose of the trip; The purpose of this trip is to visit Thailand and India, to further the environmental cooperation between the U.S. and these countries. Her trip will include the following official duties: meeting with the Thai Royal Family (the first visit of a Bush Administration cabinet official) to explore EPA cooperation on Thai environmental projects; meeting with Thai Prime Minister Thaksin Shinnawat and signing of the Tropical Forest Agreement; meetings with Thai Cabinet officials including the Foreign Minister and the Minister of Science, Technology and Environment; meetings with Indian Prime Minister Vajpayee and External Affairs Minister Jaswant Singh, signing a Memorandum of Understanding between EPA and the Indian Ministry of Environment and Forests; and a meeting with the Minister of Power. In view of the currently volatile border situation involving India and Pakistan, this trip takes on added significance.

The Administrator, EPA, has determined, in accordance with the Economy Act, that it is in the interests of the Government to designate this trip as a White House Mission, and to provide transportation pursuant to the Economy Act. Specifically, security concerns in the wake of the September 11 terrorist attacks raise significant concerns about U.S. Cabinet officials traveling without appropriate security measures in foreign countries.

REV_00264057

Draft #9 (02Jan02)

6:00 pm Reception at DCM's Residence

The reception will be attended by 50-60 invited guests. Brief CTW remarks/toast.

Location: 17, Amrita Shergill Marg, New Delhi 110 003

7:00 pm Depart for Roosevelt House

7:30 pm Dinner at Roosevelt House

RON : Maurya Sheraton Hotel and Towers

Diplomatic Enclave:
Sadar Patel Marg
New Delhi, India 110 021
Phone: 91-11-6112233
Fax: 91-11-613333

Thursday, January 17, 2002 – Delhi/Agra

8:00 am Breakfast Meeting with American Chamber of Commerce (CTW remarks on public-private partnerships)

9:45 am Depart for Roundtable Hosted by MoEF

10:00 am Roundtable on Environmental Health

Purpose: Hosted by the Ministry of Environment and Forests (MOEF), with the Ministry of Health, and focusing on children's environmental health and POP/PBTs, the Roundtable will serve as the platform for Governor Whitman to engage senior India officials on children's health agenda with India, and explore specific opportunities to engage with India on capacity building agenda related to implementation of Stockholm Convention on Persistent Organic Pollutants, as well as cooperation on mercury. (India is not presently a signatory of Stockholm Convention.) Representatives from the World Health Organization (WHO) and the U.N. Educational, Scientific and Cultural Organization (UNESCO) will also participate.

Location: TBD

REV_00264066

Draft #9 (02Jan02)

1:30 pm Luncheon and Roundtable on Environmental Management in the Information Age hosted by Federation of Indian Chambers of Commerce and Industry (FICCI). (The Federal includes many American companies.)

Purpose: Brief remarks by CTW. The Roundtable will showcase U.S. experience in using information technology to more effectively understand and manage environmental problems. It will also underscore the importance of providing the with general public credible and useful information on environmental quality in their communities. (Note: the Community-Right-To-Know provisions in U.S. environmental law emerged as result of the Bhopal tragedy, but, despite interest, no similar system currently exists in India.) Finally the event will be used to explore opportunities for further EPA/USG activities in view of the highly developed IT industry in India.

Location: Federation House, 1 Tansen Marg, New Delhi 110001

2:05 pm Depart for Ministry of Non-Conventional Energy Sources. (Coach leaves for Agra at 2:30 pm)

2:20 pm Courtesy call on M. Kannappan, Minister of State-Independent Charge, Ministry of Non-Conventional Energy Sources

Location: Block 14, CGO Complex, Lodi Road, New Delhi 110 003

2:45 pm Depart for Maurya Sheraton

4:00 pm Depart for Indira Ghandi International Airport – Domestic Terminal

5:00 pm Travel from Delhi to Agra (flying time 45 minutes) – Governor and key staff and mission personnel by Span Air, chartered aircraft

6:00 pm Arrive at Agra airport and Depart for Oberoi Amarvila Hotel

6:30 pm Coach arrives at Agra-Oberoi Amarvilas Hotel

7:00 pm Dinner and moonlight viewing of Taj Mahal from Oberoi Hotel

RON at Oberoi Hotel in Agra

Amarvilas
Taj East Gate Road

REV_00264067

Draft #9 (02Jan02)

1:30 pm Luncheon and Roundtable on Environmental Management in the Information Age hosted by Federation of Indian Chambers of Commerce and Industry (FICCI). (The Federal includes many American companies.)

Purpose: Brief remarks by CTW. The Roundtable will showcase U.S. experience in using information technology to more effectively understand and manage environmental problems. It will also underscore the importance of providing the with general public credible and useful information on environmental quality in their communities. (Note: the Community-Right-To-Know provisions in U.S. environmental law emerged as result of the Bhopal tragedy, but, despite interest, no similar system currently exists in India.) Finally the event will be used to explore opportunities for further EPA/USG activities in view of the highly developed IT industry in India.

Location: Federation House, 1 Tansen Marg, New Delhi 110001

2:05 pm Depart for Ministry of Non-Conventional Energy Sources. (Coach leaves for Agra at 2:30 pm)

2:20 pm Courtesy call on M. Kannappan, Minister of State-Independent Charge, Ministry of Non-Conventional Energy Sources

Location: Block 14, CGO Complex, Lodi Road, New Delhi 110 003

2:45 pm Depart for Maurya Sheraton

4:00 pm Depart for Indira Ghandi International Airport – Domestic Terminal

5:00 pm Travel from Delhi to Agra (flying time 45 minutes) – Governor and key staff and mission personnel by Span Air, chartered aircraft

6:00 pm Arrive at Agra airport and Depart for Oberoi Amarvila Hotel

6:30 pm Coach arrives at Agra-Oberoi Amarvilas Hotel

7:00 pm Dinner and moonlight viewing of Taj Mahal from Oberoi Hotel

RON at Oberoi Hotel in Agra

Amarvilas
Taj East Gate Road

REV_00264068

Draft #9 (02Jan02)

Taj Tagri Scheme
Agra, India
Tel # 91-562-231515
Fax # 91-562-231516

JANUARY 18 (FRIDAY) – Agra/New Delhi

8:00 am Early morning visit to Taj Mahal

11:00 am Meeting with MOEF/Central Pollution Control Board in projects in Uttar Pradesh

Location: Amarvillas Hotel, Agra

12:30 pm Meeting with Asian Development Bank on Taj Environmental Improvement Project followed by luncheon.

Purpose: Explore opportunities for EPA cooperation under Taj Mahal environmental improvement project. We are awaiting more details on MOEF project

Location: TBD

2:30 pm Return to New Delhi by charter flight

JANUARY 19 (SATURDAY) – Travel – New Delhi to New York (via Paris)

1:05am Depart New Delhi (Air France # 147) non-stop to Paris

6:30 am Arrive Paris Charles de Gaulle Airport

8:30 am Depart Paris Charles de Gaulle Airport (Delta #8600) non-stop to New York/JFK

10:40 am Arrive New York/JFK

4:30 pm Delhi Cultural Site Visit

REV_00264069

Designating this trip as a White House Mission will facilitate providing appropriate security measures for the Administrator on this trip. In addition, the locations and destinations on the Administrator's itinerary are not easily reached and served by commercially available transportation, and for efficiency would be more easily reached by U.S. government transportation, given the various destinations and the time schedule of the trip.

3. 24 Hour Point of Contact: PRA 6

4. Travel Itinerary: See Attached Itinerary

5. Total Number of Passengers (including principal): 12

6. Special Considerations: None

REVIEW:

HECTOR F. IRASTORZA, Jr.
Deputy Assistant to the President for Management and Administration

APPROVAL:

APPROVED

Joseph H Hagin
DISAPPROVED
verbal
CJL

JOSEPH HAGIN
Deputy Chief of Staff for Operations

cc: White House Counsel
Director, White House Military Office
Executive Secretary, National Security Council
Director, White House Airlift Operations

DRAFT

Draft #10 (02Jan02)

GOVERNOR WHITMAN TRIP TO ASIA:

Draft Itinerary for Thailand and India
January 11-20, 2002

JANUARY 11 (FRIDAY) – Travel – Phoenix to Los Angeles to Tokyo

8:38 am Depart Phoenix (Northwest #4804) for Los Angeles

9:05 am Arrive Los Angeles

11:25 am Depart Los Angeles (Northwest #0001) for Tokyo

JANUARY 12 (SATURDAY) – Travel – Tokyo to Bangkok

4:25 pm Arrive Tokyo Narita Airport

5:50 pm Depart Tokyo Narita (Northwest #0001) for Bangkok

10:45 pm Arrive Bangkok Airport. Motorcade to hotel

RON at Regent Hotel

155 Ratchadamri Road
Bangkok 10330
Tel #662-251-6127 Fax #662-253-9195
Hotel Floor Reserved for U.S. Delegation, with suite for Governor

JANUARY 13 (SUNDAY) – Travel – Bangkok

9:00 am Optional Visit to Grand Palace and River City

1:30am Country Team Briefing

Purpose: Receive briefing from Ambassador and senior Embassy officials on country context and discuss U.S. environment strategy for Thailand.

Location: Regent Hotel

Draft #[illegible](02Jan02)

2:30pm Protocol Briefing for Royal Audience (Regent Hotel)

3:00 pm Depart hotel for Hua Hin, Thailand, via Embassy twin-prop C-12.

4:30pm Orientation for Royal Audience

5:00pm Royal Audience with His Majesty King Bhumibol Adulyadej (Protocol requires limiting audience to Ambassador and CTW). [Note: "King Bhumibol" – people addressed by first name in Thailand]

Purpose: Discuss His Majesty's interest in environmental issues. Draw national attention to U.S.-Thai cooperation on the environment in Thailand.

Location: Klai-Kangwong Palace, Hua Hin, Thailand
Dress: Business Formal. Shoes should be easy to slip on/off, preferably flats, and not open-toed.
Press: Photo Op for Press

Evening Return to Bangkok. Exact time depends on how long royal audience lasts.

Dinner Free/Optional Shopping
Dress: Smart Casual

Option 1 for Dinner: Spice Market Restaurant, Regent Hotel
Thai Food

Option 2 for Dinner: Sala Rim Naam Restaurant, Oriental Hotel
Thai Dinner and Cultural Show on Chao Praya River
Show starts at 8:30pm.

RON at Regent Hotel

155 Ratchadamri Road
Bangkok 10330
Tel #662-251-6127 Fax #662-253-9195
Hotel Floor Reserved for U.S. Delegation

JANUARY 14 (MONDAY) – Bangkok

REV_00264060

7:30 am Breakfast meeting with American Chamber of Commerce (Brief CTW remarks on public-private partnerships) *Draft #(x)(02Jan02)*

Purpose: Represent Administration to U.S. business community in Thailand. The Governor will meet with members of the U.S. business community, including both large companies (e.g., General Motors, United Airlines, Coca Cola) and small consulting and engineering firms. Emphasis will be on public-private partnerships and voluntary programs (e.g., Energy Star).

Location: Regent Hotel
Dress: Business Dress all Day
Press: Closed to Press

9:30am Meeting with Foreign Minister Surakiet Satirathai (exchange of gifts)

Location: Ministry of Foreign Affairs
Press: Open to Press

10:30 am Meeting with Prime Minister Thaksin Shinnawat (exchange of gifts)

Purpose: Convey Bush Administration message on importance of U.S.-Thai relations. Highlight U.S.-Thai cooperation on the environment. The Prime Minister and Governor will also sign Tropical Forest Agreement, which will generate $9.5 million over 28 years on behalf of forest conservation in Thailand in this debt-for-nature agreement.

Location: Office of the Prime Minister, Protocol Room
Press: Open to Press

12:30 pm Luncheon Hosted by Ambassador Johnson (CTW table discussion only)

Purpose: Recognize key Thai environmental reformers and EPA partners. Guests will include the Secretary General of the Council State (cabinet official responsible for national legislation passed by Parliament), Vice President for the Supreme Administrative Court, the Secretary to the President of the Supreme Court, the Permanent Secretary of MOSTE, and the Chairman of the Board of the Community Organizations Development Institute.

Location: Residence of Deputy Chief of Mission
Press: Closed to Press, Photo Op

2:00 pm Meeting with Minister Sonthaya of the Ministry of Science, Technology and

REV_00264061

Environment (MOSTE) and structured discussion of MOU

Purpose: Discuss U.S.-Thai environmental cooperation with MOSTE Minister Sonthaya and receive presentations on success stories. Remarks to draw attention to EPA-MOSTE Memorandum of Understanding. CTW will present the first honorary degree from the EPA Air Pollution Training Institute to Dr. Supat (Director, Air Division, Pollution Control Department).

Location: Ministry of Science Technology and Environment
Press: Open to Press

6:30 pm Ambassador's Cocktail Reception

Guests will include 100-150 senior U.S. and Thai government officials, members of the U.S. business and non-governmental community, and representatives from Thai industry and NGO community. CTW will present EPA Certificate of Appreciation to the U.S.-Asia Environmental Partnership (U.S.-AEP) in connection with the organization's 10-year anniversary. CTW will present EPA Certificate of Appreciation to Thitima Klasnimi who has provided outstanding support to EPA activities in Thailand for many years. Potentially sponsored by American Chamber of Commerce, the U.S.-ASEAN (Association of Southeast Asian Nations) Business Council and/or the U.S.-Thai Business Council. List of attendees forthcoming.

Location: Poolside, Regent Hotel (inside ballroom if raining)
Press: Open to Press

9:00pm Dinner
Options: Biscotti Italian Restaurant, Regent Hotel

Japanese Restaurant, Regent Hotel

RON at Regent Hotel

155 Ratchadamri Road
Bangkok 10330
Tel #662-251-6127 Fax #662-253-9195

JANUARY 15 (TUESDAY) – Bangkok/Chiang Mai/New Delhi

REV_00264062

Draft #9 (02Jan02)

7:00 am Breakfast Meeting with World Bank (CTW no remarks)

Purpose: To discuss past and potential cooperation on environmental institution building in Thailand. The Governor will meet with the World Bank's country director for Thailand and environmental project managers. The World Bank is currently funding a major environmental institution-building project for the country.

Location: Regent Hotel
Dress: Business Dress all Day (pantsuit is fine)
Press: Closed to Press

9:20 am Depart Bangkok (Thai Airlines #104) for Chiang Mai

10:30 am Arrive Chiang Mai

11:00am Meeting with Mayor of Chiang Mai (exchange of gifts)

Purpose: Receive key to the City on behalf of EPA's work on Air Quality in Chiang Mai

Location: Municipal Building
Press: Open to Press

11:45 am Buffet luncheon hosted by U.S. Consul General in Chiang Mai with Chiang Mai Mayor et al (CTW no remarks/exchange of gifts)

Purpose: Discuss Clean Air Initiative in Chiang Mai. Opportunity to introduce Cabinet Official to up to 60 guests of Chiang Mai society.

Location: Consul General's Residence, U.S. Consulate General Compound
Press: Closed to Press

1:30 pm Participate in Closing Ceremony for Chiang Mai Air Quality Workshop (CTW 5-minute remarks)

Purpose: Highlight U.S. support for Clean Air Initiative in Thailand. Community participants in an EPA/State of Maryland project will report out on their progress in developing an air quality management plan for the city. Emphasizing the importance of public participation, the Governor will discuss U.S. experience in this area

REV_00264063

Location: Chiang Mai Inn
Press: Open to Press

2:45pm Depart for Airport

3:15 pm Depart Chiang Mai (Thai Airlines #113) for Bangkok

4:25 pm Arrive Bangkok Airport

5:35 pm Depart Bangkok (Thai Airlines #315) for New Delhi

8:30 pm Arrive New Delhi – Met by Senior Embassy Counselor.

RON : Maurya Sheraton Hotel and Towers

Diplomatic Enclave:
Sadar Patel Marg
New Delhi, India 110 021
Phone: 91-11-6112233
Fax: 91-11-613333

JANUARY 16 (WEDNESDAY) – New Delhi

JW Joins Party

8:05 am Depart Hotel for Roosevelt House, American Embassy Compound Shantipath, Chanakyapuri

8:15 am Breakfast with Ambassador Blackwill at Roosevelt House. Also present will be Deputy Chief of Mission (DCM)Al Thibault, Judith Ayres and Kelly Glazier

8:55 am Walk to American Embassy

9:00 am Meeting with U.S. Ambassador Robert Blackwill and Country Team. Also present will be Deputy Chief of Mission, U.S. AID Mission Director, and senior Embassy officials.

Purpose: Receive briefing from Ambassador on country context and discuss U.S. environment strategy for India. The Governor will also present EPA Certificate of Appreciation to the U.S.-Asia Environmental Partnership (U.S.-AEP) in

REV_00264064

connection with the organization's 10-year anniversary.

Location: Ambassador's Conference Room
U.S. Embassy, Shantipath

10:30 am — Meeting with T.R. Baalu, Minister of Environment & Forests (MOEF)

Purpose: Accompanied by Judith Ayres and Kelly Glazier, the Governor will hold small, getting-to-know-you meeting with the Minister while the rest of the EPA delegation meets separately with Indian counterparts.

Location: MOEF to confirm location

11:00 am — Signing Ceremony for Memorandum of Understanding Between EPA and the Ministry of Environment and Forests (MOEF), and Follow-up Discussions with Minister of Environment and Forests

Purpose: The EPA-MOEF Memorandum of Understanding will provide a framework for long-term environmental cooperation in areas of mutual interest. It represents a significant deliverable in following up on President Bush's commitment to the Prime Minister. T.R. Baalu, India's Union Minister for Environment and Forests (MOEF), will sign for India.

Follow up discussions would review areas of planned and prospective cooperation to emphasize air quality (including greenhouse gas, black soot and NOx emission reductions), toxics (incl. POPs/PBTs), improving environmental governance, and children's environmental health.

Location: MOEF to confirm location.

11:30 am — [Press Conference] – strongly recommended by Ambassador Blackwill

12:30 pm — Luncheon Hosted by Ministry of Environment and Forests (CTW no remarks)

Attendees to be determined.

2:05 pm — Depart for meeting with Ministry of Power

2:15 pm — Courtesy Call on Minister Suresh Prabhu, Minister for Power, and possibly new Minister for Non-Conventional Energy.

Location: Minister's Office, Shram Shakti-Bhavan, Rafi Marg, New Delhi 110 011

REV_00264065

THE WHITE HOUSE

WASHINGTON

December 14, 2001

file

MEMORANDUM FOR JOSEPH HAGIN
ASSISTANT TO THE PRESIDENT AND
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: HECTOR F. IRASTORZA, JR.
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: CONDOLEEZZA RICE SCR for

SUBJECT: Request for White House Mission Designation for Dr. Zalmay Khalilzad

Request approval of the following White House Mission:

1. Requesting Principal: Condoleezza Rice.

2. Purpose of the Trip: In furtherance of the President's foreign policy objectives regarding the continuing situation in Afghanistan, Special Assistant to the President Khalilzad will lead a delegation to Tashkent, Kabul, Islamabad, Mazar-e Sharif, Herat, Bamian, Jalalabad, New Delhi, and Kandahar. Due to unavailability of commercial transportation request military transportation on appropriate military aircraft on a non-reimbursable basis.

3. 24-hour Point of Contact: Kathy Cooper, 202-456-9121 (W); 24 hour contact through White House Situation Room 202-456-9431.

4. Travel Itinerary: Tashkent, Kabul, Islamabad, Mazar-e Sharif, Herat, Bamian, Jalalabad, and Kandahar.
   a. Dates: December 26, 2001 - January 9, 2002
   b. Requested Time of Departure: From Tashkent, Uzbekistan or Islamabad, Pakistan on or about December 26, 2001.

5. Total Number of Passengers: 3

6. Special Considerations: Dr Khalilzad will travel to Tashkent or Islamabad via commercial transportation. Final itinerary and timing will be flexible based on the developing situation in Afghanistan.

for NSN Reimbursement

APPROVED DISAPPROVED

JOSEPH HAGIN
[redacted]y Chief of Staff [redacted]

Cc: White House Counsel
Director, White House Military Office
Executive Secretary, National Security Council
Director, White House Airlift Operations

THE WHITE HOUSE

WASHINGTON

December 14, 2001

File

MEMORANDUM FOR JOSEPH HAGIN
ASSISTANT TO THE PRESIDENT AND
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: HECTOR F. IRASTORZA, JR.
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: CONDOLEEZZA RICE

SUBJECT: Request White House Mission Designation for Presidential Delegation to Nicaraguan Inauguration January 10

Request approval of the following proposed White House Mission:

1. Requesting Principal: Secretary of State Powell.

2. Purpose of the Trip: A Cabinet member or high-level official TBD will head a delegation to the inauguration of the Nicaraguan President.

3. 24 hour Point of Contact: Maeve Dwyer, 647-3518 (until January 1; Vicky Alvarado, 647-1510 (after January 1); Arnold Chacon, 647-4292 (backup)

4. Travel Itinerary:

a. Dates: January 9-11, 2002

b. Requested Time of Departure: The aircraft will depart TBD from Andrews AFB on January 9, and depart from Nicaragua TBD on January 11, 2002, for Andrews AFB.

5. Total Number of Passengers: The SAM aircraft should support 10-15 passengers.

6. Special Considerations: None.

APPROVED / DISAPPROVED

[redacted]SIN
Deputy Chief of Staff for Operations

for NONreimbursable per Atte

Attachment
Incoming Correspondence

cc: White House Counsel
Director, White House Military Office
Executive Secretary, National Security Council
Director, White House Airlift Operations

S/S 200129083 9329

United States Department of State

Washington, D.C. 20520
www.state.gov

December 14, 2001

UNCLASSIFIED

MEMORANDUM FOR STEPHEN E. BIEGUN
EXECUTIVE SECRETARY
NATIONAL SECURITY COUNCIL

Subject: Request for Special Air Missions Aircraft

The NSC has recommended that a 10-15 member presidential delegation, headed by a Cabinet member, be appointed to attend the January 10 inauguration of president-elect Enrique Bolaños, in Managua, Nicaragua. The delegation will convey the U.S. Government's support for the new Nicaraguan president, elected in a free and fair electoral process that constituted an historic step toward consolidation of democracy in Nicaragua, and will signal the USG's intention to remain engaged in the region.

The exact composition of the delegation is currently being determined, but is unlikely to become final until close to departure time. In order to ensure that an appropriate delegation can be assembled, the Department of State requests that a Special Air Missions Aircraft be made available on a non-reimbursable basis, from January 9 through January 11, to transport the delegation from Washington to Managua and return. Because Cabinet members generally have very demanding schedules and commercial air schedules are unreliable and time-consuming, using a commercial flight is not a viable option.

This request has been cleared by the State Department's Office of the Legal Adviser.

Maura Harty
Executive Secretary

UNCLASSIFIED

REV_00264074

S/S 200129083

United States Department of State

Washington, D.C. 20520
www.state.gov

December 14, 2001

UNCLASSIFIED

MEMORANDUM FOR STEPHEN E. BIEGUN
EXECUTIVE SECRETARY
NATIONAL SECURITY COUNCIL

Subject: Request for Special Air Missions Aircraft

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This request has been cleared by the State Department's Office of the Legal Adviser.

Maura Harty
Executive Secretary

UNCLASSIFIED

REV_00264075

THE WHITE HOUSE

WASHINGTON

MEMORANDUM FOR JOSEPH HAGIN
ASSISTANT TO THE PRESIDENT AND
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: HECTOR F. IRASTORZA, JR.
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: CONDOLEEZZA RICE SCB for

SUBJECT: Request for White House Mission to Crawford, Texas

Request approval of the following White House Mission:

1. Requesting Principal: Condoleezza Rice.

2. Purpose of the Trip: To take White House and Russian pre-advance teams to Crawford, Texas to survey sites on the itinerary for Russian President Vladimir Putin's visit to President Bush's ranch in November 2001.

3. 24-hour NSC Point of Contact: Mary Haines 202-456-9461

4. Travel Itinerary: Washington to Texas to Washington
   a. Dates: TBD in October 2001
   b. Requested Time of Departure: TBD

5. Total Number of Passengers: approximately 40

6. Special Considerations: The President invited Russian President and Mrs. Vladimir Putin to his ranch in November 2001. On September 7, 2001, the Political Counselor from the Russian Embassy asked NSC staff if a Russian pre-advance team from Moscow could visit the sites on President Putin's itinerary in Texas. A White House team will accompany the Russian team to Texas in September or October 2001. The use of commercial air transportation is not feasible due to time constraints of the two teams and the unavailability of acceptable connections.

APPROVED/DISAPPROVED

JOSEPH HAGIN
Deputy Chief of Staff for Operations

Cc: ✓White House Counsel
Director, White House Military Office
Executive Secretary, National Security Council
Director, White House Airlift Operations
Director, Advance Office
Director of Appointments and Scheduling

THE WHITE HOUSE
MANAGEMENT AND ADMINISTRATION

Date: 8/01/01

To: Al Gonzales

From: MW&A

- [ ] For Your Information
- [x] For Your Files
- [ ] As Requested
- [ ] For Your Comments and Suggestions
- [ ] For Your Signature
- [ ] Please Return
- [ ] Please Handle

Other Remarks:

Document Originally
Attached to
Following Page

July 20, 2001

MEMORANDUM FOR: JOSEPH HAGIN
ASSISTANT TO THE PRESIDENT
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: HECTOR F. IRASTORZA, JR.
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: JOE ALLBAUGH, DIRECTOR OF FEDERAL
EMERGENCY MANAGEMENT AGENCY, (FEMA)

SUBJECT: Request White House Mission Designation for Travel

1. Requesting Principal: Joe Allbaugh, Director of FEMA

2. Purpose of trip: At the request of the President, Director Allbaugh and Secretary Venaman, will attend the Memorial Service of four deceased firefights killed during the "Thirty Mile Fire" in Wanatchee, WA. and return. The Memorial service will be held in Yakima, WA on July 24, 2001

3. Point-of-contact: Kevin Caulfield, Special Assistant to Director Allbaugh,
PRA 6

4. Travel Itinerary:

Tuesday, July 24, 2001
9:40 A.M. (EDT) Tuesday, July 24, 2001
Depart Andrews Air Force Base for Yakima, WA

11:45 A.M. (PDT) Tuesday, July 24, 2001
Arrive Yakima, WA, Attend Fire Briefing at Airport

2:00 P.M. (PDT) Tuesday, July 24, 2001
Attend Memorial Service at Yakima Sun Dome

4:00 P.M. (PDT) Tuesday, July 24, 2001
Depart Yakima, WA

4:35 P.M. (PDT) Tuesday, July 24, 2001
Arrive Boeing Field (Seattle, WA)

6:00P.M. (PDT) Tuesday, July 24, 2001
Visit injured firefighter Jason Emhoff at Harbor View Hospital Burn Unit

RON

Wednesday, July 25, 2001
10:00 A.M. (PDT) Wednesday, July 25, 2001
Depart Boeing Field

12:15 P.M. (MDT) Wednesday, July 24, 2001
Arrive Missoula, MT

2:30 P.M. (MDT) Wednesday, July 24, 2001
Depart Missoula, MT

9:30 P.M. (EDT) Wednesday, July 2001
Arrive Andrews Air Force Base

5. Number of passengers: Pending, with a maximum of 12 passingers

6. Special Considerations: This is a White House Designated flight from Andrews Air Force Base to Yakima, WA. The Yakima to Boeing Field (Seattle, WA) leg is FEMA related and FEMA will pay for this part of the trip. The Boeing Field to Missoula, MT leg is Department of Agriculture related and will be paid for by the Department of Agriculture. The Missoula to Andrews Air Force Base leg is once again a White House Designated flight.

Review:

HECTOR F. IRASTORZA, JR.
Deputy Assistant to the President for Management and Administration

Approval: Disapproval

APPROVED
Joseph Hagin
Deputy Chief of Staff for Operations

Cc: White House Council
Director, White House Military Office
Executive Secretary, National Security Council
Director, white House Airlift Operations
Cabinet Secreatary

THE WHITE HOUSE

WASHINGTON

Brett

August 3, 2001

MEMORANDUM FOR JOE HAGIN
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: **ALBERT HAWKINS**
ASSISTANT TO THE PRESIDENT AND SECRETARY TO THE CABINET

HECTOR IRASTORZA, JR
DEPUTY ASSISTANT TO THE PRESIDENT FOR MANAGEMENT AND ADMINISTRATION

FROM: **SECRETARY ANN VENEMAN**

SUBJECT: **REQUEST FOR WHITE HOUSE MISSION DESIGNATION FOR TRAVEL**

Request approval of the following proposed White House Mission:

1. Requesting Principals: Secretary Ann Veneman and Ambassador Bob Zoellick

2. Purpose of the Trip: To represent the United States at the 22nd Cairns Group Ministerial Meeting in Punta del Este, Uruguay. Due to the following factors I am requesting this designation:

   Designation as a Presidential Mission is necessary in order to secure a USG aircraft, without which the trip will not be possible because of scheduling conflicts with the U.S.-Mexico Binational Commission meeting scheduled for September 5.

   The Cairns Group Ministerial was originally scheduled for September 4-5, but has been rearranged to accommodate Ambassador Zoellick and myself. We will participate in the Ministerial on September 3 and have an opportunity for bilaterals on the morning of September 4.

   Ambassador Zoellilck and I need to be in Washington on September 5 to brief Presidents Bush and Fox on the results of our activities under the U.S.-Mexico Binational Commission. Use of commercial aircraft would not allow us to return in time for the meeting with the Presidents on the 5th. If this trip is designated as a Presidential Mission we will be able to use a USG aircraft and return to Washington on the evening of September 4.

3. 24 Hour Point of Contact:

Chief of Staff Dale Moore (202-720-7971 office; PRA 6
PRA 6

4. Travel Itinerary:
   - Depart Washington, D.C. the morning of Sunday, September 2, 2001, arriving in Moldonado, Uruguay, in the late evening.
   - Depart Punta del Este on Tuesday, September 4, in the early afternoon, arriving in Washington, D.C., in the late evening.

5. Total number of passengers: The U.S. delegation would include participants from the Department of Agriculture, the Office of the United States trade Representative and perhaps the State Department and the NSC.

REVIEW:

HECTOR IRASTORZA, JR.
Deputy Assistant to the president for Management and Administration

APPROVAL:

APPROVED 8/6/01 DISAPPROVED

JOE HAGIN ANDREW H. CARD, JR.
Deputy Chief of Staff for Operations

Cc: White House Counsel
Director, White House Military Office
Executive Secretary, National Security Council
Director, White House Airlift Operations
Cabinet Affairs

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

MONDAY, AUGUST 6, 2001

MEMORANDUM FOR JOSEPH HAGIN
ASSISTANT TO THE PRESIDENT AND
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: HECTOR F. IRASTORZA, JR.
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: TIM ADAMS, CHIEF OF STAFF
US DEPARTMENT OF THE TREASURY

SUBJECT: Request White House Mission Designation for Travel

Request approval of the following proposed White House Mission:

1. Requesting Principal: Secretary Paul O'Neill, US Department of the Treasury

2. Purpose of the trip: For Secretary O'Neill to take the Administration's vision for increasing productivity to developing African nations. Available commercial airline traffic is incompatible with the planned itinerary. Travelling between countries on the African continent involves either transit back to Europe or making stops in locations well outside the desired travel route. Transit opportunities are also unreliable within the interior of the African continent. In addition, there is the distinct possibility that there will be officials from other agencies as well as Members of Congress travelling with the Secretary. The mission cannot be completed adequately if relying solely on commercial aviation.

3. 24 Hour Point of Contact: Reed Galen, Director of Advance, US Department of the Treasury

(202)622-0054 (office)

PRA 6

4. Travel Itinerary: a. Dates & Times

WDC to Dakar, Senegal	Oct. 14-15, 2001
	Dep. 7:00 pm EDT
	Arr. 7:00 am AST

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

4.	Travel Itinerary:	Dakar to Accra, Ghana	Oct. 15, 2001
			Dep. 7:00 pm
			Arr. 9:30 pm
		Accra to Entebbe, Uganda	Oct. 17, 2001
			Dep. 7:00 am
			Arr. 2:00 pm
		Entebbe to Johannesburg	Oct. 18, 2001
			Dep. 4:00 pm
			Arr. 10:00 pm
		Johannesburg to WDC	Oct. 20, 2001
			Dep. 9:00 am AST
			Arr. 7:00 pm EDT

5. Total Number of Passengers: 30

6. Special Considerations:

REVIEW:

HECTOR F. IRASTORZA, Jr.
Deputy Assistant to the President for Management and Administration

APPROVAL:

_____ _____
APPROVED DISAPPROVED
JOSEPH HAGIN
Deputy Chief of Staff for Operations

Cc: White House Counsel
Director, White House Military Office
Executive Secretary, National Security Council
Director, White House Airlift Operations

THE WHITE HOUSE

WASHINGTON

August 2, 2001

MEMORANDUM FOR JOSEPH HAGIN
ASSISTANT TO THE PRESIDENT AND
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: HECTOR F. IRASTORZA, JR.
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: CONDOLEEZZA RICE Sent for

SUBJECT: Request for White House Mission Designation for U.S Trade Representative Zoellick to Travel from India to Indonesia

Request approval of the following White House Mission:

1. Requesting Principal: Condoleezza Rice

2. Purpose of the Trip: To travel to Jakarta, Indonesia, to meet with Indonesia's President Megawati. Ambassador Zoellick will present President Megawati a letter from President Bush and convey the importance of a stable Indonesia to the United States.

3. 24 hour Point of Contact: B. Oglesby (202) 395-6850

4. Travel Itinerary: New Delhi, India to Jakarta, Indonesia

a. Dates: August 10, 2001
b. Requested Time of Departure: Depart New Delhi midday on August 10.

5. Total Number of Passengers: 6

6. Special Considerations: Ambassador Zoellick is meeting with Indian Prime Minister on August 10 in New Delhi and will meet with President Megawati in Jakarta on August 11. There are no commercial airline flights available from India to Jakarta which could transport Ambassador Zoellick to Jarkata in time to meet with President Megawati.

APPROVED/DISAPPROVED

JOSEPH HAGIN
Deputy Chief of Staff for Operations

Cc: White House Counsel
White House Cabinet Affairs
Director, White House Military Office
Executive Secretary, National Security Council
Director, White House Airlift Operations

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

MONDAY, AUGUST 6, 2001

MEMORANDUM FOR JOSEPH HAGIN
ASSISTANT TO THE PRESIDENT AND
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: HECTOR F. IRASTORZA, JR
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: TIM ADAMS, CHIEF OF STAFF T.A.
US DEPARTMENT OF THE TREASURY

SUBJECT: Request White House Mission Designation for Travel

Request approval of the following proposed White House Mission:

1. Requesting Principal: Secretary Paul O'Neill, US Department of the Treasury

2. Purpose of the trip: For Secretary O'Neill to take the Administration's vision for increasing productivity to developing African nations. Available commercial airline traffic is incompatible with the planned itinerary. Travelling between countries on the African continent involves either transit back to Europe or making stops in locations well outside the desired travel route. Transit opportunities are also unreliable within the interior of the African continent. In addition, there is the distinct possibility that there will be officials from other agencies as well as Members of Congress travelling with the Secretary. The mission cannot be completed adequately if relying solely on commercial aviation.

3. 24 Hour Point of Contact: Reed Galen, Director of Advance, US Department of the Treasury

(202)622-0054 (office)

PRA 6

4. Travel Itinerary: a. Dates & Times

WDC to Dakar, Senegal	Oct. 14-15, 2001
	Dep. 7:00 pm EDT
	Arr. 7:00 am AST

REV_00264087

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

4.	Travel Itinerary:	Dakar to Accra, Ghana	Oct. 15, 2001 Dep. 7:00 pm Arr. 9:30 pm
		Accra to Entebbe, Uganda	Oct. 17, 2001 Dep. 7:00 am Arr. 2:00 pm
		Entebbe to Johannesburg	Oct. 18, 2001 Dep. 4:00 pm Arr. 10:00 pm
		Johannesburg to WDC	Oct. 20, 2001 Dep. 9:00 am AST Arr. 7:00 pm EDT

5. Total Number of Passengers: 30

6. Special Considerations:

REVIEW:

HECTOR F. IRASTORZA, Jr.
Deputy Assistant to the President for Management and Administration

APPROVAL:

APPROVED _____ DISAPPROVED _____

~~JOSEPH HAGIN~~ ANDREW H. CARD, JR
~~Deputy~~ Chief of Staff ~~for Operations~~

Cc: White House Counsel
Director, White House Military Office
Executive Secretary, National Security Council
Director, White House Airlift Operations

REV_00264088

THE WHITE HOUSE

WASHINGTON

MEMORANDUM

TO: ANDREW H. CARD, JR.
CHIEF OF STAFF

THROUGH: HECTOR IRASTORZA
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: BRADLEY A. BLAKEMAN
DEPUTY ASSISTANT TO THE PRESIDENT FOR
APPOINTMENTS AND SCHEDULING

DATE: JULY 30, 2001

SUBJECT: MILITARY AIR REQUEST FOR TRAVEL TO ALASKA, JAPAN, SOUTH KOREA, CHINA, AND HAWAII

The President will travel to Asia in October. In direct support of the President's visit a Site Survey team will travel from Washington, DC to Alaska on Sunday, August 20, 2001. The Site Survey team will then travel to Tokyo, Japan; Seoul, South Korea; Shanghai and Beijing, China, and Oahu, Hawaii, finishing the trip in Washington, DC on Thursday, August 31, 2001. The use of commercial air transportation is not feasible due to time constraints on the team's travel itinerary and the unavailability of acceptable connections to the desired destinations. Request a military aircraft to transport approximately 34 members of the Site Survey team in accordance with the itinerary below.

August 20, 2001

8:00 am	Depart Andrews Air Force Base en route Anchorage, Alaska Flight Time: 7 hours, 10 min Time Change: -4
11:10 am	Arrive Anchorage, Alaska
3:30 pm	Depart Anchorage, Alaska en route Tokyo, Japan Flight Time: 7 hours, 45 min Time Change: +17

August 21, 2001

4:15 pm	Arrive Tokyo, Japan
RON	Tokyo, Japan

August 22, 2001	
RON	Tokyo, Japan
August 23, 2001	
3:00 pm	Depart Tokyo, Japan en route Seoul, Korea
	Flight Time: 1 hour, 30 min
	Time Change: NC
4:30 pm	Arrive Seoul, Korea
August 24, 2001	
RON	Seoul, South Korea
August 25, 2001	
3:00 pm	Depart Seoul, South Korea en route Shanghai, China
	Flight Time: 2 hour, 10 min
	Time Change: -1
4:10 pm	Arrive Shanghai, China
RON	Shanghai, China
August 26, 2001	
RON	Shanghai, China
August 27, 2001	
3:00pm	Depart Shanghai, China en route Beijing, China
	Flight Time: 1 hour, 40 min
	Time Change: NC
4:40pm	Arrive Beijing, China
RON	Beijing, China
August 28, 2001	
RON	Beijing, China
August 29, 2001	
3:00pm	Depart Beijing, China en route Oahu, Hawaii
	Flight Time: 9 hours, 45 min
	Time Change: -18
6:45am	Arrive Oahu, Hawaii
RON	Oahu, Hawaii
August 30, 2001	
RON	Oahu, Hawaii

August 31, 2001

7:00am	Depart TBD, Hawaii en route Washington, DC
	Flight Time: 9 hours, 35 min
	Time Change: +6 hours
10:35pm	Arrive Andrews Air Force Base
RON	Washington, DC

Helicopter support is also requested in countries as needed. — only as needed!.
It is respectfully requested that you approve the mission set forth.

APPROVE / DISAPPROVE

ANDREW H. CARD, JR
CHIEF OF STAFF

CC: White House Counsel
Director, White House Military Office
Director, Airlift Operations

Brett

THE WHITE HOUSE

WASHINGTON

July 30, 2001

MEMORANDUM FOR JOSEPH W. HAGIN
ASSISTANT TO THE PRESIDENT AND
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: HECTOR F. IRASTORZA, JR.
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: MARK V. ROSENKER
DEPUTY ASSISTANT TO THE PRESIDENT AND
DIRECTOR, WHITE HOUSE MILITARY OFFICE

SUBJECT: Request White House Mission Designation for Travel

Request approval of the following proposed White House Mission:

1. Requesting Principal: Mark V. Rosenker

2. Purpose of the trip: Former President Carter will be coming to Washington DC to meet with President Bush and participate in a Rose Garden event.

3. 24 hour Point of Contact: Nancy Konigsmark, PRA 6 or Julie Taub, PRA 6 Ext. 202

4. Travel Itinerary:
   a. Date: From Souther Field, GA to Andrews AFB and back to Souther Field, GA on 31 July 01.
   b. Requested time of departure: Departure time from Souther Field, GA to Andrews AFB will be at 0800L. Departure time from Andrews AFB back to Hartsfield will be TBD/NLT 1400L.

5. Total number of passengers: 5

6. Special considerations: Request received over the weekend to support Former President Carter.

Review:

HECTOR F. IRASTORZA, Jr.
Deputy Assistant to the President for Management and Administration

APPROVED

DISAPPROVED

JOSEPH W. HAGIN
Deputy Chief of Staff for Operations

Cc: White House Counsel
Director, White House Military Office
Executive Secretary, National Security Council
Director, White House Airlift Operations

REV_00264093

Cathy Alix

July 20, 2001

MEMORANDUM FOR: JOSEPH HAGIN
ASSISTANT TO THE PRESIDENT
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: HECTOR F. IRASTORZA, JR.
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: JOE ALLBAUGH, DIRECTOR OF FEDERAL
EMERGENCY MANAGEMENT AGENCY, (FEMA)

SUBJECT: Request White House Mission Designation for Travel

1. Requesting Principal: Joe Allbaugh, Director of FEMA

2. Purpose of trip: At the request of the President, Director Allbaugh and Secretary Venaman, will attend the Memorial Service of four deceased firefights killed during the "Thirty Mile Fire" in Wanatchee, WA. and return. The Memorial service will be held in Yakima, WA on July 24, 2001

3. Point-of-contact: Kevin Caulfield, Special Assistant to Director Allbaugh,
PRA 6

4. Travel Itinerary:

Tuesday, July 24, 2001
9:40 A.M. (EDT) Tuesday, July 24, 2001
Depart Andrews Air Force Base for Yakima, WA

11:45 A.M. (PDT) Tuesday, July 24, 2001
Arrive Yakima, WA, Attend Fire Briefing at Airport

2:00 P.M. (PDT) Tuesday, July 24, 2001
Attend Memorial Service at Yakima Sun Dome

4:00 P.M. (PDT) Tuesday, July 24, 2001
Depart Yakima, WA

NO

4:35 P.M. (PDT) Tuesday, July 24, 2001
Arrive Boeing Field (Seattle, WA)

6:00P.M. (PDT) Tuesday, July 24, 2001
Visit injured firefighter Jason Emhoff at Harbor View Hospital Burn Unit

Michael Brown

PRA 6

RON

Wednesday, July 25, 2001
10:00 A.M. (PDT) Wednesday, July 25, 2001
Depart Boeing Field

12:15 P.M. (MDT) Wednesday, July 24, 2001
Arrive Missoula, MT

2:30 P.M. (MDT) Wednesday, July 24, 2001
Depart Missoula, MT

9:30 P.M. (EDT) Wednesday, July 2001
Arrive Andrews Air Force Base

5. Number of passengers: Pending, with a maximum of 12 passingers

6. Special Considerations: This is a White House Designated flight from Andrews Air Force Base to Yakima, WA. The Yakima to Boeing Field (Seattle, WA) leg is FEMA related and FEMA will pay for this part of the trip. The Boeing Field to Missoula, MT leg is Department of Agriculture related and will be paid for by the Department of Agriculture. The Missoula to Andrews Air Force Base leg is once again a White House Designated flight.

Review:

HECTOR F. IRASTORZA, JR.
Deputy Assistant to the President for Management and Administration

Approval: _____ Disapproval _____

APPROVED
Joseph Hagin
Deputy Chief of Staff for Operations

Cc: White House Council
Director, White House Military Office
Executive Secretary, National Security Council
Director, white House Airlift Operations
Cabinet Secreatary

DI C11

THE WHITE HOUSE

WASHINGTON

August 3, 2001

MEMORANDUM FOR JOSEPH W. HAGIN
ASSISTANT TO THE PRESIDENT AND
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: HECTOR F. IRASTORZA, JR.
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: MARK V. ROSENKER
DEPUTY ASSISTANT TO THE PRESIDENT AND
DIRECTOR, WHITE HOUSE MILITARY OFFICE

SUBJECT: Request for Presidential Executive Airlift Support

Request approval of the following proposed White House Mission:

Requesting Principal: Mark V. Rosenker.

Purpose of the trip: provide transport for Assistant to the President for National Security Affairs, Dr. Condoleezza Rice between Washington DC, Palo Alto, California, White Sulphur Springs, West Virginia and Waco, Texas, as required when directed by the President from 5 August through 1 September, 2001. Due to scheduling constraints, commercial aircraft accommodations are not available on a timely basis.

24-hour point of contact (POC): Airlift Operations director on-call. Contact through White House Signal Switchboard, at (202) 757-6000.

Travel Itinerary:

a. Dates: TBD, as directed by the President from 5 August 01 through 1 September 01.

b. Requested time of departure: to be coordinated through White House Airlift Operations on a case-by-case basis.

Total number of passengers: TBD.

Special considerations: N/A.

REVIEW:

HECTOR F. IRASTORZA, Jr.
Deputy Assistant to the President for
Management and Administration

APPROVED _____ DISAPPROVED _____

JOSEPH W. HAGIN
Deputy Chief of Staff for Operations

Cc:
White House Counsel
Director, White House Military Office
Executive Secretary, National Security Council
Director, White House Airlift Operations

REV_00264097

Brett

THE WHITE HOUSE

WASHINGTON

August 3, 2001

MEMORANDUM FOR JOSEPH W. HAGIN
ASSISTANT TO THE PRESIDENT AND
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: HECTOR F. IRASTORZA, JR.
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: MARK V. ROSENKER
DEPUTY ASSISTANT TO THE PRESIDENT AND
DIRECTOR, WHITE HOUSE MILITARY OFFICE

SUBJECT: Request for Presidential Executive Airlift Support

Request approval of the following proposed White House Mission:

Requesting Principal: Mark V. Rosenker.

Purpose of the trip: provide transport for White House Chief of Staff Andrew H. Card between Portland, Maine, and Waco, Texas, as required when directed by the President from 5 August through 31 August, 2001. Due to scheduling constraints, commercial aircraft accommodations are not available on a timely basis.

24-hour point of contact (POC): Airlift Operations director on-call. Contact through White House Signal Switchboard, at (202) 757-6000.

Travel Itinerary:

a. Dates: TBD, as directed by the President from 5 August 01 through 31 August 01.

b. Requested time of departure: to be coordinated through White House Airlift Operations on a case-by-case basis.

Total number of passengers: TBD.

Special considerations: N/A.

REVIEW:

HECTOR F. IRASTORZA, Jr.
Deputy Assistant to the President for
Management and Administration

APPROVED

DISAPPROVED

JOSEPH W. HAGIN
Assistant to the President and
Deputy Chief of Staff for Operations

Cc:
White House Counsel
Director, White House Military Office
Executive Secretary, National Security Council
Director, White House Airlift Operations

REV_00264099

Brett

THE WHITE HOUSE

WASHINGTON

October 4, 2001

MEMORANDUM FOR JOE HAGIN
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: ALBERT HAWKINS AH
ASSISTANT TO THE PRESIDENT AND SECRETARY TO THE CABINET

FROM: SECRETARY DON EVANS

SUBJECT: REQUEST FOR WHITE HOUSE MISSION DESIGNATION FOR TRAVEL

Request approval of the following proposed White House Mission:

1. Requesting Principal: Secretary Don Evans

2. Purpose of the Trip: To represent the United States on a trade mission with Russian leaders and the business community, to attend the Asia Pacific Economic Conference in Shanghai, China. Due to the following factors I am requesting this designation:

   1) Heightened safety and security concerns in this region, and ability for safe and swift return to the United States should circumstances arise, necessitate this request.

3. 24 Hour Point of Contact:

   - Director of External Affairs Darren Grubb (202-482-2158 office, PRA 6 cell, PRA 6

   - Director of Advance Sergio Gutierrez (202-482-5880 office, PRA 6)

4. Travel Itinerary
   a) Dates: October 12-20 (or return possibly October 19)
   b) Requested time of departure: the itinerary is not complete enough, but I anticipate a Friday evening October 12 departure from Washington and arrive Moscow Saturday afternoon October 13.
   c) Lead Trade Mission October 14-17

d) Depart Moscow October 17 arrive Shanghai, China October 18
e) Attend APEC Ministerial meetings October 18. Meet with Premier Zhu Rongji October 18 or 19 (depending on the Premier's schedule)
f) Depart Shanghai October 20 (or possibly October 19)

5. Total number of passengers: The Secretary's immediate delegation would be approximately 10-12 including security

REVIEW:

HECTOR IRASTORZA, JR.
Deputy Assistant to the President for Management and Administration

APPROVAL:

APPROVED ON A REIMBURSABLE BASIS DISAPPROVED

SECRETARY ANDREW H. CARD, JR.
Chief of Staff to the President

CC: ✓White House Counsel
Cabinet Secretary
Director, White House Military Office
Executive Secretary, National Security Council
Director, White House Airlift Operations

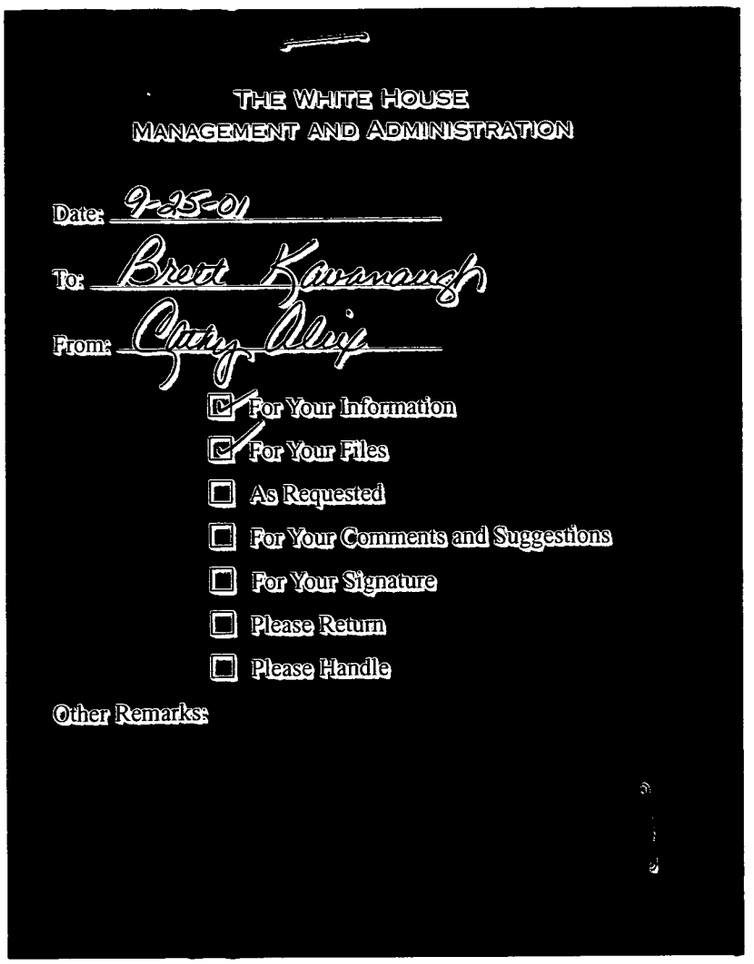

THE WHITE HOUSE
MANAGEMENT AND ADMINISTRATION

Date: 9-25-01

To: Brett Kavanaugh

From: Gary Walker

- [x] For Your Information
- [x] For Your Files
- [ ] As Requested
- [ ] For Your Comments and Suggestions
- [ ] For Your Signature
- [ ] Please Return
- [ ] Please Handle

Other Remarks:

Document Originally
Attached to
Following Page

THE WHITE HOUSE

WASHINGTON

05 September, 2001

MEMORANDUM FOR JOSEPH HAGIN
ASSISTANT TO THE PRESIDENT AND
DEPUTY CHIEF OF STAFF FOR OPERATIONS

THROUGH: HECTOR F. IRASTORZA, JR
DEPUTY ASSISTANT TO THE PRESIDENT FOR
MANAGEMENT AND ADMINISTRATION

FROM: MARK V. ROSENKER
DEPUTY ASSISTANT TO THE PRESIDENT AND
DIRECTOR OF THE WHITE HOUSE MILITARY OFFICE

SUBJECT: Request White House Mission Designation for the White House Historical Society

1. White House Designated mission status is requested for the use of a Presidential Helicopter (VH-3D) for the unique purpose of filming documentary footage for distribution to television networks.

2. Purpose of the event: To enhance the accuracy of file footage depicting the Presidential Pilots view from Marine One.

3. 24 hour Point Of Contact: White House Military Office.

4. Travel Itinerary
   a. Dates:6 September
   b. Requested time of departure: 1330 from Anacostia Facility, MD to White House South Lawn and surrounding Washington D.C. area to Anacostia Facility, MD

5. Total number of passengers: (5)

REVIEW:

HECTOR F. IRASTORZA, Jr.
Deputy Assistant to the President for Management and Administration

APPROVAL:

APPROVED DISAPPROVED

JOSEPH HAGIN
Deputy Chief of Staff for Operations

Cc: White House Counsel
Director, White House Military Office
Executive Secretary, National Security Council
Director, White House Airlift Operations

REV_00264104

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

[Treasury Department Policy on Communications with the White House Concerning Open Investigations]

Box C01
Folder 8

OA/NARA#: 2162/2073
9692

Brett

DEPARTMENT OF THE TREASURY
OFFICE OF THE GENERAL COUNSEL

June 6, 2001

FAX TRANSMITTAL

To: **Tim Flanigan**
Fax No.: **456-6279**

From: **Stephen J. McHale**
Tel. No.: **(202) 622-0287**

No. of pages: **4 (including cover sheet)**

Subject: Dept Treasury Policy on Communications with the White House Concerning Open Investigations

Comments: ***David Aufhauser asked me to send this to you.***

If you receive this document in error or the transmission is incomplete, please contact the sender immediately.

BY ORDER OF THE SECRETARY OF THE TREASURY

TREASURY ORDER 107-05

DATE: March 02, 1995

REAFFIRMED: December 2, 1999

SUNSET REVIEW: December 02, 2004

SUBJECT: Communications with the White House Regarding Open Investigations, Adjudications or Civil and Criminal Enforcement Actions

By virtue of my authority as Secretary of the Treasury, including the authority contained in 31 U.S.C. 321(b) and 5 U.S.C. 301 and 302, I hereby issue the following procedures for communications between the Department of the Treasury and the White House regarding open Department investigations, adjudications or civil or criminal enforcement actions.

1. GENERAL PROCEDURES.

a. General Policy. In order to ensure the President's ability to perform his constitutional obligation to Take care that the laws be faithfully executed, it is the policy of the Treasury Department to provide the White House with information on open investigations, adjudications, or civil (including administrative or regulatory) or criminal enforcement actions pending before or within any regulatory or law enforcement agency within the Department, where important for the performance of the President's duties, where appropriate from a law enforcement and regulatory perspective and where consistent with these procedures.

b. Referral Procedures. The below listed procedures are established to ensure the flow of appropriate information between the Department and the White House. Central to these procedures is the need for consultation with Department senior policy officials[1], including the General Counsel. The General Counsel is authorized to issue more detailed guidance should he or she determine it to be necessary.

(1) Action to be Taken by Department Employees/Senior Policy Officials. If a Department employee determines that a matter involving an open investigation, adjudication, or enforcement action under his or her jurisdiction should be communicated to the White House, he or she shall inform, through the appropriate Department senior policy official, the General Counsel about this maker.

OPI: AGC (Enforcement)

[1]Department senior policy officials shall include those Treasury officials at the Assistant Secretary level and above as set forth in Treasury Order 10145 and the organization chart attached thereto.

(2) Action to be Taken by Treasury Bureau Employees/Bureau Heads. If an employee of a Treasury law enforcement or financial regulatory bureau or the Office of Foreign Assets Control ("Treasury Bureaus") believes that a matter involving an open investigation, adjudication or enforcement action under his or her jurisdiction should be communicated to

the White House, he or she shall contact, through the Treasury Bureau head, the Department senior policy official to whom that Treasury Bureau head directly reports. If the senior policy official concurs with that recommendation, he or she shall then inform the General Counsel about this matter.

(3) General Counsel Review and Final Determination. The General Counsel shall provide the Department senior policy official with his or her recommendation concerning the advisability of disclosing the information to the White House. The General Counsel is authorized to preclude transmittal of the information on legal or ethical grounds. If the General Counsel believes that disclosure should not be made based on other than legal or ethical grounds, the General Counsel shall inform the appropriate senior policy official of this recommendation.

(4) Other Final Determinations. Unless precluded on legal or ethical grounds by the General Counsel, the Department senior policy official referred to in paragraph 1.b.(1) or 1.b.(2) shall make the final determination on whether the information should be communicated to the White House. If the Department senior policy official determines that such information should be communicated to the White House, he or she shall request the General Counsel to make the initial communication.

c. Communications.

(1) Initial Contact with White House. Initial communications between the White House and the Treasury Department regarding any pending Department investigation, adjudication or criminal or civil enforcement action shall involve only the Counsel to the President or the Deputy Counsel and the General Counsel or the Deputy General Counsel. No Treasury or bureau employee shall initiate communications on these matters with the White House other than as provided in paragraph 1.c. Any Treasury or bureau employee in possession of information pertaining to any pending criminal referrals and criminal investigations shall keep the information in strict confidence and shall not disclose the information to any person except in accordance with applicable law, Treasury standards and this Order.

(2) Continuing Contact. After the initial contact, further contact on a matter deemed appropriate for communications pursuant to this Order shall be directed to the White House Counsel's Office by the General Counsel, the Deputy General Counsel or the appropriate senior policy official designated by the General Counsel or any other lawyer in the Office of the General Counsel, as designated by the General Counsel.

d. Writing Requirements. All proposals and decisions involving open Department investigations, adjudications or enforcement actions discussed herein that either propose or result in communications with the White House shall be detailed in contemporaneous, written memoranda.

(1) Treasury Bureau Heads and Department Senior Policy Officials. All requests from Treasury Bureau Heads to Department senior policy officials and from Department senior policy officials to the General Counsel requesting a communication to the White House concerning an open investigation, adjudication or enforcement action shall be in writing. Such memoranda shall explain why the communication of information is important for the performance of the President's duties and appropriate from a law enforcement perspective.

(2) General Counsel. The General Counsel shall also issue in writing his or her legal or ethical recommendation to the appropriate Department senior policy official in response to such request for communication with the White House.

(3) Emergency Situations. If an emergency situation is present, the memoranda requested by paragraph 1.d. may be prepared as soon as practicable thereafter.

e. Information Requests by the White House. Requests by the White House for information concerning open Department investigations, adjudications or civil or criminal enforcement actions shall be referred in all cases to the General Counsel. The General Counsel shall ensure that such requests are processed consistent with the provisions of this Order and any applicable White House guidance.

2. OPEN INVESTIGATIONS, ADJUDICATIONS OR ENFORCEMENT ACTIONS DIRECTLY INVOLVING THE WHITE HOUSE.

a. Contacts Directly Involving the White House. If the President, the Vice-President, a member of their families, a senior advisor or an employee of an office which the Chief of Staff (or any similar successor position) directly supervises, is an actual or potential subject, target or witness of an open investigation, adjudication or enforcement action under the jurisdiction of the Treasury Bureaus, the determination of whether it is appropriate to disclose this information to the White House shall be made in accordance with this Order taking into consideration, among other things, the following:

(1) whether disclosure would detrimentally affect the fundamental operation of an agency or other organization in the executive branch of the federal government;

(2) whether disclosure of the information would promote or reduce the public confidence and trust in the integrity of elected officials and public servants or the Department's regulatory and law enforcement activities;

(3) whether there exists an immediate threat of harm or injury to White House persons or property which disclosure will help to avoid;

(4) whether the matter involves any sensitive or urgent national security or foreign policy concern that should be brought to the White House's attention;

(5) whether disclosure of the information would interfere or assist with the Department's law enforcement and regulatory mission or an ongoing law enforcement or regulatory activity; and

(6) whether non-disclosure could cause the White House to convey inaccurate or misleading information to the public.

b. Secretary/Deputy Secretary Consultation. The Deputy Secretary shall be informed prior to any Department communications with the White House involving the matters subject to paragraph 2. The Deputy Secretary, in turn, may consult with the Secretary. The Secretary or Deputy Secretary may consult with the Attorney General or any other appropriate senior government official concerning the advisability of such disclosure or non-disclosure.

c. Procedures. Subject to the procedures specified in paragraph 2., the procedures described in paragraph 1. herein shall apply to the communications described in paragraph 2.

3. SCOPE. In the day-to-day functioning of the Department, there exist activities necessary to carry out the Department's law enforcement and regulatory mission. These may include routine law enforcement

contacts, including administrative and regulatory contacts, designed to collect information through document requests, interviews, depositions or otherwise. Nothing in this Order shall be construed to amend the Department's current approach with respect to its handling of these routine activities.

In addition, the procedures set forth in this Order do not apply to the following circumstances.

a. Any communication subject to a specific statutory provision prohibiting or governing the disclosure of the information. (am, e.gr., 12 U.S.C. 1462a(b)(3) and 26 U.S.C. 6103.)

b. Communications between the Secret Service and the White House concerning the Service's protective responsibilities.

c. Communications between a Treasury Bureau and the National Security Council concerning open investigations or cases, if such disclosure is necessary for the conduct, determination or coordination of national security or foreign policy issues.

d. Communications between the Department and the White House appropriate to properly respond to inquiries or requests for information or documents in the form of (I) civil and criminal discovery requests; (ii) subpoenas, including but not limited to, grand jury and congressional; (iii) other congressional requests for documents and information; and (iv) any other requests for information and documents authorized by law; provided that the exception created by paragraph 3.d. shall not apply to requests for information pertaining to those officials and individuals identified in paragraph 2. who are the subject, target or witness in an open investigation, adjudication or enforcement action.

e. Communications between the Department and the White House appropriate to formulate an Administration position with respect to judicial review or settlement of pending litigation.

f. Tax, security and background checks on prospective Federal employees and appointees, including Executive and Judicial Branch appointments under consideration by the President or the Department.

g. Communications between the Inspector General or his or her authorized officials and the White House in furtherance of the duties and responsibilities of the Inspector General undertaken pursuant to the Inspector General Act of 1978, 5 U.S.C.A. App. 3.

Robert E. Rubin

Secretary of the Treasury

REV_00264110

Trophy Mart

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

OA/NARA#: 2165/2076
9695

Box 61
Folder 9

THE WHITE HOUSE

WASHINGTON

April 25, 2002

MEMORANDUM FOR HARRIET MIERS

FROM: BRETT KAVANAUGH BK

SUBJECT: Request for Use of President's Signature for Crime Victims Awards Plaques

Attached is an agreement signed by me that would authorize Trophy Mart to use the President's signature for the crime victims award plaques, as requested in the attached letter from the Attorney General that your Office forwarded to Counsel's Office. Unless you would prefer a different approach, your Office may send the agreement to Trophy Mart for its signature and also send the signature templates.

THE WHITE HOUSE

WASHINGTON

AGREEMENT

By this agreement, the White House Office authorizes Trophy Mart to use the Presidential template and inscription for Crime Victims Awards plaques ordered by the Office for Victims of Crime of the United States Department of Justice. Trophy Mart agrees that this authorization applies only to the plaques requested by the Office for Victims of Crime. Trophy Mart also agrees that it may not alter the signature or use it in any other manner whatsoever without the written approval of the White House Office.

Brett M. Kavanaugh DATE: April 25, 2002

Brett M. Kavanaugh
Associate Counsel to the President

_____ DATE: _____

for Trophy Mart

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

[United States District Court for the District of South Carolina]

Box 61
Folder 10

OA/NARA #: 1825/1743
9633

REV_00264113

REV_00264114

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

USTR (United States Trade Representative)
FOIA (Freedom of Information Act) Cases

OA/NARA#: 2181/2092
9801

Box 61
Folder 11

U.S. Department of Justice

Office of the Associate Attorney General

Washington, D.C. 20530

January 7, 2003

MEMORANDUM FOR BRETT M. KAVANAUGH
Associate Counsel to President

FROM: Peter D. Keisler PDK
Acting Associate Attorney Geneeral

SUBJECT: USTR Cases

As discussed, attached are: (1) the District Court in Center for International Environment Law v. Office of the United States Trade Representative, and (2) American Federation of Labor and Congress of Industrial Organizations v. George W. Bush.

Attachments

determines that unauthorized disclosure "reasonably could be expected to result in damage to the national security," and the original classification authority is "able to identify or describe the damage." Exec. Order No. 12, 958, § 1.2(a), 60 Fed.Reg. 19,825 (Apr. 17, 1995), *reprinted in* the Historical and Statutory Notes to 50 U.S.C. § 435 (West Supp.2002); *see Salisbury v. United States,* 690 F.2d 966, 972 (D.C.Cir.1982). While the Court determines *de novo* whether the records have been properly withheld, a court must give "substantial weight" to agency declarations and affidavits in determining whether records have been properly classified, so long as those declarations "contain reasonable specificity in detail." *Halperin v. Central Intelligence Agency,* 629 F.2d 144, 148 (D.C.Cir.1980); *see American Civil Liberties Union v. Department of Justice,* 548 F.Supp. 219, 222 (D.D.C.1982); *Iglesias v. Central Intelligence Agency,* 525 F.Supp. 547, 552 (D.D.C.1981).

***12** The Court has reviewed the declarations submitted by defendants in support of the claimed exemption and concludes that defendants properly invoked Exemption 1 to withhold these five documents. In his declaration in support of the classification and withholding of these documents, Assistant United States Trade Representative Joseph Papovich affirmed the proper classification of all five documents pursuant to Executive Order 12, 958. *See* Def. Mem., Exhibit 3, Declaration of Joseph Papovich ¶ 6 ("Papovich Decl."). With respect to three of the withheld documents (Documents 211, 212 and 213), Mr. Papovich explained:

> The issues brought to the TPRG [Trade Policy Review Group] are often sensitive and controversial. In connection with the U.S.-Chile free trade negotiations, one issue that came before the TPRG was the U.S. negotiating position on rules and procedures governing foreign investment. Foreign investment rules and procedures have generated considerable controversy in the United States and abroad. Historically, foreign investment has been a particularly controversial issue in Latin America. Documents 211, 212, and 213 are TPRG papers that address proposed U.S.-Chile investment rules.... Public release of documents 211, 212, and 213 would reveal high-level internal government deliberations on foreign investment issues and thus undermine the U.S. government's ability to debate and resolve some of the most complex and sensitive issues at stake in the negotiations. Disclosure of these documents would not only expose U.S. legal, policy, and strategic analysis of these issues, but also differing agency viewpoints on key investment rules and procedures. If information of that kind were in the public sector, it would permit other governments with which the United States is seeking to negotiate investment rules to gauge the strength of U.S. negotiating positions and exploit interagency differences. Accordingly, disclosure of these documents would make it considerably more difficult for U.S. negotiators to conclude a free trade agreements [sic] with other governments that fully secure U.S. economic interests.
>
> *Id.* at ¶¶ 5, 7.

As to the remaining two classified documents, Documents 209 and 214, Mr. Papovich stated:

> Revealing the TPRG's discussions concerning exceptions [to be included in the Free Trade Agreement] and competition could undermine U.S. negotiating positions and make it more difficult to conclude the agreement. Moreover, although the TPRG deliberations on both these subjects were initiated in the context of the Chile FTA, they have important implications for current and future U.S. economic relations with other trading partners.... The disclosure of these documents would pose a serious risk of harm to our relations with U.S. trading partners.... If high-level internal discussions on these topics were made public, it might be understood to signal a change in U.S. policy in these areas and raise questions about the U .S. government's willingness to apply current standards. Hence, the release of these documents could seriously harm diplomatic relations with our trading partners.
>
> ***13** *Id.* at ¶¶ 8-10.

Based on these statements, the Court concludes that Joseph Papovich's declaration "describe[s] the documents withheld and the justifications for nondisclosure in enough detail and with sufficient specificity to demonstrate that material withheld is logically within the domain of the exemption claimed," and is "neither controverted by contrary record evidence nor impugned by bad faith on the part of the agency." *King v. Dep't of Justice,* 830 F.2d 210, 217 (D.C.Cir.1980). Because defendants have demonstrated proper classification pursuant to Executive Order 12,958 and a reasonable expectation of harm to national security if these documents are publicly released, the Court finds that Documents 209 and 211-214 properly were withheld pursuant to Exemption 1. *See* 5 U.S.C. § 552(b)(1); Exec. Order No. 12,958, § 1.2(a), 60 Fed.Reg. 19,825 (Apr. 17, 1995); *see also Halperin v. Central Intelligence Agency,* 629 F.2d at 148.

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3. *Waiver by Public Disclosure*

Plaintiffs argue that irrespective of the Court's rulings under Exemptions 1 and 5, certain documents (at least 14 in number) must be disclosed on the ground that defendants have waived the right to assert either exemption for these documents by publicly releasing information similar to that contained in the documents. *See* Pl. Mem. at 26, 29 n. 12; Pl. Reply at 14-16. Based on two letters written to USTR by four individuals, plaintiffs claim that USTR released information to these individuals relating to United States proposals and certain inter-agency communications concerning the investment provisions of the proposed trade agreement. *See* Pl. Mot, Exhibit 6, Letter from Tom Niles to Peter Allgeier, USTR, dated November 19, 2001 ("Niles Letter"); Pl. Reply, Exhibit 1, Letter from Thomas Niles, U.S. Council for International Business; Calman Cohen, Emergency Committee for American Trade; William Reinsch, National Foreign Trade Council; and Jerry Jasinowski, National Association of Manufacturers, to Robert Zoellick, USTR, dated August 30, 2001 ("Niles, Cohen, Reinsch and Jasinowski Letter").

Furthermore, plaintiffs assert that defendants have failed to describe the withheld documents with sufficient specificity to enable plaintiffs to identify those that relate to the publicly disclosed information. *Id.* at 16.

Because the Court has held that those documents withheld by defendants under Exemption 5 are not "inter-agency" and thus are not protected by that exemption, *see supra*, Section II.B.1, the Court need not address plaintiffs' waiver argument with respect to such documents. As to those documents withheld under Exemption 1, the Court finds that plaintiffs have failed to demonstrate waiver because they have not satisfied their "initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Afshar v. Dep't of State*, 702 F .2d 1125, 1130 (D.C.Cir.1983); *see also Public Citizen v. Dep't of State*, 11 F.3d 198, 201 (D.C.Cir.1993) ("FOIA plaintiffs cannot simply show that similar information has been released, but must establish that a specific fact already has been placed in the public domain."). Although plaintiffs suggest that defendants have disclosed "in great detail proposals being considered for investment provisions in U.S. free trade agreements," the letters upon which plaintiffs base this argument do not contain or reference any specific information. Instead, the letters merely reflect the authors' belief that certain issues are under consideration by the Trade Policy Review Group, with no indication of specific agency positions or TPRG's analysis of the issues. *See* Niles Letter; Niles, Cohen, Reinsch and Jasinowski Letter; Def. Opp. at 11-12.

*14 Furthermore, USTR directly refutes plaintiff's claim of waiver with the declaration of Frances Huegel, Director of Investment for USTR. *See* Def. Surreply, Exhibit 1, Declaration of Frances Huegel ("Huegel Decl."). Huegel, who has direct knowledge of the briefing sessions and information releases upon which plaintiffs base their claim of waiver, clearly stated that "[d]uring these sessions, the USTR did not provide its own views as to the pros and cons of maintaining, amending, or eliminating NAFTA-like provisions on investment with respect to the proposed United States-Chile Free Trade Agreement." Huegel Decl. at ¶¶ 1-3, 5.

Plaintiffs' claim also is belied by the sworn declarations of Susan P. Cronin and Joseph Papovich, USTR officials familiar with the requested documents and the ongoing negotiations with Chile. *See* Def. Mem., Exhibit 2, Declaration of Susan P. Cronin ("Cronin Decl."); Papovich Decl. Both Cronin and Papovich stated that, to the best of their knowledge, the documents withheld in response to plaintiffs' request "have not been circulated outside the executive branch" other than to the Chilean government and trade advisory committees established pursuant to statute as advisors to USTR. Cronin Decl. at ¶¶ 21-26; Papovich Decl. at ¶ 13.

In light of these sworn statements denying public disclosure and plaintiffs' failure to present evidence of "specific information in the public domain that appears to duplicate that being withheld," the Court concludes that defendants have not waived the right to claim Exemption 1 privilege for the contested documents. *Afshar v. Dep't of State*, 702 F.2d at 1130; *see Public Citizen v. Dep't of State*, 11 F.3d at 201, 203 (to show waiver of Exemption 1, plaintiff must demonstrate that *"specific information at issue* has been officially disclosed.... We recognize that this is a high hurdle for a FOIA plaintiff to clear, but the Government's vital interest in information relating to national security and foreign affairs dictates that it must be.") (emphasis in original); *see also In re Sealed Case*, 121 F.3d 729, 741 (D.C.Cir.1997) (waiver of executive privilege should not be lightly inferred; waiver applies only to documents that are identical to documents publicly released).

For all of these reasons, the Court grants in part and

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denies in part both plaintiffs' motion for summary judgment and defendants' motion for summary judgment. An Order consistent with this Opinion shall issue this same day.

SO ORDERED.

ORDER

For the reasons stated in the Opinion issued this same day, it is hereby

ORDERED that the Court GRANTS IN PART and DENIES IN PART plaintiffs' motion for summary judgment [8]; it is

FURTHER ORDERED that the Court GRANTS IN PART and DENIES IN PART defendants' motion for summary judgment [6]; it is

FURTHER ORDERED that defendants are enjoined from withholding any documents produced by or shared with the Government of Chile during the negotiations of the United States-Chile Free Trade Agreement, including documents 9, 15, 16, 19, 23, 27-29, 52, 57, 89-94, 97, 99, 111, 124, 134, 141, 142, 145-149, 154, 156-59, 167, 173, 180-81, 186-191 and 215-280. Such documents shall be released to plaintiffs on or before January 17, 2003; it is

*15 FURTHER ORDERED that defendants are enjoined from withholding any reasonably segregable portions of documents produced by or shared with the Government of Chile during the negotiations of the United States-Chile Free Trade Agreement, including documents 22, 36, 130, 152, 153, 155, 156, 160-162, 164-166, 169-172, 176, 177, 182-185. Such documents shall be released to plaintiffs on or before January 17, 2003; it is

FURTHER ORDERED that on or before January 17, 2003, defendants shall identify and release all reasonably segregable portions of documents containing factual information relating to communications to or from the Government of Chile during the negotiations of the United States-Chile Free Trade Agreement; it is

FURTHER ORDERED that defendants need not disclose any portions of documents 209, 211, 212, 213 and 214; and it is

FURTHER ORDERED that this Order shall constitute a FINAL JUDGMENT in this case. This is a final appealable order. *See* Rule 4(a), Fed. R.App. P.

SO ORDERED.

2002 WL 31840970, 2002 WL 31840970 (D.D.C.)

END OF DOCUMENT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Federation of Labor and Congress of Industrial Organizations, 815 16th Street, N.W. Washington, D.C. 20006	
Plaintiff,	**Case No.**
v.	
George W. Bush, President of the United States, and Robert W. Zoellick, United States Trade Representative,	
Defendants.	

COMPLAINT FOR INJUNCTIVE, DECLARATORY, AND OTHER RELIEF

Parties

1. Plaintiff, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO or Federation), is an association of approximately 65 affiliated national and international labor unions with a combined membership of approximately 13 million working people.

2. Defendant George W. Bush is the President of the United States (President). Defendant Robert W. Zoellick is the United States Trade Representative (USTR).

3. Plaintiff, on behalf of itself and its affiliates, brings this suit against defendants for failing to appoint representatives of labor, environmental and conservation organizations, and consumer interests to the Advisory Committee for Trade Policy and Negotiations (ACTPN or the Committee), in violation of Section 135(b)(1) of the Federal Trade Act of 1974 (1974 Trade Act), 19 U.S.C. § 2155(b)(1), Section 5 of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. §5, and Sections 2103 and 2104 of the Trade Act of 2002 (2002 Trade Act), 19 U.S.C. §§ 3803, 3804. Plaintiff seeks an order compelling defendants to make the required appointments, enjoining the USTR from calling any meetings of the Committee before such appointments occur, and enjoining all Committee action until that time.

Jurisdiction and Venue

4. This Court has jurisdiction of the action under 28 U.S.C. § 1331 for violation of federal statutes and 28 U.S.C. § 1361 to compel defendants to act in fulfillment of their statutory responsibilities.

5. Venue lies in this Court under 28 U.S.C. § 1391(e).

Organizational Status of the AFL-CIO

6. The AFL-CIO is a labor organization as that term is used under the Nation's labor laws, such as the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, and the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §401 *et seq.* The Federation is dedicated to advancing the cause of labor and workers. It is the spokesperson for its affiliated unions and the individual workers those unions. As such, the Federation represents the interests of its member unions and the workers they represent in many fora, including all three branches of the federal government.

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7. Because of the direct and increasingly strong connection between the global and domestic economy, and the impact of that connection on the security of American workers, millions of whom are represented by the AFL-CIO's affiliates, the Federation focuses its efforts in part on ensuring that United States trade policy and negotiations take into account the interests of those workers. Many departments within the AFL-CIO, including Legislation, Public Policy, and International Affairs, devote substantial time and attention to these issues.

8. One of the ways in which the AFL-CIO has focused its attention on international trade issues has been to is to try to persuade the President, the Congress, the USTR, and the public that trade agreements must take into account the interests of affected workers. This includes protecting the rights of workers involved in trade in order to promote development and raise the standard of living worldwide, and to prevent violations of workers' rights abroad from contributing to unemployment and depressed wages for American workers.

Statutory Framework

9. Section 135(a) of the 1974 Trade Act, requires the President to "seek information and advice from representative elements of the private sector" with respect to the objectives, negotiations, operations, and effectiveness of trade agreements.

10. Section 135(b)(1) of the 1974 Trade Act, 29 U.S.C. § 2155(b)(1), implements that requirement by directing the President to establish an Advisory Committee for Trade Policy and Negotiations (ACTPN or Committee).

11. Section 135(b)(1) requires the President, upon recommendation of the USTR, to appoint no more than 45 individuals to the Committee for terms of two years. Under that provision, "the

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Committee shall be broadly representative of the key sectors and groups of the economy, particularly with respect to those sectors and groups which are affected by trade."

12. In addition, Section 135(b)(1) specifies the sectors and groups of the economy which must be represented on the Committee. It provides that ACTPN "shall include representatives of non-Federal governments, labor, industry, agriculture, small business, service industries, retailers, nongovernmental environmental and conservation organizations, and consumer interests."

13. ACTPN is also subject to Section 5(b)(2) of the FACA, which provides that the Committee's membership must "be fairly balanced in terms of the points of view represented and the functions to be performed."

14. Pursuant to Section 135(b)(2) of the 1974 Trade Act, 19 U.S.C. § 2155(b)(2), the Committee "shall meet as needed at the call of the United States Trade Representative or at the call of two thirds of the members of the committee."

15. ACTPN has statutory responsibilities with respect to evaluating the merits of United States trade agreements before they become U.S. law. Section 135(e)(1) of the 1974 Trade Act, 19 U.S.C.§ 2155(e)(1), requires the Committee to meet whenever negotiations have concluded for a trade agreement negotiated under Section 1102 of the Omnibus Trade and Competitiveness Act of 1988, 29 U.S.C. § 2902 (Omnibus Trade Act). The purpose of this meeting is to enable the Committee to provide a report on such agreement to the President, Congress, and the USTR no later than the date on which the President notifies Congress of the President's intent to enter into the agreement. Section 135(e)(2) of the 1974 Trade Act, 19 U.S.C. § 2155(e)(2), states that

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ACTPN's report must include the Committee's opinion on whether, and the extent to which, the agreement "promotes the economic interests of the United Sates and achieves" the negotiating objectives set forth in the Omnibus Trade Act.

16. Pursuant to this statutory mandate, ACTPN has submitted reports to Congress on agreements such as, but not limited to, the North American Free Trade Agreement, the agreement between the U.S. and China establishing permanent normal trade relations between the two countries, the Uruguay Round of multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade, and the free trade agreement between the U.S. and Jordan. Each of these agreements contained provisions of significance to labor, environmental and conservation organizations, and consumer interests.

17. The United States is concluding free trade agreement negotiations with with Chile and Singapore. Both agreements are likely to be signed in 2003. Under Section 135(e)(1) of the Trade Act of 1974, ACTPN will be required to submit a report to the President, Congress, and the USTR with respect to whether these agreements promote the United States' economic interests. Both agreements contain provisions that are of major significance to labor, environmental and conservation organizations and consumer interests. Each of these sectors will have points of view on the issues that ACTPN must address in its reports.

18. According to the USTR, the United States intends to commence negotiations in 2003 for free trade agreements with Central America, Morocco, the Southern African Customs Union, and Australia. Under Section 135(e)(1), ACTPN will be required to submit a report to Congress on each of these agreements when they are concluded as to whether they promote the economic

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interests of the United States. These agreements are likely to contain provisions that are of major interest and significance to labor, environmental and conservation organizations and consumer interests. Each of these sectors will have points of view on the issues that ACTPN must address in its reports .

19. The 2002 Trade Act authorizes the President to negotiate trade agreements and submit them for approval to Congress without their undergoing congressional amendment (fast track authority). Many sectors of society, including labor, environmental and conservation organizations, and consumer interests, opposed the passage of the 2002 Act because of fast track authority.

20. ACTPN's responsibility to submit reports under Section 135(e) of the 1974 Act also applies to trade agreements that are negotiated under the 2002 Trade Act. Section 2104 of the Trade Act of 2002 requires that such reports be submitted to the President, Congress, and the USTR no later than 30 days after the President notifies Congress of an intention to enter into the agreement. Under this provision, the Committee's reports on the Chile and Singapore agreements will be due in the first few months of 2003.

21. In addition, Section 2103 of the 2002 Trade Act directs ACTPN to submit a report to Congress as soon as is practicable, but no later than May 1, 2005 that expresses the Committee's "views regarding the progress that has been made in negotiations to achieve the purposes, policies, priorities, and objectives" of fast track authority, and that states the Committee's views as to whether the President's fast track authority should be extended to 2007. Labor,

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environmental and conservation organizations and consumer interests will all have points of view on the effectiveness of fast track authority and whether Congress should extend it.

22. The presence of labor representatives on the Committee led to a number of significant developments that have benefitted the interests of the AFL-CIO and American workers with respect to, among other issues, the recognition of the role of labor standards in trade agreements and trade policy. For example:

a) Labor representatives on the Committee helped to persuade then-President Clinton to negotiate the North American Agreement on Labor Cooperation, NAFTA's labor side accord;

b) The labor standards provisions of the Jordan free trade agreement, under which each party agrees to abide by its own labor laws, and which are enforceable under the agreement's overall dispute settlement procedures, came about in part because of the insistence of the labor representatives on the Committee;

c) ACTPN's labor representatives persuaded the entire Committee to submit a letter to then-President Clinton supporting the creation of a working group on workers' rights at the World Trade Organization; the President announced during the WTO Ministerial in Seattle that creation of such a working group had become U.S. policy.

23. The AFL-CIO, on behalf of its affiliates and their members, has increasingly come to rely

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2002 WL 31840970
--- F.Supp.2d ---
(Cite as: 2002 WL 31840970 (D.D.C.))

Only the Westlaw citation is currently available.

United States District Court, District of Columbia.

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, et al., Plaintiffs,
v.
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, et al., Defendants.

No. Civ.A. 01-2350PLF.

Dec. 19, 2002.

OPINION

FRIEDMAN, District Judge.

*1 On November 9, 2001, plaintiffs Center for International Environmental Law, Friends of the Earth and Public Citizen, three non-profit groups that monitor international trade and environmental issues, filed suit under the Freedom of Information Act, 5 U.S.C. § 522 *et seq.*, against the Office of the United States Trade Representative ("USTR") and Robert B. Zoellick, in his official capacity as the United States Trade Representative. [FN1] Plaintiffs seek to obtain information relating to the just-completed negotiation of a United States-Chile Free Trade Agreement, specifically documents that were produced by or exchanged with Chile or that relate to communications or meetings with Chile.

FN1. Defendants assert that Section 522(a)(4)(B) of the Freedom of Information Act precludes suit against individuals in their official capacities, thus requiring the dismissal of Mr. Zoellick. *See* Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment at 2 n.1. Because the Court finds no case law supporting this proposition, it will not dismiss Mr. Zoellick as a defendant.

This matter is before the Court on cross motions for summary judgment. For the reasons stated below, the Court grants in part and denies in part both plaintiffs' motion for summary judgment and defendants' motion for summary judgment. Because the Court concludes that documents exchanged with the government of Chile are not "inter-agency" documents under Exemption 5 of the Freedom of Information Act, the Court directs USTR to release these documents to plaintiffs. It also directs USTR to identify and release any internal USTR documents that contain factual information relating to meetings or communications with Chilean officials. The Court concludes that documents withheld by USTR pursuant to Exemption 1 were properly withheld and need not be released. Finally, the Court concludes that defendants have not waived their right to assert privileges by publicly disclosing information similar to that contained in withheld documents.

I. BACKGROUND

In November of 2000, United States President William Jefferson Clinton and Chilean President Ricardo Lagos announced that their respective governments would begin work toward a bilateral free trade agreement. The Office of the United States Trade Representative spearheaded the negotiations for the United States. On June 29, 2001, plaintiffs filed a Freedom of Information Act request with USTR asking for "[a]ll records containing either U.S. positions shared with Chile, or Chilean positions shared with the United States, at any in- person meeting or in any other manner" as well as "[a]ll records prepared ... during the inter-agency and/or intra-agency processes of the U.S. government coming to positions reflected in the records referred to above." Plaintiffs' Motion for Summary Judgment ("Pl.Mot."), Exhibit 1, Letter from Scott Pasternack, Earthjustice Legal Defense Fund, to Sybia Harrison, FOIA Officer, USTR, dated June 29, 2001 at 1.

In response to plaintiffs' request, USTR conducted a hard-copy and electronic search for all documents relating to the U.S.-Chile Free Trade Agreement negotiations, completing its initial search in early 2002. USTR's initial search, the adequacy of which plaintiffs do not challenge, identified 214 responsive documents, of which nine were released in full and 90 were released in part. Defendants subsequently located an additional 66 documents and released one of these in full, raising the total number of responsive documents to 280, of which a total of 270 were withheld in whole or in part. Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment at 2 n.1 ("Def.Mem."), Exhibit 1, Declaration of Sybia Harrison at ¶¶ 8-10; Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and Reply in Further Support of Defendants' Motion for Summary Judgment ("Def.Opp."), Exhibit 1, Supplemental Declaration of Susan P. Cronin at ¶¶ 5-6. Plaintiffs have conceded that defendants properly withheld one of these documents (No. 110) pursuant to Exemption 4, but seek the release of the remaining 269 documents (or reasonably segregable portions thereof)

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on the presence of labor representatives on ACTPN as an effective means of communicating labor's point of view to the President, the Congress, and the USTR, and of incorporating that point of view in trade policy and specific trade agreements, as described above.

24. The presence of environmental and conservation organizations and consumer interests on the Committee has also benefitted American workers. For example, the environmental representatives to the Committee were instrumental in then-President Clinton's negotiation of an environmental side accord to NAFTA and in the negotiation of environmental protections in the Jordan Free Trade Agreement. In addition, issues of public health and safety have been brought to the attention of the President, Congress, and the USTR that otherwise would not have been raised.

Unlawful Failure to Appoint Labor and Other Representatives to the ACTPN

25. From its inception until September 2002, ACTPN has included in its membership representatives of labor, environmental and conservation organizations, and consumer interests, as the 1974 Trade Act and FACA require.

26. In 2000 the President of the United States appointed three individuals to the Committee to represent the views and interests of labor. These individuals were John J. Sweeney, President of the AFL-CIO, Jay Mazur, then-President of UNITE!, and George Becker, then-President of the United Steelworkers of America. These individuals continued to serve as labor representatives on the Committee in 2002.

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27. In 2002, Fred Krupp, President of the Environmental Defense Fund served as the representative of environmental and conservation. Rhoda Karpatkin, President Emeritus of the Consumers Union, served as the representative of consumer interests.

28. ACTPN's last meeting was held on or about September 19, 2002. At that meeting all of the members of the Committee submitted their resignations at the request of the USTR, acting as the President's representative, so that the President could appoint an entirely new Committee. On or about December 9, 2002, these representatives received notice from the White House that their appointments were terminated as of the close of business that day.

29. On December 9, 2002, the President appointed thirty-two individuals to serve on ACTPN for two years. A copy of the list of appointees is attached to this Complaint as Exhibit A. With a few exceptions for state government officials and scholars, the new appointees hail exclusively from business and industry.

30. The thirty-two appointees do not include a single representative of labor, environmental and conservation organizations, or consumer interests, despite the requirements of the 1974 Trade Act and the FACA.

31. Since December 9, 2002, the President has not appointed any representatives of labor, environmental and conservation organizations, or consumer interests to the ACTPN, nor has he announced his intention to do so, despite the requirements of the 1974 Trade Act and the FACA.

32. None of the individuals currently appointed to the Committee is capable of representing, or have the authority to represent the points of view of those key sectors of the economy that are

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absent from ACTPN namely, labor, environmental and conservation organizations, and consumer interests.

33. A currently constituted, ACTPN cannot provide to the President, Congress, or the USTR, any advice or information that is broadly representative of key sectors and groups of the economy, particularly those groups that are affected by trade.

34. Experience has shown that business and industry are likely to take positions on trade agreements and trade policy that are contrary to those of labor, environmental, conservation, and consumer organizations. Therefore, the fact that there is virtually exclusive representation of business and industry on the Committee threatens the interests of labor, environmental, conservation, and consumer organizations.

35. Because of the statutory role that the Committee's reports play in the formulation of trade policy and negotiations, the absence of labor representatives on the Committee, as well as environmental, conservation, and consumer representatives, will significantly alter the advice that the President, Congress, and the USTR receive and will therefore affect U.S. trade policy and negotiations in a manner that disadvantages these key sectors of the economy in violation of the 1974 Trade Act.

Count 1

36. Plaintiff incorporates by reference the allegations of Paragraphs 1 through 35 of this Complaint.

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37. Defendants' failure to appoint any representatives of labor, environmental and conservation organizations, or consumer interests to ACTPN violates Section 135(b)(1) of the Trade Act of 1974, which requires the appointment of such representatives.

38. As a result of defendants' unlawful act, plaintiff and its affiliated unions and their members have been deprived, and continue to be deprived, of representatives of labor on ACTPN who express a point of view to the President, Congress, and the USTR that promotes and protects the interests of American workers on important trade negotiation and trade policy matters. Plaintiff and its affiliated unions and their members have also been deprived, and continue to be deprived, of representatives of environmental and conservation organizations and consumer interests on the ACTPN who express a point of view to the President, the Congress, and the USTR that also benefits the interests of American workers on important trade negotiation and trade policy matters. Currently, ACTPN can only the interests of business and industry, and these views are antithetical on many points to those of labor, environmental and conservation organizations, and consumer interests. Plaintiff, on behalf of its affiliated unions and their members, will be forced to spend additional resources in order to make labor's viewpoint heard, instead of relying on the representatives of ACTPN to do so. Plaintiff will also be forced to spend resources to counteract the impact of ACTPN's reports and other actions, which are made without regard to the interests of labor, environmental and conservation organizations, and consumer interests, so that they do not lead to the development of policies adverse to the interests of these key sectors of the economy.

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39. Plaintiff's injury can only be redressed through appointment of representatives of labor, environmental and conservation organizations, and consumer interests representatives to the ACTPN before the Committee meets or takes any action whatsoever, including consideration of any aspect of trade agreements or trade policy.

Count 2

40. Plaintiff incorporates Paragraphs 1 through 39 of this Complaint.

41. Defendants' failure to appoint any representatives of labor, environmental and conservation organizations, and consumer interests to the Committee violates Section 5 of the FACA because it deprives the Committee of the fair balance of points of view and functions performed by the Committee that FACA requires.

42. As a result of defendants' unlawful act, plaintiff and its affiliated unions and their members have been deprived, and continue to be deprived, of their right to have the ACTPN submit reports and opinions to the President, Congress, and the USTR that are fairly balanced in terms of the points of view represented on the Committee within the meaning of the FACA. Currently, ACTPN can express only the interests of business and industry. These views are not fairly balanced and are antithetical on many points to those of labor, environmental and conservation organizations, and consumer interests. Plaintiff, on behalf of its affiliated unions and their members, will be forced to spend additional resources in order to make labor's viewpoint heard, instead of relying on the representatives of ACTPN to do so. Plaintiff will also be forced to spend resources to counteract the impact of ACTPN's reports and other actions, which are made without regard to the interests of labor, environmental and conservation

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organizations, and consumer interests, so that they do not lead to the development of policies adverse to the interests of these key sectors of the economy.

43. This injury can only be redressed through the appointment of representatives of labor, environmental and conservation organizations, and consumer interests, to the ACTPN before the Committee meets or takes any action whatsoever, including consideration of any aspect of trade agreements or trade policy.

Count 3

44. Plaintiff hereby incorporates Paragraphs 1 through 43 of this Complaint.

45. Defendants' failure to appoint any representatives of labor, environmental and conservation organizations, and consumer groups to the Committee violates Section 2104 of the 2002 Trade Act, which requires ACTPN to submit reports under section 135(e) of the 1974 Trade Act with respect to certain agreements negotiated under the 2002 Trade Act.

46. As a result of defendants' unlawful act, plaintiff and its affiliated unions and their members have been deprived, and continue to be deprived, of representatives of labor on the ACTPN who express a point of view to the President, Congress, and the USTR that promotes and protects the interests of American workers on important trade negotiation and trade policy matters. Plaintiff and its affiliated unions and their members have been deprived, and continue to be deprived, of representatives of environmental and conservation organizations and consumer interests on the ACTPN who express a point of view to the President, the Congress, and the USTR that also benefits the interest of American workers on important trade negotiation and trade policy matters. Currently, ACTPN can only the interests of business and industry, and

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these views are antithetical on many points to those of labor, environmental and conservation organizations, and consumer interests. Plaintiff, on behalf of its affiliated unions and their members, will be forced to spend additional resources in order to make labor's viewpoint heard, instead of relying on the representatives of ACTPN to do so. Plaintiff will also be forced to spend resources to counteract the impact of ACTPN's reports and other actions, which are made without regard to the interests of labor, environmental and conservation organizations, and consumer interests, so that they do not lead to the development of policies adverse to the interests of these key sectors of the economy.

47. Defendant's failure to appoint any representatives of labor, environmental and conservation organizations, and consumer groups to the Committee also violates Section 2103 of the 2002 Trade Act, as that provision requires ACTPN to submit a report to Congress with respect to the extension of fast track authority.

48. As a result of defendants' unlawful act, plaintiff has been deprived, and continues to be deprived, of representatives of labor on the ACTPN who will express a point of view to the Congress, and on the critically important matter of fast track authority and its extension. Plaintiff has also been deprived of, and continues to be deprived of, representatives of environmental and conservation organizations, and consumer interests who will express a point of view to the Congress on this same matter. Plaintiff and its affiliated unions and their members have been deprived, and continue to be deprived, of representatives of environmental and conservation organizations and consumer interests on the ACTPN who express a point of

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view to the President, the Congress, and the USTR that also benefits the interest of American workers on important trade negotiation and trade policy matters.

Currently, ACTPN can only represent the interests of business and industry, and these views are antithetical on many points to those of labor, environmental and conservation organizations, and consumer interests. Plaintiff, on behalf of its affiliated unions and their members, will be forced to spend additional resources in order to make labor's viewpoint heard, instead of relying on the representatives of ACTPN to do so. Plaintiff will also be forced to spend resources to counteract the impact of ACTPN's reports and other actions, which are made without regard to the interests of labor, environmental and conservation organizations, and consumer interests, so that they do not lead to the development of policies adverse to the interests of these key sectors of the economy.

49. This injury can only be redressed through the appointment of representatives of labor, environmental and conservation organizations, and consumer interests, to the ACTPN before the ACTPN meets or takes any action whatsoever with respect to trade agreements negotiated under the 2002 Trade Act or the report that ACTPN must submit to Congress with respect to fast track authority.

Prayer for Relief

Wherefore, plaintiff respectfully requests that the Court issue an order that :

1. directs the USTR to recommend to the President the appointment of specific individuals to the ACTPN to represent labor, environmental and conservation organizations, and consumer interests;

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2. directs the President to appoint individuals to the ACTPN to represent labor, environmental and conservation organizations, and consumer interests in a manner consistent with Section 135(b)(1) of the 1974 Trade Agreement and Section 5 of FACA;

3. declares that the ACTPN has no legal authority to act until appointments are made that fulfill the requirements of Section 135(b)(1) of the 1974 Trade Act and Section 5 of FACA;

4. enjoins the USTR from calling any meeting of ACTPN until such appointments have taken place; and

5. enjoins the USTR from calling upon ACTPN to take any action whatsoever towards fulfilling its statutory responsibilities, including but not limited to consideration of any matters of trade agreements, trade policy, or the drafting and issuance of reports to the President, Congress, and the USTR, until representatives of labor, environmental and conservation organizations, and consumer interests have been appointed to the Committee and have had as full an opportunity as other members of the Committee to participate in such work of the Committee;

6. enjoins the USTR or his designees from providing any direction or assistance to the Committee in accomplishing any of its statutory responsibilities until representatives of labor, environmental and conservation organizations, and consumer interests have been appointed to the Committee.

7. awards attorneys' fees to plaintiff; and

8. awards such other relief as the Court deems appropriate.

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Respectfully submitted,

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in this action.

*2 The 269 documents in question can be grouped into three categories: (1) documents exchanged between the United States and Chile (131); (2) internal United States documents that describe meetings with Chilean negotiators or proposals received from Chilean officials (156); and (3) classified documents created by or for the Trade Policy Review Group, an inter-agency group of senior officials that considers and determines United States trade policy (5). [FN2] To justify withholding the documents in the first two categories, USTR relies on Exemption 5 of the FOIA, which protects from disclosure any "inter-agency" or "intra-agency" documents that reveal an agency's deliberative process. 5 U.S.C. § 522(b)(5). Plaintiffs contest all claims of Exemption 5 privilege, both with respect to documents that were exchanged between Chile and the United States and with respect to internal documents that describe meetings with or proposals from Chilean officials. The parties have agreed on the identity of all documents exchanged with Chile. *See* Defendants' Report on Documents Exchanged Between the United States and Chile at ¶ 4. [FN3]

FN2. Because many of these documents contain multiple parts (*e.g.*, e- mails with multiple documents attached), the categories are not mutually exclusive and 23 of the documents fall into multiple categories. *See* Defendants' Report on Documents Exchanged Between the United States and Chile ¶ 3; *see also infra* n. 3. As a result, the sum of the number of documents in each category exceeds the total number of documents withheld by USTR.

FN3. The complete set of documents shared between the United States and Chile in conjunction with the Free Trade Agreement negotiations consists of documents 9, 15, 16, 19, 22, 23, 27-29, 36, 52, 57, 89-94, 97, 99, 111, 124, 130, 134, 141, 142, 145-149, 152-162, 164-167, 169-173, 176, 177, 180-191 and 215-280. *See* Defendants' Report on Documents Exchanged Between the United States and Chile at ¶ 2. As noted above, however, 23 of these documents contain both material that was exchanged with Chile and material that was not exchanged. These overlapping documents are: documents 22, 36, 130, 152, 153, 155, 156, 160-162, 164-166, 169-172, 176, 177, 182- 185. *See id.* at ¶ 3.

Plaintiffs also challenge USTR's withholding of five documents under Exemption 1 of the FOIA, which exempts from disclosure any documents that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order; ...." 5 U.S.C. § 552(b)(1)(A). In addition, plaintiffs assert that defendants have waived the right to assert any privilege with respect to certain documents by publicly releasing information similar to that contained in the documents. Based on these arguments, plaintiffs seek declaratory and injunctive relief, including the release, in full or in part, of 269 documents withheld by USTR, as well as the identification and release of any additional relevant documents not yet identified by USTR.

II. DISCUSSION

A. The Freedom of Information Act

The fundamental purpose of the Freedom of Information Act is to assist citizens in discovering "what their government is up to." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). As such, "the Act is broadly conceived," *EPA v. Mink*, 410 U.S. 73, 79-80 (1973), and "disclosure, not secrecy, is the dominant objective of the Act." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976); *see also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978). The FOIA requires public disclosure of agency records unless the requested records fall within one or more of nine carefully-structured statutory exemptions. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 220; *Burka v. United States Dep't of Health and Human Serv.*, 87 F.3d 508, 515 (D.C.Cir.1996); *Oglesby v. United States Dep't of the Army*, 79 F.3d 1172, 1176 (D.C.Cir.1996). Consistent with the Act's "goal of broad disclosure, these exemptions have been consistently given a narrow compass," *United States Dep't of Justice v. Tax Analysts*, 492 U .S. 136, 151 (1989), and the agency bears the burden of justifying the withholding. The court determines *de novo* whether the exemption claimed is appropriate. *See* 5 U.S.C. § 522(a)(4)(B); *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991).

*3 In assessing a claimed exemption, a court will require the agency to provide a "[r]elatively detailed justification" through the submission of an index of documents, known as a *Vaughn* Index, sufficiently detailed affidavits or declarations, or both. *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 251 (D.C.Cir.1977); *see Oglesby v. United States Dep't of the Army*, 79 F.3d at 1178; *Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C.Cir.1973), *cert. denied*, 415 U.S. 977 (1974). Furthermore, the FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided ...

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ATTACHMENT A

MEMBERS OF ACTPN AS OF 12/9/02

Margaret Cushing Whitman, President and CEO, eBay Inc.

Steven Rollie Rogel, Chairman, President and CEO, Weyerhaeuser Company

Frank Henry Habicht II, CEO, Global Environment and Technology Foundation

Jerome Jasinowski, President, National Association of Manufacturers

William Frenzel, Guest Scholar, Brookings Institute

Rodolphe Vallee, Chairman, CEO and Owner, R.L. Vallee, Inc.

Bernard Aronson, Managing Partner, ACON Investments, LLC

Edward Emma, President and CEO, Jockey International, Inc.

Jill Considine, Chair and CEO, The Depository Trust and Clearing Corporation

Wythe Willey, President, National Cattlemen's Beef Association

Edward Perkins, Crowe Professor in Geo-Politics and Executive Director of International Programs, University of Oklahoma

Richard Rivera, Vice Chairman, Darden Restaurants

Pete Hanna, Chairman, President and CEO, Hanna Steel Corporation

John Rowland, Governor of Connecticut

Jean-Pierre Rosso, Chairman, CNH Global

Hersh Kozlov, Senior Partner, Wolf, Block, Schorr and Solis-Cohen LLP

Samuel Palmisano, President and CEO, IBM

JoAnn Brouillette, President, Demeter Corporation

Herbert Johnson, Chairman, SC Johnson & Son, Inc.

Hector Ruiz, President and CEO, Advanced Micro Devices

Melinda Bush, President and CEO, HRW Holdings, LLC

Richard Wardrop, Jr., Chairman, CEO and President, AK Steel Corporation

Grace Nichols, President and CEO, Victoria's Secret Stores

Larry Liebenow, President and CEO, Quaker Fabric

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Michael Goldstein, Chairman, Toys "R" Us Children's Fund

Thomas Mottola, Chairman and CEO, Sony Music Entertainment

George Fitch, President, IOP Associates, Mayor of Warrenton, Va.

Luis Lauredo, President, Hunton & Williams, Latin American Services, LLC

James Winston Morrison, President, Small Business Exporters Association

Walter Bernard Duffy Hickey, Jr., Chairman, Hickey Freeman Company, Inc.

Robert Edward Grady, Managing Director, The Carlyle Group Morgan

Yaping Wang, CEO and Chairman, Angeles Optics, Inc.

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after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). This comports with the policy of disclosure and prevents the withholding of entire documents, *see Billington v. Dep't of Justice*, 233 F.3d 581, 586 (D.C.Cir.2000), unless the agency can demonstrate that the non-exempt portions of a document are "inextricably intertwined with exempt portions." *Trans-Pacific Policing Agreement v. United States Customs Serv.*, 177 F.3d 1022, 1027 (D.C.Cir.1999) (quoting *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d at 260).

The Court may award summary judgment to a government agency solely on the basis of information provided in affidavits or declarations when the affidavits or declarations describe "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record or by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C.Cir.1981); *see also Vaughn v. Rosen*, 484 F.2d at 826-28. An agency must demonstrate that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly [or partially] exempt from the Act's inspection requirements." *Goland v. CIA*, 607 F.2d 339, 352 (D.C.Cir.1978) (internal citation and quotation omitted).

B. Analysis

For the reasons stated below, the Court concludes that all documents withheld by USTR under Exemption 5 were improperly withheld, while the five documents withheld pursuant to Exemption 1 were properly withheld. The Court further finds that defendants have not waived their right to claim exemptions by releasing similar but not identical information to private individuals. [FN4]

FN4. Plaintiffs also claim that USTR has failed to identify communications or information shared with Chile in sufficient detail to permit judicial review of USTR's compliance with an order requiring the release of such information. *See* Plaintiffs' Memorandum of Points and Authorities In Opposition to Defendants' Motion for Summary Judgment and In Support of Plaintiffs' Motion for Summary Judgment at 30-31 ("Pl.Mem."). Upon review of defendants' revised Index of Documents and supporting declarations, however, the Court concludes that defendants have identified and described in sufficient detail all documents containing information received from or exchanged with Chile. *See* Def. Opp., Exhibit 1, Supplemental Declaration of Susan P. Cronin at ¶¶ 5-6; Def. Opp., Exhibit 2, Revised Index of Documents; *see also Quinon v. FBI*, 86 F .3d 1222, 1227 (D.C.Cir.1996) (FOIA requires only that an agency describe withheld documents in sufficient detail to demonstrate why they fall within the claimed exemption, which can be done through a *Vaughn* index of documents or through supporting affidavits or declarations).

1. *Exemption 5*

Exemption 5 excludes from disclosure any documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 522(b)(5). This provision protects from disclosure those documents traditionally afforded protection "pursuant to evidentiary privileges in the civil discovery context," including those covered by the deliberative process privilege. *Dow Jones & Co. v. Dep't of Justice*, 917 F.2d 571, 573 (D.C.Cir.1990) (quoting *Formaldehyde Inst. v. Dep't of Health and Human Serv.*, 889 F.2d 1118, 1121 (D.C.Cir.1989) (internal quotation marks omitted). In keeping with the FOIA's goal of broad disclosure, the Section 522(b)(5) exemption is construed narrowly. *Dep't of the Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (*"Klamath Water Users"*).

*4 The purpose of the deliberative process privilege is to encourage the frank discussion of policy issues among government officials and to protect the government's decisionmaking processes. *See Wolfe v. Dep't of Health & Human Serv.*, 839 F.2d 768, 773 (D.C.Cir.1988) (*en banc*) (quoting S.REP. NO. 813, 89th Cong., 1st Sess. 9 (1965)). Such protection is necessary to

> assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C.Cir.1980). *See also Klamath Water Users*, 532 U.S. at 8, quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975) (government officials "will not communicate candidly among

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themselves if each remark is a potential item of discovery and front page news"; the object of the deliberative process privilege is "to enhance 'the quality of agency decisions.' "); *Wolfe v. Dep't of Health & Human Serv.*, 839 F.2d at 773 ("[T]he quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl.").

In order to qualify for protection under the deliberative process privilege of Exemption 5, a document must satisfy two conditions: (1) it must be either inter-agency or intra-agency in nature, [FN5] *and* (2) it must be both predecisional and part of the agency's deliberative or decisionmaking process. *See Klamath Water Users*, 532 U.S. at 8-9; *Dow Jones & Co. v. Dep't of Justice*, 917 F.2d at 574. Defendants argue that Exemption 5 applies to two categories of documents: those produced by or exchanged with Chile, and those that contain information concerning meetings with or proposals from Chilean officials. Plaintiffs challenge both applications of Exemption 5.

FN5. For ease of discussion, the Court will use the term "inter- agency" to refer to both inter- and intra-agency documents.

a. Documents Produced By or Exchanged With Chile

In support of their decision to withhold all documents or portions of documents produced by or shared with Chile during negotiations, defendants characterize the Chilean officials as allies of USTR, a government agency, in pursuit of a mutually beneficial agreement who thus qualify as outside consultants to the agency and whose communications therefore are protected as inter-agency under Exemption 5. *See* Def. Mem. at 23-25. Plaintiffs respond that Chile is not a consultant but rather is necessarily adverse to USTR in the context of trade negotiations; therefore communications between Chile and the United States are not protected. *See* Pl. Mem. at 6-7. Disclosure of the contested documents thus turns on the definitions of "consultant" and "inter- agency" under the statute and case law and raises an issue of first impression: Are communications between the United States and a foreign government in the course of treaty negotiations "inter-agency" under Exemption 5 such that any shared documents are protected from disclosure?

*5 For purposes of the inter-agency requirement, the Supreme Court has noted that the term " 'agency' means 'each authority of the Government of the United States,' § 551(1), and 'includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government ..., or any independent regulatory agency,' § 522(f)." *Klamath Water Users*, 532 U.S. at 9. In general, this definition establishes that communications between agencies and outside parties are not protected under Exemption 5. *See, e.g., Brownstein Zeidman & Schomer v. Dep't of the Air Force*, 781 F.Supp. 31, 35 (D.D.C.1991) "While FOIA exemption 5 does protect intragovernmental deliberations, it does not cover negotiations between the government and outside parties."); *see also Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d at 257-58 (policy objectives of Exemption 5 not applicable to negotiations between agency and outside party). The terms "inter-agency and intra-agency," however, are not meant to be "rigidly exclusive terms." *Dow Jones & Co. v. Dep't of Justice*, 917 F.2d at 574 (quoting *Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (1980)). The D.C. Circuit therefore has recognized that agencies often need "to rely on the opinions and recommendations of temporary consultants" and that "[s]uch consultations are an integral part of [the agency's] deliberative process." *Dow Jones & Co. v. Dep't of Justice*, 917 F.2d at 574-75.

This exception to the literal terms of the inter-agency requirement, recognized and affirmed by the Supreme Court as "the consultant corollary to Exemption 5" in *Klamath Water Users*, is not without limits. 532 U.S. at 11. *See County of Madison v. Dep't of Justice*, 641 F.2d 1036, 1040 (1st Cir.1981); *Center for Auto Safety v. Dep't of Justice*, 576 F.Supp. 739, 745- 46 (D.D.C.1983). Communications with outside consultants have been deemed part of an agency's deliberative process only where the documents prepared by or communications to or from the outside consultants "played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done," or where "the consultant functions just as an [agency] employee would be expected to do." *Klamath Water Users*, 532 U.S. at 10, 11; *see Public Citizen v. Dep't of Justice*, 111 F.3d 168, 170-71 (D.C.Cir.1997). In *Klamath Water Users*, the Supreme Court's only direct interpretation of the inter-agency requirement, the Court reiterated these limits, stating that an outside party is not an agency consultant where it represents its own interests "at the expense of others seeking benefits inadequate to satisfy everyone." *Klamath Water Users*, 532 U.S. at 12. While not reaching the question of whether such independent interests *in and of*

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themselves always preclude an outside party's qualification as a consultant for Exemption 5 purposes, the Court found that self-advocacy at others' expense was preclusive: "[T]he dispositive point is that the apparent object of the Tribe's communications is a decision by an agency of the Government to support a claim by the Tribe that is necessarily adverse to the interests of competitors." *Id.* at 14.

*6 Here, defendants concede that Chile does not act as a neutral consultant to USTR but argue that the relationship nonetheless is consultative and that any shared documents are inter-agency by virtue of the "co-regulatory" nature of bilateral free trade negotiations, where both parties seek to "create and implement a policy for their mutual benefit." Def. Mem. at 22. Defendants assert that the mutual advantage to be gained from the existence of a trade agreement between the United States and Chile demonstrates that the relationship is non-adversarial. They urge the Court to adopt a broad interpretation of the "outside consultant" exception to the inter-agency requirement and to protect any shared documents as "an integral part" of USTR's deliberative process. Def. Mem. at 19 (citing *Ryan v. Dep't of Justice,* 617 F.2d at 789).

The Court cannot accept defendants' characterization of Chile as a non- adversarial consultant to USTR. Chile is an independent party promoting its own interests, whose communications with USTR necessarily fall beyond the scope of Exemption 5. Despite the ultimate goal of cooperation between these two nations, Chilean negotiators undoubtedly approached the talks with their own best interests in mind, as any country must in such negotiations. Chile is an independent sovereign state and its participation in the development of a trade agreement with the United States, however mutually advantageous, cannot rightly be characterized as advice or consultation. Here, as in *County of Madison,* "[w]hile the [outside parties] came to parley, they were past and potential adversaries, not coopted colleagues." *County of Madison v. Dep't of Justice,* 641 F.2d at 1040. This Court agrees with the First Circuit's conclusion that "expanding exemption five to include self-seeking petitioners 'within' agencies would do more violence to statutory language than Congress' direction permits." *Id.; see also Center for Auto Safety v. Dep't of Justice,* 576 F.Supp. at 746-47 (documents received from outside party were not "inter- agency" because they were "submitted by an adversary as part of an effort to convince the agency to adopt the adversary's proposals," and shared documents were not "inter-agency" because "when the [agency] elected to use them as tools in their [settlement] negotiations with the public [opposing parties in a lawsuit] ... they lost their internal status, and their qualification for Exemption 5.").

Despite defendants' argument to the contrary, this conclusion finds support in the Supreme Court's recent discussion in *Klamath Water Users* of the nature and limits of the inter-agency requirement of Exemption 5. As explained above, the Court emphasized the importance of the inter-agency requirement, stating that "the first condition of Exemption 5 is no less important than the second; the communication must be 'inter-agency or intra-agency.' " 532 U.S. at 9. In addition, while recognizing (without affirming or rejecting) the conclusions by some courts that certain documents prepared by outside consultants were "inter-agency" documents for purposes of Exemption 5 in some contexts, the Court noted a common factor in all such cases: "[T]he fact about the consultant that is constant in the typical cases is that the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it. Its only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do." *Id.* at 10-11; *see id.* at 12 (typically, consultants whose communications have been held exempt "have not been communicating with the Government in their own interest or on behalf of any person or group whose interests might be affected by the Government action addressed by the consultant."). That is manifestly not the situation presented here.

*7 While the Court in *Klamath Water Users* emphasized that most outside parties who have been deemed consultants by the courts lacked independent interests of their own, *see* 532 U.S. at 11, it stopped short of concluding that the pursuit of any independent interest by an outside party always precludes a finding that its communications are inter-agency. *See id.* at 10-11 ("nor do we read the cases as necessarily assuming that an outside consultant must be devoid of a definite point of view when the agency contracts for its services"). The Court explicitly limited its holding: "While [the fact that the Tribe advocated its own interests] alone distinguishes tribal communications from the consultants' examples recognized by several Courts of Appeals, the distinction is even sharper, in that the Tribes are self-advocates at the expense of others seeking benefits inadequate to satisfy everyone.... [T]he dispositive point is that the apparent object of the Tribe's communications is a decision by the agency of the Government to support a claim by the

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Tribe that is necessarily adverse to the interests of competitors." *Id.* at 12, 14.

The critical factor in deciding the inter-agency status of an outside party is the degree of self-interest pursued by that party, as compared to its interest in providing neutral advice or consultation to the agency. Where an outside party's self-interest predominates over its interest in informing or assisting the agency, that party's communications cannot be considered inter-agency for purposes of Exemption 5. Here, it is not just that Chile was not "devoid of a definite point of view" (532 U.S. at 11); it was an advocate for its own interests and not a provider of independent advice to the United States. Like the Tribes in *Klamath Water Users*, Chile "communicated with the [USTR] with [its] own, albeit entirely legitimate, interests in mind." *Klamath Water Users*, 532 U.S. at 12. No matter what shared interests Chile and the United States may have with respect to free trade and the desirability of negotiating a free trade agreement, the interests of Chile are manifestly independent of those of the United States. The Court concludes that Chile's communications with USTR are not inter-agency communications for purposes of Exemption 5.

This conclusion is not inconsistent with the D.C. Circuit's decisions in *Public Citizen, Inc. v. Dep't of Justice* or *Ryan v. Dep't of Justice*. [FN6] In *Public Citizen*, former Presidents of the United States were consulted by the National Archives and Records Administration on the release of their presidential documents. Because any former President has an interest in protecting the confidentiality of documents produced during his tenure, the former Presidents undoubtedly had their own interests beyond an obligation to "truth and [a] sense of what good judgment calls for." *Klamath Water Users*, 532 U.S. at 11. Nonetheless, because each former President "clearly qualifies as an expert on the implications of disclosure of Presidential records from his administration," and because it may be assumed that a former President of the United States is not in an adversarial or potentially adversarial posture with the government he led--"[h]e retains aspects of his former role"--the former Presidents' \input was held to fall within the consultant exception to the inter-agency requirement under Exemption 5. *See Public Citizen v. Dep't of Justice*, 111 F.3d at 170, 171. Chile possesses no analogous expertise or presumed loyalty. Furthermore, consultation between the National Archives Records Administration and the former Presidents was expressly mandated by statute. *See Public Citizen v. Dep't of Justice*, 111 F.3d at 170. Here, no such statutory mandate exists.

FN6. The Supreme Court in *Klamath Water Users* called into question but refused to decide the continuing validity of these two cases in which the court of appeals treated communications with outside parties as inter- agency despite the outside parties' independent interests. *See Klamath Water Users*, 532 U.S. at 12 n. 4 (noting that both *Ryan v. Dep't of Justice* 617 F.2d 781, and *Public Citizen v. Dep't of Justice*, 111 F.3d 168, "arguably extend beyond what we have characterized as the typical examples.") Because *Klamath Water Users* did not directly overrule these two cases, the Court finds it appropriate to address them, and it finds them distinguishable from the case at hand.

*8 Contrary to defendants' assertion that *Public Citizen* supports their position that disclosure is prohibited in this case, that decision explicitly recognized that an outside party with a predominantly adversarial relationship would not enjoy the protection of Exemption 5. Acknowledging that there were non-consultative aspects to the relationship between the agency and the former Presidents, the Court noted that "[a]t some point of course, features of the other relationships (above all, a possible future adversary one) might come to eclipse the consultative relationship," but found that the plaintiff had failed to offer concrete evidence of such a shift. *Public Citizen v. Dep't of Justice*, 111 F.3d at 171. Because the government plausibly had described the relationship as aiming " 'to facilitate correct and consistent application of the Presidential Records Act" ' and achieve other agency goals, the court found that the consultative relationship predominated over the Presidents' self-interest. *Id.* The court expressly noted, however, that if the Presidents' independent interests were stronger, the adversarial features of the relationship might preclude application of Exemption 5. *See id*.

Unlike the former Presidents in *Public Citizen*, Chilean officials are not "enough like the agency's own personnel to justify calling their communications 'intra-agency.' " *Klamath Water Users*, 532 U.S. at 12. Nor did the documents that Chile submitted to USTR play "essentially the same part in [the] agency's process of deliberation as documents prepared by agency personnel might have done." *Id.* at 11. It may be true, as defendants assert, that Chilean proposals and responses are essential to USTR's development of its own negotiating positions, but the role played by such documents is unmistakably different from the role of internally created documents; Chile shares its positions not in order to advise or educate USTR but in order to

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promote its own interests. *See* Def. Mem. at 22 (acknowledging that "Chile seeks to achieve its own objectives through the negotiations"). Nor does the fact that USTR "needs to understand what is important to Chile in order to develop its own positions" confer inter-agency status on these external documents. Def. Mem. at 21.

The decision in *Ryan v. Dep't of Justice*, 617 F.2d 781, also is distinguishable. In *Ryan*, the court of appeals held that communications produced by Senators in response to an agency questionnaire regarding nominating procedures for judicial candidates fell within the narrow ambit of Exemption 5. The court characterized the Senators as "temporary consultants" who were "solicited to give advice only for specific projects." *Id.* at 789- 90. In the instant case, by contrast, the Chilean officials were not solicited for advice but rather negotiated with and treated as adversaries openly seeking to advance their own interests. Furthermore, the court in *Ryan* made much of the fact that the documents in that case were produced in response to an agency initiative. *See id.* at 790; *see also Center for Auto Safety v. Dep't of Justice*, 576 F.Supp. at 745 (central to the decision in *Ryan* "was the fact that the advice was obtained on the Department's initiative."). Here, the documents exchanged between the United States and Chile do not reflect a similar solicitation and response.

***9** Other cases cited by defendants also are distinguishable. In *Formaldehyde Inst. v. Dep't of Health and Human Serv.*, 889 F.2d 1118 (D.C.Cir.1989), the court of appeals allowed HHS to withhold unpublished reports by employees and corresponding comments made by outside journals acting as referees on the ground that such outside reviews were essential to the agency's evaluation of the readiness of a work for publication and thus were predecisional. *See* 889 F .2d at 1124. The court found that HHS relied on this exchange between government scientists and outside scientific journals to decide whether and in what form to publish scientific reports in the agency's name. Thus the confidential comments of outside reviewers were protected under Exemption 5 because they were predecisional. *See id.* The court in *Formaldehyde v. HHS* did not address the inter-agency requirement of Exemption 5 at all and made no finding that the outside reviews were inter- agency in nature. *See id.* at 1121. The continued vitality of *Formaldehyde v. HHS* is questionable in light of the Supreme Court's recent emphasis on the importance of the inter-agency requirement under Exemption 5.

Formaldehyde v. HHS is distinguishable for an additional reason: The outside reviewers did not pursue any potentially adverse interests in reviewing the submitted report; they merely considered and commented on the agency's submission "[p]ursuant to [each journal's] normal review process" and provided editorial feedback that informed the agency's decision on publication *Formaldehyde v. HHS*, 889 F.2d at 1120. In the instant case, by contrast, the Chilean negotiators did not merely review USTR's proposals and offer evaluations to inform USTR's decision on how to proceed. Rather, the Chilean officials responded to USTR's proposals with Chile's interests in mind and with the explicit goal of influencing USTR policy to their own advantage.

Nor does Judge June Green's decision in *Fulbright & Jaworski v. Dep't of Treasury*, 545 F.Supp. 615 (D.D.C.1982), support defendants' argument. In that case, one of very few to consider Exemption 5 in the context of foreign relations, individual notes taken by a United States negotiator during treaty discussions with France were protected from release under Exemption 5. The court held that "releasing these snapshot views of the negotiations would be comparable to releasing drafts of the treaty" and consequently would risk great harm to the negotiations process. *Id.* at 620. Despite the superficial similarity of context--the "give-and-take" of treaty negotiations (*id.*)--the difference is that the negotiator's notes at issue in *Fulbright & Jaworski* were clearly internal. The question of disclosure turned not on the inter- agency requirement of Exemption 5 but on whether or not the documents were part of the agency's predecisional deliberative process. *See id.* at 620. Judge Green's discussion of the harm that could result from disclosure therefore is irrelevant, since the documents at issue here are not inter-agency, and the Court does not reach the question of deliberative process.

***10** The Court is not oblivious to defendants' concern that disclosure of these documents may complicate international negotiations on free trade and other issues, and it recognizes the importance of confidentiality in treaty negotiations, particularly where, as here, the United States has promised confidentiality to its partner from the outset. Indeed, concern about confidentiality in communications between the government and the Tribes was at issue in *Klamath Water Users*. *See* 532 U.S. at 11. Ultimately, however, the Supreme Court concluded that such policy concerns cannot trump the plain language of the Freedom of Information Act or the underlying policy of the FOIA favoring public disclosure. *See Klamath*

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Water Users, 532 U.S. at 15-16 (refusing to read an "Indian Trust" exemption into the statute because "[t]here is simply no support for the exemption in the statutory text, which we have elsewhere insisted be read strictly in order to serve FOIA's mandate of broad disclosure.... In FOIA, after all, a new conception of Government conduct was enacted into law, 'a general philosophy of full agency disclosure.' " (quoting *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989)); *see also County of Madison v. United States Dep't of Justice*, 641 F.2d at 1040 (requiring that "sound policy arguments, however appealing, be grounded in a reading of statutory language that fairly reconciles rather than simply ignores the FOIA's phrasing."); *Center for Auto Safety v. Dep't of Justice*, 576 F.Supp. at 748 ("The Court is sympathetic to the DOJ's predicament. Disclosure of these documents may arguably stifle consent decree negotiations. These factors, however, are for legislative not judicial concern, ..."). For these reasons, the Court concludes that all documents or portions thereof that were produced by or shared with the Government of Chile do not qualify as "inter-agency or intra-agency" documents and thus are not protected from disclosure by Exemption 5. [FN7]

FN7. Because these documents fail the first prong of the test for protection under Exemption 5 because they are not inter-agency or intra- agency documents, the Court does not reach the second prong of the test, namely the question of whether or not these documents are predecisional and deliberative in nature. *See Klamath Water Users*, 532 U.S. at 12 n.3.

b. Documents Containing Information Relating to Communications From or Meetings With Chile

The FOIA mandates that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). Furthermore, "[i]t has long been a rule in this Circuit that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d at 260. Plaintiffs therefore have challenged defendants' withholding of any reasonably segregable portions of internal documents containing " 'purely factual, nonexempt information" ' that relates to the negotiations with Chile. *See* Pl. Mem. (quoting *Army Times Publishing Co. v. Dep't of the Air Force*, 998 F.2d 1067, 1071 (D.C.Cir.1993) (citations omitted)). Plaintiffs claim that the index of documents reveals that several documents were withheld that contain factual descriptions or summaries of communications or meetings with Chile. Plaintiffs argue that such factual portions must be released. *See* Pl. Mem. at 25-26; Plaintiffs' Reply in Support of Plaintiffs' Motion for Summary Judgment at 12-13 ("Pl.Reply").

*11 In opposition, defendants argue that releasing such portions would expose USTR's deliberative process, either by revealing substantive information about the countries' negotiating positions or by revealing USTR's internal impressions and evaluations of the negotiations. *See* Def. Opp. at 9-10. As plaintiffs concede, even purely factual documents may be exempt from disclosure under Exemption 5 if the selection of facts for summary or description reflects an agency's deliberative process. *See* Pl. Reply at 12; *Army Times Publishing Co. v. Dep't of the Air Force*, 998 F.2d at 1071. *But see Brownstein Zeidman & Schomer v. Dep't of the Air Force*, 781 F.Supp. at 35 (requiring disclosure of running summaries of offers and counteroffers because, while the documents were not completely factual in nature, they also did not "include much in the way of negotiating strategy").

The Court has held that any documents produced by or exchanged with Chile are not protected by Exemption 5 because they are not inter-agency or intra-agency records. *See supra*, Section II.B.1(a). It follows that any factual portions of documents describing or summarizing such communications to or from Chile likewise are not protected. *See EPA v. Mink*, 410 U.S. at 88. Furthermore, plaintiffs seek only those portions of documents that are non-deliberative in nature; any portions that reveal USTR's subjective impressions of Chile's proposals or the negotiations are necessarily excluded from this request. *See* Pl. Mem. at 25-26; Pl. Reply at 12-14. For these reasons, the Court holds that defendants must identify and release all reasonably segregable and factual, nondeliberative portions of documents relating to USTR's meetings or communications with Chile.

2. *Exemption 1*

Exemption 1 of the FOIA protects from disclosure any records that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). USTR has withheld five documents--Documents 209 and 211-214-- pursuant to this exemption under Executive Order 12, 958. The Executive Order allows classification where the original classification authority

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5 USCS § 3345

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*** CURRENT THROUGH P.L. 106-418, APPROVED 11/1/00 ***
*** WITH GAPS OF 106-398, 402, 405, 408, 411, 414, 415, 417 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III. EMPLOYEES
SUBPART B. EMPLOYMENT AND RETENTION
CHAPTER 33. EXAMINATION, SELECTION, AND PLACEMENT
SUBCHAPTER III. DETAILS, VACANCIES, AND APPOINTMENTS

5 USCS § 3345 (2000)

§ 3345. Acting officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office--

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if--

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

(b) (1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if--

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person--

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if--

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c) (1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.

HISTORY:

(Added Oct. 21, 1998, P.L. 105-277, Div C, Title I, § 151(b), 112 Stat. 2681-611.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 USC Sec. 4	R.S. Sec. 177.

The words "Executive department" are substituted for "department" as the definition of "department" applicable to this section is coextensive with the definition of "Executive department" in 5 USCS § 101.

The words "or military department" are inserted to preserve the application of the source law. Before enactment of the National Security Act Amendments of 1949 (63 Stat. 578), the Department of the Army, the Department of the Navy, and the Department of the Air Force were Executive departments. The National Security Act Amendments of 1949 established the Department of Defense as an Executive Department including the Department of the Army, the Department of the Navy, and the Department of the Air Force as military departments, not as Executive departments. However, the source law for this section, which was in effect in 1949, remained applicable to the Secretaries of the military departments by virtue of section 12(g) of the National Security Act Amendments of 1949 (63 Stat. 591), located at 5 USCS § 301 note.

This section was part of title IV of the Revised Statutes. Act July 26, 1947, ch 343, § 201 (d), as added Aug. 10, 1949, ch 412, § 4, 63 Stat. 579 (former 5 USC § 171-1), which provides "Except to the extent inconsistent with the provisions of this Act [National Security Act of 1947], the provisions of title IV of the Revised Statutes as now or hereafter amended shall be applicable to the Department of Defense" is omitted from this title but is not repealed.

Standard changes are made to conform with the definitions applicable and the style of this title.

Explanatory notes:

A prior § 3345 (Act Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 425; Aug. 17, 1988, P.L. 100-398, § 7(a)(1), (2), 102 Stat. 988) was repealed by Act Oct. 21, 1998, P.L. 105-277, Div C, Title I, § 151(b), 112 Stat. 2681-611, effective and applicable as provided by § 151(d) of such Act, which appears as a note to this section. Such section provided for details to office of head of Executive agency or military department.

Effective date of section:

This section took effect 30 days after enactment, pursuant to § 151(d)(1) of Division C of Act Oct. 21, 1998, P.L. 105-277, which appears as a note to this section.

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Other provisions:

Order of succession of officers to act as Secretary of Defense. Ex. Or. 13000 of April 24, 1996, 61 Fed. Reg. 18483, provides:

"By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 3347 of title 5, United States Code, it is hereby ordered as follows:

"Section 1. Succession to Act as the Secretary of Defense. (a) In the event of the death, permanent disability, or resignation of the Secretary of Defense, the incumbents holding the Department of Defense positions designated below, in the order indicated, shall act for and exercise the powers of the Secretary of Defense as Acting Secretary of Defense:

"(1) Deputy Secretary of Defense.

"(2) Secretary of the Army.

"(3) Secretary of the Navy.

"(4) Secretary of the Air Force.

"(5) Under Secretary of Defense for Acquisition and Technology [Under Secretary of Defense for Acquisition, Technology, and Logistics].

"(6) Under Secretary of Defense for Policy.

"(7) Under Secretary of Defense (Comptroller).

"(8) Under Secretary of Defense for Personnel and Readiness.

"(9) Deputy Under Secretary of Defense for Acquisition and Technology.

"(10) Deputy Under Secretary of Defense for Policy.

"(11) Director of Defense Research and Engineering.

"(12) The Assistant Secretaries of Defense, the Director of Operational Test and Evaluation, and the General Counsel of the Department of Defense, in the order fixed by their length of service as permanent appointees in such positions.

"(13) Under Secretaries of the Army, the Navy, and the Air Force, in the order fixed by their length of service as permanent appointees in such positions.

"(14) Assistant Secretaries of the Army, the Navy, and the Air Force whose appointments are vested in the President, and General Counsels of the Army, the Navy, and the Air Force, in the order fixed by their length of service as permanent appointees in such positions.

"(b) In the event of the temporary absence or temporary disability of the Secretary of Defense, the incumbents holding the Department of Defense positions designated in paragraph (a) of this section, in the order indicated, shall act for and exercise the powers of the Secretary of Defense as Acting Secretary of Defense.

"(1) In these instances, the designation of an Acting Secretary of Defense applies only for the duration of the Secretary's absence or disability, and does not affect the authority of the Secretary to resume the powers of his office upon his return.

"(2) In the event that the Secretary of Defense is temporarily absent from his position, the Secretary may continue to exercise the powers and fulfill the duties of this office during his absence, notwithstanding the provisions of this order.

"(c) Precedence among those officers designated in paragraphs (a)(12)-(14) of this section who have the same appointment date shall be determined by the Secretary of Defense at the time that such appointments are made.

"(d) Notwithstanding paragraphs (a) and (b) of this section, an officer shall not act for or exercise the powers of the Secretary of Defense under this order if that officer serves only in an acting capacity in the position that would otherwise entitle him to do so.

"Sec. 2. Temporary Nature of Succession. Succession to act for and exercise the powers of the Secretary of Defense pursuant to this order shall be on a temporary or interim basis and shall not have the effect of vacating the statutory appointment held by the successor.

"Sec. 3. Revocation of Prior Executive Order. Executive Order No. 12787 of December 31, 1991, is hereby revoked.".

Effective date and application of Oct. 21, 1998 amendments. Act Oct. 21, 1998, P.L. 105-277, Div C, Title I, § 151(d), 112 Stat. 2681-616, provides:

"(1) Effective date. Subject to paragraph (2), this section and the amendments made by this section [amending 5 USCS §§ 3345 et seq. generally; for full classification, consult USCS

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Tables volumes] shall take effect 30 days after the date of enactment of this section.

"(2) Application.

(A) In general. This section shall apply to any office that becomes vacant after the effective date of this section.

"(B) Immediate application of time limitation. Notwithstanding subparagraph (A), for any office vacant on the effective date of this section, the time limitations under section 3346 of title 5, United States Code (as amended by this section) shall apply to such office. Such time limitations shall apply as though such office first became vacant on the effective date of this section.

"(C) Certain nominations. If the President submits to the Senate the nomination of any person after the effective date of this section for an office for which such person had been nominated before such date, the next nomination of such person after such date shall be considered a first nomination of such person to that office for purposes of sections 3345 through 3349 and section 3349d of title 5, United States Code (as amended by this section).".

NOTES:

CROSS REFERENCES

Additional pay prohibited for officer performing duties of vacant office as authorized by this section, 5 USCS § 5535.

Agricultural Department, application to Under Secretary, 7 USCS § 2211.

INTERPRETIVE NOTES AND DECISIONS

1. Generally
2. Presumption of authority
3. Challenges of authority
4. Authority of particular officials
5. Signature of documents

1. Generally

The language of 28 USCS § 508 concerning **vacancy** in the office of **Attorney General** differed from that of former 5 USCS § 3345 in one significant respect: § 508 speaks of any vacancy while former § 3345 spoke of specific reasons for the vacancy; thus, § 508 applies to a vacancy caused for any reason, including the expiration of the 30 day limit of the Vacancies Act. United States v Lucido (1974, ED Mich) 373 F Supp 1142, affd (1975, CA6 Mich) 517 F2d 1.

2. Presumption of authority

Tax appeal decided by Assistant Secretary of Treasury during absence or sickness of Secretary was presumed to be lawfully decided. John Shillito Co. v McClung (1892, CA6 Ohio) 51 F 868.

In absence of proof to contrary, it was presumed that second Assistant Secretary of Labor had authority to act under predecessor to 5 USCS § 3345. MacKusick ex rel. Pattavina v Johnson (1924, CA1 Mass) 3 F2d 398.

Closing agreement under Internal Revenue law was valid though signed by Acting Secretary since it is to be presumed that Secretary was absent or ill. Perry v Page (1933, CA1 RI) 67 F2d 635, 3 USTC P 1171, 13 AFTR 362, cert den (1934) 292 US 632, 78 L Ed 1485, 54 S Ct 641.

Court would assume, in absence of evidence to contrary, that Acting Secretary of Commerce and Labor was lawfully exercising powers of secretary in hearing appeal in deportation proceedings and that deportation writ was properly signed by Assistant Secretary of Commerce and Labor. United States ex rel. Calamia v Redfern (1910, CC La) 180 F 506.

3. Challenges of authority

In deportation proceedings, Chinese immigrant was entitled to have his appeal heard by

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the Secretary of Commerce instead of his assistant except under conditions provided in predecessor to 5 USCS § 3345; and point could be raised by habeas corpus. Ex parte Tsuie Shee (1914, DC Cal) 218 F 256.

4. Authority of particular officials

Acting Secretary of War had authority of Secretary. Ryan v United States (1890) 136 US 68, 34 L Ed 447, 10 S Ct 913.

During absence of Secretary and Assistant Secretary of war, chief clerk might be authorized to sign documents. 24 OP Atty Gen 646.

5. Signature of documents

When Assistant Secretary of Interior acts at time secretary is not absent or sick under regulation made by Secretary prescribing his powers, he should sign with his own proper official designation; when secretary is sick or absent, if assistant is in charge of department, he should sign as acting secretary. 19 OP Atty Gen 133.

Source: All Sources : Federal Legal - U.S. : **USCS - United States Code Service; Code, Const, Rules, Conventions & Public Laws**
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5 USCS § 3346

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*** CURRENT THROUGH P.L. 106-418, APPROVED 11/1/00 ***
*** WITH GAPS OF 106-398, 402, 405, 408, 411, 414, 415, 417 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III. EMPLOYEES
SUBPART B. EMPLOYMENT AND RETENTION
CHAPTER 33. EXAMINATION, SELECTION, AND PLACEMENT
SUBCHAPTER III. DETAILS, VACANCIES, AND APPOINTMENTS

5 USCS § 3346 (2000)

§ 3346. Time limitation

(a) Except in the case of a vacancy caused by sickness, the person serving as an acting officer as described under section 3345 may serve in the office--
(1) for no longer than 210 days beginning on the date the vacancy occurs; or
(2) subject to subsection (b), once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate.

(b) (1) If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may continue to serve as the acting officer for no more than 210 days after the date of such rejection, withdrawal, or return.
(2) Notwithstanding paragraph (1), if a second nomination for the office is submitted to the Senate after the rejection, withdrawal, or return of the first nomination, the person serving as the acting officer may continue to serve--
(A) until the second nomination is confirmed; or
(B) for no more than 210 days after the second nomination is rejected, withdrawn, or returned.

(c) If a vacancy occurs during an adjournment of the Congress sine die, the 210-day period under subsection (a) shall begin on the date that the Senate first reconvenes.

HISTORY:
(Added Oct. 21, 1998, P.L. 105-277, Div C, Title I, § 151(b), 112 Stat. 2681-612.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 USC Sec. 5	R.S. Sec. 178.

The words "his first assistant" are substituted for "the assistant or deputy of such chief or of such officer, or if there be none, then the chief clerk of such bureau". A chief of a bureau is an officer within the meaning of this section. The words "Executive department" are

substituted for "department" as the definition of "department" applicable to this section is coextensive with the definition of "Executive department" in 5 USCS § 101.

The words "or military department" are inserted to preserve the application of the source law. Before enactment of the National Security Act Amendments of 1949 (63 Stat. 578), the Department of the Army, the Department of the Navy, and the Department of the Air Force were Executive departments. The National Security Act Amendments of 1949 established the Department of Defense as an Executive Department including the Department of the Army, the Department of the Navy, and the Department of the Air Force as military departments, not as Executive departments. However, the source law for this section, which was in effect in 1949, remained applicable to the Secretaries of the military departments by virtue of section 12(g) of the National Security Act Amendments of 1949 (63 Stat. 591), located at 5 USCS § 301 note.

Standard changes are made to conform with the definitions applicable and the style of this title.

Explanatory notes:

A prior § 3346 (Act Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 426) was repealed by Act Oct. 21, 1998, P.L. 105-277, Div C, Title I, § 151(b), 112 Stat. 2681-611, effective and applicable as provided by § 151(d) of such Act, which appears as 5 USCS § 3345 note. Such section provided for details to subordinate offices.

Effective date of section:

This section took effect 30 days after enactment, pursuant to § 151(d)(1) of Division C of Act Oct. 21, 1998, P.L. 105-277, which appears as 5 USCS § 3345 note.

Other provisions:

Applicability of section. For provisions relating to applicability of this section, see § 151(d)(2) of Division C of Act Oct. 21, 1998, P.L. 105-277, which appears as 5 USCS § 3345 note.

INTERPRETIVE NOTES AND DECISIONS

1. Generally
2. Relationship with other laws
3. Computation of period
4. Effect of expiration of period
5. Challenges to legality of detail after period expires
6. Particular vacancies

1. Generally

Predecessor to 5 USCS § 3346 limited period during which vacancy might be filled either by statutory succession or by designation by President, or by both. 17 Op Atty Gen 535.

2. Relationship with other laws

Wiretaps authorized by the Deputy Attorney General after expiration of 30-day [now 210-day] limitation period were valid, since even if time limitations imposed by former 5 USCS § 3348 had expired, provisions of 28 USCS § 508 came into play. United States v Lucido (1974, ED Mich) 373 F Supp 1142, affd (1975, CA6 Mich) 517 F2d 1.

Thirty day [now 210-day] limitation imposed by former 5 USCS § 3348 was not applicable to Solicitor General, who became Acting Attorney General pursuant to 28 USCS § 508(b), rather than as "first assistant" pursuant to former 5 USCS § 3348. United States v Halmo (1974, ED Wis) 386 F Supp 593.

3. Computation of period

Time limit for filling vacancy caused by death or resignation of constitutionally appointed officer did not begin to run until someone actually took office pursuant to Vacancies Act, either through detail under former §§ 3345 or 3346, or through Presidential directive pursuant to former § 3347; language of former § 3348 said how long position could be filled,

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not when President had to do filling. Doolin Sec. Sav. Bank, F.S.B. v Office of Thrift Supervision (1998, App DC) 139 F3d 203.

Limitation was computed from time of appointment. 15 Op Atty Gen 457.

4. Effect of expiration of period

Position of Insurance Administrator under 42 USCS § 3533a could be filled by Acting Administrator for 30 days [now 210-days] only pursuant to former 5 USCS § 3348; thereafter, there was no legal authority for incumbent or anyone else to serve as Acting Insurance Administrator. (1977) 56 Op Comp Gen 761.

5. Challenges to legality of detail after period expires

Government employee was estopped to attack illegality of overly long detail in "acting" position while being paid at lower rate, since he had been willing to retain status beyond time limit since he hoped to obtain promotion. Peters v United States (1975) 208 Ct Cl 373, 534 F2d 232.

Plaintiff, who had been in "acting" position for more than specified time period, was not estopped from challenging legality of overly long appointment. Goutos v United States (1976) 212 Ct Cl 95, 552 F2d 922.

Individuals occupying offices pursuant to Vacancies Act (5 USCS §§ 3345 et seq.) should refrain from taking action at end of 30-day [now 210-day] period as such actions taken subsequent to expiration of 30-day [now 210-day] time limitation are of uncertain validity. (1986) 65 Op Comp Gen p. 626.

6. Particular vacancies

Thirty day [now 120-day] limitation imposed by former 5 USCS § 3348 was not applicable to Solicitor General, who became Acting Attorney General pursuant to 28 USCS § 508(b), rather than as "first assistant" pursuant to 5 USCS § 3348. United States v Halmo (1974, ED Wis) 386 F Supp 593.

Predecessor to 5 USCS § 3348 applied to statutory succession of deputy auditor. 18 Op Atty Gen 50.

Predecessor to 5 USCS § 3348 was applicable upon death of Secretary of Treasury. 18 Op Atty Gen 58.

Predecessor to 5 USCS § 3348 was applicable to position of Secretary of State, whether filled by statutory succession or appointment. 32 Op Atty Gen 139.

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5 USCS § 3347

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*** CURRENT THROUGH P.L. 106-418, APPROVED 11/1/00 ***
*** WITH GAPS OF 106-398, 402, 405, 408, 411, 414, 415, 417 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
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CHAPTER 33. EXAMINATION, SELECTION, AND PLACEMENT
SUBCHAPTER III. DETAILS, VACANCIES, AND APPOINTMENTS

5 USCS § 3347 (2000)

§ 3347. Exclusivity

(a) Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless--

(1) a statutory provision expressly--

(A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(2) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

(b) Any statutory provision providing general authority to the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) to delegate duties statutorily vested in that agency head to, or to reassign duties among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(1) applies.

HISTORY:

(Added Oct. 21, 1998, P.L. 105-277, Div C, Title I, § 151(b), 112 Stat. 2681-613; May 21, 1999, P.L. 106-31, Title V, § 5011, 113 Stat. 112.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 USC Sec. 6	R.S. Sec. 179.

The words "in his discretion", "vacant", and "incumbent" are omitted as surplusage. The words "Executive department" are substituted for "department" as the definition of "department" applicable to this section is coextensive with the definition of "Executive

department" in 5 USCS § 101. As used, the word "an" is coextensive with and substituted for "either".

The words "or military department" are inserted to preserve the application of the source law. Before enactment of the National Security Act Amendments of 1949 (63 Stat. 578), the Department of the Army, the Department of the Navy, and the Department of the Air Force were Executive departments. The National Security Act Amendments of 1949 established the Department of Defense as an Executive Department including the Department of the Army, the Department of the Navy, and the Department of the Air Force as military departments, not as Executive departments. However, the source law for this section, which was in effect in 1949, remained applicable to the secretaries of the military departments by virtue of section 12(g) of the National Security Act Amendments of 1949 (63 Stat. 591), located at 5 USCS § 301 note.

Standard changes are made to conform with the definitions applicable and the style of this title.

Explanatory notes:

A prior § 3347 (Act Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 426) was repealed by Act Oct. 21, 1998, P.L. 105-277, Div C, Title I, § 151(b), 112 Stat. 2681-611, effective and applicable as provided by § 151(d) of such Act, which appears as 5 USCS § 3345 note. Such section provided for details; Presidential authority.

Effective date of section:

This section took effect 30 days after enactment, pursuant to § 151(d)(1) of Division C of Act Oct. 21, 1998, P.L. 105-277, which appears as 5 USCS § 3345 note.

Amendments:

1999. Act May 21, 1999, in subsec. (b), substituted "provision to which subsection (a)(1) applies" for "provision to which subsection (a)(2) applies".

Other provisions:

Ex. Or. No. 9967. Ex. Or. No. 9967 of June 12, 1948, 13 Fed. Reg. 3249, formerly classified as a note to this section, was superseded by Ex. Or. No. 10481 of Aug. 15, 1953, 18 Fed. Reg. 4944. These orders related to the designation of officers of the Department of Agriculture to act as the Secretary of Agriculture.

Ex. Or. No. 10148. Ex. Or. No. 10148 of Aug. 5, 1950, 15 Fed. Reg. 5067, formerly classified to 15 USCS § 1502, was superseded by Ex. Or. No. 11388 of Jan. 15, 1968, 33 Fed. Reg. 563, formerly classified as a note to this section. Ex. Or. No. 10148 related to the designation of officers of the Department of Commerce to act as the Secretary of Commerce.

Ex. Or. No. 10481. Ex. Or. No. 10481 of Aug. 15, 1953, 18 Fed. Reg. 4944, formerly classified as a note to this section, was revoked by Ex. Or. No. 11793 of July 10, 1954, 39 Fed. Reg. 25631, formerly classified as a note to this section. Ex. Or. No. 10481 related to the designation of certain officers of the Department of Agriculture to act as the Secretary of Agriculture.

Designation of officers to act as Secretary of Labor. Ex. Or. No. 10513 of Jan. 19, 1954, 19 Fed. Reg. 369, provides: "I hereby authorize and direct the Assistant Secretaries of Labor and the Solicitor of Labor, in the order designated as hereinafter provided, to perform the duties of the office of the Secretary of Labor in case of the absence, sickness, resignation, or death of both the Secretary of Labor and the Under Secretary of Labor.

"The Assistant Secretaries of Labor and the Solicitor of Labor shall act as Secretary of Labor as herein provided (1) in such order as the Secretary of Labor (or the Under Secretary when acting as Secretary) may by order designate from time to time, or (2) if no such designation order is in effect at the time, in the order of the respective dates of their commissions, or in the event that two or more of their commissions bear the same date, in the order in which they shall have taken their oath of office.

"This order supersedes Executive Order No. 9968 of June 17, 1948, entitled 'Designation of

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Certain Officers To Act as Secretary of Labor.'".

Ex. Or. No. 10753. Ex. Or. No. 10753 of Feb. 18, 1958, 23 Fed. Reg. 1107, formerly classified as a note to this section, was superseded by Ex. Or. No. 11487 of Oct. 6, 1969, 34 Fed. Reg. 15593, which appears as a note to this section. Ex. Or. No. 10753 related to the designation of officers of the Department of the Interior to act as the Secretary of the Interior.

Ex. Or. No. 10820. Ex Or. No. 10820 of May 18, 1959, 24 Fed Reg. 4045, formerly classified as a note to this section, was revoked by Ex. Or. No. 12514 of May 14, 1985, 50 Fed. Reg. 20383. It provided for the order of succession of officers in certain posts.

Ex. Or. No. 10839. Ex. Or. No. 10839 of Sept. 30, 1959, 24 Fed. Reg. 7339, formerly classified as a note to this section, was revoked by Ex. Or. No. 12343 of Jan. 27, 1982, § 3, 47 Fed. Reg. 4225, which appears as a note to this section. It provided for an order of succession in the Department of State.

Ex. Or. 10941. Ex. Or. No. 10941 of May 16, 1961, 26 Fed. Reg. 4277, formerly classified as a note to this section, was revoked by Ex. Or. No. 11680 of Aug. 21, 1972, 37 Fed. Reg. 16907, formerly classified as a note to this section. Ex. Or. No. 10941 provided for the order of succession in the Treasury Department.

Designation of officers to act as Secretary of Housing and Urban Development. Ex. Or. No. 11274 of March 30, 1966, 31 Fed. Reg. 5243, provides:

"1. In the event of a vacancy in the Office of the Secretary of Housing and Urban Development or during the absence or disability of the Secretary, the Under [Deputy] Secretary shall act as Secretary of Housing and Urban Development.

"2. During any period when, by reason of absence, disability, or vacancy in office, neither the Secretary nor the Under [Deputy] Secretary is available to exercise the powers or perform the duties of the Office of the Secretary, an Assistant Secretary or the General Counsel, in such order as the Secretary may from time to time prescribe, shall act as Secretary of Housing and Urban Development. If no such order of succession is in effect at that time, then they shall act in the order in which they shall have taken office as Assistant Secretaries or General Counsel.".

Designation of officers to act as Postmaster General. Ex. Or. No. 11313 of Oct. 15, 1966, 31 Fed. Reg. 13417, provides:

"Section 1. In the event of a vacancy in the office of Postmaster General or during the absence or disability of the Postmaster General, the Deputy Postmaster General shall act as Postmaster General.

"Sec. 2. During any period when, by reason of absence, disability, or vacancy in office, neither the Postmaster General nor the Deputy Postmaster General is available to exercise the powers or perform the duties of the office of Postmaster General, an Assistant Postmaster General or the General Counsel of the Post Office Department, in such order as the Postmaster General may from time to time prescribe in writing, shall act as Postmaster General. If no such order of succession is in effect at that time, they shall act as Postmaster General in the order in which they shall have taken office as Assistant Postmasters General or General Counsel.

"Sec. 3. The following are hereby superseded:

"(1) Executive Order No. 10154 of August 22, 1950.

"(2) Executive Order No. 10558 of September 8, 1954.

"(3) Executive Order No. 10686 of November 1, 1956.".

Ex. Or. No. 11388. Ex. Or. No. 11388 of Jan. 15, 1968, 33 Fed. Reg. 562, formerly classified as a note to this section, was superseded by Ex. Or. No. 11880 of Oct. 2, 1975, 40 Fed. Reg. 46089, which appears as a note to this section. Ex. Or. No. 11388 related to the designation of officers of the Department of Commerce to act as the Secretary of Commerce.

Designation of officers to act as Secretary of Interior. Ex. Or. No. 11487 of Oct. 6, 1969, 34 Fed. Reg. 15593, provides:

"Section 1. During any period when by reason of absence, disability, or vacancy in office, neither the Secretary of the Interior nor the Under [Deputy] Secretary of the Interior is available to exercise the powers or perform the duties of the office of Secretary, as Assistant

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Secretary of the Interior or the Solicitor of the Department of the Interior, in such order as the Secretary of the Interior may from time to time prescribe, shall act as Secretary. If no such order of succession is in effect at that time, they shall act as Secretary in the order in which they shall have taken office as Assistant Secretaries or Solicitor.

"Sec. 2. This order supersedes Executive Order No. 10753 of February 15, 1958, entitled 'Designation of certain officers of the Department of the Interior to act as Secretary of the Interior.".

Ex. Or. No. 11680. Ex. Or. No. 11680 of Aug. 21, 1972, 37 Fed. Reg. 16907, formerly classified as a note to this section, was revoked by Ex. Or. No. 11822 of Dec. 10, 1974, 39 Fed. Reg. 43275, classified as a note to this section. Ex. Or. No. 11680 provided for the order of succession in the Treasury Department.

Ex. Or. No. 11793. Ex. Or. No. 11793 of July 10, 1974, 39 Fed. Reg. 25631, formerly classified as a note to this section, was revoked by Ex. Or. No. 11957 of Jan. 13, 1977, 42 Fed. Reg. 3295, which appears as a note to this section. Ex. Or. No. 11793 provided for the designation of certain officers of the Agriculture Department to act as Secretary of Agriculture.

Designation of officers to act as Secretary of Treasury. Ex. Or. No. 11822 of Dec. 10, 1974, 39 Fed. Reg. 43275, provides:

"Section 1. During any period when, by reason of absence, disability, or vacancy in office, either the Secretary of the Treasury or his Deputy Secretary is not available to exercise the powers or perform the duties of the office of Secretary, an officer from the Department of the Treasury appointed by the President--by and with the advice and consent of the Senate, in such order as the Secretary of the Treasury may from time to time prescribe--shall act as Secretary until the absence or the disability of the incumbent shall cease, or until a successor is appointed. If no such order of succession is in effect at that time, then such officers shall act as Secretary in the descending order of rank, as established by their offices being listed in sections 5314, 5315 or 5316 of title 5 of the United States Code and, at each level of the Executive Schedule, in the order which they shall have taken the oath as such officers.

"Section 2. Executive Order No. 11680 of August 21, 1972, entitled 'Designation of Certain Officers to Act as Secretary of the Treasury' is hereby revoked.".

Designation of officers to act as Secretary of Commerce. Ex. Or. No. 11880 of Oct. 2, 1975, 40 Fed. Reg. 46089, as amended by Ex. Or. No. 12608 of Sept. 9, 1987, 52 Fed. Reg. 34617; Ex. Or. No. 12998 of April 5, 1996, 61 Fed. Reg. 15873, provides:

"Section 1. During any period when, by reason of absence, disability or vacancy in office, both the Secretary of Commerce and the Deputy Secretary of Commerce are not available to exercise the powers or perform the duties of the Office of Secretary, an Assistant Secretary of Commerce, the General Counsel of the Department of Commerce, or an officer of the Department of Commerce appointed by the President with the advice and consent of the Senate in such order as the Secretary of Commerce may from time to time prescribe, shall act as Secretary. If no such order of succession is in effect at that time, an Assistant Secretary or the General Counsel shall act as Secretary in the order in which they shall have taken office as Assistant Secretaries or General Counsel.

Sec. 2. The President may at any time, pursuant to law but without regard to the foregoing provisions of this order, direct that an officer, as defined in 5 U.S.C. 3347, and specified by the President shall act as Secretary of Commerce.

"Sec. 3. This Order supersedes Executive Order No. 11388 [former note to this section] of January 15, 1968.".

Designation of officers to act as Secretary of Agriculture. Ex. Or. No. 11957 of Jan. 13, 1977, 42 Fed. Reg. 3295, provides:

"Section 1. During any period when, by reason of absence, disability, or vacancy in office, both the Secretary of Agriculture and the Deputy Secretary of Agriculture are not available to exercise the powers or perform the duties of the Office of Secretary, the officers from the Department of Agriculture whose appointments are vested in the President, by and with the advice and consent of the Senate, shall act as Secretary in such order as the Secretary of Agriculture may from time to time prescribe. If no such order of succession is in effect at that time, then such officers shall act as Secretary in the descending order of rank, as established

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by the listing of their offices in Sections 5314, 5315 or 5316 of Title 5 of the United States Code and, at each level of the Executive Schedule, in the order in which they shall have taken oath as such officers.

"Sec. 2. Executive Order No. 11793 of July 10, 1974, is hereby revoked.".

Designation of officers to act as Secretary of State. Ex. Or. No. 12343 of Jan. 27, 1982, 47 Fed. Reg. 4225, provides:

"By the authority vested in me as President of the United States of America by Section 3347 of Title 5 and Section 301 of Title 3 of the United States Code, it is hereby ordered as follows:

"Section 1. During any period when, by reason of absence, disability, or vacancy in office, neither the Secretary of State nor the Deputy Secretary of State, is available to exercise the powers or perform the duties of the Office of the Secretary, an officer from the Department of State who has been appointed by the President, by and with the advice and consent of the Senate, in such order as the Secretary of State may from time to time prescribe, shall act as Secretary. If no such order of succession is in effect at that time, then such officers shall act as Secretary in descending order of rank, as established by the listing of their offices in Sections 5314 or 5315 of Title 5 of the United States Code, and at each level of the Executive Schedule in the order in which they shall have taken the oath as such officers.

"Sec. 2. The President may at any time, pursuant to law but without regard to the foregoing provisions of this Order, direct that an officer specified by the President shall act as Secretary of State.

"Sec. 3. Executive Order No. 10839 [former note to this section] is revoked.".

Ex. Or. No. 12514. Ex. Or. No. 12514 of May 14, 1985, 50 Fed. Reg. 20383, formerly classified as a note to this section, was revoked by § 3 of Ex. Or. 12787 of Dec. 31, 1991, 57 Fed. Reg. 517, which appears as a note to this section. The order provided for the order of succession of officers in certain posts to the position of Secretary of Defense.

Ex. Or. No. 12787. Ex. Or. No. 12787 of Dec. 31, 1991, 57 Fed. Reg. 517, formerly classified as a note to this section, was revoked by Ex. Or. No. 13000 of April 24, 1996, 61 Fed. Reg. 18483. It provided for the order of succession of officers to act as Secretary of Defense.

Order of succession of officers to act as Secretary of the Navy. Ex. Or. No. 12879 of Nov. 8, 1993, 58 Fed. Reg. 59929, provides:

"By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 3347 of title 5, United States Code, it is hereby ordered as follows:

"Section 1. Succession to the Authority of the Secretary of the Navy.

(a) In the event of the death, permanent disability, or resignation of the Secretary of the Navy, the incumbents holding the positions designated below, in the order indicated, shall act for and exercise the powers of the Secretary of the Navy:

"(1) The Under Secretary of the Navy.

"(2) The Assistant Secretaries and General Counsel of the Navy, in the order fixed by their length of services as permanent appointees in such positions.

"(3) The Chief of Naval Operations.

"(4) The Commandant of the Marine Corps.

"(b) In the event of the temporary absence or temporary disability of the Secretary of the Navy, the incumbents holding the Department of the Navy positions designated in paragraph (a) of this section, in the order indicated, shall act for and exercise the powers of the Secretary of the Navy.

"(1) In these instances, the designation of an Acting Secretary of the Navy applies only for the duration of the Secretary's absence or disability, and does not affect the authority of the Secretary to resume the powers of his office upon his return.

"(2) In the event that the Secretary of the Navy is merely absent from this position, the Secretary of the Navy may continue to exercise the powers and fulfill the duties of his office during his absence, notwithstanding the provisions of this order.

"(c) Precedence among those officers designated in paragraph (a) of this section who have the same date of appointment shall be determined by the Secretary of the Navy at the

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time that such appointments are made.

"(d) Notwithstanding paragraph (a) and (b) of this section, an officer shall not act for or exercise the powers of the Secretary of the Navy under this order if that officer serves only in an acting capacity in the position that would otherwise entitle him to do so.

"Sec. 2. Temporary Nature of Succession. Succession to act for and exercise the powers of the Secretary of the Navy pursuant to this order shall be on a temporary or interim basis and shall not have the effect of vacating the statutory appointment held by the successor.".

Order of succession of officers to act as Secretary of the Army. Ex. Or. No. 12908 of April 22, 1994, 59 Fed. Reg. 21907, provides:

"By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 3347 of title 5, United States Code, it is hereby ordered as follows:

"Section 1. Succession to act as the Secretary of the Army.

"(a) In the event of the death, permanent disability, or resignation of the Secretary of the Army, the incumbents holding the positions designated below, in the order indicated, shall act for and exercise the powers of the Secretary of the Army:

"(1) The Under Secretary of the Army.

"(2) The Assistant Secretaries and General Counsel of the Army, in the order fixed by their length of service as permanent appointees in such positions.

"(3) The Chief of Staff of the Army.

"(b) In the event of the absence or temporary disability of the Secretary of the Army, the incumbents holding the Department of the Army positions designated in paragraph (a) of this section, in the order indicated, shall act for and exercise the powers of the Secretary of the Army.

"(1) The designation of an Acting Secretary of the Army under this subsection applies only for the duration of the Secretary's absence or disability, and does not affect the authority of the Secretary to resume the powers of the Secretary's office.

"(2) When the Secretary of the Army is temporarily absent from the position, the Secretary of the Army may continue to exercise the powers and fulfill the duties of his office during his absence, notwithstanding the provisions of this order.

"(c) Precedence among those officers designated in paragraph (a) of this section who have the same date of appointment shall be determined by the Secretary of the Army at the time that such appointments are made.

"(d) Notwithstanding paragraphs (a) and (b) of this section, an officer shall not act for or exercise the powers of the Secretary of the Army under this order if that officer serves only in an acting capacity in the position that would otherwise entitle him to do so.

"Sec. 2. Temporary nature of succession. Succession to act for and exercise the powers of the Secretary of the Army pursuant to this order shall be on a temporary or interim basis and shall not have the effect of vacating the statutory appointment held by the successor.".

Order of succession of officers to act as Secretary of the Air Force. Ex. Or. No. 12909 of April 22, 1994, 59 Fed. Reg. 21909, provides:

"By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 3347 of title 5, United States Code, it is hereby ordered as follows:

"Section 1. Succession to act as the Secretary of the Air Force.

"(a) In the event of the death, permanent disability, or resignation of the Secretary of the Air Force, the incumbents holding the positions designated below, in the order indicated, shall act for and exercise the powers of the Secretary of the Air Force:

"(1) The Under Secretary of the Air Force.

"(2) The Assistant Secretaries and General Counsel of the Air Force, in the order fixed by their length of service as permanent appointees in such positions.

"(3) The Chief of Staff of the Air Force.

"(b) In the event of the absence or temporary disability of the Secretary of the Air Force, the incumbents holding the Department of the Air Force positions designated in paragraph (a) of this section, in the order indicated, shall act for and exercise the powers of the Secretary of the Air Force.

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"(1) The designation of an Acting Secretary of the Air Force applies only for the duration of the Secretary's absence or disability, and does not affect the authority of the Secretary to resume the powers of the Secretary's office.

"(2) In the event that the Secretary of the Air Force is temporarily absent from the position, the Secretary of the Air Force may continue to exercise the powers and fulfill the duties of his office during the absence, notwithstanding the provisions of this order.

"(c) Precedence among those officers designated in paragraph (a) of this section who have the same date of appointment shall be determined by the Secretary of the Air Force at the time that such appointments are made.

"(d) Notwithstanding paragraphs (a) and (b) of this section, an officer shall not act for or exercise the powers of the Secretary of the Air Force under this order if that officer serves only in an acting capacity in the position that would otherwise entitle him to do so.

"Sec. 2. Temporary nature of succession. Succession to act for and exercise the powers of the Secretary of the Air Force pursuant to this order shall be on a temporary or interim basis and shall not have the effect of vacating the statutory appointment held by the successor.".

Transfer of order relating to succession of officers to act as Secretary of Defense. Ex. Or. 13000 of April 24, 1996, 61 Fed. Reg. 18483, which formerly appeared as a note to this section, was transferred to 5 USCS § 3345 note.

Applicability of section. For provisions relating to applicability of this section, see § 151(d)(2) of Division C of Act Oct. 21, 1998, P.L. 105-277, which appears as 5 USCS § 3345 note.

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5 USCS § 3348

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*** CURRENT THROUGH P.L. 106-418, APPROVED 11/1/00 ***
*** WITH GAPS OF 106-398, 402, 405, 408, 411, 414, 415, 417 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III. EMPLOYEES
SUBPART B. EMPLOYMENT AND RETENTION
CHAPTER 33. EXAMINATION, SELECTION, AND PLACEMENT
SUBCHAPTER III. DETAILS, VACANCIES, AND APPOINTMENTS

5 USCS § 3348 (2000)

§ 3348. Vacant office

(a) In this section--
(1) the term "action" includes any agency action as defined under section 551(13); and
(2) the term "function or duty" means any function or duty of the applicable office that--
(A) (i) is established by statute; and
(ii) is required by statute to be performed by the applicable officer (and only that officer); or
(B) (i) (I) is established by regulation; and
(II) is required by such regulation to be performed by the applicable officer (and only that officer); and
(ii) includes a function or duty to which clause (i) (I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.

(b) Unless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347, if an officer of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office--
(1) the office shall remain vacant; and
(2) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office), only the head of such Executive agency may perform any function or duty of such office.

(c) If the last day of any 210-day period under section 3346 is a day on which the Senate is not in session, the second day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

(d) (1) An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect.
(2) An action that has no force or effect under paragraph (1) may not be ratified.

(e) This section shall not apply to--
(1) the General Counsel of the National Labor Relations Board;
(2) the General Counsel of the Federal Labor Relations Authority;
(3) any Inspector General appointed by the President, by and with the advice and consent of the Senate;
(4) any Chief Financial Officer appointed by the President, by and with the advice and consent of the Senate; or
(5) an office of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) if a statutory provision expressly prohibits the head of the Executive agency from performing the functions and duties of such office.

HISTORY:
(Added Oct. 21, 1998, P.L. 105-277, Div C, Title I, § 151(b), 112 Stat. 2681-613.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 USC Sec. 7	R.S. Sec. 180. Feb. 6, 1891, ch 113, 26 Stat. 733.

Standard changes are made to conform with the definitions applicable and the style of this title.

Explanatory notes:
A prior § 3348 (Act Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 426; Aug. 17, 1988, P.L. 100-398, § 7(b), 102 Stat. 988) was repealed by Act Oct. 21, 1998, P.L. 105-277, Div C, Title I, § 151(b), 112 Stat. 2681-611, effective and applicable as provided by § 151(d) of such Act, which appears as 5 USCS § 3345 note. Such section provided for limitation of details with respect to time.

Effective date of section:
This section took effect 30 days after enactment, pursuant to § 151(d)(1) of Division C of Act Oct. 21, 1998, P.L. 105-277, which appears as 5 USCS § 3345 note.

Other provisions:
Applicability of section. For provisions relating to applicability of this section, see § 151(d)(2) of Division C of Act Oct. 21, 1998, P.L. 105-277, which appears as 5 USCS § 3345 note.

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5 USCS § 3349

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*** CURRENT THROUGH P.L. 106-418, APPROVED 11/1/00 ***
*** WITH GAPS OF 106-398, 402, 405, 408, 411, 414, 415, 417 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III. EMPLOYEES
SUBPART B. EMPLOYMENT AND RETENTION
CHAPTER 33. EXAMINATION, SELECTION, AND PLACEMENT
SUBCHAPTER III. DETAILS, VACANCIES, AND APPOINTMENTS

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5 USCS § 3349 (2000)

§ 3349. Reporting of vacancies

(a) The head of each Executive agency (including the Executive Office of the President, and other than the General Accounting Office) shall submit to the Comptroller General of the United States and to each House of Congress--

(1) notification of a vacancy in an office to which this section and sections 3345, 3346, 3347, 3348, 3349a, 3349b, 3349c, and 3349d apply and the date such vacancy occurred immediately upon the occurrence of the vacancy;

(2) the name of any person serving in an acting capacity and the date such service began immediately upon the designation;

(3) the name of any person nominated to the Senate to fill the vacancy and the date such nomination is submitted immediately upon the submission of the nomination; and

(4) the date of a rejection, withdrawal, or return of any nomination immediately upon such rejection, withdrawal, or return.

(b) If the Comptroller General of the United States makes a determination that an officer is serving longer than the 210-day period including the applicable exceptions to such period under section 3346 or section 3349a, the Comptroller General shall report such determination immediately to--

(1) the Committee on Governmental Affairs of the Senate;
(2) the Committee on Government Reform and Oversight of the House of Representatives;
(3) the Committees on Appropriations of the Senate and House of Reqresentatives;
(4) the appropriate committees of jurisdiction of the Senate and House of Representatives;

(5) the President; and
(6) the Office of Personnel Management.

HISTORY:

(Added Oct. 21, 1998, P.L. 105-277, Div C, Title I, § 151(b), 112 Stat. 2681-614.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Derivation	U.S. Code	Revised Statutes and Statutes at Large

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..... 5 USC Sec. 8 R.S. Sec. 181.

The prohibition is restated in positive form.

This section was part of title IV of the Revised Statutes. Act July 26, 1947, ch 343, § 201 (d), as added Aug. 10, 1949, ch 412, § 4, 63 Stat. 579 (former 5 USC § 171-1), which provides "Except to the extent inconsistent with the provisions of this Act [National Security Act of 1947], the provisions of title IV of the Revised Statutes as now or hereafter amended shall be applicable to the Department of Defense" is omitted from this title but is not repealed.

Standard changes are made to conform with the definitions applicable and the style of this title.

Explanatory notes:

A prior § 3349 (Act Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 426) was repealed by Act Oct. 21, 1998, P.L. 105-277, Div C, Title I, § 151(b), 112 Stat. 2681-611, effective and applicable as provided by § 151(d) of such Act, which appears as 5 USCS § 3345 note. Such section provided for details to fill vacancies; restrictions.

Effective date of section:

This section took effect 30 days after enactment, pursuant to § 151(d)(1) of Division C of Act Oct. 21, 1998, P.L. 105-277, which appears as 5 USCS § 3345 note.

Other provisions:

Applicability of section. For provisions relating to applicability of this section, see § 151(d)(2) of Division C of Act Oct. 21, 1998, P.L. 105-277, which appears as 5 USCS § 3345 note.

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§ 3345. Acting officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

(A) during the 365–day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS–15 of the General Schedule.

(b)(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if—

(A) during the 365–day period preceding the date of the death, resignation, or beginning of inability to serve, such person—

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if—

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.

(Added Pub.L. 105–277, Div. C, Title 1, § 151(b), Oct. 21, 1998, 112 Stat. 2681–611.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1998 Acts. Statement by President, see 1998 U.S. Code Cong. and Adm. News, p. 582.

Effective and Applicability Provisions

1998 Acts. Section 151(d) of Pub.L. 105–277 provided that:

"(1) **Effective date.**—Subject to paragraph (2) [of this note], this section and the amendments made by this section [repealing former sections 3345 to 3349 of this title and enacting new sections 3345 to 3349 and 3349a to 3349d of this title, and enacting provisions set out as a note under section 3301 of this title] shall

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take effect 30 days after the date of enactment of this section [Oct. 21, 1998].

"(2) Application.—

"(A) In general.—This section [repealing former sections 3345 to 3349 of this title and enacting new sections 3345 to 3349 and 3349a to 3349d of this title and enacting provisions set out as a note under section 3301 of this title] shall apply to any office that becomes vacant after the effective date of this section [set forth in par. (1) of this note].

"(B) Immediate application of time limitation.—Notwithstanding subparagraph (A), for any office vacant on the effective date of this section, the time limitations under section 3346 of title 5, United States Code (as amended by this section) shall apply to such office. Such time limitations shall apply as though such office first became vacant on the effective date of this section [set forth in par. (1) of this note].

"(C) Certain nominations.—If the President submits to the Senate the nomination of any person after the effective date of this section [set forth in par. (1) of this note] for an office for which such person had been nominated before such date, the next nomination of such person after such date shall be considered a first nomination of such person to that office for purposes of sections 3345 through 3349 and section 3349d of title 5, United States Code (as amended by this section)."

Prior Provisions

A prior section 3345, Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 425, Pub.L. 100–398, § 7(a)(1), (2), Aug. 17, 1988, 102 Stat. 988, which provided for the first assistant to perform the duties of a head of an Executive agency in case of death, resignation, sickness, or absence, was repealed by Pub.L. 105–277, Div. C, Title I, § 151(b), Oct. 21, 1998, 112 Stat. 2681–611.

EXECUTIVE ORDER NO. 13060

Apr. 24, 1996, 61 F.R. 18483

ORDER OF SUCCESSION OF OFFICERS TO ACT AS SECRETARY OF DEFENSE

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 3347 of title 5, United States Code [this section], it is hereby ordered as follows:

Section 1. Succession to Act as the Secretary of Defense. (a) In the event of the death, permanent disability, or resignation of the Secretary of Defense, the incumbents holding the Department of Defense positions designated below, in the order indicated, shall act for and exercise the powers of the Secretary of Defense as Acting Secretary of Defense:

(1) Deputy Secretary of Defense.

(2) Secretary of the Army.

(3) Secretary of the Navy.

(4) Secretary of the Air Force.

(5) Under Secretary of Defense for Acquisition and Technology.

(6) Under Secretary of Defense for Policy.

(7) Under Secretary of Defense (Comptroller).

(8) Under Secretary of Defense for Personnel and Readiness.

(9) Deputy Under Secretary of Defense for Acquisition and Technology.

(10) Deputy Under Secretary of Defense for Policy.

(11) Director of Defense Research and Engineering.

(12) The Assistant Secretaries of Defense, the Director of Operational Test and Evaluation, and the General Counsel of the Department of Defense, in the order fixed by their length of service as permanent appointees in such positions.

(13) Under Secretaries of the Army, the Navy, and the Air Force, in the order fixed by their length of service as permanent appointees in such positions.

(14) Assistant Secretaries of the Army, the Navy, and the Air Force whose appointments are vested in the President, and General Counsels of the Army, the Navy, and the Air Force, in the order fixed by their length of service as permanent appointees in such positions.

(b) In the event of the temporary absence or temporary disability of the Secretary of Defense, the incumbents holding the Department of Defense positions designated in paragraph (a) of this section, in the order indicated, shall act for and exercise the powers of the Secretary of Defense as Acting Secretary of Defense.

(1) In these instances, the designation of an Acting Secretary of Defense applies only for the duration of the Secretary's absence or disability, and does not affect the authority of the Secretary to resume the powers of his office upon his return.

(2) In the event that the Secretary of Defense is temporarily absent from his position, the Secretary may continue to exercise the powers and fulfill the duties of this office during his absence, notwithstanding the provisions of this order.

(c) Precedence among those officers designated in paragraphs (a)(12)–(14) of this section who have the same appointment date shall be determined by the Secretary of Defense at the time that such appointments are made.

(d) Notwithstanding paragraphs (a) and (b) of this section, an officer shall not act for or exercise the powers of the Secretary of Defense under this order if that officer serves only in an acting capacity in the position that would otherwise entitle him to do so.

Sec. 2. Temporary Nature of Succession. Succession to act for and exercise the powers of the Secretary of Defense pursuant to this order shall be on a temporary or interim basis and shall not have the effect of vacating the statutory appointment held by the successor.

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Sec. 3. Revocation of Prior Executive Order. Executive Order No. 12787 of December 31, 1991 [formerly set out as a note under this section], is hereby revoked.

WILLIAM J. CLINTON

[Pub.L. 106–65, Div. A, Title XI, § 911(a)(1), Oct. 5, 1999, 113 Stat. 717, classified as 10 U.S.C.A. § 133 note, changed the name of the position of the Under Secretary of Defense for Acquisition and Technology to the Under Secretary of Defense for Acquisition, Technology, and Logistics.]

§ 3346. Time limitation

(a) Except in the case of a vacancy caused by sickness, the person serving as an acting officer as described under section 3345 may serve in the office—

(1) for no longer than 210 days beginning on the date the vacancy occurs; or

(2) subject to subsection (b), once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate.

(b)(1) If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may continue to serve as the acting officer for no more than 210 days after the date of such rejection, withdrawal, or return.

(2) Notwithstanding paragraph (1), if a second nomination for the office is submitted to the Senate after the rejection, withdrawal, or return of the first nomination, the person serving as the acting officer may continue to serve—

(A) until the second nomination is confirmed; or

(B) for no more than 210 days after the second nomination is rejected, withdrawn, or returned.

(c) If a vacancy occurs during an adjournment of the Congress sine die, the 210–day period under subsection (a) shall begin on the date that the Senate first reconvenes.

(Added Pub.L. 105–277, Div. C, Title I, § 151(b), Oct. 21, 1998, 112 Stat. 2681–612.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1998 Acts. Statement by President, see 1998 U.S. Code Cong. and Adm. News, p. 582.

Effective and Applicability Provisions

1998 Acts. Section to take effect 30 days after Oct. 21, 1998, applicable to any office that becomes vacant after such effective date, with certain exceptions and qualifications relating to immediate applicability of time limitations for offices vacant on such effective date, and the submission to the Senate after such effective date of nominations of persons for offices for which such persons were previously nominated prior to such effective date, see section 151(d) of Pub.L. 105–277, set out as a note under section 3345 of this title.

Prior Provisions

A prior section 3346, Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 426, which provided for the first assistant to perform the duties of an officer of a bureau of an Executive department or military department, whose appointment is not vested in the head of the department, in case of death, resignation, sickness, or absence, was repealed by Pub.L. 105–277, Div. C, Title I, § 151(b), Oct. 21, 1998, 112 Stat. 2681–613.

§ 3347. Exclusivity

(a) Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless—

(1) a statutory provision expressly—

(A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(2) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

(b) Any statutory provision providing general authority to the head of an Executive agency (including the Executive Office of the President, and other than the General

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Accounting Office) to delegate duties statutorily vested in that agency head to, or to reassign duties among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(1) applies.

(Added Pub.L. 105–277, Div. C, Title I, § 151(b), Oct. 21, 1998, 112 Stat. 2681–613, and amended Pub.L. 106–31, Title V, § 5011, May 21, 1999, 113 Stat. 112.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1998 Acts. Statement by President, see 1998 U.S. Code Cong. and Adm. News, p. 582.

1999 Acts. House Conference Report No. 106–143 and Statement by President, see 1999 U.S. Code Cong. and Adm. News, p. 27.

Amendments

1999 Amendments. Subsec. (b). Pub.L. 106–81, § 5011, substituted "provision to which subsection (a)(1) applies." for "provision to which subsection (a)(2) applies."

Effective and Applicability Provisions

1998 Acts. Section to take effect 30 days after Oct. 21, 1998, applicable to any office that becomes vacant after such effective date, with certain exceptions and qualifications relating to immediate applicability of time limitations for offices vacant on such effective date, and the submission to the Senate after such effective date of nominations of persons for offices for which such persons were previously nominated prior to such effective date, see section 151(d) of Pub.L. 105–277, set out as a note under section 3345 of this title.

Prior Provisions

A prior section 3347, Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 426, which allowed the President to direct the head of another Executive department or military department or another officer of an Executive department or military department, whose appointment is vested in the President, to perform the duties of an office until a successor is appointed or the absence or sickness stops, was repealed by Pub.L. 105–277, Div. C, Title I, § 151(b), Oct. 21, 1998, 112 Stat. 2681–611.

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 11880

Oct. 2, 1975, 40 F.R. 46089, as amended by Ex. Ord. No. 12608, Sept. 9, 1987, 52 F.R. 34617; Ex. Ord. No. 12998, Apr. 5, 1996, 61 F.R. 15873

DESIGNATION OF OFFICERS OF THE DEPARTMENT OF COMMERCE TO ACT AS SECRETARY OF COMMERCE

By virtue of the authority vested in me by section 3347 of Title 5 of the United States Code [this section] and section 301 of Title 3 of the United States Code [section 301 of Title 3, The President], and as President of the United States, it is hereby ordered as follows:

[See main volume for text of Sec. 1]

Sec. 2. The President may at any time, pursuant to law but without regard to the foregoing provisions of this order, direct that an officer, as defined in 5 U.S.C. 3347, and specified by the President, shall act as Secretary of Commerce.

Sec. 3. This Order supersedes Executive Order No. 11888 of January 15, 1968 [formerly set out as a note under this section].

EXECUTIVE ORDER NO. 12787

Ex. Ord. No. 12787, Dec. 31, 1991, 57 F.R. 517, relating to the order of succession of officers to act as the Secretary of Defense, was revoked by Ex. Ord. No. 13000, Apr. 24, 1996, 61 F.R. 18483, set out as a note under section 3345 of this title.

§ 3348. Vacant office

(a) In this section—

(1) the term "action" includes any agency action as defined under section 551(13); and

(2) the term "function or duty" means any function or duty of the applicable office that—

(A)(i) is established by statute; and

(ii) is required by statute to be performed by the applicable officer (and only that officer); or

(B)(i)(I) is established by regulation; and

(II) is required by such regulation to be performed by the applicable officer (and only that officer); and

(ii) includes a function or duty to which clause (i)(I) and (II) applies, and the applicable regulation is in effect at any time during the 180–day period preceding the date on which the vacancy occurs.

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(b) Unless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347, if an officer of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the office shall remain vacant; and

(2) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office), only the head of such Executive agency may perform any function or duty of such office.

(c) If the last day of any 210–day period under section 3346 is a day on which the Senate is not in session, the second day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

(d)(1) An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect.

(2) An action that has no force or effect under paragraph (1) may not be ratified.

(e) This section shall not apply to—

(1) the General Counsel of the National Labor Relations Board;

(2) the General Counsel of the Federal Labor Relations Authority;

(3) any Inspector General appointed by the President, by and with the advice and consent of the Senate;

(4) any Chief Financial Officer appointed by the President, by and with the advice and consent of the Senate; or

(5) an office of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) if a statutory provision expressly prohibits the head of the Executive agency from performing the functions and duties of such office.

(Added Pub.L. 105–277, Div. C, Title I, § 151(b), Oct. 21, 1998, 112 Stat. 2681–613.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1998 Acts. Statement by President, see 1998 U.S. Code Cong. and Adm. News, p. 582.

Effective and Applicability Provisions

1998 Acts. Section to take effect 30 days after Oct. 21, 1998, applicable to any office that becomes vacant after such effective date, with certain exceptions and qualifications relating to immediate applicability of time limitations for offices vacant on such effective date, and the submission to the Senate after such effective date of nominations of persons for offices for which such persons were previously nominated prior to such effective date, see section 151(d) of Pub.L. 105–277, set out as a note under section 3345 of this title.

Prior Provisions

A prior section 3348, Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 426; Pub.L. 100–398, § 7(b), Aug. 17, 1988, 102 Stat. 988, which dealt with temporarily filling a vacancy caused by death or resignation, was repealed by Pub.L. 105–277, Div. C, Title I, § 151(b), Oct. 21, 1998, 112 Stat. 2681–611.

NOTES OF DECISIONS

Title of position 8

4. Computation of period

Time limit provision of Vacancies Act, which permits president to appoint certain officers temporarily, does not begin to run immediately upon "vacancy" caused by death or resignation of constitutionally appointed officer, but begins to run only when someone takes office, either through "detail" or through presidential directive. Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision, C.A.D.C.1998, 139 F.3d 203, 329 U.S.App.D.C. 166, motion to recall mandate denied 156 F.3d 190, 332 U.S.App.D.C. 189.

8. Title of position

Nomination of deputy assistant secretary of Administration for Children and Families (ACF) to replace previous Assistant Secretary was sufficient to bring deputy within exception to 120–day limit in Vacancies Act and permit her to take valid actions in Assistant Secretary's stead, despite fact that deputy's nomination letter designated position she was being nominated to fill as "Assistant Secretary for Family Support"; ACF's previous Assistant Secretary had originally been confirmed as "Assistant Secretary for Family Support" and had held both titles prior to her resignation. Action for Boston Communi-

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Note 8

ty Development, Inc. v. Shalala, D.Mass.1997, 983 F.Supp. 222, affirmed 136 F.3d 29.

§ 3349. Reporting of vacancies

(a) The head of each Executive agency (including the Executive Office of the President, and other than the General Accounting Office) shall submit to the Comptroller General of the United States and to each House of Congress—

(1) notification of a vacancy in an office to which this section and sections 3345, 3346, 3347, 3348, 3349a, 3349b, 3349c, and 3349d apply and the date such vacancy occurred immediately upon the occurrence of the vacancy;

(2) the name of any person serving in an acting capacity and the date such service began immediately upon the designation;

(3) the name of any person nominated to the Senate to fill the vacancy and the date such nomination is submitted immediately upon the submission of the nomination; and

(4) the date of a rejection, withdrawal, or return of any nomination immediately upon such rejection, withdrawal, or return.

(b) If the Comptroller General of the United States makes a determination that an officer is serving longer than the 210–day period including the applicable exceptions to such period under section 3346 or section 3349a, the Comptroller General shall report such determination immediately to—

(1) the Committee on Governmental Affairs of the Senate;

(2) the Committee on Government Reform and Oversight of the House of Representatives;

(3) the Committees on Appropriations of the Senate and House of Representatives;

(4) the appropriate committees of jurisdiction of the Senate and House of Representatives;

(5) the President; and

(6) the Office of Personnel Management.

(Added Pub.L. 105–277, Div. C, Title I, § 151(b), Oct. 21, 1998, 112 Stat. 2681–614.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports.

1998 Acts. Statement by President, see 1998 U.S. Code Cong. and Adm. News, p. 582.

Effective and Applicability Provisions.

1998 Acts. Section to take effect 30 days after Oct. 21, 1998, applicable to any office that becomes vacant after such effective date, with certain exceptions and qualifications relating to immediate applicability of time limitations for offices vacant on such effective date, and the submission to the Senate after such effective date of nominations of persons for offices for which such persons were previously nominated prior to such effective date, see section 151(d) of Pub.L. 105–277, set out as a note under section 3345 of this title.

Prior Provisions.

A prior section 3349, Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 426, which limited the temporary authority to appoint, was repealed by Pub.L. 105–277, Div. C, Title I, § 151(b), Oct. 21, 1998, 112 Stat. 2681–611.

§ 3349a. Presidential inaugural transitions

(a) In this section, the term "transitional inauguration day" means the date on which any person swears or affirms the oath of office as President, if such person is not the President on the date preceding the date of swearing or affirming such oath of office.

(b) With respect to any vacancy that exists during the 60–day period beginning on a transitional inauguration day, the 210–day period under section 3346 or 3348 shall be deemed to begin on the later of the date occurring—

(1) 90 days after such transitional inauguration day; or

(2) 90 days after the date on which the vacancy occurs.

(Added Pub.L. 105–277, Div. C, Title I, § 151(b), Oct. 21, 1998, 112 Stat. 2681–615.)

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HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1998 Acts. Statement by President, see 1998 U.S. Code Cong. and Adm. News, p. 582.

Effective and Applicability Provisions

1998 Acts. Section to take effect 30 days after Oct. 21, 1998, applicable to any office that becomes vacant after such effective date, with certain exceptions and qualifications relating to immediate applicability of time limitations for offices vacant on such effective date, and the submission to the Senate after such effective date of nominations of persons for offices for which such persons were previously nominated prior to such effective date, see section 151(d) of Pub.L. 105–277, set out as a note under section 3345 of this title.

LIBRARY REFERENCES

American Digest System

United States ⇐35.

Encyclopedias

C.J.S. United States §§ 35, 37, 62 to 64.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number]

§ 3349b. Holdover provisions

Sections 3345 through 3349a shall not be construed to affect any statute that authorizes a person to continue to serve in any office—

(1) after the expiration of the term for which such person is appointed; and

(2) until a successor is appointed or a specified period of time has expired.

(Added Pub.L. 105–261, Div. C, Title I, § 151(b), Oct. 21, 1998, 112 Stat. 2681–615.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1998 Acts. Statement by President, see 1998 U.S. Code Cong. and Adm. News, p. 582.

Effective and Applicability Provisions

1998 Acts. Section to take effect 30 days after Oct. 21, 1998, applicable to any office that becomes vacant after such effective date, with certain exceptions and qualifications relating to immediate applicability of time limitations for offices vacant on such effective date, and the submission to the Senate after such effective date of nominations of persons for offices for which such persons were previously nominated prior to such effective date, see section 151(d) of Pub.L. 105–277, set out as a note under section 3345 of this title.

LIBRARY REFERENCES

American Digest System

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Encyclopedias

C.J.S. United States §§ 35, 37, 62 to 64.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number]

§ 3349c. Exclusion of certain officers

Sections 3345 through 3349b shall not apply to—

(1) any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that—

(A) is composed of multiple members; and

(B) governs an independent establishment or Government corporation;

(2) any commissioner of the Federal Energy Regulatory Commission;

(3) any member of the Surface Transportation Board; or

(4) any judge appointed by the President, by and with the advice and consent of the Senate, to a court constituted under article I of the United States Constitution.

(Added Pub.L. 105–277, Div. C, Title I, § 151(b), Oct. 21, 1998, 112 Stat. 2681–615.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1998 Acts. Statement by President, see 1998 U.S. Code Cong. and Adm. News, p. 582.

Effective and Applicability Provisions

1998 Acts. Section to take effect 30 days after Oct. 21, 1998, applicable to any office that becomes vacant after such effective date, with certain exceptions and qualifications relating to

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immediate applicability of time limitations for offices vacant on such effective date, and the submission to the Senate after such effective date of nominations of persons for offices for which such persons were previously nominated prior to such effective date, see section 151(d) of Pub.L. 105–277, set out as a note under section 3345 of this title.

LIBRARY REFERENCES

American Digest System
United States ⇐35.

Encyclopedias
C.J.S. United States §§ 35, 37, 62 to 64.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number]

§ 3349d. Notification of intent to nominate during certain recesses or adjournments

(a) The submission to the Senate, during a recess or adjournment of the Senate in excess of 15 days, of a written notification by the President of the President's intention to submit a nomination after the recess or adjournment shall be considered a nomination for purposes of sections 3345 through 3349c if such notification contains the name of the proposed nominee and the office for which the person is nominated.

(b) If the President does not submit a nomination of the person named under subsection (a) within 2 days after the end of such recess or adjournment, effective after such second day the notification considered a nomination under subsection (a) shall be treated as a withdrawn nomination for purposes of sections 3345 through 3349c.

(Added Pub.L. 105–277, Div. C, Title I, § 151(b), Oct. 21, 1998, 112 Stat. 2681–615.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1998 Acts. Statement by President, see 1998 U.S. Code Cong. and Adm. News, p. 582.

Effective and Applicability Provisions

1998 Acts. Section to take effect 30 days after Oct. 21, 1998, applicable to any office that becomes vacant after such effective date, with certain exceptions and qualifications relating to immediate applicability of time limitations for offices vacant on such effective date, and the submission to the Senate after such effective date of nominations of persons for offices for which such persons were previously nominated prior to such effective date, see section 151(d) of Pub.L. 105–277, set out as a note under section 3345 of this title.

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Encyclopedias
C.J.S. United States §§ 35, 37, 62 to 64.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number]

SUBCHAPTER IV—TRANSFERS

§ 3351. Preference eligibles; transfer; physical qualifications; waiver

CROSS REFERENCES

"Veterans' preference" defined as in this section for purposes of Department of Defense practice, see 10 USCA § 1599c.

§ 3352. Preference in transfers for employees making certain disclosures

CROSS REFERENCES

"Veterans' preference" defined as in this section for purposes of Department of Defense practice, see 10 USCA § 1599c.

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P.L. 105-277

105TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
105–825

MAKING OMNIBUS CONSOLIDATED AND EMERGENCY SUPPLEMENTAL APPROPRIATIONS FOR FISCAL YEAR 1999

CONFERENCE REPORT

TO ACCOMPANY

H.R. 4328



OCTOBER 19, 1998.—Ordered to be printed

REV_00264175

SEC. 148. Section 8135 of the Department of Defense Appropriations Act, 1992 (Public Law 102–172; 105 Stat. 1212; 37 U.S.C. 301b note), is amended—

(1) in subsection (a), by inserting before the period at the end the following: "or as a supplemental payment if the officer's final military pay account is already settled"; and

(2) in subsection (b)—

(A) by inserting "applies" after "subsection (a)";

(B) by striking "January 17, 1991" and inserting "August 2, 1990";

(C) by inserting "(regardless of the date of the commencement of combatant activities in such zone as specified in that Executive Order)" after "as a combat zone"; and

(D) by striking "section 302b" and inserting "section 301b".

SEC. 149. (a) Chapter 12 of title 11 of the United States Code, as in effect on September 30, 1998, is hereby reenacted for the period beginning on October 1, 1998, and ending on April 1, 1999.

(b) All cases commenced or pending under chapter 12 of title 11, United States Code, as reenacted under subsection (a), and all matters and proceedings in or relating to such cases, shall be conducted and determined under such chapter as if such chapter were continued in effect after April 1, 1999. The substantive rights of parties in connection with such cases, matters, and proceedings shall continue to be governed under the laws applicable to such cases, matters, and proceedings as if such chapter were continued in effect after April 1, 1999.

(c) This section shall take effect on October 1, 1998.

SEC. 150. (a) EXTENSION OF AGREEMENT FOR STATE OF MISSISSIPPI.—The Secretary of the Interior shall offer to reinstate the Memorandum of Agreement between the Mississippi Department of Wildlife Conservation and the United States Fish and Wildlife Service concerning the framework closing dates for the 1979–1980 through 1981–1982 duck hunting seasons, executed in November 1979, for the 1998–1999 duck hunting season in the State of Mississippi, except that—

(1) the duck hunting season shall end on January 31, 1999; and

(2) the total number of days for the duck hunting season in the State of Mississippi shall not exceed 51 days.

(b) EXTENSION OF AGREEMENT TO OTHER STATES.—At the request of any other State represented on the Lower-Region Regulations Committee of the Mississippi Flyway Council, the Secretary of the Interior shall extend the agreement described in subsection (a) to that State for the 1998–1999 duck hunting season if the State agrees to reduce the total number of days of the duck hunting season in the State to the extent necessary to result in no net increase in the duck harvest in the State for that season.

Div. C →

SEC. 151. FEDERAL VACANCIES AND APPOINTMENTS.

(a) SHORT TITLE.—This section may be cited as the "Federal Vacancies Reform Act of 1998".

(b) IN GENERAL.—Chapter 33 of title 5, United States Code, is amended by striking sections 3345 through 3349 and inserting the following:

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"§3345. Acting officer

"(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

"(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

"(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

"(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

"(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

"(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS–15 of the General Schedule.

"(b)(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if—

"(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—

"(i) did not serve in the position of first assistant to the office of such officer; or

"(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

"(B) the President submits a nomination of such person to the Senate for appointment to such office.

"(2) Paragraph (1) shall not apply to any person if—

"(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

"(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

"(C) the Senate has approved the appointment of such person to such office.

"(c)(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section

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3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

"(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.

"§3346. Time limitation

"(a) Except in the case of a vacancy caused by sickness, the person serving as an acting officer as described under section 3345 may serve in the office—

"(1) for no longer than 210 days beginning on the date the vacancy occurs; or

"(2) subject to subsection (b), once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate.

"(b)(1) If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may continue to serve as the acting officer for no more than 210 days after the date of such rejection, withdrawal, or return.

"(2) Notwithstanding paragraph (1), if a second nomination for the office is submitted to the Senate after the rejection, withdrawal, or return of the first nomination, the person serving as the acting officer may continue to serve—

"(A) until the second nomination is confirmed; or

"(B) for no more than 210 days after the second nomination is rejected, withdrawn, or returned.

"(c) If a vacancy occurs during an adjournment of the Congress sine die, the 210-day period under subsection (a) shall begin on the date that the Senate first reconvenes.

"§3347. Exclusivity

"(a) Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless—

"(1) a statutory provision expressly—

"(A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

"(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

"(2) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

"(b) Any statutory provision providing general authority to the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) to delegate duties statutorily vested in that agency head to, or to reassign duties

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among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(2) applies.

"§3348. Vacant office

"(a) In this section—

"(1) the term 'action' includes any agency action as defined under section 551(13); and

"(2) the term 'function or duty' means any function or duty of the applicable office that—

"(A)(i) is established by statute; and

"(ii) is required by statute to be performed by the applicable officer (and only that officer); or

"(B)(i)(I) is established by regulation; and

"(II) is required by such regulation to be performed by the applicable officer (and only that officer); and

"(ii) includes a function or duty to which clause (i) (I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.

"(b) Unless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347, if an officer of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

"(1) the office shall remain vacant; and

"(2) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office), only the head of such Executive agency may perform any function or duty of such office.

"(c) If the last day of any 210-day period under section 3346 is a day on which the Senate is not in session, the second day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

"(d)(1) An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect.

"(2) An action that has no force or effect under paragraph (1) may not be ratified.

"(e) This section shall not apply to—

"(1) the General Counsel of the National Labor Relations Board;

"(2) the General Counsel of the Federal Labor Relations Authority;

"(3) any Inspector General appointed by the President, by and with the advice and consent of the Senate;

"(4) any Chief Financial Officer appointed by the President, by and with the advice and consent of the Senate; or

"(5) an office of an Executive agency (including the Executive Office of the President, and other than the General Ac-

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counting Office) if a statutory provision expressly prohibits the head of the Executive agency from performing the functions and duties of such office.

"§3349. Reporting of vacancies

"(a) The head of each Executive agency (including the Executive Office of the President, and other than the General Accounting Office) shall submit to the Comptroller General of the United States and to each House of Congress—

"(1) notification of a vacancy in an office to which this section and sections 3345, 3346, 3347, 3348, 3349a, 3349b, 3349c, and 3349d apply and the date such vacancy occurred immediately upon the occurrence of the vacancy;

"(2) the name of any person serving in an acting capacity and the date such service began immediately upon the designation;

"(3) the name of any person nominated to the Senate to fill the vacancy and the date such nomination is submitted immediately upon the submission of the nomination; and

"(4) the date of a rejection, withdrawal, or return of any nomination immediately upon such rejection, withdrawal, or return.

"(b) If the Comptroller General of the United States makes a determination that an officer is serving longer than the 210-day period including the applicable exceptions to such period under section 3346 or section 3349a, the Comptroller General shall report such determination immediately to—

"(1) the Committee on Governmental Affairs of the Senate;

"(2) the Committee on Government Reform and Oversight of the House of Representatives;

"(3) the Committees on Appropriations of the Senate and House of Representatives;

"(4) the appropriate committees of jurisdiction of the Senate and House of Representatives;

"(5) the President; and

"(6) the Office of Personnel Management.

"§3349a. Presidential inaugural transitions

"(a) In this section, the term 'transitional inauguration day' means the date on which any person swears or affirms the oath of office as President, if such person is not the President on the date preceding the date of swearing or affirming such oath of office.

"(b) With respect to any vacancy that exists during the 60-day period beginning on a transitional inauguration day, the 210-day period under section 3346 or 3348 shall be deemed to begin on the later of the date occurring—

"(1) 90 days after such transitional inauguration day; or

"(2) 90 days after the date on which the vacancy occurs.

"§3349b. Holdover provisions

"Sections 3345 through 3349a shall not be construed to affect any statute that authorizes a person to continue to serve in any office—

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"(1) after the expiration of the term for which such person is appointed; and

"(2) until a successor is appointed or a specified period of time has expired.

"§3349c. Exclusion of certain officers

"Sections 3345 through 3349b shall not apply to—

"(1) any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that—

"(A) is composed of multiple members; and

"(B) governs an independent establishment or Government corporation;

"(2) any commissioner of the Federal Energy Regulatory Commission;

"(3) any member of the Surface Transportation Board; or

"(4) any judge appointed by the President, by and with the advice and consent of the Senate, to a court constituted under article I of the United States Constitution.

"§3349d. Notification of intent to nominate during certain recesses or adjournments

"(a) The submission to the Senate, during a recess or adjournment of the Senate in excess of 15 days, of a written notification by the President of the President's intention to submit a nomination after the recess or adjournment shall be considered a nomination for purposes of sections 3345 through 3349c if such notification contains the name of the proposed nominee and the office for which the person is nominated.

"(b) If the President does not submit a nomination of the person named under subsection (a) within 2 days after the end of such recess or adjournment, effective after such second day the notification considered a nomination under subsection (a) shall be treated as a withdrawn nomination for purposes of sections 3345 through 3349c.".

(c) TECHNICAL AND CONFORMING AMENDMENT.—

(1) TABLE OF SECTIONS.—The table of sections for chapter 33 of title 5, United States Code, is amended by striking the matter relating to subchapter III and inserting the following:

"SUBCHAPTER III—DETAILS, VACANCIES, AND APPOINTMENTS

"3341. Details; within Executive or military departments.
"[3342. Repealed.]
"3343. Details; to international organizations.
"3344. Details; administrative law judges.
"3345. Acting officer.
"3346. Time limitation.
"3347. Exclusivity.
"3348. Vacant office.
"3349. Reporting of vacancies.
"3349a. Presidential inaugural transitions.
"3349b. Holdover provisions relating to certain independent establishments.
"3349c. Exclusion of certain officers.
"3349d. Notification of intent to nominate during certain recesses or adjournments.".

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(2) SUBCHAPTER HEADING.—The subchapter heading for subchapter III of chapter 33 of title 5, United States Code, is amended to read as follows:

"SUBCHAPTER III—DETAILS, VACANCIES, AND APPOINTMENTS".

(d) EFFECTIVE DATE AND APPLICATION.—

(1) EFFECTIVE DATE.—Subject to paragraph (2), this section and the amendments made by this section shall take effect 30 days after the date of enactment of this section.

(2) APPLICATION.—

(A) IN GENERAL.—This section shall apply to any office that becomes vacant after the effective date of this section.

(B) IMMEDIATE APPLICATION OF TIME LIMITATION.—Notwithstanding subparagraph (A), for any office vacant on the effective date of this section, the time limitations under section 3346 of title 5, United States Code (as amended by this section) shall apply to such office. Such time limitations shall apply as though such office first became vacant on the effective date of this section.

(C) CERTAIN NOMINATIONS.—If the President submits to the Senate the nomination of any person after the effective date of this section for an office for which such person had been nominated before such date, the next nomination of such person after such date shall be considered a first nomination of such person to that office for purposes of sections 3345 through 3349 and section 3349d of title 5, United States Code (as amended by this section).

TITLE II—FISHERIES

Subtitle I—Fishery Endorsements

SEC. 201. SHORT TITLE.

This title may be cited as the "American Fisheries Act".

SEC. 202. STANDARD FOR FISHERY ENDORSEMENTS.

(a) STANDARD.—Section 12102(c) of title 46, United States Code, is amended to read as follows—

"(c)(1) A vessel owned by a corporation, partnership, association, trust, joint venture, limited liability company, limited liability partnership, or any other entity is not eligible for a fishery endorsement under section 12108 of this title unless at least 75 per centum of the interest in such entity, at each tier of ownership of such entity and in the aggregate, is owned and controlled by citizens of the United States.

"(2) The Secretary shall apply section 2(c) of the Shipping Act, 1916 (46 App. U.S.C. 802(c)) in determining under this subsection whether at least 75 per centum of the interest in a corporation, partnership, association, trust, joint venture, limited liability company, limited liability partnership, or any other entity is owned and controlled by citizens of the United States. For the purposes of this subsection and of applying the restrictions on controlling interest in section 2(c) of such Act, the terms 'control' or 'controlled'—

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Calendar No. 469

105TH CONGRESS
2D SESSION

S. 2176

[Report No. 105–250]

To amend sections 3345 through 3349 of title 5, United States Code (commonly referred to as the "Vacancies Act") to clarify statutory requirements relating to vacancies in and appointments to certain Federal offices, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 16, 1998

Mr. THOMPSON (for himself, Mr. BYRD, Mr. THURMOND, Mr. LOTT, Mr. ROTH, Mr. COCHRAN, and Mr. HATCH) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

JULY 15, 1998

Reported by Mr. THOMPSON, with amendments

[Omit the part struck through and insert the part printed in italic]

A BILL

To amend sections 3345 through 3349 of title 5, United States Code (commonly referred to as the "Vacancies Act") to clarify statutory requirements relating to vacancies in and appointments to certain Federal offices, and for other purposes.

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"(ii) is the performance of a function or duty of such vacant office.

"(2) An action that has no force or effect under paragraph (1) may not be ratified.

"(d) This section shall not apply to—

"(1) the General Counsel of the National Labor Relations Board;

"(2) the General Counsel of the Federal Labor Relations Authority; or

"(3) any Inspector General appointed by the President, by and with the advice and consent of the Senate.

"§ 3349. Reporting of vacancies

"(a) The head of each Executive agency (including the Executive Office of the President, and other than the General Accounting Office) shall submit to the Comptroller General of the United States and to each House of Congress—

"(1) notification of a vacancy and the date such vacancy occurred immediately upon the occurrence of the vacancy;

"(2) the name of any person serving in an acting capacity and the date such service began immediately upon the designation;

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"(3) the name of any person nominated to the Senate to fill the vacancy and the date such nomination is submitted immediately upon the submission of the nomination; and

"(4) the date of a rejection, withdrawal, or return of any nomination immediately upon such rejection, withdrawal, or return.

"(b) If the Comptroller General of the United States makes a determination that an officer is serving longer than the 150-day period including the applicable exceptions to such period under section 3346, the Comptroller General shall report such determination to—

"(1) the Committee on Governmental Affairs of the Senate;

"(2) the Committee on Government Reform and Oversight of the House of Representatives;

"(3) the Committees on Appropriations of the Senate and House of Representatives;

"(4) the appropriate committees of jurisdiction of the Senate and House of Representatives;

"(5) the President; and

"(6) the Office of Personnel Management.

"§ 3349a. Presidential inaugural transitions

"(a) In this section, the term 'transitional inauguration day' means the date on which any person swears or

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affirms the oath of office as President, if such person is not the President on the date preceding the date of swearing or affirming such oath of office.

~~"(b) With respect to any vacancy that exists during the 60-day period beginning on a transitional inauguration day, the 150-day period under section 3346 or 3348 shall be deemed to—~~

~~"(1) begin on the later of—~~

~~"(A) the date following such transitional inauguration day; or~~

~~"(B) the date the vacancy occurs; and~~

~~"(2) be a period of 180 days.~~

"(b) With respect to any vacancy that exists during the 60-day period beginning on a transitional inauguration day, the 150-day period under section 3346 or 3348 shall be deemed to begin on the later of the date occurring—

"(1) 90 days after such transitional inauguration day; or

"(2) 90 days after the date on which the vacancy occurs.

"§ 3349b. Holdover provisions relating to certain independent establishments

"With respect to any independent establishment for which a single officer is the head of the establishment, sections 3345 through 3349a shall not be construed to af-

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fect any statute that authorizes a person to continue to serve in any office—

"(1) after the expiration of the term for which such person is appointed; and

"(2) until a successor is appointed or a specified period of time has expired.

"§ 3349c. Exclusion of certain officers

"Sections 3345 through 3349b shall not apply to—

"(1) any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that—

"(A) is composed of multiple members; and

"(B) governs an independent establishment or Government corporation; or

"(2) any commissioner of the Federal Energy Regulatory Commission.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—

(1) TABLE OF SECTIONS.—The table of sections for chapter 33 of title 5, United States Code, is amended by striking the matter relating to subchapter III and inserting the following:

"SUBCHAPTER III—DETAILS, VACANCIES, AND APPOINTMENTS

"3341. Details; within Executive or military departments.
"[3342. Repealed.]
"3343. Details; to international organizations.
"3344. Details; administrative law judges.
"3345. Acting officer.
"3346. Time limitation.

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"3347. Application.
"3348. Vacant office.
"3349. Reporting of vacancies.
"3349a. Presidential inaugural transitions.
"3349b. Holdover provisions relating to certain independent establishments.
"3349c. Exclusion of certain officers.".

(2) SUBCHAPTER HEADING.—The subchapter heading for subchapter III of chapter 33 of title 5, United States Code, is amended to read as follows:

"SUBCHAPTER III—DETAILS, VACANCIES, AND APPOINTMENTS".

SEC. 3. EFFECTIVE DATE AND APPLICATION.

(a) EFFECTIVE DATE.—This Act and the amendments made by this Act shall take effect on the date of enactment of this Act.

(b) APPLICATION.—This Act shall apply to any office that—

(1) becomes vacant after the date of enactment of this Act; or

(2) is vacant on such date, except sections 3345 through 3349 of title 5, United States Code (as amended by this Act), shall apply as though such office first became vacant on such date.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Vacancies Reform Act of 1998".

SEC. 2. FEDERAL VACANCIES AND APPOINTMENTS.

(a) IN GENERAL.—Chapter 33 of title 5, United States Code, is amended by striking sections 3345 through 3349 and inserting the following:

"§ 3345. Acting officer

"(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

"(1) the first assistant of such officer shall perform the functions and duties of the office temporarily in an acting capacity, subject to the time limitations of section 3346; or

"(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the

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advice and consent of the Senate, to perform the functions and duties of the office temporarily in an acting capacity, subject to the time limitations of section 3346.

"(b) Notwithstanding section 3346(a)(2), a person may not serve as an acting officer for an office under this section, if—

"(1) on the date of the death, resignation, or beginning of inability to serve of the applicable officer, such person serves in the position of first assistant to such officer;

"(2) during the 365-day period preceding such date, such person served in the position of first assistant to such officer for less than 180 days; and

"(3) the President submits a nomination of such person to the Senate for appointment to such office.

"(c) With respect to the office of the Attorney General of the United States, the provisions of section 508 of title 28 shall be applicable.

"§ 3346. Time limitation

"(a) The person serving as an acting officer as described under section 3345 may serve in the office—

"(1) for no longer than 150 days beginning on the date the vacancy occurs; or

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"(2) subject to subsection (b), once a first or second nomination for the office is submitted to the Senate, *from the date of such nomination* for the period that the nomination is pending in the Senate.

"(b)(1) If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may continue to serve as the acting officer for no more than 150 days after the date of such rejection, withdrawal, or return.

"(2) ~~If~~ *Notwithstanding paragraph (1), if* a second nomination for the office (of a different person than first nominated in the case of a rejection or withdrawal) is submitted to the Senate ~~during the 150-day period~~ after the rejection, withdrawal, or return of the first nomination, the person serving as the acting officer may continue to serve—

"(A) until the second nomination is confirmed; or

"(B) for no more than 150 days after the second nomination is rejected, withdrawn, or returned.

"(c) If a person begins serving as an acting officer during an adjournment of the Congress sine die, the 150-day period under subsection (a) shall begin on the date that the Senate first reconvenes.

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"§ 3347. Application

"(a) Sections 3345 and 3346 are applicable to any office of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless—

"(1) another statutory provision expressly provides that such provision supersedes sections 3345 and 3346;

~~"(2) a statutory provision in effect on the date of enactment of the Federal Vacancies Reform Act of 1998 expressly authorizes the President, or the head of an Executive department, to designate an officer to perform the functions and duties of a specified office temporarily in an acting capacity; or~~

"(2) a statutory provision in effect on the date of enactment of the Federal Vacancies Reform Act of 1998 expressly—

"(A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

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"(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

"(3) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

"(b) Any statutory provision providing general authority to the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) to delegate duties to, or to reassign duties among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(2) applies.

"§ 3348. Vacant office

"(a) In this section—

"(1) the term 'action' includes any agency action as defined under section 551(13); and

"(2) the term 'function or duty' means any function or duty of the applicable office that—

"(A)(i) is established by statute; and

"(ii) is required by statute to be performed by the applicable officer (and only that officer); or

"(B)(i)(I) is established by regulation; and

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"(II) is required by such regulation to be performed by the applicable officer (and only that officer); and

"(ii) includes a function or duty to which clause (i) (I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs, notwithstanding any regulation that—

"(I) is issued on or after the date occurring 180 days before the date on which the vacancy occurs; and

"(II) limits any function or duty required to be performed by the applicable officer (and only that officer).

"(b) Subject to section 3347 and subsection (c)—

"(1) if the President does not submit a first nomination to the Senate to fill a vacant office within 150 days after the date on which a vacancy occurs—

"(A) the office shall remain vacant until the President submits a first nomination to the Senate; and

"(B) in the case of an office other than the office of the head of an Executive agency (in-

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cluding the Executive Office of the President, and other than the General Accounting Office), only the head of such Executive agency may perform any function or duty of such office, until a nomination is made in accordance with subparagraph (A);

"(2) if the President does not submit a second nomination to the Senate within 150 days after the date of the rejection, withdrawal, or return of the first nomination—

"(A) the office shall remain vacant until the President submits a second nomination to the Senate; and

"(B) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office), only the head of such Executive agency may perform any function or duty of such office, until a nomination is made in accordance with subparagraph (A); and

"(3) if an office is vacant after 150 days after the rejection, withdrawal, or return of the second nomination—

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"(A) the office shall remain vacant until a person is appointed by the President, by and with the advice and consent of the Senate; and

"(B) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office), only the head of such Executive agency may perform any function or duty of such office, until an appointment is made in accordance with subparagraph (A).

"(c) If the last day of any 150-day period under subsection (b) is a day on which the Senate is not in session, the first day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

"(d)(1) Except as provided under paragraphs (1)(B), (2)(B), and (3)(B) of subsection (b), an action shall have no force or effect if such action—

"(A)(i) is taken by any person who fills a vacancy in violation of subsection (b); and

"(ii) is the performance of a function or duty of such vacant office; or

"(B)(i) is taken by a person who is not filling a vacant office; and

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Calendar No. 469

105TH CONGRESS
2D SESSION

S. 2176

[Report No. 105–250]

A BILL

To amend sections 3345 through 3349 of title 5, United States Code (commonly referred to as the "Vacancies Act") to clarify statutory requirements relating to vacancies in and appointments to certain Federal offices, and for other purposes.

JULY 15, 1998

Reported with amendments

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Service: **LEXSTAT®**
Citation: **28 USC 510**

28 USCS § 510

UNITED STATES CODE SERVICE
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*** CURRENT THROUGH P.L. 106-418, APPROVED 11/1/00 ***
*** WITH GAPS OF 106-398, 402, 405, 408, 411, 414, 415, 417 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART II. DEPARTMENT OF JUSTICE
CHAPTER 31. THE ATTORNEY GENERAL

28 USCS § 510 (2000)

§ 510. Delegation of authority

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

HISTORY:
(Sept. 6, 1966, P.L. 89-554, § 4(c), 80 Stat. 612.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	[Uncodified].	1950 Reorg. Plan No. 2, S 2, eff. May 24, 1950, 64 Stat. 1261.

The words "including any function transferred to the Attorney General by the provisions of this reorganization plan" are omitted as executed and unnecessary as the words "any function of the Attorney General" include the functions transferred to the Attorney General by 1950 Reorg. Plan. No. 2.

Explanatory notes:
A prior § 510 (Act June 25, 1948, ch 646, § 1, 62 Stat. 910) was repealed by Act Sept. 6, 1966, P.L. 89-554, § 8(a), 80 Stat. 663. It provided for clerical assistants and messengers for United States attorneys. Similar provisions are contained in 28 USCS § 550.

NOTES:

CODE OF FEDERAL REGULATIONS

Judicial Administration in the Department of Justice, 28 CFR Parts 1-5, 12, 14-17, 25, 47, 55, 58, 60.

Department of Justice, Bureau of Prisons, 28 CFR Parts 500 et seq.

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Federal Acquisition Regulations System, Department of Justice, 48 CFR Parts 2801 et seq.

Add:
8 CFR Part 3
21 CFR Part 1316
28 CFR Part 5
28 CFR Parts 11, 14, 71, 73, 600-602
28 CFR Part 26
28 CFR Parts 35, 36
28 CFR Parts 37, 77
28 CFR Part 81
28 CFR Parts 0, 46, 76
48 CFR Part 2845

This section is no longer cited as authority for:
28 CFR Part 25
28 CFR Part 546

RESEARCH GUIDE

Federal Procedure:
Witnesses, Fed Proc, L Ed § 80:160.
9A Fed Proc L Ed, Criminal Procedure § 22:2265.
33A Fed Proc L Ed, Witnesses § 80:304.

Am Jur:
7 Am Jur 2d, Attorney General § 49.

INTERPRETIVE NOTES AND DECISIONS

1. Generally
2. Wiretapping
3. Immunity of witnesses
4. Delegation of authority to appoint special attorneys
5. Delegation to special prosecutor
6. Miscellaneous

1. Generally

Acting Associate Attorney General had authority to sign certification for prosecution since acting official possesses all powers that official would normally possess. United States v McGee (1999, CA6 Tenn) 173 F3d 952, 1999 FED App 121P.

Attorney General possessed statutory authority to create Office of Independent Counsel: Iran/Contra and to convey to it same investigative and prosecutorial functions and powers provided to an independent counsel by the Ethics Act. Re Sealed Case (1987, App DC) 829 F2d 50, cert den (US) 98 L Ed 2d 765, 108 S Ct 753.

Attorney General is vested with functions of all agencies, employees and officers of Department, and may delegate to any employee, officer or agency of Department any of Attorney General's functions. United States v Weiner (1975, ND Ill) 392 F Supp 81.

Attorney General has authority to seek assistance from independent counsel in function of his official duties, as decided in Nixon v. United States, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), under 28 USCS §§ 509, 510 and 515, and 5 USCS § 301. Re Sealed Case (1987, DC Dist Col) 666 F Supp 231.

2. Wiretapping

Provision of Title III of Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS § 2516(1)) conferring power on "Attorney General, or any Assistant Attorney General specially designated by Attorney General" to authorize application to federal judge for wiretap order, limits power to authorize wiretap applications to Attorney General himself and to any

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Assistant Attorney General he might designate, and thus Attorney General's Executive Assistant may not be designated to authorize wiretap applications, notwithstanding provisions of 28 USCS § 510 authorizing Attorney General to delegate his functions to any other officer, employee, or agency of Department of Justice. United States v Giordano (1974) 416 US 505, 40 L Ed 2d 341, 94 S Ct 1820.

Under 28 USCS § 510, Attorney General is free to delegate such departmental functions as he sees fit; consequently, regulation amending certain procedures so that advance authorization for consensual monitoring of conversations during criminal investigations could be obtained from any Deputy Assistant Attorney General, as well as designated Assistant Attorneys General and Attorney General, was within power of Attorney General to promulgate. United States v Caceres (1976, CA9 Cal) 545 F2d 1182, 77-1 USTC P 9226, 38 AFTR 2d 76-6215, revd 440 US 741, 59 L Ed 2d 733, 99 S Ct 1465, 79-1 USTC P 9294, 43 AFTR 2d 79-872.

In wiretap matters, 28 USCS § 510 has been superseded by 18 USCS § 2516. United States v Robinson (1973, SD Fla) 359 F Supp 52.

The application for a wire tap must be made by the attorney general or the specially designated assistant attorney general; if made by anyone else the evidence obtained by such wire tap must be suppressed; the general authorization to the attorney general to delegate powers is, in respect to wire taps, limited by the specific statute. United States v Baldassari (1972, MD Pa) 338 F Supp 904; United States v Aquino (1972, ED Mich) 338 F Supp 1080.

3. Immunity of witnesses

Provisions of 28 USCS § 510, allowing Attorney General to delegate his authority in certain cases, are applicable to Attorney General's power to approve applications for immunity from prosecution. Re Horn (1972, CA3 Pa) 458 F2d 468.

Argument that delegation of authority to Assistant Attorney General to grant immunity made by former, rather than present, Attorney General invalidates statutory grant of immunity is untenable, since power to delegate authority provided in 28 USCS § 510 is made to office of Attorney General and not to individual holding that office. December 1968 Grand Jury v United States (1970, CA7 Ill) 420 F2d 1201, cert den 397 US 1021, 25 L Ed 2d 531, 90 S Ct 1260.

4. Delegation of authority to appoint special attorneys

Nothing in 28 USCS § 515(a) or its legislative history evidences congressional intent to limit delegation of authority of Attorney General under 28 USCS § 510; Attorney General can delegate to subordinate officers his authority under § 515(a) to appoint special attorney, and where by regulation supervision of Criminal Division of Department of Justice had been delegated to Assistant Attorney in charge of that division, and such delegation included power to designate attorneys to present evidence to grand juries, delegation was proper and included power to appoint special attorneys. United States v Agrusa (1975, CA8 Mo) 520 F2d 370.

Power to appoint special attorneys under 28 USCS § 515(a) may be delegated by Attorney General to another officer of Department of Justice. DiGirlomo v United States (1975, CA8 Mo) 520 F2d 372, cert den 423 US 1033, 46 L Ed 2d 407, 96 S Ct 565.

28 USCS § 510 permits Attorney General to delegate to any other Department of Justice official any function of Attorney General which includes power to appoint special attorneys under 28 USCS § 515(a), and by regulation (CFR §§ 0.55, 0.60), Attorney General delegated to Assistant Attorney General in charge of Criminal Division, power to designate attorneys to present evidence to grand juries in all cases under his control. United States v Cravero (1976, CA5 Fla) 545 F2d 406, 2 Fed Rules Evid Serv 223, cert den 429 US 1100, 51 L Ed 2d 549, 97 S Ct 1123 and cert den 430 US 983, 52 L Ed 2d 377, 97 S Ct 1679, reh den 431 US 960, 53 L Ed 2d 279, 97 S Ct 2689 and reh den 433 US 915, 53 L Ed 2d 1102, 97 S Ct 2990.

28 USCS § 510 authorizes delegation of Attorney General's appointment powers under 28 USCS § 543; Congress expressly gave AG permission to delegate any of his functions and there is no indication Congress meant to exclude § 543 appointment power from this

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otherwise unqualified statutory authorization of delegation. United States v Plesinski (1990, CA9 Cal) 912 F2d 1033.

Since prosecutions for federal crimes not otherwise specifically assigned to another officer of Department of Justice, and coordination of enforcement activities directed against organized crime and racketeering have been delegated by Attorney General to Assistant Attorney General in charge of criminal division, such Assistant Attorney General is authorized and empowered under 28 USCS § 510 to commission special attorney to conduct grand jury proceedings. United States v Brodson (1975, ED Wis) 390 F Supp 774.

Defendants' motions to dismiss indictments on ground that Special Attorneys who presented matters to grand jury were acting without statutory authority were denied, since under 28 USCS § 515(a), Attorney General may designate Special Attorney to appear before grand jury on ongoing basis, since by reason of 28 USCS § 510, Attorney General's powers under § 515(a) are delegable, and since Attorney General had properly delegated his power to appoint Special Attorneys to appear before grand jury to Assistant Attorney General, who properly exercised it. United States v Badalamenti (1975, DC NJ) 394 F Supp 807.

Attorney General of United States has, and had on May 20, 1971, authority to delegate his 28 USCS § 515(a) power to appoint special attorneys, this authorization deriving from 28 USCS § 510; § 515(a) does not, as do other statutes, contain express or implied prohibition which would preclude attorney general from delegating power to appoint special attorneys, and hence it cannot be considered to supersede general and permissive delegation language in § 510. Re Patriarca (1975, DC RI) 396 F Supp 859.

In view of power of Attorney General to delegate authority, Acting Assistant Attorney General had authority to appoint special attorney. United States v Poe (1975, WD Okla) 398 F Supp 487.

5. Delegation to special prosecutor

As long as it remains in force, regulation issued by Attorney General which (1) delegates Attorney General's authority to represent United States in criminal proceeding to Special Prosecutor, (2) gives special prosecutor explicit power to contest invocation of executive privilege in process of seeking evidence deemed relevant to performance of specially delegated duties and (3) provides that Special Prosecutor is not to be removed without consensus of eight designated leaders of Congress, has force of law; executive branch is bound by it, and United States is bound to respect and enforce it. United States v Nixon (1974) 418 US 683, 41 L Ed 2d 1039, 94 S Ct 3090 (not followed United States v Wiley (CA2 NY) 519 F2d 1348, cert den 423 US 1058, 46 L Ed 2d 648, 96 S Ct 793) as stated in United States v Mangan (CA2 NY) 575 F2d 32, 78-1 USTC P 9349, 3 Fed Rules Evid Serv 315, 41 AFTR 2d 78-1174, cert den 439 US 931, 58 L Ed 2d 324, 99 S Ct 320 and (not followed Kerttula v Abood (Alaska) 686 P2d 1197) and (superseded by statute on other grounds as stated in Bourjaily v United States (US) 97 L Ed 2d 144, 107 S Ct 2775, 22 Fed Rules Evid Serv 1105).

Since Attorney General derived his authority to hire Watergate Special Prosecutor from Congress, Congress therefore had power to limit circumstances in which Special Prosecutor could be discharged; in this case Attorney General chose to limit his own authority by promulgating formal Department of Justice regulation giving Special Prosecutor broad powers of investigation and prosecution, and providing that Special Prosecutor would not be removed from his duties except for extraordinary improprieties, and it is well settled that in such circumstances agency regulation has force and effect of law; existence of agency regulation thus made the discharge of Special Prosecutor for insisting upon executive compliance with final court order illegal. Nader v Bork (1973, DC Dist Col) 366 F Supp 104.

6. Miscellaneous

Attorney General could and validly did delegate his power to assign government attorneys to grand jury to Assistant Attorney General in charge of Criminal Division of Department of Justice. Re Persico (1975, CA2 NY) 522 F2d 41.

Since statute relating to certification of juveniles for federal proceedings (18 USCS § 5032) says nothing about delegation of Attorney General's authority, 28 USCS § 510 is

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presumptively applicable, and order of Attorney General authorizing Assistant Attorney General to redelegate authority to United States attorneys regarding certification of juveniles is within scope of 28 USCS § 510. United States v Cuomo (1976, CA5 Tex) 525 F2d 1285.

Attorney General has authority pursuant to 28 USCS § 510 to delegate his power to schedule certain drugs as controlled substances to acting administrator of Drug Enforcement Administration. United States v Goodman (1979, CA5 Tex) 605 F2d 870, 5 Fed Rules Evid Serv 96.

In juvenile delinquency proceeding involving Columbian juvenile, District Court sitting in Florida and Court of Appeals of Eleventh Circuit are bound by former Fifth Circuit's determination that United States Attorney General has delegated his authority under 18 USCS § 5032 to United States Attorney of District in which juvenile offense occurs and that under 28 USCS § 510 such delegation is valid. United States v Bent (1983, CA11 Fla) 702 F2d 210.

Appellant's contention that writ of habeas corpus ad testificandum should be quashed because application for writ by Assistant U.S. Attorney rather than Attorney General violates terms of applicable law is without merit, since 28 USCS § 510 is presumed to control delegation by Attorney General in absence of statutory provision which explicitly supersedes it. Re Application of President's Com. on Organized Crime (1985, CA11 Fla) 763 F2d 1191 (disagreed with Re President's Com. on Organized Crime etc. (CA3 NJ) 783 F2d 370 (not followed Re Shafer & Miller Industries, Inc. (SD Fla) 66 BR 578)).

Attorney General had authority under general delegation provision to delegate to DEA Administrator his authority to temporarily schedule drugs under 21 USCS § 811. United States v Touby (1990, CA3 NJ) 909 F2d 759 (disagreed with by United States v Widdowson (CA10) 1990 US App LEXIS 18070).

@(P)Justice Department regulations delegating AG's authority to compromise claims do not create right of action for relators to challenge validity of settlement agreements since they do not create enforceable rights and only regulations having force and effect of law can create private right of action. United States ex rel. Papazian v American Prod. Indus. (1995, CA9 Cal) 58 F3d 404, 95 CDOS 4308, 95 Daily Journal DAR 7391, 40 CCF P 76790.

Attorney General may delegate her power to Assistant Attorney General who in turn may delegate his power to United States Attorneys who may delegate their power to Assistant United States Attorneys, and regulations delegating to Assistant Attorney General in charge of Criminal Division and his Deputy Assistant Attorneys General authority to sign government's need certification to transfer criminal case against juvenile to adult status was consistent with that chain of delegation. United States v Angelo D. (1996, CA10 NM) 88 F3d 856.

Attorney general was authorized to delegate authority vested in him by 18 USCS § 6004 to approve issuance by agency of United States of order compelling testimony or production of information by witness in proceeding before agency. Federal Trade Com. v Foucha (1973, ND Ala) 356 F Supp 21.

15 USCS § 77t(b) is designed to affect power of Securities Exchange Commission and not designed to limit normal power of delegation entrusted to Attorney General. United States v Tallant (1975, ND Ga) 407 F Supp 878.

Attorney General duly delegated to Director, United States Marshals Service, authority vested in Attorney General to take final action in matters pertaining to employment, direction and general administration of personnel of Marshals Service. Craig v Colburn (1976, DC Kan) 414 F Supp 185, affd (CA10 Kan) 570 F2d 916.

Defendant's drug conviction is vacated where he was convicted of manufacture and distribution of drug which had been temporarily scheduled on controlled substances list pursuant to 21 USCS § 811(h) by DEA under general delegation of authority by Attorney General, because although subdelegation of Attorney General's power under § 811(h) is proper, express subdelegation of particular power temporarily to schedule drugs is necessary in view of drastic impact on those accused of violating schedule prohibitions. United States v Hovey (1987, DC Del) 674 F Supp 161.

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28 CFR 0.85

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TITLE 28 -- JUDICIAL ADMINISTRATION
CHAPTER I -- DEPARTMENT OF JUSTICE
PART 0 -- ORGANIZATION OF THE DEPARTMENT OF JUSTICE
SUBPART P -- FEDERAL BUREAU OF INVESTIGATION

28 CFR 0.85

§ 0.85 General functions.

The **Director of the Federal** Bureau of Investigation shall:

(a) Investigate violations of the laws, including the criminal drug laws, of the United States and collect evidence in cases in which the United States is or may be a party in interest, except in cases in which such responsibility is by statute or otherwise specifically assigned to another investigative agency. The Director's authority to investigate violations of and collect evidence in cases involving the criminal drug laws of the United States is concurrent with such authority of the Administrator of the Drug Enforcement Administration under § 0.100 of this part. In investigating violations of such laws and in collecting evidence in such cases, the Director may exercise so much of the authority vested in the Attorney General by sections 1 and 2 of Reorganization Plan No. 1 of 1968, section 1 of Reorganization Plan No. 2 of 1973 and the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended, as he determines is necessary. He may also release FBI information on the same terms and for the same purposes that the Administrator of the Drug Enforcement Administration may disclose DEA information under § 0.103 of this part. The Director and his authorized delegates may seize, forfeit and remit or mitigate the forfeiture of property in accordance with 21 U.S.C. 881, 21 CFR 1316.71 through 1316.81, and 28 CFR 9.1 through 9.7.

(b) Conduct the acquisition, collection, exchange, classification and preservation of fingerprints and identification records from criminal justice and other governmental agencies, including fingerprints voluntarily submitted by individuals for personal identification purposes; provide expert testimony in Federal, State and local courts as to fingerprint examinations; and provide fingerprint training and provide identification assistance in disasters and for other humanitarian purposes.

(c) Conduct personnel investigations requisite to the work of the Department of Justice and whenever required by statute or otherwise.

(d) Carry out the Presidential directive of September 6, 1939, as reaffirmed by Presidential directives of January 8, 1943, July 24, 1950, and December 15, 1953, designating the Federal Bureau of Investigation to take charge of investigative work in matters relating to espionage, sabotage, subversive activities, and related matters.

(e) Establish and conduct law enforcement training programs to provide training for State and local law enforcement personnel; operate the Federal Bureau of Investigation National

Academy; develop new approaches, techniques, systems, equipment, and devices to improve and strengthen law enforcement and assist in conducting State and local training programs, pursuant to section 404 of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 204.

(f) Operate a central clearinghouse for police statistics under the Uniform Crime Reporting Program, and a computerized nationwide index of law enforcement information under the National Crime Information Center.

(g) Operate the Federal Bureau of Investigation Laboratory to serve not only the Federal Bureau of Investigation, but also to provide, without cost, technical and scientific assistance, including expert testimony in Federal or local courts, for all duly constituted law enforcement agencies, other organizational units of the Department of Justice, and other Federal agencies, which may desire to avail themselves of the service. As provided for in procedures agreed upon between the Secretary of State and the Attorney General, the services of the Federal Bureau of Investigation Laboratory may also be made available to foreign law enforcement agencies and courts.

(h) Make recommendations to the Office of Personnel Management in connection with applications for retirement under 5 U.S.C. 8336(c).

(i) Investigate alleged fraudulent conduct in connection with operations of the Department of Housing and Urban Development and other alleged violations of the criminal provisions of the National Housing Act, including 18 U.S.C. 1010.

(j) Exercise the power and authority vested in the Attorney General to approve and conduct the exchanges of identification records enumerated at § 50.12(a) of this chapter.

(k) Payment of awards (including those over $ 10,000) under 28 U.S.C. 524(c)(2), and purchase of evidence (including the authority to pay more than $ 100,000) under 28 U.S.C. 524(c)(1)(F).

(l) Exercise Lead Agency responsibility in investigating all crimes for which it has primary or concurrent jurisdiction and which involve terrorist activities or acts in preparation of terrorist activities within the statutory jurisdiction of the United States. Within the United States, this would include the collection, coordination, analysis, management and dissemination of intelligence and criminal information as appropriate. If another Federal agency identifies an individual who is engaged in terrorist activities or in acts in preparation of terrorist activities, that agency is requested to promptly notify the FBI. Terrorism includes the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.

(m) Carry out the Department's responsibilities under the Hate Crime Statistics Act.

(n) Exercise the authority vested in the Attorney General under section 528(a), Public Law 101-509, to accept from federal departments and agencies the services of law enforcement personnel to assist the Department of Justice in the investigation and prosecution of fraud or other criminal or unlawful activity in or against any federally insured financial institution or the Resolution Trust Corporation, and to coordinate the activities of such law enforcement personnel in the conduct of such investigations and prosecutions.

(o) Carry out the responsibilities conferred upon the Attorney General under the Communications Assistance for Law Enforcement Act, Title I of Pub. L. 103-414 (108 Stat. 4279), subject to the general supervision and direction of the Attorney General.

HISTORY:

REV_00264205

[Order No. 423-69, 34 FR 20388, Dec. 31, 1969, as amended by Order No. 884-80, 45 FR 22023, Apr. 3, 1980; Order No. 960-81, 46 FR 52347, Oct. 27, 1981; Order No. 967-82, 47 FR 4513, Feb. 1, 1982; Order No. 968-82, 47 FR 4989, Feb. 3, 1982; Order No. 1024-83, 48 FR 35088, Aug. 3, 1983; Order No. 1126-86, 51 FR 7443, Mar. 4, 1986; Order No. 1403-90, 55 FR 11585, Mar. 29, 1990; Order No. 1427-90, 55 FR 28610, July 12, 1990; Order No. 1479-91, 56 FR 10510, Mar. 13, 1991; Order No. 1951-95, 60 FR 11907, Mar. 3, 1995; Order No. 2258-99, 64 FR 52223, 52226, Sept. 28, 1999]

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5 U.S.C. 301; **28** U.S.C. 509, **510,** 515-519.

NOTES:
[PUBLISHER'S NOTE: For Federal Register citations affecting § 0.85, see the list of Sections Affected in the Finding Aids section of the current annual edition of the GPO's Code of Federal Regualtions.]
[EFFECTIVE DATE NOTE: 64 FR 52223, 52226, Sept. 28, 1999, amended pargraph (b) and revised paragraph (j), effective Oct. 28, 1999.]

NOTES APPLICABLE TO ENTIRE CHAPTER:
CROSS REFERENCES: Customs Service, Department of the Treasury: See Customs Duties, 19 CFR chapter I.
Internal Revenue Service, Department of the Treasury: See Internal Revenue Service, 26 CFR chapter I.
Employees' Benefits: See title 20.
Federal Trade Commission: See Commercial Practices, 16 CFR chapter I.
Other regulations issued by the Department of Justice appear in title 4; title 8; title 21; title 45; title 48.

NOTES APPLICABLE TO ENTIRE SUBPART:
CROSS REFERENCE: For regulations pertaining to the Federal Bureau of Investigation, see part 3 of this chapter.

1037 words

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28 CFR 0.145

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TITLE 28 -- JUDICIAL ADMINISTRATION
CHAPTER I -- DEPARTMENT OF JUSTICE
PART 0 -- ORGANIZATION OF THE DEPARTMENT OF JUSTICE
SUBPART X -- AUTHORIZATIONS WITH RESPECT TO PERSONNEL AND CERTAIN ADMINISTRATIVE MATTERS

28 CFR 0.145

§ 0.145 Overtime pay.

The **Director of the Federal** Bureau of Investigation, the **Director** of the Bureau of Prisons, the Commissioner of **Federal** Prison Industries, the Commissioner of Immigration and Naturalization, the Administrator of the Drug Enforcement Administration, the Director of the Office of Justice Assistance, Research and Statistics and the Director of the U.S. Marshals Service as to their respective jurisdictions, and the Assistant Attorney General for Administration, as to all other organizational units of the Department (including U.S. Attorneys), may, subject to any regulations which the Attorney General may prescribe, authorize overtime pay (including additional compensation in lieu of overtime of not less than 10 percent nor more than 25 percent pursuant to section 5545(c)(2) of title 5, U.S. Code) for such positions as may be designated by them.

HISTORY:
[Order No. 423-69, 34 FR 20388, Dec. 31, 1969, as amended by Order No. 516-73, 38 FR 12918, May 17, 1973; Order No. 520-73, 38 FR 18380, July 10, 1973; Order No. 960-81, 46 FR 52350, Oct. 27, 1981]

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Internal Revenue Service, Department of the Treasury: See Internal Revenue Service, 26 CFR chapter I.
Employees' Benefits: See title 20.
Federal Trade Commission: See Commercial Practices, 16 CFR chapter I.
Other regulations issued by the Department of Justice appear in title 4; title 8; title 21; title 45; title 48.

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28 CFR 0.144

§ 0.144 Determination of basic workweek.

The **Director of the Federal** Bureau of Investigation, **Director** of the Bureau of Prisons, Commissioner of **Federal** Prison Industries, Inc., Commissioner of the Immigration and Naturalization Service, Administrator of the Drug Enforcement Administration, Director of the Office of Justice Assistance, Research and Statistics, Director of the Executive Office for United States Attorneys and Director of the United States Marshals Service, as to their respective jurisdictions, and the Assistant Attorney General for Administration, as to all other organizational units of the Department, are authorized to exercise the authority vested in the Attorney General by 5 U.S.C. 6101(a), to determine that the organizational unit concerned would be seriously handicapped in carrying out its functions or that costs would be substantially increased except upon modification of the basic workweek, and when such determination is made to fix the basic workweek of officers and employees of the unit concerned.

HISTORY:
[Order No. 960-81, 46 FR 52350, Oct. 27, 1981]

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5 U.S.C. 301; **28** U.S.C. 509, **510,** 515-519.

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Internal Revenue Service, Department of the Treasury: See Internal Revenue Service, 26 CFR chapter I.
Employees' Benefits: See title 20.
Federal Trade Commission: See Commercial Practices, 16 CFR chapter I.
Other regulations issued by the Department of Justice appear in title 4; title 8; title 21; title 45; title 48.

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28 CFR 0.143

§ 0.143 Incentive Awards Plan.

The **Director of the Federal** Bureau of Investigation, the **Director** of the Bureau of Prisons, the Commissioner of **Federal** Prison Industries, the Commissioner of Immigration and Naturalization, the Administrator of the Drug Enforcement Administration, the Director of the Office of Justice Assistance, Research and Statistics, the Director of the Executive Office for U.S. Attorneys, and the Director of the U.S. Marshals Service, as to their respective jurisdictions, and the Assistant Attorney General for Administration, as to all other organizational units of the Department are authorized to exercise the power and authority vested in the Attorney General by law with respect to the administration of the Incentive Awards Plan and to approve honorary awards and cash awards under such plan not in excess of $ 5,000.

HISTORY:
[Order No. 423-69, 34 FR 20388, Dec. 31, 1969, as amended by Order No. 516-73, 38 FR 12918, May 17, 1973; Order No. 520-73, 38 FR 18380, July 10, 1973; Order No. 772-78, 43 FR 14009, Apr. 4, 1978; Order No. 960-81, 46 FR 52350, Oct. 27, 1981]

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Employees' Benefits: See title 20.
Federal Trade Commission: See Commercial Practices, 16 CFR chapter I.
Other regulations issued by the Department of Justice appear in title 4; title 8; title 21; title 45; title 48.

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28 CFR 0.142

§ 0.142 Per diem and travel allowances.

The **Director of the Federal** Bureau of Investigation, **Director** of the Bureau of Prisons, Commissioner of Fedeal Prison Industries, Inc., Commissioner of Immigration and Naturalization Service, Administrator of the Drug Enforcement Administration, Director of the United States Marshals Service, and Assistant Attorney General, Office of Justice Programs, as to their respective jurisdictions, and the Assistant Attorney General for Administration as to all other organizational units of the Department (including U.S. Attorneys), except as provided in paragraphs (f) and (g) of this section, are authorized to exercise the authority of the Attorney General to take final action in the following matters:

(a) Authorizing travel, subsistence, and mileage allowances under sections 5702-5707 of title 5 of the U.S. Code in accordance with regulations prescribed by the Administrator of General Services and the Assistant Attorney General for Administration.

(b) Fixing rates in accordance with sections 5702-5704 and 5707 of title 5, U.S. Code, and regulations prescribed by the Administrator of General Services and the Assistant Attorney General for Administration.

(c) Authorizing travel advances pursuant to 5 U.S.C. 5705 in accordance with the regulations prescribed by the Administrator of General Services and the Assistant Attorney General for Administration.

(d) Authorizing travel and transportation expenses, and, when applicable, relocation expenses for transferred employees, new appointees and student trainees, in accordance with 5 U.S.C. 5721-5733 and regulations prescribed by the Administrator of General Services and the Assistant Attorney General for Administration.

(e) Authorizing or approving, for purposes of security, the use of compartments or other transportation accommodations superior to lowest first-class accommodations under applicable travel regulations subject to 5 U.S.C. 5731.

(f) The heads of Offices, Boards and Divisions, in addition to the Bureaus, have the authority to approve the use of cash in excess of $ 100 in lieu of Government Transportation Requests in emergency circumstances, in accordance with regulations prescribed by the Administrator of the General Services Administration.

(g) The **Director of the Federal** Bureau of Investigation and the Aministrator of the Drug Enforcement Administration are authorized to approve travel expenses of newly appointed special agents and the transportation expenses of their families and household goods and personal effects from place of residence at time of selection to the first duty station, in accordance with 28 U.S.C. 530 and regulations prescribed by the Assistant Attorney General for Administration.

HISTORY:
[Order No. 423-69, 34 FR 20388, Dec. 31, 1969, as amended by Order No. 520-73, 38 FR 18380, July 10, 1973; Order No. 565-74, 39 FR 15877, May 6, 1974; Order No. 787-78, 43 FR 22969, May 30, 1978; Order No. 800-78, 43 FR 43297, Sept. 25, 1978; Order No. 864-79, 44 FR 69927, Dec. 5, 1979; Order No. 960-81, 46 FR 52350, Oct. 27, 1981; Order No. 1093-85, 50 FR 20908, May 21, 1985]

AUTHORITY:
AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
5 U.S.C. 301; **28** U.S.C. 509, **510,** 515-519.

NOTES:
NOTES APPLICABLE TO ENTIRE CHAPTER:
CROSS REFERENCES: Customs Service, Department of the Treasury: See Customs Duties, 19 CFR chapter I.
Internal Revenue Service, Department of the Treasury: See Internal Revenue Service, 26 CFR chapter I.
Employees' Benefits: See title 20.
Federal Trade Commission: See Commercial Practices, 16 CFR chapter I.
Other regulations issued by the Department of Justice appear in title 4; title 8; title 21; title 45; title 48.

455 words

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28 CFR 0.140

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TITLE 28 -- JUDICIAL ADMINISTRATION
CHAPTER I -- DEPARTMENT OF JUSTICE
PART 0 -- ORGANIZATION OF THE DEPARTMENT OF JUSTICE
SUBPART X -- AUTHORIZATIONS WITH RESPECT TO PERSONNEL AND CERTAIN ADMINISTRATIVE MATTERS

28 CFR 0.140

§ 0.140 Authority relating to advertisements, and purchase of certain supplies and services.

The **Director of the Federal** Bureau of Investigation, the **Director** of the Bureau of Prisons, the Commissioner of **Federal** Prison Industries, the Commissioner of Immigration and Naturalization, the Administrator of the Drug Enforcement Administration, the Director of the Office of Justice Research and Statistics and the Director of the United States Marshals Service as to their respective jurisdictions, and the Assistant Attorney General for Administration, as to all other organizational units of the Department (including U.S. Attorneys), are authorized to exercise the power and authority vested in the Attorney General by law to take final action in the following-described matters:

(a) Authorizing the publication of advertisements, notices, or proposals under (44 U.S.C. 3702).

(b) Making determinations as to the acquisition of articles, materials, or supplies in accordance with sections 2 and 3 of the Buy American Act (47 Stat. 1520; 41 U.S.C. 10a, 10b).

(c) Placing orders with other agencies of the Government for materials or services, and accepting orders therefor, in accordance with section 686 of title 31 of the U.S. Code.

HISTORY:
[Order No. 423-69, 34 FR 20388, Dec. 31, 1969, as amended by Order No. 516-73, 38 FR 12918, May 17, 1973; Order No. 520-73, 38 FR 18380, July 10, 1973; Order No. 960-81, 46 FR 52350, Oct. 27, 1981]

AUTHORITY:
AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
5 U.S.C. 301; **28** U.S.C. 509, **510,** 515-519.

NOTES:
NOTES APPLICABLE TO ENTIRE CHAPTER:
CROSS REFERENCES: Customs Service, Department of the Treasury: See Customs Duties, 19 CFR chapter I.
Internal Revenue Service, Department of the Treasury: See Internal Revenue Service, 26

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CFR chapter I.
Employees' Benefits: See title 20.
Federal Trade Commission: See Commercial Practices, 16 CFR chapter I.
Other regulations issued by the Department of Justice appear in title 4; title 8; title 21; title 45; title 48.

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28 CFR 0.138

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PART 0 -- ORGANIZATION OF THE DEPARTMENT OF JUSTICE
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28 CFR 0.138

§ 0.138 Federal Bureau of Investigation, Drug Enforcement Administration, Bureau of Prisons, Federal Prison Industries, Immigration and Naturalization Service, United States Marshals Service, Office of Justice Programs, Executive Office for Immigration Review, Executive Office for United States Attorneys, Executive Office for United States Trustees.

(a) The **Director of the Federal** Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the **Director** of the Bureau of Prisons, the Commissioner of **Federal** Prison Industries, the Commissioner of Immigration and Naturalization Service, the Director of the United States Marshals Service, the Assistant Attorney General for the Office of Justice Programs, the Director of the Executive Office for Immigration Review, the Director of the Executive Office for United States Attorneys, and the Director of the Executive Office for United States Trustees are, as to their respective jurisdictions, authorized to exercise the power and authority vested in the Attorney General by law to take final action in matters pertaining to the employment, direction, and general administration (including appointment, assignment, training, promotion, demotion, compensation, leave, awards, classification, and separation) of personnel in General Schedule grades GS-1 through GS-15 and in wage board positions, but excluding therefrom all attorney and U.S. Marshal positions. Such officials are, as to their respective jurisdictions, authorized to exercise the power and authority vested in the Attorney General by law to employ on a temporary basis experts or consultants or organizations thereof, including stenographic reporting services (5 U.S.C. 3109(b)).

(b) All personnel actions taken under this section shall be subject to post-audit and correction by the Assistant Attorney General for Administration.

HISTORY:
[Order No. 893-80, 45 FR 34268, May 22, 1980, as amended by Order No. 960-81, 46 FR 52350, Oct. 27, 1981; Order No. 1975-95, 60 FR 35335, July 7, 1995; Order No. 2250-99, 64 FR 46845, 46846, Aug. 27, 1999]

AUTHORITY:
AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
5 U.S.C. 301; **28** U.S.C. 509, **510,** 515-519.

NOTES:
[EFFECTIVE DATE NOTE: 64 FR 46845, 46846, Aug. 27, 1999, revised this section, effective Aug. 17, 1999.]

NOTES APPLICABLE TO ENTIRE CHAPTER:
CROSS REFERENCES: Customs Service, Department of the Treasury: See Customs Duties, 19 CFR chapter I.
Internal Revenue Service, Department of the Treasury: See Internal Revenue Service, 26 CFR chapter I.
Employees' Benefits: See title 20.
Federal Trade Commission: See Commercial Practices, 16 CFR chapter I.
Other regulations issued by the Department of Justice appear in title 4; title 8; title 21; title 45; title 48.

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28 CFR 0.89a

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TITLE 28 -- JUDICIAL ADMINISTRATION
CHAPTER I -- DEPARTMENT OF JUSTICE
PART 0 -- ORGANIZATION OF THE DEPARTMENT OF JUSTICE
SUBPART P -- FEDERAL BUREAU OF INVESTIGATION

28 CFR 0.89a

§ 0.89a Delegations respecting claims against the FBI.

(a) The **Director of the Federal** Bureau of Investigation is authorized to exercise the power and authority vested in the Attorney General Under 28 U.S.C. 2672 to consider, ascertain, adjust, determine, and settle any claim thereunder not exceeding $ 50,000 in any one case caused by the negligent or wrongful act or omission of any employee of the **Federal** Bureau of Investigation.

(b) The **Director of the Federal** Bureau of Investigation is further authorized to exercise the power and authority vested in the Attorney General under the Act of December 7, 1989, Public Law 101-203, 103 Stat. 1805 (31 U.S.C. 3724) with regard to claims thereunder not exceeding $ 50,000 in any one case.

(c) The **Director of the Federal** Bureau of Investigation is authorized to redelegate to the General Counsel of the FBI or his designee within the Office of the General Counsel or to the primary legal advisors of the FBI field offices, any of the authority, functions, or duties vested in him by paragraphs (a) and (b) of this section. This authority shall not be further redelegated.

HISTORY:
[Order No. 884-80, 45 FR 22023, Apr. 3, 1980, as amended by Order No. 1417-90, 55 FR 27808, July 6, 1990; Order No. 1551-91, 56 FR 64192, Dec. 9, 1991; Order No. 1906-94, 59 FR 41242, Aug. 11, 1994; Order No. 2314-2000, 65 FR 44682, 44683, July 19, 2000]

AUTHORITY:
AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
5 U.S.C. 301; **28** U.S.C. 509, **510,** 515-519.

NOTES:
[EFFECTIVE DATE NOTE: 65 FR 44682, 44683, July 19, 2000, revised paragraph (a), effective July 19, 2000.]

NOTES APPLICABLE TO ENTIRE CHAPTER:
CROSS REFERENCES: Customs Service, Department of the Treasury: See Customs Duties, 19 CFR chapter I.
Internal Revenue Service, Department of the Treasury: See Internal Revenue Service, 26

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CFR chapter I.
Employees' Benefits: See title 20.
Federal Trade Commission: See Commercial Practices, 16 CFR chapter I.
Other regulations issued by the Department of Justice appear in title 4; title 8; title 21; title 45; title 48.

NOTES APPLICABLE TO ENTIRE SUBPART:
CROSS REFERENCE: For regulations pertaining to the Federal Bureau of Investigation, see part 3 of this chapter.

181 words

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ARTICLES: ARTICLE II, THE VACANCIES ACT AND THE APPOINTMENT OF "ACTING" EXECUTIVE BRANCH OFFICIALS

BRANNON P. DENNING *

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SUMMARY:
... Under Article II of the Constitution, Mr. Lee's recess appointment would have been good for a year. ... Even if the Administration were suddenly to drop its contention that the Vacancies Act does not apply, differences between Mr. Lee's appointment and the appointment of Professor Dellinger place in doubt Mr. Lee's very eligibility for a temporary appointment under the Act. ... Under the Act, only one who is "the head of another Executive department or military department or another officer of an Executive department or military department, whose appointment is vested in the President, by and with the advice and consent of the Senate" is eligible to fill a temporary vacancy. ... The present interpretation suggested by the Administration allowing the Attorney General to make appointments without Senate confirmation and without a time limit is incompatible with the Vacancies Act and with the Constitution itself. ... (1) if a first or second nomination to fill such vacancy has been submitted to the Senate, the position may be filled temporarily under section **3345,** 3346, or 3347 of this title - ...

TEXT:
[*1039]

In late 1997, when the Senate Judiciary Committee refused to refer Bill Lann Lee, President Clinton's nominee to head the Justice Department's Office of Civil Rights, for a Senate vote because of concerns about Mr. Lee's position on race-based preferences and affirmative action, [1] President Clinton briefly considered waiting until the Senate had gone into recess for Christmas to appoint Mr. Lee to his position. [2] Under Article II of the Constitution, Mr. Lee's recess appointment would have been good for a year. [3] When Senate leaders threatened retaliation [4] if the President followed through with this constitutionally authorized end run around the confirmation process, [5] the President appointed Mr. Lee "**Acting**" Assistant **Attorney General** for Civil Rights, which, it was reported, meant that Mr. Lee might actually

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under 28 U.S.C. 509 and 510, the statutes creating both the position of Solicitor General and Assistant Attorney General are clear: the President nominates, and with the advice and consent **[*1061]** of the Senate, appoints--just like the Constitution says.

The Administration, regrettably, leaves the impression in its handling of both the Dellinger and the Lee appointments that it simply cannot be bothered with observation of what it deems to be constitutional minutiae. [103] On occasion, its impatience with constitutional forms and formalities is expressed candidly. When asked about Mr. Lee's nomination, and the implications of his being an acting, as opposed to a recess, appointee, White House adviser Rahm Emanuel responded, "The process is not what's important. The goal line is what's important." [104] On the contrary, our Constitution is in large part about process, and it is important that the procedures set forth therein are scrupulously observed. It should have given pause to the Administration that the position it is taking - that the Vacancies Act does not apply to the Justice Department - was first argued by the Nixon Administration as the Watergate scandal decimated its Justice Department. [105]

In the end, a combination of Senate vigilance, public pressure and congressional resolution of statutory ambiguities is needed to prevent these problems from arising again. Moreover, the branches should work together to fill vacancies, each exercising its constitutional responsibilities in good faith, without unnecessary provocation of, or embarrassment to, the other. Both the President and the Senate should remember that they exercise their respective constitutional prerogatives not for their own benefit, but for the benefit of "We the People." As one judge put it:

The Constitution was not written to protect the interests of the Senate, the Congress, the President, or any other branch or division of government. The Constitution and its system of checks and balances was written to protect the people. The restrictions it placed upon the branches' exercise of power were not designed to ensure the branches' interest in equal power, but to ensure that citizens would not find themselves governed by a single branch .... [106]

[*1062] The federal appointments process is slow and cumbersome, some would say grossly inefficient, even when working as it should. [107] It is certainly often inconvenient to a President desiring to see nominees confirmed. But those are not good reasons to ignore either the commands of Congress or of the Constitution itself. The Constitution, after all, was not framed for the convenience of members of the political class; following the formalities of the Constitution is often inconvenient for such persons, as it should be.

VIII. Epilogue

As this Article was being readied for publication this summer, members of the Senate, led by Senators Fred D. Thompson (R-TN), the majority leader Trent Lott (R-MS), Strom Thurmond (R-SC) and Robert Byrd (D-WV), apparently heeding advice from academics to provide a legislative solution to the Vacancies Act conundrum, [108] introduced legislation that would rewrite the Vacancies Act. [109] The proposed Federal Vacancies Reform Act of 1998 (the "FVRA") rewrites section **3345** and requires the President (and only the President) to make temporary appointments to vacant positions, as an alternative to automatic succession by the first assistant. [110] In addition, new section **3345** limits the first assistant succession by disqualifying persons (i) who are first assistants as of the date of the vacancy; (ii) who served in the position of first assistant for less than 180 days during the previous year; and (iii) who are nominated by the President for that position. [111]

The FVRA rewrites section 3346 to extend the period of time for which a temporary

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appointment may serve from 120 to 150 days. [112] Section 3347 clarifies the applicability of the FVRA; it applies sections **3345** and 3346 to "any office of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) for which appointment is required to be made by the President, by and with the advice and consent of the Senate," unless: (i) an act of Congress "expressly **[*1063]** supersedes" the FVRA; (ii) the President or the head of a department is "expressly authorized" by Congress to designate an acting appointee; or (iii) the President makes a recess appointment. [113] Section 3347 also preempts arguments that the Justice Department was making with regard to sections 509 and 510 by specifying that a statutory delegation of "general authority to the head of an Executive agency ... to delegate duties to, or to reassign duties among, officers or employees of such Executive agency" is not an express authorization to make temporary appointments contemplated by that section. [114]

The FVRA also includes provisions calculated to increase pressure on the President to make timely appointments. If the President does not submit a name to the Senate within 150 days of the vacancy, section 3348 provides that the office must remain vacant until a name is submitted and except in the case of a vacancy involving the head of an Executive agency, only the head of the agency "may perform any function or duty of such office, until a nomination is made ...." [115] The same section also gives no force or effect to actions taken by persons in violation of the FVRA. Remaining sections require reports of vacancies, persons acting as temporary appointees, and the names of persons who have been submitted to the Senate for confirmation to be made to Comptroller General, and make provisions for the transition of personnel following Presidential inaugurations. [116]

The Senate took up the FVRA in September 1998, but Republicans were unable to muster the necessary votes to stop debate and force a vote. [117] The failure to cut off debate was attributed both to the desire of Democrats to see wide-ranging reforms in the way the Senate acts on presidential nominees [118] and to add unrelated amendments on managed-care reform to the FVRA. [119]

[*1064]

APPENDIX A

"The Vacancies Act," 5 U.S.C. **3345**-3349 (1994).

3345. Details; to office of head of Executive agency or military department

When the head of an Executive agency (other than the General Accounting Office) or military department dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops.

3346. Details; to subordinate offices

When an officer of a bureau of an Executive department or military department, whose appointment is not vested in the head of the department, dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops.

3347. Details; Presidential authority

Instead of a detail under section **3345** or 3346 of this title, the President may direct the head of another Executive department or military department or another officer of an

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Executive department or military department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the office until a successor is appointed or the absence or sickness stops. This section does not apply to a vacancy in the office of Attorney General.

3348. Details; limited in time

(a) A vacancy caused by death or resignation may be filled temporarily under section **3345,** 3346, or 3347 of this title for not more than 120 days, except that -

(1) if a first or second nomination to fill such vacancy has been submitted to the Senate, the position may be filled temporarily under section **3345,** 3346, or 3347 of this title -

(A) until the Senate confirms the nomination; or

(B) until 120 days after the date on which either the Senate rejects the nomination or the nomination is withdrawn; or

(2) if the vacancy occurs during an adjournment of Congress sine die, the position may be filled temporarily until 120 days after the Congress next convenes, subject thereafter to the provisions of paragraph (1) of this subsection.

(b) Any person filling a vacancy temporarily under section **3345,** 3346, or 3347 of this title whose nomination to fill such vacancy has been submitted to the Senate may not serve after the end of the 120-day period referred to in **[*1065]** paragraph (1)(B) or (2) of subsection (a) of this section, if the nomination of such person is rejected by the Senate or is withdrawn.

3349. Details; to fill vacancies; restrictions

A temporary appointment, designation, or assignment of one officer to perform the duties of another under section **3345** or 3346 of this title may not be made otherwise than as provided by those sections, except to fill a vacancy occurring during a recess of the Senate.

APPENDIX B

28 U.S.C. 509-510 (1994).

509. Functions of the Attorney General

All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except for the functions -

(1) vested by subchapter II of chapter 5 of title 5 in administrative law judges employed by the Department of Justice;

(2) of the Federal Prison Industries, Inc.; and

(3) of the Board of Directors and officers of the Federal Prison Industries, Inc..[sic]

510. Delegation of authority

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

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FOOTNOTES:

n1. See Democrat Wants New Hearing for Embattled Nominee, AP, Nov. 8, 1997, available in 1997 WL 4891645; Naftali Bendavid, Democrats Delay Panel's Vote on Civil Rights Nominee, Chi. Trib., Nov. 7, 1997, 1, at 3; Eva M. Rodriguez & Edward Felthensal, Vote on Nominee for Civil-Rights Post Delayed as Clinton's Choice is in Peril, Wall St. J., Nov. 7, 1997, at A20. On Mr. Lee generally, and his nomination, see Roberto Suro, Civil Rights Nominee Has Made Allies of Adversaries; Solution-Oriented Lee Faces Scrutiny in Senate, Wash. Post, Aug. 20, 1997, at A23.

n2. Republican Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, characterized a recess appointment as a "finger in the eye" of the Senate and suggested that Lee's temporary appointment as **Acting** Assistant **Attorney General** would be less offensive and less likely to invite retaliation. Jackie Calmes, Hatch Suggests Means of Filling Civil-Rights Job, Wall St. J., Dec. 15, 1997, at A6; Helen Dewar, Appointment of Lee on Acting Basis Would Upset GOP Less, Hatch Suggests, Wash. Post, Dec. 15, 1997, at A12; Edwin Meese & Todd Gaziano, Recessing Mr. Lee?, Wash. Times, Dec. 15, 1997, at A19; Jonathan Peterson, Putting Lee in Rights Post Seen as Risky Clinton Move, L.A. Times, Dec. 15, 1997, at A1.

n3. See U.S. Const. art. II, 2, cl. 3.

n4. See Peterson, supra note 2 ("Senate Republicans have warned that if Clinton makes a recess appointment, they are prepared to retaliate on other White House nominees, program funding and Democratic legislation.").

n5. Others were urging him to exercise his Article II power to fill federal judicial vacancies as soon as Congress went into recess. See, e.g., Neal Kumar Katyal, Clinton Has the Power To Fill the Vacant Seats, L.A. Times, Oct. 1, 1997, at B7.

n6. See Stewart M. Powell, Lee Wins Civil Rights Job Despite GOP Block: President Dodges Senate Opposition and Names L.A. Lawyer to Post on an Acting Basis, S.F. Examiner, Dec. 15, 1997, at A1 (reporting that, "as an **acting attorney general,** Lee could manage the day-to-day operations of the 250 lawyers in the Justice Department's civil rights division potentially for as long as three years, with successive temporary appointments as an acting official"); see also Julia Malone, Lee Tapped as Acting Rights Chief Clinton Bypasses Congress but Takes Tack Considered Less Offensive by GOP, Austin Am.-Statesman, Dec. 16, 1997, at A2.

n7. See 5 U.S.C. **3345**-3349 (1994).

n8. See Letter from Sen. Orrin G. Hatch to Attorney General Janet Reno (Dec. 19, 1997), available in 1997 WL 12105430 (requesting to know "how long [Attorney General Reno] intends to have Mr. Lee serve in an acting capacity" and requesting a written opinion as to the applicability of the Vacancies Act to Lee's appointment or reasons why the Act is not applicable); Hatch Finds Provision to Challenge Lee's Appointment, Chi. Trib., Dec. 21, 1997, 1, at 9; Helen Dewar, Senators Question How Long Lee Can Stay in Rights Post, Wash. Post, Dec. 20, 1997, at A8; Nancy E. Roman, Hatch Hobbles Tenure of Lee with Time Limit, Wash. Times, Dec. 20, 1997, at A1; David Stout, Senator Asks How Long Rights Choice Will Remain, N.Y. Times, Dec. 20, 1997, at A9 (noting that Senator Hatch argued that Lee's tenure should be limited to four months); see also Letter from Sen. Strom Thurmond to Attorney General Janet Reno (Jan. 23, 1998), available in 1998 WL 7380358 (also questioning the legitimacy of Lee's appointment).

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n9. See, e.g., Sean Scully, Bid to Reform Vacancies Act up in Air, Wash. Times, Sept. 29, 1998, at A6 ("Democratic opponents of the bill don't deny that presidents routinely ignore the Vacancies Act...."); Vacant Government, Wall St. J., Mar. 30, 1998, at A18 ("Clinton aids privately dismiss the ... Vacancies Act as burdensome and obscure ...."); The Vacancy Act Fight, Wash. Post, Dec. 29, 1997, at A16 ("obscure statute"); The Clinton-Lee Loophole, Times-Picayune (New Orleans), Dec. 20, 1997, at B6 ("little-known"). But see Matthew M. Hoffman, The Art of "Acting," Wash. Post, Jan. 1, 1998, at A25 (arguing that the Vacancies Act is neither "obscure" nor particularly cumbersome).

n10. See infra notes 34-48 and accompanying text.

n11. Article II provides:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

U.S. Const. art. II, 2, cls. 2-3.

n12. U.S. Const. art II, 2, cl. 2. For an argument that there ought to be a little more "advice" in the Senate's "advice and consent" role and suggestions on how that might be accomplished, see Glenn Harlan Reynolds, Taking Advice Seriously: An Immodest Proposal for Reforming the Confirmation Process, 65 S. Cal. L. Rev. 1577 (1992). See also John C. Yoo, Criticizing Judges, 1 Green Bag 2d 277, 282-86 (1998).

n13. U.S. Const. art. II, 2, cl. 2.

n14. U.S. Const. art. II, 2, cl. 3.

n15. See The Federalist No. 69, at 421 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (contrasting the King of England's patronage power with the circumscribed appointment power of the President).

n16. See The Declaration of Independence paras. 12-13 (U.S. 1776) ("He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries. He has erected a multitude of New Offices and sent hither swarms of Officers to harass our People, and eat out their Substance.").

n17. For example, Samuel Spencer argued in the North Carolina ratifying convention that because of the Senate's ability to veto the President's nominees, the lines of separation between the executive and legislative branches would become blurred:

It is easy to perceive, that the President, in order to do any business, or to answer any purpose in his department of his office, and to keep himself out of perpetual hot water, will be under a necessity to form a connection with that powerful body, and be contented to put himself at the head of the leading members who compose it.

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2 The Debate on the Constitution 879 (Bernard Bailyn ed., The Library of America 1993); see also Bruce Fein, Appointments Are the President's Game Politics: The Confirmation Process Should be Limited to Scrutiny of Cronyism, Competence & Corruption, L.A. Times, Nov. 7, 1997, at B9 (arguing that "the confirmation process should be confined to scrutiny for cronyism, competence and corruption").

n18. See, e.g., The Federalist No. 76, supra note 15, at 457 (Alexander Hamilton) (arguing that the role of the Senate "would have a powerful, though, in general, a silent operation. It would be an excellent check on the spirit of favoritism in the President ....").

n19. See U.S. Const. art. II, 3 ("He shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.").

n20. See George v. Ishimaru, 849 F. Supp. 68, 71-72 (D.D.C. 1994); Olympic Fed. Sav. & Loan v. Office of Thrift Supervision, 732 F. Supp. 1183, 1199-1200 (D.D.C. 1990); Williams v. Phillips, 360 F. Supp. 1363, 1369 (D.D.C. 1973).

n21. Cf. Buckley v. Valeo, 424 U.S. 1 (1976). In Buckley, the Court rejected the argument that Congress could, under the Necessary and Proper Clause, see U.S. Const. art. I, 8, cl. 18, appoint members of the Federal Election Commission:

Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or ex post facto law contrary to the prohibitions contained in [the Constitution]. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.

Buckley, 424 U.S. at 135.

n22. See Act of July 23, 1868, ch. 227, 15 Stat. 168 (1868) (authorizing the temporary filling of vacancies in the Executive Department).

n23. Olympic Fed. Sav. & Loan v. Office of Thrift Supervision, 732 F. Supp. 1183, 1194 (D.D.C. 1990).

n24. See 5 U.S.C. **3345**-3346 (1994).

n25. Section **3345** of the Act provides for the filling of a vacancy that occurs when "the head of an executive agency (other than the General Accounting Office) or military department dies, resigns, or is sick or absent ... ," 5 U.S.C. **3345** (emphasis added), but otherwise functions like section 3346.

n26. 5 U.S.C. 3346.

n27. 5 U.S.C. 3346 (emphasis added).

n28. 5 U.S.C. 3347.

n29. 5 U.S.C. 3348(a) (emphasis added). Originally, the time limit for the temporary appointments was 10 days. See Act of July 23, 1868, ch. 227, 3, 15 Stat. 168 (1868). The Act was amended in 1891 to increase the time limit to 30 days. See Act of Feb. 6, 1891, ch. 113, 26 Stat. 733 (1891). The time limit was increased again in 1988 to the present limit of 120 days. See Presidential Transition Effectiveness Act, Pub. L. No. 100-398, 7, 102 Stat.

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985, 988 (1988).

n30. 5 U.S.C. 3348(a)(1) (1994).

n31. 5 U.S.C. 3348(a)(2).

n32. 5 U.S.C. 3348(b). This makes sense. If the temporary appointee is the first nominee referred to in subsection (a), and that nominee is either rejected or is withdrawn, that person should not get to serve for an additional120 days while a second nominee is vetted by the Senate.

n33. 5 U.S.C. 3349.

n34. 5 U.S.C. 3347 (1998).

n35. See infra notes 38-40 and accompanying text.

n36. 28 U.S.C. 509 (1994).

n37. See 28 U.S.C. 510 (1994). Specifically, "the Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." Id.

n38. See Oversight of the Implementation of the Vacancies Act, Hearings Before the Senate Committee on Governmental Affairs, Mar. 18, 1998 (Statement of Joseph N. Onek, Principal Deputy Associate Attorney General, Department of Justice and Daniel Koffsky, Special Counsel, Office of Legal Counsel), available in 1998 WL 8993549 [hereinafter Onek Statement].

n39. See Letter from Andrew Fois, Assistant Attorney General, Office of Legal Counsel, Department of Justice to Senator Orrin G. Hatch (Jan. 14, 1998), quoted in Steven J. Duffield & James C. Ho, The Illegal Appointment of Bill Lann Lee, 2 Tex. Rev. L. & Pol. 335, 353 & nn.108-09 (1998).

n40. Onek Statement, supra note 38.

n41. Id.

n42. 5 U.S.C. 3347.

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be able to serve longer than if the President had appointed Lee while the Senate was in **[*1040]** recess. [6]

Soon after the appointment, however, Senator Orrin Hatch, Chairman of the Judiciary Committee, wrote a letter to Attorney General Janet Reno in which he cited a federal statute, the Vacancies Act, [7] which imposes a time limit on the service of acting executive branch officials. [8] The letter and the statute attracted the attention of the press, though many dismissed the statute, which was variously described as "burdensome," "obscure," "little known" and even "routinely ignored." [9] The White House responded by citing another statute allegedly vesting the Attorney General with broad powers to fill any and all vacancies at the Department of Justice that, it claimed, superseded the Vacancies Act and its statutory time limit. [10]

This Article looks at both the Vacancies Act, as well as the provisions with which the Administration countered, in the context of both the Lee nomination and one other case (largely ignored by the press) involving Duke law professor Walter E. Dellinger's service as acting Solicitor General from July 1996 until August 1997. Contrary to Administration claims, I conclude that the Vacancies Act does apply to Justice Department officials, and that the statute cited by the Administration allegedly superseding the Vacancies **[*1041]** Act, if not read in harmony with that Act, unconstitutionally allows the President and the Attorney General to circumvent the Senate's constitutional advice and consent role set forth in Article II.

I. The Constitution and Presidential Appointments

The power of the President to appoint executive branch officials and the conditions for the exercise of that power are contained in Article II, Section 2 of the Constitution (the "Appointments Clause"). [11] Under the plain language of Article II, there are three ways the President may make appointments. The first is the usual process of nomination by the President and confirmation by the Senate for "Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States...." [12] Second, Congress may, by law, authorize the President or others to appoint "inferior Officers." [13] Finally, the President may fill "all Vacancies" occurring while the Senate is in recess, and such commissions are good until the end of the Senate's next session. [14]

By involving the Senate in the appointment of executive and judicial officers, the Framers intended to provide a check on the power of the Executive. [15] The fear at the time was that the President would use the power of appointment, if vested exclusively in that Office, like the King of England used his powers of patronage. [16] Though some felt the President alone should **[*1042]** have the power to make all appointments, [17] most agreed the Senate's role was necessary to avoid Executive abuses. [18]

As a result of the Framers' design, courts have consistently rejected the proposition that the President may evade the Appointments Clause by claiming an inherent power to fill vacancies under the so-called Take Care Clause, [19] which obligates the President to see that the laws are faithfully executed. [20] If the Constitution denies any inherent power to the President to fill vacancies outside the processes set forth in Article II, it would seem absurd to argue that such power is possessed by one of the President's subordinates. [21] Yet this is the position that the Administration has taken in the cases of Bill Lann Lee and Professor Dellinger. Before probing the weaknesses of the Administration's argument in Part III, this Article first discusses the operation of the Vacancies Act.

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II. The Vacancies Act

The Vacancies Act (the "Act"), first passed in 1868, [22] is an attempt to reconcile the requirements of Article II with the need to keep the executive branch functioning in the face of vacancies occasioned by death, resignation, or by delays in the confirmation process. The Act (reprinted in Appendix A) is now found in 5 U.S.C. **3345**-3349, and "delegates to the President limited authority to temporarily fill certain vacancies" [23] in Executive agencies or military departments. [24]

Section 3346 [25] provides for the filling of vacancies occurring when "an officer of a bureau of an Executive department or military department, whose appointment is not vested in the head of the department, dies, resigns, or is sick or absent ...." [26] When such a vacancy is created and the absent officer's appointment is not vested in the head of that department, "his first assistant, unless otherwise directed by the President under section 3347 of this title shall perform the duties of the office until a successor is appointed or the absence or sickness stops." [27]

Under section 3347, "the President may direct the head of another Executive department or military department or another officer of an Executive department or military department, whose appointment is vested in the President by and with the advice and consent of the Senate, to perform the duties of the office until a successor is appointed or the absence or sickness stops." [28]

Any such appointment, however, is circumscribed by section 3348, which limits the amount of time that a temporary appointee may serve without Senate action. Section 3348(a) reads: "A vacancy caused by death or resignation may be filled temporarily under section **3345,** 3346, or 3347 of this title for not more than 120 days ...." [29]

[*1044] There are exceptions to the 120-day rule. First, "if a first or second nomination to fill such vacancy has been submitted to the Senate, the position may be filled temporarily under section **3345,** 3346, or 3347 of this title -

(A) until the Senate confirms the nomination; or

(B) until 120 days after the date on which either the Senate rejects the nomination or the nomination is withdrawn ...." [30]

The second exception states that "if the vacancy occurs during an adjournment of the Congress sine die, the position may be filled temporarily until 120 days after the Congress next convenes ...." [31] Section 3348 also contains an unequivocal statement that temporary appointees under the Act "whose nomination to fill such vacancy has been submitted to the Senatemay not serve after the end of the 120-day period [set forth in section 3348 (a)(1)(B) or (a)(2)] if the nomination of such person is rejected by the Senate or is withdrawn." [32]

Finally, section 3349 states flatly that a "temporary appointment, designation, or assignment of one officer to perform the duties of another under section **3345** or 3346 of this title may not be made otherwise than as provided by those sections, except to fill a vacancy occurring during a recess of the Senate." [33] Thus, if a vacancy occurs under the Act, either (i) the first assistant will temporarily fill the post, (ii) a replacement will be appointed by the head of the agency (if the head has the power to do so) or (iii) the President shall name a replacement under the procedures set forth in section 3347. Section 3349 makes it clear that these methods of appointment, all of which are subject to the 120-day rule of section 3348, are the exclusive methods of filling vacancies.

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III. The Vacancies Act and Justice Department Vacancies

There is one very relevant exception to section 3347, which reads: "This section does not apply to a vacancy in the office of Attorney General." [34] Under the Administration's liberal interpretation of this section, "the office of **[*1045]** Attorney General" includes the entire Justice Department. [35] Meanwhile, 28 U.S.C. 509 (reprinted in Appendix B) states, in pertinent part, "All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General ...." [36] Section 510 (also reprinted in Appendix B) states that the Attorney General may delegate that authority as "he considers appropriate." [37]

In both testimony to Congress [38] and in a written response to Senator Hatch's letter, [39] the Administration maintained that sections 509-510 (sometimes referred to as the Justice Department's "Organic Act") superseded the Vacancies Act, and that the Organic Act subjects acting appointees to "no precise limit on the time during which an official may carry out the duties of a vacant Senate-confirmed office...." [40]

Though the Administration denies that this means "that such an office may remain unfilled indefinitely," neither the Administration nor the Justice Department has suggested when a permissible "temporary" appointment becomes an admittedly impermissible "indefinite" one. [41]

The origin of the exception to section 3347, however, makes it clear that the exemption applies solely to "a vacancy in the office of Attorney General" [42] and no other. The reason is simple: Congress specified by statute who succeeds to the Attorney General's post should a vacancy occur. [43] When the Department of Justice was created in 1870, [44] the enabling legislation provided:

There shall be in said Department an officer learned in the law, to **[*1046]** assist the Attorney-General in the performance of his duties, to be called the solicitor-general, and who, in case of a vacancy in the office of Attorney-General ... shall have power to exercise all the duties of that office. [45]

The Attorney General exemption was carved out when the Vacancies Act was codified in the Revised Statutes of the United States. [46] The exception remains today, although the line of succession is somewhat different. [47] It does not appear that the intent was to exempt other Justice Department officials from the operation of the Vacancies Act. Significantly, there is no similar exemption for the Attorney General, or any other temporary appointee in the section of the Act containing the 120-day time limit.

According to testimony given before the Senate in early 1998, the Administration maintains that the Vacancies Act does not apply to those vacancies occurring in the Justice Department. [48] The argument hinges in part on the exemption of the office of the Attorney General from section 3347 of the Vacancies Act, which the Administration argues exempts it (and by extension all other Justice Department officials) from all sections of the Act, including the 120-day limit. The Administration further argues that the Attorney General, by virtue of the Organic Act, has broad powers to fill departmental vacancies independent of both the constitutional appointments process and the time limit of the Vacancies Act. Assuming arguendo that the Administration is correct in its reading, such a statute would raise serious constitutional questions under the Appointments Clause.

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IV. Assessing the Administration's Case

There are several problems with the Administration's position, which I will address in turn. First, I argue that Justice Department officials are not, as suggested by the Administration, exempt from the provisions of the Vacancies Act. Second, assuming arguendo that Congress intended to include the entire Justice Department in the exemption crafted for "the office of Attorney General," that would clearly be unconstitutional because it would enable the President and the Attorney General to fill every office below that of Attorney General without Senate confirmation. Finally, in Part V, I argue that even if the Administration agrees that it is bound by the Vacancies Act, Mr. Lee would still be ineligible to serve as a temporary appointee because he was not, prior to his present appointment, occupying a position requiring Presidential appointment and Senate confirmation as required by the Act.

A. Is the Department of Justice Exempt from the Vacancies Act?

It is fairly clear that the "office of Attorney General" exemption in 5 U.S.C. 3347 does not apply to a vacancy in the Solicitor General's office, the office of Assistant Attorney General or any other office in the Justice Department. [49] The exemption explicitly mentions only the Attorney **[*1048]** General. [50] As stated above, that exception was placed in the Vacancies Act because Congress had already prescribed the line of succession for that office. [51] Further, even if the exemption in section 3347 was intended to include vacancies in the Solicitor General's Office, which the Attorney General filled under 28 U.S.C. 509-510, there is no language exempting the Attorney General's vacancy appointments from the time limit set forth in the Vacancies Act. [52]

[*1049] When asked to interpret these provisions in the early 1970s, a federal district court in United States v. Lucido [53] read the two statutes together and concluded that Congress had not intended for the Attorney General to be able to fill vacancies with persons who could serve without regard to the 120-day time limit of the Vacancies Act, despite the application of 28 U.S.C. 509-510. [54] The Lucido court rejected the Nixon Administration's version of the same argument presently being made by the Clinton Administration: that because the office of the Attorney General was exempt from section 3347, the Vacancies Act, including the time limit, did not apply. [55] The court acknowledged that the office of Attorney General was exempt from section 3347 and vacancies in that office were covered by the provisions of 28 U.S.C. **508,** but also noted that the office of Attorney General was not specifically exempted from the strictures of section 3348. [56] The court reasoned that if that had been Congress's intent, Congress would have included a specific exemption in section 3348 to make it parallel section 3347. [57] "But," the court wrote:

they did not do so and they did provide for the filling of vacancies in **508.** It is perfectly plausible that the Congress was concerned about the possibility of a lengthy vacancy in the office of Attorney General. Many duties vital to the everyday functioning of the Justice Department are exercised by the Attorney General, which duties may not be delegated to another official on the resignation of the Attorney General and obviously not delegable upon his death. But at the same time the Congress remained concerned about its constitutional responsibility to advise and consent. Thus, they retained some of the impetus for the President's sending a name to the Senate in a timely fashion rather than allowing a "temporary" Attorney General to **[*1050]** serve indefinitely. In this regard it is important to note that the purpose of [section 3348] was carried out in the instant case as Mr. Kleindienst's name was sent to the Senate for confirmation even before he assumed the duties of Attorney General. Had the President been dilatory in sending a name to Congress, perhaps a different situation would be present. [58]

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Of course, the Lucido court could have gotten it wrong; there is at least one case holding that a Solicitor General who became **Acting Attorney General** had no limit on his tenure. [59] The support for the court's conclusion in that case, however, was slight, to say the least. [60] More importantly for our **[*1051]** purposes, neither court indicated that the exemption contained in section 3347 of the Act applied to anyone other than the Attorney General.

B. Could Congress Authorize the Attorney General to Fill Justice Department Vacancies Requiring Senate Confirmation?

The Lucido court was trying to avoid larger constitutional questions that emerge from an interpretation of the Vacancies Act that bootstraps the Attorney General's power to delegate in 28 U.S.C. 509-510 into an extra-constitutional appointment power. Article II is clear that unless Congress otherwise indicates (or the Senate is in recess), Senate approval is required for the appointment of executive officers. [61] Though Congress could, if it desired, designate either the Assistant Attorney General or the Solicitor General as "inferior Officers," [62] it has not done so. The statutes creating those offices, moreover, specify that those positions are to be occupied by persons nominated by the President and appointed with the advice and consent of the Senate. [63] Yet, according to the Administration, sections 509 and 510 enable the Attorney General to "temporarily" fill vacancies with persons who could conceivably serve indefinitely without ever having to undergo Senate confirmation. Taking the Administration's position seriously would mean that no confirmation hearings for any Department of Justice official below the Attorney General would be necessary; and that the Senate has no role to play. [64] Such a position is, of course, absurd. Yet the Administration has pressed this claim on behalf of both Bill Lee and Professor Dellinger.

[*1052]

V. The Cases of Dellinger and Lee

A. Walter Dellinger

Professor Dellinger was serving as the Assistant Attorney General in charge of the Office of Legal Counsel [65] when then Solicitor General Drew Days resigned his post in the summer of 1996 to return to his teaching position at Yale Law School. [66] In the interim, Professor Dellinger was named by Attorney General Reno [67] as "Acting Solicitor General." [68] Dellinger served in that capacity until his resignation, which became effective as of mid-August 1997. [69] Primarily because of the impending presidential election, which deterred the Judiciary Committee from acting upon nominations, there were no plans to submit Professor Dellinger's name to the Senate at the time he assumed his duties. [70] After the election, the Supreme Court's term was in full swing; submitting Dellinger's name at that time would have distracted him from his appearances before the Court in a number of high-profile cases in which the Administration had a stake. [71] In addition, Dellinger made it known, before he accepted the acting appointment, that he was anxious to return to North Carolina for personal reasons. [72] Therefore, the Administration and the Justice Department informed the Senate Judiciary Committee that they did not intend to submit Dellinger's name for confirmation, but that Dellinger would likely serve only through the end of the 1996-97 Supreme Court Term. [73] Apparently, there were no objections to **[*1053]** this arrangement. [74] Though it drew scant notice at the time, [75] Professor Dellinger's tenure clearly exceeded the statutory time limit imposed by the Vacancies Act. [76]

B. Bill Lann Lee's Appointment

The controversy surrounding Bill Lann Lee's nomination recalls the politically charged days of

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the early Clinton Administration in which partisan opposition caused the Administration to withdraw the nominations of Zoe Baird and Kimba Wood, the President's first two choices for Attorney General, as well as Professor Lani Guinier, who was nominated for the civil rights post Lee now holds. [77] In contrast to the appointment of Professor Dellinger, editors and opinion columnists, [78] and more importantly, lawmakers, raised the issue of the Vacancies Act. Senator Hatch, while silent on Dellinger, sent a letter in early 1998 to Attorney General Reno asking whether Lee, a former litigator with the NAACP Legal Defense Fund, would be serving after the 120-day limit prescribed in the Act. [79] As noted, the Administration responded by citing the Justice Department's Organic Act, asserting that it superseded the Vacancies Act, and that Mr. Lee could serve without Senate confirmation for an indeterminate amount of time.

Even if the Administration were suddenly to drop its contention that the Vacancies Act does not apply, differences between Mr. Lee's appointment **[*1054]** and the appointment of Professor Dellinger place in doubt Mr. Lee's very eligibility for a temporary appointment under the Act.

Under the Act, only one who is "the head of another Executive department or military department or another officer of an Executive department or military department, whose appointment is vested in the President, by and with the advice and consent of the Senate" is eligible to fill a temporary vacancy. [80] Mr. Lee came to the job from the NAACP Legal Defense Fund, and prior to his appointment, Mr. Lee had no position in the Clinton Administration, much less one that required Senate confirmation. In contrast, Professor Dellinger had undergone Senate confirmation when he was nominated as head of the Office of Legal Counsel; this prior confirmation was apparently one of the factors making his service as Solicitor General more tolerable to the Senate. [81]

Curiously, though the Justice Department denies the Vacancies Act even applies to its temporary appointees, the mechanics of Mr. Lee's appointment were calculated to appear compliant with the Act. [82] The Act provides for automatic succession of "first assistants." [83] After Deval Patrick, the former Assistant Attorney General for Civil Rights, resigned in January of 1997, the Attorney General delegated the responsibilities of that office to Isabelle Katz Pinzler, then Deputy Assistant Attorney General, a position not subject to Senate confirmation. After Ms. Pinzler served six months in that position, Mr. Lee's name was submitted to the Senate, which returned his name to the President in November. Though Lee was named **Acting** Assistant **Attorney General** by the President on December 15, 1997, concurrent with Ms. Pinzler's resignation, the Attorney General had earlier named Mr. Lee to the position that Ms. Pinzler formerly held - Principal Deputy Assistant Attorney General.

As other commentators have pointed out, this does not legitimize Mr. Lee's service because Ms. Pinzler's service itself exceeded the 120-day time limit, and thus by the summer of 1997 she was no longer validly serving as acting head of the Civil Rights Division; therefore, Mr. Lee could not have **[*1055]** succeeded to the office as first assistant, because there was no one lawfully in that position whom he could have succeeded. [84] More importantly, the attempts to make Mr. Lee's appointment a first assistant succession under sections **3345**-46 is inconsistent with the President's announcement that he was appointing Mr. Lee as **Acting** Assistant **Attorney General,** which would seem to fall under section 3347. The difference is that under section 3347, the President is only entitled to make a temporary appointment of someone who has previously been confirmed by the Senate, which Mr. Lee was not.

VI. Remedies

It is possible that the Senate will, one way or the other, act on Mr. Lee's nomination and, like Professor Dellinger's service as acting Solicitor General, the present controversy will become moot. However, given the increasing frustration expressed over the pace and tenor of

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executive and judicial appointments, [85] and the fact that the Lee clamor followed closely on the heels of questions about Professor Dellinger's tour of duty, consideration of solutions for a situation that seems, "capable of repetition, yet evading review" [86] seems overdue. In this section, I suggest three easy solutions that could prevent future crises.

A. Clarify Statutory Ambiguities

At the very least, the statutes cry out for amendment. Congress should make it clear that although the Attorney General is exempt from the Act because the line of succession is set by another statute, an **Acting Attorney General** and all other **acting** Justice Department officials are subject to the time limits set forth in 5 U.S.C. 3348. This clarification would effect the attempt made in Lucido [87] to read the Vacancies Act and the Attorney General succession statute in harmony with the Appointments Clause. The present interpretation suggested by the Administration allowing the Attorney General to make appointments without Senate confirmation and without a time limit is incompatible with the Vacancies Act and with the Constitution itself. In addition, so that there is no doubt about the Act's enforceability, Congress should include a provision for challenging appointees whose time in office has exceeded the 120-day limit.

[*1056]

B. Greater Senate Vigilance

Senators have inexplicably stated publicly that they would have considered a recess appointment of Mr. Lee more of an affront to senatorial privilege than the Administration's extraconstitutional acting appointment. [88] At least the former is constitutionally authorized, [89] though its exercise is admittedly a bit at odds with the spirit in which the procedure was conceived originally. [90] Of course, it could be that Senators were simply hoping that the President would make an acting appointment, and they could lower the boom with the Vacancies Act argument. A recess appointment, on the other hand, would have meant that they would have been stuck with Mr. Lee for at least one year and could have done nothing about it.

Curiously, many commentators and Senators have also groused about the lack of an explicit enforcement provision in the Vacancies Act - the implication being that if Mr. Lee were temporarily appointed, there would be no way to force the Administration to observe the 120-day limit. This reasoning makes no sense. Why could not litigious Senators simply challenge the status of an acting appointee in court and claim that they were being deprived of their right to offer advice and consent? In Williams v. Phillips, [91] a group of Senators did just that, [92] and a district court held that the **[*1057]** deprivation of the opportunity to give their advice and consent to the President regarding certain nominees constituted the sort of particularized injury necessary to maintain standing. [93] The court stated:

In this case, a declaration that the defendant is unlawfully serving in office would bear upon the plaintiffs' duties to consider appropriations for OEO, or other legislative matters affecting OEO or the position of OEO Director. Moreover, the service by the defendant as Acting Director of OEO, rather than Director, does not remove the direct injury to the plaintiffs' alleged right to pass on the individual nominated to be Director. The injury is aggravated, if anything, because the Acting Director is performing the duties of the Director without the advice and consent which the plaintiffs' would have been able to assert over an individual whose name had been submitted to the Senate for confirmation. [94]

Suing the Administration over a questionable appointment may be just the impetus needed

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to encourage the Administration to submit the acting official or an alternative nominee for confirmation.

[*1058] Oaths to uphold the Constitution aside, the Senate ought to be extremely protective of its constitutional prerogatives. Senators can bet that no one else will be; and once surrendered such prerogatives are often difficult to reclaim. Just as the Senate would not sit back and allow an "Acting" Associate Justice to be named to the Supreme Court, their response should be the same when the Solicitor General [95] or an Assistant Attorney General is involved. "The Appointments Clause," one judge has written, "subjects the selection process to public scrutiny, thereby affecting who takes office, how they perceive their function, and how they exercise their powers." [96] That safeguard, and our system of checks and balances in general, is not effective when one branch fails to act, thus circumventing the Constitution's requirements, as the Senate did when it acquiesced in Professor Dellinger's appointment. Nor are those constitutional provisions theirs to waive. While it has not adopted the same "no harm-no foul" attitude toward Mr. Lee, the Senate contributed to the current situation involving Bill Lee, first by not allowing a floor vote to be taken on Mr. Lee, then by suggesting his acting appointment would be less offensive than a recess appointment.

C. Suasion

Perhaps future Presidents will, as a matter of course or in response to heretofore absent public pressure, follow both the text and the spirit of the Constitution and promptly submit acting appointees to the Senate for confirmation. [97] Though Professor Dellinger, at least, had been confirmed once by the Senate, the absurdity of maintaining that one Senate confirmation is good for the duration of one's government service should at once become evident. Imagine then President Reagan defending a decision not to submit "Acting" Associate Supreme Court Justice Robert Bork to the Senate for confirmation in part on the grounds that he had previously been confirmed for his seat on the court of appeals.

Circumvention of the Senate's Advice and Consent role is not only unconstitutional, it is dangerous, especially when the appointments involve **[*1059]** federal law enforcement officials. The increase in the number of federal criminal statutes [98] - a phenomenon of relatively recent vintage [99] - places enormous power in the hands of the Department of Justice and myriad other federal agencies. [100] While good sense is often exercised by those charged with enforcing the nation's laws, there is always a danger that the executive branch will be tempted to misuse its power. [101] Part of the Senate's responsibility is to evaluate these individuals for qualities like prudence, honesty and sensitivity to the rule of law - virtues necessary to prevent federal prosecutions from becoming persecutions.

VII. Conclusion

Twice in the last two years, the Clinton Administration has sought to avoid the inconvenience of the appointment process set forth in the Constitution. Through a questionable reading of the Attorney General's authority, it claims a broad exemption from the Vacancies Act. [102] In the case **[*1060]** of Walter Dellinger, who served for over a year as Acting Solicitor General without his name even being submitted to the Senate for confirmation, any questions became moot with his resignation from the Justice Department and his return to academia. With Bill Lann Lee, however, the issues are very much alive, and in desperate need of resolution. Not only are Justice Department officials,other than the Attorney General, not exempt from the plain language of the Act, but the President can only fill temporary vacancies under the Act with persons who have already been confirmed by the Senate for a particular job. Mr. Lee held no such position in the Clinton Administration.

Moreover, despite attempts to create ex nihilo the Attorney General's authority to fill vacancies through a synergistic interpretation of the Act and the Attorney General's power

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*** CURRENT THROUGH P.L. 106-418, APPROVED 11/1/00 ***
*** WITH GAPS OF 106-398, 402, 405, 408, 411, 414, 415, 417 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART II. DEPARTMENT OF JUSTICE
CHAPTER 31. THE ATTORNEY GENERAL

28 USCS § 509 (2000)

§ 509. Functions of the Attorney General

All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except the functions--

(1) vested by subchapter II of chapter 5 of title 5 [5 USCS §§ 551 et seq.] in administrative law judges employed by the Department of Justice;

(2) of the Federal Prison Industries, Inc.; and

(3) of the Board of Directors and officers of the Federal Prison Industries, Inc.[.]

HISTORY:

(Sept. 6, 1966, P.L. 89-554, § 4(c), 80 Stat. 612; Mar. 27, 1978, P.L. 95-251, § 2(a)(6), 92 Stat. 183; Oct. 12, 1984, P.L. 98-473, Title II, Ch II, § 228(a), 98 Stat. 2030.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	[Uncodified].	1950 Reorg. Plan No. 2, S 1, eff. May 24, 1950, 64 Stat. 1261.

The section is restated to allow incorporation into this chapter.

For Reviser's Note covering former section 507, upon which this section is partially derived, see Reviser's Note set out under section 547 of this title.

Explanatory notes:

A prior § 509 (Act June 25, 1948, ch 646, § 1, 62 Stat. 910) was repealed by Act Sept. 6, 1966, P.L. 89-554, § 8, 80 Stat. 663. It provided for expenses of United States attorneys. Similar provisions are contained in 28 USCS § 549.

Act Mar. 27, 1978, P.L. 95-251, § 2(a)(6), 92 Stat. 183, provided for substituting "administrative law judges" for "hearing examiners" in "section 509(i) of title 28, United States Code". 28 USCS § 509(1) was so amended to reflect the probable intent of Congress.

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FBI to Double Force of Digital G-Men

Bureau Plans 40 New Cyber-Squads Nationwide

March 10, 2000

By James Gordon Meek



James Gordon Meek/APBnews.com
FBI Deputy Director Thomas Pickard

WASHINGTON (APBnews.com) -- The FBI is planning to double its force of digital G-men over the next two years by deploying computer crime squads in all 56 field offices nationwide to fight cybercrime and cyberterrorism.

FBI Deputy Director Thomas Pickard told APBnews.com that the federal law enforcement agency also wants to boost the number of investigators focused on high-tech crime at the National Infrastructure Protection Center (NIPC) at FBI headquarters here.

"The workforce is going to be beefed up in the NIPC," Pickard said in an interview Thursday. "You're going to see eventually, I would say, 56 NIPC-like squads out there in all our offices."

Related Audio:
Deputy Director Details the Bureau's Cybercrime Plans

But he cautioned: "It doesn't happen overnight -- you can't turn on a faucet and make this happen."

Hacking and espionage threats

The plan emerged in recent weeks as the FBI and Justice Department scrambled to investigate high-profile hacker attacks on top e-commerce and media Web sites that shut down many of them for several hours in February.

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The deputy director's comments contrast with those from other FBI officials, who have expressed concern about the lack of new funding for the NIPC in the Clinton administration's 2001 budget proposal. And one knowledgeable official recently said that 14 special agents were reassigned from the NIPC force and not replaced.

Pickard said the bureau's cybercrime-fighting abilities have been boosted in other ways, including the addition of new computer forensics labs in San Diego and Baltimore.

In the future, he predicted, FBI computer crime investigators likely will "migrate through" the command center in Washington, then fan out into eight- or 10-person squads across the country to investigate online fraud, hacking and espionage.

"There's no better training you can get than working on the most complex cases here than going out to the field offices and helping with that," he said.

'Coming into the digital age'

Sixteen cybercrime squads already operate in the United States under the direction of the NIPC, ensconced within the FBI's counterterrorism division. Pickard said they have succeeded in stopping significant criminal enterprises. He cited a recent bust in Charlotte, N.C., where the new NIPC squad there recovered $250,000 paid to an extortionist.

In Washington, the NIPC has 100 agents drawn from the FBI, Central Intelligence Agency, National Security Agency and other government sectors, with 193 additional agents posted in field offices who answer to NIPC Director Michael Vatis. Some of the supervisors in the field cybersquads were dispatched from the NIPC command center bunkered inside the FBI's downtown headquarters.

Increasingly, Pickard said, when the FBI executes search warrants in drug or white-collar crime cases, agents find that suspects have computers and removable media, such as floppy discs, that contain information pertaining to their illegal activities.

"That wasn't the case five years ago," he said. "We are getting inundated with more and more cases coming into the digital age."

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Are hackers crushing the

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Finding forensic cyber-evidence

Terrorism is another FBI priority where skilled computer forensic technicians and agents could have a bright future.

Pickard cited as an example the case of Khalil Deek, a naturalized U.S. citizen born in the Middle East, who was arrested in Pakistan, extradited to Jordan and charged as a suspected ringleader in accused terrorist Osama bin Laden's Al Qaeda organization. Pickard said a laptop computer taken from Deek was "exploited" in the hunt for evidence of an alleged conspiracy to facilitate foiled attacks against tourist sites in Jordan.

Since becoming FBI deputy director three months ago, Pickard has been busy investigating terrorist plots and computer hack attacks that continue to fuel criticism about the FBI's ability to fight sophisticated cybercrimes.

Pickard dismissed reports that the FBI hasn't moved quickly enough to catch what he characterized as a "loose confederation" of computer hackers who used distributed denial-of-service (DDoS) assaults staged from dozens of commandeered computers to temporarily shut down a dozen top commercial Web sites in February -- and even the FBI's site last week.

"This is not a 60-minute investigation that will conclude at the end of your evening hour," he said of the international probe. "We can always do things better. We could be criticized for letting it happen at all, but we've gone out on the offensive."

'Significant progress' being made

He said the FBI released software tools in November that allowed companies to better detect DDoS attacks that cripple systems with floods of junk data.

Pickard said the bureau is making significant progress in the probe and has received information from both informants and foreign governments as it follows a digital trail that has the FBI globe-trotting from one Internet service provider to the next -- a task many security experts say could be endless.

While the FBI hopes its agents will simply be tipped off to the identity of the hackers who knocked out eBay, Yahoo and other Web sites, the deputy director said the painstaking data-gathering is necessary to make a criminal case against anyone eventually arrested.

"The informants are going to help, and we do have sources who have been helping us," he said. "We're going down a number of different avenues with this, but the progress we've made going down the electronic trail, I've been very pleased with."

James Gordon Meek is an APBnews.com staff writer in Washington (james.meek@apbnews.com).

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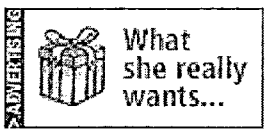

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ABOUT APB

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U.S. Department of Justice
Federal Bureau of Investigation

For Immediate Release **Washington D.C.**
December 23, 1997 **FBI National Press Office**

Director Louis J. Freeh announced today the appointment of Thomas J. Pickard, a 22-year veteran of the Federal Bureau of Investigation, as an Assistant Director of the FBI who will head the Criminal Investigative Division at FBI Headquarters.

Freeh said "Tom Pickard has distinguished himself as an investigator, supervisor, and innovator in the criminal field, demonstrating the qualities necessary to lead one of the most important posts in the FBI. During the course of his career, he had major city assignments in key investigative areas that include violent crimes, white collar crime, foreign counterintelligence, and counterterrorism."

"For example, he has most recently been involved in the on-going investigation into police corruption in the Washington Metropolitan Police Department and the apprehension and transportation of Mir Aimal Kansi to the United States," Freeh said.

"Tom Pickard also played a primary role in the investigation into the crash of TWA flight 800," Freeh said. " He supervised the trials of the first four Trade Center defendants; the trial of the Blind Sheik and his coconspirators, and the Manila Air conviction of Ramzi Youssef and his associates," Freeh said. "In addition, he personally traveled to conduct renditions of two terrorists, one from the Middle East and the other from Southeast Asia."

Pickard, 47, has most recently been the Assistant Director in Charge of the Washington Field Office. As head for the Criminal Investigative Division, he will be responsible for a growing number of investigations abroad as well as investigative matters concerning organized crime/drugs, violent crimes, white-collar crime, public corruption, civil rights, fugitives, crimes on government reservations, and interstate theft.

He earlier was the Special Agent in Charge of the National Security Division of the New York Office, and the Assistant Special Agent in Charge for all White-Collar Crime investigations and eventually Violent Crimes Matters in New York. He also served in an undercover capacity in a highly sensitive investigation code named "ABSCAM" in April 1979.

A native of Woodside, New York, Pickard holds a Bachelor of Business Administration degree in Accounting from St. Francis College, Brooklyn, New York, and a Master of Business Administration degree in Taxation from St. John's University, Jamaica, New York. He is a Certified Public Accountant.

The FBI has 14 Assistant Directors -- eleven who head divisions at Headquarters and three who head Field Offices in New York, Los Angeles, and Washington D.C. This position is the third-highest in the FBI after the Director and the Deputy Director.

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Source: All Sources : Federal Legal - U.S. : Legislative Histories & Materials : **Committee Reports**
Terms: "vacancies act" and date aft 1997 (Edit Search)
Focus: **"attorney general"**

1998 Committee Reports, July 5, 1998

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Committee Reports

105th Congress, 2nd Session

Senate Report 105-250

105 S. Rpt. 250

FEDERAL VACANCIES REFORM ACT OF 1998

DATE: July 5, 1998. Ordered to be printed

SPONSOR: Mr. Thompson submitted the following together with ADDITIONAL AND MINORITY VIEWS
(To accompany S. 2176)

COMMITTEE: from the Committee on Governmental Affairs

REPORT

TEXT:
The Committee on Governmental Affairs, to which was referred the bill (S. 2176) to provide a mechanism for the temporary filling of positions that are legally appointed by the President, by and with the advice and consent of the Senate, and having considered the same, reports favorably on the bill as amended and recommends that the bill as amended do pass.

I. Purpose

The purpose of S. 2176, the Federal Vacancies Reform Act, is to create a clear and exclusive process to govern the performance of duties of offices in the Executive Branch that are filled through presidential appointment by and with the consent of the Senate when a Senate confirmed official has died, resigned, or is otherwise unable to perform the functions and duties of the office.

II. Summary of S. 176

S. 2176 provides that upon the death, resignation, or inability to serve of an officer of an executive agency (including the Executive Office of the President), the first assistant to the officer becomes the acting officer, subject to the bills time limits. If the President so directs, a person who has already received Senate confirmation can be made the acting officer in lieu of the first assistant. The bill also requires that a first assistant who has not received Senate confirmation, but who is nominated to fill the office permanently, can be made the acting officer only if he has been the first assistant for at least 180 days in the year preceding the vacancy. The acting officer may serve for 150 days beginning on the date the vacancy occurs. In the event a first or second nominee is withdrawn, rejected or returned, the person may serve as the acting official until 150 days after the withdrawal, rejection, or return.

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history of use in the Vacancies Act. As under current law, the term "first assistant" is used to refer to the first assistant to the "officer." However, the practice under current law, which would be continued by this bill, is that the first assistant is actually the first assistant to the vacant office. Certain officers have first assistants designated by statute. See, e.g., 28 U.S.C. 508(a) ("for the purpose of section 3345 of title 5 the Deputy **Attorney General** is the first assistant to the **Attorney General.**") Other departments and agencies have established first assistants by regulation. The Vacancies Act provides for the automatic performance of the functions and duties of the vacant office by the first assistant because such person is often a career official with knowledge of the office or a Senate-confirmed individual, and the Committee believes that the routine functions of the office should be allowed to continue for a limited period of time by that one person. The provision therefore emphasizes the limit on presidential power to select an acting officer without that individual having received Senate confirmation, while permitting flexibility in the performance of governmental operations since, if a first assistant exists, the President need not take any action for an acting official to serve.

If there is no first assistant, or if the President following the assumption of acting status by the first assistant, but within the time limits prescribed by section 3346 so chooses, the President (and only the President) may direct a person who has already received Senate confirmation for another position to perform the functions and duties of the office temporarily in an acting capacity, subject to the time limits of section 3346. This provision allows the President limited flexibility in appointing temporary officers, restricting the pool to persons who have already received Senate confirmation for their current position. If there is no first assistant, no one is permitted by law to become an acting officer until the President designates a Senate-confirmed individual to be the acting officer.

In either case, the acting officers service is limited to the time period specified in section 3346. This marks a repeal of the current statutory provision in both sections 3345 and 3346 that the acting officer "shall perform the duties of the office until a successor is appointed or the absence or sickness stops," language that has been a part of each Vacancies Act since 1792.

Notwithstanding a first assistant on the day of the vacancys automatic functioning as the acting officer, such first assistant who has not served as first assistant for 180 days of the 365 days prior to the vacancy may not serve as the acting officer if the President nominates that person for appointment to that position. If the President nominates the former first assistant, who served for less than 180 of the 365 days preceding the vacancy, to the permanent position, the first assistant must cease performing the functions and duties of the office. In that instance, for an acting person to continue to perform those duties, the President would be required to designate as the acting officer a person who has received Senate confirmation to another post, who can serve as the acting officer for the remainder of the time period established under section 3346 that was not consumed by the first assistant.

A first assistant who is a career person will ordinarily have served more than 180 days as first assistant at the time the vacancy arises. Such a person will be able to serve both as the acting officer and as the permanent nominee. The 180-day requirement is not confined to the 180 days immediately preceding the vacancy, as, for instance, the first assistant may have been ill for part of that period. The Presidents power to nominate is not disturbed in any way; however, if he chooses to nominate a brief-serving first assistant, that person may no longer serve as the acting officer. The President would retain his existing power to designate first assistants to those officers where he currently enjoys such power. The Committee believes that the length of service of the first assistant eligible to be both the nominee and the acting officer should be sufficiently long to prevent manipulation of first assistants to include persons highly unlikely to be career officials.

With respect to a vacancy in the office of **Attorney General,** 28 U.S.C. 508 will remain

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applicable. That section ensures that Senate confirmed Justice Department officials will be the only persons eligible to serve as Acting **Attorney General.**

The new section 3346 limits the length of the acting officers service to 150 days, beginning on the date the vacancy occurs. The Committee believes that while the background check process takes no longer today than in 1988, when the Vacancies Act limitation was set at 120 days, the vagaries of the vetting and nomination process now make 150 days a more realistic time limit. Even if there is no first assistant, and the President declines to designate a Senate-confirmed person to be the acting person, the 150-day period begins to run. Thus, the designated person would serve for 150 days less the time that elapsed between the vacancy and the designation. If the vacancy arises while the Senate is in adjournment sine die, and thus the acting officer begins to serve during such period, the 150-day period is to begin on the date that the Senate first reconvenes. The only time this provision is relevant is when the Senate-confirmed person dies, resigns, or becomes ineligible to serve when the Senate is in adjournment sine die.

The 150 days is a maximum period, but an acting officer need not serve the full 150 days. Besides the obvious ending of service within 150 days if a nominee is confirmed in that time, the Vacancies Act also applies to the beginning of an inability of the applicable officer to serve. When that officer is again eligible to resume service, he or she may return to the office, thus ending the service of the acting officer.

The 150 days runs from the vacancy, "vacancy" referring to the death, resignation, or beginning of inability to serve of the Senate-confirmed officer. This meaning of "vacancy" applies each time it is used in the legislation. When the acting persons 150 days expires, the position again becomes vacant, but there is no "vacancy" that permits another person to serve as acting for another 150 days. Otherwise, a string of acting officials could serve for 150 days. That has never been the understanding of the functioning of the Vacancies Act, and the Committee reaffirms that there is only one vacancy that triggers the 150 days.

An acting officer may die or resign. In that event, the first assistant, if there is one, or a new presidential designee of a Senate-confirmed officer may become the acting officer, limited in service as acting officer to 150 days less the time of service of the first acting officer. No one else may serve as acting officer. Once again, that means that if there is no first assistant, and no presidential designation, no one may serve as acting officer. The prohibition on an acting officer who was first assistant for less than 180 days of the 365 days prior to the vacancy becoming the nominee for the position would still be applicable, since the original vacancy, not the subsequent departure of the acting officer, is the measuring event.

Under new section 3346(a)(2), and subject to section 3346(b), an acting officer may serve more than 150 days if a first or second nomination is submitted to the Senate, and may serve while that nomination is pending from the date the nomination is submitted. The acting officer may serve even if the nomination is submitted after the 150 days has passed although, as discussed below, the acting officer may not serve between the 151st day and the day the nomination is submitted. The Committee extends the time period for acting service so as to create an incentive for the President to submit a nomination. The submission of nominations also will lead to a reduction in the number of acting officials, a goal the Committee finds highly desirable.

The statutory language refers to "(t)he person serving as an acting officer as described under section 3345." The Committee chose this wording deliberately. That is the only person eligible to be the acting officer, whether during the 150 days or upon submission of a nomination. The same considerations apply to the bills references to "the person" in subsections (b) and (c).

If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the

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President by the Senate, the person may continue to serve as the acting officer for no more than 150 days after the date of such rejection, withdrawal, or return. "Return" refers to Senate Rule XXXI, which provides that, "(I)f the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President." This provision allows the office to be temporarily filled by "the person" who was originally eligible to be the acting officer at the time the vacancy arose while the President is provided 150 days to submit a second nomination.

Notwithstanding the 150-day limit on service of an acting officer following the rejection, withdrawal, or return of a first nomination, "the person serving as the acting officer" may serve longer than 150 days if, in the cases of rejection or withdrawal of the first nominee, a second nomination of a different individual for the office is submitted to the Senate. If the second nomination is submitted after more than 150 days after the rejection, withdrawal or return of the first nomination, the provisions of revised section 3348 will apply until the second nomination is submitted. If the second nominee is confirmed within 150 days of the nomination, the term of the acting officer ceases. In the case of a return, the second nomination could be of the same individual first nominated. The "person serving as the acting officer" may serve for 150 days following the rejection, withdrawal, or rejection of the second nomination. However, after that 150-day period has elapsed, if no permanent nominee has been confirmed, the provisions of revised section 3348 apply.

The revised section 3347 provides that the Vacancies Reform Act applies to any office of an executive agency (including the Executive Office of the President) for which appointment is required to be made by the President by and with the advice and consent of the Senate. The section does allow temporary appointments to be made other than through the Vacancies Reform Act in three narrowly delineated exceptions. First, where Congress provides that a statutory provision expressly provides that it supersedes the Vacancies Reform Act, the other statute will govern. But statutes enacted in the future purporting to or argued to be construed to govern the temporary filling of offices covered by this statute are not to be effective unless they expressly provide that they are superseding the Vacancies Reform Act.

Second, the bill retains existing statutes that are in effect on the date of enactment of the Vacancies Act of 1998 that expressly authorize the President, or the head of an executive department to designate an officer to perform the functions and duties of a specified office temporarily in an acting capacity, as well as statutes that expressly provide for the temporary performance of the functions and duties of an office by a particular officer or employee. (This includes statutes that provide for an automatic designation, unless the President designates another official). The Committee is aware of the existence of statutes specifically governing a vacancy in 41 specific offices, 40 of which would be retained by this bill:

1. Administrator, Drug Enforcement Administration (5 U.S.C. Reorg. Plan No. 2 of 1973) (two alternatives);

2. Administrator, Environmental Protection Agency (5 U.S.C. Appendix 1);

3. Administrator, Federal Aviation Administration (49 U.S.C. 106(I));

4. Administrator, General Services Administration (40 U.S.C. 751(c));

5. Administrator, National Oceanic and Atmospheric Administration (5 U.S.C. Appendix 1);

6. Administrator, Small Business Administration (15 U.S.C. 633(b)(1));

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7. Archivist, National Archives and Records Administration (44 U.S.C. 2103(c));

8. **Attorney General** (28 U.S.C. 508(a));

9. **Attorney General** (28 U.S.C. 508(b));

10. Chairman, Joint Chiefs of Staff (10 U.S.C. 154(d));

11. Chairman, Joint Chiefs of Staff (10 U.S.C. 154(e));

12. Chief Judge, Court of Veterans Appeals (38 U.S.C. 7254(d));

13. Chief of Naval Operations (10 U.S.C. 5035(d)(2));

14. Chief of Staff of the Air Force (10 U.S.C. 8034(d)(2));

15. Chief of Staff of the Army (10 U.S.C. 3034(d)(2));

16. Commandant of the Marine Corps (10 U.S.C. 5044(d)(2));

17. Commissioner, Social Security Administration (42 U.S.C. 902(b)(4));

18. Comptroller General (31 U.S.C. 703(c));

19. Director, Office of Management and Budget (31 U.S.C. 502(f));

20. Director, U.S. Arms Control and Disarmament Agency (22 U.S.C. 2563);

21. Director, U.S. Information Agency (5 U.S.C. Appendix 1);

22. Director, U.S. International Development Cooperation Agency (5 U.S.C. Appendix 1);

23. General Counsel, Department of the Treasury (31 U.S.C. 301(f)(1));

24. General Counsel, National Labor Relations Board (29 U.S.C. 153(d));

25. President, Export-Import Bank (12 U.S.C. 635a(b));

28. Public Printer, Government Printing Office (44 U.S.C. 304);

29. Secretary of Defense (10 U.S.C. 132(b));

30. Secretary of Education (20 U.S.C. 3412(a)(1) (two alternatives);

31. Secretary of Energy (42 U.S.C. 7132(a)) (two alternatives);

32. Secretary of Health and Human Services (5 U.S.C. Appendix 1) (two alternatives);

33. Secretary of Labor (29 U.S.C. 552);

34. Secretary of Transportation (49 U.S.C. 102(c)(2));

35. Secretary of Transportation (49 U.S.C. 102(e));

36. Secretary of the Treasury (31 U.S.C. 301(c)(2));

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37. Secretary of Veterans Affairs (38 U.S.C. 304);

38. Special Counsel, Immigration-Related Unfair Employment Practices (8 U.S.C. 1324b(c)(1));

39. United States Attorney (28 U.S.C. 546(a)-(d)); and

40. United States Marshal (28 U.S.C. 562(a)-(b)).

A statute, 42 U.S.C. 206(a), provides that the Surgeon General shall assign one commissioned officer from the Regular Corps to act as Surgeon General in the event of disability or vacancy in that office. The language of this bill does not retain this statutory means for filling a vacancy in a specific position.

Most of these retained statutes do not place time restrictions on the length of an acting officer. The various authorizing committees may choose in the future to reexamine whether these positions should continue to be filled through the existing procedure, or whether it would be advisable to repeal those statutes in favor of the procedures contained in the Vacancies Reform Act. The Committee believes that some of these statutes may have been passed without knowledge of the Vacancies Act. In any event, even with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies Act would continue to provide an alternative procedure for temporarily occupying the office.

The third exception to the applicability of the Vacancies Reform Act to all executive agency offices that are appointed by the President by and with the advice and consent of the Senate is the Presidents constitutional power under Article II, sec. 2, cl. 3 to make appointments during the recess of the Senate.

The bill provides that any statutory provision providing general authority to the head of an executive agency to delegate or reassign duties within that executive agency is not a statutory provision that qualifies within the exception contained in section 3347(a)(2) for existing statutes that provide for the filling of a vacancy in a specific office. This provision forecloses the argument raised by the Justice Department that sections 28 U.S.C. 509 and 510, rather than the Vacancies Act, apply to vacancies in that department. This provision also forecloses the argument that similar language of vesting and delegation contained in the organic statutes of other departments, rather than the Vacancies Act, applies to those departments.

New section 3348 provides an enforcement mechanism for the legislation. If the President does not submit a nominee for a vacant executive agency position requiring the advice and consent of the Senate within 150 days of the vacancy caused by the departure of the last Senate-confirmed officer, the functions and duties of the office can be performed only by the head of that agency until a nomination is forwarded to the Senate.

The bill defines "function or duty" of the office as those functions or duties that (1) are established by statute and are required to be performed only by the applicable officer; (2) are established by regulation and are required to be performed only by the applicable officer; (3) were established by regulation and were required to be performed only by the applicable officer at any time in the 180 days preceding the vacancy, notwithstanding any regulation issued more recently than 180 days before the vacancy occurred that limits or eliminates any function or duty required to be performed only by the applicable officer. The functions or duties of the office that can be performed only by the head of the executive agency are therefore defined as the non-delegable functions or duties of the officer as they existed at any point during the 180 days prior to the death, resignation, or inability to serve of the last Senate-confirmed person to hold the applicable office, less any such duties subsequently

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limited by statute, but including duties subsequently limited or repealed by regulation, and including any such duties subsequently imposed by statute or regulation. Since so many executive agency positions filled with the advice and consent of the Senate lack any meaningful statutory duties, and because internal departmental regulations such as those providing duties for specific officers can be changed at will without undergoing the notice and comment process, 5 U.S.C. 553(b)(3)(A), the Committee defined the functions and duties of a particular office to be those that existed at any point in the 180 days prior to the vacancy and those subsequently added, but not subtracted. Otherwise, agencies and departments could avoid the enforcement mechanism of making the office vacant by simply issuing regulations providing that the office has no non-delegable duties. The Committee believes that the duties as established 180 days before the vacancy is the appropriate period for freezing the duties because in many instances, the administration will know of an upcoming vacancy. The bill does not include as duties or functions of the office those duties that are limited or eliminated by statute after the date 180 days preceding the vacancy. When Congress shifts statutory duties from one agency to another, or changes the statutory underpinnings of a regulation affecting the duties of an officer, this bill does not extend the life of those affected regulations. Functions and duties of the office added by statute or regulation on or after 180 days preceding the vacancy are defined as functions and duties of the office, and thus, cannot be performed except by the head of the department or agency if the vacant office provisions apply.

Subject to section 3347 and a special rule discussed below when the 150th day is one on which the Senate is not in session, if 150 days elapses from a vacancy to which this legislation applies without the President having submitted a nomination for the vacant office to the Senate, the office shall remain vacant until the President submits a nomination to the Senate. After the 151st day until the date the nomination was made, neither the acting officer nor anyone else could fill the vacant office. In addition, except in the case of the head of an executive agency, only the head of that agency himself or herself could perform any function or duty of the office as defined in the legislation. Delegable functions of the office could still be performed by other officers or employees, but the functions and duties to be performed only by the officer whose appointment is by the President by and with the advice and consent of the Senate could be performed solely by the head of the executive agency. For any such office located within a department, that would mean that only the head of the department could perform those functions. All the normal functions of government thus could still be performed. The legislation only limits the person who may perform them. The goal is not to punish or to obstruct, nor to inconvenience for the purpose of inconveniencing, but, rather, to encourage that a nomination be forwarded to the Senate after more than sufficient time for doing so has elapsed. Any inconvenience to the executive branch can be eliminated instantly by the Presidents unilateral decision to make a nomination, for once such a nomination is made, the acting officer can resume service, including performing the non-delegable duties of the office.

If the head of the agency position is vacant for more than 150 days without a nomination being sent to the Senate, the office is to remain vacant.

If the President does not submit a second nomination to the Senate within 150 days after the rejection, withdrawal, or return of the first nomination, the office will remain vacant, and the non-delegable functions and duties of the office can be performed only by the head of the executive agency as described above. If an office is vacant after 150 days after the rejection, withdrawal, or return of the second nomination, then the office shall remain vacant until a person is appointed by the President by and with the advice and consent of the Senate, and only the head of the executive agency may perform any function or duty of such office until the Senate has confirmed a nominee for the office, as described above. This provision tracks other provisions in the bill that allow the acting officer to serve once a first or second nomination is made, even if more than 150 days have elapsed, but do not permit an additional opportunity for the acting officer to serve in the event of exceeding the bills time

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limits after disposition of the second nomination.

If the 150th day following the vacancy, following disposition of a first nomination other than by confirmation, or following disposition of a second nomination other than by confirmation falls on a date the Senate is not in session, then the first day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

To enforce section 3348s vacant office and performance of duties and functions of the office only by the agency head provisions be enforced, any function or duty of the office taken by a person who fills that vacancy despite the vacant office provision or who, not being the agency head, performs such a function duty without filling the office, shall be of no force or effect. Such actions cannot be made to have force or effect through ratification. For example, the successor in the office by virtue of his appointment by the President by and with the advice and the consent of the Senate may not ratify the actions of a person who filled the office in violation of the legislations provisions or who, not being the agency head, performed nondelegable duties of the office. A lawfully serving acting officer cannot ratify the actions of a temporary officer whose service does not comply with the Vacancies Reform Act. The agency head may not ratify an action that is of no force or effect under this legislation that was performed by another official. Nor under well-established principles of constitutional law may the President ratify actions taken by officials that the law has provided shall be performed solely by lower-level executive branch officials. The Committee expects that litigants with standing to challenge purported agency actions taken in violation of these provisions will raise noncompliance with this legislation in a judicial proceeding challenging the lawfulness of the agency action. It is concerned that the ratification approach taken by the court in Doolinwould render enforcement of the Vacancies Reform Act a nullity in many instances.

Section 3348 does not apply to the General Counsel of the National Labor Relations Board, the General Counsel of the Federal Labor Relations Authority or any inspector general appointed by the President, by and with the advice and consent of the Senate. Although the Committee believes that it has retained the specific statute that governs vacancies in the office of general counsel of the National Labor Relations Board, the Committee desires to make certain that the vacant office provisions do not apply to that position or its equivalent at the Federal Labor Relations Authority. These are two unusual positions that require appointment by the President by and with the advice and consent of the Senate. The positions are within multimember commissions but are not members of those commissions. Congress provided for Senate confirmation for these positions because it demands that these officials be independent of the commissioners. Specifically, it wanted to separate the official who would investigate and charge potential violations of the underlying regulatory statute from the officials who would determine whether that statute had actually been violated. If the non-delegable duties of these general counsel were somehow to be performed by the commissioners, that policy would be obliterated. Thus, section 3345 applies to all advice and consent positions, but section 3347 retains the existing statutory procedure for filling a vacancy in the general counsel of the NLRB. Section 3348 states clearly its inapplicability to the general counsel of the NLRB.

Under current law, the general counsel of the FLRA is not covered by the Vacancies Act because of the peculiarity that the position requires the advice and consent of the Senate but is not the head of an agency. Whereas the Justice Department has argued that its non-coverage under the Vacancies Act means that other provisions govern acting appointments for its offices, the Department has concluded that no statute permits an acting general counsel at the FLRA. Accordingly, in recent years, when that position has become vacant, no one has performed its duties until a permanent successor has been confirmed by the Senate. Since one of the duties of that position is to institute proceedings, this has resulted essentially in the cessation of the agencys functions. S. 2176 covers the general counsel of the FLRA under sections 3345 and 3346, permitting an acting officer to serve in case of a

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vacancy, but excludes the position from the enforcement mechanisms of section 3348 to preserve the independence of the position.

Similarly, agency inspectors general are to be independent of the agencies to which they are assigned. Inspectors general are to investigate mismanagement in their agency, and often may be critical of the agency head. If an inspector general whose appointment was made by the President by and with the advice and consent of the Senate were to have his functions performed by the agency head, the agency head might be delighted not to perform them vigilantly. Thus, section 3348 will not apply to this class of inspectors general.

Revised section 3349 of the bill requires the head of each executive agency to submit to the Comptroller General and to each house of Congress notification of vacancies in positions in their agencies requiring Senate confirmation, the name of any person serving in an acting capacity and the date such service began as soon as such service began, the name of any person nominated to the Senate to fill the vacancy as soon as such nomination is submitted, and the date of a rejection, withdrawal, or return of any nomination as soon as such rejection, withdrawal, or return occurs. If the Comptroller General makes a determination that an officer is serving longer than the 150-day period, including the applicable exceptions to such period in the legislation, the Comptroller General is to report such determination to the relevant committees listed in the legislation, the President, and the Office of Personnel Management. This function is informational only and does not provide the Comptroller General with any function properly to be performed only by an executive branch official. The Committee designated the recipients of the report so that appropriate action can be taken by the individuals who are informed of possible violations of the law.

New section 3349a extends the 150-day period in sections 3346 and 3348 for vacancies that exist on or that arise within 60 days after a presidential inaugural transition. In effect, the 150-day period becomes 240 days in this circumstance, running from the later of the date the vacancy arose or the transitional inauguration day. The bill defines a presidential inaugural transition as a date on which any person swears or affirms the oath of office as President, if such person was not the President on the date preceding the date of the swearing or affirming such oath of office. The time limit is extended in this circumstance because a new president will have essentially all positions in the executive branch requiring Senate confirmation to fill when he assumes office and may require additional time to nominate individuals to fill them. By the time the 240 days has run, the President would have confirmed sufficient of his own Senate-confirmed officials to designate as acting officers if he chose to exercise his power under section 3346, and that could continue to serve as the acting officer if a permanent nominee were submitted to the Senate. The provision covers vacancies in positions requiring Senate confirmation that arise in the 60 days following the presidential inauguration transition because each department keeps a Senate-confirmed person into a new administration for a short time in case vacancies in that department are not able to be filled as quickly as anticipated. The filling of those holdover offices should also be subject to the 90-day tolling of the 150-day period.

New section 3349b retains existing statutes that provide, with respect to any independent establishment headed by a single officer, that that officer can serve after the expiration of his term and until a successor is appointed or a specified period of time has elapsed. Whereas section 3347 retains those statutes that provide a means of succession for an acting person to perform the duties of a specified office, section 3349b retains statutes affecting specific independent establishments headed by a single officer that do not provide for an acting officer, but which instead permit the officer to serve until his successor is appointed or for a specified period of time. These statutes govern the Chairman of the National Endowment for the Arts (20 U.S.C. 954(b)(2)), the Chairman of the National Endowment for the Humanities (20 U.S.C. 956(b)(2)), the Special Counsel of the Office of Special Counsel (5 U.S.C. 1211 (b)), and the Commissioner of the Social Security Administration (42 U.S.C. 901(a)(3)). Independent establishments headed by a single officer previously covered by the Vacancies

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Act continue to be so covered under this legislation.

New section 3349c provides that the Vacancies Reform Act shall not apply to any member appointed by the President by and with the advice and consent of the Senate to a board, commission, or similar entity that is composed of multiple members, and governs an independent establishment or Government corporation. The Committee believes that this has always been the case with the respect to the Vacancies Act and wishes to avoid any confusion that might result from the enactment of a replacement statute on this point. Thus, vacancies in these positions are not covered by this legislation. Section 3349c excludes commissioners of the Federal Energy Regulatory Commission from the Vacancies Act as well, since it is an anomaly: the only multi-member independent agency that Congress has not placed in an independent establishment but in a department. Subsection (b) of section 3349c makes technical and confirming changes.

Section 3 of the legislation specifies its effective date. The legislation takes effect on the date of enactment, and shall apply to any office that becomes vacant after the date of enactment of this legislation or that is vacant on that date, although, as to the latter, its provisions shall apply as though such office first became vacant on that date. Thus, the 150-day period for those offices that are vacant on the date the legislation is enacted begins on the date the legislation is enacted, rather than the date the vacancy arose.

VII. Regulatory Impact Statement

Paragraph 11(b)(1) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate "the regulatory impact which would be incurred in carrying out this bill."

The enactment of this legislation will not have significant regulatory impact.

VIII. Cost Estimate of the Legislation U.S. Congress, Congressional Budget Office, Washington, DC, July 1, 1998. Hon. Fred D. Thompson, Chairman, Committee on Governmental Affairs, U.S. Senate, Washington, DC.

Dear Mr. Chairman:The Congressional Budget Office has prepared the enclosed cost estimate for S. 2176, the Federal Vacancies Reform Act of 1998.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is John R. Righter.

Sincerely, June E. ONeill, Director.

Enclosure.

congressional budget office cost estimate
S. 2176 Federal Vacancies Reform Act of 1998

S. 2176 would amend the Vacancies Act to clarify requirements relating to vacancies in and appointments to executive branch positions, including limitations on the amount of time that unconfirmed appointees can remain in office. It also would require the head of each executive branch agency to submit certain information regarding vacancies and appointments to the General Accounting Office. CBO estimates that enacting S. 2176 would have no significant impact on the federal budget.

Pay-as-you-go considerations: None.

Intergovernmental and private-sector impact: S. 2176 contains no intergovernmental or

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private-sector mandates as defined in the Unfunded Mandates Reform Act and would have no impact on state, local, or tribal governments.

Estimate prepared by: John R. Righter.

Estimate approved by: Paul N. Van de Water, Assistant Director for Budget Analysis.

IX. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law with no change proposed is shown in roman):
UNITED STATES CODE TITLE 5, GOVERNMENT ORGANIZATION AND EMPLOYEES

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(3342. Repealed.)

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The bill applies to all vacancies in Senate-confirmed positions in executive agencies with a few express exceptions. First, those laws that expressly provide that they supersede the Vacancies Act will do so. Second, current laws (there are approximately 41) that provide for the President or the head of an executive department to designate an officer to perform the functions and duties of a specified office in an acting capacity are maintained, as are those statutes that themselves stipulate who shall serve in a specific office in an acting capacity. Statutes that generally permit agency heads to delegate or reassign duties within their agencies are specified not to constitute statutes that provide for the temporary filling of particular offices.

The bills enforcement mechanism is to make an office vacant if, 150 days after the vacancy arises, no presidential nominee has been submitted to the Senate for the office. For offices other than the heads of agencies, the functions and duties specifically to be performed by the vacant officer are to be performed only by the head of the agency. Such duties include duties established by regulation for the officer during any part of the 180 days before the vacancy occurred, notwithstanding subsequent regulations that purported to limit those duties. The sanction can be ended if the President submits a nominee after the 150-day period, whereupon the acting officer can resume service. Actions taken in violation of the vacant officer provisions are of no effect and are not permitted to be ratified by anyone else. The shifting of duties to the agency head does not apply to vacancies in the positions of general counsel to the National Labor Relations Board and Federal Labor Relations Authority or to Senate-confirmed inspectors general, given the specific goal Congress established for those positions of independence from the agency heads.

The bill also requires heads of agencies to report to the General Accounting Office on the existence of vacancies, persons serving in an acting capacity, the names of any nominees, and dates of disposition of such nominees. The Comptroller General then reports to the Congress, the President, and the Office of Personnel Management of the existence of any violations of the Vacancies Act.

The 150-day period for submitting nominations is extended for an additional 90 days for vacancies that exist when the President changes or that arise in the 60 days thereafter. And the bill maintains holdover provisions in current law that apply to single-member independent agencies, and exempts members of multi-member independent agencies altogether, as does the present Vacancies Act.

The bill applies to any office that becomes vacant after the date of enactment, as well as to offices that are vacant on the date of enactment, except that the bill shall apply to those offices as though they first became vacant on the date of enactment.

III. Need for Legislation

The need for legislation to govern the performance of the functions and duties of vacant offices ultimately derives from Article II, Section 2 of the Constitution, which, inter alia, ests the President with the authority to appoint all officers of the United States, subject to the advice and consent of the Senate, but that Congress, by law, may vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments. Congress has passed legislation since the Washington Administration to provide for temporary officials to perform the functions and duties of vacant positions requiring the advice and consent of the Senate. Over the years, the time of temporary service has been lengthened, but Congress has always placed time limits on such acting officials.

In recent decades, the Department of Justice has argued that its advise and consent positions are not covered by the Vacancies Act. It construes its enabling legislation, and now the enabling legislation of other departments, as exempting its compliance with the

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3348. Vacant office.

3349. Reporting of vacancies.

3349a. Presidential inaugural transitions.

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3349c. Exclusion of certain officers.
PART III EMPLOYEES
Subpart B Employment and Retention

CHAPTER 33 EXAMINATION, SELECTION, AND PLACEMENT

Subchapter III Details

Subchapter III Details, Vacancies, and Appointments 3345. Details; to office of head of Executive agency or military department

When the head of an Executive agency (other than the General Accounting Office) or military department dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops.
3345. Acting officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office

(1) the first assistant of such officer shall perform the functions and duties of the office temporarily in an acting capacity, subject to the time limitations of section 3346; or

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the office temporarily in an acting capacity, subject to the time limitations of section 3346.

(b) Notwithstanding section 3346(a)(2), a person may not serve as an acting officer for an office under this section, if

(1) on the date of the death, resignation, or beginning of inability to server of the applicable officer, such person serves in the position of first assistant to such officer;

(2) during the 365-day period preceding such date, such person served in the position of first assistant to such officer for less than 180 days; and

(3) the President submits a nomination of such person to the Senate for appointment to such office.

(c) With respect to the office of the **Attorney General** of the United States, the provisions of section 508 of title 28 shall be applicable.
3346. Details; to subordinate offices

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When an officer of a bureau of an Executive department or military department, whose appointment is not vested in the head of the department, dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops.
3346. Time limitation

(a) The person serving as an acting officer as described under section 3345 may serve in the office

(1) for no longer than 150 days beginning on the date the vacancy occurs; or

(2) subject to subsection (b), once a first or second nomination for the office is submitted to the Senate from the date of such nomination, for the period that the nomination is pending in the Senate.

(b)(1) If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may continue to serve as the acting officer for no more than 150 days after the date of such rejection, withdrawal, or return.

(2) Notwithstanding paragraph (1), if a second nomination for the office (of a different person than first nominated in the case of a rejection or withdrawal) is submitted to the Senate after the rejection, withdrawal, or return of the first nomination, the person serving as the acting officer may continue to serve

(A) until the second nomination is confirmed; or

(B) for no more than 150 days after the second nomination is rejected, withdrawn, or returned.

(c) If a person begins serving as an acting officer during an adjournment of the Congress sine die, the 150-day period under subsection (a) shall begin on the date that the Senate first reconvenes.
3347. Details; Presidential authority

Instead of a detail under section 3345 or 3346 of this title, the President may direct the head of another Executive department or military department or another officer of an Executive department or military department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the office until a successor is appointed or the absence or sickness stops. This section does not apply to a vacancy in the office of **Attorney General.**
3347. Application.

(a) Sections 3345 and 3346 are applicable to any office of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless

(1) another statutory provision expressly provides that the such provision supersedes sections 3345 and 3346;

(2) a statutory provision in effect on the date of enactment of the Federal Vacancies Reform Act of 1998 expressly

(A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in

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an acting capacity; or

(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(3) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

(b) Any statutory provision providing general authority to the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) to delegate duties to, or to reassign duties among, officers or employees of such Federal agency, is not a statutory provision to which subsection (a)(2) applies.
3348. Details; limited in time

(a) A vacancy caused by death or resignation may be filled temporarily under section 3345, 3346, or 3347 of this title for not more than 120 days, except that

(1) if a first or second nomination to fill such vacancy has been submitted to the Senate, the position may be filled temporarily under section 3345, 3346, or 3347 of this title

(A) until the Senate confirms the nomination; or

(B) until 120 days after the date on which either the Senate rejects the nomination or the nomination is withdrawn; or

(2) if the vacancy occurs during an adjournment of the Congress sine die, the position may be filled temporarily until 120 days after the Congress next convenes, subject thereafter to the provisions of paragraph (1) of this subsection.

(b) Any person filling a vacancy temporarily under section 3345, 3346, or 3347 of this title whose nomination to fill such vacancy has been submitted to the Senate may not serve after the end of the 120-day period referred to in paragraph (1)(B) or (2) of subsection (a) of this section, if the nomination of such person is rejected by the Senate or is withdrawn.
3348. Vacant office

(a) In this section

(1) the term "action" includes any agency actions as defined under section 551(13); and

(2) the term "function or duty" means any function or duty of the applicable office that

(A)(i) is established by statute; and

(ii) is required by statute to be performed by the applicable officer (and only that officer); or

(B)(i)(I) is established by regulation; and

(II) is required by such regulation to be performed by the applicable officer (and only that officer); and

(ii) includes a function or duty to which clause (I) (I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs, notwithstanding any regulation that

(I) is issued on or after the date occurring 180 days before the date on which the vacancy occurs; and

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(II) limits any function or duty required to be performed by the applicable officer (and only that officer).

(b) Subject to section 3347 and subsection (c)

(1) if the President does not submit a first nomination to the Senate to fill a vacant office within 150 days after the date on which a vacancy occurs

(A) the office shall remain vacant until the President submits a first nomination to the Senate; and

(B) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office), only the head of such Executive agency may perform any function or duty of such office, until a nomination is made in accordance with subparagraph (A);

(2) if the President does not submit a second nomination to the Senate within 150 days after the date of the rejection, withdrawal, or return of the first nomination

(A) the office shall remain vacant until the President submits a second nomination to the Senate; and

(B) in the case of any office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office), only the head of such Executive agency may perform any function or duty of such officer, until a nomination is made in accordance with subparagraph (A); and

(3) if an office is vacant after 150 days after the rejection, withdrawal, or return of the second nomination

(A) the office shall remain vacant until a person is appointed by the President, by and with the advice and consent of the Senate; and

(B) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office), only the head of such Executive agency may perform any function or duty of such office, until an appointment is made in accordance with subparagraph (A).

(c) If the last day of any 150-day period under subsection (b) is a day on which the Senate is not in session, the first day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

(d)(1) Except as provided under paragraphs (1)(B), (2)(B), and (3)(B) of subsection (b), an action shall have no force or effect if such action

(A)(i) is taken by any person who fills a vacancy in violation of subsection (b); and

(ii) is the performance of a function or duty of such vacant office; or

(B)(i) is taken by a person who is not filling a vacant office; and

(ii) is the performance of a function or duty of such vacant office.

(2) An action that has no force or effect under paragraph (1) may not be ratified.

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(e) this section shall not apply to

(1) the General Counsel of the National Labor Relations Board;

(2) the General Counsel of the Federal Labor Relations Authority; or

(3) any Inspector General appointed by the President, by and with the advice and consent of the Senate. 3349. Details; to fill vacancies; restrictions

A temporary appointment, designation, or assignment of one officer to perform the duties of another under section 3345 or 3346 of this title may not be made otherwise than as provided by those sections, except to fill a vacancy occurring during a recess of the Senate.
3349. Reporting of vacancies

(a) The head of each Executive agency (including the Executive Office of the President, and other than the General Accounting Office) shall submit to the Comptroller General of the United States and to each House of Congress

(1) notification of a vacancy and the date such vacancy occurred immediately upon the occurrence of the vacancy;

(2) the name of any person serving in an acting capacity and the date such service began immediately upon the designation;

(3) the name of any person nominated to the Senate to fill the vacancy and the date such nomination is submitted immediately upon the submission of the nomination; and

(4) the date of a rejection, withdrawal, or return of any nomination immediately upon such rejection, withdrawal, or return.

(b) If the Comptroller General of the United States makes a determination that an officer is serving longer than the 150-day period including the applicable exceptions to such period under section 3346, the Comptroller General shall report such determination to

(1) the Committee on Governmental Affairs of the Senate;

(2) the Committee on Government Reform and Oversight of the House of Representatives;

(3) the Committees on Appropriations of the Senate and House of Representatives;

(4) the appropriate committees of jurisdiction of the Senate and House of Representatives;

(5) the President; and

(6) the Office of Personnel Management.
3349a. Presidential inaugural transitions

(a) In this section, the term "transitional inauguration day" means the date on which any person swears or affirms the oath of office as President, if such person is not the President on the date preceding the date of swearing or affirming such oath of office.

(b) With respect to any vacancy that exists during the 60-day period beginning on a transitional inauguration day, the 150-day period under section 3346 or 3348 shall be deemed to begin on the later of the date occurring

(1) 90 days after such transitional inauguration day; or

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(2) 90 days after the date on which the vacancy occurs.
3349b. Holdover provisions relating to certain independent establishments

With respect to any independent establishment for which a single officer is the head of the establishment, sections 3345 through 3349a shall not be construed to affect any statute that authorizes a person to continue to serve in any office

(1) after the expiration of the term for which such person is appointed; and

(2) until a successor is appointed or a specified period of time has expired.
3349c. Exclusion of certain officers

Sections 3345 through 3349b shall not apply to

(1) any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that

(A) is composed of multiple members; and

(B) governs an independent establishment or Government corporation; or

(2) any commissioner of the Federal Energy Regulatory Commission.

ADDITIONAL VIEWS

The Committee on Governmental Affairs has a long list of legislative accomplishments that have enhanced the efficiency and effectiveness of the Federal government. These milestones were achieved with bipartisan support in both Democratic and Republican controlled Administrations and Congresses. The Vacancies Act should be no exception. As the Majoritys Report well explains, the Vacancies Act is in need of reform. For too long, the Executive Branchs interpretation and implementation of that law have stripped it of its original intent and, on occasion, effectively deprived the Senate of its constitutional right to partake in the appointment of a number of Federal officers. Nevertheless, although we share the Majoritys desire to amend the Vacancies Act and agree with many, if not most, of the policy choices contained in S. 2176 we write separately to emphasize a number of concerns we have about the current draft of the bill. Although these concerns were not sufficient to prevent us from voting to report the bill out of Committee, they are nonetheless serious and, we believe, need to be addressed before the bill is ready for final action on the Senate floor.

Some of our reservations about the bill are largely technical, reflecting our concern that the bill, in fact, could be misinterpreted and fail to do what the Committee intends it to do. Others are more substantive in nature and rest on our fear that the Committees understandable desire to protect the Senates constitutional prerogatives may have led it to create a situation that could prevent the Executive Branch from efficiently and effectively fulfilling its constitutional duties to execute the Congress laws. We discuss these concerns in detail below. We remain hopeful that, in the bipartisan spirit in which this legislation has thus far progressed, we can work out all of them before moving this bill further in the legislative process.

We are pleased that the Majority included us in the discussions leading up to the introduction and markup of S. 2176, and we believe that, due to those discussions, agreement was reached in four significant areas: (1) the time period of 150 days for service by an acting official absent a nomination, (2) the need for a "cure" in the case of a nomination made subsequent to the expiration of such period to allow an acting official to resume the functions and duties of the vacant office, (3) the exclusivity of the Act except in cases in which

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Congress makes clear it is specifying an alternative or supplemental means for filling vacancies, and (4) the necessity of an enforcement mechanism to encourage nominations to be made in a timely manner.

While these four areas are addressed in the bill, we remain concerned that 3348, the enforcement mechanism, as drafted, may not operate to achieve our goals. We must be sure that the operation of this provision does not cause an unintended shutdown of the Federal agency within which the vacancy exists due to administrative paralysis and that the provision is drafted clearly so that its scope, mainly the extent of government functions and duties it would affect, is well understood. We must be clear that the non-delegable duties we intend to have performed only by the agency head in the event of a vacancy beyond the 150 days without a nomination are only those expressly vested by law or regulation exclusively in the vacant position. In this regard, we acknowledge and appreciate the Majoritys statement that "all the normal functions of government thus could still be performed." For example, where a statute or regulation specifies that an Assistant Secretary for Policy Development is responsible for overseeing policy development, the development of policy would continue, but if a non-delegable approval is necessary to implement the policy, that approval must be performed by the agency head during a vacancy.

One other concept in 3348 bears emphasis. The non-delegable duties of an agency head are not addressed in this legislation because the Committee expects that there will never be a case where a nomination for these positions is not timely submitted.

We would like to see serious consideration given to who, other than the first assistant or another Presidentially-appointed, Senate confirmed official designated by the President, as a qualifying acting official. We recognize the policy of maintaining the continuity and regularity of the vacated office by allowing a first assistant to automatically succeed to the position and the policy of allowing any individual nominated by the President and confirmed by the Senate to fill any "advice and consent" position. However, we believe that more flexibility is advisable and that our ultimate goal should be to ensure that the most qualified individual available fills the position. One possible alternative would be to allow a third category of individuals to temporarily fill positions, such as a qualified individuals who have worked within the agency in which the vacancy occurs for a minimum number of days and who are of a minimum grade level.

On related point, we believe the length of service requirement for first assistants who are nominees should be reevaluated. Senator Glenn offered an amendment at the Committees June 17, 1998 markup to shorten the period required for an acting official who was a first assistant to be a nominee. As Senator Glenn noted at markup, this requirement would preclude service by a first assistant who naturally ascends to that position from within the agency, who might be a logical choice to fill the vacancy on a permanent basis. In considering shortening this requirement, we should strive to ensure the smooth flow of government activity, not penalize the individual, the agency or the taxpayers. We reiterate our preference for shortening this requirement.

We would also like to see a "safety valve" provision considered which would extend the 150-day period for a temporary appointment for an additional period of time if the President certifies that it is in the national interest to suspend or lengthen the period. Such "interests" could include reasons relating to national security, public health and safety, or financial stability. We recommend that information be gathered to determine which critical functions affect such interests.

We believe that special consideration should be given to a situation in which a new president is being inaugurated. In such a case, especially when there is a change in the political party of the new president, there is unlikely, in many cases, to be a first assistant who, according to the bills length of service requirement, would be eligible to both serve as the acting official

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and be the nominee. This limits a new Administration which may want to put its qualified people in acting positions and nominate them as well. The Senate should consider whether it is advisable to prohibit this type of service categorically or whether a more narrow compromise would be possible. In addition, we should ensure that the extended time period for temporary appointments at the beginning of a new Administration 1 accurately reflects the reality of the nomination process when a new President assumes office. We would not want to hamper future Administrations ability to become operational as quickly as possible.

1The extended time periods provided in 3349b total 240 days as the period for temporary appointments in a new Administration. This time period is applicable to all vacancies that arise from the date of the inauguration of the new President and for the subsequent 60 days.

At markup, the Committee also discussed whether nominations could be sent up during a recess of the Senate. Specifically, we believe it is still unclear whether the bill, as written, would allow the Administration to cure a violation by making a nomination during recesses of the Senate. While it is clear that the Senate regularly authorizes itself to accept Presidential messages during its recesses, and the President is permitted to submit nominations to the Senate at any time, in practice, nominations are not sent up during recesses. We are concerned with assuring the smooth functioning of Government. One of our overriding concerns in reforming the Vacancies Act should be to ensure that we are not overburdening an agency head with the non-delegable responsibilities of other positions where such a situation can be avoided. We urge the Senate to consider remedying this situation by allowing the President to effectively notice the Senate with a letter of intent including the name of a nominee and a statement that he intends to nominate that person when the Senate reconvenes. By allowing such letter, the Senate would allow the President to exercise good faith where he wants to avoid using a recess appointment.

See 139 CR 8 (1993), 141 CR S9 (daily ed. Jan. 4, 1995), 143 CR S8 (daily ed. Jan. 7, 1997).

See Floyd M. Riddick and Alan S. Frumin, Riddicks Senate Procedure, p. 949 (Rev. Ed. 1992).

President Clinton has exercised his Constitutionally mandated recess appointment power 45 times in five years, President Bush made 78 recess appointments in four years and President Reagan made 239 in eight years.

Finally, we would hope that consideration will be given to increasing the one-day requirement of 3348(c). While we are pleased that a recess will toll the temporary appointment period, to guard against an Administrations inadvertently missing the one-day window and certain functions and duties unnecessarily being delegated to the agency head, we recommend adding two days to the requirement that the President submit a nomination the day the Senate reconvenes.

As mentioned above, there are several other issues of concern to us which we believe are of a technical nature. While they are important issues in that their resolution affects the way a new law could be interpreted, because there is agreement between Majority and Minority staffs to aim to address these issues in a Managers Amendment as the bill is considered by the full Senate, such issues will not be enumerated here. It is our hope that all of our concerns will be addressed in future discussions before S. 2176 is presented for debate on the Senate floor.

We cannot leave the topic of the process by which the President nominates federal officials without touching on the process by which the Senate confirms them. It is getting increasingly difficult to attract the best and brightest to government service, and those who serve in

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Presidentially-appointed, Senate confirmed positions are doing so for an average of less than two and a half years. And because the time period from vacancy through confirmation has become increasingly lengthy, we must go through this arduous process often multiple times within a single Administration. We agree that the Executive Branch too often takes too long to submit nominations to the Senate and that this delay not only intrudes upon the Senates constitutional prerogatives but also impedes the good functioning of government. At the same time, however, we would be truly remiss if we failed to acknowledge that blame in this area does not rest in the Executive Branch alone; the Senate has frequently declined to exercise its advice and consent responsibility in a timely and appropriate manner. Too often, nominations die in Committee, languish on the Executive Calendar, or simply take months or years to move through this Chamber. While the Senate remains free to reject the Presidents nominees when appropriate, it owes it to both the Executive, and more importantly, the American people, to discharge its constitutional duty to offer and not withhold its advice and, where appropriate, timely consent. We hope that in the future the Senate is willing to commit itself to act to reform its confirmation process in the same bi-partisan spirit we expect it to exhibit in enacting this legislation.

John Glenn.

Carl Levin.

Joe Lieberman.

Max Cleland.

Robert Torricelli.

MINORITY VIEWS

While we associate ourselves with the concerns outlined in the Additional Views of Senator John Glenn, our serious reservations abut the bill prevents us from supporting this legislation in its present form. Revisions to the Vacancies Act must reflect the realities of the nomination and confirmation process as it have evolved over the last several years. Furthermore, it is important to recognize the implication of imposing unrealistic expectations or restrictions on the process which could force the President to expand the use of recess appointment authority.

We recognize the need to safeguard the Senates constitutional prerogative to advise and consent to nominations of executive officers, and do not oppose efforts to clarify and bolster the Vacancies Act as the executive mechanism (with limited and explicit exception) for the President to designate officials to temporarily fill vacancies in positions requiring Senate confirmation. Unfortunately, this bill goes well beyond that justifiable but limited goals.

We are concerned that this bill would impede the functioning of the Executive Branch. Concerns about the inability of Presidents to promptly submit nominees to fill positions requiring Senate confirmation has been a driving force prompting periodic reevaluation of Vacancies Act provisions throughout the last two centuries, including the present instance. Yet merely adding 30 days to the time permitted under current law for positions to be temporarily filled by an acting official is, in our opinion, wholly inadequate and impractical.

While the White House certainly bears some responsibility for the time it takes to select and advance nominees, it is a responsibility that is shared by the Senate. Given that the protracted, arduous, and unduly politicized Senate confirmation process contributes to making it increasingly more difficult to identify, recruit, and screen candidates for Federal appointments, it is imprudent to impose rigid statutory deadlines and to limit the persons eligible to serve temporarily as acting officers in vacant positions. Within substantial changes,

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we cannot support this bill.

First, this legislation too narrowly restricts who can function in an "acting" capacity. Section 3345(a)(1) of the bill can be read to provide that, aside from another Senate-confirmed Presidential appointee designated by the President, only the "first assistant" to the particular Senate confirmed officer who dies, resigns or is other unable to perform the functions and duties of the position, can be an acting officer. Early in the Administration of a newly-inaugurated President, virtually the only person who could serve as acting officers would be the first assistants from the prior Administration, since transferring another PAS person would merely create a new vacancy elsewhere. Moreover, the Senate could prolong the tenure of those holdover officers simply by delaying or failing to confirm the Presidents nominee. No President should have to accept such a state of affairs.

Moreover, mandating that only first assistant or Senate-confirmed officials are eligible to serve as acting officers promotes no legitimate public policy. Indeed, this limitation prevents a President from naming an experienced career employee as an acting official, in favor of a person lacking broad experience who was brought into Department by the departing official. Consequently, the bill could preclude the President from naming the most qualified person to serve as an acting officer. In addition, the lack of a first assistant to a particular office that becomes vacant would leave the position vacant until such time as the President designates a previously Senate-confirmed official to temporarily fill that vacancy as an acting official. Given the tight time period of the Act, we fail to see why this provision should be so narrowly drawn. Without any justification based on its institutional interests, the Senate would do a great disservice by adopting such a restrictive measure. Therefore, we endorse Senator Glenns suggestion that serious consideration be given to establishing a third category of individuals eligible to temporarily fill vacant positions.

Second, the unalterable 150 day time limit on service by acting officers is far too rigid. Indeed, it could impair the national interest. Circumstances may arise under which the President is unable to nominate an individual for a particular office within 150 days of a vacancy. Under this bill, the office would have to remain vacant even if that vacancy would undermine national security, impede public health and safety, threaten financial stability, or interfere with law enforcement. We believe there should be a flexible "safety valve" available for exceptional situations, whereby the President could certify to the Senate that a reasonable amount of additional time is needed to designate the appropriate nominee and that it is essential for the acting officer to continue to perform these critical tasks in the interim without interruption.

Third, while it would not affect this President, experience has shown that at the beginning of a new Administration, filling positions in the government requires time far longer than that specified in this bill. At the outset of a new Administration, a President must nominate individuals to at least 320 positions in the 14 executive departments in addition to appointing hundreds of other employees who do not require confirmation. The new President cannot possibly make all required nominations within the 240 days allowed by the bill. In 1993, when the nominations process was, if anything, simpler than it is today, the new Administration was able to forward only 68% of nominations within the first 240 days, leaving 32% of positions unfilled. Unless this time period is changed, the next Administration could effectively be facing departmental shutdowns before the new President can even begin to accomplish what he was elected to do.

Finally, our concern about these time limitations and the constraints on who can be appointed is magnified many times by the enforcement mechanism the bill establishes. It is essentially a sanction of administrative immobilization. Section 3348 of the bill specifies that if the President fails to forward a nomination within the 150-day span following the occurrence of a vacancy or the withdrawal, rejection, or return of a first nomination, the office in question must remain vacant until a nomination is made. No one apart from the

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Vacancies Act. Specifically, the Department of Justice maintains that where a departments organic act vests the powers and functions of the department in its head and authorizes that officer to delegate such powers and functions to subordinate officials or employees as she sees fit, such authority supersedes the Vacancies Acts restrictions on temporarily filling vacant advice and consent positions, allowing for designation of acting officials for an indefinite period, even without submitting a nomination to the Senate to fill the position on a permanent basis. This interpretation of the law is wholly lacking in logic, history, or language, as evidenced by repeated opinions of the Comptroller General. Opinion B-150136, Feb. 19, 1976; 65 Op. Comp. Gen. 626, 631-33 (1986); Opinion B-220522.2, Oct. 17, 1986. By May, 1997, seven statutory offices in the Justice Department requiring presidential nomination and Senate confirmation were vacant. One vacancy had existed for twenty-one months, three were vacant for more than 120 days, and three positions were unfilled for less than 120 days. In at least four instances, positions were filled by an order of the **Attorney General** designating a person to act in the vacant position. For example, the Solicitor Generals position was occupied by an acting officer for more than one year without a nomination ever being submitted to the Senate.

Despite attempts to do so through 1988 amendments to the Vacancies Act, described below, Congress was not successful in gaining the Justice Departments agreement that its advice and consent positions are subject to the Vacancies Act. Given the growing number of federal departments and agencies that now claim exemption from the Vacancies Act, Congress must explicitly reject the position that general organic statutes for various agencies and departments, such as 28 U.S.C. 509 and 510, trump the specific provisions of the Vacancies Act. Otherwise, the Vacancies Act will be of no practical effect, thwarting the constitutional mandate that persons serving in advice and consent positions do so through the Senates approval of such service.

the 1988 amendments

The Justice Departments aggressive claims of exemption from the Vacancies Act led Congress in 1988 to make the first significant changes in the Vacancies Act since 1868. The 1988 amendments changed the laws coverage to apply to all executive departments and agencies, overruling a 1973 court decision that had limited the applicability of the Act to executive and military departments. The length of time that an acting official was permitted to serve was extended to 120 days, rather than the previous 30, and the acting officer could serve more than 120 days if the President submitted a nominee. An additional 120 days of acting service was provided if the Senate rejected the nomination or if it was withdrawn. Through this mechanism, Congress created an incentive for the President to submit nominations in a timely manner, and allowed temporary officials to serve until the Senate completed its advice and consent function. This Committees report accompanying the Senate bill stated, "The Committee also believes that the present language, however old, makes clear that the Vacancies Act is the exclusive authority for the temporary appointment, designation, or assignment of one officer to perform the duties of another whose appointment requires Senate confirmation. The exclusive authority of the Vacancies Act would only be overcome by specific statutory language providing some other means for filling vacancies." S. Rep. No. 100--317, 100th Cong., 2d Sess. 14 (1988). In 1989, the Justice Departments Office of Legal Counsel recognized the Senates view, but continued to interpret the Vacancies Act as not precluding the **Attorney Generals** authority to appoint temporary officials under the Departments organic statute, characterizing the Senate report as an improper and ineffective effort to "alter the proper construction of a statute through subsequent legislative history." 13 O.L.C. 173, 175 (1989). If the Vacancies Act is to function as it is designed to uphold the Senates prerogative to advise and consent to nominations through placing a limit on presidential power to appoint temporary officials the Justice Departments interpretation of the existing statute must be ended. Legislation is needed to ensure this result, a primary reason for the Committees reporting of S. 2176.

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head of the agency can perform the functions and duties of the office. It is imperative that the bill unequivocally ensure that the affected functions and duties of the office are only those that are expressly deemed nondelegable by statute or regulation. Absent that clarity, whole components of federal agencies would have to stop their work. The potential bottleneck created by this provision would prevent the Executive Branch from doing its job. The Senate has tried before to enforce its policy preferences by shutting down the federal government. It was a bad idea then, and its still is now.

As we noted, the Senate bears partial responsibility for the time it takes to nominate officials from Senate confirmed positions. To further amplify, this Congress has subjected the Administrations nominees to unprecedented scrutiny, using almost any prior alleged indiscretion no matter how trivial by a nominee as an excuse to delay or prevent a vote. Senators have also interjected themselves into the Presidents nominations process to an unparalleled degree. As a result, that process the selection, recruitment, and vetting of candidates takes longer than ever before. While the Administration may well bear some responsibility for the slow pace of nominations, we find it troublesome that the Senate would so severely restrict the ability to fill vacant positions temporarily and to conduct the peoples business while at the same time impeding the nominations process and confirming nominees at a snails pace.

This President has made every effort to accommodate Senators views about particular positions and nominees. Moreover, this President has used his power to make recess appointments far less than his predecessors. President Reagan made 239 recess appointments in eight years; President Bush made 78 recess appointments in four years. President Clinton has made only 45 recess appointments in his first five years in office. If this bill passes, we anticipate that the President will have no alternative but to make more recess appointments. That will hardly vindicate the Senates advise and consent function.

We are anxious to craft a bill that fully protects the Senates advise and consent function, while affording the Executive Branch the flexibility it needs to faithfully discharge the laws. In its current form, this bill does not do that. Without changes to address the problems identified above, we cannot support it.

Richard Durbin.

Daniel K. Akaka.

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The Constitutional Need for Legislation

The selection of officers is not a presidential power. The President may choose whom he wishes to nominate, but the Senate has the power to advise and consent before those nominees may assume office. The Appointments Clause "is more than a matter of tiquette or protocol; it is among the significant structural safeguards of the constitutional scheme." Edmond . United States,117 S. Ct. 1573, 1579 (1997). The Appointments Clause was adopted against a historical background: "The anipulation of official appointments had long been one of the American revolutionary generations greatest grievances against executive power because he power of appointment to offices " was deemed "the most insidious and powerful weapon of eighteenth century despotism." Freytagv. Commissioner of Internal Revenue,501 U.S. 868, 883 (1991) (citations omitted).

Nonetheless, vacancies occur in such positions, and since the President lacks any inherent appointment authority for government officers, legislation authorizing some non-Senate confirmed persons to perform the functions and duties of vacant offices is necessary if the governments operations are to be performed. The presidents duty is to submit nominees for offices to the Senate, not to fill those offices himself. The Presidents power to take care that the laws shall be enforced is a duty, and not a source of power, since the President takes care that the laws be executed, and has no right to enforce the laws himself where Congress vests such responsibility in an inferior officer. See, e.g., Kendall ex rel. Stokes . United States,12 Pet. (37 U.S.) 522, 612-613 (1838); Georgev. shimaru,849 F. Supp. 68 (D.D.C. 1994). In the absence of affirmative statutory authority to fill a vacancy, the office must remain vacant. The Vacancies Act limits presidential authority to make acting appointments, while preserving the Senates power to advise and consent. Therefore, its scope must be government-wide unless Congress chooses clearly and specifically to exempt specifically identified officers from its reach when countervailing considerations apply.

Because the Justice Department maintains that it is exempt for the Vacancies Act, it has permitted positions to be held by acting officers for years without the submission to the Senate of a nominee. Its contentions are broadly applicable to virtually all other departments given the broad language of vesting and delegation contained in those departments organic statutes. By early in 1998, 64 of 320 advise and consent positions in the executive branch were held by acting officials, 43 of whom had served more than 120 days without a nominee. Acting officials served in each of the 14 Cabinet departments. If the Constitutions separation of powers is to be maintained, and officers of the government subjected to the scrutiny of the Senate for the benefit of the liberty of the people, legislation to address the deficiencies in the operation of the current Vacancies Act is necessary. The 1988 legislation unfortunately has not succeeded in encouraging presidents to submit nominees in a timely fashion, and it has not resulted in the Justice Departments agreement that is covered by the Act. Indeed, given the number of acting officials and the growing number of departments that claim not to be covered by the Vacancies Act, the Senates confirmation power is being undermined as never before.

The "Doolin" Decision

Most recently, the need for new legislation was underscored by the decision of the United States Court of Appeals for the District of Columbia Circuit in Doolin Security Savings Bank, F.S.B. . Office of Thrift Supervision,139 F.3d 203 (D.C. Cir. 1998). In that case, the validity of an Office of Thrift Supervision administrative enforcement action was challenged by a bank subject to the order on the ground that the absence of a lawfully appointed director of the agency rendered the enforcement action void. The Senate-confirmed director of OTS resigned in December, 1992, and purported to delegate all his authority to OTSs Deputy Director for Washington Operations. That individual, who was neither the first assistant nor a Senate-confirmed individual, served as the acting director until October, 1996. Two days later, the President invoked the Vacancies Act to designate a Senate-confirmed official from

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the Department of Housing and Urban Development to serve as acting director. Within 120 days of the second acting directors appointment, the President submitted a permanent nominee to the Senate. The new acting director issued the final order against the bank in March, 1997.

The bank maintained that the 120-day limitation on acting service contained in the Vacancies Act lapsed long before the second acting director was ever named. The court agreed that the Vacancies Act may be used only when there is a vacancy caused by the departure of an officer appointed in compliance with Article II, and that the departure of an appointed acting official does not trigger the Vacancies Act. The court found that merely because a person temporarily performs the functions of an office does not make that individual an "officer" for purposes of the Vacancies Act. "Otherwise, 3348s time limitation could be easily avoided by a series of temporary resignations, with each resignation triggering a new 120-day period." 139 F.3d at 208. Thus, the departure of the Senate-confirmed Director triggered the presidents authority under 3347 to designate an acting official, not the departure of the acting official. The Committee accepts this reaffirmation of the longstanding operation of the Vacancies Act.

Notwithstanding its recognition that the Presidents designation of the second acting official took place approximately four years after the vacancy in the position arose, however, the court upheld the second acting directors 1997 final order. The court agreed with the Justice Department that the 120-day time limit contained in 3348 does not begin to run until someone actually takes office pursuant to the Vacancies Act, either by detail or by presidential directive. Under that interpretation of the statute, the second acting director served lawfully at the time the order was issued against the bank. The court rejected the banks position that the 120-day period begins immediately upon the death or resignation of a constitutionally appointed officer.

According to the court, "Nothing in the Act expressly deals with the amount of time that may transpire before the President exercises his 3347 authority to designate a temporary replacement." 139 F.3d at 209. In its view, the Vacancies Act governs how long a position may be temporarily filled, but does not specify when the President must undertake the filling of the position. "The time limit is placed not on Presidential action, but on the tenure of the Presidents designee." Id The 120-day period will commence with the vacancy when the first assistant assumes the office or the President under 3347 immediately designates an acting official. But if there is no first assistant and the President does not immediately act, the vacancy has not been "filled" and the 120-day period does not run. Id.

The Committee believes that this portion of the courts opinion necessitates legislative action. Whether or not the court properly interpreted the existing law, the Committee believes that the 120-day time limit must run from the date of the vacancy caused by the death or resignation of the Senate-confirmed official, and not from the date that the President designates an acting official. A limit must be placed on the Presidents time to act to fill a position. If the purpose of the Vacancies Act is to limit the Presidents power to designate temporary officers, a position requiring Senate confirmation may not be held by a temporary appointment for as long as the President unilaterally decides. Such a scheme obliterates the constitutional requirement that the officer serve only after the Senate confirms the nominee. If there is no first assistant, the President must designate another Senate-confirmed official. By contrast, the Doolin ourt would allow the President to accept a resignation on the second day of his term, allow an acting person to assume the functions and duties of the office (in this case, an acting officer not appointed by the President), and then, so long as there is no first assistant, by unilaterally not invoking the Vacancies Act, allow that position to be filled by an "acting" official who has never received Senate confirmation for so long as the president holds office. The Committee finds this state of affairs to be unacceptable and constitutionally suspect. Nor does it believe that the vacancy has not been "filled" when an acting person has been performing the functions and duties of the office for four years.

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Notwithstanding the 1988 Vacancies Act amendments that provide for a tolling of the 120-day period when the President submits a nomination to the Senate to fill the vacant position, the court stated, "The Vacancies Act was never meant to give the President an "incentive" to fill vacant positions with appointees confirmed by the Senate. The function of the Act is to allow some breathing room in the constitutional system for appointing officers to vacant positions, to validate the actions of those temporarily occupying the positions." Id.at 211. The Committee believes that the reason why in 1988, for the first time, the period of acting service was extended beyond 120 days if the President submitted a nominee is that, in light of the frequent noncompliance with the Vacancies Act by presidents who allowed acting officials to serve more than 120 days, Congress wanted to encourage the President to submit a nominee within the Vacancies Act period. If an acting person served beyond 120 days, the Senate at that point would bear the responsibility for the fact that a Senate-confirmed person for that office was not in place.

The court recognized that under its interpretation of the statute, if no one is detailed or directed to fill the position, or the 120 days expires without a nomination, the position will be vacant or occupied by someone not constitutionally entitled to perform the duties of the office. But in its view, that situation will create an incentive for the President to submit a nomination, for fear that the actions of part of his administration will be declared void. The Committee believes that this part of the courts opinion also shows the need for Congressional corrective action. Under the Justice Departments interpretation of the many vesting and delegation provisions in the organic statutes of various departments, few positions would remain vacant. This fact, combined with the lack of an effective enforcement process, would give the President no reason to comply with the Vacancies Act. The court seems not to understand the fundamental purpose of the Vacancies Act, which is not to ensure the legality of the actions of acting officials, but rather to limit the power of the President to name acting officials, as well as the length of service of those officials.

If the Constitution or Congress requires that an office be held only by a person appointed by the President by and with the advice and consent of the Senate, then unless legislation provides to the contrary, only a person the President has nominated for that position and who has received Senate confirmation may fill the position. The President has the duty to take care that the law be faithfully executed, and that duty includes adherence to Article II. He does not have the power to execute the law himself when Congress has given statutory duties to lower-level officials in the executive branch. Nor can he name temporary officers of his unfettered choice. That is why the Vacancies Act or other statutes providing for the temporary filling of a specific position are the exclusive authority setting forth the procedures by which acting officials can serve, with the exception only of the Presidents power to make appointments during the recess of the Senate. The courts opinion overlooks this central concept. The Vacancies Act does recognize that when vacancies arise in those positions, it may be necessary, due to time constraints on the nomination and confirmation processes, for someone who has not received Senate confirmation for that particular post to serve temporarily to keep the government functioning. But the Vacancies Act requires that those acting officers be either (1) first assistants or (2) persons who have already received Senate confirmation for some other post and are selected by the President to be the acting officer.

The court did not reach the question whether the OTS Directors designation of the first acting director satisfied the Vacancies Act. For the court, any error was harmless in light of the legality of the second acting directors appointment under the Vacancies Act, and the ratification by the second acting officer of any actions taken by the first acting director. The Committee also finds that this portion of the courts position demands legislative response. First, it is constitutionally unacceptable for any acting official to serve for four years, especially an officer "appointed" not by the President, nor by a department head, but a mere agency head. The Appointments Clause limits appointing powers to hold individuals accountable for their selections. Second, if any subsequent acting official or anyone else can

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ratify the actions of a person who served beyond the length of time provided by the Vacancies Act, then no consequence will derive from an illegal acting designation. This result also undermines the constitutional requirement of advice and consent.

In short, in light of various administrations noncompliance with the Vacancies Act and a recent court decision undermining its operation, it is imperative that Congress enact legislation to restore constitutionally mandated procedures that must be satisfied before acting officials may serve in positions that require Senate confirmation. The issue is not simply the prerogative of the Senate. Like other structural constitutional provisions, the Appointments Clause was designed to protect the liberty of the people. Although the President has the sole power to nominate, as a single officer may feel a greater sense of duty in selecting an individual for consideration to a particular post, the "the necessity of (the Senates) concurrence would have a powerful, though in general a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. And, in addition to this, it would be an efficacious source of stability in the administration." Federalist LXXVI (Hamilton). Legislation is needed to restore these goals of the Founders.

IV. Legislative History of S.2176

The Federal Vacancies Reform Act of 1998 was introduced as S. 2176 in the Senate on June 16, 1998 by Senators Fred Thompson, Robert C. Byrd, Strom Thurmond, Trent Lott, and William Roth. Introduction of S. 2176 followed the March 16, 1998 introductions of S. 1761, the Federal Vacancies Compliance Act, by Senator Byrd and S. 1764, the Vacancies Clarification Act, by Senators Thurmond and Lott. The latter two bills sought to enforce the Vacancies Act through withholding the pay of any acting officer who exceeded the time period provided by the Vacancies Act, and S. 1764 specifically provided that the time period for acting service ran from the date of the vacancy. In addition, both bills made the Vacancies Act supersede other laws governing the temporary service of non-confirmed officials, ending the argument that statutes vesting in department heads the general authority to delegate powers to other officials provided an alternative method of empowering acting officials apart from the Vacancies Act. Both bills also created a reporting mechanism to the President, the General Accounting Office, and the Congress on the length of time that each acting official had served.

A hearing was held at the Governmental Affairs Committee on oversight of compliance with the Vacancies Act on March 18, 1998. Senator Thompson chaired the hearing, which addressed the general issues of noncompliance with the law, as well as the legislative proposals that had by then been introduced. The following witnesses provided testimony: Senator Robert C. Byrd, State of West Virginia; Joseph N. Onek, Principal Deputy Associate **Attorney General,** Department of Justice, accompanied by Daniel Koffsky, Special Counsel, Office of Legal Counsel, Department of Justice; Joan M. Hollenback, Associate General Counsel, General Accounting Office; Senator Strom Thurmond, State of South Carolina; Michael J. Gerhardt, Professor of Law, Case Western Reserve University; Morton Rosenberg, Specialist in American Public Law, Congressional Research Service; and Paul C. Light, Director, Public Policy Program, The Pew Charitable Trusts.

All of the witnesses but Messrs. Onek and Koffsky supported legislation that would overturn the Justice Departments arguments of exemption from the Vacancies Act and that would create an enforcement mechanism. Senator Byrd also pointed out the Senates responsibility to demand strict compliance with the Vacancies Act from the Administration. He expressed his hope that the Senate would make the Vacancies Act "so tight, so air-tight, that no department can find a crack or crevice anywhere through which to creep." He expressed his view that the Committee could draft legislation to address the problem other than S. 1761. Ms. Hollenbeck provided reasons why the Justice Departments interpretation of the Vacancies

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Act is contrary to the language and legislative history of both the Vacancies Act and the Justice Departments organic statute, and pointed out that Congress passage of statutes governing temporary officers in particular governmental positions shows that Congress knew how to create specific exceptions to the application of the Vacancies Act. She offered GAOs recommendation that legislation be passed to explicitly provide that the Vacancies Act can be superseded only by a statute providing an alternative means for filling a particular vacancy. GAO also recommended reporting provisions and the withholding of pay of acting officials who served in violation of the Vacancies Act. Mr. Koffsky noted that there are no statutory duties that are to be performed by assistant **attorneys general.**

Senator Thurmond testified to the need to rewrite, not simply amend, the Vacancies Act. He demonstrated that the 1988 amendments had not solved the problem of excessive service by acting officials. He also stressed the need to prevent the Justice Department from arguing that it is exempt from the Vacancies Act, which he would accomplish by requiring statutes exempting particular positions from the Vacancies Act to specifically cite the Vacancies Act. Prof. Gerhardt testified to the need to change some of the terms of art used in the Vacancies Act, and suggested lengthening the 120-day time period. Mr. Rosenberg testified to the errors in the Justice Departments exemption argument in light of the language of the Vacancies Act, the Departments organic statute, and its legislative history. He also spoke of the problem of transferring assistant secretaries from one position to another without their undergoing Senate reconfirmation. He recommended adding an enforcement mechanism to freeze the duties of the office as they existed on the date of the vacancy after the 120-day period has expired. Mr. Light testified that one of the problems with noncompliance with the Vacancies Act is the unnecessary proliferation of political appointees in the government at a time when total federal employment was declining.

Following the hearing, Senator Thompson considered whether to introduce his own legislative proposal. After careful consideration, he determined to address only the Vacancies Act issues involved in the Senates advise and consent powers. The Committee believes that authorizing committees may wish to consider whether statutory duties should be given to assistant secretaries and assistant **attorneys general** in those departments in which the only current statutory duty of such officials is to assist the secretary or the **attorney general.** Staff from both parties tried to resolve as many issues as possible. Staff also attempted to respond to the suggestions of the Justice Department and the White House. S. 2176 reflects these discussions. The Committee was told informally that the Justice Department recognizes that the legislation offered effectively prevents it from arguing that departments with vesting and delegation statutes are exempt from the Vacancies Act.

V. Committee Action

On June 17, 1998, the Committee held a business meeting at which S. 2176, the Federal Vacancies Reform Act of 1998, was considered. Senator Lieberman offered an amendment to retain existing statutes that by their own terms provide a process for the filling of specific advice and consent positions, as well as the statues referenced in S. 2176 as introduced, which preserved existing statutes that allow the heads of departments to designate an acting official. That amendment was agreed to by voice vote.

Senator Glenn offered two amendments. The first amendment would have reduced the length of time that a first assistant need serve to be both the acting officer and eligible to be nominated permanently to the position from 180 of the 365 days preceding the vacancy to 30 days prior to the vacancy. The amendment failed on a roll call vote of 6 Yeas (Glenn, Levin, Lieberman, Akaka by proxy, Durbin, and Cleland) and 8 Nays (Roth by proxy, Stevens, Collins, Brownback by proxy, Domenici, Cochran, Nickles by proxy, and Thompson).

Senator Glenns second amendment would permit the acting officer to serve even after the 150-day period following the rejection, withdrawal, or return of the first nomination, once a

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second nomination was made. The amendment was agreed to by voice vote.

Senator Levin offered an amendment to begin the time limit on the service of acting officers in vacant positions arising on or in the 60 days after a transitional inauguration day 120 days after the transitional inauguration or the arising of the vacancy, whichever is later. After Senator Levin agreed to shorten the additional period to 90 days, the amendment was agreed to by voice vote.

With no other amendments being offered, Chairman Thompson moved adoption of S. 2176 as amended. The bill was ordered favorably reported by a vote of 9 Yeas (Stevens, Collins, Domenici, Cochran, Glenn, Levin, Lieberman, Cleland, Thompson) and 1 Nay (Durbin). Senators Roth, Brownback, and Nickles voted Aye by proxy.

VI. Section-by-Section Analysis

Section 1 states the short title of the legislation the "Federal Vacancies Reform Act of 1998."

Section 2 strikes sections 3345 through 3349 of Title 5 and replaces the existing law with a reformed version of the Vacancies Act. The Committee believes that amending existing legislation, given the ineffectiveness of the 1988 amendments, may again fail to ensure the exclusivity of the applicability of the Vacancies Act. To ensure an effective enforcement mechanism and to overturn the recent decision of the United States Court of Appeals for the District of Columbia Circuit in Doolin Security Savings Bank . Office of Thrift Supervision, 39 F.3d 203 (D.C. Cir. 1998), the Committee believes that replacement of the existing Vacancies Act is necessary.

Under current law, section 3345 covers heads of executive agencies, and section 3346 affects "an officer of a bureau of an Executive department or military department, whose appointment is not vested in the head of the department * * *" Section 2 creates a new section 3345, applicable to all officers of executive agencies whose appointment to office is required to be made by the President by and with the advice and consent of the Senate. References to the term of art "bureau" have been eliminated. The purpose of this change is to clearly make the Vacancies Act applicable to all officers of executive agencies whose appointments require Senate confirmation. The Vacancies Act would now apply to such officers in all departments, regardless of the department or agencys organic statute.

"Executive agency" is defined at 5 U.S.C. 105. Because the Department of Defense is a department within the meaning of 5 U.S.C. 101, the military departments, which are located in the Department of Defense, are also covered by this Act, notwithstanding the omission of the term "military department" from current sections 3345 and 3346.

The section applies when an officer in an executive agency whose appointment is made by the President by and with the advice and consent of the Senate dies, resigns, or is otherwise unable to perform the functions and duties of the office. The law applies when any of those factual situations arises, regardless of how the situation is characterized. For instance, the Vacancies Act would apply in situations such as Doolin, hen the first acting director of the Office of Thrift Supervision was purportedly designated by virtue of the departing confirmed directors invocation of a statute providing for his duties to be temporarily delegated in the directors "absence." Under this legislation, when an acting officer is to be designated, as opposed to automatically gaining acting status as a first assistant, only the President may designate an acting officer in a position that requires Senate confirmation.

When a vacancy arises, the bill provides an exclusive set of procedures that may be followed. If the vacant officer has a first assistant, the first assistant performs the functions and duties of the office temporarily in an acting capacity, subject to the time limitations of section 3346. The Committee does not establish a definition of "first assistant." That term has a long

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THE INAPPLICABILITY OF FEDERAL VACANCIES REFORM ACT'S REPORTING OBLIGATIONS FOR PAS OFFICERS SERVING UNDER STATUTORY HOLDOVER PROVISIONS

There is no "vacancy" within the meaning of the Federal Vacancies Reform Act of 1998 when a presidentially appointed, Senate-confirmed officer continues to hold a position under a statutory holdover provision and therefore the holdover service is not reportable under the Act.

July 30, 1999

MEMORANDUM FOR THE GENERAL COUNSEL
OFFICE OF MANAGEMENT AND BUDGET

We recently received two inquires that raised the question whether service of a presidentially appointed, Senate-confirmed ("PAS") officer under a statutory holdover provision is reportable as a vacancy under the Federal Vacancies Reform Act of 1998 ("Vacancies Reform Act" or "Act"). As discussed below, we have concluded that holdover service is not a vacancy for purposes of the Act and therefore is not reportable. We wanted to inform you of our conclusion to facilitate a uniform approach among the Executive agencies on the reporting of this information. Because the Act is somewhat confusing on the point, however, we also would strongly urge (and Mark Childress of the White House Counsel's Office concurs) that you notify the General Accounting Office that the Administration is not reporting holdover positions as vacancies.

Statutory holdover provisions provide for an officer appointed for a term of years to continue to serve in the office at the expiration of the term for which he or she was appointed. In some cases that period is open-ended - statutorily defined as continuing until a successor is appointed. In other cases, the period continues until either a successor is appointed or a specific period of time has expired. In either case, the PAS officer's term in the office continues until the expiration of the statutorily defined holdover period.

As a matter of constitutional law, the executive branch consistently has taken the position that there is a vacancy for purposes of the Recess Appointments Clause when an appointment for a term of years expires and the officer continues serving under a holdover provision.[1] There is, however, no necessary correspondence between the meaning of a "vacancy" for purposes of the Recess Appointments Clause and the meaning of a "vacancy" as used in a statute, such as the Vacancies Reform Act.

Under the Vacancies Reform Act, a "vacancy" occurs when a PAS officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office."5 U.S.C.A. § 3345 (a) (West Supp. 1999). This is a narrower idea of a vacancy than is applicable in the context of the Recess Appointments Clause. It is, as well, a definition that is not, by its terms, applicable to an officer serving under a statutory holdover provision. Under a holdover provision, the Senate-confirmed officer continues to serve in the office and therefore has not died, resigned, or become unable to perform the functions and duties of the office.

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In addition, the Vacancies Reform Act provides, in a separate section specifically addressing service under a holdover provision, that the Act is not intended to affect the service of a PAS officer under such a provision:

> Sections 3345 through 3349a shall not be construed to affect any statute that authorizes a person to continue to serve in any office -
>
> (1) after the expiration of the term for which such person is appointed; and
>
> (2) until a successor is appointed or a specified period of time has expired.

5 U.S.C.A. § 3349b (West Supp. 1999). As a result, we believe that there is no vacancy to be reported under the Act when a PAS officer continues service under a holdover provision.

Although we believe that this is the proper understanding of the Act, § 3345(c)(2) makes what would otherwise be a clear result somewhat less clear. Section 3345(c)(2) provides that "[f]or purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office." Viewed in isolation, this provision could be interpreted to extend the definition of a vacancy to cover service under a holdover provision. Section 3345(c)(2), however, must be interpreted in light of the purpose of § 3345(c) as a whole, and, as so interpreted, it does not alter the conclusion provided by examining the other provisions of the Act.[(2)]

Section 3345(c) was added as a late amendment to the Act for the purpose of creating an additional class of acting officers for a specific, narrow situation: officers holding fixed terms with no holdover provision who are renominated to the office. See 144 Cong. Rec. S12,823 (daily ed. Oct. 21, 1998) (statement of Sen. Thompson) ("New § 3345(c) was added to address the special case of an executive department (not executive agency) officer who serves not at the pleasure of the President, but under a fixed term, and without a holdover provision that governs acting service in that office following expiration of the fixed term." (emphasis added)). Section 3345(c) was not intended to, and does not, supplant or alter the specific statement in § 3349b that the Act does not affect service under a statutory holdover provision.[(3)]

For these reasons, we believe that when an officer serves under a holdover provision, there is no reportable vacancy under the Act.

BETH NOLAN
Deputy Assistant Attorney General
Office of Legal Counsel

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1. Judicial decisions on the issue have been mixed.Compare Staebler v. Carter, 464 F. Supp. 585, 588-601 (D.D.C. 1979) (holding that an FEC office was vacant for Recess Appointments Clause purposes when the incumbent continued to exercise authority pursuant to a holdover provision that provided that "[a] member of the [FEC] may serve on

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the Commission after the expiration of his term until his successor has taken office")with Mackie v. Clinton, 827 F. Supp. 56, 58 (D.D.C. 1993) (whether a vacancy exists for Recess Appointments Clause purposes depends on the wording and structure of the particular holdover provision; deciding that the Postal Service holdover provision did not create a vacancy), vacated as moot, Nos. 93-5287 & 93-5289, 1994 WL 163761 (D.C. Cir. Mar. 9, 1994).

2. The other part of section 3345(c) is subsection (c)(1), which provides:

> Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

3. Section 3345(c) refers to "the expiration of a term of office," and § 3349b refers to "the expiration of the term for which such person is appointed." The different phrases convey different meanings. As we discussed above, § 3345(c)(2) was meant to apply to situations in which there is no holdover provision and was not intended to supplant or alter the clear statement in § 3349b that the Act does not affect service under a holdover provision. But to the extent § 3345(c)(2) encompasses positions with holdover provisions, its reference to a term of office would sensibly include the full period of service in the office, including the holdover period. Section 3349b, on the other hand, refers to "the expiration of the term for which such person is appointed" (emphasis added) when it unquestionably intends to exclude the holdover period. This is the term of years designated as the term of appointment in the statute governing appointment to the position. See, e.g., 28 U.S.C. § 541(b) (1994) ("Each United States attorney shall be appointed for a term of four years. On the expiration of his term, a United States attorney shall continue to perform the duties of his office until his successor is appointed and qualifies.").

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Service: **LEXSTAT®**
Citation: **5 USC 5533**

5 USCS § 5533

UNITED STATES CODE SERVICE
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*** CURRENT THROUGH P.L. 106-418, APPROVED 11/1/00 ***
*** WITH GAPS OF 106-398, 402, 405, 408, 411, 414, 415, 417 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III. EMPLOYEES
SUBPART D. PAY AND ALLOWANCES
CHAPTER 55. PAY ADMINISTRATION
SUBCHAPTER IV. DUAL PAY AND DUAL EMPLOYMENT

5 USCS § 5533 (2000)

§ 5533. Dual pay from more than one position; limitations; exceptions

(a) Except as provided by subsections (b), (c), and (d) of this section, an individual is not entitled to receive basic pay from more than one position for more than an aggregate of 40 hours of work in one calendar week (Sunday through Saturday).

(b) Except as otherwise provided by subsection (c) of this section, the Office of Personnel Management, subject to the supervision and control of the President, may prescribe regulations under which exceptions may be made to the restrictions in subsection (a) of this section when appropriate authority determines that the exceptions are warranted because personal services otherwise cannot be readily obtained.

(c) (1) Unless otherwise authorized by law and except as otherwise provided by paragraph (2) or (4) of this subsection, appropriated funds are not available for payment to an individual of pay from more than one position if the pay from one of the positions is paid by the Secretary of the Senate or the Chief Administrative Officer of the House of Representatives, or one of the positions is under the Office of the Architect of the Capitol, and if the aggregate gross pay from the positions exceeds $ 7,724 a year ($ 10,540, in the case of pay disbursed by the Secretary of the Senate).

(2) Notwithstanding paragraph (1) of this subsection, appropriated funds are not available for payment to an individual of pay from more than one position, for each of which the pay is disbursed by the Chief Administrative Officer of the House of Representatives, if the aggregate gross pay from those positions exceeds the maximum per annum gross rate of pay authorized to be paid to an employee out of the clerk hire allowance of a Member of the House.

(3) For the purposes of this subsection, "gross pay" means the annual rate of pay (or equivalent thereof in the case of an individual paid on other than an annual basis) received by an individual.

(4) Paragraph (1) of this subsection does not apply to pay on a when-actually-employed basis received from more than one consultant or expert position if the pay is not received for the same day.

(d) Subsection (a) of this section does not apply to--

(1) pay on a when-actually-employed basis received from more than one consultant or expert position if the pay is not received for the same hours of the same day;

(2) pay consisting of fees paid on other than a time basis;

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(3) pay received by a teacher of the public schools of the District of Columbia for employment in a position during the summer vacation period;

(4) pay paid by the Tennessee Valley Authority to an employee performing part-time or intermittent work in addition to his normal duties when the Authority considers it to be in the interest of efficiency and economy;

(5) pay received by an individual holding a position--

(A) the pay of which is paid by the Secretary of the Senate or the Chief Administrative Officer of the House of Representatives; or

(B) under the Architect of the Capitol;

(6) pay paid by the United States Coast Guard to an employee occupying a part-time position of lamplighter; and

(7) pay within the purview of any of the following statutes:

(A) section 162 of title 2;

(B) section 23(b) of title 13;

(C) section 327 of title 15;

(D) section 907 of title 20;

(E) section 873 of title 33; or

(F) section 631 or 631a of title 31, District of Columbia Code.

(e)

(1) This section does not apply to an individual employed under sections 174j-1 to 174j-7 or 174k of title 40.

(2) Subsection (c) of this section does not apply to pay received by a teacher of the public schools of the District of Columbia for employment in a position during the summer vacation period.

HISTORY:

(Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 483; July 28, 1967, P.L. 90-57, § 105(h), 81 Stat. 143; Dec. 16, 1967, P.L. 90-206, Title II, § 214(o), 81 Stat. 637; Oct. 26, 1970, P.L. 91-510, Title IV, Part 7, § 477(d), 84 Stat. 1195; Oct. 26, 1973, P.L. 93-140, § 23, 87 Stat. 508; Nov. 1, 1973, P.L. 93-145, § 101, 87 Stat. 532; Dec. 31, 1975, P.L. 94-183, § 2(21), 89 Stat. 1058; Oct. 1, 1976, P.L. 94-440, Title I, § 103, 90 Stat. 1443; Oct. 13, 1978, P.L. 95-454, Title IX, § 906(a)(2), 92 Stat. 1224.)

(As amended Aug. 20, 1996, P.L. 104-186, Title II, § 215(7), 110 Stat. 1745.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 USC Sec. 3105 (less (e)).	Aug. 19, 1964, P.L. 88-448, Sec. 301 (less (e)), 78 Stat. 488.

In subsec. (a), the words "an individual" are substituted for "civilian personnel".

In subsec. (b), the words "and issue" are omitted as surplusage.

In subsec. (c), the words "appropriated funds are not" are substituted for "no funds appropriated by any Act shall be". The words "$ 2,000 a year" are substituted for "the sum of $ 2,000 per annum".

In subsec. (d)(7)(D), reference to "section 907 of title 20" is substituted for 5 U.S.C. 3105 (d)(7)(F) to reflect the scheduled transfer of 5 USC § 2358(b) to title 20.

In subsec. (d)(7)(H), the words "of chapter 7" are omitted as surplusage.

Standard changes are made to conform with the definitions applicable and the style of this title.

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References in text:
"Section 631 and 631a of title 31, District of Columbia Code", referred to in subsec. (d)(7)(F), were recodified as sections 31-1009 and 31-1010, respectively, of Title 31, of the District of Columbia Code.

Amendments:
1967. Act July 28, 1967 (effective 8/1/67, as provided by § 105(k) of such Act), substituted subsec. (c) for one which read:
"(c) Unless otherwise authorized by law, appropriated funds are not available for payment to an individual of pay from more than one position if the aggregate amount of the basic pay from the positions is more than $ 2,000 a year, and if--
"(1) the pay of one of the positions is paid by the Secretary of the Senate or the Clerk of the House of Representatives; or
"(2) one of the positions is under the Office of the Architect of the Capitol.".
Act Dec. 16, 1967 (effective at the beginning of the first pay period which begins on or after 12/16/67, as provided by § 220(a)3) of such Act), substituted subsec. (c) for one which read:
"(c)
(1) Except as provided by paragraph (2) of this subsection, unless otherwise authorized by law, appropriated funds are not available for payment to an individual of pay from more than one position if the aggregate amount of the basic pay from the positions exceeds $ 2,000 a year, and if--
"(A) the pay of one of the positions is paid by the Clerk of the House of Representatives (in the case of employees receiving basic rates of compensation); or
"(B) one of the positions is under the Office of the Architect of the Capitol.
"(2) Unless otherwise authorized by law, appropriated funds are not available for payment to an individual of pay from more than one position if the aggregate (gross) compensation from the positions exceeds $ 5,987 a year, and if the pay of one of the positions is paid by the Secretary of the Senate or the Clerk of the House of Representatives (in the case of employees receiving single per annum rates of compensation).".
1970. Act Oct. 26, 1970 (effective immediately prior to noon on 1/3/71, as provided by § 601(1) of such Act), in subsec. (c), in para. (1), inserted "and except as otherwise provided by paragraph (2) of this section", substituted "if the aggregate gross pay from the positions exceeds $ 7,724 a year" for "if--
"(A) the pay of one or more of the positions is fixed at a single gross per annum rate, and the aggregate gross pay from the positions exceeds $ 6,256 a year, or
"(B) the pay of each such position is fixed at a basic rate plus additional compensation authorized by law, and the aggregate basic pay of the positions exceeds $ 2,000 a year",
redesignated para. (2), as para. (3), added a new para. (2), and, in para (3), as redesignated, deleted ", and, in the case of an individual receiving basic pay plus additional compensation provided by law, includes the aggregate amount received as basic and additional compensation, but does not include sums received as premium pay under subchapter V of this chapter.", following "received by an individual".
1973. Act Oct. 26, 1973, in subsec. (e), designated existing matter as para. (1), and added para. (2).
Act Nov. 1, 1973, in subsec. (c), in para. (1), inserted "or (4)", and added para. (4).
1975. Act Dec. 31, 1975, in subsec. (d)(7), deleted subpara. (F), which read: "section 3335(a) or (c) of title 39;", and redesignated subparas. (G) and (H) as subparas. (F) and (G), respectively.
1976. Act Oct. 1, 1976, in subsec. (c)(1), inserted "($ 10,540, in the case of pay disbursed by the Secretary of the Senate)".
1978. Act Oct. 13, 1978 (effective 90 days after enactment on 10/13/78, as provided by § 907 of such Act, which appears as 5 USCS § 1101 note), in subsec. (b), substituted "Office of Personnel Management" for "Civil Service Commission".
1979. Act Sept. 27, 1979 (effective 10/1/79, as provided by § 3304 of such Act, which appears as 22 USCS § 3601 note), in subsec. (d)(7), in subpara. (E), substituted "; or" for a

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semicolon, in subpara. (F), substituted a period for "; or"; and deleted subpara. (G), which read: "(G) section 102 of title 2, Canal Zone Code.".

1996. Act Aug. 20, 1996, in subsec. (c), in paras. (1) and (2), and in subsec. (d), in para. (5)(A), substituted "Chief Administrative Officer" for "Clerk".

Other provisions:

Increases in compensation of individuals whose pay is disbursed by Secretary of the Senate. For Increases in compensation of individuals whose pay is disbursed by the Secretary of the Senate, see 2 USCS § 60a-1 notes.

Increase in pay rates of certain employees of legislative branch. For increase in pay rates of legislative branch employees subject to the General Schedule, see 5 USCS § 5332 note.

Transfer of functions of Clerk of House of Representatives. H. Resolution No.423, § 7, One Hundred Second Congress, April 9, 1992, provided that certain non-legislative and financial functions of the Clerk of House of Representatives were transferred to the Director of Non-legislative and Financial Services.

NOTES:

CODE OF FEDERAL REGULATIONS

Office of Personnel Management-Pay administration (general), 5 CFR Part 550.

CROSS REFERENCES

Time limitation on claims against Government employees who received dual compensation in violation of the dual compensation laws, 31 USCS § 3712.

This section is referred to in 2 USCS § 162; 5 USCS § 5531; 13 USCS § 23; 15 USCS § 327; 20 USCS § 907; 22 USCS § 2396; 25 USCS § 2011; 33 USCS § 873; 39 USCS § 1001.

RESEARCH GUIDE

Am Jur:

15A Am Jur 2d, Civil Service § 43.

INTERPRETIVE NOTES AND DECISIONS

1. Generally
2. Compensation for different jobs
3. Compensation for services not related to official duties

1. Generally

Dual compensation prohibitions of 5 USCS § 5533 apply only to basic pay; severance pay is not basic pay from position, and payment of severance pay following retroactive reduction in force is not barred by dual compensation prohibition. (1983) 62 Op Comp Gen p 435.

2. Compensation for different jobs

Statutes forbidding extra compensation to public officers are inapplicable to one who holds at same time 2 distinct offices each with its own duties and compensation. United States v Saunders (1887) 120 US 126, 30 L Ed 594, 7 S Ct 467.

Two offices may be held by same person, and compensation for both may be recovered. Wyman v United States (1891) 26 Ct Cl 103.

Dual compensation prohibitions of 5 USCS § 5533 do not prohibit appointment of president of Government National Mortgage Association as president of Solar Energy and Energy Conservation Bank pursuant to 12 USCS § 3605, since Solar Energy and Energy Conservation Act (12 USCS §§ 3601 et seq.) does not require president of bank to sit on full-time basis, nor is there reason to assume that president would be paid additional compensation in violation of § 5533. Dabney v Reagan (1982, SD NY) 559 F Supp 861, costs/fees proceeding (1990, SD NY) 1990 US Dist LEXIS 115, costs/fees proceeding (1992, SD NY) 1992 US Dist LEXIS 17599.

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3. Compensation for services not related to official duties

5 USCS § 5533 did not preclude officer from receiving compensation other than his salary for services in employment having no affinity or connection with his official duties. Meigs v United States (1884) 19 Ct Cl 497.

Prohibition of double compensation applied only to official services. United States v Stowe (1884, DC Minn) 19 F 807.

Service: **LEXSTAT®**
Citation: **5 USC 5533**
View: Full
Date/Time: Monday, January 15, 2001 - 9:26 AM EST

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*62 FR 23941, **

FEDERAL REGISTER

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Rules and Regulations

DEPARTMENT OF JUSTICE (DOJ)

28 CFR Part 45

RIN 3209-AA15

Supplemental Standards of Ethical Conduct for Employees of the Department of Justice

62 FR 23941

DATE: Friday, May 2, 1997

ACTION: Final rule.

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To view a specific page, transmit p* and the page number, e.g. p*1

[*23941]

SUMMARY: The Department of Justice, with the concurrence of the **Office of Government Ethics** (OGE), is issuing a final rule for Department employees as a supplement to the Uniform Standards of Ethical Conduct for Employees of the Executive Branch (Uniform Standards) issued by OGE. The regulations established by the final rule, which adopt the prior interim regulations as final with two minor changes, are a necessary supplement to the Uniform Standards because they address statutory requirements and issues that are unique to the Department. The Department is also finalizing the revision of its residual employee responsibilities regulation, with certain changes.

EFFECTIVE DATE: May 2, 1997.

FOR FURTHER INFORMATION CONTACT: Mary Braden, U.S. Department of Justice, Justice Management Division, Departmental Ethics Office, (202) 514-8196.

SUPPLEMENTARY INFORMATION:

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I. Rulemaking History

On August 7, 1992, the **Office of Government Ethics** published the Uniform Standards. See 57 FR 35006-35067, as corrected at 57 FR 48557, 57 FR 52583, and 60 FR 51667, and amended at 61 FR 42965-42970 (as corrected at 61 FR 48733) and 61 FR 50689-50691 (interim rule revisions adopted as final at 62 FR 12531), with additional grace period extensions at 59 FR 4779-4780, 60 FR 6390-6391, 60 FR 66857-66858, and 61 FR 40950-40952. The Uniform Standards, codified at 5 CFR part 2635 and effective February 3, 1993, established uniform standards of ethical conduct for executive branch personnel. Pursuant to E.O. 12674 (54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306) and 5 CFR 2635.105, executive branch agencies may issue agency-specific regulations, with the concurrence of OGE, that supplement the Uniform Standards. After considering its unique operations, the Department, with the concurrence of OGE, has determined that the regulations established by the final rule, based on the prior interim rule with two minor changes, are necessary to implement the Department's ethics program successfully.

II. Comments

On November 25, 1996, the Department, with the concurrence of OGE, issued interim supplemental standards regulations. See 61 FR 59811-59815, which provided for a 45-day comment period that ended January 9, 1997. We received only one comment on the interim rule. The comment was in regard to 5 CFR 3801.106 of the interim rule dealing with outside employment. Section 3801.106(b)(1)(i) of the interim rule, which generally prohibits outside employment that involves the practice of law, contains an exception for the practice of law on behalf of certain family members, specifically, the employee, his parents, spouse, or minor children. The commenter noted that the regulation did not conform to the exceptions for representing family members found in 18 U.S.C. 203(d) and 205(e). 18 U.S.C. 203 and 205 generally prohibit an employee from acting as agent or attorney for anyone, with or without compensation, before any agency or court of the United States on a matter in which the United States is a party or has a direct and substantial interest. Exceptions in these two statutes permit representations on behalf of the employee's parents, spouse, child and certain other persons. There is no qualification that the child must be a minor in the language of these statutes. Therefore, we agree with the commenter that the regulation should conform to the representational statutes and have been told that the **Office of Government Ethics** has no objection to our amending the rule by removing the word "minor" which appears before the word "children" in 5 CFR 3801.106(b)(1)(i). For ease of reference, the Department is publishing in this rulemaking document the part 3801 regulation in its entirety.

III. Additional Changes to 28 CFR Part 45

We are also making two additional changes to the Department's agency conduct regulations at 28 CFR part 45, as revised in the prior interim rule. First, in addition to the sections the Department repealed because they were superseded by the Uniform Standards, we are now also repealing previously redesignated and amended § 45.3 (old § 45.735-5(b)), because it was superseded by regulations at 5 CFR part 2640 which the **Office of Government Ethics** issued as a final rule on December 18, 1996, 61 FR 66830-66851 (part III), as corrected at 62 FR 1361 (January 9, 1997), and which became effective January 17, 1997.

Second, pursuant to 5 U.S.C. 301, we are publishing a Department rule at 28 CFR 45.4 which was issued earlier as policy on April 21, 1995. This rule authorizes Department of Justice office and library equipment and facilities. This policy has actually been in effect in a modified form since 1989. We believe that it is reasonable to authorize employees to make certain limited personal use of Department property as long as managers have the right to limit or

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revoke such use should it interfere with the conduct of official business. We have also amended 5 CFR 3801.105 which refers employees to the Department policy authorizing certain use of Department property to refer instead to 28 CFR 45.4.

IV. Matters of Regulatory Procedure

Executive Order 12866

In promulgating this final regulation, the Department of Justice has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. This regulation has not been reviewed by the Office of Management and Budget under the Executive Order, it **[*23942]** deals with agency organizational, management, and personnel matters and is not in any event, deemed "significant" thereunder.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. chapter 6, as Assistant Attorney General for Administration of the Department of Justice, I have determined that this regulation will not have a significant economic impact on a substantial number of small entities, because it affects only Department of Justice employees.

Paperwork Reduction Act

As Assistant Attorney General for Administration of the Department of Justice, I have determined that the Paperwork Reduction Act, 44 U.S.C. chapter 35, does not apply to the regulation established by the final rule, because the regulation does not contain any information collection requirements that require the approval of the Office of Management and Budget.

List of Subjects in 5 CFR Part 3801 and 28 CFR Part 45

Conflicts of interest, Executive branch standards of conduct, Government employees.

Dated: April 23, 1997.

Stephen R. Colgate.

Assistant Attorney General for Administration, Department of Justice.

Approved: April 25, 1997.

Stephen D. Potts,

*Director, **Office of Government Ethics.***

Accordingly, for the reasons set forth in the preamble, the Department of Justice, with the concurrence of the **Office of Government Ethics,** is amending title 5 of the Code of Federal Regulations and the Department is also amending title 28 of the Code of Federal Regulations as follows:

TITLE 5--[AMENDED]

CHAPTER XXVIII--DEPARTMENT OF JUSTICE

1. Part 3801 is revised to read as follows:

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PART 3801--SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE DEPARTMENT OF JUSTICE

Sec.

3801.101 General.

3801.102 Detailed or assigned special agents of certain Departmental components.

3801.103 Designation of separate Departmental components.

3801.104 Purchase or use of certain forfeied and other property.

3801.105 Personal use of Government property.

3801.106 Outside employment.

Authority: 5 U.S.C. 301, 7301; 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306; E.O. 12988, 61 FR 4739; 5 CFR 2635.105, 2635.203(a), 2635.403(a), 2635.701-2635.705, 2635.803, 2635.807(a)(2)(ii); and DOJ Order 1735.1.

§ 3801.101 -- General.

In accordance with § 2635.105 of this title, the regulations in this part apply to employees of the Department of Justice and supplement the Standards of Ethical Conduct for Employees of the Executive Branch in part 2635 of this title. In addition to the regulations contained in part 2635 of this title and in this part, employees are subject to the conduct regulations contained in part 735 of this title and 28 CFR part 45.

§ 3801.102 -- Detailed or assigned special agents of certain Departmental components.

Notwithstanding a detail or assignment to another entity, any special agent of the Federal Bureau of Investigation or Drug Enforcement Administration who is subject to the regulations or standards of ethical conduct of that entity pursuant to § 2635.104 of this title shall also remain subject to the regulations in this part.

§ 3801.103 -- Designation of separate Departmental components.

(a) Pursuant to § 2635.203(a) of this title, each of the following components is designated as a separate agency for purposes of the regulations contained in subpart B of part 2635 of this title governing gifts from outside sources, and, accordingly, § 2635.807 of this title governing teaching, speaking, and writing:

Antitrust Division

Bureau of Prisons

(including Federal Prison Industries, Inc.)

Civil Division

Civil Rights Division

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Community Relations Service

Criminal Division

Drug Enforcement Administration

Environment and Natural Resources Division

Executive Office for Immigration Review

Executive Office for United States Attorneys

(The Executive Office for United States Attorneys shall not be considered separate from any Office of the United States Attorney for a judicial district, but only from other designated components of the Department of Justice.)

Executive Office for United States Trustees

(The Executive Office for United States Trustees shall not be considered separate from any Office of the United States Trustee for a region, but only from other designated components of the Department of Justice.)

Federal Bureau of Investigation

Foreign Claims Settlement Commission

Immigration and Naturalization Service

Independent Counsel appointed by the Attorney General

INTERPOL

National Drug Intelligence Center

Justice Management Division

Office of Information and Privacy

Office of Intelligence Policy and Review

Office of Community Oriented Policing Services

Office of Justice Programs

Office of the Pardon Attorney

Office of Policy Development

Offices of the United States Attorney (94)

(Each Office of the United States Attorney for a judicial district shall be considered a separate component from each other such office.)

Offices of the United States Trustee (21)

(Each Office of the United States Trustee for a region shall be considered a separate

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component from each other such office.)

Tax Division

United States Marshals Service

United States Parole Commission

(b) Employees serving in positions within the Department but outside of the components designated in paragraph (a) of this section must continue to treat the entire Department of Justice as their employing agency for purposes of the gift rules of subpart B of part 2635 of this title and the application of the teaching, speaking and writing provisions found in § 2635.807 of this title.

§ 3801.104 -- Purchase or use of certain forfeited and other property.

(a) In the absence of prior approval by the agency designee, no employee shall purchase, directly or indirectly, from the Department of Justice or its agents property forfeited to the United States and no employee shall use property forfeited to the United States which has been purchased, directly or indirectly, from the Department of Justice or its agents by his spouse or minor child. Approval may be granted only on the basis of a written determination by the agency designee that in the mind of a reasonable person with knowledge of the circumstances, purchase or use by the employee of the asset will not raise a question as to whether the employee has used his official position or nonpublic information to obtain or assist in an advantageous purchase or create an appearance of loss of impartiality in the performance of the employee's duties. A copy of the written determination shall be filed with the Deputy Attorney General.

(b) No employee of the United States Marshals Service, Federal Bureau of Investigation, or Drug Enforcement **[*23943]** Administration shall purchase, directly or indirectly, from his component, the General Services Administration, or the agent of either, property formerly used by that component and no such employee shall use property formerly used by his component which has been purchased, directly or indirectly, by his spouse or minor child from his component, the General Services Administration, or to the agent of either.

§ 3801.105 -- Personal use of Government property.

Employees are prohibited by part 2635 of this title from using Government property for other than authorized purposes. The Department rule authorizing limited personal use of Department of Justice office and library equipment and facilities by its employees is at 28 CFR 45.4.

§ 3801.106 -- Outside employment.

(a) *Definition.* For purposes of this section, *outside employment* means any form of employment, business relationship or activity, involving the provision of personal services whether or not for compensation, other than in the discharge of official duties. It includes, but is not limited to, services as a lawyer, officer, director, trustee, employee, agent, consultant, contractor, or general partner. Speaking, writing and serving as a fact witness are excluded from this definition, so long as they are not combined with the provision of other services that do fall within this definition, such as the practice of law. Employees who wish to engage in compensated speaking and writing should review § 2635.807 of this title.

(b) *Prohibitied outside employment.* (1) No employee may engage in outside employment that involves:

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(i) The practice of law, unless it is uncompensated and in the nature of community service, or unless it is on behalf of himself, his parents, spouse, or children;

(ii) Any criminal or have as corpus matter, be it Federal, State, or local; or

(iii) Litigation, investigations, grants or other matters in which the Department of Justice is or represents a party, witness, litigant, investigator or grant-maker.

(2) Where application of the restrictions of paragraph (b)(1) of this section will cause undue personal or family hardship; unduly prohibit an employee from completing a professional obligation entered into prior to Government service; or unduly restrict the Department from securing necessary and uniquely specialized services, the restrictions may be waived in writing based upon a determination that the activities covered by the waiver are not expected to involve conduct prohibited by statute or Federal regulation. Employees should refer to DOJ Order 1735.1 on obtaining waivers. The Order is available from the agency designee which, for purposes of this rule, shall be the Deputy Designated Agency Ethics Official for the component.

(c) *Prior approval for outside employment.* (1) An employee must obtain written approval before engaging in outside employment, not otherwise prohibited by paragraph (b) of this section that involves:

(i) The practice of law; or

(ii) A subject matter, policy,or program that is in his component's area of responsibility.

(2) Employees should refer to DOJ Order 1735.1 for procedures on obtaining prior approval. A waiver granted pursuant to paragraph (b)(2) of this section will be sufficient to satisfy this prior approval requirement.

(3) Approval shall be granted only upon a determination that the outside employment is not expected to involve conduct that is prohibited by statute or Federal regulation.

TITLE 28--[AMENDED]

CHAPTER I--DEPARTMENT OF JUSTICE

PART 45--[AMENDED]

2. The authority citation for part 45 is revised to read as follows:

Authority: 5 U.S.C. 301, 7301; 18 U.S.C. 207; 28 U.S.C. 503, 528; DOJ Order 1735.1.

3. Section 45.1 is republished to read as follows:

§ 45.1 -- Cross-reference to ethical standards and financial disclosure regulations.

Employees of the Department of Justice are subject to the executive branch-wide Standards of Ethical Conduct at 5 CFR part 2635, the Department of Justice regulations at 5 CFR part 3801 which supplement the executive branch-wide standards, the executive branch-wide financial disclosure regulations at 5 CFR part 2634 and the executive branch-wide employee responsibilities and conduct regulations at 5 CFR part 735.

§ 45.3 -- [Removed]

§ 45.4 -- [Redesignated as § 45.3]

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4. Section 45.3 is removed and § 45.4 is redesignated as § 45.3.

5. A new § 45.4 is added to read as follows:

§ 45.4 -- Personal use of Government property.

(a) Employees may use Government property only for official business or as authorized by the Government. See 5 CFR 2635.101(b)(9), 2635.704(a). The following uses of Government office and library equipment and facilities are hereby authorized:

(1) Personal uses that involve only negligible expense (such as electricity, ink, small amounts of paper, and ordinary wear and tear); and

(2) Limited personal telephone/fax calls to locations within the office's commuting area, or that are charged to non-Government accounts.

(b) The foregoing authorization does not override any statutes, rules, or regulations governing the use of specific types of Government property (e.g. internal Departmental policies governing the use of **electronic mail;** and 41 CFR (FPMR) 101-35.201, governing the authorized use of long-distance telephone services), and may be revoked or limited at any time by any supervisor or component for any business reason.

(c) In using Government property, employees should be mindful of their responsibility to protect and conserve such property and to use official time in an honest effort to perform official duties. See 5 CFR 2635.101(b)(9), 2635.704(a), 2635.705(a).

[FR Doc. 97-11476 Filed 5-1-97; 8:45 am]

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Source: All Sources : Federal Legal - U.S. : **Federal Register**
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Terms: **("director" /5 "federal bureau of investigation") and ("attorney general")** (Edit Search)

42 USCS § 3771

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*** CURRENT THROUGH P.L. 106-418, APPROVED 11/1/00 ***
*** WITH GAPS OF 106-398, 402, 405, 408, 411, 414, 415, 417 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 46. JUSTICE SYSTEM IMPROVEMENT
FBI TRAINING OF STATE AND LOCAL CRIMINAL JUSTICE PERSONNEL

42 USCS § 3771 (2000)

§ 3771. Training and manpower development

(a) Functions, powers, and duties of **Director of Federal Bureau of Investigation. The Director of the Federal Bureau of Investigation** is authorized to--

(1) establish and conduct training programs at the Federal Bureau of Investigation National Academy at Quantico, Virginia, to provide, at the request of a State, unit of local government, or rail carrier, training for State and local criminal justice personnel, including railroad police officers;

(2) develop new or improved approaches, techniques, systems, equipment, and devices to improve and strengthen criminal justice; and

(3) assist in conducting, at the request of a State, unit of local government, or rail carrier, local and regional training programs for the training of State and local criminal justice personnel engaged in the investigation of crime and the apprehension of criminals. Training for rural criminal justice personnel shall include, when appropriate, effective use of regional resources and methods to improve coordination among criminal justice personnel in different areas and in different levels of government. Such training shall be provided only for persons actually employed as State police or highway patrol, police of a unit of local government, sheriffs, and their deputies, railroad police officer, and other persons as the State, unit of local government, or rail carrier unit may nominate for police training while such persons are actually employed as officers of such State, unit of local government, or rail carrier.

(b) General authority of **Attorney General** over Director. In the exercise of the functions, powers, and duties established under this section the **Director of the Federal Bureau of Investigation** shall be under the general authority of the **Attorney General.**

(c) Training programs for State and local personnel at Federal Training Center. Notwithstanding the provisions of subsection (a), the Secretary of the Treasury is authorized to establish, develop, and conduct training programs at the Federal Law Enforcement Training Center at Glynco, Georgia, to provide, at the request of a State or unit of local government, training for State and local criminal justice personnel provided that such training does not interfere with the Center's mission to train Federal law enforcement personnel.

(d) Rail carrier costs. No Federal funds may be used for any travel, transportation, or subsistence expenses incurred in connection with the participation of a railroad police officer in a training program conducted under subsection (a).

(e) Definitions. In this section--

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(1) the terms "rail carrier" and "railroad" have the meanings given such terms in section 20102 of title 49, United States Code; and

(2) the term "railroad police officer" means a peace officer who is commissioned in his or her State of legal residence or State of primary employment and employed by a rail carrier to enforce State laws for the protection of railroad property, personnel, passengers, or cargo.

HISTORY:

(June 19, 1968, P.L. 90-351, Title I, Part G, § 701, as added Oct. 12, 1984, P.L. 98-473, Title II, Ch VI, Div I, Subdiv A, § 609A(a), 98 Stat. 2090.)

(As amended Nov. 24, 1999, P.L. 106-110, § 1, 113 Stat. 1497.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

A prior § 3771 (Act June 19, 1968, P.L. 90-351, Title I, Part G, § 701, as added Dec. 27, 1979, P.L. 96-157, § 2, 93 Stat. 1198) was omitted in the general revision of this chapter by Act Oct. 12, 1984, P.L. 98-473, Title II, Ch VI, Division I, Subdiv A, 98 Stat. 2077. It stated the congressional purpose of training and manpower development.

Another prior § 3771 (Act June 19, 1968, P.L. 90-351, Title I, Part F, § 524, as added Aug. 6, 1973, P.L. 93-83, § 2, 87 Stat. 215) was omitted in the general revision of this Chapter by Act Dec. 27, 1979, P.L. 96-157, 93 Stat. 1167. Such section provided for prohibition against use or revelation of information for improper purpose.

Another prior § 701 of Act June 19, 1968, P.L. 90-351, Title I, as added Sept. 29, 1976, P.L. 94-430, § 2, 90 Stat. 1346, which provided for payments of Public safety officers' death benefits was classified to former 42 USCS 3796 and was omitted in the general revision of this Chapter by Act Dec. 27, 1979, P.L. 96-157, 93 Stat. 1167. For similar provision, see 42 USCS § 3796.

Another prior § 701 of Act June 19, 1968, P.L. 90-351, Title II, 82 Stat. 210, is classified to 18 USCS §§ 3501, 3502.

Effective date of section:

This section took effect on enactment, pursuant to § 609AA(a) of Act Oct. 12, 1984, P.L. 98-473, which appears as 42 USCS § 3711 note.

Amendments:

1999. Act Nov. 24, 1999, in subsec. (a), in para. (1), substituted "State, unit of local government, or rail carrier" for "State or unit of local government" and inserted ", including railroad police officers", in para. (3), substituted "State, unit of local government, or rail carrier" for "State or unit of local government" following "request of a", inserted "railroad police officer,", substituted "State, unit of local government, or rail carrier" for "State or such unit" following "persons as the", and substituted "State, unit of local government, or rail carrier." for "State or unit."; and added subsecs. (d) and (e).

Other provisions:

Travel and subsistence expenses of State and local law enforcement officers attending meetings, courses, etc., at FBI National Academy. Act Oct. 18, 1986, P.L. 99-500, and Act Oct. 30, 1986, P.L. 99-591, Title I, § 101(b) in part, 100 Stat. 3341-39, 3341-48 [Act Oct. 30, 1986, P.L. 99-591, is a corrected version of Act Oct. 18, 1986, P.L. 99-500.], provided: "Notwithstanding section 1345 of title 31, United States Code, funds made available to the Drug Enforcement Administration in any fiscal year may be used for travel, transportation, and subsistence expenses of State, county, and local law enforcement officers attending conferences, meetings, and training courses at the FBI Academy, Quantico, Virginia.".

Fees to provide training for State and local law enforcement officers at FBI National Academy; prohibition; reimbursement. Act Oct. 18, 1986, P.L. 99-500, and Act Oct. 30, 1986, P.L. 99-591, Title I, § 101(b) in part, 100 Stat. 3341-39, 3341-56 [Act Oct. 30, 1986, P.L. 99-591, is a corrected version of Act Oct. 18, 1986, P.L. 99-500.], provide: "The

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Director of the Federal Bureau of Investigation and the Administrator of the Drug Enforcement Administration shall not establish and collect fees to provide training to State and local law enforcement officers at the FBI National Academy. Any fees collected for training of State and local law enforcement officers, which occurred at the National Academy on or after October 1, 1986, shall be reimbursed to the appropriate official or agency. In addition, the Director of the National Institute of Corrections shall not establish and collect fees to provide training to State and local officers which was not provided on a reimbursable basis prior to October 1, 1986.".

Gifts to Federal Law Enforcement Training Center; use for authorized purposes, including annual award to outstanding student. Act Sept. 29, 1999, P.L. 106-58, Title I, 113 Stat. 432, provides: "The Center is authorized to accept and use gifts of property, both real and personal, and to accept services, for authorized purposes, including funding of a gift of intrinsic value which shall be awarded annually by the Director of the Center to the outstanding student who graduated from a basic training program at the Center during the previous fiscal year, which shall be funded only by gifts received through the Center's gift authority.".

Similar provisions were contained in Acts Nov. 3, 1989, P.L. 101-136, Title I, 103 Stat. 784; Nov. 5, 1990, P.L. 101-509, Title I, 104 Stat. 1390; Oct. 28, 1991, P.L. 102-141, Title I, 105 Stat. 835; Oct. 6, 1992, P.L. 102-393, Title I, 106 Stat. 1730; Oct. 28, 1993, P.L. 103-123, Title I, 107 Stat. 1227; Sept. 30, 1994, P.L. 103-329, Title I, 108 Stat. 2383; Nov. 19, 1995, P.L. 104-52, Title I, 109 Stat. 470; Sept. 30, 1996, P.L. 104-208, Div A, Title I, § 101(f) [Title I], 110 Stat. 3009-317; Oct. 10, 1997, P.L. 105-61, Title I, 111 Stat. 1275; Oct. 21, 1998, P.L. 105-277, Div A, § 101(h) [Title I], 112 Stat. 2681-483.

NOTES:

CODE OF FEDERAL REGULATIONS

Criminal justice block grants under the Department of Justice, 28 CFR Part 33.

Source: All Sources : Federal Legal - U.S. : **USCS - United States Code Service; Code, Const, Rules, Conventions & Public Laws**
Terms: **("director" /5 "federal bureau of investigation") and ("attorney general")** (Edit Search)
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28 USCS § 534

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*** CURRENT THROUGH P.L. 106-418, APPROVED 11/1/00 ***
*** WITH GAPS OF 106-398, 402, 405, 408, 411, 414, 415, 417 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART II. DEPARTMENT OF JUSTICE
CHAPTER 33. FEDERAL BUREAU OF INVESTIGATION

28 USCS § 534 (2000)

§ 534. Acquisition, preservation, and exchange of identification records and information; appointment of officials

(a) The **Attorney General** shall--
(1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records;
(2) acquire, collect, classify, and preserve any information which would assist in the identification of any deceased individual who has not been identified after the discovery of such deceased individual;
(3) acquire, collect, classify, and preserve any information which would assist in the location of any missing person (including an unemancipated person as defined by the laws of the place of residence of such person) and provide confirmation as to any entry for such a person to the parent, legal guardian, or next of kin of that person (and the **Attorney General** may acquire, collect, classify, and preserve such information from such parent, guardian, or next of kin); [and]
(4) exchange such records and information with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.

(b) The exchange of records and information authorized by subsection (a)(4) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies.

(c) The **Attorney General** may appoint officials to perform the functions authorized by this section.

(d) For purposes of this section, the term "other institutions" includes--
(1) railroad police departments which perform the administration of criminal justice and have arrest powers pursuant to a State statute, which allocate a substantial part of their annual budget to the administration of criminal justice, and which meet training requirements established by law or ordinance for law enforcement officers; and
(2) police departments of private colleges or universities which perform the administration of criminal justice and have arrest powers pursuant to a State statute, which allocate a substantial part of their annual budget to the administration of criminal justice, and which meet training requirements established by law or ordinance for law enforcement officers.

(e) (1) Information from national crime information databases consisting of identification records, criminal history records, protection orders, and wanted person records may be disseminated to civil or criminal courts for use in domestic violence or stalking cases. Nothing

grand jury, although abuse of attorney's dual employment status might be shown in particular cases, especially where agency uses grand jury investigation to gather information for civil administrative proceedings to which it would not otherwise have access. United States v Birdman (1979, CA3 Pa) 602 F2d 547, cert den 444 US 1032, 62 L Ed 2d 668, 100 S Ct 703 and cert den 445 US 906, 63 L Ed 2d 322, 100 S Ct 1084.

5. Right of privacy

Retention of arrest records, fingerprints and photographs is not per se violation of right of privacy, where there was no improper dissemination of records, no improper use of records, and no injury sustained as result of retention of records after charges against defendants resulted either in acquittal or dismissal or both, in federal court. United States v Rosen (1972, SD NY) 343 F Supp 804.

Even if arrest record showing acquittal never falls into "unauthorized" hands, fact remains that (1) information is valueless if its retention is based upon some theory of law enforcement assistance to police at any level, since it has been determined to be unfounded in law, (2) it cannot form basis for any legitimate law enforcement investigation, (3) use of this information by "authorized" agencies would place subject person at distinct disadvantage with other citizens, (4) use of information would of necessity be prejudiced specifically to rights of subject person as compared with rights enjoyed by all other citizens, and (5) such unfair state of affairs is devoid of fair play, violation of constitutional right of privacy as well as of presumption of innocence, and affront to sense of justice. United States v Dooley (1973, ED Pa) 364 F Supp 75.

Maintenance and dissemination of arrest records of persons never convicted of criminal charge based upon conduct for which they were arrested does not violate constitutional warranties of due process and constitutional right to privacy. Hammons v Scott (1976, DC Cal) 423 F Supp 625.

II. RELIABILITY OF RECORDS

6. Duty of federal government, generally

FBI's function of maintaining and disseminating criminal identification records and files carries with it as a corollary responsibility to discharge this function reliably and responsibly and without unnecessary harm to individuals whose rights have been invaded. Menard v Saxbe (1974) 162 App DC 284, 498 F2d 1017, 28 ALR Fed 248; Tarlton v Saxbe (1974) 165 App DC 293, 507 F2d 1116, on remand (DC Dist Col) 407 F Supp 1083.

FBI cannot avoid all responsibility for accuracy of information in its criminal files. Shadd v United States (1975, WD Pa) 389 F Supp 721, affd without op (CA3 Pa) 535 F2d 1247, cert den 429 US 887, 50 L Ed 2d 169, 97 S Ct 241.

Pending challenges to FBI criminal records need not be reflected on individual's FBI criminal record.

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in this subsection shall be construed to permit access to such records for any other purpose.

(2) Federal and State criminal justice agencies authorized to enter information into criminal information databases may include--

(A) arrests, convictions, and arrest warrants for stalking or domestic violence or for violations of protection orders for the protection of parties from stalking or domestic violence; and

(B) protection orders for the protection of persons from stalking or domestic violence, provided such orders are subject to periodic verification.

(3) As used in this subsection--

(A) the term "national crime information databases" means the National Crime Information Center and its incorporated criminal history databases, including the Interstate Identification Index; and

(B) the term "protection order" includes an injunction or any other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including temporary and final orders issued by civil or criminal courts (other than support or child custody orders) whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

HISTORY:

(Sept. 6, 1966, P.L. 89-554, § 4(c), 80 Stat. 616; Oct. 12, 1982, P.L. 97-292, §§ 2, 3(a), 96 Stat. 1259.)

(As amended Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle I, § 7333, 102 Stat. 4469; Sept. 13, 1994, P.L. 103-322, Title IV, Subtitle F, § 40601(a), 108 Stat. 1950.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 U.S.C. 300 (as applicable to acquisition etc. of identification and other records).	Aug. 31, 1964, Pub. L. 88-527, Sec. 201 (1st 105 words of 1st par. under "Federal Bureau of Investigation", as applicable to acquisition etc. of identification and other records), 78 Stat. 717.
.....	5 U.S.C. 340.	June 11, 1930, ch. 455, 46 Stat. 554.

The sections are combined and reorganized for clarity. Former section 300 of title 5 was from the Department of Justice Appropriation Act, 1965. Similar provisions were contained in each appropriation Act for the Department of Justice running back to 1921, which Acts are identified in a note under former section 300 of title 5, U.S.C. 1964 ed.

In subsection (a), the word "shall" is substituted for "has the duty" as a more direct expression. The function of acquiring, collecting, classifying, etc., referred to in former section 340 of title 5 was transferred to the **Attorney General** by 1950 Reorg., Plan No. 2, § 1, eff. May 24, 1950, 64 Stat. 1261, which is codified in section 509 of this title. Accordingly, the first 29 words and last 30 words of former section 340 are omitted as unnecessary.

In subsection (c), the authority to appoint officials for the cited purposes is implied.

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Explanatory notes:
The bracketed word "and" has been inserted in subsec. (a)(3) to indicate the probable intent of Congress to include such word.

Amendments:
1982. Act Oct. 12, 1982 substituted the section catchline for one which read: "Acquisition, preservation, and exchange of identification records and information; appointment of officials"; in subsec. (a), in para. (1), deleted "and" following the concluding semicolon, redesignated former para. (2) as para. (4), added paras. (2) and (3), and, in para. (4), as redesignated, substituted "exchange such records and information" for "exchange these records"; and in subsec. (b), inserted "and information", and substituted "(a)(4)" for "(a)(2)".
1988. Act Nov. 18, 1988 added subsec. (d).
1994. Act Sept. 13, 1994 added subsec. (e).

Other provisions:
Funds for exchange of identification records. Act Oct. 25, 1972, P.L. 92-544, Title II, § 201, 86 Stat. 1115, provided: "The funds provided for Salaries and Expenses, Federal Bureau of Investigation, may be used hereafter, in addition to those uses authorized thereunder, for the exchange of identification records with officials or federally chartered or insured banking institutions to promote or maintain the security of those institutions, and, if authorized by State statute and approved by the **Attorney General,** to officials of State and local governments for purposes of employment and licensing, any such exchange to be made only for the official use of any such official and subject to the same restriction with respect to dissemination as that provided for under the aforementioned appropriation.".
Parimutuel Licensing Simplification Act of 1988. Act Aug. 22, 1988, P.L. 100-413, 102 Stat. 1101, provides:
"Section 1. Short title.
"This Act may be cited as the 'Parimutuel Licensing Simplification Act of 1988'.
"Sec. 2. Submission by association of State regulatory officials.
"(a) In general. An association of State officials regulating parimutuel wagering, designated for the purpose of this section by the **Attorney General,** may submit fingerprints to the **Attorney General** on behalf of any applicant for State license to participate in parimutuel wagering. In response to such a submission, the **Attorney General** may, to the extent provided by law, exchange, for licensing and employment purposes, identification and criminal history records with the State governmental bodies to which such applicant has applied.
"(b) Definition. As used in this section, the term 'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.
"Sec. 3. Effective date.
"This Act [this note] shall take effect on July 1, 1989.".
Uniform Federal Crime Reporting Act of 1988. Act Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle I, § 7332, 102 Stat. 4468, effective Jan. 1, 1989 as provided by subsec. (g) of this note, provides:
"(a) Short title. This section may be cited as the 'Uniform Federal Crime Reporting Act of 1988'.
"(b) Definitions. For purposes of this section, the term 'Uniform Crime Reports' means the reports authorized under section 534 of title 28, United States Code, and administered by the Federal Bureau of Investigation which compiles nationwide criminal statistics for use in law enforcement administration, operation, and management and to assess the nature and type of crime in the United States.
"(c) Establishment of system.
(1) In general. The **Attorney General** shall acquire, collect, classify, and preserve national data on Federal criminal offenses as part of the Uniform Crime Reports.
"(2) Reporting by Federal agencies. All departments and agencies within the Federal

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government (including the Department of Defense) which routinely investigate complaints of criminal activity, shall report details about crime within their respective jurisdiction to the **Attorney General** in a uniform manner and on a form prescribed by the **Attorney General.** The reporting required by this subsection shall be limited to the reporting of those crimes comprising the Uniform Crime Reports.

"(3) Distribution of data. The **Attorney General** shall distribute data received pursuant to paragraph (2), in the form of annual Uniform Crime Reports for the United States, to the President, Members of the Congress, State governments, and officials of localities and penal and other institutions participating in the Uniform Crime Reports program.

"(d) Role of Federal Bureau of Investigation. The **Attorney General** may designate the Federal Bureau of Investigation as the lead agency for purposes of performing the functions authorized by this section and may appoint or establish such advisory and oversight boards as may be necessary to assist the Bureau in ensuring uniformity, quality, and maximum use of the data collected.

"(e) Inclusion of offenses involving illegal drugs. The **Director of the Federal Bureau of Investigation** is authorized to classify offenses involving illegal drugs and drug trafficking as a part I crime in the Uniform Crime Reports.

"(f) Authorization of appropriations. There are authorized to be appropriated $ 350,000 for fiscal year 1989 and such sums as may be necessary to carry out the provisions of this section after fiscal year 1989.

"(g) Effective date. The provisions of this section shall be effective on January 1, 1989.".

Data collection and reporting. Act Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle O, § 7609, 102 Stat. 4517, provides:

"(a) Family violence reporting. Under the authority of section 534 of title 28, United States Code, the **Attorney General** shall require, and include in uniform crime reports, data that indicate--

"(1) the age of the victim; and

"(2) the relationship of the victim to the offender, for crimes of murder, aggravated assault, simple assault, rape, sexual offenses, and offenses against children.

"(b) National crime survey. The Director of the Bureau of Justice Statistics, through the annual National Crime Survey, shall collect and publish data that more accurately measures the extent of domestic violence in America, especially the physical and sexual abuse of children and the elderly.

"(c) Authorization of appropriations. There are authorized to be appropriated in fiscal years 1989, 1990, 1991, and 1992, such sums as are necessary to carry out the purposes of this section.".

Hate Crime Statistics Act. Act April 23, 1990, P.L. 101-275, 104 Stat. 140; Sept. 13, 1994, P.L. 103-322, Title XXXII, Subtitle I, § 320926, 108 Stat. 2131; July 3, 1996, P.L. 104-155, § 7, 110 Stat. 1394, provides:

"[Sec. 1.] (a) This Act may be cited as the 'Hate Crime Statistics Act'.

"(b)

(1) Under the authority of section 534 of title 28, United States Code, the **Attorney General** shall acquire data, for each calendar year, about crimes that manifest evidence of prejudice based on race, religion, disability, sexual orientation, or ethnicity, including where appropriate the crimes of murder, non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property.

"(2) The **Attorney General** shall establish guidelines for the collection of such data including the necessary evidence and criteria that must be present for a finding of manifest prejudice and procedures for carrying out the purposes of this section.

"(3) Nothing in this section creates a cause of action or a right to bring an action, including an action based on discrimination due to sexual orientation. As used in this section, the term 'sexual orientation' means consensual homosexuality or heterosexuality. This subsection does not limit any existing cause of action or right to bring an action, including any action under the Administrative Procedure Act or the All Writs Act [5 USCS §§ 551 et seq. or 28 USCS § 1651].

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"(4) Data acquired under this section shall be used only for research or statistical purposes and may not contain any information that may reveal the identity of an individual victim of a crime.

"(5) The **Attorney General** shall publish an annual summary of the data acquired under this section.

"(c) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section through fiscal year 2002.

"Sec. 2. (a) Congress finds that--

"(1) the American family life is the foundation of American Society,

"(2) Federal policy should encourage the well-being, financial security, and health of the American family,

"(3) schools should not de-emphasize the critical value of American family life.

"(b) Nothing in this Act shall be construed, nor shall any funds appropriated to carry out the purpose of the Act be used, to promote or encourage homosexuality.".

Fees for fingerprint identification records and name checks. Act Nov. 5, 1990, P.L. 101-515, Title II, 104 Stat. 2112; Jan. 6, 1996, P.L. 104-91, Title I, § 101(a), 110 Stat. 11; Jan. 26, 1996, P.L. 104-99, Title II, § 211, 110 Stat. 37 (enacting into law § 113 of H.R. 2076 of the 104th Congress, as passed by the House of Representatives on Dec. 6, 1995); Jan. 26, 1996, P.L. 104-99, Title II, § 211, 110 Stat. 37, provides: "For fiscal year 1991 and hereafter the **Director of the Federal Bureau of Investigation** may establish and collect fees to process fingerprint identification records and name checks for non-criminal justice, non-law enforcement employment and licensing purposes and for certain employees of private sector contractors with classified Government contracts, and notwithstanding the provisions of 31 U.S.C. 3302, credit such fees to this appropriation to be used for salaries and other expenses incurred in providing these services, and that the **Director of the Federal Bureau of Investigation** may establish such fees at a level to include an additional amount to establish a fund to remain available until expended to defray expenses for the automation of fingerprint identification and criminal justice information services and associated costs".

National Crime Information Center Project 2000. Act Nov. 29, 1990, P.L. 101-647, Title VI, Subtitle B, 104 Stat. 4823, provides:

"Sec. 611. Short title.

"This section may be cited as the 'National Law Enforcement Cooperation Act of 1990'.

"Sec. 612. Findings.

"The Congress finds that--

"(1) cooperation among Federal, State and local law enforcement agencies is critical to an effective national response to the problems of violent crime and drug trafficking in the United States;

"(2) the National Crime Information Center, which links more than 16,000 Federal, State and local law enforcement agencies, is the single most important avenue of cooperation among law enforcement agencies;

"(3) major improvements to the National Crime Information Center are needed because the current system is more than twenty years old; carries much greater volumes of enforcement information; and at this time is unable to incorporate technological advances that would significantly improve its performance; and

"(4) the Federal Bureau of Investigation, working with State and local law enforcement agencies and private organizations, has developed a promising plan, 'NCIC 2000', to make the necessary upgrades to the National Crime Information Center that should meet the needs of United States law enforcement agencies into the next century.

"Sec. 613. Authorization of appropriations.

"There are authorized to be appropriated the following sums to implement the 'NCIC 2000' project:

"(1) $ 17,000,000 for fiscal year 1991;

"(2) $ 25,000,000 for fiscal year 1992;

"(3) $ 22,000,000 for fiscal year 1993;

"(4) $ 9,000,000 for fiscal year 1994; and

"(5) such sums as may be necessary for fiscal year 1995.

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"Sec. 614. Report.

"By February 1 of each fiscal year for which funds for NCIC 2000 are requested, the **Director of the Federal Bureau of Investigation** shall submit a report to the Committees on the Judiciary of the Senate and House of Representatives that details the progress that has been made in implementing NCIC 2000 and a complete justification for the funds requested in the following fiscal year for NCIC 2000.".

Rulemaking to carry out subsec. (e). Act Sept. 13, 1994, P.L. 103-322, Title IV, Subtitle F, § 40601(b), 108 Stat. 1951, provides: "The **Attorney General** may make rules to carry out the subsection added to section 534 of title 28, United States Code [subsec. (e) of this section], by subsection (a), after consultation with the officials charged with managing the National Crime Information Center and the Criminal Justice Information Services Advisory Policy Board.".

Compilation of statistics relating to intimidation of government employees. Act April 24, 1996, P.L. 104-132, Title VIII, Subtitle A, § 808, 110 Stat. 1310, provides:

"(a) Findings. The Congress finds that--

"(1) threats of violence and acts of violence against Federal, State, and local government employees and their families are increasing as the result of attempts to stop public servants from performing their lawful duties;

"(2) these acts are a danger to the constitutional form of government of the United States; and

"(3) more information is needed relating to the extent and nature of the danger to these employees and their families so that actions can be taken to protect public servants at all levels of government in the performance of their duties.

"(b Statistics. The **Attorney General** shall collect data, for the calendar year 1990 and each succeeding calendar year thereafter, relating to crimes and incidents of threats of violence and acts of violence against Federal, State, and local government employees and their families in the performance of their lawful duties. Such data shall include--

"(1) in the case of crimes against such employees and their families, the nature of the crime; and

"(2) in the case of incidents of threats of violence and acts of violence, including verbal and implicit threats against such employees and their families, the deterrent effect on the performance of their jobs.

"(c) Guidelines. The **Attorney General** shall establish guidelines for the collection of the data under subsection (b), including a definition of the sufficiency of evidence of noncriminal incidents required to be reported.

"(d) Use of data.

(1) Annual publishing. The **Attorney General** shall publish an annual summary of the data collected under this section.

"(2) Use of data. Except with respect to the summary published under paragraph (1), data collected under this section shall be used only for research and statistical purposes.

"(e) Exemption. The **Attorney General,** the Secretary of State, and the United States Secret Service is not required to participate in any statistical reporting activity under this section with respect to any direct or indirect threat made against any individual for whom that official or Service is authorized to provide protection.".

Applicants for employment with nursing facilities or home health care agencies; search and exchange of records. Act Oct. 21, 1998, P.L. 105-277, Div A, § 101(b) [Title I, § 124], 112 Stat. 2681-73, provides:

"(a)

(1) A nursing facility or home health care agency may submit a request to the **Attorney General** to conduct a search and exchange of records described in subsection (b) regarding an applicant for employment if the employment position is involved in direct patient care.

"(2) A nursing facility or home health care agency requesting a search and exchange of records under this section shall submit to the **Attorney General** through the appropriate State agency or agency designated by the **Attorney General** a copy of an employment applicant's fingerprints, a statement signed by the applicant authorizing the nursing facility or home health care agency to request the search and exchange of records, and any other

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identification information not more than 7 days (excluding Saturdays, Sundays, and legal public holidays under section 6103(a) of title 5, United States Code) after acquiring the fingerprints, signed statement, and information.

"(b) Pursuant to any submission that complies with the requirements of subsection (a), the **Attorney General** shall search the records of the Criminal Justice Information Services Division of the Federal Bureau of Investigation for any criminal history records corresponding to the fingerprints or other identification information submitted. The **Attorney General** shall provide any corresponding information resulting from the search to the appropriate State agency or agency designated by the **Attorney General** to receive such information.

"(c) Information regarding an applicant for employment in a nursing facility or home health care agency obtained pursuant to this section may be used only by the facility or agency requesting the information and only for the purpose of determining the suitability of the applicant for employment by the facility or agency in a position involved in direct patient care.

"(d) The **Attorney General** may charge a reasonable fee, not to exceed $ 50 per request, to any nursing facility or home health care agency requesting a search and exchange of records pursuant to this section.

"(e) Not later than 2 years after the date of enactment of this Act, the **Attorney General** shall submit a report to Congress on the number of requests for searches and exchanges of records made under this section by nursing facilities and home health care agencies and the disposition of such requests.

"(f) Whoever knowingly uses any information obtained pursuant to this section for a purpose other than as authorized under subsection (c) shall be fined in accordance with title 18, United States Code, imprisoned for not more than 2 years, or both.

"(g) A nursing facility or home health care agency that, in denying employment for an applicant, reasonably relies upon information provided by the **Attorney General** pursuant to this section shall not be liable in any action brought by the applicant based on the employment determination resulting from the incompleteness or inaccuracy of the information.

"(h) The **Attorney General** may promulgate such regulations as are necessary to carry out this section, including regulations regarding the security, confidentiality, accuracy, use, destruction, and dissemination of information, audits and recordkeeping, the imposition of fees, and any necessary modifications to the definitions contained in subsection (i).

"(i) In this section:

"(1) The term 'home health care agency' means an agency that provides home health care or personal care services on a visiting basis in a place of residence.

"(2) The term 'nursing facility' means a facility or institution (or a distinct part of an institution) that is primarily engaged in providing to residents of the facility or institution nursing care, including skilled nursing care, and related services for individuals who require medical or nursing care.

"(j) This section shall apply without fiscal year limitation.".

NOTES:

CODE OF FEDERAL REGULATIONS

Department of Justice, criminal justice information systems, 28 CFR Part 20.

RESEARCH GUIDE

Federal Procedure:

8 Fed Proc L Ed, Criminal Procedure § 22:27.

15 Fed Proc L Ed, Freedom of Information § 38:103.

Am Jur:

7 Am Jur 2d, **Attorney General** §§ 45, 55.

Forms:

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3 Am Jur Legal Forms 2d, **Attorney General** § 29:2.

Annotations:

Giving false information to federal police agency or agents as violation of 18 USCS § 1001, making it a criminal offense to make false statements in any matter within the jurisdiction of an agency of the United States. 1 ALR Fed 370.

Voir dire examination of prospective jurors under Rule 24(a) of Federal Rules of Criminal Procedure. 28 ALR Fed 26.

What action may be required of federal agency in suit by individual to have records amended, pursuant to sec. 3 of the Privacy Act of 1974 (5 USCS § 552a(g)(1)(A)). 55 ALR Fed 338.

Construction and application of § 3(e)(5) of Privacy Act (5 USCS § 552 (e)(5)), providing for proper maintenance of agency records used in determinations. 79 ALR Fed 585.

Expunction of federal arrest records in absence of conviction. 97 ALR Fed 652.

Judicial expunction of criminal record of convicted adult. 11 ALR4th 956.

Invasion of privacy by use of plaintiff's name or likeness for nonadvertising purposes. 30 ALR3d 203.

Right of exonerated arrestee to have fingerprints, photographs, or other criminal identification or arrest records expunged or restricted. 46 ALR3d 900.

Validity, construction, and application of statutory provisions relating to public access to police records. 82 ALR3d 19.

Accused's right to discovery or inspection of "rap sheets" or similar police records about prosecution witnesses. 95 ALR3d 832.

Law Review Articles:

Pendo, Recognizing violence against women: gender and the Hate Crimes Statistics Act. 17 Harv Women's LJ 157, Spring, 1994.

The F.B.I.'s right to retain and disseminate arrest records of persons not convicted of a crime may be limited by the First and Fifth Amendments. 46 N Dame Law 825.

Right of police to retain arrest records. 49 NC L Rev 509.

The right of persons who have been discharged or acquitted of criminal charges to compel the return of fingerprints, photographs, and other police records. 27 Temple LQ 441.

Retention and dissemination of arrest records: judicial response. 38 U of Chicago L Rev 850.

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I. IN GENERAL

1. Construction, generally

FBI is not prevented from disseminating accurate criminal records, or from disseminating inaccurate records after taking reasonable measures to safeguard accuracy. Tarlton v Saxbe (1974) 165 App DC 293, 507 F2d 1116, on remand (DC Dist Col) 407 F Supp 1083.

28 USCS § 534 does not contain express exemption from disclosure of documents maintained by federal government as provided by Freedom of Information Act (5 USCS § 552 (a)(4)(B)) so as to render it withholding statute under Exemption 3 of FOIA. Reporters Committee for Freedom of Press v United States Dept. of Justice (1987) 259 App DC 426, 816 F2d 730, 14 Media L R 1108, on reh 265 App DC 365, 831 F2d 1124, 14 Media L R 1908 (disagreed with United States Dept. of Agriculture v Federal Labor Relations Authority (CA8) 836 F2d 1139, 127 BNA LRRM 2360) and cert gr (US) 56 USLW 3718.

28 USCS § 534 must be narrowly interpreted to avoid constitutional issues and to avoid violation of plaintiff's constitutional rights. Menard v Mitchell (1971, DC Dist Col) 328 F Supp 718, remanded on other grounds 162 App DC 284, 498 F2d 1017, 28 ALR Fed 248 and (superseded by statute on other grounds as stated in Utz v Cullinane, 172 App DC 67, 520 F2d 467).

Word "shall" in 28 USCS § 534 is not merely authorization, but is an imperative direction, indicating that records are to be retained despite acquittal. United States v Rosen (1972, SD NY) 343 F Supp 804.

2. Purpose

Central criminal files are kept to facilitate indexing and future reference. Menard v Saxbe (1974) 162 App DC 284, 498 F2d 1017, 28 ALR Fed 248.

File of arrest records is designed only to facilitate co-ordinated law enforcement activities between federal and local government, that is, to assist arresting agencies, courts and correctional institutions in apprehension, conviction and proper disposition of criminal offenders. Menard v Mitchell (1971, DC Dist Col) 328 F Supp 718, remanded on other grounds 162 App DC 284, 498 F2d 1017, 28 ALR Fed 248 and (superseded by statute on other grounds as stated in Utz v Cullinane, 172 App DC 67, 520 F2d 467).

3. Delegation of functions

Federal criminal record keeping tasks have been delegated by **Attorney General** under 28 USCS § 534 to director of FBI (28 CFR §§ .85, 20.1 et seq.). Hammons v Scott (1976, DC Cal) 423 F Supp 625.

4. Appointment of officials

There is no inherent conflict of interest or other impropriety in appointment under 28 USCS §§ 515, 534 of agency attorney as special attorney to assist in criminal proceedings before

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28 CFR 0.132

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*** THIS SECTION IS CURRENT THROUGH THE DECEMBER 22, 2000 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 28 -- JUDICIAL ADMINISTRATION
CHAPTER I -- DEPARTMENT OF JUSTICE
PART 0 -- ORGANIZATION OF THE DEPARTMENT OF JUSTICE
SUBPART W -- ADDITIONAL ASSIGNMENTS OF FUNCTIONS AND DESIGNATION OF OFFICIALS TO PERFORM THE DUTIES OF CERTAIN OFFICES IN CASE OF VACANCY, OR ABSENCE THEREIN OR IN CASE OF INABILITY OR DISQUALIFICATION TO ACT

28 CFR 0.132

§ 0.132 Designating officials to perform the functions and duties of certain offices in case of absence, disability or vacancy.

(a) In case of vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General shall, pursuant to 28 U.S.C. 508(a) perform the functions and duties of and act as Attorney General. When by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Associate Attorney General shall, pursuant to 28 U.S.C. 508(b), perform the functions and duties of and act as Attorney General. In the event of vacancy, absence, or disability in each of these offices, the Solicitor General shall perform the functions and duties of and act as Attorney General.

(b) Every office within the Department to which appointment is required to be made by the President with the advice and consent of the Senate ("PAS office") shall have a First Assistant within the meaning of the Federal Vacancies Reform Act of 1998. Where there is a position of Principal Deputy to the PAS office, the Principal Deputy shall be the First Assistant. Where there is no position of Principal Deputy to the PAS office, the First Assistant shall be the person whom the Attorney General designates in writing.

(c) In the event of a vacancy in the office of the head of an organizational unit that is not covered by paragraphs (a) or (b) of this section, the ranking deputy (or an equivalent official) in such unit who is available shall perform the functions and duties of and act as such head, unless the Attorney General directs otherwise. Except as otherwise provided by law, if there is no ranking deputy available, the Attorney General shall designate another official of the Department to perform the functions and duties of and act as such head.

(d) The head of an organizational unit of the Department not covered by paragraphs (a) or (b) of this section is authorized, in the case of absence from office or disability, to designate the ranking deputy (or an equivalent official) in the unit who is available to act as head. If there is no deputy available to act, any other official in such unit may be designated. Alternatively, in his discretion, the Attorney General may designate any official in the Department to act as head when a head who is not covered by paragraphs (a) or (b) of this section is absent or disabled.

HISTORY:

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[Order No. 755-77, 42 FR 59384, Nov. 17, 1977, as amended by Order No. 1043-84, 49 FR 4469, Feb. 7, 1984; Order No. 1097-85, 50 FR 25708, June 21, 1985; Order No. 1858-94, 59 FR 13883, Mar. 24, 1994; Order No. 2205-99, 64 FR 6526, Feb. 10, 1999]

AUTHORITY:
AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
5 U.S.C. 301; 28 U.S.C. 509, 510, 515-519.

NOTES:
[EFFECTIVE DATE NOTE: 64 FR 6526, Feb. 10, 1999, revised paragraphs (b) through (d), and removed paragraph (e), effective Jan. 29, 1999.]

NOTES APPLICABLE TO ENTIRE CHAPTER:
CROSS REFERENCES: Customs Service, Department of the Treasury: See Customs Duties, 19 CFR chapter I.
Internal Revenue Service, Department of the Treasury: See Internal Revenue Service, 26 CFR chapter I.
Employees' Benefits: See title 20.
Federal Trade Commission: See Commercial Practices, 16 CFR chapter I.
Other regulations issued by the Department of Justice appear in title 4; title 8; title 21; title 45; title 48.

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1998 Committee Reports, July 5, 1998

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Committee Reports

105th Congress, 2nd Session

Senate Report 105-250

105 S. Rpt. 250

FEDERAL VACANCIES REFORM ACT OF 1998

DATE: July 5, 1998. Ordered to be printed

SPONSOR: Mr. Thompson submitted the following together with ADDITIONAL AND MINORITY VIEWS
(To accompany S. 2176)

COMMITTEE: from the Committee on Governmental Affairs

R E P O R T

TEXT:
The Committee on Governmental Affairs, to which was referred the bill (S. 2176) to provide a mechanism for the temporary filling of positions that are legally appointed by the President, by and with the advice and consent of the Senate, and having considered the same, reports favorably on the bill as amended and recommends that the bill as amended do pass.

I. Purpose

The purpose of S. 2176, the Federal Vacancies Reform Act, is to create a clear and exclusive process to govern the performance of duties of offices in the Executive Branch that are filled through presidential appointment by and with the consent of the Senate when a Senate confirmed official has died, resigned, or is otherwise unable to perform the functions and duties of the office.

II. Summary of S. 176

S. 2176 provides that upon the death, resignation, or inability to serve of an officer of an executive agency (including the Executive Office of the President), the first assistant to the officer becomes the acting officer, subject to the bills time limits. If the President so directs, a person who has already received Senate confirmation can be made the acting officer in lieu of the first assistant. The bill also requires that a first assistant who has not received Senate confirmation, but who is nominated to fill the office permanently, can be made the acting officer only if he has been the first assistant for at least 180 days in the year preceding the vacancy. The acting officer may serve for 150 days beginning on the date the vacancy occurs. In the event a first or second nominee is withdrawn, rejected or returned, the person may serve as the acting official until 150 days after the withdrawal, rejection, or return.

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history of use in the Vacancies Act. As under current law, the term "first assistant" is used to refer to the first assistant to the "officer." However, the practice under current law, which would be continued by this bill, is that the first assistant is actually the first assistant to the vacant office. Certain officers have first assistants designated by statute. See, e.g., 28 U.S.C. 508(a) ("for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.") Other departments and agencies have established first assistants by regulation. The Vacancies Act provides for the automatic performance of the functions and duties of the vacant office by the first assistant because such person is often a career official with knowledge of the office or a Senate-confirmed individual, and the Committee believes that the routine functions of the office should be allowed to continue for a limited period of time by that one person. The provision therefore emphasizes the limit on presidential power to select an acting officer without that individual having received Senate confirmation, while permitting flexibility in the performance of governmental operations since, if a first assistant exists, the President need not take any action for an acting official to serve.

If there is no first assistant, or if the President following the assumption of acting status by the first assistant, but within the time limits prescribed by section 3346 so chooses, the President (and only the President) may direct a person who has already received Senate confirmation for another position to perform the functions and duties of the office temporarily in an acting capacity, subject to the time limits of section 3346. This provision allows the President limited flexibility in appointing temporary officers, restricting the pool to persons who have already received Senate confirmation for their current position. If there is no first assistant, no one is permitted by law to become an acting officer until the President designates a Senate-confirmed individual to be the acting officer.

In either case, the acting officers service is limited to the time period specified in section 3346. This marks a repeal of the current statutory provision in both sections 3345 and 3346 that the acting officer "shall perform the duties of the office until a successor is appointed or the absence or sickness stops," language that has been a part of each Vacancies Act since 1792.

Notwithstanding a first assistant on the day of the vacancys automatic functioning as the acting officer, such first assistant who has not served as first assistant for 180 days of the 365 days prior to the vacancy may not serve as the acting officer if the President nominates that person for appointment to that position. If the President nominates the former first assistant, who served for less than 180 of the 365 days preceding the vacancy, to the permanent position, the first assistant must cease performing the functions and duties of the office. In that instance, for an acting person to continue to perform those duties, the President would be required to designate as the acting officer a person who has received Senate confirmation to another post, who can serve as the acting officer for the remainder of the time period established under section 3346 that was not consumed by the first assistant.

A first assistant who is a career person will ordinarily have served more than 180 days as first assistant at the time the vacancy arises. Such a person will be able to serve both as the acting officer and as the permanent nominee. The 180-day requirement is not confined to the 180 days immediately preceding the vacancy, as, for instance, the first assistant may have been ill for part of that period. The Presidents power to nominate is not disturbed in any way; however, if he chooses to nominate a brief-serving first assistant, that person may no longer serve as the acting officer. The President would retain his existing power to designate first assistants to those officers where he currently enjoys such power. The Committee believes that the length of service of the first assistant eligible to be both the nominee and the acting officer should be sufficiently long to prevent manipulation of first assistants to include persons highly unlikely to be career officials.

With respect to a vacancy in the office of Attorney General, 28 U.S.C. 508 will remain

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applicable. That section ensures that Senate confirmed Justice Department officials will be the only persons eligible to serve as Acting Attorney General.

The new section 3346 limits the length of the acting officers service to 150 days, beginning on the date the vacancy occurs. The Committee believes that while the background check process takes no longer today than in 1988, when the Vacancies Act limitation was set at 120 days, the vagaries of the vetting and nomination process now make 150 days a more realistic time limit. Even if there is no first assistant, and the President declines to designate a Senate-confirmed person to be the acting person, the 150-day period begins to run. Thus, the designated person would serve for 150 days less the time that elapsed between the vacancy and the designation. If the vacancy arises while the Senate is in adjournment sine die, and thus the acting officer begins to serve during such period, the 150-day period is to begin on the date that the Senate first reconvenes. The only time this provision is relevant is when the Senate-confirmed person dies, resigns, or becomes ineligible to serve when the Senate is in adjournment sine die.

The 150 days is a maximum period, but an acting officer need not serve the full 150 days. Besides the obvious ending of service within 150 days if a nominee is confirmed in that time, the Vacancies Act also applies to the beginning of an inability of the applicable officer to serve. When that officer is again eligible to resume service, he or she may return to the office, thus ending the service of the acting officer.

The 150 days runs from the vacancy, "vacancy" referring to the death, resignation, or beginning of inability to serve of the Senate-confirmed officer. This meaning of "vacancy" applies each time it is used in the legislation. When the acting persons 150 days expires, the position again becomes vacant, but there is no "vacancy" that permits another person to serve as acting for another 150 days. Otherwise, a string of acting officials could serve for 150 days. That has never been the understanding of the functioning of the Vacancies Act, and the Committee reaffirms that there is only one vacancy that triggers the 150 days.

An acting officer may die or resign. In that event, the first assistant, if there is one, or a new presidential designee of a Senate-confirmed officer may become the acting officer, limited in service as acting officer to 150 days less the time of service of the first acting officer. No one else may serve as acting officer. Once again, that means that if there is no first assistant, and no presidential designation, no one may serve as acting officer. The prohibition on an acting officer who was first assistant for less than 180 days of the 365 days prior to the vacancy becoming the nominee for the position would still be applicable, since the original vacancy, not the subsequent departure of the acting officer, is the measuring event.

Under new section 3346(a)(2), and subject to section 3346(b), an acting officer may serve more than 150 days if a first or second nomination is submitted to the Senate, and may serve while that nomination is pending from the date the nomination is submitted. The acting officer may serve even if the nomination is submitted after the 150 days has passed although, as discussed below, the acting officer may not serve between the 151st day and the day the nomination is submitted. The Committee extends the time period for acting service so as to create an incentive for the President to submit a nomination. The submission of nominations also will lead to a reduction in the number of acting officials, a goal the Committee finds highly desirable.

The statutory language refers to "(t)he person serving as an acting officer as described under section 3345." The Committee chose this wording deliberately. That is the only person eligible to be the acting officer, whether during the 150 days or upon submission of a nomination. The same considerations apply to the bills references to "the person" in subsections (b) and (c).

If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the

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President by the Senate, the person may continue to serve as the acting officer for no more than 150 days after the date of such rejection, withdrawal, or return. "Return" refers to Senate Rule XXXI, which provides that, "(I)f the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President." This provision allows the office to be temporarily filled by "the person" who was originally eligible to be the acting officer at the time the vacancy arose while the President is provided 150 days to submit a second nomination.

Notwithstanding the 150-day limit on service of an acting officer following the rejection, withdrawal, or return of a first nomination, "the person serving as the acting officer" may serve longer than 150 days if, in the cases of rejection or withdrawal of the first nominee, a second nomination of a different individual for the office is submitted to the Senate. If the second nomination is submitted after more than 150 days after the rejection, withdrawal or return of the first nomination, the provisions of revised section 3348 will apply until the second nomination is submitted. If the second nominee is confirmed within 150 days of the nomination, the term of the acting officer ceases. In the case of a return, the second nomination could be of the same individual first nominated. The "person serving as the acting officer" may serve for 150 days following the rejection, withdrawal, or rejection of the second nomination. However, after that 150-day period has elapsed, if no permanent nominee has been confirmed, the provisions of revised section 3348 apply.

The revised section 3347 provides that the Vacancies Reform Act applies to any office of an executive agency (including the Executive Office of the President) for which appointment is required to be made by the President by and with the advice and consent of the Senate. The section does allow temporary appointments to be made other than through the Vacancies Reform Act in three narrowly delineated exceptions. First, where Congress provides that a statutory provision expressly provides that it supersedes the Vacancies Reform Act, the other statute will govern. But statutes enacted in the future purporting to or argued to be construed to govern the temporary filling of offices covered by this statute are not to be effective unless they expressly provide that they are superseding the Vacancies Reform Act.

Second, the bill retains existing statutes that are in effect on the date of enactment of the Vacancies Act of 1998 that expressly authorize the President, or the head of an executive department to designate an officer to perform the functions and duties of a specified office temporarily in an acting capacity, as well as statutes that expressly provide for the temporary performance of the functions and duties of an office by a particular officer or employee. (This includes statutes that provide for an automatic designation, unless the President designates another official). The Committee is aware of the existence of statutes specifically governing a vacancy in 41 specific offices, 40 of which would be retained by this bill:

1. Administrator, Drug Enforcement Administration (5 U.S.C. Reorg. Plan No. 2 of 1973) (two alternatives);

2. Administrator, Environmental Protection Agency (5 U.S.C. Appendix 1);

3. Administrator, Federal Aviation Administration (49 U.S.C. 106(I));

4. Administrator, General Services Administration (40 U.S.C. 751(c));

5. Administrator, National Oceanic and Atmospheric Administration (5 U.S.C. Appendix 1);

6. Administrator, Small Business Administration (15 U.S.C. 633(b)(1));

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7. Archivist, National Archives and Records Administration (44 U.S.C. 2103(c));

8. Attorney General (28 U.S.C. 508(a));

9. Attorney General (28 U.S.C. 508(b));

10. Chairman, Joint Chiefs of Staff (10 U.S.C. 154(d));

11. Chairman, Joint Chiefs of Staff (10 U.S.C. 154(e));

12. Chief Judge, Court of Veterans Appeals (38 U.S.C. 7254(d));

13. Chief of Naval Operations (10 U.S.C. 5035(d)(2));

14. Chief of Staff of the Air Force (10 U.S.C. 8034(d)(2));

15. Chief of Staff of the Army (10 U.S.C. 3034(d)(2));

16. Commandant of the Marine Corps (10 U.S.C. 5044(d)(2));

17. Commissioner, Social Security Administration (42 U.S.C. 902(b)(4));

18. Comptroller General (31 U.S.C. 703(c));

19. Director, Office of Management and Budget (31 U.S.C. 502(f));

20. Director, U.S. Arms Control and Disarmament Agency (22 U.S.C. 2563);

21. Director, U.S. Information Agency (5 U.S.C. Appendix 1);

22. Director, U.S. International Development Cooperation Agency (5 U.S.C. Appendix 1);

23. General Counsel, Department of the Treasury (31 U.S.C. 301(f)(1));

24. General Counsel, National Labor Relations Board (29 U.S.C. 153(d));

25. President, Export-Import Bank (12 U.S.C. 635a(b));

28. Public Printer, Government Printing Office (44 U.S.C. 304);

29. Secretary of Defense (10 U.S.C. 132(b));

30. Secretary of Education (20 U.S.C. 3412(a)(1) (two alternatives);

31. Secretary of Energy (42 U.S.C. 7132(a)) (two alternatives);

32. Secretary of Health and Human Services (5 U.S.C. Appendix 1) (two alternatives);

33. Secretary of Labor (29 U.S.C. 552);

34. Secretary of Transportation (49 U.S.C. 102(c)(2));

35. Secretary of Transportation (49 U.S.C. 102(e));

36. Secretary of the Treasury (31 U.S.C. 301(c)(2));

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37. Secretary of Veterans Affairs (38 U.S.C. 304);

38. Special Counsel, Immigration-Related Unfair Employment Practices (8 U.S.C. 1324b(c)(1));

39. United States Attorney (28 U.S.C. 546(a)-(d)); and

40. United States Marshal (28 U.S.C. 562(a)-(b)).

A statute, 42 U.S.C. 206(a), provides that the Surgeon General shall assign one commissioned officer from the Regular Corps to act as Surgeon General in the event of disability or vacancy in that office. The language of this bill does not retain this statutory means for filling a vacancy in a specific position.

Most of these retained statutes do not place time restrictions on the length of an acting officer. The various authorizing committees may choose in the future to reexamine whether these positions should continue to be filled through the existing procedure, or whether it would be advisable to repeal those statutes in favor of the procedures contained in the Vacancies Reform Act. The Committee believes that some of these statutes may have been passed without knowledge of the Vacancies Act. In any event, even with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies Act would continue to provide an alternative procedure for temporarily occupying the office.

The third exception to the applicability of the Vacancies Reform Act to all executive agency offices that are appointed by the President by and with the advice and consent of the Senate is the Presidents constitutional power under Article II, sec. 2, cl. 3 to make appointments during the recess of the Senate.

The bill provides that any statutory provision providing general authority to the head of an executive agency to delegate or reassign duties within that executive agency is not a statutory provision that qualifies within the exception contained in section 3347(a)(2) for existing statutes that provide for the filling of a vacancy in a specific office. This provision forecloses the argument raised by the Justice Department that sections 28 U.S.C. 509 and 510, rather than the Vacancies Act, apply to vacancies in that department. This provision also forecloses the argument that similar language of vesting and delegation contained in the organic statutes of other departments, rather than the Vacancies Act, applies to those departments.

New section 3348 provides an enforcement mechanism for the legislation. If the President does not submit a nominee for a vacant executive agency position requiring the advice and consent of the Senate within 150 days of the vacancy caused by the departure of the last Senate-confirmed officer, the functions and duties of the office can be performed only by the head of that agency until a nomination is forwarded to the Senate.

The bill defines "function or duty" of the office as those functions or duties that (1) are established by statute and are required to be performed only by the applicable officer; (2) are established by regulation and are required to be performed only by the applicable officer; (3) were established by regulation and were required to be performed only by the applicable officer at any time in the 180 days preceding the vacancy, notwithstanding any regulation issued more recently than 180 days before the vacancy occurred that limits or eliminates any function or duty required to be performed only by the applicable officer. The functions or duties of the office that can be performed only by the head of the executive agency are therefore defined as the non-delegable functions or duties of the officer as they existed at any point during the 180 days prior to the death, resignation, or inability to serve of the last Senate-confirmed person to hold the applicable office, less any such duties subsequently

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limited by statute, but including duties subsequently limited or repealed by regulation, and including any such duties subsequently imposed by statute or regulation. Since so many executive agency positions filled with the advice and consent of the Senate lack any meaningful statutory duties, and because internal departmental regulations such as those providing duties for specific officers can be changed at will without undergoing the notice and comment process, 5 U.S.C. 553(b)(3)(A), the Committee defined the functions and duties of a particular office to be those that existed at any point in the 180 days prior to the vacancy and those subsequently added, but not subtracted. Otherwise, agencies and departments could avoid the enforcement mechanism of making the office vacant by simply issuing regulations providing that the office has no non-delegable duties. The Committee believes that the duties as established 180 days before the vacancy is the appropriate period for freezing the duties because in many instances, the administration will know of an upcoming vacancy. The bill does not include as duties or functions of the office those duties that are limited or eliminated by statute after the date 180 days preceding the vacancy. When Congress shifts statutory duties from one agency to another, or changes the statutory underpinnings of a regulation affecting the duties of an officer, this bill does not extend the life of those affected regulations. Functions and duties of the office added by statute or regulation on or after 180 days preceding the vacancy are defined as functions and duties of the office, and thus, cannot be performed except by the head of the department or agency if the vacant office provisions apply.

Subject to section 3347 and a special rule discussed below when the 150th day is one on which the Senate is not in session, if 150 days elapses from a vacancy to which this legislation applies without the President having submitted a nomination for the vacant office to the Senate, the office shall remain vacant until the President submits a nomination to the Senate. After the 151st day until the date the nomination was made, neither the acting officer nor anyone else could fill the vacant office. In addition, except in the case of the head of an executive agency, only the head of that agency himself or herself could perform any function or duty of the office as defined in the legislation. Delegable functions of the office could still be performed by other officers or employees, but the functions and duties to be performed only by the officer whose appointment is by the President by and with the advice and consent of the Senate could be performed solely by the head of the executive agency. For any such office located within a department, that would mean that only the head of the department could perform those functions. All the normal functions of government thus could still be performed. The legislation only limits the person who may perform them. The goal is not to punish or to obstruct, nor to inconvenience for the purpose of inconveniencing, but, rather, to encourage that a nomination be forwarded to the Senate after more than sufficient time for doing so has elapsed. Any inconvenience to the executive branch can be eliminated instantly by the Presidents unilateral decision to make a nomination, for once such a nomination is made, the acting officer can resume service, including performing the non-delegable duties of the office.

If the head of the agency position is vacant for more than 150 days without a nomination being sent to the Senate, the office is to remain vacant.

If the President does not submit a second nomination to the Senate within 150 days after the rejection, withdrawal, or return of the first nomination, the office will remain vacant, and the non-delegable functions and duties of the office can be performed only by the head of the executive agency as described above. If an office is vacant after 150 days after the rejection, withdrawal, or return of the second nomination, then the office shall remain vacant until a person is appointed by the President by and with the advice and consent of the Senate, and only the head of the executive agency may perform any function or duty of such office until the Senate has confirmed a nominee for the office, as described above. This provision tracks other provisions in the bill that allow the acting officer to serve once a first or second nomination is made, even if more than 150 days have elapsed, but do not permit an additional opportunity for the acting officer to serve in the event of exceeding the bills time

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limits after disposition of the second nomination.

If the 150th day following the vacancy, following disposition of a first nomination other than by confirmation, or following disposition of a second nomination other than by confirmation falls on a date the Senate is not in session, then the first day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

To enforce section 3348s vacant office and performance of duties and functions of the office only by the agency head provisions be enforced, any function or duty of the office taken by a person who fills that vacancy despite the vacant office provision or who, not being the agency head, performs such a function duty without filling the office, shall be of no force or effect. Such actions cannot be made to have force or effect through ratification. For example, the successor in the office by virtue of his appointment by the President by and with the advice and the consent of the Senate may not ratify the actions of a person who filled the office in violation of the legislations provisions or who, not being the agency head, performed nondelegable duties of the office. A lawfully serving acting officer cannot ratify the actions of a temporary officer whose service does not comply with the Vacancies Reform Act. The agency head may not ratify an action that is of no force or effect under this legislation that was performed by another official. Nor under well-established principles of constitutional law may the President ratify actions taken by officials that the law has provided shall be performed solely by lower-level executive branch officials. The Committee expects that litigants with standing to challenge purported agency actions taken in violation of these provisions will raise noncompliance with this legislation in a judicial proceeding challenging the lawfulness of the agency action. It is concerned that the ratification approach taken by the court in Doolinwould render enforcement of the Vacancies Reform Act a nullity in many instances.

Section 3348 does not apply to the General Counsel of the National Labor Relations Board, the General Counsel of the Federal Labor Relations Authority or any inspector general appointed by the President, by and with the advice and consent of the Senate. Although the Committee believes that it has retained the specific statute that governs vacancies in the office of general counsel of the National Labor Relations Board, the Committee desires to make certain that the vacant office provisions do not apply to that position or its equivalent at the Federal Labor Relations Authority. These are two unusual positions that require appointment by the President by and with the advice and consent of the Senate. The positions are within multimember commissions but are not members of those commissions. Congress provided for Senate confirmation for these positions because it demands that these officials be independent of the commissioners. Specifically, it wanted to separate the official who would investigate and charge potential violations of the underlying regulatory statute from the officials who would determine whether that statute had actually been violated. If the non-delegable duties of these general counsel were somehow to be performed by the commissioners, that policy would be obliterated. Thus, section 3345 applies to all advice and consent positions, but section 3347 retains the existing statutory procedure for filling a vacancy in the general counsel of the NLRB. Section 3348 states clearly its inapplicability to the general counsel of the NLRB.

Under current law, the general counsel of the FLRA is not covered by the Vacancies Act because of the peculiarity that the position requires the advice and consent of the Senate but is not the head of an agency. Whereas the Justice Department has argued that its non-coverage under the Vacancies Act means that other provisions govern acting appointments for its offices, the Department has concluded that no statute permits an acting general counsel at the FLRA. Accordingly, in recent years, when that position has become vacant, no one has performed its duties until a permanent successor has been confirmed by the Senate. Since one of the duties of that position is to institute proceedings, this has resulted essentially in the cessation of the agencys functions. S. 2176 covers the general counsel of the FLRA under sections 3345 and 3346, permitting an acting officer to serve in case of a

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vacancy, but excludes the position from the enforcement mechanisms of section 3348 to preserve the independence of the position.

Similarly, agency inspectors general are to be independent of the agencies to which they are assigned. Inspectors general are to investigate mismanagement in their agency, and often may be critical of the agency head. If an inspector general whose appointment was made by the President by and with the advice and consent of the Senate were to have his functions performed by the agency head, the agency head might be delighted not to perform them vigilantly. Thus, section 3348 will not apply to this class of inspectors general.

Revised section 3349 of the bill requires the head of each executive agency to submit to the Comptroller General and to each house of Congress notification of vacancies in positions in their agencies requiring Senate confirmation, the name of any person serving in an acting capacity and the date such service began as soon as such service began, the name of any person nominated to the Senate to fill the vacancy as soon as such nomination is submitted, and the date of a rejection, withdrawal, or return of any nomination as soon as such rejection, withdrawal, or return occurs. If the Comptroller General makes a determination that an officer is serving longer than the 150-day period, including the applicable exceptions to such period in the legislation, the Comptroller General is to report such determination to the relevant committees listed in the legislation, the President, and the Office of Personnel Management. This function is informational only and does not provide the Comptroller General with any function properly to be performed only by an executive branch official. The Committee designated the recipients of the report so that appropriate action can be taken by the individuals who are informed of possible violations of the law.

New section 3349a extends the 150-day period in sections 3346 and 3348 for vacancies that exist on or that arise within 60 days after a presidential inaugural transition. In effect, the 150-day period becomes 240 days in this circumstance, running from the later of the date the vacancy arose or the transitional inauguration day. The bill defines a presidential inaugural transition as a date on which any person swears or affirms the oath of office as President, if such person was not the President on the date preceding the date of the swearing or affirming such oath of office. The time limit is extended in this circumstance because a new president will have essentially all positions in the executive branch requiring Senate confirmation to fill when he assumes office and may require additional time to nominate individuals to fill them. By the time the 240 days has run, the President would have confirmed sufficient of his own Senate-confirmed officials to designate as acting officers if he chose to exercise his power under section 3346, and that could continue to serve as the acting officer if a permanent nominee were submitted to the Senate. The provision covers vacancies in positions requiring Senate confirmation that arise in the 60 days following the presidential inauguration transition because each department keeps a Senate-confirmed person into a new administration for a short time in case vacancies in that department are not able to be filled as quickly as anticipated. The filling of those holdover offices should also be subject to the 90-day tolling of the 150-day period.

New section 3349b retains existing statutes that provide, with respect to any independent establishment headed by a single officer, that that officer can serve after the expiration of his term and until a successor is appointed or a specified period of time has elapsed. Whereas section 3347 retains those statutes that provide a means of succession for an acting person to perform the duties of a specified office, section 3349b retains statutes affecting specific independent establishments headed by a single officer that do not provide for an acting officer, but which instead permit the officer to serve until his successor is appointed or for a specified period of time. These statutes govern the Chairman of the National Endowment for the Arts (20 U.S.C. 954(b)(2)), the Chairman of the National Endowment for the Humanities (20 U.S.C. 956(b)(2)), the Special Counsel of the Office of Special Counsel (5 U.S.C. 1211 (b)), and the Commissioner of the Social Security Administration (42 U.S.C. 901(a)(3)). Independent establishments headed by a single officer previously covered by the Vacancies

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Act continue to be so covered under this legislation.

New section 3349c provides that the Vacancies Reform Act shall not apply to any member appointed by the President by and with the advice and consent of the Senate to a board, commission, or similar entity that is composed of multiple members, and governs an independent establishment or Government corporation. The Committee believes that this has always been the case with the respect to the Vacancies Act and wishes to avoid any confusion that might result from the enactment of a replacement statute on this point. Thus, vacancies in these positions are not covered by this legislation. Section 3349c excludes commissioners of the Federal Energy Regulatory Commission from the Vacancies Act as well, since it is an anomaly: the only multi-member independent agency that Congress has not placed in an independent establishment but in a department. Subsection (b) of section 3349c makes technical and confirming changes.

Section 3 of the legislation specifies its effective date. The legislation takes effect on the date of enactment, and shall apply to any office that becomes vacant after the date of enactment of this legislation or that is vacant on that date, although, as to the latter, its provisions shall apply as though such office first became vacant on that date. Thus, the 150-day period for those offices that are vacant on the date the legislation is enacted begins on the date the legislation is enacted, rather than the date the vacancy arose.

VII. Regulatory Impact Statement

Paragraph 11(b)(1) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate "the regulatory impact which would be incurred in carrying out this bill."

The enactment of this legislation will not have significant regulatory impact.

VIII. Cost Estimate of the Legislation U.S. Congress, Congressional Budget Office, Washington, DC, July 1, 1998. Hon. Fred D. Thompson, Chairman, Committee on Governmental Affairs, U.S. Senate, Washington, DC.

Dear Mr. Chairman:The Congressional Budget Office has prepared the enclosed cost estimate for S. 2176, the Federal Vacancies Reform Act of 1998.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is John R. Righter.

Sincerely, June E. ONeill, Director.

Enclosure.

congressional budget office cost estimate
S. 2176 Federal Vacancies Reform Act of 1998

S. 2176 would amend the Vacancies Act to clarify requirements relating to vacancies in and appointments to executive branch positions, including limitations on the amount of time that unconfirmed appointees can remain in office. It also would require the head of each executive branch agency to submit certain information regarding vacancies and appointments to the General Accounting Office. CBO estimates that enacting S. 2176 would have no significant impact on the federal budget.

Pay-as-you-go considerations: None.

Intergovernmental and private-sector impact: S. 2176 contains no intergovernmental or

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private-sector mandates as defined in the Unfunded Mandates Reform Act and would have no impact on state, local, or tribal governments.

Estimate prepared by: John R. Righter.

Estimate approved by: Paul N. Van de Water, Assistant Director for Budget Analysis.

IX. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law with no change proposed is shown in roman):
UNITED STATES CODE TITLE 5, GOVERNMENT ORGANIZATION AND EMPLOYEES

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Subchapter III Details, Vacancies, and Appointments

3341. Details; within Executive or military departments.

(3342. Repealed.)

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3345. Acting officer.

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The bill applies to all vacancies in Senate-confirmed positions in executive agencies with a few express exceptions. First, those laws that expressly provide that they supersede the Vacancies Act will do so. Second, current laws (there are approximately 41) that provide for the President or the head of an executive department to designate an officer to perform the functions and duties of a specified office in an acting capacity are maintained, as are those statutes that themselves stipulate who shall serve in a specific office in an acting capacity. Statutes that generally permit agency heads to delegate or reassign duties within their agencies are specified not to constitute statutes that provide for the temporary filling of particular offices.

The bills enforcement mechanism is to make an office vacant if, 150 days after the vacancy arises, no presidential nominee has been submitted to the Senate for the office. For offices other than the heads of agencies, the functions and duties specifically to be performed by the vacant officer are to be performed only by the head of the agency. Such duties include duties established by regulation for the officer during any part of the 180 days before the vacancy occurred, notwithstanding subsequent regulations that purported to limit those duties. The sanction can be ended if the President submits a nominee after the 150-day period, whereupon the acting officer can resume service. Actions taken in violation of the vacant officer provisions are of no effect and are not permitted to be ratified by anyone else. The shifting of duties to the agency head does not apply to vacancies in the positions of general counsel to the National Labor Relations Board and Federal Labor Relations Authority or to Senate-confirmed inspectors general, given the specific goal Congress established for those positions of independence from the agency heads.

The bill also requires heads of agencies to report to the General Accounting Office on the existence of vacancies, persons serving in an acting capacity, the names of any nominees, and dates of disposition of such nominees. The Comptroller General then reports to the Congress, the President, and the Office of Personnel Management of the existence of any violations of the Vacancies Act.

The 150-day period for submitting nominations is extended for an additional 90 days for vacancies that exist when the President changes or that arise in the 60 days thereafter. And the bill maintains holdover provisions in current law that apply to single-member independent agencies, and exempts members of multi-member independent agencies altogether, as does the present Vacancies Act.

The bill applies to any office that becomes vacant after the date of enactment, as well as to offices that are vacant on the date of enactment, except that the bill shall apply to those offices as though they first became vacant on the date of enactment.

III. Need for Legislation

The need for legislation to govern the performance of the functions and duties of vacant offices ultimately derives from Article II, Section 2 of the Constitution, which, inter alia, ests the President with the authority to appoint all officers of the United States, subject to the advice and consent of the Senate, but that Congress, by law, may vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments. Congress has passed legislation since the Washington Administration to provide for temporary officials to perform the functions and duties of vacant positions requiring the advice and consent of the Senate. Over the years, the time of temporary service has been lengthened, but Congress has always placed time limits on such acting officials.

In recent decades, the Department of Justice has argued that its advise and consent positions are not covered by the Vacancies Act. It construes its enabling legislation, and now the enabling legislation of other departments, as exempting its compliance with the

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3348. Vacant office.

3349. Reporting of vacancies.

3349a. Presidential inaugural transitions.

3349b. Holdover provisions relating to certain independent establishments.

3349c. Exclusion of certain officers.
PART III EMPLOYEES
Subpart B Employment and Retention

CHAPTER 33 EXAMINATION, SELECTION, AND PLACEMENT

Subchapter III Details

Subchapter III Details, Vacancies, and Appointments 3345. Details; to office of head of Executive agency or military department

When the head of an Executive agency (other than the General Accounting Office) or military department dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops.
3345. Acting officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office

(1) the first assistant of such officer shall perform the functions and duties of the office temporarily in an acting capacity, subject to the time limitations of section 3346; or

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the office temporarily in an acting capacity, subject to the time limitations of section 3346.

(b) Notwithstanding section 3346(a)(2), a person may not serve as an acting officer for an office under this section, if

(1) on the date of the death, resignation, or beginning of inability to server of the applicable officer, such person serves in the position of first assistant to such officer;

(2) during the 365-day period preceding such date, such person served in the position of first assistant to such officer for less than 180 days; and

(3) the President submits a nomination of such person to the Senate for appointment to such office.

(c) With respect to the office of the Attorney General of the United States, the provisions of section 508 of title 28 shall be applicable.
3346. Details; to subordinate offices

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When an officer of a bureau of an Executive department or military department, whose appointment is not vested in the head of the department, dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops.
3346. Time limitation

(a) The person serving as an acting officer as described under section 3345 may serve in the office

(1) for no longer than 150 days beginning on the date the vacancy occurs; or

(2) subject to subsection (b), once a first or second nomination for the office is submitted to the Senate from the date of such nomination, for the period that the nomination is pending in the Senate.

(b)(1) If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may continue to serve as the acting officer for no more than 150 days after the date of such rejection, withdrawal, or return.

(2) Notwithstanding paragraph (1), if a second nomination for the office (of a different person than first nominated in the case of a rejection or withdrawal) is submitted to the Senate after the rejection, withdrawal, or return of the first nomination, the person serving as the acting officer may continue to serve

(A) until the second nomination is confirmed; or

(B) for no more than 150 days after the second nomination is rejected, withdrawn, or returned.

(c) If a person begins serving as an acting officer during an adjournment of the Congress sine die, the 150-day period under subsection (a) shall begin on the date that the Senate first reconvenes.
3347. Details; Presidential authority

Instead of a detail under section 3345 or 3346 of this title, the President may direct the head of another Executive department or military department or another officer of an Executive department or military department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the office until a successor is appointed or the absence or sickness stops. This section does not apply to a vacancy in the office of Attorney General.
3347. Application.

(a) Sections 3345 and 3346 are applicable to any office of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless

(1) another statutory provision expressly provides that the such provision supersedes sections 3345 and 3346;

(2) a statutory provision in effect on the date of enactment of the Federal Vacancies Reform Act of 1998 expressly

(A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in

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an acting capacity; or

(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(3) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

(b) Any statutory provision providing general authority to the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office) to delegate duties to, or to reassign duties among, officers or employees of such Federal agency, is not a statutory provision to which subsection (a)(2) applies.
3348. Details; limited in time

(a) A vacancy caused by death or resignation may be filled temporarily under section 3345, 3346, or 3347 of this title for not more than 120 days, except that

(1) if a first or second nomination to fill such vacancy has been submitted to the Senate, the position may be filled temporarily under section 3345, 3346, or 3347 of this title

(A) until the Senate confirms the nomination; or

(B) until 120 days after the date on which either the Senate rejects the nomination or the nomination is withdrawn; or

(2) if the vacancy occurs during an adjournment of the Congress sine die, the position may be filled temporarily until 120 days after the Congress next convenes, subject thereafter to the provisions of paragraph (1) of this subsection.

(b) Any person filling a vacancy temporarily under section 3345, 3346, or 3347 of this title whose nomination to fill such vacancy has been submitted to the Senate may not serve after the end of the 120-day period referred to in paragraph (1)(B) or (2) of subsection (a) of this section, if the nomination of such person is rejected by the Senate or is withdrawn.
3348. Vacant office

(a) In this section

(1) the term "action" includes any agency actions as defined under section 551(13); and

(2) the term "function or duty" means any function or duty of the applicable office that

(A)(i) is established by statute; and

(ii) is required by statute to be performed by the applicable officer (and only that officer); or

(B)(i)(I) is established by regulation; and

(II) is required by such regulation to be performed by the applicable officer (and only that officer); and

(ii) includes a function or duty to which clause (I) (I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs, notwithstanding any regulation that

(I) is issued on or after the date occurring 180 days before the date on which the vacancy occurs; and

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(II) limits any function or duty required to be performed by the applicable officer (and only that officer).

(b) Subject to section 3347 and subsection (c)

(1) if the President does not submit a first nomination to the Senate to fill a vacant office within 150 days after the date on which a vacancy occurs

(A) the office shall remain vacant until the President submits a first nomination to the Senate; and

(B) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office), only the head of such Executive agency may perform any function or duty of such office, until a nomination is made in accordance with subparagraph (A);

(2) if the President does not submit a second nomination to the Senate within 150 days after the date of the rejection, withdrawal, or return of the first nomination

(A) the office shall remain vacant until the President submits a second nomination to the Senate; and

(B) in the case of any office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office), only the head of such Executive agency may perform any function or duty of such officer, until a nomination is made in accordance with subparagraph (A); and

(3) if an office is vacant after 150 days after the rejection, withdrawal, or return of the second nomination

(A) the office shall remain vacant until a person is appointed by the President, by and with the advice and consent of the Senate; and

(B) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the General Accounting Office), only the head of such Executive agency may perform any function or duty of such office, until an appointment is made in accordance with subparagraph (A).

(c) If the last day of any 150-day period under subsection (b) is a day on which the Senate is not in session, the first day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

(d)(1) Except as provided under paragraphs (1)(B), (2)(B), and (3)(B) of subsection (b), an action shall have no force or effect if such action

(A)(i) is taken by any person who fills a vacancy in violation of subsection (b); and

(ii) is the performance of a function or duty of such vacant office; or

(B)(i) is taken by a person who is not filling a vacant office; and

(ii) is the performance of a function or duty of such vacant office.

(2) An action that has no force or effect under paragraph (1) may not be ratified.

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(e) this section shall not apply to

(1) the General Counsel of the National Labor Relations Board;

(2) the General Counsel of the Federal Labor Relations Authority; or

(3) any Inspector General appointed by the President, by and with the advice and consent of the Senate. 3349. Details; to fill vacancies; restrictions

A temporary appointment, designation, or assignment of one officer to perform the duties of another under section 3345 or 3346 of this title may not be made otherwise than as provided by those sections, except to fill a vacancy occurring during a recess of the Senate.
3349. Reporting of vacancies

(a) The head of each Executive agency (including the Executive Office of the President, and other than the General Accounting Office) shall submit to the Comptroller General of the United States and to each House of Congress

(1) notification of a vacancy and the date such vacancy occurred immediately upon the occurrence of the vacancy;

(2) the name of any person serving in an acting capacity and the date such service began immediately upon the designation;

(3) the name of any person nominated to the Senate to fill the vacancy and the date such nomination is submitted immediately upon the submission of the nomination; and

(4) the date of a rejection, withdrawal, or return of any nomination immediately upon such rejection, withdrawal, or return.

(b) If the Comptroller General of the United States makes a determination that an officer is serving longer than the 150-day period including the applicable exceptions to such period under section 3346, the Comptroller General shall report such determination to

(1) the Committee on Governmental Affairs of the Senate;

(2) the Committee on Government Reform and Oversight of the House of Representatives;

(3) the Committees on Appropriations of the Senate and House of Representatives;

(4) the appropriate committees of jurisdiction of the Senate and House of Representatives;

(5) the President; and

(6) the Office of Personnel Management.
3349a. Presidential inaugural transitions

(a) In this section, the term "transitional inauguration day" means the date on which any person swears or affirms the oath of office as President, if such person is not the President on the date preceding the date of swearing or affirming such oath of office.

(b) With respect to any vacancy that exists during the 60-day period beginning on a transitional inauguration day, the 150-day period under section 3346 or 3348 shall be deemed to begin on the later of the date occurring

(1) 90 days after such transitional inauguration day; or

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(2) 90 days after the date on which the vacancy occurs.
3349b. Holdover provisions relating to certain independent establishments

With respect to any independent establishment for which a single officer is the head of the establishment, sections 3345 through 3349a shall not be construed to affect any statute that authorizes a person to continue to serve in any office

(1) after the expiration of the term for which such person is appointed; and

(2) until a successor is appointed or a specified period of time has expired.
3349c. Exclusion of certain officers

Sections 3345 through 3349b shall not apply to

(1) any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that

(A) is composed of multiple members; and

(B) governs an independent establishment or Government corporation; or

(2) any commissioner of the Federal Energy Regulatory Commission.

ADDITIONAL VIEWS

The Committee on Governmental Affairs has a long list of legislative accomplishments that have enhanced the efficiency and effectiveness of the Federal government. These milestones were achieved with bipartisan support in both Democratic and Republican controlled Administrations and Congresses. The Vacancies Act should be no exception. As the Majoritys Report well explains, the Vacancies Act is in need of reform. For too long, the Executive Branchs interpretation and implementation of that law have stripped it of its original intent and, on occasion, effectively deprived the Senate of its constitutional right to partake in the appointment of a number of Federal officers. Nevertheless, although we share the Majoritys desire to amend the Vacancies Act and agree with many, if not most, of the policy choices contained in S. 2176 we write separately to emphasize a number of concerns we have about the current draft of the bill. Although these concerns were not sufficient to prevent us from voting to report the bill out of Committee, they are nonetheless serious and, we believe, need to be addressed before the bill is ready for final action on the Senate floor.

Some of our reservations about the bill are largely technical, reflecting our concern that the bill, in fact, could be misinterpreted and fail to do what the Committee intends it to do. Others are more substantive in nature and rest on our fear that the Committees understandable desire to protect the Senates constitutional prerogatives may have led it to create a situation that could prevent the Executive Branch from efficiently and effectively fulfilling its constitutional duties to execute the Congress laws. We discuss these concerns in detail below. We remain hopeful that, in the bipartisan spirit in which this legislation has thus far progressed, we can work out all of them before moving this bill further in the legislative process.

We are pleased that the Majority included us in the discussions leading up to the introduction and markup of S. 2176, and we believe that, due to those discussions, agreement was reached in four significant areas: (1) the time period of 150 days for service by an acting official absent a nomination, (2) the need for a "cure" in the case of a nomination made subsequent to the expiration of such period to allow an acting official to resume the functions and duties of the vacant office, (3) the exclusivity of the Act except in cases in which

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Congress makes clear it is specifying an alternative or supplemental means for filling vacancies, and (4) the necessity of an enforcement mechanism to encourage nominations to be made in a timely manner.

While these four areas are addressed in the bill, we remain concerned that 3348, the enforcement mechanism, as drafted, may not operate to achieve our goals. We must be sure that the operation of this provision does not cause an unintended shutdown of the Federal agency within which the vacancy exists due to administrative paralysis and that the provision is drafted clearly so that its scope, mainly the extent of government functions and duties it would affect, is well understood. We must be clear that the non-delegable duties we intend to have performed only by the agency head in the event of a vacancy beyond the 150 days without a nomination are only those expressly vested by law or regulation exclusively in the vacant position. In this regard, we acknowledge and appreciate the Majoritys statement that "all the normal functions of government thus could still be performed." For example, where a statute or regulation specifies that an Assistant Secretary for Policy Development is responsible for overseeing policy development, the development of policy would continue, but if a non-delegable approval is necessary to implement the policy, that approval must be performed by the agency head during a vacancy.

One other concept in 3348 bears emphasis. The non-delegable duties of an agency head are not addressed in this legislation because the Committee expects that there will never be a case where a nomination for these positions is not timely submitted.

We would like to see serious consideration given to who, other than the first assistant or another Presidentially-appointed, Senate confirmed official designated by the President, as a qualifying acting official. We recognize the policy of maintaining the continuity and regularity of the vacated office by allowing a first assistant to automatically succeed to the position and the policy of allowing any individual nominated by the President and confirmed by the Senate to fill any "advice and consent" position. However, we believe that more flexibility is advisable and that our ultimate goal should be to ensure that the most qualified individual available fills the position. One possible alternative would be to allow a third category of individuals to temporarily fill positions, such as a qualified individuals who have worked within the agency in which the vacancy occurs for a minimum number of days and who are of a minimum grade level.

On related point, we believe the length of service requirement for first assistants who are nominees should be reevaluated. Senator Glenn offered an amendment at the Committees June 17, 1998 markup to shorten the period required for an acting official who was a first assistant to be a nominee. As Senator Glenn noted at markup, this requirement would preclude service by a first assistant who naturally ascends to that position from within the agency, who might be a logical choice to fill the vacancy on a permanent basis. In considering shortening this requirement, we should strive to ensure the smooth flow of government activity, not penalize the individual, the agency or the taxpayers. We reiterate our preference for shortening this requirement.

We would also like to see a "safety valve" provision considered which would extend the 150-day period for a temporary appointment for an additional period of time if the President certifies that it is in the national interest to suspend or lengthen the period. Such "interests" could include reasons relating to national security, public health and safety, or financial stability. We recommend that information be gathered to determine which critical functions affect such interests.

We believe that special consideration should be given to a situation in which a new president is being inaugurated. In such a case, especially when there is a change in the political party of the new president, there is unlikely, in many cases, to be a first assistant who, according to the bills length of service requirement, would be eligible to both serve as the acting official

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and be the nominee. This limits a new Administration which may want to put its qualified people in acting positions and nominate them as well. The Senate should consider whether it is advisable to prohibit this type of service categorically or whether a more narrow compromise would be possible. In addition, we should ensure that the extended time period for temporary appointments at the beginning of a new Administration 1 accurately reflects the reality of the nomination process when a new President assumes office. We would not want to hamper future Administrations ability to become operational as quickly as possible.

1The extended time periods provided in 3349b total 240 days as the period for temporary appointments in a new Administration. This time period is applicable to all vacancies that arise from the date of the inauguration of the new President and for the subsequent 60 days.

At markup, the Committee also discussed whether nominations could be sent up during a recess of the Senate. Specifically, we believe it is still unclear whether the bill, as written, would allow the Administration to cure a violation by making a nomination during recesses of the Senate. While it is clear that the Senate regularly authorizes itself to accept Presidential messages during its recesses, and the President is permitted to submit nominations to the Senate at any time, in practice, nominations are not sent up during recesses. We are concerned with assuring the smooth functioning of Government. One of our overriding concerns in reforming the Vacancies Act should be to ensure that we are not overburdening an agency head with the non-delegable responsibilities of other positions where such a situation can be avoided. We urge the Senate to consider remedying this situation by allowing the President to effectively notice the Senate with a letter of intent including the name of a nominee and a statement that he intends to nominate that person when the Senate reconvenes. By allowing such letter, the Senate would allow the President to exercise good faith where he wants to avoid using a recess appointment.

See 139 CR 8 (1993), 141 CR S9 (daily ed. Jan. 4, 1995), 143 CR S8 (daily ed. Jan. 7, 1997).

See Floyd M. Riddick and Alan S. Frumin, Riddicks Senate Procedure, p. 949 (Rev. Ed. 1992).

President Clinton has exercised his Constitutionally mandated recess appointment power 45 times in five years, President Bush made 78 recess appointments in four years and President Reagan made 239 in eight years.

Finally, we would hope that consideration will be given to increasing the one-day requirement of 3348(c). While we are pleased that a recess will toll the temporary appointment period, to guard against an Administrations inadvertently missing the one-day window and certain functions and duties unnecessarily being delegated to the agency head, we recommend adding two days to the requirement that the President submit a nomination the day the Senate reconvenes.

As mentioned above, there are several other issues of concern to us which we believe are of a technical nature. While they are important issues in that their resolution affects the way a new law could be interpreted, because there is agreement between Majority and Minority staffs to aim to address these issues in a Managers Amendment as the bill is considered by the full Senate, such issues will not be enumerated here. It is our hope that all of our concerns will be addressed in future discussions before S. 2176 is presented for debate on the Senate floor.

We cannot leave the topic of the process by which the President nominates federal officials without touching on the process by which the Senate confirms them. It is getting increasingly difficult to attract the best and brightest to government service, and those who serve in

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Presidentially-appointed, Senate confirmed positions are doing so for an average of less than two and a half years. And because the time period from vacancy through confirmation has become increasingly lengthy, we must go through this arduous process often multiple times within a single Administration. We agree that the Executive Branch too often takes too long to submit nominations to the Senate and that this delay not only intrudes upon the Senates constitutional prerogatives but also impedes the good functioning of government. At the same time, however, we would be truly remiss if we failed to acknowledge that blame in this area does not rest in the Executive Branch alone; the Senate has frequently declined to exercise its advice and consent responsibility in a timely and appropriate manner. Too often, nominations die in Committee, languish on the Executive Calendar, or simply take months or years to move through this Chamber. While the Senate remains free to reject the Presidents nominees when appropriate, it owes it to both the Executive, and more importantly, the American people, to discharge its constitutional duty to offer and not withhold its advice and, where appropriate, timely consent. We hope that in the future the Senate is willing to commit itself to act to reform its confirmation process in the same bi-partisan spirit we expect it to exhibit in enacting this legislation.

John Glenn.

Carl Levin.

Joe Lieberman.

Max Cleland.

Robert Torricelli.

MINORITY VIEWS

While we associate ourselves with the concerns outlined in the Additional Views of Senator John Glenn, our serious reservations abut the bill prevents us from supporting this legislation in its present form. Revisions to the Vacancies Act must reflect the realities of the nomination and confirmation process as it have evolved over the last several years. Furthermore, it is important to recognize the implication of imposing unrealistic expectations or restrictions on the process which could force the President to expand the use of recess appointment authority.

We recognize the need to safeguard the Senates constitutional prerogative to advise and consent to nominations of executive officers, and do not oppose efforts to clarify and bolster the Vacancies Act as the executive mechanism (with limited and explicit exception) for the President to designate officials to temporarily fill vacancies in positions requiring Senate confirmation. Unfortunately, this bill goes well beyond that justifiable but limited goals.

We are concerned that this bill would impede the functioning of the Executive Branch. Concerns about the inability of Presidents to promptly submit nominees to fill positions requiring Senate confirmation has been a driving force prompting periodic reevaluation of Vacancies Act provisions throughout the last two centuries, including the present instance. Yet merely adding 30 days to the time permitted under current law for positions to be temporarily filled by an acting official is, in our opinion, wholly inadequate and impractical.

While the White House certainly bears some responsibility for the time it takes to select and advance nominees, it is a responsibility that is shared by the Senate. Given that the protracted, arduous, and unduly politicized Senate confirmation process contributes to making it increasingly more difficult to identify, recruit, and screen candidates for Federal appointments, it is imprudent to impose rigid statutory deadlines and to limit the persons eligible to serve temporarily as acting officers in vacant positions. Within substantial changes,

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we cannot support this bill.

First, this legislation too narrowly restricts who can function in an "acting" capacity. Section 3345(a)(1) of the bill can be read to provide that, aside from another Senate-confirmed Presidential appointee designated by the President, only the "first assistant" to the particular Senate confirmed officer who dies, resigns or is other unable to perform the functions and duties of the position, can be an acting officer. Early in the Administration of a newly-inaugurated President, virtually the only person who could serve as acting officers would be the first assistants from the prior Administration, since transferring another PAS person would merely create a new vacancy elsewhere. Moreover, the Senate could prolong the tenure of those holdover officers simply by delaying or failing to confirm the Presidents nominee. No President should have to accept such a state of affairs.

Moreover, mandating that only first assistant or Senate-confirmed officials are eligible to serve as acting officers promotes no legitimate public policy. Indeed, this limitation prevents a President from naming an experienced career employee as an acting official, in favor of a person lacking broad experience who was brought into Department by the departing official. Consequently, the bill could preclude the President from naming the most qualified person to serve as an acting officer. In addition, the lack of a first assistant to a particular office that becomes vacant would leave the position vacant until such time as the President designates a previously Senate-confirmed official to temporarily fill that vacancy as an acting official. Given the tight time period of the Act, we fail to see why this provision should be so narrowly drawn. Without any justification based on its institutional interests, the Senate would do a great disservice by adopting such a restrictive measure. Therefore, we endorse Senator Glenns suggestion that serious consideration be given to establishing a third category of individuals eligible to temporarily fill vacant positions.

Second, the unalterable 150 day time limit on service by acting officers is far too rigid. Indeed, it could impair the national interest. Circumstances may arise under which the President is unable to nominate an individual for a particular office within 150 days of a vacancy. Under this bill, the office would have to remain vacant even if that vacancy would undermine national security, impede public health and safety, threaten financial stability, or interfere with law enforcement. We believe there should be a flexible "safety valve" available for exceptional situations, whereby the President could certify to the Senate that a reasonable amount of additional time is needed to designate the appropriate nominee and that it is essential for the acting officer to continue to perform these critical tasks in the interim without interruption.

Third, while it would not affect this President, experience has shown that at the beginning of a new Administration, filling positions in the government requires time far longer than that specified in this bill. At the outset of a new Administration, a President must nominate individuals to at least 320 positions in the 14 executive departments in addition to appointing hundreds of other employees who do not require confirmation. The new President cannot possibly make all required nominations within the 240 days allowed by the bill. In 1993, when the nominations process was, if anything, simpler than it is today, the new Administration was able to forward only 68% of nominations within the first 240 days, leaving 32% of positions unfilled. Unless this time period is changed, the next Administration could effectively be facing departmental shutdowns before the new President can even begin to accomplish what he was elected to do.

Finally, our concern about these time limitations and the constraints on who can be appointed is magnified many times by the enforcement mechanism the bill establishes. It is essentially a sanction of administrative immobilization. Section 3348 of the bill specifies that if the President fails to forward a nomination within the 150-day span following the occurrence of a vacancy or the withdrawal, rejection, or return of a first nomination, the office in question must remain vacant until a nomination is made. No one apart from the

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Vacancies Act. Specifically, the Department of Justice maintains that where a departments organic act vests the powers and functions of the department in its head and authorizes that officer to delegate such powers and functions to subordinate officials or employees as she sees fit, such authority supersedes the Vacancies Acts restrictions on temporarily filling vacant advice and consent positions, allowing for designation of acting officials for an indefinite period, even without submitting a nomination to the Senate to fill the position on a permanent basis. This interpretation of the law is wholly lacking in logic, history, or language, as evidenced by repeated opinions of the Comptroller General. Opinion B-150136, Feb. 19, 1976; 65 Op. Comp. Gen. 626, 631-33 (1986); Opinion B-220522.2, Oct. 17, 1986. By May, 1997, seven statutory offices in the Justice Department requiring presidential nomination and Senate confirmation were vacant. One vacancy had existed for twenty-one months, three were vacant for more than 120 days, and three positions were unfilled for less than 120 days. In at least four instances, positions were filled by an order of the Attorney General designating a person to act in the vacant position. For example, the Solicitor Generals position was occupied by an acting officer for more than one year without a nomination ever being submitted to the Senate.

Despite attempts to do so through 1988 amendments to the Vacancies Act, described below, Congress was not successful in gaining the Justice Departments agreement that its advice and consent positions are subject to the Vacancies Act. Given the growing number of federal departments and agencies that now claim exemption from the Vacancies Act, Congress must explicitly reject the position that general organic statutes for various agencies and departments, such as 28 U.S.C. 509 and 510, trump the specific provisions of the Vacancies Act. Otherwise, the Vacancies Act will be of no practical effect, thwarting the constitutional mandate that persons serving in advice and consent positions do so through the Senates approval of such service.

the 1988 amendments

The Justice Departments aggressive claims of exemption from the Vacancies Act led Congress in 1988 to make the first significant changes in the Vacancies Act since 1868. The 1988 amendments changed the laws coverage to apply to all executive departments and agencies, overruling a 1973 court decision that had limited the applicability of the Act to executive and military departments. The length of time that an acting official was permitted to serve was extended to 120 days, rather than the previous 30, and the acting officer could serve more than 120 days if the President submitted a nominee. An additional 120 days of acting service was provided if the Senate rejected the nomination or if it was withdrawn. Through this mechanism, Congress created an incentive for the President to submit nominations in a timely manner, and allowed temporary officials to serve until the Senate completed its advice and consent function. This Committees report accompanying the Senate bill stated, "The Committee also believes that the present language, however old, makes clear that the Vacancies Act is the exclusive authority for the temporary appointment, designation, or assignment of one officer to perform the duties of another whose appointment requires Senate confirmation. The exclusive authority of the Vacancies Act would only be overcome by specific statutory language providing some other means for filling vacancies." S. Rep. No. 100--317, 100th Cong., 2d Sess. 14 (1988). In 1989, the Justice Departments Office of Legal Counsel recognized the Senates view, but continued to interpret the Vacancies Act as not precluding the Attorney Generals authority to appoint temporary officials under the Departments organic statute, characterizing the Senate report as an improper and ineffective effort to "alter the proper construction of a statute through subsequent legislative history." 13 O.L.C. 173, 175 (1989). If the Vacancies Act is to function as it is designed to uphold the Senates prerogative to advise and consent to nominations through placing a limit on presidential power to appoint temporary officials the Justice Departments interpretation of the existing statute must be ended. Legislation is needed to ensure this result, a primary reason for the Committees reporting of S. 2176.

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head of the agency can perform the functions and duties of the office. It is imperative that the bill unequivocally ensure that the affected functions and duties of the office are only those that are expressly deemed nondelegable by statute or regulation. Absent that clarity, whole components of federal agencies would have to stop their work. The potential bottleneck created by this provision would prevent the Executive Branch from doing its job. The Senate has tried before to enforce its policy preferences by shutting down the federal government. It was a bad idea then, and its still is now.

As we noted, the Senate bears partial responsibility for the time it takes to nominate officials from Senate confirmed positions. To further amplify, this Congress has subjected the Administrations nominees to unprecedented scrutiny, using almost any prior alleged indiscretion no matter how trivial by a nominee as an excuse to delay or prevent a vote. Senators have also interjected themselves into the Presidents nominations process to an unparalleled degree. As a result, that process the selection, recruitment, and vetting of candidates takes longer than ever before. While the Administration may well bear some responsibility for the slow pace of nominations, we find it troublesome that the Senate would so severely restrict the ability to fill vacant positions temporarily and to conduct the peoples business while at the same time impeding the nominations process and confirming nominees at a snails pace.

This President has made every effort to accommodate Senators views about particular positions and nominees. Moreover, this President has used his power to make recess appointments far less than his predecessors. President Reagan made 239 recess appointments in eight years; President Bush made 78 recess appointments in four years. President Clinton has made only 45 recess appointments in his first five years in office. If this bill passes, we anticipate that the President will have no alternative but to make more recess appointments. That will hardly vindicate the Senates advise and consent function.

We are anxious to craft a bill that fully protects the Senates advise and consent function, while affording the Executive Branch the flexibility it needs to faithfully discharge the laws. In its current form, this bill does not do that. Without changes to address the problems identified above, we cannot support it.

Richard Durbin.

Daniel K. Akaka.

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The Constitutional Need for Legislation

The selection of officers is not a presidential power. The President may choose whom he wishes to nominate, but the Senate has the power to advise and consent before those nominees may assume office. The Appointments Clause "is more than a matter of tiquette or protocol; it is among the significant structural safeguards of the constitutional scheme." Edmond . United States,117 S. Ct. 1573, 1579 (1997). The Appointments Clause was adopted against a historical background: "The anipulation of official appointments had long been one of the American revolutionary generations greatest grievances against executive power because he power of appointment to offices " was deemed "the most insidious and powerful weapon of eighteenth century despotism." Freytagv. Commissioner of Internal Revenue,501 U.S. 868, 883 (1991) (citations omitted).

Nonetheless, vacancies occur in such positions, and since the President lacks any inherent appointment authority for government officers, legislation authorizing some non-Senate confirmed persons to perform the functions and duties of vacant offices is necessary if the governments operations are to be performed. The presidents duty is to submit nominees for offices to the Senate, not to fill those offices himself. The Presidents power to take care that the laws shall be enforced is a duty, and not a source of power, since the President takes care that the laws be executed, and has no right to enforce the laws himself where Congress vests such responsibility in an inferior officer. See, e.g., Kendall ex rel. Stokes . United States,12 Pet. (37 U.S.) 522, 612-613 (1838); Georgev. shimaru,849 F. Supp. 68 (D.D.C. 1994). In the absence of affirmative statutory authority to fill a vacancy, the office must remain vacant. The Vacancies Act limits presidential authority to make acting appointments, while preserving the Senates power to advise and consent. Therefore, its scope must be government-wide unless Congress chooses clearly and specifically to exempt specifically identified officers from its reach when countervailing considerations apply.

Because the Justice Department maintains that it is exempt for the Vacancies Act, it has permitted positions to be held by acting officers for years without the submission to the Senate of a nominee. Its contentions are broadly applicable to virtually all other departments given the broad language of vesting and delegation contained in those departments organic statutes. By early in 1998, 64 of 320 advise and consent positions in the executive branch were held by acting officials, 43 of whom had served more than 120 days without a nominee. Acting officials served in each of the 14 Cabinet departments. If the Constitutions separation of powers is to be maintained, and officers of the government subjected to the scrutiny of the Senate for the benefit of the liberty of the people, legislation to address the deficiencies in the operation of the current Vacancies Act is necessary. The 1988 legislation unfortunately has not succeeded in encouraging presidents to submit nominees in a timely fashion, and it has not resulted in the Justice Departments agreement that is covered by the Act. Indeed, given the number of acting officials and the growing number of departments that claim not to be covered by the Vacancies Act, the Senates confirmation power is being undermined as never before.

The "Doolin" Decision

Most recently, the need for new legislation was underscored by the decision of the United States Court of Appeals for the District of Columbia Circuit in Doolin Security Savings Bank, F.S.B. . Office of Thrift Supervision,139 F.3d 203 (D.C. Cir. 1998). In that case, the validity of an Office of Thrift Supervision administrative enforcement action was challenged by a bank subject to the order on the ground that the absence of a lawfully appointed director of the agency rendered the enforcement action void. The Senate-confirmed director of OTS resigned in December, 1992, and purported to delegate all his authority to OTSs Deputy Director for Washington Operations. That individual, who was neither the first assistant nor a Senate-confirmed individual, served as the acting director until October, 1996. Two days later, the President invoked the Vacancies Act to designate a Senate-confirmed official from

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the Department of Housing and Urban Development to serve as acting director. Within 120 days of the second acting directors appointment, the President submitted a permanent nominee to the Senate. The new acting director issued the final order against the bank in March, 1997.

The bank maintained that the 120-day limitation on acting service contained in the Vacancies Act lapsed long before the second acting director was ever named. The court agreed that the Vacancies Act may be used only when there is a vacancy caused by the departure of an officer appointed in compliance with Article II, and that the departure of an appointed acting official does not trigger the Vacancies Act. The court found that merely because a person temporarily performs the functions of an office does not make that individual an "officer" for purposes of the Vacancies Act. "Otherwise, 3348s time limitation could be easily avoided by a series of temporary resignations, with each resignation triggering a new 120-day period." 139 F.3d at 208. Thus, the departure of the Senate-confirmed Director triggered the presidents authority under 3347 to designate an acting official, not the departure of the acting official. The Committee accepts this reaffirmation of the longstanding operation of the Vacancies Act.

Notwithstanding its recognition that the Presidents designation of the second acting official took place approximately four years after the vacancy in the position arose, however, the court upheld the second acting directors 1997 final order. The court agreed with the Justice Department that the 120-day time limit contained in 3348 does not begin to run until someone actually takes office pursuant to the Vacancies Act, either by detail or by presidential directive. Under that interpretation of the statute, the second acting director served lawfully at the time the order was issued against the bank. The court rejected the banks position that the 120-day period begins immediately upon the death or resignation of a constitutionally appointed officer.

According to the court, "Nothing in the Act expressly deals with the amount of time that may transpire before the President exercises his 3347 authority to designate a temporary replacement." 139 F.3d at 209. In its view, the Vacancies Act governs how long a position may be temporarily filled, but does not specify when the President must undertake the filling of the position. "The time limit is placed not on Presidential action, but on the tenure of the Presidents designee." Id The 120-day period will commence with the vacancy when the first assistant assumes the office or the President under 3347 immediately designates an acting official. But if there is no first assistant and the President does not immediately act, the vacancy has not been "filled" and the 120-day period does not run. Id.

The Committee believes that this portion of the courts opinion necessitates legislative action. Whether or not the court properly interpreted the existing law, the Committee believes that the 120-day time limit must run from the date of the vacancy caused by the death or resignation of the Senate-confirmed official, and not from the date that the President designates an acting official. A limit must be placed on the Presidents time to act to fill a position. If the purpose of the Vacancies Act is to limit the Presidents power to designate temporary officers, a position requiring Senate confirmation may not be held by a temporary appointment for as long as the President unilaterally decides. Such a scheme obliterates the constitutional requirement that the officer serve only after the Senate confirms the nominee. If there is no first assistant, the President must designate another Senate-confirmed official. By contrast, the Doolin ourt would allow the President to accept a resignation on the second day of his term, allow an acting person to assume the functions and duties of the office (in this case, an acting officer not appointed by the President), and then, so long as there is no first assistant, by unilaterally not invoking the Vacancies Act, allow that position to be filled by an "acting" official who has never received Senate confirmation for so long as the president holds office. The Committee finds this state of affairs to be unacceptable and constitutionally suspect. Nor does it believe that the vacancy has not been "filled" when an acting person has been performing the functions and duties of the office for four years.

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Notwithstanding the 1988 Vacancies Act amendments that provide for a tolling of the 120-day period when the President submits a nomination to the Senate to fill the vacant position, the court stated, "The Vacancies Act was never meant to give the President an "incentive" to fill vacant positions with appointees confirmed by the Senate. The function of the Act is to allow some breathing room in the constitutional system for appointing officers to vacant positions, to validate the actions of those temporarily occupying the positions." Id.at 211. The Committee believes that the reason why in 1988, for the first time, the period of acting service was extended beyond 120 days if the President submitted a nominee is that, in light of the frequent noncompliance with the Vacancies Act by presidents who allowed acting officials to serve more than 120 days, Congress wanted to encourage the President to submit a nominee within the Vacancies Act period. If an acting person served beyond 120 days, the Senate at that point would bear the responsibility for the fact that a Senate-confirmed person for that office was not in place.

The court recognized that under its interpretation of the statute, if no one is detailed or directed to fill the position, or the 120 days expires without a nomination, the position will be vacant or occupied by someone not constitutionally entitled to perform the duties of the office. But in its view, that situation will create an incentive for the President to submit a nomination, for fear that the actions of part of his administration will be declared void. The Committee believes that this part of the courts opinion also shows the need for Congressional corrective action. Under the Justice Departments interpretation of the many vesting and delegation provisions in the organic statutes of various departments, few positions would remain vacant. This fact, combined with the lack of an effective enforcement process, would give the President no reason to comply with the Vacancies Act. The court seems not to understand the fundamental purpose of the Vacancies Act, which is not to ensure the legality of the actions of acting officials, but rather to limit the power of the President to name acting officials, as well as the length of service of those officials.

If the Constitution or Congress requires that an office be held only by a person appointed by the President by and with the advice and consent of the Senate, then unless legislation provides to the contrary, only a person the President has nominated for that position and who has received Senate confirmation may fill the position. The President has the duty to take care that the law be faithfully executed, and that duty includes adherence to Article II. He does not have the power to execute the law himself when Congress has given statutory duties to lower-level officials in the executive branch. Nor can he name temporary officers of his unfettered choice. That is why the Vacancies Act or other statutes providing for the temporary filling of a specific position are the exclusive authority setting forth the procedures by which acting officials can serve, with the exception only of the Presidents power to make appointments during the recess of the Senate. The courts opinion overlooks this central concept. The Vacancies Act does recognize that when vacancies arise in those positions, it may be necessary, due to time constraints on the nomination and confirmation processes, for someone who has not received Senate confirmation for that particular post to serve temporarily to keep the government functioning. But the Vacancies Act requires that those acting officers be either (1) first assistants or (2) persons who have already received Senate confirmation for some other post and are selected by the President to be the acting officer.

The court did not reach the question whether the OTS Directors designation of the first acting director satisfied the Vacancies Act. For the court, any error was harmless in light of the legality of the second acting directors appointment under the Vacancies Act, and the ratification by the second acting officer of any actions taken by the first acting director. The Committee also finds that this portion of the courts position demands legislative response. First, it is constitutionally unacceptable for any acting official to serve for four years, especially an officer "appointed" not by the President, nor by a department head, but a mere agency head. The Appointments Clause limits appointing powers to hold individuals accountable for their selections. Second, if any subsequent acting official or anyone else can

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ratify the actions of a person who served beyond the length of time provided by the Vacancies Act, then no consequence will derive from an illegal acting designation. This result also undermines the constitutional requirement of advice and consent.

In short, in light of various administrations noncompliance with the Vacancies Act and a recent court decision undermining its operation, it is imperative that Congress enact legislation to restore constitutionally mandated procedures that must be satisfied before acting officials may serve in positions that require Senate confirmation. The issue is not simply the prerogative of the Senate. Like other structural constitutional provisions, the Appointments Clause was designed to protect the liberty of the people. Although the President has the sole power to nominate, as a single officer may feel a greater sense of duty in selecting an individual for consideration to a particular post, the "the necessity of (the Senates) concurrence would have a powerful, though in general a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. And, in addition to this, it would be an efficacious source of stability in the administration." Federalist LXXVI (Hamilton). Legislation is needed to restore these goals of the Founders.

IV. Legislative History of S.2176

The Federal Vacancies Reform Act of 1998 was introduced as S. 2176 in the Senate on June 16, 1998 by Senators Fred Thompson, Robert C. Byrd, Strom Thurmond, Trent Lott, and William Roth. Introduction of S. 2176 followed the March 16, 1998 introductions of S. 1761, the Federal Vacancies Compliance Act, by Senator Byrd and S. 1764, the Vacancies Clarification Act, by Senators Thurmond and Lott. The latter two bills sought to enforce the Vacancies Act through withholding the pay of any acting officer who exceeded the time period provided by the Vacancies Act, and S. 1764 specifically provided that the time period for acting service ran from the date of the vacancy. In addition, both bills made the Vacancies Act supersede other laws governing the temporary service of non-confirmed officials, ending the argument that statutes vesting in department heads the general authority to delegate powers to other officials provided an alternative method of empowering acting officials apart from the Vacancies Act. Both bills also created a reporting mechanism to the President, the General Accounting Office, and the Congress on the length of time that each acting official had served.

A hearing was held at the Governmental Affairs Committee on oversight of compliance with the Vacancies Act on March 18, 1998. Senator Thompson chaired the hearing, which addressed the general issues of noncompliance with the law, as well as the legislative proposals that had by then been introduced. The following witnesses provided testimony: Senator Robert C. Byrd, State of West Virginia; Joseph N. Onek, Principal Deputy Associate Attorney General, Department of Justice, accompanied by Daniel Koffsky, Special Counsel, Office of Legal Counsel, Department of Justice; Joan M. Hollenback, Associate General Counsel, General Accounting Office; Senator Strom Thurmond, State of South Carolina; Michael J. Gerhardt, Professor of Law, Case Western Reserve University; Morton Rosenberg, Specialist in American Public Law, Congressional Research Service; and Paul C. Light, Director, Public Policy Program, The Pew Charitable Trusts.

All of the witnesses but Messrs. Onek and Koffsky supported legislation that would overturn the Justice Departments arguments of exemption from the Vacancies Act and that would create an enforcement mechanism. Senator Byrd also pointed out the Senates responsibility to demand strict compliance with the Vacancies Act from the Administration. He expressed his hope that the Senate would make the Vacancies Act "so tight, so air-tight, that no department can find a crack or crevice anywhere through which to creep." He expressed his view that the Committee could draft legislation to address the problem other than S. 1761. Ms. Hollenbeck provided reasons why the Justice Departments interpretation of the Vacancies

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Act is contrary to the language and legislative history of both the Vacancies Act and the Justice Departments organic statute, and pointed out that Congress passage of statutes governing temporary officers in particular governmental positions shows that Congress knew how to create specific exceptions to the application of the Vacancies Act. She offered GAOs recommendation that legislation be passed to explicitly provide that the Vacancies Act can be superseded only by a statute providing an alternative means for filling a particular vacancy. GAO also recommended reporting provisions and the withholding of pay of acting officials who served in violation of the Vacancies Act. Mr. Koffsky noted that there are no statutory duties that are to be performed by assistant attorneys general.

Senator Thurmond testified to the need to rewrite, not simply amend, the Vacancies Act. He demonstrated that the 1988 amendments had not solved the problem of excessive service by acting officials. He also stressed the need to prevent the Justice Department from arguing that it is exempt from the Vacancies Act, which he would accomplish by requiring statutes exempting particular positions from the Vacancies Act to specifically cite the Vacancies Act. Prof. Gerhardt testified to the need to change some of the terms of art used in the Vacancies Act, and suggested lengthening the 120-day time period. Mr. Rosenberg testified to the errors in the Justice Departments exemption argument in light of the language of the Vacancies Act, the Departments organic statute, and its legislative history. He also spoke of the problem of transferring assistant secretaries from one position to another without their undergoing Senate reconfirmation. He recommended adding an enforcement mechanism to freeze the duties of the office as they existed on the date of the vacancy after the 120-day period has expired. Mr. Light testified that one of the problems with noncompliance with the Vacancies Act is the unnecessary proliferation of political appointees in the government at a time when total federal employment was declining.

Following the hearing, Senator Thompson considered whether to introduce his own legislative proposal. After careful consideration, he determined to address only the Vacancies Act issues involved in the Senates advise and consent powers. The Committee believes that authorizing committees may wish to consider whether statutory duties should be given to assistant secretaries and assistant attorneys general in those departments in which the only current statutory duty of such officials is to assist the secretary or the attorney general. Staff from both parties tried to resolve as many issues as possible. Staff also attempted to respond to the suggestions of the Justice Department and the White House. S. 2176 reflects these discussions. The Committee was told informally that the Justice Department recognizes that the legislation offered effectively prevents it from arguing that departments with vesting and delegation statutes are exempt from the Vacancies Act.

V. Committee Action

On June 17, 1998, the Committee held a business meeting at which S. 2176, the Federal Vacancies Reform Act of 1998, was considered. Senator Lieberman offered an amendment to retain existing statutes that by their own terms provide a process for the filling of specific advice and consent positions, as well as the statues referenced in S. 2176 as introduced, which preserved existing statutes that allow the heads of departments to designate an acting official. That amendment was agreed to by voice vote.

Senator Glenn offered two amendments. The first amendment would have reduced the length of time that a first assistant need serve to be both the acting officer and eligible to be nominated permanently to the position from 180 of the 365 days preceding the vacancy to 30 days prior to the vacancy. The amendment failed on a roll call vote of 6 Yeas (Glenn, Levin, Lieberman, Akaka by proxy, Durbin, and Cleland) and 8 Nays (Roth by proxy, Stevens, Collins, Brownback by proxy, Domenici, Cochran, Nickles by proxy, and Thompson).

Senator Glenns second amendment would permit the acting officer to serve even after the 150-day period following the rejection, withdrawal, or return of the first nomination, once a

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second nomination was made. The amendment was agreed to by voice vote.

Senator Levin offered an amendment to begin the time limit on the service of acting officers in vacant positions arising on or in the 60 days after a transitional inauguration day 120 days after the transitional inauguration or the arising of the vacancy, whichever is later. After Senator Levin agreed to shorten the additional period to 90 days, the amendment was agreed to by voice vote.

With no other amendments being offered, Chairman Thompson moved adoption of S. 2176 as amended. The bill was ordered favorably reported by a vote of 9 Yeas (Stevens, Collins, Domenici, Cochran, Glenn, Levin, Lieberman, Cleland, Thompson) and 1 Nay (Durbin). Senators Roth, Brownback, and Nickles voted Aye by proxy.

VI. Section-by-Section Analysis

Section 1 states the short title of the legislation the "Federal Vacancies Reform Act of 1998."

Section 2 strikes sections 3345 through 3349 of Title 5 and replaces the existing law with a reformed version of the Vacancies Act. The Committee believes that amending existing legislation, given the ineffectiveness of the 1988 amendments, may again fail to ensure the exclusivity of the applicability of the Vacancies Act. To ensure an effective enforcement mechanism and to overturn the recent decision of the United States Court of Appeals for the District of Columbia Circuit in Doolin Security Savings Bank . Office of Thrift Supervision, 39 F.3d 203 (D.C. Cir. 1998), the Committee believes that replacement of the existing Vacancies Act is necessary.

Under current law, section 3345 covers heads of executive agencies, and section 3346 affects "an officer of a bureau of an Executive department or military department, whose appointment is not vested in the head of the department * * *" Section 2 creates a new section 3345, applicable to all officers of executive agencies whose appointment to office is required to be made by the President by and with the advice and consent of the Senate. References to the term of art "bureau" have been eliminated. The purpose of this change is to clearly make the Vacancies Act applicable to all officers of executive agencies whose appointments require Senate confirmation. The Vacancies Act would now apply to such officers in all departments, regardless of the department or agencys organic statute.

"Executive agency" is defined at 5 U.S.C. 105. Because the Department of Defense is a department within the meaning of 5 U.S.C. 101, the military departments, which are located in the Department of Defense, are also covered by this Act, notwithstanding the omission of the term "military department" from current sections 3345 and 3346.

The section applies when an officer in an executive agency whose appointment is made by the President by and with the advice and consent of the Senate dies, resigns, or is otherwise unable to perform the functions and duties of the office. The law applies when any of those factual situations arises, regardless of how the situation is characterized. For instance, the Vacancies Act would apply in situations such as Doolin, hen the first acting director of the Office of Thrift Supervision was purportedly designated by virtue of the departing confirmed directors invocation of a statute providing for his duties to be temporarily delegated in the directors "absence." Under this legislation, when an acting officer is to be designated, as opposed to automatically gaining acting status as a first assistant, only the President may designate an acting officer in a position that requires Senate confirmation.

When a vacancy arises, the bill provides an exclusive set of procedures that may be followed. If the vacant officer has a first assistant, the first assistant performs the functions and duties of the office temporarily in an acting capacity, subject to the time limitations of section 3346. The Committee does not establish a definition of "first assistant." That term has a long

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TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART II. DEPARTMENT OF JUSTICE
CHAPTER 31. THE ATTORNEY GENERAL

28 USCS § 508 (2000)

§ 508. Vacancies

(a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 [5 USCS § 3345] the Deputy Attorney General is the first assistant to the Attorney General.

(b) When by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Associate Attorney General shall act as Attorney General. The Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General.

HISTORY:
(Sept. 6, 1966, P.L. 89-554, § 4(c), 80 Stat. 612; Oct. 19, 1977, P.L. 95-139, § 2, 91 Stat. 1171.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	[Uncodified].	R.S. Sec..347 (last sentence). 1953 Reorg. Plan No. 4, Sec. 1, eff. June 20, 1953, 67 Stat. 636.

The last sentence of R.S. § 347 is cited as authority inasmuch as the function contained therein was the function transferred to the Deputy Attorney General by 1953 Reorg. Plan No. 4. The word "may" is substituted for "have the power". The words "During any period of time" are omitted as unnecessary.

Explanatory notes:
A prior § 508 (Acts June 25, 1948, ch 646, § 1, 62 Stat. 910; Mar. 2, 1955, ch 9, § 2(a),

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69 Stat. 10; Oct. 11, 1962, P.L. 87-793, § 1003(a), 76 Stat. 865; Aug. 14, 1964, P.L. 88-426, Title III, § 306(a)(1), 78 Stat. 428; Oct. 6, 1964, P.L. 88-631, § 3(b), 78 Stat. 1008) was repealed by Act Sept. 6, 1966, P.L. 89-554, § 8, 80 Stat. 663. It provided for salaries of United States attorneys, assistant United States attorneys, and special attorneys. Similar provisions are contained in 28 USCS § 548.

Amendments:

1977. Act Oct. 19, 1977 substituted subsec. (b) for one which read: "When, by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Assistant Attorneys General and the Solicitor General, in such order of succession as the Attorney General may from time to time prescribe, shall act as Attorney General.".

NOTES:

CODE OF FEDERAL REGULATIONS

Department of Justice, statements of policy, 28 CFR Part 50.

RESEARCH GUIDE

Am Jur:

7 Am Jur 2d, Attorney General § 44.

Annotations:

Who may apply or authorize application for order to intercept wire or oral communications under Title III of Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS §§ 2510 et seq.). 64 ALR Fed 115.

INTERPRETIVE NOTES AND DECISIONS

Solicitor General acting as Attorney General under **28 USCS § 508**(b) has all powers of office of Attorney General; hence, application for electronic surveillance authorized by Assistant Attorney General who had been designated by Solicitor General was in compliance with statute providing that Attorney General or his designate may authorize application for electronic surveillance. United States v Pellicci (1974, CA1 Mass) 504 F2d 1106, cert den 419 US 1122, 42 L Ed 2d 821, 95 S Ct 805 and (disagreed with United States v Acon (CA3 Pa) 513 F2d 513).

In criminal proceedings against defendant for importation of marijuana and methaqualone, Drug Enforcement Administration's classification of methaqualone is authorized under **28 USCS § 508** which authorizes designated sucessor to attorney general in absence of attorney general in office to transfer to Drug Enforcement Administration authority to classify controlled substances pursuant to Executive Order No. 11727. United States v Lueck (1982, CA11 Fla) 678 F2d 895, reh den (CA11 Fla) 695 F2d 566 and (disagreed with by multiple cases as stated in United States v Williams (App DC) 822 F2d 1174).

While office of Attorney General was vacant, Deputy Attorney General, in position of Acting Attorney General, had power, under **28 USCS § 508,** to authorize electronic eavesdropping. United States v Curreri (1973, DC Md) 363 F Supp 430.

Assuming that authority of Deputy Attorney General to exercise duties of Attorney General ceased 30 days after he assumed position of Acting Attorney General pursuant to Vacancies Act, 5 USCS § 3348, then after 30 days, office became vacant, and provisions of **28 USCS § 508**(a), which authorizes Deputy Attorney General to exercise all duties of Attorney General when there is vacancy in that office, came into play; therefore wiretap authorizations given by Deputy Attorney General after expiration of 30-day period were valid. United States v Lucido (1974, ED Mich) 373 F Supp 1142, affd (CA6 Mich) 517 F2d 1.

Solicitor General, who became acting attorney general under provisions of **28 USCS § 508** had authority to designate assistant attorneys general to authorize applications for interception of wire and oral communications; since Solicitor General did not assume office as "first assistant" under provisions of 5 USCS § 3345 and **28 USCS § 508**(a), but rather as

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Solicitor General, he became acting attorney general pursuant to **28 USCS § 508**(b) which places no time limitation on his tenure; but even assuming that Solicitor General's authority to act as attorney general ended after 30 days, and recognizing that it did terminate when new attorney general took office, authority granted by Solicitor General as acting attorney general to assistant attorneys general to authorize applications for interception of wire and oral communications remained valid until revoked by new attorney general. United States v Halmo (1974, ED Wis) 386 F Supp 593.

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Vesting of Iraq Assets

OA/NARA#: 2165/2076
9695

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Folder 3

REV_00264339

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

OFFICE OF THE LEGAL ADVISER

FAX TRANSMITTAL COVER SHEET

DATE: 3-17-03	
TO: Brett Kavanaugh	FROM: John Bellinger
PHONE NO.:	PHONE NO.: (202) 456-9111
FAX NO.: 6-5104	FAX NO.: (202) 456-9110
COMMENTS:	
NUMBER OF PAGES (including cover page): 14	

- Some of the concern with respect to payment from the blocked assets may relate to a feeling that certain judgments under § 1605(a)(7) actions against terrorist states in the past may have been windfalls. Quite apart from the important point that seriously deterring these states from attacks against Americans requires substantial judgments, unlike some of the earlier cases with few plaintiffs, this case has 54 plaintiffs. Thus, any aggregate judicial award will be divided among 54 injured parties. Further, after federal and state taxes of approximately 46%, and expenses of the case, the average per plaintiff recovery would be substantially reduced. In addition, this amount to the POWs and their families themselves could be further reduced by the POWs' commitment to the Court to set aside a substantial amount of any punitive damages to create a new foundation for the protection of American and Allied POWs-MIAs. Such a foundation, for example, could provide a vehicle to assist the family of the one American Gulf War prisoner not yet accounted for. Moreover, would anyone voluntarily subject themselves to the suffering and permanent injury of these POWs and their families for any amount? Would any small figure remotely compensate for the serious injury suffered by these brave Americans? Would any small figure seriously deter, or simply be regarded by rogue states as a reasonable price for torturing American service personnel? In light of these factors, damages sought in this case are certainly not excessive in regard to usual and normal tort judgments in the American court system. Most importantly, it is the function of the judiciary to determine damages in specific settings before the Court. That will be done in this case by a federal district judge, after full consideration of the evidence, rather than a jury which might be emotionally swayed by the shocking nature of the torture.

- It might be noted also that the Congress of the United States and the state legislatures would actually have more involvement, or budget, if the POW judgment is honored than if all the funds are immediately returned to Iraq, because approximately 46% of any recovery would go to state and federal taxes. However, the Congress will not participate in any determination as to expenditures concerning blocked assets simply returned to Iraq and the states will receive no part in taxes.

- Given that past § 1605(a)(7) actions have resulted, through both Congressional and Presidential actions, in substantial recoveries, there is an additional fairness problem if the American POWs are singled out to be excluded from payment of their judgment through return of all the blocked assets to Iraq. This fairness issue for later judgments was noted by United States District Judge Henry H. Kennedy, Jr. in an extraordinary letter to Congress concerning an earlier § 1605(a)(7) action. In his letter, Judge Kennedy described the failure to provide for the case before him as a "grievous injustice."

- The overall cost of the reconstruction of Iraq following a second Gulf War is uncertain. A conservative figure is $35 billion and the cost could go as high as $100 billion. (The recent Council on Foreign Relations Working Group Study "Guiding Principles for U.S. Post-Conflict Policy in Iraq" uses a range of $25 to $100 billion for the cost of post-conflict reconstruction of Iraq. *Id.* at 12.) Whatever the cost, clearly the $1.73 billion in Iraqi blocked assets will be insufficient for the reconstruction of Iraq. And an escrow to pay any final judgment in this case would amount to but a small fraction of any conservative overall reconstruction cost. As our nation weighs the United States' goals

and interests in this setting, is our national interest in the deterrence against torture of American POWs, closure for these heroic Americans, and adherence to our own rule of law not worth at least a few percent of our national interest in a post-conflict reconstruction of Iraq?

- Even if the Executive were to return all of the blocked assets to Iraq without setting aside an escrow to pay a final judgment for the POWs, absent new legislation, the judgment would remain an obligation to be dealt with by any new government of Iraq and a failure to meet that obligation could mean substantial continuing legal difficulties for the new government. So any real effect of a decision to ignore the legal rights of the American POWs would be to make it more difficult, if not impossible, for the tortured American POWs to recover, without resolving Iraq's legal exposure.

- Some administrations have seemed to believe that *American* claims are unimportant in the conduct of foreign policy. To the contrary, one of the historical obligations of the President of the United States is to espouse the claims of *Americans*. An approach supporting this view of the importance of the Executive protecting American claims was taken by then-Principal Deputy Legal Adviser to the U.S. Department of State in testifying before Congress in 1993 when he stated "[I]f we ever get to a situation where we're in a position to negotiate with Iraq about anything . . . it would be logical for us to demand additional amounts for U.S. Claims." Hearing Before the Subcomm. on Europe and the Middle East of the House Comm. on Foreign Affairs, 103d Cong. 1-3, 14-15 (1993). We are confident that the Bush Administration will not be among those that would ignore the rights of the citizens of this great country.

As co-counsel for the POWs and their family members in this historic case, we would be willing at any time to meet with those who may be considering these issues.

John Norton Moore & Stephen A. Fennell
Co-counsel for the American POWs in
Acree v. Republic of Iraq
March 14, 2003

The Honorable George W. Bush
President of the United States
The White House
Washington, D.C.

Dear Mr. President:

We write to you as former public servants who have served their Nation in the national security process of this great country. We believe you have a unique opportunity for America to send a powerful message that the torture of American POWs will not be tolerated.

American POWs have been brutally tortured in war after war. While our government has tried to deal with this horror, there have been few options realistically available to us to add deterrence against it. Indeed, some of us have wrestled with precisely this challenge while in office. Now, however, thanks to the courageous action of 17 American former Gulf War POWs brutally tortured by Iraq, and 37 of their family members, we have a unique opportunity to establish an historic precedent that Nations which torture American POWs will be held accountable. Last year these brave Americans brought suit against Iraq in United States District Court and, following a non-appearance by Iraq, an entry of default was entered on September 25, 2002. Their case will go to the equivalent of a bench trial before a federal district judge on March 31 of this year. Under current law, these American POWs and their family members will be able to enforce any final judgment obtained against the substantial Iraqi blocked assets in the United States.

This would truly be one of the first serious efforts to add deterrence against the torture of American POWs. We believe that this is an historic opportunity that should not be lost. It is time now to establish the principle that we will not return blocked assets of a former enemy state absent full accountability for that state's liability in the torture of American POWs. In this case, that means that no blocked assets of Iraq should be returned to that country until provision has been made for the full payment of any court judgment.

In the event that Iraq refuses to disarm, and war and the inevitable American victory comes, some will urge you to seek legislation to return all blocked assets for the future reconstruction of Iraq, thus overturning current law permitting the POWs to enforce any judgment against the blocked Iraqi assets. We understand the importance in such circumstances of American assistance in bringing about a stable new government in Iraq rooted in the rule of law. That objective should not come, however, at the cost of failing to hold Iraq responsible for its torture of American POWs. The responsibility for torture of American POWs must be regarded by the United States, as it is set out in Article 131 of the POW Convention, as a non-absolvable responsibility of the Contracting State itself. Moreover, it would be simply unthinkable to ask the American POWs tortured by Iraq to bear the cost of the reconstruction of Iraq.

Never before has an American President had such an opportunity to strike a blow against the torture of our POWs. This is truly a unique opportunity to send a signal to all future tyrants that America values the rule of law and that we will hold nations that torture American POWs accountable.

Dick Cheney, as then-Secretary of Defense, and Mrs. Cheney, and Colin Powell, as then-Chairman of the Joint Chiefs of Staff, as well as Mrs. Powell, personally welcomed these American heroes back from their brutal captivity in Iraq. A decade later, let us embrace these brave Americans in their historic effort to say "never again" to such brutal treatment of our service personnel.

Thank you for your consideration.

Sincerely,

DISTINGUISHED AMERICANS APPENDING THEIR NAMES TO THIS LETTER

Governor Bill Richardson
former United States Ambassador to the United Nations

Ambassador Max M. Kampelman
Chairman Emeritus of the American Academy of Diplomacy,
Georgetown University Institute for the Study of Diplomacy &
Freedom House

The Honorable Anthony Lake
former Assistant to the President for National Security Affairs

The Honorable John Lehman
member of the 9/11 Commission &
former Secretary of the Navy

Ambassador Ronald F. Lehman
former Assistant Secretary of Defense for International Security Policy &
Director of the United States Arms Control
and Disarmament Agency

Admiral Thomas H. Moorer, U.S.N. (Ret.)
former Chairman of the Joint Chiefs of Staff

Admiral Paul A. Yost, Jr. U.S.C.G. (Ret.)
Commandant of the United States Coast Guard (1986-1990)

Davis R. Robinson
former Legal Adviser to the U.S. Department of State

Abraham D. Sofaer
former Legal Adviser to the U.S. Department of State

REV_00264364

Ambassador Richard Schifter
former Assistant Secretary of State
for Human Rights and Humanitarian Affairs

Ambassador Mark Palmer
former Deputy Assistant Secretary of State
and Ambassador to Hungary

Ambassador W. Nathaniel Howell
former U.S. Ambassador to the State of Kuwait

Ambassador David C. Jordan
Professor of Government and Foreign Affairs &
former U.S. Ambassador to Peru

Vice Admiral James H. Doyle, Jr. U.S.N. (Ret.)
former Deputy Chief of Naval Operations

Major General John K. Singlaub U.S.A. (Ret.)
former Chief of Staff, U.S. Forces, Korea

Lieutenant General CJ Le Van U.S.A. (Ret.)
former J3, Operations Branch, Joint Chiefs of Staff

Rear Admiral Horace B. Robertson, Jr. U.S.N. (Ret.)
Professor (Emeritus) Duke University School of Law &
former Judge Advocate General of the Navy

Malvina Halberstam
Professor of Law &
former Counselor on International Law
to the Department of State

Jerome J. Shestack
Past President of the American Bar Association

Michael P. Malloy, Ph.D.
former Special Assistant for Foreign Assets Control
United States Department of the Treasury

cc: The Honorable Dick Cheney, Vice President of the United States
The Honorable Colin Powell, Secretary of State

REV_00264365

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DELIVER TO:

NAME: **John Bellinger, III, Senior Associate Counsel to the President and Legal Adviser**

TELECOPY PHONE NUMBER: **202-456-9110**

COMPANY:

VERIFICATION NUMBER: **202-456-9111**

TOTAL PAGES & COVER SHEET: **13**

DATE TRANSMITTED:

S&J OPERATOR'S NAME:

TELEPHONE NUMBER: **202-429-3000**

CLIENT/CASE NUMBER:

FROM:

NAME: **Stephen A. Fennell and John Norton Moore**

REQUEST MADE ON DATE: **3/17/03** TIME: **12:18 PM**

COMPLETION REQUIRED BY DATE: **3/17/03** TIME: **ASAP**

SPECIAL INSTRUCTIONS:

John:

For your information.

-John Norton Moore

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March 14, 2003

Via FACSIMILE

The Honorable George W. Bush
President of the United States
The White House
Washington, D.C.

Re: **Protecting American POWs**

Dear Mr. President:

We write to you about a matter of considerable importance to the national security of the United States and the rule of law. For too many years, in war after war, American prisoners of war (POWs) have been brutally tortured. In the past, there have been few opportunities to add serious deterrence against this practice, which is a "grave breach" of the Third Geneva Convention. As a result of the 1996 Anti-Terrorism Amendments to the Foreign Sovereign Immunities Act and the Terrorism Risk Insurance Act that you recently signed into law, however, you now have an important opportunity to add deterrence against this brutal pattern of torture of American service personnel.

The 1996 Anti-Terrorism Amendments for the first time permitted suit against terrorist nations who torture American POWs. Pursuant to that law, last year 17 courageous American Gulf War POWs who were brutally tortured by Saddam Hussein, and 37 of their family members, brought suit in the United States District Court for the District of Columbia against Saddam Hussein and the Republic of Iraq. Following repeated offers of arbitration, service of process, and the non-appearance of defendants, on September 25, 2002, the defendants were declared in default. This historic case is now on the "fast-track" in the District Court, and evidence concerning the brutal torture of these national heroes will be presented to the court on March 31, 2003. Importantly, section 201 of the Terrorism Risk Insurance Act now permits these brave POWs and their family members to enforce any judgment they get directly against the blocked Iraqi assets being held in the United States.

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As you might imagine, no group more strongly supports the removal of Saddam Hussein from office or is more thankful for the leadership that you have been providing toward that goal. The concern we have as counsel to these POWs and their family members, however, is that some in our government may, in the aftermath of any action necessary to accomplish that goal, seek to change current law and return all of the blocked assets to Iraq despite the outstanding claims of our own American POWs. If this is done before we are able to obtain and enforce a judgment, these POWs could be left without any effective remedy.

We understand that it may sometimes be appropriate for the United States to return blocked assets of former terrorist states when we are able to obtain a change of government in those states and such return does not compromise claims before our courts or take the property of our citizens. We respectfully submit, however, that effective deterrence against the brutal torture of American POWs is a singular national security interest of the United States. And we are certain that you, as Commander-in-Chief, would regard adding such deterrence as one of your highest duties toward our brave servicemen and women. We also believe that this issue is of importance both in relation to the rule of law internationally, and in faithfully executing the current national law that enables these injured POWs to effectively hold Iraq accountable for their brutal torture. Article 131 of the Third Geneva Convention for the protection of POWs, to which both the United States and Iraq are parties, declares that "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself . . . in respect of [torture of POWs]." To turn assets back to Iraq without meeting the judicially-determined claims of Americans with respect to this liability of Iraq would not only say that America is not serious about deterring torture of our POWs, but it would also be in violation of our national treaty obligations. The current national law is also clear. By statute, America no longer provides immunity in our courts to terrorist states which torture our POWs, and it permits satisfaction of judgments in such cases from the blocked assets of the terrorist states.

Accordingly, we respectfully request that, in the event any blocked assets are to be returned to a new government of Iraq before the POW plaintiffs have an opportunity to enforce a final judgment against them, you set aside an escrow from those blocked funds to pay the judgment in their case. We would also hope that any such escrow would not only cover the compensatory damages awarded in any such final judgment, but that you would also honor any award of punitive damages from the court. Such an action on your part would send a powerful signal to tyrants that America will no longer tolerate the torture of our POWs and that any such outrages in the future will be accompanied by serious responsibility.

As President, you have articulated clearly the consequences of the absence of the rule of law in Iraq. And as Commander-in-Chief you understand the great importance of standing up against the torture of American POWs, which was one of those consequences. We would greatly appreciate your action in this case in support of these brave Americans and the rule of law.

Although we cannot undo Iraq's lawless action against our POWs, we can provide closure for these brave Americans and assist in their effort to say "never again" to this brutal practice.

With this letter we are also submitting to you a memorandum more fully indicating why we believe it is strongly in the interest of the United States to honor the judicially-determined legal rights of our POWs in this historic case. We would be pleased to meet with you to provide any additional information.

On March 10, 1991, *Freedom One* landed at Andrews Air Force Base with the seventeen POWs who are now plaintiffs in this case against Saddam Hussein and Iraq. As these returning American heroes were personally greeted by then-Secretary Cheney and Mrs. Cheney, and General and Mrs. Powell, the lead plaintiff in this case, Colonel Cliff Acree, who was so brutally tortured that his skull had fractured, nearly driving bone fragments from his nose into his brain and who was knocked unconscious so many times during his torture that he lost track of the number, said to Secretary Cheney: "Sir, one thing I never worried about was that President Bush would bring us home." President Bush did bring them home, and you, as president, now have the opportunity to give these brave Americans the closure they deserve from this terrible ordeal while giving notice to the world that it is no longer open season on American POWs.

Thank you for your consideration.

Sincerely,

John Norton Moore
Oceans & International

Stephen A. Pennell
Steptoe & Johnson LLP

Co-counsel for plaintiffs in *Acree v. Republic of Iraq*

Enc: Memorandum: "Protecting American POWs"

cc: The Honorable Dick Cheney, Vice President of the United States
The Honorable Colin Powell, Secretary of State

MEMORANDUM

PROTECTING AMERICAN POWS

[Including a Response to Arguments for Taxpayer Priority]

A group of 54 courageous American Gulf War POWs and family members have brought an important suit against Saddam Hussein, the Iraqi Intelligence Service, and the Republic of Iraq for the brutal torture of the American POWs by Iraq during the Gulf War. The suit was brought under the 1996 Anti-Terrorism Amendments to the Foreign Sovereign Immunities Act, which permit suit against states on the State Department terrorism list for the torture of Americans. Following repeated offers of arbitration, proper service of process through diplomatic channels, and a non-appearance by Saddam Hussein and Iraq, an entry of default was entered against the defendants on September 25, 2002. This case will go to the equivalent of a bench trial before a United States District Judge in the District of Columbia on March 31 of this year. Under § 201 of the Terrorism Risk Insurance Act of 2002, signed into law by President Bush last November, a final judgment in this case can be enforced against the blocked assets of Iraq in the United States.

A major objective of this suit is to add deterrence against the consistent practice of the brutal torture of American POWs in war after war. The case will contribute to such deterrence through calling public attention to the practice, providing an historic record of the torture (as did the Nuremberg trials), and signaling to would-be torturers that they will face substantial damages if they torture American POWs. The importance of this case as a human rights action cannot be overstated. It is unique in offering deterrence against this brutal recurring practice directed against American servicemen and women. This case also offers closure for a truly heroic group of Americans who have served their country with extraordinary courage and who have been severely injured. If, however, after obtaining a final judgment from a United States District Court, the POWs and their family members are unable to collect against Iraq because the blocked assets have been returned to Iraq, then the signal sent would be that America does not attach a priority to preventing the torture of its POWs. The message would also be that our government had prioritized the well-being of others over American service personnel.

An argument made by some for the return of all the blocked assets to Iraq before satisfaction of judgment in this historic case is that, in the event of a new Iraqi government following a second Gulf War, the United States would want to assist in the reconstruction of that country. In that context, it is urged, the taxpayers should take priority over the POWs and the blocked assets should be used for the reconstruction of Iraq. It is true that, following an ouster of Saddam Hussein (which the tortured POWs have far greater reason to support than virtually any other group), the United States may have a moral obligation to assist in the reconstruction of Iraq. Indeed, it is particularly important in the aftermath of any conflict with Iraq that we work seriously and effectively to promote democracy and the rule of law in that country. There is, and should be, consensus on these important goals of any United States action in the Gulf. These laudable goals, however, should not, and need not, come at the expense of deterrence against future torture of American POWs, closure for these injured POWs, and America's commitment to the rule of law at home. All of these national goals can be served by the establishment of an

escrow fund to pay a final judgment in the historic POW case before any blocked assets are returned to Iraq. Some of the reasons why the arguments are wrong to ignore this historic suit and our tortured POWs, and to grant Iraq immunity through return of all its blocked assets, are as follows:

- The issue of private rights versus public purpose is not new. The framers of the United States Constitution determined that private rights should not be taken even for a public purpose when they wrote in the Fifth Amendment to the United States Constitution "nor shall private property be taken for public use, without just compensation." This important provision ensures that the burden of government will be borne by the taxpayers rather than taken from individual rights. The opinion of Mr. Justice Powell in the case of *Dames & Moore v. Regan*, 453 U.S. 654 (1981), indicates that this clause applies to the taking of American claims against foreign nations when such claims, like those of the POWs, are subject to the jurisdiction of our courts. Thus, Justice Powell, in concurring with the opinion, summarizes the decision of the Court: "[P]arties whose valid claims are not adjudicated or not fully paid may bring a 'taking' claim against the United States . . . . The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts. The extraordinary powers of the President and Congress upon which our decision rests cannot, in the circumstances of this case, displace the Just Compensation Clause of the Constitution." 453 U.S. at 691 & n.2.

- A half century ago, in the Federal Tort Claims Act, our own government determined that citizens should be able to sue their government for illegal actions. Today, Americans tortured brutally by our government would be able to bring suit under numerous provisions of American law, and we would not argue that the injured plaintiffs should bear the burden rather than the American taxpayer. Nor would we argue that a change of government or government personnel extinguishes the liability. The City of Los Angeles, and thus its taxpayers, of course remains liable for the beating of Rodney King even after the removal from office, and prosecution of, the individuals responsible.

- The Foreign Sovereign Immunities Act, which was intended to end ad hoc determinations by the Executive Branch with respect to immunity issues of foreign governments, today clearly provides in § 1605(a)(7), as amended, that states such as Iraq which are on the State Department terrorism list at the time they kill or torture Americans will have no immunity from suit. Congress has also most recently overwhelmingly voted into law in the Terrorism Risk Insurance Act of 2002, after hearing the arguments made to the contrary, that judgments in these § 1605(a)(7) cases may be enforced against the blocked assets of the defendant states. These are important provisions of current American law intended to add deterrence against the killing and torture of Americans by these states.

- Not only do we as a nation not sanction payment for public purpose, no matter how laudable, from private rights, but it would be a special travesty to ask American POWs brutally tortured by Iraq to pay with their legal rights for the reconstruction of Iraq.

- In the face of this highly visible action against Iraq in the federal courts of the United States, which was brought to hold that nation responsible for its brutal torture of American POWs, a decision by the Executive Branch to disregard current law permitting satisfaction against the Iraqi blocked assets would signal future would-be torturers of American servicemen and women that the United States is not serious about holding nations accountable for such outrages.

- Further, not only would a taking of the legal rights of tortured American POWs in this setting undermine our efforts to add deterrence against such torture, but it would be in violation of the legal obligations of the United States under the Third Geneva Convention (The POW Convention). That Convention provides in Article 131: "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of . . . [grave breaches of this Convention – as is the torture of POWs]." It is the *State of Iraq*, not any particular government of Iraq, that is the High Contracting Party to this Convention. Moreover, violations of the legal obligations of a state are *state* responsibilities rather than simply governmental responsibilities. That is the normal international legal rule of state responsibility. Thus, article 1 of the International Law Commission's Articles on State Responsibility provides: "Every internationally wrongful act of a State entails the international responsibility of that *State*." (Emphasis added.) Thus, to turn the blocked assets back to Iraq without first meeting the judicially-determined claims of Americans stemming from grave breaches of this Convention, as is torture, would effectively "absolve" Iraq of its responsibility for the torture of American POWs and would thus be in violation of *our* responsibilities under the Convention. Moreover, does the United States really wish to begin a pattern of absolving foreign states for the torture of American POWs? How could such an effort be in the national security interest of this great Nation?

- The American POWs in this case, and their family members, served their country with remarkable faith and courage. During the period of brutal captivity, the American people were outraged at the visible evidence of the POWs' ongoing torture. And on the POWs' return from captivity in *Freedom One*, they were met at Andrews Air Force Base by then-Secretary of Defense Dick Cheney and his wife Mrs. Lynne Cheney, and then-Chairman of the Joint Chiefs General Colin Powell and his wife Mrs. Alma Powell. Subsequently, in celebrations in towns all across America, the POWs and their family members were properly regarded as the national heroes they truly are. George and Barbara Bush wrote in a comment on a book written by Cynthia B. Acree, with Colonel Cliff Acree, lead plaintiffs in the POW case, describing their terrible ordeal: "[w]e are delighted to add our two voices to praise Cliff's devotion to duty and Cindy's quiet courage." The POWs and their families are a proud part of our national heritage. They have been severely injured by the torture to which they have been subjected. Surely we owe them the right simply to pursue their claim for recovery and closure through existing law. Just as an important purpose of any reconstruction effort is to promote the rule of law in Iraq, we should not disregard our own rule of law in our zeal to establish the rule of law elsewhere. The rule of law starts at home.

- The special regard our Nation has for our POWs, and for preventing the brutal torture all too often directed against them, is evidenced in passage during the Gulf War of House Concurrent Resolution 48 on January 23, 1991, by a vote of 418-0, and Senate Concurrent Resolution 5 on January 24, 1991, by a vote of 99-0. Following evidence of Iraq's torture of our Gulf War POWs, the House and Senate promptly passed these Resolutions. The House Resolution "condemns the flagrant and deliberate violations" by Iraq of the Third Geneva Convention. The Senate Resolution demands that "Iraq abide by the principles and the obligations of the Third Geneva Convention concerning the treatment of prisoners of war . . ." and condemns Iraq's failure to do so. During the Senate discussion of the Senate Resolution, it was noted that "under article 131 of the Geneva Convention Iraq cannot absolve itself from any liability concerning treatment of Allied POWs."

- The torture decried by Congress that Iraq, Saddam Hussein, and the Iraqi Intelligence Service are responsible for committing included violent and inhuman acts of both physical and psychological torture against the POWs. The types of torture used included severe beatings (with objects ranging from axe handles and rifle butts to whips and clubs), systemic starvation, systematic exposure to freezing cold and vile confines, deprivation of medical care, electric shock, mock executions, videotaping for propaganda purposes, threatened castration, threatened amputation and dismemberment, continual death threats, and withholding contact by the International Committee of the Red Cross to confirm that the POWs were alive. These tortures produced severe and continuing injuries. Twelve years have passed without an effort to hold the perpetrators of these evils accountable to the POWs.

- The law of sovereign immunity and blocked assets in the United States on which the POW lawsuit has been based, and their ability to collect under current law, are established by statute. In the face of this clear statutory structure, the Executive Branch lacks legal authority to return blocked Iraqi assets absent prior provision for satisfaction of the § 1605(a)(7) actions. While others may have a different view of this issue, it is certainly not clear in this circumstance that the Executive has the authority to return blocked assets without satisfying the legal rights of American § 1605(a)(7) claimants, absent subsequent legislation changing present law. It should be remembered that in the classic *Dames & Moore* case, any Executive authority to turn back blocked assets was supported by the statutory scheme in place at that time. Today, the relevant statutory scheme specifically calls for jurisdiction in United States courts, no immunity of the State of Iraq for its torture of our POWs, and satisfaction of these § 1605(a)(7) judgments from the blocked assets of Iraq in the United States. It should also be noted that the Court in *Dames & Moore* specifically said: "We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities." 453 U.S. at 688. To act absent a new legislative mandate would expose the Executive Branch to litigation that potentially could set a precedent further narrowing any Presidential authority in this area. Moreover, even with new legislation authorizing the Executive to override the claims of the POWs, a Fifth Amendment takings claim would be presented pursuant to the holding of the Court in *Dames & Moore*. The Fifth Amendment applies to all branches of our Government.

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

Vice President Richard Cheney, US Court of Appeals for the District of Columbia Circuit (Appendix) [1]

OA/NARA#: 1650/1518
9601

Box 62
Folder 4

REV_00264366

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re VICE PRESIDENT RICHARD CHENEY, et al.,	)	
Petitioners.	)	No. 02-_____
	)	[Civil Action Nos. 01-1530, 02-631 (EGS)]

APPENDIX

THEODORE B. OLSON
Solicitor General

ROBERT D. McCALLUM, JR.
Assistant Attorney General

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REV_00264367

	Docket Text: ORDER setting forth briefing schedule.Signed by Judge Emmet G. Sullivan on 3/26/2002. (lcegs2,)		
52	*Filed:* 03/27/2002 *Entered:* 04/03/2002	Summons Returned Executed	
	Docket Text: RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. THOMAS KUHN served on 3/1/2002, answer due 3/21/2002 (td,)		
51	*Filed:* 04/02/2002 *Entered:* 04/02/2002 *Terminated:* 04/09/2002	Motion for Extension of Time to File Response/Reply	
	Docket Text: MOTION for Extension of Time to File Response/Reply re [45], [48], [49] by JUDICAL WATCH, INC.,. (Orfanedes, Paul)		
59	*Filed:* 04/03/2002 *Entered:* 04/10/2002	Remark	
	Docket Text: Notice of filing of transcript of status hearing for the date of 3/26/02. (td,)		
66	*Filed:* 04/03/2002 *Entered:* 04/19/2002 *Terminated:* 04/24/2002	Motion for Leave to Appear	
	Docket Text: MOTION for Leave to Appear pro hac vice *of non resident attorney Joanne Spalding* by SIERRA CLUB. (td,)		
67	*Filed:* 04/03/2002 *Entered:* 04/19/2002 *Terminated:* 04/24/2002	Motion for Leave to Appear	
	Docket Text: MOTION for Leave to Appear pro hac for non resident attorney Patrick Gallagher by SIERRA CLUB. (td,)		
68	*Filed:* 04/03/2002 *Entered:* 04/19/2002 *Terminated:* 04/24/2002	Motion for Leave to Appear	
	Docket Text: MOTION for Leave to Appear pro hac vice for non resident attorney Alex Levinson by SIERRA CLUB. (td,)		
53	*Filed:* 04/05/2002 *Entered:* 04/05/2002	Memorandum in Opposition	
	Docket Text: RESPONSE in Opposition re [48], [49], [45] filed by JUDICAL WATCH, INC.,. (Orfanedes, Paul)		
54	*Filed:* 04/05/2002 *Entered:* 04/05/2002	Order	
	Docket Text: ORDER consolidating Civil Action No. 01-1530 (EGS) and Civil Action No. 02-631 (EGS) and ordering all future pleadings to be filed under docket number 01-1530 (EGS).Signed by Judge Emmet G. Sullivan on 4/5/2002. (lcegs2,)		
55	*Filed:* 04/05/2002 *Entered:* 04/05/2002 *Terminated:* 05/23/2002	Motion to Dismiss	
	Docket Text: MOTION to Dismiss *Sierra Club case by Andrew Lundquist and* by SPENCER ABRAHAM, RICHARD CHENEY, DONALD EVANS, NORMAN MINETA, NATIONAL ENERGY POLICY DEVELOPMENT GROUP, GALE NORTON, PAUL O'NEILL, ANN M.		

8

REV_00264376

Is there a national "crisis"? California faces rolling summer-electricity blackouts. In New York City, officials are scrambling to add small gas-fired generators to handle peak demand. Natural-gas prices have doubled in the past year. The numbers on signs at filling stations are skyrocketing, and could hit $3 a gallon this summer in the Midwest. In a West Wing interview with NEWSWEEK, Cheney shied away from the C word. "I think the potential is there for it to adversely affect the economy," he said.

But voters are using the word. In a NEWSWEEK Poll, 71 percent of those surveyed say there is an "energy crisis" in California; 53 percent agree there now is one in the country as a whole. Given an either-or choice between "protecting the environment" and "developing new sources of energy," those polled selected energy by 52 to 41 percent, compared with a 49-44 ratio just one month ago.

There's something to be said for turning to energy-industry alums in this situation--and Cheney, who like Bush is a son of the oilfields, is not shy about saying it. "The fact of the matter is [you get] a lot of expertise with people who have been dealing with these issues for a long time," he told NEWSWEEK. In his own case, he said, his time at Halliburton, the globe-girdling oil-services company, taught him "a hell of a lot about the technology of the business," such as benign new ways to drill in Alaska's Arctic National Wildlife Refuge.

But Americans are skeptical of industry motives--and, by extension, of Bush's ties. When asked to name who had contributed "a lot" to the current energy situation, those polled named two sets of villains: the U.S. energy companies (66 percent) and overseas energy suppliers, such as OPEC. Bush himself gets his lowest approval marks for his handling of energy and environmental issues. Democrats, naturally, are pouncing on what they see as a populist hole in Bush's armor. Late last week House Minority Leader Dick Gephardt was stumping in Chula Vista, Calif.; with transmission lines as a backdrop, he vowed to impose new federal caps on electricity rates--an idea Cheney flatly opposes.

The administration may well have raised the political risk via the process it used to draft its plan. The Bushies used a secretive, believers-only process reminiscent of another such enterprise: Hillary Rodham Clinton's effort to write a national health-care plan in 1994. Since the group comprises only government officials, White House aides say, it is entitled to keep its deliberations private. Still, industry leaders--who dumped $22.5 million into GOP coffers in the last election--enjoyed constant contact with the task force. Cheney met with a group of utility executives at the Edison Electric Institute, whose president, Tom Kuhn, was a leading Bush fund-raiser. No one has enjoyed better access than Enron CEO Ken Lay, who recently had dinner with his good friend the president.

The environmental community, meanwhile, got one mass meeting with the staff a month ago (and the promise of another this week with EPA Administrator Christine Todd Whitman). Efforts to meet with Cheney were rebuffed. Cheney himself confirmed he had not met with a single spokesman for the greens. That dynamic has only fueled suspicions among enviros about what's going on behind closed doors. "They're drumming up a fake energy crisis that doesn't exist," says Phil Clapp of the National Environmental Trust.

To be sure, the Cheney report will make many nods in the direction of conservation and renewable resources. Cheney confirmed that it will call for tax credits for both. The plan will herald and encourage the advent of less

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intrusive, high-tech means for finding and extracting oil and gas and for burning more coal. White House spinners have decided to divide the report into five parts--only two of which will deal with the extraction and the transmission of new sources of traditional types of fuel. The conservation measures will be high tech and optimistically can-do about using Yankee ingenuity to give Americans all the cars and appliances they want while using less electricity from state-of-the-art power plants. But there will be no paeans to the kind of pantywaist, tree-hugging self-abnegation the Bushies think President Carter sermon- ized about a generation ago. "This isn't about not bathing or turning off your lights," said a top Cheney aide. "This is about finding environmentally safe ways to make sure we have the energy we need."

That's not enough, environmentalists say, given the rising threat of global warming the green community is convinced comes from burning fossil fuels. "The test of any energy plan will be what it does to limit greenhouse gases," says Fred Krupp of Environmental Defense. The Union of Concerned Scientists, concerned about global warming, says that renewables and conservation could displace 20 percent of traditional electricity demand by the year 2020--and greatly lessen the need for new power plants. Cheney thinks otherwise. In that span, he said, reliance on renewables could indeed triple--a "fairly optimistic" scenario but one that would still meet only 6 percent of total electricity needs. But that estimate does not include imposing tough new mileage standards on SUVs or mandating more efficient appliances. "Part of our task," he said, "is to focus on reality, and reality is not 'Well, gee, we'll conserve our way out, we don't have to produce any more,' or 'Wind and solar will take care of it, so we don't need fossilfuels anymore'."

Now comes the hard part: selling the plan to the public and to Congress. Some GOP strategists are sanguine about overcoming environmental concerns. "Nothing like $3-a-gallon gasoline to help make the case," said one. But it's probably not that simple. White House strategists are looking for clues on how best to hawk the package in polls done for them by the Republican National Committee. The surveys show that voters know very little about where energy supplies come from or how they now are distributed in what has become a relatively deregulated marketplace. "Voters out there think that the government guarantees cheap, abundant energy," said one worried Republican polltaker, "and that's not the way it works anymore." Other insiders worry less about the Democrats than the news media, which they regard as addicted to showing videotape of belching smokestacks. "Bush will have the bully pulpit," says GOP consultant Alex Castellanos, "but it's not an easy sell."

But sell Bush must. He'll take his show on the road next week, joined by a fleet of cabinet secretaries. They will declare that action is needed after years of Clinton-administration neglect. They will say that there are no quick fixes, and tout their market-based, supply-side, long-term answers. They may use real-world vignettes about energy shortages. (On request, the Natural Gas Supply Association provided the White House some.) But politics is lived in the short term, and Bush late last week suddenly found himself in the role of conservation advocate. He ordered federal facilities in California to turn up thermostats, and pledged that they would reduce electricity use by 10 percent. Cheney, the interview over, hurried to the Cabinet Room for the announcement. It turns out that conservation matters a great deal, at least in California, at least for now.

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GRAPHIC: PHOTO: Inner circle: Cheney presiding over a meeting of the Energy Task Force last week in the vice president's ceremonial office; PHOTO: The outsider: Clapp claims the Bushies may be ginning up a fake energy crisis''; GRAPHIC: (Chart) Energy Advocates in the Bush Pipeline (Graphic omitted)

LOAD-DATE: May 9, 2001

REV_00264468

ATTACHMENT 9

OFFICE OF THE VICE PRESIDENT

WASHINGTON

July 5, 2001

Larry Klayman, Esq.
General Counsel, Judicial Watch, Inc.
501 School Street SW, Suite 725
Washington, D.C. 20024

Dear Mr. Klayman:

This is in response to your letter dated June 25, 2001 to the Vice President. Please be advised that the National Energy Policy Development Group is not an "advisory committee" under the Federal Advisory Committee Act and is therefore not subject to FACA's terms, noting especially that it is composed entirely of full-time officers of the Federal Government. In addition, the Freedom of Information Act does not provide for disclosure of the materials you requested. See, 18 U.S. Op. Ofc. Legal Counsel 10 (1994).

Sincerely,

David S. Addington
Counsel to the Vice President

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ATTACHMENT 10

14 of 50 DOCUMENTS

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The New York Times

June 26, 2001, Tuesday, Late Edition - Final

SECTION: Section A; Page 17; Column 1; National Desk

LENGTH: 465 words

HEADLINE: **Cheney** Withholds List of Those Who Spoke to Energy Panel

BYLINE: By JOSEPH KAHN

DATELINE: WASHINGTON, June 25

BODY:

Vice President Dick **Cheney** has declined to identify the people who met privately with his energy **task force**, raising tensions with Congressional investigators who have repeatedly requested the information.

The **General Accounting Office**, an **investigative** arm of Congress, sent Mr. **Cheney's** office a letter late last week complaining that a month had passed since it first submitted an **inquiry** about the workings of the **task force**. The letter said the vice president had a legal obligation to provide the information immediately.

Mr. **Cheney's** office said the letter was sent one day after it submitted 77 pages of documents to the accounting office.

"Our correspondence crossed in the mail," said Juleanna Glover Weiss, a spokeswoman for Mr. **Cheney**.

But Ms. Weiss said the vice president had not provided the names of people, including industry executives, who may have influenced the formation of the Bush administration's energy policy, which was released last month.

"Our counsel and the **G.A.O.** will continue to talk about this," Ms. Weiss said.

The energy **task force** Mr. **Cheney** headed spent several months compiling a lengthy energy strategy that contained about 150 recommendations for administrative and legislative actions to address what it termed an energy crisis.

Administration officials have said that they met with a wide variety of people concerned about energy issues, including executives of oil, natural gas, electricity, nuclear power and energy infrastructure companies. They have declined to provide a list of people who had access to the **task force**.

Some Democrats have asserted that leading **Republican** donors had special access to the **task force** and that the energy policy is skewed toward measures favored by major corporations. Two Democratic representatives, Henry A. Waxman of California and John D. Dingell of Michigan, asked the accounting office to report on the officials who served on the **task force**, what information was collected by the panel, whom they met with and how much the **task force** spent.

The White House provided the **G.A.O.** with the financial records of the **task force**. But administration officials have told the investigative body that they are not compelled to provide the names of outsiders who met with the **task force**.

The accounting office's general counsel, Anthony H. Gamboa, said in a letter to Mr. **Cheney's** office last week that the investigative body is entitled to more information.

The letter warned that if the White House does not provide the full range of information the **G.A.O.** is

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seeking, it may issue a "demand letter," a more formal request. Under the law, the White House would have 20 days to respond.

If the dispute continues, the accounting office could bring a civil action against the administration.

http://www.nytimes.com

LOAD-DATE: June 26, 2001

REV_00264473

DAILY NEWS —online edition



DAILY NEWS express

Cheney Won't Give Up Names

EXPRESS WIRE SERVICES

WASHINGTON

Vice President Dick Cheney remained locked in a battle with the General Accounting Office today over the activities of a White House energy task force.

The GAO, the investigative arm of Congress, has requested a meeting with Cheney discuss an energy task force, of which Cheney was chairman.

Cheney aide Juleanna Glover Weiss said the vice president's office had already forked over a 77-page "financial account of the task force," but has not agreed to meet the GAO request to turn over the names of the people who met with the task force."

"We're still talking to the GAO about that," Weiss said.

The White House task force headed by Cheney met with officials from the oil, natural gas, electric, and nuclear industries, among others, in developing the Bush administration's new national energy plan unveiled last month.

Reps. John Dingell (D-Mich.) and Henry Waxman (D-Calif.) asked the GAO in April to investigate the task force.

"It is past time for the American people to find out what went on in Cheney's energy task force," Dingell said yesterday. "What are they hiding?"

Original Publication Date: 6/26/01

REV_00264474

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REV_00264475

	VENEMAN, CHRISTINE T. WHITMAN. (Attachments: # (1) Exhibit 1)(Buchholz, David)		
56	*Filed:* 04/08/2002 *Entered:* 04/08/2002	Response to any document	
	Docket Text: RESPONSE to Motion re [34] *to Dismiss* filed by NATURAL RESOURCES DEFENSE COUNCIL. (Attachments: # (1) Exhibit Amicus Exhibit A# (2) Exhibit Amicus Exhibit B# (3) Exhibit Amicus Exhibit C# (4) Exhibit Amicus Exhibit E# (5) Exhibit Amicus Exhibit F# (6) Exhibit Amicus Exhibit G# (7) Exhibit Amicus Exhibit H# (8) Exhibit Amicus Exhibit I# (9) Exhibit Amicus Exhibit J# (10) Exhibit Amicus Exhibit K# (11) Exhibit Amicus Exhibit L# (12) Exhibit Amicus Exhibit M# (13) Exhibit Amicus Exhibit N# (14) Exhibit Amicus Exhibit O# (15) Exhibit Amicus Exhibit P)(Crystal, Howard)		
57	*Filed:* 04/09/2002 *Entered:* 04/09/2002	Order on Motion for Extension of Time to File Response/Reply	
	Docket Text: ORDER granting Motion for Extension of Time to File Response/Reply re [51]. Signed by Judge Emmet G. Sullivan on 4/9/2002. (lcegs2,)		
58	*Filed:* 04/09/2002 *Entered:* 04/09/2002	Errata	
	Docket Text: ERRATA *exhibit to memorandum filed 4/8/02 document number [56]* by NATURAL RESOURCES DEFENSE COUNCIL. (td,) Modified on 4/9/2002 (td,).		
60	*Filed:* 04/12/2002 *Entered:* 04/12/2002	Reply to opposition to Motion	
	Docket Text: REPLY to opposition to motion re [48] *Motion to Dismiss* filed by THOMAS KUHN. (Litt, Robert)		
61	*Filed:* 04/12/2002 *Entered:* 04/12/2002	Reply in Support	
	Docket Text: REPLY in support of motion re [49] filed by MARK RACICOT. (Horn, Richard)		
62	*Filed:* 04/12/2002 *Entered:* 04/15/2002	Reply in Support	
	Docket Text: REPLY in support of motion re [45] *of motion to dismiss* filed by HALEY BARBOUR. (td,)		
63	*Filed:* 04/15/2002 *Entered:* 04/15/2002	Notice (Other)	
	Docket Text: NOTICE *of Appearance by Roger M. Adelman* by SIERRA CLUB (Adelman, Roger)		
64	*Filed:* 04/16/2002 *Entered:* 04/16/2002 *Terminated:* 04/24/2002	Motion for Leave to Appear	
	Docket Text: Consent MOTION for Admission of Counsel Pro Hac Vice *and Proposed Order* by SIERRA CLUB. (Adelman, Roger) Modified on 4/19/2002 (td,).		
65	*Filed:* 04/16/2002 *Entered:* 04/16/2002	Memorandum in Opposition	
	Docket Text: Memorandum in opposition to motion re [55] *to Dismiss* filed by SIERRA CLUB. (Attachments: # (1) Exhibit A# (2) Exhibit B# (3) Exhibit C)(Adelman, Roger)		
--	*Filed:* 04/24/2002 *Entered:* 04/24/2002	Order on Motion for Leave to Appear	

REV_00264377

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The Associated Press

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June 25, 2001, Monday, BC cycle

SECTION: Business News; Washington Dateline

LENGTH: 504 words

HEADLINE: Congress demands list of participants in **Cheney** energy meetings

BYLINE: By SCOTT LINDLAW, Associated Press Writer

DATELINE: WASHINGTON

BODY:

Congressional investigators are intensifying pressure on the White House to identify who met privately with Vice President Dick **Cheney's** energy **task force.**

The General Accounting Office has sent **Cheney's** lawyer a 10-page letter asserting a legal right to the lists and advising **Cheney** that it may make a formal demand for the information, rather than the polite requests it has made in recent weeks.

Comptroller General David M. Walker "is prepared to issue a demand letter ... if we do not receive timely access to the information," the **GAO** said in a 10-page letter dated Friday from office General Counsel Anthony H. Gamboa to David S. Addington, attorney for the vice president.

The **GAO** is the investigative arm of Congress, and it has legal authority to federal agency records under the law. A demand letter could begin a legal battle: It would give **Cheney's** office 20 days to **respond,** either by turning over the names, or providing a reason why it is not compelled to do so, said Lynn Gibson, a lawyer for the **GAO.**

If Cheney declined to turn over the records, the **GAO** would notify Congress and Attorney General John Ashcroft, among others. The **GAO** would also be authorized to file a civil action in court seeking the record, Gibson said.

She knew of no previous case in which the **GAO** was forced to go to court to obtain agency records.

The White House team that developed the national energy plan, released last month, met with more than 130 interest groups, from environmentalists and unions, often at odds with **Republicans,** to major Bush supporters who got private sessions with **Cheney.**

Reps. Henry Waxman, D-Calif., and John Dingell, D-Mich., in April asked the **GAO** to provide information on who served on the **task force,** what information was presented to the panel, who presented it and what the **task force** spent.

The White House has asserted that the **GAO** does not have the authority to ask for names of participants. However, it agreed that the **GAO** is entitled to financial records of the **task force,** and two administration officials said the vice president's office provided 77 pages of financial documents to the **GAO** last week.

The **GAO** contends it is entitled to a wider range of records. Federal law "extends **GAO's** audit authority to all matters related to the use of public money, not just matters related to costs of activities," it argued in its letter to **Cheney.** "Over the years, **GAO** has conducted many reviews that involve a wide range of White

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House programs and activities."

Juleanna Glover Weiss, a spokeswoman for Cheney, declined to comment on the GAO's assertions, other than to say, "I'm sure the GAO and the vice president's office will be talking about that."

Waxman and Dingell called on Cheney to provide the information they seek.

"The vice president should stop stonewalling and start cooperating with GAO's investigation," Waxman said Monday. "Congress is entitled to know the identity of the special interests that met with the Cheney energy task force."

LOAD-DATE: June 26, 2001

REV_00264477

ATTACHMENT 11

OFFICE OF THE VICE PRESIDENT

WASHINGTON

January 3, 2002

The Honorable Henry A. Waxman
House of Representatives
Washington, D.C. 20515

Dear Representative Waxman:

This is in response to your inquiry by letter of December 4, 2001 about meetings between the Vice President or the former National Energy Policy Development Group's ("Group") support staff and representatives of the Enron Corporation during the preparation of the National Energy Policy that was published on May 17, 2001. The Enron Corporation announced on December 2, 2001 that Enron and certain of its subsidiaries had filed voluntary petitions for reorganization under Chapter 11 of Title 11 of the U.S. Code in the U.S. Bankruptcy Court for the Southern District of New York. Your letter stated that you viewed it as appropriate to ask whether Enron had communicated "information about its precarious financial position" in any meetings.

Enron did not communicate information about its financial position in any of the meetings with the Vice President or with the National Energy Policy Development Group's support staff. These meetings are described below.

As the Vice President mentioned in his interview on the *Frontline* program on May 17, 2001, the Vice President met with Mr. Kenneth L. Lay, chairman and chief executive officer of the Enron Corporation. The meeting occurred on April 17, 2001 and lasted for about a half-hour. They discussed energy policy matters, including the energy crisis in California, and did not discuss information concerning the financial position of the Enron Corporation.

The National Energy Policy Development Group, which existed from January 29, 2001 to September 30, 2001, had a support staff. As you may recall from my letter to you of May 4, 2001, individuals on the Group support staff met, prior to issuance of the National Energy Policy, with many individuals to gather information relevant to the Group's work. The Group's support staff held such meetings with a broad representation of people potentially affected by the Group's work, including individuals involved with companies or industries (e.g., in the electricity, telecommunications, coal mining, petroleum, gas, refining, bioenergy, solar energy, nuclear energy, pipeline, railroad and automobile manufacturing sectors); environmental, wildlife, and marine advocacy; State and local utility regulation and energy management; research and teaching at universities; research and analysis at policy organizations (i.e., think-tanks); energy consumers, including consumption by businesses and individuals; major labor unions; and many Members of Congress or their staffs.

REV_00264479

Included among those with whom the Group's support staff met were representatives of the Enron Corporation. The Executive Director of the support staff met on February 22 and March 7, 2001 with Enron representatives and reports that they discussed energy policy matters and did not discuss information concerning the financial position of the Enron Corporation. On April 9, 2001, Group support staff held a meeting with about two dozen representatives of various utilities, which was known to include an Enron representative and which did not involve discussion concerning the financial position of the Enron Corporation.

Two additional meetings occurred after publication of the National Energy Policy, one of which was after the termination of the Group. The Deputy Executive Director of the support staff met on August 7, 2001 with officials of an Enron German subsidiary and reports that they discussed energy policy matters and did not discuss information concerning the financial position of the Enron Corporation. An employee on the Vice President's staff, who previously was the Executive Director of the Group's support staff, met on October 10, 2001 with Enron representatives and reports that they discussed energy policy matters and did not discuss information concerning the financial position of the Enron Corporation.

To summarize, as the above information reflects, during the period that the National Energy Policy was in formulation, the Vice President had only one meeting with Mr. Lay, which was the meeting that the Vice President mentioned on television in May. During the same period, the National Energy Policy Development Group's support staff, which had meetings with a broad range of individuals involved in energy matters, had two meetings with Enron representatives, plus a meeting with utility representatives that included an Enron representative. Also described above were two staff-level meetings that occurred well after issuance of the National Energy Policy. None of these meetings included discussion of the financial position of the Enron Corporation.

I note for your information that the Vice President and Mr. Lay of Enron Corporation both served on a panel on June 24, 2001 at the American Enterprise Institute World Forum in Beaver Creek, Colorado. The panel was widely attended and addressed energy matters. There was no discussion of information concerning the financial position of Enron Corporation.

Your letter mentioned a number of Federal officials not employed by the Office of the Vice President. To the extent you wish to inquire about their official activities, I would respectfully refer you to their employing departments, agencies or offices.

The information above is provided to you as a matter of comity between the legislative and executive branches, with due regard for the constitutional separation of powers, and reserving all legal authorities and privileges that may apply. It is our hope that submission of the information will help you avoid the waste of time and taxpayer funds on unnecessary inquiries.

Sincerely,

David S. Addington

David S. Addington
Counsel to the Vice President

REV_00264480

Patrick Gallagher (CA Bar No.146105)
Alex Levinson (CA Bar No.135307)
Sierra Club
85 Second Street
San Francisco, CA 94104
(415) 977-5696
(415) 977-5793 FAX

Attorneys for Plaintiff

FILED
02 JAN 25 PM 3:07
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JL

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

C 02 0462

SIERRA CLUB, a California nonprofit corporation,

Plaintiff

v.

VICE PRESIDENT RICHARD CHENEY, in his official capacity as Vice President of the United States and Chairman of the National Energy Policy Development Group,

The NATIONAL ENERGY POLICY DEVELOPMENT GROUP, an advisory committee commissioned by President George W. Bush, Jr.,

ANDREW LUNDQUIST, in his official capacity as Executive Director of the National Energy Policy Development Group, and Director of Energy Policy for Vice President Cheney and Senior Policy Advisor to the Department of Energy,

SPENCER ABRAHAM, in his official capacity as Secretary of the United States Department of Energy and member of the

Case No.:

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Violations of Federal Advisory Committee Act, 5 U.S.C. Appendix 2

REV_00264481

National Energy Policy Development Group,)
)
DONALD EVANS, in his official capacity as)
Secretary of the United States Department of)
Commerce and member of the National)
Energy Policy Development Group,)
)
GALE NORTON, in her official capacity as)
Secretary of the United States Department of)
the Interior and member of the National)
Energy Policy Development Group,)
)
ANN VENEMAN, in her official capacity as)
Secretary of the United States Department of)
Agriculture and member of the National)
Energy Policy Development Group,)
)
PAUL O'NEILL, in his official capacity as)
Secretary of the United States Department of)
the Treasury and member of the National)
Energy Policy Development Group,)
)
NORMAN MINETA, in his official capacity)
as Secretary of the United States Department)
of Transportation and member of the)
National Energy Policy Development Group,)
)
CHRISTINE TODD WHITMAN, in her)
official capacity as Administrator of the)
United States Environmental Protection)
Agency and member of the National Energy)
Policy Development Group,)
)
Defendants)
)

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INTRODUCTION

The Sierra Club brings this action to enforce the Federal Advisory Committee Act, 5 U.S.C. Appendix 2, ("FACA"), a "sunshine law" providing for public scrutiny of the manner in which the Executive Branch obtains advice from private individuals on policy matters. The Sierra Club seeks access to information under FACA concerning the activities of the National Energy Policy Development Group (better known colloquially as the "Cheney Energy Task Force"), and its related sub-groups ("Task Force Sub-Groups"). The Cheney Energy Task Force is a Presidential advisory committee, the purpose of which is to gather information, deliberate and make recommendations to the President on national energy policy.

JURISDICTION

1. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (action arising under the laws of the United States), 28 U.S.C. § 1361 (mandamus), 5 U.S.C. §§ 701 *et seq.* (Administrative Procedure Act) and 28 U.S.C. §§2201 and 2202 (Declaratory Judgment Act). Venue in this district is proper under 28 U.S.C. § 1391(e) because the Sierra Club is incorporated in California and maintains its headquarters and resides in this district.

INTRADISTRICT ASSIGNMENT

2. Pursuant to Civil Local Rule 3-2(c), Plaintiff states that it bases venue in this district and the San Francisco Division on the following: 1) Plaintiff is incorporated in California and maintains its headquarters and resides in San Francisco County; 2) this action seeks relief against federal officials acting in their official capacities; and 3) 28 U.S.C. §§ 1361 and 1391(e) provide for venue in the district of Plaintiff's residence, including the San Francisco Division.

PARTIES

3. Plaintiff Sierra Club is a nonprofit corporation organized under California law, with more than 700,000 members nationwide. The Sierra Club's mission is to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's resources and ecosystems; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.

4. The Sierra Club's concerns encompass the nation's use of energy and the environmental and health impacts caused by the development, extraction, production and use of energy. The Sierra Club has actively participated in the public discussion regarding the Bush Administration's national energy policy. The Sierra Club has educated its members about national energy policy, participated in and organized community events, such as rallies and demonstrations; discussed energy policy with members of Congress and other government leaders, and sought to disseminate information on energy policy via the media.

5. Sierra Club members reside in, work in, and regularly visit, use, and enjoy areas that would be affected by the Bush Administration's energy policy. These areas include, among many examples, federal public lands, national forests, and coastal areas subject to oil and gas drilling and related activities; and populated areas downwind of power plants and other sources of energy-caused pollution. Moreover, Sierra Club members routinely make use of information concerning energy policy while engaging in First Amendment activities as environmentalists and Sierra Club members.

6. Defendant Richard Cheney is sued in his official capacity as the Vice President of the United States and Chairman of the Cheney Energy Task Force. As the Chairman of the Cheney Energy Task Force, Vice President Cheney acted on behalf of the President in gathering information, advice and recommendations on national energy policy and supervising the work of the Cheney Energy Task Force and the Task Force Sub-Groups. He participated in meetings and deliberations, and his office contributed to the formulation of the Bush Administration's national energy policy.

7. Defendant National Energy Policy Development Group ("Cheney Energy Task Force") is a Presidential advisory committee, the purpose of which is to gather information, deliberate and make recommendations to the President on national energy policy.

8. Defendant Lundquist is sued in his official capacity as Executive Director of the Cheney Energy Task Force, Director of Energy Policy for Vice President Cheney, and Senior Policy Advisor to the U.S Department of Energy. As the Executive Director of the Cheney Energy Task Force, he participated in its meetings and deliberations, and contributed to the formulation of the Bush Administration's national energy policy.

9. Defendant Abraham is sued in his official capacity as Secretary of Energy and member of the Cheney Energy Task Force. Defendant Abraham participated in Cheney Energy Task Force meetings and deliberations, and he and his agency gathered information, advice and recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

10. Defendant Evans is sued in his official capacity as Secretary of Commerce and member of the Cheney Energy Task Force. Defendant Evans participated in Cheney Energy

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	Docket Text: ORDER granting Motion for Leave to Appear pro hac vice for Admission of Counsel [64], granting Motion for Leave to Appear pro hac vice for Joanne Spalding [66], granting Motion for Leave to Appear pro hace vice for Patrick Gallagher [67], granting Motion for Leave to Appear pro hac vice for Alex Levinson [68], granting Motion for Leave to Appear pro hace vice for Narayan[69]. Signed by Judge Emmet G. Sullivan on April 24, 2002. (GK,)		
--	*Filed:* 04/24/2002 *Entered:* 04/24/2002	Order on Motion for Leave to Appear	
	Docket Text: ORDER granting Motion for Leave to Appear pro hac vice for Admission of Counsel [64], granting Motion for Leave to Appear pro hac vice for Joanne Spalding [66], granting Motion for Leave to Appear pro hace vice for Patrick Gallagher [67], granting Motion for Leave to Appear pro hac vice for Alex Levinson [68], granting Motion for Leave to Appear pro hace vice for Narayan[69]. Signed by Judge Emmet G. Sullivan on April 24, 2002. (GK,)		
--	*Filed:* 04/24/2002 *Entered:* 04/24/2002	Order on Motion for Leave to Appear	
	Docket Text: ORDER granting Motion for Leave to Appear pro hac vice for Admission of Counsel [64], granting Motion for Leave to Appear pro hac vice for Joanne Spalding [66], granting Motion for Leave to Appear pro hace vice for Patrick Gallagher [67], granting Motion for Leave to Appear pro hac vice for Alex Levinson [68], granting Motion for Leave to Appear pro hace vice for Narayan[69]. Signed by Judge Emmet G. Sullivan on April 24, 2002. (GK,)		
--	*Filed:* 04/24/2002 *Entered:* 04/24/2002	Order on Motion for Leave to Appear	
	Docket Text: ORDER granting Motion for Leave to Appear pro hac vice for Admission of Counsel [64], granting Motion for Leave to Appear pro hac vice for Joanne Spalding [66], granting Motion for Leave to Appear pro hace vice for Patrick Gallagher [67], granting Motion for Leave to Appear pro hac vice for Alex Levinson [68], granting Motion for Leave to Appear pro hace vice for Narayan[69]. Signed by Judge Emmet G. Sullivan on April 24, 2002. (GK,)		
--	*Filed:* 04/24/2002 *Entered:* 04/24/2002	Order on Motion for Leave to Appear	
	Docket Text: ORDER granting Motion for Leave to Appear pro hac vice for Admission of Counsel [64], granting Motion for Leave to Appear pro hac vice for Joanne Spalding [66], granting Motion for Leave to Appear pro hace vice for Patrick Gallagher [67], granting Motion for Leave to Appear pro hac vice for Alex Levinson [68], granting Motion for Leave to Appear pro hace vice for Narayan[69]. Signed by Judge Emmet G. Sullivan on April 24, 2002. (GK,)		

Doc. No.	Dates	Description
69	*Filed:* 04/24/2002 *Entered:* 04/24/2002 *Terminated:* 04/24/2002	Motion for Leave to Appear
	Docket Text: MOTION for Leave to Appear Consent Motion for Admission of Narayan Pro Hac Vice by SIERRA CLUB. (Adelman, Roger)	
--	*Filed:* 04/25/2002 *Entered:* 04/25/2002	Order on Motion for Leave to File Excess Pages
	Docket Text: ORDER granting unopposed Motion for Leave to File Excess Pages [70] Signed by Judge Emmet G. Sullivan on 4/25/2002. (lcegs2,)	

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Task Force meetings and deliberations, and he and his agency gathered information, advice and recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

11. Defendant Norton is sued in her official capacity as Secretary of the Interior and member of the Cheney Energy Task Force. Defendant Norton participated in Cheney Energy Task Force meetings and deliberations, and she and her agency gathered information, advice and recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

12. Defendant Veneman is sued in her official capacity as Secretary of Agriculture and member of the Cheney Energy Task Force. Defendant Veneman participated in Cheney Energy Task Force meetings and deliberations, and she and her agency gathered information, advice and recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

13. Defendant O'Neill is sued in his official capacity as Secretary of the Treasury and member of the Cheney Energy Task Force. Defendant O'Neill participated in Cheney Energy Task Force meetings and deliberations, and he and his agency gathered information, advice and recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

14. Defendant Mineta is sued in his official capacity as Secretary of Transportation and member of the Cheney Energy Task Force. Defendant Mineta participated in Cheney Energy Task Force meetings and deliberations, and he and his agency gathered information, advice and

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recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

15. Defendant Whitman is sued in her official capacity as Administrator of the Environmental Protection Agency and member of the Cheney Energy Task Force. Defendant Whitman participated in Cheney Energy Task Force meetings and deliberations, and she and her agency gathered information, advice and recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

BACKGROUND

The Cheney Energy Task Force

16. On or about January 29, 2001, George W. Bush signed a memorandum to his Vice President, Richard Cheney, commissioning the Cheney Energy Task Force. The Presidential memorandum stated that the purpose of the Cheney Energy Task Force was to develop a national energy policy. The membership of the Cheney Energy Task Force included the defendants.

17. The Cheney Energy Task Force held its first meeting on or about January 29, 2001. The Task Force held at least eight additional meetings between February and May of 2001 and, on information and belief, continued its activities thereafter.

18. On information and belief, the defendants arranged, participated in and exercised responsibility over meetings and other activities involving groups of energy industry executives and other non-federal employees, for the purpose of obtaining advice and recommendations on the Administration's national energy policy.. These groups are what are referred to as the "Task Force Sub-Groups" in this Complaint.

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19. On information and belief, the Cheney Energy Task Force and Task Force Sub-Groups were not composed wholly of full time officers or employees of the federal government. Energy industry executives, including multiple representatives of single energy companies, and other non-federal employees, attended meetings and participated in activities of the Cheney Energy Task Force and Task Force Sub-Groups.

20. On information and belief, the participants in the Cheney Energy Task Force and the Task Force Sub-Groups interacted significantly and acted collectively in expressing their viewpoints and advice on energy policy.

21. On information and belief, there was continuity in the membership of the Cheney Energy Task Force and Task Force Sub-Groups.

22. On or about May 16, 2001, the Cheney Energy Task Force submitted a report to President Bush, setting forth the Task Force's findings and recommendations for a "National Energy Policy."

23. The Cheney Energy Task Force and the Task Force Sub-Groups were established or utilized by the President and the defendants for the purpose of obtaining information, advice and recommendations for the development of the "National Energy Policy." The Bush Administration has developed legislative proposals based on the "National Energy Policy." The House of Representatives has passed legislation containing many of the elements of this National Energy Policy. That legislation and related energy policy legislative proposals are still pending.

The Bush Administration's Failure to Divulge Cheney Energy Task Force Information

24. The defendants have refused to provide information to Congress, the General Accounting Office or the public (including the Sierra Club) concerning the names of non-federal

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employees who participated in the activities of the Cheney Energy Task Force and Task Force Sub-Groups, or details about the number of meetings such individuals attended, the agendas of each meeting, the purpose and scope of the meeting(s), the topics on which factual information or policy advice was sought, and whether conflicts of interest were properly addressed at each meeting.

25. Throughout the spring and summer of 2001, and continuing to the present, Congressional leaders and the General Accounting Office (GAO) have sought to obtain information from the Cheney Energy Task Force and its members concerning the activities and membership of the Cheney Energy Task Force and Task Force Sub-Groups. Representatives Henry Waxman and John Dingell, GAO Comptroller General David Walker and GAO General Counsel Anthony Gamboa have requested access to Cheney Energy Task Force and Task Force Sub-Group information, corresponding numerous times with Vice President Cheney, Cheney Energy Task Force Executive Director Andrew Lundquist, and Counsel to the Vice President David Addington.

26. The Vice President, Mr. Lundquist, and Mr. Addington have failed to provide the information requested by Representatives Waxman and Dingell and the GAO.

27. On or about January 16, 2002, Representative Henry Waxman issued a report detailing how the Cheney Energy Task Force's final report advocated energy policies favoring private companies whose representatives participated in the activities of the Cheney Energy Task Force and Task Force Sub-Groups.

28. The Sierra Club has corresponded with the defendants requesting information relating to activities of the Cheney Energy Task Force and the Task Force Sub-Groups including,

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but not limited to, the involvement of non-federal employees. Defendants have failed to provide this information to the Sierra Club. The Sierra Club intends to use this information to educate its members and, on behalf of its members, to participate actively in the ongoing national debate over energy policy, including but not limited to specific legislative proposals pending in Congress.

FIRST CLAIM FOR RELIEF
(Violations of FACA / Mandamus)

29. The Sierra Club incorporates by reference the allegations of the preceding paragraphs of this Complaint.

30. The Cheney Energy Task Force and Task Force Sub-Groups are advisory committees as defined under FACA.

31. The defendants have violated FACA as follows:

a. By failing to open each meeting of the Cheney Energy Task Force and Task Force Sub-Groups to the public. (Violation of FACA § 10(a)(1).)

b. By failing to publish timely notice of each meeting of the Cheney Energy Task Force and Task Force Sub-Groups in the Federal Register. (Violation of FACA § 10(a)(2).)

c. By failing to allow the Sierra Club and other interested persons to attend, appear before, or file statements with the Cheney Energy Task Force and Task Force Sub-Groups. (Violation of FACA § 10(a)(3).)

d. By failing to make available for public inspection and copying the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other

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documents which were made available to or prepared for or by the Cheney Energy Task Force and Task Force Sub-Groups. (Violation of FACA § 10(b).)

e. By failing to keep detailed minutes of each meeting of the Cheney Energy Task Force and Task Force Sub-Groups, certified as accurate, that contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached and copies of all reports received, issued, or approved by the Cheney Energy Task Force and Task Force Sub-Groups. (Violation of FACA § 10(c).)

f. By establishing the Task Force Sub-Groups without specific authorization by statute or by the President and without a determination, published in the Federal Register, that establishing the Task Force Sub-Groups is in the public interest. (Violation of FACA § 9(a).)

g. By allowing the Cheney Energy Task Force and Task Force Sub-Groups to meet and take action without filing an advisory committee charter containing the information required by FACA. (Violation of FACA § 9(c).)

32. The defendants have a nondiscretionary duty to comply with the procedural requirements of FACA including but not limited to those set forth in the preceding paragraph as items (a) through (g).

33. This Court has jurisdiction to compel the defendants to perform a nondiscretionary duty pursuant to the Mandamus and Venue Act, 28 U.S.C. § 1361.

SECOND CLAIM FOR RELIEF
(Violations of FACA / Administrative Procedure Act)

34. The Sierra Club incorporates by reference the allegations of the preceding paragraphs of this Complaint.

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35. By violating FACA as set forth in paragraph 31, the agency defendants have acted arbitrarily and capriciously and not in accordance with law, and without observance of procedure required by law, in violation of 5 U.S.C. § 706(2)(A) and § 706(2)(D).

PRAYER FOR RELIEF

36. The Sierra Club prays for relief and judgment as follows:

A. A declaration that the Cheney Energy Task Force and Task Force Sub-Groups are advisory committees under FACA and must comply with all requirements of FACA, 5 U.S.C. Appendix 2, and other applicable laws.

B. A declaration that the defendants have violated FACA in the following ways:

i. Defendants violated section 10(a)(1) of FACA by failing to open each meeting of the Cheney Energy Task Force and Task Force Sub-Groups to the public.

ii. Defendants violated section 10(a)(2) of FACA by failing to publish timely notice of each meeting of the Energy Task Force and Task Force Sub-Groups in the Federal Register.

iii. Defendants violated section 10(a)(3) of FACA by failing to allow the Sierra Club and other interested persons to attend, appear before, or file statements with the Cheney Energy Task Force and Task Force Sub-Groups.

iv. Defendants violated section 10(b) of FACA by failing to make available for public inspection and copying the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by the Cheney Energy Task Force and Task Force Sub-Groups.

v. Defendants violated section 10(c) of FACA by failing to keep detailed minutes of each meeting of the Energy Task Force and Task Force Sub-Groups, certified as accurate, that contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached and copies of all reports received, issued, or approved by the Cheney Energy Task Force and Task Force Sub-Groups.

vi. Defendants violated section 9(a) of FACA by establishing the Task Force Sub-Groups without specific authorization by statute or by the President and without a determination, published in the Federal Register, that establishing the sub-groups is in the public interest.

vii. Defendants violated section 9(c) of FACA by allowing the Cheney Energy Task Force and Task Force Sub-Groups to meet and take action without filing an advisory committee charter containing the information required by section 9(c) of FACA.

C. A declaration that the defendants have failed to perform a nondiscretionary duty to comply with the procedural requirements of FACA including those set forth in the preceding paragraph as items (i) through (vii).

D. A declaration that each violation of FACA described above as items (i) through (vii) in paragraph B is arbitrary and capricious and not in accordance with law, and without observance of procedure required by law, in violation of 5 U.S.C. § 706(2)(A) and (D).

E. A permanent injunction prohibiting the defendants from convening, conducting or holding any activities of the Cheney Energy Task Force and Task Force Sub-Groups that are not in full compliance with sections 5, 9 and 10(a)-(c) of FACA.

F. A permanent injunction ordering the defendants to provide to the Sierra Club, within ten working days and at no cost to the Sierra Club, a full and complete copy of all records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by the Cheney Energy Task Force or Task Force Sub-Groups, irrespective of whether any such document otherwise is or could be exempt from disclosure under 5 U.S.C. § 552(b)(2), (5) or (7)-(9).

G. A permanent injunction ordering the defendants to prepare and deliver to plaintiff, within 10 working days, detailed minutes of each meeting of the Cheney Energy Task Force and Task Force Sub-Groups, certified as accurate, that contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached and copies of all reports received, issued, or approved by the Cheney Energy Task Force and Task Force Sub-Groups.

H. An award to the Sierra Club of its costs of suit.

I. An award of such other relief as this Court deems appropriate.

DATED: January 25, 2002.

Respectfully submitted,

Alex Levinson

Patrick Gallagher
Alex Levinson
Sierra Club
Attorneys of Record

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CERTIFICATION OF INTERESTED PARTIES OR ENTITIES

Pursuant to General Order No. 48, the undersigned certifies that as of this date, there is no such interest to report.

Dated: January 25, 2002

Alex Levinson

Patrick Gallagher
Alex Levinson
Joanne Spalding
Sierra Club
Attorneys of Record

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70	*Filed:* 04/25/2002 *Entered:* 04/25/2002 *Terminated:* 04/25/2002	Motion for Leave to File Excess Pages	
	Docket Text: MOTION for Leave to File Excess Pages *by Andrew Lundquist and* by SPENCER ABRAHAM, JOSEPH M. ALLBAUGH, JOSHUA BOLTON, RICHARD CHENEY, MITCHELL E. DANIELS JR.,, DONALD EVANS, LARRY LINDSEY, NORMAN MINETA, NATIONAL ENERGY POLICY DEVELOPMENT GROUP, GALE NORTON, PAUL O'NEILL, COLIN POWELL, ANN M. VENEMAN, CHRISTINE T. WHITMAN, PATRICK H. WOOD III. (Buchholz, David)		
71	*Filed:* 04/26/2002 *Entered:* 04/26/2002	Amicus Curiae Appearance	
	Docket Text: (ENTERED IN ERROR)Amicus Curiae APPEARANCE entered on behalf of JUDICAL WATCH, INC.,. (Attachments: # (1))(Orfanedes, Paul) Modified on 4/29/2002 (td,).		
72	*Filed:* 04/26/2002 *Entered:* 04/26/2002	Reply in Support	
	Docket Text: REPLY in support of motion re [34], [55] *by Andrew Lundquist and* filed by SPENCER ABRAHAM, JOSEPH M. ALLBAUGH, JOSHUA BOLTON, RICHARD CHENEY, MITCHELL E. DANIELS JR.,, DONALD EVANS, LARRY LINDSEY, NORMAN MINETA, NATIONAL ENERGY POLICY DEVELOPMENT GROUP, GALE NORTON, PAUL O'NEILL, COLIN POWELL, ANN M. VENEMAN, CHRISTINE T. WHITMAN, PATRICK H. WOOD III. (Buchholz, David)		
73	*Filed:* 04/29/2002 *Entered:* 04/29/2002	Reply to opposition to Motion	
	Docket Text: REPLY to opposition to motion re [34] *Amicus Brief* filed by JUDICAL WATCH, INC.,. (Attachments: # (1))(Orfanedes, Paul)		
74	*Filed:* 04/29/2002 *Entered:* 04/29/2002	Order	
	Docket Text: ORDER moving hearing.Signed by Judge Emmet G. Sullivan on 4/29/2002. (lcegs2,)		
75	*Filed:* 05/21/2002 *Entered:* 05/21/2002	Order	
	Docket Text: ORDER that there will be no oral argument by individual private defendants at May 23, 2002 hearing.Signed by Judge Emmet. G. Sullivan on 5/21/2002. (lcegs2,)		
76	*Filed:* 05/21/2002 *Entered:* 05/21/2002	Order	
	Docket Text: ORDER setting forth questions to be addressed at hearing.Signed by Judge Emmet G. Sullivan on 5/21/2002. (lcegs2,)		
77	*Filed:* 05/22/2002 *Entered:* 05/22/2002	Attorney Appearance	
	Docket Text: ATTORNEY APPEARANCE. (Gallagher, Patrick)		
--	*Filed:* 05/23/2002 *Entered:* 05/24/2002	Motion Hearing	
	Docket Text: Minute Entry: Motion Hearing held on 5/23/2002 before Emmet G. Sullivan; chambers to electronically issue order (Court Reporter Gordon Slodysko.) (clv,)		

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THE WHITE HOUSE

WASHINGTON

January 29, 2001

MEMORANDUM FOR THE VICE PRESIDENT
THE SECRETARY OF THE TREASURY
THE SECRETARY OF THE INTERIOR
THE SECRETARY OF AGRICULTURE
THE SECRETARY OF COMMERCE
THE SECRETARY OF TRANSPORTATION
THE SECRETARY OF ENERGY
THE DIRECTOR OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY
THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY
THE ASSISTANT TO THE PRESIDENT AND DEPUTY CHIEF OF STAFF FOR POLICY
THE ASSISTANT TO THE PRESIDENT FOR ECONOMIC POLICY
THE ASSISTANT TO THE PRESIDENT FOR INTERGOVERNMENTAL AFFAIRS

SUBJECT: National Energy Policy Development Group

One of the greatest challenges facing the private sector and Federal, State, and local governments is ensuring that energy resources are available to meet the needs of our citizens and our economy. To help address this challenge, I am asking the Vice President to lead the development of a national energy policy designed to help the private sector, and government at all levels, promote dependable, affordable, and environmentally sound production and distribution of energy for the future. Accordingly, I direct as follows:

1. Establishment. There is hereby established within the Executive Office of the President an Energy Policy Development Group, consisting of the following officers of the Federal Government: the Vice President, Secretary of the Treasury, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Transportation, Secretary of Energy, Director of the Federal Emergency Management Agency, Administrator of the Environmental Protection Agency, Assistant to the President and Deputy Chief of Staff for Policy, Assistant to the President for Economic Policy, and Assistant to the President for

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Action to Dismiss
(PDC No 1201000550)

Intergovernmental Affairs. The Vice President may also invite the Chairman of the Federal Energy Regulatory Commission to participate. The Vice President may invite the participation of the Secretary of State when the work of the Energy Policy Development Group involves international affairs and, as appropriate, other officers of the Federal Government. The Vice President shall preside at meetings of the Energy Policy Development Group, shall direct its work, and may establish subordinate working groups to assist the Energy Policy Development Group in its work.

2. Mission. The mission of the Energy Policy Development Group shall be to develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy. In carrying out this mission, the Energy Policy Development Group's functions shall be to gather information, deliberate, and, as specified in this memorandum, make recommendations to the President. Its activities shall not supplant the authority and responsibility of State and local governments for handling energy production, purchase, and distribution difficulties.

3. Reports. The Energy Policy Development Group should submit reports to me as follows: (a) in the near-term, an assessment of the difficulties experienced by the private sector, and State and local governments in ensuring that local and regional energy needs are met, and (b) as soon thereafter as practicable, a report setting forth a recommended national energy policy designed to help the private sector, and as necessary and appropriate State and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy for the future. The recommended national energy policy should take into consideration, among other things, (i) the growing demand for energy, locally, regionally, and nationally, in the United States and in the world, (ii) the potential for local, regional, or national disruptions in energy supplies or distribution, and (iii) the need for responsible policies to protect the environment and promote conservation, and (iv) the need for modernization of energy generation, supply, and transmission infrastructure.

4. Funding. The Department of Energy shall, to the maximum extent permitted by law and consistent with the need for funding determined by the Vice President after consultation with the Secretary of Energy, make funds appropriated to the Department of Energy available to pay the costs of personnel to support the activities of the Energy Policy Development Group. If a situation arises in which Department of Energy appropriations are not available for a category of expenses of the Energy

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Policy Development Group, the Vice President or his designee should submit to me a proposal for use, consistent with applicable law, of the minimum necessary portion of any appropriation available to the President to meet the unanticipated need. The Vice President may also obtain, through the Assistant to the President for Economic Policy, such assistance from the National Economic Council staff as the Vice President deems necessary.

5. Termination. The Energy Policy Development Group shall terminate no later than the end of fiscal year 2001.

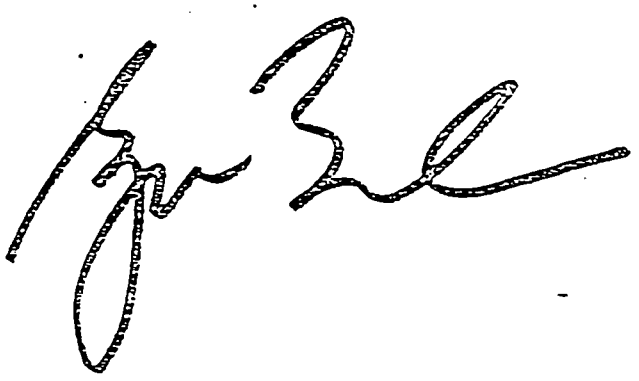

cc: Secretary of State
Chairman, Federal Energy Regulatory Commission

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78	*Filed:* 05/23/2002 *Entered:* 05/23/2002	Order on Motion to Dismiss	
	Docket Text: ORDERSigned by Judge Emmet G. Sullivan on 5/23/2002. (lcegs2,)		
78	*Filed:* 05/23/2002 *Entered:* 05/23/2002	Order on Motion to Dismiss	
	Docket Text: ORDERSigned by Judge Emmet G. Sullivan on 5/23/2002. (lcegs2,)		
78	*Filed:* 05/23/2002 *Entered:* 05/23/2002	Order on Motion to Dismiss	
	Docket Text: ORDERSigned by Judge Emmet G. Sullivan on 5/23/2002. (lcegs2,)		
79	*Filed:* 05/28/2002 *Entered:* 05/28/2002	Notice (Other)	
	Docket Text: NOTICE *of Praecipe* by SIERRA CLUB (Gallagher, Patrick)		
80	*Filed:* 05/28/2002 *Entered:* 05/28/2002	Amended Complaint	
	Docket Text: AMENDED COMPLAINT *Second.* Filed by JUDICAL WATCH, INC.,. (Attachments: # (1) Exhibit 1# (2) Exhibit 2# (3) Exhibit 3# (4) Exhibit 4# (5) Exhibit 5# (6) Exhibit 6# (7) Exhibit 7# (8) Exhibit 8# (9) Exhibit 9# (10) Exhibit 10# (11) Exhibit 11)(Orfanedes, Paul)		
81	*Filed:* 05/29/2002 *Entered:* 05/29/2002	Order	
	Docket Text: ORDER Signed by Judge Emmet G. Sullivan on 05/29/2002. (lcegs2,)		
82	*Filed:* 05/29/2002 *Entered:* 05/29/2002 *Terminated:* 06/17/2002	Motion for Leave to File	
	Docket Text: First MOTION for Leave to File *Second Amended Complaint* by JUDICAL WATCH, INC.,. (Attachments: # (1) Appendix Second Amended Complaint# (2) Exhibit 1# (3) Exhibit 2# (4) Exhibit 3# (5) Exhibit 4# (6) Exhibit 5# (7) Exhibit 6# (8) Exhibit 7# (9) Exhibit 8# (10) Exhibit 9# (11) Exhibit 10# (12) Exhibit 11)(Orfanedes, Paul)		
83	*Filed:* 05/31/2002 *Entered:* 05/31/2002	Order	
	Docket Text: ORDER Signed by Judge Emmet G. Sullivan on 5/31/2002. (lcegs2)		
84	*Filed:* 06/03/2002 *Entered:* 06/03/2002 *Terminated:* 07/11/2002	Motion to Dismiss	
	Docket Text: MOTION to Dismiss *and Supplemental Memorandum in Support of Motion* by SPENCER ABRAHAM, JOSEPH M. ALLBAUGH, JOSHUA BOLTON, RICHARD CHENEY, MITCHELL E. DANIELS JR.,, DONALD EVANS, LARRY LINDSEY, NORMAN MINETA, NATIONAL ENERGY POLICY DEVELOPMENT GROUP, GALE NORTON, PAUL O'NEILL, COLIN POWELL, ANN M. VENEMAN, CHRISTINE T. WHITMAN, PATRICK H. WOOD III. (Buchholz, David)		
87	*Filed:* 06/04/2002 *Entered:* 06/10/2002	Transcript	
	Docket Text: TRANSCRIPT for dates May 23, 2002. (td,)		

85	*Filed:* 06/07/2002 *Entered:* 06/07/2002	Memorandum in Opposition	
	Docket Text: Memorandum in opposition to motion re [84] *Motion to Dismiss and Supplemental Memorandum in Support of Motion* filed by JUDICAL WATCH, INC.,. (Orfanedes, Paul)		
86	*Filed:* 06/10/2002 *Entered:* 06/10/2002	Notice (Other)	
	Docket Text: NOTICE *of Withdrawal of Appearance by Aaron Isherwood* by SIERRA CLUB (Gallagher, Patrick)		
88	*Filed:* 06/11/2002 *Entered:* 06/11/2002 *Terminated:* 06/17/2002	Motion for Extension of Time to File Answer	
	Docket Text: Unopposed MOTION for Extension of Time to File Answer *to Sierra Club Complaint by Andrew Lundquist and* by SPENCER ABRAHAM, RICHARD CHENEY, DONALD EVANS, NORMAN MINETA, NATIONAL ENERGY POLICY DEVELOPMENT GROUP, GALE NORTON, PAUL O'NEILL, ANN M. VENEMAN, CHRISTINE T. WHITMAN. (Buchholz, David)		
89	*Filed:* 06/17/2002 *Entered:* 06/17/2002	Order on Motion for Leave to File	
	Docket Text: ORDER granting Motion for Leave to File [82] Signed by Judge Emmet G. Sullivan on 6/17/2002. (lcegs2,)		
90	*Filed:* 06/17/2002 *Entered:* 06/17/2002	Order on Motion for Extension of Time to Answer	
	Docket Text: ORDER granting Motion for Extension of Time to Answer [88].Signed by Judge Emmet G. Sullivan on 6/17/2002. (lcegs2,)		
91	*Filed:* 06/17/2002 *Entered:* 06/17/2002	Notice (Other)	
	Docket Text: NOTICE *OF SUBSTITUTION OF COUNSEL, by ANDREW LUNDQUIST and* by SPENCER ABRAHAM, JOSEPH M. ALLBAUGH, JOSHUA BOLTON, RICHARD CHENEY, MITCHELL E. DANIELS JR.,, DONALD EVANS, LARRY LINDSEY, NORMAN MINETA, NATIONAL ENERGY POLICY DEVELOPMENT GROUP, GALE NORTON, PAUL O'NEILL, COLIN POWELL, ANN M. VENEMAN, CHRISTINE T. WHITMAN, PATRICK H. WOOD III (Paisner, Jennifer)		
92	*Filed:* 07/11/2002 *Entered:* 07/11/2002	Memorandum & Opinion	
	Docket Text: MEMORANDUM OPINION. Signed by Judge Emmet G. Sullivan on 7/11/2002. (lcegs2,)		
93	*Filed:* 07/11/2002 *Entered:* 07/11/2002	Order	
	Docket Text: ORDER. Signed by Judge Emmet G. Sullivan on 7/11/2002. (lcegs2,)		
94	*Filed:* 07/19/2002 *Entered:* 07/19/2002	Status Report	
	Docket Text: STATUS REPORT - *DISCOVERY PLAN* by SIERRA CLUB. (Attachments: # (1) Exhibit A# (2) Exhibit B)(Gallagher, Patrick)		

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Doc. No.	Dates	Description
95	*Filed:* 07/25/2002 *Entered:* 07/25/2002	Response to Document
	Docket Text: RESPONSE (ANSWER) to [80] *JUDICIAL WATCH'S SECOND AMENDED COMPLAINT* by SPENCER ABRAHAM, JOSEPH M. ALLBAUGH, JOSHUA BOLTON, RICHARD CHENEY, MITCHELL E. DANIELS JR.,, DONALD EVANS, LARRY LINDSEY, NORMAN MINETA, NATIONAL ENERGY POLICY DEVELOPMENT GROUP, GALE NORTON, PAUL O'NEILL, COLIN POWELL, ANN M. VENEMAN, CHRISTINE T. WHITMAN, PATRICK H. WOOD III. (Paisner, Jennifer) Modified on 7/25/2002 (jeb,).	
96	*Filed:* 07/26/2002 *Entered:* 07/26/2002 *Terminated:* 07/26/2002	Motion for Extension of Time to File
	Docket Text: Unopposed MOTION for Extension of Time to File *Objections to Plaintiffs' Proposed Discovery Plan by Andrew Lundquist and* by SPENCER ABRAHAM, JOSEPH M. ALLBAUGH, JOSHUA BOLTON, RICHARD CHENEY, MITCHELL E. DANIELS JR.,, DONALD EVANS, LARRY LINDSEY, NORMAN MINETA, NATIONAL ENERGY POLICY DEVELOPMENT GROUP, GALE NORTON, PAUL O'NEILL, COLIN POWELL, ANN M. VENEMAN, CHRISTINE T. WHITMAN, PATRICK H. WOOD III. (Paisner, Jennifer)	
97	*Filed:* 07/26/2002 *Entered:* 07/26/2002	Order on Motion for Extension of Time to File
	Docket Text: ORDER granting in part Motion for Extension of Time to File [96] and setting forth deadlines. Signed by Judge Emmet G. Sullivan on 7/26/2002. (lcegs2,)	
98	*Filed:* 07/29/2002 *Entered:* 07/29/2002	Response to Document
	Docket Text: RESPONSE to [94] *And Objections to Plaintiffs' Proposed Discovery Plan by Andrew Lundquist and* by SPENCER ABRAHAM, JOSEPH M. ALLBAUGH, JOSHUA BOLTON, RICHARD CHENEY, MITCHELL E. DANIELS JR.,, DONALD EVANS, LARRY LINDSEY, NORMAN MINETA, NATIONAL ENERGY POLICY DEVELOPMENT GROUP, GALE NORTON, PAUL O'NEILL, COLIN POWELL, ANN M. VENEMAN, CHRISTINE T. WHITMAN, PATRICK H. WOOD III. (Paisner, Jennifer)	
99	*Filed:* 08/01/2002 *Entered:* 08/01/2002	Order
	Docket Text: ORDER rescheduling time of Status Conference on 8/2/2002 to 10:00 AM in Courtroom 1, Judge Sullivan.Signed by Judge Emmet G. Sullivan on 8/1/2002. (lcegs2,)	
99	*Filed:* 08/01/2002 *Entered:* 08/01/2002	Set Hearings
	Docket Text: ORDER rescheduling time of Status Conference on 8/2/2002 to 10:00 AM in Courtroom 1, Judge Sullivan.Signed by Judge Emmet G. Sullivan on 8/1/2002. (lcegs2,)	
100	*Filed:* 08/01/2002 *Entered:* 08/01/2002	Notice (Other)
	Docket Text: NOTICE *Plaintiff's Reply in Support of their Proposed Discovery Plan* by JUDICAL WATCH, INC., (Orfanedes, Paul)	
--	*Filed:* 08/02/2002 *Entered:* 08/06/2002	Status Conference

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	Docket Text: Minute Entry: Status Conference held on 8/2/2002 before Emmet G. Sullivan Status Conference set for 9/13/2002 10:00 AM in Courtroom 1.(Court Reporter Frank Rangus.) (clv,)		
--	*Filed:* 08/02/2002 *Entered:* 08/06/2002	Set Hearings	
	Docket Text: Minute Entry: Status Conference held on 8/2/2002 before Emmet G. Sullivan Status Conference set for 9/13/2002 10:00 AM in Courtroom 1.(Court Reporter Frank Rangus.) (clv,)		
101	*Filed:* 08/02/2002 *Entered:* 08/02/2002	Order	
	Docket Text: ORDER approving plaintiffs' proposed discovery plan and scheduling Status Conference for 9/13/2002 10:00 AM in Courtroom 1. Signed by Judge Emmet G. Sullivan on 8/2/2002. (lcegs2,)		
101	*Filed:* 08/02/2002 *Entered:* 08/02/2002	Set Hearings	
	Docket Text: ORDER approving plaintiffs' proposed discovery plan and scheduling Status Conference for 9/13/2002 10:00 AM in Courtroom 1. Signed by Judge Emmet G. Sullivan on 8/2/2002. (lcegs2,)		
102	*Filed:* 08/05/2002 *Entered:* 08/06/2002	Transcript	
	Docket Text: TRANSCRIPT for dates August 2, 2002 *by Court Reporter: Frank J. Rangus.* (td,)		
103	*Filed:* 09/03/2002 *Entered:* 09/03/2002	Response to Discovery	
	Docket Text: RESPONSE to Discovery Request from Judicial Watch/Sierra Club, by CHRISTINE T. WHITMAN. (Millet, Thomas)		
104	*Filed:* 09/03/2002 *Entered:* 09/03/2002	Answer to Interrogatories	
	Docket Text: ANSWER to Interrogatories from JudicialWatch/Sierra Club by CHRISTINE T. WHITMAN. (Millet, Thomas)		
105	*Filed:* 09/03/2002 *Entered:* 09/03/2002	Answer to Interrogatories	
	Docket Text: ANSWER to Interrogatories from Judicial Watch/ Sierra Club by JOSEPH M. ALLBAUGH. (Millet, Thomas)		
106	*Filed:* 09/03/2002 *Entered:* 09/03/2002	Response to Discovery	
	Docket Text: RESPONSE to Discovery Request from Judicial Watch/Sierra Club, by JOSEPH M. ALLBAUGH. (Millet, Thomas)		
107	*Filed:* 09/03/2002 *Entered:* 09/03/2002	Response to Discovery	
	Docket Text: RESPONSE to Discovery Request from Judicial Watch/Sierra Club, by PAUL O'NEILL. (Millet, Thomas)		
108	*Filed:* 09/03/2002 *Entered:* 09/03/2002	Answer to Interrogatories	
	Docket Text: ANSWER to Interrogatories from Judicial Watch/Sierra Club by PATRICK H. WOOD III. (Millet, Thomas)		

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109	*Filed:* 09/03/2002 *Entered:* 09/03/2002	Answer to Interrogatories	
	Docket Text: ANSWER to Interrogatories from Judicial watch/Sierra Club by ANN M. VENEMAN. (Millet, Thomas)		
110	*Filed:* 09/03/2002 *Entered:* 09/03/2002	Response to Discovery	
	Docket Text: RESPONSE to Discovery Request from Judicial Watch/Sierra Club, by ANN M. VENEMAN. (Millet, Thomas)		
111	*Filed:* 09/03/2002 *Entered:* 09/03/2002	Answer to Interrogatories	
	Docket Text: ANSWER to Interrogatories from Judicial Watch/Sierra Club by PAUL O'NEILL. (Millet, Thomas)		
112	*Filed:* 09/03/2002 *Entered:* 09/03/2002	Answer to Interrogatories	
	Docket Text: ANSWER to Interrogatories from Judicial Watch/Sierra Club by PAUL O'NEILL. (Millet, Thomas)		
113	*Filed:* 09/03/2002 *Entered:* 09/03/2002	Response to Discovery	
	Docket Text: RESPONSE to Discovery Request from Judicial Watch/Sierra Club, by NORMAN MINETA. (Millet, Thomas)		
114	*Filed:* 09/03/2002 *Entered:* 09/03/2002	Answer to Interrogatories	
	Docket Text: ANSWER to Interrogatories from Judicial Watch/Sierra Club by NORMAN MINETA. (Millet, Thomas)		
115	*Filed:* 09/03/2002 *Entered:* 09/03/2002	Answer to Interrogatories	
	Docket Text: ANSWER to Interrogatories from Judicial Watch/Sierra Club by DONALD EVANS. (Millet, Thomas)		
116	*Filed:* 09/03/2002 *Entered:* 09/03/2002	Answer to Interrogatories	
	Docket Text: ANSWER to Interrogatories from Judicial Watch/Sierra Club by DONALD EVANS. (Millet, Thomas)		
117	*Filed:* 09/03/2002 *Entered:* 09/03/2002	Response to Discovery	
	Docket Text: RESPONSE to Discovery Request from Judicial watch/Sierra Club, by DONALD EVANS. (Millet, Thomas)		
118	*Filed:* 09/03/2002 *Entered:* 09/03/2002	Response to Discovery	
	Docket Text: RESPONSE to Discovery Request from Judicial Watch/Sierra Club, by COLIN POWELL. (Millet, Thomas)		
119	*Filed:* 09/03/2002 *Entered:* 09/03/2002	Response to Discovery	

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	Docket Text: RESPONSE to Discovery Request from Judicial Watch/Sierra Club, by NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (Millet, Thomas)		
120	*Filed:* *Entered:* *Terminated:*	09/03/2002 09/03/2002 10/17/2002	Motion for Protective Order
	Docket Text: MOTION for Protective Order by RICHARD CHENEY. (Millet, Thomas)		

Doc. No.	Dates		Description
121	*Filed:* *Entered:* *Terminated:*	09/03/2002 09/03/2002 10/17/2002	Motion for Protective Order
	Docket Text: MOTION for Protective Order *Memorandum in support* by RICHARD CHENEY. (Millet, Thomas)		
122	*Filed:* *Entered:*	09/03/2002 09/03/2002	Affidavit
	Docket Text: AFFIDAVIT re [120], [121] *by Karen Knutsen* by RICHARD CHENEY. (Millet, Thomas)		
123	*Filed:* *Entered:*	09/03/2002 09/03/2002	Answer to Interrogatories
	Docket Text: ANSWER to Interrogatories from Judicial Watch/Sierra Club by GALE NORTON. (Millet, Thomas)		
124	*Filed:* *Entered:*	09/03/2002 09/03/2002	Answer to Interrogatories
	Docket Text: ANSWER to Interrogatories from Judicial Watch/Sierra Club by MITCHELL E. DANIELS JR.,. (Millet, Thomas) Modified on 9/4/2002 (td,). Modified on 9/4/2002 (td,).		
125	*Filed:* *Entered:*	09/03/2002 09/03/2002	Response to Discovery
	Docket Text: RESPONSE to Discovery Request from Judicial Watch/Sierra Club, by MITCHELL E. DANIELS JR.,. (Millet, Thomas) Modified on 9/4/2002 (td,). Modified on 9/4/2002 (td,).		
126	*Filed:* *Entered:*	09/03/2002 09/03/2002	Answer to Interrogatories
	Docket Text: ANSWER to Interrogatories from Judicial Watch/Sierra Club by COLIN POWELL. (Millet, Thomas) Modified on 9/4/2002 (td,). Modified on 9/4/2002 (td,).		
127	*Filed:* *Entered:*	09/03/2002 09/03/2002	Answer to Interrogatories
	Docket Text: ANSWER to Interrogatories from Judicial Watch/Sierra Club by SPENCER ABRAHAM. (Millet, Thomas) Modified on 9/4/2002 (td,). Modified on 9/4/2002 (td,).		
128	*Filed:* *Entered:*	09/03/2002 09/03/2002	Response to Discovery
	Docket Text: RESPONSE to Discovery Request from Judicial Watch/Sierra Club, by SPENCER ABRAHAM. (Millet, Thomas) Modified on 9/4/2002 (td,). Modified on 9/4/2002 (td,).		
129	*Filed:* *Entered:*	09/03/2002 09/03/2002	Order

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	Docket Text: ORDER. Signed by Judge Emmet G. Sullivan on September 3, 2002. (lcegs1)		
130	*Filed:* 09/04/2002 *Entered:* 09/04/2002	Order	
	Docket Text: ORDER. Signed by Judge Emmet G. Sullivan on September 4, 2002. (lcegs1,)		
131	*Filed:* 09/05/2002 *Entered:* 09/05/2002	Answer to Interrogatories	
	Docket Text: ANSWER to Interrogatories from Judicial watch/Sierra Club by JOSEPH M. ALLBAUGH. (Millet, Thomas)		
132	*Filed:* 09/06/2002 *Entered:* 09/06/2002	Response to any document	
	Docket Text: RESPONSE to any document re [120] *Preliminary Response* filed by SIERRA CLUB. (Gallagher, Patrick)		
133	*Filed:* 09/06/2002 *Entered:* 09/06/2002	Memorandum in Opposition	
	Docket Text: Memorandum in opposition to motion re [120], [121] filed by JUDICAL WATCH, INC.,. (Attachments: # (1) Exhibit 1# (2) Exhibit 2)(Orfanedes, Paul)		
--	*Filed:* 09/09/2002 *Entered:* 09/09/2002	Set/Reset Hearings	
	Docket Text: Status hearing set for September 13, 2002 cancelled. Status hearing set for 9/30/2002 at 11:00 AM in Courtroom 1.(lcegs2,)		
134	*Filed:* 09/09/2002 *Entered:* 09/09/2002	Reply in Support	
	Docket Text: REPLY in support of motion re [120], [121] *for a Protective Order* filed by RICHARD CHENEY. (Millet, Thomas)		
135	*Filed:* 09/09/2002 *Entered:* 09/09/2002	Order	
	Docket Text: ORDER. Signed by Judge Emmet G. Sullivan on September 9, 2002. (lcegs1)		
136	*Filed:* 09/10/2002 *Entered:* 09/10/2002 *Terminated:* 09/11/2002	Motion for Extension of Time to File	
	Docket Text: MOTION for Extension of Time to File *Motion to Compel* by SIERRA CLUB. (Gallagher, Patrick)		
137	*Filed:* 09/11/2002 *Entered:* 09/11/2002	Response to any document	
	Docket Text: RESPONSE to any document re [136] *Sierra Club Motion for Extension of time to file motions to compel* filed by NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (Millet, Thomas)		
138	*Filed:* 09/11/2002 *Entered:* 09/11/2002	Order on Motion for Extension of Time to File	
	Docket Text: ORDER granting Motion for Extension of Time to File [136]. Signed by Judge Emmet G. Sullivan on September 11, 2002. (lcegs1)		
139	*Filed:* 09/16/2002 *Entered:* 09/16/2002	Memorandum in Opposition	

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	Docket Text: Memorandum in opposition to motion re [120] *Supplemental Opposition* filed by SIERRA CLUB. (Gallagher, Patrick)		
140	*Filed:* *Entered:*	09/16/2002 09/16/2002	Memorandum in Opposition
	Docket Text: Memorandum in opposition to motion re [120], [121] *for protective order* filed by JUDICAL WATCH, INC.,. (Orfanedes, Paul)		
141	*Filed:* *Entered:*	09/23/2002 09/23/2002	Reply in Support
	Docket Text: REPLY in support of motion re [121] *Motion for Protective Order* filed by NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (Millet, Thomas)		
142	*Filed:* *Entered:*	09/30/2002 09/30/2002	Motion to Compel
	Docket Text: ENTERED IN ERROR..... MOTION to Compel by SIERRA CLUB. (Attachments: # (1) Exhibit A - K)(Gallagher, Patrick) Modified on 9/30/2002 (adc,).		
143	*Filed:* *Entered:*	09/30/2002 09/30/2002	Motion to Compel
	Docket Text: MOTION to Compel *CORRECTED* by SIERRA CLUB. (Attachments: # (1) Exhibit Declaration of Sanjay Narayan in Support of Motion to Compel# (2) Exhibit Exhibits A - K to Declaration of Sanjay Narayan in Support of Motion to Compel)(Gallagher, Patrick)		
144	*Filed:* *Entered:*	09/30/2002 09/30/2002	Motion to Compel
	Docket Text: MOTION to Compel *And Motion for order to Show Cause* by JUDICAL WATCH, INC.,. (Orfanedes, Paul)		
145	*Filed:* *Entered:*	09/30/2002 09/30/2002	Motion to Compel
	Docket Text: MOTION to Compel *Motion to Shorten Time to Respond to Motion to Compel* by JUDICAL WATCH, INC.,. (Attachments: # (1) Exhibit)(Orfanedes, Paul)		
146	*Filed:* *Entered:*	10/02/2002 10/02/2002	Memorandum in Opposition
	Docket Text: Memorandum in opposition to motion re [145] *Motion to Shorten Time* filed by NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (Millet, Thomas)		
--	*Filed:* *Entered:*	10/04/2002 10/04/2002	Set/Reset Hearings
	Docket Text: Set/Reset Hearings: Omnibus Hearing set for 10/10/2002 10:00 AM in Courtroom 1. (lcegs1)		
147	*Filed:* *Entered:*	10/04/2002 10/04/2002	Order
	Docket Text: ORDER. Signed by Judge Emmet G. Sullivan on October 4, 2002. (lcegs1)		
148	*Filed:* *Entered:*	10/08/2002 10/08/2002	Scheduling Order
	Docket Text: SCHEDULING ORDER: Omnibus Hearing set for 10/17/2002 10:00 AM. Signed by Judge Emmet G. Sullivan on October 8, 2002. (lcegs2)		

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Doc. No.	Dates	Description
149	*Filed:* 10/11/2002 *Entered:* 10/11/2002 *Terminated:* 10/11/2002	Motion for Miscellaneous Relief
	Docket Text: ENTERED IN ERROR. . . .MOTION motion for leave to file supplemental memorandum re [144] *Plaintiff Judicial Watch's Motion to Compel and for Order to Show Cause* by JUDICAL WATCH, INC.,. (Orfanedes, Paul) Modified on 10/15/2002 (td,).	
150	*Filed:* 10/11/2002 *Entered:* 10/11/2002 *Terminated:* 10/11/2002	Motion for Miscellaneous Relief
	Docket Text: ENTERED IN ERROR. . . .MOTION for Leave to File Supplement to Motion for Order to Show Cause re [144] *Motion to Compel and for Order to Show Cause* by JUDICAL WATCH, INC.,. (Orfanedes, Paul) Modified on 10/15/2002 (td,).	
151	*Filed:* 10/11/2002 *Entered:* 10/11/2002	Notice (Other)
	Docket Text: ENTERED IN ERROR. . . .NOTICE re [149] *Plaintiff Judicial Watch's Amended Supplemental Memorandum in Support of Plaintiff's Motion to Compel and for Order to Show Cause* by JUDICAL WATCH, INC., (Orfanedes, Paul) Modified on 10/15/2002 (td,).	
152	*Filed:* 10/15/2002 *Entered:* 10/15/2002	Notice (Other)
	Docket Text: ENTERED IN ERROR. . . .NOTICE re [149] *of Filing Plaintiff Judicial Watch's Amended-Supplemental Memorandum in Support of Plaintiff's Motion to Compel and Motion for Order to Show Cause Why Defendants Should Not Be Held in Contempt (WITH EXHIBITS)* by JUDICAL WATCH, INC., (Attachments: # (1) Exhibit 1# (2) Exhibit 2# (3) Exhibit 3# (4) Exhibit 4)(Orfanedes, Paul) Modified on 10/18/2002 (td,).	
153	*Filed:* 10/16/2002 *Entered:* 10/16/2002	Notice (Other)
	Docket Text: ENTERED IN ERROR. . . .NOTICE re [152] *Praecipe with Affidavit of Larry Klayman in Support of Plaintiff Judicial Watch's Amended-Supplemental Memorandum in Support of Motion to Compel and Motion for Order to Show Cause* by JUDICAL WATCH, INC., (Attachments: # (1) Exhibit Affidavit of Larry Klayman)(Orfanedes, Paul) Modified on 10/18/2002 (td,).	
--	*Filed:* 10/17/2002 *Entered:* 10/17/2002	Omnibus Hearing
	Docket Text: Minute Entry: Omnibus Hearing held on 10/17/2002 before Judge Emmet G. Sullivan Defendants shall produce non-privilege documents and privilege log by 11/5/02; Motion for reconsideration, denied; Motion for protective order, denied; Oral motion by defendants to extend time to 10/28/02 to respond to motion to compel, granted; defendants shall file a motion to stay by 12:00 noon on 10/21/02; response due 10/24/02 and reply due 10/25/02; Motion Hearing set for 10/31/2002 01:00 PM in Courtroom 1.(Court Reporter Kay Moomey.)(bm)	
--	*Filed:* 10/17/2002 *Entered:* 10/17/2002	Set Hearings
	Docket Text: Minute Entry: Omnibus Hearing held on 10/17/2002 before Judge Emmet G. Sullivan Defendants shall produce non-privilege documents and privilege log by 11/5/02; Motion	

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	for reconsideration, denied; Motion for protective order, denied; Oral motion by defendants to extend time to 10/28/02 to respond to motion to compel, granted; defendants shall file a motion to stay by 12:00 noon on 10/21/02; response due 10/24/02 and reply due 10/25/02; Motion Hearing set for 10/31/2002 01:00 PM in Courtroom 1.(Court Reporter Kay Moomey.)(bm)		
154	*Filed:* *Entered:*	10/17/2002 10/17/2002	Order on Motion for Protective Order
	Docket Text: ORDER denying Motion for Protective Order [120], denying Motion for Protective Order [121], setting briefing schedule and hearing date for motion to stay. Signed by Judge Emmet G. Sullivan on October 17, 2002.(lcegs2)		
154	*Filed:* *Entered:*	10/17/2002 10/17/2002	Order on Motion for Protective Order
	Docket Text: ORDER denying Motion for Protective Order [120], denying Motion for Protective Order [121], setting briefing schedule and hearing date for motion to stay. Signed by Judge Emmet G. Sullivan on October 17, 2002.(lcegs2)		
155	*Filed:* *Entered:*	10/18/2002 10/18/2002	Order
	Docket Text: ORDER granting defendants' motion for extension of time to respond to plaintiffs' motions to compel. Signed by Judge Emmet G. Sullivan on October 18, 2002. (lcegs2)		
156	*Filed:* *Entered:* *Terminated:*	10/18/2002 10/18/2002 10/21/2002	Motion for Miscellaneous Relief
	Docket Text: MOTION Plaintiff Judicial Watch's Motion for Leave to File Plaintiff Judicial Watch's Amended-Supplemental Memorandum by JUDICAL WATCH, INC.,. (Attachments: # (1) Exhibit 1 -- Plaintiff Judicial Watch's Amended-Supplemental Memorandum in Support of Plaintiff's Motion to Compel and Motion for Order to Show Cause Why defendants Should Not be Held In Contempt, and for Other Relief# (2) Exhibit Praecipe Including Affidavit of Larry Klayman)(Orfanedes, Paul)		
--	*Filed:* *Entered:*	10/21/2002 10/21/2002	Order on Motion for Miscellaneous Relief
	Docket Text: ORDER granting Motion for Leave to File Plaintiff Judicial Watch's Amended-Supplemental Memorandum. Signed by Judge Emmet G. Sullivan on October 21, 2002. (lcegs2). Modified on 10/22/2002 (lcegs2).		
157	*Filed:* *Entered:*	10/21/2002 10/21/2002	Memorandum in Opposition
	Docket Text: Memorandum in opposition to motion re [156] *Judicial Watch's Motion for Leave to File Amended-Supplemental Memorandum in Support of Motion to Compel and for Order to Show Cause* filed by NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (Millet, Thomas)		
158	*Filed:* *Entered:* *Terminated:*	10/21/2002 10/21/2002 11/01/2002	Motion to Stay
	Docket Text: MOTION to Stay *Pending Appeal by Andrew Lundquist and* by JOSHUA BOLTON, RICHARD CHENEY, LARRY LINDSEY, NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (Paisner, Jennifer)		

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159	*Filed:* 10/23/2002 *Entered:* 10/23/2002	Motion for Leave to Appeal	
	Docket Text: MOTION for Leave to Appeal *Pursuant to 28 U.S.C. sec. 1292(b) and for Expedited Consideration Of This Motion by Andrew Lundquist and* by JOSHUA BOLTON, RICHARD CHENEY, LARRY LINDSEY, NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (Paisner, Jennifer)		
160	*Filed:* 10/23/2002 *Entered:* 10/23/2002	Motion for Leave to Appeal	
	Docket Text: Amended MOTION for Leave to Appeal *Pursuant to 28 U.S.C. sec. 1292(b) and for Expedited Consideration Of This Motion by Andrew Lundquist and* by JOSHUA BOLTON, RICHARD CHENEY, LARRY LINDSEY, NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (Paisner, Jennifer)		
161	*Filed:* 10/24/2002 *Entered:* 10/24/2002	Memorandum in Opposition	
	Docket Text: Memorandum in opposition to motion re [158] *Stay Pending Appeal* filed by SIERRA CLUB. (Attachments: # (1) Exhibit Attachment)(Gallagher, Patrick)		
162	*Filed:* 10/24/2002 *Entered:* 10/24/2002	Memorandum in Opposition	
	Docket Text: Memorandum in opposition to motion re [158] *for stay* filed by JUDICAL WATCH, INC.,. (Orfanedes, Paul)		
170	*Filed:* 10/24/2002 *Entered:* 10/30/2002	Transcript	
	Docket Text: TRANSCRIPT for dates October 17, 2002 *Court Reporter: Katherine K. Moomey, Miller Reporting.* (td,)		
163	*Filed:* 10/25/2002 *Entered:* 10/25/2002	Reply in Support	
	Docket Text: REPLY in support of motion re [158] *motion for stay* filed by LARRY LINDSEY. (Millet, Thomas)		
164	*Filed:* 10/28/2002 *Entered:* 10/28/2002	Memorandum in Opposition	
	Docket Text: Memorandum in opposition to motion re [143], [144] *motion to compel* filed by NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (Millet, Thomas)		
165	*Filed:* 10/28/2002 *Entered:* 10/28/2002	Notice (Other)	
	Docket Text: NOTICE re [164] *of paper filing of defendants' declarations and attachments* by all defendants (Millet, Thomas)		
166	*Filed:* 10/28/2002 *Entered:* 10/28/2002	Order	
	Docket Text: ORDER setting forth instructions to counsel. Signed by Judge Emmet G. Sullivan on October 28, 2002. (lcegs2)		
167	*Filed:* 10/29/2002 *Entered:* 10/29/2002	Response to Document	
	Docket Text: RESPONSE to [166] *Order of October 28* by NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (Millet, Thomas)		

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168	*Filed:* 10/30/2002 *Entered:* 10/30/2002	Response to any document	
	Docket Text: RESPONSE to any document re [158] *Plaintiff Judicial Watch's Reply to Defendants' Response to Order of October 28, 2002* filed by JUDICAL WATCH, INC.,. (Attachments: # (1) Exhibit 1)(Orfanedes, Paul)		
169	*Filed:* 10/30/2002 *Entered:* 10/30/2002	Response to any document	
	Docket Text: RESPONSE to any document re [158] *Order of October 28, 2002* filed by SIERRA CLUB. (Gallagher, Patrick)		
--	*Filed:* 10/31/2002 *Entered:* 11/01/2002	Motion Hearing	
	Docket Text: Minute Entry: Motion Hearing held on 10/31/2002 before Emmet G. Sullivan Motion Hearing resumes 11/1/2002 11:00 AM in Courtroom 1.(Court Reporter Bryan Wayne.) (clv,)		
--	*Filed:* 10/31/2002 *Entered:* 11/01/2002	Set Hearings	
	Docket Text: Minute Entry: Motion Hearing held on 10/31/2002 before Emmet G. Sullivan Motion Hearing resumes 11/1/2002 11:00 AM in Courtroom 1.(Court Reporter Bryan Wayne.) (clv,)		
171	*Filed:* 10/31/2002 *Entered:* 10/31/2002	Notice (Other)	
	Docket Text: NOTICE *of Appearance* by NATIONAL ENERGY POLICY DEVELOPMENT GROUP (Millet, Thomas)		

Doc. No.	Dates	Description
--	*Filed:* 11/01/2002 *Entered:* 11/01/2002	Set Hearings
	Docket Text: Minute Entry: Motion Hearing resumes 11/1/2002 at 10:00 AM in Courtroom 1. before Judge Emmet G. Sullivan() (clv,)	
--	*Filed:* 11/01/2002 *Entered:* 11/01/2002	Motion Hearing
	Docket Text: Minute Entry: Ruling held on 11/1/2002 before Emmet G. Sullivani; order to be issued electronically (Court Reporter Jackie Wood, Miller.) (clv,)	
172	*Filed:* 11/01/2002 *Entered:* 11/01/2002	Order on Motion to Stay
	Docket Text: ORDER denying Motion to Stay [158]. Signed by Judge Emmet G. Sullivan on November 1, 2002. (lcegs2)	
173	*Filed:* 11/06/2002 *Entered:* 11/06/2002	Memorandum in Opposition
	Docket Text: Memorandum in opposition to motion re [160] *leave to appeal pursuant to 28 U.S.C. 1292(b) and for expedited consideration of this motion* filed by JUDICAL WATCH, INC.,. (Orfanedes, Paul)	

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PACER Service Center			
Transaction Receipt			
11/06/2002 15:46:21			
PACER Login:	dj0009	**Client Code:**	nepdg
Description:	HistDocQry	**Case Number:**	1-01-01530-EGS
Billable Pages:	14	**Cost:**	0.98

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REV_00264392

1-02-00631-EGS SIERRA CLUB v. CHENEY et al
Emmet G. Sullivan, presiding
Date filed: 04/04/2002 **Date of last filing:** 08/02/2002

History

Doc. No.	Dates	Description
1	*Filed:* 04/04/2002 *Entered:* 04/05/2002	Remark
	Docket Text: ORIGINAL FILE and certified copy of transfer order and docket sheet received from the Northern District of California San Francisco Division cas number 3:02-cv-00462. (td,)	
4	*Filed:* 04/04/2002 *Entered:* 07/26/2002	Complaint
	Docket Text: COMPLAINT against all defendants (Filing fee $0). Filed by SIERRA CLUB. (jeb,)	
2	*Filed:* 04/05/2002 *Entered:* 04/05/2002	Order
	Docket Text: ORDER consolidating Civil Action No. 01-1530 (EGS) and Civil Action No. 02-631 (EGS) and ordering all future pleadings in these consolidated cases to be filed under No. 01-1530.Signed by Judge Emmet G. Sullivan on 4/5/2002. (lcegs2,)	
--	*Filed:* 05/23/2002 *Entered:* 05/24/2002	Motion Hearing
	Docket Text: Minute Entry: Motion Hearing held on 5/23/2002 before Emmet G. Sullivan ; chambers to electronically issue order(Court Reporter Gordon Slodysko.) (clv,)	
3	*Filed:* 07/25/2002 *Entered:* 07/26/2002	Response to Document
	Docket Text: ANSWER to complaint by SPENCER ABRAHAM, RICHARD CHENEY, DONALD EVANS, ANDREW LUNDQUIST, NORMAN Y. MINETA, NATIONAL ENERGY POLICY DEVELOPMENT GROUP, GALE NORTON, PAUL H. O'NEILL, ANN VENEMAN, CHRISTINE T. WHITMAN. (td,) Modified on 7/26/2002 (td,).	
--	*Filed:* 08/02/2002 *Entered:* 08/06/2002	Status Conference
	Docket Text: Minute Entry: Status Conference held on 8/2/2002 before Emmet G. Sullivan Status Conference set for 9/13/2002 10:00 AM in Courtroom 1.(Court Reporter Frank Rangus.) (clv,)	
--	*Filed:* 08/02/2002 *Entered:* 08/06/2002	Set Hearings
	Docket Text: Minute Entry: Status Conference held on 8/2/2002 before Emmet G. Sullivan Status Conference set for 9/13/2002 10:00 AM in Courtroom 1.(Court Reporter Frank Rangus.) (clv,)	

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PACER Service Center			
Transaction Receipt			
11/06/2002 16:03:24			
PACER Login:	dj0009	**Client Code:**	nepdg
Description:	HistDocQry	**Case Number:**	1-02-00631-EGS
Billable Pages:	1	**Cost:**	0.07

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REV_00264394

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.
501 School Street, SW, Suite 725
Washington, DC 20024

Plaintiff,

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP
Office of the Vice President
Eisenhower Executive Office Building
Washington, DC 20501

and

THE HON. RICHARD B. CHENEY
Vice President of the United States of America
Eisenhower Executive Office Building
Washington, DC 20501

and

PAUL O' NEILL,
Secretary of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

and

GAIL NORTON,
Secretary of the Interior
1849 C Street, NW
Washington, DC 20240

and

SECOND AMENDED COMPLAINT

Civil Action No. 01-1530 (EGS)

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1-01-01530-EGS JUDICAL WATCH, INC., et al v. NATIONAL ENERGY POLICY DEVELOPMENT GROUP et al
Emmet G. Sullivan, presiding
Date filed: 07/16/2001 **Date of last filing:** 11/06/2002

History

Doc. No.	Dates	Description
--	*Filed:* 07/16/2001 *Entered:* 07/30/2001	Summons Issued as to USA
	Docket Text: SUMMONS (3) Issued as to NATIONAL ENERGY POLICY DEVELOPMENT GROUP , U.S. Attorney and U.S. Attorney General (jeb,)	
1	*Filed:* 07/16/2001 *Entered:* 07/25/2001	Complaint
	Docket Text: COMPLAINT against NATIONAL ENERGY POLICY DEVELOPMENT GROUP (Filing fee $150). Filed by JUDICAL WATCH, INC.,. (mjk,)	
2	*Filed:* 07/16/2001 *Entered:* 07/25/2001	Certificate of Disclosure - Corporate Affiliations/Financial Interests
	Docket Text: LCvR 26.1 - CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests (mjk,)	
3	*Filed:* 08/08/2001 *Entered:* 08/08/2001	Order
	Docket Text: PRELIMINARY ELECTRONIC CASE FILING ORDER . Signed by Judge Emmet G. Sullivan on August 8, 2001. (GK,)	
--	*Filed:* 08/16/2001 *Entered:* 08/22/2001	Set Deadlines
	Docket Text: D's Motion for Extension of Time to respond to plaintiff's Freedom of Information Act cause of action is granted. Responses due by 9/17/2001.Signed by Judge Emmet G. Sullivan on August 22, 2001. (GK,)	
4	*Filed:* 08/16/2001 *Entered:* 08/24/2001 *Terminated:* 08/24/2001	Motion for Extension of Time to File Answer
	Docket Text: MOTION for Extension of Time to File Answer *by 9/17/01* by NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (jeb,)	
5	*Filed:* 08/16/2001 *Entered:* 09/14/2001	Order
	Docket Text: ORDER granting Defendant's Motion for Extension of Time to September 17, 2001; re [4]. Signed by Judge Emmet G. Sullivan on September 13, 2001. (GK,)	
7	*Filed:* 09/13/2001 *Entered:* 09/18/2001 *Terminated:* 09/18/2001	Motion for Extension of Time to File Answer
	Docket Text: MOTION for Extension of Time to File Answer *the complaint by 10/17/01* by NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (jeb,)	

REV_00264369

ANN M. VENEMAN,
Secretary of Agriculture
1400 Independence Avenue, SW
Washington, D.C. 20250,

and

DONALD EVANS,
Secretary of Commerce
14th Street and Constitution Avenue, NW
Washington, DC 20230

and

NORMAN MINETA,
Secretary of Transportation
400 Seventh Street, SW
Washington, DC 20590

and

SPENCER ABRAHAM,
Secretary of Energy
Forrestal Building
1000 Independence Avenue, SW
Washington, DC 20585

and

COLIN POWELL,
Secretary of State
Harry S. Truman Bldg.
2201 C Street, NW
Washington, DC 20520

and

JOSEPH M. ALLBAUGH,
Director, Federal Emergency
Management Agency
Federal Center Plaza
500 C Street, SW
Washington, DC 20472

and

CHRISTINE TODD WHITMAN,
Administrator, Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20004

and

PATRICK H. WOOD, III,
Chairman, Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

and

MITCHELL E. DANIELS, Jr.,
Director, Office of Management and Budget
Eisenhower Executive Office Building
17th Street and Pennsylvania Avenue, NW
Washington, DC 20503

and

JOSHUA BOLTON,
Assistant to the President and Deputy Chief of Staff for Policy
Executive Office of the President
1600 Pennsylvania Ave., NW
Washington, DC 20500

and

LARRY LINDSEY,
Assistant to the President for Economic Policy
Executive Office of the President
1600 Pennsylvania Ave., NW
Washington, DC 20500

and

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MARK RACICOT
c/o Republican National Committee
310 First Street, SE
Washington, DC 20003

and

HALEY BARBOUR
c/o Barbour, Griffith & Rodgers
1275 Pennsylvania Avenue, NW
Washington, DC 20004

and

KENNETH LAY
Houston, Texas

and

THOMAS KUHN
c/o Edison Electric Institute
701 Pennsylvania Avenue, NW
Washington, DC 20004

and

JOHN AND JANE DOE NOS. 1-99,
Certain Unknown Non-Federal Employees,
and/or Members of the National Energy
Policy Development Group,

Defendants.

SECOND AMENDED COMPLAINT

Plaintiff, Judicial Watch, Inc., pursuant to the Court's Order of May 23, 2002, hereby files this second amended complaint for compliance with the Federal Advisory Committee Act, 5 U.S.C. App. 2 ("FACA"), the Administrative Procedure Act, 5 U.S.C. § 701 et seq. ("APA"), and the Freedom of Information Act, 5 U.S.C. § 552 *et seq*. ("FOIA"). Plaintiff also seeks a writ of mandamus and a declaratory judgment pursuant to 28 U.S.C. §1361 and 28 U.S.C. §§ 2201 and

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2202, respectively. As grounds therefor, Plaintiff Judicial Watch, Inc., ("JW") respectfully alleges as follows:

JURISDICTION AND VENUE

1. This court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States), 28 U.S.C. § 1346(a)(2) (United States as defendant), 5 U.S.C. § 552(a)(4)(B) (FOIA), 28 U.S.C. §1361 (mandamus), 5 U.S.C. § 701 (APA).

2. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B).

PARTIES

3. Plaintiff, whose principal place of business is 501 School Street, SW, Suite 725, Washington, D.C. 20024, is organized as a non-profit corporation under the laws of the District of Columbia. Plaintiff undertakes educational and other programs to promote and protect the public interest in matters of public concern. To this end, Plaintiff requested certain documents pursuant to the FACA and the FOIA and intends to disseminate the requested information and documents to its supporters and benefactors, government officials, appropriate news media, and to the American public at large. The information, access, and documents Plaintiff seeks are likely to contribute significantly to the public's understanding of the operations and activities of Defendants.

4. Defendant National Energy Policy Development Group ("NEPDG") is an agency and entity of the United States Government. Defendant NEPDG was created by President George W. Bush and headed by Vice President Richard B. Cheney to develop a national energy plan. Defendant NEPDG has its principal place of business in Washington, DC. Defendant NEPDG has possession of the information and documents to which Plaintiff seeks access.

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5. Defendant Richard B. Cheney ("Cheney") is the Vice President of the United States. Defendant Cheney is the director of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

6. Defendant Paul O'Neill ("O'Neill") is Secretary of the Treasury. Defendant O'Neill is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

7. Defendant Gail Norton ("Norton") is Secretary of the Interior. Defendant Norton is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

8. Defendant Ann M. Veneman ("Veneman") is Secretary of Agriculture. Defendant Veneman is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

9. Defendant Donald Evans ("Evans") is Secretary of Commerce. Defendant Evans is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

10. Defendant Norman Mineta ("Mineta") is Secretary of Transportation. Defendant Mineta is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

11. Defendant Spencer Abraham ("Abraham") is Secretary of Energy. Defendant Abraham is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

12. Defendant Colin Powell ("Powell") is Secretary of State. Defendant Powell is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

13. Defendant Joseph M. Allbaugh ("Allbaugh") is the Director of the Federal Emergency Management Agency. Defendant Allbaugh is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

14. Christine Todd Whitman ("Whitman") is the Administrator of the Environmental Protection Agency. Defendant Whitman is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

15. Patrick H. Wood, III, ("Wood") is the Chairman of the Federal Energy Regulatory Commission. Defendant Wood is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

16. Mitchell E. Daniels, Jr., ("Daniels") is the Director of the Office of Management and Budget. Defendant Daniels is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

17. Joshua Bolton ("Bolton") is Assistant to the President and Deputy Chief of Staff for Policy. Defendant Bolton is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

18. Larry Lindsey ("Lindsey") is Assistant to the President for Economic Policy. Defendant Lindsey is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

19. Mark Racicot currently is Chairman of the Republican National Committee, 310 First Street, S.E. , Washington, DC 20003 and has served as a lobbyist for Enron Corporation. On

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information and belief, Defendant Racicot is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

20. Haley Barbour is a lobbyist for electric utilities at Barbour, Griffith & Rodgers, 1275 Pennsylvania Avenue, N.W., Washington, DC 20004. Defendant Barbour formerly served as Chairman of the Republican National Committee. On information and belief, Defendant Barbour is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

21. Kenneth Lay is the former Chairman of Enron Corporation ("Enron"), of Houston, Texas. On information and belief, Defendant Lay is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

22. Thomas Kuhn is the President of the Edison Electric Institute, 701 Pennsylvania Avenue, N.W., Washington, DC 20004. On information and belief, Defendant Kuhn is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

23. John and Jane Does Nos. 1-99 are currently unknown, non-federal employees who are members of the NEPDG and have possession of the information and documents to which Plaintiff seeks access.

STATEMENT OF FACTS

24. On January 29, 2001, President Bush established the NEPDG, whose mission was to "develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State and local government, promote dependable, affordable, and environmentally sound promote dependable, affordable, and environmentally sound production and distribution of energy." President Bush directed the NEPDG to "gather information, deliberate, and . . . make recommendations to the President."

25. On information and belief, non-federal employees, including Thomas Kuhn, Kenneth Lay, Marc Racicot, Haley Barbour, representatives of the Clean Power Group, and other private lobbyists (John and Jane Does 1-99), regularly attended and fully participated in non-public meetings of the NEPDG as if they were members of the NEPDG, and, in fact, were members of the NEPDG.

26. Specifically, non-federal employees representing special energy interests, who donated approximately $22.5 million into the Bush-Cheney 2000 presidential election campaign, have reportedly enjoyed nearly unfettered access to and close contact with the NEPDG, Vice President Cheney, and even President Bush himself. Thomas Kuhn, a leading Bush fundraiser and president of the Edison Electric Institute, reportedly met with Vice President Cheney. Kenneth Lay ("Lay"), the former CEO of the now bankrupt Enron and a friend of President Bush, had a dinner meeting with the President. *See* Howard Fineman and Michael Isikoff, "Big Energy at the Table," Newsweek, May 14, 2001, attached hereto as Exhibit 1 at 18.

27. In March 2001, Lay reportedly also met with Defendant Cheney to discuss energy policy. *See* Howard Fineman and Michael Isikoff, "A New Capitol Clash," Newsweek, February 11, 2002, attached as Exhibit 2. Bush administration officials subsequently admitted to five additional meetings between Enron officials and Vice President Cheney's staff in March 2001. *Id.* In addition to these six meetings in March 2001, a top aide to Defendant Cheney, Andrew Lundquist, met with members of the "Clean Power Group" -- a coalition of five power companies, including Enron. *Id.*

28. In April 2001, Lay also reportedly met with Defendant Cheney to discuss the Bush Administration's response to the California energy crisis. *See* David Lazarus, "Memo Details Cheney-Enron Links," San Francisco Chronicle, January 30, 2002, attached as Exhibit 3. During

this meeting, Lay reportedly handed Cheney three page memorandum urging federal authorities to refrain from imposing price caps or other measures to stabilize electricity prices. *Id.* Recommendations from this memorandum subsequently became a part of the NEPDG's proposed energy plan. *Id.*

29. On May 3, 2001, former Montana Governor Marc Racicot and former Republican Party Chairman Haley Barbour, both of whom serve or have served as lobbyists for electric utilities, attended a NEPDG meeting chaired by Vice President Cheney. *See* Michael Weisskopf and Adam Zagorin, "Getting the Ear of Dick Cheney," Time, February 11, 2002, attached as Exhibit 4. At that time, Barbour also was involved heavily in fundrasing activities on behalf of President Bush. *Id.* Racicot currently is the Chairman of the Republican Party.

30. On May 4, 2001, David S. Addington, Counsel to Vice President Cheney, admitted in a letter to Reps. W.J. "Billy" Tauzin and Rep. John Dingell of the House Committee on Energy and Commerce, and Reps. Dan Burton and Henry Waxman of the Committee on Government Reform, that during so-called "stakeholder meetings," staff members of NEPDG held "have met with many individuals **who are not federal employees** to gather information relevant" to the NEPDG's work. *See* May 4, 2001 Letter from David S. Addington, attached as Exhibit 5 (emphasis added). All of the NEPDG so-called "stake-holder meetings" with non-governmental parties are covered by the FACA and the FOIA.

31. Vice President Cheney has been evasive in describing the staffing and operations of the NEPDG. During a July 25, 2001 on the ABC television program "Nightline," Vice President Cheney admitted that the NEPDG met with members of private organizations and/or companies regarding energy policy, but failed to identify the names of those individuals:

[TED] KOPPEL: You've made reference to the enormous amount of experience that you bring to this job. So, I have to ask you, as someone who knows Washington as well as you do, and who knows that the one thing that drives Congress crazy, the one thing that drives the press crazy, the one thing that is always going to be trouble is secrecy.

Vice Pres. CHENEY: Mm-hmm.

KOPPEL: Well, why did you run your--your energy study, your energy meetings the way that you did? Why to this day haven't you revealed who participated in those meetings and what they had to tell you?

Vice Pres. CHENEY: Well, that's simply not accurate, Ted. There's been this charge that it was run in secret. But it was run the same way we do everything else with respect to policy. Same way we make economic policy or education policy. It was a group of Cabinet officials and agency heads. This is the report we produced. We published thousands of them. It has not been secret. The folks that were responsible for putting it together are all listed right up here in the front. It's the Cabinet and the agency heads...

KOPPEL: What about the experts that you consulted? I mean, you--you know...

Vice Pres. CHENEY: But we didn't--I mean, there's--there was this allegation that somehow we did what the Clintons did back in '93 on health. We did not.

KOPPEL: Exactly.

Vice Pres. CHENEY: We were very sensitive to that and very careful of it. When you...

KOPPEL: Tell me where the--tell me where the difference is?

Vice Pres. CHENEY: Well, the--it's when you bring in...

KOPPEL: What was different about what you did and what Hillary Clinton...

Vice Pres. CHENEY: ...outsiders and incorporate them in the policy-making process, that then certain requirements with respect to federal advisory committees kicks in and certain requirements have to be met. We didn't do that. We did this exactly the same way, for example, that we put together the economic policy or tax policy. And there's been this claim that it was done in secret, but it wasn't. It wasn't anymore secret than anything else we do.

9	*Filed:* 09/13/2001 *Entered:* 09/28/2001 *Terminated:* 10/04/2001	Motion for Extension of Time to File Answer
	Docket Text: (ENTERED IN ERROR) MOTION for Extension of Time to File Answer re [1] *to the complaint until October 17, 2001* by NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (mjk,) Modified on 10/4/2001 (jeb,).	
6	*Filed:* 09/18/2001 *Entered:* 09/18/2001	Order
	Docket Text: ORDER denying defendant's motion to extend time to 10/17/01 to respond to the plaintiff's complaint.. Signed by Judge Emmet G. Sullivan on September 16,2001. (jeb,)	
8	*Filed:* 09/18/2001 *Entered:* 09/20/2001	Order
	Docket Text: ORDER granting defendants' Oral Motion for Reconsideration of Order Denying defendants' motion to extend time to 10/17/01 to respond to plaintiff's complaint. The Court will allow defendants to respond to plaintiff's complaint by no later than 10/17/01. Due to the unavailability of plaintiff's counsel on 9/19/01, the Court will grant leave to the plaintiff to file any objections to this extension of time by no later than 11/1/01. Signed by Judge Emmet G. Sullivan on September 20, 2001. (GK,)	
10	*Filed:* 10/17/2001 *Entered:* 10/18/2001 *Terminated:* 05/23/2002	Motion to Dismiss
	Docket Text: MOTION to Dismiss by NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (Attachments: # (1) Memorandum of Points and Authorities# (2) attachment(Memorandum of President Bush)(jeb,) Modified on 10/18/2001 (jeb,).	
11	*Filed:* 10/31/2001 *Entered:* 11/05/2001 *Terminated:* 11/06/2001	Motion for Extension of Time to File
	Docket Text: Unopposed MOTION for Extension of Time to File *opposition to defendant's motion to dismiss to 11/7/01* by JUDICAL WATCH, INC.,. (aet,)	
--	*Filed:* 11/06/2001 *Entered:* 11/06/2001	Terminate Motions
	Docket Text: ORDER - Plaintiff's unopposed Motion for Extension of Time to File Opposition to Defendant's Motion to Dismiss is GRANTED. Plaintiff has untill November 7, 2001, to file the response to Defendants' Motion to Dismiss. Defendant's Reply is due November 27, 2001. Motions [11] terminated. () (GK,)	
12	*Filed:* 11/07/2001 *Entered:* 11/14/2001 *Terminated:* 11/14/2001	Motion for Extension of Time to File Response/Reply
	Docket Text: Second MOTION for Extension of Time to File Response/Reply *to defendant's motion to dismiss* by JUDICAL WATCH, INC.,. (td,) Modified on 3/1/2002 (td,). Modified on 3/1/2002 (jeb,).	
13	*Filed:* 11/13/2001 *Entered:* 11/16/2001	Memorandum in Opposition
	Docket Text: Memorandum in Opposition to Motion re [10] *to defendant's motion to dismiss* filed by JUDICAL WATCH, INC.,. (Attachments: # (1) Exhibit # (2) Exhibit # (3) Exhibit)(td,)	

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KOPPEL: The inference that people have drawn--but, before I get to that, let me just ask you, what--what is different about what Hillary Clinton did with the health program from what you folks did with the energy policy?

Vice Pres. CHENEY: She brought in outsiders, people who were not government employees, who were not full-time...

KOPPEL: You didn't do that?

Vice Pres. CHENEY: No.

KOPPEL: No outsiders?

Vice Pres. CHENEY: Well, not as part of the deliberating pro--process.

KOPPEL: Well...

Vice Pres. CHENEY: No, that's very important.

KOPPEL: ...are you finessing that just a little bit too finely?

Vice Pres. CHENEY: No. No, you're mis--misreading what the statute says. There's a big difference. We meet all the time behind closed doors to make economic policy or to make education policy. Now, you may deal with outside groups. They may have points of view they want to represent. We heard from energy people. We heard from many environment people. We heard from consumer groups. I met with congressman and senators and governors. We heard from a broad variety of folks out there, but they were not in the meetings where we put together the policy and made recommendations to the president. That's the big difference.

KOPPEL: Isn't--isn't that a fine point?

Vice Pres. CHENEY: That's a very important point.

KOPPEL: In other words, if we--if we have one meeting here...

Vice Pres. CHENEY: Mm-hmm.

KOPPEL: ...with a bunch of people, and because of your background and the president's background in the energy industry yourselves...

Vice Pres. CHENEY: Mm-hmm.

KOPPEL: ...the assumption is that you did consult with a lot of your pals in the--in the energy industry. If you consult with them in this room, and then you adjourn to the next room to make policy, that--that...

Vice Pres. CHENEY: That's not the way it works.

KOPPEL: That satisfies the law?

Vice Pres. CHENEY: That is--that is not the way it worked. **In fact, we heard from a wide variety of different groups.** But we did not trigger the statute that specifically provides for how you deal with advisory committees, for formally constituted advisory committee that's making policy, like the Social Security Commission, for example. There's a classic example of a group of outside people, not full-time government employees, who are meeting to deliberate and to come up with a policy recommendation. They meet in open session. The press is present. You don't do that when you sit down, for example, with the--the secretary of the treasury and the Council of Economic Advisers and director of OMB to make major budget decisions, or make...

KOPPEL: But why not just take the wind out of the sails of all your critics and say, 'Here's a list of the people we consulted'?

See Transcript of ABC News: Nightline dated July 25, 2001, at 2-4 attached as Exhibit 6 (emphasis added).

32. On January 30, 2002, the General Accounting Office ("GAO") issued a decision concerning the NEPDG in which it specifically found that NEPDG had met with "selected non-governmental parties" in its efforts to develop a proposed national energy policy. *See* Decision of the Comptroller General Concerning NEPDG Litigation, January 30, 2002, attached as Exhibit 7.

33. The appearance of favoritism and access shown to these energy executives stands in stark contrast to the access the Bush-Cheney administration accorded to other groups who thus far have received only a single mass meeting with lower level NEPDG staffers. *See* Exhibit 1.

34. Recent history has unfortunately seen several ethical lapses concerning conflicts of interest in The White House and violations of the FACA. In *Association of American Physicians and Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) ("*AAPS*"), the DC Circuit remanded the case

to the district court for discovery on the issue of whether the working group of the President's Task Force on National Health Care Reform constituted an advisory committee under FACA, despite sworn claims by one of the heads of the Task Force put forth by the Clinton-Gore Justice Department that it did not so qualify. In ordering this discovery to proceed, the DC circuit stated:

> We simply have insufficient material in the record to determine the character of the working group and its members...[A]s we have indicated, because we differ with the district court concerning the Task Force, we believe further proceedings, including expedited discovery, are necessary before the district court can confidently decide whether the working group is a FACA committee.

AAPS, 997 F. 2d at 915-916. When discovery proceeded in the district court, plaintiffs uncovered facts which conclusively showed that the working group of the Task Force did qualify as an advisory committee under the FACA. The White House was sanctioned for, in part, failing to comply with discovery requests concerning the applicability of the FACA, and for misleading the court about who was and who was not a member of former First Lady Hillary Rodham Clinton's Health Care Task Force:

> The Department of Justice has a long tradition of setting the highest standards of conduct for all lawyers, and it is a sad day when this court must conclude, as did the United States Attorney in his investigation, that the Department of Justice succumbed to pressure from White House attorneys and others to provide this court with "strained interpretations" that were "ultimately unconvincing." This court goes further than the United States Attorney, however, because this court cannot agree that the Department of Justice never relied upon the "all-employee" exemption for the working group. Having been presented the "all-employee" facts in the Magaziner declaration, the Court of Appeals specifically found that defendants had made that argument. Neither the briefs on appeal, nor any transcript of the oral argument on appeal, was before this court. Yet the Department of Justice sat back and never told this court that it was not making, and had not made, such an argument, and never corrected any of the factual inaccuracies in the Magaziner declaration. The United States Attorney reported that this was a conscious decision because attorneys in the White House refused to allow any supplemental information to be provided to the court. It seems that some government officials never learn that the cover-up can be worse than the underlying conduct. Most shocking to this court, and deeply

> disappointing, is that the Department of Justice would participate in such conduct. This was not an issue of good faith word games being played with the court. The United States Attorney found that the most controversial sentence of the Magaziner declaration -- "Only federal government employees serve as members of the interdepartmental working group" -- could not be prosecuted under the perjury statute because the issue of "membership" within the working group was a fuzzy one, and no generally agreed upon "membership" criteria were ever written down. Therefore, the Magaziner declaration was actually false because of the implication of the declaration that "membership" was a meaningful concept and that one could determine who was and was not a "member" of the working group. This whole dishonest explanation was provided to this court in the Magaziner declaration on March 3, 1993, and this court holds that such dishonesty is sanctionable and was not good faith dealing with the court or plaintiffs' counsel. It was not timely corrected or supplemented, and this type of conduct is reprehensible, and the government must be held accountable for it.

AAPS, 989 F. Supp. 8, 16-17 (D.D.C. 1997). In light of this history, Plaintiff believes it is particularly in the public interest for Bush-Cheney Administration officials and the NEPDG to avoid even an appearance of a possible conflict of interest, by acknowledging the application of FACA and the FOIA to all NEPDG meetings.

35. On June 25, 2001, Plaintiff sent a letter to Vice President Cheney, pursuant to the provisions of the FOIA and the FACA, 5 U.S.C. §§ 552 and App.2, requesting copies of all minutes and final decision documents of NEPDG meetings from January 20, 2001 to that date, as well as a complete listing, including addresses, of all persons and entities that participated in NEPDG meetings, either directly or indirectly through agents and/or intermediaries. *See* June 25, 2001 Letter to The Hon. Richard B. Cheney, attached as Exhibit 8. Plaintiff also sought to attend all future meetings of the NEPDG pursuant to the FACA, and asked to be provided with future meeting schedules and contact information so that representatives of Plaintiff could attend these meetings. *Id.* Plaintiff's request was denied in its entirety on July 5, 2001. *See* July 5, 2001 Letter to Larry Klayman, attached as Exhibit 9.

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36. GAO the investigative arm of Congress, also requested that the NEPDG disclose the names of individuals who met with the NEPDG, but has thus far been stonewalled in its efforts. *See* Joseph Kahn, "Cheney Withholds List of Those Who Spoke to Energy Panel," The New York Times, June 26, 2001 at A17; Express Wire Services, "Cheney Won't Give Up Names," June 26, 2001; Scott Lindlaw, "Congress Demands List of Participants in Cheney Energy Meetings," AP, June 25, 2001, attached collectively as Exhibit 10. After several weeks of making requests, the GAO finally received some documents regarding Defendant NEPDG's finances, but incredibly, Defendant NEPDG has, as of May 28, 2002, failed to provide a full accounting of the individuals who met with Defendant NEPDG to the GAO, Plaintiff, or to the public.

37. Along with Plaintiff, the GAO, and various members of the media, legal commentators have advocated a broad reading of the FACA's language which on its face does appear to cover a vast number of communications between agencies and non-governmental parties. In a widely cited article on the FACA, Michael H. Cardozo reasons:

> In principle, any group of individuals, however selected or constituted, that considers governmental matters and furnishes views and conclusions to government officials or agencies, is a governmental advisory committee. The FACA however, is concerned only with "public advisory committees," that is groups containing at least some members who are not government employees. Thus a committee containing any number of officers of government is not covered by the Act unless its membership includes outsiders, representatives of the "private sector."

Michael H. Cardozo, "The Federal Advisory Committee Act In Operation (Administrative Law Review, Vol. 33, 3 (1981) (emphasis added). Mr. Cardozo further reasons:

> A key part of the definition of "advisory committee" is the expression "established or utilized." Superficially this means that the origin of the group is not material in determining whether it is an advisory committee covered by the act. It must be a "group," however, meaning more than one person, and someone must bring them together. That act, whether done formally or informally, "establishes" the group. However the Act does not expressly require the establishment to be performed by a government official or agency. Under the strict language of the Act, even a group

formed by private industry becomes an advisory committee if it is "utilized" by the president or by one or more agencies of the government.

Id. at 12-13. (Emphasis added.) Categorizing the types of advisory committees, Mr. Cardozo writes: "A committee in any of the five functional categories may be assigned an 'operational' as well as an 'advisory' responsibility. *Id.* at 32. Examples of the types of advisory committees include those which provide: (1) policy advice; (2) technical advice; and (3) fact finding. *Id.* at 33, 37, 39. (Emphasis added.)

38. On information and belief, the NEPDG still is in existence. In a January 3, 2002 letter to Rep. Henry Waxman, Counsel to the Vice President David Addington conceded that an unidentified member of NEPDG's staff had met with Enron representatives on October 10, 2001 and discussed energy policy matters. *See* January 3, 2002 letter from Counsel to the Vice President David Addington to Rep. Henry Waxman, attached as Exhibit 11. On information and belief, other meetings between both federal and non-federal members of the allegedly defunct NEPDG have occurred and are still occurring to this day to continue discussions on formulating a national energy policy. *Id.* Consequently, despite the alleged termination of Defendant NEPDG on September 30, 2001, Plaintiff's FACA and FOIA requests are not moot, and Plaintiff still has a right to the documents it has requested pursuant to the FACA and FOIA.

39. At a February 12, 2002 hearing in this matter, Defendants admitted that, despite the alleged termination of NEPDG, documents generated by the NEPDG are still in the custody of Defendant Cheney and that other NEPDG records "are within all of those eight agencies pertaining to the work of their agency heads, their agency heads' work on the committee." *See* Transcript of February 12, 2002 Motions Hearing at 5-6. Indeed, the Court ordered that these records be preserved. Consequently, despite the alleged termination of Defendant NEPDG, documents

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responsive to Plaintiff's FACA and FOIA requests obviously still exist. Plaintiff's FOIA and FACA requests are not moot, and Plaintiff still has a right to the documents it has requested pursuant to the FOIA and FACA.

COUNT I
(Violation of the Federal Advisory Committee Act)

40. Plaintiff incorporates by paragraphs 1-39 as if fully set forth herein.

41. The NEPDG is a federal advisory committee as defined under the FACA, 5 U.S.C. App.2, and as such is required to comply with all provisions of that law, including, but not limited to, filing a charter, allowing interested persons--such as Plaintiff--to attend and have input at meetings of the NEPDG, producing documents and other things and having open meetings in accordance with the FOIA, 5 U.S.C. § 552, publishing notice of all future meetings in the federal register, and having a board that is fairly balanced in terms of the points of view represented.

42. Plaintiff has made a request to the NEPDG that representatives of Plaintiff be allowed to attend and participate in meetings of the NEPDG, that they be given copies of certain NEPDG documents, and the NEPDG appoint at least one person with a different point of view, among other matters. *See* Exhibit 8.

43. Defendant NEPDG denied Plaintiff's request by letter dated July 5, 2001. *See* Exhibit 9.

44. The failure of Defendants to comply with the FACA has harmed Plaintiff in that Plaintiff has as one of its primary functions the monitoring and safeguarding of the public trust. The activities of the Defendants in this case have deprived Plaintiff of its right, granted by the FACA, to participate in meetings held by the NEPDG, to have advance notice of those meetings, to obtain documents generated by the NEPDG, and to have a voice in the affairs of the NEPDG. The acts of

Defendants have thus frustrated Plaintiff's ability to effectively carry out its purpose of promoting and protecting justice and social welfare, including, among other things, preventing abuse and violation of the public trust by federal officers, officials, employees, agents, and/or persons acting in concert with them.

45. As an interested party and a representative of the public, Plaintiff has been and continues to be damaged by the operations of the NEPDG. Public confidence in the integrity of the Presidency and the executive branch as a whole has been and will be harmed by the appearance that the Vice President and the Bush Administration as a whole are under the influence of a select few members of major oil and other energy producing corporations, many of whom contributed heavily to the Bush-Cheney Administration in the 2000 Presidential election cycle. Members of Defendant NEPDG also gain influence or favor with the executive branch to the detriment of others who do not participate in the NEPDG.

46. Plaintiff will continue to suffer permanent and irreparable injury unless operation of the NEPDG is brought into compliance with the provisions of the FACA.

COUNT II
(Violation of the Freedom of Information Act)

47. Plaintiff incorporates paragraphs 1-46 as if fully set forth herein.

48. Plaintiff filed with Defendant on June 25, 2001 *via* facsimile and on June 26, 2001 *via* certified mail, a FOIA request (*see* Exhibit 8) in the form of a letter to Vice President Richard B. Cheney, requesting access to certain records under FOIA. Access was requested to "copies of all minutes and final decision documents of NEPDG meetings from January 20, 2001 to the present, as well as a listing (including addresses) of all persons and entities that participated in NEPDG meetings, either directly or indirectly through agents and/or intermediaries," among other items.

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49. By letter dated July 5, 2001, Defendant Cheney denied Plaintiff's request. *See* Exhibit 9.

50. Pursuant to 5 U.S.C. § 552(a)(6)(C) and 5 U.S.C. § 552(a)(6)(E)(ii)(I), Plaintiff shall be deemed to have exhausted its administrative remedies with respect to its request to Defendant.

51. Pursuant to 5 U.S.C. § 552(a)(3), Plaintiff has a right of access to the information and documents requested in its FOIA request, and Defendants have no legal basis for refusing to disclose this information and these documents to Plaintiff.

COUNT III
(Violation of the Federal Advisory Committee Act/Mandamus)

52. Plaintiff incorporates paragraphs 1-51 as if fully set forth herein.

53. The Cheney Energy Task Force and Task Force Sub-Groups are advisory committees as defined under FACA.

54. The defendants have violated FACA as follows:

a. By failing open each meeting of the Cheney Energy Task Force and Task Force Sub-Groups to the public. (Violation of FACA §10(a)(1)).

b. By failing to publish timely notice of each meeting of the Cheney Energy Task Force and Task Force Sub-Groups in the Federal Register. (Violation of FACA §10(a)(2)).

c. By failing to allow Plaintiff and other interested persons to attend, appear before, or file statements with the Cheney Energy Task Force and the Task Force Sub-Groups. (Violation of FACA §10(a)(3)).

d. By failing to make available for public inspection and copying the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents

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which were made available to or prepared for by the Cheney Energy Task Force and Task Force Sub-Groups. (Violation of FACA §10(b)).

e. By failing to keep detailed minutes of each meeting of the Cheney Energy Task Force and Task Force Sub-Groups, certified as accurate, that contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached and copies of all reports received, issued, or approved by the Cheney Energy Task Force and Task Force Sub-Groups. (Violation of FACA §10(c)).

f. By establishing the Task Force Sub-Groups without specific authorization by statute or by the President and without a determination published in the Federal Register, that establishing the Task Force Sub-Groups is in the public interest. (Violation of FACA §9(a)).

g. By allowing the Cheney Energy Task Force and Task Force Sub-Groups to meet and take action without filing an advisory committee charter containing the information required by FACA (Violation of FACA §9(c)).

55. The Defendants have a nondiscretionary duty to comply with the procedural requirements of FACA including but not limited to those set forth in the preceding paragraph as items (a) through (g).

56. This Court has jurisdiction to compel the Defendants to perform a nondiscretionary duty pursuant to the Mandamus and Venue Act, 28 U.S.C. §1361.

COUNT IV
(Violation of the Federal Advisory Committee Act/Administrative Procedure Act)

57. Plaintiff incorporates paragraphs 1-56 as if fully set forth herein.

--	*Filed:* 11/14/2001 *Entered:* 11/14/2001	Terminate Motions	
	Docket Text: ORDER - granting Plaintiff's Second Unopposed Motion for Extention of Time to File Opposition to Defendant's Motion to Dismiss. Plaintiff's opposition is due 11/13/01; Defendant's reply is due 12/4/01. By Judge Emmet G. Sullivan on 11/8/01. Motions [12] terminated. (GK,)		
14	*Filed:* 12/03/2001 *Entered:* 12/03/2001	Reply in Support	
	Docket Text: REPLY in Support of Motion re [10] *to Dismiss* filed by NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (Bensing, Daniel)		
15	*Filed:* 01/22/2002 *Entered:* 01/29/2002 *Terminated:* 02/28/2002	Motion for Hearing	
	Docket Text: MOTION for Hearing by JUDICAL WATCH, INC.,. (Attachments: # (1) Exhibit # (2) Exhibit)(td,)		
16	*Filed:* 01/29/2002 *Entered:* 01/29/2002	Order	
	Docket Text: ORDER setting motion hearing on 02/13/02 at 11:30 a.m.Signed by Judge Emmet G. Sullivan on 01/29/02. (lcegs2,)		
17	*Filed:* 01/29/2002 *Entered:* 01/29/2002	Order	
	Docket Text: ORDER rescheduling motions hearing for 2/12/02 at 1 pm.Signed by Judge Emmet G. Sullivan on 01/29/02. (lcegs2,)		
18	*Filed:* 01/31/2002 *Entered:* 01/31/2002	Order	
	Docket Text: ORDER setting forth issues to be briefed in advance of motions hearing scheduled for 2/12/02 at 1 pm.Signed by Judge Emmet G. Sullivan on 01/31/02. (lcegs2,)		
19	*Filed:* 02/05/2002 *Entered:* 02/05/2002	Response to any document	
	Docket Text: RESPONSE to *the Court's Order of January 31, 2002* filed by NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (Attachments: # (1) Exhibit May 4, 2001 Letter and Response)(Bensing, Daniel)		
20	*Filed:* 02/08/2002 *Entered:* 02/08/2002	Response to any document	
	Docket Text: RESPONSE to *Court's Order of January 31, 2002* filed by JUDICAL WATCH, INC.,. (Orfanedes, Paul)		
21	*Filed:* 02/11/2002 *Entered:* 02/11/2002	Response to any document	
	Docket Text: RESPONSE to *Court's Order of January 31, 2001* filed by NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (Bensing, Daniel)		
22	*Filed:* 02/11/2002 *Entered:* 02/11/2002	Response to any document	
	Docket Text: (ENTERED IN ERROR; SUBMISSION NOT READABLE) RESPONSE to *Defendant's Reply to the Court's Order of January 31, 2002* filed by JUDICAL WATCH, INC.,.		

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58. By violating the FACA as set forth in paragraph 54, the agency Defendants have acted arbitrarily and capriciously and not in accordance with law, and without observance of procedure required by law, in violation of 5 U.S.C. §706(2)(A) and §706(2)(D).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prayers for relief and judgment as follows:

1. That the Court enter a judgment declaring Defendants to be in violation of the FACA and the APA;

2. That the Court enter a writ of mandamus ordering Defendants to comply with the FACA, the FOIA, and the APA;

3. That the Court grant Plaintiff a fee waiver under the FOIA;

4. That the Court enter a permanent injunction prohibiting Defendants from convening, conducting or holding any meeting or engaging in any other activities that are not in full compliance with the FACA, the FOIA, and the APA;

5. That the Court enter a permanent injunction ordering Defendants to provide to Plaintiff, within ten working days and at no cost to Plaintiff, a full and complete copy of all records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for Defendant NEPDG, irrespective of whether any such document otherwise is or could be exempt from disclosure under the FOIA;

6. That the Court enter a permanent injunction ordering Defendants to prepare and deliver to Plaintiff, within ten working days, detailed minutes of each meeting of Defendant NEPDG, certified as accurate, that contain a record of persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all report received, issued, or approved by Defendant NEPDG; and

7. That the Court award Plaintiff attorneys fees and its costs of suit, as well as any and all other relief the Court deems appropriate.

Respectfully submitted,

JUDICIAL WATCH, INC.

_____

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Attorney for Plaintiff Judicial Watch, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2002 a true and correct copy of the foregoing SECOND AMENDED COMPLAINT was served by first class mail, postage prepaid, on the following:

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ATTACHMENT 1

LEV . - 1 OF 1 STORY

Copyright 2001 Newsweek

Newsweek

May 14, 2001, U.S. Edition

SECTION: NATIONAL AFFAIRS; Pg. 18

LENGTH: 1622 words

HEADLINE: Big Energy at the Table

BYLINE: By Howard Fineman and Michael Isikoff; With Mark Hosenball, T. Trent Gegax and Rich Thomas in Washington

HIGHLIGHT:
Winning support for your agenda is easy when your allies fill out the administration's top chairs

BODY:

If you were in the oil and gas business, it was a meeting that dreams were made of. Nine days before George W. Bush was inaugurated, energy lobbyists gathered at the American Petroleum Institute's offices in downtown Washington. Their agenda: to write a wish list. One participant remembers it fondly. "The tone was, 'OK, what do you guys want? You are going to have the ear of this White House'." In came an easel and a whiteboard, and ideas flowed: looser rules for drilling on federal lands; more drilling for oil and gas in Alaska and the Gulf of Mexico; lower royalty payments for tapping offshore wells. After a while, the mood in the room grew giddy. The man from the wildcatters' association suggested going All the Way. It was time, he said, to rethink the Endangered Species Act.

That was a wish too far. But many items on that board--and other lists scribbled by other energy lobbyists in other offices around town--found their way into the recommendations that the president will unveil to the nation next week. The API list, in fact, was forwarded to George Bush's transition team, which sent it to the Interior Department. On March 20, Interior sent many of the same ideas to the Energy Task Force that Vice President Dick Cheney had convened on Jan. 29. To close the loop, key leaders from that API meeting have since been appointed to pivotal positions in Bush's administration--among them J. Steven Griles, an energy lobbyist and the new second in command at Interior, and Thomas Sansonetti, an energy lawyer recently named the top environmental cop at the Justice Department. The two, in effect, will help administer policies they helped to write.

If the Bush administration is homecoming weekend for the energy industry, Dick Cheney's task-force report is the pregame tailgate party. Not since the rise of the railroads more than a century ago has a single industry placed so many foot soldiers at the top of a new administration. While the report will recommend an array of what one White House aide advertises as "high-tech, 21st-century conservation ideas," its core will be a call to find and use new sources of fossil fuels, as well as a renewed commitment to nuclear power. What voters need to hear "loud and clear," the president declared last week, "is that we are running out of energy in America."

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Is there a national "crisis"? California faces rolling summer-electricity blackouts. In New York City, officials are scrambling to add small gas-fired generators to handle peak demand. Natural-gas prices have doubled in the past year. The numbers on signs at filling stations are skyrocketing, and could hit $3 a gallon this summer in the Midwest. In a West Wing interview with NEWSWEEK, Cheney shied away from the C word. "I think the potential is there for it to adversely affect the economy," he said.

But voters are using the word. In a NEWSWEEK Poll, 71 percent of those surveyed say there is an "energy crisis" in California; 53 percent agree there now is one in the country as a whole. Given an either-or choice between "protecting the environment" and "developing new sources of energy," those polled selected energy by 52 to 41 percent, compared with a 49-44 ratio just one month ago.

There's something to be said for turning to energy-industry alums in this situation--and Cheney, who like Bush is a son of the oilfields, is not shy about saying it. "The fact of the matter is [you get] a lot of expertise with people who have been dealing with these issues for a long time," he told NEWSWEEK. In his own case, he said, his time at Halliburton, the globe-girdling oil-services company, taught him "a hell of a lot about the technology of the business," such as benign new ways to drill in Alaska's Arctic National Wildlife Refuge.

But Americans are skeptical of industry motives--and, by extension, of Bush's ties. When asked to name who had contributed "a lot" to the current energy situation, those polled named two sets of villains: the U.S. energy companies (66 percent) and overseas energy suppliers, such as OPEC. Bush himself gets his lowest approval marks for his handling of energy and environmental issues. Democrats, naturally, are pouncing on what they see as a populist hole in Bush's armor. Late last week House Minority Leader Dick Gephardt was stumping in Chula Vista, Calif.; with transmission lines as a backdrop, he vowed to impose new federal caps on electricity rates--an idea Cheney flatly opposes.

The administration may well have raised the political risk via the process it used to draft its plan. The Bushies used a secretive, believers-only process reminiscent of another such enterprise: Hillary Rodham Clinton's effort to write a national health-care plan in 1994. Since the group comprises only government officials, White House aides say, it is entitled to keep its deliberations private. Still, industry leaders--who dumped $22.5 million into GOP coffers in the last election--enjoyed constant contact with the task force. Cheney met with a group of utility executives at the Edison Electric Institute, whose president, Tom Kuhn, was a leading Bush fund-raiser. No one has enjoyed better access than Enron CEO Ken Lay, who recently had dinner with his good friend the president.

The environmental community, meanwhile, got one mass meeting with the staff a month ago (and the promise of another this week with EPA Administrator Christine Todd Whitman). Efforts to meet with Cheney were rebuffed. Cheney himself confirmed he had not met with a single spokesman for the greens. That dynamic has only fueled suspicions among enviros about what's going on behind closed doors. "They're drumming up a fake energy crisis that doesn't exist," says Phil Clapp of the National Environmental Trust.

To be sure, the Cheney report will make many nods in the direction of conservation and renewable resources. Cheney confirmed that it will call for tax credits for both. The plan will herald and encourage the advent of less

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intrusive, high-tech means for finding and extracting oil and gas and for burning more coal. White House spinners have decided to divide the report into five parts--only two of which will deal with the extraction and the transmission of new sources of traditional types of fuel. The conservation measures will be high tech and optimistically can-do about using Yankee ingenuity to give Americans all the cars and appliances they want while using less electricity from state-of-the-art power plants. But there will be no paeans to the kind of pantywaist, tree-hugging self-abnegation the Bushies think President Carter sermon- ized about a generation ago. "This isn't about not bathing or turning off your lights," said a top Cheney aide. "This is about finding environmentally safe ways to make sure we have the energy we need."

That's not enough, environmentalists say, given the rising threat of global warming the green community is convinced comes from burning fossil fuels. "The test of any energy plan will be what it does to limit greenhouse gases," says Fred Krupp of Environmental Defense. The Union of Concerned Scientists, concerned about global warming, says that renewables and conservation could displace 20 percent of traditional electricity demand by the year 2020--and greatly lessen the need for new power plants. Cheney thinks otherwise. In that span, he said, reliance on renewables could indeed triple--a "fairly optimistic" scenario but one that would still meet only 6 percent of total electricity needs. But that estimate does not include imposing tough new mileage standards on SUVs or mandating more efficient appliances. "Part of our task," he said, "is to focus on reality, and reality is not 'Well, gee, we'll conserve our way out, we don't have to produce any more,' or 'Wind and solar will take care of it, so we don't need fossilfuels anymore'."

Now comes the hard part: selling the plan to the public and to Congress. Some GOP strategists are sanguine about overcoming environmental concerns. "Nothing like $3-a-gallon gasoline to help make the case," said one. But it's probably not that simple. White House strategists are looking for clues on how best to hawk the package in polls done for them by the Republican National Committee. The surveys show that voters know very little about where energy supplies come from or how they now are distributed in what has become a relatively deregulated marketplace. "Voters out there think that the government guarantees cheap, abundant energy," said one worried Republican polltaker, "and that's not the way it works anymore." Other insiders worry less about the Democrats than the news media, which they regard as addicted to showing videotape of belching smokestacks. "Bush will have the bully pulpit," says GOP consultant Alex Castellanos, "but it's not an easy sell."

But sell Bush must. He'll take his show on the road next week, joined by a fleet of cabinet secretaries. They will declare that action is needed after years of Clinton-administration neglect. They will say that there are no quick fixes, and tout their market-based, supply-side, long-term answers. They may use real-world vignettes about energy shortages. (On request, the Natural Gas Supply Association provided the White House some.) But politics is lived in the short term, and Bush late last week suddenly found himself in the role of conservation advocate. He ordered federal facilities in California to turn up thermostats, and pledged that they would reduce electricity use by 10 percent. Cheney, the interview over, hurried to the Cabinet Room for the announcement. It turns out that conservation matters a great deal, at least in California, at least for now.

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GRAPHIC: PHOTO: Inner circle: Cheney presiding over a meeting of the Energy Task Force last week in the vice president's ceremonial office; PHOTO: The outsider: Clapp claims the Bushies may be ginning up a fake energy crisis''; GRAPHIC: (Chart) Energy Advocates in the Bush Pipeline (Graphic omitted)

LOAD-DATE: May 9, 2001

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ATTACHMENT 2

	(Orfanedes, Paul) Modified on 2/12/2002 (td,).

Doc. No.	Dates	Description
26	*Filed:* 02/11/2002 *Entered:* 02/25/2002	Reply to Document
	Docket Text: SURREPLY to [19] *defendant's reply to the court's order of 1/31/02* by JUDICAL WATCH, INC.,. (td,) Modified on 2/25/2002 (td,).	
--	*Filed:* 02/12/2002 *Entered:* 02/13/2002	Motion Hearing
	Docket Text: Minute Entry: Motion Hearing on government's motion to dismiss held on 2/12/2002 before Emmet G. Sullivan; motion hearing continued to 4/9/2002 at 1:00 PM before Judge Emmet G. Sullivan.; plaintiff's amended complaint due by 2/15/02; government submission due by 3/1/02; plaintiff's reply due by 3/15/02; government's replly due by 3/22/02;(Court Reporter Gordon Slodysko.) (clv,)	
--	*Filed:* 02/12/2002 *Entered:* 02/13/2002	Set Deadlines
	Docket Text: Minute Entry: Motion Hearing on government's motion to dismiss held on 2/12/2002 before Emmet G. Sullivan; motion hearing continued to 4/9/2002 at 1:00 PM before Judge Emmet G. Sullivan.; plaintiff's amended complaint due by 2/15/02; government submission due by 3/1/02; plaintiff's reply due by 3/15/02; government's replly due by 3/22/02;(Court Reporter Gordon Slodysko.) (clv,)	
--	*Filed:* 02/12/2002 *Entered:* 02/13/2002	Set Hearings
	Docket Text: Minute Entry: Motion Hearing on government's motion to dismiss held on 2/12/2002 before Emmet G. Sullivan; motion hearing continued to 4/9/2002 at 1:00 PM before Judge Emmet G. Sullivan.; plaintiff's amended complaint due by 2/15/02; government submission due by 3/1/02; plaintiff's reply due by 3/15/02; government's replly due by 3/22/02;(Court Reporter Gordon Slodysko.) (clv,)	
23	*Filed:* 02/13/2002 *Entered:* 02/13/2002	Order
	Docket Text: ORDER setting forth briefing schedule.Signed by Judge Emmet G. Sullivan on 02/13/2002. (lcegs2,)	
24	*Filed:* 02/15/2002 *Entered:* 02/15/2002	Amended Complaint
	Docket Text: AMENDED COMPLAINT. Filed by JUDICAL WATCH, INC.,. (Orfanedes, Paul)	
25	*Filed:* 02/19/2002 *Entered:* 02/19/2002	Notice (Other)
	Docket Text: NOTICE *of Substitution of Counsel* by NATIONAL ENERGY POLICY DEVELOPMENT GROUP (Buchholz, David)	
--	*Filed:* 02/22/2002 *Entered:* 02/25/2002	Summons Issued as to USA
	Docket Text: SUMMONS (19) Issued as to SPENCER ABRAHAM ; JOSEPH M. ALLBAUGH ; JOHN ASHCROFT ; HALEY BARBOUR ; JOSHUA BOLTON ; RICHARD CHENEY ;	

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A New Capitol Clash

Enron continues to roil Washington. Next up: a constitutional showdown

By Howard Fineman and Michael Isikoff
NEWSWEEK

Feb. 11 issue — For security reasons, George W. Bush and Dick Cheney are not supposed to spend much time together. But they made an exception last Tuesday afternoon for a hoary ritual of life in the capital: the briefing of the network anchors. Just hours before Bush's State of the Union address, Peter Jennings, Dan Rather, Tom Brokaw & Co. were ushered into the Old Family Dining Room in the private quarters of the White House to hear the president and his veep spin the speech.

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ONE OF THE FIRST questions was about Enron, and Cheney's refusal to turn over logs of his energy task force's secret contacts with energy executives. "Won't this get in the way of the message of the speech?" one of the anchors asked. "Why not just give Congress the information and get it over with?" Before Cheney could answer, Bush cut in. Pounding the table, he insisted that a fundamental right of the presidency was at stake: the ability to get information and private, candid advice from anyone, any time. Bush fully backed Cheney's refusal to comply with the General Accounting Office's demand for the lists. What about the GAO's threat to file a suit? For Bush, it was a Texas Ranger moment. "Bring it on," he said.

As the trash talk between the two sides escalates—" Talk is cheap," Walker sneers at Cheney's chin-out attitude—the case has become in part a classic Washington showdown between two powerful, bullheaded men.

David Walker is getting ready to do just that. The GAO chief, who now says he will sue to get the documents, insists he wasn't looking for a showdown with Cheney. Last summer two House Democrats asked the GAO to probe whether the energy task force was unfairly influenced by industry lobbyists. Walker complied, sending the White House a sharply worded "demand letter" requesting all notes and minutes of its meetings.

SCALING BACK

A plain-spoken Republican who worked in Ronald Reagan's Labor Department and later as an Arthur Andersen executive, Walker tells NEWSWEEK he concluded that the demands were too intrusive. "Out of respect for the vice president," Walker says, he "personally" scaled back the request, asking only for a list of people who advised the task force and the topics of their conversations. But Cheney still refused. Then Enron collapsed late last year, and Walker's cause suddenly became a whole lot more interesting. "This all got Enronized," says one administration aide with a sigh. Walker, who has hired a Washington law firm to handle the case, says his investigation "isn't an Enron issue." Congress, he says, "has the right to know who from the outside is seeking to influence" White House policy. "I'm not seeking a confrontation. We just need the information."

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TIMELINE

The rise and fall of Enron

1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10

Feb. 12, 2002
Former Enron CEO Kenneth Lay invokes his Fifth Amendment right at a congressional hearing, drawing the scorn of a Senate panel investigating the energy firm?s collapse.
Feb. 7, 2002
Former Enron CEO Jeffrey Skilling tells a House subcommittee he did not know the company was in trouble when he unexpectedly resigned in August. Former CFO Andrew Fastow refuses to testify before the panel.
Feb. 5, 2002
The House Financial Services Committee and the Senate Commerce Committee subpoena Kenneth Lay to compel the former Enron CEO to appear before the panels.
Feb. 4, 2002
Kenneth Lay resigns from Enron's board of directors. Sen. Byron Dorgan says the Senate Commerce Committee will issue a subpoena to compel the former CEO to appear before the panel.
Feb. 3, 2002
The attorney for Kenneth Lay says the former Enron CEO will not appear at congressional hearings after several members of Congress appear on Sunday news shows accusing Lay and other Enron executives of committing crimes.

Printable version

As the trash talk between the two sides escalates—" Talk is cheap," Walker sneers at Cheney's chin-out attitude—the case has become in part a classic Washington showdown between two powerful, bullheaded men. Yet the feud frames a wider clash between two worlds: a White House with an instinct for secrecy and Washington's Axis of Inquiry—lawyers, journalists, courts and congressional investigators. That clash will only intensify in the coming days, as former Enron CEO Ken Lay heads for the Hill and the Justice Department proceeds with its criminal probe of the troubled energy company.

The White House has hung tough, but the administration made a limited tactical retreat as pressure increased to fully disclose its ties to Enron. Cheney acknowledged that he had personally discussed energy policy in a March 2001 meeting with Lay—and officials admitted that there were five other meetings between Enron representatives and Cheney's staff. In fact, there was at least one more. NEWSWEEK has learned that on March 29 of last year, Cheney's top energy aide, Andrew Lundquist, met with members of the Clean Power Group—a coalition funded by five power companies that included Enron. The group wanted the task force to replace some environmental rules with a plan that would allow industries to trade "pollution credits" among themselves. Enron stood to make hundreds of millions of dollars if the plan was adopted.

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'WHO CARES?'

The meeting was arranged by Brad Card, the Clean Power Group's outside lobbyist and brother of White House chief of staff Andrew Card. So why didn't the White House disclose the meeting in its list of Enron contacts? A White House aide says Lundquist "has no recollection" of being told that Enron was part of the group. (Brad Card's associate Mark Irion tells NEWSWEEK he made clear to Lundquist at the outset that Enron was a member.) Cheney spokeswoman Mary Matalin says it doesn't matter, since the proposal never made it into the energy plan. "Who cares if there were a hundred meetings?" she says. The Justice Department might. On Friday, Justice officials ordered the administration to preserve all documents related "in any way" to Enron.

Democrats, and even some Republicans, on the Hill are standing shoulder to shoulder with Walker's demands for still more disclosure. Their argument: when the White House or government agencies make policy, they are supposed to use a procedure that guarantees public access to keep officials from being secretly influenced by private—so-called ex parte—conversations.

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The White House insists that all meetings of the task force are exempt from this kind of disclosure. Why? Because Cheney—a "constitutional officer" as vice president—is exempt, and therefore, they say, so is the task force he ran. White House aides say they designed the task force to avoid the problems that Hillary Clinton's health-care group faced in 1994. To insulate the group within constitutional limits, aides say, Cheney himself chaired it, only government officials served on it and only task-force members—not the whole group—met with industry lobbyists. Critics complain that's a loophole big enough to drive an oil rig through.

Bush and Cheney are unimpressed. For years Cheney has loudly lamented the steady erosion of presidential power at the hands of Congress and the press. And Bush is the son of a CIA director and a third-generation Skull and Bones man: a kid to secrets born. The Cheney-Bush kinship has been strengthened by the war on terror, with its emphasis on sealed lips. "It's a horse race between them," says a top White

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House aide, "to see who can take a tougher stand."

The president's political advisers aren't nearly so confident. For months GOP strategists have been urging the White House to ease up or risk looking as if it has something to hide. "If we released everything, we would look better," admits one Bush aide. But in his increasingly tense stare-down with Walker, Cheney isn't about to be the one who blinks first.

With Martha Brant and Tamara Lipper

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ATTACHMENT 3

THE ENRON COLLAPSE

Memo details Cheney--Enron links

Company's suggestions resembled elements of the administration's energy policy

David Lazarus, Chronicle Staff Writer
Wednesday, January 30, 2002
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URL: http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2002/01/30/MN46204.DTL



While the White House insists that details of its talks with Enron officials remain secret, a memo outlining those discussions reveals the extent to which the Houston energy giant lobbied to influence government policy.

The memo, a copy of which was obtained by The Chronicle, was handed by former Enron Chairman Ken Lay to Vice President Dick Cheney last April when the two met to discuss the administration's response to California's energy crisis.

The White House acknowledged last night that aspects of the memo resembled elements of Cheney's energy plan, but it refused to say whether the document was included in notes that Cheney now refuses to divulge to congressional investigators.

The General Accounting Office is threatening to sue the administration if it doesn't disclose details of its talks with Enron officials.

The three-page document contains eight points spelling out Enron's case for why federal authorities should refrain from imposing price caps or other measures sought by California officials to stabilize runaway electricity prices.

A number of the positions in the memo subsequently made it into Cheney's energy plan or were reflected in comments by senior administration officials.

"Events in California and in other parts of the country demonstrated that the benefits of competition have yet to be realized and have not yet reached consumers," the memo argues.

"The following actions need to be taken," it continues, outlining positions on a series of matters. Some of the topics, such as equal access to transmission grids and interconnection of power networks, are largely technical in nature.

ENRON FROWNED ON PRICE CAPS

The key point as far as California was concerned was whether soaring wholesale power prices should be limited or whether such prices were merely a reflection of normal supply-and-demand dynamics.

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"The administration should reject any attempt to re-regulate wholesale power markets by adopting price caps or returning to archaic methods of determining the cost-base of wholesale power," the memo says.

It adds that even temporary price restrictions "will be detrimental to power markets and will discourage private investment."

The memo blames California officials for having made only "limited progress" in tackling the state's power woes. It says that if the administration were to follow all of Enron's recommendations, the measures "would mitigate this crisis."

An Enron spokesman confirmed that the memo had been given by Lay to Cheney during their one-on-one talks.

Mary Matalin, an adviser to the vice president, said Cheney's energy plan included input from many sources. "Just because some of the things (in the memo) are included in the plan doesn't mean they were from the talks" between Cheney and Lay, she said.

LIMITS CALLED 'A MISTAKE'

Still, as far as price caps go, the administration was quick to fall into lockstep with Enron's opposition to any federal regulatory moves. "We think that's a mistake," Cheney said just weeks after his meeting with Lay.

Nevertheless, federal regulators finally imposed price limits in June based on the cost of the least-efficient, and thus most expensive, generating plant. Democrats in Washington had threatened to act on their own if the regulators did not come up with a remedy for California's troubles.

Cheney also echoed Enron's position on the culpability of California's leaders in exacerbating the state's energy problems.

"When the problem became obvious last year, over a year ago, they didn't respond," he said in May.

Noting that California had experienced rolling blackouts and the bankruptcy of its biggest utility, he also said, "I don't think that's a sterling record of leadership, I would guess, on their part."

SHARED FAITH IN DEREGULATION

To be sure, Cheney, Lay and President Bush, as well as other industry players, shared a belief in deregulation well before the lights went out in California. But the memo underscores the broad kinship between Enron and the administration in drafting official policy.

Steve Maviglio, a spokesman for Gov. Gray Davis, said it came as no surprise that Enron had substantial clout in formation of the Bush administration's stance on California's difficulties.

"What the federal government did during the energy crisis was pretend that the problem didn't exist and say that the markets can solve everything, and that's the same thing Ken Lay told the governor," Maviglio said.

He added that "the administration was espousing what Enron was espousing -- that the markets should fix themselves."

Whatever else, it's extraordinary for a private company, particularly one accused by California officials of having gouged the state with wildly inflated energy prices, to have played such a prominent role in the White House's response to the crisis.

'CONSUMERS SHOULD BE OUTRAGED'

"If the administration was allowing Enron to guide its policy during the California energy crisis, consumers should be outraged," said Janee Briesemeister, senior policy analyst at Consumers Union in Austin, Texas.

"It's not unusual for a company to hand policymakers their ideas for what should be done," she added. "Things break down when policymakers refuse to admit that they used what was brought to them by industry."

Cheney's argument, as he told an interviewer Sunday, is that revealing details of his talks with Enron would undermine "the ability of the president and the vice president to solicit advice from anybody they want in confidence."

Bush echoed this sentiment a day later, saying that confidential talks are necessary to "get good, sound opinions." He reiterated that stance yesterday in a meeting with congressional leaders.

Craig McDonald, director of Texans for Public Justice, a watchdog group, called it laughable for the administration to cast its secrecy as a defense of high-minded principle.

"All they're fighting for is to keep the wraps on how much clout Enron had over Dick Cheney's energy plan," he said.

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THE ENRON COLLAPSE / Memo details Cheney--Enron links / Company's suggestions resembled elements of the administration's energy policy
This memo was given to Vice President Dick Cheney by Enron's then-CEO Ken Lay last April. It spells out Enron's case for why federal authorities should refrain from imposing price caps or other measures sought by California officials to stabilize runaway electricity prices. Image File: 270 Kbytes

National Energy Policy: Priorities

The 1992 Energy Policy Act (EPA) intended to introduce competition into the wholesale market for electric power by providing transmission access. Events in California and in other parts of the country demonstrated that the benefits of competition have yet to be realized and have not yet reached consumers. To realize the vision set forth in the EPA, the following actions need to be taken:

1. Fair Transmission Access

In Order No. 888, the FERC attempted to formulate fair terms and conditions of access to the transmission grid for all users. However, the FERC failed to extend its jurisdiction to transmission services bundled together with retail sales. Consequently, distinct rules apply to different parties for use of the *same* transmission asset and such rules provide vertically integrated utilities the opportunity to use their transmission assets to disadvantage independent third party generators and wholesalers.

To achieve robust competition in wholesale power markets, the FERC must actively exercise jurisdiction over all aspects of electricity transmission in interstate commerce and place all uses of the grid under the same rates, terms, and conditions. Moreover, FERC jurisdiction must extend to the terms of access applicable to transmission systems owned and operated by non-FERC jurisdictional entities including Federal Power Marketing Associations (PMAs), states and municipalities.

To improve reliability, the FERC has encouraged utilities to combine transmission facilities into large Regional Transmission Organizations (RTOs) and to assign the responsibility for operating RTOs to an independent management team. Properly structured RTOs can ease the movement of power between states and between users within a state, and will enhance reliability, commercial activities, and competition in the energy industry.

However, the FERC has refused to make RTO participation mandatory. This, coupled with the lack of non-discriminatory open access terms, has weakened the RTO initiative. Therefore, the Administration must encourage the FERC to approve only those RTOs with sufficient size and scope and with non-discriminatory terms and conditions for access and to require that all transmission owners participate in an RTO. Finally, the Administration should revise those tax provisions that prevent the transfer of assets to new, stand alone independent, for-profit transmission companies (Transcos).

2. Independent Energy Reliability Organizations

Governance of the North American Electric Reliability Council (NERC) is cumbersome and places new market entrants at a competitive disadvantage. There is a necessary role for FERC oversight of a new Independent Reliability Organization (IRO).

Legislation to establish a new IRO is required. However, the "consensus" reliability language in the proposed Murkowski bill is ineffective since it establishes an unsatisfactory procedure to resolve conflicts between the IRO and the various RTOs

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	MITCHELL E. DANIELS JR., ; DONALD EVANS ; THOMAS KUHN ; KENNETH LAY ; LARRY LINDSEY ; NORMAN MINETA ; NATIONAL ENERGY POLICY DEVELOPMENT GROUP ; GALE NORTON ; PAUL O'NEILL ; COLIN POWELL ; MARK RACICOT ; ANN M. VENEMAN ; CHRISTINE T. WHITMAN ; PATRICK H. WOOD III , U.S. Attorney (td,)		
27	*Filed:* 02/25/2002 *Entered:* 02/25/2002	Errata	
	Docket Text: (ENTERED IN ERROR) ERRATA *to Amended Complaint* by JUDICAL WATCH, INC.,. (Orfanedes, Paul) Modified on 2/25/2002 (td,).		
28	*Filed:* 02/25/2002 *Entered:* 02/25/2002	Errata	
	Docket Text: ERRATA *to Amended Complaint* by JUDICAL WATCH, INC.,. (Attachments: # (1) Errata)(Orfanedes, Paul)		
29	*Filed:* 02/26/2002 *Entered:* 02/26/2002 *Terminated:* 02/28/2002	Motion for Extension of Time to File Answer	
	Docket Text: MOTION for Extension of Time to File Answer re [24] *amended complaint* by SPENCER ABRAHAM, JOSEPH M. ALLBAUGH, JOSHUA BOLTON, RICHARD CHENEY, MITCHELL E. DANIELS JR.,, DONALD EVANS, LARRY LINDSEY, NORMAN MINETA, NATIONAL ENERGY POLICY DEVELOPMENT GROUP, GALE NORTON, PAUL O'NEILL, COLIN POWELL, ANN M. VENEMAN, CHRISTINE T. WHITMAN, PATRICK H. WOOD III. (Buchholz, David)		
31	*Filed:* 02/27/2002 *Entered:* 03/01/2002	Memorandum in Opposition	
	Docket Text: Memorandum in Opposition to Motion re [29] *to defendants' motion for extension of time to respond to amended complaint* filed by JUDICAL WATCH, INC.,. (td,) Modified on 3/1/2002 (td,).		
32	*Filed:* 02/27/2002 *Entered:* 03/01/2002	Errata	
	Docket Text: ERRATA *corrected supplemental plaintiff's opposition to defendants' motion for extension of time to respond to amended complaint* by JUDICAL WATCH, INC.,. (Attachments: # (1) Exhibit # (2) Exhibit)(td,)		
--	*Filed:* 02/28/2002 *Entered:* 02/28/2002	Motion Hearing	
	Docket Text: Minute Entry: Motion Hearing held on 2/28/2002 before Judge Emmet G. Sullivan ; government submission due by 3/8/02 12:00 Noon; plaintiff response due by 3/20/02; reply due by 3/27/02; chambers to electronically issue order;(Court Reporter Frank Rangus.) (clv,)		
30	*Filed:* 02/28/2002 *Entered:* 02/28/2002	Order on Motion for Extension of Time to Answer	
	Docket Text: ORDER granting Motion for Extension of Time to Answer, as amended by this Order. [29] Signed by Judge Emmet G. Sullivan on 2/28/2002. (lcegs2,)		
33	*Filed:* 03/07/2002 *Entered:* 03/07/2002	Order	
	Docket Text: ORDER inviting The Sierra Club to file amicus brief in this case.Signed by Judge Emmet G. Sullivan on 3/7/2002. (lcegs2,)		

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REV_00264373

unsatisfactory procedure to resolve conflicts between the IRO and the various RTOs established by the FERC.

Legislation that permits the FERC to delegate authority to develop reliability standards and enforce those standards, establishes an appropriate funding mechanism, includes a limited States' savings clause and provides the IRO participants with anti-trust immunity will accomplish the shared goal of establishing an effective IRO.

3. Wholesale Market Price Caps or Cost-Based Wholesale Rates

The Administration should reject any attempt to re-regulate wholesale power markets by adopting price caps or returning to archaic methods of determining the cost-base of wholesale power. Price caps, even if imposed on a temporary basis, will be detrimental to power markets and will discourage private investment by significantly raising political risk. Similarly, a return to cost-based wholesale rates will be extremely difficult to implement and will effectively negate significant investments made by new market entrants made in reliance on the presence of deregulated wholesale power markets.

4. Interconnection Policy

Competitive generation (including Distributed Generation "DG") and wholesale power markets have been hindered by grid interconnection policies and procedures that restrict new entry. The lack of a uniform and effective interconnection policy creates uncertainty, delay and unnecessary costs in development of new generation capacity and DG technologies. To correct this problem, FERC must develop and enforce standardized, non-discriminatory interconnection procedures.

5. Federal Transmission and Generation Siting Policy

An efficient and reliable interstate wholesale market requires construction of new transmission and generation facilities. Siting and permitting problems have frustrated construction of new facilities. Consistent with rules for certification of natural gas facilities, granting condemnation rights to private parties that have obtained federal authorization to construct facilities can significantly reduce these problems. In addition, Federal Agencies and Tribunal Governments should streamline the regulatory processes to enable expedited construction and efficient operation of energy infrastructure.

6. Demand Reduction Incentives

The Administration should mandate the creation of a regional demand exchange (implemented by mandatory RTOs) that would allow large consumers to post bids for the reduction of demand. If implemented expeditiously, such a mechanism can have an immediate impact in reducing demand this summer.

7. California Power Crisis

The political leadership in California has made limited progress in solving its power crisis. All of the above items would mitigate this crisis.

8. Natural Gas Supply Outlook

There are concerns that natural gas supplies may not be adequate to meet market demand. Yet all studies indicate that remaining economically recoverable resources in North American are ample for decades to come. These supplies can be further supplemented by imported liquified natural gas. This will allow natural gas to continue to provide an increasing share of the total energy needs to the U.S.

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ATTACHMENT 4

Time, February 11, 2002

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Time

February 11, 2002; Pg. 16

HEADLINE Getting The Ear Of Dick Cheney

BYLINE Michael Weisskopf and Adam Zagorin

Dick Cheney has taken a hard line against the General Accounting Office, refusing its efforts to get information on meetings held by his energy task force. Critics suspect that Cheney is stonewalling to conceal the Administration's links with bankrupt energy giant Enron. But Cheney may be hiding more than that. Several other energy companies had opportunities to influence the Administration's energy policy, with both persuasion and money. A key task-force meeting, sources tell TIME, was held by Cheney in the White House on May 3. Among attendees were two lobbyists for electric utilities: former Montana Governor and now G.O.P. chairman Marc Racicot and former G.O.P. chairman Haley Barbour. Two weeks later, Cheney's report gave the lobbyists much of what they wanted, including a re-evaluation of a costly clean-air rule, called the new-source review, which requires new pollution controls when power plants are expanded. While he was lobbying for these energy interests, Barbour was also raising at least $ 250,000 for a May 21 G.O.P. gala honoring President Bush. The group of utilities Barbour was representing, led by Southern Co., gave $ 150,000 to the event. The night before the gala, Cheney held a glitzy reception at the vice-presidential mansion for hundreds of the fete's sponsors and longtime party donors.

Another company that had entree to the Cheney task force was Peabody Energy, a coal behemoth whose holding company and top officer have given nearly $ 200,000 to the President and his party since Bush took office, including $ 25,000 for the May gala. Sources say Peabody chairman Irl Engelhardt and other energy executives met in March with two task-force members, Energy Secretary Spencer Abraham and Bush economic adviser Larry Lindsey. Cheney's group also heard in March from officials from the nuclear-energy industry--whose trade association, the Nuclear Energy Institute, contributed $ 100,000 to the Bush event. Both coal and nuclear power got major endorsements in the task-force report.

Racicot, who stopped lobbying after taking over the G.O.P. last month, said he didn't raise funds for the Bush bash. Barbour did not return calls for comment. Cheney spokeswoman Mary Matalin denied any link between task-force access and fund raising, saying the Veep had no idea who was financing the gala.

--By Michael Weisskopf and Adam Zagorin

ATTACHMENT 5

OFFICE OF THE VICE PRESIDENT
WASHINGTON

May 4, 2001

The Honorable W.J. "Billy" Tauzin, Chairman
The Honorable John D. Dingell, Ranking Minority Member
Committee on Energy and Commerce
House of Representatives
Washington, D.C. 20515

The Honorable Dan Burton, Chairman
The Honorable Henry A. Waxman, Ranking Minority Member
Committee on Government Reform
House of Representatives
Washington, D.C. 20515

Gentlemen:

This is in response to the letter of April 19, 2001 from the ranking minority members of your Committees to Mr. Andrew Lundquist, Executive Director of the National Energy Policy Development Group (NEPDG). The letter sought information regarding compliance with the Federal Advisory Committee Act (FACA)(5 U.S.C. Appx. 2) by the NEPDG. Please be advised that the FACA does not apply to the NEPDG, noting especially that FACA by its own terms does not apply to a group "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government."

As a matter of comity between the legislative and executive branches, with due regard for the constitutional separation of powers and the rights of Americans to petition their government, and reserving all legal authorities and privileges that may apply, we are pleased to provide the enclosed information, which will enable you to conclude independently that the establishment and activities of the NEPDG are not inconsistent with the FACA.

Sincerely,

David S. Addington
Counsel to the Vice President

Enclosure as stated

REV_00264440

RESPONSES OF ANDREW LUNDQUIST, EXECUTIVE DIRECTOR
FOR THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP
TO QUESTIONS FROM THE RANKING MINORITY MEMBERS OF THE
HOUSE COMMITTEE ON GOVERNMENT REFORM
AND THE HOUSE COMMITTEE ON ENERGY AND COMMERCE

COMMITTEE QUESTION (1): (1) It is our understanding that you are directing a task force charged with examining and formulating energy policy.

RESPONSE (1): The mission of the National Energy Policy Development Group established on January 29, 2001 is to develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy. To carry out that mission, the Group gathers information, deliberates and makes recommendations to the President. Ultimately, the Group is to report its recommended national energy policy to the President.

COMMITTEE QUESTION (1)(a): (a) Please provide a complete list of task force members and staff assigned to the task force, identifying the employer of the member or staff. In the case of federal employees, please identify the department or agency for which the member or staff works.

RESPONSE (1)(a): The National Energy Policy Development Group consists of the following officers of the Federal Government: the Vice President, Secretary of the Treasury, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Transportation, Secretary of Energy, Director of the Federal Emergency Management Agency, Administrator of the Environmental Protection Agency, Assistant to the President and Deputy Chief of Staff for Policy, Assistant to the President for Economic Policy, and Assistant to the President for Intergovernmental Affairs. The Vice President may invite the Chairman of the Federal Energy Regulatory Commission to participate. The Vice President may invite the participation of the Secretary of State when the work of the Group involves international affairs and, as appropriate, other officers of the Federal government. The Vice President has invited the Director of the Office of Management and Budget to participate. The Vice President presides at the meetings of the Group and directs its work. The Group is supported by five professionals employed by the Department of Energy and assigned for this purpose to the Office of the Vice President: an Executive Director, a Deputy Director, two Senior Professional Staff Members, and a Professional Staff Member. In addition, an individual appointed as a White House Fellow who is assigned to the Office of the Vice President provides support to the Group.

COMMITTEE QUESTION (1)(b): (b) Please identify any task force members and staff who are not full-time federal employees. In the case of any member or staff who is a part-time federal

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employee, identify the hours per week that person works for the federal government and when that person began working for the federal government.

RESPONSE (1)(b): The National Energy Policy Development Group consists solely of officers of the Federal Government. The six individuals identified in Response (1)(a) above who provide support to the Group (hereafter "Group support staff") are all full-time Federal employees. For brief periods the employment status of two of the six individuals (from February 1 through 12, 2001 in the case of the Executive Director, and from February 7 through 12, 2001 in the case of the Deputy Director) was as consultants to the Department of Energy while the Department was processing their entrance-on-duty papers; they had no employer other than the Department of Energy during those brief periods. Please note that the Government officers who are on the National Energy Policy Development Group have assistants at their individual departments and agencies who help them with review and drafting of materials and may attend Group meetings with them. Those departments and agencies could advise on the personnel status of those assistants if it were material.

COMMITTEE QUESTION (1)(c): (c) Please identify any task force member or staff who, at the time of any task force meeting, was serving as a contractor to, or temporary full time employee of, the federal government while on leave from non-federal employment. For each member or staff identified, please include the name of that person's non-federal employer.

RESPONSE (1)(c): None of the government officers who compose the National Energy Policy Development Group, nor any of the individuals on the Group's support staff, was, at the time of any Group meeting, serving as a contractor to, or temporary full time employee of, the federal government while on leave from non-federal employment.

COMMITTEE QUESTION (2): (2) It is our understanding that the task force has conducted a series of "stakeholder meetings" on energy policy and legislation at federal facilities over the past few months.

RESPONSE (2): The National Energy Policy Development Group has not held such meetings. Individuals on the Group support staff have met with many individuals who are not Federal employees to gather information relevant to the Group's work, but such meetings do not involve deliberations or any effort to achieve consensus on advice or recommendations. These meetings by the Group's staff were simply forums to collect individual views rather than to bring a collective judgment to bear. The Group's staff held such meetings with a broad representation of people potentially affected by the Group's work, including individuals involved with companies or industries (e.g., in the electricity, telecommunications, coal mining, petroleum, gas, refining, bioenergy, solar energy, nuclear energy, pipeline, railroad and automobile manufacturing sectors); environmental, wildlife, and marine advocacy; State and local utility regulation and energy management; research and teaching at universities;

research and analysis at policy organizations (i.e., think-tanks); energy consumers, including consumption by businesses and individuals; a major labor union; and about three dozen Members of Congress or their staffs.

COMMITTEE QUESTION (2)(a): (a) Please provide a list of all task force meetings held, including the date and location of each meeting.

RESPONSE (2)(a): The Vice President has convened the National Energy Policy Development Group on the following dates in the year 2001, and all such meetings have been in the White House Complex: January 29, February 9 and 16, March 12 and 19, April 3, 11, and 18, and May 2.

COMMITTEE QUESTION (2)(b): (b) Please describe in detail the purpose of these meetings. For each meeting, please explain if the meeting was conducted in order to obtain advice or recommendations about policy or proposed legislation. Please explain whether each meeting had a fixed agenda and/or a defined purpose.

RESPONSE (2)(b): The National Energy Policy Development Group, consisting only of Government officers, has met at each of its meetings for the purpose carrying out its mission to develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy. At those meetings, to carry out its assigned mission, the Group has reviewed relevant information, deliberated, and formulated potential recommendations. With regard to meetings with individuals involving the Group's support staff, please see Response (2).

COMMITTEE QUESTION (2)(c): (c) Please describe the outcome of each meeting. Please explain to what extent each meeting resulted in the formulation of specific proposals or recommendations. Please specify to what extent the task force incorporated or adopted any suggestions or advice received at each meeting from non-federal "stakeholders", or to what extent it modified its proposals based on input received from non-federal "stakeholders" at the meeting.

RESPONSE (2)(c): Each of the National Energy Policy Development Group's meetings to date have advanced its mission as set forth in Response (1). Each of the meetings of the Group's support staff described in Response (2) gathered, in support of the Group's mission, information relevant to the Group's work.

COMMITTEE QUESTION (2)(d): (d) For each task force meeting that has occurred to date, please provide a complete accounting of all attendees. Please include the name and employer of each attendee as well as the name of all clients represented by each person for the purpose of any particular task force meeting. Please indicate if any participants received any compensation for their involvement in a meeting or meetings.

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RESPONSE (2)(d): The officers of the Government constituting the National Energy Policy Development Group attended the Group's meetings. The Group's support staff attended the Group's meetings. Other employees on the staff of the Vice President attended the Group's meetings. The Government officers who constitute the National Energy Policy Development Group have assistants at their departments and agencies who attended the Group's meetings with them.

COMMITTEE QUESTION (3): (3) The Federal Advisory Committee Act (FACA) defines an advisory committee as "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for . . . one or more agencies or officers of the Federal government . . ." The Act requires that the meetings of such advisory committees be noticed in advance, open to the general public, and on the record, except under certain limited circumstances.

RESPONSE (3): Section 3(2) of the FACA provides that the term "advisory committee" as used in the FACA excludes "any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government." The National Energy Policy Development Group is composed wholly of full-time officers of the Federal Government. Accordingly, the FACA requirements to which Committee Questions (3)(a) through (3)(f) refer do not apply. See also Response (2).

COMMITTEE QUESTION (3)(a): (a) Was advance notice of these task force meetings provided to the general public?

RESPONSE (3)(a): See Response (3).

COMMITTEE QUESTION (3)(b): (b) How many of these task force meetings took place on federal property or involved the attendance of federal personnel?

RESPONSE (3)(b): See Response (3).

COMMITTEE QUESTION (3)(c): (c) Were these meetings open to the general public?

RESPONSE (3)(c): See Response (3).

COMMITTEE QUESTION (3)(d): (d) If these meetings were not open to the general public, why not and under what authority?

RESPONSE (3)(d): See Response (3).

COMMITTEE QUESTION (3)(e): (e) Were any transcripts or detailed minutes of these meetings kept by you or any other attendee or participant?

RESPONSE (3)(e): See Response (3).

COMMITTEE QUESTION (3)(f): (f) If no transcripts or minutes were kept, please explain why not and under what authority?

RESPONSE (3)(f): See Response (3).

COMMITTEE QUESTION (4): (4) As stated previously, we have been informed that only certain "stakeholders" were invited to participate in these meetings.

RESPONSE (4): The National Energy Policy Development Group has not held such meetings. To support the Group in the performance of its mission, one or more of the individuals on the Group's support staff have met with many individuals who are not Federal employees to gather from them information relevant to the Group's work. The non-Federal employees from whom the Group's support staff has thus far sought information constitute a broad range of sources of information; see Response (2).

COMMITTEE QUESTION (4)(a): (a) Was any executive branch agency or any of its personnel responsible in any way for determining who would or would not be invited to participate in these meetings?

RESPONSE (4)(a): See Response (4).

COMMITTEE QUESTION (4)(b): (b) Please provide a detailed explanation of the process by which each non-federal participant in these meetings was determine to be a "stakeholder" in energy policy.

RESPONSE (4)(b): See Response (4).

COMMITTEE QUESTION (4)(c): (c) Please provide a detailed explanation of the process by which the task force decided not to meet with any private citizens or groups.

RESPONSE (4)(c): See Response (4).

COMMITTEE QUESTION (4)(d): (d) Was the governor of any state invited to participate in these meetings? If so, which? If not, why not?

RESPONSE (4)(d): See Response (4).

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36	*Filed:* 03/07/2002 *Entered:* 03/13/2002	Transcript
	Docket Text: TRANSCRIPT for dates 2/28/02 *Court Reporter: Frank J. Rangus, OCR.* (td,)	
34	*Filed:* 03/08/2002 *Entered:* 03/08/2002 *Terminated:* 05/23/2002	Motion to Dismiss
	Docket Text: MOTION to Dismiss *Amended Complaint* by SPENCER ABRAHAM, JOSEPH M. ALLBAUGH, JOSHUA BOLTON, RICHARD CHENEY, MITCHELL E. DANIELS JR.,, DONALD EVANS, LARRY LINDSEY, NORMAN MINETA, NATIONAL ENERGY POLICY DEVELOPMENT GROUP, GALE NORTON, PAUL O'NEILL, COLIN POWELL, ANN M. VENEMAN, CHRISTINE T. WHITMAN, PATRICK H. WOOD III. (Attachments: # (1) Exhibit 1)(Buchholz, David)	
35	*Filed:* 03/08/2002 *Entered:* 03/08/2002	Order
	Docket Text: ORDER granting extension of time to file amicus brief.Signed by Judge Emmet G. Sullivan on 3/8/2002. (lcegs2,)	
37	*Filed:* 03/11/2002 *Entered:* 03/14/2002 *Terminated:* 03/18/2002	Motion for Extension of Time to File
	Docket Text: MOTION for Extension of Time to File *Amicus Brief* by SIERRA CLUB. (td,)	
38	*Filed:* 03/15/2002 *Entered:* 03/15/2002	Response to any document
	Docket Text: RESPONSE to *NRDC Motion for Extension, or, in the alternative, Motion for change of amicus briefing schedule* filed by SPENCER ABRAHAM, JOSEPH M. ALLBAUGH, JOSHUA BOLTON, RICHARD CHENEY, MITCHELL E. DANIELS JR.,, DONALD EVANS, LARRY LINDSEY, NORMAN MINETA, NATIONAL ENERGY POLICY DEVELOPMENT GROUP, GALE NORTON, PAUL O'NEILL, COLIN POWELL, ANN M. VENEMAN, CHRISTINE T. WHITMAN, PATRICK H. WOOD III. (Buchholz, David)	
39	*Filed:* 03/15/2002 *Entered:* 03/18/2002	Summons Returned Executed
	Docket Text: RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. HALEY BARBOUR served on 2/27/2002, answer due 3/19/2002 (td,)	
40	*Filed:* 03/15/2002 *Entered:* 03/18/2002 *Terminated:* 03/18/2002	Motion for Miscellaneous Relief
	Docket Text: MOTION to join Sierra Club's amicus filing on 4/2/02 by NATURAL RESOURCES DEFENSE COUNCIL. (td,)	
49	*Filed:* 03/15/2002 *Entered:* 03/22/2002 *Terminated:* 07/11/2002	Motion to Dismiss
	Docket Text: MOTION to Dismiss *this action against him* by MARK RACICOT. (td,)	
--	*Filed:* 03/18/2002 *Entered:* 03/18/2002	Terminate Motions
	Docket Text: Order amending briefing schedule for parties and amicus and rescheduling hearing date to May 2, 2002. Motions terminated. () (GK,)	

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COMMITTEE QUESTION (4)(e): (e) Were any state public utility commissioners invited to participate in these meetings? If so, which? If not, why not?

RESPONSE (4)(e): See Response (4).

COMMITTEE QUESTION (4)(f): (f) Were any representatives of organized labor invited to participate in these meetings? If so, which? If not, why not?

RESPONSE (4)(f): See Response (4).

COMMITTEE QUESTION (4)(g): (g) Were any representatives of consumer advocacy groups invited to participate in these meetings? If so, which? If not, why not?

RESPONSE (4)(g): See Response (4).

COMMITTEE QUESTION (4)(h): (h) Was the National Federation of Independent Businesses or any other small business representative invited to participate in these meetings? If not, why not?

RESPONSE (4)(h): See Response (4).

COMMITTEE QUESTION (4)(i): (i) Did the Department of Energy notify any Member of Congress about the task force's meetings prior to the first meeting or invite any Member or congressional staff to attend any of the "stakeholder" meetings?

RESPONSE (4)(i): To the best of my knowledge, no such notifications or invitations by the Department of Energy occurred with regard to any Group support staff meetings with non-Federal employees, nor would the Department of Energy have had a role with regard to such meetings that would have called for the Department of Energy to make such notifications or invitations.

Andrew Lundquist, Executive Director
National Energy Policy Development Group

5/4/01
Date

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ATTACHMENT 6

Source: All Sources > News > Transcripts
Terms: nightline vice president cheney (Edit Search)

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ABC News July 25, 2001 Wednesday

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ABC News

SHOW: ABC News: **Nightline** (11:35 PM AM ET) - ABC

July 25, 2001 Wednesday

TYPE: Interview

LENGTH: 4176 words

HEADLINE: A Conversation With Dick **Cheney; Cheney** discusses his first six months in office

ANCHORS: TED KOPPEL

BODY:
Announcer: July 25th, 2001.

Vice President DICK **CHENEY:** (From file footage) That I will support and defend the Constitution of the United States.

TED KOPPEL, host:

It's been six months since he became **vice president** of the United States.

Vice Pres. **CHENEY:** And my doctors tell me that I'm not--not up to the task, I'd be the first one to hang it up. The idea that any member of Congress can demand from me a list of everybody I meet with--there's been this claim it was done in secret, but it wasn't. KOPPEL: I'm reminded of what one of your predecessors once famously said about the office of the vice presidency not being worth a bucket of warm spit. Only, I don't think he...

Vice Pres. **CHENEY:** I think you cleaned it up.

KOPPEL: ...used the word spit.

Tonight, A Conversation With Dick **Cheney.**

Announcer: From ABC News, this is **NIGHTLINE.** Reporting tonight from the White House, Ted Koppel.

KOPPEL: Congressman, White House chief of staff, secretary of defense and, for the past six months, **vice president** of the United States. Dick **Cheney** is a substantive man in what over the years has sometimes been a largely ceremonial job. If anything, **Vice President Cheney** is occasionally given too much credit when it comes to doing the heavy lifting in this administration. That has focused an extraordinary amount of attention on his health. Is he doing too much? What would happen if he couldn't continue in the job? Tonight he will talk about his health and the public's appetite to know about it in some detail. He will also answer charges that he and other members of the Bush administration wrap the same cloak of

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secrecy around the creation of their energy policy that Hillary Clinton once used while formulating a new health plan. He doesn't buy the analogy. He'll explain why.

Dick **Cheney** is the man who once rallied Republican supporters by pointing to what he said was an under-funded US military, and promising that help is on the way. Now it is the Joint Chiefs and some senior civilians at the Pentagon complaining about what's in the Bush/**Cheney** military budget. The **vice president** will talk about a major change in US military strategy. No longer will the United States have the ability to fight two simultaneous wars. All of that and more in a wide-ranging interview with **Vice President Cheney,** conducted earlier today at the executive office building right next to the White House.

You talk about the pros and cons. In other words, the--the--the vice presidency is said to be an enormously frustrating job because you're not the boss.

Vice Pres. **CHENEY:** Mm-hmm.

KOPPEL: This president has given you a lot of authority, given you a lot of power. Talk about the good and the bad.

Vice Pres. **CHENEY:** Well, I--I find it to be virtually all good. I never planned to come back to government. This is my fifth tour, my third time in the White House, and I really thought I'd completed my time in government. And to have the opportunity to come back now at my stage in life, 60 years old, and get to do it one more time, sort of correct all those mistakes you made earlier in your career, is really a...(unintelligible).

KOPPEL: Making policy.

Vice Pres. **CHENEY:** And a chance to pol--participate in a policy-making process, he has given me a lot of responsibility. We function very much as a team, which is exactly what he said he wanted when I signed on.

KOPPEL: You've made reference to the enormous amount of experience that you bring to this job. So, I have to ask you, as someone who knows Washington as well as you do, and who knows that the one thing that drives Congress crazy, the one thing that drives the press crazy, the one thing that is always going to be trouble is secrecy.

Vice Pres. **CHENEY:** Mm-hmm.

KOPPEL: Well, why did you run your--your energy study, your energy meetings the way that you did? Why to this day haven't you revealed who participated in those meetings and what they had to tell you?

Vice Pres. **CHENEY:** Well, that's simply not accurate, Ted. There's been this charge that it was run in secret. But it was run the same way we do everything else with respect to policy. Same way we make economic policy or education policy. It was a group of Cabinet officials and agency heads. This is the report we produced. We published thousands of them. It has not been secret. The folks that were responsible for putting it together are all listed right up here in the front. It's the Cabinet and the agency heads...

KOPPEL: What about the experts that you consulted? I mean, you--you know...

Vice Pres. **CHENEY:** But we didn't--I mean, there's--there was this allegation that somehow we did what the Clintons did back in '93 on health. We did not.

KOPPEL: Exactly.

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Vice Pres. **CHENEY:** We were very sensitive to that and very careful of it. When you...

KOPPEL: Tell me where the--tell me where the difference is?

Vice Pres. **CHENEY:** Well, the--it's when you bring in...

KOPPEL: What was different about what you did and what Hillary Clinton...

Vice Pres. **CHENEY:** ...outsiders and incorporate them in the policy-making process, that then certain requirements with respect to federal advisory committees kicks in and certain requirements have to be met. We didn't do that. We did this exactly the same way, for example, that we put together the economic policy or tax policy. And there's been this claim that it was done in secret, but it wasn't. It wasn't anymore secret than anything else we do.

KOPPEL: The inference that people have drawn--but, before I get to that, let me just ask you, what--what is different about what Hillary Clinton did with the health program from what you folks did with the energy policy?

Vice Pres. **CHENEY:** She brought in outsiders, people who were not government employees, who were not full-time...

KOPPEL: You didn't do that?

Vice Pres. **CHENEY:** No.

KOPPEL: No outsiders?

Vice Pres. **CHENEY:** Well, not as part of the deliberating pro--process.

KOPPEL: Well...

Vice Pres. **CHENEY:** No, that's very important.

KOPPEL: ...are you finessing that just a little bit too finely?

Vice Pres. **CHENEY:** No. No, you're mis--misreading what the statute says. There's a big difference. We meet all the time behind closed doors to make economic policy or to make education policy. Now, you may deal with outside groups. They may have points of view they want to represent. We heard from energy people. We heard from many environment people. We heard from consumer groups. I met with congressman and senators and governors. We heard from a broad variety of folks out there, but they were not in the meetings where we put together the policy and made recommendations to the president. That's the big difference.

KOPPEL: Isn't--isn't that a fine point?

Vice Pres. **CHENEY:** That's a very important point.

KOPPEL: In other words, if we--if we have one meeting here...

Vice Pres. **CHENEY:** Mm-hmm.

KOPPEL: ...with a bunch of people, and because of your background and the president's background in the energy industry yourselves...

Vice Pres. **CHENEY:** Mm-hmm.

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KOPPEL: ...the assumption is that you did consult with a lot of your pals in the--in the energy industry. If you consult with them in this room, and then you adjourn to the next room to make policy, that--that...

Vice Pres. **CHENEY:** That's not the way it works.

KOPPEL: That satisfies the law?

Vice Pres. **CHENEY:** That is--that is not the way it worked. In fact, we heard from a wide variety of different groups. But we did not trigger the statute that specifically provides for how you deal with advisory committees, for formally constituted advisory committee that's making policy, like the Social Security Commission, for example. There's a classic example of a group of outside people, not full-time government employees, who are meeting to deliberate and to come up with a policy recommendation. They meet in open session. The press is present. You don't do that when you sit down, for example, with the--the secretary of the treasury and the Council of Economic Advisers and director of OMB to make major budget decisions, or make...

KOPPEL: But why not just take the wind out of the sails of all your critics and say, 'Here's a list of the people we consulted'?

Vice Pres. **CHENEY:** Well, there's--there's an--there isn't anybody we met with there that would be at all surprising. But there's an important principle here, I think, Ted, and that's the fact that what we have is a request from a congressman for a list of all the people we met with, not just in terms of the energy or everybody I met with, for example, during that period of time, as well as what they talked to me about. In effect, what we're saying here, if in fact we were to respond to that request, is that any member of Congress can demand to know who I meet with, what I talk to them about on a daily basis. I would have no ability to meet with anybody in confidence.

KOPPEL: So, on a--on a matter of principle then you are not going to--you're not going to reveal that list.

Vice Pres. **CHENEY:** I think it's going to have to be resolved in court, and I think that's perfectly appropriate. I think, in fact, this is the first time the GAO has ever issued a so-called demand letter to a president/**vice president.** I'm a duly elected constitutional office. The idea that any member of Congress can demand from me a list of everybody I meet with and what they say to me strikes me as--as inappropriate, and not in keeping with the Constitution...(unintelligible).

KOPPEL: You're saying--you're saying to Congressman Waxman, then, 'See you in federal court.'

Vice Pres. **CHENEY:** I think that's--may well be how it gets resolved, unless he decides he wants to back off. We, in fact, have responded to a lot of what they requested. We've given them financial records, how we spent money. We thinks that's an appropriate question for the GAO to ask. And, as I say, none of this is secret. These are the 105 recommendations, the product of the task force is all right here. All of that's been public. So, we've complied to a large extent. But this request that in fact we're suppose to provide him with this information with respect to people we consult with or people who come see us, as well as give him information on what was said and those meetings in the executive branch between the **vice president** and other individuals strikes me as--as inappropriate, and we think he's out of line in making that request.

KOPPEL: We've got to take short break. A related question on OPEC when we come back.

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Vice Pres. **CHENEY:** Yeah.

KOPPEL: Back with **Vice President Cheney** in just a moment.

Announcer: This is ABC News: **NIGHTLINE,** brought to you by...

(Commercial break)

KOPPEL: We are, I've just been informed, in the ceremonial office of the **vice president.** Thank you for having us here. Here with **Vice President** Dick **Cheney.**

We've been talking about energy policy. So I guess it's appropriate to ask you about OPEC's apparent intent to cut production by one million barrels a day in September. That's going to be problematic, isn't it? I mean, you know, just as we see the price of gasoline going down, just as it looks as though the energy crisis was not as severe, at least in the immediate sense as we may have thought, here comes OPEC and--and the president was indicating he's not happy about it.

Vice Pres. **CHENEY:** Well, what the president said is that the key force is to avoid price spikes. If you get a big run-up in fuel prices, that clearly could adversely effect the American economy. That'll adversely effect the global economy. What's really in our interest as consumers, as well as in the interest as suppliers, is stability over time. When you get these sharp swings in prices everybody may say hurrah if oil goes down to $10 a barrel again, but what happens when that occurs is you drive out a lot of marginal production, which is in the US, shut it in. You lose that, become more dependent on foreign sources. Plus, you also lose the investment that would otherwise occur in non-OPEC sources overseas. And when we get these rapid run-downs in price, it really isn't in anybody's interest. It's always followed eventually by a--you know, if it hits $10, it's only a matter of months before we're back up to 30 or 35.

KOPPEL: Particularly in this community, perception of reality is often more important than objective reality itself. Perception is that you folks are a little hard on the environment. Perception is that you were--you were late to the mantra of saving energy rather than new energy production.

Vice Pres. **CHENEY:** Mm-hmm.

KOPPEL: I know you claim you've--you've always been an advocate of that. But, again, that's not the way you've been perceived. Your mistake? Our mistake?

Vice Pres. **CHENEY:** Well, I would argue, first of all, that we've been very sensitive right along to the environment and to the need for conservation and renewables. If you look at our report, virtually all of the financial incentives, for example, that we've recommended to the Congress, involve conservation and renewables. We don't have any big financial package in there for conventional production. When we put the report together we right up front made a decision the very first meeting, we had to spend a lot of time on those issues or we wouldn't have a credible report. And we've never changed that.

Now the critics, including The New York Times, for example, editorialized against the report before they ever saw it, have made the allegation that all we care about is production and supply. And that's just not true. We have made the point repeatedly that conservation doesn't close the gap. It doesn't get us there, but it's a very important part of our overall strategy. It's one of the reasons we've gotten to where we are. As a country, we've significantly increased our energy efficiency over the years. And the charge, frankly, isn't true, but it often times it gets picked up and carried, sometimes by the press, and as well as

used by our opponents as a way to attack the report.

But the report, just to give you a for instance, Ted, out of 12 recommendations the Sierra Club came up with not long ago on energy, in their own energy plan, 11 of them are in our report. So the notion that somehow we've created a report here that is anti-environment, you'd have to say, 'Well, the Sierra Club is anti-environment, too.' And it's just not true.

KOPPEL: Let's talk about military budget for a moment. And you have been criticized by one of the most conservative magazines in town, indeed the Weekly Standard.

Vice Pres. **CHENEY:** Mm-hmm.

KOPPEL: You probably read the--the editorial. The Weekly Standard is suggesting to the secretary of defense and his deputy, Paul Wolfowitz, they may want to step down, because what you guys, you and the president, are doing to the military budget is a far cry from that clarion cry of Dick **Cheney** during the campaign, "Help is on the way." They're saying, in point of fact, help is not on the way. You guys are gutting the military budget.

Vice Pres. **CHENEY:** They're wrong. And the man who wrote the editorial was not a supporter of ours in the campaign, anyway. There are big changes that are needed in the military. And it was mistreated, I think, for the last eight years during the Clinton administration. We're still very much saddled with the old Cold War force, and there has not been any new investment in new capabilities moving forward. What Don Rumsfeld has been asked to do, and I think he has a good start on, is putting together a military that makes sense for the 21st century. That'll mean a new strategy, a new set of assumptions about what we need to defend against, and what the threats are out there and what our priorities ought to be in terms of spending.

KOPPEL: Don Rumsfeld came to you asking for a $35 billion increase. He got 18.

Vice Pres. **CHENEY:** I don't know a Cabinet member who wouldn't like to have more money in their budget, but he got more than 18. He got 18 in this most recent go around, but we provided a supplemental in '01 of...

KOPPEL: Of five.

Vice Pres. **CHENEY:** ...almost 5.6 billion, particular.

KOPPEL: But of the initial increase...

Vice Pres. **CHENEY:** We have provided an increase, as well, to cover inflation. And we put in extra money that the president pledged over and above the 18 during the course of the campaign for military pay. And all of that's been--been folded in. Now, we'd like to do more, but it's the biggest percentage increase in the defense budget since about 1985.

KOPPEL: If, in fact, you guys are going to be spending 50, 100, 200, who knows, maybe as high as $500 billion on the--the defense initiative, the....

Vice Pres. **CHENEY:** Ballistic missile defense.

KOPPEL: ...ballistic missile defense initiative, the money has got to come out of somewhere, doesn't it?

Vice Pres. **CHENEY:** Mm-hmm.

KOPPEL: Where is it going to come from?

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Vice Pres. **CHENEY:** Well, we need to do a much better job of managing the Defense Department. It's become very, very hard to run the Defense Department these days. When I was secretary 10 years ago, the defense authorization bill was 70 pages long. Today it's 900 pages long. These are earmarks, red tape requirements that the Congress has loaded over the years onto the Defense Department, forces you to keep bases open you don't need, to operate installations at inefficient levels, 40 or 50 percent of capacity, to buy things you don't need, to buy equipment at the least efficient rate, instead of going out and buying what you need.

KOPPEL: We've got to take a short break. When we come back, I want to talk to you about the--the two war premise that has always existed...

Vice Pres. **CHENEY:** OK.

KOPPEL: ...over the past 40 or 50 years. Back with the **vice president** in just a moment.

(Commercial break)

KOPPEL: And we're back for our final segment with the **vice president** of the United States, Dick **Cheney.**

Mr. **Cheney,** we were talking before, very briefly, about the--the two war scenario. The premise ever since the Cold War and before has been that the United States military has got to be capable of simultaneously fighting wars in two different theaters. Do you still subscribe to that?

Vice Pres. **CHENEY:** Well, the--the assumption that's out there now is one I put in when I was secretary of defense. When the Cold War ended, we went from the posture of having the forces in place to fight an all-out global conflict with the Soviet that could go nuclear. When the Soviet Union went away, we then moved to this two major theater contingency, based upon the notion, for example, of defending in the Gulf--Persian Gulf and simultaneously Korea.

KOPPEL: Korea.

Vice Pres. **CHENEY:** I think now we can afford to change that, but that's a question that Don Rumsfeld has been asked to look at and spend a lot of time on. But I think we're today in a--in a radically different situation with respect to--to world threat situation. I think, for example, one of the things we need to focus more on today than we have in the past is this notion of homeland defense. It's hard, if you look out around the globe, to find a nation out there today that can mount a significant conventional assault against the United States or our forces. There are few places that are sensitive, obviously, but nothing like what we faced all those years of the Cold War, or even when we were dealing with Saddam Hussein in the Gulf.

KOPPEL: Let me use the last couple of minutes that we have together to bring you back to this notion of nothing drives Washington crazier than secrecy. No one can argue that the--the individual, the man, Dick **Cheney,** has a right to keep what's between him and his doctor private. But you're the **vice president** of the United States. People would like to know what medicines you're on. People would like to know what you're EKG rate is. People would like to know--there's a lot of stuff people would like to know, and you're saying, in effect, 'Yeah, you'd like to know it, but I'm not going to tell you.' Why?

Vice Pres. **CHENEY:** Well, I would argue, Ted, that we have provided an enormous amount of information. I can't--when I get a head cold that's--that's news. I go to the grocery store,

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what I buy is in the newspapers. If I go to the restaurant, what I eat shows up in the Reliable Source column in The Washington Post.

KOPPEL: That's because you're **vice president** of the United States.

Vice Pres. **CHENEY:** Well....

KOPPEL: We--we--we think we have a claim to your private life.

Vice Pres. **CHENEY:** My--that's right, and my doctors have on at least three occasions given extensive press briefings. The most recent when I went in and had a pacemaker defibrillator implanted here a few weeks ago. They stood up and answered questions for a very long time afterwards, from the most aggressive folks in the press corp, talking exactly about my case and my circumstance, my situation. I'm probably the best known heart patient in America. I think we've provided a vast amount of information.

KOPPEL: Then why not provide the rest?

Vice Pres. **CHENEY:** Well, I think we've provided virtually everything? What does he want to know, my cholesterol level? It's 170.

KOPPEL: Well...

Vice Pres. **CHENEY:** You know, my pulse rate is perfectly normal. My blood pressure perfectly normal, 88 over 120.

KOPPEL: And what--what medications are you on?

Vice Pres. **CHENEY:** I'm on a wide variety of traditional heart medications.

KOPPEL: Do you ever, when you're coming to work, do you ever feel, 'I'm pushing this a little hard.'

Vice Pres. **CHENEY:** That I'm pushing it hard?

KOPPEL: Yeah, that you're--I mean...

Vice Pres. **CHENEY:** No, I'm--Ted, this may be a big deal for you or for others who are watching, but I've lived with this for well over 20 years, since 1978, and I, you know, I'm used to it. I pace myself. I take care of myself. I do those things I need to do. But, I have--say we have provided a vast amount of information to people. If I ever reach a point where I can't do the job or my doctors tell me that I'm not--not up to the task, I'll be the first one to hang it up. I don't need the grief. But I am here to do a job for the president. I think I am able to do it perfectly acceptably, that there's no reason in this day and age why somebody with coronary artery disease can't live a perfectly normal life, and I think I'm proof positive of that.

KOPPEL: You look as though you've lost a little weight, have you?

Vice Pres. **CHENEY:** I have. I have.

KOPPEL: All right, how much weight have you lost?

Vice Pres. **CHENEY:** Over 20 pounds.

KOPPEL: Good for you.

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41	*Filed:* 03/18/2002 *Entered:* 03/18/2002	Reply in Support	
	Docket Text: REPLY in Support of Motion re [40] *To Join Sierra Club's Amicus Filing on April 2, 2002* filed by NATURAL RESOURCES DEFENSE COUNCIL. (Crystal, Howard)		
42	*Filed:* 03/18/2002 *Entered:* 03/18/2002	Order	
	Docket Text: ORDER extending briefing schedule and rescheduling Oral Argument to May 2, 2002. Signed by Judge Emmet G. Sullivan on March 18, 2002. (GK,)		
45	*Filed:* 03/19/2002 *Entered:* 03/21/2002 *Terminated:* 07/11/2002	Motion to Dismiss	
	Docket Text: MOTION to Dismiss *counts I and II of the amended complaint* by HALEY BARBOUR. (td,)		

Doc. No.	Dates	Description
43	*Filed:* 03/20/2002 *Entered:* 03/20/2002 *Terminated:* 03/21/2002	Motion for Extension of Time to File Response/Reply
	Docket Text: MOTION for Extension of Time to File Response/Reply by JUDICAL WATCH, INC.,. (Orfanedes, Paul)	
44	*Filed:* 03/21/2002 *Entered:* 03/21/2002	Order on Motion for Extension of Time to File Response/Reply
	Docket Text: ORDER granting Motion for Extension of Time for one day to File Response/Reply re [43] [43] Signed by Judge Emmet G. Sullivan on 3/21/2002. (lcegs2,)	
46	*Filed:* 03/21/2002 *Entered:* 03/21/2002	Order
	Docket Text: ORDER scheduling status hearing in light of transfer of Sierra Club v. Vice President Cheney et al.Signed by Judge Emmet G. Sullivan on 03/21/2002. (lcegs2,)	
47	*Filed:* 03/21/2002 *Entered:* 03/21/2002	Memorandum in Opposition
	Docket Text: Memorandum in Opposition to Motion re [34] *to Dismiss* filed by JUDICAL WATCH, INC.,. (Orfanedes, Paul)	
48	*Filed:* 03/21/2002 *Entered:* 03/22/2002 *Terminated:* 07/11/2002	Motion to Dismiss
	Docket Text: MOTION to Dismiss *amended complaint as to him* by THOMAS KUHN. (td,)	
--	*Filed:* 03/26/2002 *Entered:* 03/26/2002	Status Conference
	Docket Text: Minute Entry: Status Conference held on 3/26/2002 before Emmet G. Sullivan ; chambers to issue an order electronically(Court Reporter Frank Rangus.) (clv,)	
50	*Filed:* 03/26/2002 *Entered:* 03/26/2002	Order

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Vice Pres. **CHENEY:** Mm.

KOPPEL: Good for you. In the area of information that some people would like to have, Senator Lieberman would like to have some information from you and he's threatening to throw out a few subpoenas. Do you got any thoughts on that?

Vice Pres. **CHENEY:** He's, I guess, issued subpoena threats to some federal agencies in recent days.

KOPPEL: Right.

Vice Pres. **CHENEY:** You know, I look at that, I think the departments and agencies have been very forthcoming. I think we're back, sort of, the witch hunt mode now in Washington. We're working hard to try to change the tone and what we see there, I think, is--it's politics, as usual.

KOPPEL: You realize, of course, the Democrats would say, 'Wait a second, witch hunt mode? You--you guys...'

Vice Pres. **CHENEY:** Well...

KOPPEL: '...were the ones who were throwing out subpoenas last time around.'

Vice Pres. **CHENEY:** Well, let's--let's look at it, though. The subpoenas that, in fact, the Republicans went after, there were very serious allegation of campaign finance wrongdoing. There were serious other problems, which we won't enumerate tonight. I'm sure your show covered them adequately when they were--were hot. But there were serious questions about possibility of illicit or improper conduct that the Congress was legitimately looking at. There's no such allegation here now. There hasn't been any such allegation, and , in fact, the administration has cooperated. We've provided a great deal of information to--to the Congress and will continue to do so.

KOPPEL: Mr. **Vice President,** we're out of time. I thank you for your hospitality. Thank you for talking to me and hope to see you again soon.

Vice Pres. **CHENEY:** Thank you, Ted.

KOPPEL: I'll be back in a moment.

Announcer: To receive a daily e-mail announcement about each evening's **NIGHTLINE** and a preview of special broadcasts, logon to the **NIGHTLINE** page at abcnews.com.

(Commercial break)

KOPPEL: And that's our report for tonight. I'm Ted Koppel at the White House. For all of us here at ABC News, good night.

LOAD-DATE: July 26, 2001

ATTACHMENT 7

GAO
Accountability • Integrity • Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision of the Comptroller General Concerning NEPDG Litigation
January 30, 2002

As you know, the United States General Accounting Office (GAO) has been engaged in an ongoing effort to obtain certain narrowly defined, factual information concerning the development of the National Energy Policy proposal from Vice President Cheney in his role as Chair of the National Energy Policy Development Group (NEPDG). Importantly, we are only seeking limited information in connection with NEPDG-related matters.

The administration used the NEPDG as a mechanism to, among other things, outreach to selected non-governmental parties and develop a proposed comprehensive energy policy. In addition, contrary to recent assertions, we are not seeking the minutes of these meetings or related notes of the Vice President's staff. This was conveyed to the White House in writing on August 17, 2001. Unfortunately, despite our numerous attempts to reach a reasoned and reasonable accommodation on this matter, to date, the information we requested has not been made available to us.

In his August 2, 2001, letter to both Houses of Congress, the Vice President raised a number of objections to providing the information we requested. Importantly, for both the Congress and GAO, the Vice President challenged GAO's fundamental statutory authority to assist the Congress in connection with its constitutional, legislative and oversight authorities. These challenges went far beyond issues relating to his constitutional position as Vice President and White House staff related matters. As noted in our prior correspondence concerning this matter, the information we are seeking is clearly within our statutory audit and access authority. Accordingly, as provided in our statutory access authority, on July 18, 2001, we issued a formal request for the records. Unfortunately, the statutory 20-day response period passed without any meaningful action by the Office of the Vice President. In accordance with the prescribed statutory process, on August 17, 2001, we reported to the Congress, the President, the Vice President, and other officials that the NEPDG had not provided the requested records. (See enclosed August 17, 2001, report.) While the NEPDG did provide some cost-related documents to GAO, most of these documents were not useful or self-explanatory. Moreover, even though the Vice President and his counsel acknowledge our authority to access cost information, they have not provided us the remaining cost information and explanations requested. Apart from information concerning the Vice President's meetings, they also have not provided us with factual information concerning who the NEPDG staff, including non-White House staff who were assigned to the NEPDG from various government departments and agencies, met with and the purpose of those meetings.

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We strongly disagree with the Vice President's objections to our audit and access authority. Significantly, under GAO's statutory access authority, Congress provided the President and the Director of the Office of Management and Budget a safety valve to preclude judicial enforcement of GAO's access rights. The executive branch has chosen not to use this mechanism. Furthermore, the President has not claimed executive privilege in connection with our request. As previously noted, all of our attempts to reach a reasoned and reasonable accommodation, including reducing the scope of our request, have been rebuffed, and we have now exhausted the statutory process for resolving our access requests. As a result, our only remaining recourse is either to file suit in the United States District Court for the District of Columbia or to forego further assertion of our access rights.

GAO was preparing to go to court in September of this past year until the tragic events of September 11. As I stated last September, prudence dictated that we delay any related legal action given the immediate need for the administration and the Congress to focus on developing our Nation's initial response to our fight against international terrorism and efforts to protect our homeland.

The Congress has a right to the information we are seeking in connection with its consideration of comprehensive energy legislation and its ongoing oversight activities. Energy policy is an important economic and environmental matter with significant domestic and international implications. It affects the lives of each and every American. How it is formulated has understandably been a longstanding interest of the Congress. In addition, the recent bankruptcy of Enron has served to increase congressional interest in energy policy, in general, and NEPDG activities, in particular. This, plus the Senate's expected consideration of comprehensive energy legislation this session, reinforces the need for the information we requested concerning the development of the National Energy Policy proposal. In this regard, we recently received a request for the NEPDG information we are seeking from four Senate committee and subcommittee chairmen with jurisdiction over the matters involved. Importantly, our governing statute requires GAO to perform such committee requests.

Clearly, the formulation and oversight of energy policy and the investigation of Enron-related activities represent important institutional prerogatives of the Congress. Furthermore, a number of other important principles are involved. Failure to provide the information we are seeking serves to undercut the important principles of transparency and accountability in government. These principles are important elements of a democracy. They represent basic principles of "good government" that transcend administrations, partisan politics, and the issues of the moment. As such, they should be vigorously defended. Otherwise, it could erode public confidence in and respect for the institutions of government.

The disclosure of the activities of the NEPDG is also important for precedential reasons. Specifically, the NEPDG was financed with appropriated funds and staffed largely by government department and agency personnel assigned to it. We disagree with the White House position that the formation of energy policy by the NEPDG is

REV_00264459

beyond congressional oversight and GAO review. Were the Vice President's arguments in this case to prevail, any administration seeking to insulate its activities from oversight and public scrutiny could do so simply by assigning those activities to the Vice President or a body under the White House's direct control.

In our view, failure to pursue this matter could lead to a pattern of records access denials that would significantly undercut GAO's ability to assist Congress in exercising its legislative and oversight authorities. We would have strongly preferred to avoid litigation in connection with this matter, but given the request by the four Senate committee and subcommittee chairmen, our rights to this information and the important principles and precedents involved, GAO will take the steps necessary to file suit in United States District Court in order to obtain, from the Chair of the NEPDG, the information outlined in our August 17, 2001, report. This will be the first time that GAO has filed suit to enforce our access rights against a federal official. We hope it is the last time that we will have to do so.

We have great confidence in our nation's legal system and look for a timely resolution of this important matter. If you have any questions, comments or concerns, please do not hesitate to contact me.

Sincerely yours,

[signed]

David M. Walker
Comptroller General
of the United States

cc: President of the United States
Vice President of the United States

Enclosure

REV_00264460

ATTACHMENT 8

****
*** TX REPORT ***
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Judicial Watch

Fax

To:	Vice President Cheney	**From:**	Larry Klayman, Esq.
Fax:	202-456-1798	**Date:**	June 25, 2001
Phone:		**Pages:**	7
Re:	Energy Policy Development Group	**CC:**	

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REV_00264462

Judicial Watch

Because no one is above the law.

June 25, 2001

BY CERTIFIED MAIL & FAX (202-456-1798)

The Honorable Richard B. Cheney
Vice President of the United States of America
Eisenhower Executive Office Building
Washington, DC 20501

Re: National Energy Policy Development Group, A *De Facto* Federal Advisory Committee.

Dear Mr. Vice President:

Judicial Watch, Inc., (hereinafter "Judicial Watch"), is a non-profit, public interest law firm that investigates and prosecutes government abuse and corruption.

Recent press reports have detailed the operations and staffing of the National Energy Policy Development Group, (hereinafter, "NEPDG")[1]. It is clear, based on the political appointments of energy lobbyists and attorneys to senior departmental positions within the government by the Administration, official statements by Administration spokesmen, press reports concerning the activities of energy industry lobbying organizations, as well as other documentation obtained under the Freedom of Information Act (hereinafter, "FOIA"), that the NEPDG is tantamount to a federal advisory committee (hereinafter, "the Committee") as defined in the Federal Advisory Committee Act (hereinafter, "FACA"). 5 U.S.C. App. 2. As such, the NEPDG must file a charter, must allow input from interested persons, must comply with the FOIA and the Government in the Sunshine Act, must publish notice of its meetings in the Federal Register, and must have a board that is fairly balanced in terms of the points of view represented on the Committee, among other requirements of FACA. See generally 5 U.S.C. App. 2.

Our specific concerns are illustrated by the appointment of key American Petroleum

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[1]Fineman, Howard and Isikoff, Michael; "Big Energy at the Table; Winning Support for Your Agenda Is Easy When Your Allies Fill Out the Administration's Top Chairs," *Newsweek Magazine*, May 14, 2001, (Attached).

501 School Street, SW • Suite 725 • Washington, DC 20024 • Tel: (202) 646-5172 • Fax: (202) 646-5199

REV_00264463

Institute, (including other energy trade organizations) lobbyists, attorneys, and leaders, such as J. Steven Griles and Thomas Sansonetti, to senior Administration posts with authority bearing directly on the energy policies they represented in a private business capacity. Given the unfortunate ethical history of recent memory concerning conflicts of interest in The White House, Judicial Watch believes it is in the public interest for the Administration to avoid even an appearance of possible conflict of interests.

Judicial Watch respectfully requests that, in light of the questionable legal and ethical practices, negative publicity, and public outrage surrounding Hillary Rodham Clinton's 1994 national health-care policy development group, you direct the NEPDG to abide by the FACA. The NEPDG's re-constitution under the provisions of the FACA will instill public trust and confidence in the operations of the Committee, and insure that national policy is formulated, discussed and acted upon in a manner consistent with the best traditions of our Constitutional Republic.

As a public interest law firm, educational foundation and member of the media, Judicial Watch encourages open, accountable government. We trust that you support the same principles, wherever practicable, in the operations of all three branches of government. Certainly, national energy policy is a matter all Americans are keenly interested in, and it is in the public interest for our public servants to engage in an open dialogue and exchange of ideas and options. One positive step towards that goal would be your acknowledgment of the NEPDG as a *de facto* advisory committee under the FACA , and to bring its operations into compliance with all appropriate laws and regulations.

Consistent with our assertion that the NEPDG is a Committee under the FACA, Judicial Watch respectfully requests, under the provisions of the FOIA, 5 U.S.C. 552, and its regulations, copies of all minutes and final decision documents of NEPDG meetings from January 20, 2001 to the present, as well as a listing (including addresses) of all persons and entities that participated in NEPDG meetings, either directly or indirectly through agents and/or intermediaries. Thank you for your expected cooperation in responding to our request, which should be within 10 working days pursuant to the expeditious handling provisions of the FOIA (*see* 5 U.S.C. § 552(a)(6)(E)(ii)(I)). Additionally, Judicial Watch seeks to attend all future meetings of the NEPDG Committee. Please furnish Judicial Watch with future meeting schedules and contact information so our representative may attend.

Thank you for your cooperation and prompt response.

Sincerely,

JUDICIAL WATCH, INC.

Larry Klayman

Larry Klayman
Chairman and General Counsel

Thomas Fitton
President

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Newsweek

May 14, 2001, U.S. Edition

SECTION: NATIONAL AFFAIRS; Pg. 18

LENGTH: 1622 words

HEADLINE: Big Energy at the Table

BYLINE: By Howard Fineman and Michael Isikoff; With Mark Hosenball, T. Trent Gegax and Rich Thomas in Washington

HIGHLIGHT:
Winning support for your agenda is easy when your allies fill out the administration's top chairs

BODY:
If you were in the oil and gas business, it was a meeting that dreams were made of. Nine days before George W. Bush was inaugurated, energy lobbyists gathered at the American Petroleum Institute's offices in downtown Washington. Their agenda: to write a wish list. One participant remembers it fondly. "The tone was, 'OK, what do you guys want? You are going to have the ear of this White House'." In came an easel and a whiteboard, and ideas flowed: looser rules for drilling on federal lands; more drilling for oil and gas in Alaska and the Gulf of Mexico; lower royalty payments for tapping offshore wells. After a while, the mood in the room grew giddy. The man from the wildcatters' association suggested going All the Way. It was time, he said, to rethink the Endangered Species Act.

That was a wish too far. But many items on that board--and other lists scribbled by other energy lobbyists in other offices around town--found their way into the recommendations that the president will unveil to the nation next week. The API list, in fact, was forwarded to George Bush's transition team, which sent it to the Interior Department. On March 20, Interior sent many of the same ideas to the Energy Task Force that Vice President Dick Cheney had convened on Jan. 29. To close the loop, key leaders from that API meeting have since been appointed to pivotal positions in Bush's administration--among them J. Steven Griles, an energy lobbyist and the new second in command at Interior, and Thomas Sansonetti, an energy lawyer recently named the top environmental cop at the Justice Department. The two, in effect, will help administer policies they helped to write.

If the Bush administration is homecoming weekend for the energy industry, Dick Cheney's task-force report is the pregame tailgate party. Not since the rise of the railroads more than a century ago has a single industry placed so many foot soldiers at the top of a new administration. While the report will recommend an array of what one White House aide advertises as "high-tech, 21st-century conservation ideas," its core will be a call to find and use new sources of fossil fuels, as well as a renewed commitment to nuclear power. What voters need to hear "loud and clear," the president declared last week, "is that we are running out of energy in America."

REV_00264465

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

Vice President Richard Cheney, US Court of Appeals for the District of Columbia Circuit (Appendix) [2]

OA/NARA#: 1650/1518
9601

Box 62
Folder 5

REV_00264499

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. NATIONAL ENERGY POLICY DEVELOPMENT GROUP, Defendant.	Civ. Action. 01-1530 (EGS)
SIERRA CLUB, Plaintiff, v. VICE PRESIDENT RICHARD CHENEY, *et al.* Defendants,	Civ. Action 02-631 (EGS)

MEMORANDUM OPINION

Plaintiffs Judicial Watch, Inc. and Sierra Club filed these now-consolidated lawsuits against Vice President Richard Cheney, the National Energy Policy Development Group ("NEPDG"), various other federal officials,[1] and private individuals[2] to enforce the

[1] The federal officials named in Judicial Watch's Second Amended Complaint include: Secretary of the Treasury Paul O'Neill, Secretary of the Interior Gail Norton, Secretary of Agriculture Ann Veneman, Secretary of Commerce Donald Evans, Secretary of Transportation Norman Mineta, Secretary of Energy Spencer Abraham, Secretary of State Colin Powell, Director of Federal Emergency Management Joseph Allbaugh, Administrator of the Environmental Protection Agency Christine Todd Whitman, Chairman of the Federal Energy Regulatory Commission Patrick Wood, Director of the Office of Management and Budget Mitchell Daniels, Assistant to the President Joshua Bolton, and Assistant to the President Larry Lindsey. The federal officials named in Sierra Club's Complaint include: Andrew Lundquist, Executive Director of the NEPDG, Director of Energy Policy for Vice President Cheney and Senior Policy

REV_00264500

the government would add in the time allotted. Third, the Court granted defendants' motion to dismiss the APA claims against Vice President Cheney and the NEPDG. Fourth, the Court denied all other aspects of the motions to dismiss at that time. Fifth, the Court ordered that this Memorandum Opinion, explaining the Court's decision on the motions to dismiss, would be issued promptly. Finally, the Court ordered the parties to begin to develop a proposed discovery plan, which would be filed soon after this Memorandum Opinion was issued.

On May 28, 2002, Judicial Watch filed a Second Amended Complaint, incorporating the language of Sierra Club's APA and mandamus claims.[3] On June 3, 2002 the federal defendants moved to dismiss, incorporating by reference the arguments made in their motions to dismiss of March 8, 2002 and April 5, 2002. Judicial Watch filed an opposition to that motion, similarly incorporating arguments made in previous filings.

III. Other NEPDG-related Cases Before this Court

In addition to the two consolidated suits before this Court, the activities of the NEPDG are the subject of several other lawsuits and congressional inquiries. Several other FOIA cases are pending before this Court. *See, e.g, Judicial Watch v.*

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[3] Count III of Judicial Watch's Second Amended Complaint exceeded the scope of this Court's order permitting the amendment, as it was also brought against the private defendants who do not appear in the Sierra Club lawsuit. Consequently, this Court dismissed Count III with respect to the private defendants only. *See* Order of May 31, 2002.

ENTIRELY, I BELIEVE, EXCEPT FOR, YOU KNOW, DOCUMENTS THAT HAVE BEEN --

THE COURT: THE DOCUMENT REQUESTS HAVE BEEN PRODUCED BY THE GOVERNMENT WHICH MAY BE RELEVANT IN THIS CASE?

MR. COFFIN: OH, ABSOLUTELY, THE DOCUMENT REQUESTS, THE FOIA REQUESTS RELATED TO THE OPERATION OF THE NEPDG.

THE COURT: SO THERE IS RELEVANT INFORMATION OUT THERE?

MR. COFFIN: YES.

THE COURT: THAT FOCUSES ON THIS INQUIRY?

MR. COFFIN: YES. AND IN THE FOIA CASES, WE'VE ALSO PUT FORWARD DECLARATIONS THAT HAVE EXPLAINED EACH AGENCY'S OPERATIONS WITHIN THE NEPDG. SO THERE IS A LOT OF INFORMATION OUT THERE, AND WHAT JUDICIAL WATCH --

THE COURT: SEPARATE AND APART FROM THE ADMINISTRATIVE RECORD?

MR. COFFIN: OH, YES. NO, I'M SAYING THERE'S SOMETHING FROM WHICH -- THIS IS -- I MEAN, IN MY MIND, THE PRESUMPTION OF REGULARITY HERE SAYS THAT THEY SHOULD LOOK AT ALL OF THAT INFORMATION, AND IF THEY CAN COME FORWARD WITH SOME EVIDENCE THAT SOMEONE, YOU KNOW, A NON-GOVERNMENTAL OFFICIAL REGULARLY PARTICIPATED IN THE MEETINGS.

THE COURT: WELL, THAT'S ALL THEY WANT THE OPPORTUNITY TO DO. THEY'RE GOING TO TAKE THAT INFORMATION AND LOOK THROUGH IT AND CULL THROUGH IT, BUT DISCOVERY IS AN ONGOING PROCESS.

REV_00264599

THEY WANT TO LOOK AT OTHER INFORMATION THAT MAY WELL LEAD TO OTHER DISCOVERABLE INFORMATION.

MR. COFFIN: BUT THERE WAS AN ADMINISTRATIVE DECISION HERE, AND THE ADMINISTRATIVE DECISION IS BACKED UP BY AN ADMINISTRATIVE RECORD THAT WE'RE WILLING TO SUPPLEMENT WITH THAT INFORMATION AND THE INFORMATION THAT THEY HAVE HERE. IF THEY CAN'T SHOW --

THE COURT: WHY HASN'T THE GOVERNMENT ALREADY SUPPLEMENTED THAT RECORD UP TO THIS POINT? THIS CASE HAS BEEN ONGOING SINCE LAST JULY. WHY DIDN'T THEY?

MR. COFFIN: YOUR HONOR, WE HAVEN'T MOVED FOR SUMMARY JUDGMENT IN THIS CASE. THAT'S THE ONLY REASON.

THE COURT: ALL RIGHT.

MR. COFFIN: WE MOVED TO DISMISS --

THE COURT: WHICH WAS YOUR RIGHT TO DO.

MR. COFFIN: -- AND WE THOUGHT THE CASE WOULD BE RESOLVED ON THOSE ISSUES.

THE COURT: I'M JUST ASKING THE QUESTION. I'M NOT BEING CRITICAL.

MR. COFFIN: I THINK THAT'S THE REASON. BUT, YOU KNOW, I THINK IT'S IMPORTANT THAT YOUR HONOR UNDERSTAND THE DIFFERENCE BETWEEN SUPPLEMENTATION AND DISCOVERY. I MEAN, AS YOU KNOW --

THE COURT: I'M WELL AWARE OF THE DIFFERENCE.

MR. COFFIN: OKAY, AND THE CASE --

REV_00264600

THE COURT: THAT'S WHY I'M CONVINCED THAT DISCOVERY WILL GO FORWARD, BECAUSE THERE'S A NEED, THERE'S A CRYING NEED FOR DISCOVERY IN THIS CASE.

MR. COFFIN: YOUR HONOR, THE CASE THAT THEY CITE, AMFAC RESORTS, ACTUALLY SUPPORTS THAT.

THE COURT: SUPPORTS WHAT?

MR. COFFIN: SUPPORTS THE FACT THAT DISCOVERY IS NOT THE NORM IN APA CASES ABSENT SOME SHOWING.

THE COURT: I TOTALLY AGREE WITH YOU. IN THE TYPICAL APA CASE, IT'S NOT, BUT YOU'VE AGREED WITH THE COURT THAT THIS IS NOT THE TYPICAL APA CASE.

MR. COFFIN: WELL, THIS IS AN APA CASE, YOUR HONOR. UNLESS, UNLESS THE PLAINTIFFS OR THE COURT CAN ARTICULATE AN ACCEPTED REASON FOR VARYING THE APA REVIEW IN THIS CASE, THEN APA REVIEW HAS TO BE ON THE RECORD, AND THERE HAS BEEN NO STRONG SHOWING OF THAT BAD FAITH OR IMPROPER BEHAVIOR, AND IN A CASE LIKE THIS, DISCOVERY IS SIMPLY IMPROPER.

THE COURT: EVEN THOUGH, AS YOU RECOGNIZE, THIS IS NOT THE TYPICAL APA CASE.

MR. COFFIN: YOUR HONOR, SAYING THAT THIS IS NOT THE TYPICAL APA CASE IS NOT SAYING THAT THIS IS NOT AN APA CASE. THE REASON THIS IS NOT A TYPICAL APA CASE, YOUR HONOR, IS THAT THE THRESHOLD DETERMINATION HERE IS THAT THE STATUTE THAT THE PLAINTIFFS ARE SEEKING ON THIS RELIEF HERE DOESN'T APPLY IN THE FIRST INSTANCE.

REV_00264601

THE COURT: WHAT ABOUT THE REQUEST FOR MANDAMUS RELIEF?

MR. COFFIN: YOUR HONOR, WE DON'T THINK THAT CHANGES THE DETERMINATION HERE AT ALL. MANDAMUS IS AN EXTRAORDINARY REMEDY. YOUR HONOR, YOU HAVEN'T DECIDED WHETHER MANDAMUS APPLIES HERE, BECAUSE, AS YOU NOTED, THERE ARE CONSTITUTIONAL ISSUES THAT RELATE TO MANDAMUS.

THE COURT: WHY AREN'T THEY ENTITLED TO SOME DISCOVERY, THOUGH, IN AN EFFORT TO CONVINCE ME THAT MANDAMUS MAY APPLY IN THIS CASE?

MR. COFFIN: WE WOULD SAY THAT BECAUSE IT IS A DRASTIC REMEDY THAT'S INVOKED ONLY IN EXTRAORDINARY CIRCUMSTANCES, WHERE THERE'S A CLEAR AND INDISPUTABLE RIGHT, THAT UNLESS THE INFORMATION THAT'S OUT THERE, INCLUDING THE DECLARATION THAT WOULD BE PART OF THE ADMINISTRATIVE RECORD AND ALL THE FOIA INFORMATION SHOWS SOME INKLING OF A RIGHT, NO, THEY'RE NOT ENTITLED TO DISCOVERY TO SUPPLEMENT THAT.

AND, YOUR HONOR, ON THE SUBJECT MATTER OF THE INQUIRY, BECAUSE OF YOUR CONCERNS WITH AVOIDING UNNECESSARY CONSTITUTIONAL QUESTIONS, BECAUSE OF OUR CONCERNS WITH DISRUPTING THE EFFECTIVE FUNCTIONING OF THE PRESIDENCY AND THE VICE-PRESIDENCY, WE HAVE PROPOSED THAT WE ANSWER ONE QUESTION HERE, AND THAT IS ONE OF THE THRESHOLD QUESTIONS THAT YOUR HONOR POSED IN HIS OPINION. THAT IS THE QUESTION OF MEMBERSHIP, AND OUR APA DECLARATION WOULD FOCUS ON MEMBERSHIP

REV_00264602

IN THE GROUP AND IT WOULD CONFIRM --

THE COURT: ARE YOU PREPARED TODAY TO TELL THE COURT WHO THE MEMBERS OF THE GROUP WERE?

MR. COFFIN: YOUR HONOR, IT'S MY UNDERSTANDING -- WELL, I'M SORRY. WHO THEY WERE?

THE COURT: I THOUGHT YOU SAID YOU WERE PLANNING TO FILE SOME SORT OF DECLARATION TO INFORM THE PLAINTIFFS AND THE COURT WHO THE MEMBERS OF THE GROUP ARE OR WERE.

MR. COFFIN: RIGHT. YOUR HONOR, WE WILL DO THAT.

THE COURT: ARE YOU PREPARED TO TELL THE COURT TODAY WHO THOSE PEOPLE ARE?

MR. COFFIN: WELL, I CAN READ YOU THE PRESIDENTIAL MEMORANDUM --

THE COURT: NO, NO. THAT'S ALREADY A PART OF THE RECORD.

MR. COFFIN: -- THAT ESTABLISHES THE GROUP.

THE COURT: ARE THERE ANY ADDITIONAL MEMBERS?

MR. COFFIN: YES. I THINK THE DIRECTOR OF THE (PAUSE) --

THE COURT: WHO ARE THE ADDITIONAL MEMBERS?

MR. COFFIN: I'M EXPLAINING. THE DIRECTOR OF THE OMB WAS A MEMBER. THE VICE-PRESIDENT HAD THE AUTHORITY TO INVITE ANY GOVERNMENTAL OFFICIALS, ANY GOVERNMENTAL OFFICIALS TO PARTICIPATE. I BELIEVE HE EXTENDED THAT INVITATION TO THE DIRECTOR OF THE OMB, WHO WAS NOT NAMED BY THE PRESIDENT. THERE

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WAS ONE OTHER GOVERNMENTAL OFFICIAL. WHETHER IT WAS -- I THINK THE SECRETARY OF STATE WAS AN OPTIONAL MEMBER. HE MAY HAVE BEEN INVITED, BUT I'M NOT CERTAIN OF THAT. BUT I AM CERTAIN THAT AS FAR AS WE UNDERSTAND THE FACTS, WHICH WE WOULD BE WILLING TO EXPLAIN, THAT ONLY GOVERNMENTAL OFFICIALS WERE INVOLVED. SO IT IS THE MEMBERSHIP THAT WAS NAMED BY THE PRESIDENT, WITH THE INVITATION EXTENDED TO THE OMB DIRECTOR TO ALSO PARTICIPATE.

THE COURT: AND THAT'S THE COMPLETE LIST?

MR. COFFIN: YOUR HONOR, THAT IS CERTAINLY WHAT OUR DECLARATION WILL SHOW. THAT'S MY UNDERSTANDING, THAT THAT IS THE COMPLETE LIST.

THE COURT: SO THAT'S A COMPLETE LIST OF PARTICIPANTS?

MR. COFFIN: YES, YOUR HONOR. THOSE ARE THE, THOSE ARE ALL THE MEMBERS OF THE NEPDG, THOSE WHO WE ARE, WE WOULD SHOW IN THE DECLARATION. THAT DECLARATION CAN BE PREPARED, I THINK, FAIRLY READILY, WITHIN A FEW WEEKS, AND WE COULD PROCEED TO SUMMARY JUDGMENT, I WOULD THINK, WITHIN A MONTH.

THE COURT: WHY HASN'T THE GOVERNMENT SHARED THAT INFORMATION WITH THE PUBLIC UP TO THIS POINT?

MR. COFFIN: YOUR HONOR, THE GOVERNMENT HAS SHARED THAT INFORMATION. THERE WAS A LETTER TO CONGRESS, TO REPRESENTATIVE WAXMAN, FROM -- I THINK IT WAS ACTUALLY AN ISSUE IN ONE OF OUR EARLIER HEARINGS ABOUT THAT LETTER, BUT IT DID EXPLAIN THE MEMBERSHIP. SO THAT MEMBERSHIP HAS BEEN EXPLAINED.

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WE WOULD SIMPLY CONFIRM THAT IN A DECLARATION, YOUR HONOR.

AND SO, YOUR HONOR, THOSE ARE, THAT'S THE OUTLINE OF AN APPROACH WE WOULD TAKE, BECAUSE THIS IS AN APA CASE. IF, SAY, OVER OUR OBJECTION, YOU DECIDE YOU'LL ALLOW DISCOVERY IN A NON-APA SETTING, WE WOULD SUGGEST, RELUCTANTLY, THAT YOU LOOK TO NADER VS. BARODY FOR THE FRAMEWORK OF THAT. THAT IS, IN THAT CASE, JUDGE GESELL SAID WE'LL LIMIT YOU TO, THE INQUIRY COULD BE ANSWERED THROUGH THE FOIA REQUESTS AND THROUGH WRITTEN INTERROGATORIES. SO THAT IS OUR, THE ALTERNATIVE.

THE COURT: WHAT ABOUT NON-GOVERNMENTAL-WITNESS DEPOSITIONS?

MR. COFFIN: YOUR HONOR, NON-GOVERNMENTAL-WITNESS DEPOSITIONS? IF THERE WERE SUCH DEPOSITIONS, WE WOULD CERTAINLY WISH TO BE PRESENT. WE WOULD SEEK TO PRESERVE --

THE COURT: YOU'RE ENTITLED TO NOTICE.

MR. COFFIN: -- ANY PRIVILEGE.

THE COURT: AND INVOKE THE PRIVILEGE ON BEHALF OF THE NON-GOVERNMENTAL WITNESSES?

MR. COFFIN: INVOKE THE PRIVILEGE ON BEHALF OF THE UNITED STATES, YOUR HONOR. THE PRIVILEGE, THE PRIVILEGE OF EXECUTIVE COMMUNICATIONS BELONGS TO THE EXECUTIVE. BUT, YOUR HONOR, AS FAR AS --

THE COURT: SO IF THOSE WITNESSES WERE DEPOSED, THE GOVERNMENT WOULD ATTEMPT TO INVOKE EXECUTIVE PRIVILEGE?

MR. COFFIN: I DON'T KNOW, YOUR HONOR. I'M JUST

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SAYING WE WOULD PRESERVE THE RIGHT. WE WOULD RESERVE THE RIGHT TO PARTICIPATE IN ANY SUCH DEPOSITION.

THE COURT: NO, YOU'RE ENTITLED TO NOTICE.

MR. COFFIN: AND WE WOULD, BUT I WANT TO MAKE CLEAR, OUR OBJECTIONS ARE TO DEPOSITIONS *IN TOTO*. WE BELIEVE THAT THIS CAN BE ACCOMPLISHED THROUGH WRITTEN INTERROGATORIES THAT ARE SWORN, AND THAT SHOULD BE THE END OF THE STORY.

THE COURT: YOU MAY BE CORRECT. WE'RE NOT GOING TO FOCUS ON DEPOSITIONS TODAY, BUT THE COURT'S NOT GOING TO RULE OUT THE POSSIBILITY OF GOVERNMENTAL OFFICIALS BEING DEPOSED, AS WELL AS NON-GOVERNMENTAL OFFICIALS BEING DEPOSED, BUT I'M NOT GOING TO FOCUS ON DEPOSITIONS TODAY.

MR. COFFIN: YOUR HONOR, LET ME JUST MAKE ONE MORE POINT. I WOULD SUGGEST THAT, EVEN THOUGH YOU HAVE DOUBTS ABOUT OUR PLAN, TO ALLOW IT TO GO FORWARD AND THEN HANDLE ANY OBJECTIONS AT THAT POINT.

THE COURT: I'VE ALREADY INVITED THE GOVERNMENT TO FILE OBJECTIONS. THE COURT HAS AGAIN, AND THIS IS NOT THE FIRST TIME THE GOVERNMENT WAS INVITED, THAT THE COURT HAS INVITED THE GOVERNMENT TO FRAME APPROPRIATE CONSTITUTIONAL OBJECTIONS. I DID THAT DURING THE BRIEFING SCHEDULE, AND THE GOVERNMENT CHOSE NOT TO DO SO, AND IN THIS CASE I SAID TO THE PLAINTIFFS, SUBMIT YOUR PROPOSED DISCOVERY --

MR. COFFIN: YOUR HONOR --

THE COURT: JUST A MINUTE. DON'T INTERRUPT ME.

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I TOLD THE PLAINTIFFS TO SUBMIT A PROPOSED DISCOVERY PLAN, AND PLAINTIFFS DID SO. AND I TOLD THE GOVERNMENT, IF YOU HAVE PRECISE CONSTITUTIONAL OBJECTIONS, LET ME KNOW WHAT THEY ARE SO I CAN DETERMINE WHETHER OR NOT THIS PLAN IS APPROPRIATE, AND, YOU KNOW, ESSENTIALLY, YOU SAID, *WELL, IT'S UNCONSTITUTIONAL*, WITHOUT ELABORATING. YOU SAID, *BECAUSE PLAINTIFFS' PROPOSED DISCOVERY PLAN HAS NOT BEEN APPROVED BY THE COURT, THE DEFENDANTS ARE NOT SUBMITTING SPECIFIC OBJECTIONS TO PLAINTIFFS' PROPOSED REQUEST*. WELL, THERE AGAIN, THE GOVERNMENT CHANGES THE RULE. MY RULE WAS, IF YOU HAVE OBJECTIONS, LET ME KNOW WHAT THE OBJECTIONS ARE, AND YOU CHOSE NOT TO DO SO.

MR. COFFIN: YOUR HONOR, YOU ASKED US TO OBJECT TO THE DISCOVERY PLAN, WHICH IS WHAT WE HAVE DONE. WE DID NOT CHOOSE TO OFFER WRITTEN OBJECTIONS TO THEIR WRITTEN DISCOVERY BECAUSE YOU HAVEN'T APPROVED THE DISCOVERY PLAN.

THE COURT: WELL, I'M GOING TO APPROVE IT TODAY. DISCOVERY WILL GO FORWARD. SO IF THERE ARE OBJECTIONS, YOU CAN BE PRECISE AND FILE YOUR OBJECTIONS. DISCOVERY IS GOING TO GO FORWARD.

ANYTHING FURTHER, COUNSEL?

MR. COFFIN: NO, YOUR HONOR.

THE COURT: ALL RIGHT, I'LL HEAR FROM SIERRA CLUB.

MR. BOOKBINDER: YOUR HONOR, WE'LL BE VERY BRIEF.

I THINK WE'VE HEARD ENOUGH FROM THE GOVERNMENT ON THIS

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ISSUE. I JUST WANT TO SAY TWO THINGS.

ONE IS --

THE COURT: APPARENTLY, YOU WOULD LIKE TO HEAR MORE, BECAUSE YOU WANT TO CONDUCT DISCOVERY.

MR. BOOKBINDER: I MEANT IN TERMS OF THEIR RESPONSE TO OUR DISCOVERY PLAN. ONE THING THAT BECAME APPARENT IS, NOW THE GOVERNMENT SEEMS TO BE CONCEDING THERE WAS A DECISION OR DETERMINATION MADE THAT FACA DIDN'T APPLY AT SOME POINT, WHICH IS INTERESTING, BECAUSE THE GOVERNMENT HAS ARGUED REPEATEDLY THAT THERE WAS NO ACTION, THERE WAS NO FINAL AGENCY ACTION, THERE WAS NO DETERMINATION MADE AT ANY POINT, BUT NOW WE HAVE AGENCY ACTION CONCEDED BY THE GOVERNMENT.

THE SECOND THING IS THAT ANY ADMINISTRATIVE RECORD WOULD CONSIST, OBVIOUSLY, OF ALL THE EVIDENCE THAT WAS, ALL THE MATERIALS, ALL THE DOCUMENTS, ALL THE NOTES, ALL THE MINUTES AS TO WHO PARTICIPATED, THE EXACT SAME STUFF THAT WE'RE SEEKING IN DISCOVERY, AND FINALLY THE GOVERNMENT STOOD HERE AND SAID, AS YOUR HONOR POINTED OUT, THERE IS ADDITIONAL WRITTEN MATERIAL THAT THEY CLAIM TO HAVE PRODUCED UNDER FOIA WHICH IS RELEVANT TO THIS ISSUE THAT THEY'RE NOT PUTTING IN THE ADMINISTRATIVE RECORD. SO I DON'T UNDERSTAND WHAT THEIR VERSION OF THE ADMINISTRATIVE RECORD IS.

THE LAST THING, YOUR HONOR, IS, WE HAVE ALREADY ENCOUNTERED CLAIMS OF CONSTITUTIONAL PRIVILEGE IN DEFENDANTS' ANSWERS TO OUR COMPLAINT, WHICH WERE JUST FILED. I'VE NEVER

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Department of Energy, Civ. Action No. 01-981 (PLF); *Natural Resources Defense Council v. Department of Energy*, Civ. Action No. 01-2545 (PLF). The agency defendants in those FOIA cases have been ordered by this Court to produce responsive documents, and have begun to do so, thereby revealing more information about the operations of the NEPDG than was available at the outset of either of these consolidated cases.

In addition, the General Accounting Office (GAO), on behalf of Congress, filed suit in this Court challenging the White House's refusal to turn over information about NEPDG to GAO pursuant to GAO's investigatory authority. *See Walker v. Cheney*, Civ. Action No. 02-0340 (JDB). Information released as a result of these cases may potentially impact the statutory and constitutional issues raised by this case.

DISCUSSION

I. Standard of Review

This Court will not grant the defendants' motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99 (1957); *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test."

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SEEN A SITUATION WHERE AN ANSWER TO A SPECIFIC FACTUAL ALLEGATION CONTAINS, *WE REFUSE TO ANSWER ON THE GROUND OF CONSTITUTIONAL QUESTIONS*, AND I'M NOT SURE HOW PLAINTIFF SHOULD -- I'VE NEVER HEARD OF FACTS BEING CONSTITUTIONALLY PRIVILEGED.

THE COURT: I HAVE TO ASK THE GOVERNMENT WHETHER OR NOT THE GOVERNMENT HAS, INDEED, INVOKED EXECUTIVE PRIVILEGE, THEN, IN ITS ANSWER.

MR. COFFIN: YOUR HONOR, THERE ARE POINTS IN THE COMPLAINT WHERE WE WILL, WE HAVE REFUSED TO ANSWER ON THE GROUND OF (PAUSE) --

THE COURT: EXECUTIVE PRIVILEGE?

MR. COFFIN: -- ON THE GROUND THAT, YES, ON THE GROUND OF PRIVILEGE, ON THE GROUND OF CONSTITUTIONALLY PROTECTED COMMUNICATIONS, AND, YOU KNOW, WE CAN DEAL WITH THAT IN THAT PROCESS. BUT, YES, WE HAVE.

THE COURT: THAT'S FINE. I MEAN, IF YOU WISH TO ASSERT THE PRIVILEGE, THAT SHOULD BE DONE CLEARLY. IS THAT WHAT YOU HAVE DONE IN YOUR ANSWER, THEN, ASSERTED THE EXECUTIVE PRIVILEGE?

MR. COFFIN: YES, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. BOOKBINDER: THAT'S ALL, YOUR HONOR.

THE COURT: ALL RIGHT.

ALL RIGHT, ANYTHING FURTHER, COUNSEL?

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MR. COFFIN: NO, YOUR HONOR.

THE COURT: ALL RIGHT, I'M GOING TO TAKE A FIVE-MINUTE RECESS.

ANYTHING FURTHER, MR. KLAYMAN?

MR. KLAYMAN: NO, YOUR HONOR.

THE COURT: ALL RIGHT.

(RECESS)

THE COURT: ALL RIGHT, COUNSEL, I'M GOING TO APPROVE THE PROPOSED DISCOVERY PLAN THAT THE PLAINTIFFS HAVE SUBMITTED. IT REQUIRES ANSWERS TO INTERROGATORIES. IT REQUIRES PRODUCTION OF DOCUMENTS.

LET ME JUST SAY ONE THING. I CAN SEE WHERE ALL THIS IS LEADING TO. IT'S LEADING TO MORE BRIEFS, POTENTIALLY CONSTITUTIONAL ISSUES. THAT'S FINE. THAT'S WELL. IF YOU WANT TO ASSERT PRIVILEGE, THEN YOU MAY DO SO IN THE APPROPRIATE MANNER. BUT JUST TO PICK UP ON SOMETHING THAT GOVERNMENT COUNSEL SAID AT THE PODIUM, IT MAY WELL BE THAT THE GOVERNMENT'S POSITION IS THAT IT HAS PRODUCED IN OTHER LAWSUITS, PURSUANT TO OTHER REQUESTS, FOIA REQUESTS PRIMARILY, INFORMATION THAT MAY BE RELEVANT IN THIS CASE. THE GOVERNMENT CANNOT SIMPLY SAY IT'S ALREADY PRODUCED THAT INFORMATION, WHATEVER THAT INFORMATION IS, WITHOUT PROVIDING THE PLAINTIFFS AND, INDEED, THE COURT WITH SOME DETAIL, WITH SOME PARTICULARITY, SO THAT THE COURT AND THE PLAINTIFFS KNOW EXACTLY WHAT DOCUMENTS THE GOVERNMENT IS REFERRING TO. SO YOU

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CAN'T JUST SIMPLY SAY, *WE'VE ALREADY PRODUCED THAT INFORMATION.*

SO I'M JUST GIVING YOU A HEADS-UP ON THAT, COUNSEL. ALTHOUGH I DON'T THINK YOU WOULD DO THAT, IT'S VERY IMPORTANT. IF IT'S THE GOVERNMENT'S POSITION THAT THIS INFORMATION HAS ALREADY BEEN PRODUCED IN ANOTHER FORUM, THEN IT HAS TO SAY IN DETAILED PARTICULARITY JUST WHAT THAT FORUM IS AND WHAT THAT INFORMATION IS.

I'M GOING TO -- WELL, LET ME JUST HEAR FROM PLAINTIFFS. I'VE APPROVED YOUR PROPOSED PLAN, AND WHEN I SAY THAT, I RECOGNIZE THAT THERE MAY BE LEGITIMATE OBJECTIONS TO THE PLAN THAT RAISE CONSTITUTIONAL CONCERNS AND THAT RAISE CONCERNS OF EXECUTIVE PRIVILEGE. IF SO, WE'LL ADDRESS THOSE OBJECTIONS AND CONCERNS AT THE APPROPRIATE TIME. WHEN DO YOU PLAN TO PROPOUND YOUR INTERROGATORIES AND REQUESTS FOR DOCUMENT PRODUCTION?

MR. KLAYMAN: YOUR HONOR, WE CAN DO IT TODAY.

THE COURT: THAT'S FINE. YOU CAN DO IT ANYTIME YOU WANT TO.

I'LL GIVE THE GOVERNMENT 30 DAYS FROM THE DATE THAT THE DOCUMENT REQUEST IS PROPOUNDED AND 30 DAYS FROM THE DATE ANSWERS TO INTERROGATORIES ARE PROPOUNDED TO FILE OBJECTIONS IN THE APPROPRIATE MANNER, AND IF THE GOVERNMENT ASSERTS PRIVILEGE WITH RESPECT TO A REQUEST FOR DOCUMENT PRODUCTION OR INTERROGATORY, THEN THE GOVERNMENT IS GOING TO HAVE TO, WITH PRECISION, TELL THE COURT AND TELL THE PARTIES JUST EXACTLY

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WHAT THE BASIS OF THE OBJECTION IS.

IN OTHER WORDS, IT'S NOT APPROPRIATE TO SAY EXECUTIVE PRIVILEGE WITHOUT MORE. IT'S NOT APPROPRIATE TO SAY THIS REQUEST IS UNCONSTITUTIONAL, OR PURSUANT TO THE CONSTITUTION, NO RESPONSE IS REQUIRED. THAT'S NOT APPROPRIATE. I NEED TO KNOW, FOR THE THIRD OR FOURTH TIME, WHAT THE BASIS IS FOR EITHER A RESPONSE SAYING THIS IS PROTECTED BY PRIVILEGE OR THIS INTRUDES UPON SOME CONSTITUTIONAL PROTECTIONS THAT SHOULD NOT BE INTRUDED ON, AND I'M NOT GOING TO SIT UP HERE AND TELL THE GOVERNMENT HOW TO RESPOND TO DISCOVERY. THERE ARE EXCELLENT ATTORNEYS AT GOVERNMENT COUNSEL TABLE. THEY KNOW EXACTLY WHAT SHOULD AND SHOULD NOT BE DONE.

MR. KLAYMAN: YOUR HONOR, IF I MAY PROPOSE A SUGGESTION HERE.

THE COURT: SURE.

MR. KLAYMAN: THE GOVERNMENT HAS ALREADY HAD A GOOD PERIOD OF TIME TO REGISTER ITS OBJECTIONS, AS THE COURT NOTED, TO OUR DISCOVERY. THAT'S WHY WE ACTUALLY GAVE THEM AN ADVANCE LOOK AT DISCOVERY, NOT JUST A PLAN, BUT WE GAVE THEM THE ACTUAL DISCOVERY. THEY HAVE NOT DONE SO. THE WAY THE CASE IS USUALLY RUN IN THIS KIND OF A CASE WHEN THERE'S A MATTER OF GREAT PUBLIC IMPORTANCE INVOLVED, WHEN THE GOVERNMENT PERCEIVES A POLITICAL DOWNSIDE TO THE PRODUCTION OF DOCUMENTS, AND THAT'S OBVIOUSLY THE CASE HERE OR THEY WOULDN'T BE FIGHTING THE WAY THEY ARE --

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THE COURT: I'M NOT GOING TO GET INTO THAT. I DON'T KNOW THAT TO BE THE CASE.

ANYWAY, GO AHEAD.

MR. KLAYMAN: AT LEAST FROM MY PERSPECTIVE, AND THERE WAS AN ADMISSION MADE THAT THEY WILL PRODUCE SOME DOCUMENTS IN OTHER CASES. WHAT'S BEFORE YOU HERE AND WHAT'S DIFFERENT ABOUT THIS CASE FROM THE OTHER CASES IS THAT WE'RE SEEKING THE DOCUMENTATION AT THE CORE OF THE ENERGY TASK FORCE RIGHT OUT OF THE WHITE HOUSE. THOSE DOCUMENT REQUESTS THAT WERE PROPOUNDED AND FOIA REQUESTS WERE PERIPHERAL. THEY WERE IN GOVERNMENT AGENCIES.

SO WHAT I'M PROPOSING IS, SINCE THEY'VE ALREADY HAD SOME TIME TO MAKE OBJECTIONS, AND THEY'VE OBVIOUSLY THOUGHT ABOUT WHAT THOSE OBJECTIONS WOULD BE IN ANY EVENT, TO SET A SHORTER TIME TO MAKE THE OBJECTIONS -- TEN DAYS, PERHAPS -- SO WE'LL KNOW WHERE WE STAND, TO NOT LET 30 DAYS TICK OFF AND WE'LL LOSE ALL THAT TIME, BECAUSE THIS IS A MATTER OF GREAT PUBLIC IMPORTANCE.

THE COURT: NO, I RECOGNIZE THAT. I RECOGNIZE THAT TIME IS A FACTOR.

MR. KLAYMAN: THAT WAY, WE CAN COME IN, IF WE DISAGREE WITH THOSE OBJECTIONS, AND SAY, *YOUR HONOR, CAN YOU ADJUDICATE THAT SO WE CAN HAVE TIME FOR PRODUCTION?*

SECONDLY, WE WOULD LIKE A COMMITMENT FROM THE GOVERNMENT THAT THEY'RE NOT GOING TO HANG BACK TO THE END OF 30

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DAYS AND THEN SAY, *OKAY, WE HAVE THIS PROBLEM. YOU KNOW, WE NEED ANOTHER 30 DAYS OR ANOTHER 60 DAYS.* THIS IS THE WAY IT USUALLY HAPPENS IN THESE KINDS OF CASES. WE'D LIKE TO GET AN INDICATION UP FRONT OF WHAT THEIR PROBLEMS ARE, IF ANY, IN THE NEXT TEN DAYS AS THEY MAKE THEIR OBJECTIONS, SO THE COURT CAN ADDRESS THEM, BECAUSE THE PUBLIC IS WANTING TO KNOW WHAT WENT ON.

THERE WAS A STATEMENT MADE HERE THAT THE SECRETARY OF STATE WAS LIKELY A MEMBER OF THE COMMITTEE, THE TASK FORCE. THE ISSUE OF HOW THE ENERGY POLICY AFFECTS EVEN OUR MIDDLE-EASTERN POLICY IS A MATTER THAT THE PUBLIC DESERVES TO KNOW ABOUT IN TERMS OF HOW THIS TASK FORCE WAS CONSTITUTED. WE WANT TO GET THE INFORMATION OUT. THAT'S OUR DESIRE. AS YOU KNOW, AT JUDICIAL WATCH, WE DON'T TAKE A POSITION ON ENERGY POLICY. THAT'S NOT OUR POLICY. WE JUST WANT TO GET THE INFORMATION OUT TO THE AMERICAN PEOPLE.

SO I SUGGEST THAT --

THE COURT: I UNDERSTAND YOUR CONCERNS, AND TIME IS A CONCERN OF THE COURT AS WELL. I UNDERSTAND THAT. I'M GOING TO GIVE THE GOVERNMENT 30 DAYS, THOUGH. RECOGNIZING THAT THE GOVERNMENT HAS ALREADY HAD A SIGNIFICANT AMOUNT OF TIME TO CONSIDER THE PROPOSED QUESTIONS AND PROPOSED DOCUMENT REQUESTS, IT'S NOT UNREASONABLE AT ALL TO GIVE THE GOVERNMENT UNTIL THE 3RD OF SEPTEMBER TO FILE, EITHER COMPLY WITH THE REQUEST OR FILE ITS VERY DETAILED OBJECTIONS TO DOCUMENT REQUESTS AND/OR

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INTERROGATORIES.

AND THE REASON, ANOTHER REASON FOR GIVING THE GOVERNMENT MORE TIME THAN LESS TIME IS BECAUSE I'M NOT INCLINED TO EXTEND THAT TIME, NOW, RECOGNIZING THE GOVERNMENT HAS ALREADY HAD AN OPPORTUNITY TO CONSIDER THE REQUEST FOR A SIGNIFICANT PERIOD OF TIME. SO THE 3RD OF SEPTEMBER IS THE DATE THAT THE REQUESTS ARE DUE TO THE PLAINTIFFS' REQUEST FOR PRODUCTION OF DOCUMENTS, AS WELL AS ANY ANSWERS TO INTERROGATORIES.

AND WHAT I'M GOING TO DO, I DON'T KNOW WHETHER --

MR. COFFIN: EXCUSE ME, YOUR HONOR.

THE COURT: YES.

MR. COFFIN: THAT ASSUMES THAT JUDICIAL WATCH WILL FILE ITS REQUEST TODAY.

THE COURT: TODAY. THAT'S CORRECT.

I'M GOING TO -- DO YOU PLAN TO DO IT TODAY OR TOMORROW?

MR. KLAYMAN: JUDICIAL WATCH AND SIERRA CLUB WILL SERVE THEM TODAY.

THE COURT: ALL RIGHT, THAT'S FINE.

THIS CASE IS ONE OF THE ELECTRONIC-CASE FILES, ANYWAY, SO IT CAN BE DONE ELECTRONICALLY. THAT'S ONLY FAIR, TO GIVE THE GOVERNMENT UNTIL SEPTEMBER 3RD, BUT I WILL NOT EXTEND THE TIME.

NOW, I ANTICIPATE THAT THERE'S GOING TO BE A NEED FOR

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ADDITIONAL BRIEFS TO BE FILED. YOU KNOW, I'M NOT RULING OUT THE POSSIBILITY OF APPOINTING SOMEONE TO MONITOR DISCOVERY. I HAVE A FEELING THAT THE OBJECTIONS AND THE RESPONSES TO DISCOVERY COULD TAKE AN ENORMOUS AMOUNT OF TIME OF THIS COURT TO RESOLVE. SO I'M NOT RULING OUT THE POSSIBILITY OF APPOINTING MAYBE A RETIRED JUDGE TO ASSIST THE COURT WITH MANAGING DISCOVERY. TO THE EXTENT THAT I CAN DO IT MYSELF, I'LL TRY TO DO IT MYSELF. BUT IF IT BECOMES TOO MUCH OF A DRAIN ON MY TIME -- THIS IS NOT THE ONLY CASE ON MY CALENDAR -- THEN I WILL TAKE APPROPRIATE ACTION AND APPOINT MAYBE EVEN A MAGISTRATE JUDGE OR MAYBE EVEN A RETIRED FEDERAL JUDGE TO ASSIST THE COURT WITH MONITORING DISCOVERY. BUT I'LL TRY TO DO IT MYSELF FOR THE TIME BEING.

I THINK IT'S APPROPRIATE TO SCHEDULE A STATUS HEARING, YET STILL ANOTHER STATUS HEARING NOW. I'M GOING TO GIVE THE COURT A COUPLE OF WEEKS TO -- ACTUALLY, I'M NOT GOING TO NEED MUCH TIME. I WANT TO CONSIDER THE OBJECTIONS THAT, I'M SURE, WILL BE FILED TO THE REQUESTS FOR PRODUCTION OF DOCUMENTS, AS WELL AS TO QUESTIONS. I DO WANT TO CONSIDER THOSE SO THAT I CAN THEN DETERMINE WHAT'S AN APPROPRIATE BRIEFING SCHEDULE TO BRIEF LEGAL ISSUES THAT WILL FLOW FROM THE ANSWERS. I RECOGNIZE TIME IS A FACTOR IN THIS CASE.

HOW ABOUT FRIDAY, THE 13TH, AT TEN O'CLOCK?

MR. KLAYMAN: THE PERFECT DAY, YOUR HONOR.

THE COURT: ALL RIGHT, AND THAT'S FOR PURPOSES OF

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PUTTING IN PLACE AN APPROPRIATE BRIEFING SCHEDULE. I'M SURE THAT ONE IS GOING TO BE REQUIRED IN THIS CASE.

ALL RIGHT, ANYTHING ELSE THAT WE HAVE TO FOCUS ON TODAY?

MR. BOOKBINDER: NO, YOUR HONOR.

THE COURT: ALL RIGHT, IT'S GOOD TO SEE EVERYONE. YOU'RE NOT SMILING. EVERYONE IS FROWNING. IT'S GOOD TO SEE EVERYONE.

MR. KLAYMAN: THANK YOU, YOUR HONOR.

THE COURT: HAVE A NICE DAY.

(PROCEEDINGS ADJOURNED AT 10:55 A.M.)

(END OF TRANSCRIPT)

I, FRANK J. RANGUS, OFFICIAL COURT REPORTER, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT IS A TRUE AND ACCURATE TRANSCRIPTION OF MY STENOGRAPHIC NOTES.

---(Original Signed)---

FRANK J. RANGUS, OCR

REV_00264617

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. NATIONAL ENERGY POLICY DEVELOPMENT GROUP, Defendant.	Civ. Action. 01-1530 (EGS)
SIERRA CLUB, Plaintiff, v. VICE PRESIDENT RICHARD CHENEY, *et al.* Defendants,	Civ. Action 02-631 (EGS)

ORDER

On July 11, 2002 this Court granted in part and denied in part the federal defendants' motion to dismiss these consolidated cases brought by plaintiffs Judicial Watch and the Sierra Club. This Court then ordered plaintiffs to jointly propose a discovery plan, and ordered defendants to file any objections to that plan. Having considered the proposed plan and defendants' objections thereto, for the reasons given in open court today, it is hereby

ORDERED that plaintiffs' discovery plan is **APPROVED**; it is

FURTHER ORDERED that in light of plaintiffs' representations

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Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683 (1974).

Furthermore, a motion to dismiss is intended to test the sufficiency of the complaint and the complaint alone.[4] *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683 (1974); *Tele-Communications of Key West v. USA*, 757 F.2d 1330, 1335 (D.C. Cir. 1985) ("a Rule 12(b)(6) disposition must be made on the face of the complaint alone"). Accordingly, at this stage in the proceedings, the Court must accept as true all of the complaints' factual allegations. *See Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985). Plaintiffs are entitled to "the benefit of all inferences that can be derived from the facts alleged." *Kowal*, 16 F.3d at 1276.

II. Federal Defendants' Motions to Dismiss

A. Mootness

The federal defendants have moved to dismiss both complaints as moot because the NEPDG terminated pursuant to the terms of the Presidential Memorandum on September 30, 2001. Because at least two forms of relief, an injunction requiring the disclosure of records and a declaration that the government violated FACA, are available, these case are not moot. *See Cummock v. Gore*, 180

[4] In response to the initial Judicial Watch Complaint, the NEPDG attempted to rely on facts outside the Complaint to support its motion to dismiss, *see* Defs.' Br. of 2/5/2002 at 9. However, the federal defendants do not rely on materials outside the complaints in the motion filed in response to Judicial Watch's First and Second Amended Complaints, or Sierra Club's complaint and thus this Court need no longer consider the issue of whether conversion to a summary judgment motion is appropriate pursuant to Rules 12(b)(6) and 56.

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to the Court that the first set of interrogatories and first request for the production of documents will be served upon defendants today, defendants shall respond to these requests by no later than **September 3, 2002**. Defendants shall fully comply with these requests, or file detailed and precise objections to particular requests with this Court. Should they object to any of these requests, defendants shall not make general invocations of privilege with respect to categories of documents or questions, but must identify and explain their invocations of privilege with particularity; it is

FURTHER ORDERED that should defendants believe that documents or information that they have already released to plaintiffs in different fora are responsive to these discovery requests, defendants shall bear the burden of identifying with detailed precision what information or documents have been so released, and to which discovery requests they believe the information or documents to be responsive; it is

FURTHER ORDERED that in addition to filing any specific objections to discovery requests with this Court by September 3, 2002, defendants shall also file with the Court by that date their responses to plaintiffs' interrogatories and a summary of the documents that were produced; it is

FURTHER ORDERED that a status hearing shall be held on **September 13, 2002** at **10:00 a.m.** in **Courtroom One** to discuss

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defendants' discovery responses and the need for further briefing of constitutional issues raised by any invocations of privilege, if necessary.

IT IS SO ORDERED.

Signed: EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE
August 2, 2002

Notice to:

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F.3d 282 (D.C. Cir. 1999); *Byrd v. EPA*, 174 F.3d 239 (D.C. Cir. 1999). Furthermore, because Judicial Watch has alleged in its Second Amended Complaint that on information and belief the NEPDG is continuing to operate despite the termination of its mandate in the Presidential Memorandum, Judicial Watch's claims are not moot.

It is well settled that the exercise of judicial power authorized by Article III of the U.S. Constitution depends on the existence of a case or controversy. *See, e.g., Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S. Ct. 2330 (1975). A case is moot when it "has lost its character as a present, live controversy of the kind that must exist if [the court] is to avoid advisory opinions on abstract questions of law." *Schering Corp. v. Shalala*, 995 F.2d 1103, 1106 (D.C. Cir. 1993). Article III is satisfied when, as here, the existence of a "partial remedy" is "sufficient to prevent [a] case from being moot." *Calderon v. Moore*, 518 U.S. 149, 150, 116 S. Ct. 2066 (1996).

1. Judicial Watch's Allegations of the Ongoing Existence of the NEPDG

Judicial Watch's Second Amended Complaint alleges that "[o]n information and belief, the NEPDG is still in existence." Jud. Watch Sec. Amend. Compl. at ¶ 38. The Complaint then alleges that NEPDG members and staff continue to meet to discuss and formulate energy policy. *Id.* However unlikely, this Court can not determine at this stage of the case whether or not this

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allegation is true, but rather *must* accept it as true for purposes of deciding this motion to dismiss. *Scheuer,* 416 U.S. at 236. The federal defendants argue in response that "[t]here can be no question that, as a matter of law, the NEPDG no longer exists." Defs.' Mot. of 3/8/2002 at 9. This argument misses the mark. Plaintiff Judicial Watch is not arguing that the legal authority for the NEPDG continues, but that the NEPDG has continued to meet despite the termination of its legal authority. The continued existence of the NEPDG is not, as defendants contend, a question of law, but is a question of fact that is clearly in dispute.

In the alternative, the federal defendants argue that even if the ongoing existence of the NEPDG is a question of fact, this Court should not accept this fact as true because it is not "well-pled." Defs.' Mot. of 3/8/2002 at 9 n.4. Defendants argue that where there is a disparity between facts alleged in a complaint, and exhibits submitted by the plaintiff in support of the complaint, the exhibit trumps the allegation. *Id.* (citing cases). Defendants point out that the letter attached to Judicial Watch's Second Amended Complaint and cited by Judicial Watch to support its allegation of an October 2001 meeting between NEPDG staff and Enron representatives actually states that the meeting occurred "after the termination of the Group." Jud. Watch Sec. Amend. Compl. Ex. 11, at 2. Defendants are

correct that this letter clearly states that this meeting occurred after the NEPDG's termination. Regardless, defendants' argument that Judicial Watch's Second Amended Complaint is not well-pled fails to acknowledge that the Amended Complaint does not simply allege that this one meeting occurred, but that "[o]n information and belief, other meetings between both federal and non-federal members of the allegedly defunct NEPDG have occurred and are still occurring to this day to continue discussions on forumalting a national energy policy." Jud. Watch Sec. Amend. Compl. at ¶38. At this stage of the proceedings, prior to any discovery, this Court *must* accept these facts as true, no matter how vigorously defendants contest the truthfulness of these allegations.

If the NEPDG does continue to exist and meet to formulate energy policy, this Court can still award the relief requested by Judicial Watch. Therefore, because Judicial Watch has alleged the ongoing existence of this group, none of Judicial Watch's claims are moot.

2. Even if the NEPDG no Longer Exists, These Claims are Not Moot.

Unlike Judicial Watch, Sierra Club does not allege that the NEPDG continues to exist, but concedes that the NEPDG terminated on September 30, 2001. However, even if in fact the NEPDG ceased to exist on September 30, 2001, Judicial Watch and Sierra Club's requests for documents and declaratory relief are not moot.

a. Injunctive Relief

Both plaintiffs have requested that this Court order the release of documents related to the NEPDG's activities as relief for the alleged violations of FACA. Jud. Watch Sec. Amend. Compl. at 22, ¶5,6; Sierra Club Compl. at ¶36. FACA mandates public access to some records of advisory committees:

> Subject to [the requirements of FOIA] the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents, which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying...

5. U.S.C. App. 2 § 10(b). This provision "affirmatively obligates the Government to provide access to the identified materials." *Food Chem. News v. Dep't of Health and Human Servs.*, 980 F.2d 1468, 1472 (D.C. Cir. 1992); *see also Cummock v. Gore*, 180 F.3d 282, 289 (D.C. Cir. 1999). Furthermore, this public access provision applies even where there has been no specific request made, unless "the agency reasonably claims [the materials] to be exempt from disclosure pursuant to FOIA." *Food Chem. News*, 980 F.2d at 1469; *see also Cummock*, 180 F.3d. at 289. However, this provision does have a time limitation: the documents, "shall be available for public inspection and copying ... *until the advisory committee ceases to exist.*" 5 U.S.C. App. 2 § 10(b) (emphasis added).

The federal government's statutory duty under FACA to allow the public to inspect and copy documents may be limited in time

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by the statute, but the ability of a court to award access to the documents as relief for previous violations of that duty is limited only by the existence of the documents. The terms of the statute create the substantive requirements to which the government must adhere - the government must make documents available only while an advisory committee exists. Here, both plaintiffs have properly alleged that the government failed to make documents available during the life of the NEPDG. Whether or not plaintiffs sued before or after the group terminated does not alter the allegation that the government failed to meet the substantive requirements of the statute during the relevant time-frame. Assuming the facts in the complaints to be true, the government violated the public access provisions of the statute. Contrary to the federal defendants' argument here, the terms of the statute limit the scope of liability, not the availability of a remedy.

The Court is free to exercise its discretion to craft equitable relief addressing statutory violations. Indeed, if after discovery this Court determines that a statutory violation has occurred, the Court *must* provide some form of relief. *See, e.g., Oakland Cannabis Buyers' Cooperative v. Ashcroft,* 532 U.S. 483, 121 S. Ct. 1711 (2001). Here, one alleged violation is a failure to provide access to documents during the lifetime of the NEPDG. This Court, in its discretion, could determine at some

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later date that ordering defendants to provide whatever relevant documents still exist is an appropriate remedy for that violation.

Thus, whether the relief is available is contingent not on the continued existence of the group, but on the continued existence of the records and information.[5] In other cases, plaintiffs' claims for documents pursuant to § 10(b) were eventually rendered moot not by the termination of the advisory group but only when the defendants released the documents. *See, e.g., Byrd v. EPA*, 174 F.3d 239 (D.C. Cir. 1999); *Physicians Comm. for Responsible Medicine v. Glickman*, 117 F.Supp.2d 1 (D.D.C. 2000); *Ass'n of Am. Physicians and Surgeons v. Clinton*, 879 F. Supp. 10 (D.D.C. 1994).

The D.C. Circuit has held that a request for documents pursuant to FACA is not rendered moot by the termination of the advisory committee in question. *Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999). In *Cummock*, the D.C. Circuit reversed a district court opinion that in part dismissed the plaintiff's claim because her request for documents was untimely. The Court held that Cummock had an enforceable right to the documents that were denied to her during the committee's existence and remanded for the District Court to determine precisely what information

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[5] At the hearing on February 12, 2002, when government's counsel acknowledged that relevant documents still exist, this Court ordered the government to maintain those documents for the duration of this lawsuit.

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Cummock was entitled. 180 F.3d at 292-93. The primary argument by the government in *Cummock* was that the plaintiff, as a member of the advisory committee in question, had no cause of action under FACA for access to records. The Court rejected the government's argument, holding that a member of an advisory committee has an even greater right of access than does the public under § 10(b), but in so holding discussed the parameters of the public's right. The Court explained:

> In any event, the Government does not dispute that committee members have at least the same rights under FACA as the public. Although we disagree with the Government's position that the rights of a committee member extend no further than the rights of a non-member, even taking only this limited view, the Government's concession is significant. *Because there is no question under our precedent that members of the public possess enforceable rights to obtain information under FACA, see Food Chem. News*, 980 F.2d at 1472, it follows a fortiori that committee members have at least these same rights. *And we have also made it clear that FACA rights are enforceable even after an advisory committee has been disbanded. See, e.g., Byrd*, 174 F.3d 239, 243-44 (rejecting argument that plaintiff's injury was not redressable where panel had already completed its work and been disbanded).

180 F.3d at 292 (emphasis added).

The holding of the D.C. Circuit in *Cummock* is clear: "Cummock clearly possesses an enforceable right to information under FACA, because any member of the public possesses such a right. Moreover, Cummock possesses an even greater right than a member of the public, because, as a Commission member, she is entitled to fully participate...." *Id.* at 292. In so holding,

requirements of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2, the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, the Administrative Procedures Act ("APA"), 5 U.S.C. §701 *et seq*, and the federal mandamus statute, 28 U.S.C. § 1361. While the claims raised by each plaintiff differ in relevant and important ways, there is substantial overlap between the two complaints. Both plaintiffs seek information concerning the activities of the NEPDG and its members in developing and recommending to President George W. Bush a national energy policy. Both plaintiffs allege that private individuals were given a significant role in developing this energy policy, and as a result, the confidentiality under which the NEPDG operated violated the requirements of FACA. Defendants have moved to dismiss both complaints, raising a number of jurisdictional, statutory, and constitutional objections to these suits.

This case comes before the Court on federal defendants' motions to dismiss the Judicial Watch and Sierra Club complaints, as well as three private defendants' motions to dismiss the Judicial Watch complaint. Upon consideration of these motions, the responses and replies thereto, the oral argument of counsel,

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Advisor to the Department of Energy, Secretary Abraham, Secretary Evans, Secretary Norton, Secretary Veneman, Secretary O'Neill, Secretary Mineta, and Administrator Whitman.

[2] The private individuals named in Judicial Watch's Second Amended Complaint include: Mark Racicot, Haley Barbour, Kenneth Lay, Thomas Kuhn, and John and Jane Does 1-99, Certain Unknown Non-Federal Employees. Sierra Club sued no non-federal individual defendants.

the D.C. Circuit was attempting to be faithful to legislative intent. With respect to the public access provision, § 10(b), the legislative history explains:

> This provision has the effect of assuring openness in the operations of advisory committees. This provision coupled with the requirement that complete and accurate minutes of committee meetings be kept serves to prevent the surreptitious use of advisory committees to further the interests of any special interest group. Along with the provisions for balanced representation contained in Sec. 4 of the bill, this requirement of openness is a strong safeguard of the public interest.

H.R. Rep. 92-1017, *reprinted in* 1972 U.S.C.C.A.N. at 3491. The surreptitious use of advisory committees by special interest groups could necessarily result in a lack of knowledge about the group's activities, as exemplified by the allegations in this case. It is entirely conceivable that only after the fact would the public become aware of a group's existence and activities, and only after the fact could the public then claim its right of access to documents. In addition, mandating that a court's ability to enforce the FACA record-keeping requirement ends with the termination of the advisory committee would create an odd incentive for the government to terminate any problematic advisory group to avoid shedding light on its activities.

Defendants try to distinguish *Cummock* by arguing that *Cummock* applies only to suits by members of an advisory committee. *See* Defs.' Mot. of 3/8/2002 at 10. But the passage cited above clearly assumes for sake of argument that "that the

rights of a committee member extend no further than the rights of a non-member," and then states that "members of the public possess enforceable rights to obtain information under FACA" and that "FACA rights are enforceable even after an advisory committee has been disbanded." 180 F.3d at 292. Furthermore, the Court held that "Cummock clearly possesses an enforceable right to information under FACA, because any member of the public possesses such a right." *Id.* Contrary to defendants' argument, these conclusions are not dicta, but are central to the D.C. Circuit's reasoning and holding. In order to determine what rights Cummock possessed, the Court reasoned that Cummock must have at least as many rights as the public, which include the right to documents after the committee has been disbanded.

Finally, defendants argue that *Cummock* cites only one case, *Byrd v. EPA*, 174 F.3d 239 (D.C. Cir. 1999), to support the conclusion that a claim for documents is not moot beyond the life of the committee, and therefore is limited to the scope of *Byrd*. *Byrd* held that a request for declaratory relief under FACA was not mooted by the dissolution of the advisory committee at issue. *Id.* at 244. Thus, defendants argue that *Cummock*'s citation to *Byrd* "can only be understood to be a reference to the limited declaratory relief at issue in *Byrd*." Defs.' Mot. of 3/8/02 at 11 n.7. Defendants fail to recognize that the D.C. Circuit in *Cummock* extended the general proposition in *Byrd* that relief can

exist beyond the life of the committee to claims for other relief. Insofar as *Cummock* is an extension of the holding in *Byrd*, it is an extension that is binding on this Court.

Defendants also argue that after the termination of an advisory committee, FOIA provides the only statutory right of access to documents. In the absence of a FACA violation, this may be an accurate statement. If the government complies with FACA, and provides documents in a reading room until the committee ceases to exist, and a citizen wants to access those documents at some time after the termination of the committee, that citizen would have to file a FOIA request to a proper agency defendant for those documents. But that scenario is not what plaintiffs have alleged here. When the government violates FACA, the question is not what other statutes could also provide a right of access, but what options are available to this Court to remedy that statutory violation.

Finally, defendants also argue that plaintiffs' claims are moot because they did not request a preliminary injunction to preserve the records at issue here. Indeed, plaintiffs could have moved for a preliminary injunction to require defendants to maintain the relevant documents. However, plaintiffs were in no way required to request such preliminary relief in order to maintain the controversy. Relief is available as long as relevant documents exist.

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b. Declaratory Relief

Defendants also argue that plaintiffs' request for a declaratory judgment that defendants violated FACA is moot. Defendants argue that, because all other claims for relief are moot, the claim for declaratory relief cannot survive alone, *citing City of Houston v. Dep't of Housing & Urban Dev.*, 24 F.3d 1421, 1429 (D.C. Cir. 1994). As explained above, the claims for injunctive relief regarding the documents are not moot in this case, so this argument by defendants fails. However, even if all the other claims for relief were moot, this Court would follow the D.C. Circuit's holding in *Byrd* that a claim for declaratory relief is not mooted by the termination of the committee. 174 F.3d 239 (D.C. Cir. 1999).

In conclusion, Judicial Watch's claims are not moot because it has alleged the ongoing existence of the NEPDG. Regardless of the likelihood of the truth of these allegations, this Court must accept them as true for purposes of deciding these motions. In addition, Sierra Club's claims are not moot because this Court can remedy any alleged violations of FACA, the APA, and the mandamus statute with injunctive and declaratory relief.

B. FACA Claims

1. FACA Provides No Private Cause of Action

Both Judicial Watch and Sierra Club allege that the activities of the NEPDG are subject to FACA because the group was

established by the President to provide advice on energy policy, and had members who were not full-time federal employees. Both Judicial Watch and Sierra Club further allege that the activities of the NEPDG violated all the procedural requirements of FACA by failing, for example, to provide public notice of meetings, public access to meetings, and public access to minutes and documents generated by the NEPDG. Sierra Club also alleges that in addition to the NEPDG, defendants established and utilized "Sub-Groups" of the NEPDG, which also had private members and which also were subject to and violated FACA's requirements.

In response to these allegations, defendants argue that Judicial Watch and Sierra Club's claims pursuant to FACA should be dismissed because there is no private right of action under FACA.[6] While both Sierra Club and amicus NRDC concede that there is no private cause of action under FACA, Judicial Watch contends that there is. However, in the event that this Court should be convinced by the government's argument with respect to FACA, at oral argument Judicial Watch requested and was granted leave to amend its complaint to include claims under the APA and federal mandamus statute.

Notwithstanding the many previous cases in which courts have implicitly recognized a private right of action pursuant to FACA,

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[6] Defendants did not make this argument in their original motion to dismiss the Judicial Watch claims, but raised it only in response to Judicial Watch's First Amended Complaint. *See* Defs.' Mot. of 3/8/02.

in light of the Supreme Court's recent decision in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511 (2001), this Court has no choice but to hold that FACA creates no private right of action. *Sandoval* makes very clear that courts can not read into statutes a cause of action that has no basis in the statutory text. 532 U.S. at 286-87 ("Statutory intent on this latter point is determinative.... Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.") (internal citations omitted). The *Sandoval* Court rejected any attempt to "revert in this case to the understanding of private causes of action that held sway 40 years ago" that would allow courts to imply a cause of action where consistent with the purpose of the statute at issue. *Id.* Regardless of how allowing such a private cause of action may further the purposes of FACA, nothing in the text of FACA supports a private right to sue. The statutory language may create rights and duties that have been recognized by courts in the past. *See, e.g., Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999). However, language that creates a right is insufficient to create a right to sue. The *Sandoval* Court made clear that the statute must provide not only a private right but also a private remedy. 532 U.S. at 286-87.

Nothing in the language of FACA evidences any intent to create such a remedy. Precedent does not require this Court to

hold otherwise. It is true that several cases have been brought pursuant to FACA apparently without incorporating the FACA violation into a corresponding APA claim. *See, e.g., Public Citizen v. Dep't of Justice,* 491 U.S. 440, 109 S. Ct. 2558 (1989); *Cummock v. Gore,* 180 F.3d 282 (D.C. Cir. 1999); *Ass'n of Am. Physicians and Surgeons v. Clinton,* 997 F.2d 898 (D.C. Cir. 1993). Apparently, in all of these cases, the courts assumed that FACA provided a cause of action. None of the cases addressed the issue of whether Congress created a private right to sue under FACA. This Court cannot rely on an implicit assumption, even an assumption made by the Supreme Court, when a later Supreme Court decision makes clear that the requisite statutory language is lacking here.

However, defendants overstate the amount of precedent that supports their position that a plaintiff must sue under the APA to enforce FACA. Defendants cite cases from the D.C. Circuit, *Claybrook v. Slater,* 111 F.3d 904, 908-09 (D.C. Cir. 1997), *Animal Legal Defense Fund v. Shalala,* 104 F.3d 424, 430 (D.C. Cir. 1997), *Washington Legal Found. v. U.S. Sentencing Comm'n,* 17 F.3d 1446, 1450 (D.C. Cir. 1994), and one case from this Court, *Fertilizer Institute v. EPA,* 938 F. Supp. 52, 54 (D.D.C. 1996), for the proposition that "judicial review of FACA claims is available only through the APA." Defs.' Reply of 4/26/02 at 5. Yet none of the D.C. Circuit cases cited by defendants hold

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this.[7]

The *Fertilizer Institute* case does clearly hold that "[s]ince FACA contains no provision for judicial review, the availability if such review must derive from the APA." 938 F. Supp. at 54. However, one other case from this Court, cited by plaintiff Judicial Watch, holds the opposite: that FACA does create a private cause of action. *Washington Legal Found. v. American Bar Ass'n Standing Comm. on the Fed. Judiciary*, 648 F. Supp. 1353, 1361 (D.D.C. 1986).

Notwithstanding the relative confusion that exists within the FACA doctrine with respect to this question, the Supreme Court's standard is now clear: this Court cannot read into a statute a cause of action that Congress has not expressly created. *Sandoval*, 532 U.S. at 286. Consequently, Judicial

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[7] *Claybrook v. Slater* involved a challenge under FACA to the decision of an agency representative not to adjourn an advisory committee meeting. 111 F.3d at 906. The D.C. Circuit affirmed the District Court's dismissal of the action for lack of standing, reasoning that the plaintiff had no legally cognizable injury because the action at issue was committed to agency discretion. *Id.* In so holding, the Court stated, "the Administrative Procedure Act . . . governs judicial review of agency actions." *Id.* at 908. While the D.C. Circuit did analyze that FACA claim, brought against the Federal Highway Administration, under the APA, it did not hold that a FACA claim was *only* available under the APA. The case says nothing about whether and how FACA claims brought against entities in the government that are not agencies for APA purposes can proceed.

Neither *Animal Legal Defense Fund v. Shalala* nor *Washington Legal Foundation v. U.S. Sentencing Commission* address the availability of a private right of action under FACA. 104 F.3d 424; 17 F.3d 1446. The language with respect to the APA incorrectly cited by defendants here, comes from a discussion of whether the Sentencing Commission qualifies as an "agency" for purposes of FACA. FACA incorporates the definition of "agency" used in the APA; thus, with respect to what qualifies as an agency, the APA "determines FACA coverage." 104 F.3d at 430. Neither of these cases addresses whether FACA contains a private right to sue.

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Watch and Sierra Club's claims pursuant to FACA must be dismissed.

C. APA Claims

Plaintiffs allege that by failing to comply with FACA, the defendants have acted arbitrarily and capriciously, not in accordance with law, and without observation of procedure required by law, in violation of the APA. 5 U.S.C. § 706(2)(A) and (D) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be - (A) arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law... (D) without observance of procedure required by law"). Defendants argue that plaintiffs have failed to state a claim under the APA because many of the defendants are not "agencies" and therefore not liable pursuant to the APA. For those defendants that are covered by the APA, defendants argue that plaintiffs have not identified the requisite "final agency action."

Plaintiffs' APA claims against two of the named defendants, Vice President Cheney and the NEPDG, were dismissed by this Court on May 23, 2002. Plaintiffs have alleged sufficient final agency action with respect to the remaining agency defendants for this Court to deny the motions to dismiss.

1. Non-Agency Defendants

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Judicial Watch and Sierra Club have named as defendants the following: Vice President Richard Cheney, the NEPDG, Andrew Lundquist, Executive Director of NEPDG and Director of Energy Policy for Cheney and Senior Policy Advisor to the DOE, Spencer Abraham, Secretary of DOE, Donald Evans, Secretary of Commerce, Gale Norton, Secretary of the Interior, Ann Veneman, Secretary of Agriculture, Paul O'Neill, Secretary of the Treasury, Norman Mineta, Secretary of Transportation, and Christine Todd Whitman, Administrator of the EPA. Defendants argue that the Vice President, the NEPDG, and any alleged NEPDG sub-groups are not "agencies" for purposes of the APA.

a. Vice President Cheney

Sierra Club[8] concedes that Vice President Cheney is not an agency for purposes of the APA. Sierra Club's Opp'n at 7 n.3. Thus, this Court need not resolve the question of whether the Vice President may ever be an "agency" for purposes of the APA, thereby avoiding a difficult constitutional question. *See Public Citizen v. Dep't of Justice*, 491 U.S. 440, 466, 109 S. Ct. 2558 (1989) (emphasizing doctrine of constitutional avoidance); *cf. Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) (holding

[8] Judicial Watch has opposed the federal defendants' motion to dismiss its Second Amended Complaint by incorporating by reference the arguments previously made in its opposition briefs and the briefs of Sierra Club and NRDC. *See* Jud. Watch Opp'n of 6/7/02. Because Judicial Watch has adopted Sierra Club and NRDC's arguments with respect to the APA claims in their entirety, the concessions made by Sierra Club and NRDC with respect to these claims similarly apply to Judicial Watch.

the applicable statutory and case law, the Court grants in part and denies in part the federal defendants' motions, and grants the private defendants' motions.

BACKGROUND

I. The National Energy Policy Development Group

On January 29, 2001, President George W. Bush issued a Memorandum establishing the National Energy Policy Development Group. *See* Sierra Club Compl. at ¶16; Defs.' Mem. of Points & Authorities in Support of Defs.' Mot. to Dismiss filed on 3/8/2002, Attach. A ("Bush Mem."). The Presidential Memorandum mandated that the NEPDG was to be established within the Executive Office of the President and was tasked with developing a national energy plan. *Id.* The mission of the NEPDG was to "develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy." *Id.* The expressly delineated functions of the NEPDG were to gather information, deliberate, and make policy recommendations to the President. *Id.* The President assigned the NEDPG the task of submitting reports to the President on the difficulties in ensuring the country's energy needs and setting forth a recommended national energy policy consistent with the group's

that separation of powers concerns prevent the application of the APA to the President); *Meyer v. Bush*, 981 F.2d 1288, 1295 (D.C. Cir. 1993) (suggesting that the Vice President should not be subject to FOIA).

b. NEPDG

Because Sierra Club has conceded that the NEPDG no longer exists, any APA claim brought directly against the NEPDG must be dismissed. Even though Sierra Club's FACA claims with respect to the federal defendants are not moot, if the NEPDG no longer exists, then it can not be sued as a defendant. Thus, the Court need not resolve the question of whether the NEPDG or its alleged sub-groups were sufficiently independent to qualify as an "agency" for purposes of the APA.[9]

2. Agency Defendants and Final Agency Action

Defendants concede that the cabinet members sued by plaintiffs are agency actors, and can generally be sued pursuant to the APA for agency action. Defs.' Mot. of 4/5/02 at 12. Section 704 of the APA states that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. It is uncontested that the actions in question are not made reviewable by statute, so in order to state

[9] Furthermore, Sierra Club admits that it included the NEPDG as a defendant "in order to preempt any 'shell game' tactic defendants may employ to withhold Task Force records, and for the sake of clarity." Sierra Club's Opp'n of 4/16/02 at 8 n.6.

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a claim under the APA, plaintiffs must identify a "final agency action." Defendants argue that the APA claims against these agency defendants must be dismissed because plaintiffs have not done so.

Plaintiffs argue that the agency heads named as defendants established and utilized the NEPDG and the NEPDG Sub-Groups and that the "agencies under the control of the named agency defendants have denied [plaintiffs] access to proceedings and records". Sierra Club's Opp'n of 4/16/02 at 9. To be specific, the particular FACA violations alleged to have been caused by defendants are:

- Failure to open each meeting to the public.
- Failure to publish timely notice of each meeting in the Federal Register
- Failure to allow public attendance or statements before the meetings
- Failure to make available for public inspection and copying the records of the NEPDG.
- Failure to keep detailed minutes of each meeting.
- Establishing Sub-Groups without Presidential authorization or notice in Federal Register.
- Failure to file an advisory committee charter.

Sierra Club Compl. at ¶ 31; Judicial Watch Sec. Amend. Compl. at ¶ 54.

The question before this Court is twofold: whether the

actions or lack thereof that caused the alleged FACA violation are "agency action," and whether those actions or inactions are "final." Plaintiffs allege that the agency defendants were at least in part responsible for the decision-making processes that lead to the FACA violations. Specifically, Sierra Club alleges that the various agency defendants "participated in" the NEPDG meetings and deliberations, and "gathered information, advice, and recommendations on national energy policy and supervised the work of the [NEPDG]." Sierra Club's Compl. at ¶¶ 9 - 15. Furthermore, "defendants arranged, participated in and exercised responsibility over meetings and other activities involving [Task Force Sub-Groups]." *Id.* at ¶ 18. In addition, Sierra Club alleges that the "participants in [NEPDG] and the Task Force Sub-Groups interacted significantly and acted collectively in expressing their viewpoints and advice on energy policy." *Id.* at ¶20. Sierra Club also alleges that "[t]he [NEPDG] and the Task Force Sub-Groups were established or utilized by the President and the defendants." *Id.* at ¶23. Finally, "defendants have refused to provide information to Congress, the General Accounting Office, or the public (including the Sierra Club) concerning" the NEPDG. *Id.* at ¶24.

Plaintiffs are entitled to the benefit of all inferences from the facts alleged. From the allegation that defendants caused these violations it could be possible that the group

comprised of the agency defendants, the Vice President, and private individuals acted collectively to make the decisions to hold meetings that were not open to the public, to hold meetings for which minutes were not kept and were not made public, to hold meetings for which no notice was published in the Federal Register, to create draft reports and other records that were not made public, and to meet and work on policy recommendations without filing an advisory committee charter. Given the structure of the NEPDG outlined in the Presidential Memorandum, it is possible, or even likely that these decisions were not made collectively, but in fact were made by the Vice President acting as the head of the group. However, "[i]ndeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683 (1974). This Court will not grant a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) unless a plaintiff can prove no facts in support of his claim. *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99 (1957); *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). Here, if plaintiffs can prove that decisions were made collectively by this group, those can constitute agency action for purposes of the APA.

Furthermore, in addition to holding meetings of the NEPDG that allegedly violated FACA's access requirements, plaintiffs

also allege that the agency defendants established and controlled the Task Force Sub-Groups. Plaintiffs allege that these Sub-Groups, comprised of NEPDG members and private individuals, also constituted advisory committees for purposes of FACA and also operated in violation of FACA and the APA. Specifically, Sierra Club alleges that "defendants arranged, participated in and exercised responsibility over meetings and other activities involving [Task Force Sub-Groups]." *Id.* at ¶18. Judicial Watch similarly alleges that defendants established the Sub-Groups. Jud. Watch. Sec. Amend. Compl. at ¶54(f). Once again, it is possible reasonably to infer from these allegations that an agency head, or a group of agency heads collectively or individually made the decision to establish and oversee particular Sub-Groups.

In response, the federal defendants argue that the decisions of the NEPDG were made by the President, who established the group, and the Vice President, who ran the group, rather than the agency participants. The assertion that no relevant decisions were made by the agency heads is a question of fact that cannot be determined without discovery. The fact that the Presidential Memorandum that established the NEPDG delegated authority to the Vice President to head the NEPDG is not conclusive with respect to how decisions were actually made. Did the Vice President set the dates and times of the meetings? Did the group collectively

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come to a decision to hold a meeting or conduct other activities? If these Sub-Groups did in fact exist, who made the decision to establish them? Who made the decision as to when and where the Sub-Groups would meet, and what role they would play in the policy-making process? Construing the facts in the light most favorable to plaintiffs, this Court must assume for purposes of this motion that the decisions at issue were made in part by the agency defendants.

Thus, the question before this Court is whether collective decisions by such a group, including several agency heads, to hold meetings that allegedly violated the FACA requirements and to establish and control Task Force Sub-Groups, can be considered first, agency action, and second, final agency action pursuant to the APA. Defendants argue, "[i]n the context of advisory committees, the agency that charters a committee and to which a committee reports can engage in final agency action, but individual members of an advisory committee cannot." Defs.' Reply of 4/26/02 at 12. Defendants' primary justification for why the actions of the agency heads cannot be considered agency action is that these individuals acted only as participants in a policy-making group, and were not making decisions on behalf of their agencies.

According to § 10 of the APA, 5 U.S.C. § 701(b)(2), "agency action" has the meaning given to it by 5 U.S.C. § 551. That definition of "'agency action' includes the whole or a part of an

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agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act," 5 U.S.C. § 551(13). That section further defines "order" as "the whole or a part of a final disposition ... of an agency in a matter other than rule making...." 5 U.S.C. § 551(6). According to the legislative history of the APA:

> The term 'agency action' brings together previously defined terms in order to simplify the language of the judicial-review provisions of section 10 and to assure the complete coverage of every form of agency power, proceeding, action, or inaction. In that respect the term includes the supporting procedures, findings, conclusions, or statements or reasons or basis for the action or inaction."

S. Doc. No. 248, 79th Cong., 2d Sess., 255 (1946). As the D.C. Circuit has explained, "the Act defines agency action as 'the whole or a part of an agency rule, order, license, sanction, relief, of the equivalent or denial thereof, or failure to act.' .... Id. § 551(13). These categories are imprecise, and courts have made the threshold determination of reviewable agency action on a case-by-case basis." *Industrial Safety Equipment v. EPA*, 837 F.2d 1115, 1118 (D.C. Cir. 1988).

The type of actions and inaction challenged here, creating sub-groups of the Task Force, holding meetings, refusing to disclose documents, failure to comply with FACA's other procedural requirements, certainly fall within the broad category of "agency power" Congress intended to include in this definition of agency action. S. Doc. No. 248, 79th Cong., 2d Sess., 255

(1946) ("to assure the complete coverage of every form of agency power, proceeding, action, or inaction."). The government can not seriously challenge the type of action taken here as not the type of action covered by this definition. Whether that action can be ascribed to an agency, and whether that action is sufficiently final, are two more difficult questions.

If indeed the decisions to hold NEPDG meetings in private and to create and operate the Sub-Groups were made collectively or in part by the agency heads, can these decisions be ascribed to the agencies? This Court can not detect any case law discussing whether an action taken by a Cabinet member in an advisory capacity should be ascribed to the agency for purposes of the APA. Here, the D.C. Circuit's discussion of the difficulty of distinguishing between the dual role of policy advisor and agency head played by Cabinet officials in the context of a FOIA suit in *Ryan v. Dep't of Justice*, 617 F.2d 781 (D.C. Cir. 1980), is helpful.

The question before the D.C. Circuit in *Ryan* was whether documents within the control of the Attorney General and generated for the purpose of advising the President on judicial nominations are "agency records" for purposes of FOIA. The Circuit reversed the District Court's grant of summary judgment to defendants and ordered the court to enter summary judgment in favor of plaintiffs, holding that such documents were agency

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records. The D.C. Circuit held that there was no basis for "distinguishing between the Attorney General and the Department of Justice, in such a way that the former is not an 'agency' where he functions in a purely advisory capacity to the President." 617 F.2d at 786-87. The Court emphasized the dual role played by the Attorney General as advisor to the President and administrator of the Department of Justice, and stated "[t]he same dual role would be true, to a greater or lesser extent, of all other Cabinet officers." *Id.* at 787. The Court then held that there was no "meaningful distinction" between documents generated and kept at DOJ on the basis of the dual roles. *Id.*

Similarly, with respect to the APA, there is no statutory basis for distinguishing between actions taken by an agency head as an advisor to the President and actions taken as the administrator of the agency. Just as rendering advice on judicial nominations was within the scope of the Attorney General's power both as an advisor and as the head of the Department of Justice, so too is rendering advice on energy policy within the scope of the dual roles of many of the Cabinet members sued here, particularly the Secretary of Energy. *Id.* at 787. As the D.C. Circuit explained, "[j]udicial nominations are by no means unique as an instance where normal agency functions involve some element of giving advice to the President." *Id.*

The D.C. Circuit held that "[o]nce a unit is found to be an

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agency, this determination will not vary according to its specific function in each individual case," and "[a]ny unit or official that is part of an agency and has non-advisory functions cannot be considered a non-agency in selected contexts on a case-by-case basis." *Id.* at 788-89. There is a compelling argument for applying this holding of *Ryan* to APA claims. The same difficulties attend to distinguishing between decisions made or actions taken by agency heads in a purely advisory context or as the head of the agency for purposes of the APA. The Secretary of Energy provides the strongest example of such difficulty-soliciting opinions and rendering advice on energy policy to the President is part and parcel of the Secretary's duties as the head of the DOE. It would be unrealistic to say that when involved in a group designed to create energy policy the Secretary of Energy sheds his role as the head of the DOE and acts only as an advisor to the President. Furthermore, these individuals were selected to participate in this policy-making process by virtue of their positions as the various Secretaries of administrative agencies.

Moreover, in addition to the arbitrariness involved in attempting to draw a distinction between the dual roles of Cabinet members, the D.C. Circuit also rejected such line-drawing because it would undermine the purposes of FOIA. *Id.* at 788. So too would such line-drawing, in this case, undermine the

mission. *Id.* The NEPDG was given a limited duration and was authorized to act only through the end of the 2001 fiscal year. *Id.*

Vice President Cheney was tasked with directing the group, presiding at meetings, and establishing any subordinate groups to assist the NEPDG in its work. *Id.* The memorandum appointed the following individuals as members of the group: Vice President Cheney, the Secretary of the Treasury, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Transportation, the Secretary of Energy, the Director of the Federal Emergency Management Agency, the Administrator of the Environmental Protection Agency, the Assistant to the President and Deputy Chief of Staff for Policy, the Assistant to the President for Economic Policy, and the Assistant to the President for Intergovernmental Affairs. *Id.* The memorandum also stated that the Vice President could also invite, when appropriate, the Chairman of the Federal Energy Regulatory Commission to participate, as well as the Secretary of State, and "other officers of the Federal Government." *Id.* Funding and support staff were to be provided by the Department of Energy ("DOE"), and if necessary, by the National Economic Council and other appropriations available to the President.

On May 16, 2001 the NEPDG issued a public report that recommended a set of policies in the form of administrative

purposes of the APA. Given the vast number of agency actions that include an element of advice-giving, to hold that a decision made by the head of an agency while serving in an advisory role to the President is not subject to the APA would render a large number of agency actions unreviewable. This would not comport with Congress' intent to include within the scope of the APA "every form of agency power." S. Doc. No. 248, 79th Cong., 2d Sess., at 255 (1946).

Thus, for the reasons articulated by the D.C. Circuit in *Ryan*, this Court holds that an action that otherwise would qualify for the APA's definition of "agency action" does not fall outside the coverage of the APA simply because the agency head acts in an advisory capacity to the President. The more important inquiry is whether that action is sufficiently final for APA purposes.

The Supreme Court clearly stated the definition of "final agency action" in *Bennett v. Spear*:

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process, *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948)--it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow," *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71, 91 S. Ct. 203, 209, 27 L.Ed.2d 203 (1970).

520 U.S. 154, 177-78 (1997). The decisions in question — to

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create and supervise Task Force Sub-Groups, to hold meetings closed to the public and without complying with the various procedural requirements of FACA — were not tentative or interlocutory. Plaintiffs are not challenging decisions made by low level agency actors that were subject to the review of their supervisors. Plaintiffs are challenging decisions allegedly made on behalf of an agency by the head of that agency. Nothing in the allegations indicates that the actions challenged were later corrected or reversed by the same or other decision-makers. As decisions allegedly made by the head of an agency, these actions marked the consummation of the decision-making process.

Second, these actions determined "rights or obligations" and created "legal consequences." 520 U.S. at 178. The decisions to hold meetings without public access to the meetings or the records created indeed had a legal consequence - the denial of the public's right of access to that information. Plaintiffs and other interested groups and citizens were prevented from enforcing their right to access information that exists pursuant to FACA. Subsequent actions taken without granting access, and the failure to grant access itself, constitute final agency action.

Defendants argue that recognizing the denial of information as a final agency action confuses the APA standard with FOIA. FACA imposes no requirements on individual committee members, argues defendants, so any denial of information by individual

committee members cannot violate the law. Plaintiffs, however, are not challenging an individual denial of access to a particular information request. FACA obligates the government to make open and available to the public the meetings and records of advisory committees generally, without respect to any particular request. That general failure to do so here is what plaintiffs challenge, not the particular response to their particular requests for access. Thus, any particular denial of access to Judicial Watch or Sierra Club is only relevant insofar as it reflects a general denial of public access.

Once again, the standard to be applied by this Court is not whether the factual scenario that describes final agency action is likely to have occurred here. All that is required for plaintiffs to survive defendants' motions to dismiss is for such a factual scenario to be possible. Plaintiffs have alleged sufficiently final agency action here to survive.

3. Andrew Lundquist

Defendants argue that all claims against Andrew Lunquist, sued by both Judicial Watch and Sierra Club, should be dismissed because Lundquist no longer works for the government. Such a factual determination is inappropriate at this stage of this case. Defendants may be able to establish these facts through discovery. However, this Court can not accept the unsupported factual allegations of defense counsel with respect to Mr. Lundquist's employment status.

D. Mandamus Statute

Plaintiffs have also sued defendants pursuant to the federal mandamus statute, 28 U.S.C. § 1361, arguing that this Court has the authority to remedy defendants' violation of a nondiscretionary duty created by FACA. The federal mandamus statute states: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. The parties dispute the meaning of this statute. The federal defendants argue that the mandamus statute cannot provide jurisdiction to hear claims based on a violation of another statute if that other statute does not provide a private cause of action. Plaintiffs argue that the mandamus statute provides both a cause of action and jurisdiction where another statute imposes a non-discretionary duty on a federal official and where no other relief is available.

1. Cause of Action

Defendants argue that "[t]he federal mandamus statute may provide jurisdiction for an otherwise existing cause of action, but it does not provide a plaintiff with a cause of action. . . . That means a statute that does not provide a right of action cannot be enforced through mandamus." Defs.' Reply of 4/26/02 at 6. While citing a case from this Court to support their

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argument, *Public Citizen v. Kantor*, 864 F. Supp. 208, 213 (D.D.C. 1994), defendants fail to cite controlling authority from the D.C. Circuit, *Chamber of Commerce v. Reich*, 74 F. 3d 1322 (D.C. Cir. 1996), that holds just the opposite.

The plaintiffs in *Reich* challenged the authority of the President to issue an Executive Order authorizing the Secretary of Labor to disqualify federal employers who hire strike replacements from federal contracts, arguing that the Executive Order was preempted by the National Labor Relations Act (NLRA). The D.C. Circuit held that while the APA did not support plaintiff's challenge to the Executive Order because plaintiffs had not identified any agency action, the Court could review legality of Order on a non-statutory basis. *Id.* at 1327 (*citing* Byse and Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 HARV.L.REV. 308, 321 (1967)).[10] Specifically, the Court held, "[i]f a plaintiff is unable to bring his case predicated on either a specific or a general statutory review provision, he may still be able to institute a non-statutory review action." *Id.* While the D.C. Circuit in *Reich* does not identify the "non-statutory" basis of review as a writ of

[10] The Byse and Fiocca law review article explains that while mandamus actions in federal court are technically statutory actions pursuant to § 1361, they are commonly referred to as non-statutory judicial review actions because of the traditional availability of the writ of mandamus as a source of nonstatutory relief. *See* Byse and Fiocca, 81 Harv. L. Rev. 308, 355 n. 51 (1967).

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mandamus or the mandamus statute, the cases it relies upon in this discussion are mandamus cases, and a later D.C. Circuit case, *Washington Legal Foundation v. United States Sentencing Comm'n*, confirmed that indeed *Reich* concerned mandamus. 89 F.3d 897, 901 (D.C. Cir. 1996).

Neither plaintiffs nor defendants cited or discussed the *Reich* holding in their briefs, or the issue of whether *Reich* overrules the *Kantor* decision from this Court. Defendants are correct that *Kantor* clearly held that the mandamus statute does not provide a source of review where judicial review is otherwise precluded. 864 F. Supp. at 213. However, regardless of the holding of this Court in *Kantor*, *Reich* overrules that decision.

At oral argument, defendants attempted to argue that the Supreme Court's holding in *Sandoval*, 532 U.S. at 286-87, with respect to the existence of statutory rights of action overrules *Reich*. However, *Sandoval* in no way conflicts with the holding of *Reich*. The *Sandoval* Court was concerned about the constitutionality of an Article III Court reading into a statute a cause of action that Congress had not explicitly created. *Id.* Here, there is no such concern because Congress itself created the mandamus statute.

Following *Reich*, this Court holds that the mandamus statute may provide an avenue to remedy violations of statutory duties even when the statute that creates the duty does not contain a

private cause of action. Accordingly, this Court must now turn to the question of whether FACA creates such a duty.

2. Non-Discretionary Duty

When a federal official has an obligation to perform a ministerial or non-discretionary duty, a federal district court may issue a writ of mandamus under § 1361 to compel that officer to fulfill the obligation. *National Wildlife Fed'n v. United States*, 626 F.2d 917, 923 (D.C. Cir. 1980). However, mandamus is a "drastic remedy, to be invoked only in extraordinary situations." *Consolidated Edison Co. of New York v. Ashcroft*, 286 F.3d 600, 605 (D.C. Cir. 2002); *In re Papandreou*, 139 F.3d 247, 249 (D.C. Cir. 1998). As the Supreme Court has explained, a "ministerial duty" must be "so plainly prescribed as to be free from doubt and equivalent to a positive command.... [W]here the duty is not thus plainly prescribed, but depends on a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." *Wilbur v. United States*, 281 U.S. 206, 218-19, 50 S. Ct. 320 (1920) (*quoted in Consolidated Edison*, 139 F.3d at 605).

Plaintiff identifies several non-discretionary duties imposed by FACA. However, the only duties that are relevant here are those that are not moot. *See Gray v. Office of Personnel Management*, 771 F.2d 1504, 1514 (D.C. Cir. 1985)(holding a

mandamus claim moot where requested duty was subsequently performed). With respect to plaintiff Sierra Club, because it has conceded that the NEPDG no longer exists, several of the nondiscretionary duties imposed by FACA, such as opening meetings to the public, and providing notice of meetings in the Federal Register, can no longer be ordered by this Court.

As discussed above with respect to mootness, however, one claim for injunctive relief remains available to Sierra Club: the requirement that records related to the advisory committee's work be made public, 5 U.S.C. App. 2 §10(b). In other words, the requested relief is not rendered moot by the termination of the advisory committee or the language in the statute "until the advisory committee ceases to exist." That request for relief would only be rendered moot by the disclosure of the documents to plaintiff. *See, e.g., Gray v. Office of Personnel Management*, 771 F.2d 1504, 1514 (D.C. Cir. 1985)(holding a mandamus claim moot where requested duty was subsequently performed); *see also Byrd v. EPA*, 174 F.3d 239 (D.C. Cir. 1999)(FACA claim moot when government released documents); *Physicians Comm. for Responsible Medicine v. Glickman*, 117 F.Supp.2d 1 (D.D.C. 2000) (same).

The duty to make documents related to an advisory committee available to the public is non-discretionary. Section 10(b) states:

> Subject to [the FOIA], the records, reports, transcripts, minutes, appendixes, working papers,

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> drafts, studies, agenda or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

5 U.S.C. App. 2 § 10(b). The language of this section leaves no room for discretion: the records "shall be available for public inspection." *Id.* The Supreme Court has stated that by using "shall" in a civil forfeiture statute, "Congress could not have chosen stronger words to express its intent that forfeiture by mandatory in cases where the statute applied." *United States v. Monsanto*, 491 U.S. 600, 607, 109 S. Ct. 2657 (1989); *see also Pierce v. Underwood*, 487 U.S. 552, 569-70, 108 S. Ct. 2541 (1988) (Congress' use of "shall" in a housing subsidy statute constitutes "mandatory language"); *Barrentine v. Arkansas-Best Freight Sys. Inc.*, 450 U.S. 728, 739 n.15, 101 S. Ct. 1437 (1981); Black's Law Dictionary 1233 (5th ed. 1979) ("As used in statutes . . . [shall] is generally imperative or mandatory."). The mandamus statute does allow for the possibility of invoking FOIA exemptions to protect some documents. That exception to the public disclosure rule does not, however, introduce discretion into the statutory mandate. If no FOIA exemption applies to the documents in question, the documents "shall be made available." § 10(b)

With respect to the claims made by Judicial Watch, because

Judicial Watch alleges that the NEPDG continues to exist, none of the duties created by FACA are moot. In addition to the duty to make documents publically available, FACA creates several other duties, that by virtue of the use of the word shall, Congress has made nondiscretionary. *See* 5 U.S.C. App.2 § 10(a)(1)(meetings shall be public); § 10(a)(2)(timely notice shall be published); § 10(a)(3)(interested persons shall be permitted to attend, subject to reasonable rules and regulations); § 10(b)(records shall be made public); § 10(c)(minutes shall be kept and shall contain a record of persons present, complete description of matters discussed and conclusions reached, and the accuracy of such minutes shall be certified by chairman); § 11(a)(transcripts shall be made available at cost).

Defendants' sole argument with respect to whether the duties imposed by FACA are discretionary is that FACA imposes no duty on either the Vice President or the individual members of an advisory committee. Defs.' Mot. of 4/5/2002 at 15 ("neither the Vice President (who is not an 'agency head') nor any individual member of a FACA committee is singled out for specific duties under the statute."). Plaintiffs respond that a statute need not single out the specific official on which it imposes a duty in order for that duty to be nondiscretionary. Defendants cite no cases in support of their argument that the statute must single out the relevant individuals by name or title. This argument

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actions and proposed legislation. *See* "Reliable, Affordable, and Environmentally Sound Energy for America's Future," Report of the National Energy Policy Development Group, available at www.whitehouse.gov/energy/National-Energy-Policy.pdf. That report was approved by the President as the National Energy Policy. *Id.* The authority for the NEPDG terminated at the end of the 2001 fiscal year, September 30, 2001. *See* Bush Mem. at 2.

As alleged in Judicial Watch's Complaint, from the start, the NEDPG gained the attention of the national media. In particular, the public demand for information about the energy policy development process and identity of the participants in that process has been great. That attention has only intensified with the recent controversy over the highly publicized bankruptcy of the Enron Corporation and allegations of contacts between former Enron Chief Executive Officer Kenneth Lay and the NEDPG. Both plaintiffs allege that private individuals and corporations had access to the NEPDG and participated as members of the NEPDG. Sierra Club also alleges that Sub-Groups of the NEPDG were created, which also had private individual members. Both plaintiffs made requests on behalf of their members for information about the NEPDG and had those requests denied by defendants.

ignores the Supreme Court's guidance in *Marbury v. Madison*: "[i]t is not by the office of the person to whom the writ is directed, but the nature of thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." 5 U.S. (1 Cranch) at 170. The relevant question is whether, in light of the facts as alleged in the complaints, the duty to make records public or comply with any of the other above-listed duties, could have fallen on any of the defendants. The statute does not specify who shall be responsible for this duty. As discussed above, it is possible that the Vice President had final responsibility for all decisions with respect to the NEPDG, in which case, the duty to allow public access to the records would appear to fall on his shoulders. It is possible that the NEPDG made decisions collectively, in which case the responsibility could fall on the shoulders of all members.

What is clear from the statute is that some government official, whether it is the Vice President or the NEPDG participants or someone else, has a duty pursuant to FACA if the facts as alleged are proven. To whom that non-discretionary duty falls is a question to be explored in discovery. At this stage of the case, however, the Court need only acknowledge that FACA creates non-discretionary duties, and that, according to plaintiffs' allegations, one of the defendants sued here could have violated those duties.

3. Should This Court Exercise Its Mandamus Discretion?

Even where a duty is clear and nondiscretionary, whether or not to issue the writ of mandamus is a determination committed to the discretion of this Court. *Cartier v. Sec. of State*, 506 F.2d 191, 199 (D.C. Cir. 1974); *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974). While mandamus is not necessarily precluded where the official is the President or Vice President of the United States, separation of powers concerns may impact the exercise of this Court's discretion. *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) (declining to issue writ of mandamus despite duty of President to issue pay raise out of respect for separation of powers).

At this stage of the case, it would be premature and inappropriate to determine whether the relief of mandamus will or will not issue. Certainly whether relief is available under the APA will be relevant to whether the mandamus relief requested will be necessary. It is sufficient to determine that plaintiffs have stated a claim for relief under the mandamus statute. Whether or not plaintiffs will prove that claim remains to be seen.

E. Constitutional Separation of Powers Concerns

The constitutional question suggested by this case is whether Congress can pass a law granting the public access to the deliberative process of a formally constituted group of the

President's advisors when at least one of those advisors is a private individual without violating Article II. The application of FACA to this group, argue defendants, interferes with the President's constitutionally protected ability to receive confidential advice from his advisors, even when those advisors include private individuals. Resolving that constitutional question, however, is premature at this stage of the proceedings. The government would have this Court answer that question in the negative now and dismiss the case without ever providing any discovery into the nature and number of the meetings at issue, the identities of the participants, the nature of the group's interaction with the President, the role of the Vice President in the group, the nature of the alleged Sub-Groups' interaction with the NEPDG, or the proximity of the NEPDG and alleged Sub-Groups to the President. The government further argues that it would violate the Constitution for this Court to even inquire into these matters.

The doctrine of constitutional avoidance counsels against answering such an important constitutional question at the motion to dismiss stage. By declining to resolve the constitutional issue at this stage of the case, this Court does not intend to suggest any doubt about the seriousness of the constitutional challenge raised by defendants to the application of FACA and the APA here. Rather, it is out of concern for the seriousness of this issue that this Court has determined that proceeding to

discovery is appropriate.

It is a fundamental principle of constitutional interpretation that a court should not pass on any constitutional questions that are not necessary to determine the outcome of the case or controversy before it. *Burton v. United States*, 196 U.S. 283, 295, 25 S. Ct. 243 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."). The Supreme Court has consistently explained: "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable." *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105, 65 S. Ct. 152 (1944). Furthermore, it is equally fundamental that a court should not pass on a constitutional question prematurely. "It has long been the Court's 'considered practice not to decide abstract, hypothetical or contingent questions ... or to decide any constitutional question in advance of the necessity for its decision ... or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied ... or to decide any constitutional question except with reference to the particular facts to which it is to be applied....'" *Clinton v. Jones*, 520 U.S. 681, 690 n. 11, 117 S. Ct. 1636 (1997) (*quoting Alabama State Fed'n of Labor v. McAdory*,

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325 U.S. 450, 461, 65 S. Ct. 1384 (1945)).

Here, the federal defendants ask this Court to resolve a constitutional question prematurely and, in so doing, fashion a constitutional ruling broader than the precise facts underlying this case. Defendants ask this Court to hold unconstitutional the application of FACA to any facts and factual inferences permissible from the face of plaintiffs' complaints. While it may be the case that plaintiffs will be able to prove all the pled facts as true, something defendants seriously contest, it is also likely that discovery will reveal facts that narrow the issues before this Court considerably. The proof of any violation of the statutes at issue here, FACA, the APA, and the federal mandamus statute, is contingent on development of a factual record. It is entirely possible that defendants will prevail on summary judgment on statutory grounds after proving that no private individuals participated as members of the advisory committees at issue, or that plaintiffs have failed to identify final agency action, thus rendering defendants' constitutional concerns inapplicable. Furthermore, development of the factual record will better enable this Court, if ultimately faced with deciding whether it violates separation of powers to apply the APA, FACA, or the federal mandamus statute in this context, with the information necessary to properly apply the constitutional balancing test in the nuanced, fact-intensive

fashion required by precedent. *E.g., Morrison v. Olsen,* 487 U.S. 654, 108 S. Ct. 2597 (1988); *Nixon v. Administrator of General Servs.,* 433 U.S. 425, 443, 97 S. Ct. 2777 (1977) (*Nixon II*); *Ass'n of Am. Physicians and Surgeons v. Clinton,* 997 F.2d 898 (D.C. Cir. 1993).

Defendants' justification for this Court determining the constitutional issue at this stage of the case is two-fold: first, they argue that no factual development is required to determine the constitutional issue, and second, that any factual discovery would raise identical constitutional concerns. Defendants' first argument flies in the face of the precedent that has developed separation of powers doctrine as a fact-intensive, case-by-case analysis of the specific nature of the intrusion into the President's performance of his constitutional duties. *Morrison,* 487 U.S. 654; *Nixon II,* 433 U.S. at 443. Defendants' second argument is conclusory in nature, unsupported by precedent, and equally unpersuasive.

1. Constitutional Balancing Test Deserves Further Factual Development.

Before explaining precisely why further factual development is necessary to effectively resolve the constitutional question here, first the Court must briefly discuss the proper legal standard to apply to separation of powers conflicts. Defendants have repeatedly invoked an incorrect constitutional standard in

this case, a standard that would increase Executive power at the expense of the other branches of government. Defendants have made these arguments despite previous concessions of defense counsel that their preferred standard did not reflect the governing law. The government's oscillations before this Court reflect what appears to be a problematic and unprecedented assertion, even in the face of contrary precedent, of Executive power. To borrow the words of the D.C. Circuit in *Nixon v. Sirica*, "[s]upport for this kind of mischief simply cannot be spun from incantation of the doctrine of separation of powers." 487 F.2d 700, 715 (D.C. Cir. 1973).

a. Constitutional Standard

The Supreme Court has affirmed time and again the importance of the allocation of governmental power by the United States Constitution into three coordinate branches. *Clinton v. Jones*, 520 U.S. 681, 117 S. Ct. 1636 (1997); *Morrison*, 487 U.S. 654; *Bowsher v. Synar*, 478 U.S. 714, 106 S. Ct. 3181 (1986); *Humphrey's Executor*, 295 U.S. 602, 55 S. Ct. 869 (1935). This separation of powers was regarded by the Framers of the Constitution as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122, 96 S. Ct. 612 (1976); *see also Mistretta v. United States*, 488 U.S. 361, 383, 109 S. Ct. 647 (1989) ("[c]oncern of encroachment or

aggrandizement . . . has animated our separation of powers jurisprudence."). Thus, the Supreme Court has invalidated actions by one branch of government that impermissibly usurp the power of another co-equal branch. *See, e.g., Plaut v. Spendthrift Farm*, 514 U.S. 211, 115 S. Ct. 1447 (1995) (unconstitutional legislative assumption of judicial power); *INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764 (1983) (unconstitutional legislative assumption of executive power); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863 (1952) (unconstitutional executive assumption of legislative power). Even when a branch of government does not assume for itself a power allocated to another, "the separation of powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States*, 517 U.S. 748, 757, 116 S. Ct. 1737 (1996); *Commodity Futures Trading Ass'n v. Schor*, 478 U.S. 833, 856-57, 106 S. Ct. 3245 (1986); *Nixon II*, 433 U.S. at 443.

If one thing is clear from these separation of powers cases, it is that the lines that divide the powers of the three branches of government are neither absolute nor "neatly drawn." *Clinton v. Jones*, 520 U.S. at 701. "In designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not

intended to operate with absolute independence." *United States v. Nixon*, 418 U.S. 683, 707, 94 S. Ct. 3090 (1974) (*Nixon I*). Conflicts and overlap are necessary byproducts of the constitutional design of checks and balances among the three branches of government.

The potential application of FACA to the NEPDG may well require this Court to determine the proper boundaries between the respective spheres of the co-equal branches of government. Indeed, the Supreme Court has recognized that applying FACA to meetings among Presidential advisors " present[s] formidable constitutional difficulties." *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 466, 109 S. Ct. 2558 (1989); *see also Ass'n of Am. Physicians and Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993)(*AAPS*). To be clear, defendants do not argue that the application of FACA would result in the aggrandizement of the Congressional or judicial role by usurping the powers of the Executive. Rather, the defendants contend that the application of FACA to the NEPDG encroaches on the sphere of the Executive by infringing the President's right to receive the confidential advice necessary to discharge his unique duties. In such a case, the proper test for determining whether Article II of the Constitution has been violated was first articulated by the Supreme Court in *Nixon II*:

> In determining whether the Act disrupts the proper balance between the coordinate branches, the proper

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> inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. [citing *Nixon I*]. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

433 U.S. at 443; *see also Morrison*, 487 U.S. at 695 (1988); *AAPS*, 997 F.2d at 910. Thus, this Court would first examine whether FACA, as applied to the facts of this case, prevents the Executive Branch from accomplishing any constitutionally assigned functions. *Morrison*, 487 U.S. at 696 (holding that the act creating the independent counsel's office did not infringe on the President's ability to "perform his constitutionally assigned duties"); *see also Clinton v. Jones*, 520 U.S. at 705-06 (holding that civil lawsuit against sitting President did not constitute an impermissible intrusion by judiciary into ability of President to fulfill duties). If that question is answered affirmatively, this Court would then address whether that infringement is justified by the purposes of the congressional action. *Nixon II*, 433 U.S. at 443; *APPS*, 997 F.2d at 910.

The inconsistency in defendants' position with respect to the proper test to be applied to determine the constitutionality of an interference with Executive authority is troubling. The development of the government's constitutional arguments in this case is worth recounting. In the initial motion to dismiss the original Judicial Watch complaint, the government urged this

II. Procedural History of the Judicial Watch and Sierra Club Lawsuits

On June 25, 2001, plaintiff Judicial Watch wrote to Vice President Cheney expressing its opinion that the NEDPG was required to comply with FACA, asking to attend all future NEPDG meetings, and requesting copies of minutes and other documents under FACA and FOIA. Judicial Watch is a self-described non-profit public interest law firm the mission of which includes promoting open government. The Office of the Vice President responded by letter on July 5, 2001 denying Judicial Watch's request and informing Judicial Watch that the NEPDG was not subject to either FACA or FOIA.

On July 16, 2001, Judicial Watch filed this lawsuit. Judicial Watch initially sued only the NEDPG, alleging violations of FACA and FOIA. After receiving several extensions of time to file a responsive pleading from this Court, on October 17, 2001, defendant NEPDG moved to dismiss. Defendant NEPDG originally argued that Judicial Watch's complaint failed to state a claim under FACA because the NEPDG consisted solely of federal officials, and that it would violate Article II of the Constitution to apply FACA to this group.

On January 31, 2002, this Court issued an Order setting forth constitutional issues to be briefed in advance of a hearing on the NEPDG's motion to dismiss. That briefing was completed on February 11, 2002. On February 12, 2002, this Court held a

Court to adopt a constitutional standard that has never gained the endorsement of a majority of the Supreme Court, and has recently been expressly rejected by the D.C. Circuit. Defendant argued that "[t]he Supreme Court has made clear that where, as here, the power the President is exercising is a power granted explicitly to him by the Constitution, Congress cannot interfere with that power and any statute that purports to do so is unconstitutional." Defs.' Mot. of 10/17/02 at 14. Relying on the concurrence in *Public Citizen* rather than the majority in *Nixon II*, 433 U.S. at 443, or *Morrison*, 487 U.S. at 696, the government argued that where "a power has been committed to a particular Branch of Government in the text of the Constitution, the balance has already been struck by the Constitution itself." *Public Citizen*, 491 U.S. at 486.

While conceding that the *Nixon/Morrison* balancing test applies, *See* Tr. 2/12/2002 at 33:17 - 34:1; 35:8 - 35:23; 36:15 - 38:7; 38:20 - 39:1; 39:9 - 40:16, the government urges this court nonetheless to apply the bright-line rule embraced by the *Public Citizen* concurrence. The government argued in its motions to dismiss that

> [w]hile the Court has, in other circumstances, considered the degree of intrusion into the Executive's constitutionally protected interest in light of the Congress' interest in adopting the particular legislation at issue in determining whether that legislation is valid, see Morrison, 487 U.S. at 695, that approach is unnecessary where, as here, the legislation impedes the President's ability to carry

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> out his express constitutional authority. Public Citizen, 491 U.S. at 484-86 (Kennedy, J., concurring).

Defs.' Mot. of 3/8/02 at 24 (emphasis in original). Defendants have cited no authority other than the *Public Citizen* concurrence that explicitly holds that any infringement of a textually-authorized constitutional duty is a *per se* violation of separation of powers, nor could they.[11]

The Executive Branch has long argued for a more formalistic understanding of the separation of powers doctrine than the Supreme Court and other courts have been willing to accept. *See Nixon I*, 418 U.S. at 706-707; *Nixon II*, 433 U.S. at 441-44; *AAPS*, 997 F.2d at 906 ("According to the government, [the Recommendation Clause] gives the President the sole discretion to decide what measures to propose to Congress, and it leaves no room for congressional interference."). In *Nixon II*, the Court rejected the government's argument for "three airtight departments" of government as "archaic." 433 U.S. at 441-44. The Court has instead consistently embraced the view articulated

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[11] To be fair, with respect to the constitutional standard, the government did brief both its preferred bright-line rule derived from the *Public Citizen* concurrence, and the application of the *Nixon/Morrison* balancing test. However, the government's brief says nothing about the fact that government's counsel conceded at oral argument to this Court that the *Public Citizen* concurrence standard is not the controlling law. Furthermore, while the government's briefs argue these two standards in the alternative, they say nothing about which alternative this Court *should* apply. If anything, the government's briefs imply that this Court should apply the *Public Citizen* test. *See* Defs.' Reply of 4/26/02 at 15 ("even assuming that *AAPS* mandates the balancing approach rather than the *Public Citizen* standard (a point Plaintiffs assert and Defendants contest). . .").

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by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*:

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

343 U.S. at 635 (Jackson, J., concurring). In *Mistretta v. United States*, the Court explained, "The Constitution "imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.'" 488 U.S. 361, 381, 109 S. Ct. 647 (1989). Indeed, separation of powers principles do not mean that the branches of government "ought to have no partial agency in, or no control over the acts of each other." James Madison, The Federalist No. 47.

With this conception of the separation of powers doctrine in mind, the Supreme Court has never agreed with the position taken by the government here, that any infringement on any enumerated power in Article II is necessarily a *per se* violation of the Constitution. In *Morrison*, Justice Scalia's argument that the "executive power" described in Article II of the Constitution "does not mean *some of* the executive power, but *all of* the executive power" gained the support of no other Justice. 487 U.S. at 711 (Scalia, J., dissenting). In his lone dissent, Justice Scalia argued for a "clear constitutional prescription

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that the executive power belongs to the President" and against the majority's "balancing test." *Id.* The majority of the Court opted to apply a balancing test to determine whether Congress had "impermissibly" intruded on the executive power. *Id.* at 696. In *Public Citizen*, three other Justices argued for a bright-line rule similar to that advocated by Justice Scalia in *Morrison*. *Public Citizen*, 491 U.S. at 484-86 (Kennedy, J., concurring).[12] Once again, that view did not persuade a majority of the Justices, who invoked the doctrine of constitutional avoidance to interpret FACA so as to avoid a constitutional challenge. *Id.* at 466. Furthermore, in *AAPS*, the D.C. Circuit conducted a lengthy discussion of the flaws in the government's bright-line rule argument, offered by the government in that case as well.[13] 997 F.2d at 906-11.

The implications of the bright-line rule advocated by the government are stunning. Even if this Court were to consider the question of what separation of powers standard to apply without

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[12] Justice Scalia recused from the *Public Citizen* case.

[13] While the D.C. Circuit's discussion of the constitutional issue raised by the application of FACA to the Health Care Task Force was arguably dicta because the Court ultimately declined to decide the constitutional issue, the Court explained that it was necessary to determine the strength of the constitutional argument raised by the government prior to applying the doctrine of constitutional avoidance. 997 F.2d at 906 ("It is, of course, necessary before considering the maxim of statutory construction to determine whether the government's constitutional argument in this case is a powerful one. In other words, are we truly faced, as the Court thought it was in Public Citizen, with a grave question of constitutional law?"). The Court rejected the government's constitutional standard but noted that the constitutional concerns raised were serious. This Court agrees with and follows the reasoning of that court, *Nixon II*, and *Morrison*.

the benefit of precedent, it would reach the conclusion that the government's position in untenable. Any action by Congress or the Judiciary that intrudes on the president's ability to recommend legislation to Congress or get advice from Cabinet members *in any way* would necessarily violate the Constitution. The Freedom of Information Act and other open government laws would therefore constitute an unconstitutional interference with Executive authority. Any action by a court or Congress that infringes on any other Article II power of the President, for example, the President's role as Commander in Chief of the armed forces and the national security concerns that derive from that role, would violate the Constitution. Any congressional or judicial ruling that infringes on the President's role in foreign affairs, would violate the Constitution. Clearly, this is not the law. Such a ruling would eviscerate the understanding of checks and balances between the three branches of government on which our constitutional order depends.

Finally, this is not the first case before this Judge in which the government has advocated the theory of separation of powers rejected here.[14] While the government, like any other

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[14] In this case, and in at least one other before this Court, *Stillman v. Doe*, Civ. Action No. 01-1342 (EGS) (D.D.C.), the government has proceeded by mischaracterizing the existing standard and invoking the concurring opinion of three Justices of the Supreme Court in *Public Citizen* as controlling authority. The fact that the government has stubbornly refused to acknowledge the existing controlling law in at least two cases, does not strike this Court as a coincidence. One or two isolated mis-citations or misleading interpretations of precedent are forgivable mistakes of busy counsel, but a

party, is free to argue for an extension of the law, it should be forthcoming when calling for such an extension. The fact that the government may want to advocate a new theory of Executive authority and the separation of powers is its prerogative. It cannot, however, cloak what is tantamount to an aggrandizement of Executive power with the legitimacy of precedent where none exists.

b. Application of Constitutional Standard Requires Further Facts

Thus, it is clear that once the question of whether applying FACA to the NEPDG violates Article II is properly before this Court, the constitutional inquiry will require balancing the following two considerations: first, this Court must inquire into whether the law's requirements would infringe the President's ability to perform constitutional functions, and second, the Court must determine whether that impairment is outweighed by any constitutionally authorized Congressional purposes. *Nixon II*, 433 U.S. at 443; *Morrison*, 487 U.S. at 696. It is critical to the application of this test that the Court determine the precise nature of the intrusion into Executive authority. The greater the intrusion into the Executive sphere, the greater the interest necessary to justify the intrusion.

The constitutional authority at stake here is the

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consistent pattern of misconstruing precedent presents a much more serious concern.

President's ability to receive advice that has been generated in confidence. While no clause of Article II expressly grants the President the power to acquire information or receive advice in confidence, the necessity of receiving confidential advice appears to flow from Article II. Several clauses of Article II reflect an understanding that the President will have access to information and the power to acquire it,[15] and the Supreme Court has repeatedly recognized that the importance to the Presidency of receiving candid, honest, and when necessary, unpopular, advice from "high Government officials and those who advise and assist them in the performance of their manifold duties" is paramount. *Nixon I*, 418 U.S. at 705. Indeed, the words of the *Nixon I* Court bear repeating:

> [T]he importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process.

Id. That Court went on to explain:

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[15] For example, Article II, Section 2, grants the President the power to "require the Opinion in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices." In addition, the State of the Union clause, requiring the President "from time to time give to the Congress Information of the State of the Union" presupposes superior or at least different access to information than the legislative branch. Art. II, Sec. 3. The Recommendations Clause, invoked by the government in this case, which empowers the President to "recommend to [Congress] such Measures as he shall judge necessary and expedient," similarly presupposes the ability to collect information and advice necessary to make such recommendations. Art. II, sec. 2. And as the Constitution did not presume the President to operate in a vacuum, the other powers listed in Article II, generally presuppose the President's ability to receive advice in order to exercise those powers in an informed manner.

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens, and added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives the in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.

Id. at 708; *see also In re Sealed Case*, 121 F.3d 729, 736-40 (D.C. Cir. 1997) (discussing the history of the protection of executive communications and the executive privilege doctrine). As the D.C. Circuit explained in *AAPS*, "The Framers thus understood that secrecy was related to the executive's ability to decide and to act quickly- a quality lacking in the government established by the Articles of Confederation. If a President cannot deliberate in confidence, it is hard to imagine how he can decide and act quickly." 997 F.2d at 909.

Thus, although there is no specific privilege for protecting the confidentiality of Presidential communications or deliberations in the text of the Constitution, "[c]ertain powers and privileges flow from the nature of the enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings." *Id.* (*citing McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819)). Equally clear, however, is that the need to maintain the confidentiality of the President's communications and deliberations is not unqualified.

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"The President's need for complete candor and objectivity from advisors calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values occurs." *Nixon I*, 418 U.S. at 706.

The question raised by the application of FACA to the NEPDG and the alleged Sub-Groups is not whether the President's constitutionally protected ability to receive advice in confidence is undermined, but whether his advisors' ability to deliberate in confidence is constitutionally protected, and how far down the line that protection extends. *Cf. In re Sealed Case*, 121 F.3d at 746 ("Does [executive] privilege only extend to direct communications with the President, or does it extend further to include communications that involve his chief advisers? And if the privilege does extend past the President, how far down into his circle of advisers does it extend?"). It is unclear from the facts pled in plaintiffs' complaints whether they allege that any of the deliberations involved communications with the President himself. Indeed, the only advice alleged to have directly been given to the President by the NEPDG, the final energy policy report, is a public document. *See* www.whitehouse.gov/energy/National-Energy-Policy.pdf.

While the Supreme Court has not reached the issue, the D.C.

Circuit has held that the constitutional protection for executive communications extends beyond those communications that occur directly with the President. *See In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997). The D.C. Circuit's warning about extending that constitutional protection too far applies here as well:

> Extending presidential privilege to the communications of presidential advisers not directly involving the President inevitably creates the risk that a broad array of materials in many areas of the executive branch will become "sequester[ed]" from public view. *Wolfe*, 815 F.2d at 1533. President Nixon's attempt to invoke presidential privilege to prevent release of evidence indicating that high level executive officers engaged in illegal acts is perhaps the starkest example of potential for abuse of the privilege. And openness in government has always been thought crucial to ensuring that the people remain in control of their government...The very reason that presidential communications deserve special protection, namely the President's unique powers and profound responsibilities, is simultaneously the very reason why securing as much public knowledge of presidential actions as is consistent with the needs of governing is of paramount importance.

Id. at 749. Indeed, according to James Madison,

> [a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 WRITINGS OF JAMES MADISON 103 (Gaillard Hunt, ed. 1910). The D.C. Circuit in *In re Sealed Case* did specifically limit its analysis to the context before it:

> Our determination of how far down into the executive

hearing at which the Court discussed with government's counsel several problems with the briefs filed by the government in this case. First, although moving to dismiss the complaint, the government had attached and relied on evidence outside the Complaint to support its arguments. This Court inquired why it should not convert the government's motion to a motion for summary judgment pursuant to Federal Rules of Procedure 12 and 56 and proceed immediately to discovery. Furthermore, the Court discussed several serious deficiencies in the legal arguments raised by the government, particularly the government's failure to cite controlling adverse authority from the D.C. Circuit on the issue of mootness, despite government's counsel having also been counsel in those cases. In addition, the Court discussed what appeared to be government counsel's mischaracterization of Supreme Court precedent on the constitutional separation of powers issue. Defense counsel conceded that it had argued for the application of a constitutional standard that did not reflect controlling law without informing the Court that it was doing so. *See* Tr. 2/12/2002 at 33:17 - 34:1; 35:8 - 35:23; 36:15 - 38:7; 38:20 - 39:1; 39:9 - 40:16.

At that hearing, government's counsel admitted to this Court that the briefs submitted did not represent the government's best efforts, and requested further opportunity to research and brief the important issues raised by this case. Plaintiff also

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> branch the presidential communications privilege goes is limited to the context before us, namely where information generated by close presidential adviser is sought for use in a judicial proceeding, and we take no position on how the institutional needs of Congress and the President should be balanced.

121 F.3d at 753 (D.C. Cir. 1997). However, despite the limitation on its holding, *In re Sealed Case* makes clear that determining how far down the line of advisors constitutional protection should extend in the context of balancing the needs of the Executive and Congress will be a fact-intensive inquiry.

Determining who participated in the deliberations of the NEPDG and the alleged Sub-Groups, whether in fact those Sub-Groups existed, and who interacted with the private individuals involved, the role played by private individuals, and the number of meetings and interactions will affect this Court's determination of the impact that revealing such activities to the public would have on the President's ability to perform his Executive functions. Furthermore, the role of the Vice President in the NEPDG is to be determined. The fact that the Vice President was tasked with leading the NEPDG does not mean that in fact he participated in all aspect of the NEPDG or the meetings of the alleged Task Force Sub-Groups. These Sub-Groups could have been much less operationally proximate to the President, and revealing their activities would arguably infringe the President's Executive authority to a much lesser degree.

Furthermore, no case has directly decided whether revealing

the identity or nature of advice given by private individuals to the President or the President's advisors would "impede the President's ability to perform his constitutional duty." *Morrison,* 487 U.S. at 691. However, two cases have looked at the role of private individuals in advising the President and have suggested that constitutional protection would extend to such advice. *See Public Citizen*, 491 U.S. at 466; *AAPS*, 997 F.2d at 910. In *Public Citizen* the Supreme Court recognized the "formidable constitutional difficulties" that would be raised by applying FACA to the Justice Department's consultations with the committee of the American Bar Association that evaluates the qualifications of federal judicial nominees. 491 U.S. at 466. In discussing the constitutional issue raised by the application of FACA to President Clinton's Heath Care Task Force, the D.C. Circuit stated: "A statute interfering with a President's ability to seek advice directly from private citizens as a group, intermixed, or not, with government officials, therefore raises Article II concerns." *AAPS*, 997 F.2d at 910. After noting the constitutional concern, both courts declined to resolve the question of whether applying FACA to a group that includes governmental and private advisors prevents the President from accomplishing his constitutionally assigned functions. Thus, the question of whether granting public access to the deliberations of high level officials of government, presidential advisors, and

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private individuals intrudes upon the ability of the President to conduct his official duties is unresolved. The extent of the constitutional protection for those deliberations will turn in large part on the proximity of those advisors to the President. The fact that the group was established to deliver a final report to the President is not determinative.

Additionally, this Court would be careful when applying the *Morrison* balancing test to look at those specific requirements of FACA that would have applied to the NEPDG and its alleged Sub-Groups, and determine whether applying those requirements would have infringed on the President's ability to do his job. The question here is not only whether releasing the names of the participants, or the documents generated by the group would so infringe, but rather would applying all of the FACA requirements to the NEPDG run afoul of the separation of powers. Amicus correctly points out that the imposition of the FACA requirements is less onerous than portrayed by the government. FACA has two very important exceptions to the requirement that the public have access to meetings and documents. Pursuant to various FOIA exemptions, which include deliberative process and national security concerns, documents may be withheld from the public. 5 U.S.C. App. 2 § 10(b). Furthermore, pursuant to the exceptions listed in 5 U.S.C. § 552b, the President or an agency head can close advisory committee meetings to the public. These

exceptions should be considered when determining the actual impact that FACA would have on the confidentiality of advice to the President.

All of these questions are better addressed only after discovery into the activities and composition of the NEPDG and the alleged Sub-Groups. Contrary to defendants' argument, it would be inappropriate for this Court to conduct the fact-intensive inquiry demanded by separation of powers precedent by considering only the Presidential Memorandum that established the NEPDG.

2. Discovery in this Case Will Raise Fewer and Different Constitutional Concerns

Defendants' second argument against proceeding to discovery, that discovery raises identical constitutional issues as does this motion to dismiss, is both conclusory and belied by precedent. Defendants, in a footnote, state in a conclusory manner "that these constitutional arguments apply to prevent discovery in this case." Defs.' Mot. of 4/5/02 at 19 n. 17. Further, in response to an Order from this Court requiring defendants to identify with precision the constitutional concerns raised by discovery into particular factual issues, see Order of 1/31/02, defendants simply reasserted the troubling statutory and constitutional arguments that had prompted this Court's Order in the first place. Defs.' Mem. of 2/5/2002 at 1 ("it is unnecessary for the Court to address the constitutional issues

[raised by discovery] for five compelling reasons"). Thus, while defendants have consistently asserted that discovery would implicate constitutional concerns, they have also consistently failed to explain or provide legal support for those conclusions.

Contrary to defendants' arguments, discovery in this case will potentially raise related, but different, constitutional questions than does the application of FACA to the NEPDG. In particular, the constitutional question raised by the application of a statute to Executive action, reflects a conflict between the Executive and Congressional branches of government, and must be balanced as such. Any potential intrusion into the President's constitutional authority that occurs because of specific requests for documents or information during the course of discovery must be analyzed as a conflict between the needs of the Executive and Judicial branches, and will involve the application of different precedent. *See, e.g., In re Sealed Case*, 121 F.3d at 753. Furthermore, the breadth and scope of the constitutional issue raised by applying the requirements of FACA to advisory committees established by the President dwarfs the particular, specific questions that will be raised by a very tightly-reigned discovery process. Whether revealing a particular document or piece of information will impermissibly interfere with the President's constitutional authority is a much more narrow inquiry than whether the application of all the FACA procedural

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requirements to the deliberative process of Presidential advisors will violate the Constitution. Rather than address this broad constitutional question in a factual vacuum, this Court will address the particular questions generated by discovery requests.

In conclusion, there are three primary reasons why postponing consideration of defendants' constitutional challenge is warranted here. First, after discovery, the government may prevail on summary judgment on statutory grounds without the need for this Court to address the constitutionality of applying FACA. Second, even if this Court were to attempt to apply the *Nixon/Morrison* balancing test, further factual development is necessary to clearly determine the extent to which applying FACA to the NEPDG and its alleged Sub-Groups will intrude on the President's constitutional authority. Third, while discovery in this case may raise some constitutional issues, those issues of executive privilege will be much more limited in scope than the broad constitutional challenge raised by the government here. All of these reasons weigh heavily in favor of considering any applicable constitutional questions after a factual record has been more fully developed, and requiring the government to raise specific constitutional objections to the discovery process as it proceeds.

F. Judicial Watch's FOIA Claim

Judicial Watch has also sued the Vice President pursuant to

FOIA. On June 25, 2001, Judicial Watch wrote to the Vice President and requested certain records related to the NEPDG pursuant to FOIA. *See* Jud. Watch Sec. Amend. Compl., Ex. 8. On July 5, 2001, the Counsel to the Vice President responded on behalf of the Vice President, declining the request on the grounds that FOIA does not provide for disclosure of the requested material. *See* Jud. Watch Sec. Amend. Compl., Ex. 9.

FOIA is only applicable to "agencies" and "agency records." *See generally* 5 U.S.C. §552. Entities within the Executive Office of the President whose "sole function is to advise and assist the President" are not agencies for purposes of FOIA. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 155-56 (1980); *Meyer v. Bush*, 981 F.2d 1288, 1294 (D.C. Cir. 1294). Defendants persuasively argue that the Vice President and his staff are not "agencies" for purposes of FOIA. *See Meyer v. Bush*, 981 F.2d at 1294 (expressing doubt as to whether FOIA applies to Vice President); *cf. Armstrong v. Bush*, 924 F.2d 282, 286 n. 2 (D.C. Cir. 1991) (President and Vice President subject only to Presidential Records Act, not Federal Records Act).[16] The FOIA claim against the Vice President is therefore dismissed.

Both Judicial Watch and the federal defendants assume that Judicial Watch's Second Amended Complaint also states a FOIA

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[16] Like the D.C. Circuit in *Meyer*, 981 F.2d at 1294 n.7, this Court does not decide whether the Vice President could ever act as the head of a agency subject to FOIA.

claim against the NEPDG. *See* Defs.' Mot. to Dismiss of 3/8/02 at 15; Jud. Watch Opp'n of 3/21/02 at 14-15 (arguing that further discovery is necessary before determining whether the NEPDG is an "agency" for FOIA purposes). However, Count II of the Complaint does not state that plaintiff filed a FOIA request to the NEPDG, but rather that plaintiff sent a request letter to Vice President Cheney and that counsel on behalf of Vice President Cheney responded. The request letter in question, attached as Exhibit 8 to Judicial Watch's Second Amended Complaint, confirms that the request for records was indeed made only to the Vice President. For this reason, there is no need for this Court to address whether the NEPDG is an "agency" for purposes of FOIA. Judicial Watch has stated a FOIA claim only against the Vice President, and that claim is dismissed.

III. Private Defendants' Motions to Dismiss

In addition to suing the Vice President, the NEPDG, and other federal officials, Judicial Watch has sued several private individuals, including Mark Racicot, Haley Barbour, Kenneth Lay, Thomas Kuhn, and John and Jane Does 1-99. These individuals are named as defendants only with respect to Count I of Judicial Watch's Second Amended Complaint, which alleges violations of FACA.[17] For the reasons discussed above, FACA provides no

[17] The private individuals were initially named as defendants in Count III as well, but that claim against these defendants was dismissed on May 31, 2002. *See* Order of 5/31/02. Only federal defendants are named in Counts II and IV.

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private cause of action and therefore these claims are dismissed.

CONCLUSION

For the foregoing reasons, the federal defendants' motions to dismiss are granted in part and denied in part and the private defendants' motions to dismiss are granted. An appropriate Order accompanies this Memorandum Opinion.

IT IS SO ORDERED.

Signed: EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE
July 11, 2002

Notice to:

Larry Klayman, Esq.
JUDICIAL WATCH, INC.
501 School Street, S.W.
Suite 725
Washington, DC 20024
Counsel for plaintiff Judicial Watch

Patrick Gallagher, Esq.
Alex Levinson, Esq.
Sierra Club
85 Second Street
San Francisco, CA 94104
Counsel for plaintiff Sierra Club

Anne L. Weismann, Esq.
Thomas Millet, Esq.
Jennifer Paisner, Esq.
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883

Washington, DC 20044
Counsel for federal defendants

Howard M. Crystal, Esq.
MEYER & GLITZENSTEIN
1601 Connecticut Avenue, NW
Suite 700
Washington, DC 20009
Counsel for amicus NRDC

Robert S. Litt, Esq.
ARNOLD & PORTER
555 12th St NW
Washington, DC 20004-1206
Counsel for defendant Thomas Kuhn

Paul Christian Rauser, Esq.
WILLIAMS & CONNOLLY
725 12th Street, NW
Washington, DC 20005
Counsel for defendant Haley Barbour

Richard D. Horn, Esq.
BRACEWELL & PATTERSON LLP
2000 K St NW
Suite 500
Washington, DC 20006-1872
Counsel for defendant Mark Racicot

requested the opportunity to amend its complaint to include additional defendants, in light of arguments made by the government with respect to the termination of the sole defendant NEPDG. Despite the serious inadequacies in the government's briefing to date, the Court found that it was in the interest of justice to allow the plaintiff to amend its complaint and the defendant to re-brief its motion to dismiss.

Judicial Watch filed its First Amended Complaint on February 15, 2002, naming Vice President Cheney, the NEPDG, several Cabinet members, and several private individuals as defendants. The federal defendants moved to dismiss the Amended Complaint. Defs.' Mot. of 3/8/02. For the first time, the federal defendants argued, among other things, that Judicial Watch's complaint should be dismissed because FACA affords no private cause of action. Three of the private defendants also moved to dismiss the Amended Complaint on the grounds that neither FACA or FOIA apply to private individuals.

On January 25, 2002, Sierra Club filed suit against Vice President Cheney, the NEPDG, and various agency officials pursuant to the APA, the federal mandamus statute, and FACA in the United States District Court for the Northern District of California. The government moved to transfer that case to this Court. While awaiting the decision of the Northern District of California on the transfer motion, Sierra Club and Natural

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. NATIONAL ENERGY POLICY DEVELOPMENT GROUP, Defendant.	Civ. Action. 01-1530 (EGS)
SIERRA CLUB, Plaintiff, v. VICE PRESIDENT RICHARD CHENEY, *et al.* Defendants,	Civ. Action 02-631 (EGS)

ORDER

For the reasons stated in the accompanying Memorandum Opinion issued this same day, it is hereby

ORDERED that this Order shall supercede the Order issued by this Court on May 23, 2002; it is

FURTHER ORDERED that the federal defendants' motions to dismiss plaintiff Judicial Watch's Second Amended Complaint and plaintiff the Sierra Club's Complaint are **GRANTED IN PART AND DENIED IN PART**; it is

FURTHER ORDERED that the motions to dismiss filed by Mark

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Racicot, Haley Barbour, and Thomas Kuhn are **GRANTED**; it is

FURTHER ORDERED that Count I of Judicial Watch's Second Amended Complaint is **DISMISSED** with respect to all defendants; it is

FURTHER ORDERED that Count II of Judicial Watch's Second Amended Complaint is **DISMISSED** with respect to all defendants; it is

FURTHER ORDERED that plaintiffs' APA claims with respect to Vice President Richard Cheney and the National Energy Policy Development Group (NEPDG) are **DISMISSED**; it is

FURTHER ORDERED that the federal defendants' motion to dismiss Counts III and IV of Judicial Watch's Second Amended Complaint is **DENIED** with respect to the remaining defendants; it is

FURTHER ORDERED that the federal defendants' motion to dismiss the Sierra Club's First and Second Claims for Relief is **DENIED** with respect to the remaining defendants; it is

FURTHER ORDERED that plaintiffs shall jointly submit a proposed discovery plan by no later than **5 p.m.** on **Friday, July 19, 2002**; it is

FURTHER ORDERED that defendants shall file any objections to the proposed discovery plan by no later than **5 p.m.** on **Friday, July 26, 2002**; it is

FURTHER ORDERED that plaintiffs shall file a joint reply by

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no later than **5 p.m.** on **Tuesday, July 30, 2002**; it is

FURTHER ORDERED that a status hearing shall be held on **Friday, August 2, 2002** at **9 a.m.** in **Courtroom One** to discuss the proposed discovery plan and any objections thereto and to determine whether further briefing is necessary with respect to any claims of privilege asserted by the government.

IT IS SO ORDERED.

Signed: EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE
July 11, 2002

Notice to:

Larry Klayman, Esq.
JUDICIAL WATCH, INC.
501 School Street, S.W.
Suite 725
Washington, DC 20024
Counsel for plaintiff Judicial Watch

Patrick Gallagher, Esq.
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Counsel for plaintiff Sierra Club

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Suite 500
Washington, DC 20006-1872
Counsel for defendant Mark Racicot

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.	)	C.A. NO. 01-1530 (EGS)
	)	
VS.	)	WASHINGTON, D.C.
	)	AUGUST 2, 2002
NATIONAL ENERGY POLICY DEVELOPMENT GROUP	)	10:00 A.M.
	)	

TRANSCRIPT OF STATUS HEARING

BEFORE THE HONORABLE EMMET G. SULLIVAN

UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: LARRY KLAYMAN, ESQ.
PAUL ORFANIDES, ESQ.

FOR THE DEFENDANT: ANNE WEISMANN, ESQ.
JENNIFER PAISNER, ESQ.

COURT REPORTER: FRANK J. RANGUS, OCR
U. S. COURTHOUSE, RM. 6822
WASHINGTON, D.C. 20001
(202) 371-0545

PROCEEDINGS RECORDED BY ELECTRONIC STENOGRAPHY; TRANSCRIPT PRODUCED BY COMPUTER.

(SEE NEXT PAGE)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB	)	C.A. 02-631 (EGS)
	)	
VS.	)	WASHINGTON, D.C.
	)	AUGUST 2, 2002
VICE PRESIDENT RICHARD CHENEY, ET AL.	)	10:00 A.M.
	)	

TRANSCRIPT OF STATUS HEARING

BEFORE THE HONORABLE EMMET G. SULLIVAN

UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: ROGER M. ADELMAN, ESQ.
DAVID BOOKBINDER, ESQ.
ALEX LEVINSON, ESQ. (BY TELEPHONE)

FOR THE DEFENDANTS: ANNE WEISMANN, ESQ.
JENNIFER PAISNER, ESQ.
CRAIG BLACKWELL, ESQ.
SHANNEN W. COFFIN, ESQ.

COURT REPORTER: FRANK J. RANGUS, OCR
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PROCEEDINGS RECORDED BY ELECTRONIC STENOGRAPHY; TRANSCRIPT PRODUCED BY COMPUTER.

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THE DEPUTY CLERK: CIVIL CASE 01-1530, JUDICIAL WATCH, INC. VS. NATIONAL ENERGY POLICY DEVELOPMENT GROUP.

COUNSEL, WOULD YOU PLEASE IDENTIFY YOURSELVES FOR THE RECORD.

MR. KLAYMAN: LARRY KLAYMAN, COUNSEL FOR PLAINTIFF.

THE COURT: GOOD MORNING, COUNSEL.

MR. BOOKBINDER: DAVID BOOKBINDER, COUNSEL FOR PLAINTIFF SIERRA CLUB.

MR. ADELMAN: ROGER ADELMAN, LOCAL COUNSEL.

MR. ORFANIDES: PAUL ORFANIDES, JUDICIAL WATCH.

THE COURT: ALL RIGHT, GOOD MORNING.

MR. BOOKBINDER: YOUR HONOR, ONE THING. I BELIEVE ON THE PHONE IS ALEX LEVINSON FROM THE SIERRA CLUB IN SAN FRANCISCO.

THE COURT: ALL RIGHT, GOOD MORNING, COUNSEL.

HE'S NOT THERE YET. ALL RIGHT, WE'LL GET HIM ON IN JUST A SECOND.

GOOD MORNING. HELLO?

ALL RIGHT, WHY DON'T YOU KEEP TRYING? WE'LL GET HIM ON SOON.

HELLO?

MR. LEVINSON: YES.

THE COURT: GOOD MORNING, COUNSEL.

MR. LEVINSON: GOOD MORNING, YOUR HONOR.

THIS IS ALEX LEVINSON.

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THE COURT: ALL RIGHT.

AND FOR THE GOVERNMENT?

MR. COFFIN: YOUR HONOR, SHANNEN COFFIN, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION.

WITH ME IS ANNE WEISMANN, JENNIFER PAISNER, AND CRAIG BLACKWELL.

THE COURT: ALL RIGHT, GOOD MORNING.

UNLIKE THE LAST CASE, THERE'S NO ONE SMILING IN THIS CASE.

MR. KLAYMAN: WE'RE SMILING, YOUR HONOR.

THE COURT: YOU'RE SMILING? ALL RIGHT, YOU'RE NOW SMILING.

MR. KLAYMAN: YES, WE'RE SMILING.

THE COURT: THAT'S GOOD.

ALL RIGHT, I'LL HEAR FROM PLAINTIFFS' COUNSEL. I'VE REVIEWED YOUR PLANS. IS THERE ANYTHING IN ADDITION TO THE PROPOSED DISCOVERY PLAN THAT YOU WISH TO SAY?

MR. KLAYMAN: YES, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. KLAYMAN: YOUR HONOR, LARRY KLAYMAN FOR PLAINTIFF JUDICIAL WATCH.

THE COURT: GOOD MORNING, COUNSEL.

MR. KLAYMAN: GOOD MORNING.

I'M JUST GOING TO HIT THE HIGHLIGHTS. I'M NOT GOING TO BELABOR THE POINTS, BECAUSE WE SET FORTH IN THE BRIEFS

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EXACTLY WHAT WE FEEL THE DISCOVERY PLAN SHOULD BE. BUT YOUR HONOR'S ORDER, WHICH WAS VERY WELL THOUGHT OUT AND VERY WELL REASONED, AT PAGE 52, REALLY SET FORWARD THE PARAMETERS OF DISCOVERY, WHEREIN YOU STATED, RESOLVING THE CONSTITUTIONAL QUESTIONS, THE ISSUE OF SEPARATION OF POWERS, WHICH HAS BEEN RAISED BY THE DEFENDANTS IN THIS CASE, IS PREMATURE AT THIS STAGE OF THE PROCEEDINGS. THE GOVERNMENT WOULD HAVE THIS COURT ANSWER THE QUESTION IN THE NEGATIVE NOW AND SUBMIT THE CASE WITHOUT EVER PROVIDING ANY DISCOVERY INTO THE NATURE AND NUMBER OF THE MEETINGS AT ISSUE, THE IDENTITIES OF THE PARTICIPANTS, THE NATURE OF THE GROUP'S INTERACTION WITH THE PRESIDENT, THE ROLE OF THE VICE-PRESIDENT IN THE GROUP, THE NATURE OF THE ALLEGED SUBGROUP'S INTERACTION WITH THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP, OR THE PROXIMITY OF THE, WHAT I'LL CALL THE CHENEY ENERGY TASK FORCE AND ALLEGED SUBGROUPS TO THE PRESIDENT.

YOU SET FORTH THE PARAMETERS FOR DISCOVERY ON PAGE 52, YOUR HONOR, AND YOU ADDED AT PAGE 70, *IN RE SEALED CASE* MAKES CLEAR THAT DETERMINING HOW FAR DOWN THE LINE THE ADVISERS' CONSTITUTIONAL PROTECTION SHOULD EXTEND IN THE CONTEXT OF BALANCING THE NEEDS OF THE EXECUTIVE BRANCH AND CONGRESS WILL BE A FACT-INTENSIVE INQUIRY. A FACT-INTENSIVE INQUIRY. DETERMINING WHO PARTICIPATED IN THE DELIBERATIONS IN THE CHENEY ENERGY TASK FORCE AND THE ALLEGED SUBGROUPS, WHETHER IN FACT THOSE SUBGROUPS EXISTED AND WHO INTERACTED WITH THE PRIVATE

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Resources Defense Council ("NRDC") were granted leave to file amicus briefs in the Judicial Watch case. On March 21, 2002, the Northern District of California transferred the Sierra Club case to this Court, where it was filed as a related case to the Judicial Watch case. This Court ordered the two cases consolidated under one case number and set forth an expedited briefing schedule.

On April 5, 2002, the federal defendants moved to dismiss the Sierra Club complaint, raising many of the same issues as in their motion to dismiss Judicial Watch's First Amended Complaint. Defs.' Mot. of 4/5/02. In addition, the federal defendants also argued for the dismissal of Sierra Club's claims pursuant to the APA and the federal mandamus statute. Briefing in both cases was completed on April 29, 2002.

This Court held oral argument on the federal defendants' motions to dismiss on May 23, 2002. After hearing argument from both plaintiffs, amicus NRDC, and the federal government, the Court made several rulings by Order issued that same day. First, the Court granted plaintiff Judicial Watch leave to file a second amended complaint to include claims under the APA and the federal mandamus statute that were in substance identical to Sierra Club's claims under those statutes. Second, this Court ordered that it would consider federal defendants' motion to dismiss the Sierra Club complaint and the motion to dismiss Judicial Watch's Second Amended Complaint, along with any supplemental arguments

INDIVIDUALS INVOLVED, THE ROLE PLAYED BY PRIVATE INDIVIDUALS, AND THE NUMBER OF MEETINGS AND INTERACTIONS WILL AFFECT THIS COURT'S DETERMINATION OF THE IMPACT THAT REVEALING SUCH ACTIVITIES TO THE PUBLIC WOULD HAVE ON THE PRESIDENT'S ABILITY TO PERFORM HIS EXECUTIVE FUNCTIONS.

FURTHERMORE, THE ROLE OF THE VICE PRESIDENT IN THE CHENEY ENERGY TASK FORCE IS TO BE DETERMINED. THE FACT THAT THE VICE PRESIDENT WAS TASKED WITH LEADING THE CHENEY ENERGY TASK FORCE DOES NOT MEAN THAT, IN FACT, HE PARTICIPATED IN ALL ASPECTS OF THE TASK FORCE OR THE MEETINGS OF THE ALLEGED TASK FORCE SUBGROUPS.

YOUR HONOR THEN STATED AT PAGE 74, ANY POTENTIAL INTRUSION INTO THE PRESIDENT'S CONSTITUTIONAL AUTHORITY THAT OCCURS BECAUSE A SPECIFIC REQUEST FOR DOCUMENTS OR INFORMATION DURING THE COURSE OF DISCOVERY MUST BE ANALYZED AS A CONFLICT BETWEEN THE NEEDS OF THE EXECUTIVE AND JUDICIAL BRANCHES AND WILL INVOLVE THE APPLICATION OF DIFFERENT PRECEDENT.

SO YOUR HONOR WAS VERY, VERY PRECISE IN TERMS OF HOW YOU WANTED DISCOVERY TO PROCEED HERE, AND YOU SET FORTH THOSE PARAMETERS. THE PLAINTIFFS IN THIS CASE, JUDICIAL WATCH AND SIERRA CLUB, WERE VERY DEFERENTIAL TO YOUR HONOR'S RULING, AND WE SUGGESTED STARTING WITH DOCUMENT REQUESTS AND INTERROGATORIES WHICH WERE TAILORED EXACTLY TO YOUR ORDER. IT GOES NO FURTHER THAN YOUR ORDER.

HOWEVER, RATHER THAN OBEYING YOUR ORDER, THE

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DEFENDANTS WOULD WANT TO REARGUE ALL THE ISSUES HERE, AND THEY WANT TO GO DOWN THE PRIMROSE PATH OF THE AAPS DECISION, THE HEALTH-CARE TASK FORCE DECISION, WITH AFFIDAVITS, AND ACTUALLY THAT'S JUST GOING TO CREATE MORE WORK. IT'S GOING TO SLOW THINGS DOWN. IT'S INAPPROPRIATE BECAUSE, OBVIOUSLY, WE NEED THE ABILITY TO GET FREE-FLOWING INFORMATION BY WITNESSES THEMSELVES, NOT BY LAWYERS. AFFIDAVITS ARE WRITTEN BY LAWYERS. THE INTERROGATORY RESPONSES ARE WRITTEN BY LAWYERS. BUT WE JUST WANT TO START WITH THE DOCUMENTS AND THE INTERROGATORIES AND SEE WHAT THEY SHOW, AND THEN WE'LL COME BACK TO YOUR HONOR AND PROPOSE WHO, IF ANYONE, SHOULD BE DEPOSED IN THIS CASE.

CLEARLY, THE APPROACH THAT'S BEING PROPOSED BY THE DEFENDANTS, THE CHENEY ENERGY TASK FORCE, IS THE TYPE OF BUNKER MENTALITY. IT'S THE TYPE OF AN APPROACH THAT *WE ARE ABOVE THE LAW. WE'RE ABOVE YOUR HONOR'S ORDER. WE DON'T HAVE TO ANSWER QUESTIONS. WE'LL PUT FORWARD WHAT WE WANT TO PUT FORWARD AND NOTHING MORE.* BUT YOUR HONOR'S ALREADY RULED AND, CONSEQUENTLY, THIS HEARING IS VERY STRAIGHTFORWARD. WE HAVE NOT ASKED FOR MORE THAN YOUR HONOR ORDERED, AND, IN FACT, WE'VE TAKEN A GO-SLOW APPROACH HERE, WHICH WE THOUGHT YOUR HONOR WOULD WANT US TO DO UNDER THE CIRCUMSTANCES.

SO, FOR THAT REASON, WE'RE CONFIDENT YOUR HONOR WILL ALLOW US TO SERVE THE INTERROGATORIES AND DOCUMENT REQUESTS TO GET THIS PRELIMINARY INFORMATION WITHIN 30 DAYS. THIS IS A MATTER OF GREAT PUBLIC INTEREST. THE ENERGY TASK FORCE IS NO

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MORE IMMUNE FROM DISCOVERY THAN ANY OTHER CITIZEN OR ENTITY IN THIS COUNTRY, AND WE'VE ALREADY BEEN THROUGH A LOT OF BRIEFING HERE AND A LOT OF ANALYSIS. YOUR HONOR DID A VERY FINE JOB IN BREAKING DOWN WHAT THE ISSUES ARE AT THIS STAGE OF THE PROCEEDING, AND FOR YOUR HONOR TO BE ABLE TO MAKE THE RULINGS WITH REGARD TO THE VARIOUS CONSTITUTIONAL ARGUMENTS, AT A MINIMUM, WE NEED THIS INFORMATION.

SO THAT IS OUR PROPOSAL: DOCUMENT REQUESTS AND INTERROGATORIES THAT FALL WITHIN THE SCOPE OF YOUR ORDER. LET'S SEE WHAT THEY YIELD. WE'LL THEN COME BACK TO THE COURT AND MAKE A PROPOSAL AND WHAT, IF ANY, DEPOSITIONS ARE NECESSARY.

THANK YOU.

THE COURT: ALL RIGHT, THANK YOU.

ANYONE ELSE?

MR. BOOKBINDER: YOUR HONOR, I THINK WE WOULD LIKE TO HEAR THE GOVERNMENT'S EXPLANATION FOR THEIR POSITION BEFORE SIERRA CLUB HAS ANYTHING FURTHER TO ADD.

THE COURT: ALL RIGHT.

I'LL HEAR FROM GOVERNMENT COUNSEL.

I GAVE THE GOVERNMENT A CHANCE TO PROVIDE THE COURT WITH PRECISE OBJECTIONS, AND THE GOVERNMENT DIDN'T TAKE ADVANTAGE OF THAT OPPORTUNITY.

MR. COFFIN: YOUR HONOR, OUR OBJECTION IS GENERAL, AND LET ME EXPLAIN IT. I THINK THAT THE RESOLUTION OF THE

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REMAINING ISSUES IN THIS CASE HAS TO FLOW FROM YOUR OPINION, YOUR OPINION WHICH HELD SEVERAL THINGS.

FIRST, THE RESOLUTION OF THE REMAINING ISSUES HAVE TO BE A TIGHTLY-REINED PROCESS,. AND THIS CALL FOR NARROWLY-TAILORED FACTUAL RESOLUTION FLOWS FROM TWO DIFFERENT RELATED NOTIONS OF CONSTITUTIONAL AVOIDANCE. FIRST, THE ONE THAT YOUR HONOR NOTED IN THE OPINION, THE RESOLUTION OF THE REMAINING ISSUES, MAY BE FRAMED IN A WAY DESIGNED TO AVOID UNNECESSARILY DECIDING CONSTITUTIONAL QUESTIONS PREMATURELY. I THINK WE HAD ISSUES WITH THAT AT THE TIME, BUT WE CERTAINLY ARE WILLING TO WORK WITH THAT NOTION IN A DISCOVERY PLAN AT THIS POINT AND, OR I SHOULD SAY IN OPPOSING THE DISCOVERY PLAN AT THIS POINT.

THE COURT: WELL, ESSENTIALLY, THE GOVERNMENT'S POSITION IS THAT YOU DIDN'T FILE OBJECTIONS BECAUSE NO DISCOVERY IS APPROPRIATE.

MR. COFFIN: YOUR HONOR, WE BELIEVE THAT THE APA FRAMES A RESOLUTION OF THIS CASE AND --

THE COURT: DID I CORRECTLY SAY WHAT THE GOVERNMENT'S POSITION IS?

MR. COFFIN: I THINK AT THE BEGINNING OF OUR BRIEF WE SAY WE OBJECT GENERALLY BECAUSE THIS IS AN APA CASE, AND IN AN APA CASE, THE RESOLUTION OF THE CASE HAS TO FLOW FROM THE ADMINISTRATIVE RECORD.

THE COURT: THE GOVERNMENT SAYS, *THIS IS THE RECORD*

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BECAUSE WE SAY IT'S THE RECORD AND ACCEPT IT, AND YOU GET NO DISCOVERY.

MR. COFFIN: I THINK --

THE COURT: WAIT JUST A MINUTE. DON'T CUT ME OFF.

THIS IS THE RECORD BECAUSE WE SAY IT'S THE RECORD, AND NO ONE IS ENTITLED TO DISCOVERY BECAUSE THIS IS APA REVIEW. DISCOVERY IS FROWNED ON. SO, GRANT US SUMMARY JUDGMENT. I MEAN, THAT'S THE SCENARIO.

MR. COFFIN: YOUR HONOR, THAT IS APA REVIEW THAT YOU JUST EXPLAINED. WITH ALL DUE RESPECT, LET ME EXPLAIN THE BASIS FOR APA REVIEW IN THIS CASE.

THE COURT: SO THE GOVERNMENT WINS BECAUSE THE GOVERNMENT SAYS, *THIS IS WHAT HAPPENED. WE SAY THIS IS WHAT HAPPENED, AND NO ONE CAN QUESTION WHAT HAPPENED, AND NO ONE CAN EVEN LOOK INTO WHAT HAPPENED.*

MR. COFFIN: THERE WAS A DECISION MADE HERE. BOTH JUDICIAL WATCH AND SIERRA CLUB WROTE LETTERS TO THE GOVERNMENT SAYING, *FOR THE FOLLOWING REASONS, WE BELIEVE FACA APPLIES. WE THINK YOU MET WITH OUTSIDERS,* ETC. AND THE GOVERNMENT MADE A DECISION THAT SAID, NO, FACA DOES NOT APPLY, AND AS ARTICULATED IN A LETTER THAT MEMORIALIZED THAT DECISION FROM DAVID ADDINGTON TO JUDICIAL WATCH, THEY SAID THE REASON IT DOESN'T APPLY IS BECAUSE THERE WERE NO MEMBERS, THERE WERE NO MEMBERS WHO WERE NON-GOVERNMENTAL EMPLOYEES.

I THINK THAT YOU HAVE TO START WITH THE ADMINISTRATIVE

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RECORD THAT BACKS UP THAT DECISION, AND THE ADMINISTRATIVE RECORD THAT BACKS UP THAT DECISION, FIRST AND FOREMOST, IS THE MEMORANDUM THAT ESTABLISHED THE COMMITTEE. LET ME EXPLAIN WHY THAT IS SO IMPORTANT, BECAUSE, AS IN ALL DECISIONS, ALL THE DISPUTES INVOLVING GOVERNMENTAL DECISIONS, THERE IS A PRESUMPTION OF REGULARITY, THAT THE GOVERNMENT COMPLIED WITH THE LAW.

THE COURT: WAIT. BUT IF YOU'RE CORRECT, IT MEANS THAT NO ONE WILL EVER HAVE THE OPPORTUNITY TO GO BEHIND THE MEMORANDUM THAT CREATES THE FACA GROUP AND DETERMINE WHETHER OR NOT THERE WAS COMPLIANCE WITH THE LAW, IF YOU'RE CORRECT.

MR. COFFIN: YOUR HONOR, THE PRESUMPTION OF REGULARITY MEANS THIS. WE ARE VERY WILLING IN THIS CASE, THROUGH SWORN DECLARATION, TO CONFIRM THAT THE MEMORANDUM WAS FOLLOWED, THAT REGULARITY WAS THE CASE HERE. PLAINTIFFS THEN SHOULD RELEASE ALL THE INFORMATION THAT THEY HAVE PUBLICLY AVAILABLE, INCLUDING ALL THE FOIA DOCUMENTS THAT ARE OUT THERE. THEY SHOULD BE REQUIRED TO COME FORWARD WITH SOMETHING THAT REBUTS THAT PRESUMPTION OF REGULARITY.

HERE, THERE IS ABSOLUTELY NO EVIDENCE THAT PLAINTIFFS HAVE PUT FORTH THAT ANYONE BUT GOVERNMENTAL OFFICIALS PARTICIPATED IN THE MEETINGS OF THE NEPDG, AND THAT IS BECAUSE THE PRESIDENT SAID, *YOU HAVE TO COMPLY WITH MY WISHES, AND IT IS ONLY GOVERNMENTAL EMPLOYEES THAT CAN BE, GOVERNMENTAL OFFICIALS*, I SHOULD SAY, *THAT CAN BE INVITED*.

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THE COURT: HOW DO WE KNOW THAT EVERYONE COMPLIED WITH THE PRESIDENT'S WISHES?

MR. COFFIN: YOUR HONOR, AGAIN, THE ADMINISTRATIVE RECORD WILL BACK THAT UP, AND WE ARE PREPARED TO OFFER A DECLARATION THAT CONFIRMS THAT. BUT UNLESS PLAINTIFFS ARE WILLING TO COME FORWARD WITH SOME SHRED OF EVIDENCE THAT SAYS THAT THAT IS NOT THE CASE, THEN, YES, THIS CASE SHOULD BE OVER.

I THINK, I MEAN, I THINK IN AN APA REVIEW, IT IS POSSIBLE FOR US TO SUPPLEMENT THE RECORD TO FULLY EXPLAIN OUR REASONS. I THINK CAMP V. PITTS ALLOWS THAT, AND WE ARE FULLY, WE ARE WILLING TO EXPLAIN THE RATIONALE BEHIND DAVID ADDINGTON'S LETTER TO JUDICIAL WATCH THAT SAYS FACA DOESN'T APPLY. WE'RE WILLING TO EXPLAIN THAT, IN FACT, GOVERNMENT OFFICIALS WERE THE ONLY ONES WHO PARTICIPATED IN THE MEETINGS OF THE NEPDG.

THE COURT: NORMALLY, AS A GENERAL PROPOSITION, I WOULD AGREE WITH YOU. IN APA CASES, DISCOVERY IS NORMALLY FROWNED UPON. THE REMEDY IS TO REMAND TO THE AGENCY, AND IF THERE'S A NEED TO SUPPLEMENT, THEN SOMEONE CAN PREPARE A SUPPLEMENTAL RECORD SO THAT THE COURT CAN REVIEW THAT RECORD AS OPPOSED TO EMBARKING ON DISCOVERY. BUT THIS CASE ISN'T THE TYPICAL CASE, WHERE YOU HAVE A SIGNIFICANT ADMINISTRATIVE RECORD OUT THERE. I MEAN, YOU ALLUDED TO THE MEMORANDUM THAT CREATES THE SUBGROUP, AND THAT'S IT.

MR. COFFIN: THE REPORT OF THE PRESIDENT ALSO CONFIRMS

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THE MEMBERSHIP. ON PAGE FIVE OF THE REPORT, IT SAYS, *HERE ARE THE PEOPLE WHO SIGN OFF ON THIS REPORT, BECAUSE THEY'RE THE ONES WHO PARTICIPATED IN ITS PREPARATION. THESE ARE THE MEMBERS OF THE NEPDG DE FACTO.* SO THERE IS, IN FACT, AN ADMINISTRATIVE RECORD HERE.

AND ALSO, I MEAN, IT'S THE FACTS THAT WERE RELIED UPON BY THE DECISION-MAKER IN SAYING FACA DOESN'T APPLY. NOW, THERE MAY NOT BE DOCUMENTS OUT THERE THAT BACK THAT UP, BUT THAT'S THE PURPOSE OF THE SUPPLEMENTAL DECLARATION HERE, TO CONFIRM IN FACT WHEN WE MADE THIS DECISION, WE DID SO BECAUSE IN FACT NO ONE HAD ATTENDED THESE MEETINGS AND PARTICIPATED IN THE MEETINGS THEMSELVES EXCEPT GOVERNMENTAL EMPLOYEES. SO WE'RE WILLING, YOUR HONOR. I WILL FREELY ADMIT THAT THIS IS NOT YOUR STANDARD APA.

THE COURT: ABSOLUTELY. I APPRECIATE THAT CONCESSION. ABSOLUTELY.

MR. COFFIN: YOUR HONOR, I DON'T THINK IT'S A CONCESSION. IT'S STILL AN APA CASE. IT'S JUST NOT --

THE COURT: WELL, WHY ARE YOU BACKPEDALING FROM YOUR ADMISSION? YOU'RE ABSOLUTELY CORRECT, AND I THINK EVERYONE IN THIS COURTROOM AGREES WITH YOU IT'S NOT THE TYPICAL APA REVIEW AT ALL.

MR. COFFIN: THAT'S BECAUSE YOU SAID --

THE COURT: DON'T BACKPEDAL FROM IT. I'M JUST APPLAUDING YOUR CONCESSION.

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MR. COFFIN: I'M SAYING IT'S NOT YOUR STANDARD APA REVIEW. I'M NOT SAYING IT'S NOT YOUR APA-REVIEW CASE. IT IS, AND THAT IS BECAUSE THERE WAS A CONSCIOUS DECISION MADE BY THE GOVERNMENT THAT FACA DOESN'T APPLY, BECAUSE THE PRESIDENT DIRECTED THE COMPOSITION OF THE GROUP AND THE GROUP COMPLIED WITH THAT COMPOSITION. AND WHEN JUDICIAL WATCH AND SIERRA CLUB SAID, *PLEASE COMPLY. PLEASE GIVE US ACCESS. PLEASE GIVE US YOUR DOCUMENTS AND ACCESS TO THE MEETINGS*, THE GOVERNMENT SAID NO, BECAUSE IN FACT THE FACTS BEFORE IT WERE THAT NO ONE HAD BEEN INVOLVED IN THE MEETINGS EXCEPT THE GOVERNMENTAL OFFICIALS. THAT'S THE PURPOSE OF A SUPPLEMENTAL DECLARATION IN THIS CASE, AND THAT'S --

THE COURT: YOU WOULD AGREE WITH ME, ALSO, THAT THE LAW IS NOT ALWAYS COMPLIED WITH. CORRECT? PEOPLE VIOLATE LAWS, UNFORTUNATELY, EVERY DAY.

MR. COFFIN: YOUR HONOR, HOWEVER, THERE IS A STRONG PRESUMPTION THAT THE GOVERNMENT COMPLIED WITH THE LAW, AND THAT IS --

THE COURT: BUT THE GOVERNMENT DOESN'T ALWAYS COMPLY WITH THE LAW.

MR. COFFIN: YOUR HONOR, I WILL ADMIT THERE HAVE BEEN INSTANCES WHERE THAT IS THE CASE --

THE COURT: MANY INSTANCES.

MR. COFFIN: -- BUT THAT PRESUMPTION HAS TO FRAME THE INQUIRY HERE. IF THE GOVERNMENT IS COMING FORWARD AND SAYING

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IN A SWORN DECLARATION THAT IS PART OF THE, QUOTE, ADMINISTRATIVE RECORD IN THIS CASE THAT THE LAW WAS COMPLIED WITH, BECAUSE THERE WERE, I THINK WHAT'S OUT THERE RIGHT NOW, AS FAR AS I UNDERSTAND IT, THERE WERE NINE MEETINGS, AND THAT IN EACH OF THOSE NINE MEETINGS ONLY GOVERNMENTAL OFFICIALS WERE INVOLVED, THEN THAT PRESUMPTION OF REGULARITY REQUIRES THE PLAINTIFFS TO COME FORWARD AND SAY, *BUT THERE'S EVIDENCE OUT THERE THAT SHOWS YOU DIDN'T COMPLY*. AND UNTIL WE'RE ABLE TO PUT IN A DECLARATION AND TO FILE SUMMARY JUDGMENT AND TO FRAME THESE ISSUES FOR YOU, AND UNTIL THEY CAN COME FORWARD WITH SOME EVIDENCE THAT REBUTS THAT, THEN I THINK THAT THIS CASE CAN'T BE RESOLVED PROPERLY UNDER THE APA.

THE COURT: WHAT YOU'RE SUGGESTING, THOUGH, IS THAT NO ONE CAN CONDUCT A REASONABLE INVESTIGATION, REASONABLE DISCOVERY, IN AN EFFORT TO DETERMINE WHETHER THE LAW WAS COMPLIED WITH. THAT'S ALL THEY'RE TRYING TO DO, TO SEE IF THE LAW WAS COMPLIED WITH.

MR. COFFIN: I THINK THEY HAVE A THRESHOLD BURDEN HERE --

THE COURT: ALL RIGHT.

MR. COFFIN: -- TO REBUT THE PRESUMPTION OF REGULARITY, AND THAT THRESHOLD BURDEN, IF IT CAN BE REBUTTED, YOUR HONOR, IT SHOULD BE ABLE, THEY SHOULD BE ABLE TO REBUT IT THROUGH THE INFORMATION THAT IS ALREADY OUT THERE. JUDICIAL WATCH HAS MADE FOIA DEMANDS, AND THEY'VE BEEN PROCESSED

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Counsel's Office, White House

Kavanaugh, Brett

Subject Files

Vice President Richard Cheney, US Court of Appeals for the District of Columbia Circuit (Appendix) [3]

OA/NARA#: 1650/1518
9601

Box 62
Folder 6

REV_00264621

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., *et al.*, Plaintiffs, v. NATIONAL ENERGY POLICY DEVELOPMENT GROUP, *et al.*, Defendants.	)	Civil Action No.: 01-1530 (EGS)
SIERRA CLUB, Plaintiff, v. VICE PRESIDENT RICHARD B. CHENEY, *et al.*, Defendants.	)	

PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiffs hereby request, pursuant to Rule 34 of the Federal Rules of Civil Procedure, that defendants identify and produce the documents described below at the offices of the Sierra Club, 85 Second St. 2d Fl., San Francisco, California, 94104, on 9/5/02, 2002, at 10:00 a.m. for inspection and copying.

INSTRUCTIONS

1. The documents shall be produced by category as designated in this request, and each document shall be produced in such a fashion as to indicate clearly the identity of the file in which it was located. All documents are to be produced as they are kept in the usual course of

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., *et al.*,

Plaintiffs,

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, *et al.*,

Defendants.

Civil Action No.: 01-1530 (EGS)

SIERRA CLUB,

Plaintiff,

v.

VICE PRESIDENT RICHARD B. CHENEY, *et al.*,

Defendants.

PLAINTIFFS' FIRST SET OF INTERROGATORIES

Plaintiffs Sierra Club and Judicial Watch hereby request, pursuant to Federal Rule of Civil Procedure 33, that defendants respond to the interrogatories below by 9/3/02 2002.

DEFINITIONS AND INSTRUCTIONS

A. "Person" means and refers to, without limitation, any individual, corporation, partnership, joint venture, limited partnership, association, trust, trustee, group, organization, government or government agency, office, bureau, department, or entity, and all divisions, subdivisions, bureaus, branches, offices or other units thereof, and includes the present and former officers, executives, partners, brokers, employees, agents and all other persons acting or

gotten beyond these elections, and they'll get beyond the next elections too. And that's not our concern.

But even of the meager documents that we have so far -- some are produced through the FOIA process -- one sticks in my mind, and this is what they're scared about: a letter from the Chevron Corporation to the administration saying let's end the embargo on doing business with Libya, a state on the terrorist watch list before 9/11. There's stuff like that out there, and that's why they're running out the clock.

It's not just a question of energy policy; it's a question of national security in terms of how they're perceived to react to our national security, not anything that's classified, but to simply how this administration has allowed energy policy to conflict with its war against terrorism. That's what they're concerned about, and that is not our concern.

Our concern is to get the information out to the American people so they can make their own decision. Like Fox News says, "We report; you decide." We've never taken a position on energy policy. What I'm saying here is I believe that what we should do right now is to set November 13, which you currently have. I realize you've just now referred my request for contempt for threatening me to the U.S. Attorney's Office, but there's the other contempt issue -- and they are in contempt -- and we should have a hearing on that on November 13 for having defied at a minimum your orders of August 3.

The Court needs to put its foot down. It can't permit this kind of conduct. They think they have your number, in all due respect, because you are a gentleman and because you are trying to be as agreeable as possible, but this court has been flouted.

It's been disrespected, and it's time for the Court now to send a message to this administration that we're not going to allow court orders to be defied anymore, and we represent the people of this country, not the vested political elite that simply want to keep information away from them because it's election time.

So we ask that November 13 be a date for the hearing on the order to show cause with regard to the defiance of the Court's August 3 orders.

THE COURT: All right.

MR. KLAYMAN: Thank you.

THE COURT: Thank you, Counsel. Yes.

MR. BOOKBINDER: Good afternoon, Your Honor.

THE COURT: Good afternoon, Counsel.

MR. BOOKBINDER: I'll be very brief. I just want to address the two issues of irreparable injury and success on the appeal. Briefly, no court has ever held that simple preparation of a privilege log and turning over of nonprivileged information is irreparable injury. The defendants haven't found such a case, we haven't found such a

case, no one's ever heard such a case. So as far as we can tell, there simply is no irreparable injury.

Second, on the issue of success, defendants' theory is simple participation in the discovery process is a separation of powers problem; it violates the separation of powers theory. In Clinton versus Jones, the Supreme Court was so crystal clear on this point, and I don't like to quote things because we all read them, but I'm just going to quote one sentence out of Clinton versus Jones where we're talking about documents in deposition and trial testimony of a sitting president, and the quote is:

"The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the chief executive is not sufficient to establish a violation of the constitution." Period.

That's testimony from a sitting president in a civil matter concerning issues before his presidency. That, the Supreme Court held, did not raise separation of powers concerns. Therefore, we think production of nonprivileged documents and a privilege log from the vice president and officers in the White House simply comes nowhere close to that standard. And that's all, Your Honor.

THE COURT: All right. What about the issue of stay and the discussion I had with Mr. Coffin? I'd be interested in what your views are. Mr. Coffin's views are that indeed the

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opportunity to appeal be foreclosed unless the Court granted a stay. I disagree with that, but maybe he's correct. And if you agree with his statement, then I need to rethink this whole issue of potentially denying a request for a stay and ordering a date for compliance in the future. My view is that the government would certainly have an opportunity to seek relief from the circuit and not be under any due date unless they wait until after the 23rd of November or 22nd of November.

MR. BOOKBINDER: Your Honor, we agree a hundred percent. As a matter of fact, Mr. Coffin and I were working off a makeshift calendar to make sure we were going on the assumption that as the Court has been inclined to do, it has been ruling from the bench.

Mr. Coffin and I were thinking that perhaps they would make their stay motion to the Court of Appeals by tomorrow. We figured on perhaps a week for the Court of Appeals to rule on that, and then two weeks after that we'd wind up at the 22nd. I don't think there's any foreclosure of the appellate relief. We're not here to force the government into a contempt situation.

THE COURT: Nor am I. Nor am I. That's not the way the system should work at all. In fact, I'd be inclined to grant the government more time in which to comply in an effort to assist the government to seek a stay in the Court of Appeals. That's the way our government works. I'm not going

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to force anyone into a contempt citation.

And this is not a scenario where compliance is due tomorrow and someone has to get on the elevator and speed up to the Court of Appeals and then my colleagues in that court have to stop everything they're doing. I don't want to make anyone's life miserable. I don't plan on doing that by any stretch of the imagination.

MR. BOOKBINDER: Your Honor, there are two minor scheduling things again.

THE COURT: Wait a minute. Before you say that, though, let me just say I don't intend to write any more. I've written two or three orders. I don't think I need to say anything if I'm inclined to deny the stay. I think I need to find as a matter of fact and law the standards for a stay opinion review have not been met, have not been satisfied by the plaintiffs, but I don't plan to write another lengthy opinion. I don't think a need exists. Do you think the Court needs to say anything more about its views regarding the discovery dispute?

MR. BOOKBINDER: No, Your Honor. I don't think anything more needs to be written.

THE COURT: I don't either. All right, I'm sorry. You were about to mention two scheduling issues.

MR. BOOKBINDER: Yes. In terms of scheduling, since there's so many motions and matters flying around here --

THE COURT: And also I'm in trial. I'll be starting the second week of probably, I don't know, a three-week trial. It's a multi-codefendant case. That's a factor that wasn't apparent some time ago because I didn't know that the case was going to go to trial. I thought that -- well, anyway, we're in trial and we're going to be in trial.

MR. BOOKBINDER: Is the November 13th hearing still expected to go forward on the --

THE COURT: That's a very good question, and in all candor, it should go forward. I anticipate the government concluding its case in chief in my criminal matter Tuesday at the latest, and Tuesday would be the 5th. Looking down the road, Counsel, it's difficult to predict, but I think that Monday the 12th I'll probably be instructing a jury, I think. With a little bit of luck it will be on the 8th. So the hearing scheduled on the 13th is still on my calendar. I still plan to proceed with that hearing.

MR. BOOKBINDER: Thank you, Your Honor. Currently plaintiff's replay on their motion to compel is due Monday the 4th, and we would like an extension till Thursday the 7th, and Mr. Coffin indicated he did not have --

MR. COFFIN: That's fine, Your Honor.

THE COURT: I'm sorry. What document is due on the fourth, Counsel?

MR. BOOKBINDER: Our reply brief on the motion to

compel is due on the 4th, and we'd like to move that to the 7th.

THE COURT: That's fine with me.

MR. BOOKBINDER: And in addition, our response to the 1292(b) motion is also due the 4th, and we'd like to extend that to the 7th as well, Your Honor.

THE COURT: I have no problems with that. And for the government's reply to that? I assume the government --

MR. COFFIN: Well, we have some timing issues about the appeal that --

THE COURT: All right. I'll give you a chance. I'm sorry, maybe I should have heard -- I can invite all three of you to the podium. It's big enough and safe enough for the three of you to be up there at one time.

MR. COFFIN: Your Honor, there are timing issues. As you know, we're not seeking simply 1292(b), but we would also, if you were to deny that, we would go up on a couple of other theories. One of them is a Nixon 1291 appeal, and the timing of that, we have to seek -- in order to be timely, the 60-day rule applies. By our calculation, there's an order of September 9 that would be part of this appeal, and November 8 would be the deadline for doing that.

Now, I still want to try to convince you to give us a stay, so I don't want to give up this issue. But if you were to deny a stay, it's hard for me to see how you're going to

grant us interlocutory appeal.

THE COURT: That's why when we had the original discussion, I think that's probably going to be moot anyway.

MR. COFFIN: I don't think it will be moot. I think you could still grant it, and I would ask that you give us full consideration of such a motion. I think practically -- I'm not sure -- I think the writing is on the wall if you were to deny a stay, however, depending upon what your standard was in denying the stay. As a practical matter, we believe that we have to file any appeal in the Court of Appeals by November 8.

THE COURT: All right. I'm not going to comment on that because that's beyond --

MR. COFFIN: Your Honor, I understand. I'm not --

THE COURT: You may be absolutely right. Actually, when I saw the motion for interlocutory, I thought the government was conceding there was no basis for appeal after --

MR. COFFIN: No, Your Honor. We say in the beginning of that brief we were asking you for 1292(b) certification to avoid applying the Nixon rule in the Court of Appeals and to avoid the need for a mandamus determination, so we clearly think any three of the methods is appropriate.

But as a result, and I'm not asking for your blessing on this, but as a result we believe we may have to seek an appeal by the 8th. And I still have to confer with the Solicitor General'S Office on everything else on timing, but that would

Bryan A. Wayne, RPR
Official Court Reporter

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mean that if you hadn't granted interlocutory appeal by then we'd be going up on other theories.

THE COURT: All right.

MR. COFFIN: So the fact that he's asking for a brief on the 7th we have no objection to, but it may force our hand to seek an appeal -- well, just the timing generally. I don't think there's much time anyway, but the bottom line is we're going to have to go up I think by the 8th.

THE COURT: And again, you may be absolutely correct. I haven't given any thought to that aspect of it.

MR. BOOKBINDER: Your Honor, one other thing, and I'm not sure Mr. Coffin and I conferred on this, but it might be useful on the 13th when we're already here on the motion to compel to do the 1292(b) motion as well that day if Mr. Coffin wants to do so.

MR. COFFIN: Again, if we're already in the Court of Appeals, I think it might be mooted then. If we already filed another appeal on another theory --

THE COURT: If you have an appeal and another stay, then everything is moot, at least the motion for interlocutory --

MR. COFFIN: If we have a stay, if we have an extension.

THE COURT: I can schedule it. I agree. I have not scheduled a date. I thought that the parties had originally

agreed to an accelerated briefing schedule to the interlocutory, and then the government informed the Court in one of its pleadings that that was not correct.

MR. COFFIN: Well, we had --

THE COURT: You sought expedited briefings.

MR. COFFIN: We sought it, and the plaintiffs did not agree.

THE COURT: Look, I'm willing to help the parties. I've already indicated I'm not inclined to stay; I'm not inclined to certify it. By the same token, I'm not trying to make it difficult for anyone to seek review. I mean, I can schedule a hearing before the 7th if you want me to.

MR. COFFIN: Can I suggest this, that the 13th would be okay. It may be that we have decided to withdraw our interlocutory appeal by then. I think that -- and if so, we'll notify the parties. If we go up on another theory, I don't want to foreclose --

THE COURT: No, and I'm not trying to be difficult at all.

MR. COFFIN: I'm not sure I can speak for the Solicitor General of the United States on this particular issue.

THE COURT: And I'm certainly not requiring you to do so.

MR. COFFIN: Why don't we go with the 7th for your

purporting to act on behalf of them, and any of their present or former parent corporations, subsidiaries, affiliates, divisions, predecessors and successors in interest.

B. "Meeting" means and refers to any use of any mode of conveying meaning or information such as, but not limited to, speech, telephone, telegraph, e-mail, other computer-generated or transmitted information, letter, and any written or spoken language for the purpose of transferring information from one person or place to another. When applied to the Task Force or any Sub Group, the term "meeting" includes all meetings of two or more persons where Task Force or Sub Group activities were discussed.

C. "Communication" includes, without limitation, any oral, written or electronic transmission of information including, without limitation, meetings, discussions, conversations, telephone calls, memoranda, telecopies, telexes, conferences, facsimiles, seminars, messages, notes, or memoranda.

D. "Participate" means any form of presence, observation, communication, or other involvement, including without limitation by use of telephone, computer, or video-conference, and including without limitation the submission of letters, reports, memoranda, or opinions.

E. "Any" shall be understood to encompass "all."

F. The "Task Force," means and refers to the National Energy Policy Development Group, as described in President George W. Bush's memorandum dated on or about January 29, 2001.

G. The "Report" means and refers to the Report of the National Energy Policy Development Group, titled "Reliable, Affordable, and Environmentally Sound Energy for America's Future," and published on or about May 16, 2001, or any draft of this report.

brief?

THE COURT: Do you want a few minutes to talk?

MR. COFFIN: No, I think we're fine. We're in general agreement that if he could file by the 7th and we would file any response by the 12th and have a hearing on the 13th.

THE COURT: It doesn't give me a lot of time to think about that. There's a holiday on the 11th. Can you get your response in sooner than the 7th, Counsel?

MR. BOOKBINDER: I can do Wednesday the 6th.

THE COURT: That's the earliest?

MR. COFFIN: And we can file by the 8th, Your Honor.

THE COURT: That's great. It's all electronic anyway. That will be great. The 8th's a Friday, and then the hearing on the 13th will be for the pending motion as well as for the government's motion for interlocutory certification.

MR. BOOKBINDER: Thank you, Your Honor.

THE COURT: Sure.

MR. COFFIN: Your Honor, can I go back to the stay versus --

THE COURT: Yeah, sure. Go ahead.

MR. COFFIN: I want to make clear that -- I mean, I understand your analysis here, Your Honor, but I think --

THE COURT: Well, tell me if it's wrong.

MR. COFFIN: I think it's incorrect. I think it's inappropriate to take into consideration the possibility of a

stay in the Court of Appeals in determining whether irreparable injury is met.

THE COURT: No, no. I'm sorry. If you understood me to say that I'm denying it but the Court of Appeals will grant it, I have no view as to whether the Court of Appeals will grant it. I'm just saying you have the opportunity to ask the circuit for a stay. That's why you're not foreclosed --

MR. COFFIN: But that opportunity shouldn't be taken into account by this court in determining whether irreparable injury -- we're asking for a stay pending appeal.

THE COURT: I was concerned because you said, Judge, if you don't grant our stay, we're foreclosed from taking an appeal. That's what you said.

MR. COFFIN: No, no, no, Your Honor.

THE COURT: Then I misunderstood you then.

MR. COFFIN: I think so. We are not foreclosed from doing so, but the relief would be mooted in the absence of a stay because our argument is that compliance with this last order of the Court imposes an unconstitutional burden on the United States. I recognize this court has said that it disagrees with that, but it's also said it's a serious issue.

And if we are correct on the merits of that, in the absence of a stay, an appeal is meaningless because the Court will say you've already done exactly what it is that you say is unconstitutional, so it's mooted. So a stay is necessarily to

fully effectuate our appellate's rights here.

THE COURT: And this goes back to your argument that the injury is indeed the search.

MR. COFFIN: In part. In part, certainly.

THE COURT: Well, I'm certainly not requiring you to turn over any privileged documents at all.

MR. COFFIN: No. I know you're not doing that, but the injury is submitting to discovery in the absence of a compelling showing of need by the plaintiffs. And if our argument is correct, and we believe it is, and we believe the Court of Appeals will agree with us that it's correct, if that's correct, then we can only get relief by getting a stay of your order during the entire pendency of the Court of Appeals determination.

THE COURT: I want to make the record clear. If I deny a request for a stay, it's not because this court has any view of how the circuit court is going to address that issue at all. If I deny the request, it would be because the Court is of the opinion that there's no factual and legal predicate for a stay. That would be the only reason.

I'm going to make a decision upon the issues before me and not what some other court may do. No. I thought you said earlier on: Judge, we've lost. We're foreclosed from appealing if you deny the request for a stay. I understand what you're saying.

MR. COFFIN: But that's true. It's mooted. We'd lose an effective right to an appeal.

THE COURT: You're saying the injury continues because we would nevertheless be searching our records, which we believe is unconstitutional.

MR. COFFIN: No, no, no, Your Honor.

THE COURT: Well, then I don't understand what's the injury then.

MR. COFFIN: When the 22nd comes and that's the date you've ordered us to comply, and we comply, then our appeal is meaningless.

THE COURT: Well, see, that's something new now.

MR. COFFIN: No, no, no.

THE COURT: Yes, it is, because granting your request for additional time is to give you time within which to seek relief so you don't have to comply. I thought you told me --

MR. COFFIN: No, no, Your Honor. These are alternative things. I mean, we are asking right now -- our principal request for relief here is a stay pending the duration of the appeal. That means that whatever date you set, whether it's November 5 as it currently is, which I know you're not going to do, or November 22 -- which is the date we've agreed upon with the Sierra Club, at least -- if we get to the 22nd and we go through the process and we produce the documents that are --

THE COURT: Is that an option that the government's seriously considering doing, producing the documents?

MR. COFFIN: Your Honor, in the absence of a stay, again, our only other option is to go into contempt.

THE COURT: Or to seek a stay from the circuit.

MR. COFFIN: In the absence of a stay. You're making a distinction again between a stay by the circuit and a stay by this court, and I don't think that in your evaluation of the merits of our stay petition you can consider whether we get a stay by the Court, because that assumes that we're entitled to a stay.

THE COURT: I guess I was trying to pin you down as to what your injury is. What you're concerned about is what happens on the 22nd if you don't have a stay from this court or the circuit.

MR. COFFIN: Absolutely.

THE COURT: Well, that's something new.

MR. COFFIN: No, no, no. That's not anything new at all. That's what I've been saying all along.

THE COURT: Well, you know what, I think we should focus on that if that materializes. In other words, if I deny a stay and the circuit denies a stay and you're faced with the 22nd for a deadline, then I think -- I mean, it would be very unwise for me to sit here and say what I'm going to do at that point.

MR. COFFIN: Your Honor, if you deny a stay and the Court of Appeals denies a stay, then there's been some -- and the Supreme Court, if we were to ever decide to go that far, a circuit justice, which is a possibility again -- then compliance with the order is either mandatory or we have to go into --

THE COURT: Don't we have to cross that bridge when we get to?

MR. COFFIN: No, I think you have to cross it now. I think that you have to make a determination whether compliance with your order, whether it would moot the appeal, and that is the determination --

THE COURT: All right. Well, that's where we disagree. That's where we disagree, because I've given this a lot of thought, and I said, I'm going to extend the time. Sierra Club doesn't object, Judicial Watch does, the government is attempting to comply, searching its records. I believe your pleading says there are eight lawyers at the White House searching boxes of records in an effort to determine privileged versus nonprivileged and preparing a log.

I said that's good faith compliance; I'll give the government more time. And so that no one has any anxiety about this, I'll make the 22nd or 23rd, some day in November other than Thanksgiving, I'll make it that week. And I'm still inclined, gave a lot of thought as to whether or not to grant

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the request for stay, and I said no. I'm not persuaded there's a factual legal predicate.

That's the only reason why I would deny the request for a stay, if I'm not persuaded it's a matter of fact and law that a basis exists. Denied that. I thought about it. Now, where does that leave the government? It leaves the government -- the government can always seek a stay. In fact, you have to seek a stay first --

MR. COFFIN: But that's --

THE COURT: Wait, wait, wait. You have to seek a stay first before me before you can seek a stay in the circuit, right? You have to do that.

MR. COFFIN: And we're required to do that.

THE COURT: And if I deny it, then the safeguard, the way our system works is that you can seek another stay in the circuit. Now you're concerned about a scenario where the circuit may deny a stay and you're faced with what to do on the 22nd, but that's not before me.

MR. COFFIN: No, no. It is definitely before you, Your Honor.

THE COURT: So I should be focusing on that now?

MR. COFFIN: Absolutely. The order right now that's in front of you --

THE COURT: You know what, let me tell you something. You know I'm not going to close the door on you or any other

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litigant before me, and if indeed I deny the stay and the circuit denies the stay, you know this courthouse is open to whatever request you want to make prior to the 22nd. And I'll be receptive to whatever request you want to make, but we're looking down the road to something -- I mean, I think it would probably be inappropriate for me to say what I would do in the event that there's no stay of my order and whether or not the government then is under an obligation to comply with my order.

MR. COFFIN: Your Honor, right now your order requires us to produce by November 5.

THE COURT: All right. Forget about that. I'm going to extend it to the 22nd or the 23rd.

MR. COFFIN: The point is it doesn't matter whether it's November 5 or --

THE COURT: Oh, I think it does. It would matter if the due date was tomorrow, wouldn't it?

MR. COFFIN: Well, it would just mean --

THE COURT: Well, you know what --

MR. COFFIN: -- an emergency reason to provide a stay.

THE COURT: Well, that's exactly right. But that heightened -- no, no. Wait a minute; I gotcha now. Because if I deny the request for the stay and the due date was tomorrow and the circuit denied the request for a stay, then you're absolutely correct. You need some guidance from me as to what

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I need to do because you need to take some steps to protect your client. But that's not a problem. You don't have to concern yourself about that.

The Court is always open. The Court is always going to be receptive to your request for additional relief in the event that I deny the stay, which I'm going to do, and in the even if the circuit denies the stay and you believe your client is powerless, I'm not going to close the door on your request for relief.

MR. COFFIN: No, and I fully understand and appreciate that, Your Honor, but I don't think this court appreciates what the issue is here. The issue here is whether a stay pending appeal is necessary to fully effectuate our appellate rights. As soon as this stay issue is resolved, we're going to be taking up the appeal in one way another, whether through 1292(b) or 1291 or mandamus. So your chance to rule on whether there is a stay pending appeal is now, and that requires you to decide whether a stay is necessary to fully effectuate our appellate rights.

In an absence of a stay, compliance with your order is mandatory or we face contempt. That is why that issue is joined in front of you now, and that's why a stay has to be granted. You don't argue that -- you haven't disagreed with us, and I don't think the plaintiffs really have, that these are serious issues. You've said that yourself. So the only

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issue is whether there is irreparable injury, and there is certainty irreparable injury if an appeal goes forward and we lose our effective appellate rights in the absence of a stay.

That's the argument, and that issue is in front of you right now, whether it's November 5, whether it's November 1, or whether it's November 22. And you have to decide that now, and you can't say that because we can go to the Court of Appeals that we have a remedy. Because in reality, they're going to be asking the same questions, and if you are saying we have a remedy --

THE COURT: They'll be asking the same questions I'm asking?

MR. COFFIN: Absolutely.

THE COURT: Sure. I would imagine so.

MR. COFFIN: But if you were saying we have an effective remedy in the Court of Appeals, it's because the Court of Appeals would agree with us. So I don't understand --

THE COURT: No, I'm just saying you have an opportunity to seek relief in the Court of Appeals. I didn't say it was a foregone conclusion. Again, I don't know what the circuit court's going to do. I can appreciate that the Court may have the same questions, but you're not being deprived of a potential remedy. You have the right to request a stay. That's the point I was making.

MR. COFFIN: But Your Honor, our argument isn't that

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H. "Sub-Group(s)" means and refers to any working groups, including without limitation the Task Force Working Group chaired by Andrew Lundquist, the working groups established by each agency, and all committees, sub-committees, teams or other sub-groups that participated in the activities of the Task Force or the preparation of the Report, including without limitation working groups, sub-committees, team, or other sub-groups within any federal agency or entity.

I. "Identify" means, with respect to an individual, state that person's full name, title, and last known business address and phone number.

J. Defendants are required to provide all information available to them at the time of their responses, regardless of whether the information is known to defendants, their representatives, agents, investigators or attorneys.

K. Pursuant to Rule 26(e) F. R. Civ. P., these interrogatories should be considered continuing, and defendants are required to update them if new information becomes available to them after their initial response.

L. If you object to responding to any interrogatory on the basis of privilege, please state the factual and legal basis for such objection.

INTERROGATORIES

1. Please state the dates, times, locations of, and identify all persons who were present at each meeting of the Task Force.

2. For each Task Force member, please provide a description of the member's role in the preparation of the Report and the activities of the Task Force;

we have an opportunity to seek a stay in the -- we're not being deprived of that. I've never argued that. We certainly have an opportunity to seek a stay in the Court of Appeals. The question is whether we'd be deprived of our underlying appeal. This is just like Judge Kessler recently in the CNSS detainee FOIA case. Once those documents are released and I know -- no, no. I understand what you're going to say.

THE COURT: That's the distinction.

MR. COFFIN: There's no distinction legally because our argument is that -- Your Honor, our argument is that once we comply with this order, we can't get effective relief from your order.

THE COURT: And I totally agree with you. If you completed your search, keeping in mind what you just said about Judge Kessler's case, if you completed your search, isolated the documents, prepared the privilege log and gave everything over, it's probably moot.

MR. COFFIN: Your Honor, the legal --

THE COURT: You've complied with it --

MR. COFFIN: Your Honor --

THE COURT: -- but I wouldn't do that.

MR. COFFIN: Your Honor, you're missing the major point that's made in these cases. In this case there certainly would be harm from releasing the documents, but I'm not talking about that. I'm talking about compliance with your order. We

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have argued that compliance with your order imposes an unconstitutional burden.

THE COURT: Right. The serious preparation of the log.

MR. COFFIN: Yes, and once we comply with that order, we have assumed that unconstitutional burden. So it's the same exact argument that Judge Kessler accepted.

THE COURT: You're complying with the order now, so maybe the controversy is moot.

MR. COFFIN: No, Your Honor.

THE COURT: You're argument is that compliance with my order to undertake a search and preparation of a log has some impact on this --

MR. COFFIN: Yes, there is certainly some impact. No, it's not moot. We are realizing that harm right now out of deference to this court. Yes, that is absolutely correct. We are realizing a harm right now.

THE COURT: But you're complying with it.

MR. COFFIN: If you accept our argument --

THE COURT: Why is it different then from a litigant turning over privileged documents and complying with the harm? Doesn't that moot the controversy?

MR. COFFIN: It's no different. It's the exact same point. If you turn over privileged documents, you've mooted an argument about privilege; if you turn over documents where you

say you don't have to comply with an order, you've mooted a dispute about the order. That's exactly our argument.

THE COURT: And you're complying with the order now by undertaking a search that you believe is unconstitutional, so why isn't this controversy moot?

MR. COFFIN: It is not moot because we still have an obligation to comply with your order and we haven't fully complied. So yes, we are being harmed right now by your order under our position. There is no question that turning the Office of the Vice President upside down imposes a burden on us, and we are realizing that burden out of deference to this court's order. Having said that, we haven't --

THE COURT: Well, it's certainly not my intent to turn anyone's office upside down when I issue my orders. Thank you, Mr. Coffin. Anything further? I just want to take a short recess. Mr. Klayman?

MR. KLAYMAN: Just a last point, Your Honor. This is why Your Honor has to just make a ruling and live by it. We went through this during the Watergate and the Nixon period. Nixon didn't want to turn anything over to Judge Sirica. He put his foot down and said I've had enough, that's it, turn it over.

THE COURT: All right. I'm going to take a 10-minute recess.

(Recess)

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THE COURT: All right, Counsel. I'm going to think about the issue. I'll continue the hearing until 10 o'clock tomorrow morning, and I'll rule on the government's request for a stay at that time. Thank you, Mr. Coffin, for the points that you've made, and I'll give it some further thought. I'm still inclined to deny it, but I want to consider the request in light of your representations this afternoon.

MR. COFFIN: Thank you.

THE COURT: All right. The parties are excused. Thank you. I'm sorry, to the attorneys on the phone, did you wish to say anything?

MR. NARAYAN: No, Your Honor.

THE COURT: All right. You're welcome to participate tomorrow if you wish. I recognize that's early on the West Coast, but that's the only time I can squeeze this matter in. It'll be 10 o'clock Eastern Time tomorrow. Thank you.

(Proceedings adjourned at 2:25 p.m.)

* * * * * *

CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

BRYAN A. WAYNE

Bryan A. Wayne, RPR
Official Court Reporter

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. NATIONAL ENERGY POLICY DEVELOPMENT GROUP, Defendant.	Civ. Action. 01-1530 (EGS)
SIERRA CLUB, Plaintiff, v. VICE PRESIDENT RICHARD CHENEY, *et al.* Defendants,	Civ. Action 02-631 (EGS)

ORDER

Pending before the Court is non-agency defendants' motion for a stay of proceedings pending appeal of this Court's October 17, 2002, September 9, 2002, and July 11, 2002 Orders authorizing limited discovery from defendants on threshold issues, and ordering defendants to produce non-privileged documents responsive to plaintiffs' discovery requests, along with a privilege log identifying those documents for which defendants believe there is a valid basis for the assertion of a privilege. Upon careful consideration of defendants' motion, the response

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and reply thereto, and the relevant legal authority, and for the following reasons, it is by the Court hereby

ORDERED that defendants' motion for a stay is **DENIED.**

I. BACKGROUND

Non-agency defendants move for a stay of, *inter alia*, this Court's October 17, 2002 Order, which requires them, consistent with this Court's August 2, 2002 Order and July 11, 2002 Memorandum Opinion and Order, to respond to plaintiffs' First Set of Interrogatories and to produce by no later than November 5, 2002, non-privileged documents responsive to plaintiffs' First Request for Document Production, along with a log identifying specific documents or particularized categories of documents for which they assert that a privilege precludes production, and. Defendants seek a stay to pursue an appeal to the Court of Appeals for the D.C. Circuit, on the grounds that this Court's Orders implicate important constitutional and statutory questions that are best resolved by the Court of Appeals before litigation proceeds any further in this case.

II. LEGAL STANDARD

The following factors are to be considered when determining whether a stay pending appeal is warranted:

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. To justify the granting of a stay, a movant need not

> always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or *vice versa*.

Cuomo v. United States Nuclear Regulatory Commission, 772 F.2d 972, 974 (D.C. Cir. 1985); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842, 843 (D.C. Cir. 1977). It is "the movant's obligation to justify the court's exercise of such an extraordinary remedy." *Cuomo*, 772 F.2d at 978. This Circuit has recently reiterated that a moving party must satisfy "stringent standards required for a stay pending appeal." *Summers v. Howard University*, 2002 WL 31269623 (D.C. Cir., Oct. 10, 2002). Where a moving party fails to establish a substantial case on the merits, and further fails to "demonstrate that the balance of equities or the public interest strongly favors the granting of a stay," a motion for stay is properly denied. *Cuomo*, 772 F.2d at 972.

A. *Likelihood of Success on the Merits*

Recognizing that this Court has, on numerous occasions, rejected their arguments to this effect, defendants nevertheless continue to assert that court orders requiring them to respond in *any* fashion to plaintiffs' discovery requests creates an "unconstitutional burden" on the Executive Branch unless plaintiffs are first required to demonstrate "compelling need" for the discovery sought. Defendants have cited no authority, and

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indeed this Court knows of none, which supports this proposition. To the contrary, every case cited by the defendants in support of their position involved precisely the same procedure adopted by this Court in this case. Moreover, the U.S. Supreme Court has recently confirmed the continued validity of the precedent of long-standing relied upon by this Court in the Orders and Opinions contested by defendants. As recently as 1997, the nation's highest court held

> In sum, "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." . . . the Judiciary may ***severely*** burden the Executive Branch by reviewing the legality of the President's official conduct....[emphasis added]

Clinton v. Jones, 520 U.S. 681, 705, 117 S.Ct. 1636, 1650 (1997). Here, as in *Jones*, this Court is of the opinion that defendants "err[ ] by presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *See Clinton v. Jones*, 520 U.S. at 702, 117 S.Ct. at 1648.

Notwithstanding this U.S. Supreme Court precedent, and the absolute dearth of authority supporting their arguments, defendants nevertheless contend that requiring them to review documents responsive to plaintiffs' discovery requests, disclose

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those for which no viable claim of privilege exists, and assert any applicable privileges with respect to specific documents, impermissibly interferes with "core Article II" functions and imposes an unconstitutional burden on the Executive Branch. The Court rejects these arguments and is not persuaded by defendants' assertion that they have demonstrated a likelihood of success on the merits of their appeal of this Court's Orders.

B. *Irreparable Harm*

Under this Circuit's precedent, the harms to each party are tested for "substantiality, likelihood of occurrence, and adequacy of proof." *Cuomo* 772 F.2d at 976, 977. The Court must consider the significance of the change from the *status quo* which would arise in the absence of a stay, as well as likelihood of occurrence of the claimed injury, when determining whether defendants have truly met their burden of demonstrating irreparable harm justifying imposition of a stay. *See id.*

The fact of the matter is that the offices of the President and Vice President currently respond to discovery requests on a regular basis, asserting executive privilege with respect to specific requests for particular items when necessary. *See, e.g. Clinton v. Jones,* 520 U.S. at 704, 117 S. Ct. at 1649. Plaintiffs correctly point out that, in the cases cited by the defendants, stays of court orders authorizing discovery against officers of the Executive Branch have been granted only in cases

where a court ordered production of a particular document *after* a viable claim of privilege had been made. *See e.g., Nixon v. Sirica*, 487 F.2d at 721 (approving stay of District Court orders either allowing or refusing disclosure of specific documents for which President has made a particularlized claim of privilege).

Moreover, it is in fact defendants who seek to change the *status quo* by asking this Court to relieve them of their responsibility to respond to plaintiffs' discovery requests and assert executive privilege where appropriate. Defendants' argument that any "discovery directed at" them imposes an unconstitutional burden on them absent a showing by plaintiffs of "compelling need" represents a dramatic new argument with respect to invocation of executive privilege, and contemplates the wholesale elimination of an entire step in the established discovery processes in this context. Furthermore, defendants themselves concede that, at least in some respects, they are seeking to *expand* the executive privilege, not simply rely on its settled contours. *See* Def.'s Mot. for Stay at 8 (claiming that requiring disclosure of documents which "may not be technically privileged" would nonetheless impose unconstitutional burdens on the Executive Branch).

There is no doubt that, if defendants' premise is accepted that compliance with this Court's discovery order imposes an unconstitutional burden, defendants would suffer irreparable harm

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3. Please identify all Task Force staff, personnel, consultants, employees, and all other persons who participated, in any manner, in the activities of the Task Force or the preparation of the Report.

4. For each person listed in response to Interrogatory 3, above, please provide:

a) A description of the person's role in the activities of the Task Force and in preparation of the Report.

b) A list of all meetings relating to the preparation of the Report and/or the activities of the Task Force in which the person participated, including the date and time of the meeting and identity of all persons who participated at the meeting.

5. Please list all federal agencies, offices, or other entities that participated, in any manner, in Task Force activities or preparation of the Report.

6. For each agency, office, or entity listed in response to Interrogatory 5, above, please:

a) Provide a description of the agency's, office's, or entity's participation in the activities of the Task Force and/or the preparation of the Report;

b) Identify all persons who were involved with the agency's, office's, or entity's participation in the activities of the Task Force and/or the preparation of the Report;

i) For each person listed in response in Interrogatory 6(b), above, describe the person's role in of the agency's, office's, or entity's participation in the activities of the Task Force and/or the preparation of the Report;

ii) For each person listed in response to Interrogatory 6(b), above, please provide a list of all meetings relating to the agency's, office's, or entity's

if the proceedings before this Court were not stayed to enable them to seek appellate review of such an order. However, this Court has consistently rejected, and continues to reject, in reliance upon established precedent of long-standing, defendants' central argument, namely that requiring the Vice President and members of the Executive Branch to merely review documents requested by the plaintiffs and assert executive privilege where appropriate, is unconstitutional. Defendants cannot be permitted to manufacture irreparable harm by simply stating a legal principle with no precedential support whatsoever, and then claiming irreparable harm if they believe a court order violates that principle.

Accordingly, there is insufficient likelihood of "irreparable harm" to the defendants to justify a stay. Both the Circuit and the U.S. Supreme Court have approved the very "harm" defendants point to: discovery procedures in which a request for documents from a member of the Executive is made in the context of judicially supervised discovery, the document is either produced *or* a privilege is asserted with respect to the document, and, in the latter case, the party seeking the document must demonstrate that the public need for the document outweighs the interests underlying the privilege in order to obtain production of the document. *See, e.g., Clinton v. Jones*, 520 U.S. at 704-05; *In re Executive Office of the President*, 215 F.3d 20, 22, 24;

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Dellums v. Powell, 561 F.2d 242, 247, 248 (D.C. Cir. 1977); *see also Nixon v. Administrator of General Services*, 433 U.S. 425, 439-455 (1977).

C. *Public Interest*

Conversely, the harm to both the plaintiffs and the public of granting the stay is substantial, likely, and adequately proven. As plaintiffs point out, Congress, Executive agencies, and the public have been debating the energy policy developed by defendants without the benefit of the information sought by plaintiffs in this case. In some instances, final actions have already been taken. As time proceeds, the value of the information sought by plaintiffs and the public declines substantially, thereby effectively denying plaintiffs the relief to which they contend they are entitled. Additionally, both Congress and the Judicial Branch have recognized the public interest in avoiding "piecemeal " litigation occasioned by stays and interlocutory appeals. *See, e.g., United States v. Nixon*, 418 U.S. 683, 690 (1974).

Therefore, upon balancing of relevant factors, this Court concludes that there exists no factual or legal predicate for granting defendants a stay pending appeal. Accordingly, defendants' motion for stay pending appeal is hereby **DENIED**; and it is

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FURTHER ORDERED that defendants' alternative motion for an extension of time in which to respond to plaintiffs' first request for document production is **GRANTED**; and it is

FURTHER ORDERED that defendants shall fully comply with this Court's outstanding Orders by no later than **November 29, 2002.**

Additionally, pursuant to the hearing held on defendant's motion for stay on October 31, 2002, and for the reasons given in open court, it is by the Court hereby

FURTHER ORDERED that plaintiffs shall file their response to defendants' motion for certification pursuant to 28 U.S.C. § 1292(b) by no later than **November 6, 2002** and defendants shall file their reply by no later than **November 8, 2002**; and it is

FURTHER ORDERED that defendants' motion for certification pursuant to 28 U.S.C. § 1292(b) shall be considered at the currently scheduled **November 13, 2002** hearing on all pending motions; and it is

FURTHER ORDERED that plaintiffs shall file a reply in support of their motions to compel by no later than **November 7, 2002.**

Signed: **EMMET G. SULLIVAN**
UNITED STATES DISTRICT JUDGE
November 1, 2002

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Notice to:

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2002, I am causing one copy the foregoing Appendix to be served on the following in the manner specified:

By Hand delivery:
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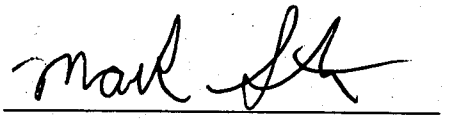

Mark B. Stern

participation in the activities of the Task Force and/or the preparation of the Report, in which the person participated, including the date and time of the meeting and the identity of all persons who participated in the meeting;

7. Please list all Sub-Groups that participated, in any manner, in the activities of the Task Force and/or the preparation of the Report.

8. For each Sub-Group listed in response to Interrogatory 7, above, please:

a) describe the role or function of the Sub-Group in the activities of the Task Force and/or the preparation of the Report;

b) identify all persons who participated in the activities of the Sub-Group;

c) list all meetings of the Sub-Group, including the date and time of the meeting and the identity of all Persons who participated at the meeting.

9. For each Person listed in response to Interrogatory 8(b), above, please:

a) Describe the person's role in the preparation of the Report, the activities of the Task Force, and/or the activities of Sub-Group(s).

b) list all meetings relating to the preparation of the Report, the activities of the Task Force, and/or the activities of Sub-Group(s), in which the person participated, including the date and time of the meeting and the identity of all persons who participated in the meeting.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2002 a true and correct copy of the foregoing PLAINTIFF'S FIRST SET OF INTERROGATORIES was served via hand-delivery, on the following:

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REV_00264637

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., et al.,	)	
Plaintiffs,	)	
v.	)	
NATIONAL ENERGY POLICY DEVELOPMENT GROUP, et al.,	)	Civil Action No. 01-15 0 (EGS)
Defendants	)	
SIERRA CLUB,	)	
Plaintiff	)	
v.	)	Civil Action No. 02-631 (EGS)
VICE PRESIDENT RICHARD B. CHENEY, et al.,	)	
Defendants.	)	

DECLARATION OF KAREN Y. KNUTSON

I, Karen Y. Knutson, hereby DECLARE:

1. I am a full-time employee of the Vice President of the United States appointed pursuant to Section 106 of Title 3 of the United States Code. My title is Deputy Assistant to the Vice President for Domestic Policy. From on or about February 6, 2001 to April 2, 2002, I was a full time employee of the U.S. Department of Energy (DOE) on assignment to the Office of the Vice President. Within that period, from on or about February 6, 2001 through September 30, 2001, my responsibility in the Office of the Vice President was to provide staff support to the National Energy Policy Development Group ("NEPDG"). My title when I performed that responsibility was Deputy Director of the NEPDG. The NEPDG was created by a memorandum of President

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of the United States George W. Bush of January 29, 2001. At the end of the last day of fiscal year 2001, on September 30, 2001, the NEPDG ceased to exist by operation of that Presidential memorandum.

2. This Declaration is based on my personal knowledge and on information available to me in my official capacity.

3. Of the professional personnel in the Office of the Vice President who were responsible for providing the staff support to the NEPDG from February 2001 through September 30, 2001,1 am the only one who is currently employed by the Vice President. Andrew Lundquist was a DOE full-time employee on assignment to the Office of the Vice President with the responsibility from February 2001 through September 30, 2001 to provide staff support to the NEPDG. His title during that period was Executive Director of the NEPDG. After the termination of the NEPDG on September 30, 2001, he was a DOE assignee, and then detailee, to the Office of the Vice President through March 26, 2002. On March 26, 2002, Mr. Lundquist left Federal Government service and at all times since then he has worked in the private sector. The NEPDG ceased to exist on September 30, 2001 and Mr. Lundquist ceased at that time to be the Executive Director of the NEPDG; therefore, when Mr. Lundquist left Federal Government employment, no one replaced him in his former capacity as Executive Director of the NEPDG.

4. As directed by the President in his memorandum of January 29, 2001, the NEPDG consisted of the following officers of the Federal Government: Vice President Cheney, Secretary of the Treasury O'Neill, Secretary of the Interior Norton, Secretary of Agriculture Veneman, Secretary of Commerce Evans, Secretary of Transportation Mineta, Secretary of Energy Abraham, Director of the Federal Emergency Management Agency Allbaugh, Administrator of the Environmental Protection Agency Whitman, Assistant to the President and Deputy Chief of Staff for Policy Joshua Bolten, Assistant to the President for Economic Policy Lawrence

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Lindsey, and the Assistant to the President for Intergovernmental Affairs. Additionally, in accordance with the terms of the Presidential memorandum of January 29, 2001, the Vice President invited the participation of Secretary of State Powell when the work of the NEPDG involved international affairs, and, as appropriate, the participation of Director of the Office of Management and Budget Mitchell Daniels. Finally, because the President had not appointed an individual with the title Assistant to the President for Intergovernmental Affairs, the Vice President invited, as appropriate, the participation of Deputy Assistant to the President and Director of Intergovernmental Affairs Ruben Barrales. The NEPDG consisted of these officers of the Federal Government, and no one else.

5. The above-named officers of the Federal Government, in their participation in the NEPDG, performed the functions set forth for them in the President's memorandum of January 29, 2001: to gather information, deliberate, and, as specified in the President's memorandum, to make recommendations to the President for a national energy policy. The Vice President performed the additional duties assigned to him by the President's memorandum of January 29, 2001 of presiding at the meetings of the NEPDG and directing its work. On May 16, 2001, the Vice President, on behalf of the NEPDG, submitted to the President for his consideration the recommendations known as the Report of the National Energy Policy Development Group.

6. During the period of the existence of the NEPDG, the NEPDG was supported by five professionals employed by the Department of Energy who were originally assigned to the Office of the Vice President for the purpose of providing such support: an Executive Director of the NEPDG (Andrew Lundquist); a Deputy Director of the NEPDG (me); two Senior Professional Staff Members, and a Professional Staff Member. In addition, a White House Fellow assigned to the Office of the Vice President provided support to the NEPDG. This support staff for the

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business, so that plaintiff can ascertain the files in which they were located, their relative order in the files, and how the files were maintained.

2. This document request extends to all documents in the possession, custody, or control of defendant and its agents, including, without limitation, documents located in all offices of defendants that were involved in the activities of the National Energy Policy Development Group or preparation of the National Energy Policy Report.

3. If you object to the production of any of the requested documents on the basis of privilege, you shall submit for each document, in lieu of it, a written description that:

a. identifies the date of the document;

b. identifies the author or source of the document;

c. briefly describes the nature of the document (e.g., letter, memorandum, handwritten note etc.) and the general subject matter of the contents of the document;

d. identifies the Person to whom the document was addressed, and each Person who received a copy of it; and

e. lists any objection raised or privilege claimed and its basis.

If any portion of a document for which you claim a privilege contains non-privileged information, you must produce the document but you may redact any allegedly privileged portion.

4. Any document, notation, or marking appearing on any document, and not a part of the original, is to be considered a separate document, and any draft, preliminary form, or superseded version of any document is also to be considered a separate document.

NEPDG also had one staff assistant who provided clerical support. All of these individuals responsible for providing staff support to the NEPDG were full-time Federal employees.

7. The NEPDG met twelve times. The dates of the twelve meetings were: January 29, February 9 and 16, March 12 and 19, April 3, 11, and 18, May 2, 4 and 16, and July 13, 2001. All twelve meetings occurred in Washington, D.C. At the January 29, 2001 meeting, the President announced the formation of the NEPDG. Other meetings of the NEPDG may have been scheduled, but did not occur because they were cancelled or rescheduled.

8. Within the Office of the Vice President, personnel of the NEPDG support staff attended the NEPDG meetings as follows: the NEPDG Executive Director (Mr. Lundquist) attended all the meetings; the NEPDG Deputy Director (me) attended all the meetings, except for the meeting on January 29, 2001; the senior of the two Senior Professional Staff Members attended approximately seven or eight of the meetings, but did not attend the meetings on January 29 and February 9, 2001; the junior of the two Senior Professional Staff Members attended one of the meetings; the White House Fellow attended all of the meetings, except for the meeting on January 29, 2001; the Professional Staff Member attended the meetings of April 3, 11, and 18 and May 2, 4 and 16; and the staff assistant who provided clerical support attended all of the meetings, except the meetings on January 29, February 9, and May 4, 2001.

9. Also, the following individuals employed on the Vice President's staff attended one or more of the NEPDG meetings: Chief of Staff to the Vice President, Deputy Chief of Staff to the Vice President, Counselor to the Vice President, Assistant to the Vice President for Legislative Affairs, Assistant to the Vice President for Domestic Policy, Deputy Assistant to the Vice President for Public Affairs, Deputy Assistant to the Vice President for Legislative Affairs (Senate), and the Press Secretary to the Vice President. These individuals at the time of their attendance were and still are full-time Federal employees, except for the individual who then was

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Press Secretary to the Vice President, who was at the time of her attendance a full-time Federal employee but who left Federal service on January 31, 2002 and is now in the private sector.

10. For each of the twelve meetings, the Office of the Vice President strictly limited those whom it invited to officers and employees of the Federal Government. The Office of the Vice President invited the officers of the Federal Government who constituted the NEPDG, and invited each such officer to be accompanied by one employee of that officer's department, agency or office. On rare occasions, such an officer would be accompanied by more than one employee of that officer's department, agency or office. To the best of my knowledge, no one other than the officers of the Federal Government who constituted the NEPDG, the Federal employees whom they chose from their respective departments, agencies and offices to accompany them (all of whom were full-time Federal employees), and the Office of the Vice President personnel set forth above, attended any of the meetings.

11. The Presidential memorandum of January 29, 2001 establishing the NEPDG authorized the Vice President to establish subordinate working groups to assist the NEPDG in its work. The Vice President did not establish any such working groups.

12. The Executive Director of the NEPDG proposed in February 2001 the establishment of a detailed structure of targeted working groups on a series of subjects, with a subset of the departments, agencies and offices whose heads were on the NEPDG to constitute each such targeted working group, but that proposal was not implemented.

13. The Executive Director of the NEPDG also gave the label "Working Group," which sometimes was also referred to as the "Staff Working Group," to a collection of staff-level Federal employees with whom he worked in drafting the Report of the NEPDG. That staff-level group held numerous meetings regarding drafting of the Report. To the best of my knowledge, the only attendees at such meetings were full-time Federal employees of the departments,

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agencies, and offices whose heads constituted, with the Vice President, the NEPDG, with one exception. The exception is that one individual, Joan C. O'Callaghan, doing business under the trade name The Communications Collective, was engaged to help provide technical writing and graphic design services relating to production of the NEPDG Report and attended brief portions of meetings -- two or three, but not more than three -- of the staff-level group as it worked on preparing the NEPDG Report; she did not participate in deliberations on or development of energy policy recommendations nor provide energy policy advice or recommendations, but rather provided technical writing and graphic design services in the preparation of the NEPDG Report. I do not recall how many meetings of the staff-level group occurred or precisely which employees attended, nor did the Office of the Vice President to the best of my knowledge keep records at such meetings that reflect such information.

14. It is my understanding that the plaintiffs in this lawsuit have alleged that the following individuals regularly attended and fully participated in the meetings of the NEPDG: the four individuals in the private sector who were named by Judicial Watch, Inc. as defendants in its Second Amended Complaint (see paragraph 25) in this lawsuit, other, unnamed, individuals who were private lobbyists, and other unnamed individuals who were energy industry executives. No such individuals attended or participated in any meetings of the NEPDG or the Staff Working Group.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Washington, D.C. on September 3, 2002.

Karen Y. Knutson

Karen Y. Knutson

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. NATIONAL ENERGY POLICY DEVELOPMENT GROUP, Defendant.	Civ. Action. 01-1530 (EGS)
SIERRA CLUB, Plaintiff, v. VICE PRESIDENT RICHARD CHENEY, *et al.* Defendants,	Civ. Action 02-631 (EGS)

ORDER

The Court hereby *sua sponte*

ORDERS that plaintiffs shall file any detailed responses to defendants' motion for a protective order and for reconsideration by no later than **September 16, 2002**; and it is

FURTHER ORDERED that any motions to compel shall be filed by no later than **September 16, 2002**; and it is

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FURTHER ORDERED that any replies to the responses to defendants' motion for a protective order and for reconsideration, and any responses to motions to compel shall be filed by no later than **September 23, 2002**; and it is

FURTHER ORDERED that any replies in support of motions to compel shall be filed by no later than **September 25, 2002**; and it is

FURTHER ORDERED that the status hearing scheduled in this matter for **September 13, 2002** is cancelled, and the hearing is rescheduled for **September 30, 2002 at 11:00 a.m.** in Courtroom One; and it is

FURTHER ORDERED that no potentially dispositive motions shall be filed in this matter until further order of the Court.

IT IS SO ORDERED.

Signed: EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE
September 9, 2002

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Notice to:

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	:	
Plaintiff,	:	
SIERRA CLUB,	:	
NATURAL RESOURCE DEFENSE COUNCIL,	:	
Amicus,	:	
vs.	:	CA-01-1530
NATIONAL ENERGY POLICY DEVELOPMENT GROUP, et al,	:	
Defendants.	:	

Washington, D. C.
October 17, 2002
10:28 a.m.

Transcript of Omnibus Motions Hearing
Before the Honorable Emmet G. Sullivan
United States District Court Judge

APPEARANCES:

For the Plaintiff:	PAUL J. ORFANEDES, ESQ. LARRY KLAYMAN, ESQ. (by telephone)
For the Intervenors:	ALEX LEVINSON, ESQ. (by telephone) DAVID BOOKBINDER, ESQ. ROGER M. ADELMAN, ESQ. SANJAY NARAYAN, ESQ.
For the Defendants:	JENNIFER PAISNER, ESQ. SHANNEN W. COFFIN, ESQ. CRAIG BLACKWELL

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Court Reporter: KATHERINE K. MOOMEY
Miller Reporting Company
735 8th Street, S. E.
Washington, D. C. 20003
(202) 546-6666

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PROCEEDINGS

THE CLERK: Civil Action 01-1530, Judicial Watch, Inc., Sierra Club, Natural Resource Defense Council, versus National Energy Policy Development Group. May I have counsel identify themselves, please?

MR. BOOKBINDER: For the plaintiff Sierra Club David Bookbinder, with me are my colleagues Sanjay Narajay and Roger Adelman.

THE COURT: All right, good morning.

MR. BOOKBINDER: And on the telephone Alex Levinson.

THE COURT: All right. Mr. Levinson.

MR. LEVINSON: Yes, I'm here.

THE COURT: All right. And for the government?

MR. COFFIN: Your Honor, Shannen Coffin.

THE COURT: All right. And your colleagues, who are they?

MR. BLACKWELL: Craig Blackwelll, Your Honor.

MS. PAISNER: Jennifer Paisner, Your Honor.

MR. KLAYMAN: Your Honor, Larry Klayman on behalf of Judicial Watch on the line.

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THE COURT: All right, Mr. Klayman, good morning.

I'm not persuaded by the government's motion that I should reconsider my ruling, nor am I persuaded that I should grant the equivalent of the protective order.

Now, Mr. Coffin, I'll afford you a few minutes not much more than that though to convince me otherwise.

Now, in doing I'd like for the government as well as the plaintiffs to address this thought, and it's just a thought that I want to share with counsel, maybe the approach by the court at this point should be along the lines of the following. Maybe the court should direct the government to prepare the equivalent of a privilege log, submit it under seal for the court's consideration, along with whatever documents that the government is of the opinion are protected pursuant to whatever privilege is invoked and give the court an opportunity to determine whether the government's assertion of privilege is appropriate.

I guess that another approach would be for the court to appoint the equivalent of a Special Master, maybe a retired judge, and direct that the

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5. If any document required to be produced by this Request for Production has been destroyed, identify such document by:

a. author or preparer;

b. addressee and all other recipients

c. indicated or blind copies;

d. date;

e. subject matter(s);

f. number of pages;

g. attachments or appendices;

h. all persons to whom it was distributed, provided, shown or explained;

i. date of destruction;

j. manner of destruction;

k. reasons for destruction;

l. person authorizing destruction; and

m. person destroying the document.

6. If any document required to be produced by this Request for Production is withheld because it is stored electronically, identify the subject matter of the document and the place or places where the information contained in the document is maintained or stored.

7. Whenever the word "and" appears, the word shall include "or" and shall be the logical inclusive of "and/or."

8. The singular includes the plural, and the plural includes the singular.

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government go through that procedure that I've just described with that Special Master affording the government's counsel an opportunity to appear before that person as appropriate and argue as appropriate in an effort to persuade the Special Master that the government's privilege, or privileges, that it has invoked are indeed permissible under the law. And then direct that Special Master to file a report with the court and I'd determine whether the privileges have been properly asserted and that there is a basis in law to support the privileges that have been asserted.

That was the approach that was followed by the court I believe, actually that was the approach that was discussed by the Circuit Court in the Gelands case. I'm not quite sure what happened when the case was remanded to the District Court.

I'm sharing those thoughts because maybe it is appropriate at this juncture for the court to carve out a middle ground since obviously the battle lines have been drawn and it appears that the government's position is clear that not only will the government produce discovery it won't respond to discovery requests and assert the privilege that everyone must assert.

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Now, having said that, Mr. Coffin, I'd give you a chance to address those two thoughts as well as any principal point. I've considered your motion more than once, I've considered your arguments and I'm not persuaded by them, and I'm not going to give the parties, anyone, a great deal of time this morning to make their arguments that you've already made very eloquently in writing. I've already considered the arguments but if there is something that I've overlooked, Mr. Coffin, you need to tell me what it is and also address those two thoughts that the court has shared with counsel for the parties.

MR. COFFIN: Good morning, Your Honor. Thank you for continuing the hearing from last week to accommodate my schedule. I appreciate that.

THE COURT: Sure, no problem.

MR. COFFIN: Let me address your point. I don't believe that the middle that you've suggested actually is how Gelands proceeded because before it went through that process--

THE COURT: No, no. What I said was that's what the Circuit Court discussed. I don't know what happened when the case was remanded.

MR. COFFIN: I'm talking about the actual

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Circuit Court decision. Before the court did that it satisfied itself that there was a need to do that, that there was sufficient evidentiary substantiation of the claims. And the court said there was a claim there--

THE COURT: Well I've already determined that discovery is appropriate.

MR. COFFIN: Well, Your Honor, we have complied with discovery to the tune of 35,000 documents.

THE COURT: You won't assert the privilege, you refuse to assert the privilege, although everyone, including the President of the United States, has to assert the privilege if that person is relying upon it.

MR. COFFIN: Well I don't--

THE COURT: The government takes the position that it's not going to assert the privilege, that it's not going to respond to court's order, that it's not going to produce anything nor will it assert the privilege because asserting the privilege is, as I understand your argument, unconstitutional.

MR. COFFIN: Let me say that--

THE COURT: I mean that's your argument.

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MR. COFFIN: Yes. And there is abundant support for the procedure we're requesting. In United States v Nixon itself--

THE COURT: All right. Do you have any authority, sir, that is different from the authority that you've relied upon in your written pleadings because that written authority that you relied upon in your pleadings is not persuasive at all.

MR. COFFIN: Your Honor, the Poindexter case discussed this very point and Judge Green said I don't have to require a formal assertion of the privilege which itself puts a burden on the executive and the executive's confidentiality, I don't have to go that far before--

THE COURT: This court isn't requiring the government to produce privilege documents.

MR. COFFIN: No, but you're requiring us to perfect the privilege.

THE COURT: I'm telling the government that if you have the privilege then assert it and telling me the reasons why you're asserting it so that I can then determine whether your assertion of the privilege is appropriate or not. Everyone has to do that. Why should these defendants, who are

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not Presidential defendants, be excused from doing what everyone else under the law has to do?

MR. COFFIN: Your Honor, the Vice President of the United States is the principal defendant in this case and I suggest to you that the concern for undue interference with the effective operation of the Executive Branch requires special treatment by this court in this context.

As the Clinton decision said that special caution is appropriate if the materials or testimony sought by the court relate to a President's official activities. There is no question that if executive privilege is implicated the President of the United States is implicated and these are documents that go to advice that was given to the President of the United States.

THE COURT: Well these defendants--let's assume a hypothetical, let's assume they're minutes of a meeting on a given day, the defendants before this court should not be put to the task of identifying that they are minutes for a meeting and that those minutes are indeed privileged and articulate the reasons why?

MR. COFFIN: Your Honor, one of the

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standards that the court suggests in establishing need is that the evidence not be available--

THE COURT: Can you just answer my question?

MR. COFFIN: I am answering your questions. That the evidence not be available through due diligence from other sources, and there are now eight to ten agencies that are involved in this case that are not asserting any sort of executive privilege and are open to discovery in this case, and have in fact complied substantially with the discovery requests that are at issue in this case. So there are other sources.

And plaintiffs haven't come to you, Your Honor, and said in any way, shape or form that we've looked at those documents and we can't prove our case through those documents and that testimony.

And so, Your Honor, yes, that is exactly the case that if there is a way of proving who was at the meetings, who was at any NEPDG meetings through other means the due deference to the executive requires this court to require that exhaustion of the plaintiffs. That is our position.

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THE COURT: All right. Any new authorities that you want me to take a look at?

MR. COFFIN: Your Honor, we've cited all of the authorities in our brief. And I call your attention to the Armstrong decision, Your Honor. Armstrong is a very important case here because that involved the same sort of standards that we're asking for this court to apply in the context of a selective prosecution claim.

The court reasoned that a showing necessary to obtain discovery against the Executive Branch should itself be a significant barrier to the litigation of insubstantial claims and it did that for two reasons. First, judicial deference to the decision of executive officers stems from a concern not to unnecessarily impair the performance of core executive functions and, second, there is a presumption of regularity that is due to the conduct of government officials.

THE COURT: Well that's what you've been arguing since January of this year that there shouldn't be any discovery in this case.

MR. COFFIN: No, Your Honor, there is a substantial difference that you're missing, 35,000 documents and responses from me to the agencies,

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that is a major difference in this case. It puts this case in a much different setting because plaintiffs have access to all of the information they need to prove their case and they don't have a single shred of evidence that anyone other than government officials were involved in the meetings of the NEPDG. There is not a single shred of evidence and that's the problem with their case.

You can't allow discovery here because there is no substantiation of the claim even though there are tons of sources for that information.

THE COURT: And still the government's argument is again there must be a need articulated by the plaintiffs before discovery can go forward?

MR. COFFIN: That's correct, Your Honor. That's correct, that is our position.

THE COURT: Well the reason why the government sought a protective order was because of your representation that you were about to file a motion for summary judgment and you thought that there should be a protective order in place because of your plan to file a motion, which I said you can file until I resolve the discovery dispute. So, that factual predicate has been--

MR. COFFIN: But--

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THE COURT: Just a minute, don't interrupt me. You have a habit of interrupting me, sir. You did this last year.

MR. COFFIN: I apologize.

THE COURT: I know. I invite zealous advocacy but I will not tolerate attorneys interrupting me.

MR. COFFIN: Yes, sir.

THE COURT: All right, fair enough. I won't interrupt you.

Read that last line back.

(The statement was read back.)

THE COURT: I think that the request for a protective order was the government's desire to file a motion for summary judgment and I said no, don't file a motion for summary judgment unless or until the court resolves the discovery dispute.

MR. COFFIN: Right.

THE COURT: So that factual predicate having been removed then what is the factual predicate now for the government's assertion that it need not assert the privilege, that the plaintiffs have not established the need, is that essentially it?

MR. COFFIN: No, Your Honor, it's not. In

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my mind the summary judgment motion was a convenient vehicle for you to understand what the evidence--

THE COURT: A convenient vehicle for the government to proceed with and I said no, we're not at the summary judgment stage and we won't be at the summary judgment stage until I resolve discovery.

MR. COFFIN: Your Honor, as we said in one of our reply briefs we did say that we don't think that it was a necessary vehicle, it was simply a convenient vehicle. In our last reply brief we explained to you, we summarized to you, what the evidence was that was out there and that--

THE COURT: Well if that is the vehicle then it puts the burden on the plaintiffs to demonstrate a need.

MR. COFFIN: Your Honor, that is exactly right.

THE COURT: All right, fine.

MR. COFFIN: That is exactly right.

THE COURT: Answer the question then, the factual predicate then is that they haven't demonstrated need.

MR. COFFIN: Oh, that's exactly right, it

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9. Pursuant to Rule 34(b), F. R. Civ. P., these requests are continuing in nature and defendants are required to produce all responsive materials that come into their possession, custody or control after the date of their initial response.

DEFINITIONS

A. "Document" means and refers to, without limitation, all written, typed, or otherwise preserved communications including any letter, memorandum, diary, log, test, analysis, study, projection, check, invoice, receipt, bill, purchase order, shipping order, contract, lease, agreement, work paper, calendar, envelope, paper, telephone message, tape, computer tape, computer disc, computer card, other electronic media, electronic data active files, electronic data archived files, electronic data backup files, electronic file fragments, recording, videotape, film, microfilm, microfiche, drawing, account, ledger, statement, financial data, and all other writings or communications including all non-identical copies, drafts, and preliminary sketches no matter how produced or maintained in your actual or constructive possession, custody or control or of which you have knowledge of the existence, and whether prepared, published or released by you or by any other person or entity. Without limitation, the term "document(s)" shall include any copy that differs in any respect from the original or other versions of the document, such as, but not limited to, copies containing notations, insertions, corrections, marginal notes, or emendations.

B. "Person" means and refers to, without limitation, any individual, corporation, partnership, joint venture, limited partnership, association, trust, trustee, group, organization, government or government agency, office, bureau, department, or entity, and all divisions, subdivisions, bureaus, branches, offices or other units thereof, and includes the present and former officers, executives, partners, brokers, employees, agents, and all other persons acting or

was just that the vehicle for doing that was to put in the context of a summary judgment motion. We didn't think that that was necessary and Your Honor, you know although we disagree with your not allowing us to file a summary judgment motion we don't think that it is a necessary vehicle. It certainly can be done here because plaintiffs have to demonstrate need.

THE COURT: All right. Anything new?

MR. COFFIN: Your Honor, I can move on to one of the--

THE COURT: I've considered the arguments that you've made in your brief and I'm not persuaded by them. Is there any new argument that you wish to make?

MR. COFFIN: Your Honor, there aren't any new arguments.

THE COURT: Thank you. I'll hear from plaintiffs counsel.

MR. KLAYMAN: Your Honor, Larry Klayman, good morning.

As occurred at the last hearing, that was the August 2nd hearing, we were concerned that the government, in this case the Bush-Cheney administration would allow the 30 days that Your

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Honor ordered to produce documents or object with regard to the Cheney Energy Taskforce itself, not the peripheral agencies that are involved but the taskforce itself, that it would allow that 30 days to tick off to try to delay this proceeding because it is apparent to us that what they are trying to do is get beyond an election period. We have no interest in the elections, the court has no interest in the elections, but we want the documents for the public as soon as possible.

It's been a year and a half since this matter was filed. At the current pace of the litigation nothing will be made available probably until after 2004 and this administration may no longer be in charge of the White House at that time.

My suggestion here is, and I think that Your Honor is touching upon it is that this Bush-Cheney administration and the defendant in this case is in a contempt situation right now. They have defied your order.

THE COURT: That's not an issue before the court, counsel. The only issues that I'm going to focus on today are the motion for reconsideration and the motion for protective order. I recognize

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that there have been additional pleadings filed, those other matters are not before the court today.

MR. KLAYMAN: Okay. Well my point if that if Your Honor can set a short timeframe I think that's important because I believe the strategy of the government, and I've seen it in other cases here, is that whatever Your Honor orders in terms of a timeframe in or about the end of that time period they will be filing a petition for a writ of mandamus with the D. C. Circuit, it will not be meritorious but what they are going to try to do is to try and slow this matter down further.

So, consequently to keep the timeframe short if they are going to use that technique, however improper, and they've used it in other cases that we've been involved with, let them use it quickly so that we can get up to the D. C. Circuit and have this thing resolved, otherwise by the time that this case is litigated this administration will be out of office.

That's basically my observation. I agree with Your Honor's approach but I think that there needs to be a short timeframe for producing the documents, for producing claims of privilege.

THE COURT: All right, thank you, counsel.

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MR. NARAYAN: Your Honor, I just want to address the two matters that you raised.

THE COURT: Sure, go ahead.

MR. NARAYAN: I refer to the privilege of producing a privilege log and documents under seal to the court. I certainly have no problem with producing reportedly privileged documents under seal. With regard to the privilege log and unprivileged documents we think that there is no need to place those under seal for two reasons. One reason is that at this stage I think we too are a bit concerned about delay here. What we've asked for in this case is a declaratory judgment and information and the value of those things does go down as the issues that we're investigating in this case get further and further into the past, and in particular as the administration's energy policy becomes something that is no longer--

THE COURT: So in other words you're suggestion along the lines of the court's thoughts would be for the court to essentially follow the procedures the court would follow in a FOIA case for instance, have the government produce a privileged log, which you would have access to but not necessarily the rationale behind the assertions

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of privilege and the court would review those documents, those evidence materials, in camera. Is that right?

MR. NARAYAN: That's right, Your Honor.

And the other thing is that a privilege log would allow us to maybe structure further discovery in a way that might be useful to us.

THE COURT: Is there a requirement that the plaintiffs demonstrate a need at this point?

MR. NARAYAN: No, Your Honor, there isn't. Although the defendants have said a lot about the separation of powers and the constitution what we're talking here about is production of non privileged documents and the privilege log.

THE COURT: Which is what is required of everyone, is it not?

MR. NARAYAN: Yes, Your Honor. And those don't effect the functioning of the executive, they haven't shown any in which that could effect the functioning of the executive in any way that could possibly implicate separation of powers. And in all of the cases that they have cited and the cases that we've cited it's clear that any separation of powers the analysis focuses on functioning not the simple status of the fact that people have desks in

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the White House, or at one point had desks in the White House.

In any event they say that we have access to other evidence, but until we know what we don't have it's very hard to say whether we can get those things from the agency or not. At a minimum here there is no intrusion on executive function in a way that would implicate separation of powers.

THE COURT: Because I'm not ordering the defendants to turn over any privileged documents whatsoever. I'm just telling them to turn over those documents that aren't privileged pursuant to the panoply of discovery rules that are in place. But for those items that the privilege attaches just tell me what the privilege is.

MR. NARAYAN: That's right, Your Honor, they haven't indicated a single specific document that the disclosure of which would effect the executive's functioning.

THE COURT: Well they haven't identified the documents.

MR. NARAYAN: Well, right, they haven't identified any specific documents at all.

THE COURT: They are essentially saying we don't have to respond to any discovery request and

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we don't have to assert a privilege because responding to a request for discovery is as unconstitutional as well as providing discovery, if I understand their argument correctly.

MR. NARAYAN: I think that Clinton versus Jones adequately disposes of the contention that these simple steps of litigation somehow effect the executive in a way that offends separation of powers anyway.

THE COURT: If the court were to deny the request for reconsideration and deny the request for a protective order then what from the plaintiffs point of view?

MR. NARAYAN: Well then we wouldn't get any non privileged documents and we'd get a privilege log.

THE COURT: And then the next step is what, the court would have to focus on the motion to compel, or is there a need to do that?

MR. NARAYAN: The motion to compel addressed the production by the agencies and they largely center on separate issues. I don't think that there is any reason to--at this point they are proceeding on separate tracks.

MR. KLAYMAN: Your Honor, to get back to

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the earlier issue. This is Mr. Klayman.

THE COURT: Just a minute counsel. I want to hear from you but I want plaintiff's counsel, your co-counsel to finish. Can you hear, counsel?

MR. KLAYMAN: Yes. I thought that he was. Thank you.

MR. NARAYAN: The next step would be we intended this discovery to provide a foundation for further focus discovery based on what shows up here. So, the next step would be depending on what we see we might have follow up discovery requests. Again it's hard to say without knowing what is out there and we might also have some questions about the privileges that they are raising in their privilege log. In other words, we would proceed like any other normal civil case.

With regard to the Special Master, Your Honor, I think our only concern there is the potential there for delay again.

THE COURT: When I made reference to that procedure I wasn't by any stretch of the imagination finding as a fact, finding as a matter of law that there had to be a need demonstrated. I just focused on that procedure that was put in place, that's all. And so I guess when you're

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thinking this through why would there be a need to have an intermediary step when in the final analysis the court would have to make the decisions in any event. And the court is most capable of making those decisions in the first instance and why burden someone else.

MR. NARAYAN: That's all that we have, Your Honor.

THE COURT: All right. Mr. Klayman.

MR. KLAYMAN: Yes, Your Honor. What I'm suggesting to clarify the earlier position, I realize that these other motions for show cause orders for contempt are pending but what we would ask for the court today is a definitive order that they comply with Your Honor's orders of August 2nd, set a short timeframe, they are not going to comply with it in any event, they've made that clear.

THE COURT: Why is there a need for the court to issue another order? I issued one order. I mean is there a need for the court to issue another order, are you essentially saying I mean it this time? I don't think so, is there?

MR. KLAYMAN: I mean you want to go through the compel procedure. I thought that you were suggesting that he wanted an interim order to

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comply is that's Your Honor's approach. I feel that they are in contempt right now, I agree with you.

THE COURT: Well, contempt is not an issue before the court.

MR. KLAYMAN: Well the Your Honor can decide on the motions at the appropriate time but I'm just concerned and I want to make sure that my position is stated clearly. I'm concerned that we need to know where we stand with regard to this Bush-Cheney administration, whether they are going to produce or whether they are going to claim privileges and not to allow time to tick off for them to then allow that time to expire, only to have them take what is in effect an appeal to the D.C. Circuit which will then shut this case down, you know, for six months to a year. We need to know where they stand right now and I think that we know where they stand. They do not intend to comply with your orders, they've told you that. They don't have any inclination to accept what they are at least with regard to the internal documents inside the taskforce itself and to give them, you know, a fourth bite of the apple. I agree with what your is saying that you have already ruled, it

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purporting to act on behalf of them, and any of their present or former parent corporations, subsidiaries, affiliates, divisions, predecessors and successors in interest.

C. "Communication" means and refers to any use of any mode of conveying meaning or information such as, but not limited to, speech, telephone, telegraph, e-mail, other computer-generated or transmitted information, letter, and any written or spoken language for the purpose of transferring information from one person or place to another. The term "Communication" shall include, without limitation, any oral, written or electronic transmission of information including, without limitation, meetings, discussions, conversations, telephone calls, memoranda, telecopies, telexes, conferences, facsimiles, seminars, messages, notes, or memoranda.

D. "Any" encompasses "all."

E. "Concerning" means and includes referring to, relating to, alluding to, responding to, connected with, commented upon, in respect of, about, regarding, discussing, involving, showing describing, reflecting, and constituting.

F. The "Task Force," means and refers to the National Energy Policy Development Group, as described in President George W. Bush's memorandum dated on or about January 29, 2001.

G. The "Report" means and refers to the Report of the National Energy Policy Development Group, titled "Reliable, Affordable, and Environmentally Sound Energy for America's Future," and published on or about May 16, 2001.

H. "Sub-Group(s)" means and refers to Any working groups, including without limitation the Task Force Working Group chaired by Andrew Lundquist, the working groups established by each agency, and all committees, sub-committees, teams or other sub-groups that

would not be appropriate.

So, yes, they've produced some documents and the documents that they've produced and not produced with regard to the agencies they should be ordered to produce that privilege log and justify what those privileges are. But with regard to the documents that they have just basically refused to produce or refuse to even claim privilege that issue in my view is beyond giving them a fourth bite of the apple and they should be ordered to produce them immediately. Quite apart whether you hold them in contempt they should be ordered to produce them tomorrow.

THE COURT: So in response the to question that I asked counsel what should be the next step for the court to take, assuming that the court denies the request for reconsideration and denies the motion for protective order?

MR. KLAYMAN: The next step should be with regard to the documents inside the taskforce. If they are not prepared to make a commitment today that those documents are going to be produced forthwith Your Honor would have to take appropriate measures to enforce the powers of the court quickly without allowing time to expire here. Their entire

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strategy is delay, that's why it is, and that's why they are willing to thumb their nose in the face of the court. It's the same strategy used by prior administrations going all of the way back in modern times to Nixon.

And with regard to the documents from the agency where they have produced some documents albeit the same documents they produced in Judge Friedman's case and Judge Kessler's case they should have to produce forthwith a privilege log along with the proper justifications for claims of privilege. But it's too late for the documents inside the taskforce, they are already in defiance of Your Honor's orders, they have waived any objections, they can't raise objections now, it's too late.

THE COURT: Let me ask you this. I have not focused on those other two cases that are before different judges in this court, Judge Friedman and Judge Kessler, at what stage are those cases proceeding now?

MR. KLAYMAN: They are proceeding as a matter of course. I mean in effect those cases have now been merged into Your Honor's case because the Bush-Cheney administration--

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THE COURT: I wouldn't go that far.

MR. KLAYMAN: Well effectively, not technically. What they are claiming is that they have reproduced all of the documents in those other cases in the context of this case and there are motions pending in these other cases.

THE COURT: All right, let me ask you this then. In those other cases, and they are not related cases, in those other cases then the government has taken the position that it will not assert privilege but that further intrusion then is indeed unconstitutional, is that the stage those other cases are in?

MR. KLAYMAN: No. You see those are the agencies, these are FOIA cases, Freedom of Information cases. They are taking the position that we've produced everything that we have to produce save for those documents that we can withhold under claim of privilege. But those documents in the other cases don't get into the so called belly of the beast which is the Cheney Energy Taskforce itself centered inside the White House.

THE COURT: For those cases that the government has asserted a privilege, for those

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documents that the government has asserted a privilege in those other cases has the government submitted those documents for in camera inspection to my colleagues?

MR. KLAYMAN: Not as yet. Various motions are pending in those cases including motions for contempt in those other cases as well. The point that I'm trying to make is you, Your Honor, have a highbred of that case and something unique here which is our seeking documents directly out of the Cheney Energy Taskforce, not the agencies that are on the periphery but right out of the taskforce.

THE COURT: I understand. I was just asking just because I was curious.

MR. KLAYMAN: And that is why when Mr. Coffin makes the argument that we have everything that we need at best that is extremely disingenuous because we don't have the core documents about what went on inside the taskforce itself. Consequently their not having objected on September 3rd, or raised any claims of privilege, they've waived any objections or claims of privilege and they have to, no pun unintended, cough up the documents immediately. They are way beyond anything else at this point, any kind of argument.

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THE COURT: All right. It that it?

MR. KLAYMAN: That's it. Thank you, Your Honor.

THE COURT: All right. Mr. Coffin.

MR. COFFIN: Your Honor, as far as waiver goes the executive privilege--the Supreme Court has made clear that the waiver of executive privilege is not likely inferred and we have in fact reserved our intent to claim that if necessary in this case. And we, of course, do intent to comply with any orders, final orders, of this court subject to appropriate appellate review.

THE COURT: Sure, sure.

MR. COFFIN: Your Honor, I mean--

THE COURT: Let's just be candid. If the court denies the request for reconsideration, denies the motion for protective order then what is next on this court's agenda, on this court's calendar?

MR. COFFIN: On this court's calendar you would have in front of you agency motions to compel. What the United States would is something that we would have to consider.

THE COURT: All right, that's fine. I just wanted to know. I think that the court should

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then focus on the motion to compel and there was a reason why I didn't have all of those remaining motions compel, contempt, et cetera, et cetera, et cetera on the court's calendar for today. All right, thank you.

Anything further?

MR. KLAYMAN: Your Honor, Mr. Klayman again.

THE COURT: Wait a minute, Mr. Coffin is at the podium, let me hear him.

MR. COFFIN: Your Honor, if you rule today we will have some housekeeping matters.

THE COURT: Let's get the housekeeping matters. Let's assume that I rule today, what are the housekeeping matters?

MR. COFFIN: There are several matters, one minor dealing with the motion to compel.

THE COURT: Well that's not really before me.

MR. COFFIN: No, it's not before the court. Our response is due on Monday and we would ask for a week extra which shouldn't effect your November 13th hearing on that motion.

THE COURT: I don't think that I'd have any problems with that but I'll hear from

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plaintiffs as well.

MR. COFFIN: The issue of Andrew Lundquist as a defendant in this case is wholly separate from all of these other issues. It's a question of whether he is now a federal government employee. We've produced an affidavit that says he isn't and I'm sure--

THE COURT: And that has not been controverted, has it?

MR. COFFIN: It hasn't been controverted. We want to move to dismiss him from the case. You've told us not to file summary judgment pleadings. I'd at least like to--

THE COURT: Well that's a motion to dismiss though.

MR. COFFIN: And as you said before there is a factual issue of whether he's--

THE COURT: Have you spoken with your opponents about that?

MR. COFFIN: I haven't, I just knew that you had a summary judgment bar in place and so that is an issue.

THE COURT: Maybe that's an issue that we can resolve.

MR. COFFIN: And, Your Honor, the big

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issue is, you know, if you go the way you were saying we would ask orally today for a stay pending appeal.

THE COURT: All right.

MR. COFFIN: I'll discuss that if you rule.

THE COURT: All right. Mr. Klayman.

MR. KLAYMAN: Yes, Your Honor. There you have it, finally we have gotten a straight response and that's why this whole procedure up until now has simply been an exercise in delay, and that's why, Your Honor, I would urge you to issue an order that they produce the documents of the taskforce forthwith. Thank you.

THE COURT: All right, thank you, counsel. What about Mr. Lundquist, Mr. Klayman?

MR. KLAYMAN: Your Honor, I will certainly take that under advisement. I believe that he is a legitimate defendant. We have thought this through, so has the Sierra Club, but there is no motion pending.

THE COURT: Well sometimes issues can get resolved by agreement of counsel.

MR. KLAYMAN: Well, we'll take a look at it. Right now I'm in trial in Seattle and so as

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soon as I get back I'll contact Mr. Coffin.

THE COURT: Let me hear from Mr. Coffin and then I'll give you a chance counsel. I'm sorry, you wanted to respond.

MR. COFFIN: I'm not sure what take a look at it means.

THE COURT: Why don't I do this, why don't I just direct counsel to meet and confer? You don't have to do it face to face.

MR. COFFIN: That's fine, we'll do that.

THE COURT: Just meet and confer about that issue, Mr. Klayman.

MR. KLAYMAN: Certainly, Your Honor.

THE COURT: You can talk over the phone about that.

Yes, counsel.

MR. NARAYAN: Just a few things, Your Honor. One is that if the court does proceed as it has indicated that it is going to I think that we'd like to know when the privilege log and privilege documents are going to be produce, and we would suggest a fairly short timeframe.

THE COURT: Well the government has indicated that it doesn't intend to comply with the court's order and would seek a stay of the court's

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order to consider its appellate options. Why shouldn't I--these matters are very important, why shouldn't the court grant a stay and give the government a chance to consider whether it wishes to file a notice of appeal?

MR. NARAYAN: Well, Your Honor, there is a circuit case right on point as to whether an appeal is appropriate here and the answer is that it isn't in In Re Executive Office of the President, which is 215 F 3rd 20. The Circuit Court specifically held that it doesn't have jurisdiction over an appeal of this nature where there is no claim of privilege and no threat that privileged documents are going to be produced as a result of the court's ruling.

THE COURT: Right, but that's not really an issue that I asked the parties to brief at all. I just wanted to ask the question anyway.

MR. NARAYAN: I guess again we are concerned about delay here and that's why we're asking for some sort of a timeframe as to how this is going to proceed.

THE COURT: All right. I'm going to take about a five or ten minute recess.

(Recess.)

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participated in the activities of the Task Force or the preparation of the Report, including without limitation working groups, sub-committees, team, or other sub-groups within any federal agency or entity.

REQUESTS FOR PRODUCTION

1. All documents identifying or referring to any staff, personnel, contractors, consultants or employees of the Task Force.

2. All documents establishing or referring to any Sub-Group.

3. All documents identifying or referring to any staff, personnel, contractors, consultants or employees of any Sub-Group.

4. All documents identifying or referring to any other persons participating in the preparation of the Report or in the activities of the Task Force or any Sub-Group.

5. All documents concerning any communication relating to the activities of the Task Force, the activities of any Sub-Groups, or the preparation of the Report, between any person (excluding full-time federal employees) and

(a) the Task Force;

(b) any member of the Task Force;

(c) any staff or personnel of the Task Force;

(d) any Sub-Groups.

(e) any members of any Sub-Groups

(f) any staff or personnel of any Sub-Groups.

6. All documents concerning any communication relating to the activities of the Task Force, the activities of Sub-Groups, or the preparation of the Report between any person (excluding full-time federal employees) and

THE COURT: The government's arguments are not new to the court, there has been nothing new to the court to persuade the court that its ruling in August is erroneous, therefore the court will deny the motion for reconsideration and deny the request for a protective order.

And again I reiterate all I'm requiring the government to do is to produce the non privileged documents and for those documents that the government believes the privilege attaches to assert the privilege and provide an appropriate privilege log just like everyone else has to do.

Under the circumstances I think that it would be appropriate for the court to direct the government to produce the non privileged information again by no later than two weeks from today, that's the 31st, and also to provide an appropriate privilege log by that date.

The government has indicated that it would like a period of time in which to seek a stay of the court's ruling and I think that given an indication of how the government plans to proceed then I think that it is appropriate for the government to file a written motion for a stay and a shorter period of time. Since this is probably

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not just a new consideration of the government I don't think that requiring the government to file its motion for stay by say noon on Monday the 21st is unreasonable. And then I'll give the plaintiffs essentially three days, the 24th noon, that's eastern time, to file a response and any reply by the government should be filed by the 25th of October by noon. I'll schedule a hearing on the government's request for a stay on the 29th of October. Even though I'll be in trial I'll--I'll deal with that. The 29th of October at 10:00 for a hearing on the government's motion for a stay.

MR. KLAYMAN: Your Honor, Mr. Klayman.

THE COURT: Yes.

MR. KLAYMAN: I may be out of town that day. Is it possible to do it on the 30th or the 31st?

THE COURT: Well I've given the government until the 31st to comply with my order. I could do it the 30th I assume. You can participate by phone if you want.

MR. KLAYMAN: I may actually be in transit. If it is possible, if not I'll live with it.

THE COURT: No, no. I mean I'm going to

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be in trial so let me just see what else I have.

MR. COFFIN: Your Honor.

THE COURT: Just a second. Is that a bad day for you?

MR. COFFIN: No, I'm concerned about the two days.

THE COURT: How much time do you need?

MR. COFFIN: Well it's the two days before the hearing and compliance.

THE COURT: I mean this is something that the government has been considering, isn't it?

MR. COFFIN: The briefing is not a problem, it's the two days at the tail end. If you were to deny our motion to stay we would have two days to go to the Court of Appeals and get an emergency stay if necessary.

THE COURT: I wouldn't make anyone speed up to the Court of Appeals. Believe me if I deny it I'll do something that is going to accommodate not only the attorneys before me but also my colleagues in the circuit.

MR. COFFIN: Well given the schedule does it make sense then to set a 31st date for compliance with the order, that's my question, since either way--

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THE COURT: Well I can shorten the period of time. I want to give you more time to file a motion for a stay. I mean you can file it tomorrow, can't you? Do you have a copy with you today?

MR. COFFIN: No, I don't. I mean in part it depends on what you do so we don't have written papers ready right now.

THE COURT: All right.

I mean what is fair? No one is going to have to run up to the Court of Appeals, I'm not going to do it to you, I'm not going to do it to my colleagues in the circuit. What were you suggesting? You said the 31st might--what are you suggesting, maybe another day or two, say the 5th for production of documents.

MR. COFFIN: Well that would give us enough time to--it would still be an emergency but we'd have more time to go to the Court of Appeals if necessary.

THE COURT: All right. That's fine. I can give the government until the 5th of November.

MR. COFFIN: Let me explain. Given our position in this litigation we have not done a document review of the Office of Vice President.

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THE COURT: Well how do you know that privilege attaches then?

MR. COFFIN: Well we've done an initial review.

THE COURT: Wait a minute, wait a minute. That's a startling revelation, Mr. Coffin. You've not done--

MR. COFFIN: Your Honor--

THE COURT: No, counsel.

MR. COFFIN: I'm trying to finish my sentence.

THE COURT: Will you let me finish my sentence, sir?

MR. COFFIN: I well.

THE COURT: You're a gifted lawyer as are the other lawyers but please don't interrupt me.

That is a startling revelation, that the government has not made a document review.

MR. COFFIN: Oh, no, no. I overstated my case.

THE COURT: Overstated. You're telling me that you haven't looked, how do you know--

MR. COFFIN: We haven't completed a document review of the Office of the Vice President. We certainly have done enough to

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satisfy ourselves that the reasons for our argument attached.

THE COURT: The government is making these arguments in good faith?

MR. COFFIN: Oh, absolutely, Your Honor.

MR. KLAYMAN: Your Honor, the language of my opponent speaks for itself.

THE COURT: Wait a minute, one at a time.

MR. KLAYMAN: It's Mr. Klayman, I mean he made a plain statement, obviously he's backing off because it is bad press, but he made the statement that he made.

THE COURT: I'm not going to lose control. Go ahead Mr. Coffin. Mr. Klayman, you'll get your chance.

MR. COFFIN: Your Honor, we haven't completed the document review. We are aware that there are a number--

THE COURT: That's completely different from what you said originally.

MR. COFFIN: You're right, you're right, I'm sorry, I misspoke.

THE COURT: But you--

MR. COFFIN: I misspoke, Your Honor.

THE COURT: How could you misspeak about

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something as important as that?

MR. COFFIN: By opening my mouth, it happens, Your Honor.

THE COURT: But counsel you're an officer of the court and I listen very carefully.

MR. COFFIN: We have not completed our document review and I'm concerned that two weeks may not be enough time, but having said that, Your Honor, the fact is we are going to--

THE COURT: I think at the very least the government had an obligation to at least complete the document review. Certainly you've had more than enough time. This case has been pending.

MR. COFFIN: Your Honor, may I speak, please?

Our point, Your Honor, has been that compliance with the order of the court imposes a burden on the Office of the Vice President. That is a real burden. If we had completed and done everything that Your Honor has asked us to do today that burden would be gone, but it would have been realized. So, the necessary part of our argument dealing with burden is that we're not going to ask our clients to complete that review. I mean that's the logical following from our argument. I know

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that you've rejected it, Your Honor, but that is what we have been arguing.

THE COURT: Why is the court learning for the first time that the government has even completed a document review?

MR. COFFIN: Your Honor, we have argued to you that the burden of doing a document production is an unconstitutional burden.

THE COURT: That's completely different. Document production as opposed to document review, to review the documents to see whether or not privilege attaches or not. I'm differentiating there--

MR. COFFIN: I understand.

THE COURT: --between document review and document production.

MR. COFFIN: I understand.

THE COURT: You haven't done a document review.

MR. COFFIN: Your Honor, that perhaps is where I misspoke but we have done--

THE COURT: You say perhaps?

MR. COFFIN: Your Honor, please.

THE COURT: He's trying to find out whether you've completed--

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MR. COFFIN: We have done a review.

THE COURT: All right.

MR. COFFIN: We have done a review, we haven't completed it, we haven't done everything necessary for a production. That's my point and I apologize for misspeaking, Your Honor.

THE COURT: You said it in your papers though. I understand your arguing your papers, document production would be unnecessary. You never said that even completing a review would be onerous, you never said that.

MR. COFFIN: Your Honor, that's part of the production. But we have--

THE COURT: Don't parties have to review documents before they can determine whether or not privilege even attaches?

MR. COFFIN: Your Honor, we have done that, we are satisfied with that.

THE COURT: All right. Now, what's onerous now, you only have two weeks to comply?

MR. COFFIN: No, Your Honor. I mean if after you issue a ruling on the stay, you're willing to revisit the date to give us time for a Court of Appeals ruling.

THE COURT: I'm going to be fair to the

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government. I'm going to be fair to anyone who appears before me. I'm not going to require anyone to get on the elevator and run up to the fifth floor. I'm not going to do that.

MR. COFFIN: Okay, Your Honor.

THE COURT: I'll treat you fairly just like I would with anyone else.

Any response to counsel's statements? Mr. Klayman.

MR. KLAYMAN: It's just that the statement of Mr. Coffin speaks for itself, it's a demonstration of the bad faith in this case.

THE COURT: All right. I gave the government until Monday to file its motion for a stay and that's by noon, and the plaintiffs until the 24th I believe I said. There is some flexibility, Mr. Coffin, not a lot but there is some flexibility. You've suggested the 5th of November for the date to comply with the court's order, is that correct, and a hearing in the preceding week to address the issue of a stay. Mr. Klayman, you said that you would be out of town the 30th. The 29th is fine or actually we can do it the 31st. If you want to do it the 31st that's fine with me.

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(a) the Department of Energy, or any employee or agent of the Department of Energy;

(b) the Department of Commerce, or any employee or agent of the Department of Commerce;

(c) the Department of Agriculture, or any employee or agent of the Department of Agriculture;

(d) the Department of Interior, or any employee or agent of the Department of Interior;

(e) the Department of Treasury, or any employee or agent of the Department of Treasury;

(f) the Department of Transportation, or any employee or agent of the Department of Transportation;

(g) the Environmental Protection Agency, or any employee or agent of the Environmental Protection Agency.

7. All documents concerning activities of the Task Force after September 30, 2001.

8. All documents concerning matters discussed in the January 3, 2002 letter from David Addington, counsel to the Vice President, to Henry Waxman, including but not limited to the October 10, 2001 meeting between a Task Force staff member and representatives of Enron Corporation.

Respectfully submitted,

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David Bookbinder (DC Bar No. 455525)

MR. KLAYMAN: That's fine, Your Honor.

THE COURT: All right at--let me make sure that I don't have any motions hearings.

MR. KLAYMAN: I believe I have something at 10:00 a.m. so if we could do it in the afternoon.

THE COURT: I don't really have any problems with that, we'll do it at 1:00 in this courtroom, it will be a hearing on the government's motion for a stay.

MR. COFFIN: Your Honor, I won't be here.

THE COURT: Well I'll accommodate you too now.

MR. COFFIN: I've got another major hearing on the 31st.

THE COURT: I mean you're the government's attorney, you've been arguing these. If you want the hearing on the 30th I'll give you a hearing on the 30th.

MR. COFFIN: Your Honor, I'm sorry. I'm arguing a case in front of Judge Bates that is of major significance.

THE COURT: It's more important than this case?

MR. COFFIN: No, sir. That's on the 31st

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and to prepare for that I can't see doing two hearings in two days. I would prefer actually--

THE COURT: All right. I was more than willing to accommodate you.

MR. COFFIN: I appreciate that.

THE COURT: So the government will be well represented on the 31st and that will be at 1:00.

Anything further, counsel? I'll issue an appropriate written order that essentially just memorializes my ruling on the denial of the request for a stay.

MR. KLAYMAN: No, Your Honor, thank you. Larry Klayman.

THE COURT: And the denial of a request for a protective order. I may not get that order issued today.

MR. COFFIN: Your Honor, I need a seven day extension on the motion to compel, our motion to compel response is due on Monday and we would ask for a seven day extension.

THE COURT: Any problems with that anyone?

MR. KLAYMAN: I didn't hear it, Your Honor.

THE COURT: Mr. Coffin asked for a seven day extension on his motion to compel and there are

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no objections by your co-counsel. I assume you have no objections having made requests for extension of time yourself.

MR. COFFIN: No.

THE COURT: All right.

Mr. Coffin, I'd just ask that you submit to my chambers an appropriate order. You can e-mail it to chambers.

Anything further?

MR. NARAYAN: No, Your Honor, thank you.

THE COURT: Thank you very much. No one has to stand, thank you.

(Proceedings concluded at 11:20 a.m.)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. NATIONAL ENERGY POLICY DEVELOPMENT GROUP, Defendant.	Civ. Action. 01-1530 (EGS)
SIERRA CLUB, Plaintiff, v. VICE PRESIDENT RICHARD CHENEY, *et al.* Defendants,	Civ. Action 02-631 (EGS)

ORDER

Pursuant to the motions hearing held in this matter on October 17, 2002, and for the reasons given in open Court and outlined in this Court's July 11, 2002 Memorandum Opinion, it is by the Court hereby

ORDERED that defendants' motion for reconsideration of the Court's August 2, 2002 order is hereby **DENIED**; and it is

FURTHER ORDERED that defendants' motion for a protective order is hereby **DENIED**; and it is

FURTHER ORDERED that the defendants who have not already done so shall produce non-privileged documents and a privilege log in compliance with this Court's August 2, 2002 Order by no

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later than November 5, 2002; and it is

FURTHER ORDERED that the defendants shall file any motion requesting a stay of proceedings pending appeal by no later than **October 21, 2002** at 12:00 p.m.; and it is

FURTHER ORDERED that plaintiffs shall respond in writing to the defendants' motion to stay by no later than **October 24, 2002** at 12:00 p.m.; and it is

FURTHER ORDERED that defendants shall submit a reply to plaintiffs' response by no later than **October 25, 2002** at 12:00 p.m.; and it is

FURTHER ORDERED that a hearing will be held on defendants' motion requesting a stay pending appeal on **October 31, 2002** at **1:00 p.m.** in **Courtroom One.**

Signed: EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE
October 17, 2002

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Notice to:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,

Plaintiff,

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP,

Defendant.

Case No. 01-CV-1530

Washington, D.C.
October 31, 2002
1:20 p.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff Judicial Watch: LARRY KLAYMAN, ESQ.

For Plaintiff Sierra Club: DAVID BOOKBINDER, ESQ.
ROGER ADELMAN, ESQ.
* SANJAY NARAYAN, ESQ.
* ALEX LEVINSON, ESQ.

For the Defendant: SHANNEN W. COFFIN, ESQ.
CRAIG BLACKWELL, ESQ.
THOMAS MILLET, ESQ.

* Appearing by telephone.

Court Reporter: BRYAN A. WAYNE, RPR
Official Court Reporter
U.S. Courthouse, Room 4808-B
Washington, D.C. 20001
202-216-0313

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

Bryan A. Wayne, RPR
Official Court Reporter

COPY316

PROCEEDINGS

THE DEPUTY CLERK: Civil Action 01-1530, Judicial Watch versus National Energy Policy Development Group. Will counsel please stand and identify yourselves.

MR. KLAYMAN: Larry Klayman for Judicial Watch.

THE COURT: Mr. Klayman.

MR. BOOKBINDER: David Bookbinder for Sierra Club.

MR. ADELMAN: Roger Adelman, local counsel for the Sierra Club.

MR. COFFIN: Shannen Coffin for the United States with Craig Blackwell and Tom Millet.

THE COURT: Good afternoon, Counsel. I just need to get a clarification first from the government. On the one hand, the government has filed a motion for a stay of the Court's orders pending appeal, and alternatively, if I understand your submissions correctly, the government has also requested additional time within which to complete its document search in preparation of a privilege log. I always thought it was the government's intent to not comply with the Court's orders, so I need some clarification.

MR. COFFIN: They're alternative relief. If you were to give us the stay, Your Honor, I don't think we need to address the due date because the issue would be joined in the Court of Appeals. If you don't give us the stay, we would then go to the Court of Appeals to seek a stay. Having said that,

if we weren't to get a stay from this court, we would simply want some more time from the November 5 deadline in the absence of a stay to complete the review.

THE COURT: That's where I'm confused, because I never thought it was the government's intent to comply with the Court's order. I guess I don't understand your request for additional time within which to complete your review of documents and then to prepare and file your privilege log if you don't intend to comply with the Court's order. I just don't understand that.

MR. COFFIN: I don't think that's -- let me say this. There's always the option to go into contempt. We haven't made a decision that we're going to go into contempt, so we'd like to be able to try to comply with the order if we don't have a stay from this court or --

THE COURT: All right. I just wanted a clarification. So if I deny the request for a stay, the government is asking for additional time to complete its review of documents in preparation of its privilege log ostensibly in an effort to comply with the Court's order, is that correct?

MR. COFFIN: In absence of the stay, yes, Your Honor.

THE COURT: So in the absence of a stay, the government intends to comply with our orders then, is that correct?

MR. COFFIN: If we don't get a Court of Appeals stay,

I don't know what choice we have except for contempt.

THE COURT: Okay.

MR. COFFIN: I suppose that's an option, but we certainly haven't made a decision that we're not going to comply with your orders, Your Honor.

THE COURT: But you haven't complied with the orders, though, up to this point.

MR. COFFIN: Well, Your Honor, we've had a protective order motion in, and our reading of the civil rules of procedure is that that stays the obligation to respond to discovery. So it's simply we haven't complied yet because of the protective order motion. Now that you have ruled, we would seek appeal of that ruling, but if we're unsuccessful --

THE COURT: I haven't ordered the government to release any privileged documents at all. I haven't done that at all. All I said was comply with the order; if there are privileged documents, tell me what the documents are without prejudicing yourself.

You can tell me what the documents are in an appropriate privilege log, and I'll determine whether privilege is properly asserted or not. It's not as if I've ordered the government to turn over all the documents that the government contends are privileged. Indeed, the government told me last year it hadn't even completed its review of all the documents. That process is now in place though, is that correct, review of the

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documents?

MR. COFFIN: Yes, sir, Your Honor. Can I step back to what happened at the last hearing? Because I just want to say that it was not clear from what I said, and I want to make clear that we certainly did enough to satisfy ourselves of the merits of our constitutional arguments. The boxes that we've had set aside have been set aside for quite some time.

I do apologize to the Court for the confusion. But we had done enough to satisfy ourselves of the merits of that argument, but we certainly hadn't done the privilege log and the Bates numbers and all the stuff that goes with a document production.

THE COURT: All right.

MR. COFFIN: But let me --

THE COURT: If I'm inclined to grant the government additional time to complete its review of the documents, how much time do you need?

MR. COFFIN: Well, Mr. Bookbinder and I have been speaking about that. I haven't spoken to Mr. Klayman this morning.

THE COURT: I'll hear from both of those gentlemen. My reading of their responses -- I understand from their responses to my order was that Sierra Club has no objection to a reasonable period of time. Judicial Watch does have an objection.

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MR. COFFIN: That's right. And what I've spoken to Sierra Club about, and at least we've come to an agreement, is that I believe three weeks from tomorrow would be the date?

MR. BOOKBINDER: The 23rd. I don't know where that fits.

THE COURT: What is today, the 31st?

MR. COFFIN: Today is the 31st, Your Honor.

THE COURT: Three weeks from tomorrow to complete your review and to do what?

MR. BOOKBINDER: Excuse me, Your Honor. The 22nd is a Friday. My apologies.

MR. COFFIN: Sorry. The 22nd. That makes sense.

THE COURT: The 22nd.

MR. COFFIN: This is what we would foresee going on here. We would be moving towards complying with your order, but we would also be seeing, if you were to deny the stay, we would be seeking to get a stay in the Court of Appeals. And that's sort of the --

THE COURT: All right, I understand. I think I understand what you're saying. All right. So if I deny your request for a stay, then you will proceed -- you're making representations you'll proceed with your documents search in an effort to comply with the Court's order, nevertheless availing yourself of your right to seek your stay in the Court of Appeals.

MR. COFFIN: That's correct.

THE COURT: And this is all separate and apart from the motion filed by the government for interlocutory appeal, which putting that aside for the time being, it's probably going to be moot. Let's assume I deny the request for a stay, which I probably will do, but I'll also -- and I want to hear from other counsel as well -- I'll probably grant your request for additional time. I'll probably do that based on your representations that you're reviewing in an effort to prepare a privilege log.

And by the same token, you're seeking a stay in the Court of Appeals, so you'll have some time. Even if I were to deny the motion for interlocutory appeal next week, you certainly have time between now and the compliance date to seek whatever you want to seek from the circuit. And our courts of appeal have said on many, many occasions, the prospect of proceeding with contempt in cases like this should be avoided, and I certainly have no intent to proceed along those lines.

So that's probably going to be a moot issue, interlocutory appeal probably, assuming I deny the request for a stay, which I will probably do. I'll give you the time to comply with my order, and then you're free to seek whatever relief you want from the circuit then, correct?

MR. COFFIN: Your Honor, I'm hoping I have a chance to convince you to grant our stay, but if you were to deny the

stay --

THE COURT: Well, go ahead. I'll give you a few minutes. I've read your pleadings; I'm obviously very familiar with your pleadings, but if there's some principal point or points you wish to make in an effort to persuade me to grant your request for a stay, be my guest.

MR. COFFIN: Okay. Well, let's talk for a minute about the seriousness of the issue. I think that the legal issues involved in this case, I recognize that Your Honor has disagreed with us on these, but I don't think you've ever said that they're frivolous legal issues. As a matter of fact, at the last hearing you called these important legal issues.

THE COURT: It's an important case.

MR. COFFIN: I agree, and I think as a result, the issues that we present and we intend to appeal are certainly important and serious issues. So I think that we do meet the first part of the stay standard, so the question then becomes about harm.

THE COURT: Now, that's an issue I want you to focus on, irreparable harm. It's not as if I've abused my authority and said to the government, turn over those documents, I don't care if they're privileged or not, turn them over right now and I'm not going to stay my order. You could make a very compelling argument for irreparable harm under those circumstances.

All I've said, though, consistent with precedent of law standing is to produce the nonprivileged documents, and indeed if there are privileged documents, prepare and file your privilege log. Indeed, I've said prepare and file it under seal for my eyes only or for the eyes only for a magistrate judge. But I wouldn't delegate; I would do it myself so that an independent determination can be made as to whether or not privilege can be properly invoked.

So I've not told the government to turn over privileged documents without any protection whatsoever, which would indeed be irreparable harm. The harm as I understand your argument to be, though, is the intrusion by the Court of requiring the government to even assert its privilege and to prepare a privilege log. That's an intrusion that I believe the government is of the opinion is unconstitutional.

MR. COFFIN: In the absence of a showing of compelling need.

THE COURT: And that's the irreparable harm then.

MR. COFFIN: Well, the irreparable harm would be if you accept our argument, which I know you haven't, but if you accept our argument that there is a constitutional harm in the absence of a showing of need to require us to submit to discovery under these circumstances, if we go up on appeal and don't have a stay, we've lost. I mean, we've lost our argument. We don't have an argument. You've effectively

mooted our argument because we'll have to comply with your order.

THE COURT: So then you're conceding then that you have no direct right to appeal then.

MR. COFFIN: Oh, no.

THE COURT: I'm sorry. We have some static coming from the telephone. Let's just see what's going on. Hello? Someone dialed in. Hello, Counsel.

MR. NARAYAN: Yes, I hear you, Your Honor.

THE COURT: Let's just get your names. How are you today?

MR. NARAYAN: Just fine, thank you. This is Sanjay Narayan and Alex Levinson with the Sierra Club.

THE COURT: All right. Good afternoon, Counsel.

MR. COFFIN: Your Honor, your question was whether I was conceding that we didn't have a right to appeal. No, not at all, but if we appeal in the absence of a stay, then we're going to have to comply with your order because it's a discovery order.

THE COURT: If I don't grant you a stay and I extend the time for compliance of my order to November 22 or 23, you certainly have time within which to request a stay from the circuit down here.

MR. COFFIN: Well, yes, we do.

THE COURT: Then you haven't lost your argument then,

have you?

MR. COFFIN: In that sense no, but why would this court require the Court of Appeals to make that determination when it's teed up for you to make? I'm not quite sure -- I mean, it's the same argument we'd be making to the Court of Appeals.

THE COURT: Exactly, and often times --

MR. COFFIN: If the Court of Appeals would grant the stay, then that means that this court should grant the stay. And the only way we --

THE COURT: I guess the point I'm making, Counsel, I'm not foreclosing the Court of Appeals from granting you whatever relief the Court of Appeals wants to grant you; I'm just saying our rules require that you make the request for a stay in this court in the first instance, and there's times when district judges for reasons, various reasons, maybe a district court's view as a matter of law that the basis for a stay has not been persuasive, deny the request for a stay, which doesn't preclude a litigant from seeking relief in the circuit court.

And you certainly aren't laboring under any significant time constraints, because my order for compliance would be the 23rd or 22nd or whatever date is agreeable to the parties. You could in your leisure seek a stay from the circuit. So you're not without your remedy, don't you agree?

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MR. COFFIN: I have to disagree in the sense that the issue -- we would certainly have time to go to the Court of Appeals, but I don't think that's the issue. The issue that is before this court is whether denying a stay would effectively harm us.

THE COURT: Nothing's going to happen to you and your clients. This is not a scenario -- I mean, I could envision a scenario that you're complaining of that doesn't exist, and that would be that the due date is tomorrow and the judge says I'm not extending this date and the government has to comply by tomorrow and I'm denying your request for a stay. Then you're off to the circuit court, right?

MR. COFFIN: Yes.

THE COURT: All right. That's not the scenario that I'm talking about. I may be well inclined -- in fact, I am inclined to grant you a stay based on your good faith representations that you want to continue with your search and that you want to prepare a privilege log. That's fine.

MR. COFFIN: You mean an extension, Your Honor.

THE COURT: Yes, an extension, I'm sorry. Thank you for correcting me. I'm inclined to grant your request for extension of time and then deny the request for a stay because I don't believe the standards for a stay are persuasive as a matter of fact or law, and that doesn't foreclose you from seeking your remedy in the circuit court unless I disagree with

you.

And then you say, Judge, then we're without a remedy then because then we have to comply with the order. You don't immediately have to turn over anything. You have three weeks within which to seek expedited consideration -- well, you're a lawyer. I shouldn't tell you what those remedies are; you know what those remedies are.

MR. COFFIN: But Your Honor, the question here is not whether -- it's not whether we could get a stay from the Court of Appeals. That would mean you would never have to grant a stay in any case.

THE COURT: Oh, no. We're not arbitrary, no. I mean I look at the -- I mean, I measure each request for a stay against precedent, Holiday Tours test is indeed the fountainhead case for determining whether or not a basis exists for a stay; similar, if not identical to the standards for extraordinary legal relief in the forms of TROs and preliminary injunctions, and there are times when I will deny a stay and the Court of Appeals will grant a stay.

That's the way the process works. It may well be that I could deny a stay in this case and the Court of Appeals will grant it, but nothing onerous is going to happen to your client between now and the Court of Appeals --

MR. COFFIN: Let's just assume that the 22nd was the deadline here. I find it hard to believe that the Court of

Appeals would issue us final relief so that a stay would have to be granted by the Court of Appeals or by this court prior to the 22nd. So the question is really whether -- the question before this court in the legal analysis is whether we need a stay to secure effective appeal, and we do, because there's no way before the 22nd that we're going to get our relief so that we'd have to by the 22nd comply with the order.

THE COURT: It's conceivable that the Court of Appeals may differ from this court's view about the need for a stay. If the Court of Appeals is of the opinion that a stay is appropriate, then certainly the Court of Appeals will -- well, I can't speak for the Court of Appeals. It's very conceivable that the Court of Appeals would grant a stay before the compliance date.

MR. COFFIN: We believe that it will, because we think that we meet the standard for a stay here. With all due respect, I think there's -- I think that there's a sense of abdication about that part of the standard here, because this court has to determine whether or not there's injury to the government. There would be an injury to our argument in the absence of a stay if we had to comply with the order of this court pending an appeal.

THE COURT: All right. And the injury is the search process and the preparation of the log or turning over the documents?

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2002 a true and correct copy of the foregoing PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS was served via hand-delivery, on the following:

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MR. COFFIN: It's the entire process. It's both.

THE COURT: So that's the government's position, it's being injured then?

MR. COFFIN: We believe we are, but we're doing so out of good faith in order to comply.

THE COURT: And I appreciate that. I appreciate that. I think that's how the three branches of government should coexist. You disagree with the order you're complying with, and I appreciate that. And I think it's appropriate that the order is being complied with, and I'm most inclined to grant you additional time within which to continue to comply with the order.

I understand what you're saying. I disagree with you as to whether or not as a matter of fact and law there is injury, a constitutional injury or an injury of the magnitude that you speak of. I would agree with you completely if I were to abuse my authority and say I don't care if these documents are privileged, turn them over, and if you don't, let the chips fall where they may. But I would never do that. I would never knowingly abuse my authority.

MR. COFFIN: But that's a matter of degree, Your Honor. It's not a matter of us showing irreparable harm. I mean --

THE COURT: No, I understand your argument.

MR. COFFIN: Okay. Well, there's an important point

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I wanted to make about --

THE COURT: I thought that was the most important point.

MR. COFFIN: Well, there's harm to the plaintiffs as well.

THE COURT: All right. And the public interest. Don't forget that, now.

MR. COFFIN: The important point is that their argument is delay, that there's been a lot of delay and there's going to be more delay if you give a stay. Let me suggest, however, and this may require a little bit of explication, that there's not really a delay if in fact an appeal goes forward and we lose the appeal and then we have to comply with this court's order. Because if we do get to the point where we assert privilege in a privilege log, that's going to require a showing of need.

I think the only difference that this court has had with the U.S.'s position has been a matter of timing, and I understand you believe that to be a very serious difference. But there's no question that if we assert privilege, the presumption of the privilege arises and the plaintiffs will then have to show need, which means they have to show in part under the Dellen standard and under the Emory Seal case standard that the lack of availability of these documents from other sources, which means that the other discovery in this

case has to go forward and will be going forward.

So I don't really think that there's going to be -- those resources have to be exhausted by plaintiffs before you can even get to the privilege issue. So I really don't think that they're really -- I mean, they can talk about theoretical delay here, but in practical terms, I don't think there's going to be much of a delay. So Your Honor, that's our position.

THE COURT: Let me hear from you with respect to the motion that's not before the Court, and that's the motion for the request for certification for interlocutory appeal purposes. Your motion's been filed. My recollection is responses have not been filed. I didn't put in place a briefing schedule. I should put that in place.

MR. COFFIN: I think their responses are due on Monday under the current schedule, but my colleague is going to want some more time. We've talked about it.

THE COURT: All right. Then I'll hear from plaintiffs in that regard, and I'll give you a chance to be heard again. Mr. Klayman?

MR. KLAYMAN: Your Honor, I think it's important because I'm going to ask Your Honor to set some times here, if Your Honor will grant my request, is to understand the context of this case. We sometimes lose sight of that. As lawyers before this court, we try to remain civil. We certainly have tried. My co-counsel and Your Honor's handled this in a very

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admirable and gentlemanly way.

THE COURT: Everyone's been a gentleman before the Court. Everyone's been a gentleman and a lady before the Court. I invite zealous advocacy, so everyone's been most civil.

MR. KLAYMAN: Unfortunately, we have to look at the facts of what's gone on at this point in time. We're now well over a year into the case. The government has known all along, and when I say the government, this administration has known all along what it was going to do. They're big boys; we've seen it in many other cases.

They've known that they were going to try to take this appeal, if Your Honor grants it, in an interlocutory matter by certification, or they'll try a writ of mandamus. They'll take this issue to the appellate court, it will sit there for six to eight months at a minimum, it will come back, nothing will happen in the interim. If indeed we win, and we're confident we will win, then we'll just be starting out in the first round of discovery, which is simply finding out what the constitutionality was of this task force.

Once we complete that and Your Honor makes a ruling, they'll try to delay as long as possible. They'll try to take that up on appeal. When Your Honor rules that we should proceed beyond that point, if Your Honor does rule that, we'll be well beyond this administration, a tried and tested

technique which is used in many different cases. We've seen it in all of our different cases. That's why it's important to understand where we are.

Number one, Your Honor, they're already in a contempt situation. Your Honor issued orders of August 3 which required them to produce documents or object, and they defied that. We're in a contempt situation because it's now quite clear that they didn't even review documents. In fact, we're in a contempt/bad faith situation because they didn't even start their review, it's apparent from their affidavits and their pleadings, until after the last hearing. They have not been in good faith with this court.

And last but not least, Your Honor, and I don't say this lightly, we have filed a supplementary motion for contempt for an order to show cause. I have been personally threatened through intermediaries. I'm prepared to provide the names of the people who provided that information; one a high-level informant who works with a government enforcement agency; another, someone well respected in town; statements made to the columnist, Robert Novak: What are we going to do about this Larry Klayman?

THE COURT: That's a collateral matter. I really don't want to get sidetracked on a collateral matter, but you know --

MR. KLAYMAN: Well, Your Honor --

THE COURT: Let me say one thing. It's important to you. You've made serious allegations, they're important to you, they're serious to you, and because of the severity of the allegations, I should probably refer those matters to the U.S. Attorney's Office, Roscoe Howard's office, and let him sort it out.

MR. KLAYMAN: Well, I think you should do both, Your Honor.

THE COURT: I have enough on my plate.

MR. KLAYMAN: The problem is, that is the Justice Department. You can pretty much figure out what the results are going to be.

THE COURT: He's an outstanding prosecutor, though.

MR. KLAYMAN: I would ask that you do both, and I would ask -- and what those allegations are, as you may remember, is not just what are we going to do about Larry Klayman, and that was a Justice Department official to Robert Novak --

THE COURT: You're in fear of your safety, are you?

MR. KLAYMAN: I could be. I could be.

THE COURT: I'd just as soon refer that whole matter, Mr. Klayman, to the attention of the United States Attorney for the District of Columbia for whatever consideration his office wishes to give it. And that would not be the first time that I've referred serious matters that litigants before me take

very seriously. And because they take them very seriously, so do I.

But I don't have the resources of the prosecutor's office. I don't have investigators. I have two overworked law clerks, brilliant as they are. I just don't have the resources to get involved in investigating something of that magnitude as Mr. Howard does. I'd keep it here for the record, but I'd want to give them first opportunity to --

MR. KLAYMAN: Well, we recommended that Your Honor do both, so we'd welcome a referral, recognizing that that is the Justice Department, and 99.9 percent of the time -- and I'm a former Justice Department prosecutor, proud to have been one at a different time --

THE COURT: Is that right?

MR. KLAYMAN: I am. I was with the Antitrust Division. I did civil and criminal. But the reality is, is that you know what happens when the Justice Department investigates itself. It's what happens when any entity investigates itself.

THE COURT: Well, if I thought that it would be a useless effort, I wouldn't do it. I have the highest regard for Mr. Howard.

MR. KLAYMAN: If you supervise it, Your Honor, I'll take your word for it.

THE COURT: Well, see again, there's a fine line

between my job and the executive branch's job, and I would never attempt to supervise or oversee a criminal prosecution. I'd be happy to write a letter, and I will do so today, referring -- and I'll attach copies of your motions -- referring those matters to the attention of the U.S. Attorney's Office for whatever consideration that office wishes to give. If I get a letter back from Mr. Howard in 90 days saying, Judge, we don't plan on taking any action, then I'll take whatever further action is necessary.

MR. KLAYMAN: We're prepared to give you hard evidence.

THE COURT: All right. Save it for Mr. Howard.

MR. KLAYMAN: Let's see how they react.

THE COURT: That's fine. I think it's only fair to do so because I just don't have the resources.

MR. KLAYMAN: We had gone through this before with Judge Lamberth where he in fact supervised the Independent Counsel and the Justice Department with regard to Filegate matters and Chinagate matters, and he was calling them in for briefing sessions. In fact, we have a status conference in a week or so which will relate to some of those matters.

THE COURT: Maybe I should refer this matter to Judge Lamberth then.

MR. KLAYMAN: That would be fine.

THE COURT: Do you think he would agree to --

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MR. KLAYMAN: I think you're both a lot alike. I respect and admire both of you.

THE COURT: Thank you very much. I have the highest regard for my colleague, but he's got enough on his plate as well.

MR. KLAYMAN: But it is a serious matter.

THE COURT: It is. You've made serious allegations. I don't take any allegations lightly, especially that an officer of the Court makes. I'm just being candid with you, Counsel. I just don't have the resources to delve into issues of that magnitude. Mr. Howard has an army of lawyers over there, and it's an outstanding U.S. Attorney's Office. And if I make the referral for whatever consideration, I'm sure they will not take lightly your allegations. I can't promise what the end result will be, but they're not going to take lightly a referral.

MR. KLAYMAN: As Your Honor says, let's see what happens, and we can take it up after, I would ask, 60 to 90 days.

THE COURT: Well, I'm not going to tell Mr. Howard -- I'm not going to tie his hands for 60 to 90 days. He's a professional. He'll treat it in a professional manner. Let me ask you something.

MR. KLAYMAN: The point I'm making --

THE COURT: Let me ask you something, though. I want

to get back to request for a stay. I know you oppose their pleadings. I know you oppose it. I'm inclined to grant the request for additional time because the government is, in my view, in good faith complying with my order.

They're reviewing the documents, they're preparing a privilege log, and I think it would be an abuse of my authority to say to the government under those circumstances, no, I'm not going to give you a date. That would not be the correct decision to make. So I'm inclined to do that.

Do you agree or disagree, though, with Mr. Coffin when he says if I give the government additional time within which to ostensibly comply but nevertheless deny the request for a stay that indeed their appellate possibilities are foreclosed? Do you agree with that?

MR. KLAYMAN: No, I don't agree with it. They don't have any appellate possibilities. This is a discovery issue, and there's none to begin with, and all they're trying to do is run out the clock. And as I've said, Your Honor, we've seen it before. I can assure you if you were to order them to produce internal documentation as to when they made the decision to pursue this strategy, you would find out --

THE COURT: I'm not going to do that.

MR. KLAYMAN: -- you would find out that it was well over six months to a year ago that they knew exactly what they were going to do. They've succeeded. They've won. They've

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Victims Claims Process

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

OA/NARA#: 2172/2083
9702

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Counsel's Office, White House

Kavanaugh, Brett

Subject Files

Victims Compensation - Armitage Letter

OA/NARA#: 2165/2076
9695

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Victims of Terrorism Compensation

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Bill 3 of 50

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Embassy Employee Compensation Act (Introduced in the House)

HR 3375 IH

107th CONGRESS

1st Session

H. R. 3375

To provide compensation for the United States citizens who were victims of the bombings of United States embassies in East Africa on August 7, 1998, on the same basis as compensation is provided to victims of the terrorist -related aircraft crashes on September 11, 2001.

IN THE HOUSE OF REPRESENTATIVES

November 29, 2001

Mr. BLUNT (for himself, Mr. MORAN of Virginia, Mr. WOLF, Mr. OBEY, Mr. ISAKSON, Mr. WYNN, Mr. BOYD, Ms. MCKINNEY, Mr. FRANK, Ms. WATERS, Mr. FALEOMAVAEGA, Mr. WATT of North Carolina, Mr. SCOTT, Mr. THOMPSON of Mississippi, Mr. OWENS, and Mr. PAYNE) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide compensation for the United States citizens who were victims of the bombings of United States embassies in East Africa on August 7, 1998, on the same basis as compensation is provided to victims of the terrorist -related aircraft crashes on September 11, 2001.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the `Embassy Employee Compensation Act'.

REV_00264761

SEC. 2. DEFINITIONS.

In this Act, the following definitions apply:

(1) CLAIMANT- The term `claimant' means an individual filing a claim for compensation under section 5(a)(1).

(2) COLLATERAL SOURCE- The term `collateral source' means all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the bombings of United States embassies in East Africa on August 7, 1998.

(3) ECONOMIC LOSS- The term `economic loss' means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

(4) ELIGIBLE INDIVIDUAL- The term `eligible individual' means an individual determined to be eligible for compensation under section 5(c).

(5) NONECONOMIC LOSSES- The term `noneconomic losses' means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.

(6) SPECIAL MASTER- The term `Special Master' means the Special Master appointed under section 404(a) of the September 11th Victim Compensation Fund of 2001 (title IV of the Air Transportation Safety and System Stabilization Act (Public Law 107-42; 115 Stat. **XX**)).

SEC. 3. PURPOSE.

It is the purpose of this Act to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the bombings of United States embassies in East Africa on August 7, 1998.

SEC. 4. ADMINISTRATION.

(a) IN GENERAL- The Attorney General, acting through the Special Master, shall--

(1) administer the compensation program established under this Act;

(2) promulgate all procedural and substantive rules for the administration of this Act; and

(3) employ and supervise hearing officers and other administrative personnel to perform

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the duties of the Special Master under this Act.

(b) AUTHORIZATION OF APPROPRIATIONS- There are authorized to be appropriated such sums as may be necessary to pay the administrative and support costs for the Special Master in carrying out this Act.

SEC. 5. DETERMINATION OF ELIGIBILITY FOR COMPENSATION.

(a) FILING OF CLAIM-

(1) IN GENERAL- A claimant may file a claim for compensation under this Act with the Special Master. The claim shall be on the form developed under paragraph (2) and shall state the factual basis for eligibility for compensation and the amount of compensation sought.

(2) CLAIM FORM-

(A) IN GENERAL- The Special Master shall develop a claim form that claimants shall use when submitting claims under paragraph (1). The Special Master shall ensure that such form can be filed electronically, if determined to be practicable.

(B) CONTENTS- The form developed under subparagraph (A) shall request--

(i) information from the claimant concerning the physical harm that the claimant suffered, or in the case of a claim filed on behalf of a decedent information confirming the decedent's death, as a result of the bombings of United States embassies in East Africa on August 7, 1998;

(ii) information from the claimant concerning any possible economic and noneconomic losses that the claimant suffered as a result of such bombings; and

(iii) information regarding collateral sources of compensation the claimant has received or is entitled to receive as a result of such bombings.

(3) LIMITATION- No claim may be filed under paragraph (1) after the date that is 2 years after the date on which regulations are promulgated under section 7.

(b) REVIEW AND DETERMINATION-

(1) REVIEW- The Special Master shall review a claim submitted under subsection (a) and determine--

(A) whether the claimant is an eligible individual under subsection (c);

(B) with respect to a claimant determined to be an eligible individual--

(i) the extent of the harm to the claimant, including any economic and noneconomic losses; and

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(ii) the amount of compensation to which the claimant is entitled based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant.

(2) NEGLIGENCE- With respect to a claimant, the Special Master shall not consider negligence or any other theory of liability.

(3) DETERMINATION- Not later than 120 days after that date on which a claim is filed under subsection (a), the Special Master shall complete a review, make a determination, and provide written notice to the claimant, with respect to the matters that were the subject of the claim under review. Such a determination shall be final and not subject to judicial review.

(4) RIGHTS OF CLAIMANT- A claimant in a review under paragraph (1) shall have--

(A) the right to be represented by an attorney;

(B) the right to present evidence, including the presentation of witnesses and documents; and

(C) any other due process rights determined appropriate by the Special Master.

(5) NO PUNITIVE DAMAGES- The Special Master may not include amounts for punitive damages in any compensation paid under a claim under this Act.

(6) COLLATERAL COMPENSATION- The Special Master shall reduce the amount of compensation determined under paragraph (1)(B)(ii) by the amount of the collateral source compensation the claimant has received or is entitled to receive as a result of the bombings of United States embassies in East Africa on August 7, 1998.

(c) ELIGIBILITY-

(1) IN GENERAL- A claimant shall be determined to be an eligible individual for purposes of this subsection if the Special Master determines that such claimant--

(A) is an individual described in paragraph (2); and

(B) meets the requirements of paragraph (3).

(2) INDIVIDUALS- A claimant is an individual described in this paragraph if the claimant is--

(A) a citizen of the United States who--

(i) was present at the United States Embassy in Nairobi, Kenya, or the United States Embassy in Dar es Salaam, Tanzania, at the time, or in the immediate aftermath, of the bombings of United States embassies in East Africa on August 7, 1998; and

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(ii) suffered physical harm or death as a result of such a bombing; or

(B) in the case of a decedent who is an individual described in subparagraph (A), the personal representative of the decedent who files a claim on behalf of the decedent.

(3) REQUIREMENTS-

(A) SINGLE CLAIM- Not more than one claim may be submitted under this Act by an individual or on behalf of a deceased individual.

(B) LIMITATION ON CIVIL ACTION-

(i) IN GENERAL- Upon the submission of a claim under this Act, the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the bombings of United States embassies in East Africa on August 7, 1998. The preceding sentence does not apply to a civil action to recover collateral source obligations.

(ii) PENDING ACTIONS- In the case of an individual who is a party to a civil action described in clause (i), such individual may not submit a claim under this Act unless such individual withdraws from such action by the date that is 90 days after the date on which regulations are promulgated under section 7.

SEC. 6. PAYMENTS TO ELIGIBLE INDIVIDUALS.

(a) IN GENERAL- Not later than 20 days after the date on which a determination is made by the Special Master regarding the amount of compensation due a claimant under this Act, the Special Master shall authorize payment to such claimant of the amount determined with respect to the claimant.

(b) PAYMENT AUTHORITY- This Act constitutes budget authority in advance of appropriations Acts and represents the obligation of the Federal Government to provide for the payment of amounts for compensation under this Act.

(c) ADDITIONAL FUNDING-

(1) IN GENERAL- The Attorney General is authorized to accept such amounts as may be contributed by individuals, business concerns, or other entities to carry out this Act, under such terms and conditions as the Attorney General may impose.

(2) USE OF SEPARATE ACCOUNT- In making payments under this section, amounts contained in any account containing funds provided under paragraph (1) shall be used prior to using appropriated amounts.

SEC. 7. REGULATIONS.

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Not later than 90 days after the date of enactment of this Act, the Attorney General, in consultation with the Special Master, shall promulgate regulations to carry out this Act, including regulations with respect to--

(1) forms to be used in submitting claims under this Act;

(2) the information to be included in such forms;

(3) procedures for hearing and the presentation of evidence;

(4) procedures to assist an individual in filing and pursuing claims under this Act; and

(5) other matters determined appropriate by the Attorney General.

SEC. 8. RIGHT OF SUBROGATION.

The United States shall have the right of subrogation with respect to any claim paid by the United States under this Act.

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S 2134 IS

107th CONGRESS

2d Session

S. 2134

To allow American victims of state sponsored terrorism to receive compensation from blocked assets of those states.

IN THE SENATE OF THE UNITED STATES

April 16, 2002

Mr. HARKIN (for himself, Mr. ALLEN, Mr. SMITH of New Hampshire, Mr. SCHUMER, Mr. NICKLES, Mrs. CLINTON, Mr. WARNER, Ms. MIKULSKI, Mr. BURNS, and Mr. CRAIG) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To allow American victims of state sponsored terrorism to receive compensation from blocked assets of those states.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the `Terrorism Victim's Access to Compensation Act of 2002'.

SEC. 2. FINDINGS.

Congress finds that:

(1) The war against international terrorism must be fought and won on multiple fronts.

(2) The state sponsors of international terrorism (including their agencies and instrumentalities) are ultimately responsible for the damages, pain, and suffering inflicted upon Americans who are victimized by terrorist acts. It is the state sponsors, not the American taxpayer, who must be compelled to pay those costs.

(3) The Secretary of the Treasury lawfully controls billions of dollars in blocked assets of several governments which the President and the Department of State have determined to be state sponsors of international terrorism and responsible for multiple terrorist attacks on United States citizens abroad.

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(4) There have been multiple Federal lawsuits brought since 1996 by American victims of state sponsored terrorism abroad and final judgments and financial awards in some of those cases have been paid appropriately by using some of the blocked assets of state sponsors of terrorism. Additional cases are still pending.

(5) Paying victims of state sponsored terrorism from the blocked assets of state sponsors of acts of terrorism (including their agencies and instrumentalities) will punish those entities, deter future acts of terrorism, and provide a powerful incentive for any foreign government to stop sponsoring terrorist attacks on Americans.

(6) There must be a level playing field for all American victims of state sponsored terrorism who are pursuing redress in the Federal courts and compensation from the blocked assets of state sponsors of terrorism (including their agencies and instrumentalities).

SEC. 3. SENSE OF THE SENATE.

Considering the policy set forth in this Act, the Antiterrorism and Effective Death Penalty Act of 1996, and in the Victims of Trafficking and Violence Protection Act of 2000, it is the sense of Congress that it should be the policy of the United States--

(1) to use the blocked assets of state sponsors of acts of terrorism (including their agencies and instrumentalities) that are under the control of the Secretary of the Treasury to pay court-ordered judgments and awards made to United States nationals harmed by such acts; and

(2) to provide equal access to all United States victims of state sponsored terrorism who have secured judgments and awards in Federal courts against state sponsors of terrorism (including their agencies and instrumentalities) and that those judgments and awards be paid by state sponsors of terrorism (including their agencies and instrumentalities) from any of their blocked assets controlled by the Secretary of the Treasury.

SEC. 4. SATISFACTION OF JUDGMENTS FROM BLOCKED ASSETS OF TERRORISTS, TERRORIST ORGANIZATIONS, AND STATE SPONSORS OF TERRORISM.

(a) IN GENERAL- Except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim for compensatory damages for an act of terrorism, or a claim for compensatory damages brought pursuant to section 1605(a)(7) of title 28, United States Code, the blocked assets of any terrorist party, or any agency or instrumentality of a terrorist party, shall be available for satisfaction of the judgment.

(b) PRESIDENTIAL WAIVER-

(1) IN GENERAL- Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) in connection with (and prior to the enforcement of) any judicial order directing attachment or satisfaction in aid of execution of judgment, or

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execution of judgment, against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(2) EXCEPTION- A waiver under this subsection shall not apply to--

(A) property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used for any nondiplomatic purpose (including use as rental property), and the proceeds of such use; or

(B) any asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that is sold or otherwise transferred for value to a third party, and the proceeds of such sale or transfer.

(c) DEFINITIONS- In this Act:

(1) BLOCKED ASSETS- The term `blocked assets' means assets seized or blocked by the United States in accordance with law.

(2) PROPERTY AND ASSETS SUBJECT TO VIENNA CONVENTIONS- The terms `property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations' and `asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations' mean any property or asset, respectively, the attachment in aid of execution or execution of which may, for the limited purpose of satisfying a judgment under subsection (a), breach an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.

(3) TERRORIST PARTY- The term `terrorist party' means a terrorist, a terrorist organization, or a foreign state designated as a state sponsor of terrorism under section 6 (j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) (including any agency or instrumentality of that state).

END

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Code of Criminal Procedure

CHAPTER 56. RIGHTS OF CRIME VICTIMS

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CHAPTER 56. RIGHTS OF CRIME VICTIMS

SUBCHAPTER A. CRIME VICTIMS' RIGHTS

Art. 56.01. Definitions

In this chapter:

(1) "Close relative of a deceased victim" means a person who was the spouse of a deceased victim at the time of the victim's death or who is a parent or adult brother, sister, or child of the deceased victim.

(2) "Guardian of a victim" means a person who is the legal guardian of the victim, whether or not the legal relationship between the guardian and victim exists because of the age of the victim or the physical or mental incompetency of the victim.

(3) "Victim" means a person who is the victim of sexual assault, kidnapping, or aggravated robbery or who has suffered bodily injury or death as a result of the criminal conduct of another.

Added by Acts 1985, 69th Leg., ch. 588, § 1, eff. Sept. 1, 1985.

Art. 56.02. Crime victims' rights

(a) A victim, guardian of a victim, or close relative of a deceased victim is entitled to the following rights within the criminal justice system:

(1) the right to receive from law enforcement agencies adequate protection from harm and threats of harm arising from cooperation with prosecution efforts;

(2) the right to have the magistrate take the safety of the victim or his family into consideration as an element in fixing the amount of bail for the accused;

(3) the right, if requested, to be informed of relevant court proceedings and to be informed if those court proceedings have been canceled or rescheduled prior to the event;

(4) the right to be informed, when requested, by a peace officer concerning the defendant's right to bail and the procedures in criminal investigations and by the district attorney's office concerning the general procedures in the criminal justice system, including general procedures in guilty plea negotiations and arrangements, restitution, and the appeals and parole process;

(5) the right to provide pertinent information to a probation department conducting a presentencing investigation concerning the impact of the offense on the victim and his family by testimony, written statement, or any other manner prior to any sentencing of the offender;

(6) the right to receive information regarding compensation to victims of crime as provided by Subchapter B, Chapter 56, including information related to the costs that may be compensated under that Act and the amount of compensation, eligibility for compensation, and procedures for application for compensation under that Act, the payment for a medical examination under Article 56.06 of this

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Art. 56.311. Legislative Findings and Intent

The legislature recognizes that many innocent individuals suffer personal injury or death as a result of criminal acts. Crime victims and persons who intervene to prevent criminal acts often suffer disabilities, incur financial burdens, or become dependent on public assistance. The legislature finds that there is a need for the compensation of victims of crime and those who suffer personal injury or death in the prevention of crime or in the apprehension of criminals. It is the legislature's intent that the compensation of innocent victims of violent crime encourage greater public cooperation in the successful apprehension and prosecution of criminals.

Added by Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.32. Definitions

(a) In this subchapter:

(1) "Child" means an individual younger than 18 years of age who:

(A) is not married; or

(B) has not had the disabilities of minority removed for general purposes under Chapter 31, Family Code.

(2) "Claimant" means, except as provided by Subsection (b), any of the following individuals who is entitled to file or has filed a claim for compensation under this subchapter:

(A) an authorized individual acting on behalf of a victim;

(B) an individual who legally assumes the obligation or who voluntarily pays medical or burial expenses of a victim incurred as a result of the criminally injurious conduct of another;

(C) a dependent of a victim who died as a result of criminally injurious conduct;

(D) an immediate family member or household member of a victim Who requires psychiatric care or counseling as a result of the criminally injurious conduct; or

(E) an authorized individual acting on behalf of an individual who is described by Subdivision (C) or (D) and who is a child.

(3) "Collateral source" means any of the following sources of benefits or advantages for pecuniary loss that a claimant or victim has received or that is readily available to the claimant or victim from:

(A) the offender under an order of restitution to the claimant or victim imposed by a court as a condition of community supervision;

(B) the United States, a federal agency, a state or any of its political subdivisions, or an instrumentality of two or more states, unless the law providing for the benefits or advantages makes them in excess of or secondary to benefits under this subchapter;

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(C) social security, Medicare, or Medicaid;

(D) another state's or another country's crime victims' compensation program;

(E) workers' compensation;

(F) an employer's wage continuation program, not including vacation and sick leave benefits;

(G) proceeds of an insurance contract payable to or on behalf of the claimant or victim for loss that the claimant or victim sustained because of the criminally injurious conduct;

(H) a contract or self-funded program providing hospital and other health care services or benefits; or

(I) proceeds awarded to the claimant or victim as a result of third-party litigation.

(4) "Criminally injurious conduct" means conduct that:

(A) occurs or is attempted;

(B) poses a substantial threat of personal injury or death;

(C) is punishable by fine, imprisonment, or death, or would be punishable by fine, imprisonment, or death if the person engaging in the conduct possessed capacity to commit the conduct; and

(D) does not arise out of the ownership, maintenance, or use of a motor vehicle, aircraft, or water vehicle, unless the conduct is intended to cause personal injury or death or the conduct is in violation of Section 550.021, Transportation Code, or one or more of the following sections of the Penal Code:

(i) Section 19.04 (manslaughter);

(ii) Section 19.05 (criminally negligent homicide);

(iii) Section 22.02 (aggravated assault);

(iv) Section 49.04 (driving while intoxicated);

(v) Section 49.05 (flying while intoxicated);

(vi) Section 49.06 (boating while intoxicated);

(vii) Section 49.07 (intoxication assault); or

(viii) Section 49.08 (intoxication manslaughter).

(5) "Dependent" means:

(A) a surviving spouse;

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(B) a person who is a dependent, within the meaning of the Internal Revenue Code, of a victim; and

(C) a posthumous child of a deceased victim.

(6) "Household member" means an individual who resided in the same permanent household as the victim at the time that the criminally injurious conduct occurred and who is related by consanguinity or affinity to the victim.

(7) "Immediate family member" means an individual who is related to a victim within the second degree by affinity or consanguinity.

(8) "Intervenor" means an individual who goes to the aid of another and is killed or injured in the good faith effort to prevent criminally injurious conduct, to apprehend a person reasonably suspected of having engaged in criminally injurious conduct, or to aid a peace officer.

(9) "Pecuniary loss" means the amount of expense reasonably and necessarily incurred as a result of personal injury or death for:

(A) medical, hospital, nursing, or psychiatric care or counseling, or physical therapy;

(B) actual loss of past earnings and anticipated loss of future earnings and necessary travel expenses because of:

(i) a disability resulting from the personal injury;

(ii) the receipt of medically indicated services related to the disability resulting from the personal injury; or

(iii) participation in or attendance at investigative, prosecutorial, or judicial processes related to the criminally injurious conduct and participation in or attendance at any postconviction or postadjudication proceeding relating to criminally injurious conduct;

(C) care of a child or dependent;

(D) funeral and burial expenses;

(E) loss of support to a dependent, consistent with Article 56.41(b)(5);

(F) reasonable and necessary costs of cleaning the crime scene;

(G) reasonable replacement costs for clothing, bedding, or property of the victim seized as evidence or rendered unusable as a result of the criminal investigation; and

(H) reasonable and necessary costs, as provided by Article 56.42(d), incurred by a victim of domestic violence for relocation and housing rental assistance payments.

(10) "Personal injury" means physical or mental harm.

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(11) "Victim" means, except as provided by Subsection (c):

(A) an individual who:

(i) suffers personal injury or death as a result of criminally injurious conduct or as a result of actions taken by the individual as an intervenor, if the conduct or actions occurred in this state; and

(ii) is a resident of this state, another state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a possession or territory of the United States;

(B) an individual who:

(i) suffers personal injury or death as a result of criminally injurious conduct or as a result of actions taken by the individual as an intervenor, if the conduct or actions occurred in a state or country that does not have a crime victims' compensation program that meets the requirements of Section 1403(b), Crime Victims Compensation Act of 1984 (42 U.S.C. Section 10602(b));

(ii) is a resident of this state; and

(iii) would be entitled to compensation under this subchapter if the criminally injurious conduct or actions had occurred in this state; or

(C) an individual who:

(i) suffers personal injury or death as a result of criminally injurious conduct caused by an act of international terrorism as defined by 18 U.S.C. Section 2331 committed outside of the United States; and

(ii) is a resident of this state.

(b) In this subchapter "claimant" does not include a service provider.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1993, 73rd Leg., ch. 805, §§ 3, 4, eff. Aug. 30, 1993; Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995; Subsec. (a)(4) amended by Acts 1995, 74th Leg., ch. 76, § 14.27, eff. Sept. 1, 1995; Subsec. (a)(8) amended by Acts 1995, 74th Leg., ch. 76, § 9.55, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 1434, § 1, eff. Sept. 1, 1997; Subsec. (a)(9) amended by Acts 1999, 76th Leg., ch. 1470, § 1, eff. June 19, 1999.

Art. 56.33. Administration; Rules

(a) The attorney general shall adopt rules consistent with this subchapter governing its administration, including rules relating to the method of filing claims and the proof of entitlement to compensation and the review of health care services subject to compensation under this chapter. Subchapters A and B, Chapter 2001, Government Code, except Sections 2001.004(3) and 2001.005, apply to the attorney general.

(b) The attorney general may delegate a power, duty, or responsibility given to the attorney general

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under this subchapter to a person in the attorney general's office.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.34. Compensation

(a) The attorney general shall award compensation for pecuniary loss arising from criminally injurious conduct if the attorney general is satisfied by a preponderance of the evidence that the requirements of this subchapter are met.

(b) The attorney general, shall establish whether, as a direct result of criminally injurious conduct, a claimant or victim suffered personal injury or death that resulted in a pecuniary loss for which the claimant or victim is not compensated from a collateral source.

(c) The attorney general shall award compensation for health care services according to the medical fee guidelines prescribed by Subtitle A, Title 5, Labor Code.

(d) The attorney general, a claimant, or a victim is not liable for health care service charges in excess of the medical fee guidelines. A health care provider shall accept compensation from the attorney general as payment in full for the charges unless an investigation of the charges by the attorney general determines that there is a reasonable health care justification for the deviation from the guidelines.

(e) A claimant or victim is not liable for the balance of service charges left as a result of an adjustment of payment for the charges under Article 56.58.

(f) The compensation to victims of crime fund and the compensation to victims of crime auxiliary fund are the payers of last resort.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 1434, § 1, eff. Sept. 1, 1997.

Art. 56.35. Types of Assistance

If the attorney general approves an application for compensation under Article 56.41, the attorney general shall determine what type of state assistance will best aid the claimant or victim. The attorney general may do one or more of the following:

(1) authorize cash payment or payments to or on behalf of a claimant or victim for pecuniary loss;

(2) refer a claimant or victim to a state agency for vocational or other rehabilitative services; or

(3) provide counseling services for a claimant or victim or contract with a private entity to provide counseling services.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

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Art. 56.36. Application

(a) An applicant for compensation under this subchapter must apply in writing on a form prescribed by the attorney general.

(b) An application must be verified and must contain:

(1) the date on which the criminally injurious conduct occurred;

(2) a description of the nature and circumstances of the criminally injurious conduct;

(3) a complete financial statement, including:

(A) the cost of medical care or burial expenses and the loss of wages or support the claimant or victim has incurred or will incur; and

(B) the extent to which the claimant or victim has been indemnified for those expenses from a collateral source;

(4) if appropriate, a statement indicating the extent of a disability resulting from the injury incurred;

(5) an authorization permitting the attorney general to verify the contents of the application; and

(6) other information the attorney general requires.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 1434, § 1, eff. Sept. 1, 1997.

Art. 56.37. Time for Filing

(a) Except as otherwise provided by this article, a claimant or victim must file an application not later than three years from the date of the criminally injurious conduct.

(b) The attorney general may extend the time for filing for good cause shown by the claimant or victim.

(c) If the victim is a child, the application must be filed within three years from the date the claimant or victim is made aware of the crime but not after the child is 21 years of age.

(d) If a claimant or victim presents medically documented evidence of a physical or mental incapacity that was incurred by the claimant or victim as a result of the criminally injurious conduct and that reasonably prevented the claimant or victim from filing the application within the limitations period under Subsection (a), the period of the incapacity is not included.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1993, 73rd Leg., ch. 805, § 10, eff. Aug. 30, 1993; Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts

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1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 1434, § 1, eff. Sept. 1, 1997.

Art. 56.38. Review; Verification

(a) The attorney general shall appoint a clerk to review each application for compensation under Article 56.36 to ensure the application is complete. If an application is not complete, the clerk shall return it to the claimant or victim and give a brief statement showing the additional information required. Not later than the 30th day after receiving a returned application, a claimant or victim may:

(1) supply the additional information; or

(2) appeal the action to the attorney general, who shall review the application to determine whether it is complete.

(b) The attorney general may investigate an application.

(c) Incident to the attorney general's review, verification, and hearing duties under this subchapter, the attorney general may:

(1) subpoena witnesses and administer oaths to determine whether and the extent to which a claimant or victim qualifies for an award; and

(2) order a claimant or victim to submit to a mental or physical examination by a physician or psychologist or order an autopsy of a deceased victim as provided by Article 56.39, if the mental, physical, or emotional condition of a claimant or victim is material to a claim.

(d) On request by the attorney general and not later than the 14th business day after the date of the request, a law enforcement agency shall release to the attorney general all reports, including witness statements and criminal history record information, for the purpose of allowing the attorney general to determine whether a claimant or victim qualifies for an award and the extent of the qualification.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.385. Review of Health Care Services

(a) The attorney general may review the actual or proposed health care services for which a claimant or victim seeks compensation in an application filed under Article 56.36.

(b) The attorney general may not compensate a claimant or victim for health care services that the attorney general determines are not medically necessary.

(c) The attorney general, a claimant, or a victim is not liable for a charge that is not medically necessary.

Added by Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.39. Mental or Physical Examination; Autopsy

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(a) An order for a mental or physical examination or an autopsy as provided by Article 56.38(c)(3) may be made for good cause shown on notice to the individual to be examined and to all persons who have appeared.

(b) An order shall:

(1) specify the time, place, manner, conditions, and scope of the examination or autopsy;

(2) specify the person by whom the examination or autopsy is to be made; and

(3) require the person making the examination or autopsy to file with the attorney general a detailed written report of the examination or autopsy.

(c) A report shall set out the findings of the person making the examination or autopsy, including:

(1) the results of any tests made; and

(2) diagnoses, prognoses, and other conclusions and reports of earlier examinations of the same conditions.

(d) On request of the individual examined, the attorney general shall furnish the individual with a copy of the report. If the victim is deceased, the attorney general on request shall furnish the claimant with a copy of the report.

(e) A physician or psychologist making an examination or autopsy under this article shall be compensated from funds appropriated for the administration of this subchapter.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.40. Hearings

(a) The attorney general shall determine whether a hearing on an application for compensation under this subchapter is necessary.

(b) If the attorney general determines that a hearing is not necessary, the attorney general may approve the application in accordance with the provisions of Article 56.41.

(c) If the attorney general determines that a hearing is necessary or if the claimant or victim requests a hearing, the attorney general shall consider the application at a hearing at a time and place of the attorney general's choosing. The attorney general shall notify all interested persons not less than 10 days before the date of the hearing.

(d) At the hearing the attorney general shall:

(1) review the application for assistance and the report prepared under Article 56.39 and any other evidence obtained as a result of the attorney general's investigation; and

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(2) receive other evidence that the attorney general finds necessary or desirable to evaluate the application properly.

(e) The attorney general may appoint hearing officers to conduct hearings or prehearing conferences under this subchapter.

(f) A hearing or prehearing conference is open to the public unless in a particular case the hearing officer or attorney general determines that the hearing or prehearing conference or a part of it should be held in private because a criminal suspect has not been apprehended or because it is in the interest of the claimant or victim.

(g) The attorney general may suspend the proceedings pending disposition of a criminal prosecution that has been commenced or is imminent, but may make an emergency award under Article 56.50.

(h) Subchapters C through H, Chapter 2001, Government Code, do not apply to the attorney general or the attorney general's orders and decisions.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.41. Approval of Claim

(a) The attorney general shall approve an application for compensation under this subchapter if the attorney general finds by a preponderance of the evidence that grounds for compensation under this subchapter exist.

(b) The attorney general shall deny an application for compensation under this subchapter if:

(1) the criminally injurious conduct is not reported as provided by Article 56.46;

(2) the application is not made in the manner provided by Articles 56.36 and 56.37;

(3) the claimant or victim knowingly and willingly participated in the criminally injurious conduct;

(4) the claimant or victim is the offender or an accomplice of the offender;

(5) an award of compensation to the claimant or victim would benefit the offender or an accomplice of the offender;

(6) the claimant or victim was incarcerated in a penal institution, as defined by Section 1.07, Penal Code, at the time the offense was committed; or

(7) the claimant or victim knowingly or intentionally submits false or forged information to the attorney general.

(c) Except as provided by rules adopted by the attorney general to prevent the unjust enrichment of

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an offender, the attorney general may not deny an award otherwise payable to a claimant or victim because the claimant or victim:

(1) is an immediate family member of the offender; or

(2) resides in the same household as the offender.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995; Subsec. (b) amended by Acts 1995, 74th Leg., ch. 76, § 14.28, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 1434, § 1, eff. Sept. 1, 1997.

Art. 56.42. Limits on Compensation

(a) Except as otherwise provided by this article, awards payable to a victim and all other claimants sustaining pecuniary loss because of injury or death of that victim may not exceed $50,000 in the aggregate.

(b) In addition to an award payable under Subsection (a), the attorney general may award an additional $50,000 for extraordinary pecuniary losses, if the personal injury to a victim is catastrophic and results in a total and permanent disability to the victim, for lost wages and reasonable and necessary costs of:

(1) making a home or automobile accessible;

(2) obtaining job training and vocational rehabilitation;

(3) training in the use of special appliances; and

(4) receiving home health care.

(c) The attorney general may by rule establish limitations on any other pecuniary loss compensated for under this subchapter.

(d) A victim who is a victim of domestic violence may receive a onetime-only assistance payment in an amount not to exceed:

(1) $2,000 to be used for relocation expenses, including expenses for rental deposit, utility connections, expenses relating to the moving of belongings, motor vehicle mileage expenses, and for out-of-state moves, transportation, lodging, and meals; and

(2) $1,800 to be used for housing rental expenses.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 1434, § 1, eff. Sept. 1, 1997; Subsec. (d) added by Acts 1999, 76th Leg., ch. 1470, § 2, eff. June 19, 1999.

Art. 56.43. Attorney Fees

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code for a victim of a sexual assault, and when requested, to referral to available social service agencies that may offer additional assistance;

(7) the right to be informed, upon request, of parole procedures, to participate in the parole process, to be notified, if requested, of parole proceedings concerning a defendant in the victim's case, to provide to the Board of Pardons and Paroles for inclusion in the defendant's file information to be considered by the board prior to the parole of any defendant convicted of any crime subject to this Act, and to be notified, if requested, of the defendant's release;

(8) the right to be provided with a waiting area, separate or secure from other witnesses, including the offender and relatives of the offender, before testifying in any proceeding concerning the offender; if a separate waiting area is not available, other safeguards should be taken to minimize the victim's contact with the offender and the offender's relatives and witnesses, before and during court proceedings;

(9) the right to prompt return of any property of the victim that is held by a law enforcement agency or the attorney for the state as evidence when the property is no longer required for that purpose;

(10) the right to have the attorney for the state notify the employer of the victim, if requested, of the necessity of the victim's cooperation and testimony in a proceeding that may necessitate the absence of the victim from work for good cause; and

(11) the right to counseling, on request, regarding acquired immune deficiency syndrome (AIDS) and human immunodeficiency virus (HIV) infection and testing for acquired immune deficiency syndrome (AIDS), human immunodeficiency virus (HIV) infection, antibodies to HIV, or infection with any other probable causative agent of AIDS, if the offense is an offense under Section 21.11(a)(1), 22.011, or 22.021, Penal Code.

(b) A victim is entitled to the right to be present at all public court proceedings related to the offense, subject to the approval of the judge in the case.

(c) The office of the attorney representing the state, and the sheriff, police, and other law enforcement agencies shall ensure to the extent practicable that a victim, guardian of a victim, or close relative of a deceased victim is afforded the rights granted by Subsection (a) of this article and, on request, an explanation of those rights.

(d) A judge, attorney for the state, peace officer, or law enforcement agency is not liable for a failure or inability to provide a right enumerated in this article. The failure or inability of any person to provide a right or service enumerated in this article may not be used by a defendant in a criminal case as a ground for appeal, a ground to set aside the conviction or sentence, or a ground in a habeas corpus petition. A victim, guardian of a victim, or close relative of a deceased victim does not have standing to participate as a party in a criminal proceeding or to contest the disposition of any charge.

Added by Acts 1985, 69th Leg., ch. 588, § 1, eff. Sept. 1, 1985. Subsec. (a) amended by Acts 1987, 70th Leg., ch. 433, § 1, eff. Aug. 31, 1987; Subsecs. (a), (c) amended by Acts 1987, 70th Leg., ch. 929, § 1, eff. Sept. 1, 1987; Subsec. (c) amended by Acts 1989, 71st Leg., ch. 996, § 1, eff. Sept. 1, 1989; Subsecs. (a), (d) amended by Acts 1991, 72nd Leg., ch. 202, § 3, eff. Sept. 1, 1991; Subsec. (a) amended by Acts 1993, 73rd Leg., ch. 811, § 3, eff. Sept. 1, 1993; Subsec. (a)(6) amended by Acts

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(a) As part of an order, the attorney general shall determine and award reasonable attorney's fees, commensurate with legal services rendered, to be paid by the state to the attorney representing the claimant or victim. Attorney fees shall not exceed 25 percent of the amount the attorney assisted the claimant or victim in obtaining. Where there is no dispute of the attorney general's determination of the amount of the award due to the claimant or victim and where no hearing is held, the attorney fee shall be the lesser of either 25 percent of the amount the attorney assisted the claimant or victim in obtaining or $300.

(b) Attorney fees may be denied on a finding that the claim or appeal is frivolous.

(c) An award of attorney fees is in addition to an award of compensation.

(d) An attorney may not contract for or receive an amount larger than that allowed under this article.

(e) Attorney fees may not be paid to an attorney of a claimant or victim unless an award is made to the claimant or victim.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1993, 73rd Leg., ch. 805, § 9, eff. Aug. 30, 1993; Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.44. Payments

(a) The attorney general may provide for the payment of an award in a lump sum or in installments. The attorney general shall provide that the part of an award equal to the amount of pecuniary loss accrued to the date of the award be paid in a lump sum. Except as provided in Subsection (b), the attorney general shall pay the part of an award for allowable expense that accrues after the award is made in installments.

(b) At the request of the claimant or victim, the attorney general may provide that an award for future pecuniary loss be paid in a lump sum if the attorney general finds that:

(1) paying the award in a lump sum will promote the interests of the claimant or victim; or

(2) the present value of all future pecuniary loss does not exceed $1,000.

(c) The attorney general may not provide for an award for future pecuniary loss payable in installments for a period for which the attorney general cannot reasonably determine the future pecuniary loss.

(d) The attorney general may make payments only to an individual who is a claimant or a victim or to a provider on the individual's behalf.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 1434, § 1, eff. Sept. 1, 1997.

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Art. 56.45. Denial or Reduction of Award

The attorney general may deny or reduce an award otherwise payable:

(1) if the claimant or victim has not substantially cooperated with an appropriate law enforcement agency;

(2) if the claimant or victim bears a share of the responsibility for the act or omission giving rise to the claim because of the claimant's or victim's behavior;

(3) to the extent that pecuniary loss is recouped from a collateral source; or

(4) if the claimant or victim was engaging in an activity that at the time of the criminally injurious conduct was prohibited by law or a rule made under law.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 1434, § 1, eff. Sept. 1, 1997.

Art. 56.46. Reporting of Crime

(a) Except as otherwise provided by this article, a claimant or victim may not file an application unless the victim reports the criminally injurious conduct to the appropriate state or local public safety or law enforcement agency within a reasonable period of time, but not so late as to interfere with or hamper the investigation and prosecution of the crime after the criminally injurious conduct is committed.

(b) The attorney general may extend the time for reporting the criminally injurious conduct if the attorney general determines that the extension is justified by extraordinary circumstances.

(c) Subsection (a) does not apply if the victim is a child.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 1434, § 1, eff. Sept. 1, 1997.

Art. 56.47. Reconsideration

(a) The attorney general, on the attorney general's own motion or on request of a claimant or victim, may reconsider:

(1) a decision to make or deny an award; or

(2) the amount of an award.

(b) At least annually, the attorney general shall reconsider each award being paid in installments.

(c) An order on reconsideration may require a refund of an award if:

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(1) the award was obtained by fraud or mistake; or

(2) newly discovered evidence shows the claimant or victim to be ineligible for the award under Article 56.41 or 56.45.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1993, 73rd Leg., ch. 805, § 6, eff. Aug. 30, 1993; Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995; Subsec. (c) amended by Acts 1995, 74th Leg., ch. 76, § 5.85(b). Amended by Acts 1997, 75th Leg., ch. 1434, § 1, eff. Sept. 1, 1997.

Art. 56.48. Judicial Review

(a) Not later than the 40th day after the attorney general renders a final decision, a claimant or victim may file with the attorney general a notice of dissatisfaction with the decision. Not later than the 40th day after the claimant or victim gives notice, the claimant or victim shall bring suit in the district court having jurisdiction in the county in which:

(1) the injury or death occurred;

(2) the victim resided at the time the injury or death occurred; or

(3) if the victim resided out of state at the time of the injury or death, in the county where the injury or death occurred or in a district court of Travis County.

(b) While judicial review of a decision by the attorney general is pending, the attorney general:

(1) shall suspend payments to the claimant or victim; and

(2) may not reconsider the award.

(c) The court shall determine the issues by trial de novo. The burden of proof is on the party who filed the notice of dissatisfaction.

(d) A court may award not more than 25 percent of the total recovery by the claimant or victim for attorney fees in the event of review.

(e) In computing a period under this article, if the last day is a legal holiday or Sunday, the last day is not counted, and the time is extended to include the next business day.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 1434, § 1, eff. Sept. 1, 1997.

Art. 56.49. Exemption; Assignability

(a) An award is not subject to execution, attachment, garnishment, or other process, except that an award is not exempt from a claim of a creditor to the extent that the creditor provided products, services, or accommodations, the costs of which are included in the award.

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(b) An assignment or agreement to assign a right to benefits for loss accruing in the future is unenforceable except:

(1) an assignment of a right to benefits for loss of earnings is enforceable to secure payment of alimony, maintenance, or child support; and

(2) an assignment of a right to benefits is enforceable to the extent that the benefits are for the cost of products, services, or accommodations:

(A) made necessary by the injury or death on which the claim is based; and

(B) provided or to be provided by the assignee.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.50. Emergency Award

(a) The attorney general may make an emergency award if, before acting on an application for compensation under this subchapter, it appears likely that:

(1) a final award will be made; and

(2) the claimant or victim will suffer undue hardship if immediate economic relief is not obtained.

(b) An emergency award may not exceed $1,500.

(c) The amount of an emergency award shall be:

(1) deducted from the final award; or

(2) repaid by and recoverable from the claimant or victim to the extent the emergency award exceeds the final award.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.51. Subrogation

If compensation is awarded under this subchapter, the state is subrogated to all the claimant's or victim's rights to receive or recover benefits for pecuniary loss to the extent compensation is awarded from a collateral source.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.52. Notice of Private Action

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(a) Before a claimant or victim may bring an action to recover damages related to criminally injurious conduct for which compensation under this subchapter is claimed or awarded, the claimant or victim must give the attorney general written notice of the proposed action. After receiving the notice, the attorney general shall promptly:

(1) join in the action as a party plaintiff to recover benefits awarded;

(2) require the claimant or victim to bring the action in the claimant's or victim's name as a trustee on behalf of the state to recover benefits awarded; or

(3) reserve the attorney general's rights and do neither in the proposed action.

(b) If the claimant or victim brings the action as trustee and recovers compensation awarded by the attorney general, the claimant or victim may deduct from the benefits recovered on behalf of the state the reasonable expenses of the suit, including attorney fees, expended in pursuing the recovery for the state. The claimant or victim must justify this deduction in writing to the attorney general on a form provided by the attorney general.

(c) A claimant or victim shall not settle or resolve any such action without written authorization to do so from the attorney general. No third party or agents, insurers, or attorneys for third parties shall participate in the settlement or resolution of such an action if they actually know, or should know, that the claimant or victim has received moneys from the fund and is subject to the subrogation provisions of this article. Any attempt by such third party, or agents, insurers, or attorneys of third parties to settle an action is void and shall result in no release from liability to the fund for any rights subrogated pursuant to this article. All such agents, insurers, and attorneys are personally liable to the fund for any moneys paid to a claimant or victim in violation of this subsection, up to the full amount of the fund's right to reimbursement. A claimant, victim, third party, or any agents, attorneys, or insurers of third parties who knowingly or intentionally fail to comply with the requirements of this chapter commits a Class B misdemeanor.

(d) A person adjudged guilty of a Class B misdemeanor shall be punished by:

(1) a fine not to exceed $500;

(2) confinement in jail for a term not to exceed 180 days; or

(3) both such fine and imprisonment.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1993, 73rd Leg., ch. 805, § 11, eff. Aug. 30, 1993; Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.53. Annual Report

Annually, the attorney general shall report to the governor and the legislature on the attorney general's activities, including a statistical summary of claims and awards made and denied. The reporting period is the state fiscal year. The attorney general shall file the report not later than the 100th day after the end of the fiscal year.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.54. Funds

(a) The compensation to victims of crime fund and the compensation to victims of crime auxiliary fund are in the state treasury.

Text of subsec. (b) as amended by Acts 1997, 75th Leg., ch. 1042, § 2

(b) Except as provided by Article 56.541, the compensation to victims of crime fund may be used only by the attorney general for the payment of compensation to claimants or victims under this subchapter and other expenses in administering this subchapter.

Text of subsec. (b) as amended by Acts 1997, 75th Leg., ch. 1434, § 1

(b) Except as provided by Subsections (h) and (i), the compensation to victims of crime fund may be used by the attorney general only for the payment of compensation to claimants or victims under this subchapter, the operation of the Crime Victims' Institute created by Chapter 412, Government Code, and other expenses in administering this subchapter.

(c) Except as provided by Subsections (h) and (i), the compensation to victims of crime auxiliary fund may be used by the attorney general only for the payment of compensation to claimants or victims under this subchapter.

(d) The attorney general may not make compensation payments in excess of the amount of money available from the combined funds.

(e) General revenues may not be used for payments under this subchapter.

(f) The office of the attorney general is authorized to accept gifts, grants, and donations to be credited to the compensation to victims of crime fund and compensation to victims of crime auxiliary fund and shall file annually with the governor and the presiding officer of each house of the legislature a complete and detailed written report accounting for all gifts, grants, and donations received and disbursed, used, or maintained by the office for the attorney general that are credited to these funds.

(g) Money in the compensation to victims of crime fund or in the compensation to victims of crime auxiliary fund may be used only as provided by this subchapter and is not available for any other purpose. Section 403.095, Government Code, does not apply to the fund.

(h) An amount of money deposited to the credit of the compensation to victims of crime fund not to exceed one-quarter of the amount disbursed from that fund in the form of compensation payments during a fiscal year shall be carried forward into the next succeeding fiscal year and applied toward the amount listed in the next succeeding fiscal year's method of financing.

(i) If the sums available in the compensation to victims of crime fund are sufficient in a fiscal year to make all compensation payments, the attorney general may retain any portion of the fund that was

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deposited during the fiscal year that was in excess of compensation payments made during that fiscal year as an emergency reserve for the next fiscal year. Such emergency reserve may not exceed $10,000,000. The emergency reserve fund may be used only to make compensation awards in claims and for providing emergency relief and assistance, including crisis intervention, emergency housing, travel, food, or expenses and technical assistance expenses incurred in the implementation of this subsection in incidents resulting from an act of mass violence or from an act of international terrorism as defined by 18 U.S.C. Section 2331, occurring in the state or for Texas residents injured or killed in an act of terrorism outside of the United States.

(j) The legislature may appropriate money in the compensation to victims of crime fund to administer the associate judge program under Subchapter C, Chapter 201, Family Code.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1993, 73rd Leg., ch. 805, § 1, eff. Aug. 30, 1993; Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995; Subsec. (b) amended by Acts 1997, 75th Leg., ch. 1042, § 2, eff. Sept. 1, 1997; Subsec. (h) added by Acts 1997, 75th Leg., ch. 1042, § 1, eff. June 19, 1997. Amended by Acts 1997, 75th Leg., ch. 1434, § 1, eff. Sept. 1, 1997; Subsec. (j) added by Acts 1999, 76th Leg., ch. 1302, § 13, eff. Sept. 1, 1999.

Art. 56.541. Appropriation of Excess Money for Other Crime Victim Assistance

(a) Not later than December 15 of each even-numbered year, the attorney general, after consulting with the comptroller, shall prepare forecasts and certify estimates of:

(1) the amount of money that the attorney general anticipates will be received from deposits made to the credit of the compensation to victims of crime fund during the next state fiscal biennium, other than deposits of:

(A) gifts, grants, and donations; and

(B) money received from the United States;

(2) the amount of money from the fund that the attorney general anticipates will be obligated during the next state fiscal biennium to comply with this chapter; and

(3) the amount of money in the fund that the attorney general anticipates will remain unexpended at the end of the current state fiscal year and that is available for appropriation in the next state fiscal biennium.

(b) At the time the attorney general certifies the estimates made under Subsection (a), the attorney general shall also certify for the next state fiscal biennium the amount of excess money in the compensation to victims of crime fund for purposes of Subsection (c), calculated by multiplying the amount estimated under Subsection (a)(2) by 120 percent, and subtracting that product from the sum of the amounts estimated under Subsections (a)(1) and (a)(3).

(c) For a state fiscal biennium, the legislature may appropriate from the compensation to victims of crime fund the amount of excess money in the fund certified for the biennium under Subsection (b) to state agencies that deliver or fund victim-related services or assistance.

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(d) The attorney general and the comptroller shall cooperate in determining the proper allocation of the various sources of revenue deposited to the credit of the compensation to victims of crime fund for purposes of this article.

(e) The attorney general may use money appropriated from the compensation to victims of crime fund for grants or contracts supporting victim-related services or assistance, including support for private Texas nonprofit corporations that provide victim-related civil legal services directly to victims, immediate family members of victims, or claimants. A grant supporting victim-related services or assistance is governed by Chapter 783, Government Code.

(f) The attorney general shall adopt rules necessary to carry out this article.

Added by Acts 1997, 75th Leg., ch. 1042, § 3, eff. Sept. 1, 1997. Subsec. (e) amended by Acts 1999, 76th Leg., ch. 1077, § 1, eff. Aug. 30, 1999.

Art. 56.55. Court Costs

(a) A person shall pay:

(1) $45 as a court cost on conviction of a felony;

(2) $35 as a court cost on conviction of a violation of a municipal ordinance punishable by a fine of more than $200 or on conviction of a misdemeanor punishable by imprisonment or by a fine of more than $500; or

(3) $15 as a court cost on conviction of a violation of a municipal ordinance punishable by a fine of not more than $200 or on conviction of a misdemeanor punishable by a fine of not more than $500, other than a conviction of a misdemeanor offense or a violation of a municipal ordinance relating to pedestrians and the parking of motor vehicles.

(b) The court shall assess and make a reasonable effort to collect the cost due under this article whether any other court cost is assessed or collected.

(c) In this article, a person is considered to have been convicted if:

(1) a sentence is imposed;

(2) the defendant receives probation or deferred adjudication; or

(3) the court defers final disposition of the case.

(d) Court costs under this article are collected in the same manner as other fines or costs.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1993, 73rd Leg., ch. 805, § 5, eff. Aug. 30, 1993; Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.56. Deposit and Remittance of Court Costs

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(a) The officer collecting the costs in a municipal court case shall keep separate records of the funds collected as costs under Article 56.55 and shall deposit the funds in the municipal treasury. The officer collecting the costs in a justice, county, or district court case shall keep separate records of the funds collected as costs under Article 56.55 and shall deposit the funds in the county treasury.

(b) The custodian of a municipal or county treasury shall:

(1) keep records of the amount of funds on deposit collected under Article 56.55; and

(2) send to the comptroller before the last day of the first month following each calendar quarter the funds collected during the preceding quarter.

(c) A municipality or county may retain 10 percent of the funds collected under Article 56.55 as a collection fee if the custodian of the treasury:

(1) keeps records of the amount of funds on deposit collected under Article 56.55; and

(2) sends to the comptroller the funds within the period prescribed by Subsection (b)(2).

(d) If no funds due as costs under Article 56.55 are collected by a custodian of a municipal or county treasury in a quarter, the custodian shall file the report required for the quarter in the regular manner and must state that no funds were collected.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.57. Deposit by Comptroller; Audit

(a) The comptroller shall deposit the funds received under Article 56.56 and all other moneys credited to the fund by any other provision of law in the compensation to victims of crime fund.

(b) Funds collected are subject to audit by the comptroller. Funds spent are subject to audit by the state auditor.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1993, 73rd Leg., ch. 805, § 2, eff. Aug. 30, 1993; Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.58. Adjustment of Awards and Payments

(a) The attorney general shall establish a policy to adjust awards and payments so that the total amount of awards granted in each calendar year does not exceed the amount of money credited to the fund during that year.

(b) If the attorney general establishes a policy to adjust awards under Subsection (a), the attorney general, the claimant, or the victim is not liable for the amount of charges incurred in excess of the adjusted amount for the service on which the adjusted payment is determined.

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(c) A service provider who accepts a payment that has been adjusted by a policy established under Subsection (a) agrees to accept the adjusted payment as payment in full for the service and is barred from legal action against the claimant or victim for collection.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.59. Attorney General Supervision of Collection of Costs; Failure to Comply

(a) If the attorney general has reason to believe that a court has not been assessing costs due under Article 56.55 or has not been making a reasonable effort to collect those costs, the attorney general shall send a warning letter to the court or the governing body of the governmental unit in which the court is located.

(b) Within 60 days after receipt of a warning letter, the court or governing body shall respond in writing to the attorney general, specifically referring to the charges in the warning letter.

(c) If the court or governing body does not respond or if the attorney general considers the response inadequate, the attorney general may request the comptroller to audit the records of:

(1) the court;

(2) the officer charged with collecting the costs; or

(3) the treasury of the governmental unit in which the court is located.

(d) The comptroller shall give the attorney general the results of the audit.

(e) If, using the results of the audit and other evidence available, the attorney general finds that a court is not assessing costs due under Article 56.55 or is not making a reasonable effort to collect those costs, the attorney general may:

(1) refuse to award compensation under this subchapter to residents of the jurisdiction served by the court; or

(2) notify the State Commission on Judicial Conduct of the findings.

(f) The failure, refusal, or neglect of a judicial officer to comply with a requirement of Article 56.55:

(1) constitutes official misconduct; and

(2) is grounds for removal from office.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.60. Public Notice

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1995, 74th Leg., ch. 76, § 5.95(108), eff. Sept. 1, 1995.

Art. 56.03. Victim impact statement

(a) The Texas Crime Victim Clearinghouse, with the participation of the Texas Adult Probation Commission and the Board of Pardons and Paroles, shall develop a form to be used by law enforcement agencies, prosecutors, and other participants in the criminal justice system to record the impact of an offense on a victim of the offense, guardian of a victim, or a close relative of a deceased victim and to provide the agencies, prosecutors, and participants with information needed to contact the victim, guardian, or relative if needed at any stage of a prosecution of a person charged with the offense. The Texas Crime Victim Clearinghouse, with the participation of the Texas Adult Probation Commission and the Board of Pardons and Paroles, shall also develop a victims' information booklet that provides a general explanation of the criminal justice system to victims of an offense, guardians of victims, and relatives of deceased victims.

(b) The victim impact statement must be in a form designed to inform a victim, guardian of a victim, or a close relative of a deceased victim with a clear statement of rights provided by Article 56.02 of this code and to collect the following information:

(1) the name of the victim of the offense or, if the victim has a legal guardian or is deceased, the name of a guardian or close relative of the victim;

(2) the address and telephone number of the victim, guardian, or relative through which the victim, guardian of a victim, or a close relative of a deceased victim, may be contacted;

(3) a statement of economic loss suffered by the victim, guardian, or relative as a result of the offense;

(4) a statement of any physical or psychological injury suffered by the victim, guardian, or relative as a result of the offense, as described by the victim, guardian, relative, or by a physician or counselor;

(5) a statement of any psychological services requested as a result of the offense;

(6) a statement of any change in the victim's, guardian's, or relative's personal welfare or familial relationship as a result of the offense;

(7) a statement as to whether or not the victim, guardian, or relative wishes to be notified in the future of any parole hearing for the defendant and an explanation as to the procedures by which the victim, guardian, or relative may obtain information concerning the release of the defendant from the Texas Department of Corrections; and

(8) any other information, other than facts related to the commission of the offense, related to the impact of the offense on the victim, guardian, or relative.

(c) The victim assistance coordinator, designated in Article 56.04(a) of this code, shall send to a victim, guardian of a victim, or close relative of a deceased victim a victim impact statement, a victims' information booklet, and an application for compensation under Subchapter B, Chapter 56, along with an offer to assist in completing those forms on request. The victim assistance coordinator,

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(a) A hospital licensed under the laws of this state shall display prominently in its emergency room posters giving notification of the existence and general provisions of this subchapter. The attorney general shall set standards for the location of the display and shall provide posters, application forms, and general information regarding this subchapter to each hospital and physician licensed to practice in this state.

(b) Each local law enforcement agency shall inform a claimant or victim of criminally injurious conduct of the provisions of this subchapter and make application forms available. The attorney general shall provide application forms and all other documents that local law enforcement agencies may require to comply with this article. The attorney general shall set standards to be followed by local law enforcement agencies for this purpose and may require them to file with the attorney general a description of the procedures adopted by each agency to comply.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.61. Compensation for Certain Criminally Injurious Conduct Prohibited

The attorney general may not award compensation for economic loss arising from criminally injurious conduct that occurred before January 1, 1980.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.62. Public Letter of Reprimand

(a) The attorney general may issue a letter of reprimand against an individual if the attorney general finds that the person has filed or has caused to be filed under this subchapter an application for benefits or claim for pecuniary loss that contains a statement or representation that the person knows to be false.

(b) The attorney general must give the person notice of the proposed action before issuing the letter.

(c) A person may challenge the denial of compensation and the issuance of a letter of reprimand in a contested case hearing under Chapter 2001, Government Code (Administrative Procedure Act).

(d) A letter of reprimand issued under this article is public information.

Added by Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.63. Civil Penalty

(a) A person is subject to a civil penalty of not less than $2,500 or more than $25,000 for each application for compensation that:

(1) is filed under this subchapter by the person or is filed under this subchapter as a result of conduct of the person; and

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(2) contains a material statement or representation that the person knows to be false.

(b) The attorney general shall institute and conduct the suit to collect the civil penalty authorized by this article on behalf of the state.

(c) A civil penalty recovered under this article shall be deposited to the credit of the compensation to victims of crime fund.

(d) The civil penalty authorized by this article is in addition to any other civil, administrative, or criminal penalty provided by law.

(e) In addition to the civil penalty authorized by this article, the attorney general may recover expenses incurred by the attorney general in the investigation, institution, and prosecution of the suit, including investigative costs, witness fees, attorney's fees, and deposition expenses.

Added by Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

Art. 56.64. Administrative Penalty

(a) A person who presents to the attorney general under this subchapter, or engages in conduct that results in the presentation to the attorney general under this subchapter of, an application for compensation under this subchapter that contains a statement or representation the person knows to be false is liable to the attorney general for:

(1) the amount paid in reliance on the application and interest on that amount determined at the rate provided by law for legal judgments and accruing from the date on which the payment was made;

(2) payment of an administrative penalty not to exceed twice the amount paid because of the false application for benefits or claim for pecuniary loss; and

(3) payment of an administrative penalty of not more than $10,000 for each item or service for which payment was claimed.

(b) In determining the amount of the penalty to be assessed under Subsection (a)(3), the attorney general shall consider:

(1) the seriousness of the violation;

(2) whether the person has previously submitted a false application for benefits or a claim for pecuniary loss; and

(3) the amount necessary to deter the person from submitting future false applications for benefits or claims for pecuniary loss.

(c) If the attorney general determines that a violation has occurred, the attorney general may issue a report that states the facts on which the determination is made and the attorney general's recommendation on the imposition of a penalty, including a recommendation on the amount of the penalty.

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(d) The attorney general shall give written notice of the report to the person. Notice under this subsection may be given by certified mail and must:

(1) include a brief summary of the alleged violation;

(2) include a statement of the amount of the recommended penalty; and

(3) inform the person of the right to a hearing on:

(A) the occurrence of the violation;

(B) the amount of the penalty; or

(C) both the occurrence of the violation and the amount of the penalty.

(e) Not later than the 20th day after the date the person receives the notice, the person, in writing, may:

(1) accept the attorney general's determination and recommended penalty; or

(2) request in writing a hearing on:

(A) the occurrence of the violation;

(B) the amount of the penalty; or

(C) both the occurrence of the violation and the amount of the penalty.

(f) If the person accepts the determination and recommended penalty of the attorney general, the attorney general by order shall approve the determination and impose the recommended penalty.

(g) If the person requests a hearing as provided by Subsection (e) or fails to respond to the notice in a timely manner, the attorney general shall set a contested case hearing under Chapter 2001, Government Code (Administrative Procedure Act), and notify the person of the hearing. The administrative law judge shall make findings of facts and conclusions of law and promptly issue to the attorney general a proposal for a decision regarding the occurrence of the violation and the amount of a proposed penalty. Based on the findings of fact, conclusions of law, and proposal for a decision, the attorney general by order may:

(1) find that a violation has occurred and impose a penalty; or

(2) find that a violation has not occurred.

(h) Notice of the attorney general's order given to the person under Chapter 2001, Government Code, must include a statement of the right of the person to judicial review of the order.

(i) Not later than the 30th day after the date that the attorney general's order is final under Section 2001.144, Government Code, the person shall:

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(1) pay the amount of the penalty;

(2) pay the amount of the penalty and file a petition for judicial review contesting:

(A) the occurrence of the violation;

(B) the amount of the penalty; or

(C) the occurrence of the violation and the amount of the penalty; or

(3) without paying the amount of the penalty, file a petition for judicial review contesting:

(A) the occurrence of the violation;

(B) the amount of the penalty; or

(C) the occurrence of the violation and the amount of the penalty.

(j) Within the 30–day period, a person who acts under Subsection (i)(3) may:

(1) stay enforcement of the penalty by:

(A) paying the amount of the penalty to the court for placement in an escrow account; or

(B) giving to the court a supersedeas bond that is approved by the court for the amount of the penalty and that is effective until all judicial review of the attorney general's order is final; or

(2) request the court to stay enforcement of the penalty by:

(A) filing with the court a sworn affidavit of the person stating that the person is financially unable to pay the amount of the penalty or to give the supersedeas bond; and

(B) delivering a copy of the affidavit to the attorney general by certified mail.

(k) On receipt by the attorney general of a copy of an affidavit under Subsection (j)(2), the attorney general may file with the court, not later than the fifth day after the date the copy is received, a contest to the affidavit. The court shall hold a hearing on the facts alleged in the affidavit as soon as practicable and shall stay the enforcement of the penalty on finding that the alleged facts are true. A person who files an affidavit under Subsection (j)(2) has the burden of proving that the person is financially unable to pay the amount of the penalty or to give a supersedeas bond.

(l) If the person does not pay the amount of the penalty and the enforcement of the penalty is not stayed, the attorney general may file suit for collection of the amount of the penalty.

(m) Judicial review of the order of the attorney general:

(1) is instituted by filing a petition as provided by Section 2001.176, Government Code; and

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(2) is governed by the substantial evidence rule.

(n) If the court upholds the finding that a violation occurred, the court may order the person to pay the full or reduced amount of the penalty. If the court does not uphold the finding, the court shall order that no penalty is owed.

(o) If the person paid the amount of the penalty and if that amount is reduced or is not upheld by the court, the court shall order that the appropriate amount plus accrued interest be remitted to the person. The rate of the interest is the rate charged on loans to depository institutions by the New York Federal Reserve Bank, and the interest shall be paid for the period beginning on the date the penalty was paid and ending on the date the penalty is remitted. If the person gave a supersedeas bond and if the amount of the penalty is not upheld by the court, the court shall order the release of the bond. If the person gave a supersedeas bond and if the amount of the penalty is reduced, the court shall order the release of the bond after the person pays the amount.

(p) A penalty collected under this article shall be sent to the comptroller and deposited to the credit of the compensation to victims of crime fund.

(q) All proceedings under this article are subject to Chapter 2001, Government Code.

(r) In addition to the administrative penalty authorized by this article, the attorney general may recover all expenses incurred by the attorney general in the investigation, institution, and prosecution of the suit, including investigative costs, witness fees, attorney's fees, and deposition expenses.

Added by Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

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on request, shall explain the possible use and consideration of the victim impact statement at sentencing and future parole hearing of the offender.

(d) If a victim, guardian of a victim, or close relative of a deceased victim states on the victim impact statement that he wishes to be notified of parole proceedings, the victim, guardian, or relative is responsible for notifying the Board of Pardons and Paroles of any change of address.

(e) Prior to the imposition of a sentence by the court in a criminal case, the court, if it has received a victim impact statement, shall consider the information provided in the statement. Before sentencing the defendant, the court shall permit the defendant or his counsel a reasonable time to read the statement, comment on the statement, and, with the approval of the court, introduce testimony or other information alleging a factual inaccuracy in the statement. If the court sentences the defendant to a term of probation, the court shall forward any victim's impact statement received in the case to the probation department supervising the defendant, along with the papers in the case.

(f) The court may not inspect a victim impact statement until after a finding of guilt or until deferred adjudication is ordered and the contents of the statement may not be disclosed to any person unless:

(1) the defendant pleads guilty or nolo contendere or is convicted of the offense; or

(2) the defendant in writing authorizes the court to inspect the statement.

(g) A victim impact statement is subject to discovery under Article 39.14 of this code before the testimony of the victim is taken only if the court determines that the statement contains exculpatory material.

(h) Not later than December 1 of each odd-numbered year, the Texas Crime Victim Clearinghouse, with the participation of the Texas Adult Probation Commission and the Board of Pardons and Paroles, shall update the victim impact statement form and any other information provided by the commission to victims, guardians of victims, and relatives of deceased victims, if necessary, to reflect changes in law relating to criminal justice and the rights of victims and guardians and relatives of victims.

(i) In addition to the information described by Subsections (b)(1)–(8), the victim impact statement must be in a form designed to collect information on whether, if the victim is a child, there is an existing court order granting to the defendant possession of or access to the victim. If information collected under this subsection indicates the defendant is granted access or possession under court order and the defendant is subsequently confined by the Texas Department of Criminal Justice as a result of the commission of the offense, the victim services office of the department shall contact the court issuing the order before the defendant is released from the department on parole or mandatory supervision.

Added by Acts 1985, 69th Leg., ch. 588, § 1, eff. Sept. 1, 1985. Subsecs. (a), (c) amended by Acts 1987, 70th Leg., ch. 929, § 2, eff. Sept. 1, 1987; Subsec. (e) amended by Acts 1987, 70th Leg., ch. 433, § 2, eff. Aug. 31, 1987; Subsec. (h) added by Acts 1987, 70th Leg., ch. 929, § 3, eff. Sept. 1, 1987; Subsec. (c) amended by Acts 1989, 71st Leg., ch. 996, § 2, eff. Sept. 1, 1989; amended by Acts 1995, 74th Leg., ch. 76, § 5.95(108), eff. Sept. 1, 1995; Subsec. (i) added by Acts 1997, 75th Leg., ch. 670, § 5, eff. Sept. 1, 1997.

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Art. 56.04. Victim assistance coordinator; crime victim liaison

(a) The district attorney, criminal district attorney, or county attorney who prosecutes criminal cases shall designate a person to serve as victim assistance coordinator in that jurisdiction.

(b) The duty of the victim assistance coordinator is to ensure that a victim, guardian of a victim, or close relative of a deceased victim is afforded the rights granted victims, guardians, and relatives by Article 56.02 of this code. The victim assistance coordinator shall work closely with appropriate law enforcement agencies, prosecuting attorneys, the Board of Pardons and Paroles, and the judiciary in carrying out that duty.

(c) Each local law enforcement agency shall designate one person to serve as the agency's crime victim liaison. Each agency shall consult with the victim assistance coordinator in the office of the attorney representing the state to determine the most effective manner in which the crime victim liaison can perform the duties imposed on the crime victim liaison under this article.

(d) The duty of the crime victim liaison is to ensure that a victim, guardian of a victim, or close relative of a deceased victim is afforded the rights granted victims, guardians, or close relatives of deceased victims by Subdivisions (4), (6), and (9) of Article 56.02(a) of this code.

(e) The victim assistance coordinator shall send a copy of a victim impact statement to the court sentencing the defendant. If the court sentences the defendant to imprisonment in the Texas Department of Corrections, it shall attach the copy of the victim impact statement to the commitment papers.

Added by Acts 1985, 69th Leg., ch. 588, § 1, eff. Sept. 1, 1985. Amended by Acts 1989, 71st Leg., ch. 996, § 3, eff. Sept. 1, 1989; Subsec. (a) amended by Acts 1991, 72nd Leg., ch. 202, § 4, eff. Sept. 1, 1991.

Art. 56.05. Reports Required

(a) The Board of Pardons and Paroles, the Texas Adult Probation Commission, and the Texas Crime Victim Clearinghouse, designated as the planning body for the purposes of this article, shall develop a survey plan to maintain statistics on the numbers and types of persons to whom state and local agencies provide victim impact statements during each year.

(b) At intervals specified in the plan, the planning body may require any state or local agency to submit, in a form prescribed for the reporting of the information, statistical data on the numbers and types of persons to whom the agency provides victim impact statements and any other information required by the planning body. The form must be designed to protect the privacy of persons afforded rights under this chapter and to determine whether the selected agency or office is making a good faith effort to protect the rights of the persons served.

(c) The Texas Crime Victim Clearinghouse shall develop crime victim assistance standards and distribute those standards to law enforcement officers and attorneys representing the state to aid those officers and prosecutors in performing duties imposed by this chapter.

Added by Acts 1985, 69th Leg., ch. 588, § 1, eff. Sept. 1, 1985. Subsec. (c) added by Acts 1989, 71st

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Leg., ch. 996, § 4, eff. Sept. 1, 1989.

Art. 56.06. Costs of medical examination

(a) A law enforcement agency that requests a medical examination of a victim of an alleged sexual assault for use in the investigation or prosecution of the offense shall pay all costs of the examination. A law enforcement agency or prosecuting attorney's office may pay all costs related to the testimony of a licensed health care professional in a criminal proceeding regarding the results of the medical examination or manner in which it was performed.

(b) This article does not require a law enforcement agency to pay any costs of treatment for injuries.

Added by Acts 1989, 71st Leg., ch. 2, § 5.05(a), eff. Aug. 28, 1989. Subsec. (a) amended by Acts 1991, 72nd Leg., ch. 75, § 1, eff. Sept. 1, 1991.

Art. 56.07. Notification

At the initial contact or at the earliest possible time after the initial contact between the victim of a reported crime and the law enforcement agency having the responsibility for investigating that crime, that agency shall provide the victim a written notice containing:

(1) information about the availability of emergency and medical services, if applicable;

(2) notice that the victim has the right to receive information regarding compensation to victims of crime as provided by Subchapter B, Chapter 56, including information about:

(A) the costs that may be compensated under that Act and the amount of compensation, eligibility for compensation, and procedures for application for compensation under that Act;

(B) the payment for a medical examination for a victim of a sexual assault under Article 56.06 of this code; and

(C) referral to available social service agencies that may offer additional assistance;

(3) the name, address, and phone number of the law enforcement agency's victim assistance liaison;

(4) the address, phone number, and name of the crime victim assistance coordinator of the office of the attorney representing the state;

(5) the following statement:

"You may call the law enforcement agency's telephone number for the status of the case and information about victims' rights"; and

(6) the rights of crime victims under Article 56.02 of this code.

Added by Acts 1991, 72nd Leg., ch. 202, § 5, eff. Sept. 1, 1991. Subd. (2) amended by Acts 1995,

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74th Leg., ch. 76, § 5.95(108), eff. Sept. 1, 1995.

Art. 56.08. Notification of rights by attorney representing the state

(a) Not later than the 10th day after the date that an indictment or information is returned against a defendant for an offense, the attorney representing the state shall give to each victim of the offense a written notice containing:

(1) a brief general statement of each procedural stage in the processing of a criminal case, including bail, plea bargaining, parole restitution, and appeal;

(2) notification of the rights and procedures under this chapter;

(3) suggested steps the victim may take if the victim is subjected to threats or intimidation;

(4) notification of the right to receive information regarding compensation to victims of crime as provided by Subchapter B of this chapter, including information about:

(A) the costs that may be compensated under Subchapter B of this chapter, eligibility for compensation, and procedures for application for compensation under Subchapter B of this chapter;

(B) the payment for a medical examination for a victim of a sexual assault under Article 56.06 of this code; and

(C) referral to available social service agencies that may offer additional assistance;

(5) the name, address, and phone number of the local victim assistance coordinator;

(6) the case number and assigned court for the case;

(7) the right to file a victim impact statement with the office of the attorney representing the state and the pardons and paroles division of the Texas Department of Criminal Justice; and

(8) notification of the right of a victim, guardian of a victim, or close relative of a deceased victim, as defined by Section 508.117, Government Code, to appear in person before a member of the Board of Pardons and Paroles as provided by Section 508.153, Government Code.

(b) If requested by the victim, the attorney representing the state, as far as reasonably practical, shall give to the victim notice of any scheduled court proceedings, changes in that schedule, the filing of a request for continuance of a trial setting, and any plea agreements to be presented to the court.

(c) A victim who receives a notice under Subsection (a) of this article and who chooses to receive other notice under law about the same case must keep the following persons informed of the victim's current address and phone number:

(1) the attorney representing the state; and

(2) the pardons and paroles division of the Texas Department of Criminal Justice if after sentencing the defendant is confined in the institutional division.

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(d) An attorney representing the state who receives information concerning a victim's current address and phone number shall immediately provide that information to the community supervision and corrections department supervising the defendant, if the defendant is placed on community supervision.

Added by Acts 1991, 72nd Leg., ch. 202, § 5, eff. Sept. 1, 1991. Subsec. (a) amended by Acts 1995, 74th Leg., ch. 253, § 2, eff. Sept. 1, 1995; Subsec. (a)(4) amended by Acts 1995, 74th Leg., ch. 76, § 5.95(108), eff. Sept. 1, 1995; Subsec. (d) added by Acts 1995, 74th Leg., ch. 252, § 2, eff. Sept. 1, 1995; Subsec. (a) amended by Acts 1997, 75th Leg., ch. 165, § 12.04, eff. Sept. 1, 1997.

Art. 56.09. Victim's right to privacy

As far as reasonably practical, the address of the victim may not be a part of the court file except as necessary to identify the place of the crime. The phone number of the victim may not be a part of the court file.

Added by Acts 1991, 72nd Leg., ch. 202, § 5, eff. Sept. 1, 1991.

Art. 56.10. Victim's discovery attendance

Unless absolutely necessary, victims or witnesses who are not incarcerated may not be required to attend depositions in a correctional facility.

Added by Acts 1991, 72nd Leg., ch. 202, § 5, eff. Sept. 1, 1991.

Art. 56.11. Notification to Victim of Release or Escape of Defendant

(a) The Texas Department of Criminal Justice or the sheriff, whichever has custody of the defendant in the case of a felony, or the sheriff in the case of a misdemeanor, shall notify the victim of the offense whenever a person convicted of an offense described by Subsection (c):

(1) completes the person's sentence and is released; or

(2) escapes from a correctional facility.

(b) If the Texas Department of Criminal Justice is required by Subsection (a) to give notice to the victim of an offense, the department shall also give notice to local law enforcement officials in the county in which the victim resides.

(c) This article applies to a person convicted of an offense involving family violence, stalking, or violation of a protective order or magistrate's order.

(d) It is the responsibility of a victim desiring notification of the offender's release to provide the Texas Department of Criminal Justice or the sheriff, as appropriate, with the address and telephone number of the victim or other person through whom the victim may be contacted and to notify the department or the sheriff of any change of address or telephone number of the victim or other person. Information obtained and maintained by the Texas Department of Criminal Justice or a sheriff under this subsection is privileged and confidential.

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(e) The Texas Department of Criminal Justice or the sheriff, as appropriate, shall make a reasonable attempt to give the notice required by Subsection (a):

(1) not later than the 30th day before the person completes the sentence and is released; or

(2) immediately if the person escapes from the correctional facility.

(f) An attempt by the Texas Department of Criminal Justice or the sheriff to give notice to the victim at the victim's last known address, as shown on the records of the department or agency, constitutes a reasonable attempt to give notice under this article.

(g) In this article:

(1) "Correctional facility" has the meaning assigned by Section 1.07, Penal Code.

(2) "Family violence" has the meaning assigned by Section 71.01, Family Code.

Added by Acts 1993, 73rd Leg., ch. 10, § 6, eff. March 19, 1993. Subsec. (a) amended by Acts 1995, 74th Leg., ch. 657, § 6, eff. June 14, 1995; amended by Acts 1997, 75th Leg., ch. 1, § 8, eff. Jan. 28, 1997. Amended by Acts 1997, 75th Leg., ch. 670, § 6, eff. Sept. 1, 1997.

Art. 56.12. Notification of escape

(a) The Texas Department of Criminal Justice shall immediately make a reasonable attempt to notify the victim of an offense, the victim's guardian, or the victim's close relative, if the victim is deceased, whenever the offender escapes from a facility operated by the institutional division of the Texas Department of Criminal Justice, if the victim, victim's guardian, or victim's close relative has notified the institutional division as provided by Subsection (b) of this article. An attempt by the Texas Department of Criminal Justice to give notice to the victim, the guardian of the victim, or a close relative of a deceased victim at the victim's, the guardian of the victim's, or a close relative of a deceased victim's last known telephone number or address as shown on the records of the department constitutes a reasonable attempt to give notice under this subsection.

(b) It is the responsibility of the victim, guardian, or close relative desiring notification of an offender's escape to notify the Texas Department of Criminal Justice of the desire for notification and any change of address.

Added by Acts 1995, 74th Leg., ch. 251, § 1, eff. May 29, 1995.

SUBCHAPTER B. CRIME VICTIMS' COMPENSATION

Art. 56.31. Short Title

This subchapter may be cited as the Crime Victims' Compensation Act.

Added by Acts 1993, 73rd Leg., ch. 268, § 6, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 76, § 5.84(a), eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 779, § 1, eff. Sept. 1, 1995.

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Victims Rights Amendment [Folder 3]

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

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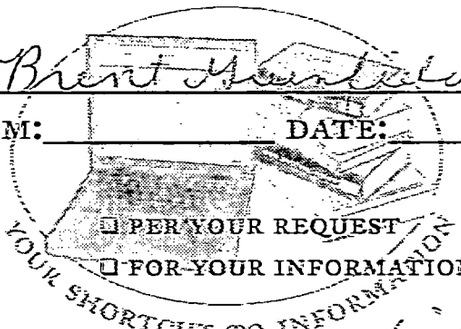

TO: Brent Hartsell

ROOM: DATE:

MESSAGE: Bills pending + recently enacted law on victims' rights, as opposed to Constitutional amend. JB

FROM:

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CQ BILLWATCH

HR3090

Sponsor:
Thomas, B. (R-CA)
Introduced:
Oct. 11, 2001
Official Title:
A bill to provide tax incentives for economic recovery.
Brief Title:
Job Creation and Worker Assistance Act of 2002

CQ BillWatch Brief:

By Michael W. Stevens and David Clarke, CQ Staff

As signed into law by the president on March 9, 2002.

Synopsis

HR3090 -- PL 107-147 extends unemployment benefits and allows businesses to take larger deductions on equipment purchases.

Highlights

The new law authorizes $8 billion in fiscal 2002 for a 13-week extension of unemployment benefits for workers who exhaust their normal 26 weeks of benefits. It also permits additional extensions in states with unemployment rates greater than 4 percent.

The measure allows businesses to deduct 30 percent of the cost of equipment purchases made from Sept. 11, 2001, through Sept. 10, 2004. It is estimated that this will cost $77.8 billion over five years.

The legislation also allows businesses to deduct losses in 2001 and 2002 to offset profits in the previous five years, at an estimated cost of $5.6 billion over five years.

The law establishes tax breaks and tax-exempt bonds for businesses in New York's "Liberty Zone," an area around the World Trade Center site, at an estimated cost of $5.6 billion over 10 years.

The measure extends 14 expiring tax credits, including a two-year extension for the electric vehicle credit and for businesses that hire former welfare recipients. It

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Related Bills

Sen. Jon Corzine, D-N.J., introduced a companion measure (S1812).

Outlook

Supporters say the hope the legislation can be the basis for a bipartisan plan to ensure that the ≤**terrorism**≥ ≤**victims**≥ are not deprived of the benefits that Congress wanted to grant them.

The Bush administration has not yet taken a position on the legislation.

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CQ BILLWATCH

HR3627

Sponsor:
Graham, L. (R-SC)
Introduced:
Jan. 24, 2002
Official Title:
A bill to protect the United States and its allies by imposing sanctions on countries and entities that aid and abet individuals or entities engaged in terrorist activity or fail to cooperate in the war against terrorism, and for other purposes.
Brief Title:
No Safe Harbor Act

CQ BillWatch Brief:

By Jeremy Torobin, CQ Staff

As introduced on Jan. 24, 2002.

Synopsis

HR3627 would permit sanctions on nations and entities that aid or harbor terrorists or otherwise fail to cooperate with the United States in its war on terrorism.

Highlights

The bill would allow the president to impose sanctions on any country or entity that he determined was:

-- failing to support U.S. counterterrorism investigations and failing to assist the

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United States or any of its allies in intelligence-gathering;

-- harboring terrorist suspects to protect them from prosecution by the United States or U.S. allies and failing to extradite terrorist suspects to the United States or to any of its allies; and

-- allowing individuals or entities to raise money for terrorism or recruit terrorists.

Among sanctions the president would be allowed to impose would be:

-- an economic embargo (including blocking the country's property or property interests in the United States, barring transactions in which any national of the country had an interest and barring trade with the country);

-- a ban on travel to and from the country; and

-- denial of entry into the United States as an immigrant or non-immigrant (except in the case of refugees) by any citizen or habitual resident of the country.

The president could sanction an entity by blocking all of its property and property interests in the United States or controlled by a U.S. citizen or by business interests that are subject to U.S. laws.

The president also would be allowed to vest and liquidate as much of the blocked property as he deemed necessary to "adequately compensate" terrorism ≤**victims**≥ or their families.

If he certified to Congress that doing so would be in the national interest, the president also could waive the sanctions against a particular country.

Finally, the legislation would assert that Congress finds "harboring, supporting or providing aid or protection to individuals or entities" involved in ≤**terrorism**≥ against the United States, U.S. citizens abroad or U.S. allies to be an act of "aggression" against the United States. The language would apply the same assertion to any nation or entity that failed to help the United States or U.S. allies in catching and punishing terrorists.

Background

HR3627 was introduced less than a week before President Bush used his 2002 State of the Union address to issue blunt new warnings to nations that sponsor terrorism or harbor terrorists.

After disclosing that American forces in Afghanistan had found diagrams of U.S. nuclear power plants and that "tens of thousands of trained terrorists are still at large," Bush told Congress that if some nations where terrorists are hiding or thriving "do not act, America will." He also fingered Iran, Iraq and North Korea by name, saying they made up "an axis of evil" that was attempting to develop nuclear, biological and chemical weapons.

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Since the Sept. 11, 2001, terrorist attacks on the United States, the Bush administration has demanded that regimes around the world cooperate with its war on terrorism. In a Sept. 20, 2001, address to a joint session of Congress, Bush declared that all nations must make a decision: "Either you are with us, or you are with the terrorists."

Related Bills

The anti-terrorism law that Bush signed on Oct. 26, 2001, (HR3162 -- PL 107-56) makes it illegal for people in the United States to harbor an individual they know or should have known had engaged in or was about to engage in terrorist crimes.

Outlook

The bill would appear to have the potential for widespread support in both chambers, but another piece of legislation introduced by HR3627 sponsor Lindsey Graham, R-S.C., may point to a slight hurdle.

HJRES75, which the House passed on Dec. 20, 2001, would call on the president and the United Nations to "insist" on monitoring weapons development in Iraq. While it initially stated that Iraq's refusal to allow inspectors constituted "an act of aggression against the United States and its allies," the House International Relations Committee leadership softened the language to address concerns that such wording would give the president implicit authority to expand the war on terrorism to Iraq.

Some lawmakers argue that the president might need another congressional resolution authorizing force before expanding the war to Iraq or elsewhere. A joint resolution (SJRES23 -- PL 107-40) authorizing military force in response to Sept. 11 tied congressional support specifically to those events and made no mention of Iraq.

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CQ BILLWATCH

HR2884

Sponsor:
Thomas, B. (R-CA)
Introduced:
Sept. 13, 2001
Official Title:
A bill to amend the Internal Revenue Code of 1986 to provide tax relief for victims of the terrorist attacks against the United States on September 11, 2001.
Brief Title:
Victims of Terrorism Tax Relief Act of 2001

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CQ BillWatch Brief:

By David Clarke, CQ Staff

As signed into law by the president on Jan. 23, 2002.

Synopsis

HR2884 -- PL 107-134 provides tax relief to families of terrorist victims.

Highlights

Tax relief provisions apply to victims of the Sept. 11, 2001, terrorist attacks on the United States; the 1995 Oklahoma City bombing; and anthrax-related deaths between Sept. 11, 2001, and January 2002.

The legislation exempts from federal income tax any money earned during the year of the victim's death, as well as the preceding year.

Victim's families are assured a minimum benefit of at least $10,000.

The measure exempts $3 million of a victim's estate from state tax and $8.5 from federal tax.

Terrorist related payments made by the government, the victims' companies to families and charities will be tax-exempt, as will any other ≤**terrorism**≥-related death benefits.

None of a ≤**victim**≥'s forgiven debt can be taxed.

The exemption amount for disability trusts will increase to $3,000.

A state court must approve any structured settlement payments stemming from wounding, illness or death as a result of the terrorist attacks. Any agreement not approved by a court could be subject to a 40 percent excise tax.

The legislation allows companies to set up private foundations to assist victims' families.

The measure allow the IRS to extend tax-related and pension-related deadlines for people affected by the terrorist attacks.

For three years after enactment, the new law increases the amount of an individual's tax information the IRS is allowed to share with law enforcement officials investigating terrorist attacks.

Background

HR2884 was introduced and passed unanimously by the House two days after the Sept. 11 attacks, in which hijackers flew commercial airliners into the World Trade

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Center towers and the Pentagon. A fourth hijacked jetliner crashed in western Pennsylvania.

"We cannot lift the heavy burden of their loss from their shoulders. We cannot bring back their loved ones," said Ways and Means Chairman Bill Thomas, R-Calif. "But we can and will relieve the immediate financial pressures imposed by tax obligations."

Sens. Charles E. Schumer, D-N.Y., and Hillary Rodham Clinton, D-N.Y., advocated including a refund of payroll taxes and a broader tax break package for New York that would include provisions for businesses and residents. The Senate's version of fiscal 2002 defense spending legislation (HR3338) would provide $9.5 billion for relief to New York. Part of this package would include residential aid programs the New York senators have endorsed, such as $500 million in community bloc grants.

Advocates of the payroll tax refund have said it is needed to help the families of low-income workers killed in the attacks, but a spokeswoman for the Ways and Means Committee said the refund was left out because it could adversely affect the Social Security trust fund.

Related Bills

HR2882 would expedite the payment of benefits to public safety officers catastrophically injured -- and the families of those killed -- in the Sept. 11 attacks.

S1423, S1433 and S1440 all contain provisions similar to what was passed by the House and Senate.

The House included HR2884 in its last economic stimulus bill of 2001 (HR3529), which the chamber passed on Dec. 20, but added a minimum benefit of $10,000 in place of a payroll tax refund.

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CQ BILLWATCH

HR3338

Sponsor:
Lewis, Jerry (R-CA)
Introduced:
Nov. 19, 2001
Official Title:
An original bill making appropriations for the Department of Defense for the fiscal year ending September 30, 2002, and for other purposes.

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Brief Title:
Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002

CQ BillWatch Brief:

By Jeremy Torobin, CQ Staff

As signed into law by the president on Jan. 10, 2002.

Synopsis

HR3338 -- PL 107-117 appropriates $317.4 billion in fiscal 2002 discretionary spending for the Defense Department and its programs. It also allocates $20 billion in funding previously appropriated by the emergency supplemental measure (HR2888 -- PL 107-38) that Congress enacted in response to the Sept. 11, 2001, terrorist attacks on the United States.

Highlights

In terms of overall Defense spending, the new law provides $19 billion more than in fiscal 2001 (including fiscal 2001 emergency supplemental funding) for the Defense Department, which is $1.9 billion less than President Bush's amended fiscal 2002 budget request.

Overall, the Defense portion provides $105 billion for operations and maintenance, $82.1 billion for military personnel (plus another $18.4 billion for defense-related health programs), $60.8 billion for weapons procurement and $48.9 billion for research and development.

The measure appropriates $881 million for a new Defense Department account devoted to counterterrorism activities and other unconventional threats. This includes the full request of $403 million -- a reduction of $40 million from fiscal 2001 -- for the Defense Department's Cooperative Threat Reduction programs, designed to safeguard and destroy nuclear stockpiles in Russia. The legislation also provides a reportedly large but classified percentage increase in funding for intelligence programs, including more money to upgrade human intelligence programs, enhance signals intelligence capabilities, accelerate the development of mapping and other reconnaissance systems and improve overall intelligence analytical capabilities.

It provides $7.8 billion for the Bush administration's highly controversial ballistic missile defense program and other related programs, about $500 million less than the president requested but $2.5 billion more than in fiscal 2001. The House version of the bill would have provided roughly the same amount for missile defense, while the Senate would have provided $7 billion, plus an additional $1.3 billion to be allocated either for missile defense or counterterrorism programs.

Much of the cut comes from restructuring the Space Based Infrared System (SBIRS)-Low program, designed to track missiles via satellite but which has drawn criticism because of program delays and cost overruns. The House and Senate agreed

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to compromise on about $250 million for space-based technology programs, and funding for the troubled SBIRS-Low and other programs would be drawn from that fund.

The measure also includes a $20 billion deal that would let the Air Force lease a fleet of Boeing 767 air tankers for 10 years to replace aging KC-130 planes.

Personnel.

The agreement's $82.1 billion for military personnel is $6.2 billion more than in fiscal 2001 and $251 million more than the president requested.

This includes full funding for the administration's proposed military pay raise, which guarantees all personnel an increase of 4.6 percent to 10 percent. The total also includes a provision designed to reduce out-of-pocket housing costs for service personnel to about 11.3 percent, and another that allows some mid-level personnel to transfer to spouses or children a portion of their Montgomery GI Bill education benefits.

In addition to the $82.1 billion, the measure slightly exceeds Bush's $18.3 billion request for the Defense Health Program, providing a more-than-50 percent increase from fiscal 2001, including a new "TRICARE for Life" program for eligible military retirees age 65 or older.

Operations and maintenance.

The legislation provides $105 billion, $1.7 billion less than requested but $8.2 billion more than in fiscal 2001, for operations and maintenance -- which includes training, supply and equipment maintenance, Defense Department administrative functions, some environmental restoration, humanitarian assistance and other programs. Much of the overall increase will be used for spare parts, real property maintenance and depot maintenance, as well as flying and other training hours.

The total includes the president's request for a 3.6 percent pay increase for Defense Department civilian employees and a $537 million requested increase for force protection measures aimed at protecting U.S. forces, assets and facilities.

Procurement.

The report's $60.8 billion for weapons procurement includes:

-- the full request of $3 billion for 48 F/A-18 E/F fighter aircraft (the Navy's upgrade of the current F/A-18 C/D aircraft, the primary strike aircraft of both the Navy and the Marine Corps);

-- the full request of $3 billion for DDG-51 Arleigh Burke-class guided-missile destroyer procurement, plus $125 million in advanced funding for the ship;

-- $2.8 billion, roughly equal to Bush's request, to purchase a total of 15 C-17 cargo planes;

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-- the full request of $2.6 billion for 13 low-rate initial production F-22 aircraft;

-- the full request of $1.6 billion for procurement of the fourth boat in the Virginia class of attack submarines, which will replace retiring Los Angeles-class submarines and constitute the bulk of the attack submarine force in the future;

-- $1 billion for procurement of 11 V-22 Osprey tilt-rotor aircraft (one less than requested), including nine MV-22 Ospreys for the Marine Corps and two CV-22 Ospreys for the Special Operations Forces. (The measure also caps the annual production rate at 11 aircraft until the V-22 has completed its program restructuring and has returned to flight status.);

-- $729 million in unrequested funds for various National Guard and Reserves procurement accounts, including funding for eight U-60 Blackhawk helicopters and two C-130J transports to be used solely for domestic firefighting in the West;

-- full funding for key Army transformation programs, including $663 million for procurement and $102 million for research and development of the Interim Armored Vehicle;

-- $450 million, $324 million more than requested, for the conversion of four Trident ballistic missile submarines to "Tactical Trident" cruise missile platforms;

-- the full request of $371 million for one ADC(X) (also called "T-AKE") cargo and ammunition resupply ship;

-- the full request of $273 million for procurement of one JSTARS long-range, air-to-ground surveillance system aircraft, which is designed to locate, classify and track ground targets in all weather conditions. (The measure also provides $49 million for advance procurement in fiscal 2003.);

-- the full request of $267 million for the eighth LHD-8 amphibious assault ship, which carries helicopters, AV-8B Harrier attack aircraft and amphibious assault and landing craft; and

-- an increase of $250 million from fiscal 2001 for Unmanned Aerial Vehicles (UAVs or "drones"), which can provide firsthand reconnaissance of opposition forces without placing lives at risk and are being used extensively in Afghanistan. (The funding includes additional funding for Predator UAVs requested by the president, as well as unrequested funds for acquisition of the follow-on Predator B variant.).

Also, because of a perceived lack of programmatic and fiscal discipline in the Navy's shipbuilding programs, as well as concerns that the Navy's use of alternative financing mechanisms such as advanced appropriations serve to artificially increase shipbuilding rates, the measure bars the Defense Department from budgeting for shipbuilding programs on the basis of advanced appropriations.

Research and development.

The new law's $48.9 billion for research and development includes:

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-- the full request of about $1.5 billion for the Joint Strike Fighter, including $767 million for Navy JSF development and $780 million for Air Force JSF development;

-- the full request of $881.6 million for development of the F-22;

-- $219 million, $64 million more than Bush requested, for continued research and development of the B-2 bomber; and

-- the full request of $36 million for research and development of the CVN-77, the Navy's next nuclear aircraft carrier, which will serve as a transition ship from the Nimitz class of nuclear carriers to the next-generation CV(X) aircraft carrier. The measure also appropriates the president's request of $139 million for advance procurement of CVN (X) and $314 million for research and development funds for the CVN (X).

Supplemental spending.

In terms of the $20 billion in supplemental funding, the allocation provides $8.3 billion for homeland defense; $8.2 billion to help New York City and parts of Pennsylvania and Virginia that were directly affected by the Sept. 11 attacks; and $3.5 billion in additional defense spending. The $20 billion also includes $50 million in reconstruction aid for Afghanistan.

The $8.3 billion for homeland defense is roughly $2.8 billion more than the president's request and the House level, but slightly less than the Senate-passed measure. It includes:

-- $2.5 billion in additional funding for improving federal, state and local bioterrorism response and preparedness activities, including money to acquire 300 million doses of smallpox vaccine;

-- $745 million for the FBI;

-- $549 million for the Immigration and Naturalization Service;

-- $500 million for the Postal Service;

-- $400 million for the Customs Service;

-- $309 million for Federal Aviation Administration facilities and equipment, including $109 million for explosive detection systems, $100 million for cockpit door and transponder modifications and $65 million to hire additional sky marshals;

-- $256 million to enhance the security of legislative branch facilities and employees;

-- $226 million for nuclear non-proliferation activities, including $120 million to secure nuclear materials at sites in Russia and the former Soviet states and $15 million for a program to find civilian jobs for Russian nuclear scientists;

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-- $210 million for emergency planning assistance for the Federal Emergency Management Agency (FEMA) firefighter grants program; and

-- $209 million for Coast Guard operating expenses and anti-terrorism activities.

The $8.2 billion to help New York City and other areas directly impacted by the Sept. 11 attacks is $1.1 billion more than the House bill and the president's request but $1.3 billion less than the Senate level. When combined with $3 billion in previously released funds, total funding for New York and the other areas will be approximately $11.2 billion. The funding in HR3338 includes:

-- $4.4 billion for disaster relief through FEMA;

-- $2 billion in unrequested funds for Community Development Block Grants for economic recovery assistance;

-- $300 million in additional transportation assistance and security enhancements, including funds for Amtrak, subways and ferries; and

-- $229 million for state and local law enforcement.

The $3.5 billion in defense funding is $3.8 billion less than the House bill and the president's request but $1.5 billion more than the Senate level. It is designed to:

-- increase the military's worldwide posture;

-- enhance situational awareness;

-- repair and upgrade the Pentagon;

-- conduct offensive counterterrorism operations;

-- provide enhanced force protection and improve command and control; and

-- enhance initial crisis response.

The measure also provides authority for agencies to reimburse the National Guard for duties it has undertaken since Sept. 11.

Other provisions.

The measure provides the president's request of $1.3 billion for the Defense Environmental Restoration Account, which is intended to rectify contamination caused by past actions, ensure present compliance and prepare a more environmentally sensitive military establishment for the future. Funding for environmental restoration also is included elsewhere in the measure, as well as in the fiscal 2002 military construction (HR2904 -- PL 107-64) and energy and water (HR2311 -- PL 107-66) spending laws.

The legislation includes several provisions designed to reduce Pentagon

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extends for five years a tax break for financial services companies with overseas income. It is estimated that the cost of these extensions will be $11.2 billion over five years.

Background

In late 2001, most economists believed that an already sagging economy had been pushed into a recession by the economic impacts of the Sept. 11 terrorist attacks on the United States. Hundreds of thousands of jobs were lost, with the airline industry alone sustaining more than 100,000 job cuts. Further economic losses were felt by the tourism and hospitality industries, and the financial sector was devastated by the destruction of the World Trade Center. In light of those losses, and in the context of an economy already hurting from a year of stock market contraction and anemic growth, pressure grew for a large-scale federal intervention in the economy.

On Oct. 5, 2001, President Bush proposed a $75 billion economic stimulus package comprising income tax rate cuts, tax rebates for low-income works, business tax cuts and abolition of the corporate alternative minimum tax (AMT). Many of those proposals were drafted into the House bill, only at a higher cost than proposed by the president.

However, Democrats and Republicans had significant disagreements about the size, scope and shape of an economic stimulus package. While Republicans sought additional tax cuts and acceleration of the 2001 tax cut (HR1836 -- PL 107-16), Democrats emphasized the expansion of unemployment benefits and infrastructure security spending.

The House initially passed HR3090 by a two-vote margin on a near party-line vote Oct. 24, 2001, after three hours of contentious debate in which Republicans accused Democrats of reviving "class warfare."

The House version was a $99.5 billion economic stimulus plan that contained tax-cutting provisions and spending increases but was weighted more heavily toward tax cuts. It would have lowered federal revenue by $99.5 billion in fiscal 2002 and $159.4 billion over 10 years.

When House Republicans advanced their bill, Senate Democrats decided to do the same, with little input from Republicans. At a contentious markup of the language written by Finance Chairman Max Baucus, D-Mont., Republicans criticized this decision, saying it went against the committee's "bipartisan tradition." They pointed to the tax cut compromise reached earlier in the year by then-Chairman Charles E. Grassley, R-Iowa, and Baucus as an example of how the stimulus negotiations should have been handled.

The Senate Finance Committee substituted into HR3090 the text from a draft Democratic bill. As subsequently approved by the committee, the language would have offered a $67 billion economic stimulus plan that would have included about $36 billion in tax cuts and rebates, $26 billion in benefits and more than $5 billion in farm aid.

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administrative and overhead costs, such as reducing Pentagon headquarters staff by 15 percent and reducing the use of outside contractors.

It provides $841 million for the drug interdiction activities, $22 million more than the president requested but $26 million less than in fiscal 2001.

Also, to address House concerns about the Army's ability to meet deadlines for its transformation to 21st century technologies, the measure establishes an Army venture capital fund to make equity investments in nascent companies developing technologies important to the Army that also have commercial applications. The fund will be modeled on the CIA's In-Q-Tel corporation that performs a similar function for the intelligence agency.

The report also provides spending authority for the Navy to pay all claims arising out of the collision between the submarine USS Greenville and the Japanese training ship Ehime Maru.

Background

The defense spending measure is usually one of the first of the 13 appropriations bills to be cleared by Congress, generally with strong bipartisan support. The exceptions often have come in years when the White House has changed occupants and the new president has proposed big changes in budgetary and monetary policy.

Defense Secretary Donald H. Rumsfeld wanted to add more than $35 billion to the $310.5 billion the Clinton administration had projected for the Pentagon budget in fiscal 2002, and the Bush White House approved only about half that. As a result, Rumsfeld's effort to "transform" U.S. defense strategy and make the forces more agile and more lethal -- a major undertaking that met with resistance from several corners -- stalled for months, with senior military officers saying they simply lacked the money to prepare for the future while protecting the nation in the present. The length of Rumsfeld's strategic review pushed back the authorization and appropriations processes and was the reason the Pentagon had to amend its initial budget request.

Moreover, in August, Democrats argued that, because of Bush's tax cut package (HR1836 -- PL 107-16) and an uncertain economic forecast, the increases in defense spending that Bush was seeking would have to come at the expense of the Social Security and Medicare trust funds or other popular social programs.

The Sept. 11, 2001, terrorist attacks created a climate of urgency that more or less erased that view. Few lawmakers continued to call for reductions in defense spending, and the two parties quickly reached compromises on funding for controversial programs such as missile defense.

The House Appropriations Committee unanimously approved the $317.5 billion core of the bill at a markup on Oct. 24, 2001, but the legislation remained unfinished as members were told they would reconvene to tack on an additional $20 billion in funding mainly for New York's recovery effort, military operations and homeland defense. That funding represents half of the $40 billion emergency appropriations

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package enacted after Sept. 11 (HR2888 -- PL 107-38). The other half of that supplemental is being spent at the administration's discretion.

New York Republicans on the committee held up the bill's consideration for weeks while they lobbied for more of the $20 billion to go toward New York's recovery effort.

When Bush threatened to veto any bill that added more than $20 billion in extra funding, they eventually settled on a deal giving New York $7.8 billion of the $20 billion. That figure is more than New York originally was slated to get as its share of the first half of the emergency money, but in exchange its total out of the full $40 billion dropped to $11.4 billion, or less than 60 percent of what the administration initially had promised.

David R. Obey, Wis., the committee's ranking Democrat, pushed unsuccessfully for his own $7.2 billion in additional homeland defense spending. The House Rules Committee effectively blocked Obey from offering his amendment on the floor by refusing to protect it from a point of order.

The Senate committee added an extra $15 billion in homeland defense spending as an amendment after it had approved the bill unanimously. The amendment was adopted by voice vote, with Republicans dissenting.

But when procedural votes on the Senate floor made clear that Republicans had the might to block the $15 billion emergency spending add-on, the Democrats settled for shifting billions from military operations into bioterrorism preparedness, homeland defense and New York's reconstruction in the bill's allocation of $20 billion. Some of the key parts of the Senate committee's add-on for homeland defense, authored by Senate Appropriations Chairman Robert C. Byrd, D-W.Va., survived in the portion devoted to ≤**terrorism**≥ preparedness.

The key issue holding up the bill in conference, however, was the tanker lease provision. Opponents said it would be more cost-effective to buy the tankers and that the deal was a bailout for Boeing Co. However, provision's sponsor, Senate Appropriations ranking Republican Ted Stevens, Alaska, won the blessing of key appropriators in the House. A Senate amendment that would have let the president divert the money for the lease deal to other programs if they were deemed vital to national security was stripped out of the conference report.

Conferees dropped a controversial provision that would have prevented U.S. cooperation with a proposed International Criminal Court. The court would handle war crimes and other human ≤**rights**≥ violations, but U.S military leaders and many lawmakers worry that it would expose U.S. troops to politically motivated accusations and trials. Reflecting widespread conservative opposition to the court, the Senate adopted an amendment offered by Jesse Helms, R-N.C., that would have restricted U.S. participation in U.N. peacekeeping operations if U.S troops were not exempted from prosecution by the court. It also would have barred U.S military aid to countries unless they signed agreements to shield U.S. troops from being handed over to the court.

REV_00264829

Although the House had approved a similar amendment as part of a State Department authorization bill (HR1646), appropriators chose to drop the language from the final bill. They did, however, include language preventing Pentagon funds from being used to support the court.

Related Bills

The conference report to HR3338 is consistent with an overall defense budget authority of about $343 billion, including the defense bill, the fiscal 2002 military construction spending law (HR2904 -- PL 107-64) and the Energy Department nuclear weapons activities funded by the fiscal 2002 energy and water appropriations law (HR2311 -- PL 107-66). The defense portion of the bill tracks closely with the fiscal 2002 defense authorization law (S1438 -- PL 107-107).

Attorney General John Ashcroft has said he would sign a letter promising to help New Yorkers win more money through the ≤**victims**≥ compensation fund created by the airline bailout law (HR2926 -- PL 107-42).

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CQ BILLWATCH

S1729

Sponsor:
Kennedy, E. (D-MA)
Introduced:
Nov. 27, 2001
Official Title:
An original bill to provide assistance with respect to the mental health needs of individuals affected by the terrorist attacks of September 11, 2001.
Brief Title:
Post ≤**Terrorism**≥ Mental Health Improvement Act

CQ BillWatch Brief:

By Karin M. Caifa, CQ Staff

As passed by the Senate on Dec. 12, 2001.

Synopsis

S1729 would increase mental health assistance to individuals affected by the Sept. 11, 2001, terrorist attacks on the United States.

Highlights

REV_00264830

The bill would authorize additional funding to state and local governments for the training of mental health professionals in the treatment of those who are ≤**victims**≥ of such disasters.

The legislation would implement a grant program for areas directly impacted by the Sept. 11, 2001, terrorist attacks to address long-term needs. State and local governments could use the money to provide treatment, including medication, for those suffering from a psychiatric illness as a result of an attack. They also could use the money for outreach programs to encourage those affected by the attacks to seek mental health care if needed. The bill would authorize such sums as necessary in fiscal 2002 through 2005.

The measure also would extend through fiscal 2005 an existing program (PL 106-505) that provides assistance for children who experience violence-related stress.

Background

Psychiatrists testifying before the Senate Health, Education, Labor and Pensions Committee on Sept. 26, 2001, warned that trauma resulting from Sept. 11 could lead to long-term mental illness if symptoms were left untreated. A recent study by the Pew Charitable Trusts found that 71 percent of Americans have had trouble sleeping at night, trouble concentrating or felt depressed since the attacks.

As panel chairman, bill sponsor Edward M. Kennedy, D-Mass., has voiced his support for S1729 and several other mental health initiatives this session.

"Access to mental health services is one of the most important civil ≤**rights**≥ issues facing the nation," Kennedy said. "One in five Americans will suffer some form of mental illness this year, but only a third of them will receive treatment."

Related Bills

HR3448 is a comprehensive legislative package aimed at improving the nation's ability to respond effectively and quickly to bioterrorist threats and other public health emergencies.

S1539, S1635 and HR3106 contain provisions for addressing mental health in children following terrorist attacks.

Paul Wellstone, D-Minn., and Pete V. Domenici, R-N.M., authored a mental health parity provision for the fiscal 2002 Labor-HHS-Education appropriations bill (HR3061). The proposal would bar group health plans that provide mental health coverage from imposing tighter restrictions on that coverage than on coverage for physical ailments.

Outlook

S1729 was referred to the House Energy and Commerce Committee, which planned to consider the bill in early 2002.

REV_00264831

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CQ BILLWATCH

HR3529

Sponsor:
Thomas, B. (R-CA)
Introduced:
Dec. 19, 2001
Official Title:
A bill to provide tax incentives for economic recovery and assistance to displaced workers.
Brief Title:
Economic Security and Worker Assistance Act of 2001

CQ BillWatch Brief:

By David Clarke, CQ Staff

Updated to reflect House passage on Dec. 20, 2001.

Synopsis

HR3529 is a comprehensive economic stimulus plan.

Highlights

The measure would provide tax breaks for businesses and individuals, extend expiring tax credits, extend unemployment benefits, provide a refundable tax credit for health insurance and provide assistance to families of the victims of terrorism.

Business tax provisions.

The measure would reduce the corporate alternative minimum tax (AMT), designed to prevent wealthy taxpayers from using credits and deductions to pay little or no tax, by allowing businesses to apply deductions on depreciation adjustment, net operating losses and foreign tax credits against minimum tax liability.

It would let businesses use losses over 2001 and 2002 to offset profits made during the previous five years.

The bill would allow businesses an additional 30 percent first-year deduction on the purchase of equipment bought between Sept. 10, 2001, and Sept. 11, 2004.

For 2002 and 2003, the amount small businesses could expense for the purchase of

new equipment would be increased from $24,000 to $35,000. Beginning in 2004, the amount would be $25,000. The total cost of equipment eligible for expensing would be increased to $325,000 during 2002 and 2003.

Individual tax provisions.

The measure would provide a tax refund of $300 to individuals and $600 to couples who filed an income tax return but did not receive a refund under the spring 2001 tax cut law (HR1836 - PL 107-16). Individuals and couples who received a partial refund from the tax cut bill would get the difference between what they were awarded and the $300 or $600.

The 27 percent tax rate, which applies to income in the $27,050 to $65,550 range for single taxpayers, would be reduced to 25 percent effective Jan. 1, 2002. Under existing law, this rate cut is not scheduled until 2006. In order to offset any increased AMT for an individual's tax liability caused by the acceleration of the rate reduction, the measure would temporarily increase the amount of income exempt from AMT. In 2002 and 2003, the exemption would be increased by $1,600 for individuals and $3,200 for couples. In 2004, the amounts would be increased by $850 for individuals and $1,700 for couples.

Health and unemployment.

The measure would provide a 60 percent refundable tax credit to workers laid off between March 15, 2001, and December 2003 to pay for health insurance for up to 12 months. The same workers would have the ≤**right**≥ to no-pre-existing-condition insurance if they were covered by their employer the previous year.

The bill would authorize $4 billion in block grants to states for health care and re-employment assistance, and an additional $4.6 billion in direct funding over two years for health care.

The measure would extend unemployment benefits by 13 weeks to workers who lost their jobs after March 15, 2001. In addition, it would transfer close to $9 billion in federal unemployment funds to the states over two years.

Terror ≤victim≥ tax relief.

The tax relief provisions would apply to the families of ≤**victims**≥ of the Sept. 11, 2001, terrorist attacks on the United States; anthrax attacks that occurred between Sept. 11, 2001, and Jan. 1, 2002; and the 1995 Oklahoma City bombing.

The measure would:

-- exempt ≤**victims**≥ from income tax liability for the year of death and the previous year, with a minimum of $10,000 per ≤**victim**≥;

-- exempt $3 million of a ≤**victim**≥'s estate from state tax and $8.5 million from federal tax;

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-- exempt income resulting from forgiveness of debt in 2001;

-- exempt payments made by the government, charities and the ≤**victims**≥' companies to families, along with any other ≤**terrorism**≥-related death benefits; and

-- allow the IRS to postpone any tax- or pension-related deadlines for ≤**victim**≥'s families.

The bill would require a state court to approve any structured settlement payments stemming from wounding, illness or death from the terrorist attacks. Any agreement that was not approved by a court could be subject to a 40 percent excise tax.

Aid for New York.

HR3529 would authorize $15 billion in tax-exempt bonds over three years for financing commercial, residential rental and public utility property in lower Manhattan's "Liberty Zone."

The measure would extend from two to five years the amount of time to reinvest insurance proceeds without paying taxes on the gains as long as a substantial amount of that money was invested in New York.

A 30 percent depreciation deduction for businesses would be extended through 2006, and through 2009 for residential and non-residential properties.

The value of property small businesses could expense would be increased from $35,000 to $75,000.

Tax and program extensions.

The measure would extend for two years:

-- the Work Opportunity tax credit;

-- the Welfare-to-Work tax credit;

-- the deduction for clean fuel vehicles and refueling property;

-- the credit for the production of electricity from wind, biomass or poultry-waste facilities; and

-- the treatment of non-refundable personal credits under the AMT.

The measure would extend by one year the Temporary Assistance for Needy Families (TANF) program's supplemental grants program and the TANF contingency fund.

Background

The Joint Committee on Taxation (JCT) estimates that HR3529 would cost $89.8

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billion in fiscal 2002, $214.2 billion over five years and $156.8 billion over 10 years. The panel estimates that the bill's business tax provisions would cost $46.1 billion in fiscal 2002, $96.9 billion over five years and $41.3 billion over 10 years. It estimates that the individual tax provisions contained in the bill would cost $27.3 billion in fiscal 2002 and $73.7 billion over 10 years.

Most economists believe that an already sagging economy was pushed into a recession by the economic impacts of the Sept. 11, 2001, terrorist attacks on the United States. Hundreds of thousands of jobs were lost, with the airline industry alone sustaining more than 100,000 job cuts. Further economic losses were felt by the tourism and hospitality industries, and the financial sector was devastated by the destruction of the World Trade Center. In light of those losses, and in the context of an economy already hurting from a year of stock market contraction and anemic growth, pressure grew for a large-scale federal intervention in the economy.

On Oct. 5, 2001, President Bush proposed a $75 billion economic stimulus package comprising income tax rate cuts, tax rebates for low-income works, business tax cuts and abolition of the corporate AMT. Many of those proposals were drafted into a House bill (HR3090), only at a higher cost than proposed by the president.

However, Democrats and Republicans had significant disagreements about the size, scope and shape of an economic stimulus package. While Republicans sought additional tax cuts and acceleration of the previous tax cut, Democrats emphasized the expansion of unemployment benefits and infrastructure security spending.

On Oct. 24, 2001, the House passed HR3090 by a two-vote margin on a near party-line vote after three hours of contentious debate in which Republicans accused Democrats of reviving "class warfare." Earlier, the chamber rejected a $110 billion Democratic alternative.

When House Republicans advanced their bill, Senate Democrats decided to do the same, with little input from Republicans. At a contentious markup of the language written by Finance Chairman Max Baucus, D-Mont., Republicans criticized this decision, saying it went against the committee's "bipartisan tradition."

Democrats cited House Republicans' decision to leave early-October negotiations between the two chambers as the first shot in the partisan battle.

Along with complaints about too much spending, committee Republicans criticized agricultural subsidies in the bill, such as $25 million for a sugar beet disaster program, as special-interest provisions with little stimulative effect.

When the Democrats brought their bill to the Senate floor, Republicans used a procedural tactic that required supporters to muster 60 votes, nine more than the Democrats could manage. That effectively halted the bill until further negotiations could take place.

What ensued was more than a month of negotiations and finger pointing as House Republicans and Senate Democrats attempted to keep their priorities in play and blame the other side if discussions bore no legislation.

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Along the way, Republicans criticized Senate Majority Leader Tom Daschle, S.D., following news reports that he told fellow Democrats a bill would not be brought to the floor if it did not have the approval of two-thirds of their caucus. Democrats were quick to criticize House Ways and Means Chairman Bill Thomas when he left town for a weekend with scheduled negotiations, claiming he wanted to attend a fundraiser while his aides insisted he was leaving to rest after a draining week of negotiations that led to the passage of fast-track trade authority legislation (HR3005).

With negotiations barely crawling forward, the White House became involved on Dec. 11, offering a $93 billion plan after meeting with members of the Senate Centrist Coalition. The president's plan attempted to placate Democrats by offering a tax credit to cover 50 percent of unemployed workers' health insurance over two years and extending unemployment insurance by 13 weeks in all states.

But Democrats balked at the acceleration of the 27 percent tax rate, the lack of funding for health care and AMT provisions they said looked like a repeal of the tax. Democrats wanted direct funding for unemployed workers that would cover 75 percent of COBRA, the Consolidated Omnibus Budget Reconciliation Act (PL 99-272), continuation health coverage premiums and Medicaid assistance for people ineligible for the program.

As 2001 drew to a close without agreement, House Republicans attempted to pressure Daschle by saying they would bring to the floor a bill (HR3529) similar to the president's plan. Daschle did not blink, even as the House passed the bill on Dec. 20, 2001.

While the White House and Republicans said they had more than 50 votes for the bill in the Senate -- Democrats John B. Breaux, La., Ben Nelson, Neb., and Zell Miller, Ga. had pledged their support -- the GOP did not have the 60 votes needed to waive a budget point of order. In response to Republican cries that he was using a parliamentary maneuver to kill the bill, Daschle said the stimulus package would have to live up to the same point of order Senate Republicans used to defeat the Democrats' plan.

Despite the concessions contained within HR3529, including removal of the corporate AMT refund, Daschle said the bill still was too generous to business interests, would cost too much and fell short on health care.

Daschle said he felt that stimulus negotiations were so difficult in comparison to other legislation considered after the Sept. 11 attacks because economic policy is the major issue that divides the parties. "There is a philosophical divide that evidences itself in these debates constantly, and this no different," he said.

Congress cleared a separate bill covering victims' tax relief (HR2884) after the stimulus talks ended.

Related Bills

HR3090 is a $99.5 billion economic stimulus plan that contains tax-cutting provisions and spending increases but is weighted more heavily toward tax cuts. It

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would lower federal revenue by $99.5 billion in fiscal 2002 and $159.4 billion over 10 years. The measure would repeal the corporate AMT and refund money collected from the tax.

The Senate Finance Committee substituted its own $67 billion stimulus plan into HR3090. That would include about $36 billion in tax cuts and rebates, $26 billion in benefits and more than $5 billion in farm aid.

Outlook

Daschle would not say that plans for an economic stimulus plan were dead, preferring to use the word "dormant." When Congress returns in 2002, debate about at least some of the provisions contained in the different plans or discussed during negotiations could be revived.

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CQ BILLWATCH

HR3413

Sponsor:
Kennedy, P. (D-RI)
Introduced:
Dec. 5, 2001
Official Title:
A bill to amend the Public Health Service Act to establish a program of grants to states and political subdivisions of states for the provision of mental health services in response to public health emergencies, including disasters resulting from ≤**terrorism**≥, and for other purposes.
Brief Title:
Extended Disaster Mental Health Services Act of 2001

CQ BillWatch Brief:

By Karin M. Caifa, CQ Staff

As introduced on Dec. 5, 2001.

Synopsis

HR3413 would authorize a grant program to help states respond to mental health needs resulting from public health emergencies or terrorist attacks.

Highlights

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Grassley said that some Democrats were unhappy about the earlier compromise and were seeking "payback." He also suggested that Democrats advanced their plan so they would only have to negotiate with Republicans once -- in conference.

Democrats cited House Republicans' decision to leave early-October negotiations between the two chambers as the first shot in the partisan battle.

Along with complaints of too much spending, committee Republicans criticized agricultural subsidies in the bill, such as $25 million for a sugar beet disaster program, as special-interest provisions with little stimulative effect.

When the Democrats brought their bill to the Senate floor, Republicans used a procedural tactic that required supporters to muster 60 votes, nine more than the Democrats could manage. That effectively halted the bill until further negotiations could take place.

Signs of economic recovery in early 2002 drained support for a comprehensive stimulus package. However, with the normal 26-week period of unemployment benefits set to expire for workers who lost their jobs around Sept. 11, 2001, pressure remained to extend those benefits.

On Feb. 14, 2002, the Senate amended the House-passed measure to include just the unemployment benefits extension. The House then amended the Senate version to include some corporate tax breaks as well as the extension of unemployment benefits and voted overwhelmingly to send the measure back to the Senate. House Republicans left out provisions, such as a repeal of the corporate AMT, that previously had grounded the legislation in the Senate.

Related Bills

HR3529 would provide tax breaks for businesses and individuals, extend expiring tax credits, extend unemployment benefits, provide a refundable tax credit for health insurance and provide assistance to families of the <**victims**> of <**terrorism**>. The Joint Committee on Taxation estimates that the bill would cost $89.8 billion in fiscal 2002, $214.2 billion over five years and $156.8 billion over 10 years

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CQ BILLWATCH

HR3633

Sponsor:
Traficant (D-OH)
Introduced:
Jan. 24, 2002

REV_00264811

The legislation would authorize necessary funding for fiscal 2002 through 2006 for grants to states for mental health services in response to public health emergencies. The grants could be used for:

-- crisis counseling;

-- outreach and screening programs to identify those at risk of developing mental health disorders;

-- extended mental health services (beyond immediate crisis counseling) for those with diagnosed mental health disorders resulting from or exacerbated by the emergency; and

-- outreach services to inform communities of the availability of crisis counseling and extended services.

In order to receive a grant, a state would have to demonstrate that it had implemented a statewide response plan for mental health services following an emergency. HR3413 would authorize $25 million annually for fiscal 2002 through 2006 for grants to implement these plans if states did not already have them. Statewide plans would have to include:

-- detailed descriptions of how to care for special populations, such as the elderly, children and people with existing mental health disorders;

-- an effort to coordinate with education, public safety and media officials; and

-- the designation of a state official who would administer the plan.

The bill also would authorize $2 million annually for fiscal 2002 through 2006 for a national mental health crisis response technical assistance center. The center, to be established within the Department of Health and Human Services, would:

-- provide technical expertise on planning, preparedness and response evaluation activities;

-- develop policy guidelines on mental health concerns related to crisis incidents;

-- develop and conduct training events and conferences on mental health needs of disaster ≤**victims**≥ and witnesses;

-- serve as the principal clearinghouse for the collection and dissemination of information concerning the mental health aspects of public health emergencies; and

-- provide onsite technical expertise during and following public health emergencies.

The bill would authorize additional funding to state and local governments for the training of mental health professionals in the treatment of disaster victims.

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Background

Psychiatrists testifying before the Senate Health, Education, Labor and Pensions Committee on Sept. 26, 2001, warned that trauma resulting from the Sept. 11, 2001, terrorist attacks on the United States could lead to long-term mental illness if symptoms were left untreated. A recent study by the Pew Charitable Trusts found that 71 percent of Americans have had trouble sleeping at night, trouble concentrating or felt depressed since the attacks.

Related Bills

HR3448 is a comprehensive legislative package aimed at improving the nation's ability to respond effectively and quickly to bioterrorist threats and other public health emergencies.

S1729 would increase mental health assistance to individuals affected by the Sept. 11 attacks.

S1539, S1635 and HR3106 contain provisions for addressing mental health in children following terrorist attacks.

Sens. Paul Wellstone, D-Minn., and Pete V. Domenici, R-N.M., authored a mental health parity provision for the fiscal 2002 Labor-HHS-Education appropriations bill (HR3061). The proposal would bar group health plans that provide mental health coverage from imposing tighter restrictions on that coverage than on coverage for physical ailments.

Outlook

HR3413 was referred to the House Energy and Commerce Committee. It is doubtful that the panel will take up the measure before the end of 2001.

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CQ BILLWATCH

HConRes280

Sponsor:
Hyde (R-IL)
Introduced:
Dec. 4, 2001
Official Title:
A concurrent resolution expressing solidarity with Israel in the fight against terrorism.

CQ BillWatch Brief:

By Jeremy Torobin, CQ Staff

As adopted by the House on Dec. 5, 2001.

Synopsis

HCONRES280 would condemn the suicide bomb attacks in Israel over the weekend of Dec. 1-2, 2001, and call on the president to take "any and all necessary" steps to ensure that the Palestinian Authority (PA) cracks down on terrorism.

Highlights

The resolution would formally condemn the attacks, express "outrage" at the "ongoing Palestinian terrorist campaign" and express solidarity between the United States and Israel.

It would insist that the PA take steps to end terrorism and demand that the authority take immediate action to:

-- destroy the infrastructure of Palestinian terrorist groups;

-- arrest those terrorists who Israel has said should be incarcerated; and

-- either prosecute those terrorists, give convicts "the stiffest possible punishment" and make them serve their full sentences, or hand over all arrested terrorists to Israel.

The resolution would urge the president to take all necessary steps, including suspending all relations with Palestinian leader Yasser Arafat and the PA, to ensure that the PA complied.

It also would urge the president to insist that all nations that harbor or support Palestinian terrorism end such support and prosecute all terrorists within their borders.

Finally, the resolution would commend President Bush for his conduct in the international fight against terrorism and his "forthright response" to the suicide attacks in Israel.

Background

The string of three suicide bombings, believed to be the deadliest 24 hours of terrorism in Israel's history, left 26 Israelis dead and dozens wounded. Two of the blasts took place at a pedestrian mall in Jerusalem's nightlife district; the other was on a crowded bus in Haifa. Several of the ≤**victims**≥ were teenagers.

It is believed that the attacks, for which the extremist group Hamas took responsibility, were primarily retaliation for the Israeli assassination in November 2001 of a top Hamas commander, Mahmoud Abu Hanoud.

REV_00264840

President Bush and other U.S. officials strongly condemned the attacks, with the administration's new Middle East envoy, retired Gen. Anthony C. Zinni, calling them "the deepest evil one can imagine." The sharp reaction caps months of U.S. exasperation with Arafat's failure to deliver on repeated pledges to restrain Palestinian violence. The administration also reportedly was unimpressed by the low- to mid-level arrests that the PA made the day after the first wave of suicide bombings.

Arafat's officials have made some key arrests since the attacks, but he argues that Israel's retaliatory attacks in Palestinian territories, as well as the Israeli military presence in the territories, have undercut his efforts.

Pro-Israel lawmakers have likened Israel's ongoing fight against <**terrorism**> to the U.S.-led efforts to root out terrorism worldwide. In light of the early December attacks, some are openly comparing the PA to the Taliban and many others are questioning whether Arafat is capable of being an effective leader and peacemaker.

Related Bills

The Senate adopted a companion measure (SCONRES88) the same day the House adopted HCONRES280.

Outlook

Concurrent resolutions require adoption by both houses of Congress but are not sent to the president for his signature and therefore lack the force of law. Since both chambers adopted identical language, no further action is necessary.

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CQ BILLWATCH

HR2926

Sponsor:
Young, D. (R-AK)
Introduced:
Sept. 21, 2001
Official Title:
A bill to preserve the continued viability of the United States air transportation system.
Brief Title:
Air Transportation Safety and System Stabilization Act

CQ BillWatch Brief:

REV_00264841

By Joseph J. Schatz, CQ Staff

As signed into law by the president on Sept. 22, 2001.

Synopsis

HR2926 -- PL 107-42 provides $15 billion in emergency financial assistance to commercial airlines and limits their liability for damages stemming from the Sept. 11, 2001, terrorist attacks on the United States.

Highlights

The legislation provides $5 billion in direct payments to compensate airlines for losses stemming from the Sept. 11 attacks. Companies must document those losses and will be allotted payments based upon their percentage of the overall available passenger seats in the industry.

The measure provides $10 billion in loan guarantees and other credit instruments to airlines. It also creates a four-member commission to oversee the dispersal of guarantees and credit instruments. Carriers that receive any of these credit instruments must enter into a contract requiring them not to raise executive salaries from their 2000 levels for two years. Retiring executives also may not receive severance packages worth more than twice their salary in 2000.

In order to ensure continuation of air service to small communities, the law allows the Transportation secretary to require airlines receiving financial assistance to maintain some level of service to all previous destinations.

The legislation allows the federal government to share in any profits of the airlines through warrants under the loan provision.

The measure limits airlines' liability for damage caused by any terrorist acts for 180 days following enactment by invoking the War Risk Insurance program, which limits airline liability on international flights during wartime, and modifying it to apply to domestic flights and acts of ≤**terrorism**≥.

The government will be liable for damages of more than $100 million and will reimburse airlines for increased insurance costs.

The law limits the liability of American Airlines and United Airlines in connection with the Sept. 11 attack. Two planes from each carrier were hijacked that morning. Terrorists flew two jetliners into the World Trade Center in New York and one into the Pentagon just outside Washington. The fourth hijacked jet crashed in Pennsylvania.

The legislation allows ≤**victims**≥ -- or the families of those killed -- two options for seeking compensation. They may:

-- apply for tax-free relief from a federal victims' compensation fund created by the law and administered by the Justice Department; or

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-- file a lawsuit in the U.S. District Court for the Southern District of New York.

The measure extends until Nov. 15, 2001, the deadline for airlines to make excise tax deposits to the U.S. government.

Finally, the legislation affirms that $3 billion from a post-attack emergency spending law (HR2888 -- PL 107-38) must be spent on airline safety and security measures.

Background

After several days of negotiation, House and Senate leaders and Bush administration officials reached a deal on language that would give the airline industry a "bailout package" in the wake of the terrorist attacks.

The legislation incorporated elements of a White House proposal that called for $5 billion in direct payments, $3 billion to offset the costs of new security requirements and the liability provisions. The administration opposed the addition of loan guarantees, which were included in the final text.

Some lawmakers wanted to see worker protections incorporated into the bill, but such provisions are not in the final language.

After the Sept. 11 attacks, Transportation Secretary Norman Y. Mineta grounded all flights in the United States. Commercial flights did not resume for two days and, at the time the president signed HR2926 -- PL 107-42 into law, Ronald Reagan Washington National Airport remained closed because of security concerns.

A week after the attacks, commercial flights still were not operating at full capacity, and several airlines had announced layoffs totaling more than 80,000. In the aftermath of the attacks, public unease about aviation security dealt a blow to the industry, in which companies already were struggling.

Related Bills

The Senate passed an identical bill (S1450) on Sept. 21, 2001.

HR2891 would provide $2.5 billion if direct payments and $12.5 billion in loan guarantees. Rep. Lloyd Doggett, D-Texas, blocked a unanimous consent request to pass the bill on Sept. 15, 2001.

HR2895 and S1447 would put the federal government in control of airport security personnel.

Additional legislation that would require increased airline and airport security was expected.

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REV_00264843

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S1450

Sponsor:
Daschle (D-SD)
Introduced:
Sept. 21, 2001
Official Title:
A bill to preserve the continued viability of the United States air transportation system.
Brief Title:
Air Transportation Safety and System Stabilization Act

CQ BillWatch Brief:

By Joseph J. Schatz, CQ Staff

As passed by the Senate on Sept. 21, 2001.

Synopsis

S1450 would provide $15 billion in emergency financial assistance to commercial airlines and limit their liability for damages stemming from the Sept. 11, 2001, terrorist attacks on the United States.

Highlights

The bill would provide $5 billion in direct payments to compensate airlines for losses stemming from the Sept. 11 attacks. Companies would be required to document these losses and would be allotted payments based upon their percentage of the overall available passenger seats in the industry.

The bill would provide $10 billion in loan guarantees and other credit instruments to airlines. It would create a four-member commission to oversee the dispersal of guarantees and credit instruments. Carriers that received any of these credit instruments would have to enter into a contract requiring them not to raise executive salaries from their 2000 levels for two years. Retiring executives would not be permitted to receive severance packages worth more than twice their salary in 2000.

In order to ensure continuation of air service to small communities, the bill would allow the Transportation secretary to require airlines receiving financial assistance to maintain some level of service to all previous destinations.

S1450 would allow the federal government to share in any profits of the airlines through warrants under the loan provision.

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The bill would limit airlines' liability for damage caused by any terrorist acts for 180 days following enactment by invoking the War Risk Insurance program, which limits airline liability on international flights during wartime, and modifying it to apply to domestic flights and acts of ≤**terrorism**≥.

The government would be liable for damages above $100 million and would reimburse airlines for increased insurance costs.

S1450 would limit the liability of American Airlines and United Airlines in connection with the Sept. 11 attack. Two planes from each carrier were hijacked that morning. Terrorists flew two jetliners into the World Trade Center in New York and one into the Pentagon just outside Washington. The fourth hijacked jet crashed in Pennsylvania.

The legislation would allow ≤**victims**≥ -- or the families of those killed -- two options for seeking compensation. They could:

-- apply for tax-free relief from a federal victims' compensation fund that would be created by the bill and administered by the Justice Department; or

-- file a lawsuit in the U.S. District Court for the Southern District of New York.

The bill would extend until Nov. 15, 2001, the deadline for airlines to make excise tax deposits to the U.S. government.

Finally, the bill would affirm that $3 billion from a post-attack emergency spending law (HR2888 -- PL 107-38) would be spent on airline safety and security measures.

Background

After several days of negotiation, House and Senate leaders and Bush administration officials reached a deal on language that would give the airline industry a "bailout package" in the wake of the terrorist attacks.

The bill incorporates elements of a White House proposal that called for $5 billion in direct payments, $3 billion to offset the costs of new security requirements and the liability provisions. The administration opposed the addition of loan guarantees, which were included in the final bill.

Some lawmakers wanted to see worker protections incorporated into the bill, but such provisions are not in the final language.

After the Sept. 11 attacks, Transportation Secretary Norman Y. Mineta grounded all flights in the United States. Commercial flights did not resume for two days and, at the time S1450 was introduced, Ronald Reagan Washington National Airport remained closed because of security concerns.

A week after the attacks, commercial flights still were not operating at full capacity, and several airlines had announced layoffs totaling more than 80,000. In the

REV_00264845

aftermath of the attacks, public unease about aviation security dealt a blow to the industry, in which companies already were struggling.

Related Bills

The House passed an identical bill (HR2926) on Sept. 21, 2001.

HR2891 would provide $2.5 billion if direct payments and $12.5 billion in loan guarantees. Rep. Lloyd Doggett, D-Texas, blocked a unanimous consent request to pass the bill on Sept. 15, 2001.

HR2895 and S1447 would put the federal government in control of airport security personnel.

Additional legislation that would require increased airline and airport security was expected.

Outlook

The same day it passed S1450, the Senate agreed by voice vote to deem the identical HR2926 passed upon receipt from the House.

President Bush signed HR2926 -- PL 107-42 on Sept. 22, 2001.

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CQ BILLWATCH

HR2888

Sponsor:
Young, C.W. (R-FL)
Introduced:
Sept. 14, 2001
Official Title:
A bill making emergency supplemental appropriations for the fiscal year 2001 for additional disaster assistance, for anti-≤**terrorism**≥ initiatives, and for assistance in the recovery from the tragedy that occurred on September 11, 2001, and for other purposes.
Brief Title:
2001 Emergency Supplemental Appropriations Act for Recovery From and Response to Terrorist Attacks on the United States

CQ BillWatch Brief:

By Rich Daly, CQ Staff

REV_00264846

As signed into law by the president on Sept. 18, 2001.

Synopsis

HR2888 -- PL 107-38 provides emergency funding to respond to the Sept. 11, 2001, terrorist attacks on the United States, in which hijackers flew commercial airliners into the twin towers of the World Trade Center and the Pentagon. A fourth hijacked jetliner crashed in western Pennsylvania.

Highlights

The legislation appropriates $40 billion to a new executive branch emergency response account. The money will be used to respond to the terrorist attacks, provide assistance to ≤**victims**≥ and fund recovery assistance.

The measure supplies money to:

-- improve federal, state and local preparedness to mitigate and responde to the attacks;

-- counter, investigate or prosecute domestic or international terrorists;

-- provide increased transportation security;

-- repair public facilities and transportation systems damaged by the attacks; and

-- support national security.

The bill makes $10 billion available immediately to President Bush to deal with needs arising from the attacks. It requires the president to consult with the chairman and ranking minority members of the House and Senate Appropriations committees before allocating the money.

Another $10 billion will become available 15 days after the president submits a budget request describing how the money will be spent. This procedure is consistent with the congressional notification process used for the allocation of funds for past emergencies.

The remaining $20 billion can be spent only when allocated in subsequent appropriations legislation in response to the terrorist acts.

HR2888 specifies that at least $20 billion of the total $40 billion allocation "shall be for domestic humanitarian assistance and disaster recovery activities in response to the terrorist acts of Sept. 11, 2001."

The bill stipulates that if further funding is required, the president must to submit detailed requests to Congress. It also mandates that the Office of Management and Budget provide quarterly reports to the Appropriations committees on the use of all funds, beginning no later than Jan. 2, 2002.

REV_00264847

Official Title:
A bill to provide compensation for the United States citizens or legal permanent residents who were victims of the bombing of the Murrah Federal Building in Oklahoma City, Oklahoma on April 19, 1995, on the same basis as compensation is provided to victims of the terrorist-related aircraft crashes on September 11, 2001.
Brief Title:
Oklahoma City Victims Compensation Act

CQ BillWatch Brief:

By Joi C. Ridley, CQ Staff

As introduced on Jan. 24, 2002.

Synopsis

HR3633 would authorize compensation for victims of the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City on the same basis as for victims of the Sept. 11, 2001, terrorist attacks on the United States.

Highlights

The bill would authorize compensation for:

-- citizens present at the Murrah building at the time or in the immediate aftermath, or within a two block radius, of the bombing; and

-- physical, economic and non-economic losses suffered as a result of the bombing.

The amount of compensation would be based upon the extent of harm as deemed by a special master appointed under the September 11th ≤**Victim**≥ Compensation Fund of 2001 (HR2888 -- PL 107-38).

Compensation would be administered through the attorney general, and claimants would have to their waive ≤**right**≥ to sue, except in relation to collateral or punitive damages.

Background

HR3633 sponsor James A. Traficant Jr., D-Ohio, contends that Federal Protective Service (FPS) officials were knowingly in non-compliance with minimum staff requirements under PL 100-440. Traficant says they "failed to provide adequate protection [for] possible liabilities."

Those so-called liabilities included the apparent car bomb outside of the Murrah building that killed 168 people and injured 500 others. Timothy McVeigh was convicted of the bombing and executed by lethal injection on June 12, 2001.

"The sad reality is that since Oklahoma City, the terrorist threat to federal buildings -- foreign and domestic -- has increased dramatically. ≤**Right**≥ now, we are

REV_00264812

The measure designates the entire $40 billion "emergency" spending pursuant to 1985's so-called Gramm-Rudman-Hollings law (PL 99-177), exempting the funds from spending caps in the fiscal 2002 budget resolution (HCONRES83).

Background

The new law gives the president tremendous flexibility in allocating immediate assistance to emergency response agencies as well as federal law enforcement officials tracking down the terrorists and their accomplices.

The legislation does not specify how the money will be divided among its various priorities. But beyond the 50 percent mandate for humanitarian assistance, Deputy Defense Secretary Paul Wolfowitz said he expected "a significant piece" of the emergency funding to be used "to bring our armed forces to the highest state of readiness" in preparation for any retaliatory actions.

Congressional negotiations centered around the concerns of some lawmakers that Congress should retain the constitutional power of the purse and oversee how the funds would be spent. Members of Congress from New York, Virginia and Pennsylvania -- where the hijacked planes came down -- insisted that the spending resolution provide money for the recovery of, and assistance to, their states. Lawmakers said they expect to appropriate additional money later this year or next to fund recovery operations fully.

Senate Majority Leader Tom Daschle, D-S. D., said the measure expanded beyond the initially planned $20 billion after New York Gov. George Pataki, R, New York Mayor Rudolph Giuliani, R, and the New York congressional delegation appealed to Bush for the funds.

Related Bills

The Senate passed a companion bill (S1426) and stipulated that an identical HR2888 would be deemed passed when it was received from the House.

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CQ BILLWATCH

SJRes22

Sponsor:
Daschle (D-SD)
Introduced:
Sept. 12, 2001
Official Title:
A joint resolution expressing the sense of the Senate and House of Representatives

REV_00264848

regarding the terrorist attacks launched against the United States on September 11, 2001.

CQ BillWatch Brief:

By Rich Daly, CQ Staff

As signed into law by the president on Sept. 18, 2001.

Synopsis

SJRES22 -- PL 107-39 expresses the sense of the Senate and House of Representatives condemning the airborne terrorist attacks on the Pentagon and World Trade Center.

Highlights

The measure condemns the Sept. 11, 2001, terrorist attacks, in which commercial airliners were hijacked and flown into the Pentagon and the twin towers of the World Trade Center. It also condemns the terrorist hijacking and downing of a fourth commercial airliner on the same day.

It offers condolences to victims and their families, friends and loved ones and commends rescue workers and government officials who responded to the attacks.

The resolution deems the terrorist actions attacks not only on the people of the United States but also on the symbols and structures of the U.S. economy and military. It declares that the United States is entitled to respond to the attacks under international law.

It also thanks foreigners who expressed solidarity with the United States following the attacks and asks them to stand with the United States in the "war on international ≤**terrorism**≥."

The measure declares a commitment to devote increased resources to eradicate ≤**terrorism**≥.

The language supports the president and urges him, in consultation with Congress, to pursue and punish the terrorists and "their sponsors."

Finally, the measure declares Sept. 12, 2001, a "national day of unity and mourning."

Background

SJRES22 was sent directly to the Senate floor a day after the terrorist attacks. Out of respect for the ≤**victims**≥, it was the only measure considered by the chamber that day.

Related Bills

REV_00264849

The House considered a companion measure (HJRES61) the same day, ultimately passing it unanimously shortly after midnight. The House also agreed by unanimous consent that upon passage of HJRES61 and receipt of SJRES22, the chamber would be considered to have passed the Senate resolution.

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CQ BILLWATCH

HJRes61

Sponsor:
Armey (R-TX)
Introduced:
Sept. 12, 2001
Official Title:
A joint resolution expressing the sense of the Senate and House of Representatives regarding the terrorist attacks launched against the United States on September 11, 2001.

CQ BillWatch Brief:

By Rich Daly, CQ Staff

As passed by the House on Sept. 13, 2001.

Synopsis

HJRES61 would condemn the airborne terrorist attacks on the Pentagon and World Trade Center.

Highlights

The measure would condemn the Sept. 11, 2001, terrorist attacks, in which commercial airliners were hijacked and flown into the Pentagon and the twin towers of the World Trade Center. It also would condemn the terrorist hijacking and downing of a fourth commercial airliner on the same day.

It would offer condolences to victims and their families, friends and loved ones and commend rescue workers and government officials who responded to the attacks.

The resolution would deem the terrorist actions attacks not only on the people of the United States but also on the symbols and structures of the U.S. economy and military. It would declare that the United States was entitled to respond to the attacks under international law.

REV_00264850

It also would thank foreigners who have expressed solidarity with the United States following the attacks and ask them to stand with the United States in the "war on international ≤**terrorism**≥."

The measure also declares a commitment to devote increased resources to eradicate ≤**terrorism**≥.

The language would support the president and urge him, in consultation with Congress, pursue and punish the terrorists and "their sponsors."

Finally, the measure declares Sept. 12, 2001, a "national day of unity and mourning."

Background

HJRES61 was sent directly to the House floor a day after the terrorist attacks, though it didn't come to a vote until shortly after midnight. Out of respect for the ≤**victims**≥, it was the only measure considered by the chamber that day.

Related Bills

The Senate introduced and passed a companion measure (SJRES22) on Sept. 12, 2001.

Outlook

The House passed HJRES61 on a 408-0 vote. It also agreed by unanimous consent that, upon receipt of the companion measure, the chamber would be considered to have cleared the Senate resolution.

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CQ BILLWATCH

S180

Sponsor:
Frist (R-TN)
Introduced:
Jan. 25, 2001
Official Title:
A bill to facilitate famine relief efforts and a comprehensive solution to the war in Sudan.
Brief Title:
Sudan Peace Act

REV_00264851

CQ BillWatch Brief:

By Jeremy Torobin, CQ Staff

Updated to reflect Senate passage on July 19, 2001.

Synopsis

S180 aims to put increased pressure on the National Islamic Front (NIF) government in Sudan to end ≤**terrorism**≥, slave raids and human ≤**rights**≥ violations. It would condemn the civil war in Sudan, direct the administration to facilitate peace talks and urge relief efforts to circumvent the Sudanese government should it try to veto aid to rebel-held areas in southern Sudan.

Highlights

The legislation would formally condemn human rights violations in Sudan, including slavery and the NIF's denial of food aid to civilians.

It would require the president to report to Congress on: the state of human rights and violence in Sudan; the extent of U.S. financing of Sudanese oil operations; and the status of humanitarian relief efforts, particularly whether they are being hampered or manipulated by the NIF or any other of the warring parties.

Also, the bill would authorize State Department personnel to support ongoing peace process negotiations between the NIF and Sudanese opposition forces -- including the planning and implementation of any peace settlement -- as well as other U.S. diplomatic efforts supporting peace in Sudan.

It would urge the U.S. representative to the United Nations to exert pressure on the body to facilitate an end to the war in Sudan. It also would urge the United Nations to investigate allegations of slavery in Sudan and to condemn aerial bombings of civilians every time they occur in Sudan.

The bill also would express the sense of Congress that the president should seek to increase humanitarian aid by renegotiating the Operation Lifeline Sudan (OLS) agreement to remove Sudan's ability to refuse or veto aid. OLS, established in 1989 and overseen by the United Nations, assists internally displaced people and other civilians affected by the civil war.

In addition, the bill would call on the president to continue to use aid organizations outside OLS to deliver humanitarian aid, and direct the president to develop a contingency plan for U.S. delivery of aid if the NIF prohibits relief flights. The president would have three months to submit a "detailed report" to Congress describing the progress made toward using non-OLS organizations to distribute relief.

As amended by the Senate Foreign Relations Committee, the bill would authorize the U.S. Agency for International Development to support programs to provide humanitarian assistance to areas considered too dangerous for normal relief missions

REV_00264852

and order a study of the impact of not delivering aid to such areas.

Background

For nearly two decades, the NIF and rebel groups have been fighting for control of Sudan in a conflict that has seen slave raids in the south and attacks on native peoples in the north. The north is predominantly Muslim, and the south is populated mostly by Christians and Sudanese who practice folk religions.

This civil war has resulted in severe famine, widespread dislocation and the deaths of at least 2 million Sudanese.

Secretary of State Colin L. Powell told members of the House International Relations Committee on March 7, 2001, that he would review U.S. policy toward Sudan, saying, "There is perhaps no greater tragedy on the face of the earth today."

Related Bills

S180's companion, HR931, is an earlier version of HR2052, which the House passed June 13, 2001. However, HR2052 differs significantly from S180. It includes proposals that would require strict disclosure rules for businesses operating in Sudan and bar businesses that operate in oil and gas exploration in Sudan from trading securities on U.S. capital markets. It also would direct the U.S. ambassador-at-large for war crimes to investigate allegations of slavery, civilian bombardment and other alleged war crimes in Sudan.

Other Sudan-related legislation introduced during the 107th Congress includes:

-- HCONRES82, concerning the human rights situation there;

-- HR894, which would provide compensation to ≤**victims**≥ of the U.S. bombing of a pharmaceutical factory in Khartoum, Sudan, on Aug. 20, 1998; and

-- S171, which would repeal certain restrictions on trade with Sudan, as well as with Cuba, Iran, Libya and North Korea.

Outlook

Sudan legislation fell by the wayside during the 106th Congress because there was not enough time to resolve differences between House and Senate versions.

Just as in the current Congress, the House version would have tightened sanctions against Sudan, while the Senate bill would have focused instead on diplomatic relations. In the last Congress, the sanctions language was added to a Senate bill by the House International Relations Committee. This time, the committee included the disclosure language in its own bill, and the House added the restrictions on companies who deal in Sudanese gas or oil.

A coalition of Congressional Black Caucus members and religious conservatives pushing for Sudan legislation grew to include House Majority Leader Dick Armey,

REV_00264853

R-Texas, thus helping HR2052 pass the House overwhelmingly.

The Bush administration appears to prefer the Senate version. Though it generally supports the House legislation, it has expressed reservations about the disclosure provision. The administration released a statement the day the House passed HR2052 that said the provision would have the potential "to damage U.S. and international capital markets and to undermine the independence and prerogative of the Securities and Exchange Commission to determine the nature and definition of information that is material to the investor."

S180 sponsor Bill Frist, R-Tenn., has said he is optimistic about a House-Senate conference.

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CQ BILLWATCH

HR2052

Sponsor:
Tancredo (R-CO)
Introduced:
June 5, 2001
Official Title:
A bill to facilitate famine relief efforts and a comprehensive solution to the war in Sudan.
Brief Title:
Sudan Peace Act

CQ BillWatch Brief:

By Jeremy Torobin, CQ Staff

Updated to reflect House passage on June 13, 2001.

Synopsis

HR2052 would seek to end the civil war in Sudan and put increased pressure on the National Islamic Front (NIF) government there to end ≤**terrorism**≥, slave raids and human ≤**rights**≥ violations.

Highlights

The legislation would condemn human rights violations in Sudan, including slavery and the NIF's denial of food aid to civilians.

REV_00264854

It also would urge the Bush administration to use $10 million in previously appropriated funds (PL 106-429) for non-military aid to Sudan and direct the State Department to focus resources on negotiating a Sudanese peace agreement.

In addition, it would direct the U.S. representative to the United Nations to:

-- seek to end the veto power of the Sudanese government over relief programs to Sudanese civilians;

-- investigate allegations of slavery in Sudan; and

-- sponsor condemnations of Sudan each time it conducts aerial bombardments of civilian populations.

The legislation would block any business that operates in Sudan from trading securities in any U.S. capital market unless the business had filed forms with the Securities and Exchange Commission (SEC) to disclose:

-- the nature of its activity in Sudan;

-- the identity of all Sudanese agencies with which business was conducted;

-- any link between business activity and human rights violations; and

-- whether the proceeds from capital market transactions would be reinvested in Sudanese commercial activity.

It also would require the SEC to make those reports public, a requirement is aimed primarily at alerting Americans to the nature of business dealings in Sudan by companies in which they hold stock.

As amended by the House, the bill also would prohibit any foreign company from raising capital or listing its securities in U.S. markets as long as the company was engaged in oil and gas development in Sudan.

The measure would require the State Department and the president to report to Congress on: the state of human rights and violence in Sudan; the level of Sudan's income from oil exploration; the extent of U.S. financing of Sudanese oil operations; the level of aerial bombardment of civilians; and the status of humanitarian relief efforts (particularly whether they were being hampered or manipulated by the NIF or any other of the warring parties).

In addition, the bill would call on the president to continue to use aid organizations outside the U.N.-affiliated Operation Lifeline Sudan (the actions of which require Sudanese government approval) to deliver humanitarian aid. It also would direct the president to develop a contingency plan for U.S. delivery of aid in case the NIF prohibited relief flights. The president would have to submit a "detailed report" to Congress describing the progress made toward using non-OLS organizations to distribute relief.

REV_00264855

Background

For nearly two decades, the NIF and rebel groups have been fighting for control of Sudan in a conflict that has seen slave raids in the south and attacks on native peoples in the north. The north is predominantly Muslim, and the south is populated mostly by Christians and Sudanese who practice folk religions.

This civil war has resulted in severe famine, widespread dislocation and the deaths of at least 2 million Sudanese.

Secretary of State Colin L. Powell told members of the House International Relations Committee on March 7, 2001, that he would review U.S. policy toward Sudan, saying, "There is perhaps no greater tragedy on the face of the earth today."

Related Bills

HR931 is an earlier version of HR2052. Rep. Tom Tancredo, R-Colo, who sponsored both pieces of legislation, wanted to make changes to the earlier bill after the International Relations Africa Subcommittee approved it, but he opted instead to introduce a new bill before the full committee markup. The newer measure includes some subtle changes in language designed to avoid jurisdictional squabbles with the Appropriations and Financial Services committees.

Other Sudan-related legislation introduced during the 107th Congress includes:

-- S180, companion legislation to HR931, introduced by Sen. Bill Frist, R-Tenn., then-chairman of the Senate Foreign Relations Subcommittee on African Affairs.

-- HCONRES82, concerning the human rights situation there;

-- HR894, which would provide for compensation to ≤**victims**≥ of the U.S. bombing of a pharmaceutical factory in Khartoum, Sudan, on Aug. 20, 1998; and

-- S171, which would repeal certain restrictions on trade with Sudan, as well as with Cuba, Iran, Libya and North Korea.

Outlook

Sudan legislation fell by the wayside during the 106th Congress because there was not enough time to resolve differences between House and Senate versions. The House version would have tightened sanctions against Sudan, while the Senate bill would have focused instead on diplomatic relations.

The sanctions language in the last Congress was added to a Senate bill by the House International Relations Committee, which did not attempt to add such language to HR2052.

A coalition of Congressional Black Caucus members and religious conservatives pushing for Sudan legislation grew to include House Majority Leader Dick Armey, R-Texas, thus helping it pass the House overwhelmingly.

REV_00264856

Though the Bush administration generally favors the legislation, it has expressed reservations about the disclosure provision. The administration released a statement the day the House passed HR2052 that said the provision would have the potential "to damage U.S. and international capital markets and to undermine the and prerogative of the Securities and Exchange Commission to determine the nature and definition of information that is material to the investor."

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CQ BILLWATCH

HR931

Sponsor:
Tancredo (R-CO)
Introduced:
March 7, 2001
Official Title:
A bill to facilitate famine relief efforts and a comprehensive solution to the war in Sudan.
Brief Title:
Sudan Peace Act

CQ BillWatch Brief:

By Jeremy Torobin, CQ Staff

Updated to reflect subcommittee approval on May 16, 2001.

Synopsis

HR931 aims to put increased pressure on the National Islamic Front (NIF) government in Sudan to end ≤**terrorism**≥, slave raids and human ≤**rights**≥ violations.

Highlights

The legislation would condemn human rights violations in Sudan, including slavery and the NIF's denial of food aid to civilians.

It would require the president to report to Congress on the state of human rights and violence in Sudan; the extent of U.S. financing of Sudanese oil operations; and the status of humanitarian relief efforts, particularly whether they were being hampered or manipulated by the NIF or any other of the warring parties.

Also, the bill would authorize the secretary of State to use department personnel to

REV_00264857

still unprepared to deal with this threat," Traficant said.

Related Bills

Traficant introduced HR307, a bill to overhaul the FPS by designating more qualified police officers to federal buildings to guard against ≤**terrorism**≥. Ironically, five days before the Sept. 11 attacks, the bill had a hearing before the House Transportation and Infrastructure Subcommittee on Economic Development, Public Buildings and Emergency Management.

Outlook

HR3633 was referred to the House Judiciary Committee.

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CQ BILLWATCH

HR622

Sponsor:
DeMint (R-SC)
Introduced:
Feb. 14, 2001
Official Title:
A bill to amend the Internal Revenue Code of 1986 to expand the adoption credit, and for other purposes.
Brief Title:
Economic Security and Worker Assistance Act of 2002

CQ BillWatch Brief:

By Joseph J. Schatz and David Clarke, CQ Staff

Updated to reflect House passage on Feb. 14, 2002.

Synopsis

HR622, which as introduced would have expanded the adoption tax credit, was changed in the Senate to offer a temporary extension of unemployment insurance and then altered by the House into a comprehensive economic stimulus plan.

Highlights

The second House version of HR622 contains a variety of tax provisions, including breaks for corporations and individuals; credits to help the unemployed afford health

REV_00264813

support ongoing peace negotiations between the NIF and Sudanese opposition forces -- including the planning and implementation of any peace settlement -- as well as other U.S. diplomatic efforts supporting peace in Sudan.

The bill would express the sense of Congress that the president should seek to increase humanitarian aid by renegotiating the Operation Lifeline Sudan (OLS) agreement to remove Sudan's ability to refuse or veto aid. OLS, established in 1989 and overseen by the United Nations, assists internally displaced people and other civilians affected by the civil war. The bill also would encourage the United Nations to play a role in the peace process.

In addition, the bill would call on the president to continue to use aid organizations outside OLS to deliver humanitarian aid, and direct the president to develop a contingency plan for U.S. delivery of aid in case the NIF prohibited relief flights. The president would have three months to submit a "detailed report" to Congress describing the progress made toward using non-OLS organizations to distribute relief.

As amended by the House International Relations Subcommittee on Africa, the legislation also would:

-- authorize the use of $10 million in previously appropriated funds (PL 106-429) for non-military aid to Sudan;

-- allow Sudanese government actions, such as slavery and attacks on civilian populations, to be defined as genocide; and

-- require full disclosure of activities by any business operating in Sudan.

Background

For nearly two decades, the NIF and rebel groups have been fighting for control of Sudan in a conflict that has seen slave raids in the south and attacks on native peoples in the north. The north is predominantly Muslim and the south is populated mostly by Christians and Sudanese who practice folk religions.

This civil war has resulted in severe famine, widespread dislocation and the deaths of at least 2 million Sudanese.

Related Bills

Other Sudan-related legislation introduced during the 107th Congress includes:

-- HCONRES82, concerning the human rights situation there;

-- HR894, which would provide for compensation to <**victims**> of the U.S. bombing of a pharmaceutical factory in Khartoum, Sudan, on Aug. 20, 1998; and

-- S171, which would repeal certain restrictions on trade with Sudan, as well as with Cuba, Iran, Libya and North Korea.

REV_00264858

Outlook

No further action is expected on HR931.

Sponsor Tom Tancredo, R-Colo., who wanted to make technical changes to the bill, introduced another version (HR2052) the day before a June 6, 2001, full International Relations Committee markup in lieu of offering a substitute amendment. The full committee approved the new version.

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CQ BILLWATCH

SConRes23

Sponsor:
Feinstein (D-CA)
Introduced:
March 13, 2001
Official Title:
A concurrent resolution expressing the sense of Congress with respect to the involvement of the government in Libya in the terrorist bombing of Pan Am Flight 103, and for other purposes.
Brief Title:
Justice for the Victims of Pan Am 103 Resolution of 2001

CQ BillWatch Brief:

By Jeremy Torobin, CQ Staff

SCONRES23 would call for continued sanctions against Libya until that nation admits responsibility for the 1989 bombing of Pan Am Flight 103 over Lockerbie, Scotland.

The resolution would express the sense of Congress that:

-- the international community should condemn, "in the strongest possible terms," the Libyan government and Colonel Muammar Qadhafi for "support of international terrorism," including the bombing;

-- the Libyan government should immediately account for its involvement in the bombing, accept responsibility for the actions of Libyan officials, provide compensation to the victims' families and demonstrate a "full renunciation" of support for international terrorism; and

-- the president should instruct the U.S. Permanent Representative to the United

REV_00264859

Nations to support maintaining U.N. sanctions against Libya, or reimposing sanctions that are currently suspended, until all conditions laid out or referred to in the applicable Security Council resolutions are met.

The resolution comes in the wake of a Scottish court's Feb. 5, 2001, conviction of Abdel Basset Ali Megrahi for his involvement in the bombing, which killed 270 people, including 189 Americans. The court also conclusively tied the planning and execution of the bombing to Libya and Libyan intelligence. U.N. resolutions have ordered Libya to pay compensation to the ≤**victims**≥' families upon the rendering of a guilty verdict and officially end support for international ≤**terrorism**≥ in order for multilateral sanctions to be lifted.

The resolution would recommend making it U.S. policy to oppose removal of U.N. sanctions, including sanctions on all forms of assistance as well as trade and travel restrictions, until:

-- Libya has met the conditions laid out above and complied with the applicable U.N.Security Council resolutions;

-- the president has certified to Congress that Libya no longer supports international ≤**terrorism**≥, including an explanation of what steps Libya has taken to resolve any outstanding ≤**terrorism**≥-related claims by Americans against the Libyan government; and

-- the Libyan government is not producing, procuring or delivering weapons of mass destruction in contravention of U.S. law.

Sponsor Dianne Feinstein, D-Calif., has introduced similar legislation (S244).

CQ BillWatch Insight:

SCONRES23 was referred to the Senate Foreign Relations Committee.

Concurrent resolutions require adoption by both houses of Congress but are not sent to the president for his signature and therefore lack the force of law.

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CQ BILLWATCH

S244

Sponsor:
Feinstein (D-CA)
Introduced:
Feb. 1, 2001

REV_00264860

Official Title:
A bill to provide for United States policy toward Libya.
Brief Title:
Justice for the Victims of Pan Am 103 Act of 2001

CQ BillWatch Brief:

By Jeremy Torobin, CQ Staff

S244 would make it U.S. policy to oppose lifting U.N. and U.S. sanctions against Libya until the Libyan government accepted responsibility for the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland.

It would prohibit any U.S. assistance to the Libyan government until the president certified that Libya had:

-- admitted its role in the bombing;

-- issued an apology;

-- paid compensation to the ≤**victims**≥' families; and

-- taken steps to end its support of international ≤**terrorism**≥.

In addition, the legislation would express the sense of the Senate that the Libya should be condemned for the bombing, and its support of other international ≤**terrorism**≥, "in the strongest possible terms."

The bill also would express the sense of Congress that the president, the secretary of State and other U.S. officials should encourage other countries and the United Nations to maintain sanctions against Libya until it fulfilled the aforementioned requirements.

CQ BillWatch Insight:

S244 was referred to the Senate Foreign Relations Committee.

The legislation comes in the wake of a Scottish court's Feb. 5, 2001, conviction of Abdel Basset Ali Megrahi for his involvement in the bombing, which killed 270 people, including 189 Americans. The court also conclusively tied the planning and execution of the bombing to Libya and Libyan intelligence.

The legislation notes that U.N. resolutions have ordered Libya to pay compensation to the ≤**victims**≥' families upon the rendering of a guilty verdict and officially end support for international ≤**terrorism**≥ in order for multilateral sanctions to be lifted.

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REV_00264861

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REV_00264862

insurance; and incentives for revitalization in New York.

Business tax provisions.

The measure would reduce the corporate alternative minimum tax (AMT), designed to prevent wealthy taxpayers from using credits and deductions to pay little or no tax, by allowing businesses to apply deductions on depreciation adjustment, net operating losses and foreign tax credits against minimum tax liability.

It would let businesses use losses over 2001 and 2002 to offset profits made during the previous five years.

The bill would allow businesses an additional 30 percent first-year deduction on the purchase of equipment bought between Sept. 11, 2001, and Sept. 10, 2004.

For 2002 and 2003, the amount small businesses could expense for the purchase of new equipment would be increased from $24,000 to $40,000. Beginning in 2004, the amount would be $25,000. The total cost of equipment eligible for expensing would be increased to $325,000 during 2002 and 2003.

Individual tax provisions.

The measure would provide a tax refund of $300 to individuals and $600 to couples who filed an income tax return but did not receive a refund under the spring 2001 tax cut law (HR1836 -- PL 107-16). Individuals and couples who received a partial refund from the tax cut bill would get the difference between what they were awarded and the $300 or $600.

The 27 percent tax rate, which applies to income in the $27,050 to $65,550 range for single taxpayers, would be reduced to 25 percent effective Jan. 1, 2002. Under existing law, this rate cut is not scheduled until 2006. In order to offset any increased AMT for an individual's tax liability caused by the acceleration of the rate reduction, the measure would temporarily increase the amount of income exempt from AMT. In 2002 and 2003, the exemption would be increased by $1,600 for individuals and $3,200 for couples. In 2004, the amounts would be increased by $850 for individuals and $1,700 for couples.

Health and unemployment.

The measure would provide a 60 percent refundable tax credit to workers laid off between March 15, 2001, and December 2003 to pay for health insurance for up to 12 months. The same workers would have the right to no-pre-existing-condition insurance if they were covered by their employer the previous year.

The bill would authorize $3.9 billion in block grants to states for health care and re-employment assistance, and an additional $4.6 billion in direct funding over two years for health care.

The House-passed bill would retain Senate language that would extend unemployment insurance for 13 weeks to individuals who filed for the benefit after

REV_00264814

March, 14, 2001, and have exhausted their regular benefits. It also would offer an additional 13 weeks of insurance in states with an insured unemployment rate of 4 percent. Under existing law, this extension is available if the rate is 5 percent or greater. The measure would appropriate funds for the extensions through 2002.

Aid for New York.

The House-passed language includes tax breaks over five years to encourage reinvestment in New York City, including:

-- the Work Opportunity Credit, which would be extended through 2003 to businesses that employed workers in the area around the World Trade Center or to businesses that relocated from the area after Sept. 11, 2001, but remained in the city;

-- a 30 percent depreciation deduction for businesses would be extended through 2006, and through 2009 for residential and non-residential properties;

-- an increase of an additional $35,000, to $70,000, in the amount that small businesses could deduct for the purchase of property;

-- $8 billion in tax-exempt bonds that would be issued over the next two years for the reconstruction of areas damaged by the Sept. 11, 2001, terrorist attacks; and

-- an extension from two to five years in the amount of time to reinvest insurance proceeds without paying taxes on the gains as long as a substantial amount of that money was invested in New York.

Tax and program extensions.

The measure would extend:

-- the Work Opportunity tax credit for two years;

-- the Welfare-to-Work tax credit for two years;

-- a credit for the production of electricity from wind, biomass or poultry-waste facilities for two years;

-- Archer Medical Savings Accounts for one year; and

-- a provision that allows domestic companies to not pay taxes on financing income received from abroad for five years.

Background

As originally passed by the House in May 2001, HR622 would have expanded the adoption tax credit, which is given for expenses incurred during the adoption process, including fees, court costs and travel expenses. That language was included in the spring 2001 tax-cut law.

REV_00264815

In January 2002, Senate Majority Leader Tom Daschle, S.D., decided to use HR622 as the vehicle for a slimmed down economic stimulus package. Daschle's stimulus language included a 13-week extension of unemployment benefits, a $300 check to those who did not receive rebates from the spring 2001 tax-cut law, tax breaks for businesses that bought equipment in 2002 and $5 billion in Medicaid money for states.

But Senate Republicans and Democrats were unable to reach a compromise amid differences about the Medicaid funding, and improving economic news began to call into question the need for a stimulus package. Daschle conceded defeat in his stimulus bid on Feb. 5, and moved to pass the extension of unemployment insurance with Republican support.

Rather than simply pass the unemployment extension, House Republicans attached many of the provisions from their previous economic stimulus plan (HR3529) and sent it back to the Senate.

Related Bills

HR3529 is a House-passed stimulus proposal that would provide tax breaks for businesses and individuals, extend expiring tax credits, extend unemployment benefits, provide a refundable tax credit for health insurance and provide assistance to families of the ≤**victims**≥ of ≤**terrorism**≥.

The House-passed version of HR3090 is a $99.5 billion economic stimulus plan that contains tax-cutting provisions and spending increases but is weighted more heavily toward tax cuts. It would lower federal revenue by $99.5 billion in fiscal 2002 and $159.4 billion over 10 years.

The Senate Finance Committee substituted text from a draft Democratic bill, which was subsequently approved by the committee, that would offer a $67 billion economic stimulus plan that would include about $36 billion in tax cuts and rebates, $26 billion in benefits and more than $5 billion in farm aid.

Outlook

The Senate is not expected to pass HR622 as amended by the House.

House Ways and Means Committee Chairman Bill Thomas, Calif., said it was possible that the House would send the Senate even more economic stimulus bills.

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CQ BILLWATCH

HR3614

REV_00264816

Sponsor:
Holt (D-NJ)
Introduced:
Jan. 23, 2002
Official Title:
A bill to repeal the provision of the September 11th Victim Compensation Fund of 2001 that requires the reduction of a claimant's compensation by the amount of any collateral source compensation payments the claimant is entitled to receive, and for other purposes.
Brief Title:
September 11th Victim Compensation Fund Fairness Act

CQ BillWatch Brief:

By Rich Daly, CQ Staff

As introduced on Jan. 23, 2002.

Synopsis

HR3614 would negate a proposed rule for the September 11th Victim Compensation Fund that would reduce payments by the amount of any life insurance, workers' compensation or other relief the claimant had received.

Highlights

The bill would amend the airline bailout law (HR2926 -- PL 107-42) that created the compensation fund to drop a mandate that the special master in charge of distributing the payments reduce awards based upon other compensation the ≤**victims**≥ or their families had received. Instead, the legislation would let the special master decide whether to reduce the awards.

Background

The fund was created to compensate and assist ≤**victims**≥ and their families who agreed to forgo lawsuits against the airlines or others. Fund administrators would calculate awards based upon family size and the ≤**victim**≥'s age and earnings. Special Master Kenneth Feinberg has said an average payment would be $1.65 million but subject to the deductions.

However, critics of the plan say that deducting for insurance payments, in particular, would penalize families that had engaged in prudent financial planning.

Final details of the program were expected to be announced in February 2002.

Members of the New Jersey and New York congressional delegations have been pushing for the exclusion of other benefits from compensation calculations because many ≤**victims**≥ of the Sept. 11, 2001, terrorist attacks on the World Trade Center lived in those states.

REV_00264817

ON BEST BEHAVIOR

The Clinton Administration and Ethics in Government



Gregory S. Walden

Foreword by Suzanne Garment

Hudson Institute

REV_00264863

Counsel's Office, White House
Kavanaugh, Brett

Subject Files

Walter Lee v. US District Court, District of Columbia

OA/NARA#: 1822/1740
9230

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REV_00264864

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only --
No reply

Document Originally
Attached to
Following Page

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

DATE RECEIVED:

NAME OF CORRESPONDENT: Walter Lee

SUBJECT: **Walter Lee vs. US District Court, D.C.**

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	ACTION DATE M/D/YR	DISPOSITION TYPE RESP	C D	COMPLETED M/D/YR
	CUGONZ	A		C		
	Brett	A				

ACTION COMMENTS: _____

ACTION COMMENTS: _____

ACTION COMMENTS: _____

ACTION COMMENTS: _____

COMMENTS: _____

ADDITIONAL CORRESPONDENTS: **MEDIA:**

Mr. Walter Lee

PRA 6

Clerk of the Court
United States District Court, D.C.
333 Constitution Avenue, N.W.
Washington, D.C. 20001

20 Apr 01

Re: Walter Lee v. U.S. District Court, D.C.

I would really appreciate it if the Court would issue an order either accepting this pleading or denying it as soon as possible. I believe it is extremely important to determine whether or not a Federal Judge can defend his ruling and use of judicial discretion against an unlearned disabled indigent, proceeding pro se, and without benefit of legal counsel in an open full and fair hearing in a competent Court of Law.

And once it is determined, that this Federal Judge can not defend his ruling and use of judicial discretion, in a competent Court of Law, against this unlearned disabled indigent proceeding pro se, and without benefit of legal counsel, the question must be asked:

"Is this the sort of Federal Judge who should have the power to use his judicial discretion up to and including, the taking of life and ordering the death of anyone?"

Someone is going to have to explain to me in plain English why this Roberts guy is still sitting on a Federal Bench in a Federal Court of Law, because I maintain that he is incompetent and judicially unfit, to sit on any Court at any Level, and should be Impeached, Disbarred and Prosecuted for Aiding and Abetting the Facilitation of Criminal Acts being committed by officers of the court in the District of Columbia.

Is the climate of the United States Judicial System set up where Federal and State judges and lawyers feel that free to be able to not only commit these criminal acts in a court of law, but to conspire with and aid and abet these criminal and civil violations against an unlearned disabled indigent proceeding pro se? My God!, you people are worst than the Roman Soldiers Herod ordered to Kill small infant children!

And before you gloss over that last statement, I want you to think of the type of person, that you would have to be, to go out and mercilessly kill small infant children! You people need to look into the mirror, and see what it is you have become!

Well anyway, just let me know what the Court plans to do with this pleading, because I'm sure Richard W. Roberts, who in my opinion is a glorified Civil Rights attorney, (and a bad one at that), should want to defend his ruling and use of judicial discretion in this petition. However, if he can not, then he should be fired!

You people are scandalous! All of this CRAP, in order to deny me the rights you know that I was and still am entitled too. But you know what, the United States is in a World Economy now, therefore, even the Beast now has reigns upon him, that can pull him this way and that, taking him where he does not want to go!

In closing, I just thought that it was amusing that you could not find a Federal Judge to sign your recent communication (smile). In all seriousness though, you need to watch more closely what you affix your signature upon. I say that because no one is going to be there to save you but me, if I have to knock on your door, to find out exactly what you knew, and when you knew it, and based upon that knowledge, determine, whether or not you had an obligation to support the U.S. Constitution and thereby inform the Court that there could be reason to believe that the criminal acts as stated in Lee v. Mertz, were indeed committed.

If it is determined that based upon the documents that have been submitted on the record and your years of legal experience and level of competency, as well as the laws governing the duties and responsibilities of the administration of the Office of the Clerk of Court, you should have been aware that such a possibility existed, and therefore should have informed the Court and did not, then you have a problem.

Because you are the gatekeeper to this Court, and your primary responsibility after Obeying your Oath of Office to support the United States Constitution, I will bet is that you protect and ensure the integrity of the Court.

Please do not mistake me for anyone other than who I am, and for the record, I'm just a United States Citizen trying to settle a complaint, the best way that he knows how.

You Know Who I Am!

Office of the President
Office of the Vice President
Office of the Secretary of State
Office of the Secretary of Defense
United States Senate Leader
Speaker of the House of Representatives
Chairman, Senate Judiciary Committee
Chairman, House Judiciary Committee
United States Attorney General
Director of the Federal Bureau of Investigations
Director of the National Security Agency
Director of the Central Intelligence Agency
Governor of the State of Virginia
Governor of the State of Maryland
Governor of the State of Minnesota
Personal File

Mr. Walter Lee

PRA 6

RICHMOND VA
PM
21 APR
2001

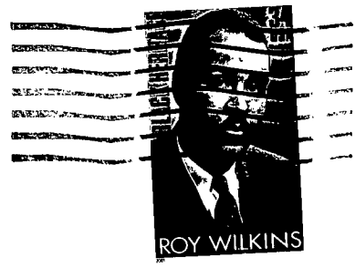

The White House
Ofc. of the White House Counsel
1600 Pennsylvania Ave.
Washington, D.C. 20500

20500X0003

REV_00264869

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

DATE RECEIVED: 7/17/01

NAME OF CORRESPONDENT: Walter Lee

SUBJECT: Lee v. US Supreme Court

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	ACTION DATE M/D/YR	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED M/D/YR
	CUGONZ	A	7/17/01		C	
	Brad	A				

ACTION COMMENTS:

ACTION COMMENTS:

ACTION COMMENTS:

ACTION COMMENTS:

COMMENTS: No Action. FYI only.

ADDITIONAL CORRESPONDENTS: **MEDIA:**

REV_00264870

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WALTER LEE

PRA 6

Plaintiff

v. Civil Action No._____

UNITED STATES SUPREME COURT
1 1st STREET., N.E.
WASHINGTON, D.C. 20543

PETITION FOR A FULL, FAIR AND OPEN HEARING

1st Argument:

On 10 Oct 00, the United States Supreme Court docketed a petition for a writ of certiorari, Lee v. District of Columbia as No. 00-6477.

In the petition the Plaintiff submitted 14 statements to the United States Supreme Court that were issued by officers of the court representing the District of Columbia and the District of Columbia Court of Appeals in a civil complaint that are material and relevant to the disposition of the complaint (CA-2817) as being Perjured Testimony.

The Plaintiff maintained in his petition that officers of the court representing the District of Columbia and the District of Columbia Court of Appeals had committed no less than (13) Counts of Perjury, (2) Counts of Fabricating Evidence and (13) Counts of Obstructing Justice (High Crimes) in order to deny the Plaintiff disability benefits.

Pursuant to Rule 15.2 of the United States Supreme Court, Counsel is admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition by the Plaintiff.

The District of Columbia nor the District of Columbia Court of Appeals submitted a brief in opposition challenging any of the High Crimes (Impeachable Offenses) stated in the petition. Therefore, the United States Supreme Court has no choice but to rule on the petition consistent with the fact that criminal acts had been committed by officers of the court representing the District of Columbia against a United States Citizen in order to deny this United States Citizen the entitled rights to the disability benefits that the governing laws demand and require.

On 11 Dec 00, the United States Supreme Court violated my Civil Rights under Article IV and the 14th Amendment of the United States Constitution when my petition was dismissed, and also on 20 Feb 01, when my petition for a rehearing was dismissed.

Therefore, on 11 Dec 00 the United States Supreme Court knowingly aided and abetted in the facilitation and accomplishment of numerous High Crimes (Impeachable Offenses) in violation of Article III, Article VI and their Oath of Office (not all-inclusive)

Once these High Crimes had been committed by the United States Supreme Court on 11 Dec 00, they no longer had any Constitutional and or Legal Authority to sit in judgment and or rule on any case or controversy that was brought before them.

Therefore, the United States Supreme Court had no Constitutional and or Legal Authority to sit in judgment and rule on Bush v. Gore on 12 Dec 00, and therefore, that ruling must be vacated so that the Constitution and the adherence thereof; remains the Supreme Laws of the Land, and not the individual discretion of flawed men and women.

2nd Argument:

The United States Constitution is the Supreme Laws of the Land, and every Federal and State Law adopted must adhere and be agreeable to the Constitution and not vice-versa. Article II is clear in that the person having the greatest number of votes shall be President of the United States. PERIOD!

Florida Law provides that the legislature picks a slate of electorates that are consistent with the person who received the majority of the popular votes in the State. The Florida Supreme Court was right in interpreting Florida State Law that was pursuant too, and agreeable too Article II of the United States Constitution.

Consistent with Article II, in order to ascertain the person who had the most popular votes in Florida, the Florida State Supreme Court ruled that a hand count of the disputed ballots in Broward, Miami-Dade, West Palm Beach and Volusia Counties should be commenced.

There is no federal or state deadline made by Man that usurps the power and authority of the United States Constitution. The Constitution is a living and breathing document which is amended from time to time to protect the citizenry of this country from tyranny, from the abuse of power.

The overriding Constitutional requirement under Article II, is that the person elected to become the President of the United States must be the same person who received the most number of votes. The only way to determine who had the most number of votes is to count them, which is what the Florida Supreme Court ruled.

On 12 Dec 00 the United States Supreme Court abused their judicial power and authority in office by usurping Article II, of the United States Constitution.

This gross and vile conduct of the United States Supreme Court was committed for the express intent and purpose of making George Bush the President of the United States of America. This violation of Article II, denied MY CIVIL RIGHTS under the 14th Amendment (as well as every other American) to enjoy a duly elected President.

By stopping the lawful counting of disputed votes in the state of Florida, the United States Supreme Court illegally and unlawfully dismissed every vote taken in the Presidential Election of the State of Florida.

When a controversy arises in a Federal or State Law, where the United States Constitution is at issue, at all times the Constitution must prevail. There is no deadline made by man that can usurp the fact that under Article II, the President of the United States must be the same person who received the most popular votes.

Therefore, I Walter Lee state that the United States Supreme Court based upon their multiple criminal and civil violations of the law did not have legal standing to sit in judgment and rule in Bush v. Gore. Furthermore, the United States Supreme Court denied the Plaintiff, and the American People the entitled Constitutional Right to know that the current President of the United States (George Bush) is the same person who received the majority of the popular votes.

Mr. Bush may have very well received the most popular votes in the State of Florida, but as a United States Citizen and resident of the State of Virginia, I, Walter Lee maintain that I have a Constitutional Right to know for sure! The only way to know for sure is to vacate the United States Supreme Court ruling in Bush v. Gore, and resume the hand counting of disputed ballots that the Florida Supreme Court properly ruled should be counted in accordance with the United States Constitution.

Wherefore, the Plaintiff demands a full, fair and open hearing where the United States Supreme Court can defend the criminal allegations that they should be Impeached, Disbarred, and Prosecuted for knowingly aiding and abetting the facilitation of High Crimes in order to deny a United States Citizen his 14th Amendment Civil Rights to equal protection of the laws in Walter Lee v. District of Columbia.

Wherefore, the Plaintiff demands a full, fair and open hearing where the United States Supreme Court can defend their violation of their Oath of Office, Article II, Article III, Article IV, Article VI and the Plaintiffs 14th Amendment Rights of the United States Constitution, in their ruling in Bush v. Gore.

When it is determined that the United States Supreme Court had no legal standing to rule in Bush v. Gore, the Plaintiff demands an immediate recount, and in the event that former Vice President Al Gore proves to be the victor, then the date upon which these determinations are made, should be consistent with the dates as if the Presidential Election had taken place upon that date. If George Bush comes out the victor, then all is well, but the integrity of the process will have been upheld.

I hereby certify that this document was mailed to the U.S. District Court, D.C. @ 333 Constitution Avenue, N.W., Washington, D.C. 20001 on 11 Jul 01.

Copies To:
Secretary General of the United Nations
President of the United States
United States Senate Leader
Chairman of the U.S. Senate Judiciary Committee
Speaker of the House
United States Attorney General

Business Week, Ebony, Essence, Forbes, Fortune, Money, Newsweek, Oxford Press, Richmond Times Dispatch, The National Inquirer, The New Republic, Thunder's Mouth Press/Nations Books, Time, U.S. News & World Reports Washington Post, Yahoo.

~JUST THOUGHTS~

The Plaintiff is an unlearned United States Citizen who happens to be a disabled indigent proceeding in a civil complaint without benefit of competent legal counsel. Therefore, the Plaintiff invites legal advice and or counsel to take over this complaint to ensure that the Civil Rights of the Plaintiff and the American People are upheld, and that the Plaintiff is duly compensated for the heinous crimes committed against him.

****

I have asked these people time and time again to leave me alone, but they will not, so they must like hearing me talk, so I will continue submitting petitions until such time that my grievances have been addressed in accordance with my Civil Right to receive a full, fair and impartial hearing on the merits of my complaint.

****

I have a fondness for movies, sports and the arts and I have some great movie concepts that I would like to share with someone who would not steal my ideas, but that requires an attorney, and I am without means. So I offer three concepts with the principal actors in each, but I have more. Concept 1: Tom Cruise, Jennifer Lopez, Sean "Puffy" Combs and Jason Cerbone. (Action) Concept 2: Alec Baldwin, Mimi Rogers, Tyra Banks and introducing Christopher Walken as "Mr. Charlie." (This is a good one!) Concept 3: Danny Glover, Ossie Davis, Ruby Dee, Burt Reynolds, Don Cheadle, Vanessa Williams, Joan Cusack, Robert Downey Jr., Joan Chen & Bill Duke (ensemble)

****

I do not like bullies, or people who abuse their power because they can, and often against those who are less fortunate than they. I especially do not like people who do so in a condescending manner, presuming that they are more intelligent than others. These people have worked my last nerves and I am tired of dealing with them, so I must remove them from office so that they can do no more harm.

REV_00264874

Mr. Walter Lee

PRA 6





The White House
Ofc. of the White House Counsel
1600 Pennsylvania Ave.
Washington, D.C. 20500

20500-0003

Counsel's Office, White House

Kavanaugh, Brett

Walters, Art Case

Subject Files

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9630

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Folder 3

REV_00264876

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

DATE RECEIVED: 5/23/01

NAME OF CORRESPONDENT: Art Walters

SUBJECT: **Affidavit**

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	ACTION DATE M/D/YR	DISPOSITION TYPE RESP	DISPOSITION C D	DISPOSITION COMPLETED M/D/YR
	CUGONZ	A	5/23/01		C	
	Brett	A				

ACTION COMMENTS: _____

ACTION COMMENTS: _____

ACTION COMMENTS: _____

ACTION COMMENTS: _____

COMMENTS: _____

ADDITIONAL CORRESPONDENTS: **MEDIA:**

In the Congress of the United States of America

Re: art walters, PRA 6 nmi, no split social security number

AFFIDAVIT

1. THE FOLLOWING FACTS ARE TRUE AND CORRECT AND CANNOT BE CHANGED OR SO ORDERED WITHOUT VIOLATION OF THE FIRST ANF THIRTEENTH AMENDMENTS; TO INCLUDE BY CONGRESSIONAL, JUDICAL, MILITARY OR EXECUTIVE AUTYHORITY! THIS INCLUDES PROVISIONS OF THE WARTIME POWERS ACT WHICH PERMITS A DECREE ONLY IN A CIRCUMSTANCE ESSENTIAL TO OPERATIONS TTO INCLUDE GOOD ORDER AND DISCIPLINE OF THE SRMED FORCES (EXCEPTION IS A FADISH RELIGON WITHOUT SPECIAL PROVISION OF LAW)!

2. THE SAME IS TRUE OF MY ESSENTIAL DATA;

NAME: ART WALTERS, PRA 6 AS REQUESTED OF CONGRESS!
FORMER NAME: ARTHUR TERRY WALTERS, PRA 6 ; ANO
NO SHARE OR SPLIT OF SOCIAL SECURITY NUMBER OR IDENTITY IS AUTHORIZED (NO CONSENT)

RELIGON: INAPPLICABLE *

3. THE VOLATION OF THE ABOVE FACTS TO INCLUDE NATIONAL MILITARY COMMAND CNETER FINGERPRINT DATA BEING SWITCHED IS FORWARDED TO YOUR OFFICES FOR RECOMMENDATION OF IMPEACHMENT!

ART WALTERS
PRA 6
Col (Ret.)

* Bush v. U.S.A. (1998/2001)

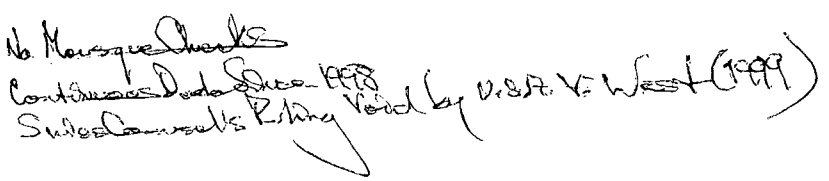

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s currently in the human resources department in Oakland, California. He is a member of the global UPS Athlete

Preservation Copy

REV_00264879

Counsel's Office, White House

Kavanaugh, Brett

Subject Files

War Powers Issues

Box 63
Folder 4

OA/NARA#: 21632074
9693

REV_00264880

The Heritage Foundation

Heritage Lecture No. 529

The Heritage Foundation Lectures and Seminars

FIXING THE WAR POWERS ACT

Expansion of remarks (at a Heritage Foundation symposium on May 22, 1995 by Ronald D. Rotunda) by Albert E. Jenner Professor of Law, University of Illinois College of Law.

In 1973, Congress enacted the War Powers Resolution over President Nixon's veto.1 Supporters viewed the law2 as an effort to prevent another Vietnam, while opponents saw it as an unconstitutional effort to restrict the Commander in Chief while not achieving its well-intentioned goals.3 The law is now more than 21 years old. Like a young child growing up, it has reached its majority. Since then, liberals, conservatives, Republicans, and Democrats have all attacked the law. Former Senate Majority Leader George Mitchell (D-ME), for example, has complained that the law simply "has not worked." It "potentially undermines our ability to effectively defend our national interests" and "unduly restricts the authority granted by the Constitution to the President as Commander-in-Chief."4 Former President Ford agrees, calling the law both "unconstitutional" and "impractical."5 Presidents of both parties have been accused of ignoring it.6 With a pedigree like that, now is a good time to reevaluate the resolution.

Applicability of the War Powers Resolution The coverage of the War Powers Resolution is broad, encompassing essentially every situation involving combat troops. Like most laws, it is written in the style of the Internal Revenue Code or the Treaty of Westphalia. Its intricate prose states that, unless there has been a declaration of war, the law applies to every case where the President introduces "United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations."7 In other words, the law applies to virtually everything.

Declarations of War. The exception for declarations of war means, in effect, that there are no exceptions, because no major power has declared war since World War II. Of course, the intervening years have witnessed major undeclared wars (the Korean War, the Vietnam War, and the Gulf War are obvious examples), as well as relatively minor ones (e.g., Panama, Grenada, Somalia, Haiti, Bosnia).

While our Constitution provides that only Congress can "declare war," the framers of our Constitution specifically rejected a proposal that would give to Congress the power to "make" war.8 Instead, the framers made the President the Commander in Chief, and the decision to seek a declaration of war became a political question for Congress to resolve. A declaration is an escalation of the war effort; in only a few circumstances has Congress taken that symbolic step. It is too late in our history to argue that there can be no war unless the war is officially "declared." Since our Declaration of Independence, our

REV_00264881

100-1012, Sept. 20, 1988), at 223.

77. U.S. Const., Art. I, 8, cl. 1. See also Art. I, 8, cl. 12, which authorizes Congress to raise and support armies, "but no Appropriation of Money to that Use shall be for a longer Term than two Years."

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country has been in about 200 armed conflicts, while we have declared war only seven times. Not even the Civil War, the bloodiest in our history, was a declared war.9

Situations that Develop into Hostilities. The War Powers Resolution also applies to "the continued use of such forces in hostilities or in such situations." Thus, if U.S. troops are already stationed in an area where there are no imminent hostilities, but then we are attacked, we have a situation where there is the "continued use of such forces in hostilities or in such situations."

In short, the War Powers Resolution applies to everything that involves hostilities or that develops into hostilities. In our uncertain world, that covers a great deal.

When the President Can Use Combat Troops Short of a Declaration of War

Three major parts of the War Powers Resolution merit specific emphasis. First, there is section 1541(c), entitled "Presidential Executive Power as Commander In Chief; Limitation." It states that the President's constitutional power to introduce U.S. combat troops is limited to only three circumstances: "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."10

This section provides that the President is not allowed to send U.S. troops into combat unless Congress specifically gives advance approval; the only exception is if the President is responding to a national emergency created by an attack on U.S. territory or on U.S. armed forces.11 Even then, the President must report to Congress immediately and then "terminate any use" of the troops within 60 days unless Congress specifically approves of further action.12

Our history demonstrates that there are many other situations where Presidents have the constitutional authority to act. For example, the President may use the military to rescue U.S. citizens abroad, to rescue foreign nationals when that directly facilitates the rescue of our citizens abroad, to protect U.S. embassies abroad, to implement a cease-fire involving the United States, or to carry out the security commitments in a treaty.13 The War Powers Resolution, oddly enough, does not even include the right of the President to deter an imminent attack on the United States. Section 1541(c) only covers the situation where there has been an actual attack! Professor John Hart Ely admits that "it truly is impossible to predict and specify all the possible situations in which the president will need to act to protect the nation's security before he has time to obtain congressional authorization."14

Over the years Presidents have justified military action without the specific consent of Congress, relying on various theories not found in the War Powers Act.15 President Roosevelt sent troops to Iceland and Greenland in 1940, although federal legislation appeared to forbid it.16 President Johnson initially justified sending Marines to the Dominican Republic to protect U.S. citizens; later Johnson relied on the Rio Treaty. President Clinton involved the military in Haiti without seeking congressional approval.

After the enactment of the War Powers Resolution, Presidents have simply ignored the strict limits of this section, as illustrated by incidents such as the Mayaguez rescue and the invasion of Grenada. Moreover, the American people (particularly our citizens abroad) would not want a President to follow this section: To do that would assure unfriendly governments and terrorists that American embassy personnel, tourists, and other American nationals abroad are all fair game, unprotected by the world's only superpower. This section should simply be repealed.17

The Reporting Obligation

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Various sections of the law impose specific reporting obligations on the President. In general, the "President in every possible instance shall consult with Congress before" introducing troops into imminent hostilities and shall also consult with Congress regularly after the introduction of combat troops.18 The President must also submit a detailed written report to the Speaker of the House of Representatives and the President Pro Tempore of the Senate within 48 hours after the introduction of combat troops.19

In a democracy, it is essential that the President consult with Congress and the American people and report what he is doing. If the American people are being asked to send their sons and daughters into combat, the President should honestly explain why. Granted, there will be some circumstances when it may be more difficult to report to particular congressional leaders. President Ford, in referring to the evacuation of Danang in April 1975, illustrated the problem:

> Congress was in a congressional Easter recess. Not one member of the key bipartisan leaders of Congress was in Washington. [H]ere is where we found the leaders of Congress. Two were in Mexico. Three were in Greece. One was in the Middle East. One was in Europe, and two were in the People's Republic of China. The rest were found in 12 widely scattered States of the Union.20

On the other hand, the law does not demand the impossible. The requirement of prior consultation only applies if it is "possible" to do so.21 The requirement of subsequent consultation is similar. The law only obligates the President to consult "regularly with Congress" while our armed forces are in combat situations.22 After he introduces troops, he must submit, within 48 hours, a written report to the House Speaker and the Senate President Pro Tempore explaining why he introduced the military, what authorized him to do so, and what is his estimate of the scope and duration of hostilities.23

This basic principle is a sound one. The President has the responsibility, in any democracy, to justify his actions to the American people in a candid way. Many of the explanations of our Vietnam policy were not candid, as Robert S. McNamara's recent memoirs acknowledged.24

Automatic Withdrawal of U.S. Troops and the Legislative Veto

Section 1544(b) of the War Powers Resolution requires that "the President shall terminate any use of United States Armed Forces" at the end of the 60-day period unless Congress has either declared war or enacted a law specifically authorizing the use of this force.25 In short, if Congress does nothing, within 60 days (or sometimes 90 days), the President must withdraw the troops. As one supporter of the War Powers Resolution explains this provision, "the president's authority to act in emergencies simply runs out in 60 days if Congress does nothing."26

Presidents and Congress have responded to this section by simply ignoring it. (Congress, for example, did not think that the 60-day clock should start running during the naval war against Iran in 1987-1988.27) Yet, its existence remains important. The inelegantly phrased language appears to give the President carte blanche authority for two months without any serious oversight.28 It also allows the executive and legislative branches to blame each other for failure of will, for exercise of judgement. It obscures blame and muddies responsibility. It is better for people to know where the responsibility lies. Then we will know whom to blame, and to whom we should give kudos.

If section 1544(b) were repealed, that would not prevent Congress from making known its view. On the contrary, Congress has always had the power to pass a concurrent resolution indicating its position on a matter. A concurrent resolution is not a law, and thus not subject to presidential veto. While this

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resolution does not legally bind the President, that does not make it irrelevant. If the President decided to ignore such a resolution, the people would know exactly whom to blame (or to praise) for the involvement of American combat troops. And Congress would make its will known by doing something, rather than by doing nothing. Everyone in Congress would have to stand up and be counted.

Section 1544(c) goes beyond the prior section and creates what is known as a legislative veto. It provides that, notwithstanding the previous section, if both houses of Congress, by concurrent resolution, direct that the troops should be removed, the President must do so. This resolution, unlike a normal law, is not subject to presidential veto. Congress has always had the power to impose its will on the President by using its spending power to enact a law to limit presidential action, but a spending law would be subject to presidential veto. Section 1544(c) declares that it is not subject to veto but (unlike a normal concurrent resolution) must be treated the same as a statute.

Section 1544(c) is known as a legislative veto because it gives Congress the right to veto presidential action. As such, scholars have concluded that it is unconstitutional ever since INS v. Chadha,29 a 1983 case that invalidated all legislative vetoes.30 While Professor John Hart Ely argues that section 1544(c) is constitutional,31 even Professor Laurence Tribe admits that this section is unconstitutional.32 The only question is whether the existence of this unconstitutional section infects the entire resolution, as some commentators have suggested.33

The Peace Powers Act of 1995

The constitutional and policy problems with the War Powers Resolution, and its apparent irrelevance to military hostilities since its enactment, have caused commentators to call for its repeal. That does not mean, however, that it should be replaced with a vacuum. People do want to avoid another Vietnam; they do want to have Congress involved; and they do want to control foreign adventurism by a President too quick to spill American blood.

Senator Dole (R-KS) and several other Senators have introduced S. 5, the Peace Powers Act of 1995. This bill continues the basic reporting requirements of the War Powers Resolution. It mandates that the President "in every possible instance shall consult with Congress before introducing" American forces into imminent involvement in hostilities.34 The proposed law also requires that the President submit a written report to the House Speaker and Senate President Pro Tempore within 48 hours after introducing or substantially increasing armed forces into a hostile situation. This written report must explain why the introduction of armed forces is necessary, what is the legislative and constitutional authority, and what is the estimated scope and duration of involvement. The President must also supply periodic reports and respond to additional requests for information.35 H.R. 1111, which is a bill that Congressman Dornan (R-CA) and others have introduced in the House, imposes similar reporting obligations on the President.36

Both bills avoid the unconstitutional legislative veto; both avoid trying to create a definitive list of circumstances where the President can use the armed forces. (Recall that Professor Ely warned that it "truly is impossible to predict and specify all the possible situations in which the president will need to act to protect the nation's security before he has time to obtain congressional authorization."37) Both avoid the situation where Congress imposes its will by doing nothing, by failing to take action.

And both avoid the problem of appearing to delegate to our court system important questions of national policy. As Dr. Morton H. Halperin has noted, one of the major problems with the War Powers Resolution is that it has led to legal line drawing by the executive branch: "What you don't need is a legal opinion from your lawyers that you have not yet crossed some line drafted in a statute about how

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imminent the hostilities are."38

The proposed Peace Powers Act also deals with an issue that Congress never really thought about in 1973: placing United States armed forces under foreign command. The United States has joined United Nations peacekeeping activities in the past, but it is only in recent times that the President has chosen to place U.S. troops under foreign command. The concern of many people is that foreign commanders may be more willing and ready to spend American blood than to spend the blood of their own countrymen. Just as many people are more generous when spending other people's money, so also we might expect that foreign military commanders, if given a choice of sending their own troops or American troops in harm's way, will prefer to spill American blood.

Consequently, Section 5 of the proposed Peace Powers Act provides that the President may not subordinate any element of the U.S. armed forces to any foreign national unless Congress enacts a law authorizing the subordination, or unless the President makes various findings and reports to various congressional committees. Sections 7 and 8 provide for prior congressional notification of proposed U.N. peacekeeping activities and require the President to identify the source of funding for these peacekeeping operations. These sections rely on Congress's spending power, which historically has been very broad.39

These sections do not put the President in any straitjacket, but are designed to assure candid consultation with Congress and the American people in matters involving foreign hostilities. In a democracy the people deserve no less. No overzealous President should involve the United States in unnecessary hostilities while avoiding congressional scrutiny. The War Powers Resolution has not worked; let us try something better: the proposed Peace Powers Act.

Endnotes

1. 87 Statutes at Large 555 (1973), codified at 50 U.S.C.A. 1541-48.

2. Although called a "resolution" because, at the time, that term was thought to be more "weighty and distinguished," it is real law, like any other statute. It was enacted by both houses of Congress, vetoed by President Nixon, and then passed over President Nixon's veto. See John Hart Ely, War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath 115 (1993).

3. Had the War Powers Resolution been in effect at the time of the Vietnam War, it probably would have made no difference, because President Johnson would have complied with it. In 1964, Congress (by a vote of 504 to 2) passed the Southeast Asian Resolution, authorizing the Vietnam War. In 1966, when we had more than 200,000 combat troops in Vietnam, when we all knew that the United States was involved in more than a minor police action, the Senate (92 to 5) voted to table an amendment to repeal the Southeast Asian Resolution. Moore, The War Powers Resolution Is of Doubtful Constitutionality, 70 A.B.A.J. 10, 12 (March 1984).

4. 134 Congressional Record, 100th Cong., 2d Sess. (No. 71, May 19, 1988), at p. S6177.

5. Statement of President Gerald Ford, Hearings Before the Special Subcommittee on War Powers of the Committee on Foreign Relations, U.S. Senate, 100th Cong., 2d Sess. (S. Hearing 100-1012, Sept. 15, 1988), at 161.

6. When the President does issue a report, he routinely states that he is "conforming" to the resolution, rather than "complying" with it.

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7. 50 U.S.C.A. 1541(a) (emphasis added).

8. Max Farrand, The Records of the Federal Convention of 1787, at 313, 318-19 (rev. ed., 1937).

9. R. Rotunda & J. Nowak, Treatise on Constitutional Law: Substance and Procedure 6.9, at 528, & Appendix following 6.10, at 532-42 (West Pub. Co., 2d ed., 1992).

10. 50 U.S.C.A. 1541(c).

11. John Hart Ely agrees that this is what the section means. Ely, supra, at p. 229. Any other interpretation leads to peculiar results, as Ely explains. Id. at 229-30.

12. 50 U.S.C.A. 1543; 1544(b).

13. Hearings on War Powers before the Subcommittee on International Security and Scientific Affairs of the House Committee on International Relations, 94th Cong., 1st Sess., 90-91 (1975), testimony of Monroe Leigh, Legal Adviser to the State Department.

14. Ely, supra, at 118 (footnote omitted).

15. See 1 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure 6.10 (West Pub. Co., 2d ed., 1992), which discusses various examples, including those discussed here.

16. Professor John Hart Ely, while flirting with an effort to make this section enforceable in the courts, and conceding that his "instincts" would make this section "operational," ultimately admits that it should be repealed. Ely, supra, at 118-19.

17. 50 U.S.C.A. 1542.

18. 50 U.S.C.A. 1543(a)(2). The written report must explain why the President introduced troops, the constitutional and legislative authority relied on, and the estimated scope and duration of the hostilities. 1543(3)(A),(B), & (C).

19. Statement of President Gerald Ford, Hearings Before the Special Subcommittee on War Powers of the Committee on Foreign Relations, U.S. Senate, 100th Cong., 2d Sess. (S. Hearing 100-1012, Sept. 15, 1988), at 161.

20. 50 U.S.C.A. 1542.

21. 50 U.S.C.A. 1542.

22. 50 U.S.C.A. 1543(a)(3); see also 1543(b), (c) (dealing with periodic reporting).

23. E.g., George Melloan, "McNamara's War? You've Got To Be Kidding," The Wall Street Journal, April 17, 1995, at A13, col. 3-6 (midwest ed.).

24. The strictness of this law is illustrated by its narrow exceptions. It allows the President to extend the time period by an additional 30 days in certain circumstances and allows Congress to enact a statute to extend the 60-day period. The law also does not apply if Congress "is physically unable

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to meet," but only if it cannot meet for a specific reason: "as a result of an armed attack upon the United States." 1544(b)(3). The President cannot avoid the time limit by refusing to submit a report, because this section also covers the case where a report is "required to be submitted," even if not submitted.

25. Tipson, The War Powers Resolution Is Constitutional and Enforceable, 70 A.B.A.J. 10, 14 (March 1984). President Nixon complained that this provision allowed Congress, "by doing nothing and sitting still," to make foreign policy and restrict the President. Edward S. Corwin, The President: Office and Powers, 1787-1984, at p. 300 (5th rev. ed., by Randall W. Bland, Theodore T. Hindson, & Jack W. Peltason, 1984) (footnote omitted), quoting Robert J. Sickels, The Presidency 128 (1980).

26. Ely, Suppose Congress Wanted a War Powers Act That Worked, 88 Colum. L. Rev. 1379, 1381-83 (1988). Congress knew exactly what was going on; during this time period, on July 3, 1988, an American missile accidentally downed a civilian Iranian airplane which entered what the Chairman of the Joint Chiefs of Staff called "a war zone." None of this was secret. Earlier, Iran planted mines that damaged a U.S. frigate, and an Iranian missile boat fired a missile at a U.S. cruiser. The Iranian missile missed its target, and U.S. missiles and bombs then destroyed the Iranian boat.

27. Edward S. Corwin, The President: Office and Powers, 1787-1984, at p. 300 (5th rev. ed., by Randall W. Bland, Theodore T. Hindson, & Jack W. Peltason, 1984).

28. 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).

29. E.g., 1 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure 6.13, at 551 (West Pub. Co., 2d ed., 1992).

30. Ely, War and Responsibility, supra, at 119.

31. Laurence H. Tribe, American Constitutional Law 218 n. 25 (Foundation Press, 2d ed., 1988), referring specifically to 1544(c).

32. Edward S. Corwin, The President: Office and Powers, 1787-1984, at p. 301 (5th rev. ed., by Randall W. Bland, Theodore T. Hindson, & Jack W. Peltason, 1984): Chadha "clearly lays the ground for a serious constitutional challenge to the entire resolution" (emphasis added). Professor Ely expresses concern that Chadha "provides an excuse to condemn the entire Resolution as 'unconstitutional.'" Ely, War and Responsibility, supra, at 119 (emphasis added). The resolution, however, contains a severability clause, 1548. On the other hand, one can argue that 1544(c) is central to large parts of the resolution -- Ely calls it part of a "package" that includes 1544(b) (emphasis in original) -- and that may be why some commentators suggest that this provision infects and invalidates the entire resolution.

33. S. 5, at 3.

34. S. 5, at 4.

35. H.R. 1111 (Mar. 2, 1995), a bill to clarify the war powers of Congress and the President in the post-Cold War period.

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36. Ely, War and Responsibility, supra, at 118 (footnote omitted).

37. Statement of Morton H. Halperin, ACLU, Hearings Before the Special Subcommittee on War Powers of the Committee on Foreign Relations, U.S. Senate, 100th Cong., 2d Sess. (S. Hearing 100-1012, Sept. 20, 1988), at 223.

38. U.S. Const., Art. I, 8, cl. 1. See also Art. I, 8, cl. 12, which authorizes Congress to raise and support armies, "but no Appropriation of Money to that Use shall be for a longer Term than two Years."
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42. 134 Congressional Record, 100th Cong., 2d Sess. (No. 71, May 19, 1988), at p. S6177.
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46. 2 Max Farrand, The Records of the Federal Convention of 1787, at 313, 318-19 (rev. ed., 1937).
47. 1 R. Rotunda & J. Nowak, Treatise on Constitutional Law: Substance and Procedure 6.9, at 528, & Appendix following 6.10, at 532-42 (West Pub. Co., 2d ed., 1992).
48. 50 U.S.C.A. 1541(c).
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50. 50 U.S.C.A. 1543; 1544(b).
51. Hearings on War Powers before the Subcommittee on International Security and Scientific Affairs of the House Committee on International Relations, 94th Cong., 1st Sess., 90-91 (1975), testimony of Monroe Leigh, Legal Adviser to the State Department.
52. Ely, supra, at 118 (footnote omitted).
53. See 1 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure 6.10 (West Pub. Co., 2d ed., 1992), which discusses various examples, including those discussed here.
54. Louis Henkin, Foreign Affairs and the Constitution 106 (1972).
55. Professor John Hart Ely, while flirting with an effort to make this section enforceable in the courts, and conceding that his "instincts" would make this section "operational," ultimately admits that it should be repealed. Ely, supra, at 118-19.
56. 50 U.S.C.A. 1542.
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58. Statement of President Gerald Ford, Hearings Before the Special Subcommittee on War Powers of

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the Committee on Foreign Relations, U.S. Senate, 100th Cong., 2d Sess. (S. Hearing 100-1012, Sept. 15, 1988), at 161.

59. 50 U.S.C.A. 1542.
60. 50 U.S.C.A. 1542.
61. 50 U.S.C.A. 1543(a)(3); see also 1543(b), (c) (dealing with periodic reporting).
62. E.g., George Melloan, "McNamara's War? You've Got To Be Kidding," The Wall Street Journal, April 17, 1995, at A13, col. 3-6 (midwest ed.).
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66. Edward S. Corwin, The President: Office and Powers, 1787-1984, at p. 300 (5th rev. ed., by Randall W. Bland, Theodore T. Hindson, & Jack W. Peltason, 1984).
67. 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).
68. E.g., 1 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure 6.13, at 551 (West Pub. Co., 2d ed., 1992).
69. Ely, War and Responsibility, supra, at 119.
70. Laurence H. Tribe, American Constitutional Law 218 n. 25 (Foundation Press, 2d ed., 1988), referring specifically to 1544(c).
71. Edward S. Corwin, The President: Office and Powers, 1787-1984, at p. 301 (5th rev. ed., by Randall W. Bland, Theodore T. Hindson, & Jack W. Peltason, 1984): Chadha "clearly lays the ground for a serious constitutional challenge to the entire resolution" (emphasis added). Professor Ely expresses concern that Chadha "provides an excuse to condemn the entire Resolution as 'unconstitutional.'" Ely, War and Responsibility, supra, at 119 (emphasis added). The resolution, however, contains a severability clause, 1548. On the other hand, one can argue that 1544(c) is central to large parts of the resolution -- Ely calls it part of a "package" that includes 1544(b) (emphasis in original) -- and that may be why some commentators suggest that this provision infects and invalidates the entire resolution.
72. S. 5, at 3.
73. S. 5, at 4.
74. H.R. 1111 (Mar. 2, 1995), a bill to clarify the war powers of Congress and the President in the post-Cold War period.
75. Ely, War and Responsibility, supra, at 118 (footnote omitted).
76. Statement of Morton H. Halperin, ACLU, Hearings Before the Special Subcommittee on War Powers of the Committee on Foreign Relations, U.S. Senate, 100th Cong., 2d Sess. (S. Hearing

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FN1. Last Term this Court affirmed, by an equally divided vote, a judgment of the United States Court of Appeals for the Fifth Circuit that held § 27A(b) constitutional. *Morgan Stanley & Co. v. Pacific Mut. Life Ins. Co.,* 511 U.S. 658, 114 S.Ct. 1827, 128 L.Ed.2d 654 (1994) (*per curiam*). That ruling of course lacks precedential weight. *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 73, n. 8, 97 S.Ct. 2264, 2271, n. 8, 53 L.Ed.2d 113 (1977).

II

[1][2] Respondents bravely contend that § 27A(b) does not require federal courts to reopen final judgments, arguing first that the reference to "the laws applicable in the jurisdiction ... as such laws existed on June 19, 1991" (the day before *Lampf* was decided) may reasonably be construed to refer precisely to the limitations period provided in *Lampf* itself, in which case petitioners' action was time barred even under ***216** § 27A. [FN2] It is true that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 312-313, 114 S.Ct. 1510, 1519, 128 L.Ed.2d 274 (1994); see also *id.,* at 313, n. 12, 114 S.Ct., at 1519, n. 12. But respondents' argument confuses the question of what the law *in fact* was on June 19, 1991, with the distinct question of what § 27A ****1452 means*** by its *reference* to what the law was. We think it entirely clear that it does not mean the law enunciated in *Lampf,* for two independent reasons. First, *Lampf* provides a uniform, national statute of limitations (instead of using the applicable state limitations period, as lower federal courts had previously done. See *Lampf,* 501 U.S., at 354, and n. 1, 111 S.Ct., at 2777, and n. 1). If the statute referred to *that* law, its reference to the "laws applicable *in the jurisdiction* " (emphasis added) would be quite inexplicable. Second, if the statute refers to the law enunciated in *Lampf,* it is utterly without effect, a result to be avoided if possible. *American Nat. Red Cross v. S.G.,* 505 U.S. 247, 263-264, 112 S.Ct. 2465, 2474-2475, 120 L.Ed.2d 201 (1992); see 2A N. Singer, Sutherland on Statutory Construction § 46.06 (Sands rev. 4th ed. 1984). It would say, in subsection (a), that the limitations period is what the Supreme Court has held to be the limitations period; and in subsection (b), that suits dismissed as untimely under *Lampf* which were timely under *Lampf* (a null set) shall be reinstated. To avoid a constitutional question by holding that Congress enacted, and the President approved, a blank sheet of paper would indeed constitute "disingenuous evasion." *George Moore Ice Cream Co. v. Rose,* 289 U.S. 373, 379, 53 S.Ct. 620, 622, 77 L.Ed. 1265 (1933).

FN2. Since respondents' reading of the statute would avoid a constitutional question of undoubted gravity, we think it prudent to entertain the argument even though respondents did not make it in the Sixth Circuit. Of course the Sixth Circuit did *decide* (against respondents) the point to which the argument was directed. See 1 F.3d 1487, 1490 (1993) ("The statute's language is plain and unambiguous.... [It] commands the Federal courts to reinstate cases which those courts have dismissed").

***217** As an alternative reason why § 27A(b) does not require the reopening of final judgments, respondents suggest that the subsection applies only to cases still pending in the federal courts when § 27A was enacted. This has only half the defect of the first argument, for it makes only half of § 27A purposeless--§ 27A(b). There is no need to "reinstate" actions that are still pending; § 27A(a) (the new statute of limitations) could and would be applied by the courts of appeals. On respondents' reading, the only consequence of § 27A(b) would be the negligible one of permitting the plaintiff in the pending appeal from a statute-of-limitations dismissal to return *immediately* to the district court, instead of waiting for the court of appeals' reversal. To enable § 27A(b) to achieve such an insignificant consequence, one must disregard the language of the provision, which refers generally to suits "dismissed as time barred." It is perhaps arguable that this does *not* include suits that are not yet *finally* dismissed, *i.e.,* suits still pending on appeal; but there is *no* basis for the contention that it includes *only* those. In short, there is no reasonable construction on which § 27A(b) does not require federal courts to reopen final judgments in suits dismissed with prejudice by virtue of *Lampf.*

III

[3] Respondents submit that § 27A(b) violates both the separation of powers and the Due Process Clause of the Fifth Amendment. [FN3] Because the latter submission, if correct, might dictate a similar result

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federal law, since the complaint does not allege and the District Court did not find that North Carolina law would provide any remedy against it as a joint tortfeasor. On the Court's theory of the case, then, it need not decide whether jurisdiction could be obtained over Duke Power under § 1331. *Ante*, at 2630 n. 16. That is a particularly felicitous conclusion from the Court's point of view, since the complaint does not allege that each member of the plaintiff class has a claim in excess of $10,000. against Duke Power, which is a prerequisite to jurisdiction under § 1331. *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973).

Despite the Court's assurances, it is conceivable that the practical effect of today's decision could be an erosion of the well-pleaded complaint doctrine. Had the plaintiffs in *Mottley* joined as defendants a federal agency having as ephemeral a relation to the statute challenged there as does the Commission to the statute involved here, the District Court, according to today's decision, would have had jurisdiction to consider the constitutionality of the statute, even though its judgment would not have been binding against the Louisville & Nashville Railroad. Innumerable federal statutes and regulations affect the daily decisions of private parties, who would undoubtedly appreciate the sort of advisory opinion rendered today on the validity of those provisions. This Court should not encourage the hope that such opinions may be obtained by suing an appropriate federal agency under a claim which verges on the frivolous.

***99 **2644** Appellees do not contend that the Price-Anderson Act itself grants to them personal rights which may be vindicated in a federal proceeding. Since the only property rights they assert arise under North Carolina law, the District Court had no jurisdiction to consider whether the setting up of an Act of Congress as a defense against those rights would deny them due process of law under the Fifth Amendment.

Indeed, the Court does not even contend that there is an independent statutory source of jurisdiction over Duke. *Ante*, at 2630 n. 16. It suggests instead that the complaint states a claim against the Nuclear Regulatory Commission, not as a joint tortfeasor under North Carolina law, but as the administrator of an unconstitutional federal statute. The Court's theory is that the complaint alleges the existence of an implied right of action under the Fifth Amendment to obtain relief against arbitrary federal statutes. It can hardly be said that this theory of the case emerges with crystal clarity from either the complaint or the brief of the appellees.

More importantly, there is no allegation in this complaint that the Nuclear Regulatory Commission has taken or will take any unconstitutional action at all. The complaint alleges only that the Commission granted construction permits to ***100** Duke, and that it will enter into an agreement "to indemnify Duke for any nuclear incident exceeding the amount of $125,000,000 subject to a maximum liability of $560,000,000." App. 31, ¶ 13. Neither of these actions is alleged to be unconstitutional. The gist of the complaint is the asserted unconstitutionality of 42 U.S.C. § 2210(e) (1970 ed., Supp. V), which limits Duke's liability. But this limitation of liability is separate and apart from the indemnity agreement which the Commission is authorized to execute under 42 U.S.C. § 2210(d) (1970 ed., Supp. V). The Commission has nothing whatever to do with the administration of the limitation of liability; whatever administration of that statute there is to be is left in the hands of the District Court. 42 U.S.C. § 2210(*o*) (1970 ed. and supp. v). the dIstrict Court, of course, is not a party to this suit. [FN3]

FN3. Appellees' challenge to the construction permits was rejected in *Carolina Environmental Study Group v. United States*, 166 U.S.App.D.C. 416, 510 F.2d 796 (1975). It is true, as the Court remarks, *ante*, at 2635 n. 26, that "absent the execution of such [indemnity] agreements between the NRC and the licensees, the liability-limitation provisions of the Act, to which appellees object, would simply not come into play." That logical connection, however, does not amount to an allegation that the Commission's execution of an indemnity agreement is itself unconstitutional. The only federal action challenged by this complaint is a hypothetical district court's hypothetical invocation of the statute in the event of a hypothetical nuclear accident. In that entire string of hypothetical events, no action of the Commission is alleged to be unconstitutional.

It simply cannot be said that these allegations make out an actual controversy against the Commission. While the Commission may be quite interested in the constitutionality of the statute, that is hardly sufficient to establish a justiciable controversy. *Muskrat v. United States*, 219 U.S. 346, 361-362, 31 S.Ct. 250, 255-256, 55 L.Ed. 246 (1911). While appellees may have been damaged by Duke's

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decision to construct these plants, there is no "challenged action of the defendant" Commission to which their damage "fairly can be traced." *Simon v. Eastern Ky. Welfare* ***101** *Rights Org.*, 426 U.S. 26, 41, 96 S.Ct. 1917, 1925, 48 L.Ed.2d 450 (1976). If Duke decided to proceed with construction despite a declaration of the statute's unconstitutionality, there would be nothing that the Commission could do to aid appellees. Where the prospect of effective relief against a defendant depends on the actions of a third party, no justiciable controversy exists against that defendant. *Warth v. Seldin*, 422 U.S. 490, 505, 95 S.Ct. 2197, 2208, 45 L.Ed.2d 343 (1975). In short, appellees' only conceivable controversy is with Duke, over whom the District Court had no jurisdiction.

**2645 II

As appellees themselves describe the second aspect of their complaint, "the central issue is whether in the circumstances of this case, the complete destruction of appellees' property by a nuclear accident, occurring at one of Duke's plants, would be a 'taking' by the United States, as that term is defined in the Fifth Amendment." Brief for Appellees 62. This statement makes clear that appellees' claim arises not under the Price-Anderson Act but under the Fifth Amendment itself. Jurisdiction under § 1337 extends only to actions vindicating rights created by an Act of Congress. Compare *Switchmen v. National Mediation Board*, 320 U.S. 297, 300, 64 S.Ct. 95, 96, 88 L.Ed. 61 (1943), with *General Committee v. Missouri-Kansas-Texas R. Co.*, 320 U.S. 323, 337, 64 S.Ct. 146, 152, 88 L.Ed. 76 (1943). Since it cannot be maintained that the Price-Anderson Act *created* appellees' asserted right to be free from takings for public use without just compensation, it follows that District Court jurisdiction may not be predicated upon § 1337.

The District Court does have jurisdiction to consider claims of taking under the Tucker Act, 28 U.S.C. § 1346(a)(2) (1976 ed.), where the amount in controversy does not exceed $10,000. [FN4] "But the Act has long been construed as authorizing *102 only actions for money judgments and not suits for equitable relief against the United States." *Richardson v. Morris*, 409 U.S. 464, 465, 93 S.Ct. 629, 631, 34 L.Ed.2d 647 (1973). It is incontrovertibly established that neither the Court of Claims nor the district courts have jurisdiction under the Tucker Act to issue the sort of declaratory relief granted here. Compare *ibid.*, with *United States v. King*, 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969). Thus, the record does not establish any jurisdictional basis upon which the District Court could grant declaratory relief on appellees' taking claim.

FN4. The Court concludes, *ante*, at 2629-2630 n. 15, although appellees do not so contend, that their taking claim is cognizable under 28 U.S.C. § 1331(a) (1976 ed.), which grants jurisdiction to the district courts where the suit "arises under the Constitution." The Court cites only the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974), in support of its conclusion that this claim may be maintained under § 1331. It is, of course, well established that "when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans v. Lavine*, 415 U.S. 528, 535 n. 5, 94 S.Ct. 1372, 1378, 39 L.Ed.2d 577 (1974). In the *Regional Rail Reorganization Act Cases* this Court's opinion did not even cite the statutory basis for jurisdiction, much less consider its validity. To conclude that § 1331 embraces a "taking" claim makes the Tucker Act largely superfluous, cf. *United States v. Testan*, 424 U.S. 392, 404, 96 S.Ct. 948, 956, 47 L.Ed.2d 114 (1976), and will permit the district courts to consider claims of over $10,000 which previously could only be litigated in the Court of Claims. *Richardson v. Morris*, 409 U.S. 464, 93 S.Ct. 629, 34 L.Ed.2d 647 (1973). Such a significant expansion of the jurisdiction of the district courts should not be accomplished without the benefit of arguments and briefing.

There being no basis for District Court jurisdiction over either of appellees' claims, its judgment should be reversed and the cause remanded with instructions to dismiss the complaint for want of jurisdiction.

Mr. Justice STEVENS, concurring in the judgment.

The string of contingencies that supposedly holds this litigation together is too delicate for me. We are told that but for the Price-Anderson Act there would be no financing of nuclear power plants, no development of those plants by private parties, and hence no present injury to persons such as appellees;

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we are then asked to remedy an alleged due process violation ***103** that may possibly occur at some uncertain time in the future, and may possibly injure the appellees in a way that has no significant connection with any present injury. It is remarkable that such a series of speculations is considered sufficient either to make this litigation ripe for decision or to establish appellees' standing; [FN*] it is even more remarkable ****2646** that this occurs in a case in which, as Mr. JUSTICE REHNQUIST demonstrates, there is no federal jurisdiction in the first place.

> FN* With respect to whether appellees' claim of present injury is sufficient to establish standing, it should be noted that some sort of financing is essential to almost all projects, public or private. Statutes that facilitate and may be essential to the financing abound--from tax statutes to statutes prohibiting fraudulent securities transactions. One would not assume, however, that mere neighbors have standing to litigate the legality of a utility's financing. Cf. *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539.

The Court's opinion will serve the national interest in removing doubts concerning the constitutionality of the Price-Anderson Act. I cannot, therefore, criticize the statesmanship of the Court's decision to provide the country with an advisory opinion on an important subject. Nevertheless, my view of the proper function of this Court, or of any other federal court, in the structure of our Government is more limited. We are not statesmen; we are judges. When it is necessary to resolve a constitutional issue in the adjudication of an actual case or controversy, it is our duty to do so. But whenever we are persuaded by reasons of expediency to engage in the business of giving legal advice, we chip away a part of the foundation of our independence and our strength.

I join Mr. Justice REHNQUIST'S opinion concurring in the judgment.

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[redacted]

Supreme Court of the United States

W. J. USERY, Jr., Secretary of the United States Department of Labor, et al., Appellants,
v.
TURNER ELKHORN MINING COMPANY et al.
TURNER ELKHORN MINING COMPANY et al., Appellants,
v.
W. J. USERY, Jr., Secretary of the United States Department of Labor, et al.

Nos. 74-1302, 74-1316.

Argued Dec. 2, 1975.
Decided July 1, 1976.

Action was brought by coal mine operators attacking constitutionality of black lung benefit provisions of Coal Mine Health and Safety Act of 1969. The Three- Judge District Court for the Eastern District of Kentucky, 385 F.Supp. 424, found amended Act constitutional on its face except in regard to two provisions concerning determination of miner's total disability due to pneumoconiosis, and appeals were taken. The Supreme Court, Mr. Justice Marshall, held that due process clause poses no bar to requiring coal mine operator to provide compensation for former miner's death or disability due to pneumoconiosis arising out of employment in its mines even if former miner terminated his employment in the industry before the Act was passed; that Congress did not act arbitrarily in selecting ten and 15-year figures as reference points for presumptions of disability due to pneumoconiosis; and that challenged provisions of Act were constitutionally sound.

Affirmed in part, reversed in part, and vacated and remanded in part.

Mr. Chief Justice Burger concurred in the judgment.

Mr. Justice Powell filed concurring opinion.

Mr. Justice Stewart filed opinion concurring in part and dissenting in part in which Mr. Justice Rehnquist joined.

West Headnotes

[1] Courts ⚖96(3)
106k96(3) Most Cited Cases

Supreme Court's summary affirmance in prior case did not foreclose district court's determination of unconstitutionality regarding issues which were not before Supreme Court on prior appeal.

[2] Courts ⚖90(1)
106k90(1) Most Cited Cases

Although several questions presented had been raised and decided in prior case which had been disposed of by summary affirmance, Supreme Court, having heard oral argument and entertained full briefing on such issues together with other questions raised, would proceed to treat them more fully.

[3] Constitutional Law ⚖48(1)
92k48(1) Most Cited Cases

Legislative acts adjusting burdens and benefits of economic life come to Supreme Court with presumption of constitutionality, and burden is on one complaining of due process violation to establish that legislature has acted in arbitrary and irrational way.

[4] Constitutional Law ⚖81
92k81 Most Cited Cases

Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations, even though effect of legislation is to impose new duties or liability based on past acts.

[5] Labor Relations ⚖13
232Ak13 Most Cited Cases

Justification for retrospective imposition of liability on coal mine operators for pneumoconiosis arising out of employment in coal mines of miners who terminated their work in the industry before Coal Mine Health and Safety Act of 1969, as amended by Black Lung Benefits Act of 1972, was enacted had

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to take into account possibility that operators may not have known of danger of their employees' contracting pneumoconiosis, and that even if they did know of danger their conduct may have been taken in reliance upon current state of the law, which imposed no liability on them for disabling pneumoconiosis. Federal Coal Mine Health and Safety Act of 1969, § 422 as amended 30 U.S.C.A. § 932.

[6] Labor Relations ⚖13
232Ak13 Most Cited Cases

Imposition of liability on coal mine operators under Coal Mine Health and Safety Act of 1969, which Act as amended requires operator to provide compensation for former employee's death or disability due to pneumoconiosis arising out of employment in its mines even if former employee terminated his employment in mines before Act was passed, for disabilities bred in the past was justified as rational measure to spread costs of employees' disability to those who profited from the fruits of their labor, the operators and coal consumers. Federal Coal Mine Health and Safety Act of 1969, § 422 as amended 30 U.S.C.A. § 932.

[7] Constitutional Law ⚖70.3(9.1)
92k70.3(9.1) Most Cited Cases
(Formerly 92k70.3(9))

Whether broader cost-spreading scheme than Coal Mine Health and Safety Act of 1969, which as amended requires coal mine operator to provide compensation for former employee's death or disability due to pneumoconiosis arising out of employment in its mines even if former employee terminated his employment before Act was passed, would have been wiser or more practical under the circumstances was not a question of constitutional dimension. Federal Coal Mine Health and Safety Act of 1969, § 422 as amended 30 U.S.C.A. § 932.

[8] Constitutional Law ⚖301(4)
92k301(4) Most Cited Cases
(Formerly 92k301)

Due process clause poses no bar to requiring coal mine operator to provide compensation for former employee's death or disability due to pneumoconiosis arising out of employment in its mines, even if former employee terminated his employment in the industry before statute requiring such compensation was passed. Federal Coal Mine Health and Safety Act of 1969, § 422 as amended 30 U.S.C.A. § 932; U.S.C.A.Const. Amend. 5.

[9] Constitutional Law ⚖70.3(9.1)
92k70.3(9.1) Most Cited Cases
(Formerly 92k70.3(9))

[9] Labor Relations ⚖8
232Ak8 Most Cited Cases

Whether impairment of health of coal miner and fact that he had been rendered unable to perform kind of work to which he adapted himself merits compensation is public policy matter left primarily to determination of legislature, and such factors are not so insignificant as not to be rightful basis for compensation, and thus statutory definition providing that coal miner is totally disabled if pneumoconiosis prevents him from engaging in gainful employment requiring skills and abilities comparable to his employment in mines was not unconstitutionally arbitrary and irrational on theory that it provided compensation for former miners who might well be employable in other lines of work. Federal Coal Mine Health and Safety Act of 1969, § 402(f), as amended 30 U.S.C.A. § 902(f).

[10] Labor Relations ⚖8
232Ak8 Most Cited Cases

[10] Labor Relations ⚖13
232Ak13 Most Cited Cases

Effect of statutory "irrebuttable presumption" of total disability establishing entitlement where coal miner is clinically diagnosable as extremely ill with pneumoconiosis arising out of coal mine employment is permissible, and thus such provision, being part of statute regulating purely economic matters, was not rendered invalid by Congress' choice of statutory language on theory that Congress accomplished result in impermissible manner by defining eligibility in terms of "total disability" and directing "irrebuttable presumption" of total disability upon factual showing that did not necessarily satisfy statutory definition of total disability. Federal Coal Mine Health and Safety Act of 1969, § 411(c)(3) as amended 30 U.S.C.A. § 921(c)(3).

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[11] Labor Relations ⚿13
232Ak13 Most Cited Cases

Benefits authorized under statutory provision that clinical evidence of miner's complicated pneumoconiosis gives rise to irrebuttable presumption that he was totally disabled by pneumoconiosis at time of his death and that his death was due to pneumoconiosis were intended not simply as compensation for damages due to miner's death, but as deferred compensation for injury suffered during miner's lifetime as result of illness itself, and thus such benefits presented no problem in connection with retrospective application of provision to employees who terminated their employment before statute authorizing benefits was passed. Federal Coal Mine Health and Safety Act of 1969, § 411(c)(3) as amended 30 U.S.C.A. § 921(c)(3).

[12] Labor Relations ⚿8
232Ak8 Most Cited Cases

[12] Labor Relations ⚿13
232Ak13 Most Cited Cases

In view of agreement that pneumoconiosis is caused by breathing coal dust and medical evidence indicating noticeable incidence of pneumoconiosis in cases of miners with ten years' mine employment, it was not "purely arbitrary" for Congress to select ten-year figure as point of reference for statutory rebuttable presumptions that coal miner with ten years' employment in mines is presumed to have contracted pneumoconiosis from employment and that death of coal miner with ten years' employment is presumed to have been due to pneumoconiosis; nor were such ten-year presumptions arbitrary because they failed to account for varying degrees of exposure. Federal Coal Mine Health and Safety Act of 1969, § 411(c)(1, 2) as amended 30 U.S.C.A. § 921(c)(1, 2); Federal Rules of Evidence, rule 301, 28 U.S.C.A.

[13] Labor Relations ⚿8
232Ak8 Most Cited Cases

[13] Labor Relations ⚿13
232Ak13 Most Cited Cases

In light of medical testimony to effect that 15-year point marks beginning of linear increase in prevalence of disease with years spent underground, 15 years' durational basis of statutory presumption that coal miner employed for 15 years in underground mines who is able to marshal evidence demonstrating totally disabling respiratory or pulmonary impairment is rebuttably presumed totally disabled by pneumoconiosis was not arbitrary. Federal Coal Mine Health and Safety Act of 1969, § 411(c)(4) as amended 30 U.S.C.A. § 921(c)(4).

[14] Constitutional Law ⚿55
92k55 Most Cited Cases

Congress has plenary authority over promulgation of evidentiary rules for federal courts.

[15] Labor Relations ⚿8
232Ak8 Most Cited Cases

[15] Labor Relations ⚿13
232Ak13 Most Cited Cases

In view of significant evidence presented to Congress demonstrating that X-ray testing which fails to disclose pneumoconiosis cannot be depended upon as trustworthy indicator of absence of disease, Congress' resolution of doubts in favor of disabled miner through enactment of provision that no claim for black lung benefits shall be denied solely on basis of chest X-ray did not render enactment arbitrary under standards of rationality appropriate to legislation in question. Federal Coal Mine Health and Safety Act of 1969, § 413(b) as amended 30 U.S.C.A. § 923(b).

[16] Constitutional Law ⚿55
92k55 Most Cited Cases

When it comes to evidentiary rules in matters not within specialized judicial competence or completely commonplace, it is primarily for Congress to amass the stuff of actual experience and cull conclusions from it.

[17] Labor Relations ⚿13
232Ak13 Most Cited Cases

[17] Workers' Compensation ⚿1388
413k1388 Most Cited Cases

Limitation on rebuttal evidence contained in

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statutory section, which provides that miner employed for 15 years in underground mine who is able to demonstrate totally disabling respiratory or pulmonary impairment is rebuttably presumed totally disabled by pneumoconiosis and his death rebuttably presumed due to pneumoconiosis, and which applies only to "the Secretary," applies only to the Secretary of Health, Education and Welfare and is inapplicable to coal mine operators, and thus evidence with which coal miner operator may rebut such presumption is not restricted. Federal Coal Mine Health and Safety Act of 1969, § 411(c)(4) as amended 30 U.S.C.A. § 921(c)(4).

[18] Federal Courts ⇐479
170Bk479 Most Cited Cases
(Formerly 30k170(1))

Where coal mine operators' amended complaint never challenged statutory or constitutional validity of regulations promulgated by Secretary of Health, Education and Welfare authorizing limitations on rebuttal evidence in determination of coal mine operator's liability for black lung benefits, and in absence of any mention of regulations in opinion and judgment of district court or in briefs and oral arguments of the parties, Supreme Court found it inappropriate to consider regulations' statutory or constitutional validity. Federal Coal Mine Health and Safety Act of 1969, §§ 411(b), 422(h) as amended 30 U.S.C.A. §§ 921(b), 932(h).

****2885** Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***1** Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, provides benefits to coal miners suffering from "black lung disease" (pneumoconiosis), and to survivors of miners who have died from, or while totally disabled by, the disease. Financial responsibility for payment of the benefits is divided into three parts: (1) Under Part B of Title IV claims filed between December 30, 1969 (enactment date), and June 30, 1973, are adjudicated by the Secretary of Health, Education, and Welfare (HEW), and paid by the United ****2886** States; (2) under s 415 of Part B claims filed during the transition period between the Federal Government benefit provision under Part B, Supra, and the state plan or operator benefit provision under Part C, Infra (July 1 to December 31, 1973), are adjudicated by the Secretary of Labor and paid by the United States. Federal payments to these claimants terminate on December 31, 1973, and the claimant's coal mine employer assumes responsibility to make continuing payments as if Part C and ***2** s 422 had applied (see (3), *infra*); and (3) under Part C, claims filed after December 31, 1973, are to be processed under an approved state workmen's compensation law and, absent such an approved plan, claims are to be filed with and adjudicated by the Secretary of Labor, d paid by the mine operators s 422. Under that provision an operator, who is entitled to a hearing in connection with these claims, is liable for benefits with respect to death or total disability due to pneumoconiosis arising out of employment in a mine for which the operator is responsible, the operator's liability covering the period from January 1, 1974, to December 30, 1981. Payments for benefits under Part C are to the same category of persons (a miner or certain survivors) and in the same amounts as under Part B. A miner is "totally disabled" and thus entitled to compensation "when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time," s 402(f). The Act prescribes several "presumptions" for use in determining compensable disability: Under s 411(c)(3) a miner shown by X-ray or other clinical evidence to be afflicted with complicated pneumoconiosis (the disease's incurable and final stage) is "irrebuttably presumed" to be totally disabled due to the disease; if such a miner has died, it is irrebuttably presumed that he was totally disabled by the disease at the time of death, and that his death was due thereto. There are three rebuttable presumptions (none of which may, under s 413(b), be defeated solely by a chest X-ray): (1) if a miner with 10 or more years' mine employment contracts pneumoconiosis, it is presumed that the disease arose out of such employment, s 411(c)(1); (2) if he died from a respiratory disease it is presumed that death was due to pneumoconiosis, s 411(c)(2); (3) if a miner, or the survivor of a miner, with 15 or more years' underground coal mine employment is able,

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despite the absence of clinical evidence of complicated pneumoconiosis, to demonstrate a totally disabling respiratory or pulmonary impairment, it is presumed that the total disability is attributable to the disease, that the miner was totally disabled thereby when he died, and that death was due to the disease, s 411(c)(4), and the final sentence of that provision specifies that "(t)he Secretary may rebut (this latter) presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment *3 did not arise out of, or in connection with, employment in a coal mine." A number of operators brought this suit claiming that the Act is unconstitutional under the Due Process Clause of the Fifth Amendment insofar as it requires benefit payments with respect to miners who left mine employment before the Act's effective date; that the statutory definitions, presumptions, and limitations on rebuttal evidence unconstitutionally impair the operator's ability to defend against benefit claims; and that certain regulations promulgated by the Secretary of Labor regarding the apportionment of liability for benefits among operators are inconsistent with the Act and unconstitutional. The District Court upheld each challenged provision as constitutional, with two exceptions: (1) It held s 411(c)(3) unconstitutional as an unreasonable and arbitrary legislative finding of total disability "in terms other than those provided by the Act as standards for total disability." (2) Reading the evidence limitation on rebuttal in s 411(c)(4) to apply to an operator's defense in a s 415 transition-period case, the court held the limitation **2887 arbitrary and unreasonable in not permitting a rebuttal showing that the case of pneumoconiosis afflicting the miner was not disabling. And, taking the provision to mean that an operator may defend against liability only on the ground that pneumoconiosis did not arise out of employment in *any* coal mine (rather than in a coal mine for which the operator was responsible) the District Court found the provision an arbitrary and unreasonable limitation on rebuttal evidence relevant and proper under s 422(c). The court enjoined the Secretary of Labor from seeking to apply the two provisions thus found unconstitutional. *Held:*

1. This Court's summary affirmance in National Independent Coal Operators Assn. v. Brennan, 419 U.S. 955, 95 S.Ct. 216, 42 L.Ed.2d 172, did not foreclose the District Court's rulings regarding ss 411(c)(3) and (4), which were not before the Court on that appeal. Pp. 2891-2892.

2. The challenged provisions do not violate the Due Process Clause of the Fifth Amendment. Pp. 2891-2903.

(a) The Clause does not bar requiring an operator to provide compensation for a former employee's death or disability due to pneumoconiosis arising out of employment in its mines, even if the former employee terminated his employment in its mines before the Act was passed. Retrospective application of the Act in this manner can be justified as serving to spread costs in a rational manner by allocating to the operator an actual cost of its business, whose avoidance might be thought to have enlarged *4 the operator's profits. *.Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468, distinguished. Pp. 2891-2894, 2896-2898.

(b) Though the operators contend that the s 402(f) definition of total disability is arbitrary because former miners who might be employable in other lines of work are compensated, a miner disabled under s 402(f)'s standards has suffered health impairment, and has been rendered unable to perform the work to which he has adapted himself, factors which afford a rational basis for compensation. P. 2895.

(c) The effect of s 411(c)(3)'s "irrebuttable presumption" of total disability to establish entitlement where a miner is clinically diagnosable as extremely ill with pneumoconiosis arising out of coal mine employment is clearly permissible, and the provision, being part of a statute regulating purely economic matters, is not rendered invalid by Congress' choice of statutory language. Pp. 2895-2897.

(d) The presumptions in ss 411(c)(1) and (2) are valid because there is a "rational connection between the fact proved and the ultimate fact presumed," Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 43, 31 S.Ct. 136, 138, 55 L.Ed. 78. In view of the medical evidence before Congress indicating the noticeable incidence of pneumoconiosis in cases of miners with 10 years' mine employment, it was not "purely arbitrary" for Congress to select the 10-year figure as a reference point for the presumptions; not are the 10-year

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presumptions arbitrary because they fail to account for varying degrees of exposure. Pp. 2898-2899.

(e) The 15-year durational basis of the presumption in s 411(c)(4) is likewise unassailable, particularly in light of medical testimony in the Senate Hearings on the 1969 Act. Pp. 2899, 2900.

(f) Congress had evidence showing doubts about the reliability of negative X- ray evidence as indicating the absence of the disease. That through its adoption of s 413(b) Congress ultimately resolved those doubts in the disabled miner's favor does not render that provision arbitrary. Pp. 2900-2901.

(g) The District Court improperly invalidated the limitation on evidence contained in s 411(c)(4) because the limitation is inapplicable to operators and applies only to the Secretary of HEW. Thus the Act does not restrict the evidence with which an operator may rebut the s 411(c)(4) presumption. Pp. 2901-2903.

385 F.Supp. 424, affirmed in part; reversed in part; vacated and remanded in part.

**2888 *5 R. RMcMahan, Chicago, Ill., for Turner Elkhorn Mining Co. et al.

Lawrence G. Wallace, Washington, D.C., for John T. Dunlop et al.

Mr. Justice MARSHALL delivered the opinion of the Court.

Twenty-two coal mine operators (Operators) brought this suit to test the constitutionality of certain aspects of Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U.S.C. s 901 Et seq. (1970 ed. and Supp. IV). The Operators, potentially liable under the amended Act to compensate certain miners, former miners, and their survivors for death or total disability due to pneumoconiosis arising out of employment in coal mines, sought declaratory and injunctive relief against the Secretary of Labor and the *6 Secretary of Health, Education, and Welfare, who are responsible for the administration of the Act and the promulgation of regulations under the Act.

On cross-motions for summary judgment, a three-judge District Court for the Eastern District of Kentucky, convened pursuant to 28 U.S.C. ss 2282 and 2284, found the amended Act constitutional on its face, except in regard to two provisions concerning the determination of a miner's total disability due to pneumoconiosis. The court enjoined the Secretary of Labor from further application of those two provisions. 385 F.Supp. 424 (1974). After granting a stay of the three-judge court's order, 421 U.S. 944, 95 S.Ct. 1673, 44 L.Ed.2d 99 (1975), we noted probable jurisdiction of the cross-appeals. 421 U.S. 1010, 95 S.Ct. 2413, 44 L.Ed.2d 678 (1975). We conclude that the amended Act, as interpreted, is constitutionally sound against the Operators' challenges.

I

Coal workers' pneumoconiosis black lung disease affects a high percentage of American coal miners with severe, and frequently crippling, chronic respiratory impairment. [FN1] The disease is caused by long-term inhalation of coal dust. [FN2] Coal workers' pneumoconiosis (hereafter *7 pneumoconiosis) is generally dgnosed on the basis of X-ray opacities indicating nodular lesions on the lungs of a patient with a long history of coal dust exposure. As the Surgeon General has stated, however, post-mortem examination data have indicated a greater prevalence of the disease than X-ray diagnosis reveals.

FN1. The House and Senate Reports on the 1969 Act placed the number of afflicted active and retired miners at 100,000. S.Rep.No.91-411, p. 6 (1969), and H.R.Rep.No.91-563, p. 17 (1969), U.S. Code Cong. & Admin.News 1969, p. 2503. The Senate Report, Supra, at 7, specified that, on the basis of X-ray examination, the disease rate was 10% For then-active coal miners, and 20% For inactive coal miners. Other estimates have run significantly higher. See E. g., Hearings on S. 355, before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess., pt. 2, p. 641 (1969).

FN2. Coal workers' pneumoconiosis is a distinct clinical entity, and is not the only type of pneumoconiosis. The remarks of the Surgeon General, reproduced in H.R.Rep.No.91-563, Supra, at 15, indicate that the pathological condition of pneumoconiosis may also be caused by inhalation of other dusty materials, such as cotton fibers or silica.

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in a challenge to state legislation underthe Fourteenth Amendment, the former is the narrower ground for adjudication of the constitutional questions in the case, and we therefore consider it first. *Ashwander v. TVA,* 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). We conclude that in § 27A(b) Congress has exceeded its authority by requiring the federal courts to exercise ***218** "[t]he judicial Power of the United States," U.S. Const., Art. III, § 1, in a manner repugnant to the text, structure, and traditions of Article III.

FN3. "No person shall be ... deprived of life, liberty, or property, without due process of law." U.S. Const., Amdt. 5.

Our decisions to date have identified two types of legislation that require federal courts to exercise the judicial power in a manner that Article III forbids. The first appears in *United States v. Klein,* 13 Wall. 128, 20 L.Ed. 519 (1872), where we refused to give effect to a statute that was said "[to] prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.,* 13 Wall., at 146. Whatever the precise scope of *Klein,* however, later decisions have made clear that its prohibition does not take hold when Congress "amend[s] applicable law." *Robertson v. Seattle Audubon Soc.,* 503 U.S. 429, 441, 112 S.Ct. 1407, 1414, 118 L.Ed.2d 73 (1992). ****1453** Section 27A(b) indisputably does set out substantive legal standards for the Judiciary to apply, and in that sense changes the law (even if solely retroactively). The second type of unconstitutional restriction upon the exercise of judicial power identified by past cases is exemplified by *Hayburn's Case,* 2 Dall. 409 (1792), which stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch. See, *e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948). Yet under any application of § 27A(b) only courts are involved; no officials of other departments sit in direct review of their decisions. Section 27A(b) therefore offends neither of these previously established prohibitions.

[4] We think, however, that § 27A(b) offends a postulate of Article III just as deeply rooted in our law as those we have mentioned. Article III establishes a "judicial department" with the "province and duty ... to say what the law is" in particular cases and controversies. *Marbury v. Madison,* 1 Cranch 137, 177, 2 L.Ed. 60 (1803). The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide ***219** them, subject to review only by superior courts in the Article III hierarchy--with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments." Easterbrook, Presidential Review, 40 Case W.Res.L.Rev. 905, 926 (1990). By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle.*

A

The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression. In the 17th and 18th centuries colonial assemblies and legislatures functioned as courts of equity of last resort, hearing original actions or providing appellate review of judicial judgments. G. Wood, The Creation of the American Republic 1776-1787, pp. 154-155 (1969). Often, however, they chose to correct the judicial process through special bills or other enacted legislation. It was common for such legislation not to prescribe a resolution of the dispute, but rather simply to set aside the judgment and order a new trial or appeal. M. Clarke, Parliamentary Privilege in the American Colonies 49-51 (1943). See, *e.g.,* Judicial Action by the Provincial Legislature of Massachusetts, 15 Harv.L.Rev. 208 (1902) (collecting documents from 1708-1709); 5 Laws of New Hampshire, Including Public and Private Acts, Resolves, Votes, Etc., 1784-1792 (Metcalf ed. 1916). Thus, as described in our discussion of *Hayburn's Case, supra,* at 6-7, such legislation bears not on the problem of interbranch review but on the problem of finality of judicial judgments.

The vigorous, indeed often radical, populism of the revolutionary legislatures and assemblies increased the frequency of legislative correction of judgments. Wood, *supra,* at 155-156, 407-408. See also *INS v.*

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According to the Surgeon General, pneumoconiosis is customarily classified as "simple" or "complicated." [FN3] Simple pneumoconiosis, ordinarily identified by X-ray opacities of a limited extent, is generally regarded by physicians as seldom productive of significant respiratory impairment. Complicated pneumoconiosis, generally far more serious, involves progressive massive fibrosis as a complex reaction to dust and other factors (which may include tuberculosis or other infection), and usually [FN4] produces significant **2889 pulmonary impairment and marked respiratory disability. This disability limits the victim's physical capabilities, may induce death by cardiac failure, and may contribute to other causes of death. [FN5]

FN3. S.Rep.No.91-411, Supra, at 7-8; H.R.Rep.No.91-563, Supra, at 15-16.

FN4. There was evidence before Congress that the complicated stage of the disease is sometimes exhibited with "mild pulmonary function changes and little or no disability." Hearings on S. 355, Supra, N. 1, at 858.

FN5. Ibid.

Removing the miner from the source of coal dust has so far proved the only effective means of preventing the contraction of pneumoconiosis, and once contracted the disease is irreversible in both its simple and complicated stages. No therapy has been developed. Finally, because the disease is progressive, [FN6] at least in its complicated *8 stage, its mptoms may become apparent only after a miner has left the coal mines.

FN6. Ibid.

In order to curb the incidence of pneumoconiosis, Congress provided in Title II of the Federal Coal Mine Health and Safety Act of 1969, s 201 Et seq., 30 U.S.C. s 841 Et seq., for limits on the amount of dust to be permitted in the ambient air of coal mines. Additionally, in view of the then-established prevalence of irreversible pneumoconiosis among miners, and the insufficiency of state compensation programs, Congress passed Title IV of the 1969 Act, s 401 Et seq., 30 U.S.C. s 901 Et seq., to provide benefits to afflicted miners and their survivors. These benefit provisions were subsequently broadened by the Black Lung Benefits Act of 1972. 30 U.S.C. s 901 Et seq. (1970 ed., Supp. IV).

As amended, the Act divides the financial responsibility for payment of benefits into three parts. Under Part B of Title IV, ss 411-414, 30 U.S.C. ss 921-924 (1970 ed. and Supp. IV), claims filed between December 30, 1969, the date of enactment, and June 30, 1973, are adjudicated by the Secretary of Health, Education, and Welfare and paid by the United States. [FN7]

FN7. As of December 31, 1974, 556,200 claims had been filed under Part B of the law. As of that date, with all but 400 cases decided, 509,900 individuals had established eligibility as black lung beneficiaries under the Act. Department of Health, Education, and Welfare, Fifth Annual Report to Congress on the Administration of Part B of Title IV of the Federal Coal Mine Health and Safety Act of 1969, p. 3 (1975).

Under Part C of Title IV, ss 421-431, 30 U.S.C. ss 931-941 (1970 ed. and Supp. IV), claims filed after December 31, 1973, are to be processed under an applicable state workmen's compensation law approved by the Secretary of Labor under the standards set forth in s 421, 30 U.S.C. s 931 (1970 ed. and Supp. IV). In *9 the absence of such an approved state program, and to date no state program has been approved, claims are to be filed with and adjudicated by the Secretary of Labor, and paid by the mine operators. s 422, 30 U.S.C. s 932 (1970 ed. and Supp. IV). Under s 422 an operator who is entitled to a hearing in connection with these claims is liable for Part C benefits with respect to death or total disability due to pneumoconiosis arising out of employment in a mine for which the operator is responsible. The operator's liability for Part C benefits covers the period from January 1, 1974, to December 30, 1981. Payments of benefits under Part C are to the same categories of persons a miner or certain survivors and in the same amounts, as under Part B. ss 422(c), (d); see s 412(a), 30 U.S.C. s 922(a) (1970 ed. and Supp. IV). [FN8]

FN8. The individual claimant is entitled to benefits at a rate equal to 50% Of the minimum monthly payment to which a totally disabled federal employee in Grade GS-2 is entitled. s 412(a)(1), 30 U.S.C. s 922(a)(1). At current rates, the individual claimant's entitlement is $196.80 per month, or $2,361.60 per year. 40 Fed.Reg. 56886-56887 (1975); see 20 CFR s 410.510 (1975). These basic

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benefits are increased if the claimant has dependents; the maximum increase of 100% Is available if the claimant has three or more dependents. s 412(a)(4), 30 U.S.C. s 922(a)(4) (1970 ed., Supp. IV). See also 30 U.S.C. ss 922(a)(3), (5) (1970 ed., Supp. IV). Thus, the maximum in benefits to which a claimant could be entitled is $393.60 per month, or $4,723.20 per year. Benefits under Part C are reduced to account for certain alternative income. s 422(g), 30 U.S.C. s 932(g). In addition to these monthly benefits, the operators are responsible for claimants' medical expenses. See s 422(a), 30 U.S.C. s 932(a) (1970 ed., Supp. IV), incorporating 33 U.S.C. s 907 (1970 ed., Supp. IV).

**2890 Claims filed during the transition period between the Federal Government benefit provision under Part B, and state plan or operator benefit provision under Part C that is, July 1 to December 31, 1973 are adjudicated *10 under s 415 of Part B, 30 U.S.C. s 925 (1970 ed., Supp. IV), by the Secretary of Labor. The United States is responsible for payment of these claims until December 31, 1973. Responsible operators, having been notified a claim and entitled to participate in a hearing thereon, are thereafter liable for benefits as if the claim had been filed pursuant to Part C and s 422 had been applicable to the operator.

The Act provides that a miner shall be considered "totally disabled," and consequently entitled to compensation, "when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time." s 402(f), 30 U.S.C. s 902(f) (1970 ed., Supp. IV). [FN9] The Act also prescribes several "presumptions" for use in determining compensable disability. [FN10] Under s 411(c)(3), a miner *11 shown by X-ray or other clinical evidence to be afflicted with complicated pneumoconiosis is "irrebuttably presumed" to be totally disabled due to pneumoconiosis; if he has died, it is irrebuttably presumed that he was totally disabled by pneumoconiosis at the time of his death, and that his death was due to pneumoconiosis. 30 U.S.C. s 921(c)(3) (1970 ed., Supp. IV). In any event, the presumption operates conclusively to establish entitlement to benefits.

FN9. Section 402(f), as set forth in 30 U.S.C. s 902(f) (1970 ed., Supp. IV), provides in full:

"The term 'total disability' has the meaning given it by regulations of the Secretary of Health, Education, and Welfare, except that such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time. Such regulations shall not provide more restrictive criteria than those applicable under section 423(d) of Title 42."

The Act defines "pneumoconiosis" as "a chronic dust disease of the lung arising out of employment in a coal mine." s 402(b), 30 U.S.C. s 902(b) (1970 ed., Supp. IV).

FN10. These presumptions are applicable directly to Part B adjudications by the Secretary of HEW, and indirectly to transition-period and Part C adjudications by the Secretary of Labor by operation of ss 422(h) and 411(b), 30 U.S.C. ss 932(h), 921(b) (1970 ed. and Supp. IV). See S.Rep.No.92-743, p. 21 (1972), U.S.Code Cong. & Admin.News 1972, p. 2305. See also ss 422(f)(2), 430, 30 U.S.C. ss 932(f)(2), 940 (1970 ed., Supp. IV).

The other presumptions are each explicitly rebuttable by an operator seeking to avoid liability. There are three such presumptions. First, if a miner with 10 or more years' employment in the mines contracts pneumoconiosis, it is rebuttably presumed that the disease arose out of such employment. s 411(c) (1), 30 U.S.C. s 921(c)(1) (1970 ed., Supp. IV). Second, if a miner with 10 or more years' employment in the mines died from a "respirable disease", it is rebuttably presumed that his death was due to pneumoconiosis. s 411(c)(2), 30 U.S.C. s 921(c)(2) (1970 ed., Supp. IV). Finally, if a miner, or the survivor of a miner, with 15 or more years' employment in underground coal mines is able, despite the absence of clinical evidence of complicated pneumoconiosis, to demonstrate a totally disabling respiratory or pulmonary impairment, the Act rebuttably presumes that the total disability is due to pneumoconiosis, that the miner was totally disabled by pneumoconiosis when he died, and that the miner's death was due to pneumoconiosis. s 411(c)(4), 30 U.S.C. s 921(c)(4) (1970 ed., Supp. IV). [FN11] Section 411(c)(4) specifically provides: "The Secretary *12 may rebut (this latter) presumption only by establishing that (A) such miner does not, or did not, have

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pneumoconiosis, or that (B) his respiratory or pulmonary **2891 impairment did not arise out of, or in connection with, employment in a coal mine." Moreover, under s 413(b), 30 U.S.C. s 923(b) (1970 ed., Supp. IV), none of these three rebuttable presumptions may be defeated solely on the basis of a chest X-ray. [FN12]

FN11. The use of this presumption in Part C adjudications is limited in some regards not significant in this case. See ss 422(f)(2), 430, 30 U.S.C. ss 932(f)(2), 940 (1970 ed., Supp. IV).

FN12. Section 413(b), as set forth in 30 U.S.C. s 923(b) (1970 ed., Supp. IV), provides in pertinent part: "(N)o claim for benefits Under this part shall be denied solely on the basis of the results of a chest roentgenogram." (Emphasis added.) Section 413(b) is found in Part B of Title IV. Section 430, as set forth in 30 U.S.C. s 940 (1970 ed., Supp. IV), provides, however, that "(t)he amendments made by the Black Lung Benefits Act of 1972 to part B . . . shall, to the extent appropriate, also apply (with limitations not relevant here) to . . . part (C)." The legislative history, moreover, makes clear that the s 413(b) limitation on use of X-ray evidence, enacted as s 4(f) of the 1972 Act, was intended to apply to Part C claims as well as Part B claims, see H.R.Conf.Rep.No.92- 1048, p. 9 (1972), U.S.Code Cong. & Admin.News 1972, p. 2338, and the Operators so concede. Brief for Operators 21.

II

In initiating this suit against the defendant Secretaries (hereafter Federal Parties), the Operators contended that the amended Act is unconstitutional insofar as it requires the payment of benefits with respect to miners who left employment in the industry before the effective date of the Act; that the Act's definitions, presumptions, and limitations on rebuttal evidence unconstitutionally impair the operators' ability to defend against benefit claims; and that certain regulations promulgated by the Secretary of Labor regarding the apportionment of liability for benefits among operators, and the provision of medical benefits, are inconsistent with the Act and constitutionally defective.

*13 The three-judge District Court held that all issues as to the validity of the challenged regulations were within the jurisdiction of a single district judge, and the court entered an order so remanding them. 385 F.Supp., at 426. The District Court upheld each challenged statutory provision as constitutional, with two exceptions. First, the District Court held that s 411(c)(3)'s irrebuttable presumption is unconstitutional as an unreasonable and arbitrary legislative finding of total disability "in terms other than those provided by the Act as standards for total disability." 385 F.Supp., at 430. Second, reading the limitation on evidence in rebuttal to s 411(c)(4)'s presumption of total disability due to pneumoconiosis to apply to an operator's defense in a s 415 transition-period case, the District Court found that limitation unconstitutional in two respects. It held the limitation arbitrary and unreasonable in not permitting a rebuttal showing that the case of pneumoconiosis afflicting the miner was not disabling. 385 F.Supp., at 430. And taking the provision to mean that an operator may defend against liability only on the ground that the pneumoconiosis did not arise out of employment in Any coal mine, rather than on the ground that it did not arise out of employment in a coal mine for which the operator was responsible, the District Court found the provision an unreasonable and arbitrary limitation on rebuttal evidence relevant and proper under s 422(c), 30 U.S.C. s 932(c). 385 F.Supp., at 430-431. The District Court accordingly entered an order declaring unconstitutional, and enjoining the Secretary of Labor from seeking to apply, s 411(c)(3)'s irrebuttable presumption and s 411(c)(4)'s limitation on rebuttable evidence.

The Operators' appeal, No. 74-1316, reasserts the constitutional challenges rejected by the District Court. *14 The appeal of the Federal Parties, No. 74-1302, seeks reversal of the declaration and injunction respecting the constitutionality of ss 411(c)(3) and (4). Neither side here questions the District Court's decision not to address the issues raised with respect to the Secretary of Labor's regulations. As we have already noted, we uphold the statute against all the constitutional contentions properly presented here. Because we read the limitation on rebuttal evidence in s 411(c)(4) as inapplicable to the Operators, however, we vacate that portion of the District Court's order which invalidates that limitation.

**2892 III

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[1][2] The Federal Parties direct our attention initially to National Independent Coal Operators Assn. v. Brennan, 372 F.Supp. 16 (DC), summarily aff'd, 419 U.S. 955, 95 S.Ct. 216, 42 L.Ed.2d 172 (1974), which raised a number of issues identical to those presented here. Our summary affirmance in that case did not foreclose the District Court's determination of unconstitutionality regarding ss 411(c)(3) and (4), those issues not having been before us on the appeal. Several questions presented here most notably those of retroactivity and preclusion of sole reliance on X-ray testimony evidence were raised and decided in National Independent Coal Operators Assn. v. Brennan, but having heard oral argument and entertained full briefing on these issues together with the other questions raised in the case, we proceed to treat them here more fully. Cf. Edelman v. Jordan, 415 U.S. 651, 670-671, 94 S.Ct. 1347, 1359, 39 L.Ed.2d 62 (1974).

IV

The Operators contend that the amended Act violates the Fifth Amendment Due Process Clause by requiring them to compensate former employees who terminated their work in the industry before the Act was passed, ***15** and the survivors of such employees. [FN13] The Operators accept the liability imposed upon them to compensate employees working in coal mines now and in the future who are disabled by pneumoconiosis; and they recognize Congress' power to create a program for compensation of disabled inactive coal miners. But the Operators complain that to impose liability upon them for former employees' disabilities is impermissibly to charge them with an unexpected liability for past, completed acts that were legally proper and, at least in part, unknown to be dangerous at the time.

> FN13. For simplicity of discussion, we will generally refer to claims as though presented by the miner himself, although they may in fact be maintained upon death by a survivor. Neither the District Court nor the parties have distinguished miners'claims from survivors' claims under the constitutional attacks raised in this case.

[3] It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. See, E. g., Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 487-488, 75 S.Ct. 461, 464, 99 L.Ed. 563 (1955). And this Court long ago upheld against due process attack the competence of Congress to allocate the interlocking economic rights and duties of employers and employees upon workmen's compensation principles analogous to those enacted here, regardless of contravening arrangements between employer and employee. New York Central R. Co. v. White, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667 (1917); see also Philadelphia, B. & W. R. Co. v. Schubert, 224 U.S. 603, 32 S.Ct. 589, 56 L.Ed. 911 (1912).

[4] To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated ***16** before the date of enactment, the Act has some retrospective effect although, as we have noted, the Act imposed no liability on operators until 1974. [FN14] And it may be that the liability imposed by the Act for disabilities suffered ****2893** by former employees was not anticipated at the time of actual employment. [FN15] But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. See Fleming v. Rhodes, 331 U.S. 100, 67 S.Ct. 1140, 91 L.Ed. 1368 (1947); Carpenter v. Wabash R. Co., 309 U.S. 23, 60 S.Ct. 416, 84 L.Ed. 558 (1940); Norman v. Baltimore & Ohio R. Co., 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885 (1935); Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934); Louisville & Nashville R. Co. v. Mottley, 219 U.S. 467, 31 S.Ct. 265, 55 L.Ed. 297 (1911). This is true even though the effect of the legislation is to impose a new duty or liability based on past acts. See Lichter v. United States, 334 U.S. 742, 68 S.Ct. 1294, 92 L.Ed. 1694 (1948); Welch v. Henry, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87 (1938); Funkhouser v. Preston Co., 290 U.S. 163, 54 S.Ct. 134, 78 L.Ed. 243 (1933).

> FN14. The Federal Parties suggest that since a claim for benefits under Part C must be filed within three years of the discovery of total disability due to pneumoconiosis (or the date of death), s 422(f)(1), 30 U.S.C. s 932(f)(1) (1970 ed., Supp. IV), the operators will not ordinarily be

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liable for any disabilities maturing before enactment of their responsibility. See also s 422(f)(2), 30 U.S.C. s 932(f)(2) (1970 ed., Supp. IV). This does not hold true, however, for nonunderground operators, since Part C liability did not apply to them until 1972. See Black Lung Benefits Act of 1972, s 3, 86 Stat. 153, amending ss 401, 402(b)(d), 411(c)(1), (2), 422(a), (h), 423(a), 30 U.S.C. ss 901, 902(b), (d), 921(c)(1), (2), 932(a), (h), 933(a) (1970 ed., Supp. IV). In any event, we think the point unnecessary to our conclusion.

FN15. The Operators have not contended, however, that the Act is constitutionally defective insofar as it requires them to provide compensation for Present employees whose disabilities may stem from exposure that was terminated before enactment of the Act.

[5] It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. ***17** The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former. Thus, in this case the justification for the retrospective imposition of liability must take into account the possibilities that the Operators may not have known of the danger of their employees' contracting pneumoconiosis, and that even if they did know of the danger their conduct may have been taken in reliance upon the current state of the law, which imposed no liability on them for disabling pneumoconiosis. [FN16] While the Operators have clearly been aware of the danger of pneumoconiosis for at least 20 years, [FN17] and while they have not specifically pressed the contention that they would have taken steps to reduce or eliminate the incidence of pneumoconiosis had the law imposed liability upon them, we would nevertheless hesitate to approve the retrospective imposition of liability on any theory of deterrence, cf. United States v. Peltier, 422 U.S. 531, 542, 95 S.Ct. 2313, 2320, 45 L.Ed.2d 374 (1975), ***18** or blameworthiness, cf. Ibid.; DeVeau v. Braisted, 363 U.S. 144, 160, 80 S.Ct. 1146, 1154, 4 L.Ed.2d 1109 (1960).

FN16. Whether or not a person who could have anticipated the potential liability attaching to his chosen course of conduct would have avoided the liability by altering his conduct has been significant in at least one line of cases in this Court. In Welch v. Henry, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87 (1938), the Court upheld against a due process attack a state statute enacted in 1935 taxing 1933 dividend income that the 1933 taxing statute had explicitly exempted. Adopting the view that a stockholder would have continued to receive corporate dividends even if he knew that the dividends would subsequently be taxed, the Court distinguished prior cases invalidating the retroactive taxation of gifts on the ground that the donor might have refrained from making the gift had he anticipated the tax. Id., at 147-148, 59 S.Ct., at 126. But see Carpenter v. Wabash R. Co., 309 U.S. 23, 60 S.Ct. 416, 84 L.Ed. 558 (1940); Louisville & Nashville R. Co. v. Mottley, 219 U.S. 467, 31 S.Ct. 265, 55 L.Ed. 297 (1911).

FN17. Coal miner's pneumoconiosis was recognized in Great Britain as early as 1943. It was not generally recognized in the United States as an entity distinct from silicosis until the 1950's. S.Rep.No.91-411, p. 8 (1969).

[6] We find, however, that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor the operators and the coal consumers. The Operators do not challenge Congress' power to impose the burden of past mine working conditions on the industry. They do claim, however, that the Act spreads costs in an arbitrary and irrational manner by basing liability upon past employment relationships, rather than taxing all coal mine operators presently in business. The Operators note that a coal mine operator whose work ****2894** force has declined may be faced with a total liability that is disproportionate to the number of miners currently employed. And they argue that the liability scheme gives an unfair competitive advantage to new entrants into the industry, who are not saddled with the burden of compensation for inactive miners' disabilities. In essence the Operators contend that competitive forces will prevent them from effectively passing on to the consumer the costs of compensation for inactive miners' disabilities, and will unfairly leave the burden on the early operators alone.

[7] Of course, as we have already indicated, a substantial portion of the burden for disabilities stemming from the period prior to enactment is borne by the Federal Government. But even taking the Operators' argument at face value, it is for Congress to choose between imposing the burden of inactive miners' disabilities on all operators,

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including new entrants and farsighted early operators who might have taken steps to minimize black lung dangers, or to impose that liability solely on those early operators whose profits may have been increased at the expense of their employees' health. We are unwilling to assess the *19 wisdom of Congress' chosen scheme by examining the degree to which the "cost-savings" enjoyed by operators in the pre-enactment period produced "excess" profits, or the degree to which the retrospective liability imposed on the early operators can now be passed on to the consumer. It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension. See, *e. g., Ferguson v. Skrupa*, 372 U.S., at 730-732, 83 S.Ct., at 1031; *Williamson v. Lee Optic Co., 348 U.S., at 488, 75 S.Ct., at 464.*

The Operators ultimately rest their due process argument on Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468 (1935), in which the Court found the Railroad Retirement Act of 1934 to be unconstitutional. Among the provisions specifically invalidated as arbitrary was a provision for employer-financed pensions for former employees who, though not in the employ of the railroads at the time of enactment, had been so employed within the year. Assuming that the portion of Alton invalidating this provision retains vitality, [FN18] we find it distinguishable from this case. The point of the black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee labored to allocate to the mine operator an actual, measurable cost of his business.

FN18. Mr. Chief Justice Hughes, joined by Justices Brandeis, Stone, and Cardozo, dissented from the Court's invalidating the Railroad Retirement Act altogether, but agreed with the Court that the provision for allowances to former employees was arbitrary. 295 U.S., at 374, 389, 55 S.Ct., at 773, 779.

[8] In sum, the Due Process Clause poses no bar to requiring an operator to provide compensation for a *20 former employee's death or disability due to pneumoconiosis arising out of employment in its mines, event if the former employee terminated his employment in the industry before the Act was passed.

V

We turn next to a consideration of the Operators' challenge to the "presumptions" and evidentiary rules governing adjudications of compensable disability under the Act.

A

The Act prescribes two alternative methods for showing "total disability," which is a prerequisite to compensation. First, a miner is "totally disabled" under the definition contained in s 402(f), if pneumoconiosis, simple or complicated,

**2895 "prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time." [FN19]

FN19. For the full text of s 402(f) see n. 9, Supra.

Second, if a miner can show by clinical evidence (ordinarily X-ray evidence) that he is afflicted with complicated pneumoconiosis, the incurable and final stage of the disease, then the miner is deemed to be totally disabled under s 411(c)(3). [FN20] Thus, Congress has mandated that *21 the final stage of the disease is ways compensable if its existence can be shown by positive clinical evidence, and that any stage of the disease is compensable when physically disabling under the terms of s 402(f). The Operators maintain that both of these standards are constitutionally untenable.

FN20. Section 411(c)(3), as set forth in 30 U.S.C. s 921(c)(3) (1970 ed., Supp. IV), provides:
"(I)f a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in

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clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be."

(1)

[9] The Operators contend that the definition of "total disability" set up in s 402(f) is unconstitutionally arbitrary and irrational, because it provides for the compensation of former miners who might well be employable in other lines of work, and who therefore are not truly disabled by their mining- generated afflictions. We think it patent that this attack on s 402(f) must fail. A miner disabled under s 402(f) standards has suffered in at least two ways: His health is impaired, and he has been rendered unable to perform the kind of work to which he has adapted himself. Whether these interferences merit compensation is a public policy matter left primarily to the determination of the legislature. Cf. Geduldig v. Aiello, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974). We cannot say that they are so insignificant as not to be a rational basis for compensation. Indeed, we long ago upheld against similar attack a workmen's compensation scheme providing benefits for injuries not depriving the employee of his ability to work. See New York Central R. Co. v. Bianc, 250 U.S. 596, 40 S.Ct. 44, 63 L.Ed. 1161 (1919); cf. Urie v. Thompson, 337 U.S. 163, 181-187, 69 S.Ct. 1018, 1030-1033, 93 L.Ed. 1282 (1949).

*22 (2)

[10] The District Court, relying on such cases as Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), and Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973), invalidated s 411(c)(3) ' s "irrebuttable presumption" of total disability due to pneumoconiosis based on clinical evidence of complicated pneumoconiosis. The presumption, the court explained,

"forecloses all fact finding as to the effect of that disease upon a particular coal miner . . . . To the extent that such presumption purports to making a finding of total disability in terms other than those provided by (s 402(f)) as standards for total disability, it is unreasonable and arbitrary. As written, section (411(c)(3)) is violative of due process in precluding the opportunity to present evidence as to the effect of a chronic dust disease upon an individual in determining whether or not he is disabled." 385 F.Supp., at 429-430.

We think the District Court erred in equating this case with those in the mold of Stanley and Vlandis.

**2896 As an operational matter, the effect of s 411(c)(3)'s "irrebuttable presumption" of total disability is simply to establish entitlement in the case of a miner who is clinically diagnosable as extremely ill with pneumoconiosis arising out of coal mine employment. [FN21] Indeed, the *23 legislative history discloses that it was precisely this advanced and progressive stage of the disease that Congress sought most certainly to compensate. [FN22] Were the Act phrased simply and directly to provide that operators were bound to provide benefits for all miners clinically demonstrating their affliction with complicated pneumoconiosis arising out of employment in the mines, we think it clear that there could be no due process objection to it. For, as we have already observed, destruction of earning capacity is not the sole legitimate basis for compulsory compensation of employees by their employers. New York Central R. Co. v. Bianc, supra. We cannot say that it would be irrational for Congress to conclude that impairment of health alone warrants compensation. Since Congress can clearly draft a statute to accomplish precisely what it has accomplished through s 411(c)(3)'s presumption of disability, the argument is essentially that Congress has accomplished its result in an impermissible manner by defining eligibility in terms of "total disability" and erecting an "irrebuttable presumption" of total disability upon a factual showing that does not necessarily satisfy the statutory definition of total disability. But in a statute such as this, regulating *24 purely economic matters, we do not think that Congress' choice of statutory language can invalidate the enactment when its operation and effect are clearly permissible. Cf. *Weinberger v. Salfi*, 422 U.S. 749, 767-785, 95 S.Ct. 2457, 2467-2476, 45 L.Ed.2d 522 (1975); *McDonald v. Board of Election*, 394 U.S. 802, 809, 89 S.Ct. 1404, 1408, 22 L.Ed.2d 739 (1969); *United States v. Carolene Products Co.*, 304 U.S. 144, 154, 58 S.Ct. 778, 784, 82 L.Ed. 1234.

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FN21. Although the premise of s 411(c)(3), that the miner have a "chronic dust disease of the lung," does not explicitly provide that the disease must be one arising out of employment in a coal mine, it is clear under s 422(a), and hence under s 415(a)(5) as well, that an operator can be liable only for pneumoconiosis arising out of employment in a coal mine. Section 422(a), as set forth in 30 U.S.C. s 932(a) (1970 ed., Supp. IV), provides that Part C liability "(shall) be applicable to each operator of a coal mine . . . with respect to death or total disability due to pneumoconiosis arising out of employment in such mine."

FN22. The original House and Senate bills that gave rise to the Conference bill enacted as Title IV of the Federal Coal Mine Health and Safety Act of 1969 each provided for compensation only for complicated pneumoconiosis. H.R. 13950, 91st Cong., 1st Sess., ss 112(b)(1), (7)(B), as it passed the House, 115 Cong.Rec. 32061 (1969), contained the diagnostic criteria presently embodied in s 411(c)(3), and deemed complicated pneumoconiosis to be "totally disabling" and compensable. S. 2917, 91st Cong., 1st Sess., ss 501-504, as amended on the floor, 115 Cong.Rec. 27632 (1969), and passed, Id., at 28243, established a program of interim benefits for total disability due to complicated pneumoconiosis, and directed the Secretary of Health, Education, and Welfare to develop standards for determining total disability due to complicated pneumoconiosis.

(3)

[11] In addition to creating an irrebuttable presumption of total disability, s 411(c)(3) provides that clinical evidence of a miner's complicated pneumoconiosis gives rise to an irrebuttable presumption that he was totally disabled by pneumoconiosis at the time of his death, and that his death was due to pneumoconiosis. The effect of these presumptions, in particular the presumption of death due to pneumoconiosis, is to grant benefits to the survivors of any miner who during his lifetime had complicated pneumoconiosis arising out of employment in the mines, regardless of whether the miner's death was caused by pneumoconiosis. The Operators raise no separate challenge to these presumptions, and we would have no occasion to comment separately on them were it not for the Operators' general complaint against the application of the Act to employees who terminated their employment before the Act was **2897 passed. To the extent that the presumption of death due to pneumoconiosis is viewed as requiring compensation for damages resulting from death unrelated to the operator's conduct, its application to employees who terminated their employment before the Act was passed would present difficulties not encountered in our prior discussion of retroactivity. The justification we found for the retrospective application of the Act is that it serves to spread costs in a rational manner by allocating to the operator an actual cost of his *25 business, the avoidance of which might be thought to have enlarged the operator's profits. The damage resulting from a miner's death that is due to causes other than the operator's conduct can hardly be termed a "cost" of the operator's business.

We think it clear, however, that the benefits authorized by s 411(c)(3)'s presumption of death due to pneumoconiosis were intended not simply as compensation for damages due to the miner's Death, but as deferred compensation for injury suffered during the miner's lifetime as a result of his illness itself. Thus, the Senate Report accompanying the 1972 amendments makes clear Congress' purpose to award benefits not only to widows whose husbands "(gave) their lives," but also to widows whose husbands "gave their health . . . in the service of the nation's critical coal needs." [FN23]

FN23. S.Rep.No.92-743, p. 8 (1972), U.S.Code Cong. & Admin.News 1972, p. 2312.

In the case of a miner who died with, but not from, pneumoconiosis Before the Act was passed, the benefits serve as deferred compensation for the suffering endured by his dependents by virtue of his illness. And in the case of a miner who died with, but not from, pneumoconiosis After the Act was passed, the benefits serve an additional purpose: The miner's knowledge that his dependent survivors would receive benefits serves to compensate him for the suffering he endures. In short, s 411(c)(3)'s presumption of death due to pneumoconiosis authorizes compensation for injury attributable to the operator's business, and viewed as such it poses no retroactivity problems distinct from those considered in our prior discussion.

It might be suggested that the payment of benefits to defendant survivors is irrational as a scheme of compensation for injury suffered as a result of a miner's disability. But we cannot say that the scheme is wholly *26 unreasonable in providing

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benefits for those who were most likely to have shared the miner's suffering. Nor can we say that the scheme is arbitrary simply because it spreads the payment of benefits over a period of time. [FN24]

FN24. Under the present scheme, the payment of monthly benefits is not without limit. Section 422(e), as set forth in 30 U.S.C. s 932(e) (1970 ed., Supp. IV), quite clearly provides that "(n)o payment of benefits shall be required under this section . . . (2) for any period prior to January 1, 1974; or (3) for any period after twelve years after December 30, 1969." This time limitation, applicable in Part C cases by its terms, is also applicable to transition-period cases by virtue of s 415(a)(5), 30 U.S.C. s 925(a)(5) (1970 ed., Supp. IV). Thus, the operator is liable for monthly payments only for a period of eight years. The total amount payable to a single dependent survivor during this period under current rates, is approximately $18,900. The maximum amount for which the operator would be liable, if the miner had four or more dependent survivors, is approximately $37,800. See n. 8, Supra.

We might face a more difficult problem in applying s 411(c)(3)'s presumption of death due to pneumoconiosis on a retrospective basis if the presumption authorized benefits to the survivors of a miner who did not die from pneumoconiosis, and who during his life was completely unaware of and unaffected by his illness; or, in the case of a miner who died before the Act was passed, if the presumption authorized benefits to the survivors of a miner who did not die from pneumoconiosis, who nevertheless was aware of and affected by his illness, but whose dependents were completely unaware of and unaffected by his illness. But the Operators in their facial attack on the Act have not suggested that a miner whose condition was serious enough to activate the **2898 s 411(c)(3) presumptions might not have been affected in any way by his condition, or that the family of such a miner might not have noticed it. Under the *27 circumstances, we decline to engage in speculation as to whether such cases may arise. [FN25]

FN25. Our analysis of the retrospective application of the s 411(c)(3) presumption of death due to pneumoconiosis is, of course, fully applicable to the retrospective application of any other provisions that might be construed to authorize benefits in the case of miners who die with, but not from, totally disabling pneumoconiosis. See ss 422(a), (c), 412(a)(2), (3), (5), 411(a), 30 U.S.C. ss 932(a), (c), 922(a)(2), (3), (5), 921(a) (1970 ed. and Supp. IV).

B

[12] Turningour attention to the statutory regulations of proof of s 402(f) disability, we focus initially on the Operators' challenge to the presumptions contained in ss 411(c)(1) and (2). Section 411(c)(1) provides that a coal miner with 10 years' employment in the mines who suffers from pneumoconiosis will be presumed to have contracted the disease from his employment. [FN26] Section 411(c)(2) provides that if a coal miner with 10 years' employment in the mines dies from a respiratory disease, his death will be presumed to have been due to pneumoconiosis. [FN27] Each presumption is explicitly rebuttable, and the effect of each is simply to shift the burden of going forward with evidence from the claimant to the operator. See Fed.Rule Evid. 301.

FN26. Section 411(c)(1), as set forth in 30 U.S.C. s 921(c)(1) (1970 ed., Supp. IV), provides in full: "(I)f a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment."

FN27. Section 411(c)(2), as set forth in 30 U.S.C. s 921(c)(2) (1970 ed., Supp. IV), provides in full: "(I)f a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis."

*28 We he consistently tested presumptions arising in civil statutes such as this, involving matters of economic regulation, against the standard articulated in Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 43, 31 S.Ct. 136, 138, 55 L.Ed. 78 (1910) :

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."

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See Atlantic Coast Line R. Co. v. Ford, 287 U.S. 502, 53 S.Ct. 249, 77 L.Ed. 457 (1933); Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 19, 52 S.Ct. 103, 107, 76 L.Ed. 136 (1931). See also Leary v. United States, 395 U.S. 6, 29-53, 89 S.Ct. 1532, 1544-1557, 23 L.Ed.2d 57 (1969); Tot v. United States, 319 U.S. 463, 467-468, 63 S.Ct. 1241, 1244, 87 L.Ed. 1519 (1943). Moreover, as we have recognized:

> "The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." United States v. Gainey, 380 U.S. 63, 67, 85 S.Ct. 754, 757, 13 L.Ed.2d 658 (1965).

Judged by these standards, the presumptions contained in ss411(c)(1) and (2) are constitutionally valid. The Operators focus their attack on the rationality of the presumptions' bases in duration of employment. But it is agreed here that pneumoconiosis is caused by breathing coal dust, and that the likelihood of a miner's developing the disease rests upon both the concentration of dust to which he was exposed and the duration of his exposure. Against this scientific background, it was not ***29** beyond Congress' authority to refer to exposure factors in establishing a presumption that throws the burden of going forward on the ****2899** operators. And in view of the medical evidence before Congress indicating the noticeable incidence of pneumoconiosis in cases of miners with 10 years' employment in the mines, [FN28] we cannot say that it was "purely arbitrary" for Congress to select the 10-year figure as a point of reference for these presumptions. No greater mathematical precision is required. . Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911).

> FN28. See, E. g., Hearings on S. 355, Supra, n. 1, at 699 (testimony of Dr. Werner A. Laqueur).

The Operators insist, however, that the 10-year presumptions are arbitrary, because they fail to account for varying degrees of exposure, some of which would pose lesser dangers than others. We reject this contention. In providing for a shifting of the burden of going forward to the operators, Congress was no more constrained to require a preliminary showing of the degree of dust concentration to which a miner was exposed, a historical fact difficult for the miner to prove, than it was to require a preliminary showing with respect to all other factors that might bear on the danger of infection. It is worth repeating that mine employment for 10 years does not serve by itself to activate any presumption of pneumoconiosis; it simply serves along with proof of pneumoconiosis under s 411(c)(1) to presumptively establish the cause of pneumoconiosis, and along with proof of death from a respiratory disease under s 411(c)(2) to presumptively establish that death was due to pneumoconiosis. In its "rough accommodations," Metropolis Theatre Co. v. Chicago, 228 U.S. 61, 69, 33 S.Ct. 441, 443, 57 L.Ed. 730 (1913), Congress was surely entitled to select duration of employment, ***30** to the exclusion of the degree of dust exposure and other relevant factors, as signaling the point at which the operator must come forward with evidence of the cause of pneumoconiosis or death, as the case may be. We certainly cannot say that the presumptions, by excluding other relevant factors, operate in a "purely arbitrary" manner. Mobile, J. & K. C. R. Co. v. Turnipseed, supra, 219 U.S., at 43, 31 S.Ct., at 138 .

[13] The Operators press the same due process attack upon the durational basis of the rebuttable presumption in s 411(c)(4), which provides, Inter alia, that a miner employed for 15 years in underground mines, who is able to marshal evidence demonstrating a totally disabling respiratory or pulmonary impairment, shall be rebuttably presumed to be totally disabled by pneumoconiosis. [FN29] Particularly ***31** in light of the Surgeon General's testimony at the Senate hearings on the 1969 Act to the effect that the 15-year point marks the beginning of linear increase in the prevalence of the disease with years spent underground, [FN30] we think it clear that the durational basis of this presumption is equally unassailable.

> FN29. Section 411(c)(4), as set forth in 30 U.S.C. s 921(c)(4) (1970 ed., Supp. IV), provides in full:
> "(I)f a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's, his parent's, his brother's, his sister's, or his dependent's claim under this subchapter and it

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Chadha, 462 U.S. 919, 961, 103 S.Ct. 2764, 2789, 77 L.Ed.2d 317 ***220** 1983) (Powell, J., concurring). "The period 1780-1787 ... was a period of 'constitutional reaction' " to these developments, "which ... leaped suddenly to its climax in the Philadelphia Convention." E. Corwin, The Doctrine of Judicial Review 37 (1914). Voices from many quarters, official as well as private, decried the increasing legislative interference with the private-law judgments of the courts. In 1786, the Vermont Council of Censors issued an "Address of the Council of Censors to the Freemen of the State of Vermont" to fulfill the council's duty, under the State Constitution of 1784, to report to the people " 'whether the legislative and executive branches of government have assumed to themselves, or exercised, other or greater powers than they are entitled to by the Constitution.' " Vermont State Papers 1779-1786, pp. 531, 533 (Slade ed. 1823). A principal method of usurpation identified by the censors was "[t]he instances ... of ****1454** judgments being vacated by legislative acts." *Id.,* at 540. The council delivered an opinion

> "that the General Assembly, in all the instances where they have vacated judgments, recovered in due course of law, (except where the particular circumstances of the case evidently made it necessary to grant a new trial) have exercised a power not delegated, or intended to be delegated, to them, by the Constitution.... It supercedes the necessity of any other law than the pleasure of the Assembly, and of any other court than themselves: for it is an imposition on the suitor, to give him the trouble of obtaining, after several expensive trials, a final judgment agreeably to the known established laws of the land; if the Legislature, by a sovereign act, can interfere, reverse the judgment, and decree in such manner, as they, unfettered by rules, shall think proper." *Ibid.*

So too, the famous report of the Pennsylvania Council of Censors in 1784 detailed the abuses of legislative interference with the courts at the behest of private interests and ***221** factions. As the General Assembly had (they wrote) made a custom of "extending their deliberations to the cases of individuals," the people had "been taught to consider an application to the legislature, as a shorter and more certain mode of obtaining relief from hardships and losses, than the usual process of law." The censors noted that because "favour and partiality have, from the nature of public bodies of men, predominated in the distribution of this relief ... [t]hese dangerous procedures have been too often recurred to, since the revolution." Report of the Committee of the Council of Censors 6 (Bailey ed. 1784).

This sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts, triumphed among the Framers of the new Federal Constitution. See Corwin, The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention, 30 Am.Hist.Rev. 511, 514-517 (1925). The Convention made the critical decision to establish a judicial department independent of the Legislative Branch by providing that "the judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Before and during the debates on ratification, Madison, Jefferson, and Hamilton each wrote of the factional disorders and disarray that the system of legislative equity had produced in the years before the framing; and each thought that the separation of the legislative from the judicial power in the new Constitution would cure them. Madison's Federalist No. 48, the famous description of the process by which "[t]he legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex," referred to the report of the Pennsylvania Council of Censors to show that in that State "cases belonging to the judiciary department [had been] frequently drawn within legislative cognizance and determination." The Federalist ***222** No. 48, pp. 333, 337 (J. Cooke ed. 1961). Madison relied as well on Jefferson's Notes on the State of Virginia, which mentioned, as one example of the dangerous concentration of governmental powers into the hands of the legislature, that "the Legislature ... in many instances decided rights which should have been left to judiciary controversy." *Id.,* at 336 (emphasis deleted). [FN4]

> FN4. Read in the abstract these public pronouncements might be taken, as the Solicitor General does take them, see Brief for United States 28-30, to disapprove only the practice of having the legislature itself sit as a court of original or appellate jurisdiction. But against the backdrop of history, that reading is untenable. Many, perhaps a plurality, of the instances of legislative equity in

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is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. In the case of a living miner, a wife's affidavit may not be used by itself to establish the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine."

FN30. See S.Rep.No.92-743, p. 13 (1972).

C

[14] The Operators also challenge s 413(b) of the Act, which provides that "no **2900 claim for benefits . . . shall be denied solely on the basis of the results of a chest roentgenogram (X-ray)." [FN31] Congress, of course, has plenary authority over the promulgation of evidentiary rules for the federal courts. See, E. g., Hawkins v. United States, 358 U.S. 74, 78, 79 S.Ct. 136, 138, 3 L.Ed.2d 125 (1958); Tot v. United States, 319 U.S., at 467, 63 S.Ct., at 1244; cf. Lindsley v. Natural Carbonic Gas Co., supra, 220 U.S., at 81, 31 S.Ct., at 341. The Operators contend, however, that s 413(b) denies them due process because X-ray evidence is frequently the sole evidence they can marshal to rebut a claim of pneumoconiosis. [FN32] We conclude that, given Congress' reasoned reservations regarding the reliability of negative X-ray evidence, it was entitled to preclude exclusive reliance on such evidence.

FN31. See n. 12, Supra.

FN32. The Operators frame their argument by saying that the effect of s 413(b) is to render the rebuttable presumptions of s 411(c) effectively irrebuttable. But this dressing adds nothing. Once it is determined that the limitation on X-ray evidence is permissible generally, it is irrelevant that the burden of going forward with some rebuttal evidence is thrown upon the operator by a permissible presumption rather than by the claimant's affirmative factual showing.

[15] Congress was presented with significant evidence demonstrating that X- ray testing that fails to disclose pneumoconiosis cannot be depended upon as a trustworthy *32 indicator of the absence of the disease. [FN33] In particular, the findings of the Surgeon General and others indicated that although X-ray evidence was generally the most important diagnostic tool in identifying the presence or absence of pneumoconiosis, when considered alone it was not a wholly reliable indicator of the Absence of the disease; that autopsy frequently disclosed pneumoconiosis where X-ray evidence had disclosed none; [FN34] and that pneumoconiosis may be masked from X-ray detection by other disease. [FN35]

FN33. Our attention has not been directed to any authoritative indications that X-ray evidence of the Presence of pneumoconiosis is untrustworthy.

FN34. Evidence was produced at the Senate hearings showing that in one study "approximately 25 percent of a random sample of some 200 coal miners whose medical records based upon X-ray findings showed no coal- worker's pneumoconiosis were found on post mortem examination to have the disease." S.Rep.No.92-743, Supra, at 12, U.S.Code Cong. & Admin.News 1972, p. 2316.

FN35. Id., at 9-16; H.R.Rep.No.92-460, pp. 8-10 (1971).

Taking these indications of the unreliability of negative X-ray diagnosis at face value, Congress was faced with the problem of determining which side should bear the burden of the unreliability. On the one hand, preclusion of any reliance on negative X-ray evidence would risk the success of some nonmeritorious claims; on the other hand, reliance on uncorroborated negative X-ray evidence would risk the denial of benefits in a significant number of meritorious cases. Congress addressed the problem by adopting a rule which, while preserving some of the utility, avoided the worst dangers of X-ray evidence. Section 413(b) does not make negative X-ray evidence inadmissible, or ineligible to be considered as ultimately persuasive evidence when

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taken together with other factors for example, a low level of coal dust concentration in the operator's mine, a relatively short duration *33 of exposure to coal dust, or the likelihood that the miner is disabled by some other cause. [FN36] The prohibition is only against sole reliance upon negative X-ray evidence in rejecting a claim.

FN36. Section 413(b) directs additionally that "(i)n determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials." 30 U.S.C. s 923(b) (1970 ed., Supp. IV).

**2901 [16] The Operators attack the limitation on the use of negative X- ray evidence by suggesting that Congress' conclusion as to the unreliability of negative X-ray evidence is constitutionally unsupportable. Relying on other evidence submitted to Congress in 1972, [FN37] the Operators contend that the consensus of medical judgment on the question is that good quality X-ray evidence does reliably indicate the presence or absence of pneumoconiosis. In essence, the Operators seek a judicial reconsideration of the judgment of Congress on this issue. But the reliability of negative X-ray evidence was debated forcefully on both sides before the Congress, and the Operators here suggest nothing new to add to the debate; they are simply dissatisfied with Congress' conclusion. As we have recognized in the past, however, when it comes to evidentiary rules in matters "not within specialized judicial competence or completely commonplace," it is primarily for Congress "to amass the stuff of actual experience *34 and cull conclusions from it." *United States v. Gainey,* 380 U.S., at 67, 85 S.Ct., at 757. It is sufficient that the evidence before Congress showed doubts about the reliability of negative X-ray evidence. That Congress ultimately determined "to resolve doubts in favor of the disabled miner" [FN38] does not render the enactment arbitrary under the standard of rationality appropriate to this legislation.

FN37. This evidence was brought to the hearings by the Social Security Administration, whose rules the s 413(b) limitation was designed to overrule, and was credited by the minority of the House Committee on Education and Labor. H.R.Rep.No.92-460, Supra, at 22, 29-30.

FN38. S.Rep.No.92-743, Supra, at 11, U.S.Code Cong. & Admin.News 1972, p. 2315.

D

[17] Finally, the Operators challenge the limitation on rebuttal evidence contained in s 411(c)(4). That section, as we have indicated, provides that a miner employed for 15 years in underground mines who is able to demonstrate a totally disabling respiratory or pulmonary impairment shall be rebuttably presumed to be totally disabled by pneumoconiosis, and his death shall be rebuttably presumed to be due to pneumoconiosis. The final sentence of s 411(c)(4) provides that

"(t)he Secretary may rebut (the presumption provided herein) only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine."

The effect of this limitation on rebuttal evidence is, Inter alia, to grant benefits to any miner with 15 years' employment in the mines, if he is totally disabled by some respiratory or pulmonary impairment arising in connection with his employment, and has a case of pneumoconiosis. The Operators contend that this limitation erects an impermissible irrebuttable presumption, because it establishes liability even though it might be medically demonstrable in an individual case that the miner's *35 pneumoconiosis was mild and did not cause the disability that the disability was wholly a product of other disease, such as tuberculosis or emphysema. Disability due to these diseases, as the Operators note, is not otherwise compensable under the Act.

The District Court, concluding that the quoted limitation on rebuttal evidence applied against an operator in a s 415 transition-period case, and recognizing that pneumoconiosis is not inherently disabling in the s 402(f) sense, judged this limitation unconstitutional on the ground that it deprived an operator of a factual defense that the miner is not "totally disabled" due to pneumoconiosis under s

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402(f). Additionally, reading the second part of the s 411(c)(4) limitation on rebuttal to preclude an operator's defense that the disease did not arise out of employment in the particular mines for which it was responsible, the District Court found this aspect of s 411(c)(4) unconstitutional as well.

**2902 The Federal Parties urge on their cross-appeal that these constitutional judgments are erroneous. We need not inquire into the constitutional questions raised by the District Court, however, because we think it clear as a matter of statutory construction that the s 411(c)(4) limitation on rebuttal evidence is inapplicable to operators. By the language of s 411(c)(4), the limitation applies only to "the Secretary" and not to an operator seeking to avoid liability under s 415 or s 422. And this plain language is fortified by the legislative history. The Senate Report on s 411(c)(4) specifically states that the limitation on rebuttal applies to the Secretary of Health, Education, and Welfare, but nowhere suggests that it binds an operator. [FN39]

FN39. Id., at 12. Similarly, the Conference Report refers to the limitation only as running against "the Secretary." S.Conf.Rep.No.92-780, p. 8 (1972); H.R.Conf.Rep.No.92-1048, p. 8 (1972).

*36 While apparently recognizing that the s 411(c)(4) limitation on rebuttal evidence could not apply against an operator in a Part C determination, the District Court believed that the limitation bound an operator in the determination of a claim filed during the s 415 transition period, "(s)ince under section (415) the operator is bound by the Secretary's finding of liability under Part B." 385 F.Supp., at 430. In so concluding, the District Court was in error. First, it would appear, again from the plain language of the statute, that the reference to "the Secretary" in s 411(c)(4) does not refer to the Secretary of Labor. On the contrary, s 402(c), 30 U.S.C. s 902(c), quite plainly defines "Secretary" when used in Part B, including s 411, as meaning the Secretary of Health, Education, and Welfare, not the Secretary of Labor. The Senate Report referred to above confirms this conclusion. Even assuming, however, that the s 411(c)(4) limitation on rebuttal by "the Secretary" may be taken to bind theSecretary of Labor insofar as he was required to Pay benefits for which the United States was liable during the transition period, s 415(a)(1), we have found nothing in the statute or in its legislative history to suggest that an operator is similarly bound because the Secretary of Labor is also to Adjudicate the operator's liability. s 415(a)(5). Indeed, such a reading would render a mine operator bound by the rebuttal limitation in s 415 transition-period cases, although not so bound in cases filed thereafter under Part C. And that result would be contrary to the language of s 415(a)(5), which prescribes that an operator "shall be bound by the determination of the Secretary of Labor (on a s 415 transition-period claim) as if the claim had been filed pursuant to part C."

In short, we conclude that the Act does not itself limit the evidence with which an operator may rebut the *37 s 411(c)(4) presumption. Accordingly, we vacate the order of the District Court declaring the s 411(c)(4) limitation on rebuttal evidence unconstitutional and enjoining the Secretary of Labor from limiting evidence in rebuttal to the s 411(c)(4) presumption. Cf. Van Lare v. Hurley, 421 U.S. 338, 344, 95 S.Ct. 1741, 1746, 44 L.Ed.2d 208 (1975); United States v. Munsingwear, Inc., 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950).

[18] We are aware that regulations promulgated in 1972 by the Secretary of Health, Education, and Welfare under his s 411(b) authorization, 20 CFR ss 410.414, 410.454 (1975), applicable to Part C determinations under s 422(h), and expressly adopted in 1973 by the Secretary of Labor, 20 CFR pt. 718 (1975), authorize limitations on rebuttal evidence similar to those contained in s 411(c) (4), and appear to apply in determinations of an operator's liability. But the Operators' amended complaint never challenged the statutory or constitutional validity of these regulations. [FN40] Particularly **2903 in the absence of any mention of the regulations in the opinion and judgment of the District Court, or in the briefs and oral arguments of the parties, we find it inappropriate to consider their statutory or constitutional validity at this stage. [FN41]

FN40. It follows from our discussion of the s 411(c)(4) limitation on rebuttal that these regulations cannot stand as authoritative administrative interpretations of the statute itself. But the role of regulations is not merely interpretative; they may instead be designedly creative in a substantive sense, if so authorized. See E. g., Mourning v. Family Publications

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Service Inc., 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973). If the regulations promulgated here are to be upheld, it must be in this latter sense.

FN41. We see no reason to remand the case to the three-judge District Court for the purpose of determining whether the Operators should be granted leave to amend their complaint to include a statutory and constitutional challenge to the regulations. The three-judge court remanded to a single judge all questions regarding the validity of regulations challenged in the Operators' complaint, and that portion of the case is pending before a single judge. Any motion for leave to amend the complaint to include a challenge to any additional regulations can be addressed to that single judge.

*38 VI

In sum, the challenged provisions, as construed, are constitutionally sound against the Operators' facial attack. The judgment of the District Court as appealed from in No. 74-1316 is affirmed. The judgment of the District Court as appealed from in No. 74-1302 is reversed, except insofar as it declares unconstitutional, and enjoins the operation of, the limitation on rebuttal evidence contained in s 411(c)(4) of the Act. In this latter respect, the judgment in No. 74-1302 is vacated, and the case remanded with directions to dismiss.

It is so ordered.

THE CHIEF JUSTICE concurs in the judgment.

Mr. Justice STEVENS took no part in the consideration or decision of these cases.

Mr. Justice POWELL, concurring in part and concurring in the judgment in part.

Appellants in No. 74-1316, the Operators, challenge as unconstitutional the retroactive obligations imposed on them by the Federal Coal Mine Health and Safety Act of 1969 (Act), 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U.S.C. s 901 Et seq. (1970 ed. and Supp. IV). The Court rejects their contention in Part IV of its opinion. I concur in the judgment as to Part IV, and concur in other portions of the opinion not inconsistent with the views herein expressed.

I

Coal miner's pneumoconiosis was not recognized in the United States until the 1950's, and there was no federal *39 legislation providing benefits to its victims until the enactment of this statute in 1969. In Title IV of the Act, Congress significantly redefined the respective rights and obligations of miners and their employers in regard to this disease by establishing a benefits scheme to compensate victims of pneumoconiosis. [FN1] Under Title VI miners who filed claims before July 1, 1973, are to collect benefits from the Federal Government, ss 411-414, 30 U.S.C. ss 921-924 (1970 ed. and Supp. IV). [FN2] Miners filing claims after June 30, 1973, are to collect benefits until 1981, see Ante, at 2897 n. 24, from their individual employers. ss 415, 421-431, 30 U.S.C. ss 925, 931-941 (1970 ed. and Supp. IV). [FN3] Under the statute, the class of claimants to which individual employers are liable **2904 includes both (i) miners employed at the time of or after enactment and (ii) miners no longer employed in the industry at the time of enactment (former miners).

FN1. Title II of the Act prescribes the maintenance of less hazardous mine conditions in the future. s 201 Et seq., 30 U.S.C. s 841 Et seq.

FN2. As does the Court, I simplify by not distinguishing between claims byemployees and claims by their survivors. See Ante, at 2892 n. 13.

FN3. Claims filed between July 1, 1973, and December 31, 1973, were to be paid by the Federal Government until December 31, 1973, after which they become the responsibility of individual mining concerns. s 415, 30 U.S.C. s 925 (1970 ed., Supp. IV). Liability on the part of individual mining concerns arises only if the claimant does not have recourse to an applicable state workmen's compensation program approved by the Secretary of Labor ss 421-422, 30 U.S.C. ss 931-932 (1970 ed. and Supp. IV), but no such state programs have been approved. See Ante, at 2889.

The unprecedented feature of the Act is that miners may be eligible to receive benefits from a particular coal-mining concern even if the miner was no longer employed in the industry at the time of enactment. The *40 Department of Labor already has made initial determinations of liability against one of the Operators and in favor of claimants whose

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employment terminated decades ago. [FN4]

FN4. Favorable initial determinations have been made for claimants who left mine work in 1923, 1927, 1931, 1932, 1937, 1943, 1946, and 1948. Brief for Operators 30 n. 1. These determinations rebut the federal parties' suggestion that in combination the initial period of federal liability and the statute of limitations specified in s 422(f)(1), 30 U.S.C. s 932(f)(1) (1970 ed., Supp. IV), will prevent employer liability to miners who left the industry before passage of the Act. See Ante, at 2892, n. 14.

II

The Operators do not challenge their liability to miners employed at the time of or after enactment, a liability which accords with familiar principles of workmen's compensation. [FN5] They contend, however, that a statutory liability to former miners has been imposed in violation of the Fifth Amendment guarantee against arbitrary, irrational, or discriminatory legislation, see, E. g., Richardson v. Belcher, 404 U.S. 78, 81, 92 S.Ct. 254, 257, 30 L.Ed.2d 231 (1971), as there ***41** is no rational justification for imposing liability to former miners upon individual mine owners.

FN5. Congress apparently recognized that the employers burdened by retroactive liability were not blameworthy. Senator Javits, who played a significant role in the development of individual-employer liability, see Brief for Operators 34, thought that the "blame" for past neglect must be shared by "all of us," including "the industry, the medical profession, and the Government particularly the Public Health Service." House Committee on Education and Labor, 91st Cong., 2d Sess., Legislative History/Federal Coal Mine Health and Safety Act 338 (Committee Print 1970), 115 Cong.Rec. 27627 (1969) (floor remarks). The retroactive nature of the liability makes deterrence an insufficient justification. In their prospective application, it is rational for Title IV and other workmen's compensation schemes to disadvantage competitively employers who take less effective precautions to protect their employees. But only prospective liability creates an incentive for occupational safety measures.

The Court recognizes that its evaluation of the rationality of the employers' challenged liability must take into account the retroactive nature of the liability:

"The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former. Thus, in this case the justification for the retrospective imposition of liability must take into account the possibilities that the Operators may not have known of the danger of their employees' contracting pneumoconiosis, and that even if they did know of the danger their conduct may have been taken in reliance upon the current state of the law. . . ." Ante, at 2893.

The Court then acknowledges that the Act would not be justified "on any theory of deterrence . . . or blameworthiness." Ante, at 2893. It nonetheless sustains the provision for retroactive liability, reasoning as follows:

"We find . . . that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor the operators and the coal consumers." Ante, at 2893.

"We are unwilling to assess the wisdom of Congress' chosen scheme by examining the degree to which the 'cost-savings' enjoyed by operators in the pre-enactment period produced 'excess' profits, or the degree to which the retrospective liability imposed on the early operators can now ****2905** be passed on to the consumer. It is enough to say that the Act approaches the problem of cost-spreading rationally. . . ." Ante, at 2894.

***42** In my view whether the retroactive liability is constitutional is a considerably closer question than the Court's treatment suggests. The rationality of retrospective liability as a cost-spreading device is highly questionable.

If coal-mining concerns actually enjoyed "excess" profits in the preenactment period by virtue of their nonliability for pneumoconiosis, and if such profits could be quantified in some discernible way, Congress rationally could impose retrospective liability for the benefit of the miners concerned. But, in this context, the term "excess profits" must mean profits over and above those that operators would have made in years and decades past if they had set aside from current operations funds sufficient to provide compensation, although under no obligation to do so. It is unlikely that such profits existed. The coal industry is highly competitive and

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prices normally are determined by market forces. One therefore would expect that, had a compensation increment been added to operating costs, the operators over the long term simply would have passed most of it on to consumers, thereby leaving their profitability relatively unaffected. In short, the talk of "excess profits" in any realistic sense is wholly speculative.

Nor can I accept without serious question the Court's view that the costs now imposed by the Act may be passed onto consumers. Firms burdened with retroactive payments must meet that expense from current production and current sales in a market where prices must be competitive with the prices of firms not so burdened. One ordinarily would expect that if burdened firms are to meet both competitive prices and their retroactive obligations, their profits necessarily will be less than those of their competitors. Thus, the burdened firms in all likelihood will have to bear the costs of the *43 retroactive liability rather than pass those costs on to consumers. And they must bear such costs quite without regard to whether "excess profits" may have been made in some earlier years. [FN6]

FN6. It is, of course, impossible to spread the cost to "coal consumers" who "profited from the fruits of (former employees') labor." Ante, at 2893. A coal-mining concern cannot retroactively increase its prices to the former customers who benefited from the pre-1969 labors of former miners. The only consumers, therefore, who could bear these burdens are those who purchase coal currently. But in a free market such customers cannot be expected to pay a reparation add-on for coal produced by disadvantaged coal companies when the same product is readily obtainable from others at a lower price.

In some industries conditions might be such that the cost of retroactively imposed benefits could be spread to consumers. It seems most unlikely, however, that the coal industry is such an industry. A notable fact about coal mining is that the industry currently employs only about 150,000 persons, whereas in 1939 it employed nearly 450,000. Brief for Operators 24. The reduced scale of employment in the coal industry, combined with the liability to former miners and their survivors, means that retroactive obligations almost certainly will be disproportionate to the scale of current operations. [FN7] Moreover, it is unlikely that liability to former miners will be distributed randomly across the industry, as it is dictated by historical patterns that may be wholly unrelated to the present contours of the industry. Two examples are illustrative: (i) Some coal-mining concerns have been in the mining business for decades, while some competitors have commenced operation more recently. The exposure of the former group to claims of employees long separated from active employment is likely to be significantly *44 greater than that of their competitors. (ii) Some companies engaged in coal mining in years past on a much **2906 larger scale and with many more employees than currently. This is not an unusual situation in a "depleting asset" industry, where smaller companies often lack the resources with which to continue the acquisition and development of new properties. Stronger competitors, on the other hand, may have operated on a constant or an increasingly large scale. [FN8] In each case the competitively disadvantaged companies may be unable to spread a substantial portion of their costs to consumers. In view of these considerations it is unrealistic to think that the Act will spread costs to "the operators and the coal consumers," Ante, at 2893, and thus I question the Court's conclusion that the Act is rational in imposing retroactive liability.

FN7. Indeed, the number of former miners and survivors whom an individual employer is obliged to compensate could be larger than the employer's present work force.

FN8. In addition, the incidence of liability to former miners may be skewed artificially by the regulation imposing liability upon the company which last employed the claimant without regard to previous employment with other companies. 20 CFR s 725.311 (1975). The validity of this regulation remains to be considered. See Ante, at 2891-2892.

III

Despite the foregoing, I must concur in the judgment on the record before us. Congress had broad discretion in formulating a statute to deal with the serious problem of pneumoconiosis affecting former miners. E. g., Richardson v. Belcher, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971); cf. Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). Nor does the Constitution require that legislation on economic

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matters be compatible with sound economics or even with normal fairness. As a result, economic and remedial social enactments carry a strong presumption of constitutionality, E. g., United States v. Carolene Products Co., 304 U.S. 144, 148, 58 S.Ct. 778, 781, 82 L.Ed. 1234 (1938), and the operators had the heavy burden of showing the Act to be unconstitutional.

*45 The constitutionality of the retrospective liability in question here ultimately turns on the sophisticated questions of economic fact suggested above, and these facts are likely to vary widely among the Operators. [FN9] In this case, however, decided on the cross-motions for summary judgment, the Operators have failed to make any factual showings that support their sweeping assertions of irrationality. Although I find these assertions strongly suggestive that Congress has acted irrationally in pursuing a legitimate end, I am not satisfied that they are sufficient in the absence of appropriate factual support to override the presumption of constitutionality. Accordingly, I agree that the federal parties were entitled to summary judgment on this record.

FN9. I would not foreclose the possibility that a particular coal- mining concern, in a proper case, may be able to show that the impact of the Act on Its operations is irrational. Cf. Ante, at 2897.

Mr. Justice STEWART, with whom Mr. Justice REHNQUIST joins, concurring in part and dissenting in part.

While in all other respects joining the opinion and judgment of the Court, I cannot accept the Court's conclusion, Ante, at 2902-2903, that the limitation on rebuttal evidence in s 411(c)(4), 30 U.S.C. s 921(c)(4) (1970 ed., Supp. IV), is inapplicable to "transition" determinations under s 415 insofar as those determinations bind operators. Section 415(a)(5) as set forth in 30 U.S.C. s 925(a)(5) (1970 ed., Supp. IV), provides that an "operator . . . shall be bound by the determination of the Secretary of Labor (on a transition) claim as if the claim had been filed pursuant to part C of this subchapter and section 932 of this title had been applicable to such operator." As the Court correctly observes, the critical question is thus whether the s 411(c)(4) limitation *46 would apply "if the claim had been filed pursuant to part C . . . and section 932 . . . ."

The Court reads the "plain language" of s 411(c)(4), and in particular the reference to "the Secretary (of Health, Education, and Welfare)," to mean that "the limitation applies only to 'the Secretary' and not to an **2907 operator seeking to avoid liability under s 415 (30 U.S.C. s 925) or s 422 (30 U.S.C. s 932)." Ante, at 2902. This reading, the Court concludes, is "fortified by the legislative history" and in particular by the "Senate Report on s 411(c) (4) (which) specifically states that the limitation on rebuttal applies to the Secretary of Health, Education, and Welfare, but nowhere suggests that it binds an operator." Ibid.

The Court's analysis omits any consideration of the effect of s 430, as set forth in 30 U.S.C. s 940 (1970 ed., Supp. IV), which provides as follows:

"The amendments made by the Black Lung Benefits Act of 1972 to part B of this subchapter shall, to the extent appropriate, also apply to (Part C): Provided, That for the purpose of determining the applicability of the presumption established by section 921(c)(4) of this title to claims filed under this part, no period of employment after June 30, 1971, shall be considered in determining whether a miner was employed at least fifteen years in one or more underground mines."

Since the limitation on rebuttal evidence in s 411(c)(4) was created by the "amendments made by the Black Lung Benefits Act of 1972," it would seem to follow that the limitation applies to Part C determinations. This inference is reinforced by the Senate Report, which stated:

"New section 430 requires that amendments to *47 part B be applied, wherever appropriate, to part C. . . .

"Questions were raised during the Committee deliberations over whether the amendments to part B would automatically be applicable, where appropriate, to part C.

"Although it would appear clear that the same standards are to govern, the Committee concluded that it would be best to so specify.

"It is contemplated by the Committee that the applicable portions of following sections of part B, as amended, would apply to part C: section 411, section 412 (except the last sentence of subsection (b) thereof), section 413, and section 414." S.Rep.No.92-743, p. 21 (1972), U.S.Code Cong. & Admin.News 1972, p. 2325.

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See also Id., at 33.

The only play in the tight linkage of Part C to the amendments to Part B is that afforded by the proviso in s 430 and by the phrase "to the extent appropriate" which appears in that section. The proviso does not remove the rebuttal limitation, but it does alter s 411(c)(4)'s allocation of the burden of proof in another crucial respect: It limits the period of employment which may be considered for purposes of determining the applicability of the presumption. The presence of the proviso is relevant in two respects. First, it underscores the basic applicability to Part C determinations of the s 411(c)(4) rebuttal presumption. Second, it demonstrates that Congress knew how to place a significant limitation on the applicability of that presumption when it chose to do so.

The care and precision which Congress used in drafting this qualifying language bears on the propriety of reading the phrase "to the extent appropriate" as obliquely qualifying the applicability of the rebuttal limitation to ***48** Part C determinations. That limitation is part and parcel of an elaborate reallocation of the burden of proving disability resulting from pneumoconiosis. Under prior Social Security procedure "if an X-ray (did) not show totally sabling pneumoconiosis, no further processing of a claim (was) allowed. Thus, any further evidence of disability (was) not allowed if the X- ray show(ed) negative." S.Rep.No.92-743, Supra, at 11, U.S.Code Cong. & Admin.News 1972, p. 2315. This heavy reliance on X-ray evidence had unfortunate consequences for coal miners because of the inability of X-ray examinations to detect pneumoconiosis in some instances. Congress responded to this particular problem by

> "prohibiting denial of a claim solely on the basis of an X-ray, by providing a presumption of pneumoconiosis for miners with respiratory or pulmonary disability ****2908** where they have worked 15 years or more in a coal mine, and by requiring the Social Security Administration to use tests other than the X- ray to establish the basis for a judgment that a miner is or is not totally disabled due to pneumoconiosis." Ibid.

The 15-year rebuttable presumption embodied in s 411(c)(4) was perhaps the most significant feature of Congress' response. Based in part on testimony of the Surgeon General that "(f)or work periods greater than 15 years underground, there was a linear increase in the prevalence of the disease with years spent underground," S.Rep.No.92-743, Supra, at 13, U.S.Code Cong. & Admin.News 1972, p. 2317, the presumption embodied a congressional decision to "giv(e) the benefit of the doubt," Id., at 11, U.S.Code Cong. & Admin.News 1972, p. 2315, to a specific class of claimants totally disabled by respiratory or pulmonary impairments who could not prove by X-ray evidence that the impairment resulted from pneumoconiosis. The presumption was rebuttable only if the respondent could show either that "(A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, ***49** or in connection with, employment in a coal mine." s 411(c) (4), 30 U.S.C. s 921(c)(4) (1970 ed., Supp. IV).

It is difficult to believe that Congress would have used the phrase "to the extent appropriate" in s 430 to withdraw the protection of the rebuttal limitation under Part C while retaining the rebuttable presumption of which it is an integral part. Such an interpretation is inconsistent with the care Congress displayed in drafting the s 430 proviso. Moreover, it leads necessarily to other improbable results. The Court's approach, for instance, necessarily implies that Congress extended the benefit of the s 411(c)(4) presumption to "surface, as well as underground, miners (in specified circumstances)," S.Rep.No.92-743, Supra, at 2, U.S.Code Cong. & Admin.News 1972, p. 2306, with the intention that the protection would lapse as soon as Part C came into play. The relevant sentence in s 411(c)(4) states that "(t) he Secretary (of Health, Education, and Welfare) shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine." (Emphasis added.) If the operative principle is that provisions in s 411(c)(4) which bind "the Secretary (of Health, Education, and Welfare)" are automatically "inappropriate" for Part C proceedings, then surface miners would be stripped of the benefits of s 411(c)(4) as soon as the legislative scheme enters its transitional stage.

Moreover, the Court's reading of the statute is

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anomalous in terms of the overall structure of Part C. The primary goal of Congress in framing Part C was to transfer adjudicatory responsibilities over coal miners' pneumoconiosis claims to state workmen's compensation tribunals, but only if the state compensation law was *50 found by the Secretary of Labor to provide "standards for determining death or total disability due to pneumoconiosis . . . substantially equivalent to . . . those standards established under part B of this subchapter . . . ." s 421(b)(2)(C), as set forth in 30 U.S.C. s 931(b)(2)(C) (1970 ed., Supp.). One of the Part B standards is the rebuttal limitation in s 411(c)(4). Thus, the Secretary of Labor would not be empowered to approve a state law which did not contain a "substantially equivalent" evidentiary limitation.

The delegation of adjudicatory responsibility to the Secretary of Labor under Part C was a backstop measure, intended to provide a forum for presentation of claims during any period after January 1, 1974, when a state workmen's compensation law was not included on the Secretary of Labor's list of state laws with provisions "substantially equivalent" to those in Part B. s 421(a), 30 U.S.C. s 931(a) (1970 ed., Supp. IV). See S.Rep.No.92-743, Supra, at 19-21. **2909 Since the very reason for withholding approval of a state law and providing an alternative federal forum is lack of "substantial equivalence" between the state-law provisions and the "standards established under part B," including the rebuttal limitation in s 411(c)(4), it would be anomalous if the substitute federal forum could employ evidentiary rules which deviate substantially from those in Part B.

The statutory language and legislative history simply will not yield such an unlikely result. The phrase "to the extent appropriate" in s 430, 30 U.S.C. s 940 (1970 ed., Supp. IV), plainly refers to language in Part B which has no relevance to Part C, notably the language that specifies that "the Secretary (of Health, Education, and Welfare)" is to have certain adjudicative responsibilities. These are the references that are not "appropriate" under Part C, because Part C transfers adjudicative responsibilities to the States or, in the alternative, *51 to the Secretary of Labor. The obvious purpose of the phrase "to the extent appropriate" is to accommodate minor linguistic variations resulting from this transfer of responsibility. Thus, the interaction of the phrase "to the extent appropriate" and the reference to "the Secretary" in the rebuttal limitation of s 411(c)(4) does not render the entire limitation "inappropriate" to Part C proceedings; it merely renders the reference to "the Secretary" inappropriate under Part C.

It is significant that the Court's interpretation of s 411(c)(4)'s rebuttal limitation is not urged or even suggested by any party to this suit. The Federal Parties' position is that the District Court erred by reading s 411(c) (4) to foreclose a showing that would refute total disability. That position is clearly correct. The s 411(c)(4) presumption comes into play only after the claimant establishes total disability. See s 411(c)(4), 30 U.S.C. s 921(c)(4) (1970 ed., Supp. IV) ("and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption . . ."). In addition, the District Court ruled that s 411(c)(4) places upon a specific coal mine owner the burden of proving that the respiratory or pulmonary disease did not arise out of coal mine employment. The Federal Parties urge that this construction is erroneous, because it overlooks the fact that under s 422(c), 30 U.S.C. s 932(c), a specific operator can also defeat liability by showing that the disability did not arise, even in part, out of employment in his mine during the period when he operated it. Again, the Federal Parties are clearly correct. If the operator makes the s 422(c) showing, then the s 411(c)(4) presumption and the rebuttal limitation is irrelevant. Accordingly, I would reverse the District Court's ruling that the s 411(c)(4) rebuttal limitation violates the Constitution.

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[redacted]

> the period before the framing simply involved duly enacted laws that nullified judgments so that new trials or judicial rulings on the merits could take place. See *supra,* at 1453.

If the need for separation of legislative from judicial power was plain, the principal effect to be accomplished by that separation was even plainer. As Hamilton wrote in his exegesis of Article III, § 1 , in The Federalist No. 81:

> **1455 "It is not true ... that the parliament of Great Britain, or the legislatures of the particular states, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory neither of the British, nor the state constitutions, authorises the revisal of a judicial sentence, by a legislative act.... A legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases." The Federalist No. 81, p. 545 (J. Cooke ed. 1961).

The essential balance created by this allocation of authority was a simple one. The Legislature would be possessed of power to "prescrib[e] the rules by which the duties and rights of every citizen are to be regulated," but the power of "[t]he interpretation of the laws" would be "the proper and peculiar province of the courts." The Federalist No. 78, pp. 523, 525. *223 See also Corwin, The Doctrine of Judicial Review, at 42. The Judiciary would be, "from the nature of its functions, ... the [department] least dangerous to the political rights of the constitution," not because its acts were subject to legislative correction, but because the binding effect of its acts was limited to particular cases and controversies. Thus, "though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: ... so long as the judiciary remains truly distinct from both the legislative and executive." *Id.,* No. 78, at 522.

Judicial decisions in the period immediately after ratification of the Constitution confirm the understanding that it forbade interference with the final judgments of courts. In *Calder v. Bull,* 3 Dall. 386, 1 L.Ed. 648 (1798), the Legislature of Connecticut had enacted a statute that set aside the final judgment of a state court in a civil case. Although the issue before this Court was the construction of the *Ex Post Facto* Clause, Art. I, § 10, Justice Iredell (a leading Federalist who had guided the Constitution to ratification in North Carolina) noted that

> "the Legislature of [Connecticut] has been in the uniform, uninterrupted, habit of exercising a general superintending power over its courts of law, by granting new trials. It may, indeed, appear strange to some of us, that in any form, there should exist a power to grant, with respect to suits depending or adjudged, new rights of trial, new privileges of proceeding, not previously recognized and regulated by positive institutions.... The power ... is judicial in its nature; and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative, authority." *Id.,* 3 Dall., at 398.

The state courts of the era showed a similar understanding of the separation of powers, in decisions that drew little distinction between the federal and state constitutions. To *224 choose one representative example from a multitude: In *Bates v. Kimball,* 2 Chipman 77 (Vt.1824), a special Act of the Vermont Legislature authorized a party to appeal from the judgment of a court even though, under the general law, the time for appeal had expired. The court, noting that the unappealed judgment had become final, set itself the question "Have the Legislature power to vacate or annul an existing judgment between party and party?" *Id.,* at 83. The answer was emphatic: "The necessity of a distinct and separate existence of the three great departments of government ... had been proclaimed and enforced by ... Blackstone, Jefferson and Madison," and had been "sanctioned by the people of the United States, by being adopted in terms more or less explicit, into all their written constitutions." *Id.,* at 84. The power to annul a final judgment, the court held (citing *Hayburn's Case,* 2 Dall., at 410), was "an assumption of Judicial power," and therefore forbidden. *Bates v. Kimball, supra,* at 90. For other examples, see *Merrill v. Sherburne,* 1 N.H. 199 (1818) (legislature may not vacate a final judgment and grant a new trial); *Lewis v. Webb,* 3 Greenleaf 299 (Me.1825) (same); T. Cooley, Constitutional Limitations 95-96 (1868) (collecting cases); J. Sutherland, Statutory **1456 Construction 18- 19 (J. Lewis ed. 1904) (same).

By the middle of the 19th century, the constitutional equilibrium created by the separation of the legislative power to make general law from the

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Supreme Court of the United States

The GLIDDEN COMPANY, etc., Petitioner,
v.
Olga ZDANOK et al.
Benny LURK, Petitioner,
v.
UNITED STATES.

Nos. 242 and 481.

Argued Feb. 21 and 26, 1962.
Decided June 25, 1962.

Certiorari to the United States Court of Appeals, 288 F.2d 99, which reversed the United States District Court for the Southern District of New York, 185 F.Supp. 441, in a diversity action for breach of seniority provisions of a collective bargaining agreement, together with certiorari to the United States Court of Appeals for the District of Columbia which at 111 U.S.App.D.C. 238, 296 F.2d 360 affirmed a conviction of a defendant in the United States District Court for the District of Columbia. The Supreme Court, Mr. Justice Harlan, held that the Court of Claims and the Court of Customs and Patent Appeals are courts created under judiciary article of the Constitution, and their judges, including retired judges, are and have been constitutionally protected in tenure and compensation, and therefore designation of judges of such courts to sit as a Court of Appeals judge and as a United States District Court judge was valid and judgments of Court of Appeals and District Court were not vitiated by respective participation of such judges.

Affirmed.

Mr. Justice Douglas and Mr. Justice Black dissented.

See also 28 F.R.D. 346.

West Headnotes

[1] Federal Courts ⚖455.1
170Bk455.1 Most Cited Cases
(Formerly 170Bk455, 106k383(1))

Certiorari would be granted in cases challenging validity of designation of a judge of the Court of Claims and a retired judge of Court of Customs and Patent Appeals to perform judicial duties in a Court of Appeals and a federal district court, limited to question of whether judgment in either of two cases wherein such designation occurred was vitiated by participation of such judges. 28 U.S.C.A. § 293(a).

[2] Constitutional Law ⚖58
92k58 Most Cited Cases

Apart from article of Constitution pertaining to vesting of the judicial power, neither tenure nor salary of federal officers is constitutionally protected from impairment by Congress. U.S.C.A.Const. art. 3, § 1.

[3] Statutes ⚖149
361k149 Most Cited Cases

Statutory declaration that judges of two federal courts should serve during good behavior and with undiminished salary was ineffective to bind any subsequent Congress unless such judges were invested at appointment with protections of article of Constitution pertaining to vesting of federal judicial powers. U.S.C.A.Const. art. 3, § 1.

[4] Judges ⚖6
227k6 Most Cited Cases

If there is a judicial office to be filled and one acting under color of authority fills that office and discharges its duties, his actions are those of an officer de facto, and binding upon the public.

[5] Judgment ⚖494
228k494 Most Cited Cases

Although a United States attorney may be permitted on behalf of the public to upset an order issued upon defective judicial authority, a private litigant ordinarily may not, but such rule does not obtain when alleged defect of authority operates also as a limitation on appellate jurisdiction of the United States Supreme Court.

[6] Federal Courts ⚖461
170Bk461 Most Cited Cases

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(Formerly 30k170(2))

[6] Federal Courts ⚖479
170Bk479 Most Cited Cases
(Formerly 30k563)

[6] Federal Courts ⚖613
170Bk613 Most Cited Cases

Supreme Court would treat alleged defect in authority in filling a judicial office as jurisdictional and consider it on review even though not raised at earliest practicable opportunity, where challenge was based upon nonfrivolous constitutional grounds.

[7] Federal Courts ⚖461
170Bk461 Most Cited Cases
(Formerly 30k185(1))

[7] Federal Courts ⚖622
170Bk622 Most Cited Cases

Whether diversity of citizenship exists may be questioned on direct review for the first time in the United States Supreme Court.

[8] Judges ⚖12
227k12 Most Cited Cases

Litigants could challenge constitutional authority of certain federal judges to sit as a federal district court judge, and a Court of Appeals judge, in the Supreme Court, even if such judges acted under color of authority and filled the offices and discharged duties thereof, and litigants were not bound by de facto doctrine from questioning validity of the designations for the first time on appeal, where defect of authority related to basic constitutional protections designed in part for benefit of litigants. U.S.C.A. Const. art. 3, § 1.

[9] Federal Courts ⚖6
170Bk6 Most Cited Cases

Authority for the federal government to decide questions of state law exists only by virtue of the diversity clause in Article 3 of the Constitution. U.S.C.A.Const. art. 3.

[10] Judges ⚖7
227k7 Most Cited Cases

Question of whether a judge of the Court of Claims enjoyed constitutional independence was presented where such judge by designation sat as a Court of Appeals judge in a case in the Court of Appeals involving determination of a question of state law presented for its decision solely by reason of diverse citizenship of the litigants. U.S.C.A. Const. art. 3, § 1.

[11] Judges ⚖7
227k7 Most Cited Cases

[11] Judges ⚖22(1)
227k22(1) Most Cited Cases

Act of September 14, 1922, authorizing assignment of Court of Customs and Patent Appeals judges to serve on courts of the District of Columbia could not be viewed ex proprio vigore as conferring constitutionally protected tenure and compensation status on judges subsequently appointed to the Court of Customs and Patent Appeals. U.S.C.A. Const. art. 3, § 1.

[12] Judges ⚖7
227k7 Most Cited Cases

[12] Judges ⚖22(1)
227k22(1) Most Cited Cases

Judges designated for service on article III courts by the Chief Justice of the United States Supreme Court who are not previously endowed with constitutional security of tenure and compensation, gain nothing in regard to such security by the designation. U.S.C.A. Const. art. 3; 28 U.S.C.A. §§ 291-296.

[13] Judges ⚖7
227k7 Most Cited Cases

[13] Judges ⚖22(1)
227k22(1) Most Cited Cases

Constitutional quality of tenure and compensation extended to a judge appointed to the Court of Claims, and to a judge appointed to the Court of Customs and Patent Appeals at time of their confirmation, was dependent upon constitutional status of courts to which they were primarily appointed, and was not affected by fact they were designated for service on courts enjoying constitutional tenure and compensation protections.

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U.S.C.A. Const. art. 3; 28 U.S.C.A. §§ 291-296.

[14] Statutes ⚿220
361k220 Most Cited Cases

Subsequent legislation which declares intent of an earlier law is not conclusive in determining what the previous Congress meant, but the later law is entitled to weight when it comes to problem of construction, and especially is that so when Congress has been stimulated by judicial decisions to investigate historical materials involved and has drawn from them a contrary conclusion.

[15] Courts ⚿90(3)
106k90(3) Most Cited Cases

Considered practice of the Supreme Court is not to apply stare decisis as rigidly in constitutional as in nonconstitutional cases.

[16] Federal Courts ⚿1.1
170Bk1.1 Most Cited Cases
(Formerly 170Bk1)

Power given Congress in the Constitution to constitute tribunals inferior to the Supreme Court, relates to inferior courts provided for in section of the Constitution vesting federal judicial power. U.S.C.A.Const. art. 1, § 8, cl. 9; art. 3, § 1.

[17] Federal Courts ⚿1021
170Bk1021 Most Cited Cases

In territories of the United States, cases and controversies falling within article of the Constitution pertaining to vesting of federal judicial power may be heard and decided in courts constituted without regard to tenure and compensation limitations of that article, that is, having judges of limited tenure and entertaining business beyond range of conventional cases and controversies. U.S.C.A.Const. art. 3.

[18] Federal Courts ⚿491
170Bk491 Most Cited Cases

Territorial courts of the United States are subjected to the appellate jurisdiction of the United States Supreme Court in view of their exercise of a federal-question jurisdiction commensurate with that of regular federal courts.

[19] Federal Courts ⚿1.1
170Bk1.1 Most Cited Cases
(Formerly 170Bk1)

Article of the Constitution vesting judicial power of the United States authorizes, but does not obligate, Congress to create inferior federal courts. U.S.C.A.Const. art. 3, § 1.

[20] Federal Courts ⚿1.1
170Bk1.1 Most Cited Cases
(Formerly 170Bk1)

Whether a tribunal is to be recognized as one created under article of the Constitution pertaining to vesting of judicial power of the United States depends upon whether its establishing legislation complies with limitations of that article, that is, whether its business is federal business there specified and the judges and judgments are allowed the independence there expressly or impliedly made requisite. U.S.C.A.Const. art. 3.

[21] Federal Courts ⚿1072
170Bk1072 Most Cited Cases

All cases within grant of jurisdiction to the Court of Claims under the Tucker Act arise either immediately or potentially under federal law within meaning of article of the Constitution pertaining to vesting of judicial power of the United States. U.S.C.A.Const. art. 3, § 2; 28 U.S.C.A. § 1491.

[22] Constitutional Law ⚿56
92k56 Most Cited Cases

Congress is authorized, consistently with article of the Constitution vesting judicial power, to impose a limitation upon remedial powers of a federal court, limiting it to awarding damages, and not specific relief. U.S.C.A.Const. art. 3.

[23] Federal Courts ⚿1.1
170Bk1.1 Most Cited Cases
(Formerly 170Bk1)

Congress is not compelled to vest entire jurisdiction provided for in article of the Constitution vesting judicial power upon inferior courts of its creation. U.S.C.A.Const. art. 3.

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[24] Federal Courts ⚿263
170Bk263 Most Cited Cases

Only in the sense that the United States is not amenable to suit of an individual without its consent is vesting of judicial power article's extension of judicial competence over controversies to which United States is a party ineffective to confer jurisdiction over suits to which it is a defendant, and once consent is given, there remains no barrier to justiciability. U.S.C.A.Const. art. 3.

[25] United States ⚿131
393k131 Most Cited Cases

Statutes giving litigants an election to sue the United States as principal in the Court of Claims, or to pursue their claims in any other court, including federal district courts, and providing for transfer between the Court of Claims and any federal district court when a suit within one court's exclusive jurisdiction is brought mistakenly in another, are evidences of congressional understanding that suits against the United States are justiciable in courts created under article of the Constitution vesting judicial power, and may not be lightly disregarded. 28 U.S.C.A. §§ 1406(c), 1500, 1506; U.S.C.A.Const. art. 3.

[26] Federal Courts ⚿492
170Bk492 Most Cited Cases

Congress, by giving jurisdiction to the Court of Claims by special act to award recovery for breach of a moral obligation, or to waive benefit of res judicata, has enlisted aid of judicial power whose exercise is amenable to appellate review in the Supreme Court.

[27] United States ⚿125(8)
393k125(8) Most Cited Cases

When Congress transmutes a moral obligation into a legal one by specially consenting to suit, it authorizes the tribunal that hears the case to perform a judicial function.

[28] Customs Duties ⚿85(2)
114k85(2) Most Cited Cases

[28] Federal Courts ⚿1071
170Bk1071 Most Cited Cases

[28] Patents ⚿113(1)
291k113(1) Most Cited Cases

Presence of the United States as a party defendant to suits maintained in the Court of Claims and the Court of Customs and Patent Appeals does not debar those courts from exercising judicial power provided for in article of the Constitution vesting judicial power, even though such courts might be judicially impotent to enforce certain of their decrees against the government. U.S.C.A.Const. art. 3.

[29] Jury ⚿12(1.2)
230k12(1.2) Most Cited Cases
(Formerly 230k12(2))

Suits against the government require legislative waiver of immunity, and are not "suits at common law," within the Seventh Amendment, and Congress was not, therefore, required to provide jury trials for plaintiffs suing in the Court of Claims. U.S.C.A. Const.Amend. 7.

[30] Judges ⚿7
227k7 Most Cited Cases

[30] Judges ⚿22(1)
227k22(1) Most Cited Cases

Absence of provision for a jury trial of counterclaims by the government in action before the Court of Claims did not prevent such courts from being considered courts within tenure and compensation protection of the judiciary article of the Constitution. U.S.C.A. Const. art. 3.

[31] Federal Courts ⚿1071
170Bk1071 Most Cited Cases

Matters referred by Congress to Court of Claims, and Court of Customs and Patent Appeals are submitted to them in a form consonant with limitation of judicial power to cases or controversies, imposed by article of the Constitution vesting the judicial power, even though their jurisdiction is specialized. U.S.C.A.Const. art. 3.

[32] District of Columbia ⚿3
132k3 Most Cited Cases

Restraints of federalism are removed from powers

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exercisable by Congress within theDistrict of Columbia.

[33] Federal Courts ⚿1032
170Bk1032 Most Cited Cases

Limitations implicit in the case or controversy provision of article of the Constitution vesting judicial power has no application in the District of Columbia, and national courts in the District can perform any of the local functions elsewhere performed by state courts. U.S.C.A.Const. art. 3.

[34] Federal Courts ⚿12.1
170Bk12.1 Most Cited Cases
(Formerly 170Bk12)

Restriction of federal judicial power to case or controversy expresses Framers' anxiety against undue intrusion upon general jurisdiction of state courts, and desire of the Framers to safeguard independence of the judicial from other government branches by so confining its cases, and in such respect, constitutional restriction remains applicable at least to courts invested with jurisdiction solely over matters of national import. U.S.C.A. Const. art. 3.

[35] Customs Duties ⚿85(.5)
114k85(.5) Most Cited Cases
(Formerly 114k85)

[35] Federal Courts ⚿1071
170Bk1071 Most Cited Cases

[35] Patents ⚿113(1)
291k113(1) Most Cited Cases

Status of Court of Claims and Court of Customs and Patent Appeals as a court established under article of the Constitution vesting judicial power would not be permitted to turn upon fact a minuscule portion of their purported functions did not involve cases or controversies within article 3 of the Constitution. U.S.C.A.Const. art. 3.

[36] Customs Duties ⚿85(.5)
114k85(.5) Most Cited Cases
(Formerly 114k85)

[36] Federal Courts ⚿1071
170Bk1071 Most Cited Cases

[36] Judges ⚿7
227k7 Most Cited Cases

[36] Judges ⚿22(1)
227k22(1) Most Cited Cases

[36] Judges ⚿29
227k29 Most Cited Cases

[36] Patents ⚿113(1)
291k113(1) Most Cited Cases

The Court of Claims and the Court of Customs and Patent Appeals are courts created under judiciary article of the Constitution, and their judges, including retired judges, are and have been constitutionally protected in tenure and compensation, and therefore designation of judges of such courts to sit as a Court of Appeals judge and as a United States District Court judge was valid and judgments of Court of Appeals and District Court were not vitiated by respective participation of such judges. U.S.C.A.Const. art. 3; 28 U.S.C.A. § 293(a).

****1462 *530** Chester Bordeau, New York City, for petitioner. Morris Shapiro, New York City, for respondents. Solicitor General Archibald Cox for United States, as intervener. Francis M. Shea, New York City, for United States Court of Claims, ****1463** as amicus curiae, by special leave of Court.

***531** Eugene Gressman, Washington, D.C., for petitioner. Solicitor General Archibald Cox for respondent. Roger Robb, Washington, D.C., for United States Court of Customs and Patent Appeals, as amicus curiae, by special leave of Court.

Mr. Justice HARLAN announced the judgment of the Court and an opinion joined by Mr. Justice BRENNAN and Mr. Justice STEWART.

In Ex parte Bakelite Corp., 279 U.S. 438, 49 S.Ct. 411, 73 L.Ed. 789, and Williams v. United States, 289 U.S. 553, 53 S.Ct. 751, 77 L.Ed. 1372, this Court held that the United States Court of Customs and Patent Appeals and the United States Court of Claims were neither confined in jurisdiction nor protected in independency by Article III of the Constitution, but that both had been created by virtue of other, substantive, powers possessed by Congress under Article I. The Congress has since

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pronounced its disagreement by providing as to each that 'such court is hereby declared to be a court established under article III of the Constitution of the United *532 States.' [FN1] The petitioners in these cases invite us to reaffirm the authority of our earlier decisions, and thus hold for naught these congressional pronouncements, at least as sought to be applied to judges appointed prior to their enactment.

FN1. Act of July 28, 1953, s 1, 67 Stat. 226, added to 28 U.S.C. s 171, 28 U.S.C.A. s 171 (Court of Claims); Act of August 25, 1958, s 1, 72 Stat. 848, added to 28 U.S.C. s 211, 28 U.S.C.A. s 211 (Court of Customs and Patent Appeals). See also Act of July 14, 1956, s 1, 70 Stat. 532, added to 28 U.S.C. s 251, 28 U.S.C.A. s 251 (Customs Court).

[1] No. 242 is a suit brought by individual employees in a New York state court to recover damages for breach of a collective bargaining agreement, and removed to the Federal District Court for the Southern District of New York by the defendant employer on the ground of diversity of citizenship. The employees' right to recover was sustained by a divided panel of the Court of Appeals, in an opinion by Judge J. Warren Madden, then an active judge of the Court of Claims sitting by designation of the Chief Justice of the United States under 28 U.S.C. s 293(a), 28 U.S.C.A. s 293(a). [FN2] No. 481 is a criminal prosecution instituted in the United States District Court for the District of Columbia and resulting in a conviction for armed robbery. The trial was presided over by Judge Joseph R. Jackson, a retired judge of the Court of Customs and Patent Appeals sitting by similar designation. [FN3] The petitioner's application for leave to appeal to the Court of Appeals *533 in forma pauperis, respecting the validity of this designation and alleged trial error, was upheld by this Court last Term, 366 U.S. 712, 81 S.Ct. 1229, 6 L.Ed.2d 845; we are now asked to review the Court of Appeals' affirmance of his conviction. Because of the significance of the 'designation' issue for the federal judicial system, we granted certiorari in the two cases, 368 U.S. 814, 815, 82 S.Ct. 56, 110, 7 L.Ed.2d 22, 23, limited to the question whether the judgment in either was vitiated by the respective participation of the judges named. [FN4]

FN2. 'The Chief Justice of the United States may designate and assign temporarily any judge of the Court of Claims or the Court of Customs and Patent Appeals * * * to perform judicial duties in any circuit, either in a court of appeals or district court, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.'

FN3. 28 U.S.C. s 294(d), 28 U.S.C.A. s 294(d) authorizes assignment of a retired judge from either court to 'perform such judicial duties as he is willing and able to undertake' in any circuit.

FN4. The petition in No. 481 sought certiorari only as to that issue.

**1464 The claim advanced by the petitioners, that they were denied the protection of judges with tenure and compensation guaranteed by Article III, has nothing to do with the manner in which either of these judges conducted himself in these proceedings. No contention is made that either Judge Madden or Judge Jackson displayed a lack of appropriate judicial independence, or that either sought by his rulings to curry favor with Congress or the Executive. Both indeed enjoy statutory assurance of tenure and compensation, [FN5] and were it not for the explicit provisions of Article III we should be quite unable to say that either judge's participation even colorably denied the petitioners independent judicial hearings.

FN5. 10 Stat. 612 (1855), as amended, 28 U.S.C. s 173, 28 U.S.C.A. s 173 (Court of Claims); 46 Stat. 590, 762 (1930), as amended, 28 U.S.C. s 213, 28 U.S.C.A. s 213 (Court of Customs and Patent Appeals). Judge Madden was appointed in 1941, Brief for Petitioner in No. 242, pp. 7--8, and retired in 1961, 290 F.2d xvi; Judge Jackson was appointed in 1937, Brief for Petitioner in No. 481, pp. 9--10, and retired in 1952, 193 F.2d xv.

[2][3] Article III, s 1, however, is explicit and gives the petitioners a basis for complaint without requiring them to point to particular instances of mistreatment in the record. It provides:

'The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior *534 Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished

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during their Continuance in Office.' [FN6]

FN6. The bearing of s 2 of Art. III on petitioners' claims is discussed later. Infra, 370 U.S., pp. 562--583, 82 S.Ct., pp. 1479-- 1490.

Apart from this provision, it is settled that neither the tenure nor salary of federal officers is constitutionally protected from impairment by Congress. Crenshaw v. United States, 134 U.S. 99, 107--108, 10 S.Ct. 431, 433, 434, 33 L.Ed. 825; cf. Butler v. Pennsylvania, 10 How. 402, 416--418, 13 L.Ed. 472. The statutory declaration, therefore, that the judges of these two courts should serve during good behavior and with undiminished salary, see note 5, supra, was ineffective to bind any subsequent Congress unless those judges were invested at appointment with the protections of Article III. United States v. Fisher, 109 U.S. 143, 145, 3 S.Ct. 154, 155, 27 L.Ed. 885; see McAllister v. United States, 141 U.S. 174, 186, 11 S.Ct. 949, 953, 35 L.Ed. 693. And the petitioners naturally point to the Bakelite and Williams cases, supra, as establishing that no such constitutional protection was in fact conferred.

The distinction referred to in those cases between 'constitutional' and 'legislative' courts has been productive of much confusion and controversy. Because of the highly theoretical nature of the problem in its present context, [FN7] we would be well advised to decide these cases on narrower grounds if any are fairly available. But for reasons that follow, we find ourselves unable to do so.

FN7. The abstractness of the present controversy is graphically demonstrated by the disparity in volume between records and briefs. The records in both cases amount to but 66 pages of motions, opinions, and the like, with no relevant transcripts of proceedings, while the bries extend to 533 pages exclusive of appendices.

***535** I.

No challenge to the authority of the judges was filed in the course of the proceedings before them in either case. The Solicitor General, who submitted briefs and arguments for the United States, has seized upon this circumstance to suggest that the petitioners should be precluded by the so-called de facto doctrine from ****1465** questioning the validity of these designations for the first time on appeal.

[4][5] Whatever may be the rule when a judge's authority is challenged at the earliest practicable moment as it was in United States v. American-Foreign S.S. Corp., 363 U.S. 685, 80 S.Ct. 1336, 4 L.Ed.2d 1491, in other circumstances involving judicial authority this Court has described it as well settled 'that where there is an office to be filled and one, acting under color of authority, fills the office and discharges its duties, his actions are those of an officer de facto, and binding upon the public.' McDowell v. United States, 159 U.S. 596, 602, 16 S.Ct. 111, 113, 40 L.Ed. 271. The rule is founded upon an obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware. Although a United States Attorney may be permitted on behalf of the public to upset an order issued upon defective authority, Frad v. Kelly, 302 U.S. 312, 58 S.Ct. 188, 82 L.Ed. 282, a private litigant ordinarily may not. Ball v. United States, 140 U.S. 118, 128--129, 11 S.Ct. 761, 764, 765, 35 L.Ed. 377.

[6] The rule does not obtain, of course, when the alleged defect of authority operates also as a limitation on this Court's appellate jurisdiction. Ayrshire Collieries Corp. v. United States, 331 U.S. 132, 67 S.Ct. 1168, 91 L.Ed. 1391 (three-judge court); United States v. Emholt, 105 U.S. 414, 26 L.Ed. 1077 (certificate of divided opinion). In other circumstances as well, when the statute claimed to restrict authority is not merely technical ***536** but embodies a strong policy concerning the proper administration of judicial business, this Court has treated the alleged defect as 'jurisdictional' and agreed to consider it on direct review even though not raised at the earliest practicable opportunity. E.g., American Construction Co. v. Jacksonville, T. & K.W.R. Co., 148 U.S. 372, 387--388, 13 S.Ct. 758, 764, 765, 37 L.Ed. 486.

A fortiori is this so when the challenge is based upon nonfrivolous constitutional grounds. In McDowell v. United States itself, supra, at 598--599, 16 S.Ct. at 111, 112, the Court, while holding that any defect in statutory authorization for a particular intracircuit assignment was immunized from examination by the de facto doctrine, specifically passed upon and upheld the constitutional authority of Congress to provide for such an assignment. And in Lamar v. United States,

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241 U.S. 103, 117--118, 36 S.Ct. 535, 539, 540, 60 L.Ed. 912, the claim that an intercircuit assignment violated the criminal venue restrictions of the Sixth Amendment and usurped the presidential appointing power under Art. II, s 2, was heard here and determined upon its merits, despite thefact that it had not been raised in the District Court or in the Court of Appeals or even in this Court until the filing of a supplemental brief upon a second request for review.

[7][8] The alleged defect of authority here relates to basic constitutional protections designed in part for the benefit of litigants. See O'Donoghue v. United States, 289 U.S. 516, 532--534, 53 S.Ct. 740, 743, 744, 77 L.Ed. 1356. It should be examinable at least on direct review, where its consideration encounters none of the objections associated with the principle of res judicata, that there be an end to litigation. At the most is weighed in opposition the disruption to sound appellate process entailed by entertaining objections not raised below, and that is plainly insufficient to overcome the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers. So this Court has concluded ***537** on an analogous balance struck to protect against intruding federal jurisdiction into the area constitutionally reserved to the States: Whether diversity of citizenship exists may be questioned on direct review for the first time in this Court. Mansfield, ****1466** C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462; City of Gainesville v. Brown-Crummer Investment Co., 277 U.S. 54, 59, 48 S.Ct. 454, 455, 72 L.Ed. 781. We hold that it is similarly open to these petitioners to challenge the constitutional authority of the judges below.

II.

The Court of Appeals for the District of Columbia found it unnecessary to reach the question whether Judge Jackson enjoyed constitutional security of tenure and compensation. It held that even if he did not, Congress might authorize his assignment to courts in the District of Columbia, by virtue of its power 'To exercise exclusive Legislation in all Cases whatsoever' over the District. Art. I, s 8, cl. 17. The Solicitor General, in support of that ruling, argues here that because the criminal charge against petitioner Lurk was violation of a local statute, D.C. Code, 1961, s 22--2901, rather than of one national in application, its trial did not require the assignment of an Article III judge.

[9][10] The question thus raised is itself of constitutional dimension, and one which we need not reach if an Article III judge was in fact assigned. In the companion case, No. 242, the necessity for such a judge is uncontested. The Court of Appeals for the Second Circuit sat to determine a question of state contract law presented for its decision solely by reason of the diverse citizenship of the litigants. [FN8] Authority for the Federal Government to ***538** decide questions of state law exists only by virtue of the Diversity Clause in Article III. Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.,Ct. 817, 82 L.Ed. 1188; see Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 284, 15 L.Ed. 372. For this reason, the question whether Judge Madden enjoyed constitutional independence is inescapably presented. Since decision of that question involves considerations bearing directly upon the constitutional status of Judge Jackson, we deem it appropriate to dispose of both cases of the same grounds, without at present intimating any view as to the correctness of the holding below by the Court of Appeals for the District of Columbia.

FN8. Under our limited writ of certiorari, 368 U.S. 814, 82 S.Ct. 56, 7 L.Ed.2d 22, we have no occasion to consider whether federal law was more appropriately the measure of the employer's obligation. Cf Teamsters Local 174, etc., v. Lucas Flour Co., 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593.

III.

The next question is whether the character of the judges who sat in these cases may be determined without reference to the character of the courts to which they were originally appointed. If it were plain that these judges were invested upon confirmation with Article III tenure and compensation, it would be unnecessary for present purposes to consider the constitutional status of the Court of Claims and the Court of Customs and Patent Appeals.

[11] No such course, however, appears to be open. The statutes under which Judge Madden and Judge Jackson were appointed speak of service only on those courts. 28 U.S.C. ss 171, 211, 28 U.S.C.A. ss 171, 211. They were not, as were the judges

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selected for the late Commerce Court, appointed as 'additional circuit judges,' Act of June 18, 1910, c. 309, 36 Stat. 539, 540, whose tenure might be constitutionally secured regardless of the fortunes of their courts. See 50 Cong.Rec. 5409--5418 (1913); Donegan v. Dyson, 269 U.S. 49, 46 S.Ct. 55, 70 L.Ed. 159; Frankfurter and Landis, The Business of the Supreme Court (1927), 168--173. It is true that at the time of Judge Jackson's appointment there was in force a statute authorizing assignment of Court of Customs and Patent Appeals judges to serve on the courts of the ***539** District of Columbia. Act of September 14, 1922, c. 306, s 5, ****1467** 42 Stat. 837, 839. At that time, however, before the O'Donoghue decision, there seems to have been a consensus that the courts of the District were not confined or protected by Article III; as late as 1930, this Court regarded it as 'recognized that the courts of the District of Columbia are not created under the judiciary article of the Constitution but are legislative courts * * *.' Federal Radio Comm'n v. General Electric Co., 281 U.S. 464, 468, 50 S.Ct. 389, 390, 74 L.Ed. 969; and see Katz, Federal Legislative Courts, 43 Harv.L.Rev. 894, 899--903 (1930). The 1922 Act cannot therefore be viewed ex proprio vigore as conferring Article III status on judges subsequently appointed to the Court of Customs and Patent Appeals. [FN9]

FN9. The debates and reports in Congress display no awareness of the problem. See H.R.Rep.No.1152, 67th Cong., 2d Sess. (1922); 62 Cong.Rec. 190--191, 207--209 (1921).

[12][13] A more novel suggestion is that the assignment statute itself, 28 U.S.C. ss 291--296, 28 U.S.C.A. ss 291--296, authorized the Chief Justice to appoint inferior Article III judges in the course of designating them for service on Article III courts. [FN10] See Shartel, Federal Judges--Appointment, Supervision, and Removal--Some Possibilities under the Constitution, 28 Mich.L.Rev. 485 (1930); cf. Ex parte Siebold, 100 U.S. 371, 397--398, 25 L.Ed. 717; Rice v. Ames, 180 U.S. 371, 378, 21 S.Ct. 406, 409, 45 L.Ed. 577. But we need not consider the constitutional questions involved in this suggestion, for the statute does not readily lend itself ***540** to such a construction. If nothing else, the authority given the Chief Justice in 28 U.S.C. s 295, 28 U.S.C.A. s 295, to revoke assignments previously made is wholly inconsistent with a reading of the statute as empowering him to appoint inferior Article III judges. Judges assigned by the Chief Justice who are not previously endowed with constitutional security of tenure and compensation thus can gain nothing by the designation. [FN11]

FN10. Article II, s 2, cl. 2 of the Constitution provides that the President
'* * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all others Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.'

FN11. Compare the statute creating the Emergency Court of Appeals, to consist of three or more judges 'designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals.' Act of January 30, 1942, c. 26, s 204(c), 56 Stat. 23, 32, 50 U.S.C.A.Appendix, s 924(c).

It is significant that Congress did not enact the present broad assignment statute until after it had declared the Court of Claims and the Court of Customs and Patent Appeals to be constitutional courts. Act of August 25, 1958, 72 Stat. 848. A major purpose of these declarations was to eliminate uncertainty whether regular Article III judges might be assigned to assist in the business of those courts when disability or disqualification made it difficult for them to obtain a quorum. [FN12] Those doubts, suggested by dicta in Ex parte Bakelite Corp., 279 U.S. 438, 460, 49 S.Ct. 411, 416, 73 L.Ed. 789, would be expanded rather than allayed were we to hold that ****1468** the judges of the Court of Claims and the Court of Customs and Patent Appeals enjoy the protections of Article III while leaving at large the status of those courts. For these various reasons, the constitutional quality of tenure and compensation extended ***541** Judges Madden and Jackson at the time of their confirmation must be deemed to have depended upon the constitutional status of the courts to which they were primarily appointed.

FN12. Hearings on H.R. 1070 before Subcommittee No. 2 of the House Committee on the Judiciary, pp. 6--7, 24 (Unpublished, May 19,

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1953; on file with the Clerk of the Committee) (testimony of Judge Howell of the Court of Claims); H.R.Rep.No.695, 83d Cong., 1st Sess. 2, 5--6 (1953); U.S.Code Cong. and Admin.News 1953, p. 2006; S.Rep.No.275, 83d Cong., 1st Sess. 2 (1953); H.R.Rep.No.2349, 85th Cong., 2d Sess. (1958); S.Rep.No.2309, 85th Cong., 2d Sess. (1958), U.S.Code Cong. and Admin.News 1958, p. 3909; 104 Cong.Rec. 16095 (1958) (remarks of Representative Keating).

IV.

[14] In determining the constitutional character of the Court of Claims and the Court of Customs and Patent Appeals, as we are thus led to do, we may not disregard Congress' declaration that they were created under Article III. Of course, Congress may not by fiat overturn the constitutional decisions of this Court, but the legislative history of the 1953 and 1958 declarations makes plain that it was far from attempting any such thing. Typical is a statement in the 1958 House Report that the purpose of the legislation was to 'declare which of the powers Congress was intending to exercise when the court was created.' H.R.Rep.No.2349, 85th Cong., 2d Sess. 3 (1958); accord, H.R.Rep.No.695, 83d Cong., 1st Sess. 3, 5, 7 (1953); and see S.Rep.No.275, 83d Cong., 1st Sess. 2 (1953), substituted for S.Rep.No.261, 83d Cong., 1st Sess. 2 (1953); 99 Cong.Rec.8943, 8944 (1953) (remarks of Senator Gore).

'Subsequent legislation which declares the intent of an earlier law,' this Court has noted, 'is not, of course, conclusive in determining what the previous Congress meant. But the later law is entitled to weight when it comes to the problem of construction.' Federal Housing Administration v. Darlington, Inc., 358 U.S. 84, 90, 79 S.Ct. 141, 145, 3 L.Ed.2d 132; accord, New York, P. & N.R. Co. v. Peninsula Exchange, 240 U.S. 34, 39, 36 S.Ct. 230, 232, 60 L.Ed. 511. Especially is this so when the Congress has been stimulated by decisions of this Court to investigate the historical materials involved and has drawn from them a contrary conclusion. United States v. Hutcheson, 312 U.S. 219, 235--237, 61 S.Ct. 463, 467, 468, 85 L.Ed. 788. As examination of the House and Senate Reports makes evident, that is what occurred ***542** here. E.g., S.Rep.No.2309, 85th Cong., 2d Sess. 2--3 (1958); H.R.Rep.No. 695, 83d Cong., 1st Sess. 3--5 (1953).

At the time when Bakelite and Williams were decided, the Court did not have the benefit of this congressional understanding. The Williams case, for example, arose under the Legislative Appropriation Act of June 30, 1932, c. 314, s 107(a)(5), 47 Stat. 382, 402, which reduced the salary of all judges 'except judges whose compensation may not, under the Constitution, be diminished during their continuance in office.' Mr. Justice Sutherland, who wrote the Court's opinions in both Williams and O'Donoghue, was plainly disadvantaged by the absence of congressional intimation as to which judges of which courts were to be deemed exempted. See O'Donoghue v. United States, 289 U.S. 516, 529, 53 S.Ct.740, 742.

In the Bakelite case, to be sure, Mr. Justice Van Devanter said of an argument drawn from tenuous evidence of congressional understanding that it 'mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred.' 279 U.S., at 459, 49 S.Ct. at 416. Yet he would hardly have denied that explicit evidence of legislative intendment concerning the factors he thought controlling may be relevant and indeed highly persuasive. In any event, the Bakelite dictum did not embarrass the Court in deciding O'Donoghue, where it looked searchingly at 'congressional practice' to determine what classification that body 'recognizes.' 289 U.S., at 548--550, 53 S.Ct. at 749, 750. We think the forthright statement of understanding ****1469** embraced in the 1953 and 1958 declarations may be taken as similarly persuasive evidence for the problem now before us.

To give due weight to these congressional declarations is not of course to compromise the authority or responsibility ***543** of this Court as the ultimate expositor of the Constitution. The Bakelite and Williams decisions have long been considered of questionable soundness. See, e.g., Brown, The Rent in Our Judicial Armor, 10 G.W.L.Rev. 127 (1941); Hart and Wechsler, The Federal Courts and the Federal System (1953), 348--351; 1 Moore, Federal Practice (2d ed. 1961), 71 n. 21. They stand uneasily next to O'Donoghue, much of whose reasoning in sustaining the Article III status of the District of Columbia superior courts seems

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judicial power to apply that law in particular cases was so well understood and accepted that it could survive even *Dred Scott v. Sandford,* 19 How. 393, 15 L.Ed. 691 (1857). In his First Inaugural Address, President Lincoln explained why the political branches could not, and need not, interfere with even that infamous judgment:

> "I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit.... And while it is obviously possible that ***225** such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice." 4 R. Basler, The Collected Works of Abraham Lincoln 268 (1953) (First Inaugural Address 1861).

And the great constitutional scholar Thomas Cooley addressed precisely the question before us in his 1868 treatise:

> "If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry." Cooley, *supra,* at 94-95.

B

[5] Section 27A(b) effects a clear violation of the separation-of-powers principle we have just discussed. It is, of course, retroactive legislation, that is, legislation that prescribes what the law *was* at an earlier time, when the act whose effect is controlled by the legislation occurred--in this case, the filing of the initial Rule 10b-5 action in the District Court. When retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than "reverse a determination once made, in a particular case." The Federalist No. 81, at 545. Our decisions stemming from *Hayburn's Case*--although their precise holdings are not strictly applicable here, see *supra,* at 1452-1453--have uniformly provided fair warning that such an act exceeds the powers of Congress. See, *e.g., Chicago & Southern Air Lines, Inc.,* 333 U.S., at 113, 68 S.Ct., at 437 ("Judgments within the powers vested in courts by the Judiciary Article ***226** of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government"); *United States v. O'Grady,* 22 Wall. 641, 647-648, 22 L.Ed. 772 (1875) ("Judicial jurisdiction implies the power to hear and determine a cause, and ... Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal"); *Gordon v. United States,* 117 U.S.Appx. 697, 700-704 (1864) (opinion of Taney, C.J.) (judgments of Article III courts are "final and conclusive upon the rights of the parties"); *Hayburn's Case,* 2 Dall., at 411 (opinion of Wilson and Blair, JJ., and Peters, D.J.) ("[R]evision and control" of Article III judgments is "radically inconsistent with the independence of that judicial power which is vested in the courts"); *id.,* at 413 (opinion of Iredell, J., and Sitgreaves, D.J.) ("[N]o decision of any court of the United States can, under any circumstances, ... be liable to a revision, or even suspension, by the [l]egislature itself, in whom no judicial power of any kind appears to be vested"). See also *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 18 How. 421, 431, 15 L.Ed. 435 (1856) ("[I]t is urged, that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby.... This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it"). Today those clear ****1457** statements must either be honored, or else proved false.

[6][7] It is true, as petitioners contend, that Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly. See *United States v. Schooner Peggy,* 1 Cranch 103, 2 L.Ed. 49 (1801); *Landgraf v. USI Film Products,* 511 U.S. 244, 273-280, 114 S.Ct. 1483, 1501-1505, 128 L.Ed.2d 229 (1994). Since that is ***227** so, petitioners argue, federal courts must apply the "new" law created by § 27A(b) in finally adjudicated

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applicable to the Court of Claims and the Court of Customs and Patent Appeals. In Pope v. United States, 323 U.S. 1, 13--14, 65 S.Ct. 16, 23, 89 L.Ed. 3, where the Solicitor General argued at length against the continued vitality of Bakelite and Williams, their authority was regarded as an open question.

[15] Furthermore, apart from this Court's considered practice not to apply stare decisis as rigidly in constitutional as in nonconstitutional cases, e.g., United States v. South Buffalo R. Co., 333 U.S. 771, 774--775, 68 S.Ct. 868, 870, 92 L.Ed. 1077; see Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405--408, 52 S.Ct. 443, 446--448, 76 L.Ed. 815 and n. 1--3 (Brandeis, J., dissenting), there is the fact that Congress has acted on its understanding and has provided for assignment of judges who have made decisions that are now said to be impeachable. In these circumstances, the practical consideration underlying the doctrine of stare decisis--protection of generated expectations--actually militates in favor of reexamining the decisions. We are well-advised, therefore, to regard the questions decided in those cases as entirely open to reconsideration.

V.

[16] The Constitution nowhere makes reference to 'legislative courts.' The power given Congress in Art. I, s 8, cl. 9, 'To constitute Tribunals inferior to the Supreme Court,' plainly relates to the 'inferior Courts' provided for in Art. III, s 1; it has never been relied on for establishment of any other tribunals.

***544** The concept of a legislative court derives from the opinion of Chief Justice Marshall in American Insurance Co. v. Canter, 1 Pet. 511, 7 L.Ed. 242, dealing with courts established in a territory. A cargo of cotton salvaged from a wreck off the coast of Florida had been purchased by Canter at a judicial sale ordered by a court at Key West invested by the territorial legislature with jurisdiction over cases of salvage. The insurers, to whom the property in the cargo had been abandoned by the owners, brought a libel for restitution, claiming in part that the prior decree was void because not rendered in a court created by Congress, as required for the exercise of admiralty jurisdiction under Article III. Chief Justice Marshall for the Court swept this objection aside by noting that the Superior Courts of Florida, which had been created by Congress, were staffed with judges appointed for only four years, and concluded that Article III did not apply in the territories:

> 'These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States.' 1 Pet., at 546.

[17][18] By these arresting observations the Chief Justice certainly did not ****1470** mean to imply that the case heard by the Key West court was not one of admiralty jurisdiction otherwise properly justiciable in a Federal District Court sitting in one of the States. Elsewhere in the opinion he distinctly referred to the provisions of Article III to show that it was such a case. 1 Pet., at 545. All the Chief Justice meant, and what the case has ever after been ***545** taken to establish, is that in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article; [FN13] courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies.

> FN13. Far from being 'incapable of receiving' federal-question jurisdiction, the territorial courts have long exercised a jurisdiction commensurate in this regard with that of the regular federal courts and have been subjected to the appellate jurisdiction of this Court precisely because they do so. Benner v. Porter, 9 How. 235, 243, 13 L.Ed. 119; Clinton v. Englebrecht, 13 Wall. 434, 447, 20 L.Ed. 659; Reynolds v. United States, 98 U.S. 145, 154, 25 L.Ed. 244; United States v. Coe, 155 U.S. 76, 86, 15 S.Ct. 16, 19, 39 L.Ed. 76; Balzac v. Porto Rico, 258 U.S. 298, 312--312, 42 S.Ct. 343, 348, 66 L.Ed. 627; International Longshoremen's & etc., Union v. Juneau Spruce Corp., 342 U.S. 237, 240-- 241, 72 S.Ct. 235, 237, 238, 96 L.Ed. 275; cf. Martin v. Hunter's Lessee, 1 Wheat. 304, 338, 4 L.Ed. 97; see Pope v. United States, 323 U.S. 1, 13--14, 65 S.Ct. 16, 23, 89 L.Ed. 3.

The reasons for this are not difficult to appreciate

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so long as the character of the early territories and some of the practical problems arising from their administration are kept in mind. The entire governmental responsibility in a territory where there was no state government to assume the burden of local regulation devolved upon the National Government. This meant that courts had to be established and staffed with sufficient judges to handle the general jurisdiction that elsewhere would have been exercised in large part by the courts of a State. [FN14] But when the territories began entering into statehood, as they soon did, the authority of the territorial courts over matters of state concern ceased; and in a time when the size of the federal judiciary was still relatively small, that left the National Government with a significant ***546** number of territorial judges on its hands and no place to put them. When Florida was admitted as a State, for example, Congress replaced three territorial courts of general jurisdiction comprising five judges with one Federal District Court and one judge. [FN15]

FN14. Under Barber v. Barber, 21 How. 582, 584, 16 L.Ed. 226, for example, the federal courts in the States were incompetent to render divorces; but in the territories, where the legislative power of the United States of necessity extended to all such local matters, the territorial courts took cognizance of them. Simms v. Simms, 175 U.S. 162, 167--168, 20 S.Ct. 58, 60, 44 L.Ed. 115; De la Rama v. De la Rama, 201 U.S. 303, 26 S.Ct. 485, 50 L.Ed. 765.

FN15. Benner v. Porter, 9 How. 235, 240, 244, 13 L.Ed. 119. For statutory techniques since developed to avoid the interregnal problems involved in that case, see Metlakatla Indian Community etc., v. Egan, 363 U.S. 555, 557--559, 80 S.Ct. 1321, 1322, 1323, 4 L.Ed.2d 1397; 1 Moore, Federal Practice (2d ed. 1961), 32--34.

At the same time as the absence of a federal structure in the territories produced problems not foreseen by the Framers of Article III, the realities of territorial government typically made it less urgent that judges there enjoy the independence from Congress and the President envisioned by that article. For the territories were not ruled immediately from Washington; in a day of poor roads and slow mails, it was unthinkable that they should be. Rather, Congress left municipal law to be developed largely by the territorial legislatures, within the framework of organic acts and subject to a retained power of ****1471** veto. [FN16] The scope of self-government exercised under these delegations was nearly as broad as that enjoyed by the States, and the freedom of the territories to dispense with protections deemed inherent in a separation of governmental powers was as fully recognized. [FN17]

FN16. See Clinton v. Englebrecht, 13 Wall. 434, 441--445, 20 L.Ed. 659; Hornbuckle v. Toombs, 18 Wall. 648, 655--656, 21 L.Ed. 966.

FN17. Compare Clinton v. Englebrecht, supra, 13 Wall., at 446, 447, with Dreyer v. Illinois, 187 U.S. 71, 83--84, 23 S.Ct. 28, 32, 47 L.Ed. 79.

Against this historical background, it is hardly surprising that Chief Justice Marshall decided as he did. It would have been doctrinaire in the extreme to deny the right of Congress to invest judges of its creation with authority to dispose of the judicial business of the territories. It would have been at least as dogmatic, having recognized the right, to fasten on those judges a guarantee ***547** of tenure that Congress could not put to use and that the exigencies of the territories did not require. Marshall chose neither course; conscious as ever of his responsibility to see the Constitution work, he recognized a greater flexibility in Congress to deal with problems arising outside the normal context of a federal system.

The same confluence of practical considerations that dictated the result in Canter has governed the decision in later cases sanctioning the creation of other courts with judges of limited tenure. In United States v. Coe, 155 U.S. 76, 85--86, 15 S.Ct. 16, 19, 39 L.Ed. 76, for example, the Court sustained the authority of the Court of Private Land Claims to adjudicate claims under treaties to land in the territories, but left it expressly open whether such a course might be followed within the States. The Choctaw and Chickasaw Citizenship Court was similarly created to determine questions of tribal membership relevant to property claims within Indian territory under the exclusive control of the National Government. See Stephens v. Cherokee Nation, 174 U.S. 445, 19 S.Ct. 722, 43 L.Ed. 1041; Ex parte Joins, 191 U.S. 93, 24 S.Ct. 27, 48 L.Ed. 110; Wallace v. Adams, 204 U.S. 415, 27 S.Ct. 363, 51 L.Ed. 547. Upon like considerations, Article III has been viewed as inapplicable to courts

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created in unincorporated territories outside the mainland, Downes v. Bidwell, 182 U.S. 244, 266--267, 21 S.Ct. 770, 778, 779, 45 L.Ed. 1088; Balzac v. Porto Rico, 258 U.S. 298, 312--313, 42 S.Ct. 343, 348, 66 L.Ed. 627; cf. Dorr v. United States, 195 U.S. 138, 145, 149, 24 S.Ct. 808, 811, 813, 49 L.Ed. 128, and to the consular courts established by concessions from foreign countries, In re Ross, 140 U.S. 453, 464--465, 480, 11 S.Ct. 897, 900, 905, 35 L.Ed. 581. [FN18]

FN18. See generally, as to each of these courts, 1 Moore, Federal Practice (2d ed. 1961), 40--44, 47--50.

The touchstone of decision in all these cases has been the need to exercise the jurisdiction then and there and for a transitory period. Whether constitutional limitations on the exercise of judicial power have been held inapplicable has depended on the particular local setting, ***548** the practical necessities, and the possible alternatives. When the peculiar reasons justifying investiture of judges with limited tenure have not been present, the Canter holding has not been deemed controlling. O'Donoghue v. United States, 289 U.S. 516, 536--539, 53 S.Ct. 740, 745, 746.

Since the conditions obtaining in one territory have been assumed to exist in each, this Court has in the past entertained a presumption that even those territorial judges who have been extended statutory assurances of life tenure and undiminished compensation have been so favored as a matter of legislative grace and not of constitutional compulsion. McAllister v. United States, 141 U.S. 174, ****1472** 186, 11 S.Ct. 949, 953, 35 L.Ed. 693. [FN19] By a parity of reasoning, however, the presumption should be reversed when Congress creates courts the continuing exercise of whose jurisdiction is unembarrassed by such practical difficulties. See Mookini v. United States, 303 U.S. 201, 205, 58 S.Ct. 543, 545, 82 L.Ed. 748. As the Bakelite and Williams opinions recognize, the Court of Claims and the Court of Customs and Patent Appeals were created to carry into effect powers enjoyed by the National Government over subject matter--roughly, payment of debts and collection of customs revenue-- and not over localities. What those opinions fail to deal with is whether that distinction deprives American Insurance Co. v. Canter of controlling force.

FN19. We do not now decide, of course, whether the same conditions still obtain in each of the present-day territories or whether, even if they do, Congress might not choose to establish an Article III court in one or more of them.

The Bakelite opinion did not inquire whether there might be such a distinction. After sketching the history of the territorial and consular courts, it continued at once:

'Legislative courts also may be created as special tribunals to examine and determine various matters, ***549** arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.' 279 U.S., at 451, 49 S.Ct. at 413.

Since in the Court's view the jurisdiction conferred on both the Court of Claims and the Court of Customs and Patent Appeals included 'nothing which inherently or necessarily requires judicial determination,' [FN20] both could have been and were created as legislative courts.

FN20. Ex parte Bakelite Corp., 279 U.S. 438, 453, 458, 49 S.Ct. 411, 414, 416, 73 L.Ed. 789; accord, Williams v. United States, 289 U.S. 553, 579, 53 S.Ct. 751, 759, 77 L.Ed. 1372.

We need not pause to assess the Court's characterization of the jurisdiction conferred on those courts, beyond indicating certain reservations about its accuracy. [FN21] Nor need we now explore the extent to which Congress may commit the execution of even 'inherently' judicial business to tribunals other than Article III courts. We may and do assume, for present purposes, that none of the jurisdiction vested in our two courts is of that sort, so that all of it might be committed for final determination to non-Article III tribunals, be they denominated legislative courts or administrative agencies.

FN21. Williams itself recognized that the jurisdiction conferred on the Court of Claims by the Tucker Act, now 28 U.S.C. s 1491, 28 U.S.C.A. s 1491, to award just compensation for a governmental taking, empowered that court to decide what had previously been described as a judicial and not a legislative question. 289 U.S., at 581, 53 S.Ct. at 760; see, e.g., Monongahela Navigation Co. v. United States, 148 U.S. 312, 327, 13 S.Ct. 622, 626, 37 L.Ed. 463. As for

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Bakelite, its reliance, 279 U.S., at 458 n. 26, 49 S.Ct. at 416, on Cary v. Curtis, 3 How. 236, 11 L.Ed. 576, for the proposition that disputes over customs duties may be adjudged summarily without recourse to judicial proceedings, appears to have overlooked the care with which that decision specifically declined to rule whether all right of action might be taken away from a protestant, even going so far as to suggest several judicial remedies that might have been available. See 3 How., at 250.

But because Congress may employ such tribunals assuredly does not mean that it must. This is the crucial ***550** non sequitur of the Bakelite and Williams opinions. Each assumed that because Congress might have assigned specified jurisdiction to an administrative agency, it must be deemed to have done so even though it assigned that jurisdiction to a tribunal having every appearance of a court and composed of judges enjoying statutory assurances of life tenure and undiminished compensation. In so doing, each appears to have misunderstood the trust ****1473** of the celebrated observation by Mr. Justice Curtis, that

'* * * there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.' Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 284, 15 L.Ed. 372.

This passage, cited in both the Bakelite and Williams opinions, [FN22] plainly did not mean that the matters referred to could not be entrusted to Article III courts. Quite the contrary, the explicit predicate to Justice Curtis' argument was that such courts could exercise judicial power over such cases. For the very statute whose authorization of summary distress proceedings was sustained in the Murray case, also authorized the distrainee to bring suit to arrest the levy against the United States in a Federal District Court. And as to this, the author of the opinion stated, just before his more trenchant remark quoted above:

FN22. 279 U.S., at 451 note 8, 49 S.Ct. at 413; 289 U.S., at 579, 53 S.Ct. at 759.

'The United States consents that this fact of indebtedness may be drawn in question by a suit against them. Though they might have withheld ***551** their consent, we think that, by granting it, nothing which may not be a subject of judicial cognizance is brought before the court.' [FN23]

FN23. 18 How., at 284.

Thus Murray's Lessee, far from furnishing authority against the proposition that the Court of Claims is a constitutional court, actually supports it.

[19] To deny that Congress may create tribunals under Article III for the sole purpose of adjudicating matters that it might have reserved for legislative or executive decision would be to deprive it of the very choice that Mr. Justice Curtis insisted it enjoys. Of course possession of the choice, assuming it is coextensive with the range of matters confided to the courts, [FN24] subjects those courts to the continuous possibility that their entire jurisdiction may be withdrawn. See Williams v. United States, 289 U.S. 553, 580--581, 53 S.Ct. 751, 760, 77 L.Ed. 1372. But the threat thus facing their independence is not in kind or effect different from that sustained by all inferior federal courts. The great constitutional compromise that resulted in agreement upon Art. III, s 1, authorized but did not obligate Congress to create inferior federal courts. 1 Farrand, The Records of the Federal Convention (1911), 118, 124--125; The Federalist, No. 81 (Wright ed. 1961), at 509 (Hamilton). Once created, they passed almost a century without exercising any very significant jurisdiction. Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv.L.Rev. 49, 65--70 (1923); Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 Cornell L.Q. 499 (1928). Throughout this period and beyond it up to today, they remained constantly subject to jurisdictional curtailment. Turner v. Bank of North America, 4 Dall. 8, 10 note, 1 L.Ed. 718 (Chase, J.); ***552** Cary v. Curtis, 3 How. 236, 245, 11 L.Ed. 576; Sheldon v. Sill, 8 How. 441, 449, 12 L.Ed. 1147; Kline v. Burke Construction Co., 260 U.S. 226, 233-234, 43 S.Ct. 79, 82, 67 L.Ed. 226. Even if it should be conceded that the Court of Claims or the Court of Customs and Patent Appeals is any more likely to be supplanted, we do not think the factor of constitutional significance. [FN25]

FN24. But see note 21, supra.

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FN25. See generally Hart and Wechsler, The Federal Courts and the Federal System (1953), 312--340, and more specifically, 370 U.S., pp. 567--568, 82 S.Ct., pp. 1481--1482, infra.

**1474 [20] What has been said should suffice to demonstrate that whether a tribunal is to be recognized as one created under Article III depends basically upon whether its establishing legislation complies with the limitations of that article; whether, in other words, its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite. To ascertain whether the courts now under inquiry can meet those tests, we must turn to examine their history, the development of their functions, and their present characteristics.

VI.

A. Court of Claims.--The Court of Claims was created by the Act of February 24, 1855, c. 122, 10 Stat. 612, primarily to relieve the pressure on Congress caused by the volume of private bills. As an innovation the court was at first regarded as an experiment, and some of its creators were reluctant to give it all the attributes of a court by making its judgments final; instead it was authorized to hear claims and report its findings of fact and opinions to Congress, together with drafts of bills designed to carry its recommendations into effect. s 7, 10 Stat. 613; see Cong.Globe, 33d Cong., 2d Sess. 70--72 (1854) (remarks of Senators Brodhead and Hunter). From the outset, however, a majority of the court's proponents insisted that its judges be given life tenure as a means of assuring independence *553 of judgment, and their proposal won acceptance in the Act. s 1, 10 Stat. 612; see Cong. Globe, 33d Cong., 2d Sess. 71, 108--109 (Senator Hunter); 72 (Senator Clayton); 106 (Senator Brodhead); 110 (Senator Pratt); 114, 902 (the votes). Indeed there are substantial indications in the debates that Congress thought it was establishing a court under Article III. Cong.Globe, 33d Cong., 2d Sess. 108--109 (Senator Hunter); 110--111 (Senator Pratt); 111 (Senator Clayton); 113 (Senators Stuart and Douglas).

By the end of 1861, however, it was apparent that the limited powres conferred on the court were insufficient to relieve Congress form the laborious necessity of examining the merits of private bills. In his State of the Union message that year, President Lincoln recommended that the legislative design to provide for the independent adjudication of claims against the United States be brought to fruition by making the judgments of the Court of Claims final. The pertinent text of his address is as follows, Cong.Globe, 37th Cong., 2d Sess., Appendix, p. 2:

'It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals. The investigation and adjudication of claims, in their nature belong to the judicial department * * *. It was intended by the organization of the Court of Claims mainly to remove this branch of business from the Halls of Congress; but while the court has proved to be an effective and valuable means of investigation, it in great degree fails to effect the object of its creation, for want of power to make its judgments final.'

By the Act of March 3, 1863, c. 92, s 5, 12 Stat. 765, 766, Congress adopted the President's recommendation and made the court's judgments final, with appeal to the *554 Supreme Court provided in certain cases. The significance of this nearly contemporaneous enactment for the light it sheds on the aims of the 1855 Congress is apparent.

There was one further impediment. Section 14 of the 1863 Act, 12 Stat. 768, provided that 'no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated **1475 for by the Secretary of the Treasury.' In Gordon v. United States, 2 Wall. 561, 17 L.Ed. 921, this Court refused to review a judgment of the Court of Claims because it construed that section as giving the Secretary a revisory authority over the court inconsistent with its exercise of judicial power. Congress promptly repealed the offensive section, Act of March 17, 1866, c. 19, s 1, 14 Stat. 9, once again exhibiting its purpose to liberate the Court of Claims from itself and the Executive. Thereafter, the Supreme Court promulgated rules governing appeals from the court, 3 Wall. vii-- viii, and took jurisdiction under them for the first time in De Groot v. United States, 5 Wall. 419, 18 L.Ed. 700.

The early appeals entertained by the Court furnish striking evidence of its understanding that the Court of Claims had been vested with judicial power. In De Groot the court had been given jurisdiction by

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special bill only after the passage of two private bills had failed to produce agreement by administrative officials upon adeqquate recompense. This Court was thus presented with a vivid illustration of the ways in which the same matter might be submitted for resolution to a legislative committee, to an executive officer, or to a court, Murray's Lessee, supra, and nevertheless accepted appellate jurisdiction over what was, necessarily, an exercise of the judicial power which alone it may review. Marbury v. Madison, 1 Cranch 137, 174-- 175, 2 L.Ed. 60.

After the repeal of s 14, the Court was quick to protect the Court of Claims' judgments from executive revision. *555 In United States v. O'Grady, 22 Wall. 641, 22 L.Ed. 772, a judgment had been diminished by the Secretary of the Treasury in an amount equal to a tax assertedly due, although the United States had not pleaded a set-off as it was entitled by the 1863 Act to do. [FN26] The Court of Claims and this Court on appeal held the deduction unwarranted in law, with the following pertinent closing observation:

FN26. s 3, 12 Stat. 765, now 28 U.S.C. s 1503, 28 U.S.C.A. s 1503. See also 18 Stat. 481 (1875), as amended, 31 U.S.C. s 227, 31 U.S.C.A. s 227, requiring the Comptroller General to bring suit against a nonconsenting judgment creditor if that official believes a debt not previously asserted as a set-off is due the United States.

'Should it be suggested that the judgment in question was rendered in the Court of Claims, the answer to the suggestion is that the judgment of the Court of Claims, from which no appeal it taken, is just as conclusive under existing laws as the judgment of the Supreme Court, until it is set aside on a motion for a new trial.' [FN27]

FN27. 22 Wall., at 648.

Like views abound in the early reports. In United States v. Union Pacific R. Co., 98 U.S. 569, 603, 25 L.Ed. 143, for example, referring to Article III, the Court said:

'Congress has, under this authority, created the district courts, the circuit courts, and the Court of Claims, and vested each of them with a defined portion of the judicial power found in the Constitution.'

Such remained the view of the Court as late as Miles v. Graham, 268 U.S. 501, 45 S.Ct. 601, 69 L.Ed. 1067, decided in 1925. There it was held, on the authority of Evans v. Gore, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887, that the salary of a Court of Claims judge appointed even after enactment of the taxing statute in question was not subject to such diminution. Although the case was afterwards overruled on this point, O'Malley v. Woodrough, 307 U.S. 277, 283, 59 S.Ct. 838, 840, 83 L.Ed. 1289, what is of continuing interest is the *556 Court's reliance in Miles upon Evans v. Gore, where Mr. Justice Van Devanter for the Court devoted six full pages to recitation of the **1476 importance of the guarantees of tenure and salary contained in Article III. [FN28] How it was possible to say in Bakelite, 279 U.S., at 455, 49 S.Ct. at 415, that the Court in Miles, decided only five years after Evans and with copious quotation from it, was unaware of the crucial question whether Article III extended its protection to a judge of the Court of Claims, is very difficult to understand.

FN28. Evans v. Gore, 253 U.S. 245, 248--254, 40 S.Ct. 550, 551, 553.

In actuality, the Court's pre-Bakelite view of the Court of Claims in supported by the evidence of increasing confidence placed in that tribunal by Congress. The Tucker Act, s 1, 24 Stat. 505 (1887), now 28 U.S.C. s 1491, 28 U.S.C.A. s 1491 , greatly expanded the jurisdiction of the court by authorizing it to adjudicate

'All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable * * *.'

[21] All of the cases within this grant of jurisdiction arise either immediately or potentially under federal law within the meaning of Art. III, s 2. Osborn v. Bank of the United States, 9 Wheat. 738, 818--819, 823--825, 6 L.Ed. 204; see Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838; Federal Crop Insurance Corp. v.

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Merrill, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10; Mishkin, The Federal 'Question' in the District Courts, 53 Col.L.Rev. 157, 184--196. The cases heard by the Court have *557 been as intricate and far-ranging as any coming within the federal-question jurisdiction, 28 U.S.C. s 1331, 28 U.S.C.A. s 1331, of the District Courts. E.g., Causby v. United States, 60 F.Supp. 751, 104 St.Cl. 342, remanded for further findings, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (eminent domain); Lovett v. United States, 66 F.Supp. 142, 104 Ct.Cl. 557, aff'd, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (bill of attainder); Shapiro v. United States, 69 F.Supp. 205, 107 Ct.Cl. 650 (military due process). In none of these cases, nor in others, could it well be suggested that the Court of Claims had adjudged the issues, no matter how important to the Government, otherwise than dispassionately.

[22] Indeed there is reason to believe that the Court of Claims has been constituted as it is precisely to the end that there may be a tribunal specially qualified to hold the Government to strict legal accounting. From the beginning it has been given jurisdiction only to award damages, not specific relief. United States v. Alire, 6 Wall. 573, 18 L.Ed. 947; United States v. Jones, 131 U.S. 1, 9 S.Ct. 669, 33 L.Ed. 90; see Schwartz and Jacoby, Government Litigation (tentative ed. 1960), 123--126. No question can be raised of Congress' freedom, consistently with Article III, to impose such limitation upon the remedial powers of a federal court. Lauf v. E. G. Shinner & Co., 303 U.S. 323, 330, 58 S.Ct. 578, 581, 82 L.Ed. 872 (Norris- LaGuardia Act). But far from serving as a restriction, this limitation has allowed the Court of Claims a greater freedom than is enjoyed by other federal courts to inquire into the legality of governmental action. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 703--704, 69 S.Ct. 1457, 1468, 93 L.Ed. 1628; Malone v. Bowdoin, 369 U.S. 643, 82 S.Ct. 980, 8 L.Ed.2d 168; Brenner, Judicial Review by Money Judgment in the Court of Claims, 21 Fed.B.J. 179 (1961).

'If there are such things as political axioms,' said Alexander Hamilton, 'the propriety of the judicial power of a government **1477 being coextensive with its legislative, may be ranked among the number.' The Federalist, *558 No. 80 (Wright ed. 1961), at 500. His sentiments were not ignored by the Framers of Article III. The Randolph plan, which formed the basis of that article, called for establishment of a national judiciary coextensive in authority with the executive and legislative branches. IV Farrand, The Records of the Federal Convention (rev. ed. 1937), 47--48. For, as Hamilton observed, a chief defect of the Confederation had been '* * * the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation.' The Federalist, No. 22 (Wright ed. 1961), at 197. But because of the barrier of sovereign immunity, the laws controlling governmental rights and obligations could not for years obtain a fully definitive exposition. The creation of the Court of Claims can be viewed as a fulfillment of the design of Article III.

B. The Court of Customs and Patent Appeals.--The Court of Customs Appeals, as it was first known, was established by s 29 of the Customs Administrative Act of 1890, c. 407, 26 Stat. 131, as added by s 28 of the Payne-Aldrich Tariff Act of August 5, 1909, c. 6, 36 Stat. 11, 105, to review by appeal final decisions of the Board of General Appraisers (now Customs Court) respecting the classification and rate of duty applicable to imported merchandise. The Act was silent about the tenure of the judges, as had been the Judiciary Act of 1789, c. 20, ss 3, 4, 1 Stat. 73--75, 28 U.S.C.A. ss 133, 457 , 141, 41. The salary, first set at $10,000, was afterwards lowered to the $7,000 then being paid to circuit judges, Act of February 25, 1910, c. 62, s 1, 36 Stat. 202, 214, but before the first nominations had been received or confirmed, see 45 Cong.Rec. 2959, 4003 (1910); and, although it has since been increased, it has never been diminished. [FN29] After the Bakelite case had *559 been decided, Congress expressly conferred tenure during good behavior upon the court's judges, in the Tariff Act of 1930, s 646, 46 Stat. 590, 762. [FN*] Representative Chindblom, in supporting the measure, stated that 'when this court was established it was believed to be a constitutional court (so) that it was not necessary to fix the term.' 71 Cong.Rec. 2043 (1929).

FN29. Under the Legislative Appropriation Act of June 30, 1932, c. 314, 47 Stat. 382--the statute under which the Williams and O'Donoghue cases arose--the judges of the Court of Customs and Patent Appeals accepted a reduction in salary from $12,500 to $10,000. That court had not, however, been specified for reduction by Congress; the action of the judges was understandable coming as

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it did after Bakelite had been decided; and under s 109 of the Act, 47 Stat. 403, the Treasury was authorized to accept reductions in payment voluntarily tendered by judges whose salary was constitutionally exempt from diminution.

FN* Now 28 U.S.C.A. ss 213, 371, 372.

The debates in the Senate at the time of the court's creation bear out this observation. See 44 Cong.Rec. 4185--4225 (1909). For under the Customs Administrative Act of 1890, c. 407, s 15, 26 Stat. 131, 138, review of decisions of the Board of General Appraisers had been vested in the Circuit Courts, undoubted Article III courts; it was this jurisdiction that was proposed to be transferred to the new court. [FN30] The debates accordingly concerned themselves with whether there was a need for a specialized court in the federal judicial system to deal with customs matters.

FN30. 36 Stat. 106. Provision was made for the transfer of pending cases and of appeals from final decisions in and of the Circuit Courts and Courts of Appeals. 36 Stat. 106, 107. The very first case heard by the Court of Customs Appeals was an appeal from the Circuit Court for the Southern District of New York in Hansen v. United States, 1 Ct.Cust.App. 1; it also took jurisdiction of a case transferred from the Court of Appeals for the Ninth Circuit in United States v. Seattle Brewing & Malting Co., 1 Ct.Cust.App. 362.

As was said some 35 years age, 'an important phase of the history of the federal judiciary deals with the movement **1478 for the establishment of tribunals whose business was to be limited to litigation arising from a restricted *560 field of legislative control.' Frankfurter and Landis, The Business of the Supreme Court (1927), 147. In certain areas of federal judicial business there has been a felt need to obtain, first, the special competence in complex, technical and important matters that comes from narrowly focused inquiry; second, the speedy resolution of controversies available on a docket unencumbered by other matters; and, third, the certainty and definition that come from nationwide uniformity of decision. See generally id., at 146--186. Needs such as these provoked formation of the Commerce Court and the Emergency Court of Appeals. They also prompted establishment of the Court of Customs and Patent Appeals and its investiture with jurisdiction over customs, tariff, and patent and trademark litigation. 28 U.S.C. ss 1541--1543, 28 U.S.C.A. ss 1541 --1543.

The parallelism with the Commerce Court is especially striking. That court was created to exercise the jurisdiction previously held by the Circuit Courts to review orders of the Interstate commerce Commission. Mann-Elkins Act of June 18, 1910, c. 309, 36 Stat. 539. It was needed, so its sponsors believed, to afford uniform, expert, and expeditious judicial review. See President Taft's message to Congress, 45 Cong.Rec. 379 (1910), in the course of which he stated:

'Reasons precisely analogous to those which induced the Congress to create the court of customs appeals by the provisions in the tariff act of August 5, 1909, may be urged in support of the creation of the commerce court.'

When disfavor with the court caused its abolition three years later, Act of October 22, 1913, c. 32, 38 Stat. 208, 219, it was decided in Congress after extensive debate that the judges then serving on it were protected in tenure by Article III, and they were thereafter assigned to sit on *561 other constitutional courts. See, e.g., 48 Cong.Rec. 7994 (1912) (remarks of Senator Sutherland); and see Donegan v. Dyson, 269 U.S. 49, 46 S.Ct. 55, 70 L.Ed. 159.

The Emergency Court of Appeals was similarly created, by the Act of January 30, 1942, c. 26, 56 Stat. 23, to exercise exclusive equity jurisdiction to determine the validity of regulations, price schedules, and orders issued by the wartime Office of Price Administration. [FN31] Its Article III status was recognized inLockerty v. Phillips, 319 U.S. 182, 187--188, 63 S.Ct. 1019, 1022, 87 L.Ed. 1339 .

FN31. Its functions were continued under the Defense Production Act of 1950, c. 932, s 408, 64 Stat. 798, 808, 50 U.S.C.A.Appendix, s 2108, to determine the validity of price and wage stabilization orders issued under that Act. On April 18, 1962, after denial of certiorari in the last case on its docket, Rosenzweig v. Boutin, 369 U.S. 818, 82 S.Ct. 830, the court terminated its existence. 299 F.2d 1--21.

Of course the judges of those courts were appointed as judges of inferior federal courts generally, or drawn from among those previously appointed as

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such. See page 538 of 370 U.S., page 1466 of 82 S.Ct. and note 11, supra. But by 1942 at least, when the latter court was created, Congress was well aware of the doubt created by the Bakelite and Williams decisions whether Article III judges could sit on non-Article III tribunals. Its action in authorizing judges of the District Courts and Courts of Appeals to sit on the Emergency Court thus reflects its understanding that that court was being created under Article III.

[23] Such an understanding parallels that of previous Congresses since the adoption of the Constitution. Congress has never been compelled to vest the entire jurisdiction provided for in Article III upon inferior courts of its creation; until 1875 it conferred very little of it indeed. See 370 U.S., pp. 551--552, 82 S.Ct., pp. 1473--1474, supra. The Court of Customs and Patent Appeals therefore fits harmoniously into the federal judicial system authorized by Article III.

****1479 *562** VII.

Article III, s 2 provides in part:
'The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * *--to Controversies to which the United States shall be a Party * * *.'

The cases heard by the Court of Claims and the Court of Customs and Patent Appeals all arise under federal law, as we have seen; they are also cases in which the United States is a party. But in Williams v. United States, 289 U.S. 553, 572--578, 53 S.Ct. 751, 757, 759, 77 L.Ed. 1372, far from making of that circumstance a further proof that the Court of Claims exercises the judicial power contemplated by Article III, this Court held that it did not because that article, so it was said, does not make justiciable controversies to which the United States is a party defendant.

The Court's opinion dwelt in part upon the omission of the word 'all' before 'Controversies' in the clause referred to. To derive controlling significance from this semantic circumstance seems hardly to be faithful to John Marshall's admonition that 'it is a constitution we are expounding.' McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L.Ed. 579. But it would be needlessly literal to suppose that the Court rested its holding on this point. Rather it deemed controlling the rule, 'well settled and understood' at the time of the Constitutional Convention, that 'the sovereign power is immune from suit.' 289 U.S., at 573, 53 S.Ct. at 757. Accordingly it becomes necessary to reconsider whether that principle has the effect claimed of rendering suits against the United States nonjusticiable in a court created under Article III.

***563** At least one touchstone of justiciability to which this Court has frequently had reference is whether the action sought to be maintained is of a sort 'recognized at the time of the Constitution to be traditionally within the power of courts in the English and American judicial systems.' United Steelworkers v. United States, 361 U.S. 39, 44, 60, 80 S.Ct. 1, 4, 185, 4 L.Ed.2d 12 (FRANKFURTER, J., concurring). There can be little doubt that that test is met here. Suits against the English sovereign by petition of liberate, monstrans de droit, and other forms of action designed to gain redress against unlawful action of the Crown had been developed over several centuries and were wellestablished before the Revolution. See 9 Holdsworth, History of English Law, 7--45 (1926). Similar provisions for judicial remedies against themselves were made by the American States immediately after the Revolution. E.g., 9 Laws of Va. 536, 540 (1778) (Hening 1821); see Higginbotham's Executrix v. Commonwealth, 25 Gratt. 627, 637--638 (Va.1874). This history was known by Congress when it established the Court of Claims, see Cong. Globe, 33d Cong., 2d Sess. 73 (1854) (remarks of Senator Pettit), and undoubtedly was familiar to the Framers of the Constitution, most of them lawyers.

[24] Hamilton's view, quoted in the Williams case, 289 U.S., at 576, 53 S.Ct. at 758, are not to the contrary. To be sure, Hamilton argued that 'the contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will.' The Federalist, No. 81 (Wright ed. 1961), at 511. But that is because there was no surrender of sovereign immunity in the plan of the convention; [FN32] so ***564** that, for suits against the United States, it remained '****1480** inherent in the nature of sovereignty not to be amenable to the suit of an

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individual without its consent.' Ibid. (Emphasis in original.) In this sense, and only in this sense, is Article III's extension of judicial competence over controversies to which the United States is a party ineffective to confer jurisdiction over suits to which it is a defendant. For 'behind the words of the constitutional provisions are postulates which limit and control.' Principality of Monaco v. Mississippi, 292 U.S. 313, 322, 54 S.Ct. 745, 748, 78 L.Ed. 1282. But once the consent is given, the postulate is satisfied, and there remains no barrier to justiciability. Cf. Cohens v. Virginia, 6 Wheat. 264, 383--385, 5 L.Ed. 257.

FN32. As there was, for example, in suits between States and by the United States against a State. Rhode Island v. Massachusetts, 12 Pet. 657, 720, 9 L.Ed. 1233; United States v. Texas, 143 U.S. 621, 639--646, 12 S.Ct. 488, 491--493, 36 L.Ed. 285.

So the Court had given itself to understand before Williams was decided. In United States v. Louisiana, 123 U.S. 32, 35, 8 S.Ct. 17, 18, 31 L.Ed. 69, it held maintainable under Article III a suit brought in the Court of Claims by a State against the United States with Congress' consent. And in Minnesota v. Hitchcock, 185 U.S. 373, 384, 22 S.Ct. 650, 654, 46 L.Ed. 954, which reaffirmed that ruling, the Court said:

'This is a controversy to which the United States may be regarded as a party. It is one, therefore to which the judicial power of the United States extends. It is, of course, under that clause, a matter of indifference whether the United States is a party plaintiff or defendant.'

Further in the same opinion, 185 U.S., at 386, 22 S.Ct. at 655, the Court significantly remarked:

'While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy. Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition.'

***565** To deny that proposition now would be to call into question a large measure of the jurisdiction exercised by the United States District Courts. Under the Federal Tort Claims Act, s 410(a), 60 Stat. 842, 843--844 (1946), as amended, 28 U.S.C. s 1346(b), 28 U.S.C.A. s 1346(b), those courts have been emplowered to determine the tort liability of the United States in suits brought by individual plaintiffs. In so doing, they exercise functions akin to those of the Court of Claims, as is evidenced by the statutory authorization of appeals to that court from their judgments, with the consent of the appellee. s 412(a) (2), 60 Stat. 844--845 (1946), as amended, 28 U.S.C. s 1504, 28 U.S.C.A. s 1504.

In truth the District Courts have long been vested with substantial portions of the identical jurisdiction exercised by the Court of Claims. The Tucker Act, s 2, 24 Stat. 505 (1887), as amended, 28 U.S.C. s 1346(a)(2), 28 U.S.C.A. s 1346(a)(2), gives them concurrent jurisdiction over the suits it authorizes, when the amount in controversy is less than $10,000. Under that Act a District Court sits 'as a court of claims,' United States v. Sherwood, 312 U.S. 584, 591, 61 S.Ct. 767, 771, 85 L.Ed. 1058, and affords the same rights and privileges to suitors against the United States. Bates Manufacturing Co. v. United States, 303 U.S. 567, 571, 58 S.Ct. 694, 696, 82 L.Ed. 1020. See generally Schwartz and Jacoby, Government Litigation (tentative ed. 1960), 109--111.

There have been and are further statutory indications that Congress regards the two courts interchangeably. In 1921, Mr. Justice Brandeis compiled a list of 17 statutes passed during World War I, permitting suit against the United States for the value of propertyseized for use in the war effort, and authorizing them to be instituted in either the Court of Claims or one of the District Courts. United States v. Pfitsch, 256 U.S. 547, 553 note 1, 41 S.Ct. 569, 571, 65 L.Ed. 1084. Today, 28 U.S.C. s 1500, 28 U.S.C.A. s 1500 gives litigants an election to sue the United States as principal in the Court of Claims or to ***566** pursue their claims against its agents in ****1481** any other court, including the District Courts. See National Cored Forgings Co. v. United States, 132 F.Supp. 454, 132 Ct.Cl. 11. In addition, by the Act of September 13, 1960, ss 1, 2(a), 74 Stat. 912, Congress added ss 1406(c) and 1506 to Title 28 of the United States Code, 28 U.S.C.A. ss 1406(c), 1506, providing for transfer between the Court of Claims and any District Court when a suit within one court's exclusive jurisdiction is brought mistakenly in another.

[25] These evidences of congressional understanding that suits against the United States are justiciable in courts created under Article III may

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cases as well; for the line that separates lower court judgments that are pending on appeal (or may still be appealed), from lower-court judgments that are final, is determined by statute, see, *e.g.*, 28 U.S.C. § 2107(a) (30-day time limit for appeal to federal court of appeals), and so cannot possibly be a *constitutional* line. But a distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in what Article III creates: not a batch of unconnected courts, but a judicial *department* composed of "inferior Courts" and "one supreme Court." Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole. It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws." *Schooner Peggy, supra,* 1 Cranch, at 109. Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was. Finality of a legal judgment is determined by statute, just as entitlement to a government benefit is a statutory creation; but that no more deprives the former of its constitutional significance for separation-of-powers analysis than it deprives the latter of its significance for due process purposes. See, *e.g., Cleveland Bd. of Ed. v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Meachum v. Fano,* 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976).

[8] To be sure, § 27A(b) reopens (or directs the reopening of) final judgments in a whole class of cases rather than in a particular suit. We do not see how that makes any difference. ***228** The separation-of-powers violation here, if there is any, consists of depriving judicial judgments of the conclusive effect that they had when they were announced, not of acting in a manner--viz., with particular rather than general effect--that is unusual (though, we must note, not impossible) for a legislature. To be sure, a general statute such as this one may reduce the perception that legislative interference with judicial judgments was prompted by individual favoritism; but it is legislative interference with judicial judgments nonetheless. Not favoritism, nor even corruption, but *power* is the object of the separation-of- powers prohibition. The prohibition is violated when an individual final judgment is legislatively rescinded for even the *very best* of reasons, such as the legislature's genuine conviction (supported by all the law professors in the land) that the judgment was wrong; and it is violated 40 times over when 40 final judgments are legislatively dissolved.

[9] It is irrelevant as well that the final judgments reopened by § 27A(b) rested on the bar of a statute of limitations. The rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: as a judgment on the merits. See, *e.g.*, Fed.Rule Civ.Proc. 41(b); *United States v. Oppenheimer,* 242 U.S. 85, 87-88, 37 S.Ct. 68, 69-69, 61 L.Ed. 161 (1916). Petitioners suggest, directly or by implication, two reasons why a merits judgment based on this particular ground may be uniquely subject ****1458** to congressional nullification. First, there is the fact that the length and indeed even the very existence of a statute of limitations upon a federal cause of action is entirely subject to congressional control. But virtually *all* of the reasons why a final judgment on the merits is rendered on a federal claim are subject to congressional control. Congress can eliminate, for example, a particular element of a cause of action that plaintiffs have found it difficult to establish; or an evidentiary rule that has often ***229** excluded essential testimony; or a rule of offsetting wrong (such as contributory negligence) that has often prevented recovery. To distinguish statutes of limitations on the ground that they are mere creatures of Congress is to distinguish them not at all. The second supposedly distinguishing characteristic of a statute of limitations is that it can be extended, without violating the Due Process Clause, after the cause of the action arose and even after the statute itself has expired. See, *e.g., Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945). But that also does not set statutes of limitations apart. To mention only one other broad category of judgment-producing legal rule: Rules of pleading and proof can similarly be altered after the cause of action

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not be lightly disregarded. Nevertheless it is probably true that Congress devotes a more lively attention to the work performed by the Court of Claims, and that it has been more prone to modify the jurisdiction assigned to that court. It remains to consider whether that circumstance suffices to render nonjudicial the decision of claims against the United States in the Court of Claims.

First. Throughout its history the Court of Claims has frequently been given jurisdiction by special act to award recovery for breach of what would have been, on the part of an individual, at most a moral obligation. E.g., 45 Stat. 602 (1928), as amended, 25 U.S.C. ss 651--657, 25 U.S.C.A. ss 651-- 657; Indians of California v. United States, 98 Ct.Cl. 583, 599. Congress has waived the benefit of res judicata, Cherokee Nation v. United States, 270 U.S. 476, 486, 46 S.Ct. 428, 432, 70 L.Ed. 694, and of defenses based on the passage of time, United States v. Alcea Band of Tillamooks, 329 U.S. 40, 45--46, 67 S.Ct. 167, 169, 170, 91 L.Ed. 29; United States v. Central Eureka Mining Co., 357 U.S. 155, 78 S.Ct. 1097, 2 L.Ed.2d 1228.

[26] In doing so, as this Court has uniformly held, Congress has enlisted the aid of judicial power whose exercise is amenable to appellate review here. United States v. Alcea Band of Tillamooks, supra; see Colgate v. United States, 280 U.S. 43, 47--48, 50 S.Ct. 22, 23, 74 L.Ed. 157. Indeed the Court has held ***567** that Congress may for reasons adequate to itself confer bounties upon persons and, by consenting to suit, convert their moral claim into a legal one enforceable by litigation in an undoubted constitutional court. United States v. Realty Co., 163 U.S. 427, 16 S.Ct. 1120, 41 L.Ed. 215.

[27] The issue was settled beyond peradventure in Pope v. United States, 323 U.S. 1, 65 S.Ct. 16, 89 L.Ed. 3. There the Court held that for Congress to direct the Court of Claims to entertain a claim theretofore barred for any legal reason from recovery--as, for instance, by the statute of limitations, or because the contract had been drafted to exclude such claims--was to invoke the use of judicial power, notwithstanding that the task might involve no more than computation of the sum due. Consent judgments, the Court recalled, are nonetheless judicial judgments. See 323 U.S., at 12, 65 S.Ct. at 22, and cases cited. After this decision it cannot be doubted that when Congress transmutes a moral obligation into a legal one by specially consenting to suit, it authorizes the tribunal that hears the case to perform a judicial function.

Second. Congress has on occasion withdrawn jurisdiction from the Court of Claims to proceed with the disposition of cases pending therein, and has been upheld in so doing by this this Court. E.g., District of Columbia v. Eslin, 183 U.S. 62, 22 S.Ct. 17, 46 L.Ed. 85. But that is not incompatible with the possession of Article III judicial power by the tribunal affected. Congress has consistently with that article withdrawn the jurisdiction of this Court to proceed with a case then sub judice, Ex parte McCardle, 7 Wall. 506, 19 L.Ed. 264; its power can be no less when dealing with an inferior federal court, In re Hall, 167 U.S. 38, 42, 17 S.Ct. 723, 724, 42 L.Ed. 69. For as Hamilton assured those of his contemporaries who were concerned about the reach of ****1482** power that might be vested in a federal judiciary, 'it ought to be recollected that the national legislature will have ample authority to make ***568** such exceptions, and to prescribe such regulations as will be calculated to obviate or remove (any) * * * inconveniences.' The Federalist, No. 80 (Wright ed. 1961), at 505.

The authority is not, of course, unlimited. In 1870, Congress purported to withdraw jurisdiction from the Court of Claims and from this Court on appeal over cases seeking indemnification for property captured during the Civil War, so far as eligibility therefor might be predicated upon an amnesty awarded by the President, as both courts had previously held that it might. Despite Ex parte McCardle, supra, the Court refused to apply the statute to a case in which the claimant had already been adjudged entitled to recover by the Court of Claims, calling it an unconstitutional attempt to invade the judicial province by prescribing a rule of decision in a pending case. United States v. Klein, 13 Wall. 128, 20 L.Ed. 519. Surely no such concern would have been manifested if it had not been thought that the Court of Claims was invested with judicial power. [FN33]

> FN33. Pocono Pines Assembly Hotels Co. v. United States, 73 Ct.Cl. 447, leave to file petition for writ of mandamus or prohibition denied, 285 U.S. 526, 52 S.Ct. 392, 76 L.Ed. 923, in which the Congress 'remanded' a final and unappealed decision against the United States to the Court of Claims for new findings, does not detract from the

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authority of Klein. Without examining anything else, it is enough to note that the considerations governing a grant or denial of a petition for mandamus are, like those controlling the issuance of a writ of certiorari, so discretionary with the Court as to deprive a denial of precedential effect on this score. Compare Sup.Ct. Rule 30 with Rule 19(1), (2), 28 U.S.C.A., and cf. Brown v. Allen, 344 U.S. 443, 488, 491--492, 73 S.Ct. 397, 431, 438, 439, 97 L.Ed. 469 (opinion of FRANKFURTER, J.).

VIII.

[28] A more substantial question relating to the justiciability of money claims against the United States arises from the impotence of a court to enforce its judgments. It was Chief Justice Taney's opinion, in Gordon v. United ***569** States, afterwards published at 117 U.S. 697, 702, that the dependence of the Court of Claims upon an appropriation by Congress to carry its awards into effect negatived the possession of judicial power:

'The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power.'

But Taney's opinion was not the opinion of the Court. It was a memorandum of his views prepared before his death and circulated among, but not adopted by, his brethren. The opinion of the Court, correctly reported for the first time in United States v. Jones, 119 U.S. 477, 478, 7 S.Ct. 283, 284, 30 L.Ed. 440, makes clear that its refusal to entertain the Gordon appeal rested solely on the revisory authority vested in the Secretary of the Treasury before the repeal of s 14. See also United States v. Alire, 6 Wall. 573, 576, 18 L.Ed. 947; United States v. O'Grady, 22 Wall. 641, 647, 22 L.Ed. 772; Langford v. United States, 101 U.S. 341, 344--345, 25 L.Ed. 1010--in each of which the limitation of the Gordon decision to the difficulties caused by s 14 clearly appears.

Nevertheless the problem remains and should be considered. Its scope has, However, been reduced by the Act of July 27, 1956, s 1302, 70 Stat. 678, 694, 31 U.S.C. s 724a, 31 U.S.C.A. s 724a, a general appropriation act which eliminates the need for subsequent separate appropriations to pay judgments below $100,000. A judgment creditor of this order simply files in the General Accounting Office a certificate of the judgment signed by the clerk and the chief judge of the Court of Claims, and is paid. 28 U.S.C. s 2517(a), 28 U.S.C.A. s 2517(a). For judgments of this dimension, therefore, there need ****1483** be no concern about the issuance of execution.

For claims in excess of $100,000, 28 U.S.C. s 2518, 28 U.S.C.A. s 2518 directs the Secretary of the Treasury to certify them to Congress once review in this Court has been foregone or sought and found unavailing. This, then, is the domain ***570** of our problem, for Art. I, s 9, cl. 7, vests exclusive responsibility for appropriations in Congress, [FN34] and the Court early held that no execution may issue directed to the Secretary of the Treasury until such an appropriation has been made. Reeside v. Walker, 11 How. 272, 291, 13 L.Ed. 693.

FN34. 'No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law * * *.'

The problem was recognized in the Congress that created the Court of Claims, where it was pointed out that if ability to enforce judgments were made a criterion of judicial power, no tribunal created under Article III would be able to assume jurisdiction of money claims against the United States. Cong.Globe, 33d Cong., 2d Sess. 113 (1854) (remarks of Senator Stuart). The subsequent vesting of such jurisdiction in the District Courts, 370 U.S., pp. 565--566, 82 S.Ct. pp. 1480--1481, supra, of course bears witness that at least the Congress has not thought such a criterion imperative.

Ever since Congress first accorded finality to judgments of the Court of Claims, it has sought to avoid interfering with their collection. Section 7 of the Act of March 3, 1863, 12 Stat. 765, 766, provided for the payment of final judgments out of general appropriations. In 1877, Congress shifted for a time to appropriating lump sums for judgments certified to it by the Secretary of the Treasury, not in order to question the judgments but to avoid the possibility that a large judgment might exhaust the prior appropriation. Act of March 3, 1877, c. 105, 19 Stat. 344, 347; see 6 Cong.Rec. 585--588 (1877). A study concluded in 1933 found only 15 instances in 70 years when Congress had refused to pay a judgment. Note, 46 Harv.L.Rev. 677, 685--686 n. 63. This historical record, surely more

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favorable to prevailing parties than that obtaining in private litigation, may well make us doubt whether the capacity to enforce a judgment is always indispensable for the exercise of judicial power.

*571 The Court did not think so in La Abra Silver Mining Co. v. United States, 175 U.S. 423, 461--462, 20 S.Ct. 168, 181--182, 44 L.Ed. 223, where the issue was the justiciability under Article III of a declaratory judgment action brought by the United States in the Court of Claims to determine its liability for payment of an award procured by the defendant from an international arbitral commission assertedly through fraud. See also Nashville, C. & St. L.R. Co. v. Wallace, 288 U.S. 249, 263, 53 S.Ct. 345, 348, 77 L.Ed. 730. Nor has it thought so when faced with the exactly analogous problem presented by suits for money between States in the original jurisdiction. That jurisdiction has been upheld, for example, in South Dakota v. North Carolina, 192 U.S. 286, 318--321, 24 S.Ct. 269, 275--277, 48 L.Ed. 448, notwithstanding the Court's recognition of judicial impotence to compel a levy of taxes or otherwise by process to enforce its award. See especially the opinions of Chief Justice Fuller and Chief Justice White at the beginning and inconclusive end of the extended litigation between Virginia and West Virginia, 206 U.S. 290, 319, 27 S.Ct. 732, 741, 51 L.Ed. 1068 (1907) and 246 U.S. 565, 38 S.Ct. 400, 59 L.Ed. 1272 (1918), in which the Court asserted jurisdiction to award damages for breach of contract despite persistent and never-surmounted challenges to its power to enforce a decree. [FN35] If this Court may rely on the good faith of state governments or other public bodies to respond to its judgments, there seems to be no sound reason why the Court of Claims may not rely **1484 on the good faith of the United States. We conclude that the presence of the United States as a party defendant to suits maintained in the Court of Claims and the Court of Customs and Patent Appeals does not debar those courts from exercising the judicial power provided for in Article III.

FN35. See also the intervening opinions and dispositions: 209 U.S. 514, 28 S.Ct. 614, 52 L.Ed. 914; 220 U.S. 1, 36, 31 S.Ct. 330, 336, 55 L.Ed. 353; 222 U.S. 17, 19--20, 32 S.Ct. 4, 5--6, 56 L.Ed. 71; 231 U.S. 89, 34 S.Ct. 29, 58 L.Ed. 135 ; 234 U.S. 117, 34 S.Ct. 889, 58 L.Ed. 1243; 238 U.S. 202, 35 S.Ct. 795, 59 L.Ed. 1272; 241 U.S. 531, 36 S.Ct. 719, 60 L.Ed. 1147.

*572 IX.

All of the business that comes before the two courts is susceptible of disposition in a judicial manner. What remains to be determined is the extent to which it is in fact disposed of in that manner.

[29][30] A preliminary consideration that need not detain us long is the absence of provision for jury trial of counterclaims by the Government in actions before the Court of Claims. Despite dictum to the contrary in United States v. Sherwood, 312 U.S. 584, 587, 61 S.Ct. 767, 770, 85 L.Ed. 1058, the legitimacy of that nonjury mode of trial does not depend upon the supposed 'legislative' character of the court. It derives instead, as indeed was also noted in Sherwood, ibid., from the fact that suits against the Government, requiring as they do a legislative waiver of immunity, are not 'suits at common law' within the meaning of the Seventh Amendment. McElrath v. United States, 102 U.S. 426, 439--440, 26 L.Ed. 189. The Congress was not, therefore, required to provide jury trials for plaintiffs suing in the Court of Claims; the reasonableness of its later decision to obviate the need for multiple litigation precludes a finding that its imposition of amenability to nonjury set-offs was an unconstitutional condition. Cf. Minneapolis & St. L.R. Co. v. Bombolis, 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961; see 74 Harv.L.Rev. 414, 415 (1960). [FN36]

FN36. The provision in 28 U.S.C. s 2503, 28 U.S.C.A. s 2503, for Commissioners to take evidence and make preliminary rulings is conformable in all respects with the practice of masters in chancery. For the judicial quality of the proceedings, see the Revised Rules of the Court of Claims, effective December 2, 1957, 140 Ct.Cl. II, 28 U.S.C. App., p. 5237, as amended, id. (Supp. III), p. 863, 28 U.S.C.A.

[31] The principal question raised by the parties under this head of the argument is whether the matters referred by Congress to the Court of Claims and the Court of Customs and Patent Appeals are submitted to them in a form consonant with the limitation of judicial power to 'cases or *573 controversies' imposed by Article III. We may consider first the bulk of jurisdiction exercised by the two courts, reserving for separate treatment in the next section of this opinion two areas which may reasonably be regarded as presenting special

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difficulty.

'Whether a proceeding which results in a grant is a judicial one,' said Mr. Justice Brandeis for a unanimous Court, 'does not depend upon the nature of the thing granted, but upon the nature of the proceeding which Congress has provided for securing the grant. The United States may create rights in individuals against itself and provide only an administrative remedy. * * * It may provide a legal remedy, but make resort to the courts available only after all administrative remedies have been exhausted. * * * It may give to the individual the option of either an administrative or a legal remedy. * * * Or it may provide only a (legal) remedy. (See 370 U.S., pp. 549--552, 82 S.Ct. pp. 1472--1474, supra.) Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status.' Tutun v. United States, 270 U.S. 568, 576--577, 46 S.Ct. 425, 426--427, 70 L.Ed. 738. (Citations omitted.)

**1485 It is unquestioned that the Tucker Act cases assigned to the Court of Claims, 28 U.S.C. s 1491, 28 U.S.C.A. s 1491, advance to judgment 'according to the regular course of legal procedure.' Under this grant of jurisdiction the court hears tax cases, cases calling into question the statutory authority for a regulation, controversies over the existence or extent of a contractual obligation, and the like. See generally Schwartz and Jacoby, Government Litigation (tentative ed. 1960), 131--223. Such cases, which account for as much as 95% of the court's work, [FN37] form the staple *574 judicial fare of the regular federal courts. There can be no doubt that, to the 'expert feel of lawyers,' United Steelworkers v. United States, 361 U.S. 39, 44, 60, 80 S.Ct. 1, 4, 185, 4 L.Ed.2d 12 (Frankfurter, J., concurring), they constitute cases or controversies.

FN37. In 1950, Tucker Act cases constituted 2,350 of the 2,472 proceedings conducted by the court. Wilkinson, The United States Court of Claims, 36 A.B.A.J. 89, 159 (1950). The percentage may well have been augmented since that time by the extension of Tucker Act jurisdiction to Indian claims accruing after August 13, 1946. 28 U.S.C. s 1505, 28 U.S.C.A. s 1505, added by 63 Stat. 102 (1949).

The balance of the court's jurisdiction to render final judgments may likewise be assimilated to the traditional business of courts generally. Thus the court has been empowered to render accountings, [FN38] to decide if debts [FN39] or penalties [FN40] are due the United States, and to determine the liability of the United States for patent or copyright infringement [FN41] and for other specially designated torts. [FN42] In addition, it has been given jurisdiction to review, on issues of law including the existence of substantial evidence, decisions of the Indian Claims Commission. [FN43] Each of these cases, like those under the Tucker Act, is contested, is concrete, and admits of a decree of a sufficiently conclusive character. See Aetan Life Insurance Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240-- 241, 57 S.Ct. 461, 463--464, 81 L.Ed. 617.

FN38. 28 U.S.C. s 1494, 28 U.S.C.A. s 1494 (contractor or their sureties); 28 U.S.C. ss 1496, 2512, 28 U.S.C.A. ss 1496, 2512 (disbursing officers).

FN39. R.S. s 5261 (1878), as amended, 45 U.S.C. s 87, 45 U.S.C.A. s 87 (governmentaided railroads).

FN40. 28 U.S.C. s 1499, 28 U.S.C.A. s 1499 (violations of the Eight-Hour Law, 37 Stat. 137 (1912), as amended, 40 U.S.C. s 324, 40 U.S.C.A. s 324).

FN41. 28 U.S.C. (Supp. III) s 1498, 28 U.S.C.A. s 1498.

FN42. 28 U.S.C. ss 1495, 2513, 28 U.S.C.A. ss 1495, 2513 (wrongful imprisonment); 28 U.S.C. s 1497, 28 U.S.C.A. s 1497 (trespass to oyster beds).

FN43. 60 Stat. 1049, 1054 (1946), 25 U.S.C. s 70s, 25 U.S.C.A. s 70s.

The same may undoubtedly be said of the customs jurisdiction vested in the Court of Customs and Patent Appeals by 28 U.S.C. s 1541, 28 U.S.C.A. s 1541. [FN44] Contests over classification *575 and valuation of imported merchandise have long been maintainable in inferior federal courts. Under R.S. s 3011 (1878), suits after protest against the collector were authorized in the circuit courts. E.g., Greely's

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Administrator v. Burgess, 18 How. 413, 15 L.Ed. 455; Iasigi v. The Collector, 1 Wall. 375, 17 L.Ed. 686. When the Customs Administrative Act of 1890 was passed, c. 407, 26 Stat. 131, repealing that section and creating a Board of General Appraisers to review determinations of the collector, a further right of review was provided in the Circuit Courts. See **1486 De Lima v. Bidwell, 182 U.S. 1, 175, 21 S.Ct. 743, 744, 45 L.Ed. 1041. This Court took unquestioned appellate jurisdiction from those courts on numerous occasions. E.g., United States v. Ballin, 144 U.S. 1, 12 S.Ct. 507, 36 L.Ed. 321; Hoeninghaus v. United States, 172 U.S. 622, 19 S.Ct. 305, 43 L.Ed. 576. It has continued to accept review by certiorari from the Court of Customs Appeals since the jurisdiction of the Circuit Courts was transferred to it in 1909. E.g., Five Per Cent. Discount Cases, 243 U.S. 97, 37 S.Ct. 346, 61 L.Ed. 617; Barr v. United States, 324 U.S. 83, 65 S.Ct. 522, 89 L.Ed. 765. That the customs litigation authorized by s 1541 conforms to conventional notions of case or controversy seems no longer open to doubt.

FN44. 42 Stat. 15 (1921), as amended, 19 U.S.C. s 169, 19 U.S.C.A. s 169, makes 28 U.S.C. s 1541, 28 U.S.C.A. s 1541 applicable as well to the antidumping statute. See also 46 Stat. 735 (1930), as amended, 19 U.S.C. s 1516(b), (c), 19 U.S.C.A. s 1516(b, c), permitting classification or valuation cases to be initiated by protest from a competing domestic manufacturer, after which the importer's consignee may be made a party to suit in the Customs Court, with appeal to the Court of Customs and Patent Appeals.

Doubt has been expressed, however, about the jurisdiction conferred by 28 U.S.C. s 1542, 28 U.S.C.A. s 1542 and 60 Stat. 435 (1946), as amended, 15 U.S.C. s 1071, 15 U.S.C.A. s 1071, to review application and interference proceedings in the Patent Office relative to patents and trademarks. Parties to those proceedings are given an election to bring a civil action to contest the Patent Office decision in a District Court under 35 U.S.C. ss 145, 146, 35 U.S.C.A. ss 145, 146, or to seek review in the Court of Customs and Patent Appeals under 35 U.S.C. s 141, 35 U.S.C.A. s 141. If the latter choice is made, the Court confines its review to the evidence adduced before the Patent *576 Office and to the questions of law preserved by the parties; its decision 'shall be entered of record in the Patent Office and govern the further proceedings in the case.' 35 U.S.C. s 144, 35 U.S.C.A. s 144. The codification 'omitted as superfluous' the last sentence in the existing statute: 'But no opinion or decision of the court in any such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question.' Act of July 8, 1870, c. 230, s 50, 16 Stat. 198, 205; see Reviser's Note to 35 U.S.C. s 144, 35 U.S.C.A. s 144.

The latter provision was evidently instrumental in prompting a decision of this Court, at a time when review of Patent Office determinations was vested in the Court of Appeals for the District of Columbia, that the ruling called for by the statute was not of a judicial character. Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693, 699, 47 S.Ct. 284, 286, 71 L.Ed. 478. That is the most that the Postum holding can be taken to stand for, as United States ex rel. Bernardin v. Duell, 172 U.S. 576, 588--589, 19 S.Ct. 286, 290, 43 L.Ed. 559, had upheld the judicial nature of the review in all other respects. [FN45] And the continuing vitality of the decision even to this extent has been seriously weakened if not extinguished by the subsequent holding in Hoover Co. v. Coe, 325 U.S. 79, 88, 65 S.Ct. 955, 959, 89 L.Ed. 1488, sustaining the justiciability of the alternative remedy by civil action even though the Court deemed 'the effect of adjudication in equity the same as that of decision on appeal.' See Kurland and Wolfson, Supreme Court Review of the Court of Customs and Patent Appeals: Patent Office and Tariff Commission Cases, 18 G.W.L.Rev. 192, 194--198 (1950).

FN45. Curiously, Duell was not cited in Postum, while the cases that were--Frasch v. Moore, 211 U.S. 1, 29 S.Ct. 6, 53 L.Ed. 65; Atkins & Co. v. Moore, 212 U.S. 285, 29 S.Ct. 390, 53 L.Ed. 515; Baldwin Co. v. Howard Co., 256 U.S. 35, 41 S.Ct. 405, 65 L.Ed. 816--had, as the Court recognized, held only that the statutory scheme of review did not produce a 'final judgment' as required by the statute then governing appeals to the Court.

*577 At the time when Postum was decided, the proceeding in equity against the Patent Office was cumulative rather than alternative with the review by appeal, and it seems likely that it was this feature of the statute which caused the Court to characterize the judgment of the Court of Appeals as 'a mere administrative decision.' 272 U.S., at 698, **1487

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47 S.Ct., at 285. Thereafter Congress made the remedies alternative, Act of March 2, 1927, c. 273, s 11, 44 Stat. 1335, 1336, and it was this amended jurisdiction that it later transferred to the Court of Customs and Patent Appeals, renaming the court in the process. Act of March 2, 1929, c. 488, 45 Stat. 1475.

It may still be true that Congress has given to the equity proceeding a greater preclusive effect than that accorded to decisions of the Court of Customs and Patent Appeals. [FN46] Even so, that circumstance alone is insufficient to make those decisions nonjudicial. Tutun v. United States, 270 U.S. 568, 46 S.Ct. 425, 70 L.Ed. 738, decided by the same Court as Postum and not there questioned, is controlling authority. For the Court there held that a naturalization proceeding in a Federal District Court was a 'case' within the meaning of Article III, even though the Government was empowered by statute [FN47] to bring a later bill in equity for cancellation of the certificate.

FN46. See Stern and Gressman, Supreme Court Practice (1950), 44--46. But see Hobart Mfg. Co. v. Landers, Frary & Clark, 26 F.Supp. 198, 202, aff'd per curiam, 2 Cir., 107 F.2d 1016; Battery Patents Corp. v. Chicago Cycle Supply Co., 7 Cir., 111 F.2d 861, 863; Reviser's Note, 35 U.S.C. s 144, 35 U.S.C.A. s 144.

FN47. Naturalization Act of June 29, 1906, c. 3592, s 15, 34 Stat. 596, 601.

Mr. Justice Brandeis, the author of the Tutun opinion, had also prepared the Court's opinion in United States v. Ness, 245 U.S. 319, 38 S.Ct. 118, 62 L.Ed. 321, which upheld the Government's right to seek denaturalization even upon grounds known to and ***578** asserted unsuccessfully by it in the naturalization court. [FN48] Proceedings in that court, the opinion explained, were relatively summary, with no right of appeal, whereas the denaturalization suit was plenary enough to permit full presentation of all objections and was accompanied with appeal as of right. 245 U.S., at 326, 38 S.Ct., at 121. These differences made it reasonable for Congress to allow the Government another chance to contest the applicant's eligibility.

FN48. For later developments, see Schneiderman v. United States, 320 U.S. 118, 123--125, 63 S.Ct. 1333, 1335--1337, 87 L.Ed. 1796; Knauer v. United States, 328 U.S. 654, 671--673, 66 S.Ct. 1304, 1313--1314, 90 L.Ed. 1500; Chaunt v. United States, 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120.

The decision in Tutun, coming after Ness, draws the patent and trademark jurisdiction now exercised by the Court of Customs and Patent Appeals fully within the category of cases or controversies. So much was recognized in Tutun itself, 270 U.S., at 578, 46 S.Ct., at 427, where Mr. Justice Brandeis observed:

'If a certificate is procured when the prescribed qualifications have no existence in fact, it may be cancelled by suit. 'It is in this respect,' as stated in Johannessen v. United States, 32 S.Ct. 613, 615, 225 U.S. 227, 238 (56 L.Ed. 1066) 'closely analogous to a public grant of land (Rev.Stat. s 2289 et seq. * * , or of the exclusive right to make, use and vend a new and useful invention (Rev.Stat., s 4883, et seq. * * .'' (Emphasis added.)

Like naturalization proceedings in a District Court, appeals from Patent Office decisions under 35 U.S.C. s 144, 35 U.S.C.A. s 144 are relatively summary--since the record is limited to the evidence allowed by that office-- and are not themselves subject to direct review by appeal as of right. [FN49] It ***579** was as reasonable for Congress, therefore, to bind only the ****1488** Patent Office on appeals and to give private parties whether or not participants in such appeals a further opportunity to contest the matter on plenary records developed in litigation elsewhere. This practice but furnishes a further illustration of the specialized jurisdiction of the Court of Customs and Patent Appeals, akin to that of the Commerce Court, in passing upon the consistency with law of expert administrative judgments without undertaking to conclude private parties in nonadministrative litigation. We conclude that the Postum decision must be taken to be limited to the statutory scheme in existence before the transfer of patent and trademark litigation to that court.

FN49. We intimate no opinion whether 28 U.S.C. s 1256, 28 U.S.C.A. s 1256 was intended by Congress to make patent and trademark cases reviewable by certiorari in this Court. See Kurland and Wolfson, Supreme Court Review of the Court of Customs and Patent Appeals, 18 G.W.L.Rev. 192, 194--198 (1950).

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X.

We turn finally to the more difficult questions raised by the jurisdiction vested in the Court of Customs and Patent Appeals by 28 U.S.C. s 1543, 28 U.S.C.A. s 1543 to review Tariff Commission findings of unfair practices in import trade, and the congressional reference jurisdiction given the Court of Claims by 28 U.S.C. ss 1492 and 2509, 28 U.S.C.A. ss 1492, 1509. The judicial quality of the former was called into question though not resolved in Ex parte Bakelite Corp., 279 U.S. 438, 460--461, 49 S.Ct. 411, 416--417, 73 L.Ed. 789, [FN50] while that of the latter must be taken to have been adversely decided, so far as susceptibility to Supreme Court review is concerned, by In re Sanborn, 148 U.S. 222, 13 S.Ct. 577, 37 L.Ed. 429. [FN51]

FN50. Section 316(c) of the Tariff Act of 1922, c. 356, 42 Stat. 858, 943, involved in Bakelite, was reenacted in virtually identical terms by s 337(c) of the Tariff Act of 1930, 46 Stat. 590, 703, as amended, 19 U.S.C. s 1337(c), 19 U.S.C.A. s 1337(c).

FN51. Sanborn involved the departmental reference jurisdiction of the Court of Claims, since repealed by 67 Stat. 226 (1953); but the functions performed by the court in that case were not in substance different from those it still performs on request by Congress.

*580 At the outset we are not with a suggestion by the Solicitor General that even if the decisions called for by these heads of jurisdiction are nonjudicial, their compatibility with the status of an Article III court has been settled by O'Donoghue v. United States, 289 U.S. 516, 545--548, 53 S.Ct. 740, 748--749, 77 L.Ed. 1356. It is true that O'Donoghue upheld the authority of Congress to invest the federal courts for the District of Columbia with certain administrative responsibilities--such as that of revising the rates of public utilities [FN52]--but only such as were related to the government of the District. See Pitts v. Peak, 60 App.D.C. 195, 197, 50 F.2d 485, 487, cited and relied upon in O'Donoghue, 289 U.S., at 547--548, 53 S.Ct., at 749. [FN53] To extend that holding **1489 to the wholly nationwide jurisdiction of courts whose seat is in the District of Columbia would be to ignore the special importance attached in the O'Donoghue opinion to the need there for an independent national judiciary.

FN52. See Keller v. Potomac Electric Power Co., 261 U.S. 428, 43 S.Ct. 445, 67 L.Ed. 731.

FN53. Federal Radio Comm'n v. General Electric Co., 281 U.S. 464, 50 S.Ct. 389, 74 L.Ed. 969, which sustained the authority of the Court of Appeals for the District of Columbia to render an 'administrative' decision respecting the issuance of a radio broadcasting license to a station in Schenectady, New York, was decided at a time when the courts of the District were regarded wholly as legislative courts. Id., at 468, 50 S.Ct., at 390.
It is significant that all of the jurisdiction at issue in the Keller, Postum, and General Electric cases has long since been transformed into judicial business. The change with respect to review of Patent Office decisions took place, as we have seen, 370 U.S., p. 577, 82 S.Ct., p. 1487, supra, before the transfer of that jurisdiction to the Court of Customs and Patent Appeals. Review of the Public Utilities Commission was restricted to questions of law upon the evidence before the Commission, in the Act of August 27, 1935, s 2, 49 Stat. 882, D.C.Code, 1961, s 43--705. See Public Utilities Comm'n v. Pollak, 343 U.S. 451, 458, 72 S.Ct. 813, 818, 96 L.Ed. 1068. And the Act of July 1, 1930, c. 788, 46 Stat. 844, likewise made review of the Radio Commission judicial, as was recognized in Federal Radio Comm'n v. Nelson Bros., etc., Co., 289 U.S. 266, 274--278, 53 S.Ct 627, 632--633, 77 L.Ed. 1166.

*581 [32][33] The restraints of federalism are, of course, removed from the powers exercisable by Congress within the District. For, as the Court early stated, in Kendall v. United States ex rel. Stokes, 12 Pet. 524, 619, 9 L.Ed. 1181:

'There is in this district, no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice.'

Thus those limitations implicit in the rubric 'case or controversy' that spring from the Framers' anxiety not to intrude unduly upon the general jurisdiction of state courts, see Madison's Notes of the Debates, in II Farrand, Records of the Federal Convention (1911), 45--46, need have no application in the

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District. The national courts here may, consistently with those limitations, perform any of the local functions elsewhere performed by state courts. [FN54]

FN54. The D.C.Code, 1961, Tit. 11, c. 5, establishes a special term of the United States District Court as a probate court, whereas the other Federal District Courts have been debarred from exercising such a jurisdiction as one traditionally within the domain of the States. Byers v. McAuley, 149 U.S. 608, 619, 13 S.Ct. 906, 910, 37 L.Ed. 867. Similarly, the divorce proceedings maintainable under the general jurisdictional grant, D.C.Code, s 11--306; see Bottomley v. Bottomley, 104 U.S.App.D.C. 311, 262 F.2d 23, are beyond the ken of the federal courts in the States. Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383, 50 S.Ct. 154, 155, 74 L.Ed. 489.
The appointing authority given judges of the District Court to select members of the Board of Education and of the Commission on Mental Health, D.C.Code, ss 31--101, 21--308, is probably traceable to Art. II, s 2 of the Constitution. See note 10, supra; Ex parte Siebold, 100 U.S. 371, 397--398, 25 L.Ed. 717.

[34] But those are not the only limitations embodied in Article III's restriction of judicial power to cases or controversies. ***582** The restriction expresses as well the Framers' desire to safeguard the independence of the judicial from the other branches by confining its activities to 'cases of a Judiciary nature,' see II Farrand, op. cit., supra, at 430, and in this respect it remains fully applicable at least to courts invested with jurisdiction solely over matters of national import. Our question is whether the independence of either the Court of Claims or the Court of Customs and Patent Appeals has been so compromised by its investiture with the particular heads of jurisdiction described above as to destroy its eligibility for recognition as an Article III court.

The jurisdictional statutes in issue, s 337 of the Tariff Act of 1930 and 28 U.S.C. ss 1492, 2509, 28 U.S.C.A. ss 1492, 2509, appear to subject the decisions called for from those courts to an extrajudicial revisory authority incompatible with the limitations upon judicial power this Court has drawn from Article III. See, e.g., Chicago & Southern Air Lines, Inc., v. Waterman S.S. Corp., 333 U.S. 103, 113--114, 68 S.Ct. 431, 437--438, 92 L.Ed. 568; Hayburn's Case, 2 Dall. 409, 1 L.Ed. 436. Whether they actually do so is not, however, entirely free from difficulty, and cannot in our view appropriately be decided in a vacuum, apart from the setting of particular cases in which we may gauge the operation of the statutes. For disposition of the present cases, we think it is sufficient simply to note the doubt attending the validity of the jurisdiction, ****1490** and to proceed on the assumption that it cannot be entertained by an Article III court.

[35] It does not follow, however, from the invalidity, actual or potential, of these heads of jurisdiction, that either the Court of Claims or the Court of Customs and Patent Appeals must relinquish entitlement to recognition as an Article III court. They are not tribunals, as are for example the Interstate Commerce Commission or the Federal Trade Commission, a substantial and integral part of whose business is nonjudicial.

***583** The overwhelming majority of the Court of Claims' business is composed of cases and controversies. See 370 U.S., pp. 573--574, 82 S.Ct., pp. 1484, 1485, supra. In the past year, it heard only 10 reference cases, Annual Report of the Administrative Office of the United States Courts (1961), 318; and its recent annual average has not exceeded that figure, Pavenstedt, The United States Court of Claims as a Forum for Tax Cases, 15 Tax L.Rev. 1, 6 n. 23 (1959). The tariff jurisdiction of the Court of Customs and Patent Appeals is of even less significant dimensions. In the past fiscal year, that court disposed of 41 customs cases and 112 patent or trademark cases, but heard no appeals from the Tariff Commission. Annual Report of the Administrative Office of the United States Courts (1961), 318. Indeed we are advised that in all the years since 1922, when the predecessor to s 337 of the Tariff Act was first enacted, the Court of Customs and Patent Appeals has entertained only six such cases. [FN55] Certainly the status of a District Court or Court of Appeals would not be altered by a mere congressional attempt to invest it with such insignificant nonjudicial business; it would be equally perverse to make the status of these courts turn upon so minuscule a portion of their purported functions.

FN55. Brief on behalf of the chief judge and the associate judges of the United States Court of Customs and Patent Appeals as amici curiae, p. 10.

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The Congress that enacted the assignment statute with its accompanying declarations was apprised of the possibility that a re-examination of the Bakelite and Williams decisions might lead to disallowance of some of these courts' jurisdiction. See 99 Cong.Rec. 8944 (1953) (remarks of Senator Gore); 104 Cong.Rec. 17549 (1958) (remarks of Senator Talmadge.) Nevertheless it chose to pass the statute. We think with it that, if necessary, the particular offensive jurisdiction, and not the courts, would fall.

***584** CONCLUSIONS.

Since the Court of Claims and the Court of Customs and Patent Appeals are courts created under Article III, their judges--including retired judges, Booth v. United States, 291 U.S. 339, 350--351, 54 S.Ct. 379, 380--381, 78 L.Ed. 836--are and have been constitutionally protected in tenure and compensation. Our conclusion, it should be noted, is not an ex post facto resurrection of a banished independence. The judges of these two courts have never accepted the dependent status thrust at them by the Bakelite and Williams decisions. See, e.g., Judge Madden writing for the Court of Claims in Pope v. United States, 53 F.Supp. 570, 100 Ct.Cl. 375, rev'd, 323 U.S. 1, 65 S.Ct. 16, 89 L.Ed. 3. The factors set out at length in this opinion, which were not considered in the Bakelite and Williams opinions, make plain that the differing conclusion we now reach does no more than confer legal recognition upon an independence long exercised in fact.

[36] That recognition suffices to dispose of the present cases. For it can hardly be contended that the specialized functions of these judges deprive them of capacity, as a matter of due process of law, to sit in judgment upon the staple business of the District Courts and Courts of Appeals. Whether they should ****1491** be given such assignments may be and has been a proper subject for congressional debate, e.g., 62 Cong.Rec. 190--191, 207--209 (1921), but once legislatively resolved it can scarcely rise to the dignity of a constitutional question. To be sure, a judge of specialized experience may at first need to devote extra time and energy to familiarize himself with criminal, labor relations, or other cases beyond his accustomed ken. But to elevate this temporary disadvantage into a constitutional disability would be tantamount to suggesting that the President may never appoint to the bench a lawyer whose life's practice may have been devoted to patent, tax, antitrust, or any other specialized ***585** field of law in which many eminently well- qualified lawyers are wont to engage. The proposition will not, of course, survive its statement.

The judgments of the Courts of Appeals are affirmed.

Affirmed.

Mr. Justice FRANKFURTER took no part in the decision of this case.

Mr. Justice WHITE took no part in the consideration or decision of this case.

Mr. Justice CLARK, with whom THE CHIEF JUSTICE joins, concurring in the result.

I cannot agree to the unnecessary overruling of Ex parte Bakelite Corp., 279 U.S. 438, 49 S.Ct. 411, 73 L.Ed. 789 (1929), and Williams v. United States, 289 U.S. 553, 53 S.Ct. 751, 77 L.Ed. 1372 (1933). Both were unanimous opinions by most distinguished Courts, [FN1] headed in the Bakelite case by Chief Justice Taft and in Williams by Chief Justice Hughes.

> FN1. Bakelite: Taft, Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford and Stone, Williams: Hughes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Stone, Roberts and Cardozo.

Long before Glidden v. Zdanok was filed, the Congress had declared the Court of Claims 'to be a court established under article III of the Constitution of the United States.' Act of July 28, 1953, s 1, 67 Stat. 226, 28 U.S.C.A. s 171. Not that this ipse dixit made the Court of Claims an Article III court, for it must be examined in light of the congressional power exercised and the jurisdiction enjoyed, together with the characteristics of its judges. But the 1953 Act did definitely establish the intent of the Congress, which prior to that time was not clear in light of the Williams holding 20 years earlier that it was not an Article III court.

***586** It is my belief that prior to 1953 the Court of Claims had all of the characteristics of an Article III court--jurisdiction over justiciable matters, issuance

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of final judgments, judges appointed by the President with consent of the Senate--save as to the congressional reference matters. It was the fact that a substantial portion of its jurisdiction consisted of congressional references that compelled the decision in Williams that it was not an Article III court and therefore the salaries of its judges could be reduced. [FN2] Since that time the Article III **1492 jurisdiction of the Court of Claims has been enlarged by including original jurisdiction under several Acts, e.g., suits against the United States for damages for unjust conviction, Act of May 24, 1938, ss 1--4, 52 Stat. 438, 28 U.S.C. s 1495, 28 U.S.C.A. s 1495, and appellate jurisdiction over tort suits against the United States tried in the District Courts, Act of Aug. 2, 1946, s 412(a)(2), 60 Stat. 844, 28 U.S.C. s 1504, 28 U.S.C.A. s 1504, and over suits before the Indian Claims Commission, Act of May 24, 1949, s 89(a), 63 Stat. 102, 28 U.S.C. s 1505, 28 U.S.C.A. s 1505. In addition, the former jurisdiction over questions referred by the Executive branch was withdrawn in 1953. Act of July 28, 1953, s 8, 67 Stat. 226. The result is that practically all of the court's jurisdiction *587 is now comprised of Article III cases. And I read the 1953 Act as unequivocally expressing Congress' intent that this court--the jurisdiction of which was then almost entirely over Article III cases--should be an Article III court, thereby irrevocably establishing life tenure and irreducible salaries for its judges.

> FN2. "From the outset Congress has required it (the Court of Claims) to give merely advisory decisions on many matters. Under the act creating it all of its decisions were to be of that nature. Afterwards some were to have effect as binding judgments, but others were still to be merely advisory. This is true at the present time." Williams v. United States, supra, 289 U.S. at 569, 53 S.Ct. at 756 (quoting from Ex parte Bakelite).
>
> 'Further reflection tends only to confirm the views expressed in the Bakelite opinion * * * and we feel bound to reaffirm and apply them. And, giving these views due effect here, we see no escape from the conclusion that, if the Court of Customs Appeals is a legislative court, so also is the Court of Claims.' Williams, at 571, 53 S.Ct. at 757. The Bakelite decision was posited squarely on the legislative reference function. See Ex parte Bakelite, supra, 279 U.S. 454--458, 49 S.Ct. 414--416.

It is true that Congress still makes legislative references to the court, averaging some 10 a year. The acceptance of jurisdiction of either executive or legislative references calling for advisory opinions has never been honored by Article III courts. Indeed, this Court since 1793 has consistently refused so to act. Correspondence of the Justices, 3 Johnston, Correspondence and Public Papers of John Jay (1891), 486--489. Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911). I do not construe the legislative history of the 1953 Act to be so clear as to require the Court of Claims to carry on this function, which appears to be minuscule. On the contrary, the congressional mandate clearly and definitely declared the court 'to be a court established under article III.' I would carry out that mandate. In my view the Court of Claims, if and when such a reference occurs, should with due deference advise the Congress, as this Court advised the President 169 years ago, that it cannot render advisory opinions.

Likewise I find that the Court of Customs and Patent Appeals has been an Article III court since 1958. It was created by the Congress in 1909 to exercise exclusive appellate jurisdiction over customs cases. Payne-Aldrich Tariff Act of Aug. 5, 1909, 36 Stat. 11, 105--108. At that time these cases were reviewed by Circuit Courts of Appeals--clearly of Article III status-- 36 Stat. 106, and they have since been considered on certiorari by this Court without suggestion that they were not 'cases' in the Article III sense. E.g., The Five Per Cent. Discount *588 Cases, 243 U.S. 97, 37 S.Ct. 346, 61 L.Ed. 617 (1917). [FN3] The Congress enlarged the jurisdiction of the Court of Customs and Patent Appeals in 1922 to include appeals on questions of law from Tariff Commission findings in proceedings relating to unfair practices in the import trade. Tariff Act of 1922, 42 Stat. 943, 944. In 1929 this Court in Bakelite, supra, which involved a tariff matter, found these references to be of an advisory nature and on this basis declared the Court of Customs and Patent Appeals to be a legislative rather than an Article III court. The Bakelite decision indicates that this Court was of the impression that the tariff jurisdiction of the Court of Customs and Patent Appeals would be significant. However, since that time that court has handled but four such references--and only one in the **1493 last 27 years. At about the same time that the Bakelite opinion came down, Congress transferred the appellate jurisdiction in patent and trademark cases from the Court of Appeals of the District of

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arises, *Landgraf v. USI Film Products, supra,* 511 U.S., at 275, and n. 29, 114 S.Ct. at 1502, and n. 29, and even, if the statute clearly so requires, after they have been applied in a case but before final judgment has been entered. Petitioners' principle would therefore lead to the conclusion that final judgments rendered on the basis of a stringent (or, alternatively, liberal) rule of pleading or proof may be set aside for retrial under a new liberal (or, alternatively, stringent) rule of pleading or proof. This alone provides massive scope for undoing final judgments and would substantially subvert the doctrine of separation of powers.

The central theme of the dissent is a variant on these arguments. The dissent maintains that *Lampf* "announced" a new statute of limitations, *post,* at 1466, in an act of "judicial ... lawmaking," *post,* at 1467, that "changed the law," *post,* at 1468. That statement, even if relevant, would be wrong. The point decided in *Lampf* had never before been addressed by this Court, and was therefore an open question, no matter what the lower courts had held at the time. But the more important point is that *Lampf* as such is irrelevant to this case. The dissent itself perceives that "[w]e would have the same issue to decide had Congress enacted the *Lampf* rule," and that the *Lampf* rule's genesis in judicial lawmaking rather than, shall we say, legislative lawmaking, "should not ***230** affect the separation-of-powers analysis." *Post,* at 1467. Just so. The issue here is not the validity or even the source of the legal rule that produced the Article III judgments, but rather the immunity from legislative abrogation of those judgments themselves. The separation-of-powers question before us has nothing to do with *Lampf,* and the dissent's attack on *Lampf* has nothing to do with the question before us.

C

Apart from the statute we review today, we know of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation. That prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed. The closest analogue that the Government has been able to put forward is the statute at issue in *United States v. Sioux Nation,* 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980). That law required the Court of Claims " '[n]otwithstanding any other provision of law ... [to] review on the merits, without regard to the defense of res judicata or collateral estoppel,' " a Sioux claim for just compensation from the United States--even though the Court of Claims had previously heard and rejected that very claim. We considered and rejected separation-of-powers objections to the statute based upon *Hayburn's Case* and *United States v. Klein.* See 448 U.S., at 391-392, 100 S.Ct., at 2728-2729. The basis for our rejection was a line of precedent (starting with *Cherokee Nation v. United States,* 270 U.S. 476, 46 S.Ct. 428, 70 L.Ed. 694 (1926)) that stood, we said, for the proposition that "Congress has the power to waive the res judicata effect of a prior judgment ****1459** entered in the Government's favor on a claim against the United States." *Sioux Nation,* 448 U.S., at 397, 100 S.Ct., at 2731. And our holding was as narrow as the precedent on which we had relied: "In sum, ... Congress' mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States does ***231** not violate the doctrine of separation of powers." *Id.,* at 407, 100 S.Ct., at 2737. [FN5]

> FN5. The dissent quotes a passage from the opinion saying that Congress " 'only was providing a forum so that a new judicial review of the Black Hills claim could take place.' " *Post,* at 1471 (quoting 448 U.S., at 407, 100 S.Ct., at 2736). That is quite consistent with the res judicata holding. Any party who waives the defense of res judicata provides a forum for a new judicial review.

The SolicitorGeneral suggests that even if *Sioux Nation* is read in accord with its holding, it nonetheless establishes that Congress may require Article III courts to reopen their final judgments, since "if res judicata were compelled by Article III to safeguard the structural independence of the courts, the doctrine would not be subject to waiver by any party litigant." Brief for United States 27 (citing *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 850-851, 106 S.Ct. 3245, 3256-3257, 92 L.Ed.2d 675 (1986)). But the proposition that legal defenses based upon doctrines central to the courts' structural independence can never be waived simply does not accord with our cases. Certainly one such doctrine consists of the "judicial Power" to disregard an unconstitutional statute, see *Marbury,* 1 Cranch, at 177; yet none would suggest that a litigant may never waive the

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Columbia to the Court of Customs and Patent Appeals. Act of March 2, 1929, ss 1, 2, 45 Stat. 1475. Thus, contrary to the apparent assumption in Bakelite, the business of that court now consists exclusively of Article III cases--with tariff references practically nonexistent (one in the last 27 years). In view of this evolution of its jurisdiction, I believe the court became an Article III court upon the clear manifestation of congressional intent that it be such. Act of Aug. 25, 1958, s 1, 72 Stat. 848, 28 U.S.C.A. s 211.

FN3. That its original jurisdiction was in 'cases' in the Article III, s 2, sense cannot be questioned. See In re Frischer & Co., 16 Ct.Cust.App. 191, 198 (1928); Osborn v. Bank of U.S., 9 Wheat. 738, 819, 6 L.Ed. 204 (1824); Interstate Commerce Commission v. Brimson, 154 U.S. 447, 487, 14 S.Ct. 1125, 1137, 38 L.Ed. 1047 (1894); Tutun v. United States, 270 U.S. 568, 576--577, 46 S.Ct. 425, 426--427, 70 L.Ed. 738 (1926).

As I have indicated, supra, the handling of the tariff references--numbering only 6 in 40 years--is not an Article III court function. The Congress has declared ***589** the Court of Customs and Patent Appeals to be an Article III court. It should, therefore, if and when such a case arose, with due deference refuse to exercise such jurisdiction. [FN4]

FN4. The validity of Judge Jackson's participation, as the Government points out, might also be sustained under the Act of September 14, 1922, c. 306, s 5, 42 Stat. 837, 839, which provided for the assignment of judges of the Court of Customs Appeals to the courts of the District of Columbia. This Act was on the books when Judge Jackson took his seat on the Court of Customs and Patent Appeals as well as when the Lurk case was tried.

I see nothing in the argument that the 1953 and 1958 Acts so changed the character of these courts as to require new presidential appointments. Congress was merely renouncing its power to terminate the functions or reduce the tenure or salary of the judges of the courts. Much more drastic changes have been made without reappointment. [FN5] And there is no significance to the fact that Judge Jackson, who presided over the Lurk trial, was not in active status in 1958 when Congress declared his court to be an Article III court. He remained in office as a judge of that court even though retired, cf. Booth v. United States, 291 U.S. 339, 54 S.Ct. 379, 78 L.Ed. 836 (1934), and his judgeship was controlled by any act concerning the jurisdiction of that court or the status of its judges.

FN5. Nor does my holding carry any implication that judgments entered prior to the date of these Acts in which judges of these courts participated might be collaterally attacked. Ex parte Ward, 173 U.S. 452, 19 S.Ct. 459, 43 L.Ed. 765 (1899).

I would affirm.

Mr. Justice DOUGLAS with whom Mr. Justice BLACK concurs, dissenting.

The decision in these cases has nothing to do with the character, ability, or qualification of the individuals who sat on assignment on the Court of Appeals in No. 242 and ***590** on the District Court [FN1] in No. 481. The problem is an impersonal one, concerning the differences between an Article I court and an Article III court. ****1494** My Brother HARLAN calls it a problem of a 'highly theoretical nature.' Far from being 'theoretical' it is intensely practical, for it deals with powers of judges over the life and liberty of defendants in criminal cases and over vast property interests in complicated trials customarily involving the right to trial by jury.

FN1. The District Court of the District of Columbia, like the 'inferior courts' established by Congress under Art. III, s 1, of the Constitution, is an Article III court (O'Donoghue v. United States, 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356), even though it possesses powers that Article III courts could not exercise. Congress, acting under its plenary power granted by Art. I, s 8, to legislate for the District of Columbia, has from time to time vested in the courts of the District administrative and even legislative powers. See, e.g., Keller v. Potomac Electric Co., 261 U.S. 428, 440--443, 43 S.Ct. 445, 447--448, 67 L.Ed. 731 (review of rate making); Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693, 698--701, 47 S.Ct. 284, 285--286, 71 L.Ed. 478 (patent and trademark appeals); Federal Radio Comm. v. General Electric Co., 281 U.S. 464, 467--468, 50 S.Ct. 389, 390, 74 L.Ed. 969 (review of radio station licensing; cf. Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 274--278, 53 S.Ct. 627, 631--633, 77 L.Ed. 1166). Congress has also authorized District Court judges to appoint members of the Board of Education. D.C.Code, s 31--101.
In O'Donoghue v. United States, supra, 289 U.S.

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at 545, 53 S.Ct. at 748, the Court said:
'The fact that Congress, under another and plenary grant of power, has conferred upon these courts jurisdiction over nonfederal causes of action, or over quasi judicial or administrative matters, does not affect the question. In dealing with the District, Congress possesses the powers which belong to it in respect of territory within a state, and also the powers of a state.'
The eighteenth-century courts in this country performed many administrative functions. See Pound, Organization of Courts (1940), pp. 88--89. The propriety of the union of legislative and judicial powers in a state court was assumed in Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150.

Prior to today's decision the distinction between the two courts had been clear and unmistakable. By Art. I, s 8, Congress is given a wide range of powers, including ***591** the power 'to pay the Debts' of the United States and the power to 'lay and collect Taxes, Duties, Imposts and Excises.' By Art. I, s 8, Congress is also given the power 'To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.' Pursuant to the latter--the Necessary and Proper Clause--the Court of Claims was created 'to pay the Debts'; [FN2] and the Court of Customs and Patent Appeals was created in furtherance of the collection of duties. My Brother HARLAN shows that the Court of Customs Appeals traces back to the Payne-Aldrich Tariff Act of August 5, 1909, which should be proof enough that it is an administrative court, performing essentially an executive task. [FN3]

FN2. 'Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.
'Conspicuous among such matters are claims against the United States. These may arise in many ways and may be for money, lands, or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them.
The Court of Claims is such a court. It was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies.' Ex parte Bakelite Corp., 279 U.S. 438, 451--452, 49 S.Ct. 411, 413, 73 L.Ed. 789.

FN3. 'The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution. The full province of the court under the act creating it is that of determining matters arising between the government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the Customs Court, formerly called the Board of General Appraisers. The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers. True, the provisions of the customs laws requiring duties to be paid and turned into the treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid; but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. In fact, their final determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings.' Ex parte Bakelite Corp., supra, note 2, at 458, 49 S.Ct. at 416.

****1495 *592** In Williams v. United States, 289 U.S. 553, 53 S.Ct. 751, 77 L.Ed. 1372, the Court in a unanimous decision written by Mr. Justice Sutherland held that the Court of Claims, though exercising judicial power, was an Article I court. And in Ex parte Bakelite Corp., 279 U.S. 438, 49 S.Ct. 411, 73 L.Ed. 789, the Court in a unanimous opinion written by Mr. Justice Van Devanter held the Court of Customs Appeals to be an Article I court. Taft was Chief Justice when Ex parte Bakelite was decided. Hughes was Chief Justice when Williams v. United States was decided. I

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mention the two regimes that filed the unanimous opinions in those cases to indicate the vintage of the authority which decided them. Their decisions, of course, do not bind us, for they dealt with matters of constitutional interpretation which are always open. Yet no new history has been unearthed to show that the Taft and the Hughes Courts were wrong on the technical, but vitally important, question now presented.

Mr. Justice Van Devanter in Ex parte Bakelite marked the line between the Court of Claims and the Court of *593 Customs and Patent Appeals on the one hand and the District Courts and Courts of Appeals on the other:

'Those established under the specific power given in section 2 of article 3 are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of section 2 of article 3; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior.' Id., at 449, 49 S.Ct. at 412.

My Brother HARLAN emphasizes that both Judge Madden of the Court of Claims and Judge Jackson of the Court of Customs and Patent Appeals 'enjoy statutory assurance of tenure and compensation'; and so they do. But that statement reveals one basic difference between an Article III judge and an Article I judge. The latter's tenure is statutory and statutory only; Article I contains no guarantee that the judges of Article I courts have life appointments. Nor does it provide that their salaries may not be reduced during their term of office. On the other hand, the tenure of an Article III judge is during 'good behaviour'; moreover, Article III provides that its judges shall have a compensation that 'shall not be diminished during their Continuance in Office.' See O'Malley v. Woodrough, 307 U.S. 277, 59 S.Ct. 838, 83 L.Ed. 1289. To repeat, there is not a word in Article I giving its courts such protection in tenure or in salary. A constitutional amendment would be necessary to supply Article I judges with the guarantees *594 of tenure and salary that Article III gives its judges. The majority attempts to evade this problem by looking to so-called 'Congressional intent' to find the creation of an Article III court. Congress, however, has always understood **1496 that it was only establishing Article I courts when it created the Court of Claims and the Court of Customs and Patent Appeals. The tenure it affixed to the judges of those tribunals was of necessity statutory only, as no mandate or requirement of Article I was involved.

The importance of these provisions to the independence of the judiciary needs no argument. Hamilton stated the entire case in The Federalist No. 79 (Lodge ed. 1908), pp. 491--493:

'Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made in relation to the President is equally applicable here. In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter. The enlightened friends to good government in every State, have seen cause to lament the want of precise and explicit precautions in the State constitutions on this head. Some of these indeed have declared that permanent salaries should be established for the judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. The plan of the convention accordingly has provided that the judges of *595 the United States 'shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office.'

'This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant to- day, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity

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to the variations in circumstances, yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial officers may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office, in respect to him. * * *

'This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the States in regard to their own judges.

'The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate; and, if convicted, may be dismissed from office, and ***596** disqualified for holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own ****1497** Constitution in respect to our own judges.'

We should say here what was said in United States ex rel. Toth v. Quarles, 350 U.S. 11, 17, 76 S.Ct. 1, 5, 100 L.Ed. 8:

'* * * the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals.'

Tenure that is guaranteed by the Constitution is a badge of a judge of an Article III court. The argument that mere statutory tenure is sufficient for judges of Article III courts was authoritatively answered in Ex parte Bakelite Corp., supra, 279 U.S. at 459--460, 49 S.Ct. at 416:

'* * * the argument is fallacious. It mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred. Nor has there been any settled practice on the part of Congress which gives special significance to the absence or presence of a provision respecting the tenure of judges. This may be illustrated by two citations. The same Congress that created the Court of Customs Appeals made provision for five additional circuit judges, and declared that they should ***597** hold their offices during good behavior; and yet the status of the judges was the same as it would have been had that declaration been omitted. In creating courts for some of the territories, Congress failed to include a provision fixing the tenure of the judges; but the courts became legislative courts just as if such a provision had been included.' (Italics added.)

Congress could make members of the Interstate Commerce Commission lifetime appointees. Yet I suppose no one would go so far as to say that a member of the Interstate Commerce Commission could be assigned to sit on the District Court or on the Court of Appeals. But if any agency member is disqualified, why is a member of another Article I tribunal, viz., the Court of Claims or the Court of Customs and Patent Appeals, qualified? No distinction can be drawn based on the functions performed by the Interstate Commerce Commission and those performed by the other two legislative tribunals. In each case some adjudicatory functions are performed. [FN4] Though the judicial functions of the Interstate Commerce Commission are as distinct as those of the Court of Claims, they nevertheless derive from Article I; and they are functions that Congress can exercise directly or delegate to an agency. Williams v. United States, supra, 289 U.S. pp. 567--571, 53 S.Ct. at 755--756. To make the present decision turn on whether the Court of Claims and the Court of Customs and Patent Appeals perform 'judicial' functions is to adopt a false standard. The manner in which the majority reasons exposes the fallacy.

FN4. The Interstate Commerce Commission has long entered reparation orders directing carriers to

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pay shippers specified sums of money plus interest for excessive and unreasonable rates. See Meeker v. Lehigh Valley R. Co., 236 U.S. 434, 35 S.Ct. 337, 59 L.Ed. 659; II Sharfman, The Interstate Commerce Commission (1931), pp. 387--388.

**1498 The majority says that once the United States consents to be sued all problems of 'justiciability' are satisfied; and *598 that Congress has broad powers to convert 'moral' obligations into 'legal' ones enforceable by 'constitutional' courts. The truth is, I think, that the dimensions of Article III can be altered only by the amending process, not by legislation. Congress can create as respects certain claims a limited 'justiciability.' But if 'justiciability' in the 'constitutional' sense is involved, then there must be trial by jury assuming, as my Brother HARLAN does, that the claim is for recovery for torts or some other compensable injury. To repeat, it does not advance analysis by calling the function a 'judicial' one (see Pope v. United States, 323 U.S. 1, 12, 65 S.Ct. 16, 22, 89 L.Ed. 3), for both Article I courts and Article III courts perform functions of that character. The crucial question on this phase of the problems is the manner in which that judicial power is to be exercised.

As Mr. Justice Brandeis made clear in Tutun v. United States, 270 U.S. 568, 576--577, 46 S.Ct. 425, 426, 70 L.Ed. 738, an administrative remedy may be 'judicial.' The question here is different; it is whether the procedures utilized by the tribunal must comport with those set forth in the Bill of Rights and in the body of the Constitution. Yet who would maintain that in an administrative action for damages a jury trial was necessary?

Judges of the Article III courts work by standards and procedures which are either specified in the Bill of Rights or supplied by well-known historic precedents. Article III courts are law courts, equity courts, and admiralty courts [FN5]--all specifically named in Article III. They sit *599 to determine 'cases' or 'controversies.' But Article I courts have no such restrictions. They need not be confined to 'cases' or 'controversies' but can dispense legislative largesse. See United States v. Alcea Band of Tillamooks, 329 U.S. 40, 67 S.Ct. 167, 91 L.Ed. 29; 341 U.S. 48, 71 S.Ct. 552, 95 L.Ed. 738. Their decisions may affect vital interests; yet like legislative bodies, zoning commissions, and other administrative bodies they need not observe the same standards of due process required in trials of Article III 'cases' or 'controversies.' See Bi-Metallic Inv. Co. v. State Board of Equalization of Colorado, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372. That is what Chief Justice Marshall meant when he said in American Ins. Co. v. Canter, 1 Pet. 511, 545--546, 7 L.Ed. 242 that an Article I court (in that case a territorial court) could make its adjudications without regard to the limitations of Article III. On the other hand, as the Court in O'Donoghue v. United States, supra, 289 U.S. at 546, 53 S.Ct. at 748, 77 L.Ed. 1356, observed, Article III courts could not be endowed with the administrative and legislative powers (or with the power to render advisory opinions) which Article I tribunals or agencies exercise.

FN5. As respects admiralty, Chief Justice Marshall said in American Ins. Co. v. Canter, 1 Pet. 511, 545, 7 L.Ed. 242:
'If we have recourse to that pure fountain from which all the jurisdiction of the Federal Courts is derived, we find language employed which cannot well be misunderstood. The Constitution declares, that 'the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction.'
'The Constitution certainly contemplates these as three distinct classes of cases * * *.'

In other words, the question, apart from the constitutional guarantee of tenure and the provision against diminution of salary, concerns the functions of the particular tribunal. Article III **1499 courts have prescribed for them constitutional standards some of which are in the Bill of Rights, while some (as for example those concerning bills of attainder and ex post facto laws) are in the body of the Constitution itself. Article I courts, on the other hand, are agencies of the legislative or executive branch. Thus while Article III courts of law must sit with a jury in suits where the value in controversy exceeds $20, the Court of Claims--an Article I court--is not so confined by the Seventh Amendment. The claims which *600 it hears are claims with respect to which the Government has agreed to be sued. As the Court said in McElrath v. United States, 102 U.S. 426, 440, 26 L.Ed. 189, since the jurisdiction of the Court of Claims is permissive only, Congress can prescribe the rules

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and the procedures to be followed in pursuing claims against the Government. Likewise, the Court of Customs Appeals hears appeals that 'include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers.' Ex parte Bakelite Corp., supra, 279 U.S. at 458, 49 S.Ct. at 416.

The judicial functions exercised by Article III courts cannot be performed by Congress nor delegated to agencies under its supervision and control. [FN6] The bill of *601 attainder is banned by Art. I, s 9. If there is to be punishment, courts (in the constitutional sense) must administer it. As we stated in United States v. Lovett, 328 U.S. 303, 317, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252:

> 'Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because **1500 the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts.'

Moreover, when an Article III court of law acts, there is a precise procedure that must be followed:

> 'An accused in court must be tried by an impartial jury, has a right to be represented by counsel, he must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him, he must not be compelled to incriminate himself, he cannot twice be put in jeopardy for the same offense, and even after conviction no cruel and unusual punishment can be inflicted upon him.' Id., 317--318, 66 S.Ct. at 1080.

*602 On the civil side there is not only the right to trial by jury in suits at common law where the value in controversy exceeds $20 but there is also the mandate of the Seventh Amendment directing that 'no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'

Neither of these limitations is germane to litigation in the Court of Claims or in the Court of Customs and Patent Appeals. Those courts, moreover, exercise no criminal jurisdiction, no admiralty jurisdiction, no equity jurisdiction.

As noted, the advisory opinion is beyond the capacity of Article III courts to render. Muskrat v.

FN6. The limitations on Article III courts that distinguish them from Article I courts were stated by Chief Justice Vinson in National Mut. Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 629--630, 69 S.Ct. 1173, 1201, 93 L.Ed. 1556, in words that have, I think, general acceptance, though on the precise issue he wrote in dissent:
'In Keller v. Potomac Electric Power Co., 1923, 261 U.S. 428, 43 S.Ct. 445, 67 L.Ed. 731, where this Court had before it an Act under which the courts of the District of Columbia were given revisory power over rates set by the Public Utilities Commission of the District, the appellee sought to sustain the appellate jurisdiction given this Court by the Act on the basis that 'Although Art. III of the Constitution limits the jurisdiction of the federal courts, this limitation is subject to the power of Congress to enlarge the jurisdiction, where such enlargement may reasonably be required to enable Congress to exercise the express powers conferred upon it by the Constitution.' 261 U.S. at page 435, 43 S.Ct. 445, 67 L.Ed. 731. There, as here, the power relied upon was that given Congress to exercise exclusive jurisdiction over the District of Columbia, and to make all laws necessary and proper to carry such powers into effect. But this Court clearly and unequivocally rejected the contention that Congress could thus extend the jurisdiction of constitutional courts, citing the note to Hayburn's Case, 1792, 2 Dall. 409, 410, 1 L.Ed. 436; United States v. Ferreira, 1851, 13 How. 40, note 52, 14 L.Ed. 42 and Gordon v. United States, 1864, 117 U.S. 697. These and other decisions of this Court clearly condition the power of a constitutional court to take cognizance of any cause upon the existence of a suit instituted according to the regular course of judicial procedure, Marbury v. Madison, 1803, 1 Cranch 137, 2 L.Ed. 60, the power to pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision, Muskrat v. United States, 1910, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246; Gordon v. United States, supra, the absence of revisory or appellate power in any other branch of Government, Hayburn's Case, supra; United States v. Ferreira, supra, and the absence of administrative or legislative issues or controversies, Keller v. Potomac Electric Power Co., supra; Postum Cereal Co. v. California Fig Nut Co., 1927, 272 U.S. 693, 47 S.Ct. 284, 71 L.Ed. 478.'

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United States, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246. Yet it is part and parcel of the function of legislative tribunals. [FN7]

FN7. See 28 U.S.C. s 1492, 28 U.S.C.A. s 1492, giving the Court of Claims power 'to report to either House of Congress on any bill referred to the court by such House.' And see 28 U.S.C. ss 2509, 2510, 28 U.S.C.A. ss 2509, 2510. 28 U.S.C. s 1542, 28 U.S.C.A. s 1542, gave the Court of Customs and Patent Appeals a kind of administrative review over certain decisions of the patent office. And see note 2, supra.

Thus I cannot say, as some do, that the distinction between the two kinds of courts is a 'matter of language.' [FN8] The majority over and again emphasizes the declaration by Congress that each of the courts in question is an Article III court. It seems that the majority tries to gain momentum for its decision from those congressional declarations. This Court, however, is the expositor of the meaning of the Constitution, as Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60, held; and a congressional enactment in the field of Article III is entitled to no greater weight than in other areas. The declarations by Congress that these legislative tribunals are Article III ***603** courts [FN9] would be determinative only if Congress had the power to modify or alter the concepts that radiate throughout Article III and throughout those provisions of the Bill of Rights that specify how the judicial power granted by Article III shall be exercised.

FN8. See H.R.Rep.No.2348, 84th Cong., 2d Sess., p. 3, U.S. Code Congressional and Administrative Service, 1956, p. 3122.

FN9. See Act of July 28, 1953, 67 Stat. 226, 28 U.S.C.A. s 171 (Court of Claims); Act of July 14, 1956, 70 Stat. 532, 28 U.S.C.A. s 251 (Customs Court); Act of August 25, 1958, 72 Stat. 848, 28 U.S.C.A. s 211 (Court of Customs and Patent Appeals).

An appointment is made by the President and confirmed by the Senate in light of the duties of the particular office. Men eminently qualified to sit on Article I tribunals or agencies are not picked or confirmed in light of their qualifications ****1501** to preside at jury trials or to process on appeal the myriad of constitutional and procedural problems involved in Article III 'cases' or 'controversies.' A President who sent a name to the Senate for the Interstate Commerce Commission or Federal Trade Commission might never dream of entrusting the nominee with the powers of an Article III judge. The tasks are so different, the responsibilities and the qualifications so diverse that it is difficult for one who knows the federal system to see how in the world of practical affairs these offices are interchangeable.

In the Senate debate on the Court of Customs Appeals, Senator Cummins stated that the judges who were to man it were to become tariff 'experts' whose judicial business would be 'confined to the matter of the duties on imports.' 44 Cong.Rec. 4185. Senator McCumber, who spoke for the Committee, emphasized the technical nature of the work of those judges and the unique specialization of their work.

'The law governing the development of the human intellect is such that constant study of a particular question necessarily broadens and expands and intensifies and deepens the mind on that particular subject. ***604** Any man who has gone over even the cotton schedule will understand how delicate questions will arise; how complex those questions must necessarily be, and how necessary it will be to have judges who will possess technical knowledge upon that subject; and a technical knowledge can only be obtained by a constant daily study of those questions. For that second reason it was thought best to have a court whose whole attention, whose whole life work, should be given to that particular subject.' Id., at 4199.

Could there be any doubt that the late John J. Parker, rejected by the Senate for this Court, would have been confirmed for one of these Article I courts?

It is said that Congress could separate law and equity and create federal judges who, though Article III judges, sit entirely on the equity side. If Congress can do that, it is said that Congress can divide up all judicial power as it chooses and by making tenure permanent allow judges to be assigned from an Article I to an Article III court. The fact that Article III judicial power may be so divided as to produce judges with no experience in the trial of jury cases or in the review of them on appeal is no excuse for allowing legislative judges to be imported into the important fields that Article III preserves and that are partly safeguarded by the Bill

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of Rights and partly represented by ancient admiralty practice [FN10] and equity procedures. Federal judges named to Article III courts are picked in light of the functions entrusted to them. No one knows whether a President would have appointed to an Article III court a man he named to an Article I court.

FN10. See The Lottawanna, 21 Wall. 558, 575, 22 L.Ed. 654; The Osceola, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760.

My view is that we subtly undermine the constitutional system when we treat federal judges as fungible. If members of the Court of Claims and of the Court of Customs ***605** and Patent Appeals can sit on life-and-death cases in Article III courts, so can a member of any administrative agency who has a statutory tenure that future judges sitting on this Court by some mysterious manner may change to constitutional tenure. With all deference, this seems to me to be a light-hearted treatment of Article III functions. [FN11] Men of highest quality chosen as Article I judges might never pass muster for Article III courts when tested by their record of tolerance for minorities ****1502 *606** and for their respect of the Bill of Rights-- neither of which is as crucial to the performance of the duties of those who sit in Article I courts as it is to the duties of Article III judges.

FN11. The Court does great mischief in today's opinions. The opinion of my Brother HARLAN stirs a host of problems that need not be opened. What is done will, I fear, plague us for years.
First, that opinion cites with approval Ex parte McCardle, 7 Wall. 506, 19 L.Ed. 264, in which Congress withdrew jurisdiction of this Court to review a habeas corpus case that was sub judice, and then apparently draws a distinction between that case and United States v. Klein, 13 Wall. 128, 20 L.Ed. 519, where such withdrawal was not permitted in a property claim. There is a serious question whether the McCardle case could command a majority view today. Certainly the distinction between liberty and property (which emanates from this portion of my Brother HARLAN'S opinion) has no vitality even in terms of the Due Process Clause.
Second, Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693, 47 S.Ct. 284, 71 L.Ed. 478, is apparently overruled. Why this is done is not apparent. That case ruled on the question whether a ruling on a Patent Office determination was 'judicial.' Whether it was or not is immaterial because, as already noted, Article I courts, like Article III courts, exercise 'judicial' power. The only relevant question here is whether a court that need not follow Article III procedures is nonetheless an Article III court.
Third, it is implied that Congress could vest the lower federal courts with the power to render advisory opinions. The character of the District Court in the District of Columbia has been differentiated from the other District Courts by O'Donoghue v. United States, supra, in that the former is, in part, an agency of Congress to perform Article I powers. How Congress could transform regular Article III courts into Article I courts is a mystery. Certainly we should not decide such an important issue so casually and so unnecessarily.

In sum, Judges who do not perform Article III functions, who do not enjoy constitutional tenure and whose salaries are not constitutionally protected against diminution during their term of office cannot be Article III judges.

Judges who perform 'judicial' functions on Article I courts do not adjudicate 'cases' or 'controversies' in the sense of Article III. They are not bound by the requirements of the Seventh Amendment concerning trial by jury.

Judges who sit on Article I courts are chosen for administrative or allied skills, not for their qualifications to sit in cases involving the vast interests of life, liberty, or property for whose protection the Bill of Rights and the other guarantees in the main body of the Constitution, including the ban on bills of attainder and ex post facto laws, were designed. Judges who might be confirmed for an Article I court might never pass muster for the onerous and life-or-death duties of Article III judges.

For these reasons I would reverse the judgments below.

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defense that a statute is unconstitutional. See, *e.g., G.D. Searle & Co. v. Cohn,* 455 U.S. 404, 414, 102 S.Ct. 1137, 1144, 71 L.Ed.2d 250 (1982). What may follow from our holding that the judicial power unalterably includes the power to render final judgments is not that waivers of res judicata are always impermissible, but rather that, as many Federal Courts of Appeals have held, waivers of res judicata need not always be accepted--that trial courts may in appropriate cases raise the res judicata bar on their own motion. See, *e.g., Coleman v. Ramada Hotel Operating Co.,* 933 F.2d 470, 475 (CA7 1991); *In re Medomak Canning,* 922 F.2d 895, 904 (CA1 1990); *Holloway Constr. Co. v. United States Dept. of Labor,* 891 F.2d 1211, 1212 (CA6 1989). Waiver subject to the control of the ***232** courts themselves would obviously raise no issue of separation of powers, and would be precisely in accord with the language of the decision that the Solicitor General relies upon. We held in *Schor* that, although a litigant had consented to bring a state-law counterclaim before an Article I tribunal, 478 U.S., at 849, 106 S.Ct., at 3255, we would nonetheless choose to consider his Article III challenge, because "when these Article III limitations are at issue, notions of consent and waiver cannot be *dispositive," id.,* at 851, 106 S.Ct., at 3257 (emphasis added). See also *Freytag v. Commissioner,* 501 U.S. 868, 878-879, 111 S.Ct. 2631, 2638-2639, 115 L.Ed.2d 764 (1991) (finding a "rare cas[e] in which we should exercise our discretion" to hear a waived claim based on the Appointments Clause, Art. II, § 2, cl. 2). [FN6]

> FN6. The statute at issue in *United States v. SiouxNation,* 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980), seemingly prohibited courts from raising the res judicata defense *sua sponte.* See *id.,* at 432-433, 100 S.Ct., at 2749-2750 (REHNQUIST, J., dissenting). The Court did not address that point; as far as appears it saw no reason to raise the defense on its own. Of course the unexplained silences of our decisions lack precedential weight. See, *e.g., Brecht v. Abrahamson,* 507 U.S. 619, 630-631, 113 S.Ct. 1710, 1717-1718, 123 L.Ed.2d 353 (1993).

Petitioners also rely on a miscellany of decisions upholding legislation that altered rights fixed by the final judgments of non-Article III courts, see, *e.g., Sampeyreac v. United States,* 7 Pet. 222, 238, 8 L.Ed. 665 (1833); *Freeborn v. Smith,* 2 Wall. 160, 17 L.Ed. 922 (1865), or administrative agencies, *Paramino Lumber Co. v. Marshall,* 309 U.S. 370, 60 S.Ct. 600, 84 L.Ed. 814 (1940), or that altered the prospective effect of injunctions entered by Article III courts, *Wheeling & Belmont Bridge Co.,* 18 How., at 421. These cases distinguish themselves; nothing in our holding today calls them into question. Petitioners rely on general statements from some ****1460** of these cases that legislative annulment of final judgments is not an exercise of judicial power. But even if it were our practice to decide cases by weight of prior dicta, we would find the many dicta that reject congressional ***233** power to revise the judgments of Article III courts to be the more instructive authority. See *supra,* at 1456-1457. [FN7]

> FN7. The dissent tries to turn the dicta of the territorial-court cases, *Sampeyreac* and *Freeborn,* into holdings. It says of *Sampeyreac* that "the relevant judicial power that the [challenged] statute arguably supplanted was this Court's Article III appellate jurisdiction." *Post,* at 1470. Even if it were true that the judicial power under discussion was that of this Court (which is doubtful), the point could still not possibly constitute a holding, since there was no "supplanted power" at issue in the case. One of the principal grounds of decision was that the finality of the territorial court's decree had *not* been retroactively abrogated. The decree had been entered under a previous statute which provided that a decree "shall be final and conclusive *between the parties.*" *Sampeyreac v. United States,* 7 Pet., at 239, 8 L.Ed. 665 (emphasis in original). The asserted basis for reopening was fraud, in that Sampeyreac did not actually exist. We reasoned that "as Sampeyreac was a fictitious person, he was no party to the decree, and the act [under which the decree had allegedly become final] in strictness does not apply to the case." *Ibid.*
>
> The dissent likewise says of *Freeborn* that "the 'judicial power' to which the opinion referred was this Court's Article III appellate jurisdiction." *Post,* at 1470. Once again, even if it was, the point remains dictum. No final judgment was at issue in *Freeborn.* The challenged statute reached only " 'cases of appeal or writ of error heretofore prosecuted *and now pending* in the supreme court of the United States,' " see *post,* at 1470, n. 7 (quoting 13 Stat. 441) (emphasis added). As we have explained, see *supra,* at 1456-1457, Congress may require (insofar as separation-of-powers limitations are concerned) that new statutes be applied in cases not yet final but still pending on appeal.

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Finally, petitioners liken § 27A(b) to Federal Rule of Civil Procedure 60(b), which authorizes courts to relieve parties from a final judgment for grounds such as excusable neglect, newly discovered evidence, fraud, or "any other reason justifying relief...." We see little resemblance. Rule 60(b), which authorizes discretionary judicial revision of judgments in the listed situations and in other " 'extraordinary circumstances,' " *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864, 108 S.Ct. 2194, 2204, 100 L.Ed.2d 855 (1988), does not impose any legislative mandate to reopen upon the courts, but merely reflects and ***234** confirms the courts' own inherent and discretionary power, "firmly established in English practice long before the foundation of our Republic," to set aside a judgment whose enforcement would work inequity. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244, 64 S.Ct. 997, 1000, 88 L.Ed. 1250 (1944). Thus, Rule 60(b), and the tradition that it embodies, would be relevant refutation of a claim that reopening a final judgment is always a denial of property without due process; but they are irrelevant to the claim that legislative instruction to reopen impinges upon the independent constitutional authority of the courts.

The dissent promises to provide "[a] few contemporary examples" of statutes retroactively requiring final judgments to be reopened, "to demonstrate that [such statutes] are ordinary products of the exercise of legislative power." *Post,* at 1471. That promise is not kept. The relevant retroactivity, of course, consists not of the requirement that there be set aside a judgment that has been rendered *prior to its being setting aside*--for example, a statute passed today which says that all default judgments rendered in the future may be reopened within 90 days after their entry. In that sense, *all* requirements to reopen are "retroactive," and the designation is superfluous. Nothing we say today precludes a law such as that. The finality that a court can pronounce is no more than what the law in existence at the time of judgment will permit it to pronounce. If the law then applicable says that the judgment may be reopened for certain reasons, that limitation is built into the judgment itself, and its finality is so conditioned. The present case, however, involves a judgment that Congress subjected to a reopening requirement which did not exist when the judgment was pronounced. The dissent provides not a single clear prior instance of such congressional action.

The dissent cites, first, Rule 60(b), which it describes as a "familiar remedial measure." *Ibid.* As we have just discussed, Rule 60(b) ****1461** does not provide a new remedy at all, but ***235** is simply the recitation of pre-existing judicial power. The same is true of another of the dissent's examples, 28 U.S.C. § 2255, which provides federal prisoners a statutory motion to vacate a federal sentence. This procedure " 'restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis.' " *United States v. Hayman,* 342 U.S. 205, 218, 72 S.Ct. 263, 271, 96 L.Ed. 232 (1952) (quoting the 1948 Reviser's Note to § 2255). It is meaningless to speak of these statutes as applying "retroactively," since they simply codified judicial practice that pre-existed. Next, the dissent cites the provision of the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, 50 U.S.C.App. § 520(4), which authorizes courts, upon application, to reopen judgments against members of the Armed Forces entered while they were on active duty. It could not be clearer, however, that this provision was not retroactive. It says: "If any judgment *shall be rendered* in any action or proceeding governed by this section against any person in military service during the period of such service ... *such judgment* may ... be opened...." (Emphasis added.)

The dissent also cites, *post,* at 1472, a provision of the Handicapped Children's Protection Act of 1986, 82 Stat. 901, 20 U.S.C. § 1415(e)(4)(B) (1988 ed. and Supp. V), which provided for the award of attorney's fees under the Education for All Handicapped Children Act of 1975, 89 Stat. 773, 20 U.S.C. § 1411 *et seq.* (1988 ed. and Supp. V). This changed the law regarding attorney's fees under the Education for All Handicapped Children Act, after our decision in *Smith v. Robinson,* 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984), found such fees to be unavailable. The provision of the Statutes at Large adopting this amendment to the United States Code specified, in effect, that it would apply not only to proceedings brought after its enactment, but also to proceedings pending at the time of, or brought after, the decision in *Smith.* See 100 Stat. 798. The amendment says nothing about reopening final judgments, and the retroactivity provision may well mean nothing ***236** more than that it applies not merely to new suits

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commenced after the date of its enactment, but also to *previously* filed (but not yet terminated) suits of the specified sort. This interpretation would be consistent with the only case the dissent cites, which involved a court-entered consent decree not yet fully executed. *Counsel v. Dow,* 849 F.2d 731, 734, 738-739 (CA2 1988). Alternatively, the statute can perhaps be understood to create a new cause of action for attorney's fees attributable to already concluded litigation. That would create no separation-of-powers problem, and would be consistent with this Court's view that "[a]ttorney's fee determinations ... are 'collateral to the main cause of action' and 'uniquely separable from the cause of action to be proved at trial.' " *Landgraf v. USI Film Products,* 511 U.S., at 277, 114 S.Ct., at 1503 (quoting *White v. New Hampshire Dept. of Employment Security,* 455 U.S. 445, 451-452, 102 S.Ct. 1162, 1166-1167, 71 L.Ed.2d 325 (1982)). [FN8]

FN8. Even the dissent's scouring the 50 States for support has proved unproductive. It cites statutes from five States, *post,* at 1472, nn. 13- 14. Four of those statutes involve a virtually identical provision, which permits the state-chartered entity that takes over an insolvent insurance company to apply to have any of the insurer's default judgments set aside. See Del.Code Ann., Tit. 18, § 4418 (1989); Fla.Stat. § 631.734 (1984); N.Y.Ins. Law § 7717 (McKinney Supp.1995); 40 Pa.Cons.Stat. § 991.1716 (Supp.1994). It is not at all clear, indeed it seems to us unlikely, that these statutes applied retroactively, to judgments that were final before enactment of the scheme that created the state-chartered entity. The last statute involves a discretionary procedure for allowing appeal by *pro se* litigants, Va.Code Ann. § 8.01-428(C) (Supp.1994). It is obvious that the provision did not apply retroactively, to judgments rendered before the procedures were established.

The dissent's perception that retroactive reopening provisions are to be found all about us is perhaps attributable to its inversion of the statutory presumption regarding retroactivity. Thus, it asserts that Rule 60(b) must be retroactive, since "[n]ot a single word in its text suggests that it does not apply to judgments entered prior to its effective date." ***237** *Post,* at 1471-1472. This reverses the traditional rule, confirmed only last Term, that statutes do *not* apply retroactively *unless* Congress expressly states that ****1462** they do. See *Landgraf, supra,* 511 U.S., at 277-280, 114 S.Ct., at 1502-1504. The dissent adds that "the traditional construction of remedial measures ... support[s] construing [Rule 60(b)] to apply to past as well as future judgments." *Post,* at 1472. But reliance on the vaguely remedial purpose of a statute to defeat the presumption against retroactivity was rejected in the companion cases of *Landgraf,* see 511 U.S., at 284-286, and n. 37, 114 S.Ct., at 1507-1508, and n. 37 and *Rivers v. Roadway Express,* 511 U.S., at 309-313, 114 S.Ct., at 1517-1520. Cf. *Landgraf, supra,* 511 U.S., at 297, 114 S.Ct., at 1488-1489 (Blackmun, J., dissenting) ("This presumption [against retroactive legislation] need not be applied to remedial legislation...") (citing *Sampeyreac,* 7 Pet., at 238).

The dissent sets forth a number of hypothetical horribles flowing from our assertedly "rigid holding"--for example, the inability to set aside a civil judgment that has become final during a period when a natural disaster prevented the timely filing of a certiorari petition. *Post,* at 1474. That is horrible not because of our holding, but because the underlying statute *itself* enacts a "rigid" jurisdictional bar to entertaining untimely civil petitions. Congress could undoubtedly enact *prospective* legislation permitting, or indeed requiring, this Court to make equitable exceptions to an otherwise applicable rule of finality, just as district courts do pursuant to Rule 60(b). It is no indication whatever of the invalidity of the constitutional rule which we announce, that it produces unhappy consequences when a legislature lacks foresight, and acts belatedly to remedy a deficiency in the law. That is a routine result of constitutional rules. See, *e.g., Collins v. Youngblood,* 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) (*Ex Post Facto* Clause precludes post-offense statutory extension of a criminal sentence); *United States Trust Co. of N.Y. v. New Jersey,* 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) (Contract Clause prevents retroactive alteration of contract with state bondholders); *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 589-***238** 590, 601-602, 55 S.Ct. 854, 863-864, 868-869, 79 L.Ed. 1593 (1935) (Takings Clause invalidates a bankruptcy law that abrogates a vested property interest). See also *United States v. Security Industrial Bank,* 459 U.S. 70, 78, 103 S.Ct. 407, 412, 74 L.Ed.2d 235 (1982).

Finally, we may respond to the suggestion of the

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UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 23--DEVELOPMENT AND CONTROL OF ATOMIC ENERGY
DIVISION A--ATOMIC ENERGY
SUBCHAPTER XIII--GENERAL AUTHORITY OF COMMISSION

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Current through P.L. 107-11, approved 5-28-01

§ 2212. Contractor liability for injury or loss of property arising out of atomic weapons testing programs

(a) Short title

This section may be cited as the "Atomic Testing Liability Act".

(b) Federal remedies applicable; exclusiveness of remedies

(1) Remedy

The remedy against the United States provided by sections 1346(b) and 2672 of Title 28, by the Act of March 9, 1920 (46 U.S.C.App. 741-752), or by the Act of March 3, 1925 (46 U.S.C.App. 781-790), as appropriate, for injury, loss of property, personal injury, or death shall apply to any civil action for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States.

(2) Exclusivity

The remedies referred to in paragraph (1) shall be exclusive of any other civil action or proceeding for the purpose of determining civil liability arising from any act or omission of the contractor without regard to when the act or omission occurred. The employees of a contractor referred to in paragraph (1) shall be considered to be employees of the Federal Government, as provided in section 2671 of Title 28, for the purposes of any such civil action or proceeding; and the civil action or proceeding shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of such title and shall be subject to the limitations and exceptions applicable to those actions.

(c) Procedure

A contractor against whom a civil action or proceeding described in subsection (b) of this section is brought shall promptly deliver all processes served upon that contractor to the Attorney General of the United States. Upon certification by the Attorney General that the suit against the contractor is within the provisions of subsection (b) of this section, a civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings shall be deemed a tort action brought against the United States under the provisions of section 1346(b), 2401(b), or 2402, or sections 2671 through 2680 of Title 28. For purposes of removal, the certification by the Attorney General under this subsection establishes contractor status conclusively.

(d) Actions covered

The provisions of this section shall apply to any action, within the provisions of subsection (b) of this section, which is pending on November 5, 1990, or commenced on or after November 5, 1990. Notwithstanding section

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concurrence that this case should be decided more narrowly. The concurrence is willing to acknowledge only that "*sometimes* Congress lacks the power under Article I to reopen an otherwise closed court judgment," *post,* at 1463. In the present context, what it considers critical is that § 27A(b) is "exclusively retroactive" and "appli[es] to a limited number of individuals." *Ibid.* If Congress had only "provid[ed] some of the assurances against 'singling out' that ordinary legislative activity normally provides--say, prospectivity and general applicability--we might have a different case." *Post,* at 1465.

This seems to us wrong in both fact and law. In point of fact, § 27A(b) does not "single out" any defendant for adverse treatment (or any plaintiff for favorable treatment). Rather, it identifies a class of actions (those filed pre-*Lampf,* timely under applicable state law, but dismissed as time barred post-*Lampf*) which embraces many plaintiffs and defendants, the precise number and identities of whom we even now do not know. The concurrence's contention that the number of covered defendants "is too small *(compared with the number of similar, uncovered firms)* to distinguish meaningfully the law before us from a similar law aimed at a single closed case," *post,* at 1465 (emphasis added), renders the concept of "singling out" meaningless.

More importantly, however, the concurrence's point seems to us wrong in law. To be sure, the class of actions identified by § 27A(b) could have been more expansive (*e.g.,* all actions that were *or could have been* filed pre-*Lampf*) and the provision could have been written to have prospective as well as retroactive effect (*e.g.,* "all post-*Lampf* dismissed actions, plus all future actions under Rule 10b-5, shall be timely if brought within 30 years of the injury"). But it escapes us ***239** how this could in any way cause the statute to be any less an infringement upon the judicial power. The nub of that infringement consists *not* of the Legislature's ****1463** acting in a particularized and hence (according to the concurrence) nonlegislative fashion; [FN9] but rather of the Legislature's nullifying prior, authoritative judicial action. It makes no difference whatever to that separation-of-powers violation that it is in gross rather than particularized (*e.g.,* "we hereby set aside *all* hitherto entered judicial orders"), or that it is not accompanied by an "almost" violation of the Bill of Attainder Clause, or an "almost" violation of any other constitutional provision.

> FN9. The premise that there is something wrong with particularized legislative action is of course questionable. While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action. Private bills in Congress are still common, and were even more so in the days before establishment of the Claims Court. Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid--or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause, including cases which say that it requires not merely "singling out" but also *punishment,* see, *e.g., United States v. Lovett,* 328 U.S. 303, 315- 318, 66 S.Ct. 1073, 1078-1080, 90 L.Ed. 1252 (1946), and a case which says that Congress may legislate "a legitimate class of one," *Nixon v. Administrator of General Services,* 433 U.S. 425, 472, 97 S.Ct. 2777, 2805, 53 L.Ed.2d 867 (1977).

Ultimately, the concurrence agrees with our judgment only "[b]ecause the law before us embodies risks of the very sort that our Constitution's 'separation of powers' prohibition seeks to avoid." *Post,* at 1466. But the doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judicial judgments is assuredly one) it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict. It is interesting that the concurrence quotes twice, and cites without quotation a third time, the opinion of Justice Powell in ***240** *INS v. Chadha,* 462 U.S., at 959, 103 S.Ct. at 2788. But Justice Powell wrote only for himself in that case. He alone expressed dismay that "[t]he Court's decision ... apparently will invalidate every use of the legislative veto," and opined that "[t]he breadth of this holding gives one pause." *Ibid.* It did not give pause to the six-Justice majority, which put an end to the long-simmering interbranch dispute that would otherwise have been indefinitely prolonged. We think legislated invalidation of judicial judgments deserves the same categorical treatment accorded by *Chadha* to congressional invalidation of executive action. The delphic

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alternative suggested by the concurrence (the setting aside of judgments is all right so long as Congress does not "impermissibly tr[y] to *apply,* as well as *make,* the law," *post,* at 1463-1464) simply prolongs doubt and multiplies confrontation. Separation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors.

* * *

We know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment, and for good reason. The Constitution's separation of legislative and judicial powers denies it the authority to do so. Section 27A(b) is unconstitutional to the extent that it requires federal courts to reopen final judgments entered before its enactment. The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice BREYER, concurring in the judgment.

I agree with the majority that § 27A(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1 (1988 ed., Supp. V) (hereinafter § 27A(b)) is unconstitutional. In my view, the separation of powers inherent in our Constitution means that at least *sometimes* Congress lacks the power under Article ***241** I to reopen an otherwise closed court judgment. And the statutory provision here at issue, § 27A(b), violates a basic "separation- of-powers" principle--one intended to protect individual liberty. Three features of this law--its exclusively retroactive effect, its application to a limited number of individuals, and its reopening of closed judgments--taken together, show that Congress here impermissibly tried to *apply,* as well as *make,* ****1464** the law. Hence, § 27A(b) falls outside the scope of Article I. But, it is far less clear, and unnecessary for the purposes of this case to decide, that separation of powers "is violated" *whenever* an "individual final judgment is legislatively rescinded" or that it is "violated 40 times over when 40 final judgments are legislatively dissolved." See *ante,* at 1457. I therefore write separately.

The majority provides strong historical evidence that Congress lacks the power simply to reopen, and to revise, final judgments in individual cases. See *ante,* at 1453-1454. The Framers would have hesitated to lodge in the Legislature both that kind of power and the power to enact general laws, as part of their effort to avoid the "despotic government" that accompanies the "accumulation of all powers, legislative, executive, and judiciary, in the same hands." The Federalist No. 47, p. 241 (J. Gideon ed. 1831) (J. Madison); *id.,* No. 48, at 249 (quoting T. Jefferson, Notes on the State of Virginia). For one thing, the authoritative application of a general law to a particular case by an independent judge, rather than by the legislature itself, provides an assurance that even an unfair law at least will be applied evenhandedly according to its terms. See, *e.g.,* 1 Montesquieu, The Spirit of Laws 174 (T. Nugent transl. 1886) (describing one objective of the "separation of powers" as preventing "the same monarch or senate," having "enact[ed] tyrannical laws" from "execut[ing] them in a tyrannical manner"); W. Gwyn, The Meaning of the Separation of Powers 42-43, 104-106 (1965) (discussing historically relevant sources that explain one purpose of separation of powers as helping to assure an "impartial rule of ***242** law"). For another thing, as Justice Powell has pointed out, the Constitution's "separation-of-powers" principles reflect, in part, the Framers' "concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person." *INS v. Chadha,* 462 U.S. 919, 962, 103 S.Ct. 2764, 2789, 77 L.Ed.2d 317 (1983) (opinion concurring in judgment). The Framers "expressed" this principle, both in "specific provisions, such as the Bill of Attainder Clause," and in the Constitution's "general allocation of power." *Ibid.;* see *United States v. Brown,* 381 U.S. 437, 442, 85 S.Ct. 1707, 1711, 14 L.Ed.2d 484 (1965) (Bill of Attainder Clause intended to implement the separation of powers, acting as "a general safeguard against legislative exercise of the judicial function"); *Fletcher v. Peck,* 6 Cranch 87, 136, 3 L.Ed. 162 (1810) (Marshall, C.J.) ("It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments"); cf. *Hurtado v. California,* 110 U.S. 516, 535-536, 4 S.Ct. 111, 120-121, 28 L.Ed. 232 (1884).

Despite these two important "separation-of-powers" concerns, *sometimes* Congress can enact legislation

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that focuses upon a small group, or even a single individual. See, *e.g., Nixon v. Administrator of General Services,* 433 U.S. 425, 468-484, 97 S.Ct. 2777, 2802-2813, 53 L.Ed.2d 867 (1977); *Selective Service System v. Minnesota Public Interest Research Group,* 468 U.S. 841, 846-856, 104 S.Ct. 3348, 3351-3357, 82 L.Ed.2d 632 (1984); *Brown, supra,* 381 U.S., at 453-456, 85 S.Ct., at 1717-1719. Congress also sometimes passes private legislation. See *Chadha, supra,* 462 U.S., at 966, n. 9, 103 S.Ct., at 2792, n. 9 (Powell, J., concurring in judgment) ("When Congress grants particular individuals relief or benefits under its spending power, the danger of oppressive action that the separation of powers was designed to avoid is not implicated"). And, *sometimes* Congress can enact legislation that, as a practical matter, radically changes the effect of an individual,previously entered court decree. See *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 18 How. 421, 15 L.Ed. 435 (1856). Statutes that apply prospectively and (in part because of that prospectivity) to an open-ended class of persons, however, are more than simply ***243** an effort to apply, person by person, a previously enacted law, or to single out for oppressive treatment one, or a handful, of particular individuals. Thus, it seems to me, if Congress enacted legislation that reopened an otherwise closed judgment but in a way that mitigated some of the here relevant "separation-of-powers" concerns, by ****1465** also providing some of the assurances against "singling out" that ordinary legislative activity normally provides--say, prospectivity and general applicability--we might have a different case. Cf. *Brown, supra,* 381 U.S., at 461, 85 S.Ct., at 1721 ("Congress must accomplish [its desired] results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied"). Because such legislation, in light of those mitigating circumstances, might well present a different constitutional question, I do not subscribe to the Court's more absolute statement.

The statute before us, however, has no such mitigating features. It reopens previously closed judgments. It is entirely retroactive, applying only to those Rule 10b-5 actions actually filed, on or before (but on which final judgments were entered after) June 19, 1991. See 15 U.S.C. § 78j(b) and 17 CFR 240.10b-5 (1994). It lacks generality, for it applies only to a few individual instances. See Hearings on H.R. 3185 before the Subcommittee on Telecommunications and Finance of the House of Representatives Committee on Energy and Commerce, 102d Cong., 1st Sess., 3-4 (1991) (listing, by case name, only 15 cases that had been dismissed on the basis of *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991)). And, it is underinclusive, for it excludes from its coverage others who, relying upon pre-*Lampf* limitations law, may have failed to bring timely securities fraud actions against any other of the Nation's hundreds of thousands of businesses. I concede that its coverage extends beyond a single individual to many potential plaintiffs in these class actions. But because the legislation disfavors not plaintiffs but defendants, I should think ***244** that the latter number is the more relevant. And, that number is too small (compared with the number of similar, uncovered firms) to distinguish meaningfully the law before us from a similar law aimed at a single closed case. Nor does the existence of § 27A(a), which applies to Rule 10b-5 actions pending at the time of the legislation, change this conclusion. That provision seems aimed at too few additional individuals to mitigate the low level of generality of § 27A(b). See Hearings on H.R. 3185, *supra,* at 5-6 (listing 17 cases in which dismissal motions based on *Lampf* were pending).

The upshot is that, viewed in light of the relevant, liberty-protecting objectives of the "separation of powers," this case falls directly within the scope of language in this Court's cases suggesting a restriction on Congress' power to reopen closed court judgments. See, *e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103, 113, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948) ("Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised [or] overturned ... by another Department of Government"); *Wheeling & Belmont Bridge Co., supra,* 18 How., at 431 ("[I]f the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress"); *Hayburn's Case,* 2 Dall. 409, 413 (1792) (letter from Justice Iredell and District Judge Sitgreaves to President Washington) ("[N]o decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be

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liable to a revision, or even suspension, by the Legislature itself").

At the same time, because the law before us *both* reopens final judgments *and* lacks the liberty-protecting assurances that prospectivity and greater generality would have provided, we need not, and we should not, go further--to make of the reopening itself, an absolute, always determinative distinction, a "prophylactic device," or a foundation for the building of a new "high wal[l]" between the branches. ***245** *Ante,* at 1463. Indeed, the unnecessary building of such walls is, in itself, dangerous, because the Constitution blends, as well as separates, powers in its effort to create a government that will work for, as well as protect the liberties of, its citizens. See The Federalist No. 48 (J. Madison). That doctrine does not "divide the branches into watertight compartments," nor "establish and divide fields of black and white." *Springer v. Philippine Islands,* 277 U.S. 189, 209, 211, 48 S.Ct. 480, 484, 485, 72 L.Ed. 845 (1928) (Holmes, J., dissenting); ****1466** see also *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952) (Jackson, J., concurring) (referring to the need for "workable government"); *id.,* at 596-597, 72 S.Ct., at 890-891 (Frankfurter, J., concurring); *Mistretta v. United States,* 488 U.S. 361, 381, 109 S.Ct. 647, 659, 102 L.Ed.2d 714 (1989) (the doctrine does not create a "hermetic division among the Branches" but "a carefully crafted system of checked and balanced power within each Branch"). And, important separation-of-powers decisions of this Court have sometimes turned, not upon absolute distinctions, but upon degree. See, *e.g., Crowell v. Benson,* 285 U.S. 22, 48-54, 52 S.Ct. 285, 291-294, 76 L.Ed. 598 (1932); *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 551-555, 55 S.Ct. 837, 852-854, 79 L.Ed. 1570 (1935) (Cardozo, J., concurring). As the majority invokes the advice of an American poet, one might consider aswell that poet's caution, for he not only notes that "Something there is that doesn't love a wall," but also writes, "Before I built a wall I'd ask to know/ What I was walling in or walling out." R. Frost, Mending Wall, The New Oxford Book of American Verse 395-396 (R. Ellmann ed. 1976).

Finally, I note that the cases the dissent cites are distinguishable from the one before us. *Sampeyreac v. United States,* 7 Pet. 222, 8 L.Ed. 665 (1833), considered a law similar to § 27A(b) (it reopened a set of closed judgments in fraud cases), but the Court did not reach the here relevant issue. Rather, the Court rested its conclusion upon the fact that Sampeyreac was not "a real person," while conceding that, were he real, the case "might present a different question." *Id.,* 7 Pet., at 238-239. *Freeborn v. Smith,* 2 Wall. 160, 17 L.Ed. 922 (1865), which involved ***246** an Article I court, upheld a law that applied to all cases pending on appeal (in the Supreme Court) from the territory of Nevada, irrespective of the causes of action at issue or which party was seeking review. See *id.,* 2 Wall., at 162. That law had generality, a characteristic that helps to avoid the problem of legislatively singling out a few individuals for adverse treatment. See *Chadha,* 462 U.S., at 966, 103 S.Ct., at 2791 (Powell, J., concurring in judgment). Neither did *United States v. Sioux Nation,* 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980), involve legislation that adversely treated a few individuals. Rather, it permitted the reopening of a case against the United States. See *id.,* at 391, 100 S.Ct., at 2728.

Because the law before us embodies risks of the very sort that our Constitution's "separation-of-powers" prohibition seeks to avoid, and because I can find no offsetting legislative safeguards that normally offer assurances that minimize those risks, I agree with the Court's conclusion and I join its judgment.

Justice STEVENS, with whom Justice GINSBURG joins, dissenting.

On December 19, 1991, Congress enacted § 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1 (1988 ed., Supp. V) (hereinafter 1991 amendment), to remedy a flaw in the limitations rule this Court announced on June 20, 1991, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991). In *Lampf* the Court replaced the array of state statutes of limitations that had governed shareholder actions under the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 CFR 240.10b-5 (1994) (hereinafter 10b-5 actions), with a uniform federal limitations rule. Congress found only one flaw in the Court's new rule: its failure to exempt pending cases from its operation. Accordingly, without altering the

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prospective effect of the *Lampf* rule, the 1991 amendment remedied its flaw by providing that pre-*Lampf* law should determine the limitations period applicable to all cases that had ***247** been pending on June 20, 1991--both those that remained pending on December 19, 1991, when § 27A was enacted, and those that courts dismissed between June 20 and December 19, 1991. Today the Court holds that the 1991 amendment violates the Constitution's separation of powers because, by encompassing the dismissed claims, it requires courts to reopen final judgments in private civil actions.

Section 27A is a statutory amendment to a rule of law announced by this Court. The ****1467** fact that the new rule announced in *Lampf* was a product of judicial, rather than congressional, lawmaking should not affect the separation-of-powers analysis. We would have the same issue to decide had Congress enacted the *Lampf* rule but, as a result of inadvertence or perhaps a scrivener's error, failed to exempt pending cases, as is customary when limitations periods are shortened. [FN1] In my opinion, if Congress had retroactively restored rights its own legislation had inadvertently or unfairly impaired, the remedial amendment's failure to exclude dismissed cases from the benefited class would not make it invalid. The Court today faces a materially identical situation and, in my view, reaches the wrong result.

> FN1. Our decisions prior to *Lampf* consistently held that retroactive application of new, shortened limitations periods would violate "fundamental notions of justified reliance and due process." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 371, 111 S.Ct. 2773, 2786, 115 L.Ed.2d 321 (1991) (O'CONNOR, J., dissenting); see, *e.g., Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) ; *Saint Francis College v. Al-Khazraji,* 481 U.S. 604, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987).

Throughout our history, Congress has passed laws that allow courts to reopen final judgments. Such laws characteristically apply to judgments entered before as well as after their enactment. When they apply retroactively, they may raise serious due process questions, [FN2] but the Court ***248** has never invalidated such a law on separation-of-powers grounds until today. Indeed, only last Term we recognized Congress' ample power to enact a law that "in effect 'restored' rights that [a party] reasonably and in good faith thought he possessed before the surprising announcement" of a Supreme Court decision. *Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 310, 114 S.Ct. 1510, 1518, 128 L.Ed.2d 274 (1994) (discussing *Frisbie v. Whitney,* 9 Wall. 187, 19 L.Ed. 668 (1870)). We conditioned our unambiguous restatement of the proposition that "Congress had the *power* to enact legislation that had the practical effect of restoring the statusquo retroactively," 511 U.S., at 310, 114 S.Ct., at 1518, only on Congress' clear expression of its intent to do so.

> FN2. Because the Court finds a separation-of-powers violation, it does not reach respondents' alternative theory that § 27A(b) denied them due process under the Fifth Amendment, a theory the Court of Appeals did not identify as an alternative ground for its holding. In my judgment, the statute easily survives a due process challenge. Section 27A(b) is rationally related to a legitimate public purpose. Cf., *e.g., Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.,* 508 U.S. 602, 636-641, 113 S.Ct. 2264, 2286-2289, 124 L.Ed.2d 539 (1993). Given the existence of statutes and rules, such as Rule 60(b), that allow courts to reopen apparently "final" judgments in various circumstances, see *infra,* at 1471-1472, respondents cannot assert an inviolable "vested right" in the District Court's post-*Lampf* dismissal of petitioners' claims. In addition, § 27A(b) did not upset any "settled expectations" of respondents. Cf. *Landgraf v. USI Film Products,* 511 U.S. 244, 266, 114 S.Ct. 1483, 1497, 128 L.Ed.2d 229. (1994). In *Landgraf,* we concluded that Congress did not intend § 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a (1988 ed., Supp. V), to apply retroactively because retroactive application would have placed a new legal burden on past conduct. 511 U.S., at 280-286, 114 S.Ct., at 1505- 1508. Before 1991 no one could have relied either on the yet-to-be- announced rule in *Lampf* or on the Court's unpredictable decision to apply that rule retroactively. All of the reliance interests that ordinarily support a presumption against retroactivity militate in favor of allowing retroactive application of § 27A.

A large class of investors reasonably and in good faith thought they possessed rights of action before the surprising announcement of the *Lampf* rule on June 20, 1991. When it enacted the 1991 amendment, Congress clearly expressed its intent to restore the rights *Lampf* had denied the aggrieved

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class. Section 27A comported fully with *Rivers* and with other precedents in which we consistently have recognized Congress' power to enact remedial statutes that set aside classes of final judgments. The only remarkable feature of ***249** this enactment is the fact that it remedied a defect in a new judge-made rule rather than in a statute.

The familiar history the Court invokes, involving colonial legislatures' ad hoc decisions of individual cases, " 'unfettered by rules,' " *ante,* at 1454 (quoting Vermont State Papers 1779-1786, p. 540 (Slade ed. 1823)), provides no support for its holding. On the contrary, history and precedent demonstrate that Congress may enact laws that establish ****1468** both substantive rules and procedures for reopening final judgments. When it enacted the 1991 amendment to the *Lampf* rule, Congress did not encroach on the judicial power. It decided neither the merits of any 10b-5 claim nor even whether any such claim should proceed to decision on the merits. It did provide that the rule governing the timeliness of 10b-5 actions pending on June 19, 1991, should be the pre-*Lampf* statute of limitations, and it also established a procedure for Article III courts to apply in determining whether any dismissed case should be reinstated. Congress' decision to extend that rule and procedure to 10b-5 actions dismissed during the brief period between this Court's law- changing decision in *Lampf* and Congress' remedial action is not a sufficient reason to hold the statute unconstitutional.

I

Respondents conducted a public offering of common stock in 1983. Petitioners, suing on behalf of themselves and other purchasers of the stock, filed a 10b-5 action in 1987 in the United States District Court for the Eastern District of Kentucky, alleging violations of substantive federal rules that had been in place since 1934. Respondents moved to dismiss the complaint as untimely because petitioners had filed it more than three years after the events in dispute. At that time, settled law in Kentucky and elsewhere in the United States directed federal courts to determine statutes of limitations applicable to 10b-5 actions by reference to ***250** state law. [FN3] The relevant Kentucky statute provided a 3-year limitations period, [FN4] which petitioners contended ran from the time the alleged fraud was or should have been discovered. A Magistrate agreed with petitioners and recommended denial of respondents' motion to dismiss, but by 1991 the District Court had not yet ruled on that issue. The factual question whether petitioners should have discovered respondents' alleged 10b-5 violations more than three years before they filed suit remained open for decision by an Article III judge on June 20, 1991.

FN3. "Federal judges have 'borrowed' state statutes of limitations because they were directed to do so by the Congress of the United States under the Rules of Decision Act, 28 U.S.C. § 1652." *Lampf,* 501 U.S., at 367, n. 2, 111 S.Ct., at 2784, n. 2 (STEVENS, J., dissenting) (citations omitted); see, *e.g., Stull v. Bayard,* 561 F.2d 429, 431-432 (CA2 1977), cert. denied, 434 U.S. 1035, 98 S.Ct. 769, 54 L.Ed.2d 783 (1978); *Roberts v. Magnetic Metals Co.,* 611 F.2d 450, 456 (CA3 1979); *Robuck v. Dean Witter & Co.,* 649 F.2d 641, 644 (CA9 1980) (borrowing state statutes of limitations for 10b-5 actions).

FN4. See Ky.Rev.Stat.Ann. § 292.480(3) (Michie 1988).

On that day, this Court's decision in *Lampf* changed the law. The Court concluded that every 10b-5 action is time barred unless brought within three years of the alleged violation and one year of its discovery. Moreover, it applied that novel rule to pending cases. As Justice O'CONNOR pointed out in her dissent, the Court held the plaintiffs' suit "time barred under a limitations period that did not exist before," a holding that "depart[ed] drastically from our established practice and inflict[ed] an injustice on the [plaintiffs]." *Lampf,* 501 U.S., at 369, 111 S.Ct., at 2785. [FN5] The inequitable consequences of *Lampf* reached beyond the parties to that case, ***251** injuring a large class of litigants that includes petitioners. Without resolving the factual issue that would have determined the timeliness of petitioners' complaint before *Lampf,* the District Court dismissed the instant action as untimely under the new limitations period dictated by this Court. Because *Lampf* had deprived them of any non-frivolous basis for an appeal, petitioners acquiesced in the dismissal, which therefore became final on September 12, 1991.

FN5. The *Lampf* opinion drew two other dissents. Justice KENNEDY, joined by Justice O'CONNOR, would have adopted a different substantive limitations rule. See 501 U.S., at 374,

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111 S.Ct., at 2788. Justice SOUTER and I would have adhered to "four decades of ... settled law" and maintained the existing regime until Congress enacted a new federal statute of limitations. *Id.*, at 366-367, 111 S.Ct., at 2784 (STEVENS, J., dissenting). No one dissented from the proposition that a uniform federal limitations period would be wise policy.

**1469 Congress responded to *Lampf* by passing § 27A, which became effective on December 19, 1991. The statute changed the substantive limitations law, restoring the pre-*Lampf* limitations rule for two categories of 10b-5 actions that had been pending on June 19, 1991. Subsection (a) of § 27A applies to cases that were still pending on December 19, 1991. The Courts of Appeals have uniformly upheld the constitutionality of that subsection, [FN6] and its validity is not challenged in this case. Subsection (b) applies to actions, like the instant case, that (1) were dismissed after June 19, 1991, and (2) would have been timely under the pre- *Lampf* regime. This subsection authorized the district courts to reinstate dismissed cases if the plaintiff so moved within 60 days after the effective date of § 27A. The amendment was not self-executing: Unless the plaintiff both filed a timely motion for reinstatement and then satisfied the court that the complaint had been timely filed under applicable pre-*Lampf* law, the dismissal would remain in effect.

FN6. See *Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 993 F.2d 269 (CA1), cert. pending, No. 93-564; *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78 (CA2 1993); *Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256 (CA4 1993); *Berning v. A.G. Edwards & Sons, Inc.*, 990 F.2d 272 (CA7 1993); *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (CA9 1993); *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (CA10 1992), cert. denied *sub nom. Dennler v. Trippet*, 507 U.S. 1029, 113 S.Ct. 1841, 123 L.Ed.2d 467 (1993); *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567 (CA11 1992), cert. denied, 510 U.S. 828, 114 S.Ct. 95, 126 L.Ed.2d 62 (1993).

In this case petitioners made the required showing, but the District Court refused to reinstate their case. Instead, *252 it held § 27A(b) unconstitutional. 789 F.Supp. 231 (ED Ky.1992). The Court of Appeals for the Sixth Circuit, contrary to an earlier decision of the Fifth Circuit, affirmed. 1 F.3d 1487 (1993).

II

Aside from § 27A(b), the Court claims to "know of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation." *Ante*, at 1458. In fact, Congress has done so on several occasions. Section 27A(b) is part of a remedial statute. As early as 1833, we recognized that a remedial statute authorizing the reopening of a final judgment after the time for appeal has expired is "entirely unexceptionable" even though it operates retroactively. "It has been repeatedly decided in this court, that the retrospective operation of such a law forms no objection to it. Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed." *Sampeyreac v. United States*, 7 Pet. 222, 239, 8 L.Ed. 665 (1833). We have upheld remedial statutes that carried no greater cause for separation-of-powers concerns than does § 27A(b); others have provoked no challenges. In contrast, the colonial directives on which the majority relies were nothing like remedial statutes.

The remedial 1830 law we construed in *Sampeyreac* strongly resembled § 27A(b): It authorized a class of litigants to reopen claims, brought under an 1824 statute, that courts had already finally adjudicated. The 1824 statute authorized proceedings to establish title to certain lands in the State of Missouri and the territory of Arkansas. It provided for an appeal to this Court within one year after the entry of the judgment or decree, "and should no appeal be taken, the judgment or decree of the district court shall in like manner be final and conclusive." 7 Pet., at 238. In 1827 the Arkansas Territorial Court entered a decree in favor of one Sampeyreac, over the objection of the United States that the nominal plaintiff was a fictitious person. Because no appeal *253 was taken from that decree, it became final in 1828. In 1830 Congress passed a special statute authorizing the Arkansas court to reopen any decree entered under the 1824 statute if, prior to July 1, 1831, the United States filed a bill of review alleging that the decree had been based on forged evidence of title. The United States filed such a bill and obtained a reversal of the 1827 decree from the Arkansas court.

The successors in interest of the fictitious Mr.

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Sampeyreac argued in this Court that **1470 the Arkansas court should not have entertained the Government's bill of review because the 1830 statute "was the exercise of a judicial power, and it is no answer to this objection, that the execution of its provisions is given to a court. The legislature of the union cannot use such a power." *Id.*, at 229. We categorically rejected that argument: "The law of 1830 is in no respect the exercise of judicial powers." *Id.*, at 239. Of course, as the majority notes, *ante,* at 1459, the particular decree at stake in *Sampeyreac* had issued not from an Article III court but from a territorial court. However, our opinion contains no suggestion that Congress' power to authorize the reopening of judgments entered by the Arkansas court was any broader than its power to authorize the reopening of judgments entered under the same statute by the United States District Court in Missouri. Moreover, the relevant judicial power that the 1830 statute arguably supplanted was this Court's Article III appellate jurisdiction-- which, prior to the 1830 enactment, provided the only avenue for review of the trial courts' judgments.

Similarly, in *Freeborn v. Smith,* 2 Wall. 160, 17 L.Ed. 922 (1865), the Court rejected a challenge to an Act of Congress that removed an accidental impediment to the exercise of our appellate jurisdiction. When Congress admitted Nevada into the Union as a State in March 1864, ch. 36, 13 Stat. 30, it neglected to provide for the disposition of pending appeals from final judgments previously entered by the Supreme Court of *254 the Nevada Territory. Accordingly, the *Freeborn* defendants in error moved to dismiss a writ of error to the territorial court on the ground that we had no power to decide the case. At the suggestion of plaintiffs in error, the Court deferred ruling on the motion until after February 27, 1865, when Congress passed a special statute that authorized the Court to decide this and similar cases. [FN7] Defendants in error renewed their motion, arguing that Congress could not reopen judgments that were already final and unreviewable because Congress was not competent to exercise judicial power.

> FN7. The Act provided, in part:
> "That all cases of appeal or writ of error heretofore prosecuted and now pending in the supreme court of the United States, upon any record from the supreme court of the Territory of Nevada, may be heard and determined by the supreme court of the United States, and the mandate of execution or of further proceedings shall be directed by the supreme court of the United States to the district court of the United States for the district of Nevada, or to the supreme court of the State of Nevada, as the nature of said appeal or writ of error may require, and each of these courts shall be the successor of the supreme court of Nevada Territory as to all such cases, with full power to hear and determine the same, and to award mesne or final process thereon.... *Provided,* That said appeals shall be prosecuted and said writs of errors sued out at any time before the first day of July, eighteen hundred and sixty-six." Ch. 64, § 8, 13 Stat. 441.

Defendants in error argued that, "[i]f it be possible for a right to attach itself to a judgment, it has done so here, and there could not be a plainer case of an attempt to destroy it by legislative action." 2 Wall., at 165. The Court, however, noted that the omission in the 1864 statute had left the case "in a very anomalous situation," *id.*, at 174, and that passage of the later statute "was absolutely necessary to remove an impediment in the way of any legal proceeding in the case." *Id.*, at 175. It concluded that such "acts are of a remedial character, and are peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power." *Ibid.* As in *Sampeyreac,* although *Freeborn* involved *255 the review of a judgment entered by a territorial court, the "judicial power" to which the opinion referred was this Court's Article III appellate jurisdiction. If Congress may enact a law authorizing this Court to reopen decisions that we previously lacked power to review, Congress must have the power to let district courts reopen their own judgments.

Also apposite is *United States v. Sioux Nation,* 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980), which involved the Sioux Nation's longstanding claim that the Government had in 1877 improperly abrogated the treaty by which the Sioux had held title to the Black Hills. The Sioux first brought their claim under a special 1920 jurisdictional statute. The Court of Claims dismissed the suit in 1942, holding that the 1920 Act did not **1471 give the court jurisdiction to consider the adequacy of the compensation the Government had paid in 1877. Congress passed a new jurisdictional statute in 1946, and in 1950 the Sioux brought a new action. In 1975 the Court of Claims, although acknowledging the merit of the Sioux's claim, held that the res judicata effect of the 1942 dismissal barred the suit.

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In response, Congress passed a statute in 1978 that authorized the Court of Claims to take new evidence and instructed it to considerthe Sioux's claims on the merits, disregarding res judicata. The Sioux finally prevailed. We held that the 1978 Act did not violate the separation of powers. 448 U.S., at 407, 100 S.Ct., at 2736.

The Court correctly notes, see *ante,* at 1459, and n. 5, that our opinion in *Sioux Nation* prominently discussed precedents establishing Congress' power to waive the res judicata effect of judgments against the United States. We never suggested, however, that those precedents sufficed to overcome the separation-of-powers objections raised against the 1978 Act. Instead, we made extensive comments about the propriety of Congress' action that were as necessary to our holding then as they are salient to the Court's analysis today. In passing the 1978 Act, we held, Congress

***256** "only was providing a forum so that a new judicial review of the Black Hills claim could take place. This review was to be based on the facts found by the Court of Claims after reviewing all the evidence, and an application of generally controlling legal principles to those facts. For these reasons, Congress was not reviewing the merits of the Court of Claims' decisions, and did not interfere with the finality of its judgments. "Moreover, Congress in no way attempted to prescribe the outcome of the Court of Claims' new review of the merits." 448 U.S., at 407, 100 S.Ct., at 2737.

Congress observed the same boundaries in enacting § 27A(b).

Our opinions in *Sampeyreac, Freeborn,* and *Sioux Nation* correctly characterize statutes that specify new grounds for the reopening of final judgments as remedial. Moreover, these precedents correctly identify the unremarkable nature of the legislative power to enact remedial statutes. "[A]cts ... of a remedial character ... are the peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power." *Freeborn,* 2 Wall., at 175. A few contemporary examples of such statutes will suffice to demonstrate that they are ordinary products of the exercise of legislative power.

The most familiar remedial measure that provides for reopening of final judgments is Rule 60(b) of the Federal Rules of Civil Procedure. That Rule both codified common-law grounds for relieving a party from a final judgment and added an encompassing reference to "any other reason justifying relief from the operation of the judgment." [FN8] ****1472** Not a ***257** single word in its text suggests that it does not apply to judgments entered prior to its effective date. On the contrary, the purpose of the Rule, its plain language, and the traditional construction of remedial measures all support construing it to apply to past as well as future judgments. Indeed, because the Rule explicitly abolished the common-law writs it replaced, an unintended gap in the law would have resulted if it did not apply retroactively. [FN9]

FN8. The full text of Rule60(b) provides:

"On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

This Court adopted the Federal Rules of Civil Procedure and submitted them to Congress as the Rules Enabling Act required. They became effective after Congress adjourned without altering

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them. See generally 308 U.S. 647 (letter of transmittal to Congress, Jan. 3, 1938).

FN9. In its criticism of this analysis of Rule 60(b), the majority overstates our holdings on retroactivity in *Landgraf,* 511 U.S., at 280, 114 S.Ct., at 1505, and *Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994). Our opinion in *Landgraf* nowhere says "that statutes do *not* apply retroactively *unless* Congress expressly states that they do." *Ante,* at 1461-1462. To the contrary, it says that, "[w]hen ... the statute contains no such express command, the court must determine whether the new statute would have retroactive effect," an inquiry that requires "clear congressional *intent* favoring such a result." *Landgraf,* 511 U.S., at 280, 114 S.Ct., at 1505 (emphasis added); see also *id.,* at 273-275, 114 S.Ct., at 1501-1502; *Rivers,* 511 U.S., at 304-309, 114 S.Ct. at 1515-1517. In the case of Rule 60(b), the factors I have identified, taken together, support a finding ofclear congressional intent. Moreover, neither *Landgraf* nor *Rivers* "rejected" consideration of a statute's remedial purpose in analyzing Congress' intent to apply the statute retroactively. Compare *ante,* at 1462, with *Landgraf,* 511 U.S., at 281-286 and n. 37, 114 S.Ct., at 1505- 1508, and n. 37, and *Rivers,* 511 U.S., at 304-311, 114 S.Ct., at 1515- 1518.

***258** Other examples of remedial statutes that resemble § 27A include the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.App. § 520(4), which authorizes members of the Armed Forces to reopen judgments entered while they were on active duty; the Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415(e)(4)(B) (1988 ed. and Supp. V), which provided for recovery of attorney's fees under the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1411 *et seq.* (1988 ed. and Supp. V); [FN10] and the federal habeas corpus statute, 28 U.S.C. § 2255, which authorizes federal courts to reopen judgments of conviction. The habeas statute, similarly to Rule 60(b), replaced a common-law writ, see App. to H.R.Rep. No. 308, 80th Cong., 2d Sess., A180 (1947), and thus necessarily applied retroactively. [FN11] State statutes that authorize the reopening of various types of default judgments [FN12] and judgments that became final before a party received ***259** notice of their entry, [FN13] as well as provisions for motions to reopen based on newly discovered evidence, [FN14] further demonstrate the widespread acceptance of remedial statutes that allow courts to set aside final judgments. As in the case of Rule 60(b), logic dictates that these statutes be construed to apply retroactively to judgments that were final at the time of their enactments. All of these remedial statutes announced generally applicable rules of law ****1473** as well as establishing procedures for reopening final judgments. [FN15]

FN10. When it enacted the Handicapped Children's Protection Act, Congress overruled our contrary decision in *Smith v. Robinson,* 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984), by applying the Act retroactively to any action either pending on or brought after July 4, 1984, the day before we announced *Smith.* See 100 Stat. 798. Accordingly, a court has applied the Act retroactively to a case in which the parties had entered into a consent decree prior to its enactment. See *Counsel v. Dow,* 849 F.2d 731, 738-739 (CA2 1988).The Court's attempts to explain away the retroactivity provision, *ante,* at 1461-1462, simply do not comport with the plain language of the Act.

FN11. The Government also calls our attention to 28 U.S.C. § 1655, a statute that requires courts to reopen final *in rem* judgments upon entries of appearance by defendants who were not personally served. See Brief for United States 24-25, and n. 17. While that statute had only prospective effect, the Court offers no reason why Congress could not pass a similar statute that would apply retroactively to judgments entered under pre-existing procedures.

FN12. See, *e.g.,* Del.Code Ann., Tit. 18, § 4418 (1989); Fla.Stat. § 631.734 (1984); N.Y.Ins. Law § 7717 (McKinney Supp.1995); 40 Pa.Cons.Stat. § 991.1716 (Supp.1994).

FN13. For example, a Virginia statute provides that, when a *pro se* litigant fails to receive notice of the trial court's entry of an order, even after the time to appeal has expired, the trial judge may within 60 days vacate the order and grant the party leave to appeal. Va.Code Ann. § 8.01-428(C) (Supp.1994).

FN14. See *Herrera v. Collins,* 506 U.S. 390, 410-411, and nn. 8-11, 113 S.Ct. 853, 865-866, and nn. 8-11, 122 L.Ed.2d 203 (1993) (citing state statutes).

FN15. The Court offers no explanation of why the

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2401(b) of Title 28, if a civil action or proceeding to which this section applies is pending on November 5, 1990, and is dismissed because the plaintiff in such action or proceeding did not file an administrative claim as required by section 2672 of that title, the plaintiff in that action or proceeding shall have 30 days from the date of the dismissal or two years from the date upon which the claim accrued, whichever is later, to file an administrative claim, and any claim or subsequent civil action or proceeding shall thereafter be subject to the provisions of section 2401(b) of Title 28.

(e) "Contractor" defined

For purposes of this section, the term "contractor" includes a contractor or cost reimbursement subcontractor of any tier participating in the conduct of the United States atomic weapons testing program for the Department of Energy (or its predecessor agencies, including the Manhattan Engineer District, the Atomic Energy Commission, and the Energy Research and Development Administration). Such term also includes facilities which conduct or have conducted research concerning health effects of ionizing radiation in connection with the testing under contract with the Department of Energy (or any of its predecessor agencies).

CREDIT(S)

1995 Main Volume

(Pub.L. 101-510, Div. C, Title XXXI, § 3141, Nov. 5, 1990, 104 Stat. 1837.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1990 Acts. House Report No. 101-665, House Conference Report No. 101- 923, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 2931.

References in Text

Act of March 9, 1920, referred to in subsec. (b)(1), is a reference to the Suits in Admiralty Act, Act Mar. 9, 1920, c. 95, 41 Stat. 525, as amended, which is classified generally to chapter 20 (section 741 et seq.) of the Appendix to Title 46, Shipping. For complete classification of this Act to the Code, see Short Title note set out under section 741 of the Appendix to Title 46 and Tables.

Act of March 3, 1925, referred to in subsec. (b)(1), is a reference to the Public Vessels Act, Act Mar. 3, 1925, c. 428, 43 Stat. 1112, which is classified generally to chapter 22 (section 781 et seq.) of the Appendix to Title 46, Shipping. For complete classification of this Act to the Code, see Short Title note set out under section 781 of the Appendix to Title 46 and Tables.

Codifications

Section was enacted as part of the National Defense Authorization Act for Fiscal Year 1991, and not as part of the Atomic Energy Act of 1954, which comprises subchapters I to XVII of this chapter.

Prior Provisions

A prior section 2212, Pub.L. 98-525, Title XVI, § 1631, Oct. 19, 1984, 98 Stat. 2646, relating to similar subject matter, was repealed by Pub.L. 101- 426, § 13, as added Pub.L. 101-510, Div. C, Title XXXI, § 3140, Nov. 5, 1990, 104 Stat. 1837.

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> Constitution should be construed to interpose an absolute bar against these statutes' retroactive application. Under the Court's reasoning, for example, an amendment that broadened the coverage of Rule 60(b) could not apply to any inequitable judgments entered prior to the amendment. The Court's rationale for this formalistic restriction remains elusive.

In contrast, in the examples of colonial legislatures' review of trial courts' judgments on which today's holding rests, the legislatures issued directives in individual cases without purporting either to set forth or to apply any legal standard. Cf. *ante,* at 1453-1456; see, *e.g., INS v. Chadha,* 462 U.S. 919, 961-962, 103 S.Ct. 2764, 2789-2790, 77 L.Ed.2d 317 (1983) (Powell, J., concurring in judgment). The principal compendium on which the Court relies, *ante,* at 1453, accurately describes these legislative directives:

> "In these records, which are of the first quarter of the 18th century, the provincial legislature will often be found acting in a judicial capacity, sometimes trying causes in equity, sometimes granting equity powers to some court of the common law for a particular temporary purpose, and constantly granting appeals, new trials, and other relief from judgments, on equitable ***260** grounds." Judicial Action by the Provincial Legislature of Massachusetts, 15 Harv.L.Rev. 208, n. 1 (1902).

The Framers' disapproval of such a system of ad hoc legislative review of individual trial court judgments has no bearing on remedial measures such as Rule 60(b) or the 1991 amendment at issue today. The history on which the Court relies provides no support for its holding.

III

The lack of precedent for the Court's holding is not, of course, a sufficient reason to reject it. Correct application of separation-of-powers principles, however, confirms that the Court has reached the wrong result. As our most recent major pronouncement on the separation of powers noted, "we have never held that the Constitution requires that the three branches of Government 'operate with absolute independence.' " *Morrison v. Olson,* 487 U.S. 654, 693-694, 108 S.Ct. 2597, 2620, 101 L.Ed.2d 569 (1988) (quoting *United States v. Nixon,* 418 U.S. 683, 707, 94 S.Ct. 3090, 3107, 41 L.Ed.2d 1039 (1974)). Rather, our jurisprudence reflects "Madison's flexible approach to separation of powers." *Mistretta v. United States,* 488 U.S. 361, 380, 109 S.Ct. 647, 659, 102 L.Ed.2d 714 (1989). In accepting Madison's conception rather than any "hermetic division among the Branches," *id.,* at 381, 109 S.Ct., at 660, "we have upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment," *id.,* at 382, 109 S.Ct., at 660. Today's holding does not comport with these ideals.

Section 27A shares several important characteristics with the remedial statutes discussed above. It does not decide the merits of any issue in any litigation but merely removes an impediment to judicial decision on the merits. The impediment it removes would have produced inequity because the statute's beneficiaries did not cause the impediment. It requires a party invoking its benefits to file a motion within a specified time and to convince a court that the statute entitles the party to relief. Most important, § 27A(b) specifies ***261** both a substantive rule to govern the reopening of a class of judgments--the pre-*Lampf* limitations rule--and a procedure for the courts to apply in determining whether a particular motion to reopen should be granted. These characteristics are quintessentially legislative. They reflect Congress' fealty to the separation of powers and its intention to avoid the sort of ad hoc excesses the Court rightly criticizes in colonial legislative practice. In my judgment, all of these elements distinguish § 27A from "judicial" action and confirm its constitutionality. A sensible analysis would at least consider them in the balance.

Instead, the Court myopically disposes of § 27A(b) by holding that Congress has no power to "requir[e] an Article III court to set aside a final judgment." *Ante,* at 1463. That holding must mean one of two things. ****1474** It could mean that Congress may not impose a mandatory duty on a court to set aside a judgment even if the court makes a particular finding, such as a finding of fraud or mistake, that Congress has not made. Such a rule, however, could not be correct. Although Rule 60(b), for example, merely authorizes federal courts to set aside judgments after making appropriate findings, Acts of Congress characteristically set standards that judges are obligated to enforce. Accordingly, Congress surely could add to Rule 60(b) certain instances in which courts *must* grant relief from final judgments

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if they make particular findings--for example, a finding that a member of the jury accepted a bribe from the prevailing party. The Court, therefore, must mean to hold that Congress may not *unconditionally* require an Article III court to set aside a final judgment. That rule is both unwise and beside the point of this case.

A simple hypothetical example will illustrate the practical failings of the Court's new rule. Suppose Congress, instead of endorsing the new limitations rule fashioned by the Court in *Lampf,* had decided to return to the pre- *Lampf* regime (or perhaps to enact a longer uniform statute). Subsection ***262** a) of § 27A would simply have provided that the law in effect prior to June 19, 1991, would govern the timeliness of all 10b-5 actions. In that event, subsection (b) would still have been necessary to remedy the injustice caused by this Court's failure to exempt pending cases from its new rule. In my judgment, the statutory correction of the inequitable flaw in *Lampf* would be appropriate remedial legislation whether or not Congress had endorsed that decision's substantive limitations rule. The Court, unfortunately, appears equally consistent: Even though the class of dismissed 10b-5 plaintiffs in my hypothetical would have been subject to the same substantive rule as all other 10b-5 plaintiffs, the Court's reasoning would still reject subsection (b) as an impermissible exercise of "judicial" power.

The majority's rigid holding unnecessarily hinders the Government from addressing difficult issues that inevitably arise in a complex society. This Court, for example, lacks power to enlarge the time for filing petitions for certiorari in a civil case after 90 days from the entry of final judgment, no matter how strong the equities. See 28 U.S.C. § 2101(c). If an Act of God, such as a flood or an earthquake, sufficiently disrupted communications in a particular area to preclude filing for several days, the majority's reasoning would appear to bar Congress from addressing the resulting inequity. If Congress passed remedial legislation that retroactively granted movants from the disaster area extra time to file petitions or motions for extensions of time to file, today's holding presumably would compel us to strike down the legislation as an attack on the finality of judgments. Such a ruling, like today's holding, would gravely undermine federal courts' traditional power "to set aside a judgment whose enforcement would work inequity." *Ante,* at 1460. [FN16]

FN16. The Court also appears to bar retroactive application of changes in the criminal law. Its reasoning suggests that, for example, should Congress one day choose to abolish the federal death penalty, the new statute could not constitutionally save a death row inmate from execution if his conviction had become final before the statute was passed.

***263** Even if the rule the Court announces today were sound, it would not control the case before us. In order to obtain the benefit of § 27A, petitioners had to file a timely motion and persuade the District Court they had timely filed their complaint under pre-*Lampf* law. In the judgment of the District Court, petitioners satisfied those conditions. Congress reasonably could have assumed, indeed must have expected, that some movants under § 27A(b) would fail to do so. The presence of an important condition that the District Court must find a movant to have satisfied before it may reopen a judgment distinguishes § 27A from the unconditional congressional directives the Court appears to forbid.

Moreover, unlike the colonial legislative commands on which the Court bases its holding, § 27A directed action not in "a civil case," *ante,* at 1455 (discussing *Calder v. Bull,* 3 Dall. 386, 1 L.Ed. 648 (1798)), but in a ****1475** large category of civil cases. [FN17] The Court declares that a legislative direction to reopen a class of 40 cases is 40 times as bad as a direction to reopen a single final judgment because "*power* is the object of the separation-of-powers prohibition." See *ante,* at 1457. This self-evident observation might be salient if § 27A(b) unconditionally commanded courts to reopen judgments even absent findings that the complaints were timely under pre-*Lampf* law. But Congress did not decide--and could not know how any court would decide--the timeliness issue in any particular ***264** case in the affected category. Congress, therefore, had no way to identify which particular plaintiffs would benefit from § 27A. It merely enacted a law that applied a substantive rule to a class of litigants, specified a procedure for invoking the rule, and left particular outcomes to individualized judicial determinations--a classic exercise of legislative power.

FN17. At the time Congress was considering the

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bill that became § 27A, a House Subcommittee reported that *Lampf* had resulted in the dismissal of 15 cases, involving thousands of plaintiffs in every State (of whom over 32,000 had been identified) and claims totaling over $692.25 million. In addition, motions to dismiss based on *Lampf* were then pending in 17 cases involving thousands of plaintiffs in every State and claims totaling over $4.578 billion. Hearing on H.R. 3185, before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 102d Cong., 1st Sess., 1-4 (1991).

"All we seek," affirmed a sponsor of § 27A, "is to give the victims [of securities fraud] a fair day in court." [FN18] A statute, such as § 27A, that removes an unanticipated and unjust impediment to adjudication of a large class of claims on their merits poses no danger of "aggrandizement or encroachment." *Mistretta,* 488 U.S., at 382, 109 S.Ct. at 660. [FN19] This is particularly true for § 27A in light of Congress' historic primacy over statutes of limitations. [FN20] The statute contains several checks against the danger of congressional overreaching. The Court in *Lampf* undertook a legislative function. Essentially, it supplied a statute of limitations for 10b-5 actions. ***265** The Court, however, failed to adopt the transition rules that ordinarily attend alterations shortening the time to sue. Congress, in § 27A, has supplied those rules. The statute reflects the ability of two coequal branches to cooperate in providing for the impartial application of legal rules to particular disputes. The Court's mistrust of such cooperation ill serves the separation of powers. [FN21]

FN18. 137 Cong.Rec. S18624 (Nov. 27, 1991) (statement of Sen. Bryan).

FN19. Today's decision creates a new irony of judicial legislation. A challenge to the constitutionality of § 27A(a) could not turn on the sanctity of final judgments. Section 27A(a) benefits litigants who had filed appeals that *Lampf* rendered frivolous; petitioners and other law-abiding litigants whose claims *Lampf* rendered untimely had acquiesced in the dismissal of their actions. By striking down § 27A(b) on a ground that would leave § 27A(a) intact, the Court indulges litigants who protracted proceedings but shuts the courthouse door to litigants who proceeded with diligence and respect for the *Lampf* judgment.

FN20. "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles.... They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate.... [T]he history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." *Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628 (1945) (Jackson, J.) (footnote and citation omitted).

FN21. Although I agree with Justice BREYER's general approach to the separation-of-powers issue, I believe he gives insufficient weight to two important features of § 27A. First, he fails to recognize that the statute restored a pre-existing rule of law in order to remedy the manifest injustice produced by the Court's retroactive application of *Lampf.* The only " 'substantial deprivation' " Congress imposed on defendants was that properly filed lawsuits proceed to decisions on the merits. Cf. *ante,* at 1464 (BREYER, J., concurring in judgment) (quoting *INS v. Chadha,* 462 U.S. 919, 962, 103 S.Ct. 2764, 2789, 77 L.Ed.2d 317 (1983) (Powell, J., concurring in judgment)). Second, he understates the class of defendants burdened by § 27A: He finds the statute underinclusive because it provided no remedy for potential plaintiffs who may have failed to file timely actions in reliance on pre-*Lampf* limitations law, but he denies the importance of § 27A(a), which provided a remedy for plaintiffs who appealed dismissals after *Lampf.* See *ante,* at 1464-1465 (BREYER, J., concurring in judgment). The coverage of § 27A is coextensive with the retroactive application of the general rule announced in *Lampf.* If Congress had enacted a statute providing that the *Lampf* rule should apply to all cases filed after the statute's effective date and that the pre-*Lampf* rule should apply to all cases filed before that date, Justice BREYER could not reasonably condemn the statute as special legislation. The only difference between such a statute and § 27A is that § 27A covered all cases pending on the date of *Lampf*--June 20, 1991--rather than on the effective date of the statute--December 19, 1991. In my opinion, § 27A has sufficient generality to avoid the characteristics of a bill of attainder.

****1476** IV

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The Court has drawn the wrong lesson from the Framers' disapproval of colonial legislatures' appellate review of judicial decisions. The Framers rejected that practice, not out of a mechanistic solicitude for "final judgments," but because they believed the impartial application of rules of law, rather *266 than the will of the majority, must govern the disposition of individual cases and controversies. Any legislative interference in the adjudication of the merits of a particular case carries the risk that political power will supplant evenhanded justice, whether the interference occurs before or after the entry of final judgment. Cf. *United States v. Klein,* 13 Wall. 128, 20 L.Ed. 519 (1872); *Hayburn's Case,* 2 Dall. 409 (1792). Section 27A(b) neither commands the reinstatement of any particular case nor directs any result on the merits. Congress recently granted a special benefit to a single litigant in a pending civil rights case, but the Court saw no need even to grant certiorari to review that disturbing legislative favor. [FN22] In an ironic counterpoint, the Court today places a higher priority on protecting the Republic from the restoration to a large class of litigants of the opportunity to have Article III courts resolve the merits of their claims.

FN22. See *Atonio v. Wards Cove Packing Co.,* 513 U.S. 809, 115 S.Ct. 57, 130 L.Ed.2d 16 (1994); see also *Landgraf,* 511 U.S., at 258, 114 S.Ct., at 1493 ("The parties agree that § 402(b) [of the Civil Rights Act of 1991] was intended to exempt a single disparate impact lawsuit against the Wards Cove Packing Company").

"We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Tex. v. Pinson,* 282 U.S. 499, 501, 51 S.Ct. 228, 229, 75 L.Ed. 482 (1931) (Holmes, J.). The three branches must cooperate in order to govern. We should regard favorably, rather than with suspicious hostility, legislation that enables the judiciary to overcome impediments to the performance of its mission of administering justice impartially, even when, as here, this Court has created the impediment. [FN23] Rigid rules often make good law, but judgments in areas such as the review of potential conflicts among the three coequal branches of the *267 Federal Government partake of art as well as science. That is why we have so often reiterated the insight of Justice Jackson:

FN23. Of course, neither the majority nor I would alter its analysis had Congress, rather than the Court, enacted the *Lampf* rule without any exemption for pending cases, then later tried to remedy such unfairness by enacting § 27A. Thus, the Court's attribution of § 27A to "the legislature's genuine conviction (supported by all the law professors in the land) that *[Lampf]* was wrong," *ante,* at 1457, is quite beside the point.

"The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952) (concurring opinion).

We have the authority to hold that Congress has usurped a judicial prerogative, but even if this case were doubtful I would heed Justice Iredell's admonition in *Calder v. Bull,* 3 Dall., at 399, that "the Court will never resort to that authority, but in a clear and urgent case." An appropriate regard for the interdependence of Congress and the judiciary amply supports the conclusion that § 27A(b) reflects constructive legislative cooperation **1477 rather than a usurpation of judicial prerogatives.

Accordingly, I respectfully dissent.

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Supreme Court of the United States

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC., Petitioner
v.
CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA.

No. 91-904.

Argued Dec. 1, 1992.
Decided June 14, 1993.

Employer filed action to set aside or modify arbitrator's decision as to employer's withdrawal liability to multiemployer pension plan under the Multiemployer Pension Plan Amendments Act (MPPAA). The United States District Court for the Central District of California granted plan's motion to confirm award, and employer appealed. The Court of Appeals for the Ninth Circuit, 936 F.2d 576, affirmed. The Supreme Court of the United States granted certiorari. The Supreme Court, Justice Souter, held that: (1) presumptions in the MPPAA favoring multiemployer plans did not violate due process rights of the employer by denying access to an impartial decision maker, and (2) MPPAA provisions did not violate the employer's Fifth Amendment rights as applied to employer's withdrawal liability.

Affirmed.

Justice O'Connor filed a concurring opinion.

Justice Scalia did not join Part III-B-1-b of the opinion of the Court.

Justice Thomas filed an opinion concurring in part and concurring in the judgment.

West Headnotes

[1] Constitutional Law ⚖251.5
92k251.5 Most Cited Cases

Due process requires a neutral and detached judge in the first instance, and the command is no different when a legislature delegates adjudicative functions to a private party. U.S.C.A. Const.Amend. 5.

[2] Constitutional Law ⚖255(1)
92k255(1) Most Cited Cases

[2] Constitutional Law ⚖278(1)
92k278(1) Most Cited Cases

Before one may be deprived of a protected interest, whether in a criminal or civil setting, one is entitled as matter of due process of law to an adjudicator who is not in situation which would offer possible temptation to the average man as judge, which might lead him not to hold balance nice, clear and true. U.S.C.A. Const.Amend. 5.

[3] Constitutional Law ⚖251.5
92k251.5 Most Cited Cases

Even appeal and trial de novo will not cure the failure to provide a neutral and detached adjudicator required as a matter of due process. U.S.C.A. Const.Amend. 5.

[4] Constitutional Law ⚖251.5
92k251.5 Most Cited Cases

Requirement that justice must satisfy the appearance of justice, even to the point of requiring trial by judges who have no actual bias and would do their best to weigh the scales of justice equally between contending parties, applies where private party is given statutory authority to adjudicate a dispute. U.S.C.A. Const.Amend. 5.

[5] Constitutional Law ⚖318(1)
92k318(1) Most Cited Cases

Where an initial determination is made by a party acting in an enforcement capacity, due process may be satisfied by providing for a neutral adjudicator to conduct de novo review of all factual and legal issues. U.S.C.A. Const.Amend. 5.

[6] Constitutional Law ⚖275(5)
92k275(5) Most Cited Cases

[6] Pensions ⚖103
296k103 Most Cited Cases

Multiemployer pension plan trustees act only in an

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enforcement capacity, not in an adjudicatory capacity, and thus alleged bias or appearance of bias in trustees' initial determination of an employer's withdrawal liability did not alone violate due process right to impartial adjudicator; first adjudication was proceeding that occurred before arbitrator, not trustees' initial determination of withdrawal liability. Employee Retirement Income Security Act of 1974, §§ 4219(b)(1, 2), 4221(a)(1), as amended, 29 U.S.C.A. §§ 1399(b)(1, 2), 1401(a)(1).

[7] Pensions ⚿86
296k86 Most Cited Cases

Under the Multiemployer Pension Plan Amendments Act, presumption favoring determination made by plan sponsor shifts burden of proof or persuasion to employer. Employee Retirement Income Security Act of 1974, § 4221(a)(3)(A), as amended, 29 U.S.C.A. § 1401(a)(3)(A).

[8] Evidence ⚿94
157k94 Most Cited Cases

Burden of showing something by a "preponderance of the evidence" simply requires trier of fact to believe that the existence of fact is more probable than its nonexistence before he may find in favor of party who has burden to persuade judge of fact's existence.

[9] Federal Courts ⚿853
170Bk853 Most Cited Cases

A finding is "clearly erroneous," when although there is evidence to support it, reviewing body on the entire evidence is left with the firm and definite conviction that a mistake has been committed.

[10] Federal Courts ⚿847
170Bk847 Most Cited Cases

[10] Federal Courts ⚿848
170Bk848 Most Cited Cases

A showing of "unreasonableness" would require even greater certainty of error on the part of a reviewing body than the "clearly erroneous" standard would require.

[11] Evidence ⚿598(1)
157k598(1) Most Cited Cases

A "preponderance of the evidence" standard is customarily used to prescribe one possible burden or standard of proof before a trier of fact in the first instance; before such burden can be satisfied, fact finder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with requisite degree of certainty.

[12] Federal Courts ⚿847
170Bk847 Most Cited Cases

[12] Federal Courts ⚿848
170Bk848 Most Cited Cases

[12] Federal Courts ⚿850.1
170Bk850.1 Most Cited Cases
(Formerly 170Bk850)

The terms "clearly erroneous" and "unreasonable" are customarily used to describe, not a degree of certainty that some fact has been proven in the first instance, but a degree of certainty that a fact finder in the first instance made a mistake in concluding that a fact has been proven under the applicable standard of proof, and thus are "standards of review" normally applied by reviewing courts to determinations of fact made at trial by courts that have made those determinations in an adjudicatory capacity. Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

[13] Federal Courts ⚿853
170Bk853 Most Cited Cases

Review under the "clearly erroneous" standard is significantly deferential, requiring a "clear and firm conviction that a mistake has been committed."

[14] Federal Courts ⚿847
170Bk847 Most Cited Cases

[14] Federal Courts ⚿848
170Bk848 Most Cited Cases

Application of a "reasonableness" standard of review is more deferential than a "clearly erroneous" standard, requiring reviewer to sustain finding of fact unless it is so unlikely that no reasonable person would find it to be true, to whatever required degree of proof.

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[15] Pensions ⚿103
296k103 Most Cited Cases

When unresolved dispute as to employer's withdrawal liability under Multiemployer Pension Plan Amendments Act is referred to arbitration, arbitrator is reviewing body, as is clear from his obligation absent contrary showing to deem certain determinations by plan sponsor correct, but is also a reviewing body invested with further powers of a fact finder, as is clear from his power to take evidence in course of his review and from presumption of correctness that district court is bound to give his findings of fact. Employee Retirement Income Security Act of 1974, § 4221(b)(3), (c), as amended, 29 U.S.C.A. § 1401(b)(3), (c).

[16] Evidence ⚿90
157k90 Most Cited Cases

Although where the burden of proof lies on a given issue is rarely without consequence, and frequently may be dispositive to the outcome of the litigation or application, the locus of the burden of persuasion is normally not an issue of federal constitutional moment outside the criminal law area.

[17] Pensions ⚿103
296k103 Most Cited Cases

Under the Multiemployer Pension Plan Amendments Act, it is entirely sensible to burden party which is more likely to have information relevant to the facts about its withdrawal from the plan with the obligation to demonstrate that facts treated by the plan as amounting to a withdrawal did not occur as alleged. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001- 4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301-1461; U.S.C.A. Const.Amends. 5, 14.

[18] Constitutional Law ⚿48(4.1)
92k48(4.1) Most Cited Cases

[18] Pensions ⚿103
296k103 Most Cited Cases

Where statutory language was ambiguous and legislative history contained very little relevant to issue of degree of certainty on part of arbitrator required for employer to overcome sponsor's factual conclusions as to employer's withdrawal liability under Multiemployer Pension Plan Amendments Act, statute would be construed so as to avoid serious doubt as to its constitutionality. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001-4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301-1461; U.S.C.A. Const.Amends. 5, 14 .

[19] Constitutional Law ⚿275(5)
92k275(5) Most Cited Cases

[19] Pensions ⚿23
296k23 Most Cited Cases

Under the Multiemployer Pension Plan Amendments Act, employer had burden of persuasion in a dispute over a sponsor's factual determination as to the employer's withdrawal liability; because that burden did not foreclose any factual issue from independent consideration by the arbitrator, there was no constitutional infirmity in it. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001-4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301-1461; U.S.C.A. Const.Amends. 5, 14 .

[20] Pensions ⚿103
296k103 Most Cited Cases

Determining the date of an employer's "complete withdrawal" from a multiemployer pension plan is a mixed question of fact and law. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001-4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301-1461.

[21] Constitutional Law ⚿275(5)
92k275(5) Most Cited Cases

[21] Pensions ⚿103
296k103 Most Cited Cases

Where dispute as to employer's withdrawal liability under Multiemployer Pension Plan Amendments Act was referred to arbitration, arbitrator's determination of date of withdrawal did not involve misapplication of statutory presumption and did not deprive employer of right to procedural due process; because plan's letter to employer contained no statement of facts justifying trustees' demand and because parties entered into factual stipulation in

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district court prior to commencing arbitration, there were virtually no contested factual determination as to which arbitrator might have deferred. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001-4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301-1461; U.S.C.A. Const.Amends. 5, 14 .

[22] Pensions ⚿103
296k103 Most Cited Cases

Multiemployer pension plan actuary's selection of assumptions and methods to calculate withdrawal liability under the Multiemployer Pension Plan Amendments Act were not vulnerable to suggestions of bias or its appearance; actuaries were trained professionals subject to regulatory standard, and technical nature of actuary's assumptions and methods and necessity for applying same assumptions and methods in more than one context limited any opportunity actuary might otherwise have to act unfairly toward withdrawing employer. Employee Retirement Income Security Act of 1974, §§ 302(c)(3), 3041, 3042, as amended, 29 U.S.C.A. §§ 1082(c)(3), 1241, 1242; 26 U.S.C.A. § 7701(a)(35).

[23] Pensions ⚿103
296k103 Most Cited Cases

Legislative history of ERISA provision suggested that actuarial assumptions in regard to withdrawal liability had to be independently determined by an actuary, and that it was inappropriate for employer to substitute his judgment for that of qualified actuary with respect to those assumptions. Employee Retirement Income Security Act of 1974, § 302, as amended, 29 U.S.C.A. § 1082.

[24] Pensions ⚿103
296k103 Most Cited Cases

In action in which employer challenged reasonableness of assumptions and methodology chosen by multiemployer pension plan actuary to calculate withdrawal liability, employer's burden of proof to show by preponderance of evidence that actuarial assumptions and methods were in the aggregate unreasonable was a burden to show that the combination of methods and assumptions used would not have been acceptable to a reasonable actuary. Employee Retirement Income Security Act of 1974, § 4221(a)(3)(A, B), as amended, 29 U.S.C.A. § 1401(a)(3)(A, B).

[25] Constitutional Law ⚿275(5)
92k275(5) Most Cited Cases

[25] Pensions ⚿23
296k23 Most Cited Cases

Under Multiemployer Pension Plan Amendments Act, requiring employer challenging methods and assumptions used by actuary in calculating employer's withdrawal liability to show that combination of methods and assumptions employed in calculation would not have been acceptable to reasonable actuary, did not violate due process. Employee Retirement Income Security Act of 1974, § 4221(a)(3)(A, B), as amended, 29 U.S.C.A. § 1401(a)(3)(A, B); U.S.C.A. Const.Amends. 5, 14.

[26] Pensions ⚿24.1
296k24.1 Most Cited Cases

Multiemployer pension plan has features of insurance scheme in which employers spread risk that their employees will meet plan's vesting requirements and obtain entitlement to benefits.

[27] Constitutional Law ⚿275(5)
92k275(5) Most Cited Cases

[27] Pensions ⚿23
296k23 Most Cited Cases

Multiemployer Pension Plan Amendments Act, as applied to an employer which withdrew from a multiemployer pension plan, did not violate employer's substantive due process rights as the imposition of withdrawal liability was rationally related to terms of the employer's participation in plan; employer had voluntarily decided to enter plan after trustee decisions affecting calculation of withdrawal liability had been made and thus could have assessed any implications for plan's future liability at that time and could have assessed implications for future liability of identity of plan trustees before it decided to enter plan whose trustees included representatives of contractors' associations of which employer was not member. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001-4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301-1461; U.S.C.A.

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Const.Amends. 5, 14.

[28] Eminent Domain ⚿2(1.1)
148k2(1.1) Most Cited Cases

[28] Pensions ⚿23
296k23 Most Cited Cases

Application of Multiemployer Pension Plan Amendments Act, a regulatory statute that was otherwise within Congress' powers, could not be defeated by private contractual provisions such as those protecting an employer from liability beyond what was specified in its collective bargaining and trust agreement, and thus application was not an unconstitutional taking. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001-4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301-1461; U.S.C.A. Const.Amend. 5.

[29] Eminent Domain ⚿2(1.1)
148k2(1.1) Most Cited Cases

[29] Pensions ⚿23
296k23 Most Cited Cases

Application of Multiemployer Pension Plan Amendments Act to employer's withdrawal liability did not deprive employer of its property without just compensation; government did not physically invade or permanently appropriate employer's assets for its own use, so as to warrant application of analysis as to whether portion of property taken was taken in its entirety. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001-4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301-1461; U.S.C.A. Const.Amend. 5.

[30] Eminent Domain ⚿2(1.1)
148k2(1.1) Most Cited Cases

[30] Pensions ⚿23
296k23 Most Cited Cases

Application of Multiemployer Pension Plan Amendments Act to employer's withdrawal liability did not take employer's property without just compensation on theory that property was taken for sole purpose of protecting Pension Benefit Guarantee Corporation (PBGC), a government body, from being forced to honor its pension insurance; any benefit to PBGC deriving from solvency of pension trust fund was merely incidental to primary congressional objective of protecting covered employees and beneficiaries of pension trusts. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001-4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301-1461; U.S.C.A. Const.Amend. 5.

[31] Constitutional Law ⚿23
92k23 Most Cited Cases

[31] Eminent Domain ⚿2(1.1)
148k2(1.1) Most Cited Cases

Mere diminution in value of property, however serious, is insufficient to demonstrate a taking for purposes of the Fifth Amendment, and thus fact that employer had to pay out estimated 46% of shareholder equity to satisfy its withdrawal liability obligation to multiemployer pension plan was insufficient to show that an unconstitutional taking had occurred. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4001-4402, as amended, 29 U.S.C.A. §§ 1001 et seq., 1301-1461; U.S.C.A. Const.Amend. 5.

[32] Eminent Domain ⚿2(1.1)
148k2(1.1) Most Cited Cases

[32] Pensions ⚿23
296k23 Most Cited Cases

Application of Multiemployer Pension Plan Amendments Act to employer's withdrawal liability did not amount to a "taking" based on degree of interference with employer's reasonable investment backed expectations; at time employer began contributions to plan, pension plans had long been subject to federal regulation, plan was subject to ERISA, withdrawing employer faced contingent liability up to 30% of its net worth, and it had no reasonable basis to expect that legislative ceiling on contingent liability would never be lifted. Employee Retirement Income Security Act of 1974, §§ 4062(b), 4064, as amended, 29 U.S.C.A. §§ 1362(b), 1364; U.S.C.A. Const.Amend. 5.

****2268** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S.

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Tort liability for nonmedical radiological harm. 73 ALR4th 582.

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Claims against United States founded on contract in general, see C.J.S. United States § 138.

6 Am Jur 2d, Atomic Energy §§ 48, 53.

NOTES OF DECISIONS

Constitutionality 1
Substitution of United States party 2

1. Constitutionality

Former provisions of this section providing that action against United States under Tort Claims Act is exclusive remedy for claims against contractor for radiation injuries resulting from atomic weapons testing program did not constitute taking under Fifth Amendment as applied to pending actions. In re Consolidated U.S. Atmospheric Testing Litigation, C.A.9 (Cal.) 1987, 820 F.2d 982, certiorari denied 108 S.Ct. 1076, 485 U.S. 905, 99 L.Ed.2d 235.

By enacting former provisions of this section substituting United States as defendant in all suits against private contractors to the Government for radiation injuries arising from any of the United States atomic weapons testing programs and making the Federal Tort Claims Act, 28 U.S.C.A. §§ 1346, 2671-2680, the sole remedies for those injuries, thereby retroactively abolishing widow's cause of action in tort for death of her husband from radiation, Congress abridged no vested rights of widow, as rights in tort do not vest until there is a final, unreviewable judgment. Hammond v. U.S., C.A.1 (Mass.) 1986, 786 F.2d 8.

2. Substitution of United States party

Former provisions of this section, providing that action against United States under Tort Claims Act is exclusive remedy for claims against contractors for radiation injuries resulting from atomic weapons testing programs, required claims to be pursued in action solely against United States. Contractors were to be dismissed from such suits. In re Consolidated U.S. Atmospheric Testing Litigation, N.D.Cal.1985, 616 F.Supp. 759, affirmed 820 F.2d 982, certiorari denied 108 S.Ct. 1076, 485 U.S. 905, 99 L.Ed.2d 235.

42 U.S.C.A. § 2212

42 USCA § 2212

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321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) amended the Employee Retirement Income Security Act of 1974 (ERISA) to provide that in certain circumstances an employer withdrawing from a multiemployer plan incurs as "withdrawal liability" a share of the plan's unfunded vested benefits, 29 U.S.C. §§ 1381, 1391. Withdrawal liability is assessed by means of a notification by the "plan sponsor" and a demand for payment. § 1399(b). An unresolved dispute is referred to arbitration, where (1) the sponsor's factual determinations are "presumed correct" unless a contesting party "shows by a preponderance of the evidence that the determination was unreasonable ****2269** or clearly erroneous," § 1401(a)(3)(A); and (2) the sponsor's actuary's calculation of a plan's unfunded vested benefits is presumed correct unless a contesting party "shows by a preponderance of the evidence" that, *inter alia,* "the actuarial assumptions and methods" used in a calculation "were, in the aggregate, unreasonable," § 1401(a)(3)(B). Petitioner Concrete Pipe and Products of California, Inc., is an employer charged with withdrawal liability by the trustees of respondent, a multiemployer pension plan (Plan). After losing in arbitration, Concrete Pipe filed an action to set aside or modify the arbitrator's decision and raised a constitutional challenge to the MPPAA, but the District Court granted the Plan's motion to confirm the award. The Court of Appeals affirmed.

Held:

1. The MPPAA does not unconstitutionally deny Concrete Pipe an impartial adjudicator by placing the determination of withdrawal liability in the plan sponsor, here the trustees, subject to § 1401's presumptions. Pp. 2276- 2286.

(a) Even assuming that the possibility of trustee bias toward imposing the greatest possible withdrawal liability would suffice to bar the trustees from serving as adjudicators of Concrete Pipe's withdrawal liability because of their fiduciary obligations to beneficiaries of the Plan, the Due Process Clause is not violated here because the first adjudication in this case was the arbitration proceeding, not the trustees' initial liability determination. The trustees' statutory notification ***603** and demand obligations are undertaken in an enforcement capacity. Pp. 2276-2278.

(b) Nor did the arbitrator's adjudication deny Concrete Pipe its right to procedural due process. While the § 1401(a)(3)(A) presumption shifts the burden of persuasion to the employer, the statute is incoherent with respect to the degree of certainty required to overturn a plan sponsor's factual determination. In light of the assumed bias, deference to a plan sponsor's determination would raise a substantial due process question. The uncertainty raised by this incoherent statute is resolved by applying the canon requiring that an ambiguous statute be construed to avoid serious constitutional problems unless such construction is plainly contrary to Congress's intent. Thus, the presumption is construed to place the burden on the employer to disprove an alleged fact by a preponderance permitting independent review by the arbitrator of the trustees' factual determinations. The approach taken by the arbitrator and courts below in this case is not inconsistent with this Court's interpretation of the first presumption. Pp. 2278-2284.

(c) The § 1401(a)(3)(B) presumption also raises no procedural due process issue. The assumptions and methods used in calculating withdrawal liability are selected in the first instance not by the trustees, but by the plan actuary, § 1393(c), who is a trained professional subject to regulatory standards. The technical nature of the assumptions and methods, and the necessity for applying the same ones in several contexts, limit an actuary's opportunity to act unfairly toward a withdrawing employer. Moreover, since § 1401(a)(3)(B) speaks not about the reasonableness of the trustees' conclusions of historical fact, but about the aggregate reasonableness of the actuary's assumptions and methods in calculating the dollar liability figure, an employer's burden to overcome the presumption is simply to show that an apparently unbiased professional, whose obligations tend to moderate any claimed inclination to come down hard on withdrawing employers, has based a calculation on a combination of methods and assumptions that falls outside the range of reasonable actuarial practice. Pp. 2284-2286.

2. The MPPAA, as applied, does not deny substantive due process in violation of the Fifth Amendment. The imposition of withdrawal liability

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is clearly rational here because Concrete Pipe's liability is based on **2270 a proportion of its contributions during its participation in the Plan. Pp. 2286-2289.

3. The MPPAA, as applied, did not take Concrete Pipe's property without just compensation. The application of a regulatory statute that is otherwise within Congress's powers may not be defeated by private contractual provisions, such as those protecting Concrete Pipe from liability beyond what was specified in its collective-bargaining and trust *604 agreements. See *Connolly v. Pension Benefit Guaranty Corporation,* 475 U.S. 211, 223-224, 106 S.Ct. 1018, 1025, 89 L.Ed.2d 166. Examining Concrete Pipe's relationship with the Plan in light of the three factors the Court has said have particular significance for takings claims confirms this. First, the Government did not physically invade or permanently appropriate Concrete Pipe's assets for its own use. Second, Concrete Pipe has failed to show that having to pay out an estimated 46% of shareholder equity is an economic impact out of proportion to its experience with the Plan, since diminution in a property's value, however serious, is insufficient to demonstrate a taking. See, *e.g., Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 384, 47 S.Ct. 114, 117, 71 L.Ed. 303. Third, the conditions on its contractual promises did not give Concrete Pipe a reasonable expectation that it would not be faced with liability for promised benefits. At the time it began making payments to the Plan, pension plans had long been subject to federal regulation. Indeed, withdrawing employers already faced contingent liability under ERISA, and Concrete Pipe's reliance on ERISA's original limitation of contingent withdrawal liability to 30% of net worth is misplaced, there being no reasonable basis to expect that the legislative ceiling would never be lifted, see *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 16, 96 S.Ct. 2882, 2893, 49 L.Ed.2d 752. Pp. 2289- 2292.

936 F.2d 576 (CA9 1991), affirmed.

SOUTER, J., delivered the opinion of the Court, which was unanimous except insofar as O'CONNOR, J., did not join the statement to which n. 28 is attached, SCALIA, J., did not join Part III-B-1-b, and THOMAS, J., did not join Part III-B-1. O'CONNOR, J., filed a concurring opinion, *post,* p. ----. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. ----.

Dennis R. Murphy, Sacramento, CA, for petitioner.

John S. Miller, Jr., Los Angeles, CA, for respondent.

Carol Connor Flowe, Washington, DC, for Pension Ben. Guar. Corp. as amicus curiae by special leave of the Court.

*605 Justice SOUTER delivered the opinion of the Court. [FN1]

> FN1. Justice SCALIA does not join Part III-B-1-b of this opinion.

Respondent Construction Laborers Pension Trust for Southern California (Plan) is a multiemployer pension trust fund established under a Trust Agreement executed in 1962. Petitioner Concrete Pipe and Products of California, Inc. (Concrete Pipe), is an employer and former contributor to the Plan that withdrew from it and was assessed "withdrawal liability" under provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1301-1461 (1988 ed. and Supp. III), added by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub.L. 96-364, 94 Stat. 1208. Concrete Pipe contends that the MPPAA's assessment and arbitration provisions worked to deny it procedural due process. And, although we have upheld the MPPAA against constitutional challenge under the substantive component of the Due Process Clause and the Takings Clause, *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.,* 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984); *Connolly v. Pension Benefit Guaranty Corporation,* 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986), Concrete Pipe contends that, as applied to it, the MPPAA violates these provisions as well. **2271 We see merit in none of Concrete Pipe's contentions.

I

A pension plan like the one in issue, to which more than one employer contributes, is characteristically maintained to fulfill the terms of collective-bargaining agreements. The contributions made by

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employers participating in such a multiemployer plan are pooled in a general fund available to pay any benefit obligation of the plan. To receive benefits, an *606 employee participating in such a plan need not work for one employer for any particular continuous period. Because service credit is portable, employees of an employer participating in the plan may receive such credit for any work done for any participating employer. An employee obtains a vested right to secure benefits upon retirement after accruing a certain length of service for participating employers; benefits vest under the Plan in this case when an employee accumulates 10 essentially continuous years of credit. See Brief for Petitioner 28.

Multiemployer plans like the one before us have features that are beneficial in industries where

> "there [is] little if any likelihood that individual employers would or could establish single-employer plans for their employees ...[,] where there are hundreds and perhaps thousands of small employers, with countless numbers of employers going in and out of business each year, [and where] the nexus of employment has focused on the relationship of the workers to the union to which they belong, and/or the industry in which they are employed, rather than to any particular employer." Multiemployer Pension Plan Termination Insurance Program: Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means, 96th Cong., 1st Sess., 50 (1979) (statement of Robert A. Georgine, Chairman, National Coordinating Committee for Multiemployer Plans).

Multiemployer plans provide the participating employers with such labor market benefits as the opportunity to offer a pension program (a significant part of the covered employees' compensation package) with cost and risk-sharing mechanisms advantageous to the employer. The plans, in consequence, help ensure that each participating employer will have access to a trained labor force whose members are able to move from one employer and one job to another without *607 losing service credit toward pension benefits. See 29 CFR § 2530.210(c)(1) (1991); accord, *Washington Star Co. v. International Typographical Union Negotiated Pension Plan,* 582 F.Supp. 301, 304 (DC1983).

Since the enactment of ERISA in 1974, the Plan has been subject to the provisions of the statute as a "defined benefit plan." Such a plan is one that does not qualify as an " 'individual account plan' or 'defined contribution plan,' " which provide, among other things, for an individual account for each covered employee and for benefits based solely upon the amount contributed to the covered employee's account. See 29 U.S.C. §§ 1002(35), 1002(34), 1002(7). Concrete Pipe has not challenged the determination that the Plan falls within the statutory definition of defined benefit plan, and no issue as to that is before the Court.

A

We have canvassed the history of ERISA and the MPPAA before. See *Pension Benefit Guaranty Corporation v. R.A. Gray & Co., supra; Connolly v. Pension Benefit Guaranty Corporation, supra.* ERISA was designed "to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in [them].... Congress wanted to guarantee that if a worker has been promised a defined pension benefit upon retirement--and if he has fulfilled whatever conditions are required to obtain a vested benefit--he will actually receive it." *Id.,* 475 U.S., at 214, 106 S.Ct., at 1020 (citations **2272 and internal quotation marks omitted). As enacted in 1974, ERISA created the Pension Benefit Guarantee Corporation (PBGC) to administer and enforce a pension plan termination insurance program, to which contributors to both single-member and multiemployer plans were required to pay insurance premiums. 29 U.S.C. §§ 1302(a), 1306 (1988 ed. and Supp. III). Under the terms of the statute as originally enacted, the guarantee of basic *608 benefits by multiemployer plans that terminated was not to be mandatory until 1978, and for terminations prior to that time, any guarantee of benefits upon plan termination was discretionary with PBGC. 29 U.S.C. §§ 1381(c)(2)-(4) (1976 ed.). If PBGC did choose to extend a guarantee when a multiemployer plan terminated with insufficient assets to pay promised benefits, an employer that had contributed to the plan in the five preceding years was liable to PBGC for the shortfall in proportion to its share of contributions during that 5-year period, up to 30 percent of the employer's net worth. 29 U.S.C. §§ 1362(b), 1364 (1976 ed.). "In other words, any employer withdrawing from a

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multiemployer plan was subject to a contingent liability that was dependent upon the plan's termination in the next five years and the PBGC's decision to exercise its discretion and pay guaranteed benefits." *Gray,* 467 U.S., at 721, 104 S.Ct. at 2713.

"As the date for mandatory coverage of multiemployer plans approached, Congress became concerned that a significant number of plans were experiencing extreme financial hardship." *Ibid.* Indeed, the possibility of liability upon termination of a plan created an incentive for employers to withdraw from weak multiemployer plans. *Connolly,* 475 U.S., at 215, 106 S.Ct. at 1021. The consequent risk to the insurance system was unacceptable to Congress, which in 1978 postponed the mandatory guarantee pending preparation by the PBGC of a report "analyzing the problems of multiemployer plans and recommending possible solutions." *Ibid.* PBGC issued that report on July 1, 1978. Pension Benefit Guaranty Corporation, Multiemployer Study Required by P.L. 95-214 (1978). "To alleviate the problem of employer withdrawals, the PBGC suggested new rules under which a withdrawing employer would be required to pay whatever share of the plan's unfunded liabilities was attributable to that employer's participation." *Connolly,* 475 U.S., at 216, 106 S.Ct. at 1021 (citation and internal quotation marks omitted).

***609** Congress ultimately agreed, see *id.,* at 217, 106 S.Ct. at 1022, and passed the MPPAA, which was signed into law by the President on September 26, 1980. Under certain provisions of the MPPAA (which when enacted had an effective date of April 29, 1980, 29 U.S.C. § 1461(e)(2)(A) (1976 ed., Supp. V)), if an employer withdraws from a multiemployer plan, it incurs "withdrawal liability" in the form of "a fixed and certain debt to the pension plan." *Gray, supra,* 467 U.S., at 725, 104 S.Ct. at 2715. An employer's withdrawal liability is its "proportionate share of the plan's 'unfunded vested benefits,' " that is, "the difference between the present value of vested benefits" (benefits that are currently being paid to retirees and that will be paid in the future to covered employees who have already completed some specified period of service, 29 U.S.C. § 1053) "and the current value of the plan's assets. 29 U.S.C. §§ 1381, 1391." *Gray, supra,* 467 U.S., at 725, 104 S.Ct. at 2715. [FN2]

FN2. In various places the statute uses the terms "participant" and "beneficiary," and these terms are defined at 29 U.S.C. §§ 1002(7), 1002(8). For simplicity, we will use the term "covered employee" to refer depending on context both to those earning service credits and to those entitled to benefits.

B

The MPPAA provides the procedure for calculating and assessing withdrawal liability. ****2273** The plan's actuary, who is subject to regulatory and professional standards, 29 U.S.C. §§ 1241, 1242; 26 U.S.C. § 7701(a)(35), must determine the present value of the plan's liability for vested benefits. [FN3] In the absence of regulations promulgated by the PBGC, the actuary must employ "actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. ***610** § 1393(a)(1). [FN4] The assumptions must cover such matters as mortality of covered employees, likelihood of benefits vesting, and, importantly, future interest rates. After settling the present value of vested benefits, the actuary calculates the unfunded portion by deducting the value of the plan's assets. § 1393(c).

FN3. Even if no employer withdraws, ERISA requires an assessment of the plan's liability at least annually. See 29 U.S.C. § 1082(c)(9) (1988 ed., Supp. III).

FN4. While the PBGC is also authorized to promulgate regulations governing such assumptions under 29 U.S.C. § 1393(a), it has not done so. See Brief for Pension Benefit Guaranty Corp. as *Amicus Curiae* 7, n. 7.

In order to determine a particular employer's withdrawal liability, the unfunded vested liability is allocated under one of several methods provided by law. § 1391. In this case, the Plan used the presumptive method of § 1391(b), which bases withdrawal liability on the proportion of total employer contributions to the plan made by the withdrawing employer during certain 5- year periods. See §§ 1391(b)(2)(E)(ii), (b)(3)(B), (b)(4)(D)(ii). In essence, the withdrawal liability

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imposes on the withdrawing employer a share of the unfunded vested liability proportional to the employer's share of contributions to the plan during the years of its participation.

Withdrawal liability is assessed in a notification by the "plan sponsor" (here the trustees, see § 1301(a)(10)(A)) and a demand for payment. § 1399(b). The statute requires notification and demand to be made "[a]s soon as practicable after an employer's complete or partial withdrawal." § 1399(b)(1). A "complete withdrawal"

"occurs when an employer--

"(1) Permanently ceases to have an obligation to contribute under the plan, or

"(2) permanently ceases all covered operations under the plan." § 1383(a). [FN5]

FN5. There is an exception to this definition that applies to the building and construction industry, see § 1383(b), but neither party argues that it pertains in this case.

***611** "[T]he date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations." § 1383(e).

The statute provides that if an employer objects after notice and demand for withdrawal liability, and the parties cannot resolve the dispute, § 1399(b)(2), it shall be referred to arbitration. See § 1401(a)(1). Two presumptions may attend the arbitration. First, "any determination made by a plan sponsor under [29 U.S.C. §§ 1381-1399 and 1405 (1988 ed. and Supp. III)] is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A). Second, the sponsor's calculation of a plan's unfunded vested benefits.

"is presumed correct unless a party contesting the determination shows by a preponderance of evidence that--

"(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

"(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods." § 1401(a)(3)(B).

****2274** The statute provides for judicial review of the arbitrator's decision by an action in the district court to enforce, vacate, or modify the award. See § 1401(b)(2). In any such action "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." § 1401(c)

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II

The parties to the Trust Agreement creating the Plan in 1962 are the Southern California District Council of Laborers (Laborers) and three associations of contractors, the ***612** Building Industry of California, Inc., the Engineering Contractors Association, and the Southern California Contractors Association, Inc. App. 75, ¶ 6 (stipulation of facts filed in the District Court). Under § 302(c)(5)(B) of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. § 186(c)(5)(B), when a union participates in management of a plan permitted by the LMRA, the plan must be administered jointly by representatives of labor and management. Accordingly, half of the Plan's trustees are selected by the Laborers, and half by these contractors' associations. Concrete Pipe has never been a member of any of the contractors' associations that are parties to the Trust Agreement.

In 1976, Concrete Pipe, which is a wholly owned subsidiary of Concrete Pipe and Products Co., Inc., purchased certain assets of another company, Cen-Vi-Ro, including a concrete pipe manufacturing plant near Shafter, California, which Concrete Pipe continued to operate much as Cen-Vi-Ro had done. Cen-Vi- Ro had collective-bargaining agreements with several unions including the Laborers, and Concrete Pipe abided by the agreement with the latter by contributing to the Plan at a specified rate for each hour worked by a covered employee. [FN6] In 1978, Concrete Pipe negotiated a new 3-year contract with the Laborers that called for continuing contributions to be made to the Plan based on hours worked by covered employees in the collective-bargaining unit. [FN7] The collective-bargaining agreement specified that it would remain in effect until June 30, 1981, and thereafter from year to year unless either Concrete Pipe or the Laborers gave notice of a desire to renegotiate or terminate it. " 'Such written notice [was to] be given at least sixty (60) ***613** days prior to June 30 ... [and if] no

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agreement [was] reached by June 30 ... the Employer or the [Laborers might] thereafter give written notice to the other that on a specified date [at least] fifteen (15) days [thereafter] the Agreement [should] be considered terminated.' " App. 76.

FN6. The average rate for covered employees at which Concrete Pipe contributed to the Plan in 1977 was $1.14 per hour, and Concrete Pipe's contributions for 1977 totaled $29,337.71.

FN7. The collective-bargaining agreement provided for contributions for each laborer at a rate of $1.20 per hour. In 1978 Concrete Pipe's total contribution to the Plan was $49,913.04, and in 1979 it was $20,826.60.

In August 1979, Concrete Pipe stopped production at the Shafter facility. Although the details do not matter here, by October 1979, work by employees covered by the agreement with the Laborers had virtually ceased, and Concrete Pipe eventually stopped making contributions to the Plan. In the spring of 1981, Concrete Pipe and the Laborers each sent the other a timely notice of a desire to renegotiate the collective-bargaining agreement. Concrete Pipe subsequently bargained to an impasse and, on November 30, 1981, sent the Laborers a letter withdrawing recognition of that union as an employee representative, and giving notice of intent to terminate the 1978 collective- bargaining agreement. At about the same time, however, in November 1981, Concrete Pipe reopened the Shafter plant to produce 7,000 tons of concrete pipe needed to fill two orders for which it had successfully bid. It hired employees in classifications covered by **2275 its prior agreement with the Laborers, but did not contribute to the Plan for their work.

In January 1982, the Plan notified Concrete Pipe of withdrawal liability claimed to amount to $268,168.81. See *id.*, at 89-94. Although the demand letter did not specify the date on which the Plan contended that "complete withdrawal" from it had taken place, it referred to the failure of Concrete Pipe to make contributions to the Plan since February 1981, and stated that "[w]e are further advised that you have not signed a renewal of a collective bargaining agreement obligating you to continue contributions to the Plan on behalf of the Construction laborers currently in your employ." *Id.*, at 90.

The Plan filed suit seeking the assessed withdrawal liability. Concrete Pipe countersued to bar collection, contending *614 that "complete withdrawal" had occurred when operations at the Shafter plant ceased in August 1979, a date prior to the effective date of the MPPAA, and challenging the MPPAA on constitutional grounds. These cases were consolidated in the United States District Court for the Central District of California, which *sua sponte* ordered the parties to arbitrate the issue of whether withdrawal occurred prior to the effective date of the MPPAA. [FN8]

FN8. The District Court concluded that the effective date of the withdrawal liability provisions of the MPPAA was September 26, 1980, in reliance on the Ninth Circuit's decision in *Shelter Framing Corp. v. Pension Benefit Guaranty Corporation,* 705 F.2d 1502 (1983), which held the retroactivity provision of the MPPAA unconstitutional. App. 198. The decision in *Shelter Framing* was reversed by this Court in *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.,* 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984). Subsequent to this Court's decision in *Gray,* Congress amended the effective date of the MPAA's withdrawal liability provisions. See 29 U.S.C. § 1461(e)(2)(A).

The arbitration took place in two phases. In the first, the arbitrator determined that Concrete Pipe had not withdrawn from the Plan prior to the effective date of the MPPAA. App. 216. In the second phase, explicitly applying the presumption of 29 U.S.C. § 1401(a)(3)(B), the arbitrator found that Concrete Pipe had failed to meet its burden of showing the actuarial assumptions and methods to be unreasonable in the aggregate. App. 400. For reasons not at issue here, the arbitrator did rule partially in Concrete Pipe's favor, and reduced the withdrawal liability from $268,168.61 to $190,465.57.

Concrete Pipe then filed a third action in the District Court, to set aside or modify the arbitrator's decision, and again raised its constitutional challenge. *Id.*, at 406. The District Court treated Concrete Pipe's subsequent motion for summary judgment as a petition to vacate the arbitrator's award, which it denied, and granted a motion by the Plan to confirm the award. *Construction Laborers Pension Trust for Southern California v. Cen-Vi-Ro Concrete Pipe* *615 *and Products,*

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CV-82-5184-HLH (CD Cal., July 5, 1989), App. 416-425. [FN9] On Concrete Pipe's appeal, the judgment of the District Court was affirmed. *Board of Trustees of Construction Laborers Pension Trust for Southern California v. Concrete Pipe and Products of California, Inc.*, 936 F.2d 576 (CA9 1991), App. 431-432, judgt. order reported at 935 F.3d 576. We granted certiorari limited to two questions presented, which are set out in the margin. 504 U.S. 940, 112 S.Ct. 2273, 119 L.Ed.2d 200 (1992). [FN10]

FN9. In its motion to confirm the award, the Plan also asked that it be modified. The District Court treated this as a motion to vacate the arbitration award and denied it as well. See App. 416. The Plan did not appeal.

FN10. Our grant of certiorari was limited to the questions: "Do the presumptions in 29 U.S.C. § 1401 favoring multiemployer plans like Construction Laborers Pension Trust for Southern California ... violate the due process rights of Concrete Pipe and Products by denying access to an impartial decisionmaker?" and "Do the provisions of the Multi-Employer Pension Plan Amendments Act ... violate the Fifth Amendment rights of Concrete Pipe and Products, *as applied,* by retroactively imposing withdrawal liability on an employer who never had employees vested in the pension plan and whose collective bargaining agreements specifically limited liability to contributions made?" Pet. for Cert. i.

****2276** III

Concrete Pipe challenges the assessment of withdrawal liability on several grounds, the first being that by placing determination of withdrawal liability in the trustees, subject to the presumptions provided by § 1401, the MPPAA is unconstitutional because it denies Concrete Pipe an impartial adjudicator. This is not the first time this legal question has been before the Court. See *Pension Benefit Guaranty Corporation v. Yahn & McDonnell, Inc.*, 481 U.S. 735, 107 S.Ct. 2171, 95 L.Ed.2d 692 (1987), aff'g by an equally divided Court *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (CA3 1986)

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***616** A

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Concrete Pipe and its *amici* point to several potential sources of trustee bias toward imposing the greatest possible withdrawal liability. The one they emphasize most strongly has roots in the fact that "all of the trustees, including those selected by employers, are fiduciaries of the fund, 29 U.S.C. § 1002(21)([A]), and thus owe an exclusive duty to the fund." *Id.*, at 139 (emphasis omitted). As we said in another case discussing employee benefit pension plans permitted under LMRA:

"Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with 'uncompromising rigidity.'

. . . . .

"In sum, the duty of the management-appointed trustee of an employee benefit fund under § 302(c)(5) is directly antithetical to that of an agent of the appointing party.... ERISA essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet. [Title 29 U.S.C. § 1104(a)(1)] requires a trustee to 'discharge his duties ... solely in the interest of the participants [*i.e.*, covered employees] and beneficiaries.' " *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-332, 101 S.Ct. 2789, 2794-2795, 69 L.Ed.2d 672 (1981) (citations and footnote omitted).

The resulting tug away from the interest of the employer is fueled by the threat of personal liability for any breach of the trustees' fiduciary responsibilities, obligations, or duties, 29 U.S.C. § 1109, which may be enforced by civil actions brought by the Secretary of Labor or any covered employee or beneficiary of the plan, § 1132(a)(2).

***617** The trustees could act in a biased fashion for several reasons. The most obvious would be in attempting to maximize assets available for the beneficiaries of the trust by making findings to enhance withdrawal liability. The next would not be so selfless, for if existing underfunding was the consequence of prior decisions of the trustees, those decisions could, if not offset, leave the trustees open to personal liability. See Brief for American Trucking Associations, Inc., as *Amicus Curiae* 9. A risk of bias may also inhere in the mere fact that,

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fiduciary obligations aside, the trustees are appointed by the unions and by employers. Union trustees may be thought to have incentives, unrelated to the question of withdrawal, to impose greater rather than lesser withdrawal liability. Employer trustees may be responsive to concerns of those employers who continue to contribute, whose future burdens may be reduced by high withdrawal liability, and whose competitive position may be enhanced to boot. See Brief for Midwest Motor Express, Inc., et al. as *Amici Curiae* 8, citing Note, Trading Fairness for Efficiency: Constitutionality of the Dispute Resolution Procedures of the Multiemployer Pension Plan Amendments Act of 1980, 71 Geo.L.J. 161, 168 (1982).

**2277 [1][2][3] As against these supposed threats to the trustees' neutrality, due process requires a "neutral and detached judge in the first instance," *Ward v. Village of Monroeville,* 409 U.S. 57, 61-62, 93 S.Ct. 80, 84, 34 L.Ed.2d 267 (1972), and the command is no different when a legislature delegates adjudicative functions to a private party, see *Schweiker v. McClure,* 456 U.S. 188, 195, 102 S.Ct. 1665, 1669, 72 L.Ed.2d 1 (1982). "That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule." *Tumey v. Ohio,* 273 U.S. 510, 522, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927). Before one may be deprived of a protected interest, whether in a criminal or civil setting, see *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242, and n. 2, 100 S.Ct. 1610, 1613, and n. 2, 64 L.Ed.2d 182 (1980), one is entitled as a matter of due process of law to an adjudicator who is not in a situation " 'which would offer a possible *618 temptation to the average man as a judge ... which might lead him not to hold the balance nice, clear and true....' " *Ward, supra,* 409 U.S. at 60, 93 S.Ct. at 81 (quoting *Tumey, supra,* 273 U.S., at 532, 47 S.Ct., at 444). Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator. 409 U.S., at 61, 93 S.Ct. at 83.

[4] "[J]ustice," indeed, "must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Marshall v. Jerrico, Inc., supra,* 446 U.S., at 243, 100 S.Ct., at 1613 (citations and internal quotation marks omitted). This, too, is no less true where a private party is given statutory authority to adjudicate a dispute, and we will assume that the possibility of bias, if only that stemming from the trustees' statutory role and fiduciary obligation, would suffice to bar the trustees from serving as adjudicators of Concrete Pipe's withdrawal liability.

2

[5] The assumption does not win the case for Concrete Pipe, however, for a further strand of governing law has to be applied. Not all determinations affecting liability are adjudicative, and the " 'rigid requirements' ... designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity." 446 U.S., at 248, 100 S.Ct., at 1616. Where an initial determination is made by a party acting in an enforcement capacity, due process may be satisfied by providing for a neutral adjudicator to "conduct a *de novo* review of all factual and legal issues." Cf. *id.,* at 245, 100 S.Ct., at 1614; see also *id.,* at 247-248, and n. 9, 100 S.Ct., at 1615 and n. 9; cf. *Withrow v. Larkin,* 421 U.S. 35, 58, 95 S.Ct. 1456, 1470, 43 L.Ed.2d 712 (1975) ("Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised").

[6] *619 The distinction between adjudication and enforcement disposes of the claim that the assumed bias or appearance of bias in the trustees' initial determination of withdrawal liability alone violates the Due Process Clause, much as it did the similar claim in *Marshall v. Jerrico.* Although we were faced there with a federal agency administrator who determined violations of a child labor law and assessed penalties under the statute, we concluded that the administrator could not be held to the high standards required of those "whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime." 446 U.S., at 250, 100 S.Ct. at 1617. Of the administrator there we said, "He is not a judge. He performs no judicial or quasi-judicial functions. He hears no witnesses and rules on no disputed factual

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or legal questions. The function of assessing a violation **2278 is akin to that of a prosecutor or civil plaintiff." *Id.*, at 247, 100 S.Ct., at 1615.

This analysis applies with equal force to the trustees, who, we find, act only in an enforcement capacity. The statute requires the plan sponsor, here the trustees, to notify the employer of the amount of withdrawal liability and to demand payment, 29 U.S.C. § 1399(b)(1), actions that bear the hallmarks of an assessment, not an adjudication. The trustees are not required to hold a hearing, to examine witnesses, or to adjudicate the disputes of contending parties on matters of fact or law. [FN11] In *Marshall,* we observed that an employer "except[ing] to a penalty ... is entitled to a *de novo* hearing before an administrative law judge," 446 U.S., at 247, 100 S.Ct., at 1615, and we concluded that this latter proceeding was the *620 "initial adjudication," *id.*, at 247, n. 9, 100 S.Ct., at 1615, n. 9. Likewise here, we conclude that the first adjudication is the proceeding that occurs before the arbitrator, not the trustees' initial determination of liability. [FN12]

FN11. While the employer "may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments," 29 U.S.C. § 1399(b)(2) , and while the plan sponsor must then respond, *ibid.*, this hardly amounts to "adjudication." The statute does not require the employer to exhaust the avenue of making a request of the plan sponsor prior to initiating arbitration proceedings. See § 1401(a)(1).

FN12. "[W]e need not say with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function," *Marshall,* 446 U.S., at 250, 100 S.Ct., at 1617 (footnote omitted), as that issue is not within the scope of the questions on which we granted certiorari in this case.

B

This does not end our inquiry, however, for Concrete Pipe goes on to argue that the statutory presumptions preserve the trustees' bias by limiting the arbitrator's autonomy to determine withdrawal liability, and thereby work to deny the employer a fair adjudication.

1

Under the first provision at issue here, "any determination made by the plan sponsor under [29 U.S.C. §§ 1381-1399 and 1405] is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A). Concrete Pipe argues that this presumption denied it an impartial adjudicator on the issue of its withdrawal date, thus raising a constitutional question on which the Courts of Appeals have divided. [FN13]

FN13. The Courts of Appeals for the First, Second, Fourth, Ninth, and District of Columbia Circuits have found the provision at issue constitutional, while the Court of Appeals for the Third Circuit has struck it down. Compare *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Indus. Pension Fund, Inc.*, 762 F.2d 1137, 1140-1143 (CA1 1985) (en banc); *Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1403- 1404 (CA9 1984), cert. denied, 471 U.S. 1054, 105 S.Ct. 2116, 85 L.Ed.2d 481 (1985); *Washington Star Co. v. International Typographical Union Negotiated Pension Plan,* 235 U.S.App.D.C. 1, 10, 729 F.2d 1502, 1511 (1984); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 855 (CA2), cert. denied *sub nom. Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers,* 467 U.S. 1259, 104 S.Ct. 3554, 82 L.Ed.2d 856 (1984); and *Republic Indus., Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund,* 718 F.2d 628, 639-641 (CA4 1983), cert. denied, 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed.2d 855 (1984), with *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128, 138-142 (CA3 1986), aff'd by an equally divided Court *sub nom. Pension Benefit Guaranty Corporation v. Yahn & McDonnell, Inc.*, 481 U.S. 735, 107 S.Ct. 2171, 95 L.Ed.2d 692 (1987).

*621 The parties apparently agree that this presumption applies only to factual determinations, see Reply Brief for Petitioner 17; Brief for Respondent 24 (deferring to brief for the PBGC as *amicus curiae*); Brief for Pension Benefit Guaranty Corporation as *Amicus Curiae* 10, and n. 11, and this position is consistent with a PBGC regulation requiring the arbitrator "[i]n reaching his **2279 decision [to] follow applicable law, as embodied in

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statutes, regulations, court decisions, interpretations of the agencies charged with the enforcement of the Act, and other pertinent authorities," 29 CFR § 2641.4(a)(1) (1992). We will assume for purposes of this case that the regulation reflects a sound reading of the statute. [FN14]

> FN14. There is no utility in attempting to construe § 1401(a)(3)(A) finely to apply the "unreasonable" standard to certain determinations possible under § § 1381-1399 and 1405, and the "clearly erroneous" formulation to others. These distinctions are not relevant in light of the relationship in this context of both of these terms to the statutory phrase requiring a showing "by a preponderance," which we explain below.

a

[7] It is clear that the presumption favoring determinations of the plan sponsor shifts a burden of proof or persuasion to the employer. The hard question is what the employer must show under the statute to rebut the plan sponsor's factual determinations, that is, how and to what degree of probability the employer must persuade the arbitrator that the sponsor was wrong. The question is hard because the statutory text refers to three different concepts in identifying this burden: "preponderance," "clearly erroneous," and "unreasonable."

[8][9][10] ***622** The burden of showing something by a "preponderance of the evidence," the most common standard in the civil law, "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.' " *In re Winship,* 397 U.S. 358, 371-372, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring) (brackets in original) (citation omitted). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing [body] on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). A showing of "unreasonableness" would require even greater certainty of error on the part of a reviewing body. See, *e.g., Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986).

[11] In creating the presumption at issue, these terms are combined in a very strange way. As our descriptions indicate, the first, "preponderance," is customarily used to prescribe one possible burden or standard of proof before a trier of fact in the first instance, as when the proponent of a proposition loses unless he proves a contested proposition by a preponderance of the evidence. The term thus belongs in the same category with "clear and convincing" and "beyond a reasonable doubt," which are also used to prescribe standards of proof (but when greater degrees of certainty are thought necessary). Before any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty.

[12] The second and third terms differ from the first in an important way. They are customarily used to describe, not a degree of certainty that some fact has been proven in the first instance, but a degree of certainty that a factfinder in the first instance made a mistake in concluding that a fact ***623** had been proven under the applicable standard of proof. They are, in other words, standards of review, and they are normally applied by reviewing courts to determinations of fact made at trial by courts that have made those determinations in an adjudicatory capacity (unlike the trustees here). See, *e.g.,* Fed.Rule Civ.Proc. 52(a). As the terms readily indicate, a reviewing body characteristically examines prior findings in such a way as to give the original factfinder's conclusions of fact some degree of deference. This makes sense because in many circumstances the costs of providing for duplicative ****2280** proceedings are thought to outweigh the benefits (the second would render the first ultimately useless), and because, in the usual case, the factfinder is in a better position to make judgments about the reliability of some forms of evidence than a reviewing body acting solely on the basis of a written record of that evidence. Evaluation of the credibility of a live witness is the most obvious example.

[13][14] Thus, review under the "clearly erroneous" standard is significantly deferential, requiring a "definite and firm conviction that a

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mistake has been committed." And application of a reasonableness standard is even more deferential than that, requiring the reviewer to sustain a finding of fact unless it is so unlikely that no reasonable person would find it to be true, to whatever the required degree of proof.

[15] The strangeness in the statutory language creating the first presumption arises from the combination of terms from the first category (burdens of proof) with those from the second (standards of review). It is true, of course, that this apparent confusion of categories may have resulted from the hybrid nature of the arbitrator's proceeding in which it is supposed to be applied. The arbitrator here does not function simply as a reviewing body in the classic sense, for he is not only obliged to enquire into the soundness of the sponsor's determinations when they are challenged, but may receive new evidence in the course of his review and adopt his own conclusions of fact. He may conduct proceedings in the ***624** same manner and with the same powers as an arbitrator may do under Title 9 of the United State Code, see 29 U.S.C. § 1401(b)(3), being authorized, for example, to hear (indeed to subpoena) witnesses and to take evidence. See 9 U.S.C. § 7; 29 U.S.C. § 1401(b)(3) (making specific reference to subpoena power). He is, then, a reviewing body (as is clear from his obligation, absent a contrary showing, to deem certain determinations by the plan sponsor correct), but a reviewing body invested with the further powers of a finder of fact (as is clear from his power to take evidence in the course of his review and from the presumption of correctness that a district court is bound to give his "findings of fact," § 1401(c)). The arbitrator may thus provide a dual sort of trial and review, ultimately empowered to draw his own conclusions, and it would make sense to describe his different functions respectively by the language of trial and the language of review.

It does not, however, make sense to use the language of trial and the language of review as the statute does, for the statute does not refer to different arbitrator's functions in language appropriate to each; it refers, rather, to one single conclusion that must be drawn about a determination previously made by a plan sponsor. By its terms the statute purports to provide a standard for reviewing the sponsor's findings, and it defines the nature of the conclusion the arbitrator must draw by using a combination of terms that are categorically ill-matched. They are also inconsistent with each other on any reading. As used here, as distinct from its more usual context, the statutory phrase authorizing the arbitrator to reject a factual conclusion upon proof by a "preponderance" implies review of the sponsor's determination on the basis of the record, supplemented by any new evidence, for simple error. If this statutory phrase were given effect, and the arbitrator concluded from a review of the record and of new evidence that a finding of fact was more probably wrong than not, it would be rejected, and a different ***625** finding might be substituted. On the other hand, requiring a showing that the sponsor's determination was "clearly erroneous" or "unreasonable" would grant the plan sponsor's factual findings a great deal of deference. But to say in this context that one must demonstrate that something is more probably clearly erroneous than not or more probably than not unreasonable is meaningless. One might as intelligibly say, in a trial court, that a criminal prosecutor is bound to prove each ****2281** element probably true beyond a reasonable doubt. The statute is thus incoherent with respect to the degree of probability of error required of the employer to overcome a factual conclusion made by the plan sponsor. [FN15]

FN15. Justice THOMAS reads the statute not to be about the standard of review of the plan sponsor's findings of fact at all. On his reading, "clearly erroneous" is not a term of art, but an attempt at independent literal description. Under his reading, if the arbitrator concludes a factual determination of a plan sponsor is probably wrong, it will nonetheless be permitted to stand, unless the error is "obvious, plain, gross, significant, or manifest." See *post,* at 2295 (citation omitted). Justice THOMAS does not adequately explain what purpose would be served by a statute that let some erroneous (and presumably material) factual determinations stand even when they were "clearly erroneous" in the legal sense or "unreasonable," merely because of the degree to which they happened to deviate from the true facts, even when the latter are supported by overwhelming evidence. He does refer to a possible congressional desire to avoid disputes over "insignificant errors," *post,* at 2296, but under his reading a factual error could be significant, in the sense that it was both material and undeniably incorrect, and yet still stand because it was not that far different from the truth. Justice THOMAS cites the presumption of innocence for the proposition that the presumption

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at issue here does not imply a standard of review. See *post,* at 2295. But just because some presumptions do not imply standards of review does not mean that this one does not. Here, by its terms, the statutory presumption says that factual findings of the plan sponsor will stand unless some showing is made, necessarily implying a standard of review of those findings.

[16][17] The proper response to this incomprehensibility is obviously important in deciding this case. If it permitted an employer to rebut the plan sponsor's factual conclusions by a ***626** preponderance, merely placing a burden of persuasion on the employer, and permitting adjudication of the facts by the arbitrator without affording deference to the plan sponsor's determinations, the provision would be constitutionally unremarkable. For although we have observed that "[w]here the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application, ... [o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Lavine v. Milne,* 424 U.S. 577, 585, 96 S.Ct. 1010, 1016, 47 L.Ed.2d 249 (1976) (footnote omitted). Concrete Pipe points to no special interest that would distinguish this from the normal case. It is indeed entirely sensible to burden the party more likely to have information relevant to the facts about its withdrawal from the Plan with the obligation to demonstrate that facts treated by the Plan as amounting to a withdrawal did not occur as alleged. Such was the rule at common law. W. Bailey, Onus Probandi 1 (1886) (citing Powell on Evidence 167-171) ("In every case the *onus probandi* lies on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant").

On the other hand, if the employer were required to show the trustees' findings to be either "unreasonable or clearly erroneous," there would be a substantial question of procedural fairness under the Due Process Clause. In essence, the arbitrator provided for by the statute would be required to accept the plan sponsor's findings, even if they were probably incorrect, absent a showing at least sufficient to instill a definite or firm conviction that a mistake had been made. Cf. *Withrow v. Larkin,* 421 U.S., at 58, 95 S.Ct., at 1470. In light of our assumption of possible bias, the employer would seem to be deprived thereby of the impartial adjudication in the first instance to which it is entitled under the Due Process Clause. See *supra,* at 2276- 2277.

***627** b

Having found the statutory language itself incoherent, we turn, as we would in the usual case of textual ambiguity, to the legislative ****2282** purpose as revealed by the history of the statute, for such light as it may shed. [FN16] Unsurprisingly, we have found no direct discussion in the legislative history of the degree of certainty on the part of the arbitrator required for the employer to overcome the sponsor's factual conclusions. The Report of the House Committee on Education and Labor on the bill that became the MPPAA describes the presumption as applying to "a determination of withdrawal liability by a plan," and lumps it together with the statutory presumption, discussed below, that applies to the choice of actuarial assumptions and methods. See H.R.Rep. No. 96-869, pt. 1, p. 86 (1980); 29 U.S.C. § 1401(a)(3)(B). [FN17] The Report states that

FN16. The textual incomprehensibility concerns a very narrow matter, and we find nothing in the structure of the statutory scheme that provides elucidation.

FN17. The presumption at issue here was included in a new § 4221 added by the MPPAA to ERISA. In the text of the version of the bill to which the House Report refers the presumption was contained in § 4203, and the provision began: "For purposes of this part, a determination made with respect to a plan under section 4201 [relating to employer withdrawals] is presumed correct unless the party contesting the determination shows...." See H.R.Rep. No. 96-869, pt. 1, p. 17 (1980), 1980 U.S.C.C.A.N. p. 2918. As enacted, this text was replaced with "For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 4201 through 4219 and section 4225 is presumed correct unless the party contesting the determination shows...." Pub.L. 93-406, title IV, § 4221, as added, Pub.L. 96-364, title I § 104(2), Sept. 26, 1980, 94 Stat. 1239, 29 U.S.C. § 1401(a)(3)(A). The text of what was called § 4201 differs somewhat from the text of the sections to which the enacted bill refers, which are

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now codified at 29 U.S.C. §§ 1381-1399 and 1405. Our concern with legislative history here goes only to the question of what degree of certainty of error Congress intended to require in this situation. While the change in referent that took place might have some implications for this question, we do not think anything relevant in the legislative history turns on the different scope of the earlier version of the bill.

***628** "[t]hese rules are necessary in order to ensure the enforceability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination. The committee believes it is extremely important that a withdrawn employer begin making the annual payments even though the period of years for which payments must continue will be based on the actual liability allocated to the employer." H.R.Rep. 96-869, pt. 1, *supra,* at 86, 1980 U.S.C.C.A.N. at 2954.

The only other comment that we have found in the legislative history occurs in a Report prepared by the Senate Committee on Labor and Human Resources, which first purports to speak about both statutory presumptions, but directs its brief discussion to problems unique to "technical actuarial matters." See *S. 1076:* The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong., 2d Sess., 20-21 (Comm.Print 1980) (hereinafter Committee Print); see also *infra,* at 2286, and n. 20.

The legislative history thus sheds little light on the odd language chosen to describe the employer's burden. All it tells us is that the provision's purpose is to prevent the employer from "forcing the plan sponsor to prove every element involved in making an actuarial determination." Since this purpose would be served simply by placing the burden of proof as to historical fact on the employer, however light or heavy that burden may be, the legislative history does nothing to make sense of the drafter's failure to choose among the standards included in the text.

c

[18] The only way out of the muddle is by a different rule of construction. It is a hoary one that, in a case of statutory ambiguity, "where an otherwise acceptable construction of ***629** a statute would raise serious constitutional ****2283** problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988). "Federal statutes are to be so construed as to avoid serious doubt of their constitutionality. 'When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' *Crowell v. Benson,* 285 U.S. 22, 62 [52 S.Ct. 285, 296, 76 L.Ed. 598 (1932)]." *Machinists v. Street,* 367 U.S. 740, 749-750, 81 S.Ct. 1784, 1790, 6 L.Ed.2d 1141 (1961). Cf. *Parsons v. Bedford,* 28 U.S. (3 Pet.) 433, 448-449, 7 L.Ed. 732 (1830) (Story, J.) (a construction that would render a statute unconstitutional should be avoided); *Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804) (Marshall, C.J.).

[19] Although we are faced here not with ambiguity within the usual degree, but with incoherence, we have a common obligation in each situation to resolve the uncertainty in favor of definite meaning, and the canon for resolving ambiguity applies with equal force when terminology renders a statute incoherent. In applying that canon here, we must give effect to the one conclusion clearly supported by the statutory language, that Congress intended to shift the burden of persuasion to the employer in a dispute over a sponsor's factual determination. This objective can be realized without raising serious constitutional concerns simply by construing the presumption to place the burden on the employer to disprove a challenged factual determination by a preponderance. In so construing the statute we make no pretense to have read the congressional mind to perfection. We would not, indeed, even have this problem if an argument could not obviously be made that Congress intended greater deference than the preponderance standard extends. But one could hardly call the intent clear after wondering why the preponderance ***630** standard was also included. In these circumstances it is enough that the choice to attain coherence by obviating constitutional problems is not "plainly

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contrary to the intent of Congress." *DeBartolo, supra,* 485 U.S., at 575, 108 S.Ct., at 1397.

Because the statute as we construe it does not foreclose any factual issue from independent consideration by the arbitrator (the presumption is, again, assumed by all to be inapplicable to issues of law), there is no constitutional infirmity in it. For the same reason, that an employer may avail itself of independent review by the concededly neutral arbitrator, we find no derivative constitutional defect infecting the further presumption that a district court must afford to an arbitrator's findings of fact. See 29 U.S.C. § 1401(c).

d

[20] Before applying the presumption to this case, one must recognize that in spite of Concrete Pipe's contention to the contrary, determining the date of "complete withdrawal" presents not a mere question of fact on which the arbitrator was required in the first instance to apply the § 1401(a)(3)(A) presumption, but a mixed question of fact and law. The relevant facts are about the closure of the Shafter plant (such as the intent of Concrete Pipe with respect to the plant, its expression of that intent, its activities while the plant was not operating, and the circumstances of the plant's reopening), while the question whether these facts amount to a "complete withdrawal" is one of law.

[21] As to the truly factual issues, the arbitrator's decision fails to reveal the force with which factual conclusions by the trustees here were presumed correct, and in such a case we would ordinarily reverse the judgment below for consideration of the extent to which the arbitrator's application of the presumption **2284 was contrary to the construction we adopt today. But two reasons (urged upon us by neither party) persuade us not to take this course: the Plan's letter to Concrete Pipe contains no statement of facts justifying the trustees' *631 demand, and the parties entered into a factual stipulation in the District Court prior to commencing the arbitration. Because of these two circumstances, there were virtually no contested factual determinations to which the arbitrator might have deferred. And, on the one question of fact that may have been disputed, the arbitrator found, apparently in the first instance, that Concrete Pipe's intent in closing the Shafter plant had been to cease operations permanently. App. 213-214. [FN18]

FN18. Despite this favorable finding, Concrete Pipe still lost, of course. The arbitrator treated subjective intent as irrelevant. See App. 213-215. While the District Court and the Court of Appeals, which relied on the District Court's reasoning, did not go so far, see *id.,* at 419-420, any factual deference in their decisions would be to the arbitrator's finding, itself untainted by the force of any presumption. See 29 U.S.C. § 1401(c); Fed.Rule Civ.Proc. 52(a).

While we express no opinion on whether the facts in this case constitute a "complete withdrawal" within the meaning of the statute, a question not before us today, the approach taken by the arbitrator and the courts below is not inconsistent with our interpretation of the first presumption. The determination of the date of withdrawal by the arbitrator did not involve a misapplication of the statutory presumption, and it did not deprive Concrete Pipe of its right to procedural due process.

2

The second presumption at issue attends the calculation of the amount of withdrawal liability. The statute provides that in the absence of more particular PBGC regulations, the plan is required to use "actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1). The presumption in question arises under § 1401(a)(3)(B), which provides that

*632 "the determination of a plan's unfunded vested benefits for a plan year, [is] presumed correct unless a party contesting the determination shows by a preponderance of evidence that--

"(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

"(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods."

Concrete Pipe's concern is with the presumptive force of the actuarial assumptions and methods covered by subsection (i).

[22] While this provision is like its counterpart

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creating the presumption as to factual determinations in placing the burden of proof on the employer, the issues implicated in applying it to the actuary's work are not the same. As the text plainly indicates, the assumptions and methods used in calculating withdrawal liability are selected in the first instance not by the trustees, but by the plan actuary. For a variety of reasons, this actuary is not, like the trustees, vulnerable to suggestions of bias or its appearance. Although plan sponsors employ them, actuaries are trained professionals subject to regulatory standards. See 29 U.S.C. §§ 1241, 1242 ; 26 U.S.C. § 7701(a)(35). The technical nature of an actuary's assumptions and methods, and the necessity for applying the same assumptions and methods in more than one context, as a practical matter limit the opportunity an actuary might otherwise have to act unfairly toward the withdrawing employer. The statutory requirement (of "actuarial assumptions and methods--which, in the aggregate, are reasonable ...") is not unique to the withdrawal liability context, for the statute **2285 employs identical language in 29 U.S.C. § 1082(c)(3) to describe the actuarial assumptions and methods to be used in determining whether a plan has satisfied the minimum funding requirements contained in the statute. The use of the same language to describe the actuarialassumptions *633 and methods to be used in these different contexts tends to check the actuary's discretion in each of them.

> "Using different assumptions [for different purposes] could very well be attacked as presumptively unreasonable both in arbitration and on judicial review.
>
> "[This] view that the trustees are required to act in a reasonably consistent manner greatly limits their discretion, because the use of assumptions overly favorable to the fund in one context will tend to have offsetting unfavorable consequences in other contexts. For example, the use of assumptions (such as low interest rates) that would tend to increase the fund's unfunded vested liability for withdrawal liability purposes would also make it more difficult for the plan to meet the minimum funding requirements of § 1082." *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d, at 146-147 (Seitz, J., dissenting in part).

[23] This point is not significantly blunted by the fact that the assumptions used by the Plan in its other calculations may be "supplemented by several actuarial assumptions unique to withdrawal liability." Brief for Respondent 26. Concrete Pipe has not shown that any method or assumption unique to the calculation of withdrawal liability is so manipulable as to create a significant opportunity for bias to operate, and arguably the most important assumption (in fact, the only actuarial assumption or method that Concrete Pipe attacks in terms, see Reply Brief for Petitioner 18-20) is the critical interest rate assumption that must be used for other purposes as well. [FN19]

> FN19. It may be that the trustees could, in theory, replace the actuary's assumptions with their own, but that would involve a different case from this, and while we are aware of at least one case in which a plan sponsor exercised decisive influence over an actuary whose initial assumptions it disliked, see *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85, 93 (CA3 1990), we know of none in which a plan sponsor was found to have replaced an actuary's actuarial methods or assumptions with different ones of its own. Although we express no view on the question whether a plan sponsor must adopt the assumptions used by the actuary, we note that the legislative history of § 1082, which was enacted as part of ERISA in 1974, suggests that the acturarial assumptions must be "independently determined by an actuary," and that it is "inappropriate for an employer to substitute his judgment ... for that of a qualified actuary" with respect to these assumptions. S.Rep. No. 93-383, p. 70 (1973); see also H.R.Rep. No. 93-807, p. 95 (1974), 1974 U.S.C.C.A.N. 4639, 4954, 4761.

*634 The second major difference attending the two presumptions lies in the sense of reasonableness that must be disproven by an employer attacking the actuary's methods and assumptions, as against the reasonableness of the trustees' determinations of historical fact. Following the usual presumption of statutory interpretation, that the same term carries the same meaning whenever it appears in the same Act, see *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433, 52 S.Ct. 607, 608, 76 L.Ed. 1204 (1932), we might expect "reasonable" in § 1401(a)(3)(B) to function here just as it did in § 1401(a)(3)(A), to denote a certain range of probability that a factual determination is correct. For several reasons, however, we think it clear that this second presumption of reasonableness functions quite differently.

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[24] First, of course, the statute does not speak in terms of disproving the reasonableness of the calculation of the employer's share of the unfunded liability, which would be the finding of future fact most obviously analogous to the findings of historical fact to which the § 1401(a)(3)(A) presumption applies. Section 1401(a)(3)(B) speaks instead of the aggregate reasonableness of the assumptions **2286 and methods employed by the actuary in calculating the dollar liability figure. Because a "method" is not "accurate" or probably "true" within some range, "reasonable" must be understood here to refer to some different kind of judgment, one that it would make sense to apply to a review of methodology as *635 well as of assumptions. Since the methodology is a subject of technical judgment within a recognized professional discipline, it would make sense to judge the reasonableness of a method by reference to what the actuarial profession considers to be within the scope of professional acceptability in making an unfunded liability calculation. Accordingly, an employer's burden to overcome the presumption in question (by proof by a preponderance that the actuarial assumptions and methods were in the aggregate unreasonable) is simply a burden to show that the combination of methods and assumptions employed in the calculation would not have been acceptable to a reasonable actuary. In practical terms it is a burden to show something about standard actuarial practice, not about the accuracy of a predictive calculation, even though consonance with professional standards in making the calculation might justify confidence that its results are sound.

[25] As thus understood, the presumption in question supports no due process objection. The employer merely has a burden to show that an apparently unbiased professional, whose obligations tend to moderate any claimed inclination to come down hard on withdrawing employers, has based a calculation on a combination of methods and assumptions that falls outside the range of reasonable actuarial practice. To be sure, the burden may not be so "mere" when one considers that actuarial practice has been described as more in the nature of an "actuarial art" than a science, *Keith Fulton & Sons v. New England Teamsters,* 762 F.2d 1137, 1143 (CA1 1985) (en banc) (internal quotation marks omitted), and that the employer's burden covers "technical actuarial matters with respect to which there are often several equally 'correct' approaches," Committee Print 20-21. [FN20] But since imprecisioninheres *636 in the choice of actuarial methods and assumptions, the resulting difficulty is simply in the nature of the beast. Because it must fall on whichever party bears the burden of persuasion on such an issue, at least where the interests at stake are no more substantial than Concrete Pipe's are here, its allocation to one party or another does not raise an issue of due process. See *supra,* at 2281.

> FN20. Indeed, our view of the problem of imprecision in reviewing actuarial methods and assumptions seems to have been the very reason for including the presumption in the statute. The Senate Committee Report states that "[t]he [Senate] Committee [on Labor and Human Resources] includes the presumption to reduce the likelihood of dispute and delay over technical actuarial matters with respect to which there are often several equally 'correct' approaches. Without such a presumption, a plan would be helpless to resist dilatory tactics by a withdrawing employer--tactics that could, and could be intended to, result in prohibitive collection costs to the plan." Committee Print 20-21.

IV

Concrete Pipe argues next that, as applied, the MPPAA violates substantive due process and takes Concrete Pipe's property without just compensation, both in violation of the Fifth Amendment. As to these issues, our decisions in *Gray* and *Connolly* provide the principal guidance.

A

In *Gray* we upheld the MPPAA against substantive due process challenge. Unlike the employer in *Gray,* Concrete Pipe here has no complaint that the MPPAA has been retroactively applied by predicating liability on a withdrawal decision made before passage of the statute. To be sure, since there would be no withdrawal liability without prewithdrawal contributions to the Plan, some of which were made before the statutory enactment, some of the conduct upon which Concrete Pipe's liability rests ante**2287 dates the statute. But this fact presents a far weaker premise for claiming a substantive due process violation even than the *Gray* employer raised, and rejection of Concrete Pipe's contention is compelled by our decisions not only in *Gray,* but in *Usery v. Turner Elkhorn Mining Co.,*

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428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976), upon which the *Gray* Court relied.

*637 " 'It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. See, *e.g.*, *Ferguson v. Skrupa,* 372 U.S. 726 [83 S.Ct. 1028, 10 L.Ed.2d 93] (1963); *Williamson v. Lee Optical Co.,* 348 U.S. 483, 487-488 [75 S.Ct. 461, 464, 99 L.Ed. 563] (1955).

. . . . .

" '[I]t may be that the liability imposed by the Act ... was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. See *Fleming v. Rhodes,* 331 U.S. 100 [67 S.Ct. 1140, 91 L.Ed. 1368] (1947); *Carpenter v. Wabash R. Co.,* 309 U.S. 23 [60 S.Ct. 416, 84 L.Ed. 558] (1940); *Norman v. Baltimore & Ohio R. Co.,* 294 U.S. 240 [55 S.Ct. 407, 79 L.Ed. 885] (1935); *Home Bldg. & Loan Assn. v. Blaisdell,* 290 U.S. 398 [54 S.Ct. 231, 78 L.Ed. 413] (1934); *Louisville & Nashville R. Co. v. Mottley,* 219 U.S. 467 [31 S.Ct. 265, 55 L.Ed. 297] (1911). This is true even though the effect of the legislation is to impose a new duty or liability based on past acts. See *Lichter v. United States,* 334 U.S. 742 [68 S.Ct. 1294, 92 L.Ed. 1694] (1948); *Welch v. Henry,* 305 U.S. 134 [59 S.Ct. 121, 83 L.Ed. 87] (1938); *Funkhouser v. Preston Co.,* 290 U.S. 163 [54 S.Ct. 134, 78 L.Ed. 243] (1933).' " *Gray,* 467 U.S., at 729-730, 104 S.Ct., at 2718, quoting *Turner Elkhorn, supra,* 428 U.S., at 15-16, 96 S.Ct., at 2892 (footnotes omitted).

To avoid this reasoning, Concrete Pipe relies not merely on a claim of retroactivity, but on one of irrationality. Since the company contributed to the plan for only 3 1/2 years, it argues, none of its employees had earned vested benefits through employment by Concrete Pipe at the time of its withdrawal. See Brief for Petitioner 28. Concrete Pipe argues that, consequently, no rational relationship exists between its payment of past contributions and the imposition of liability for a share of the unfunded vested benefits.

But this argument simply ignores the nature of multiemployer plans, which, as we have said above, operate by *638 pooling contributions and liabilities. An employer's contributions are not solely for the benefit of its employees or employees who have worked for it alone. Thus, Concrete Pipe's presupposition that none of its employees had vested benefits at the time of its withdrawal may be wrong. An employee whose benefits had vested before coming to work for Concrete Pipe may have earned additional vested benefits by the subsequent covered service. Another may have had sufficient prior service credit to obtain vesting of benefits during employment at Concrete Pipe. A third may have attained vesting while working for other employers but based in part on service credits earned at Concrete Pipe.

But even if Concrete Pipe is correct and none of its employees had earned enough service credits for entitlement to vested benefits by the time of Concrete Pipe's withdrawal, as a Concrete Pipe employee each had earned service credits that could be built upon in future employment with any other participating employer. In determining whether the imposition of withdrawal liability is rational, then, the relevant question is not whether a withdrawing employer's employees have vested benefits, but whether an employer has contributed to the plan's probable liability by providing employees with service credits. When the withdrawing employer's **2288 liability to the plan is based on the proportion of the plan's contributions (and coincident service credits) provided by the employer during the employer's participation in the plan, the imposition of withdrawal liability is clearly rational.

[26][27] It is true that, depending on the future employment of Concrete Pipe's former employees, the withdrawal liability assessed against Concrete Pipe may amount to more (or less) than the share of the Plan's liability strictly attributable to employment of covered workers at Concrete Pipe. But this possibility was exactly what Concrete Pipe accepted when it joined the Plan. A multiemployer plan has features of an insurance scheme in which employers spread the risk that their employees will meet the plan's vesting requirements *639 and obtain an entitlement to benefits. A rational employer hopes that its employees will vest at a rate above the average for all employees of contributing

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employers, and that, in this way, it will pay less than it would have by creating a single-employer plan. But the rational employer also appreciates the foreseeable risk that circumstances may produce the opposite result. [FN21] Since the MPPAA spreads the unfunded vested liability among employers in approximately the same manner that the cost would have been spread if all of the employers participating at the time of withdrawal had seen the venture through, the withdrawal liability is consistent with the risks assumed on joining a plan (however inconsistent that liability may be with the employer's hopes). In any event, under the deferential standard of review applied in substantive due process challenges to economic legislation there is no need for mathematical precision in the fit between justification and means. See *Turner Elkhorn,* 428 U.S., at 19, 96 S.Ct., at 2894.

FN21. An employer's calculation whether to join a plan will include these factors as well as a determination of the other benefits it can hope to receive from its participation in the plan. See *supra,* at 2271.

Concrete Pipe's substantive due process claim is not enhanced by its argument that the MPPAA imposes obligations upon it contrary to limitations on liability variously contained in the 1962 Trust Agreement, [FN22] in a collective-***640** bargaining agreement between the Laborers and multiemployer associations (the "1977-1980 Laborer's Craft Master Labor Agreement") [FN23] and in an appendix to the "Southern California Master Labor Agreements in 1977-1980." [FN24] Even assuming that ****2289** all these provisions apply to Concrete Pipe, [FN25] its argument runs against the holding in *Gray* that federal economic legislation, which is not subject to constraintscoextensive ***641** with those imposed upon the States by the Contract Clause of Art. I, § 10, of the Federal Constitution, *Gray,* 467 U.S., at 733, 104 S.Ct., at 2719; *United States Trust Co. of N.Y. v. New Jersey,* 431 U.S. 1, 17, n. 13, 97 S.Ct. 1505, 1515, n. 13, 52 L.Ed.2d 92 (1977), is subject to due process review only for rationality, which, as we have said, is satisfied in theapplication of the MPPAA to Concrete Pipe.

FN22. The 1962 Trust Agreement states:
" 'Section 4.07. Neither the Association or (sic) any officer, agent, employee or (sic) committee member of the Associations shall be liable to make Contributions to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he may incur liability as a Trustee as hereinafter provided. The liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operation of the Fund or of the Pension Plan, except as may be hereafter provided in the Collective Bargaining Agreements.
" 'Section 4.08. Neither the Associations, any Individual Employer, the Union, any Local Union, nor any Employee shall be liable or responsible for any debts, liabilities or obligations of the Fund or the Trustees.' " App. 80-81, ¶ 32.

FN23. Article X, § E(4) of the 1977-1980 Laborers' Craft Master Labor Agreement provides:
" 'The parties recognize and agree that the Pension Trust and Plan was created, negotiated, and is intended to continue to be if permitted by Law under ERISA, a defined contribution plan and trust and that the individual Contractors' liability with regard to the pension has been and remains limited exclusively to payment of the contributions specified from time to time in collective bargaining agreements.' " *Id.,* at 82, ¶ 34.

FN24. Appendix K to the Southern California Master Labor Agreements in 1977-1980 states:
" 'IMPORTANT.

PENSION BENEFITS ARE NOT AND HAVE NEVER BEEN GUARANTEED. THEY ARE PAYABLE ONLY TO THE EXTENT THAT THE FUND HAS ASSETS TO PAY BENEFITS. NEITHER YOUR EMPLOYER NOR YOUR UNION HAS ASSUMED ANY LIABILITY, DIRECTLY OR INDIRECTLY, TO PROVIDE MONTHLY PENSION BENEFITS. YOUR EMPLOYERS'S SOLE OBLIGATION IS TO MAKE THE CONTRIBUTIONS CALLED FOR IN ITS COLLECTIVE BARGAINING AGREEMENT. THE PENSION PLAN HAS ALSO BEEN CONSIDERED BY THE EMPLOYERS, THE UNION AND THE TRUSTEES TO BE A DEFINED CONTRIBUTION PLAN.' " *Id.,* at 81-82, ¶ 33.

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FN25. The Plan contends that the record does not reflect that the appendix mentioned in the text was incorporated by reference into Concrete Pipe's own collective-bargaining agreement. See Brief for Respondent 10, n. 7.

Nor does the possibility that trustee decisions made "before [Concrete Pipe] entered [the Plan]" may have led to the unfunded liability alter the constitutional calculus. See Brief for Petitioner 31. Concrete Pipe's decision to enter the Plan after any such decisions were made was voluntary, and Concrete Pipe could at that time have assessed any implications for the Plan's future liability. Similarly, Concrete Pipe cannot rely on any argument based on the fact that, because it was not a member of any of the contractors' associations represented among the Plan's trustees, it had no control over decisions of the trustees after it entered the Plan that may have increased the unfunded liability. Again, Concrete Pipe could have assessed the implications for future liability of the identity of the trustees of the Plan before it decided to enter. [FN26] The imposition of withdrawal liability here is rationally related to the terms of Concrete Pipe's participation in the Plan it joined and that suffices for substantive due process scrutiny of this economic legislation.

FN26. Even if Concrete Pipe were represented, its representative, like all the trustees, would be bound to act consistently with the fiduciary duty owed by trustees to covered employees and beneficiaries of the plan. See 29 U.S.C. § 1104(a)(1).

B

[28] Given that Concrete Pipe's due process arguments are unavailing, "it would be surprising indeed to discover" the challenged statute nonetheless violating the Takings Clause. *Connolly,* 475 U.S., at 223, 106 S.Ct., at 1025. Nor is there any violation. Following the analysis in *Connolly,* we begin with the contractual provisions relied upon from the Trust Agreement and ***642** the collective-bargaining agreements, which we find no more helpful to Concrete Pipe than those adduced in the facial challenge brought in *Connolly,* as described in that opinion:

"By the express terms of the Trust Agreement and the Plan, the employer's sole obligation to the Pension Trust is to pay the contributions required by the collective-bargaining agreement. The Trust Agreement clearly states that the employer's obligation for pension benefits to the employee is ended when the employer pays the appropriate contribution to the Pension Trust. This is true even though the contributions agreed upon are insufficient to pay the benefits under the Plan." *Id.,* at 218, 106 S.Ct., at 1022 (citations and footnotes omitted).

Indeed, one provision of the Trust Agreement on which Concrete Pipe primarily relies is substantially identical to the one at issue in *Connolly.* Compare n. 22, *supra,* with *Connolly, supra,* at 218, n. 2, 106 S.Ct., at 1022, n. 2.

We said in *Connolly* that

****2290** "[a]ppellants' claim of an illegal taking gains nothing from the fact that the employer in the present litigation was protected by the terms of its contract from any liability beyond the specified contributions to which it had agreed. 'Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.'

"Ifthe regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions." 475 U.S., at 223-224, 106 S.Ct., at 1025 (citations omitted).

***643** Nothing has changed since these words were first written. [FN27]

FN27. To the extent that Concrete Pipe's argument could be characterized as a challenge to the determination that, notwithstanding the contractual language, it is a "defined benefits plan" under the statute, this is a question on which Concrete Pipe did not seek review. See *supra,* at 2271.

Following *Connolly,* the next step in our analysis is to subject the operative facts, including the facts of the contractual relationship, to the standards derived from our prior Takings Clause cases. See *id.,* at 224- 225, 106 S.Ct., at 1026. They have identified three factors with particular significance for assessing the results of the required "ad hoc, factual inquir [y] into the circumstances of each particular case." *Id.,* at 224, 106 S.Ct., at 1026. The first is the nature of the governmental action. Again, our

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analysis in *Connolly* applies with equal force to the facts before us today.

> "[T]he Government does not physically invade or permanently appropriate any of the employer's assets for its own use. Instead, the Act safeguards the participants in multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan. This interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation." *Id.*, at 225, 106 S.Ct., at 1026.

[29] We reject Concrete Pipe's contention that the appropriate analytical framework is the one employed in our cases dealing with permanent physical occupation or destruction of economically beneficial use of real property. See *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2890-2892, 120 L.Ed.2d 798 (1992). While Concrete Pipe tries to shoehorn its claim into this analysis by asserting that "[t]he property of [Concrete Pipe] which is taken, is taken in its entirety," Brief for Petitioner ***644** 37, we rejected this analysis years ago in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 130-131, 98 S.Ct. 2646, 2662, 57 L.Ed.2d 631 (1978), where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question. Accord, *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 497, 107 S.Ct. 1232, 1248, 94 L.Ed.2d 472 (1987) ("[O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, [and] one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction' ") (citation omitted).

****2291** [30] There is no more merit in Concrete Pipe's contention that its property is impermissibly taken "for the sole purpose of protecting the PBGC [a government body] from being forced to honor its pension insurance." Brief for Petitioner 38; see also Brief for Midwest Motor Express, Inc., et al. as *Amici Curiae* 12. That the solvency of a pension trust fund may ultimately redound to the benefit of the PBGC, which was set up in part to guarantee benefits in the event of plan failure, is merely incidental to the primary congressional objective of protecting covered employees and beneficiaries of pension trusts like the Plan. "[H]ere, the United States has taken nothing for its own use, and only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within the power of Congress to impose." *Connolly, supra,* 475 U.S., at 224, 106 S.Ct. at 1025-1026.

Nor is Concrete Pipe's argument about the character of the governmental action strengthened by the fact that Concrete Pipe lacked control over investment and benefit decisions that may have increased the size of the unfunded vested liability. The response to the same argument raised ***645** under the substantive Due Process Clause is appropriate here: although Concrete Pipe is not itself a member of any of the management associations that are represented among the trustees of the fund, Concrete Pipe voluntarily chose to participate in the Plan, notwithstanding this fact. See *supra,* at 2289, and n. 26.

[31] As to the second factor bearing on the taking determination, the severity of the economic impact of the Plan, Concrete Pipe has not shown its withdrawal liability here to be "out of proportion to its experience with the plan," 475 U.S., at 226, 106 S.Ct., at 1026, notwithstanding the claim that it will be required to pay out 46% of shareholder equity. As a threshold matter, the Plan contests this figure, arguing that Concrete Pipe, a wholly owned subsidiary of Concrete Pipe & Products Co., Inc., was simply "formed to facilitate the purchase ... of certain assets of Cen-Vi-Ro," Brief for Respondent 2, and that the relevant issue turns on the diminution of net worth of the parent company, not Concrete Pipe. See Tr. of Oral Arg. 29. But this dispute need not be resolved, for even assuming that Concrete Pipe has used the appropriate measure in determining the portion of net worth required to be paid out, our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.

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Supreme Court of the United States

Ed PLAUT, et ux., et al., Petitioners,
v.
SPENDTHRIFT FARM, INC., et al.

No. 93-1121.

Argued Nov. 30, 1994.
Decided April 18, 1995.

Securities fraud plaintiffs moved to reinstate their time-barred Securities Exchange Act § 10(b) claims. The United States District Court for the Eastern District of Kentucky, Joseph M. Hood, J., 789 F.Supp. 231, denied motion. Plaintiffs appealed. The Sixth Circuit Court of Appeals, 1 F.3d 1487, affirmed. Certiorari was granted. The United States Supreme Court, Justice Scalia, held that Securities Exchange Act section § 27A(b), providing that any § 10b suit started before and dismissed as time barred after June 19, 1991 (day before Supreme Court decided *Lampf* case establishing uniform limitations period for federal securities fraud actions) which would have been timely under laws existing on that date was to be reinstated upon motion made not later than 60 days after December 19, 1991, violated constitutional separation of powers principles by instructing federal courts to reopen final judgments.

Affirmed.

Justice Breyer concurred in judgment and filed opinion.

Justice Stevens dissented and filed opinion, in which Justice Ginsburg joined.

West Headnotes

[1] Statutes ⚿174
361k174 Most Cited Cases

Judicial construction of statute is an authoritative statement of what statute meant before as well as after decision of case giving rise to construction.

[2] Securities Regulation ⚿2.30
349Bk2.30 Most Cited Cases

There is no reasonable construction of Securities Exchange Act § 27A(b), providing that any § 10(b) suit started before and dismissed as time barred after June 19, 1991 (day before *Lampf* decision establishing uniform limitations period for securities fraud cases) which would have been timely under laws existing on that date was to be reinstated upon motion made not later than 60 days after December 19, 1991, that would not require federal courts to reopen final judgments. Securities Exchange Act of 1934, §§ 10(b), 27A(b), as amended, 15 U.S.C.A. § § 78j(b), 78aa-1(b).

[3] Constitutional Law ⚿47
92k47 Most Cited Cases

Supreme Court will first consider narrowest of alternate grounds submitted for claim that congressional statute is unconstitutional.

[4] Federal Courts ⚿4
170Bk4 Most Cited Cases

Article III of Constitution gives federal judiciary power, not merely to rule on cases, but to decide them, subject to review only by superior courts, with understanding that judgment conclusively resolves case. U.S.C.A. Const. Art. 3, § 1 et seq.

[5] Constitutional Law ⚿57
92k57 Most Cited Cases

[5] Securities Regulation ⚿2.10
349Bk2.10 Most Cited Cases

Securities Exchange Act § 27A(b), providing that any § 10(b) suit started before and dismissed as time barred after June 19, 1991 (day before *Lampf* decision establishing uniform limitations period for federal securities fraud cases) which would have been timely under laws existing on that date was to be reinstated upon motion made not later than 60 days after December 19, 1991, violated constitutional separation of powers principles by instructing federal courts to reopen final judgments. U.S.C.A. Const. Art. 3, § 1 et seq.; Securities Exchange Act of 1934, §§ 10(b), 27A(b), as amended, 15 U.S.C.A. §§ 78j(b), 78aa-1(b).

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See, *e.g., Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 384, 47 S.Ct. 114, 117, 71 L.Ed. 303 (1926) (approximately 75% diminution in value); *Hadacheck v. Sebastian,* 239 U.S. 394, 405, 36 S.Ct. 143, 143, 60 L.Ed. 348 (1915) (92.5% diminution).

[32] The final factor is the degree of interference with Concrete Pipe's "reasonable investment-backed expectations." 475 U.S., at 226, 106 S.Ct., at 1027. Again, *Connolly* controls. At the time Concrete Pipe purchased Cen-Vi-Ro and began its contributions to the Plan, pension plans had long been subject to federal regulation, and " '[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.' *FHA v. The Darlington, Inc.,* 358 U.S. 84, 91, 79 S.Ct. 141, 146, 3 L.Ed.2d 132 (1958). See ***646** also *Usery v. Turner Elkhorn Mining Co.,* 428 U.S., at 15-16, 96 S.Ct., at 2892 and cases cited therein." *Id.,* 475 U.S., at 227, 106 S.Ct., at 1027. Indeed, at that time the Plan was already subject to ERISA, and a withdrawing employer faced contingent liability up to 30% of its net worth. See 29 U.S.C. § 1364 (1976 ed.); see also 29 U.S.C. § 1362(b) (1976 ed.); *Connolly, supra,* at 226-227, 106 S.Ct., at 1027; *Gray,* 467 U.S., at 721, 104 S.Ct., at 2713. Thus while Concrete Pipe argues that requiring it to pay a share of promised benefits "ignores express and bargained-for conditions on [its contractual] promises," *Connolly,* 475 U.S., at 235, 106 S.Ct., at 1031 (O'CONNOR, J., concurring), it could have had no reasonable expectation that it would not be faced with liability ****2292** for promised benefits. *Id.,* at 227, 106 S.Ct., at 1027 (opinion of the Court). Because "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations ... even though the effect of the legislation is to impose a new duty or liability based on past acts," *Turner Elkhorn,* 428 U.S., at 16, 96 S.Ct., at 2983, Concrete Pipe's reliance on ERISA's original limitation of contingent liability to 30% of net worth is misplaced, [FN28] there being no reasonable basis to expect that the legislative ceiling would never be lifted. [FN29]

FN28. See Brief for Petitioner 36-37 ("The ERISA contingent liabilities were substantially different in scope from the liabilities of MPPAA so that [Concrete Pipe] had no reasonable notice that 46% of its net worth would be seized").

Justice O'CONNOR does not join the statement to which this footnote is attached.

FN29. Nor do the contractual provisions on which Concrete Pipe would rely provide the support it seeks. Indeed, one such provision, Article X, § E(4) of the 1977-1980 Laborers' Craft Master Labor Agreement, provides that liability will be limited to contributions specific in collective-bargaining agreements "if permitted by law under ERISA." App. 82, ¶ 34.

"The employe[r] in the present litigation voluntarily negotiated and maintained a pension plan which was determined to be within the strictures of ERISA." *Connolly, supra,* 475 U.S., at 227, 106 S.Ct., at 1027. In light of the relationship between Concrete Pipe and the Plan, we find no basis to conclude that Concrete Pipe is ***647** being forced to bear a burden "which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960).

V

Having concluded that the statutory presumptions work no deprivation of procedural due process, and that the statute, as applied to Concrete Pipe, violates no substantive constraint of the Fifth Amendment, we affirm the judgment of the Court of Appeals.

It is so ordered.

Justice O'CONNOR, concurring.

I join all of the Court's opinion, except for the statement that petitioner cannot "rel[y] on ERISA's original limitation of contingent liability to 30% of net worth." *Ante,* at 2292. The Court's reasoning is generally consistent with my own views about retroactive withdrawal liability, which I explained in *Connolly v. Pension Benefit Guaranty Corporation,* 475 U.S. 211, 228-236, 106 S.Ct. 1018, 1027-1032, 89 L.Ed.2d 166 (1986) (concurring opinion), and which I need not restate at length here. In essence, my position is that the "imposition of this type of retroactive liability on employers, to be constitutional, must rest on some basis in the employer's conduct that would make it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility." *Id.,* at 229, 106 S.Ct., at 1027.

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The Court does not hold otherwise. Rather, it reasons that, although "the withdrawal liability assessed against Concrete Pipe may amount to more ... than the share of the Plan's liability strictly attributable to employment of covered workers at Concrete Pipe," this possibility "was exactly what Concrete Pipe accepted when it joined the Plan." *Ante,* at 2288. I agree that a withdrawing employer can be held responsible for its statutory "share" of unfunded vested benefits if the employer should have anticipated the prospect of withdrawal liability when it joined the plan. In such a ***648** case, the "basis in the employer's conduct that would make it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility" would be the very act of joining the plan.

I am not sure that petitioner did in fact "accept" the prospect of withdrawal liability when it joined the Construction Laborers ****2293** Pension Trust (Plan) in 1976. As of that date, Congress had not yet promulgated the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA); the kind of "withdrawal liability" imposed on petitioner did not yet exist. Although the Employee Retirement Income Security Act of 1974 (ERISA) was in effect, and did create a contingent liability for the employer that withdrew from a multiemployer defined benefit plan, such liability was limited to 30% of the employer's net worth. See 29 U.S.C. §§ 1364, 1362(b)(2) (1976 ed.). Petitioner's withdrawal liability under the MPPAA amounts to *46%* of its net worth. See *ante,* at 2291. In addition, the Plan apparently is a hybrid "Taft-Hartley" plan, which provides for fixed employee benefits *and* fixed employer contributions. It remains an open question whether hybrid Taft- Hartley plans are indeed "defined benefit" rather than "defined contribution" plans, and therefore subject to withdrawal liability. See *Connolly, supra,* at 230, 232-235, 106 S.Ct., at 1028-1029, 1029-1035 (O'CONNOR, J., concurring). We do not decide that question today. See *ante,* at 2271, 2290, n. 27.

But petitioner has not argued that its withdrawal liability, even if otherwise permissible, cannot exceed the 30% cap that was in effect in 1976. Nor has petitioner claimed that the Plan is a defined contribution plan. In short, petitioner has failed to adduce the two features of this case that might have demonstrated why it did not "accept" the prospect of full withdrawal liability when it joined the Plan. I therefore agree with the Court's result as well as most of its reasoning.

I cannot, however, agree that petitioner is precluded from "rely[ing] on ERISA's original limitation of contingent liability to 30% of net worth." *Ante,* at 2292. The Court seizes ***649** upon a passing reference in petitioner's brief, see *ante,* at 2292, n. 28, to justify issuing this unnecessary statement about a difficult issue that the parties essentially have ignored. I would not decide without adversary briefing and argument whether ERISA's 30% cap might prevent retroactive withdrawal liability above 30% of the employer's net worth for an employer that joined a multiemployer plan after the passage of ERISA but before the passage of the MPPAA. I also note that the Court's opinion should not be read to imply that employers may be subjected to retroactive withdrawal liability simply because "pension plans [have] long been subject to federal regulation." *Ante,* at 2291. Surely the employer that joined a multiemployer plan before *ERISA* had been promulgated--before Congress had made employers liable for unfunded benefits--might have a strong constitutional challenge to retroactive withdrawal liability. The issue is not presented here--again, petitioner joined the Plan *after* the passage of ERISA--and the Court does not address it. It remains to be resolved in a future case.

Justice THOMAS, concurring in part and concurring in the judgment.

I join all of the Court's opinion except Part III-B-1--the portion of the opinion in which the Court grapples with the trustee presumption in 29 U.S.C. § 1401(a)(3)(A). The Court finds the presumption "incoherent with respect to the degree of probability of error required of the employer to overcome a factual conclusion made by the plan sponsor." *Ante,* at 2281. And because, in the Court's view, "there would be a substantial question of procedural fairness under the Due Process Clause" if employers had to show that sponsors' findings were unreasonable or clearly erroneous, *ante,* at 2281, the Court proceeds to interpret the statute as if it required an unconstrained evidentiary hearing into "any factual issue" concerning the employer's withdrawal liability, *ante,* at 2283.

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*650 Until today, § 1401(a)(3)(A) provided:

"For purposes of any [arbitration] proceeding under this section, any determination made by a plan sponsor under sections **2294 1381 through 1399 of this title and section 1405 of this title *is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.*" (Emphasis added.)

Now the statute provides, in effect, that "any factual determination made by a plan sponsor shall be rejected by the arbitrator if the party contesting the determination shows by a preponderance of the evidence that the determination was erroneous." There is no meaningful presumption of correctness and no examination for reasonableness or clear error. I decline to participate in this redrafting of a federal law.

As I see it, there are three missteps in the analysis. First, the Court believes the statutory text is "incomprehensib[le]," *ante,* at 2281, because it refers to three different, and mutually inconsistent, "degree[s] of certainty," *ante,* at 2279, or of "probability," *ante,* at 2281. This is incorrect--in large part because the Court overlooks the grammatical structure of the statute. Section 1401(a)(3)(A) sets up no parallelism between the phrase "by a preponderance of the evidence," which establishes the standard of proof for the arbitration proceeding, and the critical terms "unreasonable" and "clearly erroneous." "*[B]y* a preponderance of the evidence" (emphasis added) is an adverbial phrase that modifies the "show[ing]" required of the employer. "Unreasonable" and "clearly erroneous," on the other hand, are predicate adjectives used to describe what it is the employer must show.

The incoherence identified by the Court follows from the assumption that Congress has "confus[ed]" burdens of proof with standards of review. *Ante,* at 2280. The Court believes that the terms "clearly erroneous" and "unreasonable" must signify standards of review. *Ante,* at 2279-2280. Standards of proof and standards of review are entirely unrelated *651 concepts (as the Court intimates, see *ante,* at 2279-2281). The Court's reading leads to the conclusion that § 1401(a)(3)(A) is "meaningless," *ante,* at 2280, because the statute (as so interpreted) "defines the nature of the conclusion the arbitrator must draw by using a combination of terms that are categorically ill-matched," *ante,* at 2280. [FN*]

FN* Regrettably, the Court compounds and further muddles the textual difficulty by suggesting that in some sense, "preponderance of the evidence," "unreasonable," and "clearly erroneous" are comparable--that they all refer to relative "degree[s] of certainty." *Ante,* at 2279. There is, in fact, no basis for comparing any particular standard of proof with any particular standard of review. An appellate tribunal could be required to determine whether it was "clearly erroneous" to find a disputed fact "by a preponderance of the evidence," or it could ask whether any "reasonable" factfinder could have found "probable cause" to believe, or "clear and convincing evidence" supporting, the fact in question. See, *e.g., Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986) ("If the defendant in a ... civil case moves for summary judgment or for a directed verdict ..., [the inquiry is] whether *reasonable jurors* could find *by a preponderance of the evidence* that the plaintiff is entitled to a verdict") (emphasis added); *Jackson v. Virginia,* 443 U.S. 307, 318-319, 99 S.Ct. 2781, 2788-2789, 61 L.Ed.2d 560 (1979) ("[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction ... is whether [a] *rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*") (emphasis added). Any combination of evidentiary and review standards is possible.

The Court's preoccupation with standards of review is understandable, at least with respect to "clearly erroneous," a term with an established legal usage. See *Anderson v. Bessemer City,* 470 U.S. 564, 573-575, 105 S.Ct. 1504, 1511- 1512, 84 L.Ed.2d 518 (1985); Fed.Rule Civ.Proc. 52(a). But such a reading is not compelled. As used in this statutory provision, "unreasonable" and "clearly erroneous" cannot signify standards applicable to the review of prior findings, since the arbitrator himself is undeniably a factfinder, not an appellate tribunal. See § 1401(c) (establishing a presumption of correctness for "the findings of fact made by the arbitrator"). That the arbitrator is to undertake his examination "by a preponderance of the evidence" explicitly establishes his role as factfinder; **2295 appellate review *652 does not occur "by" a taking of "evidence." The Court sees the arbitrator as a "hybrid," who acts as both a trier of fact and a reviewer of facts found. *Ante,* at 2279-2280. But the presumption of correctness that applies to the

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plan sponsor's determinations does not make the arbitrator a "reviewing body," *ante,* at 2280, any more than the presumption of innocence in a criminal trial renders the jury a reviewer, rather than a trier, of fact.

The way out of the conundrum is apparent. The terms "unreasonable" and "clearly erroneous" must refer to what are, in effect, *elements* of the employer's claim in the arbitration proceeding. To prevail in its action before the arbitrator, in other words, the employer must show by a preponderance of the evidence, first, that the plan sponsor has made a determination under one of the relevant provisions and, second, that that determination was either unreasonable or clearly erroneous. This construction requires us to put aside the technical definition of "clearly erroneous" and focus on the literal meaning of the phrase. "Clear" error can simply mean an obvious, plain, gross, significant, or manifest error or miscalculation. See Black's Law Dictionary 250 (6th ed. 1990). That may not be the most natural reading (for a court, that is) of this legal term of art, but if we do not drop the assumption that "clearly erroneous" must be a reference to the *Bessemer City* standard of review, we cannot avoid the incoherence that has trapped the majority. The term "unreasonable," of course, is even more readily construed to refer to something other than a standard of review, since it can hardly be thought to have a sharply defined meaning that is limited to the context of appellate review. There is, for example, nothing unusual about requiring a party to show as an element of a substantive claim that something--an interstate carrier's filed rate, for example, see *Reiter v. Cooper,* 507 U.S. 258, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993)--is "unreasonable." Section 1401(a)(3)(A) is thus susceptible of a reading that gives it a coherent meaning.

***653** This interpretation also conforms neatly with the very similar language and structure of the actuarial presumption in § 1401(a)(3)(B), which the Court today finds unproblematic. See *ante,* at 2284-2286. That presumption provides that the actuary's determination of unfunded vested benefits will be presumed correct unless the employer shows "by a preponderance of the evidence" that the actuarial assumptions and methods were "unreasonable" or that the actuary made a "significant error." The Court offers no persuasive explanation as to why this presumption does not suffer from the same incoherence. In addition, my reading of the term "clearly erroneous" in § 1401(a)(3)(A) renders it virtually indistinguishable from the term "significant error" in § 1401(a)(3)(B).

The second false step in the Court's analysis is the use of the rule of construction applied in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 1397- 1398, 99 L.Ed.2d 645 (1988). *Ante,* at 2282-2283. This rule, which requires a court to adopt a reasonable alternative interpretation of a statute when necessary to avoid serious constitutional problems, does not provide authority to construe the statute in a way that "is plainly contrary to the intent of Congress." *DeBartolo, supra,* at 575, 108 S.Ct., at 1397. The rule "cannot be stretched beyond the point at which [the alternative] construction remains '*fairly* possible.' " *Public Citizen v. Department of Justice,* 491 U.S. 440, 481, 109 S.Ct. 2558, 2580, 105 L.Ed.2d 377 (1989) (KENNEDY, J., concurring in judgment) (emphasis in original) (quoting *Crowell v. Benson,* 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932)). "And it should not be given too broad a scope lest a whole new range of Government action be proscribed by interpretive shadows cast by constitutional provisions that might or might not invalidate it." *Public Citizen, supra,* 491 U.S., at 481, 109 ****2296** S.Ct., at 2580. Here it is plain, in my view, that Congress intended to shield the plan sponsor's factual determinations behind a presumption of correctness and intended that withdrawing employers would have to show something more than simple error. The ***654** Court's construction is plainly contrary to this intent and is not "fairly possible" under the terms of the statute. Rather than a reasonable alternative reading, therefore, the interpretation adopted by the Court today is effectively a declaration that the statute as written is unconstitutional.

Which leads to my final, and perhaps most fundamental, disagreement with the Court. Before a court can appropriately invoke the *Crowell/ DeBartolo* rule of construction, it must have a significantly higher degree of confidence that the statutory provision would be unconstitutional should the problematic interpretation be adopted. The potential due process problem troubling the Court is the supposed lack of a neutral or "impartial"

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arbitration hearing. *Ante,* at 2281. This potential is based on an "assumption" about a "risk" or "possibility" of trustee bias, *ante,* at 2276, 2277--bias that, if it existed, might be "preserve[d]" during the arbitration proceeding by the presumption of correctness. *Ante,* at 2278. Petitioner has not established that the trustees were biased in fact. And whatever structural bias may flow from the trustees' fiduciary obligations or from the fact that the trustees are appointed by interested parties, see *ante,* at 2276-2277, will likely be nullified by the elaborately detailed criteria that channel and cabin their exercise of discretion. See 29 U.S.C. §§ 1381 -1399 (1988 ed. and Supp. III). Such bias may be checked, in particular, by the requirement of consistency that governs the trustees' choice of a method for calculating liability. See *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund, Inc.,* 762 F.2d 1137, 1142 (CA1 1985) (en banc). And the very fiduciary duty the trustees owe to the fund should simultaneously prevent them from imposing excessive withdrawal liability that will discourage other employers from joining the fund in the future. *Id.,* at 1142-1143. The Court does not consider these countervailing forces.

But even if there is a real risk that structural bias may distort the trustees' factual determinations, I am inclined ***655** to believe that the arbitration proceeding--presumption and all--provides adequate process for the employer. Cf. *Mathews v. Eldridge,* 424 U.S. 319, 334-335, 96 S.Ct. 893, 902-903, 47 L.Ed.2d 18 (1976) (adequacy of specific procedures involves consideration of private and public interests and risk of erroneous deprivation). This conclusion rests principally on the nature of the particular statutory determinations to which the presumption applies (those described in §§ 1381-1399 and 1405). Many of these determinations, such as the mathematical computations the trustees must perform under §§ 1386, 1388, and 1391, involve little or no discretion. As a result, the employer will have correspondingly little difficulty proving the existence of any significant error made by the trustees (either inadvertently or because of bias). The same can be said of withdrawal-date determinations under §§ 1381 and 1383, especially where all the information relevant to the determination is better known to the employer than to the trustees.

To me, the public interest is plain on the face of the statute: Congress did not want withdrawing employers to avoid their obligations by engaging in a lengthy arbitration over relatively insignificant errors. At the same time, the employer's interest in correcting miscalculations that are significant is adequately protected by the opportunity for arbitration afforded by § 1401.

For these reasons, I concur only in the Court's judgment that the application of § 1401(a)(3)(A) "did not deprive Concrete Pipe of its right to procedural due process." *Ante,* at 2283-2284.

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Supreme Court of the United States

PENSION BENEFIT GUARANTY CORPORATION
v.
R.A. GRAY & COMPANY.
OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND
v.
R.A. GRAY & COMPANY.

Nos. 83-245, 83-291.

Argued April 16, 1984.
Decided June 18, 1984.

The United States District Court for the District of Oregon, 549 F.Supp. 531, held that the Multiemployer Pension Plan Amendments Act was constitutional. The Court of Appeals, 705 F.2d 1502, reversed, and probable jurisdiction was noted, 104 S.Ct. 271. The Supreme Court, Justice Brennan, held that in view of congressional purpose in utilizing retroactive application of the statutes, i.e., to prevent employers from taking advantage of lengthy legislative process and withdrawing while Congress debated revisions, application of the withdrawal liability provisions to employers withdrawing from pension plans during the five-month period prior to the statute's enactment did not violate due process clause of the Fifth Amendment, such purpose being a rational legislative purpose.

Judgment of Court of Appeals reversed, and cases remanded.

West Headnotes

[1] Pensions ⚿66.1
296k66.1 Most Cited Cases
(Formerly 296k66, 255k78.1(1), 255k78.1(9))

Among principal purposes of Employee Retirement Income Security Act was to insure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by termination of pension plans before sufficient funds have been accumulated in the plans, so as to guarantee that worker who has been promised defined pension benefit upon retirement and has fulfilled whatever conditions are required to obtain vested benefit will actually receive it. U.S.C.A. Const.Amend. 5; Employee Retirement Income Security Act of 1974, §§ 2-4082, as amended, 29 U.S.C.A. §§ 1001-1381.

[2] Pensions ⚿23
296k23 Most Cited Cases
(Formerly 232Ak131.1)

In legislating to protect pension plans from adverse consequences when individual employers terminate their participation in, or withdraw from, multiemployer plans, Congress provided retroactive effective date for withdrawal liability so as to prevent employers from avoiding adverse consequences of withdrawal liability by withdrawing from plans while such liability was being considered by Congress, and effective date was later advanced from February 27, 1979 to April 29, 1980 because, while legislation was being considered, such original purpose of retroactive effective date had been achieved. Employee Retirement Income Security Act of 1974, §§ 4001-4082, 4062(b)(2), 4082(a, b), (c)(1-4), as amended, 29 U.S.C.A. §§ 1301-1381, 1362(b)(2), 1381(a, b), (c)(1-4).

[3] Labor Relations ⚿436
232Ak436 Most Cited Cases

By accepting certain findings of pension plan, employer waived right to arbitration. Employee Retirement Income Security Act of 1974, § 4221(a), as amended, 29 U.S.C.A. § 1401(a).

[4] Constitutional Law ⚿48(4.1)
92k48(4.1) Most Cited Cases
(Formerly 92k48(4))

Legislative acts adjusting burdens and benefits of economic life come to court with presumption of constitutionality, and burden is on one complaining of due process violation to establish that legislature acted in arbitrary and irrational way, and the strong deference accorded legislation in field of national economic policy is no less applicable when the legislation is applied retroactively. U.S.C.A. Const.Amend. 5; Employee Retirement Income Security Act of 1974, §§ 2-4082, as amended, 29 U.S.C.A. §§ 1001-1381; Federal Coal Mine Health

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and Safety Act of 1969, §§ 2 et seq., 402 et seq., as amended, 30 U.S.C.A. §§ 801 et seq., 901 et seq.

[5] Constitutional Law ⚿253(4)
92k253(4) Most Cited Cases

Although retroactive aspects of legislation, as well as prospective aspects, must meet test of due process, and justifications for the latter may not suffice for the former, such burden is met simply by showing that retroactive application of the legislation is itself justified by rational legislative purpose. U.S.C.A. Const.Amends. 5, 6, 14; Employee Retirement Income Security Act of 1974, §§ 2-4082, as amended, 29 U.S.C.A. §§ 1001-1381.

[6] Constitutional Law ⚿275(5)
92k275(5) Most Cited Cases

[6] Pensions ⚿23
296k23 Most Cited Cases
(Formerly 232Ak83.1, 232Ak83)

In view of congressional purpose in utilizing retroactive application of the statutes, i.e., to prevent employers from taking advantage of lengthy legislative process and withdrawing while Congress debated revisions, application of withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 to employers withdrawing from pension plans during five-month period prior to the statute's enactment did not violate due process clause of the Fifth Amendment, such purpose being a rational legislative purpose. U.S.C.A. Const.Amend. 5; Employee Retirement Income Security Act of 1974, §§ 2-4082, 4001(a)(3), 4203(b), 4211, 4219(b)(2), 4402(e), as amended, 29 U.S.C.A. §§ 1001-1381, 1301(a)(3), 1383(b), 1391, 1399(b)(2), 1461(e); 28 U.S.C.A. § 1252.

[7] Constitutional Law ⚿253(4)
92k253(4) Most Cited Cases

Enactment of retroactive statutes confined to short and limited periods required by practicalities of producing national legislation is customary congressional practice, which courts are loathe to reject when conducting limited judicial review accorded economic legislation under the Fifth Amendment's due process clause. U.S.C.A. Const.Amend. 5.

[8] Constitutional Law ⚿113
92k113 Most Cited Cases

Contract clause does not apply, either by its own terms or by convincing historical evidence, to actions of the national government. U.S.C.A. Const. Art. 1, § 10, cl. 1.

[9] Constitutional Law ⚿252.5
92k252.5 Most Cited Cases

Principles embodied in the Fifth Amendment's due process clause have not been held coextensive with prohibitions existing against state impairments of preexisting contracts, and the standards imposed on economic legislation by the due process clauses are less searching. U.S.C.A. Const. Art. 1, § 10, cl. 1; Amends. 5, 14.

[10] Constitutional Law ⚿253(4)
92k253(4) Most Cited Cases

Although retrospective civil legislation may offend due process if it is particularly harsh and oppressive, such standard does not differ from prohibition against arbitrary and irrational legislation. U.S.C.A. Const.Amends. 5, 14.

[11] Pensions ⚿103
296k103 Most Cited Cases
(Formerly 232Ak131.6)

Multiemployer Pension Plan Amendments Act of 1980 merely requires withdrawing employer to compensate pension plan for benefits that have already vested with employees at time of employer's withdrawal. Employment Retirement Income Security Act of 1974, §§ 2-4082, as amended, 29 U.S.C.A. §§ 1001-1381.

Syllabus [FNa1]

FNa1. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The Employee Retirement Income Security Act (ERISA), enacted in 1974, created a pension plan termination insurance program whereby the Pension Benefit Guaranty Corporation (PBGC), a wholly

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owned Government corporation, collects insurance premiums from covered private retirement pension plans and provides benefits to participants if their plan terminates with insufficient assets to support its guaranteed benefits. For multiemployer pension plans, the PBGC's payment of guaranteed benefits was not to become mandatory until January 1, 1978. During the intervening period, the PBGC had discretionary authority to pay benefits upon the termination of such plans. If the PBGC exercised its discretion to pay such benefits, employers who had contributed to the plan during the five years preceding its termination were liable to PBGC in amounts proportional to their share of the plan's contributions during that period. As the mandatory coverage date approached, Congress became concerned that a significant number of multiemployer pension plans were experiencing extreme financial hardship that would result in termination of numerous plans, forcing the PBGC to assume obligations in excess of its capacity. Ultimately, after deferring the mandatory coverage until August 1, 1980, and extensively debating the issue of withdrawal liability in 1979 and 1980, Congress enacted the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), requiring an employer withdrawing from a multiemployer **2712 pension plan to pay a fixed and certain debt to the plan amounting to the employer's proportionate share of the plan's "unfunded vested benefits." These withdrawal liability provisions were made to take effect approximately five months before the statute was enacted into law. When appellee building and construction firm, within this 5- month period, withdrew from a multiemployer pension plan that it had been contributing to under collective-bargaining agreements with a labor union, the pension plan notified appellee that it had incurred a withdrawal liability and demanded *718 payment. Appellee then filed suit in Federal District Court, seeking declaratory and injunctive relief against the pension plan and the PBGC and claiming, inter alia, that the retroactive application of the MPPAA violated the Due Process Clause of the Fifth Amendment. The District Court rejected this claim and granted summary judgment in favor of the pension plan and the PBGC. The Court of Appeals reversed, holding that retroactive application of withdrawal liability violated the Due Process Clause because employers had reasonably relied on the contingent withdrawal liability provisions included in ERISA prior to passage of the MPPAA and because the equities generally favored appellee over the pension plan.

Held: Application of the withdrawal liability provisions of the MPPAA during the 5-month period prior to the statute's enactment does not violate the Due Process Clause of the Fifth Amendment. Pp. 2717-2720.

(a) The burden of showing that retroactive legislation complies with due process is met by showing that retroactive application of the legislation is justified by a rational legislative purpose. Here, it was rational for Congress toconclude that the MPPAA's purposes could be more fully effectuated if its withdrawal liability provisions were applied retroactively. One of the primary problems that Congress identified under ERISA was that the statute encouraged employer withdrawals from multiemployer pension plans, and Congress was properly concerned that employers would have an even greater incentive to withdraw if they knew that legislation to impose more burdensome liability on withdrawing employers was being considered. Congress therefore utilized retroactive application of the statute to prevent employers from taking advantage of the lengthy legislative process and withdrawing while Congress debated necessary revisions in the statute. Pp. 2717-2719.

(b) It is doubtful that retroactive application of the MPPAA would be invalid under the Due Process Clause even if it was suddenly enacted without any period of deliberate consideration. But even assuming that advance notice of retroactive legislation is constitutionally compelled, employers had ample notice of the withdrawal liability imposed by the MPPAA. Not only did ERISA impose contingent liability, but the various legislative proposals debated by Congress before the MPPAA was enacted uniformly included retroactive effective dates. P. 2719.

(c) The principles embodied in the Fifth Amendment's Due Process Clause have never been held coextensive with prohibitions existing against state impairments of pre-existing contracts. Rather, the limitations imposed on States by the Contract Clause have been contrasted with the less searching standards imposed on economic legislation by the Due Process Clauses. Pp. 2719- 2720.

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***719** (d) Unlike the statute invalidated in Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468, which required employers to finance pensions for former employees who had already been fully compensated while employed, the MPPAA merely requires a withdrawing employer to compensate a pension plan for benefits that have already vested with the employees at the time of the employer's withdrawal. P. 2720.

705 F.2d 1502, reversed and remanded.

Baruch A. Fellner argued the cause for appellants in both cases. With him on the briefs for appellant in No. 83-245 were *Henry Rose, Mitchell L. Strickler, J. Stephen Caflisch, Peter H. Gould, David F. Power, Nathan Lewin,* and *Seth P. Waxman. William B. Crow, James N. Westwood, William H. Walters,* and *David S. Paull* filed briefs for appellant in No. 83-291.

***2713** *Thomas M. Triplett* argued the cause and filed a brief for appellee. < < dagger > > > > >

< <dagger> > *Gerald M. Feder* filed a brief for the National Coordinating Committee for Multiemployer Plans as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for G & R Roofing Co. by *Michael E. Merrill, Stephen J. Schultz,* and *Mark T. Bennett;* for the National Association of Wholesaler-Distributors by *Harold T. Half-penny;* for the National Association of Manufacturers by *Chester W. Nosal, John R. Keys, Jr., Jan S. Amundson,* and *Quentin Riegel;* for the National-American Wholesale Grocers' Association by *William H. Borghesani, Jr.,* and *Peter A. Susser;* for the National Steel Service Center, Inc., by *Ralph T. DeStefano* and *Richard R. Riese;* for Republic Industries, Inc., by *Philip B. Kurland, Christopher G. Walsh, Jr., Lester M. Bridgeman,* and *Louis T. Urbanczyk;* for Sibley, Lindsay & Curr Co. by *William L. Dorr;* and for Transport Motor Express, Inc., et al. by *Harris Weinstein.*

Jack L. Whitacre and *Stephen A. Bokat* filed a brief for the Chamber of Commerce of the United States as *amicus curiae.*

***2713** Justice BRENNAN delivered the opinion of the Court.

The question presented by these cases is whether application of the withdrawal liability provisions of the Multiemployer ***720** Pension Plan Amendments Act of 1980 to employers withdrawing from pension plans during a 5-month period prior to the statute's enactment violates the Due Process Clause of the Fifth Amendment. We hold that it does not.

I

A

[1] In 1974, after careful study of private retirement pension plans, Congress enacted the Employee Retirement Income Security Act (ERISA), 88 Stat. 829, 29 U.S.C. § 1001 et seq. Among the principal purposes of this "comprehensive and reticulated statute" was to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans. Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 361-362, 374-375, 100 S.Ct. 1723, 1726, 1732-1733, 64 L.Ed.2d 354 (1980). See Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510-511, 101 S.Ct. 1895, 1899-1900, 68 L.Ed.2d 402 (1981). Congress wanted to guarantee that "if a worker has been promised a defined pension benefit upon retirement--and if he has fulfilled whatever conditions are required to obtain a vested benefit--he actually will receive it." Nachman, supra, 446 U.S., at 375, 100 S.Ct., at 1733; Alessi, supra, 451 U.S., at 510, 101 S.Ct., at 1899.

Toward this end, Title IV of ERISA, 29 U.S.C. § 1301 et seq., created a plan termination insurance program, administered by the Pension Benefit Guaranty Corporation (PBGC), a wholly owned Government corporation within the Department of Labor, § 1302. The PBGC collects insurance premiums from covered pension plans and provides benefits to participants in those plans if their plan terminates with insufficient assets to support its guaranteed benefits. See §§ 1322, 1361. For pension plans maintained by single employers, the PBGC's obligation to pay benefits took effect immediately upon enactment of ERISA in 1974. §§ 1381(a)-(b). For multiemployer pension plans, however, the payment of guaranteed benefits by the PBGC was

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[6] Constitutional Law ⚿57
92k57 Most Cited Cases

[6] Securities Regulation ⚿2.10
349Bk2.10 Most Cited Cases

Securities Exchange Act § 27A(b), providing that any § 10(b) suit started before and dismissed as time barred after June 19, 1991 (day before *Lampf* decision establishing uniform limitations period for federal securities fraud cases) which would have been timely under laws existing on that date was to be reinstated on motion made not later than 60 days after December 19, 1991, violated constitutional separation of powers principles by instructing federal courts to reopen final judgments, even though it was Congress that established what constituted finality of judgments. U.S.C.A. Const. Art. 3, § 1 et seq.; Securities Exchange Act of 1934, §§ 10(b), 27A(b), as amended, 15 U.S.C.A. § § 78j(b), 78aa-1(b).

[7] Constitutional Law ⚿52
92k52 Most Cited Cases

[7] Constitutional Law ⚿186
92k186 Most Cited Cases

Having achieved finality, judicial decision becomes last word of judicial department with regard to particular case or controversy, and Congress may not declare by retroactive legislation that law applicable to that very case was something other than what court said it was. U.S.C.A. Const. Art. 3, § 1 et seq.

[8] Constitutional Law ⚿57
92k57 Most Cited Cases

[8] Securities Regulation ⚿2.10
349Bk2.10 Most Cited Cases

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[9] Constitutional Law ⚿57
92k57 Most Cited Cases

[9] Securities Regulation ⚿2.10
349Bk2.10 Most Cited Cases

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****1449** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***211** In a 1987 civil action, petitioners alleged that in 1983 and 1984 respondents committed fraud and deceit in the sale of stock in violation of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission. The District Court dismissed the action with prejudice following this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbert son,* 501 U.S. 350, 364, 111 S.Ct. 2773, 2782, 115 L.Ed.2d 321, which required that suits such as petitioners' be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation. After the judgment became final, Congress enacted § 27A(b) of the

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not to become mandatory until January 1, 1978. § 1381(c)(1).

*721 During the intervening period, the PBGC had discretionary authority to pay benefits upon the termination of multiemployer pension plans. §§ 1381(c)(2)-(4). If the PBGC exercised its discretion to pay such benefits, employers who had contributed to the plan during the five years preceding its termination were liable to the PBGC in amounts proportional to their share of the plan's contributions during that period. § 1364. In other words, any employer withdrawing from a multiemployer plan was subject to a contingent liability that was dependent upon the plan's termination in the next five years and the PBGC's decision to exercise its discretion and pay guaranteed benefits. In addition, any individual employer's liability was not to exceed 30% of the employer's net worth. § 1362(b)(2).

As the date for mandatory coverage of multiemployer pension plans approached, Congress became concerned that a significant number of plans were experiencing extreme financial hardship. This, in turn, could have resulted in the termination of numerous plans, forcing the PBGC to assume obligations in excess of its capacity. To avoid this potential collapse of the plan termination insurance program, Congress deferred mandatory insurance coverage for multiemployer plans for 18 months--until July 1, 1979--extending the PGBC's discretionary authority to insure plans terminating during the interim. Pub.L. 95-214, 91 **2714 Stat. 1501. [FN1] The PBGC was also directed to prepare a comprehensive report analyzing the problems faced by multiemployer plans and recommending appropriate legislative action. See S.Rep. No. 95-570, pp. 1-4 (1977), U.S.Code Cong. & Admin.News 1977, p. 4128; H.R.Rep. No. 95-706, p. 1 *722 (1977). In this way, Congress created "time to legislate, if necessary, before the mandatory coverage comes into effect." 123 Cong.Rec. 36800 (1977) (statement of Sen. Williams); id., at 36800- 36802.

FN1. The effective date for mandatory insurance coverage of multiemployer plans was subsequently deferred to May 1, 1980, Pub.L. 96- 24, 93 Stat. 70, to July 1, 1980, Pub.L. 96-239, 94 Stat. 341, and finally to August 1, 1980, Pub.L. 96-293, 94 Stat. 610. On each occasion, Congress was providing more time for thorough consideration of the complex issues posed by the termination of multiemployer pension plans. Ultimately, mandatory insurance coverage was superseded by the Multiemployer Pension Plan Amendments Act of 1980, Pub.L. 96-364, 94 Stat. 1208.

The PBGC issued its report on July 1, 1978. Pension Benefit Guaranty Corporation, Multiemployer Study Required by P.L. 95-214 (1978). Among its principal findings was that ERISA did not adequately protect plans from the adverse consequences that resulted when individual employers terminate their participation in, or withdraw from, multiemployer plans. As the report summarized:

"The basic problem with the withdrawal rules is that they are designed primarily to protect PBGC. They do not provide an efficient mechanism for reducing the burden of withdrawal on the plan and remaining employers. They may even encourage withdrawals in some instances (e.g., where termination may be imminent). Changes in the withdrawal rules should be considered:

"(1) to provide relief to plans without increasing the burden on the insurance system,

"(2) to provide a disincentive to voluntary employer withdrawals,

"(3) to reduce or remove disincentives to plan entry, and

"(4) to work with, instead of against, the termination liability provisions." Id., at 96-97. [FN2]

FN2. Congressional testimony by the Executive Director of the PBGC further explained the problems caused by employers withdrawing from multiemployer plans:

"A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage--or force--further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to

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continue." Pension Plan Termination Insurance Issues: Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 2nd Sess., 22 (1978) (statement of Matthew M. Lind).

[2] *723 To alleviate the problem of employer withdrawals, the PBGC suggested new rules under which a withdrawing employer would be required to pay whatever share of the plan's unfunded vested liabilities was attributable to that employer's participation. Id., at 97-114. [FN3] These tentative proposals were included in policy recommendations submitted to Congress on February 27, 1979, and were incorporated in proposed legislation that the Executive **2715 Branch formally sent to Congress three months later, S.1076, 96th Cong., 1st Sess. (1979). Most significantly for present purposes, the bill included an effective date for withdrawal liability of February 27, 1979--the date on which the PBGC had initially submitted its recommendations to Congress. Id., § 108. This date was chosen to prevent employers from avoiding the adverse consequences of withdrawal liability by withdrawing from plans while such liability was being considered by Congress. As one Senator noted, the retroactive effective date was designed "to prevent ... the withdrawal of these opportunistic employers without imposition of liability" and was to *724 serve "as a deterrent to hasty employer withdrawal." 126 Cong.Rec. 20234 (1980) (remarks of Sen. Matsunaga).

FN3. Again, the PBGC's Executive Director provided a more elaborate explanation:
"To deal with this problem, our report considers an approach under which an employer withdrawing from a multiemployer plan would be required to complete funding its fair share of the plan's unfunded liabilities. In other words, the plan would have a claim against the employer for the inherited liabilities which would otherwise fall upon the remaining employers as a result of the withdrawal....
"We think that such withdrawal liability would, first of all, discourage voluntary withdrawals and curtail the current incentives to flee the plan. Where such withdrawals nonetheless occur, we think that withdrawal liability would cushion the financial impact on the plan." Id., at 23 (statement of Matthew M. Lind).

Congress debated the issue of withdrawal liability for the remainder of 1979 and much of 1980. By April 1980, two Committees in the House and one in the Senate had approved substantially similar versions of the bill, each containing the February 27, 1979, effective date for withdrawal liability. The Senate Finance Committee had not yet completed its work on the bill, however, and sought more time for consideration of the legislation. See supra, at 3, and n. 1. At the same time, the Senate advanced the effective date for imposing withdrawal liability to April 29, 1980. As Senator Javits later explained:

"The committees decided in part to move up the date from February 27, 1979, the date contained in earlier versions of the bill, because the original purpose of a retroactive effective date--namely, to avoid encouragement of employer withdrawals while the bill was being considered--has been achieved. It should also be noted that the April 29 effective date is the product of strong political pressures by certain withdrawing employers who were caught by the earlier date. I realize that permitting these employers to avoid liability only increases the burdens of those employers remaining with the plans in question, but it appears necessary to accept the April 29 date in order to enact the bill before the August 1 deadline for action." 126 Cong.Rec. 20179 (1980) (statement of Sen. Javits).

See also id., at 9236-9237 (statement of Sen. Bentsen).

The House unanimously passed its version of the bill, including the February 27, 1979, effective date, in May 1980. Id., at 12233. The Senate version, adopting an effective date of April 29, 1980, was endorsed by a vote of 85-1. Id., at 20247. The Conference Committee accepted the Senate's effective date, and the legislation was signed into law by *725 the President on September 26, 1980. Multiemployer Pension Plan Amendments Act of 1980 (MPPAA or Act), Pub.L. 96-364, 94 Stat. 1208. As enacted, the Act requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's "unfunded vested benefits," calculated as the difference between the present value of vested benefits and the current value of the plan's assets. 29 U.S.C. §§ 1381, 1391. Pursuant to 29 U.S.C. § 1461(e), these withdrawal liability provisions took effect on April 29, 1980, approximately five months before the statute was enacted into law.

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B

Appellee R.A. Gray & Co. (Gray) is a building and construction firm doing business in Oregon. Under a series of collective-bargaining agreements with the Oregon State Council of Carpenters (Council), Gray contributed to the Oregon- Washington Carpenters-Employers Pension Trust Fund (Pension Plan), a multiemployer pension plan under 29 U.S.C. § 1301(a)(3). During February 1980, Gray advised the Council that it would be terminating their collective-bargaining agreement when it expired on June 1, 1980. Gray continued to engage in the building and construction industry, however, and therefore was deemed to have completely **2716 withdrawn from the Pension Plan pursuant to § 1383(b).

[3] The Pension Plan subsequently notified Gray that, by completely withdrawing from the plan on June 1, 1980, it had incurred a withdrawal liability of $201,359. The notice set forth a schedule of quarterly payments and demanded payment in accordance with that schedule. After some preliminary correspondence between Gray and the plan's trustees, the Pension Plan informed Gray that it was delinquent in its payments. Gray thereafter filed suit in the United States District Court for the District of Oregon, seeking *726 declaratory and injunctive relief against the Pension Plan and the PBGC. [FN4]

FN4. Gray also moved for a preliminary injunction to restrain the Pension Plan from taking any further steps to collect the withdrawal liability it assessed. The District Court denied that motion. App. 50-57. At the same time, Gray requested that the Pension Plan review its determination of withdrawal liability. See 29 U.S.C. § 1399(b)(2). In response, the Pension Plan issued a "Decision on Review," concluding that it had "accurately determined: (1) the method for allocating the unfunded vested benefits to Gray, (2) the amount of the Plan's unfunded vested benefits, (3) the schedule of payments offered to Gray, and (4) the date of Gray's complete withdrawal." 549 F.Supp. 531, 534 (Ore.1982). Although Gray could have initiated arbitration with the Pension Plan on these issues, 29 U.S.C. § 1401(a), it accepted these findings and waived its right to arbitration, 549 F.Supp., at 534.

Gray's complaint raised several constitutional claims, including a challenge to the retroactive application of the MPPAA under the Due Process Clause of the Fifth Amendment. [FN5] In particular, Gray noted that its June 1, 1980, withdrawal from the Pension Plan occurred during the 5-month period preceding enactment of the MPPAA, and therefore was directly affected by the retroactivity provision included in the Act. Moreover, Gray contended, retroactive application of withdrawal liability could not be sustained under the Due Process Clause because it was arbitrary and irrational, and because it impaired the collective-bargaining agreements that Gray had signed with the Council.

FN5. Gray also contended, inter alia, that the different treatment afforded employers participating in multiemployer pension plans as opposed to employers participating in single-employer pension plans violates the equal protection component of the Fifth Amendment, that retroactive application of the MPPAA violates the Ex Post Facto Clause included in Art. I, § 9, of the Constitution, and that the Act's arbitration provisions violated Gray's rights to procedural due process and trial by jury. The District Court rejected the first two claims, see 549 F.Supp., at 538-539, and refused to reach the last claim because Gray had waived its right to arbitration, id., at 539; n. 4, supra. These issues were not reached by the Court of Appeals, Shelter Framing Corp. v. Pension Benefit Guaranty Corp., 705 F.2d 1502, 1515 (CA9 1983), and are not now pressed before this Court.

*727 The District Court rejected Gray's due process claim, and granted summary judgment in favor of the Pension Plan and the PBGC. 549 F.Supp. 531 (1982). Specifically, the court analyzed the constitutionality of retroactively imposing withdrawal liability on employers by applying a four-part test established by the Court of Appeals for the Seventh Circuit in Nachman Corp. v. Pension Benefit Guaranty Corp., 592 F.2d 947 (1979), aff'd on statutory grounds, 446 U.S. 359, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980). As that test requires, the court examined (1) the reliance interest of the affected parties, (2) whether the interest impaired is in an area previously subjected to regulatory control, (3) the equities of imposing the legislative burdens, and (4) the statutory provisions that limit and moderate the impact of the burdens imposed. [FN6] **2717 Under these criteria, the court concluded that Gray had not satisfied the heavy burden faced by parties attempting to demonstrate that Congress has acted arbitrarily and irrationally when enacting

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socioeconomic legislation.

FN6. The court in Nachman developed this four-part test for reviewing the constitutionality of retroactive legislation under the Fifth Amendment's Due Process Clause primarily by relying upon this Court's decisions in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978), and Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468 (1935). For reasons explained below, however, we do not believe that these cases control judicial review of retroactive federal legislation affecting economic benefits and burdens. See infra, at 2719-2720. We therefore reject the constitutional underpinnings of the analysis employed by the Court of Appeals in Nachman, although we have no occasion to consider whether the factors mentioned by that court might in some circumstances be relevant in determining whether retroactive legislation is rational. Cf. Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 367-368, and n. 12, 100 S.Ct. 1723, 1729-1730, and n. 12, 64 L.Ed.2d 354 (1980) (explicitly limiting our review to the statutory question presented).

The Court of Appeals for the Ninth Circuit reversed, although it too believed that the four-factor Nachman test was the appropriate standard to use when analyzing the constitutionality of retroactive legislation enacted by Congress. Shelter Framing Corp. v. Pension Benefit Guaranty Corp., *728 705 F.2d 1502 (1983). In particular, the court concluded that retroactive application of withdrawal liability violated the Due Process Clause because employers had reasonably relied on the contingent withdrawal liability provisions included in ERISA prior to passage of the MPPAA, id., at 1511- 1512, and because the equities in this action generally favored Gray over the Pension Plan, id., at 1512-1514.

Both the Pension Plan and the PBGC invoked the appellate jurisdiction of this Court under 28 U.S.C. § 1252. We noted probable jurisdiction, 464 U.S. 912, 104 S.Ct. 271, 78 L.Ed.2d 253 (1983), [FN7] and now reverse.

FN7. At least three Courts of Appeals, as well as numerous District Courts, have concluded that retroactive application of the MPPAA's withdrawal liability provisions satisfies constitutional standards. See, e.g., Textile Workers Pension Fund v. Standard Dye & Finishing Co., 725 F.2d 843 (CA2 1984); Peick v. Pension Benefit Guaranty Corp., 724 F.2d 1247 (CA7 1983), cert. pending, 465 U.S. 1098, 104 S.Ct. 1588, 80 L.Ed.2d 121; Republic Industries, Inc. v. Teamsters Joint Council, 718 F.2d 628 (CA4 1983), cert. pending, No. 83-541.
The prospective application of the MPPAA's withdrawal liability provisions has also been the subject of extensive nationwide litigation. All of the Courts of Appeals addressing the various constitutional challenges raised in those cases, however, have upheld the statute. See, e.g., The Washington Star Co. v. International Typographical Union Negotiated Pension Plan, 235 U.S.App.D.C. 1, 729 F.2d 1502 (1984); Peick v. Pension Benefit Guaranty Corp., supra; Republic Industries, Inc. v. Teamsters Joint Council, supra. Because these issues were not addressed by the Court of Appeals, cf. n. 5, supra, and are not actively pursued by the parties before this Court, we assume for purposes of our decision in these cases that the prospective effects of the Act satisfy constitutional standards.

II

[4] The starting point for analysis is our decision in Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976). In Turner Elkhorn, we considered a constitutional challenge to the retroactive effects of the Federal Coal Mine Health and Safety Act of 1969 as amended by the Black Lung Benefits Act of 1972. Under Title IV of that Act, coal mine operators were required to compensate former employees disabled pneumoconiosis *729 even though those employees had terminated their work in the industry before the statute was enacted. We nonetheless had little difficulty in upholding the statute against constitutional attack under the Due Process Clause. As we initially noted:

"It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. See, e.g., Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 487-488, 75 S.Ct. 461, 464, 99 L.Ed. 563 (1955)." 428 U.S., at 15, 96 S.Ct., at 2892.

We further explained that the strong deference accorded legislation in the field of national economic

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policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational **2718 means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches:

"[I]nsofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect--although, as we have noted, the Act imposed no liability on operators until [after its enactment]. And it may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases areclear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. See Fleming v. Rhodes, 331 U.S. 100, 67 S.Ct. 1140, 91 L.Ed. 1368 (1947); Carpenter v. Wabash R. Co., 309 U.S. 23, 60 S.Ct. 416, 84 L.Ed. 558 (1940); Norman v. Baltimore & Ohio R. Co., 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885 (1935); Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934); Louisville *730 & Nashville R. Co. v. Mottley, 219 U.S. 467, 31 S.Ct. 265, 55 L.Ed. 297 (1911). This is true even though the effect of the legislation is to impose a new duty or liability based on past acts. See Lichter v. United States, 334 U.S. 742, 68 S.Ct. 1294, 92 L.Ed. 1694 (1948); Welch v. Henry, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87 (1938); Funkhouser v. Preston Co., 290 U.S. 163, 54 S.Ct. 134, 78 L.Ed. 243 (1933)." Id., at 15-16, 96 S.Ct., at 2892-2893 (footnotes omitted).

[5] To be sure, we went on to recognize that retroactive legislation does have to meet a burden not faced by legislation that has only future effects. "It does not follow ... that what Congress can legislate prospectively it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." Id., at 16- 17, 96 S.Ct., at 2892-2893. But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.

For example, in Turner Elkhorn we found that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor--the operators and the coal consumers." Id., at 18, 96 S.Ct., at 2893. Similarly, in these cases, a rational legislative purpose supporting the retroactive application of the MPPAA's withdrawal liability provisions is easily identified. Indeed, Congress was quite explicit when explaining the reason for the statute's retroactivity.

[6][7] In particular, we believe it was eminently rational for Congress to conclude that the purposes of the MPPAA could be more fully effectuated if its withdrawal liability provisions were applied retroactively. One of the primary problems Congress identified under ERISA was that the statute encouraged employer withdrawals from multiemployer plans. And Congress was properly concerned that employers would have an even greater incentive to withdraw if they knew that legislation to impose more burdensome liability on withdrawing *731 employers was being considered. See 126 Cong.Rec. 20179 (1980) (statement of Sen. Javits); id., at 20244 (remarks of Sen. Matsunaga). See also supra, at 2715. Withdrawals occurring during the legislative process not only would have required that remaining employers increase their contributions to existing pension plans, butalso could have ultimately affected the stability of the plans themselves. Congress therefore utilized retroactive application of the statute to prevent employers from taking advantage of a lengthy legislative process and withdrawing while Congress debated necessary revisions in the statute. Indeed, as the amendments progressed through the legislative process, Congress advanced the effective date chosen so that it would encompass only that retroactive time period **2719 that Congress believed would be necessary to accomplish its purposes. As we recently noted when upholding the retroactive application of an income tax statute in United States v. Darusmont, 449 U.S. 292, 296-297, 101 S.Ct. 549, 551-552, 66 L.Ed.2d 513 (1981) (per curiam), the enactment of retroactive statutes "confined to short and limited periods required by the practicalities of producing national legislation ... is a customary congressional practice." We are loathe to reject such a common practice when conducting the limited judicial review accorded economic legislation under the Fifth Amendment's Due Process Clause.

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III

Gray and its supporting amici offer several reasons for subjecting the retroactive application of the MPPAA to some form of heightened judicial scrutiny. We are not persuaded, however, by any of their arguments.

First, Gray contends that retroactive legislation does not satisfy due process requirements unless persons affected by the legislation had "notice" of changing legal circumstances and "an opportunity to conform their conduct to the requirements of [the] new legislation." Brief for Appellee 20. We have doubts, however, that retroactive application of the *732 MPPAA would be invalid under the Due Process Clause for lack of notice even if it was suddenly enacted by Congress without any period of deliberate consideration, as often occurs with floor amendments or "riders" added at the last minute to pending legislation. But even assuming that advance notice of legislative action with retrospective effects is constitutionally compelled, cf. Darusmont, supra, at 299, 101 S.Ct., at 553 (similarly assuming that notice is a relevant consideration), we believe that employers had ample notice of the withdrawal liability imposed by the MPPAA. Not only did ERISA itself impose contingent liability on withdrawing employers, but the various legislative proposals debated by Congress before enactment of the MPPAA uniformly included retroactive effective dates among their provisions. See supra, at 2714-2715. [FN8]

FN8. See, e.g., Textile Workers Pension Fund v. Standard Dye & Finishing Co., 725 F.2d, at 852 ("Notice was everywhere.... [Employers] withdrew from their funds not only when pervasive regulation, including withdrawal liability under ERISA, existed in the pension field, but also when the advent of the MPPAA was imminent"); Peick v. Pension Benefit Guaranty Corp., 724 F.2d, at 1269 ("[T]he intent of Congress to provide for the retrospective imposition of liability was quite clear from the very beginning of the legislative process.... [E]mployers who withdrew during [[[[the retrospective] period cannot argue that they are now being required to pay wholly unanticipated liabilities" (footnote omitted).

[8][9][10] Second, it is suggested that we apply constitutional principles that have been developed under the Contract Clause, Art. I, § 10, cl. 1 ("No State shall ... pass any ... Law impairing the Obligation of Contracts ..."), when reviewing this federal legislation. [FN9] See, e.g., Energy Resources *733 Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978). We have never held, however, that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibitions existing against state impairments of pre-existing contracts. See, e.g., Philadelphia, B. & W.R. Co. v. Schubert, 224 U.S. 603, **2720 32 S.Ct. 589, 56 L.Ed. 911 (1912). Indeed, to the extent that recent decisions of the Court have addressed the issue, we have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses. See United States Trust Co. v. New Jersey, 431 U.S. 1, 17, n. 13, 97 S.Ct. 1505, 1515, n. 13, 52 L.Ed.2d 92 (1977). And, although we have noted that retrospective civil legislation may offend due process if it is "particularly 'harsh and oppressive,' " ibid. (quoting Welch v. Henry, 305 U.S. 134, 147, 59 S.Ct. 121, 125, 83 L.Ed. 87 (1938), and citing Turner Elkhorn, 428 U.S., at 14-20, 96 S.Ct., at 2891-2894), that standard does not differ from the prohibition against arbitrary and irrational legislation that we clearly enunciated in Turner Elkhorn.

FN9. It could not justifiably be claimed that the Contract Clause applies, either by its own terms or by convincing historical evidence, to actions of the National Government. Indeed, records from the debates at the Constitutional Convention leave no doubt that the Framers explicitly refused to subject federal legislation impairing private contracts to the literal requirements of the Contract Clause:
"MR. GERRY entered into observations inculcating the importance of public faith, and the propriety of the restraint put on the states from impairing the obligation of contracts; alleging that Congress ought to be laid under the like prohibitions. He made a motion to that effect. He was not seconded." 5 J. Elliott, Debates on the Federal Constitution 546 (2 ed. 1876). See 2 M. Ferrand, Records of the Federal Convention of 1787, p. 619 (1911).

[11] Finally, Gray urges that we resuscitate the Court's 1935 decision in Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468, which invalidated provisions of the Railroad Retirement Act of 1934 that required

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employers to finance pensions for former railroad employees. Assuming, as we did in Turner Elkhorn, supra, 428 U.S., at 19, 96 S.Ct., at 2894, that this aspect of Alton "retains vitality" despite the changes in judicial review of economic legislation that have occurred in the ensuing years, we again find it distinguishable from the present litigation. Unlike the statute in Alton, which created pensions for employees who had been fully compensated while working for ***734** the railroads, the MPPAA merely requires a withdrawing employer to compensate a pension plan for benefits that have already vested with the employees at the time of the employer's withdrawal.

IV

We conclude that Congress' decision to apply the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act to employers withdrawing from pension plans during the 5-month period preceding enactment of the Act is supported by a rational legislative purpose, and therefore withstands attack under the Due Process Clause of the Fifth Amendment. Accordingly, the judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

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[redacted]

Supreme Court of the United States

DUKE POWER COMPANY, Appellant,
v.
CAROLINA ENVIRONMENTAL STUDY GROUP, INC., et al.
UNITED STATES NUCLEAR REGULATORY COMMISSION et al., Appellants,
v.
CAROLINA ENVIRONMENTAL STUDY GROUP, INC., et al.

Nos. 77-262, 77-375.

Argued March 20, 1978.
Decided June 26, 1978.

Direct appeal was taken from a decision of the United States District Court for the Western District of North Carolina, 431 F.Supp. 203, declaring that the Price-Anderson Act, which imposed a $560 million limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants, was constitutionally invalid. The Supreme Court, Mr. Chief Justice Burger, held that: (1) citizens living near the site of proposed nuclear power plants had standing to maintain the declaratory judgment action; (2) the constitutional challenges to the Act were ripe for adjudication; (3) the Act did not violate the due process clause of the Fifth Amendment, and (4) the Act did not violate the equal protection component of the Fifth Amendment.

Reversed.

Mr. Justice Stewart filed an opinion concurring in result.

Mr. Justice Rehnquist filed an opinion concurring in judgment, with whom Mr. Justice Stevens joined.

Mr. Justice Stevens filed an opinion concurring in the judgment.

West Headnotes

[1] Federal Courts ⚿242.1
170Bk242.1 Most Cited Cases
(Formerly 170Bk242)

For purposes of determining whether general federal question jurisdiction exists, it is not necessary to decide whether alleged cause of action against federal agency based directly on Constitution is in fact cause of action on which plaintiffs could actually recover; instead, test is whether cause of action alleged is so patently without merit as to justify court's dismissal for want of jurisdiction. 28 U.S.C.A. § 1331(a).

[2] Federal Courts ⚿243
170Bk243 Most Cited Cases

District court had jurisdiction over complaint seeking declaration of constitutional invalidity of statute limiting liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants under general federal question jurisdictional statute rather than under statute granting jurisdiction over cases arising under acts regulating commerce or protecting against restraints and monopolies, where complaint, fairly read, raised two basic challenges to act, both of which were derived from Fifth Amendment; whether direct cause of action against Nuclear Regulatory Commission under Constitution was one generally to be recognized need not be decided since claimed cause of action to vindicate plaintiffs' constitutional rights was sufficiently substantial and colorable to sustain jurisdiction. Atomic Energy Act of 1954, § 1 et seq. as amended 42 U.S.C.A. § 2011 et seq.; 28 U.S.C.A. §§ 1331(a), 1337; U.S.C.A.Const. Amend. 5.

[3] Federal Civil Procedure ⚿103.2
170Ak103.2 Most Cited Cases
(Formerly 170Ak103)

Essence of standing inquiry is whether parties seeking to invoke court's jurisdiction have alleged such personal stake in outcome of controversy as to assure that concrete adverseness which sharpens presentation of issues upon which court so largely depends for illumination of difficult constitutional questions; "personal stake" requires not only distinct and palpable injury to plaintiff, but also fairly traceable causal connection between claimed injury and challenged conduct.

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[4] Federal Courts ⚿478
170Bk478 Most Cited Cases

In action brought against Nuclear Regulatory Commission challenging constitutional validity of statute imposing $560 million limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants, district court's finding that several of immediate adverse effects of construction of plants, including environmental and aesthetic consequences of thermal pollution of two lakes in vicinity of disputed plants and emission of nonnatural radiation into environment, were adequate to satisfy "injury in fact" standard required as predicate for standing was not clearly erroneous. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

[5] Federal Courts ⚿478
170Bk478 Most Cited Cases

In action brought against Nuclear Regulatory Commission by citizens groups and individuals living near sites of proposed nuclear power plants, seeking declaration of constitutional invalidity of statute limiting liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants, district court's finding of "substantial likelihood" that neither of disputed nuclear plants would be completed or operated absent challenged statute, and that relief requested would redress injury claimed, so as to satisfy constitutional standing requirement, was not clearly erroneous. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

[6] Federal Civil Procedure ⚿103.3
170Ak103.3 Most Cited Cases
(Formerly 170Ak103)

Outside context of taxpayer suits, litigant need not demonstrate more than injury in fact and substantial likelihood that judicial relief requested will prevent or redress claimed injury to satisfy "case and controversy" standing requirement; where party champions his own rights, and where injury alleged is concrete and particularized one which will be prevented or redressed by relief requested, basic practical and prudential concerns underlying standing doctrine are generally satisfied when constitutional requisites are met. U.S.C.A.Const. art. 3, § 1 et seq.

[7] Constitutional Law ⚿42.3(2)
92k42.3(2) Most Cited Cases

Citizens groups and individuals who lived within close proximity to planned nuclear power plants had standing to maintain action against public utility and Nuclear Regulatory Commission seeking declaration of constitutional invalidity of statute limiting liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants where immediate adverse effects of construction of plants, including environmental and aesthetic consequences of thermal pollution of two lakes in vicinity of plants, was adequate to satisfy "injury in fact" standard and where there was substantial likelihood that plants would be neither completed nor operated absent challenged statute. Atomic Energy Act of 1954, § 1 et seq. as amended 42 U.S.C.A. § 2011 et seq.

[8] Federal Courts ⚿13.25
170Bk13.25 Most Cited Cases
(Formerly 170Bk13)

Constitutional challenges to statute imposing $560 million limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants were ripe for adjudication where all parties would be adversely affected by decision to defer definitive resolution of constitutional validity vel non of act, and where alleged injury could be redressed by relief requested. Atomic Energy Act of 1954, § 170 et seq. as amended 42 U.S.C.A. § 2210 et seq.

[9] Constitutional Law ⚿48(4.1)
92k48(4.1) Most Cited Cases
(Formerly 92k48(4))

Statute imposing limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants was classic example of economic regulation, and came to court with presumption of constitutionality; burden was on parties complaining that statute violated due process to establish that legislature acted in arbitrary or irrational way. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

[10] Constitutional Law ⚿299.1
92k299.1 Most Cited Cases

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1934 Act, which provides for reinstatement on motion of any action commenced pre-*Lampf* but dismissed thereafter as time barred, if the action would have been timely filed under applicable pre-*Lampf* state law. Although finding that the statute's terms required that petitioners' ensuing § 27A(b) motion be granted, the District Court denied the motion on the ground that § 27A(b) is unconstitutional. The Court of Appeals affirmed.

Held: Section 27A(b) contravenes the Constitution's separation of powers to the extent that it requires federal courts to reopen final judgments entered before its enactment. Pp. 1451-1463.

(a) Despite respondents' arguments to the contrary, there is no reasonable construction on which § 27A(b) does not require federal courts to reopen final judgments in suits dismissed with prejudice by virtue of *Lampf*. Pp. 1451- 1452.

(b) Article III establishes a "judicial department" with the "province and duty ... to say what the law is" in particular cases and controversies. *Marbury v. Madison,* 1 Cranch 137, 177, 2 L.Ed. 60. The Framers crafted this charter with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them conclusively, subject to review only by superior courts in the Article III hierarchy. Thus, the Constitution forbids the Legislature to interfere with courts' final judgments. Pp. 1453-1456.

(c) Section 27A(b) effects a clear violation of the foregoing principle by retroactively commanding the federal courts to reopen final judgments. This Court's decisions have uniformly provided fair warning that retroactive legislation such as § 27A(b) exceeds congressional powers. ***212** See, *e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103, 113, 68 S.Ct. 431, 437, 92 L.Ed. 568. Petitioners are correct that when a new law makes clear that it is retroactive, an appellate court must apply it in reviewing judgments still on appeal, and must alter the outcome accordingly. However, once a judgment has achieved finality in the highest court in the hierarchy, the decision becomes the last word of the judicial department with regard to the particular case or controversy, ****1450** and Congress may not declare by retroactive legislation that the law applicable to that case was in fact something other than it was. It is irrelevant that § 27A(b) reopens (or directs the reopening of) final judgments in a whole class of cases rather than in a particular suit, and that the final judgments so reopened rested on the bar of a statute of limitations rather than on some other ground. Pp. 1456-1458.

(d) Apart from § 27A(b), the Court knows of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation. Fed.Rule Civ.Proc. 60(b), 20 U.S.C. § 1415(e)(4), 28 U.S.C. § 2255, 50 U.S.C.App. § 520(4), and, *e.g.,* the statutes at issue in *United States v. Sioux Nation,* 448 U.S. 371, 391-392, 100 S.Ct. 2716, 2728-2729, 65 L.Ed.2d 844, *Sampeyreac v. United States,* 7 Pet. 222, 238, 8 L.Ed. 665, *Paramino Lumber Co. v. Marshall,* 309 U.S. 370, 60 S.Ct. 600, 84 L.Ed. 814, and *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 18 How. 421, 15 L.Ed. 435, distinguished. Congress's prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed by the Constitution's separation of powers. The Court rejects the suggestion that § 27A(b) might be constitutional if it exhibited prospectivity or a greater degree of general applicability. Pp. 1458-1463.

1 F.3d 1487 (CA6 1993), affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, KENNEDY, SOUTER, and THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in the judgment, *post,* p. 1463. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post,* p. 1466.

William W. Allen, Lexington, KY (argued), for petitioners. Michael R. Dreeben, Washington, DC (argued), for federal respondent.

***213** Theodore B. Olson (argued), Washington, DC, for private respondents.

For U.S. Supreme Court Briefs See:

1994 WL 387806 (Pet.Supp.Brief)

1994 WL 389771 (Pet.Brief)

1994 WL 496344 (Resp.Brief)

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(Formerly 92k299(1), 92k299)

[10] Electricity ⚿1
145k1 Most Cited Cases

[10] United States ⚿53(6.1)
393k53(6.1) Most Cited Cases
(Formerly 393k53(6))

Price-Anderson Act statutory limit on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants bears rational relationship to Congress' concern for stimulating involvement of private enterprise in production of electric energy through use of atomic power and thus the Act does not violate the due process clause. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210; U.S.C.A.Const. Amend. 5.

[11] Constitutional Law ⚿299.1
92k299.1 Most Cited Cases
(Formerly 92k299(1), 92k299)

[11] Electricity ⚿1
145k1 Most Cited Cases

[11] United States ⚿53(6.1)
393k53(6.1) Most Cited Cases
(Formerly 393k53(6))

Assuming arguendo that $560 million fund provided by Price-Anderson Act limiting liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants would not insure full recovery in all conceivable circumstances, it does not follow that liability limitation is therefore irrational and violative of due process in view of extremely remote possibility of accident in which liability would exceed statutory limit, and of Congress' commitment to "take whatever action is deemed necessary and appropriate to protect the public from the consequence of" a disaster of such proportions. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

[12] United States ⚿53(6.1)
393k53(6.1) Most Cited Cases
(Formerly 393k53(6))

District court's finding that statute limiting liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants encouraged irresponsibility in matters of safety and environmental protection could not withstand careful scrutiny, since nothing in liability limitation provision undermined or altered rigor and integrity of process involved in review of applications for license to construct or operate nuclear power plant, and since in event of nuclear accident utility itself would probably suffer largest damages. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

[13] Constitutional Law ⚿92
92k92 Most Cited Cases

Person has no property right or vested interest in any rule of common law; Constitution does not forbid creation of new rights or abolition of old ones recognized by common law to attain permissible legislative objective, despite fact that otherwise settled expectations may be upset thereby.

[14] Constitutional Law ⚿92
92k92 Most Cited Cases

Parties who lived within close proximity to planned nuclear power plants, and who sought declaration of constitutional invalidity of statutory limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants did not, prior to enactment of such statute, have any right cognizable under due process clause to be free of nuclear power or to take advantage of state of uncertainty which inhibited private development of nuclear power; parties' only relevant right prior to enactment of statute was to utilize their existing common-law and state law remedies to vindicate any particular harm visited on them from whatever resources. U.S.C.A.Const. Amend. 5; Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

[15] United States ⚿53(6.1)
393k53(6.1) Most Cited Cases
(Formerly 393k53(6))

Statute limiting liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants to $560 million provides fair and reasonable substitute for state tort law remedies it replaces, in view of uncertainty of recovery of damages of such magnitude from utility or

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component manufacturer whose resources might well be exhausted at early stage, and in view of congressional assurance of $560 million fund for recovery accompanied by statutory commitment to "take whatever action is deemed necessary and appropriate to protect the public from the consequences of" a nuclear accident; statutorily mandated waiver of defenses establishes right of injured parties to compensation without proof of fault and eliminates burden of delay and uncertainty which would follow from need to litigate question of liability after accident. Atomic Energy Act of 1954, § 170 as amended 42 U.S.C.A. § 2210.

[16] Constitutional Law ⚷243.1
92k243.1 Most Cited Cases
(Formerly 92k243(1))

[16] Electricity ⚷13
145k13 Most Cited Cases

[16] United States ⚷53(6.1)
393k53(6.1) Most Cited Cases
(Formerly 393k53(6))

General rationality of Price-Anderson Act imposing limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants, particularly with reference to important congressional purpose of encouraging private participation and exploitation of nuclear energy, is ample justification for difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other causes; liability limitation does not violate equal protection. Atomic Energy Act of 1954, § 170(b, e) as amended 42 U.S.C.A. § 2210(b, e); U.S.C.A.Const. Amend. 5.

[17] Eminent Domain ⚷266
148k266 Most Cited Cases

Statute imposing limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants does not withdraw Tucker Act remedy for any "taking" which would result from such accident. 28 U.S.C.A. § 1491; Atomic Energy Act of 1954, § 170(b, e) as amended 42 U.S.C.A. § 2210(b, e); U.S.C.A.Const. Amend. 5.

***2623 *Syllabus* [FN*]**

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***59** The Price-Anderson Act (Act), having the dual purpose of protecting the public and encouraging the development of the nuclear energy industry, imposes a $560 million limitation on liability for nuclear accidents resulting from the operation of federally licensed private nuclear power plants, requires those indemnified by the $560 million fund established under the Act to waive all legal defenses in the event of a substantial nuclear accident, and further provides that in the event of a nuclear accident involving damages in excess of the amount of aggregate liability Congress "will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude." Appellant Duke Power Co. (Duke), an investor-owned public utility which is constructing nuclear power plants in North and South Carolina, and appellant Nuclear Regulatory Commission (NRC), were sued by appellees (an environmental organization, a labor union, and a number of individuals who live near the plants in question) who sought a declaration that the Act is unconstitutional. After finding, *inter alia,* that the "immediate" adverse effects upon appellees resulting from the operation of the plants included thermal pollution of lakes in the vicinity, and emission of non-natural radiation into appellees' environment, and also that there was a "substantial likelihood" that Duke would not be able to complete construction and maintain operation of the plants "but for" the protection provided by the Act, the District Court held that appellees had standing to challenge the Act's constitutionality and that their claim could be properly adjudicated. The court then went on to hold that the Act violated the Due Process Clause of the Fifth Amendment because the amount of recovery is not rationally related to the potential losses, the Act tends to encourage irresponsibility in matters of safety and environmental protection, and there is no *quid pro quo* for the liability limitation; and, the Act also offended the equal ***60** protection component of the Fifth Amendment by forcing the victims of nuclear incidents to bear the burden of injury, whereas society as a whole benefits from the existence and development of nuclear power. *Held:*

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1. The District Court had jurisdiction over appellees' complaint against the NRC under 28 U.S.C. § 1331(a) (1976 ed.) rather than § 1337, the jurisdictional base pleaded. The complaint, fairly read, raised two basic challenges to the Act, both of which are derived from the Fifth Amendment. Appellees' cause of action against the NRC directly under the Constitution is sufficiently substantial to sustain jurisdiction; the further question of whether such a cause of **2624 action is to be generally recognized need not be decided on this record. Pp. 2628-2630.

2. Appellees have standing to challenge the Act's constitutionality. That several of the "immediate" adverse effects of construction of the plants were found to harm appellees is sufficient to satisfy the "injury in fact" prong of the constitutional requirement for standing. And the finding as to the "but for" causal connection between the Act and the construction of the plants satisfies the second prong of the constitutional test for standing, that the exercise of the court's remedial powers would redress the claimed injuries. Pp. 2630-2635.

3. The constitutional challenges to the Act are ripe for adjudication, since all parties would be adversely affected by a decision to defer definitive resolution of the constitutional validity *vel non* of the Act. To the extent that "issues of ripeness involve, at least in part, the existence of a live 'Case or Controversy.' " *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 138, 95 S.Ct. 335, 355, 42 L.Ed.2d 320 (1974) , the fact that appellees will sustain immediate injury from the operation of the disputed power plants and that such injury would be redressed by the relief requested satisfies this requirement. P. 2635.

4. The Act does not violate the Due Process Clause of the Fifth Amendment. Pp. 2635-2641.

(a) The record supports the need for the imposition of a statutory limit on liability to encourage private industry participation and hence bears a rational relationship to Congress' concern for stimulating private industry's involvement in the production of nuclear electric energy. P. 2636.

(b) Assuming, *arguendo,* that the $560 million fund would not insure full recovery in all conceivable circumstances, it does not follow that the liability limitation is therefore irrational and violative of due process. When appraised in light of the extremely remote possibility of an accident in which liability would exceed the statutory limit and Congress' commitment to "take whatever action is deemed necessary and appropriate *61 to protect the public from the consequences of" a disaster of such proportions, the congressional decision to fix a $560 million ceiling is within permissible limits and not violative of due process. Pp. 2636-2638.

(c) The District Court's finding that the Act tends to encourage irresponsibility in matters of safety and environmental protection cannot withstand careful scrutiny, since nothing in the liability-limitation provision undermines or alters the rigor and integrity of the process involved in the review of applications for a license to construct or operate a nuclear power plant, and since, in the event of a nuclear accident the utility itself would probably suffer the largest damage. P. 2638.

(d) The Act provides a reasonably just substitute for the common-law or state tort law remedies it replaces, and nothing more is required by the Due Process Clause. The congressional *assurance* of a $560 million fund for recovery, accompanied by the statutory commitment to "take whatever action is deemed necessary and appropriate to protect the public from the consequences of" a nuclear accident, is a fair and reasonable substitute for the uncertain recovery of damages of this magnitude from a utility or component manufacturer whose resources might well be exhausted at an early stage. And, at the minimum, the statutorily mandated waiver of defenses establishes at the threshold the right of injured parties to compensation without proof of fault and eliminates the burden of delay and uncertainty that would follow from the need to litigate the question of liability after an accident. Pp. 2638-2641.

(e) There is no equal protection violation, since the general rationality of the Act's liability limitation, particularly with reference to the congressional purpose of encouraging private participation in the exploitation of nuclear energy, is ample justification for the difference in treatment between those injured in nuclear accidents **2625 and those whose injuries are derived from other causes. P. 2641.

5. The Act does not withdraw the Tucker Act

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remedy, 28 U.S.C.A § 1491, and thus appellees' challenge under the Just Compensation Clause must fail. The further question of whether a taking claim could be established under the Fifth Amendment is a matter appropriately left for another day. P. 2641 n. 39.

431 F.Supp. 203, reversed and remanded.

*62 Steve C. Griffith, Jr., Charlotte, N. C., for appellant in No. 77- 262.

Sol. Gen. Wade H. McCree, Jr., Washington, D. C., for appellants in No. 77- 375.

William B. Schultz, Washington, D. C., for appellees.

Mr. Chief Justice BURGER delivered the opinion of the Court.

These appeals present the question of whether Congress may, consistent with the Constitution, impose a limitation on *63 liability for nuclear accidents resulting from the operation of private nuclear power plants licensed by the Federal Government.

I
A

When Congress passed the Atomic Energy Act of 1946, it contemplated that the development of nuclear power would be a Government monopoly. See Act of Aug. 1, 1946, ch. 724, 60 Stat. 755. Within a decade, however, Congress concluded that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing. See H.R.Rep. No. 2181, 83d Cong., 2d Sess., 1-11 (1954). The Atomic Energy Act of 1954, Act of Aug. 30, 1954, ch. 1073, 68 Stat. 919, as amended, 42 U.S.C. §§ 2011-2281 (1970 ed. and Supp V), implemented this policy decision, providing for licensing of private construction, ownership, and operation of commercial nuclear power reactors for energy production under strict supervision by the Atomic Energy Commission (AEC). [FN1] See *Power Reactor Development Co. v. Electrical Workers,* 367 U.S. 396, 81 S.Ct. 1529, 6 L.Ed.2d 924 (1961), rev'g and remanding, 108 U.S.App.D.C. 97, 280 F.2d 645 (1960).

FN1. Under the terms of the Energy Reorganization Act of 1974, 42 U.S.C. § 5801 *et seq.* (1970 ed., Supp. V), the Nuclear Regulatory Commission (NRC) has now replaced the AEC as the licensing and regulatory authority.

Private industry responded to the Atomic Energy Act of 1954 with the development of an experimental power plant constructed under the auspices of a consortium of interested companies. It soon became apparent that profits from the private exploitation of atomic energy were uncertain and the accompanying risks substantial. See Green, Nuclear Power: *64 Risk, Liability, and Indemnity, 71 Mich.L.Rev. 479-481 (1973) (Green). Although the AEC offered incentives to encourage investment, there remained in the path of the private nuclear power industry various problems--the risk of potentially vast liability in the event of a nuclear accident of a sizable magnitude being the major obstacle. Notwithstanding comprehensive testing and study, the uniqueness of this form of energy production made it impossible totally to rule out the risk of a major nuclear accident resulting in extensive damage. Private industry and the AEC were confident that such a disaster would not occur, but the very uniqueness of nuclear power meant that the possibility remained, and the potential liability dwarfed the ability of the industry and private insurance companies to absorb the risk. See Hearings before the Joint Committee on Atomic Energy on Government Indemnity for Private Licensees and AEC Contractors Against Reactor Hazards, 84th Cong., 2d Sess., 122-124 (1956). Thus, while repeatedly stressing that the risk of a **2626 major nuclear accident was extremely remote, spokesmen for the private sector informed Congress that they would be forced to withdraw from the field if their liability were not limited by appropriate legislation. *Id.,* at 9, 109-110, 115, 120, 136-137, 148, 181, 195, and 240.

Congress responded in 1957 by passing the Price-Anderson Act, 71 Stat. 576, 42 U.S.C. § 2210 (1970 ed. and Supp. V). The Act had the dual purpose of "protect[ing] the public and . . . encourag[ing] the development of the atomic energy industry." 42 U.S.C. § 2012(i). In its original form, the Act limited the aggregate liability for a

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single nuclear incident [FN2] to $500 million plus the amount of liability insurance *65 available on the private market--some $60 million in 1957. The nuclear industry was required to purchase the maximum available amount of privately underwritten public liability insurance, and the Act provided that if damages from a nuclear disaster exceeded the amount of that private insurance coverage, the Federal Government would indemnify the licensee and other "persons indemnified" [FN3] in an amount not to exceed $500 million. Thus, the actual ceiling on liability was the amount of private insurance coverage plus the Government's indemnification obligation which totaled $560 million.

FN2. A "nuclear incident" is defined as "any occurrence . . . within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or by-product material . . . ." 42 U.S.C. § 2014(q).

FN3. "The term 'person indemnified' means (1) with respect to a nuclear incident occurring within the United States . . . the person with whom an indemnity agreement is executed and any other person who may be liable for public liability . . . ." 42 U.S.C. § 2014(t).

Since its enactment, the Act has been twice amended, the first occasion being on the eve of its expiration in 1966. [FN4] These amendments extended the basic liability-limitation provisions for another 10 years, and added a provision which had the effect of requiring those indemnified under the Act to waive all legal defenses in the event of a substantial nuclear accident. [FN5] This provision was based on a congressional concern that state tort law dealing with liability for nuclear incidents was generally unsettled and that some way of insuring a common standard of responsibility for all jurisdictions--strict liability--was needed. A waiver of defenses was thought to be the preferable approach since it entailed less *66 interference with state tort law than would the enactment of a federal statute prescribing strict liability. [FN6] See S.Rep. No. 1605, 89th Cong., 2d Sess., 6-10 (1966); U.S.Code Cong. & Admin.Code 1966, p. 3201.

FN4. By the terms of the Act as originally passed, it was only applicable to licenses issued between August 30, 1954, and August 1, 1967. § 4, 71 Stat. 576, as amended, 42 U.S.C. § 2210(c).

FN5. The waiver provision is incorporated in the indemnity agreement. The defenses of negligence, contributory negligence, charitable or governmental immunity and assumption of risk all are waived in the event of an extraordinary nuclear occurrence, as are, to a limited degree, defenses based on certain short state statutes of limitations. 80 Stat. 891, 42 U.S.C. § 2210(n)(1). See also 10 C.F.R. §§ 140.81 to 140.85, 140.91 to 140.92 (1977).

FN6. The Act was also amended in 1966 to provide for the transfer of all claims arising out of a nuclear incident to a single federal district court. 42 U.S.C. § 2210(n)(2). If the court finds that liability may exceed the liability limitation of the Act, immediate payments to injured parties are limited to 15% of the liability limitation until the court approves a plan of distribution to insure equitable treatment of all parties. § 2210(*o*) (1970 ed. and Supp. V).

In 1975, Congress again extended the Act's coverage until 1987, and continued the $560 million limitation on liability. However a new provision was added requiring, in the event of a nuclear incident, each of the 60 or more reactor owners to contribute between $2 and $5 million toward the cost **2627 of compensating victims. [FN7] 42 U.S.C. § 2210(b) (1970 ed., Supp. V). Since the liability ceiling remained at the same level, the effect of the "deferred premium" provision was to reduce the Federal Government's contribution to the liability pool. [FN8] In its amendments to the Act in 1975, Congress also explicitly provided that "in the event of a nuclear incident involving damages in excess of [the] amount of aggregate liability, the Congress will thoroughly review the particular incident and will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a *67 disaster of such magnitude . .. ." 42 U.S.C. § 2210(e) (1970 ed., Supp. V).

FN7. The NRC, which was empowered by the 1975 amendments to choose a figure in the $2-$5 million range, has set the assessment at $5 million. 42 Fed.Reg. 46 (1977).

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FN8. As the number of reactors increases, the $5 million deferred premium in itself will yield a fund exceeding the present liability ceiling. For example, it is predicted that by 1985 there will be a maximum of 138 reactors operating, see Executive Office of the President, The National Energy Plan 71 (1977), which would produce $690 million in addition to whatever insurance is available from the private insurance market. Under the Act, the liability ceiling automatically increases to a level equal to the amount of primary and secondary (deferred premium) insurance coverage when the amount of such coverage exceeds the $560 million figure. 42 U.S.C. § 2210(e) (1970 ed., Supp. V).

Under the Price-Anderson Act as it presently stands, liability in the event of a nuclear incident causing damages of $560 million or more would be spread as follows: $315 million would be paid from contributions by the licensees of the 63 private operating nuclear power plants; $140 million would come from private insurance (the maximum now available); the remainder of $105 million would be borne by the Federal Government. [FN9]

FN9. Appellees' expert witness on insurance testified in the District Court that homeowners were unable to purchase insurance against nuclear catastrophes because "the nuclear industry has essentially absorbed the entire capacity of the private insurance markets in their need for property and liability insurance." App. 293-294.

B

Appellant in No. 77-262, Duke Power Co., is an investor-owned public utility which is constructing one nuclear power plant in North Carolina and one in South Carolina. Duke Power, along with the NRC, was sued by appellees, two organizations--Carolina Environmental Study Group and the Catawba Central Labor Union--and 40 individuals who live within close proximity to the planned facilities. The action was commenced in 1973, and sought, among other relief, a declaration that the Price-Anderson Act is unconstitutional. [FN10]

FN10. The complaint also sought review of the AEC's decision to grant a construction permit for one of the plants. During the pendency of this action, however, the United States Court of Appeals for the District of Columbia Circuit decided that the AEC had properly issued the permits. *Carolina Environmental Study Group v. United States,* 166 U.S.App.D.C. 416, 510 F.2d 796 (1975). Accordingly, the District Court dismissed all counts of the complaint except those relating to the Price-Anderson Act's constitutionality.

After the parties had engaged in extensive discovery, the District Court held an evidentiary hearing on the questions of whether the issues were ripe for adjudication and whether ***68** appellees had standing to challenge the constitutionality of the Act. That court determined that appellees had standing and that their claim could properly be adjudicated. The District Court went on to hold that the Price-Anderson Act was unconstitutional in two respects: (a) it violated the Due Process Clause of the Fifth Amendment because it allowed injuries to occur without assuring adequate compensation to the victims; (b) the Act offended the equal protection component of the Fifth Amendment by forcing the victims of nuclear incidents to bear the burden of injury, whereas society as a whole benefits from the existence and development of nuclear power.

****2628** We noted probable jurisdiction [FN11] in these appeals, 434 U.S. 937, 98 S.Ct. 426, 54 L.Ed.2d 297 (1977), and we now reverse.

FN11. Our jurisdiction was invoked under 28 U.S.C. § 1252 (1976 ed.), which provides for a direct appeal to this Court from any decision invalidating an Act of Congress in any suit to which the United States, its agencies, officers, or employees are parties.

II

As a threshold matter, we must address the question of whether the District Court had subject-matter jurisdiction over appellees' claims, despite the fact that none of the parties raised this issue and the District Court did not consider it. See *Liberty Mutual Ins. Co. v. Wetzel,* 424 U.S. 737, 740, 96 S.Ct. 1202, 1204, 47 L.Ed.2d 435 (1976). Appellees' complaint alleges jurisdiction under 28 U.S.C. § 1337 (1976 ed.), which provides for original jurisdiction in the district courts over "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." Our reading of the pleadings, [FN12] however, indicates that ***69** appellees' claims do not "arise under" the Price-Anderson Act as that statutory language has been interpreted in prior decisions.

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See *Peyton v. Railway Express Agency,* 316 U.S. 350, 353, 62 S.Ct. 1171, 1172, 86 L.Ed. 1525 (1942).

FN12. The complaint provides in relevant part: "19. Since the Price-Anderson Act provides victims of a nuclear disaster no benefit while at the same time limiting their right to recover for their losses to approximately 2 1/2 % of such losses, the operation of the $500 million limitation would, in the event of a nuclear disaster, deprive the persons injured by such a disaster of property rights without due process of law in violation of the Fifth Amendment to the Constitution of the United States." App. 32.

Specifically, as we read the complaint, appellees are making two basic challenges to the Act--both of which find their moorings in the Fifth Amendment. First, appellees contend that the Due Process Clause protects them against arbitrary governmental action adversely affecting their property rights and that the Price-Anderson Act--which both creates the source of the underlying injury and limits the recovery therefor--constitutes such arbitrary action. And second, they are contending that in the event of a nuclear accident their property would be "taken" without any assurance of just compensation. The Price-Anderson Act is the instrument of the taking since on this record, without it, there would be no power plants and no possibility of an accident. Implicit in the complaint is also the assumption that there exists a cause of action directly under the Constitution to vindicate appellees' federal rights through a suit against the NRC, the executive agency charged with enforcement and administration of the allegedly unconstitutional statute. [FN13] Appellees' right to relief ***70** thus depends not on the interpretation or construction of the Price-Anderson Act itself, but instead "upon the construction or application of the Constitution," *Smith v. Kansas City Title & Trust Co.,* 255 U.S. 180, 199, 41 S.Ct. 243, 245, 65 L.Ed. 577 (1921). Hence, if there exists jurisdiction to hear appellees' claims at all, it must be derived from 28 U.S.C. § 1331(a) (1976 ed.), the general federal-****2629** question statute, rather than from § 1337--the jurisdictional base pleaded. [FN14]

FN13. Mr. Justice REHNQUIST would read the complaint, insofar as it alleges a denial of due process, as stating a claim only against Duke Power under North Carolina law. Under such a construction of the complaint, the question of the constitutionality of the Price-Anderson Act would emerge only in anticipation of a defense to appellees' state-law claims and thus would not support federal jurisdiction under the "well-pleaded" complaint rule regardless of the jurisdictional statute relied upon. See *Louisville & Nashville R. Co. v. Mottley,* 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). We conclude that the complaint is more fairly read as stating a claim against the NRC directly under the Due Process Clause of the Fifth Amendment. See n. 12, *supra.* On this view, the "well-pleaded" complaint rule poses no bar to the assertion of jurisdiction. Appellees' claim under the Due Process Clause is an essential ingredient of a well-pleaded complaint asserting a right under the Constitution and is not simply a claim made in anticipation of a defense to be raised in an action having its origin in state law. See also n. 26, *infra.*

FN14. Previously § 1331(a) required a minimum amount in controversy in all suits, but a 1976 amendment eliminated the jurisdictional amount requirement in actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." Pub.L. 94-574, § 2, 90 Stat. 2721. Thus this action, at least as against the NRC, would seem clearly permitted by § 1331(a) without specification of an amount in controversy. See *Andrus v. Charlestone Stone Products Co.,* 436 U.S. 604, 608 n.6, 98 S.Ct. 2002, 2005 n.6, 56 L.Ed.2d 570 (1978). Appellees' failure to assert § 1331(a) as a basis for jurisdiction in their complaint is not fatal since the facts alleged are sufficient to support such jurisdiction. See 436 U.S., at 608 n.6, 98 S.Ct., at 2005 n.6.

[1][2] For purposes of determining whether jurisdiction exists under § 1331(a) to resolve appellees' claims, it is not necessary to decide whether appellees' alleged cause of action against the NRC based directly on the Constitution is in fact a cause of action "on which [appellees] could actually recover." *Bell v. Hood,* 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946). Instead, the test is whether " 'the cause of action alleged is *so patently without merit* as to justify . . . the court's dismissal for want of jurisdiction.' " *Hagans v. Lavine,* 415 U.S. 528, 542-543, 94 S.Ct. 1372, 1382, 39 L.Ed.2d 577 (1974) quoting *Bell v. Hood, supra,* at 683, 66 S.Ct., at 776. (Emphasis added.) See also *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 666, 94 S.Ct. 772, 778,

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39 L.Ed.2d 73 (1974) (test is whether right claimed is "so insubstantial, implausible, foreclosed by prior decisions of this *71 Court, or otherwise completely devoid of merit as not to involve a federal controversy"). In light of prior decisions, for example, *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) and *Hagans v. Lavine, supra,* as well as the general admonition that "where federally protected rights have been invaded . . . courts will be alert to adjust their remedies so as to grant the necessary relief," *Bell v. Hood, supra,* 327 U.S., at 684, 66 S.Ct., at 777, we conclude that appellees' allegations are sufficient to sustain jurisdiction under § 1331(a). [FN15]

FN15. Mr. Justice REHNQUIST suggests that appellees' "taking" claim will not support jurisdiction under § 1331(a), but instead that such a claim can be adjudicated only in the Court of Claims under the Tucker Act, 28 U.S.C. § 1491 (1976 ed.). We disagree. Appellees are not seeking compensation for a taking, a claim properly brought in the Court of Claims, but are now requesting a declaratory judgment that since the Price-Anderson Act does not provide advance assurance of adequate compensation in the event of a taking, it is unconstitutional. As such, appellees' claim tracks quite closely that of the petitioners in the *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974), which were brought under § 1331 as well as the Declaratory Judgment Act. See App. in *Regional Rail Reorganization Act Cases,* O.T.1974, Nos. 74-165, 74-166, 74-167, 74-168, p. 161, 95 S.Ct. at p. 367. While the Declaratory Judgment Act does not expand our jurisdiction, it expands the scope of available remedies. Here it allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained.

The further question of whether appellees' cause of action under the Constitution is one generally to be recognized need not be decided here. The question does not directly implicate our jurisdiction, see *Bell v. Hood, supra,* was not raised in the court below, was not briefed, and was not addressed during oral argument. As we noted last Term in a similar context, questions of this sort should not be resolved on such an inadequate record; leaving them unresolved is no bar to full consideration of the merits. See *Mt. Healthy City Bd. of Educ. v. Doyle,* 429 U.S. 274, 278-279, 97 S.Ct. 568, 571-572, 50 L.Ed.2d 471 (1977). It is enough for present purposes that the claimed cause of action to vindicate appellees' *72 constitutional rights is sufficiently substantial and colorable to sustain jurisdiction under § 1331(a). [FN16]

FN16. We need not resolve the question of whether Duke Power is a proper party since jurisdiction over appellees' claims against the NRC is established, and Duke's presence or absence makes no material difference to either our consideration of the merits of the controversy or our authority to award the requested relief.

****2630 III**

The District Judge held four days of hearings on the questions of standing and ripeness; his factual findings form the basis for our analysis of these issues.

A

[3] The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). As refined by subsequent reformulation, this requirement of a "personal stake" has come to be understood to require not only a "distinct and palpable injury," to the plaintiff, *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975), but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct. *Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 261, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1977). See also *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1925-1926, 48 L.Ed.2d 450 (1976); *Linda R. S. v. Richard D.,* 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973). Application of these constitutional standards to the factual findings of the District Court persuades us that the Art. III requisites for standing are satisfied by appellees.

We turn first to consider the kinds of injuries the

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District Court found theappellees suffered. It discerned two categories of effects which resulted from the operation of nuclear ***73** power plants in potentially dangerous proximity to appellees' living and working environment. The immediate effects included: (a) the production of small quantities of non-natural radiation which would invade the air and water; (b) a "sharp increase" in the temperature of two lakes presently used for recreational purposes resulting from the use of the lake waters to produce steam and to cool the reactor; (c) interference with the normal use of the waters of the Catawba River; (d) threatened reduction in property values of land neighboring the power plants; (e) "objectively reasonable" present fear and apprehension regarding the "effect of the increased radioactivity in air, land and water upon [appellees] and their property, and the genetic effects upon their descendants"; and (f) the continual threat of "an accident resulting in uncontrolled release of large or even small quantities of radioactive material" with no assurance of adequate compensation for the resultant damage. 431 F.Supp. 203, 209. Into a second category of potential effects were placed the damages "which may result from a CORE MELT OR OTHER MAJOR ACCIDENT IN THE OPERATION OF A REACTOR . . . ." *Id.*, at 209. [FN17]

FN17. For a detailed explanation of the nature and consequences of a core melt, see 431 F.Supp., at 206-207.

[4] For purposes of the present inquiry, we need not determine whether all the putative injuries identified by the District Court, particularly those based on the possibility of a nuclear accident and the present apprehension generated by this future uncertainty, are sufficiently concrete to satisfy constitutional requirements. Compare *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974), with *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). See also *Conservation Society of Southern Vermont v. AEC*, Civ. Action No. 19-72 (DC Apr. 17, 1975). It is enough that several of the "immediate" adverse effects were found to harm appellees. Certainly the environmental and aesthetic consequences of the thermal pollution of the two lakes in the vicinity of the disputed power plants is the type ***74** of harmful effect which has been deemed adequate in prior cases to satisfy the "injury in fact" standard. See *United States v. SCRAP, supra.* Cf. *Sierra Club v. Morton*, ****2631** 405 U.S. 727, 734, 92 S.Ct. 1361, 1365, 31 L.Ed.2d 636 (1972). [FN18] And the emission of non- natural radiation into appellees' environment would also seem a direct and present injury, given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants. [FN19]

FN18. "We do not question that this type of harm may amount to an 'injury in fact' sufficient to lay the basis for standing . . . . Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society . . . ." *Sierra Club v. Morton*, 405 U.S., at 734, 92 S.Ct., at 1366.

FN19. It is argued that the District Court's findings on the question of injury in fact upon which we rely are clearly erroneous and should not be accepted as a predicate for standing. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). Application of this standard to the factual findings of the District Court does not persuade us that they should not be accepted.

The more difficult step in the standing inquiry is establishing that these injuries "fairly can be traced to the challenged action of the defendant," *Simon v. Eastern Ky. Welfare Rights Org., supra*, 426 U.S., at 41, 96 S.Ct., at 1926, or put otherwise, that the exercise of the Court's remedial powers would redress the claimed injuries. 426 U.S., at 43, 96 S.Ct., at 1926. The District Court discerned a "but for" causal connection between the Price- Anderson Act, which appellees challenged as unconstitutional, "and the construction of the nuclear plants which the [appellees] view as a threat to them." 431 F.Supp., at 219. Particularizing that causal link to the facts of the instant case, the District Court concluded that "there is a substantial likelihood that Duke would not be able to complete the construction and maintain the operation of the McGuire and Catawba Nuclear Plants ***75** but for the protection provided by the Price-Anderson Act." *Id.*, at 220.

These findings, which, if accepted, would likely satisfy the second prong of the constitutional test for

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standing as elaborated in *Simon*, [FN20] are challenged on two grounds. First, it is argued that the evidence presented at the hearing, contrary to the conclusion reached by the District Court, indicated that the McGuire and Catawba nuclear plants would be completed and operated without the Price-Anderson Act's limitation on liability. And second, it is contended that the Price-Anderson Act is not, in some essential sense, the "but for" cause of the disputed nuclear power plants and resultant adverse effects since if the Act had not been passed Congress may well have chosen to pursue the nuclear program as a Government monopoly as it had from 1946 until 1954. We reject both of these arguments.

> FN20. Our recent cases have required no more than a showing that there is a "substantial likelihood" that the relief requested will redress the injury claimed to satisfy the second prong of the constitutional standing requirement. See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 262, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1977), quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976) ("MHDC has shown an injury to itself that is 'likely to be redressed by a favorable decision' "). See also *Warth v. Seldin*, 422 U.S. 490, 504, 506-507, 95 S.Ct. 2197, 2207, 2209-2210, 45 L.Ed.2d 343 (1975).

The District Court's finding of a "substantial likelihood" that the McGuire and Catawba nuclear plants would be neither completed nor operated absent the Price-Anderson Act rested in major part on the testimony of corporate officials before the Joint Committee on Atomic Energy (JCAE) in 1956-1957 when the Price- Anderson Act was first considered and again in 1975 when a second renewal was discussed. During the 1956-1957 hearings, industry spokesmen for the utilities and the producers of the various component parts of the power plants expressed a categorical unwillingness to participate in the development of nuclear **2632 power absent guarantees of a limitation on their liability. 431 F.Supp., at 215. See also *76 Green, 486, 490-491. [FN21] By 1975, the tenor of the testimony had changed only slightly. While large utilities and producers were somewhat more equivocal about whether a failure to renew Price-Anderson would entail their leaving the industry, the smaller producers of component parts and architects and engineers--all of whom are essential to the building of the reactors and generating plants--considered renewal of the Act as the critical variable in determining their continued involvement with nuclear power. 431 F.Supp., at 216-217. Duke Power itself, in its letter to the Committee urging extension of the Act, cited recent experiences with suppliers and contractors who were requiring the inclusion of cancellation clauses in their contracts to take effect if the liability-limitation provisions were eliminated. *Id.*, at 217. And the Report of the JCAE, in discussing the need for renewal of the Act, stated:

> FN21. Nor was the situation different in 1965-1966, when the first 10-year renewal of Price-Anderson was considered. See H.R.Rep.No.883, 89th Cong., 1st Sess., 9 (1965). See generally Green 493.

> "Nuclear power plants now in the planning and design phases would not receive construction permits until about 1977-1978. Thus there is uncertainty as to whether these plants would receive protection in the form of Government indemnity. Reactor manufacturers and architect-engineers are already requiring escape clauses in their contracts to permit cancellation in the event some form of protection from unlimited potential liability is not provided. Action is required soon to prevent disruption in utility plans for nuclear power." H.R.Rep.No.94-648, p. 7 (1975).

[5] Nor was the testimony at the hearing in this case, evaluation of which is the primary responsibility of the trial judge, at odds with the impression drawn from the legislative history. The testimony of Executive Vice President Lee of Duke Power *77 simply echoed the views presented by Duke and others to Congress in 1975, that is, although some of the utilities themselves might be confident enough with respect to safety factors to proceed with nuclear power absent a liability limitation, the suppliers of critical parts and the utility shareholders could reasonably be expected to take a more cautious view. [FN22] Appellees presented expert testimony essentially to the same effect. Considering the documentary evidence and the testimony in the record, we cannot say we are left with "the definite and firm conviction that" the finding by the trial court of a substantial likelihood that the McGuire and Catawba nuclear power plants would be neither completed nor operated absent the Price-Anderson Act is clearly erroneous; and,

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1994 WL 596801 (Reply.Brief)

For Transcript of Oral Argument See:

1994 WL 714637 (U.S.Oral.Arg.)

Justice SCALIA delivered the opinion of the Court.

The question presented in this case is whether § 27A(b) of the Securities Exchange Act of 1934, to the extent that it requires federal courts to reopen final judgments in private civil actions under § 10(b) of the Act, contravenes the Constitution's separation of powers or the Due Process Clause of the Fifth Amendment.

I

In 1987, petitioners brought a civil action against respondents in the United States District Court for the Eastern District of Kentucky. The complaint alleged that in 1983 and 1984 respondents had committed fraud and deceit in the sale of stock in violation of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission. The case was mired in pretrial proceedings in the District Court until June 20, 1991, when we decided *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321. *Lampf* held that "[l]itigation instituted pursuant to § 10(b) and Rule 10b-5 ... must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." *Id.,* at ***214** 364, 111 S.Ct., at 2782. We applied that holding to the plaintiff-respondents in *Lampf* itself, found their suit untimely, and reinstated a summary judgment previously entered in favor of the defendant-petitioners. *Ibid.* On the same day we decided *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), in which a majority of the Court held, albeit in different opinions, that a new rule of federal law that is applied to the parties in the case announcing the rule must be applied as well to all cases pending on direct review. See *Harper v. Virginia Dept. of Taxation,* 509 U.S. 86, 92, 113 S.Ct. 2510, 2514-2515, 125 L.Ed.2d 74 (1993). The joint effect of *Lampf* and *Beam* was to mandate application of the 1-year/3-year limitations period to petitioners' suit. ****1451** The District Court, finding that petitioners' claims were untimely under the *Lampf* rule, dismissed their action with prejudice on August 13, 1991. Petitioners filed no appeal; the judgment accordingly became final 30 days later. See 28 U.S.C. § 2107(a) (1988 ed., Supp. V); *Griffith v. Kentucky,* 479 U.S. 314, 321, n. 6, 107 S.Ct. 708, 712, n. 6, 93 L.Ed.2d 649 (1987).

On December 19, 1991, the President signed the Federal Deposit Insurance Corporation Improvement Act of 1991, 105 Stat. 2236. Section 476 of the Act-- a section that had nothing to do with FDIC improvements--became § 27A of the Securities Exchange Act of 1934, and was later codified as 15 U.S.C. § 78aa- 1 (1988 ed., Supp. V). It provides:

"(a) Effect on pending causes of action

"The limitation period for any private civil action implied under section 78j(b) of this title [§ 10(b) of the Securities Exchange Act of 1934] that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

"(b) Effect on dismissed causes of action

"Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991--

***215** "(1) which was dismissed as time barred subsequent to June 19, 1991, and

"(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

"shall be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991."

On February 11, 1992, petitioners returned to the District Court and filed a motion to reinstate the action previously dismissed with prejudice. The District Court found that the conditions set out in §§ 27A(b)(1) and (2) were met, so that petitioners' motion was required to be granted by the terms of the statute. It nonetheless denied the motion, agreeing with respondents that § 27A(b) is unconstitutional. Memorandum Opinion and Order, Civ. Action No. 87-438 (ED Ky., Apr. 13, 1992). The United States Court of Appeals for the Sixth Circuit affirmed. 1 F.3d 1487 (1993). We granted certiorari. 511 U.S. 1141, 114 S.Ct. 2161, 128 L.Ed.2d 885 (1994). [FN1]

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hence, we are bound to accept it. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 526, 541 (1948).

> FN22. "From what I know about nuclear power, it would be my recommendation that Duke proceed even in the absence of Price-Anderson. However, from the point of view of how others perceive nuclear power, there is some question about whether it would be a practical undertaking in the absence of the Act. . . . I have already been advised by several firms that the existence of Price-Anderson is required for them to be a supplier to our nuclear program . . .. If Price-Anderson did not exist, I would therefore have to evaluate the extent to which its absence caused disappearance of suppliers from the marketplace in arriving at my recommendation." App. 368-369.

The second attack on the District Court's finding of a causal link warrants only brief attention. Essentially the argument is, as we understand it, that Price-Anderson is not a "but for" cause of the injuries appellees claim, since if Price-Anderson had not been passed, the Government would have undertaken development of nuclear power on its own and the same injuries would likely have accrued to appellees from such Government-operated plants as from privately operated ones. Whatever the ultimate accuracy of this speculation, it is not responsive to the simple proposition that private power companies now do in fact **2633 operate the nuclear-powered generating plants injuringappellees, *78 and that their participation would not have occurred but for the enactment and implementation of the Price-Anderson Act. Nothing in our prior cases requires a party seeking to invoke federal jurisdiction to negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate the likely effectiveness of judicial relief.

B

It is further contended that in addition to proof of injury and of a causal link between such injury and the challenged conduct, appellees must demonstrate a connection between the injuries they claim and the constitutional rights being asserted. This nexus requirement is said to find its origin in *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), where the general question of taxpayer standing was considered:

> "The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." *Id.*, at 102, 88 S.Ct., at 1954.

See also *United States v. Richardson*, 418 U.S. 166, 174-175, 94 S.Ct. 2940, 2945-2946, 41 L.Ed.2d 678 (1974). Since the environmental and health injuries claimed by appellees are not directly related to the constitutional attack on the Price-Anderson Act, such injuries, the argument continues, cannot supply a predicate for standing. [FN23] We decline to accept this argument.

> FN23. The only injury that would possess the required subject-matter nexus to the due process challenge is the injury that would result from a nuclear accident causing damages in excess of the liability limitation provisions of the Price-Anderson Act.

[6] The major difficulty with the argument is that it implicitly assumes that the nexus requirement formulated in the context of taxpayer suits has general applicability in suits of all other types brought in the federal courts. No cases have been cited *79 outside the context of taxpayer suits where we have demanded this type of subject-matter nexus between the right asserted and the injury alleged, and we are aware of none. [FN24] Instead, in *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 225, 94 S.Ct. 2925, 2934, 41 L.Ed.2d 706 n. 15 (1974), we explicitly rejected such a broad compass for the *Flast* nexus requirement:

> FN24. In *Linda R. S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973), a nontaxpayer suit, reference was made to *Flast* ' s nexus requirement in the course of denying appellant's standing to challenge the nonenforcement of Texas' desertion and nonsupport statute. Upon careful reading, however, it is clear that standing was denied not because of the absence of a subject-matter nexus between the injury asserted and the constitutional claim, but instead because of the unlikelihood that the relief requested would redress appellant's claimed injury. *Id.*, at 618, 93 S.Ct., at 1149. This case thus provides no qualitative support for the broader application of *Flast* 's principles which appellants

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appear to advocate. Cf. Scott, Standing in the Supreme Court--A Functional Analysis, 86 Harv.L.Rev. 645, 660-662 (1973).

"Looking 'to the substantive issues' which *Flast* stated to be both 'appropriate and necessary' in relation to taxpayer standing was for the express purpose of determining 'whether there is a logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated.' 392 U.S. at 102 [88 S.Ct. 1942]. This step is not appropriate on a claim of citizen standing since the *Flast* nexus test is not applicable where the taxing and spending power is not challenged. . . ."

We continue to be of the same view and cannot accept the contention that, outside the context of taxpayers' suits, a litigant must demonstrate something more than injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the ****2634** "case or controversy" requirement of Art. III. [FN25]

FN25. Both at the time of its formulation, see *Flast v. Cohen*, 392 U.S., at 120, 130-131, 88 S.Ct., at 1962, 1968-1969 (Harlan J., dissenting), and more recently, see *United States v. Richardson*, 418 U.S. 166, 181, 196 n. 18, 94 S.Ct. 2940, 2948, 2956, 41 L.Ed.2d 678 (1974). (POWELL, J., concurring), there have been questions as to whether the nexus requirement, even in the context of taxpayers' suits, is constitutionally mandated or is instead simply a prudential limitation.

***80** Our prior cases have, however, acknowledged "other limits on the class of persons who may invoke the courts' decisional and remedial powers," *Warth v. Seldin*, 422 U.S., at 499, 95 S.Ct., at 2205, which derive from general prudential concerns "about the proper--and properly limited--role of the courts in a democratic society." *Id.*, at 498, 95 S.Ct., at 2205. See also *Schlesinger v. Reservists Comm. to Stop the War, supra*, 418 U.S., at 221-227, 94 S.Ct., at 2932-2935. Thus, we have declined to grant standing where the harm asserted amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure. See *United States v. Richardson, supra.* We have also narrowly limited the circumstances in which one party will be given standing to assert the legal rights of another. "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin, supra*, at 499, 95 S.Ct., at 2205. See also *United States v. Raines*, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). This limitation on third-party standing arguably suggests a connection between the claimed injury and the right asserted bearing some resemblance to the nexus requirement now urged upon us.

There are good and sufficient reasons for this prudential limitation on standing when rights of third parties are implicated--the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them. See *Singleton v. Wulff*, 428 U.S. 106, 113-114, 96 S.Ct. 2868, 2873-2874, 49 L.Ed.2d 826 (1976). We do not, however, find these reasons a satisfactory predicate for applying this limitation or a similar nexus requirement to all cases as a matter of course. Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be ***81** prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met. See, *e. g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

[7] We conclude that appellees have standing to challenge the constitutionality of the Price-Anderson Act. [FN26]

FN26. Mr. Justice REHNQUIST undertakes to sever the action of the NRC in executing indemnity agreements under the Act from the Act's alleged constitutional infirmities--particularly the liability limitation provisions. Careful examination of the statutory mechanism indicates that such a separation simply cannot be sustained. The execution of the indemnification agreements by the NRC triggers the statutory ceiling on liability which, in terms, applies only to "persons indemnified." See 42 U.S.C. § 2210(e) (1970 ed., Supp. V). Thus, absent the execution of such agreements between the NRC and the licensees, the liability-limitation provisions of the Act, to which appellees object, would simply not come into play.

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> This fact, coupled with the District Court's finding that "but for" the liability-limitation provisions there is a substantial likelihood that the contemplated plants would not be built or operated, is sufficient to establish the justiciability of appellees' claim against the Commission. See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S., at 44-46, 96 S.Ct., at 1927-1928.

C

The question of the ripeness of the constitutional challenges raised by appellees need not long detain us. To the extent that "issues of ripeness involve, at least in part, the existence of a live 'Case or Controversy,' " ***2635** *Regional Rail Reorganization Act Cases*, 419 U.S., at 138, 95 S.Ct., at 356, our conclusion that appellees will sustain immediate injury from the operation of the disputed power plants and that such injury would be redressed by the relief requested would appear to satisfy this requirement.

[8] The prudential considerations embodied in the ripeness doctrine also argue strongly for a prompt resolution of the claims presented. Although it is true that no nuclear accident has yet occurred and that such an occurrence would eliminate much of the existing scientific uncertainty surrounding this ***82** subject, it would not, in our view, significantly advance our ability to deal with the legal issues presented nor aid us in their resolution. However, delayed resolution of these issues would foreclose any relief from the present injury suffered by appellees--relief that would be forthcoming if they were to prevail in their various challenges to the Act. Similarly, delayed resolution would frustrate one of the key purposes of the Price-Anderson Act--the elimination of doubts concerning the scope of private liability in the event of major nuclear accident. In short, all parties would be adversely affected by a decision to defer definitive resolution of the constitutional validity *vel non* of the Price-Anderson Act. Since we are persuaded that "we will be in no better position later than we are now" to decide this question, *id.*, at 143- 145, 95 S.Ct., at 359, we hold that it is presently ripe for adjudication.

IV

The District Court held that the Price-Anderson Act contravened the Due Process Clause because "[t]he amount of recovery is not rationally related to the potential losses"; because "[t]he Act tends to encourage irresponsibility in matters of safety and environmental protection . . ."; and finally because "[t]here is no *quid pro quo* " for the liability limitations. 431 F.Supp., at 222-223. An equal protection violation was also found because the Act "places the cost of [nuclear power] on an arbitrarily chosen segment of society, those injured by nuclear catastrophe." *Id.*, at 225. Application of the relevant constitutional principles forces the conclusion that these holdings of the District Court cannot be sustained.

A

Our due process analysis properly begins with a discussion of the appropriate standard of review. Appellants, portraying the liability-limitation provision as a legislative balancing of economic interests, urge that the Price-Anderson Act be ***83** accorded the traditional presumption of constitutionality generally accorded economic regulations and that it be upheld absent proof of arbitrariness or irrationality on the part of Congress. See *Ferguson v. Skrupa*, 372 U.S. 726, 731-732, 83 S.Ct. 1028, 1031-1032, 10 L.Ed.2d 93 (1963); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976). Appellees, however, urge a more elevated standard of review on the ground that the interests jeopardized by the Price- Anderson Act "are far more important than those in the economic due process and business-oriented cases" where the traditional rationality standard has been invoked. Brief for Appellees 36. An intermediate standard like that applied in cases such as *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (equal protection challenge to statute requiring that males be older than females in order to purchase beer) or *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) (Contract Clause challenge to repeal of statutory covenant providing security for bondholders) is thus recommended for our use here.

[9] As we read the Act and its legislative history, it is clear that Congress' purpose was to remove the economic impediments in order to stimulate the private development of electric energy by nuclear power while simultaneously providing the public compensation in the event of a catastrophic nuclear

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incident. See, *e. g.*, S.Rep. No. 296, 85th Cong., 1st Sess., 15 (1957); **2636 U.S.Code, Cong. & Admin.Code 1957, p. 1803. The liability-limitation provision thus emerges as a classic example of an economic regulation--a legislative effort to structure and accommodate "the burdens and benefits of economic life." *Usery v. Turner Elkhorn Mining Co., supra,* 428 U.S., at 15, 96 S.Ct., at 2892. "It is by now well established that [such] legislative Acts . . . come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Ibid.* That the accommodation struck may haveprofound and far-reaching consequences, contrary to appellees' suggestion, provides all the *84 more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational. [FN27]

FN27. Appellees, in apparent reliance on our recent decision in *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), argue that because the Price-Anderson Act encroaches on substantial state government interests, an augmented standard of review under the Due Process Clause is warranted. Nothing in *National League of Cities* or in our prior due process cases provides any support for this claim.

B

[10] When examined in light of this standard of review, the Price-Anderson Act, in our view, passes constitutional muster. The record before us fully supports the need for the imposition of a statutory limit on liability to encourage private industry participation and hence bears a rational relationship to Congress' concern for stimulating the involvement of private enterprise in the production of electric energy through the use of atomic power; nor do we understand appellees or the District Court to be of a different view. Rather their challenge is to the alleged arbitrariness of the *particular figure* of $560 million, which is the statutory ceiling on liability. The District Court aptly summarized its position:

"The amount of recovery is not rationally related to the potential losses. Abundant evidence in the record shows that although major catastrophe in any particular place is not certain and may not be extremely likely, nevertheless, in the territory where these plants are located, damage to life and property for this and future generations could well be many, many times the limit which the law places on liability." 431 F.Supp., at 222.

[11] Assuming, *arguendo,* that the $560 million fund would not insure full recovery in all conceivable circumstances [FN28]--and *85 the hard truth is that no one can ever know--it does not by any means follow that the liability limitation is therefore irrational and violative of due process. The legislative history clearly indicates that the $560 million figure was not arrived at on the supposition that it alone would necessarily be sufficient to guarantee full compensation in the event of a nuclear incident. Instead, it was conceived of as a "starting point" or a working hypothesis. [FN29] The reasonableness **2637 of the statute's assumed ceiling on liability was predicated on two corollary considerations--expert appraisals of the exceedingly small risk of a nuclear incident involving claims in excess of $560 million, and the recognition that in the event of such an incident, Congress would likely enact extraordinary relief provisions to provide additional relief, in accord with prior practice.

FN28. As the various studies considered by the District Court indicate, there is considerable uncertainty as to the amount of damages which would result from a catastrophic nuclear accident. See 431 F.Supp., at 210-214. The Reactor Safety Study published by the NRC in 1975 suggested that there was a 1 in 20,000 chance (per reactor year) of an accident causing property damage approaching $100 million and having only minor health effects. By contrast, when the odds were reduced to the range of 1 in 1 billion (per reactor year), the level of damages approached $14 billion; and 3,300 early fatalities and 45,000 early illnesses were predicted. NRC, Reactor Safety Study, An Assessment of Accident Risks in U. S. Commercial Nuclear Power Plants 83-85 (Wash.-1400, Oct. 1975). For a thorough criticism of the Reactor Safety Study, see EPA, Reactor Safety Study (Wash.-1400): A Review of the Final Report (June 1976).

FN29. "What we were thinking about was the magnitude of protection and we set up an arbitrary figure because it seemed to be practical at that time and because we didn't think an accident would happen . . . but yet we recognize that it could happen. *We wanted to have a base to work from.*" Hearings before the Joint Committee on Atomic Energy on Possible Modification or Extension of the Price-Anderson Insurance And Indemnity Act

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of 1957 In Order for Proper Planning of Nuclear Power Plants to Continue Without Delay, 93d Cong., 2d Sess., 68 (1974) (remarks of Rep. Holifield) (emphasis added).

"[T]his limitation does not, as a practical matter, detract from the public protection afforded by this legislation. In the first place, the likelihood of an accident occurring ***86** which would result in claims exceeding the sum of the financial protection required and the governmental indemnity is exceedingly remote, albeit theoretically possible. Perhaps more important, in the event of a national disaster of this magnitude, it is obvious that Congress would have to review the problem and take appropriate action. The history of other natural or man-made disasters, such as the Texas City incident, bears this out. The limitation of liability serves primarily as a device for facilitating further congressional review of such a situation, rather than as an ultimate bar to further relief of the public." H.R.Rep. No. 883, 89th Cong., 1st Sess. 6-7 (1965).

See also S.Rep. No. 296, *supra*, at 21; H.R.Rep. No. 94-648, pp. 12, 15 (1975).

Given our conclusion that, in general, limiting liability is an acceptable method for Congress to utilize in encouraging the private development of electric energy by atomic power, candor requires acknowledgment that whatever ceiling figure is selected will, of necessity, be arbitrary in the sense that any choice of a figure based on imponderables like those at issue here can always be so characterized. This is not, however, the kind of arbitrariness which flaws otherwise constitutional action. When appraised in terms of both the extremely remote possibility of an accident where liability would exceed the limitation [FN30] and Congress' now statutory commitment to "take whatever action is deemed necessary and appropriate to protect the public from the consequences of" any such disaster, 42 U.S.C § 2210(e) (1970 ed., Supp. V), [FN31] we hold the ***87** congressional decision to fix a $560 million ceiling at this stage in the private development and production of electric energy by nuclear power, to be within permissible limits and not violate of due process.

FN30. Congress' conclusion that "the probabilities of a nuclear incident are much lower and the likely consequences much less severe than has been thought previously," was a key factor in the decision not to increase the $560 million liability ceiling in 1975. S.Rep. No. 94-454, p. 12 (1975), U.S.Code, Cong. & Admin.News 1975, pp. 2251, 2262.

FN31. In the past Congress has provided emergency assistance for victims of catastrophic accidents even in the absence of a prior statutory commitment to do so. For example in 1955, Congress passed the Texas City Explosion Relief Act, 69 Stat. 707, to provide relief for victims of the explosion of ammonium nitrate fertilizer in 1947. Congress took this action despite the decision in *Dalehite v. United States,* 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), holding the United States free from any liability under the Federal Tort Claims Act for the damages incurred and injuries suffered. More recently Congress enacted legislation to provide relief for victims of the flood resulting from the collapse of the Teton Dam in Idaho. Pub.L. 94-400, 90 Stat. 1211. Under the Act, the Secretary of the Interior was authorized to provide full compensation for any deaths, personal injuries, or property damage caused by the failure of the dam. *Ibid.*
The Price-Anderson Act is, of course, a significant improvement on these prior relief efforts because it provides an advance guarantee of recovery up to $560 million plus an express commitment by Congress to take whatever further steps are necessary to aid the victims of a nuclear incident.

[12] This District Court's further conclusion that the Price-Anderson Act "tends to encourage irresponsibility . . . on the part of builders and owners" of the nuclear power plants, 431 F.Supp., at 222, simply cannot withstand careful scrutiny. We recently outlined the multitude of detailed ****2638** steps involved in the review of any application for a license to construct or to operate a nuclear power plant, *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 526-527, and n.5, 98 S.Ct. 1197, 1203-1204, and n.5, 55 L.Ed.2d 460 (1978); nothing in the liability limitation provision undermines or alters in any respect the rigor and integrity of that process. Moreover, in the event of a nuclear accident the utility itself would suffer perhaps the largest damages. While obviously not to be compared with the loss of human life and injury to health, the risk of financial loss and possible bankruptcy to the utility is in itself no small incentive to avoid the kind of irresponsible and cavalier conduct implicitly attributed to licensees by

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the District Court.

[13][14] The remaining due process objection to the liability- limitation provision is that it fails to provide those injured by a ***88** nuclear accident with a satisfactory *quid pro quo* for the common-law rights of recovery which the Act abrogates. Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. [FN32] However, we need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces. *Cf. New York Central R. Co. v. White,* 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667 (1917); *Crowell v. Benson,* 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932). [FN33]

FN32. Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common law." *Second Employers' Liability Cases,* 223 U.S. 1, 50, 32 S.Ct. 169, 175, 56 L.Ed. 327 (1912), quoting *Munn v. Illinois,* 94 U.S. 113, 134, 24 L.Ed. 77 (1877). The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," *Silver v. Silver,* 280 U.S. 117, 122, 50 S.Ct. 57, 58, 74 L.Ed. 221 (1929), despite the fact that "otherwise settled expectations" may be upset thereby. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 16, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976). See also *Arizona Employers' Liability Cases,* 250 U.S. 400, 419-422, 39 S.Ct. 553, 555-556, 63 L.Ed. 1058 (1919). Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts. See, *e. g., Silver v. Silver, supra* (automobile guest statute); *Providence & New York S.S. Co. v. Hill Mfg. Co.,* 109 U.S. 578, 3 S.Ct. 379, 27 L.Ed. 1038 (1883) (limitation of vessel owner's liability); *Indemnity Ins. Co. of North America v. Pan American Airways,* 58 F.Supp. 338 (SDNY 1944) (Warsaw Convention limitation on recovery for injuries suffered during international air travel). Cf. *Thomason v. Sanchez,* 539 F.2d 955 (C.A.3 1976) (Federal Driver's Act).

FN33. We reject at the outset appellees' contention that the Price- Anderson Act differs from other statutes limiting liability because the Act itself is the "but for" cause of the tort for which liability is limited. Put otherwise, the argument is that no *quid pro quo* can be provided by the Act since without it there would be no nuclear power plants and no possibility of accidents or injuries. As we understand the argument, it proceeds from the premise that prior to the enactment of the Price-Anderson Act, appellees had some right, cognizable under the Due Process Clause, to be free of nuclear power or to take advantage of the state of uncertainty which inhibited the private development of nuclear power. This premise we cannot accept. Appellees' only relevant right prior to the enactment of the Price-Anderson Act was to utilize their existing common-law and state-law remedies to vindicate any particular harm visited on them from whatever sources. After the Act was passed, that right at least with regard to nuclear accidents was replaced by the compensation mechanism of the statute, and it is only the terms of that substitution which are pertinent to the *quid pro quo* inquiry which appellees insist the Due Process Clause requires.

***89** The legislative history of the liability-limitation provisions and the accompanying compensation mechanism reflects Congress' determination that reliance on state tort law remedies and state-court procedures was an unsatisfactory approach to assuring public compensation for nuclear accidents, while at the same time providing the necessary incentives for private development of nuclear-produced energy. The remarks of Chairman Anders of the NRC before the Joint Committee on Atomic Energy during the 1975 hearings on the need for renewal of the Price-Anderson Act are illustrative of this concern and of the expectation that ****2639** the Act would provide a more efficient and certain vehicle for assuring compensation in the unlikely event of a nuclear incident:

> "The primary defect of this alternative [nonrenewal of the Act], however, is its failure to afford the public either a secure source of funds or a firm basis for legal liability with respect to new plants. While in theory no legal limit would be placed on liability, as a practical matter the public would be less assured of obtaining compensation than under Price-Anderson. Establishing liability would depend in each case on state tort law and procedures, and these might or might not provide for no-fault liability, let alone the multiple other protections now embodied in Price-Anderson. The present assurance of prompt and equitable compensation under a pre-structured and nationally applicable protective system would give way to

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uncertainties, variations and potentially lengthy delays in recovery. It should be emphasized, moreover, that it is collecting a judgment, not filing a *90 lawsuit, that counts. Even if defenses are waived under state law, a defendant with theoretically "unlimited" liability may be unable to pay a judgment once obtained. When the defendant's assets are exhausted by earlier judgments, subsequent claimants would be left with uncollectable awards. The prospect of inequitable distribution would produce a race to the courthouse door in contrast to the present system of assured orderly and equitable compensation." Hearings on H.R. 8631 before Joint Committee on Atomic Energy, 94th Cong., 1st Sess., 69 (1975).

Appellees, like the District Court, differ with this appraisal on several grounds. They argue, *inter alia*, that recovery under the Act would not be greater than without it, that the waiver of defenses required by the Act, 42 U.S.C. § 2210(n) (1970 ed., Supp. V), is an idle gesture since those involved in the development of nuclear energy would likely be held strictly liable under common-law principles; [FN34] that the claim-administration procedure under the Act delays rather than expedites individual recovery; and finally that recovery of even limited compensation is uncertain since the liability ceiling does not vary with the number of persons injured or amount of property damaged. The extension of short state statutes of limitations and the provision of omnibus [FN35] coverage do not save the Act, in their view, since such provisions could equally well be included in a fairer plan which would assure greater compensation.

FN34. See *Rylands v. Fletcher*, L.R. 3 E. & I. App. (H.L.1868). See generally W. Prosser, Law of Torts § 79, p. 516 (4th ed. 1971); Cavers, Improving Financial Protection of the Public Against the Hazards of Nuclear Power, 77 Harv.L.Rev. 644, 649 (1964).

FN35. See n. 3, *supra*.

[15] We disagree. We view the congressional *assurance* of a $560 million fund for recovery, accompanied by an express statutory commitment, to "take whatever action is deemed necessary *91 and appropriate to protect the public from the consequences of" a nuclear accident, 42 U.S.C. § 2210(e) (1970 ed., Supp. V), to be a fair and reasonable substitute for the uncertain recovery of damages of this magnitude from a utility or component manufacturer, whose resources might well be exhausted at an early stage. The record in this case raises serious questions about the ability of a utility or component manufacturer to satisfy a judgment approaching $560 million--the amount guaranteed under the Price-Anderson Act. [FN36] Nor are we persuaded that the **2640 mandatory waiver of defenses required by the Act is of no benefit to potential claimants. Since there has never been, to our knowledge, a case arising out of a nuclear incident like those covered by the Price-Anderson Act, any discussion of the standard of liability that state courts will apply is necessarily speculative. At the minimum, the statutorily mandated waiver of defenses establishes at the threshold the right of injured parties to compensation without proof of fault and eliminates the burden of delay and uncertainty which would follow from the need to litigate the question of liability after an accident. Further, even if strict liability were routinely applied, the common-law doctrine is subject to exceptions for acts of God or of third parties [FN37]--two of the very factors which appellees emphasized in the District Court in *92 the course of arguing that the risks of a nuclear accident are greater than generally admitted. All of these considerations belie the suggestion that the Act leaves the potential victims of a nuclear disaster in a more disadvantageous position than they would be in if left to their common-law remedies--not known in modern times for either their speed or economy.

FN36. The expert testimony before the District Court indicated that Duke Power, one of the largest utilities in the country, could not be expected to accumulate more than $200 million for damages claims without reaching the point of insolvency. App. 393-397. This amount, even when coupled with the amount of available private insurance, would be less than the $560 million provided by the Act. Moreover, if the liability were of sufficient magnitude to force the utility or component manufacturer into bankruptcy or reorganization, recovery would likely be further reduced and delayed. See Joint Committee on Atomic Energy, Issues of Financial Protection in Nuclear Activities in Selected Materials on Atomic Energy Indemnity and Insurance Legislation, 93d Cong., 2d Sess., 110 (Comm. Print 1974).

FN37. See Prosser, *supra*, n.34, at 520-521.

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Appellees' remaining objections can be briefly treated. The claim- administration procedures under the Act provide that in the event of an accident with potential liability exceeding the $560 million ceiling, no more than 15% of the limit can be distributed pending court approval of a plan of distribution taking into account the need to assure compensation for "possible latent injury claims which may not be discovered until a later time." 42 U.S.C. § 2210(*o*)(3) (1970 ed., supp. v). althoUgh somE DELAY MIGht follow from compliance with this statutory procedure, we doubt that it would approach that resulting from routine litigation of the large number of claims caused by a catastrophic accident. [FN38] Moreover, the statutory scheme insures the equitable distribution of benefits to all who suffer injury--both immediate and latent; under the common-law route, the proverbial race to the courthouse would instead determine who had "first crack" at the diminishing resources of the tortfeasor, and fairness could well be sacrificed in the process. The remaining contention that recovery is uncertain because of the aggregate rather than individualized nature of the liability ceiling is but a thinly disguised version of the contention that the $560 million figure is inadequate, which we have already rejected.

> FN38. The Act explicitly provides for "payments to, or for the aid of, claimants for the purpose of providing immediate assistance following a nuclear incident." 42 U.S.C. § 2210(m). Unlike the normal tort recovery situation, these emergency payments are made prior to the determination of injury and the setting of damages, and are not conditioned on the execution of any release by the victim. *Ibid.*

In the course of adjudicating a similar challenge to the ***93** Workmen's Compensation Act in *New York Central R. Co. v. White*, 243 U.S., at 201, 37 S.Ct., at 252, the Court observed that the Due Process Clause of the Fourteenth Amendment was not violated simply because an injured party would not be able to recover as much under the Act as before its enactment. "[H]e is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages." The logic of *New York Central* would seem to apply with renewed force in the context of this challenge to the Price-Anderson Act. The Price-Anderson Act not only provides a reasonable, prompt, and equitable mechanism for compensating victims of a catastrophic nuclear incident, it also guarantees a level of net compensation generally exceeding that recoverable in private litigation. Moreover, the Act contains an explicit congressional commitment to take further action to aid victims of a nuclear accident in the event that the $560 million ceiling on liability is exceeded. This panoply of remedies and guarantees is at ****2641** the least a reasonably just substitute for the common-law rights replaced by the Price-Anderson Act. Nothing more is required by the Due Process Clause.

[16][17] Although the District Court also found the Price-Anderson Act to contravene the "equal protection provision that is included within the Due Process Clause of the Fifth Amendment," 431 F.Supp., at 224-225, appellees have not relied on this ground since the equal protection arguments largely track and duplicate those made in support of the due process claim. In any event, we conclude that there is no equal protection violation. The general rationality of the Price-Anderson Act liability limitations--particularly with reference to the important congressional purpose of encouraging private participation in the exploitation of nuclear energy--is ample justification for the difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other ***94** causes. Speculation regarding other arrangements that might be used to spread the risk of liability in ways different from the Price-Anderson Act is, of course, not pertinent to the equal protection analysis. See *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 378, 93 S.Ct. 1652, 1665, 36 L.Ed.2d 318 (1973). [FN39]

> FN39. Appellees also contend that the Price-Anderson Act effects an unconstitutional "taking" because in the event of a catastrophic nuclear accident their property would be destroyed without any assurance of just compensation. We find it unnecessary to resolve the claim that such an accident would constitute a "taking" as that term has been construed in our precedents since on our reading the Price-Anderson Act does not withdraw the existing Tucker Act remedy, 28 U.S.C. § 1491 (1976 ed.). See *Regional Rail Reorganization Act Cases*, 419 U.S., at 125-136, 95 S.Ct., at 349-354. Appellees concede that if the Tucker Act remedy would be available in the event of a nuclear disaster, then their constitutional challenge to the Price-Anderson Act under the Just Compensation

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Clause must fail. Brief for Appellees 71 n. 56. The further question of whether a taking claim could be established under the Fifth Amendment is a matter appropriately left for another day.

Accordingly, the decision of the District Court is reversed, and the cases are remanded for proceedings consistent with this opinion.

Reversed and remanded.

Mr. Justice STEWART, concurring in the result.

With some difficulty, I can accept the proposition that federal subject- matter jurisdiction under 28 U.S.C. § 1331 (1976 ed.) exists here, at least with respect to the suit against the Nuclear Regulatory Commission, the agency responsible for the administration of the Price-Anderson Act. The claim under federal law is to be found in the allegation that the Act, if enforced, will deprive the appellees of certain property rights, in violation of the Due Process Clause of the Fifth Amendment. One of those property rights, and perhaps the sole cognizable one, is a state-created right to recover full compensation for tort injuries. The Act impinges on that right by limiting recovery in major accidents.

***95** But there never has been such an accident, and it is sheer speculation that one will ever occur. For this reason I think there is no present justiciable controversy, and that the appellees were without standing to initiate this litigation.

On the issue of standing, the Court relies on the "present" injuries of increased water temperatures and low-level radiation emissions. Even assuming that but for the Act the plant would not exist and therefore neither would its effects on the environment, I cannot believe that it follows that the appellees have standing to attack the constitutionality of the Act. Apart from a "but for" connection in the loosest sense of that concept, there is no relationship at all between the injury alleged for standing purposes and the injury alleged for federal subject-matter jurisdiction.

Surely a plaintiff does not have standing simply because his challenge, if successful, will remove the injury relied on for standing purposes *only* because it will put the ****2642** defendant out of existence. Surely there must be *some* direct relationship between the plaintiff's federal claim and the injury relied on for standing. Cf. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261, 97 S.Ct. 555, 561, 50 L.Ed.2d 450; *United States v. SCRAP*, 412 U.S. 669, 687-690, 93 S.Ct. 2405, 2415-2417, 37 L.Ed.2d 254; *Linda R. S. v. Richard D.*, 410 U.S. 614, 617-618, 93 S.Ct. 1146, 1148-1149, 35 L.Ed.2d 536. An interest in the local water temperature does not, in short, give these appellees standing to bring a suit under 28 U.S.C. § 1331 (1976 ed.) to challenge the constitutionality of a law limiting liability in an unrelated and as-yet-to-occur major nuclear accident.

For these reasons, I would remand these cases to the District Court with instructions to dismiss the complaint.

Mr. Justice REHNQUIST, with whom Mr. Justice STEVENS joins, concurring in the judgment.

I can understand the Court's willingness to reach the merits of this case and thereby remove the doubt which has been cast over this important federal statute. In so doing, however, it ignores established limitations on district court jurisdiction ***96** as carefully defined in our statutes and cases. Because I believe the preservation of these limitations is in the long run more important to this Court's jurisprudence than the resolution of any particular case or controversy, however important, I too would reverse the judgment of the District Court, but would do so with instructions to dismiss the complaint for want of jurisdiction. Cf. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249-250, 71 S.Ct. 692, 694-695, 95 L.Ed. 912 (1951).

Giving the conclusory allegations of appellees' complaint the most liberal possible reading, they purport to establish only two grounds for the declaratory relief requested. First, they contend that the Price-Anderson Act deprives them of their property without due process of law in that it irrationally limits the tort recovery otherwise available in the North Carolina courts. [FN1] Second, they contend that the Act works an unconstitutional taking of their property for public use without just compensation. They purport to base District Court jurisdiction upon 28 U.S.C. §

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1337 (1976 ed.) which covers "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

FN1. Appellees have explicitly abandoned their claim based upon the so-called equal protection component of the Fifth Amendment "since in this case any equal protection arguments would be largely duplicative of appellees' due process arguments." Brief for Appellees, 21 n. 26.

I

It is apparent that appellees' first asserted basis for relief does not state a claim "arising under" the Price-Anderson Act. Their complaint alleges that the operation of the two power plants will cause immediate injury to property within their vicinity. App. 32, ¶ 21. The District Court explicitly found that these injuries "give rise to an immediate right of action for redress. Under the law of North Carolina a right of action arises as soon as a wrongful act has created 'any injury, however ***97** slight,' to the plaintiff." 431 F.Supp. 203, 221 (W.D.N.C.1977) (citations omitted). This right of action provided by state, not federal, law is the property of which the appellees contend the Act deprives them without due process. Thus, the constitutionality of the Act becomes relevant only if the appellant Duke Power Co. were to invoke the Act as a defense to appellees' suit for recovery under their North Carolina right of action.

It has long been established that the mere anticipation of a possible federal defense to a state cause of action is not sufficient to invoke the federal- question jurisdiction of the district courts. In *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908), the plaintiffs sought to compel the specific performance ****2643** of a contract by which the railroad had granted them free passes for life. Although their contract was not predicated upon federal law, the plaintiffs contended that federal-question jurisdiction was established by the presence of an Act of Congress forbidding railroads to issue free passes. This Court held that the District Court did not have jurisdiction to consider whether the Act was inapplicable or unconstitutional:

"It is the settled interpretation of these words ['arising under'], as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action, and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution." *Id.*, at 152, 29 S.Ct., at 43.

***98** Just as the underlying claim in *Mottley* arose under Kentucky contract law, the underlying claim in this case arises under North Carolina tort law. This Court has construed the "arising under" language of 28 U.S.C. § 1337 (1976 ed.) just as it has the similar language of 28 U.S.C. § 1331 (1976 ed.). *Peyton v. Railway Express Agency, Inc.*, 316 U.S. 350, 353, 62 S.Ct. 1171, 1172, 86 L.Ed. 1525 (1942).

Nor does the fact that appellees seek only declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201 (1976 ed.), support a different result. This Court has held that the well-pleaded complaint rule applied in *Mottley* is fully applicable in cases seeking only declaratory relief, because the Declaratory Judgment Act merely expands the remedies available in the district courts without expanding their jurisdiction. "It would turn into the federal courts a vast current of litigation indubitably arising under State law, in the sense that the right to be vindicated was State-created, if a suit for a declaration of rights could be brought into the federal courts merely because an anticipated defense derived from federal law." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673, 70 S.Ct. 876, 880, 94 L.Ed. 1194 (1950). See also *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125, 94 S.Ct. 1002, 39 L.Ed.2d 209 (1974); C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3566, pp. 437-438 (1975). [FN2]

FN2. The Court asserts that its decision today does not undermine the well-pleaded complaint doctrine because of its conclusion "that the complaint is more fairly read as stating a claim against the NRC directly under the Due Process Clause of the Fifth Amendment." *Ante*, at 2629 n. 13. The supposed claim against the Commission arises only under

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Supreme Court of the United States.

GIBBES
v.
ZIMMERMAN et al.

No. 117.

Argued Nov. 17, 1933.
Decided Dec. 4, 1933.

Proceedings by Simpson J. Zimmerman, individually and as conservator of the Central Union Bank of South Carolina, and others, for a writ of prohibition prayed to be directed to Hunter A. Gibbes, representing himself and all other depositors of the Central Union Bank of South Carolina, and another. From a judgment of the Supreme Court of South Carolina (171 S.C. 209, 172 S.E. 130) granting the writ of prohibition, the respondent named appeals.

Affirmed.

West Headnotes

[1] Federal Courts ⚿502
170Bk502 Most Cited Cases
(Formerly 106k391(4))

Where contract clause in Federal Constitution was not relied on in proceeding in state court, question thereunder was not presented for review on appeal to United States Supreme Court. 28 U.S.C.A. §§ 1257, 2103, 2106; U.S.C.A. Const. art. 1, § 10.

[2] Constitutional Law ⚿307
92k307 Most Cited Cases

Person has no property right, in constitutional sense, in any particular form of remedy; only guaranty, under due process clause, being preservation of substantial right to redress by some effective procedure. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law ⚿308
92k308 Most Cited Cases

[3] Banks and Banking ⚿63
52k63 Most Cited Cases

Statute suspending existing statutes applicable to liquidation of state banks, and regulations thereunder authorizing governor to appoint conservator, held not invalid as depriving depositor of property without due process, especially in view of later statute authorizing liquidation by conservator. Act S.C. March 9, 1933, 38 St. at Large S.C. p. 1174; Act S.C. May 16, 1933, 38 St. at Large S.C. p. 489; Code S.C. 1932, §§ 7843, 7844, 7848, § 7852 (repealed 1936) §§ 7854, 7855 (See Code 1942, §§ 7871, 7872), § 7868 (repealed 1935); U.S.C.A.Const.Amend. 14.

[4] Federal Courts ⚿511.1
170Bk511.1 Most Cited Cases
(Formerly 30k843(2), 106k380)

Where Governor appointed conservator for state bank and conservator accepted special trust deposits and permitted such depositors to withdraw same, question whether, in conducting such restricted business, overhead expenses exceeded net income andjeopardized creditors, held moot, where Governor subsequently directed liquidation of bank. Act S.C. March 9, 1933 (38 St. at Large S.C. p. 1174); Act S.C. May 16, 1933 (38 St. at Large S.C. p. 489).

****140 *326** Appeal from the Supreme Court of the State of South Carolina.

***327** Mr. D. W. Robinson, of Columbia, S.C., for appellant.

***328** Mr. Irvine F. Belser, of Columbia, S.C., for appellees.

Mr. Justice ROBERTS delivered the opinion of the Court.

[1] This appeal brings here for review an order of the Supreme Court of South Carolina prohibiting the further prosecution of a bill in equity seeking the appointment of a receiver for the Central Union Bank. An Act of the General Assembly approved March 9, 1933 (38 St. at Large S.C. p. 1174), was held to forbid the maintenance of the proceeding. The appellant, who was plaintiff in the suit asserts that the act impairs the obligation of contract in violation of the Constitution of the United States.

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forty-two plaintiffs in this appeal missed Pennsylvania's two year limitations date, and filed suit in Mississippi in order to fall within that state's six year statute of limitations. These plaintiffs now challenge the retroactive application of the choice of law provision of the Price-Anderson Amendments Act of 1988, Pub.L. No. 100-408, 102 Stat. 1066. Retroactive application of the choice of law provision would require application of Pennsylvania's statute of limitations to all actions arising from the Three Mile Island accident and would bar plaintiffs' claims filed in Mississippi. Plaintiffs argue retroactive application of the choice of law provision violates federal constitutional guarantees of due process. Alternatively they argue that even if the Pennsylvania statute of limitations applies, Pennsylvania law provides for a grace period in which to file their claims. Because retroactive application of the choice of law provision was a rational exercise of Congress' legislative power, we hold it does not violate due process. Additionally, we hold Pennsylvania law does not provide for a grace period under the circumstances of this case.

The same plaintiffs also challenge summary judgment rendered against them in actions they filed in Pennsylvania state court after the two year limitation date. They assert the statute of limitations should have been tolled under Pennsylvania law. Because plaintiffs have failed to raise a material issue of fact, we will affirm summary judgment.

I. Facts and Procedural History

On March 28, 1979, the Three Mile Island nuclear power facility located near Harrisburg, Pennsylvania released radiation into the atmosphere. As a result, thousands of area residents and businesses filed suit ***1110** against the owners and operators of the facility, alleging various injuries. [FN1] In 1985, each of the forty-two plaintiffs involved in this appeal filed suit in Pennsylvania state court, Mississippi state court, and Mississippi federal court to recover for personal injuries allegedly suffered in the incident. The Mississippi actions were filed within that state's six year statute of limitations for personal injury actions.

FN1. Over two thousand plaintiffs' claims for personal injuries have been consolidated in the present litigation. *See In re TMI,* 67 F.3d 1103, 1105 (3d Cir.1995), *cert. denied sub nom. General Public Util. Corp. v. Dodson,* 516 U.S. 1154, 116 S.Ct. 1034, 134 L.Ed.2d 111 (1996). Some plaintiffs filed duplicative claims in both Pennsylvania and Mississippi.

In 1981, defendants settled non-personal injury claims brought by individuals, businesses, and non-profit organizations within a twenty-file mile radius of the Three Mile Island facility. *See Stibitz v. General Pub. Util. Corp.,* 746 F.2d 993, 995 n. 1 (3d Cir.1984) (citing *In Re Three Mile Island Litig.,* No. 79-0432 (M.D.Pa. Sept. 9, 1981)), *cert. denied,* 469 U.S. 1214, 105 S.Ct. 1187, 84 L.Ed.2d 334 (1985). In addition, hundreds of claims involving allegations of personal injury were settled in 1985.

We have already resolved other issues raised on appeal by the plaintiffs. *See In re TMI,* 67 F.3d 1103 (duty of care); *In re TMI,* 67 F.3d 1119 (3d Cir.1995) (punitive damages), *cert. denied sub nom. Metropolitan Edison Co. v. Dodson,* 517 U.S. 1163, 116 S.Ct. 1560, 134 L.Ed.2d 660 (1996).

In September 1986, defendants moved for summary judgment in plaintiffs' Pennsylvania state court actions contending each claim related to health problems diagnosed more than two years before plaintiffs commenced their suits. The Court of Common Pleas of Dauphin County, Pennsylvania entered summary judgment for defendants, finding plaintiffs' claims barred by Pennsylvania's two year statute of limitations. *In re TMI Litig. Cases Consolidated II,* No. 426 S (1985) (Dauphin Co. February 20, 1987); *In re TMI Litig. Cases Consolidated II,* No. 426 S (1985) (Dauphin Co. July 6, 1987). The Pennsylvania Superior Court affirmed. *In re TMI Litig. Cases Consolidated II,* 383 Pa.Super. 672, 550 A.2d 255 (1988).

Subsequently, Congress enacted the Price-Anderson Amendments Act of 1988, Pub.L. No. 100-408, 102 Stat. 1066, which created a federal cause of action--the "public liability action"--for injuries resulting from nuclear incidents, 42 U.S.C. § 2014 (hh) (1988), [FN2] and provided for jurisdiction over and the consolidation of such actions in the federal district court in the district where the accident occurred, 42 U.S.C. § 2210(n)(2). [FN3] Defendants removed the Pennsylvania and Mississippi state cases to federal court in the Middle District of Pennsylvania pursuant to 42 U.S.C. § 2210(n)(2). At the time of removal of the

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Pennsylvania state cases, the time to ***1111** appeal the grant of summary judgment to the Pennsylvania Supreme Court had not yet expired. The Mississippi federal actions were transferred to the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1404(a).

FN2. The definition of "public liability action" appears at 42 U.S.C. § 2014(hh):

(hh) The term 'public liability action', as used in [section 2210 of this title], means any suit asserting public liability. A public liability action shall be deemed to be an action arising under [section 2210 of this title], and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident occurs, unless such law is inconsistent with the provisions of such section.

42 U.S.C. § 2014(hh); *see also* Price-Anderson Amendments Act of 1988, Pub.L. 100-408, § 11(b), 102 Stat. 1066, 1076.

FN3. The Price-Anderson Act, Pub.L. No. 85-256, 71 Stat. 576 (1957) (codified as amended in scattered sections of 42 U.S.C.), did not originally grant the federal courts jurisdiction over all claims arising out of nuclear accidents. The Price-Anderson Amendments Act expanded federal jurisdiction to reach all "public liability actions." After amendment by the Price Anderson Amendments Act, the jurisdiction, removal, and consolidation provision of the Price-Anderson Act provided:

With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place ... shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission, or the Secretary, as appropriate any such action pending in any State court (including any such action pending on August 20, 1988) or United States district court shall be removed or transferred to the United States district court having venue under this subsection ... 42 U.S.C. § 2210(n)(2) (1988); *see also* Price-Anderson Amendments Act of 1988, Pub.L. 100-408, § 11(a), 102 Stat. 1066, 1076.

In *In re TMI Litig. Cases Consol. II,* 940 F.2d 832 (3d Cir.1991), *cert. denied sub nom. Gumby v. General Pub. Utils. Corp.,* 503 U.S. 906, 112 S.Ct. 1262, 117 L.Ed.2d 491 (1992), we upheld the constitutionality of the retroactive application of this provision to cases arising from the Three Mile Island accident.

After consolidation of the cases in the Middle District of Pennsylvania, defendants filed a motion for summary judgment with respect to the Mississippi state and federal court actions on the grounds that plaintiffs' claims were untimely under the Price-Anderson Amendments Act of 1988. Section 11(b) of the Amendments Act, the choice of law provision (codified at 42 U.S.C. § 2014(hh) (1988)), provides that "the substantive rules of decision in [any public liability action] shall be derived from the law of the State in which the nuclear incident involved occurs." Section 20(b) of the Amendments Act, the effective date provision (codified as a note to 42 U.S.C. § 2014), provides that "the amendments made by Section 11" of the Amendments Act "shall apply to nuclear incidents occurring *before,* on, or after the date of the enactment of this Act." 42 U.S.C. § 2014 note (emphasis added). The district court held that § 20(b), read in conjunction with § 11(b), compels retroactive application of Pennsylvania's two year statute of limitations to the causes of action brought by the plaintiffs, mandating the dismissal of the Mississippi state and federal cases as time barred. *In re TMI Litig. Cases Consol. II,* No. 88-1452, slip. op. at 2-6 (M.D.Pa. Aug. 16, 1993). Plaintiffs do not dispute this reading of the AmendmentsAct on appeal.

Plaintiffs asserted before the district court that retroactive application of the choice of law provision would violate constitutional guarantees of due process. They also argued that Pennsylvania law, incorporated as federal law by the Amendments Act, would provide a grace period in which to file their claims. The district court rejected both arguments, *id.* at 15-20, and plaintiffs now appeal the district court's grant of summary judgment.

The district court also adopted the prior judgment rendered by the Court of Common Pleas against plaintiffs in the Pennsylvania state cases. *Id.* at 23. Plaintiffs sought reconsideration of the grant of summary judgment, arguing that under the intervening holding of the Pennsylvania Superior Court in *Marinari v. Asbestos Corp.,* 417 Pa.Super. 440, 612 A.2d 1021 (1992), their claims arising from "second injuries" should not have been dismissed. [FN4] Upon reconsideration, the district court ordered plaintiffs to specify which plaintiffs had "second injuries" subject to the *Marinari* rule. *In re TMI Litig. Cases Consol. II,* No. 88-1452,

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slip. op. at 13 (M. D. Pa. June 1, 1994). On July 12, 1994, the parties entered into a stipulation that *Marinari* did not relate to the "initial injury" claims which were the subject of defendants' motion for summary judgment and that any "second injury" claims would be treated in a separate class action. *In re TMI Litig. Cases Consol. II,* No. 88-1452 (M.D.Pa. July 14, 1994). The district court then entered summary judgment against plaintiffs on the "initial injury" claims and dismissed them as time barred. *In re TMI Litig. Cases Consol. II,* No. 88-1452 (M.D.Pa. July 22, 1994). Plaintiffs appeal this order, arguing the statute of limitations had not expired on "initial injury" claims.

> FN4. When the Court of Common Pleas granted summary judgment, Pennsylvania was a "one-disease" state. This meant the statute of limitations for any claim arising out of exposure to a toxic substance began to run when the plaintiff knew or should have known of his "initial injury" resulting from exposure. *See Cathcart v. Keene Indus. Insulation,* 324 Pa.Super. 123, 471 A.2d 493 (1984) (in banc). Subsequently, Pennsylvania became a "two disease" state. Under this rule, the statute of limitations on a claim for a separate and distinct "second injury" related to a prior toxic exposure would not begin to run until the second injury manifested itself. *See Marinari v. Asbestos Corp.,* 417 Pa.Super. 440, 612 A.2d 1021 (1992).

[1] The district court had jurisdiction over these "public liability actions" under 42 U.S.C. § 2210(n)(2), and we exercise jurisdiction over the district court's final orders under 28 U.S.C. § 1291. Our review of the district court's grant of summary judgment is plenary. *See F.D.I.C. v. Bathgate,* 27 F.3d 850, 860 (3d Cir.1994).

II. Statutory Construction

[2] The district court held the language of § 20(b) is unambiguous and "by its very ***1112** terms clearly requires the retroactive application of all of the provisions of § 11, including the choice of law provision." *Inre TMI Litig. Cases Consol. II,* No. 88-1452, slip. op. at 3 (M.D.Pa. Aug. 16, 1993). Although plaintiffs have not challenged the district court's reading of the Amendments Act on appeal, we exercise plenary review of the district court's construction of the Act. *Moody v. Sec. Pac. Business Credit, Inc.,* 971 F.2d 1056, 1063 (3d Cir.1992).

[3][4][5][6][7] Section 20(b) unambiguously calls for the retroactive application of the choice of law provision in § 11(b). The choice of law provision in turn provides that "the substantive rules for decision" shall be derived from Pennsylvania law. Since the statute of limitations is a substantive rule of decision, *Menichini v. Grant,* 995 F.2d 1224, 1228 n. 2 (3d Cir.1993); 42 Pa. Cons.Stat. Ann. § 5524 (1981), we believe the Pennsylvania statute of limitations applies retroactively to plaintiffs' causes of action filed in Mississippi. [FN5] Congress could have exempted statutes of limitations from retroactive application, but it did not. Accordingly, plaintiffs' Mississippi causes of action are time-barred, unless some constraint imposed by the Constitution or state law prevents this result. [FN6]

> FN5. Statutes of limitations are treated as substantive rules of decision for purposes of the doctrine of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). As the dissent points out, the intent of *Erie* was to ensure that "the outcome of the litigation in federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co. of New York v. York,* 326 U.S. 99, 109, 65 S.Ct. 1464, 1470, 89 L.Ed. 2079 (1945).
>
> We believe the *Erie* rationale is instructive in interpreting Congress' command that "the substantive rules for decision in [any public liability action] shall be derived from the law of the State in which the nuclear incident occurs." 42 U.S.C. § 2014(hh); *see also* Price-Anderson Amendments Act of 1988, Pub.L. 100-408, § 11(b), 102 Stat. 1066, 1076. Although the legislative history is silent on the issue, we believe the clear language of this provision indicates an intent to ensure that the outcome of any public liability action arising from a single nuclear incident should be substantially the same as it would be if tried in the state where the incident occurred. The goal of achieving substantially the same outcome in all public liability actions, regardless of where filed, necessitates treatment of statutes of limitations as "substantive rules for decision." We do not believe Pennsylvania law can answer whether Congress intended the term "substantive rules for decision" to include statutes of limitations.
>
> Of course, because Pennsylvania courts do not sit in diversity, they will never have the occasion to decide whether to apply the Pennsylvania orthe Mississippi statute of limitations to an action filed in Mississippi. But Pennsylvania courts generally

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"apply[ ] Pennsylvania's statute of limitations not only to wholly domestic causes of action but also to causes of action arising in other jurisdictions (unless, pursuant to Pennsylvania's borrowing statute, a Pennsylvania court is directed to apply a *shorter* limitation statute of another jurisdiction.)" *AAMCO Transmissions, Inc. v. Harris,* 759 F.Supp. 1141, 1143-44 (E.D.Pa.1991) (footnotes omitted).

FN6. Section 20(b) provides that "the amendments made by Section 11" "shall apply to nuclear incidents occurring before, on, or after the date of the enactment of this Act." The dissent contends that the words "shall apply" may be interpreted in two ways: as requiring the application of Pennsylvania law from the date of filing of pending suits, or from August 20, 1988 forward. The dissent asserts the former interpretation necessitates imposition of a "historical fiction," while the latter merely "attaches new legal consequences to events completed before [ ] enactment [of the Amendments Act]." Dissent at 1118-19.

But we do not create a historical fiction that plaintiffs filed suit on any date other than that on which they actually filed. We simply attach new legal consequences to the fact that the filing date was not within two years of the Three Mile Island accident. In sum, we apply Pennsylvania's statute of limitations retroactively, as the clear language of § 20(b) and § 11(b) demands. The dissent, on the other hand, attaches no legal consequences to the application of Pennsylvania's statute of limitations. In fact, the dissent does not apply the Pennsylvania statute of limitations retroactively at all, but only prospectively to suits brought after the enactment of the Amendments Act. It refuses to apply the statute of limitations retroactively, despite the clear language that Pennsylvania law "shall apply," and even though it acknowledges that rulings made prior to the passage of the Amendments Act on the basis of substantive law which no longer applies should be modified to conform to the new governing law of the case. Dissent at 1119.

We believe the unambiguous language of § 20(b) and § 11(b) calls for the retroactive application of all of Pennsylvania law, including the statute of limitations. It is difficult to conceive of a clearer formulation than the "shall apply" language in § 20(b). In fact, in *Landgraf v. USI Film Products,* 511 U.S. 244, ----, 114 S.Ct. 1483, 1494, 128 L.Ed.2d 229 (1994), the Supreme Court considered virtually identical language to have "a determinate meaning" mandating retroactive application of legislation. *See id.* (language such as "the new provision 'shall apply to all proceedings pending on or commenced after the date of enactment' " mandates retroactive application). The dissent invokes the often stated presumption against retroactive legislation. Dissent at 1118-19. But if Congress has "expressly prescribed" a statute should apply retroactively, "there is no need to resort to judicial default rules." *Landgraf,* 511 U.S. at ----, 114 S.Ct. at 1505. The dissent also asserts that its interpretation accords with Congressional intent. Yet it has not offered any evidence that Congress intended to except statutes of limitations from retroactive application.

Finally, we note that plaintiffs have not argued that § 20(b) is ambiguous or that it exempts statutes of limitations from retroactive application.

*1113 III. Due Process

The district court held the choice of law provision of the Price-Anderson Amendments Act requires application of Pennsylvania law, including the Pennsylvania statute of limitations, to the Mississippi state and federal cases. Plaintiffs argue the retroactive application of Pennsylvania's statute of limitations to bar properly filed and already pending causes of action violates federal constitutional due process. Well-established precedent indicates that it does not.

A.

[8][9][10] Under the United States Constitution, legislation affecting a pending tort claim is not subject to "heightened scrutiny" due process review because a pending tort claim does not constitute a vested right. *See Hammond v. United States,* 786 F.2d 8, 12 (1st Cir.1986) (plaintiff does not have a vested right in a tort cause of action until there is a final, unreviewable judgement); *see also Arbour v. Jenkins,* 903 F.2d 416, 420 (6th Cir.1990) (retroactivity of a statute does not make it unconstitutional as a legal claim affords no enforceable property right until reduced to final judgement); *Sowell v. American Cyanamid Co.,* 888 F.2d 802, 805 (11th Cir.1989) (same). Other courts of appeals that have recently addressed the constitutionality of retroactive legislation that either abolishes or substantially affects a plaintiff's pending tort cause of action have reviewed such legislation on a "rational basis" standard. *See, e.g., In re Consolidated U.S. Atmospheric Testing Litig.,* 820 F.2d 982, 990-91 (9th Cir.1987) (plaintiff challenging retroactivity bears the burden of showing that the legislature acted in arbitrary,

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irrational way), *cert. denied sub nom. Konizeski v. Livermore Labs,* 485 U.S. 905, 108 S.Ct. 1076, 99 L.Ed.2d 235 (1988); *see also Hammond,* 786 F.2d at 13. In *In re TMI Litig. Cases Consol. II,* 940 F.2d 832 (3d Cir.1991), *cert. denied sub nom. Gumby v. General Pub. Utils. Corp.,* 503 U.S. 906, 112 S.Ct. 1262, 117 L.Ed.2d 491 (1992), we held that due process requires only that "the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means." *Id.* at 860 (quoting *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 729, 104 S.Ct. 2709, 2717-18, 81 L.Ed.2d 601 (1984)). Accordingly, in order to show that retroactive application of the choice of law provision of the Amendments Act violates due process guarantees, plaintiffs bear the burden of showing that retroactive application was "irrational in purpose and effect." *Id.* at 861. This they cannot do.

B.

Congress adopted the Amendments Act "to effect uniformity, equity, and efficiency in the disposition of public liabilityclaims" arising from nuclear accidents. H.R.Rep. No. 104, 100th Cong., 1st Sess., pt. 3, at 18 (1987). We believe retroactive application of the Amendments Act's choice of law provision furthers each of these goals.

First, retroactive application of the Amendments Act's choice of law provision uniformly applies Pennsylvania law to all plaintiffs. Second, retroactive application advances equity by applying the same law to all similarly situated plaintiffs and eliminating inconsistent results. While retroactive application of the choice of law provision requires dismissal of these plaintiffs' claims which were filed in compliance with Mississippi's six year statute of limitations, this result is not inequitable. These actions were time-barred in Pennsylvania when they were brought, and plaintiffs resorted to a distant forum in order to avoid Pennsylvania's statute of limitations. Application of the law of the state in which the accident occurred, the ***1114** plaintiffs live, and where the plaintiffs were allegedly injured is not inequitable.

Finally, retroactive application of the choice of law provision promotes efficiency by allowing the constitutional exercise of federal jurisdiction over, and the consolidation of, these "public liability actions." Prior to the Amendments Act, the Price-Anderson Act provided for federal jurisdiction over only a limited class of cases--those arising from an "extraordinary nuclear occurrence." *Kiick v. Metropolitan Edison Co.,* 784 F.2d 490, 493 (3d Cir.1986); *Stibitz v. Gen. Pub. Utils. Corp.,* 746 F.2d 993, 997 (3d Cir.1984), *cert. denied,* 469 U.S. 1214, 105 S.Ct. 1187, 84 L.Ed.2d 334 (1985). Because the Nuclear Regulatory Commission did not designate the Three Mile Island accident an "extraordinary nuclear occurrence," the federal courts lacked subject matter jurisdiction to hear Three Mile Island cases filed in jurisdictions across the country. This situation resulted in "duplicative determinations of similar issues in multiple jurisdictions." S.Rep. No. 218, 100th Cong., 1st Sess. 13 (1987), *reprinted in* 1988 U.S.C.C.A.N. 1476, 1488.

[11] Congress sought to remedy the procedural problems plaguing the Three Mile Island cases by retroactively providing for federal jurisdiction over them and allowing their consolidation. But in creating federal jurisdiction, Congress was constrained by the constitutional principle that it cannot confer subject matter jurisdiction on federal courts where there is no underlying federal statute creating a federal question. *See Osborn v. Bank of United States,* 22 U.S. (9 Wheat) 738, 6 L.Ed. 204 (1824); *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983); *see also In re TMI Litig. Cases Consol. II,* 940 F.2d at 849 ("a case cannot be said to arise under a federal statute where there is nothing more than a jurisdictional grant."). Congress was clearly aware of this constitutional constraint. [FN7] It did not, therefore, simply grant federal courts subject matter jurisdiction over all cases arising from nuclear accidents. Instead it created substantive federal law governing nuclear accidents in the choice of law provision of the Amendments Act by providing "the substantive rules of decision in [any public liability action] shall be derived from the law of the State in which the nuclear incident involved occurs." 42 U.S.C. § 2014(hh). In the absence of the retroactive application of the choice of law provision to the Three Mile Island cases, Congress' retroactive creation of federal jurisdiction over them in the Amendments Act would be ***1115** nothing more than an unconstitutional grant of jurisdiction without any underlying substantive federal legislation creating a federal question. *In re TMI*

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Litig. Cases Consol. II, 940 F.2d at 854-55; *O'Conner v. Commonwealth Edison Co.,* 13 F.3d 1090, 1096-1101 (7th Cir.), *cert. denied,* 512 U.S. 1222, 114 S.Ct. 2711, 129 L.Ed.2d 838 (1994). [FN8] Accordingly, there is little doubt that the retroactive application of the choice of law provision has furthered the efficient and uniform processing of claims arising from the Three Mile Island accident by allowing those claims to be brought and to be consolidated in federal court.

FN7. In its report, the Senate Committee on Environment and Public Works stated the choice of law provision was essential to creating federal jurisdiction over public liability actions: [In order to] avoid the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation ... the bill provides the federal district court in which the nuclear incident occurred with subject matter jurisdiction over claims arising from the nuclear incident. [The choice of law provision provides that] [a]ny suit asserting public liability shall be deemed to be an action arising under the Price-Anderson Act, and the substantive law of decision shall be derived from the law of the State in which the incident occurred, *in order to satisfy the Article III requirement that federal courts have jurisdiction over cases arising under the Constitution or the laws of the United States.*
S. Rep. No. 218, 100th Cong., 1st Sess. 13 (1987), *reprinted in* 1988 U.S.C.C.A.N. 1476, 1488 (emphasis added).
The House Committee on Interior and Insular Affairs came to the same conclusion. Reporting on H.R. 1414, the House version of the Amendments Act, it explained:
The Committee recognizes, of course, that Article III of the Constitution limits the type of cases that federal courts created under the Article may hear. For this reason, H.R. 1414 expressly states that any suit asserting public liability shall be deemed to be an action arising under the Price-Anderson Act, thereby making suits asserting public liability "Cases ... arising under ... the laws of the United States" within the meaning of Article III. Rather than designing a new body of substantive law to govern such cases, however, the bill provides [in the choice of law provision] that the substantive rules for decision in such actions shall be derived from the law of the state in which the nuclear incident involved occurs, unless such law is inconsistent with the Price- Anderson Act. The Committee believes that conferring on the Federal courts jurisdiction over claims arising out of all nuclear incidents in this manner is within the constitutional authority of Congress and notes that Congress has used this approach in the Outer Continental Shelf Lands Act.
H.R.Rep. No. 104, 100th Cong., 1st Sess., Pt. 1, at 18 (1987).

FN8. Congress explicitly stated that the jurisdiction and consolidation provision of the Amendments Act should apply retroactively to pending causes of action. *See* 42 U.S.C. § 2210(n)(2) (Amendment Act's consolidation and removal provision shall apply to all public liability actions, "including any such action pending on August 20, 1988"). Congress understood that the jurisdiction and consolidation provision could not pass constitutional muster without the choice of law provision. Accordingly, we believe Congress intended the choice of law provision also to apply retroactively. Moreover, even if retroactive application of the choice of law provision is not constitutionally essential, Congress at least had to create a federal cause of action for cases arising out of nuclear incidents before the district court could exercise jurisdiction. It did this in § 11(b) of the Amendments Act--the section in which the choice of law provision is contained--by defining a "public liability action." If § 11(b) does not apply retroactively, we do not have jurisdiction over the plaintiffs' claims because there was no federal cause of action under the Price- Anderson Act prior to its passage. *Stibitz v. General Pub. Utils. Corp.,* 746 F.2d at 996.

Because retroactive application of the choice of law provision to pending causes of action advances Congress' goals of uniformity, equity and efficiency in the disposition of claims arising from nuclear accidents, it is not arbitrary and irrational. Plaintiffs have not demonstrated retroactive application violates constitutional due process. *Cf. O'Conner v. Commonwealth Edison Co.,* 13 F.3d at 1102 (retroactive application of Amendments Act not arbitrary and irrational); *In re TMI Litig. Cases Consol. II,* 940 F.2d at 860-61 (same).

IV. Grace Period under Pennsylvania Law

[12] Plaintiffs also argue retroactive application of the Amendments Act's choice of law provision does not require dismissal of the Mississippi actions. They assert the choice of law provision incorporates all Pennsylvania law as federal law, including a century-old line of Pennsylvania cases that holds due process requires a grace period when the legislature retroactively curtails a statute of limitations. *See*

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Kay v. Pennsylvania Railroad Co., 65 Pa. 269 (1870); *Byers v. Pennsylvania Railroad Co.,* 18 Pa. Co. Ct. R. 187 (Allegheny Co. 1896); *Philadelphia B. & W.R. Co. v. Quaker City Flour Mills Co.,* 282 Pa. 362, 127 A. 845 (1925); *Ferki v. Frantz's Transfer Co.,* 152 Pa.Super. 267, 31 A.2d 586 (1943); *Wilson v. Central Penn Indus., Inc.,* 306 Pa.Super. 146, 452 A.2d 257 (1982). The district court declined to follow this line of cases, doubting its vitality in light of intervening developments in property law relating to vested rights, and refusing to read broad due process rights into the Pennsylvania Constitution on such a weak precedential basis. [FN9] *In re TMI Litig. Cases Consol. II,* No. 88-1452, slip. op. at 17-19 (M.D.Pa. Aug. 16, 1993). Even if the grace period doctrine retains force under the Pennsylvania Constitution, we do not believe the Pennsylvania Supreme Court would apply it under the facts of this case.

> FN9. Most of the cited cases base their imposition of a grace period on the due process clause of the Fourteenth Amendment of the United States Constitution or on cases construing the Fourteenth Amendment. *See, e.g., Quaker City Flour,* 127 A. at 846-47; *Ferki,* 31 A.2d at 587-88; *Wilson,* 452 A.2d at 260. These cases treat an accrued tort cause of action as a "vested right" under the United States Constitution, *see Jenkins v. Hospital of Med. College,* 535 Pa. 252, 634 A.2d 1099, 1104-05 (1993), and are contrary to current federal constitutional precedent that finds no vested right in a tort cause of action before final judgment, *see, e.g., Arbour,* 903 F.2d at 420; *Hammond,* 786 F.2d at 12. They also conflict with current case law that finds no Fourteenth or Fifth Amendment due process violation in rational, retroactive legislation not affecting vested rights. *See, e.g., In re TMI Litig. Cases Consol. II,* 940 F.2d at 860-61 ; *Sowell,* 888 F.2d at 805; *In re Consolidated U.S. Atmospheric Testing Litig.,* 820 F.2d at 990-91.

[13] None of the Pennsylvania grace period cases addresses a situation in which ***1116** Pennsylvania plaintiffs failed to sue within the time period allotted by the Pennsylvania statute of limitations and brought suit in another state's courts to avoid Pennsylvania's time bar. We believe the Pennsylvania borrowing statute, 42 Pa. Cons.Stat. Ann. § 5521 (1981), accurately reflects current state policy against "forum shopping" by applying to claims arising in another state either the other state's statute of limitations or the Pennsylvania statute of limitations, whichever is shorter. "Pennsylvania's borrowing statute unequivocally [evinces] the legislative intent to prevent a plaintiff who sues in Pennsylvania from obtaining greater rights than those available in the state where the cause of action arose." *Gwaltney v. Stone,* 387 Pa.Super. 492, 564 A.2d 498, 503 (1989). We believe Pennsylvania courts would not look favorably on plaintiffs here who missed Pennsylvania's statute of limitations, although Pennsylvania is the state where the accident occurred, and brought suit in Mississippi. Even if the Pennsylvania Supreme Court would require a grace period when the Pennsylvania legislature retroactively shortens a statute of limitations, we do not believe they would require a grace period in this case.

V. The Discovery Rule and Fraudulent Concealment

Plaintiffs in the Pennsylvania state cases appeal the district court's grant of summary judgment on their "initial injury" claims. [FN10] First, plaintiffs argue the statute of limitations was tolled under the "discovery rule" until they knew or should have known their injuries were caused by the Three Mile Island accident. Plaintiffs assert there are material issues of fact as to whether they knew or should have known the cause of their injuries. Second, plaintiffs argue the statute of limitations was tolled because defendants fraudulently concealed information about the Three Mile Island accident.

> FN10. The district court originally adopted in its entirety the prior judgment rendered by the Dauphin County Court of Common Pleas against plaintiffs in the Pennsylvania state cases. *In re TMI Litig. Cases Consol. II,* No. 88-1452, slip. op. at 23 (M.D.Pa. Aug. 16, 1993). Upon reconsideration, the court limited the state court's holding to "initial injury" claims. It then entered summary judgment against plaintiffs on the "initial injury" claims and dismissed them as time barred. *In re TMI Litig. Cases Consol. II,* No. 88-1452 (M.D.Pa. July 22, 1994).

A. The Discovery Rule

[14] The discovery rule tolls the running of a statute of limitations until "the plaintiff knows, or reasonably should know: (1) that he has been injured, and (2) that his injury has been caused by another party's conduct." *Cathcart v. Keene*

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Industrial Insulation, 324 Pa.Super. 123, 471 A.2d 493, 500 (1984) (in banc); *see also Hayward v. Medical Ctr. of Beaver County,* 530 Pa. 320, 608 A.2d 1040, 1043 (1992). Every plaintiff has a duty to exercise "reasonable diligence" in ascertaining the existence of an injury and its cause. *Stauffer v. Ebersole,* 385 Pa.Super. 306, 560 A.2d 816, 817, *app. denied,* 524 Pa. 622, 571 A.2d 384 (1989).

[15][16][17][18] In their brief, plaintiffs assert that several plaintiffs filed their actions within two years of diagnosis of a specific injury, and thereby complied with the discovery rule. Under Pennsylvania law, plaintiffs bear the burden of proving they filed their claims within the applicable statute of limitations. *See Osei-Afriyie v. Medical College of Pennsylvania,* 937 F.2d 876, 884 (3d Cir.) (citing cases), *cert. denied,* 502 U.S. 979, 112 S.Ct. 581, 116 L.Ed.2d 606 (1991). Where, as here, the non- moving party bears the burden of proof at trial, summary judgment is appropriate if non-movants fail to "make a showing sufficient to establish the existence of an element essential to [their] case." *Nebraska v. Wyoming,* 507 U.S. 584, 590, 113 S.Ct. 1689, 1694, 123 L.Ed.2d 317 (1993) . In responding to a motion for summary judgment, the non-moving party must "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (internal quotations omitted). Beyond mere assertions, plaintiffs have not directed us to any evidence in the record that raises a material issue of fact as to whether any plaintiff filed suit within two years of discovery ***1117** of an "initial injury." Accordingly, we believe summary judgment was appropriate.

Plaintiffs also argue that "because the [discovery rule] involves questions of what a reasonable person should have known, a classic jury question is invariably presented, thereby precluding the use of the summary judgment procedure." Brief of the Appellants at 35-36. But the Court of Common Pleas held, and the record confirms, that the plaintiffs knew of the Three Mile Island accident, [FN11] and knew or should have known that exposure to radiation could cause adverse health affects. In such circumstances, the discovery rule does not toll the running of the statute of limitations.

FN11. Although plaintiffs did not file suit until almost six years after the Three Mile Island accident, they were able to answer in detail defendants' interrogatories on how they came to know of the accident, and where they were during the course of the accident. Some plaintiffs even left the geographic area in response to the accident.

Plaintiffs also assert summary judgment was improper because factual questions remain as to whether they used reasonable diligence to discover the cause of their injuries. The Court of Common Pleas held:

> The responses to interrogatories ... reveal plaintiffs knew of their specific injury more than two years prior to the time they filed their complaint. Thus, at that time they possessed the requisite knowledge to set the statutory clock running. Under the law of Pennsylvania they were under a duty to use all reasonable diligence to investigate the operative facts of their cause of action.... Given the notoriety of the accident and the plethora of investigative reports available to plaintiffs, it is clear that they had the "means of discovery" available to them.

In re TMI Litig. Cases Consolidated II, No. 426 S (1985), slip op. at 8-9 (Dauphin Co. February 20, 1987). Plaintiffs have not directed us to any evidence in the record that leads us to doubt these conclusions. Accordingly, we believe the district court properly granted summary judgment with respect to "initial injury" claims.

B. Fraudulent Concealment

[19][20] Plaintiffs also argue the statute of limitations was tolled because defendants fraudulently concealed information relating to the Three Mile Island accident. *See Molineux v. Reed,* 516 Pa. 398, 532 A.2d 792, 794 (1987) ("Where through fraud or concealment, the defendant causes the plaintiff to relax his vigilance or deviate from his right of inquiry, the defendant is estopped from invoking the bar of the statute of limitations.") (internal quotations omitted). In order to establish fraudulent concealment by a defendant, a plaintiff must prove "an affirmative or independent act of concealment that would divert or mislead the plaintiff from discovering the injury" or its cause. *Bohus v. Beloff,* 950 F.2d 919, 925 (3d Cir.1991). But plaintiffs have not directed us to any evidence

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that defendants sought to conceal the cause of their injuries. While plaintiffs have referred to statements by defendants' employees downplaying the seriousness of the accident immediately after it occurred, such statements do not create an issue of material fact with respect to fraudulent concealment.

In response to plaintiffs' fraudulent concealment argument, the Court of Common pleas found:

> The contention simply cannot prevail. Here, defendants did not "conceal" the fact that radiation escaped from the TMI facility. Defendants did nothing to induce plaintiffs not to file timely claims. In fact, the notice of the 1981 class action settlement, which was disseminated to all households within twenty-five miles of the reactor and widely publicized, put all persons on notice that if they believed they had a claim for personal injury, they should start their own lawsuit. This is not the type of conduct which could give rise to a claim of estoppel.
>
> Moreover, given the vast amount of information available to plaintiffs concerning the nature and extent of the accident, it is not rationally possible to ascertain any basis from which plaintiffs could claim that defendants are estopped from asserting the limitations defense. Defendants engaged in no affirmative action which could ***1118** have caused these plaintiffs to deviate from their right of inquiry.

In re TMI Litig. Cases Consolidated II, No. 426 S (1985), slip op. at 10 (Dauphin Co. February 20, 1987).

We agree that defendants' statements could not have caused plaintiffs to deviate from their right of inquiry into the source of their injuries. The record reflects that voluminous information about the Three Mile Island accident was in the public domain. [FN12] Moreover, many other plaintiffs obtained sufficient information to file suit within the statute of limitations. Under these circumstances, plaintiffs' have not raised a genuine issue of material fact with respect to fraudulent concealment. Summary judgment was proper.

> FN12. The Three Mile Island accident was the subject of extensive investigation and exhaustive reports long before plaintiffs were diagnosed with their illnesses or brought suit. *See Pennsylvania v. General Pub. Util. Corp.,* 710 F.2d 117, 118 n. 1 (3d Cir.1983).

VI. Conclusion

The choice of law provision of the Price Anderson Amendments Act, 42 U.S.C. § 2014(hh), mandates the retroactive application of Pennsylvania's two year statute of limitations to the plaintiffs claims filed in Mississippi state and federal court. Retroactive application comports with constitutional requirements of due process, and, in the circumstances of this case, Pennsylvania law does not provide for a grace period in which plaintiffs may file their claims. No issue of material fact precluded a grant of summary judgment based on the statute of limitations in the Pennsylvania state cases. For the foregoing reasons, we will affirm the judgment of the district court.

SAROKIN, Circuit Judge, dissenting.

I dissent primarily because I cannot conclude that Congress intended the Amendments Act to extinguish pending suits that were timely instituted in accordance with then-applicable statutes of limitations simply because they would not have satisfied the statute of limitations of the forum in which the underlying nuclear accident occurred. Nor can I conclude that Congress intended that certain pending claims survive while other identical ones cease to exist as a result of limitations periods that did not apply on the day those claims were filed. Certainly such a result is inconsistent with Congress's intent to promote " 'equitable and uniform treatment of victims.' " *TMI II,* 940 F.2d at 861 (quoting H.R.Rep. No. 104, 100th Cong., 1st Sess., pt. 1, at 18, 29 (1987)).

I agree with the majority that the jurisdictional provision, the choice- of-law provision, and the definition of "public liability action" contained in section 11 apply retroactively to lawsuits that were pending when the Amendments Act was passed. Because the majority's understanding of that retroactive application sweeps too broadly, however, I respectfully dissent.

It is well established that "[a] law is retrospective if it 'changes the legal consequences of acts completed before its effective date.' " *Miller v. Florida,* 482 U.S. 423, 430, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (1987)(quoting *Weaver v. Graham,* 450 U.S. 24, 31, 101 S.Ct. 960, 965, 67 L.Ed.2d 17 (1981)).

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Thus, retroactive legislation includes " 'all statutes, which, *though operating only from their passage,* affect vested rights and past transactions.' " *Id.* (quoting *Society for the Propagation of the Gospel v. Wheeler,* 22 F.Cas. 756, 767 (No. 13,156)(CCDNH 1814))(emphasis added). In the words of Justice Story,

> "every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective...."

Id. (citation omitted). Nevertheless, "deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Landgraf v. USI Film Products,* 511 U.S. 244, ----, 114 S.Ct. 1483, 1498, 128 L.Ed.2d 229 (1994). Ultimately, whether a particular application is retroactive "depends upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated." *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 857 n. 3, ***1119** 110 S.Ct. 1570, 1588 n. 3, 108 L.Ed.2d 842 (1990)(Scalia, J., concurring).

In this case, Congress expressly stated that the Amendments Act "shall apply to nuclear incidents occurring *before,* on, or after the date of the enactment of this Act." 42 U.S.C. § 2014 (emphasis added). I agree with the majority that the term "nuclear incidents" includes pending actions arising from such incidents. What is unclear from the statute is how exactly the "shall apply" language should be interpreted in the context of pending actions.

The statute itself offers no guidance on this point. As a theoretical matter, however, retroactivity can be understood in one of two ways. First, it can be understood as the majority apparently construes it: as a rewriting of history. Under this theory, section 20 reaches into the past to transform pending lawsuits as of their inception, undoing and rewriting all subsequent proceedings and applying new law as though it had existed from the date of filing. This theory engenders a historical fiction pursuant to which plaintiffs' suits were public liability actions when they were filed in 1985, governed by Pennsylvania substantive law and subject to original federal jurisdiction, although the Amendments Act did not take effect until three years later.

Alternatively, the Amendments Act can be seen as retroactive in the more limited sense that it "attaches new legal consequences to events completed before its enactment." *Landgraf,* 511 U.S. at ----, 114 S.Ct. at 1499. This theory would mean simply that all pending actions asserting public liability were transformed on August 20, 1988 into public liability actions, and that the federal courts acquired original jurisdiction over those actions as of, but not prior to, that date.

Either interpretation of retroactivity is acceptable as a theoretical matter. It is our task to determine which is the correct one under the circumstances of this case.

I conclude that the latter interpretation of retroactivity under section 20 is the correct one, for several reasons. First and foremost, applying the Amendments Act to pending cases from August 20, 1988 forward accomplishes the goals that Congress intended the retroactivity provision to accomplish by defining the pending Three Mile Island cases as public liability actions and providing for their removal to federal court and litigation under federal substantive law.

Second, where, as here, the statute is ambiguous as to the appropriate scope of retroactivity, I believe that the well-established presumption against statutory retroactivity requires interpreting that scope narrowly. In this case, the statute neither states explicitly that the substantive law of the state in which the incident occurred applies "retroactively" to pending actions nor offers any guidance as to how the language "shall apply" should be interpreted in the context of a pending action. It is ambiguous as to whether section 11 applies to pending actions as of August 20, 1988, or whether, as the majority concludes, it applies to such actions as of their inception. In the absence of explicit Congressional instruction, I believe that the principles underlying the anti-retroactivity presumption make the former interpretation far more appropriate than the sweeping approach to retroactivity enunciated by the majority. [FN1]

> FN1. This is not to suggest that the presumption against retroactive legislation governs this case; on the contrary, I am in agreement with the majority that Congress intended the Amendments Act to

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We cannot consider this contention since in his pleading the appellant relied solely on the provisions of the state Constitution (art. 1, s 8) with respect to the obligation of contracts, and made no reference to section 10, of article 1 of the Federal Constitution; and the Supreme Court, in disposing of the case, did not mention or discuss that section. Rev. St. s 709, U.S.C. tit. 28, s 344 (28 USCA s 344) Chicago & Northwestern Ry. v. Chicago, 164 U.S. 454, 457, 17 S.Ct. 129, 41 L.Ed. 511; Levy v. Superior Court, 167 U.S. 175, 177, 17 S.Ct. 769, 42 L.Ed. 126; Miller v. Cornwall Railroad Co., 168 U.S. 131, 134, 18 S.Ct. 34, 42 L.Ed. 409; Bowe v. Scott, 233 U.S. 658, 665, 34 S.Ct. 769, 58 L.Ed. 1141.

The statute was also assailed below and is challenged here as depriving the appellant of the due process guaranteed by the Fourteenth Amendment. A brief statement of the facts is requisite to an understanding of appellant's argument. Prior to March 9, 1933, the statutory provision as to state banks was, in summary, this: A state official, known as a bank examiner, had general supervision of the operation of these institutions. If a bank became embarrassed or insolvent he might, upon an order of a court, take possession of the assets and business for a period of thirty days, during which time ****141** no suits ***329** could be brought against the bank. He might restore the bank to the management of its officers, or, if liquidation were required, apply to a court for the appointment of himself or another as receiver. The affairs of the bank were then to be liquidated by the receiver under the suppervision of the court. Stockholders were liable to creditors other than depositors only to the extent of any unpaid balance on their shares; but to depositors, in an amount equal to the face value of their shares. It was the duty of the receiver to demand and collect for the benefit of creditors and depositors the amount due from stockholders, and, if necessary, to sue the stockholders individually and collectively therefor. [FN1]

FN1 Civil Code of South Carolina (1932) ss 7843, 7844, 7848, 7852, 7854, 7855, 7868.

Shortly after the declaration of a banking holiday by the President on March 4, 1933, the Governor of South Carolina issued a proclamation temporarily closing the banks in that state. The General Assembly passed, and on March 9 the Governor approved, an act suspending for eighteen months legislation then applicable to the conduct and liquidation of banks, vesting in the Governor plenary power over state banks, empowering him to extend the time for payment of deposits as the condition of each institution might require; to direct the creation of special trust accounts for receipt of deposits, which should be held separate from other assets and be subject to withdrawal on demand; to determine whether the overhead expenses of any bank exceed its net income, and, if so, to compel it to reduce the expenses or to order immediate liquidation, as might best serve the depositors' interests; and to make all necessary rules and regulations to carry out the intent of the act. The examiner was prohibited from taking possession of any bank unless authorized so to do by the Governor, and all persons were forbidden, while the Governor remained in control of the banks, to institute any action ***330** against a bank, except by the Governor's consent. The Governor was authorized to appoint a board of bank control, with whom he might advise and consult, and to whom he might delegate powers under the act. Pursuant to this legislation the Governor appointed a board of bank control and promulgated regulations which provided, inter alia, that upon advice of the board he might, where necessary, appoint a conservator for any bank to conserve its assets for the benefit of depositors and creditors, who should posses himself of all books, records, and assets, and take all necessary action to preserve the property, 'pending further disposition of its business as provided by law.' The regulations provided: 'Such conservator * * * shall have all the rights, powers and privileges now possessed by or hereafter given Receivers of insolvent state banks. * * * During the time that such conservator * * * shall remain in possession of such bank, the rights of all parties with respect thereto shall, subject to the other provisions of this order, be the same as if a receiver had been appointed therefor.' Further regulations dealing with the reopening of solvent banks and reorganization of banks were promulgated, but these are irrelevant to the present case.

The appellee Zimmerman was appointed conservator of the Central Union Bank and entered upon his duties. The appellant, on behalf of himself and other depositors, filed a bill in the common pleas court averring the bank's insolvency, charging that the Act of March 9 is invalid so far as it purports to prevent appellant and other depositors

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> apply retroactively. *See* Majority Op. at 1112-13 n.6. The principles underlying the anti-retroactivity presumption are relevant, however, insofar as they evince a cautious and conservative approach to retroactivity that is fundamental to our legal system. Where, as here, there is a question as to the intended scope of retroactivity, I believe that the principles underlying the anti- retroactivity presumption urge us to interpret that scope narrowly.

Third, this interpretation eliminates the strained historical fiction on which the majority opinion, by necessity, must be based, thereby providing a more rational analytic framework for effectuating Congress's intent and leading to a more equitable result. For the most part, the practical effect of the retroactivity provision is the same under either interpretation; in either case, rulings made prior to the passage of the Amendments Act on the basis of substantive law which no longer applies can be modified to ***1120** conform to the new governing law of the case. Causes of action recognized in the filing state but not in the forum state can be dismissed. Rules of evidence, burdens of proof, and jury instructions all can be adjusted to accommodate the law of the forum. Under the majority's interpretation, these adjustments would be made by adopting a fiction that Pennsylvania law applied from the beginning and then relitigating the entire case accordingly. Under my interpretation, these adjustments can be made simply by applying Pennsylvania law after August 20, 1988 to motions, new or renewed, brought by the parties. In other words, after August 20, 1988, a party can move to dismiss a claim that no longer has any legal basis, renew a summary judgment motion that failed previously but might now succeed, or seek reconsideration of prior evidentiary rulings that do not stand up under the new governing law. Thus, while the two interpretations require different procedures for implementation, the ultimate effect on the parties is, for the most part, the same in both cases.

In the statute of limitations context, however, the difference in theory between the two interpretations translates into a crucial difference in outcome. The historical fiction on which the majority's theory is premised forces the majority to conclude that plaintiffs' action, although filed within the Mississippi statute of limitations, is now barred by the Pennsylvania statute of limitations--an inequity which I believe contravenes Congress's intent and which my theory avoids. Statutes of limitations are uniquely concerned with a specific point in time: the date on which the complaint was filed. While a defendant can raise the statute of limitations as a defense at any time during the course of a lawsuit, the relevant question for the court is always whether, *at the time the case was filed,* the applicable statute of limitations was satisfied. Because the majority reasons that section 20 requires extending Pennsylvania law back in time to the inception of plaintiffs' action, it concludes that Pennsylvania's statute of limitations applied--and was violated--at the time the suit was filed. However, *at the time it was filed,* plaintiffs' lawsuit was not a public liability action. As a result, I conclude that it was governed *at the time it was filed* by Mississippi, not Pennsylvania, law. Although the substantive law of Pennsylvania governs plaintiffs' case from August 20, 1988 forward, the statute of limitations was satisfied or violated back in 1985, when Mississippi law applied. At that time, under the applicable law, I conclude that it was satisfied.

Finally, the interpretation I endorse conforms with the "settled policy" of federal courts to "avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question," *Gomez v. United States,* 490 U.S. 858, 864, 109 S.Ct. 2237, 2241, 104 L.Ed.2d 923 (1989), by eliminating the constitutional questions of due process raised by the majority's interpretation. If the Amendments Act applies to pending actions from August 20, 1988 forward, then there is no issue as to whether the Act violates the due process rights of plaintiffs to pending lawsuits, because the Pennsylvania statute of limitations does not apply to deprive plaintiffs of their cause of action.

As a result, I conclude that the retroactivity provision of the Amendments Act does not rewrite history as applied to pending actions, but rather operates by changing the ground rules midway through the game, altering the legal status and governing law of pending actions from the time of its enactment forward.

The majority proffers that it agrees with this interpretation, and denies that its interpretation of section 20 engenders a rewriting of history. [FN2]

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Nevertheless, while conceding ***1121** that the definition of public liability action, the choice-of-law provision, and the original jurisdiction provision apply to pending cases from August 20, 1988 forward, the majority concludes that plaintiffs' lawsuit was filed in violation of Pennsylvania's two-year statute of limitations. Both positions cannot be correct. In effect, the Amendments Act drew a bright line down the middle of this lawsuit on August 20, 1988, dividing the case into two distinct parts. Prior to August 20, 1988, the suit was generic and Mississippi law governed; since that date, it has been a public liability action and Pennsylvania law governs. I think it logically inconsistent to hold, as the majority does, that plaintiffs' suit was not a public liability action when it was filed, and yet conclude that it was required at the time it was filed to satisfy the Pennsylvania statute of limitations--a statute that only applies to this action in its public liability incarnation. [FN3] Either plaintiffs' lawsuit was a public liability action when it was filed, subject to federal jurisdiction and Pennsylvania's statute of limitations, or it was not.

FN2. The majority's understanding of the term "historical fiction" is different from what I intend. In denying that its interpretation of the Amendments Act engenders a historical fiction, the majority states that it "do[es] not create a historical fiction that plaintiffs filed suit on any day other than that on which they actually filed." This rebuttal is wide of the mark. My point is simply this: (1) When plaintiffs filed their suit, it was not a public liability action--indeed, that cause of action did not yet exist; (2) When plaintiffs filed their suit, it was not governed by Pennsylvania law; (3) When plaintiffs' filed their suit, it satisfied the applicable statute of limitations; (4) On August 20, 1988, plaintiffs' suit was transformed into a public liability action, governed by Pennsylvania substantive law and subject to federal jurisdiction; (5) In order to conclude that plaintiffs' suit was filed in violation of the Pennsylvania statute of limitations, the majority must first conclude that the Pennsylvania statute of limitations applied to plaintiffs' suit at the relevant time: the day on which it was filed. Because Pennsylvania law applies only to public liability actions, however, the majority's holding in this case cannot be sustained without the historical fiction that plaintiffs' suit was a public liability action on the day it was filed.

FN3. As explained *infra,* I question whether Congress intended the phrase "substantive rules of decision" to include statutes of limitations in the first place. Because I think that the majority's argument fails even if the Amendments Act encompasses statutes of limitations, however, I will assume for now that the Pennsylvania statute of limitations is substantive law in this context.

Therefore, in my view it is the majority, and not I, who seeks to treat the statute of limitations differently from all other "substantive rules for decision" of Pennsylvania law. While concluding that Pennsylvania substantive law operates on plaintiffs' lawsuit from August 20, 1988 forward, the majority carves out an exception for the statute of limitations, allowing it to reach back in time--crossing the imaginary line drawn by the Amendments Act--to operate on the suit on the day it was filed. This treatment of the statute of limitations clashes directly with the majority's overarching theory of the case. Statutes of limitations, as discussed above, can only be violated (or satisfied) at one specific point in time--the day on which the suit was filed-- notwithstanding that such violations can be called to the attention of the court at any point during the pendency of a lawsuit. Under the majority's own interpretation of section 20, this case was not a public liability action when it was filed, and Pennsylvania law did not apply. As a result, the majority's treatment of the statute of limitations cannot be reconciled with its interpretation of the meaning and effect of the Amendments Act.

The majority seeks to justify this illogical result in terms of congressional intent. It is not at all clear, however, that Congress intended the choice- of-law provision of the Amendments Act to encompass statutes of limitations. While it is well established that statutes of limitations are characterized as substantive law for purposes of the doctrine of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), *see Guaranty Trust Co. of New York v. York,* 326 U.S. 99, 109, 65 S.Ct. 1464, 1470, 89 L.Ed. 2079 (1945), this does not mean that they are considered substantive in other contexts. Indeed, in holding that statutes of limitations are substantive for purposes of the *Erie* doctrine, such that federal courts sitting in diversity must apply state statutes of limitations, the Supreme Court confined its analysis narrowly to the context of *Erie:*

> It is therefore immaterial whether statutes of limitation are characterized either as 'substantive'

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or 'procedural' in State court opinions *in any use of those terms unrelated to the specific issue before us. Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to ensure that, *in all cases where a federal court is exercising jurisdiction solely because *1122 of the diversity of citizenship of the parties,* the outcome of the litigation in federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.

Guaranty Trust Co. of New York, 326 U.S. at 109, 65 S.Ct. at 1470 (emphasis added).

In this case, the majority opinion's conclusion that "the statute of limitations is a substantive rule of decision," Majority Opinion, at 1112, is based entirely on cases holding that statutes of limitations are substantive rather than procedural for purposes of *Erie.* The characterization of statutes of limitations as substantive for *Erie* purposes, however, was not based on an assessment of their procedural or substantive nature in the abstract but rather on their impact on the federalism concerns that *Erie* 's rough procedural/substantive distinction was intended to address. *See Guaranty Trust Co.,* 326 U.S. at 109, 65 S.Ct. at 1470.

In this case, by contrast, there is no federalism concern at issue and no balance of power between federal and state courts to be maintained. The cause of action is federal, and the only question is whether Congress intended the term "substantive rules for decision" to include statutes of limitation. The legislative history of the Amendments Act is silent on this point; indeed, there is nothing to indicate that Congress even considered the status of statutes of limitations under that Act, much less intended to include them as substantive rules of decision. Moreover, a review of Pennsylvania case law makes clear that the courts of Pennsylvania "generally treat statutes of limitations as 'procedural.' " *AAMCO Transmissions, Inc. v. Harris,* 759 F.Supp. 1141, 1143-44 (E.D.Pa.1991) (footnotes omitted); *Boyle v. State Farm Mutual Automobile Ins. Co.,* 310 Pa.Super. 10, 456 A.2d 156, 162 (1983); *Altoona Area Sch. Dist. v. Campbell,* 152 Pa.Cmwlth. 131, 618 A.2d 1129, 1134 (1992). This strikes me as a strong indication that the courts of Pennsylvania would not consider the phrase "substantive rules for decision" to include Pennsylvania's statutes of limitations. [FN4] For these reasons, I do not think that congressional intent with respect to statutes of limitations is clear enough to sustain the majority's logically inconsistent conclusion that plaintiffs' suit is time-barred. [FN5] *See* Majority Op., at 1112 ("Congress could have exempted statutes of limitations from retroactive application, but it did not.").

FN4. The majority cites *AAMCO Transmissions, Inc. v. Harris,* 759 F.Supp. 1141, 1143-44 (E.D.Pa.1991), for the proposition that Pennsylvania courts generally apply Pennsylvania's statute of limitations to causes of action that arose in other jurisdictions as well as to causes of action that arose in Pennsylvania. Majority Op., at 1112 n.5. This may well be true, but it is irrelevant to the issue at hand, for two reasons. First, Pennsylvania law regarding the statute of limitations has no bearing on the question before us: whether section 20--a federal statute--requires us to apply Pennsylvania's statute of limitations retroactively to bar the underlying actions. This is purely a question of federal law, and neither the courts nor the statutes of Pennsylvania can provide the answer. Second, even if Pennsylvania law were relevant to the issue at hand, the language quoted by the majority is inapposite. The quoted language describes the way in which Pennsylvania courts treat cases which are filed in Pennsylvania in the first instance but which are based on events that took place ("arose") outside the jurisdiction--not cases such as this one which were filed in other jurisdictions and later transferred to Pennsylvania. It tells us nothing about the way Pennsylvania courts would treat a unique and highly unusual case such as this one, and provides no basis for inference.

FN5. Contrary to the majority's assertion, it is not true that "achieving substantially the same outcome in all public liability actions, regardless of where filed, necessitates treatment of statutes of limitations as 'substantive rules for decision.' " Majority Op., at 1112 n.5. Significantly, a finding that Congress did not intend the term "substantive rules for decision" to include statutes of limitations would not mean that there is no statute of limitations on public liability actions. Rather, in the absence of an express command from Congress, federal courts "ordinarily do not assume that Congress intended that there be no time limit

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> on such actions at all; rather, our task is to 'borrow' the most suitable statute or other rule of timeliness from some other source." *DelCostello v. Teamsters,* 462 U.S. 151, 158, 103 S.Ct. 2281, 2287, 76 L.Ed.2d 476 (1983). If there is no indication in the legislative history as to what statute of limitations Congress intended the courts to apply to a given type of action, the "fallback rule of thumb" is to "apply the most closely analogous statute of limitations under state law." *Id.* at 158 & n. 12, 103 S.Ct. at 2287 & n. 12. If the relevant state statute of limitations is an "unsatisfactory vehicle[ ] for the enforcement of federal law," however, courts may borrow timeliness rules from federal law--"either express limitations periods from related federal statutes, or such alternatives as laches." *Id.* at 161, 162, 103 S.Ct. at 2289. Thus, there are two possible outcomes if Congress did not intend for "substantive rules of decision" to include statutes of limitations and thus did not expressly provide for a statute of limitations for public liability actions: (1) the courts would apply state statutes of limitations anyway (although they would not fall under the rubric of section 20); or (2) the courts would apply a uniform statute of limitations to public liability actions drawn from federal law. In either event, all public liability actions arising from a single occurrence would be subject to the same statute of limitations, with the exception of cases already pending when the Amendments Act was passed.

***1123** Nor is there any evidence in the legislative history or elsewhere that Congress intended the sweeping retroactivity that the majority endorses. On the contrary, the legislative history indicates that the Amendments Act was based on the lessons of claims resulting from the TMI accident:

> The experience with claims following the TMI accident demonstrates the advantages of the ability to consolidate claims after the nuclear incident. Attorneys representing both plaintiffs and defendants in the TMI litigation testified ... that the ability to consolidate claims in federal court would greatly benefit the process for determining compensation for claimants.... The availability of the provisions for consolidation of claims in the event of any nuclear incident ... would avoid the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation.

S.Rep. No. 218, 100th Cong., 2d Sess. 13, *reprinted in* 1988 U.S. Cong. & Admin. News 1476, 1488; *In re TMI Litig. Cases Consol. II,* 940 F.2d 832, 853 n. 18 (3d Cir.1991)(stating that Congress' decision to enact the Amendments Act was based on the lessons of litigation resulting from the TMI accident). This indicates to me that Congress contemplated providing a mechanism for consolidating TMI cases to facilitate their continued litigation. This forward-looking approach evidenced by the legislative history is wholly inconsistent with a congressional desire to extinguish those suits on technical grounds.

Because I conclude that retroactive application of the choice-of-law provision means simply that Pennsylvania substantive law applies to and governs the instant litigation from August 20, 1988 forward, I respectfully dissent from the majority's far-reaching and overly broad interpretation of section 20 and from its conclusion that Pennsylvania's two-year statute of limitations reaches back in time to bar plaintiffs' suit. Accordingly, I would reverse.

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[redacted]

United States Court of Appeals,
Eleventh Circuit.

Philip H. EDDINGS, as Personal Representative of the Estate of Scott Philip Eddings, Deceased, on Behalf of Philip H. EDDINGS, and Virginia Rae Randt, individually, Plaintiffs-Appellants,
v.
VOLKSWAGENWERK, A.G., a/k/a Volkswagen Aktiengesellschaft, a foreign corporation, et al., Defendants-Appellees.
Patricia Ann GRIFFIN, By and Through her next friend and natural father, Larry D. GRIFFIN, and Larry D. Griffin, individually, Plaintiffs-Appellants,
v.
FORD MOTOR COMPANY, Defendant-Appellee.
Albert V. VERHINE, Jr., a minor, By A. Brennis VERHINE, his legal Guardian; and A. Brennis Verhine, and Glenda L. Verhine, his natural parents, Individually, Plaintiffs-Appellants,
v.
VOLKSWAGENWERK, A.G., a foreign corporation and Volkswagen of America, Inc., a foreign corporation, Defendants-Appellees.
Dana C. LAMB, a minor, By and Through his mother and next friend, Jeanne F. DONALDSON, Jeanne F. Donaldson, individually, Plaintiffs-Appellants,
v.
VOLKSWAGENWERK AKTIENGESELLSCHAFT, a German Corporation, Volkswagen of America, Inc., a New Jersey corporation, Defendants-Appellees.

Nos. 86-3068, 86-3103, 86-3138 and 86-5258.

Jan. 22, 1988.

Actions were brought against automobile manufacturers for injuries suffered more than 12 years after date of delivery of automobiles to original purchasers, and defendants moved for summary judgment. The United States District Court for the Northern District of Florida, No. PCA 83-4127-WEA, 635 F.Supp. 45, Winston E. Arnow, J., entered summary judgment for defendants, as did the United States District Court for the Northern District of Florida, Nos. TCA 85-7244-09 and 84-7120-WS, William Stafford, Chief Judge, and the United States District Court for the Southern District of Florida, 631 F.Supp. 1144, Stanley Marcus, J., and plaintiffs appealed. On consolidated diversity actions, the Court of Appeals, Tjoflat, Circuit Judge, held that plaintiffs did not have vested property rights in causes of action that accrued based on Florida Supreme Court decision holding 12-year statute of repose unconstitutional, such that application of statute of repose after Florida Supreme Court receded from its position and held that statute of repose was constitutional would deprive plaintiffs of vested property right in violation of Fourteenth Amendment due process.

Affirmed.

West Headnotes

[1] Constitutional Law ⚿308
92k308 Most Cited Cases

[1] Limitation of Actions ⚿4(2)
241k4(2) Most Cited Cases

Florida's statute of repose which barred actions for products liability brought more than 12 years after date of delivery of completed product to original purchaser did not violate Fourteenth Amendment due process clause; recognizing overruling of *Battilla v. Allis Chalmers Mfg. Co.*, 392 So.2d 874 (Fla.). U.S.C.A. Const.Amend. 14; West's F.S.A. § 95.031(2).

[2] Constitutional Law ⚿308
92k308 Most Cited Cases

[2] Limitation of Actions ⚿31
241k31 Most Cited Cases

Plaintiffs who brought actions against automobile manufacturers for injuries suffered more than 12 years after date of initial purchase of automobiles did not have vested property rights in causes of action that accrued based on Florida Supreme Court decision holding Florida statute of repose which barred actions for products liability brought more

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than 12 years after date of delivery of completed product to its original purchaser unconstitutional, such that application of statute of repose after Florida Supreme Court receded from its position and held that statute of repose was constitutional would deprive plaintiffs of vested property right in violation of Fourteenth Amendment due process. U.S.C.A. Const.Amend. 14; West's F.S.A. § 95.031(2).

[3] Constitutional Law ⚖249(3)
92k249(3) Most Cited Cases

[3] Limitation of Actions ⚖4(2)
241k4(2) Most Cited Cases
(Formerly 241k412)

Florida statute of repose which barred actions for products liability brought more than 12 years after date of delivery of completed product to its original purchaser did not violate Fourteenth Amendment equal protection clause on theory that the statute of repose, combined with four-year statute of limitations, created two classes of injured persons with different legal rights--one class including persons who were injured less than eight years after delivery of product to original purchaser, who had full four years afforded by statute of limitations to bring actions, and another class including persons who were injured more than eight years, but less than 12 years, after product was delivered to original purchaser, who therefore had less than full four years afforded by statute of limitations to file suit--with no rational basis for the disparate treatment. U.S.C.A. Const.Amend. 14; West's F.S.A. § 95.031(2).

***1370** Karen E. Roselli, Kevin A. Malone, Fort Lauderdale, Fla., for plaintiffs-appellants in 86-3068.

Cathy Jackson Lerman, Fort Lauderdale, Fla., for amicus curiae Academy of Florida Trial Lawyers.

J. Richard Caldwell, Jr., Sharon Lee Stedman, Orlando, Fla., for defendants- appellees in 86-3068.

Edward T. O'Donnell, Mershon, Sawyer, Johnston, Dunwody & Cole, Miami, Fla., for amicus curiae Motor Vehicle & Product Liability.

***1371** Robert K. High, Jr., E.C. Deeno Kitchen, Brian S. Duffy, Robert M. Ervin, Jr., Tallahassee, Fla., Allen W. Lindsay, Jr., Milton, Fla., for plaintiffs-appellants in 86-3103.

Patrick J. Farrell, Jr., Patricia Guilday, Tallahassee, Fla., John M. Thomas, Office of the General Counsel,Ford Motor Co., Dearborn, Mich., for defendant- appellee in 86-3103.

John Stephen Derr, Field, Granger, Santry & Mitchell, Tallahassee, Fla., Michael Hoenig, Herzfeld & Rubin, New York City, for plaintiffs-appellants in 86-3138.

Sharon Lee Stedman, Rumberger, Kirk, Caldwell, Cabaniss & Burke, Orlando, Fla., for defendants-appellees in 86-3138.

Charles R. Stack, High, Stack, Lazenby & Palahach, Coral Gables, Fla., for plaintiffs-appellants.

Wendy F. Lumish, Rumberger, Wechsler & Kirk, Miami, Fla., Sharon Lee Stedman, Miami, Fla., for defendants-appellees in 86-5258.

Appeals from the United States District Court for the Northern District of Florida.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT and HILL, Circuit Judges, and LYNNE [FN*], Senior District Judge.

FN* Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

TJOFLAT, Circuit Judge:

These four consolidated diversity actions present two issues involving Florida's products liability statute of repose. The first issue concerns the effect of a decision by the Florida Supreme Court in which the court reversed a prior decision holding that the statute of repose was invalid as applied. We must decide whether application of the supreme court's later decision in the cases before us deprives the appellants of a vested property right, in violation of the fourteenth amendment's due process clause. The second issue involves the question of whether Florida's statute of repose creates two classes of

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persons with different legal rights, in violation of the fourteenth amendment's equal protection clause. In each of the four cases, the district court granted the appellee's motion for summary judgment. 635 F.Supp. 45, 631 F.Supp. 1144. We affirm.

I.

A.

In 1974, the Florida legislature enacted a twelve-year products liability statute of repose. [FN1] That statute terminated manufacturer liability with respect to suits brought more than twelve years after delivery of the product to its first purchaser. In other words, the Florida legislature determined that independent of whether the applicable statute of limitations had run, an injury caused by a product that had been delivered to its original purchaser more than twelve years prior to the filing of the plaintiff's lawsuit would give rise to no cause of action against the manufacturer or designer. [FN2]

FN1. The statute of repose, Fla.Stat. § 95.031(2) (1982), provided as follows:

Actions for products liability ... must be begun within the period prescribed in this chapter ... but in any event within 12 years after the date of delivery of the completed product to its original purchaser ... regardless of the date the defect in the product ... was or should have been discovered.

In 1986, the Florida legislature amended section 95.031(2) so as to repeal the statute of repose in products liability actions. *See* Fla.Stat. § 95.031(2) (Supp.1987). The Florida Supreme Court has held that this repeal has no effect on cases arising prior to the date of the amendment. *See Melendez v. Dreis & Krump Mfg. Co.*, 515 So.2d 735, 737 (Fla.1987).

FN2. A statute of repose is to be distinguished from a statute of limitations. The district court in one of the cases before us thoughtfully explained the difference between a statute of repose and a statute of limitations:

While in the most general sense statutes of repose and statutes of time limitation are similar in that they prescribe the periods within which actions may be brought, we think there are critical analytical distinctions between the two and we do not use the terms interchangeably here. A statute of repose terminates the right to bring an action after the lapse of a specified period. The right to bring the action is foreclosed when the event giving rise to the cause of action does not transpire within this interval. A statute of limitations delineates the time a party has to initiate an action once the injury has occurred; it does not begin to run until the wrong has been or should have been discovered. Simply stated, a statute of repose is triggered once the product is delivered to its first purchaser. If an injury results from the product after the authorized period has elapsed the victim is without recourse to the manufacturer of the product. A statute of repose "... does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action, from ever arising." *Rosenberg v. Tower of North Bergen,* 61 N.J. 190, 293 A.2d 662, 667 (1972). Thus under the Florida statute of repose an injury caused by a product which has reached its original purchaser more than twelve years prior forms no basis for recovery because the statute prevents the accrual of a right of action. "The injured party literally has *no* cause of action. The harm that has been done is *damnum absque injuria*--a wrong for which the law affords no redress." *Id.* The effect of the statute of repose may be to bar the cause of action before it has accrued.

These product liability statutes of repose are designed and intended to encourage diligence in the prosecution of claims, eliminate the potential of abuse from a state claim, and ultimately foster certainty and finality in liability.

Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F.Supp. 1144, 1147 (S.D.Fla.1986).

***1372** In December 1980, in *Battilla v. Allis Chalmers Mfg. Co.*, 392 So.2d 874 (Fla.1980) (per curiam), the Florida Supreme Court held that the twelve-year statute of repose, as it applied to a plaintiff whose injury occurred more than twelve years after delivery of the product to its first purchaser, worked a denial of access to courts in violation of the Florida Constitution. [FN3] In August 1985, the Florida Supreme Court, in *Pullum v. Cincinnati, Inc.*, 476 So.2d 657, 659 (Fla.1985), overruled *Battilla* and held that the statute of repose is "not unconstitutionally violative of [the right of access] of the Florida Constitution." Although the supreme court did not state in *Pullum* whether the rule announced in that case would apply to cases involving injuries occurring after the *Battilla* decision but before the *Pullum* decision, it has since held that *Pullum* does apply to such cases. *See Pait v. Ford Motor Co.*, 515 So.2d 1278, 1279 (Fla.1987); *Melendez v. Dreis & Krump Mfg. Co.*, 515 So.2d 735, 737 (Fla.1987).

FN3. Article I, section 21 of the Florida Constitution provides as follows:

§ 21 Access to courts

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> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

B.

Each of the present lawsuits arose out of an accident occurring in Florida and involving an automobile that had been delivered to the original purchaser more than twelve years before the accident. [FN4] In three of the cases, the accident occurred after the supreme court's decision in *Battilla;* in the fourth case, the accident occurred before *Battilla* was decided. All of the accidents occurred before the supreme court reversed itself in *Pullum.* In each case, someone injured in the accident, or a representative of his estate, filed suit in the district court against the manufacturer of *1373 the automobile, invoking jurisdiction under 28 U.S.C. § 1332 (1982). [FN5] In three of the cases, suit was filed after the supreme court decided *Battilla* but before it decided *Pullum.* In the fourth case, suit was filed eleven days after the supreme court decided *Pullum.*

> FN4. The chronology of relevant dates for each of the four cases is summarized below:
> *Eddings v. Volkswagenwerk, A.G.,* No. 86-3068
> 1967--Car delivered to original purchaser
> 1979--Statute of repose expires
> 1980--*Battilla* decided
> 1982--Accident occurs
> 1983--Suit filed
> 1985--*Pullum* decided
> *Lamb v. Volkswagenwerk Aktiengesellschaft,* No. 86-5258
> 1967 (Nov. 13)--Car delivered to original purchaser 1979 (Nov. 13)--Statute of repose expires
> 1979 (Nov. 21)--Accident occurs
> 1980--*Battilla* decided
> 1982--Suit Filed
> 1985--*Pullum* decided
> *Verhine v. Volkswagenwerk, A.G.,* No. 86-3138
> 1969 (July)--Car delivered to original purchaser
> 1980--*Battilla* decided
> 1981 (July)--Statute of repose expires
> 1981 (Aug.)--Accident occurs
> 1984--Suit filed
> 1985--*Pullum* decided
> *Griffin v. Ford Motor Co.,* No. 86-3103
> 1971--Car delivered to original purchaser
> 1980--*Battilla* decided
> 1983--Statute of repose expires
> 1985 (Jan.)--Accident occurs
> 1985 (Aug.)--*Pullum* decided
> 1985 (Sept.)--Suit filed
>
> FN5. Section 1332 provides as follows: (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and is between--
> (1) citizens of different states;
> ....

In each of the four cases, the defendant manufacturer moved the court for summary judgment, contending that because the twelve-year statute of repose had run its course, the plaintiff had no cause of action. In each case, the district court granted the defendant's motion for summary judgment. The plaintiffs have appealed to this court.

II.

The district court correctly interpreted Florida law in holding that the decision in *Pullum* controls these cases and leaves appellants with no cause of action rooted in products liability. [FN6] Appellants argue, however, that application of the statute of repose to their suits would, as a matter of federal law, deprive them of a vested property right in violation of the fourteenth amendment's due process clause.

> FN6. At the time the district court decided these cases, the Florida Supreme Court had not expressly decided whether *Pullum* would apply so as to bar a cause of action arising from an injury occurring after the *Battilla* decision but before the *Pullum* decision. The supreme court has, however, since ruled that *Pullum* is to have such application. *See Pait v. Ford Motor Co.,* 515 So.2d 1278, 1279 (Fla.1987); *Melendez v. Dreis & Krump Mfg. Co.,* 515 So.2d 735, 737 (Fla.1987).
> In their briefs, appellants have in various degrees relied on *Chevron Oil v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). *Chevron* involved the retroactive application of a federal court decision regarding a matter of federal statutory law and is not applicable to our analysis in this case.

[1] We note preliminarily that appellants' facial attack on the constitutionality of the Florida statute

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of repose is without merit. The United States Supreme Court, in cases raising the constitutionality of similar statutes, has found no violation of the fourteenth amendment. *See, e.g., Woodward v. Burnham City Hosp.*, 449 U.S. 807, 101 S.Ct. 54, 66 L.Ed.2d 11 (1980), *dismissing appeal from Anderson v. Wagner*, 79 Ill.2d 295, 37 Ill.Dec. 558, 402 N.E.2d 560 (1979) (no due process violation from legislative action "establishing the four-year outer limit within which to file a complaint for medical malpractice") (appeal dismissed for want of a substantial federal question; see 49 U.S.L.W. 3065 for summary of questions presented on appeal); *Ellerbe v. Otis Elevator Co.*, 459 U.S. 802, 103 S.Ct. 24, 74 L.Ed.2d 39 (1982), *dismissing appeal from* 618 S.W.2d 870 (Tex.Civ.App.1981) (due process of law not denied plaintiff by virtue of statute prohibiting suits against licensed engineers or architects for damages arising out of unsafe condition of real property that was improved more than ten years earlier) (appeal dismissed for want of a substantial federal question; see 51 U.S.L.W. 3146 for summary of questions presented on appeal). [FN7]

> FN7. Summary disposition by the Supreme Court of an appeal for want of a substantial federal question is a disposition on the merits of the case:
> As Mr. Justice Brennan once observed, "[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case ...," *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247, 79 S.Ct. 978, 979, 3 L.Ed.2d 1200 (1959); cf. R. Stern & E. Gressman, Supreme Court Practice, 197 (4th ed. 1969) ("The Court is, however, deciding a case on the merits, when it dismisses for want of a *substantial* question...."); C. Wright, Law of Federal Courts 495 (2d ed. 1970) ("Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits.").
> *Hicks v. Miranda*, 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975).

[2] Appellants argue in the alternative that the statute of repose is unconstitutional as applied. Their argument, reduced to its essentials, is as follows. They begin with the premise that a products liability cause of action accrues at the time the injury occurs. Appellants' injuries occurred ***1374** after the Florida Supreme Court decided *Battilla* but before it decided *Pullum*. Since their injuries therefore occurred at a time when Florida decisional law held that application of the statute of repose to cases such as theirs would violate the Florida Constitution, appellants reason that nothing in Florida law prevented the accrual of their causes of action at that time. Appellants argue that an accrued cause of action is a vested property right, and that application of the statute of repose now would deprive them of that right in violation of the due process clause. [FN8]

> FN8. In one of the cases, *Lamb v. Volkswagenwerk, A.G.*, No. 86- 5258, the accident occurred before *Battilla* was decided. The appellant in *Lamb* therefore cannot make this particular argument.

We reject appellants' arguments that the *Pullum* decision should be analyzed as if it were a legislative reenactment of a repealed statute. *Battilla* did not invalidate the statute of repose; during the interim between the *Battilla* and the *Pullum* decisions, the statute continued to bar causes of action in cases factually distinguishable from *Battilla*. Appellants therefore cannot assert that the statute was repealed at the time their injuries occurred. Although at that time the supreme court had held that application of the statute to cases such as theirs violated the Florida Constitution, the supreme court was free to change its interpretation, and appellants had no vested right in the former interpretation. *See New York Cent. R.R. v. White*, 243 U.S. 188, 198, 37 S.Ct. 247, 250, 61 L.Ed. 667 (1917) ("No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit."); *see also Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n. 32, 98 S.Ct. 2620, 2638 n. 32, 57 L.Ed.2d 595 (1978) ("Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' "); *Ducharme v. Merrill-Nat'l Laboratories*, 574 F.2d 1307, 1309 (5th Cir.) ("[A] plaintiff has no vested right in any tort claim for damages under state law."), *cert. denied*, 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978). [FN9]

> FN9. Even if each appellant did possess an accrued cause of action, it would be questionable whether an accrued cause of action necessarily translates into a vested property right protected under the due process clause. *See Hammond v. United States*, 786 F.2d 8, 12 (1st Cir.1986) (reviewing Supreme Court precedent and concluding that "rights in tort

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from prosecuting the suit, and praying the appointment of a receiver who should proceed to enforce the stockholders' statutory liability to depositors. The defendants named were the conservator, the Governor, and the state treasurer, who was also a member of the board of bank control. The court issued a temporary injunction and a rule on the defendants to show cause.

*331 At this juncture the defendants in the common pleas court prayed a writ of prohibition from the state Supreme Court, addressed to the appellant and to the judge of the common pleas court, to stay the equity proceeding. The judge made return submitting himself to such order as the Supreme Court should enter. The appellant filed a demurrer and motion to dismiss, and a return denying the validity of the Act of March 9 and the regulations, and asserting that his right to proceed for the collection of stockholders' liability was a vested property right, to be enforced through a receiver, of which he could not lawfully be deprived; that the conservator was engaged in receiving and paying trust cash deposits, and the expense of conducting this branch of the business would deplete assets available for payment of depositors. The writ of prohibition was granted.

Subsequent to the judgment of the state Supreme Court certain official action occurred of which we may take judicial notice. On May 16, 1933, there was approved an Act of the General Assembly (38 St. at Large S.C. p. 489), empowering the Governor, whenever he should determine, after advising with the board of bank control, that any bank for which a conservator had been or hereafter might be appointed, was insolvent, or in imminent danger of insolvency, and liquidation was therefore required to protect depositors and creditors, to order liquidation, which should be accomplished by the conservator, who was to have all the powers and be under all the duties of a receiver, and might **142 apply to a court for instructions on question arising in liquidation. All appointments of conservators theretofore made were ratified and confirmed. On June 22 the Governor issued an order finding the Central Union Bank insolvent, or in imminent danger of insolvency, reciting that he had consulted with the board of bank control and had found that the overhead expense of the bank exceeded its net income, and directing its liquidation.

*332 [2][3] The appellant says the Act of March 9 arbitrarily deprives him of a remedy for the enforcement of stockholders' liability, which remedy was his property, and was taken from him without due process. But although a vested cause of action is property and is protected from arbitrary interference (Pritchard v. Norton, 106 U.S. 124, 132, 1 S.Ct. 102, 27 L.Ed. 104), the appellant has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure. Iowa Central Ry. Co. v. Iowa, 160 U.S. 389, 393, 16 S.Ct. 344, 40 L.Ed. 467; Backus v. Fort St. Union Depot Co., 169 U.S. 557, 571, 18 S.Ct. 445, 42 L.Ed. 42 S.Ct. 214, 66 L.Ed. 258 U.S. 142, 147, 42 S.Ct. 214, 66 L.Ed. 514; Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 158, 52 S.Ct. 69, 76 L.Ed. 214.

Under the Act of March 9, and the regulations, the conservator was endowed with all the functions of a receiver, one of which is the enforcement on behalf of depositors of stockholders' excess liability. If under that act and the regulations power was lacking the defect was cured by the Act of May 16. Nothing is shown to indicate that the conservator will prosecute the claim against the stockholders in a manner different from that to be pursued under the old law by a receiver or that the state courts will refuse him process to that end. The Act of March 9, the regulations, and the Act of May 16, do not purport, and, so far as we can perceive, do not operate, to deny the depositors participation in the distribution of assets, or in the benefit of the stockholders' excess liability. It is not alleged that the proceedings of the conservator will impose upon creditors of the bank greater burden or expense than would have been the case if a receiver were functioning. The substantive rights existing under the old law are preserved. In no proper sense can it be said that any property of the appellant has been taken, injured or destroyed.

*333 [4] The appellant, however, insists that after the conservator took possession, he accepted special trust deposits which were segregated and against which the depositors were allowed to draw, and in conducting this restricted business the overhead expenses of the institution exceeded its net income. So long as this condition existed, he says his position as a creditor was being jeopardized for the fund to

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do not vest until there is a final, unreviewable judgment").

We note that the Florida Supreme Court has decided that application of the statute of repose to persons in the appellants' position does not impair any vested rights cognizable under state law. *See Brackenridge v. Ametek, Inc.*, 517 So.2d 667, 12 Fla. Law Weekly 589, 590 (Fla.1987).

Appellants also apparently contend that their property rights are implicated because they relied on the *Battilla* decision when they filed their lawsuits. Underlying this argument is the notion that persons subject themselves to tortious conduct in reliance on a particular state of tort law. The timing of appellants' accidents, however, was of course purely fortuitous. We therefore conclude that appellants' due process challenge must fail.

III.

[3] Appellants in two of the cases before us argue that Florida's statute of repose violates the equal protection clause of the fourteenth amendment. [FN10] Appellants contend that the operation of the twelve-year statute of repose, Fla.Stat. § 95.031(2) (1982), together with the four-year statute of limitations, Fla.Stat. § 95.11(3)(e) (1982), creates two classes of injured persons with different legal rights. The first class includes those persons who are injured less than eight years after delivery of the product to its first purchaser and who therefore have the full four years afforded by the statute of limitations to bring their actions. The second class includes those persons who are injured more than eight years but less than twelve years after the product is delivered to its first purchaser. Owing to the operation of the twelve-year statute of repose, persons in the second class have ***1375** less than the full four years afforded those in the first class to file suit. Appellants argue that the statute of repose violates the equal protection clause of the fourteenth amendment because there is no rational basis for this disparate treatment.

FN10. Appellants in one of the two cases, *Verhine v. Volkswagenwerk, A.G.*, No. 86-3138, concede in their reply brief that their case does not present an equal protection challenge.

The Florida Supreme Court rejected this equal protection argument in *Pullum*, 476 So.2d at 660. The plaintiff in *Pullum* appealed that decision to the United States Supreme Court. The Supreme Court dismissed the appeal for want of a substantial federal question. *Pullum v. Cincinnati, Inc.*, 475 U.S. 1114, 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986) (see 54 U.S.L.W. 3654 for summary of questions presented on appeal). The Court therefore disposed of *Pullum* on the merits, rejecting the equal protection arguments raised in that case. [FN11] We are bound by the Supreme Court's disposition of *Pullum* and accordingly reject appellants' contention that Florida's statute of repose violates the fourteenth amendment's equal protection clause.

FN11. *See supra* note 7.

IV.

For the foregoing reasons, the district court's grant of summary judgment in each of these four consolidated cases is

AFFIRMED.

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United States Court of Appeals,
Ninth Circuit.

In re CONSOLIDATED UNITED STATES ATMOSPHERIC TESTING LITIGATION, Christina KONIZESKI, et al., Plaintiffs-Appellants,
v.
LIVERMORE LABS, et al., Defendants-Appellees.
Alice P. BROUDY, et al., Plaintiffs-Appellants,
v.
UNITED STATES of America, Defendant-Appellee.

Nos. 85-2842, 86-5553.

Argued and Submitted Feb. 13, 1987.
Decided June 22, 1987.

Actions were brought against United States and federal contractors, asserting claims arising out of alleged exposure to nuclear radiation resulting from bombing of Hiroshima and atmospheric testing of nuclear weapons. Government moved to be substituted for contractors as sole defendant and for summary judgment. The United States District Court for the Northern District of California, William W Schwarzer, J., 616 F.Supp. 759, granted motions, and appeal was taken. In a similar action brought by widow of former serviceman, the United States District Court for the Central District of California, Laughlin E. Waters, J., granted summary judgment for Government, and appeal was taken. Upon consolidation of appeals, the Court of Appeals, J. Blaine Anderson, Circuit Judge, held that: (1) statute providing that actions against United States under Tort Claims Act is exclusive remedy for claims against contractors for radiation injuries resulting from atomic weapons testing programs was constitutional, and (2) claims were barred by discretionary function exception to Tort Claims Act.

Judgments affirmed.

West Headnotes

[1] Eminent Domain ⚖2(1)
148k2(1) Most Cited Cases

Two-step analysis is used to determine whether "taking" has occurred: first, is subject matter "property" within meaning of Fifth Amendment; second, if so, has there been taking of that property. U.S.C.A. Const.Amend. 5.

[2] Eminent Domain ⚖2(1.1)
148k2(1.1) Most Cited Cases

Statute providing that action against United States under Tort Claims Act is exclusive remedy for claims against contractor for radiation injuries resulting from atomic weapons testing program did not constitute taking under Fifth Amendment as applied to pending actions. Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, § 1631(b), 42 U.S.C.A. § 2212(b); U.S.C.A. Const.Amend. 5.

[3] Constitutional Law ⚖305(1)
92k305(1) Most Cited Cases

Congress must comply with due process when abolishing or substantially modifying common-law cause of action. U.S.C.A. Const.Amend. 5.

[4] Constitutional Law ⚖253(4)
92k253(4) Most Cited Cases

Rational basis, and not strict scrutiny standard of due process review, applied to constitutional challenge to retroactive application of federal statute substituting United States as defendant in all suits against private contractors to Government for radiation injuries arising out of any United States atomic weapons testing programs, and making Federal Tort Claims Act sole remedy for those injuries; Congress acted within its powers under war powers and commerce clauses of the Constitution, and there was no fundamental right or suspect classification involved. Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, § 1631(b), 42 U.S.C.A. § 2212(b); U.S.C.A. Const. Art. 1, § 8, cl. 3.

[5] Constitutional Law ⚖309(1)
92k309(1) Most Cited Cases

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Federal statute substituting United States as defendant in all suits against private contractors to Government for radiation injuries arising from any of the United States atomic weapons testing programs, and making Federal Tort Claims Act sole remedy for those injuries, was not wholly arbitrary and irrational in purpose, and thus did not violate due process; it was reasonably related to legitimate congressional purpose. Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, § 1631(b), 42 U.S.C.A. § 2212(b).

[6] Constitutional Law ⚷57
92k57 Most Cited Cases

Statute providing that action against United States under Tort Claims Act is exclusive remedy for claims against contractor for radiation injuries resulting from atomic weapons testing programs, as applied to pending actions, did not violate Article III under principle prohibiting congressional attempts to alter rule of decision in pending cases in favor of Government, where statute did not withdraw jurisdiction from federal courts, did not deprive party of benefit of judgment, and did not mandate outcome of particular case. Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, § 1631(b), 42 U.S.C.A. § 2212(b).

[7] Jury ⚷12(1.2)
230k12(1.2) Most Cited Cases

There is no right to jury trial against sovereign under Seventh Amendment. U.S.C.A. Const.Amend. 7.

[8] United States ⚷125(7)
393k125(7) Most Cited Cases

When United States abolishes cause of action and then sets up separate administrative remedy against itself, Seventh Amendment does not require that it must also provide jury trial. U.S.C.A. Const.Amend. 7.

[9] Jury ⚷31.2(1)
230k31.2(1) Most Cited Cases
(Formerly 230k31(3))

Statute providing that action against United States under Tort Claims Act is exclusive remedy for claims against contractors for radiation injuries resulting from atomic weapons testing programs did not constitute unconstitutional deprivation of right to jury trial. Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, § 1631, 42 U.S.C.A. § 2212(b); U.S.C.A. Const.Amend. 7.

[10] United States ⚷78(12)
393k78(12) Most Cited Cases

Discretionary function exception to Tort Claims Act barred claims for injuries caused by exposure to radiation from nuclear weapons based on allegations of negligent failure to take adequate safety precautions at test sites. 28 U.S.C.A. § 2680(a).

[11] United States ⚷78(12)
393k78(12) Most Cited Cases

Discretionary function exception to Tort Claims Act barred claims against Government for failing to warn participants in atomic weapons testing programs of dangers to which they would be exposed and for failing to monitor participants for health problems resulting from radiation exposure. 28 U.S.C.A. § 2680(a).

[12] United States ⚷127(2)
393k127(2) Most Cited Cases

Medical malpractice claim against Government by widow of former serviceman who had been ordered to participate in military exercises near two atmospheric nuclear test sites, was barred for failure to state sufficient claim to appropriate federal agency, where widow's administrative claim was filed with Department of Energy, but Department of Defense, which controlled medical facility where her husband received treatment, received no notice. 28 U.S.C.A. § 2675(a).

***983** Alan W. Sparer, San Francisco, Cal., and Ronald G. Bakal, Beverly Hills, Cal., for plaintiffs-appellants.

Marc Johnston, Washington, D.C., for defendants-appellees.

Appeal from the United States District Court for the Northern and Central Districts of California.

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Before ANDERSON, ALARCON and HALL, Circuit Judges.

J. BLAINE ANDERSON, Circuit Judge:

These consolidated appeals arise out of judgments entered by the United States District Court for the Northern District of ***984** California, [FN1] in actions for personal injury and wrongful death brought by or on behalf of military and civilian participants in the United States atmospheric nuclear weapons testing program. Appellees are the United States Government and private contractors who participated in the nuclear weapons testing program.

> FN1. Consolidated with these appeals is *Broudy v. United States,* No. 86-5553, a case from the Central District of California. The issues unique to *Broudy* will be dealt with in a separate section.

In the district court, the government moved pursuant to 42 U.S.C. § 2212, to be substituted for the contractors as defendants in these actions. The contractors joined in that motion. The government then moved to dismiss or for summary judgment in all actions based on various exceptions to its liability under the Federal Tort Claims Act (the "FTCA"), 28 U.S.C. § 2680.

The district court granted the motion to substitute the government as defendant in place of the contractors, specifically finding 42 U.S.C. § 2212 to be constitutional. It then granted the government's motion for summary judgment pursuant to the FTCA under the discretionary function exception, 28 U.S.C. § 2680(a), the foreign country exception, 28 U.S.C. § 2680(k), the combatant activities exception, 28 U.S.C. § 2680(j), and the *Feres* doctrine, *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). We affirm.

The district court, The Honorable William W. Schwarzer presiding, in its Memorandum Opinion and Order, published as *In re Consolidated U.S. Atmospheric Testing Litigation,* 616 F.Supp. 759 (N.D.Cal.1985), accurately summarized the facts, analyzed the contentions of the parties, and properly applied the law to this case. The opinion is well reasoned, and we adopt, with appropriate deletions and additions, the following portions of it as the opinion of this court. [FN2]

> FN2. Brackets together, in this manner [ ], without enclosing material are used to indicate deletions from the opinion of the district court; brackets enclosing materials are, unless otherwise indicated, used to denote insertions or additions by this court. Footnotes in the district court opinion have been renumbered sequentially. Where appropriate, we have added and adopted portions of First Circuit's opinion in *Hammond v. United States,* 786 F.2d 8 (1st Cir.1986). *Hammond* examined 42 U.S.C. § 2212 and held that substituting the United States as defendant in all suits against private contractors for radiation injuries arising from any of the United States atomic weapons testing programs, was constitutional.

I. FACTS

"The atmospheric nuclear weapons tests giving rise to these actions took place between the closing days of World War II and the adoption of the Partial Nuclear Test Ban Treaty in 1963. Even before these tests, the United States Government had enlisted the scientific resources of industrial firms and universities in the program to develop an atomic bomb. The Manhattan Project, which ultimately produced the bomb detonated over Hiroshima, was an unprecedented joint effort by the government, universities and industry.

"Immediately following the end of World War II, the military services proposed a series of tests to determine the effects of atomic weapons. On orders of the President, a joint military task force was established to conduct the first of these tests, Operation Crossroads, at Bikini Atoll. The task force, commanded by an admiral, comprised 42,000 military and civilian personnel and numerous ships and aircraft.

"In 1946, Congress adopted the Atomic Energy Act, (the 'AEA'), establishing a national policy for the development and control of nuclear weapons. Under the AEA, authority was transferred from the military to the Atomic Energy Commission, (the 'AEC'), which was to operate a 'program of federally conducted research and development' with the 'paramount objective of assuring the common defense and security'. AEA, P.L. No. 585, ch. 724, 60 Stat. 755, §§ 1(a), (b)(3) (current version at 42 U.S.C. § 2011 *et seq.*). To this end the AEC was authorized to conduct experiments, undertake research, and develop the military applications of

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atomic energy either in its own facilities or pursuant to arrangements with public or private institutions. ***985** *Id.* at § 4(c)(2). All right, title and interest in fissionable material was vested in it. *Id.* at §§ 4(b), 5(a)(2). The production of atomic bombs and bomb parts was authorized, but 'only to the extent that the express consent and direction of the President of the United States has been obtained....' *Id.* at § 6(a)(2). In addition, Congressional oversight of the AEC's activities was established by creation of the Joint Committee on Atomic Energy. *Id.* at § 15(a). The AEA thus established a program of pervasive '[g]overnmental control of the production, ownership, and use of fissionable material', including the development and testing of nuclear weapons. *Id.* at § 1(b)(4).

"When the AEC took over the nuclear weapons program from the military, it acquired a complex of plants, laboratories and other facilities staffed by some 2,000 military personnel, 4,000 civilian government employees and 38,000 employees of contractors. The integral role of contractors, which started in the Manhattan Project, continued under the AEC. The University of California, Sandia Corporation and Reynolds Electrical and Engineering Co., Inc., were among those contractors.

"Escalating international tensions, marked by the Berlin blockade in 1948, the confrontation with the Soviet Union over Czechoslovakia, Greece and Iran, the detonation by the Soviet Union of an atomic device in 1949, and the Korean War led the government to assign the highest priority to the development and production of nuclear weapons. Weapons tests were an essential part of that effort.

"These tests were regarded as critical to national security. Presidents Eisenhower and Kennedy and the Chairman of the AEC made public statements stressing the vital importance of tests to the development of modern weapons needed to assure national security in the face of the threat posed by the Soviet Union. Indeed, atmospheric nuclear weapons testing was a major issue in United States-Soviet relations during this period. Beginning in 1955, testing was a topic in the disarmament negotiations. In 1958, a moratorium on tests was agreed on and was observed until the Soviet Union resumed atmospheric testing in 1961. The United States followed suit to counteract qualitative improvements in Soviet weapons. In 1963, atmospheric nuclear tests were finally banned by the Partial Nuclear Test Ban Treaty.

"From 1947 through 1963, the AEC in conjunction with the Department of Defense conducted 21 test series, some of which are the subject of these actions. These tests had a number of objectives, including developing weapons, planning their tactical and strategic use, determining how targets could be given protection, assessing the vulnerability of troops to the effects of detonations, and improving radiological safety. A particular objective of the tests was to determine the effects of nuclear explosions on the equipment, clothing, weapons and fighting capability of military personnel. The tests were coordinated with studies conducted at laboratories operated by contractors.

"Every phase of the preparation and implementation of each nuclear weapons test series was closely controlled and supervised by government officials. Initially, proposals for tests had to be approved at various levels by the responsible divisions of the AEC and the Department of Defense. Before any test took place, a detailed Operation Plan had to be reviewed and approved by the AEC, by the National Security Council, and finally by the President.

"Tests at the Pacific Proving Ground were under the control of a joint task force commander, appointed by the AEC and the Joint Chiefs of Staff. At the Nevada Test Site, tests were under the control of a Test Manager designated by the AEC. Tests were conducted in conformity with the approved Operation Plan, which incorporated radiation exposure limits established by the AEC applicable to both military and civilian personnel. Various military and civilian committees and medical and scientific experts took part in making the decisions which were incorporated into the Operation Plan. Designated units in each test organization ***986** were assigned responsibility for radiological safety.

"Nuclear weapons testing was known to be an inherently dangerous activity. Aside from the recognized radiation hazards, the risks included the dangers associated with any explosive devices, the effects of unpredictable meteorological conditions, and the risks of injury inherent in any large-scale military operation.

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"The need to balance risks against test objectives was particularly acute in tests involving troop maneuvers. These tests were intended to expose troops to battlefield conditions to test psychological reactions and protective measures. The location and movement of those troops was a subject of controversy between the AEC and military commanders. It was recognized that the desire of the military to expose troops to realistic combat conditions could interfere with the AEC's weapons testing objectives. The arrangements ultimately incorporated in the Operation Plans represented an accommodation of these divergent requirements by the AEC and military officials. In later tests, involving large scale military maneuvers under battlefield conditions, these considerations led to delegation of responsibility for radiological and physical safety of troops to the military commanders.

II. DISCUSSION

A. Motions to Substitute--42 U.S.C. § 2212

1. The Provisions and Effect of § 2212

"In October 1984, Congress adopted § 1631 of the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, (the 'Act'), codified at 42 U.S.C. § 2212. It provides that an action against the United States shall be the exclusive remedy for injuries 'due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States', § 2212(a)(1), and requires any action against these contractors to be maintained solely against the United States pursuant to the FTCA. The Act applies to alleged acts or omissions of contractors 'without regard to when the act or omission occurred.' § 2212(a)(2).

> The Act provides, in pertinent part, that: A contractor against whom a civil action or proceeding described in subsection (a) ... is brought shall promptly deliver all processes served upon that contractor to the Attorney General of the United States. *Upon certification by the Attorney General* that the suit against the contractor is within the provisions of subsection (a) ..., a civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and *the proceedings shall be deemed a tort action brought against the United States....* For purposes of removal, the certification by the Attorney General under this sub-section establishes contractor status conclusively.
> 42 U.S.C. § 2212(b) (emphasis added).

"A 'contractor' is defined as a 'contractor or cost reimbursement subcontractor of any tier participating in the conduct of the United States atomic weapons testing program....' § 2212(d). Authority to certify pursuant to § 2212(b) that the action against the contractor 'is based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States' rests with the Attorney General. § 2212(a)(1).

"In its statement supporting the Act, the Department of Justice explained the unique situation at which it is aimed:

> [The Act] would clarify the status of certain contractors operating government-owned facilities relating to atomic energy national defense activities in litigation arising from those activities. Many actions recently have been brought against these contractors who have invaluably assisted the Government of the United States in carrying out its nuclear weapons testing program. The actions allege exposure to radiation and consequent***987** injury or death as a result of the United States atomic weapons testing.
> The provisions of the Federal Tort Claims Act determine the rights of individuals and corporate litigants to seek monetary recovery from the United States for alleged torts. Typically, the United States cannot be sued for and is not liable for the acts of independent contractors providing goods or services to the United States. However, contractors who operate nuclear weapons testing facilities for the Department of Energy or its predecessor agencies and who, as a result, have participated in the atomic weapons testing program are unique. They are not typical contract suppliers of commercially provided goods or services to the government. These contractors were and are utilized by the United States as instruments of national policy to assist in an entirely governmental task--nuclear weapons

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research, development and testing. Further, the government reimburses these contractors for any liability arising out of their assistance in the weapons program, including the costs of litigation. The use of the contractors to implement national policy and perform a uniquely governmental function cannot be disputed. Therefore, it should be perfectly clear that, for the purposes of civil litigation arising from atomic weapons testing, the proper party defendant is the government. Only the government sets policy, makes decisions, and controls activities and circumstances regarding atomic weapons testing.

H.R.Rep. No. 124, Part I, 98th Cong., 1st Sess. 34-35 (1983).

"The report of the Senate Committee on Armed Services elaborates the Act's underlying rationale:

Each nuclear test that has been made since 1946 has been made under the statutory direction of Congress. Each nuclear test has been approved, before the fact, by the President of the United States. Each nuclear test has been under the direct supervision of government officials. Each nuclear test has been participated in by hundreds, and in some cases thousands, of government officials and military and civilian personnel.

The committee recognizes, as has the Congress, that the military applications of atomic energy could not proceed either technically or economically without the participation of organizations that possess both scientific management skills and a high degree of scientific and technical expertise. Several such organizations were placed under contract almost at the inception of the nuclear weapons program in 1942 and have performed in an outstanding manner in the national interest for more than three decades. These organizations have provided scientific, engineering and technical support for nuclear tests carried out by the government and for the government in the exercise of a governmental function, i.e., providing for the national defense. These organizations did not order the tests to be performed; they did not set the times or places for the tests; nor did they direct military or civilian government personnel to participate in them.

S.Rep. No. 500, 98th Cong., 2d Sess. 376 (1984).

"The Senate Report described the effect of the legislation as follows:

[The Act] would cause all litigation involving the atomic weapons testing program, including suits now filed against contractors, to be maintained against the United States under the substantive and procedural requirements of the FTCA.

Id. at 375. By its terms, however, the Act is specifically limited to claims

for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States.

42 U.S.C. § 2212(a)(1).

"The instant actions [ ] qualify under the Act. The Attorney General [ ] made the statutory certification. The [appellees'] motions to substitute the United States as the sole defendant in these actions must be ***988** granted unless § 2212 is found to be invalid."

[Appellants raise several issues concerning the constitutionality of 42 U.S.C. § 2212: (1) whether § 2212 constitutes a taking without just compensation in violation of the fifth amendment; (2) whether § 2212 violates the procedural and substantive due process requirements of the fifth and fourteenth amendments; (3) whether § 2212 violates the principle of separation of powers; and (4) whether § 2212 deprives appellants of their right to a jury trial as guaranteed by the seventh amendment.]

2. Constitutionality of § 2212

a. Fifth Amendment--Taking

"The effect of § 2212 is to substitute the remedy against the government under the FTCA for any cause of action against the contractors arising under state law. In adopting this legislation, Congress broke no new ground. In a number of other acts, Congress substituted the FTCA remedy against the government for remedies available against private parties, and these acts have been uniformly upheld. *See Ducharme v. Merill-National [sic] Laboratories,* 574 F.2d 1307 (5th Cir.), *cert. denied,* 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978) (Swine Flu Act); *Carr v. United States,* 422 F.2d 1007 (4th Cir.1970) (Federal Drivers Act). *See also* 42 U.S.C. § 233 (Public Health Service medical personnel); 38 U.S.C. § 4116 (Veterans Administration medical personnel); 22 U.S.C. §

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817(a) (State Department medical personnel); 10 U.S.C. § 1089(a) (Armed Forces medical personnel).

"[Appellants] contend that the Act [ ] results in a compensable taking. In a classic example of understatement, the Supreme Court has said that '[t]he question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty.' *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 123, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978)."

[1] [A two-step analysis is used to determine whether a "taking" has occurred. First, is the subject matter (i.e., a pending cause of action) "property" within the meaning of the fifth amendment? Second, if so, has there been a taking of that property?]

"A cause of action has been described as a 'species of property protected by the Fourteenth Amendment's Due Process Clause.' *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982) (quoting *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950)). *See also In re Aircrash in Bali, Indonesia on April 22, 1974,* 684 F.2d 1301, 1312 (9th Cir.1982) (dictum). [FN3] [ ] It is helpful at the outset to recognize that ' "[a] claim of *deprivation* of property without due process of law cannot be blended as one and the same with the claim that property has been *taken* for public use without just compensation." ' *Kizas v. Webster,* 707 F.2d 524, 539 (D.C.Cir.1983), *cert. denied,* 464 U.S. 1042, 104 S.Ct. 709, 79 L.Ed.2d 173 (1984) (quoting J. Sackman, *Nichols' The Law of Eminent Domain* § 4.3 at 187 rev. 3d ed. cum. supp. 1982) (emphasis in original). [ ]"

> FN3. In *Bali,* the court of appeals in dictum postulated that wrongful death claims are property within the meaning of the just compensation clause. The court, however, reserved the question whether the Warsaw Convention, limiting the amount recoverable in a wrongful death action, constituted a compensable taking.

[In *Ducharme v. Merrill-National Laboratories,* 574 F.2d 1307 (5th Cir.), *cert. denied,* 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978), the Fifth Circuit examined the constitutionality of the Swine Flu Act, 42 U.S.C. § 247. Like § 2212, this statute provides for the substitution of the United States as the sole defendant. That court found it well settled that "a plaintiff has no vested right in any tort claim for damages under state law." *Id.* at 1309 (citing *Keller v. Dravo Corporation,* 441 F.2d 1239 (5th Cir.1971), *cert. denied,* 404 U.S. 1017, 92 S.Ct. 679, 30 L.Ed.2d 665 (1972)). *See also Carr v. United States,* ***989** 422 F.2d 1007 (4th Cir.1970). Furthermore, in *Hammond,* the First Circuit found:

> "No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *New York Central R.R. Co. v. White,* 243 U.S. 188, 198, 37 S.Ct. 247, 250, 61 L.Ed. 667 (1917); *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 88 n. 32, 98 S.Ct. 2620, 2638 n. 32, 57 L.Ed.2d 595 (1978); *Second Employers' Liability Cases,* 223 U.S. 1, 50, 32 S.Ct. 169, 175, 56 L.Ed. 327 (1912); *Ducharme v. Merrill-National Laboratories,* 574 F.2d 1307, 1309 (5th Cir.), *cert. denied,* 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978). This is true after suit has been filed and continues to be true until a final unreviewable judgment is obtained.
> *Hammond,* 786 F.2d at 12.]

"While a cause of action is considered to be a species of property, as heretofore discussed, those words do not translate into a cognizable taking claim. *See In re Aircrash in Bali, Indonesia on April 22, 1974,* 684 F.2d 1301, 1312 (9th Cir.1982) . Whether such a claim exists is subject to an 'essentially ad hoc, factual inquir[y].' *Penn Central,* 438 U.S. at 124, 98 S.Ct. at 2659. Both the nature of the property right and of the governmental invasion must be considered [to determine whether a taking has occurred.]

"Unlike contract claims, the tort claims asserted here lack 'investment-backed expectations.' " *Penn Central,* 438 at 124, 98 S.Ct. at 2659. *Cf. Lynch v. United States,* 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934). Not only are they contingent by their nature, but they also arise in a field in which the law remains to be developed. *See, e.g., Molsbergen v. United States,* 757 F.2d 1016, 1020-25 (9th Cir.1985).

[2] "The governmental action, moreover, does not abrogate the claims but subjects them to the tort claims procedure which the plaintiffs could

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reasonably expect might be applied. This is true, notwithstanding the naming of contractors as defendants, because the claims arose out of activities conducted by the government and the contractors were named [by appellants] for the obvious purpose of escaping the well-known limits on the government's waiver of sovereign immunity. For these reasons, the Court concludes that [appellants] do not have a taking claim."

b. Fifth Amendment--Due Process

(i) Procedural Due Process

[As indicated above, a cause of action has been recognized as a species of property protected by the fifth amendment's due process clause.]

"To say that a cause of action is a species of protected property, however, is not to answer the question of what process is due. A cause of action is property of a substantially different nature than real or personal property or vested intangible rights. It is inchoate and affords no definite or enforceable property right until reduced to final judgment. *Cf. Armstrong v. United States,* 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960) (state law materialman's lien entitling supplier to resort to specific property to satisfy claims is a property right compensable under fifth amendment); *Lynch v. United States,* 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934) (contract rights are property rights compensable under fifth amendment).

"A cause of action does not afford the holder the traditional bundle of rights associated with the ownership of property. *Cf. United States v. Security Industrial Bank,* 459 U.S. 70, 75-76, 103 S.Ct. 407, 410-11, 74 L.Ed.2d 235 (1982). Instead, it represents a right to assert a claim for compensation or some other form of judicial relief. Its value is contingent on successful prosecution to judgment. Thus, to the extent it is entitled to due process protection, that protection focuses on assuring access to fair procedures for its prosecution. The notion of due process relevant to causes of action is that 'deprivation ... by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' *Mullane v. Central Hanover Bank & Trust Co.,* ***990** 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950)." [On notice of hearing, appellants were given the opportunity to present their claims before the district court. The requirements of procedural due process were thereby satisfied. The plaintiffs' claims were simply unavailing under the procedure pursued by them. Procedural due process, however, does not guarantee that a party will prevail. *Logan,* 455 U.S. at 432, 102 S.Ct. at 1155-56. To the extent that § 2212 may have abrogated appellants' causes of action by substituting the parties and remedies, this court's analysis will focus on substantive due process.]

(ii) Substantive Due Process

[We adopt the *Hammond* court's cogent due process analysis of § 2212 with the following deletions and additions:

[3] "[ ] Congress must comply with due process when abolishing or substantially modifying a common law cause of action. In that sense the right to sue is a 'species of property.' *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982); *see Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. at 82-94, 98 S.Ct. at 2635-41. But, an act of Congress comes to us clothed with a presumption of constitutionality, and the burden is on the plaintiff to show that it violates due process. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976); *McGowan v. Maryland,* 366 U.S. 420, 425- 26, 81 S.Ct. 1101, 1104-05, 6 L.Ed.2d 393 (1961).

[4] "Because Congress has acted within its powers under the war powers and commerce clauses of the Constitution and there is no fundamental right or suspect classification involved here, we find that the rational basis standard of due process review applies.

[5] "In applying the rational basis test to this case we follow the guidance of the Supreme Court in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 728-34, 104 S.Ct. 2709, 2717-20, 81 L.Ed.2d 601 (1984); *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. at 82-94, 98 S.Ct. at 2635-41; and *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. at 15-20, 96

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which he must look for payment was being depleted. But he has not averred that the conservator's activities will deplete the bank's resources to such extent that depositors cannot be paid in full; and whatever injury might have been inflicted by a continuation of the business has now been abated for the future by the Governor's order of June 22 directing liquidation. No present advantage could accrue to the appellant from the ousting of the conservator and the appointment of a receiver, who could only liquidate by the methods obligatory on the conservator. In this aspect the case is now moot.

The judgment is affirmed.

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S.Ct. at 2892-94. We find that [appellants have] not met [their] burden of showing that § 2212 is wholly arbitrary and irrational in purpose and effect, *i.e.*, not reasonably related to a legitimate congressional purpose. *See United States R.R. Retirement Bd. v. Fritz,* 449 U.S. 166, 174-77, 101 S.Ct. 453, 459-60, 66 L.Ed.2d 368 (1980); *Vance v. Bradley,* 440 U.S. 93, 97-98, 99 S.Ct. 939, 942-43, 59 L.Ed.2d [sic] (1979).

"The reasons asserted by the United States for Congress' enactment of § 2212 are neither arbitrary nor irrational, and can be stated simply. The United States has operated a nuclear weapons testing program for over 40 years. It initiates, designs and authorizes all nuclear tests under the program but has found it necessary to obtain the assistance of various private entities including universities and private companies for many aspects of the testing. From the late 1940's to the early 1960's a series of above-ground tests of atomic weapons were conducted with military personnel, civilian government employees and private employees of government contractors taking part. [ ] There is no dispute that these tests were designed and supervised by government officials and were individually authorized by the President. A significant number of those present at the above-ground tests have instituted suits against the government contractors involved in them for injuries caused by radiation exposure. The contractors are generally not threatened with financial liability by these suits since most of their contracts with the government included a clause making the United States indemnitor for all tort liability, including costs of litigation, arising from their participation in the testing programs. S.Rep. No. 500, 98th Cong., 2d Sess. 374-76 (1984). Congress has nevertheless perceived these lawsuits to constitute a threat to the continued participation of the private contractors in the nuclear weapons program because the contractors fear the bad publicity generated by the suits. The contractors testified before ***991** Congress that the lawsuits have led the public to blame them for the formulation, implementation and execution of the atomic weapons testing policy of the United States. H.R.Rep. No. 124, Part 4, 98th Cong., 1st Sess. 2-3 (1983). They also testified that the lawsuits result in a diversion of human and financial resources away from research and testing activities and into litigation and, therefore, seriously disrupt their participation in the program. *See Litigation Relating to Atomic Testing, 1983: Hearings on H.R. 2797 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary,* 98th Cong., 1st Sess. 46-49 (1983). [Appellants assert] that the mere public embarrassment of the private contractors is not a rational or legitimate reason for relieving them of liability. We disagree. Even if we question the extent and effect of this public embarrassment it is not for us to reevaluate it. It is a plausible reason for Congress' action. *United States R.R. Retirement Bd. v. Fritz,* 449 U.S. at 179, 101 S.Ct. at 461.

"Nor has Congress chosen a wholly arbitrary or irrational means to its legitimate end. [Appellants] claim[ ] that Congress created only an illusory substitute remedy in § 2212, that [ ] probably will not [ ] compensate [ ] [them] because under the terms of § 2212(a)(2) the 'limitations and exceptions' applicable to the remedies provided by § 2212 are preserved. [ ]"]

"[Appellants] argue, however, that the Act must be viewed not simply as a substitution of remedies, but rather as an abrogation of existing claims. By substituting the FTCA remedy, the claims become subject to dispositive defenses available to the government, including the *Feres* doctrine and the discretionary function exception."

["Nevertheless, although Congress could have relieved the independent contractors of their burden of defending suits for radiation injuries and still provided those injured by radiation a more generous substitute compensation scheme, we cannot say that Congress' choice of means was without any rational basis. The atomic weapons testing program has been an important, some say vital, government function from its inception. Independent contractors were used only to aid the government to carry out its program. When the program began Congress could have mandated that all tort claims arising from it be litigated through the FTCA. Under the statute as originally enacted, [appellants] had the right to sue contractors without restriction, but it was the government who paid the judgment under its indemnitor agreement with the contractor. [Appellants] had the best of both possible worlds, a right to sue free of any FTCA limitations with the government guaranteeing payment of the judgment. It was neither arbitrary nor irrational for Congress to change the law so as to place putative [appellants]

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in the same position as any other party suing the United States in tort. *See Hearings, supra,* at 46-48; S.Rep. No. 500, *supra,* at 377. Moreover, there may be government compensation available to many of those injured by radiation, including [appellants] here, under veterans benefits legislation, 38 U.S.C. §§ 301- 363, §§ 401-423, or the FECA." *Hammond,* 786 F.2d at 14.]

[Finally, appellants argue that § 2212 cannot be applied to them retroactively. However, "[t]he retroactive application of a federal statute ... is not forbidden under the constitution so long as due process requirements are met." *Matter of Reynolds,* 726 F.2d 1420, 1422 (9th Cir.1984) (citing C.D. Sands, *Statutes and Statutory Construction,* § 41-03 (4th ed. 1973)) (footnote omitted). As a general rule, a judge should apply the law in effect on the date of a decision. *Matter of Reynolds,* 726 F.2d at 1422; *United States v. The Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801). To comport with the requirements of due process, the retroactive application of a statute must be supported by a legitimate legislative purpose furthered by a rational means. *Pension Benefit Guaranty Corp.,* 467 U.S. at 729, 104 S.Ct. at 2717-18. "[T]he burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Id.* (quoting *Turner Elkhorn Mining Co.,* 428 ***992**U.S. at 15, 96 S.Ct. at 2892). As we discussed above, appellants have not met this burden].

c. Separation of Powers Doctrine

[6] "Congressional attempts to alter the rule of decision in pending cases in favor of the government have been condemned as a violation of Article III. *See United States v. Klein,* 80 U.S. (13 Wall.) 128, 146-47, 20 L.Ed. 519 (1871); *United States v. Sioux Nation of Indians,* 448 U.S. 371, 404, 100 S.Ct. 2716, 2735, 65 L.Ed.2d 844 (1980). The instant cases, however, do not fall within that prohibition. Section 2212 does not withdraw jurisdiction from the federal courts, does not deprive a party of the benefit of a judgment, and does not mandate the outcome of particular cases. It substitutes remedies but it leaves the application of the rules of law, including any defenses, for judicial determination. *See Dames & Moore v. Regan,* 453 U.S. 654, 685, 101 S.Ct. 2972, 2989, 69 L.Ed.2d 918 (1981).

> [T]he better reading of *Klein* is quite narrow and construes the case as holding only that Congress violates the separation of powers when it presumes to dictate 'how the Court should decide an issue of fact (under threat of loss of jurisdiction)' and purports to 'bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds.'

United States v. Brainer, 691 F.2d 691, 695 (4th Cir.1982) (quoting P. Bator, D. Shapiro, P. Mishkin & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 316 n. 4 (2d ed. 1973)). Since the Act neither directs the court to make a certain finding of fact nor requires them to apply an unconstitutional law, the separation of powers doctrine is not offended. *See also Battaglia [v. General Motors Corporation],* 169 F.2d [254, 262 (2d Cir.1948)]."

d. Seventh Amendment--Right to Jury

[7][8][9] [Appellants argue that they were unconstitutionally deprived of their right to trial by jury because § 2212 makes an FTCA action against the United States the exclusive remedy for damages. [FN4] The court in *Hammond* held:

> FN4. The FTCA specifically provides that in tort actions against the United States, trials shall be to the court without a jury. 28 U.S.C. § 2402.

> There is no right to a jury trial against the sovereign under the seventh amendment, *Glidden Co. v. Zdanok,* 370 U.S. 530, 572, 82 S.Ct. 1459, 1484, 8 L.Ed.2d 671 (1962). If the United States can abolish the right to a cause of action altogether it can also abolish the right to a jury trial that is part of it. When the United States abolishes a cause of action and then sets up a separate administrative remedy against itself, as it has [with § 2212], the seventh amendment does not require that it must also provide a jury trial.

Hammond, 786 F.2d at 15. We agree and find that appellants were not unconstitutionally deprived of their right to a jury trial.]

"Section 2212 is therefore a valid exercise of Congressional power. The United States must be substituted as the defendant in place of the contractors, and the contractors dismissed from these actions."

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B. Motion for Summary Judgment

"Under § 2212, these actions must be treated as having been brought against the United States under the FTCA. The FTCA is a limited waiver of sovereign immunity subject to certain statutory and judicial exceptions. The government [ ] moved [and the district court granted, a motion] for summary judgment on the ground that each [appellant's] claims are barred by one or more of those exceptions.

[1]. The Discretionary Function Exception

"The FTCA excludes any claim 'based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal ***993** agency or an employee of the Government, whether or not the discretion involved be abused.' 28 U.S.C. § 2680(a). The government raises the discretionary function exception as a defense to all claims raised by all [appellants].

[a]. Claims arising out of acts or omissions in connection with the detonation of nuclear weapons.

[10] "[Appellants'] first category of claims is based on injuries caused by their exposure to radiation from nuclear weapons. They may be summed up as resting on alleged negligent failures to take adequate safety precautions at the test sites.

"[Appellants] acknowledge that the decision to conduct the tests is covered by the discretionary function. They contend, however, that the Court must examine each challenged act or omission to determine whether, in the light of the policies underlying the exception, it is of the type that Congress intended to protect. According to [appellants], many of those acts involved only the exercise of what they refer to as 'scientific or professional judgment' in implementing an overall decision to conduct the atomic weapons testing program and hence are not covered by § 2680(a). *See e.g., Driscoll v. United States,* 525 F.2d 136 (9th Cir.1975). In addition, they argue that the government can be held liable for failing to enforce its own safety requirements.

"The fountainhead of jurisprudence relating to the discretionary function exception is *Dalehite v. United States,* 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). The continuing vitality of that decision was recently affirmed in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense ('Varig'),* 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984). *Dalehite* involved claims for damages against the United States arising out of a disastrous explosion of ammonium nitrate fertilizer, which had been produced and distributed under the direction of the United States for export to areas occupied by the Allied Armed Forces after World War II. Numerous acts of the government were charged as negligent: the cabinet-level decision to institute the fertilizer export program, the failure to experiment with the fertilizer to determine the possibility of explosion, the drafting of the basic plan of manufacture, and the failure properly to police the storage and loading of the fertilizer.

"The Supreme Court concluded that these allegedly negligent acts were governmental duties protected by the discretionary function exception and held the actions barred by § 2680(a). Describing the discretion protected by § 2680(a) as 'the discretion of the executive or the administrator to act according to one's judgment of the best course,' 346 U.S. at 34, 73 S.Ct. at 967, the Supreme Court stated:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.

Id. at 35-36, 73 S.Ct. at 967-68 (footnotes omitted). In the course of its opinion, the Supreme Court analyzed the legislative history of the FTCA. It noted that 'congressional thought was centered on granting relief for the run-of-the-mine accidents, as distinguished from injury from performing discretionary governmental functions,' *id.* at 28, n. 19, 73 S.Ct. at 964, n. 19, and concluded that in § 2680 'Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions.'

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Id. at 32, 73 S.Ct. at 966. [footnote omitted].

"*Dalehite* is squarely on point. The argument made by plaintiffs in that case, and rejected by the Supreme Court, was essentially ***994** the same as that made here, i.e., that the charges were directed not at

> 'any Cabinet decision ... [but] only to the mistakes of judgment and the careless oversight of Government employees who were carrying out a program of manufacturing and shipping fertilizer and who failed to concern themselves as a reasonable man should with the safety of others.'

Id. at 35, 73 S.Ct. at 967 (quoting petitioners' arguments).

"The specific acts of negligence charged were the temperature at which the fertilizer was bagged, the coating and bagging materials used, and the labelling of the bags. *Id.* at 39, 46-57, 73 S.Ct. at 969, 973-79. The Supreme Court found all of these acts covered by the discretionary function exception because they were 'performed under the direction of a plan developed at a high level under a direct delegation of planmaking authority from the apex of the Executive Department.' *Id.* at 40, 73 S.Ct. at 970.

"The case presented by [Appellants] is congruent with *Dalehite*. [Appellants] chose to focus their arguments on the conduct of Operation Crossroads. [FN5] There, too, a detailed and extensive Operation Plan was adopted on orders from the highest levels of the Executive Department. [FN6] An integral part of that Plan was an extensive Safety Plan which, according to [appellants] at first lacked but later contained a plan for decontamination. [FN7] TheSafety Plan described anticipated radiation hazards, established exposure limits, and assigned responsibility for protecting personnel against exposure to unknown hazards. [FN8]

FN5. Plaintiffs' Op.Br. at 3. That operation, according to plaintiffs, epitomizes the nuclear weapons testing program at its worst: "In hindsight Operation Crossroads was an extraordinary fiasco, America's first nuclear disaster. The Joint Task Force took a radiation bath without adequate resources to deal with the decontamination problems that ensued." *Id.* at 76.

FN6. Government Exhibits E-7.10-7.15. Operation Plans for subsequent tests may be found at Government Exhibits E-8 (Operation Buster-Jangle), E-9 (Operation Castle), E-10 (Operation Redwing), E-11 (Operation Hardtack), E-12 (Operation Ivy), and E-13 (Operation Dominic I).

FN7. Government Exhibits E-7.3 to E-7.7. Extensive Safety Plans were a part of the Operation Plan for each test. *See, e.g.,* Operation Plan for Operation Castle, Government Exhibit E-9, at N-I to N-III-2.

FN8. Plaintiffs' Statement of Facts, at 11-16.

"[Appellants'] contention is that the government's scientists who prepared the plan 'failed to appreciate or prepare for the magnitude of the hazards that would result.' Plaintiffs' Statement of Facts at 16. They argue that 'AEC and military officials were responsible for developing safety plans to carry out Presidential and cabinet and agency-level directives to conduct the planned detonations without unduly jeopardizing the safety of the participants; for ensuring that all participants except those performing unusual or high priority missions such as cloud sampling were not subjected to radiation doses exceeding the exposure limits established by the plan; and for following other safety guidelines established in the plan, such as decontamination measures and use of protective clothing and gear..... There is substantial evidence that their negligent failure to carry out these operational tasks resulted in the overexposure of many hundreds or thousands of test participants, including the safety monitors themselves.' Plaintiffs' Op.Br. at 30.

"The nuclear weapons tests on which these actions are founded were carried out pursuant to specific legislative authority in the 1946 Atomic Energy Act, and its successor, the 1954 Atomic Energy Act, 42 U.S.C. § 2011 *et. seq.,* and presidential order. [FN9] They were conducted for the purpose of developing and testing weapons and discovering their effects, an inherently dangerous undertaking. The Safety Plan developed for each test series was designed to minimize exposure to radiation consistent with the purposes of the tests. The Plan provided that '[r]adiological safety of all military and civilian personnel is a command ***995** responsibility.' [FN10] While the Plan established radiation exposure limits, it was subject to the authority of the officer in charge of any particular test, who could permit exposure in excess of the established level if the exigencies of the situation

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required. Thus the Plans specified that compliance with exposure limits was conditioned upon operational requirements:

> FN9. *See* Government Exhibits E-14 to E-26.4.
>
> FN10. Government Exhibit I-4, at 1. *See also* Government Exhibits J- 5, at 3; I-1, at 3; E-11, at K-1; J-3 at 1.

> Due to the special nature of field tests it is considered that a policy of strict adherence to the radiological standards prescribed for routine work is not realistic. The regulations set forth herein have been designed as a reasonable and safe compromise considering conservation of personnel exposures, the international import of the test and the cost aspects of operational delays chargeable to excessive radiological precautions. In all cases other than emergencies or tactical situations, the ultimate criteria will be limited by the MPEs [maximum permissible exposure] for personnel. Special instances may arise ... in which operations will be carried out without regard to the MPEs and MPLs [maximum permissible level] prescribed herein. For such emergency or tactical operations the criteria prescribed below for tactical situations will be used as a guide. [FN11]
>
> FN11. Joint Task Force Seven, Command Task Group 7.3, *Operation Plan,* December 7, 1953, Government Exhibit J-21, at G-I-1. *See generally* references cited in Government Memo, in Support of Summary Judgment (Discretionary Function) [ ].

"The Safety Plan incorporated into the Operation Plan contemplated that judgments and decisions concerning exposure to radiological hazards and the degree of protection to be afforded would be made in the light of the objectives and the needs of the test program. Safety decisions, therefore, were a part of the policy decisions made in the conduct of the weapons tests, [ ] and they fall squarely within the articulation in *Dalehite* that

> [w]here there is room for policy judgment and decision there is discretion.

346 U.S. at 36, 73 S.Ct. at 968. That those judgments and decisions may have been made by scientists or other operational personnel does not affect the application of the discretionary function exception. As stated by the Court in *Varig,* 'it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies....' [467 U.S. at 813], 104 S.Ct. at 2765. [FN12]

> FN12. The pre-*Varig* criterion of looking at whether the decision was made at the planning level or operational level is no longer valid in view of the Supreme Court's statement in *Varig. See also Begay v. United States,* 768 F.2d 1059, 1062-63 n. 2 (9th Cir.1985).

"In these actions, the decisions concerning safety were in the first instance made by those charged with the preparation of the Operation Plan and its components. The responsibility for carrying out the Safety Plan was assigned to the officials in charge of the tests who had discretion to adopt and modify the Plan as necessary to achieve the objectives of the test. A court would be ill-equipped to evaluate the judgments concerning safety made by those officials based on the exigencies of the moment. Any attempt to do so would, moreover, require a comprehensive reexamination of the conduct of the tests and the decisions made during their course which would itself defeat the purpose of the exception. The consequences of such a reexamination would be to hamper the government in its future conduct of weapons tests and similar operations affecting the national security. [FN13]

> FN13. The appropriateness of deciding issues of governmental immunity on summary judgment to avoid unnecessary inquiries disruptive of effective government was stressed by the Supreme Court in *Harlow v. Fitzgerald,* 457 U.S. 800, 816-17, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

[Finally, the appellants argue that the discretionary function exception does not bar their challenge to the government's alleged negligent failure to supervise the contractor's compliance with the safety procedures and guidelines established by ***996** the Safety Plan. Appellants rely heavily on *Gardner v. United States,* 780 F.2d 835 (9th Cir.1986) for the proposition that, under California law, there is a "nondelegable duty to ensure adequate safety precautions were taken by an independent contractor" where the work to be performed involves special dangers. *Garnder,* 780 F.2d at 837 (citing *Rooney v. United States,* 634 F.2d 1238 (9th Cir.1980)). Furthermore, the United States can be liable under the FTCA for breaching this non-delegable duty. *Gardner,* 780 F.2d at 837. This

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case is clearly distinguishable. The discretionary function exception was not raised nor discussed. Furthermore,

> It is irrelevant to the discretion issue whether the AEC or its employees were negligent in failing to adequately protect the public. *See Cisco v. United States,* 768 F.2d 788, 789 (7th Cir.1985); *General Public Utilities Corp. v. United States,* 745 F.2d 239, 243, 245 (3d Cir.1984), *cert. denied,* 469 U.S. 1228, 105 S.Ct. 1227, 84 L.Ed.2d 365 (1985). [ ] When the conduct at issue involves the exercise of discretion by a government agency or employee, § 2680(a) preserves governmental immunity 'whether or not the discretion involved be abused.' "

Allen v. United States, 816 F.2d 1417 (10th Cir.1987) (footnotes omitted). *See also Cunningham v. United States,* 786 F.2d 1445 (9th Cir.1986) (negligent failure to inspect falls within discretionary function exception--"When an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind." (quoting *Varig,* 467 U.S. at 819-20, 104 S.Ct. at 2767)).

Furthermore, the Act is specifically limited to claims "for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions *by a contractor* in carrying out an atomic weapons testing program under a contract with the United States." 42 U.S.C. § 2212(a)(1) (emphasis added). Section 2212 is not designed to cover the negligence of the government itself.]

"Accordingly, [Appellants'] claims based on failures to take adequate safety precautions at tests must be dismissed. [footnote omitted].

[b]. Claims Based on the Government's Failure to Issue Warnings Prior to 1977.

[11] "[Appellants'] second category of claims is based on the breach of the government's alleged duty to warn [appellants] of the dangers to which they had been exposed or to monitor test participants for health problems resulting from radiation exposure. [This court] has postulated that California courts would impose a duty on the government to warn test participants of the dangers to which they have been exposed. *See Molsbergen v. United States,* 757 F.2d 1016, 1020-25 (9th Cir.1985). Such a duty would exist when a test participant could show that (1) the government has information relating to a serious risk to the life, safety or health of a participant; (2) the conduct of the government gave rise to the risk; (3) the burden resulting from imposition of a duty to warn is not onerous; and (4) there is reason to believe that a warning would have some practical effect. *Id.* For purposes of this ruling, it is assumed that the government failed to provide [appellants] with any warning of the health risks of exposure to radiation until 1977.

"The government's motion is not directed at whether it had a duty to warn. Rather, the government argues that in these cases the government's failure to warn involved the failure to perform a discretionary function and that the claims are therefore barred.

"Assuming the government had a duty to warn, the threshold question in determining whether the discretionary function applies is what, if any, warning measures it was obliged to undertake on behalf of test participants prior to 1977. This is not a case of failing to warn river users of a hidden obstruction beneath the surface, *Lindgren v. United States,* 665 F.2d 978 (9th Cir.1982); or park users of the risk of flash floods, *Ducey v. United States,* 713 ***997** F.2d 504 (9th Cir.1983); or a treating physician of his patient's dangerous propensities, *Jablonski v. United States,* 712 F.2d 391 (9th Cir.1983). The kind of 'warning' that these cases involve is best illustrated by the program the government did undertake beginning in 1977 on the strength of findings by the Centers for Disease Control of a leukemia cluster among test participants. At that time the Defense Nuclear Agency established the Nuclear Test Personnel Review ("NTPR") program. It began to assemble and publish voluminous materials concerning radiation exposure during tests and to calculate levels of exposure of personnel. Beginning in 1979, test participants whose records indicated significant radiation exposure were notified and provided with medical examinations. The notification and examination program was gradually expanded to include personnel who had received lower doses. It was also extended to the Department of Health, Education and Welfare which began to conduct studies and a public information program. [FN14]

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FN14. *See* the discussion and references cited at Government Memo, in Support of Summary Judgment (Discretionary Function) [ ]; Government Reply Memo [ ].

"The decision to embark on this program entailed a commitment of substantial resources, including the assignment of a large number of employees and the expenditure of large sums of money. The initial cost of the NTPR alone was $6,000,000 per year. The program required difficult judgments balancing the magnitude of the risk from radiation exposure--of which there was only fragmentary knowledge--against the risks and burdens of a public program. Those risks included the potential consequences of creating public anxiety and the health hazards inherent in the medical responses to the warning. [FN15]

FN15. *See* E. Robin, *Matters of Life & Death: Risks v. Benefits of Medical Care* (1984), which discusses the health hazards inhering in any widespread campaign to warn against and detect disease. Diagnostic tests, by reason of the intrusive procedures used, false positive indications, and sometimes unwarranted psychological effects, produce their own adverse consequences which must be taken into account. The experience under the government's 1976 Swine Flu Program illustrates the hazards of a hasty reaction to a health program, the dimensions and seriousness of which are not yet known at the time. Although the probability of an epidemic was never established, the public was strongly urged to submit to immunization with little advice respecting its attendant hazards. R. Neustadt, *Swine Flu Affair: Decision-Making on a Slippery Disease* 86-97 (1978); Gray, "Complexities of Informed Consent," 437 *Annals Am. Academy Pol. & Soc. Sci,* 37, 44 (May, 1978); Centers for Disease Control, *Public Attitudes Toward the Swine Flu Immunization Program and Medical Coverage of Events* 2-7 (1981). The government's experience with the swine flu program highlights the policy and cost/benefit tradeoffs involved in large-scale public responses to perceived health problems.

"Thus any decision whether to issue warnings to thousands of test participants of possibly life-threatening dangers and to provide them with appropriate examinations and counseling calls for the exercise of judgment and discretion at high levels of government. The difficulty of such decisions is illustrated simply by the problem of how to phrase such a warning where the degree of exposure of any particular participant and the consequent risk is not known. [FN16] A decision must also take into account sensitive questions concerning its impact on on-going and future tests and on the military and civilian participants. [FN17]

FN16. Not the least of the problems the government would face is that once having undertaken to issue a "warning", it may come under an obligation to exercise due care toward members of the public relying on it. *See Indian Towing Co. v. United States,* 350 U.S. 61, 69, 76 S.Ct. 122, 126, 100 L.Ed. 48 (1955) (not decided under the discretionary function exception).

FN17. Studying the psychological reactions of troops to nuclear weapons during field tests was a specific goal of many of the tests. *See, e.g.,* Characteristics of Troops with Varying Levels of Information about Atomic Effects, Government Exhibit D-67; Memorandum for the AEC Chairman, July 16, 1951, Government Exhibit K-14. To carry out such studies and achieve test objectives, the government needed complete control over information supplied to the troops. Troops were to be indoctrinated on how to conduct themselves on the nuclear battlefield. As one officer explained, the goal was to teach soldiers to respect radioactivity, not to fear it. Capt. Frank Winant, Command Problems of Atomic Defensive Warfare, Sept. 1947, Government Exhibit J-13.

***998** "In no sense can such a decision be equated with decisions to warn of submerged obstructions to navigation or flash floods. [FN18] Courts cannot be considered qualified to evaluate such a decision and any attempt to do so is likely to interfere with important governmental activities. Formulating and issuing warnings requires the government 'to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding.' *Varig,* [467 U.S. at 820], 104 S.Ct. at 2768. The conclusion is inescapable that every aspect of a warning program is a matter that falls within the discretionary function exception as defined in *Dalehite* and *Varig:*

FN18. *See, Begay v. United States,* 768 F.2d 1059 (9th Cir.1985); *First Nat'l Bank in Albuquerque v. United States,* 552 F.2d 370, 374-77 (10th Cir.), *cert. denied,* 434 U.S. 835, 98 S.Ct. 122, 54 L.Ed.2d 96 (1977) (decision by Department of Agriculture whether label on fungicide complied

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with statutory requirement that it contain a warning "necessary and if complied with adequate to prevent injury" fell within discretionary function exception).

Where there is policy judgment and decision there is discretion.

346 U.S. at 36, 73 S.Ct. at 968. The decisions of [this court], discussed in the immediately preceding section, compel the same result.

"[Appellants] argue that the discretionary function exception cannot apply in the absence of a 'conscious decision.' [FN19] The statute is not so limited; it exempts '[a]ny claim based upon ... the failure to exercise or perform a discretionary function ...' 28 U.S.C. § 2680(a). The language is directed at the nature of the conduct, and does not require an analysis of the decision-making process. *Cf. General Public Utilities Corp. v. United States,* 745 F.2d 239, 245 (3d Cir.1984), *cert. denied,* 469 U.S. 1228, 105 S.Ct. 1227, 84 L.Ed.2d 365 (1985) (the exemption is based on the nature of the conduct, 'not whether there is an option to choose'). When enacting § 2680, 'Congress exercised care to protect the Government from claims, *however negligently caused,* that affected the governmental functions.' *Dalehite,* 346 U.S. at 32, 73 S.Ct. at 966 (emphasis added).

FN19. *See Allen v. United States,* 588 F.Supp. 247, 337-40 (D.Utah 1984).

[The district court's decision in *Allen* was overturned by the Tenth Circuit in *Allen v. United States,* 816 F.2d 1417 (10th Cir.1987). In that opinion, the Tenth Circuit specifically rejected the District oof Utah District Court's "deliberate choice" or "conscious decision" analysis which was heavily relied upon by the appellants in this case. The Tenth Circuit held:

It is also irrelevant whether the alleged failure to warn was a matter of "deliberate choice," or a mere oversight. *See Allen,* 588 F.Supp. at 337-38. We agree with the treatment of this distinction in *Myslakowski v. United States,* 806 F.2d 94 (6th Cir.1986), *cert. denied,* --- U.S. ----, 107 S.Ct. 1608, 94 L.Ed.2d 793 (1987):

"The critical error in the trial court's analysis is in its conclusion that because the evidence does not show that the departmental policymakers evaluated the pros and cons of requiring that a warning be given concerning the rollover propensity of the jeep and then made a discretionary decision not to give such warnings, it therefore follows that no discretionary decision, of the kind contemplated by § 2680(a), was made....

Stated otherwise, even the negligent failure of a discretionary government policymaker to consider all relevant aspects of a subject matter under consideration does not vitiate the discretionary character of the decision that is made.

Indeed, it is, in part, to provide immunity against liability for the consequences of negligent failure to consider the relevant, even critical, matters in discretionary decisionmaking that the statutory exception exists. If it were otherwise, a judgment-based policy determination made at the highest levels, to which all would concede that the statutory exception applies (the decision to sell surplus jeeps), would result in no immunity if the decision could be shown to have been made without consideration of important, relevant factors, or was a decision negligently reached. If that reasoning were sound, the discretionary function exception would be inapplicable in every case in which a negligent 'failure to consider' a relevant risk could be proved."

Id. at 97-98. *Accord In re Consolidated United States Atmospheric Testing Litigation,* 616 F.Supp. 759, 776-77 (N.D.Cal.), *appeal docketed,* No. 85-2842 (9th Cir.1985).

Allen, 816 F.2d at 1422 n. 5.]

"If the decision to issue or not to issue a 'warning' is within the discretionary function exception, then logically the failure to consider whether to issue one necessarily ***999** falls within the exception as well. Any other interpretation of the statute would create insurmountable problems in its administration: What would constitute a 'decision'? Would a decision to defer decision be a 'decision'? Would the government be subject to liability for failing to act where operational employees conducting the relevant research consider the evidence as yet insufficient for making a decision? As the Supreme Court said in *Varig,* one must look to 'the nature of the conduct' to determine whether the exception applies. In this case, the relevant conduct is the issuance of 'warnings,' not the decision-making process or the failure to make a conscious, explicit decision.

"Accordingly, plaintiffs' claims based on the failure to issue warnings must also be dismissed." [FN20]

FN20. Because we dismiss all appellants' claims under the discretionary function exception, we do not reach the *Feres* doctrine, foreign country exception or the combatant activities exception.

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C. *Broudy* Appeal

Appellant Alice Broudy, decedent's wife, appeals from the United States District for the Central District of California's granting of the government's motion for summary judgment. In granting that motion, the Honorable Judge Laughlin E. Waters adopted the reasoning of the decision in *In re Consolidated United States Atmospheric Testing Litigation,* 616 F.Supp. 759 (D.C.Cal.1985) ("Konizeski appeal") and held, *inter alia,* that the discretionary function exception barred Broudy's post-discharge failure to warn and her medical malpractice claims. We affirm.

Major Broudy served as an officer in the U.S. Marine Corps from 1944 to 1960. In 1957, Major Broudy was ordered to participate in military exercises near two atmospheric tests conducted in Nevada.

Major Broudy was honorably discharged in 1960. He received medical care for various health problems at the Marine Corps medical facility at El Toro. He was never informed of nor warned about the dangers associated with his exposure to radiation. In 1976, he was diagnosed as having lymphosarcoma, a form of cancer that has been related to radiation exposure. He died from that disease in 1977.

Broudy, by stipulation, joined in all arguments and precedent advanced by the appellants in the Konizeski appeal on the issue of the government's post- discharge failure to warn and the applicability of the discretionary function. For the same reasons and policy considerations stated above in the Konizeski appeal, we find that the government's post-discharge failure to warn Major Broudy of any harm arising from his exposure to radiation is barred by the discretionary function exception to the FTCA.

[12] Broudy has attempted to distinguish her husband's case from the Konizeski appellants by asserting a medical malpractice claim. Specifically, she contends the medical personnel at the El Toro Medical Facility committed medical malpractice when they failed to warn Major Broudy of the dangers of radiation exposure when he went to the facility for post-discharge treatment. The district court held that this medical malpractice claim was barred for failure to state a sufficient claim to the appropriate federal agency. We agree.

28 U.S.C. § 2675(a) provides that as a prerequisite to maintaining a suit under the FTCA, a plaintiff must first present the claim to the appropriate federal agency. By enacting the notice requirement, Congress sought to ensure that plaintiffs "would promptly inform the relevant agency of the accident so that it may investigate the claim and respond either by settlement or by defense." *Broudy v. United States,* 722 F.2d 566, 568 (9th Cir.1983) (quoting *Adams v. United States,* 615 F.2d 284, 289 (5th Cir.1980)). The purpose of this notice requirement is to give the relevant agency an opportunity to commence an investigation into the claim. *See Broudy,* 722 F.2d at 568. Broudy's administrative claim was filed with the Department of Energy ("DOE"). The Department of Defense ("DOD") controls the medical facility at El Toro. The DOD received no notice of Broudy's claim. As a consequence, the ***1000** DOD was unable to initiate an investigation into her claims. We agree with the district court that Broudy's medical malpractice claim is barred because she failed to file the claim with the DOD which was the appropriate federal agency.

The judgments are AFFIRMED.

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United States Court of Appeals,
First Circuit.

Mary E. HAMMOND, Individually and Mary E. Hammond as She Is the Executrix of the Estate of Charles E. Hammond, Plaintiff, Appellant,
v.
UNITED STATES of America, Defendant, Appellee.

No. 85-1339.

Argued Oct. 11, 1985.
Decided March 12, 1986.

Widow brought suit against private contractor for radiation death of her husband, a civilian employee of Department of Defense and observer at several atomic weapons tests. Private contractor moved to dismiss for failure to file an administrative claim under the Federal Tort Claims Act, which was granted by the United States District Court for the District of Massachusetts, A. David Mazzone, J. On appeal, the Court of Appeals, Bownes, Circuit Judge, held that federal statute substituting United States as defendant in all suits against private contractors to the Government for radiation injuries arising from any of the United States atomic weapons testing programs, and making the Federal Tort Claims Act the sole remedy for those injuries was rationally related to legitimate Congressional purpose, and thus did not violate due process.

Affirmed.

West Headnotes

[1] Constitutional Law ⚖105
92k105 Most Cited Cases

By enacting statute, 42 U.S.C.A. § 2212, substituting United States as defendant in all suits against private contractors to the Government for radiation injuries arising from any of the United States atomic weapons testing programs and making the Federal Tort Claims Act, 28 U.S.C.A. §§ 1346, 2671-2680, the sole remedies for those injuries, thereby retroactively abolishing widow's cause of action in tort for death of her husband from radiation, Congress abridged no vested rights of widow, as rights in tort do not vest until there is a final, unreviewable judgment. Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, § 1631, 42 U.S.C.A. § 2212.

[2] Constitutional Law ⚖305(1)
92k305(1) Most Cited Cases

Congress must comply with due process when abolishing or substantially modifying a common-law cause of action. U.S.C.A. Const.Amends. 5, 14.

[3] Constitutional Law ⚖305(1)
92k305(1) Most Cited Cases

Rational basis, and not strict scrutiny standard of due process review applied to constitutional challenge to retroactive application of federal statute, 42 U.S.C.A. § 2212, substituting United States as defendant in all suits against private contractors to the Government for radiation injuries arising from any of the United States atomic weapons testing programs, and making the Federal Tort Claims Act, 28 U.S.C.A. §§ 1346, 2671-2680, the sole remedy for those injuries, as Congress had thereby acted within its powers under the war powers and commerce clauses of the Constitution, and there was no fundamental right or suspect classification involved. Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, § 1631, 42 U.S.C.A. § 2212; U.S.C.A. Const. Art. 1, § 8, cl. 3.

[4] Constitutional Law ⚖305(1)
92k305(1) Most Cited Cases
(Formerly 94k305(1) Continuance)

Federal statute, 42 U.S.C.A. § 2212, substituting United States as defendant in all suits against private contractors to the Government for radiation injuries arising from any of the United States atomic weapons testing programs, and making the Federal Tort Claims Act, 28 U.S.C.A. §§ 1346, 2671- 2680 , the sole remedy for those injuries, was not wholly arbitrary and irrational in purpose, and thus did not violate due process, as it was reasonably related to a legitimate Congressional purpose. Department of

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Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, § 1631, 42 U.S.C.A. § 2212.

[5] Federal Courts ⚿1139
170Bk1139 Most Cited Cases

Where widow claimed several million dollars in compensation resulting from her husband's death by radiation, Court of Appeals lacked jurisdiction to consider widow's "taking" claim; rather, proper forum for such claim was the court of claims. U.S.C.A. Const.Amend. 5; 28 U.S.C.A. §§ 1346(a)(2), 1491.

[6] Jury ⚿12(1.2)
230k12(1.2) Most Cited Cases

There is no right to a jury trial against the sovereign under the Seventh Amendment. U.S.C.A. Const.Amend. 7.

[7] United States ⚿125(7)
393k125(7) Most Cited Cases

When United States abolishes cause of action and then sets up a separate administrative remedy against itself, Seventh Amendment does not require that it must also provide jury trial. U.S.C.A. Const.Amend. 7.

[8] Constitutional Law ⚿186
92k186 Most Cited Cases

Prohibition against ex post facto laws only applies to criminal or penal statutes. U.S.C.A. Const. Art. 1, § 9, cl. 3.

[9] Constitutional Law ⚿82.5
92k82.5 Most Cited Cases

[9] United States ⚿78(2)
393k78(2) Most Cited Cases

Federal statute, 42 U.S.C.A. § 2212, substituting United States as defendant in all suits against private contractors to the Government for radiation injuries arising from any of the United States atomic weapons testing programs, and making the Federal Tort Claims Act, 28 U.S.C.A. §§ 1346, 2671- 2680 , the sole remedy for those injuries was not punitive so as constitute a bill of attainder. Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, § 1631, 42 U.S.C.A. § 2212.

***9** Marc S. Alpert, P.C., Boston, Mass., for plaintiff, appellant.

Leon B. Taranto, Atty., Torts Branch, Civ. Div., U.S. Dept. of Justice, with whom Jeffrey Axelrad, Director, Torts Branch, Paul F. Figley, Asst. Director, Torts Branch, Richard K. Willard, Acting Asst. Atty. Gen., Washington, D.C., and William F. Weld, U.S. Atty., Boston, Mass., were on brief for defendant, appellee.

Before BOWNES and TORRUELLA, Circuit Judges, and HILL, [FN*] Senior District Judge.

FN* Of the Central District of California, sitting by designation.

BOWNES, Circuit Judge.

This is a constitutional challenge to the retroactive application of a federal statute, 42 U.S.C. § 2212, that substitutes the United States as defendant in all suits against private contractors to the government for radiation injuries arising from any of the United States atomic weapons testing programs, and makes the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80, the sole remedy for those injuries.

I. BACKGROUND

Plaintiff Mary Hammond, individually and as executrix of the estate of her deceased husband Charles Hammond, formerly a civilian employee of the Department of Defense and observer at several atomic weapons tests, originally filed suit in 1978 in Massachusetts Superior Court for Middlesex County against defendants to be named later. Plaintiff filed an amended complaint on June 2, 1984, naming E G & G Company as defendant. The amended complaint alleged wrongful death, pain and suffering of the decedent, and loss of consortium, all due to cancer caused by the ***10** negligent conduct of E G & G in failing to design the tests adequately to protect the deceased from radiation exposure. The complaint did not set out specific facts but generally alleged failure to warn, failure to provide proper protective clothing or equipment, general negligence, willful, wanton or reckless conduct, breach of warranty and fraud or deceit. There

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were three counts, the first and third in negligence, and the second under the Massachusetts wrongful death statute, Mass.Gen.Laws Ann. ch. 229. E G & G removed the case to federal court.

During the pendency of the action § 2212 was enacted. It provides, *inter alia:*

§ 2212. Contractor liability for injury or loss of property arising out of atomic weapons testing programs

(a) Federal remedies applicable; exclusiveness of remedies; Federal employee status; procedure, limitations, and exceptions applicable

(1) The remedy against the United States provided by sections 1346(b) and 2672 of Title 28, or by the Act of March 9, 1920 (46 U.S.C. 741-752 and 781-790), as appropriate, for injury, loss of property, personal injury, or death shall apply to any civil action for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States.

(2) The remedies referred to in paragraph (1) shall be exclusive of any other civil action or proceeding for the purpose of determining civil liability arising from any act or omission of the contractor without regard to when the act or omission occurred. The employees of a contractor referred to in paragraph (1) shall be considered to be employees of the Federal Government, as provided in section 2671 of Title 28, for the purposes of any such civil action or proceeding; and the civil action or proceeding shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of such Title and shall be subject to the limitations and exceptions applicable to those actions.

Pursuant to § 2212(b) [FN1] E G & G was first certified by the Attorney General as an atomic weapons testing contractor on January 10, 1985, and then on January 23 the motion of the United States to substitute itself as defendant was granted. Defendant's motion to dismiss for failure to file an administrative claim under the FTCA was granted without prejudice on March 11. The district court considered plaintiff's challenge to the constitutionality of § 2212 and rejected it. It denied plaintiff's motion to vacate its order of dismissal. Plaintiff then took this appeal.

FN1. Section 2212(b) provides:

(b) Delivery of process to Attorney General; removal of cases from State courts; certification of contractor status

A contractor against whom a civil action or proceeding described in subsection (a) of this section is brought shall promptly deliver all processes served upon that contractor to the Attorney General of the United States. Upon certification by the Attorney General that the suit against the contractor is within the provisions of subsection (a) of this section, a civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings shall be deemed a tort action brought against the United States under the provisions of section 1346(b), 2401(b), or 2402, or sections 2671 through 2680 of Title 28. For purposes of removal, the certification by the Attorney General under this subsection establishes contractor status conclusively.

Plaintiff contends that § 2212 is unconstitutional on several alternative grounds: under the fifth amendment because the act destroyed vested rights in her pending state-law cause of action without due process of law, because it is an uncompensated "taking" of property, because it is the application of "unexpected" law without procedural due process of law, or because it violates equal protection; under the seventh amendment because the act denies plaintiff her right to a jury trial; under the ninth amendment because the act violates unenumerated rights reserved to the people; ***11** under the tenth amendment because the act is beyond the power of Congress and infringes on powers reserved to the states; under the general constitutional right of access to the courts; under the article 1 prohibitions against *ex post facto* laws, bills of attainder and laws impairing contracts. We find that § 2212 does not violate the Constitution, and affirm.

II. FIFTH AMENDMENT DUE PROCESS CHALLENGE

Plaintiff contends that § 2212 deprives her of a vested cause of action against E G & G without due process of law. She asserts that the filing of a suit

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on an accrued common-law or state statutory cause of action gives her a vested property right in that action, and that Congress cannot retroactively abolish that cause of action and legislate the dismissal of plaintiff's suit without violating due process. Plaintiff relies principally on *Coombes v. Getz,* 285 U.S. 434, 52 S.Ct. 435, 76 L.Ed. 866 (1932), and *Ettor v. Tacoma,* 228 U.S. 148, 33 S.Ct. 428, 57 L.Ed. 773 (1913). Plaintiff also contends that since Congress has denied plaintiff her right of access to the courts § 2212 must be subject to strict scrutiny review or an intermediate level of review to determine if Congress has justified its action. Finally, plaintiff claims that even under the least exacting standard of rational basis review the act cannot pass constitutional muster.

A. Abolition of Vested Rights

The Supreme Court has found in certain cases that vested rights created by statute cannot be abridged by a subsequent statute that effectively takes away accrued causes of action to enforce those rights. The principal cases striking down retroactive abridgment involved statutes that created rights "vesting" in: a corporate charter, *Coombes v. Getz,* 285 U.S. at 439-48, 52 S.Ct. at 435-38; real property, *Ettor v. Tacoma,* 228 U.S. at 155-58, 33 S.Ct. at 430-31; and a quasi-contract, *Steamship Co. v. Joliffe,* 69 U.S. (2 Wall.) 450, 456-58, 17 L.Ed. 805 (1864). *Cf. Richmond Screw Anchor Co. v. United States,* 275 U.S. 331, 48 S.Ct. 194, 72 L.Ed. 303 (1928) (rights in a patent); *Forbes Pioneer Boat Line v. Board of Comm'rs,* 258 U.S. 338, 339- 40, 42 S.Ct. 325, 325-26, 66 L.Ed. 647 (1922) (rights to a fixed sum of money); *Ochoa v. Hernandez,* 230 U.S. 139, 161-64, 33 S.Ct. 1033, 1041-42, 57 L.Ed. 1427 (1913) (rights in real property). In these cases, because the rights had "vested" in real property, a contract, or in a fixed sum, they were said to stand independent of the statute that created them and could not be abridged by the subsequent statute. *Coombes,* 285 U.S. at 442, 52 S.Ct. at 436; *Ettor,* 228 U.S. at 156, 33 S.Ct. at 430; *Joliffe,* 69 U.S. at 458. In none of these cases was any right to a tort cause of action, or a right deriving from a tort, held to be "vested." The Supreme Court in *Ettor,* 228 U.S. at 157-58, 33 S.Ct. at 431, heavily relied on by the plaintiffs, expressly distinguished the action for an injury to property involved in that case from one in tort. *Cf. Louisiana v. Mayor of New Orleans,* 109 U.S. 285, 3 S.Ct. 211, 27 L.Ed. 936 (1883) (a state that limits a city's tax collecting power to such an extent that the city cannot pay a tort judgment against it does not violate the judgment holder's fourteenth amendment rights).

The present case involves common-law and state statutory tort rights that are nothing like the vested rights of the *Coombes, Ettor,* and *Joliffe* cases relied on by the plaintiff. Moreover, these are old cases and their rationales are not easy to reconcile or apply. In fact, their vitality may now be in doubt because more recent cases have upheld retroactive application of statutes that abridge economic and real property rights created under a prior statute without always carefully distinguishing the older cases. *See, e.g., Welch v. Henry,* 305 U.S. 134, 144, 146-51, 59 S.Ct. 121, 125-27, 83 L.Ed. 87 (1938); *Graham & Foster v. Goodcell,* 282 U.S. 409, 426-32, 51 S.Ct. 186, 192-95, 75 L.Ed. 415 (1931); *United States v. Heinszen & Co.,* 206 U.S. 370, 386-91, 27 S.Ct. 742, 746-58, 51 L.Ed. 1098 (1907); *Moss v. Hawaiian Dredging Co.,* 187 F.2d 442, 444-47 (9th Cir.1951); ***12** *Battaglia v. General Motors Corp.,* 169 F.2d 254, 257-62 (2d Cir.), *cert. denied,* 335 U.S. 887, 69 S.Ct. 236, 93 L.Ed. 425 (1948); *Woods v. Schmid,* 164 F.2d 981, 982-83 (5th Cir.1947); *United States v. Atlantic Richfield Co.,* 435 F.Supp. 1009, 1029-31 (D.Alaska 1977), *aff'd,* 612 F.2d 1132 (9th Cir.1980); *Asselta v. 149 Madison Avenue Corp.,* 79 F.Supp. 413, 415-16 (S.D.N.Y.1948); *Hospital Data Center of S.C., Inc. v. United States,* 634 F.2d 541, 544-45, 225 Ct.Cl. 158 (1980); *but cf. United States Trust Co. of New York v. New Jersey,* 431 U.S. 1, 17-28, 97 S.Ct. 1505, 1515-20, 52 L.Ed.2d 92 (1977) (applying an intermediate standard of review to strike down under the contracts clause a repeal of a statutory covenant that provided security for bondholders).

[1] The question whether the rights asserted in plaintiff's state-law causes of action are "vested" cannot be answered by looking to see whether suit had already been filed and how far it had proceeded when Congress enacted § 2212. "No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *New York Central R.R. Co. v. White,* 243 U.S. 188, 198, 37 S.Ct. 247, 250, 61 L.Ed. 667 (1917); *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 88 n. 32, 98 S.Ct. 2620, 2638 n.

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32, 57 L.Ed.2d 595 (1978); *Second Employers' Liability Cases,* 223 U.S. 1, 50, 32 S.Ct. 169, 175, 56 L.Ed. 327 (1912); *Ducharme v. Merrill-National Laboratories,* 574 F.2d 1307, 1309 (5th Cir.), *cert. denied,* 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978). This is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained. Chief Justice Marshall first announced the principle in *The Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801). The Supreme Court held in that case that a court must apply the law in force at the time of its decision, even if it is hearing the case on appeal from a judgment entered pursuant to a prior law. For a more recent and stringent application of this rule, see *149 Madison Avenue Corp. v. Asselta,* 331 U.S. 795, 67 S.Ct. 1726, 91 L.Ed. 1822 (1947), *modifying* 331 U.S. 199, 67 S.Ct. 1178, 91 L.Ed. 1432 (1947). [FN2]

> FN2. In *149 Madison Avenue Corp. v. Asselta,* 331 U.S. 795, 67 S.Ct. 1726, 91 L.Ed. 1822 (1947), *modifying* 331 U.S. 199, 67 S.Ct. 1178, 91 L.Ed. 1432 (1947), the Supreme Court had affirmed a judgment for overtime pay due plaintiffs under the Fair Labor Standards Act. After their affirmance, but before the time for a motion for rehearing had run, Congress passed the Portal-to-Portal Act to give employers good-faith defenses against back overtime pay actions under the Fair Labor Standards Act. The defendants, on a timely motion for rehearing, asked the Court to reconsider its affirmance in light of the changed law. The Supreme Court remanded to the district court for reconsideration under the new law and judgment was vacated below. The defendants prevailed after a new trial. *Asselta v. 149 Madison Avenue Corp.,* 79 F.Supp. 413, 415-16 (S.D.N.Y.1948) (upholding constitutionality of the application of new law to this case), 90 F.Supp. 422 (S.D.N.Y.1950) (judgment for defendants).

Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridged no vested rights of the plaintiff by enacting § 2212 and retroactively abolishing her cause of action in tort.

B. Applicable Standard of Review

[2] Plaintiff is correct that Congress must comply with due process when abolishing or substantially modifying a common law cause of action. In that sense the right to sue is a "species of property." *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982); *see Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. at 82- 94, 98 S.Ct. at 2635-41. But, an act of Congress comes to us clothed with a presumption of constitutionality, and the burden is on the plaintiff to show that it violates due process. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976); *McGowan v. Maryland,* 366 U.S. 420, 425-26, 81 S.Ct. 1101, 1104-05, 6 L.Ed.2d 393 (1961).

[3] This is not the first time Congress has substituted the government as defendant ***13** in a certain category of tort suits and relegated plaintiffs to an FTCA remedy. Statutory schemes similar to § 2212 have been enacted in the Federal Drivers Act, 28 U.S.C. §§ 2679(b)-(e) (substitution in any tort claim against a federal employee who was operating a motor vehicle within the scope of his employment at the time of an incident giving rise to personal injuries), and in the Swine Flu Act, 42 U.S.C. § 247b(k)- (1) (1976) (repealed 1978) (substitution in any tort claim against a private manufacturer of the swine flu vaccine for injuries arising from the vaccine). These two acts have withstood constitutional challenges, and the rational basis test has been the standard of due process analysis applied by the courts. *See, e.g., DiPippa v. United States,* 687 F.2d 14, 19 (3d Cir.1982) (Swine Flu Act); *Ducharme v. Merrill-National Laboratories,* 574 F.2d at 1310-11 (Swine Flu Act); *Carr v. United States,* 422 F.2d 1007, 1010-12 (4th Cir.1970) (Federal Drivers Act).

Plaintiff claims § 2212 must be specially scrutinized because she has been denied her fundamental right of access to the courts. But this case does not involve someone burdening or blocking plaintiff's right of access to the courts to seek enforcement of the law as in the cases plaintiff cites. *See, e.g., California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *Boddie v. Connecticut,* 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *McKay v. Hammock,* 730 F.2d 1367 (10th Cir.1984); *Ryland v. Shapiro,* 708 F.2d 967 (5th Cir.1983); *Harris v. Pate,* 440 F.2d 315 (7th Cir.1971). This is a matter of Congress altering her prior rights and remedies. There is no fundamental right to particular state- law tort claims.

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Because Congress has acted within its powers under the war powers and commerce clauses of the Constitution and there is no fundamental right or suspect classification involved here, we find that the rational basis standard of due process review applies.

C. Rational Basis Review

[4] In applying the rational basis test to this case we follow the guidance of the Supreme Court in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 728 - 34, 104 S.Ct. 2709, 2717-20, 81 L.Ed.2d 601 (1984); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. at 82- 94, 98 S.Ct. at 2635-41; and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 15-20, 96 S.Ct. at 2892-94. We find that plaintiff has not met her burden of showing that § 2212 is wholly arbitrary and irrational in purpose and effect, *i.e.*, not reasonably related to a legitimate congressional purpose. *See United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174-77, 101 S.Ct. 453, 459-60, 66 L.Ed.2d 368 (1980); *Vance v. Bradley*, 440 U.S. 93, 97-98, 99 S.Ct. 939, 942-43, 59 L.Ed.2d (1979).

The reasons asserted by the United States for Congress' enactment of § 2212 are neither arbitrary nor irrational, and can be stated simply. The United States has operated a nuclear weapons testing program for over 40 years. It initiates, designs and authorizes all nuclear tests under the program but has found it necessary to obtain the assistance of various private entities including universities and private companies for many aspects of the testing. From the late 1940's to the early 1960's a series of above-ground tests of atomic weapons were conducted with military personnel, civilian government employees and private employees of government contractors taking part. Plaintiff's deceased husband was an observer at several of the tests. There is no dispute that these tests were designed and supervised by government officials and were individually authorized by the President. A significant number of those present at the above-ground tests have instituted suits against the government contractors involved in them for injuries caused by radiation exposure. The contractors are generally not threatened with financial liability by these suits since most of their contracts with the government included a clause making the United States indemnitor for all tort liability, ***14** including costs of litigation, arising from their participation in the testing programs. S.Rep. No. 500, 98th Cong., 2d Sess. 374-76 (1984). Congress has nevertheless perceived these lawsuits to constitute a threat to the continued participation of the private contractors in the nuclear weapons program because the contractors fear the bad publicity generated by the suits. The contractors testified before Congress that the lawsuits have led the public to blame them for the formulation, implementation and execution of the atomic weapons testing policy of the United States. H.R.Rep. No. 124, Part 4, 98th Cong., 1st Sess. 2-3 (1983). They also testified that the lawsuits result in a diversion of human and financial resources away from research and testing activities and into litigation and, therefore, seriously disrupt their participation in the program. *See Litigation Relating to Atomic Testing, 1983: Hearings on H.R. 2797 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 98th Cong., 1st Sess. 46-49 (1983). Plaintiff asserts that the mere public embarrassment of the private contractors is not a rational or legitimate reason for relieving them of liability. We disagree. Even if we question the extent and effect of this publicembarrassment it is not for us to reevaluate it. It is a plausible reason for Congress' action. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. at 179, 101 S.Ct. at 461.

Nor has Congress chosen a wholly arbitrary or irrational means to its legitimate end. Plaintiff claims that Congress created only an illusory substitute remedy in § 2212, that she probably will not be compensated for her husband's death because under the terms of § 2212(a)(2) the "limitations and exceptions" applicable to the remedies provided by § 2212 are preserved. For purposes of this opinion we will assume, without deciding, that these "limitations and exceptions" include the "discretionary function" exception, 28 U.S.C. § 2680(a), the *Feres* doctrine, *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), and the exclusivity provisions of the Federal Employees Compensation Act, 5 U.S.C. § 8816(c), and that they will bar many putative plaintiffs from any relief under the FTCA for radiation injuries. *See DiPippa v. United States*, 687 F.2d at 16-19; *Noga v. United States*, 411 F.2d 943, 945 (9th Cir.) , *cert. denied*, 396 U.S. 841, 90 S.Ct. 104, 24 L.Ed.2d 92 (1969); *Thol v. United States*, 218 F.2d

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12, 13 (9th Cir.1954); *In re Consolidated United States Atmospheric Testing Litigation,* 616 F.Supp. 759, 771-80 (N.D.Cal.1985); *but see Wallace v. United States,* 669 F.2d 947, 950-54 (4th Cir.1982). Nevertheless, although Congress could have relieved the independent contractors of their burden of defending suits for radiation injuries and still provided those injured by radiation a more generous substitute compensation scheme, we cannot say that Congress' choice of means was without any rational basis. The atomic weapons testing program has been an important, some say vital, government function from its inception. Independent contractors were used only to aid the government to carry out its program. When the program began Congress could have mandated that all tort claims arising from it be litigated through the FTCA. Under the statute as originally enacted, plaintiffs had the right to sue contractors without restriction, but it was the government who paid the judgment under its indemnitor agreement with the contractor. Plaintiffs had the best of both possible worlds, a right to sue free of any FTCA limitations with the government guaranteeing payment of the judgment. It was neither arbitrary nor irrational for Congress to change the law so as to place putative plaintiffs in the same position as any other party suing the United States in tort. *See Hearings, supra,* at 46-48; S.Rep. No. 500, *supra,* at 377. Moreover, there may be government compensation available to many of those injured by radiation, including the plaintiff here, under veterans benefits legislation, 38 U.S.C. §§ 301-363, §§ 401-423, or the FECA.

***15** III. REMAINING CONSTITUTIONAL ISSUES

Plaintiff's other constitutional challenges can be dealt with summarily.

[5] (1) Fifth Amendment Taking. We have already found that plaintiff had no vested property right in her tort cause of action, so it is very unlikely there could be a "taking" here. But, in any event, we have no jurisdiction to consider a taking claim where the amount in controversy exceeds $10,000. Plaintiff claims several million dollars in compensation. The proper forum for such a claim is the Court of Claims. 28 U.S.C. §§ 1346(a)(2), 1491. *See, Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. at 71 n. 15, 101-02 & n. 4, 98 S.Ct. at 2629 n. 15, 2644-45 & n. 4 (Rehnquist, J., dissenting); *In re Aircrash in Bali, Indonesia, on April 22, 1974,* 684 F.2d 1301, 1312 (9th Cir.1982) .

(2) Unexpected Law. There is nothing "unexpected" about a validly enacted congressional statute even if the plaintiff was surprised by its enactment. Plaintiff alleges nothing unfair about the legislative procedure by which § 2212 was enacted.

(3) Equal Protection. Plaintiff claims that radiation victims of government atomic tests are a suspect class and that, therefore, strict scrutiny must be our standard of review under an equal protection analysis. Alternatively, she claims we must apply at least an intermediate test to this classification. We disagree. These radiation victims were injured because of the work they did. They do not fall within any of the suspect classifications based on race, gender, alienage or illegitimacy recognized by the Supreme Court as requiring a standard of review more exacting than the rational basis test. *See* J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 524-25 (1978). We find no violation of equal protection for the same reasons we found no violation of due process.

[6][7] (4) Seventh Amendment. There is no right to a jury trial against the sovereign under the seventh amendment. *Glidden Co. v. Zdanok,* 370 U.S. 530, 572, 82 S.Ct. 1459, 1484, 8 L.Ed.2d 671 (1962). If the United States can abolish the right to a cause of action altogether it can also abolish the right to a jury trial that is part of it. When the United States abolishes a cause of action and then sets up a separate administrative remedy against itself, as it has here, the seventh amendment does not require that it must also provide a jury trial. This has been the holding of those courts that considered seventh amendment challenges to the Federal Drivers Act and Swine Flu Act. *See Jones v. Wyeth Laboratories, Inc.,* 583 F.2d 1070, 1070-71 (8th Cir.1978); *Ducharme v. Merrill-National Laboratories,* 574 F.2d at 1311; *Sparks v. Wyeth Laboratories, Inc.,* 433 F.Supp. 411, 418 (W.Okl.1977); *Nistendirk v. McGee,* 225 F.Supp. 881, 882 (W.D.Mo.1963).

(5) Ninth Amendment. Plaintiff asserts that certain rights are preserved in the ninth amendment for the people. She has not, however, specified which of those rights has been violated.

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(6) Tenth Amendment. Plaintiff relies on *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), to support her argument that Congress invaded rights reserved to the states when it abolished state-law causes of action by the enactment of § 2212. *Usery* was overruled in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. ----, ----, 105 S.Ct. 1005, 1021, 83 L.Ed.2d 1016 (1985). Moreover, *Usery* was a case involving Congress' commerce clause powers. We do not think that the tenth amendment limits Congress' war powers under the facts of this case. *Cf. Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. at 84 n. 27, 98 S.Ct. at 2636 n. 27.

(7) Right of Access. As stated in our consideration of the standard of review applicable in plaintiff's due process challenge, plaintiff's right of access to the courts has not been abridged. Furthermore, since plaintiff has not alleged that she has been denied access to the administrative remedies contemplated under § 2212 she cannot ***16** claim her right to petition for redress of grievances has been eliminated.

[8][9] (8) *Ex Post Facto* Laws, Bills of Attainder, the Contracts Clause. The prohibition against *ex post facto* laws only applies to criminal or penal statutes. *Galvan v. Press,* 347 U.S. 522, 531 & n. 4, 74 S.Ct. 737, 742 & n. 4, 98 L.Ed. 911 (1954). Section 2212 is not punitive so it does not constitute a bill of attainder. *See Selective Service System v. Minnesota Public Interest Research Group,* 468 U.S. 841, ----, 104 S.Ct. 3348, 3351-56, 82 L.Ed.2d 632 (1984). We decline plaintiff's invitation to apply the contracts clause to the federal government.

Affirmed.

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United States Court of Appeals,
Third Circuit.

**Jacqueline and Salvadore A. DiPIPPA,
Appellants,
v.
UNITED STATES of America, Appellee.**

No. 82-3000.

Argued July 8, 1982.
Decided Aug. 24, 1982.

Federal employee and her husband appealed from order of the United States District Court for the Middle District of Pennsylvania, Richard P. Conaboy, J., dismissing their action against United States for injuries federal employee sustained from swine flu vaccination. The Court of Appeals, Seitz, Chief Judge, held that: (1) substantial question existed as to whether Federal Employees Compensation Act provided exclusive remedy for employee who contracted Guillain-Barre Syndrome after voluntarily receiving swine flu vaccination; (2) providing that federal employees pursue action under Federal Employees Compensation Act rather than Swine Flu Act was not denial of equal protection; and (3) to avoid statute of limitations problem district court should have stayed employee's swine flu claim until Secretary of Labor resolved question of Federal Employees Compensation Act coverage.

Vacated and remanded with directions.

West Headnotes

[1] Workers' Compensation ⚿2085
413k2085 Most Cited Cases

Where Federal Employees Compensation Act applies, its remedy is exclusive and bars all other claims for compensation against government. 5 U.S.C.A. § 8101 et seq.

[2] Workers' Compensation ⚿2085
413k2085 Most Cited Cases

Where three Federal Employees Compensation Act program memoranda indicated Labor Department's intent to provide Federal Employees Compensation Act coverage for adverse reactions to swine flu innoculations administered by federal employees on federal premises, substantial question of Federal Employees Compensation Act coverage existed, which would preclude any other remedy for injury sustained by federal employee who contracted Guillain-Barre Syndrome after voluntarily receiving swine flu vaccination given on federal premises during normal working hours. 5 U.S.C.A. § 8101 et seq.

[3] Workers' Compensation ⚿1095
413k1095 Most Cited Cases

Secretary of Labor's decisions regarding coverage under Federal Employees Compensation Act are absolutely immune from judicial review, whether particular determination is grounded in logic or precedent. 5 U.S.C.A §§ 8101 et seq., 8128(b).

[4] Workers' Compensation ⚿2085
413k2085 Most Cited Cases

In Swine Flu Act, Congress sought to substitute itself as defendant in all potential swine flu claims, made itself amenable to suit under Federal Tort Claims Act, and made Swine Flu Act exclusive remedy for all swine flu claims except where alternate and exclusive method of compensation existed under prior law; therefore, if employee who contracted Guillain-Barre Syndrome after voluntarily receiving swine flu vaccination on federal premises during normal working hours was covered under Federal Employees Compensation Act, Federal Employees Compensation Act would bar any swine flu claim against Government. Public Health Service Act, § 2(k)(1)(B),(k)(3),(k)(5)(C), 42 U.S.C.(1976 Ed.) § 247b(k)(1)(B),(k)(3),(k)(5)(C); 5 U.S.C.A. §§ 8116(c), 8131, 8131(a).

[5] Constitutional Law ⚿251.3
92k251.3 Most Cited Cases

Statutory classification in area of social and economic welfare will not violate due process if it is reasonable and bears some rational relationship to legitimate congressional goal. U.S.C.A.Const.Amend. 5.

[6] Constitutional Law ⚿299.2
92k299.2 Most Cited Cases

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Supreme Court of the United States.

COMBES
v.
GETZ.

No. 528.

Argued March 21, 1932.
Decided April 11, 1932.

Mr. Justice CARDOZO, Mr. Justice BRANDEIS, and Mr. Justice STONE, dissenting.

On Writ of Certiorari to the Supreme Court of the State of California.

Suit by Peirce Coombes against Milton E. Getz. Judgment for defendant and appeal therefrom dismissed by the State Supreme Court (1 P.(2d) 992), and plaintiff brings certiorari.

Reversed.

West Headnotes

[1] Constitutional Law ⚿168
92k168 Most Cited Cases

[1] Constitutional Law ⚿253(4)
92k253(4) Most Cited Cases
(Formerly 92k307)

[1] Corporations ⚿326
101k326 Most Cited Cases

[1] Corporations ⚿346
101k346 Most Cited Cases

Repeal of constitutional provision making corporate directors responsible for officer's defalcations held not to affect right of creditor in respect to claim theretofore arising. Const. art. 12, §§ 1, 3; and U.S.C.A.Const. art. 1, § 10, and Amend. 14.

[2] Federal Courts ⚿505
170Bk505 Most Cited Cases
(Formerly 106k366(1), 106k394(3))

Decision of state Supreme Court construing and applying its own Constitution and laws generally is binding on federal courts.

[3] Federal Courts ⚿505
170Bk505 Most Cited Cases
(Formerly 106k365(3), 106k394(9))

Decision of Supreme Court of state construing and applying Constitution and laws is not binding on federal court where contract clause of Federal Constitution is involved.

[4] Constitutional Law ⚿154(2)
92k154(2) Most Cited Cases

[4] Corporations ⚿38
101k38 Most Cited Cases

[4] Constitutional Law ⚿93(1)
92k93(1) Most Cited Cases

Obligations of contract may not be impaired by state in exercise of authority under reserved powers with respect to corporate charters. U.S.C.A.Const. art. 1, § 10, and Amend. 14.

****435 *435** Messrs. Joseph L. Lewinson and W. H. Douglass, both of Los Angeles, Cal., Nat Schmulowitz, J. C. McKinstry, Joseph Haber, Jr., and Charles L. Firebaugh, all of San Francisco, Cal., for petitioner.

***437** Mr. Alfred Sutro, of San Francisco, Cal., for respondent.

***439** Mr. Justice SUTHERLAND delivered the opinion of the Court.

This is a suit brought in a California superior court by petitioner, on behalf of himself and other creditors, to recover from respondent, a director in Getz Bros. & Company, a California corporation, the amount of an indebtedness upon an open account for goods sold to the corporation by petitioner's assignor. The basis of the liability sought to be enforced is found in the following provision of section 3, art. 12, of the California Constitution of 1879: 'The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to ***440** the creditors and stockholders for all moneys embezzled or misappropriated by the

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(Formerly 92k299(2))

[6] Workers' Compensation ⚿19
413k19 Most Cited Cases

Congress could have reasonably concluded that federal employees asserting swine flu claim already had sufficient remedy under Federal Employees Compensation Act and needed no supplements; thus, denying federal worker's right to pursue claim under Swine Flu Act was not denial of equal protection. Public Health Service Act, § 2(j-*l*), 42 U.S.C.(1976 Ed.) § 247b(j-*l*); 5 U.S.C.A. § 8101 et seq.; U.S.C.A.Const.Amend. 5.

[7] Action ⚿69(7)
13k69(7) Most Cited Cases

Although there was substantial question of Federal Employees Compensation Act coverage for federal employee who contracted Guillain-Barre Syndrome after receiving swine flu vaccination, where language of Swine Flu Act required dismissal of action against United States only where "availability" of exclusive remedy precluded claim under Federal Tort Claims Act, to avoid statute of limitations problem, district court should have stayed federal employee's Swine Flu Act claim until Secretary of Labor resolved question of employee's coverage under Federal Employees Compensation Act. Public Health Services Act, § 2(k)(5)(C), 42 U.S.C.(1976 Ed.) § 247b(k)(5)(C); 5 U.S.C.A. § 8101 et seq.

***15** Anthony J. Ciotola, Hazleton, Pa., Clifford J. Shoemaker, (argued), Washington, D. C., for appellants.

David C. Shipman, Asst. U. S. Atty., Harrisburg, Pa., Leonard Schaitman, John F. Cordes (argued), U. S. Dept. of Justice, Civ. Div., Washington, D. C., for appellee.

Before SEITZ, Chief Judge, SLOVITER, Circuit Judge, and McCUNE, District Judge.[FN*]

FN* Honorable Barron P. McCune, United States District Judge for the Western District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

SEITZ, Chief Judge.

The DiPippas appeal from the district court's order dismissing their action against the United States for injuries Jacqueline DiPippa sustained from a swine flu vaccination. This court has jurisdiction under 28 U.S.C. s 1291 (1976).

I.

In November 1976, while a federal employee, Jacqueline DiPippa voluntarily received a swine flu vaccination. The shot was given on federal premises during normal working hours. A month later, Jacqueline DiPippa developed symptoms diagnosed as Guillain-Barre Syndrome. In 1978, she and her husband filed a notice of administrative claim under the Swine Flu Act for injuries sustained from the vaccination. The Government denied the claim on the ground that the DiPippas' exclusive remedy was one for compensation pursuant to the Federal Employees Compensation Act (FECA), 5 U.S.C. s 8101 et seq. This action followed.

The DiPippas filed their complaint in the United States District Court for the District of Columbia under the Swine Flu Act of 1976, 42 U.S.C. s 247b(j)- (l) (amended 1978). The case was consolidated with other swine flu cases for pretrial proceedings in In re Swine Flu Immunization Products Liability Litigation, 446 F.Supp. 244 (J.P.M.D.L.1978), and then was transferred to the United States District Court for the Middle District of Pennsylvania. Because the district court found there was a substantial question that FECA might be the DiPippas' exclusive remedy,[FN1] it dismissed the action for want of jurisdiction.

FN1. Mr. DiPippa seeks damages for loss of consortium arising from his wife's injuries. Because it found there was a substantial likelihood that Mrs. DiPippa's injuries are compensable under FECA, and because FECA coverage bars a spouse's suit for loss of consortium, Underwood v. United States, 207 F.2d 862 (10th Cir. 1953); Levine v. United States, 478 F.Supp. 1389 (D.Mass.1979), the district court also dismissed Mr. DiPippa's claim against the Government. Mr. DiPippa's claim to relief is dependent on his wife's. Thus we need conduct no independent analysis of his claim.

***16** II.

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DiPippa argues that she may pursue her swine flu claim against the Government for two reasons: (1) there is no substantial question of FECA coverage and therefore she need not pursue a FECA remedy; and (2) even if there were FECA coverage, it would not bar her claim against the Government for the acts and omissions of the program participants. [FN2] DiPippa further argues that the district court's interpretation of the Swine Flu Act denies her equal protection under the law and, in light of our doctrine that statutes should be interpreted in a constitutionally valid manner, should be rejected.

> FN2. The Swine Flu Act defines program participants in s 247b(k)(2)(B): "the term 'program participants' ... means the manufacturer or distributor of the swine flu vaccine ..., the public or private agency or organization that provided an inoculation under the swine flu program ..., and the medical and other health personnel who provided or assisted in providing an inoculation under the swine flu program ...."

A.

(1) The Swine Flu Act provides that a claim for any injury sustained from the swine flu program shall bebrought directly against the United States under the procedures established by the Federal Tort Claims Act (FTCA), 28 U.S.C. s 2671 et seq. The Swine Flu Act makes this remedy exclusive, 42 U.S.C. s 247b(k)(3), except where a remedy under any other law provides claimant's exclusive remedy, 42 U.S.C. s 247b(k)(5)(C). Where FECA applies, its remedy is exclusive and bars all other claims for compensation against the Government. Thus, we must first determine whether FECA is DiPippa's exclusive remedy.

Only the Secretary of Labor or his designee may determine the scope of FECA coverage. 5 U.S.C. s 8128(b). In deference to such authority, this court has held that where a "substantial question" of FECA coverage exists, federal district courts will not entertain claims under the FTCA. Joyce v. United States, 474 F.2d 215, 219 (3rd Cir. 1973); Somma v. United States, 283 F.2d 149, 151 (3rd Cir. 1960).

A substantial question of FECA coverage exists unless it is "certain that (the Secretary of Labor) would find no coverage." Concordia v. United States Postal Service, 581 F.2d 439, 442-43 (5th Cir. 1978). Thus, we first consider whether DiPippa's claim presents a substantial question of FECA coverage under that standard.

(2) DiPippa voluntarily received the swine flu inoculation while she was a federal employee, on federal premises, during normal working hours. Three FECA Program Memoranda indicate the Labor Department's intent to provide FECA coverage for adverse reactions to inoculations administered by federal employers on federal premises. FECA Program Memorandum No. 42 (March 3, 1966) states that "(d) eleterious effects such as ... reaction to agency-sponsored innoculation (sic) ... will be compensable" under FECA. FECA Program Memorandum No. 186 (December 23, 1974) supplements the 1966 memorandum and states that FECA covers "any deleterious result of medical services furnished by the employing agency for non-work related illnesses or injuries." In 1976, the Labor Department published a third memorandum stating that adverse reactions to swine flu inoculations "given to Federal employees by Federal facilities are compensable under (FECA)." FECA Bulletin No. 26-76 (October 27, 1976). We believe that these bulletins raise a substantial question of FECA coverage.

(3) DiPippa correctly points out that the first two memoranda indicate only that agency-sponsored medical services provided ***17** under 5 U.S.C. s 7901 (1976) qualify for FECA coverage, and that she received her swine flu shot under a nationally sponsored program pursuant to 42 U.S.C. s 247b(j)-(l). She argues that the third memorandum conflicts with recent federal court decisions and prior policies of the Secretary. See Wallace v. United States, 669 F.2d 947, 954 (4th Cir. 1982). While this may be true, it does not mean that there is not a substantial question of FECA coverage. The Secretary of Labor's decisions regarding coverage are absolutely immune from judicial review, 5 U.S.C. s 8128(b), whether or not a particular determination is grounded in logic or precedent. Cf. Gill v. United States, 641 F.2d 195 (5th Cir. 1981) (employee may not seek review of Secretary's determination of coverage on the ground of bad motive). Should the Secretary rule that FECA covers DiPippa's injury, his determination would be conclusive. We think the presence of FECA Bulletin 26-76 raises a substantial possibility that he would so rule.

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We agree with the district court that DiPippa's claim presents a substantial question of FECA coverage. We are not persuaded to the contrary by the analysis in Wallace.

B.

The second issue we address is whether FECA coverage would bar DiPippa's swine flu claim against the United States for the acts and omissions of the program participants. To resolve this issue, we must look to the language of both statutes.

(4) In the Swine Flu Act, Congress sought to implement a national vaccination program in response to the perceived threat of a national flu epidemic. In doing so, it strove both to immunize manufacturers from any liability for injuries allegedly sustained from the vaccination program and to provide just compensation for any such injury. 122 Cong.Rec. 26,813 (remarks of Cong. Rogers). To achieve these two goals, the United States substituted itself as defendant in all potential swine flu claims, s 247b(k)(1)(B), made itself amenable to suit under the FTCA, id., and made this the exclusive remedy for all swine flu claims, s 247b(k)(3), except where an alternate and exclusive method of compensating the injury existed under prior law, s 247b(k)(5)(C). Thus, we must look to FECA to determine whether or not DiPippa can maintain an action against the Government for the acts and omissions of the program participants.

Where FECA applies, it unambiguously precludes "all other liability of the United States" either "under a workmen's compensation statute or under a Federal tort liability statute." 5 U.S.C. s 8116(c). On the other hand, FECA allows claims for compensable injuries only against "a person other than the United States." 5 U.S.C. s 8131(a). DiPippa's suit is not against a third party, but directly against the United States, as the plain language of the Swine Flu Act expressly requires. See 42 U.S.C. s 247b(k)(1)(B). FECA coverage therefore seems to bar DiPippa's swine flu claim against the Government.

DiPippa argues, however, that because section 8131 allows suits against third parties, section 8116(c) does not bar her claim against the Government for the acts and omissions of the program participants. Her theory is that section 8116(c) does not apply, because, although the Government is the named defendant, the action is against third parties. DiPippa's argument not only ignores the plain language of the statute, but it misinterprets the purpose behind section 8131. Sections 8131 and 8132 make it clear that the claimant should not be compensated twice for the same injury at the Government's expense. Congress intended those sections to provide a means of reimbursement to the Government where the claimant recovers twice for the same injury. The sections allow the claimant to pursue a third party, at the claimant's expense, so long as the successful claimant reimburses the Government for any FECA benefits the claimant receives. Congress designed these sections to limit the Government's costs under FECA, not to subject it to multiple claims for the same injury, as DiPippa's statutory interpretation would do.

> ***18** Plainly, by these two sections (8131 and 8132) Congress deals with the liability of persons "other than the United States " to employees entitled to compensation under the act, not for the purpose of increasing that compensation, but for the purpose of reimbursing the Government for payments made and of indemnifying it against other amounts payable in the future. The sections emphasize the disposition to treat the compensation provided for as adequate for the injuries received, and they negative any intention on the part of the Government to make further payments.

Dahn v. Davis, 258 U.S. 421, 430, 42 S.Ct. 320, 321, 66 L.Ed. 696 (1922) (emphasis in original).

Despite the clear statutory language, DiPippa argues that Congress did not intend for FECA to bar a tort claim based on the acts and omissions of the program participants. She relies on both Hunt v. United States, 636 F.2d 580 (D.C.Cir.1980), and Wallace v. United States, 669 F.2d 947 (4th Cir. 1982), to support her statutory interpretation. Hunt is distinguishable, and we find ourselves in disagreement with the statutory interpretation in Wallace.

In Hunt, plaintiffs received a swine flu vaccination while on active military duty and filed suit under the FTCA against the United States. The court held that the doctrine of Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), which holds that remedies granted under the veterans' laws often bar relief under the FTCA, did not bar

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plaintiffs' swine flu claims. The fact that compensation under the relevant veterans' laws was not expressly exclusive was the determinative factor in Hunt. The court reasoned that the Swine Flu Act's subordination clause, section 247b(k)(5)(C), "does not itself bar an action under the Swine Flu Act; another remedy must preclude it." 636 F.2d at 595. In Hunt, the veterans' laws provided the other remedy, and, " '(u)nlike the usual workman's compensation statute, ... there is nothing in ... the veterans' laws which provides for exclusiveness of remedy.' " Id. at 585 (quoting Brooks v. United States, 337 U.S. 49, 53, 69 S.Ct. 918, 920, 93 L.Ed. 1200 (1949)). In this case, FECA provides the other remedy, and it is expressly exclusive.

In Wallace, the Fourth Circuit held that FECA "does not bar (plaintiff's) claim against the United States as the substitute defendant for other program participants." 669 F.2d at 954. The court reasoned that "FECA is an exclusive remedy only for potential claims against the United States as employer for work-related injury," and that the Act "cannot preclude claims against the United States as substitute defendant for acts or omissions of private third parties." Id. at 945-55. We disagree.

We find strong support for our analysis in cases holding that FECA bars claims based on the negligence of federal drivers under the Federal Drivers Act, 28 U.S.C. s 2679 (1976). The Federal Drivers Act provided the "pattern" after which Congress fashioned the "unusual, though not unique manner" by which the Government assumed liability for the acts of program participants in the swine flu program. See 122 Cong.Rec. 26,816 (remarks of Cong. Rogers). Application of that Act therefore provides a useful analogy. Congress intended the Federal Drivers Act to relieve federal drivers of the burden of expensive personal liability insurance. See S.Rep.No. 736, 87th Cong., 1st Sess. 1961, reprinted in 1961 U.S.Code Cong. & Ad.News 2784, 2785. To achieve that purpose, Congress, in language remarkably similar to that of the Swine Flu Act, substituted the United States as the exclusive defendant in all claims against federal employees operating motor vehicles in the performance of duty.

The compensation system set up under FECA bars an action under the Federal Drivers Act, even though federal employees would have had a common law action against the negligent driver prior to the Act. See, e.g., Van Houten v. Ralls, 411 F.2d 940, 943 (9th Cir.), cert. denied, 396 U.S. 962, 90 S.Ct. 436, 24 L.Ed.2d 426 (1969); Noga v. United States, 411 F.2d 943, 944 (9th Cir.), cert. denied, 396 U.S. 841, 90 S.Ct. 104, 24 L.Ed.2d 92 (1969). In ***19** Noga, plaintiff sought to avoid this result by "characteriz(ing) the United States as a technical defendant substituted in place of the negligent federal driver," and arguing that FECA's exclusivity clause therefore did not apply. 411 F.2d at 945. This is precisely DiPippa's argument. The United States Court of Appeals for the Ninth Circuit rejected Noga's argument.

> We do not believe plaintiff's proposed solution is permissible under the exclusivity provision of the FECA. The statutory language (of section 8116(c)) is not ambiguous. It states that the United States is not liable under the FECA and the Federal Tort Claims Act, but only under the FECA. This provision was not tampered with in the Federal Drivers Act.

Id. We find DiPippa's argument similarly unacceptable. The statutory language is clear: the Swine Flu Act did not negate the exclusivity language of FECA. On the contrary, it provided for it in section 247b(k)(5)(C). The legislative history explaining that clause makes this eminently clear.

> This provision gives priority to the handling of claims for which a remedy from the United States (as compared to some other source) is already available, using that remedy rather than the remedy provided by (this) legislation.

122 Cong.Rec. 26,815 (remarks of Cong. Rogers).

We agree with the district court that if there is FECA coverage, it would bar any swine flu claim DiPippa might assert against the Government.

C.

DiPippa argues that the district court's construction of the Swine Flu Act violates her right to equal protection. She argues that the district court's interpretation establishes two classes of swine flu plaintiffs: 1) injured persons eligible for compensation from the United States under another statute; and 2) those not so eligible. Only the latter group is permitted to pursue remedies based upon acts of both the Government and the program participants.

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(5) Although the equal protection clause of the Fourteenth Amendment has no application against the United States, the Supreme Court has held that "if a classification would be invalid under the Equal Protection clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment." Johnson v. Robison, 415 U.S. 361, 364-65 n.4, 94 S.Ct. 1160, 1164 n.4, 39 L.Ed.2d 389 (1974). A statutory classification in the area of social and economic welfare will not violate due process if it is reasonable and bears some rational relationship to a legitimate congressional goal. Richardson v. Belcher, 404 U.S. 78, 81, 92 S.Ct. 254, 257, 30 L.Ed.2d 231 (1971).

(6) DiPippa argues that "(s)ingling out those who happen to receive federal workers' compensation benefits and denying them the right they would otherwise be entitled to ... is clearly anirrational classification." We disagree. We are unable to find that the disparity in treatment between persons compensated under FECA and those who are not is so unrelated to the objects of both FECA and the Swine Flu Act as to be arbitrary and irrational.

One congressional purpose behind the Swine Flu Act is to "assure an orderly procedure for the prompt and equitable handling of any claim for personal injury or death arising out of the administration of (the swine flu) vaccine." s 247b(k)(1)(B)(i). Courts have uniformly recognized that Congress intended FECA to guarantee federal employees "surer and more immediate relief in return for foregoing more expensive awards outside the system." Gill v. United States, 641 F.2d 195, 197 (5th Cir. 1981). In light of this guarantee, Congress could have reasonably concluded that federal employees asserting a swine flu claim already had a sufficient remedy under FECA that needed no supplement.

We hold that the procedure that Congress adopted under the Swine Flu Act is rationally related to achieving the legitimate goal of assuring "an orderly procedure for the prompt and equitable handling" of claims.

***20** III.

The district court dismissed DiPippa's claim for want of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1). While recognizing the general rule that "district courts ordinarily must withhold further action pending the outcome of proceedings under the FECA," the district court reasoned that the language of the Swine Flu Act required dismissal of DiPippa's claim.

> Where an action or proceeding under this subsection is precluded because of the availability of a remedy through proceedings for compensation or other benefits from the United States as provided by any other law, the action or proceeding shall be dismissed....

42 U.S.C. s 247b(k)(5)(C).

(7) We do not interpret the language of that section so harshly where, as here, there is a substantial question of FECA coverage. The district court would require dismissal where there is a mere possibility of an exclusive remedy under some other law. The language of the Act requires dismissal only where the "availability" of an exclusive remedy precludes a claim under the FTCA. If the Secretary of Labor should determine that no FECA remedy is available, DiPippa may pursue her claim under the FTCA. To avoid statute of limitations problems, the district court should stay proceedings in the action until the Secretary resolves the question of FECA coverage. Joyce v. United States, 474 F.2d 215 (3rd Cir. 1973); Somma v. United States, 283 F.2d 149 (3rd Cir. 1960). Indeed, the Government specifically stated that it would not object if this court remanded the case to the district court with instructions to reinstate the complaint and stay proceedings.

IV.

We will vacate the order of the district court and remand the case with directions to reinstate the complaint and to stay further action pending the outcome of any FECA proceeding.

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[redacted]

REV_00265215

United States Court of Appeals,
Fifth Circuit.

Marie and Donald DUCHARME, Plaintiffs-Appellants,
v.
MERRILL-NATIONAL LABORATORIES, and United States of America, Defendants-Appellees.

No. 77-3488
Summary Calendar.[FN*]

FN* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

June 14, 1978.

Diversity action was brought against manufacturer of swine flu vaccine to recover for injuries resulting from adverse reaction to the vaccine. The United States District Court for the Western District of Louisiana, W. Eugene Davis, J., granted motion of United States to be substituted as sole defendant and to dismiss for failure to exhaust administrative remedies, and plaintiffs appealed. The Court of Appeals affirmed on basis of district court's memorandum opinion holding that: (1) the Act, which provides that cause of action against United States arising out of administration of the vaccination program is exclusive of any civil action against a manufacturer or distributor, does not violate Fifth Amendment due process as abrogating a state cause of action against the manufacturer for damages; (2) allowing a manufacturer a trial by jury on the government's indemnity claim while denying a jury trial in a claimant's action against the government does not violate equal protection; (3) procedures established under the Act are rationally related to achieving goal of assuring interstate distribution of vaccine, and (4) depriving claimants of jury trial in their action against the sovereign does not violate Seventh Amendment right to trial by jury.

Affirmed.

West Headnotes

[1] Constitutional Law ⚖105
92k105 Most Cited Cases

[1] Constitutional Law ⚖301(1)
92k301(1) Most Cited Cases
(Formerly 92k299)

[1] Drugs and Narcotics ⚖20.1
138k20.1 Most Cited Cases
(Formerly 138k20)

[1] United States ⚖127(1)
393k127(1) Most Cited Cases
(Formerly 393k127)

One has no vested right in a tort claim for damages under state law; hence, Swine Flu Act, which provides that a cause of action against United States arising out of administration of swine flu vaccine is exclusive of any civil action against a program participant, is not violative of Fifth Amendment due process as abrogating a state law right of action against the manufacturer for injuries resulting from the adverse reaction to the vaccine; also, cause of action against the manufacturer did not arise until after passage of the Act and, hence, there was no prior vested right in a cause of action under state law. LSA-C.C. art. 2315; U.S.C.A.Const. Amend. 5; Public Health Service Act, §§ 317, 317(k)(3) as amended 42 U.S.C.A. §§ 247b, 247b(k)(3).

[2] Constitutional Law ⚖253.2(2)
92k253.2(2) Most Cited Cases
(Formerly 92k253(2))

While equal protection clause of Fourteenth Amendment has no application against the United States, the Fifth Amendment does prohibit discrimination that is so unjustifiable as to be violative of due process. U.S.C.A.Const. Amends. 5, 14.

[3] Constitutional Law ⚖253.1
92k253.1 Most Cited Cases

In area of social and economic welfare, in order to meet due process standards the classification created under the statute must be reasonable, not arbitrary and bear some rational relationship to legitimate congressional goals. U.S.C.A.Const. Amends. 5, 14
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[4] Constitutional Law ⚖249(7)
92k249(7) Most Cited Cases
(Formerly 92k313)

[4] United States ⚖127(1)
393k127(1) Most Cited Cases
(Formerly 393k127)

Swine Flu Act does not violate equal protection by allowing a manufacturer or distributor a jury trial on an indemnity claim asserted against it by the United States while denying a jury trial in an action against the United States by one who has suffered an adverse reaction to the vaccine. Public Health Service Act, § 317(k)(1)(B) as amended 42 U.S.C.A. § 247b(k)(1)(B); 28 U.S.C.A. § 2402.

[5] Drugs and Narcotics ⚖20.1
138k20.1 Most Cited Cases
(Formerly 138k20)

[5] United States ⚖127(1)
393k127(1) Most Cited Cases
(Formerly 393k127)

Provisions of Swine Flu Act creating a cause of action against the United States for damages arising out of act of a program participant and making such cause of action exclusive of any civil action against a participant with the government having right to seek indemnity from a participant on basis of negligence or breach of contract, are rationally related to achieving goal of assuring interstate distribution of swine flu vaccine, in view of fact that commercial insurers refused to insure drug manufacturers for interstate distribution of the vaccine but would provide insurance for limited risk for which the government could seek indemnity. Public Health Service Act, § 317(k)(3, 7) as amended 42 U.S.C.A. § 247b(k)(3, 7); U.S.C.A.Const. Amend. 5.

[6] Jury ⚖31.1
230k31.1 Most Cited Cases
(Formerly 230k31(2))

[6] United States ⚖125(7)
393k125(7) Most Cited Cases

Swine Flu Act does not violate Seventh Amendment right to jury trial; in waiving its sovereign immunity by providing for a cause of action against it arising out of administration of the vaccine program the government was entitled to attach any conditions, including no right to jury trial, to its consent. Public Health Service Act, § 317(k)(1)(B), (3) as amended 42 U.S.C.A. § 247b(k)(1)(B), (3); 28 U.S.C.A. § 2402; U.S.C.A.Const. Amend. 7.

[7] Jury ⚖12(1.2)
230k12(1.2) Most Cited Cases
(Formerly 170Ak2081)

Suits against United States, requiring waiver of sovereign immunity, are not "suits at common law" within meaning of Seventh Amendment right to jury trial. U.S.C.A.Const. Amend. 7.

[8] United States ⚖125(7)
393k125(7) Most Cited Cases

When the sovereign waives immunity it may attach any conditions, including no right to trial by jury, to its consent. U.S.C.A.Const. Amend. 7.

[9] United States ⚖131
393k131 Most Cited Cases

Administrative procedure required under Federal Tort Claims Act is jurisdictional and cannot be waived. 28 U.S.C.A. § 2675.

[10] Federal Civil Procedure ⚖1838
170Ak1838 Most Cited Cases

Although no administrative claim was filed prior to institution of action for injuries resulting from adverse reaction to swine flu vaccine, dismissal of the government was without prejudice since under Swine Flu Act, if a suit is dismissed for failure to file an administrative claim, the plaintiff has 30 days from date of dismissal or two years from date claim arose in which to file an administrative claim. Public Health Service Act, § 317 as amended 42 U.S.C.A. § 247b.

***1308** J. Minos Simon, Lafayette, La., for plaintiffs-appellants.

***1309** Edward L. Shaheen, U. S. Atty., Shreveport, La., Jeffrey Axelrad, Leon B. Taranto, Civ. Div., Dept. of Justice, Washington, D. C., for United States of America.

Appeal from the United States District Court for the

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Western District of Louisiana.

Before RONEY, GEE and FAY, Circuit Judges.

PER CURIAM:

We affirm the judgment below on the basis of the district court's memorandum opinion appended.

AFFIRMED.

APPENDIX

(Title Omitted)No. 770,452

RULING ON MOTIONS

Plaintiffs filed this diversity action against Merrill-National Laboratories for injuries resulting from an adverse reaction to a swine flu vaccine. The basis of their cause of action is Louisiana Civil Code Article 2315.

The United States filed motions under the Swine Flu Act (42 U.S.C. s 247b) to dismiss for failure to exhaust administrative remedies, to substitute United States as sole defendant and an additional motion to stay discovery pending outcome of hearing on the motions.

Plaintiffs oppose the government motions alleging: (1) the Swine Flu Act is in violation of the due process clause of the 5th and 14th Amendments in that it abrogates plaintiffs' cause of action under Article 2315 for damages against the manufacturer; (2) the Swine Flu Act, which incorporates the Federal Tort Claims Act, violates plaintiffs' right to a jury trial.

Constitutional attacks on the Swine Flu Act, similar to the attack being made here, have been made in at least three district courts.[FN1]

> FN1. Wolfe v. Merrill National Laboratories, 433 F.Supp. 231 (M.D.Tenn.1977); Sparks v. Wyeth Laboratories, Inc., 431 F.Supp. 411 (W.D.Okl.1977); Stephens v. Wyeth Laboratories, Inc., No. 77-L-0274-S (W.D.Ala., June 3, 1977).

The courts, in all three of the above cases, upheld the constitutionality of the Swine Flu Act.

The Swine Flu Act basically:

1. Creates a cause of action against the United States based on negligence, strict liability or breach of warranty for damages arising out of the act of a program participant; [FN2]

> FN2. Program participant is defined as a manufacturer or distributor of swine flu vaccine. 42 U.S.C. s 247b(k)(2)(B).

2. provides that the cause of action against the United States arising out of the administration of the swine flu vaccine shall be exclusive of any civil action against the program participant, 42 U.S.C. s 247b(k)(3);

3. incorporates provisions of the Federal Tort Claims Act (42 U.S.C. s 247b(k) (1)(B) including (a) no right to jury trial (28 U.S.C. s 2402), (b) two year prescription (28 U.S.C. s 2401(b), and (c) requirement of first exhausting an administrative remedy (28 U.S.C. s 2675); and

4. affords the United States the right to seek indemnity from the program participant on the basis of negligence or breach of contract in connection with the swine flu program. 42 U.S.C. s 247b(k)(7) .

The cause of action provided by the Swine Flu Act to an injured person against the United States is substantially the same as that afforded against the manufacturer under Louisiana Civil Code Article 2315 except that under the Swine Flu Act no trial by jury is afforded and the plaintiff is required to seek first administrative review of his claim.

DUE PROCESS CLAIM

[1] It is well settled that a plaintiff has no vested right in any tort claim for damages under state law. Keller v. Dravo Corporation, 441 F.2d 1239 (5th Cir. 1971), upheld ***1310** the exclusive remedy provision of the Longshoremen's & Harbor Workers' Compensation Act against a due process challenge. The Court in Keller noted that the "abolition of non-vested rights is especially innocuous if . . . one remedy is substituted for another." (441 F.2d at 1242). Legislation has even been upheld where no remedy was substituted in place of the cause of action that was taken away. For example, in Carr v. United States, 422 F.2d 1007 (4th Cir. 1970), the Court upheld the

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constitutionality of the Federal Drivers Act (28 U.S.C. s 2679) which abrogated a federal employee's cause of action against a fellow employee. The Court in Silver v. Silver, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929) upheld the abolition of a guest passenger's action against the host driver for negligence. In Brady v. Roosevelt Steamship Co., 317 U.S. 575, 63 S.Ct. 425, 87 L.Ed. 471 (1943), the Supreme Court recognized the congressional power to grant immunity from tort liability to private operators of government vessels, and in so doing paved the way for the enactment of the Suits in Admiralty Act, 46 U.S.C. s 745.

Plaintiffs rely on Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 48 S.Ct. 194, 72 L.Ed. 303 (1928) for the proposition that congress may never validly divest a private litigant of a civil cause of action. The identical argument was made in Carr v. United States and disposed of in the following manner:

> "There the Supreme Court dealt with statutes whose combined effect deprived a patent owner of his right to sue for infringement. But the patent in that case had been issued prior to the enactment of the relevant legislation. There was, therefore, a vested right in being which was sought to be abrogated." (422 F.2d at 1010-11)

Plaintiffs' cause of action against the manufacturer did not arise until after passage of the Swine Flu Act. Plaintiffs had no prior vested right in a cause of action under Louisiana Civil Code Article 2315.

TRIAL BY JURY CLAIM

[2][3][4] Plaintiffs allege that the Swine Flu Act deprives them of equal protection of the law by allowing the manufacturer a trial by jury of the indemnity claim of the United States but denies trial by jury of their own claim. Plaintiffs contend that they and the manufacturer fall in the same general classification under the Act and they should be treated alike with respect to their right to trial by jury.

While the equal protection clause of the 14th Amendment has no application against the United States, the 5th Amendment does prohibit discrimination that is "so unjustifiable as to be violate of the due process." [FN3] In the area of social and economic welfare, in order to meet due process standards the classification created under the statute must be reasonable, not arbitrary and bear some rational relationship to legitimate congressional goals.[FN4]

> FN3. Bolling v. Sharpe, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954).

> FN4. Richardson v. Belcher, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971).

I am unable to find that the disparity in treatment between plaintiffs and manufacturer with respect to jury trial is so unrelated to the object of the statute as to be arbitrary.

Congressional purpose is set forth in the Act, 42 U.S.C. s 247b(k)(1)(A):

> "(i) . . . to achieve the participation in the program of the agencies, organizations, and individuals who will manufacture, distribute and administer the swine flu vaccine . . . and to assure the availability of such vaccine in interstate commerce . . .
> (ii) . . . to establish an orderly procedure for the prompt and equitable handling of claims . . .
> (iii) to be prepared to meet the potential emergency of a swine flu epidemic . . . "

[5] Congress found it necessary to insulate manufacturers from primary liability and provide an exclusive remedy against the United States due to the collapse of the ***1311** commercial liability insurance market. Legislative history reflects that insurance companies refused to insure drug manufacturers for interstate distribution of the vaccine due to the potential for a large number of meritless claims with attendant costs of investigation and defense and recent federal court decisions holding drug manufacturers strictly liable for failure to warn of possible adverse drug effects. While the Swine Flu Act is drafted to provide immunity to manufacturers from primary responsibility, the Act affords the United States the right to indemnity on the bases of negligence and breach of the contractural obligation. For this limited risk to drug manufacturers insurance was available.[FN5]

> FN5. See Cong.Rec. E 4695-4707, August 12, 1976. Debate in both chambers appears at Cong.Rec. H 8643-8655 and S 14108-14122, August 10, 1976.

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officers of such corporation or joint-stock association, during the term of such director or trustee.'

The bill alleges misappropriation and embezzlement of moneys of the corporation by its officers, with appropriate details to bring the respondent within the terms of the foregoing provision. The superior court sustained a demurrer to the complaint, for reasons not material here, and rendered final judgment accordingly. An appeal was taken to the state supreme court; and, while that appeal was pending, the provision of the state constitution above quoted was repealed. Thereupon, respondent moved to dismiss the appeal, on the ground that the cause of action had abated by reason of the repeal of the provision of law upon which it was based. The court sustained the motion and dismissed the appeal, Coombes v. Franklin (Cal. Sup.) 1 P.(2d) 992; and subsequently denied a petition for rehearing (Cal. Sup.) 4 P.(2d) 157.

[1] In substance, it was held that the right accorded to corporate creditors was created by, and dependent alone upon, the constitutional provision, said to have the force of a statute; and that when that was repealed, the right fell with it, being still inchoate, not reduced to possession nor perfected by final judgment. It was conceded that the liability created by the Constitution was in its nature contractual and, as a matter of law, entered into and became a part of every contract between the corporation and its creditors. But this contractual liability, it was said, was conditioned by the power reserved over corporate laws by section 1, art. 12, of the Constitution, as follows: 'All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed.' ***441** In virtue of this reservation of power, the state court held that the repeal of the liability provision was a known contingency constituting a part of the contract ****436** as much as the provision which imposed the liability.

[2][3] The decision of the Supreme Court of a state construing and applying its own Constitution and laws generally is binding upon this court; but that is not so where the contract clause of the Federal Constitution is involved. In that case this court will give careful and respectful consideration and all due weight to the adjudication of the state court, but will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that obligation has been impaired; and, likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been effected. Scott v. McNeal, 154 U. S. 34, 45, 14 S. Ct. 1108, 38 L. Ed. 896; Mobile & Ohio Railroad v. Tennessee, 153 U. S. 486, 492, etc., 14 S. Ct. 968, 38 L. Ed. 793; Stearns v. Minnesota, 179 U. S. 223, 232, 233, 21 S. Ct. 73, 45 L. Ed. 162; Louisiana Ry. & Nav. Co. v. New Orleans, 235 U. S. 164, 170, 35 S. Ct. 62, 59 L. Ed. 175; Huntington v. Attrill, 146 U. S. 657, 684, 13 S. Ct. 224, 36 L. Ed. 1123; N. O. Waterworks v. La. Sugar Co., 125 U. S. 18, 38, 8 S. Ct. 741, 31 L. Ed. 607; Bridge Proprietors v. Hoboken Co., 1 Wall. 116, 144, 17 L. Ed. 571; Jefferson Branch Bank v. Skelly, 1 Black, 436, 443, 17 L. Ed. 173.

In substance, the contention of respondent here is that the reserved power provision, read into the contract as one of its terms, authorizes an extinction by repeal of the creditor's cause of action, unless previously reduced to final judgment.

[4] The authority of a state under the so-called reserved power is wide; but is not unlimited. The corporate charter may be repealed or amended, and, within limits not now necessary to define, the interrelations of state, corporation, and stockholders may be changed; but ***442** neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired. Tomlinson v. Jessup, 15 Wall. 454, 459, 21 L. Ed. 204; Lake Shore, etc., Railway Co. v. Smith, 173 U. S. 684, 690, 19 S. Ct. 565, 43 L. Ed. 858. Compare Greenwood v. Freight Co., 105 U. S. 13, 17, 19, 26 L. Ed. 961; Shields v. Ohio, 95 U. S. 319, 324, 24 L. Ed. 357. The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the

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The United States also recognized some potential liability due to their "unique role in the initiation, planning, and administration of the swine flu (vaccine)." 42 U.S.C. s 247b(k)(1)(A)(ii). By making a claimant's remedy exclusive against the United States but allowing limited indemnity by United States against the manufacturer, Congress struck a balance between plaintiff's interest in preserving a tort remedy and the manufacturer's interest in obtaining insurance coverage.

Congress is not denied the power to "treat different classes of persons in different ways," but it is denied power to "legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." [FN6]

> FN6. Reed v. Reed, 404 U.S. 71, 75-76, 92 S.Ct. 251, 253, 30 L.Ed.2d 225 (1971); Johnson v. Robison, 415 U.S. 361, 374, 94 S.Ct. 1160, 1169, 39 L.Ed.2d 389 (1974).

I conclude that the procedure established under the Act is rationally related to achieving the goal of assuring interstate distribution of the swine flu vaccine.

[6][7][8] Plaintiffs make the additional argument that the Act violates their 7th Amendment right to trial by jury.

Although the 7th Amendment preserves the right to trial by jury of suits at common law, it is settled that suits against the United States, requiring waiver of sovereign immunity, are not "suits at common law" within the meaning of the 7th Amendment. When the sovereign waives immunity it may attach any conditions (including no right to trial by jury) to its consent.[FN7]

> FN7. Glidden Company v. Zdanok, 370 U.S. 530, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962); United States v. Sherwood, 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058 (1941); Nistendirk v. McGee, 225 F.Supp. 881 (W.D.Mo.1963).

CONCLUSION

I conclude that the Swine Flu Act represents a valid exercise of Congressional power under the Constitution. Accordingly, the motion of the United States to be substituted as sole defendant under the terms of the Act is granted.

[9][10] The administrative procedure required under the Federal Tort Claims Act is jurisdictional and cannot be waived. Executive Jet Aviation, Inc. v. United States, 507 F.2d 508 (6th Cir. 1974). However, under the Swine Flu Act, if a suit is dismissed for failure to file an administrative claim, the plaintiff is given 30 days from the date of dismissal or two years from the date the claim arose in which to file an administrative claim. Therefore, the Government's motion to dismiss without prejudice to plaintiff is granted.

Lafayette, Louisiana, this 1st day of December, 1977.

/s/ W. Eugene Davis

Judge, United States District Court

Filed

Dec. 2, 1977.

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REV_00265221

United States Court of Appeals,
Third Circuit.

Jimmie Dale THOMASON, Appellant in No. 75-2142 and 75-2143,
v.
John H. SANCHEZ et al.
Jimmie Dale THOMASON
v.
John H. SANCHEZ et al.
Jimmie Dale THOMASON
v.
John H. SANCHEZ and United States of America.
Jimmie Dale THOMASON
v.
John H. SANCHEZ and Dorothy E. Sanchez.

Nos. 75-2142 to 75-2143.

Argued May 3, 1976.
Decided July 22, 1976.

Following collision between automobile and motorcycle both operated by servicemen on military base, motorcyclist commenced common-law action in state court against motorist and his wife and filed federal complaints naming as defendants the motorist, his insurer and the United States. The state action was removed and the actions were consolidated. The United States District Court for the District of New Jersey, Clarkson S. Fisher, J., 398 F.Supp. 500, granted summary judgment in favor of defendants and plaintiffs appealed. The Court of Appeals, Aldisert, Circuit Judge, held that the government was not liable under the Federal Tort Claims Act for the injuries; that, under Federal Drivers Act provision that if district court determines that removed case is one in which remedy by suit within the Act is not available against United States, case shall be remanded to state court, the Tort Claims Act remedy is "not available" only where government driver was not acting within scope of his employment, so that case against motorist acting within scope of his employment would not be remanded to state court; and that, under the Federal Drivers Act, recovery would not be allowed against motorist's personal liability insurance carrier.

Affirmed.

West Headnotes

[1] United States ⚿125(30)
393k125(30) Most Cited Cases

Government was not liable under Federal Tort Claims Act for injuries sustained by serviceman who was operating his motorcycle on military base while in present for duty status. 28 U.S.C.A. §§ 1346(b), 2671 et seq.

[2] Removal of Cases ⚿102
334k102 Most Cited Cases

Under Federal Drivers Act provision that if district court determines that removed case is one in which remedy by suit is not available against United States, case shall be remanded to state court, the Federal Tort Claims Act remedy is "not available" only where government driver was not acting within scope of his employment; thus where the Tort Claims Act remedy was not available because injured serviceman was in present for duty status, the remand provision did not apply. 28 U.S.C.A. § 2679(b-e), (d).

[3] United States ⚿125(30)
393k125(30) Most Cited Cases

Inasmuch as defendant motorist was acting within scope of his employment as a serviceman when automobile struck motorcyclist, there could be no action, separate from an action under Federal Tort Claims Act, against defendant individually or against his insurer. 28 U.S.C.A. § 1346(b).

[4] Insurance ⚿2742
217k2742 Most Cited Cases
(Formerly 217k435.4)

Under Federal Driver's Act, serviceman motorcyclist injured in collision on military base with automobile driven by another serviceman in scope of his employment could not recover from motorist's personal liability insurer for coverage of his privately owned vehicle. 28 U.S.C.A. § 2679(b-e).

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[5] Armed Services ⚖33
34k33 Most Cited Cases

[5] Constitutional Law ⚖299.2
92k299.2 Most Cited Cases
(Formerly 92k299(2), 92k299)

Federal Drivers Act, as applied to deprive motorcyclist serviceman of all lawsuit remedies for injuries received in collision with car driven by another serviceman, did not constitute a denial of due process. 28 U.S.C.A. § 2679(a, d).

***956** Ira Rabkin, Molotsky, Rabkin & Gross, Haddonfield, N. J., for appellant.

C. Kennon Hendrix, Roy D. Cummins, Pennsauken, N. J., for appellees Sanchez and Government Employees Ins. Co.

Jonathan L. Goldstein, U. S. Atty., Maryanne T. Desmond, Asst. U. S. Atty., Newark, N. J., for appellee United States of America.

Before ALDISERT, GIBBONS and GARTH, Circuit Judges.

OPINION OF THE COURT

ALDISERT, Circuit Judge.

These appeals from summary judgments in favor of defendants emanate from a vehicular collision involving two servicemen on active duty and require us to interpret provisions of the Federal Tort Claims Act and the Federal Drivers Act. We affirm.

Appellant Thomason, a member of the United States Army, was operating his motorcycle on the grounds of Fort Dix, New Jersey on November 30, 1972, when he was struck by an automobile owned and operated by defendant Sanchez, himself a serviceman. Subsequently, Thomason commenced a number of lawsuits seeking compensation for injuries incurred in the collision. The district court has detailed these various actions now consolidated and their procedural nuances. 398 F.Supp. 500, 501 (D.N.J.1975). In the interest of simplicity, the following recitation suffices for our purposes. A common law action, commenced in state court against Sanchez and his wife, was removed to federal court pursuant to 28 U.S.C. s 2679(d).[FN1] Plaintiff filed federal complaints naming variously as defendants Sanchez, his insurer the Government Employees Insurance Company, and the United States. In these federal actions, Thomason sought money damages and other relief, essentially under the Federal Tort Claims Act. 28 U.S.C. ss 1346(b), 2671 et seq.

FN1. Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

Reluctantly, the district court granted summary judgment in favor of all three defendants. In its view, the doctrine of Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), barred the action against the United States, while the exclusivity provision of the Federal Drivers ***957** Act, 28 U.S.C. s 2679(b),[FN2] defeated the claims against Sanchez and GEICO. Thomason now challenges, with varying ferocity, each of these conclusions.

FN2. See note 4 infra.

I.

Feres v. United States held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146, 71 S.Ct. at 159.[FN3] Injured servicemen were limited to seeking redress through "systems of simple, certain, and uniform compensation for injuries or death of those in armed services." Ibid. at 144, 71 S.Ct. at 158 (footnote omitted). In so ruling, the Court distinguished its then one-year-old precedent of Brooks v. United States, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200

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(1949): "The injury to Brooks did not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission." 340 U.S. at 146, 71 S.Ct. at 159. In the instant case, the district court found Feres, not Brooks, applicable:

> FN3. Feres was actually three cases, consolidated for disposition. Read together, the fact patterns disclose the sweep of the Feres doctrine. In Jefferson v. United States plaintiff had claimed damages for a negligent abdominal operation after which a towel 30 inches long was found still inside the plaintiff's stomach. United States v. Griggs was a wrongful death action alleging negligent and unskillful medical treatment by army surgeons. Feres also was a wrongful death action alleging negligence in the quartering of decedent in barracks known or which should have been known to be unsafe due to a defective heating plant.

> The fact that Thomason was in a "present for duty" status and not on any type of leave or pass, as sworn to in an affidavit by Captain James A. Kerchman, Commander of the Medical Company at Fort Dix, brings plaintiff within the ambit of Feres, thereby negating the applicability of the FTCA.

398 F.Supp. at 504.

[1] On appeal, Thomason does not urge that there is a genuine issue as to the material fact of his status at the time of the collision. See F.R.Civ.P. 56(c). Moreover, he concedes that "it seems that the Feres line of decisions is too firmly entrenched to be dislodged at this time." Appellant's Brief at 9. We previously expressed reservations about the continuing validity of the broad Feres doctrine. Peluso v. United States, 474 F.2d 605 (3d Cir.) (per curiam), cert. denied, 414 U.S. 879, 94 S.Ct. 50, 38 L.Ed.2d 124 (1973) (three Justices voting to grant certiorari). Upon reconsideration we reiterate that concern; as we noted there, however, we are powerless to jettison Feres or to dislodge it sufficiently to create an exception for vehicular collisions involving servicemen. See ibid. at 606.

II.

Appellant challenges the judgments as to Sanchez and GEICO on several grounds.

First, he asserts that the Federal Drivers Act, 28 U.S.C. s 2679(b)-(e), "operates only to deny plaintiff a choice of remedies where there is a remedy against the United States." Appellant's Brief at 11. Where, as here, there is no remedy against the United States, the actions against Sanchez and GEICO should be allowed to proceed. This argument has a first-blush appeal. Indeed, the second sentence of 28 U.S.C. s 2679(d), see note 1 supra, provides that, if a district court determines that a removed case such as this "is one in which a remedy by suit within the meaning of (28 U.S.C. s 2679(b) [FN4]) is not available against the United States, the case shall be remanded to the State court." (Emphasis added.)

> FN4. The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

***958** [2] The contention, however, is not of first impression. Rather, it has been presented to and rejected by at least three other circuits. Carr v. United States, 422 F.2d 1007, 1011 (4th Cir. 1970); Van Houten v. Ralls, 411 F.2d 940, 942 (9th Cir.), cert. denied, 396 U.S. 962, 90 S.Ct. 436, 24 L.Ed.2d 426 (1969); Vantrease v. United States, 400 F.2d 853, 855 (6th Cir. 1968). These courts are unanimous in holding "that within the meaning of the Drivers Act the Tort Claims Act remedy is 'not available' only where the government driver was not acting within the scope of his employment. When the Tort Claims Act remedy is not available for any other reason, the remand provision does not apply." [FN5] Carr v. United States, supra, 422 F.2d at 1011. The reason for this rule lies in the exclusivity provision of 28 U.S.C. s 2679(b), the basic purpose of which was to immunize individual government driversfrom the heavy financial burdens and personal liabilities associated with operating motor vehicles. A contrary interpretation of the "not available" language in the removal section "would revitalize the common law action. (T)his result would directly contradict the Act's immunizing purpose . . . ." Ibid. Moreover, Congress itself has indicated approval of this judicial construction of the exclusivity provision of the

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Federal Drivers Act.[FN6] Accordingly, we confidently join ranks with the Fourth, Sixth and Ninth Circuits.

> FN5. Conceivably, the Federal Tort Claims Act remedy might be barred by a statute of limitations shorter than that prevailing for the common law, state tort action. In such circumstances it would frustrate the immunizing congressional intent behind 28 U.S.C. s 2679(b) to construe 28 U.S.C. s 2679(d) as authorizing a remand to the state court for trial on the merits. Vantrease v. United States, supra, 400 F.2d at 855-86 n.2.

> FN6. See H.R.Rep. No. 715, 92d Cong., 1st Sess. 16 (1971); S.Rep. No. 776, 92d Cong., 1st Sess. 51 (1971) (proposed amendment to 38 U.S.C. s 4116). Using the Federal Drivers Act as a model, Congress passed legislation immunizing the medical personnel of the Veterans' Administration, 38 U.S.C. s 4116 (1970), as amended, (Supp. III, 1973), and the Public Health Service, 42 U.S.C. s 233 (1970). In these two immunity statutes, however, Congress explicitly stated that the remedy supplanting any common law right of action against the individual government employee was not only that provided by the Federal Tort Claims Act but also any compensation or other benefits provided by the United States where the availability of such compensation or benefits precludes a remedy under the Federal Tort Claims Act. See 38 U.S.C. s 4116(a); 42 U.S.C. s 233(a) . Rather than amend the statutory language of 28 U.S.C. ss 2679(b) and (d) in the same manner as it amended 38 U.S.C. ss 4116(a) and (c) in 1973, see Pub.L. 93-82, 87 Stat. 193 (1973), Congress apparently has been content to rely on this judicial construction of the Federal Drivers' Act.

[3] In this case, the district court was fully cognizant of its duty to make "an independent determination . . . as to whether Sanchez was acting within the scope of his employment." 398 F.Supp. at 504. The court concluded:

> The facts reveal that at the time of the collision Sanchez was operating his own vehicle, returning from procuring change for the use of Annex # 1 of the Non-Commissioned Officers' Club at Fort Dix, N.J., of which he was in charge. This finding is substantiated by affidavit of Sanchez of April 3, 1975 indicating that he was within the scope of his employment.
>
> A verified petition for removal has been executed by Maryanne T. Desmond, Assistant United States Attorney, which certifies that defendant John Sanchez was acting within the scope of his employment at the time of the incident out of which the within suit arose. The concomitant result of this petition is to provide an exclusive remedy against the United States for personal injuries "resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment." 28 U.S.C.A. s 2679(b).

Ibid. at 504-05. Defendant's status, therefore, had the effect of limiting anyone injured by Sanchez in his official capacity to a lawsuit under the Federal Tort Claims Act. ***959** There could be no separate action against Sanchez individually or against his insurer. Plaintiff's status as a serviceman which status eliminated the Tort Claims Act remedy is simply irrelevant to the foregoing.

Moreover, even were we to adopt a different construction of 28 U.S.C. s 2679(d) and order a remand to the state court, we doubt whether the New Jersey courts would be empowered to afford appellant a remedy. "Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law." Feres v. United States, supra, 340 U.S. at 146, 71 S.Ct. at 159. We gather, then, that under the Supremacy Clause New Jersey courts would be bound to apply federal law including both the Feres doctrine and 28 U.S.C. s 2679(b).

[4] Appellant's second challenge to the judgments in favor of Sanchez and GEICO asserts that "under the Federal Drivers Act, there should be allowed recovery which is actually against a federal employee's personal automobile liability insurance carrier for coverage of his privately-owned vehicle." Appellant's Brief at 11. We reject this contention. The reality is that any judgment against GEICO would affect Sanchez, if only in the form of an increased premium. Moreover, we question the desirability and the practicality of formulating a rule of law dependent upon a factual determination whether or not insurance is involved in the case which generally is improper for jury consideration.

[5] Appellant's final argument is that the Federal Drivers Act, as applied to him to deprive him of all lawsuit remedies,[FN7] constitutes a denial of due process. The Fourth Circuit discussed a kindred due process argument at length in Carr v. United States,

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supra:

> FN7. As a result of the injuries Thomason received in the collision with Sanchez, the government represented in its brief, the Veterans Administration determined that Thomason had a 60% service-connected disability for which he will receive $277 a month, subject to changes in his condition. Appellee's Brief of Government at 15.

Carr next contends that the Drivers Act violates the fifth amendment's due process clause by denying him equal protection. Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). The deprivation, he argues, results from the fact that abrogation is restricted to accidents which involve motor vehicles. Government employees can sue their co-workers for injuries sustained in any other job-related activity.

The classification which the Drivers Act creates does not penalize the exercise of any constitutional right. As we have held, the right to sue a co-worker does not enjoy constitutional protection. Therefore, the classification need not be justified by "a compelling governmental interest." Shapiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (emphasis in the original). Nor does the Act create a "suspect" classification, see, e. g., Korematsu v. United States, 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944), or involve a "fundamental" interest. See, e. g., Reynolds v. Sims, 377 U.S. 533, 561-562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Thus, a rigorous standard of review would be inappropriate here. Rather, the statutory classification comes here clothed with a presumption of constitutionality and it "will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961).

The legislative history to which we have already referred makes it clear that Congress was moved by the fact that automobile accident insurance placed such a heavy financial burden on government drivers that it was adversely affecting morale and making it difficult for the government to attract competent drivers into its employ. S.Rep. No. 736, 87th Cong., 1st Sess. (1961), reprinted in 2 U.S.Code Cong. & Admin.News 1961, at p. 2784 (1962). We think that the magnitude of the automobile insurance problem justified Congress's separate treatment ***960** of this specific problem. Furthermore, as the Supreme Court said in Silver v. Silver, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221, in response to a substantially similar argument:

(T)here is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied that the legislature must be held rigidly to the choice of regulating all or none. * * * It is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs.

280 U.S. at 123-124, 50 S.Ct. at 59.

422 F.2d at 1011-12 (footnote omitted). We adopt this reasoning.

Appellant argues that his case differs materially from Carr's that he is in a distinct sub-class, that of injured servicemen, upon which the effect of the Federal Drivers Act is not reasonable. Appellant's Brief at 14. We are sympathetic with appellant's position, but not receptive to his argument. It is not the effect of the Federal Drivers Act which renders an unreasonable result. The effect of the Federal Drivers Act predicated upon defendant's status is to make the Federal Tort Claims Act the exclusive remedy. Rather, it is the effect of the Feres doctrine which turns on plaintiff's status which produces the hardship in this case. And, as we have stated previously, only the Supreme Court can overrule, or modify, Feres. Peluso v. United States, supra, 474 F.2d at 606.

The judgments of the district court will be affirmed.

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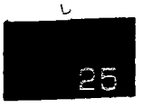
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United States Court of Appeals, Fourth Circuit.

Richard Thomas CARR and Doreen Carr, Appellants,
v.
UNITED STATES of America, William Granville Reynolds, Sr., and Joseph B. Biggs, Appellees.

No. 13500.

Argued Jan. 5, 1970.
Decided Feb. 27, 1970.

Action for personal injuries resulting from automobile accident involving federal employees. The United States District Court for the District of Maryland, at Baltimore, Alexander Harvey, II, J., entered a judgment dismissing the action and the plaintiff employee appealed. The Court of Appeals, Winter, Circuit Judge, held that Federal Drivers Act provision abrogating federal employee's common-law right of action against government driver acting within the scope of his employment was not unconstitutional as contended by injured federal employee who asserted that the abrogation of his right of action without creation of some new benefit violation due process clause of Fifth Amendment.

Affirmed.

West Headnotes

[1] Federal Civil Procedure ⚿1951
170Ak1951 Most Cited Cases

District judge was well within his range of discretion in refusing to consider certain contentions advanced with respect of the alleged invalidity of Federal Drivers Act on ground that the same had not been timely asserted under the district court's local rules. 28 U.S.C.A. § 2679(b-e).

[2] Automobiles ⚿196
48Ak196 Most Cited Cases

Federal Drivers Act was enacted to relieve government employee of burden of personal liability for accidents occurring on job by excluding actions against employee for injuries resulting from employee's operation of motor vehicle while within the scope of employment. 28 U.S.C.A. § 2679(b).

[3] Automobiles ⚿196
48Ak196 Most Cited Cases

Federal Drivers Act abrogates federal employee's common-law right of action against government driver who is acting within the scope of his employment. 28 U.S.C.A. § 2679(b).

[4] Automobiles ⚿147
48Ak147 Most Cited Cases

[4] Constitutional Law ⚿307
92k307 Most Cited Cases

Federal Drivers Act provision abrogating federal employee's common-law right of action against government driver acting within the scope of his employment was not unconstitutional as contended by injured federal employee who asserted that the abrogation of his right of action without creation of some new benefit violated due process clause of Fifth Amendment. 28 U.S.C.A. § 2679(b-e); U.S.C.A.Const. Amend. 5.

[5] Removal of Cases ⚿21
334k21 Most Cited Cases

Under Federal Drivers Act provision for remand to state court of removed action for which a remedy under Tort Claims Act is not available against United States, Tort Claims Act remedy is "not available" only in those cases where government driver was not acting within the scope of his employment, and when remedy is not available for any other reason the remand provision does not apply. 28 U.S.C. A. §§ 2401(b), 2679(b-e).

[6] Automobiles ⚿147
48Ak147 Most Cited Cases

[6] Constitutional Law ⚿299.2
92k299.2 Most Cited Cases
(Formerly 92k299(2), 92k253(2), 92k253)

Federal Drivers Act abrogating federal employee's common-law right of action against fellow employee for injuries sustained from operation of automobile within scope of employment does not violate due process by denying equal protection merely because

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abrogation was restricted to accidents involving motor vehicles, and federal coworkers could be sued for injuries sustained in other job-related activities. 28 U.S.C.A. § 2679(b-e); U.S.C.A.Const. Amend. 5.

[7] Constitutional Law ⚿208(16)
92k208(16) Most Cited Cases

Right to sue federal coworker for injuries in action arising out of activity within the scope of employment does not enjoy a constitutional protection, and therefore, classification as to what types of accident give rise to cause of action against federal coworker need not be justified by compelling government interest. 28 U.S.C.A. § 2679(b-e).

[8] Constitutional Law ⚿208(16)
92k208(16) Most Cited Cases

Federal Drivers Act abrogating common-law right of action against coworker for injuries arising out of automobile accident within scope of employment did not create a suspect classification or involve a fundamental interest, and the statutory classification was clothed with presumption of constitutionality and would not be set aside if any state of facts could reasonably be conceived to justify it. 28 U.S.C.A. § 2679(b-e).

[9] Armed Services ⚿34.11(1)
34k34.11(1) Most Cited Cases

Soldiers' and Sailors' Civil Relief Act providing for tolling of statute of limitations with respect to action by or against person in military service only tolls a limitation provision if action is either against any person in military service or is against his heirs, executors, administrators, or assigns. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 100, 205, 50 U.S.C.A. App. §§ 510, 525.

[10] Armed Services ⚿34.11(1)
34k34.11(1)Most Cited Cases

Since Federal Drivers Act abolished plaintiff federal employee's right to recover from coworker who was in Navy for a period of time after accident, plaintiff federal employee had no action against any person in military service, and provision of Soldiers' and Sailors' Civil Relief Act tolling statute of limitations was not applicable. Soldiers' and Sailors' Civil Relief Act of 1940, § 205, 50 U.S.C.A. App. § 525; 28 U.S.C.A. § 2679(b).

[11] Armed Services ⚿34.11(1)
34k34.11(1) Most Cited Cases

Provision extending benefits of Soldiers' and Sailors' Civil Relief Act to persons bringing actions against servicemen is intended to promote tranquility in military by permitting claimants to await termination of potential defendant's tour of duty without losing meritorious claim. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 100, 205, 50 U.S.C.A. App. §§ 510, 525.

***1008** Bernard S. Cohen, Alexandria, Va. (Cohen, Hirschkop, Hall & Jackson, Alexandria, Va., on brief), for appellants.

***1009** Daniel Joseph, Atty., Dept. of Justice (William D. Ruckelshaus, Asst. Atty. Gen., and Morton Hollander, Atty., Dept. of Justice, and Stephen H. Sachs, U.S. Atty., on brief), for appellees.

Before BRYAN, WINTER and BUTZNER, Circuit Judges.

WINTER, Circuit Judge:

This action for personal injuries resulting from an automobile accident was first removed from a state court under the Federal Drivers Act, 28 U.S.C.A. § § 2679(b)-(e), and subsequently dismissed as untimely under the Federal Tort Claims Act, 28 U.S.C.A. § 2401(b). We affirm.

On December 8, 1965, Richard T. Carr was injured in a collision between an automobile operated by Robert D. Mitchell and another vehicle. At the time of the accident both Carr and Mitchell were federal employees acting within the scope of their employment. On March 6, 1968, over two years after the accident, Carr instituted suit for personal injuries in a Maryland Court against Mitchell. [FN1] Upon the certification that at the time of the accident Mitchell had been a federal employee acting within the scope of his employment, the action was removed to the district court pursuant to the Federal Drivers Act, 28 U.S.C.A. §§ 2679(b)-(e), and 28 U.S.C.A. §§ 1441(c), 1442(a)(1), 1446(d). Simultaneously, the United States was substituted

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rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right, Ettor v. Tacoma, 228 U. S. 148, 156, 33 S. Ct. 428, 57 L. Ed. 773; Pritchard v. Norton, 106 U. S. 124, 132, 1 S. Ct. 102, 27 L. Ed. 104) to enforce his cause of action upon the contract. Ettor v. Tacoma, supra; Hawthorne v. Calef, 2 Wall. 10, 22, 17 L. Ed. 776; Steamship Company v. Joliffe, 2 Wall. 450, 17 L. Ed. 805; Ochiltree v. Railroad Company, 21 Wall. 249, 252, 253, 22 L. Ed. 546; Harrison v. Remington Paper Co. (C. C. A.) 140 F. 385, 390, etc., 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; Knickerbocker Trust Co. v. Myers (C. C.) 133 F. 764, 767.

The Ettor Case, supra, involved a statute of the state of Washington which required municipalities to compensate for consequential damages. While that statute was in force actions were brought to recover for damages inflicted upon abutting property in consequence of street grading done by the authority and direction of the city of Tacoma. While these actions were being heard, the statute in respect of this liability was repealed; and the trial court directed a verdict for the city, on the theory that the right of action was statutory and fell with the ***443** statute, there being no saving clause. Judgment was affirmed by the state Supreme Court and the case came here on writ of of error. This court reversed the judgment and in the course of its opinion (pages 155-156 of 228 U. S., 33 S. Ct. 428, 430, 57 L. Ed. 773) said:

'The court below gave a retrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. The obligation of the city was fixed. The plaintiffs in error had a claim which the city was as much under obligation to pay as for the labor employed to do the grading. It was a claim assignable and enforceable by a common-law action for a breach of the statutory obligation.

'The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act,-a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes. ****437** and the right so vested cannot be defeated by subsequent legislation.'

In the Hawthorne Case, supra, it was held that a state statute, incorporating a railroad company, which provided that the shares of the stockholders should be liable for the debts of the corporation, in effect pledges the liability or guarantee of the stockholders to the extent of their stock to the creditors of the company. 'They thereby virtually agree to become security to the creditors for the payment of the debts of the company, which have been contracted upon the faith of this liability.' Haw ***444** thorne supplied the corporation with materials to build its road and obtained judgment against it. Being unable to satisfy the judgment, he brought suit against Calef, a stockholder. The state Supreme Court rendered judgment against Hawthorne on the ground that the individual liability provision had been repealed by subsequent legislation, passed two months after the debt was contracted, and that such repeal had taken away the right to enforce the stockholders' liability. This court reversed on the ground that when the debt was contracted with the company the creditor held the stockholders' liability as security for its payment and the repealing act, by abolishing it, impaired the obligation of that contract.

In the Joliffe Case, supra, this court had before it for determination substantially the same question that is involved here. There a California statute had created a Board of Pilot Commissioners, and authorized the board to license pilots, prescribe their qualifications, etc. The statute provided, with an exception, that when a vessel was spoken by a pilot and his service was declined he should be entitled to one-half pilotage fees. Joliffe, a pilot licensed under this statute, spoke a vessel of the steamship company and offered his service to pilot her out of the port of San Francisco. This was declined, and the pilot brought suit to recover for one-half the pilotage. Judgment was rendered against the company. Pending review in this court, a new statute was passed and the old act, in terms, repealed. The point was made that the claim to half pilotage fees having been given by statute, the right to recover fell with its repeal, and accordingly that the writ of

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for Mitchell as defendant on the ground that the Drivers Act, 28 U.S.C.A. § 2679(b), made the Federal Tort Claims Act, 28 U.S.C.A. § 1346(b), the exclusive remedy for injuries resulting from the operation of a motor vehicle by a government employee acting within the scope of his employment. At a later date, the district court granted the government's motion to dismiss on the ground that since the action had been commenced more than two years after the accident, it was barred by the limitations provision of the Federal Tort Claims Act, 28 U.S.C.A. § 2401(b).

FN1. Carr's wife also brought suit for loss of consortium. Our holding that Carr's claim was untimely makes it unnecessary to distinguish between the two actions.

[1] In this Court Carr argues (1) that the Drivers Act is an unconstitutional abrogation of a government employee's common law right of action against a fellow-employee for negligence; (2) that the Federal Employees' Compensation Act, 5 U.S.C.A. § 8116(c), requires a remand to the state courts under the Drivers Act, 28 U.S.C.A. § 2679(d); (3) that the Drivers Act violates the due process clause of the fifth amendment by restricting the abrogation of the common law right of action to cases which involve motor vehicles; and (4) that the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A. App. § 525, tolls the limitations provision of the Tort Claims Act. [FN2]

FN2. The district judge refused to consider the first three arguments on the ground that they had not been timely asserted under the district court's local rules. The district judge was well within the range of his discretion in this ruling. Ledwith v. Storkan, 2 F.R.D. 539, 542, 544- 545 (D.Neb.1942); 6 W. Moore, Federal Practice P55.10(4), at 1837-42 (2d ed. 1966); see Consolidated Masonry & Fireproofing, Inc. v. Wagman Construction Corp., 383 F.2d 249, 251 (4 Cir. 1967). However, we prefer to consider Carr's contentions on their merits.

[2] The Drivers Act was enacted to relieve government employees of the burden of personal liability for accidents which occurred on the job; for unlike many employers, the United States neither maintained liability insurance which protected its employees nor assisted them in paying for their own insurance against on-the-job accidents. Uptagrafft v. United States, 315 F.2d 200, 204 (4 Cir. 1963); H.R.Rep. No. 297, 87th Cong., 1st Sess. (1961); S.Rep. No. 736, 87th Cong., 1st Sess. (1961), reprinted in 2 U.S. Code Cong. & Admin. News 1961, at p. 2784 (1962); 107 Cong.Rec. 18,499-500 (1961). See generally Annot., 16 A.L.R.3d 1394, 1402 (1967). To accomplish this purpose 28 U.S.C.A. § 2679(b) excludes actions ***1010** against employees for injuries which result from the employee's operation of a motor vehicle while within the scope of his employment. H.R.Rep. No. 297, 87th Cong., 1st Sess. 4 (1961). It provides:

'The remedy against the United States provided by * * * (the Federal Tort Claims Act) * * * for personal injury * * * resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his * * * employment, shall hereafter be exclusive of any other civil action * * * by reason of the same matter against the employee or his estate whose act or omission gave rise to the claim.'

28 U.S.C.A. § 2679(b), as amended by the Act of July 18, 1966, Pub.L. No. 89-506, § 5(a), 80 Stat. 306, 28 U.S.C.A. § 2679(b). [FN3]

FN3. The changes instituted in section 2679(b) by the 1966 amendment have no significance in this case.

The Drivers Act had an apparently uncontemplated but not necessarily incongruous impact on federal employees injured by government drivers. Prior to the Act a government employee who sustained injuries as a result of the negligence of a fellow-employee acting within the scope of his employment was not restricted to the remedy against the United States provided by the Employees' Compensation Act, 5 U.S.C.A. §§ 751 et seq., 8101 et seq. He could also have brought a common law action against his co-worker for negligence. Allman v. Hanley, 302 F.2d 559 (5 Cir. 1962); Marion v. United States, 214 F.Supp. 320, 322-324 (D.Md.1963).

[3] Congress apparently did not specifically consider whether or not this cause of action against a fellow government employee should survive. Gilliam v. United States, 407 F.2d 818, 819 (6 Cir. 1969) (Combs, J., concurring). Nevertheless, abrogation is well within the ambit of the statutory

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language:

'the remedy against the United States * * * shall * * * be exclusive of any other civil action * * * against the employee * * *.'

28 U.S.C.A. § 2679(b), as amended by the Act of July 18, 1966, Pub.L. No. 89-506, § 5(a), 28 U.S.C.A. § 2679(b). Any other result would undermine the Act's purpose to protect government drivers from all liability. We, therefore, agree with the holdings of other circuits that the Drivers Act abrogates a federal employee's common law right of action against a government driver who is acting within the scope of his employment. Van Houten v. Ralls, 411 F.2d 940 (9 Cir. 1969); Gilliam v. United States, 407 F.2d 818 (6 Cir. 1969); Vantrease v. United States, 400 F.2d 853 (6 Cir. 1968).

[4] Carr does not seriously question this interpretation of the Act. But he does argue that abrogation without the creation of some new benefit as a quid pro quo constitutes a violation of the due process clause of the fifth amendment. We are not persuaded.

First, the argument's premise was rejected as unsound by the Supreme Court in Silver v. Silver, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221, 65 A.L.R. 939 (1929). There, in sustaining the abolition of a gratuitous passenger's right to sue his host for negligence, the Court held that:

'The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law * * *.'

Id., at 122, 50 S.Ct., at 58. There has been no indication that this is not the settled law on the question. E.g., Clarke v. Storchak, 322 U.S. 713, 64 S.Ct. 1270, 88 L.Ed. 1555 (1944), dismissing appeal for want of a substantial federal question from 384 Ill. 564, 52 N.E.2d 229 (1943).

Nothing in Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 48 S.Ct. 194, 72 L.Ed. 303 (1928), constitutes contrary authority. There the Supreme Court dealt with statutes whose combined ***1011** effect deprived a patent owner of his right to sue for infringement. But the patent in that case had been issued prior to the enactment of the relevant legislation. There was, therefore, a vested right in being which was sought to be abrogated. By contrast, here the accident occurred over four years after the enactment of the Drivers Act. [FN4] Therefore, under Silver Carr had no interest entitled to constitutional protection.

> FN4. The Drivers Act does not apply to accidents which occurred up to six months after its enactment. Pub.L. No. 87-258, § 2, 75 Stat. 539.

Second, we think that in any event Congress provided an adequate quid pro quo for the common law cause of action which it abolished. True, a Tort Claims Act remedy may not be available to Carr because of the exclusivity provision of the Employees' Compensation Act, 5 U.S.C.A. § 8116(c). Van Houten v. Ralls, 411 F.2d 940 (9 Cir. 1969); Vantrease v. United States, 400 F.2d 853 (6 Cir. 1968). But we need not decide this question now. Even assuming that the Tort Claims Act is not available, the Drivers Act is itself an adequate quid pro quo, for it provided Carr with valuable protection against personal liability for on-the-job automobile accidents for which he might have been responsible.

[5] Carr also argues that if the Employees' Compensation Act's exclusivity provision does apply, the Drivers Act requires that his action against Mitchell be remanded to the state courts. In part the Drivers Act provides that if the action which has been removed

'is one in which a remedy (under the Tort Claims Act) is not available against the United States, the case shall be remanded to the State court.'

28 U.S.C.A. § 2679(d). Carr contends that if the Employees' Compensation Act's exclusivity provision bars his action under the Tort Claims Act, then necessarily his Tort Claims Act remedy against the United States 'is not available.' Therefore, he concludes, his case against Mitchell must be remanded to the state courts.

This argument has been rejected by the only other courts of appeals to consider it. Van Houten v. Ralls, 411 F.2d 940 (9 Cir. 1969); Gilliam v. United States, 407 F.2d 818 (6 Cir. 1969); Vantrease v. United States, 400 F.2d 853 (6 Cir. 1968). They have held that within the meaning of

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the Drivers Act the Tort Claims Act remedy is 'not available' only where the government driver was not acting within the scope of his employment. When the Tort Claims Act remedy is not available for any other reason, the remand provision does not apply.

We adopt this interpretation of the Act. While the statutory language does not by itself reject Carr's position, his theory would revitalize the common law action. Since this result would directly contradict the Act's immunizing purpose, we reject it.

[6] Carr next contends that the Drivers Act violates the fifth amendment's due process clause by denying him equal protection. Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). The deprivation, he argues, results from the fact that abrogation is restricted to accidents which involve motor vehicles. Government employees can sue their co-workers for injuries sustained in any other job-related activity. [FN5]

> FN5. The Act of Oct. 31, 1965, Pub.L. No. 89-311, § 6(a), 79 Stat. 1156 (codified at 38 U.S.C.A. § 4116), extended like immunity to government medical personnel, but the Act was not effective at the time of the accident in this case. Id., § 6(c). In any event, numerous other employees remain personally liable for on-the-job accidents.

[7] The classification which the Drivers Act creates does not penalize the exercise of any constitutional right. As we have held, the right to sue a co-worker does not enjoy constitutional protection. Therefore, the classification need not be justified by 'a compelling governmental interest.' Shapiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 ***1012** L.Ed.2d 600 (1969) (emphasis in the original). Nor does the Act create a 'suspect' classification, see, e.g., Korematsu v. United States, 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944), or involve a 'fundamental' interest. See, e.g., Reynolds v. Sims,377 U.S. 533, 561-562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Thus, a rigorous standard of review would be inappropriate here. Rather, the statutory classification comes here clothed with a presumption of constitutionality and it 'will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961).

[8] The legislative history to which we have already referred makes it clear that Congress was moved by the fact that automobile accident insurance placed such a heavy financial burden on government drivers that it was adversely affecting morale and making it difficult for the government to attract competent drivers into its employ. S.Rep. No. 736, 87th Cong., 1st Sess. (1961), reprinted in 2 U.S. Code Cong. & Admin. News 1961, at p. 2784 (1962). We think that the magnitude of the automobile insurance problem justified Congress's separate treatment of this specific problem. Furthermore, as the Supreme Court said in Silver in response to a substantially similar argument:

'There is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied-- that the legislature must be held rigidly to the choice of regulating all or none. * * * It is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs.'

280 U.S. at 123-124, 50 S.Ct. at 59.

As we have indicated, we find it unnecessary to consider the government's position that the Employees' Compensation Act precludes relief under the Tort Claims Act in this case, because even if Carr is not limited to his rights under the Employees' Compensation Act his action is barred by the two-year limitations provision of the Tort Claims Act, 28 U.S.C.A. § 2401(b).

[9] Lastly, Carr contends that the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A. App. § 525, tolls this statute of limitations. This Act in part provides for tolling with respect to

'the bringing of any action * * * in any court * * * by or against any person in military service or by or against his heirs, executors, administrators, or assigns * * *.'

Since Mitchell was in the United States Navy for a period of time after the accident, Carr believes that his action under the Tort Claims Act is still viable.

We disagree. Section 525 only tolls a limitations provision if the action is either one 'against any

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person in military service' or one 'against his heirs, executors, administrators, or assigns.' Since the Drivers Act abolishes Carr's right to relief from Mitchell, Carr has no 'action * * * against any person in military service.' Nor do we think that in this case the United States is accurately described as one of Mitchell's 'heirs, executors, administrators, or assigns.' Therefore, we conclude that § 525 does not apply here.

[10][11] We arrive at this conclusion after a consideration of the relevant statutory purposes. The Soldiers' and Sailors' Civil Relief Act was intended to enable persons serving in the armed forces 'to devote their entire energy to the defense needs of the Nation' without the worries and distractions which are involved in the conduct of litigation. 50 U.S.C.A. App. § 510; e.g., Van Heest v. Veech, 58 N.J.Super. 427, 432, 156 A.2d 301, 304 (1959). We have found nothing to suggest that Congress was protecting a contrary purpose when it extended the benefits of § 525 to persons who bring actions 'against' servicemen. Consistent with the statute's broad purpose, therefore, we think that ***1013** § 525 was intended to promote tranquility in the military by permitting claimants to await the termination of the potential defendant's tour of duty without losing a meritorious claim. Blazejowski v. Stadnicki, 317 Mass. 352, 356-357, 58 N.E.2d 164, 166 (1944); Annot., 26 A.L.R.2d 284, 287-88 (1952). See also Reed, Soldiers' and Sailors' Civil Relief Act of 1940, 28 Iowa L.Rev. 14, 27 (1942).

This purpose, however, has no applicability here. A serviceman in Mitchell's situation is, by virtue of the Drivers Act, completely immune from 'any * * * action.' 28 U.S.C.A. § 2679(b). He has no need for the partial and temporary relief from worry and distraction which § 525 would provide.

The judgment of the district court is Affirmed.

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error should be dismissed. This court held the point not well taken and declined to dismiss the writ. The transaction between the pilot and the ship, it was held (pages 457, 458 of 2 Wall., 17 L. Ed. 805), gave rise to a quasi contract. 'The claim of the plaintiff below for half-pilotage fees, resting upon a transaction regarded by the law as a quasi contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction *445 was had. When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action: the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed.'

Respondent, however, insists that long prior to the extension of credit to the corporation by petitioner's assignor, the decisions of the Supreme Court of California had established that the repeal of a law creating such a liability as that here involved extinguishes the cause of action; and that this amounted to a construction of the constitutional provision which entered into the contract and will be followed and applied by this court. Warburton v. White, 176 U. S. 484, 495, 20 S. Ct. 404, 44 L. Ed. 555; Ennis Water Works v. Ennis, 233 U. S. 652, 657, 34 S. Ct. 767, 58 L. Ed. 1139. But upon a careful consideration of the California cases referred to, we are of opinion that they fail to establish the premises upon which the conclusion is based.

The decisions chiefly relied upon are Moss v. Smith, 171 Cal. 777, 155 P. 90, and Willcox v. Edwards, 162 Cal. 455, 123 P. 276, Ann. Cas. 1913C, 1392; Moss v. Smith, involved section 309 of the Civil Code of California, which created a liability against directors who had participated in the creation of debts in excess of the subscribed capital stock. Suit was brought to enforce this liability against directors of a public utility company, but it appearing that during the pendency of the suit section 309 had been repealed as to public utility companies without a saving clause, the court held that all pending causes of action were thereby extinguished. The basis of the decision was that the statute was of a penal character; the court, however, saying that *446 it was not of vital consequence whether it be viewed as penal or remedial. In any event, the liability was not held to be contractual. On the contrary, the court said (page 787 of 171 Cal., 155 P. 90, 94), 'The right of action against these directors conferred by section 309 was a statutory right pure and simple, having no foundation in contract, nor any existence at common law.' And it is significant that the court perceived a determinative distinction between section 309 of the Civil Code, and the provision of the Constitution here under consideration. 'Nothing in Winchester v. Howard, 136 Cal. 441, 64 P. 692, 69 P. 77, 89 Am. St. Rep. 153,' the court said (page 785 of 171 Cal., 155 P. 90, 93), 'is in conflict with this; in the first place, because **438 the directors, under section 3, art. 12, of the Constitution, which section was the foundation of the action, are liable solely for loss sustained by embezzlement and misappropriation-a liability involving loss, and thus entirely different in character from that which appellants contend is imposed by section 309.' 'And that this statute,' the court already had said (page 783 of 171 Cal., 155 P. 90, 92), 'becomes highly penal in character the moment there is eliminated from it the consideration of compensation for loss is at once apparent.'

As already suggested, Winchester v. Howard, 136 Cal. 432, 64 P. 692, 69 P. 77, 89 Am. St. Rep. 153, arose under section 3, art. 12, of the state Constitution, and the court there, in pointing out the purpose and effect of that provision, said (page 444 of 136 Cal., 69 P. 77, 82, 89 Am. St. Rep. 153): 'The constitution merely makes the directors sureties for their fellow directors and for the officers of the corporation for moneys when so misappropriated as to make the officer misappropriating liable, and authorizing the creditors and stockholders to sue. * * * It is not penal in the technical sense, as it allows no recovery as a punishment, but only to compensate for a loss.'

And again at page 448 of 136 Cal., 69 P. 77, 82, 89 Am. St. Rep. 153: 'There is no difference between this case and the ordinary contract of a surety, unless it can be said that this liability is placed upon the director against his will. *447 Argument is hardly required to show that such is not

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the case. The state could refuse to grant corporate franchises altogether, or may grant on such terms as it pleases. The right to do business as a corporation, or to be a director, if I may speak of it as a right, is not a natural right. These directors took office knowing the responsibilities they assumed in so doing, and in the eye of the law did so as freely and voluntarily as they would have done had they signed a bond agreeing to be responsible for the corporate officers.'

The distinction between the section of the Code and the constitutional provision, therefore, is clear. In the former the liability is wholly statutory; in the latter it is contractual.

In Willcox v. Edwards, supra, the court had under consideration a constitutional provision repealing a former provision of the constitution making valid certain contracts for the sale of stocks on margin. The right to sue for the recovery of money paid under such a contract, the court held, was not a vested right depending upon a quasi contract arising by operation of law from the terms of the original constitutional provision, but a right dependent upon that provision standing alone; and that upon its repeal, without a saving clause, pending litigation fell for want of authority to maintain it. But it plainly appears that the decision would have been otherwise if the court had deemed the right to be contractual.

Another case relied upon is Napa State Hospital v. Flaherty, 134 Cal. 315, 66 P. 322, 323. There a state statute made certain kindred of indigent insane persons liable for their board at the insane asylum to which such insane persons were committed. The right to maintain an action for nonpayment was conferred upon the board of trustees or directors. Such an action was brought; but the court held that the remedy had been repealed and the cause of action fell with it, putting its decision upon *448 the ground that 'where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession, or perfected by final judgment, the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause.'

The case here is entirely different. There the obligation which was imposed upon the relatives was purely statutory. No act was contemplated on their part by way of assumption of an obligation in order to fix the liability. No element of a contract was present. Here both parties acted. The creditor extended credit to the corporation; and his action in so doing, under the state constitutional provisions, brought into force for his benefit the costitutional obligation of the director, which, by becoming a director, the latter had voluntarily assumed and, thereby, in the eye of the law, created against himself a contractual liability in the nature of a suretyship. Harrison v. Remington Paper Co., supra, page 388 of 140 F., 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314. Doubts which otherwise might have existed in respect of the character and effect of the transaction are no longer open. It is settled by decisions of this and other federal courts (Ettor v. Tacoma, and cases cited in connection therewith, supra) that, upon the facts here disclosed, a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in article 1, s 10, and the due process of law clause in the Fourteenth Amendment, of the federal Constitution.

Decree reversed.

Mr. Justice CARDOZO.

I am unable to concur in the reversal of this judgment.

'The directors or trustees of corporations and joint stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled *449 or misappropriated by the officers of such corporation or joint stock association during the term **439 of office of such director or trustee.' Constitution of California, article 12, s 3, repealed November 4, 1930.

The Supreme Court of California has said that the liability thus created is contractual (Dean v. Shingle, 198 Cal. 652, 246 P. 1049); but only in a qualified sense, as the expression of a legal fiction, is the statement true, nor did the court that made it intend otherwise. The liability would not be destroyed though the directors when assuming office and repeatedly thereafter were to repudiate the obligation utterly. They would be held for all their protestations upon a liability imposed by law. Indeed, they would have to answer to the creditors

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Supreme Court of the United States

GALVAN
v.
PRESS.

No. 407.

Argued Jan. 11, 12, 1954.
Decided May 24, 1954.

Habeas corpus proceeding. The United States District Court for the Southern District of California, Southern Division, denied the petition, and the petitioner appealed. The Court of Appeals for the Ninth Circuit, 201 F.2d 302, affirmed. On certiorari granted, the United States Supreme Court, Mr. Justice Frankfurter, held that even if petitioner, an alien, had joined Communist Party without knowledge of its advocacy of violence he was deportable as a party 'member', absent any claim that he had joined the party 'accidentally, artificially, or unconsciously in appearance only.'

Affirmed.

Mr. Justice Black and Mr. Justice Douglas dissented.

West Headnotes

[1] Habeas Corpus ⚿849
197k849 Most Cited Cases
(Formerly 197k114)

Where issues of constitutionality and construction of 1950 Internal Security Act were raised for first time in habeas corpus proceeding, certiorari was granted for review of judgment affirming denial of writ.

[2] Aliens ⚿53.1
24k53.1 Most Cited Cases
(Formerly 24k53)

An alien's membership in a proscribed organization may have been so nominal as to keep him out of the deportable class even though he did not join such organization (1) as a child, (2) by operation of law, or (3) to obtain necessities of life, since those instances, enumerated in 1951 corrective statute, were not intended to be exclusive. Immigration and Nationality Act, § 212(a) (28) (E), (I) (i), 8 U.S.C.A. § 1182(a) (28) (E), (I) (i).

[3] Aliens ⚿53.3
24k53.3 Most Cited Cases
(Formerly 24k53)

For purpose of statutory provision making "membership" in Communist Party a basis for deportation of an alien, it is enough that alien join Party, aware that he was joining an organization known as Communist Party and operating as a distinct and active political organization, and that he did so of his own free will; cognizance of the Party's advocacy of violence not being a prerequisite to deportation. Immigration and Nationality Act, § 212(a) (28) (E), (I) (i), 8 U.S.C.A. § 1182(a) (28) (E), (I) (i); Internal Security Act of 1950, §§ 7, 13, 50 U.S.C.A. §§ 786, 792.

[4] Aliens ⚿54.1(6)
24k54.1(6) Most Cited Cases
(Formerly 24k54(9))

On issue as to alien's deportability, evidence sustained finding that alien had in fact joined Communist Party. Immigration and Nationality Act, § 241(a) (6) (C), 8 U.S.C.A.§ 1251 (a) (6) (C)
.

[5] Aliens ⚿53.3
24k53.3 Most Cited Cases
(Formerly 24k53)

Even if alien had joined Communist Party without knowledge of its advocacy of violence, he was deportable as a party "member", absent any claim that he had joined the party "accidentally, artificially, or unconsciously in appearance only." Immigration and Nationality Act, § 212(a) (28) (E), (I) (i), 8 U.S.C.A. § 1182(a) (28) (E), (I) (i); Internal Security Act of 1950, §§ 7, 13, 50 U.S.C.A. §§ 786, 792.

[6] Aliens ⚿39
24k39 Most Cited Cases

The power of Congress over the admission of aliens

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though they had ceased to be directors before the debts were in existence. If we put aside deceptive labels, borrowed from the law of quasi contracts, the tangle is unraveled. The petitioner had a contract with the corporation and not with any one else (Crane v. Hahlo, 258 U. S. 142, 146, 42 S. Ct. 214, 66 L. Ed. 514), but annexed by law to the obligation of that contract was a liability purely statutory imposed on the directors. Compare Christopher v. Norvell, 201 U. S. 216, 225, 26 S. Ct. 502, 50 L. Ed. 732, 5 Ann. Cas. 740; Bernheimer v. Converse, 206 U. S. 516, 529, 27 S. Ct. 755, 51 L. Ed. 1163. The decisions in California, when analyzed, will be found to hold nothing to the contrary. They amount merely to this, that the liability created by the statute, which is enforceable also by the shareholders, is not penal but remedial, and is limited to the damage resulting to the corporation from the loss of the embezzled moneys as if the director were a surety to the corporation for the acts of its defaulting officer. Dean v. Shingle, supra; compare, Winchester v. Howard, 136 Cal. 432, 64 P. 692, 69 P. 77, 89 Am. St. Rep. 153. In any event, this Court is not controlled by the label which the state court may affix to a liability growing out of a given state of facts. It determines for itself whether within the meaning of the Constitution the product is a contract to be protected*450 by the power of the nation. Appleby v. City of New York, 271 U. S. 364, 380, 46 S. Ct. 569, 70 L. Ed. 992; Coolidge v. Long, 282 U. S. 582, 597, 51 S. Ct. 306, 75 L. Ed. 562. As to this, its judgment is guided by realities and not by words. The section of the Constitution whereby contracts are secured against impairment is aimed at true agreements, and not at quasi contracts as distinguished from agreements implied in fact. Crane v. Hahlo, 258 U. S. 142, 146, 42 S. Ct. 214, 66 L. Ed. 514; Louisiana v. New Orleans, 109 U. S. 285, 288, 3 S. Ct. 211, 27 L. Ed. 936. Here whatever duty was assumed by a director through the acceptance of his office, was one that he owed in the first instance to the corporation itself, though the creditors and shareholders were privileged to enforce it. Dean v. Shingle, supra. Payment to the corporation before action brought would establish a defense, and even after action brought, any surplus remaining would go into the treasury. A distinction may exist between a liability cast upon directors and one cast upon the shareholders, who are quasi partners in the venture. Corning v. McCullough, 1 N. Y. 47, 49 Am. Dec. 287. To develop the implications of the distinction is unnecessary now.

I start then with the assumption that the petitioner had a contract with a corporation secured in certain contingencies by a statutory liability. I add the assumption that the state of California was not at liberty, after the contract had been made and a cause of action had accrued thereunder, to make the security defeasible if it wasindefeasible in its origin. Either the article of the Constitution prohibiting the impairment of contracts (U. S. Constitution, art. 1, s 10) or the Fourteenth Amendment (which, however, is not invoked) might then stand in the way. Hawthorne v. Calef, 2 Wall. 10, 17 L. Ed. 776; Steamship Co. v. Joliffe, 2 Wall. 450, 17 L. Ed. 805; Ettor v. Tacoma, 228 U. S. 148, 33 S. Ct. 428, 57 L. Ed. 773; Forbes Pioneer Boat Line v. Board of Commissioners, 258 U. S. 338, 42 S. Ct. 325, 66 L. Ed. 647. The difficulty with the petitioner's case is this, that his security in its origin was not vested, but contingent. The meaning of the California Constitution *451 is whatever the courts of California declare it to be. The obligation of the petitioner's contract is whatever the law of California attached to the contract at the hour of its making. Long before that time, the Supreme Court of that state had held that under the law of California a statutory cause of action, whether penal or remedial, may be canceled or modified by repeal or amendment until it has ripened into a judgment. Moss v. Smith, 171 Cal. 777, 788, 155 P. 90; Napa State Hospital v. Flaherty, 134 Cal. 315, 66 P. 322; Willcox v. Edwards, 162 Cal. 455, 466, 123 P. 276, Ann. Cas. 1913C, 1392. Compare Combes v. Franklin (Cal. Sup.) 1 P.(2d) 992, Id. (Cal. Sup.) 4 P.(2d) 157, the decision under review. Consistent with these decisions is a provision of the Political Code: 'Any statute may be repealed at any time, except when it is otherwise provided therein. Persons acting under any statute are deemed to have acted in contemplation of this power of repeal.' California Political Code, s 327, quoted in Moss v. Smith, supra, at page 787, of 171 Cal., 155 P. 90, 94. I assume for present purposes that the rule thus announced would be held of no effect if the statute and decisions declaring it had been made after Coombes became a creditor. Made as they were before that time they were reservations or conditions limiting the statutory liability, and to be read into the **440 statute, and hence into any contract to which the statute was an incident, as if written there in words. Citizens' Savings Bank v. Owensboro,

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173 U. S. 636, 644, 19 S. Ct. 530, 43 L. Ed. 840; Farmers' Bank v. Fed. Reserve Bank, 262 U. S. 649, 660, 43 S. Ct. 651, 67 L. Ed. 1157, 30 A. L. R. 635. 'The claim of an irrepealable contract cannot be predicated upon a contract which is repealable.' Hammond Packing Co. v. Arkansas, 212 U. S. 322, 346, 29 S. Ct. 370, 378, 53 L. Ed. 530, 15 Ann. Cas. 645. Either the petitioner took his cause of action subject to such infirmities or contingencies as were attached to it by the law of the state of its creation, or he did not take anything.

This view of the case puts aside as irrelevant the provision of the California Constitution permitting the ***452** amendment of corporate charters, and sustains the repeal upon the ground that the liability by the law of its creation was defeasible in its origin.

Mr. Justice BRANDEIS and Mr. Justice STONE join in this dissent.

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not retroactive

Supreme Court of the United States.

SILVER
v.
SILVER.

No. 24.

Argued Oct. 25, 1929.
Decided Nov. 25, 1929.

Appeal from the Supreme Court of the State of Connecticut.

Action by Mae Silver against Benjamin Silver. From a judgment of the Supreme Court of Connecticut (108 Conn. 371, 143 A. 240), affirming a judgment for defendant, plaintiff appeals. Affirmed.

West Headnotes

[1] Federal Courts ⚿511.1
170Bk511.1 Most Cited Cases
(Formerly 30k1082(1), 106k398(1))

Supreme Court will review only constitutional question considered in lower court's opinion, where record does not disclose others raised by appellant.

[2] Constitutional Law ⚿92
92k92 Most Cited Cases

Constitution does not forbid creation of new rights or abolition of old ones to attain permissible legislative object.

[3] Automobiles ⚿181(1)
48Ak181(1) Most Cited Cases

[3] Constitutional Law ⚿70.3(10)
92k70.3(10) Most Cited Cases
(Formerly 92k70(3))

Wisdom of legislation restricting liability for injuries to gratuitous passengers in automobiles is not for courts.

[4] Automobiles ⚿181(1)
48Ak181(1) Most Cited Cases

[4] Constitutional Law ⚿245(2)
92k245(2) Most Cited Cases
(Formerly 92k243)

Distinction between gratuitous passengers in automobiles and other vehicles by statute prohibiting recovery for injuries to former held not so evidently groundless as to warrant holding it arbitrary. Pub.Acts Conn.1927, p. 4404, c. 308; U.S.C.A.Const. Amend. 14.

[5] Automobiles ⚿181(1)
48Ak181(1) Most Cited Cases

[5] Constitutional Law ⚿245(2)
92k245(2) Most Cited Cases
(Formerly 92k243)

Legislative restriction on vehicle operators' liability for injuries to guests or licensees need not reach every class to which it might be applied. U.S.C.A.Const. Amend. 14.

[6] Automobiles ⚿181(1)
48Ak181(1) Most Cited Cases

[6] Constitutional Law ⚿245(2)
92k245(2) Most Cited Cases

[6] Automobiles ⚿6
48Ak6 Most Cited Cases

Statute prohibiting recovery from automobile owners for injuries to gratuitous passengers held not unconstitutional, though not reaching all abuses. Pub.Acts Conn.1927, p. 4404, c. 308; U.S.C.A.Const. Amend. 14.

****58 *118** Messrs. Thomas R. Robinson, Arthur B. O'Keefe, David M. Reilly and Herman Levine, all of New Haven, Conn., for appellant.

***119** Mr. Wm. L. Hadden, of New Haven, Conn., for appellee.

***121** Mr. Justice STONE delivered the opinion of the Court.

This is an appeal under section 237 of the Judicial Code, as amended by Act of February 13, 1925 (28

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USCA s 344), from a judgment of the Supreme Court of Connecticut upholding the constitutionality of a state statute. Chapter 308 of the Public Acts of Connecticut of 1927 (printed in the margin [FN1]) ***122** provides that no person carried gratuitously as a guest in an automobile may recover from the owner or operator for injuries caused by its negligent operation. The appellant brought suit in the superior court of New Haven county against appellee, her husband, for injuries so sustained. Judgment for the defendant was affirmed by the Supreme Court. Both courts ruled that the statute barred appellant, a guest carried gratuitously, from recovery for injuries caused by ordinary negligence in the operation of the car, and the Supreme Court, by divided bench, held that the statute did not deny to appellant the equal protection of the laws guaranteed by the Fourteenth Amendment. 108 Conn. 371, 143 A. 240.

> FN1 Chapter 308. An Act Releasing Owners Of Motor Vehicles From Responsibility For Injuries To Passengers Therein.
>
> Be it enacted by the Senate and House of Representatives in General Assembly convened:
>
> Section 1. No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others.
>
> Sec. 2. This act shall not relieve a public carrier or any owner or operator of a motor vehicle while the same is being demonstrated to a prospective purchaser of responsibility for any injuries sustained by a passenger being transported by such public carrier or by such owner or operator.

[1][2] As the record does not disclose the constitutional grounds on which the appellant challenged the validity of the statute, our review will be limited to the single question arising under the Federal Constitution which was considered in the opinion of the court below. Saltonstall v. Saltonstall, 276 U. S. 260, 48 S. Ct. 225, 72 L. Ed. 565. We need not, therefore, elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object. See Louis Pizitz Dry Goods Co. v. Yeldell, 274 U. S. 112, 116, 47 S. Ct. 509, 71 L. Ed. 952, 51 A. L. R. 1376; New York Central Railroad Co. v. White, 243 U. S. 188, 37 S. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; Mountain Timber Co. v. Washington, 243 U. S. 219, 37 S. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642; Wilmington Star Mining Co. v. Fulton, 205 U. S. 60, 74, 27 S. Ct. 412, 51 L. Ed. 708.

[3] The use of the automobile as an instrument of transportation is peculiarly the subject of regulation. We cannot assume that there are no evils to be corrected or permissible social objects to be gained by the present statute. We are not unaware of the increasing frequency of litigation in which passengers carried gratuitously in automobiles, often casual guests or licensees, have sought the recovery of large sums for injuries alleged to have ***123** been due to negligent operation. In some jurisdictions it has been judicially determined that a lower standard of care should be exacted where the carriage in any type of vehicle is gratuitous. See Massaletti v. Fitzroy, 228 Mass. 487, 118 N. E. 168, L. R. A. 1918C, 264, Ann. Cas. 1918B, 1088; Marcienowski v. Sanders, 252 Mass. 65, 147 N. E. 275; Epps v. Parrish, 26 Ga. App. 399, 106 S. E. 297. Whether there has been a serious increase in the evils of vexatious litigation in this class of cases, where the carriage is by automobile, is for legislative determination, and, if found, may well be the basis of legislative ***59** action further restricting the liability. Its wisdom is not the concern of courts.

[4] It is said that the vice in the statute is not that it distinguishes between passengers who pay and those who do not, but between gratuitous passengers in automobiles and those in other classes of vehicles. But it is not so evident that no grounds exist for the distinction that we can say a priori that the classification is one forbidden as without basis, and arbitrary. See State of Ohio ex rel. Clarke v. Deckebach, 274 U. S. 392, 397, 47 S. Ct. 630, 71 L. Ed. 1115.

[5][6] Granted that the liability to be imposed upon those who operate any kind of vehicle for the benefit of a mere guest or licensee is an appropriate subject of legislative restruction, there is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied-that the Legislature must be held rigidly to the choice of regulating all or none. Patsone v. Pennsylvania, 232 U. S. 138, 144, 34 S.

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Ct. 281, 58 L. Ed. 539; Miller v. Wilson, 236 U. S. 373, 382, 384, 35 S. Ct. 342, 59 L. Ed. 628, L. R. A. 1915F, 829; International Harvester Co. v. Missouri, 234 U. S. 200, 215, 34 S. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525; Barrett v. Indiana (1913) 229 U. S. 26, 29, 33 S. Ct. 692, 57 L. Ed. 1050. In this day of almost universal highway transportation by motorcar, we cannot say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the Legislature may regard as an evil, as to justify ***124** legislation aimed at it, even though some abuses may not be hit. Carroll v. Greenwich Insurance Co., 199 U. S. 401, 411, 26 S. Ct. 66, 50 L. Ed. 246; People of State of New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73, 49 S. Ct. 61, 73 L. Ed. 184. It is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs.

Affirmed.

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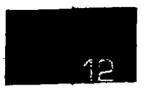
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Supreme Court of the United States

NEW YORK CENTRAL RAILROAD COMPANY, Plff. in Err.,
v.
SARAH WHITE.

No. 320.

Argued February 29 and March 1, 1916.
Restored to docket for reargument November 13, 1916.
Reargued February 1, 1917.
Decided March 6, 1917.

IN ERROR to the Supreme Court Appellate Division, Third Judicial Department, of the State of New York, to review a judgment affirmed by the Court of Appeals of that state, which affirmed an award by the state Workmen's Compensation Commission. Affirmed.

See same case below, in appellate division, 169 App. Div. 903, 152 N. Y. Supp. 1149; in court of appeals, 216 N. Y. 653, 110 N. E. 1051.

The facts are stated in the opinion.

West Headnotes

Commerce ⚿62.21
83k62.21 Most Cited Cases
(Formerly 83k27(8))

A night watchman, injured while guarding tools and material for the erection of a depot, held not engaged in interstate commerce, within the federal Employers' Liability Act of April 22, 1908, 45 U.S.C.A. § 51 et seq., though such depot was intended to be used in interstate commerce.

Constitutional Law ⚿245(4)
92k245(4) Most Cited Cases
(Formerly 92k245)

The exclusion of farm laborers and domestic servants from the New York Workmen's Compensation Act does not render the act violative of the Fourteenth Amendment, as denying equal protection.

Constitutional Law ⚿245(4)
92k245(4) Most Cited Cases
(Formerly 92k245)

The requirement of the New York Workmen's Compensation Act, § 50, that the employer either secure insurance or furnish proof of his financial ability and deposit securities, does not violate the Fourteenth Amendment, U.S.C.A., as denying equal protection of law.

Constitutional Law ⚿301(4)
92k301(4) Most Cited Cases
(Formerly 92k275(2))

The New York Workmen's Compensation Act, providing for compulsory compensation without regard to fault, except willful act of employe to produce injury, or his intoxication, and graduating the compensation according to earning power or dependency of survivors, *held* not to violate the U.S.C.A. Const.Amend. 14, as unwarrantably limiting freedom of contract.

Constitutional Law ⚿301(4)
92k301(4) Most Cited Cases
(Formerly 92k301)

The New York Workmen's Compensation Act, providing for compulsory compensation without regard to fault except willful act of employe to produce injury, or his intoxication, and graduating the compensation according to earning power or dependency of survivors, *held* not to contravene U.S.C.A. Const.Amend. 14, as taking property without due process of law.

Constitutional Law ⚿313
92k313 Most Cited Cases

Trial by jury is not secured by U.S.C.A. Const.Amend. 14.

Workers' Compensation ⚿13
413k13 Most Cited Cases

Workmen's Compensation Acts and Industrial Insurance Acts *held* valid.

****247 *190** Messrs. **William L. Visscher, Frank**

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V. Whiting, Robert E. Whalen, and H. Leroy Austin for plaintiff in error.

Messrs. **Harold J. Hinman** and **E. Clarence Aiken,** and Mr. Egburt E. Woodbury, Attorney General of New York, for defendant in error.

Mr. Justice **Pitney** delivered the opinion of the court:

A proceeding was commenced by defendant in error before the Workmen's Compensation Commission of the State of New York, established by the Workmen's Compensation Law of that state, [FN1] to recover ****248** compensation from the New York Central & Hudson River Railroad Company for the death of her husband, Jacob White, who lost his life September 2, 1914, through an accidental injury arising out of and in the course of his employment under that company. The Commission awarded compensation in accordance with the terms of the law; its award was affirmed, without opinion, by the appellate ***191** division of the supreme court for the third judicial department, whose order was affirmed by the court of appeals, without opinion. 169 App. Div. 903, 152 N. Y. Supp. 1149, 216 N. Y. 653, 110 N. E. 1051. Federal questions having been saved, the present writ of error was sued out by the New York Central Railroad Company, successor, through a consolidation of corporations, to the rights and liabilities of the employing company. The writ was directed to the appellate division, to which the record and proceedings had been remitted by the court of appeals. Sioux Remedy Co. v. Cope, 235 U. S. 197, 200, 59 L. ed. 193, 196, 35 Sup. Ct. Rep. 57.

The errors specified are based upon these contentions: (1) that the liability, if any, of the railroad company for the death of Jacob White, is defined and limited exclusively by the provisions of the Federal Employers' Liability Act of April 22, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657, and (2) that to award compensation to defendant in error under the provisions of the Workmen's Compensation Law would deprive plaintiff in error of its property without due process of law, and deny to it the equal protection of the laws, in contravention of the 14th Amendment.

The first point assumes that the deceased was employed in interstate commerce at the time he received the fatal injuries. According to the record, he was a night watchman, charged with the duty of guarding tools and materials intended to be used in the construction of a new station and new tracks upon a line of interstate railroad. The Commission found, upon evidence fully warranting the finding, that he was on duty at the time, and at a place not outside of the limits prescribed for the performance of his duties; that he was not engaged in interstate commerce; and that the injury received by him and resulting in his death was an accidental injury arising out of and in the course of his employment.

The admitted fact that the new station and tracks were ***192** designed for use, when finished, in interstate commerce, does not bring the case within the Federal act. The test is, 'Was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?' Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, 558, 60 L. ed. 436, 438, L.R.A.1916C, 797, 31 Sup. Ct. Rep. 188. Decedent's work bore no direct relation to interstate transportation, and had to do solely with construction work, which is clearly distinguishable, as was pointed out in Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 152, 57 L. ed. 1125, 1128, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779. And see Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 180, 60 L. ed. 941, 942, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992; Raymond v. Chicago, M. & St. P. R. Co. this day decided [243 U. S. 43, 61 L. ed. 583, 37 Sup. Ct. Rep. 268]. The first point, therefore, is without basis in fact.

We turn to the constitutional question. The Workmen's Compensation Law of New York establishes forty-two groups of hazardous employments, defines 'employee' as a person engaged in one of these employments upon the premises, or at the plant, or in the course of his employment away from the plant of his employer, but excluding farm laborers and domestic servants; defines 'employment' as including employment only in a trade, business, or occupation carried on by the employer for pecuniary gain, 'injury' and 'personal injury' as meaning only accidental injuries arising out of and in the course of employment, and such disease or infection as naturally and unavoidably may result therefrom; and requires every employer subject to its provisions to pay or provide

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compensation according to a prescribed schedule for the disability or death of his employee resulting from an accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where it results solely *193 from the intoxication of the injured employee while on duty, in which cases neither the injured employee nor any dependent shall receive compensation. By § 11 the prescribed liability is made exclusive, except that, if an employer fail to secure the payment of compensation as provided in § 50, an injured employee, or his legal representative, in case death results from the injury, may, at his option, elect to claim compensation under the act, or to maintain an action in the courts for damages, and in such an action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant, that the employee assumed the **249 risk of his employment, or that the injury was due to contributory negligence. Compensation under the act is not regulated by the measure of damages applied in negligence suits, but, in addition to providing surgical, or other like treatment, it is based solely on loss of earning power, being graduated according to the average weekly wages of the injured employee and the character and duration of the disability, whether partial or total, temporary or permanent; while in case the injury causes death, the compensation is known as a death benefit, and includes funeral expenses, not exceeding $100, payments to the surviving wife (or dependent husband) during widowhood (or dependent widowerhood) of a percentage of the average wages of the deceased, and if there be a surviving child or children under the age of eighteen years an additional percentage of such wages for each child until that age is reached. There are provisions invalidating agreements by employees to waive the right to compensation, prohibiting any assignment, release, or commutation of claims for compensation or benefits except as provided by the act, exempting them from the claims of creditors, and requiring that the compensation and benefits shall be paid only to employees or their dependents. *194 Provision is made for the establishment of a Workmen's Compensation Commission [FN2] with administrative and judicial functions, including authority to pass upon claims to compensation on notice to the parties interested. The award or decision of the Commission is made subject to an appeal, on questions of law only, to the appellate division of the supreme court for the third department, with an ultimate appeal to the court of appeals in cases where such an appeal would lie in civil actions. A fund is created, known as 'the state insurance fund,' for the purpose of insuring employers against liability under the law, and assuring to the persons entitled the compensation thereby provided. The fund is made up primarily of premiums received from employers, at rates fixed by the Commission in view of the hazards of the different classes of employment, and the premiums are to be based upon the total pay roll and number of employees in each class at the lowest rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve. Elaborate provisions are laid down for the administration of this fund. By § 50, each employer is required to secure compensation to his employees in one of the following ways: (1) By insuring and keeping insured the payment of such compensation in the state fund; or (2) through any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in the state; or (3) 'by furnishing satisfactory proof to the Commission of his financial ability to pay such compensation for himself, in which case the Commission may, in its discretion, require the deposit with the Commission of securities of the kind prescribed in § 13 of the Insurance Law, in an amount to be determined by the Commission, to secure his *195 liability to pay the compensation provided in this chapter.' If an employer fails to comply with this section, he is made liable to a penalty in an amount equal to the pro rata premium that would have been payable for insurance in the state fund during the period of noncompliance; besides which, his injured employees or their dependents are at liberty to maintain an action for damages in the courts, as prescribed by § 11.

In a previous year, the legislature enacted a compulsory compensation law applicable to a limited number of specially hazardous employments, and requiring the employer to pay compensation without regard to fault. Laws 1910, chap. 674. This was held by the court of appeals in Ives v. South Buffalo R. Co. 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N.

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and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, and more particularly our foreign relations and the national security; and formulation of policies pertaining to entry of aliens and their right to remain here is entrusted exclusively to Congress.

[7] Constitutional Law ⚿252
92k252 Most Cited Cases

An "alien" is a "person" entitled to the same protection for his life, liberty and property under the due process clause as is afforded to a citizen. U.S.C.A.Const. Amend. 5.

[8] Constitutional Law ⚿251
92k251 Most Cited Cases

Fair play is the essence of "due process." U.S.C.A.Const. Amend. 5.

[9] Constitutional Law ⚿251
92k251 Most Cited Cases

Substantive due process is a limitation upon all powers of Congress, including the war power. U.S.C.A.Const. Amend. 5.

[10] Constitutional Law ⚿197
92k197 Most Cited Cases

Ex post facto clause of federal Constitution is applicable only to punitive legislation. U.S.C.A.Const. Amend. 5.

[11] Constitutional Law ⚿197
92k197 Most Cited Cases

Ex post facto clause of the federal Constitution has no application to deportation, even though deportation may deprive a man of all that makes life worth living and may at times be the equivalent of banishment or exile. U.S.C.A.Const. Amend. 5.

[12] Constitutional Law ⚿274.3
92k274.3 Most Cited Cases
(Formerly 92k318)

Policies pertaining to entry of aliens and their right to remain here are peculiarly concerned with political conduct of government, and in enforcement of those policies, executive branch of government must respect procedural safeguards of due process. U.S.C.A.Const. Amend 5.

[13] Aliens ⚿40
24k40 Most Cited Cases

[13] Constitutional Law ⚿199
92k199 Most Cited Cases

[13] Constitutional Law ⚿255(2)
92k255(2) Most Cited Cases
(Formerly 92k255)

Statute making present or former membership in Communist Party a basis for deportation of alien was not repugnant to either due process or ex post facto clauses of Federal Constitution. Internal Security Act of 1950, § 2(1), 50 U.S.C.A. § 781(1); U.S.C.A.Const. Amend. 5.

[14] Courts ⚿90(3)
106k90(3) Most Cited Cases

Not being prepared to deem themselves wiser or more sensitive to human rights than their predecessors, especially those who had been most zealous in protecting civil liberties under Constitution, members of Supreme Court could not justifiably overturn a view of the Constitution which was deeply rooted and had been consistently adhered to. U.S.C.A.Const.Amend. 5.

****738** Messrs. ***523** Harry Wolpin and A. L. Wirin, Los Angeles, for petitioner.

Mr. Oscar H. Davis, Washington, D.C., for respondent.

Mr. Justice FRANKFURTER delivered the opinion of the Court.

Petitioner, an alien of Mexican birth, first entered the United States in 1918 and has since resided here with only occasional brief visits to his native country. In the course of two questionings, in March 1948, by the Immigration and ****739** Naturalization Service, he indicated that he had been a member of the Communist Party from 1944 to 1946. In March of 1949, the petitioner was served with a deportation warrant, and on the same day a preliminary deportation hearing was held to acquaint him with the charges against him--that after entry he

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E. 431, Ann. Cas. 1912B, 156 1 N. C. C. A. 517, to be invalid because in conflict with due process of law provisions of the state Constitution and of the 14th Amendment. Thereafter, and in the year 1913, a constitutional amendment was adopted, effective January 1, 1914, declaring:

'Nothing contained in this Constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall **250 be exclusive of all *196 other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer.'

In December, 1913, the legislature enacted the law now under consideration (Laws 1913, chap. 816), and in 1914 re-enacted it (Laws 1914, chap. 41) to take effect as to payment of compensation on July 1 in that year. The act was sustained by the court of appeals as not inconsistent with the 14th Amendment in Jensen v. Southern P. Co. 215 N. Y. 514, L.R.A.1916A, 403, 109 N. E. 600, Ann. Cas. 1916B, 276; and that decision was followed in the case at bar.

The scheme of the act is so wide a departure from common-law standards respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity. The adverse considerations urged or suggested in this case and in kindred cases submitted at the same time are: (a) That the employer's property is taken without due process of law, because he is subjected to a liability for compensation without regard to any neglect or default on his part or on the part of any other person for whom he is responsible, and in spite of the fact that the injury may be solely attributable to the fault of the employee; (b) that the employee's rights are interfered with, in that he is prevented from having compensation for injuries arising from the employer's fault commensurate with the damages actually sustained, and is limited to the measure of compensation prescribed by the act; and (c) that both employer and employee are deprived of their liberty to acquire property by being prevented from making such *197 agreement as they choose respecting the terms of the employment.

In support of the legislation, it is said that the whole common-law doctrine of employer's liability for negligence, with its defenses of contributory negligence, fellow servant's negligence, and assumption of risk, is based upon fictions, and is inapplicable to modern conditions of employment; that in the highly organized and hazardous industries of the present day the causes of accident are often so obscure and complex that in a material proportion of cases it is impossible by any method correctly to ascertain the facts necessary to form an accurate judgment, and in a still larger proportion the expense and delay required for such ascertainment amount in effect to a defeat of justice; that, under the present system, the injured workman is left to bear the greater part of industrial accident loss, which, because of his limited income, he is unable to sustain, so that he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity; and that litigation is unduly costly and tedious, encouraging corrupt practices and arousing antagonisms between employers and employees.

In considering the constitutional question, it is necessary to view the matter from the standpoint of the employee as well as from that of the employer. For, while plaintiff in error is an employer, and cannot succeed without showing that its rights as such are infringed (Plymouth Coal Co. v. Pennsylvania, 232 U. S. 571, 576, 59 L. ed. 713, 719, 34 Sup. Ct. Rep. 359; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 59 L. ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570), yet, as

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pointed out by the court of appeals in the Jensen Case (215 N. Y. 526), the exemption from further liability is an essential part of the scheme, so that the statute, if invalid as against the employee, is invalid as against the employer.

The close relation of the rules governing responsibility as between employer and employee to the fundamental rights *198 of liberty and property is, of course, recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit. Munn v. Illinois, 94 U. S. 113, 134, 24 L. ed. 77, 87; Hurtado v. California, 110 U. S. 516, 532, 28 L. ed. 232, 237, 4 Sup. Ct. Rep. 111, 292; Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284, 294, 51 L. ed 184, 191, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 50, 56 L. ed. 327, 346, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 76, 59 L. ed. 1204, 1210, 35 Sup. Ct. Rep. 678. The common law bases the employer's liability for in juries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law;ant the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence. Indeed, liability may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense; safety appliance acts being a familiar instance. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. **251 S. 281, 295, 52 L. ed. 1061, 1068, 28 Sup Ct. Rep. 616, 21 Am. Neg. Rep. 464; Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 39, 43, 60 L. ed. 874, 877, 878, 36 Sup. Ct. Rep 482.

The fault may be that of the employer himself, or--most frequently--that of another for whose conduct he is made responsible according to the maxim respondeat superior. In the latter case the employer may be entirely blameless, may have exercised the utmost human foresight to safeguard the employee; yet, if the alter ego, while acting within the scope of his duties, be negligent,-- in disobedience, it may be, of the employer's positive and specific command,-- the employer is answerable for the consequences. It cannot be that the rule embodied in the maxim is unalterable by legislation.

The immunity of the employer from responsibility to an employee for the negligence of a fellow employee is of comparatively recent origin, it being the product of the judicial conception that the probability of a fellow workman's *199 negligence is one of the natural and ordinary risks of the occupation, assumed by the employee and presumably taken into account in the fixing of his wages. The earliest reported cases are Murray v. South Carolina R. Co. (1841) 1 McMull. L. 385, 398, 36 Am. Dec. 268; Farwell v. Boston & W. R. Corp. (1842) 4 Met. 49, 57, 38 Am. Dec. 339, 15 Am. Neg. Cas. 407; Hutchinson v. York, N. & B. R. Co. (1850) L. R. 5 Exch. 343, 351, 19 L. J. Exch. N. S. 296, 299, 14 Jur. 837, 840, 6 Eng. Ry. & C. Cas. 580; Wigmore v. Jay (1850) L. R. 5 Exch. 354, 19 L. J. Exch. N. S. 300, 14 Jur. 838, 841; Bartonshill Coal Co. v. Reid (1858) 3 Macq. H. L. Cas. 266, 284, 295, 4 Jur. N. S. 767, 6 Week Rep. 664, 19 Eng. Rul. Cas. 107. And see Randall v. Baltimore & O. R. Co. 109 U. S. 478, 483, 27 L. ed. 1003, 1005, 3 Sup. Ct Rep. 322; Northern P. R. Co. v. Herbert, 116 U. S. 642, 647, 29 L. ed. 755, 758, 6 Sup. Ct. Rep. 590. The doctrine has prevailed generally throughout the United States, but with material differences in different jurisdictions respecting who should be deemed a fellow servant and who a vice principal or alter ego of the master, turning sometimes upon refined distinctions as to grades and departments in the employment. See Knutter v. New York & N. J. Teleph. Co. 67 N. J. L. 646, 650-653, 58 L.R.A. 808, 52 Atl. 565, 12 Am. Neg. Rep. 109. It needs no argument to show that such a rule is subject to modification or abrogation by a state upon proper occasion.

The same may be said with respect to the general doctrine of assumption of risk. By the common law the employee assumes the risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks and those due to the employer's negligence he does not assume until made aware of them, or until they become so obvious that an ordinarily prudent man would observe and appreciate them; in either of which cases he does assume them, if he continues in the employment without obtaining from the employer an assurance that the matter will be remedied; but if he receive such an assurance, then, pending performance of the promise, the employee does not, in ordinary cases, assume the special risk. Seaboard

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Air Line R. Co. v. Horton, 233 *200 U. S. 492, 504, 58 L. ed. 1062, 1070, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834, 239 U. S. 595, 599, 60 L. ed 458, 461, 36 Sup. Ct. Rep. 180. Plainly, these rules, as guides of conduct and tests of liability, are subject to change in the exercise of the sovereign authority of the state.

So, also, with respect to contributory negligence. Aside from injuries intentionally self-inflicted, for which the statute under consideration affords no compensation, it is plain that the rules of law upon the subject, in their bearing upon the employer's responsibility, are subject to legislative change; for contributory negligence, again, involves a default in some duty resting on the employee, and his duties are subject to modification.

It may be added, by way of reminder, that the entire matter of liability for death caused by wrongful act, both within and without the relation of employer and employee, is a modern statutory innovation, in which the states differ as to who may sue, for whose benefit, and the measure of damages.

But it is not necessary to extend the discussion. This court repeatedly has upheld the authority of the states to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee. Missouri P. R. Co. v. Mackey, 127 U. S. 205, 208, 32 L. ed. 107, 108, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Minnesota Iron Co. v. Kline, 199 U. S. 593, 598, 50 L. ed. 322, 325, 26 Sup. Ct. Rep. 159, 19 Am. Neg. Rep. 625; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 53, 54 L. ed. 921, 928, 47 L.R.A.(N.S.) 84, 30 Sup. Ct. Rep. 676; Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581; Wilmington Star Min. Co. v. Fulton, **252 205 U. S. 60, 73, 51 L. ed. 708, 715, 27 Sup. Ct. Rep. 412; Missouri P. R. Co. v. Castle, 224 U. S. 541, 544, 56 L. ed. 875, 878, 32 Sup. Ct. Rep. 606. A corresponding power on the part of Congress, when legislating within its appropriate sphere, was sustained in Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. And see El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 97, 54 L. ed. 106, 111, 30 Sup. Ct. Rep. 21; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 619, 55 L. ed. 878, 883, 31 Sup. Ct. Rep. 621.

*201 It is true that in the case of the statutes thus sustained there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. Considering the vast industrial organization of the state of New York, for instance, with hundreds of thousands of plants and millions of wage earners, each employer, on the one hand, having embarked his capital, and each employee, on the other, having taken up his particular mode of earning a livelihood, in reliance upon the probable permanence of an established body of law governing the relation, it perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary. And just as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing *202 the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale. The act evidently

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is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety. We have said enough to demonstrate that, in such an adjustment, the particular rules of the common law affecting the subject matter are not placed by the 14th Amendment beyond the reach of the lawmaking power of the state; and thus we are brought to the question whether the method of compensation that is established as a substitute transcends the limits of permissible state action.

We will consider, first, the scheme of compensation, deferring for the present the question of the manner in which the employer is required to secure payment.

Briefly, the statute imposes liability upon the employer to make compensation for disability or death of the employee resulting from accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause except where the injury or death is occasioned by the employee's wilful intention to produce it, or where the injury results solely from his intoxication while on duty; it graduates the compensation for disability according to a prescribed scale based upon the loss of earning power, having regard to the previous wage and the character and duration of the disability; and measures the death benefits according to the dependency of the surviving wife, husband, or infant children. Perhaps we should add that it has no retrospective effect, and applies only to cases arising some months after its passage.

Of course, we cannot ignore the question whether the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling ***203** or fatal personal injuries received in the course of hazardous employment in gainful occupation. Reduced to its elements, the situation to be dealt with is this: Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both; the employee is to contribute his personal services, and for these is to receive wages, and, ordinarily, nothing more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and mange the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the profits, ****253** if any there be, and, of necessity, bearing the entire losses. In the nature of things, there is more or less of a probability that the employee may lose his life through some accidental injury arising out of the employment, leaving his widow or children deprived of their natural support; or that he may sustain an injury not mortal, but resulting in his total or partial disablement, temporary or permanent, with corresponding impairment of earning capacity. The physical suffering must be borne by the employee alone; the laws of nature prevent this from being evaded or shifted to another, and the statute makes no attempt to afford an equivalent in compensation. But, besides, there is the loss of earning power,--a loss of that which stands to the employee as his capital in trade. This is a loss arising out of the business, and, however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasonable for the state, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, ***204** by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall,--that is, upon the injured employee or his dependents. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which, in all ordinary cases of accidental injury, he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale.

Much emphasis is laid upon the criticism that the act creates liability without fault. This is sufficiently answered by what has been said, but we may add that liability without fault is not a novelty in the law. The common-law liability of the carrier, of the innkeeper, or him who employed fire or other

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dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained. St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 22, 41 L. ed. 611, 619, 17 Sup. Ct. Rep. 243; Chicago, R. I. & P. R. Co. v. Zernecke, 183 U. S. 582, 586, 46 L. ed. 339, 340, 22 Sup. Ct. Rep. 229.

We have referred to the maxim, respondeat superior. In a well-known English case, Hall v. Smith, 2 Bing. 156, 160, 130 Eng. Reprint, 265, 9 J. B. Moore, 226, 2 L. J. C. P. 113, this maxim was said by Best, Ch. J., to be 'bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it.' And this view has been adopted in New York. Cardot v. Barney, 63 N. Y. 281, 287, 20 Am. Rep. 533. The provision for compulsory compensation, in the act under consideration ***205** cannot be deemed to be an arbitrary and unreasonable application of the principle, so as to amount to a deprivation of the employer's property without due process of law. The pecuniary loss resulting from the employee's death or disablement must fall somewhere. It results from something done in the course of an operation from which the employer expects to derive a profit. In excluding the question of fault as a cause of the injury, the act in effect disregards the proximate cause and looks to one more remote,--the primary cause, as it may be deemed,-- and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as coadventurers, with personal injury to the employee as a probable and foreseen result. In ignoring any possible negligence of the employee producing or contributing to the injury, the lawmaker reasonably may have been influenced by the belief that, in modern industry, the utmost diligence in the employer's service is in some degree inconsistent with adequate care on the part of the employee for his own safety; that the more intently he devotes himself to the work, the less he can take precautions for his own security. And it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected, and to the community, whether the proximate cause be culpable or innocent. Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or, in case of his death, to those who were entitled to look to him for support, in lieu of ****254** the common-law liability confined to cases of negligence.

This, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed ***206** by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises.

But, it is said, the statute strikes at the fundamentals of constitutional freedom of contract; and we are referred to two recent declarations by this court. The first is this: 'Included in the right of personal liberty and the right of private property--partaking of the nature of each--is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense.' Coppage v. Kansas, 236 U. S. 1, 14, 59 L. ed. 441, 446 L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240. And this is the other: 'It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [14th] Amendment to secure.' Truax v. Raich, 239 U. S. 33, 41, 60 L. ed. 131, 135, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7.

It is not our purpose to qualify or weaken either of these declarations in the least. And we recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the state. In our opinion it is fairly supportable upon that ground. And for this reason: The subject matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. 'The whole is

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no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state *207 must suffer.' Holden v. Hardy, 169 U. S. 366, 397, 42 L. ed. 780, 793, 18 Sup. Ct. Rep. 383. It cannot be doubted that the state may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared, in bills of rights, to be 'natural and inalienable;' and the authority to prohibit contracts made in derogation of a lawfully-established policy of the state respecting compensation for accidental death or disabling personal injury is equally clear. Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 571, 55 L. ed. 328, 340, 31 Sup. Ct. Rep. 259; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 52, 56 L. ed. 327, 347, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

We have not overlooked the criticism that the act imposes no rule of conduct upon the employer with respect to the conditions of labor in the various industries embraced within its terms, prescribes no duty with regard to where the workmen shall work, the character of the machinery, tools, or appliances, the rules or regulations to be established, or the safety devices to be maintained. This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees, arising out of the employment, bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations. Sherlock v. Alling, 93 U. S. 99, 103, 23 L. ed. 819, 820; Missouri P. R. Co. v. Castle, 224 U. S. 541, 545, 56 L. ed. 875, 879, 32 Sup. Ct. Rep. 606 .

No question is made but that the procedural provisions of the act are amply adequate to afford the notice and opportunity to be heard required by the 14th *208 Amendment. The denial of a trial by jury is not inconsistent with 'due process.' Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Frank v. Mangum, 237 U. S. 309, 340, 59 L. ed. 960, 985, 35 Sup. Ct. Rep. 582.

The objection under the 'equal protection' clause is not pressed. The only apparent basis for it is in the exclusion of farm laborers and domestic servants from the scheme. But, manifestly, this cannot be judicially declared to be an arbitrary classification, since it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar. Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 650, 58 L. ed. 1135, **255 1137, 34 Sup. Ct. Rep. 678, and cases there cited.

We conclude that the prescribed scheme of compulsory compensation is not repugnant to the provisions of the 14th Amendment and are brought to consider, next, the manner in which the employer is required to secure payment of the compensation. By § 50, this may be done in one of three ways: (a) State insurance; (b) insurance with an authorized insurance corporation or asso ciation; or (c) by a deposit of securities. The record shows that the predecessor of plaintiff in error chose the third method, and, with the sanction of the Commission, deposited securities to the amount of $300,000, under § 50, and $30,000 in cash as a deposit to secure prompt and convenient payment, under § 25, with an agreement to make a further deposit if required. This was accompanied with a reservation of all contentions as to the invalidity of the act, and had not the effect of preventing plaintiff in error from raising the questions we have discussed.

The system of compulsory compensation having been found to be within the power of the state, it is within the limits of permissible regulation, in aid of the system, to require the employer to furnish satisfactory proof of his financial ability to pay the compensation, and to deposit a reasonable amount of securities for that purpose. The third clause of § 50 has not been, and presumably will *209 not be, construed so as to give an unbridled discretion to the Commission; nor is it to be presumed that solvent employers will be prevented from becoming self-insurers on reasonable terms. No question is made but that the terms imposed upon this railroad company were reasonable in view of the magnitude of its operations, the number of its employees, and the amount of its pay roll (about $50,000,000

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annually); hence no criticism of the practical effect of the third clause is suggested.

This being so, it is obvious that this case presents no question as to whether the state might, consistently with the 14th Amendment, compel employers to effect insurance according to either of the plans mentioned in the first and second clauses. There is no such compulsion, since self-insurance under the third clause presumably is open to all employers on reasonable terms that it is within the power of the state to impose. Regarded as optional arrangements, for acceptance or rejection by employers unwilling to comply with that clause, the plans of insurance are unexceptionable from the constitutional standpoint. Manifestly, the employee is not injuriously affected in a constitutional sense by the provisions giving to the employer an option to secure payment of the compensation in either of the modes prescribed, for there is no presumption that either will prove inadequate to safeguard the employee's interests.

Judgment affirmed.

FN1 Chap. 816, Laws 1913, as re-enacted and amended by chap. 41, Laws 1914, and amended by chap. 316, Laws 1914.

FN2 By chap. 674, Laws 1915, §§ 2 and 8, this Commission was abolished and its functions were conferred upon the newly created Industrial Commission.

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13

Supreme Court of the United States.

MANLEY ETTOR and Mary T. Ettor, Plffs. in Err.,
v.
CITY OF TACOMA and Chicago, Milwaukee, & St. Paul Railway Company.

No. 68.
EDWIN HOWARD and Emma Howard, Plffs. in Err.,
v.
CITY OF TACOMA and Chicago, Milwaukee, & St. Paul Railway Company.

No. 69.
Nos. 68 and 69.

Argued December 6, 1912.
Decided April 7, 1913.

TWO WRITS OF ERROR to the Supreme Court of the State of Washington to review judgments which affirmed judgments of the Superior Court of Pierce County, in that state, directing verdicts in favor of a municipality in actions to recover damages for injuries to abutting property from an original street grading done under municipaly authority. Reversed and remanded for further proceedings.

See same case below, No. 68, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061; No. 69, 57 Wash. 698, 106 Pac. 481, 107 Pac. 1064.

The facts are stated in the opinion.

CONSTITUTIONAL LAW ⚿93(1)

92k93(1)

The right of abutting owners to compensation for consequential damages from an original grading under municipal direction given by Laws Wash.1893, c. 840, and Laws 1907, c. 153, is a vested property right which cannot be destroyed by repeal of the compensatory provision after the damage is done.

EMINENT DOMAIN ⚿70
148k70

The right of abutting owners to compensation for consequential damages from an original grading under municipal direction given by Laws Wash.1893, c. 840, and Laws 1907, c. 153, is a vested property right which cannot be destroyed by repeal of the compensatory provision after the damage is done.

****428 *149** Messrs. **Stanton Warburton,** John M. Boyle, E. B. Brockway, and C. M. Boyle for plaintiffs in error.

Messrs. **Heman H. Field,** George W. Korte, and T. L. Stiles for defendants in error.

Mr. Justice **Lurton** delivered the opinion of the court:

These were actions to recover for damage inflicted upon abutting property in consequence of an original street grading done by the railroad company under authority and direction of the city of Tacoma.

At the time the grading was done there was in force an act of the Washington legislature which required the city ***150** to make compensation for consequential damages due to an original street grading. Pending these suits, and while they were actually being heard, the provision of the act referred to which expressly required the city to provide for or make compensation for all such damage was amended so as to provide that the act should not apply to the original grading of any street. Laws of Washington, 1907, p. 316, and Laws of 1909, p. 151. When the attention of the trial court was called to this repealing act, it dircted a verdict for the city upon the theory that the right of action was statutory and fell with the statute, there being no saving clause. This judgment, upon the same ground, was affirmed by the supreme court of the state.

For the plaintiffs in error the contention, shortly stated, is, that the act of 1907 was the sole legislative authority of the city for making the cuts and fills in front of their premises upon the public street, and that that act expressly required the city to make provision for compensating an owner so damaged; and that their right to such compensation, having accrued while the act was in force, cannot be

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destroyed by subsequent legislation without a violation of the rights guaranteed by the 14th Amendment.

In the absence of legislation requiring compensation for such damage the general rule of law is that a municipality, in making, grading, and improving streets, is the agent of the state, exercising in the performance of such work a governmental power, and is not liable for consequential injuries to property abutting, if it keep within the street, and use reasonable care and skill in doing the work. 4 Dill. Mun. Corp. 5th ed. §§ 1674, 1677; Smith v. Washington, 20 How. 135, 15 L. ed. 858; Northern Transp. Co. v. Chicago, 99 U. S. 635, 641, 25 L. ed. 336, 338; Humes v. Knoxville, 1 Humph. 403, 34 Am. Dec. 657. This was the general law as announced by the supreme court of Washington in its first opinion in the case of Fletcher v. Seattle, *151 43 Wash. 627, 86 Pac. 1046, 88 Pac. 843, and is the general law of the state, as announced by the court's opinion in the instant case. Where the benefits equaled the injury, there was, of course, no injustice in the application of the general rule. But where the damage exceeded the benefits, there was an apparent injustice in casting upon such an owner an undue share of the cost of an improvement for the public benefit. This was recognized in Northern Transp. Co. v. Chicago, supra, where municipal nonliability was said to be due to the fact that in improving **429 its highways the municipality was but the agent of the state, and that, as the state could not be sued, its agents were equally immune for improvements authorized by the law of the state, without the consent of the state. But this equity which exists when the benefits are less than the damage affords a strong foundation for legislation requiring compensation in such circumstances. This consideration doubtless led to the legislation of the state, requiring compensation for such damage, under which the rights of the plaintiffs in error are asserted.

Whatever may have been the authority of the city of Tacoma under its charter or the general law of the state, to take or damage property for the purpose of opening, making, improving, or grading its public streets, and its immunity from liability for consequential damages in making an original grading, prior to the legislation found in the two acts of 1893 and 1907, Laws of Washington, 1893, p. 189, and Laws of 1907, p. 316, it is plain that the acts in question cover the whole subject of its authority and its liability for taking private property or 'damaging' it, in either making, grading, or regrading its public streets. The two acts referred to are identical in every essential. The latter is a mere re-enactment of the first, by which its provisions are extended to a larger class of municipal corporations.

The act of 1893 was construed and applied by the *152 supreme court of the state in Fletcher v. Seattle, supra. The action was by the owner of premises which had sustained damage while the act was in force, in consequence of an original grading. He recovered a judgment, which, upon a first hearing, was reversed by the supreme court, that court holding that consequential damages arising from an original grading, when the work had been done with due care, was neither a taking nor a damaging of private property within the meaning of the Constitution of the state, requiring compensation for taking or damaging private property for public purposes. But, upon a rehearing, the attention of the court was for the first time called to the act of 1893, and the contention advanced that the only authority of the city to take or damage the property of the plaintiff for the purpose of grading the street was under that act, and that, by its terms, the city was required to make compensation for damage arising from an original grading. The construction of that act upon facts like those in the present case was thereby directly involved. It was urged that the 47th section did not require compensation for consequential damages, but in answer to this, the court said:

'We think the word 'damages' used in the section [the 47th] has the same significance and meaning that it has in other sections of the same act, and that it was used in its broad sense and includes consequential damages. We see no reason why this provision of the law should be segregated from the other provisions, and a different construction placed upon it, or why the provisions of the act in relation to the assessment of the damages should not apply to it as it does to the other sections; and if it does, the right of compensation is equally granted.

'It was said that the title of the act shows that it is legislation concerning the exercise of the right of eminent domain, but we think the title is sufficient to cover the *153 section objected to equally as well as the other sections in the act, and it was evidently

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had become a member of an organization which advocated the violent overthrow of the United States Government, and of an organization which distributed material so advocating. In December 1950, petitioner had a de novo hearing at which the transcripts of all earlier proceedings were, by agreement, made part of the record. Shortly after the hearing commenced, the examining officer lodged the additional charge against the petitioner that after entry he had been a member of the Communist Party, membership in which had been made a specific ground for deportation by the Internal Security Act of 1950, 64 Stat. 987, 1006, 1008.

At this final hearing the evidence against the petitioner was derived from two principal sources. The first was ***524** his own testimony during the two interrogations by immigration authorities in 1948. During those interrogations, he had testified as to the time and place he had joined the Communist Party, talked freely about his membership in the Party, and indicated generally that the distinction between the Party and other groups was clear in his mind; he had explained that the reason he had not applied for naturalization was that he feared his former Party membership might be revealed, and had offered to make amends by rejoining the Party as an undercover agent for the Government. At the hearing in December of 1950, petitioner denied that in his prior hearing he had admitted joining the Party, insisting that at the time he thought the question related to labor union activities. In response to a question whether he had ever attended meetings of the Spanish Speaking Club, an alleged Communist Party unit, he replied: 'The only meetings I attended were relating to the Fair Employment Practices Committee.'

The second source of information was the testimony of a Mrs. Meza to the effect that she had been present when petitioner was elected an officer of the Spanish Speaking Club. Petitioner denied the truth of this and other statements of Mrs. Meza calculated to establish his active participation in the Communist Party and said: 'She must have been under great strain to imagine all those things.'

The Hearing Officer found that petitioner had been a member of the Communist Party from 1944 to 1946 and ordered him deported on that specific ground. He did not deem it necessary to make findings on the more general charges contained in the original warrant. The Hearing Officer's decision was adopted by the Assistant Commissioner and an appeal was dismissed by the Board of Immigration Appeals. A petition for a writ of habeas corpus was denied by the District Court, and the dismissal ***525** was affirmed by the Court of Appeals for the Ninth Circuit. 201 F.2d 302.

[1] On certiorari, petitioner challenged the sufficiency of the evidence to sustain deportation under s 22 of the Internal Security Act of 1950 and attacked the validity of the Act as applied to him. [FN1] These are issues that raise the constitutionality and construction of the ****740** 1950 Act for the first time and so we granted certiorari. 346 U.S. 812, 74 S.Ct. 53.

FN1. In his petition, petitioner also contended that the procedure used against him was unfair because of the new charge lodged by the Examining Officer in the December 1950 hearing. Apart from the fact that this claim was not pressed in the argument or petitioner's brief, it is sufficient to note that there was no element of surprise in the additional charge, since it was simply in more specific terms the same ground for deportation that petitioner already knew he had to defend against, namely, membership in the Communist Party. Furthermore, petitioner declined the Hearing Officer's offer of a continuance to meet the new charge.

Petitioner's contention that there was not sufficient evidence to support the deportation order brings into question the scope of the word 'member' as used by Congress in the enactment of 1950, whereby it required deportation of any alien who at the time of entering the United States, or at any time thereafter, was a 'member' of the Communist Party. [FN2] We are urged to construe the Act as providing for the deportation only of those aliens who joined the Communist Party fully conscious of its advocacy ***526** of violence, and who, by so joining, thereby committed themselves to this violent purpose.

FN2. Section 22 of the Internal Security Act of 1950 provides that the Attorney General shall take into custody and deport any alien 'who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1(2) of this Act * * *.' Subparagraph (C) of s 1(2) lists 'Aliens who are members of or affiliated with (i)

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the intention of the legislature to pass an act covering the whole subject of opening streets, and of providing methods of making compensation for damages where damages followed. The title not only provides for the exercise of the right of eminent domain, but, also, the taking and damaging of land and property for public purposes; and § 1 of the act empowers the city to condemn and also empowers it to *damage* any land or other property for the purpose of opening streets. Section 2 says, when the corporation authorities of any such city shall desire to condemn land or other property, *or damage the same*, for any purpose authorized by this act, such city shall provide, etc. In this case the city had the power to damage the respondents' land, and it was found that it did damage it, and it damaged it in a way that it was authorized by § 47 of this act; namely, by establishing a grade on the street upon which their property abutted. And this idea is manifested throughout the act. That the section does not contemplate such damages as are caused by an encroachment or actual trespass upon the lands of the owner, as is suggested by the appellant, is manifest from the language of the section itself, which evidently contemplates that the work will be upon the street, and not upon the abutting property.

'We are unable to find any more ambiguity in this section than in any other provision of the act; and under its provisions the plaintiffs are entitled to such damages as they can show they have suffered. The question of public policy and expense to the city are questions which are purely legislative.' **430 THE JUDGMENT OF THE LOWER COURT WAS THEREupOn affirmed.

The opinion so construing the act of 1893 was filed in September, 1906. In March, 1907, the act of 1893, then in force, was extended to a larger class of cities and *154 re-enacted, without any change in any material respect, the 1st, 2d, and 47th sections being re-enacted, the 47th section becoming in the later act § 48. While this act of 1907 was in force, the city directed the grading in question, and made or caused the railroad company to make cuts and fillsin the street in front of the premises of the plaintiffs in error, which resulted in large injury to their property. The city did not provide for compensation for the damage so done by any special assessment upon the property benefited. This brought into effect the provision of the 2d section, requiring the payment of such damage to be made out of the general funds of the city. Payment not having been made as required, the plaintiffs in error brought these actions to recover compensation.

The defense of the city, that it was but the agent of the state in improving the highways of the city, and therefore immune, because the state was immune, vanishes in the face of the fact that the state had absolutely coupled authority in the matter with an obligation to make compensation. The city had no authority save that which came from the very act which imposed an obligation. It would seem to need no argument to establish the contention that the obligation to make compensation to these plaintiffs in error could not be destroyed by subsequent legislation.

Neither of the acts provided any remedy for the enforcement of the obligation to make compensation. Both provided that the city might by ordinance arrange for the ascertainment of the damages, and for their collection by special assessment on the property benefited, or within a special assessment district. But the plain requirement of the 1st and 2d sections of both acts is that if the city does not so provide for special assessments, that it should make the compensation out of its general treasury. The repealing clause of the act of 1909 does not touch the *155 general features of the law beyond the provision that the 48th section of the act, which extended the obligation of compensation to original gradings, should not apply to damage arising from such gradings. It is a mistake to say that the act of 1907 gave a remedy where none existed before. What it did was to impose an obligation to compensate abutters injured by an original grading,--an obligation which, however meritorious, had no sanction in positive law. The remedy, if the city disregarded the obligation, was that afforded by the common law for the breach of any valid contractual or statutory duty. That was the remedy which was enforced by the Washington court in Fletcher v. Seattle, 43 Wash. 627, 86 Pac. 1046, 88 Pac. 843.

Statutes concerning remedies are such as relate to the course and mode of procedure to enforce or defend a substantive right. Matters which belong to the remedy are subject to change and alteration, and even repeal, provided the legislation does not operate to impair a contract or deprive one of a vested property right. If the changing or repealing

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statute leaves the parties a substantial remedy, the legislation does not exceed its authority. Rights and remedies shade one into the other so that it is sometimes difficult to say that a particular act creates a right or merely gives a remedy. So, also, a statute, under the form of taking away or changing a particular remedy, may take away an existing property right, or impair the obligation of a contract. That the state court has treated the act of 1907 as merely giving a remedy where none existed before, and the act of 1909, as merely repealing the remedy so given, is plain.

The court below gave a retrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. The obligation of the city was fixed. The plaintiffs in error had a claim which the city was as much under obligation ***156** to pay as for the labor employed to do the grading. It was a claim assignable and enforceable by a common-law action for a breach of the statutory obligation.

The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act,--a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation. Elgin v. Eaton, 83 Ill. 535, 25 Am. Rep. 412; Healey v. New Haven, 49 Conn. 394; Harrington v. Berkshire, 22 Pick. 263, 33 Am. Dec. 741; People ex rel. Fountain v. Westchester County, 4 Barb. 64, are cases arising under street ****431** or highway statutes. The principle has been applied in reference to rights accruing under a variety of statutes when affected by a subsequent change of the law. Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 17 L. ed. 805; Miller v. Union Mill Co. 45 Wash. 199, 88 Pac. 130; Grey v. Mobile Trade Co. 55 Ala. 388, 28 Am. Rep. 729; Stephens v. Marshall, 3 Pinney (Wis.) 203; Gorman v. McArdle, 67 Hun, 484, 22 N. Y. 202, 62 Am. Dec. 160; Creighton N. W. 202, 62 Am. Dec. 160; Creighton v. Pragg, 21 Cal. 115; State Trust Co. v. Kansas City, P. & G. R. Co. 115 Fed. 367.

Certain cases have been cited in support of the action of the state court, among them Yeaton v. United States, 5 Cranch, 281, 3 L. ed. 101. But that was a case of a forfeiture to the United States. The repeal of the statute was held to end the proceeding, although a sentence had been pronounced and was pending upon appeal when the act under which it had been entered was repealed. No private right had ***157** vested, and the government could abandon its own proceeding, if it saw fit, at any stage. Another case cited is East Saginaw Salt & Mfg. Co. v. East Saginaw, 13 Wall. 373, 20 L. ed. 611. For the purpose of encouraging the manufacture of salt, the state of Michigan, by a general statute addressed to no particular person or corporation, offered a bounty upon salt produced, and exempted from taxation the property engaged in the business. After a time the act was repealed. The claim was that the exemption constituted a contract, and that it could not be repealed without impairing the obligation of the contract. But this court said that the exemption did not constitute a contract, and was nothing more nor less than a law dictated by public policy for the encouragement of an industry. So long as the law was in force, the state promised the exemption and bounty; but there was no pledge that it should not be repealed at any time. In Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 385, 387, 48 L. ed. 229-232, 24 Sup. Ct. Rep. 107, the case was said to point out the distinction between 'an exemption in a special charter and general encouragement to all persons to engage in a certain enterprise;' and the same principle was applied to an act which provided an exemption to any corporation building a line of railroad north of certain lines of latitude. The court held that it was addressed to no one in particular, and constituted a mere announcement of policy not constituting a contract, and was therefore subject to repeal at any time. The case of Louisiana ex rel. Folson v. New Orleans, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211, has been cited. That case merely held that a judgment against the city under a statute for damage to private property, inflicted by a mob, did not constitute a contract, the obligation of which had been impaired by the repeal of a statute under which the city might have been compelled to levy a special tax for its satisfaction. The case turned upon the distinction between liability for a

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tort and liability under a contract.

In the instant case the action is neither for a tort, nor *158 for a penalty, nor for a forfeiture, but for injury to property, actually accomplished before the repeal of the law under which the street was graded, which required compensation to be made. The right to compensation was a vested property right.

The judgments must be reversed and the cases remanded for further proceedings not inconsistent with this opinion.

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[redacted]

Supreme Court of the United States.

ANGLE
v.
CHICAGO, ST. P., M. & O. RY. CO.

No. 73.

January 3, 1894.

Appeal from the circuit court of the United States for the western district of Wisconsin. Reversed.

****241** Statement by Mr. Justice BREWER:

This is an appeal from a decree of the circuit court of the United States for the western district of Wisconsin dismissing plaintiff's bill.

The bill was filed on the 23d of May, 1888, against the Chicago, Portage & Superior Railway Company, the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and the Farmers' Loan & Trust Company. The Chicago, St. Paul, Minneapolis & Omaha Railway Company was the only defendant served with process. It appeared, and on the 28th of July filed a demurrer to the bill, which, after argument, was sustained, and on September 2, 1889, the decree of dismissal was entered. 39 Fed. 143, 912.

The facts as stated in the bill are as follows: By two acts, of date June 3, 1856, and May 5, 1864, respectively, (11 Stat. 20, and 13 Stat. 66,) congress granted lands to the state of Wisconsin to aid in the construction of certain railroads, among others one 'from a point on the St. Croix river or lake, between townships 25 and 31, to the west end of Lake Superior, and from some point on the line of said railroad, to be selected by said state, to Bayfield.' These land grants were accepted by an act of the legislature approved October 8, 1856, (Laws Wis. 1856, p. 137,) and by a joint resolution of the legislature of the state of date March 20, 1865, (Gen. Laws Wis. 1865, p. 689,) and a map of definite location was duly filed, and accepted by the secretary of the interior.

By an act of March 4, 1874, (Laws Wis. 1874, p. 186,) the state granted to the North Wisconsin Railway Company, whose name was subsequently changed to Chicago, St. Paul, Minneapolis & Omaha Railway Company, and who is the defendant herein, (to be hereafter called the Omaha Company,) that portion of the land grant applicable to the construction of the road from a point on St. Croix river to Bayfield, and to the Chicago & Northern Pacific Air-Line Railway Company, whose name was subsequently, and before 1878, changed to that of the Chicago, Portage & Superior Railway Company, (hereafter called the Portage Company,) so much of said grant as was applicable to the construction of the road from the west end of Lake Superior to a junction with the line running from St. Croix rever to Bayfield.

The eighth section of this act, which is the granting section to the latter company, is as follows:

'There is hereby granted to the Chicago and Northern Pacific Air-Line Railway Company all the right, title, and interest which the state of Wisconsin now has, or may hereafter acquire, in or to that portion of the lands granted to said state by said two acts of congress as is or can be made applicable to the construction of that part of the railway ctober 8, 1856, (Laws Wis. 1856, point of intersection of the branches of said grants, as fixed by the surveys and maps on file in the land office at Washington, and the west end of Lake Superior. This grant is made upon the express condition that said company shall construct, complete, and put in operation that part of its said railway above mentioned as soon as a railway shall be constructed and put in operation from the city of Hudson to said point of intersection, and within five years from its acceptance of said lands as herein provided, and shall also construct and put in operation the railway of said company from Genoa northerly, at the rate of twenty miles per year.'

The value of the lands thus granted was, at the time of the wrongs hereinafter described, $4,000,000.

By section 12 the company was required within 60 days to file with the secretary of state an acceptance of the grant upon the terms and conditions named therein, and also such security for the construction of the road as should be required by the governor. Both of these conditions were complied with.

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Genoa, named in section 8, was the town on the southern boundary of the state of Wisconsin at which the line of the Chicago & Northern Pacific Air-Line Railway entered the state; and Hudson was the place on the St. Croix river, described in the acts of congress as the initial point of the road to be aided.

On March 16, 1878, an act was passed by the legislature of Wisconsin (Laws Wis. 1878, p. 442) extending the time for the construction of the Portage Company's road three years.

In the panic of 1873-74 the Portage Company had broken down under a load of debts and embarrassments, and remained inactive until 1880. At that time it secured the services of Willis Gaylord to assist in extricating it from its embarrassments, and in continuing the construction of its road. William H. Schofield, an experienced railway projector and financier, was induced to accept the office of president, and the co-operation and assistance of the New York, New England & Western Investment Company (hereafter called the Investment Company) was secured.

A new mortgage for $25,000 a mile, and a new issue of stock, was provided for. Seven ****242** hundred thousand dollars of the new bonds and one million of the new stock were to be issued in full satisfaction of all outstanding stock, bonds, and other demands. In pursuance of these arrangements, it issued certificates of stock for $1,000,000, in the name of A. A. Jackson, general solicitor of the Portage Company, which, indorsed by him in blank, were deposited with the Trust Company, and it also executed its orders to the number of 90, calling for the delivery to John C. Barnes or bearer or a designated amount of said $1,000,000 of stock in 10 per cent. installments. These orders were in the following form:

'To the Farmers' Loan and Trust Company: This is to certify that, for value received, Mr. John C. Barnes or bearer is entitled to have and receive _____ shares of the capital stock of the Chicago, Portage and Superior Railway Company, which stock has been fully paid for and placed in your keeping as a special trust for delivery upon this order, and you are hereby authorized and directed to accept or certify in the usual manner this order for the delivery of said stock, and to deliver to the bearer hereof _____ shares of the said stock whenever and as often as any two hundred and fifty thousand dollars of the first mortgage bonds of the said railway company are sold or disposed of by said railway company or by its fiscal agent, or whenever and as often as any ten miles of the railroad of said railway company shall be built, as will be certified to by the president of said railway company; and in any event you are hereby directed to deliver to the bearer, on the 1st day of January, A. D. 1883, any of the said _____ shares of capital stock then remaining undelivered upon a surrender of this order therefor. [Seal.] Chicago, Portage and Superior Railway Company. By _____, President.'

On the margin: 'This order for the delivery of the bonds and stock of this company held in special trust is hereby approved and accepted. The Farmers' Loan and Trust Company. [Seal.]'

These orders were all delivered to John C. Barnes in exchange for and redemption of all the theretofore outstanding stock of the Portage Company, which stock was at once canceled, with the exception of two certificates for $25,000, which, by oversight or design on the part of Charles J. Barnes, vice president of the Portage Company, remained in his custody uncanceled.

The situation after these arrangements were made was such that the entire outstanding stock was in the possession and control of C. J. Barnes, J. C. Barnes, and A. A. Jackson, yet held by them in trust for the company. The further stock provided for was to be issued from time to time to assist in the sale of the bonds, until enough of the latter had been disposed of to construct the road. These arrangements having been perfected, the Portage Company, through its president, sought the alliance and support of the Grand Trunk Railway Company of Canada, which had recently completed an extension of its road to Chicago.

Three contracts were entered into of dates June 16, 1881, July 10, 1881, and September 30, 1881, by which the bonds of the company were to be disposed of, and money enough advanced for the construction of the road. The bill sets out fully the nature and scope of these contracts, and copies of them are attached as exhibits. It is unnecessary here to say more than that by them, taken in connection with the prior arrangements of the Portage Company, the

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latter obtained satisfactory assurances of abundant funds, and was placed in a position to fully perform its agreement with the state, and construct the railroad by at least May 5, 1882; all this, of course, upon the condition of no outside and wrongful interference.

Relying upon the sufficiency of its arrangements for money, it, on August 18, 1881, entered into a contract with Horatio G. Angle for the construction of about 65 miles of its railway, being that portion covered by the land grant heretofore referred to. By the terms of that contract Angle was to receive $8,500 per mile in cash and $5,000 per mile in the full-paid stock of the company, on condition that he completed the road on or before May 5, 1882. It also contracted for steel rails and fastenings to be delivered as the work of construction proceeded.

Angle commenced work, and had made such progress that on the 20th of January, 1882, he had 1,600 men employed along the line, and it was an assured fact that, unless interfered with, he would complete the railway, according to the terms of the contract, on or before May 5, 1882.

The bill further charges that about this time the Omaha Company conspired with other parties to wrest from the Portage Company its land grant, and to that end to prevent the completion of the contract by Angle and the construction of the road.

In the carrying out of this conspiracy the conspirators bribed Charles J. Barnes and A. A. Jackson, officers of the Portage Company, and who, either personally or as attorneys in fact for John C. Barnes, had the control of all the outstanding stock of the Portage Company, though holding it in trust for the benefit of the company, to betray their trust, and transfer the stock to one L. J. Gage, for the benefit of the Omaha Company.

Having thus secured the control of the stock, they caused notice thereof to be given to the officers of the Grand Trunk Railway Company. These gentlemen, finding that the control of the Portage Company was passing into the hands of hostile interests, surrendered the collateral which had been already transferred to them, and declined ****243** to proceed further in the contracts which had been entered into.

Continuing the execution of this conspiracy, the Omaha Company notified the general manager of the Portage Company of the purchase of the outstanding stock, and advised and induced him to telegraph officially to the engineer in chief in charge of the work of construction, who had engaged in that work seven engineering corps, to forthwith call in these engineers, suspend their work, and pay them off. They also caused the general manager to notify the contractor, Angle, that the control of the company had been changed, and the English capitalists forced out, and also to telegraph to the merchants at Duluth and Superior City (who were furnishing supplies to the 1,600 men at work) that the company had been sold out, advising them to protect themselves, because the company could not pay or protect them.

In consequence of these notices, the several engineering corps were broken up, the engineers left the work, all the tools, materials, and other personal property belonging to the contractor and the company were attached at the suit of these merchant creditors, and the 1,600 laborers dispersed, and went elsewhere for work.

In further execution of this conspiracy it endeavored to bribe the president and directors of the Portage Company and the Investment Company to turn over the organization of the Portage Company at once to them. Failing in this, it caused a bill to be filed in the circuit court for Cook county, Illinois, falsely charging the president and board of directors with incurring imprudent obligations, and otherwise thus impairing the value of the million and twenty- five thousand of stock, purchased as heretofore set forth, and praying for a temporary injunction, which, on February 11, 1882, was granted without hearing or notice, and restrained the president and other officers of the Portage Company from doing any act or thing whatsoever in the name or behalf of the company during the continuance of the injunction.

In still further execution of the conspiracy, the Omaha Company caused the fact of the abandonment of the work and the dispersion of the laborers engaged thereon to be promptly and widely published throughout Wisconsin, and especially among the members of the legislature, then in session at Madison; concealing at the same time the means by which this had been accomplished.

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Further, through its own agents, and especially through Jackson and Barnes, the corrupted officers of the Portage Company, it falsely represented to the legislature that no special progress had been made in the matter of constructing this road; that no considerable number of men had ever been at work; and that the Portage Company had finally abandoned it, and was wholly without means or credit to prosecute it.

On the strength of these representations the legislature, without inquiry or hearing, on February 16, 1882, (Laws Wis. 1882, p. 11,) hurriedly passed an act forfeiting and revoking the grant to the Portage Company, and bestowing it upon the Omaha Company, which forfeiture and regranting were confirmed by an act passed March 5, 1883.

The contract with Angle having been thus broken by the Portage Company, he commenced an action at law against that company. While this action was pending Angle died, but a revivor was had in the name of the present plaintiff, and on January 31, 1887, she recovered a judgment in the circuit court of the United States for the western district of Wisconsin for $205,803.19.

Upon that judgment execution was issued and returned nulla bona, and thereupon this bill was filed to reach the land grant in the hands of the Omaha Company.

West Headnotes

Action ⚿2
13k2 Most Cited Cases

Torts ⚿12
379k12 Most Cited Cases

A railroad company which, by bribing the officials of a rival company, obtains control of the latter's stock, causes the calling in of its engineering parties so as to stop construction work, spreads abroad notices which break down the credit of the contractor and result in the seizure of his tools, and by such means prevents the completion of the road in time to earn a land grant, and then by false representations to the legislature secures a forfeiture of the lands and a subsequent grant to itself, is liable to such contractor for the damage caused by these wrongful acts, and such damages may be enforced in equity against the lands in its hands, without questioning the validity of the legislature's action.

***10** J. R. Doolittle, Thomas Ewing, M. I. Southard, F. J. Lamb, and B. W. Jones, for appellant.

Thomas Wilson and John F. Dillon, for appellee.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

That which attracts notice on even a casual reading of the bill--the truth of all the allegations in which must be taken, upon this record, to be admitted by the demurrer--is the fact that, while Angle was actively engaged in executing a contract which he had with the Portage Company,--a contract whose execution had proceeded so far that its successful completion within the time necessary to secure to the Portage Company its land grant was assured, and when neither he nor the Portage Company was moving or had any disposition to break that contract or stop the work,--through the direct and active efforts of the Omaha Company the performance of that contract was prevented, the profits which Angle would have received from a completion of the contract were lost to him, and the land grant to the Portage Company was wrested from it.

Surely it would seem that the recital of these facts would carry with it an assurance that there was some remedy which the law would give to Angle and the Portage Company for the losses they had sustained, and that such remedy would reach to the party, the Omaha Company, by whose acts these losses were caused.

That there were both wrong and loss is beyond doubt. And, as said by Croke, J., in Baily v. Merrell, 3 Bulst. 94, 95, 'damage without fraud gives no cause of action; but where these two do concur and meet together, there an action lieth.' ***11** The Portage Company held a land grant worth four millions of dollars. It had contracted for the construction of its road, such construction to be completed in time to perfect its title to the **244 land. The contract had been so far executed that its full completion within the time prescribed was assured. The contractor had 1,600 men employed. The rails had been purchased. The company had lifted itself out of the embarrassments which years

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before had surrounded it. It had taken up all its old stock but $25,000, which was ignorantly or wrongfully withheld by one of its officers. It had issued 1,000,000 of new stock, had authorized a new issue of bonds, and had arranged for the canceling of all its obligations with 700,000 of these bonds and 1,000,000 with 700,000 of these bonds and 1,000,000 with a wealthy company for the advancement of moneys sufficient for its work, and had gone so far as to place in the hands of that company 100,000 of its bonds, upon which $50,000 in cash was to be advanced. Except through some wrongful interference, it was reasonably certain that everything would be carried out as thus planned and arranged.

At this time the Omaha Company, which was a rival in some respects, and which had located a line parallel and contiguous to the line of the Portage Company, interferes, and interferes in a wrongful way. It bribes the trusted officers of the Portage Company to transfer the entire outstanding stock into its hands, or at least place it under its control. Being thus the only stockholder, it induces the general manager to withdraw the several engineering corps, whose presence was necessary for the successful carrying on of the work of constructing the road; to give such notice as to result in the seizure of all the tools and supplies of the contractor and the company, and the dispersion of all laborers employed. To prevent any action by the faithful officers of the Portage Company, it wrongfully obtains an injunction tying their hands. In the face of this changed condition of affairs, the company, which had negotiated with the Portage Company, and was ready to advance it money, surrendered the 100,000 of the bonds, and abandoned the arrangement. ***12** By false representations to the legislature as to the facts of the case, it persuaded that body to revoke the grant to the Portage Company, and bestow the lands upon itself.

That this was a wrongful interference on the part of the Omaha Company, and that it resulted directly in loss to the contractor and to the Portage Company, is apparent. It is not an answer to say that there was no certainty that the contractor would have completed his contract, and so earned these lands for the Portage Company. If such a defense were tolerated, it would always be an answer in case of any wrongful interference with the performance of a contract, for there is always that lack of certainty. It is enough that there should be, as there was here, a reasonable assurance, considering all the surroundings, that the contract would be performed in the manner and within the time stipulated, and so performed as to secure the land to the company.

It certainly does not lie in the mouth of a wrongdoer, in the face of such probabilities as attend this case, to say that perhaps the contract would not have been completed even if no interference had been had, and that, therefore, there being no certainty of the loss, there is no liability.

Neither can it be said that the Omaha Company had a right to contend for these lands; that it simply made an effort, which any one might make, to obtain the benefit of this land grant. No rights of this kind, whatever may be their extent, justify such wrongs as were perpetrated by the Omaha Company. Here, bribery was resorted to to induce the trusted officers of the Portage Company to betray their trust, and to place at least the apparent ownership of the stock in the hands of the rival company.

Without notice, without hearing, and by false allegations, it secured an injunction to stay the hands of the honest officers of the Portage Company. Such wrongful use of the powers and processes of the court cannot be recognized as among the legitimate means of contest and competition. It burdens the whole conduct of the Omaha Company with the curse of wrongdoing, and makes its interference with the affairs of the Portage Company a wrongful interference.

***13** Further, by false representations as to what the Portage Company has done and intends to do, it induced the legislature of the state to revoke the grant to the Portage Company, and bestow it upon itself. The result, and the natural result, of these wrongful actions on the part of the Omaha Company, was the breaking down of the Portage Company, the disabling it from securing the means of carrying on this work, the dispersion of the laborers, and the prevention of the contractor from completing his contract. It will not do to say that the contractor was not bound to quit the work, but might have gone on and completed his contract, and thus earned the lands for the Portage Company; nor that the wrongful act of the trusted officers of the Portage Company in betraying their trust could have

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been corrected by the Portage Company by appropriate suit in the courts; that the law in one shape or another would have offered redress to the Portage Company for all the wrongs that were attempted and done by the Omaha Company. Granting all of this, yet the fact remains that the natural, the intended, result of these wrongful acts was the breaking down of the Portage Company, the unwillingness of the foreign company to furnish it with money, and the prevention of the contractor from completing his contract.

It is not enough to say that order remedies might have existed and been resorted to by the Portage Company, and that notwithstanding the hands of its officers were tied ****245** by this wrongful injunction. It is enough that the Portage Company did break down; that it broke down in consequence of these wrongful acts of the Omaha Company, and that they were resorted to by the latter with the intention of breaking it down.

It has been repeatedly held that, if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer. Green v. Button, 2 Comp. M. & R. 707, in which the defendant, by falsely pretending to one party to a contract that he had a lien upon certain property, prevented such party from delivering it to the plaintiff, the other party to the contract, and was ***14** held responsible for the loss occasioned thereby. Lumley v. Gye, 2 El. & Bl. 216, in which a singer had entered into a contract to sing only at the theater of the plaintiff, and the defendant maliciously induced her to break that contract, and was held liable to the damages sustained by the plaintiff in consequence thereof. Bowen v. Hall, 6 Q. B. Div. 333, in which it was held that an action lies against a third person who maliciously induces another to break his contract of exclusive personal service with an employer, which thereby would naturally cause, and did in fact cause, an injury to such employer. In the opinion of Brett, L. J., it was said 'that wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of Ashby v. White, [1 Smith, Lead. Cas. (8th Ed.) *264.] If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person, or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him.' Walker v. Cronin, 107 Mass. 555, in which a manufacturer was held entitled to maintain an action against a third party who, with the unlawful purpose of preventing him from carrying on his business, willfully induced many of his employes to leave his employment, whereby the manufacturer lost their services, and the profits and advantages which he would have derived therefrom. Benton v. Pratt, 2 Wend. 385. Rice v. Manley, 66 N. Y. 82, in which a party had contracted to sell and deliver to plaintiffs a quantity of cheese, but, having been made to believe through the fraud of the defendant that the plaintiffs did not want the cheese, sold and delivered it to him, and it was held that an action could be maintained against the defendant for the damages which the plaintiffs sustained from failing to get the cheese. Jones v. Stanly, 76 N. C. 355, in which the court said: 'It was decided in Haskins v. Royster, 70 N. C. 601, that if a person ***15** maliciously entices laborers or croppers to break their contracts with their employer, and desert his service, the employer may recover damages against such person. The same reasons cover every case where one person maliciously persuades another to break any contract with a third person. It is not confined to contracts for service.'

Under these authorities, if the Omaha Company had, by its wrongful conduct, simply induced the Portage Company to break its contract with Angle, it would have been liable to him for the damages sustained thereby. A fortiori, when it not only induces a breach of the contract by the Portage Company, but also disables it from performance.

But there is still another aspect in which these transactions may be regarded. The Omaha Company became by its wrongful acts the sole stockholder in the Portage Company. It matters not that it might have been dispossessed of this position by appropriate action in the courts. It was, for the time at least, the sole stockholder. As such sole stockholder, it took advantage of its position and its powers to strip the Portage Company of its property, and secure its transfer to itself.

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the Communist Party of the United States * * *.' The substance of this provision was incorporated in the Immigration and Nationality Act of 1952, 66 Stat. 163, 205, 8 U.S.C. s 1251(a)(6)(C), 8 U.S.C.A. s 1251(a)(6)(C).

But the Act itself appears to preclude an interpretation which would require proof that an alien had joined the Communist Party with full appreciation of its purposes and program. In the same section under which the petitioner's deportation is sought here as a former Communist Party member, there is another provision, subsection (2)(E), [FN*] which requires the exclusion or deportation of aliens who are 'members of or affiliated with' an organization required to register under the Internal Security Act of 1950, [FN3] 'unless such aliens establish that they did not know or have reason to believe at the time they became members of or affiliated with such an organization * * * that such organization was a Communist organization.' 64 Stat. 1007. In describing the purpose of this clause, Senator McCarran, the Act's sponsor, said: 'Aliens who were innocent dupes when they joined a Communist Front organization, as distinguished from a Communist political organization (such as the Communist Party), would likewise not ipso facto be excluded or deported.' 96 Cong.Rec. 14180. In view of this specific escape provision for members of other organizations, it seems clear that Congress did not exempt 'innocent' members of the Communist Party.

FN* Now 8 U.S.C.A. s 1182(a)(28)(E).

FN3. Under s 7 of the Internal Security Act of 1950, 50 U.S.C.A. s 786, 'Communist-action' and 'Communist-front' organizations are required to register as such with the Attorney General. Section 13, 50 U.S.C.A. s 792, provides that where such an organization fails to register the Attorney General may institute proceedings requiring such registration.

While the legislative history of the 1950 Act is not illuminating on the scope of 'member,' considerable light was shed by authoritative comment in the debates on the statute which Congress enacted in 1951 to correct what it regarded as the unduly expanded interpretation by the Attorney General of 'member' under the 1950 Act. 65 ***527** Stat. 28. [FN**] The amendatory statute dealt with certain specific situations which had been brought to the attention of Congress and provided that where aliens had joined a proscribed organization (1) when they were children, (2) by operation of law, or (3) to obtain the necessities of life, they were not to be deemed to have been 'members.' In explaining the measure, its sponsor, Senator McCarran, stated repeatedly and emphatically that 'member' was intended to have the same meaning in the 1950 Act as had been given it by the courts and administrative agencies since 1918, 97 Cong.Rec. 2368--2374. See S.Rep. ****741** No. 111, 82d Cong., 1st Sess. 2; H.R.Rep. No. 118, 82d Cong., 1st Sess. 2. To illustrate what 'member' did not cover he inserted in the Record a memorandum containing the following language quoted from Colyer v. Skeffington, D.C., 265 F. 17, 72: 'Congress could not have intended to authorize the wholesale deportation of aliens who, accidentally, artificially, or unconsciously in appearance only, are found to be members of or affiliated with an organization of whose platform and purposes they have no real knowledge.' 97 Cong.Rec. 2373.

FN** Now 8 U.S.C.A. s 1182(a)(28)(I)(i).

[2] This memorandum, as a weighty gloss on what Congress wrote, indicates that Congress did not provide that the three types of situations it enumerated in the 1951 corrective statute should be the only instances where membership is so nominal as to keep an alien out of the deportable class. For example, the circumstances under which the finding of membership was rejected in Colyer v. Skeffington, supra, would not have been covered by the specific language in the 1951 Act. In that case, the aliens passed 'from one organization into another, supposing the change to be a mere change of name, and that by assenting to membership in the new organization they had not really changed their affiliations or political or economic activities.' 265 F. at 72.

***528** [3] On the other hand, the repeated statements that 'member' was to have the same meaning under the 1950 Act as previously, preclude an interpretation limited to those who were fully cognizant of the Party's advocacy of violence. For the judicial and administrative decisions prior to 1950 do not exempt aliens who joined an organization unaware of its program and purposes. See Kjar v. Doak, 7 Cir., 61 F.2d 566; Greco v. Haff, 9 Cir., 63 F.2d 863; In the matter of O.---, 3.

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Now, what rights, if any, a corporation may have against a sole stockholder who wrongfully causes the transfer of all the property of the corporation to be made to himself, need not be inquired into. It is clear that this stockholder cannot secure this transfer from the corporation to itself of the property of the latter so as to deprive a creditor of the corporation of the payment of his debt.

To put it in another way: The Portage Company, a corporation, owed Angle $200,000. It had property with which that debt could be paid. The Omaha Company became the sole stockholder in the Portage Company. As such sole stockholder, it used its powers to transfer the property of the Portage Company to itself, and its conduct all the way through was marked by wrongdoing.

Whatever the Portage Company might do, Angle may rightfully hold the sole stockholder responsible for that payment, which the corporation would have made but for the wrongful acts of such stockholder.

***16** But the stress of the defendant's contention is not that the bill fails to state a case of wrong, for which, generally speaking, the law would give a remedy, but that the action of the legislature of the state in revoking the land grant to the Portage Company and donating it to the Omaha Company is conclusive upon the courts, and prevents any recovery; and, secondly, that although actionable wrong on the part of the defendant may be disclosed by the bill, the ****246** only remedy which the plaintiff has therefor is an action at law for damages, and no grounds are shown for the interposition of a court of equity.

With respect to the first of these matters, it is insisted that the Portage Company was in default at the very time that these wrongs on the part of the Omaha Company were charged to have been committed and the act of forfeiture was passed. By section 8 (the granting section) of the act of March 4, 1874, it was provided: 'This grant is made upon the express condition that said company shall construct, complete, and put in operation that part of its said railway above mentioned, as soon as a railway shall be constructed and put in operation from the city of Hudson to said point of intersection, and within five years from its acceptance of said lands as herein provided, and shall also construct and put in operation the railway of said company from Genoa northerly, at the rate of twenty miles per year.' The act of March 16, 1878, reads that 'the time limited for the construction of the railway * * * is hereby extended three years.' It is said that this act in effect merely struck out the word 'five' in the clause quoted, and substituted therefor the word 'eight,' leaving the other conditions of the grant unchanged. It is not claimed in the bill that the Portage Company had ever constructed any part of its road from Genoa northward, or that a railway had not been constructed and put in operation from the city of Hudson to the point of intersection, and therefore it is urged that it is not shown that the Portage Company was not in default, or that the legislature had not the absolute right to forfeit, as it did, by the act of February 16, 1882. It is contended, on the other hand, by the plaintiff, that the extension ***17** was an absolute extension of three years from May 5, 1879, irrespective of the other two conditions in the original grant, and gave to the Portage Company an interest in the land grant which the legislature had no power to take away before May 5, 1882. It is further insisted by the defendant that, even if this claim of the plaintiff be sustained, the act of March 5, 1883, confirming the revocation and resumption of the land grant to the Portage Company, and the regranting of the same to the Omaha Company, was after the expiration of the full limit of extended time as thus claimed by the plaintiff, and that then the Portage Company had unquestionably failed to earn the grant, and had lost all right to the land. Hence, it is said that there was, in whatever aspect the matter may be looked at, a valid resumption by the state of the grant which it had made conditionally to the Portage Company, and a regrant of the lands to the Omaha Company; that the act of the legislature cannot be questioned; that full knowledge of all the situation must be presumed, and that no inquiry is permissible as to the motives which actuated the legislature, it being presumed that everything which it did it did rightly.

In this respect, the case of Fletcher v. Peck, 6 Cranch, 87, is relied upon. In that case a purchase of a large body of lands was made by James Gunn and others in the year 1795 from the state of Georgia, the contract for which was made in the form of a bill passed by the legislature. The title to some of these lands thus acquired passed by conveyances to Peck, who conveyed them to Fletcher. An action was brought on certain covenants in that deed. The third covenant was that

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all the title which the state of Georgia ever had in the premises had been legally conveyed to Peck, the guarantor. The second count assigned 'as a breach of this covenant, that the original grantees from the state of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that if the said members would assent to and vote for the passing of the act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said *18 state by virtue of such law; and that divers of the said members, to whom the said promises were made, were unduly influenced thereby, and, under such influence, did vote for the passing of the said bill; by reason whereof the said law was a nullity,' etc., 'and so the title of the state of Georgia did not pass to the said Peck.' In respect to this matter, the court, by Chief Justice Marshall, observed, among other things, as follows:

'This is not a bill brought by the state of Georgia to annul the contract, nor does it appear to the court by this count that the state of Georgia is dissatisfied with the sale that has been made. The case, as made out in the pleadings, is simply this: One individual, who holds lands in the state of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach, that some of the members of the legislature were induced to vote in favor of the law, which constituted the contract, by being promised an interest in it, and that, therefore, the act is a mere nullity.

'This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity in consequence of the impure **247 motives which influenced certain members of the legislature which passed the law.'

The rule upon which this decision rests has been followed in many cases, and has become a settled rule of our jurisprudence. The rule, briefly stated, is that whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does notextend to the matter of expediency, the motives of the legislators, or the reasons which were spread before them to induce the passage of the act. *19 This principle rests upon the independence of the legislature as one of the co-ordinate departments of the government. It would not be seemly for either of the three departments to be instituting an inquiry as to whether another acted wisely, intelligently, or corruptly. Upon that rule it is insisted that these two acts of the state of Wisconsin cannot be impeached; that whatever wrongs may in fact have been done by the Omaha to the Portage Company, the legislature of Wisconsin, in the exercise of its undoubted power, has taken away the lands from the Portage and given them to the Omaha Company, and, as its power is undoubted, no court can interfere or inquire as to why, or under the influence of what motives or information, those acts were passed; nor can any court decree, either directly or indirectly, that those lands, which were taken away from one company and given to the other, either legally or equitably, still remain the property of the first company, and subject to the payment of its debts.

But it must be remembered that the wrongs of the Omaha Company were done before the legislature passed either the act of 1882 or that of 1883, and it is to redress those wrongs that this suit was brought. Can it be that the legislature, by passing those acts, condoned the wrongs, and relieved the Omaha from any liability to the Portage Company? Did the resumption of the land grant and the regrant to the Omaha Company make lawful its acts in bribing the officers of the Portage Company? Did it relieve the Omaha Company from any liability for the wrongful use of the process of the courts in the injunction? Could it act judicially, and in effect decree that the wrongs done by the one company to the other created no cause of action? A right of action to recover damages for an injury is property, and has a legislature the power to destroy such property? An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong, or relieve the wrongdoer from civil liability to the individual he has wronged. The wrong was not one done by the state or in the act of the legislature in taking away the land grant, but in such proceedings *20 on the part of the

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Omaha Company as put the Portage Company in a position which apparently called for the action of the legislature. There is no more challenge of the validity of this legislation by suing the Omaha Company for the wrongs it did leading up to this legislation than there is in challenging the validity of a criminal proceeding by an action against the prosecutor for malicious prosecution. It may be, as counsel claim, that the legislature is presumed to act with full knowledge of the situation; that it knew of the wrongs done by the Omaha to the Portage Company; knew that those wrongs had disabled the Portage Company from proceeding with the work; knew that thereby a cause of action had arisen to the contractor, Angle, against the Portage Company, and also against the Omaha Company; and with all that knowledge in possession deliberately passed the statutes referred to, and yet it does not follow that its legislation was intended or was potent to relieve the Omaha Company from liability. There is in this suggestion no impugning the motives, the wisdom, or the power, of the legislature. It acts as the guardian of the public interests, to which all private interests must yield, and it may well have thought that, notwithstanding the wrong that had been done by the Omaha Company, the fact was obvious that the Portage Company had become disabled, and could not go on with the work; and that in subserviency to such public interest it was necessary that the grant be taken away from the former and given to the latter company, in order thus to expedite the construction. As the courts will not interfere with the action of the legislature, so it may rightfully be presumed that the legislature never intends to interfere with the action of the courts, or to assume judicial functions to itself. It may be presumed to have left to the courts the redress of the private wrongs done by the Omaha Company. In other words, it may have acted upon considerations like these: Public interest requires the speedy building of this road. The Portage Company cannot build it. The Omaha Company can, if aided by this grant. Therefore the public interests demand a taking away of the grant from the one company and giving it to the ***21** other. If the disabled condition of the Portage Company has been brought about by the wrongs of the Omaha Company, the courts are open, and the accepted maxim in those tribunals is that, where there is a wrong, there is a remedy. It thus subserves the interests of the public, and leaves the redress of the wrong to that department which has not only the requisite jurisdiction, but also the appropriate machinery, for ascertaining the amount of the injury, and enforcing the due compensation.

Look at this from the opposite standpoint. When this matter was brought to the attention of the legislature, and its action invoked, was it confronted with only these alternatives? ****248** Must it, even if it could, as a condition of subserving the public interests, condone the private wrong done by the one company to the other; or must it let the public interests be neglected until such time as the question of private wrong has been determined; or must it, without the possession of the suitable machinery for investigation, arbitrarily determine--as a condition of this transfer in subservience to public interests--the measure of injury done by the one company to the other, and the amount and character of the compensation to be rendered? Large and unnecessary stress would be laid upon the legislature if the question of public interest was always to be thus hampered by suggestions of injury and compensation between private individuals. While, if there be no such stress, abundant freedom of action is open to the legislature, the distinction between the separate functions of the co-ordinate departments of the government is preserved, and at the same time public interest and private justice may be secured. The legislature may proceed with sole regard in all its actions to the public interests, with the assurance that all questions of wrong and loss between individuals will be settled in the judicial department, and that its own action in subserviency to the public interest will bar no redress of a private wrong unless such bar be absolutely necessary to the accomplishment of the public interest.

But it is said that to permit this suit to be maintained, and to subject these lands in the possession of the Omaha Company ***22** to the satisfaction of the judgment against the Portage Company, is, pro tanto, to nullify the action of the legislature; that in taking the lands away from the one company and giving them to the other it intended that the transfer should be absolute, without limitation, and subject to no contingencies or burdens. But it affirmatively expressed no such intention; it simply made the transfer, leaving the property subject to all the burdens and contingencies which might arise in the ordinary course of law. Suppose at the time of this transfer from the one company to the state, and from the state to the other company, there was an existing judgment in favor of

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the Portage against the Omaha Company, would it be for a moment contended that there was anything in the transfer which prevented the Portage Company from satisfying its judgment by a seizure and sale of the lands thus transferred to the Omaha Company? Unless there were in the words of the grant to the Omaha Company something which expressly tied up that land, it passed to the company, subject to seizure and sale in satisfaction of any of its past or future obligations.

Even if it be conceded that, under a true construction of the grant, taken in connection with the act extending the time for three years, the Portage Company was in default on February 16, 1882, and the legislature had then the absolute right to forfeit the grant, such concession would be no answer to the cause of action set out in the bill. For who can say that the legislature would have exercised that right of forfeiture? The mere fact that the Portage Company could not enforce at the time a legal right to the lands as against the state does not absolve the Omaha Company from liability for those wrongs which resulted in putting the Portage Company in a condition naturally calling for legislative action in furtherance of the public interest. If nothing of the kind had been done by the Omaha Company, and the Portage Company was, as it is stated, proceeding diligently in the work, with reasonable assurance that it would be completed within three or four months, it is fair to presume that the legislature would not have disturbed the grant, but would have permitted the Portage Company to fully earn that which it had already partially *23 earned. The selection of the Portage Company in tHe first instance was, of course, made by the legislature in good faith, and the time was extended with the intent that the Portage Company should do the work and have the grant; and, if the legislature saw that the company was doing the work, and would have it promptly completed, respect for the good faith of the legislature compels the conclusion that, but for the untoward circumstances precipitated upon the Portage Company by the wrongful acts of the Omaha Company, the act of February 16, 1882, would never have been passed. Assuredly it does not lie in the power of the wrongdoer--the party whose wrongs created that condition which induced the legislative forfeiture--to excuse its wrongs on the grounds that the legislature had the power to forfeit, and might have done it anyway. The cases of Benton v. Pratt, 2 Wend. 385, and Rice v. Manley, 66 N. Y. 82, are suggestive upon this question. In the former of these cases it appeared that certain parties had contracted with the plaintiff to purchase of him 20 hogs, to be delivered at a future day, nothing having been done to make the contract binding under the statute of frauds. While the plaintiff was driving his hogs, and preparing to fulfill his contract, the defendants, knowing the facts, fraudulently represented that he did not intend to deliver them, and thus induced those third parties to buy their hogs; and when the plaintiff arrived with his they refused to take them, simply because they had already a full supply. The point was made that the plaintiff could not recover, because there was no binding contract between him and the third parties; but the point was overruled, the court saying: 'It was not material whether the contract of the plaintiff with Seagraves & Wilson was **249 binding upon them or not, the evidence established beyond all question that they would have fulfilled it but for the false and fraudulent representations of the defendants.' And in the latter case the plaintiffs had made an agreement with one Stebbins to purchase from him a quantity of cheese, to be delivered at a future day; and that contract, too, was not binding by reason of the statute of frauds. The defendant, knowing of this, fraudulently, by means of a fictitious telegram, *24 persuaded Stebbins that the plaintiffs did not want the cheese, and would not take it, and thus himself secured a purchase of it. Here, too, it was objected, in defense to an action against him for the damages caused by a failure on the part of the plaintiffs to obtain the cheese from Stebbins, that there was no contract which could be enforced against Stebbins for the sale and delivery of the cheese; but the court overruled the objection, saying: 'Plaintiffs' actual damage is certainly as great as it would have been if Stebbins had been obliged to perform his contract of sale, and greater, for the reason that they cannot indemnify themselves for their loss by a suit against Stebbins to recover damages for a breach of the contract. Suppose a testator designed to give A. a legacy, and was prevented from doing it solely by the fraud of B.; in such case, while A. has no right to the legacy which he can enforce against the estate of the testator, yet both law and equity will furnish him appropriate relief against B., depending upon the facts of the case. Kerr, Fraud & M. 274, and cases cited; Bac. Abr. 'Fraud, B.' Suppose A. made a parol contract with B. for the purchase of land, and B. is ready and

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willing to convey, but is prevented from so doing by the fraudulent representations of C. as to A., by which B. is deceived, and induced to convey to C.; in such case, although A. could not have compelled B. to give him the conveyance, it would be a reproach to the law to hold that C. would not be liable to A. for the damage caused by the fraud.' The same line of thought applies to the case before us. While it cannot be affirmed with certainty that the legislature would not have passed the act of forfeiture, yet it is reasonable to presume that it would not, and that its act was induced by the situation of the Portage Company, which situation was brought about by the wrongful acts of the Omaha Company.

Our conclusions in respect to this matter may be summed up thus: The Portage Company would have completed the work but for the wrongful acts of the Omaha Company. In consequence of the disability thus caused, and also moved by the false representations of the Omaha Company, the legislature resumed its grant, and made a regrant to the Omaha *25 Company. The validity of that act is conceded. It is to be presumed the legislature acted with proper regard to the public interests, and without any improper motives or inducements. Conceding all this, it is equally to be presumed that it left the redress of private wrongs to the judicial department. It attached no conditions to the grant to the Omaha Company which would prevent the appropriation of those lands to the satisfaction of any claims against that company. And hence to hold the Omaha Company as trustee for the creditors of the Portage Company in respect to these lands neither impeaches the validity of the action of the legislature nor casts any imputation upon its knowledge or motives. It may also be noticed that the purpose of this grant from congress in the first place, and from the state to the companies in the second place, was to aid in the construction of the railroad. That purpose having already been accomplished, there is no thwarting public policy, or the purposes of the grant, if the lands granted shall now be appropriated, through the processes of the courts, to the satisfaction of any claims against the Omaha Company.

Passing now to the other of the two objections, it may be conceded that an action at law would lie for the damages sustained by the Portage Company through the wrongful acts of the Omaha Company. Indeed, that is a fact which underlies this whole case. Yet, while an action at law would lie, it does not follow that such remedy was either full or adequate. Waiving the question as to the solvency of the Omaha Company, and assuming that any judgment against it for damages could be fully satisfied by legal process, there remains the proposition that it is contrary to equity that the defendant should be permitted to enjoy unmolested that particular property, the possession of which it sought to secure, and did in fact secure, by its wrongful acts. Ought the Portage Company to be compelled to experiment with the solvency of the Omaha Company before coming into a court of equity? While no express trust attached to the title to these lands, either in the Portage or in the Omaha Company, while it may be conceded that when the legislature resumed *26 the grant it took the title discharged of any express trust or liability in favor of the creditors of the Portage Company, and might have transferred an absolute title to any third party beyond the reach or pursuit of the Portage Company, or its creditors, yet it is still true that the lands were given to the Portage Company, as they had been given by congress to the state in the first instance, for the purpose of aiding in the construction of this road; that a part of the work necessary for such construction had been done; and there is, therefore, an equity in securing, to the extent to which the work had been done, the application of these lands in payment thereof. And when the Omaha Company, by its wrongdoings, secured the full legal title to those lands, equity will hold that the party **250 who has been deprived of payment for his work from the Portage Company by reason of their having been taken away from it shall be able to pursue those lands into the hands of the wrongdoer, and hold them for the payment of that claim which, but for the wrongdoings of the Omaha Company, would have been paid by the Portage Company, partially at least, out of their proceeds. While no express trust is affirmed as to the lands, yet it is familiar doctrine that a party who acquires title to property wrongfully may be adjudged a trustee ex maleficio in respect to that property.

In Pomeroy's Equity Jurisprudence (section 155) the author says, citing many cases: 'If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which

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really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner.' And again, in section 1053: 'In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or ***27** under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property, either in the hands of the original wrongdoer or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed 'ex maleficio' or 'ex delicto,' are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer.'

These authorities are ample to sustain this suit. The property was in the Portage Company for the purpose of aiding in the construction of this road. Work was done by the plaintiff in that direction. Equity recognizes a right that that property should be applied in the payment for that work. The wrongdoing of the defendant, the Omaha Company, has wrested the title to this property from the Portage Company, and transferred it to itself. It has become, therefore, a trustee ex maleficio in respect to the property. It follows from these considerations that the court erred in sustaining the demurrer to this bill, and the decree of dismissal must be reversed, and the case remanded, with instructions to overrule the demurrer, and for further proceedings in conformity to law.

Mr. Justice HARLAN dissents from the opinion and judgment for the reasons stated by him at the circuit in Angle v. Railway Co., 39 Fed. 912, and Farmers' Loan & Trust Co. v. Chicago, P. & S. Ry. Co., Id. 143.

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15

Supreme Court of the United States

UNITED STATES
v.
KLEIN.

December Term, 1871

THIS was a motion by *Mr. Ackerman, Attorney-General*, in behalf of the United States, to remand an appeal from the Court of Claims which the government had taken in June, 1869, with a mandate that the same be dismissed for want of jurisdiction as now required by law.

The case was thus:

Congress, during the progress of the late rebellion, passed various laws to regulate the subject of forfeiture, confiscation, or appropriation to public use without compensation, of private property whether real or personal of non- combatant enemies.

The first was the act of July 13th, 1861. [FN1] It made liable to seizure and forfeiture all property passing to and fro between the loyal and insurrectionary States, and the vessels and vehicles by which it should be attempted to be conveyed.

1. The act of March 12th, 1863 (12 Stat. at Large, 820), to provide for the collection of abandoned and captured property in insurrectionary districts within the United States, does not confiscate, or in any case absolutely divest the property of the original owner, even though disloyal. By the seizure the government constituted itself a trustee for those who were entitled or whom it should thereafter recognize as entitled.

2. By virtue of the act of 17th July, 1862, authorizing the President to offer pardon on such conditions as he might think advisable, and the proclamation of 8th December, 1863, which promised a restoration of all rights ***129** of property, except as to slaves, on condition that the prescribed oath be taken and kept inviolate, the persons who had faithfully accepted the conditions offered became entitled to the proceeds of their property thus paid into the treasury, on application within two years from the close of the war.

3. The repeal, by an act of 21st January, 1867 (after the war had closed), of the act of 17th July, 1862, authorizing the executive to offer pardon, did not alter the operation of the pardon, or the obligation of Congress to give full effect to it if necessary by legislation.

4. The proviso in the appropriation act of July 12th, 1870 (16 Stat. at Large, 235), in substance----

'That no pardon or amnesty granted by the President shall be admissible in evidence on the part of any claimant in the Court of Claims as evidence in support of any claim against the United States, or to establish the standing of any claimant in said court, or his right to bring or maintain suit therein; and that no such pardon or amnesty heretofore put in evidence on behalf of any claimant in that court be considered by it, or by the appellate court on appeal from said court, in deciding upon the claim of such claimant, or any appeal therefrom, as any part of the proof to sustain the claim of the claimant, or to entitle him to maintain his action in the Court of Claims, or on appeal therefrom, . . . but that proof of loyalty (such as the proviso goes on to mention), shall be made irrespective of the effect of any executive proclamation, pardon, amnesty, or other act of condonation or oblivion. And that in all cases where judgment shall have been heretofore rendered in the Court of Claims in favor of any claimant on any other proof of loyalty than such as the proviso requires, this court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction:

'And further, that whenever any pardon shall have heretofore been granted by the President to any person bringing suit in the Court of Claims for the proceeds of abandoned or captured property under the act of March 12th, 1863; and such pardon shall recite, in substance, that such person took part in the late rebellion, or was guilty of any act of rebellion against, or disloyalty to, the United States, and such pardon shall have been accepted, in writing, by the person to whom the same issued, without an express disclaimer of and protestation against such fact of guilt contained in such acceptance, such pardon and acceptance shall be taken and deemed in such suit in the said Court of Claims, and on appeal therefrom,

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conclusive evidence that such person did take part in and give aid and comfort to the late rebellion, and did not maintain true allegiance or consistently adhere to the United States, and on proof of such pardon and acceptance the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant'----

is in conflict with the views expressed in paragraphs 1, 2, and 3, above; and is unconstitutional and void. Its substance being that an acceptance of a pardon without a disclaimer shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of rights conferred by it, both in the Court of Claims and in this court; it invades the powers both of the judicial and of the executive departments of the government.***130**

West Headnotes

Pardon and Parole ⚿23.1
284k23.1 Most Cited Cases
(Formerly 284k23, 284k4)

Under the clause of the constitution giving the president "power to grant reprieves and pardons," he may grant a conditional pardon.

Pardon and Parole ⚿24
284k24 Most Cited Cases
(Formerly 284k9)

"Pardon" includes amnesty, and blots out the offense pardoned and removes all its penal consequences, and can be granted on conditions.

Pardon and Parole ⚿26
284k26 Most Cited Cases
(Formerly 284k11)

Act Jan. 21, 1867, 14 Stat. 377, repealing Act July 17, 1862, 12 Stat. 589, which authorized the executive to offer pardon to those engaged in rebellion, did not alter the operation of the general pardon given thereunder, or the obligation of congress to give full effect to such pardon by necessary legislation.

Pardon and Parole ⚿26
284k26 Most Cited Cases
(Formerly 284k11)

Under Act July 17, 1862, 12 Stat. 589, authorizing the president to offer pardon on such conditions as he might think advisable, and the proclamation of December 8, 1863, 13 Stat. 737, promising a restoration of all rights of property, except as to slaves, on condition that the prescribed oath be taken and kept, the persons who complied with the conditions became entitled to the proceeds of their confiscated property, on application within two years from the close of the war.

United States ⚿66
393k66 Most Cited Cases

It is as much the duty of the government as of individuals to fulfil its obligations.

War and National Emergency ⚿12
402k12 Most Cited Cases

Under acts of Congress relating to property of citizens engaged in hostilities against the United States during the Civil War, no titles, except as to property used in actual hostilities, were divested in the insurgent states unless in pursuance of a judgment rendered after due legal proceedings.

War and National Emergency ⚿12
402k12 Most Cited Cases

The abandoned and captured property act of March 12, 1863, 12 Stat. 820, relating to property of citizens engaged in hostilities against the United States during the Civil War, was not intended to divest title to such property absolutely out of the original owners, but it was the purpose of Congress that the proceeds of the property for which the special provision of the act was made should go into the Treasury without change of ownership.

War and National Emergency ⚿12
402k12 Most Cited Cases

During the Civil War, property in certain states belonging to hostile organizations or employed in actual hostilities on land became, wherever taken, ipso facto, the property of the United States.

War and National Emergency ⚿25
402k25 Most Cited Cases

During the Civil War, property in ships and vessels

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was not changed by capture alone but by regular judicial proceeding and sentence.

Constitutional Law ⚿54
92k54 Most Cited Cases

16 Stat. 235, prescribing the mode of proving the loyalty of the claimant, under 12 Stat. 820, 28 U.S.C.A. § 268, providing for the collection of abandoned and captured property in insurrectionary districts, and for the taking possession by the government, for the true owner, of the proceeds of such property, and declaring, in effect, that the unqualified acceptance of a pardon by such claimant, without a disclaimer of guilt, is conclusive evidence of his having committed the acts pardoned, but that it shall be null and void as evidence of the rights conferred by it, both in the court of claims, and in the supreme court on appeal, is unconstitutional, as invading the powers of the judicial branch of the government.

Constitutional Law ⚿72
92k72 Most Cited Cases

The President's power of pardon is not subject to legislation, and Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders.

Constitutional Law ⚿72
92k72 Most Cited Cases

The legislature cannot change the effect of a conditional pardon any more than the executive can change a law.

Courts ⚿448
106k448 k.

The Court of Claims is an inferior court which Congress authorizes, and has jurisdiction of contracts between the government and the citizen, from which appeal regularly lies to the Supreme Court.

Courts ⚿460
106k460 k.

The Congress has complete control over the organization and existence of the Court of Claims, and can confer or withhold the right of appeal from its decisions.

Courts ⚿460
106k460 k.

An act of Congress denying the right of appeal from Court of Claims in a particular class of cases is proper as an exercise of the power of Congress to make "such exceptions from the appellate jurisdiction" as should seem expedient to Congress.

Constitutional Law ⚿58
92k58 Most Cited Cases

The provision of 16 Stat. 235, prescribing the mode of proving the loyalty of the claimant, under 12 Stat. 820, 28 U.S.C.A. § 268, providing for the collection of abandoned and captured property in insurrectionary districts, and for the taking possession by the government, for the true owner, of the proceeds of such property, and declaring, in effect, that the unqualified acceptance of a pardon by such claimant, without a disclaimer of guilt, is conclusive evidence of his having committed the acts pardoned, but that it shall be null and void as evidence of the rights conferred by it, is unconstitutional, as invading the powers of the executive branch of the government.

Pardon and Parole ⚿4
284k4 k.

The president may grant a conditional pardon, provided the condition be compatible with the genius of our constitution and laws; and such condition, when accepted by the convict, will be binding upon him.

FN1 12 Stat. at Large, 257.

So an act of August 6th, 1861, [FN2] subjected to seizure and forfeiture all property of every kind, used or intended to be used in aiding, abetting, or promoting the insurrection, or allowing or permitting it to be so used.

FN2 Ib. 319.

These statutes require judicial condemnation to make the forfeiture complete.

A more general law, and one upon which most of

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I. & N. Dec. 736.

It must be concluded, therefore, that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will. A fair reading of the legislation requires that this scope be given to what Congress enacted in 1950, however severe the consequences and whatever view one may have of the wisdom of the means which Congress employed to meet its desired end.

[4][5] On this basis, the Hearing Officer's finding that petitioner here was a 'member' of the Communist Party must be sustained. Petitioner does not claim that he joined the Party 'accidentally, artificially, or unconsciously in appearance only,' to use the words in Senator McCarran's memorandum. The two points on which he bases his defense against the deportation order are, first, that he did not join the Party at all, and that if he did join, he was unaware of the Party's true purposes and program. The evidence which must have been believed and relied upon for the Hearing Officer's finding that petitioner was a 'member' is that petitioner was asked to join the Party by a man he assumed to be an organizer, that he attended a number of meetings and that he did not apply for citizenship because he feared his Party ***529** membership would become known to the authorities. In addition, on the basis of Mrs. Meza's testimony, the Hearing Officer was entitled to conclude that petitioner had been active in the Spanish Speaking Club, and, indeed, one of its officers. Certainly there was sufficient evidence to support a finding of membership. And even if petitioner was unaware of the Party's advocacy of violence, as he attempted to prove, the record does not show a relationship to the Party so nominal as not to make him a 'member' within the terms of the Act.

****742** [6][7][8][9][10][11][12][13][14] This brings us to petitioner's constitutional attack on the statute. Harisiades v. Shaughnessy, 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586, sustained the constitutionality of the Alien Registration Act of 1940. 54 Stat. 670. That Act made membership in an organization which advocates the overthrow of the Government of the United States by force or violence a ground for deportation, notwithstanding that membership in such organization had terminated before enactment of the statute. Under the 1940 Act, it was necessary to prove in each case, where membership in the Communist Party was made the basis of deportation, that the Party did, in fact, advocate the violent overthrow of the government. The Internal Security Act of 1950 dispensed with the need for such proof. On the basis of extensive investigation Congress made many findings, including that in s 2(1) of the Act that the 'Communist movement * * * is a worldwide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship', 50 U.S.C.A. s 781(1) and made present or former membership in the Communist Party, in and of itself, a ground for deportation. Certainly, we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress.

***530** In this respect--the dispensation with proof of the character of the Communist Party--the present case goes beyond Harisiades. But insofar as petitioner's constitutional claim is based on his ignorance that the Party was committed to violence, the same issue was before the Court with respect to at least one of the aliens in Harisiades.

The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security. Nevertheless, considering what it means to deport an alien who legally became part of the American community, and the extent to which, since he is a 'person,' an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen, deportation without permitting the alien to prove that he was unaware of the Communist Party's advocacy of violence strikes one with a sense of harsh incongruity. If due process bars Congress from enactments that shock the sense of fair play-- which is the essence of due process--one is entitled to ask whether it is not beyond the power of Congress to deport an alien who was duped into joining the Communist Party,particularly when his conduct

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the seizures made during the rebellion was founded, is the act of July 17th, 1862. [FN3] It provides for the punishment of treason, and specifies its disqualifications and disabilities. In its sixth section, it provides that every person who shall be engaged in or be aiding the rebellion, and shall not cease and return to his allegiance within sixty days after proclamation made by the President of the United States, shall forfeit all his property, &c. The proclamation required by this act was issued by the President on the 25th day of July, 1862. [FN4] The sixty days expired September 23d, 1862.

FN3 Ib. 589.

FN4 Id. 1266.

On the 12th of March, 1863, Congress passed another species of act--the one entitled 'An act to provide for the ***131** collection of abandoned property, & c., in insurrectionary districts within the United States.' The statute authorized the Secretary of the Treasury to appoint special agents to receive and collect all abandoned or captured property in any State or Territory in insurrection: '*Provided*, That such property shall not include any kind or description which has been used, or which was intended to be used, for waging or carrying on war against the United States, such as arms, ordnance, ships, steamboats, or other watercraft, and their furniture, forage, military supplies, or munitions of war.'

The statute went on:

'And any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; *and on proof to the satisfaction of said court* of his ownership of said property, of his right to the proceeds thereof, and *that he has never given any aid or comfort to the present rebellion*, to receive the residue of such proceeds after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof.'

Some other acts, amendatory of this one or relating to the Court of Claims, required proof of the petitioner's loyalty during the rebellion as a condition precedent to recovery.

By the already-mentioned confiscation act of July 17th, 1862, the President was authorized by proclamation to extend to persons who had participated in rebellion, pardon, and amnesty, with such exceptions, and at such times, and on such conditions as he should deem expedient for the public welfare.

And on the 8th of December, 1863, he did issue his proclamation, reciting the act, and that certain persons who had been engaged in the rebellion desired to resume their allegiance and reinaugurate loyal State governments within and for their respective States. And thereupon proclaimed ***132** that a full pardon should be thereby granted to them, with restoration of all rights of property, except as to slaves, and in property cases where rights of third parties shall have intervened; and upon condition that every such person shall take and subscribe a prescribed oath of allegiance, and thenceforward keep and maintain said oath inviolate, &c.

Under this proclamation, V. F. Wilson, who during the rebellion had voluntarily become the surety on the official bonds of certain officers of the rebel confederacy, and so given aid and comfort, to it, took, February 15th, 1864, this oath of allegiance, and had kept the same inviolate.

He himself having died in 1865, one Klein, his administrator, filed a petition in the Court of Claims, setting forth Wilson's ownership of certain cotton which he had abandoned to the treasury agents of the United States, and which they had sold; putting the proceeds into the Treasury of the United States, where they now were, and from which the petitioner sought to obtain them. This petition was filed December 26th, 1865.

The section of the act of 1862, by which the President was authorized to extend pardon and amnesty on such conditions as he should deem expedient for the public welfare, was repealed on the 21st of January, 1867. [FN5]

FN5 14 Stat. at Large, 377.

The Court of Claims, on the 26th May, 1869, decided that Wilson had been entitled to receive the

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proceeds of his cotton, and decreed $125,300 to Klein, the administrator of his estate. An appeal was taken by the United States June 3d, following, and filed in this court on the 11th December, of the same year.

Previously to this case of Klein's the Court of Claims had had before it the case of one Padelford, quite like this one; for there also the claimant, who had abandoned his cotton and now claimed its proceeds, having participated in the rebellion, had taken the amnesty oath. The Court of Claims held that the oath cured his participation in the rebellion, ***133** and so it gave him a decree for the proceeds of his cotton in the treasury. The United States brought that case here by appeal, [FN6] and the decree of the Court of Claims was affirmed; this court declaring that although Padelford had participated in the rebellion, yet, that having been pardoned, he was as innocent in law as though he had never participated, and that his property was purged of whatever offence he had committed and relieved from any penalty that he might have incurred. The judgment of this court, to the effect above mentioned, was publicly announced on the 30th of April, 1870.

FN6 United States *v.* Padelford, 9 Wallace, 531.

Soon after this--the bill making appropriations for the legislative, executive, and judicial expenses of the government for the year 1870-71, then pending in Congress--the following was introduced as a proviso to an appropriation of $100,000, in the first section, for the payment of judgments in the Court of Claims, and with this proviso in it the bill became a law July 12th, 1870: [FN7]

FN7 16 Stat. at Large, 235.

'*Provided*, That no pardon or amnesty granted by the President, whether general or special, by proclamation or otherwise, nor any acceptance of such pardon or amnesty, nor oath taken, or other act performed in pursuance or as a condition thereof, shall be admissible in evidence on the part of any claimant in the Court of Claims as evidence in support of any claim against the United States, or to establish the standing of any claimant in said court, or his right to bring or maintain suit therein; nor shall any such pardon, amnesty, acceptance, oath, or other act as aforesaid, heretofore offered or put in evidence on behalf of any claimant in said court, be used or considered by said court, or by the appellate court on appeal from said court, in deciding upon the claim of said claimant, or any appeal therefrom, as any part of the proof to sustain the claim of the claimant, or to entitle him to maintain his action in said Court of Claims, or on appeal therefrom; but the proof of loyalty required by the Abandoned and Captured Property Act, and by the sections of several acts quoted, shall be made by proof of the matters required, ***134** irrespective of the effect of any executive proclamation, pardon, amnesty, or other act of condonation or oblivion. And in all cases where judgment shall have been heretofore rendered in the Court of Claims in favor of any claimant, on any other proof of loyalty than such as is above required and provided, and which is hereby declared to have been and to be the true intent and meaning of said respective acts, the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction.

'*And provided further*, That whenever any pardon shall have heretofore been granted by the President of the United States to any person bringing suit in the Court of Claims for the proceeds of abandoned or captured property under the said act, approved 12th March, 1863, and the acts amendatory of the same, and such pardon shall recite in substance that such person took part in the late rebellion against the government of the United States, or was guilty of any act of rebellion against, or disloyalty to, the United States; and such pardon shall have been accepted in writing by the person to whom the same issued without an express disclaimer of, and protestation against, such fact of guilt contained in such acceptance, such pardon and acceptance shall be taken and deemed in such suit in the said Court of Claims, and on appeal therefrom, conclusive evidence that such person did take part in, and give aid and comfort to, the late rebellion, and did not maintain true allegiance or consistently adhere to the United States; and on proof of such pardon and acceptance, which proof may be heard summarily on motion or otherwise, the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant.'

The motion already mentioned, of the Attorney-General, that the case be remanded to the Court of Claims with a mandate that the same be dismissed

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for want of jurisdiction, as *now* required by law, was, of course, founded on this enactment in the appropriation bill of July 12th, 1870.

Mr. Akerman, Attorney-General, Mr. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, in support of the motion:

The United States as sovereign are not liable to suit at ***135** all, and if they submit themselves to suit it is *ex gratia*, and on such terms as they may see fit.

Accordingly the right of the Court of Claims to entertain jurisdiction of cases in which the United States are defendants, and to render judgments against them, exists only by virtue of acts of Congress granting such jurisdiction, and it is limited precisely to such cases, both in regard to *parties* and to the *cause of action*, as Congress has prescribed, which body may also define *the terms on which judgments shall be rendered against the government*, either as to classes of cases or as to individual cases.

Rules of evidence are at all times subject to legislative modification and control, and the alterations which are enacted therein by the legislature may be made applicable as well to existing as to future causes of action. In prescribing the evidence which shall be received in its courts, and the effect of that evidence, the state is exercising its acknowledged powers.

From the foregoing propositions it follows:

1. That Congress may prescribe what shall or shall not be received in evidence in support of a claim on which suit is brought against the government, or in support of the right of the claimant to maintain his suit, and, on the other hand, may declare what shall be the effect of certain evidence when offered in behalf of the government.

2. That it may withdraw entirely from the consideration of the court evidence of a particular kind in behalf of the claimant, even after the same has been submitted to and received by the court.

3. That it may, upon the presentation of proof of a certain description in behalf of the government, determine the jurisdiction of the court over the particular subject.

4. That it may, even in cases where judgment has been rendered in favor of the claimant on certain proof, and notwithstanding the proof was competent at the time of the rendering of the judgment, interpose when such cases are afterwards brought before the appellate court and require the same to be dismissed by the latter.***136**

These different things are what are done, and no more is done by different parts of the proviso in question.

Messrs. Bartley and Casey, P. Phillips, Carlisle, McPherson, and T. D. Lincoln, arguing in this or similar cases against the motion.

The CHIEF JUSTICE delivered the opinion of the court.

The general question in this case is whether or not the proviso relating to suits for the proceeds of abandoned and captured property in the Court of Claims, contained in the appropriation act of July 12th, 1870, debars the defendant in error from recovering, as administrator of V. F. Wilson, deceased, the proceeds of certain cotton belonging to the decedent, which came into the possession of the agents of the Treasury Department as captured or abandoned property, and the proceeds of which were paid by them according to law into the Treasury of the United States.

The answer to this question requires a consideration of the rights of property, as affected by the late civil war, in the hands of citizens engaged in hostilities against the United States.

It may be said in general terms that property in the insurgent States may be distributed into four classes:

1st. That which belonged to the hostile organizations or was employed in actual hostilities on land.

2d. That which at sea became lawful subject of capture and prize.

3d. That which became the subject of confiscation.

4th. A peculiar description, known only in the recent war, called captured and abandoned property.

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The first of these descriptions of property, like property of other like kind in ordinary international wars, became, wherever taken, *ipso facto*, the property of the United States. [FN8]

FN8 Halleck's International Law.

The second of these descriptions comprehends ships and vessels with their cargoes belonging to the insurgents or ***137** employed in aid of them; but property in these was not changed by capture alone but by regular judicial proceeding and sentence.

Accordingly it was provided in the Abandoned and Captured Property Act of March 12th, 1863, [FN9] that the property to be collected under it 'shall not include any kind or description used or intended to be used for carrying on war against the United States, such as arms, ordnance, ships, steamboats and their furniture, forage, military supplies, or munitions of war.'

FN9 12 Stat. at Large, 820.

Almost all the property of the people in the insurgent States was included in the third description, for after sixty days from the date of the President's proclamation of July 25th, 1862, [FN10] all the estates and property of those who did not cease to aid, countenance, and abet the rebellion became liable to seizure and confiscation, and it was made the duty of the President to cause the same to be seized and applied, either specifically or in the proceeds thereof, to the support of the army. [FN11] But it is to be observed that tribunals and proceedings were provided, by which alone such property could be condemned, and without which it remained unaffected in the possession of the proprietors.

FN10 Ib. 1266.

FN11 Ib. 590.

It is thus seen that, except to property used in actual hostilities, as mentioned in the first section of the act of March 12th, 1863, no titles were divested in the insurgent States unless in pursuance of a judgment rendered after due legal proceedings. The government recognized to the fullest extent the humane maxims of the modern law of nations, which exempt private property of non-combatant enemies from capture as booty of war. Even the law of confiscation was sparingly applied. The cases were few indeed in which the property of any not engaged in actual hostilities was subjected to seizure and sale.

The spirit which animated the government received special illustration from the act under which the present case arose. We have called the property taken into the custody ***138** of public officers under that act a peculiar species, and it was so. There is, so far as we are aware, no similar legislation mentioned in history.

The act directs the officers of the Treasury Department to take into their possession and make sale of all property abandoned by its owners or captured by the national forces, and to pay the proceeds into the national treasury.

That it was not the intention of Congress that the title to these proceeds should be divested absolutely out of the original owners of the property seems clear upon a comparison of different parts of the act.

We have already seen that those articles which became by the simple fact of capture the property of the captor, as ordnance, munitions of war, and the like, or in which third parties acquired rights which might be made absolute by decree, as ships and other vessels captured as prize, were expressly excepted from the operation of the act; and it is reasonable to infer that it was the purpose of Congress that the proceeds of the property for which the special provision of the act was made should go into the treasury without change of ownership. Certainly such was the intention in respect to the property of loyal men. That the same intention prevailed in regard to the property of owners who, though then hostile, might subsequently become loyal, appears probable from the circumstance that no provision is anywhere made for confiscation of it; while there is no trace in the statute book of intention to divest ownership of private property not excepted from the effect of this act, otherwise than by proceedings for confiscation.

In the case of Padelford we held that the right to the possession of private property was not changed until actual seizure by proper military authority, and that actual seizure by such authority did not divest the title under the provisions of the Abandoned and

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Captured Property Act. The reasons assigned seem fully to warrant the conclusion. The government constituted itself the trustee for those who were by that act declared entitled to the proceeds of captured and abandoned property, and for those whom it should thereafter ***139** recognize as entitled. By the act itself it was provided that any person claiming to have been the owner of such property might prefer his claim to the proceeds thereof, and, on proof that he had never given aid or comfort to the rebellion, receive the amount after deducting expenses.

This language makes the right to the remedy dependent upon proof of loyalty, but implies that there may be proof of ownership without proof of loyalty. The property of the original owner is, in no case, absolutely divested. There is, as we have already observed, no confiscation, but the proceeds of the property have passed into the possession of the government, and restoration of the property is pledged to none except to those who have continually adhered to the government. Whether restoration will be made to others, or confiscation will be enforced, is left to be determined by considerations of public policy subsequently to be developed.

It is to be observed, however, that the Abandoned and Captured Property Act was approved on the 12th of March, 1863, and on the 17th of July, 1862, Congress had already passed an act--the same which provided for confiscation-- which authorized the President, 'at any time hereafter, by proclamation, to extend to persons who may have participated in the existing rebellion, in any State or part thereof, pardon and amnesty, with such exceptions and at such time and on such conditions as he may deem expedient for the public welfare.' The act of the 12th of March, 1863, provided for the sale of enemies' property collected under the act, and payment of the proceeds into the treasury, and left them there subject to such action as the President might take under the act of the 17th of July, 1862. What was this action?

The suggestion of pardon by Congress, for such it was, rather than authority, remained unacted on for more than a year. At length, however, on the 8th of December, 1863, [FN12] the President issued a proclamation, in which he referred to that act, and offered a full pardon, with restorationof all ***140** rights of property, except as to slaves and property in which rights of third persons had intervened, to all, with some exceptions, who, having been engaged in the rebellion as actual participants, or as aiders or abettors, would take and keep inviolate a prescribed oath. By this oath the person seeking to avail himself of the offered pardon was required to promise that he would thenceforth support the Constitution of the United States and the union of the States thereunder, and would also abide by and support all acts of Congress and all proclamations of the President in reference to slaves, unless the same should be modified or rendered void by the decision of this court.

FN12 13 Stat. at Large, 737.

In his annual message, transmitted to Congress on the same day, the President said 'the Constitution authorizes the Executive to grant or withhold pardon at his own absolute discretion.' He asserted his power 'to grant it on terms as fully established,' and explained the reasons which induced him to require applicants for pardon and restoration of property to take the oath prescribed, in these words: 'Laws and proclamations were enacted and put forth for the purpose of aiding in the suppression of the rebellion. To give them their fullest effect there had to be a pledge for their maintenance. In my judgment they have aided, and will further aid, the cause for which they were intended. To now abandon them would not only be to relinquish a lever of power, but would also be a cruel and astounding breach of faith . . . For these and other reasons it is thought best that support of these measures shall be included in the oath, and it is believed the Executive may lawfully claim it in return for pardon and restoration of forfeited rights, which he has clear constitutional power to withhold altogether or grant upon the terms which he shall deem wisest for the public interest.'

The proclamation of pardon, by a qualifying proclamation issued on the 26th of March, 1864, [FN13] was limited to those persons only who, being yet at large and free from confinement ***141** or duress, shall voluntarily come forward and take the said oath with the purpose of restoring peace and establishing the national authority.

FN13 13 Stat. at Large, 741.

On the 29th of May, 1865, [FN14] amnesty and pardon, with the restoration of the rights of property

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except as to slaves, and that as to which legal proceedings had been instituted under laws of the United States, were again offered to all who had, directly or indirectly, participated in the rebellion, except certain persons included in fourteen classes. All who embraced this offer were required to take and subscribe an oath of like tenor with that required by the first proclamation.

FN14 13 Stat. at Large, 758.

On the 7th of September, 1867, [FN15] still another proclamation was issued, offering pardon and amnesty, with restoration of property, as before and on the same oath, to all but three excepted classes.

FN15 15 Id. 699.

And finally, on the 4th of July, 1868, [FN16] a full pardon and amnesty was granted, with some exceptions, and on the 25th of December, 1868, [FN17] without exception, unconditionally and without reservation, to all who had participated in the rebellion, with restoration of rights of property as before. No oath was required.

FN16 Ib. 702.

FN17 Ib. 711.

It is true that the section of the act of Congress which purported to authorize the proclamation of pardon and amnesty by the President was repealed on the 21st of January, 1867; but this was after the close of the war, when the act had ceased to be important as an expression of the legislative disposition to carry into effect the clemency of the Executive, and after the decision of this court that the President's power of pardon 'is not subject to legislation;' that 'Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders.' [FN18] It is not important, therefore, to refer to this repealing act further than to say that it is impossible to believe, while the repealed provision was in full force, and the faith of the legislature ***142** as well as the Executive was engaged to the restoration of the rights of property promised by the latter, that the proceeds of property of persons pardoned, which had been paid into the treasury, were to be withheld from them. The repeal of the section in no respect changes the national obligation, for it does not alter at all the operation of the pardon, or reduce in any degree the obligations of Congress under the Constitution to give full effect to it, if necessary, by legislation.

FN18 14th January, 1867.

We conclude, therefore, that the title to the proceeds of the property which came to the possession of the government by capture or abandonment, with the exceptions already noticed, was in no case divested out of the original owner. It was for the government itself to determine whether these proceeds should be restored to the owner or not. The promise of the restoration of all rights of property decides that question affirmatively as to all persons who availed themselves of the proffered pardon. It was competent for the President to annex to his offer of pardon any conditions or qualifications he should see fit; but after those conditions and qualifications had been satisfied, the pardon and its connected promises took full effect. The restoration of the proceeds became the absolute right of the persons pardoned, on application within two years from the close of the war. It was, in fact, promised for an equivalent. 'Pardon and restoration of political rights' were 'in return' for the oath and its fulfilment. To refuse it would be a breach of faith not less 'cruel and astounding' than to abandon the freed people whom the Executive had promised to maintain in their freedom.

What, then, was the effect of the provision of the act of 1870 [FN19] upon the right of the owner of the cotton in this case? He had done certain acts which this court [FN20] has adjudged to be acts in aid of the rebellion; but he abandoned the cotton to the agent of the Treasury Department, by whom it has been sold and the proceeds paid into the Treasury of the ***143** United States; and he took, and has not violated, the amnesty oath under the President's proclamation. Upon this case the Court of Claims pronounced him entitled to a judgment for the net proceeds in the treasury. This decree was rendered on the 26th of May, 1869; the appeal to this court made on the 3d of June, and was filed here on the 11th of December, 1869.

FN19 16 Stat. at Large, 235.

FN20 United States *v.* Padelford, 9 Wallace, 531.

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The judgment of the court in the case of Padelford, which, in its essential features, was the same with this case, was rendered on the 30th of April, 1870. It affirmed the judgment of the Court of Claims in his favor.

Soon afterwards the provision in question was introduced as a proviso to the clause in the general appropriation bill, appropriating a sum of money for the payment of judgments of the Court of Claims, and became a part of the act, with perhaps little consideration in either House of Congress.

This proviso declares in substance that no pardon, acceptance, oath, or other act performed in pursuance, or as a condition of pardon, shall be admissible in evidence in support of any claim against the United States in the Court of Claims, or to establish the right of any claimant to bring suit in that court; nor, if already put in evidence, shall be used or considered on behalf of the claimant, by said court, or by the appellate court on appeal. Proof of loyalty is required to be made according to the provisions of certain statutes, irrespective of the effect of any executive proclamation, pardon, or amnesty, or act of oblivion; and when judgment has been already rendered on other proof of loyalty, the Supreme Court, on appeal, shall have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction. It is further provided that whenever any pardon, granted to any suitor in the Court of Claims, for the proceeds of captured and abandoned property, shall recite in substance that the person pardoned took part in the late rebellion, or was guilty of any act of rebellion or disloyalty, and shall have been accepted in writing without express disclaimer and protestation against the fact so recited, such pardon or acceptance shall be taken as conclusive evidence ***144** in the Court of Claims, and on appeal, that the claimant did give aid to the rebellion; and on proof of such pardon, or acceptance, which proof may be made summarily on motion or otherwise, the jurisdiction of the court shall cease, and the suit shall be forthwith dismissed.

The substance of this enactment is that an acceptance of a pardon, without disclaimer, shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it, both in the Court of Claims and in this court on appeal.

It was urged in argument that the right to sue the government in the Court of Claims is a matter of favor; but this seems not entirely accurate. It is as much the duty of the government as of individuals to fulfil its obligations. Before the establishment of the Court of Claims claimants could only be heard by Congress. That court was established in 1855 [FN21] for the triple purpose of relieving Congress, and of protecting the government by regular investigation, and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims. It was required to hear and determine upon claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States. [FN22] Originally it was a court merely in name, for its power extended only to the preparation of bills to be submitted to Congress.

FN21 10 Stat. at Large, 612.

FN22 Ib.

In 1863 the number of judges was increased from three to five, its jurisdiction was enlarged, and, instead of being required to prepare bills for Congress, it was authorized to render final judgment, subject to appeal to this court and to an estimate by the Secretary of the Treasury of the amount required to pay each claimant. [FN23] This court being of opinion [FN24] that the provision for an estimate was inconsistent with the finality essential to judicial decisions, Congress repealed that provision. [FN25] Since then the Court of Claims has exercised ***145** all the functions of a court, and this court has taken full jurisdiction on appeal. [FN26]

FN23 12 Ib. 765.

FN24 2 Wallace, 561.

FN25 14 Stat. at Large, 9.

FN26 14 Stat. at Large, 44, 391, 444.

The Court of Claims is thus constituted one of those inferior courts which Congress authorizes, and has jurisdiction of contracts between the government and the citizen, from which appeal regularly lies to this

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court.

Undoubtedly the legislature has complete control over the organization and existence of that court and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient.

But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We had already decided that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty. It provides that whenever it shall appear that any judgment of the Court of Claims shall have been founded on such pardons, without other proof of loyalty, the Supreme Court shall have no further jurisdiction of the case and shall dismiss the same for want of jurisdiction. The proviso further declares that every pardon granted to any suitor in the Court of Claims and reciting that the person pardoned has been guilty of any act of rebellion or disloyalty, shall, if accepted in writing without disclaimer of the fact recited, be taken as conclusive evidence in that court and on appeal, of the act recited; and on proof of pardon or acceptance, summarily made on motion ***146** or otherwise, the jurisdiction of the court shall cease and the suit shall be forthwith dismissed.

It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?

We think not; and thus thinking, we do not at all question what was decided in the case of *Pennsylvania* v. *Wheeling Bridge Company*. [FN27] In that case, after a decree in this court that the bridge, in the then state of the law, was a nuisance and must be abated as such, Congress passed an act legalizing the structure and making it a post-road; and the court, on a motion for process to enforce the decree, held that the bridge had ceased to be a nuisance by the exercise of the constitutional powers of Congress, and denied the motion. No arbitrary rule of decision was prescribed in that case, ***147** but the court was left to apply its ordinary rules to the new circumstances created by the act. In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.

FN27 18 Howard, 429.

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of

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the same article, provides that in all cases other than those of original jurisdiction, 'the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.'

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.

The rule prescribed is also liable to just exception as impairing the effect of a pradon, and thus infringing the constitutional power of the Executive.

It is the intention of the Constitution that each of the great co-ordinate departments of the government--the Legislative, the Executive, and the Judicial--shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offence pardoned and removes all its penal consequences. It may be granted on conditions. In these particular pardons, ***148** that no doubt might exist as to their character, restoration of property was expressly pledged, and the pardon was granted on condition that the person who availed himself of it should take and keep a prescribed oath.

Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the court to be instrumental to that end.

We think it unnecessary to enlarge. The simplest statement is the best.

We repeat that it is impossible to believe that this provision was not inserted in the appropriation bill through inadvertence; and that we shall not best fulfil the deliberate will of the legislature by DENYING the motion to dismiss and AFFIRMING the judgment of the Court of Claims; which is

ACCORDINGLY DONE.

Mr. Justice MILLER (with whom concurred Mr. Justice BRADLEY), dissenting.

I cannot agree to the opinion of the court just delivered in an important matter; and I regret this the more because I do agree to the proposition that the proviso to the act of July 12th, 1870, is unconstitutional, so far as it attempts to prescribe to the judiciary the effect to be given to an act of pardon or amnesty by the President. This power of pardon is confided to the President by the Constitution, and whatever may be its extent or its limits, the legislative branch of the government cannot impair its force or effect in a judicial proceeding in a constitutional court. But I have not been able to bring my mind to concur in the proposition that, under the act concerning captured and abandoned property, there remains in the former owner, who had given aid and ***149** comfort to the rebellion, any interest whatever in the property or its proceeds when it had been sold and paid into the treasury or had been converted to the use of the public under that act. I must construe this act, as all others should be construed, by seeking the intention of its framers, and the intention to restore the proceeds of such property to the loyal citizen, and to transfer it absolutely to the government in the case of those who had given active support to the rebellion, is to me too apparent to be disregarded. In the one case the government is converted into a trustee for the former owner; in the other it appropriates it to its own use as the property of a public enemy captured in war. Can it be inferred from anything found in the statute that Congress intended that this property should ever be restored to the disloyal? I am unable to discern any such intent. But if it did, why was not some provision made by which the title of the government could at some time be made perfect, or that of the owner established? Some judicial proceeding for confiscation would seem to be necessary if there remains in the disloyal owner any right or interest whatever. But there is no such provision, and unless the *act* intended to forfeit absolutely the right of the disloyal owner, the proceeds remain in a condition where the owner

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cannot maintain a suit for its recovery, and the United States can obtain no perfect title to it.

This statute has recently received the attentive consideration of the court in two reported cases.

In the case of the *United States* v. *Anderson*, [FN28] in reference to the relation of the government to the money paid into the treasury under this act, and the difference between the property of the loyal and disloyal owner, the court uses language hardly consistent with the opinion just read. It says that Congress, in a spirit of liberality, constituted the government a trustee for *so much* of this property as belonged to the faithful Southern people, and while it directed that *all* of it should be sold and its proceeds paid into the treasury, gave to *this class* of persons an opportunity to establish ***150** their right to the proceeds. Again, it is said, that 'the measure, in itself of great beneficence, was practically important only in its application to the *loyal Southern* people, and sympathy for their situation doubtless prompted Congress to pass it.' These views had the unanimous concurrence of the court. If I understand the present opinion, however, it maintains that the government, in taking possession of this property and selling it, became the trustee of all the former owners, whether loyal or disloyal, and holds it for the latter until pardoned by the President, or until Congress orders it to be restored to him.

FN28 9 Wallace, 65.

The other case which I refer to is that of *United States* v. *Padelford*. [FN29] In that case the opinion makes a labored and successful effort to show that Padelford, the owner of the property, had secured the benefit of the amnesty proclamation *before* the property was seized under the same statute we are now considering. And it bases the right of Padelford to recover its proceeds in the treasury on the fact that *before the capture* his *status* as a loyal citizen had been restored, and with it all his rights of property, although he had previously given aid and comfort to the rebellion. In this view I concurred with all my brethren. And I hold now that as long as the possession or title of property remains in the party, the pardon or the amnesty remits all right in the government to forfeit or confiscate it. But where the property has already been seized and sold, and the proceeds paid into the treasury, and it is clear that the statute contemplates no further proceeding as necessary to divest the right of the former owner, the pardon does not and cannot restore that which has thus completely passed away. And if such was not the view of the court when Padelford's case was under consideration I am at a loss to discover a reason for the extended argument in that case, in the opinion of the court, to show that he had availed himself of the amnesty before the seizure of the property. If the views now advanced are sound, it was wholly immaterial whether Padelford was pardoned before or after the seizure.

FN29 9 Wallace, 531.

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antedated the enactment of the legislation under which his deportation is sought. And this because deportation may, as this Court has said in Ng Fung Ho v. White, 259 U.S. 276, 284, 42 S.Ct. 492, 495, 66 L.Ed. 938, deprive a man 'of all that makes life worth living'; and, as it has said in Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S.Ct. 374, 376, 92 L.Ed. 433; 'deportation is a drastic measure and at times the equivalent of banishment or exile'.

In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, see Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 155, 40 S.Ct. 106, 107, 64 L.Ed. 194, much could be said for the view, were we writing on a clean slate, that the Due Process *531 Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the ex post facto Clause, even though applicable **743 only to punitive legislation, [FN4] should be applied to deportation.

FN4. First in Ogden v. Saunders, 12 Wheat. 213, 271, 6 L.Ed. 606, and again in Satterlee v. Matthewson, 2 Pet. 380, 686 (appendix), 7 L.Ed. 458, a characteristically persuasive attack was made by Mr. Justice Johnson on the view that the ex post facto Clause applies only to prosecutions for crime. The Court, however, has undeviatingly enforced the contrary position, first expressed in Calder v. Bull, 3 Dall. 386, 1 L.Ed. 648. It would be an unjustifiable reversal to overturn a view of the Constitution so deeply rooted and so consistently adhered to.

But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history,' New York Trust Co. v. Eisner, 256 U.S. 345, 349, 41 S.Ct. 506, 507, 65 L.Ed. 963, but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. Kaoru Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 101, 23 S.Ct. 611, 614, 47 L.Ed. 721; Wong Yang Sung v. McGrath, 339 U.S. 33, 49, 70 S.Ct. 445, 453, 94 L.Ed. 616. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government. And whatever might have been said at an earlier date for applying the ex post facto Clause, it has been the unbroken rule of this Court that it has no application to deportation.

We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil *532 liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens, on the basis of which we are unable to find the Act of 1950 unconstitutional. See Bugajewitz v. Adams, 228 U.S. 585, 33 S.Ct. 607, 57 L.Ed. 978, and Ng Fung Ho v. White, 259 U.S. 276, 280, 42 S.Ct. 492, 493, 66 L.Ed. 938.

Judgment affirmed.

Mr. Justice REED concurs in the judgment of the Court and in the opinion as written, except as to the deductions drawn from Senator McCarran's citation of Colyer v. Skeffington, D.C., 265 F. 17, 72.

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS concurs, dissenting.

Petitioner has lived in this country thirty-six years, having come here from Mexico in 1918 when only seven years of age. He has an American wife to whom he has been married for twenty years, four children all born here, and a stepson who served this country as a paratrooper. Since 1940 petitioner has been a laborer at the Van Camp Sea Food Company in San Diego, California. In 1944 petitioner became a member of the Communist Party. Deciding that he no longer wanted to belong to that party, he got out sometime around 1946 or 1947. As pointed out in the Court's opinion, during the period of his membership the Communist Party functioned 'as a distinct and active political organization'. See Communist Party of United States of America v. Peek, 20 Cal.2d 536, 127 P.2d 889. Party candidates appeared on California election ballots, and no federal law then frowned on Communist Party political activities. Now in 1954, however, petitioner is to be deported from this country solely

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REV_00265067

United States Court of Appeals,
Fourth Circuit.

Kenneth M. ZERAN, Plaintiff-Appellant,
v.
AMERICA ONLINE, INCORPORATED, Defendant-Appellee.

No. 97-1523.

Argued Oct. 2, 1997.
Decided Nov. 12, 1997.

Negligence action was brought against commercial interactive computer service provider alleging that provider unreasonably delayed in removing defamatory messages posted by unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter. The United States District Court for the Eastern District of Virginia, T.S. Ellis, III, J., 958 F.Supp. 1124, granted provider's motion for judgment on pleadings. Plaintiff appealed. The Court of Appeals, Wilkinson, Chief Judge, held that: (1) Communications Decency Act (CDA) barred claims, and (2) CDA applies to any complaint instituted after its effective date, regardless of when relevant conduct giving rise to claims occurred.

Affirmed.

West Headnotes

[1] Federal Courts ⚿794
170Bk794 Most Cited Cases

On appeal of grant of motion for judgment on pleadings, Court of Appeals accepts facts alleged in complaint as true.

[2] Libel and Slander ⚿28
237k28 Most Cited Cases

Communications Decency Act (CDA) immunized commercial interactive computer service provider from liability for defamatory information posted by third parties. Telecommunications Act of 1996, § 509(c)(1), 47 U.S.C.A. § 230(c)(1).

[3] Telecommunications ⚿262
372k262 Most Cited Cases

Communications Decency Act (CDA) creates federal immunity to any cause of action that would make interactive computer service providers liable for information originating with third-party user of service. Telecommunications Act of 1996, § 509(c)(1), 47 U.S.C.A. § 230(c)(1).

[4] Telecommunications ⚿262
372k262 Most Cited Cases

Communications Decency Act (CDA) bars lawsuits seeking to hold interactive computer service provider liable for its exercise of publisher's traditional editorial functions, such as deciding whether to publish, withdraw, postpone or alter content.

[5] Telecommunications ⚿262
372k262 Most Cited Cases

Communications Decency Act (CDA) was enacted, in part, to maintain robust nature of Internet communication and, accordingly, to keep government interference therein to minimum. Telecommunications Act of 1996, § 509(c)(1), 47 U.S.C.A. § 230(c)(1).

[6] Telecommunications ⚿262
372k262 Most Cited Cases

One important purpose of Communications Decency Act (CDA) was to encourage interactive computer service providers to self-regulate dissemination of offensive material over their services. Telecommunications Act of 1996, § 509(c)(1), 47 U.S.C.A. § 230(c)(1).

[7] Libel and Slander ⚿28
237k28 Most Cited Cases

While publishers may be liable for defamatory statement in their works even if they lacked specific knowledge that such statement was included, distributors are free from liability for defamatory statements in materials they distribute unless, at minimum, they actually knew of defamatory statements upon which liability is based.

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[8] Libel and Slander ⚿28
237k28 Most Cited Cases

Interactive computer service provider was "publisher" under Communications Decency Act (CDA) with respect to claim that provider failed to promptly remove defamatory statements posted by third party when informed of those statements; thus, CDA precluded provider's liability on that claim. Telecommunications Act of 1996, § 509(c)(1), 47 U.S.C.A. § 230(c)(1).

[9] Telecommunications ⚿262
372k262 Most Cited Cases

Communications Decency Act (CDA) applies to any complaint instituted after its effective date, regardless of when relevant conduct giving rise to claims occurred. Telecommunications Act of 1996, § 509(d)(3), 47 U.S.C.A. § 230(d)(3).

***328 ARGUED:** John Saul Edwards, Law Offices of John S. Edwards, Roanoke, VA; Leo Kayser, III, Kayser & Redfern, New York City, for Appellant. Patrick Joseph Carome, Wilmer, Cutler & Pickering, Washington, DC, for Appellee. **ON BRIEF:** John Payton, Samir Jain, Wilmer, Cutler & Pickering, Washington, DC; Randall J. Boe, America Online, Inc., Dulles, VA, for Appellee.

Before WILKINSON, Chief Judge, RUSSELL, Circuit Judge, and BOYLE, Chief United States District Judge for the Eastern District of North Carolina, sitting by designation.

Affirmed by published opinion. Chief Judge WILKINSON wrote the opinion, in which Judge RUSSELL and Chief Judge BOYLE joined.

OPINION

WILKINSON, Chief Judge:

Kenneth Zeran brought this action against America Online, Inc. ("AOL"), arguing that AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter. The district court granted judgment for AOL on the grounds that the Communications Decency Act of 1996 ("CDA")--47 U.S.C. § 230--bars Zeran's claims. Zeran appeals, arguing that § 230 leaves intact liability for interactive computer service providers who possess notice of defamatory material posted through their services. He also contends that § 230 does not apply here because his claims arise from AOL's alleged negligence prior to the CDA's enactment. Section 230, however, plainly immunizes computer service providers like AOL from liability for information that originates with third parties. Furthermore, Congress clearly expressed its intent that § 230 apply to lawsuits, like Zeran's, instituted after the CDA's enactment. Accordingly, we affirm the judgment of the district court.

I.

"The Internet is an international network of interconnected computers," currently used by approximately 40 million people worldwide. *Reno v. ACLU,* 521 U.S. 844, ----, 117 S.Ct. 2329, 2334, 138 L.Ed.2d 874 (1997). One of the many means by which individuals access the Internet is through an interactive computer service. These services offer not only a connection to the Internet as a whole, ***329** but also allow their subscribers to access information communicated and stored only on each computer service's individual proprietary network. *Id.* AOL is just such an interactive computer service. Much of the information transmitted over its network originates with the company's millions of subscribers. They may transmit information privately via electronic mail, or they may communicate publicly by posting messages on AOL bulletin boards, where the messages may be read by any AOL subscriber.

[1] The instant case comes before us on a motion for judgment on the pleadings, see Fed.R.Civ.P. 12(c), so we accept the facts alleged in the complaint as true. *Bruce v. Riddle,* 631 F.2d 272, 273 (4th Cir.1980). On April 25, 1995, an unidentified person posted a message on an AOL bulletin board advertising "Naughty Oklahoma T-Shirts." The posting described the sale of shirts featuring offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City. Those interested in purchasing the shirts were instructed to call "Ken" at Zeran's home phone number in Seattle, Washington. As a result of this anonymously perpetrated prank, Zeran received a high volume of calls, comprised primarily of angry

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and derogatory messages, but also including death threats. Zeran could not change his phone number because he relied on its availability to the public in running his business out of his home. Later that day, Zeran called AOL and informed a company representative of his predicament. The employee assured Zeran that the posting would be removed from AOL's bulletin board but explained that as a matter of policy AOL would not post a retraction. The parties dispute the date that AOL removed this original posting from its bulletin board.

On April 26, the next day, an unknown person posted another message advertising additional shirts with new tasteless slogans related to the Oklahoma City bombing. Again, interested buyers were told to call Zeran's phone number, to ask for "Ken," and to "please call back if busy" due to high demand. The angry, threatening phone calls intensified. Over the next four days, an unidentified party continued to post messages on AOL's bulletin board, advertising additional items including bumper stickers and key chains with still more offensive slogans. During this time period, Zeran called AOL repeatedly and was told by company representatives that the individual account from which the messages were posted would soon be closed. Zeran also reported his case to Seattle FBI agents. By April 30, Zeran was receiving an abusive phone call approximately every two minutes.

Meanwhile, an announcer for Oklahoma City radio station KRXO received a copy of the first AOL posting. On May 1, the announcer related the message's contents on the air, attributed them to "Ken" at Zeran's phone number, and urged the listening audience to call the number. After this radio broadcast, Zeran was inundated with death threats and other violent calls from Oklahoma City residents. Over the next few days, Zeran talked to both KRXO and AOL representatives. He also spoke to his local police, who subsequently surveilled his home to protect his safety. By May 14, after an Oklahoma City newspaper published a story exposing the shirt advertisements as a hoax and after KRXO made an on-air apology, the number of calls to Zeran's residence finally subsided to fifteen per day.

Zeran first filed suit on January 4, 1996, against radio station KRXO in the United States District Court for the Western District of Oklahoma. On April 23, 1996, he filed this separate suit against AOL in the same court. Zeran did not bring any action against the party who posted the offensive messages. [FN1] After Zeran's suit against AOL was transferred to the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(a), AOL answered Zeran's complaint and interposed 47 U.S.C. § 230 as an affirmative defense. AOL then moved for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). ***330** The district court granted AOL's motion, and Zeran filed this appeal.

> FN1. Zeran maintains that AOL made it impossible to identify the original party by failing to maintain adequate records of its users. The issue of AOL's record keeping practices, however, is not presented by this appeal.

II.

A.

[2] Because § 230 was successfully advanced by AOL in the district court as a defense to Zeran's claims, we shall briefly examine its operation here. Zeran seeks to hold AOL liable for defamatory speech initiated by a third party. He argued to the district court that once he notified AOL of the unidentified third party's hoax, AOL had a duty to remove the defamatory posting promptly, to notify its subscribers of the message's false nature, and to effectively screen future defamatory material. Section 230 entered this litigation as an affirmative defense pled by AOL. The company claimed that Congress immunized interactive computer service providers from claims based on information posted by a third party.

[3][4] The relevant portion of § 230 states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). [FN2] By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions--such as deciding

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whether to publish, withdraw, postpone or alter content--are barred.

> FN2. Section 230 defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(e)(2). The term"information content provider" is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(e)(3). The parties do not dispute that AOL falls within the CDA's "interactive computer service" definition and that the unidentified third party who posted the offensive messages here fits the definition of an "information content provider."

[5] The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. In specific statutory findings, Congress recognized the Internet and interactive computer services as offering "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." *Id.* § 230(a)(3). It also found that the Internet and interactive computer services "have flourished, to the benefit of all Americans, *with a minimum of government regulation.*" *Id.* § 230(a)(4) (emphasis added). Congress further stated that it is "the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*" *Id.* § 230(b)(2) (emphasis added).

None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability. While Congress acted to keep government regulation of the Internet to a minimum, it also found it to be the policy of the United States "to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." *Id.* § 230(b)(5). Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companiesthat serve as intermediaries ***331** for other parties' potentially injurious messages.

Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. *See Reno v. ACLU,* 521U.S. at ----, 117 S.Ct. at 2334 (noting that at time of district court trial, "commercial online services had almost 12 million individual subscribers"). The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

[6] Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. In this respect, § 230 responded to a New York state court decision, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.,* 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995). There, the plaintiffs sued Prodigy--an interactive computer service like AOL--for defamatory comments made by an unidentified party on one of Prodigy's bulletin boards. The court held Prodigy to the strict liability standard normally applied to original publishers of defamatory statements, rejecting Prodigy's claims that it should be held only to the lower "knowledge" standard usually reserved for distributors. The court reasoned that Prodigy acted more like an original publisher than a distributor both because it advertised its practice of controlling content on its service and because it actively screened and edited messages posted on its bulletin boards.

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Congress enacted § 230 to remove the disincentives to selfregulation created by the *Stratton Oakmont* decision. Under that court's holding, computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of a publisher. Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4). In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.

B.

[7][8] Zeran argues, however, that the § 230 immunity eliminates only publisher liability, leaving distributorliability intact. Publishers can be held liable for defamatory statements contained in their works even absent proof that they had specific knowledge of the statement's inclusion. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 113, at 810 (5th ed.1984). According to Zeran, interactive computer service providers like AOL are normally considered instead to be distributors, like traditional news vendors or book sellers. Distributors cannot be held liable for defamatory statements contained in the materials they distribute unless it is proven at a minimum that they have actual knowledge of the defamatory statements upon which liability is predicated. *Id.* at 811 (explaining that distributors are not liable "in the absence of proof that they knew or had reason to know of the existence of defamatory matter contained in matter published"). Zeran contends that he provided AOL with sufficient notice of the defamatory statements appearing on the company's bulletin board. This notice is significant, says Zeran, because AOL could be held liable as a distributor only if it acquired knowledge of the defamatory statements' existence.

Because of the difference between these two forms of liability, Zeran contends that the term "distributor" carries a legally distinct meaning from the term "publisher." ***332** Accordingly, he asserts that Congress' use of only the term "publisher" in § 230 indicates a purpose to immunize service providers only from publisher liability. He argues that distributors are left unprotected by § 230 and, therefore, his suit should be permitted to proceed against AOL. We disagree. Assuming *arguendo* that Zeran has satisfied the requirements for imposition of distributor liability, this theory of liability is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230.

The terms "publisher" and "distributor" derive their legal significance from the context of defamation law. Although Zeran attempts to artfully plead his claims as ones of negligence, they are indistinguishable from a garden variety defamation action. Because the publication of a statement is a necessary element in a defamation action, only one who publishes can be subject to this form of tort liability. Restatement (Second) of Torts § 558(b) (1977); Keeton et al., *supra,* § 113, at 802. Publication does not only describe the choice by an author to include certain information. In addition, both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party--each alleged by Zeran here under a negligence label--constitute publication. Restatement (Second) of Torts § 577; *see also Tacket v. General Motors Corp.,* 836 F.2d 1042, 1046-47 (7th Cir.1987). In fact, every repetition of a defamatory statement is considered a publication. Keeton et al., *supra,* § 113, at 799.

In this case, AOL is legally considered to be a publisher. "[E]very one who takes part in the publication ... is charged with publication." *Id.* Even distributors are considered to be publishers for purposes of defamation law:

> Those who are in the business of making their facilities available to disseminate the writings composed, the speeches made, and the information gathered by others may also be regarded as participating to such an extent in making the books, newspapers, magazines, and information available to others as to be regarded as publishers. They are intentionally making the contents available to others, sometimes without knowing all of the contents--including the defamatory content--and sometimes without any opportunity to ascertain, in advance, that any defamatory matter was to be included in the matter published.

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Id. at 803. AOL falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by § 230's immunity.

Zeran contends that decisions like *Stratton Oakmont* and *Cubby, Inc. v. CompuServe Inc.*, 776 F.Supp. 135 (S.D.N.Y.1991), recognize a legal distinction between publishers and distributors. He misapprehends, however, the significance of that distinction for the legal issue we consider here. It is undoubtedly true that mere conduits, or distributors, are subject to a different standard of liability. As explained above, distributors must at a minimum have knowledge of the existence of a defamatory statement as a prerequisite to liability. But this distinction signifies only that different standards of liability may be applied *within* the larger publisher category, depending on the specific type of publisher concerned. *See* Keeton et al., *supra,* § 113, at 799-800 (explaining that every party involved is charged with publication, although degrees of legal responsibility differ). To the extent that decisions like *Stratton* and *Cubby* utilize the terms "publisher" and "distributor" separately, the decisions correctly describe two different standards of liability. *Stratton* and *Cubby* do not, however, suggest that distributors are not also a type of publisher for purposes of defamation law.

Zeran simply attaches too much importance to the presence of the distinct notice element in distributor liability. The simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law. To the contrary, once a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher. The computer service provider must decide whether to publish, edit, or withdraw the posting. In this respect, Zeran seeks to impose liability on AOL for assuming the ***333** role for which § 230 specifically proscribes liability--the publisher role.

Our view that Zeran's complaint treats AOL as a publisher is reinforced because AOL is cast in the same position as the party who originally posted the offensive messages. According to Zeran's logic, AOL is legally at fault because it communicated to third parties an allegedly defamatory statement. This is precisely the theory under which the original poster of the offensive messages would be found liable. If the original party is considered a publisher of the offensive messages, Zeran certainly cannot attach liability to AOL under the same theory without conceding that AOL too must be treated as a publisher of the statements.

Zeran next contends that interpreting § 230 to impose liability on service providers with knowledge of defamatory content on their services is consistent with the statutory purposes outlined in Part IIA. Zeran fails, however, to understand the practical implications of notice liability in the interactive computer service context. Liability upon notice would defeat thedual purposes advanced by § 230 of the CDA. Like the strict liability imposed by the *Stratton Oakmont* court, liability upon notice reinforces service providers' incentives to restrict speech and abstain from self-regulation.

If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement--from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context. *Cf. Auvil v. CBS 60 Minutes,* 800 F.Supp. 928, 931 (E.D.Wash.1992) (recognizing that it is unrealistic for network affiliates to "monitor incoming transmissions and exercise on-the-spot discretionary calls"). Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not. *See Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 777, 106 S.Ct. 1558, 1564, 89 L.Ed.2d 783 (1986) (recognizing that fears of unjustified liability produce a chilling effect antithetical to First Amendment's protection of speech). Thus, like strict liability, liability upon notice has a chilling effect on the freedom of Internet speech.

Similarly, notice-based liability would deter service

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providers from regulating the dissemination of offensive material over their own services. Any efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability. Instead of subjecting themselves to further possible lawsuits, service providers would likely eschew any attempts at self-regulation.

More generally, notice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits. Whenever one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply "notify" the relevant service provider, claiming the information to be legally defamatory. In light of the vast amount of speech communicated through interactive computer services, these notices could produce an impossible burden for service providers, who would be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability. Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes, we will not assume that Congress intended to leave liability upon notice intact.

Zeran finally contends that the interpretive canon favoring retention of common law principles unless Congress speaks directly to the issue counsels a restrictive reading of the ***334** § 230 immunity here. *See United States v. Texas,* 507 U.S. 529, 534, 113 S.Ct. 1631, 1634-35, 123 L.Ed.2d 245 (1993). This interpretive canon does not persuade us to reach a different result. Here, Congress has indeed spoken directly to the issue by employing the legally significant term "publisher," which has traditionally encompassed distributors and original publishers alike.

The decision cited by Zeran, *United States v. Texas,* also recognized that abrogation of common law principles is appropriate when a contrary statutory purpose is evident. *Id.* This is consistent with the Court's earlier cautions against courts' application of the canon with excessive zeal: " 'The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure.' " *Isbrandtsen Co. v. Johnson,* 343 U.S. 779, 783, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294 (1952) (quoting *Jamison v. Encarnacion,* 281 U.S. 635, 640, 50 S.Ct. 440, 442, 74 L.Ed. 1082 (1930)); *cf. Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 110-11, 111 S.Ct. 2166, 2170-71, 115 L.Ed.2d 96 (1991) (statute need not expressly delimit manner in which common law principle is abrogated). Zeran's argument flies in the face of this warning. As explained above, interpreting § 230 to leave distributor liability in effect would defeat the two primary purposes of the statute and would certainly "lessen the scope plainly intended" by Congress' use of the term "publisher."

Section 230 represents the approach of Congress to a problem of national and international dimension. The Supreme Court underscored this point in *Reno v. ACLU,* finding that the Internet allows "tens of millions of people to communicate with one another and to access vast amounts of information from around the world.[It] is 'a unique and wholly new medium of worldwide human communication.' " 521 U.S. at ----, 117 S.Ct. at 2334 (citation omitted). Application of the canon invoked by Zeran here would significantly lessen Congress' power, derived from the Commerce Clause, to act in a field whose international character is apparent. While Congress allowed for the enforcement of "any State law that is consistent with [§ 230]," 47 U.S.C. § 230(d)(3), it is equally plain that Congress' desire to promote unfettered speech on the Internet must supersede conflicting common law causes of action. Section 230(d)(3) continues: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." With respect to federal-state preemption, the Court has advised: "[W]hen Congress has 'unmistakably ... ordained,' that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. The result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977) (citations omitted). Here, Congress' command is explicitly stated. Its exercise of its commerce power is clear and

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counteracts the caution counseled by the interpretive canon favoring retention of common law principles.

III.

[9] The CDA was signed into law and became effective on February 8, 1996. Zeran did not file his complaint until April 23, 1996. Zeran contends that even if § 230 does bar the type of claim he brings here, it cannot be applied retroactively to bar an action arising from AOL's alleged misconduct prior to the CDA's enactment. We disagree. Section 230 applies by its plain terms to complaints brought after the CDA became effective. As noted in Part IIB, the statute provides, in part: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(d)(3).

Initially, it is doubtful that a retroactivity issue is even presented here. Retroactivity concerns arise when a statute applies to conduct predating its enactment. Section 230 does not directly regulate the activities of interactive computer service providers like AOL. Instead, § 230 is addressed only to the bringing of a cause of action. Here, Zeran ***335** did not file his complaint until over two months after § 230's immunity became effective. Thus, the statute's application in this litigation is in fact prospective. *See St. Louis v. Texas Worker's Compensation Comm'n,* 65 F.3d 43, 46 (5th Cir.1995) (holding "issue is not technically one of retroactivity" when statute applies to "filing of the complaint"), *cert. denied,* 518 U.S. 1024, 116 S.Ct. 2563, 135 L.Ed.2d 1080 (1996); *Vernon v. Cassadaga Valley Central Sch. Dist.,* 49 F.3d 886, 889 (2d Cir.1995) (same).

Even if this were a case implicating the application of a federal statute to pre-enactment events, the Supreme Court's *Landgraf* framework would nevertheless require § 230's application to Zeran's claims. *Landgraf* instructs us first "to determine whether Congress has expressly prescribed the statute's proper reach." *Landgraf v. USI Film Prods.,* 511 U.S. 244, 280, 114 S.Ct. 1483, 1505, 128 L.Ed.2d 229 (1994). This case can be resolved at this first step. In § 230(d)(3), Congress clearly expressed its intent that the statute apply to any complaint instituted after its effective date, regardless of when the relevant conduct giving rise to the claims occurred. Other circuits have interpreted similar statutory language to clearly express Congress' intent that the relevant statutes apply to bar new actions under statutorily specified conditions. *See Wright v. Morris,* 111 F.3d 414, 418 (6th Cir.1997) (holding language "No action shall be brought ...," 42 U.S.C. § 1997e(a), to "expressly govern[ ] the bringing of new actions"), *cert. denied,* 522 U.S. 906, 118 S.Ct. 263, 139 L.Ed.2d 190 (1997); *Abdul-Wadood v. Nathan,* 91 F.3d 1023, 1025 (7th Cir.1996) (holding language "In no event shall a prisoner bring a civil action or appeal a judgment ...," 28 U.S.C. § 1915(g), to govern the bringing of new actions or filing of new appeals).

If we were to find a directive as plain as § 230(d)(3) to be ambiguous as to Congress' intent, we would be announcing a new superclear-statement condition for the retroactive operation of statutes. Such a jurisprudential shift would be both unwise and contrary to the Court's admonitions in *Landgraf:* "Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary." 511 U.S. at 267-68, 114 S.Ct. at 1498. Here, Congress decided that free speech on the Internet and self-regulation of offensive speech were so important that § 230 should be given immediate, comprehensive effect.

There finally is a significant contrast between statutes that impose new liabilities for already-completed conduct and statutes that govern litigants' access to courts. For example, courts often apply intervening statutes that restrict a court's jurisdiction. *See Landgraf,* 511 U.S. at 274, 114 S.Ct. at 1501-02. Section 230 neither imposes any new liability on Zeran nor takes away any rights acquired under prior law. No person has a vested right in a nonfinal tort judgment, much less an unfiled tort claim. *Hammond v. United States,* 786 F.2d 8, 12 (1st Cir.1986). Furthermore, Zeran cannot point to any action he took in reliance on the law prior to § 230's enactment. Because § 230 has no untoward retroactive effect, even the presumption against statutory retroactivity absent an express directive from Congress is of no help to Zeran here.

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IV.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

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because of his past lawful membership in that party. And this is to be done without proof or finding that petitioner knew that the party had any evil purposes or that he **744 agreed *533 with any such purposes that it might have had. On the contrary, there is strong evidence that he was a good, law-abiding man, a steady worker and a devoted husband and father loyal to this country and its form of government.

For joining a lawful political group years ago--an act which he had no possible reason to believe would subject him to the slightest penalty--petitioner now loses his job, his friends, his home, and maybe even his children, who must choose between their father and their native country. Perhaps a legislative act penalizing political activities legal when engaged in is not a bill of attainder. But see United States v. Lovett, 328 U.S. 303, 315--316, 66 S.Ct. 1073, 1078, 1079, 90 L.Ed. 1252. Conceivably an Act prescribing exile for prior innocent conduct does not violate the constitutional prohibition of ex post facto laws. Cf. American Communications Ass'n v. Douds, 339 U.S. 382, 412--415, 70 S.Ct. 674, 690--693, 94 L.Ed. 925. It may be possible that this deportation order for engaging in political activities does not violate the First Amendment's clear ban against abridgment of political speech and assembly. Maybe it is not even a denial of due process and equal protection of the laws. But see dissenting opinions in Carlson v. Landon, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547, and Harisiades v. Shaughnessy, 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586. I am unwilling to say, however, that despite these constitutional safeguards this man may be driven from our land because he joined a political party that California and the Nation then recognized as perfectly legal.

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK concurs, dissenting.

As Mr. Justice BLACK states in his dissent, the only charge against this alien is an act that was lawful when done. I agree that there is, therefore, no constitutional basis for deportation, if aliens, as well as citizens, are to be the beneficiaries of due process of law.

*534 The case might, of course, be different if the past affiliation with Communism now seized upon as the basis for deportation had continued down to this date. But so far as this record shows, the alien Galvan quit the Communist Party at least six years ago. There is not a word in the present record to show that he continued his affiliations with it sub rosa or espoused its causes or joined in any of its activities since he ceased to be a member of it.

I cannot agree that because a man was once a Communist, he always must carry the curse. Experience teaches otherwise. It is common knowledge that though some of the leading Socialists of Asia once were Communists, they repudiated the Marxist creed when they experienced its ugly operations, and today are the most effective opponents the Communists know. So far as the present record shows, Galvan may be such a man. Or he may be merely one who transgressed and then returned to a more orthodox political faith. The record is wholly silent about Galvan's present political activities. Only one thing is clear: Galvan is not being punished for what he presently is, nor for an unlawful act, nor for espionage or conspiracy or intrigue against this country. He is being punished for what he once was, for a political faith he briefly expressed over six years ago and then rejected.

This action is hostile to our constitutional standards, as I pointed out in Harisiades v. Shaughnessy, 342 U.S. 580, 598, 72 S.Ct. 512, 523, 96 L.Ed. 586. Aliens who live here in peace, who do not abuse our hospitality, who are lawabiding members of our communities, have the right to due process of law. They too are 'persons' within the meaning of the Fifth Amendment. They can be molested by the government in times of peace only when their presence here **745 is hostile to the safety or welfare of the Nation. If they are to be deported, it must be for what they are and do, not for what they once believed.

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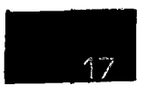
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United States Court of Appeals,
Eighth Circuit.

HONEYWELL, INC.; Honeywell Pension and Retirement Committee, on their own behalf and on behalf of the Honeywell Retirement Investment Plan; Investment Plus Plan of Honeywell, Inc.; Honeywell Retirement Savings Plan; First Trust National Association, Plaintiffs-Appellants,
v.
MINNESOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION, Defendant-Appellee.

No. 95-1754.

Submitted Oct. 22, 1996.
Decided April 2, 1997.

Sponsor of employee benefit and retirement plans sued state life and health insurance guaranty association in state court, seeking declaration that retroactive application of statutory amendment restricting to residents the right to receive guaranty payments was unconstitutional. Association removed. The United States District Court for the District of Minnesota, Richard H. Kyle, J., granted summary judgment to association, and sponsor appealed. A panel of the Court of Appeals affirmed, 86 F.3d 766, but opinion was vacated upon grant of sponsor's request for en banc review. After en banc hearing, the Court of Appeals, Hansen, Circuit Judge, held that: (1) amendment was not unconstitutional under contract clause of Federal Constitution; and (2) retroactive application of amendment did not violate due process; and in an opinion by Loken, Circuit Judge, held that: (3) statutory right to guaranty payments was contractual in nature; and (4) amendment effected substantial impairment of guaranty rights of sponsor's nonresident employees.

Affirmed.

Loken, Circuit Judge, filed concurring opinion in which Bowman, Circuit Judge, joined.

Richard S. Arnold, Chief Judge, filed dissenting opinion in which McMillian, Magill, Beam, and Morris Sheppard Arnold, Circuit Judges, joined.

See also, 518 N.W.2d 557.

West Headnotes

[1] Constitutional Law ⚖154(3)
92k154(3) Most Cited Cases

[1] Insurance ⚖1490
217k1490 Most Cited Cases
(Formerly 217k4(2))

Retroactively applicable state statutory amendment restricting to residents the right to receive life and health insurance guaranty payments was not unconstitutional under contract clause of Federal Constitution. U.S.C.A. Const. Art. 1, § 10, cl. 1; Minn.St.1992, §§ 61B.01-61B.16.

[2] Constitutional Law ⚖251.3
92k251.3 Most Cited Cases

Modern framework for substantive due process analysis concerning economic legislation only requires inquiry into whether legislation is reasonably related to legitimate governmental purpose; "vested rights" analysis appears to have been supplanted. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law ⚖253(4)
92k253(4) Most Cited Cases

[3] Insurance ⚖1490
217k1490 Most Cited Cases
(Formerly 217k4.4)

Due process was not violated by retroactive application of amendment to former version of state statute creating life and health insurance guaranty association, which amendment restricted to residents the right to receive guaranty payments, as retroactive application achieved legitimate legislative purposes by rational means. U.S.C.A. Const.Amend. 14; Minn.St.1992, §§ 61B.01 -61B.16, 61B.06, subd. 2.

[4] Constitutional Law ⚖253(4)
92k253(4) Most Cited Cases

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Retroactive application of legislation satisfies reasonableness test for due process if it is justified by rational legislative purpose, even where it destroys settled expectancy or imposes new liability. U.S.C.A. Const.Amend. 14.

[5] Statutes ⚖268
361k268 Most Cited Cases

"Curative legislation" corrects unintended and unanticipated mistake in underlying legislation which went undetected until some time after original enactment.

[6] Statutes ⚖4
361k4 Most Cited Cases

Legislatures have authority to cure inadvertent defects in their legislation.

[7] Constitutional Law ⚖154(3)
92k154(3) Most Cited Cases

[7] Insurance ⚖1494
217k1494 Most Cited Cases
(Formerly 217k4(2))

Right to payment under former version of state statute creating life and health insurance guaranty association was contractual in nature, such that statutory amendment affecting that right implicated contract clause of Federal Constitution. U.S.C.A. Const. Art. 1, § 10, cl. 1; Minn.St.1992, §§ 61B.01-61B.16.

[8] Constitutional Law ⚖154(3)
92k154(3) Most Cited Cases

[8] Insurance ⚖1490
217k1490 Most Cited Cases
(Formerly 217k4(2))

Retroactively applicable state statutory amendment restricting to residents the right to receive life and health insurance guaranty payments effected substantial impairment of guaranty rights of nonresident employees participating in employee benefit and retirement plans sponsored by resident employer, for purposes of contract clause analysis under Federal Constitution, where plans lost 75% of their guaranty rights, based on percentage of nonresident employees. U.S.C.A. Const. Art. 1, § 10, cl. 1; Minn.St.1992, §§ 61B.01-61B.16.

***548** David L. Hashmall, Minneapolis, MN (argued), Karen R. Cole, Paul A. Koches, Joseph Brooks, on the brief, for Plaintiffs-Appellants.

Gary J. Haugen, Minneapolis, MN (argued), Jonathan S. Parritz, on the brief, for Defendant-Appellee.

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges, en banc.

***549** HANSEN, Circuit Judge.

The plaintiffs (collectively referred to as Honeywell) appeal the district court's [FN1] grant of summary judgment for the defendant, Minnesota Life and Health Insurance Guaranty Association (the Association), in this declaratory judgment suit. At issue is whether an amendment to a Minnesota statute, which amendment applies retroactively, violates either the Contract Clause or the Due Process Clause of the Constitution of the United States. The district court granted the Association's motion for summary judgment and dismissed Honeywell's complaint, concluding that the amendment passes constitutional muster.

FN1. The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota.

A panel of this court unanimously affirmed the judgment of the district court. *Honeywell v. Minnesota Life & Health Ins. Guaranty Assoc.*, 86 F.3d 766 (1996). Honeywell requested en banc review. We granted this request, vacated the panel's opinion on August 27, 1996, and heard the case en banc. We now affirm the judgment of the district court.

I. BACKGROUND

Honeywell, Inc. is a Delaware corporation with its principal place of business in Minnesota. Honeywell sponsors certain defined contribution benefit and retirement plans for its employees. These plans include the Honeywell Retirement Investment Plan, the Investment Plus Plan of Honeywell Inc., and the Honeywell Retirement

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Savings Plan. The current trustee of the Honeywell plans is First Trust National Association, which has its principal place of business in Minnesota.

The Association is a nonprofit Minnesota corporation created pursuant to the Minnesota Life and Health Insurance Guaranty Association Act (the Act), Minn.Stat.Ann. §§ 61B.01-61B.16 (West 1986). [FN2] The Association exists to protect the contractual rights of policy owners and beneficiaries of life insurance policies, health insurance policies, and annuity contracts (subject to certain definitions and limitations), when the insurer that issued the life insurance, health insurance, or annuity contract becomes financially unable to perform its obligations. *See* Minn.Stat.Ann. § 61B.02, subd. 2. *See also Minnesota Life & Health Ins. Guar. Assoc. v. Department of Commerce,* 400 N.W.2d 769, 770 (Minn.Ct.App.1987). To provide this protection, all insurance companies that deal in life, health, and annuity contracts and elect to do business in Minnesota are required to join and contribute to the Association. *Minnesota Life,* 400 N.W.2d at 770. The dispute in this case arose following the 1991 insolvency of an out-of-state member insurance company and the 1992 enactment by the Minnesota legislature of an amendment that retroactively redefines the term "contractual obligation" under the Act.

> FN2. This Act has been repealed and was replaced in 1993 with Minn.Stat.Ann. §§ 61B.18--61B.32 (West Supp.1996). The legislature provided, however, that §§ 61B.01--61B.16, as amended in 1992, remain applicable to the subject of this suit. *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Assoc.,* 518 N.W.2d 557, 558 n. 4 (Minn.1994). The issue in this case deals with a 1992 amendment to the Act, and not the new 1993 version of the Act.

In 1988, the Honeywell plans' trustee, who was a Minnesota resident (as is the current trustee), invested in Guaranteed Investment Contracts (GICs) issued by Executive Life Insurance Company of California (ELIC), a member of the Association. GICs are unallocated annuity contracts, or annuity contracts "not issued to or owned by a named individual." *Id.* GICs are investments made by the trustee for the benefit of the plan participants and are considered covered policies under the Act. *See id.* at 775 (holding that GICs are covered annuities under Minn.Stat. § 61B.03, subd. 3 (1984)). The Honeywell GICs expressly name the Honeywell trustee as the policy owner, and not the individual plan participants for whom the investment was made. *Honeywell,* 518 N.W.2d at 561.

In 1991, ELIC became insolvent and unable to fulfill its contractual obligations on the Honeywell GICs, which amounted to $111,000,000. By letter dated January 10, 1992, the Honeywell trustee, as the resident policy owner, submitted to the Association a claim for guaranty coverage under the Act. ***550** Honeywell sought coverage for ELIC's entire obligation to the Honeywell trustee, which would inure not only to the benefit of Honeywell's 9,000 Minnesota resident plan participants but also to Honeywell's 27,000 nonresident plan participants.

The Association neither granted nor denied Honeywell's claim initially. ELIC's insolvency had also affected approximately 10,000 other Minnesota residents who were employed in Minnesota by other companies whose plan trustees owned GICs but which trustees were *not* Minnesota residents. At that time, the Act required the Association to guarantee the covered policies of "residents" to whom any "contractual obligation" was owed from an out-of-state insurer. Minn.Stat.Ann. § 61B.06, subd. 2 (West 1986). *See Honeywell,* 518 N.W.2d at 558. The term "resident," defined as "any person who resides in this state at the time the impairment is determined and to whom contractual obligations are owed," Minn.Stat.Ann. § 61B.03, subd. 13 (West 1986), was broad enough to include a trustee who resided in Minnesota. *Honeywell,* 518 N.W.2d at 560-61. The term "contractual obligation," defined as "any obligation under covered policies," Minn.Stat.Ann. § 61B.03, subd. 5 (West 1986), was broad enough to include a GIC obligation owed to a resident trustee. *Honeywell,* 518 N.W.2d at 560-61. Thus, as then codified, the Act, combined with ELIC's insolvency, created the potential that all the Honeywell plan participants, thousands of whom were not residents of Minnesota, might be entitled to coverage under the Minnesota Act because their plan trustee happened to be a Minnesota resident. Whereas, many other Minnesota non-Honeywell employed resident plan participants, who worked for companies whose plan trustee resided in a different state, might not be entitled to any coverage because their trustee (the one to whom the contractual obligation was owed) was not a Minnesota resident.

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Faced with this dilemma, on January 21, 1992, the Minnesota Department of Commerce (which supervises and regulates the Association and to whom appeals may be taken from the Association's determinations, *see* Minn.Stat.Ann. § 61B.09(c)), issued an opinion, advising the Association chairman on the coverage problems created by the ELIC insolvency:

> The Department believes it is the clear intent of the Act to cover the people of Minnesota. Accordingly, it is the Department's position that the Guaranty Association Act provides coverage to Minnesota resident employees who are the beneficiaries of defined-contribution pension plans funded by Guaranteed Investment Contracts purchased from Executive Life.
>
> Consistent with that position the Department has determined that non- resident employees of such a plan, regardless of the residency of the trustee or plan sponsor, are not covered under the Act.

(Appellee's App. at GA-59.)

Subsequently, on April 27, 1992, the governor signed into law an amendment to the definition of the term "contractual obligation," in a purported attempt to retroactively "clarify" the statutory coverage in a manner consistent with the Department of Commerce opinion. *Honeywell,* 518 N.W.2d at 562. The 1992 amendment, which specifically applies retroactively, narrowed the definition of "contractual obligation" to specifically *exclude* any obligation owed "to nonresident participants of a covered plan or to the plan sponsor, employer, trustee, or other party who owns the contract; in such cases, the association is obligated under this chapter only to participants in a covered plan who are residents of the state of Minnesota on the date of impairment." 1992 Minn.Laws, ch. 540. Thus, the amendment expressly provides coverage only to plan participants who are Minnesota residents. In light of the opinion of the Department of Commerce and the retroactive 1992 amendment, the Association took the position that its guaranty obligation to Honeywell covers only those Honeywell plan participants who resided in Minnesota when ELIC became insolvent.

Honeywell then brought an action for declaratory and injunctive relief and monetary damages in Minnesota state court based on the Association's refusal to fully guaranty the whole of the trustee's claim. Honeywell ***551** sought a declaration that retroactive application of the 1992 amendment violates both the Contract Clause and the Due Process Clause of the Constitution because Honeywell's entitlement to coverage and payment under the prior statute had fully accrued before the enactment of the 1992 amendment. The Association removed the case to federal district court pursuant to 28 U.S.C. § 1441.

After removal, the parties filed cross motions for summary judgment. The district court ruled in favor of Honeywell, holding that the retroactive abrogation of Honeywell's guaranty coverage rights impermissibly destroyed vested rights in violation of both the Contract Clause and the Due Process Clause of the Constitution. After the Association moved for reconsideration, however, the district court vacated its initial opinion and certified two questions to the Supreme Court of Minnesota: (1) Did the 1992 amendment to the Act's definition of "contractual obligation" effect a substantive change in the Association's obligations or merely clarify existing obligations? (2) Is the annuity contract owner's (the trustee's) right to guaranty payment from the Association a purely statutory right or is it contractual in nature? The Supreme Court of Minnesota ruled on the certified questions, holding that (1) the 1992 amendment to the definition of "contractual obligation" substantively changed the Association's coverage obligations, and (2) the right to payment from the Association is a purely statutory right under state law. *See Honeywell,* 518 N.W.2d at 563.

After the Supreme Court of Minnesota responded to the certified questions, the parties again filed cross motions for summary judgment. This time, the district court granted the Association's motion for summary judgment, concluding that retroactive application of the 1992 amendment did not violate either the Contract Clause or the Due Process Clause, and dismissed Honeywell's complaint with prejudice. Honeywell appeals.

II. DISCUSSION

Honeywell contends that its preamendment right to insurance guaranty coverage is contractual in nature and that retroactive application of the amendment constitutes the impairment of its contractual rights in violation of the Contract Clause. Honeywell also

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argues that the 1992 amendment arbitrarily and irrationally destroyed its accrued, vested right to guaranty coverage, in violation of the Due Process Clause. We begin our analysis with the Contract Clause.

A. CONTRACT CLAUSE

The Constitution provides, "No State shall ... pass any Law impairing the Obligation of Contracts...." U.S. CONST. art. I, § 10, cl. 1. Read literally, this constitutional prohibition bans any interference with contracts, but cases interpreting the clause clearly indicate that this prohibition "is not an absolute one and is not to be read with literal exactness like a mathematical formula." *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 428, 54 S.Ct. 231, 236, 78 L.Ed. 413 (1934). Instead, when a litigant contends that a legislative amendment has impermissibly impaired contractual obligations, our inquiry initially focuses on "whether the change in state law has 'operated as a substantial impairment of a contractual relationship.' " *General Motors Corp. v. Romein,* 503 U.S. 181, 186, 112 S.Ct. 1105, 1109, 117 L.Ed.2d 328 (1992) (quoting *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727 (1978)) (other citation omitted). Three basic components are essential to this inquiry: (1) Does a contractual relationship exist, (2) does the changein the law impair that contractual relationship, and if so, (3) is the impairment substantial? *Id.* If we conclude that a substantial impairment of a contractual relationship exists, we must then carefully examine "the nature and purpose of the state legislation." *Allied Structural Steel Co.,* 438 U.S. at 244, 98 S.Ct. at 2722.

We first consider whether a contractual relationship exists. In this case, the district court certified to the state supreme court the question of whether the Association's guaranty obligation to GIC owners, such as the Honeywell trustee, is a contractual or a statutory obligation. The Supreme Court of Minnesota determined that the right to payment ***552** from the Association is a purely statutory right under *state* law. *Honeywell,* 518 N.W.2d at 563. Honeywell first contends that the district court erroneously certified a question of federal constitutional law to the state court.

While federal courts "accord respectful consideration and great weight to the views of the State's highest court," the determination of whether the Act created a contractual obligation "is a federal question for purposes of Contract Clause analysis, and whether it turns on issues of general or purely local law, we can not surrender the duty to exercise our own judgment." *Romein,* 503 U.S. at 187, 112 S.Ct. at 1110 (internal quotations omitted). Contrary to Honeywell's assertion, however, the district court did not avoid its duty to determine the constitutional issue by certifying a question to the state supreme court. Instead, the district court gave proper consideration to the state court's views but independently determined that the right to payment under the Act is not contractual within the meaning of the Contract Clause. We review de novo the district court's judgment on this constitutional question. *See United States v. Bates,* 77 F.3d 1101, 1104 (8th Cir.), *cert. denied,* 519 U.S. 884, 117 S.Ct. 215, 136 L.Ed.2d 149 (1996).

Our independent review leads us to agree with the district court that the rights at issue are statutory in nature and therefore, no contractual relationship existed between Honeywell and the Association. Two factors lead us to this conclusion: (1) the Act itself does not create a contract, and (2) the GICs do not specifically incorporate the terms of the Act.

First, the Act's guaranty is not itself a contract between the Association and those who qualify for the Act's protection. "In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." *United States Trust Co. v. New Jersey,* 431 U.S. 1, 17 n. 14, 97 S.Ct. 1505, 1516, 52 L.Ed.2d 92 (1977). The right to payment under the Act is not enforceable against the state of Minnesota but is an obligation imposed upon the Association. The Association is a nonprofit legal entity and not a state agency. Minn.Stat.Ann. § 61B.04, subd. 1 (West 1986). *See also* Minn.Stat.Ann. § 61B.21, subd. 1 (West Supp.1996). Even if the Association were a state agency, the Act contains no "clear indication that the legislature intends to bind itself contractually," which is necessary in order to overcome the general presumption "that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.,* 470

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U.S. 451, 465-66, 105 S.Ct. 1441, 1451, 84 L.Ed.2d 432 (1985) (quotations omitted). Rather, the Act creates an insurance guaranty association with attendant statutory obligations to safeguard the financial well-being of Minnesota residents to whom contractual obligations are owed by its member insurance companies. The Act does not create a contract; instead, it creates a statutory safety net to protect the economic well-being of Minnesota resident policy owners in the event a member insurer becomes insolvent.

Second, while the Association has the power to enter into contracts, Minn.Stat.Ann. § 61B.06, subd. 9(a) (West 1986), the Association is not a party to the GICs involved here. The GICs at issue are contracts between the Honeywell trustee and the impaired ELIC, not the Association. The Honeywell trustee did not specifically bargain for protection under the Act, and the Act is not expressly or impliedly incorporated into the terms of the GICs. "For the most part, state laws are implied into private contracts regardless of the assent of the parties only when those laws affect the validity, construction, and enforcement of contracts." *Romein,* 503 U.S. at 189, 112 S.Ct. at 1111. The Association's statutory obligation to guaranty the insurance coverage of residents protected by the Act does not in any way affect the validity, construction, or enforcement of ELIC's obligation on the GICs. Moreover, there is no evidence that the GICs were created in pursuance of the statutory obligation. *Cf. Coombes v. Getz,* 285 U.S. 434, 442, 448, 52 S.Ct. 435, 436, 438, 76 L.Ed. ***553** 866 (1932) (upholding the contractual liability created pursuant to a state constitutional rule of law that was repealed). The 1992 amendment merely altered definitions under the Act, which in turn affect the Association's statutory obligation to the Honeywell trustee, but the amendment did not alter or affect any bargained-for agreement between the Association and the Honeywell trustee. The Contract Clause does not "protect against all changes in legislation, regardless of the effect of those changes on bargained-for agreements." *Romein,* 503 U.S. at 190, 112 S.Ct. at 1107.

[1] We conclude that the Association's obligations are statutory in nature rather than contractual. Absent the existence of a contractual relationship, our Contract Clause inquiry is finished. Accordingly, we affirm the district court's conclusion that the 1992 amendment did not unconstitutionally impair a contractual relationship in violation of the Contract Clause.

B. DUE PROCESS

Honeywell's due process claim presents a closer question. Honeywell argues that retroactive application of the 1992 amendment defeats its vested right to payment under the Act, in violation of the Due Process Clause. Honeywell relies on *Coombes,* 285 U.S. at 439-48, 52 S.Ct. at 437-38, where the Supreme Court held unconstitutional the repeal of a California state constitutional provision that provided a cause of action against corporate directors. The Court stated in absolute terms that "neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired." *Id.* at 442, 52 S.Ct. at 436. More specifically, the Court in *Coombes* held, "a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. 1, § 10, and the due process of law clause in the Fourteenth Amendment, of the Federal Constitution." *Id.* at 448, 52 S.Ct. at 438. Honeywell also relies on *Ettor v. City of Tacoma,* 228 U.S. 148, 158, 33 S.Ct. 428, 431, 57 L.Ed. 773 (1913), where the Supreme Court held that a statutory right to compensation for property damage caused by the city in the course of grading streets, which right to compensation was complete before a repeal of the cause of action, was a vested property right that could not be retroactively destroyed. Claiming that these cases control the outcome of the case at hand, the Honeywell trustee asserts a vested right to payment under the Act as it existed when ELIC became insolvent, prior to the 1992 amendment.

The Association, on the other hand, urges us to follow more recent Supreme Court precedents in which the Court reviews economic legislation with a very deferential eye and does not accord vested rights status to economic rights. The Association observes that under this modern approach, due process is satisfied as long as a reasonable legislative purpose supports the retroactive application of the legislation. The Association contends that the retroactive 1992 amendment is supported by a reasonable legislative purpose, and alternatively, that no vested rights accrued in favor of the

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Honeywell trustee upon ELIC's insolvency.

In one sense, both arguments are right. The Supreme Court has never expressly overruled the reasoning of *Ettor* and *Coombes,* which accords great protection to accrued statutory causes of action. In the area of economic legislation, however, we cannot ignore the abundance of cases where substantive due process has evolved into a deferential rational basis analysis. We believe that an understanding of the historical context of *Ettor* and *Coombes* is essential to divine accurately the present weight of their authority on the issue before us. *See Hammond v. United States,* 786 F.2d 8, 11 (1st Cir.1986) (questioning the continued vitality of *Coombes* and *Ettor* because recent cases have retroactively abridged economic and real property rights without always carefully distinguishing these prior cases). *See also* W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking,* 48 Cal.L.Rev. 216, 232 (1960) ("The decision [of *Coombes v. Getz*] seems far too rigid in its conception of permissible legislative change and would almost certainly not be followed today.").

***554** *Ettor* and *Coombes* were decided during what is referred to in the history of American jurisprudence as the *Lochner* era, named for the pivotal case of judicial activism, *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (invalidating maximum work hours legislation as an unconstitutional exercise of police power). Cases of that era frequently invalidated statutes that limited economic autonomy in a manner thought by the Court to be unnecessary or unwise, but in more recent decisions, the Court plainly sees its role differently: "[W]e do not sit as a super legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952). The reasoning prevalent during the "*Lochner* [era] has been implicitly rejected many times." *Whalen v. Roe,* 429 U.S. 589, 597 & n. 18, 97 S.Ct. 869, 875, 51 L.Ed.2d 64 (1977). *See also United States v. Carlton,* 512 U.S. 26, 31- 34, 114 S.Ct. 2018, 2023-24, 129 L.Ed.2d 22 (1994) (recognizing that three tax cases from the *Lochner* era "were decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded' " (citation omitted)); *Planned Parenthood of S.E. Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, 861 (1992) (recognizing that the demise of *Lochner* era reasoning began in *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937)).

Within two years of the *Coombes* decision, substantive due process analysis in the area of retroactive economic legislation began to be framed in terms of reasonableness, drifting away from the *Lochner* era's strict protection of economic freedom and vested rights. *See Blaisdell,* 290 U.S. at 438, 54 S.Ct. at 240 (upholding as an emergency measure a mortgage moratorium law that impaired obligations on mortgage contracts). The Court acknowledged that even the expressly protected obligation of contracts (and similarly, we believe, the concept of vested rights) may be impaired by economic legislation if "the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." *Id.* This rational basis substantive due process test appears to have supplanted the legislatively restrictive vested rights mode of analysis, and allows legislatures more freedom in dealing with economic situations. *See, e.g.,* James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights,* 79 Cornell L.Rev. 87, 119 (Nov.1993) ("Modern jurists reject the categorical logic of vesting and consider the statute's justifications under the rubric of substantive due process."); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 Harv.L.Rev. 692, 696-97 (1959- 60) (noting that the vested rights analysis has been replaced by balancing three factors: (1) the nature and strength of the public interest served by the statute, (2) the extent to which the statute modifies or abrogates a preenactment right, and (3) the nature of the right altered by the statute).

[2] In 1976, the Court announced, "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976). These authorities leave no doubt that, even though

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Coombes and *Ettor* have never been overruled by the Supreme Court, the modern framework for substantive due process analysis concerning economic legislation requires only an inquiry into whether the legislation is reasonably related to a legitimate governmental purpose. Given the criticism surrounding the Court's *Lochner* era decisions in general, coupled with the development of judicial deference to economic legislation since then, we join those who question the continued validity of the vested rights analysis of *Coombes* and *Ettor* when reviewing the constitutionality of economic legislation, recognizing as we must that only the Supreme Court itself can overrule its precedents. We rely instead on the more recent Supreme Court pronouncements of substantive due process analysis for economic ***555** legislation, which articulate a rational basis test.

[3][4] Our task, then, is to determine whether the retroactive application of the 1992 amendment is justified by a rational legislative purpose, or whether it is illegitimate and arbitrary. Retroactive legislation, like prospective legislation, must meet the reasonableness test of due process. *Usery,* 428 U.S. at 17, 96 S.Ct. at 2893. "But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 730, 104 S.Ct. 2709, 2718, 81 L.Ed.2d 601 (1984). Retroactive economic legislation has been upheld as reasonable even in circumstances where it destroys a settled expectancy or imposes a new liability. *See, e.g., Carlton,* 512 U.S. at 30-31, 114 S.Ct. at 2022-23 (upholding a curative measure that took away an expected and relied upon deduction for estate tax); *Gray,* 467 U.S. at 734, 104 S.Ct. at 2720 (upholding retroactive application of ERISA's withdrawal liability as supported by rational legislative purpose); *Usery,* 428 U.S. at 19-20, 96 S.Ct. at 2894-95 (upholding retroactive aspects of Black Lung Benefits Act of 1972, which required employers to compensate former employees disabled by a work- related disease). The Court has repeatedly noted that although certain economic liabilities or burdens were not anticipated, nevertheless, " ' "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." ' " *Concrete Pipe & Prod. v. Constr. Laborers Pension Trust,* 508 U.S. 602, 637, 113 S.Ct. 2264, 2287, 124 L.Ed.2d 539 (1993) (quoting *Gray,* 467 U.S. at 729, 104 S.Ct. at 2717-18, quoting *Usery,* 428 U.S. at 16, 96 S.Ct. at 2892-93).

Using these standards, we conclude that the 1992 amendment redefining "contractual obligation" was neither arbitrary nor illegitimate. The state has a legitimate interest in regulating the insurance industry, easing the economic burdens of its own residents, and ensuring the economic life of an association created by its statute to protect its residents. The general purpose of the Act at issue in this case "is to protect the future financial stability of individuals," *Minnesota Life & Health Ins.,* 400 N.W.2d at 773, and the preamendment Act expressly provided protection to "residents" to whom "contractual obligations" are owed. Minn.Stat. § 61B.06, subd. 2 (1986). The 1992 amendment serves to narrow the definition of contractual obligation, explicitly providing coverage only to resident plan participants. This is a legitimate purpose.

[5][6] The 1992 amendment is also curative in nature, even though it worked a substantive change in the law. *See Honeywell,* 518 N.W.2d at 560- 63 (holding that the amendment worked a substantive change in the law because before the amendment, it plainly entitled resident policy owners, including trustees, to coverage). Curative legislation corrects an unintended and unanticipated mistake in the underlying legislation, which went undetected until some time after the original enactment. Certainly, legislatures have the authority to cure inadvertent defects in their legislation. *See Carlton,* 512 U.S. at 30, 114 S.Ct. at 2022 (upholding Congress's attempt to cure a defect in the tax code). In *Carlton,* the Court concluded that Congress's purpose in retroactively taking away an estate tax deduction, even though the decedent's executor had relied upon it, was neither illegitimate nor arbitrary because "Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." 512 U.S. at 31, 114 S.Ct. at 2023. We also note the observation of one commentator that "the individual who claims that a vested right has arisen from the defect is seeking a windfall since, had the legislature's ... action had the effect it was intended to and could have had, no such right would have arisen." Hochman, *supra* at 705.

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Here, the Minnesota legislature acted reasonably when it gave retroactive effect to the 1992 amendment in order to cure a drafting defect that might have inadvertently left thousands of Minnesota residents without coverage under the Act due to the ELIC debacle. We agree with the observation of the Supreme Court of Minnesota: "Given ***556** that unallocated annuity contracts were not prevalent at the time of the statute's enactment in 1977, the legislature likely did not contemplate how the Act specifically applied to these contracts." *Honeywell,* 518 N.W.2d at 561. Absent retroactive effect, an unintended gap in coverage would have left many Minnesota resident workers (whose trustee resided elsewhere) without coverage, while an unintended windfall in favor of nonresident workers who had a Minnesota trustee would have strained the financial capabilities of the Association and required Minnesota residents to pay higher premiums to finance the Association's obligation to out-of-state residents. In sum, "the interest in the retroactive curing of such a defect in the administration of government outweighs the individual [trustee's] interest in benefiting from the defect." Hochman, *supra* at 705-06. Thus, we conclude that retroactive application of the 1992 amendment was a rational means by which to accomplish the state's legitimate goals.

Honeywell contends that retroactive application is arbitrary and irrational because there is no connection linking the Honeywell trustee to the ELIC failure that triggered coverage and because the amendment has a disparate impact on non-residents. Neither contention has merit. We have already determined that the retroactive application of the amendment was rational and prevented an unanticipated gap in coverage for resident plan participants and an unexpected windfall for nonresident plan participants. Because the context here is curative in nature, there is no need to demonstrate any connection of the Honeywell trustee to the ELIC failure in order for the legislation to be rational. We agree with the Association's contention that the amendment actually eliminates the arbitrary aspect of the prior legislation under which Minnesota residents may or may not have had coverage for their plan funds, depending solely upon the arbitrary residence of their plan trustee, over which they have no control. Additionally, the disparate impact results only from the state's legitimate interest in maintaining the welfare of its own citizens, not from arbitrariness or discrimination. Retroactive application does not deprive nonresidents of any rights (except the expectation of coverage based on the arbitrary residence of their trustee), and it does not place any added burdens or liabilities on nonresidents.

To the extent Honeywell argues that this case is fully controlled by *Coombes* and *Ettor,* we also disagree. As already noted, we question the continued vitality of these cases. Furthermore, even assuming they remain authoritative, we conclude that they do not control the outcome in this situation. In our view, *Ettor* and *Coombes* do not stand for the proposition that an inviolable vested right exists whenever a statutory economic right accrues. In *Coombes,* the Court expressly protected what had become a vested contract right, independent of the statute. 285 U.S. at 448, 52 S.Ct. at 438. We have previously concluded that no contract rights are implicated by the 1992 amendment. This case involves legislation of economic matters which exist only by statute and have not been integrated into a private contract, and Honeywell did not even make choices in reliance on the preamendment Act. In *Ettor,* the Court protected a cause of action that provided a remedy for property damage to private property that occurred while the city graded streets for public use. 228 U.S. at 156, 33 S.Ct. at 430- 31. In the present case, neither the state nor the Association caused a harm and then took away a remedy for the injury caused, as the city and state did in *Ettor.*

In sum, *Coombes* and *Ettor* are not directly applicable to the case at hand because each involves an element distinguishable from the type of economic legislation at issue here. Thus, even if *Coombes* and *Ettor* apply, they do not dictate a conclusion that accrued economic rights under the preamendment Act rise to the level of a vested right. Rather, in spite of the expectancies that may have been based upon the preamendment Act, the retroactive 1992 amendment was a rational means by which to accomplish the legitimate economic goal of ensuring the welfare of Minnesota resident workers.

III. CONCLUSION

Finding no violation of either the Contract Clause or the Due Process Clause through ***557** retroactive

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application of the 1992 amendment, we affirm the judgment of the district court.

LOKEN, Circuit Judge, with whom BOWMAN, Circuit Judge, joins, concurring.

I concur in Part II.B. of the court's opinion, concluding that the Minnesota statute at issue does not violate Honeywell's right to substantive due process, except to the extent that the rollover paragraph on pages 18 and 19 is inconsistent with my view of the Contract Clause issue. As to that issue, I respectfully disagree with the court's conclusion that no contract has been impaired, but I agree that there has been no *unconstitutional* impairment. Accordingly, I concur in the court's decision to affirm.

As the court explains, the modern Contract Clause analysis is (1) has the State impaired a contract, (2) is the impairment substantial, and (3) is the statute nevertheless a permissible exercise of the State's police power. *See General Motors v. Romein,* 503 U.S. 181, 186, 112 S.Ct. 1105, 1109, 117 L.Ed.2d 328 (1992); *Energy Reserves, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 410, 103 S.Ct. 697, 703-04, 74 L.Ed.2d 569 (1983). The latter two factors are interrelated. "The severity of the impairment measures the height of the hurdle the state legislation must clear." *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 245, 98 S.Ct. 2716, 2723, 57 L.Ed.2d 727 (1978).

[7] *1. Was There a Contract.* My starting point on this question is *Coombes v. Getz,* 285 U.S. 434, 440-42, 52 S.Ct. 435, 435-36, 76 L.Ed. 866 (1932), in which California repealed a constitutional provision holding corporate directors personally liable to creditors for embezzled or misappropriated corporate funds. In holding that the repeal unconstitutionally impaired a creditor's contract with a corporation, the Court described the repealed liability as "in its nature contractual." Justice Cardozo in dissent observed that to call the liability contractual was "a legal fiction ... borrowed from the law of quasi contracts." But he nonetheless agreed that the Contract Clause may protect a creditor's "contract with a corporation secured in certain contingencies by a statutory liability."

To me, *Coombes* confirms that a statute may create a contract between private parties that the Contract Clause protects. *See also Steamship Co. v. Joliffe,* 2 Wall. 450, 69 U.S. 450, 456-57, 17 L.Ed. 805 (1864) (statute created contract between shipping company and harbor pilots); *Hawthorne v. Calef,* 2 Wall. 10, 69 U.S. 10, 22, 17 L.Ed. 776 (1864) (statute providing that stock is security for railroad's creditors created contract between creditors and shareholders). All recent Supreme Court cases analyzing whether a statute had created a contract for Contract Clause purposes dealt with obligations of the State, rather than, as in *Coombes,* obligations the State has compelled private parties to assume. But that should not alter the analysis. For example, even if a statute mandates the terms of a fire insurance policy, the policy is still a contract. *Accord In re Workers' Compensation Refund,* 46 F.3d 813, 818 (8th Cir.1995).

In this case, the statute created the Guaranty Association, a private non- profit entity consisting of all insurers wishing to do business in the State, and required that entity to guarantee the "covered policies" of its members in the event of an insolvency. That third party guaranty looks much like the statutory liability in *Coombes.* "In determining whether a particular statute gives rise to a contractual obligation, it is of first importance to examine the language of the statute." *National R.R. Passenger Corp. v. Atchison, Topeka & S.F. Ry.,* 470 U.S. 451, 466, 105 S.Ct. 1441, 1452, 84 L.Ed.2d 432 (1985). Here, the statute uses the word "guaranty" in its title and provides that the Association "shall ... guarantee, assume, or reinsure" the obligations of its members. Minn.Stat. § 61B.06, subd. 1 (1986). A guaranty is a contract under Minnesota law. *See Baker v. Citizens State Bank of St. Louis Park,* 349 N.W.2d 552, 557-58 (Minn.1984). In these circumstances, Honeywell has had a "contract" impaired, either its underlying investment contracts with ELIC or, more directly, the guaranty by the Guaranty Association. The contrary conclusion of the Minnesota Supreme Court, though entitled to deference in its construction of state law, is not binding ***558** on us for Contract Clause purposes. *See Romein,* 503 U.S. at 187, 112 S.Ct. at 1110.

[8] *2. Was the Contract Substantially Impaired.* Total destruction of a contract is a substantial impairment. *Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 431, 54 S.Ct. 231, 237, 78 L.Ed. 413 (1934). At first glance, this case seems

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to involve total destruction of the guaranty rights of non-resident Honeywell employees. But that ignores the nature of the guaranteed contracts. As a GIC trade association monograph explained, "GICs are assets of the pension plan. Individual employees do not own any part of a GIC, nor do employees have any individual rights under the contract." Thus, properly viewed, the impairment is partial--a reduction in the Association's guaranty obligation to the Honeywell Plan. (Whether that loss to the Plan must ultimately be borne only by non-resident beneficiaries is an issue not before us.)

Though partial, the impairment is quantitatively substantial--based on the percentage of non-resident Honeywell employees, the statutory amendment deprived the Plan of some 75% of its guaranty claim against the Association. In addition, the impairment was not merely incidental to another legislative purpose; the statute was enacted to impair. *Compare Energy Reserves,* 459 U.S. at 418, 103 S.Ct. at 708; *Exxon v. Eagerton,* 462 U.S. 176, 194 n. 14, 103 S.Ct. 2296, 2307, 76 L.Ed.2d 497 (1983).

Beyond the sheer magnitude of an impairment, the Supreme Court looks at whether the impaired term was central to the contract, whether settled expectations have been disrupted, and whether the impaired right was reasonably relied on. *See El Paso v. Simmons,* 379 U.S. 497, 514, 85 S.Ct. 577, 586- 87, 13 L.Ed.2d 446 (1965); *Spannaus,* 438 U.S. at 243 n. 14, 98 S.Ct. at 2722 n. 14. In general, when an industry is heavily regulated, parties are considered to have less reasonable expectation that legislation will not alter their contractual arrangements. *See Energy Reserves,* 459 U.S. at 411, 103 S.Ct. at 704. These other factors cut against the substantiality of this impairment. As in *Veix v. Sixth Ward Bldg. & Loan Ass'n of Newark,* 310 U.S. 32, 38, 60 S.Ct. 792, 794-95, 84 L.Ed. 1061 (1940), the industry is both heavily regulated and "regulated in the particular to which [Honeywell] now objects," since the State created the impaired guaranty. Honeywell cannot show substantial reliance on the Association's guaranty when it purchased the GICs in 1988 because the Association has broad power to unilaterally impose conditions on its guaranty obligations, subject to the Commissioner's approval, including the power to declare a moratorium on payments. *See* Minn.Stat. § 61B.06, subds. 1-3 (1986); *Honeywell v. Minnesota Life & Health Ins. Guar. Ass'n,* 518 N.W.2d 557, 563 (Minn.1994).

On the other hand, recent Eighth Circuit cases have looked unfavorably on retroactive legislation impairing contracts, even in heavily regulated industries. *See Workers' Compensation Refund,* 46 F.3d at 820 (statute confiscating excess reinsurance premiums invalid though reinsurance plan documents incorporated changes in state law); *Holiday Inns Franchising, Inc. v. Branstad,* 29 F.3d 383, 384 (8th Cir.), (statute retroactively restricting franchisor termination rights invalid), *cert. denied,* 513 U.S. 1032, 115 S.Ct. 613, 130 L.Ed.2d 522 (1994); *Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dept. of Public Welfare,* 742 F.2d 442, 451 (8th Cir.1984) (statute retroactively reducing nursing home rates for medicaid patients invalid "because it disrupts settled and completed financial arrangements under contracts made in reliance on existing law"), *cert. denied,* 469 U.S. 1215, 105 S.Ct. 1191, 84 L.Ed.2d 337 (1985).

On balance, I conclude this impairment is substantial. Honeywell lost 75% of its guaranty benefit. *Cf. Spannaus,* 438 U.S. at 247, 438 U.S. at 239-40 (statute imposing $185,000 pension charge on employer closing state office was substantial impairment). Thus, on the sliding scale the Supreme Court uses for the last two Contract Clause factors, this impairment requires close scrutiny of the State's justification.

3. Is the Substantial Impairment Justified. The economic interests of a state may justify its impairing contracts, *see, e.g., Blaisdell,* 290 U.S. at 437, 54 S.Ct. at 239-40, but the Contract Clause imposes limits on that ***559** power. "Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *United States Trust Co. of New York v. New Jersey,* 431 U.S. 1, 22, 97 S.Ct. 1505, 1518, 52 L.Ed.2d 92 (1977). Given the deference paid to state legislatures, especially when the State is not a party to the impaired contract, most claims founder on this aspect of the modern Contract Clause analysis. The Supreme Court looks hard at whether there is a legitimate public purpose and then defers to the legislative judgment as to the reasonableness of a particular remedy. *See Energy Reserves,* 459 U.S

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at 412-13, 103 S.Ct. at 704-06.

Of particular importance in this case, the Court has stated that it is reasonable to amend a statute to eliminate unforeseen consequences or windfall benefits, even if that impairs existing contracts. *See U.S. Trust,* 431 U.S. at 31 & n. 30, 97 S.Ct. at 1522 & n. 30; *Energy Reserves,* 459 U.S. at 412, 103 S.Ct. at 704-05. For example, the Court in *U.S. Trust* explained that the amendment in *El Paso* was valid because it simply limited parties "to those gains reasonably to be expected from the [original] contract." Conversely, the amendment struck down in *U.S. Trust* was not in response to windfall benefits or unforeseen consequences because it repealed a provision expressly prohibiting the use of Port Authority revenues for transportation subsidies.

In this case, the Minnesota Legislature based its initial 1977 statute on the NAIC Model Life & Health Guaranty Association Act. The Model Act at that time provided that the association must guarantee all obligations of an insolvent *domestic* insurer. For an insolvent foreign or out-of-state insurer, however, the association only guaranteed "the covered policies of residents," and it would have "no liability" if that insurer's home State provided "substantially similar" protection "for residents of other states." *See*Minn.Stat. § 61B.06, subds. 2 and 4 (1986). In other words, if every State had enacted this Model Act and uniformly applied it, the association in an insolvent U.S. insurer's home State would pay *all* guaranty claims. But if an offshore insurer grabbed everyone's money and went under, each State's association would guarantee the covered policies of that State's residents.

In this environment, Honeywell's guaranty claim for its investment in ELIC GICs posed a substantial unforeseen consequence in Minnesota for three reasons. First, the legislators who enacted the initial Minnesota statute in 1977 did not foresee that, unlike regulators in most every other State, Minnesota's Commissioner would take the position in the 1980s, before ELIC became insolvent, that GICs are "covered policies," and the Supreme Court of Minnesota would agree in *Minnesota Life & Health Ins. Guar. Ass'n v. Department of Commerce,* 400 N.W.2d 769, 773-74 (1987). As a result of this lack of uniform implementation, when Honeywell sent its ELIC claims to all fifty States, it received blanket denials from most everyone except Minnesota.

Second, the Legislature did not foresee that "covered policies" would include group annuities in which a single contract holder, rather than thousands of beneficiaries, is the "resident." One can argue that this issue was reasonably foreseeable. But I see no indication that even the drafters of the various Model Acts anticipated the problem before 1985. That the issue was unforeseen is confirmed by the fact that any careful drafter familiar with ERISA insurance-funded group life and health plans would not try to solve this complex an issue with the single word "resident."

Third, Honeywell took the position that the $300,000 statutory ceiling on the Association's liability "for all benefits ... with respect to any one life," Minn.Stat. § 61B.06, subd. 8 (1986), does not apply to its GIC claims. That exposed the Association to a $111,000,000 claim, far more than any State has allowed in *expressly* covering GICs. *See* Minn.Stat. § 61B.19, subd. 4(6) (1996) ($7,500,000 limit on claims regarding "unallocated annuities of a retirement plan"); 1985 NAIC Model Act § 3(c)(2)(B) ($5,000,000 limit).

Faced with this surprising confluence of factors that produced a genuinely unforeseen consequence and arguable windfall benefit, ***560** the Legislature enacted an amendment that reduced the Association's statutory guaranty to a level that Honeywell (or any other plan sponsor) should reasonably have expected from the statute as originally enacted: because GICs are not "covered policies" in California, ELIC's home State, the Minnesota Association must guarantee ELIC's GIC obligations to Minnesota residents; therefore, the Honeywell Plan is entitled to a guaranty benefit equal to that portion of its GIC contracts that represent investments on behalf of its Minnesota resident beneficiaries.

In enacting this amendment, the State acted in furtherance of the legitimate economic interests of its citizens. [FN3] The effect of its action was to reduce a state-mandated private benefit in a manner not inconsistent with the reasonable expectations of the parties to that "contract." In these circumstances, I concur in the court's conclusion that Minnesota did not unconstitutionally impair the

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Contract Clause rights of the Honeywell Plan trustee or the Plan's ultimate employee beneficiaries.

> FN3. As the court observes in its substantive due process discussion, because the Association's liabilities are unfunded--claims are paid by post-insolvency assessments of the remaining, solvent members--it does not take a team of actuaries to deduce that if Minnesota compels the Association to bestow uniquely generous guaranty benefits on the non- Minnesota customers of this year's insolvent insurer, ELIC, the Association's members must eventually recoup those benefits by imposing higher insurance premiums on future Minnesota policyholders.

RICHARD S. ARNOLD, Chief Judge, with whom McMILLIAN, MAGILL, BEAM, and MORRIS SHEPPARD ARNOLD, Circuit Judges, join, dissenting.

I agree with Judge Loken that a contract was impaired by the Minnesota Legislature's amendment of section 61B. I also believe that impairment was substantial within the meaning of the Contracts Clause, and not sufficiently justified. I therefore respectfully dissent.

The lead opinion holds that there was no contract to be impaired when the Minnesota Legislature amended § 61B to exclude out-of-state-resident life-insurance policyholders and other beneficiaries from its coverage. As Judge Loken's opinion explains, it is settled law that obligations between private parties which are mandated by statute may nonetheless be contractual and enforceable as such. The statute which created the Minnesota Life and Health Insurance Guaranty Association states that the Association was created to protect the rights of policyowners and other beneficiaries by guaranteeing the obligations owed them by insurance companies. Minn.Stat. § 61B.02 subd. 2 (1990) ("The purpose of sections 61B.01 to 61B.16, is to protect policyowners, death benefit certificate holders, insureds, beneficiaries, annuitants, payees, and assignees of life insurance policies, health insurance policies, annuity contracts and supplemental contracts...."). The duty to guarantee the obligations of member insurance companies appears to be the Association's primary reason for existence. The power to collect assessments from member companies exists to enable the Association to fulfill that duty. A guaranty is itself a kind of contract, an undertaking to fulfill the obligation of another if that other is in default.

It seems improbable that the Legislature would create a separate, nonprofit legal entity and endow it with the power to collect assessments from member insurance companies without demanding reciprocal performance from the Association. The words of the statute belie such a possibility: "If a domestic insurer is an impaired insurer [unable to meet its obligations to policyholders and other beneficiaries], the association shall ... guarantee, assume, or reinsure, or cause to be guaranteed, assumed, or reinsured, the covered policies of the impaired insurer...." Minn.Stat. § 61B.06 subd. 1(b); see also § 61B.06 subd. 2 (pertaining to foreign insurers). The lead opinion today holds the Association did not owe a contractual duty to guarantee all covered policies because a legislature must exhibit a clear indication that it intends to bind itself contractually before it will be considered to be so bound. The Legislature in the instant case did not bind itself, however; it bound the Association. The Legislature created the Association to collect membership fees from insurance companies and to assume the obligations of those ***561** companies should they become "impaired." I therefore agree with Judge Loken that the obligations owed by the Association, even though their origin is in the statute, are nonetheless contractual and not merely "statutory."

It follows that the Minnesota Legislature's amendment of the statute was an impairment of a contract. Two sets of contractual relationships were impaired by the Legislature's action: that between Honeywell's trustee and the Association, and that between the trustee and ELIC. The former is affected because the Association, under the amended statute, is released from most of its duty to guarantee the obligation owed the trustee. The latter is affected because the trustee contracted with ELIC under the prior version of the statute, and consequently under the assumption that the GICs were fully guaranteed by the Association.

Judge Loken's concurring opinion concludes that there was only a partial destruction of the contract in this case, because the amendment merely diminished the Association's obligation to guarantee the GICs, rather than destroying that obligation completely. As Judge Loken recognizes, a substantial

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impairment need not be a total destruction to violate the Contracts Clause. I agree that the impairment in this case was substantial. Indeed, the Minnesota Legislature chose which investments to protect and which to abandon at the level of the individual, according to the individual's state of residence. It specifically intended to abrogate the Association's duty to guarantee a given obligation based on the individual investor to whom that duty was owed. It therefore seems appropriate to view the Legislature's action as a complete destruction of those individual contractual relationships.

The Supreme Court has held that the Constitution does not prevent a legislature from working a substantive change in the law, and impairing contracts thereby, as long as it had sufficient justification for doing so. "[L]egislation adjusting the rights and responsibilities of contracting parties" will not violate the Contracts Clause if it is created "upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *Allied Structural Steel v. Spannaus,* 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727 (1978) (internal quotation omitted).

One possible justification for the amendment could be to avoid unforeseen consequences or windfall benefits. Under that view, the Legislature could not have foreseen that Minnesota's Association would be the only one which guaranteed GICs as "covered policies." To the contrary, it was not only foreseeable, but readily ascertainable, that other states did not treat GICs the way Minnesota did. Minnesota's Commissioner and its State Supreme Court both came to that conclusion in the 1980s.

Minnesota also, it is argued, could not have intended to guarantee coverage of policies based simply on the residence of a trustee. The coverage mandated by such a rule, the argument continues, is far more expansive than the Legislature could have anticipated. Perhaps the Legislature did not anticipate that the Association would incur such a large obligation. But it should have; the language of the statute is not so ambiguous that such a reading should be surprising. Under the subdivision which applies to out-of-state impaired insurers, the statute requires the Association to "guarantee, assume, or reinsure or cause to be guaranteed, assumed, or reinsured, the covered policies of residents, and shall make or cause to be made prompt payment of the impaired insurer's contractual obligations which are due and owing to residents." Minn.Stat. § 61B.06 subd. 2. It was clear when Honeywell applied for coverage of its ELIC GICs that GICs were already "covered policies" in Minnesota. The ambiguity is allegedly whether "residents" could foreseeably have included a trustee which held several "covered policies" on behalf of both resident and non-resident beneficiaries. The statute defines "resident" in § 61B.03: " 'Resident' means any person who resides in this state at the time the impairment is determined and to whom contractual obligations are owed." "Person," according to the statute, "means any individual, corporation, partnership, association or voluntary organization." Minn.Stat. § 61B.03 subd. 12-13. The drafters should have realized ***562** that individual corporations, partnerships, associations, and voluntary organizations could hold numerous covered policies on behalf of employees or other beneficiaries. I therefore cannot agree that the Legislature's amendment of the statute is justified because of unforeseeable consequences.

That the amendment imposed a retroactive change raises the "hurdle" the state must clear in order to justify a substantial impairment of contracts. Legislation which makes prospective changes affecting private contracts is an appropriate and commonplace legislative function; private contracting parties, especially in regulated industries, should expect that laws and regulations may change and affect their future dealings. We examine the state's justification for retroactive changes more carefully because the opposite is generally true: private contracting parties should and do expect that the conditions under which they contracted will remain in effect unless and until there is a change. They do not normally expect lawmakers to change the basic assumptions underlying those agreements so as to affect legal obligations incurred, or rights vested, in the past. See *Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dep't of Pub. Welfare,* 742 F.2d 442, 450-51 (8th Cir.1984) (upholding prospective change but striking down retroactive change because it "disrupt[ed] settled and completed financial arrangements under contracts made in reliance on existing law"), *cert. denied,* 469 U.S. 1215, 105 S.Ct. 1191, 84 L.Ed.2d 337 (1985); *Holiday Inns Franchising, Inc. v. Branstad,* 29 F.3d 383, 385

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(8th Cir.) (observing that retroactive changes which alter prior contractual relationships have "almost uniformly been declared unconstitutional," and that "this is a datum on which [parties] are presumably allowed to rely while bargaining"), *cert. denied,* 513 U.S. 1032, 115 S.Ct. 613, 130 L.Ed.2d 522 (1994).

The Minnesota Legislature in this case deliberately effected a retroactive change in the law to allow the Association to avoid a $110 million payout. The Minnesota Supreme Court has held that the Legislature's amendment was a change, and not a clarification of the statute. *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n,* 518 N.W.2d 557, 562 (Minn.1994). The Legislature's action was a deliberate, retroactive change in the law which altered the settled contractual duties of the Association, and greatly impaired Honeywell's right to payment. The size of the payout, while substantial, does not seem to me to provide sufficient justification for the change. Indeed, the large size of the payout serves only to underscore the substantiality of the obligation that the Legislature has nullified.

Many reasons underlay the determination of the Framers to create a new Constitution. Perhaps none was more prominent than their conviction that States should not be allowed to destroy or water down contracts for the payment of money. The Contracts Clause "was perhaps the strongest single constitutional check on state legislation during our early years as a Nation...." *Allied Structural Steel Co. v. Spannaus, supra,* 438 U.S. at 241, 98 S.Ct. at 2720-21 (footnote omitted). I regret that this Court today shrinks from enforcing this part of the Constitution, which is designed to safeguard a basic human right, the right to make private contracts. It is not a coincidence that most of the people injured by this statute cannot vote for the Minnesota Legislature.

I respectfully dissent.

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United States Court of Appeals,
Third Circuit.

In re TMI,
Dorothy L. Aldrich; Faith Alleman; Philip Angeli; Michael J. Anoka; Ruth V. Anoka; Catherine J. Balinosky; Regis E. Beasley; Louis Borda; Betty Marie Boylestein; George L. Boylestein; Shirlean Burhanan; Ruth E. Butler; Frank J. Caka; Susan H. Chynoweth; Daniel M. Chynoweth; Catherine Costello; John T. Costello; Martha A. Costik; Richard N. Costik; Mary Margaret Earhart; Edward Ferguson; Marco G. Glad, Jr.; Linda I. Glad; Barbara Grandon; Helen M. Hank; Edward John Hertzog; Marie H. Hertzog; Dianne Hindermyer; George Vance Hitz; Marjorie B. Hitz; Carol C. Hoch; Louis A. Hoch; Estate Of Robert P. Holmes; Thelma M. Nagy; Barry Obercash; Georgeann Pristello; James J. Pristello; Jamie Lynn Pristello; Kenneth R. Snyder; Patricia Southard; Joseph Stewart; Charlotte Evelyn Stewart, Appellants.

No. 94-7598.

Argued May 1, 1995.
Decided July 18, 1996.

Pennsylvania residents brought actions in Pennsylvania state court, Mississippi state court, and federal district court in Mississippi seeking to recover for injuries allegedly sustained as result of Three Mile Island nuclear accident. After dismissal of Pennsylvania state claims based on statute of limitations was affirmed, and Price-Anderson Amendments Act was amended, claims were transferred to federal district court in Pennsylvania and consolidated, and defendants moved for summary judgment on claims originally brought in Mississippi state and federal court. The United States District Court for the Middle District of Pennsylvania, Sylvia H. Rambo, J., granted summary judgment on claims originally brought in Mississippi and adopted prior summary judgment by Pennsylvania state court. Plaintiffs appealed, and the Court of Appeals, Scirica, Circuit Judge, held that: (1) under Act, Pennsylvania statute of limitations applied retroactively to actions properly filed and pending in Mississippi at time of Act's enactment; (2) retroactive application of Act did not violate due process clause; (3) plaintiffs were not entitled to grace period following retroactive application; and (4) discovery rule and doctrine of fraudulent concealment could not be applied to extend period.

Affirmed.

Sarokin, Circuit Judge, dissented and filed opinion.

West Headnotes

[1] Federal Courts ⚿766
170Bk766 Most Cited Cases

Review by Court of Appeals of district court's grant of summary judgment is plenary.

[2] Federal Courts ⚿754.1
170Bk754.1 Most Cited Cases

Court of Appeals exercises plenary review of district court's construction of statute.

[3] Limitation of Actions ⚿6(1)
241k6(1) Most Cited Cases

Under Price-Anderson Amendments Act, Pennsylvania statute of limitations applied retroactively to actions filed in Mississippi state court prior to effective date of Act to recover for injuries allegedly suffered as result of Three Mile Island nuclear accident. Atomic Energy Act of 1954, § 11(hh), as amended, 42 U.S.C.A. § 2014 (hh); Price-Anderson Amendments Act of 1988, § 20(b), 42 U.S.C.A. § 2014 note.

[4] Federal Courts ⚿425
170Bk425 Most Cited Cases

Statutes of limitations are treated as substantive rules of decision, as to which state law is applicable in federal diversity action, for purposes of *Erie* doctrine.

[5] Federal Courts ⚿372

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170Bk372 Most Cited Cases

Intent of *Erie* doctrine is to ensure that outcome of litigation in diversity action in federal court should be substantially the same, so far as legal rules determine outcome of litigation, as it would be if tried in state court.

[6] Electricity ⚷16(1)
145k16(1) Most Cited Cases

Intent of Congress in enacting provision of Price-Anderson Amendments Act under which substantive rules for decision in any public liability action are derived from law of state in which nuclear incident occurs was to ensure that outcome of any public liability action arising from single nuclear incident should be substantially the same as it would be if tried in state where incident occurred. Atomic Energy Act of 1954, § 11(hh), as amended, 42 U.S.C.A. § 2014(hh).

[7] Limitation of Actions ⚷2(1)
241k2(1) Most Cited Cases

Pennsylvania courts generally apply Pennsylvania's statute of limitations not only to wholly domestic causes of action but also to causes of action arising in other jurisdictions unless, pursuant to Pennsylvania's borrowing statute, Pennsylvania court is directed to apply shorter limitation statute of another jurisdiction.

[8] Constitutional Law ⚷305(1)
92k305(1) Most Cited Cases

Legislation affecting pending tort claim is not subject to heightened scrutiny review under due process clause, because pending tort claim does not constitute vested right. U.S.C.A. Const.Amend. 5.

[9] Constitutional Law ⚷253(4)
92k253(4) Most Cited Cases

Challenge under due process clause to retroactive application under Price- Anderson Amendments Act of Pennsylvania statute of limitations to actions arising from Three Mile Island nuclear accident which were already filed and pending in Mississippi state court at time of Act's enactment was reviewed under rational basis standard. U.S.C.A. Const.Amend. 5; Atomic Energy Act of 1954, § 11(hh), as amended, 42 U.S.C.A. § 2014(hh); Price-Anderson Amendments Act of 1988, § 20(b), 42 U.S.C.A. § 2014 note.

[10] Constitutional Law ⚷253(4)
92k253(4) Most Cited Cases

[10] Limitation of Actions ⚷6(1)
241k6(1) Most Cited Cases

Retroactive application pursuant to Price-Anderson Amendments Act of Pennsylvania statute of limitations to actions arising from Three Mile Island nuclear accident which were already properly filed and pending in Mississippi state court at time of Act's enactment was supported by rational basis and did not violate due process clause; retroactive application uniformly applied to all plaintiffs and advanced equity by applying same law to similarly situated plaintiffs, and promoted efficiency by allowing exercise of federal jurisdiction over, and consolidation of, claims arising from accident. U.S.C.A. Const.Amend. 5; Atomic Energy Act of 1954, § 11(hh), as amended, 42 U.S.C.A. § 2014 (hh); Price-Anderson Amendments Act of 1988, § 20(b), 42 U.S.C.A. § 2014 note.

[11] Federal Courts ⚷1.1
170Bk1.1 Most Cited Cases

Congress cannot confer subject matter jurisdiction on federal courts where there is no underlying federal statute creating federal question.

[12] Limitation of Actions ⚷6(1)
241k6(1) Most Cited Cases

Pennsylvania residents who had filed actions to recover for injuries allegedly suffered in Three Mile Island nuclear accident in Mississippi state court after failing to timely bring claims under two-year Pennsylvania statute of limitations were not entitled to grace period after retroactive application of Pennsylvania statute of limitations to Mississippi claims under Price-Anderson Amendments Act rendered those actions untimely; even if Pennsylvania law still requires grace period after retroactive application of statute, Pennsylvania Supreme Court would not apply grace period to plaintiffs who missed Pennsylvania limitations period and brought suit in another state. Atomic Energy Act of 1954, § 11(hh), as amended, 42

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U.S.C.A. § 2014(hh); Price- Anderson Amendments Act of 1988, § 20(b), 42 U.S.C.A. § 2014 note.

[13] Limitation of Actions ⚿2(1)
241k2(1) Most Cited Cases

Pennsylvania borrowing statute accurately reflects state policy against forum shopping by applying to claims arising in another state either the other state's statute of limitations or Pennsylvania statute of limitations, whichever is shorter, and unequivocally evinces legislativeintent to prevent plaintiff who sues in Pennsylvania from obtaining greater rights than those available in state where cause of action arose. 42 Pa.C.S.A. § 5521.

[14] Limitation of Actions ⚿95(1)
241k95(1) Most Cited Cases

Under Pennsylvania law, "discovery rule" tolls running of statute of limitations until plaintiff knows, or reasonably should know, that he has been injured and that his injury has been caused by another party's conduct.

[15] Limitation of Actions ⚿195(3)
241k195(3) Most Cited Cases

Under Pennsylvania law, plaintiff bears burden of proving that claim was filed within applicable statute of limitations.

[16] Federal Civil Procedure ⚿2466
170Ak2466 Most Cited Cases

Where nonmoving party bears burden of proof at trial, summary judgment is appropriate if nonmovant fails to make showing sufficient to establish existence of element essential to its case.

[17] Federal Civil Procedure ⚿2544
170Ak2544 Most Cited Cases

In responding to motion for summary judgment, nonmoving party must go beyond pleadings and by her own affidavits, or by depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is genuine issue for trial.

[18] Limitation of Actions ⚿95(4.1)
241k95(4.1) Most Cited Cases

Under Pennsylvania law, plaintiffs who brought actions to recover for injuries allegedly sustained as result of Three Mile Island nuclear accident could not rely on discovery rule to toll running of statute of limitations; plaintiffs knew of accident and knew or should have known that exposure to radiation as result of accident could cause adverse health affects.

[19] Limitation of Actions ⚿104(2)
241k104(2) Most Cited Cases

Under Pennsylvania law, in order to establish fraudulent concealment by defendant as will toll statute of limitations plaintiff must prove affirmative or independent act of concealment that would divert or mislead plaintiff from discovering injury or its cause.

[20] Limitation of Actions ⚿104(2)
241k104(2) Most Cited Cases

Under Pennsylvania law, plaintiffs who sought to recover for injuries allegedly sustained as result of Three Mile Island nuclear accident could not rely on doctrine of fraudulent concealment to extend statute of limitations on actions; even though plaintiffs pointed to statements by workers of utility downplaying seriousness of accident immediately after it occurred, voluminous information about accident was in public domain.

***1109** Arnold Levin (argued), Levin, Fishbein, Sedran & Berman, Philadelphia, Pennsylvania, Lee C. Swartz, Hepford, Swartz & Morgan, Harrisburg, Pennsylvania, William R. Wilson, Jr., Jackson, Mississippi, for Appellants.

Ellen K. Scott (argued), Alfred H. Wilcox, Pepper, Hamilton & Scheetz, Philadelphia, Pennsylvania, for Appellees.

Before: SCIRICA, McKEE and SAROKIN, Circuit Judges.

OPINION OF THE COURT

SCIRICA, Circuit Judge.

In the wake of the Three Mile Island nuclear accident in 1979, more than two thousand individuals brought suit for personal injuries. The

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Terms: **("executive office" /2 president) and "political activities"** (Edit Search)

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ARTICLE: Lawyers and the Defense of the Presidency

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While serving at the White House as associate counsel to the president from 1989 to 1992, I participated in many of the matters discussed here; all facts directly relied on for this analysis are matters of public record or common knowledge. For helpful comments on an earlier draft, I am grateful to Neal Devins, Harvey Flaumenhaft, Stephen G. Gilles, Mara S. Lund, John O. McGinnis, Geoffrey P. Miller, Stephen G. Rademaker, and Nicholas P. Wise. Generous financial support was provided by the Sarah Scaife Foundation and the John M. Olin Foundation, and William Loeffler offered able research assistance. The author retains responsibility for errors.

SUMMARY:
... The function of articulating a principled defense of presidents and the presidency--mostly from congressional incursions--is carried out primarily by those who serve in the Office of the Counsel to the President at the White House and in the Justice Department's Office of Legal Counsel ("OLC"), to which the Attorney General's legal advisory function has largely been delegated. ... In this address, he claimed that he had possessed the "inherent power" to use the armed forces in the Gulf War without congressional authorization; he said that when Congress takes aggressive legislative action against specific presidential powers, "the President has a constitutional obligation to protect his Office and to veto the legislation"; and he boasted of having said on many occasions "that statutory provisions that violate the Constitution have no binding legal force." ... It is impossible to assess with certainty whether the Bush administration's veto and signing statement strategy will prove to have any lasting effects. ... President Bush emphasized in his veto message that his refusal to approve the bill was based solely on constitutional grounds and that he had no substantive or policy objections to the legislation. ... One might argue that the provision for a Board of Review is the kind of practical accommodation between the Legislature and the Executive that should be permitted in a "workable government." ...

I am not afraid to say that the doctrine of self-interest properly understood appears to me the best suited of all philosophical theories to the wants of men in our time and that I see it as their strongest remaining guarantee against themselves. Contemporary moralists therefore should give most of their attention to it. Though they may well think it incomplete, they must nonetheless adopt it as necessary. [1]

want in on the take-off, fine. I've got to make the decision. I have constitutional responsibilities and they have theirs, largely in the purse strings." [43] The President **[*37]** also moved quickly to establish a special team of lawyers to devise legal strategies for carrying out his interests in these matters. [44] The ranking members of this group were C. Boyden Gray and William P. Barr, the Assistant Attorney General for OLC, who was often described as Gray's protege. [45] Barr's reputation at OLC came to rest largely on his aggressive defense of presidential authority, [46] and he enjoyed a meteoric rise from almost complete obscurity to the office of Attorney General.

Defense of the constitutional authorities of the presidency continued to receive considerable attention throughout Bush's presidency. In a major address on the Constitution midway through his term, for example, the President talked mainly about relations between the president and Congress. In this address, he claimed that he had possessed the "inherent power" to use the armed forces in the Gulf War without congressional authorization; he said that when Congress takes aggressive legislative action against specific presidential powers, "the President has a constitutional obligation to protect his Office and to veto the legislation"; and he boasted of having said on many occasions "that statutory provisions that violate the Constitution have no binding legal force." [47] At the very end of his term, moreover, President Bush engaged in an unusually direct and personal effort to assert authority over a federal agency **[*38]** (the U.S. Postal Service) that Congress had sought to insulate from the president's control. [48]

This very high-level interest in shoring up the legal defense of the presidency distinguished the Bush administration from its predecessor. President Reagan's first Attorney General, in a rare criticism of the president he served, wrote in his memoirs:

> If there was one area in which the White House was deficient during my years in office, it was in the protection of presidential power. Decisions there were made on the basis of the substance of individual issues. There was no effective concern or review of the impact that issue or the position taken with respect to it would have on presidential power. Nor was there any effort to identify governmental activities elsewhere that, if developed, would adversely affect the province of the executive. Nor, to be candid, was the bully pulpit used to provide leadership or defense of that vital institution. [49]

This is not to say that the Reagan administration ignored the separation of powers or that it was unwilling to act in defense of the presidency. [50] Indeed, Reagan's constitutional lawyers--primarily those at OLC--had worked out a detailed jurisprudence that was scarcely revised or supplemented during the Bush years. [51] Bush's new initiative may be viewed merely as **[*39]** an elevation of the Reagan administration's jurisprudence to the status of administration policy. Or, one could say, Bush was endorsing the concerns and goals of OLC in a way that would allow the body of legal principles developed in that office to be given a fair test outside the rarefied and insular atmosphere of OLC itself. If we want some idea of what can happen when a president allows, and even encourages, his leading lawyers to devote themselves to the interests of the presidency itself, the Bush administration offers an almost perfect case study.

I have argued elsewhere that OLC faces a set of constraints and incentives that prevent it from developing an institutional mission of the kind that is often observed in government bureaucracies, including such legal bureaucracies as the Office of the Solicitor General. [52] It is even more obvious that the White House Counsel's office--which is completely reconstituted with each new administration and which each president is free to shape in whatever way he sees fit--cannot be assumed to be driven by a stable institutional or

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bureaucratic culture. It is nonetheless possible that some "missions" are so inherently appropriate or attractive to presidential legal advisors that they will be adopted with a kind of inevitability that does not depend on the operation of bureaucratic imperatives of the usual kind. For OLC, the defense of the presidency seems to be an obvious candidate for such a mission, and separation of powers does seem to be regarded as the soul of that office's work. [53] For those who serve in the office of the White House Counsel, moreover, adopting the mission of defending the presidency would seem to offer them a way of taking the edge off their slightly unsavory reputation for politically driven lawyering. [54] The Bush administration should therefore show us what can happen when lawyers with a commitment to the separation **[*40]** of powers are elevated, or get themselves elevated, to the role of serious policy players.

The record of the Bush administration also provides an opportunity to test an important hypothesis derived from game theory. As Professor John O. McGinnis has pointed out, the actual practice of separation of powers can be described through "a model in which governmental powers are often distributed [not by the formal rules set out in the Constitution, but] by the branches themselves through bargains and accommodations that maximize their respective interests." [55] One corollary of this model seems to be that the president should be able to strengthen his bargaining position through a "pre-commitment strategy": by committing his prestige to the defense of a set of publicly articulated principles, the president can strengthen his own hand in future negotiations because everyone will know that departures from those principles will be more costly to the president than they would be if his prestige were not already committed. [56] Under this view, President Bush's visible elevation of the role played by his constitutional lawyers could be seen as serving the president's interests at least as much as it served those lawyers' interests: "By articulating the principles that the executive will not concede, OLC generates commitments for the future that may strengthen the president's bargaining position vis-a-vis the other branches." [57] If this plausible suggestion about the usefulness of "pre-commitment strategies" helps explain the development of the separation of powers, we should expect to observe significantly more resolute and uncompromising behavior by the Bush administration than by the Reagan administration. The theory and evidence presented in this article, however, suggests that other incentives operating on the president and his advisors render a pre-commitment strategy untenable.

A. Implementation of the Legal Strategy: Veto Messages and Signing Statements

President Bush's interest in promoting a coherent and forceful legal strategy for defending the presidency had observable **[*41]** effects. Perhaps the most visible results of the initiative emerged in his veto messages and in the signing statements he issued when approving new legislation. The President vetoed forty-six bills, citing constitutional objections in at least eleven instances. In five of these eleven cases, the bills would have been vetoed for independent policy reasons, and might well not have been vetoed on constitutional grounds alone. [58] In two of the eleven cases, however, the principal grounds for the President's objection to the bill were constitutional in nature, [59] and in four other cases constitutional objections were the only apparent reason for his veto. [60] Remarkably, *every* **[*42]** veto that was based solely or primarily on constitutional grounds involved a claimed invasion of the constitutional authority of the president's office, while at least two other bills that the President deemed unconstitutional (although not a threat to his office) were allowed to become law. [61] President Reagan, by way of contrast, seemed *never* to have vetoed a bill on the ground that it infringed on the president's authority, [62] although he sometimes included objections to such infringements in messages dealing with vetoes that were based primarily on policy grounds. [63] Reagan, however, did veto at least two bills on constitutional grounds unrelated to presidential authority, including one that simply codified a regulation that the Supreme Court had previously upheld. [64] Reagan frequently approved **[*43]** bills containing constitutionally dubious restrictions on his authority, [65] and he signed into law at

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least four bills that his administration later challenged in the courts as violations of the president's constitutional powers. [66]

A pattern similar to that found in Bush's veto messages can be found in his signing statements. Unlike the President's veto messages, which are required by the Constitution, the statements that presidents sometimes issue when they approve new legislation are completely discretionary. Many presidents have issued such statements from time to time, but serious efforts to use them as a tool for advancing a coherent legal strategy began only in the Reagan administration. [67] Signing statements can serve as such a tool in three principal ways: by interpreting ambiguous statutory language in a manner that the president hopes will be treated by the courts as a legitimate form of legislative history; [68] by instructing the president's subordinates in the executive agencies to resolve **[*44]** statutory ambiguities in a way favored by the president; [69] and by creating a record that can be used later to refute claims that the president has approved of constitutionally dubious provisions in bills that the president has chosen to sign because of his desire to see other provisions of the legislation become law.

During the Bush years, the constitutional issues addressed in signing statements dealt mostly with questions of presidential authority, and they seem designed mostly to serve the third purpose listed above, namely avoiding the appearance that the President approved of objectionable provisions in legislation he signed. This concern with appearances is quite striking: Bush's signing statements are pervaded by an amazing scrupulosity about the separation of powers that becomes at times almost comical. Even a cursory review of the record suggests that the administration tried to identify and deal with every issue, no matter how small, in every bill that was presented to the President. The lengths to which the Bush administration was prepared to go in applying legalistic analysis to enrolled bills, moreover, are suggested in the following droll passage from the signing statement for the 1991 defense authorization bill:

> Section 1409(a) refers to a classified annex that was prepared to accompany the conference report on this Act and states that the annex "shall have the force and effect of law as if enacted into law." The Congress has thus stated in the statute that the annex has not been enacted into law, but it nonetheless urges that the annex be treated as if it were law. I will certainly take into account the Congress' wishes in this regard, but will do so mindful of the fact that, according to the terms of the statute, the provisions of the annex are not law. [70]

Similarly, the President claimed in another signing statement that provisions in a bill that purported to give the force of law to language in a classified annex to the bill were legal nullities because the annex was not presented to the President along with the bill. [71]

[*45] This kind of hyperlegalistic interpretation was complemented by a grand attempt at comprehensive scrutiny. Each year, for example, the President issued a statement claiming that all legislative veto provisions would be treated as legal nullities. [72] Numerous signing statements challenged the legal validity of provisions that restricted the president's discretion, and the President sometimes seemed to threaten that he would act in defiance of the objectionable provisions. On at least four occasions, he went so far as to obtain a legal opinion from OLC concluding that it would be lawful for him to disregard a statutory provision, [73] and he apparently acted contrary to statutory direction in at least one case. [74] Although the President's constitutional objections to statutory provisions arose most often in the context of Bush's principal interest, foreign affairs, [75] many **[*46]** dealt with matters, such as the arcana of the Appointments and Recommendation Clauses, in which he could not possibly have taken a passionate interest. [76]

It is impossible to assess with certainty whether the Bush administration's veto and signing statement strategy will prove to have any lasting effects. The strategy was defensive, consisting almost entirely in resisting new congressional encroachments into areas that were thought to be reserved by the Constitution to the Executive's discretion. In order to measure the consequences of this resistance, one would need to determine what precedents would have been created but for the resistance, and to determine what significance those precedents would have had in the future. Once the Clinton administration begins to establish its own approach to veto messages (if there prove to be any) and signing statements, some useful comparisons may begin to emerge. On the evidence that now exists, however, it remains quite possible that the Bush administration's strategy amounted to little more than a kind of gesturing through which it sought to signal its intention--or reserve its rights--to seize ground from Congress if the opportunity to do so ever arose. Absent evidence that such opportunities arose and were taken, it is difficult to see how Bush's veto messages and signing statements could have any real or lasting importance.

B. Compromise of the Constitutional Vetoes

The four Bush vetoes that were apparently based solely on constitutional grounds reinforce this suspicion. They are therefore worth examining is some detail, for their contribution to legal and political developments can only be understood by examining the reasoning on which they were based and by observing how the President subsequently dealt with what proved to be ongoing disputes.

[*47] *1. The Appointments Clause*

One minor piece of pork barrel legislation sponsored by a Democratic Senator was vetoed solely because of provisions that violated the Appointments Clause. [77] This bill, which was named in honor of former Congressman Morris Udall, would have assigned authority to make determinations about eligibility for Federal funds to a board dominated by members not appointed by the president. President Bush emphasized in his veto message that his refusal to approve the bill was based solely on constitutional grounds and that he had no substantive or policy objections to the legislation. But when the President was presented with a successor bill that he deemed constitutionally invalid because of a different type of Appointments Clause violation, he signed it anyway. [78] Fidelity to the constitutional analysis that provoked the first veto thus proved less than thoroughgoing. [79]

President Bush's concession in this case can usefully be contrasted with another incident in which he was more successful in getting what he wanted. When he approved the National and Community Service Act of 1990, [80] Bush issued a signing statement discussing what he regarded as constitutional defects in the provision establishing a commission created by the statute to administer the most important programs established in the act. Under the statute, various restrictions were placed on the president's freedom to choose nominees for this commission. The President regarded these restrictions as violations of the Appointments Clause, and said that they were "without legal force or effect." [81]

[*48] So long as the President refused to nominate candidates for the commission, the congressionally mandated programs could probably not have been administered. [82] In his signing statement, the President also indicated that while he was not particularly enthusiastic about the programs that this commission was to implement, he strongly favored a separate part of the act that authorized funding for one of his own favorite programs. [83] Congress therefore had reason to believe that the President might very well refuse to make the nominations required by the statute. In a burst of speed that would otherwise be mystifying, Congress passed remedial legislation bringing the statute into conformity with the President's view of the Appointments Clause early in the next legislative session. [84] What distinguishes this case from the one involving the Udall bill is that here the President's political and policy

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interests were firmly aligned with his interest in the Appointments Clause, whereas the objections to the Udall bill seem to have been rooted solely in constitutional principle.

2. Presidential control over foreign policy

In late 1990, President Bush vetoed a bill dealing with export controls on certain goods with military applications because of provisions requiring that sanctions be imposed on countries that use or distribute chemical and biological weapons. The President did not object to such sanctions on policy grounds, and he made this clear by signing an executive order that directed the imposition of the same sanctions contained in the bill. [85] What he did object to was the "rigid" and "mandatory" imposition on him of a legal obligation to impose the sanctions, which interfered with what he called his "constitutional responsibilities" to conduct the nation's foreign policy. [86]

[*49] Although the President's objection to the export control bill was clearly rooted in his understanding of the constitutional separation of powers, he did not claim that such interference violated the Constitution. His constitutional objections were also not clearly distinguishable from his concerns about immediate practical consequences that the bill might have during what proved to be the prologue to the Gulf War: "The mandatory imposition of unilateral sanctions as provided in this bill would harm U.S. economic interests and provoke friendly countries who are essential to our efforts to resist Iraqi aggression." [87] The relative importance of these practical concerns was confirmed, after the Gulf War had been successfully prosecuted, when the President signed a bill with mandatory-sanctions provisions that differed little from those to which he had objected earlier. [88] This outcome, together with the attenuated nature of the President's original constitutional objections, makes it impossible to regard his veto of the original version of the mandatory sanctions as an important sign of commitment to constitutional principles.

3. Congressional responses to Iran-Contra

The two other vetoes that President Bush exercised on constitutional grounds were more significant, but they, too, were followed by compromises that substantially undercut their importance. The vetoed bills were part of a highly complex struggle between the Bush administration and the Congress over legislative efforts to prevent a repetition of certain activities that had occurred in connection with the Iran-Contra affair. In simplified form, many individuals on the Hill were determined 1) to require that Congress be kept fully and contemporaneously informed about covert actions (like the arms sales to Iran); and 2) to ensure that when Congress placed limits on the president's ability to take certain foreign policy actions directly (like the limits placed at times on assisting the Contras), the president would not be able to take those same **[*50]** actions indirectly by imposing on other nations to carry out activities prohibited by U.S. law.

In late 1989, President Bush was presented with a bill that made it a felony for anyone in the Executive to "assist" others (including foreign governments) in carrying out diplomatic initiatives that the Executive itself is prohibited by statute from pursuing directly. The bill also required the president to notify Congress whenever anyone in the Executive "advocates, promotes, or encourages" the provision of material assistance by others for activities that the Executive itself is forbidden by statute to assist with or undertake. [89] As President Bush noted when he vetoed this bill, its vague and sweeping provisions threatened to interfere with the conduct of foreign affairs by exposing diplomats and other officials to the threat of imprisonment for engaging in discussions that might later be found to constitute a prohibited form of "assistance." President Bush also observed that the threat to the president's constitutional role in conducting foreign relations was heightened by the fact that those who serve in Congress would remain free to engage in the very diplomatic activities forbidden to the Executive. [90] The resulting timidity and disarray in the conduct of foreign policy, said the President, would be "wholly contrary to the allocation of powers under the Constitution." [91]

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The following year, President Bush vetoed another bill that would have had similar effects. This second bill contained a complex set of provisions designed to force the president to notify Congress about covert actions more promptly than President Reagan had informed the legislature about the secret arms sales to Iran during the 1980's. [92] As part of this effort to ensure greater congressional involvement in the conduct of covert actions, the bill defined such covert actions to include any "request" by our government to a foreign government or private citizen to conduct a covert action on behalf of the **[*51]** United States. This definition was sufficient to provoke the President's veto (although the provisions dealing with notifications to Congress about covert actions were no less important). [93] In language reminiscent of that used the previous year, President Bush criticized the bill's vagueness about the meaning of reportable "requests," and complained that this vagueness "could have a chilling effect on the ability of our diplomats to conduct highly sensitive discussions concerning projects that are vital to our national security." [94] Because the contested provision of this bill did not forbid diplomatic discussions but only required that they be reported, and because it did not include provisions for criminal sanctions, it could not easily be characterized as unconstitutional (and the President's veto message did not use that term). President Bush's decision to veto the bill therefore seemed to reflect a serious determination to resist congressional meddling in the prerogatives of his office and to preserve the traditional separation of powers even beyond what he saw as the strict requirements of the Constitution.

It should come as no surprise that President Bush was most aggressive in his defense of the authority of his office in the field of foreign relations, where his expertise and interest were greatest. The veto messages dealing with prohibited forms of "assistance" and with reportable "requests" reflect this emphasis, and they are also typical of the highly nuanced and sophisticated constitutional analysis that runs consistently **[*52]** through almost all of the Bush veto messages and signing statements. Viewed in isolation, however, these two veto messages could be quite misleading. First, it should not be overlooked that the group of officials most directly threatened by these two bills was composed of career foreign service officers, a potent interest group within the government and one that counted among its own the man then serving as Deputy Secretary of State (and later as Secretary). More important, the Bush administration proved willing to compromise, and in a very serious way, exactly the principles that seemed to be at the center of the President's decisions to veto these two bills.

To see how this happened, one has to begin by examining yet another bill that was vetoed in 1989. Two days before he vetoed the bill that would have prohibited American officials from "assisting" others in certain foreign policy activities, President Bush had vetoed an appropriations bill that contained two provisions that he said were unacceptable. One of those provisions had to do with funding for abortions in countries receiving U.S. foreign aid. The other provision, which was sponsored by Representative David Obey and which closely resembled the vetoed ban on "assistance," would have prohibited the use of certain appropriated funds either "for the purpose of furthering any military or foreign policy activity which is contrary to [express prohibitions in] United States law" or "to solicit the provision of funds by any foreign government (including any instrumentality or agency thereof), foreign person, or United States person, for the purpose of furthering any military or foreign policy objective which is contrary to [express prohibitions in] United States law." [95] The Obey Amendment also contained provisos that purported to leave U.S. officials free to express their own views or those of the president. When he vetoed the bill, President Bush acknowledged that these provisos might allow the Obey Amendment to be construed in a way that he would consider constitutionally acceptable. He nevertheless complained that "the section as a whole remains sufficiently ambiguous to present an *unacceptable risk* that it will chill the conduct of our Nation's foreign affairs." [96]

[*53] The President's decision to veto this bill because of ambiguities in the Obey Amendment that created an "unacceptable risk" of chilling the conduct of our foreign

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relations, however, did not turn out to be the end of the story. Because this amendment was a rider to an appropriations bill sent to the President near the end of a congressional session, the legislature had to respond to the President's veto by passing a new bill. Two days later, the President signed a new version of the bill, from which the controversial abortion-funding provisions had been removed. The Obey Amendment, however, remained in the bill in a slightly modified form. Under the new version, American officials were barred from providing appropriated funds to any foreign government or other person "in exchange for" that government or person undertaking an action that U.S. law expressly prohibited the American officials themselves from engaging in.

President Bush's signing statement recognized that the new version of the Obey Amendment, though less sweeping than the first, had the same kind of potential to chill the conduct of foreign affairs: "Many routine and unobjectionable diplomatic activities could be misconstrued as somehow involving a forbidden 'exchange.'" [97] Why then did the President sign the bill? Following a pattern characteristic of many Bush signing statements, in which he interpreted objectionable provisions so as to render them consistent with his view of the Constitution (though often completely inconsistent with the statutory language), [98] the President contended that the Obey Amendment **[*54]** covered only transactions "in which U.S. funds are provided to a foreign nation on the *express* condition that the foreign nation provide specific assistance to a third country." [99] The signing statement also maintained that because the Obey Amendment applied only where U.S. law "expressly prohibits" American officials from taking an action, it would not apply where U.S. statutes "merely limit funding to undertake such an action." [100]

The President's interpretation was in some respects simply irreconcilable with the statutory language. The Obey Amendment, for example, unambiguously referred to exchanges with any "foreign person or United States person," not just to exchanges with "foreign nations." [101] Similarly, the Obey Amendment prohibited U.S. officials from inducing others to undertake "any action" that the American government is forbidden from taking, not just actions in which a foreign nation "provide[s] specific assistance to a third country." Where the President's interpretation of the Obey Amendment's text was not preposterous, it was far-fetched. The natural and obvious meaning of the phrase "in exchange for" clearly covers implicit agreements as well as transactions based on an express condition, especially in a statutory provision that carefully distinguishes implicit from express prohibitions. And there is precious little room in the statute's language for the President's claim that laws which limit funding for certain activities do not expressly prohibit U.S. officials from providing funding in excess of those limits; on the contrary, it has for a very long time been a felony, pursuant to an express and general statutory prohibition, for government officials to make expenditures beyond the limits set in appropriations legislation. [102]

In a desperate attempt to shore up his utterly implausible interpretation of the Obey Amendment's language, President Bush sought to rely on the amendment's legislative history to **[*55]** show that his interpretation reflected congressional intent. But he had little to rely on. Flouting standard canons of statutory construction, the Bush signing statement ignored those portions of the legislative history that courts consider the most reliable indicia of legislative intent, such as statements by the sponsor of the provision in question (which in this case was Representative Obey, who chaired the appropriations subcommittee with jurisdiction over the bill). Instead, President Bush referred vaguely to statements by Representative Mickey Edwards (the ranking Republican on the subcommittee), and to a colloquy between two Republican Senators (Kasten and Rudman). [103]

When one examines the legislative history of the Obey Amendment, the flimsiness of the administration's legal argument becomes even more apparent. Representative Obey made it clear that the intent of his amendment was to prohibit appropriated funds from being "expended in any way to promote or entice other governments to support policies which would be illegal if followed by the United States." [104] Representative Edwards, moreover,

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who helped negotiate the final version of the Obey Amendment and on whom the Bush signing statement purports to rely, never said that the Amendment requires an express agreement. Edwards said that a violation of the provision would have to be based on a "quid pro quo," which is just another way of describing the provision of funds "in exchange for" some action. [105] The term "quid pro quo" no more **[*56]** excludes implicit agreements than the statutory "in exchange for" language does. [106]

The President's invocation of Representative Edwards' statements to support his narrow construction of the Obey Amendment was baseless, and his reliance on a colloquy between Senators Kasten and Rudman was not much better. Immediately after the House passed the bill containing the Obey Amendment, the Senate debate began. At the end of that debate, Senator Kasten offered a substitute amendment that would have replaced the Obey provision with language forbidding U.S. officials from providing appropriated funds pursuant to agreements under which, "as an express condition for receipt of such assistance," the recipients would undertake military or foreign policy activities that are illegal under American law. [107] Kasten, who was openly serving as the Bush administration's agent on this issue, withdrew this amendment after engaging Senator Rudman (who had generally opposed the administration's position on related issues) in a planned colloquy. According to the transcript of the colloquy in the *Congressional Record*, Rudman asserted that violations of the Obey Amendment should not give rise to criminal penalties, and that the words "in exchange for" should be understood to refer to agreements under which U.S. aid is provided on the "express condition" that the recipient undertake an action that U.S. officials are legally forbidden to carry out. [108]

Because no objections were raised to Senator Rudman's interpretation, which the record indicates was offered on the floor immediately before the bill containing the Obey Amendment was passed by the Senate, the Kasten-Rudman colloquy **[*57]** may not be completely worthless as an indicator of the Senate's intent. [109] Even if one assumes that the colloquy firmly establishes that the Senate's interpretation of the Obey Amendment was the same as the President's, however, the record in the House does not support that interpretation, at least with respect to whether a violation must be based on an express agreement. And since the meaning suggested by the debates in the originating chamber is more consistent with the language of the provision, a disinterested interpreter such as a court would almost certainly reject the construction put on the statute in the Bush signing statement.

It is true that the second version of the Obey Amendment was less threatening to the president's conduct of foreign affairs than either of the predecessor versions that President Bush used his veto to stop. The President's signing statement, moreover, may have helped prevent the new law from being used as a tool of partisan or ideological combat. But President Bush gave up a great deal when he signed the bill containing the second version of the Obey Amendment. To see how much he surrendered, one need only look at his signing statement's claim that the Senate record made it clear that "neither the criminal conspiracy statute, nor any other criminal penalty" would apply to violations of the Obey Amendment. [110] Even if one assumes, perhaps somewhat heroically, that the courts would apply the rule of lenity (which counsels that ambiguous statutes should be construed in favor of criminal defendants), such legislative history could not prevent an Independent Counsel from procuring indictments based on the general conspiracy **[*58]** statute. [111] Lawrence Walsh had done this and more when he prosecuted Oliver North and others for conspiring to obstruct government functions by evading two of the so-called Boland Amendments (which put restrictions on aid to the Nicaraguan Contras). [112] Everyone concerned clearly understood that the Obey Amendment was an effort to make it easier (not more difficult) to discourage government officials from engaging in activities like those engaged in by the targets of Walsh's investigations. Nor could anyone who was involved in the conduct of foreign policy during this period have had less than an acute awareness of the costs that an Independent Counsel can impose on his targets even when he fails to make his criminal

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charges stick. Neither the president nor anyone else could assure American diplomats either that similar indictments for violating the Obey Amendment would not be brought or that the courts would rule against the validity of such prosecutions. [113] To the extent that American diplomats chose to take their legal advice from the President's signing statement, or from the more elaborate but equally dubious legal opinion subsequently issued by OLC, [114] the Obey Amendment could have had little chilling effect. But when one considers how reckless or self-sacrificing it would have been to take the President's statement as legal advice, any notion that the President's concession in signing the Obey Amendment into law was an unimportant surrender dissipates like the insubstantial haze of the legal analysis in the signing statement itself. [115]

[*59] *C. The War Powers Resolution*

President Bush's use of veto messages and signing statements--which articulated, without insisting on, an aggressive view of his constitutional prerogatives--resembles his approach to the War Powers Resolution. [116] Section 4(a)(1) of this statute, which was enacted over President Nixon's veto in 1973, requires that the President file a report with Congress within forty-eight hours after U.S. forces are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." [117] A report under this section of the statute triggers a sixty-day deadline within which the president is required to terminate the use of military forces unless Congress authorizes their continued deployment. [118] The president is also required to report certain other kinds of military deployments in foreign nations, but these do not trigger a deadline that would force him to seek congressional authorization.

Like other presidents beginning with Nixon, President Bush regarded the sixty-day limit as unconstitutional. Except for one ambiguous reference to section 4(a)(1) by President Ford after the Mayaguez incident, no president has ever submitted a report acknowledging that the sixty-day clock had been triggered. [119] While technically complying with a narrow construction of the reporting requirements of the War Powers Resolution, President Bush was relatively aggressive in asserting the statute's irrelevance to his conduct. After using American air power to help suppress a coup in the Philippines, for example, Bush notified Congress of the actions he had taken, but sought to avoid conceding that his military decisions could be constrained by that statute:

> This measured action by U.S. Forces was taken at my direction in accordance with recognized principles of international **[*60]** law and pursuant to my constitutional authority with respect to the conduct of foreign relations and as Commander in Chief. I am mindful of the historical differences between the Executive and Legislative branches and the positions taken by me and all my predecessors in office with respect to the constitutionality of certain provisions of the War Powers Resolution. I am sharing this information with you consistent with that Resolution. [120]

A few weeks later, the President ordered the invasion of Panama. Once again noting that his report was "consistent with" (not "pursuant to") the War Powers Resolution, the President said the invasion:

> was necessary to protect American lives in imminent danger and to fulfill our responsibilities under the Panama Canal Treaties. . . . The military operations were ordered pursuant to my constitutional authority with respect to the conduct of foreign relations and as Commander in Chief. [121]

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The following year, after Iraq's invasion of Kuwait, the President grew bolder still. In his letter notifying Congress of substantial troop deployments to the Gulf, he said that Iraq's military was "capable of initiating further hostilities with little or no additional preparation," and that "Iraq's actions pose a direct threat to neighboring countries and to vital U.S. interests in the Persian Gulf region." [122] Despite this reference to further hostilities, however, the President implied that the sixty-day clock in the War Powers Resolution had not been triggered, and that in any event the statute would not affect the President's military decisions:

> I do not believe involvement in hostilities is imminent; to the contrary, it is my belief that this deployment will facilitate a peaceful resolution of the crisis. If necessary, however, the Forces are fully prepared to defend themselves. Although it is not possible to predict the precise scope and duration of **[*61]** this deployment, our Armed Forces will remain so long as their presence is required to contribute to the security of the region and desired by the Saudi government to enhance the capability of Saudi armed forces to defend the Kingdom.
>
> I have taken these actions pursuant to my constitutional authority to conduct our foreign relations and as Commander in Chief. [123]

Despite frequent claims that Bush and other presidents have evaded the War Powers Resolution, or deliberately avoided compliance with it, [124] the statute's language has made it fairly easy for presidents to engage in what they saw as appropriate military actions without having to flout its terms or even to acknowledge that the constitutionally questionable sixty-day clock had begun to run. [125] As the examples above illustrate, President Bush took full advantage of the statute's wording to avoid the risk of acting in clear contravention of its terms. Events in the Gulf, however, finally closed off this path.

As it became clear that Iraq was unlikely to surrender its ambitions in the face of threats and economic sanctions alone, the President was apparently undecided about the advisability **[*62]** of seeking congressional authorization for a military offensive. Administration officials had consistently maintained that such authorization was not legally required, [126] and the Secretary of Defense is said to have worried that prosecution of the war would become impossible if Congress voted against authorizing the use of force. [127] The President, however, decided to seek congressional authorization before attacking Iraq, and he succeeded in obtaining it.

The President's decision may have been politically prudent, and it may even have reflected a consensus among his legal advisors. [128] Subsequent events, however, by no means disproved the argument attributed to Secretary Cheney: that if the use of force turned out to be successful and the costs were reasonably low, it would not matter what kind of debate or vote there had been in Congress, whereas if the military operation failed or the costs of victory were very high, prior congressional authorization would not save the President from taking the blame. [129]

President Bush, moreover, clearly passed up an obvious opportunity to frustrate congressional efforts to establish a precedent adverse to his claims about the unconstitutionality of the War Powers Resolution. When he asked Congress for legislation, the President was careful not to ask for statutory "authorization," but only for a bill stating that Congress "supports the use of all necessary means to [liberate Kuwait]." [130] And **[*63]** when he was presented instead with legislation expressly providing the legal authorization required by the War Powers Resolution, [131] the President's signing statement emphasized

TEXT:
[*17] I. INTRODUCTION

President Clinton's first White House Counsel, [2] Bernard Nussbaum, was pressured into resigning his post after a special prosecutor began looking into meetings he had held with officials of an independent regulatory agency. These meetings, which dealt with the agency's investigations of financial dealings in which the President and his wife had been involved before they came to Washington, were immediately and almost universally denounced. Clearly bitter at having lost his job because of a standard of conduct having more to do with appearances of impropriety than with legal rules, Nussbaum claimed that he was the victim of people "who do not **[*18]** understand, nor wish to understand the role and obligations of a lawyer, even one acting as White House Counsel." [3]

Nussbaum seems to have believed that the job of a lawyer--any lawyer--is to act as aggressively as possible to protect the interests of the individual who retains him, so long as his actions are "consistent with the rules of law, standards of ethics, and the highest traditions of the Bar." [4] Nussbaum's view was soon attacked by his predecessor from the Bush administration, C. Boyden Gray, who said: "He confused his fiduciary role as a temporary occupant of that office with the no-holds-barred role a private litigant would have. He is not [the Clintons'] private lawyer. He is the lawyer for the Oval Office." [5] Nussbaum's successor, Lloyd Cutler, also rejected the applicability of the private-lawyer model. When the President announced his appointment, Cutler said:

> The Counsel is supposed to be counsel for the President in office and for the Office of the Presidency, as many people have said. Most of the time, those two standards coincide. Almost always the advice you would give the President is advice that is in the interest of the Office of the Presidency . . . . When it comes to a President's private affairs, particularly private affairs that occurred before he took office, those should be handled by his own personal private counsel and, in my view, not by the White House Counsel. [6]

As this is written, [7] the Clintons and Nussbaum have steadily maintained that they committed no illegal or unethical acts. Although this article is not concerned with the events surrounding Nussbaum's resignation, those events provide a striking illustration of the somewhat uneasy professional and institutional relationships between presidents and their closest legal advisors. Whatever may come to light in the continuing investigations of the Clinton administration, we can be sure that this will not be the last eruption of controversy about the proper relationship between presidents and their legal advisors **[*19]** in the government. Ever since Watergate made the distinctions among the president's various personal and official interests in his office a subject of close public scrutiny, the history of that office has looked as much like a battle among lawyers as it has a contest between presidents and their political opponents.

One legacy of Watergate has been an intense interest, often politically motivated, in the ethics of those who serve in the upper reaches of government, along with a proliferation of new laws ostensibly aimed at curbing unethical conduct by government officials. [8] And one consequence of that legacy has been a growth in the size of the office of the White House Counsel, which plays a preeminent role in seeking to prevent ethical embarrassments from impeding the president's substantive agenda. [9] Mr. Nussbaum's government career foundered on the treacherous ethical rocks that have been thrown around the shores of the presidency, a fate that has become almost commonplace among senior officials during the last two decades. [10]

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that

> my request for congressional support did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution. [132]

The President may not have conceded that he needed this resolution as a legal matter, but after he requested a mere resolution of support and then signed this one instead, his claims about the legal irrelevance of the War Powers Resolution could themselves only look quite irrelevant.

D. Summary

President Bush's signing statements and veto messages, like his statements about the War Powers Resolution, displayed a consistent and relatively aggressive approach to the separation of powers issues that arose from congressional efforts to subject the administration to a variety of statutory restrictions. In this sense, the Bush record represents a kind of triumph for the academically oriented lawyers responsible for crafting the President's statements. [133] Upon closer examination, however, this victory appears to have been one more of form than substance. The aggressive signing statements do not appear to have reflected much actual resistance to congressional control, and each of the vetoes based on constitutional objections was followed by substantial compromise of the principles on which those vetoes were based. With respect to the War Powers Resolution, President Bush simply (though perhaps **[*64]** sensibly) flinched when presented with circumstances in which he could have put his bold words to a test.

IV. THREE RETREATS FROM THE ADMINISTRATION'S CONSTITUTIONAL PRINCIPLES

If the lawyers' "successes" do not seem to suggest that their role in the development of separation of powers law was particularly important, the lawyers' "failures" provide even stronger evidence that their influence did not amount to much. The Bush record shows that his administration was simply unwilling to defend its theories of the Constitution on several important occasions. A brief look at some of these departures from the principled jurisprudence articulated in the Bush signing statements and veto messages will help to illuminate the forces that discourage a thoroughgoing implementation of a principled jurisprudence of the separation of powers.

A. Legislative Vetoes

Early in its tenure, the Bush administration sought to be done with the contentious matter of the Nicaraguan Contras, which had been inherited from President Reagan. After investing a significant amount of his own time in negotiations, the Secretary of State reached an agreement with congressional leaders that provided temporary funding to support the Contras. Part of these so-called "Central American Accords" required the administration to promise in writing that no money would be used to support the Contras after a date certain unless the chairmen of four congressional committees approved the continued funding in writing. [134] Neither OLC nor the Counsel to the President (nor for that matter the State Department's own Legal Adviser) was consulted about this arrangement, [135] which incorporated a formal legislative-veto device that would clearly have been unconstitutional under the *Chadha* decision had it been adopted in legislation. [136] There was speculation in the press that personal factors may have **[*65]** contributed to the absence of advance consultations, and it can hardly be doubted that the Secretary of State and the Counsel to

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the President had an uneasy relationship. [137] But there was no suggestion that the agreement's impact on the president's ability to protect the authority of his office was overlooked. On the contrary, one State Department official who took part in the negotiations was quoted as saying that "the precedential aspects of this agreement were well and truly understood" by Secretary of State Baker and other negotiators. [138] Instead, it appears that the President decided that resolving the very contentious issue of aid to the Contras was simply more important than maintaining a principled opposition to the use of legislative vetoes. The fact that the newly inaugurated President felt quite free to make this decision without consulting OLC, the Counsel to the President, or any other legal officer in the government, is a striking illustration of how unlikely it is that a president would ever allow the concerns that lawyers have with the interests of his office to determine his conduct in that office.

The flap over the agreement to comply with a non-statutory legislative veto attracted considerable attention because the Counsel to the President made the mistake of voicing his objections in the press. [139] During the ensuing years, however, no attention at all was paid the fact that President Bush routinely signed bills containing *real* legislative vetoes that clearly violated the *Chadha* rule, unlike the Contra funding agreement (which was not technically unconstitutional). Although the President also routinely issued statements denouncing the congressional practice of including such "legal nullities" in bills that were presented to him, [140] I have found no recorded example of the Bush administration's refusing to comply with any of the innumerable legislative vetoes to which it was subjected. Nor does the Bush administration seem to have taken any **[*66]** other action that might have discouraged the Congress from flouting one of the few apparently significant post-Watergate Supreme Court victories for the office of the president. [141]

B. The Appointments Clause

It is easy to imagine why President Bush might make the trade-off between politics and principle that he accepted in the Central American Accords, especially when one considers that the arrangement did not involve an actual violation of the Constitution. The same cannot be said, however, of another departure from well-settled principles of the separation of powers. On August 9, 1989, President Bush signed into law the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), which effected a massive restructuring of the regulatory regime governing the savings-and-loan industry. As part of that restructuring, an independent agency known as the Federal Home Loan Bank Board ("FHLBB") had most of its functions transferred to a new entity, called the Office of Thrift Supervision ("OTS"), which was located within the Department of the Treasury. When he signed the bill, President Bush did not mention that the new statute contained a provision that purported to appoint as the first Director of OTS the individual who had been Chairman of the FHLBB. [142]

Such a provision, under which an officer of the United States is appointed by statute, is about as clear a violation of the Appointments Clause of the Constitution as one could hope to find. If one were familiar only with the fastidious attention to Appointments Clause issues that pervades the Bush **[*67]** administration's signing statements and with the President's decision to veto one bill solely because of a less clear-cut violation of the Appointments Clause, [143] acquiescence in the statutory appointment of a federal officer might be surprising, or even shocking. The President's failure to object to this element of the bill when he signed it, however, becomes easier to understand when one recognizes the still more extraordinary fact that the Bush administration had *itself* proposed the same kind of illegal statutory appointment in a savings-and-loan bill it had transmitted to the Congress a few months earlier. [144]

This blunder led directly to litigation brought by a thrift whose assets OTS was threatening to seize. [145] In the course of the law suit, which challenged the authority of OTS to act on the

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ground that its director had been unconstitutionally appointed, [146] the Director resigned and was eventually replaced by an official appointed in the constitutionally prescribed manner. Before that happened, however, the Bush administration put forward the desperate argument that the statutory appointment was valid because the chairmanship of the FHLBB and the directorship of OTS were the same office, a position emphatically rejected by the district court. [147] This litigation, which threatened serious disruption of OTS' regulatory work, **[*68]** became moot when a new Director was confirmed by the Senate and appointed by the President. [148]

Given the Bush administration's scrupulous attention to the Appointments Clause in other contexts, including one veto that was based solely on an Appointments Clause objection, [149] its flagrant disregard of constitutional forms in this case is quite striking. William P. Barr, who served at the head of OLC when the President signed the bill enacting the violation into law, has publicly stated that OLC "recognized an Appointments Clause problem" in the bill. [150] He also reports that many people in the Treasury Department and Congress thought it was "absurd" to worry about such an issue, so that "the views of the Department of Justice were overridden. Political deals were made, and the bill passed." [151] Read carefully, Barr's account is highly revealing. First, it refers only to a bill in which OLC "recognized" a constitutional "problem." No mention is made of the fact that the Bush administration itself had formally proposed adopting the blatantly unconstitutional statutory appointment mechanism. Second, there is no suggestion that OLC's constitutional objections were communicated to the President or to the White House Counsel. Nor is there any suggestion that the Department of Justice recommended that the President veto the bill, despite Barr's statement in the very same paragraph that "when a provision raises constitutional difficulties, in most cases the Attorney General should recommend veto." [152] It is hard to resist the inference that the Department **[*69]** of Justice was cutting its own "political deals" with those at Treasury and on the Hill who thought OLC's concerns were "absurd."

What might the "political deals" involving the unconstitutional appointment provision have involved? Press speculation centered on the theory that the Bush administration--as the price for bringing the functions performed by the FHLBB under the control of the Treasury Department--acquiesced in a scheme to install the Chairman of the FHLBB, who had close personal ties to a powerful Republican Senator, as Director of OTS. Under this theory, the unconstitutional appointment (which was strongly opposed in the House of Representatives) was necessary to avoid confirmation hearings involving someone who had been intimately involved in the operation of the FHLBB. The reason for this, in turn, was that such hearings had the potential to embarrass other Senators who were suspected of having improperly interfered with regulatory decisions of the FHLBB. [153] None of this suggests what interests the Justice Department (in contradistinction to the Treasury Department) might have had in participating in any political deals, though one could easily come up with plenty of hypotheses. The most important conclusion for present purposes, however, does not require a choice among such hypotheses. What the FIRREA episode suggests is that circumstances can arise in which the president's constitutional lawyers themselves bargain away the interests of his office for purposes of their own even in an administration in which the president himself has made the defense of that office an important goal. That this may have happened during the Bush administration is a reminder that the president's lawyers have interests other than serving their client--even (or especially) if their client is assumed to be the presidency itself. The Justice Department's acquiescence in the unconstitutional statutory appointment may therefore be usefully compared with the phenomenon illustrated by the Contra funding incident. Just as the president **[*70]** has interests that he must weigh against those of the office he holds, so his lawyers may be tempted to forego the interests of his office to pursue an agenda of their own.

C. The Mask of "Complicated and Indirect Measures"

The Contra-funding and FIRREA examples expose some important forces that necessarily

limit any single-minded pursuit of the institutional interests of the presidency. Whatever intrinsic importance one may attach to the principles at stake in these incidents, however, neither departure from principle was likely to produce a truly large or enduring effect on the structure of government or on the law of the separation of powers. For an illustration of the Bush administration's abandonment of constitutional principles when something very significant was actually at stake, it is useful to examine the history of the Supreme Court's decision in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc. ("Airports Case")*. [154] This case proved to be an important victory for the interests of the president's office--in fact, it was probably the most important case involving those interests decided during the Bush administration. But the outcome was one that the President's lawyers actually *opposed* in the courts.

The *Airports Case* arose from a congressional effort to create an ingenious substitute for the legislative veto device that the Supreme Court had declared unconstitutional in *Chadha*. To the extent relevant here, the story begins in 1984, when a consensus developed that capital improvements at Washington National and Dulles Airports could best be carried out if operating control and financial responsibility for the airports were transferred from the federal Department of Transportation to some sort of newly created state, local, or interstate entity. [155] In 1986, after consultations among executive agencies and interested congressional staffers over the best means of effecting such a transfer, OLC reviewed three different proposals that would have given Congress substantial powers **[*71]** to supervise the new entity. [156] These powers were in the nature of legislative vetoes, and were manifestly intended to substitute for the informal oversight powers that Congress and certain of its officers and committees had been exercising in the normal course of administration while control of the airports was vested in the Department of Transportation.

Under one proposal, state authorities would have been authorized to operate the airports, but Congress would have created a board of review comprising several members and officers of Congress; this board would have been empowered to veto the most important decisions of the new operating authority. OLC emphatically rejected this proposal because it would constitute a legislative veto in violation of *Chadha*. Under a second proposal, Congress would have required Virginia and the District of Columbia to establish the same kind of review board under state law, as a condition of their being allowed to gain control of the airports. Characterizing this proposal as one that presented "complex and novel questions involving the relationship between federal and state grants of authority," OLC gave an elaborate legal analysis and concluded, despite its "grave reservations" about the proposal's constitutionality, that "a colorable argument" could be made in its defense. [157]

The third proposal was similar to the second proposal except that a) the members of the review board would serve in their "personal capacities" as users of the airport and not as representatives of Congress, and b) the members of the review board would be members of Congress appointed by the new state operating authority from a list of names submitted by the congressional leadership. OLC declared that this proposal would probably withstand constitutional scrutiny, and declined to object to it on legal grounds.

[*72] The provision finally enacted in 1986 closely resembled the third proposal, which had been cleared by OLC earlier that year. After Virginia and the District of Columbia enacted the required enabling legislation, and the Secretary of Transportation entered into long-term leases with the new operating authority, the board of review was appointed from lists provided by the congressional leadership. In 1988, a citizens' suit was brought, challenging the new arrangement on the ground that the veto power granted to the board of review was unconstitutional. [158]

In 1989, after George Bush became president, the District Court ruled that the legislative veto device created through the statute was constitutional. Appeal was taken, and the Department of Justice intervened in the Court of Appeals to defend the constitutionality of the

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statute. [159] The Court of Appeals, however, reversed the district court, holding that the device violated the separation of powers because the members of the board of review were in reality agents of the Congress. [160]

At this point, the Justice Department began behaving in an equivocal manner. Although it had intervened in the Court of Appeals to defend the constitutionality of the statute, it declined to join the airport authority's petition for certiorari. [161] When the Supreme Court granted the petition, the United States automatically became a respondent, [162] and it filed a brief on the merits that offered the Court little more than an expression of the government's ambivalence.

This ambivalence might more accurately be described as incoherence. On the one hand, the Justice Department [163] argued that the mere fact that the board of review was created pursuant to state law did not preclude its being characterized as an agent of Congress, and therefore invalid under *Chadha* (which forbids legislative vetoes) or under *Bowsher* (which forbids agents of Congress from exercising executive authority). [164] **[*73]** The Justice Department's brief correctly observed that treating the board of review as a mere creature of state law would open "a massive loophole in the separation of powers." To permit such influence laundering would allow Congress to require the states, as a condition of receiving federal financial assistance, to appoint members of Congress to state offices controlling the administration of virtually all roads, schools, housing, and health care, thereby completely supplanting the federal agencies through which the president performs his central function of executing the federal laws. In a stunning effort to evade the compelling logic of this argument, however, the Justice Department then claimed that the statute at issue in the *Airports Case* was constitutionally valid. Noting that members of Congress on the board of review were supposed to serve in their "personal capacities," the Justice Department contended that such individuals were especially well suited to represent the interests of all other users of the airports because members of Congress must make frequent trips between Washington and their home districts. The Court was invited to imagine that members of Congress would somehow be appropriate representatives of airport users because they use the airports heavily, while they would not be appropriate representatives of those who use roads, schools, and hospitals because they merely partake in those programs to the same extent as other citizens.

The Supreme Court understandably dismissed this argument by observing that the facts of the case "belie the ipse dixit that the Board members will act 'in their individual capacities.'" [165] Rather than accept this "individual capacity" fiction, the Court affirmed the Court of Appeals, holding that the board-of-review device, although difficult to characterize, logically must be either an effort to exercise legislative power in violation of *Chadha* or an attempt to exercise executive power in violation of *Bowsher*. [166] Repudiating the Justice Department's unprincipled suggestion that the Court uphold the statute while essentially confining the case to its facts, Justice Stevens forcefully explained why such ad hoc constitutional decision-making should be avoided:

> **[*74]** One might argue that the provision for a Board of Review is the kind of practical accommodation between the Legislature and the Executive that should be permitted in a "workable government." Admittedly, Congress imposed its will on the regional authority created by the District of Columbia and the Commonwealth of Virginia by means that are unique and that might prove to be innocuous. However, the statutory scheme challenged today provides a blueprint for extensive expansion of the legislative power beyond its constitutionally-confined role. Given the scope of the federal power to dispense benefits to the States in a variety of forms and subject to a host of statutory conditions, Congress could, if this Board of Review were valid, use similar expedients to

> enable its Members or its agents to retain control, outside the ordinary legislative process, of the activities of state grant recipients charged with executing virtually every aspect of national policy. As James Madison presciently observed, the legislature "can with greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." Heeding his warning that legislative "power is of an encroaching nature," we conclude that the Board of Review is an impermissible encroachment. [167]

Perhaps the best that can be said about the Justice Department's brief is that it supplied the Supreme Court with the key argument needed for understanding the threat that the board-of-review device posed to the separation of powers. By contending that the argument did not apply in this case, however, the Government's brief created a risk that the Court would misapprehend how serious that threat was. The significance of that risk is suggested by the fact that three dissenting Justices emphasized how odd it was that the Court was reaching out to protect the president's authority from a threat that the President's own lawyers denied was real: "Should Congress ever undertake such improbable projects as transferring national parklands to the States on the condition that its agents control their oversight, there is little doubt that the President would be equal to the task of safeguarding his or her interests." [168]

[*75] How can the strange behavior of the Justice Department be explained? The first crucial step obviously came in 1986, when OLC approved the scheme that was eventually invalidated by the Supreme Court. This approval seems manifestly inconsistent with OLC's institutional propensity to resist congressional efforts to undermine the principles articulated in *Chadha* and *Bowsher*, and it is easy to imagine that OLC's 1986 decision reflected policy pressures from the Department of Transportation and the Office of Management and Budget. These agencies would undoubtedly have been more concerned with paying the price demanded by Congress for relieving the government of financial commitments and onerous operating responsibilities than with the niceties of constitutional law. Once OLC's clearance was obtained, and the statute was enacted, it is not the least bit surprising that the Justice Department's litigating divisions defended the scheme when it was challenged in court. The Department's litigation bureaucracies are strongly predisposed to defend the constitutionality of federal statutes, and they would have had little or no incentive to second-guess OLC's earlier approval of this one.

Surprisingly, the Justice Department continued to take this approach even after President Bush came into office and gave the defense of the presidency the kind of apparently serious backing that it had lacked during the Reagan administration. The Bush administration was notorious for its efforts to avoid being perceived as "Reagan's third term," [169] and it would have been easy to abandon the Reagan-era OLC position when the Justice Department first entered the case in 1989. Even if one assumes that the case did not at that time receive the kind of serious attention within the Department that this **[*76]** would have required, it would have been perfectly possible for the Department to change its position after the Court of Appeals bestowed upon the President a significant and unaskedfor victory. Such confessions of error by the government are not common, but they are a traditional and well-accepted element of the Justice Department's practice. [170] So long as they do not become so frequent as to undermine the Government's credibility in the courts, their only negative effect is the embarrassment they cause to whichever individuals approved the position later abandoned by the Government. [171] Thus, the fear of such embarrassment is the likeliest cause of the Justice Department's failure to change its position in the *Airports Case*. [172]

[*77] If inertia was propelling the Justice Department to defend this statute in the courts, the Court of Appeals' decision does seem to have introduced a bit of wobble into the trajectory, for the Justice Department declined to seek certiorari after that decision. But the Department was never actually deflected from its course, even though its own brief in the

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Supreme Court clearly showed why a decision upholding the statute would pose a serious threat to the interests of the presidency. The fact that the Court of Appeals and the Supreme Court were both far more willing than President Bush's own Justice Department to defend the institutional interests of the presidency in this case is highly suggestive, especially when this incident is considered together with the FIRREA case. Judicial precedents are by nature more powerful than the kinds of precedents about which the administration was so scrupulous in its signing statements and veto messages. Despite the Bush administration's rhetorical commitment to the legal defense of the presidential office, the most enduring victory for that office was imposed by the courts in the face of *outright resistance* by President Bush's lawyers. Thus, when the outcome mattered most, the Bush administration was at its weakest in defending the president's constitutional interests.

Lest one think that bureaucratic glitches or other special circumstances within the Justice Department are sufficient to explain the way the *Airports Case* was handled, the administration **[*78]** later confirmed that deeper forces were at work. A few months after the Supreme Court refused the invitation to create what the President's own lawyers called "a massive loophole in the separation of powers," Congress passed a bill amending the airport statute in response to the Court's decision. This bill included yet another desperate effort by Congress to retain its control over Dulles and Washington National by creating a new board of review that differed only superficially from the one that had been invalidated. Although membership on the new board was not in terms restricted to members of Congress, the board's members had to meet certain qualifications that few people outside Congress would possess, and the congressional leadership was given complete control over choosing candidates for the board. The new board also lacked an absolute veto over the operating authority's decisions, but it was given the power to delay (for up to six months) important actions with which it disagreed.

This congressional persistence in the pursuit of an unconstitutional goal can probably be explained by a strong and bipartisan fear that a state-controlled airports authority might inconvenience members of Congress by shifting some flights from the overburdened facilities at Washington National to Dulles Airport (which is several miles farther from the Capitol). Members may also have been concerned that they might lose the reserved, free parking places that they now enjoy at both airports. [173] Although the President said that he considered this new device unconstitutional, he signed the bill into law anyway, blandly commenting that the courts would have to deal with the constitutional problem. [174] This latest congressional **[*79]** gambit was eventually invalidated by the courts, which concluded that it violated the separation of powers under the analysis set forth in the *Airports Case*. [175] Although the courts did curb this congressional overreaching again--an overreaching apparently motivated by the pettiest kind of self-interest--it will never be possible to accuse the Bush administration of having been a significant contributor to that outcome.

D. Summary

The three examples discussed in this section show that the Bush administration was willing to tolerate and even advocate substantial losses of presidential legal authority in response to perfectly ordinary--and in some cases remarkably trivial--political pressures. As the examples suggest, such pressures sometimes operated directly on the president and sometimes they seem to have had their effect at lower levels of the government. When one looks at these incidents--together with the results of the administration's strategy of using signing statements, veto messages, and presidential addresses to articulate an ambitious agenda for defending the presidency--there appears to be no evidence that the President's agenda was significantly furthered or even seriously pursued. Not only did the Bush administration fail to carry out a "precommitment strategy" of the kind described by Professor McGinnis, but it may have undermined its credibility on the Hill by wrapping itself rhetorically in high-flown constitutional "principles" that were abandoned as soon as adhering to them became

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inconvenient.

V. DEBACLE IN THE COURTS

Perhaps the most remarkable example of the Bush administration's reluctance to act on its stated principles transpired after the President became a lame duck in the autumn of 1992. In a well-publicized series of judicial decisions growing out of an arcane dispute over the litigating authority of the U.S. Postal Service, President Bush and his Justice Department **[*80]** suffered serious setbacks on several important issues involving presidential legal authority. [176] These losses are significant for present purposes not so much because they occurred, but because they could likely have been avoided if the administration had proceeded in a timely fashion according to the principles that it claimed to treasure.

On January 22, 1991, the U.S. Postal Service filed suit against the Postal Rate Commission in the Court of Appeals for the District of Columbia Circuit. Although such suits are specifically authorized by statute, they are constitutionally questionable because they assume that disputes within the executive establishment can be resolved by an entity outside the president's control. The principle at stake--that the executive department of government is a unitary entity subject to the president's control and supervision--implies that a suit brought by one executive agency against another is a kind of absurdity, like a person bringing suit against himself. It is also a principle that is central to the constitutional vision to which President Bush committed himself at the beginning of his administration, and which he affirmed in numerous signing statements throughout his term. [177]

Despite the centrality of the unitary executive in the jurisprudence adopted by the Bush administration, the theory has **[*81]** met with a chilly reception in the courts, which have taken a relaxed attitude to the creation of independent agencies that are legally insulated from presidential control (at least when those agencies perform functions that do not seem to be at the core of the president's own constitutional responsibilities). [178] When confronted with the Postal Service lawsuit, the administration therefore had two obvious choices. It could let the suit go forward, hoping that nobody would notice the retreat from administration principles. Or it could try to use the President's claimed authority over the two agencies to force them to resolve their dispute outside the courts.

This should have been an easy decision. The Postal Service is controlled by an eleven-member Board of Governors that comprises nine part-time Governors together with the Postmaster General and the Deputy Postmaster General (who are chosen by the Governors). At the time of this dispute, all of the Governors had been appointed by Presidents Reagan and Bush, and a majority were Republicans. Although the Postmaster General and his Deputy could have been expected to resist presidential control because they were full-time officials with a vested interest in their statutory independence, it should have been political child's play for a then-popular president to persuade a sufficient number of the part-time Governors to avoid a confrontation with him over an obscure legal issue that he considered important. Had this occurred, a useful administrative precedent would have been created, and without the risk of any adverse judicial decisions. If the President had failed to persuade the Board of Governors to go along with his wishes, the administration could then have made a considered decision whether to risk litigation or to retreat to the passive role embodied in the first option.

The Bush administration took neither of the obvious paths. Instead it entered a prolonged period of dithering, during which it relied on what one commentator has aptly called a **[*82]** strategy of "delay, threats, and prayers." [179] The public record does not indicate who was responsible for this "strategy," but there can be no doubt that it was adopted. In any event, as the delay continued the threats began to look empty, and the prayers went unanswered. Finally, some twenty months later, further stalling became impossible, and the Justice Department formally directed the Postal Service to withdraw its lawsuit. After this

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extremely tardy directive was predictably ignored, President Bush at last took action. On December 11, 1992, a president whose political resources had largely evaporated when he lost his bid for re-election took the extraordinary step of personally directing the Board of Governors to withdraw the lawsuit, on pain of dismissal. The Board voted six to five to defy the President, and the winning majority immediately went to court seeking an order to block their threatened removal. The President responded by attempting to use his recess appointment power to replace one of the Governors, which might have led to a reversal of the Board's narrow decision to ignore his directive.

The upshot of this litigation was a total victory for the Postal Service and a complete loss for the President. First, President Bush was subjected to an unprecedented court order forbidding him to discharge presidential appointees. [180] Second, the court of appeals ruled that the Postal Service had the authority to bring suit against the Postal Rate Commission even in defiance of the president. [181] The court firmly rejected the Justice Department's theory of the unitary executive, concluding that the judiciary may resolve disputes arising among executive agencies when authorized by statute to do so. [182] Finally, although the Clinton administration continued to defend Bush's recess appointment, that issue was also resolved against the presidency. [183]

[*83] Thus ended George Bush's experiment with presidential commitment to the theories developed by the constitutional lawyers who saw themselves as the guardians of the presidency. The Bush administration arrived where the Reagan administration had so often found itself: begging the courts for relief from impositions that might have been avoided through the exercise of political will. One difference, however, is that while the Reagan administration at least achieved some notable victories through litigation, as in *Chadha* and in *Bowsher*, the Bush administration seems to have contributed less than nothing to the few legal gains that the presidency made during its four years in office.

VI. CONCLUSION

Perhaps the most obvious question raised by the Bush record on separation of powers is whether the absence of signal successes in enhancing or defending the office of the presidency resulted more from incompetence or from the operation of incentives that caused the administration to put greater value on achieving other goals. Examples like the postal service case and the airports litigation suggest that ineptitude played a significant role, for in neither case does any strong overriding political or policy goal seem to explain the administration's failure to defend the interests of the presidency. Poor execution of policy, however, occurs in all administrations (and all other large organizations), so examples like these are not necessarily very revealing.

In this case, incompetence is not likely the sole or even principal explanatory factor even for those incidents in which it probably played an important part. In the airports matter, for example, the Justice Department became institutionally invested in defending the congressional board of review during the Reagan administration. One would therefore have expected this defense to have continued during the Bush administration, as it did, unless the new President's special commitment to policing the separation of powers had been taken quite seriously. What this incident suggests more strongly than anything else is that the commitment communicated by the President was not strong enough to overcome ordinary forces of bureaucratic inertia and personal egotism at the Justice Department. Similarly, the Postal Service case is probably best explained in terms of an unwillingness by the Justice Department to request that the President take action in a matter that involved *only* **[*84]** separation of powers principles (with no prospect of collateral political or policy benefits), during a period when both the President and the Department's senior officials had more politically promising and seemingly urgent items competing for their time and attention. Both cases might have seemed quite important to lawyers whose principal concern was constitutional law and the long-term effects of that law on the structure of government, but

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neither case promised the President or the Attorney General any immediate political or policy payoff. The same kind of explanation seems to fit the Bush record taken as a whole. Consider each group of incidents analyzed in this paper: the compromises that followed the four vetoes that were based on objections to legislative encroachments on the president's authority; the Administration's support of the unconstitutional statutory appointment in the FIRREA legislation; and the virtual absence of a willingness to violate the many unconstitutional provisions (such as legislative vetoes) contained in legislation signed by the President. Taken together, all of these suggest that the defense of the presidency never assumed real importance in the Bush administration.

The President's public pronouncements, however, as well as the prominent role that he assigned in his administration to lawyers known especially for their interest in separation of powers issues, [184] and the extremely scrupulous attention that was given to these issues in his signing statements and veto messages, suggest that these issues were *deemed* quite important by President Bush. Since Bush had little or nothing to gain from feigning this interest in the defense of his office, there is no reason to suppose that his intellectual commitment to the issue was anything other than genuine. His administration's strong pattern of significant concessions, inaction at crucial moments, and downright self-destructiveness, therefore suggests that a more resolute pattern of behavior would have imposed short-term costs that the President and others around him simply proved unwilling to pay. One should **[*85]** expect other presidents and other administrations to be subject to the same incentives, and one should expect them to respond to those incentives in a similar manner. What makes the Bush administration unusual is only that the President and some of his lawyers seemed to think at the outset that this time things could be different.

Those who hoped to assist President Bush in strengthening the office he temporarily held must have been personally disappointed in the outcome. Some of them may even have been disappointed in the President himself. Should other citizens share this sense of a missed opportunity? I suspect not, and I believe the reason has implications that go beyond the particular incidents that so preoccupied the lawyers during the Bush administration. Whether in the context of the separation of powers or in that of ethics--and sometimes in both at once, as with Iran-Contra--the increased lawyerization of political disputes since Watergate has often submerged real disputes about substantive choices beneath distracting contests over abstract principles. This has probably had some healthy effects, for distractions can sometimes avert potentially destructive clashes. And there would be poisonous long-term consequences if disputes over ethics issues and separation of powers were fought out as naked trials of political strength. But more of a good thing is not always better. The logic of reframing political disputes in legal terms can ultimately draw lawyers into the role of the client, a result that lawyers seldom find disagreeable. But it would be irresponsible for a President to let his lawyers determine how far he should push the defense of his constitutional prerogatives, just as it would be to cede the definition of those prerogatives to Congress. The professional training and professional obligations of lawyers do not qualify them for that task, however valuable and necessary their *advice* on the subject may be.

George Bush and his administration may not have made all the right decisions in trying to balance the president's substantive goals and his constitutional responsibilities to his office. That would hardly distinguish his presidency from any other, and it ought not to obscure the fact that he at least did not leave his office significantly weaker in legal terms than when he assumed it. It is obvious that Bush might have weakened the presidency by offering too little resistance to an aggressive Congress. But it is equally true, and much less obvious, **[*86]** that he might also have weakened it by letting his lawyers effectively assume an office to which they were not elected.

[*87] AFTERWORD: A NOTE ON SOURCES AND METHODS

The analysis presented in this article is based on a study of the public record, and those who

The preoccupation with ethics in government is the most obvious lingering effect of the Watergate affairs, but it may not be the most important. This article will consider a less visible aftermath of Watergate: the increasing significance of disputes that generally fall under the rubric of separation of powers. President Nixon, of course, tried unsuccessfully to invoke the **[*20]** constitutional separation of powers to prevent his own downfall. As emboldened congresses and a more belligerent press have sought to subject subsequent presidents to tighter and tighter controls, those presidents have also invoked the Constitution to protect themselves from encroachments on their freedom of action. Some of these disputes have arisen from the post-Watergate ethics laws, [11] but they have not by any means been limited to this context. Because recent turf fights between presidents and their adversaries have often been waged in legal and constitutional terms, lawyers who specialize in the separation of powers have become much more prominent than they once were. The function of articulating a principled defense of presidents and the presidency--mostly from congressional incursions--is carried out primarily by those who serve in the Office of the Counsel to the President at the White House and in the Justice Department's Office of Legal Counsel ("OLC"), to which the Attorney General's legal advisory function has largely been delegated. [12] The rise of this species of presidential lawyer is worthy of considerable attention, both for its intrinsic intellectual interest and because it can be expected to have continuing effects on the political life of our nation. [13]

The comments that Gray and Cutler offered when Nussbaum resigned his office [14] exemplify the conventional wisdom among this new breed of presidential lawyer about the proper relationship between them and their client. Cutler and Gray agree that government lawyers may not properly serve as the president's personal attorney, and in this they are surely correct. But they also agree that the office of the presidency should, at least to some extent or in some circumstances, be **[*21]** regarded as the real client to whom the president's lawyers owe their professional loyalty. I believe this is incorrect in several respects. First, it has no basis in the law. Second, it exaggerates the professional obligations and constitutional role of the lawyers, while suggesting an unduly restricted view of the president's own role and obligations. Third, the moralistic romanticism of the Gray and Cutler vision obscures the economy of incentives that actually determines much of what presidents and their lawyers actually do.

This article seeks to present a more realistic understanding of the work that is and can be done by those who advise the president about his constitutional rights and responsibilities. I argue that the role of lawyers in defending the presidency is determined primarily by the operation of ordinary incentive structures, rather than by legal requirements or professional norms. The potential influence of these lawyers, moreover, is sharply constrained by those same incentive structures, and especially by the fact that the president faces different incentives than his legal advisors. I conclude that as a result of these constraints, the principled defense of the office of the presidency cannot become a significant element of any president's agenda, even if the president wants it to be. For the reasons suggested by Tocqueville, [15] this analysis is not the enemy of professional obligation or constitutional responsibility, but their friend. The doctrine of self-interest properly understood may be incomplete, but it is the strongest guarantee against our lawyers and our presidents.

Part II explains the analytical framework used in this article, and contrasts it with other approaches that dominate the existing academic literature. The following sections of the article provide a detailed case study to support the conclusions suggested by the analysis used here. Part III explores the Bush administration's unprecedented effort to implement a serious and systematic legal strategy for the defense of the presidency. This strategy unquestionably had visible results, but it also generated compromises that were often more important, though much less conspicuous. Part IV examines three major incidents in which the administration's legal strategy was simply abandoned. I argue that these incidents were, on the whole, **[*22]** more significant than the cases in which the strategy was actually

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are skeptical about its conclusions can test the evidence presented here against that record. This point deserves some emphasis because I worked in the Office of the Counsel to the President during the Bush administration, and in OLC during the Reagan administration. Anyone with such a background might reasonably be supposed to have the usual biases that arise when one has been involved with events and institutions that one later seeks to explain. [185] It should not be thought, however, that lack of direct involvement in government provides any assurance of impartiality in the study of government. Those who devote their time to the study of their own country's political institutions are not likely to be unaffected by their own political opinions, and those opinions need to be disciplined for the same reason and in much the same way as the biases of the former participant.

The difficulties in preventing one's political beliefs from distorting one's analysis are particularly acute in the study of legal policy and separation of powers, where there is nothing like a political or academic consensus about the basic criteria that one could use to judge the performance of government officials and institutions. For that reason, scholars who work in this area cannot easily escape the necessity of acquiring a detailed familiarity with the legal issues and materials that legal policy-makers must grapple with in their own work. Such familiarity is also needed to avoid a different kind of shortcoming, because adequate analysis also requires independence from the explanations offered by policy-makers for their own conduct. This afterword provides illustrations of both points, using examples drawn from two of the most detailed recent studies of the operation of the legal bureaucracies that have primary responsibility for separation of powers issues.

Professor Cornell W. Clayton's critique of the Bush administration's approach to legal policy illustrates some of the pitfalls that can trap those who do not acquire a sufficient **[*88]** familiarity with the law. [186] Professor Clayton, who sees the Bush approach to legal policy as an ill-advised extension of the Reagan administration's misguided efforts to increase its control over the administrative state (and thereby to diminish congressional influence), concludes that a new alliance between the Justice Department and a conservative Supreme Court has implications that are "potentially far more dangerous to the rule of law" than previous presidential efforts to supervise legal administration. [187] Although this threat to "the rule of law" remains obscure in Professor Clayton's analysis, it seems to proceed from a notion that the "politicization" of legal policy by recent conservative presidents constitutes an improper evasion of congressional will. [188] The best solution, Professor Clayton suggests, may be for Congress to remove the Justice Department from the president's control. [189]

Leaving aside the implausible suggestion that the Supreme Court's separation of powers jurisprudence would permit the president's authority over the Justice Department's core law enforcement functions to be taken away, [190] the legal materials that Professor Clayton uses to support his thesis do not in fact support his claims. I will limit myself here to two examples that are especially relevant to this article because they involve the Bush administration's approach to separation of powers.

[*89] First, after claiming that the Bush administration went farther than its predecessors in using "signing statements to gut congressional policies with which it disagreed," [191] Professor Clayton offers as his *only* example a draft signing statement that the President *never issued*:

> In the most egregious example of this practice, Boyden Gray circulated a statement interpreting the 1991 Civil Rights Act so as to gut several key provisions, even before the bill was signed. . . . [The Gray directive] specifically attacked race preference policies and would have ended the use of preferences and quotas in federal hiring. The directive was clearly an attempt to achieve administratively what the administration was not able to achieve in its fight with

Congress over the wording of the Civil Rights Act. [192]

Not only was the draft signing statement described here never issued, [193] but Professor Clayton's characterization of it is demonstrably inaccurate. Gray's draft would have required federal agencies to terminate programs "that may be inconsistent with the new law or with the principle of discouraging quotas and unfair preferences. So-called 'race norming' of the General Aptitude Test Battery, for example, is plainly forbidden by section 106 of the new Act." [194] The Gray draft would also **[*90]** have directed federal agencies to begin work on new employee selection guidelines, to be "established under section 105 and other provisions of the Act," and it would have directed federal agencies to cease inducing employers "to violate the laws" by adopting quotas, preferences, and set-asides "on the basis of race, color, religion, sex, or national origin." [195] In addition to the fact that the document focused on requiring federal agencies to *conform* with the Civil Rights Act of 1991, including such specific provisions as the statute's flat prohibition of "race norming," there is not one word in that statute authorizing the kind of "quotas and unfair preferences" described in the draft. On the contrary, the statute specifically and expressly forbids "any employment practice [in which] race, color, religion, sex, or national origin [is] a motivating factor . . . even though other factors also motivated the practice." [196] Thus, the statute plainly and on its face dictates exactly the policy that Professor Clayton castigates Gray for recommending.

This misinterpretation seems to have arisen from unfamiliarity with the relevant legal materials and background. At one point, for example, Professor Clayton makes the following statement about the Bush Justice Department: "In *Wards Cove v. Antonio* [sic] (1989), *Patterson v. McClean Credit Union* (1989), and *City of Richmond v. Croson* (1989), the department argued and finally won a majority of the Court to accept its position that the use of disparate impact evidence under Title [VII] should be restricted." [197] This sentence contains several **[*91]** errors. First, none of these cases was briefed or argued during the Bush administration. Second, *Patterson* had nothing to do with disparate impact evidence or with Title VII, and the Court *rejected* the position advocated by the Justice Department in that case. Third, the *Croson* decision had nothing to do with either of these issues or with any other federal statute. In a note appended to this sentence, Professor Clayton says that "Congress overturned these decisions by passing the Civil Rights Act of 1991." [198] The 1991 statute in fact *codified* large parts of *Wards Cove*, including its holding, and unambiguously "overturned" only one relatively minor dictum. The 1991 Act overturned *Patterson*, but in doing so it *adopted* the position advocated by the Bush administration throughout the legislative debate, which in turn was consistent with the position taken by the Justice Department in the *Patterson* litigation itself. Finally, the 1991 Act contains no provisions that have anything to do with the legal issue in the *Croson* case.

A second example of difficulties that can ensue when complex legal issues are treated in too summary a fashion arises in Professor Clayton's discussion of the relation between the Supreme Court's *Chevron* doctrine (which requires judicial deference to federal agencies' interpretations of statutes in certain circumstances) and Justice Scalia's views on the use of legislative history in statutory construction. According to Professor Clayton, the Bush Justice Department was engaged in a "quest to get the Supreme Court to place more stringent limitations on lower court review of administrative action." [199] The key to this effort, we are told, was Justice Scalia, who has "championed broad application of the *Chevron* standards" and who "has argued that lower courts should ignore congressional intent altogether as a basis for reviewing administrative action." [200]

At best, these are caricatures of Justice Scalia's positions. Taking the second allegation first, Professor Clayton cites two of Scalia's opinions (one for the Court and one concurring in the Court's judgment) to support his description of Scalia's position on congressional intent. [201] But neither case involved **[*92]** a review of any federal administrative interpretation, and

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neither opinion advocates ignoring congressional intent. In neither case, nor anywhere else that I am aware of, has Scalia even suggested that lower courts should adopt different principles in interpreting statutes than the Supreme Court should. Nor do I believe that Scalia has ever contended that any court should "ignore congressional intent altogether."

Professor Clayton's notion that Scalia wants to "ignore congressional intent altogether" seems to proceed from a misunderstanding of Scalia's views about the use of legislative history in statutory construction: "According to [Scalia's] view, all that is important is the language of [the] statute, not Congress' efforts to explain what its statutes mean through committee reports or legislative histories." [202] So far as I am aware, however, Scalia has never asserted that courts should ignore the legislative history of a statute when it provides the most probative evidence of a statute's meaning, and Professor Clayton cites no such assertion. Scalia has argued, in considerable detail and in a variety of contexts, that courts should not unnecessarily substitute inferences drawn from the legislative history of statutes (which consists of statements by entities *other* than Congress, such as congressional committees and individual members) for inferences drawn from the statute itself (which is the only thing that Congress has actually voted on). Some of what Sca

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pursued. Part V analyzes the Bush administration's single most aggressive attempt to carry out its program, and explains how and why it completely missed its goal, leading instead to a setback for the program. Part VI offers some concluding observations.

II. FRAMEWORK FOR THE ANALYSIS

The increased legalization of ethics and the increased legalization of turf battles between the legislature and the executive have a common origin in Watergate, but they have also had a common effect: enhancing the influence of lawyers in the White House and in OLC. To see why this has occurred, consider for a moment the roles played by most of the senior political appointees in the executive departments and agencies, such as cabinet secretaries. In theory, these are supposed to be the president's representatives in the permanent bureaucracy, giving policy direction in the light of an agenda set by the single popularly elected possessor of the executive power of the United States. [16] In practice, these officials inevitably serve both as the president's representatives in the agencies and as representatives *to* the White House for the bureaucracies and their congressional and interest-group overseers. These conflicting roles can be balanced in different ways, and with greater or lesser success, depending on a great variety of circumstances. What is important for present purposes is simply to note that the remedies for failing to balance these roles successfully are entirely political. Political appointees can be fired by the president, and can be subjected to various lesser kinds of pressure and embarrassment from the White House. Similarly, an agency's congressional superintendents can often exert a considerable countervailing influence on its political managers because of legislators' discretion to grant and withhold appropriations, provide desirable enabling legislation, inflict unflattering publicity through hearings and investigations, and take other steps that will cause political appointees to appear as successes or failures.

[*23] The president's principal legal advisors have an apparently very different set of roles. Unlike the various interests that political managers are expected to balance politically, the law binds everyone, including the president. As oracles of the law, therefore, attorneys can in effect issue commands to their nominal superiors in a way that others cannot. As ethics laws have become increasingly complex and arcane, those who are expert in their interpretation have naturally become more important and more powerful. And, as disputes over the allocation of power between the executive and the legislature have become more legalistic, experts in this branch of constitutional law have also become more important and more powerful. The most important authorities on ethics and separation of powers, moreover, are largely found in the same small group of people who work at the White House Counsel's Office and in OLC. [17]

[*24] If lawyers were, or could be, simply the voice of the law, it might be appropriate to treat them very differently from other political officials in the government. But politically appointed lawyers obviously have interests and obligations that are quite similar to those of political managers, such as protecting and advancing their own reputations and promoting the president's agenda. To appreciate the special role played by lawyers who specialize in the separation of powers, one must begin by understanding more precisely how they differ from other political appointees, and how they are the same.

A. Legal Ethics and the Role of the President's Legal Advisors

Among the more salient features of most commentaries on the advisory function of the presidential lawyer is the exaggeration of the deep and inherent tensions that are supposed to exist between the political and professional obligations of those responsible for providing the president with legal advice. Real tensions between these obligations undoubtedly do exist, but the dilemmas that result are typically specious. Lawyers who work for the president without fully sharing his political goals, for example, have an obvious incentive to wrap their own political agenda in the guise of professional obligations. Similarly, those who wish to

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influence an administration's conduct have an obvious incentive to encourage the president's lawyers to **[*25]** resist his agenda in the name of supposedly professional considerations. Exaggeration of the tension in the role of presidential legal advisor has had real effects on the public discourse about the role of lawyers in government, and on the academic literature about the functioning of legal bureaucracies. [18]

The principal alternative views about the professional obligations of the president's legal advisors are illustrated by the quotations in Part I from the three lawyers who have recently served as White House Counsel. Gray and Cutler are clearly right in one respect. Those who serve in this position are government employees, who cannot properly act as personal counsel for their supervisors. In this respect, however, they are no different from lawyers retained or employed by institutional clients in the private sector. There are circumstances in which the distinction between the interests of a corporation and the personal interests of its principal officers is genuinely difficult to draw. And counsel to a private corporation will sometimes be tempted to substitute loyalty to an officer who controls the disposition of the firm's legal work for loyalty to the firm. Painful ethical dilemmas can arise and mistaken choices may be made by lawyers in these circumstances just as they may in the government. Such problems are inherent in the business of representing institutional clients, however, and the underlying standard of conduct is the same in the public and private sectors: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." [19] Thus, if Nussbaum undertook **[*26]** to represent the President or his wife (or both) in their personal capacities while he was on the public payroll, he was acting improperly. This judgment does not depend on any peculiar ethical tensions created by government service in general or by the special demands of employment in the White House. [20] The same impropriety would exist if Nussbaum, after returning to private practice, were to bill a corporate client for services performed in behalf of the personal interests of the client's chief executive officer. [21]

If it is clear that government employees may not properly represent the personal interests of those who hire them, it is not nearly so clear exactly what interests they *are* supposed to represent. Gray and Cutler differ on this question, and their views represent the two alternatives most frequently presented. According to Cutler, the White House Counsel must seek to balance the interests of the president as a politician against the interests of the office he holds. When these interests diverge, as they occasionally must, Cutler suggests that the lawyer must decide which is more important in the case at hand. Good judgment--a sensitivity to the competing demands of politics and **[*27]** principle, and an ability to resolve concrete dilemmas in a way that serves the interests of the nation as a whole--is thus considered the hallmark of excellence in a presidential legal advisor. Cutler's view is neither quirky nor indefensible. It is, for example, essentially the view taken by Professor Nancy V. Baker in her extended study of the history of the Attorney General's office. [22]

Gray articulates what seems at first to be a sharply different and more glorified view of the White House lawyer's job: that his client is the presidency itself, an entirely abstract entity whose needs and interests transcend the desires and concerns of any individual who happens to get elected to that post. When fully elaborated, this view provides a theoretical justification for the ascent, and in many ways the ascendance, of government lawyers who specialize in the separation of powers. Tracing their intellectual roots to Alexander Hamilton, whose theory of the executive gives intellectual respectability (and even a certain air of timelessness) to their endeavors, these lawyers present themselves as agents of the Constitution itself and guardians of an office whose significance to our nation far outstrips the petty political disputes that consume the daily life of most of those around the president. Important elements of an academic theory supporting Gray's view are presented by Terry Eastland, who contends both that the Constitution itself largely dictates how presidents should conduct themselves in office and that these constitutional duties are largely bound up with defending the prerogatives of his office. [23]

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What unites the views expressed by Cutler and Gray--and in my view unites them in error--is the assumption that mere lawyers should be deciding how the president ought to accommodate his political and policy agenda with the obligations he has to the office he occupies. Like clients in private practice, the president is responsible for his own decisions, and in fact he has the authority either to make his own legal determinations without consulting any of his lawyers or to proceed in the face of contrary advice from any lawyer he does consult. [24] It is **[*28]** true that the president has legal obligations that differ from those of any private citizen, or indeed from any other government official. But they are *his* obligations, not those of his lawyers or subordinates. [25] If, for example, the president decides that his political and policy agenda is more important to the future of the country than defending his office from constitutionally dubious legislative restrictions, no lawyer anywhere in the government has the authority to displace that determination. Like anyone else, his lawyers may argue that a particular judgment by the president is mistaken, and they may sometimes be right. But when lawyers assume to substitute their own judgment for the president's--as they must if "the Oval Office" (Gray) or the "office of the presidency" (Cutler) is their client--they are acting without legal warrant.

Though the president's lawyers have no legal right to substitute the presidency for the president as their client, they have the right to negotiate with the president for the privilege of making such a substitution. Lloyd Cutler may have done just that, for it appeared when he was appointed that President Clinton needed his services far more than Cutler wanted the job. [26] But even apart from such special circumstances, there **[*29]** are persistent forces encouraging presidents to allow their closest legal advisors to view themselves as counsel for the presidency. If those forces were to produce a settled expectation that the president should be treated by his chief legal advisors merely as a kind of caretaker for the institution of the presidency, to which they owe their true allegiance, it might not much matter whether there is a legal basis upon which the president's lawyers could rely in presuming to set themselves up as judges of his fidelity to his constitutional oath of office. Such an arrangement might even be thought to benefit presidents more than their lawyers, since it is after all the president who gets to employ the authority that the lawyers would be dedicated to defending and expanding.

The Bush administration provides a useful case study through which to explore the tensions between advising a president and advising the presidency. When George Bush was elected president, a variety of factors had established a pattern of conflicts in which unsettled constitutional issues involving the separation of powers provided the terms of debate for a struggle over control of the basic mechanisms of governance. In addition to the continuing repercussions of the Watergate scandals and the 1974 elections, these factors included both the seemingly fixed disinclination of the voters to establish either political party in command of both the legislative and executive departments of government and the fresh tensions generated by the Iran-Contra affair. Coming into office without a well-articulated substantive agenda, but with a strong sense of the disorder that can arise from congressional attempts to exercise naturally executive functions, President Bush took what must be the unique or very unusual step of directing that a legal strategy be developed for enhancing the defense of his office. The record of this effort to close the gap between constitutional principle and administration policy can help illuminate both the possibilities open to presidential legal advisors and the limits on their role in government.

[*30] *B. The Existing Literature and an Alternative Approach*

A close study of the Bush administration's record on separation of powers issues also offers an opportunity to supplement a growing body of scholarship dealing with the behavior of legal bureaucracies. This scholarship, which has been produced mainly by political scientists, attempts to explain the behavior of lawyers in government in terms of a variety of personal, institutional, and historical forces. Professor Nancy V. Baker, for example, focuses on individual Attorneys General and seeks to explain their performance in office according to

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whether they behaved more as a neutral law officer or as the president's advocate and supporter. [27] Professor James Michael Strine's detailed study of OLC concludes that both continuity and change within that office can be explained by its institutional structures, norms, roles, and rules. [28] Professor Cornell W. Clayton emphasizes the impact on legal policy-making at the Justice Department of wider historical and political forces such as the nationalization of governmental power, the judicialization of large areas of public policy, and the institutionalization of partisan conflict. [29]

The information included in these studies can explain a great deal, for government lawyers operate in environments that are severely constrained by a variety of factors including the norms and expectations of the legal profession, the balance of power that obtains among various political factions in and out of government at any given time, and the sheer growth in the size and complexity of the federal administrative state. In my view, however, the existing literature does not adequately explain the operation of these factors because it gives insufficient attention to the way in which incentive structures affect the choices made by individual lawyers and those with whom they deal.

The absence of serious inquiry into the incentives that affect individual choice in legal bureaucracies appears to result in part from constraints that the subject matter places on those who undertake these studies. First, the most accessible sources of information about the way legal bureaucracies operate are the memoirs of those who have served in high positions in the **[*31]** government. Such memoirs are unreliable because their authors face an extremely strong temptation to understate the degree to which they engaged in self-serving or mistaken behavior while in office. When researchers try to supplement such sources through interviews with more obscure officials, their research cannot escape the underlying problem. Many government lawyers take the confidentiality of their work seriously, and are therefore reluctant to speak in useful detail about what they and others in the government do. Those who do choose to speak with researchers, especially when they speak anonymously, cannot be assumed either to constitute a fair sample or to be unbiased reporters. On the contrary, it would be safer to suppose that many who are willing to provide information to outsiders do so because they have an axe to grind. [30]

Documentary evidence in legal archives will rarely be able to provide much assistance in correcting the problems described above. The documents that underlie the legal advice presidents receive are seldom available to researchers until after the decisions to which they relate are long past, and they often never become available. [31] Much advice, moreover, is formulated in meetings and discussions that are never recorded, among people who will never have a reason to offer complete, or completely candid, accounts of what was said.

These limitations can to some extent be overcome through sufficient study of the public record, which contains a great deal of information about what presidents and their lawyers actually do, and about their efforts to explain publicly what they do. Not only does the public record contain a great deal of information, but it has the very important advantage that research based on it can be checked by anyone who wants to verify the claims made by those who rely on it. Unfortunately, the public record has not been thoroughly scrutinized in the existing literature, and for very understandable reasons. Light reading it is not, and much of it can be confusing to those who are unfamiliar with the specific bodies of law out of which particular **[*32]** legal issues arise. And yet, one cannot meaningfully evaluate what happens when the president is given legal advice on important issues unless one can evaluate the strengths and weaknesses of the legal arguments involved. Without such an evaluation, one is not likely to understand the relationship between the legal and the extra-legal components of the advice, or the real causes of any ensuing decisions.

The Afterword to this article gives examples of the difficulties that can arise from insufficient skepticism about information from sources within legal bureaucracies and from insufficient familiarity with the law with which these bureaucracies deal. These difficulties can be

especially serious when academic analysts are intent on formulating lessons that they wish to urge on policy-makers, as most students of this subject have been. Professor Clayton, for example, is extremely harsh in criticizing what he considers the "politicization" of the Justice Department under Presidents Reagan and Bush, and he concludes that serious consideration should be given to removing that Department from the president's control. [32] Professor Jeremy Rabkin, conversely, reviews most of what little is known about the history of the Office of the Counsel to the President, and concludes by attacking the Clinton administration for relying insufficiently on the institutional wisdom of the Justice Department. [33]

Such recommendations, however, can hardly be distinguished from political advice unless they are grounded in adequate explanatory models. The models employed in the literature, however, are ill-defined, and the scholarship in this area is very short on testable predictions. Indeed, one rarely sees any analysis that gets much beyond such self-evident points as the following: when the executive and legislative departments are controlled by different political parties, conflicts over separation of powers increase; [34] increasing conflicts between the executive and the legislature tend to increase the involvement of the judiciary in issues involving the control of governmental institutions; [35] executive officials have less success in pursuing aggressive agendas if their private financial dealings create opportunities **[*33]** for their adversaries to attack their ethics; [36] and legal advisors who do not champion the president's agenda lose influence with the president while those who do champion his agenda invite attacks from the president's political adversaries. [37]

I have tried to overcome some of the limitations in the existing literature. First, I employ a simple and fairly well defined model of human behavior, drawn from the science of economics, which has proven useful in explaining a wide range of human conduct. I assume, as a hypothesis, that the president's legal advisors and the other people with whom they deal in their professional lives behave as rational utility maximizers in an environment characterized by limited resources. This model implies, most importantly for present purposes, that people cannot have as much as they want of the most obvious things they desire--such as money, prestige, power, and leisure--and that they will respond to changes in their environment by changing their own behavior in an effort to maximize their self-interest. Using this model does not require one to assume that truly disinterested, or even self-sacrificing, behavior never occurs. Nor need one assume that acts of insanity or irrational zealotry never occur. The approach adopted here simply makes the provisional assumption that such conduct is rare enough in certain contexts (in this case, the business of government during the late twentieth century in the United States) that events will largely proceed *as if* self-sacrificing or irrational behavior were nonexistent. [38]

Use of the rational-choice model seems particularly suitable in examining the behavior of people operating in a system that was consciously designed to promote an identity (though necessarily an imperfect one) between duty and interest. [39] Another **[*34]** reason for regarding this model as especially useful in the present context is that it helps direct attention to important causal influences that those who create the public record on which we must rely have a motive to conceal, even from themselves. People who serve in public office are both expected and inclined to explain their own behavior by reference to the "public interest" or "the law" or "the Constitution," rather than in terms of their self-interest. Abandoning this expectation and discouraging these inclinations would not elevate public discourse or improve the operation of government. But neither can it advance the understanding of government to accept such protestations of disinterestedness, at least without critical examination. Government lawyers, in particular, may be less driven by self-interest than those who compete with other people in the worlds of business or electoral politics, but such a happy fact is one that would need to be proved rather than assumed.

One of the more obvious dangers in the use of a rational-choice model, of course, is that one will be tempted simply to discount appeals to standards such as "the law" or "the Constitution" as so much self-serving camouflage, without giving sufficient attention to the

fact that people can include fidelity to the law in their own utility functions. [40] The law and legal principles, like the dictates of loyalty and justice, can and do operate as meaningful constraints on lawyers' behavior even **[*35]** though this surely happens less often than lawyers say it does when they are explaining their own actions. I have tried to avoid the pitfall of unjustified cynicism by examining the strengths and weaknesses of the legal arguments offered by the individuals whose conduct is being considered, and by comparing what they actually did with the explanations they offered for what they did.

The rational-choice model of human behavior generates a simple but somewhat counter-intuitive prediction about the subject-matter of this article: *a president should prove unsuccessful if he attempts to make the defense of the presidency an important element of his administration's agenda*. The rewards for a consistent and forceful defense of the legal interests of the office of the presidency would be largely abstract, since they would consist primarily of fidelity to a certain theory of the Constitution. To the extent that the rewards could be translated into actual increased power to accomplish policy and political goals, those rewards would mostly be reaped at some remote period of time, after the defenders of the theory had left office. The costs of pursuing a serious defense of the presidency, however, would tend to be immediate and tangible. These costs would include the expenditure of political capital that might have been used for more pressing purposes, the unpleasantness of increased friction with congressional barons and their allies, and the sheer expenditure of time by extremely busy people on uninvitingly dry legal issues.

Presidential lawyers who specialize in the separation of powers would tend to collect a large share of the benefits in the form of increased glory and increased job satisfaction, but the specialization of functions that produces this result also means that the costs would largely be borne by others in the government, above all by the president. Therefore, when the costs to the president (and to those of his advisors with a broader responsibility for governance than that allocated to separation-of-powers lawyers) become significant, we should expect the lawyers' legal principles to be compromised or abandoned. And because the costs of adhering to those principles tend to be highest in the most important cases, we should expect to find a pattern in which the principles are adhered to only primarily in relatively trivial cases. The following sections of this article are devoted to testing these predictions.

The approach sketched here necessarily requires a level of analysis that is more detailed than one ordinarily finds in studies **[*36]** of the operation of legal bureaucracies. I have therefore limited the study in two dimensions. First, only issues involving the separation of powers are considered. Second, the analysis is confined almost exclusively to George Bush's four years in office. [41]

III. THE EFFORT TO IMPLEMENT CONSTITUTIONAL PRINCIPLE

In 1987, Vice President Bush was introduced at a meeting of a group of conservative lawyers by C. Boyden Gray, who had served as his Counsellor throughout the Reagan administration. The Vice President then delivered a speech arguing that congressional "micromanagement" of foreign policy was an improper substitution of the legislature's properly political oversight responsibilities with an unduly legalistic "regulatory" regime. Bush believed both that this was a serious practical problem because it threatened to "destroy our government's ability to function effectively," and that its amelioration required practical steps to establish relationships of trust between officials in the executive and legislative departments of government. Significantly, however, Bush contended that these practical steps should be taken in the context of a reexamination of the intent of the Framers of the Constitution and the "objective principles embodied in the law" they created. [42]

After becoming president, one of Bush's very first public statements dealt with this same issue: "I am concerned about the erosion of presidential power, particularly in the fields of national defense and foreign policy, but I want to work with Congress," Bush said. "If they

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* no elections // fundraising
* no lobbying

Signup Page and Personalization

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This is your chance to receive updates directly from the White House. We offer different types of information, from general updates on the President's agenda, to information regarding specific issues. Occasionally, there's even information that effects local communities.

By submitting your e-mail address below, you will automatically get Message to America, a timely general update on the latest information from the White House.

[Type e-mail here]

Please note:
Typically, these updates would not go out more than once a week. Due to rapidly developing events, we may send out up to two messages per week if substantial new information is available.

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- Zip code – when available, get information that affects your community
- First Name & Last Name – so we can address you by name, when appropriate
- Issue category – receive the latest information on the issues below

Submit your custom information

No customization please (go to home page)

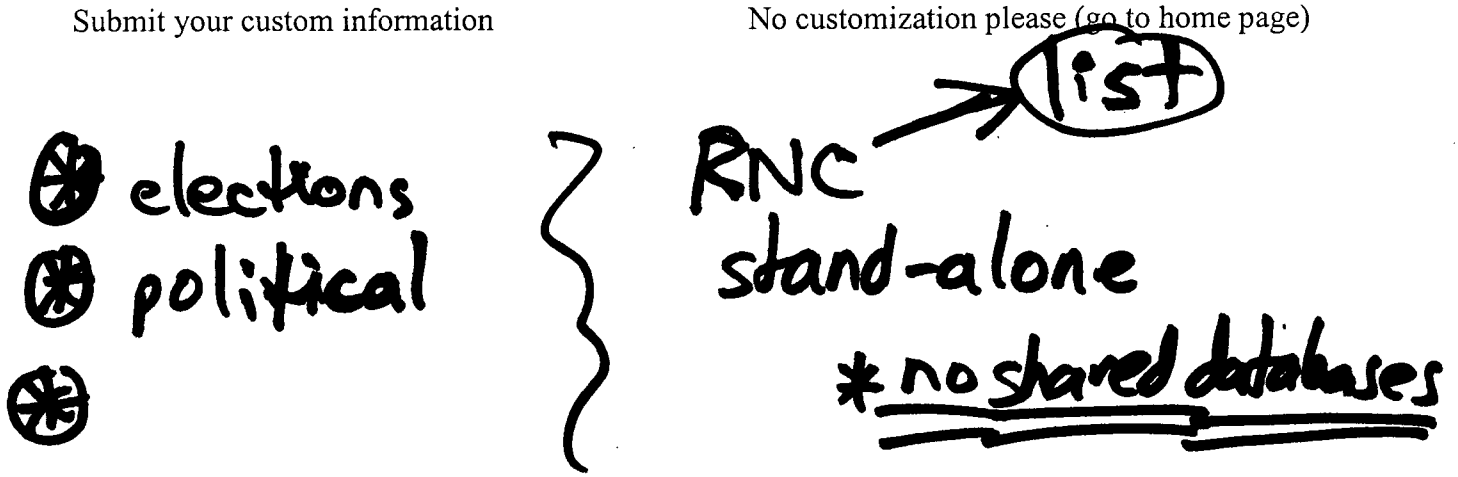

Header Signup Confirmation and Personalization Option Page

Thank you for submitting Neil_Zimmerman@who.eop.gov for White House e-mail updates.

Important Notice:
Whitehouse.gov uses a "double opt-in" process to ensure the privacy of our subscribers. A second step must be completed to receive White House e-mail updates. An e-mail will be sent to the address you submitted (Neil_Zimmerman@who.eop.gov) to explain how to complete the double opt-in process.

Get Custom E-mail Updates

Take 15 seconds to customize your White House updates based on:

- Zip code – when available, get information that affects your community
- First Name & Last Name – so we can address you by name, when appropriate
- Issue category – receive the latest information on the issues below

Submit your custom information No customization please (go to home page)

Confirmation Page

Please confirm the information you submitted is correct.

E-mail: Neil_Zimmerman@who.eop.gov
Zip code: 20502
First Name: Neil
Last Name: Zimmerman
Issues: Education
Economy/Budget
Homeland Defense
Message to America

If the above information is correct, please "click submit."

If you want to make changes to the above information, please click "go back."

Possible E-mail Names

WH News
WH Update
WH Alert
White House News
Stars & Stripes
The Red White & Blue

Message to America
Liberty Mail
Enduring Freedom
Freedom Mail
United Voices
American Freedom
Voice of Freedom
Freedom Ring
Our Country
Victory Mail
America United
American Unity
United America
Free and Brave

E-mail Updates on whitehouse.gov

The process will take no more than two weeks, but can be compressed the faster we get the Office of Administration (OA) certain information.

E-mail subject/issue categories
When you sign up for e-mail updates, you will automatically get the general e-mail update we send out. This e-mail should not go out much more than once a week except under special circumstances.

As soon as they finish the initial sign-up process, they will be asked if they would like to personalize their e-mail updates. If they don't, then they're finished with the sign-up process. If they do, then they will be able to personalize in three ways:

- Zip code – when available, get information that affects your community.
- First Name & Last Name – so we can address you by name, when appropriate.
- Issue category – receive the latest information on the issues below.

We should start out with a few issue categories until we have a more robust system (including a way to measure e-mail campaign success) and more people to help write these updates.

We could start off with the core agenda topics:

1. General (Message to America)
2. Budget
3. Education
4. Faith- and community-based initiatives
5. Trade promotion authority
6. Military reform
7. Missile defense
8. Energy


In light of recent events, we may want to revise these topics.



Once we have a more robust system and e-mail writing/approval process we can offer as many issue categories as we wish. Correspondence helped identify the following top 22 issues:

1. Adoption
2. Agriculture
3. Campaign Finance Reform
4. Child Support
5. Civil Rights
6. Crime
7. Community and Faith Based Initiatives
8. Defense
9. Disabilities
10. Drug Policy
11. Economy, Budget, and Taxes
12. Education
13. Energy
14. Environment and Natural Resources
15. Foreign Policy
16. Health Care
17. Housing / Homeownership
18. Immigration
19. International Trade
20. Labor Relations
21. Medicaid/Medicare
22. Social Security

1. User enters email address into a web form and clicks a submit button

2. User is presented with a "thank you" page that shows their email address and describes the double opt-in process (verbiage to be supplied by you). Below the thank you and double opt-in language, the user is presented either:
   - An enticement for personalization, with a choice of going to the personalization forms or returning to the home page.
   - An enticement for personalization, with the personalization fields available below the thank you, double opt-in, and enticement language.

   The personalization text boxes would be First Name, Last Name, and Zip Code. Check boxes related to subjects will be available for users to indicate their interests. (Subjects to be supplied by OSI) Demonstration form will have one subject checkbox.

   User fills in form and indicates subject interest via a check box, then clicks "submit" button or, if no personalization is desired, clicks on a button to return to the home page.

   2.a. (only if no personalization) User receives an email asking them to confirm their desire to receive email updates.

   2.b. User replies affirmatively and their email address is added to the list of subscribers.

3. User is presented with a confirmation page showing their e-mail address as well as the fields they have filled in. They are asked to confirm their information and click "submit" if correct, or click "go back" if corrections are needed. Process loops until "submit" is clicked.

4. User is presented with a "thank you" page (verbiage to be supplied by OSI) with a link to the home page.

5. User receives an email asking them to confirm their desire to receive email updates.

6. User replies affirmatively and their email address is added to the list of subscribers.



OFFICE OF STRATEGIC INITIATVES

September 19, 2001

MEMORANDUM FOR TIM CAMPEN

THROUGH: BARRY JACKSON AND TUCKER ESKEW

FROM: NEIL ZIMMERMAN, JIMMY ORR, AND JANE COOK

CC: BRETT KAVANAUGH AND MARCUS MOLLMANN

RE: WHITE HOUSE INTERNET CONTENT MANAGEMENT

The Office Media Affairs (OMA) will be responsible for the content management of the White House Web site. All posts to the Web site will need to be approved by OMA.

The Office of Strategic Initiatives (OSI) will be responsible for the content and database design for the White House Web site e-mail distribution system. All e-mail sends and database manipulation will need to be approved by OSI.

OMA and OSI will work closely on e-mail and Web site message coordination. The White House Counsel's office will be an integral part of all OMA and OSI Internet processes and planning to ensure White House Internet components (Web site and e-mail) receive continual ethical, legal, and privacy review.

The e-mail system should capture e-mail addresses, first name, last name, zip codes and issue categories. The database should be scalable so that additional personalization information can be collected.

Sign-up process attached.

The e-mail system will need to send general updates to the entire list (up to millions of addresses) as well as specialized updates based on user personalization (name, zip code, issue categories, etc.). The e-mail content will be original material, not the automatic generation of documents available on the White House Web site.

While it may not be possible now, the Web site and the E-mail system will need to interact with each other. They should operate from the same database and content management system. The goal: to have a personalization system allowing the Web site experience to mirror preferences indicated via e-mail (link usage, questionnaire responses, etc.) and vice-versa.

E-mail Sign-up Process

Sign-Up Box in Web site Header or Sidebar

I. Insert E-mail address and click submit
II. Pop-up confirmation box
    A. Thank you for submitting (show address submitted)
    B. Want Personalized updates?
        1. Click here to find out how to:
            a. Get localized information
            b. Be addressed by name
            c. Choose your own issue categories
III. End of process OR click through to personalization page (Item II,B below)

WH News Sign-Up Page

I. Insert E-mail address and click submit
II. Go to Confirmation page:
    A. Thank you for submitting (show address submitted)
    B. Want to personalize your updates?
        1. Zip Code
            a. Get information that is relevant to your area.
        2. First and Last Name
            a. Allow e-mails to be addressed to you by name.
        3. Issue Categories
            a. Get special updates based on the topics you choose.
III. End of process if no personalization
IV. Click through to personalization confirmation if personalization selected
    A. Show what personalization has been selected and the information that's been submitted
    B. Click OK to submit or GO BACK to correct
V. End of process once OK selected

Note: Whichever method is used to sign-up, a double opt-in process is required.

Mass Outbound E-mail

Phases:

I. Limited system
   A. Limited changes
      1. Current staff structure
      2. Current Web site and e-mail Listserv
   B. Basic Format
      1. Plain text
      2. E-mail content will be written specifically for e-mail delivery
      3. No automatic content generated based on Web site content
   C. Limited issue categories
      1. General agenda updates
      2. Only top issues available for specified issue updates
      3. Scheduled updates only, no real time content generation
   D. Little information collection, simple personalization
      1. E-mail address
      2. Personalization info: name, zip code and/or issue category

II. Comprehensive system
   A. Significant changes
      1. Structured Internet content and design teams (at least OSI and Media Affairs)
      2. Integrated Content Management system for Website and E-mail
   B. Dynamic Format
      1. Plain text
      2. HTML Web based
      3. AOL friendly HTML
   C. Multiple subject categories
      1. General agenda updates
      2. Specified issue updates, including a more comprehensive list of issues
      3. Automatic "filler" content generated based on personalization information, i.e. general information is replaced if specialized information is available either on the Web site or in original e-mail content
   D. Full Personalization
      1. Basic information collection (email, name, zip code, issue category)
      2. Format of e-mail (plain, html, etc.)
      3. Frequency of updates (scheduled, real time)
      4. Relationship Marketing Option to receive targeted information
      5. Ability for subscribers to view/alter their subscription (myWhiteHouse.gov)
      6. Ability to measure click through rate of each e-mail
      7. Ability to measure click through rate of individual accounts for message targeting

Jane M. Cook
09/27/2001 02:45:55 PM

Record Type: Record

To: Neil H. Zimmerman/WHO/EOP@EOP

cc: Christopher J. Orr/WHO/EOP@EOP
Subject: email updates graphic update

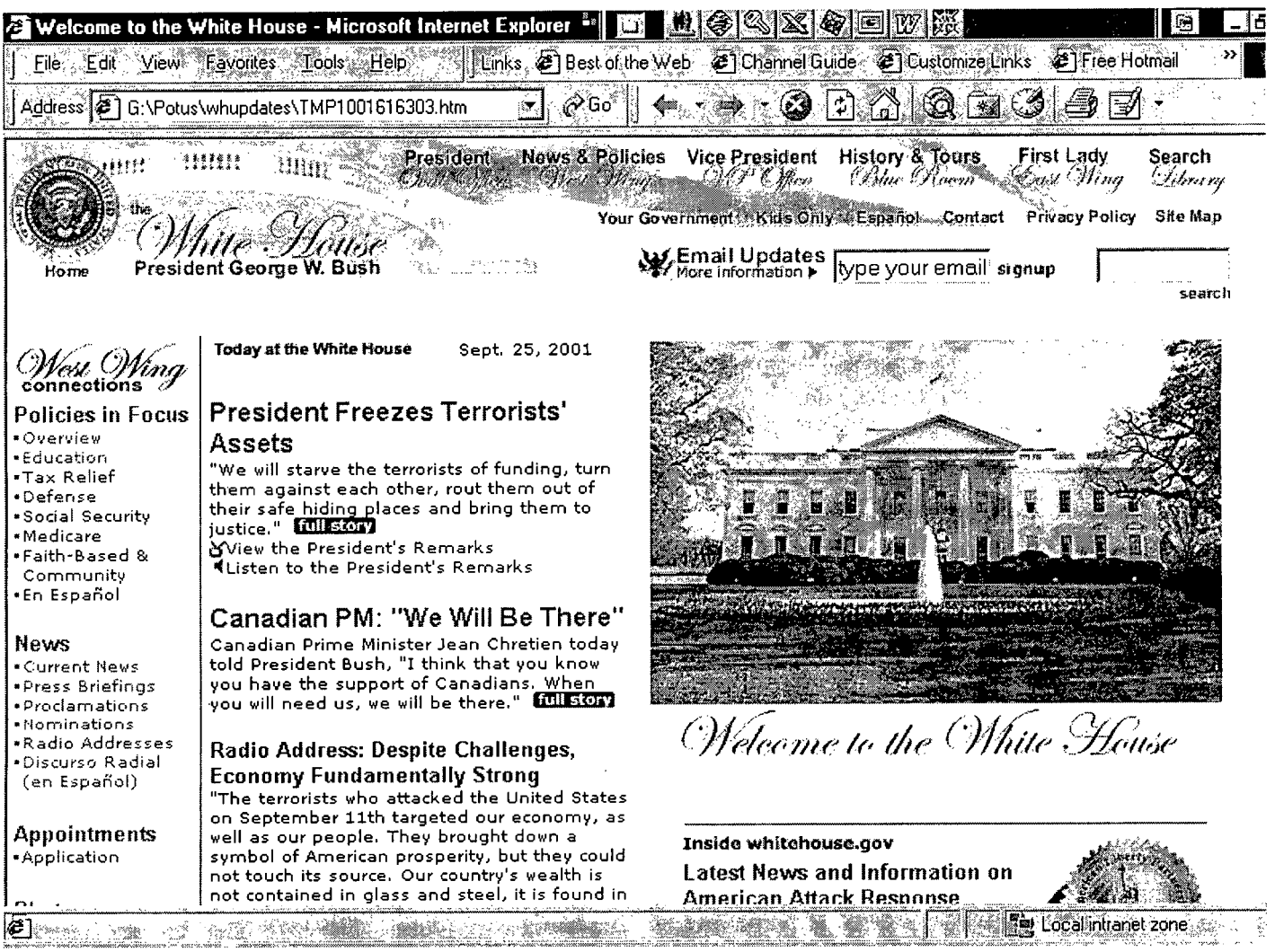

Source: All Sources : News : By Individual Publication : W : **The Washington Post**
Terms: **"susan webber wright"** (Edit Search)

The Washington Post, April 14, 1999

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April 14, 1999, Wednesday, Final Edition

SECTION: EDITORIAL; Pg. A26

LENGTH: 577 words

HEADLINE: President Clinton in Contempt

BODY:

IN WHAT NOW seems that long-ago age of impeachment, it was easy to lose sight of the basic issue: the damage caused by a president's choosing to lie under oath. The president's lawyers used clever wordplay as a distraction, the House managers bumbled into blind alleys. But now **Susan Webber Wright,** a federal district court judge in Arkansas, has eloquently returned to the central point. With her unsparing order holding President Clinton in contempt of court, Judge Wright has employed that most powerful legal tool -- common sense. Yes, she concludes, the president lied. Yes, this is a serious offense against the judicial system. Yes, the record should reflect that such behavior is unacceptable. This is the judgment that Mr. Clinton's behavior deserved, and it is one that seems likely to stand the test of time.

Mr. Clinton and his defenders have made much of the purported political motives of his accusers in the independent counsel's office and in Congress. Whatever the merits of his complaints -- and we believe they are limited -- Judge Wright cannot conceivably be similarly vilified as a partisan. It was she, after all, who initially ruled that the Paula Jones case should not proceed until Mr. Clinton left the White House -- a ruling reversed on appeal. It was also she who ultimately threw out Ms. Jones's claims without a full trial. She has given the president a fair shake all along the way.

Now she is stating what is, when all the White House obfuscation is stripped away, only obvious. "The record demonstrates by clear and convincing evidence," she says, "that the president responded to plaintiff's questions by giving false, misleading and evasive answers that were designed to obstruct the judicial process." When Mr. Clinton was asked in a sworn deposition whether he had ever been alone with Monica Lewinsky, the judge says, his testimony was "intentionally false." When he was asked whether he had engaged in sexual relations with Ms. Lewinsky, his answers were "intentionally false."

"Intentionally false" -- this isn't the maybe-some-people-could-conclude-that-he crossed-the-line of Mr. Clinton's lawyers. This is, as the judge says, "a willful refusal to obey this court's discovery orders." This is behavior, she spells out, that cannot be tolerated.

The practical consequences of Judge Wright's finding -- fines, legal expenses, appeals -- remain to be seen. But the moral consequences are plain. Mr. Clinton, for all his talk of repentance and soul-searching, never could bring himself to acknowledge the seriousness of his offense against the American judicial system. Now, freed of the political danger of conviction in the Senate, he already has begun a further spinning of the ordeal to which he subjected the nation. Impeachment was no badge of shame, he told us not long ago; he had

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been honored to defend the Constitution in his impeachment trial.

We wonder if, as he reads through Judge Wright's ruling, he can still feel his role in all this has earned him any honor. "Sanctions must be imposed," she says, "not only to redress the president's misconduct, but to deter others who might themselves consider emulating the president of the United States by engaging in misconduct that undermines the integrity of the judicial system." Removal from office would not have been the proper remedy, but there had to be a reckoning for Mr. Clinton's conduct. Finally, someone has gotten this right.

LOAD-DATE: April 14, 1999

Source: All Sources : News : By Individual Publication : W : **The Washington Post**
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Source: All Sources : News : By Individual Publication : N : **The New York Times**
Terms: **"susan webber wright"** (Edit Search)

The New York Times, July 30, 1999

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July 30, 1999, Friday, Late Edition - Final

SECTION: Section A; Page 18; Column 1; Editorial Desk

LENGTH: 339 words

HEADLINE: A Deserved Fine for Mr. Clinton

BODY:
Federal Judge **Susan Webber Wright** has set an appropriate sanction in directing President Clinton to pay nearly $90,000 to Paula Jones's lawyers for making false statements about his relationship with Monica Lewinsky in the Jones lawsuit. The constitutional and political issues raised by the events that ultimately led to Mr. Clinton's impeachment will long be analyzed by historians. But Judge Wright steered clear of pronouncing judgment on the full harm done to the Clinton Presidency or to the office itself by Mr. Clinton's behavior. Instead she focused on his actions not as a political leader but as a litigant governed by the rule of law.

In April she found him in contempt of court for "giving false, misleading and evasive answers that were designed to obstruct the judicial process." That stark assessment, unvarnished by political spin, now stands as the appropriate legal conclusion about his conduct.

Yesterday, as part of the contempt ruling, Judge Wright ordered Mr. Clinton to pay the Jones lawyers for expenses and attorneys' fees incurred as a result of his false answers to written interrogatories and false testimony during a deposition on Jan. 17, 1998. He had denied ever being alone with Ms. Lewinsky and denied having sexual relations with her. Judge Wright earlier ordered Mr. Clinton to pay $1,202 for the costs the Government incurred when she traveled to Washington to preside over that tainted deposition.

The Jones lawyers had sought nearly $500,000 in costs, but Judge Wright ruled that the sanction must be based on actual losses in light of the fact that the parties have already settled the case for $850,000. Mr. Clinton's lawyers did not appeal the contempt ruling, and many may have considered the ruling a symbolic gesture. But the order to pay goes beyond symbolism. The $90,000 penalty sends a clear message that even a President cannot get away with intentional falsehoods under oath. It may also deter ordinary citizens from emulating Mr. Clinton's abuse of the judicial system.

http://www.nytimes.com

LOAD-DATE: July 30, 1999

Source: All Sources : News : By Individual Publication : N : **The New York Times**
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Detroit Free Press MAY 6, 1999 Thursday METRO FINAL EDITION

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MAY 6, 1999 Thursday METRO FINAL EDITION

SECTION: NWS; Pg. 8B

LENGTH: 529 words

HEADLINE: MISCONDUCT CASE MAY PROCEED RUNCO'S CONCERNS TO BE HEARD, JUSTICES ASSURED BY TENURE COMMISSION

BYLINE: DAVID ASHENFELTER FREE PRESS STAFF WRITER

DATELINE: LANSING

BODY:
The **Michigan** Supreme Court appears likely to allow the judicial misconduct case against Dearborn District Judge William Runco to move forward, based on justices' comments during a court hearing Wednesday.

Justice Robert Young Jr. told lawyers for Runco and the **Michigan** Judicial Tenure Commission that the court halted Runco's case so it could receive assurances that the commission would consider Runco's claim that the incident that prompted the charge is so old, he can't prove his innocence.

"What's missing that requires the further intervention of this court," Young asked Runco's lawyer, Richard Bone of Southfield, after wringing assurances out of the commission's executive director, Allan Sobel, that Runco's concerns would be considered during misconduct proceedings.

Bone and Sobel declined to comment after the 85-minute hearing. Justices didn't indicate when they might decide.

Runco, 42, is accused of enriching himself at the expense of his clients in a 12-year-old real estate deal before he became a judge. The commission says Gerald and Ilene Trifan of Dearborn retained Runco to review a pizza chain's $46,000 offer to purchase their lots in Melvindale.

Instead of representing the Trifans' interests, the commission says Runco secretly teamed with a Dearborn developer who bought the lots for $46,000, resold them for $153,000 and gave Runco a $53,000 cut.

The commission said it learned about the incident from the FBI in late 1997. Trifan's husband

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died late last year.

Runco hasn't offered his account of the events, but he says he did nothing wrong. He asked the **Michigan** Supreme Court to dismiss the misconduct charges on grounds witnesses have died, memories have faded and documents to exonerate him no longer exist. A Supreme Court-appointed fact finder was scheduled to hear the case May 24.

In March, the high court took the unprecedented step of halting the misconduct proceedings and directed both sides to tell justices whether they should adopt a statute of limitations for judicial misconduct in **Michigan** or allowed judges to raise the so-called laches doctrine to protect judges from stale claims.

The decision fueled considerable speculation in **Michigan's** legal community that the court's five Republicans, who voted in favor of holding up the case, might be trying to help out a fellow Republican. Runco, a former state legislator, was Gov. John Engler's pick to become a Republican Party nominee for state Supreme Court justice last summer. Runco dropped out of the race after learning of the tenure investigation.

At Wednesday's hearing, Bone said it's unfair to make Runco endure a costly, humiliating and damaging fact-finding hearing because he can't defend himself. Sobel urged the court not to dismiss the case until after the charges are fully aired. After that, Sobel said, the fact finder, the commission and ultimately the Supreme Court can decide whether Runco did anything wrong or whether it was impossible for him to defend himself. Sobel said Runco's stale-claim defense will be considered at every stage of proceedings.

DAVID ASHENFELTER can be reached at 1-313-223-4490.

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Source: Legal > States Legal - U.S. > Michigan > Cases > **Federal & State Cases, Combined**
Terms: **department of natural resources and burt township** (Edit Search)

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*459 Mich. 659, *; 593 N.W.2d 534;*
*1999 Mich. LEXIS 1249, **

TOWNSHIP OF BURT, Plaintiff-Appellee, v STATE OF MICHIGAN, **DEPARTMENT OF NATURAL RESOURCES,** Defendant-Appellant. STATE OF MICHIGAN, **DEPARTMENT OF NATURAL RESOURCES,** Defendant-Appellant.

No. 111334

SUPREME COURT OF MICHIGAN

459 Mich. 659; 593 N.W.2d 534; 1999 Mich. LEXIS 1249

June 2, 1999, Decided
June 2, 1999, Filed

PRIOR HISTORY: **[**1]** Cheboygan Circuit Court, Robert C. Livo, J. CAVANAGH and REILLY, JJ. and WHITE, P.J. (Docket No. 200328).

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant state environmental agency appealed an order from the Cheboygan Circuit Court (Michigan), which granted judgment for plaintiff township and held that defendant was subject to plaintiff's local zoning laws for its construction of a public boat launch. Defendant claimed it was not subject to local zoning laws where it was inherently immune from local zoning laws and had exclusive jurisdiction over the subject matter.

OVERVIEW: Defendant state environmental agency was required to comply with plaintiff township's local zoning laws in the construction of a public-access boat launch where Mich. Comp. Laws §§ 125.327(2)(b) and 125.321 empowered townships with the right to regulate the development of boating facilities and the township and the legislature did not exempt defendant from compliance with local zoning laws. Defendant began construction of a boat launch without plaintiff's approval. Plaintiff brought suit, claiming defendant was subject to local zoning laws. The trial court entered judgment for plaintiff, holding plaintiff could not prevent construction, but defendant was subject to the zoning laws. Defendant appealed and the appellate court affirmed. Defendant again appealed. The reviewing court affirmed, holding where state law gave townships the right to govern the use and development of boating facilities and no clear legislative intent existed to exempt defendant from such laws, defendant was required to comply with local zoning laws. State laws did not give defendant exclusive jurisdiction over the subject matter.

OUTCOME: The reviewing court affirmed the appellate court's affirmance of a judgment in plaintiff township's favor in a zoning action in which defendant state environmental agency sought to build a boat launch. Defendant was subject to local zoning laws where state law gave townships the right to regulate the development of boating facilities and

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C

Following *Dearden's* example, the appropriate order for the application of that test to our facts would seem to be first to determine whether the Legislature has provided the department claiming exemption from local zoning ordinances a sufficient grant of authority that might support such a claim. Should that be the case, the next step would be to refer to the zoning enabling act to determine if a countervailing intent was present. n1

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n1 As might be gathered from this, I believe it more correct to analyze the issues in this order than the order in which the majority reviews them. I do not, however, suggest that the order in which the issues are analyzed would be determinative of the result reached in this case. Likewise, the determinative factor in this case for me is not, as the majority suggests, some sort of "presumption" along the lines rejected by *Dearden*, but rather a careful comparison of the provisions of the NREPA, TRZA and TPA. In viewing these, as required by *Dearden* to determine the Legislature's intent, I find, much as in *Dearden,* an expression of legislative intent in the NREPA investing complete jurisdiction in the DNR, and nothing to the contrary in those portions of the TRZA and TPA the majority cites in support of its holding. This finding rests not on a view of "inherent immunity," but rather on the intent of the Legislature as expressed in these competing statutes.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[*674] [**21]**

The DNR's duties are outlined in § 503 of the Natural Resources and Environmental Protection Act (NREPA):

The department shall protect and conserve the natural resources of this state; provide and develop facilities for outdoor recreation; . . . prevent and guard against the pollution of lakes and streams within the state and enforce all laws provided for that purpose with all authority granted by law . . . . The department has the power and jurisdiction over the management, control, and disposition of all land under the public domain, except for those lands under the public domain that are managed by other state agencies to carry out their assigned duties and responsibilities. On behalf of the people of the state, the department may accept gifts and grants of land and other property and may buy, sell, exchange, or condemn land and other property, for any of the purposes contemplated by this part. [MCL 324.503(1); MSA 13A.503(1).]

Also relevant, as acknowledged by the majority, is § 78105 of the NREPA:

The department shall have the following powers and duties:

(a) To acquire, construct, and maintain harbors, channels, and facilities for vessels **[**22]** in the navigable waters lying within the boundaries of the state of Michigan.

(b) To acquire, by purchase, lease, gift, or condemnation the lands, rights of way, and easements necessary for harbors and channels.

* * *

(h) To charge fees for both daily and seasonal use of state-operated public access sites, if the cost of collecting **[*675]** the fees will not exceed the revenue derived from the fees for daily and seasonal passes. All revenues derived from this source shall be deposited in the Michigan state waterways fund. A seasonal pass shall grant the permittee the right to enter any state-operated public access site without payment of an additional fee. [MCL

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324.78105; MSA 13A.78105.]

Lastly, § 78110 provides:

The Michigan state waterways fund is created in the state treasury. The fund shall be administered by the state treasurer and shall be used by the department solely for the construction, operation, and maintenance of recreational boating facilities, the acquisition of property for the purposes of this part, for grants to local units of government to acquire and develop harbors of refuge and public boating access sites under section 78115, and **[**23]** for the administration of this part. The fund shall receive such revenues as the legislature may provide. [MCL 324.78110(1); MSA 13A.78110(1).]

Thus these provisions, taken together, have the following import: first, the DNR is charged with providing outdoor recreation facilities and, in particular, with both the power and duty to construct harbors and channels for our navigable waterways; second, the DNR may expend funds or otherwise acquire property to accomplish this; and, third, the DNR may raise revenue, by access fees, to further accomplish the above purposes. n2

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n2 I pause to note that this case would seem to center on the DNR's charge to provide harbors and recreational facilities, rather than on its charge to protect the waterways. As the majority demonstrates, the latter issue can be seen, at the level of the DNR, to be a vestige of the Legislature's constitutional mandate to protect the natural resources, Const 1963, art 4, § 52, and another vestige of this mandate can be seen in the zoning enabling ordinances. *Hess v West Bloomfield Twp*, 439 Mich. 550, 565; 486 N.W.2d 628 (1992). It is important to note, however, that, while *Hess* dealt with the applicability of a zoning ordinance to a pier constructed for mooring of boats, the pier and land it abutted were under private, as opposed to public, ownership, and thus the issue of a potential conflict between the zoning enabling ordinance and the NREPA was not present.

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I further note that I agree with the majority that while *Dearden* involved a statute that granted "exclusive jurisdiction" to a department, that is not a mandatory bar that must be hurdled by a department claiming jurisdiction. The determinative factor is whether the Legislature's intent is clear from the statute as a whole, not whether any particular words are present within the statute. In this case, in viewing the various statutory enactments, I find a clear grant of broad-ranging authority to the DNR to provide and maintain access to our navigable waters, and further specific authority for the DNR to provide outdoor recreational facilities.

D

In viewing the Township Rural Zoning Act (TRZA), MCL 125.271 *et seq.*; MSA 5.2963(1) *et seq.*, and the township planning act (TPA), MCL 125.321 *et seq.*; MSA 5.2963(101) *et seq.*, and, in particular, the provisions cited by the majority, see slip op at 6-7, I find only a general grant of power to regulate to meet recreational needs n3 and conserve natural resources, n4 as well as a provision that a township's basic zoning plan include subjects pertinent to the future development **[**25]** of the township, which may include, among other things, waterways and waterfront developments. n5 **[*677]** What I am unable to find in reviewing the TRZA and TPA is the exact thing that eluded the *Dearden* Court, an expression that either act was intended to subject the department's jurisdiction to provide access to waterways to the myriad local ordinances that exist, in widely varying degrees,

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throughout our state.

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n3 MCL 125.271(1); MSA 5.2963(1)(1).

n4 MCL 125.273; MSA 5.2963(3).

n5 MCL 125.327(2)(b); MSA 5.2963(107)(2)(b). I would suggest, however, that a requirement that such pertinent subjects as waterways be included in the basic plan is not, on its face, any sort of enablement of zoning authority over such things. The actual question of the applicability of a local zoning ordinance to a navigable waterway is not before us, and hence I will refrain from further addressing this issue.

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III

In *Dearden,* the Court noted **[**26]** with concern:

If the department were subject to those ordinances, the underlying policies of the general correctional system could be effectively thwarted by community after community prohibiting the placement of certain penal institutions in appropriate locations. [403 Mich. at 267.]

That is exactly the case here. If the DNR is subject to zoning ordinances in each of the local municipalities that exist throughout the state, local communities could effectively prohibit the placement of public access sites within their communities, thus thwarting the DNR's performance of its legislatively mandated duty.

This case, on its face, would seem to provide an example of just such a danger. Burt Lake is one of Michigan's larger lakes, with, according to the DNR, over 16,700 surface acres. It is not disputed that currently public access to this lake consists of a seven-car/trailer site at one state campground, a twenty-three-car/trailer site at another state campground, and **[*678]** a number n6 of unimproved road endings that abut the lake. The DNR claims that it has determined that a deficiency of public access facilities exists on the lake. The township disputes this. It would seem **[**27]** clear, however, that, currently, the DNR, by way of the access points at two state parks, is able to provide access to Burt Lake for thirty boats (the obvious corollary to car/trailer parking places provided at the access points). Some indeterminate number of other boats may be able to gain access from the unimproved roadway ends that abut the lake. In any event, it would seem that very few indeed of our state's citizens will be able, on any particular day, to access Burt Lake, unless, of course, they own private property on the lake.

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n6 While the parties do not offer an exact number, a review of the township's zoning map would suggest that, at least on paper, twelve road ends are marked as public access sites.

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The township lays claim to regulating, through zoning, the land that abuts the lake, while this as a general proposition, is within the authority granted by the TRZA, the effect of this application of zoning power, when applied to the DNR, could well be to frustrate the DNR's attempt to carry out its **[**28]** legislatively directed mandate to provide harbors, channels, n7 and recreation facilities.

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n7 We are informed by an amicus curiae that the proposed boat launch would entail the DNR dredging a 76 x 332 foot channel.

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The Court of Appeals and the majority suggest that the DNR is free to carry out its mandate, but that it must comply with the zoning regulation of the township. Given the posture of this case, the township has not yet had the opportunity to review an application **[*679]** from the DNR and rule on it. The township's stated position before this Court is that the DNR's proposed access site would be reviewable as a "special land use." The record includes the township's zoning plan, which, in § 5.6, states that the planning commission shall have the "function, duty and power to approve or disapprove" an application for such a permit.

Consistent with its statutory mandate, the DNR has acquired 5.6 acres of land, which includes 362.3 feet of shoreline on Burt Lake. The effect of the majority's decision today **[**29]** is to remove from the DNR its ability to fulfill its legislatively mandated duty to provide access to the lake and, instead, to hinge the performance or nonperformance of that duty on the discretion of a local planning commission. n8 The navigable waterways of this state belong to all the citizens of this state. n9 The Legislature has charged the DNR with providing our citizens with access to their waterways. The Court today grants a local planning commission the ability to veto such endeavors and frustrate both the DNR's lawful activities and the ownership interest of the great majority of our citizens in their waterways.

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n8 The record is not clear whether the members of the local planning commission are themselves elected by township citizens, or, alternatively, appointed by elected officials. In either event, it would seem fair to say that such officials are likely accountable to their constituency, the citizens of **Burt Township.**

n9 *Collins v Gerhardt*, 237 Mich. 38; 211 N.W. 115 (1926).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[**30]**

While I am not unmindful of the interests of the township and its citizens in issues regarding access to the lake, and in effecting the underlying purposes of their zoning ordinance, such interests should not be elevated to a point where they might serve to frustrate **[*680]** the interests of the citizens of this state in their waterways, the DNR's ability to effect its mandate, and the Legislature's interest in seeing its mandate carried out. Within the text of the NREPA, I see no intent to subject the broad mandates of that act to the complete discretion of every local municipality, nor do I find evidence of such an intent in the TRZA or TPA. Furthermore, the Court's decision may well tend to negatively implicate the ability of the vast majority of our citizens to enjoy the waterways of this state.

KELLY, J., concurred with CAVANAGH, J.

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Terms: **department of natural resources and burt township** (Edit Search)
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did not exempt defendant from compliance from such laws.

CORE TERMS: township, zoning, ordinance, et seq, waterway, zoning ordinance, legislative intent, local zoning, boat, duty, natural resources, lake, public access, site, exclusive jurisdiction, launch, harbors, exempt, recreation, immune, channel, seasonal, penal, state agencies, public domain, conserve, vest, exemption, acquire, recreational facilities

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Real & Personal Property Law > Zoning & Land Use > Zoning Generally
Administrative Law > Sovereign Immunity
HN1 The legislative intent, where it can be discerned, is the test for determining whether a governmental unit is immune from the provisions of local zoning ordinances.

Real & Personal Property Law > Zoning & Land Use > Zoning Generally
Governments > Legislation > Interpretation
HN2 The Michigan legislature, through the Township Rural Zoning Act (TRZA), Mich. Comp. Laws § 125.271 et seq., grants significant authority to townships bearing on their right to regulate the use and development of boating and recreational facilities. The TRZA broadly vests authority in townships to regulate land development to meet the needs of the state's citizens for recreation and other uses of land Mich. Comp. Laws § 125.271(1). The TRZA further provides that zoning ordinances shall be based on a plan designed to, among other things, conserve natural resources. Mich. Comp. Laws § 125.273. Indeed, the status and force of this zoning authority is enhanced by Michigan's state constitution. Mich. Const. art. 7, § 34 (1963) provides that statutory provisions relating to townships shall be liberally construed in their favor.

Real & Personal Property Law > Zoning & Land Use > Zoning Generally
HN3 The Township Planning Act, Mich. Comp. Laws § 125.327, provides that a basic zoning plan shall show the planning commission's recommendations for the development of the township and include certain subjects pertinent to the future development of the township, including the general location, character, and extent of, among other things, waterways and water front developments.

Environmental Law > Zoning & Land Use
Governments > Legislation > Interpretation
HN4 There is nothing in the Natural Resources and Environmental Protection Act, Mich. Comp. Laws § 324.101 et seq., that suggests a "clear expression" of legislative intent to vest the Michigan **Department of Natural Resources** with exclusive jurisdiction over its subject matter.

COUNSEL: Secrest, Wardle, Lynch, Hampton, Truex & Morley (by Gerald A. Fisher and Thomas R. Schultz), Farmington Hills, MI, and Lyon & Ingelson (by Jeffrey T. Lyon), Cheboygan, MI. for plaintiff-appellee.

Jennifer M. Granholm, Attorney General, Thomas L. Casey, Solicitor General, and James L. Stropkai and Stephen M. Rideout, Assistant Attorneys General, Knapps Centre, Lansing, MI, for defendant-appellant.

Amici Curiae:

Kohler & Black, P.L.C. (by Ellen J. Kohler), Traverse City, MI, for Michigan Environmental

Council.

Olson, Noonan, Ursu & Ringsmuth, P.C. (by James M. Olson and Christopher M. Bzdok), Traverse City, MI, for **Burt Township** Association.

Butzel, Long (by James Y. Stewart), Birmingham, MI, for Michigan Boating Industries Association.

Miller, Canfield, Paddock & Stone, P.L.C. (by Larry J. Saylor), Detroit, MI, for Huron-Clinton Metropolitan Authority.

David M. McCleary, Lansing, MI. for Michigan United Conservation Clubs, Federation of Fly Fishers, Anglers of the AuSable, and Michigan Recreation and Parks Association.

Bauckham, **[**2]** Sparks, Rolfe & Thomsen, P.C. (by John H. Bauckham), Kalamazoo, MI, for Michigan Townships Association and Michigan Municipal League Legal Defense Fund.

JUDGES: Chief Justice Elizabeth A. Weaver, Justices James H. Brickley, Michael F. Cavanagh, Marilyn Kelly, Clifford W. Taylor, Maura D. Corrigan, Robert P. Young, Jr. KELLY, J., concurred with CAVANAGH, J.

OPINIONBY: Robert P. Young, Jr.

OPINION: [*661]

BEFORE THE ENTIRE COURT

YOUNG, J.

We granted leave to appeal in this case to determine whether defendant, the Michigan **Department of Natural Resources,** is required to comply with plaintiff **Burt Township's** zoning ordinance in constructing a public-access boat launch on the shores of Burt Lake. We conclude that the DNR is subject to **Burt Township's** zoning ordinance. Accordingly, we affirm the judgment of the Court of Appeals.

I. Factual and Procedural Background

In 1989, the DNR obtained title to two lots on Burt Lake n1 for the purpose of constructing a public-access boat launch. n2 Upon learning of the proposed development, the **Burt Township** zoning administrator sent a letter to the DNR, noting that the project had not been approved by the township zoning board and requesting that the **[**3]** DNR submit an application for the board's review. The DNR responded that it did not need the **[*662]** board's approval because the DNR was a state agency and local zoning ordinances therefore did not apply to it.

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n1 The lots consist of 5.6 acres, with 362.3 feet of water frontage.

n2 The proposed facility would accommodate fifty vehicles and trailers and would include a "vault toilet."

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Burt Township originally filed suit in 1992, requesting a declaratory judgment that the DNR was required to comply with the zoning ordinance. However, **Burt Township** voluntarily

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dismissed the lawsuit without prejudice in June 1993. According to **Burt Township,** it agreed to the dismissal because the DNR indicated that it did not have sufficient funding to complete the boat launch. Moreover, township officials believed that they had reached an informal agreement with the DNR concerning the scope of the project in the event that the DNR later chose to pursue the project.

In 1995, having obtained the necessary funding, the DNR began **[**4]** construction of the boat launch. However, the DNR did not seek approval from or otherwise notify the township board. As a result, **Burt Township** filed the instant lawsuit. The township again sought a declaratory judgment that the DNR was required to comply with the township zoning ordinance. The complaint also requested permanent injunctive relief.

Following a hearing, the trial court issued a written opinion. The court held that, while **Burt Township** could not prevent the DNR from building the boat launch, the DNR had to comply with the township zoning ordinance. The Court of Appeals, over a dissent by Judge White, affirmed. 227 Mich. App. 252; 576 N.W.2d 170 (1997). We granted the DNR's application for leave to appeal. 458 Mich. 865 (1998).

II. Standard of Review

Whether the DNR's construction of the boat launch facility is subject to **Burt Township's** zoning ordinance is a question of law subject to de novo review. *Cardinal* **[*663]** *Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich. 75, 80; 467 N.W.2d 21 (1991).

III. Analysis

A. *Dearden v Detroit*--Legislative Intent

We agree with the **[**5]** parties and the Court of Appeals that the present dispute is governed by this Court's decision in *Dearden v Detroit*, 403 Mich. 257, 264; 269 N.W.2d 139 (1978), in which we held that "*HN1*the legislative intent, where it can be discerned, is the test for determining whether a governmental unit is immune from the provisions of local zoning ordinances."

In *Dearden*, the Michigan Department of Corrections leased a multiresidential structure from the archdiocese of Detroit with the intent to convert it into a rehabilitation center. However, the Detroit Board of Zoning Appeals denied the archdiocese's request for a variance and permission to change the use of the property. The archdiocese brought suit, seeking to set aside the board's decision. The Department of Corrections intervened. The circuit court and the Court of Appeals affirmed the board's decision denying the requested variance. 403 Mich. at 260-261.

This Court disagreed and held that the Department of Corrections was immune from local zoning ordinances when establishing state penal institutions. *Id.* at 267. The Court found in the statute establishing the authority of the Department of Corrections, **[**6]** MCL 791.201 *et seq.*; MSA 28.2271 *et seq.*, "a clear expression of the Legislature's intent to vest the department with complete jurisdiction over the state's penal institutions . . . ." 403 Mich. at 265. Conversely, the Court found nothing in the language of the zoning enabling act, **[*664]** MCL 125.581 *et seq.*; MSA 5.2931 *et seq.*, to suggest a legislative intent

to subject the department's exclusive jurisdiction over the state's penal institutions, and its duty to coordinate and adjust those institutions as an integral part of a unified, general correctional system, to the many and varied municipal zoning ordinances throughout the state. [403 Mich. at 266-267.]

The Court concluded that Detroit's zoning ordinance was "void to the extent that it attempts

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to prohibit the use of the subject property as a rehabilitation center." *Id.* at 267. n3

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n3 We note that the test enunciated in *Dearden*, while relatively straightforward in concept, has proven to be difficult to apply. Indeed, the Court of Appeals has issued several published decisions reaching varying conclusions regarding the application of the *Dearden* test. See, e.g., *Addison Twp v Dep't of State Police (On Remand)*, 220 Mich. App. 550; 560 N.W.2d 67 (1996) (holding that the Department of State Police was not immune from a local zoning ordinance); *Lutheran High School Ass'n v Farmington Hills*, 146 Mich. App. 641; 381 N.W.2d 417 (1985) (holding that a school district was subject to a zoning ordinance); *Cody Park Ass'n v Royal Oak School Dist*, 116 Mich. App. 103; 321 N.W.2d 855 (1982) (same); *Marquette Co v Northern Mich Univ Bd of Control*, 111 Mich. App. 521; 314 N.W.2d 678 (1981) (holding that a state university was immune from the State Construction Code Act, MCL 125.1501 *et seq.*; MSA 5.2949[1] *et seq.*). We express no opinion on the results reached in these cases. However, we note that the decisions in *Cody Park Ass'n*, *Lutheran High School Ass'n,* and *Addison Twp* have since been "overruled" by subsequent legislative amendments of the statutes at issue in those cases.

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B. The DNR's Proposed Boat Launch

In order to determine whether the DNR's boat launch is exempt from **Burt Township's** zoning ordinance, we must, as required by *Dearden*, examine the texts of the Township Rural Zoning Act (TRZA), n4 which provides **Burt Township** with authority to regulate land use and development, and the Natural Resources **[*665]** and Environmental Protection Act (NREPA), n5 which governs the DNR's activities here. n6

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n4 MCL 125.271 *et seq.*; MSA 5.2963(1) *et seq.*

n5 MCL 324.101 *et seq.*; MSA 13A.101 *et seq.*

n6 We reject at the outset the DNR's claim that the Legislature, through part 301 of the NREPA, MCL 324.30101 *et seq.*; MSA 13A.30101 *et seq.*, formerly the Inland Lakes and Streams Act, MCL 281.951 *et seq.*; MSA 11.475(1) *et seq.*, has established in the DNR "an exclusive framework for the protection of the public trust in the waters of this state."

Const 1963, art 4, § 52 mandates that the Legislature conserve and develop the natural resources of the state and provides that such protection is of "paramount public concern in the interest of the health, safety and general welfare of the people." As fully explained below, the Legislature clearly has charged *both* the DNR, through the NREPA, and townships, through their statutory zoning power, with the protection of natural resources. Indeed, we recognized in *Hess v West Bloomfield Twp*, 439 Mich. 550, 565; 486 N.W.2d 628 (1992), that by granting townships the authority to promote the public health, safety, and general welfare through enactment of zoning ordinances, the Legislature was complying with the constitutional mandate to protect the environment, including bodies of water, from impairment or destruction.

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1. Township Zoning Authority

HN2

The Legislature, through the TRZA, has granted significant authority to townships bearing on

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their right to regulate the use and development of boating and recreational facilities such as the one at issue. The TRZA broadly vests authority in townships to regulate land development "to meet the needs of the state's citizens for . . . recreation . . . and other uses of land . . . ." MCL 125.271(1); MSA 5.2963(1)(1). The TRZA further provides that zoning ordinances shall be based on a plan designed to, among other things, "conserve natural resources." MCL 125.273; MSA 5.2963(3). n7 Indeed, the status and force of this zoning **[*666]** authority is enhanced by our state constitution. Const 1963, art 7, § 34 provides that statutory provisions relating to townships "shall be liberally construed in their favor."

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n7 Reiterated in this section is the importance of zoning ordinances in meeting "the needs of the state's residents for . . . places of . . . recreation."

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In addition to the broad grant of regulatory authority contained in the TRZA, we also believe the township planning act (TPA), MCL 125.321 *et seq.*; MSA 5.2963(101) *et seq.*, to be particularly relevant in this case involving waterfront development. HN3 The TPA provides that a basic zoning plan shall show the planning commission's recommendations for the development of the township and include certain subjects pertinent to the future development of the township, including the general location, character, and extent of, among other things, "waterways and water front developments." MCL 125.327(2)(b); MSA 5.2963 (107)(2)(b).

These statutory provisions reveal that the TRZA and the TPA provide townships with extensive authority to regulate the use and development of land within their borders, including waterfront property. Moreover, this Court in *Dearden* declined to adopt a rule that state agencies have inherent immunity from local zoning ordinances. *Dearden*, 403 Mich. at 261. Thus, we conclude that it is incumbent upon the DNR to establish a clear legislative intent to exempt the DNR's activities from the **Burt Township** zoning **[**10]** ordinance. n8

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n8 The dissent takes issue with the "order" in which we address the relevant statutes. We believe our analysis to be consistent with *Dearden.* The dissent, on the other hand, would presume that the DNR, by virtue of its grant of authority under the NREPA, is exempt from local zoning ordinances unless a contrary intent is stated in the TRZA. This is tantamount to a rule of inherent immunity that *Dearden* expressly rejected.

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[*667]

2. The DNR's Claimed Exemption From Zoning Ordinances

As the Court of Appeals noted, the DNR relies upon three NREPA provisions in support of its claim of immunity. The first is § 503, which provides in relevant part:

The department shall protect and conserve the natural resources of this state [and] provide and develop facilities for outdoor recreation . . . . The department has the power and jurisdiction over the management, control, and disposition of all land under the public domain, except for those lands under the public domain that are managed by **[**11]** other state agencies to carry out their assigned duties and responsibilities. On behalf of the people of the state, the department may accept gifts and grants of land and other property and may buy, sell, exchange, or condemn land and other property, for any of the purposes contemplated by this part. [MCL 324.503(1); MSA 13A.503(1).]

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Section 78105 further provides that the DNR "shall" have the following powers and duties:

(a) To acquire, construct, and maintain harbors, channels, and facilities for vessels in the navigable waters lying within the boundaries of the state of Michigan.

(b) To acquire, by purchase, lease, gift, or condemnation the lands, rights of way, and easements necessary for harbors and channels. . . .

* * *

(h) To charge fees for both daily and seasonal use of state-operated public access sites, if the cost of collecting the fees will not exceed the revenue derived from the fees for daily and seasonal passes. All revenues derived from this source shall be deposited in the Michigan state waterways fund. A seasonal pass shall grant the permittee the right to enter any state-operated public access site without **[*668]** payment of an additional **[**12]** fee. [MCL 324.78105; MSA 13A.78105.] Finally, at the time that this case arose, § 78110 provided in pertinent part:

The Michigan state waterways fund is created in the state treasury. The fund shall be administered by the state treasurer and shall be used by the department solely for the construction, operation, and maintenance of recreational boating facilities, the acquisition of property for the purposes of this part, and for the administration of this part. The fund shall receive such revenues as the legislature may provide. [MCL 324.78110(1); MSA 13A.78110 (1).][n9]

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n9 We note that the Legislature has since amended part 781 of the NREPA. See 1998 PA 210. Because those amendments became effective on July 1, 1998, they are not applicable to this appeal.

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The DNR maintains, and the dissenting Court of Appeals judge agreed, that these various statutory provisions evince a legislative intent that the DNR has absolute authority to **[**13]** provide public access facilities on inland lakes to the complete exclusion of municipal zoning interests. However, we agree with the Court of Appeals majority that, unlike the statute at issue in *Dearden*, HN4 there is nothing in the NREPA that similarly suggests a "clear expression" of legislative intent to vest the DNR with exclusive jurisdiction over its subject matter and thus to exempt the DNR's activities in this case from the **Burt Township** zoning ordinance. n10

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n10 We agree with the observation made in the Court of Appeals dissent that the NREPA "sets forth a comprehensive legislative scheme addressing the protection, conservation, and development of the natural resources of this state." 227 Mich. App. at 262 (White, J.). However, we do not accept the dissent's conclusion that such a scheme is "inconsistent with the view that a local unit of government can control public access through local zoning." *Id.* at 263. The creation of a comprehensive regulatory scheme simply does not, standing alone, equal a grant of exclusive jurisdiction, particularly in light of townships' rival comprehensive regulatory power under the TRZA.

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As an initial matter, we note that the *Dearden* Court found persuasive to its holding the fact that the statutes establishing the authority of the Department of Corrections explicitly stated that the department had "exclusive jurisdiction" over prison facilities. *Dearden*, 403 Mich. at 265. Accordingly, **Burt Township** has argued that the absence of such a term in the NREPA is controlling. We reject this argument. While the presence of such terms as "exclusive jurisdiction" certainly would be indicative of a legislative intent to immunize the DNR from local zoning ordinances, we decline to require that the Legislature use any particular talismanic words to indicate its intent. The Legislature need only use terms that convey its clear intention that the grant of jurisdiction given is, in fact, exclusive. Whatever terms are actually employed by the Legislature, our task is to examine the various statutory provisions at issue and attempt to discern the legislative intent in enacting them.

The DNR places great emphasis on the mandatory nature of the duties expressed in the NREPA, as evidenced by the Legislature's repeated use of the term "shall," as well as the fact that the DNR **[**15]** is given the "power and jurisdiction" to manage and control lands under the public domain. n11 However, we are not persuaded that the Legislature, in directing that the DNR engage in certain governmental functions, intended that the DNR be authorized to do so in any manner it chooses. According the DNR "power and jurisdiction" **[*670]** to manage land within its control is not the same as granting it *exclusive* jurisdiction. Thus, the fact that the DNR is mandated to create recreational facilities on public land it manages and controls does not indicate a legislative intent that the DNR may do so in contravention of local zoning ordinances.

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n11 "Public domain" is defined by statute merely as "all land owned by the state or land deeded to the state under state law." MCL 324.301(h); MSA 13A.301(h).

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We also find no particular significance in the fact that the TRZA does not expressly provide that state agencies are subject to zoning ordinances. As stated, this Court in *Dearden* declined to **[**16]** hold that state agencies are inherently immune from local zoning ordinances. *Id.* at 261. Nor was the *Dearden* Court persuaded by those foreign decisions finding immunity if, as here, the agency was granted the power of eminent domain. *Id.* Again, the issue is one "not of absolute governmental immunity, but rather of legislative intent." *Id.* at 265.

Further supporting our conclusion that the DNR is not immune from local ordinances enacted under the TRZA is the fact that the TRZA itself expressly exempts from local control or regulation "the drilling, completion, or operation of oil or gas wells" as well as the location of such wells. MCL 125.271(1); MSA 5.2963(1)(1). The TRZA instead vests jurisdiction over wells "exclusively in the supervisor of wells of this state . . . ." *Id.* The TRZA further exempts from zoning ordinances a "state licensed residential facility." MCL 125.286a; MSA 5.2963 (16a). As such, the Legislature has demonstrated that it was aware of overriding land-use issues that warranted specific exemption from local regulation, but provided no such exemption for the DNR's **[**17]** activities. This fact provides additional assurance that there was no legislative intent to exempt the DNR here.

[*671]

IV. Conclusion

In sum, the NREPA and the TRZA appear to provide coextensive statutory rights concerning the protection of natural resources in general and the development of recreation facilities and other waterfront developments in particular. Moreover, nothing in the NREPA establishes a clear expression of legislative intent to exempt the DNR's activities in this case from the **Burt Township** zoning ordinance. Accordingly, for all the reasons stated, we hold that the DNR, in

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the construction of its public-access boat launch, is subject to **Burt Township's** zoning ordinance. The decision of the Court of Appeals is affirmed.

WEAVER, C.J., and BRICKLEY, TAYLOR, and CORRIGAN, JJ., concurred with YOUNG, J.

DISSENTBY: Michael F. Cavanagh

DISSENT:

CAVANAGH, J. (*dissenting*).

I must respectfully dissent from the conclusion reached by the majority. While we are all in agreement in regard to the principles that form the basis for our analysis, I find the majority's application to be wanting, and fear that the effect of the majority's decision will be to wrest away from the **[**18]** **Department of Natural Resources** (DNR) a significant portion of its ability to comply with its legislatively issued mandate.

I

I agree with the Court of Appeals, the parties, and the majority, that *Dearden v Detroit,* 403 Mich. 257, 264; 269 N.W.2d 139 (1978), provides the controlling test on this issue. Therein, we held that "the legislative intent, where it can be discerned, is the test for determining whether a governmental unit is immune **[*672]** from the provisions of local zoning ordinances." *Id.* Likewise, this question of law is subject to de novo review. *Cardinal Mooney High School v Michigan High School Athletic Ass'n,* 437 Mich. 75, 80; 467 N.W.2d 21 (1991). Accordingly, I am able to concur with the majority regarding parts I, II, and III(A) of its analysis.

II

A

With respect to the application of the *Dearden* test, however, I must part company with the majority. As might be gathered from the "where it can be discerned" language of the *Dearden* test, determining the intent of the Legislature in situations such as this is often a difficult endeavor. While there are cases where the Legislature has specifically excluded **[**19]** a governmental unit from zoning provisions by including such an exemption in the plain language of a statute, the more common instance is the one that was found in *Dearden* itself, where no facial exemption exists. In such instances, we are forced to peruse both the statutes relating to the governmental unit's function and the statute that enables zoning to determine whether one contains an implicit legislative grant of superiority, or, alternatively, whether the two appear coequal and thus must coexist.

B

As a benchmark to this endeavor, recall our findings in *Dearden.* There, we found the statute relating to the governmental unit (the Department of Corrections, **[*673]** MCL 791.201 *et seq.*; MSA 28.2271 *et seq.*) to be "a clear expression of the Legislature's intent to vest the department with complete jurisdiction over the state's penal institutions . . . ." *Dearden* at 265. At the time, the statute included language that the "department shall have exclusive jurisdiction over . . . penal institutions . . . ." MCL 791.204; MSA 28.2274.

Conversely, this Court found persuasive the absence of any specific expression of legislative **[**20]** intent in the zoning enabling act to subject the department's exclusive jurisdiction to the various local zoning ordinances. In the absence of such an expression, the Legislature's grant of authority to the Department of Corrections was controlling.

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SECTION: EDITORIAL; Pg. 10A

LENGTH: 1018 words

HEADLINE: FROM OUR READERS;
STATE SUPREME COURT

BODY:
POLITICS, JUSTICES AND RACE
The debate surrounding this year's Supreme Court contests has not been pretty thus far, and it promises to get uglier. There was, however, something particularly disturbing about Trevor Coleman's May 17 editorial page column concerning state **Justice Robert Young** (" A telling silence speaks volumes on behalf of Brown ruling").

Coleman cautioned Young to note that, although he is African American, no organizations typically supportive of the causes of racial minorities have defended him against the latest attack aimed at him by the **Michigan** Democratic Party. Coleman's premise is that the color of one's skin dictates one's political agenda or judicial philosophy, under penalty of ostracism.

I don't know what research into Young's background Coleman engaged in, beyond observing that he is a conservative jurist who believes the will of the people, as expressed by the Legislature, should be strictly adhered to.

Does Coleman know, for instance, that Young spent countless hours tutoring minority law students while carrying on a busy law practice? Does he know that Young was a member of the Task Force on Children's Justice concerning child abuse and neglect; that he is a director of Vista Maria, a member of 100 Black Men, a trustee of the Detroit

Institute of Children, former general counsel of AAA **Michigan,** a member of the American Bar Association's minority council, and is on the community leaders council of United Way Community Services? I suspect not. In any event, Coleman argues that one characteristic -- Justice Young's judicial conservatism -- means that he must not be thoughtful, compassionate or sensitive to the concerns of his race. This is, of course, pernicious nonsense, by which he and others attempt to dictate to African Americans what their judicial or political philosophy must be.

Coleman should keep in mind that discrimination is defined as the arbitrary classification of a group of persons. When one classifies on the basis of skin color, as Coleman did in his

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column, such arbitrary classification is called racism.

Thomas G. Kienbaum
Former president, State Bar of **Michigan**
Birmingham

Anti-civil rights record
Your May 12 editorial " Justice Young: Protests over campaign literature seem injudicious" was on target. **Justice Robert Young** is indignant because his support of Brown vs. Board of Education is being questioned. No matter what Young's position on Brown is, however, he has made it clear through his rulings where he stands on civil rights.

Prior to being appointed to the state Supreme Court by Gov. John Engler, Young's career was spent defending corporations against charges of civil rights violations at a silk-stocking firm and later as vice president and general counsel of AAA of **Michigan.** In that role, he argued over and over again that claims of race, sex and other types of discrimination should be dismissed. As a Court of Appeals judge and now Supreme Court justice, he has continued in that vein.

While on the Court of Appeals, in numerous cases Young routinely ruled against civil rights plaintiffs. As a justice, he recently voted to let stand a **Michigan** Court of Appeals ruling that is probably the biggest blow to civil rights in the state of **Michigan** in the last 20 years (Rembert vs. Ryan's Steak House).

By insisting that he is a supporter of Brown, Young would like us to believe he is a supporter of civil rights. His track record belies this.

Deborah L. Gordon
Attorney, Royal Oak

Racial politics
There can only be great sadness that race has become an issue in this year's **Michigan** Supreme Court elections. It would be one thing if genuine matters of equality were at stake, but repeated attacks on **Justice Robert Young** are merely a crude playing of the race card.

As recounted in Trevor Coleman's column, at issue are Young's views of the landmark Brown vs. Board of Education ruling. Coleman is right to say that Young, who supports the outcome, has nonetheless concluded the case was poorly reasoned. I do not share Young's views on this point.

Yet Young's viewpoint is considered respectable by many prominent people in legal circles and does not discredit him from being a judge. Apparently, however, African Americans are not allowed to engage in this kind of analysis. Recent attacks on Young have included outrageous claims that he desires "the elimination of constitutional rights and believe(s) Brown vs. Board of Education was wrong." The head of the AFL-CIO has gone so far as to say that this campaign is about the defeat of the "three white men."

Why have no major civil rights leaders come to Young's defense? Coleman suggests the reason is that, in essence, they believe Young is guilty as charged. It appears that Young's problem is that his independence of mind has made him an outcast among those who toe a single line and accept no dissent. Yet I believe an independent mind is a highly desirable trait in a judge.

Reasoned political debate is at the heart of our system. Racial politics must be put behind us.

Leroy C. Richie

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Dearborn

Immune from rebuke?
I got a kick out of constitutional law professor Robert Sedler's rebuke, in his May 18 op-ed column, of **Michigan** Justices Clifford Taylor, Robert Young and Stephen Markman (" Activist court shames **Michigan**"). Sedler bemoaned their "radical departure from the traditional judicial role by ignoring stare decisis, disregarding precedent and even reaching out to overrule prior decisions."

By this logic, I take it that Sedler disapproved, in principle, of repealing alcohol Prohibition, of overturning the constitutional definition of blacks as "three-fifths" of a person, and of overturning Plessy vs. Ferguson ("separate but equal") in favor of Brown vs. Board of Education.

I am reminded of C.S. Lewis' observation that there are critics who "debunk ...values" while "having in the background values of their own which they believe to be immune from the debunking process."

Ronald L. Trowbridge
Vice President for External Programs and Communications, Hillsdale College

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March 14, 2002

Senator Maria Cantwell's Statement on the Nomination of Charles Pickering

Mr. Chairman, I share my colleagues' belief in the importance of the confirmation process. Federal Judges serve for lifetime terms, and are responsible for interpreting our Constitution and our laws in ways that have real implications for the ability of regular Americans to assert their rights.

In evaluating judicial nominations, among the factors I consider include whether the nominee demonstrates:

The highest level of professional ethics and integrity, and have the ability to distinguish between personal beliefs and the issues that come before the court. Unfortunately, I believe Judge Pickering falls short in meeting these criteria. Judge Pickering is an honorable person he is simply the wrong person to fill this very important position.

Like my colleagues, I am troubled by Judge Pickering's handling of the case of United States v. Swann, where a white defendant was tried for burning a cross on the lawn of an interracial couple. Judge Pickering had multiple ex parte conversations with prosecutors and Justice officials in an effort to get the sentence of Mr. Swann lowered. In doing so, Judge Pickering seems to have lost sight of the ethical limitations on his own actions, and the extent to which he was failing to maintain judicial independence. As Brenda Polkey, the victim of the cross burning said, her "faith in the justice system was destroyed" by Judge Pickering's efforts to reduce Mr. Swann's sentence. In every aspect of government we need to work hard and keep faith with the public.

This case indicates how deeply held Judge Pickering's views are, and how far he will go to arrive at an outcome he believes to be correct. The difficulty that he has in keeping his personal views out of his judicial decision making are obvious not only in this case but in several opinions in which he goes beyond the facts of the case to state his belief of what the law ought to be.

Because of this troubling record of not following precedent, and of overstepping ethical bounds to achieve a particular outcome, at his hearing I asked Judge Pickering questions that focused on the right to privacy.

I asked Judge Pickering about privacy as it pertains to consumers' rights-- specifically medical and financial records -- as it pertains to an individual's right to privacy in the context of government surveillance, and with regard to a woman's right to make personal decisions about her body. In response, he declined to state whether he believed that any right to privacy was conferred by our Constitution.

While my concern about how Judge Pickering would rule on cases of fundamental privacy rights is not the only factor in my decision to oppose his elevation to the Circuit Court, it is one I believe is important.

The Fifth Circuit covers three states -- Louisiana, Texas and Mississippi - that have each passed more anti-choice legislation restricting a woman's right to make personal choices about her own body than any other states. In fact, all three states continue to have unconstitutional and unenforceable laws prohibiting a woman from receiving an abortion on their books, because the legislature in each of these states will not repeal the laws. This is the context against which we must consider the President's nomination of Judge Pickering.

While Judge Pickering has repeatedly pledged to restrain his personal ideological views and follow the legal precedent of the Supreme Court, given the unique role that the Fifth Circuit plays in protecting not only the constitutional right to privacy enunciated in Roe and affirmed in Casey, but also in protecting women's access to abortion providers in the states within the Fifth Circuit, I am concerned about Judge Pickering's willingness to say where in the Constitution privacy is protected and his willingness to follow the law.

Judge Pickering's actions on the bench reveal at times a lack of understanding of the requirements of judicial ethics and a failure to meet the very highest standards of the legal profession. Judge Pickering has exhibited an inability to distinguish his personal beliefs from judging the issues before the court. Therefore, I can not support his elevation to the Fifth Circuit.

# # #

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CC:	Karl Rove	202-456-1806
	Jack Oliver	202-863-8774
	Scott Talbott	202-289-1903
	Steve Bartlett	
	Sam Upchurch	205-326-7751
FROM:	Steve Still	
DATE:	April 15, 2003	
COMMENTS:	President Bush's Growth and Job Initiative	

TOTAL PAGES INCLUDING COVER PAGE: 3 SENT BY: Grace Long

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April 15, 2003

Via Facsimile
Mr. Adam Goldman
Associate Director for Public Liaison Office
122 EEOB
17th Street and Pennsylvania Avenue, NW
Washington, DC 20500

Re: President Bush's Growth and Job Initiative

Dear Mr. Goldman:

Please find the attached letter that Carl Jones, Chairman and CEO of Regions Financial Corporation will send to all 52,000 registered shareholders. The letter will also be sent to all Regions bank presidents within the company's nine state territory to be forwarded to employees and customers. In addition, the letter will go to the client base of Morgan Keegan, a Regions subsidiary and the largest investment-banking firm headquartered in the South.

On behalf of Regions Financial Corporation, I know that the company is pleased that it can assist the Administration with this worthwhile initiative. Please let us know if Regions can be of further help.

We also plan to contact various members of Congress regarding this matter. Moreover, I am copying my good friends Karl Rove and Jack Oliver so that they will be informed of this activity.

Very truly yours,

Stephen W. Still

cc: Karl Rove
Jack Oliver
Steve Bartlett
Scott Talbott
Samuel E. Upchurch, Jr.

Regions Financial Corp.

Post Office Box 10247
Birmingham, Alabama 35202-0247
Telephone 205 944-1300

Dear Regions stockholder:

I am writing to ask that you consider supporting President Bush's growth and jobs initiative currently pending in Congress. I believe that we have a rare and important opportunity before us to provide for a better economic future for all Americans.

As you know, our economy has teetered on the brink of recession during the past three years. While there is no single solution for our nation's slow economic growth, the growth and jobs initiative pending in Congress provides a significant opportunity to place our economy on the road to recovery. The plan would create new jobs for Americans, encourage savings and investment, promote economic growth, and put money back in the pockets of American taxpayers.

In particular, I hope that you will consider supporting the proposal to eliminate personal taxes on corporate dividends. Regions pays what we believe to be a generous dividend of 3.7% to our stockholders. We recognize that dividend payments are an important source of income for many of our stockholders and for 40 million other American families. The proposed elimination of the dividends tax is an acknowledgement by our nation's leaders of the importance of this income to its citizens. Furthermore, the dividends tax is a double tax, as this income is already taxed at the corporate level. The elimination of the tax is expected to create jobs, boost wages and lower the cost of capital for American businesses — meaningful results for all Americans. In addition, by removing the double tax, it should encourage greater dividend payments to stockholders.

If you support the pending jobs and growth proposal and, in particular, the proposal to eliminate the double taxation of dividends, then I urge you to contact your representatives in Congress. You may also voice your support by simply logging onto www.trcdividendbenefits.org.

Thank you for investing in our company and in our country, and for your interest in shaping our nation's economic future.

Best regards.

Sincerely,

Carl E. Jones, Jr.
Chairman and Chief Executive Officer

April 14, 2003

The President of the Republic of Colombia
Alvaro Uribe Vélez

requests the pleasure of the company of

Mr. David Hobbs

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on Friday, May 2nd
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if you haven't read this from AJ, you might find it interesting.



HAIR-TRIGGER OUTRAGE IS TIRESOME, DANGEROUS

BY CHARLIE COOK

There is much to love about politics and the people it attracts, but one of the tiresome things about covering politics is the highly selective sense of outrage that exists among political people of all stripes. They're quick to pounce on the slightest transgression—whether real, imagined, or contrived—on the other side of the fence, but are strangely silent when something similar happens on their own side.

Last month, my good friend Stu Rothenberg wrote a dead-on column in *Roll Call* after Democrats expressed outrage over two comments—one by then-Senate Majority Leader Trent Lott, R-Miss., who waxed nostalgic about Strom Thurmond's 1948 presidential campaign, and the other by Rep. James P. Moran, D-Va., who used a poor choice of words in discussing the role of the pro-Israel community in rallying support for war with Iraq. Stu wrote of "the hypersensitivity displayed by self-proclaimed arbiters of political correctness, and in both cases, the reaction is more dangerous than the alleged crimes themselves." This hypersensitivity, he said, was "bound to chill the discussion of issues and create more incentive for the thought police to turn the politically incorrect into political outcasts."

Recently, two more examples of hypersensitivity—one on each side of the aisle—occurred. The first was the GOP reaction to Democratic presidential candidate John F. Kerry's comment that "what we need now is not just a regime change in Saddam Hussein and Iraq, but we need a regime change in the United States." Outraged cries went up, charging that it was treasonous to compare President Bush to Saddam, especially in wartime. I must confess to wincing at the "regime-change" remark that Kerry himself later called a bit "harsh." But because the first and last uniforms I ever wore bore Boy Scout insignia, I give considerable latitude on war-related matters to anyone who has served in combat. As Kerry's campaign press secretary put it, "Unlike many of his Republican critics, Senator Kerry has worn the uniform, served his country, seen combat. So he'd just as soon skip their lectures about supporting our troops."

The Massachusetts Democrat's remarks amused many liberals and Democrats, while conservatives and Republicans (who would never vote for Kerry anyway) were appalled. Most moderates and independents, who will likely decide the 2004 election, won't even be aware of Kerry's candidacy for another six months. And a year from now, few voters will recall his controversial comment.

An alleged gaffe on the Republican side came when freshman Sen. Norm Coleman of Minnesota told *Roll Call*, "I am a 99 percent improvement over Paul Wellstone." Democrats pounced, with Rep. Betty McCollum of Minnesota calling on Coleman to apologize. She called the remarks "inappropriate and disrespectful" and "an unnecessary attack on a leader our state continues to mourn." Coleman responded that he should have been clearer: "It was my understanding we were comparing my relationship to the White House to the relationship Senator Wellstone had with this White House." He went on to say he would never want to "diminish the legacy or memory" of Wellstone. Frankly, if Coleman was merely talking about how well he gets along with the Bush White House, his assessment was correct, if poorly phrased. If he was talking more broadly, his critics were right on target.

Senate Minority Leader Thomas A. Daschle, D-S.D., drew fire for saying on the eve of combat in Iraq, "I'm saddened, saddened that this president failed so miserably at diplomacy that we're now forced to war, saddened that we have to give up one life because this president couldn't create the kind of diplomatic effort so critical for our country." Later, Daschle rather lamely claimed that he didn't know war was so imminent. While Daschle was certainly within his rights to criticize the president, his remarks occurred at a time when such attacks should have been muted. The content was not out of bounds, but the timing was.

None of these was a hanging offense, though. The context of Coleman's remarks isn't clear, so it's difficult for an outsider to say whether he was out of bounds. Kerry gave a flip response that probably should have been worded differently, but few of his most vocal critics are in a position to question his patriotism. In Daschle's case, the content was fine, the timing wasn't. In every case, though, the reactions were overblown. ■

The author can be reached at ccook@nationaljournal.com.

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Fitzgerald not going to pursue re-election

By Rick Pearson
Tribune political reporter

April 15, 2003, 3:16 PM CDT

Update: U.S. Sen. Peter Fitzgerald announced this afternoon he will not seek a second term, leaving the Illinois Republican Party scrambling for a candidate in a crucial state for the 2004 elections. The senator said he was concerned about the time he would have to spend away from his wife, his 10-year-old son and his job to campaign.

First-term U.S. Sen. Peter Fitzgerald (R-Ill.) told close associates Monday night that he would not seek re-election next year, saying he had "no fire in the belly" and citing concerns about the personal cost of another campaign and the lament that his independence had left him with few political friends, sources said.

Neither Fitzgerald, 42, nor his top aides responded to requests for comment as questions about his political future swirled from Washington to Chicago. But sources said he began notifying close political supporters of his decision late Monday.

On Tuesday, Fitzgerald plans to make a formal announcement at a luncheon of what was supposed to have been his Chicago-based campaign finance and business leadership committee, the sources said.

The decision by Fitzgerald, a wealthy banking heir from Inverness who was known for bucking the traditional Republican establishment, immediately created the potential for a wide-open GOP primary for the party nomination next March. A handful of Republicans, including businessman Andrew McKenna, had been exploring the possibility of a primary challenge to Fitzgerald.

That list is likely to grow with him out of the race. Former Atty. Gen. Jim Ryan, the unsuccessful GOP candidate for governor last fall, has expressed interest, GOP sources said. Other names being mentioned included former state Sen. Patrick O'Malley of Palos Park and DuPage County Board Chairman Robert Schillerstrom.

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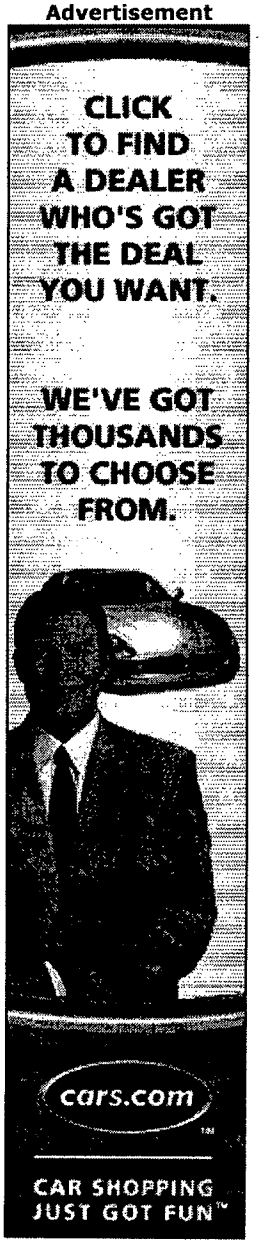

Early polling results questioned Fitzgerald's political viability, causing concern in the White House that a weak GOP candidate in Illinois could threaten the party's bare majority in the Senate and undermine President Bush's re-election efforts in a state he lost badly in 2000. Fitzgerald was regarded by many Republicans as the most imperiled of all GOP senators up for election in 2004.

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Publicly, the White House opposed any primary challenge to Fitzgerald. But a Republican close to the Bush administration said efforts had been under way to see if Fitzgerald could be encouraged to drop out.

Fitzgerald served six years in the state Senate before his election to the U.S. Senate in 1998, first bucking the candidate of the GOP establishment in a bruising primary and then defeating first-term incumbent Democrat Carol Moseley Braun by 50 percent to 47 percent in the general election.

Fitzgerald's tenure has been fraught with controversy, which only accentuated deep divisions in a state Republican Party left in shambles following the scandal-clouded rein of former Gov. George Ryan. Fitzgerald and Ryan fought continuously, with the senator demanding federal purchasing rules governing construction of the Abraham Lincoln Library and Museum in Springfield to prevent the former governor's friends from getting beneficial contracts.

That controversy also brought Fitzgerald into conflict with U.S. House Speaker J. Dennis Hastert of Plano. Hastert, a product of the regular Republican organization, berated Fitzgerald for grandstanding.

Two years ago, Fitzgerald went outside the Illinois political spectrum to name assistant federal prosecutor Patrick Fitzgerald of New York as the new U.S. attorney for the Northern District of Illinois. Patrick Fitzgerald, who is of no relation to the senator, went on to indict and win convictions of several of George Ryan's associates as part of an ongoing probe into corruption that occurred during Ryan's tenure as secretary of state.

Sen. Fitzgerald also battled Republican business interests as he fought attempts to block the expansion of O'Hare International Airport championed by Ryan and Mayor Richard Daley. Fitzgerald repeatedly vowed a filibuster to block federal legislation to cement the O'Hare project into law. Daley allies, including Democratic U.S. Sen. Dick Durbin of Illinois, never called the measure for a vote because of Fitzgerald's opposition.

Fitzgerald's decision caught some of his closest friends by surprise. "We had just finished organizing one of his [campaign] finance committees," said state Sen. Dave Syverson (R-Rockford). "I just can't imagine that."

Even with his conservative background, Fitzgerald's tenure in the Senate represented an independent political ideology. Though he sided with Republican conservatives on opposition to abortion and other social issues, Fitzgerald also supported tighter restrictions on guns and had a strong environmental record. Despite intense pressure from the Bush administration, he recently voted against oil drilling in the Arctic National Wildlife Refuge in Alaska.

All told, Fitzgerald ended up primarily self-financing his first campaign for the Senate and spent more than $13 million of his own money.

Concerns about spending more of his personal wealth were among the reasons he opted not to seek re-election, sources close to the senator said. Although new federal campaign spending laws allow candidates to raise money in greater amounts than he was able to do in his first campaign, Fitzgerald still expected that he would be the primary source for dollars.

Tribune staff reporters Diane Rado and Mike Dorning contributed to this report

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536006

FRANK KEATING
PRESIDENT & CHIEF EXECUTIVE OFFICER
FrankKeating@acli.com

AMERICAN COUNCIL OF LIFE INSURERS
FINANCIAL SECURITY FOR LIFE

February 6, 2003

Karl Rove
Senior Advisor to the President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Karl:

I am writing to request a meeting with you regarding the Administration's proposed economic growth package. I commend President Bush and his team, on behalf of the American Council of Life Insurers ("ACLI"), for leadership on this important initiative. As the fourth largest investor in the US economy, the life insurance industry relies heavily on a strong and growing economy.

With regard to the growth package, the dividends exclusion proposal is praiseworthy. Reducing the cost of capital is something we can certainly support. However, the proposal could have an unintended but very negative effect on the annuities market. Quite simply, such a proposal could immediately and directly extinguish a very important part of our business, one that is integral to another important economic goal – long-term retirement security for individuals.

I look forward to exploring this matter with you in more detail at your earliest convenience.

Sincerely,

Frank Keating

101 CONSTITUTION AVENUE, NW, Suite 700, WASHINGTON, DC 20001-2133
Telephone: (202) 624-2300 Facsimile: (202) 572-4700

ACLI AMERICAN COUNCIL OF LIFE INSURERS FINANCIAL SECURITY FOR LIFE

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To: *Karl Rove*

Company: *The White House*

Phone: *202-456-2108*

Fax: *202-456-0191*

From: *Frank Keating*

President & Chief Executive Officer

American Council of Life Insurers

101 Constitution Avenue, NW, Suite 700

Washington, D.C. 20001-2133

Phone: *(202) 624-2300*

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Ralston, Susan B. 536006

From: Karl Rove [KR@georgewbush.com]
Sent: Tuesday, April 08, 2003 7:34 AM
To: Ralston, Susan B.
Subject: Fw: The Press & The War: April 7, 2003

-----Original Message-----
From: Mark McKinnon
To: Tucker Eskew; Peter_H._Wehner@who.eop.gov; Jim Wilkinson; mark Kitchens
Cc: Dan Bartlett; Adam Levine; Scott McClellan; Karl Rove
Sent: Apr 7, 2003 9:18p
Subject: FW: The Press & The War: April 7, 2003

Latest Tessin Report:

The Press & The War: April 7, 2003

Vis-à-vis the war in Iraq, this Dan Balz piece from today's Washington Post (http://www.washingtonpost.com/wp-dyn/articles/A43777-2003Apr6.html) may not be the most important press of the last three days; but it's still pretty amazing:

The war in Iraq dominates the world's attention and gobbles up television air time and newspaper columns round-the-clock. But at the first in a series of forums for Democratic presidential candidates, Iraq and President Bush's foreign policy took a back seat to the economy, health care and education.

Not one question dealt directly with the war. When Sen. John Edwards (D-NC), the first candidate to participate in the forums, explained his pro-war position to the audience during his opening remarks, he won scattered applause -- not the boos he has often heard at such gatherings.

(Thomas Beaumont writes in the Des Moines Register (http://desmoinesregister.com/news/stories/c4789004/20939101.html): "Edwards...fielded questions about health care and a wide array of economic and social issues during a 90-minute town hall-style forum perhaps most remarkable for the absence of any questions about the war in Iraq." Ouch.)

To give Sen. Edwards' experience some perspective, contrast Beaumont's campaign report in the March 16 Register: "Democrats are finding, despite their best efforts in some cases, only one issue matters on the caucus campaign trail right
---
Sent from my BlackBerry Wireless Handheld (www.BlackBerry.net)

Ralston, Susan B. 536006

From: Rove, Karl C.
Sent: Monday, April 07, 2003 10:13 AM
To: Ralston, Susan B.
Subject: FW: meeting

see previous message

-----Original Message-----
From: Hennessey, Keith
Sent: Sunday, April 06, 2003 10:35 PM
To: Rove, Karl C.; Buchan, Claire
Cc: Bolten, Joshua B.
Subject: FW: meeting

SF met with Rahn, at Cesar's request. SF agreed to meet with a group of conservatives to talk about Jobs & Growth. Given what happened last time (they leaked stuff from a similar meeting with Larry), I wanted to suggest smaller meetings, but it wasn't appropriate in the meeting for me to interject.

We'll exclude Moore.

Karl -- Do you have any problems with anyone else on Rahn's suggested list?

Claire -- SF is now aware of what happened last time. You'll be invited to sit in, and SF will assume that everything he says will leak.

-kbh

-----Original Message-----
From: PRA 6
Sent: Monday, March 31, 2003 2:01 PM
To: Hennessey, Keith
Cc: PRA 6
Subject: meeting

Dear Keith:

It was a pleasure to have met you on Friday. As we discussed, I suggest you invite the following economists to participate in the meetings. (All of them write frequently on tax and economic issues for the national media, and generally support the Administration.)

Dan Mitchell - Heritage
Alan Reynolds - Cato
Steve Entin - IRET
Kevin Hassett - AEI
Bruce Bartlett - NCPA
Steve Moore - Club for Growth
Larry Kudlow - Kudlow and Cramer
Grover Norquist - ATR
Larry Hunter - Empower America (he also writes Jack Kemp's columns)
David Malpass - Bear Stearns
Richard Rahn - Discovery

Even though I have listed 11 people, given travel schedules and conflicts, I expect you would never have more than 7 or 8 at any particular meeting.

I expect they are all in your data bank - but if you need anyone's contact information please contact Taya Bullard in my office at 703-553-3700.

I look forward to hearing from you.

Best regards,

Richard

REV_00265454

536006

Upcoming Political Travel

Event	Date	Surrogate	Location
Kent County Lincoln Day	4-Apr-03	Karl Rove	Michigan
Fundraiser for Jeb Hensarling	4-Apr-03	Sec. Evans	Dallas, TX
Roundtable with Finance Committee / Grove City College event	9-Apr-03	Karl Rove	Pittsburgh, PA Grove City, PA
Fundraiser for Lisa Murkowski	**9-Apr-03**	**Sec. Abraham**	**Washington, DC**
Republican Women's Federal Fund	10-Apr-03	Mehlman	Washington, DC
American Society of Newspaper Editors / Breakfast with Finance Committee (T)	11-Apr-03	Karl Rove	New Orleans, LA
Berks County Lincoln Day Dinner	11-Apr-03	Mehlman	Reading, PA
RNC Dinner in Palm Beach at Cathy Bailey's home	15-Apr	Gov. Racicot and Lezlee Westine (T)	Palm Beach, FL
Hot Springs, AR Lincoln Day Dinner	15-Apr-03	Mehlman	Hot Springs, AR
Kanawha County Lincoln Day	15-Apr-03	Sec. Evans	Charleston, WV
Brown County Lincoln Day Dinner	**15-Apr-03**	**Mitch**	**Indiana**
Fundraiser for Sen. Kit Bond	**16-Apr-03**	**Sec. Martinez**	**Kansas City, MO**
Cass County Lincoln Day Dinner	**16-Apr-03**	**Mitch**	**Indiana**
Fundraiser for Rep. Bob Ney	**17-Apr-03**	**Sec. Martinez**	**Logan, OH**
Howard County Lincoln Day	17-Apr-03	Mitch	Indiana
Harris County Lincoln Day Dinner	17-Apr-03	Karl Rove	Houston, TX
Fundraiser for Cong. Burr	24-Apr-03	Karl Rove	Winston-Salem, NC
Fundraiser for Boehner/Turner/State-GOP	25-Apr-03	Karl Rove	Dayton, OH
RNC Eagles Spring Meeting- Bush Library	25-Apr-03	41	College Station, TX
Harrison County Lincoln Day Dinner	**25-Apr-03**	**Mitch**	**Indiana**
VA-10 Jefferson Day Dinner	25-Apr-03	Mehlman	Fairfax County, VA
Lincoln Club event	**27-Apr-03**	**Rosario Marin**	**Pebble Beach, CA**
RNC Renewal Dinner at Dwight Schar's house	30-Apr-03	Karl Rove	McLean, VA
Fundraiser for Scott Walker	1-May-03	Karl Rove	Chicago, IL
Meeting with IL GOP Finance Committee	2-May-03	Karl Rove	Chicago, IL
Editorial Board Meeting with Chicago Tribune	2-May-03	Karl Rove	Chicago, IL
McLean County Lincoln Day	9-May	Dep Sec MacKay	Bloomington, IL
Wisconsin State GOP Convention	**10-May-03**	**Sec. Thompson**	**Milwaukee, WI**
Kalamazoo Lincoln Day Dinner	**12-May**	**Mehlman**	**Kalamazoo, MI**
Fundraiser for Sen. Bunning	15-May-03	Karl Rove	Lexington, KY
Iowa Statewide Lincoln Day	16-May	Sec. Evans	Des Moines, IA
Fundraiser for Sam Katz	21-May	Sec. Paige	Philadelphia, PA
Fundraiser for DE GOP	21-May	Sec. Paige	Wilmington, DE
President's Dinner	**21-May**	**POTUS and FLOTUS (T)**	**Washington, DC**
Fundraiser for Bob Peeler	**29-May**	**Karl Rove**	**TBD, SC**
TN Statesmens Dinner	7-Jun	Sec. Martinez	Nashville, TN

REV_00265455

THE WHITE HOUSE 536006
WASHINGTON

Date: 4/1/03

To: Bob McNally

From: Strategic Initiatives Susan P.

x FYI
___ Appropriate Action
___ Direct Response
___ Prepare Response For My Signature
___ Per Our Conversation
___ Let's Discuss
___ Per Your Request
___ Please Return
___ Deadline
___ Other

Comments: _____

_____

_____

REV_00265456

Canadian Electricity Association
Association canadienne de l'électricité

March 28, 2003

Mr. Karl Rove
Senior Advisor to the President
White House
2nd Floor, West Wing
1600 Pennsylvania Avenue, NW
Washington DC, 20500

Dear Mr. Rove:

It was a pleasure to hear your remarks on March 26, 2003 at the Edison Electric Institute Policy Forum.

As I mentioned in my brief comments during the Q and A session after you spoke, the Canadian Electricity Association (CEA) released its annual North American Energy paper on March 21, 2003. In the context of increasing regional integration and promoting greater energy security, our paper is titled "Enhancing Opportunities for Cross Border Trade and Environmental Performance." The paper identifies seven areas for enhanced cross-border cooperation, including air issues management, which you made reference to in your remarks. I would encourage you to review the paper, and should you have any questions, feel free to contact me.

Together with our American counterparts, Canadian electricity companies consider the continued integration of the North American energy marketplace a significant priority, in the interests of consumers on both sides of the border. The open and constructive working relationship we have is a vital one that has evolved over decades, and over many hurdles. We want to continue to build on that relationship, and look forward to continuing to work together in delivering on the President's continental energy vision as set out in the "Cheney Report".

Sincerely,

Hans Konow
Canadian Electricity Association

Enclosure

66 Slater Street, Suite 1210
Ottawa, Ontario, K1P 5H1

Tel.: (613) 230-9263
Fax: (613) 230-9326

REV_00265457

Canadian Electricity and the

economy

The Integrated North American Electricity Market

Enhancing Opportunities for Cross Border Trading and Environmental Performance

March 2003

Canadian Electricity Association



Canadian Electricity Association
Association canadienne de l'électricité

REV_00265458

THE WHITE HOUSE 536006

WASHINGTON

Date: 4/4/03

To: ~~Mary Ann Hamilton~~

From: Strategic Initiatives Susan Ralston

____ FYI

____ Appropriate Action

X Direct Response

____ Prepare Response For My Signature

____ Per Our Conversation

____ Let's Discuss

____ Per Your Request

____ Please Return

____ Deadline

____ Other

Comments: Can you send a POTUS letter?

REV_00265459

THE WHITE HOUSE 536006

WASHINGTON

Date: 4/4

To: ~~Adam Goldman~~

From: **Strategic Initiatives** Susan

1 FYI

____ Appropriate Action

____ Direct Response

____ Prepare Response For My Signature

____ Per Our Conversation

____ Let's Discuss

____ Per Your Request

____ Please Return

____ Deadline

____ Other

Comments: _____

_____

_____

REV_00265463



CAPITAL TO CAPITAL:

AIPAC'S *birthright israel*

American Israel
Public Affairs Committee
Political Leadership Development Program

TAGLIT · תגלית
birthright israel
www.birthrightisrael.com

REV_00265464

AIPAC

Dear Friend,

AIPAC is now recruiting for its first ever *birthright israel* mission.

The AIPAC *birthright israel* trip is open to Jewish young adults, between the ages of 18-26, who are involved in the American political process, and who have not previously traveled to Israel on a peer educational program. **This trip is a free gift from *birthright israel* – a partnership between the government of Israel, local Jewish communities, and Jewish philanthropic partners.** Tentative dates for this program, which we are calling "Capital to Capital," are **May 25-June 5, 2003.**

We are writing to solicit your recommendations of young political professionals – perhaps on your staff – who may be interested in this exciting opportunity. The program will be unlike any other Israel trip being offered, and it will provide valuable reference points for the seminal issues affecting American foreign policy in the Middle East.

This unique experience creates a nexus between participants' political and Jewish identities by fusing their experience in American politics with their first formal experience with the Jewish State. Together, we will visit Israel's most important sites, as well as places associated with the U.S.-Israel relationship. Our proposed itinerary includes: The Israeli Knesset, an IDF army base, the American Embassy in Tel Aviv and American Consulate in Jerusalem, and the Arrow missile defense testing site.

Registration for this program is now open – a short profile and application form, as well as our proposed itinerary, is enclosed. Space will be limited, so it is important that applicants notify AIPAC of their interest as soon as possible by responding to Brian Jaffee, Campus Programming Director, via e-mail: bjaffee@aipac.org or phone: (202) 639-5334. The deadline for applications is Friday, April 11, 2003.

We hope that you know of young political professionals who may be interested in participating, and that you will encourage them to contact us at their earliest convenience.

Sincerely,

Robert Bassin
Political Director

Jonathan Kessler
Leadership Development Director

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415-989-4140

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Southwest:
713-871-1891

Israel:
011-972-2-625-5105

America's Pro-Israel Lobby
The American Israel Public Affairs Committee
440 First Street, NW • Suite 600 • Washington, D.C. 20001 • (202) 639-5200
http://www.aipac.org

Rev. 6/02

REV_00265465

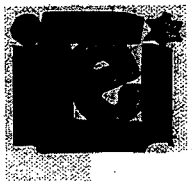

IsraelExperts
The Experts in Educational Travel

CAPITAL TO CAPITAL:
AIPAC'S PROPOSED *birthright israel* ITINERARY

Day 1 — Check-in for El Al overnight flight to Israel

Day 2 — Arrival at Ben Gurion Airport.
Assistance through customs and transfer to Hotel.
Welcome Dinner with guests from AIPAC Israel Office
Orientation session: getting to know each other and discussing expectations
Overnight - Herzliah.

Day 3 — Breakfast at the hotel and early meeting:
An introduction into Israeli Politics and Society .
Guest Speaker - David Horovitz, Editor of Jerusalem Report

Tour of Tel Aviv and Old Jaffa, including a visit to Rabin Square, and Ben Gurion House.

Visit to the Inter-Disciplinary Center in Herzliah
The War on Terror
Guest Speaker – Boaz Ganor, Director, International Policy Institute for Counter-Terrorism

Visit to American Embassy in Tel Aviv.
Key issues in current U.S.-Israel relations
Guest Speaker - American Ambassador

This evening, **Dinner with Young Student Activists** – from all parties – an informal opportunity to meet Israel's future Political leaders and get a better understanding of the Israeli Political scene. Dinner to be held either at the home of the American Ambassador or at Tel Aviv University.
Overnight – Herzliah.

Day 4 — Breakfast at the Hotel

The Middle East and U.S.-Israel Defense Cooperation: A Strategic Assessment
Guest Speaker – General Giora Eiland, IDF Chief of Planning

Visit site of one of the U.S.– Israel joint strategic Military projects
Possibly Arrow testing facility.

Tour Beth Hatefutsoth Museum of the Diaspora.
Jewish History and the Connection between Israel and World Jewry
Guest Speaker – Natan Sharansky, Minister for Diaspora Affairs

P.O. Box 298 Gedera 70700 Israel
Telephone: 972-8-867-4343 Fax: 972-8-857-3813 Email: education@israelexperts.com
Toll Free in North America: 1-866-7-ISRAEL

www.israelexperts.com

Visit the Jaffee Center for Strategic Studies at the Tel Aviv University
Post Iraq Middle East
Panel of Experts – Moderated by Shai Feldman, Director, Jaffee Center for Strategic Studies

Dinner at the Hotel
Israel Advocacy and Propaganda Response
Guest Speaker – Ross Culiner, Israeli Educator, Advocate, and Guide

Overnight Herzliah.

Day 5. Breakfast at the Hotel
The Israeli Economy and US-Israel Trade Relations
Guest Speaker ....Representative of the Israel-America Chamber of Commerce.

Leave Tel Aviv for the Galilee and visit sites and people illustrating the various connections to this tiny land – Travel past the Crusader ruins of Caesarea, past the Druze Village of Ussafiah and through Haifa with its blend of Jewish, Arab and Christian inhabitants;

Travel through the Lower Galilee and learn about the importance of the Kibbutz Movement in Israel, its place in the development of the State, and the situation of the Kibbutz 50 years after the establishment of the State.

Continue through the Galilee to Tiberias on the Sea of Galilee for a late afternoon special program on **"Poets and Pioneers"** – who came to settle the land and reclaim their soul... reshaping the land of Israel and its people for the coming generations.

Dinner at a Kibbutz in Galilee

(Campfire with members of kibbutz)

Overnight: Kibbutz

Day 6 Morning –leave the kibbutz and ascend the Golan Heights overlooking the borders with Jordan, Syria and Lebanon.
Security considerations in the North and the strategic Significance of the Golan Heights: Tour the Golan Heights and visit an army base accompanied by an Israel Defense Force spokesman.

After lunch, leave the Galilee and head for Jerusalem stopping at the Machal Memorial which pays tribute to the many volunteers from abroad, and particularly from the US, who contributed to the defense of the country – a time to say "Shehecheyanu" before entering Jerusalem.

Visit the Haas Promenade overlooking the Old City of Jerusalem for a visual introduction to the complexity of Jerusalem in the search for Middle East peace.

Dinner at the Hotel with guest speaker.
Israel in the Media – a discussion and analysis of Israel's changing image.
Guest Speaker – Colonel Miri Eisen, IDF Spokeswoman

Overnight – Jerusalem.

Day 7 Breakfast at the hotel.

Visit Yad Vashem Holocaust Memorial, including the Children's Pavilion, and lay a wreath in the Valley of the Destroyed Communities.
While 6 million died....US Policy and Implications of Jewish Powerlessness
Guest Speaker – Ross Culiner, Israeli Educator, Advocate, and Guide

Visit Mt Herzl military cemetery where Israel's top leaders are buried – the price to pay... including Americans who have given their lives during the establishment of the State of Israel.

Dialogue with Congressional Delegation visiting from the U.S.

Early afternoon walking tour through the Nachlaot suburbs to see the ultra-orthodox prepare for Sabbath.

Kabbalat Shabbat: An opportunity to choose to attend synagogue services at one of the many religious streams of Judaism – Hebrew Union of College, Kol Haneshama or the Great Synagogue of Jerusalem.

Dinner at the Hotel and discussion with guest speaker
The Land and the People: The History and Vision of Zionism
Guest Speaker - Rabbi Levi Lauer, Director of Israel-Diaspora Education at the Shalom Hartman Institute or Avraham Infeld

Overnight – Jerusalem.

Day 8 Shabbat –in Jerusalem

Optional – an opportunity for early morning synagogue services.

Join your tour guide on a walking tour through the old city of Jerusalem, entering through the Zion Gate viewing the Jewish Quarter, the Cardo and on to the Western Wall.

Lunch at the hotel

Afternoon, at leisure or free time for family visits

Dinner at Hotel.

Evening hike along the Burma Road, once a strategic thoroughfare for a besieged Jerusalem during the War of Independence. Learn of the important role played by American volunteers who joined forces with the Israelis to defend Jerusalem.

End the evening with a camp-fire and program of Israeli songs that shaped the nation.

Overnight Jerusalem.

Day 9 Breakfast at the hotel and early meeting
Israeli Government Perspective on the Search for Peace...The "Road Map" – where does it lead

(Speaker ...Bibi Nethanyahu/ Dori Gold/Shimon Peres/ David Agoz)

Visit the American Consulate in Jerusalem
American-Palestinian Relations
Guest Speaker...Acting Consul General Jeff Feltman

Visit and tour the Knesset (Israeli Parliament) and meet with Israeli Politicians, including Yuli Edelstein, Shlomo Benizri, Nissim Dahan, Neomi Hazan etc.

Visit with Hillel at the Hebrew University on Mount Scopus and see the Mt Scopus Sinatra Cafeteria, meeting with student political activists of both Jewish and Arab origin.

Dinner at the Hotel.

The Story of Operation Moses; After dinner, hear an amazing and moving account of the operation of bringing thousands of Ethiopian children to Israel, walking for weeks through the deserts of Sudan – accounted by an officer who participated.
Overnight Jerusalem.

Day 10. **The Story of Massada**
After breakfast, leave the hotel for a thrilling day trip to Massada and the Dead Sea. Ascend Massada from the Roman ramp and tour the remarkable remnants of this fortress, built to escape the invading Roman Forces. Descend and enjoy time floating in the salty waters of the Dead Sea.

Late afternoon, continue on to Kibbutz Nacshon in the Jerusalem corridor, for a farewell dinner including home-made cheese and wine ...

Evening: Evaluation and summary.

Overnight – Jerusalem

Day 11. Transfer to the airport for departure.

CAPITAL TO CAPITAL
AIPAC'S *birthright israel* MISSION

Participant Application and Profile

NAME:_____

CAMPUS (if applicable):_____

YEAR IN SCHOOL (if applicable):_____

STUDENTS: Please indicate which political organizations you are affiliated with on campus:

AIPAC **Student Government** **College Democrats** **College Republicans**

Other_____

POST-GRADS: Please indicate which political institution/organization you are currently working for:

Congressional Office_____ **Executive Branch Dept.**_____

Political Party_____ **Other**_____

Please indicate how are you currently registered to vote: **Dem.** **Rep.** **Ind.**

HOMETOWN:_____

EMAIL ADDRESS:_____

PHONE NUMBERS: School:_____

Cell:_____

Hometown:_____

1. Have you ever been to Israel?

   Yes **No**

   - If so, how many times: _____
   - Please indicate the nature of your trip(s):

     Family **High School Mission**

     University Program **Other**_____

2. Do you aspire to a career in politics, public policy, or media?

Yes **No**

3. Are you considering running for elected office in the future

Yes **No**

4. Have you ever contributed time or money to an electoral political campaign?

Yes **No**

5. Do you have any personal contacts within the campus, community, or national media?

Yes **No**

6. Did you attend AIPAC's Summer or Winter SAI/Saban NPLTS?

Yes **No**

7. Have you attended an AIPAC Policy Conference?

Yes **No**

8. Are you currently active in Hillel or Chabad?

Yes **No**

- If so, please indicate which:

Hillel **Chabad**

9. Are you affiliated with a campus fraternity or sorority?

Yes **No**

- If so, which?_____

536006

THE WHITE HOUSE
WASHINGTON

Date: 4/2/03

To: ~~Mary Ann Hennessy~~

From: Strategic Initiatives Susan Ralston

____ FYI
____ Appropriate Action
X Direct Response
____ Prepare Response For My Signature
____ Per Our Conversation
____ Let's Discuss
____ Per Your Request
____ Please Return
____ Deadline
____ Other

Comments: Karl would like a note from POTUS sent.

THE WHITE HOUSE 536006
WASHINGTON

Date: 4/2/03

To: Barry

From: Strategic Initiatives Susan

____ FYI
__✓__ Appropriate Action
____ Direct Response
____ Prepare Response For My Signature
____ Per Our Conversation
____ Let's Discuss
____ Per Your Request
__✓__ Please Return
____ Deadline
____ Other

Comments: Karl would like you to review this draft to determine if it is appropriate.

The 80-20 Initiative, Inc.

http://www.80-20initiative.net

February 22, 2003

Mr. Karl Rove
Senior Advisor to the President
Faxed to 202 456-0191
A hard copy is sent via Express Mail

Dear Mr. Rove:

May we work together to find a win-win situation out of a lose-lose one?

Are you aware that Rep. Howard Coble's recent statement on internment of Japanese Americans could cost President Bush 1.5 million of about 2.0 million Asian American votes in 2004? It is wrecking the grand design and hard work that President Bush and you laid out in late 2000 to attract minority votes.

My name is S. B. Woo, former Lt. Gov. of Delaware (85-89), and currently president of The 80-20 PAC, Inc. 80-20's ability to deliver a bloc vote in the Asian Am. community in a presidential election is proven by two independent research projects. Here are the facts:

1) See results of a large national survey on how AsAm voted in 2000. It was done by group of professors from Utah, Harvard, Yale and Florida and was partlally funded by The National Science Foundation
http://www.80-20initiative.net/NAA_Political_Survey.pdf
Specifically, see parag. 4 of p. 1 on how AsAms "voted by more than 2 to 1 for Gore. See also parag. 6 of p.3 where 80-20 was specifically mentioned. At the time 80-20 was only 2 years old. We are now 4.5 years old and much stronger.

2) A book by 3 Syracuse Univ. professors, entitled "Click on Democracy," ranked 80-20 as one of nation's two most effective cyberspace political orgs. in the 2000 election. You probably know 1 of the authors, Steve Davis who used to be the national news editor of "USA Today."
http://www.amazon.com/exec/obidos/ASIN/0813340055/qid%3D10251
98992/ref%3D%3Dsr%5F11%5F0%5F1/104-8613051-5694362

In 2000, 80-20 had only 300,000 valid AsAm e-mail addresses. Today, we have 600,000 and can reach all of them via e-mail in one day.

Why are we so worked up over Rep. Coble's statement?

Let me share with you our principal "hopes and fears." Our hope is to enjoy equal opportunity and justice. Our fear is that the conservatives in GOP will advocate putting some or all of us in internment camps, if and when, God forbid, we get into a war with some of the Asian nations.

Lastly, let me assure you that 80-20 has no problem endorsing a Republican presidential candidate in 2004, if the Coble episode can be resolved to our satisfaction. From day one, 80-20 has advocated a "SWING bloc vote." Although we endorsed Gore the last time, we are quite prepared to endorse a GOP candidate. The AsAm appointments that President Bush made are deeds that we count strongly in his favor.

I hope you are interested in finding a win-win situation. Please let me know. You will not only be helping to restore the faith of millions of Asian Americans in the GOP but also helping to make America "a more perfect Union." In addition, you may be helping to prevent another minority from voting in a bloc in favor of the Democratic party permanently. If and when the AsAms have voted in a bloc for a Democratic presidential nominee twice in a row, a pattern might begin to set in.

I'll be glad to travel to D.C. to see you. The conversation can be confidential, if you like. If I don't hear back from you, then I also know your answer.

Sincerely,

S. B. Woo

S. B. Woo
President, The 80-20 PAC, Inc.
(302 366-0259 -p or 302 366-0909-fax or sbw@udel.edu)

S. B. Woo

PRA 6

THE WHITE HOUSE 5360006

WASHINGTON

Date: 4/02/03

To: ~~Dan Bartlett~~ Karl Rove

From: **Strategic Initiatives**

X FYI

____ Appropriate Action

____ Direct Response

____ Prepare Response For My Signature

____ Per Our Conversation

____ Let's Discuss

____ Per Your Request

____ Please Return

____ Deadline

____ Other

Comments: _____

_____

_____

The Dilenschneider Group

XC: Dan Bartlett
(and return)

April 1, 2003

VIA FACSIMILE (202) 456-0191

The Honorable Karl C. Rove
Senior Advisor to the President
The White House
West Wing, Second Floor
Washington, DC 20502

Dear Karl:

If you think this worthy, would you consider advancing it to the President?

Best regards,

Robert L. Dilenschneider

RLD:llg
Attachment

The Dilenschneider Group, Inc.
MetLife Building, 200 Park Avenue, 26th Floor, New York, NY 10166
212 922 0900 (fax 212 922 0971)

THE WHITE HOUSE 536006

WASHINGTON

Date: 4/3/05

To: ~~Lauren Willson~~ Karl

From: **Strategic Initiatives**

✓ FYI

____ Appropriate Action

____ Direct Response

____ Prepare Response For My Signature

____ Per Our Conversation

____ Let's Discuss

____ Per Your Request

____ Please Return

____ Deadline

____ Other

Comments: _____

_____

_____

THE WHITE HOUSE
WASHINGTON

536006

Date: 4/3/03

To: ~~Ken Mehlman~~ Karl

From: **Strategic Initiatives**

X FYI

____ Appropriate Action

____ Direct Response

____ Prepare Response For My Signature

____ Per Our Conversation

____ Let's Discuss

____ Per Your Request

____ Please Return

____ Deadline

____ Other

Comments: _____

REV_00265488

Republican
National
Committee

Schlepp –
Make sure
this language
is ok +
consistent
w/ what
we
said in
the
~~[illegible]~~
campaign

Date: 2/6

FAX COVER SHEET

TO: Kate

FAX NUMBER:

FROM: Janice

FAX NUMBER: (202)863-8760

TOTAL NUMBER OF PAGES INCLUDING THIS COVER: 4

IF YOU DO NOT RECEIVE ALL THE PAGES, CALL (202)863-8720

THANK YOU

Kate – This draft is Chairman Correspondence
Jack wants Ken to see -- the cover
sheet explains letter to NRA members –

310 First Street, S.E. • Washington, D.C. 20003 • 202-863-8720

Feb-06-2003 11:18pm From-CHAIRMANS OFFICE 2028638684 T-165 P.001/004 F-888

REV_00265490

REPUBLICAN NATIONAL COMMITTEE – APPROVAL SHEET

Program:	**Direct Marketing / Correspondence**
Date:	**January 24, 2002**
Mail Date:	**Varies**
Project Name:	**Response to NRA post card**
Copy Due Date:	**February 5, 2002**

Background/history: Chairman Racicot is receiving the attached post card that was generated by an NRA mailing. (note: this is a repeat of a similar NRA package from last year.) Attached is response letter as Finance will key names. This first letter does not ask for funds, but names will be added to prospecting.

Note to legal: this will be printed on standard RNC letterhead.

Please call Janice with any questions. Thank you.

CHECK OFF AS APPROPRIATE:

	INITIALS	DATE	COMMENTS:
Finance	[signature]	1/24	_____
Legal	[signature]	1/24/03	_____
Dep. Chairman	[signature]	_____	_____
Chairman	_____	_____	_____
Deputy Finance Director			
Program Director	[signature]	1/24	

[signature]

Feb-06-2003 11:18pm From-CHAIRMANS OFFICE 2028638684 T-165 P.002/004 F-698

REV_00265491

AN IMPORTANT MESSAGE TO REPUBLICAN NATIONAL COMMITTEE CHAIRMAN MARC RACICOT

Dear Party Chairman:

As the 108th Congress convenes and we begin to move toward the next presidential election in 2004, please know that my fellow NRA-PVF supporters and I will continue to be vigorously committed to defending the Second Amendment and defeating anti-gun candidates.

Please be advised that NRA-PVF will keep me closely informed of the actions of politicians who ran for office as pro-gun candidates but who fail to keep their promise to support our gun rights. Their betrayal of our trust will be answered at the ballot box.

Sincerely,

Robert J Perkins

Robert J Perkins
Dacula, GA 30019-2562

Additional Comments:

FOLDED Post Card copy

Feb-06-2003 11:18pm From-CHAIRMANS OFFICE 2028638684 T-165 P.004/004 F-698

REV_00265492

THE WHITE HOUSE 536006

WASHINGTON

Date: 4/3/03

To: ~~Ken Mehlman~~

From: **Strategic Initiatives** Susan

____ FYI

✓ Appropriate Action

____ Direct Response

____ Prepare Response For My Signature

____ Per Our Conversation

____ Let's Discuss

____ Per Your Request

____ Please Return

____ Deadline

____ Other

Comments: _____

5 36006

UNIONS AFFECTED BY CREATION OF THE DEPARTMENT OF HOMELAND SECURITY

Labor Organization	Acronym	Affiliation	Number of Bargaining Unit Employees
American Federation of Government Employees	AFGE	AFL-CIO	32,736
National Treasury Employees Union	NTEU	Independent	12,130
National Association of Agricultural Employees	NAAE	Independent	2,032
National Association of Government Employees/ International Brotherhood of Police Officers	NAGE /IBPO	AFL-CIO	572
Metal Trades Council	MTC	AFL-CIO	513
International Association of Machinists and Aerospace Workers	IAM	AFL-CIO	482
National Federation of Federal Employees	NFFE	AFL-CIO	240
National Association of Plant Protection and Quarantine Service Employees	NAPPQSE	Independent	225
Fraternal Order of Police	FOP	Independent	97
Service Employees International Union	SEIU	AFL-CIO	47
National Marine Engineers' Beneficial Association	MEBA	AFL-CIO	41
United Food and Commercial Workers	UFCW	AFL-CIO	34
International Brotherhood of Boilermakers	IBB	AFL-CIO	24
International Association of Fire Fighters	IAFF	AFL-CIO	19
Federal Law Enforcement Officers Association	FLEA	Independent	15
International Brotherhood of Painters and Allied Trades	BPAT	AFL-CIO	12
Total			**49,219**

UNION RECOGNITION IN DEPARTMENT OF HOMELAND SECURITY

Structure	Border and Transportation Security											Emergency Preparedness and Response				Chemical, Biological, Radiological, and Nuclear Countermeasures	Information Analysis and Infrastructure Protection
Designated Component	Immigration & Naturalization Service	Customs Service	Animal & Plant Health Inspection Service	Coast Guard (Appropriated and Non-Appropriated)	Coast Guard 3(cont'd)	Coast Guard (cont'd)	Coast Guard (cont'd)	Coast Guard (cont'd)	Coast Guard (cont'd)	Coast Guard (cont'd)	Federal Protective Service	Federal Emergency Management Agency	Federal Emergency Management Agency (cont'd)	Chemical, Biological, Radiological, & Nuclear Response Assets	Office of Health Services, Office of Emergency Preparedness	Plum Island Animal Disease Center	Federal Computer Incident Response Center
Former Agency	Justice	Treasury	USDA	DOT	DOT	DOT	DOT	DOT	DOT	DOT	GSA	FEMA		HHS	HHS	USDA	GSA
Total # of Bargaining Units Employees (Units)	28,095 (3)	11,930 (2)	2,498 (7)	4,224 (45)							786 (6)	1,138 (9)		150 (1)	200 (2)	10 (1)	18 (1)
Unions & Bargaining Units (# of Employees)		NTEU (DC) 11,373					IBB (CA) 10	NAGE (NJ) 34			BPAT (SC) 12				NTEU (DC) 150		NFFE (DC) 18
		NTEU (DC) 557					IBB (WA) 14	NAGE (VA) 30		UFCW (AL) 34	NFFE (DC) 179				NTEU (DC) 50		
							NAGE (CT) 85	NAGE (NJ) 87	MTC (MD) 435	SEIU (LA) 47	IBPO (MA) 8						
							NAGE (ME) 5	NAGE (MA) 180	MTC (VA) 78		FOP (N. East) 81						
			NAAE (DC) 2,032				NAGE (MA) 101	NFFE (MO) 13	IAFF (NY) 10		FOP (TX) 16						
							NAGE (MA) 34	NFFE (OH) 28	IAFF (CA) 8		FLEA (PA) 15						
			NFFE (AZ) 6				NAGE (MI) 8	NFFE (WI) 2	IAM (NC) 482								

KEY

AFGE = American Federation of Government Employees
BPAT = International Brotherhood of Painters and Allied Trades
FLEA = Federal Law Enforcement Association
FOP = Fraternal Order of Police
IAFF = International Association of Federal Firefighters
IAM = International Association of Machinists and Aerospace Workers
IBB = International Brotherhood of Boilermakers
IBPO = International Brotherhood of Police Officers
MEBA = National Marine Engineers Beneficial Association
MTC = Metal Trades Council
NAAE = National Association of Agriculture Employees
NAGE = National Association of Government Employees
NAPPQOSE = National Association of Plant Protection and Quarantine Office Service Employees
NFFE = National Federation of Federal Employees
NTEU = National Treasury Employees Union
SEIU = Service Employees International Union
UFCW = United Food Commercial Union

Note: There are no bargaining units in the following agencies: Transportation Security Administration, Department of Energy, Lawrence Livermore National Laboratory, Department of Health and Human Services, Civilian Biodefense Research Program; National Biodefense Analysis Center; Department of Defense, National Communication System; Department of Commerce, Critical Infrastructure Assurance Office; Federal Bureau of Investigation, National Infrastructure Protection Center; Department of Energy, National Infrastructure Simulation and Analysis Center; Department of Justice, Office of Domestic Preparedness; Department of Energy, Nuclear Incident Response; Federal Bureau of Investigation, National Domestic Preparedness Office; Domestic Emergency Support Team; and Secret Service.

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536006

Union Recognition in the Department of Homeland Security and the Department of Defense

	DHS	DoD
Total Number of Unions	16	57
Total Number of Bargaining Units	75	1,556
Total Number of Members	12,304*	106,969*
Total Number of Employees Represented	49,219	427,875
Total Number of Overall Employees	170,000	664,348

* OPM does not maintain this data. Estimates are based on 25% union membership.

PRA 6

5 36006

THE WHITE HOUSE
WASHINGTON

FACSIMILE TRANSMITTAL SHEET

TO: Bill Kristol	FROM: Karl Rove
COMPANY:	DATE: 4/8/2003
FAX NUMBER: PRA 6	TOTAL NO. OF PAGES INCLUDING COVER: 3
PHONE NUMBER:	SENDER'S REFERENCE NUMBER:
RE: Dallas Morning News article	YOUR REFERENCE NUMBER:

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

Dallas Morning News
April 8, 2003

Instructor suspended after extra-credit offer

College class was given option to attend, write about peace rally

By MATTHEW ZABEL
Denton Record-Chronicle

A government instructor at North Central Texas College in Corinth said she was suspended last week for offering her students extra credit for attending an anti-war rally in February.

She said she plans to file a grievance with the college.

"I see it as a way to stop discussion on this topic," said Peggy Connally, the instructor. "In a democracy, I feel that, especially at a college campus, both sides of the issue should be aired."

Ms. Connally, who has taught government for nine years in the North Central Texas College district, said Monday that college officials suspended her April 1, citing several anonymous student complaints about her "unfair teaching and not being a good citizen."

"All I can tell you at this point

See **STUDENT** *Page 2B*

REV_00265511

Continued from Page 1B

is there is an investigation ongoing," said Dr. Lee Ann Nutt, provost of the college's Corinth campus. "The suspension with pay from one class is the situation we've got here. It's just from one class. The investigation is ongoing. Nothing has been decided at this time."

Dr. Nutt would not comment on the nature of the investigation and would not give an ending date for the suspension.

In February, Ms. Connally said, she offered an optional extra-credit assignment to her students in Corinth to attend a peace rally in Dallas and write a paper about the event. She offered a different extra credit assignment to her Bowie campus class because the Dallas event seemed too far away to be practical for them.

Dr. David Meernik, chairman of the political science department at the University of North Texas, said he's not sure he agrees that Ms. Connally should have been suspended for that assignment, but perhaps she should have allowed students to pick what type of rally they wanted to attend.

"It's a good idea to let students choose which rallies they want to go to," he said. "You wouldn't dream of telling students they could attend a Republican Party meeting for extra credit but that they can't go to a Democratic meeting."

Faculty members have academic freedom to teach and give credit in the area of their subject matter, said Dr. Richard Rafes, a University of North Texas administrator who also teaches a course in higher education law.



Peggy Connally

"Academic freedom also includes academic responsibility, which means they must be balanced in objectivity," he said.

When she made the assignment, she made it clear that students need not agree with the anti-war viewpoint, Ms. Connally said. At that time, the war with Iraq had not begun, and she knew of no rallies in favor of the war, she said.

"If a student had come to me and said, 'I found this pro-war rally, could we attend that instead?' I would have considered it," she said. "To be fair, you'd have to offer both."

Ms. Connally said she gives a wide range of extra-credit opportunities each semester. She also had given an assignment for students to research the U.S.-Iraq war and to be prepared for a class debate on the subject.

Ms. Connally said she plans to file a grievance internally with the college because she thinks school officials suspended her without due process.

Citing a college policy, Ms. Connally said students were supposed to bring complaints first to their professor, then to the department chairman and then to the dean.

"If those complaints came t the dean or the vice president they should have been referre back to me," she said. "I'm sur prised this particular issue wa taken this far. If the students ha come to me, we could have avoid ed this. This has been blown wa out of proportion."

Metropolitan

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Assistant Managing Editor/Metropolitan News
Sharon Grigsby 214-977-7693

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Mail:P.O. Box 655237, Dallas, TX 75265

REV_00265512

THE WHITE HOUSE 536006
WASHINGTON

Date: 4/8/03

To: ~~John Bridgeland~~ Karl

From: **Strategic Initiatives**

x FYI
____ Appropriate Action
____ Direct Response
____ Prepare Response For My Signature
____ Per Our Conversation
____ Let's Discuss
____ Per Your Request
____ Please Return
____ Deadline
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Comments: _____

HOW YOU CAN HELP

American Legion Programs, Products & Support Troops and Inspire Communities



Navy photo



Navy photo



DoD photo

AMERICAN LEGION

REV_00265517

536004

GLOBAL BUSINESS COALITION ON HIV/AIDS

Decline declined 4/9/03

Juergen E. Schrempp
Chairman of the Board of Management,
DaimlerChrysler AG
Chairman

Richard Holbrooke
President & CEO

Ben Plumley
Executive Director

Simpson Thacher & Bartlett
Legal Counsel

Mr. Karl T. Rove
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

March 19, 2003

Dear Mr. Rove,

As Chairman and President of the Global Business Coalition on HIV/AIDS, we would like to invite you to be one of our honored guests at our Annual Dinner to be held in Washington, DC on June 11, 2003. Our keynote speaker will be Secretary of State Colin Powell. There will be additional remarks by Senators Frist and Kerry, who are among the leading co-sponsors of the bill supporting President Bush's dramatic State of the Union commitment to fight the disease. The MC will be Glenn Close, and the Invocation will be delivered by the Reverend Franklin Graham. We expect Secretary Powell to make a major statement on the global scourge of HIV/AIDS.

The dinner will be held at the Kennedy Center. Dinner co-chairs will be Senator and Mrs. Jesse Helms, Mr. and Mrs. James A. Johnson and Mr. and Mrs. Franklin Raines. Please let us know if you will attend, and if you wish to bring your spouse or a guest. Our complimentary space will be extremely limited, as we anticipate great interest in this event, especially from the business community.

The GBC is the world's foremost organization of businesses committed to fighting AIDS. We have 107 members with a total workforce of over three million employees in 178 countries, and are growing rapidly. The GBC works closely with UNAIDS, the ILO, the Global Fund, and other international organizations. Our website (www.businessfightsaids.org) carries the most comprehensive information available on how business should participate in the war against AIDS, and it publishes the plans adopted by many of its members as part of their effort to put an end to the pandemic.

Please let us know if you wish to reserve a place (or two) reserved for you at one of our head tables on June 11th. Call (212) 651-6403, or fax: (212) 651-6405.

Sincerely,

Juergen E. Schrempp
Chairman, GBC

Richard Holbrooke
President, GBC

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Commissioner
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Chairman, Tata Sons
Tata Iron & Steel Co. Ltd

Tony Trahar
Chief Executive Officer
Anglo American plc

HEAD OFFICE
1515 Broadway, 45th floor
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FAX +1 212 846 1939

www.businessfightsaids.org

FAX / MEMO FROM MERLE FRASER

536006

TO: MR. CARL ROVE
Office of The President

DATE: 28 Mar 03

Good Morning, Nr. Rove!

Thank you, for your letter ackowledging receipt of the Dr. Jack Wheeler article.

Enclosed is a most important article on Islam's "intentions" for the US, along with two Jack Wheeler articles.

I realize you are busy, but I truly appreciate you and your advice to our President.

Blessings,

Merle C. Fraser, Jr.

PRA 6

PS I am the 70 yr old Korean vet who wrote to you.

ANSWER:

If action is required, please indicate date completed.

FM 12: 04

behind the lines

by Dr. Jack Wheeler

To the Point

In 1991, as the Soviet Union was collapsing and Central Europe was being liberated, I had a meeting in Prague with Martin Palous, Czech President Václav Havel's principal aide and today Minister of Czech Foreign Affairs. He told me the exact moment when he and other Czech anti-communists knew they had a chance to bring freedom to their country.

"The moment was when we heard," he explained, "on secret short-wave radio, Ronald Reagan tell the world that the Soviet Union was an 'Evil Empire.' At last — at last!! — a President of the United States finally..." and Martin pointed straight up with his index finger, then swept it dramatically down in an arc to the table... "touched to the point. Finally, America and the West had found the courage to name the true identity of the Soviet Union. It was then that we knew we had real hope."

For 16 years now, since January 1987, I have been writing this column for *Strategic Investment*. For 16 years, I have been trying to "touch to the point," to provide the critical insights and identify the fundamental principles of what moves world events. For 16 years I have been faced with the same frustration. It is that this is impossible to do in 800 words a month.

So it is that, with Dan Denning's and Bill Bonner's blessing, I will be making my departure from *Strategic Investment*. My last monthly column will be in April. Starting that month, I will launch my own electronic newsletter. It will be entitled *To the Point*.

Trying to decide what to write about this month typifies the problem I have had for so many years. I could write a column entitled "The Lynchpin," about how the overthrow of the Shah in Iran enabled the Soviet invasion of Afghanistan and the virus of Islamic radicalism to terrorize the world — and how the coming overthrow of Iran's Mullah dictatorship and its replacement with a pro-West democracy will both crash oil prices and drive a stake into the heart of Muslim terror.

I could write a column entitled "War is Peace," about the remarkable parallels between Islamic morality and communist morality. From Orwellian double-think (war is peace, slavery is freedom), to property-is-theft kleptomania (private/non-Muslim property rightfully belongs to the state/Muslims), to a the-end-justifies-the-means moral code, Marx and Mohammed were in striking ways ideological brothers.

I could write a column on "Solar System Warming," about how so-called "global warming" is part of a solar system-wide phenomenon: Pluto is getting warmer, as are Mercury and Neptunian moons, while the polar caps of Mars are retreating several meters per year. You'd be amazed at how easy the solution is to prevent a hotter sun from heating up the Earth. This will, of course, infuriate the eco-fascists for whom "global warming" is a rationale for destroying the prosperity of Western civilization.

I could write a column on the next oil bonanza (it's in West Africa) and how to make a lot of money from it. Or a column on how to destroy North Korea's Yongbyon bomb-making nuclear plant without those stone age fascists in Pyongyang knowing what did it (clue: it's done with Smart Spears). Or a column on why every other Democratic presidential candidate is a joke compared to Joe Lieberman — but why Joe is going to lose anyway to GW in 2004. Or a column on how California is going to rise from Gray Davis' ashes by electing Arnold Schwarzenegger as governor. Or... well, the list is very long.

The world is far, far too big, exciting, and complex for me to cram it into 800 words a month. Plus, it's far too dynamic to stay still for a month. Every month for 16 years now I've written my column, then crossed my fingers that the world would stay put long enough until the lag time between writing, editing, printing, and mailing passed and the issue got into people's hands (normally about two weeks — I'm writing this on Jan. 14).

An electronic *To the Point* will allow me to provide in-depth analyses and insider nuggets about what moves the world on a continual — and instantaneous — basis. I'm really excited about it — and I hope you would be too. If you are, I'd like you to consider subscribing. We're going to launch *To the Point* in April. I'd really appreciate it if you were one of our founding subscribers. To be one of them, you can call Pater Patrone at Precision Communications, 301-657-9482.

Not that this means goodbye. Dan Denning made it clear that he wasn't willing to see me ride off into the sunset. It's just that I'll be writing for *SI* on a periodic, rather than regular, basis. And we've got two more months where "Behind the Lines" will still be there.

By the time you read this, I'll be leading an overland expedition across the Sahara Desert. I'll let you know how it went in the March *SI*. Then in April, you can join me on another kind of exploration, searching the world where we can touch it to the point. ■

REV_00265528

BEAR MARKETS, FROM PAGE 1

with call options on the indexes. I would NOT go loading up on blue chips (more on that in moment). But if you look at the S&P chart I've included on page one, you'll see that it's looking pretty "toppy" over the short term, even after the rally off the October lows.

And with a longer-term view, note that the S&P's 200-day moving average, which is moving down, lies at 948. The S&P has not traded above its 200-day moving average since late March 2002. Should it test those October lows...there's no telling where the downside is. If you traced the ascent of the index back to the beginning of the mania in 1995, you'd be looking at around 450. Buying long-term, out-of-the money puts is the surest way to take advantage of this.

Right now, out-of-the money S&P puts have large premiums. You're not alone if you're looking to hedge against a big and sudden fall in the index. As of this writing, the June 800s are selling for around $24. If you get closer to being in-the-money, the June 900s will cost you more than double than at $52.

If the Dow retraced back to where it started the hyperbolic part of its rally in 1995, you'd be looking at Dow 3,800.

Going further out in time isn't much help. The September 800 puts are at $36 and the September 900s are at $62. There's a chance these premiums could come down. But if you look to the Dow you'll find more reasonable prices, although because the Dow puts aren't as volatile, you'll also see smaller upside gains if the indexes do move down. The Dow is also bucking-up against its 200-day moving average at 8,911. It hasn't traded above its long-term average since June of last year. And if the Dow retraced back to where it started the hyperbolic part of its rally in 1995, you'd be looking at Dow 3,800.

Now, I know there are a lot of even more negative prognostications about where the Dow is headed. There's also the question of time. It could turn out, as my friends at *The Daily Reckoning* believe, that this will be a soft, slow-motion erosion of stock prices. It could take 10 years, as it has in Japan. I personally think that external events will shock the system and accelerate the pace of decline. But for now, let's stick with how you can trade it, should it happen in 2003. Remember, this is a trade, not an investment. You may be able to make some money on it. But if you can't afford to lose the money, your best bet is to own a few gold stocks and sit on the sidelines.

That said, the Dow's October low was 7,286. If we look at long-term out-of-the-money puts, we find some reasonable prices in June of this year. For example, the June 2003 76 puts (DJXRX) go for $2.60. Even the June 84s (DJXRF) at $4.50 are reasonable. If you want to go further out, the December 72s (DJXXT) are at $3.60 and the December 80s (DJXXB) are at $5.80.

My recommendation if you're looking for a long-term hedge is to buy the June 76 puts (DJXRX) and the December 72s (DJXXT). I'll track these two puts in the weekly e-mails and in the portfolio page on the Web site (http://www.strategicinvestment.com).

Existing Options Positions

On Jan. 7, I sent an e-mail to subscribers to sell the February '03 Amex Diamond 80 puts (DAVNB). Those puts closed at $.95 that day, which would have left you with a 59%% loss if you got in at the entry price of $2.30. As I told readers, I had hoped to sell the puts on a decline in the Dow, which has since come. But as I advise readers of my trading service, *Strategic Trader Alert*, if you're going to enter into these positions, keep a mental or actual stop-loss of 25% to prevent yourself from taking an unduly large loss.

I replaced those Diamond puts with a longer-dated put, the June 88s (DAVRJ), entry price $6.30. If you're still in those puts, look to sell them on further declines in the Dow. I'll keep you posted via e-mail. If you didn't buy those puts, refer to the Dow puts above for a newer recommendation. By the way, if you're looking for a good place to get pricing information on the puts I recommend, try http://CBS.marketwatch.com. That's where I get all my ticker symbols (also bigcharts.com), and that's where you can find historical pricing information for the options I recommend.

As you can see, trading options on the indexes still entails risk. If you don't have an e-mail address, I suggest you avoid it. It's too hard to keep up with the movements in the market. I'm not trying to scare you, but if you're playing with money you can't afford to lose, sit these trades out and read what I have to say below for a more conservative way to invest in the "big picture" trend.

The Trade of the Decade Heats Up

The trade of the decade, you'll recall, is to sell stocks and buy gold. Pretty simple. But which stocks to sell? Take your pick. Some short-sellers specialize in picking the sickly and weak stocks in the market. And this works just fine as far as it goes.

I have a much simpler approach. In a bear market, most stocks go down. The stocks that go down the most are usually the ones that went up the most during the bull market. Stocks don't obey Newton's law of gravity exactly. But it's not hard to understand that those who've gone up the most have the

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sumption, there must always be some diminution in what would otherwise have been the productive funds of the society.

"With regard to profusion, the principle which prompts to expence, is the passion for present enjoyment; which, though sometimes violent and very difficult to be restrained, is in general only momentary and occasional. But the principle which prompts to save, is the desire of bettering our condition, a desire which, though generally calm and dispassionate, come with us from the womb, and never leaves us till we go into the grave. In the whole interval which separates those two moments, there is scarce perhaps a single instant in which any man is so perfectly and completely satisfied with his situation, as to be without any wish of alteration or improvement of any kind. An augmentation of fortune is the means by which the greater part of men propose and wish to better their condition. It is the means the most vulgar and the most obvious; and the most likely way of augmenting their fortune, is to save and accumulate some part of what they acquire, either regularly and annually, or upon some extraordinary occasions." ■

behind the lines

by Dr. Jack Wheeler

A Positive Scenario for 2003

One hundred and sixty years ago, in 1843, the commissioner of the U.S. Patent Office, Henry Ellsworth, reported to Congress: "The advancement of the arts, from year to year, taxes our credulity and seems to presage the arrival of that period when human improvement must end." (This is the source of the spurious quote attributed in 1899 to Ellsworth's successor, Charles Duell, who never said, "Everything that can be invented has been invented.")

Human improvement did not come to an end in 1843, nor will it in 2003. In fact, I think 2003 is going to be a great year for the U.S. economy. Not spectacular. But I'm willing to bet a glass of Guinness at the Irish Times bar on Capitol Hill that the Dow, S&P 500, and NASDAQ will all be higher at the end of 2003 than they were at the start.

There are two basic reasons for this, and they are both named George W. Bush. GW is determined not to make his dad's mistake, and knows voters must perceive an improvement in the economy for many months, up to a year, before he runs for reelection. Further — and here's the key — his strategy for accomplishing this is to get the government out of the way, stimulating the economy by decreasing tax and regulatory burdens on businesses and investors, and not through socialist subsidies.

In other words, GW's economic policy is to give the real engines of growth — entrepreneurs and small businesses — more freedom to prosper. The timing couldn't be better. The bubble — and its bursting — has come and gone. Both are over. The entrepreneurs who are stepping up now aren't the flashy, arrogant kids of the dot-com Age. They are more sober and experienced, i.e., grown-up. They are coming up with solid technology and business plans that make sense and will make a lot of money.

A good example is Wayne Pierzga. He and his partners are levelheaded engineers who've been around the entrepreneurial block and know the electromagnetic spectrum inside and out. They've got a proprietary technology to capitalize big-time on a niche of the wireless communications market no one else has.

Instead of launching billion-dollar satellites or erecting gazillions of ground-based repeater towers, they're going to put low-cost, lightweight radio repeaters on existing aircraft flying normal flight routes. Such repeaters on only 14 aircraft at any given time (with two ground stations) will give full coverage for the entire United States east of the Mississippi, providing a high-speed (240+kbs DSL equivalent) Internet and voice connection for business jet and commercial airline passengers, and for the entire shipping industry (cargo planes, trains, trucks, and ships).

In talking to Wayne, what struck me immediately was not just the enormous financial potential of his technology but its national security implications. Every one of the countless shipping containers that enters the United States daily is a possible security threat, containing, say, a "dirty bomb" capable of ruining a city. A small tracking device placed on a container signaling Wayne's system will tell the shipper where it is in real time and if it's being opened after customs inspection. Warren Buffet (who owns NetJets), and Fred Smith (who runs FedEx) may have to get in line behind Tom Ridge (who runs the new Department of Homeland Security) to see Wayne.

I found out about Wayne and his company, Aegeus, through a venture capital (VC) firm that specializes in discovering startups with both proven business savvy and proprietary technology with a fabulous upside — the Artemis Strategy Fund in Bethesda, Md. The Artemis team knows what it's doing more than any other VC outfit I'm aware of.

CONTINUED ON NEXT PAGE

REV_00265530

A POSITIVE SCENARIO, FROM PAGE 7

Amidst the myriad of VC flameouts and retrenching, Artemis developed a smarter strategy that wasn't impacted like so many recent VC debacles. Give Jim DeMocker a call at Artemis — 301-657-6222 — if you'd like to learn more about Wayne Pierzga's Aegeus or get a report on the Artemis investment strategy.

With GW now running the whole Washington show, he is going to make it far easier for folks like Wayne and at Artemis to revitalize the U.S. economy. The latent ingenuity, creativity, and sheer raw ability of so many Americans is staggering. All they need is for the government to take away the regulatory and tax obstacles it sets on the road. You watch. A lot of these ingenious entrepreneurs are going to be unleashed in 2003, and a lot of investors are going to make money with them. It's our job here at *SI* to help you be one of them. This is the start of my 17th year for *SI*, with my first article appearing in the January 1987 issue. I wish you a free, healthy, and prosperous 2003 — and come January 2004, we can talk about it over a Guinness at the *Irish Times*. ■

doom, boom and gloom report

by Dr. Marc Faber

A Vision of the Future

The rise of China as Asia's dominant economic and political power raises a number of issues. It is obvious that with a population of 1.2 billion, China will be the largest consumer in the world for most goods and services. Already today, China has more refrigerators, mobile phones, TVs, and motorcycles than the United States, and it is only a matter of time before it will have huge markets for just about any product. As a result, its resource requirements will rise very substantially, and Chinese purchases of oil, coffee, copper, grains, and so on will move commodity prices dramatically.

Just consider the following. Asia, with a population of approximately 3 billion people, consumes 19 million barrels of oil daily. By comparison, the United States, with a population of 285 million, consumes about 22 million barrels of oil — that is a per capita consumption more than 10 times that in Asia. However, consumption in Asia is now rising rapidly. China's oil demand has doubled over the last seven years to around 4.5 million barrels a day. In Asia ex Japan, a similar trend can be observed. Therefore, my guess would be that oil consumption in Asia will double again over the next 10 years or so to anywhere between 35 million and 45 million barrels. It is worth noting that if Asian demand doubled to around 40 million barrels per day, Asia's per capita oil consumption would still be inferior to that of Latin America.

This is fairly realistic given Asia's superior growth prospects, rapid industrialization, and the steady increase in the standard of living in countries that have recently opened up, such as China and Vietnam. With a demand of around 45 million barrels of oil a day, Asia will change the geopolitics surrounding the oil-producing regions of the world, as by then Asia's oil demand will be the largest of any economic bloc. Therefore, I expect China to become far more involved in the Middle East and Central Asia in the years to come, which could lead to some additional tensions in this volatile part of the world. In particular, I regard a clash of Chinese interests in the Middle East and in Central Asia with American, as well as possibly Russian, interests as almost inevitable. A doubling of oil demand in Asia will inevitably lead to significantly higher oil prices in the second half of this decade, when total oil production in the world is expected to peak out.

But it is not only in the oil market that Chinese economic growth will be felt. Take, for instance, the per capita consumption of food in China, which I won't compare to food consumption in some Western countries where a large percentage of the population suffers from obesity. If we look at consumption of meat, milk, fish, fruits, and poultry in China, Taiwan, and Hong Kong, it becomes obvious that the rising standard of living in China will lead to very meaningful increases in its purchases of agricultural products in the years to come; sometime in the future, it will have a similar per capita consumption pattern to those in Hong Kong and Taiwan.

Or compare the per capita consumption of coffee in China with that in Western countries. Annual per capita consumption of coffee in Germany amounts to 8.6 kg, in Switzerland to 10.1 kilograms, and in Japan — where coffee consumption has increased rapidly in the last 30 years — to 2.3 kilograms. In China, per capita consumption is just 0.2 kilograms. If China's per capita consumption rose to just 1 kilograms (a little less than in South Korea), then China would have a total consumption of 1.2 billion kilograms compared to a total consumption of around 70 million kilograms in Switzerland!

What I wish to emphasize here is that if standards of living continue to rise in China, the country will have a huge impact on the world's commodity

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markets and is likely to push up commodity prices very considerably. In fact, I regard the purchase of a basket of commodities as the safest way to play the emergence of China as the world's dominant economic power.

Asian Demand Driving up Coffee Prices (December 2002 Coffee Futures)

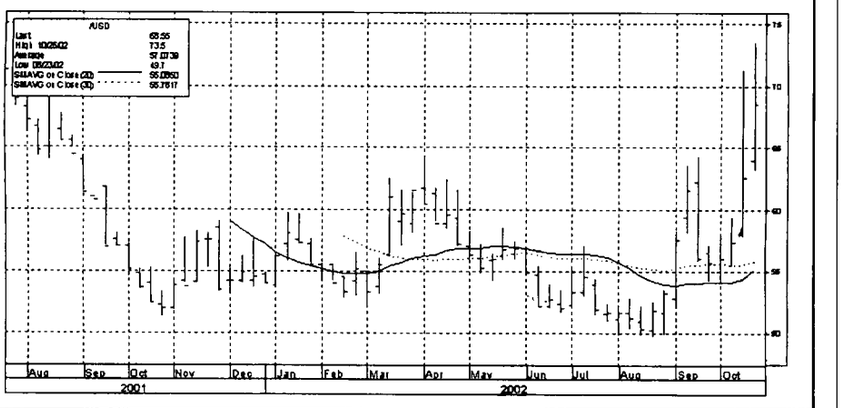

Some readers will, of course, question my optimism about China's growth prospects and point to the large number of problems China is facing. These problems relate largely to its financial system, large bad loans at state-owned banks, underfunded pension fund liabilities, corruption, and the growing wealth inequity between its rural and urban populations. I am very familiar with all of these problems, since I am usually invited to conferences around Asia to present the bearish case about China.

My bearish case, however, rests more on the fact that it is extremely difficult for foreigners to make much money in China because of its deflationary and highly competitive environment in which foreigners — as was the case in the 19th-century American economy — are regularly taken to the cleaners. But in terms of China's own problems, which, incidentally, are endemic to almost all emerging economies, I believe that, while substantial in scope, they *can* be dealt with. I emphasize *can* be dealt with, because the problem is that China has so far failed to deal effectively with most of the causes of its problems and has postponed making radical financial reforms.

However, I remain convinced that, sometime in the future, China will experience a serious financial crisis, which will then force its policymakers to deal with the bad loan and pension fund issues. You, however, should not be overly concerned about this financial crisis. The American economy of the 19th century also experienced a series of crises, and even a civil war, and yet its economy performed admirably well between 1800 and 1900. Moreover, all rapidly growing economies experience terrific temporary setbacks from time to time — a phenomenon that was already familiar to the father of the business cycle theory, Clement Juglar, who pointed out that the riches of nations can be measured by the violence of the crises which they experience.

But in terms of China's long-term prospects, I should like to remind you that the U.S. economy also expanded rapidly in the second half of the 19th century — and (this) in a deflationary environment. This was due to several factors, including a rapid increase in its population (rising from 37 million in 1867 to 76 million in 1900), the opening of new territories facilitated by the railroadization of the country, and the application of new inventions to manufacturing, which boosted productivity dramatically. Thus, when we compare the U.S. economy in the second half of the 19th century to China at present, we should not overlook the fact that, in 1850, the U.S. economy was well behind the United Kingdom and the Continent in terms of industrialization; therefore, a catching-up effect came into play.

This is evident when we compare the growth of industrial production in the United States, Germany, and the United Kingdom from 1875 to 1890. In the case of the United States, industrial production grew on average by 4.9% per annum, compared to just 1.2% for the United Kingdom and 2.5% for Germany. America's strong growth in the second half of the 19th century was typical of an emerging economy and is comparable to strong per capita GDP growth in China between 1978 and 1995, averaging more than 5% per annum, while the world's per capita GDP growth only averaged 1.11% over the same period. Moreover, by 1885, the United States, which had hardly any industries at the beginning of the century, led the world in manufacturing, producing 28.9% of the world's manufactured goods, while Britain had been displaced to second, with 26.6%, and Germany to third, with 13.9%. Also, while the United States had produced hardly any cotton around 1800, its plantations supplied five-sixths of the world's cotton by 1860!

The point is simply this: if the United States could become the world's dominant economic power

CONTINUED ON NEXT PAGE

Dr. Marc Faber is managing director of Marc Faber Ltd., Room 2705 New World Tower, 16-18 Queen's Road Central, Hong Kong; tel. (852) 2801-5410, fax (852) 2845-9192.

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A VISIONOF THE FUTURE, FROM PAGE 9

by the end of the 19th century from extremely humble beginnings, I think that, with the acceleration of the pace of change that allows regions that open up to industrialize in no time, it is quite probable that within just 10 to 20 years China will be by far the world's most important economy — no matter how many crises it will have to deal with in the interim.

One problem that I can foresee, however, is that, because of its size and increasing economic and military importance, China will grow out of proportion for a harmonious balance of power in Asia. When, in future, China has become Asia's largest trading partner, with respect to both its exports and imports, it will not only be an economic hegemon but will also replace the United States as Asia's most influential political power. That such a transition will at some point lead to serious tensions between the United States and Japan on one side and China on the other is obvious, but the trend towards China's dominance in Asia is well established and, in my opinion, unstoppable.

What Asia Still Needs to Implement!

The philosophers of progress — men such as ARJ Turgot, the Marquis de Condorcet, William Godwin, Adam Smith, etc. — showed that progress depended to a large extent on freedom, equality, and popular sovereignty. Only where restrictions on the individual's freedom to think, work, and create were lifted could society progress. Freedom was considered essential for successful manufacturing and commerce. For Adam Smith, a "system of natural liberty" would only permit three functions for the government: defense from foreign attack, administration of justice, and maintenance of a few important public works.

The origin of progress and economic development in Western Europe is extremely complex, but in essence it highlights what Asia still lacks, to a large extent. However, I am hopeful that the transition from the Asian feudal society to a well-structured market economy and an institutional capitalistic system, as opposed to a feudalistic capitalistic system (such as we still find in many Asian societies, including China), will get under way. The reason I am optimistic is that a feudal system is based on a complete system in which political, economic, and military power are one and the same, and its objectives are security and stability, rather than growth. The market economy and the capitalistic system, however, rest on equality and individual freedom, and on institutions with dependable rules and laws (as opposed to the discretionary justice of manorial or royal courts).

The move towards democracy in Asia and towards a true market economy and capitalistic system seems to be, from a historical perspective, an irreversible trend. That the transition from a political system resembling feudalism to sovereign power with liberal representative governments creates tensions shouldn't be surprising. Countries that have a strong and forward-looking leadership, such as Taiwan, South Korea, and Singapore, may be able to sail through this difficult transition phase smoothly. Other countries whose governments resist the changes or tend to go backwards (such as Hong Kong, which is increasingly run by the property lobby and obeys the commands it receives from China), may face a more uncertain political and social future. Still, even a country such as Indonesia, which, under Sukarno and Suharto, was organized in a very feudalistic fashion, held fair elections in 2001, in which Mrs. Megawati Sukarnoputri was elected by popular vote.

Moreover, it is likely that we will also see big changes in China's political system sometime in the years to come. I would expect these changes to occur at the same time as the coming financial crisis I referred to above, which will simultaneously bring about the necessary financial and economic reforms.

There is another factor that fosters my optimism about the Asian region, and emerging markets in general. Because of feudalistic capitalism and the perceived strength of the American economy in the 1990s, emerging economies suffered from significant capital flight. As a result, individual investors and central banks have a vast pool of funds parked principally in the U.S. capital market. If, however, the political, social, and economic transition outlined above does indeed take place, conditions for a massive repatriation of funds held overseas will be created, which would lead to higher investment activity and boost local asset values.

As explained above, China and India are exporting deflation and will continue to put extreme pressure on Western manufacturers and tradable service companies, as well as on the export-oriented industries of other emerging economies in and outside of Asia. At the same time, China is becoming a major buyer of commodities and will become, in due course, Asia's largest trading partner. The emergence of China as a major buyer of commodities should support commodity prices, and if, in future, the global economy should resume synchronized growth, as was the case in the 1980s (in our opinion, not very likely in the near future), commodity prices could soar. In fact, grain prices, after having built an extended base since 1998, have been rising explosively since June. We therefore still believe that commodity prices are bottoming out and will outperform Western financial markets in the years to come. The purchase of commodity futures, including coffee, cotton, rubber, copper, gold, silver, sugar, etc., is recommended. ■

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rather than rising. [The same as in the 1990s — ed. note] How, then, can there have been inflation? ...owing to decreasing costs following on technical progress, prices would have fallen if an amount of additional credit had not been pumped into the economic system. Hence there was inflation, even if only of the relative kind. But it can be perfectly well argued that the quantitative effect of the inflationary credit expansion was considerably aggravated by an abnormal qualitative distribution of credits. One case is the great expansion of installments credits which gives the impression that the Federal System was trying to administer the heroin not only *per os* but also *per rectum*... Another example is the real estate market which was grossly oversupplied with credits. The worst and most conspicuous case, however, was the stock market speculation which was the leader on the road to disaster. For purpose of illustration, it may be mentioned that the volume of brokers' loans rose from 1921 to 1929 by about 900 per cent... **We may conclude, then, that the last American boom is a striking example of how the disequilibrating effects of variations in the volume of credit may possibly be greatly aggravated by peculiarities in the qualitative composition of the stream.**

[Emphasis added — ed. note]

I have reproduced Röpke's explanation of the 1920s' boom and the following depression, because it immediately becomes obvious that we have a very similar situation today — only with far worse credit excesses and far more "abnormal qualitative distributions of credit." This time, however, the problem is not so much the expansion of brokers' loans, but consumer and real estate credits as well as the leverage that was built up through government-sponsored enterprises (Fannie Mae, Freddie Mac, etc.), the derivatives markets, and corporations' special-purpose entities.

I hope the reader will understand that the current mortgage financing boom and consumer credit explosion are simply not sustainable in the long run and that, at some point, credit expansion in the consumer and mortgage sector will slow down, as it has in the last two years in the corporate sector (see above). The consequences of such a slowdown will obviously be that consumer spending will have to slow down very considerably, which will inevitably hurt the economy, but hopefully will redress some of the external imbalances. So, whereas economists who point out that the consumer is in great shape may be correct now, sometime in the future the consumer may wake up with a terrific "debt hangover," which will force him to retrench. ■

credit and currency markets

by Dr. Kurt Richebächer

A New Borrowing Era

Several peculiarities strike us about the American economy. There is, first of all, an unusual emphasis on consumption as the prime mover of economic growth, and there is furthermore a general disregard of what is happening to saving and capital accumulation. Alternatively, the emphasis is on autonomous changes in productivity growth through new technologies as the root cause of economic growth and profitability.

This is a radical departure from the thinking of the old economists. Measured by the rate of productivity growth, the U.S. economy appears to be in excellent shape, definitely better than the whole rest of the world. But measured by its record-low rates of saving and capital accumulation, it is in most miserable shape. What is the right interpretation?

Looking at the whole postwar period, the United States actually experienced its most vigorous and definitely its most healthy economic performance in the 1960s. Its rates of national saving and of capital investment were then at their highest in the whole postwar period, and so were its rates of business profits. The main purpose of moderate borrowing on the part of the consumer at the time was the financing of new homes, and the main purpose on the part of businesses was the financing of new investment in plant and equipment, that is, in tangible assets. In essence, it was overwhelmingly borrowing for capital formation.

This pattern of borrowing began to change gradually in the 1970s and rather dramatically in the 1980s. From then on, debt growth went exponential. Consumer debts have since skyrocketed by 473% and business debts by 382%. These numbers compare with simultaneous GDP growth by 283%.

A drastic change in the use of the new debts was the other striking new feature of the developing borrowing binge. Exploding credit quantity implied plunging credit quality.

Consumers started to borrow like crazy to finance increased current spending, and businesses

CONTINUED ON NEXT PAGE

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NEW BORROWING ERA, FROM PAGE 11

borrowed like crazy no longer to invest in plant and equipment, but to finance financial transactions — mainly leveraged stock buyouts, mergers, acquisitions, and stock repurchases — that were thought to be more appropriate for quickly raising shareholder value.

The Forgotten Need for Saving

No less drastic were the changes in the behavior and the finances of the consumer. On the surface, his finances look far better than those of the corporate sector as the vertical rise in indebtedness was more than outpaced by the combined rise in market values of houses and corporate equities. Even though the consumer's net worth has modestly declined since the second quarter of 2002, it is still sharply up since the mid-1990s. The question is how quickly these market values will fall, if the U.S. economy weakens again.

Our immediate particular interest, however, is in the macroeconomic dislocations and distortions that are plaguing the U.S. economy in the post-bubble aftermath. In the case of the consumer, this macroeconomic damage resides mainly in his massive dissaving, as reflected in the extraordinary plunge of the personal saving rate to almost zero in 2001.

Ever since firms and retailers invented consumer installment credit in the 1920s, U.S. economic growth has become heavily geared to consumer spending and borrowing. But this traditional consumption bias took a big leap in the 1980s and in particular in the late 1990s. The most striking characteristic of both periods were exploding consumer debts and collapsing national saving.

In the 1980s, in actual fact, the hemorrhage of national saving had caused great and widespread concern. Many American economists expressed their strong misgivings about the implicit negative effects on capital investment. This time, in diametric contrast, nobody seems to care or even take notice.

There seems to prevail a widely accepted view that credit creation makes old-fashioned saving from current income superfluous. As to the equal utter lack of interest in capital formation, the apparent explanation is a singular focus on productivity growth. Why are saving and investing even necessary, if the U.S. economy is enjoying stellar productivity growth without them?

What's wrong with this view? In short, everything. It's macroeconomic nonsense.

What really induced generations of economists of all schools of thought to elevate saving to an indispensable, key condition for economic growth? The basic reason is that it is the limiting factor for capital investment. Short of nirvana, all resources are scarce. Due to this elementary wisdom, new capital investment can only come about to the extent that somebody makes the resources for the production of the capital goods available. That somebody happens to be mainly the consumer. By saving, that is, by spending less than he earns, he effectively releases the necessary productive resources for investment.

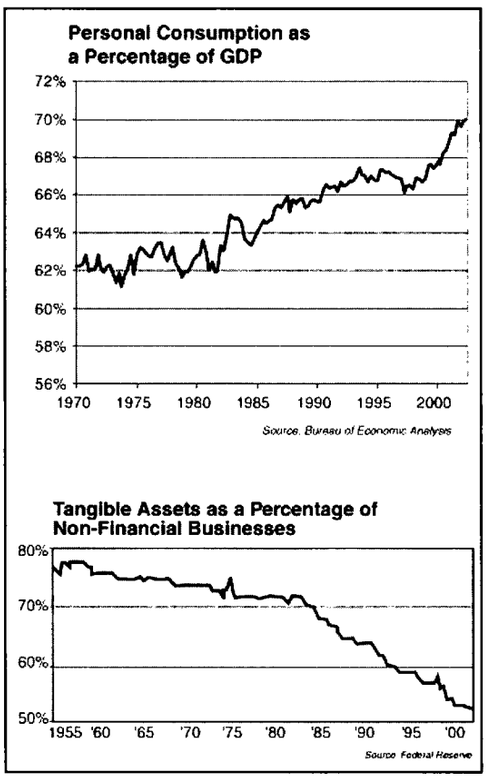

But this necessary release of productive resources is true only for saving from current income, coming implicitly from current production. The attendant release of resources is what makes this kind of saving indispensable for investment and economic growth. In essence, capital formation represents the surplus of production over consumption, and that has to be made possible by saving.

In today's America, there apparently prevails a very fuzzy conception of the essence and function of saving in the macroeconomic growth process. Typically, people think of it exclusively in terms of finance. But that is by no means the key aspect.

Manifestly, nothing is easier than to replace a lack of savings with credit creation. But this does not replace savings in the sense of releasing productive resources for the production of capital goods. From this perspective, falling savings imply falling investment.

The latter is precisely what happened in the

Dr. Kurt Richebächer, former chief economist and managing partner for the Dresdner Bank in Germany, writes The Richebächer Letter, *a monthly look at the state of world currency and credit markets.*

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Senior Advisor to the P

The White House

Karl Rove
Phone: (202) 456-2369
Fax: (202) 456-0191

EUROPE

PLEASE ADVISE

Date: Thursday, March 27, 2003
Date Due: April 10, 2003
To: **Action Request**

Steve Hadley NSC WW **Please make a recommendation**

Correspondence Subject:
3/27/03 letter from Jean-David Levitte re: requesting a meeting with Karl Rove. Please return this form to advise of your recommendation. Thanks.

Prepared by:
Susan Ralston (202) 456-2369

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BY
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Records Management, White House Office of (ORM)

Subject Files

FG006-27
(Office of Senior Advisor - Karl Rove)

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FROM THE OFFICE OF RICHARD F. HOHLT.....A Fax

rick@hohlt.com
aaron@hohlt.com

202-833-4146- Office
202-833-1587- Fax

DATE: April 18, 2003

REMINDER

TO: **Karl Rove**
Attn.: Susan
456-0191

Chairman Racicot has scheduled the next **"Off the Record"** dinner for next **Tuesday, April 22nd.**

LOCATION: **The Metropolitan Club - Anderson Room**
1700 H Street, NW
835-2500

USUAL TIME: **7:00 p.m. Cocktails**
7:30 p.m. Dinner

Please contact my office at 833-4146 if you **will not** be able to attend.

ONLY PAGE

Receipts as a Percentage of GDP

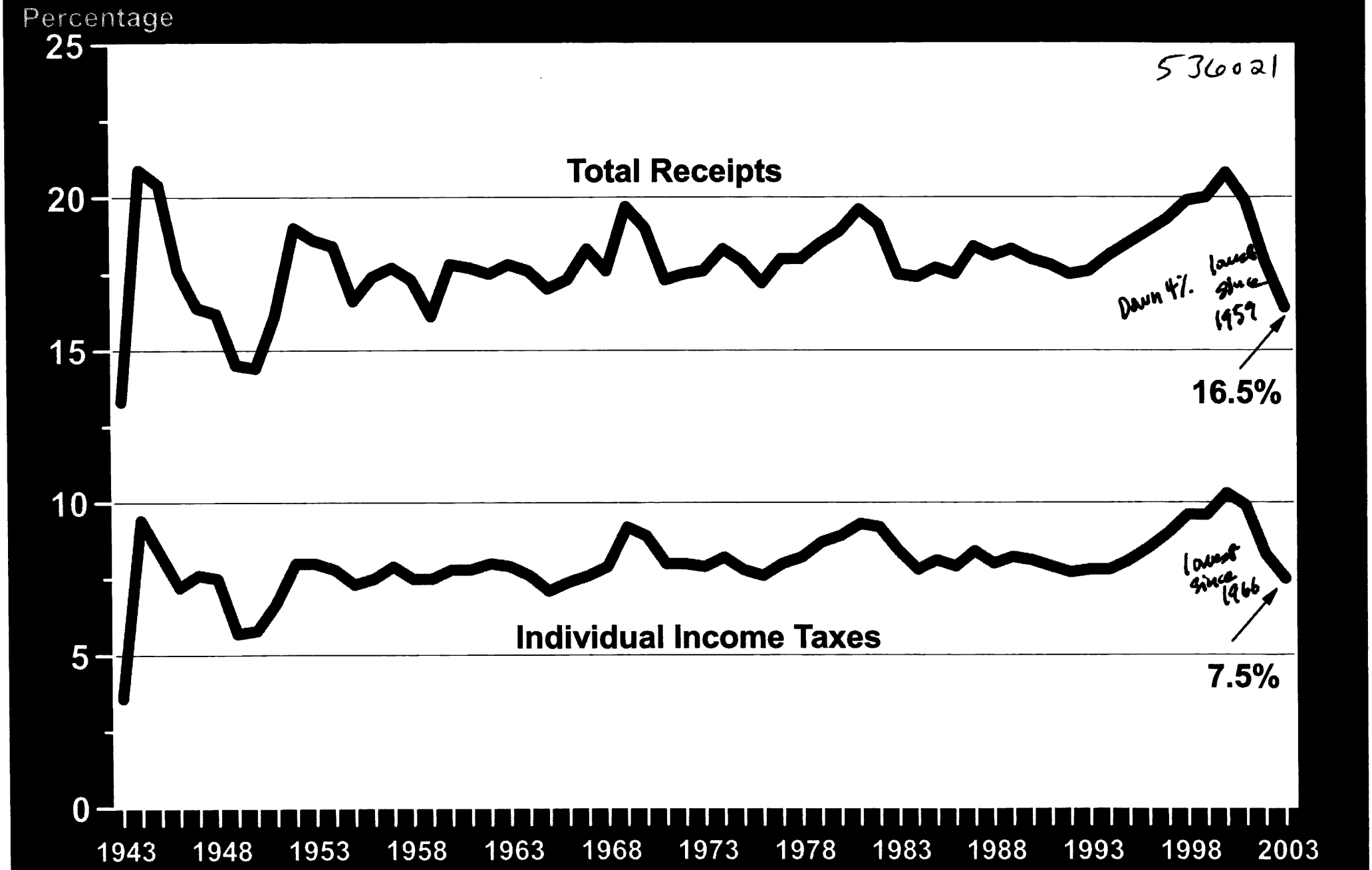

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Real Consumption and Disposable Personal Income Per Capita

(1996 Dollars)

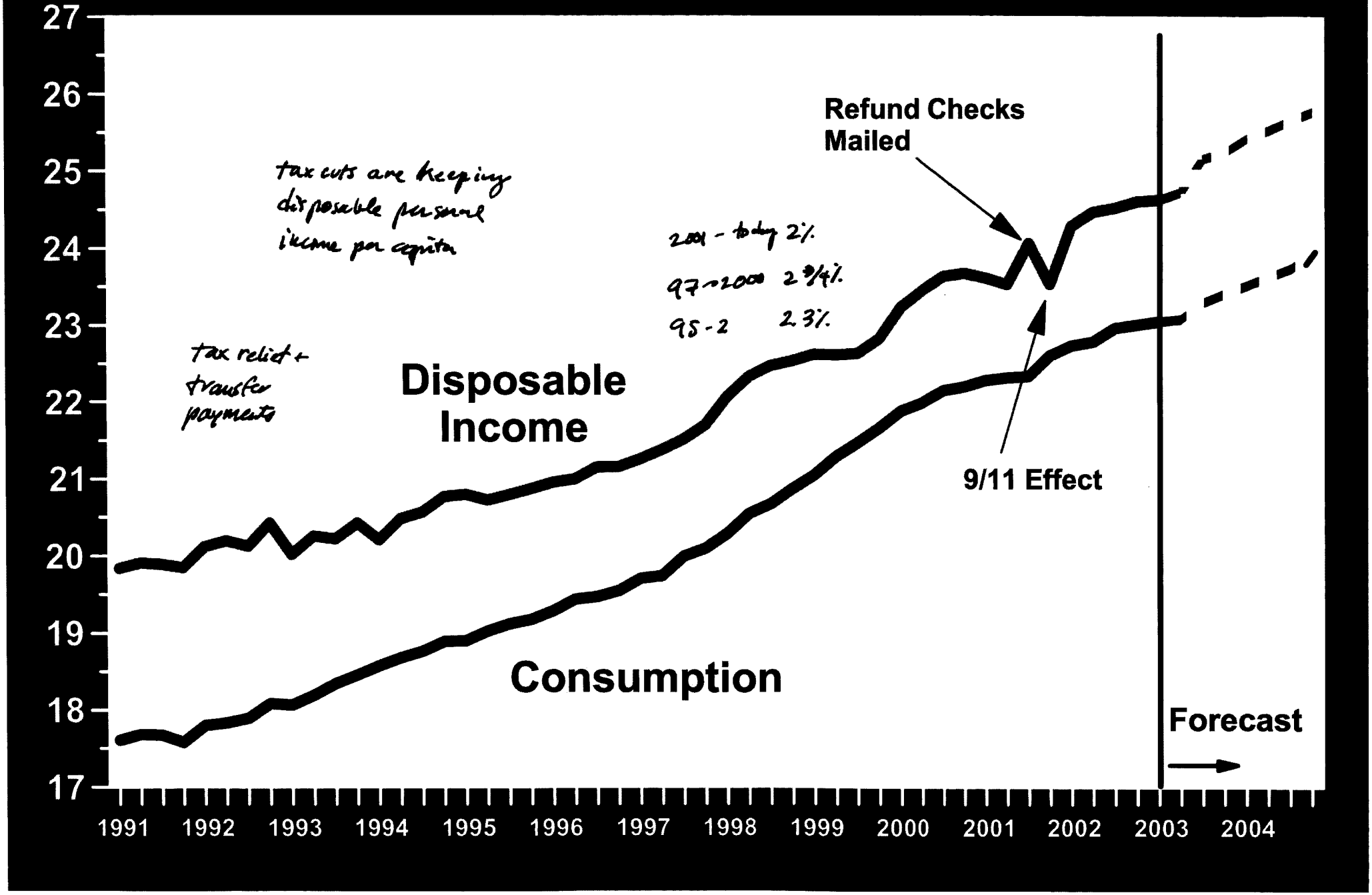

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FILE:

Rove, Karl C.

536021

From: Mehlman, Ken
Sent: Monday, May 19, 2003 7:34 PM
To: Bartlett, Daniel J.
Cc: Rove, Karl C.; Taylor, Sara M.; Johnson, Collister W.; Dyck, Paul B.; Schlapp, Matthew A.; Thomas, David M.; Napolitano, Michael J.; Rodriguez, Leonard B.; Davis, Alicia W.; Hoelscher, Douglas L.; McMaster, David; Bearson, Darren W.; Gray, Adrian G.; Walters, Katherine M.; Mehlman, Ken; travis@georgewbush.com; jack@rnchq.org
Subject: Upcoming BC04 fundraising activity that could earn media

Dan,

None of these events has been announced by the White House but our finance team is working to put them together--making calls, sending our faxes, etc.

Host committee pre-sell memo sent out tomorrow
1. POTUS-- DC-- 6/17
2. POTUS--NY--6/23
3. POTUS--Greensboro, GA-- 6/20
4. POTUS--LA--6/27
5. VP-- Boston--6/23
6. VP--Richmond--6/23
7. FLOTUS--Chatanooga--6/20
8. FLOTUS--Cincinnatti--6/24

People already making calls for event (although memo has not been sent out, but will be in coming days)
1. FLOTUS--Philadelphia--6/24
2. POTUS--San Fransisco--6/27
3. VP-- Akron--6/30
4. POTUS--Miami--6/30
5. POTUS--Tampa--6/30

People begininning to make calls for events
1. POTUS--Dallas--7/18
2. POTUS--Houston--7/19

NRN 536021

WARREN W. TICHENOR

16 May, 2003

Dear Karl,

Thank you for your time yesterday morning.

And thanks too for visiting with Rhonda via phone last evening. She was very surprised and pleased to hear from our favorite genius.

Thanks for all you're doing.

Sincerely,

Warren

The Honorable Karl Rove
Assistant to the President
and Senior Advisor
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

202-456-0191 fax

WWT:am

536021

THE WHITE HOUSE

21 May

Steve-

This is from Senator Helms' former Chief of Staff - very strange request from a very strange acquitance. Guibanne.

Lane

Jean-Louis Gergorin



Jean-Louis Gergorin is Executive Vice President, Head of Strategic Coordination and a Member of the Executive Committee at EADS .
Prior to this position, Mr. Gergorin was Group Managing Director and Deputy to the CEO of Lagardère SCA. He joined the Lagardère Group in 1984 as Senior Vice President of Corporate Strategy for Matra.

Before joining the private sector in 1984, Mr. Gergorin spent 12 years in the French government, in particular as a founding member of the Franco-German Committee on Defence and Security. In 1973, he co-founded the French Foreign Ministry's policy planning staff, serving first as deputy head, and then in 1979 as head. In June 1972, he became a member of the Council of State.

Today, Mr. Gergorin is advisor to the French Foreign Ministry's policy planning staff and lectures at the Institute for Political Science in Paris. He is a member of the Executive Committee of the International Institute for Strategic Studies.

Mr. Gergorin studied in Paris at the *École Polytechnique* and the *École Nationale d'Administration* (ENA). He has been a research fellow at the Rand Corporation and Harvard's Kennedy School of Government in Cambridge, Massachusetts. He also participated in senior management studies at the Naval Postgraduate School in Monterey, California and is an alumnus of the Stanford Executive Program of the Stanford Business School.

Mr. Gergorin is a *"Chevalier de la Légion d'Honneur"* and "Officier *de l'Ordre National du Mérite"*, an Aviation Week Aerospace Laureate (1989).

THE WHITE HOUSE
WASHINGTON

5J6021

Date: 5/21/03

To: Judge Gonzales

From: **Strategic Initiatives** Carl

____ FYI

____ Appropriate Action

____ Direct Response

____ Prepare Response For My Signature

____ Per Our Conversation

X Let's Discuss

____ Per Your Request

____ Please Return

____ Deadline

____ Other

Comments: _____

_____

_____

REV_00265547

Ralston, Susan B. 536021

From: Steve Weisman [weisman@nytimes.com]
Sent: Friday, May 02, 2003 12:08 PM
To: Ralston, Susan B.
Cc: Ralston Senior Advisor, Susan B.
Subject: for Karl Rove

Karl,

I wonder if you would like to travel the high road with me.

I'm putting together a piece about this yin-yang moment in history. Is the whole debate on foreign affairs between multilateralists vs. unilateralists (or between advocates of force vs. advocates of diplomacy) an oversimplification? Or is it something that the President likes because he wants to hear all the options? Or both?

It would great to have you on the record reflecting on this, contributing some insight into what the dismay vs. eagerness over this subject. I'm trying to get Wolfowitz on the record and already have Armitage. I want to do it before leaving next week Powell back to Middle East.

Thanks.

Steve

Share w/ Dan
Decline - tell Steve I
have made way too much
on my plate now.

536021

WILLIAM D. WITTER, INC.
153 East 53RD Street
51ST Floor
New York, New York 10022
Phone: (212) 753-4421 Hit # 3 or (212) 753-7878
Fax: (212) 752-1981

Fax Cover Sheet

(If you have any problems receiving these pages, please call us directly.)

DATE: 5 / 9 / 03

TO: Mr. Karl Rove c/o Susan Ralston

FAX #: 202 / 456-0191

FROM: Charles F. Huber c/o Diane Nafornita

NUMBER OF PAGES (Including Cover Sheet): 3

MESSAGE:

Please see attached. Thank you.

Give Us a Paradigm Shift
Not Shifty Policy

Tax policy which shifts percents, trades exemptions or favors one group against another is politics. A paradigm shift redirects policy. The exemption of dividends from taxation favors production over consumption. It creates future jobs. The gap is bridged by private borrowing- for production -- not services or handouts. Corporations pay taxes. The only change is that a dividend deduction replaces the interest deduction while debt equity ratios improve.

Non taxation of dividends is a paradigm shift in the economic life of individuals, corporations and government. Over the past fifty years corporate America has pyramided debt. Non-tax deductibility of dividends has all but wiped out preferred stocks. Individuals were convinced to eschew taxable dividends in favor of capital appreciation. In a generation stock ownership rose from about 8% of the population to almost 60%. These holdings were mostly pensions, IRA's, 401K's and other savings plans.

The stock market bubble burst. Badly burned investors now look approvingly at dividends. The Board of Directors of debt-laden corporations may welcome the opportunity to recapitalize debt with equity. Widespread such recapitalization would further lower interest rates.

Let's turn back the pages of history to Ma Perkins, FDR's Cabinet Secretary who conceived Social Security. Unemployment hovered at 20%, interest rates were low and mortality stood at 67/8. Long forgotten is the fact that Social Security was founded primarily to induce a portion of elderly workers to retire at about 1/3 of their annual salary, to create a job shift to employ a younger out of work force with family responsibilities. To finance this response were 45 givers for each recipient based on a $10 per year contribution (1/2% of $2,000 per year average income). Against 67/8 year mortality the fund was cash flow positive and hailed as one of the great achievements of the New Deal.

Peering through the looking glass from the other end Ma Perkins might find herself aligned with President Bush over the exclusion of dividends from taxation. Unemployment is low. Mortality now rose to the mid 70's. There is pressure by corporations to retire workers early as technology obsoletes the training and education of its older employees. Medical magic extends mortality to seventy five but 50% of all the money we spend on health during our lifetime will be spent during our last six months. And, the cost will continue to rise. Death is a luxury.

For Government to finance this cost it will have to print money (inflation) or confiscate capital (death taxes approaching 100%). The only alternative is forced savings. Pensions, 401K's, IRA's, etc. are now under funded and individuals pinch paychecks as costs rise mostly local taxes. The appearance of a new tax-free income stream would be welcome even if qualified by restrictions (education, health, emergency, etc.).

Gradually the burden of social security must switch from Government to the individual. Antipathy between employers and employee will be muted by focus on the same end game a comfortable passage at age 75.

At this point why not have two work cycles. Allow our 55 and older retirees to become civil servants (teachers, hospital workers, postal, local civic, etc.) for a supplemental tax-free modest income to boost the effectiveness of their savings or pensions while at the same time lowering the operating costs of the agencies in which they serve. Accomplish this through attrition. Face down the public servant unions.

Consistent with Ma Perkins plan to ease the plight of the young by creating unemployment income for the elderly would be giving the public sector at all levels the opportunity to hire anyone over fifty five years of age for wages with tax free income over and above social security, retirement and other private funds. Obviously these people can be hired at wages far lower than young family providers. The young are better able to compete for higher paying, faster rising jobs in the dynamic high technology market of the future and will build savings. Education will veer right from left. The crucial gap between 55 years of age and rising mortality will be eased by cash flow and insurance absent today for 40 million uninsured Americans will be available.

Private and faith based institutions will step forward and with Government provide a safety net for a drastically reduced pool of Americans who somehow missed the American dream. Charity for the needy is quite different from the need for charity. Everyone deserves his fair share.

Personalization of Social Security can become reality as the young discover the wonder of compounding – interest, whether dividends or capital appreciation when given thirty or forty years to develop. IOU's by the Treasury are replaced by real cash.

Secretary Rumsfeld proved that intelligence; communication and speed supercede manpower, equipment, and stationary defenses. So also must programs in place for 50 years be reexamined. Carbon paper has been replaced by E-mail and the Internet for all but Government. Static budgets must be replaced with moving matrices reflecting daily changes in markets. Ten year forecasts are laughed at. Five year plans deserve careful study Rumsfeld, Gingrich, and Cheney are not conservatives – they shake fruit from over ripe limbs -- they propel rather than impel and they destroy obstacles to change rather than reinforce them.

Freeing dividends from taxation unleashes funds which can hold up our teetering social security while building a larger privately owned corporate base to support it.

We defeated Baghdad – let's defeat Washington.

Charles F. Huber II

536021

Washington Post Correction 05.09.03

CORRECTIONS

The headline on a May 8 article about President Bush's visit to the aircraft carrier USS Abraham Lincoln incorrectly said the ship was delayed. The ship arrived at its scheduled time after waiting offshore for a day.

536021

CHUCK HAGEL — FAX —

U.S. SENATOR — NEBRASKA

To: Karl Rove

Of: White House

Fax: (202) 456-0191

Subject: Cordell Hull Award Acceptance Speech

Pages: 7, including cover

Date: May 9, 2003

Attached is the Cordell Hull Award Acceptance Speech that Senator Hagel gave last night at the first annual event.

The award was given by the Cordell Hull Institute to Senator Hagel as a leader committed to principles of open trade, private enterprise and free competition. Hagel was honored for his "consistent, vigorous and courageous support for free and open trade and maintenance and development of the mutilateral trading system.

In the speech Senator Hagel linked the leadership and vision of Cordell Hull in responding to the challenges of the first half of the 20th century to the challenges America faces today.

Please call Mike Buttry at 202/224-5809 or myself if you have any questions.

-Beth Lee

From the desk of...
Beth Lee
Press Secretary
Senator Chuck Hagel
248 Senate Russell Bldg.
Washington, D.C. 20510
Phone: (202) 224-3474 Fax: (202) 228-2086
beth_lee@hagel.senate.gov

UNITED STATES SENATOR • NEBRASKA
CHUCK HAGEL
PRESS RELEASE

FOR IMMEDIATE RELEASE
Thursday, May 8, 2003

Contact: Mike Buttry
Beth Lee, 202/224-4224

Cordell Hull Award Acceptance Speech
U.S. Senator Chuck Hagel
May 8, 2003

The history of America is the history of great leaders. In that pantheon of visionary, wise, and courageous leaders resides Cordell Hull. The Cordell Hull Institute does America and the world an important service by reminding us of the power of Hull's ideas and the strength of his leadership. This included, but certainly was not limited to, his vision of an international economic order that helped build the base for post World War II peace and prosperity.

I am deeply honored to be the first to receive the Cordell Hull Award.

Hull understood, like few others of his time, the connections between trade, democracy, security, and world stability. This required alliances -- coalitions of common interests in a world that would be forever inter-connected. As a U.S. Congressman and Senator from Tennessee, and later as Secretary of State under President Franklin Roosevelt, Hull helped steer American foreign policy away from the misguided tendencies of American isolationism. Those isolationist policies led to global instability after World War I, undermined the American and global economies during the inter-war period, and, in the process, contributed to the origins of World War II. It was at the end of his tenure as Secretary of State in 1944, at Dumbarton Oaks, here in Washington, that Hull and others developed a plan for a United Nations built on the ashes and carnage of World War II.

Hull's influence and achievements with regard to trade and a liberal international economic order were unparalleled during his time. He believed that benefits from free trade would flow to all peoples, and his commitment to free trade never wavered. Hull also knew that the mechanisms of free trade were imperfect. But he understood that trade

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contributed to prosperity, stability, property rights, human rights, more transparent governments, rule of law, and hope for a better life and a better world for all people.

In his memoirs, Hull describes the philosophy that helped inform his approach to foreign policy, that free trade can play an instrumental role in reducing the chances for war among nations. He wrote that he came to believe that,

> "unhampered trade dovetailed with peace; high tariffs, trade barriers, and unfair competition, with war. Though realizing that many factors were involved, I reasoned that, if we could get a freer flow of trade – freer in the sense of fewer discriminations and obstructions – so that one country would not be deadly jealous of another and the living standards of all countries might rise, thereby eliminating the economic dissatisfaction that breeds war, we might have a reasonable chance for lasting peace."

Despite spectacular successes over the last 55 years, we are again today at another defining time in global trade. Our greatest challenges lie in the developing world. Many developing countries are not convinced of the relevance of the November, 2001 Doha Round of WTO talks to their long-term economic development. We know that trade-based development strategies are critical to setting countries on the path to democracy and economic prosperity. But many developing countries have been disenchanted by the previous WTO trade round negotiations. Our challenge, today, in the Doha Round, is to make trade-based development relevant to all nation's interests.

Many developing countries are not able to get to the starting line of trade-based development. The first priorities of the citizens of poor countries are the basics; food, water, shelter, medicine – then maybe training and education. America and other developed nations must not overlook these fundamental requirements and challenges of economic development. We must acknowledge and address them, with constructive and real policies and programs. The U.S. and other industrialized countries must continue to help developing countries build the capacity and infrastructure for trade-based growth, so they may fully participate in, and benefit from, the world trade system.

Economic reform and change means difficult choices and tough decisions. Even in the United States and other developed countries, it is often easier to avoid or defer the tough choices that come from enacting enlightened, long-term economic and trade policies than it is to make these choices and focus on the future. Free and fair trade is not a guarantee. It is an opportunity.

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Hull's insights and achievements, that helped form the building blocks of global peace and prosperity, do not end with his commitment to more open markets and a liberal international economic order. Hull was a man of many parts, and he understood in a deep and profound way the connection between American power and purpose in world affairs. For Hull, who guided American statecraft during World War II, knew that American leadership meant more than the application of great military power. The experience of two world wars reinforced his belief that international organizations and structures would be critical to future global prosperity and stability. The national interests of the United States could not be separated from global stability. Looking out on the international landscape in 1948, Hull observed that,

> "We are today more powerful in arms and powerful in the cause of peace and humanity. But with our great strength [sic] have come great responsibilities. The heaviest of these, which we have accepted in the light of our power and duties, is that of providing our full share of leadership toward cooperation among nations for peace, justice, freedom, and progress."

Hull's wise counsel is not limited by time. It applies today, just as it did fifty-five years ago. Our successes in defeating communism during the Cold War, and in prosecuting the war on terrorism today, are the result of unprecedented cooperation among our allies in Europe, Asia, and throughout the world. America's long-term interests are almost always best served by working through institutions, coalitions and alliances, such as NATO and the United Nations. Building coalitions is never easy. But coalitions are a kind of diplomatic stock option that allows other countries to invest in our shared interests and policies, both the risks and the gains... serving the purposes of all investors.

The September 11, 2001 attack on America reinforced the necessity of coalitions. We cannot win the war on terrorism alone, and our many successes against terrorism so far have been the result of cooperation with our allies. That said, we cannot underestimate the effect that 9/11 has had on the American consciousness, and its implications for America's policies at home and abroad. We must be vigilant, but we must be balanced in our responses and policies. Our responsibilities to secure our borders and protect our citizens should not undercut policies that promote and protect free trade, civil rights, immigration policy, and other vital dynamics and rights central to America's past and future.

The build-up to the war in Iraq fractured some of our most valued alliances and institutions, including the Atlantic Alliance and the United Nations. These two relationships have been integral parts to America's security and diplomacy since World War II. These fractures cannot be ignored, and must be rebuilt. America has always had

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differences with friends and allies and we will continue to have differences in the future. But we strengthen our relationships by building on our common interests – not focusing on what divides us.

I regret that there exists today a negative perception of American power and intentions that has fostered concern and resentment among some of the peoples and governments of long-standing allies. While we have never and will never compromise our national security, we must be careful to avert the perception that we are charting a unilateralist course in our foreign policy. A return to the balance of power politics of the 19th century would be a dangerous setback for America and the world. Shifts in alliances occur during times of great change in world history, but we must be careful not to allow these shifts to work against America's global interests.

My late friend and colleague, Daniel Patrick Moynihan, also made this case at last year's commencement address at Harvard University when he said,

> "Certainly we must not let ourselves be seen as rushing about the world looking for arguments. There are now American armed forces in some 40 countries overseas. Some would say too many. Nor should we let ourselves be seen as ignoring allies, disillusioning friends, thinking only of ourselves in the most narrow terms. That is not how we survived the 20th century. Nor will it serve in the 21st."

Re-building Iraq is an opportunity for re-vitalizing our relationships, alliances, and international institutions. What we do next in Iraq, the Middle East and around the world, and how we do it, will help America, in Henry Kissinger's words, "to translate its dominance into a systematic fostering of international consensus." Dr. Kissinger further stated in a recent *Washington Post* op-ed, with regard to Iraq, that,

> "it is in America's interest not to insist on an exclusive role in a region in the heart of the Muslim world and to invite other nations to share the governance – at first coalition partners, progressively other nations, and with a significant role for the United Nations, especially its technical and humanitarian organs."

At the beginning of the 21st Century we find historic opportunities to help build a better world. President Bush has committed the United States, in consultation with our Quartet allies -- Russia, the United Nations, and the European Union -- to implement the Road Map to get the Middle East peace process back on track. This is a critically important step. As we work these single international tracks in Iraq, Afghanistan, the

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Middle East, and North Korea, we must also work parallel tracks that develop regional security institutions, especially in the Persian Gulf and the Middle East, in order to help build long-term trust and confidence among the states of these regions. Supporting policies that promote and enhance trade and private sector development in these countries is essential for their future. Such policies and institutions will be key to regions moving away from authoritarianism and stagnation toward a hopeful and dynamic future.

Cordell Hull understood that economic prosperity at home could not be de-coupled from peace and stability abroad. America's competitive position in the world is vital to our power, purpose, and future. Economic growth and prosperity are not zero-sum games, at home or abroad. We therefore cannot disconnect our foreign and trade policies from our domestic policies. Both foreign and domestic policies are woven into the fabric of America's national security and our economic prosperity.

Our long-term economic potential depends on confidence and stability. Confidence is gone when there is instability in the world and uncertainty in America.

American power and purpose must be focused on meeting the challenges of today... but not unmindful of the burdens of tomorrow. At the height of American power following World War II, in 1948, Cordell Hull, in a chapter of his memoirs entitled "What of the Future?" advised that, "We have, in fact, reached the time when we should stop, look, and listen. We should analyze ourselves and our position in the world with sharp introspection."

Some time for reflection on America's role in our world at this present critical juncture in history would bring us back to a basic truth that, in addition to great power, world leadership requires trust. And trust is the indispensable coin of the realm. We cannot lead without the confidence of others. Former President George Bush, writing with Brent Scowcroft in *A World Transformed* in 1998, reflected on the importance of a benign perception of American power in promoting stability in world affairs. He wrote that the United States, because of our resources and power,

> "has a disproportionate responsibility to use that power in the pursuit of a common good. We also have an obligation to lead. Yet our leadership does not rest solely on the economic strength and military muscle of a superpower: much of the world trusts and asks for our involvement. The United States is mostly perceived as benign, without territorial ambitions, uncomfortable with exercising our considerable power.
> Among our most valuable contributions will be to engender predictability and stability in international relations, and we are the only power with the resources and reputation to act and be broadly accepted in this role."

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The power of America's steadfast commitment to free trade, democracy, human rights, religious freedom, and economic prosperity has been an inspiration to much of the world, because these values are not ours alone. Cordell Hull knew that America does not have sole ownership of these values. There must be a sharing of a common destiny for all peoples.

In so many ways, America's purpose at the beginning of this new century remains what it has always been: investing in the next generation and in the citizens of the world for a better future. Ours is indeed a shared destiny, and the American experience offers hope for all mankind; for those who have never known the promise of democracy, open economies, universal tolerance and respect for the dignity of all people. Our optimism and ideals are tempered by the cold reality of a dangerous world. The threats from tyranny, terrorism, weapons of mass destruction, disease and poverty allow us no reprieve. But we must meet these challenges just as Cordell Hull and his generation met the challenges of their time. We are better prepared than any generation in American history to meet these 21st Century challenges. This is so because of what past generations of Americans built for us and bequeathed to us – immense power and nobility of purpose. We are now the guardians of this trust.... and we must protect it, build on it, and prove worthy of inheriting it.

REV_00265562

Ralston, Susan B.

536021

From: Ralston, Susan B.
Sent: Friday, May 09, 2003 9:28 AM
To: Devenish, Nicolle
Cc: Davis, Alicia W.
Subject: CORRECTION - The Union Leader
Importance: High

In Distaso's article about KR's visit, he writes:

> "He said Bush's tax cut plan would create $1.4 billion in new revenue in 2004, $600 million of which will be generated by the elimination of double taxation of dividends."

http://www.theunionleader.com/Articles_show.html?article=20970&archive=1

Karl said he was misquoted. Karl said **1.4 million jobs, 600,00 of which...**

JOBS not REVENUE

Can you have the correct this?

The Union Leader NEW HAMPSHIRE SUNDAY NEWS

News - May 8, 2003

Bush adviser Rove: Don't trade tax cuts for health care plan

By JOHN DISTASO
Senior Political Reporter


KARL ROVE

Senior Presidential adviser Karl Rove said yesterday rescinding all or part of President George W. Bush's tax cuts to fund a sweeping health-care program is "just wrong" and nothing short of a huge tax hike.

At least two Democratic Presidential candidates want to kill Bush's tax cuts and divert the money to health-care plans. Dick Gephardt wants to use all of the cut; Howard Dean, a part of it.

In New Hampshire yesterday to talk to business people, students and Republican activists, Rove was greeted with biting criticism of his boss by the state Democratic chair.

Describing himself in a self-deprecating way as the mastermind of Bush's 19-percentage point loss to John McCain in the 2000 first-in-the-nation GOP Presidential primary, the administration's chief political adviser said the White House is officially months, if not a year, from shifting into a 2004 reelection mode.

But he was clearly on hand to let Granite Staters know Bush takes the state just as seriously as the Democratic contenders.

Rove said Democratic plans to rescind tax cuts for health care "would just absolutely stop the economy dead in its tracks. We'd have a lot more people out of work and a lot less growth."

In an interview, Rove said, "If they want to advocate that, that's their right, but I don't think that's going to go down with the vast majority of Americans."

State Democratic Chair Kathleen Sullivan said Bush, through his tax cut, "wants to borrow $550 billion to give away to the very wealthiest Americans, with middle-class and working Americans stuck paying off the debt for years to come." She said Rove "and his buddies are looting our prosperity for generations to come."

Sullivan said two million Americans have lost their jobs since Bush became President; 40 million have no health insurance. "Yet George W. Bush wants to use the United States Treasury to bankroll a tax giveaway for his friends," Sullivan said.

Rove said Congress agreed two years ago to phase in the tax cut over 10 years. Rescinding it would be "a huge tax increase on the American people."

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- George F. W
- Jonah Goldb
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- Kathleen Pa

Prudential Yearl Realty

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He said that despite opposition to the cut plan from some moderate Senate Republicans, "at the end of the day we'll get it. It's not a process that people with weak stomachs should watch."

Recent polls have shown Bush's overall approval ratings high, better on foreign policy than domestic policy.

"The difference is, one he's popular on and on the other, he's really popular on," said Rove. "I look at how you match him up (in polls) with named Democrats or generic Democrats or Democrats in Congress, and he has a significant lead. People have a real trust in him because they've seen him for three years and because they know what his values are."

But, told that a poll by Franklin Pierce College released Tuesday showed that in New Hampshire, Bush is in a dead heat with a generic Democratic Presidential candidate, Rove said, "I'm not surprised."

He predicted "a very close election" and predicted that in any poll specifically pitting Bush against any Democratic contender "where you had to deal with the reality instead of the abstract, he'd be fine."

Rove said he is unfamiliar with the Pentagon contract hiring Vice President Dick Cheney's former company to fight oil fires in Iraq and, it was revealed this week, also to operate Iraqi oil fields and distribute petroleum.

Democratic Presidential candidate Howard Dean said yesterday the contract "doesn't surprise me a bit. It's an emblem of an administration that has sold this country down the river."

Cheney's office has said repeatedly the vice president has no role in the operations or government contracts of Halliburton Corp.

Rove said the Pentagon believed it "was important to make certain we had a company with the ability to do certain things — fight the fires and make sure the oil fields get back in operation as quickly as possible. And smart people at the Defense Department went through this process and determined Halliburton."

California Democratic Rep. Henry Waxman questioned Halliburton's expanded role in a letter to the U.S. Army Corps of Engineers.

Rove said Waxman "has a tendency of sending off letters accusing — alleging — certain things in order to get a little more attention. But I'm confident this was thought through and was the right thing to do."

Earlier, at a corporate-sponsored "Politics and Eggs" forum, Rove pushed hard for Bush's tax cut and blamed the sluggish economy on the 9/11 terrorist attacks, corporate scandals and the Iraqi war.

He said Bush's tax cut plan would create $1.4 billion in new revenue in 2004, $800 million of which will be generated by the elimination of double taxation of dividends.

At St. Anselm College's New Hampshire Institute of Politics, Rove advised students interested in government and politics never to assume politicians can mislead the public, which he called the "masses are asses" theory.

He lauded New Hampshire as a state where, in politics, "retail matters, wholesale doesn't." And he denied Republicans were trying to exploit the 9/11 tragedy by holding its convention in New York City in late August and early September. He also said the Iraqi conflict was merely one battle in an overall war on terrorism, and, he said, he had "no doubt at all" that weapons of mass destruction will be found.

Return to Front Page

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536021

Allstate.
You're in good hands.

FAX

Date 5-27

Number of Pages 2
(Including Cover Sheet)

To KARL ROVE

Company

Department

Phone Fax 202-456-0191

From Laura Sarlo

Department

Phone 847-402-8386 Fax 847-402-2832

Subject

Notes

☐ For Review ☐ Please Respond ☐ Urgent ☐ FYI

Allstate Insurance Company
2775 Sanders Road, F9 Northbrook, IL 60062 Email Lsarlo@allstate.com



Allstate.
You're in good hands.

Thomas J. Wilson
President
Allstate Protection

May 27, 2003

Mr. Karl Rove
Special Advisor to the President
The White House

Dear Karl:

Thank you for enabling my daughter's eight grade class to tour the White House during their recent visit to Washington, DC.

I hope things are well with you and look forward to seeing you at a future Financial Services Forum meeting.

Best regards,

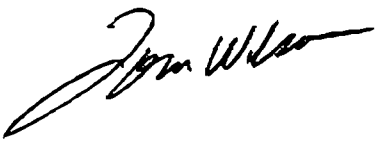

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536021

U.S. News & WORLD REPORT

BRIAN DUFFY
EDITOR

EXEC. OFFICE OF THE PRESIDENT
WHITE HOUSE ARCHIVES
2003 JAN 27 AM 10:11

January 17, 2003

Karl Rove
Senior Advisor to the President
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Karl,

We are pleased that you will be joining us as a guest of Mort Zuckerman at the annual White House Correspondents' Association dinner on Saturday April 26, 2003 at the Washington Hilton.

Before the black-tie dinner, *U.S. News* is hosting a private reception in the Conservatory Room at the Hilton. We would be delighted if you could join us there starting at 6:30 p.m. You may pick up your dinner ticket at the reception. If you prefer to receive your dinner ticket before the dinner, please contact Lynne Edwards at 955-2659 to arrange to have your ticket delivered to you. Feel free to call Lynne if you have any questions about the reception or dinner. The dinner begins at 7:30 p.m. in the International Ballroom.

We look forward to seeing you on April 26.

Pls deliver
tick through
Press office

Sincerely,

B. Duffy

Brian Duffy

1050 THOMAS JEFFERSON STREET NW • WASHINGTON, DC 20007-3837
202-955-2271 • BDUFFY@USNEWS.COM
HTTP://WWW.USNEWS.COM

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1/17 accepted
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Mortimer B. Zuckerman
Chairman and Editor-in-Chief

December 4, 2002

Mr. Karl Rove
Senior Advisor to the President
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Karl:

I would be delighted if you would join *U.S.News & World Report* as my guest at the annual White House Correspondents' Association Dinner. It's a black tie event on Saturday, April 26, 2003 at the Washington Hilton Hotel. *U.S. News* will host a private cocktail party in the Conservatory Room at the Hilton starting at 6:30 p.m; dinner follows at 7:30 p.m.

Please RSVP to Mary Jean Hopkins (202) 955-2541. I very much hope that you will be able to come.

Sincerely,

Mortimer B. Zuckerman

1050 Thomas Jefferson Street, N.W., Washington, DC 20007-3871
Tel: 202-955-2537
U.S.News Online: http://www.usnews.com

REV_00265573

April 24

CONGRESSMAN RICHARD BURR
NORTH CAROLINA

January 16, 2003

Mr. Karl Rove
The White House
Washington, DC 20500

Dear Karl:

This is to follow up with a request that I made when meeting with Ken Mehlman last week. I would like to ask that you be the guest speaker at an event sponsored by my campaign during the April Congressional recess. Ken indicated to me that he would have a date worked out by the time I return to the U.S. on January 22.

My campaign hosts this event every non-election year as a means of beginning the fundraising process for the next election. The donors are all $1000 givers and by attending this level they secure membership in the Richard Burr Capitol Club. This event has always been successful and has been well attended.

This year, my plan is to expand this event to draw attendees from the entire state of North Carolina and if you will agree to be the speaker, I have no doubt that you will be a major draw. Typically this event is held on a weeknight and I will be glad to work with your schedule to pick a suitable time.

I hope that by the time I return that we can quickly set a date that is convenient for you so that I can put in motion the plans for making this dinner a success.

Please let me know if you have any questions and I look forward to having you as my guest.

Sincerely,

Richard Burr

Authorized and paid for by The Richard Burr Committee, Timothy W. Gupton, Treasurer
Post Office Box 5928 • Winston-Salem, North Carolina 27113-5928 • 336-777-1170 • Fax 336-773-0198

536021

FROM THE OFFICE OF RICHARD F. HOHLT.....A Fax

rick@hohlt.com
wade@hohlt.com

202-833-4146- Office
202-833-1587- Fax

DATE: May 23, 2003

SAVE THE DATE

TO: **Karl Rove**
Attn: Susan
456-0191

Chairman Racicot has scheduled the next **"Off the Record"** dinner for **Thursday, June 19th.**

LOCATION: **To Be Determined ...**

USUAL TIME: **7:00 p.m. Cocktails**
7:30 p.m. Dinner

Please contact my office at 833-4146 if you **will not** be able to attend.

ONLY PAGE

5 J6021

REMARKS VIA SPEAKERPHONE TO THE
OHIO REPUBLICAN PARTY EXECUTIVE FINANCE COMMITTEE

Thursday, May 22, 2003
6:00 p.m. – 6:15 p.m.
Ohio Republican Party
Via Speakerphone to Columbus, Ohio
Coddy Johnson

I. PURPOSE

To thank the Ohio Republican Party Executive Finance Committee for their support and leadership moving towards 2004.

II. BACKGROUND

Tonight's event is intended to promote the strong partnership between the Ohio Republican Party (ORP) and the Party's Executive Finance Committee, which is comprised of 19 of the State's top CEOs and business leaders. This event will provide the Executive Finance Committee with an overview of the party's financial and political plans and an opportunity to meet with local and statewide GOP elected officials. The business leaders in attendance have all committed to contribute $25,000 a year over the next two years to the ORP Operating Account, the Party's new fund for unlimited, unreported personal contributions as allowed under state election law.

The event includes a program with speakers Bob Bennett (State GOP Chairman), Jim Dicke (Finance Committee Chairman), Barry Jackson (Deputy Senior Advisor to the President), Senate President Doug White, House Speaker Larry Householder, Chris McNulty (ORP Executive Director), Governor Taft, and you. Your remarks will take place at 6:00pm and will be broadcast via speakerphone to event participants. The meeting will already be in progress, beginning at 4:00 p.m.

The ORP has cultivated a relationship with top state CEOs and donors for nearly two decades, which has helped to garner the resources necessary to achieve an unparalleled record of electoral dominance. In the 2002 election cycle, the Party's successful efforts help to:

- Re-elect Governor Bob Taft with 58 percent of the vote, thereby allowing Republican control of the governor's office for 16 straight years, the longest GOP tenure since 1822.
- Elect Jennette Bradley as the State's first African-American lieutenant governor and the first female African-American lieutenant governor in the Nation.
- Elect Republican candidates to the other four statewide offices (State Attorney General, State Auditor, State Treasurer, and Secretary of State) for the second straight cycle.

- Elect Maureen O'Connor and re-electing Justice Evelyn Stratton to the Ohio Supreme Court, giving the court a conservative majority and the first female majority in State history.
- Gain an additional three seats in the Ohio State House, giving the GOP a 62-seat majority and matching the record set in 1966.
- Pick up an additional seat in the Ohio State Senate for a 22-seat edge, representing the largest margin since 1967.
- Gain seven countywide offices on Election Day, bringing the GOP total to nearly 65 percent.

The ORP also played a critical role in the 2000 campaign, spending over $4 million on a statewide Victory Program that included paid and volunteer phone banks, issue and slate mailings, and targeted radio advertisements. Under new Campaign Finance Laws, the ORP has restructured its 2003 budget so that $2 million will be spent on generic, non-Federal party-building activity and over $1.4 million on Federal election activity. The Party's 2004 budget has not yet been decided.

III. PARTICIPANTS

VIPs in Attendance
Governor Bob Taft (R, OH)
Attorney General Jim Petro (R, OH)
Treasurer Joe Deters (R, OH)
Missy Deters, Joe's wife
Senate President Doug White (R, OH)
House Speaker Larry Householder (R, OH)
GOP State Chairman Bob Bennett

VIPs Not in Attendance
Senator George Voinovich (R, OH)
Senator Mike DeWine (R, OH)
State Auditor Betty Montgomery (R, OH)
Secretary of State Ken Blackwell (R, OH)
Ohio's GOP U.S. House Congressional Delegation

19 Executive Finance Committee Members (see attached list)

ORP Staff
State GOP Chairman Bob Bennett
State GOP Executive Director Chris McNulty

White House Staff
Barry Jackson (in Ohio)
Sara Taylor (with you)

IV. SEQUENCE OF EVENTS

5:58 pm: Sara Taylor is conference into the ORP Executive Finance Committee Meeting via her cell phone.
6:00 pm: Sara Taylor hands her cell phone to you.
6:01 pm: Chairman Bob Bennett introduces you to event participants.
6:03 pm: You deliver remarks.
6:15 pm: You conclude remarks and direct any follow-up questions to Barry Jackson.
Note: This is an opportunity to thank leadership and get them excited for 2004. It does not require long remarks.

V. PRESS

Closed

VI. REMARKS

Talking Points provided by Coddy Johnson

VII. ATTACHMENTS

Talking Points
List of Executive Finance Committee Members

OHIO EXECUTIVE FINANCE COMMITTEE MEMBERS

Dave Brennan, White Hat Management
Jack Chester, Chester Wilcox & Saxbe
Jim Dickie, Chairman EFC, and Crown Equipment Corporation
Harley Dunbar, Dunbar Mechanical
Dick Farmer, Cintas Corporation
Jerry Jordan, Jordan Energy, Inc.
John Kessler, The New Albany Company
Carl Linder, American Financial Corporation
Bob Meyerson, Texlon Corporation
Wally O'Dell, Diebold Corporation
Butch O'Neill, AGT International
Niles Overly, The Frank Gates Company
Joe Ruscigno, Fitch Reporting Inc.
Rick Stansely, The Stansley Group
Tim Timken, The Timken Company
Dr. Michael Walsh, Physician, Toledo Hospital
Mrs. Lillian Walsh, Dr. Walsh's wife
Monte Will, First Union Securities
Bob Winzeler, Winzeler Stamping Company

Declined 5/23

536021

5310 North Sheridan. Chicago Illinois 60640
Telephone No. 773-334-4573
Fax No. 773-334-6225

CINDY's PHARMACY

PRA 6

Fax

To: SUSAN B. RALSTON From: CINDY FLORES (773) 334-4573

Fax: (202)456-0191 Pages: 2

Phone: 202 456-2369 Date: 5/21/2003

Re: CC:

☑ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

• Comments:

Please help also follow up my request for a Message from Pres. G. Bush for our Souvenir Program (ASAP). Sending you a copy of the letter. Thanks!

I hope you can come to our Dinner Ball on June 7th.

FACC – Kasarinlan™
Dr. Jose P. Rizal Heritage Center
1332 West Irving Park Road, Chicago, IL
Tel: (773) 281-1210 Fax: (773) 281-9586

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HERMINIO R. POBLETE
BEN ROSERO
RUDY TAPALLA

May 21, 2003

Ms. Susan B. Ralston
Executive Assistant to the Senior Advisor
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Susan:

In behalf of the FACC-*Kasarinlan*, I would like to invite you to attend our dinner ball on June 7, 2003 at the Holiday Inn O'Hare at 5440 North River Road in suburban Rosemont. While the program starts at 7:30 p.m., guests usually arrive earlier for the cocktails (6:30 p.m.). Dinner is served at 7:00 p.m.

The Filipino American Council of Greater Chicago (FACC) is the Filipino American community's umbrella organization, hence is the lead organization in these festivities. This year, we are celebrating the 150th anniversary of Philippine independence from Spain's colonial rule. One of the *Kasarinlan* activities is the dinner ball, where the community's movers and shakers get together (at least once a year) to commemorate our native land's independence. We also have other activities, like the dinner theatre and art exhibits, which showcase Philippine culture at its best.

We are pleased to inform you that our guest speaker for the night is the Honorable Loren Legarda, the majority leader in the Philippine Senate. The lady senator will most likely speak about the ever-growing relationship between the U.S. and the Philippines, what with President George W. Bush hosting a rare state visit for the visiting President Gloria Macapagal-Arroyo last weekend. This promises to be a lovely night, so we are looking forward to June 7th, where we expect you to be one of our VIP guests.

Thank you for your kind attention, and I hope that you will accept this invitation.

Sincerely,

Cynthia C. Flores

CYNTHIA C. FLORES
Overall Vice Chairperson
& Dinner Ball Chair

KASARINLAN™ IS A TRADEMARK OF THE FILIPINO AMERICAN COUNCIL OF GREATER CHICAGO (FACC)

FACC – Kasarinlan™
Dr. Jose P. Rizal Heritage Center
1332 W. Irving Park Rd, Chicago, IL 60613
☎ 773-281-1210 🖷 773-281-9586

HERMINIO R. POBLETE
PRESIDENT, FACC

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ED LIBUNAO
FLORANTE A. LLANES
EMIL MENDOZA
HERMINIO R. POBLETE
BEN ROSERO
RUDY TAPALLA

May 7, 2003

The Honorable George W. Bush
President, United States of America
1600 Pennsylvania Avenue
Washington, DC 20500-0001

Dear Sir:

In behalf of all the Filipinos in the state of Illinois, we send you our greetings!

On June 12th of this year, the Philippine flag will be raised at the Daley Center Plaza in Chicago to honor the 105th anniversary of Philippine independence. It is also a tribute to the more than 150,000 Filipinos who have adopted Illinois as their second home.

To commemorate this important day in our history, the Filipino American Council of Greater Chicago, through its Kasarinlan Committee, has scheduled a series of activities that will feature various aspects of Philippine history, arts and culture. The first major event is the dinner ball, which will be held on June 7th at the Holiday Inn O'Hare, where we will be honoring Mrs. Philippines-Kasarinlan 2003 and Miss Philippines-Kasarinlan 2003. The other events showcase Philippine culture at its best — art exhibit by Filipino artists, poetry reading/short plays by the Pintig Group, and a *balagtasan* (Filipino drama). There will also be a special tribute to Filipino seniors and veterans, a health fair, and a dinner theatre presentation, among others.

In this regard, we would like to request for your message and your photograph, which we will publish in our souvenir book. We are sure the Filipinos in Illinois will be honored to hear from you.

Thank you very much for your kind attention. *Mabuhay!*

Respectfully yours,

MANUEL E. BELBIS
Overall Chair

CYNTHIA C. FLORES
Chair, Dinner Ball

KASARINLAN™ IS A TRADEMARK OF THE FILIPINO AMERICAN COUNCIL OF GREATER CHICAGO (FACC)

FACC

FILIPINO AMERICAN COUNCIL OF GREATER CHICAGO

Dr. Jose P. Rizal Heritage Center
1332 W. Irving Park Road, Chicago IL 60613
(773) 281-1210 * FAX (773) 281-9586

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JAIME M. ALBAN
Administrator

LUIS CHITO BAUTISTA
Asst. Administrator

ALFONSO S. BASCOS, ESQ.
Legal Counsel

May 16, 2003

Ms. Susan B. Ralston
15572 Wigeon Way
Woodbridge, VA 22191

SUBJECT: INVITATION TO THE KASARINLAN DINNER BALL ON JUNE 7, 2003

Dear Ms. Ralston:

We have the honor of inviting you as a Special Presidential Guest in our *Kasarinlan* dinner ball this coming June 7th, starting at 6:30 p.m., at the Holiday Inn O'Hare at 5440 N. River Road in Rosemont, Illinois.

As you know, we are celebrating the 150th anniversary of Philippine independence from Spanish colonial rule in the FACC's *Kasarinlan* (the Tagalog word for independence). In the said dinner ball we are expecting many guests from our Filipino American community in the greater Chicago area, among which are the leaders from the various groups — socio-civic, political, mass media, professionals, and business, among others.

The Guest of Honor and speaker is Senator Loren Legarda-Leviste, a prominent political personality in the Philippines. Aside from the other events in the said dinner ball, there will also be coronation ceremonies for Mrs. FACC-*Kasarinlan* 2003, and Miss FACC-*Kasarinlan* 2003.

We hope that you will honor us with your acceptance of this invitation.

Sincerely,

HERMINIO R. POBLETE
President

456-0191

536021

FROM THE OFFICE OF RICHARD F. HOHLT.....A Fax

rick@hohlt.com
elizabeth@hohlt.com
wade@hohlt.com

202-833-4146- Office
202-833-1587- Fax

DATE: 5/22/03

TO:

Susan -

Please give to Karl, only if he's interested. Thanks very much.

2 *PAGE(S) TO FOLLOW*

FROM THE OFFICE OF RICHARD F. HOHLT.....

rick@hohlt.com
wade@hohlt.com

202-833-4146- Office
202-833-1587- Fax

DATE: May 22, 2003

TO: Chairman Racicot
Jack Oliver
Ken Mehlman

The following individuals have confirmed their attendance for tonight's "Off the Record" dinner at the **Hay Adams Hotel** in the **John Hay Room**. As customary, cocktails at 7:00pm and dinner at 7:30pm.

Josh Bolten
Dan Bartlett
Tom Collamore
Ken Duberstein
Secretary Don Evans
Don Fierce
Ed Gillespie
Ed Goeas
Rick Hohlt
David Hobbs
David Keene
Ron Kaufman
Jan Van Lohuizen
Cathie Martin
Bill Timmons
Matt Schlapp
Ambassador Mercer Reynolds

Total: 20, including the three of you

CC: Karl Rove

ONLY PAGE

FROM THE OFFICE OF RICHARD F. HOHLT.....A Fax

rick@hohlt.com
wade@hohlt.com

202-833-4146- Office
202-833-1587- Fax

DATE: May 22, 2003

TO: Chairman Racicot
Jack Oliver
Ken Mehlman

Following is the Suggested Agenda for tonight's "Off the Record" dinner at the **Hay Adams Hotel** in the **John Hay Room.** As customary, cocktails at 7:00pm and dinner at 7:30pm.

SUGGESTED AGENDA

I.	Chairman Racicot	Opening Remarks Introductions: Schlapp, Reynolds, Martin
II.	Pollsters	Latest Data
III.	Ken Mehlman	Campaign Overview Convention Update
IV.	Jack Oliver	Fundraising
V.	Josh Bolten/David Hobbs	Domestic Agenda/Legislative Strategy
VI.	Dan Bartlett	Communications Effort

CC: Karl Rove

ONLY PAGE

F cuba
536021

Mercedes M. Viana
05/08/2003 08:04:17 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: El Nuevo Herald: Critican la postura de la Casa Blanca con Cuba

El Nuevo Herald: Criticisms on the White House's position on Cuba

Our "friends" are criticizing the White House on Cuba . . . Here's what they are saying in the article

Quote from Congresswoman Ileana Ros-Lehtinen, "I wrote a letter three months ago and I'm still waiting for a response and to tell you the truth, I don't believe I will ever receive a response."

More quotes form Ileana: "I feel very frustrated, but will not surrender and will continue to fight, even if it's against a Republican administration and against the (Cuban) tyranny."

Other Cuban American legislators admit that they receive some courtesy calls from the White House. Otto Reich is the only one to answer the phone.

Mario Diaz-Balart was the only one to defend the President. His quote: "The President remains firm in keeping the sanctions and economic embargo in place, and we are very grateful (to the President). However, I believe we need to take additional steps to assure that the tyrant is not a a danger to the United States."

A complete translated version will be sent shortly . . .

elNuevoHerald.com

Posted on Thu, May. 08, 2003

Critican la postura de la Casa Blanca con Cuba
RUI FERREIRA
El Nuevo Herald

Las imágenes de tres balseros intentado esquivar a los guardacostas ante las costas de Cayo Largo han levantado una polémica dentro de la comunidad exiliada, donde muchos aseguran que la Casa Blanca no escucha sus clamores y parece prestar poca atención a la situación cubana.

Los mismos congresistas cubanoamericanos y personal de su entorno, hasta ahora feroces defensores de la administración republicana de George W. Bush, se quejan hasta de que nos los atienden.

"Hace unos tres meses le escribí una carta. Todavía estoy esperando una respuesta y a decir la verdad, no creo que la vaya a recibir nunca", dijo la congresista republicana Ileana Ros-Lehtinen, desde su oficina en el Capitolio.

La congresista cree que la política hacia Cuba creada por la pasada administración Clinton fue diseñada para favorecer al gobernante cubano. De hecho, en sus argumentos ella la llama "política Clinton-Castro". Pero, pese el cambio de administración, Ros-Lehtinen no mostró un mayor optimismo.

"Me siento muy frustrada, pero no me voy a rendir y seguiré batallando, aunque sea contra una administración republicana, en contra de la tiranía", agregó la congresista.

El presidente Bush vino a Miami el año pasado y prometió que endurecería la política hacia la isla. Tanto los congresistas por el sur de la Florida, como importantes comentaristas, se embarcaron en una ofensiva de apoyo al presidente.

Pero ahora, escasos 11 meses después, los aplausos se han convertido en quejas que están tocando a la puerta de la Casa Blanca.

Miembros del entorno de los legisladores, admiten en privado que la Casa Blanca no les está prestando mucha atención, si es que prestan alguna.

"Los contactos a veces son de mera cortesía. Otto Reich [enviado especial para Latinoamérica] es el único que contesta el teléfono", dijo uno de ellos.

Añadió otro: ``Nosotros estamos literalmente cubriéndole las espaldas al presidente, pero me pregunto durante cuánto tiempo. ¿Hasta cuándo lo vamos a proteger cuando la realidad es que, en privado, está pasando otra cosa?".

"Esto se está calentando, no son sólo los congresistas, es también la comunidad que está molesta. La tensión está subiendo y son como dos trenes a punto de chocar", agregó la fuente en el Congreso, que solicitó no ser identificada.

El novato congresista Mario Díaz-Balart, aunque crítico, fue más cuidadoso.

``El presidente es muy firme en relación a las sanciones y el embargo económico, y por eso le estamos agradecidos. Pero creo que por la situación que tenemos ahora en Cuba, se debería tomar pasos adicionales para ayudar a que el tirano deje de ser un peligro para Estados Unidos".

En la carta enviada por Ros-Lehtinen hace tres meses a la Casa Blanca, la congresista se quejaba abiertamente de que todavía los exiliados no habían visto expresiones concretas de un cambio en la política hacia la isla.

De hecho, los cambios introducidos por la administración republicana no alteraron significativamente la política trazada por Clinton, como la de "pies secos, pies mojados". Las nuevas medidas que se anunciaron, están paralizadas, argumentan.

Así, la administración Bush incrementó 10 veces el monto que cada exiliado puede enviar de remesa y, pese a que prohibió los viajes de estudio, los estadounidenses siguen viajando clandestinamente como los hacían antes.

Por otro lado, las fuentes congresionales aseguraron que la Casa Blanca rebajó a la Agencia Internacional para el Desarrollo (USAID) el presupuesto de ayuda a la disidencia interna cubana de $15 millones a $6 millones.

"¿Se acuerdan del programa de becas para los disidentes que anunciaron el año pasado? No se puede decir que ese programa esté funcionando, no se puede decir que sea siquiera un programa", añadió la fuente en el Congreso.

Por otro lado, los cuatro balseros que arribaron la víspera seguían ayer en poder de las autoridades. Tres de ellos estaban en el Centro de Detención de Krome, mientras que un cuarto, que nunca llegó a tocar tierra, seguía en custodia del Servicio de Guardacostas.

Se creía que este cuarto inmigrante era Jorge Parrado, pero luego sus familiares fueron informados de que se trataba de otro hombre.

"Estamos perplejos", dijo Sandy Cobas, de Judicial Watch, que había comenzado a representar legalmente a los familiares de Parrado en sus esfuerzos por evitar de que éste fuera repatriado a Cuba. ``Ahora no sabemos dónde está Jorge".

Una mujer de Miami reveló que su hermano, Ramón Aguilar, es el balsero que se encuentra en el barco de los guardacostas, explicó Cobas.

A su vez, otros 12 cubanos se entregaron ayer a las autoridades en Los Cayos después que desembarcaron en dos grupos separados, confirmó el portavoz de la Patrulla Fronteriza, Keith Roberts. Un grupo llegó a Cayo Largo y otro a Cayo Hueso. Al cierre estaban siendo procesados en Krome.

Message Sent To: _____

Nicolle Devenish/WHO/EOP@EOP
rfernandez@rnchq.org @ inet
Otto Reich/NSC/EOP@EOP
Emilio T. Gonzalez/NSC/EOP@EOP
Jeanie S. Mamo/WHO/EOP@EOP
Matthew A. Schlapp/WHO/EOP@EOP
Leonard B. Rodriguez/WHO/EOP@EOP
scastillo@rnchq.org @ inet
Abel Guerra/WHO/EOP@EOP
Israel Hernandez/WHO/EOP@Exchange@EOP

536021

~~CONFIDENTIAL~~

FILE: Faith Based

The InnerChange Freedom Initiative: A Preliminary Evaluation of a Faith-Based Prison Program

by

Byron R. Johnson
Distinguished Senior Fellow and Director
Center for Research on Religion and Urban Civil Society
University of Pennsylvania
and
Adjunct Fellow
Manhattan Institute

with

David B. Larson
International Center for the Integration of Health and Spirituality

May 2003

JCR – Key findings on page 5

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DRAFT

Determined to be an Administrative Marking Per E.O. 13526, SEC 3.4(B)

REV_00265604

The InnerChange Freedom Initiative: A Preliminary Evaluation of a Faith-Based Prison Program

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REV_00265605

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DRAFT

The InnerChange Freedom Initiative:
A Preliminary Evaluation of a Faith-Based Prison Program

Determined to be an Administrative Marking Per E.O. 13526, SEC 3.4(B)

Executive Summary

In April of 1997, with the full support of the Texas Department of Criminal Justice (TDCJ), Prison Fellowship Ministries (PF) launched an unusual correctional experiment - a Faith-Based Pre-Release Program. The program was distinctive in that it was expressly Christian in orientation. The InnerChange Freedom Initiative (IFI), as it would later be named, was officially launched under the recommendation of then-governor George W. Bush. This unique public-private partnership between TDCJ and PF represented a first for Texas, if not the country. Technically speaking, IFI is a faith-based program operated by PF through a contract with TDCJ. IFI is a largely volunteer driven program that is different from other rehabilitation programs or prison ministries in some profound ways. It represents perhaps the first full-scale attempt to offer comprehensive programming emphasizing education, work, life skills, values restructuring, and one-on-one mentoring in an environment where religious instruction permeates all aspects of the prison environment.

Reanalyzing data previously compiled and analyzed by the Criminal Justice Policy Council of Texas, this study tracks the two-year post-release recidivism rates for those prisoners that entered the IFI program from April of 1997 through January of 1999, and were released from prison prior to September 1, 2000. In addition, this report summarizes the results of an intensive on-site, multi-year field study of IFI, including in-depth interviews with IFI staff and participants.

To allow for a two-year tracking period, IFI participants included in the current study are those who have had the potential to be out of prison for at least two years by September 1, 2002. A total of 177 participants met these requirements and thus form the basis of the IFI study group. Comparison groups were selected from the records of inmates released during the evaluation period that met program selection criteria but did not enter the program. The comparison groups were matched with IFI participants based on the following characteristics: race, age, offense type, and salient factor risk score. A total of 1,754 inmates were identified as the matched group for this study.

Anchored in biblical teaching, life-skills education, and group accountability, IFI is a three-phase program involving prisoners in 16 to 24 months of in-prison programs and 6 to 12 months of aftercare following release from prison. In this ambitious correctional experiment, IFI is responsible for implementing, administering, and funding inmate programs, and TDCJ is responsible for housing and security matters. IFI and TDCJ are testing the proposition that by intentionally working together they will be able to achieve the civic purpose of recidivism reduction and thereby increase public safety.

REV_00265606

Among the study's key findings are the following:

1. The IFI participants in this study include 75 prisoners who completed all phases of the program (called IFI Graduates), 51 who were paroled early, 24 who voluntarily quit the program, 19 who were removed for disciplinary reasons, 7 who were removed at the request of the staff, and 1 who was removed for serious medical problems. The total number of IFI participants comes to 177 offenders who were released prior to September 1, 2000. IFI participants were compared to a matched group of 1,754 inmates who met the IFI selection criteria but did not participate in the program.

2. 17.3% of IFI program graduates and 35% of the matched comparison group were arrested during the two-year post-release period. A program graduate is someone who completes not only the in-prison phases of IFI dealing with biblical education, work, and community service (usually lasting 16 months), but also includes an aftercare phase (usually lasting 6 months) in which the participant must hold a job and have been an active church member for 3 consecutive months following release from prison.

3. 8% of IFI program graduates and 20.3% of the matched comparison group were incarcerated during the two-year post-release period.

4. Considering all participants, including those inmates who did and did not complete all phases of the program, 36.2% of IFI participants were arrested compared to 35% of the matched group during the two-year tracking period. Among the total number of IFI participants, 24.3% were incarcerated compared to 20.3% of the comparison group during the two-year post-release period.

5. Mentor contact is associated with lower rates of recidivism.

6. Initial skepticism of the IFI program diminished over time with TDCJ staff eventually embracing the program.

7. Narratives of IFI members revealed five spiritual transformation themes that are consistent with characteristics long associated with offender rehabilitation: (a) I'm not who I used to be; (b) spiritual growth; (c) God versus the prison code; (d) positive outlook on life; and (e) the need to give back to society.

8. Spiritual transformation can best be understood as a developmental process marked by key turning points or events.

9. Completing the IFI program, and continued positive pre and post-release mentoring are linked to both the offender's spiritual transformation and rehabilitation.

REV_00265607

10. **Lack of post-release accountability via mentors and congregations, the decision of the IFI participants to isolate themselves from those that could most benefit them, and finally, the tendency to not accept personal responsibility for poor decision-making, are factors associated with recidivism.**

REV_00265608

TR: KR 536021
FYI -
from Tim G.

F: Guns

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GUN OWNERS HOME PAGE .COM

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Print Page

Print This Page

Written By: Sam Cohen

President Bush's Boy Feels the Sting of His Boss' Mistake

by Sam Cohen
SamCohen@attbi.com

May 8, 2003

KeepAndBearArms.com -- The New Hampshire State Republican Committee is sponsoring a series of in-state visits from party bigwigs. Last night, Karl Rove, advisor to the President, and a friend of George W. Bush for 30 years, spoke at a lecture hall at Southern New Hampshire University, in Manchester. The hall was full, with several hundred people there, including a state senator, a recent Congressional candidate, and a number of other people I knew. (New Hampshire's a small state.) I sat in the front row, and after Rove's speech, was the last of a half-dozen people to be recognized for questions.

I introduced myself as a director of Gun Owners of New Hampshire, the NRA state affiliate, noting -- for the benefit of the audience -- that even Bill Clinton admitted that the country's 83 million gun owners, and the NRA, delivered the electoral votes of Arkansas, Tennessee, and West Virginia in the 2000 election. I then told of assistant White House Press Secretary Scott McClellan's statement a couple of weeks ago that President Bush had joined Democrat senators Dianne Feinstein and Chuck Schumer in calling for renewal of the so-called Assault Weapons Ban of 1994, due to sunset after ten years in 2004.

My question was whether President Bush was aware that many thousands of gun-rights activists around the country felt so strongly about this that we had drawn a line in the sand (my exact words), and would not support ANY politician -- even President Bush himself -- who supported this atrocious legislation.

Rove began his answer by referring to the tremendous amount of email that the White House had received on this subject, but then he shot back the question of whether we supported Bush in the 2000 elections.

I said "absolutely." His follow-up was that Bush had publicly campaigned on his position of "enforcing existing gun laws," and his position hasn't changed; he was just being consistent. Rove then closed the session and walked off the stage.

Just a few minutes later, I approached him to continue in private as he was leaving the building; I was the last to do so before he got into his car. This is where it got interesting: Rove took my arm and literally got in my face, using the old drill sergeant intimidation trick of speaking through clenched teeth with his nose an inch from mine. It didn't work, because I'm taller (and older, and uglier) than he is, and I took HIS arm in turn. He told me that Bush was sticking to his position, but that Congress would never pass the legislation. I told him that there were a lot of us, that we were dead serious, and that if Bush let the ban get renewed he'd lose the election, because freedom is more important than politics. He looked at me -- still with clenched teeth -- turned, and walked to his car, obviously angry.

GOOD! First, his anger told me that he knew that the hypocritical strategy was dangerous. More importantly, it tells me he'll remember the exchange.

Molon Labe!

Sam Cohen
http://www.thespiritof76.com/rkba.html

* RKBA! (...the exclamation point means "shall not be infringed!")

REV_00265610

Decline
5/12 536021

THE JAZZ MUSEUM IN HARLEM
104 EAST 126TH ST., 2ND FLOOR
NEW YORK, N.Y. 10035

Leonard Garment
212-348-8300
212-348-5030 FAX

May 5, 2003

Dear Karl,

You know how much I would love to have you come to The Jazz Museum in Harlem party on May 14 (see attachment). Charlie McWhorter would not have missed it for the world! (If your Boss and/or Mrs. Boss would like to drop by, we would be thrilled, charmed and, of course hugely grateful.)

Best.

Len

FILE

Leonard Garment, David Levy and the
Board of The National Jazz Museum in Harlem
invite you to
an evening of cocktails, music and conversation
with Ken Burns, Billy Taylor and other friends of jazz

Wednesday, May 14, 2003 at 6:30 in the evening

at the home of
Daryl and Beth Libow

PRA 6

Please RSVP by May 7
rphillips@jazzmuseuminharlem.org
or PRA 6

Business or casual attire

536021

INTER-AMERICAN DEVELOPMENT BANK

Office of the Executive Director for the United States of America

Declined 5/12

DOCUMENT TRANSMISSION FORM

DATE: 05-09-03	**No OF PAGES: 2** Including this page	**OUR FAX ACCESS No** (202) 623-3612	
Approved by:			

To: Mr. Karl Rove

Fax No.: (202) 456-0191

From: US Office

Subject: Farwell Reception for Mr. Arrizurieta

Please find attached invitations.

FILE

REV_00265612

Farewell - Despedida

for

Jorge L. Arrizurieta
United States Alternate Executive Director



Please join us in a farewell toast

Date: Tuesday, May 20 2003
Time: 5:30 p.m.
Location: Las Americas Dining Room

R.S.V.P. Adela Yurawecz x-1029

Maria Eugenia Peredo-Cohen x-3519

Suggested Contribution: $15

Adela Yurawecz
Assistant to Mr. Jorge L. Arrizurieta
US Alternate Executive Director
(202) 623-1029

5/12/2003

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(Office of Senior Advisor - Karl Rove)

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Thurs, 4/3 ok
TBD POTUS travel

EVANS & NOVAK
1750 Pennsylvania Avenue, N.W.
Suite 1203
Washington, D.C. 20006

ROBERT D. NOVAK

Telephone: 202/393-4340 Fax: 202/393-5588

February 8, 2003

NOTE TO SUSAN RALSTON

FROM KATHLEEN CONNOLLY

RE Evans and Novak Political Forum

Following up on their telephone conversation, here's Bob's letter inviting Karl to speak at the upcoming forum.

I look forward to hearing from you regarding Karl's schedule.

EVANS-NOVAK POLITICAL REPORT

WHAT'S HAPPENING . . . WHO'S AHEAD . . . IN POLITICS TODAY

1750 Pennsylvania Ave., N.W. • Suite 1203 • Washington, D.C. 20006 • 202-393-4340

February 8, 2003

Karl Rove
Senior Advisor to the President
The White House
Washington, DC

Dear Karl:

I'm delighted that, schedule permitting, you will once again address an Evans and Novak Political Forum.

The Sixty-Third Evans and Novak Political Forum will be held on Thursday, April 3, at the University Club, 1135 16th Street in Washington. The Forum begins with an 8:30 speaker, runs through lunch and ends in mid-afternoon.

The audience consists of about 60 executives who are subscribers to the Evans-Novak Political Report. All proceedings are completely off the record.

As you know, your presentation would be one hour, 10-15 minutes of remarks on any subject of your choosing and the balance of the hour used for a q and a session. Kathleen Connolly will contact your office to work out a convenient speaking time.

Thank you for your consideration.

Sincerely,

Robert D. Novak

Level 39
55 Collins Street
Melbourne Vic 3000
Australia
Telephone: 61 3 9921 7147
Facsimile: 61 3 9921 7142

536027

AUSTRALIAN
AMERICAN
EDUCATION
LEADERSHIP
FOUNDATION
ABN 37 652 060 192

NO

20 December 2002

Mr Karl C Rove
Senior Advisor to the President
The White House
1600 Pennsylvania Ave NW
Washington DC 20500 USA

Dear Karl,

INVITATION TO AUSTRALIA – FORUM 03/AUGUST 13-16

I have pleasure in inviting you to participate in the 11th Annual Meeting of the Australian American Leadership Dialogue – of which you are an original member. We would like you to bring your wife and son. We have a family program established through the support of the Premier of the State of Victoria.

The Leadership Dialogue is scheduled for August 14 and 15 in Melbourne – the world's most liveable city. You and the family should plan to arrive no later than August 13. Through our Section 501 (c) 3 Foundation in Washington DC, we would be responsible for your return airfares from DC to Melbourne, and for your accommodation at the Melbourne Park Hyatt for the nights of August 13, 14 and 15.

This year's Leadership Dialogue was a spectacular success, in no small measure to the outstanding leadership you and your staff demonstrated during the half day of sessions at the White House. This was a truly unique and memorable occasion for us all.

Karl, please let me know if you and your wife are able to join us, and I shall set in train the arrangements.

Kind regards,

Phil Scanlan
Founder

Do come!

THE SENIORS COALITION

Working for a Responsible America

June 4, 2002

The Honorable Karl Rove
Senior Advisor to the President
Strategic Initiatives
The White House
1600 Pennsylvania Avenue
Washington, DC 20502

Dear Karl:

Since we last ran into one another on the Hill, we've made tremendous progress in building the Senior Congress program, the exciting grassroots senior advocacy and action arm of The Seniors Coalition (TSC).

As you may know, TSC is the leading free-market advocacy and education organization representing four million seniors nationwide. We've been very active in advocating the President's priorities in Congress. We've worked closely with Gian-Carlo Peressutti of the Office of Public Liaison, and since his departure, with Josephine Robinson and Angela Sailor.

The response to our Senior Congress initiative has been enthusiastic and encouraging. We've already briefed Jack Oliver, Senate Minority Leader Trent Lott, Rep. John Thune, Sen. Tim Hutchinson, NRCC Chairman Rep. Tom Davis, as well as top GOP political strategists on this program. Now that Senior Congress has moved beyond the concept phase and is underway, I thought this might be a good time to brief you on this program. It would be a worthwhile investment of your time to understand the strategic grassroots capabilities this program is developing.

I would welcome the opportunity to meet with you to discuss the Senior Congress program. I hope that you can find some time in your busy schedule to hear about this initiative. Please let me know when you might be available to meet. I can be reached at (703) 239-1960.

Thank you for your consideration.

Sincerely,

J. Drew Hiatt
Vice President
Federal Government Affairs

Washington D.C. Metro Office:9001 Braddock Road, Suite 200 • Springfield, Virginia 22151
Phone (703) 239-1960 • Fax (703) 239-1985 • E-mail:tsc@senior.org

THE SENIORS COALITION

Working for a Responsible America

To: Karl Rove

Fax: (202) 456-0191

From: Drew Hiatt

Phone: (703) 239-1960

Fax: (703) 239-1985

Date: June 7, 2002

Pages:2, (including this sheet)

Subject: Request for meeting

Comments:

Karl,

Please see attached.

Sincerely,

Washington D.C. Metro Office: 9001 Braddock Road, Suite 200 • Springfield, Virginia 22151
Phone (703) 239-1960 • Fax (703) 239-1985 • E-mail: tsc@senior.org • Web: www.senior.org

Call list 536027

Ralston, Susan B.

From: Rove, Karl C.
Sent: Wednesday, April 23, 2003 2:33 PM
To: Bartlett, Daniel J.
Subject: FW: Hello

Can we talk about this? And have you seen his "Hell of A Ride" book?

-----Original Message-----
From: John Podhoretz <PRA 6 >@EOP
Sent: Wednesday, April 23, 2003 2:50 PM
To: Rove, Karl C.
Subject: Hello

To: Karl Rove
From: John Podhoretz

I am writing because I'm looking for a little help in setting the historical record in the right way. I've signed a book deal with St. Martin's for a book about the making of a great president -- how George W. Bush is becoming a world-historical figure. The book will come out at the beginning of 2004.

This is not a work of reportage, but rather a polemic-argument that will seek to demonstrate the truth of the president's rise to greatness and the folly of his ideological and partisan foes.

I was hoping I could get some guidance from you on these matters. I am not looking for scoop or inside dirt, but rather an informed perspective on my thesis and whether it's right, wrong or stupid.

I'm going to be in Washington next week from April 29 through May 3, Tuesday through Saturday, and would love to buy you lunch, dinner, breakfast, or coffee at your convenience. My schedule is open right now except for lunch Tuesday and breakfast Friday.

You can reach me by return of this e-mail or by phone at PRA 6
I'd only ask one favor, which is that you not forward or copy this e-mail to anyone else.

Thanks so much for your consideration.

John Podhoretz



att1.eml (2 KB)

- att1.eml

5 36027

Phil Gramm

Ralston, Susan B.

From: Rove, Karl C.
Sent: Tuesday, May 06, 2003 8:07 AM
To: Ralston, Susan B.
Subject: FW: updated version for Senator Gramm

discuss

-----Original Message-----
From: DeFrancis, Suzy
Sent: Monday, May 05, 2003 5:47 PM
To: Rove, Karl C.
Cc: Ralston, Susan B.
Subject: FW: updated version for Senator Gramm

CEA has updated the study if you decide to send on to him.

-----Original Message-----
From: Swagel, Phillip L.
Sent: Monday, May 05, 2003 5:40 PM
To: DeFrancis, Suzy
Cc: Mankiw, Nicholas G.
Subject: updated version for Senator Gramm

Suzy, attached is a version of the memo without the CEA letterhead. If it's not too late, please use this for Senator Gramm.
Phill



Economic Effect of Jobs and Gr...

- Economic Effect of Jobs and Growth Proposal.pdf

REV_00265643

4542

EVENT: Religious Freedom

EVENT DATE: Mid - May

INVITATION TRACKING SHEET

Office of the Director of Appointments and Scheduling
Bradley A. Blakeman

TODAY'S DATE: 5-9-03

TO:

___ Andi Ball
___ Ruben Barrales
___ Dan Bartlett
___ Joshua Bolten
___ John Bridgeland
___ Secretary Card
___ Ari Fleischer
___ Stephen Friedman
___ Justice Gonzales
___ Joseph Hagin
___ David Hobbs
___ Melanie Jackson
___ Elizabeth Kleppe
___ Jay Lefkowitz
___ Ken Mehlman
___ Admiral Miller
___ Brian Montgomery
X Condoleezza Rice / John Fiklin
___ Karl Rove
___ Margaret Spellings
___ James Towey
___ Lezlee Westine

COMMENTS DUE BY: 5-13-03

Note: Please return this form with your recommendations within 5 working days or else we will assume that this invitation should be regretted.

ACTION REQUIRED

☐ Accept Invitation/Meeting Request (Schedule Proposal Attached)
Comments:

☐ Consider in Long Range Meeting
Comments:

☐ Regret Invitation/Meeting Request
Comments:

☐ Recommend Surrogate
Name(s):

Please return to Brook Holladay and Bonny-Kate Marshall, 1800 G Street, 9th Floor

REV_00265644

293853

4542

UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM

April 29, 2003

The Honorable George W. Bush
President of the United States of America
The White House
Washington, D.C. 20500

Dear Mr. President:

The U.S. Commission on International Religious Freedom commends your deep personal commitment to religious freedom. On numerous occasions you have called for countries to provide for and protect the religious freedom of their people. The Commission is aware that you have also stressed this fundamental human right specifically in meetings with Presidents Putin and Jiang. In recognition of your commitment to international religious freedom, the Commission respectfully requests a meeting with you in mid-May to present our findings and policy recommendations on countries to be featured in our annual May 1 report.

The Commission was established by the International Religious Freedom Act of 1998 and is composed of ten members, including presidential appointees Dr. Richard Land, Bishop William Murphy, Ambassador-at-Large for International Religious Freedom John Hanford, and, until recently, Ambassador Shirin Tahir-Kheli. As you know, the Commission reviews and recommends options for United States' policies with respect to foreign countries engaging in or tolerating violations of religious freedom. By statute, the Commission is required to submit a report to the President, the Secretary of State, and the Congress each May 1. The Commission looks forward to having the opportunity to present its report to you in person for the first time.

In addition, as you may know, the Commission has accepted an invitation from the Chinese government to conduct a fact-finding mission to their country this summer. We greatly appreciate that you personally requested access for the Commission during your February 2002 visit to China. In preparing for this mission, we welcome any advice you might have.

Thank you for your consideration of this meeting request.

Respectfully yours,

Felice D. Gaer

Felice D. Gaer
Chair

Felice D. Gaer, Chair • Dean Michael K. Young, Vice Chair • Firuz Kazemzadeh • Richard Land • Bishop William F. Murphy • Leila Nadya Sadat • Nina Shea • Hon. Charles R. Stith • Ambassador John V. Hanford III, *Ex-Officio* • Joseph R. Crapa, Executive Director

800 NORTH CAPITOL STREET, NW, SUITE 790 | WASHINGTON, DC 20002 | 202-523-3240 | 202-523-5020 (FAX)

REV_00265645

add to cable list

536027

Ralston, Susan B.

From: McClellan, Scott
Sent: Tuesday, May 20, 2003 1:51 PM
To: Ralston, Susan B.
Subject: RE: excerpts

This is the story that ran. He did not include much from what I told him.

Bush White House, GOP lawmakers put trial lawyers on defensive By PETE YOST, Associated Press Writer

WASHINGTON

Renewing a battle from President Bush's days as Texas governor, the White House and its GOP congressional allies are putting trial lawyers on the defensive, from immunizing drug makers from lawsuits to cutting into the fees of attorneys who sue major corporations.

The latest effort, ahead of the 2004 elections, was unveiled last month when two Republicans allied with the White House introduced legislation that would sharply curtail lawyers' contingency fees in lawsuit awards topping $100 million.

Democrats point out that the legislation is aimed at a group of attorneys who traditionally are a major source of campaign donations for their party.

The Association of Trial Lawyers of America contributed $3.8 million to Democrats in the 2002 election cycle, compared to $335,000 to Republicans, according to the Center for Responsive Politics.

"We've heard of enemies' lists, but this now looks like the White House and their friends in Congress want to start employing an enemies tax," Democratic consultant Jenny Backus said.

Tort reform has long been of interest to Bush, predating his first race for governor in 1994, the White House says.

In a recent book about Bush, presidential adviser Karl Rove is quoted as persuading Bush to elevate the importance of tort reform in the governor's race. In a memo obtained by The Associated Press in December, the White House identified legal reform as one of 10 possible "signature issues" heading into the president's bid for re-election in 2004.

The barrage of proposals by Republicans - from legislation to presidential executive orders - has trial lawyers working several fronts to protect their turf. The trial lawyers association spent $3.5 million lobbying Congress last year.

"On the other side, there's every corporation in America, thousands of lobbyists and many millions of campaign contributions," pointed out Carlton Carl, a spokesman for ATLA.

Republicans say the effort isn't about punishing a Democratic constituency, but about excesses in the legal system that the Bush administration says ultimately drive up insurance rates and other costs for consumers.

"The president has always been a strong supporter of efforts to stop lawsuit abuse," White House spokesman Scott McClellan said.

The latest effort to create a federal excise tax on lawyers' fees is part of a broader attack by Republicans in Congress.

Medical malpractice bills in Congress would cap some economic damages for insurance companies, HMOs, nursing homes, pharmaceutical companies and medical device manufacturers.

Separate legislation would push more class action lawsuits out of state courts and into federal courts where delays are common and where legal requirements make it harder for plaintiffs to pursue cases brought by large numbers of people. Another bill would

effectively immunize the makers of a vaccine additive that may cause autism.

Bush and corporate America have long been at odds with plaintiffs' lawyers.

Sinking tens of millions of dollars into lawsuits against well-heeled corporations, trial lawyers receive a percentage of any money awarded in a case. If the lawsuit fails, the clients who often have few assets owe their lawyers nothing, while the attorneys lose the money they put into the effort.

Lawsuits have become an avenue of potential relief for groups such as asbestos workers whose health has been harmed in the workplace and consumers injured by defective products.

The bill sponsored by Republican Sens. John Kyl of Arizona and John Cornyn of Texas would force lawyers who won a landmark $246 billion settlement against the nation's big tobacco companies to pay $9 billion to the states. In other types of cases, the fees of trial lawyers would be limited to no more than five times an hourly rate.

"If $2,500 an hour isn't enough, I'm not sure I can help," Cornyn spokesman Don Stewart said.

Lawyers question the bill's emphasis on big money. "It's interesting that this proposed tax wouldn't apply to lawsuits filed by corporations like Enron against its employees but it would apply to lawsuits filed by employees against Enron," says Carl of the trial lawyers group.

Supporters of the bill say it would apply only to the largest lawsuits, but Carl says the measure actually would have much broader coverage. The $100 million threshold requirement can be met by adding up awards in many similarly filed cases, said Carl.

The bill, which faces uphill struggle in the Senate, resurrects a Texas political battle that pitted Bush and Cornyn against Democratic state Attorney General Dan Morales, a Democrat.

Morales hired a team of plaintiffs' lawyers, sued the tobacco industry and won a settlement in which the companies will pay $17.3 billion to the state and $3.3 billion to the private lawyers over 25 years. Bush denounced the legal fees and Cornyn made them a major issue in a successful campaign to succeed Morales as attorney general.

As soon as he was elected state attorney general, Cornyn announced an investigation of the legal fees, leading to Morales' federal indictment two months ago for allegedly steering hundreds of millions of dollars in attorneys' fees in the tobacco case to a friend. Morales says he is innocent and his legal team says the case was politically motivated.

-----Original Message-----
From: Ralston, Susan B.
Sent: Tuesday, May 20, 2003 1:00 PM
To: McClellan, Scott
Subject: RE: excerpts

Karl wanted to know what happened w/ this. Can you please let me know?

-----Original Message-----
From: McClellan, Scott
Sent: Friday, May 09, 2003 2:19 PM
To: Rove, Karl C.; Ralston, Susan B.
Subject: FW: excerpts

Karl -- The AP may be doing a story about what they are referring to as White House Congressional allies who are seeking to sharply limit the fees of lawyers who sue tobacco companies (through legislation by Kyl and Cornyn to place an excise tax on excessive fees) and who are big sources of funding for the democrat party.

The reporter is not sure if this is going to run, but he said they will need to answer the question "what role did karl rove have in tort reform in texas?" he is asking which version is correct -- your trial testimony or the one from slater's book.

REV_00265647

Have you responded to this previously? This article is going to bed at the close of business today. He said he would just reference both if I did not have any additional feedback.

-----Original Message-----
From: Pete Yost [mailto:pyost@ap.org]
Sent: Friday, May 09, 2003 2:11 PM
To: McClellan, Scott
Subject: excerpts

Scott,
below are excerpts from wayne slater's book and from karl rove's 1997 deposition in the tobacco litigation. the picture rove gives in the book is that he persuaded bush to put tort reform on the agenda. in his testimony in the lawsuit, the picture rove gives is different. he says tort reform "was not my area" and that "I can't say that I did" discuss tort reform with Bush and "I can't say that I didn't. I do not recall." which version is correct?

slater's book:
"The two issues, education and juvenile justice, were on the agenda list. And they were on the people's agenda list," said Rove. "Now welfare, was not, the idea of the compassionate conservative, faith-based institutions _ that was not on their radar scope in a public way, but it was on Bush's. This idea of culture change was really the dominant driving influence here, the idea that we had to change the culture from one that said: 'If it feels good, do it. If you have a problem, blame it on somebody else.' So he chose welfare reform because he said we're not just about educating every child and locking up the bad actors. There's a caring side of this that is aimed at changing the culture.
"Later, we added tort reform. I sort of talked him into that one."

1997 deposition:
Rove: the governor had a very specific tort reform package that he laid out in the 1994 campaign that he largely enacted in 1995.
q. and you were involved and participated in discussions with him regarding tort reform?
rove. I can't say that I did, but i can't say that i didn't. i do not recall. i know that the tort reform was a significant part of his legislative agenda, but, as i say, it was not my area.

REV_00265648

5/26/07

Submitted to Claire Buchan on 5/21 at 6:00p

Key Columnists

George Will Rove
Mort Zuckerman -- Rove
Paul Gigot -- Daniels
Kate O'Beirne -- Daniels
Bill Kristol -- Daniels
Bob Novak --- Rove
Fred Barnes -- Daniels
Bob Samuelson (won't write but will pay tax-free dividends later perhaps)
Charles Krauthammer -Pete Wehner
Rich Lowry, Ramesh Ponuru (National Review online) Rove

Mort Kondracke Rove
David Broder -- ~~Rove~~ not Rove
EJ Dionne Rove if absolutely needed

Key Reporters

Jeanne Cummings – WSJ
Dick Stevenson - NYT
Mike Allen – WP

Likely Sources for Reporters

Grover Norquist Rove
Paul Weyrich Rove
Robert Bixby
Warren Rudman Rove if needed
Phil Gramm Rove
Jack Danforth Rove
Steven Moore

THE WHITE HOUSE
WASHINGTON

Date: April 8

To: Susan

From: **Strategic Initiatives** Pete

____ FYI
____ Appropriate Action
____ Direct Response
____ Prepare Response For My Signature
____ Per Our Conversation
____ Let's Discuss
__X__ Per Your Request
____ Please Return
____ Deadline
____ Other

Comments: Bill, Neil + el looked but couldn't find that Karl ever said anything close to this.
-Rebekah

THE WHITE HOUSE
WASHINGTON

Date: 3/31/03

To: Pete

From: **Strategic Initiatives** Susan

____ FYI
____ Appropriate Action
____ Direct Response
____ Prepare Response For My Signature
____ Per Our Conversation
____ Let's Discuss
____ Per Your Request
__X__ Please Return
____ Deadline
__X__ Other Research

Comments: Can you have someone find this quote?

REV_00265652

"Conservatives are just another special interest group."

-Karl Rove, Bush White House, 2002

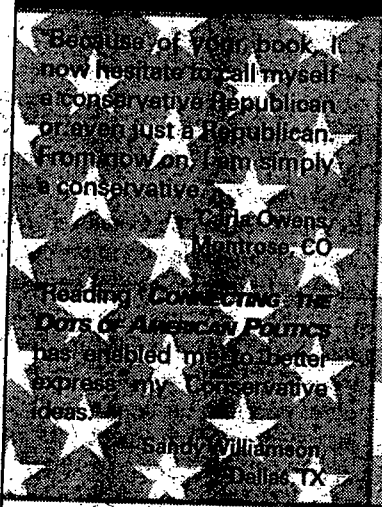

"Because of your book, I now hesitate to call myself a conservative Republican or even just a Republican. From now on, I am simply a conservative."

– Dale Owens
Montrose, CO

"Reading *Connecting the Dots of American Politics* has enabled me to better express my Conservative ideals."

– Sandy Williamson
Dallas, TX

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REV_00265653

536027

THE WHITE HOUSE
WASHINGTON

Date: 4/14/03

To: ~~Ashley~~ Estes

From: **Strategic Initiatives** Susan

____ FYI
__X__ Appropriate Action
____ Direct Response
____ Prepare Response For My Signature
____ Per Our Conversation
____ Let's Discuss
____ Per Your Request
____ Please Return
____ Deadline
____ Other

Comments: _____

FILE

REV_00265654

Cheryl F. Halpern

PRA 6

April 4, 2003

Dear Karl,

It was good to see you, if only fleetingly, the other day at the White House. I hope that you and Jay had a good work out.

I want to take this opportunity to share with you my heartfelt appreciation for the manner in which the President has been leading our country. Enclosed please find my letter to the President, which expresses my admiration. I apologize for sending this to you at home. It is my understanding that given security considerations mail sent directly to the White House would not be seen by either you or the President for some time, if at all. I hope that you will pass my letter to the President.

Many thanks!

As always,

Cheryl

Cheryl F. Halpern

PRA 6

April 4, 2003

President George W. Bush
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Dear President Bush,

I have started writing a letter to you on several occasions but time and again I have found myself at a loss for words to adequately express my gratitude for the compassion, morality and courage with which you lead our nation.

As President you have had to address issues unlike those faced by any other American leader. The tragedy of 9/11 has forever changed the way Americans live. Your decision to go to war against terrorism was a courageous act that was necessary in order to preserve our values and way of life. Similarly the decision to go to war against the brutal regime of Saddam Hussein was a moral and compassionate act.

The experiences of the Iraqi people, especially Iraqi women, are unfortunately reminiscent of the atrocities perpetrated by the Nazis. Although the number of people killed is not as large as those lost in the Holocaust, the public beheadings, the ethnic cleansing, the campaign of terror, torture and rape that has been vigorously pursued by Saddam Hussein is certainly as brutal and horrific. Thanks to your clarity of vision the sins of silence and appeasement that occurred at the time of the Nazi perpetration of crimes against humanity will no longer be repeated with this Iraqi regime.

My family represents a Jewish legacy of both rabbinic scholars and Holocaust survivors. Our way of life is predicated on the teachings of faith and the memories of ever reoccurring anti-Semitism. The manner in which you have chosen to prioritize the war on terrorism and the liberation of Iraq personifies so many of the lessons that the Jewish people have learned through time as well as our religious beliefs. Maimonides, the codifier of Jewish law, taught, "One does not wage war, whether profane or holy, before one offers peace, as it is written (Deuteronomy 20:10) –When you draw near to a city to wage war against it, you shall call out to it for peace." Your deliberation before committing American troops and your repeated appeal to Saddam Hussein to leave his country and avoid war is consistent with this Jewish perspective.

Cheryl F. Halpern

PRA 6

Mr. President, you and I walked together down the path of the righteous at Yad Vashem when we visited Israel together in 1998. Today you have raised America to be "righteous among the nations" with the commitment of our armed forces to save the lives of the oppressed Iraqi people. It is a privilege to be able to say that I know you. I pray that the Almighty will bless you and our country and that we will all go on, "from strength to strength."

With admiration and affection,

Cheryl

P.S. My best regards to the First Lady!

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Property Solutions Worldwide

Grubb & Ellis Company
600 Six PPG Place
Pittsburgh, PA 15222

To/ Alicia Davis-

Need to get a Thankyou
letter to the Chairman.

Love

~~Mr. Carl Rove~~

REV_00265659

RCAC
REPUBLICAN COMMITTEE
OF ALLEGHENY COUNTY

125 Seventh Street, Suite 626
Pittsburgh, PA 15222-3410
Ph: 412-281-9748 Fx: 412-471-3271
www.rcac.net

Resolution

Supporting President Bush's call for tax cuts and expressing dissatisfaction with the nations of Russia, France, Germany and China.

WHEREAS, the Republican Committee of Allegheny County Operating Committee was assembled with a quorum present at the March 27, 2003 monthly meeting.

WHEREAS, those assembled recognizing the tax burden on the American people passed a resolution supporting the tax cuts being advocated by President George Bush.

WHEREAS, recognizing that tax cuts are a national issue and that tax relief would stimulate our economy.

WHEREAS, those assembled feel that the countries of France, Germany, Russia, and China and others who worked against the United States in their efforts to get United Nations support for the War in Iraq should not be rewarded with any tax dollars or financial aid from the United States.

NOW THEREFORE, IT IS MOVED, AND IT IS THE SENSE OF THE OPERATING COMMITTEE OF THE REPUBLICAN COMMITTEE OF ALLEGHENY COUNTY,

That this body does hereby support President Bush's tax cut proposal and does support withholding financial support to the above mentioned countries.

April 2, 2003 **2003. Read and Approved.**

Richard J. Stampahar
Richard J. Stampahar
Chairman

Attest: Robert A Dell II

REV_00265661

536027

THE WHITE HOUSE

WASHINGTON

Date: 4/14/03

To: ~~Steve~~ Hadley, ~~Dave~~ Bartlett, ~~Tucker~~ Eskew

From: Strategic Initiatives Karl

X FYI

____ Appropriate Action

____ Direct Response

____ Prepare Response For My Signature

____ Per Our Conversation

____ Let's Discuss

____ Per Your Request

____ Please Return

____ Deadline

____ Other

Comments: _____

FILE

From: Kenneth Y. Tomlinson
To: Karl Rove
Subj: Broadcasting to Baghdad/Iraq
1 April '03

Radio

BBG's Radio Sawa gives Iraqi listeners straightforward reporting about the war, humanitarian information, and clear, persuasive explanations of current US policy. We can also rely on the daily broadcasts of Radio Free Europe/Radio Liberty's Radio Free Iraq.

Radio Sawa now broadcasts to Iraq on medium wave and three simultaneous shortwave frequencies, 24 hours a day. Although shortwave reaches the target audience during all hours of the day, the far more popular medium wave signal only covers Baghdad at night.

The only option to improve medium wave and add FM transmission (which is a highly popular medium in the capital) is DoD's COMMANDO SOLO platforms that DoD is currently using exclusively. According to our most up to date information there are at least four such platforms in theater. BBG is accustomed to work with COMMANDO SOLO having done so in Kosovo and in Afghanistan.

COMMANDO SOLO would greatly improve our ability to reach the 5+ million population in and immediately surrounding Baghdad around the clock.

BBG is prepared to implement a decision to dedicate COMMANDO SOLO medium wave and FM assets to this mission immediately.

Attached is a map and technical details of known terrestrial transmission sites in Iraq. If they were to become available and secure, we are also prepared immediately to provide round-the-clock Radio Sawa programming. The signals from these ground-based assets would be stronger and more cost-effective than those relayed through airborne platforms.

Television

The anti-American images that the Iraqi television audience sees today must be countered by factual, objective information. Although the timetable for BBG's Arabic television service is half a year away from its initial broadcast, we must move now. Using clips and segments from US broadcasters, BBG proposes within a week to start providing four hours of daily television programming *specifically* for the Iraqi audience with a focus on Baghdad. The suspicion of Iraqis that the US may not free them from the tyrant keeps them quiet. They are afraid of Saddam, and they are afraid of having to pay with their lives for any expression of relief or joy at the possibility of liberation.

The television broadcasts discussed below will address this fear. With sufficient additional resources including also COMMANDER SOLO TV broadcasting facilities we would produce for distribution with simultaneous translation where necessary shows that:

- start building the concrete seeds of hope that can sustain the Iraqi people while the bombs are falling around them. We can give them HOPE;
- interview Iraqis in exile who are not afraid to speak out about the horrors they have suffered under Saddam, and who are leading far better lives in the West than they did under the Iraqi dictator;
- demonstrate how Iraqis living in parts of the country that have already been liberated are enjoying better lives and new freedom;
- look in detail at how well American troops are treating Iraqis in the liberated areas;
- look at possible new leaders of Iraq and their visions for a better future;
- examine how individuals control their destinies in democracies, and what life in Iraq could look like under elected leadership;
- counter hostile-to-the-US propaganda to separate truth from lies giving historical context of wars that are known in the Middle East—like the invasion of Kuwait and the Iraq-Iran war;
- offer health segments that deal with wartime issues like malnutrition, water shortages, refugee issues, and preparations for chemical or biological attacks;
- cover the news to include White House, Pentagon, CENTCOM, and State department briefings;

Broadcast Transmission Sites in Iraq

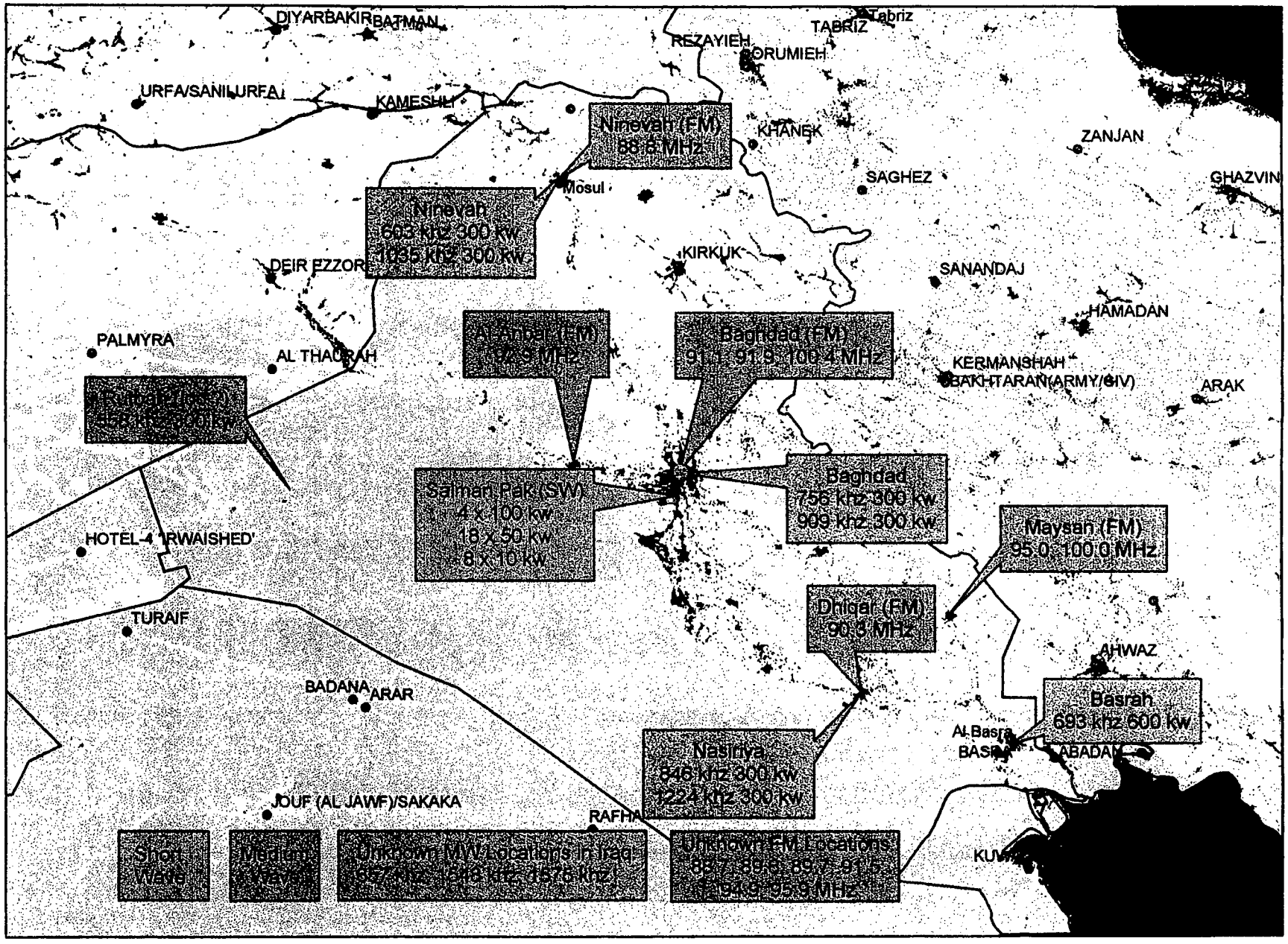

IBB Engineering - Jan. 16, 2003

0 87.5 175 350 525 700 Miles

REV_00265665

536027

F: Steel

THE WHITE HOUSE
WASHINGTON

Office of Political Affairs
Coddy Johnson
Associate Director

w. 202-456-5390
c. 202-309-1361

To:	Brett Kavanaugh
CC:	Karl Rove, Susan Ralston, Matt Schlapp
Date:	5/21/03
Re:	Response to John Walker Letter

Brett –

Per your recommendation, Please find enclosed a copy of the letter I sent to John Walker in response to his letter dated May 12.



ay

THE WHITE HOUSE

WASHINGTON

Office of Political Affairs
Coddy Johnson
Associate Director

w. 202-456-5390
c. 202-309-1361

To: Karl Rove
Cc: Matt Schlapp
Date: 5/26/03
Re: Weirton Steel Bankruptcy

Karl -

As discussed, Weirton Steel filed on May 19th for Chapter 11 bankruptcy citing increased legacy costs, industry consolidation, and illegal foreign dumping as reasons for the decision. Weirton has devised a two part plan to address the situation:

1) Weirton will use the protection of bankruptcy to shed much of their outstanding legacy costs of $760 million. It is unclear at this time whether the Pension Benefit Guarantee Corporation (PBGC) will step in to help, but PBGC Director Steve Kandarian is considering possible options.
2) Weirton will also file for a loan from the Emergency Steel Loan Guarantee Board (ESLGB), likely for the $250 million maximum limit, similar to what was granted to Wheeling-Pitt on March 27.

In the meantime, the company has received a $255 million credit line from Fleet Capital Corporation. Their long-term viability will depend heavily on the results of the ESLGB process.

Thanks,

REV_00265670

536027

THE WHITE HOUSE

WASHINGTON

Date: 4/14/03

To: ~~Lefkowitz~~

From: Strategic Initiatives Karl

____ FYI

____ Appropriate Action

____ Direct Response

____ Prepare Response For My Signature

____ Per Our Conversation

____ Let's Discuss

____ Per Your Request

____ Please Return

____ Deadline

✓ Other

Comments: can we talk about whether these talking points are adequate?

FILE

REV_00265673

Global Health

The "ABCs" of HIV Prevention

AIDS - Still a Growing Problem

The AIDS pandemic continues to claim millions of lives, particularly in high prevalence regions such as southern Africa. UNAIDS data also indicates disturbing signs of rapidly increasing HIV prevalence, mainly related to injecting drug use, in eastern Europe and in parts of central and southeast Asia, and southern South America. These continuing trends underscore the pivotal role of preventing HIV transmission through fundamental changes in behavior among youth and adults. Ultimately, the most effective way to reduce the numbers of sick and dying persons, infants at risk of infection, and orphans is to reduce the number of infected adults in the first place.

Condoms have been an important and successful intervention in many regions, particularly when targeted at commercial and casual sexual encounters. Reported condom use among female sex workers is now close to 100 percent in such countries as Thailand, the Dominican Republic, Cambodia, Senegal, and Uganda. However, condom use within marriage and other regular relationships remains low in nearly all regions, including the most severely affected African countries. According to Demographic and Health Surveys (DHS), "ever use" of condoms in Uganda was 23 percent in 2000 (up from 10 percent in 1995), 28 percent in Zambia in 1996, and 34 percent in 1999 in Zimbabwe (down from 36 percent in 1994). It is thus unlikely that condoms alone will significantly reduce HIV prevalence in generalized, mainly heterosexual epidemics. Botswana, for example, has the highest per-capita condom availability in Africa, yet adult HIV prevalence continues to increase (38 percent in 2001).

The "ABC" Message: Abstain, Be Faithful, or Use a Condom

Recent epidemiological and behavioral data from Uganda and other countries where HIV prevalence has been reduced or stabilized suggest that an "ABC"-based approach can alter patterns of personal behavior

In the Spotlight
▸ President Bush Announces Emergency Plan for AIDS Relief
▸ USAID Announces New Initiative to Fight HIV/AIDS
▸ Faith and Community-Based Organizations
▸ USAID HIV/AIDS March E-Newsletter

through a fundamental modification of community norms and rules of behavior. Successful prevention programs in places like Uganda, Senegal, and Jamaica have employed a multi-pronged approach to behavior change, involving promotion of abstinence or delayed onset of sexual debut and fidelity/partner reduction, along with condom use especially for higher risk sexual encounters. By finding common ground among diverse political, religious, public health, and other constituencies, such an approach can facilitate a more concerted and unified prevention effort. In Uganda, for example, the participation of faith-based groups, youth, women, and other grassroots sectors, combined with clear, forceful government leadership and donor (including USAID) support, resulted in broad community mobilization in support of delayed sexual onset, reductions in casual partnerships, and increases in condom use for commercial sex and other high-risk encounters.

In 1995, about 10 percent of Ugandan respondents reported having a casual sexual partner, down from almost 30 percent in 1989. This major decline in casual sex resembles a similarly large reduction in HIV prevalence, from 15 to 5 percent between 1991 and 2001. In Lusaka, Zambia, there have also been encouraging signs of HIV decline among youth, primarily linked to a large reduction in the number of non-regular sex partners. Outside of Africa, prevalence appears to have declined in the Dominican Republic, for example, mainly due to reduction in sex partners and high levels of condom use for commercial and other casual sex.

USAID's Position on "ABC"

USAID believes that where there are generalized epidemics, a fully balanced approach to the ABC's - abstinence, being faithful, and condoms - should be implemented. USAID is encouraging its missions to support the development of HIV/AIDS communication strategies that involve input from a broad-based constituency of local stakeholders. The agency has developed new indicators for monitoring and evaluating of HIV prevention programs consistent with an ABC framework, to include median age of sexual debut, percentage of people reporting multiple partners, and condom use with non-regular partners, which reflect these adjustments.

As the fight against AIDS increasingly expands into care and support, prevention of mother-to-child transmission, voluntary counseling and testing, orphans and vulnerable children, and the development of vaccines and microbicides, effective behavior change components must be fully integrated.

January 2003

REV_00265677

Have a question or comment about USAID or the USAID website?
Visit our contact page to find the appropriate resource.

5J6027

THE WHITE HOUSE

WASHINGTON

Date: 4/14

To: ~~BEN MEHLMAN~~ KARL

From: Strategic Initiatives

X FYI

____ Appropriate Action

____ Direct Response

____ Prepare Response For My Signature

____ Per Our Conversation

____ Let's Discuss

____ Per Your Request

____ Please Return

____ Deadline

____ Other

Comments: _____

FILE



REV_00265679

Ralston, Susan B.

From: Rove, Karl C.
Sent: Wednesday, April 09, 2003 8:10 AM
To: Mehlman, Ken; Ralston, Susan B.
Subject: FW: Houston Mayor's Race

-----Original Message-----
From: Chris Wilson [mailto:cwilson@w-r-s.com]
Sent: Tuesday, April 08, 2003 7:26 PM
To: Rove, Karl C.
Subject: Houston Mayor's Race

Karl,
Thought you might find the attached memo on the Houston Mayor's race interesting. It's from a poll I did for Michael Berry, a candidate for Mayor.
Best regards,
Chris

Chris Wilson
WRS
Global Perspective. Innovative Research. Superior Results.
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McLean, VA 22102
703.744.7990 – main
202.318.3067 – fax

www.w-r-s.com

12 April 2003

Susan - update data base on your computer and mine.

Then send to Ken.

Ken -
Have never seen a more contorted explanation of why a loser guy in 4th place with less than 1/5th the vote of the frontrunner and all of 6% is the inevitable winner!
Karl

Global Perspective.
Innovative Research.
Superior Results.

RESEARCH FINDINGS

TO: BERRY FOR MAYOR TEAM

FROM: CHRIS WILSON, CEO

SUBJECT: RECENT POLLING NUMBERS

DATE: THURSDAY, APRIL 03, 2003

The Current Race for Mayor: Sanchez cannot win

At present, the race for Mayor of Houston is nothing more than a contest in name identification. The bottom line is that those candidates who are better known (e.g., Orlando Sanchez due to his previous race, Sylvester Turner due to his years in the state house, and now to a lesser degree Bill White thanks to his $500,000 expenditure on media) have an artificial lead in the polls simply due to their name identification.

Our recent numbers show Sanchez in the lead with 32% of the vote, followed by Turner (21%), White (8%) and Berry (6%). However, any poll that is published now does not reflect support for a candidacy, per se, but rather indicates that voters recognize the name of that candidate. Of course, by November it is likely that all of the candidates will have equal name identification, and voters will actually have factors on which to decide which candidate to support. Most importantly, more than one in four voters (28%) is undecided.

Understanding current numbers are nothing more than a reflection of name identification, these recent polling numbers say that Orlando Sanchez will NOT be the next Mayor of Houston. As a researcher who has seen literally thousands of political opinion surveys, it is clear that Sanchez cannot win.

To explain, Orlando Sanchez has a soft name ID of 95% and a hard name ID of 77%, yet he only receives 32% of the vote. This is what is known as a "still-birth" candidacy. Sanchez has effectively peaked and has nowhere to go but down. His anemic numbers show that without completely redefining himself (which is all but impossible when a candidate already has universal name ID), Sanchez cannot win this election.

Voters are already looking for another option.

Voters are looking for another choice: Berry is that choice

Conversely, Michael Berry is very well positioned to win. This early in the campaign he is not expected to have high name ID (again, that's all a survey at this point amounts to—a name ID poll), yet he is very popular with voters who know him (unlike Sanchez or Turner) and is the most popular second choice with all voters.

The fact that Berry is already the number one second choice shows that as his name ID increases, his portion of the vote will increase exponentially.

This is far more important, in my view, than having universal name ID in March and points to a surge in support once voters become more familiar with his candidacy.

Who would be your second choice?

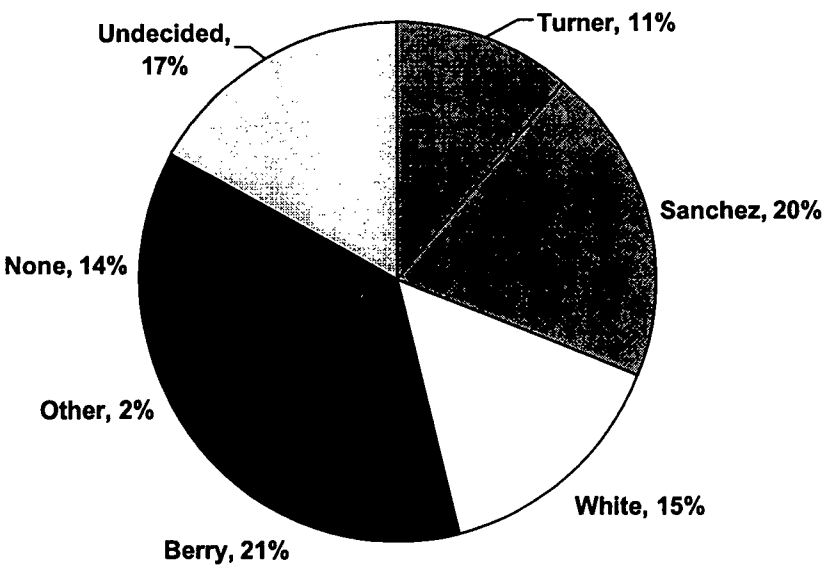

8484 Westpark Drive, Suite 800 • McLean, VA 22102
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Informed Ballot: Berry in dead heat for lead

To fully understand the underlying support for Berry, consider the following data: after being given more information regarding the background and positions of Councilman Michael Berry, respondents were asked what is commonly referred to as an "informed ballot". After learning this new information about Berry, both positive and negative, and simply the type of information they could be expected to hear over the course of a campaign for Mayor, Berry moves into a dead heat for the lead with Sanchez– 22% to 23%.

If you knew all the information you just heard were true, for whom would you vote if the election were held today?

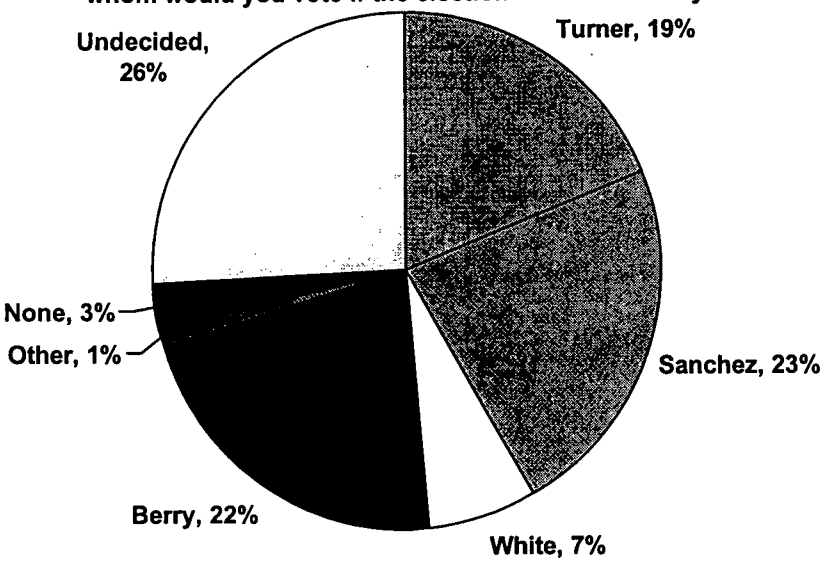

Further, the fact that Berry surges from 6% to 22% illustrates the type of growth potential necessary to win a race of this kind. Berry is the only candidate with the ability to hold a base of Republicans and pick up enough Democrats and Independents to win.

Conclusion: Berry is the only candidate who can beat Sylvester Turner

Most political experts recognize that it is likely that Sylvester Turner will make the Mayoral runoff election due to his natural base of support from Democrats, voters in his district and African American voters city-wide–I would concur with that supposition based on this data and historical trends in Houston.

What these numbers show is that Michael Berry is the only candidate who can beat Sylvester Turner. If either Orlando Sanchez or Bill White makes the runoff with Turner, Turner will be the next Mayor. Again, Michael Berry is the only candidate who can draw support across party lines and across the city.

I understand that some candidates have released data that purport to show support for their candidacy. The fact is, these findings and the manner in which we have interpreted the data are far more indicative of what will occur in November than any name ID poll released today.

As always, please feel free to contact me with any questions.

Statement of Methodology: These findings are based on an n= 540 sample of likely voters in Houston conducted February 8th – 11th, 2003. A study of this size has a margin of error of +/-4.3% at the 95% Confidence Interval.

REV_00265682

THE WHITE HOUSE
WASHINGTON

Date: 4/14

To: ~~DOUG BADGER~~ KEITH HENNESSEY

From: Strategic Initiatives KARL

X FYI
___ Appropriate Action
___ Direct Response
___ Prepare Response For My Signature
___ Per Our Conversation
___ Let's Discuss
___ Per Your Request
___ Please Return
___ Deadline
___ Other

Comments: _____

THE WHITE HOUSE 536027
WASHINGTON

Date: 4/14

To: ~~KEITH HENNESSEY~~ DOUG BADGER

From: Strategic Initiatives KARL

X FYI
___ Appropriate Action
___ Direct Response
___ Prepare Response For My Signature
___ Per Our Conversation
___ Let's Discuss
___ Per Your Request
___ Please Return
___ Deadline
___ Other

Comments: _____

THE WHITE HOUSE
WASHINGTON

Date: 4/14 FILE

To: BARRY

From: Strategic Initiatives KARL

X FYI
___ Appropriate Action
___ Direct Response
___ Prepare Response For My Signature
___ Per Our Conversation
___ Let's Discuss
___ Per Your Request
___ Please Return
___ Deadline
___ Other

REV_00265683

AC: Barry Badger Hennessey



SEAN KELLY

MEDICARE | The **PRESIDENT'S REFORM PLAN** would give beneficiaries three choices. *By Mary Beth Franklin*

PICK YOUR PLAN

OLDER Americans who are struggling to pay the ever-increasing cost of prescription drugs may get some relief. President Bush's proposed overhaul of medicare would offer *all* participants some help paying for their medicine. But the richest benefits would be reserved for those who agree to switch from traditional medicare to new private plans.

The President's package is merely a rough outline, but congressional leaders are optimistic that they can craft a medicare reform bill by Labor Day. Although most lawmakers, industry groups and consumer advocates agree that some kind of drug benefit is needed, the devil is in the details. At this point, it's a bit like playing *Let's Make a Deal*: Is the prize hidden behind door number one, two or three?

The choices. The President's proposal would devote an extra $400 billion to medicare over the next ten years and offer seniors three options.

Seniors could stick with the traditional program that permits free choice of doctors and is used by more than 85% of today's 40 million participants. Here, the new drug benefit would include a discount card that could cut costs by 10% to 25% and offer added protection against drug costs above a yet-to-be-determined annual limit. People who choose this route would continue to need supplemental insurance to fill in the gaps in coverage.

Choice number two would be an HMO with comprehensive benefits (including some prescription-drug coverage) but a limited choice of doctors. This lowest-cost option would be similar to the medicare HMOs used by about five million seniors today.

Alternatively, beneficiaries could sign up for a new "enhanced medicare." Referred to as a PPO, this plan is modeled after the preferred-provider organizations used by most working Americans as well as an ongoing medicare pilot project (see "New Prescription," Nov.). A PPO offers the best deal if you use its participating doctors, but allows you to seek out-of-network care at a higher cost. The enhanced plan would also offer comprehensive drug coverage and preventive care not available under traditional medicare, and would eliminate the need for medigap insurance.

The debate. Consumer advocate Ron Pollack, of Families USA, calls the PPO proposal a cruel trade-off for seniors. "It forces them to choose between the doctors they trust and the medicines they need," Pollack says. Congressional Democrats proposed a prescription-drug benefit that would be added to the existing medicare program. But opponents say it is too expensive and does not address the need to update the 38-year-old program and institute cost-saving reforms before the 77 million baby-boomers retire.

AARP associate director Chris Hansen sees President Bush's proposal as a "positive step," particularly his desire to issue the drug-discount card as soon as possible, even if more dramatic program reforms take years to implement. "We are getting deluged with calls from people who need help yesterday," Hansen said.

One of the biggest challenges is to design a medicare drug benefit that works in conjunction with retiree health benefits from private employers. "Companies want a wraparound plan that offers some added value to their retirees," notes James Klein, president of the American Benefits Council. Some observers worry that if medicare offers drug coverage, employers may drop this costly retiree health benefit. K

—*Reporter:* MATT POPOWSKY

REV_00265684

536027

THE WHITE HOUSE

WASHINGTON

Date: 4/14

To: ~~KEITH HENNESSEY~~ KARL

From: **Strategic Initiatives**

X FYI

____ Appropriate Action

____ Direct Response

____ Prepare Response For My Signature

____ Per Our Conversation

____ Let's Discuss

____ Per Your Request

____ Please Return

____ Deadline

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Comments: _____

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FILE

REV_00265685

xc: Keith H.

ME? A DEFICIT HAWK?

AFRAID OF the big, bad budget deficit? Not I. Mind you, I'm not complacent about it, but neither am I going to lose any sleep over the rising tide of red ink that is bubbling up in Washington. And I hate to see the budget deficit becoming, once again, a political football in an increasingly bitter partisan debate.

Yes, the federal budget deficit is on the rise again, after falling to zero—with even a year or two of surplus—during the robust-revenue years of the late 1990s and the first year or so of this new millennium. The reasons are pretty simple: A three-year bear market has slashed capital-gains tax receipts, and anemic business profits have trimmed corporate income-tax revenues. Personal income-tax receipts aren't so hot, either.

Red-ink equation. Meanwhile, federal spending continues to rise on everything from social security to homeland security, from defense to farm subsidies, from medicare to roads.

It's that simple: Sagging revenues and rising spending mean more red ink.

The tax cuts passed by Congress in 2001 haven't been a big factor in the rising budget deficit so far, because they are being phased in gradually over the next few years. But Democrats are blaming the tax cuts anyway—despite the fact that many Democrats in Congress voted for them and aren't calling for their repeal.

It's useful to keep in mind that federal budget deficits have been a bipartisan way of life in Washington for over a half-century, with surpluses a rarity—just a half-dozen or so since 1953. The magnitude of the deficit is usually a function of how the economy is doing. Deficits tend to contract in good times and swell during and shortly after recessions, when tax receipts fall but government spending grows to fight the slump.

CHRISTOPHER ROBBINS

Columnist Knight Kiplinger is editor in chief of this magazine and of The Kiplinger Letter *and* Kiplinger.com.



KNIGHT KIPLINGER

At the levels now likely, the red ink that is bubbling up in Washington won't be a drag on the economy.

Measured as a share of the country's annual economic output, the largest budget deficit since World War II occurred in 1983, right after the severe recession of 1981–82. That year the deficit topped 6% of gross domestic product (GDP). During times of moderate economic growth over the past 30 years, deficits typically ran 2% to 3% of GDP, and the budget deficit was, appropriately, a nonissue with most voters.

John Maynard Keynes, the father of deficit spending, would have approved. He said it was okay for government to run an occasional deficit to stimulate a weak economy and make up for impaired spending in the private sector. But Lord Keynes also insisted that in boom times, government should run a surplus, or at most a very small deficit—an admonition that members of both political parties conveniently overlook.

Republicans used to rail against all deficits, but most have embraced the mainstream economists' view that deficits that constitute a modest share of GDP (say, 3%) are not risky to the nation's health. Democrats, who controlled Congress during most of the 28 years of continuous deficits between 1969 and 1998, used to excuse deficits as no big deal. Now, no longer in the congressional majority, they find political advantage in becoming born-again balanced-budget hawks.

Over the next fiscal year or two, the U.S. budget deficit will probably expand to some $300 billion, due to continued sluggishness in tax receipts (corporate and personal income, as well as capital gains), federal-spending increases of almost 10% a year, the cost of military operations and phasing in of the 2001 tax cuts.

I am assuming that Congress will enact just a few of President Bush's requested new tax cuts—most for low- and

middle-income taxpayers and for small businesses—but won't abolish taxation of dividends, make the estate-tax repeal permanent or accelerate the 2001 rate cuts for high-income taxpayers. Given their modest size, the new tax cuts won't be a big factor in boosting budget deficits anytime soon.

If the deficit does hit $300 billion a year, it will undoubtedly be misrepresented—by politicians and financial journalists who should know better—as the biggest ever. But it won't be even close to a record shortfall. It will be less than 3% of today's $10.5 *trillion* economy, a manageable share that will be half the record level of 1983. And that's why I am not going to lose sleep over it.

Significantly, the U.S. economy grew its way out of big deficits twice before, with strong economic growth in the second half of both the '80s and the '90s, as the supply-side tax-cutters predicted it would. Will this happen again in the second half of the current decade? It certainly *could,* if economic vitality picks up, if tax receipts rise accordingly and if Congress shows some discipline on the spending side.

The first two "ifs"—faster economic growth and higher tax receipts—are definitely in the cards, as capital spending by business picks up, companies begin hiring again, and profits reemerge from a brutal reduction of overcapacity.

But the last "if"—spending restraint by Congress—will be harder to achieve. An aging population will send medicare costs soaring in the years ahead, even without the likely addition of some sort of prescription-drug benefit. And there is no reason to believe that military spending will decline much in a more dangerous world.

What needs watching. So deficits are back. But for most of the past 50 years, they didn't impede a steadily rising standard of living for all Americans, and they're nothing to get alarmed about now. Their share of annual GDP, however, *does* bear close watching.

Deficits do matter because the annual shortfall has to be borrowed, mostly from American citizens and companies, but also from foreign lenders. So deficits put mild upward pressure on U.S. interest rates. And the interest on those government bonds consumes a significant share of Uncle Sam's tax revenue every year—currently it takes about 18%. That's money that could be spent instead to fill today's and tomorrow's social needs. **K**



REV_00265687

THE WHITE HOUSE 536027
WASHINGTON

Date: 4/14/03

To: Ruben

From: Strategic Initiatives Susan

X FYI
___ Appropriate Action
___ Direct Response
___ Prepare Response For My Signature
___ Per Our Conversation
___ Let's Discuss
___ Per Your Request
___ Please Return
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___ Other

FILE

Comments: _____

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REV_00265688

Board of Supervisors
County of Los Angeles

MICHAEL D. ANTONOVICH
SUPERVISOR

April 2, 2003

Mr. Karl Rove
Senior Advisor to the President
The White House
Washington, DC 20500

Dear Mr. Rove:

Unlike the Los Angeles City Council -- one of our 88 cities voting not to support your foreign policy -- the Los Angeles County Board of Supervisors, representing the County's 10 million citizens, 88 cities and 134 unincorporated communities, unanimously passed my resolution supporting President Bush, the Commander in Chief, and our Armed Forces in the administration's efforts to liberate Iráq and protect our national security.

Best regards and God bless.

Sincerely,

Michael D. Antonovich
Los Angeles County Supervisor

MDA:aab

ROOM 869 KENNETH HAHN HALL OF ADMINISTRATION, 500 WEST TEMPLE STREET, LOS ANGELES, CALIFORNIA 90012
TELEPHONE (213) 974-5555 • FAX (213) 974-1010 • WEBSITE http://antonovich.co.la.ca.us/

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F; ASIAN Outreach
FILIPINOS

536027

3/3/03
J. Tafoya

FOR IMMEDIATE RELEASE

Contacts: Perry Diaz, 916/691-6642, FAX 916/691-6643,
Perrydiaz@aol.com

Judy Tafoya, 916/6829718, FAX 916/682-7960,
Jtafoya7344@yahoo.com

FILIPINO-AMERICANS UNITE TO SUPPORT BUSH IN 2004

Sacramento, CA – 'Fil-Ams for Bush 2004' was recently formed to unite Americans of Filipino heritage in support of the re-election of President George W. Bush.

On February 17, Presidents' Day, the national effort was announced by Perry Diaz--a recognized Filipino-American political leader and organizer residing near Sacramento, California--national coordinator of the non-partisan 'Fil-Ams for Bush 2004.' Diaz is a Republican stalwart who approximately 60 days ago spearheaded the National Movement of Filipino-American Republicans; it already includes affiliated organizations from 13 states and the District of Columbia.

He explained the rationale for a Filipino-American, non-partisan campaign by saying, "...while it may be that Democrats currently outnumber Republicans, we're finding more and more that we are able to demonstrate that Filipinos are more closely-aligned with the Republican Party's beliefs." He goes on to say, "Preserving the traditional family, individual hard work, self-determination and personal opportunities, sacrifices made for their children's higher education, the entrepreneurial spirit and sometimes just a small business on the side in addition to their regular jobs, and so much more are common traits among Filipino-Americans. These are the things they do and how they live. And, when it is finally put to them whether they truly believe that they are incapable of accomplishing these things on their own, but that government must step in and be their caretaker, Filipino-Americans begin to understand the difference and to realize their comfort zone is with the Republican Party."

"Then, if you take it to the next step," adds Judy Tafoya, Executive Director of NMFAR, "and point out the threatened traditional family

(more)

structure, the taxpayers' tremendous burdens, the job-busting over-regulation of small business and escalating costs, the shenanigans to block qualified nominees and so much more, it doesn't take long to figure out that maybe it's time for a change, The party to the left which purports to be the champion of the people really isn't."

'Fil-Ams for Bush 2004' intends to form a Fil-Am PAC, harvest votes and raise funds in support of President Bush's re-election. A dedicated web site will be up and running in April, 2003. In the mean time, support is fast building via NMFAR's network and is gaining momentum with Fil-Am individuals and organizations representing businesses, professionals, and various community interests. Leaders in Arkansas, California, Colorado, the District of Columbia, Florida, Hawaii, Maryland, Michigan, Nevada, New York, Pennsylvania, Rhode Island, Texas and Virginia are already solidly aligned with 'Fil-Ams for Bush 2004.'

For more information about 'Fil-Ams for Bush 2004,' or the National Movement of Filipino-American Republicans (NMFAR), call Perry Diaz Toll Free at 800/905-0240, 916/691-6642, FAX 916/692-6643, FILAMGOP-Movement@yahoogroups.com; or, P.O. Box 231841, Sacramento, CA 95823.

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NATIONAL MOVEMENT OF FILIPINO-AMERICAN REPUBLICANS

Vision Statement:

To empower the Filipino-American community through involvement in the American political process.

Mission Statement:

To provide the leadership and resources to build the structure of a National Federation of Filipino-American Republican grassroots organizations to be established at the regional, state, and local levels for the purpose of developing and supporting Filipino-American Republican candidates at every level of government and for supporting Republican candidates to get elected to positions and offices vital to the interests of the Filipino-American community.

Goals:

A. **Advocate for the passage of the Filipino Veterans Equity bills in 2003.**
B. **Organize the Filipino-Americans for Bush by March 2003.**
C. **Establish FILAMGOP PAC to raise funds for Filipino-American Republican candidates by Spring of 2003.**
D. **Organize state and local organizations and have them chrtered by their respective states by Spring of 2004.**
E. **Hold a convention in Washington DC to organize the National Federation of Filipino-American Republicans (NFFAR) by Spring of 2004.**
F. **Work for the recognition and chartering of NFFAR by the Republican National Committee by 2004.**

Initial Organizational Structure of NMFAR:

National Coordinator	**Perry Diaz**
West Coast Coordinator	**Hernando Caampued**
East Coast Coordinator	**Ernie Gange**
Executive Director	**Judy Tafoya**

State Coordinators:

State Coordinators will be assigned to Filipino-American Republican leaders who will commit to building up their state organizations. Multiple coordinators in each state may be assigned. Interested persons are encouraged to volunteer by contacting the National Coordinator or the East Coast Coordinator.

Contact Information:

Address: **P.O. Box 231841**
Sacramento, CA 95823

Telephone No.: **(916) 691-6642**
FAX No.: **(916) 691-6643**

Email Address: **FILAMGOP@attbi.com**
Web Site: **FILAMGOP.COM (under construction)**

The NATIONAL MOVEMENT OF FILIPINO-AMERICAN REPUBLICANS (NMFAR) is registered and recognized under the laws of the State of California on December 2, 2002.

DRAFT
1/30/03
J. Tafoya

MEDIA RELEASE

Contacts: Perry Diaz, 916/691-6642, FAX 916/691-6643,
PRA 6
Judy Tafoya, 916/682-9718, FAX 916/682-7960,
PRA 6

FILIPINO-AMERICAN REPUBLICANS LAUNCH NATIONAL POLITICAL AGENDA

Sacramento, CA —

Known as the **National Movement of Filipino-American Republicans (NMFAR),** an effort that was launched about 45 days ago has already lined up Fil-Am leaders in 13 states and the District of Columbia for the purpose of galvanizing Filipino-American Republican voters. Five additional states are also targeted.

The Movement's primary objective is to establish the National Federation of Filipino-American Republicans by spring, 2004, at a convention in Washington, D.C. **The dream of the Movement's organizers: Full participation of Republicans of Filipino heritage in the American political mainstream.**

Organizers of this undertaking are Perry Diaz, National Coordinator; Hernando Caampued, West Coast Coordinator; Ernie Gange, East Coast Coordinator; and Judy Tafoya, Executive Director.

Perry Diaz describes the Filipino-American experience as follows: "The first Filipino emigrants were the 'pensionados'—young men who came for an education in America in the early 1900s. In the 1920s, agricultural laborers began arriving to work in Hawaii and the Pacific Coast—mostly young, unmarried men. Then, in the mid-1960s, changes in immigration laws and quotas again brought Filipinos across the Pacific. This time, however, this 'third wave' consisted mostly of professionals—

--more--

men and women--and families, as compared to the students and laborers of the past. Our Filipino-American experience, and The Philippines' own history before that, is quite unique."

"Even so," Diaz continues, "there is very little evidence, politically speaking, that Filipino-Americans—Republicans in this case—have any significant role in the policy-making and decision-making processes. We hope to change that."

NMFAR's Executive Director, Judy Tafoya, added, "What we are beginning to see, at long last, is the arrival of the 'fourth wave' of American Filipinos on America's political shores—a crossing that took nearly 100 years. First and foremost, NMFAR consists of Republicans in support of Republican principles and objectives. Now, we want to work for our seat at the table along with everyone else."

State Coordinators officially on board, thus far, are acknowledged leaders in their communities and states, representing a variety of businesses and professions. Each one has endorsed NMFAR'S pursuit of political empowerment and is committed to develop and support Fil-Am GOP candidates for elective and appointed offices at all levels, as well as other GOP candidates who are vital to the interests of Filipino-Americans:

- Arkansas – Mary J. Bradley
- California – Marissa Acierto, Ely Ayao, Charito Benipayo, Paul Blanco, Hernando Caampued, Celly Carbonell, Nick Catudan, Perry Diaz, Van Dichoso, Bob Medina, Frankie Jaramilla, Eli Perdido, Dennis Purificacion, Judy Tafoya, Oscar Velasco
- Colorado – Nestor J. Mercado
- District of Columbia – Myriam Silverio
- Florida – Ning Aguila
- Hawaii – Hon. David Pendleton
- Maryland – Thelma Estrella
- Michigan – Ed Navarra, Owen Diaz
- Nevada - Geny Del Rosario
- New York – Myrna Littlewort
- Pennsylvania – Hon. Jeff Coleman, Ernie Gange
- Rhode Island – Armando "Doy" Heredia
- Texas – Luz O. Bates, Esq.; Arsenio R. Martin, M.D.
- Virginia – Vellie S. Dietrich-Hall, Myriam Silverio, Gil Zulueta

--more--

Coordinators are being sought for Illinois, Massachusetts, New Jersey, Ohio and Washington, as well.

By the spring of 2004, the **National Federation of Filipino-American Republicans** will have been established to continue the work begun by NMFAR. NMFAR will drive organized GOP voter registration and support campaign operations as key elements in the development of Fil-Am GOP state organizations, including a 'Filipino-Americans for Bush 22004' effort. It will also raise funds for viable Fil-Am GOP candidates, and others. Passage of the Filipino veterans' equity bills also ranks high on NMFAR's priority list.

Diaz stated, "This is an exciting time for us--for Filipino-Americans. For too long, we have been a minority within minorities, politically. Now, we're beginning to see candidates for local offices—city councils, school boards, state legislatures—and we're starting to gain ground, incrementally. We'll not only support well-prepared candidates who are ready for public office, we'll be grooming a 'farm team' for the future, as well. This is just the beginning."

For more information about NMFAR, or becoming a State Coordinator, please contact Perry Diaz at Toll Free 800/905-0240, 916/691-6642, FAX 916/691-6643; FILAMGOP@attbi.com; or write NMFAR, P.O. Box 231841, Sacramento, CA 95823.

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NATIONAL MOVEMENT OF FILIPINO-AMERICAN REPUBLICANS

Endorsement and Commitment Form

Name _____

Address _____

City/State/Zip _____

County _____

Political Involvement _____

Community Involvement _____

Phones: Business _____ **Home** _____

Phones: Fax _____ **Mobile** _____

E-Mail _____

Registered Republican? Yes _____ **No** _____

I endorse the Vision and Mission Statements of the National Movement of Filipino-American Republicans and I am committed to work to attain its Goals.

I will serve as a State Coordinator for _____
(State)

Signature _____ **Date** _____

Fax to: (916) 691-6643 or E-mail to: FILAMGOP@attbi.com

For more information, please call (800) 905-0240

536027

April 23, 2003

Dear Karl,

fyi.

Regards,

tsg

SUPPORT PRESIDENT BUSH'S TAX PLAN!

To: Senator Lincoln Chafee of Rhode Island
Senator George Voinovich of Ohio
Senator Michael DeWine of Ohio
Senator Susan Collins of Maine
Senator Olympia Snowe of Maine
Senator Arlen Specter of Pennsylvania

Cc: President George W. Bush

Re: Support President Bush's Tax Plan!

Please stop standing in the way of the Bush Tax Plan!

President Bush's Tax Plan will bring real and immediate benefits to all Americans. A family of four with two earners and $39,000 in income will receive more than $1,100 in tax relief -- real money to help pay the bills and push the economy forward.

His plan will allow Americans to keep more of their own money so they can spend and save and invest -- the millions of individual decisions that support the market, that support business, and help create jobs.

I believe America needs that tax relief now!

And our economy, our President, our country needs you to STOP STANDING IN THE WAY OF THE BUSH TAX PLAN.

Please change your position and support President Bush's Tax Plan today.

Thank you.

Juliet Baden Affonso, PRA 6
Karla Armendariz, PRA 6
Michael Arterburn, PRA 6
Charles V. Austin, Jr, PRA 6
JAMES BESSINGER, PRA 6
JAMES BESSINGER, PRA 6
Carolyn Blashek, PRA 6
William F. Britt, Jr., PRA 6
chris burch, PRA 6
John Carter, PRA 6
Herbert Chandler, PRA 6
Mary Chandler, PRA 6
Esther Chang, PRA 6
Bill Coleman, PRA 6
Tamara Coleman, PRA 6
Fred L. Colica, PRA 6
JOHN CORMIER, PRA 6
Mrs. Catherine Costello, PRA 6
James & Jerry Ann Crawford, PRA 6
Ronald Davis, PRA 6
Charles Dettis, PRA 6
Adam Dickinson, PRA 6

Carlie Dixon, PRA 6
Dan Donahue, PRA 6
Daniel Dumas, PRA 6
KEN ENDERLE, PRA 6
Lorena Hancock, PRA 6
Rayma Hannah, PRA 6
Dennis B. Hardwick, PRA 6
Barton Hartzell, PRA 6
Glenn Hastie, PRA 6
Tom Hayman, PRA 6
Ernie Haynes, PRA 6
Eugene Hughes, PRA 6
Karolee Hughes, PRA 6
Ed & Gloria Hynes, PRA 6
Gary Johnson, PRA 6
Tamara Kaeding, PRA 6
David Keefer, PRA 6
Gordon P. Kellogg, PRA 6
Mary Knobeloch, PRA 6
Lori LaBree, PRA 6
John LaPorte, PRA 6
judy lee, PRA 6

Sixty Second Activist Club
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Olivia Lovett, PRA 6
Jane MacFarland, PRA 6
Martha D. Mauldin, PRA 6
Randall McCraney, PRA 6
Barbara McFeters, PRA 6
Lacey McKinnon, PRA 6
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Daniel R. Miller, PRA 6
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Marilyn G. Nichols, PRA 6
Charles Nickerson, PRA 6
Philip J. Nicolay, PRA 6
lin padden, PRA 6
Raymond Raboin, PRA 6
Kathleen Ramich, PRA 6
Sylvia Reiter, PRA 6
Tal Rice, PRA 6
Claudette Riley, PRA 6

Carol Romano, PRA 6
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Priscilla Savage, PRA 6
Linda Scalf, PRA 6
Charles Scalzo, PRA 6
Terry Schwartz, PRA 6
Cindy Showalter, PRA 6
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Mary Smith, PRA 6
Patricia Sodermark, PRA 6
BEN TORRES, PRA 6
Drew Travis, PRA 6
Christina Tunger, PRA 6
Dan Vegas, PRA 6
Martha Vergara, PRA 6
Susan Wolven, PRA 6

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536027

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Family Research Council <frcpub@frc.org>
04/16/2003 04:34:08 PM

Please respond to frcpub@frc.org

Record Type: Record

KR

To: Tim Goeglein/WHO/EOP@EOP

cc:
Subject: Washington Update - April 16, 2003

To: Friends of Family Research Council
From: Ken Connor, President
Date: April 16, 2003 - Wednesday

'Big Tent Theory' Pitches Fits for the Party's Future

As Abraham Lincoln, the first Republican president observed, a house divided against itself cannot stand. Neither can a political party divided against itself endure. But that lesson appears lost on Republican National Committee Chairman Mark Racicot. In his pursuit of an inclusive GOP, he has jeopardized the foundational views of the Republican Platform, particularly its stance on the sanctity of marriage. Since its inception, the GOP has supported the legal union of one man and one woman. The party does not endorse the notion of same-sex marriage, does not believe in criminalizing thought in so-called hate crimes legislation, does not support transferable privileges and prerogatives of marriage to the unmarried, and asserts that homosexuality is incompatible with military service. As such, what could possibly be gained from the chairman of the RNC secretly meeting with a homosexual activist organization that positions itself in direct opposition to the GOP views on these issues? Only the destruction of the Republican platform as we know it. The Republican party cannot stand for marriage, yet, in the name of "inclusion" seek to accommodate those who would destroy it. What may or may not have transpired at Racicot's meeting with the Human Rights Campaign is irrelevant. What does matter is that his appearance has lent credibility and legitimacy to the leftist agenda. If the GOP recruits members of groups whose views are diametrically opposed to the party's platform, the GOP will not only lose the marriage plank--it may end up walking it.

Peek-Abu: U.S. Captures Hidden Iraqi Terrorist

The wheels of justice grind slowly, but they do grind. The capture of Abu Abbas is proof of that. Eighteen years after the heinous murder of Mr. Leon Klinghoffer in the

The Associated Press State & Local Wire

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March 28, 2003, Friday, BC cycle

SECTION: Business News; State and Regional

LENGTH: 435 words

HEADLINE: Davis calls on Bush administration to end oil lease litigation

BYLINE: BY TOM CHORNEAU, Associated Press Writer

DATELINE: SACRAMENTO

BODY:
With a deadline looming over the Bush administration to decide its interests in coastal California oil leases, Gov. Gray Davis and U.S. Sens. Barbara Boxer and Dianne Feinstein renewed their stand Friday opposing any new offshore drilling.

The U.S. Justice Department has until Tuesday, April 1, to decide whether to ask the U.S. Supreme Court to overturn a ruling that gives California a say in how coastal waters are developed.

At issue are 36 leases off the central California coast the Bush administration would like to see explored and potentially developed. Estimates are that the leases contain a supply of oil large enough to keep California refineries working for two years and a pool of natural gas big enough to satisfy the state's demand for five months.

In a conference call with reporters Friday, Davis said a letter signed by the three California leaders, all Democrats, has been sent to the president asking him to halt the legal effort in support of opening the leased areas to oil drilling.

"Two federal courts have ruled in the state's favor, the right is clearly on our side," Davis said. "The message needs to be made, that when it comes to protecting our coast, Californians stand strongly and firmly. Keep your hands off our coast."

California leaders have been vigilant in opposing **offshore oil drilling** virtually since the disastrous Santa Barbara oil spill in 1969. No drilling to explore for oil deposits has been conducted since 1989.

But 36 leases, originally granted by the federal government between 1968 and 1984, remain viable.

The oil companies that hold the leases were given 10-year extensions by the Clinton administration in 1999, and California leaders have been battling in the courts ever since to prevent new projects.

A federal appeals court upheld a lower ruling in December that said the disputed leases cannot be drilled or explored until the California Coastal Commission approves of the plan. It is the appeals court ruling that attorneys for the Justice Department are considering to take to the U.S. Supreme Court.

The efforts of the Bush administration to pursue the California coast comes in stark contrast to how the president has handled a similar issue in Florida.

Last spring, when the president's brother, Florida Gov. Jeb Bush, was fighting a tough re-election campaign, Bush announced plans to provide over $230 million to protect Florida's Everglades and Gulf coast areas from oil and gas development. Requests from California leaders for the president to help buyout leases on the West Coast have gone unfulfilled.

LOAD-DATE: March 29, 2003

Digest Briefs

Tuesday, April 1, 2003
AP Breaking News

The Associated Press

(04-01)

SACRAMENTO (AP) -- The Bush administration dropped its challenge Monday to a court ruling halting oil and natural gas exploration off the California coast, a move hailed by California officials as a victory.

A day before the deadline to appeal to the Supreme Court, Interior Secretary Gale Norton said the administration wants to resolve the dispute over 36 offshore leases held by oil companies through negotiation, not lawsuits.

"The administration supports the moratorium on new leasing off the California shore and respects the wishes of the people of California," Norton said in a statement.

The move was praised by California officials and environmentalists who had sued the federal government to allow the state to have some say in the future of the 36 leases in waters off Ventura, Santa Barbara and San Luis Obispo counties.

"The future of California's beaches is now where it should be -- in the hands of California," said Gov. Gray Davis.

Posted on Sat, Mar. 29, 2003

Davis calls on Bush administration to end oil lease litigation

SACRAMENTO (AP) - Gov. Gray Davis and U.S. Sens. Barbara Boxer and Dianne Feinstein have renewed their stand opposing any new offshore drilling, just days ahead of a deadline for the Bush administration to legally assert its interest in coastal California oil leases.

The U.S. Justice Department has until Tuesday to decide whether to ask the U.S. Supreme Court to overturn a ruling that gives California oversight in how coastal waters are developed.

At issue are 36 leases off the central California coast the Bush administration would like to see explored and potentially developed. Estimates are that the leases contain a supply of oil large enough to keep California refineries working for two years and a pool of natural gas big enough to satisfy the state's demand for five months.

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DOI Will Not Seek Review of CA Offshore Leases Litigation
U.S. Newswire
31 Mar 18:08

Interior Department Will Not Seek Supreme Court Review of California Offshore Leases Litigation

To: National Desk
Contact: Mark Pfeifle of the U.S. Dept. of the Interior, 202-208-6416

WASHINGTON, March 31 /U.S. Newswire/ -- Interior Secretary Gale A. Norton today reiterated the Bush administration's goal of protecting the scenic beauty of coastal California. The secretary announced that the United States will not seek Supreme Court review of the 9th Circuit Court of Appeals decision in the case California v. Norton.

The Interior Department hopes that issues related to 36 undeveloped oil leases off the coast of California can be resolved through negotiations with the lessees.

"Our administration strongly supports environmental protection and understands the importance of this issue to the people of California," Norton said. "The administration supports the moratorium on new leasing off the California shore and respects the wishes of the people of California. We believe our efforts will be better spent in negotiation rather than in continued litigation with the state."

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Bush Reverses View Of California Offshore Oil Ban

By J.R. Pegg

WASHINGTON, DC, April 1, 2003 (ENS) - The Bush administration said Monday it will not appeal a court decision that upheld California's right to ban oil and gas exploration in federal waters off the central coast of the state.

Administration officials downplayed this reversal in policy and said they now prefer to resolve the dispute through negotiations rather than in the courts.

"Our administration strongly supports environmental protection and understands the importance of this issue to the people of California," Interior Secretary Gale Norton said in a statement.

"The administration supports the moratorium on new leasing off the California shore and respects the wishes of the people of California."

Today was the deadline for the administration to decide whether or not to take its legal challenge to the U.S. Supreme Court. An appeal to the 9th U.S. Circuit Court of Appeals was denied in December 2002.

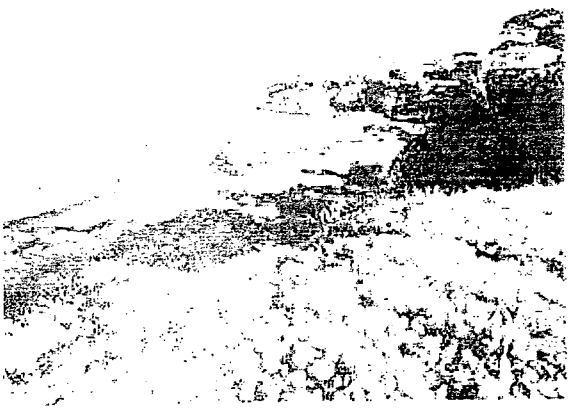

Californians fear offshore oil drilling could harm the state's coastal areas such as Monterey Bay shown here. (Photo by Robert Holmes courtesy California Division of Tourism)

California officials and environmentalists hailed the administration's change of mind, but said it reflects the realization that the legal challenge was weak.

"Bush administration officials must have decided that they don't have a strong legal case, as I have pointed out all along," said California Senator Barbara Boxer, a Democrat. "I hope that they now also understand how much we Californians care about our coast."

The decision makes it clear that California will have a large role in future decisions about the 36 offshore leases at the center of the

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with the Natural Resources Defense Council.

But it does not end the possibility that the Bush administration might still try to extend the leases or push forward with new drilling, he said.

The 36 undeveloped oil leases are located in federal waters, some three miles off the coast between the Channel Islands National Marine Sanctuary and the Monterey Bay National Marine Sanctuary.

They were leased prior to the moratorium on new offshore oil and gas drilling and before the creation of the marine sanctuaries.

Bush administration officials have not said they are giving up on these leases.

"They still have not answered the big question," Caputo said. "Is there or is there not going to be drilling?"

There are two formal ways to end the debate - the Bush administration could either not renew the leases or buy them back from the leaseholders.

Not renewing the leases would allow them to expire, costing the government nothing. But a legal challenge from the leaseholders is a near certainty. Some are already involved in a legal action because they have not been permitted to develop the leases.

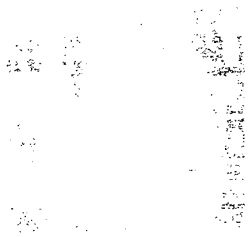

California Senator Barbara Boxer vowed to battle against any effort to increase offshore oil drilling off her state's coast. (Photo courtesy Senator Boxer's office)

There is precedent for a buy back. In May 2002, the administration agreed to purchase some $235 million worth of oil and gas leases off the coast of Florida.

Some California officials have questioned the different treatment for California versus Florida. California Governor Gray Davis, among others, called into question the role of the President's brother, Jeb Bush, who is the governor of Florida.

"It is hard to say that the Florida coast should be protected but the California coast should not," Caputo said.

State officials favor a buy back and believe the federal government should pay for it. The Interior Department did not comment on its specific plans for the leases.

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The legal battle began in 1999 when the federal government, during President Bill Clinton's administration, extended the leases by two to four years.

State officials and environmentalists filed suit, arguing that the state had the right to review the oil drilling leases under its Coastal Management Plan.

In June 2001 a U.S. District Court ruled in favor of state officials and environmentalists and determined that the Interior Department's Minerals Management Service failed to comply with the Coastal Zone Management Act, a federal law that gives states the authority to review federal actions that may affect their coasts.

The U.S. District Court ruling also found that the lease extensions were illegal because the federal government failed to study the environmental consequences of drilling the leases, as required by federal law. It determined that the state has the right to ban drilling on the leases permanently if it determines they threaten the coast or the state's fisheries.



Conservationists fear oil drilling could have negative impacts on California's array of marine life, including the sea otter. (Photo by Mike Boylan courtesy U.S. Fish and Wildlife Service)

Bush administration officials challenged the ruling and argued the environmental impact assessment was unnecessary because the leases had been extended, not approved for drilling.

In December 2002, the U.S. 9th Circuit Court of Appeals in San Francisco upheld the lower court ruling in all respects. According to federal law, the administration had until March 3 to ask the U.S. Supreme Court to review this decision. In February, the Bush administration asked for and was granted an extension to April 1.

Bush administration officials declined to comment on their next course of action, but state officials and environmentalists hope Monday's decision reflects an understanding that the majority of Californians oppose offshore oil drilling.

REV_00265709

other than protect it," Caputo said.

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REV_00265710

Bush won't challenge ban on new California offshore oil drilling

4/1/03

WASHINGTON (AP) _ The Bush administration said Monday it is dropping its challenge to a court ruling halting oil and natural gas exploration off the central California coast.

Facing a Tuesday deadline to decide on an appeal to the Supreme Court, Interior Secretary Gale Norton said the administration wants to resolve the controversy over 36 offshore leases held by oil companies through negotiation, not lawsuits.

``The administration supports the moratorium on new leasing off the California shore and respects the wishes of the people of California,'' Norton said in a statement.

California officials had been asking the administration to call off the litigation and buy back the leases. Interior officials have said they want the state to bear some of the cost.

In December, a three-judge panel of the 9th U.S. Circuit Court of Appeals unanimously blocked any attempt to build the first new oil platforms off California's coast since 1994. No drilling to explore for oil deposits has been conducted since 1989. The proposed developments were off the coast of San Luis Obispo, Santa Barbara and Ventura counties.

The ruling, upholding a lower court decision, said the area can't be drilled or explored until the California Coastal Commission approves the plan.

Oil exploration off California's coast has been an explosive issue since 1969, when a massive oil spill soiled the Santa Barbara and Ventura county coast. Offshore rigs account for roughly 20 percent of the state's petroleum production.

California sued to block the exploration in 1999, days after President Clinton's interior secretary, Bruce Babbitt, extended petroleum companies' offshore leases for 10 years as they were set to expire.

The lawsuit contended that Babbitt's decision was subject to review by the state under a federal law giving California authority to determine whether offshore drilling in federal waters is consistent with the state's coastal protection plans.

Posted on Wed, Apr. 02, 2003

California's offshore oil drilling debate, at-a-glance

The history:

A 1969 oil spill dumped 4 million gallons of crude on the Santa Barbara and Ventura county coasts, prompting an outcry against offshore drilling.

The oil rigs:

Twenty-three oil and gas platforms operate off California's coast in the Santa Barbara Channel, where they are visible from the Pacific Coast Highway. The platforms serve 43 operating leases.

The leases:

Oil companies paid the federal government $1.25 billion between 1968 and 1984 for 40 additional undeveloped leases, each covering about nine square-miles of ocean floor. The leases let the companies do exploration and development work, which typically takes five to 10 years, but does not allow them to drill. No drilling to explore for oil deposits has been conducted since 1989.

Four leases expired in 1999 with no moves to renew them; the others would have expired had not the Interior Department kept them alive by granting extensions.

The lawsuit:

California sued in November 1999, days after President Clinton's interior secretary, Bruce Babbitt, extended the offshore oil leases for 10 years as they were about to expire.

The state argued federal law gives California the right to decide if offshore drilling is consistent with the state's coastal protection plans. The Bush administration contended the state's environmental reviews would be conducted before the sites are developed or explored.

Federal district and appellate courts ruled in the state's favor. The Bush administration decided Monday it would not appeal the decisions.

The oil:

The federal government estimates the Santa Barbara Channel contains enough oil to run California's refineries for two years and meet its natural gas needs for five months. That's about one fifth the amount of energy within Alaska's Arctic National Wildlife Refuge, where the Bush administration also wants to allow drilling.

REV_00265712

Interior Deputy Attended Oil Lease Talks

Thu Apr 3, 3:13 AM ET

By DON THOMPSON

SACRAMENTO, Calif. - The No. 2 official in the U.S. Interior Department participated in meetings on oil and gas leases involving companies that were clients of a lobbying firm he had worked for previously.

Clients of Deputy Interior Secretary J. Steven Griles' former lobbying firm had huge financial stakes in the leases off Florida and California.

Some of the meetings involving Griles figured in a dispute that ended with the Bush administration paying $46 million to Chevron USA Inc. to abandon a natural gas drilling project in the Gulf of Mexico, just 30 miles from Florida beaches.

Before the Senate confirmed Griles in 2001, he promised to refrain for a year from involvement in any issue in which one of his former clients or employers had a financial interest.

Though Griles is listed as a lobbyist for Chevron in reports filed with Congress by his firm, he says he did no personal lobbying for the company.

While Griles' nomination was pending before the Senate, Chevron was paying Griles' firm $80,000 to lobby the Interior Department, according to reports filed with Congress.

In September 2001, two months after he was confirmed, Griles participated in the first of at least four meetings with Interior Department colleagues about the Chevron project, according to Griles' appointment calendars, which were obtained by news organizations and environmental groups under the Freedom of Information Act.

Interior spokesman Mark Pfeifle defended Griles' actions, saying he acted ethically.

Pfeifle said Griles participated in discussions about the dispute involving Chevron's leases, but made no decisions. The Justice Department (news - web sites) negotiated a settlement with the company.

"Steve Griles made as many decisions for the Tampa Bay Buccaneers to win the Super Bowl as he did on the Destin Dome buyout," said Pfeifle. Destin Dome is the name of the area of the Gulf where Chevron's leases were located.

Pfeifle said the Chevron settlement was negotiated by career employees who saved taxpayers more than $285 million because Chevron and other oil companies had sued the federal government for far more than they collected.

After inquiries by The Associated Press, Griles' former lobbying partner Marc Himmelstein said the firm plans to change each of the three lobbying reports it filed with Congress to remove Griles' name.

One of the lobbying firm's principals, John Northington, said he performed all the work for Chevron. Northington said his work focused exclusively on the proposed merger of Chevron and Texaco which the federal government was reviewing.

Griles worked in the Interior Department during the Reagan administration and later worked at the lobbying firm, National Environmental Strategies Inc. It was co-founded by former Republican National Committee (news - web sites) chairman Haley Barbour.

In 2001, President Bush (news - web sites) nominated Griles as deputy to Interior Secretary Gale Norton. As a condition of his Senate confirmation, Griles promised, in writing, to "recuse myself for one year, from becoming involved in official matters dealing with my former employers and clients."

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At the time, Florida was fighting a proposal by Chevron to drill up to 21 gas production gas wells in the Gulf of Mexico. Last spring, Bush announced plans to provide over $230 million to protect Florida's Everglades and Gulf coast areas from oil and gas development. That provided a boost to the re-election campaign of his brother, Florida Gov. Jeb Bush, for whom offshore drilling was a thorny political issue.

Griles also participated in at least 10 meetings regarding 36 oil and gas leases off the California coast. California has blocked development of the leases, and leaseholders are seeking $1.2 billion in compensation.

For two years ending in 1997, Griles lobbied for Shell Oil Co., which has a major financial stake in the leases through its ownership share in one of its 43 subsidiaries, Aera Energy, which wants $772 million in federal reimbursement for its investment in 19 leases.

Griles also lobbied for Devon Energy, which has a 30 percent share in one of the leases.

Norton announced Monday that the Bush administration would not ask the U.S. Supreme Court (news - web sites) to review lower court decisions upholding California's right to review the renewal of the federal offshore drilling leases. That raises the possibility that the federal government will buy back the California leases, as it did with Chevron in the Gulf of Mexico.

Pfeifle said Griles was unaware of Shell's financial interest and removed himself from discussions of the California issue in May 2002 when he discovered Devon Energy's involvement.

Within a month, however, Griles met with Shell Exploration & Production Co. President and CEO Rauoul Restucci. Pfeifle described the Restucci meeting as a "courtesy" visit.

While he is at the Interior Department, Griles is receiving four annual payments of $284,000 from his former firm, for having brought in so many clients while he worked there.

EDITOR'S NOTE — Associated Press reporter Pete Yost in Washington contributed to this story.

REV_00265714

TO: DT
FR: SR
Per our conversation.

536027

Bruce C. Thompson

PRA 6

May 28, 2003

Karl Rove
White House

Karl:

I understand the President will be in San Diego and other parts of CA this week. Is there any chance of me being able to greet him?

Bruce

BCT/drn
fax

Conaughton Barry

5136027

Ralston, Susan B.

OK

From: PRA 6
Sent: Wednesday, February 05, 2003 2:14 PM
To: Ralston, Susan B.
Subject: Brownfield Stimulus Act

Karl,
Good to see you at the White House reception last week. As I mentioned to you, I would like to have the opportunity to occasionally bring a client of Capitol Link which whom I am affiliated to meet with you.
As soon as possible, I would like to schedule an appointment with you for Tom Darden, CEO of Cherokee Investment Partners headquartered in Raleigh who is not only a client, but a friend and major Republican donor to the NCGOP and our candidates; former Congressman Mick Staton who is President of Capitol Link; Jonathan Philips who is the legal counsel for Cherokee and me. We will come at a moments notice on any date that is convenient for you.
Attached is an email from Cherokee with attachments that summarizes what the Brownfield Stimulus Act would be, and the support and involvement it already has.
I am always looking for win-win situations and as a former Secretary of Environment and Natural Resources under Governor Martin, I believe this is the type of environmental initiative that could be a "home run" for all concerned.
I look forward to hearing from you.
Many thanks,
Bill Cobey, PRA 6

Fri 3/7 3:3>

Ralston, Susan B.

From: Jonathan Philips PRA 6
Sent: Tuesday, February 04, 2003 7:11 PM
To: Bill Cobey
Cc: Mick Staton
Subject: talking points

Bill—great speaking with you. Thanks for calling. I've attached a one page overview, the published colloquy between Grassley and Baucus, and an article published when the colloquy was published. Feel free to include whatever you feel is helpful.

Here are some quickly assembled talking points for your email. You may wish to switch around the order to reflect at the top what you think will resonate most powerfully. I've also included a blurb about supporters, Cherokee and timing. Feel free to amend as you see fit.

TALKING POINTS

Win-Win—

TOP 4 Points:

1. Easy environmental win that would be supported by Chamber of Commerce and Sierra Club alike

2. No cost to federal treasury—not another government program, this is a market-based environmental solution. No one is paying UBIT on these investments so no federal revenue tax hit (working with Joint Tax in crafting language); ideal measure for economically troubled times. Cost/benefit study shows positive impact on local, state and federal treasuries

3. Creates jobs, stimulates economy, and answers recent state/city cries for more federal help

4. Complements President's Faith-Based and Community Initiative by empowering religious and other community nonprofits to invest in blighted sites without penalty

SECONDARY POINTS

5. Bipartisan issue: popular with conservatives (and liberals alike)

6. Builds and strengthens communities

7. Cleans up contamination and pollution across the country with private dollars

8. Reduces workload of and expenditure by federal and state governments which currently handle nation's estimated 1,000,000 brownfields.

9. Issue/Proposal has no natural enemies

10. Brownfield tax incentives are one of President's 6 stated objectives with regard to environment

11. Fits well with (and tracks) Brownfield Tax Incentive (Sec. 198); dove-tails nicely with President's effort to expand and make Sec. 198 permanent

NOTABLE PARTIES INVOLVED – with organizational contact familiar with issue.

Working Closely with Senators Grassley and Baucus on Senate proposal

US Conference of Mayors—Mayor Patrick McCrory (Charlotte) and Judy Sheahan (USCM) announced in January that they will support it; working with National Governors Association to jointly support it.

EPA—Met with Governor Whitman and she and Marianne Horinko await White House direction on this. Like it very much but, of course, cannot endorse without White House stamp of approval.

Chamber of Commerce—Bruce Josten and Bill Kovacs are supporting it.

National Taxpayers Union---John Berthoud and Al Cors support it.

International Council of Shopping Centers—Cynthia Stewart

International County/City Management Association – Danielle Miller Wagner

GROUPS THAT WOULD NATURALLY SUPPORT IT

Pension funds, universities, foundations, churches, other tax exempts

Environmental insurance companies (e.g., AIG)

Real estate groups (developers, investors, REITS) – favorably discussed with Real Estate Roundtable

Environmental Groups

Tax Groups

CHEROKEE

Cherokee is the largest brownfield investment firm in the world, headquartered in Raleigh, NC, with offices in Denver, NJ and London. Clean-up activities in one state alone are estimated to create $200 million in annually recurring tax revenue. Cherokee stumbled upon this solution while raising its last fund. It learned that US tax exempt investors are finally getting comfortable with the risks associated with brownfield cleanup and are feeling pressure to place capital into socially responsible investments. Unfortunately, investors sensitive to UBIT (unrelated business income tax), representing over 60% of the investment capital in the US, have generally avoided brownfield investment due to their underlying fear of UBIT on these investments. Since no one is paying UBIT on these investments, Cherokee, in November of 2002, raised the idea of exempting UBIT from qualified brownfield sites with members and staff on the Senate Finance Committee and the proposal has since rapidly gathered momentum.

TIMING

The time is now for the White House to seize the issue as its own before a flurry of others do so. Let the President introduce it as a fresh idea generated by the private sector to dramatically increase the private capital invested in cleaning up the environment. The press is sniffing around the issue and eager to write stories. We expect it to be introduced shortly by Senators Grassley and Baucus in the Senate. Several influential members on Ways and Means in the House have expressed interest in introducing the proposal, as well.

Thanks!

Jonathan Philips

PRA 6

THE BROWNFIELDS INVESTMENT STIMULUS ACT OF 2003

Providing Needed Private Capital for Brownfield Cleanup and Redevelopment

OVERVIEW

The Problem

- Brownfield sites are real property, the expansion, redevelopment or reuse of which may be complicated by the presence or potential presence of contamination. Brownfield sites create public health risks, blight our communities, siphon public funds away from worthy uses, encourage sprawl and drain municipal tax rolls.
- The United States has an estimated 1,000,000 brownfield sites spread across the country, with tens of thousands of new sites being discovered or created each year.
- Currently, tax-exempt investors such as endowments, foundations and pension funds can incur Unrelated Business Income Tax (UBIT) by investing in the cleanup and redevelopment of brownfield sites. Because these investors hold over $6-trillion dollars in financial assets, the unintended consequence of UBIT has been to deprive brownfield sites of much-need capital for remediation and redevelopment activities.
- Congress originally adopted UBIT to level the playing field in situations where tax-exempt organizations entered marketplaces occupied traditionally by taxable entities (for example, tax-exempt university bookstores competing against taxable bookstores).
- Because of concerns about liability and the difficulty of quantifying risk at brownfield sites, however, taxable entities are not investing sufficient funds into the cleanup and redevelopment of these sites. At the current rate of cleanup, it could take many generations to clean up all of our nation's brownfield sites.
- The prospect of incurring UBIT has 1) rendered brownfield investment virtually inaccessible to 60% of institutional investment capital in the US, and 2) has had a chilling effect on the few brownfield investment funds that do have tax-exempt investors by imposing strict limitations on the ability to clean up and redevelop the vast majority of sites that are in desperate need of revitalization.

The Solution

- The Brownfield Investment Stimulus Act of 2003 will allow UBIT-sensitive entities to invest in the cleanup and redevelopment of brownfield sites without incurring UBIT.
- This will open investment by tax-exempt entities and will provide brownfield cleanups much needed private capital.
- This solution will cost little to administer and is expected to have, at most, a *de-minimus* and short-term impact on tax revenues (because these institutional investors are not currently invested in brownfield sites due to their fear of UBIT).
- Because revitalization and redevelopment returns brownfield sites to productive use and to the tax rolls, **this bill will create jobs and result in a significant increase in local, state, and federal revenues for years to come.**

Click here for documents related to the 12/9/2002 issue of Superfund Report

SENATORS PLAN TAX BILL TO BOOST BROWNFIELDS REDEVELOPMENT FUNDS

Date: December 9, 2002 -

Two key lawmakers on the Senate Finance Committee will likely introduce legislation in the 108th Congress designed to spur brownfields redevelopment by tax-exempt entities by easing the tax code.

The bill would give an additional boost to EPA's popular brownfields program, which was strengthened earlier this year when President Bush signed legislation easing the liability provisions in federal Superfund law for brownfields developers. However, top EPA officials have indicated that the program may face budget cuts next year because of an uncertain budget climate.

Now congressional sources say outgoing Finance Committee Chairman Max Baucus (D-MT) and likely incoming chair Charles Grassley (R-IA) are preparing to introduce legislation to make it easier for tax-exempt organizations -- such as pension funds and university endowments -- to invest in brownfield cleanups. The legislation is necessary because such entities hold more than 60 percent of the institutional capital in the United States, according to a statement Baucus made on the Senate floor on Nov. 19.

A source with Grassley's office says the bill is still in the preliminary stages, but will focus on easing the unrelated business taxable income (UBTI) provisions of the tax code, as well as easing rules on deducting interest on mortgage debt. UBTI is incurred by tax-exempt organizations to ensure that they do not exploit their tax-free status to gain a competitive advantage over taxed entities.

"If we were to allow tax-exempt entities to invest in the remediation and redevelopment of these sites without incurring UBTI, we may be able to create a powerful engine to help revitalize our Nation's brownfield sites," Baucus said on the Senate floor. "It also seems possible that we could accomplish these goals in this slowed economic climate with a solution that neither materially impacts revenue or requires significant costs for administration."

An industry source says finding a legislative vehicle for any tax bill is the first challenge, since such legislation rarely moves on its own. The Grassley source says it is uncertain what sort of legislative package the bill may ultimately fit into, but says it will be initially introduced as a stand alone bill.

Source: Superfund Report via InsideEPA.com
Date: December 9, 2002
Issue: Vol. 16, No. 25
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SUPERFUND-16-25-7

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BROWNFIELDS REVITALIZATION -- (Senate - November 19, 2002)

[Page: S11556] GPO's PDF

Mr. BAUCUS. Mr. President, I rise today to highlight an issue of great importance to the people of my State and to people across this country.

Over the past several years, I worked closely with a number of my Senate colleagues to pass the Brownfields Revitalization and Environmental Restoration Act. Signed into law by the President last year, this act is an innovative piece of legislation that will promote and accelerate the cleanup of hundreds of brownfield sites around the country.

The Brownfields Revitalization and Environmental Restoration Act passed with strong bipartisan support in both the House and the Senate. It will help states and local communities clean up the country's estimated 1,000,000 brownfield sites. These sites blight our communities, threaten public health and safety, and drain local tax bases.

I am proud of this legislation. It devotes desperately needed resources to address the environmental and economic challenges posed by brownfields.

Still, I remain convinced that there is much left to do. With an estimated 1,000,000 brownfield sites across this nation and new sites being discovered each day, the very best efforts of our government will be insufficient to tackle this growing concern in any reasonable period of time.

For that reason, I have begun exploring legislative options to encourage additional private capital investment in the remediation and redevelopment of our nation's brownfield sites. Such a solution would complement the Brownfields Revitalization and Environmental Restoration Act and could help us make great strides toward creating jobs and cleaning up the environment in communities across the country.

Over 60 percent of the institutional capital in the United States is held for investment by tax-exempt entities such as pension funds and university endowments. Given the risks associated with acquiring and cleaning up contaminated sites, it is no surprise that private investors are reluctant to invest large amounts of capital in brownfields cleanup and revitalization. Tax exempt entities are often prevented from engaging in brownfield cleanups because of the unrelated business taxable income, UBTI, provisions in the code.

The UBTI provisions of the tax code play an important role in ensuring that entities do not use their tax-exempt status to gain a competitive advantage in the marketplace over taxed entities. It is clear, however, that the free market is not moving to remediate and redevelop many of these sites, certainly

REV_00265722

not at a rate that will solve this problem during our lifetimes. It is my belief that without some additional stimulus, many of these sites will remain unattractive as business investments and will continue to languish and blight our communities.

If we were to allow tax-exempt entities to invest in the remediation and redevelopment of these sites without incurring UBTI, we may be able to create a powerful engine to help revitalize our Nation's brownfield sites. It also seems possible that we could accomplish these goals in this slowed economic climate with a solution that neither materially impacts revenues nor

[Page: S11557] GPO's PDF

requires significant costs for administration.

In the coming months, it is my intent to explore legislative options to encourage the investment of additional private capital into the cleanup and redevelopment of our Nation's brownfield sites. It is my intention and desire to work on this matter in a bipartisan fashion with my good friend and colleague, the senior Senator from Iowa.

Mr. GRASSLEY. Mr. President, let me thank the good Senator from Montana and take a moment to echo his remarks. I strongly supported the Brownfield Revitalization Act and applaud the strides that it is making toward remediating brownfield sites across our Nation.

In Iowa, as in many other States, we are challenged with our share of brownfields in places like Des Moines, Cedar Rapids and Sioux City. The cleanup and redevelopment of brownfield sites can help reduce health risks, protect the environment, revitalize surrounding communities, preserve open space and create jobs by reintroducing properties into the stream of commerce that have languished for years.

Philosophically, I support efforts to encourage private markets to help solve problems such as those presented by our Nation's brownfield sites. Given the size and scope of the brownfield problem in this country, I believe it behooves us to look for additional, innovative and low-cost solutions to help encourage investment in the remediation and redevelopment of these sites.

I understand that current law may discourage tax-exempt investors from contributing capital to the remediation and revitalization of brownfield sites. Let me say to my good friend and colleague from Montana that I will gladly work with him to explore legislative options to help bring additional private capital to bear on solving our Nation's brownfield problem.

Mr. BAUCUS. Mr. President, I thank my good friend from Iowa. As we have worked together as chairmen and as ranking members of the Senate Finance Committee, I have always found him to approach issues in a fair and even-handed manner. Let me express my sincere appreciation to him for the many bipartisan efforts that we have worked on together, particularly the Brownfields Revitalization and Environmental Restoration Act that passed 99-0 in the Senate. I look forward to working with him on this and many other issues in the months and years to come.

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DATE: April 16, 2003

TO: Karl Rove

COPIES: Richard Wirthlin

FROM: Dee Allsop

SUBJECT: Trade Winds Results

cc: Lauren W.
Matthew D.
Fred
JVL

Dr. Wirthlin asked that I send you the enclosed results of our latest National Quorum™. In late March and again in early April, WirthlinWorldwide conducted a survey called "Trade Winds" that addressed changes in American consumer attitudes and behavior since the start of the war in Iraq. The attached document contains the topline results of those two studies.

If you desire more information (crosstabulation, etc) please contact Beth Strackbein at 703-480-1900 ext 3082.

FROM:
KARL
ROVE

FILE

MEMORANDUM

BRUSSELS | CANBERRA | CHICAGO | CINCINNATI | DALLAS | DETROIT | GRAND RAPIDS | HONG KONG | LONDON | MANCHESTER | NEW YORK CITY | OREM | SALT LAKE CITY | SINGAPORE | WASHINGTON

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April C 2003 National Quorum Survey Results
Field Dates: April 8-12, 2003; N=1,000 Adult Americans
March 21-24, 2003; N=1,003 Adult Americans
Margin of Error: ± 3.1 percentage points at a 95% confidence level

To begin, I'd like to ask you some questions about the situation in Iraq...

*A1. How interested are you in following the events that are happening in the war in Iraq and the war on terrorism. Would you say that you are...

4/03	3/03	
71%	74%	Very interested
26%	24%	Moderately interested
3%	3%	Not at all interested
**	**	Don't Know/Refused

---

*A2. Next, how informed do you feel you are about the events that are happening in the war in Iraq and the war on terrorism? Would you say that you are...

4/03	3/03	
52%	52%	Very well informed
43%	43%	Moderately well informed
5%	4%	Poorly informed
**	1%	Don't Know/Refused

---

*A3 Which of the following types of long-term financial services investment products do you own? **[MULTIPLE RESPONSES ACCEPTED]**

4/03	3/03	9/01	
42%	45%	54%	An employer sponsored 401k, 403b, or similar retirement plan
38%	45%	45%	Individual retirement accounts such as Roth IRA or regular IRA
35%	39%	45%	Mutual funds, which invest in stocks
31%	38%	39%	Universal life insurance (other than what is paid for by your employer)
32%	32%	37%	Individual company stocks
20%	26%	27%	Bonds
20%	24%	29%	Money market funds
19%	24%	29%	Other mutual funds
13%	15%	15%	Annuities
27%	20%	18%	None of the above
4%	3%	2%	Don't Know/Refused

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L. Nestle

10%	France
7%	Germany
7%	Canada
59%	The United States
10%	Other
7%	Don't Know/Refused

M. Orangina

24%	France
9%	Germany
6%	Canada
14%	The United States
16%	Other
31%	Don't Know/Refused

N. Allegra

18%	France
6%	Germany
9%	Canada
48%	The United States
4%	Other
15%	Don't Know/Refused

O. Michelin

23%	France
16%	Germany
4%	Canada
43%	The United States
7%	Other
7%	Don't Know/Refused

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GERMAN

P. Volkswagen

1%	France
87%	Germany
1%	Canada
5%	The United States
3%	Other
4%	Don't Know/Refused

Q. BMW

5%	France
70%	Germany
1%	Canada
6%	The United States
14%	Other
5%	Don't Know/Refused

R. Chrysler

2%	France
19%	Germany
4%	Canada
67%	The United States
3%	Other
5%	Don't Know/Refused

S. Mercedes Benz

9%	France
76%	Germany
**	Canada
4%	The United States
5%	Other
4%	Don't Know/Refused

T. Audi

16%	France
58%	Germany
4%	Canada
3%	The United States
10%	Other
8%	Don't Know/Refused

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U. Saab

12%	France
42%	Germany
1%	Canada
3%	The United States
31%	Other
11%	Don't Know/Refused

V. Krupp

8%	France
56%	Germany
2%	Canada
9%	The United States
6%	Other
19%	Don't Know/Refused

W. Bayer

5%	France
20%	Germany
8%	Canada
55%	The United States
2%	Other
10%	Don't Know/Refused

X. Adidas

15%	France
15%	Germany
6%	Canada
33%	The United States
21%	Other
10%	Don't Know/Refused

Y. T-Mobile

7%	France
8%	Germany
11%	Canada
49%	The United States
7%	Other
18%	Don't Know/Refused

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Z. Heineken

1%	France
70%	Germany
4%	Canada
7%	The United States
10%	Other
7%	Don't Know/Refused

AA. Walther Firearms

4%	France
30%	Germany
6%	Canada
35%	The United States
6%	Other
19%	Don't Know/Refused

BB. Heckelr and Koch Firearms

3%	France
40%	Germany
5%	Canada
25%	The United States
6%	Other
21%	Don't Know/Refused

CC. Braun

10%	France
47%	Germany
5%	Canada
18%	The United States
6%	Other
15%	Don't Know/Refused

DD. Siemens

16%	France
24%	Germany
10%	Canada
31%	The United States
4%	Other
15%	Don't Know/Refused

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EE. Stihl

7%	France
32%	Germany
7%	Canada
29%	The United States
12%	Other
14%	Don't Know/Refused

FF. Miele

34%	France
14%	Germany
3%	Canada
4%	The United States
23%	Other
22%	Don't Know/Refused

CANADA

GG. Molson

4%	France
25%	Germany
30%	Canada
13%	The United States
8%	Other
20%	Don't Know/Refused

HH. Moosehead

5%	France
12%	Germany
49%	Canada
19%	The United States
5%	Other
9%	Don't Know/Refused

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II. Canadian Club

-- France
** Germany
79% Canada
16% The United States
** Other
5% Don't Know/Refused

JJ. Canada Dry

** France
-- Germany
68% Canada
27% The United States
2% Other
3% Don't Know/Refused

KK. LaBatts

37% France
13% Germany
24% Canada
5% The United States
6% Other
16% Don't Know/Refused

LL. Air Canada

** France
** Germany
90% Canada
4% The United States
1% Other
4% Don't Know/Refused

MM. Bombardier

25% France
14% Germany
12% Canada
15% The United States
9% Other
24% Don't Know/Refused

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NN. Roots

9%	France
11%	Germany
8%	Canada
32%	The United States
16%	Other
25%	Don't Know/Refused

OO. Ski-doo

9%	France
11%	Germany
17%	Canada
31%	The United States
13%	Other
19%	Don't Know/Refused

PP. LearJet

22%	France
13%	Germany
6%	Canada
45%	The United States
4%	Other
10%	Don't Know/Refused

QQ. Sun Life

9%	France
4%	Germany
13%	Canada
48%	The United States
4%	Other
23%	Don't Know/Refused

RR. T.D. Waterhouse

6%	France
7%	Germany
13%	Canada
47%	The United States
5%	Other
22%	Don't Know/Refused

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SUMMARY TABLE OF "FRANCE"

80%	Perrier
64%	Grey Poupon
62%	Christian Dior
60%	Evian
52%	L'Oreal
45%	Yoplait
48%	Peugeot
41%	Lancome
37%	LaBatts
34%	Miele
29%	French's Mustard
24%	Orangina
25%	Bombardier
23%	Dannon
23%	Michelin
22%	Learjet
18%	Allegra
16%	Audi
15%	Adidas
16%	Siemens
12%	Saab
10%	Nestle
9%	Sun Life
10%	Braun
9%	Roots
9%	Ski-Doo
8%	Krupp
9%	Mercedes Benz
8%	Universal Pictures
7%	T-Mobile
7%	Stihl
6%	T.D. Waterhouse
5%	Bayer
5%	Moosehead
5%	BMW
4%	Molson
4%	Walther Firearms
3%	Heckelr And Koch Firearms
2%	Chrysler
1%	Heineken
1%	Volkswagen

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** Canada Dry
** Air Canada

SUMMARY TABLE OF "GERMANY"

87% Volkswagen
70% Heineken
70% BMW
76% Mercedes Benz
58% Audi
56% Krupp
47% Braun
40% Heckelr And Koch Firearms
42% Saab
32% Stihl
30% Walther Firearms
25% Molson
24% Siemens
19% Chrysler
20% Bayer
15% Adidas
16% Michelin
14% Bombardier
14% Peugeot
14% Miele
13% Learjet
12% Moosehead
12% Lancome
13% LaBatts
10% Dannon
11% Ski-Doo
11% Roots
9% Orangina
8% T-Mobile
7% T.D. Waterhouse
7% Grey Poupon
7% Nestle
6% Allegra
5% Yoplait
5% Evian
5% Christian Dior
4% Sun Life
2% L'Oreal

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2% Universal Pictures
1% Perrier
1% French's Mustard
** Air Canada
** Canadian Club

SUMMARY TABLE OF "CANADA"

90% Air Canada
79% Canadian Club
68% Canada Dry
49% Moosehead
30% Molson
24% LaBatts
17% Ski-Doo
13% T.D. Waterhouse
13% Sun Life
12% Bombardier
11% T-Mobile
9% Allegra
10% Siemens
8% Dannon
8% Roots
8% Bayer
7% Stihl
7% Nestle
8% Evian
6% Orangina
6% Adidas
6% Lancome
6% Walther Firearms
6% Learjet
5% Heckelr And Koch Firearms
5% Yoplait
5% Braun
4% L'Oreal
4% Audi
4% Universal Pictures
4% Chrysler
4% Michelin
4% Heineken
3% Christian Dior
3% Miele

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*A4. How confident are you in the security of your investments? Would you say you are...

4/03	3/03	9/01	
66%	**73%**	**82%**	**TOTAL CONFIDENT (NET)**
26%	**21%**	**16%**	**TOTAL NOT CONFIDENT (NET)**
25%	28%	28%	Very confident
40%	45%	54%	Somewhat confident
15%	14%	12%	Not too confident
11%	7%	4%	Not at all confident
9%	6%	2%	Don't Know/Refused

[n=452 RESPONDENTS WHO OWN INDIVIDUAL COMPANY STOCKS OR MUTUAL FUNDS IN Q.A3]

A5. If you were buying stocks now, how much influence would the fact that a company were French, German or Canadian have on your decision whether or not to purchase that stock? Would you say it would be...

55%	**TOTAL INFLUENCE**
44%	**TOTAL NO INFLUENCE**
28%	A great deal of influence
27%	Some influence
19%	Very little influence
25%	No influence at all
1%	Don't Know/Refused

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2%	Perrier
2%	Krupp
2%	Peugeot
1%	French's Mustard
1%	Grey Poupon
1%	Saab
1%	Volkswagen
1%	BMW
**	Mercedes Benz

SUMMARY TABLE OF "UNITED STATES"

78%	Universal Pictures
67%	Chrysler
64%	French's Mustard
59%	Nestle
48%	Sun Life
47%	T.D. Waterhouse
55%	Bayer
49%	T-Mobile
48%	Allegra
45%	Learjet
43%	Michelin
33%	Adidas
34%	Dannon
35%	Walther Firearms
32%	Roots
29%	Stihl
31%	Siemens
28%	L'Oreal
31%	Ski-Doo
27%	Canada Dry
24%	Yoplait
25%	Heckelr And Koch Firearms
19%	Moosehead
16%	Canadian Club
18%	Braun
15%	Bombardier
15%	Grey Poupon
14%	Orangina
13%	Molson
13%	Lancome
11%	Christian Dior

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9%	Krupp
10%	Evian
7%	Heineken
6%	BMW
5%	Peugeot
5%	Volkswagen
5%	LaBatts
4%	Air Canada
4%	Mercedes Benz
4%	Perrier
4%	Miele
3%	Audi
3%	Saab

SUMMARY TABLE OF "OTHER"

31%	Saab
21%	Adidas
23%	Miele
17%	Peugeot
16%	Orangina
16%	Roots
14%	BMW
13%	Ski-Doo
12%	Stihl
11%	Dannon
10%	Heineken
10%	Audi
10%	Nestle
9%	Yoplait
9%	Bombardier
8%	Molson
7%	T-Mobile
7%	Michelin
6%	Krupp
7%	Christian Dior
6%	Walther Firearms
6%	Lancome
6%	Grey Poupon
6%	Heckelr And Koch Firearms
5%	T.D. Waterhouse
6%	Braun
6%	Evian

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6%	LaBatts
4%	Sun Life
4%	Allegra
5%	Mercedes Benz
5%	Moosehead
4%	Siemens
4%	Learjet
3%	L'Oreal
3%	Perrier
3%	Volkswagen
3%	Chrysler
3%	Universal Pictures
2%	Bayer
2%	Canada Dry
1%	Air Canada
1%	French's Mustard
**	Canadian Club

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France	Germany	Canada	U.S.	Other	Brand
48%	14%	2%	5%	17%	Peugeot
80%	1%	2%	4%	3%	Perrier
60%	5%	8%	10%	6%	Evian
41%	12%	6%	13%	6%	Lancome
62%	5%	3%	11%	7%	Christian Dior
8%	2%	4%	78%	3%	Universal Pictures
45%	5%	5%	24%	9%	Yoplait
23%	10%	8%	34%	11%	Dannon
29%	1%	1%	64%	1%	French's Mustard
64%	7%	1%	15%	6%	Grey Poupon
52%	2%	4%	28%	3%	L'Oreal
10%	7%	7%	59%	10%	Nestle
24%	9%	6%	14%	16%	Orangina
18%	6%	9%	48%	4%	Allegra
23%	16%	4%	43%	7%	Michelin
1%	87%	1%	5%	3%	Volkswagen
5%	70%	1%	6%	14%	BMW
2%	19%	4%	67%	3%	Chrysler
9%	76%	*	4%	5%	Mercedes Benz
16%	58%	4%	3%	10%	Audi
12%	42%	1%	3%	31%	Saab
8%	56%	2%	9%	6%	Krupp
5%	20%	8%	55%	2%	Bayer
15%	15%	6%	33%	21%	Adidas
7%	8%	11%	49%	7%	T-Mobile
1%	70%	4%	7%	10%	Heineken
4%	30%	6%	35%	6%	Walther Firearms
3%	40%	5%	25%	6%	Heckelr And Koch Firearms
10%	47%	5%	18%	6%	Braun
16%	24%	10%	31%	4%	Siemens
7%	32%	7%	29%	12%	Stihl
34%	14%	3%	4%	23%	Miele
4%	25%	30%	13%	8%	Molson
5%	12%	49%	19%	5%	Moosehead
*	*	79%	16%	*	Canadian Club
*	*	68%	27%	2%	Canada Dry
37%	13%	24%	5%	6%	LaBatts
*	*	90%	4%	1%	Air Canada
25%	14%	12%	15%	9%	Bombardier
9%	11%	8%	32%	16%	Roots
9%	11%	17%	31%	13%	Ski-Doo
22%	13%	6%	45%	4%	Learjet
9%	4%	13%	48%	4%	Sun Life
6%	7%	13%	47%	5%	T.D. Waterhouse

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A11a. How concerned would you say you are that U.S. consumer boycotts of French, German or Canadian products will hurt the U.S. employees of these companies and employees of their U.S. suppliers?

58%	**TOTAL CONCERNED**
42%	**TOTAL NOT CONCERNED**
19%	Very concerned
39%	Somewhat concerned
25%	Not too concerned
16%	Not at all concerned
**	Don't Know/Refused

A12. Moving on...Have you read seen or heard anything recently in the media about consumers in countries like France, Germany or Canadian boycotting US products sold in their countries due to the US led war in Iraq?

33%	Yes
67%	No

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*A13. Do you think that U.S. military action will lead to fewer acts of terrorism against U.S. citizens, or will it lead to even more terrorism because terrorists will try to get back at the U.S.?

4/03	3/03	
42%	40%	Fewer acts of terrorism
52%	53%	More acts of terrorism
4%	5%	No difference
2%	2%	Don't Know/Refused

*A14. How long do you think it will take for things to pretty much go back to normal?

4/03	3/03	
33%	27%	More than 3 years
29%	21%	2-3 years
21%	20%	6-12 months
6%	10%	3-6 months
4%	8%	2-3 months
5%	6%	This will never go back to normal
1%	4%	1 month
1%	2%	2 weeks
1%	3%	Don't Know/Refused

A15. Based on recent world events, which do you think is more likely to be the target of a possible terrorist attack against the United States...US interests overseas like embassies, American Universities and American tourists, or targets here in the United States itself?

48%	U.S. interests overseas
46%	Targets in the U.S.
4%	Both equally
2%	Don't Know/Refused

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A16. And finally, based on recent world events have you modified your behavior with respect to any of the following based on any concerns you have about possible terrorist attacks here in the US? The first one/next one is....

[PROBE IF NECESSARY: have you modified your behavior with respect to this activity out of concern over possible terrorist attacks?]

Yes	No	DK/Ref	
25%	75%	–	D. Traveling for business or pleasure
13%	87%	–	B. Visiting shopping malls
9%	90%	1%	C. Traveling to and from work
16%	84%	–	*A. Dropping off or picking up your children from school

*n=294 respondents with school-age children; B-D were asked of all respondents

---

And just a few final questions for statistical purposes...

X1. Are you currently registered to vote?

82%	Yes
18%	No

D1. What is your age, please?

4%	18 - 20
4%	21 - 24
6%	25 - 29
9%	30 - 34
10%	35 - 39
12%	40 - 44
9%	45 - 49
9%	50 - 54
9%	55 - 59
8%	60 - 64
5%	65 - 69
6%	70 - 74
7%	75 and older
1%	Refused

REV_00265754

D2. Do you have any children? [IF YES, ASK:] And how many children do you have?

75%	**TOTAL YES**
15%	Yes/1
26%	Yes/2
18%	Yes/3
9%	Yes/4
4%	Yes/5
4%	Yes/6 or more
24%	**No/No children**
1%	Refused

[n=750 RESPONDENTS WITH CHILDREN IN Q.D2]

D2a. Are any of your children school age? (IF YES) What grades are your children in at school? **[MULTIPLE RESPONSES ACCEPTED FOR THOSE WITH CHILDREN]**

56%	No school age children
7%	Preschool/ kindergarten
23%	1-6
11%	7-8
15%	9-12
7%	College/Post graduate
1%	Don't Know/Refused

[n=323 RESPONDENTS WITH SCHOOL-AGE CHILDREN IN Q.D2a]

D2b. Has the War in Iraq resulted in any changes in your children's activities at school?

17%	Yes
82%	No
1%	Don't Know/Refused

D3. What is the last grade of formal education you completed?

17%	Less than high school
24%	High school graduate
9%	Technical/Vocational
27%	Some college
16%	College graduate
8%	Post-graduate
**	Refused

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D4. In politics today, do you usually think of yourself as a Republican, a Democrat, an Independent, or what?

D4A. Would you call yourself a STRONG (Republican/Democrat) or a NOT-SO-STRONG (Republican/Democrat)?

D4B. Do you lean more toward the Republican Party or toward the Democratic Party?

44%	**Total Republican**
12%	**Total Independent**
45%	**Total Democrat**
20%	Strong Republican
13%	Not-So-Strong Republican
11%	Lean to Republicans
12%	Independent
12%	Lean to Democrats
17%	Not-So-Strong Democrat
16%	Strong Democrat

D5. In politics today, do you generally consider yourself to be liberal or conservative on most issues?

D5A. Would you consider yourself VERY (Conservative/Liberal) or just SOMEWHAT (Conservative/Liberal)?

D5B. Would you say you lean more toward [ROTATE ORDER] conservative or liberal?

60%	**Total Conservative**
37%	**Total Liberal**
3%	**Total Moderate**
14%	Very Conservative
43%	Somewhat Conservative
2%	Lean Conservative
3%	Moderate
1%	Lean Liberal
31%	Somewhat Liberal
5%	Very Liberal

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D6. What is your religious preference? **(IF "PROTESTANT," ASK:)** What denomination would that be?

1%	Episcopalian
4%	Presbyterian
8%	Methodist
6%	Lutheran
19%	Baptist
2%	Pentecostal
22%	Catholic
19%	**Other Christian (Net)**
2%	LDS/Mormon
1%	United Church of Christ
1%	Seventh Day Adventist
**	Church of the Nazarene
**	Assembly of God
1%	Church of God
**	Mennonite Churches/Amish
**	Reformed Churches
13%	Other Christian Churches
1%	Jewish
2%	Other Non-Christian
1%	Agnostic/Atheist
1%	Muslim/Islam
13%	None
2%	Don't Know/Refused

[n=801 CHRISTIAN RESPONDENTS IN Q.D6]

D6a. Do you consider yourself to be a born again Christian?

53%	Yes
46%	No
1%	Don't Know/Refused

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Next, I would like you to think about how recent world events may be influencing the types of products you purchase.

A6-A. As a result of recent world events, how likely are you to try a substitute product for one you've previously bought that is made in France or by a French company?

A6-B. As a result of recent world events, how likely are you to try a substitute product for one you've previously bought that is made in Germany or by a German company?

A6-C. As a result of recent world events, how likely are you to try a substitute product for one you've previously bought that is made in Canada or by a Canadian company?

CANADA		GERMAN		FRANCE		
4/03	3/03	4/03	3/03	4/03	3/03	
48%	**49%**	**44%**	**47%**	**41%**	**46%**	**TOTAL LIKELY (NET)**
51%	**50%**	**55%**	**53%**	**58%**	**53%**	**TOTAL UNLIKELY (NET)**
17%	13%	19%	15%	19%	23%	Very Likely
31%	36%	25%	32%	22%	23%	Somewhat Likely
20%	19%	22%	22%	19%	16%	Not Too Likely
31%	31%	33%	31%	39%	37%	Not At All Likely
1%	1%	1%	1%	1%	1%	Don't Know/Refused

*A7. Now I'd like you to think about how events including the war in Iraq and the ongoing war on terrorism are going to affect your own personal life. I'm going to read you a list of activities and I'd like you to tell me if you are MORE LIKELY to engage in the activity or find the activity more appealing, or if you are LESS LIKELY to engage in the activity or find each activity less appealing given what is happening in the world and in the United States. The first/next is ...

A. Boycotting or avoiding purchasing products from French companies
B. Boycotting or avoiding purchasing products from German companies
C. Boycotting or avoiding purchasing products from Canadian companies

More likely/ More appealing		Less likely/ Less appealing		About the same		
4/03	3/03	4/03	3/03	4/03	3/03	
31%	29%	43%	29%	26%	42%	Boycotting or avoiding purchasing products from **French** companies
23%	19%	44%	29%	33%	52%	Boycotting or avoiding purchasing products from **German** companies
17%	11%	45%	32%	38%	57%	Boycotting or avoiding purchasing products from **Canadian** companies

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D7. What is your total annual family income? Please stop me when I reach your income.

23%	**Less than $20,000 (Net)**
4%	Under $5,000
5%	$5,000 but less than $10,000
8%	$10,000 but less than $15,000
6%	$15,000 but less than $20,000
14%	**$20,000 - less than $30,000 (Net)**
7%	$20,000 but less than $25,000
6%	$25,000 but less than $30,000
12%	**$30,000 - less than $40,000 (Net)**
7%	$30,000 but less than $35,000
5%	$35,000 but less than $40,000
8%	$40,000 but less than $50,000
7%	$50,000 but less than $60,000
6%	$60,000 but less than $70,000
5%	$70,000 but less than $80,000
6%	$80,000 but less than $100,000
8%	$100,000 or more
11%	Refused

D8a. Do you consider yourself to be of Hispanic, Latino or Spanish origin?

D8b. What is your race? [NOTE: If respondent says "Don't Know" or doesn't mention a punch below, SAY: "Which of the following race categories do you most closely identify with?"]

10%	Mexican, Mexican American, Chicano, Puerto Rican, Cuban, or other Spanish/Hispanic/Latino origin.
73%	White
12%	Black or African-American
1%	American Indian or Alaskan Native
1%	Asian (e.g., Asian Indian, Chinese, Filipino, Japanese, Korean, Vietnamese)
**	Native Hawaiian or Other Pacific Islander (e.g., Samoan, Guamanian or Chamorro)
1%	Other ethnic origin
1%	Don't Know/Refused

REV_00265758

D9. Are you married, separated, divorced, or single and never been married?

54%	Married
4%	Separated
14%	Divorced
18%	Single, and Never Been Married
9%	Widowed
**	Engaged to Be Married
**	Living with Significant Other
1%	Refused

D9a. Are you currently employed, either full-time or part time? [IF NECESSARY] Is that full-time, or part time? [INTERVIEWER: SELF-EMPLOYED COUNTS AS YES, STILL GET FULL-TIME/PART-TIME]

61%	**TOTAL YES**
48%	Yes, full-time
13%	Yes, part-time
39%	**No**
1%	Don't Know/Refused

[n=388 UNEMPLOYED RESPONDENTS IN Q.D9A]

D9b. Are you a full-time student, a homemaker, retired or something else?

7%	Full-time student
31%	Homemaker
46%	Retired
3%	Unemployed
7%	Disabled
6%	Other

D11. Gender (BY OBSERVATION)

48%	Male
52%	Female

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A8. Next I'd now like to know if recent world events have impacted your impressions of international organizations and international views as well. For each of the following, please tell me if recent world events have made you more supportive or less supportive of that organization or view. The first/next is...

A. NATO – The North Atlantic Treaty Organization

34%	**TOTAL MORE SUPPORTIVE**
47%	**TOTAL LESS SUPPORTIVE**
10%	Much more supportive
25%	Somewhat more supportive
15%	**No impact**
31%	Somewhat less supportive
16%	Much less supportive
4%	Don't Know/Refused

B. The United Nations

36%	**TOTAL MORE SUPPORTIVE**
55%	**TOTAL LESS SUPPORTIVE**
17%	Much more supportive
19%	Somewhat more supportive
8%	**No impact**
26%	Somewhat less supportive
29%	Much less supportive
1%	Don't Know/Refused

C. U.S. support for Israel

50%	**TOTAL MORE SUPPORTIVE**
35%	**TOTAL LESS SUPPORTIVE**
22%	Much more supportive
29%	Somewhat more supportive
13%	**No impact**
25%	Somewhat less supportive
10%	Much less supportive
2%	Don't Know/Refused

D. Government and military cooperation between the US and Europe

52%	**TOTAL MORE SUPPORTIVE**
38%	**TOTAL LESS SUPPORTIVE**
22%	Much more supportive
29%	Somewhat more supportive
9%	**No impact**
26%	Somewhat less supportive
12%	Much less supportive
2%	Don't Know/Refused

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E. Economic cooperation and free trade with France and Germany

20%	**TOTAL MORE SUPPORTIVE**
67%	**TOTAL LESS SUPPORTIVE**
6%	Much more supportive
14%	Somewhat more supportive
12%	**No impact**
34%	Somewhat less supportive
33%	Much less supportive
1%	Don't Know/Refused

F. Economic cooperation and free trade with Canada

34%	**TOTAL MORE SUPPORTIVE**
47%	**TOTAL LESS SUPPORTIVE**
10%	Much more supportive
24%	Somewhat more supportive
18%	**No impact**
35%	Somewhat less supportive
13%	Much less supportive
1%	Don't Know/Refused

SUMMARY OF SUPPORT

Total More Supportive	Total Less Supportive	Much Less Supportive	
52%	38%	12%	Government and military cooperation between the US and Europe
50%	35%	10%	U.S. support for Israel
36%	55%	29%	The United Nations
34%	47%	16%	NATO - The North Atlantic Treaty Organization
34%	47%	13%	Economic cooperation and free trade with Canada
20%	67%	33%	Economic cooperation and free trade with France and Germany

REV_00265733

Wirthlin WORLDWIDE
1920 ASSOCIATION DRIVE, SUITE 500
RESTON, VIRGINIA 20191
PHONE 703 480 1900 FAX 703 480 1905
www.wirthlin.com

Next, I would like you to think about how recent world events may be influencing the types of products you have purchased recently.

A8a. As a result of recent world events, have you substituted a product for one you've previously bought that is made in France or by a French company?

A8b. As a result of recent world events, have you substituted a product for one you've previously bought that is made in Germany or by a German company?

A8c. As a result of recent world events, have you substituted a product for one you've previously bought that is made in Canada or by a Canadian company?

Germany	Canada	France	
9%	8%	15%	Yes
91%	92%	85%	No
**	**	**	Don't Know/Refused

[n=180 RESPONDENTS WHO HAVE SUBSTITUTED A PRODUCT FOR ONE THEY'VE PREVIOUSLY BOUGHT MADE IN EITHER FRANCE, GERMANY, OR CANADA IN Q.A8A-Q.A8C]

A9. How long do you expect that you will continue to substitute for these products?

3%	Less than 3 months
9%	Three months to less than six months
9%	Six months to less than one year
12%	One year to less than two years
63%	Two years or more
5%	Don't Know/Refused

A9a. As a result of recent world events, have you cancelled or postponed a personal or business trip to France?

A9b. As a result of recent world events, have you can cancelled or postponed a personal or business trip to Germany?

A9c. As a result of recent world events, have you cancelled or postponed a personal or business trip to Canada?

Canada	France	Germany	
4%	4%	3%	Yes
96%	96%	97%	No
--	**	--	Don't Know/Refused

REV_00265734

RESTON, VIRGINIA 20195
PHONE 703 480 1900 FAX 703 480 1905
www.wirthlin.com

[n=80 RESPONDENTS WHO HAVE SUBSTITUTED A PRODUCT FOR ONE THEY'VE PREVIOUSLY BOUGHT MADE IN CANADA IN Q.A8C]

A10. Based on what you have seen read or heard, please tell me all of the Canadian brands, products or companies that you are aware of here in the United States. **[MULTIPLE RESPONSES ACCEPTED]**

4%	Air Canada
3%	Canada Dry
3%	Water - General
3%	LaBatts
2%	Ford
2%	General Motors
2%	Lumber Products - General
2%	Molson
1%	Bombardier
1%	Moosehead
1%	Canadian Club
1%	LearJet
1%	T.D. Waterhouse
17%	Other
67%	Don't Know/Refused

[SPLIT SAMPLE; EACH RESPONDENT IS ASKED 1/3 OF ALL PRODUCTS]

A11. As you know, consumers here in the US can purchase products not only made here in the US, but in various other countries around the world as well. I'm going to read you a list of various products and after each one, please tell me which country you most closely associate that product with. The first/next is ...

FRENCH

A. Peugeot

48%	France
14%	Germany
2%	Canada
5%	The United States
17%	Other
14%	Don't Know/Refused

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PHONE 703 480 1900 FAX 703 480 1905
www.wirthlin.com

B. Perrier

80%	France
1%	Germany
2%	Canada
4%	The United States
3%	Other
9%	Don't Know/Refused

C. Evian

60%	France
5%	Germany
8%	Canada
10%	The United States
6%	Other
11%	Don't Know/Refused

D. Lancome

41%	France
12%	Germany
6%	Canada
13%	The United States
6%	Other
23%	Don't Know/Refused

E. Christian Dior

62%	France
5%	Germany
3%	Canada
11%	The United States
7%	Other
13%	Don't Know/Refused

F. Universal Pictures

8%	France
2%	Germany
4%	Canada
78%	The United States
3%	Other
5%	Don't Know/Refused

1515 ASSOCIATION DRIVE, SUITE 500
RESTON, VIRGINIA 20191
PHONE 703 480 1900 FAX 703 480 1905
www.wirthlin.com

G. Yoplait

45% France
5% Germany
5% Canada
24% The United States
9% Other
13% Don't Know/Refused

H. Dannon

23% France
10% Germany
8% Canada
34% The United States
11% Other
14% Don't Know/Refused

I. French's mustard

29% France
1% Germany
1% Canada
64% The United States
1% Other
4% Don't Know/Refused

J. Grey Poupon

64% France
7% Germany
1% Canada
15% The United States
6% Other
7% Don't Know/Refused

K. L'Oreal

52% France
2% Germany
4% Canada
28% The United States
3% Other
10% Don't Know/Refused

REV_00265737

Records Management, White House Office of (ORM)

Subject Files

FG006-27
(Office of Senior Advisor-Karl Rove)

536037

OA/NARA#: 10735/10793
9711

Box
Folder

REV_00265760

2018-0011-P [ ]

Systematic Processing Marker

This is not a textual record. This Systematic Processing Marker indicates that material has been removed during systematic processing by George W. Bush Presidential Library staff.

WHORM
FG006-27

Stack:	Row:	Sect.:	Shelf:	Pos.:	FRC ID:	Location or Hollinger ID:	NARA Number:	OA Number:
W	11	4	3	1	9711		10793	10735

Folder Title:

536037

536037

June 15, 2002

RE: Alternative DVA Health Care Concept Submitted May 10,2002

Mr. Karl Rove
Senior Advisor to the President

Dear Mr. Rove:

This is to update you on developments since your letter of May 21, 2002. I realize that the inefficient and wasteful DVA system can only be reformed with a long-term strategy. Hopefully, this first step will be feasible as a GOP campaign issue in 2004.

You undoubtedly remember how the entitlement-demanding professional veterans (mostly with brief periods of non-combat service) turned their backs on former President Bush in 1992. They have a major share of blame for the recent 8 years of bad foreign and defense policies. Although the National staffs of the VFW and TROA have tried to dismiss this concept out of hand, it was unanimously endorsed by both my local VFW Post (8194, Stuart, FL) and TROA (FL Treasure Coast) chapter.

On June 12th, my fellow Martin Co. GOP Executive Committee members voted 63% (27 to 17) in favor of it, just missing the 2/3 needed to pass. A few veteran members who didn't closely read the copy that was mailed to them and confused several people in the audience into believing they would have to wait until 60 to get VA treatment and that I was advocating depriving peace time vets. Considering that was my second meeting as a member, I'm very encouraged. Enclosed is the non-partisan version I'm currently working through AUSA.

Sincerely,

PRA 6

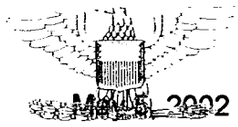

Association of the United States Army
Resolutions Committee
Government Affairs Directorate

Gentlemen:

Enclosed is a proposed resolution for reforming and enhancing the U.S. Department of Veterans Affairs (DVA) health care system.

Few leaders in government, the media and key segments of our society have any military service. Unfortunately, this has made it easy for liberals and their allies in Congress to degrade the prestige of an Honorable Discharge. The DVA also is no longer dominated by veterans who understand veteran-unique problems as it was from the post-war era through the 1980s. Consequently, an unfair DVA priority system currently reflects post-Viet Nam victimization and liberal guilt trends within our culture. It simply is wrong for our gallant warriors from World War II and the Korean Conflict to compete on waiting lists for treatment with able bodied younger peace time veterans, especially those with substandard service records.

I have also enclosed a supporting editorial and would appreciate your forwarding copies to the editorial staff of Army magazine and the AUSA news. Your server appears to be having problems. Once it is repaired please contact me and I will E-mail you electronic copies.

Sincerely,

Signed
Charles J. Winn
Colonel, AUS (Retired)

PRA 6

5 May 2002

PROPOSED RESOLUTION FOR THE ASSOCIATION OF THE UNITED STATES ARMY

SUBJECT: VETERANS HEALTH CARE ENHANCEMENT

SUBMITTED BY: Colonel Chuck Winn, AUS (Ret)

PRA 6

All veterans separated under honorable conditions are entitled to some form of quality medical treatment. The recent opening of the Department of Veterans Affairs (DVA) medical treatment facilities to all veterans however, regardless of status, created second-order adverse impacts on our most deserving veterans. These include our World War II and Korean War veteran populations who are in most need of medical care. Other honorably discharged veterans who served in combat theaters, deployed on contingency operations, or in support assignments during periods of hostilities have made the most contributions and greatest sacrifices. Like our greatest generation of veterans they too deserve local, no-hassle quality health care.

A fairer and more cost-effective method of providing health care can be achieved, without building and staffing new or expanded DVA medical facilities and infrastructure. This can be accomplished through a DVA-funded enrollment card used for payment of any board-certified hospital, clinic or health care provider in the private sector.

WE THEREFORE RESOLVE to urge the Administration and Congress to:

- Establish a premium veterans' health care plan for our veterans who have gone above and beyond, modeled on the Department of Defense (DoD) TRICARE system.
- Determine eligibility on a point system assigning weighted criteria on such variables as service in combat, length of service on active duty, the numbers of deployments for contingencies, degree(s) of service-connected disability; type of military occupational specialty; and age.
- Make all honorably discharged veterans who completed a full term of active or reserve service eligible upon reaching age 60.
- Continue funding and operating existing DVA hospitals and medical facilities at current levels for treatment of veterans until they criteria for the premium plan.
- Redefine treatment priorities at all DVA medical facilities with highest categories based on character and length of service, medical condition and economic need.
- Establish an absolute disqualification for such premium plan to any veteran with less than an honorable discharge or a record of substandard service.

May 5, 2002

A Veterans' Health Care Proposal

PRA 6

Veterans who have gone the extra mile for their country deserve local, no-hassle quality health care. Ex-servicemen and women from all regions of the country, must also receive their fair share of the Department of Veterans' Affairs (DVA) resources for this purpose. A fair and cost-effective method of achieving this is possible without building and staffing new or expanded DVA medical facilities and infrastructure.

Unfortunately, the recent opening of the doors of DVA medical treatment facilities to all veterans, regardless of status, created second, and third-order adverse impacts on our most deserving veterans, who have made the greatest sacrifices and are in most need of care. Honorably discharged veterans who served in combat theaters, deployed on contingency operations, or in support assignments during periods of hostilities contributed more than others. For years, politically untouchable "sacred cows" have been the large number of veterans who draw various degrees of disability payments for conditions contracted during relatively short periods of peacetime service. Not to denigrate supporting duties or peacetime service, but considering all military service relatively equal is absurd. Why, for example, should an ailing World War II or Korean War combat veteran have to compete on waiting lists on the same footing with a peacetime veteran with a general discharge for drug or alcohol abuse? A less extreme example is a combat veteran having a lower priority than an honorably discharged peacetime veteran with a service-connected disability contracted from an off duty sports injury.

A premium veterans' health care plan must be established for our veterans who have gone above and beyond. Such a plan could be modeled on either the Department of Defense (DoD) TRICARE system or possibly MEDICARE. Eligibility could be determined on a point system assigning weighted criteria on such variables as service in combat, length of service on active duty, the numbers of deployments for contingencies, degree(s) of service-connected disability; and type of military occupational specialty. Age should also be a factor. Perhaps any honorably discharged veteran who completed a full term of service could become entitled to the premium treatment plan upon reaching age 60. General guidelines might be:

- All honorably discharged vets would become eligible for the premium plan at age 60. This would include those with one full enlistment or term or service and honorably discharged reservists who completed their full service obligations.

- At age 50, all honorably discharged after a full term who deployed OCONUS to an active warfighting theater resulting in a campaign or expeditionary medal; reservists activated for contingencies or war time service, or gray area reservists with 20 years qualifying service for retirement, would become eligible.

- Any veteran with a VA disability exceeding 70 percent, or any combat wounded veteran would be eligible regardless of age.

- All honorably discharged vets should be eligible for a TRICARE-style pharmacy system regardless of age.

- All other veterans should be required to use VA facilities until reaching the minimum age for the premium plan. Highest priority Should be based on character and length of service and economic need. i.e. all honorably discharged vets get a higher priority over general discharge types regardless of how dire their economic circumstances.

Our older veterans should not have to travel for quality care, or compete on waiting lists with the maladjusted and able-bodied who were separated for sub-standard performance or misconduct. Premium DVA enrollees could be issued a credit card-style enrollment card that could be accepted by any board-certified hospital, clinic or health care provider.

All veterans separated under honorable conditions are entitled to some form of quality medical treatment. This mass base of veterans can provide the patient load to keep DVA hospitals properly funded and operating at existing levels. A premium service must also be established however, for our greatest generation and veterans from other eras who have gone above and beyond. Under no circumstances however, should a veteran with less than an honorable discharge be eligible. Unquestionably, this proposal requires additional definition, but it is a sound and compassionate alternative to expanded and less efficient bigger government programs.

536037

National Journal

19 June 2003

VIA FACSIMILE

Alberto R. Gonzales
White House Counsel
The White House

RE: National Journal article about Bush White House and Hatch Act requirements

Dear Judge Gonzales:

I believe you are aware through the White House Press Office that *National Journal* will publish an article in its issue of June 27 regarding the responsibilities and challenges posed to White House employees and others in the government during the re-election season, as they juggle governing responsibilities and campaign enthusiasm.

As with previous White House counsels, you recently distributed a memo to staff providing explanatory information related to the Hatch Act and its 1993 reform amendments.

I would like to interview you, for the record, about the advisory you and Brett Kavanaugh shared with staff, and the general procedures President Bush expects his staff, the Vice President's staff, and others in the Bush administration to follow to avoid any question of wrongdoing or abuse of Treasury resources for partisan political purposes. I am familiar with former Counsel Abner Mikva's April 27, 1995, memo and would like you to describe how President Bush would compare his interpretations of the Hatch Act and his own provisos to those of the previous administration, which obviously ran into difficulties on this score.

I am, of course, interested in the president's application of appropriate procedures to Senior Adviser Karl Rove and his staff, the Office of Political Affairs, the Office of Public Liaison, Cabinet Affairs, and others who hold dual responsibilities for helping the President as he governs while also tending to campaign considerations. I have made a separate such request to David Addington in the Vice President's office through Mr. Cheney's press office.

My deadline is no later than midday June 25, and preferably earlier.

Thank you in advance for your assistance.

Alexis Simendinger

Alexis Simendinger
White House Correspondent
National Journal
202-739-8490
202-833-8069 Fax

cc: Dan Bartlett, Communications Director
Ari Fleischer & Ashley Snee, Press Office
Karl Rove, Office of Strategic Initiatives
David Addington, Office of the Vice President

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LE COVP
FRISEVR
München - Hamburg - Berlin

LE COVP Coiffeur et Beauté GmbH
Verwaltung : Pienzenauerstr. 18 81679 München
White House
Mr. Carl Rove
Senior adviser
to the President

Washington DC
USA

18 th June 2002

Invoice

Dear Mr. Rove,

Le Coup Coiffeur et Beauté GmbH is located near the reception hall in the Hotel Adlon in Berlin. The safety-measures taken during the visit of President Bush in May caused the closure of our business-rooms.

The business rooms remained closed on 22nd and 23rd of May 2002.
This costs a loss of two full days amounting to the sum of **€ 2.400,00.**

Please settle the bill within 4 weeks to our account

HypoVereinsbank Munich
Account number PRA 6
National bank code PRA 6

Yours sincerely

Annette Angermaier
LE COVP

LE COVP Coiffeur et Beauté GmbH
Im Hotel Adlon, Unter den Linden 77, 10117 Berlin
Verwaltung: Pienzenauerstr. 18 81679 München
Telefon 089-2714088 Fax 089-2714089

536037

CENTER FOR COMMUNITY CHANGE BACKGROUNDER

Company Profile

- "For almost 30 years, CCC has been nationally recognized for its work helping people build organizations and create better communities and policies. The Center's 84 person staff includes many of the nation's leading experts on community development, community organizing, leadership training, coalition-building, housing, welfare reform, jobs, economic development, banking and reinvestment, and Native American issues." (CCC's Website, www.communitychange.org, Accessed 6/11/2003)

- "The Center for Community Change is committed to reducing poverty and rebuilding low income communities. To do this, we help people to develop the skills and resources they need to improve their communities as well as change policies and institutions that adversely affect their lives. We believe that poor people themselves – through organizations they control – need to lead efforts to eliminate poverty." (CCC's Website, www.communitychange.org, Accessed 6/11/2003)

- CCC Focuses on low-income communities, especially those of color. Additionally, they look for groups whose aim is to create progressive social change to benefit their constituents as well as a community that has serious social problems, such as poverty or high unemployment. (CCC's Website, www.communitychange.org, Accessed 6/11/2003)

- "The National Campaign for Jobs and Income Support (NCJIS), a project of the Center for Community Change (CCC), is a coalition of more than 1000 grassroots anti-poverty groups that have been organizing since 2000 to transform TANF into a meaningful anti-poverty program. Under the banner Make TANF Work! (www.maketanfwork.org), the National Campaign is spearheading a national effort to fashion a progressive policy and political strategy on welfare reform reauthorization." ("New Poverty Data Should Turn Welfare Debate On Its Head," *US Newswire*, 9/24/02)

Employees

Deepak Bhargava: Executive Director

Richard Stolz: Deputy Director For Public Policy

Stephanie Robinson: Director Of Public Policy; Former General Counsel To Sen. Edward M. Kennedy (D-Mass.)

Rachel Gragg: Senior Policy Analyst; Former Policy Adviser For The Late Sen. Paul Wellstone, D- Minn. (1991-2002).

Benson Roberts: Board Member, CCC; Working On President Bush's "Renewing The Dream" Tax Credit To Benefit Low-Income Homebuyers.

Anti-Bush Child Tax Credit Ad

On June 5, 2003, Center For Community Change Lauched An Ad Claiming Bush Chose The Fortunate Over The Needy. "In another effort to build pressure, a coalition of liberal groups today begins airing TV ads in Washington blasting Bush for leaving the working poor out of the child credit benefit increase. The Center for Community Change is buying a relatively modest amount of airtime, but it is encouraging hundreds of like-minded groups to air the same ad in other cities. The ad shows two children: one too poor to qualify for the increased credit and another, whose parents make more money, who receives it. 'President Bush chose the most fortunate to get the most,' an announcer says." (William M. Welch, "Study: Military Kids Slighted On Tax Credit," USA Today, 6/5/03)

The Ad, Run On Cable News Television, Is Set To Run For Two Weeks, But May Be Extended. "Center for Community Change spokeswoman Germonique Jones said the spot began running last Thursday [6/5/03] in Washington on CNN, CNBC, MSNBC and Fox News Channel. The spot is scheduled to air for two weeks, but Jones said the group could change the buy depending on congressional action on the issue. Squier Knapp Dunn Communications produced the spot." (Mark H. Rodeffer, "Group Bashes Bush On Child Tax Credit," *National Journal*, 6/10/2003)

Anti-Bush Statements And Policy Positions

"The Sheep's Clothing Has Long Come Off 'Compassionate Conservatism' And President Bush's True Colors Are In Full View. This Administration Is Engineering The Most Comprehensive Assault On Poor Americans Since The Reagan Years." (CCC Press Release, "CCC Nominates Bush Administration For Oscar," 2/13/03)

Center For Community Change Opposes President Bush's Work Initiatives. "'For all the fanfare in the 1990s about how we were going to reward work, what's happening now is the reverse - we're punishing work,' says Deepak Bhargava, executive director of the Center for Community Change, a Washington-based advocacy group." (Holly Yeager, "State Fiscal Crises And Law Changes Hit Nation's Working Poor," Financial Times [London], 1/25/03)

In January 2003, The ED of CCC Vocally Opposed Bush's Work Initiatives, Calling The Bill "Bankrupt". "Advocates for the poor criticized Bush for pushing the same plan that couldn't muster enough support last year in the Senate. Welfare measures stalled in the then Democratic-controlled Senate. 'Bush is proposing the same bankrupt bill that failed last year,' said Deepak Bhargava, executive director of the Center for Community Change, an advocacy group. 'Bush has been bashed for a week for giving away the store to the rich and [now] they want to show that they care about the poor. But this is the wrong way to do it.'" (Deborah Barfield Berry, "Bush Touts Welfare Changes," Newsday, 1/15/03)

The Group Is Pressuring The Bush Administration To Establish A National Housing Trust Fund. "A coalition of advocates for construction of affordable housing

today called on the Bush Administration to establish a national housing trust fund that would help state and local governments 'address the acute housing shortage for America's low wage earners and low income elderly and disabled people.' The groups -- The Center For Community Change, ACORN and the Low Income Housing Coalition -- joined by members of Congress, released a report at a Capitol Hill news conference this morning, which found 'that 65,000 affordable homes are being built every year by local and state funds.'" ("Coalition Of Affordable Housing Advocates Urge Bush Administration To Back National Housing Trust," White House Bulletin, 7/23/02)

The Center For Community Change Opposed President Bush's 2001 Tax Cut. President Bush's proposed tax cut plan would overwhelmingly benefit the nation's wealthiest one percent. . . . The plan has been widely criticized because upper-income earners have enjoyed most of the gains in recent years, faced a lower share of the tax burden in the last 25 years, and yet would still receive most of the benefits under the president's tax plan. (Center For Community Change Policy Alert #218, CCC Website, www.communitychange.org, Accessed 6/11/2003)

CCC Opposed Bush's Child Tax Credit In 2001, Claiming It Was Not "Refundable." "A refundable child credit of $1,000 per child would be the single most effective measure that policymakers could take to achieve greater fairness in any tax cut and to reduce child and family poverty. President Bush's proposal to double the existing child credit will not accomplish these goals as presently drafted. It provides little or no benefit to the families that need it most. Millions of poor and moderate-income children would receive no benefit whatsoever from the Administration's proposal simply because it is not refundable. . . . [N]o children would be lifted from poverty under a nonrefundable child credit." (Press Release, ACORN, Center for Community Change, Children's Defense Fund, Food Research and Action Center, National Campaign for Jobs and Income Support and National Council of La Raza, "Joint Statement: Make The Bush Child Tax Credit Refundable," 2/8/01)

KansasCity•com

536077

Posted on Mon, Jun. 23, 2003

Ex-geek enjoys 'meteoric' rise to White House

By DAVID GOLDSTEIN
The Kansas City Star

WASHINGTON - By his own admission, the new White House political director was once a bit of a geek.

Growing up in Wichita, Matt Schlapp spent a lot of time in front of the television, glued to C-Span.

Washington's political wars fascinated him. He watched confirmation hearings and congressional investigations the way other kids watched MTV. He followed debates on the Senate and House floors as if he had a front-row seat in the gallery. He felt in the know.

Now the one-time C-Span devotee has become one of the off-camera Washington insiders that always so intrigued him.

Schlapp is the new White House political director. He advises the president. His boss is Karl Rove, the West Wing's resident political guru. Republican leaders and party chairmen from 50 states take his calls. He has a large corner office in the ornate Eisenhower Executive Office Building.

"I guess I always thought it'd be great to do politics," Schlapp said, relaxing in his office one recent afternoon. "But I can't imagine as a kid in Wichita, Kansas, that I thought seriously I'd do something like this in the White House."

Republican Rep. Todd Tiahrt of Kansas, his former boss who brought him to Washington eight years ago, called Schlapp's rise "meteoric." He summed up his friend's status in a way that the political world can instantly grasp.

"He has Karl Rove's ear," Tiahrt said.

Rove praises Schlapp's judgment and political instincts.

"He doesn't flinch when bullets are whizzing by," said Bush's chief strategist. "He keeps focused on the goal."

Schlapp, 35, still has a "pinch me, I must be dreaming" quality about him. Walking down the long, black-and-white checkerboard marble corridors of the Eisenhower building, he said he often thinks of the people who once worked there, including Eisenhower and Teddy Roosevelt.

"When you first walk into this environment and imagine working in this place, you have a real reverence for it," he said. "You think, `What an accomplishment. What a privilege.' "

Schlapp was born in Ohio. His family moved to Wichita when he was 12. His mother, Wichita City Councilwoman Sue Schlapp, said her son always watched the news and read presidential biographies. But she added, as any mother would: "I don't know that he was geeky."

A tennis instructor, she passed on her skills and love for the game, while her son, who idolized Ronald Reagan, eventually persuaded the New York-born, Irish, Catholic, dyed-in-the-wool Democrat to switch parties.

"She finally woke up one day and said, `Why am I always voting for Republicans for president?' " he said.

Schlapp played tennis for Wichita's Kapaun-Mount Carmel High School and still tries to squeeze in a game when he can. He calls the game a release valve from the pressure of his 12- to 14-hour days. He occasionally plays in charity tournaments in the capital, partnering with people such as Fox News anchor Brit Hume.

He joined Tiahrt as a volunteer when the former Boeing engineer ran his giant-killer campaign against nine-term Democrat Dan Glickman in 1994. His political resume was pretty thin, apart from being a student co-chairman of the first President Bush's 1988 re-election campaign at Notre Dame University.

Schlapp became Tiahrt's chief of staff, but returned to Wichita every two years to manage the congressman's re-election.

In 2000, he joined then-Texas Gov. George Bush's presidential campaign as a regional campaign manager over seven Midwestern states. Several, such as Missouri, became key battlegrounds.

"I really felt sorry for the guy," said Tony Feather, a Missouri-based Republican strategist who was the Bush campaign's political director in 2000. "We gave him what we thought was a manageable set of targets (states) and layered in three or four more targets on top. He got it done. He did a fabulous job."

Schlapp served in the Florida trenches during the post-election re-count, as did many campaign aides who went on to the White House. He was part of the supposedly spontaneous Thanksgiving eve demonstration at the Miami-Dade County Hall, where protesters pounded on the windows and disrupted the first re-count of the ballots. One participant dubbed it the "Brooks Brothers protest" because of the buttoned-down appearance of the demonstrators.

Asked what he did in Florida during the re-count, Schlapp said: "Just different things."

After Bush was declared the winner, Schlapp became deputy political director.

"Your short-term elation is quickly replaced with a real desire to get to the work and do it seriously," he said. But he conceded: "It's really exciting to be able to tell people what you do and who you work for."

When his immediate boss, White House political director Ken Mehlman, left a few weeks ago to manage Bush's 2004 re-election campaign, Schlapp moved up. Not long after that, he became a father for the first time.

Schlapp's office is where the politics and policy of the administration meet. His main responsibility is to ensure that Bush's program has support around the country and to look for the best venues for the president to make his case.

He is in close touch with Republican Party leaders across the country, constantly taking the political temperature and -- particularly with 2004 looming -- gauging the president's strengths and weaknesses.

With so much political drama on so many fronts -- the aftermath of the war in Iraq, the fate of the president's agenda in Congress, the roiling field of potential challengers in the Democratic Party -- Schlapp

REV_00265777

has little time to kick back and enjoy his sudden ascendance.

But he knew that would be the case. He recalled that when Bush took office more than two years ago, the president told his staff: Don't mark time. The first term will go by very quickly.

"That resonated with me," Schlapp said. "I think he wanted us to quickly get over the wide-eyed `Wow! Isn't this a fantastic experience' and turn immediately to the task at hand. The last 21/2 years are like a blink of an eye."

To reach David Goldstein, Washington correspondent, call **(202) 383-6105** or send e-mail to dgoldstein@krwashington.com.

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REV_00265778

FARHAT
INDUSTRIES
3500 Grapevine Mills Parkway
Grapevine, TX 76051

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Per E.O. 13526, SEC 3.4(B)

Karl Rove
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

~~CONFIDENTIAL~~

20300-0003

OCV #018

✓#156

REV_00265781

F.

DAIMLERCHRYSLER

Letkowit & Joe O'Neil Barry

DaimlerChrysler Corporation
Robert G. Liberatore
Senior Vice President
External Affairs and Public Policy

536037

June 10, 2003

The Honorable Karl Rove
Senior Adviser to the President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Mr. Rove: Karl

As the world's largest transatlantic company, DaimlerChrysler takes a keen interest in healthy relations between the United States and Europe. As a global corporate citizen, DaimlerChrysler also takes seriously its obligation to act in a socially responsible manner wherever it operates.

These two interests recently converged with approval of President Bush's initiative on AIDS. DaimlerChrysler CEO Juergen Schrempp chairs the Global Business Coalition on HIV/AIDS, and authored the attached article from the German newspaper Frankfurter Allgemeine calling on European leaders to join President Bush in the fight against AIDS. The article appeared as the leaders of the G-8 countries gathered in Evian, France.

DaimlerChrysler is proud of its own efforts to combat HIV/AIDS, which include providing our South African employees with treatment and prevention services. We have also supported a number of initiatives to keep open channels of communication and dialogue between European and American officials during recent times of tension.

If you would like more information on DaimlerChrysler's efforts to combat HIV/AIDS, or if you have any questions, please do not hesitate to contact us.

Sincerely,

RGL/aw
Attach.

DaimlerChrysler Corporation
1401 H Street, NW, Suite 700
Washington DC USA 20005-2110
Phone 202.414.6747
Fax 202.414.6716
e-mail: rgl1@dcx.com

Article translated from German.
Published on June 1, 2003 in "Frankfurter Allgemeine Sonntags Zeitung" in Germany

Don't give AIDS a chance

By Juergen Schrempp

Today the leaders of the G-8 nations at Evian will have an opportunity to overcome American-European tensions and find new common goals. Together they can help to restrain a disease, which already has already killed 25 million people.

President George Bush has already set a sterling example. He won approval from Congress to spend $15 billion over the next five years to combat AIDS. Of that total, $14 billion would go primarily to countries in Africa.

More than 42 million people worldwide are infected with the HIV virus. By 2010 the death total is expected to rise to 80 million. 30 million of those suffering from AIDS are in Africa, where some countries may lose up to a quarter of their populations by the end of the decade. In some African countries, almost 40 percent of the adult population is infected with the virus.

As President Bush has said, "this is a terrible disease, but not a hopeless disease."

We know what to do. AIDS can be prevented. Infection rates in Uganda have been brought down dramatically. AIDS can be treated. Anti-retroviral drugs are becoming more affordable, extending many lives.

Unchecked, the disease will overwhelm the economies and national structures of developing countries. Demographic experts warn that the crisis could spread to Eurasia and destabilize even Russia, India and China.

The leaders of the G-8 countries can pledge additional funding. This is necessary. Beyond this they should do whatever they can to enlist the civil institutions of their countries in the fight against AIDS.

During the five minutes it has taken to read this article, 30 people have died from AIDS and 55 have been infected with the virus. The leaders of the G-8 countries have an historic opportunity to give millions of people hope.

GASTBEITRAG

Gebt Aids keine Chance

VON JÜRGEN SCHREMPP

Die Führer der G-8-Staaten werden heute in Evian Gelegenheit haben, die amerikanisch-europäischen Spannungen zu überwinden, und neue Gemeinsamkeit zu finden. Sie können gemeinsam eine Krankheit bändigen helfen, die 25 Millionen Menschen das Leben gekostet hat.

Präsident George W. Bush ist mit gutem Beispiel vorangegangen. Er bekam 15 Milliarden Dollar für die Bekämpfung von Aids über die nächsten fünf Jahre vom Kongreß bewilligt. Von dieser Summe werden 14 Milliarden vor allem afrikanischen Ländern zugute kommen.

Weltweit sind mehr als 42 Millionen Menschen mit dem HIV-Virus infiziert. Bis 2010 wird von 80 Millionen Todesfällen ausgegangen. 30 Millionen der an Aids erkrankten Menschen leben in Afrika, wo einige Staaten bis zum Ende des Jahrzehnts ein Viertel ihrer Einwohner verlieren könnten. In manchen afrikanischen Ländern sind fast 40 Prozent der Erwachsenen mit dem Erreger infiziert.

Präsident Bush hat es auf den Punkt gebracht: „Dies ist eine furchtbare, aber keine hoffnungslose Krankheit." Denn wir wissen, was wir zu tun haben: Aids kann verhindert werden. In Uganda konnte die Infektionsrate dramatisch reduziert werden. Aids kann auch behandelt werden. Medikamente zur Bekämpfung von Retroviren werden erschwinglich und verlängern das Leben vieler Infizierter.

Unkontrolliert wird die Krankheit die Volkswirtschaften und staatlichen Strukturen in den Entwicklungsländern überfordern. Demographen warnen, daß sich die Krise auf den eurasischen Kontinent ausdehnen und sogar Rußland, Indien und China destabilisieren könnte.

Die Führer der G-8-Staaten können weitere finanzielle Mittel zur Verfügung stellen. Dies ist notwendig. Darüber hinaus sollten sie alles unternehmen, um die zivilen Institutionen ihrer Länder in den Kampf gegen Aids einzubinden.

In den letzten fünf Minuten, die zum Lesen dieses Artikels benötigt wurden, starben 30 Menschen an Aids, 55 weitere infizierten sich. Die Führer der G-8-Staaten haben die historische Chance, Millionen Menschen Hoffnung zu geben.

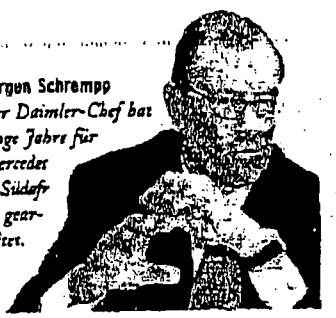

Jürgen Schrempp *Der Daimler-Chef hat lange Jahre für Mercedes in Südafrika gearbeitet.*

REV_00265784

F: Jean Becker

THE WHITE HOUSE
WASHINGTON

536037

FACSIMILE TRANSMITTAL SHEET

TO:	FROM:
Ms. Jean Becker	Karl Rove
COMPANY:	DATE: 6/30/2003
FAX NUMBER: PRA 6	TOTAL NO. OF PAGES INCLUDING COVER: 2
PHONE NUMBER:	SENDER'S REFERENCE NUMBER: 202-456-2369
RE: Kentucky Governor's Race	YOUR REFERENCE NUMBER:

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

26 KENTUCKY GOVERNOR: According To Ben

Campaign Tip Sheet
Primary/Filing Dates, Latest Polls, Latest Ads...

AG **Ben Chandler** was in DC 6/26 and held an interview with reporters at DGA headquarters. Chandler said GOPers will have trouble "nationalizing" the election in KY, and suggested that if Pres. **Bush** comes to the state, he should be asked "if he brought any jobs with him." He said that KY voters have questions about the war on terrorism and WMD and said he has been amazed at "how well Bush has been able to string out 9/11."

Chandler noted that Dems have a "sizeable registration advantage" over GOpers in KY, said he is better known, and noted that his grandfather, **Happy Chandler**, also served as gov. Chandler maintained that he is an independent Dem, pointing to his 100% rating from the NRA and his willingness to take on scandal-plagued Dem Gov. **Paul Patton**. Chandler, who has called on Patton to resign, says he doesn't think he'll see any fallout from Patton's problems because he's been taking on Patton from day one. Chandler said he is also looking for Dem chairs who aren't "connected to the current regime" in Frankfurt. More Chandler: "I'm more anti-Patton than the Republicans."

Chandler downplayed the influence of Sen. **Mitch McConnell** (R), who he said hand-picked Rep. **Ernie Fletcher** (R-06) to run for gov. Chandler: "I'm not sure how popular he is." He noted that McConnell brings in "funding and strategy," but said that KY voters had an independent streak and don't necessarily vote party line.

When asked about the final days of the Dem primary which saw businessman **Bruce Lunsford** drop out and endorse House Speaker **Jody Richards**, Chandler said his campaign didn't have enough time to respond to what was going on." Since then, Chandler has tapped Richards' campaign manager to run his own and has tried to unite the party.

As for fundraising, Chandler predicts he will be behind at the end of this quarter, but plans to have a big July and August. He noted that he raised $3M in the primary, besting Fletcher's primary total by $1M. He said he's not sure if he'll tap into the fortune of his running mate, **Charlie Owen**. Chandler: "It may or may not happen." He said he plans to raise substantial amounts of money, regardless of whether own helps.

As for other KY issues, Chandler said that he believes Sen. **Jim Bunning** (R) is vulnerable and that there are several Dems mulling bids against the sen. Asked if he made his Owen, his running mate and someone often mentioned as a possible Senate candidate, pledge to serve a full four-year term as LG, Chandler said he did not (*Hotline*, 6/27).

A Good Gimmick?

A Louisville *Courier-Journal* editorial says that Fletcher "is right: Ben Chandler's proposal for the two of them to get on a bus for three weeks and make joint campaign appearances all over the state is a 'gimmick.'" But Fletcher "is wrong to imply that gimmicks are bad, and to be so dismissive of this particular one. ... Yes, a bus tour would be a gimmick. But exploitive TV ads are gimmicks, too, and a tour might be just the kind of new gimmick voters need" (6/26).

(Back to Contents)

REV_00265786

F: Declined invitations

536037

The Atlantic Monthly

TO:	The scheduler of Mr. Karl Rove
FAX:	(202) 456-2369
FROM:	Amanda Whipkey
DATE:	June 20, 2003
NO. OF PAGES TO FOLLOW:	2
REGARDING:	*Atlantic Monthly*/Microsoft "Salon Dinner"

-need to check schedule
-check w/ Dan

Please see the attached invitation to the *Atlantic Monthly*/Microsoft "Salon Dinner" on July 15th.

-~~E~~J. Goergen called to decline on ~~4~~ 6/30/03 at 4:42 p.m.

600 New Hampshire Avenue Washington DC 20037 Telephone: 202-672-5600 Fax: 202-672-5700



THE ATLANTIC MONTHLY

(Est. 1857)

June 20, 2003

Mr. Karl Rove
Senior Advisor to the President
The White House
Washington, DC 20510

Dear Mr. Rove:

Before Washington closes down for the summer recess, I hope that you'll join us for an *Atlantic Monthly*/Microsoft "salon dinner." Please mark your calendar for Tuesday, July 15, at the Metropolitan Club, with a cocktail reception at 6:30pm, moving to dinner and discussion at 7:15pm.

Our first two dinner conversations focused on Iraq and the economy. For this, our third, we will turn to politics and the ongoing campaign, and will give some special attention to the upcoming presidential race, including the media's role, key constituencies, the power of incumbency, and the growing impact of technology. Beyond the political focus, the conversation will be as broad or narrow as the group dictates, reflecting the topics of the day and preoccupations of our guests—a cross-section of leaders from the political, media and business worlds in Washington.

Joining us as a special guest will be Jeff Raikes, Group Vice President of Microsoft. Jim Fallows, National Correspondent for *The Atlantic* and recent National Magazine Award winner ("Iraq: The Fifty-First State?" November, 2002) will launch our dinner conversation on the 15th. Also joining us will be Cullen Murphy, Managing Editor of *The Atlantic*, and David Brooks, *Atlantic* Correspondent.

I do hope that you'll attend and would ask that you RSVP to Amanda Whipkey at awhipkey@theatlantic.com or on 202-266-6003. Of course, feel free to contact me with any questions or thoughts at 202-266-7201.

All the best,

John Fox Sullivan
President and Group Publisher

THE WATERGATE, 600 NEW HAMPSHIRE AVENUE, NW, WASHINGTON, DC 20037
Telephone (202) 266-6000 *Facsimile* (202) 266-6001

Atlantic Monthly/Microsoft Salon Dinner

Tuesday, July 15, 2003

The Metropolitan Club
1700 H Street, NW
Washington, DC

Schedule for the Evening

6:30pm	Cocktail Reception
7:15pm	Dinner and Group Conversation *Anderson Room* *2nd floor*
9:30pm (approx)	Conclusion

RSVP Information

Please respond to Amanda Whipkey at 202-266-6003 or at awhipkey@theatlantic.com, including any special dietary or other needs

Special Notes Regarding the Metropolitan Club

- Complimentary valet parking available.
- Please observe the dress code – coat and tie for gentlemen and commensurate attire for ladies.
- No cell phones or personal communication devices are permitted to be used in the Clubhouse.
- The Metropolitan Club is made available through the courtesy of Mr. Jack Krumholtz, Director of Federal Affairs of Microsoft's Washington office

536011

March 8, 2002

The Honorable Karl Rove
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Karl:

BOARD OF TRUSTEES

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LEW R. WASSERMAN

Executive Director
MARK BURSON

As you know, on Thursday, May 16, 2002 the Congressional Gold Medal will be awarded to President and Mrs. Reagan. The ceremony will take place in the Rotunda of the United States Capitol and Nancy Reagan will receive the awards on behalf of herself and the former President.

In celebration of the presentation of the Congressional Gold Medals, a special tribute to President and Mrs. Reagan will take place on the evening of Wednesday, May 15th at the Ronald Reagan Building in Washington, DC. As a special tribute to President and Mrs. Reagan, Mstislav Rostropovich has rearranged an international concert tour to perform for the dinner.

The Board of Trustees of the Ronald Reagan Presidential Library Foundation would like to invite you to serve as a member of the Honorary Host Committee, which includes attending the reception and dinner. We certainly hope Mrs. Rove will be able to join you.

All proceeds from the event will benefit the Ronald Reagan Presidential Library Foundation. This will be the first time Nancy Reagan has been in Washington, DC for several years and there are no other plans for her to return in the foreseeable future. We certainly hope you will be able to attend. To RSVP please have your office contact Erica Jolles or Holly Bauer at the Ronald Reagan Presidential Library Foundation at 805-522-2977.

We hope you will be able to join us for what promises to be a very special evening.

Sincerely,

Fred.

FREDERICK J. RYAN, JR.
Chairman

Washington Address: 808 Seventeenth Street, N.W., Suite 300
Washington, D.C. 20006
Tel: (202) 789-2130 Fax: (202) 530-0324

40 PRESIDENTIAL DRIVE, SIMI VALLEY, CALIFORNIA 93065
Phone (805)522-2977 Fax (805)520-9702
www.reaganfoundation.org

REV_00265828

NKN
536037

THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS
THE QUORUM OF THE TWELVE APOSTLES
47 EAST SOUTH TEMPLE STREET, SALT LAKE CITY, UTAH 84150-1200

January 9, 2002

Mr Karl Rove
Senior Advisor to the President
The White House
1600 Pennsylvania Ave NW
Washington DC 20500

Dear Friend:

Our visit in your office last week was the highlight of my trip to Washington. Thank you for seeing us, and for your extraordinary warmth and candor.

It was a special privilege to get to know one whose work I have admired and appreciated, and who is, in the midst of all of this, a native son of Salt Lake City!

I am very grateful for the presidential cuff links you gave me, which will be a treasured possession always.

You and your associates (and especially President George W. Bush) are in our thoughts and prayers always.

Sincerely,

Dallin H. Oaks

DHO/mm

REV_00265833

Goergen, Barbara J.

From: Ingols, Adam B.

Sent: Monday, July 14, 2003 11:43 AM

To: Bennett, Melissa S.; Mallea, Jose; Campbell, Anne E.; Goergen, Barbara J.; Cooper, Jean; Allgood, Lauren K.; Ritacco, Krista L.; Pfeifer, Sarah; Ingwell, Carmen M.; Smith, Marty P.; McQuade, Vickie A.; Kratovil, Lindley ; Mayfield, Jennifer H.

Cc: Douglas, Penny G.; West, Christal R.

Subject: Medicare Meeting

Attached is the list of invites for tomorrow's Medicare meeting with Members of Congress. The meeting is scheduled for 4:20pm - 5:05pm in the Cabinet Room. Please let me know if anyone is unable to attend. Thanks

Sarah and Carmen, please let me know if you have any trouble with Secretary Thompson and Tom Scully attending the meeting. Thanks

PARTICIPANT LIST

Vice President
Tommy Thompson, Secretary of the Department of Health and Human Services

House Members
Congressman Dennis Hastert (R, IL-14), Speaker of the House
Congressman Tom DeLay (R, TX-22), House Majority Leader
Congressman Bill Thomas (R, CA-22), Chairman, House Ways and Means Committee
Congressman Billy Tauzin (R, LA-03), Chairman, House Energy and Commerce Committee
Congressman Collin Peterson (D, MN-07)
Congressman Rodney Alexander (D, LA-05)

Senate Members
Senator Bill Frist (R, TN), Senate Majority Leader
Senator Charles Grassley (R, IA), Chairman, Senate Finance Committee
Senator Max Baucus (D, MT), Ranking Member, Senate Finance Committee
Senator John Kyl (R, AZ), Chairman, Senate Finance Subcommittee on Health Care
Senator John Breaux (D, LA), Ranking Member, Senate Finance Subcommittee on Social Security and Family Policy

White House Staff
Andrew Card, Chief of Staff
Harriet Miers, Deputy Chief of Staff for Policy
Karl Rove, Senior Advisor
David Hobbs, Assistant to the President for Legislative Affairs
Stephen Friedman, Assistant to the President for Economic Policy
Dan Bartlett, Director, Communications
Lewis Libby, Chief of Staff to the Vice President
Scott McClellan, Press Secretary

Candida Wolff, Assistant to the Vice President for Legislative Affairs
Ziad Ojakli, Principal Deputy Assistant to the President for Legislative Affairs
Eric Pelletier, Deputy Assistant to the President for Legislative Affairs

REV_00265840

Daniel Keniry, Deputy Assistant to the President for Legislative Affairs
Keith Hennessey, Deputy Assistant to the President for Economic Policy

Amy Jensen, Special Assistant to the President for Legislative Affairs
Matthew Kirk, Special Assistant to the President for Legislative Affairs
Doug Badger, Special Assistant to the President for Economic Policy

Agency Staff
Tom Scully, Administrator, Centers for Medicare and Medicaid Services

Pres. Yes 7/15 11:40am

Ralston, Susan B.

From: Howerton, Glenda [ghowerton@tri-city.org]
Sent: Wednesday, May 21, 2003 6:31 PM
To: Ralston, Susan B.
Subject: RE: Message from Dr. Carl Herbster of Kansas City

I will be in Washington, D.C. again on Tuesday, July 15 and Wed. morning July 16. I could be available Monday, July 14 as well. My preference would be Tuesday, July 15.

Carl of KC

-----Original Message-----
From: Ralston, Susan B. [mailto:Susan_B._Ralston@who.eop.gov]
Sent: Monday, May 19, 2003 12:46 PM
To: Howerton, Glenda
Subject: FW: Message from Dr. Carl Herbster of Kansas City

When he's next in town, let me know at early as possible.

-----Original Message-----
From: Howerton, Glenda [mailto:ghowerton@tri-city.org]
Sent: Monday, May 19, 2003 11:56 AM
To: Rove, Karl C.
Subject: Message from Dr. Carl Herbster of Kansas City

Dear Karl,

Just want to drop you a note and let you know how much I appreciate you and the President's staff at the White House. I am especially thankful for Tim Goeglein and all he does to keep us and the conservative movement informed and activitated. You are very fortunate to have him on your team. I enjoy talking with him on the conference call weekly and meeting with him periodically when I am in Washington, D.C. He is a great guy and a wonderful help to me and many others.

Next time I am in Washington, I would like to meet with you again. I know your schedule is hectic and I do not want to waste your time. However, I do have an idea to bounce off you concerning a conservative movement. I would also like to talk with you personally about some commitments I am making to the conservative cause and to the President. Let me know when you might be available and I will arrange my schedule to meet yours.

Thanks again for all you are doing on behalf of the President and the people of the United States. We pray for you often.

With great appreciation,
Carl of KC

536037

THE WHITE HOUSE

WASHINGTON

Date: 7/1/03

To: Richard Russell

From: **Strategic Initiatives** Susan Kalston x67323

____ FYI

____ Appropriate Action

X Direct Response

____ Prepare Response For My Signature

____ Per Our Conversation

____ Let's Discuss

____ Per Your Request

____ Please Return

____ Deadline

____ Other

Comments: Can you please call Bill Timmons per Kari? Let me know.

REV_00265844

United States Commission for the Preservation of America's Heritage Abroad

888 17th Street, N.W., Suite 1160
Washington, DC 20006
(202) 254-3824 phone (202) 254-3934 fax
e-mail: uscommission@heritageabroad.gov

536037

F: Declined Events 3/2/03

Fax

To: Hon. Karl Rove **From:** Sheila Leslie

Fax: 202-456-0191 **Pages:** 2 (including cover sheet)

Phone: 202-456-2369 **Date:** July 1, 2003

Re: Reception honor of Chairman Miller, at the Polish Embassy, Tuesday, July 8th **CC:**

☐ **Urgent** ☐ **For Review** ☐ **Please Comment** ☐ **Please Reply**

Please RSVP to the Commission office at 254-3824.

Thank you

RSVP called to decline on 7/1/03 - conflict w/ schedule

Washington, June 18, 2003

The Ambassador of the Republic of Poland
Mr. Przemyslaw Grudzinski
kindly requests the pleasure of your company
to attend a reception in recognition of
the NATO Parliamentary Assembly.
During the event
the Honorable Longin Pastusiak,
President of the Senate of the Republic of Poland
will present
Mr. Warren Miller,
Chairman of the United States Commission for the Preservation of
America's Heritage Abroad
with the Commander Cross of the Order of Merit
of the Republic of Poland
The reception will take place on Tuesday, July 8, 2003, at 7 p.m.
at the Embassy of the Republic of Poland,
2640 16th Street, NW Washington, DC

Business Attire

R.S.V.P.
202 - 2343800, ext. ~~2101~~ 2111

REV_00265848

536027

THE WHITE HOUSE
WASHINGTON

Date: 7/2/03

To: Matt Schlapp & Brad Hoester

From: **Strategic Initiatives** Susan

____ FYI
____ Appropriate Action
____ Direct Response
____ Prepare Response For My Signature
____ Per Our Conversation
____ Let's Discuss
____ Per Your Request
____ Please Return
____ Deadline
____ Other

Comments: What can we say to Bloomfield?

REV_00265849

The Washington Post

Tuesday, June 17, 2003



Comrades is the largest ultramarathon in the world, with almost 13,000 runners this year. Some years they run uphill, some years they run downhill, but you always have 12 hours to finish.

54 Miles in 12 Hours

South Africa's Comrades Marathon Is Test of Endurance, Mutual Support

By Dina Kraft
Special to The Washington Post

DURBAN, South Africa, June 16 t the end, some of the runners were taken away on stretchers while others skipped, sang and kissed the ground. Some had hobbled or crawled toward the finish line, others leaned on fellow runners for support.

Fat beads of perspiration rolled down the face of Mohamed Vorajee, a 42-year-old mechanic from Ladysmith. His dark green tank top and shorts were soaked. He had finished a few seconds too late to receive a medal, but he could not stop smiling.

"I feel great," he said. "I've never been this far in my life."

Almost 13,000 competitors wound their way through 54 miles of steep hill country to cross the finish line today in South Africa's Comrades Marathon, the biggest ultramarathon and one of the most unusual sporting events in the world.

A South African institution, the race is run on alternate years uphill from the lush east coast city of Durban to the British colonial-style town of Pietermaritzburg. This year was a downhill run, beginning before the day's first light from the brick city hall of Pietermaritzburg. The sounds of "Shosholoza," a Zulu worker song translated as "Go Forward," launched the runners on their way.

See COMRADES, *D2, Col. 3*



BY RAJESH JANTILAL FOR THE WASHINGTON POST

Mark Bloomfield, 53, of Adams Morgan, one of the more than 320 foreign entrants, embraces wife Maxine after finishing race.

Long and Crowded Road

South Africa's Comrades Marathon is about 54 miles long, between Pietermaritzburg and Durban. More than 12,000 runners enter annually and about 9,000 finish in the alotted 12 hours.

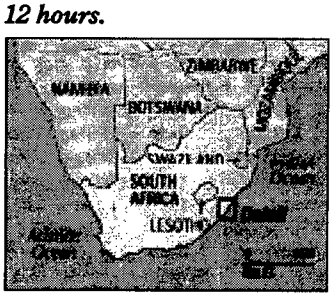

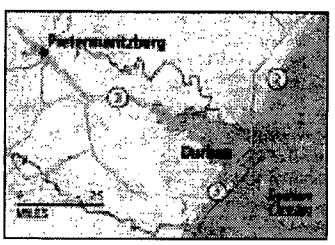

BY GENE THORP—THE WASHINGTON POST

REV_00265856

Going a Long Way With Comrades

COMRADES, *From D1*

Thousands thronged the sidewalks and hilltops to cheer the runners on, especially in their final push toward the finish. The grueling race must be completed in 12 hours to get a finisher's medal—no excuses, no exceptions. Still, many runners return year after year. Those who have run 10 or more are awarded a special green number. For a handful, this year marked their 30th Comrades. One man ran his 42nd.

Thunderous peals of "Go! Go!" ushered the last man—who also was the oldest man competing—across the finish line. Zeb Luhabe, the 76-year-old retired policeman who had taken 10 races to finish before the cut-off, said he was "on top of the world." Right behind him a 24-year-old collapsed after missing it by one second.

South Africa has become known for "ultra" racing, a term for distances longer than the standard marathon, 26.2 miles. In addition to Comrades, which is in its 78th year, the country is host to the world's second-largest ultramarathon, a 35-mile run along the shoreline of Cape Town called Two Oceans, and long-distance canoeing, swimming and cycling events.

"The nation is psychologically drawn to extremes," said Bob Aldridge, editor of Suparunner, one of South Africa's largest running magazines. "Anything harder and tougher, we like to do. It's part of still being part of a wild, tough continent."

The popularity of distance events can also be traced to the 1970s and 1980s, when South Africa, at the height of its political isolation under the apartheid government's policy of enforced racial separation, looked within for athletic inspiration.

The spirit of camaraderie for which the race was named helps keep people coming back. Everyone has a favorite story: the woman who misses the finish line by a few yards to help an injured friend; the blind runner whose guide drops out but who keeps running with the help of another runner; couples who marry minutes before the starting gun's blast.

Blanche Moila, one of South Africa's top long distance runners, says the race typifies *ubuntu*, the Zulu word for humanity. "You think of the other person's well-being . . . it's putting others' needs before yours."

Today's race began at 5:30 a.m., so in some of the early stretches the runners raced by moonlight. A pink sliver of sun eventually rose, exposing ribbons of mist curled into valleys dotted with thatch-roofed farm houses and acacia trees. As they ran, they passed the history of the country, hills soaked in the blood of battles fought alternately between the Zulu, the British and the Dutch settlers known as Boers.

More recently the fighting that took place led to a near civil war. Death squads of the Zulu nationalist Inkatha Freedom Party backed by the apartheid government attacked their rivals, members of the African National Congress, which is not the ruling party. Counterattacks followed. As the runners made their way through an area called the Land of 1,000 Hills, some remembered that in the early 1990s it was dubbed the Land of 1,000 Kills.

Running in a pair of American flag-patterned shorts was Mark Bloomfield, a 53-year-old business lobbyist from Adams Morgan. International participation in Comrades has grown since South Africa's first all-races election in 1994. This year's race had more than 320 runners from abroad, among them several from the Washington area.

"Running is sort of my freedom . . . there are no outside pressures on me," he said. "My world in Washington is the White House, Congress, journalists and my business sponsors. The running is a balance to that."

Bloomfield, tired but exhilarated as he crossed the finish line in 11:02:00, said he was buoyed by the crowd and his fellow runners.

Struggling up one of the hills he suddenly felt a hand clasped with his and a push forward. It was the runner next to him.

Running not far from Bloomfield was Paul Newton, 34, of Bethesda. Originally from South Africa, he said Comrades was always a challenge he wanted to meet. He trained through the snowy winter, running routes from Georgetown through Rock Creek Park. His friends were baffled.

"They all think I'm nuts," Newton said. Crazy or not, his training paid off, and he finished in 10:53:23.

The country's most celebrated sporting event has a long history.

It began in 1921, the brainchild of World War I veteran Vic Clapham. He had fought with the British in the savannah of East Africa and wanted to find the most fitting way to honor his fallen comrades. He sought an event that would recall not only the intense heat, thirst and physical demands endured in the war's long treks and fighting, but the friendships and connections forged in battle.

His answer: a very long run.

Clapham was said to have been inspired by tales of a Zulu running between Pietermaritzburg and Durban each week delivering newspapers and mail in the mid-1800s. Word had it the Zulu prided himself on running the hills in 12 hours flat.

The first Comrades was run on dirt roads. Runners had to open and shut farm gates behind them and even cross a stream. There was none of today's refreshment stands with high energy drinks and peeled bananas. Runners stopped at farmhouses along the way for chunks of bread and jugs of water. A young

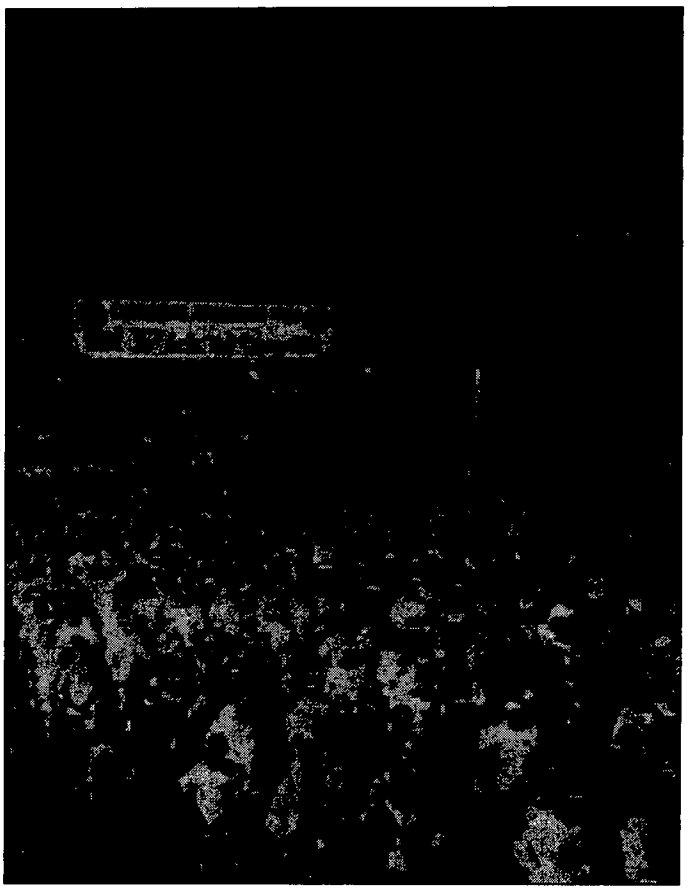

BY RAJESH JANTILAL FOR THE WASHINGTON POST

The sun isn't even up when the flood of runners crosses the starting line in Pietermaritzburg. They'll go through the hill country and end up in Durban.

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farmer won with a time of 8:59, the slowest winning time in the competition's history, but still a respectable result by today's standards.

Comrades' popularity soared during the time of political isolation. South Africa's athletes were banned from international competition and the country needed local sports heroes.

They found a hero in Bruce Fordyce, a handsome archaeology student who won nine consecutive times. In 1981 Fordyce, a mop of blond hair flowing behind him, won his first Comrades. His youth and can-do charisma captured the imagination of a nation, and television—relatively new to South Africa at the time—helped put both him and the race on the map.

Fordyce's politics also caused a stir. In the 1981 race he wore a black armband to protest the aligning of the race with Republic Day, the 20th anniversary of the apartheid government. Some spectators threw tomatoes, others booed and spat.

"We had unbelievable flak," he said.

An intelligence officer friend cautioned him to accept drinks along the route only from people he knew, warning of government plans to poison him.

Fordyce said he began running seriously in 1976, the same year of the bloody uprising by black students in the Soweto township, a turning point in the anti-apartheid struggle. He said he was depressed and "looking for something to do."

At 47, Fordyce says he now runs for the fun of it, even though that means walking some of the last hills on the course.

He also credits the spirit of camaraderie among the runners and the supporters who chant, wave and shout encouragement along the entire route. Farm workers cluster on the edges of sugar cane fields to wave. Children in wheelchairs line up along the roadside to cheer.

"Everybody helps each other," Fordyce said. "The spectators urge you on. It's a wonderful vibe."



Russia's Elena Nurgalevia wins women's race in 6 hours 7 minutes 46 seconds. Fusi Nhlapo was first man, in 5:28:52.



Comrades contestants pass the halfway point in the ultramarathon. They have already run farther than they would in a regular, 26.2-mile marathon.

To qualify for this race, runners must have completed a race of marathon length or longer in a prescribed time. (For example, you have to run a marathon in less than five hours.) But nothing can prepare a runner for this. As miles are run, but dozens lie ahead, willpower kicks in.

"It's incredible how the mind takes you through ... it's much worse to stop than to carry on," Fordyce said.

Helen Lucre, who immigrated to South Africa from New Zealand, won the women's race from 1985 to 1987. She said she did not realize when she began training that the distance run in Comrades was unusual.

"Everybody ran Comrades. You did not know 90 kilometers [about 54 miles] was not normal. I did not know otherwise," she said, laughing. "Ignorance is bliss."

The legacy of Comrades was also a powerful pull.

"It was almost mythical before you run it. [People] would tell you about this race in the hills. There is so much history, so many legends," she said.

In a 1921 letter to the editor of a Pietermaritzburg newspaper urging people to support the race, founder Clapham noted the race was open to "Europeans of any sex or age"—no blacks, and later women were banned as well. It was not until 1975 that the race opened to all, becoming one of the first multiracial sporting events in South Africa.

Lucre recalled scenes of whites and blacks helping each other across the finish line, collapsing into each other's arms in exhaustion and exhilaration at a time when the two races rarely interacted.

"Sport has been an incredible bridge to show that regardless of race we could mix," Lucre said. "Running was one of the few outlets where race did not have to matter."

The diminutive cross-country runner Moila, 46, ran her third Comrades race. She was the first black woman in South Africa to receive national colors for a sporting event in 1983.

Bringing black women into the fold of running has not been easy here, she said.

"[Running] was frowned upon in my community," said Moila, who trains twice a day between shifts as a psychiatric nurse. "Sports was too much of a male thing to do and the main fear was that it would interfere with the reproductive system and you would not be able to have children."

Black men are now taking a leading role in the race, which was long the domain of white South Africans. Today's winner was 31-year-old Fusi Nhlapo, recently laid off from his job at an iron and steel company, who finished in 5:28:52.

"If you want something you have to work hard for it," Nhlapo said. "You must have a dream."

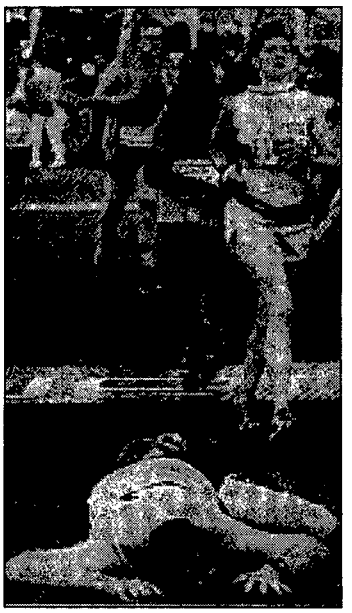

A competitor collapses after crossing the finish line. The 78-year-old event has a history of runners helping each other.

A Long-Running Obsession

While ultramarathoning is still outside the mainstream in most countries and statistics are often sketchy, it is universally agreed that Comrades is by far the world's largest ultramarathon, followed by Two Oceans, another South African race.

World's Largest Ultramarathons in 2002 (according to USA Track & Field)

Race (City or Country)	Distance	2002 finishers
Comrades Marathon (Durban, South Africa)	about 54 miles	9,099
Two Oceans (Cape Town, South Africa)	34.8 miles	6,460
City to City (Johannesburg)	31 miles	1,625 in 2001*
IAU World Championships (site varies)	62.1 miles	1,331 in 2001*
Millau (Paris)	62.1 miles	1,316
River Schimanto (Jap	farmer won with a time of 8:59, the	921 in 2001*
Del Passatore (Florence)	slowest winning time in the competi-	914

*Statistics for these races were not available for 2002.

South Africa is so ultra-obsessed that Comrades is the second-largest road race in the country. (A women's 10K is first.) In contrast, the largest U.S. ultra is more than 50 times smaller than the biggest U.S. race, and it doesn't crack the top 100 in field size.

Largest U.S. Road Races in 2002

Top Five Races	Distance	Finishers
Peachtree Road Race (Atlanta)	6.2 miles	50,000 (estimate)
National Race for the Cure (D.C.)	3.1 miles	46,953
Lilac Bloomsday Run (Spokane, Wash.)	7.46 miles	45,795
Bolder Boulder (Boulder, Colo.)	6.2 miles	42,501
Race for the Cure (Denver)	3.1 miles	39,400 (estimate)
Largest U.S. ultra: JFK 50 (Boonsboro, Md.)	50 miles	862

Sources: Ryan Llampa, USA Track & Field; Association of International Marathons and Road Races

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June 4, 2003

Stock Option Accounting – Ownership or Employee Compensation
E. Floyd Kvamme

FASB, in its study of how to treat Employee Stock Options, has taken the position that these options ***are*** an expense. SEC Chairman Donaldson last weekend in a two-hour meeting in Silicon Valley is quoted as saying, "We've crossed the Rubicon, options are worth something and should be treated as an expense."

Subsequently, Mr. Donaldson and his Chief of Enforcement were not particularly open to talking about the ownership position but rather wanted to have input on "how to expense". This position mirrors that of FASB in that only valuation method is on the table for discussion. Donaldson did say that the method the accounting industry proposed for use in footnotes over the last several years, the Black-Scholes formula, is "off the table". This admission of the fallacy of using Black-Scholes for options accounting may be viewed by some as good news; I'm inclined to view it as an example of a rush-to-judgment that has mislead readers of footnotes for almost ten years and an example of what could happen again if expensing is mandated.

Ownership
The practice of using broad based option plans in Silicon Valley was driven by the desire of employees to be owners. Existing companies saw that if they didn't grant ownership opportunities to their employees, they would start their own company. From the start up phase, venture capitalists used ownership opportunity as a lure to build the team at the new company. VCs diluted their own holdings at every round of financing to ensure that there were enough shares in a pool to attract new talent into a company. As companies moved into the public market, shareholders continued to be asked to approve requests for share pools to be used to attract and maintain employees.

No one supporting the Ownership argument is suggesting that Options have no value. They have value just as the people to whom they are granted have value. But, the value of the person – the key asset in most technology companies – is not "accounted" for either, or placed on the balance sheet because we definitely haven't figured out how to do that. (More on this point later.) The value of the option to the shareholder is that an important asset (person) has been added to the company and that addition will, hopefully, increase the value of the company and, correspondingly, the share value for all shareholders.

For reporting purposes in the private stage, an investor's ownership percentage always assumed that the option pool was fully utilized. The accounting was simple; the option shares were simply added to the share count. Once public, shareholders were regularly asked to approve additional pools of shares to continue to attract and maintain employees. Fixed price options were granted at

the market price on the day of grant on the theory that the market was aware of the share count including approved option programs, thus dilution was in the market number. The owners were saying, "If you will join our company and make it more valuable, we will allow you to share in our investment's success." Analogies to this sharing motivation exist in most of business – the "promise" of being made partner if you work hard and prove yourself or the "promise" of some profit sharing if you stay with the firm for a certain time and it achieves certain results.

At the time of exercise of an option, the accounting simply made an entry on the Cash line and the Paid In Capital line – just as happens when a new round of capital is raised except that in the case of Options, the share count already included the shares being exercised so the only real change is an increase in cash – the exercise price of the option.

Expensing

If expensing is required, the P/L takes a charge. I'll not get into the issue of how to determine what the charge will be – as mentioned above that's the focus of FASB and the SEC. The other side of the entry is to add to Paid In Capital in the Equity section of the Balance Sheet. At the end of a year, Earnings are moved into Retained Earnings, also in the Equity section. The net result of Expensing is that the Equity section sees a shift from Earnings to Paid In Capital. The cash flow from operations is not changed. Scores of examples could be used; I'll only mention one company on whose board I sit to show how little sense this all makes. Power Integrations (POWI) last year had sales of about $100M and showed good profits; further, they generated over $15M in cash; the required Black-Scholes footnote showed them losing millions of dollars on these results. While many (now including Mr. Donaldson) are saying that Black-Scholes is not an appropriate tool, this reporting has been going on for years as required by FASB and is clearly misleading. If Power Integrations had chosen – as FASB suggested in 1993 – to use what is now their footnote reporting as their standard reporting, they would have accumulated massive deficits with their GAAP reporting while being handsomely cash flow positive.

Clearly, with many examples like POWI, anyone supporting expensing must call for an alternate valuation method so that the results are not as ridiculous as Black-Scholes results. The problem is that *any number* will simply add expense, increase Paid In Capital without having any impact on operations or the cash flow resulting from operations.

Further, in accounting for equity transactions, for example when a new round of financing or an IPO or secondary are raised, the entire transaction is required to be kept off the P/L – that's the rule and it's a good one. Paid In Capital means the total of the hard dollars that have been paid into a company – whether through the sale of securities or options and always has the cost of those transactions netted out so that hard numbers are used. These equity

transactions have never gone through the P/L; the net result of an option grant is either that nothing happens (the option is not exercised) or shares are sold. Thus, these are equity transactions.

Lastly, if expensing is mandated by an argument that says it is a true compensation expense, it is hard to see how that expense stays off the tax books. As a result, a company will be tempted to use an exaggerated valuation for its options so as to gain the tax benefit of so doing; I'm personally convinced that several of the companies that have opted to expense are doing so to gain this favorable tax advantage. If Black-Scholes had been used over the last ten years as suggested in 1993, corporate taxes from tech companies would have been multiple billions of dollars less even as cash flows were strong. The public would not approve of this treatment.

What to do

Here are several suggestions on what steps I recommend:

1. Accept that traditional accounting using a P/L, balance sheet and cash flow statements has many issues when applied to tech companies. Our assets are our people, our intellectual property and know-how and our customer relationships – none of which are on the balance sheet or accounted for. Calculating a "book value" in a tech company is a joke; it is meaningless. Rather than putting another patch on the system by expensing ownership opportunities for our key assets but not valuing that asset (person), support legislation that says this whole area needs study and review – Dreier-Eshoo and Ensign-Boxer are a step in this direction.
2. Establish a study panel to recommend strong rules on shareholder involvement in approving stock option plans. At a minimum, in my view, all plans should be shareholder approved annually, no automatic green-up plans should be accepted, and plans should have a minimum vesting period and a maximum exercise period. Further, plans should be designed to encourage long-term holdings. This study should also seek to advise on the many types of option plans that are in use and seek to rationalize the treatment of the many forms of plans.
3. In the interim, give shareholders the best data possible on how to value their shares and remove the requirement for Black-Scholes treatment in footnotes. At a minimum, this means that if a person becomes a shareholder when a stock is selling at $20, they should be presented information at each quarterly report as to how many shares will be used in calculating EPS (earnings per share) for the full range of outstanding options. This data will yield what most individual investors are relying on – the best measure of what the earnings must be for the share price to reach the target price of the investor. Dreier-Eshoo calls for such data presentations.

Why this is important
Some may argue that the tech industry is making a "mountain out of this molehill". I fear that such talk in utterly uninformed.

Expense advocates must recognize that all valuation methods proposed to date are built on calculations of past stock performance. Using the past to predict the future is antithetical to the tech industry; we have always sought to change the future – sometimes with success, sometimes not; the past is not and never will be a good yardstick – thus, making impossible the search for the "holy grail" of an appropriate expense value.

Today, Asian competitors are attracting hundreds of Americans – American citizens – into their high tech startups by offering options at par value in an economy that has no capital gains tax – they are treating the options as equity, not a business expense. Suggestions that America should follow the IASB and rationalize its accounting to "world standards" is really proposing "European" standards. Our competitor is not in Europe; s/he is in Asia.

Lastly, over the years, I have had the pleasure of entertaining delegations from virtually every corner of the globe studying the "Silicon Valley Miracle". That miracle is tied to Ownership. Owning a "piece of the rock" is Silicon Valley; book entries that confuse the investor as to the operating results of a company and lower the attraction of tech investing will deflate the risk level people are willing to take to our great expense.

536077

THE WHITE HOUSE

WASHINGTON

Date: 7/1/03

To: Terri Troy

From: **Strategic Initiatives** Karl Rove

X FYI

____ Appropriate Action

____ Direct Response

____ Prepare Response For My Signature

____ Per Our Conversation

____ Let's Discuss

____ Per Your Request

____ Please Return

____ Deadline

____ Other

Comments: _____

Karl - FYI
Barry

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June 4, 2003, Wednesday xc: Teri Troy

SECTION: OPINION; Pg. 7

LENGTH: 1158 words

HEADLINE: Rise up, Republicans

BYLINE: Michael Freund

HIGHLIGHT:
Avocacy of the **road map** will undermine support necessary for Bush's reelection. The writer served as deputy-director of Communications & Policy Planning under prime minister Binyamin Netanyahu.

BODY:

Nearly 20 years ago, while some of my teenage friends were out doing the kinds of things our grandparents' generation would have thought morally reprehensible, I was busy doing something they might have considered even worse - handing out flyers on behalf of a Republican presidential candidate.

I still remember the sneers, and the occasional smiles, that my nascent political activity evoked as I stood there in New York's Grand Central Station, a kippa perched on my head, trying to persuade rush-hour commuters to cast their ballots for Ronald Reagan.

At the time, the very idea of a "young Jewish Republican" was still something of an oddity, as most Jews continued to lean leftwards, carrying on what for many was the equivalent of an inviolable family tradition, namely to vote Democratic come thick or thin.

In the intervening years, of course, that has started to change, as increasing numbers of American Jews have begun to find a comfortable ideological home in the GOP, a place where they can park their political identities while still remaining true to their belief in the need for a safe and secure Israel. But whatever gains the Republican have made among American Jews in recent years are now in danger of being erased, and the person to blame for this may be none other than George W. Bush himself.

Though Bush received just 19 percent of the Jewish vote in 2000, the aftermath of 9/11 and the president's tough stand against Yasser Arafat enthralled numerous American Jews, leading to what many perceived to be a potentially galvanizing shift among the Children of Abraham away from the Democrats and towards the party of Lincoln.

Indeed, a May 8 Boston Globe article noted that "after a year and a half of strong statements from President Bush about fighting terrorism, along with his equally strong backing of Prime Minister Ariel Sharon of Israel, some prominent analysts in both parties say they detect a shift in the Jewish community" toward the Republicans.

JUN. 5. 2003 12:34PM CONGRESSMAN PLATTS NO. 986 P. 2

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But that shift is now at risk as Bush heads to Aqaba today for a summit meeting with Prime Minister Ariel Sharon and Palestinian leader Abu Mazen, where he will press for implementation of the **road map** leading to the establishment of a Palestinian state.

By compelling Israel to make concessions inimical to its security, Bush is gambling not only with the future of the Land of Israel but also with that of the Republican party itself. His pursuit of the **road map**, and his insistence that Israel turn over territory to its enemies, has rightly evoked a growing sense of anger and frustration among many pro-Israel American Jews and Christians.

After all, how can Bush possibly justify coercing Israel to appease Arab terror at the same time that America is using force against it? And why should the Palestinian regime be rewarded with statehood when the Taliban and Saddam Hussein were punished with removal from power? With next year's presidential election campaign just around the corner, Bush is playing with political fire, making it virtually impossible for American Jews who support Israel to fully embrace him and his party.

Consider, for example, the letter sent to the White House last week by the official Israeli branch of Republicans Abroad, in which the group warned the president that pressing ahead with the **road map** "will only serve to alienate American Jews and the Christian Right."

In the letter, the group's leaders noted that "We are aware of increasing numbers of American citizens, both here in Israel and in the United States, who are now considering abandoning the Republican party as a result of your Administration's pursuit of the '**Road Map.**'"

AND IF you think the Jewish vote doesn't matter anymore in American politics, then think again.

According to a 2001 study by the Jerusalem Center for Public Affairs, 55% to 60% of American Jews consistently vote Democratic, 10% are loyal Republicans, while 30% to 35% "can be lured by any party depending on its position." Sprinkled among key battleground states in the campaign, that large group in the middle "adds up to a swing vote representing up to 2% of the electorate in states like Florida and Pennsylvania," says the study.

In either case, "a shift of that amount would have changed the result in that state and, in all probability, singlehandedly crowned the American president. Put another way, the Jewish swing vote, mobilized behind a particular candidate, would have given him the 2000 election."

Thus the Jewish vote remains key and is sure to play an important role in next year's presidential election campaign.

But the political risk to Bush may be even greater than just the loss of Jewish votes, for his strong-arm tactics against Israel have also started to arouse the ire of a key component of his core constituency, the Christian Right.

Just last Thursday, Bush received a political warning shot across his bow from Christian televangelist Pat Robertson, the founder of the Christian Coalition and a former Republican presidential candidate.

Speaking on the Christian Broadcasting Network, Robertson declared, "The president of the United States is imperiling the nation of Israel. Not only is he going against the clear mandate of the Bible, which is very important, but he's also setting up a situation where Israel will no longer have secure borders."

JUN. 5. 2003 12:35PM CONGRESSMAN PLATTS NO. 986 P. 3

REV_00265870

He even suggested that Bush's insistence on establishing a Palestinian state "will be the beginning of the end of the state of Israel as we know it." Those are pretty strong words, the kind of words that could cost Bush and his fellow Republicans a lot of votes next year if they aren't careful.

Sure, Bush's approval ratings may still be riding high after the recent war in Iraq, but as the memory of the victory fades and a lethargic economic recovery sets in, if at all, those numbers will begin to slide, and the president knows it.

Hence, as unlikely as it may seem right now, the outcome of next year's presidential race is far from being a foregone conclusion.

It is therefore imperative that Republicans - Christian and Jew alike - speak up now, loudly and unequivocally, against the **road map.**

Not just because it endangers the future of Israel, although that should be reason enough, but also because it threatens to undermine the principled stand which the party has taken in the global war on terror, in the process needlessly driving away countless numbers of sympathetic Jewish and Christian voters alike.

There is simply no good moral, political, or ideological reason for Bush to be twisting Israel's arm, and he needs to understand that he will pay a price at the ballot box if he does.

Republicans who care about Israel, then, need to rise up and send the president a clear and unambiguous message: If you choose Palestine, then come November 2004, we will not hesitate to choose someone else in your stead.

GRAPHIC: Photo: President Bush saying hello at Sharm el-Sheik. Is he also saying good-bye to Jewish and Christian support? (Credit: Ap)

LOAD-DATE: June 4, 2003

JUN. 5. 2003 12:35PM CONGRESSMAN PLATTS NO. 986 P. 4

REV_00265871

THE WHITE HOUSE
WASHINGTON

5)6077

Date: 7/1/03

To: Keith Hennessey

From: **Strategic Initiatives** Karl. Rove

X FYI

____ Appropriate Action

____ Direct Response

____ Prepare Response For My Signature

____ Per Our Conversation

____ Let's Discuss

____ Per Your Request

____ Please Return

____ Deadline

____ Other

Comments: _____

REV_00265872

Keith- Have ya seen this? Is it of any relevance? Sun; Jun 15, 2003 7:43 PM

Subject: further comments on the travelocity-drug purchasing system-newt
Date: Sunday, June 15, 2003 9:33 AM
From: PRA 6
To: PRA 6, PRA 6, PRA 6, PRA 6, PRA 6
Cc: PRA 6 <SteveL@cbo.gov>, <douglas.holtz-eakin@cbo.gov>, PRA 6, PRA 6, PRA 6, PRA 6, PRA 6, <dorothy_gray@rpc.senate.gov>, <CHansen@aarp.org>, <bjames@ihc.com>, PRA 6, PRA 6, PRA 6, <jrother@aarp.org>, <dsweeney@aarp.gov>, <darren.willcox@mail.house.gov>, PRA 6

Molly Coye has been sharing the concept of a travelocity type drug purchasing system and got the encouraging response back from London that is at the end of this email

I am beginning to look for one or two companies that as payers might want to set up a travelocity style drug purchasing system that would emphasize

1. patient-physician and patient-pharmacist management of the decisions (a pharmacy benefit administrater rather than manager system)

2. an expert system (possibly along the lines of rxaminer.com)to provide the page of choices so the doctor, the pharmacist and the patient would all have a common knowledge of the medically appropriate drugs and the prices and subsidies (studies show this knowledge reduces the cost of prescriptions substantially)

3. a supplier of pricing data and possibly as the backroom for the transactions (possibly ndchealth)

4. e-prescribing(probably along the surescripts model) and e-health records (the latter along the healthtrio model they have developed for the British National Health Service) to minimize medication errors and to reduce the cost of the system (e prescription can save as much as two hours a day of doctors' time)

5. a payment plan which subsidizes the first dollar cost for the least expensive choice (including where medically appropriate over the counter drugs such as Claritin) and then allows the patient to apply that number of dollars to any more expensive purchase so you have an open formulary with an economic incentive to buy the least expensive drug

I think this system would prove to be substantially less expensive than the current systems and would have a higher level of aptient control and patient satisfaction while actually costing a lot less.

any additional questions or critiques would be helpful as we work on this

thanks
newt

To Keith —
Assume you saw this.

charles SCHWAB
CAPITAL MARKETS

Washington Research Group

Kmk

Washington Commentary
Portfolio Perspectives
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Cover Story: House and Senate Make Progress on Medicare Drug Bills

Congress made more progress this week toward enactment of a Medicare drug benefit bill. Legislation won the approval of the two House committees with jurisdiction over the government health insurance program for the elderly. The Senate, meantime, began debating its version of Medicare drug benefit legislation.

The full House and Senate will debate and likely approve their versions of the $400-billion, 10-year legislation by the end of next week and then begin trying to reconcile the differences between the two bills when they return from their Fourth of July recess.

The House legislation goes further than key Democrats such as Sen. Edward Kennedy (D-Mass.) would like in relying on private insurers to provide the drug benefit. That could still be a potential obstacle to passage. However, we think the odds favor compromise and enactment before Congress adjourns this fall.

As the legislation stands now, we believe enactment would be positive for generic drug makers and rural hospitals, potentially positive in the short-term for brand-name drug makers, health plans and pharmacy benefit managers and probably negative for

REV_00265875

Electricity: FERC Schedules Action on Contracts, Refunds

Christine Tezak, June 20 Bulletin Summary

The Federal Energy Regulatory Commission (FERC) continues to move forward on the long-term contract review and on the modifications to the global refund proceedings in California (covering the Oct. 2, 2000-June 30, 2001 period) for the open meeting on June 25, 2003.

On the bilateral contracts, which have been protested by buyers (**Puget Sound Energy**, the Pacificorp subsidiary of **Scottish Power**, **Sierra Pacific** and the California Department of Water Resources), the FERC suggested at its open meeting on March 26 that the preferences of the three seated commissioners would lead to orders that would set the Puget Sound docket for settlement before an administrative law judge orders to uphold the contracts in the other three proceedings.

Oral arguments have been held before the commission on all four of the dockets listed above. We do not believe that those proceedings changed the inclinations indicated by the three commissioners — Chairman Pat Wood III and Commissioner Nora Mead Brownell to uphold, Commissioner William Massey to modify — **and that we are likely to see a 2-1 split vote to uphold the contracts.**

If we get a decision at the meeting next week, this is better than our expectation that these proceedings could lag through the summer.

We do anticipate that if the contracts are upheld by the commission, the buyers will petition for rehearing, be denied and then seek recourse in the federal appellate courts. However, we believe that there is a high likelihood that the appellate courts could side with FERC and eventually uphold its decision, whether it is in favor of the sellers or buyers.

On the refund proceedings, the FERC has indicated it plans to issue an order next week. On March 26, the FERC decided that it would modify the gas prices used in calculating the refunds for the period Oct. 2, 2000 to June 30, 2001. This entailed filings and a technical conference where sellers had the opportunity to submit natural gas cost data in order to make sure that natural gas costs were properly covered.

California has complained that it doesn't like the cost numbers for natural gas submitted by the power sellers. According to participants in the technical conference, we believe that there may be a good chance that the recalculated refund numbers may result in refunds lower than the $3.3. billion "back of the envelope" calculation suggested by the FERC external affairs office in March. An order next week may be a denial of California's protests and a direction to the California Independent System Operator to

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run the refund simulation based on the cost numbers provided since the open meeting on March 26, 2003.

FERC indicated that it plans to have the new refund numbers available by late summer. Movement forward on this docket now would make achieving that timeline more likely.

Energy/ Electricity: Senate's Energy Bill Slides Further Into Summer

Christine Tezak, June 16 Bulletin Summary

With a unanimous consent vote to end discussion on the energy bill until after the July 4 recess, the Senate ended its efforts to move energy legislation forward last week. While Energy and Natural Resources Committee Chairman Sen. Pete Dominici (R-N.M.) remained upbeat and talked of getting another week of dedicated floor time when Congress returns that he expects would be enough to get a bill passed, **we do believe that getting this bill into conference with the House measure** (that passed in April) **is unlikely before September.** While we do not think that this delay dooms the bill, we do believe that the odds of it ultimately failing to emerge from the legislative process increase the longer it is subject to debate in the Senate.

This bulletin also updates status of Section 29 and Section 45 credits. Bottom line: we expect these to be in a bill, should one get to the president.

Energy/ Electricity: White House Sends Democrat Nominee for FERC to Congress

Christine Tezak, June 18 Bulletin Summary

The White House finally sent a nominee for the Democratic slot at the Federal Energy Regulatory Commission (FERC) to Congress yesterday. The Bush Administration named Suedeen Kelly to the balance of former Chairman Curt Hébert's term expiring in June 2004. The nominations of Kelly and Joe Kelliher, still at the Department of Energy after being initially nominated almost two years ago, have been "linked" by Democratic senators seeking to keep the five-member FERC from getting a three-to-one majority with a vacant seat. That goal, however, may not be realized if current Commissioner Bill Massey is not renominated during recess (his term expires this June 30), and Kelly and Kelliher are, subject to Senate confirmation at a later date. In any event, the whole issue should be resolved in the next few weeks.

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Agribusiness: Beef Exporters Facing a July 1 Deadline over Japanese Market

Mark McMinimy, June 19 Bulletin Summary

Officials in Japan, the largest foreign market for U.S. beef, are demanding that as of July 1 all U.S. exports of beef be certified as having originated from cattle that were born and bred in the United States. Industry sources say U.S. exporters probably cannot meet this deadline and are hoping Japan will be flexible.

Unless a compromise solution is found, U.S. beef processors and exporters, such as **Tyson Foods** and **Smithfield Foods** could lose – at least temporarily – a market valued at $900 million last year. And it is conceivable that other significant foreign markets, like South Korea, might follow Japan's lead.

Pharmaceuticals: Generic Drug Legislation Likely to Become Law

Paul Heldman, June20 Bulletin Summary

We now think that the odds favor enactment of generic drug legislation as part of the final Medicare drug benefit package after the Senate voted 94-1 yesterday to attach it the Medicare bill. This is modestly positive for generic drugmakers **Barr Laboratories Inc.**, **Teva**, **Andrx**, **Ivax**, **Mylan**, **Watson** and **Dr. Reddy's**.

With the strong Senate vote, House Republicans and Democrats are negotiating a possible generic drug amendment to the House Medicare bill. While the House could still be an obstacle to passage, we believe House Republican lawmakers will have a hard time opposing generic drug legislation after yesterday's Senate vote, signs of acceptance of the legislation from some brand-name drugmakers and efforts by the bill's drafters to satisfy Bush Administration concerns about the proposal.

We still think the Medicare drug benefit will have a far greater impact in generating new business for generic drugmakers than the generic drug legislation. The generic drug legislation, sponsored by Senate Health Committee Chairman Judd Gregg (R-N.H.) and Democratic Sen. Charles Schumer (D-N.Y.), builds on a final regulation introduced by the Bush Administration last week to reduce legal barriers to bringing generic drugs to market.

Pharmaceuticals: Pixantrone Potential Appears Paltry

Greg Frykman, M.D., June 18 Bulletin Summary

With **Cell Therapeutics'** merger with **Novuspharma** announced June 17, we believe there are several facets of Novuspharma's new anthracycline, pixantrone, that investors should be aware of in evaluating its prospects both at the FDA and commercially.

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Our view is that pixantrone will face a small market in its desired indication (high-grade non-Hodgkin's lymphoma), will not see much off-label use in what is a crowded field of similar compounds, and may have difficulty demonstrating the one safety advantage it could have - lower cardiac toxicity.

Considering the many members of the anthracycline drug class in which it resides, pixantrone is unlikely to gain much traction in an already competitive space whether the setting is for palliative care, such as in prostate cancer, or one in which a survival advantage has been demonstrated, as in breast cancer.

Additionally, a number of similar drugs have gone off patent and their generic use is being increasingly incentivized by payors including the Medicare and Medicaid programs. **We remain concerned that pixantrone, as a new member of an existing class comprised of many other similar drugs, would have a difficult time establishing much market share.**

Broadcast/Cable: FCC Ownership Rules Should Survive Legislative Challenge

Paul Glenchur, June 20 Bulletin Summary

Yesterday, a Senate Committee backed legislation to undo recent deregulatory changes in the FCC broadcast ownership rules. The Committee vote was bipartisan with all but one Democrat on the Committee backing the proposal and about half of the Committee Republicans going along for the ride. Despite the Committee vote, however, actual passage and enactment of the legislation remains unlikely. Stiff opposition in the House and uncertain prospects in the full Senate suggest major obstacles remain. Also, the administration supports the FCC's deregulatory action and we question whether Republican leaders would push the legislation against White House resistance. The FCC appropriations bill, however, could be another legislative vehicle worth monitoring in the ongoing battle over media ownership.

Telecom: FCC Focuses on Public Safety Spectrum Improvements

Paul Glenchur, June 17 Bulletin Summary

The Federal Communications Commission (FCC) is hard at work on a plan to address public safety interference in the 800 MHz spectrum band. Concerns about disrupted communications among first responders in the case of disasters or terrorist attacks have made resolving this issue a priority. The Commission is weighing the details of a **Nextel** plan that would realign the 800 MHz band and provide 10 MHz of contiguous spectrum in the 1.9 GHz range as compensation for lower range spectrum allocated to public safety users. The plan is facing stiff opposition, however, and we expect the debate over Nextel's plan and possible alternatives to heat up in the months ahead. At this point, we think Nextel stands a good chance of getting a contiguous block of spectrum in the 800 MHz range, a positive development for the company as it could improve operations and

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allow cost-effective shifts in the company's transmission technology. The effort to obtain 1.9 GHz spectrum as part of the plan appears much less likely to prevail.

Financial Services:

Assessing the Potential for OFHEO's Move to Treasury

Katherine Scheeler, June 17 Bulletin Summary

After a week of tumult, investors seem to have found some breathing room on **Freddie Mac** and **Fannie Mae**. We believe that, absent unexpected findings of criminal activity on the part of Freddie Mac, the worst may be over, and the time to sort out the regulatory fallout has begun.

According to sources, the government sponsored housing enterprises (GSEs) intend to begin negotiations to move their safety and soundness regulator - the embattled Office of Federal Housing Enterprise Oversight (OFHEO) - from the Department of Housing and Urban Development (HUD) to the Treasury Department.

While there could be risk for the GSEs in amending their charter through the legislative process, which a move to Treasury would necessitate, we believe the GSEs would require guarantees from the administration to minimize that risk. The most likely scenario is a series of conversations between Treasury and the GSEs led by Fannie Mae with some buy-in by essential Senators (e.g.; Sens. Richard Shelby (R - Ala.), Paul Sarbanes (D - Md.), Kit Bond (R - Mo.)) and Congressmen (e.g.; Reps. Michael Oxley(R - Ohio), Barney Frank (D - Mass.), David Dreier (R - Calif.), and Tom Delay(R - Texas)). We believe that the legislators would prefer to attach the negotiated provisions as a rider to the VA-HUD appropriations legislation, since using regular legislative order would be an unwieldy process with much opportunity for mischief by GSE detractors. The VA-HUD bill is expected to be completed soon after the July 4th recess.

We continue to believe that a regulatory move to Treasury could resolve the perennial questions about regulator credibility and lift the cloud of regulatory uncertainty that has remained stalled over the GSEs and their stock prices. In particular, we feel that a move to Treasury would strengthen the GSEs by reaffirming by statute the relationship of the GSEs to the government and by providing regulatory "running room" for the foreseeable future. Tangibly, it may also provide comfort regarding derivatives use as Treasury has more experience in this area and is likely to quell critics' complaints about inadequate oversight. We believe that an agreement to move to Treasury would take off the table any changes in the capital standards, registration of debt or mortgage backed securities as well as pre-approval for new products but could involve a quid pro quo exchange of the Treasury line of credit for access to the Federal Reserve's discount window.

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Homeland Defense:

The Myth of Homeland Security Spending – A FY04 Analysis

Erik Olbeter, June 16 Bulletin Summary

In FY03 to date, federal homeland security funds have been spent largely on personnel - not technology products. Although personnel is likely to be the largest component of FY04 spending on detection systems, select technology vendors are likely to see more monies. President Bush's budget proposal may call for less than a one percent increase in federal homeland security spending, but within the budget, two areas are likely to see significant funding growth: *explosive detection systems* from companies like **L-3 Communications**, **OSI Systems** and **Smith Group**; and *biometrics credentialing* from firms such as **ActivCard** and **Maximus.** Firms such as **Drexler Technology** and **Identix** are also in the running, although we believe they face more challenges than the others. It's also important to note that once again the budget directs a significant portion of overall spending to state and local governments. Our analysis shows that only a small portion of the total is likely to be spent on technology vendor wares and that it is difficult to determine a common investment theme.

Asbestos:

Day One of Asbestos Markup Produces Little Movement

Katherine Scheeler, June 20 Bulletin Summary

The Senate Judiciary Committee's asbestos legislation markup made little progress yesterday. Approximately 65 amendments have been circulated by six Democrats and two Republicans, of which 25 are amendments sponsored by Judiciary Committee Chairman Sen. Orrin Hatch (R-Utah) and Sen. Patrick Leahy (D-Vt.) covering issues like collateral sources and a ban on asbestos. We believe it is very likely that the committee will face continued difficulties with maintaining a quorum necessary to proceed with votes on amendments, given the tightness of senators' schedules, which may dog Hatch's efforts to make progress on the bill in markup.

According to Judiciary Committee staff, Hatch does not have the votes to pass the current version of the legislation out of committee, since Sen. Charles Grassley (R-Iowa) reportedly objects to the provisions creating an Asbestos Court and Sen. Arlen Specter (R-Pa.) has expressed skepticism about the medical criteria. The committee is set to resume consideration of the bill Tuesday, June 24, though it is possible that progress may be made over the weekend. Although difficulty in reaching consensus over such controversial legislation is to be expected, we are somewhat surprised by Hatch's strategy. Still, we continue to believe that enactment is possible, given the intensity of effort so far by interested parties.

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pharmacies, home respiratory care companies and other providers or manufacturers of durable medical equipment.

Here's our side-by-side comparison of the House and Senate bills, and our thoughts on how providers of health care services and products would be affected.

Issue	Senate Version	House Version	WRG Analysis
Medicare Advantage Structure	Beginning in 2006, would create a new "Medicare Advantage" program that would include regional preferred provider organizations (PPOs) and Medicare HMOs. The Medicare Advantage plans would provide a benefit package that would include medical care and prescription drugs. PPO plans would bid on a national or regional basis. CMS would choose three PPOs in each region. Offers disease management services, chronic care and quality improvement programs. Plans would share risk with the federal government.	Structure similar to the Senate. Private insurers would offer a drug benefit that is essentially the same whether a senior enrolls in a managed care plan or remains in traditional fee-for-service. Seniors would have the same options available in the House plan: traditional fee-for-service with a private drug insurance add-on, Medicare HMOs and PPOs.	There is consensus among Republicans on the structure and the White House has dropped its insistence that seniors be given a better drug benefit if they join a managed care plan. The decision to choose only 3 PPOs per region increases the pressure to bid lower.
Traditional Fee for Service Structure	Private plans would compete to offer a drug-only insurance product that would be an add-on to traditional Medicare. The value of the plan would be equal to the drug component of the new Medicare Advantage plans. Seniors could receive additional prescription coverage from employers and state programs.	Nearly identical to the Senate plan.	The question remains who will offer the drug-only insurance plans. Lawmakers envision pharmacy benefit managers (PBMs), we believe a PBM/insurer hybrid is more likely. This is a risky product and there may not be many willing to play in the space.

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Issue	Senate Version	House Version	WRG Analysis
Fall Back	If no private plans are available in a region, Medicare would offer its own plan that would be administered by a private insurer, but all risk would fall to Medicare.	The Health and Human Services (HHS) Department would be allowed to pick-up as much as 99% of the risk in order to get plans to move into rural areas. Legislation also would increase the minimum size of a region a plan can bid on to minimize the areas potentially uncovered by a private plan.	This is still an area of contention. Democrats would like a stronger Medicare presence in the fall-back. Too much of a move towards Medicare would likely bring opposition from the Pharmaceutical Research and Manufacturers of America (PhRMA) and Republicans.
Benefit and Income Testing	$35 a month premium. $275 deductible. 50% co-pay from $276 to $4,500 in total spending. Senior pays all cost between $4,500 and $5,800 in total spending. Government pays 90% of costs above $5,800. Deductible and size of the "benefit hole" may still change on the Senate floor. The bill does not include any means testing.	Similar structure, though amounts vary. $35 a month premium, $250 deductible. Medicare would pay 80% of the costs up to $2,000. After that, a senior would pay all the costs up to $3,500 in out-of-pocket costs after which Medicare would pay 100% of the cost. The catastrophic benefit would be income tested, meaning seniors with higher incomes, $60,000 for an individual or $120,000 for a couple, would have a higher catastrophic limit. The most a senior would pay before catastrophic coverage starts would be $12,000 for individuals with incomes of $200,000 or more.	Senate has voted for income testing before but this could be an issue on which AARP takes a stand. Still likely to survive in final bill. Means testing catastrophic benefit probably has little impact on Rx sales since higher income seniors are unlikely to go without drugs. House bill is more generous for the average senior. According to the Confessional Budget Office (CBO), the average senior has about $2,500 in drug costs per year. Under the Senate plan, that senior would pay 72% of the cost for the first $2,500 while under the House plan the senior would pay about 60% of the cost.

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Issue	Senate Version	House Version	WRG Analysis
Low Income Seniors	Provides assistance on a sliding scale up to 160% of the federal poverty level (FPL).	Subsidies up to 150% of FPL. Beneficiaries would pay a $2 co-pay for a generic drug and $5 for a brand name drug.	This is the cohort that is likely to see the greatest increase in utilization. According to a March/April 2000 *Health Affairs* study, there are more than 4 million seniors with incomes below 150% of the FPL who do not have any insurance, including Medicaid. According to CBO, Medicare beneficiaries without drug coverage have seven, or 22%, fewer prescriptions filled on average than elderly people with medicine benefits. Beneficiaries with drug benefits filled an average of 32 prescriptions in 1999 (the latest year for which figures are available), compared to 25 filled for senior citizens without insurance.
Drug Card	Interim step for the first two years. Cards would be offered by PBMs or insurers. Medicare would provide a $600 yearly subsidy for low-income seniors.	Similar.	The drug card is a likely an interim step. PBMs support the measure because it would allow them to increase utilization of mail order pharmacies. Conversely, retail pharmacies oppose the measure for the same reason.
Dual Eligibles	Leaves responsibility to the state Medicaid programs.	Federal government would pick up the bill for drugs for the dual eligible population.	House plan likely to be included in final measure due to pressure from governors.
Employer Subsidies	Employers would be subsidized to continue retiree drug coverage. Payments would be 64.3% of the average premiums.	Employers would be subsidized 28% of drug spending over the $250 deductible for beneficiaries that remain in employer-sponsored plans. The employer subsidies would end after $5,000 in total beneficiary spending.	Final version likely to include some employer subsidies. According to CBO about 37% of seniors currently enrolled in an employer-sponsored plan would have their employer plan terminated under the Senate plan.

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Issue	Senate Version	House Version	WRG Analysis
Managed Care Plans	Plans would bid and Medicare would pay plans according to a "benchmark" that is based on 100% of fee-for-service spending. Unlike the current system, plan risk would be limited for drugs and Medicare would reinsure plans for drug risk. **No increase in Medicare + Choice payments for the 2004-2005 interim period.** Medicare PPOs would have risk corridors for drug spending for 2006 and 2007. Medicare would pay 50% of the cost of drugs between 105% and 110% of the premium and 10% of the cost above 110%.	House plan could be more positive for managed care plans. The benchmark rate is likely to be higher because it may include spending such as medical education not included in the Senate plan. Annual increases would also be higher under the House plan. Bill calls for an increase in payments for 2004 and 2005. Rate increase in 2004 for most counties under the plan would be 3.7% (compared to 2% in current law). Increase in 2005 unknown but also likely to be higher than 2%.	The House plan is likely to survive conference. It has support from the White House and is likely to be scored at a minimal cost.
Formularies and Cost Containment Measures	Plans would be allowed to use formularies, tiered co-pays and other private sector cost containment measures.	Same.	

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Issue	Senate Version	House Version	WRG Analysis
Drug Payments to Providers	Freezes average wholesale prices (AWP) at April 1, 2003 level and reduces payments from 95% of AWP to 85% of AWP. Instructs Medicare to look for "widely available market price" for drugs and substitute for AWP. If resulting decrease is greater than 15% then AWP would be reduced by 15% a year until the new price is reached. Physician fees would be increased to offset some of the reduction in AWP. Adds an administrative fee for home infusion drugs.	Uses "stock replacement" model beginning in 2005 for oncology drugs (and 2006 for other drugs). Specialty pharmacies would bid by HCPCs code to deliver a drug to a physician or outpatient facility. Medicare would choose a reference price and certify specialty pharmacies as Medicare eligible, meaning they can deliver the drug for the reference price. Exempts hemophilia, radiopharmaceuticals and drugs used in conjunction with end-stage renal disease from the stock replacement changes. For 2004 the plan instructs Medicare to lower prices as they see fit but exempts only radiopharmaceuticals from the interim changes.	Stock replacement model takes away the physicians' financial incentive completely and makes the specialty pharmacy the Medicare contractor. Bidding by HCPCs code gives incentive to use generics. Stock replacement model likely to be in the final bill over objections of oncologists. Even with increased fees to doctors and new administrative fees for other services this measure could still save as much as $8 billion over 10 years. Interim step is likely to reduce drug prices at a variable rate, meaning the cuts will be greatest where the mark-ups are the highest. That would be negative for **Lincare**, **Apria** and **U.S. Oncology**.
Rural Hospitals	Lowers wage index, increases DSH payments and equalizes the standardized amounts. Total increase is probably between $15 billion and $20 billion over 10 years. Amendment in the Senate Finance committee moved the start date for the increases to FY2005.	Many of the same rural provisions. Most start in FY2004.	Rural provisions are likely to be in the final version of the bill. Start date remains uncertain due to funding constraints. If equalization of standardized amount is moved to FY2005 rural hospitals may actually see a decline in Medicare rates beginning Oct. 1. That's because under a temporary provision passed last year, rural hospital standardized rates are equalized from April 1, 2003 through Sept. 30, 2003 then are scheduled to revert back to their original rural rate, a 1.6% decrease. Rural hospital companies include **Health Management Associates, Lifepoint, Province Healthcare** and **Community Health Systems**.

REV_00265880

Issue	Senate Version	House Version	WRG Analysis
Puerto Rico Hospitals	Medicare inpatient payments to hospitals in Puerto Rico would increase for five years starting in the fiscal year that begins in October 2004. Medicare would pay Puerto Rico hospitals at 100 percent of the national standardized rate, instead of the current blend of 50 percent of the local rates and 50 percent of the national standardized amount.	Increases the blend from 50/50 federal/local to 75/25 federal local over a three year phase in.	Some version of the pay increase is likely to survive. Would be positive for **Universal Health Services,** which owns three hospitals in Puerto Rico. UHS owns and operates more than 30 acute-care hospitals.
Orthotics and Prosthetics	Seven year freeze on durable medical equipment (DME). Custom orthotics and prosthetics would be exempt from the freeze.	Competitive bidding for DME including oxygen. Custom orthotics and prosthetics would be exempt from the freeze.	Exempting custom orthotics and prosthetics means the impact on **Hanger Orthopedic Group** could be minimal.
Dialysis	Increases payments temporarily by 1.6% for 2005 and 2006. Moves to a bundled composite rate. Leaves Epogen out of the bundle and paid at the current rate. New composite rate would be increased at 5 basis points a year beginning in 2005.	Increases the current composite rate by 1.6% in 2004. Rumored increase in the Medicare secondary payer timeframe from 30 months to 36 months was not included in the bill.	The separately billable drugs, excluding EPO would be moved into the composite rate at current AWP rates so that the change is budget neutral. A payment increase is likely but start date is an open question. Pay increase would be positive for **Davita, Fresenius Medical, Renal Care Group** and **Gambro AB.**
Acute Care Hospitals	No provisions.	Annual increase equal to market basket less 40 basis points for 2004-2006.	House provision is worst-case scenario and likely outcome. Nevertheless, 40 basis points is a historically low decrease in the annual update and should be viewed as positive for hospital companies.

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Issue	Senate Version	House Version	WRG Analysis
Skilled Nursing Facilities (SNFs)	No provisions.	No reduction in the annual payment increase.	House decision not to seek a reduction in the rate of growth is a surprise and good news for nursing home companies including **Beverly Enterprises**, **ManorCare**, **Kindred**, **Genesis Health Ventures** and the REIT **Ventas**, which now appear likely to get a more than 6% increase in Medicare rates beginning October 1.
Ambulatory Surgery Centers (ASCs)	No provisions.	Would set annual increase at CPI less 2 percentage points.	Neither bill includes a provision to reduce ASC payments down to the HOPD rates as recommended by the Medicare Payment Advisory Commission (MedPAC). That provision may still appear as an amendment, however.
Specialty Hospitals	An amendment by Sen. John Breaux (D-La.) would close the "whole hospital" exception to the physician self-referral law meaning physicians would no longer be able to refer patients to specialty hospitals in which they have an ownership interest. Provision is likely to be clarified to grandfather in all current specialty hospitals and those under construction, though the exact rules are unclear.	Calls for a report on specialty hospitals.	Inclusion of grandfathering clause would be a significant victory for specialty hospitals. There is opposition to the Breaux amendment in the House and the final outcome is unclear. Overall, the likely outcome should be viewed as more positive for specialty cardiac hospital operator **MedCath** than the scenario envisioned a few weeks ago.
Functional Equivalency	Prohibits CMS from implementing functional equivalency in the future but does not appear to reverse the CMS ruling that found **Amgen**'s Aranesp to be functionally equivalent to **Johnson & Johnson**'s Procrit.	Allows CMS to use functional equivalence in the future but only through a detailed rulemaking process. Does not reverse the Aranesp/Procrit decision.	Amgen appears to stand little chance of getting Congress to overturn CMS's decision. Amgen continues to lobby CMS to change the dosing crosswalk between the two drugs and may have some success.

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Issue	Senate Version	House Version	WRG Analysis
Therapy Caps	No provision.	Would delay implementation of the therapy caps until 2004.	Delay of implementation would be positive for SNFs and rehab companies.
Long-Term Acute Care Hospitals (LTCHs)	No provision.	No provision.	Both bills would be neutral for **Select Medical** and **Kindred**, which avoid feared Medicare payment reductions.
Hospice	No provision.	No provision.	Both bills would be neutral for **VistaCare** and **Odyssey Healthcare** which avoid feared Medicare payment reductions.
Disease Management	Includes a demonstration project to promote disease management.	Requires PPOs to offer disease management services.	Increased use of disease management potentially positive for disease management firms including **American Healthways**.

Source: Senate Finance Committee. House Medicare documents.

* * *

– by Eric Weissenstein/Paul Heldman/Brenda Mallory
WRG Health Care Team

Economy: The Debate Within the Fed

Greg Valliere, June 20

Oh, to be a fly on the wall at the June 24-25 Fed meeting! With the economy apparently at a turning point, with deflation fears continuing, with "non-traditional" options clearly on the table, what will the central bankers do?

They'll probably cut rates by a quarter point, issue an upbeat statement about the future of the economy and hope that they have finished their work for this cycle. Former Fed Gov. Lyle Gramley thinks Chairman Alan Greenspan isn't comfortable with a 50 basis point move, in part because of the potential impact on the money market business.

Greenspan undoubtedly realizes that the Fed's last move in a cycle often appears -- in retrospect -- to be unnecessary. But he and his colleagues have hinted so broadly that another rate cut is coming that failure to move could disappoint the markets, which is the last thing they want.

So the Fed appears poised to move one last time, but we believe the larger story is that the central bankers may leave rates unchanged until 2004 -- perhaps well into 2004 -- while making an important upward adjustment in their implicit inflation target.

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THE WHITE HOUSE
WASHINGTON

536037

Date: 7/1/03

To: Sezlee Westine

From: Strategic Initiatives Karl Rove

X FYI

___ Appropriate Action

___ Direct Response

___ Prepare Response For My Signature

___ Per Our Conversation

___ Let's Discuss

___ Per Your Request

___ Please Return

___ Deadline

___ Other

Comments: _____

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BRT Press Release

White House Study Reveals Tort System's Harm To America's Workers And Consumers

Contact: John Schachter
(202) 872-1260

Release Date: 04/29/2002

Individuals bear brunt of $180 billion cost through higher prices, lower wages, report finds

Washington, DC - At a Business Roundtable (BRT) meeting today, the Chairman of the President's Council of Economic Advisors released a study that sheds new light on who pays the cost of excessive litigation in the United States. According to the study, up to $136 billion in annual tort costs are "economically excessive," and American workers, consumers and investors bear the burden of an expensive and inefficient liability system through higher prices, lower wages, and decreased returns to investment, as well as lower levels of innovation.

"This important study adds credence to calls for wide-ranging changes to America's civil justice system," said BRT President John J. Castellani. "The extent of the tort tax illustrates why a substantial majority of Americans believe the current liability system needs major reform."

The study, released by Dr. Glenn Hubbard, predicts that the total cost of the tort system in the future will likely be greater than the $180 billion estimated in 2000. "The trends are ominous," Castellani added. "Litigation costs are rising along every dimension. In some states, class action lawsuits have increased 1,000 percent over the past 10 years." The BRT is currently urging Congress to pass class action reform legislation that closes the legal loopholes that have made state court systems choice locations of frivolous suits.

Other noteworthy findings of the study, entitled ***"Who Pays for Tort Liability Claims? An Economic Analysis of the U.S. Tort Liability System,"*** include:

- The U.S. civil liability system is the most expensive in the world, more than double the average cost of other industrialized nations.
- Studies are likely to substantially underestimate the economic cost of the U.S. tort system by as much as $50 billion due to distortions in production and consumption decisions.
- The $136 billion excessive cost of the U.S. tort system would be equivalent to a 2 percent tax on consumption, a 3 percent tax on wages, or a 5 percent tax on capital income.
- Only 20 percent of direct tort costs actually go to claimants for economic damages, such as lost wages or medical expenses.
- 58 percent of the total annual cost of tort is due to administrative expenses and legal fees.

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The Business Roundtable is an association of chief executive officers of leading corporations with a combined workforce of more than 10 million employees in the United States and $3.5 trillion in revenues. The chief executives are committed to advocating public policies that foster vigorous economic growth and a dynamic global economy.

Who Pays for Tort Liability Claims?
An Economic Analysis of the U.S. Tort Liability System

Council of Economic Advisers
April 2002

Executive Summary

With conservatively estimated annual direct costs of $180 billion, or 1.8 percent of GDP, the United States tort system is the most expensive in the world, more than double the average cost of other industrialized nations. Whereas an efficient tort system has a potentially important role to play in ensuring that firms have proper incentives to produce safe products, poorly designed policies can mistakenly impose excessive costs on society through forgone production of public and private goods and services. To the extent that tort claims are economically excessive, they act like a tax on individuals and firms. This paper pursues this analogy between inefficient tort litigation and taxes, and examines the question of "who pays" for excessive tort costs. It finds that the cost of excessive tort may be quite substantial, with intermediate estimates equivalent to a 2 percent tax on consumption, a 3 percent tax on wages, or a 5 percent tax on capital income. As with any tax, the economic burden of the "tort tax" is ultimately borne by individuals through higher prices, reduced wages, or decreased investment returns.

States, which is designed to deliver compensation efficiently to workers who are injured on the job. Workers' compensation is a no-fault system, and thus litigation costs will be lower. According to the National Academy of Social Insurance, for every dollar paid to workers' compensation claimants, approximately 23 cents is paid in administrative costs.[16] Using this assumption that "fair" administrative costs should be roughly equal to 23 percent of damages paid to claimants, one can begin to estimate the "excessive" costs inherent in the U.S. tort system.

Even if we start with the extremely cautious assumption that both economic ($36 billion) and non-economic damages ($40 billion) are set at an economically efficient level, and that an additional 23 percent should be spent on administration, an efficient tort system would result in transfers of only $93 billion per year.[17] By this cautious calculation, the current U.S. tort system includes "excessive" tort costs of $87 billion per year.[18] Were one to adapt the assumption that non-economic damages are random, the "litigation tax" would rise to $136 billion per year, even after accounting for reasonable administrative expenses.[19] To the extent that the economic damages awarded by the tort system are not well targeted and therefore fail to provide proper incentives to firms, the entire $180 billion in direct costs is economically excessive.

Another useful perspective is provided by comparing the cost of tort liability in the United States to that of other developed countries. While it is difficult to make cross-national comparisons because of data limitations, estimates by Tillinghast-Towers Perrin suggest that the U.S. tort system is substantially more costly than that of other countries. As shown in figure 2, U.S. tort costs in 1998 were 1.9 percent of GDP, approximately double the average cost of the other nations studied. Only Italy, with

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[16] National Academy of Social Insurance, "Workers' Compensation: Benefits, Coverage and Costs, 1999 New Estimates and 1996-1998 Revisions," May 2001.

[17] (Economic damages ($36 b.) + Non-Economic damages ($40 b.)) * Administrative cost factor (1.23) = Non-excessive tort costs ($93 b.)

[18] Total tort costs ($180 b.) – Non-excessive tort costs ($93 b.) = Excessive tort costs ($87 b.)

[19] Total ($180 b.) – (Economic($36 b.) *Admin cost factor(1.23)) = Excessive tort costs ($136 b.)

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costs of 1.7 percent of GDP, rivaled the U.S. in total direct costs. Tort costs in Denmark, the United Kingdom, France, Japan, Canada and Switzerland are all estimated to be less than 1 percent of GDP.

Figure 2

International Tort Costs as a Percentage of GDP, 1998

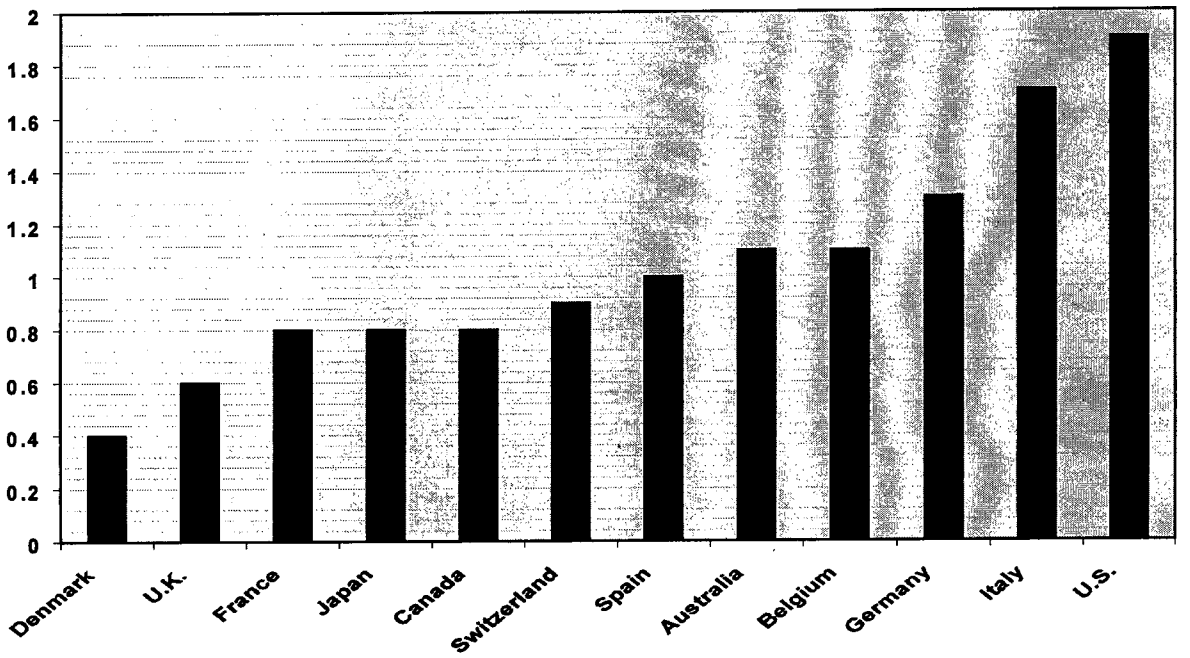

Source: Tillinghast-Towers Perrin, "U.S. Tort Costs: 2000"

How Large is the Burden of the Litigation Tax?

Regardless of which estimate of the direct cost presented above is closest to the truth, it is likely to substantially *underestimate* the total economic cost of the U.S. tort system. In the analysis of taxation, economists recognize that the total burden of a tax exceeds the revenue it collects. The excess burden or "deadweight loss" of taxation arises because taxes distort production and consumption decisions. In the current setting, an example of this phenomenon is that physicians may prescribe unnecessary precautionary treatments, often referred to as "defensive medicine," in order to avoid

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non-financial litigation penalties such as harm to their reputations and the time and stress associated with a malpractice suit.[20] Some socially desirable products and services are likely never produced due to excessive tort liability claims.

Anecdotal evidence suggests that some products that may have a net benefit to society as a whole are withheld from the marketplace due to excessive concerns of liability from the tort system. For example, concerns over liability have resulted in withdrawals of certain medicines, and halted the production of vaccines such as smallpox and DPT. In trying to gauge the size of these costs, the appropriate measure of loss is the difference between the value of the good that is not produced and the value of the next best alternative. Because only one of these goods is produced in the market, it is difficult to assess this loss. The net economic cost of these types of actions is difficult to quantify, and is not included in the $180 billion estimate.

Despite these difficulties, one can approximate the magnitude of the deadweight loss through the literature on taxation. Recent research by Professor Dale Jorgenson of Harvard University estimates that the marginal deadweight loss per dollar of revenue raised by the corporate income tax in the United States is 27.9 cents.[21] If all tort claims have a comparable deleterious effect on the economy, the deadweight loss resulting from the $180 billion in direct costs would be an *additional* $50 billion. Even using the most cautious estimate that excessive direct costs total $87 billion, an additional 27.9 percent deadweight loss would bring the total cost of the litigation tax to $111 billion. In the intermediate case with direct costs of $136 billion, the total economic burden would be $174 billion annually.

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[20] Daniel Kessler and Mark McClellan, "Do Doctors Practice Defensive Medicine?" *The Quarterly Journal of Economics*, May 1996.

[21] Dale Jorgenson and Kun-Young Yun, Investment, Volume 3, *Lifting the Burden: Tax Reform, the Cost of Capital, and U.S. Economic Growth*, 2001, Table 7.10, page 287.

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Who Pays for Excessive Liability Claims?

Who pays the litigation tax? While a tax may be collected from a firm, its burden must ultimately be borne by individuals through job loss or a reduction in wages (workers), an increase in consumer prices (consumers), a decline in property values (landowners), or a reduction in profits and thus share prices (owners of capital). Of course, these categories are not mutually exclusive. The same person could suffer from lower wages, face higher prices for products, and have lower returns on his pension assets.

Determining the true economic burden. or economic incidence. of a tax is a complex undertaking, as it requires that one consider how wages and prices have adjusted throughout the economy as a result of the tax. If wages fall as the result of a tax, economists say that the tax has been *shifted backward* onto labor. If prices rise, economists say that the tax has been *shifted forward* to consumers.[22] Alternatively, firm profitability could be reduced, in which case the tax burden is borne by participants in private pension plans and owners of stocks and mutual funds.

For example, in the United States, the Social Security system collects 12.4 percent of a worker's wages[23] to support retirement and disability benefit payments. Half of this, or 6.2 percent, is levied on the worker. The remaining 6.2 percent is levied on the employer. However, most of the employer-paid portion of the social security tax is shifted backward so that the employer portion of the payroll tax has the same effect on a worker as does the portion levied directly on the worker. Thus, even though employees *legally* bear only half of the payroll tax, they bear the full – or almost full – economic burden of the tax through lower wages.[24]

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[22] Joseph E. Stiglitz, *Economics of the Public Sector*, Third Edition, New York: W. W. Norton, 2000, page 483.

[23] Up to a maximum taxable amount of $84,900 in 2002.

[24] Joseph E. Stiglitz, *Economics of the Public Sector*, Third Edition, New York: W. W. Norton, 2000, page 483.

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The *legal* incidence of the costs of the U.S. tort system falls on firms engaged in the production and sale of goods and services. Moreover, to the extent that the distribution of tort costs is largely random, tort costs only increase a firm's costs and decrease profits in a manner similar to the corporate income tax. Thus, to a first approximation, one can view the economic incidence of excessive tort costs as being similar to the corporate income tax in the United States.

The incidence of the corporate income tax is the subject of considerable debate among tax economists. Most economists believe that a substantial portion of the corporate tax is shifted to consumers through higher prices, or to workers if wages decline due to a decreased demand for the taxed good. The remainder falls on investors. Importantly, to the extent that it falls on capital, it is on owners of *all* capital, not just those firms most likely to fall subject to tort litigation. To see this, suppose that some industries or sectors are more likely to be subject to liability losses. If the high cost of liability makes investing in these sectors less attractive, capital will move out of the higher cost sector, driving down the rate of return to capital in other sectors. The lower return reflects the cost of the litigation tax. Thus part of the burden of these tort claims can be borne by all owners of capital not just those in the sector with higher tort claims.

Traditionally, three governmental agencies have engaged in the distributional analysis of tax policy: the Joint Committee on Taxation (JCT), the Office of Tax Analysis (OTA) at the Department of Treasury, and the Congressional Budget Office (CBO). During the 1980s and early 1990s, "JCT did not distribute corporate income tax changes at all, on the ground that the incidence of the tax was too uncertain."[25] Beginning in 1992, JCT allocated the corporate income tax to owners of capital generally, and for the past several years, the JCT has not conducted distributional

[25]Michael J. Graetz, "Distributional Tables, Tax Legislation, and the Illusion of Precision," in David F. Bradford, Ed., *Distributional Analysis of Tax Policy*, 1995, page 47.

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analysis at all. OTA makes the assumption that the tax is borne by owners of capital. Traditionally, the CBO has used three different variations: 100 percent by capital, 100 percent by labor, and half by each. The inconsistent set of assumptions and methodologies across agencies highlights the uncertainty about the economic incidence of the corporate income tax. In fact, a recent survey of economists who specialize in public finance found that virtually all of these economists believe that the burden of the corporate income tax is shared by both capital and labor generally, but "there is significant disagreement about the precise division."[26]

To the extent that capital markets are globally linked, allowing capital to flow freely across borders, the after-tax rate of return to capital must be equated across countries. One implication is that if tort liability raises the cost of capital in the United States, mobile capital will seek the relatively higher return available elsewhere, until rates of return are again equalized. The result is that the capital stock in the United States may be smaller with high tort costs than with low tort costs. A smaller capital stock means there is less capital per worker, thus lowering productivity and wages. In this way, the costs of tort may fall on the less mobile factors of production, namely labor. If global capital markets were fully integrated and capital freely mobile, then the entire burden of the costs of excessive tort in the United States could be shifted to labor through reduced real wages and consumers through higher prices.

The relative magnitude of the burden of excessive tort costs in the U.S. is quite substantial. For perspective, in the year 2000, total wage and salary disbursements to private industries (i.e., excluding government workers) totaled just over $4 trillion.[27] Taking the extremely conservative excessive cost estimate of $87 billion – an estimate that treats the current level of economic and non-economic damages as appropriate,

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[26] Victor R. Fuchs, Alan B. Krueger, and James M. Poterba, "Why Do Economists Disagree about Policy? The Roles of Beliefs about Parameters and Values," National Bureau of Economic Research Working Paper No. 6151, August 1997, page 12.

[27] *Economic Report of the President*, February 2002, Table B-29.

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allows for a reasonable administrative charge of 23 percent of the award, and ignores the deadweight burden – the litigation tax is equivalent to a 2.1 percent wage and salary tax shifted onto private sector workers. Alternatively, if this $87 billion were shifted forward to consumers through higher prices, this would be equivalent to a 1.3 percent tax on personal consumption.[28] If the excess burden were not passed through to labor or consumers, and instead was borne entirely by capital, then it would be equivalent to a tax on capital income of 3.1 percent.[29] It should be noted that nearly 80 million Americans own corporate stock, either individually or through their pension funds.[30] In fact, over 20 percent of corporate stock in the U.S. is held by public and private pension funds – suggesting that if this litigation tax is not passed through to workers via wage reductions or price increases, workers are still harmed through reduced returns on their retirement saving.

Table 1 below illustrates the "tax equivalence" of tort litigation costs under various assumptions about the incidence of the tax, and the size of the excessive tort costs. As a lower bound on the size of the litigation tax, we treat all economic and non-economic damages as economically appropriate, allow for 23 percent administrative costs, and ignore the deadweight burden. This translates to a litigation tax of approximately $87 billion per year. For an intermediate estimate, we include non-economic damages in the excess cost of tort, following the work of Viscusi. This implies a litigation tax of $136 billion per year, ignoring the deadweight loss. For an upper-bound estimate, we treat *all* tort costs as economically excessive, and also include an estimated $50 billion in deadweight loss.

As illustrated in Table 1, under the assumption that the tax is fully shifted forward through prices, the annual excessive tort costs are equivalent to a tax on consumption

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[28] *Economic Report of the President*, February 2002, Table B-1.
[29] According to unpublished data from the Productivity and Technology Division of the Bureau of Labor Statistics, the capital (non-labor) share of nonfarm business output was $2,762 billion in 2001.
[30] Investment Company Institute, *Equity Ownership in America*, 1999.

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ranging from 1.3 percent to 3.4 percent. Alternatively, if shifted backwards onto labor, the "litigation tax" is equivalent to a tax on wages from 2.1 percent to as high as 5.7 percent. If the incidence of the tax falls on investors, it is equivalent to a tax on capital ranging from 3.1 percent to 8.2 percent. The final row of Table 1 illustrates the case in which the burden of the litigation tax is shared by consumers, workers and investors.[31]

Whether it falls entirely on labor, or whether some portion of it also falls on capital owners in the U.S., the cost to the U.S. economy is substantial. For example, in the year 2000, the intermediate cost estimate of $136 billion is more than the Federal government spent on all of the following programs *combined*: Education, training, and employment; general science; space and technology; conservation and land management; pollution control and abatement; disaster relief and insurance; community development; Federal law enforcement and administration of justice; and unemployment compensation.[32] Alternatively, $136 billion is two-thirds the amount of revenue collected from the corporate income tax[33] or nearly half (46 percent) of the amount spent on national defense.[34] Viewed differently, at more than 3 percent of wages per year, the cost of the litigation tax is also far more than enough money to solve Social Security's long-term financing crisis. To a family of average income, three percent of wages is also the cost of more than three months of groceries, six months of utility payments, or eight months of health care costs[35]. That is, $136 billion represents a large drain on the productive resources of the United States.

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[31] The assumed division is 25 percent through prices, 25 percent through wages, and 50 percent through reduced investment returns. This incidence assumption is based on one of the corporate tax incidence scenarios used by Joseph A. Pechman in Who Paid the Taxes, 1966-85, Washington, D.C., The Brookings Institution, 1985, p.35.
[32] *Budget of the United States Government*, Fiscal Year 2003, Historical Tables, Table 3.2, pages 54-69.
[33] *Ibid*, Table 2.1 page 30.
[34] *Ibid*, Table 3.1, page 51.
[35] Bureau of Labor Statistics, "Consumer Expenditures in 1999," May 2001.

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Table 1
Size of the Tort Litigation Tax

Incidence Assumption	Equivalent Tax Base	Annual "Excessive" Tort Costs		
		$87 billion	$136 billion	$230 billion
Fully shifted forward Through prices	Consumption Tax	1.3%	2.0%	3.4%
Fully shifted backward Onto workers	Wage Tax	2.1%	3.3%	5.7%
Fully borne by Investors	Capital Tax	3.1%	4.9%	8.2%
25% shifted through prices, 25% shifted through wages, 50% borne by investors	Consumption Wage Capital	0.3% 0.5% 1.6%	0.5% 0.8% 2.4%	0.8% 1.4% 4.1%

Source: CEA calculations. The taxes are calculated by dividing the annual excessive tort costs by the appropriate base. The consumption base is total personal consumption expenditures which totaled $6,728 billion in the year 2000. The wage base is total wage and salary disbursements to private industries, which totaled $4,069 billion. The capital base is non-labor payments in national income, which totaled $2,789 in the year 2000.

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Summary

The cost of the U.S. legal liability system has increased substantially over the past several decades. While economic theory suggests a potentially useful role for a tort system in providing proper incentives, excessive tort costs are akin to a tax on firms. Like any tax, this "litigation tax" imposes deadweight losses on the economy in the form of products and services that are never produced as a result of the fear of litigation. Both the direct and indirect costs of excessive tort must ultimately be borne by individuals in the economy through some combination of higher prices, lower wages, and reduced returns to investments.

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Introduction

With estimated annual direct costs of nearly $180 billion,[1] or 1.8 percent of GDP, the U.S. tort liability system is the most expensive in the world, more than double the average cost of other industrialized nations that have been studied.[2] This cost has grown steadily over time, up from only 1.3 percent of GDP in 1970, and only 0.6 percent in 1950. The current cost amounts to nearly $650 for every citizen of the United States, and is one reason that many commentators have called for reform of the tort liability system. The cost is especially troubling because only 20 percent of these dollars actually go to claimants for economic damages, such as lost wages or medical expenses.

Defenders of the status quo argue that the existing system protects consumers by making firms responsible for damages caused by their products and services.[3] Indeed, the underlying notion that firms are induced to recognize the full social cost of their products is one economic rationale for an *efficient* tort system.[4] That is, just as firms must pay compensation to employees and suppliers as part of the cost of producing output, ideally tort liability forces the firm to consider the potential for damage that the firm's products may cause. In this sense, it is analogous to "making polluters pay."

However, poorly designed policies can mistakenly make polluters pay too much and impose excessive costs on society through forgone production of public and private

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[1] Direct costs include awards for economic and non-economic damages, administration, claimants' attorney fees and the costs of defense.

[2] Tillinghast-Towers Perrin, "U.S. Tort Costs: 2000, Trends and Findings on the Costs of the U.S. Tort System," February 2002.

[3] Throughout this paper, we use the term "firm" to refer to any producer of goods and services.

[4] Another economic argument sometimes used to support tort liability is that the right to sue provides consumers with "insurance" in the event of an accident. For a discussion of the limitations of this view, see Paul Rubin, *Tort Reform by Contract*, Washington, D.C.: The AEI Press, 1993. For purposes of this paper, it should be noted that regardless of the rationale for the system, the cost is still borne by individual consumers, workers, or investors.

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goods and services. Tort law alters firm behavior in a socially desirable manner if tort liability claims are optimal. If claims are excessive and fail to provide proper incentives, then these claims are a drain on resources that can deter the production of desired goods and services and reduce economic output. The United States bears the burden of an expensive and inefficient liability system through higher prices, lower wages, and decreased returns to investment, as well as lower levels of innovation.

The similarity between inefficient tort litigation and taxes suggests that the economic costs of the tort liability system may be better understood by pursuing the analogy between the expected costs arising from the tort system and taxes on firms. As with a tax, it is possible to examine the question of who bears the incidence of – that is, who pays for – excessive tort costs. An important lesson in the economics of taxation is that *people* pay taxes; firms are legal entities that can bear no real burden. Put differently, the burden of any tax depends not on who writes the check (the legal liability), which may be the firm, but rather on the market outcomes that shift the cost to workers, consumers or owners of capital.

What Are the Role and Limits of Liability Laws in a Market Economy?

The production and sale of nearly every economic good or service entails a degree of risk, however small, that the product may cause unintended harm. Children can be injured playing with toys, patients may have adverse reactions to medications or medical procedures, and workers may fall off ladders or be injured by machinery. Because consumers often have less than perfect information about these risks and are generally unable to insure against them, the government plays a potentially important role in promoting health and safety.

Many policy tools are available to address such risks, including a reliance on market forces, contracts, direct regulation, social insurance, and the legal liability system. Each approach has its relative strengths and weaknesses, and reliance on any

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single one may not be desirable.[5] In the United States, the tort system of legal liability is sometimes viewed as contributing to overall social objectives by ensuring that firms consider more fully the health and safety aspects of their products.

A guiding insight is that competition in private markets for goods and services pushes firms to produce the kinds of goods that consumers prefer using the most efficient combination of labor, capital and other inputs. If consumers and firms are already faced with incentives to weigh the social costs and benefits of their respective consumption and production decisions, the burden of government policy is to preserve economic efficiency by avoiding intervention.

For some transactions, however, it may be infeasible to account fully for all of the relevant benefits and costs. A consumer purchasing a new car, for example, may have neither the technical expertise nor the information necessary to fully evaluate the risk of injury posed by a particular design feature. It could also be costly to obtain complete information on every key aspect. Alternatively, a patient purchasing a medical procedure, for example, may be unlikely to fully understand the complex risks, costs and benefits of that procedure relative to others. Such a patient must turn to a physician who serves as a "learned intermediary," though there remains the problem that the patient may also not be able to judge the skill of the physician from whom the procedure is "purchased." In such a case, the ability of the individual to pursue a liability lawsuit in the event of an improper treatment, for example, provides an additional incentive for the physician to follow good medical practice. Indeed, from a broad social perspective, this may be the least costly way to proceed – less costly than trying to educate every consumer fully. In a textbook example, recognition of the expected costs from the liability system causes the provider to undertake the extra effort or care that

[5] For broader discussion of the role of each of these approaches, see W. Kip Viscusi, "Toward a Diminished Role for Tort Liability: Social Insurance, Government Regulation, and Contemporary Risks to Health and Safety," *Yale Journal on Regulation*, Winter 1989.

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matches the customer's desire to avoid the risk of harm. This process is what economists refer to as "internalizing externalities." In other words, the liability system makes persons who injure others aware of their actions, and provides incentives for them to act appropriately.

Central to this view, however, is the notion that the exposure of firms to potential tort liability costs provides proper incentives. In the specific context of punitive damages, Professor W. Kip Viscusi of Harvard University makes the point that "the linchpin of any law and economics argument in favor of punitive damages is that these awards alter incentives."[6] In his research on corporate decisions regarding environmental and safety torts, Viscusi evaluates the effect of punitive damages "by examining the risk performance in the four states that do not permit punitive damages as compared with other states that do." He finds that "this detailed effort to detect a deterrent effect yielded no evidence of any safety incentive role. This lack of evidence is consistent with the proposition that punitive damages are random." If punitive damages are essentially random, then they will not provide proper incentives for risk mitigation. Instead, they will operate purely as a "tax" on firms -- a cost with no corresponding benefit.

Some scholars disagree with Viscusi's conclusion. For example, Professor David Luban of Georgetown University argues that one should consider the "retributive aims of punishment" as well as the deterrent aims.[7] However, tort liability only achieves a goal of retribution if the economic burden of the punishment is borne by the responsible party, which may not be the case if the costs are ultimately passed through to investors, workers or consumers, or if punitive damages are essentially random, as Viscusi argues. Professor Theodore Eisenberg of Cornell Law School and several co-authors take an alternate view, claiming that tort liability is largely predictable and is

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[6] W. Kip Viscusi, "Why There is No Defense of Punitive Damages," *Georgetown Law Journal*, November 1998.
[7] David Luban, "A Flawed Case Against Punitive Damages," *Georgetown Law Journal*, November 1998.

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therefore capable of providing proper incentives to firms.[8] However, while both authors question Viscusi's findings, neither provides direct empirical evidence to indicate that punitive damages actually have a deterrent effect. In fact, the empirical evidence that Eisenberg and co-authors do offer is consistent with the possibility that punitive damages are awarded on a random basis, as noted by Professor A. Mitchell Polinsky of Stanford University.[9]

Other research has examined the effect of expected tort liability costs on innovation and investments in safety. At lower levels of expected liability costs, Viscusi and Professor Michael Moore of Duke University[10] find that firms have incentives to invest in product safety research in an effort to reduce liability costs while still bringing a particular product to market. At higher levels of expected liability costs, however, firms will choose to forgo innovation or to withhold a product from the market, resulting in a net negative effect of expected liability costs on innovation. Based on their estimates, Viscusi and Moore identify many industry groups for which high liability costs exert a net negative effect on innovation.

Industry-specific studies by other authors have generally supported the results of Viscusi and Moore, documenting negative effects of liability on innovation in many areas, such as general aviation, chemicals, pharmaceuticals, and medical practice. The evidence of direct linkages between liability and safety in industry-specific analyses has been weak. Other factors, such as regulation and the fear of bad publicity, may provide stronger incentives to improve safety features than does legal liability, though liability

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[8] Theodore Eisenberg, John Goerdt, Brian Ostrom, David Rottman, and Martin Wells, "The Predictability of Punitive Damages," *The Journal of Legal Studies*, June 1997.

[9] A. Mitchell Polinsky, "Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg, et al.," *The Journal of Legal Studies*, June 1997.

[10] W. Kip Viscusi and Michael Moore, "Product Liability, Research and Development, and Innovation," *Journal of Political Economy*, 1993.

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may play an indirect role by encouraging the spread of safety-related information and by bringing potential hazards to the attention of regulators[11].

Reconciling these alternative views is beyond the scope of this paper. Instead, recognizing the controversy that exists about the incentive effects of tort liability in general, and punitive damages in particular, this paper will consider several scenarios. For our most cautious estimates of the size of the "litigation tax," we make the very strong assumption that both economic (e.g., loss of wages, medical expenses) and non-economic (e.g., pain and suffering, loss of consortium, punitive) damages are currently set at an optimal level. We then consider an intermediate case that treats non-economic damages as essentially random and therefore part of the litigation tax. Finally, we consider the case in which all of the costs of the U.S. tort system are treated as economically excessive, which would result if both economic and non-economic damages were largely random and failed to provide proper incentives.

What Are the Direct Costs of the U.S. Tort Liability System?

In the year 2000, according to a study by Tillinghast-Towers Perrin, the U.S. tort system cost $179 billion. This includes $128 billion of "insured" costs derived from financial data for the U.S. insurance industry. These data "are considered highly reliable in that they are subject to audit and reviewed by state regulatory agencies."[12] The costs include benefits paid to third parties or their attorneys, claim handling, legal defense costs and insurance company administrative costs. Tillinghast estimates that $30 billion in costs is paid by firms that insure themselves. Finally, they estimate that an additional $21 billion is due to medical malpractice. We will make use of these Tillinghast estimates for illustrative purposes in this paper, although the main conceptual

[11] Peter Huber and Robert Litan, eds., *The Liability Maze: The Impact of Liability Law on Safety and Innovation*, Washington, D.C.: The Brookings Institution, 1991.
[12] Tillinghast-Towers Perrin, "U.S. Tort Costs: 2000, Trends and Findings on the Costs of the U.S. Tort System," February 2002, page 8.

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contribution of this paper – that excessive tort claims act as a tax paid by individuals – would hold with equal force with any alternative measure of direct costs.

The estimate of nearly $180 billion in direct costs of the U.S. tort system is likely to understate substantially the actual costs of the tort system for several reasons. First, the $180 billion estimate pre-dates September 11. The terrorist attacks have increased the uncertainty surrounding legal liability claims. Insurance companies, uncertain how to assess new liability risks, are raising premiums and capping or denying coverage. As such, the cost of the tort system in the future will likely be even greater than the year 2000 estimates employed herein. Second, this estimate ignores the many economic distortions that arise as a result of individuals and firms trying to avoid lawsuits. These costs, which will be discussed in more detail below, can include distortions to labor markets (e.g., doctors deciding not to practice certain specialties or in particular communities for fear of being sued), the practice of "defensive medicine," or the decision by manufacturers to keep products off the market.[13] Third, this estimate also ignores the potential deleterious effect of excessive tort claims on innovation. In product areas where litigation is frequent and costly, the prospect of high liability claims may be enough to ward off any potential new entrants.

Lacking a more comprehensive estimate of total costs, however, we will use the $180 billion as an initial conservative estimate of total tort costs. An even more difficult issue is deciding how much of this $180 billion is economically "excessive." There is no easy or widely accepted empirical answer to this question. To the extent that awards are largely "random" and fail to provide incentives to firms, most, or even all, of the tort expenses are excessive. Alternatively, to the extent that damages awarded to claimants are a good proxy for the actual damages caused, the fraction of tort costs that

[13] Some anecdotal evidence of these costs can be found in Michael Freedman's "The Tort Mess," Forbes.com, May 13, 2002.

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go to claimants to compensate for damages, plus reasonable "transactions costs," could be loosely viewed as the "right" level, and costs above this amount as being excessive.

To pursue this line of reasoning, recall that more than half of the total annual cost of tort is due to administrative expenses and legal fees. As observed, "viewed as a mechanism for compensating victims for their economic losses, the tort system is extremely inefficient, returning only 20 cents of the tort cost dollar for that purpose."[14] This share of total tort costs that go to direct compensation for victims is lower than in the past. In the late 1980s and early 1990s, economic damages accounted for 22-25 percent of total tort system costs.[15]

Figure 1: Distribution of Liability Costs

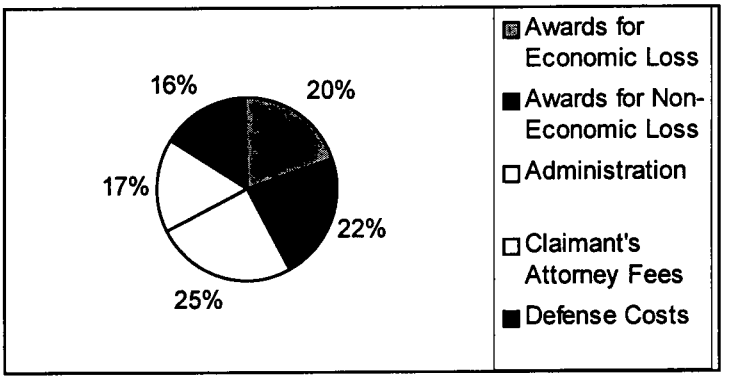

Source: Tillinghast-Towers Perrin, February 2002.

As indicated in Figure 1, an additional 22 cents goes to claimants for non-economic damages, such as pain and suffering, loss of consortium and punitive damages. The remaining 58 percent of tort costs go to pay for administration, claimants' attorney fees, and defense costs. However, one should not necessarily view the entire 58 percent as "excessive," because some level of "transactions costs" is required in order to administer any system. As a guide for what is a reasonable level of costs, we use the experience of the Workers' Compensation system in the United

[14] *Ibid*,,page 12.
[15] According to previous studies by Tillinghast-Towers Perrin published in 1995, 1992 and 1989.

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Records Management, White House Office of (ORM)

Subject Files

FG006-27
(Office of Senior Advisor - Karl Rove)

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Systematic Processing Marker

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11/4/3/1	9711			

Folder Title: ORM
FG006-27
536041

Dan B.
DHS - Susan Neely
D. Holtz

Ralston, Susan B.

53604 #

From: Karl Rove [kr@georgewbush.com]
Sent: Wednesday, July 16, 2003 3:23 PM
To: Ralston, Susan B.
Cc: Ed Gillespie
Subject: FW: Homeland Briefings/Battles

------ Forwarded Message
From: PRA 6
Date: Wed, 16 Jul 2003 12:09:45 -0400
To: "Karl Rove" <kr@georgewbush.com>
Subject: Homeland Briefings/Battles

Karl,

Feel free to disseminate this in any way.

I attended what was billed as a "Homeland Security Briefing" in Memphis. Harold Ford was the sponsor.

Attended by about 50 opinion makers -- mayors, chiefs, hospitals, industry, law enforcement.

Ford handed out the CFR "woefully unprepared" document.

Ford specifically criticized the tax cuts as putting us at "risk".

Said DHS "process" is "not adequately described by the administration."

Said there was "growing unease" with the process. Said he opposed DHS from the beginning.

Critical of ODP specifically. Said he may bring them to Memphis for explanations.

Chief Deputy Marshall for Western District brought up the budget/six months behind/'hurtful to process. Ford pounced on that as reason to be more critical.

State Homeland Security Director for Bredesen was somewhat critical. Said feds were slow. Contradicted himself on whether money had come down yet or not. I strongly suspect states are sitting on this grant money letting it draw interest because of the shortfalls.

The intended message is that nobody knows where the money is, and that it's the

administration's fault.

Should you ever need to say that Dems are politicizing Homeland Security, this is an extreme example of it. I had a rep from USMS with me, so there is a more credible witness than myself. I also suspect some of the chiefs there would be willing to comment off the record. Some appeared disgusted.

There were also FOUR TV cameras there. No one defended the administration. I couldn't, because I was there for information analysis/intelligence purposes for the chairman of the city council. But someone should have. I suspect Ford is an extreme example, but his remarks may be some indicator of what the Dems will be saying.

I'm happy to do anything I can to help with this, other briefings, try to get talking points into the hands of someone who can speak up, etc. Whatever you need.

I hope this is helpful. If there's someone else you prefer I send stuff like this to, I'll be glad to. You are my only contact at this point.

tommy

------ End of Forwarded Message

From: Bob Novak

XC: KH - FYI
BJackson

Sign-on letter to Sens. Allen and Corzine, Reps. Reynolds and Matsui:

Circulated by Senator Lindsey Graham (R-SC), Rep. Charlie Stenholm (D-TX) and Rep. Jim Kolbe (R-AZ)

We believe that strengthening Social Security is one of our most important domestic policy priorities. The long-term financial outlook of Social Security is deteriorating and, absent structural reforms, it will impose an unsustainable financial burden on today's workers and future generations.

The white-hot rhetoric surrounding Social Security modernization is creating an environment that punishes those who discuss reform options openly and honestly. The American people deserve a modernized Social Security system that provides true retirement security for all Americans, while reducing the pressure on future taxpayers and on other budgetary priorities.

This goal will only be achieved if we make a commitment to discuss the need for Social Security reform candidly. Unfortunately, this has not always been in the case. Social Security has often been used as a weapon to achieve short term political goals. Indeed, both parties seemingly compete to outbid each other in ruling out options for restoring the fiscal health of Social Security. It is time for the demagoguery to stop.

To this end, we pledge to defend candidates – Republican or Democrat – who support Social Security modernization and are willing to make tough choices to address the fiscal challenges facing Social Security. We will no longer turn a blind eye to political attack ads that accuse responsible reform advocates of wanting to dismantle Social Security or slash benefits of current retirees. These attacks are untruthful and poison the bipartisan cooperation that will be required to enact the necessary reforms.

In 2000, then-candidate Bush said, "Too many times, Social Security has been demagogued to frighten the elderly for political advantage. Too many candidates have traded on the problems of the system instead of correcting them, shoving them off for others to handle – to some future generation, some other president and some other Congress."

We agree. It is time for this Congress and this President to solve the problems plaguing Social Security. Inaction is no longer an option. The longer we wait to tackle the necessary reforms, the harder the task becomes.

Although we all come from different political backgrounds and ideologies, and we have different ideas on how to modernize Social Security, we are proud to stand together in this effort to address Social Security and we encourage others to join us.

Dan FYI
Karen
Hughes

Reading

Karl:

Given the topic ("God and George W. Bush"), the writer (Christopher Hitchens, a devoted and vocal atheist), and the publication (Vanity Fair), I think this piece turned out okay.

Pete

Susan

discuss

Karl

CHRISTOPHER HITCHENS

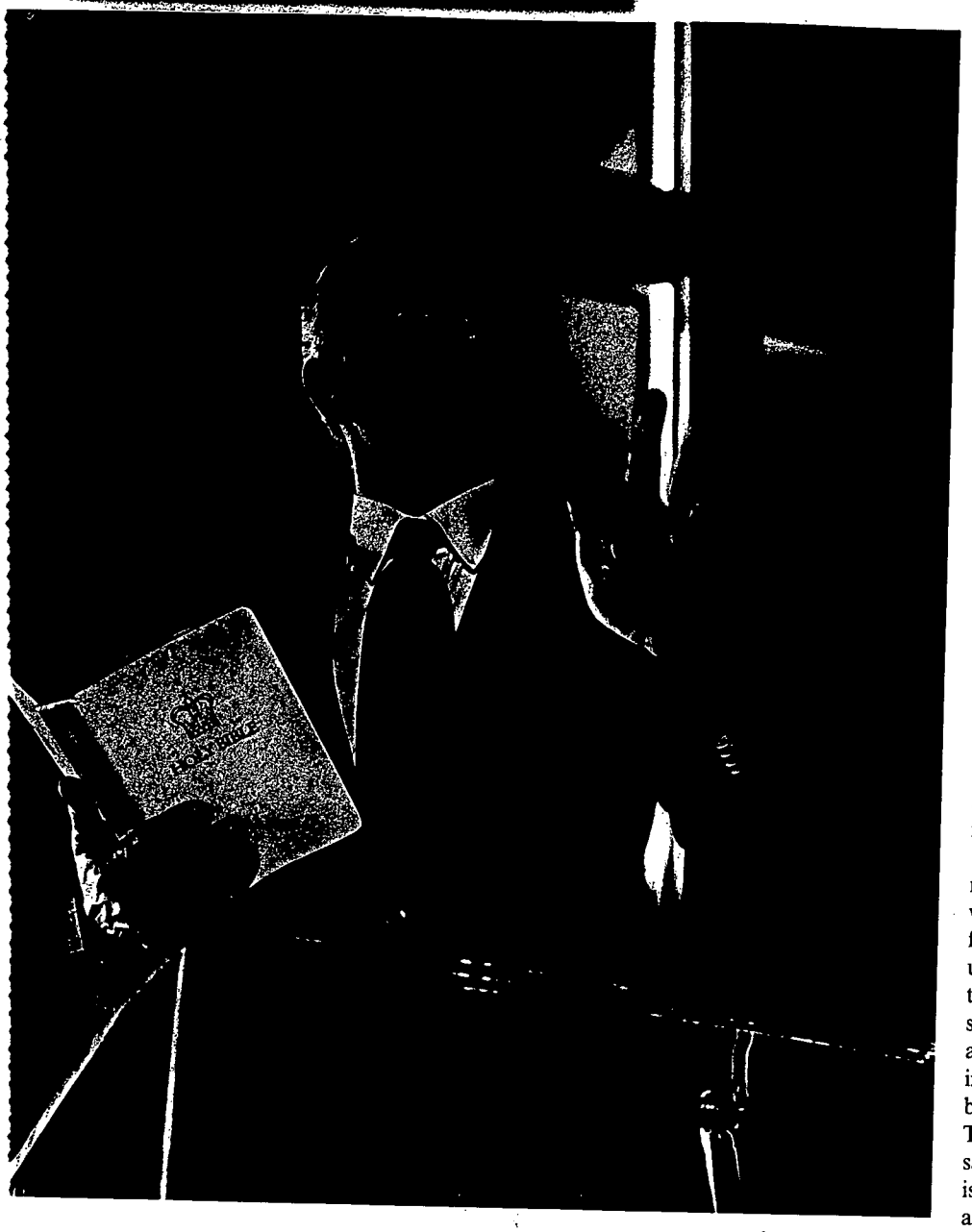

ONE PRESIDENT UNDER GOD
George W. Bush's deep religious belief has resulted in a "faith-based initiative," among other questionable policies.

GOD AND MAN IN THE WHITE HOUSE

The Supreme Court will soon consider the 1954 addition to the Pledge of Allegiance of two short words: "under God." The Bush administration has sworn to keep them there. What is happening to the wall separating church and state–the key distinction between America and the fundamentalists it is fighting?

I am a strict constructionist and a firm believer in original intent. This is why I believe that the Pledge of Allegiance, in its current phrasing, is two words too long. The superfluous words—"under God"—were inserted during a jittery McCarthy-era moment in 1954, and after President Eisenhower had been unduly impressed by a preacher. The same preacher sermonized that the pledge, in its form as then recited, could be uttered by any schoolchild in Moscow. Quick remedial action was required, and so it was determined that the rhythm and harmony of the pledge, along with its main point, should be ruined by a crude editorial insertion.

Francis Bellamy, the former Baptist minister and Christian socialist who wrote the original pledge, was looking for a form of words that would be genuinely "inclusive." At the time he did this, in 1892, children in the South were still watching Civil War veterans swear allegiance to the Confederate flag, and in the North there was much Protestant bigotry against Catholic immigration. Thus, reasoned Bellamy, it was necessary to have a civic and secular patriotism, based upon the idea of "liberty and justice for all." That simple notion managed to get the country's children through two World Wars before it was trashed. Now the Court of Appeals for the Ninth Circuit in California has upheld a complaint brought by an atheist parent. So we'll soon see the Supreme Court debating something apparently trivial but actually essential. How stands the "wall of separation" between church and state, in a country locked in furious battle with armed and dangerous theocrats?

Over at the Department of Justice, Attorney General John Ashcroft is in righteous mode and prepared for spiritual warfare. You might think that he would be too busy pursuing the god-inflamed and god-intoxicated enemies of the Republic, but he's taking time out to keep the pledge the way it is: a standing insult to secular Americans. After the appellate court voted 2–1 to find the current wording of the pledge unconstitutional, he swore that his department would "spare no effort to preserve the rights of all our citizens to pledge allegiance to the American flag." This is the intellectual equivalent of saying that the Constitution upholds the right of all Americans to worship Santa Claus in their own way. But then, Mr. Ashcroft has also made another famous statement, telling his audience that "America has been different. We have no king but Jesus." This proclamation is also two words too long. We have no king at all, and we have no state church, or official religion, and that's that. It's also supposed to be

PHOTO COMPOSITE BY MICHAEL ELINS

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the essential difference between ourselves and the homicidal fundamentalists.

Ashcroft was not attorney general when he made this stupid remark in 1999, while accepting an "honorary degree" from Bob Jones University. (A full degree from that historically racist and sectarian sink of ignorance would hardly count higher.) And George Bush was not president when he was asked to name his favorite political philosopher during a candidates' debate in 1999, and modestly nominated Jesus Christ. As it happens, the two favorite "political philosophers" of the American right are Leo Strauss, an agnostic, and Ayn Rand, a proud and determined atheist. But millions of people at home and abroad have now gotten hold of the idea that we have a fundamentalist and proselytizing administration, led by a born-again believer. How true is this charge?

To begin with the defense rather than the prosecution: Bush has not mentioned the name of Jesus, except when speaking to other Christians, since taking the oath of office. He only makes general invocations of the Almighty these days. It's understood that he privately asks himself, "What would Jesus do?," but there's no particular objection to that, since if he were not a Christian he would be the first president since Abraham Lincoln who did not make this claim. (Also, he clearly doesn't take the advice of his favorite "political philosopher," who generally counseled turning the other cheek.) It's true that the president employed the word "crusade" when speaking of the fight against al-Qaeda, but this word has only lately fallen under a ban of disapproval. Until very recently, every civil-rights activist in America would have described his or her movement as a crusade. Also, Bush only said it twice. And he more than balanced it by making several highly flattering remarks about the Muslim religion, going further in this respect than any of his predecessors and making a claim—that Islam is "a religion of peace"—which asks us to believe quite a lot, and which nobody living in an officially Muslim society could believe for a second.

Descending from the grand to the minuscule, the president has also told us on more than one occasion that he personally has been aided by a higher authority, and that he needed the help as much as he once needed a drink. The old choice—"It's me or Jack Daniel's, you asshole"—has been brusquely offered to many a gross Texan husband by many a pissed-off Texan wife, and there's no good reason to doubt that this story is just another version of the old, old one. Except that in Bush's case it worked. He really did choose Jesus over the amber nectar. (Forcing myself to reflect on this choice has taken me into an area of ethereal responsibility well above my pay grade at this magazine.) Yet, not to be overly sarcastic about it, the decision did involve the future candidate in the first page-by-page, line-by-line scrutiny of any book that he had ever undertaken. As a result of a long, hard stint at "Community Bible Study," he is now as abstemious as any Muslim or strict Hindu or 1920s biblical-Protestant prohibitionist.

In a society half crazed by its own addiction to therapy and personal growth, there needn't be any great alarm about that either. Bush's marriage was saved, and his daughters and niece grew up to be barflies or prescription forgers, which shows that we are all at the mercy of heredity as well as of divine judgment. There is no final victory of good over evil. Did someone say evil? Yes, as a matter of fact, Bush did, on several occasions, adding the word "evildoers" to describe the perps themselves. I think that it's culturally shallow for liberals to assume, as they mainly do, that evil is a word only of religious discourse. (Try "malefactor," for example, as a synonym for evildoer.) Hannah Arendt, an imperishable name among secular intellectuals, referred repeatedly in her analyses of genocidal Europe to the "evil-doer" Adolf Eichmann and to "radical evil" and "the banality of evil." This suggests, if we put it only briefly, that we do need a word for it. The president did not refer to an axis of sin, now did he?

Bush has not mentioned the name of Jesus, except when speaking to other Christians, since taking the oath of office.

Actually, his problem is more one of banality than it is of evil. Like that great Republican Dwight Eisenhower, he seems to believe that any "faith" is better than none. Eisenhower remarked rather gauchely that "our government makes no sense unless it is founded on a deeply-held religious belief—and I don't care what it is." With comparable naïveté, President Bush announced that Vladimir Putin was a fellow he could bond with because he carried a crucifix inherited from his mother and was a man of faith who could be looked in the eye, and that Turkey's new Islamist prime minister, Recep Tayyip Erdogan, was also a trusty believer in heaven's providence. Thus a cruel and shifty ex-lieutenant colonel in the K.G.B. and a mediocre religious demagogue from Ankara both received a kiss of peace at the White House. (Both went on to watch coldly and to act cynically, after numerous Bush entreaties, as American forces took on Saddam Hussein more or less by themselves.)

The case for the defense now switches automatically to the case for the prosecution. If faith can lead to such godawful pratfalls in foreign policy, what fresh hell might it not wreak on the domestic front? Here we find the president resorting to the softer language, not of faith but of the "faith-based," in order to imply that the federal government can and should take care of the rich, while the churches, mosques, synagogues, and cults can and should take care of the poor. To some extent this was inevitable, because the Clinton welfare policy had already dumped poor children off the rolls. But it was impressive to see how soon a doubt-based policy kicked in. Church-state relations, especially financial ones, are not a one-way street. The state should not, as our Constitution stipulates, have anything to do with favoring religion in general, let alone any religion in particular. But neither should any religion—or all religion, for that matter—be tainted by association with the state. You cannot escape this dilemma by pretending to be neutral or indiscriminate. Do I want my taxpayer dollars to fund, say, a security detail in some housing project that is run by Louis Farrakhan's Nation of Islam local recruits? Emphatically not. But how can Farrakhan himself justify taking money from a regime he regards as polluted and profane? And how can anyone justify the funding of a group such as Farrakhan's, which has, to put it squarely, discriminatory hiring practices? This is an extreme case, which did in fact come up, but it nonetheless illustrates all the other ones. The charitable instinct, or the prompting of compassion, is one thinkable defense of the religious mentality. But this is undermined and corrupted by definition if it solicits money that's already been compulsorily raised by law. There's no way around or through this contradiction, which is why the "faith-based initiative" was so eviscerated by the Senate this spring.

Embarrassed overseas and thwarted at home by his reliance on simplemindedness, Bush has resorted to a tactic of "signaling." In his speeches, and in some of his nominations and appointments, he lets the relevant constituencies know that he is on their side. He has two amazingly smart

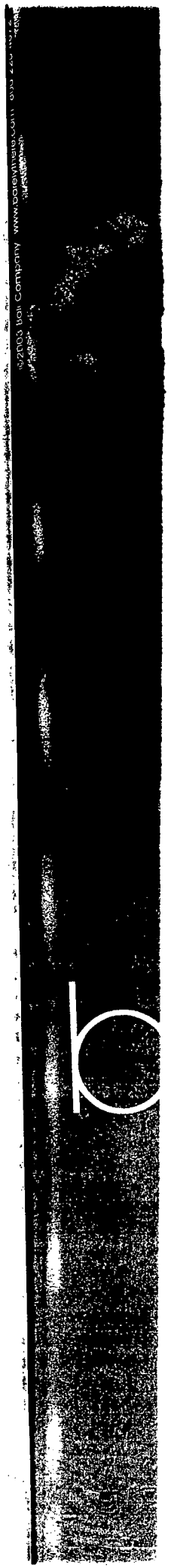

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allies in this process: Michael Gerson, his chief speechwriter, and Karl Rove, his senior adviser. Gerson is loosely describable as a Christian "evangelical," a term of art in the religion business that has no known definition. (Approximately speaking, an "evangelical" Christian is one who really believes this stuff and wants to share the good news.) Neither Gerson nor Rove has anything to do with "end time" or "premillennial" Christianity, and neither believes that an intense military tussle with Satan is soon to take place at Armageddon. This is an often circulated slander against them, and against Bush too. It obscures the picture rather than illuminating it. Bush had an Episcopalian boyhood, attended Presbyterian church when the family moved to Texas, and later joined his wife's United Methodist congregation. His "conversion" moment had nothing to do with any particular branch of Christianity and was complete long before he planned a political career.

But in 1994, as he was thinking about running for governor, he told a reporter from a Houston newspaper that you don't get to heaven if you don't believe in Jesus. The reporter was Jewish, and there was a minor flap. (Some Jews get upset when some Christians say there won't be a Christian-Jewish reunion in paradise. Other Jews, I have noticed, can manage to bear the idea.) Anyway, this crass remark probably helped secure a Bush base among true believers in the more brush-infested parts of Texas. He did much the same thing, running for president in 2000, when he made an emergency pit stop at—yes—Bob Jones University during a tough battle on the southern front with Senator John McCain. Since then, the signaling has become much more sophisticated, not to say refined, not to say more niche-marketed.

In his inaugural speech, written by Michael Gerson, Bush put the following question about America and destiny: "Do you not think an angel rides in the whirlwind and directs this storm?" That arresting image was, I think, first used by the 18th-century English poet and essayist Joseph Addison. But it was actually drawn in this case from a letter written by John Page, during the American Revolution, to the deistical skeptic Thomas Jefferson. The idea was as ecumenical as you could get.

Then, in his most recent State of the Union address, the president announced that there was "power, wonder-working power," in "the goodness and idealism and faith of the American people." The wording was corny enough—all presidents say something like that—but if you were an old-time gospel type you couldn't have failed to "get" the reference to a favorite hymn, "There Is Power in the Blood," which says that there's "power, power, wonder-working power, in the precious blood of the lamb." This same "lamb," as we know, is the human sacrifice represented by Jesus. A similar "message" was sent in the very title of Bush's campaign biography. As you will all at once recall, this was *A Charge to Keep*—which derives from a famous hymn by Charles Wesley, brother of the founder of Methodism. It speaks of the duty "to serve the present age" and "to do my Master's will." But such hinting and indirection is imposed on the president, who must also try to please Catholic and Jewish and Muslim voters as well as a surprising number of secular ones, and who has—in Karl Rove—a polycentric and polymorphous organizer who got him most of the Muslim vote last time. Bush's appeal to Catholics, by way of statements on cloning, stem-cell research, and partial-birth abortion, completes this holy triangulation. As for the Jewish vote, still muted as a force in G.O.P. circles, that's perhaps why we hear, from time to time, that Ariel Sharon is "a man of peace" as well. (If religion is so goddamned peaceful, then why are we fighting zealots and fundamentalists on so many fronts?)

As a result of "Community Bible Study," Bush is now as abstemious as any Muslim or strict Hindu or 1920s biblical-Protestant prohibitionist.

One provisional conclusion would be that Bush does better when speaking in devotional codes, or in the words of Michael Gerson, than he does when improvising for himself. (The gift of speaking in tongues has emphatically not yet descended upon him when he talks ad lib.) I have spoken to numerous thoughtful people who work or who have worked for Bush, none of whom wanted to be quoted, none of whom go to the same place of worship as he or as one another, and most of whom are more devout than he, who all agreed on one point. The president is neither a religious fanatic nor a man who just uses religious rhetoric as a cynical tactic. He takes his religion as a confirmation, or as a reinforcement. He doesn't think he's a prophet. He prefers to be a fatalist and to say that all is in God's hands. "It relieves him of the things of this world," one of them said. "It means he's less worried." Bush, in other words, could have made a very plausible Muslim, and—why is this more of a stretch?—a fairly good Hasidic Jew.

America is a most religious country and has a most decidedly secular constitution. Only state secularism, after all, can guarantee religious pluralism. This is an easy paradox to grasp. Has Bush grasped it? He has appointed not just John Ashcroft but also Rod Paige. And he has nominated Dr. W. David Hager. Mr. Paige is secretary of education and appears to believe that in a future, ideal America the churches and not the government should be in charge of the instruction of the young. Dr. Hager, who is Bush's idea of an adviser to the F.D.A., is an opponent not just of abortion but also of contraception outside of marriage, and has been quoted as saying that women suffering pre-menstrual syndrome should turn to prayer and Bible reading. (If this man is wedded, I think Congress must subpoena his wife, or—if he should turn out to be from Utah—all his wives.) One of Bush's first presidential acts was to forbid federal funding for any group overseas that even gives advice on abortion. This is, by all reports, just the compassionate treatment that the African AIDS epidemic needs. And the foregoing implicitly raises the very fraught question: If this is Bush's idea of a political nomination, what might his judicial nominations be like? (The current nightmare of the Democrats, and fund-raising tool for advocacy groups, is J. Leon Holmes, proposed for a district-court judgeship in Arkansas in spite of his expressed opinion that rape victims hardly ever get pregnant and thus won't be needing access to abortion.)

The wider picture might clarify a bit if Bush's critics did not also attack him in the name of god. During the prelude to the war against Saddam Hussein, a spokesman for Bush's own United Methodist Church was quoted in a bit of peace-loving propaganda as saying that such a conflict "violates God's law and the teachings of Jesus Christ." How the bishop could know this is quite beyond me. How the Pope presumed to say what Jesus would do is also quite beyond my power of surmise (I do know that it came as a huge shock to the White House to discover that it was *Christianity* that was the religion of peace). If religion is to be kept separate from politics, or at the very least separate from government, then everyone, including so-called liberation theologians and candidates running under the assumed title of "Reverend," must learn to contribute their own brick to the wall of separation. □

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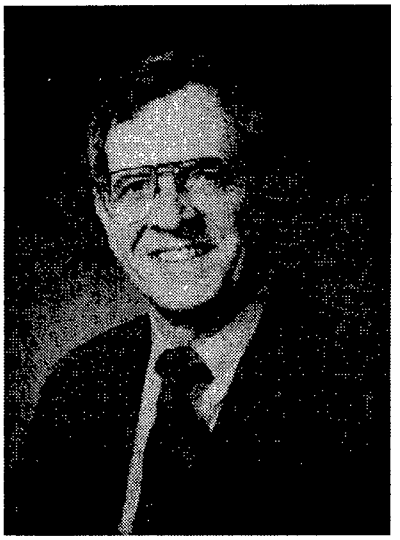

Jack M. Webb, Businessman, lawyer, geologist, mediator, lobbyist, farmer, soldier, diplomat, and political advisor. He currently serves as Chairman and President of Jack M. Webb & Associates, Inc., as a Director of Scotia Pacific Holding Company, Techxas Ventures, American Meridian Insurance Company (Bermuda), Employers Indemnity Company and the Boy Scouts of America. Previous directorships include Houston National Bank, Charter Bank Houston, Altair Corporation, Medical Community Insurance Company, Lucas Petroleum, Vision Software, Inc., the National Parks Foundation, the Museum of Natural Science, Rice Center, Texas Aerospace Commission, the Bluebonnet Bowl, Episcopal High School, River Oaks Property Owners Association, Harris County Health Facility Development Corporation and the Texas State Board of Registration for Professional Engineers. As Executive Director of the Houston Political Action Committee, he has been influential in national electoral politics for more than twenty years. He is also a graduate of the American Leadership Forum and Leadership Houston.

Presidential appointments include the President's Commission on White House Scholars, the Advisory Board of the U.S. Peace Corps and Presidential Delegation assignments to Finland, Haiti, Ghana, Angola and Bolivia, as well as various White House advance teams. Other appointments include the Pipeline Safety Standards Committee by the Secretary of Transportation, Take Pride in America by the Secretary of the Interior and the Houston World War II Commemorative Committee by the Secretary of Defense. Government related activities have included assignments in Africa, Europe, the Middle East and Latin America. Currently he serves as the Honorary Consul of Ghana.

In the private sector, he has undertaken thirty-four federal court appointments as Trustee in complex business reorganization cases, e.g. Couch Mortgage Company, and twelve state court appointments as Special Deputy Receiver for Texas insurance companies, e.g. Employers Casualty Company. He also has served as Chairman of the Board and General Counsel of Republic Capital, Senior Vice President of First City Texas, Vice President, Secretary and Assistant General Counsel of Gulf Resources & Chemical Corporation and as legal counsel for Panhandle Eastern Corporation and Standard Oil Company of California. Founder of Jack M. Webb & Associates, he has specialized in representing individuals and corporations before the Congress of the United States and also provided clients with consulting services in government relations, both in domestic and international matters.

An Eagle Scout as a boy, for over thirty years, he has been a Scoutmaster of a Houston Boy Scout troop and served as a leader for Boy Scout World Jamboree trips to Korea, Japan, Australia and New Zealand. He received a Doctor of Jurisprudence from Tulane University and Bachelor of Science in Geology from Centenary College of Louisiana prior to service as a Captain in the U.S. Army tank corps. In 1999, he attended the John F. Kennedy School of Government at Harvard University.

3434 Locke Lane • Houston, Texas 77027 • (713)960-8806 • FAX (713)960-8833

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CALFEE, HALTER & GRISWOLD LLP
ATTORNEYS AT LAW
Cleveland

Direct Dial No. 216/622-8448
email: jmino@calfee.com

February 19, 2002

Mr. Karl Rove
Senior Advisor to the President
The White House
1600 Pennsylvania Avenue
Washington, DC 20502-0001

Dear Mr. Rove:

Thank you for taking the time to meet with Alex Arshinkoff, Tom Wagner and me last week. We appreciated the opportunity to share our views on the state of the steel industry and put forth some considerations as the President shapes his steel policy in the coming weeks.

We were pleased to provide input on the legacy cost issue as well as bring to your attention the liquidity issues facing a substantial portion of the steel industry. Certainly, we are prepared to provide further input upon request.

Sincerely,

John Mino

cc: Thomas E. Wagner, Esq.
Alex Arshinkoff

CALL SHEET

5 36641

DATE		TIME	NAME	COMPANY	PHONE NO.	NOTES	MESSAGE
3/17		2:46p	Michael Beschloss				
4/11			Suzie Terrell				
4/29			John Podhoretz				
5/9		8:50a	Amb. Tony Hall				
5/16			Desiree Sayle				
5/19			William Harvey	Hampton Univ.			
6/16			Bob Lichter				
6/24			Bob Tyrell				
6/25		10:00 a	Rev. Eugene Rivers				
6/25		1:48 p	Newt Gingrich				
6/26		5:00 p	Rev. James Robison				
6/30			Fran Manilla	National Parks Dept of Interior			
7/1			JP Woodley	DoD			
7/9		8:00 a	Bill Pope	State Dept.			

PRA 6

PRA 6

7/9		8:10 a	Rev. Kirbyjohn Caldwell	
7/9			Dan Fried	
7/9			Doug MacKinnon	
7/9			Dr. James Dobson	
7/14	6	8:33 am	Eli Jacobs	
7/14	5	10:00 a	Jerome Lewis	
7/14		6:30 p	Amb. Sam Zakhem	
7/15			Rush Limbaugh	
7/15		9:00 a	Kristen Silverberg	
7/15	4	12:30 p	Dina Powell	
7/15			Governor Thompson	
7/15			George Will	
7/15			Thomas DeLeire	
7/15	3	2:33 p	Steve Bell	Sen. Domenici

Holly +

PRA 6

CALL SHEET

7/15		3:00 p	Senator Domenici	
7/15	(2)	3:22 p	Governor Pataki	
7/15		3:30 p	Haley Barbour	
7/15	(1)		Senator Don Nickles	

→ Brett Bernhardt

PRA 6

REV_00265928

Discuss w/ Andy

F: Hagin 536041

Susan Ralston

From: Ken Mehlman [kmehlman@georgewbush.com]
Sent: Friday, June 20, 2003 10:28 AM
To: Karl Rove
Cc: Susan Ralston
Subject: PLEASE MAKE SURE KARL SEES THIS

Hagin's information was only partially correct. See below note from Mercer. Jamie Reynolds only ordered the tent after the service told him to.

-----Original Message-----
From: Mercer Reynolds
Sent: Friday, June 20, 2003 10:27 AM
To: Ken Mehlman
Subject: Re:

Yes because the secret service told us they needed 24 hours to sweepNthe ballroom and we couldn't get in ther until noon today because of a conflict. If we had known sooner about the needs of the ss we could have moved the meeting.

Sent from my BlackBerry Wireless Handheld

F: Americorps
Karl 536041

Goergen, Barbara J.

From: BJ Goergen [BGoergen@georgewbush.com]
Sent: Tuesday, July 15, 2003 10:18 AM
To: Goergen, Barbara J.
Subject: FW: Americorps

-----Original Message-----
From: Karl Rove [mailto:KR@georgewbush.com]
Sent: Tuesday, July 15, 2003 10:16 AM
To: BJ Goergen
Subject: FW: Americorps

------ Forwarded Message
From: PRA 6
Date: Tue, 15 Jul 2003 08:20:35 -0400
To: "Karl Rove" <kr@georgewbush.com>
Subject: Americorps

Karl:
I believe you should know the following if you don't already because I believe the intensity of feeling continues to mount.

As you know, Teach For America has had incredible support from the White House and from the Secretary of Education since the start of the Administration. The President spoke at a White House-arranged event under a Teach For America banner in Atlanta two days after his State of the Union in 2002 and talked about the creation of the USA Freedom Corps and expansion of AmeriCorps.
I also understand that Teach For America's growth is one of the First Lady's five official "projects," and that Mrs. Bush has done multiple events across the country for Teach For America to help with recruitment and also with building the program's community support. Moreover, Secretary Paige was one of their biggest supporters when he was superintendent in Houston and has remained a vocal advocate.

Without the supplemental funding it appears that Teach For America will have education awards for 570 corps members. LAST YEAR THEY HAD 3300. They were expecting to place those 3,300 corps members in the following cities and states:

Atlanta
Baltimore
Bay Area (CA)
Chicago

Detroit
Houston
Los Angeles
Miami
Mississippi Delta
New Jersey
New Mexico (Navajo Reservation)
New Orleans
New York City
North Carolina (eastern rural)
Philadelphia
Phoenix
Rio Grande Valley
South Dakota (2004 expansion)
South Louisiana
St. Louis
Washington D.C.

2800 teachers who were scheduled to go teach in poverty areas in a number of target states for little or nothing because they heard a call to service.

In addition, there will be a letter from Governors, which presently has 28 signatures, including 9 Republicans and 19 Democrats, to the House leadership urging support of the supplemental. Fourteen additional Governors, including 10 Republicans and 4 Democrats, are still considering endorsement. The list includes the following:

Republicans

1. Gov. Huckabee, AR

2. Gov. Sonny Perdue, GA

3. Gov. Mike Foster Jr., LA

4. Gov. Romney, MA

5. Gov. Judy Martz, MT

6. Gov. Johanns, NE

7. Gov. Guinn, NV

8. Gov. Pataki, NY

9. Gov. O Leavitt, UT

Democrats

1. Gov. Napolitano, AZ

2. Gov. Davis, CA
3. Gov. Minner, DE
4. Gov. Vilsack, IA
5. Gov. O'Bannon, IN
6. Gov. Patton, KY
7. Gov. Sebelius, KS
8. Gov. Musgrove, MS
9. Gov. Granholm, MI
10. Gov. Easley, NC
11. Gov. McGreevey, NJ
12. Gov. Richardson, NM
13. Gov. Henry, OK
14. Gov. Rendell, PA
15. Gov. Holden, MO
16. Gov. Warner, VA
17. Gov. Locke, WA
18. Gov. Doyle WI
19. Gov. Wise, WV

Marc

------ End of Forwarded Message

F: Jean Becker
536041

THE WHITE HOUSE
WASHINGTON

FACSIMILE TRANSMITTAL SHEET

TO:	FROM:
Jean Becker	Karl Rove
COMPANY:	DATE: 7/16/2003
FAX NUMBER:	TOTAL NO. OF PAGES INCLUDING COVER: 2
PHONE NUMBER:	SENDER'S REFERENCE NUMBER: 202-456-2369
RE: From the Hotline...	YOUR REFERENCE NUMBER:

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

REV_00265942

grapes by those who want to undo '02 election	40	57
Recalling Davis will make it easier to solve the state's budget problems	29	65

Are You Inclined To Support Each Of Six Possible Candidates In A Replacement Election For Governor Should Davis Be Recalled? (LVs)

	Yes	No
Richard Riordan, Republican	37%	53%
Arnold Schwarzenegger, Republican	31	62
Bill Simon, Republican	30	62
Tom McClintock, Republican	27	57
Darrell Issa, Republican	22	61
Peter Miguel Camejo, Green Party	11	73

Pollster **Mark DiCamillo** said, while the 51%-43% "split" on the recall "is grim news" for Davis, "it's far too early to write Davis' political obituary." DiCamillo: "I feel we really haven't begun to get a good feeling of what the chances are of a Davis recall. This is a very hypothetical situation where we don't even know the whole ballot yet. The voters' intentions are unsettled." Meanwhile, Davis pollster **Paul Maslin** said "the slim pro-recall majority is likely to be a high-water mark"; he "predicted support for a recall will slip as an election moves closer."

"The real wild cards" in a recall "are the people running to replace Davis." So far, Dem leaders "have managed to keep the field confined to Republicans and minor party candidates, which is likely to help Davis." DiCamillo: "When Democrats see that they're presented with five Republicans and a Green Party candidate to replace Davis, they say 'Give me someone else.' ... That's a political vacuum that usually gets filled. Certainly it presents an opportunity to any Democrat who would want to get involved" (**Wildermuth**, San Francisco *Chronicle*, 7/16).

(Back to Contents)

Fax to Jean Becker

18 KENTUCKY GOVERNOR: Analize This

Louisville *Courier-Journal*'s **Hawpe** writes, "Accountability is the essence of good politics," and AG **Ben Chandler**'s (D) quest to make the cong. record of Rep. **Ernie Fletcher** (R-KY 06) and his support of **Bush** policies "an issue" should "not come as a surprise." Likewise, "Fletcher wants voters to see" Chandler's record and find "proof that he's at least partly responsible" for the "ineptitude and corruption" scandals surrounding KY Gov. **Paul Patton** (D-KY). In short, "Chandler hopes to nationalize the election," while "Fletcher hopes to Pattonize it."

Campaign Tip Sheet
Primary/Filing Dates, Latest Polls, Latest Ads...

On Fletcher manager **Daniel Groves**' recent criticism towards the Chandler camp for trying to "nationalize" the KY GOV race, Hawpe writes, "I don't understand. ... It ought to work very well, not for Chandler but for Fletcher. ... The congressman has earned the right to bask in the reflected glow of broad public support for the President," after "faithfully" supporting Bush tax cuts and the admin's policies toward Afghanistan and Iraq. Hawpe continues, "Indeed, the assumption is that Fletcher will bring Bush to Kentucky as many times as possible."

More Hawpe musings: "Is it fair, or sensible, to nationalize the gubernatorial election? Certainly, Fletcher's votes, like Chandler's decisions and actions as a state official, tell the public a lot about his value system." As for the Fletcher camp's tactics, "Is it fair to Pattonize the election? Nothing wrong with trying. ... [Voters] can inspect Chandler's record to see whether he contributed to political and policy messes the Patton administration has created in Frankfort, or whether he tried to do something about them" (7/16).

(Back to Contents)

REV_00265943

536041

California State Senate

STATE CAPITOL
SACRAMENTO, CA 95814
(916) 445-3688
FAX (916) 327-2272
E-MAIL: SENATOR.BRULTE@SEN.CA.GOV

10681 FOOTHILL BLVD., #325
RANCHO CUCAMONGA, CA 91730
(909) 466-9096
FAX (909) 466-9892

COMMITTEES:
GOVERNMENTAL ORGANIZATION
TRANSPORTATION

JAMES L. BRULTE
SENATE REPUBLICAN LEADER
SENATOR, THIRTY-FIRST DISTRICT

June 11, 2002

Mr. Karl Rove
White House
West Wing, 2nd Floor
Washington, DC 20500

Dear Karl:

I thought you might like to see the mail piece (State Paid) that I put out on the Anniversary of President Bush's Tax Cut.

Over 70,000 pieces went out to California households in my District.

Sincerely,

JIM BRULTE

P.S. I've got at least three other Republican Senators sending them out too.

Materials received in ORM

REV_00265944

The National Center on
Addiction and Substance Abuse
at Columbia University

June 18, 2003

Mr. Karl Rove
Senior Advisor to the President
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Dear Karl:

Enclosed please find a copy of a note I sent to Andy Card asking the President to proclaim September 22nd as "Family Day—A Day to Eat Dinner with Your Children."

CASA research has consistently found that the more often children eat dinner with their parents, the less likely they are to smoke, use illegal drugs or abuse alcohol.

Family Day could be a real plus for the country, for substance abuse prevention and for the President.

Sincerely,

Joseph A. Califano, Jr.

Enclosures

633 Third Avenue
New York, NY 10017-6706

phone 212 841 5200
fax 212 956 8020
www.casacolumbia.org

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Michael I. Sovern (1992-1995)
Frank G. Wells (1992-1994)

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George Rupp (1995-2002)
Michael I. Sovern (1992-1995)
Frank G. Wells (1992-1994)

June 18, 2003

Mr. Andrew H. Card, Jr.
Chief of Staff to the President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Andy:

For the past two years, President Bush has proclaimed the fourth Monday in September, "Family Day." The President joined the governors of thirty-five states and a host of organizations and community groups across the nation in recognizing the importance of family dinners to creating healthy children.

This year Family Day will take place on September 22. We would like the President to issue a proclamation declaring that day "Family Day" by June and host a ceremony to publicize the event in June. Family Day fits in perfectly with the President's Parents Drug Corps initiative. Family dinners are a comfortable, natural way that any parent can help their kids grow up safe and drug-free. CASA research has consistently found that the more often children eat dinner with their parents, the less likely they are to smoke, use illegal drugs or abuse alcohol.

With the President's support, this year we will be able to teach even more Americans that simple actions like eating dinner together can do a world of good in protecting a child's health and well-being. This ceremony would be an ideal way for the President to emphasize the importance of parental involvement in their children's lives.

I hope the President will support this important initiative which can help thousands of parents and children across the nation.

Enclosed are copies of the Presidential Proclamations issued in 2001 and 2002.

Sincerely,

Joseph A. Califano, Jr.

Family Day, 2002

By the President of the United States of America

A Proclamation

America's character begins in the home, where children learn proper standards of conduct, principled values, and the importance of service. Families provide children the encouragement, support, and love they need to become confident, compassionate, and successful members of society. We must work together to promote and preserve the health and security of our families by upholding the timeless values that have sustained our society through history.

Recent events have reminded Americans of the blessings of family and friends, and of the importance of faith. As a Nation, we have a renewed dedication to our freedom, our country, and our principles. In homes, schools, places of worship, the workplace, and civic and social organizations, we must continue to encourage responsibility, compassion, and good citizenship.

Americans must also act to fight crime and drugs, and provide a safe and healthy environment for our children. We can begin by working to strengthen the bonds and improving communication between parents and children. Research done by the National Center on Addiction and Substance Abuse at Columbia University has consistently shown that the more often children eat dinner with their parents, the less likely children are to smoke, drink, or use illegal drugs. Naturally, parents should be the most prominent and active figures in their children's lives. By spending more family time together, parents can better engage with their children and encourage them to make the right choices.

The nurturing and development of our families require investment, focus, and commitment. Strong families make strong and drug-free communities. By taking time to develop positive and open relationships with their children, parents help fight the war on drugs and encourage positive choices. Across our land, citizens, schools, and civic institutions can assist families by helping to meet the needs of all those who live in our communities. As we work together to strengthen our families, we will build a Nation of hope and opportunity for all.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim September 23, 2002, as Family Day. I call upon the people of the United States to observe this day by spending quality time with family members and engaging in other nurturing activities to strengthen the relationships between parents and children and help fight against substance abuse.

IN WITNESS WHEREOF, I have hereunto set my hand this Twentieth day of September, in the year of our Lord two thousand two, and of the Independence of the United States of America the two hundred and twenty-seventh.

Family Day, 2001

By the President of the United States of America

A Proclamation

Strong families make a strong America. Responsible, caring, and involved parenting dramatically affects the direction of a child's life and fundamentally influences the well-being of society as a whole. To help ensure a bright future for our children and for our Nation, we must expand our efforts to strengthen and empower families in their important task of effectively preparing children for the challenges of tomorrow.

To help families, we must fight crime and violence in our schools and communities, and we must make a quality education available to all young people, regardless of background. We must also work to ensure that adults have the skills and resources they need to provide for the health, safety, and well-being of their children.

Our Nation should send a consistent message that hails the vital importance of families. We live in an era of busy schedules and significant commitments to work, school, and community. However, quality time among family members remains as vital as ever to maintaining strong and loving bonds between parents and children and to protecting young people from harm. In its most recent survey, the National Center on Addiction and Substance Abuse at Columbia University (CASA) found that a teenager who sits down to dinner with his or her family seven nights a week is 20 percent less likely to smoke, drink, or use illegal drugs than those that do not. By contrast, teenagers who never eat dinner with their families are 61 percent more likely to engage in these activities.

According to CASA's research, other family-bonding activities can similarly promote the avoidance of drug, alcohol, or cigarette use by teens. These include helping teenagers with homework, attending religious services with them, making religion an important part of their lives, and praising and disciplining teens as appropriate. CASA also advises that parents should monitor their teen's television viewing, music purchases, and Internet use, and should establish curfews and know where their children are after school and on weekends. Perhaps most importantly, parents should send a clear message, by example and word, of their clear disapproval of cigarette, alcohol, and drug use.

CASA's findings demonstrate how parental influence remains the single most important weapon in the war on drugs. Americans must continue to recognize the importance of strong families and involved parents in setting our Nation on the road to a drug-free society. The health, safety, and well-being of our young people merit nothing less.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim September 24, 2001, as Family Day. I call upon the people of the United States to observe this day by spending quality time with family members and engaging in other wholesome activities that help unite and strengthen the bonds between parents and children.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fourth day of September, in the year of our Lord two thousand one, and of the Independence of the United States of America the two hundred and twenty-sixth.

FACSIMILE

THE NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE
At Columbia University
633 Third Avenue – 19th Floor
New York, NY 10017-6706
(212) 841-5200

FAX: (212) 956-8020

Date: June 18, 2003

To: Karl C. Rove

Fax: 202/456-0191

From: Joseph A. Califano, Jr.

Direct Phone: 212-841-5210 Direct Fax: 212-957-8987

#of Pages (including this cover): ___5___

CASA Account code: _150_

The information contained in this telecopy message is intended only for the use of the individual or entity named above and may contain information that is privileged, confidential and exempt from disclosure under any applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this message in error, please immediately notify us by telephone and return the original message to us at the above address via the US Postal Service. Thank You.

536041

THE WHITE HOUSE

WASHINGTON

Date: 7/15/03

To: Matt Schlapp

From: **Strategic Initiatives** Karl

X FYI

____ Appropriate Action

____ Direct Response

____ Prepare Response For My Signature

____ Per Our Conversation

____ Let's Discuss

____ Per Your Request

____ Please Return

____ Deadline

____ Other

Comments: _____

REV_00265953

FYI - NR

NRN
but alert Matt
so he can mention
in next discussion
w/ Teamster
staff

- Mary Ann Hanusa just received this from the Mail room
- Wanted you to see this

JAMES P. HOFFA
GENERAL PRESIDENT

January 31, 2002

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

I would like to thank you for the invitation to attend the State of the Union address as your guest. It was truly an honor to represent the members of the Teamsters Union by sitting with the First Lady and so many other distinguished guests.

Since I have been elected President of the International Brotherhood of Teamsters, I have fought to unify this great Union. At your State of the Union address, I was inspired by how you have unified this great nation.. Republicans, Democrats, and Independents took to their feet, time and time again, in solidarity with you. Thank you, for allowing me to be present at such a great showing of American spirit.

We face many challenges in the upcoming months and years. We must do more to better the lives of working families; union and non-union, Republican, and Democrat. I look forward to facing these challenges with you.

Thank you.

Fraternally,

James P. Hoffa

25 LOUISIANA AVENUE, N.W.
WASHINGTON, D.C. 20001

536041

THE WHITE HOUSE

WASHINGTON

Date: 7/15/03

To: Ruben Barrales

From: Strategic Initiatives B.J. Koerge

X FYI

X Appropriate Action

____ Direct Response

____ Prepare Response For My Signature

____ Per Our Conversation

____ Let's Discuss

____ Per Your Request

____ Please Return

____ Deadline

____ Other

Comments: This came to Karl as an fyi so we are sending directly to you.

REV_00265955

5J6041

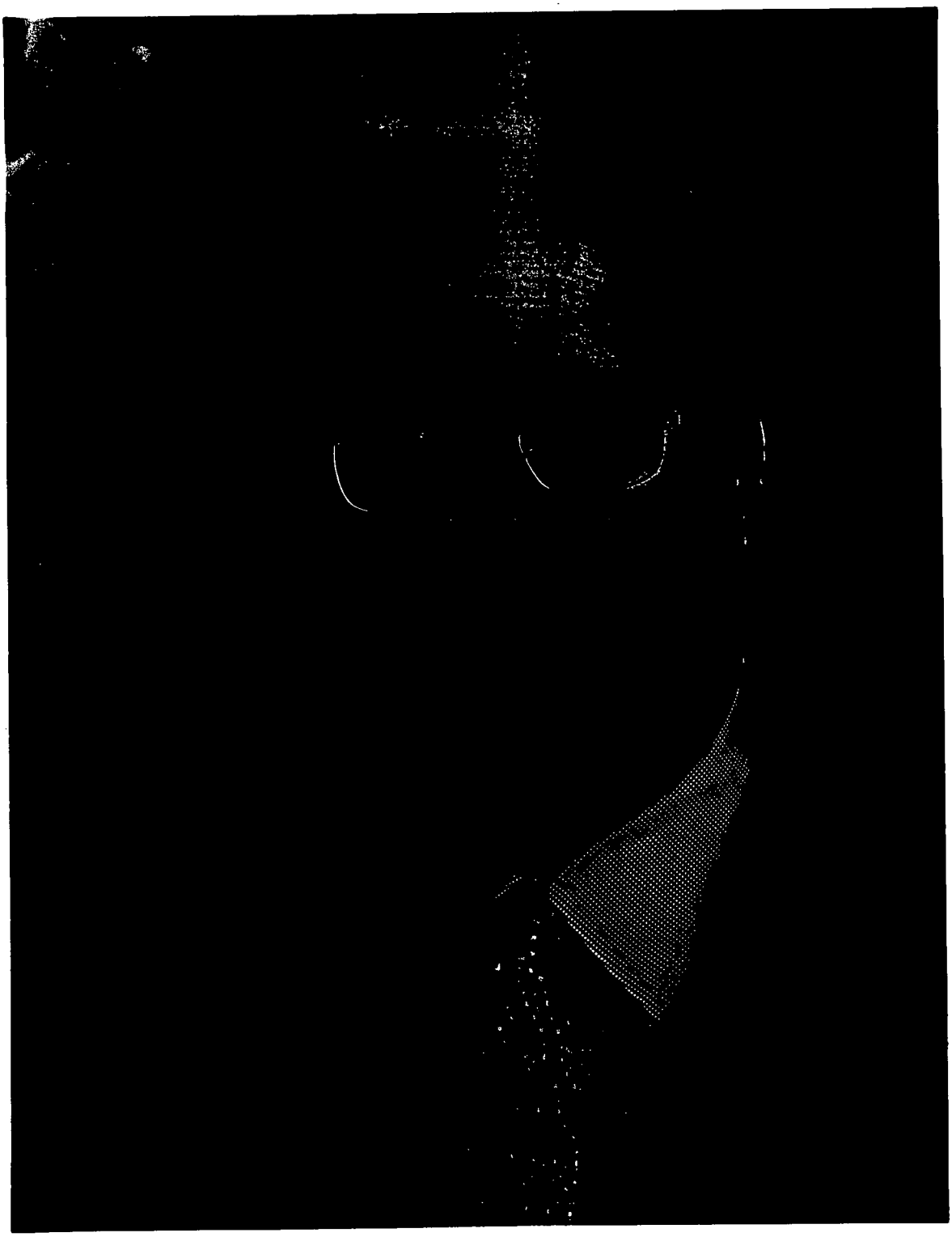

BEST WISHES,

Kane Rose

Dustin-Have we already sent him something?

EXEC. OFFICE OF THE PRESIDENT
WHITE HOUSE LIAISON

2003 JUL -9 PM 4:59

Steve McDowell

PRA 6

The White House
Attn: White House Senior Advisor Karl Rove
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Dear Mr. Rove:

My name is Steve McDowell and I am a Retired Vietnam Veteran whose only hobby now is my extensive Autograph Collection. In writing this letter, I am in hopes that you will be able to send me an Autographed Official Photograph signed in your hand? Please no Auto Pen or Machine Signed Pictures please.

This new hobby due to some disabilities currently going on is my only Favorite Thing these days, and I sure would appreciate adding your Photo to my Private Collection. I am also a New Freedom Helper, a GOP Team Leader, and worked for the Republican Campaign here in Alabama before and during those last exciting days when President Bush actually was voted into Office! Also, may I say that you are doing a wonderful job in your capacity for The President, he could not ask for more!

Sincerely,

Steve McDowell

ask KR
maybe

— Please decline

— last minute conflict TRY



From: Miss Amanda Downes
Social Secretary,
British Embassy,
3100 Massachusetts Avenue, NW
Washington DC 20008-3600.

Telephone: 202 588 7951

Facsimile: 202 588 7894

Date: 30th May

To: The Hon Karl Rove

Number of pages including cover page: 3

The British Chargé d'Affaires, Mr Tony Brenton
requests the pleasure of the company of
Mr and Mrs Karl Rove
at a Tribute to the Life of The Rt. Hon. the Lord Jenkins of Hillhead
on Tuesday, 15th July
Tribute at 6 o'clock followed by a reception

The Ambassador's Residence
3100 Massachusetts Avenue, NW
Washington DC 20008

R.S.V.P. to the Social Secretary
by fax: 202 588 7894
Business Attire

Limited parking will be available in the Embassy Compound
Please present this invitation on arrival and bring ID

Lord Jenkins of Hillhead

Biography

Roy Jenkins was born in 1920, and was educated at Abersychan Grammar School and Balliol College, Oxford, where he read Philosophy, Politics and Economics. He was Chancellor of the University of Oxford from 1987 until his death.

Lord Jenkins was Labour MP for Central Southwark (1948–50) and for Stechford, Birmingham (1950–77), and SDP MP for Glasgow Hillhead (1982–87). A former Chancellor of the Exchequer (1967–70), Home Secretary (1965–67 and 1974–76), and President of the Commission of the European Communities (1977–81), he was one of the four founders of the Social Democratic Party and its first leader, and was, until January 1998, Leader of the Liberal Democrats in the House of Lords.

Lord Jenkins was an Honorary Fellow of Balliol and St Antony's Colleges in Oxford and of Berkeley College, Yale. He held honorary doctorates from universities including Harvard, Pennsylvania, Louvain, Urbino, Michigan, Wales, Reading, Warwick, Trinity College Dublin, Bristol, Georgetown, Kent, West Virginia, Bologna, Sofia, and London. He was a member of the American Academy of Arts and Sciences. In 1972 he was awarded both the Charlemagne and the Robert Schuman Prizes for promoting European unity. He also held the Luxembourg Order of Merit and the Prix Bentinck. He received the Freedom of the City of Brussels in 1980 and was awarded the Grand Cross of the Order of Charles III of Spain in the same year, the Order of Merit of Italy in 1990 and a Commander of the order of Légion d'honneur of France in 1999. He was made a Fellow of the Royal Society in 1992, and awarded an Order of Merit in 1993.

Among his publications are *Mr Balfour's Poodle* (1954), *The Labour Case* (1959), *Asquith* (1964), *Afternoon on the Potomac?* (1972), *Nine Men of Power* (1974), *Truman* (1986), *Baldwin* (1987), his autobiography, *A Life at the Centre* (1991), *Gladstone* (1995), which won the 1995 Whitbread Biography Award, *The Chancellors* (1998), *Churchill* (2001) and *Twelve Cities* (2002). He was a frequent contributor to British newspapers and periodicals on a wide range of subjects. In 2001 the Chancellor was recognised with a lifetime award by the Wolfson History Prize panel.

536041

FAX TRANSMITTAL

July 11.2003

To: Karl Rove

Fax: 202 456-0191

From: John L. Sullivan

PRA 6

F. Declined events

SULLIVAN LAND & CATTLE COMPANY PO BOX 3088 GALVESTON, TEXAS 77552

Mr. Karl Rove
The White House
Washington, D.C. 20500

July 11, 2003

Dear Karl

My son, Rocky (John Richmond), Sullivan will be interning for Congressman Pete Sessions from July 13th, 2003 to July 25th, 2003. He will be at the White House on July 17th at 7:30 AM for a tour and on July 22nd to intern from 8:45 AM. He would very much like to meet with you on one of these dates or any other time when you could spare a few minutes to see him.

Rocky is an ambitious 18 year old who plans to be President someday. It would certainly be a thrill for him to meet you!

My personal best wishes to you and your family. Additionally, I think *The President is doing a job that's great and needs to continue through two thousand eight!*

Yours truly,

John L. Sullivan
W. 409.740.4200

PRA 6

BJ. called to decline on 7/14/03

cell phone

PRA 6

Rocky Sullivan

(saved in &PUBLIC, ADMIN, interns, interns 2003, schedules – Section III)

July 13-25, 2003

Intern Coordinator – Bethany Smith
PRA 6
Office of Congressman Pete Sessions – 202.225.2231
Office Location – Longworth House Office Building 1318

July 13, 2003 - Sunday
3:00 pm – 7:00pm - Arrive and get settled in their rooms/housing accommodations.
7:00 pm - Dinner with interns at George Washington University (**Jacqueline Bouvier Kennedy Onassis Hall** – Directly across from Foggy Bottom Metro Station)

July 14, 2003 – Monday – Business Casual
9:00 am – Meet in front of Capitol South Metro Station, go to Longworth Office Building
9:30am – 12:00 pm - Orientation (HC - 8)
10:00 am – Judy Schneider "How Congress Works"
12:00 pm – 1:00 pm – Speaker: David Boaz, Executive Vice President (Topic: The War on Drugs: A Constitutional and Moral Critique) – Located in B-339 Rayburn lunch will be provided
1:00 pm – Meet at Capitol South metro Station to compute to Archives
1:15 pm – 2:45pm - National Archives
3:00 pm – 4:00 pm – Visit Smithsonian Museums on the Mall
4:30 pm – 5:30pm – Kennedy Center Tour (Liz PRA 6
6:00 pm – Millennium Stage at the Kennedy Center (optional)
6:30 pm – Softball Game: Team Sessions vs. Young, but Legal

July 15, 2003 – Tuesday – PROFESSIONAL ATTIRE
8:45 am – Library of Congress (101 Independence Avenue; across from the Capitol building)
9:00 am – Library of Congress tour
11:00 am – Jonathan Poe with the NRCC
2:00 pm – Supreme Court (begins at 2:30pm must be there at 2:00pm to ensure the reservations; located next to the Library of Congress)
5:30pm – 6:30pm – Pictures with Congressman Pete Sessions (Cannon Balcony)
7:00pm – Dinner with Congressman Pete Sessions (HC – 8)

July 16, 2003 – Wednesday – Business Casual
8:50 am – Meet at Foggy Bottom Metro Station
9:30 am – Anne Frank Exhibit (at the Holocaust Museum)
11:30 am – The U.S. Holocaust Museum (confirmation 65381)
3:30 pm – 5:00 pm - Crossfire, CNN (Jack Morton Auditorium, Media and Public Affairs Building, The George Washington University on the corner of 21st and H streets)
7:00 pm - The United States Army Military District of Washington presents - The Twilight Tattoo at the Ellipse near the White House (optional)
6:30 pm – Softball Game: Team Sessions vs. Coalition of the Willing

July 17, 2003 – Thursday – Business Casual
7:20 am – White House Tour (meet at the SE Visitor's Entrance to the White House no later than 7:30am Bring Congressional Intern ID Badge and Drivers License) (Paul, Lauren, Julianne, Katherine, Michael, Prasid, Rocky, Joseph, Casey, Marcus, Frederick)
11:00 am – Meet in front of Longworth House Office Building: Depart by Bus to Navy Yard
11:00 am – 4:00 pm Jag Day Contact: Erin PRA 6
6:30 pm – Softball Game: Team Sessions vs. Dept of Homeplate Security

July 18, 2003 – Friday
8:45 am – Meet in front of Jacqueline Bouvier Kennedy Onassis Hall at George Washington University

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(Take the Metro Blue and Orange line and transfer to the Red Line to the Tenleytown/AU station, Exit on the west side of Wisconsin Avenue, Take any "30" series bus (#30, #32, #34 or #36) going south on Wisconsin Avenue, Ride approximately one and one-half miles south on Wisconsin Avenue to the Cathedral. (This is a downhill walk, if you prefer to walk.)

10:00 am – 11:00 am – National Cathedral

1:00 pm – 3:30 pm Coast Guard Tour (meet outside Longworth House Office Building)

****Press Release Due****

July 19-20, 2003 – Saturday and Sunday

Weekend: Trip ideas; Monticello, New York, Philadelphia, Atlantic City, Charlottesville, US Army Ordinance Museum at Aberdeen Proving Grounds, Antietam Civil War Battlefield in Sharpsburg, Gettysburg Civil War Battlefield, Annapolis/Naval Academy, Chesapeake Bay, DC Sessions

July 21, 2003 – Monday

10:00am – 12:00pm – Spy Museum (Contact Chase Lum (PRA 6); 800 F Street NW & 9th)

6:30 pm – Softball Game: Team Sessions vs. Bread for the City

7:05 pm – Baltimore Oriole vs Texas Rangers Oriole Park at Camden Yards (take the train from Union Station to Baltimore)

July 22, 2003 – Tuesday – PROFESSIONAL ATTIRE

8:45 am – Intern at the White House (BRING CONGRESSIONAL ID'S!)

Meet Bethany at the 1800 G Street in front of the building

July 23, 2003 – Wednesday

7:30 am – Leave for Mount Vernon (Take Metro's Yellow Line Train to Huntington Station in Virginia. Exit to the lower level (Huntington Avenue) of the station to catch a Fairfax Connector bus to Mount Vernon. Board the Fairfax Connector Bus, 101, at Huntington Station for a 20 minute trip to Mount Vernon's entrance gate; fare is $.50. Monday through Friday: 7:09; 8:11; 9:11; 10:19; 11:19; 12:19; 1:19; 2:19; 3:19; 3:44; 4:14).

8:45 am – Mount Vernon

7:00 pm - The United States Army Military District of Washington presents The Twilight Tattoo at the Ellipse near the White House

8:00pm – Intern Survivor (JBKO Basement with Congressman Sessions)

July 24, 2003 – Thursday – PROFESSIONAL ATTIRE

8:45 am – Meet in front of Longworth House Office Building

9:00 am – 10:00 am - Coffee with Senator Kay Bailey Hutchinson (284 Russell Senate Office Building)

4:00 pm – Bureau of Engraving and Printing Tour

6:30 pm – Softball Game: Team Sessions vs. Young, but Legal

July 25, 2003 – Friday

Wrap-up and final evaluations

10:00 am – 12:00pm – Guy Harrison and Marty McGuinness

2:00 pm – Singapore Embassy

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536041

Ralston, Susan B.

From: Steve Papermaster [PRA 6]
Sent: Friday, June 13, 2003 1:16 AM
To: 'Karl Rove'
Cc: Ralston, Susan B.
Subject: White House Innovation Summit, PCAST

Karl,

You guys are really working me hard for all this great pay! I've been in Washington all week and will be through next Tuesday. We held our PCAST meetings - very productive. We need to schedule one with the President this fall if possible. I'm co-chairing the Nanotechnology Committee with Chuck Vest from MIT -very promising - big (in a nano way) opportunities. Also, I was at the White House dinner last night following the Holocaust Museum Anne Frank Exhibit opening with Laura. Beautiful.

I'm working via PCAST, etc. on the prospective White House Innovation Summit - have talked through with Lezlee, Richard Russell, Steve Friedman, Jay Lefkowitz and others. I think there is very good reason to go through with this and also to build out the Innovation theme for the campaign and for economic development plans. This could also wrap in the IT Advisory Council and others in science, industry and technology. I'd like to discuss this soon with you and the President present some ideas and get your thoughts. If this is possible in the next few days (through next Tuesday) let me know. Otherwise I'm back here June 24 - 26th and then July 2, 3.

I'm also working with Ken, Jack and Marc on the web campaign plans along the lines that we discussed - FYI.

Hope you're well. Please let me know or have Susan R. contact me.

PRA 6

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Ralston, Susan B. 536041

From: Stanzel, Scott
Sent: Thursday, June 12, 2003 11:46 AM
To: Schlapp, Matthew A.; Ralston, Susan B.
Cc: Mamo, Jeanie S.
Subject: Akron Beacon Journal - Alex Arshinkoff (Summit Co. Ohio GOP Chair)

The Akron Beacon Journal called to see if Karl would like to comment on Mr. Arshinkoff, his visits to the White House and his friendship with Karl. I don't think he should be involved with the stories, but I wanted to make sure you were aware of them.

Akron Beacon Journal
Stories fly about the life of Summit GOP chief Alex Arshinkoff
http://www.ohio.com/mld/ohio/news/6069768.htm

Scene magazine (free Cleveland weekly - original story)
The Godfather in the Closet
http://www.clevescene.com/issues/current/feature.html/1/index.html

Susan -
Re Scott Stanzel's instructs are correct.
Land

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Ohio•com

Posted on Thu, Jun. 12, 2003

Stories fly about life of Summit GOP chief

Alternative magazine publishes allegations about Alex Arshinkoff, hitchhiker, nightclubs

By Bob Dyer
Beacon Journal staff writer

His enemies have whispered it for years. But not until now has it been paraded into the spotlight.

The new issue of Scene magazine features a cover story titled, ``The Godfather in the Closet.'' In it, the Cleveland publication accuses Summit County Republican Chairman Alex Arshinkoff of going to gay bars and offering political favors to keep that knowledge quiet.

The magazine also details a police report accusing Arshinkoff of touching a male hitchhiker he picked up at 2 a.m. on a cold December night in the Highland Square section of Akron.

When contacted for comment Wednesday, Arshinkoff said he hadn't read the article. Later, his niece, lawyer Betty Konen, called and said:

``Everybody knows that Alex's political adversaries have been promoting this for months. And finally, after all this time, an alternative publication has sensationalized the police report that was previously circulated to daily newspapers and rejected as a story....

``This story is preposterous, = [100.0]and everyone who knows Alex and Karen Arshinkoff knows it is not true.''

Given his bitter, ongoing wars with local Democrats, much of the invective in the story is not surprising. But a couple of Republicans rip him, too. Former Fairlawn Mayor Pete Kostoff claims Arshinkoff double-crossed him, and Common Pleas Judge Mary Spicer talks about falling from Arshinkoff's favor in a dispute over Oriana House.

After Kostoff failed to toe the line, several relatives were fired from government jobs.

Democrat interviewed

That, apparently, is one of the reasons Democrat Michael Curry, who works for the Summit County Board of Elections, was not afraid to ``out'' Arshinkoff in the Scene story.

Curry describes encountering the GOP leader on different nights in two gay bars, the Leather Stallion and The Grid, both on St. Clair Avenue on the near east side of Cleveland. The former bills itself online as ``the Midwest's Oldest Gay Leather/Levi Club.''

According to Curry, Arshinkoff offered to allow two Democratic judges to run unopposed if Curry would keep his mouth shut.

Curry, reached Wednesday evening, said everything in the article pertaining to him was accurate. He was willing to go on the record because of ``the (type of) people he's running for office (while) living the

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double life."

Other allegations

Among the other charges in the 5,000-word story, Arshinkoff:

• Sponsored campaign ads wrongly claiming Democrat Probate Judge Jane Bond was under investigation by the state Supreme Court because her husband profited from a program she supervised.

• Arranged a lucrative contract between the Republican attorney general's office and a lawyer who had made major contributions to the county's GOP.

• While chairman of the University of Akron's board of trustees, switched some of the university's law work from Buckingham, Doolittle and Burroughs to Amer Cunningham when his niece, Konen, left the former for the latter.

Scene is a free weekly publication with a circulation of about 100,000. It is widely distributed in Summit County, at stores, bars, restaurants and newsstands.

In the story, written by staff writer Sarah Fenske, an incident two days after Christmas is explored in great detail.

According to Scene, the young man was hitching a ride. Arshinkoff picked him up, asked him about his sexuality and refused to take him home.

According to a police report, at that point the driver tried to touch the hitchhiker. The hitchhiker jumped out at a red light.

Police were watching as the car sped away and stopped it to see whether the driver was intoxicated. He wasn't. He told police he had picked up a hitchhiker but kicked him out because he was too drunk. Meanwhile, the hitchhiker circled back and approached the police after Arshinkoff pulled away and told them he jumped out after the driver tried to touch him.

No complaint filed

Police did not pursue the matter because the hitchhiker, a 21-year-old Kent State University student, did not file a complaint.

No formal police report was written, but ``field interrogation cards'' were filled out by officers at the scene.

The Akron Beacon Journal heard about the documents in January. City officials initially said the reports weren't public records.

When the Beacon Journal threatened to sue to obtain them, the city released copies. After viewing the reports, the newspaper made a decision not to pursue a story because no formal charge was made.

Akron City Prosecutor Doug Powley said Wednesday that he was only made aware of the cards through the downtown rumor mill. He said such cards are maintained by the department primarily for possible future drug or prostitution investigations.

Based on the information taken by the officers, there was not enough evidence to bring charges.

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``You cannot prosecute for sexual imposition under the statute unless the purported victim is offended by the contact," said Powley. ``If the victim is not complaining, it would appear they are not offended. I cannot be offended for the victim."

The hitchhiker could not be reached for comment Wednesday.

Some of Arshinkoff's enemies were downright gleeful Wednesday, anticipating that the disclosure would lead to his political demise.

Said Tom Adgate, a Republican who incurred Arshinkoff's wrath by running against his hand-picked prosecutor, Michael Callahan: ``I guess family values has a whole new meaning."

Beacon Journal staff writer Phil Trexler contributed to this story. Bob Dyer can be reached at 330-996-3580 or bdyer@thebeaconjournal.com.

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From clevescene.com
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The Godfather In the Closet

The Republican boss of Summit County revels in crushing his enemies. Now his private life might crush him.

BY SARAH FENSKE

It was past 2 a.m. when the kid left the bar and headed for home. Back from college for Christmas, he'd met up with his high school buddies at Annabell's, a neighborhood watering hole in Akron. Frustrated for reasons that no longer seem important, the 21-year-old Kent State student had been too annoyed to wait for a ride.

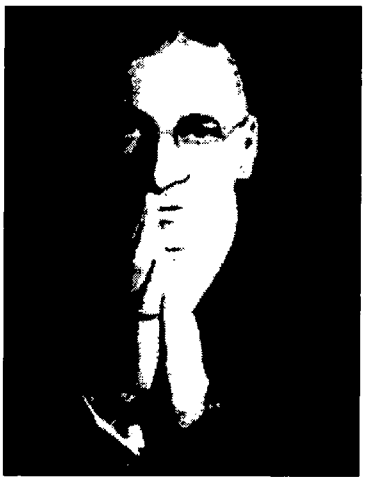

It wasn't long before he wished he had. It had been a white Christmas. The ground was still blanketed, early that morning of December 27, 2002; the air, frigid. Maybe a stranger would give him a lift.

As the kid would later explain in an interview with *Scene*, he tried to flag down the first car he spotted, a souped-up Mitsubishi, neon underbelly aglow. It didn't stop. But when the new Audi behind it did, the kid got in.

The driver was a middle-aged white man. Dark hair, well dressed. He asked the kid how he was doing; the kid said OK, then offered a few dollars for gas. The man said not to worry.



Arshinkoff, 50, has run the county Republican Party for half his life.

The kid told him to take a right at Main Street. But the man didn't. *I'll get you home, don't worry about it*, the kid remembers him saying. Then the man started rubbing his thigh. *Are you gay?* he asked. *Are you bi? No? Are you sure?*

The kid was trying not to freak out. He saw a red light ahead and clicked open his seatbelt, bracing himself for the jump out. But the light flicked to green.

What are you doing? The man asked. *Are you nervous?*

The kid said no, he was just trying to get comfortable. The man was caressing his thigh, grabbing at his crotch. "I didn't want to piss him off," he says. "He could just hit the gas, and I'd be stuck."

Do you want to make some money? The man asked. The kid laughed weakly and said he had plenty. He was watching the light ahead, willing it to stay red.

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under investigation by the Ohio Supreme Court because her husband did work for Oriana House, while she supposedly supervised it.

Never mind that she hadn't actively supervised the program. Or that her husband earned a total of $2,000. Or that the Supreme Court had received a complaint from one of Arshinkoff's buddies, but wasn't necessarily investigating.

Presumably, a man who plays this brand of hardball should know the ball will eventually be fired back.

Michael Curry believes so. In the summer of 2001, Curry, who works for the Summit County Board of Elections, spotted Arshinkoff at the Leather Stallion, a gay bar on St. Clair. The Democrat made a point of greeting Arshinkoff "just to freak him out," he says.

Thirty minutes later, Arshinkoff came over and asked him to stay quiet about seeing him there, Curry says. Curry replied that it wasn't his style to out people. "It's just not my belief system," he says.

Arshinkoff seemed relieved. "If there's anything I can do for you, I'd be happy to do it," he said, according to Curry.

Joking, Curry seized the gambit. He named two friends, both Democratic judges. "I want to see that the two of them never have any opponents," he said.

"I can do that," Arshinkoff responded.

"I was shocked at the transference of power," Curry says. He'd been joking, after all. But when he ran into Arshinkoff several months later, at a gay dance club called The Grid, Arshinkoff waved him over. "He said he'd live up to his end of the bargain," Curry recalls.

Curry decided not to live up to his. "I've just decided he's a hypocrite about it," he says. "He's gone out and recruited candidates who are homophobic and anti-gay." Also, it's tempting to envision the fallout: "If he ever openly admitted he was gay, I think a lot of the money would dry up."

The pyre is growing. The newest memo circulating among the anti-Arshinkoff crowd is a complaint phoned in to the board of elections. In the conversation, a former Municipal Court employee claims Arshinkoff sexually harassed him.

It's public record, duly noted by a deputy clerk. Coupled with the police report, it's led to talk of an overthrow.

But Democrats aren't sure how to play it. "We're a party that supports gay rights," says county Chairman Russ Pry. "We don't believe in outing people. But we don't believe in being hypocrites, either. We don't believe in condemning someone's lifestyle -- and then secretly living it."

Adds McCarthy, "If this was an elected official who had picked up a young girl, I think people would have been all over that. And if Alex is a cruiser, if that's his M.O. . . . I'm sure there are people within his party that would be upset."

Chris Bleuenstein, who recently quit the Republican central and executive committees, says he thinks the gay issue may be the straw that finally breaks Arshinkoff's back. "Most people are aware of it," he says. "Stupid him -- he just keeps getting caught."

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The party, Bleuenstein believes, is probably "not enlightened enough" to deal with a gay leader. "I would envision a coup," he says, adding, "He is not going to step down."

Madden, the Akron police deputy, says the whole thing doesn't seem fair. Arshinkoff hasn't been charged with anything, and homosexual acts -- Rick Santorum's views aside -- are perfectly legal in Ohio. "There's crime, and then there's embarrassment," Madden says.

But this is politics. And Alex Arshinkoff would be the first to explain: In politics, embarrassment is often enough.

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The Audi pulled to a stop, and the kid saw his chance. He took off running. The Audi peeled off in a different direction.

Then the kid heard a siren. An Akron patrolman had witnessed his desperate departure, according to the police report. The cop stopped the car and questioned the driver. The man told him he'd picked the kid up, but he was too drunk and had hopped out.

But the kid, fearing trouble, doubled back to the cop car. Gasping for breath, he relayed his version. The man had tried to touch him, he said. He had to run. "You can arrest me for anything you want right now," he remembers saying.

The cop took the driver's information and let him go. Then he told the kid to relax, something like "What are you doing getting into a stranger's car, anyway?" He offered to take the kid home.

Then a second black-and-white pulled up. The officer gestured at the departing Audi with its ARA 1 vanity plate. "Do you know who that was?" the kid heard him ask. "That was Alex Arshinkoff. He's the chair of the county Republican Party."

"My stomach just dropped," the kid says.

Photo courtesy of Judge Mary Spicer



Republican Judge Mary Spicer held onto her seat — despite opposition from the party boss's niece.

Walter Novak

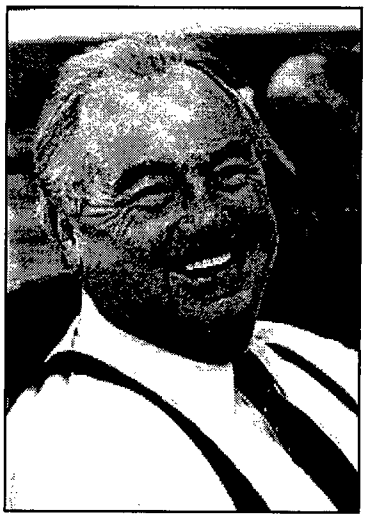

County Executive James McCarthy says people would be "all over" the report if it involved a young female hitchhiker.

For years, Alex Arshinkoff topped the scale at more than 400 pounds. He was a man of giant appetites: for politics, for conversation, and of course, for food. A former dining companion says Arshinkoff would order one entrée, finish it, then order another. Sometimes he'd go for a third.

Thanks to the Atkins diet, a personal trainer, and daily nine-mile walks, Arshinkoff has shed half of his girth. But he's still larger than life. Head of the Summit County GOP for 25 years, he seems to burnish a reputation as the county's Dark Lord, a man who consumes politics and plays to win. To many insiders, he is Don Corleone in the flesh, with a dose of Machiavelli's Prince thrown in for good measure.

(Through his assistant, Arshinkoff declined *Scene*'s interview request.)

Since two failed runs for city council more than two decades ago, Arshinkoff has never been the guy on the ballot. He's not a politician, as he'll tell anyone willing to listen.

He's far more powerful, and he knows it. He picks the candidates. He runs their campaigns. He tells them what to do. Who to hire. Who to fire. If they don't play ball, they're out. Just like that. He's done it to top Summit Republicans. He did it as a University of Akron trustee.

He was on George W. Bush's campaign finance committee. Karl Rove is said to call him for advice. When the first President Bush visited Akron in 1990, he started his speech by thanking Alex

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Arshinkoff.

"He's a master of the nuts and bolts of politics," says state Senator Kevin Coughlin (R-Cuyahoga Falls). "He is just one of these old-school political leaders."

Arshinkoff lives for the job, calling up candidates at all hours of the night with advice and exhortations. When he's not being compared to Machiavelli, he gets Boss Tweed.

"Even those who don't like him have to admit he's as shrewd as they come," says Republican County Councilman Mike Callahan.

He's made himself wealthy. He's on Senator Mike DeWine's payroll as a consultant; he also began a lobbying business in 1997, harvesting the ties he developed as party chairman. He represents nine companies, from FirstEnergy to Playhouse Square, offering his advice and pushing their interests in Columbus. He has a $200,000 home in Hudson, an antique Chevy Bel Air, and two Corvettes -- in addition to the Audi paid for by the party.

His family has done well too. One brother is a bailiff; so is a sister-in-law. One niece is Barberton's clerk of courts; another is the party's attorney; a third works for the county engineer. Until Republicans lost the judge's seat this January, his nephew-in-law worked for the Juvenile Court.

In other counties, party chairs aren't so powerful, and there's little reason Summit County should be an exception. Akron has long been heavily Democratic. Despite suburban growth, the county retains a three-to-two Democratic edge.

But you'd never know it, looking at a list of Summit County officeholders. Under Arshinkoff, Republicans have put practically every seat in play. They hold a majority of judgeships, the Probate Court, the sheriff's office, both Ohio House districts, and the state senate seat.

"He has created the most effective county organization in the state," says Arshinkoff's Cuyahoga County counterpart, state Representative Jim Trakas. "Republicans in Summit County do better than they should. And state and national candidates do much better there than they should too."

A relentless fund-raiser, Arshinkoff gets $100,000 checks from lawyers and $1 million donations from CEOs. He also collects from the little guys: A list of campaign contributions shows bailiffs, magistrates, low-level county flunkies and their spouses -- all chipping in their $100 or $1,000 when asked.

He's a great motivator. "He has always kept the heat on, kept the pressure on," says state Representative Bryan Williams (R-Akron). "He keeps people prepared and primed and ready to go."

In 2000, the county party raised more than $2.19 million and spent $200,000 on TV ads, $300,000 on the sheriff's campaign, and $700,000 in a failed bid for the county executive's office.

The money doesn't just stay in Akron. In the last decade, the party gave $64,000 to Bob Taft, $46,500 to Secretary of State Kenneth Blackwell, and a whopping $339,000 to Ohio Auditor Betty Montgomery.

To Arshinkoff, though, the local game is paramount. He's not so much interested in policy, though friends insist he's a true right-wing believer. For him it's the power, and power is in the money: the salaries, retirement benefits, and perks intrinsic in several hundred county jobs.

"It all has to do with raising money, contracts, pay-to-play," says County Executive James

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McCarthy, a Democrat. "If you don't give money to his party, you're not going to get jobs from the county -- or state contracts."

Democrats point to lawyer Deidre Hanlon. From 1996 to 2001, she earned $1.69 million from Attorney General Betty Montgomery's office. Most of the money came from an exclusive contract, allowing Hanlon to sell assets of deceased Summit County residents to pay off their Medicaid bills. As *The Plain Dealer* first reported, she was one of only two lawyers in the state to get such a contract.

Her luck may have followed the money trail: From 1996 to 2001, Hanlon donated $121,000 to the county GOP. Meanwhile, under Arshinkoff, the Summit GOP gave Montgomery $244,400 during the same period.

Democrats say it's a system where those who play ball are rewarded; the recalcitrant are punished.

Consider Saundra Robinson. She beat a Democrat for a Juvenile Court judgeship in 1990 -- a surprising upset and a major victory for a party that counts its success by the jobs it controls.

Arshinkoff was in heaven. But Robinson was no pushover. "He made suggestions," she says. "Some of them were good." She had no problem hiring loyal Republicans who were qualified, she says, but refused to hire those who weren't.

That was her fatal mistake. When it came time for her reelection four years later, Arshinkoff ran another Republican in the primary -- with the party's full support. Robinson lost. "If I wanted to stay there, there were rules to play by. I didn't," she says. "I know I could have gone the other way and still be sitting there today."

Kim Hoover, then a Cuyahoga Falls councilman, found himself in a similar position in 1994. The county prosecutor's seat opened up when its longtime holder was appointed a judge; Hoover was widely considered the Republican Party's top choice.

But first Arshinkoff wanted to talk. The day before the appointment was to be announced, Arshinkoff informed him of the people to be fired his first day, Hoover says. One was Fred Zuch, chief of the criminal division, a widely respected bulldog who paid no mind to the orders of party bosses.

Arshinkoff's reasons seemed nebulous at best, Hoover says. He refused.

It didn't take long for Arshinkoff to find another candidate: Maureen O'Connor, then a common pleas judge. She took the job.

O'Connor didn't have to fire Zuch; Hoover's plight was leaked to the newspapers, and even Arshinkoff wasn't bold enough to order Zuch's termination after that. But the opportunity Hoover missed is clear. Five years later, O'Connor was elected lieutenant governor. She now sits on the Ohio Supreme Court.

Today Hoover is a Cuyahoga Falls Municipal Court judge. He hears traffic violations, DUIs, and minor drug busts.

He has no regrets. "I know who and what I am," he says. "Alex can say to me, 'If you'd listened to me, you could be lieutenant governor, you could be a Supreme Court justice.' Well, I have no interest in those types of things. And he can't beat me here in my own town -- and that's a source of great frustration to him."

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Last election, Hoover faced a challenger in the Republican primary. He beat her handily. Soon after, Arshinkoff appointed her to an open Municipal Court seat. She'd done her job by challenging the rogue Republican; she'd earned it.

Get people talking about Arshinkoff, and soon enough they'll mention the incident involving the Kent State student. "You've heard about that report, right?" they'll ask. Feign ignorance, and they'll offer you a copy.

In the six months since that night, the police report has been circulated among politicos, pushed at newspaper reporters, and whispered about wherever Democrats gather. The kid got a call from someone who works for Summit County and someone at *The Plain Dealer*. The first wanted to know if he thought Arshinkoff was dangerous; he didn't call the second back.

The kid isn't exactly basking in the attention. He doesn't want his name used; he has no intention of filing suit. "It's water under the bridge to me," he says. But he can't help but wonder: "What is a public official going and picking up people like that?"

Nothing official became of the report. The kid says the police never talked to him again. He didn't press the matter, either. Akron Deputy Police Chief Mike Madden says the cops generally don't investigate "field reports," which are generated by traffic stops rather than official complaints.

"You've got a he said/she said situation, or in this case, he said/he said," Madden says. "There's no way for me to make a case off of that." Sure, if the kid is telling the truth, the incident could be a case of sexual imposition, Madden says. But who's to say? There are no witnesses, no physical evidence.

"I don't know that anyone even took cognizance of this report when it came in," Madden says. "If it weren't that particular name on it, no one would even care."

But it is that name. And people do care. For a Republican who touts "family values," there's a question of hypocrisy. There's also the antagonism factor: Arshinkoff has made so many enemies, they're practically a political party of their own. Even people who say positive things about him are glad to snark when they know it won't get back to him.

Of course, every powerful man has enemies, but the hatred Arshinkoff engenders goes beyond that. Now, perhaps emboldened by the report, many people who've felt his lash are breaking their silence for the first time.

Pete Kostoff, the mayor of suburban Fairlawn for 11 years, was a loyal party man who shared Arshinkoff's Macedonian heritage. Their fathers were friends, and they'd attended the same Eastern Orthodox church for years. Kostoff was considered one of Arshinkoff's top lieutenants.

That meant little when Kostoff endorsed a Democrat in the Cuyahoga Falls mayoral race. It wasn't just any Democrat -- it was his law partner and close friend, Wayne Jones. Kostoff thought it would be OK, because Jones was taking on Don Robart, a Republican known to be on the outs with Arshinkoff.

Indeed, Kostoff thought he had Arshinkoff's blessing. "He told me I'd have to sit out for a period of time, but then I'd be brought back to the party," Kostoff says. Like a good soldier, he agreed to step down from the party's central and executive committees, presuming it was temporary. Arshinkoff told him that he would also be supporting Jones, however quietly.

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But as the campaign heated up, it became apparent that Arshinkoff was doing no such thing. Robart's campaign literature was vintage Arshinkoff. It showed an aerial view of Jones's five-acre spread, calling him out for supporting low-income housing because *he* didn't have to live by it.

After Jones lost and it came time for Kostoff's promised rehabilitation, he and Arshinkoff met for lunch. "You'll have to buy a little time," Kostoff remembers his friend saying.

After six months, Kostoff could read the writing on the wall. "There are a lot of people pissed off at you," Arshinkoff told him.

"I was hoping you'd help explain this to them," Kostoff protested.

No such luck. "It became convenient for me to be expendable," Kostoff says.

Within the next three years, Kostoff's uncle was fired from the Board of Elections -- just one year before he could retire with a decent pension, Kostoff says. His brother was fired from the engineer's office. His sister-in-law, the chief magistrate at Juvenile Court, returned from a week's vacation to find a letter tacked to her front door. She, too, had been sacked.

"At the end of the day," Kostoff says, "people can say it's just politics, but I don't think you use politics to hurt people. He and his gang seem to enjoy inflicting hurt on people."

Kostoff gives money to Republicans he thinks are independent. He considers himself part of the Republican Party. But he won't give it money, not as long as Arshinkoff is around. "Sooner or later, other people of conviction are going to stand up and tell him it's time to move on."

Common Pleas Judge Mary Spicer had always been a good Republican, though she was occasionally annoyed by Arshinkoff's directives. He'd summon the Republican judges to lunch at Tangier or the Portage Country Club, then tell them who to hire, she says. She resented it.

Spicer was the court's point woman for Oriana House, a halfway house the county used as a sentencing alternative to hard time. Though Spicer did the nitty-gritty supervision work, all eight judges signed off on decisions and appointments. They were, technically, a "judicial corrections board," she says, though they didn't officially meet or take minutes.

Such leadership may have seemed lackadaisical, but no one considered it a problem. The county was happy with Oriana, says County Executive McCarthy. So were the judges.

Or so they thought.

In February 2002, it was Spicer's task to get the other judges to sign off on appointments to Oriana's citizens' advisory board. Most were reappointments -- people involved with the issues at hand, such as vocational training and rehab programs.

But that wasn't what her fellow Republican, John Adams, noticed when Spicer gave him the papers to sign.

"These are all Democrats," he told her.

Spicer was surprised. She'd never thought of party affiliation as an issue. Still, she agreed to let Adams take the appointment papers and think it over. She couldn't formalize the appointments

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until another judge returned from vacation anyway.

(Adams says he "may have issue" with Spicer's recollections, but would prefer not to revisit "these things.")

Then Spicer's phone rang. It was her cousin, Probate Court Judge Bill Spicer. He reminded her that the filing deadline for their reelection campaigns was a week away. He also asked her to hold off on the Oriana appointments. "These are our last bargaining chips," he said. (Bill Spicer declined comment for this story.)

Mary Spicer knew that Adams, Arshinkoff, and her cousin were tight. She also knew that another Common Pleas judge, Democrat Jane Bond, was planning to challenge her cousin for his seat. The link was clear, she says: The GOP would approve the appointments only if Bond got out of the race.

Spicer thought it ridiculous. Then she got a call from Arshinkoff.

He was irate, Spicer says, and launched into a rant about Oriana House. "He said there was all this fraud and theft and corruption," she recalls, still amazed. But he offered no evidence, no specifics. Yelling, he said he was only telling her because he had to protect "his" judges.

Spicer yelled back, finally shouting that she wasn't going to talk about it anymore. Then she hung up.

In short order, she got a visit from her cousin and his bailiff, Chris Masich. They asked her to get Bond to drop out of the Probate Court race, she says. They told her she could promise Bond that she'd never face an opponent again.

Spicer resisted. She saw the party boss's hand. "This is how Alex Arshinkoff works," Spicer says. "He sends other people with messages, so he can say, 'I never said that.'"

Shortly thereafter, Masich sent Spicer a note telling her to forget the whole thing. Judge Adams started making a stink to the papers about problems with Oriana House's leadership, using buzzwords of "fraud" and "corruption."

The only judge to second him was another Republican running for reelection; after that judge announced her concerns, her challenger, another Republican, decided not to run after all.

Insiders believe Arshinkoff wanted control of the jobs at Oriana. If the organization could be proved corrupt, the county could take it over -- meaning direct oversight by Republican judges, meaning more jobs for the GOP to fill.

"Alex likes any place that has people," McCarthy says, "because that becomes patronage, contributors, campaigners."

Jim Lawrence, Oriana's executive director, would accuse Arshinkoff of "running a political operation out of Common Pleas Court." But it was effective: State Auditor Jim Petro agreed to do an audit.

Then Adams -- despite only four years' experience as a Common Pleas judge -- was appointed to a federal judgeship. And Arshinkoff's niece, attorney Betty Konen, announced that she was running against Mary Spicer as an independent.

Arshinkoff pushed an unprecedented amendment through the GOP's executive committee: From

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then on, the party could give support -- and cash -- to independents, even those challenging Republicans.

Spicer won her reelection, despite not getting a penny from the party or use of its in-house communications firm. She was also barred from using the party's bulk-rate postage unless Arshinkoff first approved her mailers. (She declined.)

Still, Arshinkoff had his own interpretation of Spicer's victory. He noted to a friend that Spicer had been forced to spend $70,000 of her own money on the campaign.

Spicer isn't bitter. "I'm still here," she says. "And I have a new birth of freedom. I don't get calls summoning me to lunch." She doesn't get told who to hire, either. She just gets ignored.

The Oriana House fallout continues. Montgomery, one of the largest recipients of Arshinkoff's largesse, took the auditor's position in January. A month later, she announced that the ongoing performance audit would be teamed with a more extensive "special audit."

Due to Montgomery's ties to Arshinkoff, Oriana's attorney asked her for an independent, outside review. She refused.

Four months later, she has yet to announce any major findings or problems, or complete the first audit. She's still looking.

With Arshinkoff, politics always comes first. Callahan, the county councilman, remembers Arshinkoff saying at a late-night poker game, "I've got a lot of friends in this business, but I'm in the business of getting people elected. That comes first. The job comes first." Good government can finish no better than a distant second.

In 1999, two Common Pleas judges completed a study showing that the Court needed two more judges. The recommendation was approved by the county and the Ohio Supreme Court. The bill was written.

And then it died.

The reason? State Senator Roy Ray, an Akron Republican and Arshinkoff ally, lobbied fellow legislators to kill it. His official reason: The courthouse didn't have room for two more judges.

But Judge Mary Spicer says word drifted back from Columbus that Arshinkoff had stopped it. After all, more judges meant more openings for Democrats, in years when Arshinkoff already had several expensive races to run.

The same fate befell plans to add a second Juvenile Court judge. For years, court workers had pushed for another judge as well as building renovations.

But talks between County Executive McCarthy, a Democrat, and Juvenile Court Judge Judy Hunter, a Republican, reached a stalemate in 2001. So Hunter asked Kostoff to run interference.

The Kostoff plan, recorded in a letter signed by Hunter in February 2001, agreed to details of building expansion and signed off on adding a second judge once renovations were complete.

One month later, McCarthy got a terse, one-paragraph letter from Hunter. She wrote that she

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"must and do hereby rescind" her previous statements. She gave no explanation.

Kostoff says Arshinkoff caught wind of the plan and stopped it. He was afraid Democrats would win the second judgeship and wrest partial control of the Juvenile Court, which Republicans then held.

Hunter denies this, although she offers no explanation. "There were a whole lot of dynamics at work with that whole scenario, including other issues beside court expansion," she says. As for Arshinkoff's involvement, "You would have to talk to him about that."

Arshinkoff's goal might be protecting his party, but it's irritated his opponents to the point of open contempt. "I have no respect for him, for a lot of reasons," says Jones, now the county Democratic Party's finance chairman. "He's been in powerful positions, and he's used that position in no way to help the county. It's all for his personal gain."

Arshinkoff's power plays extend beyond government. He sat on the University of Akron Board of Trustees for nine years and was its chairman from 1997 to 2001.

Under his watch, the board drummed out university President Peggy Gordon Elliott, after commissioning a report from then-Attorney General Montgomery on Elliott's hiring practices. Montgomery's report finished with "no recommendations or ultimate conclusions," but it was enough for the trustees to send Elliott packing, settlement agreement in hand. The trustees who supported her ouster were Republicans; Democrats were irate, but outnumbered.

John Wray was the university's treasurer when he drew Arshinkoff's ire. Wray says he's still not sure what happened, though he won't dispute that politics played a role. William Beyer, then the associate vice president of administrative support services and Wray's boss, is more outspoken.

"John's work was outstanding," he says. "But you could see what was going on. There was talk for a couple years that they weren't happy with him, because he did a lot of work for [then-Democratic Congressman] Tom Sawyer. That's the way things were up there."

Wray, whose contract wasn't renewed, headed off to Walsh University in Canton.

It was hard to fight. Trustees are appointed by the governor, and for years, Ohio's governor has been Republican. Akron's board is stacked with big Republican contributors: Of the nine members currently serving, eight have contributed more than $7,000 to county party coffers in the last four years, according to records. As for the ninth, her husband provided the money.

Arshinkoff may be gone from the university, but his relatives are still making money there. The university began using the firm Buckingham, Doolittle & Burroughs for substantial amounts of legal work in 1999. In 2001, the firm's workload dropped precipitously, and the university took on a new firm, Amer Cunningham Co., according to financial records.

What happened? Konen, Arshinkoff's beloved niece, left Buckingham, Doolittle in August 2001. She landed at -- where else? -- Amer Cunningham.

Hardball campaign ads have become Arshinkoff's signature. He uses TV extensively, even for judicial seats, though Summit County is dependent on costly Cleveland airtime. Every penny seems to bring torrents of mud.

In one ad, Judge Bond -- who lost a tight Probate Court race last year - was accused of being

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Briefing
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THE WHITE HOUSE

WASHINGTON

MEMORANDUM

TO:	KARL ROVE SENIOR ADVISOR TO THE PRESIDENT
FROM:	TIM GOEGLEIN DEPUTY DIRECTOR OF PUBLIC LIAISON
	MATT SMITH ASSOCIATE DIRECTOR OF PUBLIC LIAISON
DATE:	THURSDAY, JUNE 19, 2003
RE:	LUNCH WITH KATE O'BEIRNE AND GUESTS
Time/Location:	12:00 p.m. / The Oval Room (800 Connecticut Avenue, NW)
Invited attendees:	Kate O'Beirne - National Review Brit Hume - Fox News Channel Jon Rauch - National Journal Larry Kudlow - National Review Hugo Gurdon - conservative editor of The Hill Ramesh Ponnuru - National Review Byron York - National Review
Potential Topics:	Campaign 2004 Medicare Reform Economy Judicial Nominations, including Supreme Court

Attachments:
Current articles by attendees

Their Brothers' Keepers
June 30, 2003 – CURRENT ISSUE OF NATIONAL REVIEW
By Kate O'Beirne

In early May, the Institute on Religion and Democracy sent a letter to President Bush, prompted by South Korean president Roh Moo Hyun's visit to Washington. The letter — spearheaded by Christian conservatives — issued a plea in behalf of Roh's suffering neighbors: "We call on you to give voice to desperate cries for freedom from the tormented people of North Korea." The liberal National Council of Churches received a very different letter, concerning its work in North Korea: The head of a North Korean government-approved Christian church group thanked the Council for siding with the "international solidarity movement for peace" and condemned America's "high-handed and imprudent acts." Liberal religious groups, which once enjoyed a monopoly on the issue of human rights, are largely silent about abuses not only in North Korea but in many other repressive states, including Cuba, China, Sudan, Nigeria, and Iran. In recent years, religious conservatives have become the most effective international human-rights crusaders.

See additional attachment for full article as it appears in this week's issue of National Review

Sandra's Day
June 30, 2003 – CURRENT ISSUE OF NATIONAL REVIEW – Cover Story
By Ramesh Ponnuru

Justice O'Connor gets her way more often than the chief justice does. As the "swing vote" on the Court, O'Connor is in the majority more often than any of her colleagues. Legal briefs in important cases are written to appeal, above all, to her. As a result of her position at the center of the Court, she can be a powerful voice for conservatives when she is with them. When the Court upheld school choice last year, it was her unqualified endorsement of the decision in a concurring opinion, as much as the majority opinion itself, that conferred solidity to the ruling. But it is disturbing to reflect that, given the power the Supreme Court has assumed, O'Connor has become the most powerful woman in America. Excluding foreign policy, indeed, one could even say that she is the most powerful person in America.

See additional attachment for full article as it appears in this week's issue of National Review

Byron York
June 12, 2003, 8:45 a.m. National Review Online
The Nominee Who Won't Back Down
Alabama's Bill Pryor faces Senate Democrats.

Say you find yourself nominated for a seat on one of the nation's federal courts of appeal. You face a confirmation hearing in a bitterly divided Senate Judiciary Committee. You know that if you've ever made any particularly blunt statements in the past - particularly if they were true - you'll be confronted with your words and expected to explain to senators that your remarks were somehow taken out of context, that your real meaning was obscured, or that you wouldn't say such a thing today.

At least that's what the confirmation handbook says you should do. But on Wednesday in the Dirksen Senate Office Building, William Pryor, the Alabama state attorney general who has been nominated to a seat on the 11th Circuit Court of Appeals, threw the confirmation handbook out the window. The result was one of the most extraordinary Judiciary Committee sessions in recent memory.

THE "WORST ABOMINATION"

Pryor has said some very blunt things in the past. For example, he's a vigorous opponent of abortion and has called the Roe v. Wade decision "the worst abomination in the history of constitutional law."

The quote appears in every anti-Pryor tract produced by the liberal interest groups that oppose his nomination. Before the hearing, Pryor no doubt knew that more than one senator would read his words to him and ask for an explanation. And indeed, right off the bat, New York Democrat Charles Schumer recited the "abomination" line and asked, "Do you believe that now?"

It was the perfect moment for Pryor to begin a backpedaling, thank-you-for-your-question-and-please-confirm-me explanation. Instead, Pryor said, simply, "I do."

Schumer looked slightly amazed. "I appreciate your candor," he said. "I really do."

Later, Pennsylvania Republican Arlen Specter went over the same ground. Did Pryor really say such a thing? Specter asked. Was the quote accurate?

Yes, Pryor said, the quote was accurate.

Did Pryor stand by his words?

"I stand by that comment," Pryor said. "I believe that not only is [Roe] unsupported by the text and structure of the Constitution, but it has led to a morally wrong result. It has led to the slaughter of millions of innocent unborn children."

Specter seemed more than a little chagrined. "Well," he said, pausing for a moment and looking down, "let's move on."

There were plenty of other Pryor statements to move on to. There was the time he said that with Roe, the Supreme Court had created "out of thin air a constitutional right to murder an unborn child." And then there was the remark that he "will never forget January 22, 1973 [the day of the Roe decision], the day seven members of our highest Court ripped up the Constitution."

Given more opportunities to back away from his words, Pryor again declined. "I believe that abortion is the taking of human life," he explained when committee chairman Orrin Hatch asked him about his comments. "I believe that abortion is morally wrong."

At that point some longtime confirmation observers, while impressed with Pryor's candor, wondered what was going on. Who is this guy? Is he suicidal?

Honest would be more like it. In years of speeches, interviews, campaigning, and writing, Pryor has in fact said many of the things attributed to him. Faced with strong Democratic opposition in a tense confirmation setting, he could either do an across-the-board climb down - something that would have looked ridiculous, given the intensity of his opinions on many matters - or he could argue that yes, he holds strong personal views but is able to separate them from his performance as a public official.

Pryor chose the latter. "I have a record as attorney general that is separate from my personal beliefs," he told Hatch. "I am able to put aside personal beliefs and follow the law, even when I strongly disagree with it."

On abortion, Pryor argued that, despite his personal opposition, he had ordered Alabama's district attorneys to take "the narrowest construction available" of the state's newly passed partial-birth-abortion ban. Pryor told the committee that he believed Supreme Court precedent, specifically the Casey decision, dictated a more moderate reading of the law than the aggressive stance favored by some pro-life groups in Alabama. "Look at my record," he told the committee. "I have done my duty."

MR. FEDERALISM

After abortion, the most contentious issue at Wednesday's hearing was the sometimes-touchy legal relationship between the states and the federal government. Pryor is a state attorney general and has on several occasions argued in favor of state interests when he felt they were being encroached upon by federal power. For his troubles, the left-wing interest group People for the American Way recently called him "a leader of the modern states' rights movement," a not-too-subtle attempt to link Pryor to southern defenses of segregation.

People for the American Way and other critics pointed to a Supreme Court case, United States v. Morrison, in which Pryor filed an amicus brief arguing against the constitutionality of part of the Violence Against Women Act. Pryor argued that Congress had unreasonably stretched the meaning of the Constitution's Commerce Clause to impose federal penalties on those guilty of violence against women. He argued that if Congress wanted to use the Commerce Clause to regulate an activity, then that activity must involve commerce - and that physical assault does not qualify. Pryor's opponents have written disapprovingly that he was the only state official to file a brief opposing portions of the act, while officials from 37 other states filed briefs supporting it.

To hear Democrats tell it, Pryor had made a grievously misguided legal judgment. But the problem for Pryor's opponents is that he was, in fact, proved right. The Supreme Court, in a five to-four decision, ruled in favor of Pryor's argument in United States v. Morrison.

The same held true for other federalism cases in which Pryor played a part. While committee Democrats clearly did not like Pryor's position in those cases, they found it difficult to overcome the fact that Pryor's arguments had been validated by a majority of the nation's highest Court. At

the very least, Pryor's Court victories made it difficult for Democrats to charge, as they have in other confirmation battles, that the nominee was far outside the judicial mainstream.

THAT NICE JUSTICE SOUTER

Much of the hearing focused mostly on stray comments Pryor has made in the past about the Supreme Court. For example, after a high Court ruling on an Alabama death-penalty case a few years ago, Pryor said, "This issue should not be decided by nine octogenarian lawyers who happen to sit on the Supreme Court." While nobody pointed out that the remark was factually wrong - after all, there are some spry justices who have not quite hit their 80s - Democrats in general took offense.

Massachusetts senator Edward Kennedy pressed Pryor to admit that he had made an "improper" statement. Pryor declined, calling it instead "overheated political rhetoric."

But wasn't it improper? Kennedy asked again.

"It was overheated," Pryor answered.

Kennedy kept at it. Finally, Pryor offered a compromise. "I think it was inappropriate," he said.

Other Democrats questioned Pryor about remarks made in July 2000 about David Souter, the Supreme Court justice appointed by the first President Bush who has often disappointed Republicans by taking liberal positions in key cases. Speaking to a Federalist Society audience, Pryor praised the Court's federalism decisions, but noted the narrow margin of victory in many of them. "We are one vote away from the demise of federalism," he said. "Perhaps that means that our real last hope for federalism is the election of Governor George W. Bush as President of the United States, who has said his favorite justices are Antonin Scalia and Clarence Thomas....I will end with my prayer for the next administration: Please, God, no more Souters."

Senator Schumer asked Pryor: "What's wrong with Justice Souter?" For a moment it appeared that Pryor would retreat, as he began to explain that his remarks were a "perhaps feeble attempt at humor." But then Pryor stiffened again, saying he was simply responding to Souter's outspoken opposition to majority decisions in some federalism cases. "I have on several occasions disagreed with decisions of Justice Souter," Pryor explained. When asked why he had singled Souter out, Pryor gave a simple answer: Because Souter had written the opposing opinions. The issue went away.

THE ATTACK THAT WASN'T

All the talk about abortion and federalism and octogenarians and David Souter tended to conceal an extraordinary aspect of the hearing. Even though Pryor is a conservative white Republican from Alabama, there were almost no attacks on him based on race. Race was, in fact, a virtual non-issue in the hearing.

Yes, there was the "states' rights" innuendo - Pryor told the committee he didn't like the term because "from John C. Calhoun to George C. Wallace" it had been "used as an illegitimate defense of evil." There was also some talk about Pryor's opinion on one portion of the Voting

Rights Act. But the strength of Pryor's record on race forced Democrats to abandon their traditional strategy of accusing southern Republicans of being "insensitive" to the concerns of African Americans.

To attack Pryor on race, Democrats would have had to counter the evidence contained in a detailed testimonial for Pryor sent to the committee by Alabama Democratic state representative Alvin Holmes. Offering his "full support and endorsement" of Pryor, Holmes, who is black, listed several examples of what he called Pryor's "constant efforts to help the causes of blacks in Alabama." Pryor had sided with the NAACP against a Republican lawsuit challenging state-legislative districts, Holmes wrote, even after he "came under heavy pressure from other white Republicans in Alabama for fighting to protect black legislative seats." Pryor played a key role in the prosecution of the last men charged in the 1963 Birmingham church bombing, took the lead in ending racial disparities in criminal sentences, worked to strike the state's ban on interracial marriages, and wrote a bill strengthening penalties for cross burning, Holmes wrote.

The committee also received a letter from former Alabama state representative Chris McNair. While McNair noted Pryor's stands on legislative districting and other issues, his testimonial was more personal. McNair's daughter, Denise, was one of four girls killed in the 1963 bombing. "Bill Pryor's personal support for the recent trials of the men convicted of bombing the 16th Street Baptist Church and the murder of my daughter has meant a lot to my family and this community," McNair wrote. "By designating the prosecutors as Special Assistant Attorney Generals and by providing financial assistance through his office, he demonstrated a commitment to justice that had been long overdue. I had numerous conversations with him about these cases and his desire to see that justice was done. His commitment to the cases was sincere and has been very much appreciated."

NO BACKING DOWN

Whenever Pryor comes up for a vote in the Judiciary Committee - it could be a couple of weeks - it is likely that he will be approved on a straight party-line vote. If Democrats remain united in opposition, that would make him an ideal candidate for yet another filibuster on the Senate floor.

But that is not guaranteed. Yes, Pryor has made strong statements about abortion, but not any stronger than those made by Michael McConnell, who was confirmed by the Senate - when it was controlled by Democrats - to a seat on the Tenth Circuit Court of Appeals. Yes, Pryor's opinions on federalism rankle some Democrats, but his views have the virtue of having prevailed in several Supreme Court cases. And yes, Pryor's statements about Souter and the Court's octogenarians were unwise, but by no means confirmation-killers.

So maybe he will be filibustered and maybe not. In the end, Pryor's nomination might be the ultimate illustration of the capriciousness of the confirmation process as currently practiced in the Senate. How could Democrats filibuster Pryor when they confirmed McConnell? On the other hand, how could they not filibuster Pryor when they are filibustering Priscilla Owen, the Texas judge who angered Democrats by her views on the decidedly tangential issue of parental notification for teenage girls seeking abortions?

Whatever happens, Pryor knows this: He didn't duck, he didn't cover, and he didn't backtrack in the face of his critics on the Judiciary Committee. And when it was all over, even his opponents respected him for that.

Larry Kudlow
June 17, 2003, 8:00 a.m. National Review Online
Pour It On
We need shock-and-awe accommodation from the Fed.

Now that President Bush has signed the most pro-growth and investment-oriented tax cut in 20 years — the stock market is up 500 points since Congress passed the bill — the focus of economic policy shifts to the Federal Reserve. The monetary priests next meet on June 25. Most supply-siders disagree, but Alan Greenspan & Co. should turn the money spigots wide open that day — more than they have thus far in this reflation cycle. I'm talking about shock-and-awe level accommodation from the Fed.

No matter what the investment — be it corporate profits paid out as dividends, or capital gains, or new capital-goods orders and shipments by large and small businesses, or new high-risk venture start-ups — higher after-tax investor-class returns will place new liquidity demands on the financial system. The Fed must accommodate them.

A shock-and-awe liquidity-expansion policy from the Fed will counter our underperforming economic recovery, offset the forces of worldwide deflation and recession, and stomp out deflation fears at home. An aggressive liquidity stance will also accommodate rising transaction demands following the latest Bush tax cut. And it will even counter the negative effects of any potential breakdowns in the investment portfolios of Freddie Mac and Fannie Mae, the troubled loan institutions.

Deflationary interest rates are making this very same case. Last winter, the bellwether 10-year Treasury note yielded around 4 percent. Today it is slightly over 3 percent. In the money markets, euro-dollar and fed-funds futures have all risen to new contract highs, thereby pricing in a 50 basis-point cut of the Fed's interest rate.

In commodity markets, early year rallies for basic metals and industrial materials have stalled. Even gold prices, the strongest reflation indicator so far, have slipped in recent weeks.

The Fed should follow these real-time financial- and commodity-market indicators. Liquidity-sensitive market prices are signalling that the economy is still soft and that lingering deflation remains a threat to future growth. In fact, business durable-goods prices continue to fall at a 2 to 3 percent rate, on average.

Broad-based government price indexes may be registering zero inflation, but people like Ben Bernanke, a new Fed board member, and Glenn Hubbard, the president's former top economic advisor, have sensibly argued for a 2 percent inflation target. Meeting this objective would require sustained reflationary policies, not stand-patism.

Over the past two years, an output gap — the difference between actual and potential GDP — has opened up to roughly $500 billion. The three-quarter-long recession in 2001 deserves much of the blame, but so does a sub-par 2 percent economic recovery since then. Continued 2 percent growth will widen the output gap, raise unemployment further, and guarantee that budget deficits at the federal, state, and city levels continue to expand.

The most hopeful economic indicator has been the stock market. The Wilshire 5000 index of all actively traded stocks has climbed by roughly 30 percent since last October 9, adding nearly $2.2 trillion to investor wealth. But stocks remain 35 percent below their prior peaks.

The National Association of Business Economists is now predicting 3 to 4 percent real economic growth over the next 18 months — another good omen, one with which I basically agree. But both the stock market and the more optimistic NABE economists are providing forecasts. And these forecasts are surrounded by more-than-usual uncertainty.

Some say that market interest-rate declines have already done the Fed's work; no additional central bank actions are necessary. But the key measure of Fed policy is not their short-term interest-rate target, but the volume of new cash they put into the economy.

That's why recent statements by Alan Greenspan and his vice chairman Roger Ferguson sound encouraging. They have suggested that the Fed could purchase 10-year Treasury bonds — even if this reform is only temporary. Here, too, the issue is not the Fed's theoretical control of interest rates. World credit markets — not the U.S government — set rate levels. Instead the issue is conducting open-market operations through 10-year bond purchases, which will pump in new cash just as readily as the Fed's more normal method of buying Treasury bills.

We must not risk another disappointment in the stock market or the economy. That would be devastating. Mr. Greenspan and all his little maestros need to pour it on. This is no time to take chances. Add more money. Do whatever it takes to get America humming again. Supply-side tax cuts set the stage for strong economic growth. But it's up to the Fed to show us the money.

— Mr. Kudlow is CEO of Kudlow & Co.

The Hill
JUNE 18, 2003
EDITORIAL

On target, on time

Congress is on a roll. The lawmakers' ability to get things done belies what many critics envisioned only a few short months ago as yet another season of legislative gridlock and chaos.

Instead, President Bush has signed into law a $350 billion tax cut, sought as a needed tonic for a sluggish economy. Signs are that at least Wall Street is paying heed to the altered outlook.

Then, in short order, a child tax-credit for lower-income families that slipped through the cracks during the first go-around got bolted into the package. Once again, Senate and House conferees demonstrated their ability to act quickly.

Now attention has shifted prescription drug legislation as an integral part of Medicare reform. While much still remains to be decided, it seems likely that a comprehensive package will be enacted. All concerned, including the Bush White House, deserve praise for showing the mix of flexibility and resolve needed to move ahead on big-ticket items.

But before more plaudits are awarded, Congress must still prove its mettle by moving the 13 annual spending bills through the pipeline in a timely manner and within already determined budgetary targets. This exercise will require a break from a sorry tradition: for Congress has managed to enact all 13 bills on time as stand-alone measures only three times in the past four decades.

Lawmakers were four months late in dealing with the 2003 package, which is typical. It arrived at the White House as a catch-all, virtually incomprehensible mish-mash even as Bush sent his 2004 budget in the other direction down Pennsylvania Avenue.

To be sure, the means exist to keep the machinery cranking even in the absence of timely congressional action. But continuing resolutions are inherently inefficient and augur a break down in budgetary restraint. The current fiscal year proved no exception; after intending to spend $763 billion, Congress wound up approving $842 billion, without counting the extraordinary outlays needed to fight the war in Iraq.

As we have regularly reported, the key problem has been enactment of constricted budget resolutions that could not be squared with real-world needs set by even the most conservative-minded appropriations chairmen.

Happily, some progress is being made. Through a series of program shifts, Rep. Bill Young (R-Fla.), the House Appropriations Committee chairman, has secured an extra $5.2 billion to be allocated to the 2004 domestic spending bills.

Clearly more needs to be done if Young and his counterpart in the Senate, Ted Stevens (R-Alaska), are finally to achieve the appropriations ideal of ending gridlock and holding overall spending in check.

Along the way, the lawmakers should revive the Budget Enforcement Act. which was quietly allowed to expire last Sept. 30 after 12 years on the books. Although an imperfect instrument, it could serve as a useful psychological tool.

Baghdad last summer and then went into hiding in the Ansar al-Islam terrorist camps in northern Iraq. These camps, in which traces of Ricin were found on the soles of a shoe and boot recovered from the bombed-out wreckage, were populated by over 150 bin Laden-trained disciples. Zarqawi is now believed to be hiding out in Iran, where he may still be able to run parts of the European network that were not dismantled earlier this year.

Two. Documents found in the rubble of Iraq's Mukhabarat intelligence headquarters by reporters for London's *Daily Telegraph* show that Iraqi military and intelligence officials sought out al-Qaeda leaders much earlier than previously thought, and met with bin Laden on at least two occasions. In addition to previously reported meetings between Farouk Hijazi, a senior Iraqi intelligence officer, and bin Laden in Sudan in 1994, the Mukhabarat documents show that on February 19, 1998, about six months prior to the attacks in Dar es Salaam and Nairobi, Iraqi intelligence officials made plans to bring a senior bin Laden aide to Baghdad from Khartoum. The key document shows that a recommendation was made for "the deputy director general [of Iraqi intelligence to] bring the [bin Laden] envoy to Iraq because we may find in this envoy a way to maintain contacts with bin Laden." The meetings took place in March 1998.

Concurrent with Saddam's outreach program to al-Qaeda was Sudan's almost desperate efforts to convince the Clinton administration to examine the intelligence they had gathered on everyone from bin Laden and his key deputy, Egyptian Islamic Jihad chief Ayman al-Zawahiri, to members of the Hamburg cell who provided aid to many of the 9/11 hijackers. Correspondence of February 1998 from Sudan's intelligence chief to the FBI's regional director went without reply until June 24, 1998, at which time the FBI sheepishly made it clear that the problem in communicating with Sudan lay elsewhere in the U.S. bureaucracy. The U.S. embassies were bombed six weeks later.

Three. Some of the world's most notorious terrorist villains have turned up in the postwar cleanup of Iraq. The legendary terrorist Abu Nidal committed "suicide" in Iraq last fall—supposedly by shooting himself in the head three times. His deputy, Abdul Rahman Isa, disappeared in an apparent kidnap in early September. In both cases, there was the strong smell of an effort to get rid of evidence in the form of living terrorists on Iraqi soil that could implicate Saddam.

But after the war, more of them emerged. Abu Abbas, mastermind of the 1985 *Achille Lauro* hijacking, was captured by U.S. forces. It turned out, further, that Abu-Zubayr, a senior al-Qaeda operative who had planned attacks on U.S. ships passing through the Straits of Gibraltar, was an officer in Iraq's secret police. In April, U.S. forces in Baghdad also arrested Khala Khadr al-Salahat, the terrorist who allegedly had constructed the radio-sized bomb that blew up Pan Am Flight 103. In the rubble of the intelligence headquarters, evidence was found that the Iraqis had used their Manila embassy to funnel payments to al-Qaeda's Philippine operation, Abu Sayyaf; at Iraq's Salman Pak terror-training facility, an airplane was found that had been used to train hijackers.

When the world made it difficult for Saddam to hit his intended targets directly, he sought out others suitably inclined to do his dirty work.

One thing is clear from the postwar trove of intelligence on Saddam's ties to terrorists: When the world made it difficult for Saddam to hit his intended targets directly, he sought out others suitably inclined to do his dirty work. In some cases, he hid it well; in others he did not. But even the most diehard opponent of the war can no longer deny the physical evidence of the ties that bound Saddam to al-Qaeda and other terrorists, the scientific linkages that made them lethal, and the rationale for having to put an end to it all. The world is a much safer place thanks to the U.S. war to end this terror-sponsoring regime. ■NR

■ THE WORLD

Their Brothers' Keepers

The conservative shade of human-rights activists

KATE O'BEIRNE

In early May, the Institute on Religion and Democracy sent a letter to President Bush, prompted by South Korean president Roh Moo Hyun's visit to Washington. The letter—spearheaded by Christian conservatives—issued a plea in behalf of Roh's suffering neighbors: "We call on you to give voice to desperate cries for freedom from the tormented people of North Korea."

The Christian Left is also concerned about abuse in North Korea—by the United States against the Pyongyang regime. The National Council of Churches received a very different letter, concerning its work in North Korea: The head of a North Korean government-approved Christian church group thanked the Council for siding with the "international solidarity movement for peace" and condemned America's "high-handed and imprudent acts."

North Korea's widespread famine, its vast system of gulags, and its cruel treatment of dissidents and religious believers are not the only human-rights catastrophes to escape the condemnation of most of the mainline churches that worship with the Christian Left. Liberal religious groups, which once enjoyed a monopoly on the issue of human rights, are largely silent about the abuses of many other repressive states, including Cuba, China, Sudan, Nigeria, and Iran. In recent years, religious conservatives have become the most effective international human-rights crusaders.

The Christian Left has always been a bit deaf to the cries of certain political

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dissidents and religious minorities. In the 1970s, President Jimmy Carter's human-rights crusades enjoyed the support of the mainline Protestant community, liberal evangelicals, and left-wing Catholics, whose collective moral indignation echoed the selective outrage of secular liberals. Thus, right-wing regimes were roundly denounced for repressing political liberties, while left-wing ones were gently encouraged to "dialogue" about their troubling shortcomings.

In the 1990s, a different crew took up the cause of global human rights: religious conservatives. Their first successful campaign, for which they built a broad alliance of believers, highlighted the widespread incidence of religious persecution. It resulted in the 1998 International Religious Freedom Act, establishing an independent commission to monitor violations and a State Department office responsible for an annual report to the president. Two years later, religious conservatives led the effort to enact landmark legislation to combat international sex trafficking. (The Clinton administration opposed both laws. In the case of the International Religious Freedom Act, their opposition was a combination of liberal suspicion of Christian activism and State Department resistance to congressional meddling. The sex-trafficking legislation got caught up in the feminist debate over whether or not prostitution is a legitimate career choice.) This year, conservatives lobbied successfully to secure billions of dollars for the global battle against AIDS.

Recent events show that the Christian Left is up to its old tricks. The sympathy and support religious liberals have extended to Havana and Beijing was also extended to Saddam Hussein. In early May, about 150 activists, including the Rev. Jesse Jackson and representatives of Pax Christi, the United Methodist Church, the United Church of Christ, and the Unitarian Universalists, placed an ad in the *New York Times*. They declared, "We, religious leaders, stand firmly in support of the United Nations," and praised the leadership of Secretary-General Kofi Annan. Earlier this year, the Rev. Robert Edgar, general secretary of the National Council of Churches, reported that the "highlight" of a visit by American church officials to Baghdad was the opportunity to pray with Tariq Aziz, Saddam's notorious deputy. During the visit, any concerns about Saddam's brutal repression were raised in private. Public concerns focused on Iraqi victims of the 1991 Gulf War and American plans "to use its imperial power to crush a small nation."

A "pilgrimage of peace" to the Middle East last April followed the same pattern. No moral distinction was made in the condemnation of Israeli and Palestinian "acts of violence," except that only Israel's behavior was specifically criticized. Mark Tooley, director of the United Methodist committee at the Institute on Religion and Democracy, explains that because the mainline Christian community generally can't bear to criticize any Marxist or Muslim regimes, its outrage is highly selective: "The only country they criticize on human rights is Israel."

Even as Christians and other religious believers risk rape, torture, enslavement, and death in scores of countries, religious liberals direct their attention to alleged American atrocities. The National Council of Churches has mounted a campaign against SUVs and is promoting an initiative to help Florida's farm laborers. The World Council of Churches is waging a war against the use of most forms of energy worldwide.

Persecution of Christians has increased due to global population trends. Prof. Allen D. Hertzke of the University of Oklahoma, author of the forthcoming book *Freeing God's Children: The New Faith-Based Movement for International Human Rights*, describes "an unheralded demographic revolution—a tectonic shift of the Christian population away from the West toward developing and non-democratic countries." Because about 60 percent of the world's Christians now live outside of Europe and North America, an estimated 200 million Christians are at the mercy of hostile governments in Asia, Africa, and the Middle East.

History teaches that where religious

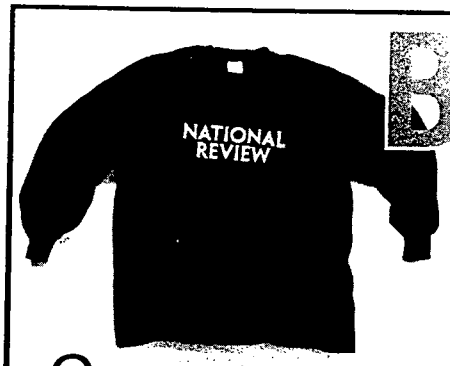

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freedom exists, liberalization and democracy take root. In recognition of this fact, and given the resurgence of religious conflict in the post–Cold War world, Hertzke believes that religious liberty should be a key goal of foreign policy. Indeed, many non-Christians understand that promoting religious liberty benefits believers and non-believers alike. Hertzke points to David Saperstein, the liberal leader of the Religious Action Center of Reform Judaism and an active member of the coalition to fight Christian persecution, and to former *New York Times* executive editor A. M. Rosenthal, who wrote a dozen columns in 1997 alone calling attention to the plight of Christians. Hertzke concludes, "There is a greater antipathy between some mainline religious leaders and evangelicals than between evangelicals and Jewish leaders."

He offers a number of reasons why liberal Christians have largely ignored the issue of religious persecution. First, they are uneasy about strengthening religious believers anywhere, especially Christians — a legacy of the Enlightenment view that religion has been at the root of persecution from the distant past to the present day (from Torquemada to the Taliban, one might say). The feminist conviction, shared by many liberals, that traditional religious believers and the patriarchal West pose the most alarming threat to freedom was captured in the motto of the 2002 International Women's Day: "Afghanistan Is Everywhere."

Second, liberals are deeply suspicious of the motives of the despised "Religious Right." In a 1997 *New York Times* column, Anthony Lewis perfectly reflected liberal animosity to religious conservatives when he dismissed the efforts of evangelical proponents of religious liberty as a self-interested appeal in behalf of their coreligionists. He accused them of mounting the campaign "to advance their cause of giving religion a prime role in the American political structure."

Untroubled by the Left's attempts to undermine them, conservative Christian human-rights groups continue to fight for the world's most defenseless and imperiled peoples. In January 1996, Michael Horowitz of the Hudson Institute and Nina Shea of Freedom House organized a conference on "Global Persecution of Christians." That same year, 5,000 churches observed an International Day of Prayer organized by Christian groups and ministries. Two years later, 100,000 churches participated. Fueled by the energy of the evangelical grassroots, and mobilized through religious newsletters and radio stations, this successful coalition has commanded congressional action despite the hostility of the mainstream media and mainline churches. For worldwide victims of persecution, this faith-based movement has been an answer to their prayers. NR

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■ **THE WORLD II**

We're Number Twenty?!

The odd, anti-American scorekeeping of the Center for Global Development

JIM LACEY

The Center for Global Development (CGD), a left-leaning global-poverty think tank, recently announced that the United States ranks 20th out of 21 countries when it comes to helping poorer nations—just barely ahead of last-place Japan. Considering that the total aid given by the U.S. and Japan is equal to the combined total for the other 19 nations in the survey, it's worth asking why we fared so poorly. Could the top-ranked Dutch truly be twice as generous as we are—or are the data simply being tortured to shame America?

The survey ranks countries according to their policies in aid, trade, investment, migration, peacekeeping, and the environment. America wins hands down in trade, but is at or near the bottom in every other category. It was only right that the CGD gave us a win on trade, considering that America has been the global growth engine for two decades; in recent years, our willingness to import products from the rest of the world (and to run a potentially harmful current-account deficit) has kept the global economy afloat. Unfortunately, the CGD does not give the U.S. much credit for making it easy for poor countries to export their goods to us. It ranks all of the countries in Europe only fractions of a point behind us on this measure—even though the EU's trade policies do more harm to

Mr. Lacey is a *Time* magazine correspondent.

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SANDRA'S Day

Why the Rehnquist Court has been the O'Connor Court, and how to replace her (should it come to that)

BY RAMESH PONNURU

CONSERVATIVES have never much cared for Justice Sandra Day O'Connor. They viewed her nomination to the Supreme Court as the result of Ronald Reagan's ill-advised, because gratuitous, 1980 campaign pledge to appoint the first female justice. During her confirmation hearings in 1981, some conservatives argued that her record as a state legislator in Arizona made it unlikely that she would vote against *Roe* v. *Wade*. Her subsequent votes confirmed that suspicion: She reaffirmed *Roe* in *Planned Parenthood* v. *Casey* (1992) and even divined a kind of constitutional right to partial-birth abortion in *Stenberg* v. *Carhart* (2000). Conservative activists tend to regard her as a "moderate," or even "liberal," justice, and say that President Bush should avoid appointing another justice like her.

The standard conservative picture of Justice O'Connor is, at best, an oversimplification. She is, in truth, both better and worse than they think she is. Some conservative Court-watchers fear that the Right's confusion could cost it dearly if there is a nomination fight later this year.

The conservative case for O'Connor is that she has voted reasonably well. While she has become a reliable vote for social liberalism at the Court, she has also sided with conservatives on many occasions. The conservative heroes on the Court have been Clarence Thomas, Antonin Scalia, and, to a lesser extent, the chief justice, William Rehnquist. O'Connor has generally voted with them on racial preferences, the death penalty, criminal procedure, and other issues. She also sided with them in *Bush* v. *Gore*.

The Rehnquist Court is known for two great doctrinal innovations. Instead of continuing to insist on strict secularism, the Court now merely requires governmental neutrality among religions. The Court has also embarked on a so-called "federalism revolution" that limits the power of Congress while protecting the prerogatives of the states. O'Connor has played a leading role in both areas. Eugene Volokh, a law professor at UCLA who once clerked for her, concludes, "She's a woman of the center-right on a lot of the really important issues that have come before the Supreme Court."

Have conservatives damaged their own cause by taking an excessively negative view of O'Connor? Washington is rife with speculation that Rehnquist, O'Connor, or both will retire this summer. In one scenario, Rehnquist leaves and Bush elevates O'Connor to chief justice. If O'Connor leaves, however, the conservatives may have lowered the bar for her replacement. Alberto Gonzales, the White House counsel, is often mentioned as a potential Bush nominee. He is a moderate, and possibly to the left of O'Connor on some issues, such as racial preferences. But so hostile are conservatives to O'Connor that the White House could tell them that he is an improvement. If, on the other hand, Bush nominates a true-blue (true-red?) conservative to replace O'Connor, liberals will say that he is tilting the Court far to the right—and by exaggerating her liberalism, the conservatives will have lent that claim credibility.

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ON THE O'CONNOR COURT

The difficulty conservatives have in getting a fix on O'Connor is a function of the bifurcation in their view of the Supreme Court. Conservative lawyers and law professors care a lot about issues such as affirmative action and federalism, on which O'Connor often votes the way they want. But social conservatives are the only mass constituency on the right that pays attention to the Court; and while they are usually allied with the conservative legal community, their priorities are different. The activists tend to disdain O'Connor because of her votes on abortion and, to a lesser extent, gay rights. The conservative lawyers tend to disagree with her decisions on those issues, but are less hostile to her because of her other votes. Another way of saying this is that how happy a conservative is with Justice O'Connor is a reflection on how happy he is with the Rehnquist Court.



Actually, the O'Connor Court might be a better label for it. Justice O'Connor gets her way more often than the chief justice does. As the "swing vote" on the Court, O'Connor is in the majority more often than any of her colleagues. Legal briefs in important cases are written to appeal, above all, to her. As a result of her position at the center of the Court, she can be a powerful voice for conservatives when she is with them. When the Court upheld school choice last year, it was her unqualified endorsement of the decision in a concurring opinion, as much as the majority opinion itself, that conferred solidity to the ruling. But it is disturbing to reflect that, given the power the Supreme Court has assumed, O'Connor has become the most powerful woman in America. Excluding foreign policy, indeed, one could even say that she is the most powerful *person* in America.

O'Connor's style of judging has increased that power. The justice is famous for issuing narrow rulings that turn on the particular facts of the case rather than rulings that articulate broad principles. Applying this common-law approach to constitutional cases preserves her freedom of action in future cases. But it also, and necessarily, undermines the predictability of the law and aggrandizes the judicial role. This is the principal critique that conservative lawyers—including Justice Scalia, in many opinions—make of O'Connor. She may often vote with Scalia and Thomas, says a former Rehnquist clerk, but "she is not driven by . . . legal arguments in the sense that a conservative jurist should be."

In the 1995 *Adarand* case, for example—concerning racial preferences in federal contracting—O'Connor voted with the conservatives. But she refused to say that racial preferences in federal contracting were always impermissible, or to expound some other rule that made it clear which preferences were okay. Instead she said that such preferences would receive "strict scrutiny" from the Court. "Strict scrutiny" is the highest degree of scrutiny in the Court's equal-protection jurisprudence; traditionally, a legislative or bureaucratic classification is subjected to strict scrutiny as a prelude to being found impermissible. Justice O'Connor, however, went out of her way to explain that while the program at issue in the case had to go, in future cases strict scrutiny would not necessarily be "fatal in fact." So which preferences should stay and which go? The Clinton administration's response to this uncertain guidance was to preserve all existing federal preference programs except the one at issue and another that fell in court. To this day the Court's position with regard to other contracting preferences remains unclear.

O'Connor has ruled (or rather not ruled) similarly in racial-gerrymandering cases. Jeffrey Rosen, an influential legal commentator, has said that the upshot of those cases is that congressional district lines cannot be drawn with regard to race if the results offend Justice O'Connor's aesthetic sensibilities.

Or take abortion. From her earliest days on the Court, O'Connor has argued that restrictions should be upheld so long as they do not impose an "undue burden" on the right to procure abortions. In *Casey*, Justices O'Connor, Anthony Kennedy, and David Souter adopted this standard for the Court. It is a standard, not a rule—in the parlance of the law profs—because its application depends on subjective judgments. In *Stenberg*, Justice O'Connor and four of her colleagues decided that a ban on partial-birth abortion imposed an "undue burden" on the abortion right; Justice Kennedy apparently felt that it was a "due burden," since he dissented from the judgment. Justice Scalia, also in dissent, noted that the only effect of the standard was to turn the Supreme Court into a veto board for abortion regulations.

In *Bush* v. *Gore*, the Court said that the doctrine underlying its decision was "limited to the present circumstances" and would not govern future cases. Critics have seized on the line as the epitome of the decision's lawlessness. But the Court has been making good-for-one-ticket-only decisions for some time, thanks in large part to O'Connor. Volokh, the former clerk for O'Connor, notes that in some areas of the law she has been willing to defend "bright-line rules" and that other justices also adopt vague, subjective standards on some occasions. This observation should be taken as a qualification, rather than a refutation, of a valid generalization: Justice O'Connor practices "one case at a time" judging more often, and with greater consequence, than her colleagues.

THE FEDERALISM REVOLUTION

Conservative lawyers consider the federalism revolution the most valuable part of the Rehnquist Court's legacy. O'Connor's record on federalism is not without the ambiguities one would expect from the rest of her jurisprudence. She has sometimes held the revolution back—as in *U.S.* v. *Lopez*, a 1995 case that is something of a landmark. The Constitution gives Congress the power to regulate commerce among the states. In *Lopez*, the Court ruled that the Gun-Free School Zones Act was not a legitimate exercise of this authority. The Court had not imposed a limit on congressional power under the commerce clause in six decades. O'Connor, the swing vote, joined a concurring opinion that appeared to weaken

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the Court's conclusion and left the law unsettled.

Notwithstanding such episodes, O'Connor can fairly be said to have not only participated in but even led the revolution. Her strong dissent from the federal drinking-age case in 1987 was a harbinger of it. And one of its signal accomplishments was the doctrine, announced by Justice O'Connor in *Gregory* v. *Ashcroft* (1991), that federal law will not be read to compromise the sovereignty of state governments unless the law includes a clear statement to that effect.

Unfortunately, the Court's federalism revolution isn't all it's cracked up to be by legal conservatives. Michael Greve of the American Enterprise Institute has noted that the Court's federalist decisions partake of romanticism about "states' rights." These decisions contain many references to the "dignity" of states. The Court's assumption is that it can protect federalism by protecting state governments. As a consequence, the Court has been inattentive to the "horizontal" dimension of federalism: to the constitutional provisions that promote competition and accountability among state governments by constraining *their* power. If Eliot Spitzer wants to nationalize American industries from the New York attorney general's office, the Supreme Court is not going to stop him. The O'Connor Court's federalism is not that of the Founders.

How legal conservatives convinced themselves that federalism could be restored by the federal judiciary is one of the minor mysteries of the age. The O'Connor Court is itself a significant offender against federalism, just as its predecessors, the Warren and Burger courts, were. When the voters of Colorado passed an amendment to the state constitution opposing certain gay-rights laws, the Court's response was to slap them down. On abortion, the Court—O'Connor very much included—is "hysterically nationalist," as Robert Nagel argues in *The Implosion of American Federalism*. When seen against this backdrop, the "federalism revolution" starts to look less like a readjustment of state-federal relations and more like a transfer of power from Congress to the Court.

A highly developed institutional *amour propre* may be the most striking feature of the O'Connor Court. It is present in the plurality opinion in *Casey*, which O'Connor joined. The *Casey* Court reaffirmed *Roe* in large part out of a reluctance to give in to the Court's critics. Appearing to capitulate would compromise the Court's ability to "speak before all others" for the nation's constitutional ideals. It is this self-regard that brings together O'Connor's penchant for finicky edicts, the O'Connor Court's marked reluctance to overturn the activist precedents of the Warren and Burger courts, the Court's racial cases, and its intervention in the 2000 election. There is an authoritarian streak in this jurisprudence that Justice O'Connor does not, in all likelihood, perceive.

Should O'Connor either retire or be nominated to chief justice, fixing her position in the conservative-liberal spectrum more precisely may be important in the political battles that follow. But her most important legacy is not as a liberal, moderate, or conservative justice. It might be best expressed in the title of Kenneth Starr's book on the O'Connor Court—*First Among Equals*—except that the title is two words too long. There is little evidence that O'Connor or her Court regards other governmental authorities as equals. ■ NR

■ **AT WAR II**

The New Fellow-Traveling

In the present crisis, a sickening familiarity

DAVID PRYCE-JONES

ISLAMIST fellow-traveling today has a different focus from the Soviet fellow-traveling that preceded it, but the cast of mind is the same. The common premise that Western society is responsible for the world's ills generates in certain intellectual circles guilt for the present as well as fear for what is to come. The conviction then develops that whatever "we" do must be wrong, and whatever "they" do is justified. Fellow-travelers in both cases come to apologize for those hostile to Western society, even to identify with them.

The Soviet Union invariably proclaimed that the goal of Communism was peace and the perfectibility of mankind. Evidence to the contrary never dissuaded fellow-travelers from the belief that Communists must be admirable because they said they were. Islamist extremists likewise speak of jihad as the necessary prelude to peace and the perfectibility of mankind. In the eyes of the new fellow-travelers, these extremists may not yet be necessarily admirable, but they are Muslims, therefore victims of Western colonialism in the Third World, and deserving sympathy. So in the perspective of Islamist fellow-traveling September 11 becomes a day when America had it coming, and the exploding aircraft had the effect of "a work of art." In the aftermath of September 11 there was a record number of conversions to Islam in non-Islamic countries—apparently some 30,000 in Holland alone. The Free Iraq campaign brought the new fellow-traveling to unprecedented heights, notably a speech by an academic at Columbia University appealing for "a million Mogadishus" to throw American forces out of Iraq. Here was a reprise in animus and tone of Cold War fellow-traveling.

The Soviet Union aimed to destroy bourgeois democracy. Only in their more extravagant moments do Islamists and their fellow-travelers promise to destroy the United States; their narrower but

Mr. Pryce-Jones is an NR senior editor, and this essay is adapted from a speech given at the YIVO Institute for Jewish Research in New York.

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Briefing

536041

June 18, 2003

To: Karl Rove
Fr: Marc Lampkin
Re: Meeting with John Tyson

Dear Karl,

Great to see you last night! Thanks also for your kind words to Emily and me.

Thank you for agreeing to meet with John Tyson, Chairman and CEO of Tyson Foods. As you may know, Tyson Foods is the world's largest producer of chicken, beef and pork, and the company produces one-out-of-four servings of meat consumed in the United States. In addition to food production, Tyson stands as one of the largest agricultural consumers in the country serving as an enormous purchaser of corn and soybean animal feed.

Mr. Tyson is eager to share with you his perceptions of the American agricultural sector as well as news of the Company's recent developments, including Tyson Foods' expanded charitable efforts. Specific topics to be covered include:

Trade and Trade Promotion: The state of American agriculture has never been more dependent upon access to foreign markets than it is today. Tyson is very supportive of the President's interest in promoting free trade.

Mr. Tyson would like to reiterate the industry's concern about the ongoing problems with chicken exports to Russia, America's largest market for poultry exports. Mr. Tyson is hopeful that resolution of the matter may be close at hand, due in large part to the efforts of the Bush Administration.

Country of Origin Labeling: Tyson would like to see the Administration support Congressional repeal of mandatory country of origin labeling for meat. The law passed in last year's Farm Bill will burden farmers, ranchers, processors and retailers with tremendous new costs and legal liabilities -- with no apparent benefit to consumers. A broad coalition of farmers and processors is working to get Congress to reconsider and make the country of origin labeling voluntary instead.

Additionally, we expect that Mr. Tyson may touch briefly on a few additional public policy challenges facing his company including issues related to meat packer ownership of livestock, recent developments in food safety, and the poulty industry's concern with the Department of Labor's poultry initiative.

File
536041

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Mike –

I am Director of Federal Affairs for the American Medical Association. Attached is the resolution you asked about. I will be working with Rich Deem on this issue. Please don't hesitate to call if you have any questions –

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Thanks–

Margaret

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AMERICAN MEDICAL ASSOCIATION HOUSE OF DELEGATES

Resolution: 213
(A-03)

Introduced by: Wisconsin Delegation

Subject: End of Life Drug and Pain Treatment

Referred to: Reference Committee B
(Cyndi J. Yag-Howard, MD, Chair)

Whereas, Physicians have the right and obligation to provide treatment in accordance with the best interest and wishes of the patient; and

Whereas, A recent interpretation by US Attorney General John Ashcroft of 21 Code of Federal Regulations Section 1306.04 (2001) threatens to revoke the license of a physician who prescribes medication that may hasten dying for someone with a terminal illness; and

Whereas, The Drug Enforcement Administration has issued a warning that threatens physicians with loss of their DEA narcotic license in regard to their treatment of end-of-life patients; and

Whereas, A non-medically trained individual will be assessing the physician as to whether it was an attempt to relieve pain or to end the life of the patient; and

Whereas, Such directive can have a "chilling" effect on pain treatment by all physicians; therefore be it

RESOLVED, That our American Medical Association communicate to the President, the Secretary of the Department of Health and Human Services, and the Attorney General, its strong opposition to the use of 21 Code of Federal Regulations Section 1306.04 or any other rationale that would involve placement of licensure restrictions on physicians who use opioid analgesics and other pain-reducing medications appropriately to treat patients with pain (Reaffirm HOD Policy); and be it further

RESOLVED, That our AMA oppose harassment of physicians by agents of the Drug Enforcement Administration in response to the appropriate prescribing of opiates and other controlled substances to patients with terminal illness. (Reaffirm HOD Policy)

Fiscal Note: No Significant Fiscal Impact

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Bernie	Marcus	The Home Depot			
Ed	Rust	State Farm			
John	Bachman	Jones Financial Corp			
Mac	Crawford	Caremark Rx			
John	Dillon	International Paper			
Bob	Essner	Wyeth			
Lou	Giuliano	ITT			
David	Glass	Wal-Mart Stores, Inc.			
Hank	Greenberg	AIG			
Chad	Holliday	DuPont			
John	Jones	Air Products and Chemicals			
Bill	Jurgenson	National Mutual			
Ed	Kelly	Liberty Mutual			
Ed	Liddy	Allstate			
Bob	Nardelli	The Home Depot			
Earl	Nye	TXU			
Phil	Purcell	Morgan Stanley			
Art	Ryan	Prudential			
Lee	Scott	Wal-Mart			
Fred	Smith	FedEx			
Bill	Walters	FMC			
Bill	Weldon	Johnson & Johnson			

PRA 6

Ralston, Susan B.

536041

File: Medicare

From: Karl Rove [KR@georgewbush.com]
Sent: Tuesday, June 17, 2003 1:14 PM
To: Ralston, Susan B.
Subject: Fw: thinking threogh the medicare conference

Sent from my BlackBerry Wireless Handheld (www.BlackBerry.net)

-----Original Message-----
From: PRA 6
To: bill_frist@frist.senate.gov <bill_frist@frist.senate.gov>; jill_cernok@kyl.senate.gov <jill_cernok@kyl.senate.gov>
CC: Dean_Rosen@frist.senate.gov <Dean_Rosen@frist.senate.gov>
Sent: Tue Jun 17 08:58:50 2003
Subject: thinking threogh the medicare conference

I want to reemphasize that thinking through who serves on the medicare conference is 90% of the game

I went through a series of negotiations as speaker where one senator could hold up the entire conference forever.
you cannot allow grassley and baucus to dictate the conferees or you will have given away the game before it starts.

you have to make sure this is a leader's conference and that you hahve enough signatures to report out a bill for the senate even if you lose one or two republicans

this is very hard under senate rules and traditions and will lead to a lot of complaining but you should insterview each member and make sure they are on the team before you appoint them to the conference

the peak moment for individual members is before the bill gets off the floor

the key moment for leaders is in appointing conferees and holding up a conference until you get the bill you want

they will not be able to filibuster you but if you are not careful they will be able to block a bill from coming out of conference
newt

Records Management, White House Office of (ORM)

Subject Files

FG006-27
(Office of Senior Advisor - Karl Rove)

5360124

OA/NARA #: 10726/10704
9713

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2018-0011-P [ ]

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11/4/3/3	9713			

Folder Title: ORM
FG006-27
536124

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United Press International

January 7, 2003 Tuesday

LENGTH: 746 words

HEADLINE: Outside View: Nigh time for tax reform

BYLINE: By LESLIE **CARBONE**

DATELINE: FAIRFAX, Va., Jan. 5 (UPI)

BODY:
With so much attention focused on what President George W. Bush proposed in the way of economic reform in his Tuesday speech to The Economic Club of Chicago, the administration has a rare and promising opportunity to help America's struggling families today and for generations to come.

A 2-year window of political opportunity exists to promote fundamental tax reform that will substantially reduce taxes on working families and dramatically simplify America's Byzantine tax system.

With the prospects for significant tax reform -- and his own political clout -- buoyed by the November 2002 election, the president is expected to spend the next couple of years rallying support for the cause of dramatically altering America's progressive income tax.

That's good news for working families who pay a high price for America's behemoth tax code.

The progressive income tax applies higher marginal tax rates to people earning more. It is a selective law that levies an additional penalty on people who do well-- and it backfires badly.

Middle-class Americans were originally exempt from the income tax. First introduced as a tax on just "the rich" -- the wealthiest 1 percent of Americans -- the average two-earner family today pays more than $6,000 just in federal income taxes.

Once the tax was put in place, under the guise of "soaking the rich," it was very easy to broaden it. Now nearly everybody pays.

The government's demand for revenue during World War II provided the rationale for expansion from a class-based tax to a mass tax. Once it had begun milking the middle class, the government was loath to stop.

That's only the beginning. Progressive taxes actually make it harder for middle-class workers to find jobs in the first place. Progressive taxes discourage productivity and inhibit economic growth -- which translates into fewer available jobs for workers.

Fewer available jobs mean lower wages for those who find and keep work. Wages are highest when many employers have to compete for few workers; they are lowest when many workers have to compete for few jobs. In this setting, lower- and middle-class families suffer the most.

Though the highest marginal rates are imposed upon the most productive Americans in terms of the income they generate the real costs -- fewer jobs, lower wages, slower growth

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-- hit working families the hardest.

America's progressive tax policy is also morally destructive.

Progressive taxation casts suspicion on the virtuous behavior that creates wealth and is a kind of fine on prosperity. Government seizes a greater share of the fruits of the labor of hard-working, honest citizens who have prospered against the odds then their neighbors who may have not. In so doing, it stigmatizes prosperity and the virtues that produce it.

Prosperity brings less tangible benefits, such as greater freedom from worry, the trust and confidence of others, and self-respect. Virtues become habits when practiced regularly, building healthy families, healthy communities and healthy nations.

A nation that treats the fruits of virtuous behavior as sinister is a nation in moral peril because it lures its citizens toward the practice of vice rather than virtue. The resulting social-down-spiral creates greater dependency on government by infantilizing the citizenry, teaching people that they can't make it on their own without a government handicap.

With a new Congress heading into session and new economic leadership taking office shortly, the president now has a golden opportunity to reshape America's tax policy and undo the damage that the mistakes of the past century have wrought.

In the coming State of the Union address, Bush should ask the Congress and the country what kind of America tax policy should support. Should it forge a nation that honors the virtues that create wealth to everyone's benefit or one that punishes creative and responsible economic behavior and ends up hurting those who can least afford it? By adopting the right vision, the Bush economic team can remodel America's tax code into one that will strengthen -- not undermine -- the nation's moral and economic fiber.

Leslie **Carbone,** former director of family tax policy at Family Research Council, is the author of Slaying Leviathan: The Moral Case for Tax Reform (forthcoming).

"Outside View" commentaries are written for UPI by outside writers who specialize in a variety of important global issues.

LOAD-DATE: January 8, 2003

prev Document 8 of 10 next

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United Press International

February 16, 2002, Saturday

SECTION: FINANCIAL NEWS

LENGTH: 910 words

HEADLINE: Outside view: Enron? Blame the government

BYLINE: By LESLIE CARBONE, Special to United Press International

DATELINE: WASHINGTON, Feb. 16

BODY:
The U.S. government announced Feb. 10 that it is trying to wrest control of Enron Corporation's retirement plans. That's a little like the Taliban trying to grab control of the National Organization for Women.

The beleaguered energy-trading company has been the target of non-stop government and media scrutiny since filing bankruptcy last December after hiding huge debts and losses via off-the-books partnerships, many of them named for Star Wars characters.

This scam made multimillionaires out of Enron executives but cost about 20,000 of its workers and former workers an average of $50,000 apiece in retirement savings.

The unfolding drama, which features cool as a cuke company fat cats testifying (or refusing to testify) before Congress, emotional employees recounting the tens of thousands of dollars that they lost, and even a suicide, has provided politicians a rare opportunity to look virtuous beside the corruption of others.

Congress has seized the day. In opening statements during the House Energy and Commerce oversight subcommittee's Feb. 7 hearing, angry politicians condemned Enron's panel of pariahs waiting to testify.

Committee Chairman James Greenwood, R-Penn., accused the assembled executives of "avarice" and "appetite". Richard Burr, R-N.C., railed against their "greed with no regard for the American lives affected by it".

Billy Tauzin, R-La., called the men "crooks"; Michael Bilirakis, R-Fla., and Bobby Rush, D-Ill., labeled them "terrorists".

Some of this criticism is no doubt warranted, but perhaps Congress should remove the log from its own eye before the speck in Enron's.

While those who run and ran Enron are responsible for their own wrongdoing, it is government's incompetent meddling in Americans' financial lives that left the employees at the mercy of the company's shenanigans.

It is federal policies that have left workers dependent on retirement shelters like 401(k)s and therefore on the companies that administer them.

Here's how: First, by creating the Social Security program, government enshrined retirement income as a right -- but, because the program is insolvent, no one can count on it -- but

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being forced to put 12.4 percent of their earnings into the system makes it that much harder for low- and middle-income workers to save on their own.

Second, this difficulty is exacerbated by the federal tax code, which also diminishes take-home pay and therefore the opportunity to save -- and then diminishes the earnings from any savings or investments the worker has managed to make.

Instead of eliminating these problems directly and making it easier for people to simply save, the government permits tax-deferred savings and investments only via vehicles like the 401(k) plans at the center of the Enron scandal. While they are restrictive, company-sponsored 401(k) plans allow workers far greater tax-deferment opportunities than they have on their own under current law.

That's what helps companies like Enron that offer seemingly generous retirement benefits lure employees -- and why workers can lose big when these companies behave unscrupulously.

Naturally, many in government have learned all the wrong lessons from the debacle and are proposing various means to increase -- rather than decrease -- the meddling that allowed for it.

The Labor Department announced on Feb. 10 that it plans to remove and replace Enron's retirement plan overseers -- as though the government provided a stellar example of how to run a retirement program.

Recent rumblings suggest that Social Security privatization is losing steam, as Enron's free fall and the stock market's recent problems have shaken investor confidence, but that's a little like choosing television over books because there are so many trashy novels out there.

A number of bills in Congress would cap the percentage of company stock allowable in 401(k) accounts; fortunately, the Bush administration opposes such limits. Even campaign finance reform has been given a boost, largely because Enron gave more money in campaign contributions to Republicans, including George W. Bush, than to Democrats.

There is a better solution. The answer to the problems created or exacerbated by government meddling is less meddling, not more.

First of all, Social Security reform that allows workers more direct control over their own money is needed now more than ever.

Second, fundamental tax reform is needed to cut the Gordian knot of bizarre disincentives to earn, save, and invest in the current income tax code. Such reform could come as either a national sales tax or a flat income tax, but, either way, it should reduce the overall tax burden, tax everyone fairly at the same rate, eliminate the multiple taxation that subjects workers to paying taxes on money when they earn it and again when they save or invest it, and let people simply save.

It's understandably tempting to want the government to protect the little people from the Enrons of the world, but the best way that the government can do so is to undo the policies that allowed so many people to be hurt in the debacle in the first place. As the Enron case makes clear, government is not the solution; government is the problem.

(Leslie Carbone, former director of family tax policy at Family Research Council, is writing a book, Slaying Leviathan: The Moral Imperative of Tax Reform.) Content: 02001000 04010000 09011000 11006000 11008000

REV_00266019

5JC-124

THE WHITE HOUSE
WASHINGTON

Date: 9/5/03

To: Matt Schlapp

From: Strategic Initiatives Karl Rove

- [X] FYI
- [ ] Appropriate Action
- [ ] Direct Response
- [ ] Prepare Response For My Signature
- [ ] Per Our Conversation
- [ ] Let's Discuss
- [ ] Per Your Request
- [ ] Please Return
- [ ] Deadline
- [ ] Other

Comments: _____

REV_00266020

536124

THE WHITE HOUSE
WASHINGTON

Date: 9/5/03

To: Keith Hennessey
From: Strategic Initiatives Karl Rove

____ FYI
____ Appropriate Action
____ Direct Response
____ Prepare Response For My Signature
____ Per Our Conversation
X Let's Discuss
____ Per Your Request
____ Please Return
____ Deadline
____ Other

Comments: _____

_____

_____

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536124

September 3, 2003

MEMORANDUM FOR SUSAN RALSTON

FROM: BJ Goergen

SUBJECT: Arizona and New Mexico Travel

Timeline of Events:

Friday, July 11th	Leonard Rodriguez e-mailed Susan Ralston, Israel Hernandez, BJ Goergen, and Matthew Schlapp to request dates for Karl Rove's participation in fundraisers for the New Mexico GOP and Congressman Renzi (AZ-1).
Thursday, July 17th	Susan Ralston e-mailed Leonard Rodriquez saying Karl Rove was available on the evening of September 12th and the morning of September 13th. Leonard started organizing the events.
Monday, August 11th	Israel Hernandez, Susan Ralston, and BJ Goergen met to discuss Karl Rove's September and October Presidential travel schedule. Israel Hernandez said it was important for Karl Rove to travel with POTUS on September 12th to Georgia and Mississippi, so BJ Goergen called Leonard Rodriguez to determine the possibility of changing the dates of the AZ/NM events to September 19th and 20th.
Tuesday, August 12th	Leonard Rodriguez e-mailed to BJ Goergen that September 19th and 20th worked well for the AZ/NM events. BJ Goergen called Jack Oliver and Kate Walters at BC '04 to confirm that these dates worked for the BC '04 events as well.

	BJ Goergen called Leonard Rodriguez to let him know the campaign was ok with the new date change.
Friday, August 15th	Leonard Rodriguez e-mailed BJ Goergen, Susan Ralston, and Israel Hernandez the line by line for Karl's travel to AZ/NM.
Tuesday, August 19th	In the directors' meeting, Angela Flood brought up the line by line with Karl Rove to make sure he approved. Karl Rove replied that his only concern was that he wanted the people on the ground in Arizona and New Mexico to have enough time to plan the event properly.
Tuesday, September 2nd	Matt Schlapp e-mailed Karl Rove.

HISPANIC RELIGIOUS LEADERS
OF SOUTH FLORIDA
September 5, 2003

Via Facsimile
The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20024

Dear Chairman Powell,

On behalf of our fast growing national group of religious leaders representing over 3,000 Hispanic churches, we must express to you our deep regret at what we understand to be the handling of the Univision/HBC merger since requesting to meet with you, our request still denied. We share this with deepest respect and pray for those entrusted with the important responsibility to protect the public interest.

We now understand that in spite of the Third Circuit Court decision to stay the Republican Commissioners' new media ownership rules, you may be insisting upon finalizing approval under the old media ownership rules, rules that you and the other Republican Commissioners had rejected as inappropriate and not in the interests of minorities.

In essence, there appears to be such an overwhelming obsession to do what HBC and Univision demand be done that people whose entire legal and professional careers have been built on integrity and consistency appear to be scrambling to circumvent a Circuit Court order to please non-Hispanic billionaires at the expense of the public interest: 38 million Hispanic Americans. This obsession is so strong that public officials will rely on rules that they themselves deemed inadequate and legally unsupportable.

Our disappointment is furthered by the news that our brothers and sisters in this cause, the fine student leaders and exemplary graduates across America along with the mothers and grandmothers who move our communities have not even had the opportunity to exercise their right to petition the government by securing a meeting with you. We are sincerely grateful for the time that Paul Gallant gave us, but as these important groups have individual points of view that you have not yet heard, it seems appropriate that they be given the right to speak directly to you about the greatest threat that our community's freedom of speech has ever faced in this country before you make a final decision.

While some might say that it is late in the process, please remember that since this process has been conducted in secret with no public hearings, it is new to the citizens that are affected.

CREATIVE BUILDING PRODUCTS
6409 Highview Drive . Fort Wayne, IN . 46818
Tel: 800.830.0245, Tel: 260.432.7158, Fax: 260.459.0929

800.860.2855

NESTABLE COT BUNKER BARRICADE

Product Description:

The Cot Bunker is a uniquely molded plastic unit that is shipped broken down in a nestable mode to conserve space. It requires no tools for assembly, has no loose parts to lose or replace, and does not require any engineering support.

The multi-use Cot Bunker can be deployed both inside and outside of tents. It can be setup directly on the ground or on a hard floor surface. For additional security, individual Cot Bunkers can be placed side by side to construct a ballistic wall that will provide the troops with an excellent Defensive Fighting Position for any threat up to .50 cal M33, .50 cal Armor Piercing and 155 mm shrapnel. When the troops stop to rest and retire to their cot area a full measure of security will be apparent and provide a welcome time to relax, take care of personal needs, or prepare for the next assigned mission.

Tests by an independent lab show **the cot bunker will withstand a .50 caliber ball, a .50 caliber Armor Piercing and up to 155 mm fragmentation with no through penetration.** Written report provided on request. Great for Defensive Fighting Position or inside small arms target!

Points of Contact:

Mr. J.C. Brown
(260) 432-7158 or (800) 860-2855
(260) 459-0929, fax
E-mail: spirit@soacorp.com

Product Information:

Size:	N/A
Weight Empty:	75 lbs
Weight Full:	2400 lbs
Capacity:	23 cubic feet

F.O.B. - Origin:

Quantity discounts available on retail sales only.
Terms 2% 10, Net 30 Days Standard.
***Product Only**
Will Accept Government Credit Card

Product Photograph:



Cost Data:

NSN No	Part No.	Color	Retail/Ea.	Gov./Ea.	GSA No.
-	4140	Olive Drab	$481.00	$446.00	-
-	4141	Desert Tan	$481.00	$446.00	-

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6409 Highview Drive . Fort Wayne, IN . 46818
Tel: 800.830.0245, Tel: 260.432.7158, Fax: 260.459.0929

800.860.2855

WATER/SAND FILLED BUNKER/CHECKPOINT

Product Description:

The Bunker/Checkpoint is designed to enable the combat troops to secure and hold the specific objective. The objective can be in various forms of check points, road intersections, airfields, bridges, supply dumps, troop encampments and others in various threat level situations. This unit can be erected quickly and is portable, utilizing the least amount of manpower with very limited engineering support. The 18" of overhead cover and 360 degree protection provides the greatest amount of soldier protection and survivability and enable the troops to take care of themselves quickly and adequately.

The Bunker/Checkpoint is portable, all weather, all terrain and reusable, adapting to any basic terrorism at most threat levels providing exceptional force protection. Relocation is simple, merely remove the media used as ballast, disassemble, and you're ready to deploy. Standard colors are Olive Drab and Desert Tan. An optional bad weather protective cover (P/N 4130) is available. The Bunker comes with all materials and tools necessary for setup and deployment.

Points of Contact:

Mr. J.C. Brown
(260) 432-7158 or (800) 860-2855
(260) 459-0929, fax
E-mail: spirit@soacorp.com

Product Information:

Size: 7' deep x 9' (W) x 8' (H)
Weight Empty: 1,375 lbs water or 1,495 lbs sand
Weight Full:
Bottom: 8,995 lbs water or 18,792 lbs sand
Top: 5,100 lbs water or 10,710 lbs sand
Gallon Capacity:
Bottom: 1,044 gallons water
Top: 595 gallons water

F.O.B. - Origin:

Quantity discounts available on retail sales only.
Terms 2% 10, Net 30 Days Standard.
***Product Only**
Will Accept Government Credit Card

Product Photograph:

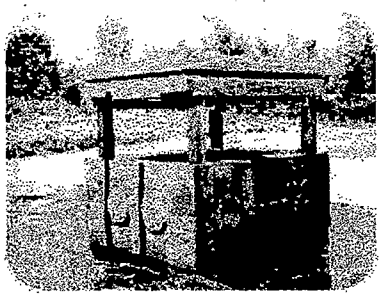

Sand Filled

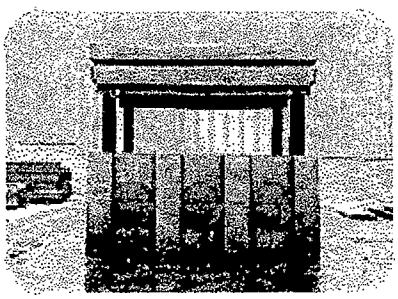

Water Filled

Cost Data:

NSN No	Part No.	Color	Retail/Ea.	Gov./Ea.	GSA No.
5419-01-447-4690	4218W	Olive Drab	$5904.00	$4920.00	-
5419-01-450-1758	4219W	Desert Tan	$5904.00	$4920.00	-
5419-01-447-4613	4218S	Olive Drab	$8532.00	$7110.00	-
5419-01-450-1756	4219S	Desert Tan	$8532.00	$7110.00	-

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6409 Highview Drive . Fort Wayne, IN . 46818
Tel: 800.830.0245, Tel: 260.432.7158, Fax: 260.459.0929

800.860.2855

BUNKER/CHECKPOINT PROTECTIVE COVER

Product Description:

The product is designed to cover the Bunker/Checkpoints and to provide a level of comfort to the troops. If you ever stood a post, you will immediately understand the great benefit of this product. The clear plastic, roll up windows give excellent wind/rain protection and the double zippers allow for easy installation and removal.

Tie straps are sufficient to roll up the cover for fresh air and other uses. Constructed from military specification material makes this a great addition to the force protection. The simple act of keeping rain off the equipment is a very good benefit. Available colors are P/N 4130 Olive Drab and P/N 4131 Desert Tan.

Points of Contact:

Mr. J.C. Brown
(260) 432-7158 or (800) 860-2855
(260) 459-0929, fax
E-mail: spirit@soacorp.com

Product Information:

Size: 7' deep x 9' (W) x 4' (H)
Weight: 48 lbs
Weight Full: N/A
Gallon Capacity: N/A

F.O.B. - Origin:

Quantity discounts available on retail sales only.
Terms 2% 10, Net 30 Days Standard.
***Product Only**
Will Accept Government Credit Card

Product Photograph:

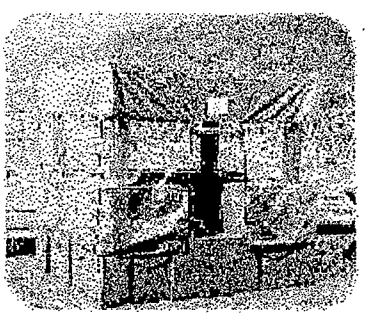

Cost Data:

NSN No	Part No.	Color	Retail/Ea.	Gov./Ea.	GSA No.
-	4130OD	Olive Drab	$1125.00	$1042.00	-
-	4130DT	Desert Tan	$1125.00	$1042.00	-

CREATIVE BUILDING PRODUCTS
6409 Highview Drive . Fort Wayne, IN . 46818
Tel: 800.830.0245, Tel: 260.432.7158, Fax: 260.459.0929

800.860.2855

BUNKER COVER PERSONNEL PROTECTOR

Product Description:

A molded plastic system to mitigate blast and absorb fragmentation, shrapnel and energy as a personal protection enhancement. The molded, plastic, color-safe unit can be installed by hand and filled with sand to create 24 inches of minimum protection.

Quickly deployed and easily recoverable make this an excellent system. The front and rear treatment complete the ability to protect from small arms fire or ricochet. The complete systems includes four (4) segment covers and two (2) end treatments. Colors are Desert Tan and Olive Drab.

Test results are available upon request.

Points of Contact:

Mr. J.C. Brown
(260) 432-7158 or (800) 860-2855
(260) 459-0929, fax
E-mail: spirit@soacorp.com

Product Information:

Size: 30" Deep x 121" (W) x 84 1/2" (H)
Weight Empty: 385 lbs
Weight Full: 9450 lbs
Gallon Capacity: N/A

F.O.B. - Origin:

Quantity discounts available on retail sales only.
Terms 2% 10, Net 30 Days Standard.
***Product Only**
Will Accept Government Credit Card

Product Photograph:

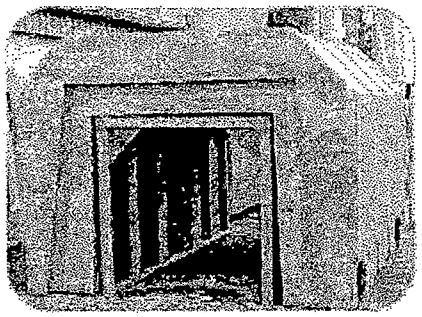

Cost Data:

NSN No	Part No.	Color	Retail/Ea.	Gov./Ea.	GSA No.
-	12541OD	Olive Drab	$1017.00	$942.00	-
-	12542DT	Desert Tan	$1017.00	$942.00	-

CREATIVE BUILDING PRODUCTS
6409 Highview Drive . Fort Wayne, IN .. 46818
Tel: 800.830.0245, Tel: 260.432.7158, Fax: 260.459.0929

800.860.2855

PERSONNEL PROTECTOR END CAP

Product Description:

The Roto Molded, Plastic, Safety End Treatment is designed to provide safety from blast and shrapnel. This unit is placed at the entrance of any opening, where blast mitigation or ballast protection is desired.

The fifteen (15) year UV unit is sand filled, eliminating the typical labor of intensive sand bagging. This unit is easily recovered and repositioned, as threat level or operation requirement dictates.

Test results are available upon request.

Points of Contact:

Mr. J.C. Brown
(260) 432-7158 or (800) 860-2855
(260) 459-0929, fax
E-mail: spirit@soacorp.com

Product Information:

Size: 36" Deep x 121" (W) x 84 1/2" (T)
Weight Empty: 385 lbs
Weight Full: 15,800 lbs
Capacity: 150 cubic feet
Gallon Capacity: N/A

F.O.B. - Origin:

Quantity discounts available on retail sales only.
Terms 2% 10, Net 30 Days Standard.
***Product Only**
Will Accept Government Credit Card

Product Photograph:

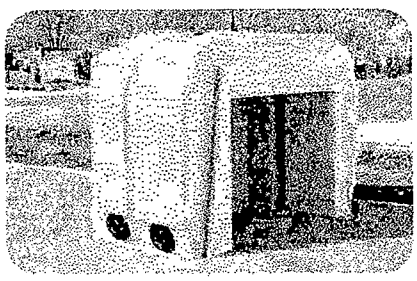

Cost Data:

NSN No	Part No.	Color	Retail/Ea.	Gov./Ea.	GSA No.
-	12543OD	Olive Drab	$906.00	$788.00	-
-	12544DT	Desert Tan	$906.00	$788.00	-

CREATIVE BUILDING PRODUCTS
6409 Highview Drive . Fort Wayne, IN . 46818
Tel: 800.830.0245, Tel: 260.432.7158, Fax: 260.459.0929

800.860.2855

PORTABLE GUARD TOWER

Product Description:

The Portable Guard Tower is sold as a complete unit which includes one Guard Tower, one Conex Box and one pallet (75 coils or 3750 ft) of Concertina wire. The Guard Tower itself is manufactured with four seperate wall units that allow for quick and easy assembly on top of the standard Conex Box. Once placed on the Conex Box the Guard Tower will be approximately 12 feet in the air, giving the guards a greater view of the perimeter or area of threat. Once in position, the walls are filled from the top using sand as ballast. The sand filled walls provide the guards inside with 360 degrees of protection from 9mm, 5.56, and 7.62 threats. 12" dumps are provided for easy removal of the ballast allowing the Guard Tower to be repositioned as needed.

The overhead cover is 3/4" plywood on which lights, sensors, and antannae can be installed if desired. Access to the cover can be reached through a hatch type door that is pre-installed for convenience. The CBP Guard Tower eliminates the time and the mess associated with using sandbags. This product is a recoverable asset that can be broken down and deployed inside the Conex Box.

All parts and tools needed for assembly are included in the kit bag. Stakes are also provided for the Concertina Wire installation. The standard colors for the Portable Guard Tower are Olive Drab or Desert Tan; however, all colors are available upon request.

Points of Contact:

Mr. J.C. Brown
(260) 432-7158 or (800) 860-2855
(260) 459-0929, fax
E-mail: spirit@soacorp.com

Product Information:

Size:	Approx 12' in the air
Additional Sizes:	Base is 48" (H) and Cover is 48" (H)
Total Weight:	4652 lbs approx.
Weight Conex:	2700 lbs
Weight Tower:	1000
Weight Wire:	952 lbs

F.O.B. - Origin:

Quantity discounts available on retail sales only.
Terms 2% 10, Net 30 Days Standard.
***Product Only**
Will Accept Government Credit Card

Product Photograph:



Cost Data:

NSN No.	Part No.	Color	Gov./Ea.
Guard Tower	9672OD-GT	Olive Drab	$3722.72
Guard Tower	9672DT-GT	Desert Tan	$3722.72
Conex Box	9672OD-CB	Olive Drab	$4795.00
Conex Box	9672DT-CB	Desert Tan	$4795.00
Concertine Wire	9672CW	Silver	$2101.60
Complete Unit	9672	OD or DT	$10,618.82

CLEAR SKIES
VPDATE

536124

Hernandez, Israel

From: Estes, John D.
Sent: Friday, September 05, 2003 7:42 PM
To: Hernandez, Israel; Willeford, Emily; Jackson, Barry S.; Westine, Lezlee J.; Bearson, Darren W.; 'dbearson@georgewbush.com'
Cc: Stolpe, Elizabeth A.
Subject: WV Clear Skies Venues

The following is a list of venues that we have been able to identify for the September 16 Clear Skies Event. OPL and CEQ believes that the best legislative location for the President to travel would be the Charleston site at the Kanawha Manufacturing Company. This company will benefit the most by passage of Clear Skies and will more than likely increase jobs when the bill passes.

Note: OPA has identified that the Vice President will be in Charleston on the 15th for a Fundraiser for Congresswoman Capito, and have heard that James Carville and Terry McAuliffe will be in town on the 16th for a Fundraiser for the West Virginia State Democrat Party.

State and local support: IGA is still waiting to hear back from state and local officials and should have something for us early next week. Below the three venues I have listed several elected officials that Congresswoman Capito's office sent over as possible supporters of Clear Skies. OPA would like to double check with IGA before signing off, but it is a good start for us on support.

Vetting: EPA has signed off on the Charleston and Huntington site, but we are still waiting to hear back on the Mineral Wells location. Also scheduling/vetting has not had a chance to vet the locations, but they will check them over the weekend and get back to us.

If you have any questions please call me on my cell phone PRA 6

JD

Charleston, West Virginia

Kanawha Manufacturing Company has been serving the power, coal, and metals industries since 1902. From the '40s through the '60s, Kanawha designed and built coal tipples, or preparation plants where coal is cleaned and sized before it is shipped. Kanawha Mfg. Co. started business in 1902 building mine cars for the coal mines in West Virginia. Early products included boilers for industrial heaters, all kinds of coal handling equipment, and even farm tractors. Since the '60s, Kanawha has expanded into the power generation aftermarket for both products and maintenance services. Kanawha offers a complete line of replacement parts for the fossil power industry. In addition, they can rebuild most wear components.
Kanawha provides maintenance and installation services in power plants. From the coal yard to the stack, they repair, rebuild, or replace just about everything that wears out in a power plant. Kanawha makes pollution control equipment components (scrubbers, etc.). Clients include American Electric Power, Con Edison.

Business

- Non-unionized

- Family owned and operated company in its 4th generation of management
- 187 employees working in two shops

Clear Skies Impact: The Clear Skies mandated emission reductions will require a substantial investment in pollution control equipment by the coal-fired power generators. Kanawha will benefit by maintaining or even increasing production of their pollution control equipment components business. The current Clean Air Act regulatory scheme would likely decrease their business as coal fired plants repower to natural gas or shut down. Kanawha has very small air emissions so they would not be directly affected by the attainment status of their county (Kanawha County will come into attainment with new PM air quality standards in 2010 and 2020 just because of Clear Skies).

Huntington, West Virginia

J.H. Fletcher controls approximately 95% of the domestic roof bolting business for underground coal mines. The company provides similar equipment for copper, gold and other minerals mined underground. Roof bolting machines go into an area after the coal has been extracted to drill into the rock layers comprising the roof of the mine to insert the metal rods and bolts that bind the rock layers together to provide a stable and safe area in which to work. Liability coverage is significant for the company because roof bolting machinery goes into area that is unstable. New companies are reluctant to enter the business because of the liability. J.H. Fletcher has remained in the business even with the significant costs for liability coverage.

Business

- 185 employees grown moderately over last 10 years

  2 machine shops in town are exclusive supplier – 50 additional employees
- $35 -50 million in sales – about 15% is overseas business
- Private company, non-unionized
- Currently manufacturing equipment for salt, limestone and coal mines in the U.S. and coal mines in South Africa and copper mines in Poland.

Committed to Manufacturing in the U.S.

- Hired 14 new people in 2002 to enter 2-3 year in-house training program. When the market declined, kept individuals in the training program. Committed to long-term training and employee development for the company
- Created a new division last year for industrial minerals, which company sees as a significant growth area for them

Clear Skies Impact: The goal of Clear Skies is to get mandatory emission reductions while preserving the use of coal for electricity generation. Fletcher will benefit from Clear Skies by maintaining or increasing their coal mine equipment production due to continued coal use. Fletcher does not have significant air emissions so they would not benefit directly from the attainment status of their county. (Cabell County comes into attainment with new PM air quality standards just because of Clear Skies in 2010 and 2020.)

REV_00266038

Mineral Wells, West Virginia

Benson International located just outside of Parkersburg has been building steel and aluminum dump truck bodies for 40 years. Benson International has product lines that include steel and aluminum dump trailers, all aluminum platform trailers, steel drop deck trailers, 35 to 70 ton lowboy trailers, moving floor and refuse trailers, custom non-pneumatic dry bulk hopper trailers, specialized equipment trailers and logging trailers. Benson International is considered one of the largest custom trailer and body builders in the business.

Business

- Employee owned business
- 80 employees
- Non-unionized

Clear Skies Impact: One-third of Benson's business is related to the coal industry. Benson will benefit from Clear Skies by maintaining or increasing their coal transport equipment production due to continued coal use for electricity generation under Clear Skies. Benson does not have significant air emissions so they would not benefit directly from the attainment status of their county. (Wood County comes into attainment with new PM air quality standards just because of Clear Skies in 2010 and 2020.)

From Congresswoman Capito's Office - Supportive Local Elected Officials in these areas include:

State Senators:
Vic Sprouse
Steve Harrison
Karen Facemyer
Lisa Smith
Donna Boley
Frank Deem

State Delegates:
Mike Hall
Patty Schoen
Ann Calvert
Tim Armstead
Rusty Webb
Ron Walters
Bob Ashley
Mitch Carmichael
Larry Border

County Commissioners:
Putnam -- Jim Caruthers and Steve Andes
Kanawha -- Hoppy Shores
Mason -- Bob Baird
Jackson - Jim Waybright

REV_00266039

Mayors :
Charleston -- Danny Jones
South Charleston -- Richie Robb
St. Albans -- Richard Milam
Hurricane -- Raymond Peak

Charleston city council:
Minority Leader -- Tom Lane

Kanawha County Board of Education:
Board Member -- Becky Jordan

REV_00266040

536124

THE WHITE HOUSE
WASHINGTON

Date: 9/8/03

To: Matt Schlapp & Brad Hester

From: Strategic Initiatives Susan Ralston

____ FYI

✓ Appropriate Action

____ Direct Response

____ Prepare Response For My Signature

____ Per Our Conversation

____ Let's Discuss

____ Per Your Request

____ Please Return

____ Deadline

____ Other

Comments: _____

_____

_____

AmeriCorps Chronology

President Bush strongly supports AmeriCorps. In both his 2003 and 2004 budgets, he called on Congress to expand AmeriCorps by 50 percent to 75,000 members annually. He also requested and received $64 million in the 2003 wartime supplemental for the National Service Trust, the fund that pays the education awards for AmeriCorps members who complete their service. Last April he proposed a Citizen Service Act reauthorization bill to extend and reform AmeriCorps and other programs of the Corporation. Following is a chronology of Presidential actions and key events related to AmeriCorps.

January 2002	President Bush calls on every American to give two years of service over their lifetime and creates USA Freedom Corps to foster a culture of service, responsibility and citizenship and help Americans answer the President's call to service.
February 2002	President submits fiscal 2003 budget request for Corporation for National and Community Service for $1,035 billion, an increase of $297 million (+40%), above enacted levels for fiscal year 2002. This budget proposes to expand AmeriCorps by 50% to enroll 75,000 members per year.
April 2002	President unveils "Principles and Reforms for a Citizen Service Act" to guide the reauthorization of the Corporation and its programs AmeriCorps, Senior Corps, and Learn and Serve America. The President's proposal would extend programs for 5 years and make them more accountable and effective and responsive to local needs. Principles lead to bipartisan legislation being introduced in May, 2002.
June 2002	Citizen Service Act passes House Education and Workforce Act with broad bipartisan support.
July 2002	Sec. Ridge announces grants to involve AmeriCorps members in homeland security efforts in law enforcement, public health, and disaster relief and preparedness.
October 2002	Corporation discovers that there may not be sufficient funding in National Service Trust to support all the positions it approved for 2002-03 program year. Several factors led to this situation, including a surge of enrollments in the wake of 9/11, longstanding lack of clear accounting guidelines for the Trust, and inadequate procedures for reconciling positions with available Trust funding.
November 2002	Corporation implements an enrollment pause until additional funds are appropriated to the Trust.
January 2003	Corporation institutes comprehensive set of new procedures for awarding AmeriCorps grants and monitoring AmeriCorps enrollments to ensure timely reporting and tracking of member enrollments.
January 2003	President urges Congress to pass Citizen Service Act in State of the Union Address.
February 2003	President submits fiscal 2004 budget request to Congress, which again proposes to increase AmeriCorps to 75,000 members per year.

February 2003	Congress passes the omnibus fiscal 2003 appropriations bill with funding for AmeriCorps that is far short of the President's request. While a slight increase over 2002, the bill reduces AmeriCorps Grants by 30%, rescinds $48 million in unspent funds from prior year balances, and places a cap limiting fiscal 2003 enrollments in the National Service Trust to 50,000 members, including the approximately 20,000 positions affected by the enrollment pause.
March 2003	President Bush requests $64 million to provide for prior-year obligations for education awards in the National Service Trust.
March 2003	AmeriCorps lifts enrollment pause, allowing AmeriCorps grantees to enroll members in approximately 20,000 positions previously approved in the 2002 grant cycle and supported by fiscal year 2003 Trust appropriations.
April 2003	GAO releases legal opinion stating that the Corporation must use a far more conservative method of accounting for the Trust than OMB recommended.
April 2003	President signs Public Law 108-11, the Emergency Wartime Supplemental Appropriations Act, which includes language providing up to $64 million to cover obligations previously incurred in National Service Trust.
May 2003	OMB issues legal opinion disagreeing with GAO stating that the Corporation may use estimates of enrollment and earning rates.
July 2003	President Bush signs into law the Strengthen AmeriCorps Program Act, which establishes accounting guidelines for the Trust that will enable AmeriCorps to increase grant levels in all categories in 2003.
July 2003	Corporation issues new set of grants based on Strengthen AmeriCorps Program Act accounting guidelines. The Corporation expects to support the maximum possible number of 50,000 positions, consisting of 30,000 new positions and 20,000 positions approved last year but delayed by the enrollment pause.
July 2003	Corporation announces new leadership, including new Chief Operating Officer James Manning and intent to nominate David Eisner as CEO.
July 2003	President proposes fiscal 2003 supplemental limited to emergency funds to support disaster response, firefighting, and shuttle recovery operations.
July 2003	Senate passes by 71-21 margin a fiscal 2003 supplemental appropriation of $100 million for an additional 20,000 new AmeriCorps positions. House rejects this request. $100 million is still pending in Legislative Branch appropriations conference, but is unlikely to be passed with this funding in it.
July 2003	House subcommittee passes fiscal 2004 VA-HUD bill that for the first time since the mid-1990s includes funding for AmeriCorps. White House SAP expresses disappointment that the bill is $119 million or 20 percent below the President's request ($79 million below the President's request for AmeriCorps) and would only support 55,000 members, not the 75,000 the President requested.
September 2003	Senate appropriations committee passes VA-HUD bill that sets the expectation that AmeriCorps will reach 75,000 members in FY 2004, provides flexibility to reach that goal, but underfunds the President's request for AmeriCorps by $93 million.

DEPARTMENT OF THE ARMY
HEADQUARTERS, 3D INFANTRY DIVISION (MECHANIZED) AND FORT STEWART
954 WILLIAM H. WILSON AVENUE
FORT STEWART, GEORGIA 31314-3418

REPLY TO
ATTENTION OF

AFZP-CG

MEMORANDUM THRU

Commander, V CORPS, Unit 91402 APO, AE 093002
Commander, Combined Forces Land Component Command (CFLLCC) APO, AE 09304
Commander, US Central Command(CENTCOM), 7115 S. Boundary Blvd. McDill Air Force Base, Florida 33621-5101

FOR Commander, PERSCOM, ATTN: TAPC-PDA

SUBJECT: Recommendation for the 3D Infantry Division (Mechanized) (and attached units) for the Presidential Unit Citation

1. I strongly recommend the 3D Infantry Division (Mechanized) (attached units) for the Presidential Unit Citation.

2. The performance of the division in these operations was exemplary and deserves the highest praise and recognition.

3. Proposed Citation:

THE 3D INFANTRY DIVISION (MECHANIZED) DISTINGUISHED ITSELF BY EXCEPTIONALLY MERITORIOUS SERVICE DURING COMBAT OPERATIONS IN IRAQ FROM 20 MARCH 2003 TO 29 JULY 2003. DURING THIS PERIOD THE DIVISION ADVANCED OVER 750 KILOMETERS INTO ENEMY TERRITORY AND DECISIVELY WON EVERY ENGAGEMENT OF EVERY BATTLE, AGAINST MORE THAN FIVE IRAQI DIVISION; SUSTAINED RELATIVELY FEW CASUALTIES AND ACHIEVED ONE OF THE MOST ONE- SIDED VICTORIES IN MILITARY HISTORY. THE DIVISION BOLDLY ADVANCED INTO THE HEART OF BAGHDAD AND ULTIMATELY REMOVED THE BRUTAL IRAQI REGIME FROM POWER: AND RAPIDLY TRANSITIONED TO ENFORCE LAW AND ORDER AND HELP REBUILD A SHATTERED NATION. THE ACTIONS OF THE DIVISION'S SOLDIERS, AND THOSE OF THE UNITS IN SUPPORT OF THEM, DESERVE THE HIGHEST RECOGNITION AND ARE IN KEEPING WITH THE FINEST TRADITIONS OF THE 3D INFATNRY DIVISION (MECHANIZED), "ROCK OF THE MARNE", AND UNITED STATES ARMY.

AFZP- CG
SUBJECT: Recommendation for the 3D Infantry Division (Mechanized) (and attached units) for the Presidential Unit Citation

4. Point of contact for the request is CPT Charles E. Hall, 767-5857.

4 Encls
1. Narrative
2. Casualty List
3. Task Organization
4. Proposed Citation

BUFORD C. BLOUNT
MG, USA
Commanding

REV_00266048

F: 536124

TALKER (GWOT)

- CANNOT LET FUNDING BECOME DRIVER IN PROSECUTION OF WAR EFFORT

- SO FAR FROM AN ARMY VIEW
  - ✓MILPERS PAY
  - ✓OPERATING TEMPO & ENABLERS
  - ❑RESETING THE FORCE FOR 5026 (SWIFTLY DEFEAT THE EFFORT)
  - ❑SOLDIER SUPPORT ITEMS

- NO CHECK MEANS ....AT RISK
  - MUST BE READY TO FIGHT IN KOREA & MUST BE READY FOR ALL SUBSEQUENT ROTATIONS TO SWA (IRAQ & AFGANISTAN)
  - ALL SOLDIERS MUST BE SIMILARILY EQUIPPED WITH BEST STUFF WE HAVE...OWE IT TO THEM & THEIR FAMILIES....OWE IT TO THE NATION

REV_00266049

F: Yes on 12

536124

Yes on 12 Committee

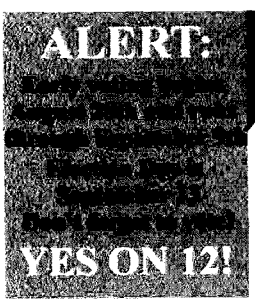



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View the Yes on 12 Television Commercial

President Bush Backs Medical Lawsuit Relief

"We understand a person who has been harmed by a bad doctor deserves his or her day in court. Yet, the system should not reward lawyers who are fishing for rich settlements. Because frivolous lawsuits drive up the cost of health care, they affect the federal budget. Therefore, medical liability reform is a national issue that requires a national solution."

--President George W. Bush
Houston, Texas
June 10, 2003



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Yes on 12 Committee



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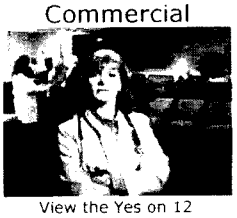

View the Yes on 12 Television Commercial

President Bush Backs Medical Lawsuit Relief



"We understand a person who has been harmed by a bad doctor deserves his or her day in court. Yet, the system should not reward lawyers who are fishing for rich settlements. Because frivolous lawsuits drive up the cost of health care, they affect the federal budget. Therefore, medical liability reform is a national issue that requires a national solution."

--President George W. Bush
Houston, Texas
July 10, 2003

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REV_00266051

536124

THE WHITE HOUSE
WASHINGTON

OFFICE OF THE SENIOR ADVISOR

202-456-2369

202-456-0191 FAX

FACSIMILE TRANSMITTAL SHEET

TO: Sherill Whisenand	FROM: Melissa Cathleen Danforth MCD
COMPANY:	DATE: SEPTEMBER 9, 2003
PRA 6	TOTAL NO. OF PAGES INCLUDING COVER: 3
	SENDER'S PHONE NUMBER: (202) 456-7375
RE: Tour Request - Approved	SENDER'S FAX NUMBER: 202-456-0191

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

Sherill,

The White House tour request has been approved for October 24, 2003 at 10:00am.

Attached are detailed instructions for the day of the tour. Please note the important point of not bringing anything to the White House but a photo ID. We apologize for the inconvenience, but it is essential that this rule is followed.

If you or any of the participants have any questions, please do not hesitate to contact me directly at the phone number above. Thank you again for your help.

Office of the Senior Advisor



Directions for a White House Mansion Tour

- Arrive at the Southeast Visitor's Entrance Gate Located on the Provided Map
    - Report to the Southeast/ Visitor's Entrance gate 15 minutes before 10:00 AM.
    - The guard at the gate will have your name on a list, but you must provide a valid form of photo identification, such a driver's license, for all those over 15 years old.
    - **You may not bring bags or cameras of any kind – please do not arrive with them, as the Secret Service has prohibited any bag or coat check. (This includes handbags/purses and all personal bags; bring only a photo ID)**

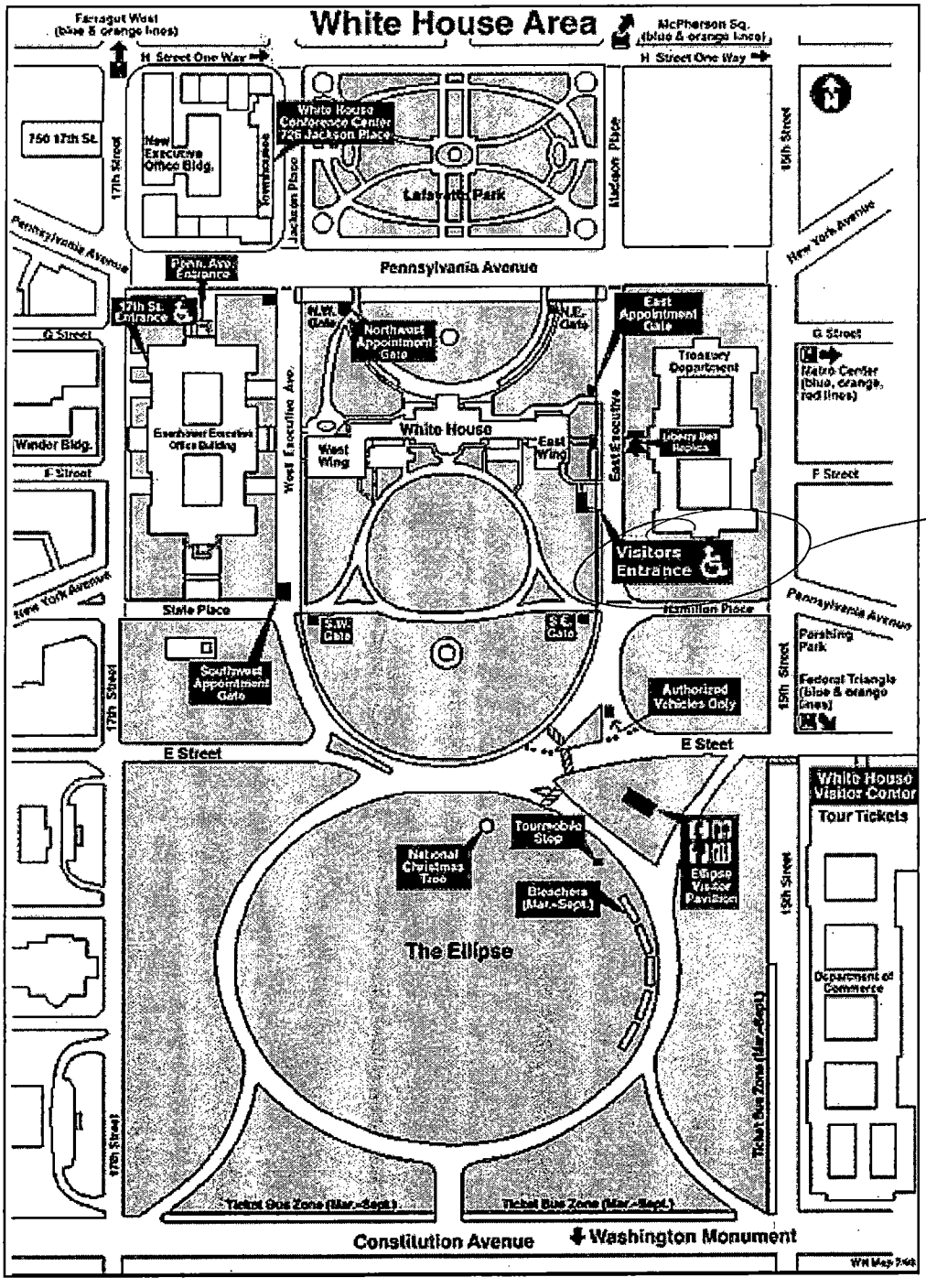

SE Gate

- If any further assistance is needed please contact our office at (202)-456-7375

Staff Tour Request Form
White House Visitors Office
Fax: 6-3623

Today's Date: September 4, 2003

Sponsor Code: SI
Staff Member's Name: Karl Rove
Office: Senior Advisor's Office
Phone/Fax: 6-2369/6-0191

Tour Information
Date(s) Requested: Preference: October 24, 2003
Option B: October 23, 2003

Number of People: Seven (7)

Security information for each guest

Name	DOB	SS#
John Edward Whisenand	PRA 6	
Holly Scharf Whisenand		
Bryn Logan Whisenand		
Ronald H. Short		
Claudia Schalk Short		
Katherine Anne Short		
Sarah Elizabeth Short		

Request is: X confirmed for 10/24/03.
___ not available.

Time: 10:00 a.m.

Response sent on 9/5/03 by KM.

Instructions for Staffers Requesting Tours

1. One staff member may escort up to **6 people** a day, space permitting, Tuesdays through Saturdays at 10:00 a.m. **The staffer should personally know the guests he/she is escorting.**

2. **Staff members must submit requests through their office contact** using the following form via fax to the White House Visitors Office (202-456-2370) no later than 10 days before the requested date of the tour.

3. The Visitors Office will return the fax to you as soon as possible, notifying you of the availability of the tour.

4. Changes to the security forms can be made no less than one week prior to the tour date.

5. The information will then be processed by White House security and clearance will be determined.

6. You will then be responsible for contacting your guests and confirming the tour date and time. Please inform your guests of all the new rules and security procedures.

7. Staffers and their guests should arrive at the south side of East Executive Avenue **OUTSIDE THE SOUTHEAST GATE** at least 15 minutes before their scheduled tour time. Please do not suggest meeting your party inside the gate, for guests will not be allowed on East Executive Avenue without the pass holder.

8. All guests age 15 and up will need to show photo identification with information exactly matching the name previously submitted for clearance. Individuals whose identification does not exactly match the name or data cleared for entry may be denied admittance.

9. **Prohibited items include, but are not limited to, the following:** handbags, book bags, backpacks, purses, food and beverages of any kind, tobacco products, personal grooming items (make up, hair brush or comb, lip or hand lotions, etc.), strollers, any pointed objects (pens, knitting needles, etc.), aerosol containers, cameras, video recorders or any type of recording device, guns, ammunition, fireworks, electric stun guns, mace, martial arts weapons/devices, or knives of any size.

   The U.S. Secret Service reserves the right to prohibit any other personal items. Neither the White House nor the U.S. Secret Service will provide coat or package check facilities.

10. All persons and items entering the White House will be screened through a security process. Individuals may be requested to consent to an interview or additional security procedures before they are admitted to the White House complex.

Records Management, White House Office of (ORM)
Subject Files

FG006-27
(Office of Senior Advisors - Karl Rove)

538065

OA/NARA #: 10745/10803
9/21

Box _____
Folder _____

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2018-0011-P [ ]

Systematic Processing Marker

This is not a textual record. This Systematic Processing Marker indicates that material has been removed during systematic processing by George W. Bush Presidential Library staff.

Stack:	Row:	Sect.:	Shelf:	Pos.:	FRC ID:	Location or Hollinger ID:	NARA Number:	OA Number:
11	4	10	11		9721			

Folder Title:
ORM
FG006-27
538065

Revised 10A
Adopted by Voice Vote 08/13/02

AMERICAN BAR ASSOCIATION

KENTUCKY BAR ASSOCIATION
SECTION OF LITIGATION
STANDING COMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS

REPORT TO THE HOUSE OF DELEGATES

RECOMENDATION

RESOLVED, that the prompt filling of existing judicial vacancies in the federal courts of the United States is essential for the efficient, responsible, and effective administration of justice; and that undue delays in the nomination and confirmation of candidates for vacancies in the federal courts of the United States adversely affects such effective, responsible and timely administration of justice;

FURTHER RESOLVED, that the American Bar Association urges the following:

1. The president of the United States should promptly nominate candidates to fill vacancies in the federal courts of the United States.

2. The Senate Committee on the Judiciary should promptly act on nominees,

3. The Senate of the United States should promptly advise and consent to or reject the nominees.

FURTHER RESOLVED, that the American Bar Association urges its members and state, local and territorial bar associations to encourage the President to make prompt appointments to fill federal judicial vacancies and to contact the appropriate members of the Senate to urge prompt hearings and votes on pending nominations for the federal courts of the United States.

REPORT

Introduction

This report will be short on rhetoric and long on statistics. The number of judicial vacancies in the federal courts was termed "alarming" by the Chief Justice of the United States in his 2001 Year-End Report on the Federal Judiciary.[1] President George W. Bush, a Republican, began making judicial nominations on May 9, 2001. The Senate, controlled since June 2001 (after reorganization) by the Democrats, was responsible for the confirmation process. This process includes control of the setting of hearings at the Senate Judiciary Committee and control of the calendar of consent proceedings in the United States Senate as a whole. As noted by the Chief Justice, "When the Senate adjourned on December 20th [2001], 23 court of appeals nominees and 14 district court nominees were left awaiting action by the Judiciary Committee or the full Senate,"[2]

The Present State of Affairs

Since the beginning of this year, the same delay in holding hearings and acting upon the nominees has continued: By July 19, 2002, President Bush nominated (or

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[1] Hereinafter referred to as "2001 Year-End Report."

[2] Ibid. at p. 3.

REV_00266062

renominated) a total of 113 prospective Article III judges,[3] 59 of whom have been confirmed by the Senate. Here is the complete breakdown on pending nominations as of July 19, 2002:

- Total nominations pending before the Senate:
  - 21 Circuit Court
  - 32 District Court
  - 4 Claims Court
  - 1 International Trade Court.
- Nominations pending before the Senate Judiciary Committee awaiting a hearing:
  - 16 Circuit Court
  - 19 District Court
  - 4 Claims Court
  - 1 International Trade Court.
- Nominations pending before the Senate Judiciary Committee awaiting a vote:
  - 1 Circuit Court
  - 5 District Court
- Nominations scheduled for a hearing:
  - 0 Circuit Court

[3] Also nominated were four nominees for the U.S. Court of Claims and one for the International Trade Court.

REV_00266063

- 0 District Court
- 0 Claims Court

- Nominations pending before the full Senate awaiting a vote:
  - 3 Circuit Court
  - 12 District Court
- Nominations Confirmed by the Senate:
  - 11 Circuit Court
  - 48 District court.[4]

As of July 19, 2002, there were 91 existing Article III federal judicial vacancies. Of these 91 vacancies, 29 are circuit seats and 62 are district seats. These 91 vacancies constitute 10.6 percent of the federal judiciary. Thirty-five of the 91 vacancies are so-called "judicial emergency" vacancies. Twenty-six nominees pending are for positions designated as "judicial emergency" vacancies.[5] Nothing has changed.

Indeed, data recently released by the bipartisan Constitution Project at Georgetown University and Professor Wendy Martinek of Binghampton University, points out that in the first year of President George W. Bush's term in office, successful

---

[4] Figures are taken from the website of the U. S. Department of Justice's Office of Legal Policy. For a review of that site and the information on federal judicial vacancies and confirmations, see www.usdoj.gov/olp/judicialnominations.htm.

[5] The formulation by which a judicial vacancy is determined to be a "judicial emergency" is quite convoluted: In its simplest format any court with more than one authorized judgeship and only one active judge has a "judicial emergency."

REV_00266064

nominees took an average of 112 days from nomination to confirmation. On May 9, 2002, the anniversary of his first judicial nominations, President Bush met with members of the Senate Judiciary Committee to take stock of the situation. Of the 11 circuit court nominees who were named 365 days previously, only 3 had been granted hearings at the Senate Judiciary Committee. Nothing came of the meeting.[6] Those 8 have still not had hearings.[7] By July 19, 2002, President Bush had nominated 32 individuals to serve on circuit courts, but only 11 were confirmed, for a confirmation rate of less than 35 percent. Finally, there are more judicial vacancies today than when President Bush took office.

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6 White House Press Release, May 9, 2002.

7 See footnote 4 above.

REV_00266065

The Damage

The purpose of this Report and Resolution is not to excoriate either Democrats or Republicans; as the Chief Justice has pointed out, in the second term of President Clinton, a Democrat, the Senate, then controlled by Republicans, confirmed only 17 judges in 1996 and 36 in 1997.[8] The fact is that whoever may bear responsibility for delays in the process, it is the federal courts that suffer, and so does the rule of law. As noted recently by Senator Arlen Specter in a published letter in Legal Times, "filling vacancies is the most pressing issue facing our lower courts – due to the correlation between judicial vacancies and delays in processing cases."[9] The Senator goes on to cite examples of hardship arising from the present situation:

- 50% vacancy rate on the 6th Circuit Court of Appeals, resulting in a death penalty appeal left pending for eight years, and a plaintiff in a civil case dying after having waited more than 15 months just to have an oral argument in a job discrimination suit.

- More than a quarter of the seats vacant in the 4th Circuit court of Appeals despite four declared judicial emergencies and one seat vacant for eight years. A municipality in South Carolina is waiting 39 months for clarification of the constitutionality of a municipal ordinance. A maritime Longshoremen's Act claim has been pending for 38 months.[10]

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[8] See Report of the Chief Justice, 1997 Year End Report on the Federal Judiciary at p. 8..

[9] Senator Arlen Specter, "Let's Agree on a Timely Basis," Legal Times, July 8, 2002.

[10] Ibid.

REV_00266066

A real possibility arising from the often lengthy and unpleasant nature of the confirmation process is that successful lawyers in private practice will become reluctant to serve. As the Chief Justice notes, "for lawyers coming directly from private practice, there is both a strong financial disincentive and the possibility of losing clients in the course of the wait for a confirmation vote."[11] We simply cannot lose this component from the reservoir of available and willing candidates for judicial office. In the words of the Chief Justice, "The Senate ought to act with reasonable promptness and to vote each nominee up or down. The Senate is not, of course, obliged to confirm any particular nominee. But it ought to act on each nominee and to do so within a reasonable time."[12] We respectfully agree: Vote them up or down, but don't hang them out to dry.

Prior House of Delegates Action

As noted above, the situation arising from the state of judicial vacancies is not unique to our time, and the House has dealt with it previously: In February 1990, at its Mid-Year Meeting, the House passed Report No. 8F, sponsored by the Virgin Islands Bar Association and the Standing Committee on Judicial Selection, Tenure, and Compensation. The Resolution, inter alia, urged "the President of the United States to expedite the appointment to vacancies existing in the United States judicial system and that the Senate take prompt action in considering confirmation of such nominees."

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[11] 2001 Year-End Report, p. 4.

REV_00266067

In 1998, at the Mid-Year Meeting, the House passed Report No. 8A, sponsored by numerous bar associations and Sections. The Resolution, inter alia, urged, "the President of the United States promptly to advance nominations for current vacancies for federal judicial positions and the Senate of the United States to hear and vote on those nominations in an expeditious manner."

In October of 1997, at a meeting of the Board of Governors attended by Senator Patrick Leahy, now Chairman of the Senate Committee on the Judiciary, the Board approved the following Resolution:

> Resolved, That the Board of Governors of the American Bar Association, which includes members of both political parties, urges the United States Senate promptly to hear and vote on pending nominations for United States District Courts and Courts of Appeal.
>
> Further Resolved, That such action is essential for the effective and efficient administration of justice in the United States.

The present report recognizes the existence of the prior actions by the House and the Board of Governors. We believe, however, the present resolution is required by the emergency situation existent in the federal courts. In addition, the present resolution focuses with greater emphasis on the role of the Senate Committee on the Judiciary as a cause of the blockage in the confirmation process: The notion that that Committee, by the simple expedient of refusing to hold timely hearings may avoid confirmation proceedings

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[12] Id. At p. 3.

REV_00266068

in the full Senate, is simply unacceptable to our notion of an appropriate and constitutional nomination process.

Finally, this resolution is presently timely because Report No. 112, which will be considered by the House at the August 2002 Session, and presented by ABA member C. Boyden Gray, contains unsatisfactory language which can only be overcome by House approval of the present resolution. The most unacceptable portion of the Gray Report is its insistence upon urging that the Senate Committee on the Judiciary clear nominees for a full Senate vote within a specific time period. We believe that urging such a requirement upon a full committee of the Senate by the ABA is, to say the least, presumptuous. Note that Senator Specter, in the protocol he would require of the Senate Committee requests precisely such a time limitation. We believe Senator Specter's proposal is a reasonable one for a United States Senator who is himself a Member of that Committee.

REV_00266069

Records Management, White House Office of (ORM)
Subject Files

FG006-27
(Office of the Senior Advisor - Karl Rove)

538438

OA/NARA #: 107446/10804
9722

Box ____
Folder ____

REV_00266070

2018-0011-P [ ]

Systematic Processing Marker

This is not a textual record. This Systematic Processing Marker indicates that material has been removed during systematic processing by George W. Bush Presidential Library staff.

Stack:	Row:	Sect.:	Shelf:	Pos.:	FRC ID:	Location or Hollinger ID:	NARA Number:	OA Number:
	11	4	6	2	9722			

Folder Title: ORM
FG006-27
538438

538438
FG006-27

Keith Hennessey
10/17/2002 04:51:32 PM

Record Type: Record

To: Karl C. Rove/WHO/EOP@EOP, Ken Mehlman/WHO/EOP@EOP, Kirk Blalock/WHO/EOP@EOP

cc:

Subject: can we do something with this?

Mr. REID. ... I have great respect for the AARP. It is a great organization, but they don't run the Senate or this country. There are many people in the State of Nevada, and all over the country, who badly need this Medicare give-back. **So I am willing to take my chances with AARP** because the Republicans would not let us pass a prescription drug bill, a generic drug bill. **I will take my chances with AARP and go with the Senator from Montana.** Let's pass the Medicare give-back bill to help millions of people in America--rural America and urban America--people who badly need this. I am going to have convalescent centers going broke in Nevada, filing bankruptcy.

Is that what we want? We had a convalescent center in rural Nevada. They had all kinds of problems. They did not know what to do with the people in the center because they were going broke. What do they do with them? It was the only center in town. This legislation would direct money to that situation.

AARP is a great organization, but they can take that letter and carpet floors with it because that is not how we run the Senate. We do what is best for the people of our States, and the best for our States is to do what the Senator from Montana said to do. We tried to pass all kinds of legislation, and we have had the big stall. So do not have anyone lecture me on enough time to do things. I have spent days, weeks, and probably months of my life sitting here doing nothing because they would not let us do anything.

=====

Source: Congressional Record, October 16, 2002, pp. 10538-10539

p. 10538:
http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2002_record&page=S10538&position=all
p. 10539:
http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2002_record&page=S10539&position=all

Robert_C._McNally@opd.eop.gov
10/18/2002 11:25:56 AM

Record Type: Record

To: Robert C. McNally/OPD/EOP@EOP

cc: See the distribution list at the bottom of this message
Subject: Re: Enron Guilty Plea Talkers -- recommended

Please find attached a slightly revised set of talkers and longer list of FERC actions on the help list. This reflects input from FERC. DOE is fine with these.

(See attached file: Enron Guilty Plea Talkers 2.doc)

- Enron Guilty Plea Talkers 2.doc

Message Copied To:

Daniel J. Bartlett/WHO/EOP@EOP
Lawrence A. Fleischer/WHO/EOP@EOP
Claire E. Buchan/WHO/EOP@EOP
James R. Wilkinson/WHO/EOP@EOP
Scott McClellan/WHO/EOP@EOP
Tucker A. Eskew/WHO/EOP@EOP
Mary J. Matalin/OVP/EOP@EOP
Catherine J. Martin/OVP/EOP@EOP
Kenneth A. Lisaius/WHO/EOP@EOP
Joel D. Kaplan/WHO/EOP@EOP
Keith Hennessey/OPD/EOP@EOP
Edward Ingle/WHO/EOP@EOP
Matthew Koch/WHO/EOP@EOP
Karen Y. Knutson/OVP/EOP@EOP
Douglas J. Holtz-Eakin/CEA/EOP@EOP
Marcus Peacock/OMB/EOP@EOP
Cesar Conda/OVP/EOP@EOP
Benjamin A. Powell/WHO/EOP@EOP
Karl C. Rove/WHO/EOP@EOP
Susan B. Ralston/WHO/EOP@EOP
David M. Thomas/WHO/EOP@EOP
Israel Hernandez/WHO/EOP@EOP
Phil Cooney/CEQ/EOP@EOP

Jim Towey 538438
FG006-27

Karl C. Rove
10/18/2002 08:54:00 AM

Record Type: Record

To: Susan B. Ralston/WHO/EOP@EOP

cc:
Subject: 2nd Annual Superintendent's Prayer Breakfast

---------- Forwarded by Karl C. Rove/WHO/EOP on 10/18/2002 08:55 AM ----------

Beth Kennedy Jones <bkjones@aunahil.com>
10/16/2002 04:03:06 PM

Record Type: Record

To: Karl C. Rove/WHO/EOP@EOP

cc:
Subject: 2nd Annual Superintendent's Prayer Breakfast

Dear Mr. Rove,

2nd Annual Superintendent's Prayer Breakfast

I am sending you this invitation at the suggestion of Cathy Fenton.

Beth Kennedy Jones
Aunahil, Inc.
202.256.3132
Fax 301.656.7167

- att1.htm
- Invitation for White House.doc
- Prayer Breakfast Flyer.pdf

Aunahil, Inc.

On Saturday, November 2, 2002, the Interfaith Partnership will host its second annual District of Columbia Public Schools Superintendent's Prayer Breakfast from 8:30am to 10:30am at the Washington Hilton Hotel, 1919 Connecticut Avenue, NW, Washington, DC. The White House is invited to be part of this endeavor.

The Interfaith Partnership is collaboration between the District of Columbia Public Schools and members of the faith community who support the moral and academic development of our children. Frequently the faith community comes together to discuss what can be done to help our children grow and develop both academically and morally so that they can become productive citizens of this city, this country, and this world. Declaring that our children are our future is a great thought, however, taking steps to build a better future for them is what will make the difference. We long to reach out to young people when we see them going in the wrong direction, but often we don't know how or where to start. This Prayer Breakfast is your opportunity to help us take that first step. The proceeds from this Breakfast will go to DCPS programs that help young people reach their fullest potential in every way possible

Your attendance will help us support the young people of our schools who need to know that they are part of a world community that cares.

Please contact Beth Kennedy Jones BKJ@aunahil.com or (202)256-3132

7217 Oakridge Avenue, Chevy Chase, MD 20815
202.256.3132 FAX 301.656.7167
BKJ@aunahil.com

REV_00266094

"Team Work: Making The Dream Work, OUR CHILDREN FIRST!

Interfaith Partnership presents the

2nd Annual Superintendent's Prayer Breakfast

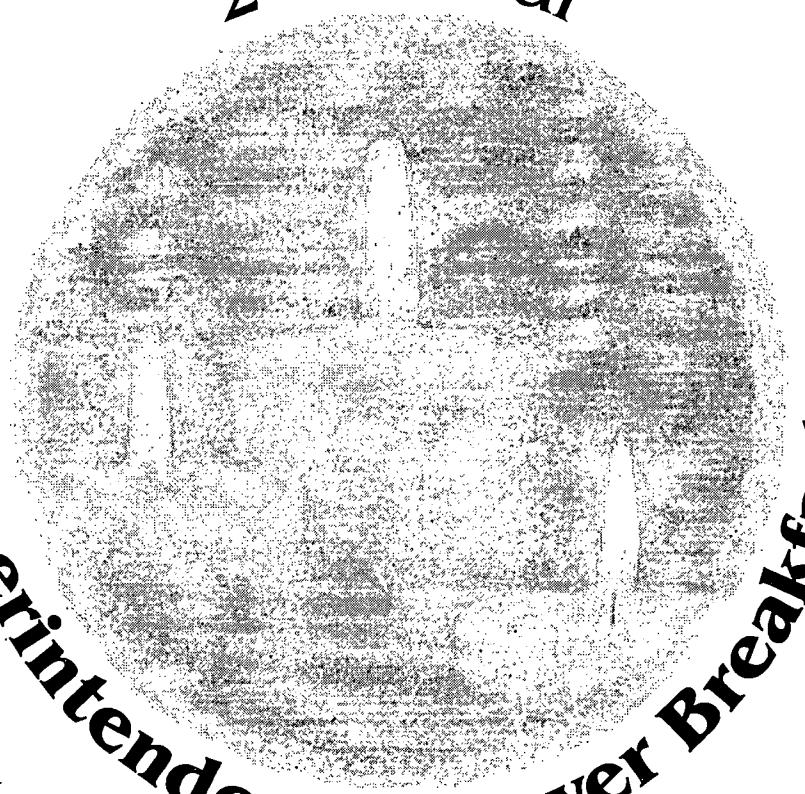

in Support of DC Public Schools

Saturday, November 2, 2002 • 8:30am

Washington Hilton Hotel
1919 Connecticut Avenue, NW • International Ballroom

Donations: $35
Proceeds to benefit the Superintendent's Student Services Fund

Make checks or money orders payable to:
Interfaith Partnership to Support DCPS
PO BOX 63102 • Washington, DC 20029-3102
(Payment must be received by Monday October 21, 2002)

For more information, call the Interfaith Partnership (202)399-5079
DCPS staff call (202) 442-4287

OK
538438
FG006-7

FAX

URGENT

ATTN: Susan

TO: Jim Connaughton, Chairman
Council on Environmental Quality
722 Jackson Place NW, Washington DC 20503
1 202 456 0191

FROM: Amory B. Lovins, CEO
Rocky Mountain Institute
1739 Snowmass Creek Road, Snowmass, CO 81654-9199
1 970 927 3129 (direct)
1 970 927 4178 (fax)
ablovins@rmi.org

DATE: 4 October 2002

RE: Private Visit with Mr. Connaughton and/or Mr. Rove

[3 pages including this one]

Susan:

Please forward this 2-page memo to Mr. Connaughton as soon as possible. On behalf of Mr. Lovins, and with thanks,

Sincerely,

[Mr.] O-E Bustnes
Special Aide to CEO

29 August 2002

Jim Connaughton, Chairman
Council on Environmental Quality
722 Jackson Place NW, Washington DC 20503
fax 202 456-2710

Dear Mr. Connaughton:

I understand that after her conversations with you and with Karl Rove last year—the latter with RMI Directors Ray Anderson and David Orr and our friend Bo Callaway—RMI cofounder L. Hunter Lovins sent you in May a copy of the report of RMI's National Energy Policy Initiative (www.nepinitiative.org). It validated the hypothesis that building energy policy around existing consensus could bypass the most contentious issues and yield a highly integrated and effective package. The NEP Initiative report has so far been endorsed by a remarkably bipartisan group of 33 senior private- and public-sector energy leaders. It will inform and jump-start the work of the Hewlett Foundation's new National Commission on Energy Policy, and is already sparking many constructive industry conversations.

The fractious current round of energy legislative activity will soon reach its conclusion. Then, and increasingly as even more of the original assumptions unravel, the consensus-based, inclusive, and transparent process that the NEP Initiative explored for addressing pressing national security, economic, and environmental needs—simultaneously and without compromise—will invite closer attention. On 26 June, when Bruce Smart, Jack Riggs, and I presented the process and outcome to a not-even-standing-room EESI crowd of 175 Members and staffers, cochaired by Zach Wamp and Mark Udall, the general reaction was, "This makes so darned much sense—so why didn't we just do that?" And the reaction I typically get among senior energy-industry executives is that our little group of policy wildcatters drilled down through thick layers of partisan polarization, and discovered...a gusher of consensus. Not a bad thing to try, and I daresay a good one for you and Mr. Rove to reflect on, because the energy issue remains largely unhandled. Like health care after President Clinton, it will be baaaack; and it will become a worsening political liability if handled again in the same fashion.

This is one of several topics I'd like to visit privately with you and Mr. Rove about. Hunter resigned from RMI in June to lead the Natural Capitalism Academy, which works on our shared goal of making natural capitalism a dominant business model. Yet RMI's work has only accelerated, and so has the need for our favorite kind of discreet, nonpartisan, high-level conversation. Among other things, we could usefully discuss:

- Innovative, win-win, market-based, and economically stimulative policy approaches to such vexed issues as automotive and electrical efficiency.
- How and why "barrier-busting" should move to the top of the energy-policy and environmental agenda.
- Eliminating oil dependence for fun andprofit (our "prospecting" operation recently found a Saudi Arabia under Detroit, and a nega-OPEC worldwide).

REV_00266097

- Two political opportunities to do more with very profitable climate protection and get to brag about it.
- How FreedomCAR risks spending 10–20 years (and embarrassing itself) reinventing a vehicle that was privately developed two years ago, and how refocusing FreedomCAR's goals—as I suggested when leading an industry panel before the Energy Subcommittee of the House Science Committee—could instead reinvigorate and extraordinarily advantage the Big Three in global competition.
- The order-of-magnitude economic gain we've just documented in resilient distributed electricity generating systems (*Small Is Profitable*, RMI, 30 August 2002).
- The nearly $10 billion of annual fuel and logistics savings potential recently found in military platforms by a Defense Science Board panel on which I served, using profitable means that all boost warfighting capability.
- How DOE is undercutting DoD's mission, and how to fix that contradiction.
- A long-term inconsistency in QDR01 strategic doctrine that troubles me and some very senior military experts, and that needs to be addressed rather soon in the evolution of post-9/11 security policy and military transformation.

I'm next in Washington 7–9 October, with a fairly flexible schedule 7–8 October and early the 9th (when my DoD engagements begin at 1000). Might any of those dates be convenient for you, Mr. Rove, or ideally both? I think at least a half-hour would be rewarding and an hour highly desirable. You can check me out with folks like Jim Woolsey, Bud McFarlane, and Bill Reilly. My background in brief:

> Physicist Amory Lovins, 54, cofounded and leads Rocky Mountain Institute—a 20-year-old, 50-person, independent, nonpartisan applied research center (www.rmi.org)—and cofounded and chairs Hypercar, Inc., which transforms how the world designs and builds light vehicles (www.hypercar.com). He has briefed 16 heads of state and worked in over 50 countries, advising major firms and governments worldwide. Published in 28 books and hundreds of papers, his accomplishments in diverse fields have been recognized by the "Alternative Nobel," Onassis, Nissan, Shingo, and Mitchell Prizes, a MacArthur Fellowship, the Happold Medal, eight honorary doctorates, and the World Technology, Heinz, Lindbergh, and "Hero for the Planet" Awards. His work was recently featured in a six-page *Fortune* feature (20 May 2002) and in *Time*. (26 August 2002).

I look forward to the opportunity to expand our exploration of breakthrough policies.

Sincerely,



Amory B. Lovins, CEO

1739 SNOWMASS CREEK ROAD • SNOWMASS, COLORADO 81654-9199, USA
1 970 927 3129 • FAX 1 970 927 4178 • ABLOVINS@RMI.ORG • *WWW.RMI.ORG*
SCHEDULING ASSISTANT: MISSY MORGAN, 1 970 927 7202, MMORGAN@RMI.ORG
SPECIAL AIDE: ODD-EVEN BUSTNES, 1 970 927 3129, OEBUSTNES@RMI.ORG

REV_00266098

538438

FG006-27

Deborah Hart Strober
Gerald Strober
25 East End Avenue
New York, New York 10028

TO: Mr. Karl Rove
FROM: Deborah Hart Strober and Gerald Strober
DATE: October 9, 2002
SUBJECT: Kennedys and Cuban Missile Crisis

Dear Mr. Rove,

Regarding recent comments by Senator Edward Kennedy and others concerning the attitudes of President Kennedy and Attorney General Robbert Kennedy on the use of military force during the Cuban Missile Crisis, we call your attention to the following verbatim quotations from our book, Let Us Begin Anew: An Oral History of the Kennedy Presidency [HarperCollins, 1993]:

Gaylord Nelson, Governor of Wisconsin, 1958-62; U.S. Senator [D. Wis.] 1963-81 Bobby Kennedy was out in Wisconsin when this crisis was happening. We flew from Milwaukee to Green Bay to watch a Packer game. On the way there Bobby said, "What do you think about the Cuban situation?" I said, "As far as the public is concerned, the president is barely keeping up with the crowd. Public opinion is moving out ahead of him. The president should declare a belligerent blockade." Although he has been credited with supporting the blockade, he said, "No, no. It would be the worst thing you could do. The Russians would challenge it. What we really should do is make a strike--a huge strike, and knock 'em right out of business." In any event, that was Bobby's position at the Green Bay game before the president went ahead and put up the blockade. [Page 377]

Dean Rusk, Secretary of State, 1961-69 I met frequently during those thirteen days with Bob McNamara and Robert Kennedy. We built a consensus among the three of us that the quarantine should be the technique used in response to the crisis, realizing that that might be no more than a temporary move, because in the background was the possibility of direct military action. [Page 394]

Richard Bissell, Deputy Director of Plans, Central Intelligence Agency, 1959-62 From the time the hard evidence was in, Kennedy handled himself very well. I don't know how many options he had open to him: with all the hard evidence in, he couldn't simply dust his hands and say he didn't believe it, ot that it didn't really make any difference whether there were missiles there or not. Some of the participants in Washington thought we were close

to nuclear war. [Page 395]

Ray Cline, Deputy Director for Intelligence, CIA, 1962-64 Bobby was not as impressive as Jack was. I think he was really a vindictive fellow. I hate to say that, but I think he was really determined to put Castro out of business. Jack Kennedy would have made up his own mind, and he would have finally made the bitter decision to move against Cuba, because he knew the Russians couldn't move against him. We had plans for maybe seventy cities to be destroyed in the Soviet Union. [Page 396]

D. H. S. G.S.

538438
FG006-07

MAYOR VICTOR ASHE
P.O. BOX 1631
KNOXVILLE, TN 37901

TELEPHONE – 865-215-2040
FAX – 865-215-2978

TO: KARL ROVE

COMPANY:

FROM: MAYOR VICTOR ASHE

DATE: 10/09/02

NUMBER OF PAGES INCLUDING COVER PAGE: 3

MESSAGE:

I THOUGHT YOU WOULD FIND THIS of INTEREST.

VA

538439
Eliu FG006-27

PRA 6

KARL ROVE

Washington, DC
Richmond, VA
Washington, DC
Wednesday, October 9, 2002

3:40 p.m. Depart the White House for Washington, Dulles Airport
Via: Susan's car

4:25 p.m. Arrive Washington, Dulles Airport
FBO: Piedmont Hawthorne
23411 Autopilot Drive
Dulles, VA
Phone: (703) 661-0150
Tail Number: N326HG

4:30 p.m. Depart Washington, DC for Richmond, VA
Charter Flight (50 min flight)
Pilots: Tim Sullivan
Eliu Rivera
Passengers: Karl Rove
Senator George Allen (T)
Dwight Schar
Martha Schar
Susan Ralston
Tom Spahr

5:20 p.m. Arrive Richmond International Airport
FBO: Million Air
Phone: (800) 962-5262
400 Portugee Road
Richmond, VA
Met by: Ken Hutcheson, Political Consultant to Attorney General Kilgore
Contact: (804) 304-1698

5:25 p.m. Depart Airport for The Jefferson Hotel
Via: Ken Hutcheson
Contact: (804) 304-1698

PRA 6

EVENT: REPUBLICAN PARTY OF VIRGINIA'S ADVISORY COUNCIL MEETING
The Jefferson Hotel
101 West Franklin Street
Richmond, VA

5:40 p.m. Arrive at Jefferson Hotel and proceed to Dominion Room for meeting.

5:50 p.m. Attorney General Jerry Kilgore introduces you.

5:55 p.m. You make remarks.

6:10 p.m. Conclude participation in meeting and proceed to Lemaire Restaurant (Valentine Room) for Dinner.

EVENT: REPUBLICAN NATIONAL COMMITTEE DINNER

The Jefferson Hotel
101 West Franklin Street
Richmond, VA

6:15 p.m. Begin participation in Dinner.
***Note: Everyone is seated for dinner at 6:30 p.m.**

7:15 p.m. Attorney General Jerry Kilgore introduces you.

7:20 p.m. You deliver remarks and participate in Question and Answer Session.

7:40 p.m. You conclude remarks and participation in event.

7:45 p.m. Depart Jefferson Hotel en route Richmond International Airport
Via: Ken Hutcheson
Contact: (804) 304-1698

8:05 p.m. Arrive Richmond International Airport
FBO: Million Air
Phone: (800) 962-5262
400 Portugee Road
Richmond, VA
Tail Number: N326HG

8:10 p.m. Depart Richmond, VA en route Washington, DC
Charter Flight (50 min flight)
Pilots: Tim Sullivan
Eliu Rivera
Passengers: Karl Rove
Senator George Allen (T)
Dwight Schar
Martha Schar
Susan Ralston
Tom Spahr

9:00 p.m.	Arrive Washington, Dulles Airport FBO: Piedmont Hawthorne Phone: (703) 661-0150 23411 Autopilot Drive Dulles, VA
9:05 p.m.	Depart Piedmont Hawthorne for your residence Via: Mike Frederick Contact: (703) 919-8288
9:30 p.m.	Arrive at your residence.

KARL ROVE

REMARKS AT REPUBLICAN NATIONAL COMMITTEE DINNER

Wednesday, October 9, 2002
6:15 p.m. – 7:45 p.m.
The Jefferson Hotel
101 West Franklin Street
Richmond, Virginia

I. PURPOSE

To support the Republican National Committee's fundraising efforts on behalf of 2002 Republican candidates.

II. BACKGROUND

There are no competitive races in Virginia this year. This event is expected to raise over $900,000 for the RNC.

III. PARTICIPANTS

Attorney General Jerry Kilgore (R)

Co-Chairs
Don Blakenship, Massey Energy Company
Bill Goodwin, CCA Industries, co-owns the Jefferson Hotel (Not in attendance)
Tom Saunders, SKM Equity (Not in attendance)
Dwight Schar, NVR, Inc.
Nick Taubman, Advanced Auto Parts

25 Invited Guests (See attached list)

Susan Ralston

IV. PRESS PLAN

Closed

V. SEQUENCE OF EVENTS

6:15 p.m. -- You arrive Lemaire Restaurant (Valentine Room) for dinner.
6:30 p.m. -- Everyone is seated for dinner.
Note: You will switch tables between the main course and dessert.
7:15 p.m. -- Attorney General Jerry Kilgore introduces you.
7:20 p.m. -- You deliver remarks and participate in Q and A.
7:45 p.m. -- You conclude remarks and depart for Richmond International Airport.

VI. REMARKS

Provided by Kasey Pipes

VII. ATTACHMENTS

Talking Points
List of Dinner Participants
Virginia Political Briefing

DINNER PARTICIPANTS

Tom Benedetti, Benedetti & Farris
Liz Benedetti, guest of Tom Benedetti
Don Blankenship, Massey Energy Company
Richard Cullen, McGuireWoods, LLP
Abby Farris, Benedetti & Farris
Jerry Kilgore, Attorney General of Virginia
Marty Kilgore, wife of Jerry Kilgore
Alan King, Universal Leaf
Wanda King, Universal Leaf
Aaron Leibowitz, Executive Director, Republican Party of Virginia
Baxter Phillips, Jr., Massey Energy, Co.
Dick Poulson, Smithfield Foods, Inc.
John Rocovich, Moss & Rochovich
Sue Ellen Rocovich, wife of John Rochovich
Dwight Schar, NVR, Inc.
John Sherman, Scott & Stringfellow Investments
Martha Sherman, wife of John Sherman
Tom Spahr, Self-Employed, Computer Software
Nick Taubman, Advanced Auto Parts
Jenny Taubman, wife of Nick Taubman
Gary Thomson, Chairman, Republican Party of Virginia

General Talking Points for Republican National Committee Dinner

Acknowledgements:

- Attorney General Kilgore
- Chairman Gary Thomson
- Event co-chairs: Dwight Schar, Nick Taubman, and Don Blankenship. Also not in attendance, Bill Goodwyn and Tom Saunders were co-chairs.

Memorandum

To: Karl Rove

From Tom Benedetti

Date: October 8, 2002

Re: RNC Dinner in Richmond

VIA FACSIMILE: 202-456-6538

Attached are the attendees for the RNC dinner at the Jefferson Hotel in Richmond. I wanted to give you a quick heads up on the evening.

We have raised over $900k on the event. The success of the event is due to Nick Taubman and Dwight Schar, but especially Nick. We had 5 Co-Chairs each contribute $100,000: Nick, Dwight, Don Blankenship, Bill Goodwin and Tom Saunders in New York. Nick got on the phone and really hustled on this because he believes it is important to the President. Tom Suanders secured two $100,000 contributions as well. Unfortunately, he couldn't make the dinner.

Dwight, Nick and Tom Saunders have also been sending personal and family contributions around the country to the GOP Senate candidates.

Of the guests that will be at the dinner, I know that you have met Nick and Jenny Taubman at Julie Finley's house several months ago, Dwight and Martha Schar (they hosted an event for Norm Coleman you attended), and Dick Poulson of Smithfield at a dinner in the spring at the Metropolitan Club.

Finally, Senator George Allen may attend and fly down with you. But as of 9am this morning, that has not been confirmed.

VIRGINIA POLITICAL BRIEFING

13 ELECTORAL VOTES
2001 – Open Governor
2002 – Senator Warner Up

POLITICAL CLIMATE:

BUDGET SHORTFALL

With this year's projected revenue shortage approaching $2 billion, Governor Mark Warner (D) announced at a September 25 press conference that all State agencies will experience cuts of at least five percent in the December 20 budget. His plan, to be unveiled on October 15, will include "significant layoffs" in the 100,000 member bureaucracy and tuition hikes at State universities.

TRANSPORTATION TAX

A November referendum backed by Governor Warner will give Northern Virginia voters the option to increase their sales tax rate from four-and-a-half percent to five percent to fund road and transit projects over the next 20 years. Proponents, including Senator John Warner (R) and Congressman Tom Davis (R, VA-11), argue the measure will relieve traffic congestion. Opponents of the referendum, a mixed coalition of anti-tax conservatives and environmentalists, are skeptical of the benefits for the region. Supporters have raised nearly $1 million, and opponents have raised less than $200,000. Internal polling shows over 60 percent of Northern Virginia voters support the proposal.

DROUGHT

Despite recent statewide showers, Virginia's rivers and reservoirs remain far below normal levels. The three-year drought has caused erratic harvest yields, and most of the State has implemented mandatory water restrictions, including a ban on lawn watering since August 30.

VANCE WILKINS' RESIGNATION

Vance Wilkins, Virginia's first-ever Republican Speaker of the House, was forced to resign this summer after it was revealed that he paid a 26-year-old woman $100,000 to settle sexual harassment allegations against him. Wilkins denied any wrongdoing but acknowledged paying the money to keep the case out of court. The Republican House caucus selected William Howell (R, Stafford) as new Speaker on July 20. Howell will be sworn in when the General Assembly reconvenes on January 8, 2003.

MATRICARDI INDICTMENT

Virginia Republican Party Executive Director Ed Matricardi was indicted April 9 for secretly listening to and recording two Democrat strategy sessions conducted by telephone in late March. On May 14, State prosecutors dropped the charges in favor

Drafted by: *Coddy Johnson, Office of Political Affairs*
202/456-5390 office
202/309-1361 mobile

REV_00266110

of a joint State-Federal probe. Matricardi resigned from his post April 10 and was hired as executive director of the South Carolina Republican Party in early July.

GOVERNOR MARK WARNER

On April 4 Governor Warner vetoed legislation outlawing partial-birth abortion. Warner said the late term abortion ban "does not contain sufficient protections to safeguard the women of Virginia." The General Assembly returned April 17 for a scheduled one-day session but failed to override the veto.

On the same day, Governor Warner endorsed a bill that rolls back Alexandria's ban on carrying guns in municipal buildings. Analysts said the two decisions were meant to reflect Warner's "middle-of-the-road" ideology.

REDISTRICTING

For the first time since Reconstruction, Republicans controlled Virginia's redistricting process and mapped all Republican members of Congress into safer districts. However, in March, Salem Circuit Court Judge Richard Pattisall ruled the redistricting plan unconstitutional because he said it "diminished the voting strength of African Americans." Governor Warner and Attorney General Kilgore have since been engaged in a partisan battle over the legality of the plan. They have asked the State Supreme Court for an expedited decision in an appeal of Judge Pattisall's ruling, but the Court has yet to make a decision.

SENATE

With no Democrat nominee and no legitimate opposition, Senator Warner is expected to win re-election in November.

HOUSE

Randy Forbes (R, VA-04)
Louise Lucas (D) dropped out of the race on August 24, leaving incumbent Randy Forbes (R) without general election opposition. Lucas was Forbes' opponent in the June 19, 2001 special election to fill deceased Congressman Norman Sisisky's seat.

Drafted by: *Coddy Johnson, Office of Political Affairs*
202/456-5390 office
202/309-1361 mobile

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VIRGINIA POLITICAL BRIEFING

13 ELECTORAL VOTES
2001 – Open Governor
2002 – Senator Warner Up

STATISTICS

2000 General Election Results (Presidential):

	Total Votes	%Won
Bush	1,437,490	52%
Gore	1,217,290	44%
Nader	59,398	2%
Other	27,650	1%

1996 General Election Results (Presidential):

	Total Votes	%Won
Dole	1,137,171	48%
Clinton	1,090,219	46%
Perot	159,795	7%

Virginia has gone to the Republican candidate in every presidential election since 1964.

CONGRESSIONAL DELEGATION - *And Win %'s*

U.S. SENATE:

- Senator John Warner (R), 4th term, re-elected in 1996 with 53%
- Senator George Allen (R), 1st term, elected in 2000 with 52%

U.S. HOUSE: 11 total (3D, 7R, 1I)

- Jo Ann S. Davis (R-01), 1st term, elected with 58%
- Ed Schrock (R-02), 1st term, elected with 52%
- Robert "Bobby" C. Scott (D-03), 5th term, re-elected without contest
- Randy Forbes (R-04), 1st term, elected in a special election on June 19, 2001 with 52%
- Virgil H. Goode, Jr. (I-05), 3rd term, re-elected with 67%
- Bob W. Goodlatte (R-06), 5th term, re-elected without contest
- Eric Cantor (R-07), 1st term, elected with 67%
- James P. Moran (D-08), 6th term, re-elected with 63%
- Rick Boucher (D-09), 10th term, re-elected with 70%
- Frank R. Wolf (R-10), 11th term, re-elected with 84%
- Thomas M. Davis, III (R-11), 4th term, re-elected with 62%

STATE GOVERNMENT

Governor Mark Warner (D), 1st term, elected in 2001 with 52%
Lieutenant Governor Tim Kaine (D), 1st term, elected in 2001 with 50%
Attorney General Jerry Kilgore (R), 1st term, elected in 2001 with 60%*

**The largest winning margin (60% to 40%) in statewide election history.*

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VIRGINIA POLITICAL BRIEFING

13 ELECTORAL VOTES
2001 – Open Governor
2002 – Senator Warner Up

State House:	**100 (64R, 34D, 2I)**
Speaker:	William Howell (R)
Majority Leader:	Walter Stosch (R)
State Senate:	**40 (22R, 18D)**
President:	Lieutenant Governor Tim Kaine (D)
President Pro Tempore:	John H. Chichester (R)

STATE PARTY

Chairman:	Gary Thomson
National Committeeman:	Morton Blackwell
National Committeewoman:	Anne Petera

STATE DEMOGRAPHIC PROFILE

Estimated Population 1998: 7,078,515, up 14.4% since 1990
Race/Ethnicity: 72.3% White, 19.6% African-American, 4.7% Hispanic, 3.7% Asian
Median Household Income: $46,677
College Educated: 30.3%
Median Age: 36 years (11.2% are 65 years and older)
Family Households: 68.5%
Married-Couple Families: 52.8%
(Source: 2000 US Census Bureau)

THE PRESIDENT'S PREVIOUS TRAVEL

Date	Event	City
9/11/02	Pentagon Observance for September 11	Arlington
4/17/02	Remarks at George C. Marshall ROTC Award Seminar	Lexington
3/20/02	America's Fund for Afghan Children	Alexandria
1/10/02	Signing of H.R. 3338	Arlington
10/15/01	Welcoming Ceremony of the Joint Chiefs of Staff	Arlington
10/11/01	DOD Service of Remembrance at the Pentagon	Arlington
10/2/01	Announcement at Reagan Washington National Airport	Arlington
9/26/01	Remarks and Briefing at the CIA	Langley
9/17/01	Briefing and Meeting at the Pentagon	Arlington
9/12/01	Visit to the Pentagon	Arlington
8/1/01	Meeting with Secretary of Defense at the Pentagon	Arlington

Drafted by: *Coddy Johnson, Office of Political Affairs*
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7/9/01	Tour and Meeting at Fair Oaks Hospital	Fairfax
7/3/01	Visit to Inova Fairfax Hospital	Fairfax
6/19/01	Tour and Remarks at the Pentagon	Arlington
6/6/01	National D-Day Memorial	Bedford
5/10/01	Vienna Community Anti-Drug Coalition Dinner	Vienna
4/6/01	2000 Malcolm Baldrige Awards	Alexandria
3/20/01	Visit to CIA Headquarters	McLean
3/4/01	Visit to Newport News Shipbuilding	Newport News
2/13/01	Visit to Naval Air Station	Norfolk
2/6/01	Visit to Tree Top Toys and Books, Inc.	McLean
2/2/01	Republican House and Senate Retreat	Williamsburg

VICE PRESIDENT'S PREVIOUS TRAVEL

Event	Date	Location
FBI SAIC Conference	05/15/02	Rosslyn
Fundraiser for Senator Mark Warner	03/04/02	Tysons Corner
Fundraiser for Randy Forbes	06/04/01	Chesapeake
VA Technology Council Spring Banquet	04/18/01	McLean
Fundraiser for Randy Forbes	04/12/01	Richmond
CPAC Reception and Dinner	02/15/01	Arlington
GOP Retreat	02/02/01	Williamsburg

House of Representatives
Washington, D.C. 20515

MEMORANDUM

9/26

Hard copy of letter
faxed on 9/26-

U.S. House of Representatives

David B. Dettoni
Senior Legislative Assistant

Honorable Frank R. Wolf
Member of Congress
10th District, Virginia

241 Cannon Building
Washington, D.C. 20515
(202) 225-5136
Fax (202) 225-0437

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FRANK R. WOLF
10TH DISTRICT, VIRGINIA

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(800) 945-9653 (IN STATE)

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WINCHESTER, VA 22601
(540) 667-0990
(800) 850-3463 (IN STATE)

www.house.gov/wolf/

Congress of the United States
House of Representatives

September 26, 2002

The Honorable Colin Powell
Secretary of State, Department of State
2201 C St NW Ste 7276
Washington DC 20520

EXEC. OFC. PRESIDENT
WH STRATEGIC INITIATIVES
2002 OCT -9 AM 10: 41

Dear Secretary Powell:

I have received some very disturbing information concerning U.S. policy in southern Sudan outlined in the enclosed letter and a memorandum from two very knowledgeable individuals whom I know to be credible sources. They have been in the region and have met with senior government officials in countries neighboring Sudan. These reliable sources have informed me that the State Department has instructed our ambassadors in the region to intervene with these countries to convince them to cease their aid and support to the SPLM. This situation clearly gives the appearance that the U.S. has sided with the Government of Sudan. The people of south Sudan are the victims and they need America's support.

The Bush Administration and special envoy John Danforth have taken bold action to raise the prospect for peace. I was very pleased to learn about the July 20 Machakos agreement in which the Government of Sudan and the Sudan People's Liberation Movement agreed on the two contentious issues: self determination for the south and the issue of Sharia.

But, as you are well aware, in early September, the Government of Sudan walked out of the Machakos talks, dashing hopes for peace in the Sudan. Since then they have launched a brutal campaign against the people of southern Sudan, including blanket aerial bombardment of civil and civilian targets.

I am horrified by the pictures of devastation coming out of southern Sudan. Innocent civilians are being mercilessly slaughtered and maimed by government fighter planes. I have enclosed two photographs that graphically show the results of the Government of Sudan's recent attacks on innocent civilians. The Government of Sudan has declared a jihad against the people of southern Sudan. The Government of Sudan is reportedly receiving arms and ammunition from Yemen and using its newly purchased Mig 29 fighter planes against civilian targets.

President Omar Bashir of Sudan has ordered his armed forces to devastate the south. Here is what he said recently: "I gave the army a free hand to move out in all directions, to use all of its weapons, with no restraints, no restrictions, whatsoever."

THIS STATIONERY PRINTED ON PAPER MADE OF RECYCLED FIBERS

Although I am encouraged to hear that the Government of Sudan is cooperating in the war against terrorism, I am mindful of the fact that this is the same government and leaders who provided sanctuary to Osama bin Laden's al-Qaeda. While they are claiming to have abandoned their support for international terrorism, their terror campaign against their own people continues unabated. They must be stopped.

Mr. Secretary, our government has always stood with the helpless and the innocent civilians in Sudan. Having U.S. ambassadors place pressure on the SPLM's allies in the region, as the reports I received now indicate, while turning a blind eye to the massive mobilization and armament of the Sudan military, would represent a shift of our support to the Government of Sudan.

I seriously doubt that it is our government's objective to weaken the south in favor of the Government of Sudan. Peace will not come to Sudan if the south is severely weakened. There must be a balance of political and military power to give peace a chance in the Sudan. Our government should not reward the Government of Sudan with a cease-fire before it commits itself to a just and lasting peace in Sudan.

Mr. Secretary, I strongly urge you to instruct our ambassadors in Africa and other pertinent U.S. officials that it is <u>not</u> the policy of the U.S. to pressure the SPLM's neighbors to cease their support of the SPLM and they should immediately and forcefully reinforce this point with the appropriate officials in those countries. Equal pressure needs to be applied to both sides of the conflict in order to return the parties to the peace process so that the suffering people of Sudan can live in peace.

Your leadership on this matter is critical.

Sincerely,

Frank R. Wolf
Member of Congress

FRW:dd

P.S. I have just received reports that the Government of Sudan has put in effect a flight ban over the region of Eastern and Western Equatoria for all Operation Lifeline Sudan relief flights. This flight ban will prevent much needed food and medicine from getting to vast parts of the needy and suffering in Sudan.

Thank You for your help.

September 25, 2002

Dear Congressman Wolf,

Thank you for calling me today. I am writing as you requested and I am writing to you as a private American citizen and in no way do my views represent the views of my employers or associates.

This time in Sudan is unique; unique for a chance, a small chance, at peace. It is a fragile time and one that has come at tremendous cost in terms of lives and suffering. This moment will be fleeting if not approached in a correct, just, fair, and careful manner; equally treating all the parties.

The opposition to the National Islamic Front have little to live for and everything to die for. They want freedom....plain and simple. The war is more than North vs. South, Muslim vs. Christian, Black vs. Arab or who gets the oil. It is about the oppressed against the oppressors.

The parties have come to the negotiating table, not because of the pressure the USA or IGAD brought to bear, but because of the military and political pressure the SPLA has brought to bear on the GOS regime. The SPLM want peace more than anyone because they and their people have suffered the most.

The engagement of the US in the peace talks known as Machakos is vital. America has the most important and influential role of all outside parties to play. We must stay involved; but if that involvement is not fair or realistic to the circumstances of the parties, then indeed, we could see the destruction of the very opportunity for peace that President Bush and his administration has worked hard to achieve.

I have been to Sudan perhaps 100 times in the last five years. I am a humanitarian worker and give assistance to people of all races, religions, and creeds. In this process the leadership of the opposition held areas talk with me about their future, their vision, their fears, their frustration, and their hopes.

The opposition forces can not and will not accept a cease-fire without first having a comprehensive political settlement; a settlement that is just and allows the right of self-determination and participation in governmental processes. The leadership of the SPLA has no choice in this regard. The actual people fighting the war will not lay down their arms without guarantees of a comprehensive political settlement they know will be monitored by the international community.

Even if the SPLM Chairman, John Garang, said he agreed to a cease-fire, his troops would not follow his orders unless they were assured of such a settlement! The US State department is pressuring the SPLA for a cease-fire, but without any political settlement. By all appearances there is not equal pressure on the GOS. During Machakos I, the GOS launched massive ground attacks south of Bentiu, driving off hundreds of thousands of civilians from farm and marsh land. Thousands were killed. During Machkos II, the SPLA took the town of Torit and the GOS walked out of the talks.

The GOS walked out of the talks! Not the SPLM.

Now intense and unrealistic pressure is being placed on the SPLM to enter into a cease-fire. This is happening while the GOS launches massive air attacks on civilians throughout the south of Sudan. Humanitarian sites have been the targets of these attacks and my colleagues have help the injured, gathered the dead and buried them.

Why is the US using its influence, its ambassadors, and its resources to favor a government that it includes on its own sheet of countries who support terrorism?

In regards to the Sudan peace talks, why is the US favoring a government system that is a platform-driver of international terrorism?

Many voices, including mine, are calling for peace. In Sudan a bad peace will be worse than no peace! A bad peace will further marginalize and weaken people like the Nuba, the Dinka, the Nuer and the Fung. A bad peace will weaken and destroy the only thing that has brought the parties to the table to discuss peace...and that is the fighting capacity of the SPLA forces. A bad peace will play into the hands of the National Islamic Front.

There is strong fear in neighboring countries of the export of radical Islam from Sudan. These countries have a justified right to worry. Where was the assassination attempt on the President of Egypt originated? Sudan. Where were Islamic extremists attacks launched into Eritrea from? Sudan. What country has been supporting the Lord's Resistance Army in Uganda? Sudan. What country hosted, perhaps birthed, al'Queda? Sudan.

What has changed about Sudan and their world view that now makes them partners in the war on terror? Has their ideology changed? Has their leadership changed? Have their tactics changed? How much can they cooperate on the war on terror before they are directly implicated in the attacks? The world needs evidence of any changes in the National Islamic Front or its methodologies before trust is bestowed.

Even though the surrounding countries worry about the export of extreme Islam into their own lands they are being pressured by the US Ambassadors to provide no assistance to the opposition forces.

Congressman Wolf, America must stay engaged and pressure the parties back to talk peace. But if that pressure is not exerted in a fair manner and directed to a just end I fear peace will not come.

These are my concerns, my worries and thoughts as you have asked for.

I pray for a just and true peace for all of Sudan.

Ken Isaacs

Duplicate of fax

EXEC. OFC. PRESIDENT
/H STRATEGIC INITIATIVES
2002 OCT -9 AM 10: 46

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FG006-27

TEXAS PARKS & WILDLIFE

COMMISSIONERS

KATHARINE ARMSTRONG
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FORT WORTH

ROBERT L. COOK
EXECUTIVE DIRECTOR

September 27, 2002

Mr. Karl Rove
Senior Advisor to the President
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20502

Dear Karl:

This is a request for you to facilitate a grant through the U.S. Fish and Wildlife Service (the Service) to the Texas Parks and Wildlife Department (TPWD) for the World Birding Center (WBC). A capital contribution of $1.9 million from the Service would help develop facilities, create interpretive features, restore native habitat, and would establish the Service as a full WBC partner. Such a significant contribution to our capital effort will demonstrate just how effective state and federal partnerships can be. We have already secured $11,350,000 or 71 percent of the $16,100,000 needed for capital improvements at the three major resource sites (Mission, Weslaco, and Brownsville). The Parks and Wildlife Foundation of Texas is raising the additional funds to complete this capital phase of the WBC project.

The WBC is destined to become an internationally recognized conservation model, using economic incentives to promote conservation. Ecotourism and birdwatching in the Lower Rio Grande Valley currently generate over $100 million annually. The WBC will include a 120-mile corridor in the Valley and is designed to further wildlife conservation and ecotourism in one of America's most important bird migratory corridors. This area also is, unfortunately, an area where 95 percent of the wildlife habitat has already been lost. Despite this, the diverse sub-tropical landscapes in South Texas support incredible birdlife, making this region the number one destination for birdwatchers in North America.

WBC communities are adjacent or very near to the Service's Lower Rio Grande Valley Santa Ana and Laguna Atascosa National Wildlife Refuges. Federal properties are integrated with WBC site planning at most of our locations. As it opens and grows, the WBC will continue to further ecotourism south into Latin America, emphasizing bird migration and habitat conservation and mirroring the Service's own binational efforts in the border region. The enclosed brochure will give you more background information and a map of the principal WBC sites.

ENJOY THE TEXAS OUTDOORS!

Take a kid hunting or fishing

Visit a state park or historic site

We hope the Service will join us as a major partner in this international conservation model. Please let me know as soon as possible your thoughts on this state and federal cooperation opportunity. We can then discuss additional details, such as the federal role in ongoing development, recognition of National Wildlife Refuges as part of the WBC network, onsite acknowledgement and other mutual benefits.

Sincerely,

Katharine Armstrong
Chairman

KA:GG:ne

4200 SMITH SCHOOL ROAD
AUSTIN, TEXAS 78744-3291
512-389-4800

www.tpwd.state.tx.us

To manage and conserve the natural and cultural resources of Texas and to provide hunting, fishing and outdoor recreation opportunities for the use and enjoyment of present and future generations.

TEXAS PARKS & WILDLIFE

Sept 27

KATHARINE ARMSTRONG
CHAIRMAN

Dear Karl,

Per our discussion.
Any help you can give
me on this would be
very much appreciated.

All the Armstrongs are
so proud of the wonderful
job you are doing for the
Pres & Country.

Love, K

PARKS AND WILDLIFE COMMISSION

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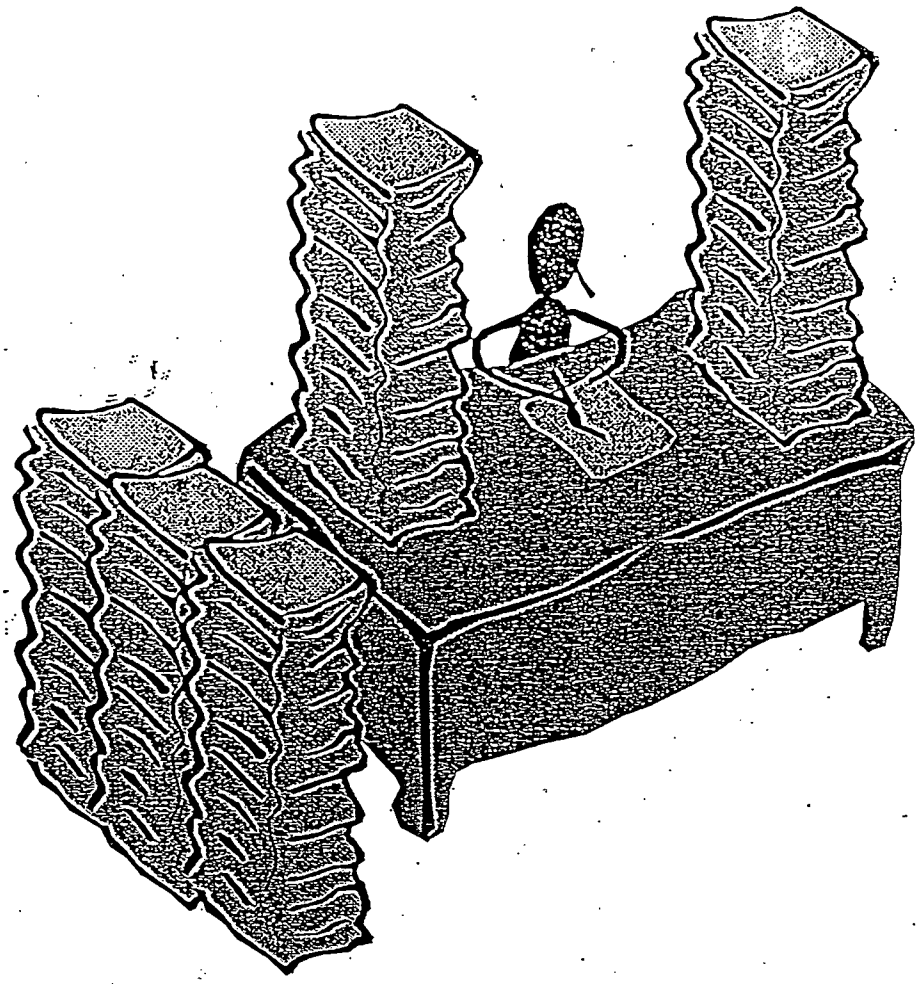

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WORLD BIRDING CENTER

The World Birding Center hosts one of the most spectacular convergences of birds on earth



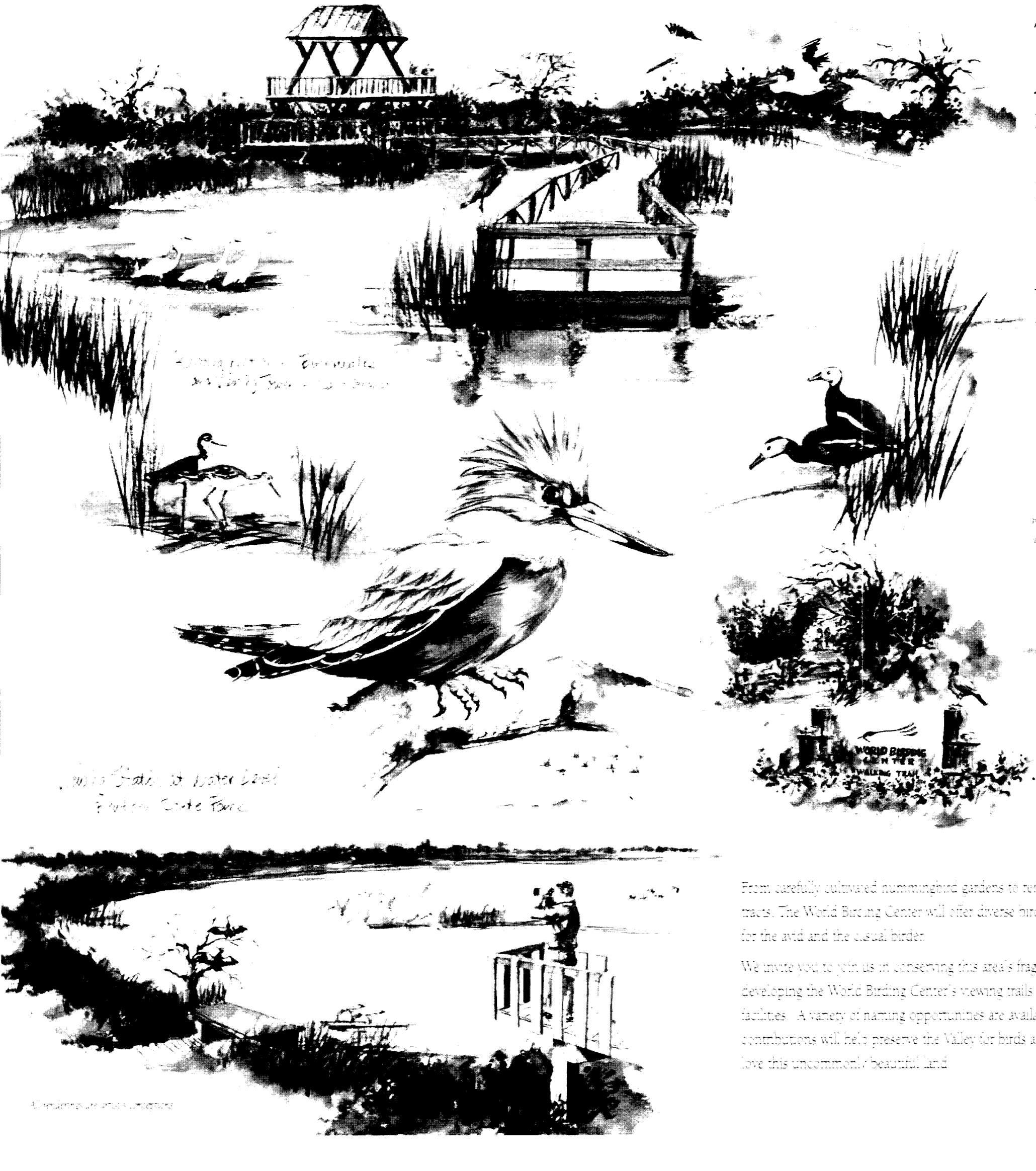

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World Birding

To significantly
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education, comm
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More than 95 pe
Lost Through
from Roma to Sout
the precious habitat

From carefully cultivated hummingbird gardens to remote wilderness tracts, The World Birding Center will offer diverse birding experiences for the avid and the casual birder.

We invite you to join us in conserving this area's fragile habitat and developing the World Birding Center's viewing trails and visitor facilities. A variety of naming opportunities are available. Your contributions will help preserve the Valley for birds and for all who love this uncommonly beautiful land.

REV_00266126

The World Birding Center, A Passion and A Mission

World Birding Center Mission Statement:
To significantly increase appreciation, understanding and active conservation of habitat, birds and other wildlife for current and future generations through education, community involvement, and sustainable nature tourism.

More than 95 percent of the Valley's native habitat already has been lost. Through the World Birding Center Valley communities from Roma to South Padre Island are restoring new areas and preserving the precious habitat that remains.

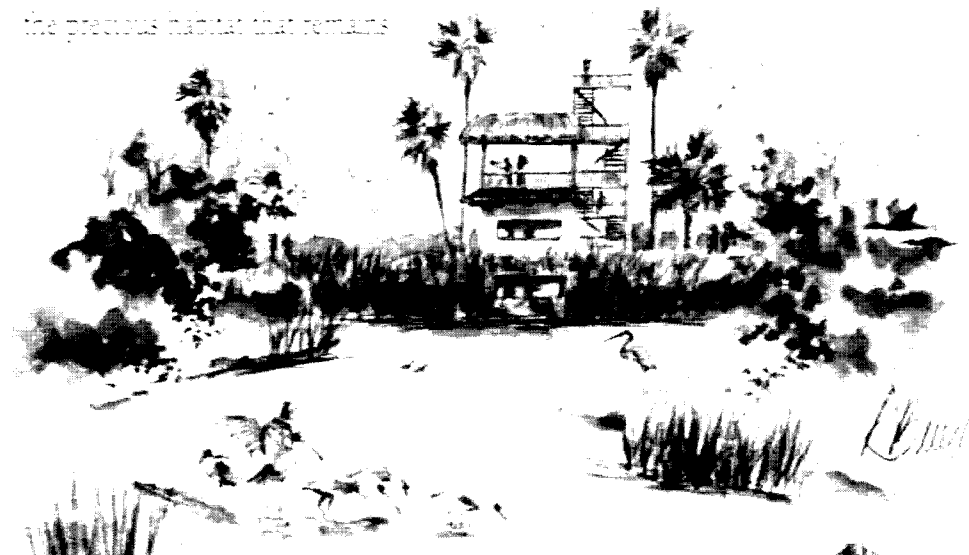

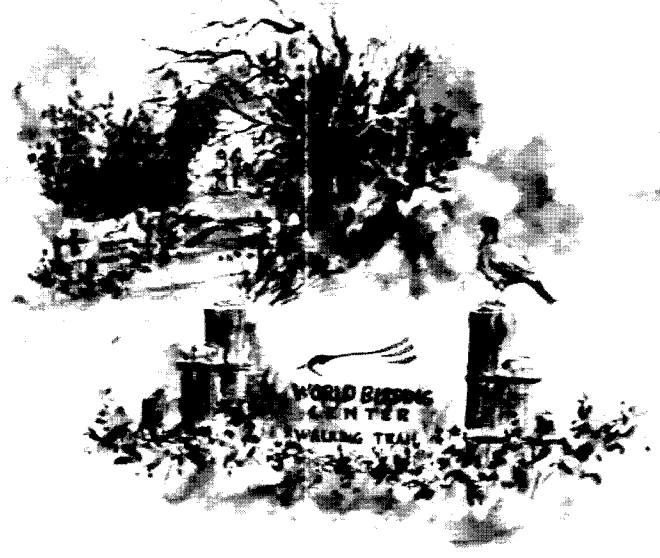

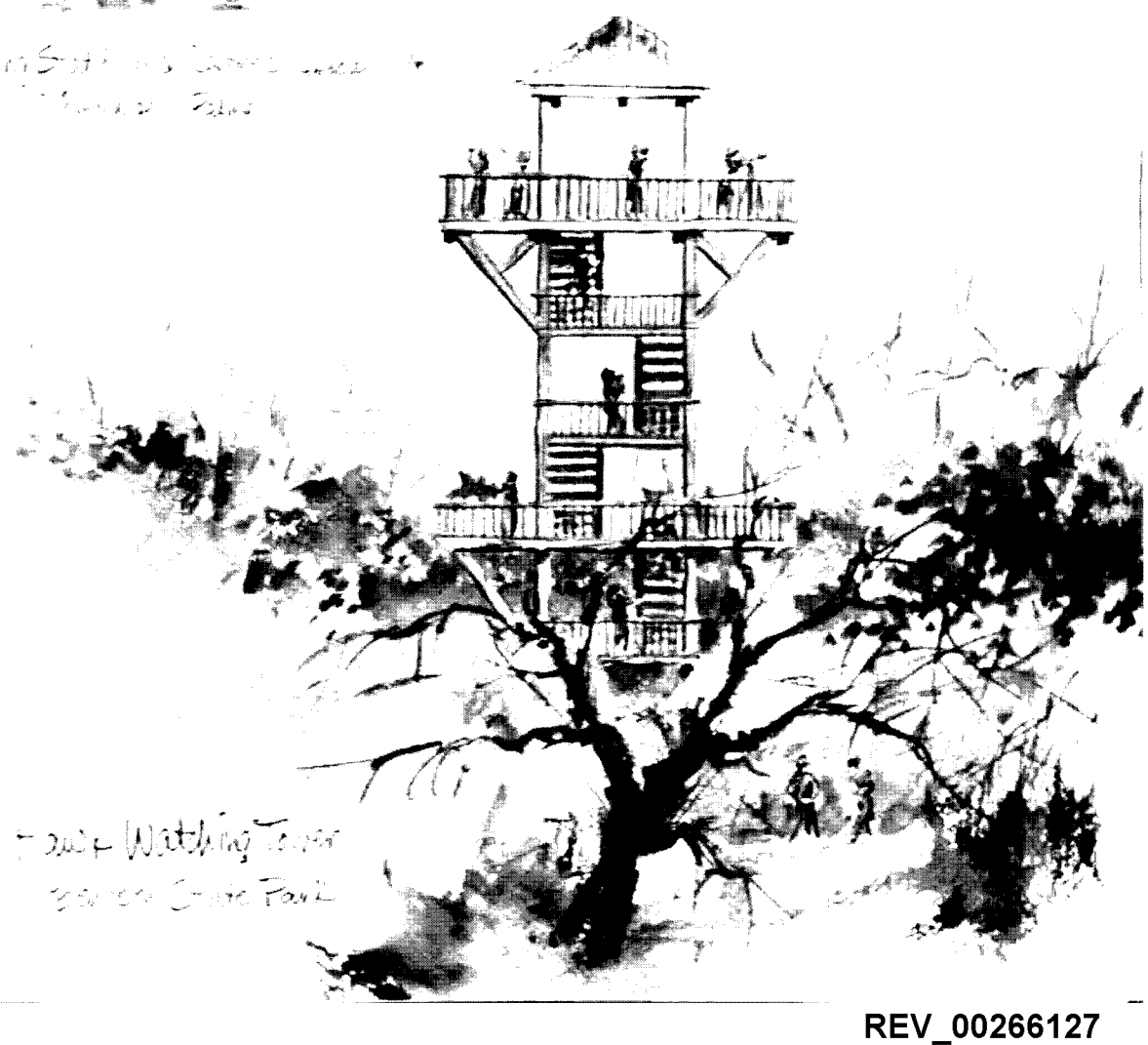

From carefully cultivated hummingbird gardens to remote wilderness tracts, The World Birding Center will offer diverse birding experiences for the avid and the casual birder.

We invite you to join us in conserving this area's fragile habitat and developing the World Birding Center's viewing trails and visitor facilities. A variety of naming opportunities are available. Your contributions will help preserve the Valley for birds and for all who love this uncommonly beautiful land.





WORLD BIRDING
CENTER

538438
F G006-27

49.5 % of households own stock.

Susan - discuss, please.
PUB: ELO. PACKAGE

Characteristics of Members of 25th, 50th, and 75th Percentiles of Net Worth Distribution
(Based on 1998 Survey of Consumer Finances)

	25th Pctile		50th Pctile		75th Pctile		2002 Projected 50th Pctile	
Net worth	$9,280		$70,259		$205,031		$75,334	
Total assets	$27,614		$117,863		$261,597		$132,242	
Financial assets	$4,835	(17.5%)	$22,430	(19.%)	$89,706	(34.3%)	$20,047	(19.%)
Directly held equity	$53	(.2%)	$2,367	(2.%)	$16,390	(6.3%)	$2,362	(2.%)
Bonds	$218	(.8%)	$320	(.3%)	$1,861	(.7%)	$391	(.3%)
Assets in retirement accts	$1,733	(6.3%)	$10,257	(8.7%)	$31,022	(11.9%)	$11,194	(8.7%)
Equity	$835	(3.0%)	$5,986	(5.1%)	$16,786	(6.4%)	$5,974	(5.1%)
Non-equity	$898	(3.3%)	$4,271	(3.6%)	$14,236	(5.4%)	$5,219	(3.6%)
Other financial assets	$2,830	(10.2%)	$9,486	(8.%)	$40,433	(15.5%)	$6,100	(8.%)
Non-financial assets	$22,779	(82.5%)	$95,433	(81.%)	$171,892	(65.7%)	$112,195	(81.%)
Housing value	$14,461	(52.4%)	$73,988	(62.8%)	$123,603	(47.2%)	$96,776	(62.8%)
Other non-financial assets	$8,318	(30.1%)	$21,445	(18.2%)	$48,289	(18.5%)	$15,419	(18.2%)
Total Debt	$18,333		$47,604		$56,566		$56,909	
Housing debt	$12,343	(67.3%)	$35,274	(74.1%)	$45,306	(80.1%)	$48,043	(84.4%)
Other debt	$5,990	(32.7%)	$12,331	(25.9%)	$11,260	(19.9%)	$8,866	(15.6%)
Percent with any pension	44.1%		63.9%		76.3%			
Percent with DB plans	25.6%		33.1%		53.1%			
Percent with IRA or 401(k)	25.1%		45.0%		66.2%			

Note: Percentages in parentheses are shares of total assets and total debt, respectively.

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Characteristics of Members of 25th, 50th, and 75th Percentiles of Retirement Asset Distribution
(Conditional on having positive retirement assets. Based on 1998 Survey of Consumer Finances)

	25th Pctile		50th Pctile		75th Pctile		2002 Projected 50th Pctile	
Net worth	$184,796		$239,177		$426,526		$223,671	
Total assets	$236,813		$295,297		$505,683		$293,363	
Financial assets	$70,145	(17.5%)	$107,777	(19.%)	$185,277	(34.3%)	$97,885	(19.%)
Directly held equity	$8,953	(.2%)	$26,726	(2.%)	$56,249	(6.3%)	$26,672	(2.%)
Bonds	$3,924	(.8%)	$6,971	(.3%)	$6,664	(.7%)	$8,518	(.3%)
Assets in retirement accts	$6,958	(6.3%)	$24,281	(8.7%)	$75,266	(11.9%)	$26,889	(8.7%)
Equity	$3,424	(3.0%)	$12,424	(5.1%)	$40,755	(6.4%)	$12,399	(5.1%)
Non-equity	$3,534	(3.3%)	$11,857	(3.6%)	$34,510	(5.4%)	$14,490	(3.6%)
Other financial assets	$50,310	(10.2%)	$49,800	(8.%)	$47,098	(15.5%)	$35,806	(8.%)
Non-financial assets	$166,668	(82.5%)	$187,519	(81.%)	$320,406	(65.7%)	$195,477	(81.%)
Housing value	$84,126	(52.4%)	$102,973	(62.8%)	$135,523	(47.2%)	$134,689	(62.8%)
Other non-financial assets	$82,542	(30.1%)	$84,546	(18.2%)	$184,883	(18.5%)	$60,789	(18.2%)
Total Debt	$52,017		$56,120		$79,157		$69,692	
Housing debt	$38,944	(74.9%)	$45,633	(81.3%)	$59,134	(74.7%)	$62,152	(89.2%)
Other debt	$13,073	(25.1%)	$10,487	(18.7%)	$20,023	(25.3%)	$7,540	(10.8%)
Percent with DB plans	37.2%		52.6%		50.6%			
Percent with IRA or 401(k)	86.3%		94.2%		93.0%			

Note: Percentages in parentheses are shares of total assets and total debt, respectively.

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Equity Ownership in America

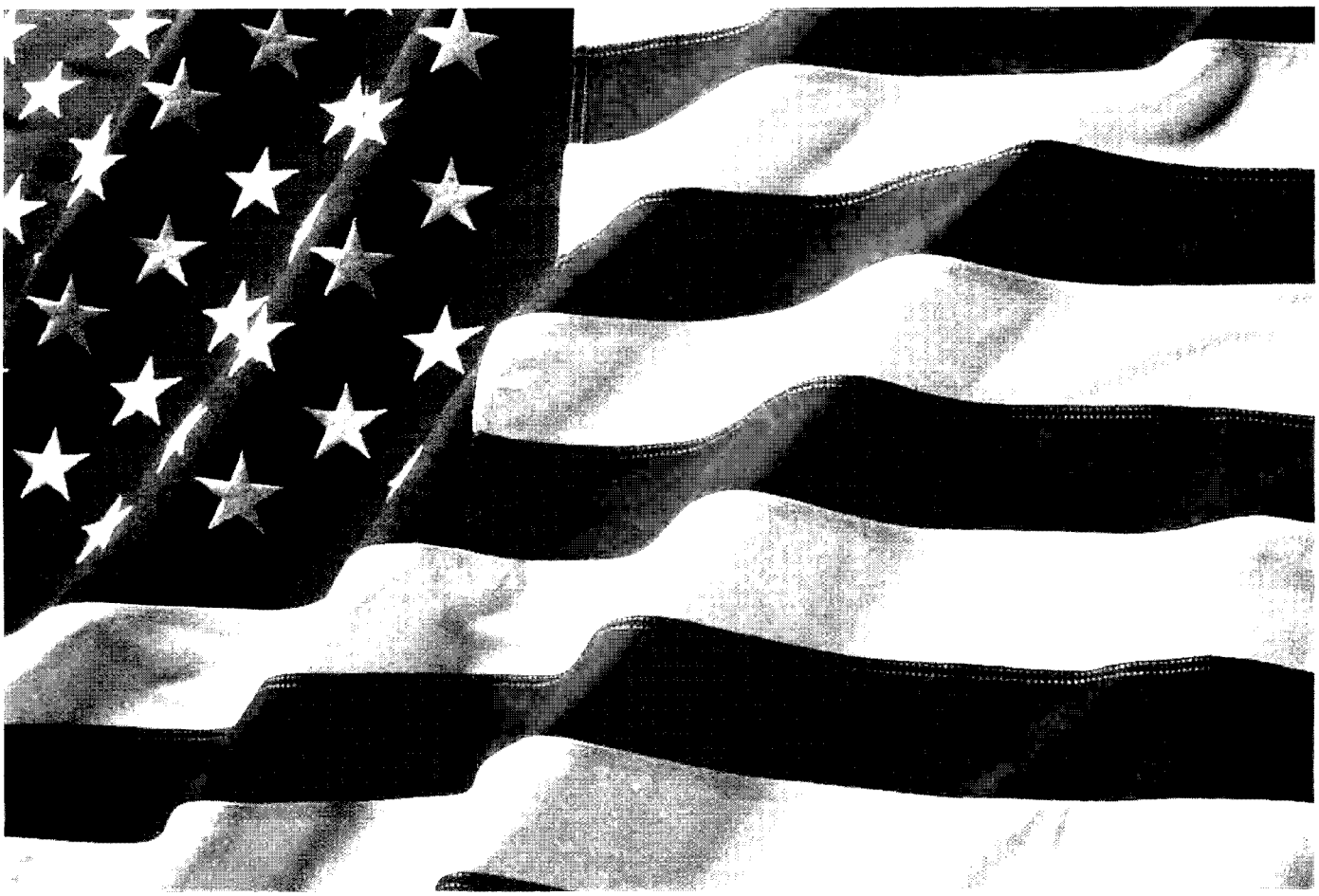

Investment Company Institute
and the
Securities Industry Association

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FIGURE 76. *continued*

	Equity Investors	Type of Equity Owned: Individual Stock	Type of Equity Owned: Stock Mutual Fund
Household Defined Benefit or Defined Contribution Retirement Plan Coverage[2,3]			
Defined benefit retirement plan	38	41	38
Defined contribution retirement plan	70	68	71
401(k) plan	57	56	58
403(b) plan	12	10	13
State, local, or federal government retirement plan	18	16	19
Any of the above	79	78	80
Household Ownership of State-Sponsored College Savings Plans			
Yes	5	6	6
No	95	94	94
Number of respondents	2,148	1,109	1,910
Financial Goals[2,3]			
Retirement	87	84	88
Inheritance	34	37	33
Emergency	33	35	32
Minimizing taxes	31	31	32
Education	29	30	29
Current income	18	21	17
Purchase of a home or other large item	14	15	13
Primary Financial Goal			
Retirement	65	60	67
Education	10	11	9
Current income	6	8	6
Inheritance	6	7	6
Emergency	5	6	4
Purchase of home or other large item	3	4	3
Minimizing taxes	3	2	3
Number of respondents	2,110	1,093	1,878
Financial-Related Uses of the Internet in 2001[2,3]			
Check stock prices	46	60	46
Read online financial publications	38	49	38
Access brokerage account for information	35	43	35
Access bank account	35	38	35
Collect information on retirement planning or personal financial planning	34	42	34
Send email to professional financial adviser or broker	15	20	16
Seek specific recommendations on how to invest money	15	20	15

[1] *Excludes primary residence but includes assets in employer-sponsored retirement plans.*

[2] *Multiple responses included.*

[3] *Number of respondents varies.*

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FIGURE 76

Financial Characteristics of All Equity Investors, Individual Stock Shareholders, and Stock Mutual Fund Shareholders, 2002

(percent)

		Type of Equity Owned	
	Equity Investors	Individual Stock	Stock Mutual Fund
Household Financial Assets[1]			
Less than $5,000	3	2	3
$5,000 to $9,999	5	4	5
$10,000 to $24,999	11	7	11
$25,000 to $49,999	14	12	14
$50,000 to $74,999	8	5	8
$75,000 to $99,999	8	6	8
$100,000 to $149,999	10	8	10
$150,000 to $199,999	6	8	6
$200,000 to $499,999	19	22	19
$500,000 to $749,999	6	9	6
$750,000 to $999,999	3	4	3
$1,000,000 or more	8	13	8
Mean	$463,400	$668,200	$466,800
Median	$100,000	$180,000	$100,000
Number of respondents	1,132	580	1,015
Household Ownership of Non-Equity Investments[2,3]			
Bank deposit accounts	86	86	85
Bond investments	36	38	37
Individual bonds (excluding U.S. savings bonds)	17	21	17
Bond mutual funds	26	26	27
Hybrid mutual funds	52	53	56
Money market mutual funds	35	41	37
Fixed or variable annuities	23	23	24
Variable annuities	17	17	18
Fixed annuities	11	11	11
Investment real estate	24	29	24
Household Ownership of IRAs[2,3]			
Traditional or Roth IRA	53	59	55
Traditional IRA	44	52	46
Roth IRA	21	24	23
SIMPLE IRA, SEP-IRA, or SAR-SEP IRA	15	15	16
Any of the above	57	62	59

REV_00266133

FIGURE 82

Equity Ownership Characteristics by Household Financial Assets

	Household Financial Assets			
	Less than $25,000	$25,000 to $99,999	$100,000 to $499,999	$500,000 or More
Median				
Household financial assets in equities	$6,000	$25,000	$100,000	$497,200
Number of equities owned	3	4	6	11
Percent of Equity-Owning Households				
Own:				
Individual stock (net)[1]	33	38	53	73
Inside employer-sponsored retirement plans	10	15	20	21
Outside employer-sponsored retirement plans	25	31	44	67
Stock mutual funds (net)[1]	89	88	92	90
Inside employer-sponsored retirement plans	68	76	72	58
Outside employer-sponsored retirement plans	38	39	60	71
Conducted equity transaction(s) during 2001	20	33	44	60
Year of first equity purchase:				
Before 1990	12	27	55	78
1990 to 1995	20	33	25	12
1996 to 1998	25	27	12	9
1999 or later	43	13	8	1
Source of first equity purchase:				
Inside employer-sponsored retirement plan	63	60	49	30
Outside employer-sponsored retirement plan	31	33	41	64
Both inside and outside employer-sponsored retirement plan in same year	6	7	10	6
Type of equity first purchased:				
Individual stock only	17	19	21	31
Stock mutual funds only	74	72	67	51
Both individual stock and stock mutual funds	9	9	12	18
Willing to take:				
Substantial risk for substantial gain	11	10	8	10
Above-average risk for above-average gain	25	29	27	29
Average risk for average gain	45	47	51	50
Below-average risk for below-average gain	11	7	9	8
Unwilling to take any risk	8	7	5	3
Primary financial goal:				
Retirement	63	72	68	64
Education	12	9	10	8
Other	25	19	22	28
Agree:[1]				
I am not concerned about short-term fluctuations in my investments	77	77	80	80
I tend to rely on advice from a professional financial adviser when making investment decisions	54	54	57	56

[1]Multiple responses included.

Note: Number of respondents varies. See pp. 2–3 for transaction definitions.

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FIGURE 91

Characteristics of Individual Stock Shareholders by Household Financial Assets

	Household Financial Assets			
	Less than $25,000	$25,000 to $99,999	$100,000 to $499,999	$500,000 or More
Median				
Age[1]	36 years	39 years	46 years	55 years
Household income	$45,000	$63,800	$75,100	$125,000
Household financial assets[2]	$10,000	$48,000	$212,600	$1,000,000
Percent of Individual Stock-Owning Households				
Married or living with a partner[1]	67	60	71	81
College or postgraduate degree[1]	40	50	59	77
Completed graduate school[1]	15	14	24	43
Employed[1]	88	91	79	67
Retired from lifetime occupation[1]	7	9	18	43
Non-equity investments held:[3]				
Savings accounts, money market deposit accounts, or certificates of deposit	80	84	82	88
Bond investments (net)[3]	10	19	40	51
Individual bonds (excluding U.S. savings bonds)	8	8	19	33
Bond mutual funds	6	13	29	36
Fixed or variable annuities	9	9	23	33
Hybrid mutual funds	32	47	57	65
Money market mutual funds	21	28	39	52
Investment real estate	8	15	31	49
Participate in or covered by defined benefit or defined contribution retirement plan (net)[3]	71	86	85	77
Defined benefit plan	27	41	48	47
Defined contribution plan (net)[3]	64	80	78	63
401(k) plan	55	67	66	49
403(b) plan	5	11	10	13
State, local, or federal government plan	13	14	21	16
Have IRA (net)[3]	31	58	64	78
Traditional IRA	22	37	55	72
Roth IRA	18	27	24	24
SIMPLE IRA, SEP-IRA, SAR-SEP IRA	9	12	19	15
Used Internet in 2001 to:[3]				
Check stock prices	72	63	66	68
Send email to a professional financial adviser or broker	18	16	22	31
Seek specific investment recommendations	19	22	22	27
Access a brokerage account to get information	49	44	49	52
Ethnic background:[3]				
Caucasian	95	92	94	94
African-American	4	5	3	1
Asian	2	1	2	2
Hispanic	4	2	5	3

[1] Refers to the household's responding financial decisionmaker for investments.

[2] Includes assets in employer-sponsored retirement plans but excludes value of primary residence.

[3] Multiple responses included.

Note: Number of respondents varies.

REV_00266135

FIGURE 92

Individual Stock Ownership Characteristics by Household Financial Assets

	Household Financial Assets			
	Less than $25,000	$25,000 to $99,999	$100,000 to $499,999	$500,000 or More
Median				
Household financial assets in individual stocks	$3,800	$13,000	$35,000	$200,000
Number of individual stocks owned	2	2	3	8
Percent of Individual Stock-Owning Households				
Own:				
Individual stock (net)[1]	100	100	100	100
Inside employer-sponsored retirement plans	32	40	38	29
Outside employer-sponsored retirement plans	78	83	85	93
Stock mutual funds (net)[1]	65	69	85	85
Inside employer-sponsored retirement plans	36	59	69	55
Outside employer-sponsored retirement plans	46	38	62	72
Conducted individual stock transaction(s) during 2001	24	45	44	62
Year of first individual stock purchase:				
Before 1990	18	22	41	70
1990 to 1995	11	22	24	19
1996 to 1998	31	31	19	6
1999 or later	40	25	16	5
Source of first individual stock purchase:				
Inside employer-sponsored retirement plan	30	32	30	17
Outside employer-sponsored retirement plan	70	60	63	81
Both inside and outside employer-sponsored retirement plan in same year	0	8	7	2
Type of equity first purchased:				
Individual stock only	54	47	40	44
Stock mutual funds only	16	30	38	31
Both individual stock and stock mutual funds	30	23	22	25
Willing to take:				
Substantial risk for substantial gain	14	9	9	11
Above-average risk for above-average gain	29	31	29	31
Average risk for average gain	45	49	49	49
Below-average risk for below-average gain	9	6	9	5
Unwilling to take any risk	3	5	4	4
Primary financial goal:				
Retirement	48	70	65	64
Education	10	11	12	10
Other	42	19	23	26
Agree:[1]				
I am not concerned about short-term fluctuations in my investments	75	80	78	81
I tend to rely on advice from a professional financial adviser when making investment decisions	45	41	49	52

[1] *Multiple responses included.*

Note: Number of respondents varies. See pp. 2–3 for transaction definitions.

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October 17, 2002

Rope a Dope or Knockout

John R. Averyt

Iraq is "off the table." Democrats want to discuss the economy. While President Bush was on vacation this summer, the Democrats demanded a debate on Iraq. They kept up their drumbeat until the President came off the ropes.

The Bush administration responded with a full court press on Iraq. Under patriotic pressure, Minority Leader Richard Gephardt and Majority Leader Senator Tom Daschle signed the Resolution of Force against Iraq. Now they want to discuss the economy? As the old saying goes, be careful for what you wish . You might get it.

Election rhetoric tends to overheat, so what is the current state of the economy? Is it really as bad as Democrats say? Do they exercise political poetic license? Their fellow travelers claim this the worst economy since Herbert Hoover. Visions of bread lines dance in Democrat heads. Are they merely visions or have they some basis in reality?

There is general agreement that the economy is growing. September's 5.6% unemployment represents the second monthly decline. It peaked at 6.0% in April of 2002. A level of 7.0% unhorsed the President's father in 1992. Joblessness reached its nadir at 4.0% during 2000, the final year of the Clinton Bubble.

Unemployment from the Carter years peaked at 9.0% in 1982, making 5.6% seem downright reasonable. Assuming, that is, one is still employed. To the unemployed, this is a depression. In a time of relative prosperity, it must seem worse than Hoover's.

On October 15, 2002, the Dow Industrial Average rose 378.28 points, or 4.8 percent, to close at 8,255.68. Strong earnings from Bank of America and Citigroup led the market. Microsoft, General Motors, Cisco, and Intel posted solid gains. In four trading days the Dow is up 13.3 %, over a thousand points. The S&P 500 is up 13.4%. While both remain negative for the year, things certainly look better today than Wednesday, October 9, 2002. The Dow was then at a five year low.

No one can measure the anger of the unemployed. They have not yet mounted an assault upon the

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Capitol steps. Nor is there any indication they have turned against Republicans. This is something Democrats aim to change.

The Associated Press reported that Representative Richard Gephardt had denounced President Bush for "abdicating" economic leadership. The Minority Leader proposed a 200 billion-dollar tax cut and spending program for economic stimulus. Tax cut from Richard Gephardt? Is someone coming to his senses?

Mr. Gephardt went on to say that "the last thing you do in a recession is raise taxes." Aside from the inaccuracy of the recession statement, the economy is growing, he sounded like Dick Armey. $200 billion seems like a lot of money. One cannot cavil when stimulating a $10 trillion economy. The President should see Mr. Gephardt's $200 billion and raise him $500 billion. Time to come off the ropes.

Rope a dope is the boxing tactic used by Mohammed Ali to defeat George Foreman. He laid on the ropes and absorbed punches until Foreman was exhausted. Then Ali put the big man on the canvas.

As Mr. Gephardt observed, one cannot ask for bi-partisanship on Iraq and not on the economy. Even a broken watch is correct twice a day.

The President's economic advisors should meet with Democrat and Republican leaders. Let them craft proposals and discuss alternatives. The President could give a speech to the nation calling for bi-partisan cooperation. He should outline his master plan for the economy. The Democrats are eager to debate. GOP Chairman Marc Racicot says that the Republicans have already proposed all the items in Mr. Gephardt's bill. Let the games begin.

Things are not as bad as they could be and not as good as they should be. They are not as bad as the Democrats would have us think. There is no recession. Growth is slow. Unemployment is moderate, if one is still employed. Responsibility can be assigned to a Democrat Senate stone wall. They refuse to pass growth-stimulating legislation. Homeland Security, Terrorism Insurance, Energy Independence, all would add thousands of jobs to our economy. The President should tell Mr. Daschle, "tear down that wall."

Mr. Gephardt's proposal doesn't sound so bad. The President who signed the bloated farm bill and the unconstitutional Campaign Finance Reform can consider a few billion in tax rebates. Christmas is coming. Why not play Santa Claus? It's much more attractive than Ebenezer Scrooge.

A recent survey found 40% of Americans wanted to hear their candidates talk about the economy. 11% mentioned terrorism; 4% Iraq. The Republicans can master this issue. Mr. Bush spent the last part of the summer on the ropes. He won a famous victory. Time to put them on the canvas, Mr. President. Those who have lost their livelihoods depend on you. Christmas is coming.

###

John R. Averyt

http://www.opinioneditorials.com/guestcontributors/averyt_20021017.html 10/17/2002

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I wanted to thank all of you for the great memories I will take with me when I leave the White House today for the last time. I am moving back to Texas to be closer to my family and friends. Time did not allow me to say personal farewells to everyone, so I hope you accept this as my expression of thanks for all you have done to make working here so special. I enjoyed working with each of you and hope to keep in touch once I am gone. Take care.

Lorraine Nisbet

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OTHER COMMENTS

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ECONOMIC DEVELOPMENT ADMINISTRATION
Assistant Secretary

2 October 02

Karl,

While attending the Churchill Center's recent annual conference, the Chairman asked that I pass on a copy of Supreme Command w/ his compliments to the President. The chapters on Lincoln + Churchill are especially noteworthy.

Keep up the great work and feel free to use me wherever I can help in the next few weeks.

Best regards.

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Founded in 1968 to encourage study of the life and thought of Winston Spencer Churchill; to foster research about his speeches, writings and deeds; to advance knowledge of his example as a statesman; and, by programs of teaching and publishing, to impart that learning to men, women and young people around the world.

Dear Mr President.

Having heard your views on the Great Man many times, and knowing of the bust in your office, David Sampson and I thought you would enjoy the enclosed book.

I also enclose two copies of our journal, Finest Hour—the current issue, and the 9/11 one. If you should wish to receive them regularly you have only to let David know, though I cannot imagine how limited your time is.

Our mission for 20 years has never changed: to foster leadership, statesmanship, vision and boldness among democratic and freedom loving peoples worldwide, through the thoughts, words, works and deeds of Winston Churchill. We are glad to know you share our sentiments.

All success attend your hand in the months ahead.

Respectfully

Richard M. Langworth

The President
The White House
Washington

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SUPREME COMMAND

★ ★ ★

SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME



★ ★ ★

"Cohen argues . . . that great victories are more often achieved precisely when national leaders involve themselves in the pursuit of policy. This is a great read, and more importantly, it carries a significant message."
—PAUL KENNEDY, author of *The Rise and Fall of the Great Powers*

ELIOT A. COHEN

REV_00266148



October 9, 2002

The President
The White House
Washington, DC 20502-0184

Dear Mr. President:

On behalf of the family of Cesar E. Chavez and the Cesar E. Chavez Foundation, I write to invite you to deliver the keynote address at the Foundation's **Third Annual Educating the Heart Dinner on Friday evening, April 4, 2003, in Los Angeles**.

The Educating the Heart Dinner is the Chavez Foundation and family's official celebration of Cesar Chavez Day, now an official holiday in five states: California, Colorado, Arizona, Texas, and New Mexico. In these states and throughout the country, Cesar Chavez Day is a "day on," not a day off—a chance for people to celebrate Cesar's life by participating in his legacy of self-improvement through serving others. In California alone, over 500,000 students took part in service-learning activities around Cesar Chavez Day 2002 that directly benefited over one million California residents.

Our 2002 Dinner was one of the largest events in Los Angeles, attended by over 1,400 of Southern California's business, labor, community, and political leaders. This year's Cesar Chavez Day is of particular significance, as we prepare to mark the tenth anniversary of Cesar's passing; the Dinner promises to be one of California's most important events.

Speakers at past Educating the Heart events have included Governor Gray Davis, Cardinal Roger Mahony, actors Martin Sheen and Edward James Olmos, and Yolanda King, eldest daughter of Dr. Martin Luther King, Jr. This year, as the United States celebrates Cesar's place among our pantheon of national heroes by publishing a commemorative postage stamp in his honor, it would be particularly fitting for you to address our gathering. We would be honored if you were able to join us.

The Cesar E. Chavez Foundation, a 501(c)(3) non-profit charity, was established in 1993 by Cesar's family and friends to preserve, promote, and apply the legacy and universal values of civil rights and farm labor leader Cesar Chavez through contemporary programming based on his timeless vision for a better and more just world. Proceeds from the Dinner enable the Foundation to pursue its mission through programs such as the Cesar E. Chavez Citizenship Project, the Cesar E. Chavez Oral History Project, and scholarships for needy students.

We sincerely hope that you will be able to participate in the Educating the Heart Dinner on April 4, 2003.

Very truly yours,

Andrés F. Irlando
Executive Director

CESAR E. CHAVEZ FOUNDATION
634 SOUTH SPRING STREET SUITE 727 LOS ANGELES, CA 90014
PHONE: 213 362 0267 FAX: 213 362 0265
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THE AMERICAN JEWISH COMMITTEE
PROPOSED TALKING POINTS ON U.S. POLICY TOWARD IRAQ

~~CONFIDENTIAL~~

The American Jewish Committee does not intend to issue a written statement on policy toward Iraq. However, if members are asked the organization's views by members of Congress or other officials, or by fellow civic leaders, the following talking points may guide a response:

- The American Jewish Committee supports the Administration's assessment of the danger posed by the regime of Saddam Hussein – and the Administration's conclusion, affirmed in bipartisan resolutions before Congress, that absent strict, swift and certain Iraqi compliance with its disarmament agreements and with repeated UN Security Council resolutions, force may be required to confront the Iraqi threat. If the U.S. decides to go to war against Iraq, AJC will give its total support to our country's effort.

- The regime of Saddam Hussein, a supporter and instrument of terror, poses a grave threat to America and American interests – and to regional and world stability.

  - Iraq possesses biological and chemical warfare materials and has shown its willingness to use them; Saddam has used chemical warfare against Iran and against Kurdish villagers in his own country. For decades, Iraq has been trying to develop nuclear weapons – and, with UN inspectors banished since 1998, it appears close to succeeding. Over the years AJC has commissioned and disseminated research papers on the Iraqi weapons programs, assessing the grave threat they pose to the region and to the world.

  - The Iraqi regime continues to violate Security Council mandates, and its own commitments, to disarm. It evaded and deceived UN inspectors seeking to enforce these commitments, and ultimately forced their exit. It continues its quest to acquire weapons of mass destruction.

  - Saddam Hussein has proven himself to be vicious and maniacal, and the world cannot rely on his self-restraint or self-preservation to keep him from using non-conventional weapons.

- The Iraqi threat is likely to grow more ominous unless checked decisively – that is, unless the regime, a necessary target of the war against global terrorism, is effectively disarmed – at the earliest feasible date. U.S. leadership is essential in meeting this challenge.

- AJC's consultations with 60 foreign governments in the opening weeks of the current UN General Assembly session found wide agreement on Iraq's threat to peace and stability; we also heard praise for the President's decision to seek Security Council support for decisive action.

- AJC commends the Administration for seeking to work through the UN Security Council for effective inspections and appropriate military measures that would assure the elimination of Iraq's WMD capability, and for seeking congressional authority to take military action against Iraq if necessary.

- AJC recognizes the strategic, political and humanitarian challenges that will face Iraq and the international community in the aftermath of military action – and at the dawn of Iraqi freedom from the despotic rule of Saddam Hussein. U.S. leadership in meeting these challenges will be essential.

538438

FG006-27

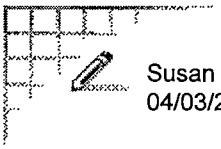

Susan B. Ralston
04/03/2002 05:14:39 PM

Record Type: Record

To: Kirk Blalock/WHO/EOP@EOP

cc:
Subject: American Chemistry Council

Per our conversation, call Fred Webber re: 9/17/02 invitation to Karl to have dinner w/ ACC Executive Committee at Ritz Carlton at 7 PM.

PRA 6

FREDERICK L. WEBBER
PRESIDENT AND CEO

American Chemistry Council *Good Chemistry Makes It Possible*

March 11, 2002

The Honorable Karl Rove
Senior Advisor to the President
The White House
1600 Pennsylvania Ave., NW
Washington, DC 20500

Dear Karl,

The American Chemistry Council Executive Committee, made up of 15 CEOs of the world's leading chemical companies, will be meeting in Washington on September 17, 2002. We would be pleased if you could join us at dinner from 7:00 to 9:00 PM at the Ritz Carlton Pentagon City and speak to the group on the administration's accomplishments and priorities.

I will follow up with your office, or you can have a member of your staff contact me directly or Ed Murphy of the American Chemistry Council Federal Relations Department at 703-741-5936 concerning your participation. I know our Executive Committee will find your comments extremely valuable.

Again, thank you for considering this request.

Sincerely,

I'm looking forward to seeing you on Wednesday evening at the St. Regis. All the best!

THE GRIZZLE COMPANY
Suite 400
1400 Sixteenth Street, N.W.
Washington, D.C. 20036
Tel 202/234-2101
Fax 202/234-1614
e-mail: grizzleco@aol.com

* * * * * FAX * * * * *

TO: Susan Ralston

FAX No.: 456-0191

FROM: Charlie Grizzle

DATE: April 3, 2002 (5:01PM)

TOTAL PAGES FAXED: 3 (including cover)

MESSAGE:

THANKS!

THE GRIZZLE COMPANY

Tel: 202 234 2101 Fax: 202 234 1614

April 2, 2002

Mr. Karl C. Rove
Senior Advisor to the President
The White House
Washington, D.C. 20500

Dear Karl:

You will recall that I spoke with you about this potential dinner with the Executive Committee of the American Chemistry Council at our recent old gang dinner. Dave D'Antoni, with Ashland, Inc., one of our clients is the current chair of the Executive Committee.

I know you have many demands on your time, but I believe this would be a very worthwhile engagement.

Thank you for your consideration.

Best regards,

Charlie

Charles L. Grizzle
Chairman

Attachment

Suite 400 1400 Sixteenth Street, N.W. Washington, D.C. 20036 E-mail: GrizzleCo@aol.com

538438
F0006-27

ITINERARY
New York City
October 16, 2002

Marc Racicot, Karl Rove, Adam Goldman

8:00 – 9:05	**US Air Shuttle #2662 National to La Guardia**
Transportation	Carey Limo at Baggage claim (will remain all day) 212-599-1122 confirmation: 02688047
10:00 – 10:40	**Paul Gigot, WSJ** 200 Liberty Street, World Financial Center, 11th Floor 212-416-4236
11:00 – 11:30	**Roger Ailes, CEO of Fox News Channel** 1211 Avenue of the Americas, Second Floor Contact is Bridget: 212-301-8220
12:00 – 12:30	**Hon. John Whitehead, Chairman, Lower Manhattan Redevelopment Corp.** 21 Club, Main Private Dining Room 21 West 52nd Street Contact is Mindy Gollop: 212-582-7200 Mark Miller: 202-309-1528
12:30 – 2:30	**Louis Perlmutter Fundraiser Luncheon** 21 Club, Club Room
2:45 – 3:15	**Jack Rosen, President, American Jewish Congress** 21 Club, Club Room
Transportation	Carey – please note separate car for Rove/Goldman 212-599-1122 confirmation: 02688015
Rove/Goldman **4:30 – 5:44**	**Delta Shuttle #1761 La Guardia to National**
Racicot **TBD**	**To Atlantic City**

539438
FG006-27

KARL ROVE

REMARKS AT LEWIS PERLMUTTER LUNCHEON
12:30 p.m. – 2:00 p.m.
21 Club
New York, New York

Israel Policy Forum

The Israel Policy Forum (IPF) was founded in 1993 "with a singular purpose: to support active and sustained American efforts aimed at resolving the conflict between Israel and its Arab neighbors." The IPF "has been the only independent, mainstream Jewish organization that consistently mobilizes prominent American Jews to deliver a solid message of support for an active American diplomatic role in the Mideast."

The Forum states in their mission statement that they are non-partisan. They are generally supportive of President Bush promoting peace in the Middle East, and their recent activities have "worked hard on encouraging support for the President's vision of a peaceful Middle East." In a letter to the President this July they thanked the President for his efforts stating, "Thank you for your commitment set forth in your June 24, 2002, address to actively lead toward the goal of reaching a final status agreement between Israel and the Palestinians within three years. We pledge to support our country's effort to do so."

The Forum's main focus is on peace. They are critical of all sides who utilize force as a sword or a shield. Consequently, the tone of the Forum has become less supportive of the President in his effort to gain support for an attack on Iraq. In an October 11th article titled *"Like Father, Like Son?,"* the Forum advises that it would be "best if the Bush administration puts its weight behind diplomatic efforts to resume negotiations and achieve an end to Israeli-Palestinian violence, in advance of any action against Saddam Hussein if possible." The Forum makes its case that war on Iraq should be done with care and advises that "it is the responsibility of the United States to ensure that the Iraq situation does not make the Middle East even more of a tinder box."

Lunch Group

This luncheon is with business leaders of the American Jewish community. This group is made up mostly of people involved in finance but also includes textiles and manufacturing sectors. On whole, the group leans Democrat. While most of the attendees are from the Northeast (mainly New York), there is one attendee from California and one from Ohio.

Note: Since 1998, the luncheon attendees have collectively donated $1.125 million to Democrat groups and candidates and $332,500 to Republican groups and candidates.

Invited Guests

Gary Heiman (Ohio)
CEO, Standard Textile
Industry: Textiles

William Kaye (New York)
Managing Partner, MBK Partners
Industry: Finance – Investment Management

Marvin Lender (Connecticut)
Vice Chairman, M & M Investments, LLC
Industry: Finance - Investment

Jerry Levin (New York)
Chairman and CEO, Sunbeam
Industry: Manufacturing

Peter May (New York)
President and COO, Triarc Companies Inc.
Industry: Metals and Packaging

Joseph Neubauer (Pennsylvania)
Chairman and CEO, Aramark
Industry: Managed Services

Norman Pattiz (California)
Founder and Chairman, Westwood One
Industry: Radio

Stephen Peck (New York)
Partner, Torrey Associates, LLC
Industry: Finance - Investment

Louis Perlmutter (New York)
Limited Managing Director, Lazard Freres & Co. LLC
Industry: Finance – Investment Banking

Michael Sonnenfeldt (New York)
Founder and Owner, MUUS & Co.
Industry: Finance - Investment

538938
FE001-77

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

In order to consider whether the Government may accept from an outside source payment of your travel, subsistence and related expenses under the GSA travel rule or 5 C.F.R. 2635.204(f), you must complete the information below. You must submit this form and related documentation and receive approval PRIOR to commencement of travel. Failure to receive PRIOR approval may result in you having to pay the travel expenses yourself. The outside source need not be a 501(c)(3) organization, but if it is, please state so on this form and include the IRS determination letter.

Please include a copy of the letter of invitation.

CONTACT PERSON: Susan Ralston

PHONE NUMBER: 6-2369

DATE OF REQUEST: 10/8/02

Your Name and Position:
Adam Goldman, Associate Director of Public Liaison

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
RNC political meetings in NYC

Dates of Travel: Wed, 10/16/02 **Destination(s):** NYC

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):
~~Republican National Committee~~

Contact at Organization Making the Payment: Marc Racicot

Address of Organization: ~~310 First Street, SE~~
Washington, DC 20003

Phone: PRA 6

Expense:	Amount:	Method:*
Transportation (specify): Airfare	$236.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify):		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)

*Payment may be made either in-kind or by check made payable to the U.S. Treasury; you may not directly receive payment by either cash or a check made out to you.

This form and any accompanying memorandum of approval must be attached to your travel authorization. You MUST complete a travel voucher listing all expenses (regardless of payment method) following the trip.

Please send this form to the Counsel's Office (Room 128, EEOB) at least three (3) days before commencement of travel

TO BE COMPLETED BY COUNSEL'S OFFICE ☐ Approved ☐ Disapproved Pursuant to ☐ 31 U.S.C. 1353 ☐ 5 CFR 2635.[illegible]

Counsel's Signature Date

15 Oct 02

(REV. 7/96)

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

In order to consider whether the Government may accept from an outside source payment of your travel, subsistence and related expenses under the GSA travel rule or 5 C.F.R. 2635.204(f), you must complete the information below. You must submit this form and related documentation and receive approval PRIOR to commencement of travel. Failure to receive PRIOR approval may result in you having to pay the travel expenses yourself. The outside source need not be a 501(c)(3) organization, but if it is, please state so on this form and include the IRS determination letter.

CONTACT PERSON: Susan Ralston

PHONE NUMBER: 6-2369

DATE OF REQUEST: 10/8/02

Please include a copy of the letter of invitation.

Your Name and Position:
Karl C. Rove, Senior Advisor to the President

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
RNC political meetings in NYC

Dates of Travel: Wed, 10/16/02 **Destination(s):** NYC

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):
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Meals:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify):		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)

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Please send this form to the Counsel's Office (Room 128, EEOB) at least three ~~(3)~~ days before commencement of travel

TO BE COMPLETED BY COUNSEL'S OFFICE ☐ Approved ☐ Disapproved Pursuant to: ☐ 41 CFR 304-1.2 ☐ 5 CFR 2635.204(f)

Counsel's Signature Date

15 Oct 02

(REV. 7/98)

TRAVEL AUTHORIZATION

WHITE HOUSE OFFICE

DATE OF REQUEST: 10/8/02

Please Print

TRAVEL AUTHORIZATION NUMBER: _____

Last Name	First Name		
Rove	Karl		
Extension: 6-2369	**Room:** WW-2	**Title:** Senior Advisor	**Office:** OSI
Contact Person: *please print* Susan Ralston			**Extension:** 6-2369

ATTACHMENTS:

☐ Invitation/Documentation Regarding Event ☒ Travel Expenses From Outside Sources Form

PURPOSE OF TRAVEL *(include event dates and host information, if applicable):*

RNC political meetings in NYC

DEPARTURE:			RETURN:		
Date:	**Time:**	**Mode:**	**Date:**	**Time:**	**Mode:**
Wed, 10/16	9:00 AM	US Air	Wed, 10/16	5:00 PM	US Air

ITINERARY *(List all cities including those through which flights are routed):*

Origin: Washington National Airport, DC

Destination: LaGuardia, New York

Return to: Washington National Airport, DC

FUNDING SOURCE:

☐ Official ☒ Political ☐ Mixed ☐ 501 (c)(3) ☐ Other: _____

NOTE: *For travel funded by political, 501(c)(3) or other sources, an approved "Travel Expenses From Outside Source" form must be attached.*

SPECIAL EXPENSES

Hotel:		**Per Diem:**		**Privately Owned Vehicle:**	
Air Fare:	$236.00	**Taxi:**		**Standard Vehicle Rental:**	
Train Fare:		**Mini-Van Rental:**		**TOTAL ESTIMATED EXPENSES:**	$236.00

APPROVING SIGNATURES:

Office Head:	**Chief of Staff or Designee:**
White House Management:	**Political Travel:**

(REV. 1/02)

ORIGINAL (WH MANAGEMENT COPY)

REV_00266163

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

In order to consider whether the Government may accept from an outside source payment of your travel, subsistence and related expenses under the GSA travel rule or 5 C.F.R. 2635.204(f), you must complete the information below. You must submit this form and related documentation and receive approval PRIOR to commencement of travel. Failure to receive PRIOR approval may result in you having to pay the travel expenses yourself. The outside source need not be a 501(c)(3) organization, but if it is, please state so on this form and include the IRS determination letter.

CONTACT PERSON: Susan Ralston

PHONE NUMBER: 6-2369

DATE OF REQUEST: 10/8/02

Please include a copy of the letter of invitation.

Your Name and Position:
Adam Goldman, Associate Director of Public Liaison

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
RNC political meetings in NYC

Dates of Travel: Wed, 10/16/02 **Destination(s):** NYC

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):
~~Republican National Committee~~

Contact at Organization Making the Payment: Marc Racicot

Address of Organization: ~~310 First Street, SE~~
Washington, DC 20003

Phone: PRA 6

Expense:	Amount:	Method:*
Transportation (specify): Airfare	$236.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Meals:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
Misc. (specify):		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)

*Payment may be made either in-kind or by check made payable to the U.S. Treasury; you may not directly receive payment by either cash or a check made out to you.

This form and any accompanying memorandum of approval must be attached to your travel authorization.
You MUST complete a travel voucher listing all expenses (regardless of payment method) following the trip.

Please send this form to the Counsel's Office (Room 128, EEOB) at least three (3) days before commencement of travel

TO BE COMPLETED BY COUNSEL'S OFFICE ☐ Approved ☐ Disapproved Pursuant to: ☐ 31 U.S.C. § 1353 ☐ 5 C.F.R. 2635.204(f)

Counsel's Signature _____ Date _____

(REV. 7/96)

REV_00266164

TRAVEL AUTHORIZATION

WHITE HOUSE OFFICE

DATE OF REQUEST: 10/8/02

Please Print

TRAVEL AUTHORIZATION NUMBER: _____

Last Name	First Name
Goldman	Adam

Extension:	Room:	Title:	Office:
6-5157	187B	Associate Director	OPL

Contact Person: *please print*	Extension:
Susan Ralston	6-2369

ATTACHMENTS:

☐ Invitation/Documentation Regarding Event ☒ Travel Expenses From Outside Sources Form

PURPOSE OF TRAVEL *(include event dates and host information, if applicable):*

RNC political meetings in NYC

DEPARTURE:			RETURN:		
Date:	Time:	Mode:	Date:	Time:	Mode:
Wed, 10/16	9:00 AM	US Air	Wed, 10/16	5:00 PM	US Air

ITINERARY *(List all cities including those through which flights are routed):*

Origin: Washington National Airport, DC

Destination: LaGuardia, New York

Return to: Washington National Airport, DC

FUNDING SOURCE:

☐ Official ☒ Political ☐ Mixed ☐ 501 (c)(3) ☐ Other: _____

NOTE: *For travel funded by political, 501(c)(3) or other sources, an approved "Travel Expenses From Outside Source" form must be attached.*

SPECIAL EXPENSES

Hotel:		Per Diem:		Privately Owned Vehicle:	
Air Fare:	$236.00	Taxi:		Standard Vehicle Rental:	
Train Fare:		Mini-Van Rental:		TOTAL ESTIMATED EXPENSES:	$236.00

APPROVING SIGNATURES:

Office Head:	Chief of Staff or Designee:
White House Management:	Political Travel:

(REV. 1/02)

ORIGINAL (WH MANAGEMENT COPY)

REV_00266165

TRAVEL EXPENSES FROM OUTSIDE SOURCE

WHITE HOUSE OFFICE

In order to consider whether the Government may accept from an outside source payment of your travel, subsistence and related expenses under the GSA travel rule or 5 C.F.R. 2635.204(f), you must complete the information below. You must submit this form and related documentation and receive approval PRIOR to commencement of travel. Failure to receive PRIOR approval may result in you having to pay the travel expenses yourself. The outside source need not be a 501(c)(3) organization, but if it is, please state so on this form and include the IRS determination letter.

Please include a copy of the letter of invitation.

CONTACT PERSON: Susan Ralston

PHONE NUMBER: 6-2369

DATE OF REQUEST: 10/8/02

Your Name and Position:
Karl C. Rove, Senior Advisor to the President

Nature of Meeting or Event: ☐ Official ☒ Political

Meeting or Event Description and HOW IT RELATES TO YOUR OFFICIAL OR POLITICAL DUTIES:
RNC political meetings in NYC

Dates of Travel: Wed, 10/16/02 **Destination(s):** NYC

Persons or Entity Making The Payment (please also note any financial interests of the person or entity known to you that may be affected by the exercise of your Government responsibilities):
~~Republican National Committee~~

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Address of Organization: ~~310 First Street, SE~~
Washington, DC 20003

Phone: PRA 6

Expense:	Amount:	Method:*
Transportation (specify): Airfare	$236.00	☒ In Kind ☐ Reimbursable ☐ Other (Political Only)
Lodging:		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)
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Misc. (specify):		☐ In Kind ☐ Reimbursable ☐ Other (Political Only)

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Please send this form to the Counsel's Office (Room 128, EEOB) at least three (3) days before commencement of travel

TO BE COMPLETED BY COUNSEL'S OFFICE ☐ Approved ☐ Disapproved Pursuant to: ☐ 31 U.S.C. § 1353 ☐ 5 C.F.R. 2635.204(f)

Counsel's Signature: Date:

(REV. 7/96)

REV_00266166

538438
FLOOD-27

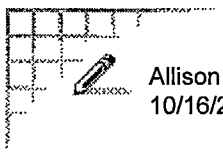

Allison L. Riepenhoff
10/16/2002 04:33:18 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: Springfield, MO and Rochester, MN

There is the potential for fairly cold weather this Friday, and I wanted to advise those of you traveling of the current forecasts for these two cities:

Springfield, MO
Partly Cloudy
High: 65
Low: 47

Rochester, MN
Showers
High: 53
Low: 35

Especially with the potential for cold weather in Rochester, please consider bringing a coat with you.

Thank you,

Allison

Message Sent To:

538438 MRN
FG006-27

FORSTMANN LITTLE & CO.
767 Fifth Avenue, New York, New York 10153
Telephone: (212) 355-5656 Fax: (212) 759-9059

EXEC. OFC. PRESIDENT
WH STRATEGIC INITIATIVES

2002 OCT 16 AM 10: 13

September 27, 2002

Mr. Karl Rove
White House Senior Advisor
1600 Pennsylvania Avenue
West Wing, 2nd Floor
Washington, D.C. 20500

Dear Karl,

My profound thanks to you for turning your life inside out to appear in Aspen. I can assure you that you got a lot of people, many of whom are not on "our team", to think differently about Iraq. I hope that you got something out of the day as well.

Needless to say, if there is ever anything I can do to be helpful, you only have to let me know.

I hope the hat is useful for your boy.

With best regards,

Teddy

Theodore J. Forstmann

538438

FG006-27

PBS Policies for Acquisition of Real Estate
As Related to the American Media Inc. Building

GSA, as a general policy, will not acquire through lease, purchase or construction any building unless it has first identified tenants for the property. No tenant needs are currently pending in the area around the AMI building location.

For property that can only be used for special purposes, e.g., to study the effects of anthrax, the policy is even more stringent. GSA will acquire special purpose space only after the requesting agency has signed a formal agreement committing itself to be financially liable for all related costs for the term of the lease, or life of the property; or be willing to pay all costs necessary to convert the facility into common office space should it vacate the property prematurely. Even if willing to pay conversion costs, the original tenant pays full rent until a new tenant is found.

The Atlanta Regional Office of GSA has contacted the Centers for Disease Control and the Environmental Protection Agency. Neither have any long-term interest in the American Media Building. Moreover, both CDC and EPA are landholding agencies, so either could acquire the property directly if either so chose. CDC further opined, that to make the building safe for occupancy would be most costly. They recommended the building be torn down. We believe the FBI's only interest in the building is because it is a crime site.

Regardless of whether viewed as a general office or special purpose space, the overall value of the property is in excess of the $2.1 million level for which specific congressional approval of a prospectus is necessary before GSA could do anything.

This discussion did not consider the legal liabilities issues presented in Mr. Hance's letter.

GSA rightly views the property as contaminated and it believes that cleanup of such a facility requires skills which are beyond its current expertise. Of course, GSA would follow any legislatively enacted direction or mandate regarding the property.

REV_00266169

Office of Inspector General
Washington, DC 20405

FACSIMILE TRANSMISSION RECORD

DATE: September 30, 2002

TO: Susan Ralston

OFFICE: Office of Karl Rove

FAX TELEPHONE NO.: ( ) 456-0191
AREA CODE

CORRESPONDENCE SYMBOL: --

OFFICE TELEPHONE NO.: ( )
AREA CODE

FROM: Daniel R.Levinson

OFFICE: Inspector General

CORRESPONDENCE SYMBOL: J

OFFICE TELEPHONE NO.: ( ) 501-0450

NUMBER OF PAGES BEING TRANSMITTED
INCLUDING COVER SHEET: 2

REMARKS:

PLEASE NOTIFY US BY CALLING (202) 501-0450 TO
LET US KNOW THAT YOU HAVE RECEIVED THE MESSAGE/MESSAGES.

HAVE A NICE DAY!

Federal Recycling Program Printed on Recycled Paper

F: HUGHES, KAREN

F: Karen 538438

FG006-27

Karl C. Rove
10/09/2002 01:05:33 PM

Record Type: Record

To: Susan B. Ralston/WHO/EOP@EOP

cc:
Subject: Re: strategery

discuss
---------- Forwarded by Karl C. Rove/WHO/EOP on 10/09/2002 01:07 PM ----------

From: Barry S. Jackson on 10/09/2002 12:51:19 PM
Record Type: Record

To: Karl C. Rove/WHO/EOP@EOP

cc:
Subject: Re: strategery

i made a special point of asking krista to see if we could get karen's participation next week at strategery - this is an fyi in case you have occasion to talk to karen between now and tuesday
---------- Forwarded by Barry S. Jackson/WHO/EOP on 10/09/2002 12:52 PM ----------

Krista L. Ritacco
10/09/2002 10:33:43 AM

Record Type: Record

To: Barry S. Jackson/WHO/EOP@EOP
cc:
bcc:
Subject: Re: strategery

Karen can't attend or call in.... she's speaking at the LBJ school at UT that day from 3 p.m. until 10:30 pm that evening. Maybe next time....

From: Barry S. Jackson on 10/09/2002 09:59:48 AM

From: Barry S. Jackson on 10/09/2002 09:59:48 AM
Record Type: Record

To: Krista L. Ritacco/WHO/EOP@EOP

cc:
Subject: strategery

you may want to see if Karen can join us - I think this is a meeting where her input will be valuable - if she can't be here, maybe we can hook her up by phone -thanks

538438
FE006-67

Karl,
Any chance you can make it?
Would love to see you!
Bill Gertz

Regnery Publishing
cordially invites you to celebrate
Bill Gertz's
New York Times *Bestseller*

BREAKDOWN

6:00 to 8:00 p.m.
Tuesday, October 15, 2002

Morton's
1050 Connecticut Avenue, NW
Washington, DC

RSVP 202-216-0601 ext. 434
by Friday, October 11, 2002

EAGLE PUBLISHING, INC.

- Bethune
- Just got this 10/16

REV_00266174

CENTER FOR THE STUDY
OF THE PRESIDENCY

AMBASSADOR RICHARD T. MCCORMACK
COUNSELOR

1020 19TH STREET, NW SUITE 250
WASHINGTON, DC 20036
202-872-9800 ☆ FAX 202-872-9811
E MAIL: CENTER@THEPRESIDENCY.ORG

538438
FG006-27

Karl Rove

Oct. 4, 2002

Dear Karl;

This is potentially an opportunity for the President to take a high profile intervention on behalf of the interest of the broader investment public.

This industry's failures have been so massive, so expensive, so embarrassing, so costly to the broader economy that the public will stand up and cheer if the President were to personnally intervene in this case, and back the tougher candidate for the oversight responsibility in the accounting industry.

Obviously on a matter of this kind there are potential problems that an outsider like myself is not aware of; but if all that is at stake here is which of the potential candidates is more agreeable to an industry which has fallen so short, this ought to be an opportunity for the President to score some long term points with the investing public, and the American people.

I also think that foreign capital is likely to return to America quicker if we are seen to be really cracking down on the accounting indsutry's past failures. We have a massive loss of confidence here that needs to be addressed, if the dollar itself is not to face continual weakness due to current accounts problems.

Sincerely,

Richard McCormack

Attachments: Note to Larry Lindsey; Washington Post article.

REV_00266175

THE WHITE HOUSE

WASHINGTON

Date: 10/15/02

To: ~~Josh Bolten, Gary Edson~~ 10/15

From: Strategic Initiatives Karl

____ FYI

____ Appropriate Action

____ Direct Response

____ Prepare Response For My Signature

____ Per Our Conversation

X Let's Discuss

____ Per Your Request

____ Please Return

____ Deadline

____ Other

Comments: _____

_____

_____

REV_00266178

538438

FG006-21

Voter / Consumer Research
RNC 35
Topline Results
n = 801
Oct 8-10, 2002

Hello, I am _____, from Voter / Consumer Research. We're a national survey research company doing a public opinion survey in your area. I need to speak with the youngest (male / female) available now, who is 18 years of age or older. This person must be registered to vote at this address.

Q1. Do you feel things in this country are going in the right direction, or have they gotten off on the wrong track?

		Sep 01	Sep 29	Oct 8
1	Right direction	37	41	39
2	Wrong track	49	47	52
3	Don't know	13	12	8
4	Refused	-	1	*

Here are the names of some people and organizations in the news. Please tell me for each of these whether you have a very favorable, somewhat favorable, somewhat unfavorable or very unfavorable impression. If you're not aware of the name just let me know. (RANDOMIZE)

		Very favorable	Somewhat favorable	Somewhat unfavorable	Very unfavorable	Aware / No opinion	Not aware	Refused
Q2. George W Bush	Sep 01	30	25	17	26	2	*	*
	Sep 29	38	26	14	20	2	*	-
	Oct 8	40	26	13	19	2	*	*
Q3. The Republican Party	Sep 01	20	31	22	21	4	1	*
	Sep 29	25	32	18	18	6	1	*
	Oct 8	24	33	19	17	5	2	*
Q4. The Democratic Party	Sep 01	21	33	21	17	6	1	1
	Sep 29	20	35	20	17	6	1	*
	Oct 8	18	38	21	16	5	1	*
Q5. Tom Daschle	Sep 29	8	22	12	19	14	25	*
	Oct 8	7	22	12	16	13	29	*

Q6. Thinking about the elections this November, on a 0 to 10 scale, with 0 meaning you have paid no attention at all and 10 meaning you have paid a great deal of attention, how much attention would you say you have paid to the upcoming elections in November?

		Sep 01	Sep 29	Oct 8
	Mean rating:	-	6.5	6.3
11	Don't know	-	1	*
12	Refused	-	-	*

Q7. And if this fall's elections for Congress were held today, would you vote for (ROTATE) the Republican candidate or for the Democratic candidate?

1	Republican candidate	35	41	43
2	Democratic candidate	39	42	42
3	Don't know	25	16	14
4	Refused	1	2	2

REV_00266179

Q62. Which of the following income groups includes your TOTAL FAMILY INCOME in 2001, before taxes? Just stop me when I read the right category—

1	Under $10,000	6
2	$10,000-$20,000	10
3	$20,000-$30,000	13
4	$30,000-$40,000	12
5	$40,000-$50,000	10
6	$50,000-$75,000	15
7	$75,000-$100,00	11
8	$100,000 and over	11
9	Don't know (VOL)	2
10	Refused (VOL)	10

Q63. Are you yourself of Hispanic or Latino descent – for instance Mexican American, or Cuban or Puerto Rican, or not?

1	Yes	7
2	No	92
3	Don't know	*
4	Refused	1

Q64. (IF NO) Is your racial or ethnic background (RANDOMIZE) white, black, Asian, Native American, or something else?

1	White	81
2	Black	10
3	Asian	2
4	Native American	3
5	Other	3
6	Don't know	*
7	Refused	2

Q65. Sex (BY OBSERVATION)

1	Male	48
2	Female	52

Q8. If the elections for President were held today, and the candidates were (ROTATE) George W Bush, the Republican and Al Gore, the Democrat, who would you vote for?

		Sep 01	Sep 29	Oct 8
1	George W Bush, the Republican	-	55	57
2	Al Gore, the Democrat	-	37	35
3	Don't know	-	7	6
4	Refused	-	1	2

Q9. How would you rate the job George W Bush has been doing as President ... do you strongly approve, somewhat approve, somewhat disapprove or strongly disapprove of the job he's been doing?

1	Strongly approve	24	33	35
2	Somewhat approve	35	37	35
3	Somewhat disapprove	18	14	15
4	Strongly disapprove	2	15	15
5	Don't know	2	1	*
6	Refused	-	*	-

? →

Q10. Thinking about the job George W. Bush has done as President, is it better than you expected, worse than you expected or about what you expected?

1	Better than expected	-	35	35
2	Worse than expected	-	11	11
3	About as expected	-	52	53
4	Don't know	-	2	1
5	Refused	-	*	*

REV_00266180

Here are some specific issues I'd like you to rate President Bush on. Again, please tell me for each of these whether you strongly approve, somewhat approve, somewhat disapprove or strongly disapprove of him on that point. (RANDOMIZE)

		Strongly approve	Somewhat approve	Somewhat disapprove	Strongly disapprove	Don't know	Refused
Q11. Managing the economy	Sep 01	19	30	19	28	4	*
	Sep 29	15	36	19	26	3	*
	Oct 8	17	36	19	24	4	*
Q12. Working with both parties to get things done	Sep 01	29	35	15	15	6	*
	Sep 29	30	37	16	12	4	*
	Oct 8	36	36	15	11	3	*
Q13. Understanding the problems facing people like yourself	Sep 01	24	26	16	29	5	-
	Sep 29	21	35	14	24	4	1
	Oct 8	24	32	18	22	4	*
Q14. Handling foreign policy	Sep 01	19	32	17	21	11	-
	Sep 29	31	33	13	20	4	*
	Oct 8	32	32	14	19	3	*
Q15. Fighting the war on terrorism	Sep 01	-	-	-	-	-	-
	Sep 29	50	26	11	11	2	*
	Oct 8	54	24	9	11	2	*
Q16. Education	Sep 01	-	-	-	-	-	-
	Sep 29	28	36	16	12	8	*
	Oct 8	30	36	15	12	7	-

Q17. Of the following list of issues, which ONE is the most important as far as you are concerned? (RANDOMIZE)

		Sep 01	Sep 29	Oct 8
1	Taxes	6	4	4
2	The economy	19	21	18
3	Education	14	8	12
4	Homeland security	-	12	14
5	Medicare	4	5	4
6	Health care reform	9	7	7
7	Social Security	17	7	8
8	The breakdown of the family	17	9	9
9	Fighting terrorism	-	19	20
10	The environment	4	3	2
11	Other (VOL)	1	2	2
12	Don't know	2	3	2
13	Refused	*	*	*

REV_00266181

Q18. And of this same list, which one is your second choice? (RANDOMIZE REMAINING ITEMS)

		Sep 01	Sep 29	Oct 8
1	Taxes	10	5	6
2	The economy	16	17	18
3	Education	15	17	13
4	Homeland security	-	12	12
5	Medicare	10	6	6
6	Health care reform	10	8	11
7	Social Security	16	10	8
8	The breakdown of the family	9	5	7
9	Fighting terrorism	-	15	15
10	The environment	8	5	3
11	Other (VOL)	*	1	*
12	Don't know	1	*	*
13	Refused	-	*	-

Q19. As of right now, how concerned are you about your personal retirement security?

1	Very concerned	-	39	39
2	Somewhat concerned	-	37	34
3	Not very concerned	-	14	14
4	Not at all concerned	-	8	13
5	Don't know	-	2	1
6	Refused	-	*	*

Q20. As of today, which do you think (VER A:) the President should do more about .. (READ, ROTATE)

1	Fighting terrorism /OR/	-	42	37
2	Improving the economy	-	46	47
3	Both (VOL)	-	10	14
4	Neither / other (VOL)	-	*	1
5	Don't know	-	2	1
6	Refused	-	-	-

As of today, which do you think (VER B:) Congress should do more about .. (READ, ROTATE)

7	Fighting terrorism /OR/	-	35	42
8	Improving the economy	-	48	44
9	Both (VOL)	-	14	12
10	Neither / other (VOL)	-	*	1
11	Don't know	-	1	1
12	Refused	-	*	-

Q21. Thinking about the economy, in the next year do you think the economy will improve, decline or stay about the same?

1	Improve	-	37	34
2	Decline	-	18	22
3	Stay about the same	-	40	41
4	Don't know	-	6	4
5	Refused	-	-	*

Q22. And what about your own financial situation, do you think a year from now you will be in better financial shape, worse financial shape or about the same?

	Sep 01	Sep 29	Oct 8
1 Better shape	-	34	36
2 Worse shape	-	10	11
3 About the same	-	53	51
4 Don't know	-	3	2
5 Refused	-	*	*

Q23. As of right now, do you think economic conditions in the country are (ROTATE) getting better or getting worse?

1 Getting better	-	27	26
2 Getting worse	-	61	63
3 Same / no change (VOL)	-	6	8
4 Neither / other (VOL)	-	3	1
5 Don't know	-	3	3
6 Refused	-	*	*

Q24. Thinking about the stock market, do you believe that the market will (ROTATE) improve, remain at its current level, or decline over the next six months?

1 Improve	-	32	30
2 Current level / Same	-	35	33
3 Decline	-	24	28
4 Don't know	-	9	8
5 Refused	-	*	*

Q25. (ROTATE) Do you think the President could do more to improve the economy / OR / do you think he is doing about all he can to improve the economy?

1 Could do more	-	51	57
2 Doing all he can	-	44	39
3 Don't know	-	4	4
4 Refused	-	*	*

Q26. Did you by any chance watch the speech about his policy on Iraq that President Bush gave on Monday, or not?

1 Watched it	42
2 Did not watch it	58
3 Don't know	*
4 Refused	-

Q27. (IF DID NOT WATCH: From what you saw in the news) do you have a very positive impression of what President Bush said, somewhat positive, somewhat negative or a very negative impression? (IF DID NOT WATCH: If you haven't heard enough to say, just let me know)

	Saw it	Didn't
1 Very positive	38	11
2 Somewhat positive	32	21
3 Somewhat negative	15	9
4 Very negative	13	8
5 Haven't heard enough to say (VOL)	-	47
6 Don't know	3	3
7 Refused	-	1

REV_00266183

(VERSION A:) Now on the following list of issues, please tell me for each one who you trust more to handle that issue between (ROTATE) President Bush and the Democrats in Congress. (RANDOMIZE)

		President Bush	Democrats in Congress	Equal / no difference (VOL)	Neither (VOL)	Don't know	Refused
Q28. Education	Sep 3	47	39	3	3	7	*
	Oct 8	46	37	4	4	10	-
Q29. The economy	Sep 3	44	42	3	4	7	-
	Oct 8	42	41	7	4	7	-
Q30. Health care	Sep 3	31	52	3	6	9	-
	Oct 8	35	47	4	6	9	-
Q31. Social Security	Sep 3	33	50	3	5	9	-
	Oct 8	37	45	5	6	8	-
Q32. Managing the federal budget	Sep 3	42	42	3	6	7	*
	Oct 8	44	36	6	5	9	*
Q33. Caring about people like you	Sep 3	44	42	2	9	4	-
	Oct 8	41	41	5	8	5	*
Q34. Dealing with corporate misconduct and the stock market	Sep 3	42	40	3	6	8	1
	Oct 8	40	38	3	7	11	*
Q35. Working with both parties to get things done	Sep 3	54	31	2	8	5	*
	Oct 8	54	27	6	6	7	*

(VERSION B:) Now on the following list of issues, please tell me for each one who you trust more to handle that issue between (ROTATE) Republicans and Democrats in Congress. (RANDOMIZE)

		GOP in Congress	Dem in Congress	Equal / no difference	Neither	Don't know	Refused
Q36. Education	Sep 3	41	43	4	4	8	*
	Oct 8	41	44	6	3	6	*
Q37. The economy	Sep 3	48	38	1	5	7	*
	Oct 8	42	41	6	5	6	1
Q38. Health care	Sep 3	29	50	4	6	11	*
	Oct 8	32	51	5	4	7	1
Q39. Social Security	Sep 3	34	48	2	6	9	-
	Oct 8	34	48	6	4	8	1
Q40. Managing the federal budget	Sep 3	45	38	2	5	10	*
	Oct 8	44	36	6	7	7	1
Q41. Welfare reform	Sep 3	38	45	2	4	10	*
	Oct 8	39	43	5	4	9	*
Q42. Dealing with corporate misconduct and the stock market	Sep 3	39	37	5	8	11	*
	Oct 8	39	36	7	8	10	*
Q43. Working with both parties to get things done	Sep 3	42	34	5	10	9	1
	Oct 8	40	32	10	9	8	1

REV_00266184

Q44. (VERSION A:) One issue concerns establishing a federal government department to deal with domestic security. Between the following two views, which one is closest to your point of view (ROTATE)

The view of Republicans who say it is wrong to give the President less authority to manage the homeland security department then he has for other federal agencies
OR
The view of Democrats who say that people working for this Department should have the same civil service protections that people working for other federal government departments have

(IF NECESSARY:) which of these two views is closest to your own?

1	Republican view, more flexible in dealing with threats	39
2	Democratic view, same civil service protections	49
3	Both equally (VOL)	2
4	Neither (VOL)	2
5	Don't know	7
6	Refused	*

Q45. (VERSION B:) One issue concerns establishing a federal government department to deal with domestic security. Between the following two views, which one is closest to your point of view (ROTATE)

The view of Republicans who say the department should not be restricted by union rules, like requiring that border patrol agents live near restaurants or have easy access to dry-cleaners
OR
The view of Democrats who say that people working for this Department should have the same civil service protections that people working for other federal government departments have

(IF NECESSARY:) which of these two views is closest to your own?

1	Republican view, more flexible in dealing with threats	29
2	Democratic view, same civil service protections	57
3	Both equally (VOL)	1
4	Neither (VOL)	4
5	Don't know	8
6	Refused	1

Here are several things the President has been saying recently. Please tell me for each of these if you have a positive or negative reaction, using a 10 point scale. A zero would mean you have an extremely negative reaction, while a ten would mean you have an extremely positive reaction. You can use any number between zero and ten of course. (RANDOMIZE)

		Mean Rating	Don't know	Refused
Q46.	I should have the same authority to protect national security as every President since Jimmy Carter has had	7.5	2	*
Q47.	The Senate should not tie my hands and take away authority to protect national security	6.5	2	*
Q48.	The Senate should not give me less authority to manage the homeland security department then I have for every other agency in the federal government	6.5	3	*
Q49.	I have worked with members of both parties on a compromise homeland security bill, but I am opposed to Democrats in the Senate, who want to expand the power of unions to block hiring and firing decisions in the federal government	5.8	5	-

REV_00266185

As I mentioned unions are working with Democrats in the Senate to include features in the Homeland Security bill that have to do with department employees. For each of the following please tell me whether you strongly favor, somewhat favor, somewhat oppose or strongly oppose that specific proposal. (RANDOMIZE)

		Strongly Favor	Somewhat Favor	Somewhat Oppose	Strongly Oppose	Don't know	Refused
Q50.	A proposal to require that border patrol agents live within easy access of restaurants, movie theatres and dry cleaning	10	22	24	30	15	1
Q51.	Not allowing the Customs Service to require that they carry nuclear radiation detectors, but making this subject to union negotiations	15	18	19	36	12	1
Q52.	Prohibiting the customs service from selecting agents for foreign assignment based on qualifications, basing selection on seniority instead	15	16	22	42	5	*
Q53.	Keeping in place rules and procedures that make it very difficult to remover poorly performing government employees	21	14	13	47	4	*

And now just a few last questions for classification purposes...

Q54. In the last general election in which you voted, which answer best describes how you voted for state and local offices such as governor and senator? (ROTATE CODES 1 THRU 7, TOP TO BOTTOM / BOTTOM TO TOP)

1	Straight Democratic	14
2	Mostly Democratic	18
3	A few more Democrats than Republicans	7
4	About equally for both parties	18
5	A few more Republicans than Democrats	7
6	Mostly Republican	21
7	Straight Republican	11
8	Other (VOL)	1
9	Never voted (VOL)	2
10	Don't know	1
11	Refused	*

Q55. What is your approximate age?

1	18-24	8
2	25-34	14
3	35-44	17
4	45-54	25
5	55-64	14
6	65 and over	22
7	Don't know	*
8	Refused	*

Q56. Is your religious background Protestant, Catholic, Jewish or something else? (IF SOMETHING ELSE OR UNCLEAR RESPONSE ASK: Is that a Christian religion or not?)

1	Protestant	42
2	Catholic	24
3	Other Christian	18
4	Jewish	2
5	Other non-Christian	6
6	Agnostic / Atheist	1
7	None	4
8	Don't know	*
9	Refused	2

Q57. (IF ANSWERED 1 – 3) How often do you attend worship services? Would you say... (READ – ROTATE TOP TO BOTTOM, BOTTOM TO TOP)

1	Never	10
2	A few times a year	27
3	A few times a month	16
4	Almost every week	12
5	Every week	23
6	More than once a week	11
7	Don't know (DNR)	1
8	Refused (DNR)	1

Q58. On political issues, do you consider yourself (ROTATE) a liberal, a moderate, or a conservative?

1	Liberal	17
2	Moderate	39
3	Conservative	39
4	Don't know	4
5	Refused	1

Q59. Are you or is anyone in your household a member of a labor union or a teacher's association, or not? (PROBE IF NECESSARY: Would that be a labor union or a teacher's association?)

1	Yes / Labor	13
2	Yes / Teacher	10
3	Yes / both	2
4	No	76
5	Don't know	*
6	Refused	*

Q60. (IF FEMALE:) Do you / (IF MALE:) Does the woman of the household work outside the home or not?

1	Yes	54
2	No	44
3	Don't know	1
4	Refused	1

Q61. Do you have any money invested in the stock market through individual stocks, retirement plans or mutual funds or not?

1	Yes - Invested in the market	62
2	No - not invested	35
3	Don't know	*
4	Refused	3

REV_00266187

538438 File
FG006-27

October 14, 2002

MEMORANDUM FOR KARL ROVE

FROM: KEN MEHLMAN
DEPUTY ASSISTANT TO THE PRESIDENT AND
DIRECTOR OF POLITICAL AFFAIRS

ADRIAN GRAY
DEPUTY DIRECTOR OF SCHEDULING AND DIRECTOR OF
SURROGATE SCHEDULING

SUBJECT: POLITICAL ACTIVITY: October 6 – October 20
63 Fundraisers, 36 message events

Monday, October 7, 2002 (6 F/R, 6 message)
- **FLOTUS** fundraiser for Collins (NYC)
- **Rove** fundraiser for Rogers (Birmingham)
- **Evans** fundraiser for Cianchette (Portland)
- **Evans** message event for Bass (Nashua)
- **Martinez** fundraiser for Talent (St. Louis)
- **Whitman** message event for Hutchison (Dallas)
- **Whitman** fundraiser for Perry (Houston)
- **Chao** fundraiser for Ferguson (WDC)
- **Barreto** message event for Hayes (Charlotte)
- **Van De Water (DOT)** message event for Ballenger (Hickory)
- **Carbonell (HHS)** message event for Taff (Kansas City)
- **England (Navy)** message event for Leach (Iowa City)

Tuesday, October 8, 2002 (10 F/R, 6 message)
- **POTUS** fundraiser for Hilleary (Knoxville)
- **Martinez** fundraiser for Brown (Philadelphia)
- **Principi** fundraiser for Forrester (East Orange)
- **Evans** fundraiser for Sununu (Manchester)
- **Chao** fundraiser for Chambliss (WDC)
- **Norton** fundraiser for Talent (Kansas City)
- **Abraham** fundraiser for Wilson (WDC)
- **Abraham** fundraiser for Chambliss (WDC)
- **Whitman** message event for Sanchez (Albuquerque)
- **O'Neill** message event for Istook (Oklahoma City)
- **Manson (DOI)** message event for Chambliss (Cumberland Island)
- **Peters (DOT)** message event for Chocola (South Bend)
- **Peters (DOT)** fundraiser for McVey (Indianapolis)
- **Carbonell (HHS)** message events for Taff (Kansas City) (x2)
- **Jackson (DOT)** fundraiser for PA HRCC (Harrisburg)
- **Sampson (DOC)** message event for Pickering (Meridian)

Wednesday, October 9, 2002 (5 F/R, 3 message)

- **Mrs. Cheney** message event for Hutchinson (Ft. Smith)
- **Mrs. Cheney** fundraiser for Talent (Kansas City)
- **Rove** fundraiser for T-100/Regents (Richmond)
- **Norton** fundraiser for Talent (Kansas City)
- **Evans** fundraiser for Fisher (Philadelphia)
- **Martinez** fundraiser for Feeney (Orlando)
- **Allen (HHS)** message event for Lingle (Honolulu)
- **Perry (GSA)** message event for Benjamin (Youngstown)

Thursday, October 10, 2002 (2 F/R, 3 message)

- **Mehlman** fundraiser for WV GOP (WDC)
- **Evans** message event for Burr (WDC)
- **Paige** message event for Chambliss (Atlanta)
- **Barreto** message event for Bush (Orlando)
- **Mainella (DOI)** fundraiser for Turner (Dayton)

Friday, October 11, 2002 (5 F/R, 3 message)

- **Mehlman** fundraiser for Kinder (Kansas City)
- **Mehlman** fundraiser for Talent (Kansas City)
- **Chao** fundraiser for Alexander (Nashville)
- **Whitman** message event for Gerlach (Philadelphia)
- **Norton** fundraiser for Raye (WDC)
- **Martinez** fundraiser for Bush/FL GOP (Miami)
- **Martinez** message event for Bush (Orlando)
- **Towey** message event for Ferguson (Union)

Saturday, October 12, 2002 (3 message)

- **Principi** message event for Monteith (San Diego)
- **Paige** message event for Regula (Cleveland)
- **MacKay (VA)** message event for Brown-Waite (Florida)

Monday, October 14, 2002 (9 F/R, 1 message)

- **POTUS** fundraiser for MI Victory (Detroit)
- **VPOTUS** fundraiser for Renzi (Phoenix)
- **VPOTUS** fundraiser for Pearce (Roswell)
- **Mrs. Cheney** fundraiser for Bentley (Glen Burnie)
- **Abraham** fundraiser for WV GOP (Charleston)
- **Abraham** fundraiser for Capito (Charleston)
- **Whitman** fundraiser for AZ GOP (Arizona)
- **Martinez** fundraiser for Oxley (Findlay)
- **O'Neill** message event for Leach (Cedar Rapids)
- **Norton** fundraiser for Smith (Salem)

Tuesday, October 15, 2002 (6 F/R)

- **VPOTUS** fundraiser for Cole (Midwest City)
- **VPOTUS** fundraiser for Sullivan (Tulsa)
- **VPOTUS** fundraiser for Sununu (WDC)
- **41** fundraiser for Porter (Las Vegas)

- **Chao** fundraiser for Hutchinson (Fort Smith)
- **Mrs. Ashcroft** fundraiser for Talent (Springfield)

Wednesday, October 16, 2002 (4 F/R, 1 message)
- **VPOTUS** fundraiser for Janklow (WDC)
- **Whitman** fundraiser for Morella (Maryland)
- **Thompson** fundraiser for Chocola (WDC)
- **Abraham** fundraiser for Chocola (WDC)
- **Jackson (HUD)** message event for Taff (Kansas City)

Thursday, October 17, 2002 (8 F/R, 3 message)
- **POTUS** fundraiser for Chambliss (Atlanta)
- **POTUS** fundraiser for Perdue (Atlanta)
- **POTUS** fundraiser for Bush (Daytona Beach)
- **Chao** fundraiser for Forrester (Union)
- **Paige** message event for Talent (St. Louis)
- **Abraham** message event for Allard (Rocky Flats)
- **Thompson** fundraiser for Leach (Iowa City)
- **Martinez** fundraiser for Simon (Salinas County)
- **Evans** fundraiser for Garrett (Trenton)
- **Giuliani** fundraiser for Coleman (Minnesota)
- **Walters** message event for Portman (Cincinnati)

Friday, October 18, 2002 (5 F/R, 7 message)
- **POTUS** rally for MN Victory (Rochester)
- **POTUS** rally for Talent (Springfield)
- **Rove** fundraiser for TX Victory (Dallas)
- **Abraham** message event for Thune (Sioux Falls)
- **Paige** message event for Ballenger (Hickory)
- **Paige** message event for Hayes (Charlotte)
- **Thompson** fundraiser for WI GOP (Wisconsin)
- **Whitman** fundraiser for Straight (Princeton)
- **Evans** fundraiser for Chocola (South Bend)
- **Martinez** fundraiser for Simon/CA GOP (Los Angeles)
- **MacKay (VA)** message event for Chambliss (Columbus)
- **Scully (HHS)** message event for Sununu (TBD City)

Sunday, October 20, 2002 (2 F/R)
- **41** fundraiser for Ganske (Des Moines)
- **Thompson** fundraiser for Green (Wisconsin)

ADMINISTRATION POLITICAL EVENT BREAKDOWN

Total # of Administration Events: **1231**
Message: **587**
Fundraiser: **541**
Photo-op: **110**

Total # of events for Senate: **342**
Message: **169**
Fundraiser: **154**
Photo-op: **19**

Total # of events for House: **684**
Message: **352**
Fundraiser: **273**
Photo-op: **59**

Total # of events for Governor: **205**
Message: **66**
Fundraiser: **114**
Photo-op: **25**

538438 file Cal fed
F6006-27

Memo

To: Karl Rove
From: Ken Calvert
Date: September 12, 2002
Subject: CALFED/Drought articles

Please see the attached article from the September 3 editorial page of the *Los Angeles Times*. While I disagree with the editors' assertions regarding the Administration's record on the environment, the editors do tap a concern prevalent throughout California regarding CALFED. Namely, many in the state are concerned that the CALFED compromise is unraveling. The Administration could easily allay this concern by asking House Leadership to schedule a bill that already has widespread Congressional support.

As you know, for the past two years, I have been working on a CALFED bill (HR 3208) that brings back much-needed balance to water use among urban water users, farmers, and the environment. It passed the Resources Committee last November and is ready for floor action. In spite of the support of Chairman Jim Hansen, Bill Thomas, George Miller and many others from both sides of the aisle, it is being held up by the House Leadership due to concerns regarding labor language.

As we have discussed, the labor language is, at worst, meaningless because it applies only to California, a state with stricter labor law than the federal statute. In fact, according to a Congressional Research Service, the language is *detrimental* to unions in California because legal precedent could make the less-stringent federal law supercede state law. (The supporters of the labor language have not seen the CRS report that explains the precedent.)

This language should not stand in the way of the CALFED bill. To allow it to unravel a compromise so many years in the making would be disastrous. Please help Chairman Hansen and me in our efforts to get this bill scheduled as soon as possible. If the House does not act, Senator Feinstein will likely attach her plan to another bill. If she is successful, CALFED will become a glorified environmental restoration program. We will lose the important private property protections and enhanced water storage in my bill. In short, conservatives will lose any influence on the process.

Under separate cover, I am sending recent articles from various news sources on the country-wide drought. A robust White House water policy, beginning with support of CALFED, would be a perfect compliment to President Bush's excellent new forest initiative.

Keep Water Project Afloat

The Bush administration's decision to quit its appeal of a lawsuit pitting farmers against the environment in the Sacramento-San Joaquin river delta threatens to revive some of California's most bitter water battles. And there's concern that the action signals a waning of federal support for Cal-Fed, the program to end those old wars and to restore the environment of the two rivers' delta and San Francisco Bay.

An Interior Department official says nothing's really changed and the administration remains committed to Cal-Fed, the $8.5-billion cooperative state-federal program to revitalize the delta. But considering the Bush record on the environment—reciting platitudes while unraveling good policy—it's prudent to remain skeptical. The department and its U.S. Bureau of Reclamation will have to back up those assurances with actions.

The dispute started when the giant Westlands Water District sued the Interior Department over interpretation of a 1992 law that ordered the Bureau of Reclamation to dedicate 800,000 acre-feet of water annually from its Central Valley Project to environmental protection, primarily for the health of fish in the bay-delta system.

Westlands claimed the criteria the bureau used actually resulted in diverting 1.1 million acre-feet for the fish, cutting into the farm district's allocation. (One acre-foot meets the household needs of two families a year). A federal judge in Fresno ruled in favor of Westlands. The Clinton administration and the Natural Resources Defense Council appealed, seeking to uphold the rule.

Now the Bush administration has dropped the appeal. Assistant Interior Secretary Bennett W. Raley says the formula will be simplified. The fish will get their 800,000 acre-feet, he added. But Barry Nelson of the Natural Resources Defense Council says the fish may actually lose 300,000 acre-feet if the accounting system is changed.

The allocation is a key provision of Cal-Fed, which is designed to restore environments damaged by years of pumping water from the delta and to stabilize water deliveries to farmers and Southern California homes.

If Cal-Fed is allowed to unravel after years of negotiation and delicate compromise, the state will fall back into water warfare and allocation of supplies by the courts. With water supplies shrinking everywhere, such a war is unaffordable.

Just the FAX from...

Ken Calvert

United States House of Representatives

43rd Congressional District
CALIFORNIA

2201 Rayburn HOB
Washington, D.C. 20515

Please Deliver To:

Name: Karl Rove Date: 9/12/02

Office: _____

Fax Number: 456-0191 Phone Number _____

From:

- ✓ Rep. Ken Calvert
- ___ Dave Kennett
- ___ Rebecca Rudman
- ___ Intern
- ___ Dave Ramey
- ___ Deron McElroy
- ___ Caroline Eklund
- ___ Linda Ulrich
- ___ Deena Contreras
- ___ Sara Smith

Phone Number: **(202) 225-1986** Fax Number: **(202) 225-2004**

Total Number of Pages (Including Cover) 3

Comments: Re: CALFED Water

538438 Mc Hagel FG006-27

CHUCK HAGEL — FAX —

U.S. SENATOR — NEBRASKA

To: Karl Rove

Of: White House

Fax: (202) 456-0191

Subject: Hagel's Senate Floor Speech

Pages: 6, including cover

Date: October 9, 2002

Attached is the speech Senator Hagel just gave on the Senate floor regarding the Iraq resolution that the Senate is currently debating.

Call me if you have any questions. Thanks.

-Beth Lee

From the desk of...
Beth Lee
Press Manager
Senator Chuck Hagel
248 Senate Russell Bldg.
Washington, D.C. 20510
Phone: (202) 224-3474 Fax: (202) 228-2086
beth_lee@hagel.senate.gov

UNITED STATES SENATOR • NEBRASKA
CHUCK HAGEL

PRESS RELEASE

FOR IMMEDIATE RELEASE
Wednesday, October 9, 2002

Contact: Beth Lee or
Josh Denney, 202/224-4224

The Iraq Resolution
Statement on the Floor of the U.S. Senate
U.S. Senator Chuck Hagel
October 9, 2002

"The Senate is by design a deliberative institution, and over this past week we have witnessed thoughtful debate and commentary on how to meet the challenge of Saddam Hussein's Iraq. Ours is not an academic exercise; debate informs our decision whether to authorize the President to use force, if necessary, to enforce UN Security Council resolutions dealing with Iraqi disarmament.

There are no easy answers in Iraq. The decision to commit our troops to war is the most difficult decision Members of Congress make. Each course of action we consider in Iraq leads us into the imperfect, the dangerous, and the unknown. But we cannot avoid decision on Iraq. The President cannot avoid decision. The risks of inaction are too high. We are elected to solve problems, not just debate them. The time has come to chart a new course in Iraq and the Middle East.

History informs our debate and our decisions. We know that tyranny cannot be appeased. We also know that our power and influence are enhanced by both a nobility of purpose and the support of allies and institutions that reinforce an international commitment to peace and prosperity. And we know that war has its own dynamic, that it favors neither ideology nor democracy nor tyranny, that men and women die, and that the nations and individuals who know war are never again the same.

President Bush has rightly brought the case against Iraq back before the United Nations. Our problems with Iraq, as well as terrorism and the worldwide proliferation of weapons of mass destruction, are not America's alone. Israel, Iran, Turkey, Saudi Arabia, Kuwait, Iraq's own Kurdish population, and other nations and peoples are on the front lines of Saddam's ambitions for weapons of mass death. The United Nations, with American leadership, must act decisively to end Saddam Hussein's decade-long violations of UN Security Council resolutions.

REV_00266210

America's best case for the possible use of force against Iraq rests with the American and international commitment to enforcing Iraq's disarmament. The diplomatic process is not easy, and we face the competing interests and demands of Russia, France, China, and others, whose interests in Iraq may not always be the same as ours. A regional and international coalition is essential for creating the political environment that will be required for any action we take in Iraq, and especially for how we sustain a democratic transition in a post-Saddam Iraq. We cannot do it alone.

America, including the Congress, and the world, must speak with one voice about Iraqi disarmament, as it must continue to do in the war on terrorism.

Because the stakes are so high, America must be careful with her rhetoric and mindful of how others perceive her intentions. Actions in Iraq must come in the context of an American-led, multi-lateral approach to disarmament, not as the first case for a new American doctrine involving the preemptive use of force. America's challenge in this new century will be to strengthen its relationships around the world, while leading the world in our war on terrorism. For it is the success of the first challenge that will determine the success of the second. We should not mistake our foreign policy priorities for ideology in a rush to proclaim a new doctrine in world affairs. America must understand that it cannot alone win a war against terrorism. It will require allies, friends, and partners.

American leadership in the world will be further defined by our actions in Iraq and the Middle East. What begins in Iraq will not end in Iraq. There will be other "Iraqs." There will be continued acts of terrorism, proliferating powers, and regional conflicts. If we do it right, and lead through the United Nations in concert with our allies, we can set a new standard for American leadership and international cooperation. The perception of American power is power, and how our power is perceived can either magnify or diminish our influence in the world. The Senate has a constitutional responsibility and an institutional obligation in this effort. *Federalist Paper* #63 specifically notes the responsibilities of the Senate in foreign affairs as follows:

> "An attention to the judgment of other nations is important to every government for two reasons: the one is that independently of the merits of any particular plan or measure, it is desirable, on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy; the second is that in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed. What has not America lost by her want of character with foreign nations and how many errors and follies would she not have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiased part of mankind?"

REV_00266211

The resolution before us today should be tried in that same light as *The Federalist Papers*. The original resolution proposed by the Bush Administration, S.J. Res. 45, would have been a setback for this institution. It did not reflect the best democratic traditions of either Congressional-Executive relations, or the conduct of American foreign policy.

S.J. Res. 46, sponsored by Senators Lieberman, Warner, McCain, and Bayh, is a far more responsible and accountable document than the one we started with three weeks ago. I congratulate my colleagues, especially Senators Lugar, Biden, and Daschle, and the four sponsors of this resolution, for their efforts and leadership in getting us to this point. S.J. Res. 46 narrows the authorization for the use of force to all relevant UN resolutions regarding Iraq, and to defending our national interests against the threats posed by Iraq. It includes support for U.S. diplomatic efforts at the United Nations; a requirement that before taking action, the President formally determines that diplomatic or other peaceful means will not be adequate in meeting our objectives; reference to the War Powers Resolution requirements; and periodic reports to Congress that include those actions described in the section of the Iraq Liberation Act of 1998 regarding assistance and support for Iraq upon replacement of Saddam Hussein. This resolution recognizes Congress as a co-equal partner in dealing with the threat from Saddam Hussein's Iraq.

If disarmament in Iraq requires the use of force, we need to consider carefully the implications and consequences of our actions.

The future of Iraq after Saddam Hussein is also an open question. Some of my colleagues and some American analysts now speak authoritatively of Sunnis, Shi'ites and Kurds in Iraq, and how Iraq can be a test case for democracy in the Arab world. How many of us really know and understand Iraq, its country, history, people, and role in the Arab world? I approach the issue of a post-Saddam Iraq and the future of democracy and stability in the Middle East with more caution, realism, and humility. While the people of the Arab world need no education from America about Saddam's record of deceit, aggression and brutality, and while many of them may respect and desire the freedoms that the American model offers, imposing democracy through force in Iraq is a roll of the dice. A democratic effort cannot be maintained without building durable Iraqi political institutions and developing a regional and international commitment to Iraq's reconstruction. No small task. To succeed, our commitment must extend beyond the day after, to the months and years after Saddam has gone. The American people must be told of the long-term commitment, risk and cost of this undertaking.

We should not be seduced by the expectations of "dancing in the streets" after Saddam's regime has fallen, the kites, candy and cheering crowds that we expect to greet our troops, but instead focus on the great challenges ahead, the commitment and resources that will be needed to ensure a democratic transition in Iraq and a more stable and peaceful Middle East.

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We should spend more time debating the cost and extent of this commitment, the risks we may face in a military engagement with Iraq, the implications of the precedent of U.S. military action for regime change, and the likely character and challenges of a post-Saddam Iraq. We have heard precious little from the President and his team, as well as from the Congress, with a few notable exceptions, about these most difficult and critical questions.

We need only look to Afghanistan, where the Afghan people joyously welcomed our liberation force, but months later a fragile transitional government grapples with rebuilding a fractured political culture, economy and country. However, Iraq, because of its resources, geography, capabilities, and history, offers even more complications and greater peril ... and yes, greater promise. This is the vast unknown – the heavy burden that lies ahead.

The Senate should not cast its vote in the hopes of putting Iraq behind us so we can get back to our campaigns or move on to other issues next year. The decision to possibly commit a nation to war cannot and should not ever be considered in the context of either party loyalty or campaign politics. I regret that this vote will take place under the cloud and pressure of elections next month. Some are already using the Iraq issue to gain advantage in the political campaigns. It might have been better for our vote to have been delayed until after the elections, as it was in 1990. Authorizing the use of force against Iraq or any country, for any purpose, should always be weighed on its own merits, not with an eye on the politics of the vote or campaign TV spots. War is too serious, the human price too high, and the implications unforeseen. While I cannot predict the future, I believe that what we decide in these chambers this week will influence America's security and role in the world for the coming decades. It will serve as the framework, both intentionally and unintentionally, for the future... it will set in motion a series of actions and events that we cannot now understand or control.

In authorizing the use of force against Iraq, we are at the beginning of a road that has no clear end. The votes in Congress this week are votes for an intensification of engagement with Iraq and the Middle East, a world of which we know very little, and whose destiny will now be directly tied to ours.

America cannot trade a new focus on Iraq for a lesser effort in the Israeli-Palestinian conflict. The bloodshed between Israel and the Palestinians continues and the danger mounts. Stability in Afghanistan is not assured. We must carry through with our commitment. Stability in this region depends on it. America's credibility is at stake, and long-term stability in Central and South Asia hangs in the balance. We must also continue to pay close attention to North Korea, where there is no guess work about nuclear weapons. There, on the Korean Peninsula, reside nuclear weapons, ballistic missiles, and 37,000 American troops.

Despite setting the right course for disarmament in Iraq, the Administration has yet to define an end game in Iraq; or explain the extent of the American commitment if

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regime change is required; or describe how our actions in Iraq might affect our other many interests and commitments throughout the world.

I share the hope of a better world without Saddam Hussein. But we do not really know if our intervention in Iraq will lead to democracy in either Iraq or elsewhere in the Arab world. America has continued to take on large, complicated and expensive responsibilities that will place heavy burdens on us over the next generation. It may be necessary. But Americans should understand the extent of this burden and what may be required to pay for and support it...in both American blood and treasure.

As the Congress votes on this resolution, we must understand that we have not put Iraq behind us. This is just the beginning. The risks should not be under-stated, miscast or misunderstood. Ours is a path of both peril and opportunity, with many detours and no shortcuts.

We in the Congress are men and women of many parts. For me, is it the present-day Senator, the former soldier, or the concerned father that guides my judgment and ultimate vote? It is pieces of all ... for I am pieces of all. The responsibilities of each leads me to support the Lieberman-McCain-Warner-Bayh resolution. In the end, each of us who has the high honor of holding public office has the burden and privilege of decision and responsibility. It is a sacred trust we share with the public. We will be held accountable for our actions. As it must be."

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Sile telcom
538438
FG006-27

Richard M. Russell
10/11/2002 01:09:18 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: fyi--comptel

Baby Bell Rivals To Take Case to White House

By Robert MacMillan
washingtonpost.com Staff Writer
Thursday, October 10, 2002; 1:57 PM

Executives from upstart telecommunications firms are scheduled to go to the White House Friday to lobby senior officials to maintain tough restrictions on what services the Baby Bell telephone giants can offer.

Executives from firms competing with Verizon and other regional phone companies are expected to tell White House Chief of Staff Andrew Card and special adviser Karl Rove that they should not kowtow to Baby Bell requests that the government kill regulations that tell them where they can sell Internet service.

A spokeswoman for the Competitive Telecommunications Association (CompTel) said that its members also will tell Rove and Card that they support the administration's desire for a competitive telecom market, but that fewer rules on the Baby Bells won't erase the industry slump.

Some of CompTel's larger members include McLeodUSA and Williams Communications. The Association of Local Telecommunications Services (ALTS), which also will have members in attendance at tomorrow's meeting, represents such companies as Covad Communications, Time Warner Telecom and Teligent. CompTel had not finalized its attendee list before deadline, and ALTS officials were not available for comment.

White House officials also did not return telephone calls seeking comment.

Demand for broadband Internet access is strong among businesses and consumers, according to industry studies, but access barriers in some areas and high costs have kept subscriber numbers relatively low.

Some business groups have accused the administration of failing to act on broadband, though U.S. Commerce Secretary Donald Evans said that it has been one of the White House's top issues in the past two years.

The FCC is considering changing the regulations that govern high-speed broadband service, a move that the Baby Bells support. The Telecommunications Act of 1996 says the Bells must open their own local markets to competing local phone service providers before being allowed to offer their phone or Internet services in other regions.

If the FCC changes the rules, the Bells could offer broadband access outside of their traditional local calling areas, which the Justice Department established when it broke up Ma Bell in 1984.

The change would classify digital subscriber line -- or DSL broadband service -- as an information

service rather than a telecommunications service, taking away regulations that the Bells say hurt telecom competition..

The Bush administration has been loath to take a stand on broadband rules for fear of alienating the various sides in the battle. In June, President Bush spoke for the first time on the topic, saying that supports the FCC's reconsideration of broadband rules

Congress, meanwhile, has made little progress in the debate. The Tauzin-Dingell bill, which favors the Baby Bells, passed the House early this year but is frozen in the Senate Commerce Committee. The chairman on the Senate committee, Ernest "Fritz" Hollings (D-S.C.), has introduced a competing bill that does not favor the Bells and which includes millions of dollars in government spending to encourage broadband deployment.

Congress is not expected to complete action on any broadband legislation before it adjourns later this month for the mid-term elections.

Message Sent To:

adam b. goldman/who/eop@eop
melissa s. bennett/who/eop@eop
susan b. ralston/who/eop@eop
jean m. russell/opd/eop@eop
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keith hennessey/opd/eop@eop
kristen silverberg/who/eop@eop
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Kathryn J. Hayes/WHO/EOP@EOP

Open Letter from Lay Catholics to President Bush

Dear Mr. President:

Religious believers are not of a single mind when it comes to the difficult question of what to do about the threat posed to the United States and other nations by the regime of Saddam Hussein. We are divided not so much between communities of faith as within them. Devout Catholics, Protestants, Jews, and people of other faiths can be found on both sides of the question whether military action is the correct course at this time. We are Catholic citizens who wish to contribute to your deliberation of the question.

Recently, Bishop Wilton D. Gregory wrote to you on behalf of the 60-member Administrative Committee [of] the United States Conference of Catholic Bishops, to raise "serious questions about the moral legitimacy of any pre-emptive, unilateral use of military force to overthrow the government of Iraq." We believe that Bishop Gregory made the case for that position as well as it can be made in light of basic principles of just war that are accepted by faithful Catholics as well as by many Protestants, Jews, and other believers. However, we think it is important for you to consider the arguments to be made in light of these same principles for the opposing position, namely, that pre-emptive and, if necessary, unilateral force can be justified to remove the grave threat to peace and justice posed by the Iraqi dictatorship.

Let there be no doubt that we are in complete agreement with Bishop Gregory's statement of the principles of just war. Moreover, as Catholics, we believe that these principles, as propounded by the *magisterium* of the Church, are binding upon us in conscience. As Bishop Gregory himself says, however, "[p]eople of good will may apply ethical principles and come to different prudential judgments, depending upon their assessment of the facts at hand and other issues."* His letter makes clear that the Administrative Committee's judgment that "pre-emptive, unilateral . . . force is difficult to justify at this time," is based on a prudential assessment of "the facts that are known to us."

Bishop Gregory explores the application of just war principles in four areas: "just cause," "legitimate authority," "probability of success and proportionality," and "norms governing the conduct of war." The questions he raises are legitimate and important; we hope and trust that you will consider them carefully. In doing so, perhaps the following points will be helpful.

---

* The distinction between ethical principles and prudential judgments can be manipulated and abused, as it sometimes is by Catholic and other politicians who claim to be "personally opposed" to abortion but support laws permitting and even funding deliberate feticide. The stringent ethical norm requiring that every human being be recognized as possessing full dignity and afforded the equal protection of the laws excludes support for abortion on putatively "prudential" grounds.

Just cause. Here Bishop Gregory does not offer conclusions, but simply raises pointed questions. (1) *Is there clear and adequate evidence of a direct connection between Iraq and the attacks of September 11th or clear and adequate evidence of an imminent attack of a grave nature?* It seems to us relevant that (a) the Iraqi regime has amply proven its hostile intent and willingness to engage in aggression against Kuwait, Israel, and other foreign states, as well as its own minority populations; (b) the regime has acquired and used biological and chemical weapons against foreign and domestic enemies; (c) it has made determined efforts to increase its stockpile and enhance the lethal quality of its biological and chemical weapons, while also attempting to acquire nuclear arms; (d) it has resisted and confounded the efforts of duly constituted United Nations weapons inspection teams; (e) it is in material violation of 16 United Nations Security Council resolutions, designed to ensure that Iraq does not pose a threat to international peace and security; (f) it is plain that the regime is equipping itself for further aggression and attempting to develop the capability to blackmail its victims with credible threats of annihilation.

(2) *Is it wise to dramatically expand traditional moral and legal limits on just cause to include preventive or preemptive uses of military force to overthrow threatening regimes or to deal with the proliferation of weapons of mass destruction?* Just war principles do not exclude the preemptive uses of military force against a proven aggressor who is planning or equipping himself for further aggression. No "expansion" of traditional moral and legal limits is necessary or being called for. The question is one of prudential judgment: In light of the likely horrific consequences of Saddam's acquisition of weapons of mass destruction, is the use of force the only effective way to defend his potential victims? If you conclude in view of all of the facts that force *is* necessary, then we believe that you are justified, and indeed required, to act. (The proposition sometimes asserted—though not by Bishop Gregory—that preventive or preemptive military action can never be *defensive* within the meaning of just war doctrine, is simply erroneous.)

(3) *Should not a distinction be made between efforts to change unacceptable behavior of a government and efforts to end that government's existence?* We believe that the relevance of this distinction depends upon the circumstances. Again, the question is one of prudence. If a regime's murderous aggression cannot be prevented without changing the regime, then nothing in the theory of just war excludes efforts—by force, if necessary—to change the regime.

Legitimate authority. We agree with Bishop Gregory on the importance of your decision to seek a congressional resolution for action against the Iraqi regime. We also endorse your efforts to enlist United Nations support, though any failure of the United Nations to live up to its own responsibilities should not deter you from acting with those nations that are prepared to join with the United States to prevent aggression. Prudence plainly suggests that no effort should be spared to build consensus at home and abroad. Complete consensus in the matter of war can hardly be expected, however, and the absence of complete consensus does not render unjust an otherwise just use of military force.

Probability of Success and Proportionality. Here again Bishop Gregory raises a set of important questions. And again we hope and trust that you will consider them carefully. None of the points he raises rules out the use of military force as a matter of moral principle. All concern factors that must be taken into account in assessing the prudence of a decision one way or another. For example, Bishop Gregory asks: *How would another war in Iraq impact the civilian population, in the short- and long-term?* On the one hand, as Bishop Gregory implies, harm to non-combatants (including civilian deaths) is virtually inevitable in war, even where one side is careful, as we are confident the United States would continue to be, to minimize civilian casualties. On the other hand, the people of Iraq have suffered for many years under a brutal and murderous tyranny from which the effective use of military force could liberate them. As Bishop Gregory says in his letter, "[t]here are no easy answers." But we stress the need to consider the factors on both sides of the equation.

The same is true for Bishop Gregory's other questions, such as: *Would the use of military force lead to wider conflict and instability?* We agree that you must very carefully consider whether force might lead to wider conflict. Yet you must also consider whether the reverse is more likely true. Indeed, the weight of evidence, in our judgment, tends in that direction. If The Iraqi regime is not deterred from acquiring weapons of mass destruction, it will almost certainly become an even more aggressive and destabilizing factor in the Middle East than it has heretofore been. Wider conflict and instability could result from the failure to use force in a timely manner. One need think only of the tragic consequences of the failure of France and other nations to enforce the terms of the Versailles Treaty against Germany when Hitler remilitarized the Rhineland in 1936. Had the allies exerted themselves to act at this moment of comparative weakness for the Nazi tyranny, much conflict could have been avoided, and many lives spared.

Norms governing the conduct of war. Here again the focus of Bishop Gregory's attention is on the very important question of harm to the civilian population of Iraq. And, again, we urge you to take this consideration very seriously, but also to consider the likely harm to innocent people of failing to deter aggression by the Iraqi regime, as well as the possibility of restoring to the Iraqi people freedom from the merciless tyranny of Saddam Hussein.

Catholics and all men and women of goodwill agree that the decision to use military force must never be taken lightly. Indeed, the tradition of just war theory holds that force may be justified only as a last resort. We therefore echo Bishop Gregory's admonition to "pursue actively alternatives to war." But if, in your careful and considered judgment, no alternative can be found capable of removing or disarming a proven aggressor whose willingness to murder his enemies is checked only by his capacity to accomplish the task without unacceptable consequences to himself, then the norms of justice permit—and your obligations of civic leadership require—you to act with the force of arms.

Yours sincerely,

The Star-Ledger dug up a court case that, in Forrester's view, makes the case against a switcheroo. LINK

California

Mickey Kaus's trial balloon pops:

"Former Los Angeles Mayor Richard Riordan announced Monday that he will not seek to be a write-in candidate for governor." LINK

Gov. Gray Davis (D) isn't keeping a low profile in these final weeks before the election, his staff insists to the *Los Angeles Times* , noting that today, Davis will be in Los Angeles "finalizing preparations for a three-week campaign blitz, talking with strategists and supporters, and discussing campaign ads ... He will devote much of the week to shoring up his support among Latinos, a crucial bloc of voters for Davis — and a source of simmering discontent as well ... On Monday, the Davis campaign unveiled a 60-second, Spanish-language radio spot touting the governor's support for Latinos in policy decisions and appointments." LINK

Republican gubernatorial nominee Bill Simon didn't heavily advance yesterday's campaign appearance by Rudy Giuliani for fear that it would draw protests. So only a handful of supporters showed up to hear and see America's Mayor. LINK

Not a huge shock: the *Los Angeles Times* endorses Davis. LINK

We admit: we love the phrase "Governor Woogie." Sadly, the *Los Angeles Times* doesn't dig up a similar nickname for Woogie's Republican opponent Bill Simon, but does give Simon otherwise comparably insightful profile treatment today. LINK

Florida

Gov. Jeb Bush (R) debates attorney Bill McBride (D) at Universal Studios in Orlando today.

On "Today", Bush spoke movingly about his daughter with family psychologist Jamie Gangel.

The *Miami Herald* watchdogs a state GOP party mailing, noting that it appears to feature an AARP endorsement of Governor Bush. But the AARP says it hasn't endorsed him. LINK

And if the senior vote in Florida hadn't decided the past two gubernatorial elections, it wouldn't be as big as a story as it is.

Iowa

David Yepsen warns that Iowa's 4th district race is tightening. LINK

New Hampshire

Republican Senate nominee John Sununu and Democratic Gov. Jeanne Shaheen were "testy" in last night's debate, and the estimable Dante Scala of St. Anselm College doesn't see a quick rapprochement. LINK

New Hampshire is preparing for an onslaught of get-out-the-vote efforts. The Portsmouth Herald looks at NARAL's plans for the state (and mentions their expected efforts in Colorado, Georgia, Iowa, Minnesota, Missouri, New Jersey, North Carolina, Oregon and Texas).

It's not rocket science or even fuzzy math why NARAL chose New Hampshire: a strong Democratic woman candidate is running in a tight race where more than 16 percent of voters who turn out (according to NARAL) have identified themselves as pro-choice voters, first and foremost. LINK

Arkansas

Senator Tim Hutchison (R) chose last night's debate to argue that obstructionist Senate Democrats refused to confirm qualified judges. From the write-ups, Democratic nominee Mark Pryor scored more points by urging Hutchison to stop "blaming" and start explaining. Also last night: those Reform Voter Project ads were a subject of discussion, no doubt making proprietor David Donnelly a happy man. LINK

REV_00266226

Bob Smith

FULL TIME PAS POSITIONS IN NATIONAL SECURITY
10/02/02

538439
FG006-77

Ambassador positions:

Organization for Economic Development and Cooperation
European Union
UNESCO (United Nations Educational, Scientific and Cultural Organization)

Department of Homeland Security:

Assistant Secretary positions to be determined in the area of:

Intelligence and Information Analysis
Chemical, Nuclear, Biological Countermeasures
Emergency Response and Preparedness
Other administrative (CFO, GC, IG, HR)
President's Homeland Security Advisory Council (PA PT)

NASA:

Chief Financial Officer

Defense:

Assistant Secretary for Army Civil Works

USAID:

Director of Democracy (SES)

State:

Assistant Secretary for International Narcotics and Law Enforcement

Energy:

Under Secretary for Nuclear Security
Administrator, National Nuclear Security Administration
Deputy Under Secretary, National Nuclear Security Administration

Records Management, White House Office of (ORM)
Subject Files

FE006-27
(Office of Senior Advisor - Karl Rove)

538440

OA/NARA #: 107446/10804
9722

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Folder

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2018-0011-P [ ]

Systematic Processing Marker

This is not a textual record. This Systematic Processing Marker indicates that material has been removed during systematic processing by George W. Bush Presidential Library staff.

Stack:	Row:	Sect.:	Shelf:	Pos.:	FRC ID:	Location or Hollinger ID:	NARA Number:	OA Number:
11	4	6	2		9722		10804	10746

Folder Title:
ORM
FG006-27
538440

538440
FG006-27



Karl Rove <KR@georgewbush.com>
10/10/2002 04:28:58 PM

Record Type: Record

To: Susan B. Ralston/WHO/EOP@EOP

cc:
Subject: Fw: FYI

Sent from my BlackBerry Wireless Handheld (www.BlackBerry.net)

Please send all replies to kr@georgewbush.com

-----Original Message-----
From: MRacicot - Bracepatt <MRacicot@bracepatt.com>
To: Karl Rove <KR@georgewbush.com>
Sent: Thu Oct 10 14:18:01 2002
Subject: FYI

CQ MONITOR NEWS

Montana GOP Senate Nominee Suspending Campaign
By Adam Graham-Silverman, CQ Politics Reporter

Oct. 10, 2002 - Montana Republican Senate nominee Mike Taylor plans to announce Thursday that he is suspending his campaign against incumbent Democrat Max Baucus, chairman of the Senate Finance Committee.

In a news conference in Helena, Mont., Taylor was expected to cite the tone of the campaign as the reason he is halting campaign operations.

The state Democratic Party began running an ad this week that accused Taylor of lining his pockets with money from a student loan program at a hair design school he ran.

Campaign spokesman Bowen Greenwood told The Associated Press that Taylor believes the ad, which includes videotape of Taylor from the 1980s in which he is wearing an open-front shirt and gold chains while massaging a man s face, was an attempt by Democrats to portray him as a homosexual.

"At this point, in order to win, Mike would have to stoop to their level," Greenwood said.

The move fueled speculation that another candidate, such as Marc Racicot, a highly popular former governor who is now chairman of the Republican National Committee, could replace Taylor. Last year, Racicot refused to run for the Senate, despite pleas from top Bush> administration officials and national GOP leaders.

New Jersey Democrats succeeded in replacing embattled Sen. Robert G. Torricelli with former Sen. Frank R. Lautenberg on their Nov. 5 ballots, surmounting a GOP legal challenge that was turned back by

the U.S. Supreme Court Oct. 7.

Under state law, Taylor, a state senator who made a fortune with his hair care products and school, can get off the ballot only by petitioning the state Supreme Court, but the situation is differs from New Jersey in several ways. Ballots already have been printed for the race and early voting began Sept. 20.

Write-in candidates, however, can file up to 15 days before the election, leaving an small opening for a challenger to Baucus.

One GOP source said that an effort to substitute Racicot was not behind Taylor s decision.

"I am not aware of anybody actively reaching out to Racicot about the race," the source said.

The Republican National Committee declined to comment on Racicot s interest in the race.

Despite Montana s Republican lean, Baucus has led in recent polls and in the money chase. He often cites his work with President <Bush> on his signature <tax cut law (HR 1836 - PL 107-16) and on Montana issues.

The Democratic ad cites Department of Education letters to Taylor and claims he caused students to default on their loans.

Taylor s wife took responsibility for what she called "clerical errors" that resulted in the letters from the department, but denied that Taylor was involved in a scam to bilk students.

Source: CQ Monitor News

538446
FG006-17



Karl Rove <KR@georgewbush.com>
10/10/2002 04:30:48 PM

Record Type: Record

To: Susan B. Ralston/WHO/EOP@EOP

cc:
Subject: Fw: taylor's statement

Run and bring in

Sent from my BlackBerry Wireless Handheld (www.BlackBerry.net)

Please send all replies to kr@georgewbush.com

-----Original Message-----
From: WHF <whf@nrsc.org>
To: Ken Mehlman <kmehlman@georgewbush.com>; Karl Rove <KR@georgewbush.com>
Sent: Thu Oct 10 16:31:00 2002
Subject: Fw: taylor's statement

Fyi montana

Bill Frist

-----Original Message-----
From: Wolfe, Ginny <GWolfe@nrsc.org>
To: WHF <whf@nrsc.org>
Sent: Thu Oct 10 15:33:28 2002
Subject: taylor's statement

Taylor made the following statement at a press conference in his headquarters in Helena, MT:

Perhaps foolishly, I believed that a god fearing common person that worked hard and honest could be anything he wanted to be in America. I ran for the U.S. Senate because I wanted to help Montana families, America, and our President. I believed in the American dream.

Now I knew that this was a tough hill to climb - especially since my opponent raised more money from out of state special interests than any other U.S Senator in history. But we kept hoping that with the White House, and the RNC under Marc Racicot, we could take that steep hill.

I understood and accepted the fact that politics in Montana is a contact sport. I actually welcomed the rough and tumble ... the clashing of ideas and visions for the future.

I'd seen the ads where Nancy Keenan and Denny Rehberg exchanged shots about each other's voting record. I'd seen the ads where Conrad Burns and Brian Schweitzer traded jabs over prescription drug ideas. And sure, they were all hard hitting.

But not lies. And never personal slanders of the vilest kind.

I simply never thought that my opponent would run television ads that lied, assassinated my character, and mislead the people of Montana (see the following documentation).

And not in my wildest dreams did I ever imagine that a sitting U.S. Senator of 28 years would sanction the use of 20-year-old pictures of me for the most despicable of insinuations about my character.

My opponent has blanketed the airwaves with loathsome distortions of the truth, and called it a campaign. I talked - always - about votes, about plans for the future, and about ideas. I thought it would be enough. I was wrong.

With his millions of out-of-state special interest money, he has turned me into a lightning rod, drawing criticism not just to me, but to my party and even my beloved state. The lies about me made national news on Tuesday - he has smeared my good name so badly that regrettably I draw unfavorable reviews of Montana.

All of this over a picture of me that's untrue - the furthest thing from the truth.

Perhaps I may be able to repair the damage my opponent has inflicted upon my good name and that of my family, but at what price? I would have to blanket the airwaves with slime more thoroughly than he. I will not.

I will not.

If that's what it takes to win, it is a victory not worth the winning. I think I would make a good Senator. But I know I'd make a bad liar. I will not be like him.

And so today I stand before you today prepared to set aside my dream of serving Montanans in the United States Senate, for someone of impeccable character and integrity ... someone yet un-poisoned by my opponent's venom .... someone with the stature to enter this race as a write- in candidate who could win and put an end to my opponent's vicious, self-serving ways once and for all.

I am willing to step down in favor of a man or woman who will have a better chance than I to return decency to our seat in the United States Senate.

I am willing to do this, not because my ideas have been tried and found wanting, but because they've been shouted down with slander and left untried.

I've thought about little else, day and night. And I've talked to my wife at great length, because I know how she loves me and how forceful she gets

when our family's reputation is unjustly impugned.

I am willing to suspend my campaign because my opponent's lies about me are hurting my wife, my family, my friends, my party and most of all Montanans from all walks of life. Were it just me, and there was no one else in a better position to win, I would stay and absorb the blows. I would stand and let him hit me believing that sooner or later the truth would prevail. But there is so much more at stake. Montanans young and old are suffering and so to is our national image.

I cannot let this go on, without giving Montanans an option ... a reason to hope that there is a candidate out there who - with their massive outpouring of support - could overcome this sea of sleaze from my opponent. The notion that Montana deserves a U.S. Senator who will always put Montana first rather than just in election years deserves a fair hearing, not a mud bath.

I know that my departure would only temporarily dash the hopes of many generous, giving donors ... hardworking, dedicated volunteers ... people who lent me their good names and reputations.

To them I say: Please understand that we must offer this option for the sake of all Montanans. Your efforts are exemplary - beyond compare. No candidate has ever had better allies. Your friendship and support will be the shining memory that I take from this race, which my opponent's lies can never sully.

To Rick Allen in Kalispell, Mary Jolley and Brent Stanghelle in Great Falls, John Rush in Helena, Jim and Jan Helgason in Billings, to all the women in Gallatin County, and a hundred others I could name if you'd give me enough airtime, I say more than just thank you. I say that the state of Montana owes you a debt for your diligent efforts to keep this race on a high note.

To all of you who helped, I will always be in your debt. Now let's look to the horizon and prepare to embrace the candidate who's out there who we pray will rise to the occasion and make history of which all Montanans will be proud for generations to come.



Karl Rove <KR@georgewbush.com>
09/20/2002 11:35:05 PM

Record Type: Record

To: Susan B. Ralston/WHO/EOP@EOP

cc:
Subject: Fw: october 11th

Run off and put with his incoming letter

Sent from my BlackBerry Wireless Handheld (www.BlackBerry.net)

Please send all replies to kr@georgewbush.com

-----Original Message-----
From: Karl_C._Rove@who.eop.gov <Karl_C._Rove@who.eop.gov>
To: Karl Rove <KR@georgewbush.com>
CC: Susan_B._Ralston@who.eop.gov <Susan_B._Ralston@who.eop.gov>
Sent: Fri Sep 20 15:49:03 2002
Subject: october 11th

---------- Forwarded by Karl C. Rove/WHO/EOP on 09/20/2002 03:50 PM

(Embedded
image moved Ashley Estes
to file: 09/20/2002 03:13:23 PM
pic01051.pcx)

Record Type: Record

To: Kara G. Figg/WHO/EOP@EOP

cc: Karl C. Rove/WHO/EOP@EOP
Subject: october 11th

rev. james and betty robison have asked to come see the president while they are in town that day. he said ok...
this is like the 7th time they've asked.

kr - do you have any issues with this? he keeps talking about his book and said that you gave a copy to the president? Sent to Gift Unit

538440
FG006-27

Comments to Keith @ 11:10 pm

Keith Hennessey
10/07/2002 10:30:47 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: fact sheet

All recommended edits have been incorporated.

I'm looking for final signoff from Dan and Karl on this document.

Chao goes at 11. I'm getting them to send me her latest draft now, including our suggested edits, I hope.

Gene Scalia will do a "technical briefing" off-camera at 11:30 AM.

-kbh

---------- Forwarded by Keith Hennessey/OPD/EOP on 10/07/2002 10:23 AM ----------

Keith Hennessey
10/07/2002 10:28:18 AM

Record Type: Record

To: Joel D. Kaplan/WHO/EOP@EOP

cc:
Subject: fact sheet

taft-hartley fact sheet.do

Message Sent To:

Daniel J. Bartlett/WHO/EOP@EOP
James R. Wilkinson/WHO/EOP@EOP
Karl C. Rove/WHO/EOP@EOP
Susan B. Ralston/WHO/EOP@EOP
Krista L. Ritacco/WHO/EOP@EOP

ADMINISTRATION TAKES ACTION TO PROTECT AMERICA'S ECONOMY AND AMERICAN JOBS

PRESIDENTIAL ACTION

- Faced with a growing threat to the American economy and American jobs, the President today used his statutory authority under the Taft-Hartley Act to convene a Board of Inquiry to examine the work stoppage at the West Coast ports. A Board of Inquiry is part of a framework established by Congress to address labor disputes that threaten national health and safety.

- The dispute is a threat to America's national health and safety. The health of our economy in every corner of America is in jeopardy because of the dispute. In many areas of the economy layoffs have begun, thousands more jobs may be lost, and all Americans may soon begin to pay sharply higher prices for household goods.

- Each shipping container at these ports holds a part of the national economy – from produce to computers, spare auto parts to lumber, consumer electronics to grain and wheat. Any household good sold on a store shelf can be found in these containers.

- The dispute is estimated by some to be costing America's economy as much as $1 billion a day:

  - ✓ West Coast ports are crucial to US trade, handling over $300 billion in trade a year. These ports handle more than half of all containerized imports and exports.

  - ✓ West Coast ports handle 25 percent of all US grain exports, 40 percent of all wheat, 14 percent of all corn, and seven percent of all soybeans exports.

  - ✓ Sixty-five percent of all US containerized food trade moved through these ports in 2001.

  - ✓ Layoffs have already begun in multiple industries around the country.

  - ✓ Millions of dollars in produce, fish, meat and poultry are rotting on docks and ships.

  - ✓ Trade with Asia is particularly affected. Japan, Korea, Taiwan, Hong Kong, China, Indonesia, Thailand, the Philippines, India, and Malaysia are the top 10 destinations for containerized US agriculture products. Together, these nations receive 85 percent of all agricultural shipments from the West Coast.

  - ✓ The costs to the economy become larger and more permanent the longer the ports remain closed.

  - ✓ Improvements in supply chain management mean that shipping delays quickly translate into empty store shelves and cancelled orders.

  - ✓ Air cargo carrier rates are increasing dramatically, increasing the retail cost of those goods shipped by air.

  - ✓ October is a critical inventory-building month for retailers: the value of imports through West Coast ports is greater in October than in any other month of the year. If the ports remain closed, revenues from the holiday shopping season will soon be affected.

  - ✓ As the duration of the shutdown increase, more manufacturers and retailers will use up their remaining inventory. Trucks and trains transporting goods to and from the ports are backing up – the longer the shutdown continues, the more time it will take for shipping to return to normal.

- ✓ Reopening the ports, even if only for 80 days, will benefit the economy. The parties will be given time to settle the dispute. Manufacturers and retailers will be given additional time to adjust and prepare.

- ✓ Manufacturing is only barely beginning to recover from the recent recession, having lost nearly 1.9 million jobs in the last two years. Manufacturing cannot afford further jolts.

- ✓ With modern inventory techniques and the increased integration brought by globalization, shutting off much of our trade with Asia will affect not just large importers and producers, but also the tens of thousands of smaller U.S. firms that supply directly-affected firms.

Three times as much of the U.S. economy is now directly related to trade as was the case in 1971, the last time the United States had a major West Coast port stoppage.

- The employment consequences of a continued shutdown would fall hardest on those with the least economic opportunity – workers with less job seniority are likely to be laid off first, and low-income families may have little savings to weather the effects of a shutdown.

- The dispute has implications for national defense. The American military relies on commercial ships using the West Coast ports to carry exports necessary for the support of armed forces. In addition, defense contractors receive components and materials through the West Coast ports that are necessary to supply the military's needs. The disruption of the flow of such military-related goods could impact national security.

- The Taft-Hartley process is the government's principal legal means of addressing a labor dispute that could have a devastating national impact. The government first sought mediation as an alternative solution to this dispute. Since the beginning of the dispute, the government has made itself available to help both parties resolve their differences. The Federal Mediation and Conciliation Service (FCMS) has been on the ground seeking a solution since before the work stoppage began. However, the mediation process has not been successful, and the President has decided to take action in order to protect America's national health and safety.

THE ISSUE

West Coast ports have been closed since the second shift on Sunday, September 29, when the Pacific Maritime Association (PMA) shut down the ports in response to a reported work slow-down by members of the International Longshore and Warehouse Union (ILWU).

WHAT HAPPENS NEXT

Step 1: The President's Executive Order

The President's Executive Order establishes a Board of Inquiry. The Executive Order states that:

- A labor dispute exists;

- The dispute affects a substantial part of the maritime industry, an industry engaged in trade, commerce, transportation (including the transportation of military supplies), transmission, and communication among the several States and with foreign nations; and

- A continuation of this lockout will imperil the national health and safety.

The law states that the President may begin the Taft-Hartley process if he determines that the labor dispute issue "will imperil the national health and safety." The President has determined that the short-term and long-term damage to our economy and our national health and safety constitute such a threat.

The President has appointed the following three Board of Inquiry members:

- **Bill Brock (Chairman)** – Served as a member of the House of Representatives from 1963 to 1971, as a U.S. Senator from Tennessee from 1971 to 1977, and as U.S. Trade Representative and Secretary of Labor from 1985 to 1987. Currently Chairman of Bridges Learning Systems, an intervention program for academically troubled students

- **Patrick Hardin** – W. Allen Separk Distinguished Professor of Law, University of Tennessee College of Law. A former Chief Counsel to the Chairman and Associate General Counsel in charge of the Division of Enforcement Litigation of the National Labor Relations Board, Professor Hardin has been on the faculty of the University of Tennessee since 1975. Editor-in-chief of *The Developing Labor Law* (3rd ed.)

- **Dennis R. Nolan** – Webster Professor of Labor Law, University of South Carolina School of Law. Professor Nolan has been on the faculty of the University of South Carolina since 1974. Currently serves as Vice President of the National Academy of Arbitrators. Author of eight books and numerous articles on arbitration, collective bargaining, and labor disputes.

The President has chosen these three individuals for the Board because they are **unbiased**, **fair** and **experienced** at labor and employment issues.

Under the Taft-Hartley process, the Board's job is to inquire into the issues involved in the dispute and issue a public report that outlines the facts of the dispute – including each party's statement of its position. However, the law prevents the Board from making any recommendations or choosing sides in the dispute. The Board may only state the facts.

The Executive Order requires the Board to report back to the President by no later than October 8th.

Step 2: Petition for Injunction

After the President receives the Board's report, he may then direct the Attorney General to seek a court injunction to halt the work stoppage. To receive this injunction, the Government must establish that the dispute affects a substantial part of an entire industry and imperils the national health or safety.

If the court issues the legal injunction against further work stoppage, an 80-day clock begins, the ports would open, and employees would return to work.

Step 3: Reconvening the Board of Inquiry

After 60 days, if no agreement has been reached, the Board is required to issue a second public report to the President that includes:

- The current positions of the parties involved;
- The efforts which have been made for settlement;
- A statement by each party of its position; and
- A statement of the employers' (PMA) last offer of settlement.

Step 4: NLRB Secret Ballot Vote

Between days 61 and 75, the National Labor Relations Board (NLRB) will conduct a secret ballot vote of ILWU employees on the PMA's last offer of settlement. The NLRB is required to certify the results to the Attorney General no later than five days thereafter.

At the end of the 80-day period the legal injunction is discharged. If the dispute is unresolved, and if ILWU employees have rejected the PMA's final offer in the NLRB secret ballot vote, the parties become free to engage in work stoppages again.

Step 5: President Reports to Congress

The law requires the President to send a final report to Congress on the entire Taft-Hartley process. The report may include further recommendations on how to resolve the labor dispute.

THE THREAT TO AMERICA'S NATIONAL HEALTH AND SAFETY

The President is taking this first step to protect our economy because the West Coast port dispute is causing serious damage to multiple industries and putting thousands of American jobs in jeopardy. This growing economic damage constitutes a threat to America's national health:

- Ford Motor Co. has 14 plants -- 10 assembly plants and four power train plants -- that receive parts from affected ports in Seattle and Tacoma, Wash., and Long Beach, Calif. The assembly plants that receive parts are Atlanta Assembly, Chicago Assembly, Kansas City Assembly, Louisville Assembly, St. Louis Assembly, Ontario Truck, Twin Cities Assembly, the Edison, N.J. assembly plant, the Norfolk, Va. assembly plant and an assembly and stamping plant in Hermosillo, Mexico. The power train plants affected are Cleveland Engine No. 2, Dearborn Engine, the Sharonville, Ohio, transmission plant and Van Dyke Transmission in Sterling Heights. *(Detroit Free Press, October 5, 2002)*

- New United Motor Manufacturing Inc. (NUMMI) of Fremont California has run out of material for their production line and has been forced to lay off two shifts, about 5,100 employees. They were told to take two days off. NUMMI builds the Pontiac Vibe, Toyota Corolla, Voltz, and Tacoma pickups. Honda of America Manufacturing is resorting to airlifting critical parts from Japan. *(Automotive News, October 4, 2002 and reports to Maritime Administration)*

- Matsushita Kotobuki, which manufactures televisions and VCRs for Panasonic, has had to stop production. They have laid off 150 workers in Vancouver, Washington. They could be rehired in one to two weeks. *(KOIN, October 4, 2002)*

- Hawaiian Express Service, a freight forwarder in Hayward, California, laid off 100 employees Friday. *(The Mercury News, October 6, 2002)*

- A shipment of blankets, clothing, and medical supplies destined for hurricane victims in Haiti has been stuck in Lynnwood, Washington, since Monday. And a container of similar supplies for Nicaragua is backed up on a rail car destined for Long Beach. *(Heraldnet, October 5, 2002)*

- Tyson, the world's largest meat producer, said it might have to adjust production in its beef, pork and poultry operations because the fresh meat it exports is perishable. More than half of the country's beef, pork and lamb export products go through West Coast ports, according to the U.S. Meat Export Federation. George's Inc., a poultry and egg company based in Springdale, also is being affected. *(Arkansas Democrat Gazette, October 3, 2002)*

- If the shutdown lasts even another week or two, it could take more than a month to unsnarl the backlog of idled or ruined goods -- a delay that could torpedo the holiday sales plans of a variety of retailers. Within three weeks, the shutdown could force companies around the country to jettison nearly a quarter-million jobs. *(Contra Costa Times, October 2, 2002)*

- Eastern Washington farmers and others shipping perishable goods are particularly anxious because the dispute comes during apple and potato harvests. Washington, on average, exports one of every three apples picked in the state, and it's the biggest exporter of french fries in the world. Apples farmers must get off to a quick start in the fruit selling season, said Richard Thomason, who grows red, granny smith, fuji and honey crisp apples on 120 acres in Brewster. If buyers can't find Washington apples, they will simply turn to other suppliers, he added. "I think agriculture is probably going to take the biggest hit on this thing," Thomason, chairman of the Washington Apple Commission, said yesterday. – *Seattle (WA) Post-Intelligencer*, October 2, 2002

- Nissan North America eliminated the Saturday shift at its 6,000-employee plant in Smyrna, Tenn., and will soon shut down if the port lockout continues. The Smyrna plant manufactures almost 500,000 Altimas, Xterra SUVs, and Frontier pickups each year. *(Buffalo News, October 5, 2002)*

- No. 1 U.S. railway Union Pacific Corp. said the stoppage was cutting sales by as much as $5 million a day. The Consumer Electronics Association, whose members include Microsoft Corp., said a prolonged lockout could cut consumer electronics sales by $22-billion this year. – *Financial Post*, October 5, 2002

- Food is rotting in cargo holds, and railroads have halted grain shipments from the Midwest. Wheat futures dropped sharply Thursday on the Chicago Board of Trade as concerns rose that the lockout would hurt U.S. grain exports. *(Associated Press, October 5, 2002)*

- Elope Inc., a hat wholesaler in Colorado Springs, Colo., usually does brisk business this time of year. "We've already lost the Halloween business. It's Christmas I'm worried about now," said company chief executive Kevin Johnson. "If this isn't resolved in the next week, we're dead in the water." *(Associated Press, October 5, 2002)*

- Layoffs may begin Friday for 15 full-time employees at Quality Trading, one of the largest straw exporters in Oregon. Quality Trading is made up of 22 Willamette Valley farmers who cut, bale, store and ship straw to farmers in Japan, Taiwan and Korea. *(Associated Press, October 5, 2002)*

- Union Pacific, the nation's largest railroad, had 55 trains parked across the western United States, unable to move cargo. Grain shipments bound for export are sitting in warehouses and growers of perishable goods like apples and citrus worry that their harvests will not reach lucrative Asian markets. *(Associated Press, October 4, 2002)*

- At New United Motor Manufacturing Inc., half-assembled Toyota Corollas and Pontiac Vibes were sitting in limbo because the necessary engines, transmissions and vehicle frames were sitting in cargo holds at the Port of Oakland. *(Chicago Tribune, October 4, 2002)*

- California almond growers, who exported $662 million worth of almonds in 2000, said each day of the shutdown threatens their ability to serve Asian consumers preparing for holidays. *(Chicago Tribune, October 4, 2002)*

- "We're already in a crisis," said James McCranie, executive vice president of marketing at Seald-Sweet, a citrus growers' cooperative in Vero Beach, Fla. McCranie said the co-op had at least 30 containers trapped at West Coast terminals, the first shipment of a crop of grapefruit headed for Japan. The fruit, which is carried in refrigerated containers that have no independent power source, will quickly rot if not handled properly. "The problem is you have no confidence that your cargo is being properly refrigerated and there's no way to divert it," McCranie said. "It's perfectly fine fruit and could be sold in Washington or Oregon. He complained that shipping lines were not able to give any information about where the cargo was and in what condition. "For a perishable, it couldn't be worse." *(Journal of Commerce, October 4, 2002)*

- Bill Ciesinski, manager of transportation and logistics at International Forest Products in Foxboro, Mass. said that the lock-out had brought some of his business to a halt. IFP had begun to load 6,000 metric tons of woodpulp aboard a ship in Eureka, Calif. just prior to the port shutdown. Ciesinski said his company was paying detention for the ship, hoping for a quick resolution of the dispute. "I'm holding the ship there because if I don't load it, I have to wait another month," he said. He also has had shipments of waste papers delayed. "It's jeopardizing letters of credits and if it is not settled by Sunday, we are going to lose a significant number of orders," he said. *(Journal of Commerce, October 4, 2002)*

- Phoenix-based Action Performance (ATN), a maker of die-cast model cars, was hit the day shippers locked out dock workers, on Sunday. The company had a shipment of thousands of model cars that were supposed to be unloaded that day so Action could record a sale before the quarter's end. The cars, however, didn't make it off the ship, so the company had to issue notices saying it wouldn't book $5.7 million in expected revenue for the quarter. That caused Action's stock to slide $1.10 to $19.90 Thursday, a 5.2 percent drop. *(CBS Marketwatch.com, October 4, 2002)*

- Reports are coming in that such companies as Chiquita Brands (CQB) and Del Monte (DLM) were having to leave perishable goods on docks. Those companies, along with Dole (DOL), are expected to feel the effects. *(CBS Marketwatch.com, October 4, 2002)*

- California's sole auto plant halted production of Toyota Tacoma pickups and stopped making passenger cars before the end of the normal shift. *(Memphis TN Commercial-Appeal, October 3, 2002)*

- Gap Inc., the nation's largest clothing retailer, was hoping to receive its first shipment of apparel intended for the holiday season when the port shutdown began last Friday. *(Newhouse News Service, October 3, 2002)*

- Retailers might not be able to get enough toys made in China in time for the holiday season. Electronics and technology companies won't be able to get television or computers assembled in the Pacific Rim, or parts for electronics they make in factories here. Foreign automakers won't be able to import cars or trucks made overseas, or the parts for cars they made domestically. *(Atlanta Journal-Constitution, October 2, 2002*

-end-

538440
FG086-27

EXEC. OFC. PRESIDENT
WH STRATEGIC INI.
2002 OCT 10 PM 7:17

THE VICE PRESIDENT
WASHINGTON

September 25, 1992

Mr. Ernest A. Whiting, Jr.

PRA 6

Dear Ernest:

Thank you very much for your letter regarding concerns about our government and the threat posed to our nation by the loss of respect for traditional values of faith, family and morality. I understand and share your concerns, and I appreciate your views.

Love for God, family, neighbor and country has always been the source of our strength and goodness as a nation, and the decline of traditional values is cause for grave concern. This decline is directly responsible for many of the social ills that our country faces today.

I want to assure you that President Bush and I are deeply committed to upholding traditional American values, and we will continue such efforts as restoring protection for the unborn, combatting pornography, and supporting voluntary prayer in our public schools. It is encouraging to hear from citizens like you who recognize the need to renew the values that are our greatest heritage as Americans.

Thank you again for taking the time to write me.

Sincerely,

Dan Quayle

Dan Quayle

REV_00266248

E.O. 13166 Regulations Now in Our Public Schools

TO: Jim Boulet, Jr., Executive Director
English First
8001 Forbes Place, #102
Springfield, VA 22151

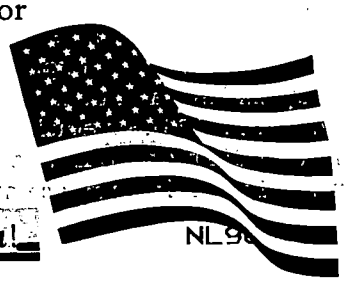

FROM:

God Bless America!

Mr. Ernest A. Whiting, Jr.
PRA 6

English First was established in 1986 and is recognized by the Internal Revenue Service as a 501(c)(4) non-profit organization to help Congress establish language policies that would preserve our common language. Contributions or gifts to English First are not deductible for federal income tax purposes. A copy of our annual report is available for inspection at our office or can be mailed to you upon written request. West Virginia residents may obtain a summary of the registration and financial documents from the Secretary of State, State Capitol, Charleston, WV 25305. The official registration and financial information of English First may be obtained from the Pennsylvania Department of State by calling toll-free, within Pennsylvania, 1-800-732-0999. Florida residents may obtain a copy of the official registration and financial information of English First (Registration number SC-02949) from the Division of Consumer Services by calling toll-free, within the state, 800-HELPFLA.

While the President has been busy fighting the war against terrorism, Clinton holdovers in the Departments of Education and Health and Human Services continue to push Bill Clinton's radical anti-English agenda. It is time for the Bush Administration to hear our side of the story on E.O. 13166.

☑ **It's outrageous!** I can't believe President Bush didn't get rid of Clinton's radicals who are now undermining any efforts to restore the unity of a common language that our nation so urgently needs today.

☑ **I support** English First's efforts to continue the battle against E.O. 13166 until we have convinced the Bush Administration to repeal it and restore the unity that made America great.

☑ **I will send** the enclosed postcards to the President; to Congressman Dan Burton, Chairman of the House Committee on Government Reform; and to Congressman Ernest Istook, a member of the House Appropriations Committee, urging them to repeal E.O. 13166; investigate the activities of the Clinton holdovers and cut off funding to **any** agency that enforces E.O. 13166.

☑ **Enclosed is** my contribution so that English First can push even harder to resolve our language crisis while we still have a chance to reunite all Americans behind our common language.

☐ $20 ☐ $35 ☐ $50 ☐ $100 ☐ $250 ☐ $500 ☐ $1,000 ☑ Other $ 30.00

Please make your check payable to **English First**. Thank you!

☑ Check enclosed ☐ Please charge my:
☐ VISA ☐ MasterCard ☐ American Express ☐ Discover card

Card # _____ Exp. Date _____

Signature _____

☐ Check here if you have added English First to your will.

Thank You For Your Continued Support!

REV_00266249

SFC Ernest A. Whiting, Jr.

PRA 6

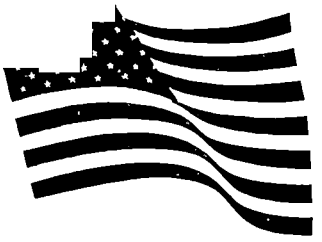



God Bless America!

The Honorable George W. Bush
The President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

SFC Ernest A. Whiting, Jr.

PRA 6

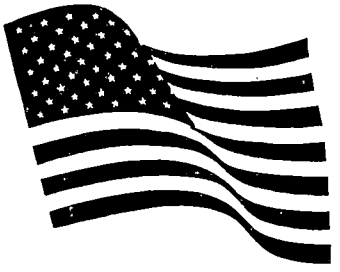



God Bless America!

The Honorable Dan Burton
House Committee on Government Reform
2157 Rayburn House Office Building
Washington, DC 20515-1101

SFC Ernest A. Whiting, Jr.
U.S. Army Retired
1446 C Street SE
Washington, DC 20003

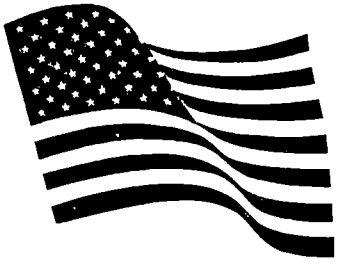



God Bless America!

The Honorable Ernest Istook
U.S.House of Representatives
Washington, DC 20515-1101

REV_00266250

Dear President Bush:

While you are dealing with a variety of pressing issues, there are Clinton holdovers within your Administration who are undermining your efforts.

English First, the national organization dedicated to making English our official language, has discovered a hotbed of anti-English activists at HHS OCR and believes there are other activists advancing Clinton's language rights goals throughout your Administration.

The most effective way to stop these activities is to rescind Clinton's Executive Order 13166 which makes choice of language a civil right. The 11th-hour Executive Order has already caused a lot of chaos and tremendous expense for communities, hospitals, government contractors and even schools and churches. Please repeal this dangerous order and take the time to clean out all of Bill Clinton's holdovers.

Sincerely,
Sfc Ernest A. Whiting, Jr., U.S. Army Retired

Dear Representative Burton:

As Chairman of the House Committee on Government Reform, I urge you to hold public hearings and use your powers of subpoena to compel people such as HHS OCR employees Robinsue Frohboese and Claudia Schlosberg to testify under oath regarding the abuse of their offices to advance a radical anti-English language agenda.

It is time the American people had the facts about this unethical conduct.

Sincerely,
Sfc Ernest A. Whiting, Jr.
U.S. Army Retired

Dear Representative Istook:

I urge you to add language to the Labor/HHS Appropriations bill forbidding HHS OCR from implementing the Tucson regulations anywhere else.

If it is possible, I would also urge you to cut off funding to this agency unless and until it ceases all efforts to implement E.O. 13166 regulations. This order is destroying the unity of our nation and costing the government billions in implementation. Thank you.

Sincerely,
Sfc Ernest A. Whiting, Jr.
U.S. Army Retired

Ari / Dan
538440
FF 006.27

United Brotherhood of Carpenters & Joiners of America

To: Blalock
Rine
Naupo

Fax

To:	Ken Mehlman	**From:**	Chris Heinz File - Terror Ins
Fax:	202-456-6538	**Pages:**	2
Phone:	202-546-6206 x312	**Date:**	9/30/2002
Re:	Terrorism Insurance Letter	**CC:**	

☐ **Urgent** ☐ **For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

101 Constitution Avenue, NW Washington DC 20001

THE WHITE HOUSE
WASHINGTON

Date: 10/10/02

To: ~~Dan Bartlett, Ari Fleischer~~

From: Strategic Initiatives Karl 10/10

X FYI

___ Appropriate Action

___ Direct Response

___ Prepare Response For My Signature

___ Per Our Conversation

___ Let's Discuss

___ Per Your Request

___ Please Return

___ Deadline

___ Other

Comments: _____